Federal Rules of Evidence Manual

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Publication Information

1 Federal Rules of Evidence Manual AN INTRODUCTION TO ORGANIZATION: HOW TO USE THE BOOK

AN INTRODUCTION TO ORGANIZATION: HOW TO USE THE BOOK

AN INTRODUCTION TO ORGANIZATION:
HOW TO USE THE BOOK

In an effort to provide all the information concerning the Federal Rules of Evidence in the simplest and clearest way, we have divided this edition into four parts. It is our hope that each Part will add a dimension to the understanding of the reader.

Part One traces the history of the movement to codify rules of evidence generally before focusing on the particular events that gave rise to the specific Federal Rules of Evidence that are the subject of this enquiry. Although this history may not aid in the understanding of each individual Rule, those who have not followed the debate over the utility of codification and over what to codify may find this brief background to be of general interest. Some insight into the creation of Rules may also help in interpreting several of them.

Part Two is the heart of the book. Each Rule is individually analyzed. The analysis takes the following illustrative form.

RULE X. A RULE OF EVIDENCE

§ X.01 ***Official Text of the Rule***

The exact text of the particular Rule signed into law by President Ford on January 2, 1975, as part of Public Law 93-595, 88 Stat. 1926 et seq., and subsequent additions, all as amended to date, begin the analysis.

§ X.02 ***Editorial Explanatory Comment***

Following the official text of each Rule is a concise explanation of the Rule, the way it operates, and a discussion of important questions that have arisen under the Rule. When problems with a Rule are apparent, we attempt to highlight some of the difficulties that Bench and Bar have experienced and to anticipate some developing problems. No contention is made here that all potential problems are exhaustively covered. Such a task would be impossible. Where, however, a problem is both obvious and significant, we believe it is important to attempt to solve it. Our answers are concededly debatable. At times we have no ready answer. Still, we attempt to pose the important questions and to

suggest possible solutions that Judges and lawyers may want to consider.

This section gives special treatment to recent and planned amendments to the Evidence Rules, including their rationale and potential impact. One of the authors of this Manual served as a member of the Advisory Committee on Evidence Rules, and another is currently the Reporter to that Committee. We try to give a special perspective on the drafting process that gave rise to a new amendment.

§ X.03 *Annotated Cases*

Important Federal cases construing the Rule are grouped by subject matter headings, cited and discussed. At times we repeat our discussion of a case under several Rules and headings for the convenience of the reader.

Despite the fact that we have included numerous cases, we have not offered a mechanical compendium of all decided cases. Rather, we have screened every decided case, assessed its importance, and summarized the important ones in this Manual. The cases are arranged first by topic. The topics represent various sections of the Rule or classes of cases decided under it. Within these topics the cases are arranged by circuit. See, e.g., Rule 103. We hope this organization will maximize the usefulness of the Manual.

§ X.04 *Legislative History*

Relevant portions of legislative history are provided. These include:

Advisory Committee's Note.

Set forth in this section is the Advisory Committee's Note accompanying each Rule approved by the Supreme Court on November 20, 1972 (with the exception in most instances of Rules deleted by Congress). Even though many of these Rules were modified by the Congress and differ in form in the official text contained in Section X.01, the Note is still important. It contains a wealth of authority to which Judges and lawyers may wish to refer to understand the Rule or to do further research about the Rule or general area of the law with which they are concerned. Moreover, it is the beginning of a "legislative" history that is important in understanding how the final draft came into being. If a Rule has been amended, subsequent Advisory Committee's Notes have been included also. In the end, however, it must be remembered that where the words of the Rule are clear, the "plain meaning" of the Rule will control over any contrary indication in the Advisory Committee note.

House Subcommittee on Criminal Justice Notes.

The first Congressional body to examine the draft of the Rules approved by the Supreme Court was the House Subcommittee on Criminal Justice, a subcommittee of the House Committee on the Judiciary. This Subcommittee made important changes in the Rules, and we include, where pertinent, the Subcommittee Notes explaining why the changes were made. It should be noted that the Subcommittee developed one draft of the Rules and tentatively approved it on June 28, 1973. After receiving comments and criticisms, the Subcommittee amended its draft on October 10, 1973, and sent its proposed final draft to the full House Judiciary Committee. This section of the book contains the Subcommittee Notes in the later draft, *i.e.,* the October 10, 1973, draft. However, whenever the Subcommittee made a major change between the first and second drafts, the Notes explaining both drafts are included. Whenever only one Note appears, the reader can safely assume that it is from the October 10, 1973, draft, and that this Note is not appreciably different from the one found in the earlier draft. We have used the word "Notes" in our heading as a reminder that there are two separate sets of Notes, even though most often it is only necessary to present the later Note.

Report of the House Committee on the Judiciary.

Some of the changes recommended by the House Subcommittee on Criminal Justice were accepted by the full Committee on the Judiciary, while others were rejected. H.R. 5463, a bill sent to the floor of the House by the full Committee, was subjected to only a few amendments on the House floor. The bill is an important step in the legislative history of the Federal Rules of Evidence. Report No. 93-650 accompanied the bill. Whenever the Report makes reference to any significant change in the Rules drafted by the Advisory Committee, that portion of the report is included in this section. Although we have not included every single reference in the Report, it is our hope that we erred on the side of including anything that anyone might find to be relevant in understanding a particular Rule. The separate views of the members of Congress found in the Report are also included in this section. The House bill was approved with several amendments by the House of Representatives on February 6, 1974. House Reports relating to later amendments are specially noted.

Report of the Senate Committee on the Judiciary.

The Senate Committee recommended several major changes in H.R. 5463. These changes are discussed in Report No. 93-1277. Following the same procedure outlined in the previous section, whenever the Senate Report makes reference to a change in the House draft, or to its interpretation of a Rule, we have attempted to include it in this section. Once again we have left out references that do not provide any insight into why a change was made or into the intent of the Congress in choosing certain language, but we have attempted to include all relevant material The Senate passed its version of the bill on November 22, 1974. Senate Reports relating to later amendments are specially noted.

Report of the House and Senate Conferees.

This Report (House No. 93-1597) accompanied the bill actually approved by both Houses of Congress.

Citations to Hearings and Debates.

Several days of hearings on the proposed Rules of Evidence were held before the Subcommittee on the Criminal Justice. In addition to the testimony of numerous witnesses, the Subcommittee had before it many documents and letters submitted in opposition to or in support of the proposed Rules. Hearings were also held before the Senate Committee on the Judiciary.

Whenever material found in the Hearings is helpful in understanding the way in which a Rule developed, we have endeavored to include a citation to it. Similarly, whenever the debate on the floor of either the House or Senate on the Rules casts light on particular provisions, we have included a reference to the debate. It is our hope that this information may provide some guidance, especially to Judges, when a difficult problem of interpreting a particular Rule is encountered.

Excerpts From "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification."

At the request of the Advisory Committee on Evidence Rules, one of the authors of this Manual prepared a monograph highlighting all of the Advisory Committee Notes that are inconsistent with the text of the accompanying Rule. These inconsistencies were generally caused by Congress having made a material change from the Advisory Committee's draft of a particular Rule. The Advisory Committee Notes provide comment on the Advisory Committee proposals that were sent to Congress, not on the rules that Congress subsequently enacted. The current Advisory Committee believed that it would be useful to instruct practitioners and judges that certain Rules were changed by Congress and that the Advisory

Committee Note should not be unduly relied upon for interpretation of such Evidence Rules. We include excerpts from the monograph for those Rules in which the Advisory Committee Note comments on a proposed Rule that is substantially different from the Rule actually adopted.

In Part Three of this Book, we include those Rules originally proposed by the Advisory Committee which were rejected by Congress. The Advisory Committee's Notes to these Rules have also been included.

Part Four includes an article from one of the authors of this Manual, highlighting those Federal Rules as to which case law diverges from the text of the Rule. It also includes an article on the authentication of Internet and Email evidence.

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Publication Information

1 Federal Rules of Evidence Manual AN INTRODUCTION TO THE FEDERAL RULES OF EVIDENCE

AN INTRODUCTION TO THE FEDERAL RULES OF EVIDENCE

THE RULES THAT TRIAL LAWYERS (AND JUDGES) NEED TO KNOW

The Nature of Evidence Rules

Evidence rules are special. They require more of trial lawyers than most rules of civil or criminal procedure. Although there are rules of civil and criminal procedure that trial lawyers need to keep in mind during a trial - for example, the requirement that a motion for judgment as a matter of law or a motion for judgment of acquittal be made in order to preserve a sufficiency of the evidence issue - most issues that involve interpretation of procedural rules are resolved before the trial actually begins or *after* some or all evidence is presented. Therefore, most procedural issues provide an opportunity for research, for thoughtful consideration, and for consultation with others.

Evidence issues also may be considered pretrial. The increasing demands of rules like *Fed. R. Civ. P. 16*, the prevalence of motions *in limine*, and the final pretrial orders entered by many judges require that trial lawyers think about some evidence issues before the trial starts. But, it is inevitably the case that questions will be asked and answers will be given at trial that will require immediate objections or motions to strike if a party intends to protect itself against inadmissible evidence. It is also inevitable that a proponent of evidence will have to respond to objections and motions to strike in order to demonstrate why proffered evidence is admissible and should be admitted, and to make a proper offer of proof if an objection is improperly sustained.

Speed is essential at trial. It is often said that there are only two kinds of trial lawyers, the quick and the dead. When it comes to objections to evidence and responses to objections, this division of trial lawyers is especially accurate. Delay may mean loss; indeed, it may mean disaster. Raising the wrong objection or making the wrong response is no better than failing to object or to respond. Being "close" generally is no more helpful than being "just plain wrong." The pressure on trial lawyers to be right is great.

The Federal Rules of Evidence might appear intimidating at first glance. They are comprehensive, copious, and trans-substantive. Certainly they must be mastered for trial counsel to be effective. We believe, however, that the task of

mastering the Federal Rules is not as daunting as it may seem. This is due to the simple fact that many of the Rules never become a subject of contention in a trial.

Are Rule Numbers Important?

Before turning to specific rules, it makes some sense to address the question whether lawyers operating under the Federal Rules should feel some obligation to cite rule numbers to a Trial Court. Although reasonable minds might differ about this, our experience is that it is generally more important to educate the Trial Judge about the substance of an objection or of a response than it is to demonstrate one's erudition by citing the correct rule number and even the correct subdivision in a rule.

For example, assume a witness is asked during a homicide trial, "As you stood there over the person who was bleeding, did that person say anything?" It is more important for defense counsel to say "hearsay" than it is to invoke *Rule 802*. In fact, *Rule 802* is cited so infrequently that a Trial Judge might well respond to the words "I object, your Honor, under *Rule 802*" by asking what rule that is. Similarly, in the same example, it is more important for the proponent to respond to the hearsay objection by saying "Your honor, it is an excited utterance," or "it is a dying declaration," than it is to cite *Rule 803(2)* or *Rule 804(b)(2)*.

There are two dangers when lawyers reach for rule numbers. The first danger is that they will state the wrong number. All honest trial lawyers and evidence teachers will admit that they sometimes have to look at the rules to remember the number of the particular rule they are invoking. Uttering the wrong number is worse than uttering no number at all. The second danger is that the Trial Judge will confuse in his or her mind the rule numbers and reject an argument on the assumption that it rests on a rule other than the one actually relied upon. Unless the Judge offers reasons for a ruling, it is possible that the losing advocate would never know that the Judge was confused.

One objection, however, ought to be made by rule number in almost every case. Any time a trial lawyer invokes *Rule 403* and objects that evidence is too prejudicial, the objection is best made by number and the objector ought to seek to articulate the reasons for the objection outside the hearing of the jury. The reason should be obvious. If the objecting counsel declares in the presence of the jury, "Your Honor, this evidence is so prejudicial that if the jury hears it, it will overwhelm all other evidence," and the objection is overruled, some if not all of the jurors are likely to understand that the objecting counsel has stamped this evidence as overwhelming. The objection in the hearing of the jury may well assure that it is certain rather than probable that the evidence will have the extreme impact that gave rise to the objection. Indeed, even a successful objection may lead to jury speculation about what kind of "prejudicial" evidence they were not allowed to hear.

There are other situations in which rule numbers can be important. The most common arise when counsel wishes to call the Trial Judge's attention to particular language in an evidence rule. The Trial Judge is likely to have a copy of the rules at the bench. By referring to a rule by number and reading relevant language, counsel is most likely to induce the Trial Judge to turn to the rule and read the language. This may be necessary if the Judge is to understand a complex argument based upon particular language in a rule that has not been the subject of previous argument.

The Most Important Rules

Turning now to specific rules of evidence, we offer a list of the rules that trial lawyers ought to master and be prepared to invoke or respond to at all times. Whenever part of a rule is more important than the rest, the list identifies the most important part or parts. Altogether the list contains 24 rules. This may seem like too many to master, but we believe that the list is manageable, especially if emphasis is placed upon the key rules, which are identified with an asterisk. These are the "top ten" on our list of evidence rules. Actually, there are eleven rules in the "top ten," but the two with double asterisks are included in a tie for the last spot, because each in our view could qualify as the most underutilized of the

rules. Both are included to call attention to them.

The List

Rule 103. Rulings on evidence

(a) Effect of erroneous ruling

(c) Hearing of jury

Rule 104. Preliminary questions

(a) Questions of admissibility generally

(b) Relevancy conditioned on fact

Rule 105. Limited admissibility

*Rule 401. Definition of "relevant evidence"

*Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

*Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion,or waste of time

*Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(b) Other crimes, wrongs, or acts

**Rule 602. Lack of personal knowledge

*Rule 607. Who may impeach

Rule 608. Evidence of character and conduct of witness

(b) Specific instances of conduct

Rule 609. Impeachment by evidence of conviction of crime

(a) General Rule

*Rule 611. Mode and order of interrogation and presentation

(a) Control by Court

Rule 612. Writing used to refresh memory

Rule 613. Prior statements of witnesses

Rule 701. Opinion testimony by lay witnesses

*Rule 702. Testimony by experts

Rule 703. Bases of opinion testimony by experts

*Rule 801. Definitions

(a) Statement

(c) Hearsay

(d) Statements which are not hearsay

Rule 803. Hearsay exceptions; availability of declarant immaterial

(1) Present sense impression

(2) Excited utterance

(3) Then existing mental, emotional or physical condition

(4) Statements for purposes of medical diagnosis or treatment

(5) Recorded recollection

(6) Records of regularly conducted activity

(8) Public records and reports

(18) Learned treatises

Rule 804. Hearsay exceptions; declarant unavailable

(b) (1) Former testimony

**Rule 806. Attacking and supporting credibility of declarant

Rule 807. Residual Exception

*Rule 901. Requirement of authentication or identification

(a) General provision

Rule 1006. Summaries

We shall consider these rules in groups and explain how we arrived at the list. We shall also explain why the "top ten" rules are so important to trial lawyers.

Offering & Objecting; Rulings; Instructions - Rules 103, 104 & 105

Trial lawyers need to know the basic requirements of a timely objection and a proper offer of proof when an objection is sustained. *Rule 103* sets forth the same basic rules as at common law. One important thing to notice about *Rule 103(a)* is that a "timely" objection is required, but the word "timely" is not defined in the Rule. *Rule 103* is not one that lawyers need to know by number; it sets forth the basic proposition that, generally speaking, Trial Judges will not intervene when evidence is offered unless an objection is made, and Appellate Courts will not consider a claim that an objection should not have been sustained unless they can review the substance of the excluded evidence.

Rule 104 is another rule that generally need not be cited by number. It is important because it sets forth the basic tasks of judge and jury. The Trial Judge has the duty of deciding whether or not evidence qualifies for admission under the various rules set forth in Articles IV-X of the Federal Rules and to deal with presumptions and judicial notice under Articles II and III of the Rules. *Rule 104(a)* sets forth the Judge's responsibility to interpret and to apply the rules of evidence.

Rule 104(b) indicates that, when a relevance issue arises, the Trial Judge decides whether, when evidence is relevant only if some fact or other is true, there is sufficient evidence for a reasonable juror to find the necessary fact. Under *Rule 104(a)*, the Trial Judge often is factfinder; what the Judge finds to be true is critical. Under *Rule 104(b)*, the Judge sifts the evidence to decide whether it is sufficient to support a jury's finding that something is true.

Trial lawyers need to know how to raise an objection and to make an offer of proof; they also need to know what the Judge's role in ruling on evidence is. The Supreme Court held in *Bourjaily v. United States, 483 U.S. 171 (1987)* , that the Trial Judge is to use a preponderance of the evidence standard in ruling on coconspirator statements offered under *Rule 801(d)(2)(E)*. After *Bourjaily*, the preponderance standard is the standard that Trial Judges use for *Rule 104(a)* rulings. See the Advisory Committee Note to the 2000 amendment to *Rule 702*. With *Bourjaily* and *Rule 104(a)* in mind, trial lawyers can employ a very useful rule of thumb: *The lawyer who relies upon a rule of evidence has the burden of showing, by a preponderance of the evidence if facts are disputed, entitlement under the rule*. Thus, a lawyer who objects to admission of a statement on the ground that it falls within the attorney-client privilege must show that the elements of a privilege claim exist, just as the proponent of a statement as an excited utterance must show by a preponderance that it satisfies the requirements of *Rule 803(2)*.

Rule 103(c) is a much neglected rule. It provides that in jury cases, "proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." This rule may be useful to a lawyer trying to stop an opponent from making "speaking objections" in front of the jury or to counsel who wants to make an evidence argument outside the hearing of the jury.

Rule 105 should be considered along with these rules. It provides that, upon request, a party can obtain a limiting instruction when evidence is admitted for a limited purpose. Because *Rule 105* requires a request for an instruction, just as *Rule 103* requires an objection and an offer of proof, trial lawyers are on notice that they cannot expect the Trial Judge *sua sponte* to explain to the jury how evidence may or may not be used. (See the further discussion of this point in the Editorial Explanatory Comment to *Rule 105*, *§§ 105.02[2], [3]*). A trial lawyer who asks for an instruction has a right to one under the Rule, and experienced trial lawyers will decide what language to suggest to the Judge. The most experienced lawyers may in some cases ask the Judge not to give a specific instruction to the jury, out of fear that the instruction might do more harm than good, and instead to instruct opposing counsel not to use the evidence except in a limited way.

In short, *Rules 103* and *104* set forth basic requirements for raising and responding to evidence claims, and *Rule 105* sets forth a rule that governs limiting instructions with respect to admitted evidence.

Relevancy (Rules 401, 402 & 403) and Rules 901(a), 611(a) & 1006

One federal District Judge gave a speech a few years ago and claimed that he only needed two evidence rules, 401 and 403, to do his job. He said *Rule 401* permitted him to admit anything while *Rule 403* permitted him to exclude anything. This is slightly exaggerated, but only slightly, and we think that the Judge should have mentioned *Rule 402* as well as the other two Rules. All three make the "top ten" and for good reason. *Rule 401* provides a generous standard of relevant evidence, combining in one definition the common-law distinction between materiality and relevance. *Rule 402* provides that "[a]ll relevant evidence is admissible" except as otherwise provided by law, and that "[e]vidence which is not relevant is not admissible." Thus, evidence is not admitted under *Rule 401*--that Rule is definitional only, and technically the power to admit relevant evidence is grounded in *Rule 402*. *Rule 403* provides that relevant evidence can be excluded if the prejudicial effect or other problems substantially outweigh the probative value of the evidence.

These rules are tremendously important. *Rule 402*, as interpreted by the Supreme Court in *United States v. Abel, 469 U.S. 45 (1984)* , stands for the proposition that all relevant evidence is admissible, whether or not any other rule says so, unless there is some provision in law that excludes the evidence. This is important because there are many types of relevant evidence that are not specifically mentioned in the Federal Rules, and all are presumptively admissible under *Rule 402*. In *Abel*, for example, the Court noted that no rule must say that bias evidence is admissible to impeach a witness; bias evidence is relevant and therefore is admissible under *Rule 402*. *Rule 402* also states clearly that irrelevant evidence can never be properly admitted.

Under *Rule 401*, evidence is relevant if it adds in the slightest to a case - this is a very permissive standard for relevance. *Rule 403* provides Trial Judges with a variety of reasons to exclude evidence that is relevant and not excluded by other rules. *Rule 403* permits a Judge to conclude that evidence is prejudicial, confusing, misleading, cumulative, time-consuming, or unnecessary. It is a rule that can be cited by trial lawyers any time they have no other objection to make. However, the success rate on *Rule 403* exclusions is relatively low - in order to be subject to exclusion, the risk of prejudice, confusion and delay must *substantially* outweigh the probative value of the evidence. Appellate opinions generally pay great deference to Trial Judges who make *Rule 403* rulings in view of the fact that Trial Judges see and hear the litigants and observe the jury, while Appellate Courts have only a cold record on which to base a decision.

Closely related to *Rule 401* is *Rule 901(a)*, the basic rule of authentication. *Rule 901(a)* states that "evidence sufficient to support a finding that the matter in question is what its proponent claims" is all that is needed to authenticate challenged evidence. Essentially, any relevant evidence that a factfinder could believe is enough for authentication. The standard of *Rule 901(a)*, like the definition of relevance in *Rule 401*, requires only a minimal showing. (Though perhaps the requirement is a bit more stringent than might appear at first glance - see the Editorial Explanatory Comment to *Rule 901*, *§§ 901.02[3], [4]*). Moreover, the Trial Judge who rules on whether evidence is relevant or whether it is properly authenticated decides not whether he or she believes the evidence, but whether a reasonable juror could believe it. Essentially, authentication is treated in the same way as evidence whose relevance is conditioned on fact under *Rule 104(b)*. A trial lawyer who knows these rules understands that there are virtually unlimited ways to authenticate evidence.

A rule that should be considered along with the relevance rules, especially *Rule 403*, is *Rule 611(a)*, which specifically grants the Trial Judge authority to control the scope and the order of proof. These rules provide support for Judges imposing time limits on parties, for Judges permitting witnesses to testify out of turn, for ruling on whether instructional charts, videos, etc. can be presented to the jury, and for virtually any trial management that the Judge concludes will avoid prejudice, waste of time, presentation of cumulative evidence, etc., and will enhance a jury's understanding. If counsel wants a Trial Judge to do something unusual by way of trial management, counsel often will find that Rules 611(a) and 403 provide the best authority for experimentation.

The last rule in this grouping is *Rule 1006*, which permits summaries of voluminous material to be introduced. This is the only really important "best evidence" rule in modern litigation, now that *Rule 1003* provides that duplicates (most mechanically reproduced copies of documents and recordings) are presumptively admissible. *Rule 1006* permits trial lawyers to present voluminous materials in an understandable way. The most important thing for trial counsel to remember under this rule is that summaries are only admissible if the underlying documents would be; summaries of

inadmissible evidence are themselves inadmissible.

Rule 611(a) gives the Trial Judge authority to permit summaries of evidence that do not qualify under *Rule 1006*. For example, a chart used by a law enforcement officer to trace a series of telephone calls and to summarize how they connect to one another is properly characterized as a summary of trial evidence, not as a *Rule 1006* summary. *Rule 611(a)* is the rule that provides the authority for a Trial Judge to permit and to control the use of summaries and instructional aids falling outside of *Rule 1006*.

Rules 401, 402, 403, 901(a), and 611(a) all make our "top ten" because they set forth the most basic requirements for admission of evidence and provide the Trial Judge with expansive authority to manage a trial. *Rule 1006*, while outside the "top ten," is grouped with these rules because it provides an opportunity for trial lawyers to present voluminous evidence in a way that judges and juries can understand it. It is a management device that trial lawyers can utilize much like the Trial Judge utilizes *Rule 611(a)*.

Character Evidence - Rules 404(b), 608, 609

The common-law approach to character evidence is codified in *Rule 404(a)*: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion ... ." The basic exclusion of character evidence rests on a judgment that general proof of a predisposition to act a certain way is not very probative of how a person acted on any given occasion and more importantly that triers of fact may give character evidence undue weight or punish a person because of general character without paying sufficient attention to the facts alleged in a particular case.

Character evidence is only excluded, however, when offered to prove a character trait and action in conformity therewith. It is not excluded when offered as evidence of other crimes, wrongs or acts under *Rule 404(b)* to prove things like intent, knowledge, or identity. Thus, it is common in criminal cases for the government to offer *Rule 404(b)* evidence, ostensibly for a permissible, particularized purpose rather than to prove character. According to the Supreme Court's decision in *Huddleston v. United States, 485 U.S. 681 (1988)* , the Trial Judge is to consider an offer of character evidence under *Rule 104(b)* and decide whether the evidence offered is relevant and whether it is tied to other facts sufficiently to warrant admission, and whether to exclude such evidence as unduly prejudicial under *Rule 403*. Once evidence of other crimes, wrongs or acts is introduced, it is difficult for any instruction to assure that a jury will not use this evidence to reach forbidden inferences.

Rule 404(b) evidence is not limited to criminal cases. It is frequently offered, for example, in employment discrimination cases to prove intent. The possibility that other crimes, wrongs, or acts will be misused as character evidence is ever present, and it is why this evidence is so difficult to control. Plaintiffs and prosecutors are particularly prone to offer such evidence, and defense counsel in both civil and criminal cases must be aware that the standard for admission is relevance, and must be prepared to raise objections under *Rule 403*. Because the introduction or exclusion of *Rule 404(b)* evidence arises in most every case and has a genuine potential to affect the outcome of a case, it makes the "top ten" list.

It is vitally important that counsel know the difference between *Rule 404(b)* on the one hand and *Rule 608(b)* and *609(a)* on the other hand. *Rule 404(b)* evidence can be offered in a proponent's case-in-chief; this evidence is not dependent on whether any particular witness testifies. In contrast, questions about prior bad acts under *Rule 608(b)* and about prior convictions under *Rule 609(a)* cannot be asked except when impeaching a witness. Nonetheless, these two impeachment rules raise some issues similar to those raised under *Rule 404(b)*, e.g., whether introduction of impeachment evidence, especially when it is a party who is impeached, will result in the misuse of such evidence as showing action in conformity therewith in violation of *Rule 404(a)*.

Counsel also should be aware of limitations found in Rules 608 and 609 that are not found in *Rule 404(b)*. For example,

Rule 608(b) permits a witness to be questioned about prior bad acts when probative of the witness' character for veracity, but the questioner is bound by the witness's answer. Extrinsic evidence is prohibited. And *Rule 609(a)* contains a specialized balancing test favoring the criminal accused. Because all of this evidence, like *Rule 404(b)* evidence, can have a genuine effect on the verdict in a case, these rules are important.

Character evidence of any sort always poses a danger for the reasons stated. *Rule 404(b)* sets forth a variety of reasons why evidence of specific acts not charged or pleaded may be offered, and is a rule of tremendous importance, justifying its place among the "top ten." Rules 608(b) and 609(a) are also very important, although resort can be made to them only after a witness takes the stand to testify.

Flexible Impeachment Rules: 607, 612, and 613

A trial lawyer operating under the Federal Rules has more options available for impeachment or for anticipating impeachment than were available at common law. *Rule 607* marks an important departure from the common-law principle that a party generally could not impeach its own witness. On its face the Rule permits any party to impeach any witness.

Rule 607 clearly permits a party to anticipate an adversary's impeachment and to "remove the sting" by eliciting negative material on direct examination rather than leaving it for the cross-examiner to bring out. *Rule 607*, read together with *Rule 402*, permits any relevant impeachment evidence to be offered unless some other rule, like *Rule 403*, *608* or *609*, places limits on such evidence.

There is one caveat about *Rule 607*. It must be considered in conjunction with *Rule 801(d)(1)(A)*, the rule that permits certain prior inconsistent statements to be admitted as substantive evidence. If a lawyer knows that a witness has recanted a prior statement, it is impermissible for the lawyer to call the witness in order to place the inconsistent statement before the jury under the guise of impeachment; the lawyer may only call the witness for the purpose of eliciting or introducing the inconsistent statement if it is admissible as substantive evidence under *Rule 801(d)(1)* or under some other exception to the hearsay rule. See the discussion in the Editorial Explanatory Comment to Rule 607.02[2].

Rule 612 might seem out of place in a discussion of impeachment, since it is a rule governing refreshing recollection. But, it does fit.

Rule 612 expands the common-law right of a party to inspect anything used to refresh a witness's recollection at trial to provide that "if a witness uses a writing to refresh memory for the purpose of testifying ... before testifying," "if the court in its discretion determines it is necessary in the interests of justice," then "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." This Rule is especially important when experts are retained in a case. It is highly likely in both civil and criminal cases that the Court will require an expert to disclose all of the documents or information provided to the expert and reviewed by the expert. Parties who wish to protect work product and privileged communications must take care not to provide these documents to witnesses, particularly experts, or the documents will lose their protection. The adversary may then impeach the witness with the documents.

Rule 613(a) provides that counsel may question a witness about a prior inconsistent statement in a document without first showing the document to the witness. This is a relaxation of the common-law rule. *Rule 613(b)* on its face appears to relax the foundation requirement by not requiring that the foundation for a prior inconsistent statement be laid before extrinsic evidence is offered. Experienced counsel generally will continue to lay the foundation first, however, for two reasons. The first is that an inconsistent statement is most effective in many cases when it is used as close in time to direct examination as is possible. The second is that some Judges will hesitate to force witnesses to await recall so that a foundation can be laid and may find that the failure to lay a foundation while the witness was first on the stand is a

waiver of the right to offer an inconsistent statement, despite the language of *Rule 613*.

If there is a good reason for counsel to want to offer the inconsistent statement before providing a witness an opportunity to explain or deny - for example, where the same statement might impeach several witnesses and counsel does not want to reveal the statement too early -- counsel should alert the Trial Judge that a witness may have to be recalled and seek permission to depart from the traditional foundation. The language of *Rule 613(b)* and the Trial Judge's authority under *Rule 611(a)* should provide all the authority that the Court needs to fashion an appropriate procedure for any given case.

Rule 607 makes the "top ten" because it affords maximum flexibility in dealing with witnesses. *Rule 612* and *613* are also important. Counsel must think about *Rule 612* in dealing with witnesses before a trial starts, and should be aware that *Rule 613* does relax strict common-law requirements.

Counsel should also note that, under *Rule 806*, a party may impeach a hearsay declarant. The rules governing impeachment of witnesses generally govern impeachment of hearsay declarants, except that foundation requirements are relaxed. *Rule 806* is rarely cited and rarely used. It can, however, be a very important rule to combat hearsay testimony. As we stated in introducing our "top ten," *Rule 806* is one of two rules placed on the list to call attention to its potential importance rather than to acknowledge its past significance.

Opinions and Expert Witnesses: Rules 702 and 703

Not only are the Federal Rules more flexible than the common law with respect to impeachment, but they are also more flexible with respect to both lay and expert opinion.

Rule 701 abolishes the common-law distinction between facts and opinion and provides that a lay witness can testify in the form of an opinion if the opinion is rationally based on the witness's perceptions and helpful to the trier of fact. *Rule 701* does not permit a witness to assume the role of a factfinder and to suggest how disputed issues ought to be decided; nor does it permit what is tantamount to expert testimony in the guise of "lay opinion." But, the Rule does permit witnesses to testify as fully as possible as to what they perceived so that triers of fact can have as much useful information as possible.

It is the unusual case these days in which no expert witness is called. Expert testimony is not limited to matters beyond the ken of a judge or jury; any helpful testimony may be admitted under *Rule 702*. Under *Rule 703*, an expert may rely upon facts or data reasonably relied upon others in the field even if those facts or data are not independently admissible as evidence.

Rule 702 makes our "top ten" largely because of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* . The Court held that the Trial Judge sits as a "gatekeeper" and must exclude expert testimony when it is unreliable. A recent amendment to *Rule 702* codifies *Daubert* and its progeny. *Daubert* signifies that, while the expert rules are more flexible than the common-law approach to expert testimony, the Trial Judge still has an important screening role to play.

Rules 701, 702, and 703 liberalize the admissibility of lay and expert opinion. All are important, and *Rule 702* ranks among the "top ten" as a result of *Daubert*.

Hearsay: Rule 801, 803 and 804, and Personal Knowledge, Rule 602

Hearsay is one of the most difficult of all evidence subjects. The Federal Rules make some important departures from the common law, especially in *Rule 801*.

Rule 801(a) defines "statement" so as to exclude conduct that is not intended as a communication. Thus, conduct, not intended to be an assertion but offered to prove what the actor believed to be true, which was hearsay at common law, is not hearsay under the Federal Rules.

Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This basic definition focuses on whether a statement was made outside of court rather than on whether the declarant who made the statement is present in court.

However, *Rule 801(d)* contains eight categories of statements that are defined as "not hearsay." Unlike the common law, *Rule 801(d)(1)* makes certain prior inconsistent statements and certain prior consistent statements of a testifying witness nonhearsay. It also makes prior identifications by a testifying witness nonhearsay.

Rule 801(d)(2) sets forth five categories of admissions. Each is deemed to be "not hearsay." There are personal admissions, adoptive admissions, authorized admissions, agent's admissions, and coconspirator's admissions. Under the Supreme Court's decision in *Bourjaily*, discussed above, a Trial Judge may consider a challenged hearsay statement in the course of determining whether it qualifies as a coconspirator's statement. This is a departure from many common-law decisions which required that a Court find that a conspiracy existed and that the declarant and any party against whom a statement is offered were members of that conspiracy on the basis of evidence *aliunde* (or independent evidence). The *Bourjaily* principle has been extended to proof of agency under the other agency exceptions found in *Rule 801(d)(2)*.

The Supreme Court left undecided in *Bourjaily* whether a challenged statement, standing alone, would be sufficient to permit a statement to qualify as a coconspirator's statement. An amendment to *Rule 801(d)(2)* states that with respect to authorized, agent's, and coconspirator's statements, the hearsay statement standing alone is insufficient to prove the foundational fact.

Rule 801 now provides the vehicle for admitting most hearsay in Federal Courts. Every admission, the most common hearsay exception, falls under *Rule 801*. So do prior statements of testifying witnesses. Moreover, the vicarious admissions that fall under *Rule 801(d)(2)(D)* are increasingly important in civil cases, while coconspirator statements under *Rule 801(d)(2)(E)* remain important in criminal cases. *Rule 801(d)* plainly warrants inclusion among the "top ten."

Rule 803 and *804(b)* respectively provide 23 and 5 particular hearsay exceptions, and *Rule 807* adds a residual exception. The hearsay exceptions that are most commonly used are the ones found on our list. A few comments on each are offered here.

Rule 803(1) provides an exception for a present sense impression, an exception that not all common-law courts recognized. It is confined in time and scope. It is a useful Rule for admitting evidence of telephone conversations reported by another and for admitting notes taken during conversations.

Rule 803(2) is the classic excited utterance. It should be noted that a statement need only relate to a startling event or condition to qualify. That standard is broad enough to include a variety of statements.

Rule 803(3) codifies the distinction between forward and backward looking statements. This is the classic distinction between *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892)* , and *Shepard v. United States, 290 U.S. 96 (1933)* .

Rule 803(4) admits a wide variety of statements made to both treating and diagnosing physicians. It is more inclusive than many common-law rules.

Rule 803(5) offers an exception for prior recorded recollection. There is no requirement that a witness have total memory loss, only that there be "insufficient recollection." It is important to note that the memorandum or record must be read to the trier of fact; it is not admissible as evidence.

Rules 803(6) and 803(8) cover business and public records. "Business" is broadly defined as a regularly conducted activity. Public records include factual findings in public investigations with some limitation on that principle when law enforcement reports are offered against a criminal accused. *Rule 803(8)(C)* was given a broad reading in *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)* .

Rule 803(18) expands the use of learned treatises. Experts are permitted to read on direct examination from treatises they relied upon. An authoritative work may be read to the jury whether or not the witness relied upon it. More flexibility is provided both on direct and cross-examination than at common law.

None of the 803 particular exceptions requires a showing of unavailability of the declarant, the showing that is required under *Rule 804*. The most frequently used 804 exception is for former testimony. The key under the Rule is that the party *against whom* the former testimony is offered, or a predecessor in interest of that party, must have had an opportunity and similar motive as at trial to question the witness.

Finally, *Rule 807* can be relied upon when no particular exception is satisfied but the proponent of a hearsay statement proves that the statement is especially reliable. The trial lawyer must remember to give notice to the other side before offering statements under this residual exception.

All of these exceptions are familiar, and all are important. None is so much more important than the others to warrant a place among the "top ten."

It might seem strange, but the final place on the "top ten" is reserved for a rule that is too often ignored, *Rule 602*, which provides that a witness may only testify if there is evidence to support a finding that the witness is testifying from personal knowledge. The personal knowledge requirement is not likely to be ignored when a witness testifies at trial. But it is too often ignored when hearsay statements are offered. Except for admissions, defined as nonhearsay under *Rule 801*, the general rule is that hearsay statements falling within the definition provided in *Rule 801(c)* require evidence sufficient to support a finding that the declarant had personal knowledge.

For example, a proponent of an excited utterance might call a witness to say that a hearsay declarant, who had blood on her clothes, said that the defendant stabbed the deceased. Proving that this is an excited utterance might be easy. Proving that the declarant had personal knowledge might be more difficult. The blood might have come as the declarant examined the deceased without the declarant's having seen what occurred. The blood might even belong to someone other than the deceased. The Trial Judge must decide whether a reasonable juror could believe that the witness had personal knowledge of the event related.

We put *Rule 602* on our list of the ten most important rules in order to call attention to the importance of personal knowledge as applied to hearsay declarants. Like *Rule 806*, *Rule 602* is too little appreciated.

These twenty-four rules, especially the "top ten," should be familiar to all trial lawyers. We recognize that everyone reading this will want to add some rules or eliminate some that we have identified as important. Lawyers who specialize in particular kinds of litigation might find some omissions particularly galling. Those who handle negligence cases or product liability cases might complain that *Rule 407* should be on the list. Those who handle insurance coverage cases might want to see *Rule 408* or *411* here. We acknowledge that there is no list that will meet the needs of every lawyer, but we believe that this one will provide some useful guidance for most lawyers in most cases.

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§ One.syn Synopsis to Chapter One: Background of Codification Generally and the Federal Rules Specifically

1 The Push to Codify

2 The Path to the Supreme Court

3 The Legislative Response

4 The Future of the Rules

5 Amendments to the Rules

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1 ***The Push to Codify***

The background of the codification movement in the United States is a curious one; there has been and still is a fairly constant demand among some lawyers for evidentiary codes. But it has been exceedingly difficult to build sufficient momentum to enact codes into law. "Ambivalent" is probably the best word to describe the long-time attitude of many lawyers towards legislation in the evidentiary domain.

There is apparently some appreciation of the benefits of uniformity and ease of ascertainment of the rules when a statute is enacted. At the same time there is some fear that legislation produces wooden rules, concern that some established principles will be inadvertently omitted, and some feeling that case by case adjudication is a superior means of doing justice. Lurking in the background also is a sense, for most lawyers, that some evidentiary rules are of questionable value and that some may even approach the realm of the absurd. But the problem has been to find the appropriate means to change the rules without impairing the functioning of those that are justifiable and that are presently working well.

Legislation, at first glance, offers a nice clean solution. One swing of the legislative (or rulemaking) axe and the umbilical cord tying present to past is cut, and legislation emerges that solves the problems of the past and serves the needs of the future. But when it is remembered that not all lawyers agree on which are silly rules and which are wise, that too radical a departure from tradition makes it difficult to enact legislation, that the problem of too much rigidity is a real one, and that there are many possible solutions, not simply one, the difficulties of enacting legislation become readily apparent.

Common-law courts, on the other hand, can examine the facts of particular cases and fashion rules to fit those facts. They are also somewhat free to modify past rules to meet present needs. However, the mere mention of the term *stare decisis* should serve to explain one of the "problems" of common-law Courts, i.e., precedent is important and resistant to change. Moreover, while molding rules to fit particular facts may do justice in individual cases, it becomes difficult to predict what a Court will say about the rules of evidence in any given case; and evidence rules especially need to be predictable as they are used in the heat of a trial. Finally, there is the feeling on the part of many Judges that once a rule has stood over time, even if it is of questionable value, legislative intervention is a more appropriate response than judicial overruling.

More could be said on the relative advantages and disadvantages of legislation and adjudication. It is sufficient for the

purposes of this brief background, however, to note that the demand for codification has never come unanimously from the members of the bar. Codification has had its opponents as well as its adherents. It is difficult to review the history of the last sixty years and to reach any firm conclusion as to whether feelings about codification of evidentiary rules differ greatly from the feelings of most lawyers about the relative merits of legislation versus adjudication generally.

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2 *The Path to the Supreme Court*

Much of the impetus toward legislation arose from enactment of the Federal Rules of Civil Procedure in the late 1930's. When the original Advisory Committee on Civil Rules issued its report in 1937, it suggested that evidentiary rules be largely excluded, because at that time there was no ready reference for codification and there was apparently insufficient time for the task. It is also likely that inclusion of evidentiary rules with the Rules of Civil Procedure would have provoked much of the same controversy that surrounded the 1970's attempt at codification and thus would have diverted attention from the much needed Rules of Civil Procedure. The Chairman of the Advisory Committee, Attorney-General William D. Mitchell, said:

> There was tremendous pressure brought on the advisory committee by those familiar with the subject of evidence insisting that there was a need for reform which we did not meet, and some advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.

Following the suggestion of Attorney-General Mitchell that some Advisory Committee should tackle the task of revising the rules of evidence and compose them into a new set of rules to be promulgated by the Supreme Court, other prominent members of the legal profession made similar proposals.

These clarion calls did not go unheeded. In 1939, the American Law Institute turned to the subject of evidence, and with Professor Edmund Morgan of Harvard as its Reporter, promulgated the Model Code of Evidence in 1942. Despite the "tremendous pressure" of which the Advisory Committee Chairman had spoken, no jurisdiction ever adopted the Model Code of Evidence.

While unadopted, the Model Code was not entirely disregarded. In 1943 the American Bar Association took action. Its House of Delegates directed a study of uniform evidentiary rules, and the following year specifically provided that the Model Code should serve as the basis of the study.

In the interim, the Advisory Committee had an opportunity once again to consider whether or not it should undertake to compile rules of evidence. It concluded: "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task."

The American Bar Association recognized that the Model Code as drafted would not receive support from the various states, so it enlisted the National Conference of Commissioners on Uniform State Laws in a program of revision in the hope that acceptable rules could be promulgated.

The actual drafting by the Commissioners began in 1950 and culminated in the Uniform Rules of Evidence, in 1953. But only a handful of jurisdictions (e.g., California, Kansas, New Jersey, Oklahoma, Utah) have adopted comprehensive evidence codes based upon the Uniform Rules. Like the Model Code, the Uniform Rules were not the stimulus to reform that some had hoped they would be. In 1958 the House of Delegates of the American Bar Association urged the Judicial Conference of the United States to appoint a special committee to adapt the Uniform Rules for use in Federal Courts in order to clarify and to improve the evidentiary rules and to provide a means of uniformity and conformity.

In March 1961, in special session, the Judicial Conference of the United States approved a proposal of the Standing Committee on Rules of Practice and Procedure that called for a project devoted to Federal Rules of Evidence. The Chief Justice implemented the proposal by naming a Special Committee under the chairmanship of the distinguished Yale Professor James William Moore. The Committee's mandate was to inquire into the feasibility and advisability of Federal Rules of Evidence. During 1961, its report (A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts) was written. This report concluded that uniform Rules of Evidence were both advisable and feasible. On February 12, 1962, the report was circulated to members of the bar and to Judges. After considering their comments, the Standing Committee and the Judicial Conference confirmed the recommendation of the Special Committee. On March 8, 1965, Chief Justice Warren appointed an Advisory Committee on Rules of Evidence.

The Advisory Committee transmitted to the Standing Committee a "Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates" on January 30, 1969. On March 31, 1969, the Standing Committee circulated the preliminary draft to the Bar and Bench for consideration. It was not until October 1970 that the Standing Committee presented to the Judicial Conference its revised draft of evidentiary rules which substantially modified the preliminary draft. The revised draft was approved by the Judicial Conference and referred to the Supreme Court. The Supreme Court concluded that the revised draft should be submitted for comments to lawyers and Judges in the same manner as the preliminary draft. This was done in March 1971.

Many comments and criticisms were made with respect to both drafts, and revisions were made in the revised draft, just as they had been made in the previous draft. After the Advisory Committee had reworked its product, it submitted the revised draft to the Standing Committee, which made some further revisions before approving the draft and submitting it to the Judicial Conference. The Judicial Conference also approved the draft and then forwarded it to the Supreme Court in October 1971. Although the Court did not promulgate this revision of the revised draft, it did receive further comments and suggestions, including some from the Department of Justice. Upon receipt of these comments, the Court requested the Advisory Committee and the Standing Committee to evaluate them. Early in 1972 the Advisory Committee and the Standing Committee met again and made further modifications. This procedure, which did not allow for public comment on the final draft, was severely criticized. See, e.g., Testimony of George Halpern and George Frampton, Hearings on Proposed Rules of Evidence Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93rd Congress, First Session, at 158-92 (1973). In any event, on November 20, 1972, the Supreme Court approved a final draft.

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3 ***The Legislative Response***

Had the same procedure that was used in adopting the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure been used with respect to the evidentiary Rules (a procedure that would also have applied absent any contrary Congressional action), the Supreme Court draft would have become effective automatically after the passage of ninety days. But because Congress recognized the importance of the evidentiary Rules and because the label "substantive" was persistently applied to several of the Rules, Congress enacted Public Law 93-12, which provided that the Rules should not be effective until expressly approved by the Congress.

Two days after receiving the proposed Rules from Chief Justice Burger on February 5, 1973, the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives (formerly designated as Special Subcommittee on Reform of Federal Criminal Laws) opened hearings on the desirability of the uniform code of evidence and the merits of the Rules approved by the Supreme Court. After six days of hearings, and receipt of numerous written communications, the Subcommittee circulated a draft on June 28, 1973. Following extensive comments from the public, the Subcommittee revised its draft and on October 10, 1973, reported its revised draft to the full Judiciary Committee. On October 16 and 18, and on November 6, 1973, the full Committee debated the bill and amended it in several respects before reporting it to the full House. Several additional amendments were made by the full House before the Rules were passed on February 6, 1974. A Senate version of the Rules was passed on November 22, 1974, following hearings on July 4 and 5, 1974, before the full Senate Committee on the Judiciary. As a result of compromises by House and Senate conferees, the final bill was approved by the House on December 16, and by the Senate on December 18. It was sent to President Ford, who approved it on January 2, 1975, whereupon it became Public Law 93-595, 88 Stat. 1926 et seq.

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4 *The Future of the Rules*

After more than thirty years under the Rules, it is fair to state that the goals of codification -- increased certainty as to what the rules are, predictability, efficiency, and uniformity of result -- have been met in large part, but not completely. There is still some disuniformity and unpredictability. Part of the reason for disparate results is that several of the most important Rules (such as *Rule 403* and the residual exception to the hearsay rule) call for an ad hoc judgment on the part of the Trial Judge that will necessarily vary from case to case. As to other Rules, the disuniformity is largely due to vague or misguided statutory language. See Becker and Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, *60 G.W. L. Rev. 857 (1992)* (presenting a catalog and summary of some problems that have arisen under the Rules, including "circuit splits, gaps and inconsistencies in the Rules, debates over fundamental policy, and innovative suggestions").

Also, there is no question that some of the Rules are poorly drafted, and this has often led the Courts to reach results that they believe to be correct and just, even though such results are not mandated (and are even arguably prohibited) by the Rule. In a world of perfect codification, the rule itself would always lead to fair and just results. See Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, *66 Tex. L. Rev. 745 (1990)* (noting the reluctance on the part of many Courts to apply certain Federal Rules as they are written when to do so would lead to an unfair result). Case law has often diverged from the text of the Federal Rules. n1

Finally, some commentators have complained that under the Rules, Judges have lost the common-law power to promulgate new exclusionary rules of evidence, and that Judges are forced to admit evidence in certain circumstances even where they have legitimate doubts about its reliability or where exclusion would serve public policy. See Imwinkelreid, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, *41 Vand. L. Rev. 879 (1988)*.

Still, on balance, the Federal Rules of Evidence have been a success. See *Becker and Orenstein, supra at 858* ("By most accounts, the Rules have been a great success."). Litigators and Judges undoubtedly have found it easier to master the Rules rather than a morass of common-law precedent; and many of the Rules have been uncontroversial and have led to uniform and just results in the Federal Courts.

One important question that has arisen is whether the codification of rules of evidence has totally supplanted the common law previously developed in the Federal Courts. The Supreme Court has visited this question on several occasions, and a unifying principle can be derived from these cases. In *United States v. Abel, 469 U.S. 45 (1984)* , the Court quoted with approval the statement that as a matter of principle, "under the Federal Rules no common law of evidence remains." Yet the Court in *Abel* analyzed and applied the common-law rule permitting impeachment for bias, even though there is nothing specifically concerning impeachment for bias in the Federal Rules. Given the widespread use of impeachment for bias at the time the Federal Rules were being drafted and adopted, the *Abel* Court found it unlikely that the drafters "intended to scuttle entirely the evidentiary availability of cross-examination for bias."

This would suggest that widespread common-law practice would still be relevant in the absence of a Federal Rule on the point or put another way, that common-law concepts have been subsumed within the perameters of *Rule 402* (providing that relevant evidence is admissible) and *Rule 403* (giving the judge discretion to exclude relevant evidence under certain circumstances).

Any common-law rule will be supplanted, however, if there is an Evidence Rule that is in conflict with the common law. Thus, in *Bourjaily v. United States, 483 U.S. 171 (1987)* , the Court rejected the applicability of a widespread practice under the common law, finding that it had been supplanted by an explicit Federal Rule. Under common law, the prosecution was required to establish independent evidence of conspiracy by a preponderance of the evidence before a coconspirator's hearsay statement could be admitted. The *Bourjaily* Court found no support for this practice in the language of the Federal Rules, and stated that under the explicit terms of *Rule 104*, the coconspirator's hearsay statement itself could be used by the Judge in determining whether a conspiracy existed.

More recently, in *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)* , the Court rejected the well-known common-law *Frye* test for assessing scientific expert testimony, and held that it was superseded by *Federal Rule 702*. n2 The *Daubert* Court explained that common-law principles could serve as an "aid" to the application of the Federal Rules, but that they are superseded insofar as they are inconsistent with "a specific Rule that speaks to the contested issue."

The distinction, therefore, is between common law that is supplemental to and consistent with the Federal Rules, and common law that is inconsistent with a specific Rule. Thus, the common law as to bias was not in conflict with any Federal Rule in *Abel* -- in fact it was consistent with the general principles of relevance and prejudice set forth in *Rule 403* -- whereas the common law was found to be in conflict with a specific Rule in both *Bourjaily* and *Daubert*.

Finally, it must be remembered that, in one area at least, a common-law approach is mandated by the Federal Rule itself. *Federal Rule 501* provides that the law of privileges in the Federal Courts shall be determined by principles of Federal common law, as developed in light of "reason and experience."

FOOTNOTES:
(n1)Footnote 1. Part Four of this Manual contains an article from one of the authors highlighting the case law that diverges from the Federal Rules. See Capra, *Case Law Divergence From the Federal Rules of Evidence* in Part Four, *infra*.

(n2)Footnote 2. See the Editorial Explanatory Comment to Rule 702, *§ 702.02*, for a discussion of the difference between *Frye* and the reliability standard mandated by Rule 702 after *Daubert*.

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5 ***Amendments to the Rules***

From time to time certain Rules have been amended and others have been added, some of the amendments originating in Congress and some generated by the Judicial Conference (and specifically by the Advisory Committee on Evidence Rules). The amendments have generally fallen into four categories: (1) technical amendments such as those designed to make the Rules gender-neutral; (2) amendments responding to particular developments, such as the amendment to *Rule 704(b)*, which resulted from Congress's dissatisfaction with proof of the insanity defense in the trial of John Hinckley; (3) amendments that have sought to clarify problematic language, such as the amendment to Rule 609, concerning impeachment of witnesses with prior convictions -- which as originally written created anomalous results when used in a civil trial; and (4) amendments seeking to resolve a split in the circuits, such as the amendment to *Rule 407* which specifically states that subsequent remedial measures are not admissible to prove product defect, defective design, and the like.

The original Advisory Committee on the Federal Rules of Evidence was dissolved shortly after the Rules were enacted. For many years thereafter, there was no advisory committee specifically and exclusively assigned to the Federal Rules of Evidence; amendments were few and far between, especially compared with the amendments promulgated to the Federal Rules of Civil Procedure over the corresponding time period. See Becker and Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 G.W. L. Rev. 857 (1992)* (noting six substantive amendments to the Federal Rules of Evidence during the first seventeen years -- three initiated by Congress -- compared with over one hundred substantive amendments to the Federal Rules of Civil Procedure during that time period).

In 1993, the Judicial Conference, responding to calls from Judges, scholars and practitioners, appointed a new Advisory Committee on the Federal Rules of Evidence. This committee meets regularly to consider proposed changes in the Rules. Its package of amendments to Rules 103, 404, 701, 702, 703, 803(6) and 902 became effective on December 1, 2000, and an amendment to Rule 608(b) became effective on December 1, 2003. As this edition goes to press, proposed amendments to Rules 404(a), 408, 606(b) and 609(a) have been approved by the Judicial Conference and the Supreme Court. If all goes well, these amendments will become effective on December 1, 2006. One of the authors of this Treatise currently serves as the Reporter to the Advisory Committee on Evidence Rules.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Preamble

1- Federal Rules of Evidence Manual .syn

Synopsis to Chapter : Preamble

A OFFICIAL TEXT

B EDITORIAL EXPLANATORY COMMENT

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PART TWO: THE RULES THEMSELVES
Preamble

1- Federal Rules of Evidence Manual A

A OFFICIAL TEXT

AN ACT

To Establish Rules of Evidence for Certain Courts and Proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

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PART TWO: THE RULES THEMSELVES
Preamble

1- Federal Rules of Evidence Manual B

B EDITORIAL EXPLANATORY COMMENT

The preamble to the Act is straightforward. It provides that the Rules take effect on the one hundred and eightieth day after their enactment (i.e., on July 1, 1975). Thus, any action brought after the date the Rules became effective is governed by them. With respect to actions tried between the date of enactment and the one hundred and eightieth day thereafter, the Rules did not apply, irrespective of when the action was filed. As for actions brought before or during the one hundred eighty day period and pending when the Rules actually took effect, the Rules applied unless the Court found that it would be unfair for them to be so applied.

The preamble was important in the early years after the Rules took effect. Its importance declined, however, as cases filed before the Rules took effect were decided.

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual 101.syn

§ 101.syn Synopsis to Chapter 101: RULE 101

§ 101.01 Official Text

§ 101.02 Editorial Explanatory Comment

§ 101.03 Annotated Cases

§ 101.04 Legislative History

[1] Advisory Committee's Note

[2] October 1987 Amendment

[3] November 1988 Amendment

[4] December 1993 Amendment

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual § 101.01

§ 101.01 Official Text

Rule 101.01 Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

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CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual § 101.02

§ 101.02 Editorial Explanatory Comment

This Rule simply states that the Rules of Evidence are generally applicable in the Federal Courts whether a case is before a Judge, a Bankruptcy Judge, or a Magistrate Judge. Express reference is made, however, to *Rule 1101*, which more specifically identifies the proceedings in which the Rules are applicable and those in which they are not. Thus, the Rules are applicable in all civil and criminal cases and generally in cases in which Courts review agency actions *de novo*. They are also applicable in bankruptcy cases. They are inapplicable in a number of types of proceedings, including: (1) when a Judge is deciding a preliminary question of fact -- preliminary, that is, to a decision on whether or not to admit evidence; (2) in grand jury proceedings and in preliminary examinations (such as suppression hearings) in criminal cases; (3) in probation, supervised release and sentencing proceedings; (4) when a warrant is sought; (5) in bail proceedings; (6) in hearings on motions independent of the merits; (7) in arbitrations and administrative proceedings; and (8) in any other proceedings in which Congress has explicitly stated that the Federal Rules are inapplicable -- for example, Congress has provided that in pretrial hearings concerning criminal forfeiture of assets, the District Court "may receive and consider ... evidence and information that would be inadmissible under the Federal Rules of Evidence." *21 U.S.C. § 853(e)(3) (1988)*. See *United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991)* , discussed in the annotations to this Rule.

Rule 101 is essentially a reference point to the more precise delineation of applicability of the Rules set forth in *Rule 1101*. For a more detailed exploration on the Rules' applicability, see the Editorial Explanatory Comment to Rule 1101, *§ 1101.02*. As will be discussed in that Comment, the Rules have been found inapplicable to certain proceedings even though *Rule 1101* does not specifically provide for an exclusion.

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CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual § 101.03

§ 101.03 Annotated Cases

Daigle v. Maine Med. Center, Inc., 14 F.3d 684 (1st Cir. 1994) : The Trial Court in a diversity medical malpractice action ordered that the plaintiff present her case to a prelitigation screening panel as required by state law, and when the panel unanimously found no acts of negligence, followed the state law by admitting the findings into evidence without providing an opportunity for impeachment. Affirming a judgment for the defendant, the Court held that the federal evidence rules governing hearsay and impeachment do not seek to displace the state's substantive policy implemented by the screening panel procedure.

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (en banc): In holding that continuation of an *ex parte* restraint of assets subject to forfeiture in the event of conviction requires a post-restraint, pretrial adversary hearing as to probable cause that the defendant committed the crimes providing a basis for forfeiture, the Court held that the Federal Rules of Evidence do not apply in the hearing.

United States v. Chase, 18 F.3d 1166 (4th Cir. 1994) : The Court reversed a murder conviction, concluding that the rule that a defendant cannot be convicted of murder if the victim's death occurred more than a year and a day after the defendant's attack was a substantive rule unchanged by adoption of the Evidence Rules.

In re Oil Spill by Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) : In a nonjury damages trial arising from an oil spill in the English Channel, the Trial Court admitted considerable evidence it characterized as hearsay, thinking that it would be too cumbersome to apply the rule. The Court noted that the hearsay rule applies in all trials -- jury and bench, big and small -- but after considering available exceptions, found no reason to upset the damages award on evidentiary grounds.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual § 101.04

§ 101.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

[2] October 1987 Amendment

The entire Advisory Committee Note accompanying the amendment that became effective October 1, 1987, is as follows: "United States bankruptcy judges are added to conform this rule with Rule 1101(b) and *Bankruptcy Rule 9017*."

[3] November 1988 Amendment

[Following the 1987 amendment to Rule 101, the Supreme Court sent to Congress a technical amendment correcting capitalization, effective November 1, 1988.]

[4] December 1993 Amendment

On December 1, 1993, Rule 101 was amended to refer to "magistrate judges" rather than "magistrates." The Committee note to the revision states: "This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990."

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PART TWO: THE RULES THEMSELVES
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Supp. To CHAPTER 101 RULE 101

1-101 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 101, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE I. GENERAL PROVISIONS	**ARTICLE I. GENERAL PROVISIONS**
[1] **Rule 101. Scope**	**Rule 101. Scope; Definitions**
These	**(a) Scope.**

rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in

These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

rule
110
1.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "re-

cord " includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

[1] Rules in effect on December 1, 2010 (including amendments to

Rule 804(b)(3) scheduled to take effect on that date).

Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at page x (Feb. 2005) (available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.,* Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase" -- one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

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PART TWO: THE RULES THEMSELVES
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CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual 102.syn

§ 102.syn Synopsis to Chapter 102: RULE 102

§ 102.01 Official Text

§ 102.02 Editorial Explanatory Comment

[1] Goals of the Rules; When Admissibility Is In Doubt

[2] Relationship to Specific Rules

[3] Plain Meaning

[4] Judge or Jury Cases, Civil or Criminal Cases

§ 102.03 Annotated Cases

§ 102.04 Legislative History

[1] Advisory Committee's Note

[2] Citations to Hearings and Debates

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PART TWO: THE RULES THEMSELVES
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CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual § 102.01

§ 102.01 Official Text

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual § 102.02

§ 102.02 Editorial Explanatory Comment

[1] Goals of the Rules; When Admissibility Is In Doubt

Rule 102 sets forth the goals of the Rules, which are to provide speedy, inexpensive, and fair trials designed to reach the truth.

When *Rule 102* states that the Federal Rules shall be construed so that the truth may be ascertained and proceedings justly determined, does this signify that the Judge who is doubtful of whether to admit or exclude evidence should always err on the side of admission in order to aid the search for truth?

The answer must be NO for several reasons. First, Article Four of the Federal Rules makes it clear that certain evidence must be excluded even though it is relevant, because it is too prejudicial or possibly too confusing. In such instances, the search for truth would not be aided by admitting the evidence. When Trial Judges have doubts about the admissibility of evidence, they must always remember to balance the possible prejudicial effect of the evidence against its probative value. Only then can they be sure to assist the search for truth. Second, the Rules also recognize that there are other policies served by rules of evidence aside from reaching accurate decisions as to what happened in a particular case. In dealing with offers to compromise, evidence of insurance, subsequent remedial measures, and privileges, for example, the Trial Judge must consider factors other than accurate reconstruction of historical facts. Finally, *Rule 102* itself notes that the Rules must be construed to eliminate unjustifiable expense and delay. In short, there are other factors to be weighed against the probative value of evidence.

Professor (now Judge) Posner has suggested that the basic goals of a judicial system are ascertaining the truth (i.e., determining historical facts accurately) while keeping the costs of litigation as low as is reasonably feasible. See generally *An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973)*. Other goals may also be operative, including: protecting the sanctity of the individual (e.g., the *Fifth Amendment*); providing disincentives for governmental abuses (e.g., *Fourth Amendment* exclusionary rule); promoting safety (*Federal Rule of Evidence 407*); and encouraging other socially useful activity, such as payment of medical expenses (*Federal Rule 409*) or settlement of claims (*Federal Rule 408*). It should also be noted that the principle of ascertaining truth necessarily mandates certain rules of exclusion as well as rules of inclusion. Thus, a system concerned with the search for truth must protect against the possibility of biased and unbalanced decisionmaking (*Federal Rule 403*); and it must ensure

that the evidence considered by the factfinder meets at least some minimal standard of reliability (*Federal Rules 702-703* and *801-805*). Judges are often called upon to balance the impact of a decision on "the search for truth," the burdens on the competing litigants, and the promotion of highly regarded social values. Ensuring that "proceedings [are] justly determined" as this Rule states is by no means a simple task.

Rule 102 is sometimes cited by a court when a literal interpretation of an Evidence Rule would lead to a nonsensical or unjust result. For example, in *Costantino v. Herzog, 203 F.3d 164 (2d Cir. 2000)*, a party sought to admit a video of an operation as a learned treatise. The opponent objected, arguing that under the literal terms of *Rule 803(18)* (the learned treatise exception), only published, hardcopy materials would qualify. The Court found that this argument ignored the fact that "we are exhorted under *Rule 102* to interpret the Rules of Evidence to promote the 'growth and development of the law ... to the end that the truth may be ascertained.' " The Court saw "no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed format." It concluded that "[i]n this age of visual communication, a videotape may often be the most helpful way to illuminate the truth in the spirit of Rule 102."

[2] Relationship to Specific Rules

Rule 102 gives the Trial Judge authority to fashion evidentiary procedures to deal with situations not specifically covered by the Rules. n1 In a few instances, however, Federal Courts, both Trial and Appellate, have used *Rule 102* to disregard more specific Rules. n2 *Rule 102* is not, however, an invitation to Judges to treat other specific Rules as if they were nonexistent. As Rule 102 is used, it is important for Courts to differentiate when Congress has spoken and finally determined an issue and when Congress has left room for judicial interpretation. n3 Drawing lines between permissible and impermissible constructions of Rules requires an understanding of congressional intent and a fair reading of statutory language. Our general view is that *Rule 102* is not a basis in any case for disregarding a more specific Rule that makes basic sense as applied. Otherwise, the entire notion of a uniform set of federal evidence rules is threatened. n4

[3] Plain Meaning

Rule 102 establishes a principle of flexibility in the application of the Federal Rules of Evidence. But the Supreme Court has in some cases stated that judicial flexibility has no place when the "plain meaning" of a Federal Rule of Evidence mandates a certain result. *United States v. Salerno, 505 U.S. 317 (1992)*, presents the clearest example of the Court's plain meaning approach. However, other cases, such as *Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993)*, and *United States v. Mezzanatto, 513 U.S. 196 (1995)*, indicate that the Court is sometimes willing to employ a more flexible approach than a rigid adherence to plain meaning would seem to allow.

In *Salerno*, the prosecution immunized grand jury witnesses, who then unexpectedly gave testimony to the effect that the defendants were not guilty. The Court held that this grand jury testimony could not be admitted against the government at trial under *Rule 804(b)(1)*, the prior testimony exception to the hearsay rule, unless it could be shown that the government had a "similar motive" to develop the testimony at the grand jury as it would have had at trial. The Court of Appeals had found it unnecessary for the defendants to establish a similar motive; it had reasoned that it would be *unfair* to allow the government to immunize witnesses in the hope of obtaining damaging testimony, and then to hide behind the hearsay rule if the testimony actually exculpated the defendant. But the Lower Court's concern, that the government could develop evidence in a one-sided manner, was found irrelevant by the Supreme Court in the face of a clear requirement in the Rule that a similar motive must be established. The Court contended that it had no authority to override the plain meaning of the rule by applying notions of adversarial fairness. Justice Thomas, writing for the Court, noted that the hearsay exceptions contained in the Federal Rules are both numerous and detailed. From this, he concluded that Congress "presumably made a careful judgment as to what hearsay may come into evidence and what may not," and that to respect Congress' determination, "we must enforce the words that it enacted." In essence, the Court held that it did not matter if the government had acted unfairly and had developed the evidence in a one-sided manner: The plain meaning of the Rule prohibited the Court from considering this unfairness.

Salerno can be read as embracing the unremarkable concept that when the words of a statute impose a clear requirement, the words control. However, the Federal Rules of Evidence are in many instances intentionally ambiguous. Generally speaking, the Rules are intended to provide a guide for a Trial Court in exercising its discretion -- thus, the Rules often read more like a draft of general principles than a specific code. n5

Therefore, a rigid adherence to plain meaning -- even assuming, arguendo, that this is a good idea -- can take the Court only so far. Moreover, *Salerno* was an easy case because it dealt with a specific statutory requirement that was affirmatively placed in the Rule; such an explicit requirement (proving a similar motive) can hardly be ignored. The plain meaning approach does not reach such easy results in the converse situation -- where a party is arguing for an evidentiary principle that is not specifically in the Rule.

This converse situation arose in *Daubert*. The *Daubert* Court held that the common-law test for assessing the admissibility of scientific expert testimony -- the "general acceptance" or *Frye* test -- was inapplicable in federal trials. The Court did pay lip service to the plain meaning rule of construction, by stating that there was nothing in the language of Rule 702 that would support a standard as rigorous as that of "general acceptance." Yet it also relied more broadly on the *tenor* of the Federal Rules, which are designed to promote admissibility and which generally defer to the discretion of Trial Judges. That type of analysis is broader than a single-minded focus on the language of a particular rule; thus, the Court did not simply say, "it's not specifically in the Rule, so that is that." As Professor Taslitz has stated about *Daubert*:

> *Daubert* reveals a sensitivity to the need for judicial value choices and an awareness of the role of judicial discretion within the broad limits set by text and by whatever other indicators of congressional intent are available. This sensitivity is consistent with the Court's continued adherence to a more flexible, pragmatic approach to reading the Rules than is embodied in portions of other decisions. n6

The approach indicated in *Daubert* -- a more flexible construction is justified, and indeed encouraged, when the Rule does not affirmatively impose an absolute requirement or an absolute exclusion -- was followed in *Mezzanatto*. The question in that case was whether a defendant could permissibly waive the protections of *Federal Rule 410*, which forbids the introduction of statements made by the defendant in unsuccessful plea bargaining. The defendant, invoking a plain meaning approach, argued waiver was not permitted because the Rule did not specifically provide that its protections could be waived. But the Court rejected this analysis, reasoning that the Rule had to be read against the background presumption that all rights are waivable. If the Rule had specifically stated that the rights provided could *not* be waived, it would have been a different matter; but the Rule's *absence* of language did not preclude a construction consistent with the broader context of the Rules. Professor Jonakait provides helpful commentary on the result in *Mezzanatto*:

> *Mezzanatto* teaches an important lesson for interpretations of the Federal Rules of Evidence. While the text gave a clear rule, none of the Justices looked to that plain meaning. Whatever the merits of the plain-meaning doctrine, *Mezzanatto* was correct to conclude that, even if the language does not authorize them, waivers can still be valid. Waivers and stipulations are routine and valuable in litigation. Their blanket prohibition would change trials tremendously, and it is almost inconceivable that the drafters of the evidence code would have meant to ban waivers completely without at least some discussion of such a major change. Only a reflexive acolyte of plain meaning could conclude that because the text does not mention them, waivers cannot be enforced under the Federal Rules of Evidence.
>
> ... *Mezzanatto* convincingly demonstrates, if it had not been clear before, that the Federal Rules of Evidence cannot simply be treated as a self-contained code in which the text alone embraces the answer to all evidence questions. Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or are ambiguous ... but

> sometimes even when the text is clear. ... n7

The Court continued its flexible application of the plain-meaning approach in *Ohler v. United States, 529 U.S. 753 (2000)* . The Judge decided in a pretrial hearing that Ohler's prior conviction would be admissible to impeach her if she testified. When Ohler took the stand, defense counsel decided to bring up the conviction on direct examination. The Supreme Court found that Ohler had waived her right to appeal the pretrial ruling by bringing out the conviction herself. The Court relied on the general principle that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." Ohler argued that this general principle had been altered by *Rules 103* and 609(a)(1). But the Court rejected this argument. It stated that

> neither of these Rules addresses the question at issue here. *Rule 103* sets forth the unremarkable propositions that a party must make a timely objection to a ruling admitting evidence and that a party cannot challenge an evidentiary ruling unless it affects a substantial right. The Rule does not purport to determine when a party waives a prior objection, and it is silent with respect to the effect of introducing evidence on direct examination, and later assigning its admission as error on appeal. *Rule 609(a)* is equally unavailing for Ohler; it merely identifies the situations in which a witness' prior conviction may be admitted for impeachment purposes. The Rule originally provided that admissible prior conviction evidence could be elicited from the defendant or established by public record during cross-examination, but it was amended in 1990 to clarify that the evidence could also be introduced on direct examination. According to Ohler, it follows from this amendment that a party does not waive her objection to the in limine ruling by introducing the evidence herself. However, like Rule 103, Rule 609(a) simply does not address this issue. There is no question that the Rule authorizes the eliciting of a prior conviction on direct examination, but it does no more than that.

Thus, as in *Mezzanatto*, the Court in *Ohler* held that the *absence* of statutory language did not preclude a construction consistent with the broader context of the rules and with trial practice generally.

One of the most helpful critiques on the plain-meaning approach, as applied to the Federal Rules of Evidence, is provided by Judge Becker and Professor Orenstein, in *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, *60 Geo. Wash. L. Rev. 857, 867*-68 (1992):

> Significant scholarly attention has been devoted to theories of statutory interpretation, particularly in light of the Court's recent trend toward plain meaning. In particular, there is a growing recognition that generalized, global theories of statutory interpretation are less helpful than approaches tailored to individual statutes. The Federal Rules present a fascinating, if peculiar, case study for plain meaning.
>
> The Rules govern an area of judicial activity where judges have firm opinions, strong interest, and perhaps some unique wisdom. The Rules are generally clear and well-written. Thus, a plain meaning approach does not trigger noticeable angst about our ability to understand and agree upon meaning. Many of the Rules, however, although "clear" and "plain," are purposely flexible. For example, whether information will "assist" [see *Rule 702*] or "confuse" [see *Rule 403*] the trier of fact is a quintessential judicial judgment call. Where Congress purposely left a point open or vague, attempts to justify various interpretations by resort to plain meaning are disingenuous.
>
> ...
>
> Many of the so-called plain meaning debates pose questions of how to resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions. Under the new theory of plain meaning, the language of the Federal Rules controls, even in light of a strong and persuasive common law tradition to the contrary.

> Obviously, where the Rules consciously and clearly depart from preexisting common law, that departure supplants the pre-Rules approach. Plain meaning is troubling, however, when there is no indication that Congress intended to deviate from the prior common law consensus. ...

Becker and Orenstein focus on an important problem, that the plain meaning approach -- even as limited to enforcing only specific, affirmative statutory requirements -- threatens to repudiate the shared understanding of the Courts, derived from the common law, as to how a traditional rule of evidence should be applied. Another problem with the plain meaning approach is discussed by Professor Jonakait in *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 Tex. L. Rev. 745 (1990)*. Professor Jonakait addresses several situations in which a plain meaning approach will reach a result that is simply wrong on the merits, either because it is unfair or not fully thought out by Congress. He notes that the Lower Courts have often rebelled against the plain meaning approach in these instances. See the article by Professor Capra, *Case Law Divergence from the Federal Rules of Evidence*, set forth in Part Four of this Manual, for a complete discussion of Lower Court departures from the text of the Federal Rules.

It should be noted that the plain meaning approach has its limits even as applied by the Supreme Court. The Court has recognized that if a Rule on its face would lead to an "absurd" result, then it cannot be read literally. In *Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989)* , the Court encountered an anomaly in former Federal Rule 609, and concluded that Congress could not possibly have meant what it said. Former Rule 609 provided that a prior felony conviction, not based on dishonesty or false statement, was admissible to impeach a witness so long as the probative value outweighed its prejudicial effect "to the defendant." How should this Rule apply in civil cases? Read literally, it would mean that prior felony convictions would be automatically admissible against the civil plaintiff and his witnesses, yet they would not be admissible against the civil defendant and his witnesses unless the probative value outweighed the prejudice to the defendant. Thus, the plain meaning of the Rule granted a benefit -- possible exclusion of convictions offered for impeachment -- to the civil defendant that it did not grant to the civil plaintiff.

The Court in *Green* refused to be constrained by the plain meaning of Rule 609, concluding that "no matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant." Yet the *Green* exception to the plain meaning doctrine is not itself so "plain." Reasonable minds can certainly differ as to whether a result is sufficiently "absurd" to trigger the exception to the plain meaning rule. And if the objection to former Rule 609 is that it merely led to an "unfair" result in civil cases, then it is difficult to justify the Court's adherence to plain meaning in *Salerno*, where the Court found itself unable to override an unfair result in criminal cases.

In light of the foregoing cases, two principles can be derived with which to construe the Federal Rules of Evidence:

1. If a Rule contains specific language imposing an admissibility requirement or excluding certain evidence, that requirement must be satisfied for evidence to be admissible under that Rule -- unless the requirement is so irrational as to be an obvious mistake.

2. If a Rule says nothing about a particular requirement, its absence from the Rule is not dispositive. One must resort to the policy behind the Rules (embodied in Rule 102), the entire body of text of the Rules, the common understandings of trial practice, and relevant legislative history to determine whether the requirement should be imposed. n8 In other words, the plain-meaning doctrine does not foreclose an argument that a Rule should be read to mean more than it actually says, so long as that reading is not directly in conflict with the specific provisions of the Rule.

[4] Judge or Jury Cases, Civil or Criminal Cases

The Federal Rules provide Trial Judges with a good deal of flexibility in handling most admissibility issues. This is because the Rules mandate an ad hoc balancing approach for many evidentiary questions -- most importantly under *Rule 403* of the Federal Rules. For these more flexible applications, *Rule 102* can be cited as authority for a

differentiated approach to admissibility questions, depending on whether the case is tried to a jury or to a Judge, and depending on whether the case is civil or criminal. It is true that the Rules are equally applicable to civil and criminal cases, and equally applicable to jury and bench trials. Yet a civil case tried to a Judge should not necessarily require the same evidentiary formalities as a criminal case tried to a jury.

For example, under *Rule 403*, a Trial Judge is authorized to exclude evidence where it is unduly prejudicial or confusing. But surely these considerations are mainly applicable to jury trials. We must presume -- and the Trial Judge will certainly presume -- that she will not be unduly confused or prejudiced by the proffered evidence. In this situation, *Rule 102* can be used as authority for a flexible approach depending on the case, since the language of *Rule 403* is not so plain as to mandate a single result.

It must be remembered that, without regard to Rule 102, certain Rules explicitly require different treatment for civil and criminal trials. For example, *Rule 609* applies a heightened exclusionary test for convictions of testifying defendants in criminal prosecutions -- a test not applicable to other witnesses; and *Rule 803(8)(C)* prohibits the use of certain public reports against a criminal defendant, but there is no similar prohibition as to other litigants. Finally, the criminal defendant has constitutional rights to confrontation and compulsory process; these rights obviously supersede any interest in flexibility set forth in Rule 102.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977)* (evidentiary procedure fashioned to deal with inconsistent statements); *Benna v. Reeder Flying Serv., 578 F.2d 269 (9th Cir. 1978)* (permitting defendant to offer surrebuttal evidence); *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994)* (discussing the use of *in limine* hearings).

(n2)Footnote 2. See, e.g., *McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976)* (citing Rule 102, the Court held it proper for the Trial Judge to prohibit cross-examination as to a witness' prior conviction, where the Judge found that the witness had been rehabilitated, even though the witness had not received a formal pardon, annulment, or certificate of rehabilitation as required by Rule 609(c)). See generally Capra, *Case Law Divergence From the Federal Rules of Evidence, 197 F.R.D. 531 (2001)* (setting forth instances in which courts reach results inconsistent with the text of certain rules, in order to reach a just result). Professor Capra's article on case law divergence is reprinted in its entirety in Part Four of this Manual.

(n3)Footnote 3. See, e.g., *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* (admission of business records without proper foundation was reversible error, even though the documents were trustworthy; despite the general purposes of the Rules as stated in Rule 102, the express admissibility requirements in the Rules must be met; Rule 803(6) sets forth specific admissibility requirements for business records, and while the Rules "are to be liberally construed in favor of admissibility, this does not mean that we may ignore requirements of specific provisions merely because we view the proffered evidence as trustworthy.").

(n4)Footnote 4. See Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence, 71 Ind. L.J. 551, 591 (1996)* ("If the Rules are to be meaningful rules, their interpretation must be text centered. This requires refraining from treating each provision, phrase or requirement as a separate text, isolated from the rest of the text. It demands acknowledgment of the Rules as one text. Courts, when confronted with alternative interpretations of a Rule, must examine the alternatives' interrelationships with other portions of the evidence code and then select the meaning that best harmonizes with the entire text.").

(n5)Footnote 5. See Mengler, *The Theory of Discretion in the Federal Rules of Evidence, 74 Iowa L. Rev. 413*, 457 (1989) (The Federal Rules of Evidence are intended to provide some guidance to Trial Courts and litigants, but cannot be consulted for the definitive answers to many questions.).

(n6)Footnote 6. Taslitz, *Daubert's Guide to the Federal Rules of Evidence -- A Not-So-Plain Meaning*

Jurisprudence, *32 Harv. J. Legis. 3*, 67 (1995).

(n7)Footnote 7. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, *71 Ind. L.J. 551, 571 (1996)*.

(n8)Footnote 8. See Scallen & Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelreid*, 75 Ore. L. Rev. 429, 440 (1996) ("While careful consideration of rules passed by Congress suggests that the text deserves the greatest relative weight when it is clear, where there is any ambiguity, other indicators of intent, such as legislative history, must be examined precisely to show appropriate deference to legislative authority. ...").

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual § 102.03

§ 102.03 Annotated Cases

No significant decisions.

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual § 102.04

§ 102.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, *Rule 1 of the Federal Rules of Civil Procedure*, *California Evidence Code § 2*, and New Jersey Evidence Rule 5.

[2] Citations to Hearings and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, March 22, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 3-4 (1973).

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Supp. To CHAPTER 102 RULE 102

1-102 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 102, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 102. Purpose and Construction	**Rule 102. Purpose**
These rules shall be construed to secure fairness in	These rules should be construed so as to administer ever

ad- min- is- tra- tion, elim ina- tion of un- jus- tifi- able ex- pens e and dela y, and pro- mo- tion of gro wth and de- vel- op- men t of the law of evid ence to the end that the truth may be as- cer- taine d and y pro- ceed ing fairl y, elim inate un- jus- tifi- able ex- pens e and dela y, and pro- mot e the de- vel- op- men t of evid ence law, to the end of as- cer- tain- ing the truth and se- cur- ing a just de- ter- min- atio n.

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Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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§ 103.syn Synopsis to Chapter 103: RULE 103

§ 103.01 Official Text

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[1] Objections and Offers of Proof; General Requirement

[2] Harmless Error, Prejudicial Error, Plain Error

[3] Difference Between Harmless Error and Plain Error

[4] Waiver Distinguished From Forfeiture

[5] Deferential Standards of Review

[6] Affirmance on a Different Theory

[7] Offers of Proof

[8] Timeliness of Objections

[9] Importance of Specificity

[10] Continuing Objections

[11] Objections in Multiparty Cases

[12] In Limine Rulings

[13] Taking the Stand to Preserve an In Limine Objection

[14] Forfeiting a Claim of Error By Proffering the Evidence at Trial

[15] Renewing an In Limine Objection or Proffer at Trial

§ 103.03 Annotated Cases

[1] Rule 103(a) -- Effect of Erroneous Ruling

[a] Rule 103(a) -- Affirmance on a Different Theory

[b] Rule 103(a) -- Automatic Reversal

[c] Rule 103(a) -- Explanation for Proffer of Excluded Evidence

[d] Rule 103(a) -- Harmless and Harmful Error

[i] Rule 103(a) -- Civil Cases

[ii] Rule 103(a) -- Harmless and Harmful Error -- Criminal Cases

[e] Rule 103(a) -- In Limine Rulings

[i] Rule 103(a) -- Appealability -- Requirement that Witness Testify and Other Conditions Precedent

[ii] Rule 103(a) -- In Limine Rulings -- Procedures

[iii] Rule 103(a) -- In Limine Rulings -- Requirement of Record

[iv] Rule 103(a) -- In Limine Rulings -- Summary Judgment

[f] Rule 103(a) -- In Limine Rulings Admitting Evidence -- Appealability

[i] Rule 103(a) -- Evidence Introduced by Opponent

[ii] Rule 103(a) -- In Limine Rulings Admitting Evidence -- Appealability -- Generally

[iii] Rule 103(a) -- In Limine Rulings Admitting Evidence -- Appealability -- Renewing Objections

[A] Rule 103(a) -- Civil Cases

[B] Rule 103(a) -- In Limine Rulings Admitting Evidence -- Appealability -- Renewing Objections -- Criminal Cases

[iv] Rule 103(a) -- In Limine Rulings Admitting Evidence -- Appealability -- Tentative or Reserved Rulings

[g] Rule 103(a) -- In Limine Rulings Excluding Evidence -- Appealability

[i] Rule 103(a) -- Civil Cases

[ii] Rule 103(a) -- In Limine Rulings Excluding Evidence -- Appealability -- Criminal Cases

[h] Rule 103(a) -- Objections

[i] Rule 103(a) -- Acquiescence in Ruling

[ii] Rule 103(a) -- Objections -- Adequate in Context

[iii] Rule 103(a) -- Objections -- Continuing Objections

[iv] Rule 103(a) -- Objections -- Evidentiary Objections Insufficient To Preserve Constitutional Claims

[v] Rule 103(a) -- Objections -- Failure to Object

[vi] Rule 103(a) -- Objections -- General Relevancy Objections

[vii] Rule 103(a) -- Objections -- Incorrect Specific Objections

[viii] Rule 103(a) -- Objections -- Insufficiently Specific Objections

[ix] Rule 103(a) -- Objections -- Multiple Parties

[x] Rule 103(a) -- Objections -- Sufficiently Specific Objections

[xi] Rule 103(a) -- Objections -- Timing of Objection

[i] Rule 103(a) -- Offers of Proof

[i] Rule 103(a) -- Basic Requirement

[A] Rule 103(a) -- Civil Cases

[B] Rule 103(a) -- Offers of Proof -- Basic Requirement -- Criminal Cases

[ii] Rule 103(a) -- Offers of Proof -- Cross-Examination

[iii] Rule 103(a) -- Offers of Proof -- Expert Testimony

[iv] Rule 103(a) -- Offers of Proof -- Requirement Excused

[v] Rule 103(a) -- Offers of Proof -- Response by Objecting Party

[vi] Rule 103(a) -- Offers of Proof -- Specific Hearsay Exception

[j] Rule 103(a) -- Summary Judgment

[2] Rule 103(c) -- Hearing of Jury

[3] Rule 103(d) -- Plain Error

[a] Rule 103(d) -- Definition of Plain Error

[b] Rule 103(d) -- Effect of Failure To Object When Rule Requires Application of a Balancing Test

[c] Rule 103(d) -- Examples of Plain Error

[d] Rule 103(d) -- Relationship to Harmless Error

Rule 103(d)-- Stipulation

[f] Rule 103(d) -- Waiver

§ 103.04 Legislative History

[1] Advisory Committee's Note

[2] 2000 Amendment Committee Note

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House and Senate Conferences

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PART TWO: THE RULES THEMSELVES
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CHAPTER 103 RULE 103

1-103 Federal Rules of Evidence Manual § 103.01

§ 103.01 Official Text

Rule 103 Rulings on Evidence

(a) *Effect of erroneous ruling*. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. -- In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. -- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling*. -- The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury*. -- In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or

asking questions in the hearing of the jury.

(d) *Plain error*. -- Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

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1-103 Federal Rules of Evidence Manual § 103.02

§ 103.02 Editorial Explanatory Comment

[1] Objections and Offers of Proof; General Requirement

This Rule is a codification of the basic rules of offering evidence and objecting to admission of evidence. In order to preserve an objection for appeal, ordinarily a party must make a specific, as opposed to a general, objection. n1 If, however, a specific ground is apparent, no absolute requirement of specification will be imposed. n2 Once an objection is made, if the Trial Judge excludes evidence, the party offering the evidence must make an offer of proof. n3 However, Courts have excused a failure to make an offer of proof where the offer would have been extremely difficult or futile under the circumstances. n4 The Rule sensibly states that Trial Judges should attempt to conduct proceedings for the determination of the admissibility of evidence outside of the presence of the jury. n5

The requirement of a timely and specific objection is not a mere formality. A timely and specific objection is required so that the Court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal. Specific and timely objections are also required, in fairness, to allow the opponent an opportunity for argument on the question and to correct any possible deficiencies in the evidence. Finally, Courts are concerned that, without a requirement of timely and specific objection, a party could remain silent at trial in the hope of a favorable trial outcome, with the insurance policy of an appeal should that hope not become reality. n6

[2] Harmless Error, Prejudicial Error, Plain Error

The text of the Rule specifically mentions only plain error. In application, however, the Rule concerns three types of Trial Court error, each of which has been well-recognized by the Courts both before and after the passage of the Federal Rules. The three types of error are: (1) harmless error, which is error objected to at trial, but found on appeal not to affect substantial rights; n7(2) prejudicial error, also called reversible error, which is that raised at trial and found on appeal to affect substantial rights; and (3) plain error, which is error not raised at trial, but nevertheless so egregious that it is considered and rectified on appeal. n8 Thus, the distinction between harmless and prejudicial error is dependent on whether substantial rights have been adversely affected by a mistake. The distinction between prejudicial error and plain error is dependent on whether the error is so grave as to excuse the party's failure to preserve it at trial.

The Circuit Courts have adopted conflicting standards of harmless error. Some Circuits have differentiated between

civil and criminal cases, and have held that the standard for harmless error in a civil case is whether substantial rights were "more probably than not" untainted by the error. n9 Some Circuits have applied this same more-probable-than-not standard to criminal cases as well. n10 Other Circuits have held that errors are not harmless unless it is "highly probable" that they did not affect a party's substantial rights. This standard results in more reversals, but is hardly a wholesale ticket to reversal. Some Circuits hold that this "highly probable" standard is limited to criminal cases (applying the more-probable-than-not standard to civil cases), while some hold that it is equally applicable to civil and criminal cases. n11 Other Circuits have held that in criminal cases, the standard for harmlessness is whether the evidentiary error was harmless beyond a reasonable doubt. n12

If the error is one of constitutional dimension, rather than merely evidentiary, the test of harmlessness on direct review is whether the prosecution can prove that the error was harmless beyond a reasonable doubt. n13 On habeas corpus review, constitutional error is considered by the stricter standard of whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." n14

All these various standards are probably not as important as the judgment that is applied in determining the effect of an error on the verdict. n15 If the Appellate Court is left with a definite and firm conviction that the error was substantial enough to affect the fairness of the proceedings, then it will probably reverse regardless of the standard employed.

Some of the factors that are relevant to the harmless error inquiry include: (1) whether erroneously admitted or excluded evidence was "cumulative" on a point or, conversely, whether it was the most powerful or only evidence in support of the point; n16(2) whether the Trial Court gave timely and effective curative instructions; (3) whether erroneously admitted evidence was relied upon by counsel in argument; (4) whether the error was discrete or pervasive; n17(5) whether evidence, though improperly admitted for one purpose, was properly admitted for another; n18 and (6) whether the error was made in a lengthy or short trial. Of course, if more than one error was made, the Appellate Court must assess the cumulative effect of the errors on the verdict. However, Appellate Courts have understandably taken the view that no trial can be error-free, and the longer the trial, the less likely it is that a few discrete errors will have had an impact on the verdict. For further application of these principles, see the annotated cases under this Rule.

[3] Difference Between Harmless Error and Plain Error

The failure to preserve an objection does not mean that an Appellate Court is absolutely precluded from considering the evidentiary issue. It does mean, however, that the question is reviewed under the more stringent plain error standard of review. n19 The plain error test is more rigorous for the party seeking reversal than is the abuse of discretion standard, which is applied to most evidentiary rulings; and the abuse of discretion standard is itself so Trial Court-friendly as to make most evidentiary rulings reversal-proof.

In *United States v. Olano, 507 U.S. 725 (1993)* , the Supreme Court interpreted the plain error provision of *Fed. R. Crim. P. 52(b)*, which is substantively identical to the plain error provision of *Federal Rule of Evidence 103(d)*; both Rules permit an Appellate Court to take notice of plain errors "affecting substantial rights although they were not brought to the attention of the court." Indeed, *Rule 103(d)* was patterned after *Fed. R. Crim. P. 52(b)*. n20 Consequently, the Court's interpretation of "plain error" in *Olano* is instructive on the application of the plain error standard of *Rule 103*. n21

The *Olano* Court identified three limitations on a Court's power to reverse because of errors that were not properly preserved for review in the Trial Court. First, there must be an error. Second, the error must be plain, which means it must be clear or obvious. Thus, even more deference is given to the Trial Court than under the deferential abuse of discretion standard of review. Moreover, if the Courts are split on an evidentiary point, any asserted error on that point is by definition not "plain" enough to permit reversal. n22 Finally, the plain error must affect substantial rights, which means in most cases that it must have been prejudicial in the sense of affecting the outcome of the case.

Most importantly, the *Olano* Court stated that the language of the plain error rule (unlike that of the harmless error rule) is permissive, not mandatory. The Court recognized that "the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." However, a "plain error affecting substantial rights does not, without more" mandate reversal; otherwise the discretion not to reverse that is afforded by Criminal Rule 52 (and by *Rule 103*) "would be rendered illusory." The Court also made it clear that the burden of showing plain error and its effect on the verdict is on the appellant. n23 It follows that reversal for plain error is extremely rare and within the broad discretion of the Appellate Court. For example, the Court in *Olano* found no plain error even though alternate jurors were permitted to sit in on jury deliberations, in clear violation of *Fed. R. Crim. P. 24(c)*. For applications of the plain error standard, see the annotated cases under this Rule.

[4] Waiver Distinguished From Forfeiture

If a party fails to object in a timely and specific manner to evidence offered at trial, review for plain error is the party's best hope. But sometimes the failure to object is not the result of inadvertence or neglect. Sometimes counsel decides not to object for strategic reasons -- either because the matter is better left alone, or because the evidence introduced is thought at the time to be beneficial to the party's position. When that strategy does not work out, may the party seek plain error review on appeal?

The answer is no. There is a difference between a forfeiture of an objection (permitting plain error review) and a strategic waiver of an objection. "Forfeiture" denotes conduct (or lack of it) by which the party failed to preserve a claim of error. In contrast, a waiver denotes an intentional relinquishment of the right to appeal. A strategic waiver disentitles the party from seeking any kind of review of a claim of evidentiary error. Judge Calabrese's opinion in *United States v. Yu-Leung, 51 F.3d 1116 (2d Cir. 1995)* , is instructive on this point. The defendant was indicted with others in a drug conspiracy. His coconspirators suspected that he was stealing money from them, and kicked him out of the conspiracy. After he was ejected, the coconspirators continued to engage in drug activities, murder, etc. The defendant was the only member of the conspiracy to be tried -- the others all became cooperating witnesses for the government. At trial, these former coconspirators testified, among other things, to their own participation in acts of drug activity and murder, which acts occurred well after the defendant had been ejected from the conspiracy. Defense counsel did not object to any of this testimony. On appeal, the defendant argued that this evidence was erroneously admitted, and should be reviewed for plain error.

Judge Calabrese noted that the *Olano* Court had "carefully distinguished the concept of waiver from that of forfeiture" and noted that "forfeiture does not preclude appellate consideration of a claim in the presence of plain error, whereas waiver necessarily extinguishes the claim altogether." In this case, it was clear that the defendant had made a strategic decision to waive any objection to the evidence of drug and related activity in which the former coconspirators took part. This brought any plain error analysis "to a grinding halt." The defendant's defense was that he was an innocent victim of false accusations made by "unsavory drug runners who desperately wanted to curry favor with the government." Thus, it was reasonable to conclude that counsel did not object to evidence of the witnesses' criminal activity because he thought that the evidence would help the defense. Moreover, there was so much of this evidence introduced that one could not reasonably believe that the failure to object was the result of inadvertence or neglect. As Judge Calabrese remarked: "[G]iven the sheer quantity of unchallenged yet allegedly prejudicial testimony ... that is in the trial record, [the defendant's] lawyer would have had to have suffered from aggravated narcolepsy for us to believe that his failure to object did not reflect a clear and conscious tactical decision."

[5] Deferential Standards of Review

Whatever the standard of error applied on review, it is clear from the cases that even the most lenient standard of review is difficult to meet. Most appellants do not even get the opportunity to test the harmfulness of error because the deferential standard of review employed by the reviewing Court makes it extremely difficult to prove error on an

evidentiary question in the first place. While pure issues of Rule construction are reviewed *de novo*, there are very few such issues that arise in practice. n24 Mixed questions of law and fact are also reviewed *de novo*, and they arise with somewhat more frequency than pure questions of law; for example, the question whether a communication is protected by a privilege is usually a mixed question of law and fact. n25 Still, the vast majority of evidentiary rulings are reviewed under the Trial-Court-friendly abuse of discretion standard, even where the claim of error has been properly preserved. n26 This has prompted one Court to state that appellants who challenge evidentiary rulings of the Trial Court "are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle." n27 Then, once passing through the eye of the needle, the appellant may still be without a remedy; the Appellate Court is more than likely to find that the error was harmless. All in all, the chances of reversal on the ground of an evidentiary error are slim indeed. n28

[6] Affirmance on a Different Theory

Suppose that the prosecution in a murder trial offers a hearsay statement from the victim that implicates the defendant. The statement is offered and admitted as a dying declaration. On appeal, the Court holds that the Trial Court erred in finding that the victim, at the time of the statement, had given up all hope of recovery. The government argues, however, that the conviction should be affirmed anyway, because the victim made the statement while under the influence of a startling event and thus the statement could have been admitted as an excited utterance. The defendant responds that the excited utterance argument should be rejected since it is being made for the first time on appeal. How should the Appellate Court rule?

The general rule is that an Appellate Court may uphold the admission of evidence on any theory that finds support in the record. n29 This is a corollary of the principle of harmless error: If the Trial Court admits evidence on an incorrect ground, this will not generally harm the appellant if the Trial Court could properly have admitted the evidence on an alternative theory.

An exception to the general rule of harmlessness will apply, however, if the objectionable evidence would have been used or treated differently at trial had it been admitted under an alternate theory. The leading case refusing affirmance on a different ground is *Shepard v. United States, 290 U.S. 96 (1933)* . Shepard was on trial for murdering his wife. He called witnesses who testified that Mrs. Shepard had been planning to commit suicide. He was convicted largely upon his wife's statement to her maid that "Dr. Shepard has poisoned me." The statement was offered over objection and admitted at trial as a dying declaration. The prosecutor used the statement as proof of the truth of the wife's claims, and argued the statement to the jury on that basis.

On appeal, the Supreme Court held that the statement was not admissible as a dying declaration, because it was not made under a belief of impending death. The government then argued that the statement could nonetheless have been admitted as circumstantial proof of Mrs. Shepard's state of mind, as being inconsistent with suicide. But Justice Cardozo, writing for the Court, refused to consider this theory of admissibility since it had not been used at trial:

> Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial [i.e. to prove that Dr. Shepard had in fact poisoned his wife]. A trial becomes unfair if testimony thus accepted may be used in an appellate court although admitted for a different purpose, unavowed and unsuspected. n30

How can *Shepard* be squared with the general principle that the Trial Court's ruling, though incorrect, should be affirmed where an alternative theory could have been used to admit the evidence? The answer is that if the evidence had been admitted under the alternate theory, it would have been treated and used differently at trial. Specifically, Shepard would have been entitled to a limiting instruction if the evidence had been used to prove Mrs. Shepard's state of mind. The Court would have had to instruct the jury that Mrs. Shepard's statement could not be used to prove that Dr. Shepard

actually poisoned her, but only to prove that Mrs. Shepard believed it to be so, and thus may have had a state of mind inconsistent with suicide. But as the evidence was actually used at trial, there was no limiting instruction, since the statement was treated as a dying declaration, admitted for the truth of the facts asserted.

It follows that the *Shepard* exception will not apply when the evidentiary ground asserted on appeal serves the same purpose and would lead to the same use and consequences as the theory actually used at trial. The unfairness and prejudice in *Shepard*, where the government advanced on appeal a theory different in evidentiary effect from the one presented to the Trial Court, is not present where different theories serve the same evidentiary purpose. For example, there would be no unfairness where records incorrectly offered as business records could have been admitted as admissions. Both theories of admissibility serve the same purpose and would lead to the same consequences -- proof of the truth of the matters asserted in the records. n31

Nor can the appellant complain if the theory used at trial is less prejudicial than the theory that could have been used. For instance, if the government in a criminal trial offers bad acts as "other crimes" evidence, when in fact the crimes are encompassed by the indictment, the error, if any, is harmless, because "the limiting instruction was more favorable than the defendant deserved." n32

Even where the new theory of admissibility serves the same purpose as the one used at trial -- such as substituting one hearsay exception for another -- the fact remains that each theory of admissibility has its own unique proof requirements. The party who proffers the evidence must show by a preponderance that the applicable admissibility requirements are met. n33 It follows that a new theory of admissibility cannot be upheld on appeal unless the admissibility requirements supporting that theory were proved during the proceedings below. And given the fact that a new theory of admissibility was by definition not pursued at trial, it will only be by happenstance that the necessary proof requirements would have been met. It is uncertain, for example, whether the record will indicate that a hearsay statement could have been admitted as a dying declaration, when in fact it was admitted at trial as an excited utterance.

Even if there is proof in the record that the Trial Judge could have admitted the evidence under a different theory than the one actually used, an Appellate Court should be cautious before concluding that the appellee has proved that the admissibility requirements were met. This is because whatever proof was elicited below was asserted in another context, and the nonoffering party never had a chance to meet the proof head on, in the context in which it is argued on appeal. For reasons similar to those given in *Shepard*, the nonoffering party can be prejudiced by being denied an opportunity to meet the evidence directly on a theory that was not argued at trial. n34

On the other hand, the appellee can make a strong argument for affirmance where the new theory of admissibility argued on appeal has requirements that will almost inevitably (though inadvertently) have been proved below. Thus, if the new theory of admissibility is that a statement could have been admitted as a party admission, the only proof requirements are that the statement was made by the party against whom the statement is offered; this would probably have been shown below as a matter of course. n35 In contrast, an argument that a hearsay statement could have been admitted under the residual exception is usually precluded on appeal because, among other things, admissibility under the residual exception requires advance notice to be given to the nonoffering party; and advance notice is unlikely to have been given if the statement was not offered at trial as residual hearsay. n36

[7] Offers of Proof

The Rule provides that an objection to exclusion of evidence will ordinarily not be preserved unless the party makes an offer of proof. The offer of proof has an important function at both the trial and appellate level. At trial, the offer of proof informs the Judge what the proponent expected to prove by the evidence, thereby enabling the Judge to determine whether the evidence would be admissible for any purpose. On appeal, the offer of proof ensures that the record will provide enough detail with which to determine whether the Trial Court committed reversible error by excluding the evidence. n37

The Rule does not specify what form the offer of proof should take. The fairest reading of the Rule is that counsel has the obligation only of representing to the Judge what the evidence would be if allowed to present it. n38 While the requirement is flexible, it cannot be ignored. n39 Of course, the more specific the description or presentation of the proof, the more helpful it will be to both the Trial and Appellate Court. If the Trial Judge has doubts about counsel's ability to produce, or wishes to know more about the evidence, counsel may be required to offer a witness to give testimony so the record will be complete. Obviously, the more complete the record, the less likely it is that a new trial will be required. A Judge will have to weigh the costs of a full trial record -- i.e., delay, expense, and even possible confusion -- against the potential benefits of alleviating the necessity for retrial.

The Court in *United States v. Adams, 271 F.3d 1236 (10th Cir. 2001)*, provides this incisive analysis of the offer of proof requirement:

> On numerous occasions we have held that merely telling the court the content of proposed testimony is not an offer of proof. In order to qualify as an adequate offer of proof, the proponent must, first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence ... .
>
> There are at least four ways to make an offer of proof of testimony and achieve the purposes underlying the rule. First, and most desirable from all standpoints except cost, the proponent may examine the witness before the court and have the answers reported on the record ... .
>
> The second, and least favorable, method for making an offer of proof of testimony is a statement of counsel as to what the testimony would be ... .
>
> Documentary offers of proof comprise the third and fourth proper forms of proffering anticipated testimony. The first of these, and the least common, is a statement written by examining counsel describing the answers the proposed witness would give if permitted to testify. More common ... the proponent of the evidence may introduce a written statement of the witness's testimony signed by the witness and made part of the record.

In *Adams*, the Court held that the defendant's offer of proof of excluded expert testimony was inadequate. Counsel sent the expert's report directly to the Trial Judge, but it was never made part of the record. And counsel's colloquy with the Judge at the time of the Court's ruling was insufficient because counsel stated "kind of" what the expert's conclusion would be.

The Rule states that an offer of proof is unnecessary where the substance of the evidence "was apparent from the context within which questions were asked." One example of this exception is where testimony is received and subsequently stricken. It is clear in these circumstances that an offer of proof is unnecessary, since the substance of the evidence is apparent. Another possible application of this exception arises with witness testimony, where it is clear from the question what the answer would be. Obviously, though, no such assurance is justified if the witness is hostile to the party who asked the question.

Appellate Courts have been forgiving about the offer of proof requirement where it appears that the Trial Court was itself responsible for the incompleteness of the offer. For example, in *Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)* , the plaintiffs sought inquiry into certain statements made at a meeting. The Trial Court granted a protective order on grounds of attorney-client privilege. The defendants argued that any claim of error was forfeited by the plaintiffs' failure to make an offer of proof as to the substance of the testimony they sought to introduce. The Court noted that the plaintiffs had failed to make a specific showing of the asserted contents of the conversations. But it also noted that the plaintiffs' failure was "attributable primarily to the confusion caused by the District Court's broad rulings excluding in advance any inquiry into evidence that may be covered under the privilege." Thus, the Trial Court had through a broad

protective order deprived the plaintiffs of the ability to put any evidence into the record. Under these circumstances, the Court held that the plaintiffs had done all they could to preserve their claim of error.

[8] Timeliness of Objections

Rule 103 does not provide a standard for when an objection is timely, nor for when a motion to strike is sufficient. Generally, the rule has been that an objection to an improper question is waived if not made before the answer, since counsel is not allowed to gamble that there will be some benefit if it is answered. n40 Federal Courts have shown much flexibility, however, in permitting objections or motions to strike following an improper question that is answered where counsel reacts swiftly, but not quite quickly enough. Of course, where the answer is objectionable but the question is not, a motion to strike is appropriate following the answer. Where demonstrative or documentary evidence is offered, the grounds for objection are ordinarily apparent at that time. Therefore, an objection should be made when the evidence is offered.

It should be noted that sometimes a ground for objection or for a motion to strike is not immediately apparent. In these circumstances, the objection is timely if made as soon as the ground for objection appears.

Rules 30(c) and *32(d) of the Federal Rules of Civil Procedure* provide that objection must be made during a deposition to errors or irregularities in the form of the questions or answers, to the administering or taking of the oath, or to anything that might be corrected. Objections to the competency of a witness or to the materiality or relevance of evidence may be made at trial. *Fed. R. Civ. P. 26(a)(3)* provides that parties have fourteen days from the date of production to disclose any objections they have to deposition testimony or documentary evidence. All objections other than those under Rules 402 and 403 are waived if not made within the time period, unless good cause is shown. *Rule 15(f) of the Federal Rules of Criminal Procedure* is not as specific, but is interpreted to impose requirements similar to the Civil Rules.

[9] Importance of Specificity

A quick reading of *Rule 103* might lead one to conclude that its principal purpose is to announce standards to be used for appellate review of Trial Court actions. It should be apparent, however, that the real thrust of the Rule is directed to action in the Trial Court. Whether or not an appeal is ever taken in a case, trial lawyers should utilize, and Trial Judges should require, specific objections and particularized offers of proof if evidentiary claims are to be adequately resolved during the course of litigation. n41 It is our view that Trial Judges, who bear the burden of justifying their rulings on the basis of reasons articulated for the record, owe it to themselves to compel counsel to state precise grounds for opposing or supporting a point at trial. If the Trial Judge is alerted to the specific intentions of the parties, a ruling is likely to be better than if only general arguments are made.

It is axiomatic that a specific objection made on one ground will not preserve an objection to the same evidence on different grounds. n42 This rule is more than a formality. Courts recognize that a litigant will often choose a specific ground of objection, and reject another ground, for tactical reasons. There is no reason in these circumstances to allow reconsideration of this strategic choice on appeal. Moreover, if an objection is made on one ground, neither the Trial Court nor the opposing party has been properly notified that the evidence may be objectionable on different grounds.

Counsel must take care that an objection to proffered evidence is not so detailed and specific as to miss the forest for the trees. For example, an objection to specific language in a document is not an objection to the document itself. Likewise, an objection to the details of a prior conviction is not an objection to the conviction itself. n43 Generally, an objection as to details should be used only as a fallback argument once the more all-encompassing objection has failed.

[10] Continuing Objections

Often, a particular line of testimony or other evidence will present the same evidentiary objection with respect to each question or each witness. In these circumstances, neither the Court nor counsel may find it productive to reiterate continuous objections at each point down the line, as if the issue had not been raised before. On the other hand, counsel must be concerned that a failure to renew an objection down the line could be deemed a failure to preserve a claim of error.

Nothing in *Rule 103* prevents continuing objections. n44 However, reviewing Courts have sometimes frowned on the practice due to the concern that such a "cookie cutter" way of making objections may not take unto account the nuances of presenting certain types of evidence. For example, in *United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1988)* , the defendant in one of the Oklahoma City bombing trials objected under *Rule 403* to the testimony of a number of witnesses who identified deceased victims of the blast and described the impact of the explosion. The Trial Court granted McVeigh a continuing objection to testimony dealing with the "long-range effects" of the bombing that went beyond the "immediate effects" of the blast. The Court of Appeals analyzed this continuing objection as follows:

> We have serious doubts as to whether McVeigh's continuing objection was a proper form of objection for the victim testimony that followed. In certain circumstances, a continuing objection has been allowed as a specific, timely objection under *Federal Rule of Evidence 103. See United States v. Fortenberry, 919 F.2d 923 (5th Cir. 1990)* ; *United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990)* ; *United States v. Vinson, 606 F.2d 149 (6th Cir. 1979)* . ...
>
> However, continuing objections generally are considered inappropriate for preserving error on appeal under *Rule 403*. In *United States v. Mangiameli, 668 F.2d 1172, 1177 (10th Cir. 1982)* , this court cautioned that "in our view, the considerations bearing upon a decision whether to admit or exclude evidence under Rules 404(b) and 403 are sufficiently complex that ordinarily neither counsel nor the trial court should rely on a standing objection with respect to evidence coming within the purview of these rules. ...

The *McVeigh* Court stated that a continuing objection would be sufficient to preserve a claim of error only if each piece of evidence presented the same exact circumstances, undifferentiated by trial context or witness. It concluded that "[g]iven the sheer number of witnesses involved and the variety of factual contexts presented, the admissibility of victim testimony would not ordinarily be an issue that could be decided ... by means of a continuing objection." Nonetheless, the Court decided that in this case it would be unfair to hold that McVeigh forfeited his claim of error, because that the Trial Court had granted the continuing objection and McVeigh therefore had a right to rely on it.

The *McVeigh* Court noted, however, that "a standing objection should not be given broader scope than is found in its establishing statement." A party cannot rely on a standing objection lodged on one evidentiary ground to argue a different ground for error on appeal. n45 Thus, the Court limited its abuse-of-discretion review to testimony regarding the "long-range effects" of the bombing. On appeal, McVeigh also complained about testimony concerning witness histories, pre-explosion witness activities, and descriptions of the bombing and its immediate aftermath. None of these complaints were within the scope of the continuing objection -- the claims of error on these grounds were therefore reviewed for plain error only.

As *McVeigh* indicates, it will often be prudent to make specific objections as evidence is offered, rather than to rely on a continuing objection. This is particularly true if the admissibility of the evidence is dependent on balancing within the Trial Judge's discretion, as is the case with *Rule 403*. Of course the downside of serial objections is that the practice risks the annoyance of both the Judge and the jury.

[11] Objections in Multiparty Cases

Suppose that two codefendants share a common defense but they are represented by separate counsel. If only one

codefendant objects to proffered evidence, does this preserve the right to appeal for both parties or only one? Looking to the purposes of *Rule 103*, a strong argument can be made that the objection of one party should apply to both, assuming that the ground for objection was specific, and was equally applicable to both parties. Despite the inaction of one of the parties, the purpose of the Rule has been served: both the Trial Court and the offering party have been properly informed of the nature of the objection, and a clear record has been made for appeal. Nor can it usually be said that the inactive party has been negligent or has slept on his or her rights; a party in these circumstances can assume that it would be unnecessary to join in a proper and specific objection that is clearly applicable to both the objecting and the inactive party. There is little to be gained by "piling on" and risking the annoyance of the jury and the Trial Judge.

Consequently, Courts have held that a nonobjecting party may appeal an evidentiary ruling on grounds specified at trial by an objecting party, when the parties are in the same situation with respect to the evidence. n46 The Courts reasonably conclude that a rule requiring all parties to object would significantly complicate and prolong multiple party cases. n47

The prudent course, however, is to join in an objection made by another party. Otherwise, it may later be found that the interests of the parties are not sufficiently aligned for the objection of one to be deemed the objection of the other. n48

[12] *In Limine* Rulings

A party who foresees the use of prejudicial and arguably inadmissible evidence by the adversary may find it useful to make a motion *in limine* to exclude the evidence in advance of trial. Also, a party who is concerned about the admissibility of evidence it intends to proffer may find it advisable to seek an advance ruling. The most frequent use of a motion *in limine* occurs when a criminal defendant with prior convictions might wish to testify at trial. The motion *in limine* is particularly useful in this situation because the defendant otherwise would have to take the stand and gamble that his or her convictions would be excluded.

It is important to note, however, that an *in limine* ruling is not written in stone. The Judge is free to revisit the evidentiary question presented *in limine* when it arises in the context of the trial. n49 A new look at the issue may be necessary especially where the admissibility decision is dependent upon balancing factors within the Judge's discretion, as is the case under *Rule 403*. Ordinarily, such a balancing process is context-dependent and cannot be conducted with certainty until the evidence is proffered at trial. As one Court put it, it is usually "too great a handicap to bind a trial judge to a ruling on a subtle evidentiary question, requiring the most delicate balancing, outside a precise factual context." n50

A Trial Judge has discretion either to rule *in limine* or to await developments at trial before ruling. The decision whether to rule in advance often will turn on the Judge's confidence or uncertainty concerning the relationship of particular evidence to the case as a whole. Rarely will Trial Judges be reversed for declining to rule *in limine*. n51 The one situation in which an *in limine* ruling may be mandated is prior to a second trial when the Trial Judge knows the evidence and the issues raised by the parties as a result of the first trial. n52

[13] Taking the Stand to Preserve an *In Limine* Objection

In *Luce v. United States, 469 U.S. 38 (1984)* , a unanimous Court concluded that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." n53 The Court was concerned that defendants could get a windfall if they could claim error from an *in limine* ruling and yet not have to testify. Defendants could argue on appeal that the Trial Court's erroneous pretrial ruling kept them off the stand when in fact they might never have had an intention of taking the stand. The defendant might be trying to cook up an appealable issue in case the trial goes bad. The *Luce* Court was also concerned that the harmless error determination, and indeed the determination of whether the Court was even in error, would be speculative if the defendant never testified at trial.

While the Court in *Luce* had justifiable concerns and reached a reasonable conclusion, it must be recognized that *Luce*

leaves defendants with prior convictions in a difficult situation -- in order to preserve an objection as to the convictions, they must take the stand and face a much higher probability of a guilty verdict once the jury hears about their past.

The lower Courts have extended the *Luce* principle to other forms of impeachment, such as impeachment with bad acts under *Rule 608* n54 and impeachment of witnesses other than the defendant. n55 Such extensions are clearly within the logic of *Luce*. Other Courts have read *Luce* even more broadly for the proposition that any *in limine* ruling dependent on an event occurring at trial is not appealable unless that event actually occurs. Thus, in *United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988)* , the defendant in a drug case moved *in limine* to exclude prior drug transactions. The Trial Court held that the uncharged misconduct would be admissible if the defendant chose to pursue a "personal use" defense. The defendant decided to pursue a different defense, and argued on appeal that the Trial Court's *in limine* ruling was erroneous. But the Court held that to preserve her claim of error, the defendant was required to pursue the personal use defense at trial. n56 The Court declared that "[t]he proper method to preserve a claim of error in similar circumstances is to take the position that leads to the admission of the adverse evidence, in order to bring a fully developed record into this Court." Thus, if an *in limine* ruling is conditioned on an event occurring at trial, there will be no appealable issue unless that event actually happens.

[14] Forfeiting a Claim of Error By Proffering the Evidence at Trial

If the Trial Court makes a definitive ruling that objectionable evidence is going to be admitted at trial, it would appear that the prudent course is for the objecting party to bring out the evidence first. For example, if the Trial Court rules that a party's witness can be impeached with a prior conviction, it would seem to make sense for the party calling that witness to bring out the conviction on direct examination. This tactic seeks to "remove the sting" of the anticipated impeachment. More importantly, it prevents the jury from drawing the negative inference that the party was trying to hide the unfavorable evidence. But if the party does follow the prudent course by bringing out the objectionable evidence, does this constitute a forfeiture of the right to appeal the Trial Court's ruling? If so, the objecting party is put between a rock and a hard place -- in order to preserve a claim of error for appeal, the party must suffer at trial the unjustified inference that the party was trying to hide negative evidence.

The Supreme Court in *Ohler v. United States, 529 U.S. 753 (2000)* , held that a party who introduced evidence of a prior conviction on direct examination forfeited her right to appeal an *in limine* ruling holding that the evidence would be admissible at trial. The Court, in an opinion by Chief Justice Rehnquist, refused to depart from the general rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." The Court recognized that a defendant who did not bring out an objectionable conviction on direct examination might suffer an adverse inference that he was trying to hide that conviction from the jury. But the Chief Justice thought this risk to be simply part of the reality that the defendant "must make choices as the trial progresses." The Court reasoned that when a defendant brings out an objectionable conviction on direct, this denies the Government "its usual right to decide, after she testifies, whether or not to use her prior conviction against her." In the Court's view, the defendant in *Ohler* sought to "short-circuit that process by offering the conviction herself (and thereby removing the sting) and still preserve its admission as a claim of error on appeal." The Court saw nothing unfair "about putting petitioner to her choice in accordance with the normal rules of trial."

The Court in *Ohler* has a point, that by bringing out the evidence herself, Ohler deprived the government of the power *not* to introduce the conviction. If the prosecution would not have used the conviction on cross-examination, then Ohler herself created the error. It might be wondered why the prosecution might choose not to introduce Ohler's prior conviction on cross-examination. Wouldn't the government *always* introduce it? The answer is no. The prosecution might be worried that the Trial Judge's ruling admitting the conviction was in error. And it might not need the conviction, or at least the prosecution might think it not worth the risk of creating reversible error. So the *Ohler* Court is right in thinking that defendants should not be able to short circuit prosecutorial decisionmaking.

This does not mean, however, that the Court's result in *Ohler* is correct. The fact is that in many cases the prosecution

will want to introduce the objectionable evidence on cross-examination, and in some cases it will not. If defendants bring out the evidence on direct examination when the prosecutor would have done so anyway on cross-examination, then it is exceedingly harsh to hold that the defendants have forfeited their right to appeal. The question then is whether a procedure can be fashioned to accommodate the defendant's interest in preserving a claim of error and in avoiding unjustified negative inferences, and the prosecution's interest in being able to decide whether or not to proffer the objectionable evidence on cross-examination. And indeed a compromise procedure is possible.

We propose this solution in cases like *Ohler*: At the conclusion of the direct examination of the defendant, the Trial Judge should ask the government, Do you still want to offer the prior convictions? If the answer is yes, the defense should be permitted to offer them before passing the witness. Why? Because otherwise the failure of the defense to offer the convictions may be viewed by the jury as concealment of relevant facts, and this inference would be completely unjustified under the circumstances. Such an unjustified inference should be forbidden by basic notions of fairness and by *Rule 403*. If the prosecution answers that it has decided not to use the convictions on cross-examination, then they need not be mentioned at trial, and no appealable issue is created.

It is possible in some cases that the government will express doubt as to whether it wishes to use the convictions and will claim that a decision cannot be made until the cross-examination has begun and the defendant's answers to a variety of questions are known. When the government expresses doubt, the Trial Judge has two options available to protect both the defendant and the government.

The first option is for the Trial Judge to ask the government to make a proffer as to the nature of its expected cross-examination. The Judge then can decide whether the government does have a good-faith doubt about its need to use the convictions. If the Court finds that the doubt is not sincere, it can require the government to choose whether it wishes to rely on the convictions. If not, they disappear from the case. If so, and if the Judge concludes that they will be admitted, the defense can offer them as the final part of direct examination.

Alternatively, the Trial Judge can reserve a final decision on whether to admit the convictions until the conclusion of cross-examination. If the convictions are deemed admissible, the Judge can give the defense an opportunity to offer them as part of a redirect examination. This is fair to both sides. After all, if the government has represented before beginning cross-examination that prior convictions may not be necessary or important evidence, it cannot complain about admission being delayed until redirect examination if it subsequently decides that it wants the evidence to be admitted. By permitting the defendant to offer the convictions, the Judge permits the defense to avoid the unfair aspect of impeachment described above.

Should the Trial Judge choose the second option, the Judge might also choose to instruct the jury that, for procedural reasons with which the jury need not be concerned, the defendant had no opportunity earlier to present the prior convictions. Although this is not correct as a matter of law, because the defendant theoretically could have offered the convictions on direct examination, it is correct as a matter of trial reality, because no reasonable defense counsel would offer the convictions if the Trial Judge might ultimately declare them inadmissible.

We believe that the above approach strikes a fair compromise between the interests of the defendant in preserving a right to appeal and the interests of the prosecution in avoiding appealable issues. More importantly, it avoids the unjustified cost of appeal imposed by the *Ohler* Court; under *Ohler*, a party who wants to preserve the right to appeal must suffer the unjustified inference that it was trying to hide negative evidence. We realize that the compromise we set out above is not mandated, or even supported, by the language in *Ohler*. Yet we do not believe that the use of this fair and balanced procedure is completely foreclosed by the *Ohler* decision, either.

It should also be noted that the Court in *Ohler* did not discuss whether the Trial Court must instruct the jury not to draw a negative inference against a defendant who wants to preserve his right to appeal by waiting for the prosecution to introduce the objectionable evidence. We believe that such an instruction must be given upon request. This is the bare

minimum of protection to which the defendant is entitled. n57

[15] Renewing an *In Limine* Objection or Proffer at Trial

If the Trial Judge specifically makes an *in limine* ruling provisional, or defers a ruling, the litigant must renew an objection at trial, when the evidence is offered or excluded, in order to preserve it for appeal. This makes sense, because the Judge is essentially telling the parties that she would like to revisit the question in the trial context. If the objecting party refuses this invitation, the party is hardly in a position to complain. n58

One of the most difficult questions arising from *in limine* motions is whether a losing party has to renew an objection or offer of proof in order to preserve an issue for appeal, where the ruling is not obviously provisional. This question was taken up by the Advisory Committee on Evidence Rules, and the result is an amendment to *Rule 103* that became effective on December 1, 2000. Before the amendment, Courts took differing approaches to whether an objection to a definitive pretrial ruling had to be renewed at trial. Some Courts held that a renewal at the time of trial was always required, no matter how definitive the *in limine* ruling. Some Courts took the contrary approach. Other Courts distinguished between objections to evidence, which had to be renewed when evidence was offered at trial, and offers of proof, which did not need to be renewed.

The Advisory Committee believed that when an advance ruling is definitive, a renewal requirement imposes a needless formality. *Rule 46 of the Federal Rules of Civil Procedure* and *Rule 51 of the Federal Rules of Criminal Procedure* both state that formal exceptions are unnecessary. Requiring a party to make what is, in reality, a formal exception in order to preserve error will only lead to interruption of the trial and needless provocation of the Trial Judge. For example, in *United States v. Lui, 941 F.2d 844 (9th Cir. 1991)* , the defendant moved *in limine* to exclude drug courier profile testimony. The Trial Judge found the motion frivolous and threatened to impose sanctions. Obviously, defense counsel in *Lui* should not have been required to risk sanctions by renewing the objection at trial; the Trial Judge made painfully clear how he would rule on such an objection. The costliness of a renewal requirement is even more pronounced if a party has moved *in limine* for a ruling and the Court has found definitively that the evidence will not be admitted at trial. Under these circumstances, it would be extremely wasteful for the proponent to have to make a futile offer of evidence at trial solely to preserve the right to appeal. The proponent might have to produce witnesses for trial who would never actually testify.

The amendment to *Rule 103* provides that if the advance ruling is definitive, a party need not renew an objection or offer of proof in order to preserve the right to appeal that ruling. The public comment on the proposed rule change was generally positive. A comment from the American College of Trial Lawyers was typical, stating that the amendment has "the virtue of establishing certainty by placing lawyers on notice of the circumstances under which it is necessary to renew pretrial objections. At present, counsel may place unwarranted reliance on a pretrial ruling, only to learn after the fact that the failure to renew an objection at trial has foreclosed appellate review." The Association of the Bar of the City of New York commented that "the Rule would eliminate the wasteful and unnecessary practice of renewing objections and offers of proof as to issues that can be and have been definitively resolved. On the other hand, the requirement that the ruling be 'definitive' will give the district court flexibility to provide guidance to the litigants as to its initial view with respect to the admissibility of evidence in those cases where a definitive ruling cannot be made without depriving itself of the ability to reconsider the decision in the developed context of the trial."

One constructive comment, from Magistrate Judge Tommy Miller, pointed out that appeals from a Magistrate Judge's determination must, by statutory requirement, be renewed in the District Court in order to preserve a claim of error on appeal. See *28 U.S.C. § 636(b)(1)*. A paragraph was added to the Committee Note to alert practitioners to this statutory requirement and to indicate that the amendment does not purport to change that requirement.

The key concept in the amended *Rule 103(a)* is the term "definitive ruling." If the advance ruling is "definitive," the objection or offer of proof need not be renewed at trial. The Advisory Committee deliberately decided not to define the

term "definitive ruling," believing that the concept was very case-dependent. There is a good deal of case law pre-dating the amendment in the circuits that already followed the practice now codified. It would behoove counsel to consult that case law. For example, in *United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993)* , the Court noted that the Trial Court in that case stated unequivocally that the challenged evidence would be admissible at trial, and contrasted that situation from one where the Trial Court stated that it was inclined to admit the evidence but expressly reserved a final ruling. Under the amendment, the Trial Court's ruling in *Mejia-Alarcon* would be definitive, and renewal of the pretrial objection would not be required when the evidence is introduced. The opinion in *Scott v. Ross, 140 F.3d 1275 (9th Cir. 1998)* , provides a useful counterpoint. When Scott sought to qualify his witness as an expert, Ross objected on the ground the expert was unqualified. The Trial Judge stated that although Scott would not be precluded from calling the witness as an expert, the Judge would consider objections to specific testimony elicited at trial. Ross never objected to specific testimony. The Court held that the issue of the admissibility of the witness' testimony was not properly preserved for review "because the district court's ruling lacked the necessary definitiveness." The Trial Judge had essentially reserved a ruling on specific questions which the witness might be unqualified to answer. Under the amendment to *Rule 103*, Ross would have to object to the specific questions at trial, just as under previous practice.

The Advisory Committee recognized that the term "definitive ruling" might be considered fuzzy around the edges. The Committee therefore included language in the Committee Note indicating that the "amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point." Should counsel believe that the Court has foreclosed an issue, obtaining a statement from the Court to that effect is prudent practice.

Of course, if the Trial Court changes at trial what had been a *favorable in limine* ruling, or if the opposing party violates the *in limine* ruling at trial, objection must be made when the evidence is offered. The error, if any, in each of these situations occurs only when the evidence is offered and admitted. n59 Similarly, an objection must be made at trial if the claim of error is that the Judge's trial ruling is based on considerations or circumstances that have developed since the *in limine* determination. For example, assume that the Trial Judge rules *in limine* on the admissibility of a prior conviction. When the evidence is offered at trial, the Judge reasons that the conviction is admissible because the objecting party opened the door on direct examination. If the objecting party believes that this assumption is in error (e.g., the door was not really opened), then objection on these grounds must be made at trial to preserve a claim of error. In the words of the Advisory Committee, an advance ruling "is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike."

FOOTNOTES:

(n1)Footnote 1. See, e.g., *McKnight v. Johnson Controls, Inc., 36 F.3d 1396 (8th Cir. 1994)* (objection to expert's "lack of foundation" failed "to raise any question about the scientific validity of the principles and methodology" underlying the expert's testimony). See also *United States v. Fendley, 522 F.2d 181 (5th Cir. 1975)* (expression of concern for trustworthiness of business record was insufficient to preserve an objection that record was not made in ordinary course of business).

(n2)Footnote 2. It is, of course, essential to make a record of objections. See, e.g., *United States v. Johnson, 542 F.2d 230 (5th Cir. 1976)* (objection in chambers without court reporter present may not be sufficient to preserve evidentiary question for appeal).

(n3)Footnote 3. See, e.g., *Polys v. Trans-Colorado Airlines, 941 F.2d 1404 (10th Cir. 1991)* (error not preserved where plaintiffs made no formal offer of proof after exclusion of expert deposition testimony); *United States v. Brady, 579 F.2d 1121 (9th Cir. 1978)* (refusal to consider admissibility of excited utterances, due to failure to make an offer of proof); *Phillips v. Hillcrest Medical Center, 244 F.3d 790 (10th Cir. 2001)* (proponent of excluded evidence must explain to the Trial Court what he expects the evidence to show and the grounds for which he believes the evidence to

be admissible in order to preserve error for review).

(n4)Footnote 4. See, e.g., *United States v. Bell Petroleum Servs., Inc., 64 F.3d 202 (5th Cir. 1995)* (in a remanded action under CERCLA, the Trial Judge erred in reading a prior opinion by the Court as precluding the reopening of the record on remand; "because the district court refused to allow any additional evidence, the EPA was not required to make an offer of proof"). See also *Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)* (where Trial Court orders limited the plaintiffs' ability to put evidence in the record, the Court of Appeals would not hold that the plaintiffs failed to make a proper offer of proof).

(n5)Footnote 5. See, e.g., *Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976)* (testimony regarding insurance).

In *United States v. Ledesma, 632 F.2d 670 (7th Cir. 1980)* , the Court of Appeals criticized the Trial Judge's rule against sidebar conferences, but found no prejudice from the argument of evidence issues within the hearing of the jury.

(n6)Footnote 6. See, e.g., *United States v. Bamberger, 456 F.2d 1119 (3d Cir. 1972)* (party may not "sit by silently, take his chances on a verdict, and, if it is adverse, then complain of a matter which, if error, could have been eradicated during the trial").

(n7)Footnote 7. For a thorough discussion of the appropriate test for harmless error, see *Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005)* (concluding that "when reviewing the effect of erroneous evidentiary rulings, we will begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict" even if the error had not been made.)

(n8)Footnote 8. See, e.g., *United States v. Restivo, 8 F.3d 274 (5th Cir. 1993)* ("Plain error is error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of the judicial proceedings and would result in manifest injustice.").

(n9)Footnote 9. See, e.g., *Haddad v. Lockheed Cal. Corp., 720 F.2d 1454 (9th Cir. 1983)* ; *Smith v. Chesapeake & Ohio Ry., 778 F.2d 384 (7th Cir. 1985)* .

(n10)Footnote 10. See, e.g., *United States v. Guerrero, 756 F.2d 1342 (9th Cir. 1984)* .

(n11)Footnote 11. See, e.g., *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* (applying the "highly probable" no effect rule to both civil and criminal cases). On the conflict in the cases, see Becker & Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 892 (1992). For an argument that different harmless error standards should apply to different types of cases, see Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988 (1973).

(n12)Footnote 12. See, e.g., *United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992)* .

(n13)Footnote 13. *Chapman v. California, 386 U.S. 18 (1967)* . Some constitutional errors can never be harmless (e.g., denial of trial counsel or denial of the right to a public trial). See S. Saltzburg & D. Capra, American Criminal Procedure 1614-17 (7th ed. 2004).

(n14)Footnote 14. *Brecht v. Abrahamson, 507 U.S. 619 (1993)* .

(n15)Footnote 15. *Id.* (Stevens, J., concurring) (noting that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.").

(n16)Footnote 16. See, e.g., *United States v. Williams, 133 F.3d 1048 (7th Cir. 1998)* (error in admitting hearsay evidence identifying the defendant as the perpetrator was not harmless where other evidence of identification was

"paper-thin"). Compare *United States v. Cass, 127 F.3d 1218 (10th Cir. 1997)* (erroneous admission of hearsay was harmless given the wealth of properly admitted evidence put forth by the prosecution).

(n17)Footnote 17. *United States v. Noushfar, 78 F.3d 1442 (9th Cir. 1996)* (Trial Judge committed reversible error in sending to the jury room, over the defendant's objection, 14 tapes that had not been played in the courtroom, together with a tape recorder; this was a "structural error requiring automatic reversal").

(n18)Footnote 18. See, e.g., *United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997)* (when a conviction is properly admitted for impeachment under *Rule 609*, any error in admitting the conviction under *Rule 404(b)* is automatically harmless).

(n19)Footnote 19. See, e.g., *Government of the Virgin Islands v. Mujahid, 990 F.2d 111 (3d Cir. 1993)* (admission of coconspirator's guilty plea was a serious error, but did not rise to the level of plain error; Court defines plain errors as those "particularly egregious errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings"). See also *United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998)* (reviewing some claims of error under the abuse of discretion standard and others under the plain error standard).

(n20)Footnote 20. See Advisory Committee Note to Rule 103(d), § 103.04[1].

(n21)Footnote 21. See, e.g., *United States v. Thompson, 82 F.3d 849 (9th Cir. 1996)* (applying *Olano* in the analysis of evidentiary error under *Rule 103*).

(n22)Footnote 22. *United States v. Thompson, 82 F.3d 849 (9th Cir. 1996)* ("Because of this circuit split [over the admissibility of pre-arrest silence as substantive evidence of guilt], the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue, we cannot brand the court's failure to exclude the evidence as plain error.").

(n23)Footnote 23. See also *Angelo v. Armstrong World Indus., 11 F.3d 957 (10th Cir. 1993)* (appellants "bear the burden of proving plain error and that it almost surely affected the outcome of the case").

(n24)Footnote 24. One example of a pure Rules construction would be whether an offer of compromise is excluded under *Rule 408* when it is introduced by the party who made the offer; this is a question of whether the language of the Rule provides a *per se* exclusion or not. See the discussion of Rule 408, *infra* . Another example is whether a prior conviction offered for impeachment is the kind of conviction that is automatically admissible under *Rule 609(a)(2)*, or whether it is the kind of conviction subject to a balancing of probative value and prejudicial effect under *Rule 609(a)(1)*. See the discussion of Rule 609, *infra* .

(n25)Footnote 25. See, e.g., *Reed v. Baxter, 134 F.3d 351, 355 (6th Cir. 1998)* ("The question of whether the attorney-client privilege applies is a mixed question of law and fact, subject to de novo review.").

(n26)Footnote 26. See, e.g., *United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999)* (admission of impeachment evidence reviewed for abuse of discretion); *Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993)* (admission of evidence under prior testimony exception to the hearsay rule is reviewed for abuse of discretion); *United States v. Duran, 4 F.3d 800 (9th Cir. 1993)* (questions involving authentication of documents and reliability of in-court identification testimony are reviewed for abuse of discretion).

(n27)Footnote 27. *United States v. Glecier, 923 F.2d 496 (7th Cir. 1991)* (abuse of discretion standard applied to ruling under *Rule 403*).

(n28)Footnote 28. For rare examples of appellate success, see *United States v. Heath, 188 F.3d 916 (7th Cir. 1999)* (conviction reversed where government introduced evidence of a prejudicial bad act which it attributed to the defendant without a sufficient foundation that the defendant had actually committed the act; error was prejudicial under

the circumstances); *Government of the Virgin Islands v. Archibald, 987 F.2d 180 (3d Cir. 1993)* (in a rape case, there was no probative value in admitting the defendant's uncharged sexual relationship with a minor; reversal was required where the defendant suffered severe prejudice in a close case resting on the credibility of the victim).

(n29)Footnote 29. See, e.g., *United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980)* (statement incorrectly admitted as a coconspirator declaration was nonetheless properly admitted since it fit the requirements of a declaration against interest: "We note that this basis for admission was not argued either at trial or on appeal. We may, however, uphold the admission on any theory which finds support in the record, regardless of the ground relied upon by the trial court.").

(n30)Footnote 30. See also *United States v. Check, 582 F.2d 668 (2d Cir. 1978)* (out-of-court statement offered at trial for its truth cannot be considered on appeal as "background" evidence: "it would be unfair to consider the admissibility of the evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at trial").

(n31)Footnote 31. See, e.g., *United States v. Williams, 837 F.2d 1009 (11th Cir. 1988)* (records incorrectly admitted as business records could have been admitted as admissions; Trial Court ruling affirmed since "both evidentiary rules serve the same purpose -- to permit the introduction of evidence proving the truth of the matter asserted"); *United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984)* (error in admitting defendant's own statement under coconspirator exception was "immaterial" since because it could have been admitted as a personal admission; both theories serve the same purpose of allowing statements to be considered for the truth of the matters asserted therein). See also *United States v. Gallo, 782 F.2d 1191 (4th Cir. 1986)* (other crimes evidence "is deemed admissible on appeal if it is admissible under *Rule 404(b)* on any theory").

(n32)Footnote 32. *United States v. Mancari, 875 F.2d 103, 106 (7th Cir. 1989)* ("Mancari could hardly complain that the jury was permitted to consider the April 23 and May 2 transactions for a limited purpose when the jury should have been permitted to consider them without limitation because the indictment encompassed them after all.").

(n33)Footnote 33. *Bourjaily v. United States, 483 U.S. 171 (1987)* .

(n34)Footnote 34. See, e.g., *United States v. Ordonez, 737 F.2d 793 (9th Cir. 1984)* . At trial, the government did not suggest that it had laid a proper foundation to admit a drug ledger as coconspirator statements, and the reviewing Court would not sustain admissibility on this theory:

> For us to sustain a theory of admissibility not presented below, would unfairly rob appellants of the opportunity to argue the weight, sufficiency and trustworthiness of the evidence to establish a proper foundation before the trial judge, or to offer proof to controvert the facts now relied upon by the government.

(n35)Footnote 35. See, e.g., *Onujiogu v. United States, 817 F.2d 3 (1st Cir. 1987)* (statement erroneously admitted as a statement pertinent to treatment could have been admitted as a party admission under Federal *Rule 801(d)(2)(A)*).

(n36)Footnote 36. See, e.g., *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* (records erroneously admitted as business records at trial cannot be retroactively held admissible on appeal as residual hearsay; the defendant never received notice in accordance with the residual exception, and the Trial Court never made the predicate findings required by that Rule). Compare *United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989)* (statement can be retroactively justified as residual hearsay, where it *was* proffered as residual hearsay at the trial, but admitted -- erroneously -- by the Trial Court as a business record; under the circumstances, the defendant was properly notified under the residual exception). See generally Saltzburg, *Another Ground for Decision -- Harmless Trial Court Errors, 47 Temp. L.Q. 193 (1974).*

(n37)Footnote 37. See *United States v. Rayco, Inc., 616 F.2d 462 (10th Cir. 1980)* (objection to exclusion of exhibit was not preserved, where exhibit was not made part of the record and the Court of Appeals was "unable to determine that the contents of the exhibit were so central to Rayco's case that its exclusion prevented examination of the real issues.").

(n38)Footnote 38. See *Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990)* (counsel's statement as to witness' anticipated testimony is a sufficient offer of proof; it is not required that the proffered witness take the stand). See also *Porter-Cooper v. Dalkon Shield Claimants Trust, 49 F.3d 1285 (8th Cir. 1995)* (the plaintiff's pretrial designation of expert witnesses, which stated that the expert "may testify concerning the cause and effect" of the plaintiff's injuries, was found to be an inadequate offer of proof, insufficient to preserve an objection to the exclusion of the expert; an offer of proof "must express precisely the substance of the excluded evidence, which counsel accomplishes by stating with specificity what he or she anticipates will be the witness' testimony or by putting the witness on the stand").

(n39)Footnote 39. See *Polys v. Trans-Colorado Airlines, 941 F.2d 1404 (10th Cir. 1991)* (error not preserved where defendants made no offer of proof following exclusion of their expert's deposition testimony). One Court has upheld the practice of requiring an offer of proof of expert testimony to be made in the form of a written witness statement, rather than by question and answer. See *Fidelity Sav. & Loan Assoc. v. Aetna Life & Cas. Co., 647 F.2d 933 (9th Cir. 1981)* (noting that the "form of offers of proof is left to the discretion of the trial court").

(n40)Footnote 40. See, e.g., *United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996)* (the defendants failed to make a timely objection to the testimony of a law enforcement officer called as an expert on money-laundering practices; no objection was made when the testimony was given, and while the defendants raised concerns about the testimony in a bench conference called at the behest of the government part way through the officer's testimony, it was not until the following day that they moved to strike the testimony).

(n41)Footnote 41. See, e.g., *Angelo v. Armstrong World Indus., 11 F.3d 957 (10th Cir. 1993)* (objection that testimony on redirect was "beyond the scope" would reasonably be taken to mean that the testimony addressed issues not raised in cross-examination; therefore, the objection that the redirect testimony violated pretrial protocols set for expert testimony was not properly preserved for appeal: "The objecting party must make its objection clear; the trial judge need not imagine all the possible grounds for an objection.").

(n42)Footnote 42. See, e.g., *United States v. Campos, 217 F.3d 707 (9th Cir. 2000)* (objection that expert testimony constituted impermissible "drug courier profile testimony" did not preserve the claim that the testimony was an impermissible conclusion on the defendant's mental state under *Rule 704(b)*); *Bryant v. Consolidated Rail Corp., 672 F.2d 217 (1st Cir. 1982)* (objection on relevance grounds does not preserve objection under *Rule 404*); *United States v. Wilson, 966 F.2d 243 (7th Cir. 1992)* (objection on relevance grounds does not preserve objection that the evidence is unduly prejudicial under *Rule 403*).

(n43)Footnote 43. See *United States v. Reed, 977 F.2d 14 (1st Cir. 1992)* (motion *in limine* arguing that details of a prior conviction should be excluded, and requesting that prosecution be limited to questions about the fact of conviction and the nature of the defense, failed to preserve an objection to the use of the conviction itself).

(n44)Footnote 44. See *United States v. Marshall, 762 F.2d 419 (5th Cir. 1985)* (defendant had a continuing objection that need not have been repeated as to subsequent evidence admitted within the scope of the initial ruling).

(n45)Footnote 45. See also *United States v. Gomez-Norena, 908 F.2d 497 (9th Cir. 1990)* (continuing objection merely avoids "repeated objections to evidence admitted within the scope of the court's specific evidentiary ruling"; where continuing objection was made on character and hearsay grounds, an objection that the evidence was unfairly prejudicial under *Rule 403* was not preserved).

(n46)Footnote 46. See, e.g., *United States v. Church, 970 F.2d 401 (7th Cir. 1992)* (objection by counsel for one defendant held applicable to the other two); *Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1981)* ("Unless the identity of

the objector somehow affects the admissibility of the evidence, no reason appears why a party should be required to join in the objection or offer of another litigant aligned with him, in order to raise the issue on appeal.").

(n47)Footnote 47. See *United States v. Gatling, 96 F.3d 1511 (D.C. Cir. 1996)* ("Trial judges have discretion to determine whether each defendant must individually object or whether objections raised by one defendant will count as having been raised for all similarly situated defendants. Where a judge does not indicate what her policy will be in express terms during a trial, we will consider objections raised by one defendant to be preserved for other defendants if an examination of the record suggests that this was the approach taken by the judge in practice.").

(n48)Footnote 48. See, e.g., *United States v. Rivera-Figueroa, 149 F.3d 1 (1st Cir. 1998)* (appeal by non-objecting party subject to plain error review; the parties had differing interests with respect to the evidence).

(n49)Footnote 49. See *Luce v. United States, 469 U.S. 38 (1984)* ("Even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.").

(n50)Footnote 50. *United States v. Griffin, 818 F.2d 97 (1st Cir. 1987)* .

(n51)Footnote 51. See *United States v. Browne, 829 F.2d 760 (9th Cir. 1987)* (defendant had no right to definitive *in limine* determination; Trial Court justifiably was uncertain as to how it would rule at trial).

(n52)Footnote 52. See, e.g., *United States v. Barletta, 644 F.2d 50 (1st Cir. 1981)* .

(n53)Footnote 53. For a discussion of the advantages and disadvantages of permitting appellate review where the defendant complains about an impeachment ruling made *in limine* even though he did not testify, see Saltzburg, *Tactics of the Motion in Limine*, 9 Litig., No. 4, at 17 (1983).

(n54)Footnote 54. See, e.g., *United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992)* ("an appeal of a *Rule 608(b)* ruling is precluded where the defendant did not testify at trial"); *United States v. Weichert, 783 F.2d 23 (2d Cir. 1986)* ("there is no reason to distinguish *Rule 608(b)* cases from *Rule 609* cases"); *United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985)* :

> We now hold under *Luce* that a defendant's decision not to present a witness whose credibility would have formed the basis of an evidentiary objection under *Rule 608(b)* forecloses our ability to review the claim that the district court might have erroneously allowed extrinsic evidence to impeach that witness in violation of *Rule 608(b)*.

(n55)Footnote 55. *United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986)* (objection to *in limine* determination that evidence would be admissible to impeach the defendant's witness was not preserved where the witness never testified).

(n56)Footnote 56. See also *United States v. Griffin, 818 F.2d 97 (1st Cir. 1987)* (the prosecutor proposed to explain a government witness' delay in coming forward by offering evidence of a third-party threat against him; the Trial Court sustained the *in limine* objection to this evidence, but warned that, if defense counsel cross-examined the witness as to the delay, the threat evidence could come in as rebuttal; the failure to cross-examine the witness as to delay operated to forfeit any objection to the Court's ruling; since because the threat evidence was never introduced, the defendant's challenge "never ripened into an appealable issue").

(n57)Footnote 57. For an extensive critique of *Ohler*, see Timothy L. Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After Ohler v. United States,* 2001 U.C. Davis L. Rev. 615. Professor Perrin argues, among other things, that the Court in *Ohler* "gave primacy to efficiency" at the expense of "a full and fair presentation of the evidence."

(n58)Footnote 58. See *Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997)* (failure to renew objection forfeits right to appeal a pretrial ruling that was provisional when rendered: although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done."); *United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994)* (where order excluding evidence is provisional, "the exclusion of evidence pursuant to that order may be challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order"); *Doty v. Sewall, 908 F.2d 1053, 1056 (1st Cir. 1990)* ("a pre-trial motion *in limine* is not sufficient to preserve an issue for appeal where the district court declines to rule on the admissibility of the evidence until the evidence is actually offered").

(n59)Footnote 59. *Macsenti v. Becker, 237 F.3d 1223 (10th Cir. 2001)* (*in limine* ruling barred the evidence to which the defendant had objected in advance of trial; when the Trial Judge decided to admit the evidence at trial, objection was required to preserve the right to claim of error for appeal).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 103 RULE 103

1-103 Federal Rules of Evidence Manual § 103.03

§ 103.03 Annotated Cases

[Go To Supp]

[1] Rule 103(a) -- Effect of Erroneous Ruling

[a] Rule 103(a) -- Affirmance on a Different Theory

United States v. Samaniego, 345 F.3d 1280 (11th Cir. 2003) : The Court held that a statement erroneously admitted under *Rule 803(3)* could nevertheless have properly been admitted under *Rule 804(b)(3)*. Although the Judge had not reached that alternative ground for admissibility, the Court said that it would not find an abuse of discretion where the correct result had been reached even if for the wrong reason, so the judgment was affirmed. In *United States v. Williams, 837 F.2d 1009 (11th Cir. 1988)* , the Court held that "yellow sheets" were properly admitted against a defendant charged with filing a false tax return, where the defendant's initials were identified at the bottom of several sheets. The government had not relied on the admissions exemption at trial, but the Court found no unfairness in permitting the exemption to be relied upon on appeal.

[b] Rule 103(a) -- Automatic Reversal

United States v. Noushfar, 78 F.3d 1442 (9th Cir. 1996) : Reversing convictions for illegal importation of goods and money laundering, the Court held it was error to send to the jury room, over the defendants' objection, 14 tapes that had not been played in the courtroom, together with a tape recorder. The Trial Judge had "completely abdicated control of the presentation of the evidence," and "made no analysis of whether undue emphasis might be placed on some of the recorded conversations." The Court stated that "we find the error to be a structural error requiring automatic reversal."

[c] Rule 103(a) -- Explanation for Proffer of Excluded Evidence

Ramey v. District 141 Int'l Ass'n of Machinists, 378 F.3d 269 (2d Cir. 2004) : The plaintiffs sued their union for breach of its duty of fair representation, arising from the treatment of their seniority status after a previous employer went bankrupt and a new employer took over. The plaintiffs introduced a memorandum filed in the bankruptcy

proceeding that demonstrated that the union had then taken a position inconsistent with the one it was espousing at trial. When the union sought to show that the Bankruptcy Court had rejected its position then, the Judge cut off the questioning with an instruction that the only relevance of the memorandum was its inconsistency with the union's current position. On appeal, the union argued that it wanted to present the outcome in the bankruptcy proceedings in order to show that it had been forced to reevaluate its position in light of the Bankruptcy Judge's ruling, and thus that it had changed its position reasonably and not out of malice or animus toward the plaintiffs. The Court held that, although it did not require detailed explanations of objections to evidentiary rulings in the heat of trial, here union counsel never made any explanation or counter-argument. Thus, the Judge, whose ruling was correct on one plausible reading of the purpose of the evidence, was not alerted to the union's other purpose. Because no notice was given below, the Court refused to entertain the union's challenge to the ruling.

[d] Rule 103(a) -- Harmless and Harmful Error

[i] Rule 103(a) -- Civil Cases

Lataille v. Ponte, 754 F.2d 33 (1st Cir. 1985) : The Court determined that the erroneous admission of an inmate's disciplinary record required reversal of a judgment for prison guards in an action alleging that the guards beat the inmate. In deciding that the error was prejudicial, the Court focused on "[t]he centrality of the evidence, its prejudicial effect, whether it is cumulative, the use of the evidence by counsel, and the closeness of the case."

Habecker v. Copperloy Corp., 893 F.2d 49 (3d Cir. 1990) : The Court reversed a judgment for the defendants in a product liability action arising out of a forklift accident, holding that error in excluding testimony by the plaintiff's proposed expert required reversal because it could not be said to be "highly probable" that the error did not affect a party's rights. In *McQueeney v. Wilmington Trust Co.*, n1 the Court reversed a judgment for a seaman in a Jones Act case, finding that the Trial Judge erred in excluding evidence from which it could have been inferred that the seaman had suborned perjury of a proffered witness. It determined that the error was prejudicial, and it held that the same standard should be used for assessing the harmless or prejudicial nature of errors in civil and criminal cases. Thus, it relied upon its prior decision in *Government of Virgin Islands v. Toto*. n2 In a medical malpractice case brought on behalf of a child who suffered severe brain damage, *Salas v. Wang*, n3 the Court applied its *McQueeney* harmless error rule and held that inappropriate remarks made by the plaintiff's counsel during closing argument did not require reversal of a judgment for the plaintiff.

Beck v. Haik, 377 F.3d 624 (6th Cir. 2004) : The Court held that the standard for harmless error in civil cases was the same as that for criminal cases: reversal is required when the appellate court lacks a "fair assurance" that the outcome of the trial was not affected by evidentiary error. The Court rejected a definition that would require the appellant to prove by a preponderance of the evidence that the error was outcome-determinative. The Court further held that errors are to be assessed cumulatively in civil cases as well as in criminal cases. It reasoned that "[s]ince a jury reaches its verdict in light of the evidence as a whole, it makes no sense to try to analyze errors in artificial isolation, when deciding whether they are harmless."

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) : In an employee's race discrimination action, the Court found abuses of discretion in the exclusion of a statistical report showing a correlation between race and promotion, a co-worker's testimony that the defendant's officials had made disparaging remarks about the ethnic group to which the plaintiff belonged, and co-workers' testimony that they had been denied promotion on discriminatory grounds. Resolving a conflict in its precedents, the Court held that "when reviewing the effect of erroneous evidentiary rulings we will begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted." Applying that

standard, the Court found that the evidentiary errors in this case were not harmless. In *Haddad v. Lockheed Cal. Corp., 720 F.2d 1454 (9th Cir. 1983)* , an employment discrimination suit, although the Court found it was error to admit testimony of the plaintiff's ex-wife that revealed marital communications, the error was harmless. Affirming a judgment for the defendant, the Court held that "when an appellate court ponders the probable effect of an error on a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error."

[ii] Rule 103(a) -- Harmless and Harmful Error -- Criminal Cases

United States v. Logan, 998 F.2d 1025 (D.C. Cir. 1993) : A defense witness in a drug prosecution was impeached with convictions for misdemeanor offenses of taking property without a right and distributing marijuana and PCP. The Court held the error in admitting the evidence was harmless because it was a witness rather than a defendant who was impeached, the prosecution did not emphasize the convictions, a proper limiting instruction was promptly given, the witness' story was confirmed in part by another witness, and the other evidence against the defendant was strong. The dissenting Judge argued that when a defendant does not testify and presents his case through others, improper impeachment (particularly of the defendant's chief witness) is likely to be prejudicial and not harmless.

United States v. Lamberty, 778 F.2d 59 (1st Cir. 1985) : The Court reversed a postmaster's conviction for opening another's package, because the government wrongly elicited testimony that investigators suspected the postmaster of thefts. It stated that "[w]hen faced in a criminal case with a clearly prejudicial error, unless it is certain that the error is harmless beyond a reasonable doubt, a court should not be forced to gamble with a defendant's liberty." See also *United States v. Ferreira* n4(reversing bank robbery conviction for admission of evidence concerning weapons seized from the defendant upon his arrest; not a harmless error, using "beyond a reasonable doubt" standard).

United States v. Musacchia, 900 F.2d 493 (2d Cir. 1990) , *vacated on other grounds*, *955 F.2d 3 (2d Cir. 1991)* : The Court, reviewing a tax evasion case, held that error in permitting three prosecution witnesses to testify on direct about "truth-telling" provisions in their cooperation agreements was harmless, as elicitation of the testimony was not an intentional violation, the defense conceded the truthfulness of testimony by two of the witnesses, the third's witness' testimony was peripheral, and the Judge gave a clear curative instruction not to consider the bolstering evidence.

United States v. Dowling, 855 F.2d 114 (3d Cir. 1988) , *aff'd*, *493 U.S. 342 (1990)* : The Court applied its harmless error test for nonconstitutional errors in this case and found that error in the introduction of prior act evidence was harmless. In *Government of Virgin Islands v. Joseph*, n5 the Court, using the "beyond a reasonable doubt" test of harmless error (which it usually reserves for constitutional errors), reversed convictions for assault, robbery, and rape because two documents not admitted into evidence were submitted to the jury. In *United States v. Zarintash*, n6 the Court again seemed to equate its test for judging the effect of nonconstitutional error with the test used for constitutional errors. In *Government of Virgin Islands v. Toto*, n7 the Court had indicated that it would reverse criminal convictions because of error unless it could say that it is highly probable that the error did not contribute to the judgment of conviction.

United States v. Urbanik, 801 F.2d 692 (4th Cir. 1986) : The Court reversed a defendant's marijuana convictions because coconspirator statements were improperly admitted. It stated that a nonconstitutional error could be harmless only where it is highly probable that the error did not affect the judgment.

United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984) : The Court reversed a conviction for extortion, finding that the use of hypnosis on an identifying witness presented dangers of undue suggestiveness and that the resulting

evidence was more prejudicial than probative. It found that the admission of the evidence was prejudicial, not harmless, error. The opinion recognized that in some prior cases, the Court had appeared to test nonconstitutional errors by the demanding test of harmlessness required for constitutional errors. The Court stated that those prior expressions were inadvertent and that nonconstitutional errors are not as likely to require reversal as constitutional ones.

United States v. McFadyen-Snider, 552 F.2d 1178 (6th Cir. 1977) : Using the "beyond a reasonable doubt" test, the Court reversed convictions in a bank fraud case, holding that the prosecutor improperly attempted to impeach the defendant with proof of her sexual conduct and that evidence of bad checks she wrote was improperly admitted because "it directly imputed to her other bad acts that were not necessary to prove the prosecution's case." Furthermore, the Trial Judge failed to give complete limiting instructions.

United States v. Dominguez, 992 F.2d 678 (7th Cir. 1993) : In a cocaine distribution prosecution, an agent testified that she had learned from Guatemalan police that tests of the delivered packages had revealed cocaine. The Court held it was harmless error to admit the testimony, as there was strong evidence of the defendant's participation in a conspiracy, and no proof of the identity of a controlled substance is required. A dissenting Judge argued that all the evidence was consistent with an intent to engage in a sham transaction rather than a drug deal, so it was impossible to conclude that the hearsay evidence did not have a substantial influence on the jury's verdict.

United States v. Hitt, 981 F.2d 422 (9th Cir. 1992) : Reviewing a conviction for possessing a machine gun, the Court held it was reversible error to admit a photograph that showed a dozen weapons in addition to the one charged. The Court observed a conflict in the Circuit as to whether the harmless error test permits affirmance only if the Court can say with "fair assurance" that an error was harmless or whether affirmance is required if it is more probable than not that an error was harmless. The Court found that the error was prejudicial under either test and thus did not resolve the conflict. In *United States v. Dixon*, n8 the Court said that plain error requires reversal only when it is "*highly probable* that the error materially affected the jury's verdict," whereas nonconstitutional error properly raised in the Trial Court requires reversal unless "it is more *probable* than not that the error did not materially affect the verdict" (emphasis in original). See also *United States v. Soulard* n9(reiterating that nonconstitutional errors would not require reversal unless it is more probable than not that they affected verdict). In *United States v. Eaglin*, n10 the Court indicated that, before deciding on the appropriate test for harmless error, it was appropriate to decide whether it was dealing with a violation of the hearsay rules only or with a confrontation problem. See also *United States v. Ragghianti* n11(error for failing to give limiting instruction must be harmless beyond a reasonable doubt); *United States v. Tebha* n12(constitutional standard used when exhibit not in evidence reaches jury).

United States v. Polsinelli, 649 F.2d 793 (10th Cir. 1981) : The Court used the "beyond a reasonable doubt" standard in finding a mistake in the prosecutor's cross-examination of character witnesses to have been prejudicial error.

United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992) : The Court held that it was harmless error when the government suggested that the defendant in a cocaine importation conspiracy engaged in frequent "partying" and fathered an illegitimate child. A concurring Judge believed that the majority opinion improperly blended the "harmless beyond a reasonable doubt" standard applicable to errors of constitutional magnitude and the "harmless error" standard of *Fed. R. Crim. P. 52(a)*. In the majority's view, to the extent there is any difference in the standards, the Circuit has employed the constitutional standard for nonconstitutional evidentiary errors; in any event, the error in this case was harmless by either standard.

[e] Rule 103(a) -- *In Limine* Rulings

[i] Rule 103(a) -- Appealability -- Requirement that Witness Testify and Other Conditions Precedent

Luce v. United States, 469 U.S. 38 (1984) : The Court held that an accused wishing to preserve for review a claim of improper impeachment with a prior conviction may not rely on an adverse *in limine* ruling but must testify. This case is discussed in the Editorial Explanatory Comment, *§ 103.02[13], [14].*

United States v. Coumaris, 399 F.3d 343 (D.C. Cir. 2005) : The Court affirmed a defendant's conviction for conspiring to help another person evade arrest. It held that the defendant waived his objection to an *in limine* ruling granting the government's motion to cross-examine proposed character witnesses. "Coumaris clearly waived his objection to the district court's *in limine* ruling by failing to call the character witnesses to testify."

United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994) : In a trial for illegally exporting firearms, the defendant sought to subpoena three witnesses who purportedly would testify that the defendant's activity had been authorized by certain government officials. The Trial Judge entered an *in limine* order that before such evidence could be proffered at trial, the defendant would first have to present it in chambers or at sidebar. At trial, the defendant never called the witnesses to testify, and on appeal he argued that the Trial Court had imposed unreasonable conditions on the presentation of his evidence of authorization. The Court, citing *Luce v. United States* (see the Editorial Explanatory Comment, *§ 103.02[13], [14]*), declared that "when a judge issues a provisional *in limine* pretrial order and clearly invites the adversely affected party to offer evidence at sidebar for the purpose of reassessing the scope or effect of the order in the setting of the actual trial, the exclusion of evidence pursuant to that order may be challenged on appeal only if the party unsuccessfully attempts to offer such evidence in accordance with the terms specified in the order." In *United States v. Nivica*, n13 the defendant sought an *in limine* ruling limiting the scope of cross-examination if he took the stand, but the Judge said he would be subject to cross-examination on all matters relevant to the issue at hand. The Court held that the defendant had not preserved the issue for appeal, as he did not testify. One Judge concurred because Circuit precedent did not limit *Luce* to *Rule 609(a)* issues. In *United States v. Griffin*, n14 the Court affirmed marijuana convictions, holding that the defendant failed to preserve for appeal an objection to an *in limine* ruling that the government could elicit from a witness the fact that he had been threatened by a third party, if the defense impeached the witness with evidence that he withheld information from investigators for more than a year. Since the defense never attacked the witness, the threat evidence was not offered.

United States v. Velez, 354 F.3d 190 (2d Cir. 2004) : The defendant in a felon firearm possession case agreed at a proffer session that the government could use any statements made to rebut arguments or evidence offered by the defendant at trial. After the defendant elected to go to trial, he requested an *in limine* ruling on the scope of defense arguments and defenses that would open the door to use of statements from the proffer. In response, the Judge implicitly ruled that the proffer agreement was enforceable. At trial, the defendant failed to trigger the waiver provision through evidence or argument, and the government argued on appeal that this meant his constitutional challenge to the provision could not be considered. However, the Court held that "[t]he record and its fact-specific contents [were] irrelevant" to the defendant's contention that the waiver provision was unenforceable and unconstitutional as a general matter. In the Court's view, the *Luce* requirement is limited to situations in which the ruling to be reviewed, such as the balancing of probative value and prejudicial effect, is contextually bound. In *United States v. Ortiz*, n15 a drug prosecution in which the defendant disputed identity, the Court found that defense counsel appeared inclined to argue both mistaken identity and intent. Defense counsel did not challenge the ruling that a prior conviction could be used to rebut the intent argument if it were raised, and thus waived any complaint about the ruling. In *United States v. Weichert*, n16 the Court relied upon *Luce v. United States* (see the Editorial Explanatory Comment, *§ 103.02[13], [14]*) to hold that defendants in a fraud case could not challenge an *in limine* ruling permitting the government to ask an attorney-witness about his disbarment if he testified, since the defendants never called him as a witness. In *United States v. DiPaolo*, n17 the Court affirmed convictions for intimidating witnesses, holding that a defendant could not appeal an *in limine* ruling that

denied his motion to preclude impeachment of a witness with a prior criminal conviction, since the witness never testified.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996) : Affirming the Trial Judge's refusal to permit a defendant to withdraw his guilty plea, the Court relied upon the Supreme Court's decision in *Luce v. United States* in holding that the defendant could not appeal the Magistrate Judge's ruling that if the defendant testified at a hearing, he would waive his privilege against self-incrimination about all issues regarding his motion to withdraw. The defendant's objection was not properly preserved because he did not take the stand and testify.

United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992) : In a prosecution for theft of government property, the Trial Judge ruled that evidence of prior thefts by the defendant was not admissible on the government's direct case but would be admissible under *Rule 608(b)* to impeach the defendant if he took the stand. The Court held that the defendant was precluded from appealing that ruling because he did not testify at trial.

United States v. Wilson, 307 F.3d 596 (7th Cir. 2002) : Affirming a conviction for wire fraud, the Court held that it would not review the defendant's claim that the Trial Judge violated his right to remain silent by deciding conditionally to allow the government to introduce evidence of the defendant's "selective silence" as to the identity of a purported associate if the defendant were to bring up the issue of the associate at trial. Because the defendant never brought up the issue of the associate at trial, the trial court's conditional ruling never ripened into an error. The Court, citing *Luce v. United States, 469 U.S. 38 (1984)* , declared that the defendant could not "attack a potential introduction of evidence by the government in response to his potential testimony."

United States v. Hall, 312 F.3d 1250 (11th Cir. 2002) : The Court affirmed a conviction for distribution and receipt of child pornography through a computer. It held that an *in limine* ruling that other crimes evidence (a videotaped interview of a four-year-old girl who was the victim in a pending state case against Hall for molestation) was admissible to prove intent, knowledge, and lack of mistake or accident was not reviewable. The *in limine* ruling was conditioned on the defendant arguing at trial that he lacked intent. The defendant made no such defense at trial, so the evidence was never admitted, but the defendant argued that the Trial Judge's error in finding the evidence admissible was the reason he had offered no such defense. The Court noted that other Circuits had applied *Luce v. United States, 469 U.S. 38 (1984)* , to *Rule 404(b)* evidence. It reasoned that because the defendant did not take the position leading to admission of adverse evidence, the record was too minimally developed to support any meaningful review of the Judge's pre-trial *Rule 404(b)* decision, and any possible harm from the ruling would be wholly speculative. In *United States v. DiMatteo*, n18 the Court held, in affirming a conviction for a marijuana importation conspiracy, that the failure to present a defense witness barred appellate review of an *in limine* ruling regarding permissible cross-examination and rebuttal of the witness.

[ii] Rule 103(a) -- *In Limine* Rulings -- Procedures

United States v. Buckner, 91 F.3d 34 (7th Cir. 1996) : In a prosecution for conspiracy to illegally transfer a machine gun, the defendant moved ten days before trial to prohibit the government from playing tapes of conversations between the defendant and an alleged conspirator that occurred after the conspiracy ended. The Trial Judge heard argument on the motion on the morning of trial and granted the motion without hearing the tapes, and the government appealed. The Court noted that, given the pressures on a Trial Judge on the morning of trial, "the best way to deal with many [motions *in limine*] is usually to reserve ruling and get the trial on the road, for many times, what appears to be vitally important before the start of trial, becomes less so once the case starts moving." The Court found error in the exclusion of the tape, and observed that "[t]he wholesale exclusion of all this taped evidence, before hearing it and

considering it in context, was an abuse of discretion."

[iii] Rule 103(a) -- *In Limine* Rulings -- Requirement of Record

United States v. Mitchell, 954 F.2d 663 (11th Cir. 1992) : In a Hobbs Act prosecution of police officers for fixing drunk driving tickets, the Trial Judge granted the defendants' *in limine* motion under Rules 702 and 403 to exclude the testimony of a government expert on alcoholism and highway safety. There was no record of the arguments by counsel, the proffer of the expert's testimony made *in camera*, or the Judge's oral ruling; it was, therefore, impossible to conclude that the precluded testimony could under no circumstances have been admissible, so the Court vacated the order and remanded with instructions to conduct an adequate hearing. The Court also noted its doubts about the appropriateness of a pretrial ruling on the question, as relevancy issues depend on the exact state of the record at the time the evidence is offered.

[iv] Rule 103(a) -- *In Limine* Rulings -- Summary Judgment

In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* : In a massive antitrust case against Japanese television manufacturers, the Court reversed most of the summary judgment for the defendants but expressed its approval of the District Court's substantial use of *in limine* hearings on evidence questions "not only because the court's *in limine* consideration was far more efficient than if the rulings were deferred until the trial, with consequent interruptions, but also because the *in limine* procedure permitted more thorough briefing and argument than would have been likely had the rulings been deferred." Although the Court noted that there are "countervailing considerations, especially with respect to relevancy rulings under *Rule 403* which may be made pretrial without the benefit of the flavor of the record developed at trial," it found that the Trial Judge has discretion to make those rulings prior to trial and that the discretion was properly exercised in this case.

[f] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability

[i] Rule 103(a) -- Evidence Introduced by Opponent

Ohler v. United States, 529 U.S. 753 (2000) . See the Editorial Explanatory Comment, *§ 103.02[14]*.

Rojas v. Richardson, 713 F.2d 116 (5th Cir. 1983) : The Court held in an employee's personal injury action that a motion *in limine* to preclude testimony about the plaintiff's status as an illegal alien did not preserve his claim of error, where his counsel mentioned the status during jury selection and made no objection to references by the defense.

United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998) : The Court held that a defendant convicted for drug offenses had waived his right to appeal from an adverse *in limine* ruling when he voluntarily introduced the conviction on direct examination.

United States v. Saunders, 359 F.3d 874 (7th Cir. 2004) : In a felon firearm prosecution, the parties stipulated that the defendant was a felon. The Judge, relying on *Rule 403*, held nonetheless that if the defendant took the stand, he could be impeached with his prior murder conviction. The defendant took the stand and his counsel brought up the murder conviction on direct examination. On appeal, the defendant argued that the Judge erred in relying on *Rule 403*, as the admissibility of a prior conviction for impeachment is governed by *Rule 609(a)*. But the Court, relying on *Ohler v. United States, 529 U.S. 753 (2000)* , held that the defendant had not preserved the right to appeal from the *in limine* ruling, because his counsel brought out the conviction. The defendant argued that *Ohler* was distinguishable because the

Judge in this case relied on the wrong rule of evidence in the *in limine* ruling, but the Court found this to be a distinction without a difference.

Jones v. Collier, 762 F.2d 71 (8th Cir. 1985) : The Court ruled that a plaintiff in a civil rights action waived any objection to impeachment with a prior conviction by presenting evidence of the conviction on direct examination following an unsuccessful motion *in limine*.

United States v. Williams, 939 F.2d 721 (9th Cir. 1991) : The Court held that a defendant convicted for possession of cocaine had waived the right to appeal from an adverse *in limine* ruling by bringing out the fact of his prior conviction during direct examination. By the defendant's strategic choice at trial, the Trial Judge and the government were deprived of a last chance to reverse their prestated positions.

[ii] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Generally

Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999) (en banc): In a § 1983 action by a detainee against corrections officers, the plaintiff made an *in limine* motion to exclude any reference to the fact that he had been convicted of murdering a police officer. The Judge ruled that the jury could hear the date, time, conviction, and employment of the victim as impeachment if the plaintiff testified. Throughout the trial, beginning with his opening statement, defense counsel referred to the plaintiff as a "cop killer" and never missed an opportunity to remind the jury that the plaintiff was a despicable person who had committed a despicable crime. The plaintiff did not object to this line of argument, but contended on appeal of a defense judgment that the motion *in limine* should have been granted. The Court *en banc* overruled *United States v. York, 933 F.2d 1343 (7th Cir. 1991)* , and held that a party does not waive a claim of error in a definitive *in limine* ruling by failing to renew the objection at trial. Treating definitive rulings as sufficient to preserve an appeal serves the purpose of the objection requirement -- ensuring focused consideration of the problem at the time when the decision is best made -- while avoiding a trap for unwary counsel and permitting adjustment of trial strategy in light of the Judge's decisions. However, the plaintiff in this case had received a ruling only on the question of whether the victim's occupation could be mentioned; he did not receive any ruling on how that fact could be used. Therefore, the Court held that because he made no objections, he was entitled only to plain error review of the defendant's inflammatory references. The Court found there was no plain error, and that the ruling denying the *in limine* motion was erroneous, but harmless. Two Judges dissented in part on the ground that the defendant's use of the victim identity evidence was plain error and that the error in the *in limine* ruling was not harmless.

Coursen v. A.H. Robins Co., 764 F.2d 1329 (9th Cir. 1985) : In a suit for Dalkon Shield injuries, two of the plaintiffs took involuntary dismissals with prejudice following an *in limine* ruling that evidence of their sexual history would be admitted. The Court held that a litigant cannot make a nonfinal order appealable by taking a voluntary nonsuit. It vacated the judgment of dismissal, however, and remanded the case because it was possible that the Judge as well as the litigants assumed that the dismissals were proper vehicles for obtaining review of the *in limine* ruling.

United States v. Harrison, 296 F.3d 994 (10th Cir. 2002) : Affirming convictions for sexual abuse of a child, the Court upheld the admission, under *Rule 807*, of a statement by the victim to an FBI agent. The Trial Judge had made an *in limine* ruling that the statement would be admitted provided that the prosecution proved the credentials and methods of the agent, and had made clear to defense counsel that he did not wish to hear repetitive argument on the matter. Accordingly, the Court held that the Judge made a definitive ruling, so under the 2000 amendment to *Rule 103*, the defendant was not required to renew his objection when the evidence was admitted at trial. On the question of the scope of the record to be reviewed in assessing the ruling, the Court determined that, where an objecting party does not renew an objection at trial, the objecting party is limited to relying on the evidence and argument made *in limine*. It reasoned,

however, that a ruling admitting evidence could be affirmed based on consideration of all trial evidence, because "[t]he cause of justice is unlikely to be furthered by reversing a judgment because a ruling was not supported by sufficient evidence when made but was so supported by the time of the verdict."

[iii] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Renewing Objections

[A] Rule 103(a) -- Civil Cases

Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) : The Court held that an employer waived any objection to a plaintiff's statistical proof in an age discrimination case by failing to object to an expert's testimony during trial. The Trial Judge had ruled *in limine* that the expert could testify if the employee laid a proper foundation, and the defendant failed to object after the foundation evidence was offered. Although the Court recognized that a ruling on an *in limine* motion may be definitive enough to excuse omission of an objection at trial, it stated that it was unclear in this case whether the defendant continued to object to statistical evidence and on what grounds. The Court added that "the importance of a contemporaneous objection is at its zenith in a situation such as this, where defendant's *in limine* motion invoked *Rule 403*."

Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996) : In a breach of contract action by an art dealer against an artist's estate, the Court held that the estate had not waived the Dead Man's Statute by failing to object when testimony given by the dealer at a former trial was introduced. The Judge's *in limine* ruling that the former testimony would be admissible was explicit and definitive, and the issue was essentially a legal one, not dependent on the character of other evidence admitted at trial.

American Home Assur. Co. v. Sunshine Supermarket, 753 F.2d 321 (3d Cir. 1985) : In an action on a fire insurance policy, the insurance company had moved *in limine* to exclude evidence that the insured was not prosecuted for arson, but the Trial Judge had ruled that the evidence could be admitted if the company relied on opinions by local officials that the insured was responsible for the fire. Holding that the company preserved for appeal its claim that admission of the evidence was error, the Court reasoned that if an evidence issue is fully briefed and the Judge is able and willing to make a definitive pretrial ruling, there is no necessity for a litigant to repeat during the trial an objection to evidence that the Judge has indicated will be admitted.

Elsayed Mukhtar v. California State Univ., Hayward, 299 F.3d 1053 (9th Cir. 2002) : The Court vacated a judgment in favor of a professor who alleged racial discrimination in the decision to deny him tenure, holding that the defendant had properly preserved an objection to the admissibility of the testimony of the plaintiff's expert by moving *in limine* to exclude it. It was not necessary under the circumstances to renew the objection at trial, since under the 2000 amendment to *Rule 103*, contemporaneous objection is not required where the Judge definitively rules on a motion *in limine*. The Court emphasized that "[h]ere, the district court made clear at the outset of the trial that it was admitting Dr. Wellman's testimony subject to the limitation that he not offer a legal conclusion," and "Dr. Wellman's testimony stayed within these parameters." Thus, "because he did not violate the district court's *in limine* ruling, no additional objection was necessary." In *Palmerin v. City of Riverside, 794 F.2d 1409 (9th Cir. 1986)* , an arrestee's §1983 action against officers for using excessive force, the Court held that where the Judge makes an explicit and definitive ruling on an *in limine* motion, an objection need not be renewed.

The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002) : A retail mall tenant brought an action for violation of § 1981 and for interference with prospective advantage, after its lease was not renewed. The defendants' motions *in limine* to exclude testimony by the plaintiffs' expert witness and some comparative

evidence were denied, with the issues reserved for trial. Affirming much of a judgment for the plaintiffs, the Court held that the defendants waived any error by failing to object when the evidence identified in the motions was introduced at trial. In *National Environmental Serv. v. Ronan Eng'g, 256 F.3d 995 (10th Cir. 2001)* , a breach of contract action, the Court held that the plaintiff adequately preserved a claim of error after the Trial Judge ruled *in limine* that a defense witness would be allowed to testify. This ruling was definitive, and was not dependent on balancing of interests or on subsequent developments at trial. Moreover, the plaintiff's counsel raised the issue again shortly before the testimony was to be offered. Under these circumstances, there was no need for the plaintiff to renew its objection to the testimony at the time it was offered. In *Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996)* , the Court held that the defendants in a product liability action had not waived their objection to similar accident evidence by failing to object at trial. The parties had argued the question in their trial briefs, before the defendants' opening, and again before their cross-examination; as presented by the plaintiff, the question involved a general legal issue capable of decision before trial; and the Judge addressed the issue definitively and in detail.

[B] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Renewing Objections -- Criminal Cases

United States v. Aleskerova, 300 F.3d 286 (2d Cir. 2002) : The defendant, convicted for possession in 1997 of stolen artworks from an Azerbaijan museum, challenged the admission of evidence that in 1996 she was stopped by customs officials at an airport in Azerbaijan and was found with other artwork that was in a museum's inventory but missing. The Trial Judge ruled that the evidence would be admitted as probative of the defendant's intent and plan. On appeal, the defendant complained that there was insufficient evidence that the items found in the 1996 stop were stolen. The Court held that the defendant could obtain only plain error review, because she had not renewed an *in limine* motion at trial. It reasoned that the Judge will not normally be aware of any deficiencies in foundation evidence in ruling on an *in limine* motion but only after the evidence is presented at trial. Thus, the *in limine* ruling was conditioned on the government's presenting evidence at trial that the artwork was stolen, and if it did not do so, the defendant was obliged to object then. Affirming, the Court found no plain error.

Government of Virgin Islands v. Joseph, 964 F.2d 1380 (3d Cir. 1992) : The Court held that the defendant's failure to object at trial to hearsay evidence did not constitute waiver where the issue had been raised by a pretrial motion with supporting memorandum, had been considered at a hearing during the trial at which both counsel were given a chance to advocate their positions, and had been the subject of a definitive ruling made with no suggestion that it would be reconsidered at trial.

United States v. Wilson, 118 F.3d 228 (4th Cir. 1997) : Affirming a lawyer's conviction for obstructing administration of the revenue laws, the Court held that a pretrial motion to strike evidence as irrelevant was sufficient for review although no objection was made when the evidence was offered at trial. The pretrial motion clearly identified the ruling sought and the Trial Judge made the requested ruling. By contrast, in *United States v. Ellis, 121 F.3d 908 (4th Cir. 1997)* , the Trial Judge had deferred a decision on the defendant's motion *in limine* regarding certain statements, and the defendant had not objected when one of the statements was offered as a prior consistent statement to rehabilitate an impeached prosecution witness. The Court held that under those circumstances admission of the statement was reviewable only for plain error.

United States v. Brawner, 173 F.3d 966 (6th Cir. 1999) : The defendant, charged with fraud in a telemarketing scheme, moved *in limine* to exclude expert testimony on common practices in fraudulent telemarketing. After the motion was denied, he did not object at trial when the expert testified. The Court held that the defendant had not waived his objection, since the issue had been thoroughly explored during the hearing on the *in limine* motion and the Trial Judge's ruling was explicit and definitive. In such circumstances, treating the claim of error as preserved is consistent

with the rules and decisions encouraging or requiring pretrial procedures in order to narrow the issues remaining for trial and to minimize disruptions at trial.

United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993) : The Court held that an objection to a conditional *in limine* ruling admitting the defendant's State Court guilty plea was not preserved when no objection was made at trial.

United States v. Archdale, 229 F.3d 861 (9th Cir. 2000) : A defendant charged with child sexual abuse moved *in limine* to exclude a hearsay statement from the alleged victim. The motion was overruled, and no objection was made when the statement was introduced at trial. The Court held that the *in limine* motion was insufficient to preserve the objection, because there was no "explicit and definitive ruling by the district court that the evidence was admissible." The Court reviewed for plain error, and found none. In *United States v. Palmer, 3 F.3d 300 (9th Cir. 1993)* , the Court affirmed a conviction for manufacturing marijuana plants, holding it was error (but harmless) to admit the defendant's postarraignment statement to law enforcement officials. Although the defendant had objected prior to trial to admission of the statement, he did not renew the objection at trial. The Court held that "requiring a contemporaneous objection immediately after the district court has denied a pretrial objection and motion on the same grounds would have the perverse result of making form the master of substance." In *United States v. Lui*, n19 a defendant charged with importation and possession of heroin filed a motion *in limine* to exclude drug courier profile testimony; the motion was denied, and he did not object when the testimony was offered at trial. The Court reviewed admission of the testimony for abuse of discretion rather than plain error, because when the motion was denied as frivolous and sanctions were threatened, the defendant should not be penalized for failing to raise the objection again.

United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999) : In one of the prosecutions for bombing the Federal Building in Oklahoma City, the defendant moved *in limine* to exclude the testimony of a forensic explosives expert. The Trial Judge stated that defense objections regarding the expert's testimony would be considered "during the course of trial." The expert testified at trial without objection. Under these circumstances, the Court held that the *in limine* motion did not preserve the defendant's right to appeal. Because the Judge reserved decision on the motion, the defendant was obligated to renew his objection at trial. The Court reviewed for plain error and found none. Although the Court affirmed drug and firearms convictions in *United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993)* , it held that the defendant was not required to renew his objection to an *in limine* ruling that a prior conviction for a food stamp offense could be admitted as a "dishonesty" crime for impeachment if he testified. Defense counsel made no objection to the introduction of the conviction during trial. While ruling that an *in limine* ruling could be appealed if (1) the issue had been adequately presented to the Trial Judge, (2) the issue had been of a type that can be finally decided in a pretrial hearing, and (3) the ruling was definitive, the Court stressed that "[p]rudent counsel will renew objections at trial" rather than take the risk that an Appellate Court would find one of the requirements unsatisfied.

[iv] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Tentative or Reserved Rulings

United States v. Polishan, 336 F.3d 234 (3d Cir. 2003) : The Court affirmed the conspiracy, securities fraud, and related convictions of a corporate officer, finding no plain error in the admission of testimony by the defendant's co-workers that described the defendant's role in the company. The Court noted that the defendant's pretrial motion *in limine* adequately explained his objection that lay opinion testimony about the defendant's knowledge should be excluded, but found that the Trial Judge never made a definitive ruling on the motion. The pretrial order explicitly reserved ruling on the issue until "the evidence has been presented within its context at trial." Thus, Polishan's failure to make contemporaneous trial objections left him with only plain error review.

Hidalgo v. Fagen, Inc., 206 F.3d 1013 (10th Cir. 2000) : Affirming a judgment for a contractor in a suit by a meat

packing plant employee who was injured while cleaning a machine built by the contractor, the Court held that the plaintiff waived any objection to expert testimony for the defendant about compliance with OSHA standards. The plaintiff had filed a motion *in limine*, the Trial Judge declined to rule on the motion in advance of the issue arising at trial, and the plaintiff failed to renew his objections at trial. In one of the prosecutions for bombing the Federal Building in Oklahoma City, *United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999)* , the defendant moved *in limine* to exclude the testimony of a forensic explosives expert. The Trial Judge stated that defense objections regarding the expert's testimony would be considered "during the course of trial." The expert testified at trial without objection. Under these circumstances, the Court held that the *in limine* motion did not preserve the defendant's right to appeal. Because the Judge reserved decision on the motion, the defendant was obligated to renew his objection at trial. The Court found reviewed for plain error and found none.

[g] Rule 103(a) -- *In Limine* Rulings Excluding Evidence -- Appealability

[i] Rule 103(a) -- Civil Cases

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997) : In an employment discrimination case, the plaintiffs made an *in limine* motion to admit certain statements by the defendant's supervisors. The Trial Court stated that it was making a "tentative" ruling excluding the evidence, "and then we will see where we are as we begin with the different aspects of the case." Seeing no reason to distinguish between objections and offers of proof with respect to renewal of admissibility questions that were the subject of *in limine* hearings, the Court held that under these circumstances the plaintiff was obligated to renew the issue by making an offer of proof at trial. The Court rejected the plaintiffs' argument that the *in limine* ruling was in fact definitive and thus a sufficient ground for appeal, noting that although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done." The Court did observe that it was "hard pressed" to see the advantages of an *in limine* hearing that produces only tentative rulings, because "the game would hardly be worth the candle." The Court reviewed for plain error and found none.

McQuaig v. McCoy, 806 F.2d 1298 (5th Cir. 1987) : In a false arrest and imprisonment action, the plaintiffs moved at a pretrial conference for admission of the entire internal affairs investigation report. The Trial Judge ruled that the report could be used for a limited purpose only, and the plaintiffs twice objected to the ruling during trial. Although the plaintiffs made no formal offer of proof, the Court held they had preserved the issue for appeal by "go[ing] into such detail (six pages in the record) as to the substance of the evidence and why it should be admitted" and later filing the actual investigation report as part of the record. In *Garner v. Santoro*, n20 the Court held that a manufacturer was not required to make an offer of proof at trial on a government contractor defense, since the Trial Judge had precluded the defense well in advance of trial.

Tennison v. Circus Circus Enters., Inc., 244 F.3d 684 (9th Cir. 2001) : The Court affirmed a judgment for the defendant employer in a sexual harassment action brought by casino employees, finding that the plaintiffs had not preserved error after the defendant's motion *in limine* to exclude evidence of pre-1994 complaints was granted because the earlier events fell outside the statute of limitations. The Trial Judge had made it clear that the ruling was tentative, so the plaintiffs' failure to offer the evidence at trial waived any error.

Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186 (10th Cir. 1997) : The Court held in a contract case that the plaintiff could appeal, without having made an offer of proof at trial, the grant of an *in limine* motion based on Rules 402 and 403 to exclude evidence. The plaintiff had made clear the evidence it wished to admit and the grounds of admissibility, the issue was a discrete one that could be presented adequately and ruled upon before trial, and the issue was definitively decided by the order granting the motion.

[ii] Rule 103(a) -- *In Limine* Rulings Excluding Evidence -- Appealability -- Criminal Cases

United States v. Rivera-Figueroa, 149 F.3d 1 (1st Cir. 1998) : Defendants in a fatal carjacking case moved *in limine* to suppress the victim's dying declaration, and the Judge granted the motion on implicit *Rule 403* grounds. At trial, one of the defendants who was not named in the statement sought to introduce it as exculpatory evidence; he had been represented at the suppression hearing and had raised no objection to the motion. The Court held that exclusion of the statement could be reviewed only under the plain error standard, since the defendant had waived his objection by not making it at the suppression hearing. Had the objection been timely made, the Judge would have faced a different set of arguments for admissibility, a conflict in position among the codefendants, and the possibility of a severance if the evidence were admissible as to one codefendant but inadmissible as to the others. The Court noted that a motion to suppress evidence effectively advances the time at which a party who wants the evidence admitted has to make that argument, since rulings *in limine* are relied upon by the Judge and the parties in preparing for trial.

United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001) : The Trial Judge in an arson prosecution granted a motion *in limine* precluding the defense from discussing the mental health of a witness unless it could show that the condition existed at the time of the events relevant to the case. During the trial the Judge reviewed the witness' mental health records *in camera*, determined that they did not encompass the relevant time period, sealed the records, and stated that they would be subject to appellate review. Although the defendants did not make an offer of proof regarding their proposed impeachment based on the mental health records, the Court held that a formal offer of proof was not required. The Judge was adequately informed of the reasons for which counsel wished to impeach the witness, and the issue was sufficiently preserved for appeal.

United States v. Vest, 116 F.3d 1179 (7th Cir. 1997) : A doctor was charged with fraudulently subjecting his patients to unnecessary medical tests. The Court held that the defendant failed to preserve his claim that testimony from patients who were happy with his medical care was erroneously excluded. The Trial Judge had ruled *in limine* that the testimony could not be admitted, but the ruling allowed Vest to seek leave at trial to call the witnesses should their testimony turn out to be relevant. Since Vest never sought such leave at trial, it was "too late to reopen the issue now on appeal."

United States v. Echols, 346 F.3d 818 (8th Cir. 2003) : The Court affirmed robbery and firearm convictions, holding that the defendant failed to preserve a claim of error with respect to a pretrial ruling that the defendant could not cross-examine the robbery victim regarding his illegal alien status. The Court noted that the Judge expressly invited the defendant to raise his objection during trial. Therefore the *in limine* objection was not sufficient to preserve the claim of error. In *United States v. Kirkie, 261 F.3d 761 (8th Cir. 2001)* , a sexual abuse prosecution, the defendant claimed that during a telephone conversation between the victim and her cousin, the cousin had told her about the cousin's experience of making false accusations of sexual abuse against her father, resulting in his incarceration, and had explained certain aspects of sexual intercourse to the eleven-year-old victim. At a pretrial conference the Judge ruled that the victim could be questioned as to the source of her knowledge of sexual intercourse and the nature and implications of allegations of sexual abuse, but that no hearing was necessary at that time regarding what the cousin had allegedly said. At trial the defendant was not permitted, on the ground that it was collateral impeachment, to elicit what the cousin had allegedly said about her own similar situation. Because the defendant did not make, or ask to make, an offer of proof when the cousin's statements were excluded at trial, the Court held that the issue was not properly preserved for appeal.

[h] Rule 103(a) -- Objections

[i] Rule 103(a) -- Acquiescence in Ruling

United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990) : The defendant in a crack possession case objected on grounds of Rules 404(b) and 403 to other crimes evidence, but the Trial Judge admitted the evidence. During a conference on limiting instructions after the defendant rested, the prosecutor represented that the defendant was no longer objecting on *Rule 404(b)* grounds and defense counsel did not protest, nor did he request any limiting instruction. Affirming the conviction, the Court held that the *Rule 404(b)* objection had been waived by acquiescence, but the *Rule 403* objection to the evidence was preserved, as the prosecutor had not mentioned it, and the defense lawyer, by making the strategic choice not to ask for a limiting instruction, did not thereby waive his remaining objection to admission of the evidence in the first instance.

United States v. Ramirez-Velasquez, 322 F.3d 868 (5th Cir. 2003) : The Court affirmed two defendants' marijuana-related convictions. It held that one defendant waived any objection to the admission of the other defendant's confession when defense counsel agreed to its admission: "Having waived his objection to admission of the statement, Villarreal cannot now argue that its admission was error."

United States v. Pittman, 319 F.3d 1010 (7th Cir. 2003) : The Court affirmed a conviction for making a false statement to a federally insured bank, holding that the defendant waived any objection to *Rule 404(b)* evidence when defense counsel affirmatively represented that he had no objection to the evidence.

[ii] Rule 103(a) -- Objections -- Adequate in Context

United States v. Whitaker, 127 F.3d 595 (7th Cir. 1997) : The Court affirmed a defendant's conviction for marijuana conspiracy, finding no error in admitting printouts from a coconspirator's computer. Although defense counsel did not use the specific word "authentication," the Court considered the challenge because it concluded that the defendant's lawyer adequately preserved an authentication objection to the printouts. The Court reasoned that "[c]ounsel's questions about the accuracy of the retrieval of the records were sufficient to preserve his objection as to authenticity, and counsel clearly stated his objection as to foundation."

[iii] Rule 103(a) -- Objections -- Continuing Objections

United States v. Fortenberry, 919 F.2d 923 (5th Cir. 1990) , *denying reh'g en banc to 914 F.2d 671 (5th Cir. 1990)* : The defendant, charged with conspiracy to commit arson and other offenses, moved *in limine* to exclude evidence of uncharged crimes; at a hearing on the motion, the Trial Judge permitted defense counsel to enter a continuing objection to the testimony and instructed that objecting further at trial was unnecessary. The Court held that the continuing objection preserved error for appeal under the Rule, but noted its displeasure at the procedure, which precludes a reevaluation of admissibility in context.

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) : Reviewing one of the prosecutions for bombing the Oklahoma City Federal Building, the Court expressed "serious doubts" whether a continuing objection was proper, noting that continuing objections are generally inappropriate for preserving error on appeal under *Rule 403*, because the balancing required under that Rule is complex, contextual, and fact-intensive. This case is discussed in the Editorial Explanatory Comment, § 103.02[10], *supra* .

[iv] Rule 103(a) -- Objections -- Evidentiary Objections Insufficient To Preserve Constitutional Claims

United States v. Logan, 419 F.3d 172 (2d Cir. 2005) : Affirming a conviction for conspiracy to commit arson, the Court noted that the defendant's hearsay objection to evidence at trial did not preserve any *Confrontation Clause* objection for appellate review. The Court found no plain error in the admission of statements made by coconspirators to investigating officers. In *United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003)* , the prosecution of a drug conspiracy, the government offered the testimony of a DEA agent about the meaning of various "code words." The Court concluded that "in this case the expert was repeating hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay." The Court held, however, that when the defendants objected on hearsay grounds to the agent's testimony, they did not preserve a *Confrontation Clause* objection. Thus, the constitutional objection was reviewed only for plain error, and none was found.

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) : Appealing convictions of a drug trafficking conspiracy, the defendants argued that admission of certain evidence violated the *Confrontation Clause*, but the Court applied only plain error review because the defendants had asserted only hearsay objections to the evidence at trial.

[v] Rule 103(a) -- Objections -- Failure to Object

Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995) : In an action for damages resulting from alleged sexual assaults during her childhood, the plaintiff called an expert in repressed memories. The defendant did not object. On appeal from denial of relief under *Fed. R. Civ. P. 60(b)*, the defendant argued that his failure to object was not dispositive. He read *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (discussed in the Editorial Explanatory Comment to *Rule 702*) to require the Trial Judge to make a *sua sponte* ruling on the admissibility of all expert testimony. The Court stated that while *Daubert* does instruct Judges to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection, it does not require a Judge to *sua sponte* hold a hearing and make explicit on-the-record findings. In the absence of an explicit objection, "we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony." The Court found that the admission of the expert testimony was not a "mistake" within the meaning of Rule 60(b). In *United States v. Lopez*, n21 the Court said that because no objection was made to conspirators' statements, the Trial Judge was not required to make a finding that a conspiracy existed and that the declarants and the defendant were part of it before admitting the statements.

United States v. Sandini, 803 F.2d 123 (3d Cir. 1986) : In a marijuana conspiracy case, the Court held that a defendant could not argue on appeal that evidence should have been excluded under Rules 403 and 404(b), since neither of these Rules was relied upon in the Trial Court.

United States v. Mejia, 844 F.2d 209 (5th Cir. 1988) : The Court declined to consider on appeal an objection to a document describing a company's business, since no hearsay objection was raised below. In *United States v. Vesich, 724 F.2d 451 (5th Cir. 1984)* , the Court held that the failure to object to other act evidence barred review on appeal.

Helmniski v. Ayerst Labs., 766 F.2d 208 (6th Cir. 1985) : Affirming a judgment for a manufacturer in a product liability action, the Court rejected an argument that a failure to object to comments by the Trial Judge and opposing counsel should be excused because the plaintiff's counsel did not want to call attention to the comments by objecting. The Court reasoned that "[w]hile under limited circumstances an objection might only exacerbate an error in admission of testimony, ... counsel is generally not excused from bringing an objection to the court's attention," since "[a]ny other general rule would eviscerate *Rule 103(a)(1)*." See also *United States v. Brady, 595 F.2d 359 (6th Cir. 1979)* (failure to object to scientific evidence).

United States v. Pallais, 921 F.2d 684 (7th Cir. 1990) : In a drug conspiracy prosecution, a witness was asked whether he had been told who would be flying a plane, the Trial Judge overruled a hearsay objection, and the witness then volunteered the names without objection. The government argued that the prosecutor should not be blamed because a witness blurts out an answer to a question that has not been asked, but the Court rejected the argument as shallow casuistry. Since it was clear to the witness and the defense counsel that the identity of the pilots was sought, the hearsay objection was timely and preserved the point for appeal. Error in admitting the evidence was harmless, however.

Owen v. Patton, 925 F.2d 1111 (8th Cir. 1991) : During the trial of a personal injury action against a tavern owner whose employee allegedly committed a battery, defense counsel repeatedly brought out that the plaintiff's companions were now incarcerated, despite instructions to end the line of inquiry. Because the plaintiff's counsel did not object, move to strike, request special instructions, or move for a mistrial, however, the Trial Judge was not called upon to make a ruling that could result in error for failure to accommodate the request. Although the Court did not grant a new trial, it did exercise its discretionary authority to deny costs to the prevailing party. In *Terrell v. Poland*, n22 the Court affirmed a judgment for an insurance company that proved arson in a suit on a fire insurance policy. The Court found that, by failing to object when it was offered, the plaintiffs waived their hearsay objection to a written statement of a person who stated that she saw the plaintiffs move furniture from their nightclub two weeks before the fire. A motion to strike at the close of the evidence came too late.

ESCO Corp. v. United States, 750 F.2d 1466 (9th Cir. 1985) : The Court held that a taxpayer who failed to object to the admission of letters as settlement negotiations could not raise the objection for the first time on appeal.

Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985) : In a civil rights action in which the plaintiffs claimed that the defendants had unlawfully arrested them, the Court found that *Rule 403* cannot be relied upon on appeal if objections under the Rule are not made at trial. Parties failing to object may only rely on the doctrine of plain error, which the Court did not find in the instant case. See also *Collins v. Seaboard Coast Line R.R., 675 F.2d 1185 (11th Cir. 1982)* (railroad's failure to object to testimony that one of its employees made a racially derogatory remark about the victim and to evidence of accidents occurring after the one giving rise to the instant case preserved no issue for appeal).

[vi] Rule 103(a) -- Objections -- General Relevancy Objections

United States v. Garcia-Torres, 280 F.3d 1 (1st Cir. 2002) : Reversing a drug trafficking conviction on other grounds, the Court noted that the defendant had objected to a coconspirator's statement only on relevancy grounds, so only plain error review was available regarding a hearsay objection. There was no plain error. In *Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (1st Cir. 1992)* , the Court reversed a judgment for the defendant in a product liability action arising out of a motorcycle accident, holding that an objection stated to be on grounds of Rules 402, irrelevancy, and 403, prejudice, was sufficient to preserve error in admission of evidence that the plaintiff had been convicted of speeding. The plaintiff specifically raised *Rule 404(b)* in a later request for an instruction to the jury; given the close relation between Rules 404(b) and 403, under the circumstances the objections were sufficiently timely and specific. In a FELA action, *Bryant v. Consolidated Rail Corp.*, n23 the Court held that a relevance objection to a medical report admitted during cross-examination of the plaintiff was insufficient to preserve an objection that the report was improperly used as character evidence in violation of *Rule 404*.

Failla v. City of Passaic, 146 F.3d 149 (3d Cir. 1998) : In a suit brought by a police officer who claimed that his employer did not properly accommodate his disability (a back problem), the plaintiff proffered evidence of a worker's compensation award compensating him for his back injury. The defendants objected on the ground that the award was

irrelevant, but the Trial Judge held that it was relevant because it tended to prove that the plaintiff did have a back problem. On appeal, the defendants argued that the worker's compensation award should have been excluded under *Rule 403*. Since that specific objection was not raised at trial, the Court reviewed for plain error, and found none. And because the test for relevance under *Rule 401* is so permissive, the Court found no error in the Trial Judge's determination that the award was relevant.

United States v. Williams, 132 F.3d 1055 (5th Cir. 1998) : Appealing a conviction for transporting illegal aliens, the defendant argued that evidence of his prior acts of transporting illegal aliens was improperly admitted. On appeal the defendant relied on *Rule 404(b)*, but at trial the defendant had argued only that the uncharged misconduct evidence was irrelevant. Because the defendant failed to assert his *Rule 404(b)* objection at trial, the Court reviewed only for plain error, and found none.

United States v. Price, 418 F.3d 771 (7th Cir. 2005) : The Court held that a general objection to relevance was not sufficiently specific to preserve a claim of error under Rules 403 or 404(b). In *United States v. Spiller, 261 F.3d 683 (7th Cir. 2001)* , the Court affirmed a conviction for distributing crack cocaine, noting (although it was unnecessary to decide) that an objection of "irrelevant, immaterial and uncorroborated" was probably sufficient to preserve a hearsay issue for appeal. Although much hearsay is relevant and material, "[l]ack of reliability and corroboration go to the heart of the hearsay objection." In *United States v. Rhodes*, n24 a narcotics prosecution, the defendant objected to evidence that he had carried a pellet gun. On appeal, he argued that this evidence was inadmissible propensity evidence under *Rule 404(b)* and that it should have been excluded as unduly prejudicial under *Rule 403*. The Court found, however, that the objection at trial was solely on the ground that the pellet gun evidence was "irrelevant" to drug activity, so it limited its abuse of discretion review to whether the Trial Judge erred in finding the pellet gun evidence relevant, and it reviewed the claims under Rules 404(b) and 403 only for plain error. In *United States v. Wilson*, n25 the defendant objected on grounds of relevance to introduction of a gun at a trial for a cocaine distribution conspiracy. Affirming, the Court held that the defendant's argument on appeal that the prejudicial effect of the gun substantially outweighed its probative value had not been preserved by the objection, which alerted the Trial Judge only to problems under Rules 401 and 402, not *Rule 403*. See also *United States v. Field* n26(objection on grounds of relevancy and remoteness does not preserve *Rule 404(b)* objection).

United States v. Johnson, 722 F.2d 407 (8th Cir. 1983) : A defendant convicted as a felon possessing a firearm had objected on relevance grounds to admission of a BATF form that indicated that the gun had been shipped interstate. The Court ruled that a hearsay objection had been waived and rejected a claim that receipt of the form was plain error.

Goulah v. Ford Motor Co., 118 F.3d 1478 (11th Cir. 1997) : Appealing a judgment for the defendant in a product liability action arising from the crash of a sport utility vehicle, the plaintiffs argued that the Trial Court erroneously admitted a report from the National Highway Safety Traffic Administration. The plaintiffs argued that the report was not sufficiently trustworthy to qualify under *Rule 803(8)(C)*, and that the report should also have been excluded under *Rule 403*. The Court refused to entertain these arguments on appeal, however, because the plaintiffs objected at trial only on relevance grounds. Such a general objection was "totally inadequate to preserve counsel's *Rule 803(8)(C)* and *Rule 403* objections." In *Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997)* , an action brought by the plaintiff against the defendant for infecting her with genital herpes, the Trial Judge denied her objections under *Rule 402* to evidence of her breast augmentation surgery. The Court held that the failure to object under *Rule 412* precluded her from raising that ground of inadmissibility on appeal.

[vii] Rule 103(a) -- Objections -- Incorrect Specific Objections

United States v. Nnanyererugo, 39 F.3d 1205 (D.C. Cir. 1994) : The Court held in a bank fraud prosecution that a hearsay objection failed to preserve for appeal a claim that a witness testifying to the bank's insured status was not competent because he lacked personal knowledge.

Brookover v. Mary Hitchcock Mem. Hosp., 893 F.2d 411 (1st Cir. 1990) : In a medical malpractice action, the plaintiff introduced evidence that after the patient's fall the nurses in the defendant hospital said that he should have been restrained. The Court held that the evidence should not have been admitted as an agent's admission because there was no proof the nurses were employees of the hospital, but that the defendant had waived the objection by asserting only the declarants' lack of personal knowledge of the circumstances. See also *United States v. Barrett, 766 F.2d 609 (1st Cir. 1985)* (changing grounds for objection from *Rule 403* to *Rule 608(b)* not permitted on appeal).

United States v. Mennuti, 679 F.2d 1032 (2d Cir. 1982) : In a prosecution for conspiracy to destroy residences in order to obtain insurance money, the Court found that a defendant could not complain that the Trial Judge's ruling -- that if the defendant testified, he could be asked on cross-examination about another act -- should have been barred by *Rule 608*, where his only objection at trial was based on *Rule 403*.

United States v. Guerrero, 169 F.3d 933 (5th Cir. 1999) : At the defendant's trial on bank robbery charges, he objected to evidence of other bank robberies, citing Rules 402 and 403. On appeal, he relied on *Rule 404(b)* to argue that the Trial Judge erred in admitting the uncharged misconduct. The Court reviewed the *Rule 404(b)* question for plain error only, and found none.

United States v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004) : The Court affirmed the revocation of the defendant's citizenship on the ground that he illegally procured his citizenship after World War II. One of the important pieces of evidence at trial was a German identification card identifying the defendant as a prison guard at a Polish concentration camp. At trial the defendant objected to the document as improperly authenticated, and on appeal he urged that it was double hearsay. Because the defendant did not raise his hearsay objection at trial, the Court held that the double hearsay objection would be reviewed only for plain error, and it found none.

United States v. Campos, 217 F.3d 707 (9th Cir. 2000) : The defendant, arrested after she crossed over from Tijuana in a van that had a false compartment full of marijuana, claimed that the van was a friend's and she did not know it contained marijuana. Affirming her conviction, the Court held (2-1) that there was no plain error in permitting a customs agent to testify that in his opinion an organization trafficking in marijuana would not entrust 151 pounds of the drug to a courier unless she knew what she was transporting. The defendant claimed on appeal that this was improper expert testimony on the defendant's mental state, but the majority observed that the defendant did not object under *Rule 704(b)* and declined to find plain error. The defendant's trial objection to the testimony on the ground that it was impermissible "drug courier profile" evidence was seen as implicating *Rule 403* rather than *Rule 704(b)*. The dissenting Judge thought it was plain error to admit the testimony because it clearly amounted to an opinion on the mental state of the defendant. In *Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999)* , the defendants argued on appeal that a certain statement was improperly admitted because it was made in the course of settlement negotiations and was therefore protected under *Rule 408*. At trial, however, the defendants argued that the statement was inadmissible because it was irrelevant and hearsay. The Court held that by failing to make a timely and specific objection on the basis of *Rule 408*, the defendants waived their right to contest the admissibility of the statement on that ground. Reviewing the admission of drug courier profile testimony in *United States v. Gomez-Norena*, n27 the Court noted that the defendant had not preserved the *Rule 403* objection being asserted on appeal by his trial objections on *Rule 404(b)* and hearsay grounds.

United States v. Ramirez, 348 F.3d 1175 (10th Cir. 2003) : Affirming methamphetamine and cocaine convictions, the Court rejected the defendant's argument that an undercover police officer was erroneously permitted to testify as an expert regarding the contents of wiretapped phone calls. Because the objection was made at trial was for "speculation," the Court reviewed the admission of the testimony only for plain error. In *K-B Trucking Co. v. Riss Int'l Co., 763 F.2d 1148 (10th Cir. 1985)* , an action for fraudulent misrepresentation, the Court held that the defendant's objection to an exhibit on the ground of foundation was insufficient to preserve a *Rule 403* claim.

[viii] Rule 103(a) -- Objections -- Insufficiently Specific Objections

Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003) : In a sexual harassment lawsuit, the Court ruled that there was no plain error in the admission of testimony by a female police officer, who also experienced harassment, as to her opinion about the plaintiff's claims. Although the defendant objected to the witness's testimony regarding her own harassment, the Court found that the objection was "only a generic objection" that was unsound and properly rejected, and that no objection on the ground of improper opinion testimony by a lay witness had been properly preserved. In *United States v. Diaz, 300 F.3d 66 (1st Cir. 2002)* , the Court affirmed an arson conviction, holding that the defendant's objections at trial to expert testimony failed to advise the Trial Judge that he was objecting to the reliability of the methods employed by those experts. The defendant's pretrial objections related solely to the experts' qualifications; at trial, the defendant made generic references to "the *Daubert* analysis" but the Judge could have reasonably understood this to refer back to the objections as to qualifications. The Court reviewed for plain error and found none.

United States v. Williams, 264 F.3d 561 (5th Cir. 2001) : The Court affirmed the conviction of a former city councilman for conspiracy to commit extortion and solicitation of bribes. Although the government conceded that the Trial Judge erroneously admitted the prior testimony of a witness as prior consistent statements, the Court noted that the defendant's objection at trial was simply that "*Rule 801(d)(1)(B)* does not apply." It concluded that this objection was not sufficiently specific to raise the question whether the motive to falsify arose after the prior testimony. In *United States v. Burton, 126 F.3d 666 (5th Cir. 1997)* , the Court affirmed convictions for bank robbery, holding that defense counsel had failed to preserve an objection that a hearsay statement of a coconspirator was not in furtherance of the conspiracy. Defense counsel objected "under 801d2e," and argued that there was insufficient evidence to connect the defendant to the conspiracy. The Court noted that "*Rule 801(d)(2)(E)* contains at least four possible bases for an objection to proffered co-conspirators' testimony" and that "the thrust of the objections here was whether sufficient evidence linked [the defendant] to the conspiracy and not whether the statements were in furtherance of the conspiracy." The Court reviewed the "in furtherance" question for plain error and found none.

United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984) : The Court affirmed a conviction for conspiracy to bomb an automobile, declining to consider "foundation" objections to a magazine that was found to contain the appellant's fingerprint and a map resembling the neighborhood surrounding the bomb scene. The defendant failed to raise the objections at trial, and the Court indicated that admission of an exhibit on the basis of a general, not a specific, foundation is sufficient when no request is made for greater specificity.

United States v. Holland, 880 F.2d 1091 (9th Cir. 1989) : In a prosecution arising from a payroll-padding scheme, the Court held that the defendant did not preserve an objection to failure to redact a 90-minute tape recording by making a blanket objection to admission of the tape.

[ix] Rule 103(a) -- Objections -- Multiple Parties

United States v. Gatling, 96 F.3d 1511 (D.C. Cir. 1996) : On an appeal from conspiracy convictions in a multiple

defendant case, the government argued that the evidentiary complaints of one of the defendants should be reviewed only for plain error, because that defendant did not make an objection to the evidence at trial, although other defendants did. The Court, however, rejected any hard-and-fast rule requiring a personal objection from each defendant. It noted that such a rule would significantly complicate multi-defendant trials, and concluded as follows:

> Trial judges have discretion to determine whether each defendant must individually object or whether objections raised by one defendant will count as having been raised for all similarly situated defendants. Where a judge does not indicate what her policy will be in express terms during a trial, we will consider objections raised by one defendant to be preserved for other defendants if an examination of the record suggests that this was the approach taken by the judge in practice.

United States v. Rivera-Figueroa, 149 F.3d 1 (1st Cir. 1998) : Defendants in a fatal carjacking case moved *in limine* to suppress the victim's dying declaration, and the Judge granted the motion on implicit *Rule 403* grounds. At trial, one of the defendants who was not named in the statement sought to introduce it as exculpatory evidence. The Court held that exclusion of the statement could be reviewed only under the plain error standard, since the defendant had waived his objection by not making it at the suppression hearing. Had the objection been timely made, the Judge would have faced a different set of arguments for admissibility, a conflict in position among the codefendants, and the possibility of a severance if the evidence were admissible as to one codefendant but inadmissible as to the others.

[x] Rule 103(a) -- Objections -- Sufficiently Specific Objections

Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (1st Cir. 1992) : Reversing a judgment for the defendant in a product liability action arising out of a motorcycle accident, the Court held that an objection stated to be on grounds of Rules 402, irrelevancy, and 403, prejudice, was sufficient to preserve error in admission of evidence that the plaintiff had been convicted of speeding. The plaintiff specifically raised *Rule 404(b)* in a later request for an instruction to the jury; given the close relation between Rules 404(b) and 403, under the circumstances the objections were sufficiently timely and specific.

United States v. Musacchia, 900 F.2d 493 (2d Cir. 1990) , *vacated on other grounds*, *955 F.2d 3 (2d Cir. 1991)* : The Court held, in reviewing a tax evasion case, that the defendants' objection, without stating grounds, to prosecution witnesses' testimony on direct about "truth-telling" provisions in their cooperation agreements was sufficiently preserved because the ground of objection was apparent from the context.

United States v. Long, 574 F.2d 761 (3d Cir. 1978) : Other crimes evidence was admitted against the appellant without a proper specific objection being raised. On appeal, the Court concluded that when no objection under *Rule 403* is raised, the Court does not have to deal with the Rule. It added that "[w]here an objection does invoke *Rule 403*, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal. However, where *Rule 403* is not invoked, the trial judge's balancing will be subsumed in his ruling."

United States v. Polasek, 162 F.3d 878 (5th Cir. 1998) : The defendant, who operated a service that transferred motor vehicle documents from dealers to purchasers, was charged with fraudulently altering the mileage on titles and related documents. After the defendant's testimony denying any fraudulent alteration, the government called a special agent of the National Highway Traffic Safety Administration, who testified that the defendant had done title work for persons who were subsequently convicted of odometer fraud. Reversing the defendant's conviction, the Court held that

the rebuttal testimony was improper evidence of guilt by association. The Court found that the defendant's objection, "It doesn't prove that she had anything to do with altering anything or had knowledge of it," was sufficient to put the Trial Judge on notice that the defendant was contending that her relationship with other individuals did not show bad acts or guilty knowledge on her part, and this was sufficient to demonstrate that the only purpose for which the evidence could be offered was to show guilt by association. In *Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985)* , the Court overturned a judgment n.o.v. for the defendant in a personal injury action against the manufacturer of a crawler tractor. The Court found that, in the light of a motion *in limine*, the defendant's objections at trial were specific enough to preserve an issue for appeal.

United States v. Kone, 307 F.3d 430 (6th Cir. 2002) : The Court affirmed convictions involving the immigration laws, finding that a ruling that one defendant's objection would be treated as an objection for all defendants did not imply that an objection as to one witness would be treated as having been made concerning another witness. The Court found, however, that the defense did raise specific objections to three prosecution witnesses. In *United States v. Sheffey, 57 F.3d 1419 (6th Cir. 1995)* , the defendant was charged with murder and assault after an automobile collision that occurred while he was driving impaired with prescription drugs and alcohol. At trial eyewitnesses were asked whether the defendant had driven "recklessly, in extreme disregard of human life." The Court held that the defendant's ultimate issue objection under *Rule 704* sufficiently preserved for appeal the issue under *Rule 701* whether the question called for a legal conclusion or unhelpful opinion testimony, since the former Rule clearly incorporates the analysis of the latter by the words "otherwise admissible." In *Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985)* , the Court held that an objection to opinion testimony in an employment discrimination action was properly preserved for appeal where the ground of the objection was clear from the context.

United States v. Long, 86 F.3d 81 (7th Cir. 1996) : Appealing a drug conviction, the defendant argued that prior uncharged drug transactions were erroneously admitted against him in violation of *Rule 404(b)* because the prior drug transactions were not similar enough to the charged transaction to be probative of intent and because the government had not presented sufficient evidence of the uncharged misconduct. The government contended that these arguments were waived because the defendant's *Rule 404(b)* objection at trial went to the issues of timeliness and the reason for introducing the evidence. The Court rejected the government's position (but affirmed the conviction), finding that the defendant clearly relied on *Rule 404(b)* as the basis of his objection at trial, and thus sufficiently alerted the Trial Judge to all *Rule 404(b)* issues. The Court noted that "waiver is a doctrine designed to protect the district court from being reversed on grounds it did not have a chance to consider."

K-B Trucking Co. v. Riss Int'l Co., 763 F.2d 1148 (10th Cir. 1985) : The Court held in an action for fraudulent misrepresentation that the defendant's objection to an exhibit on the ground it was cumulative was sufficient to preserve error under *Rule 403*.

[xi] Rule 103(a) -- Objections -- Timing of Objection

United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996) : Affirming convictions in a money-laundering prosecution, the Court held that the defendants had failed to make a timely objection to the testimony of a law enforcement officer called as an expert on money-laundering practices. The defendants made no objection when the testimony was given, and although they raised concerns about the testimony in a bench conference called at the behest of the government partway through the officer's testimony, it was not until the following day that they moved to strike the testimony. The Court therefore reviewed for plain error and found none.

Government of Virgin Islands v. Archibald, 987 F.2d 180 (3d Cir. 1993) : Reversing a conviction for aggravated

rape of a ten-year-old, the Court held that, when the victim's mother was asked how she happened to know the defendant and answered that the defendant had fathered the child of her fifteen-year-old other daughter, the defendant could not reasonably have been expected to object to the question, and therefore an objection and motion to strike the answer were timely.

Spivey v. United States, 912 F.2d 80 (4th Cir. 1990) : In a Federal Tort Claims Act case, the Court held that a proper hearsay objection and motion to strike made nine days after the plaintiff offered a posttrial affidavit were timely.

Jones v. Lincoln Elec. Co., 188 F.3d 709 (7th Cir. 1999) : The Court affirmed a judgment for manufacturers and distributors of welding rods in a suit by a welder who claimed neurological injuries from being exposed to manganese present in fumes emitted from the rods. The plaintiff complained that it was error to permit a professor of materials engineering to testify about an epidemiological study of welders at Caterpillar, where the expert failed to disclose, under *Fed. R. Civ. P. 26*, that he would be relying on that study at trial. The plaintiff had not raised any objection until the close of the expert's testimony. Although the Trial Judge found that the objection was waived, the Court disagreed and concluded that the objection was sufficiently timely. Noting that the objection was made when the Trial Judge could take corrective action and that the case was protracted with many experts, the Court stated that "*Rule 103* should not be construed in such a narrow manner that courts cannot, or should not, recognize the exigencies of attempting to recall on a moment's notice whether a particular document or opinion has been disclosed in an expert's Rule 26 disclosure, especially when such evidence does not concern the expert's core testimony, as is the case here." The Court found any error in permitting the expert to rely on the study to be harmless.

United States v. Potter, 616 F.2d 384 (9th Cir. 1979) : The Court sustained a *Rule 403* balancing ruling, which was not accompanied by reasons, in part because the objection to a line of evidence was late. See also *United States v. Lara-Hernandez* n28(posttrial evidence claims come too late).

Vallejos v. C.E. Glass Co., 583 F.2d 507 (10th Cir. 1978) : The Court held that the proper time to object to evidence such as a stipulation is when it is offered, not in a subsequent motion.

[i] Rule 103(a) -- Offers of Proof

[i] Rule 103(a) -- Basic Requirement

[A] Rule 103(a) -- Civil Cases

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) : Agreeing with the Court of Appeals that the Trial Judge had erred in refusing to permit a plaintiff, who had been called as an adverse witness and asked about a letter he had written to a Navy officer concerning his wife's death, to testify on cross-examination as to other aspects of the letter, the Court held that the plaintiff had preserved for appeal a rule of completeness argument. Justice Brennan reasoned that "the nature of the proposed testimony was abundantly apparent from the very question put by Rainey's counsel," the Trial Court appeared to indicate that it understood counsel to be making a completeness argument, counsel was interrupted by opposing counsel and by the Judge, and "the degree of precision with which counsel is required to argue must be judged, among other things, in accordance with the leeway the court affords him in advancing his arguments."

BWX Electronics, Inc. v. Control Data Corp., 929 F.2d 707 (D.C. Cir. 1991) : In a suit alleging breach of contract and fraud after termination of negotiations to purchase a business and a building, the Trial Judge granted the defendant's motion *in limine* to exclude evidence allegedly showing improper motive. The Court affirmed judgments for the

defendant, holding that the plaintiff's failure to suggest a single piece of tangible evidence supporting its unsubstantiated allegations doomed its challenge to the ruling.

Faigin v. Kelly, 184 F.3d 67 (1st Cir. 1999) : During his case in chief the plaintiff in a defamation action plaintiff sought to testify about inconsistent statements made by the deposition witness, but was not permitted to because the deposition had not yet been introduced; the Judge told the plaintiff he would be permitted to delve into the inconsistent statements on rebuttal. After the videotape was introduced and the defense rested, the plaintiff requested "ten minutes" in rebuttal, but the Judge denied the request on the ground that the plaintiff had testified eight days and the rebuttal testimony would likely be repetitive. The Court held that the plaintiff had not preserved any error, since he neither made an offer of proof when denied the opportunity to rebut nor identified the particular statements that he wished to impeach. In *Curreri v. International Bhd. of Teamsters*, n29 the Court reversed a judgment against a union in an action for injuries that the plaintiff received when he crossed a picket line, holding it was error to exclude certain testimony by the union's business agent concerning directions he gave to workers on the first day of the strike, as the instructions were not hearsay but were conduct probative of whether the union instigated violence or attempted to prevent it. Discussing the union's offer of proof, the Court observed that "[m]ere compliance with *Rule 103* may, in some situations be insufficient to preserve for appeal the issue whether evidence was properly excluded." The Court cited pre-Rules cases requiring a party to make clear, after a ruling, that the party is still pressing a point so that the Judge might reconsider an exclusionary ruling as the issues in a case become clearer. In an employment discrimination case, *Andrews v. Bechtel Power Corp.*, n30 the Court refused to excuse a *pro se* litigant from the offer of proof requirement, since there is nothing for an Appellate Court to review when a litigant fails to indicate the evidence he wishes to offer.

Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358 (5th Cir. 2000) : In an action for trademark infringement and misappropriation of trade secrets regarding offshore marine cranes, the Court found no error in the Judge's order forbidding the plaintiff from showing how defendant came into possession of drawings of the cranes, since the plaintiff failed to make an offer of proof indicating the evidence that would support its allegation of theft. In a class action alleging discriminatory lending practices, *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, n31 the Court affirmed a judgment for a bank, holding that the plaintiffs failed to make an offer of proof with respect to several documents relating to a federal investigation of the bank. Thus, there was nothing for the Court to review on appeal. See also *Petty v. Ideco* n32("[w]here no offer of proof appears of record, there is no way that a party can demonstrate that his substantial rights have been affected"); *Gray v. Lucas* n33(error for Judge to deny opportunity for offer of proof, but substance of claims raised was sufficient for Appellate Court to rule).

Paschal v. Flagstar Bank, FSB, 295 F.3d 565 (6th Cir. 2002) : Affirming in part a Fair Housing Act case that held the defendant engaged in racially discriminatory mortgage lending, the Court found that the defendant had not made an offer of proof when loan files alleged to be comparable had been excluded; therefore, any error was waived.

Okai v. Verfuth, 275 F.3d 606 (7th Cir. 2001) : Affirming a judgment for corrections officers sued by an inmate who claimed that he was beaten while being moved during a transfer that followed a prison riot, the Court found no abuse of discretion in the exclusion of evidence that the officers had been suspended following the riot, when the plaintiff provided no indication of the basis for and nature of the officers' discipline. The Court noted that the plaintiff made no offer of proof as to what the excluded evidence would have shown or how it would have helped the plaintiff's case. In *Brandt v. Vulcan, Inc., 30 F.3d 752 (7th Cir. 1994)* , the Court affirmed a judgment for the defendant manufacturer in a worker's action for injuries suffered in a fall off a scaffold, holding there was no error in excluding evidence of subsequent design changes made by third parties. The Court emphasized that the plaintiff failed to respond to the exclusion with an offer of proof regarding such matters as how the design was changed, what motivated the alteration, or when it occurred. In *Evanston Bank v. Brink's, Inc.*, n34 the Court affirmed a judgment for a bank that sued an armored car company for breach of contract. Declining to consider arguments for admissibility of evidence not

raised below, the Court opined that "it is incumbent upon the party presenting the evidence to make an appropriate offer of proof describing both the relevance of the evidence and the basis upon which it is being offered in order to properly preserve an issue regarding such evidence for appeal."

United Fire & Cas. Co. v. Historic Preservation Trust, 265 F.3d 722 (8th Cir. 2001) : After a fire damage claim was submitted, the insurer conducted a five-day examination of the Trust's sole trustee; the entire examination was transcribed and the final three days were videotaped. At trial of its action seeking a declaration of nonliability, the insurer sought to introduce both the 600-page transcript and the videotape in their entirety as admissions by a party-opponent and as evidence of the trustee's "demeanor and attitude" during the investigation. The Judge ruled that only portions offered for impeachment or as substantive evidence would be admitted. The Court held that because no offer of proof was made, it would find no abuse of discretion in refusing to admit the complete transcript and videotapes. In *Dupre v. Fru-Con Eng'g, 112 F.3d 329 (8th Cir. 1997)* , an age discrimination case, the Court held that the plaintiff had not preserved error with respect to exclusion of certain deposition testimony, where the record contained neither an offer of proof at trial nor a demonstration of the context within which the questions regarding the testimony were asked. Although the plaintiff claimed that the offer of proof was made at an *in limine* hearing but, unbeknownst to him, it was not recorded, the Court held that an offer of proof must be made a part of the record. In *Porter-Cooper v. Dalkon Shield Claimants Trust*, n35 a personal injury action arising out of the plaintiff's use of the Dalkon Shield, the Court held that the plaintiff had not made a sufficient offer of proof to justify a claim of error regarding exclusion of expert testimony. The plaintiff's pretrial designation of expert witnesses stated only that the expert "may testify concerning the cause and effect" of the plaintiff's injuries. A sufficient offer of proof "must express precisely the substance of the excluded evidence, which counsel accomplishes by stating with specificity what he or she anticipates will be the witness' testimony or by putting the witness on the stand." In *Lee v. Rapid City Area School Dist. No. 51-4*, n36 an ADEA action by a teacher whose contract was not renewed, the Trial Judge admitted evidence that school administrators had received complaints about the plaintiff from students and parents but refused, on grounds that the evidence was hearsay and the witnesses repeatedly volunteered nonresponsive statements, to allow testimony about the substance of the complaints unless they had been documented. The Court held, *inter alia*, that the defendants had not preserved any error, as their offer of proof referred only generally to the complaints without naming the individuals making them or their specific substance. Four Judges believed the offer of proof was sufficient. In *Fox v. Dannenberg*, n37 the Court, holding that evidence from the plaintiff's expert engineers had been improperly excluded in a wrongful death case arising out of an automobile accident, noted that the error had been sufficiently preserved by counsel's specific statement describing the witnesses' anticipated testimony. Putting a proffered witness on the stand is not the only way to make an adequate offer of proof. In *Estes v. Dick Smith Ford, Inc.*, n38 the Court reversed a judgment in an employment discrimination case and found that prior acts of discrimination against black customers by the service department for which the plaintiff formerly worked should have been admitted. Although the defendant complained that the plaintiff had not established the number of times discrimination occurred or proved that nondiscriminatory reasons might have explained the actions of its employees, the Court concluded that the substance of the evidence was made known and that an offering party did not have to answer all questions that went more to the weight than to the admissibility of evidence.

Price v. Seydel, 961 F.2d 1470 (9th Cir. 1992) : In a fraud action by the purchaser of a hotel, the plaintiff attempted to show that the defendant kept two sets of books, one accurate and the other showing greater income in order to induce purchase of the property. The Magistrate Judge excluded evidence of the first set, presuming that they were kept for the purpose of defrauding the IRS. The Court noted that exclusion may well have been an abuse of discretion under *Rule 404(b)*, but the plaintiff's attorney never made a clear statement of the theory on which admission was sought. An offer of proof would have avoided the problem.

Inselman v. S & J Operating Co., 44 F.3d 894 (10th Cir. 1995) : Land owners suing an oil well operating

company for pollution damage were not permitted to elicit from the defendant's witness that leases covering adjacent property had been purchased by the defendant because it had also polluted that property, as there was no evidence the adjacent property was polluted. The plaintiffs' counsel then made an offer of proof that the witness would have stated that pollution complaints were the reason the purchase was made, but defense counsel stated that the witness would not testify to that effect. The Court held there was no error in precluding the testimony, since the plaintiffs' failure to examine the witness made it impossible to tell whether the excluded evidence would have been relevant or helpful to the plaintiffs' case. In *Polys v. Trans-Colorado Airlines, 941 F.2d 1404 (10th Cir. 1991)* , the Court held that plaintiffs who had brought a personal injury action against an airline had not preserved error for appeal when they made no formal offer of proof following exclusion of their expert's deposition testimony. Elicitation through later testimony of the substance of the previously excluded evidence did not require reconsideration of the ruling without more in the way of explanation or proffer.

Murphy v. City of Flagler Beach, 761 F.2d 622 (11th Cir. 1985) : The Court held that a plaintiff in a civil rights case made a proper offer of proof at a conference on evidence questions that was held some time after the plaintiff had been barred from eliciting certain testimony from a witness. Since the plaintiff intended to elicit similar testimony from subsequent witnesses, the Court found that the Trial Judge had a chance to correct the error in his ruling.

[B] Rule 103(a) -- Offers of Proof -- Basic Requirement -- Criminal Cases

United States v. Thompson, 279 F.3d 1043 (D.C. Cir. 2002) : The defendant was charged with crack distribution after he gave an undercover officer a covered large drink cup in exchange for $1,500. The defendant denied knowing cocaine was in the cup and testified that earlier a codefendant had asked him to deliver the cup, saying it contained $2,600, which the defendant assumed was to pay a gambling debt. The defendant tried to recount what the codefendant said after he returned with the $1,500, but a hearsay objection was sustained as to any post-transaction statements. The Court held that, although it was possible that post-transaction statements might be nonhearsay relevant to the defendant's state of mind, any error had not been preserved, since the defendant did not indicate what the statements were or otherwise inform the Judge of the nature of the evidence sought to be adduced, or even at a minimum indicate the purpose for which the evidence was being offered. In *United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986)* , the Court held that evidence of a telephone call that one defendant claimed to have received was not hearsay when it was offered in support of a duress defense to prove that the call contained a threat, but found that no offer of proof was made at trial and that the exclusion of the evidence was not plain error. Thus, the Court affirmed a conviction for kidnapping.

United States v. Hudson, 970 F.2d 948 (1st Cir. 1992) : After witnesses, including the defendant's brother, testified under a grant of immunity about drug transactions, the defense offered evidence that the witnesses had participated in jailhouse conversations indicating that the defendant was not involved in drugs and that the brother was upset at the defendant for beating him out of gambling money and not taking care of his family. The Court held that the error in excluding the evidence was sufficiently preserved where the "substance of the evidence was made known to the court" and the defendants asserted that the evidence was admissible as impeachment by inconsistent statement and to show bias, even though much of the colloquy centered on whether the evidence came within a hearsay exception.

United States v. Dennis, 843 F.2d 652 (2d Cir. 1988) : The Court held that a defendant in a cocaine conspiracy case could not obtain appellate review with respect to allegedly inconsistent statements by a government witness, since no offer of proof was made as to the substance of the statements.

United States v. Ballis, 28 F.3d 1399 (5th Cir. 1994) : In a prosecution for bank fraud, the Court held that the defendant had sufficiently preserved error when testimony by defense witnesses regarding a meeting with government

agents was excluded as hearsay. The government argued that the defendant had proffered the entire record of the hearing on the motion to dismiss, rather than specifically listing the parts of that testimony that he wished to present. The Court concluded that the general proffer was sufficient, given that the Trial Court had chided defense counsel for "spoon feeding" it, and had expressed an "intimate familiarity" with the challenged statements on the basis of having tried related cases and ruled on the motion to dismiss. In *United States v. Mejia*, n39 the Court declined to consider whether testimony from the defendant's attorney should have been admitted to demonstrate the defendant's innocent state of mind, since no claim was made at trial that the testimony came within a hearsay exception.

United States v. King, 75 F.3d 1217 (7th Cir. 1996) : A defendant, charged with attempting to hire someone to kill his wife, sought to have a witness testify that he was invited by the defendant to attend a meeting, which the defendant would argue was with the hit-man for the purpose of terminating the scheme. The Court held that the government's hearsay objection was prematurely sustained, but that any error was harmless because, *inter alia*, the defendant's offer of proof did not indicate that the witness would support the theory that the scheme was to be terminated.

United States v. Kirkie, 261 F.3d 761 (8th Cir. 2001) : The defendant in a sexual abuse prosecution claimed that during a telephone conversation between the victim and her cousin, the cousin had told her about the cousin's experience of making false accusations of sexual abuse against her father, resulting in his incarceration, and had explained certain aspects of sexual intercourse to the eleven-year-old victim. At a pretrial conference the Judge ruled that the victim could be questioned as to the source of her knowledge of sexual intercourse and the nature and implications of allegations of sexual abuse, but that no hearing was necessary at that time regarding what the cousin had allegedly said. At trial the defendant was not permitted, on the ground that it was collateral impeachment, to elicit what the cousin had allegedly said about her own similar situation. Because the defendant did not make, or ask to make, an offer of proof when the cousin's statements were excluded at trial, the Court held that the issue was not properly preserved for appeal.

United States v. Clark, 918 F.2d 843 (9th Cir. 1990) : The Court affirmed convictions of perjury offenses, holding that an offer of proof asserted to have been made off the record did not preserve for appeal a defendant's argument that evidence was erroneously excluded. In *United States v. Cutler*, n40 a defendant charged with mail fraud and arson tried to show that an employee of his was the guilty party, but the Court upheld a ruling excluding *modus operandi* evidence concerning the employee because the defendant failed to demonstrate by a proper offer of proof that the evidence would amount to a "signature" that could be associated with the employee.

United States v. Adams, 271 F.3d 1236 (10th Cir. 2001) : A defendant charged with felon firearm possession claimed error in the exclusion of a psychologist's report regarding his mental condition. The Court noted that counsel's general statements about the psychologist's planned testimony did not constitute an offer of proof that was sufficiently explicit to enable the Trial Judge to make an informed decision on the substance of the evidence. A facsimile of the psychologist's report sent to the Judge's chambers the morning before the hearing, but not made an exhibit or marked for identification, did not create the required clear record that the Appellate Court could review to determine whether there was reversible error in excluding the evidence. The Court did, however, permit defense counsel to supplement the record on appeal, because the Judge had made reference to the facsimile at the hearing. In *United States v. Willie, 941 F.2d 1384 (10th Cir. 1991)* , at a tax protestor's trial for tax evasion, the defendant offered a series of documents, including the Constitution and a Navajo Treaty, to show the basis for his belief that he was not required to file tax returns; all were excluded as irrelevant. Affirming, the Court held that the defendant failed to preserve the issue for appeal because the purpose for which the evidence was offered was not clear, even though the substance of the evidence was presented, and that there was no plain error.

United States v. West, 898 F.2d 1493 (11th Cir. 1990) : In a trial for solicitation of murder, the Trial Judge excluded testimony as to unrecorded statements by an informant to the defendant, which the defendant argued on appeal would have shed light on his defense that he lacked criminal intent. The Court said that the defendant was improperly prevented from testifying to the effect of the informant's statements on his state of mind, but as he made no attempt to inform the Judge of the nature of the informant's statements, the Court was unable to determine whether their exclusion substantially prejudiced his rights, so the conviction was affirmed.

[ii] Rule 103(a) -- Offers of Proof -- Cross-Examination

Wright v. Hartford Acc. & Indem. Co., 580 F.2d 809 (5th Cir. 1978) : The defendant cross-examined the plaintiff's expert at a deposition in a worker's compensation case. The plaintiff's motion *in limine* to exclude this cross-examination was granted and the plaintiff objected both times the defendant offered the testimony at trial. The evidence was excluded after the defendant provided no authority supporting its admission in response to the Trial Judge's request. Affirming a judgment for the plaintiff, the Court observed: "The arguments for a more relaxed requirement of an offer of proof on cross-examination ... are inapplicable, when, as in this case, the evidence is deposition testimony, counsel is forewarned of the objection, and the trial judge specifically requests that counsel provide support for admitting the evidence."

[iii] Rule 103(a) -- Offers of Proof -- Expert Testimony

United States v. Rettenberger, 344 F.3d 702 (7th Cir. 2003) : A defendant, charged with fraudulently obtaining disability insurance payments, was not permitted to introduce testimony from an expert challenging testimony from experts for the government that the defendant was faking his symptoms, because the defense had not disclosed before trial that it would ask the witness about his analysis of the other physicians' assessments, although it did disclose that the witness would explain and support his own assessments. The defendant argued that pretrial disclosure would have been pointless; the Court agreed that it would have been if the witness planned only to reiterate his own diagnosis, but not if he had scientific reasons for thinking that the other experts used unreliable techniques or implemented good techniques in slipshod ways. However, the defense made no offer of proof regarding the reasons the witness would have given, so no error was preserved and the ruling below would not be disturbed.

United States v. Rouse, 111 F.3d 561 (8th Cir. 1997) : Affirming convictions for sexual abuse of children, the Court held that any error in the Trial Judge's exclusion of expert testimony concerning how adult questioning may taint the testimony of children was harmless. The Court noted that an expert may explain the dangers of implanted memory but may not give an opinion as to whether a particular child witness is truthful, and observed that a narrative offer of proof may pose problems for a Trial Judge that would be avoided if counsel made an offer of proof through specific questions and answers.

[iv] Rule 103(a) -- Offers of Proof -- Requirement Excused

United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001) : The Trial Judge in an arson prosecution granted a motion *in limine* precluding the defense from discussing the mental health of a witness unless it could show that the condition existed at the time of the events relevant to the case. During the trial the Judge reviewed the witness' mental health records *in camera*, determined that they did not encompass the relevant time period, sealed the records, and stated that they would be subject to appellate review. Although the defendants did not make an offer of proof regarding their proposed impeachment based on the mental health records, the Court held that a formal offer of proof is not required. The Judge was adequately informed of the reasons for which counsel wished to impeach the witness, and the issue was sufficiently preserved for appeal. In *United States v. Bell Petroleum Servs., Inc., 64 F.3d 202 (5th Cir. 1995)* , an

environmental suit by the United States under CERCLA, the Court held that the Trial Judge erred in reading a prior opinion by the Court as precluding the reopening of the record on remand, and reasoned that "because the district court refused to allow any additional evidence, the EPA was not required to make an offer of proof."

Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998) : In a reverse discrimination case, the plaintiffs sought inquiry into statements made at a meeting between the city attorney and some city councilmen. The Trial Judge granted a protective order on grounds of privilege. The defendants asserted that the plaintiffs' claim of error was waived because they had never made a complete offer of proof regarding the substance of the testimony they sought to introduce. Although the plaintiffs "failed to take steps that would have more clearly preserved the attorney-client issue for appeal," the Court found that the lack of evidence concerning the content of the meeting was "attributable primarily to the confusion caused by the District Court's broad rulings excluding in advance any inquiry into evidence that may be covered under the privilege." Therefore, the Court concluded that the plaintiffs had taken sufficient steps to preserve the privilege question on appeal.

[v] Rule 103(a) -- Offers of Proof -- Response by Objecting Party

Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984) : The Court upheld a ruling denying class certification in an employment discrimination action, finding that an offer of proof as to class size failed to demonstrate that the members of the class were so numerous that joinder was impractical. In a footnote, the Court observed that the Trial Judge wisely permitted defense counsel to comment on the offer of proof in an effort to ascertain whether there were matters in the offer that were uncontroverted.

[vi] Rule 103(a) -- Offers of Proof -- Specific Hearsay Exception

United States v. Gaines, 170 F.3d 72 (1st Cir. 1999) : Appealing drug convictions, the defendant argued that an exculpatory statement from a coconspirator should have been admitted either as not hearsay or as an excited utterance. When the defendant made the offer of proof at trial, however, he argued that the statement was admissible under the state of mind exception. The Court declared that "[g]rounds not identified at trial on which rejected evidence is admissible will ordinarily not provide a basis for reversal on appeal." The Court reviewed for plain error, and found none.

United States v. Pugliese, 712 F.2d 1574 (2d Cir. 1983) : The Court affirmed heroin-related convictions, finding that a defendant could not argue that a statement originally offered under the residual exception to the hearsay rule should have been admitted as a declaration against interest. The Court noted that where evidence was improperly admitted under one theory, it might affirm if the evidence should have been admitted anyway under another theory, but in the instant case the defendant never offered a solid ground for admitting the evidence.

[j] Rule 103(a) -- Summary Judgment

Movie 1 & 2 v. United Artists Commun., Inc., 909 F.2d 1245 (9th Cir. 1990) : The Trial Judge granted summary judgment for the defendants in an antitrust action involving film distribution rights after excluding from evidence statements by an employee of a defendant. The appellees argued that a plain error standard under *Rule 103(d)* applied because the appellants did not address appellees' specific objections in their responsive papers or in oral argument on the summary judgment motion. But the Court held *Rule 103(d)* does not apply where the evidence was made known to the Trial Court, so the *de novo* standard of review was applicable.

[2] Rule 103(c) -- Hearing of Jury

United States v. Adames, 56 F.3d 737 (7th Cir. 1995) : The Court held there was no abuse of discretion in removing the jury from the courtroom, as opposed to holding sidebar conferences, when determining evidentiary and procedural matters in this complex drug conspiracy case.

United States v. Nace, 561 F.2d 763 (9th Cir. 1977) : Although it affirmed loansharking convictions, the Court indicated that the government should use *Rule 103(c)* and should broach highly inflammatory material outside of the jury's presence in order to avoid possible mistrials.

[3] Rule 103(d) -- Plain Error

[a] Rule 103(d) -- Definition of Plain Error

United States v. Thompson, 82 F.3d 849 (9th Cir. 1996) : The defendant appealed his conviction for a firearms violation, arguing that the Trial Court had erred in permitting his pre-arrest silence to be used as substantive evidence of guilt. Because the defendant did not properly object to this evidence at trial, the Court reviewed for plain error. Quoting *United States v. Alli-Balogun, 72 F.3d 9 (2d Cir. 1995)* , the Court stated that " '[w]e do not see how an error can be plain when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split.' " Thus, to be plain error, the Trial Court must have ignored clearly established law. Since the Circuit Courts were found to be split on the admissibility of pre-arrest silence as evidence of guilt, the Court held that there was no plain error and affirmed the defendant's conviction.

[b] Rule 103(d) -- Effect of Failure To Object When Rule Requires Application of a Balancing Test

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : The Court affirmed convictions for robbery of a convenience store and firearms offenses. The Trial Judge admitted a conviction that was more than twenty years old to impeach a bartender who was a defense alibi witness. Because the defendant failed to object at trial, the Court reviewed the ruling for plain error. The Court concluded that there could be no plain error when a party failed to make a timely objection and thus deprived the Trial Judge of the opportunity to engage in a balancing as *Rule 609(b)* contemplates.

[c] Rule 103(d) -- Examples of Plain Error

United States v. Jean-Baptiste, 166 F.3d 102 (2d Cir. 1999) : In the defendant's trial for falsely stating her place of birth in a passport application, the government introduced evidence that the defendant gave a social security number belonging to another person when she obtained an earlier passport. However, in offering the evidence and in closing argument, the prosecutor transposed digits in the social security number, so the references were not to the false number actually used by the defendant. Vacating the conviction, the Court held that the error was plain and it was not made harmless either by the fact that the nature of the proper evidence was exactly the same or by the other evidence offered against the defendant.

Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982) : The Court found plain error in the submission to a jury of two critical documents not admitted in evidence and reversed the appellant's convictions for assault, robbery, and rape. In *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, n41 the Court vacated a judgment awarding the plaintiff one dollar for breach of contract, even though the evidence point that was determinative on appeal was not raised below. The Court said that the appellant's counsel was not solely to blame, since "appellee's counsel also failed to assist the court in the proper resolution of a very difficult evidentiary problem" and went on to find that "fundamental

dictates of fairness and justice" required a new trial on the issue of damages.

United States v. Escobar, 674 F.2d 469 (5th Cir. 1982) : The Court reversed a conviction for marijuana offenses because, in explaining how his attention focused on the defendant, a police officer related computer information stating the defendant was a suspected marijuana smuggler. The evidence was hearsay and clearly prejudicial, and was not offered for any proper limited purpose. Even though the defendant raised only a hearsay objection at trial, the Court also found plain error under *Rule 404(b)*.

Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357 (8th Cir. 1990) : The Court reversed a judgment for the defendant in a personal injury action brought by a store customer who allegedly suffered back injuries when a shelf display collapsed on him. It was plain error to preclude the plaintiff from asking his medical experts whether he experienced a trauma to his back.

United States v. Baez, 703 F.2d 453 (10th Cir. 1983) : In a drug conspiracy case, the Court found plain error in a statement by the Trial Judge to the jury that two codefendants had pleaded guilty.

[d] Rule 103(d) -- Relationship to Harmless Error

United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993) : The Court held it was plain error in a drug prosecution to admit a prior inconsistent statement not given under oath without a limiting instruction, but the error did not affect substantial rights, so there was no authority to correct it.

Rule 103(d)-- Stipulation

United States v. McGill, 952 F.2d 16 (1st Cir. 1991) : The Court held there was no plain error where the jury was permitted to view a three-hour film in its entirety pursuant to a stipulation of the parties. The film depicted an incident allegedly imitated by the defendant guard when he shot an inmate, and the defendant had apparently not wished the jury to see the relevant scene in isolation.

[f] Rule 103(d) -- Waiver

United States v. Sanchez-Berrios, 424 F.3d 65 (1st Cir. 2005) : The Court affirmed convictions for cocaine-related crimes and firearms offenses, finding no plain error in the admission of coconspirator statements. The Court addressed the "threshold issue" of "the distinction between waiver and forfeiture" as follows:

> A party waives a right when he intentionally relinquishes or abandons it. This is to be distinguished from a situation in which a party fails to make a timely assertion of a right -- what courts typically call a "forfeiture." The difference is critical: a waived issue cannot be resurrected on appeal, whereas a forfeited issue may be reviewed for plain error.

Rejecting the argument that the hearsay issue was so obvious that the defendants' failure to object constituted a waiver, the Court stated that in the absence of "extraordinary circumstances -- and none are present here -- a party who does not object to an evidentiary ruling has forfeited his claim of error, not waived it." In a securities and common-law

fraud action, *Willco Kuwait (Trading) S.A.K. v. deSavary,* n42 the Court held that the Kuwait oil company had waived any objection to redirect testimony by the financier who it had sued, by failing to object when it elicited similar testimony on cross-examination.

United States v. Yu-Leung, 51 F.3d 1116 (2d Cir. 1995) : The defendant's codefendants in a narcotics conspiracy pleaded guilty and testified against him at trial, without objection, to acts of drug-dealing and murder that the witnesses had committed after the defendant was thrown out of the conspiracy. On appeal, the defendant argued that the introduction of these bad acts was plain error. The Court, however, distinguished the forfeiture of an objection, which permits plain error review, from the waiver of an objection, which extinguishes the claim of error altogether. This case is discussed in the Editorial Explanatory Comment, *§ 103.02[4].*

United States v. Hall, 845 F.2d 1281 (5th Cir. 1988) : In a prosecution for forging an endorsement on a stolen treasury check, the Court held that the defendant not only failed to object to the victim's testimony concerning what a "surprise witness" might say, but also opened the door to the victim's testimony when it cross-examined the victim about this witness.

United States v. Cowart, 90 F.3d 154 (6th Cir. 1996) : In a drug prosecution, the government gave notice of its intent to introduce evidence of the defendant's drug activity occurring after the events that were the subject of the instant trial. The defendant did not object to this evidence, and even took the stand and admitted that he was involved in the other drug incident. The Court saw this as a stratagem, i.e., "to enable the defense to argue that since Cowart testified and readily admitted, on direct examination, his guilt of the Florida incident, he must have also testified truthfully when he denied his guilt with respect to the Tennessee incident for which he was on trial." Under these circumstances, the defendant would not be allowed to use "his appeal rights to evade that strategy's ultimate failure." Thus, even though the admission of the evidence under *Rule 404(b)* might have been erroneous, the Court found the point to be waived.

United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983) : In a prosecution for threatening the life of the President, the Trial Judge permitted the government's expert to rely on statements made in a pretrial competency examination. Admission of the evidence violated the governing statute and possibly the *Fifth Amendment*, but defense counsel was aware of the statute and chose to cross-examine extensively on the background material related by the doctor. In light of the defense strategy and the absence of a specific objection, the Court refused to consider on appeal the claim that the expert impermissibly relied on statements made in the competency examination.

FOOTNOTES:

(n1)Footnote 1. *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* .

(n2)Footnote 2. *Government of Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976)* .

(n3)Footnote 3. *Salas v. Wang, 846 F.2d 897 (3d Cir. 1988)* .

(n4)Footnote 4. *United States v. Ferreira, 821 F.2d 1 (1st Cir. 1987)* .

(n5)Footnote 5. *Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982)* .

(n6)Footnote 6. *United States v. Zarintash, 736 F.2d 66 (3d Cir. 1984)* .

(n7)Footnote 7. *Government of Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976)* .

(n8)Footnote 8. *United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977)* .

(n9)Footnote 9. *United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984)* .

(n10)Footnote 10. *United States v. Eaglin, 571 F.2d 1069 (9th Cir. 1977)* .

(n11)Footnote 11. *United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977)* .

(n12)Footnote 12. *United States v. Tebha, 770 F.2d 1454 (9th Cir. 1985)* .

(n13)Footnote 13. *United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989)* .

(n14)Footnote 14. *United States v. Griffin, 818 F.2d 97 (1st Cir. 1987)* .

(n15)Footnote 15. *United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988)* .

(n16)Footnote 16. *United States v. Weichert, 783 F.2d 23 (2d Cir. 1986)* .

(n17)Footnote 17. *United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986)* .

(n18)Footnote 18. *United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985)* .

(n19)Footnote 19. *United States v. Lui, 941 F.2d 844 (9th Cir. 1991)* .

(n20)Footnote 20. *Garner v. Santoro, 865 F.2d 629 (5th Cir. 1989)* .

(n21)Footnote 21. *United States v. Lopez, 709 F.2d 742 (1st Cir. 1983)* .

(n22)Footnote 22. *Terrell v. Poland, 744 F.2d 637 (8th Cir. 1984)* .

(n23)Footnote 23. *Bryant v. Consolidated Rail Corp., 672 F.2d 217 (1st Cir. 1982)* .

(n24)Footnote 24. *United States v. Rhodes, 229 F.3d 659 (7th Cir. 2000)* .

(n25)Footnote 25. *United States v. Wilson, 966 F.2d 243 (7th Cir. 1992)* .

(n26)Footnote 26. *United States v. Field, 875 F.2d 130 (7th Cir. 1989)* .

(n27)Footnote 27. *United States v. Gomez-Norena, 908 F.2d 497 (9th Cir. 1990)* .

(n28)Footnote 28. *United States v. Lara-Hernandez, 588 F.2d 272 (9th Cir. 1978)* .

(n29)Footnote 29. *Curreri v. International Bhd. of Teamsters, 722 F.2d 6 (1st Cir. 1983)* .

(n30)Footnote 30. *Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985)* .

(n31)Footnote 31. *Fischer v. Dallas Fed. Sav. & Loan Ass'n, 835 F.2d 567 (5th Cir. 1988)* .

(n32)Footnote 32. *Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985)* .

(n33)Footnote 33. *Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982)* .

(n34)Footnote 34. *Evanston Bank v. Brink's, Inc., 853 F.2d 512 (7th Cir. 1988)* .

(n35)Footnote 35. *Porter-Cooper v. Dalkon Shield Claimants Trust, 49 F.3d 1285 (8th Cir. 1995)* .

(n36)Footnote 36. *Lee v. Rapid City Area School Dist. No. 51-4, 981 F.2d 316 (8th Cir. 1992)* (en banc).

(n37)Footnote 37. *Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990)* .

(n38)Footnote 38. *Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)* .

(n39)Footnote 39. *United States v. Mejia, 844 F.2d 209 (5th Cir. 1988)* .

(n40)Footnote 40. *United States v. Cutler, 676 F.2d 1245 (9th Cir. 1982)* .

(n41)Footnote 41. *Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399 (3d Cir. 1980)* .

(n42)Footnote 42. *Willco Kuwait (Trading) S.A.K. v. deSavary, 843 F.2d 618 (1st Cir. 1988)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 103 RULE 103

1-103 Federal Rules of Evidence Manual § 103.04

§ 103.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; *California Evidence Code §§ 353* and *354*; Kansas Code of Civil Procedure §§ 60-404 and 60-405. The rule does not purport to change the law with respect to harmless error. See *28 U.S.C. § 2111*, *F.R. Civ. P. 61*, *F.R. Crim. P. 52*, and decisions construing them. The status of constitutional error as harmless or not is treated in *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)* , *reh. denied, id.* 987, 87 S. Ct. 1283 (1967).

Subdivision (b). The first sentence is the third sentence of *Rule 43(c) of the Federal Rules of Civil Procedure* virtually verbatim. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice § 43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Subdivision (c). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1968)* . *Rule 43(c) of the Federal Rules of Civil Procedure* provides: "The court may require the offer to be made out of the hearing of the jury." *In re McConnell, 370 U.S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962)* , left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

Subdivision (d). This wording of the plain error principle is from *Rule 52(b) of the Federal Rules of Criminal Procedure*. While judicial unwillingness to be constricted by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, *7 Wis. L. Rev. 91, 160 (1932)*; Vestal, Sua Sponte Consideration in Appellate Review, *27 Fordham L. Rev. 477 (1958-59)*; *64 Harv. L. Rev. 652 (1951)*. In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

[2] 2000 Amendment Committee Note

2000 Amendment Committee Note

The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. Courts have taken differing approaches to this question. Some courts have held that a renewal at the time the evidence is to be offered at trial is always required. *See, e.g., Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980)* . Some courts have taken a more flexible approach, holding that renewal is not required if the issue decided is one that (1) was fairly presented to the trial court for an initial ruling, (2) may be decided as a final matter before the evidence is actually offered, and (3) was ruled on definitively by the trial judge. *See, e.g., Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996)* (admissibility of former testimony under the Dead Man's Statute; renewal not required). Other courts have distinguished between objections to evidence, which must be renewed when evidence is offered, and offers of proof, which need not be renewed after a definitive determination is made that the evidence is inadmissible. *See, e.g., Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir. 1993)* . Another court, aware of this Committee's proposed amendment, has adopted its approach. *Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999)* (en banc). Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts.

The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See *Fed.R.Civ.P. 46* (formal exceptions unnecessary); *Fed.R.Cr.P. 51* (same); *United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993)* ("Requiring a party to renew an objection when the district court has issued a definitive ruling on a matter that can be fairly decided before trial would be in the nature of a formal exception and therefore unnecessary."). On the other hand, when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. *See, e.g., United States v. Vest, 116 F.3d 1179, 1188 (7th Cir. 1997)* (where the trial court ruled *in limine* that testimony from defense witnesses could not be admitted, but allowed the defendant to seek leave at trial to call the witnesses should their testimony turn out to be relevant, the defendant's failure to seek such leave at trial meant that it was "too late to reopen the issue now on appeal"); *United States v. Valenti, 60 F.3d 941 (2d Cir. 1995)* (failure to proffer evidence at trial waives any claim of error where the trial judge had stated that he would reserve judgment on the *in limine* motion until he had heard the trial evidence).

The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. *See, e.g., Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997)* (although "the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done.").

Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of

the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error if any in such a situation occurs only when the evidence is offered and admitted. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir. 1990)* ("objection is required to preserve error when an opponent, or the court itself, violates a motion *in limine* that was granted"); *United States v. Roenigk, 810 F.2d 809 (8th Cir. 1987)* (claim of error was not preserved where the defendant failed to object at trial to secure the benefit of a favorable advance ruling).

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. *See Old Chief v. United States, 519 U.S. 172, 182, n.6 (1997)* ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure tothe court's attention by a timely motion to strike or other suitable motion. *See Huddleston v. United States, 485 U.S. 681, 690, n.7 (1988)* ("It is, of course, not the responsibility of the judge *sua sponte* to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Nothing in the amendment is intended to affect the provisions of *Fed.R.Civ.P. 72(a)* or *28 U.S.C. § 636(b)(1)*, pertaining to nondispositive pretrial rulings by magistrate judges in proceedings that are not before a magistrate judge by consent of the parties. *Fed.R.Civ.P. 72(a)* provides that a party who fails to file a written objection to a magistrate judge's nondispositive order within ten days of receiving a copy "may not thereafter assign as error a defect" in the order. *28 U.S.C. § 636(b)(1)* provides that any party "may serve and file written objections to such proposed findings and recommendations as provided by rules of court" within ten days of receiving a copy of the order. Several courts have held that a party must comply with this statutory provision in order to preserve a claim of error. *See, e.g., Wells v. Shriners Hospital, 109 F.3d 198, 200 (4th Cir. 1997)* ("[i]n this circuit, as in others, a party 'may' file objections within ten days or he may not, as he chooses, but he 'shall' do so if he wishes further consideration."). When *Fed.R.Civ.P. 72(a)* or *28 U.S.C. § 636(b)(1)* is operative, its requirement must be satisfied in order for a party to preserve a claim of error on appeal, even where Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States, 469 U.S. 38 (1984)* , and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985)* (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman, 41 F.3d 785, 788 (1st Cir. 1994)* ("Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria, 88 F.3d 136 (2d Cir. 1996)* (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988)* (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond, 87 F.3d 695 (5th Cir. 1996)* (where the trial court rules *in limine* that the defendant would waive his *fifth amendment* privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby

waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher, 106 F.3d 622 (5th Cir. 1997)* (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997)* (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996)* ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"); *United States v. Williams, 939 F.2d 721 (9th Cir. 1991)* (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Rules submitted by the Court used the terms "judge" and "court" interchangeably. The Subcommittee determined that the term "court" should be preferred unless plainly inappropriate in the context of a rule since "court" has the advantage of including cases tried by multi-judge courts. Amendments of "judge" to "court" with concomitant changes in pronoun references appear throughout the Rules.

[4] Report of the House and Senate Conferences

The House bill contains the word "judge." The Senate amendment substitutes the word "court" in order to conform with usage elsewhere in the House bill.

The Conference adopts the Senate amendment.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
Supp. To CHAPTER 103 RULE 103

1-103 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 103, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 103. Rulings on Evidence	**Rule 103. Rulings on Evidence**
(a) Effect of erroneous ruling. Error may not be	**(a) Preserving a Claim of Error.** A party may claim

predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) Objection. In case the ruling is one admitting evidence, a timely

(1) if the ruling admits evidence, a party, on the record:

objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) Offer **(2)** if the

of pro of. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked or ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

d.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserv

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record -- either before or at trial -- a party need not renew an objection or offer of proo

e a claim of error for appeal.

f to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offer

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence

ed, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.		ce, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.	
(c)	**Hearing of jury.** In jury cases, proceedings shall be conducted, to the	**(d)**	**Preventing the Jury from Hearing Inadmissible Evidence.** To

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(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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1-103 Federal Rules of Evidence Manual Supp. to § 103.03

Supp. to § 103.03 Annotated Cases

[Go To Main]

[1] Rule 103(a) -- Effect of Erroneous Ruling [Go To Main]

[c] Rule 103(a) -- Explanation for Proffer of Excluded Evidence

United States v. DeSimone, 488 F.3d 561 (1st Cir. 2007) : The Court affirmed a tax fraud conviction, finding no plain error in the exclusion of a witness' testimony. The Judge had sustained a hearsay objection, and the defense provided no specific basis for overruling the objection until after the trial.

[e] Rule 103(a) -- *In Limine* Rulings

[i] Rule 103(a) -- Appealability -- Requirement that Witness Testify and Other Conditions Precedent

United States v. Gunter, 551 F.3d 472 (6th Cir. 2009) : Affirming narcotics convictions, the Court held that the defendant failed to preserve a claim of error on the Judge's ruling that if he testified, the government could introduce his prior conviction for impeachment. The defendant did not testify at trial and, on appeal, argued that he was deprived of his constitutional right to testify. The Court noted that the "admissibility of a prior conviction is not appealable where a defendant does not testify." Additionally, there is no constitutional deprivation where a rule merely "deters" a defendant from taking the stand and does not actually "prevent" him from doing so.

United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006) : In the sentencing phase of a prosecution for aggravated carjacking, an *in limine* ruling provided that if defense experts gave opinions about the defendant's mental condition, the government might be permitted to present rebuttal evidence that included portions of a sealed report of a psychiatric evaluation by experts for the government. The Court held that because the defense decided not to elicit the opinions, the *in limine* ruling was not appealable.

[i.1] Rule 103(a) -- *In Limine* Rulings -- Definitive Ruling

United States v. Parish, 606 F.3d 480 (8th Cir. 2010) : In a prosecution for drug offenses, the defense indicated before

trial that it would ask police about an alleged beating when the defendant was arrested, and the government moved *in limine* to preclude such questions before the defendant had testified to his having been beaten and raised those allegations as part of his defense. To forestall an argument to the jury based on the content of cross-examination questions, the Judge ruled that there should be some foundation established before the officers were cross-examined on the alleged beating. The Judge further stated that "as things go along, and if foundation can be established for the admission of this stuff, that's a whole other issue. For right now, I'm not going to get into it, especially during voir dire or opening statements." The alleged beating was never raised during the government's case-in-chief, although officers testified about the circumstances of the arrest. On appeal, the defendant claimed that he had been erroneously limited in questioning the police during the government's case-in-chief. Affirming, the Court held that the *in limine* ruling had been "'definitive' only in the sense that it applied to voir dire and opening statements and not to the offer of testimony or evidence during the trial." Because the question of later admission of the evidence as the trial record developed was left open, there was no abuse of discretion in the ruling, and the defendant had been provided the opportunity to present to the jury all the evidence supporting his story.

[f] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability

[i] Rule 103(a) -- Evidence Introduced by Opponent

United States v. El-Alamin, 574 F.3d 915 (8th Cir. 2009) : Affirming a conviction for felon firearm possession, the Court held that because the defendant had introduced his prior convictions, he waived his right to appeal the Judge's denial of his motion *in limine* to exclude evidence of the convictions.

[iii] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Renewing Objections

[B] Rule 103(a) -- *In Limine* Rulings Admitting Evidence -- Appealability -- Renewing Objections -- Criminal Cases

United States v. Whitney, 524 F.3d 134 (1st Cir. 2008) : Affirming a conviction for making a false statement to a firearms dealer while attempting to purchase a firearm, the Court found no plain error in the admission of evidence that the defendant was arrested for violating the protective order that resulted in the charge (since defendant signed a form stating that he was not under any protective order). The Court used the plain error standard of review because it determined that the Trial Judge made no definitive pretrial ruling on the defendant's motion to exclude the evidence, and the defendant did not renew his objection when the evidence was introduced at trial. The Judge stated at the pretrial hearing a willingness to entertain any stipulation that the parties would agree to and encouraged the parties to discuss the matter. Therefore the ruling "was preliminary and subject to change in light of further negotiations by the parties or the trial evidence."

United States v. Atchley, 474 F.3d 840 (6th Cir. 2007) : When the defendant objected to the admission of flight evidence at a pretrial conference, the Judge responded: "I think that if there is evidence of flight ... I will allow the evidence in" but "I'm not going to give a flight charge until I hear what the evidence in the case is." When the flight evidence was admitted at trial, the defendant did not object. The Court held that the objection at the pretrial conference was not sufficient to preserve the right to appeal the admission of the flight evidence, since the Judge had merely stated that a ruling would await the trial.

United States v. Jumper, 497 F.3d 699 (7th Cir. 2007) : The Court affirmed marijuana convictions, holding that the defendant preserved for appeal the issue whether it was an abuse of discretion to admit portions of a videotape of the defendant's postarrest interrogation. The defendant had moved *in limine* to exclude the evidence and the Trial Judge had made a definitive ruling rejecting the motion. Moreover, before the agent testified, defense counsel requested and obtained a ruling that he preserved his objection. In *United States v. McMahan, 495 F.3d 410 (7th Cir. 2007) , vacated for reconsideration of sentencing, 128 S. Ct. 917 (2008)* , the Court affirmed drug-related convictions, finding no plain error when a government witness was permitted to testify to the wiretap procedures that were employed in investigating

the defendants. The defendants had not objected to the testimony at trial, but they argued that they preserved the error by objecting to an *in limine* ruling by the Trial Judge. The Court held that the *in limine* objection did not preserve the claim of error: "[T]he government's motion in limine, which sought to preclude testimony regarding the legality of the wiretap, does not preserve for the defense an objection to testimony regarding the process for obtaining a wiretap order."

United States v. Commanche, 577 F.3d 1261 (10th Cir. 2009) : The Court reversed a conviction for assault with intent to do bodily harm arising from a fight in which the defendant, who claimed self-defense, used a box cutter. The defendant, who had twice been convicted of aggravated battery after altercations in which he brandished sharp cutting instruments, moved *in limine* to exclude the details of his convictions if they were admitted pursuant to Rule 609, but did not renew his objection when a conviction was admitted at trial. The Court reasoned that in most cases a Judge cannot do the balancing under Rule 609(a)(1) until trial and thus the defendant's failure to renew an objection at trial meant that he could only have plain error review. Here, there was plain error in the ruling admitting the details of the convictions: "That Commanche was twice convicted of aggravated battery was properly admissible. That the crimes involved cutting instruments consistent with the box cutter used in the present case was not." In *United States v. Franklin-El, 555 F.3d 1115 (10th Cir. 2009)* , the Court, affirming convictions for health care fraud, reviewed the admission of evidence of wrongful receipt of welfare benefits only for plain error because the Judge had reserved ruling on the defendant's motion *in limine* and had instructed counsel to object to the issue at the appropriate time, but no objection was made. The Court found no plain error.

[g] Rule 103(a) -- *In Limine* Rulings Excluding Evidence -- Appealability

[ii] Rule 103(a) -- *In Limine* Rulings Excluding Evidence -- Appealability -- Criminal Cases

United States v. Jackson, 540 F.3d 578 (7th Cir. 2008) : In a prosecution for bank fraud arising from a scheme by bank employees to create false mortgage documents, one of the conspirators implicated another in her guilty plea proffer and her plea hearing, but then recanted the incriminating testimony just before the trial. The Judge granted a government motion to preclude the defense from presenting evidence of the recantation and ruled that it was not admissible under Rule 804(b)(3) because of insufficient corroborating circumstances. Affirming, the Court noted that only one of three defendants sought admission of the recanting statements; as to that defendant the Court would review the ruling below for abuse of discretion. A second defendant had actually objected to their admission, so she had waived her right to challenge their exclusion, which precluded any appellate review as to her. The third had not addressed the evidence; that was a forfeiture of his right to challenge exclusion, so he was entitled to only plain error review. The Court found neither plain error nor abuse of discretion in the Judge's ruling. In *United States v. Clark, 538 F.3d 803 (7th Cir. 2008)* , a drug conspiracy case, the defendant wanted to admit a photo that he claimed showed a prosecution witness making a hand gesture that was a gang signal. The prosecution and the witness disputed the defendant's characterization. The Judge ruled that the photo could not be admitted on cross-examination of the witness, but that the defendant could revisit it if he testified -- as defense counsel insisted that the defendant would testify and that he could lay a proper foundation by stating that the witness's hand gesture in the photo was a gang signal. But the defendant never testified. On appeal, the Court held that the claim of error in exclusion of the photo was not preserved. "When a district court indicates that a final evidentiary ruling must await developments at trial, the party must reoffer the evidence at trial to preserve the issue for appeal." The Court reviewed for plain error and found none.

[h] Rule 103(a) -- Objections

[i] Rule 103(a) -- Acquiescence in Ruling

United States v. Clark, 538 F.3d 803 (7th Cir. 2008) : In a drug conspiracy case, the government offered evidence of the defendant's prior drug dealings. To the surprise of the Trial Judge, defense counsel agreed to the admission of the evidence and expressed his intent to expand on it in order to establish what he referred to as "the patsy defense." On appeal, the defendant argued that it was error to admit the prior drug dealings. The Court found that the right to appeal

the Court's ruling had been waived, and therefore the defendant's arguments would not be considered at all. The Court noted that "[w]aiver occurs when a criminal defendant intentionally relinquishes a known right. Forfeiture, on the other hand, occurs when a defendant negligently fails to assert a right in a timely fashion. Waiver extinguishes any error and precludes appellate review, while forfeiture warrants review for plain error only. When a defendant elects to pursue one argument over another as a matter of strategy, he waives those arguments he decided not to present."

[ii] Rule 103(a) -- Objections -- Adequate in Context

United States v. Carpenter, 494 F.3d 13 (1st Cir. 2007) : The Court held that objections to arguments made by the prosecutor in closing were properly preserved even though the defendant failed to lodge a specific objection until after the jury had delivered its verdict. The defendant had continually and specifically objected, both *in limine* and at trial, to the admission of the evidence upon which the prosecutor was commenting in closing argument. The Court relied on the 2000 amendment to Rule 103, which provides that an objection need not be renewed if the Trial Court's initial ruling is definitive; in this case, the Judge had definitively ruled admissible the evidence on which the prosecutor was commenting in closing argument. The Judge had considered the defendant's objection to be properly preserved, and the Court concluded that it should defer to the preservation ruling, since "it is certainly the trial judge who is in the best position to decide if she sufficiently understood that an objection had been made and the grounds for it."

[iv] Rule 103(a) -- Objections -- Evidentiary Objections Insufficient To Preserve Constitutional Claims

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) : The Court held that a hearsay objection did not preserve a claim that admission of hearsay violated the defendant's right to confrontation.

[v] Rule 103(a) -- Objections -- Failure To Object

King v. Harrington, 447 F.3d 531 (7th Cir. 2006) : Affirming a judgment for the defendant in a negligence action arising from an intersection collision, the Court found no abuse of discretion in refusing to permit a traffic officer to offer an opinion as to the cause of the accident, where he was not present at the time of the accident and testified that he had no independent recollection beyond what was in his accident report. The accident report was admitted into evidence, but an opinion as to the cause of the accident was redacted. The plaintiffs had agreed to the redaction, so they could not claim on appeal that the redaction was erroneous. In *Naeem v. Mckesson Drug Co., 444 F.3d 593 (7th Cir. 2006)* , the Court, affirming a judgment for a discharged female employee who claimed intentional infliction of emotional distress, held that the defendants had waived their objection that an expert for the plaintiff improperly provided "a legal interpretation and application of a federal regulation." The defendants had not objected to the expert's testimony at trial and had asserted the ground only in their post-verdict motions. Although they had moved *in limine* before trial to exclude the expert's testimony, they had not asserted improper opinions on law as a basis for that motion.

In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1013 (9th Cir. 2008) : In the trial of claims by bellwether plaintiffs alleging that radioiodine emissions by plutonium producers at a nuclear facility caused cancers and other life-threatening diseases, the expert for one of the plaintiffs gave testimony that his thyroid contained Hurthle cells, which are indicative of some kind of injury to the thyroid, although the expert's pretrial report contained no evidence regarding Hurthle cells. Defense counsel did not object to the testimony, but when the jury asked during deliberations whether it could consider the Hurthle cell evidence even though it was not in the expert's report, the Judge instructed the jury to disregard the evidence. The Court held the ruling was reversible error, since rarely may evidence be excluded after the close of the parties' cases: they no longer have a chance to provide a curative response to the excluded evidence or to present the testimony in another fashion, and "it is impossible to erase from the jury's minds any arguments that were made during closing summation about the belatedly-excluded evidence."

[vii] Rule 103(a) -- Objections -- Incorrect Specific Objections

United States v. Diaz, 597 F.3d 56 (1st Cir. 2010) : Affirming a conviction for conspiring to engage in the sexual

trafficking of children, the Court held that the defendant failed to preserve a hearsay objection to a minor's statement, as he objected at trial only to its relevance. In *United States v. Colon-Diaz, 521 F.3d 29 (1st Cir. 2008)* , the Court affirmed drug convictions, finding no abuse of discretion in admitting a hearsay statement by the defendant's coconspirator. The defendant argued on appeal that the government had not established a sufficient foundation that there was a conspiracy between the defendant and the declarant. But at trial, the defendant only objected to the statement on the ground that it was not in furtherance of the conspiracy. Thus, this was the only error preserved for appeal. The Court found no plain error in the ruling that the foundation requirement for the existence of a conspiracy was satisfied.

United States v. Seale, 600 F.3d 473 (5th Cir. 2010) : In the prosecution of a fatal kidnapping committed in 1964, the defendant objected to the admission of his confession made that year on the ground that it did not comply with the standards applicable before the *Miranda* decision in 1966, and repeated that argument in his appellate brief. Only in his reply brief did he argue the *Miranda* standards, which the Supreme Court has held applicable to trials after that decision. Affirming, the Court of Appeals treated the objection to admissibility as insufficiently specific and a failure to preserve the objection based on *Miranda*, thus entitling the defendant only to plain error review.

United States v. Schalk, 515 F.3d 768 (7th Cir. 2008) , The Court affirmed a conviction for conspiracy to distribute marijuana and cocaine. The defendant's challenge to the admission of notebooks was reviewed for plain error only, because at trial the defendant argued that the ledgers were inadmissible under Rule 403, while on appeal he argued they were hearsay. In *United States v. Eberhart, 467 F.3d 659 (7th Cir. 2006)* , the court affirmed a conviction for conspiracy to distribute cocaine, holding that an objection to introduction of tape recordings on the ground that "there was no adequate foundation in terms of showing that the equipment had been tested and functioning properly" was inadequate to preserve the defendant's appellate objection that the tapes were not true and accurate recordings of the conversations. The Court noted that a "foundation" objection is usually not specific enough to preserve an alleged error on appeal, and an objection concerning the equipment would not have alerted the Judge to the objection being asserted on appeal. Therefore, admission of the tapes was reviewed only for plain error.

[viii] Rule 103(a) -- Objections -- Insufficiently Specific Objections

United States v. Vargas, 471 F.3d 255 (1st Cir. 2006) : Affirming a conviction for making a false passport application, the Court held that the defense had not preserved error regarding the sufficiency of facts or the reliability of an expert witness' fingerprint identification. Although three objections were made to the expert's testimony, the first went to only to his qualifications; the second was only a general objection following a lengthy cross-examination covering many subjects, including the witness' qualifications, the methods he employed and records he kept, the accuracy of fingerprint analysis generally, and his knowledge of statistical studies on the reliability of fingerprint identification; and the third again addressed his qualifications and the scientific foundation of fingerprint analysis. None of the objections called the Judge's attention to the witness' data (one of the comparisons was to a faxed copy) or to his application of analysis methods, so admission of his testimony was reviewed only for plain error.

United States v. Phillips, 596 F.3d 414 (7th Cir. 2010) : The Court affirmed a conviction for Medicaid fraud, finding that the defendant had forfeited a claim that the Trial Judge erred in denying her motion to exclude a redacted audio recording without having reviewed the complete version first. The defendant had moved to exclude the evidence only on the ground that it was redacted, and there is no rule requiring the Judge to review a complete recording before admitting a redacted version into evidence. The Court found no plain error in admitting the redacted version, noting that even if it told an incomplete story, the proper remedy would be to supplement it under Rule 106, not exclude it. In *Griffin v. Foley, 542 F.3d 209 (7th Cir. 2008)* , the Court affirmed a judgment for the defendant in a medical malpractice case, holding that an *in limine* motion to bar the defendant from introducing in his case in chief any medical article or treatise that was not disclosed before trial did not preserve the plaintiff's claim that a defense expert's testimony regarding his general recollection regarding the support in the medical literature (without reference to specific articles) of a particular procedure was improper because the literature had not been disclosed before trial. In *United States v. Eberhart, 467 F.3d 659 (7th Cir. 2006)* , the Court affirmed a conviction for conspiracy to distribute cocaine,

holding that an objection to introduction of tape recordings on the ground that "there was no adequate foundation in terms of showing that the equipment had been tested and functioning properly" was inadequate to preserve the defendant's appellate objection that the tapes were not true and accurate recordings of the conversations. The Court noted that a "foundation" objection is usually not specific enough to preserve an alleged error on appeal, and an objection concerning the equipment would not have alerted the Judge to the objection being asserted on appeal. Therefore, admission of the tapes was reviewed only for plain error.

United States v. Phillips, 543 F.3d 1197 (10th Cir. 2008) : The Court affirmed convictions for immigration fraud, finding no abuse of discretion when a copy of a document was admitted as a duplicate under Rule 1003. A defendant argued on appeal that there was a question as to the copy's authenticity; however, at trial he objected to the document's admission only because it was a copy, without making any objection to its authenticity.

[x] Rule 103(a) -- Objections -- Sufficiently Specific Objections

Hudson v. Dist. of Columbia, 558 F.3d 526 (D.C. Cir. 2009) : Reversing a judgment for an arrestee who sued for excessive force, the Court found it was error to admit evidence that the arresting officer had previously been disciplined for misconduct involving other arrestees, and then to allow the plaintiff's counsel to argue to the jury that the misconduct showed that the officer was a "bad cop" and would always be a bad cop. The plaintiff argued that the defendant had not preserved an objection under Rule 404(b), but the Court disagreed. During the bench conference regarding the prior discipline, defense counsel asked the Judge: "Is this evidence of prior misconduct to show on this particular date that he is inconsistent [*sic*]? That's not allowed by the rules." The Court noted that "[w]hile the phrasing may have been somewhat inartful (and perhaps mistranscribed), it was stated with enough specificity to alert the district court and opposing counsel to the basis for the objection, namely that the examination violated Rule 404(b)."

[xi] Rule 103(a) -- Objections -- Timing of Objection

Hill v. Principi, 439 F.3d 18 (1st Cir. 2006) : The Court affirmed a judgment for the Department of Veterans Affairs in an action by a psychiatrist who resigned her employment after being assigned additional duties, which she claimed violated the Rehabilitation Act. It held that the plaintiff failed to object in a timely fashion to the defense expert testimony, where she waited to object until moments before the witness was to testify despite having received the witness' report five months earlier. The Court noted that "because *Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' function, untimely *Daubert* motions should be considered only in rare circumstances."

Jerden v. Amstutz, 430 F.3d 1231 (9th Cir. 2005) : The Court reversed a judgment for the defendant in a medical malpractice action, finding it was an abuse of discretion to strike testimony by an expert witness for the plaintiff. The defendant's objection that the expert lacked the required knowledge of professional standards in the locality or a similar community was not made until two days after the expert finished testifying. The objection was untimely, and the foundational flaw likely could have been repaired if the defendant had disclosed the basis for his objection while the expert was still on the stand and available to amplify his testimony.

[i] Rule 103(a) -- Offers of Proof

[i] Rule 103(a) -- Basic Requirement

[A] Rule 103(a) -- Civil Cases

Harris v. Chand, 506 F.3d 1135 (8th Cir. 2007) : The Court affirmed a judgment for the employer in a Title VII race discrimination action, finding no abuse of discretion in the Trial Judge's placing time limits on the presentation of the plaintiff's case and no plain error when plaintiff was not able to call witnesses due to the time limit. The plaintiff made no objection when the Judge said her time was up nor offer of proof as to the testimony that she was unable to present. The Court observed that time limits imposed before trial must be sufficiently flexible to accommodate adjustments if it

appears during trial that the limits were too restrictive, and that when there is an objection to the exclusion of evidence as a result of time limits the Judge must explain the exclusion. A dissenting Judge argued that the Trial Judge "placed an impermissibly rigid time constraint on the plaintiff's case" and that the plaintiff had attempted to make offers of proof but was not permitted to do so.

[ii] Rule 103(a) -- Offers of Proof -- Cross-Examination

United States v. Crockett, 435 F.3d 1305 (10th Cir. 2006) : In a prosecution for tax fraud, the Judge refused to allow cross-examination of a witness about the tax advice she received from a third party. The government objected that the cross-examination was beyond the scope of the direct, and defense counsel did not explain the relevance of the cross-examination. Because defense counsel failed to reveal the content of the evidence he expected to adduce, the Court reviewed the ruling for plain error and found none.

[iii] Rule 103(a) -- Offers of Proof -- Expert Testimony

United States v. Ganier, 468 F.3d 920 (6th Cir. 2006) : In a prosecution for obstruction of justice arising from deletion of computer files subpoenaed by a grand jury, testimony from Drueck, a forensic computer specialist who would have testified regarding manipulation of the defendant's computer files, was excluded as a discovery sanction on the ground that the defense had not been provided with a written summary of the testimony (*see Fed. R. Crim. P. 16(a)(1)(G)*). On interlocutory appeal the defendant argued that the ruling should be reviewed for plain error because the government had not made an offer of proof of Drueck's testimony in accordance with *Rule 103(a)*. The government had, however, explained in general terms what Drueck would testify to, the analysis he had performed, and how it was relevant to the proceedings. The Court held that although the government did not make a formal offer of proof, the government's presentation was sufficient to preserve its claim of error. Much of the proposed testimony was brought out in arguments on the motion from both sides; and the Judge had copies of the reports generated by the forensic software. The Court noted, however, that the government "would have been well advised to make a formal offer of proof, as the district court was left to discern the substance of Drueck's testimony from Ganier's written motion and the parties' arguments the next morning." On the merits, the Court found a discovery violation but held that exclusion of the witness was an excessive sanction.

[iii.1] Rule 103(a) -- Offers of Proof -- Informal Offer

United States v. Kay, 513 F.3d 432 (5th Cir. 2007) : In a fraud case, the government objected to the admission of certain tax receipts on the ground of inadequate authentication. The Trial Judge excluded the records and the government argued on appeal that the defendants had not made an offer of proof sufficient to preserve a claim of error. The Court, however, found that "a formal offer of proof was not necessary here." It explained that "[b]y explaining to the court the substance of the proffered evidence (receipts indicating tax payments that Defendants made after shipments were complete) and why the court should admit these documents (describing how the documents had been 'subscribed and sworn -- and certified by the United States vice counsel'), Defendants made a sufficient 'informal' offer of proof." The Court concluded that the records were properly excluded and affirmed the conviction.

[iii.2] Rule 103(a) -- Offers of Proof -- Offer Insufficient

United States v. Gregg, 451 F.3d 930 (8th Cir. 2006) : Affirming convictions arising from a murder on an Indian reservation, the Court found no error when evidence of specific acts of violence committed by the victim on other occasions was excluded. Although specific act evidence is inadmissible if offered to prove that the victim was violent and therefore acted aggressively on the occasion in question, the defendant argued that it should have been admitted for a non-character purpose, i.e., to establish the defendant's fear of the victim. The defendant's offer of proof stated that the defendant "would have testified that he believed [the victim] was tougher than he was, that he's not a person that he would want to have a fight with, that in his experience [the victim] could have beaten him up, and that he would not have wanted to have an ongoing feud with [the victim]." The Court held that this offer of proof was insufficient to

establish admissibility of the victim's violent conduct to prove the defendant's state of mind, since it identified no specific instances of the victim's violent conduct, "let alone any instances known by Gregg at the time of the shooting."

[3] Rule 103(d) -- Plain Error [Go To Main]

[a] Rule 103(d) -- Definition of Plain Error

United States v. James, 464 F.3d 699 (7th Cir. 2006) : In a prosecution for drug and firearm offenses, evidence of other acts was admitted on the government's mistaken representation that they occurred only a few days after the charged crimes and were "intricately related" thereto. In fact, the other acts took place a month later, but the defendant did not object to the admission of the evidence on *Rule 404(b)* grounds until the appeal. Affirming, the Court held that it was error to admit the evidence, since the story of the crime was complete on the date of its occurrence, the subsequent acts did nothing to explain the circumstances of the charged offenses nor to prove any element of the charged conduct, and the only link between the later acts and the charged offenses was propensity. However, the error was not "plain error," as required when no timely objection was made, because the defendant could not demonstrate that the outcome probably would have been different without the error.

[b.1] Rule 103(d) -- Effect of Failure To Object When Rule Requires Findings of Fact

United States v. Shoup, 476 F.3d 38 (1st Cir. 2007) : The Court affirmed a conviction for felon firearm possession, finding no plain error in the admission of a 911 call reporting that the defendant had a gun. The call had been admitted under the hearsay exceptions for present sense impressions and excited utterances. Both exceptions require some showing of a short amount of time between the event and the statement. The Court noted that by failing to make a contemporaneous objection, the defendant "precluded (thus relieved) the government from presenting its best evidence as to the time-lapse issue, and the district court from making the attendant findings of fact. For these reasons, we perceive no plain error."

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 104 RULE 104

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Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 104 RULE 104

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104.01 Official Text

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury*. -- Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) *Testimony by accused*. -- The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 104 RULE 104

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104.02 Editorial Explanatory Comment

[1] Questions of Admissibility

Rule 104 allocates responsibility between the Judge and jury for deciding preliminary questions of fact upon which the admissibility of evidence depends. The Rule preserves the force of exclusionary rules of evidence by assuring that inadmissible evidence will not generally be brought before the jury. At the same time, the Rule assures that the jury will be the factfinder as to all substantive issues in the case.

The determination of whether certain evidence should be admitted at trial cannot be made until preliminary questions of fact are resolved. For example, if one party wants to introduce hearsay statements of a declarant, and the other party objects, some exception to the hearsay rule will have to be found. If the offering party claims that the statement is an excited utterance under *Rule 803(2)*, the Court will have to determine whether the declarant spoke while under the influence of a startling event. Factfinding is necessary. Another example is an attempt by the prosecution in a criminal case to introduce evidence of a confession by the defendant. If the defendant claims that the confession was coerced, a finding of voluntariness will have to be made before the confession can be introduced. Once again, factfinding is required.

Rule 104 provides the general rule that it is the Trial Judge and not the jury who decides the preliminary questions of fact that condition the admissibility of evidence. There are a number of practical reasons for this allocation. First, one cannot expect jurors to exclude inadmissible evidence from their minds if they find that preliminary facts have not been established. For example, if the jury were to decide that a hearsay declarant was not under the influence of a startling event, it might still wish to consider the hearsay statement for its truth. Having been exposed to the hearsay statement, it would be difficult for jurors to exclude that statement from their minds on the technical ground that a preliminary fact had not been established. Second, allocating such preliminary questions to the jury would bog down the trial; Judges clearly can act more expeditiously with preliminary questions than can juries.

[2] "Competency" Distinguished From Conditional Relevance

Under *Rule 104*, the Trial Judge decides preliminary questions of fact relating to competency. Competency is a word of art that really stands for all of the technical rules of evidence. Competency is used in contradistinction to relevancy.

Suppose, for instance, a defendant is charged with receiving stolen property. The prosecution contends that the defendant was in Philadelphia on a given day. This fact may be relevant only if the stolen goods were also in Philadelphia on the same day; thus, the relevance of one piece of evidence depends on the existence of another piece. Since it is generally believed that the jury is capable of deciding the truth of both propositions equally well, it is thought that there is no reason to take either of these questions from the jury. The whole idea of a jury system is that the jury will apply logic and experience in reaching its conclusions, and will reject a conclusion unsupported by the evidence. The decision that must be made is one of connection, and the jurors can easily ignore the evidence if no connection is established. In our example, evidence that the defendant was in Philadelphia on a given day will be discarded by the jury if they do not find that the stolen goods were there as well. The role of the Trial Judge in these circumstances is merely to determine whether there is enough evidence for a reasonable juror to find each of the facts. n1

This is often referred to as connecting one piece of evidence up with another piece of evidence. If the connection cannot be made, then both pieces of evidence should be rejected, since the relevance of each part of the evidence depends upon the existence of some other part. n2 For example, in a case where notice is an issue, the relevancy of a shouted-out warning is dependent upon whether the shout was heard. *Rule 104(b)* allocates to the jury -- subject to minimal scrutiny by the Judge -- the responsibility to determine whether a condition of fact has been met whenever the relevancy of proffered evidence depends on a factual condition. n3

When a competency issue is raised, the problem is not whether evidence is relevant. A competency objection maintains that evidence, even if relevant, still should be excluded. Competency rules, which include most of the evidence rules that exist, serve as screening devices to protect against certain special problems -- such as unreliability, confusion of the jury, and governmental error -- or as special guarantees of privacy or some other social policy.

Examples of competency rules include: (1) the hearsay rule, and the admissibility requirements of the hearsay exceptions (such as whether the declarant, whose statement is proffered as an excited utterance, was in fact speaking while under the influence of a startling event); (2) the rules on privilege (such as whether a client was seeking legal advice from an attorney for purposes of the attorney-client privilege); (3) rules mandating qualifications for testifying witnesses (such as whether a person is qualified to testify as an expert); n4 and (4) rules mandating exclusion of illegally obtained evidence. n5

Examples of conditional relevancy include: (1) whether a witness has a basis of personal knowledge from which to testify; n6 and (2) whether a document has been properly authenticated. n7

While *Rule 104* distinguishes "competency" from "relevancy," it would be a mistake to conclude that the Judge has no role in determining questions of relevancy. The question of whether evidence is relevant within the meaning of *Rule 401* is one for the Trial Judge. Likewise, it is for the Judge to determine, under *Rule 403*, whether the probative value of proffered evidence is substantially outweighed by the risk of prejudice, confusion, and delay. n8 Even questions of conditional relevancy, specifically allocated to the jury under *Rule 104(b)*, are subject to the Trial Court's determination that a reasonable juror could find the existence of the predicate facts.

[3] Preliminary Questions That Mirror the Ultimate Question

In some cases, the preliminary question to be decided by the Trial Judge is the same question as that to be decided ultimately by the jury. For example, suppose a plaintiff is injured in a car accident, and sues the employer of the other driver. At the scene, the other driver made a statement admitting fault. That statement is not admissible against the employer unless the other driver was an agent speaking about a matter within the scope of employment. Yet the questions of agency and scope of employment may be the very questions the jury will have to decide to determine the employer's liability. A similar example of a confluence of preliminary questions and ultimate issues occurs in conspiracy cases. A hearsay statement is not admissible as coconspirator hearsay unless the declarant and the defendant are coconspirators; the jury may well have to decide the same question in determining guilt.

Where the preliminary question mirrors the ultimate question, the Trial Judge who excludes the evidence for insufficient proof of the preliminary fact will often preempt the jury. But this is not particularly troublesome. n9 The law of evidence is based on the assumption that litigants will not get to the jury unless they have enough evidence that the Trial Judge finds to be admissible. There is no good reason for the Trial Judge to treat "mirror" admissibility questions differently from any other question of admissibility.

Where preliminary and ultimate determinations involve the same question, Trial Judges who admit the evidence should not inform the jury that they have found the admissibility requirement in the proponent's favor. To do so would improperly influence the jury's decision on its ultimate determination. This would be especially problematic in criminal cases where evidence is offered against the defendant; in that situation, the jury must decide the ultimate question by proof beyond a reasonable doubt, whereas the Trial Judge decides the preliminary question by a preponderance of the evidence. n10

[4] Inapplicability of Evidence Rules

The Rules of Evidence, with the exception of the rules on privileges, do not apply to preliminary fact determinations. So for example, a Court may consider affidavits and other hearsay statements in ruling on whether proffered hearsay is admissible or whether an expert is qualified. The reasoning behind this principle is sound. Most of the Rules that control admissibility of evidence at trial are justified by the presumed inability of the jury to handle certain kinds of evidence; it makes no sense to apply those rules when the Trial Judge alone decides preliminary questions. For example, a Trial Judge can consider hearsay for what it's worth, while a jury might think a hearsay statement to be more reliable than it actually is. *See generally Bourjaily v. United States, 483 U.S. 171 (1987)* (noting that a judge making an admissibility determination can receive otherwise inadmissible evidence and "give it such weight as his judgment and experience counsel"). With respect to privileges, however, disclosure at any stage would destroy the purpose of the privilege.

[5] Exclusion of Jurors From Preliminary Determinations

Subdivision (c) of the Rule provides that hearings concerning the admissibility of confessions must be conducted outside the hearing n11 of the jury, and that other hearings shall be so conducted when the interests of justice require it. The mandatory aspect of the Rule tracks constitutional law. In *Jackson v. Denno, 378 U.S. 368 (1964)* , the Court held that a Judge must, upon objection, hold a hearing and make a ruling on whether the defendant's confession is voluntary. A fair reading of *Jackson* is that the hearing must be held outside the jury's presence. Also in *Jackson,* the Court held that Trial Judges may not inform the jury that they have found the defendant's confession to be voluntary, even if the Judge instructs the jurors that they can reject the finding if they wish. Giving the jury this information might interject an improper judicial influence on the jury's obligation to weigh the confession.

Courts have held, in search and seizure cases, that a suppression hearing should be held outside the presence of the jury. n12 As a practical matter this will almost always be the case, because *Rule 104(c)* requires exclusion of the jury if the accused is a witness and so requests; ordinarily the defendant is a witness at the suppression hearing, and there is no upside to the defendant in having the jury listen to suppression hearing testimony. At any rate, pursuant to *Fed. R. Crim. P. 41*, suppression hearings are likely to be held long before trial and well before the jury is empanelled.

In contrast, in *Watkins v. Sowders, 449 U.S. 341 (1981)* , the Court found no constitutional error when the Trial Court conducted a hearing on the admissibility of identification testimony in the presence of the jury. The *Watkins* Court distinguished *Jackson*, where the admissibility question related to the voluntariness of the defendant's confession. The Court explained that *Jackson* was based on the concern that the jury may give credit to the defendant's confession even if it was found by the Judge to be involuntary; this was because involuntary confessions could still be probative and reliable. Thus, the only way to keep involuntary confessions from the jury was to exclude them before the jury could hear them. The Court found no such danger with respect to pretrial identification evidence. Its rather dubious reasoning

was that if the identification was so suggestive as to be unreliable under due process standards, the jury would be unlikely to give it any consideration at trial, and so it wouldn't matter that the jury heard the inadmissible identification. The Court did state, however, that a "judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable." But it was not constitutionally required.

Sometimes the Trial Judge will find it more efficient to make a determination of admissibility after much of the evidence is already before the jury. For example, in a conspiracy case, the Trial Judge may admit statements by alleged coconspirators on the condition that, before resting, the prosecution show by a preponderance of the evidence that there was a conspiracy. n13 Failure to connect up the evidence will result in the Judge either declaring a mistrial, or, at the very least, instructing the jury to disregard all of the statements of the alleged coconspirator with respect to anyone other than the declarant. n14 Reviewing Courts have sometimes stated a preference for a separate hearing on the admissibility of coconspirator hearsay, but they also recognize that the Trial Judge should have discretion to leave the admissibility question for trial. n15 The predicate question of conspiracy is often the question to be decided on the merits at trial. Thus, an ironclad rule requiring an admissibility hearing for all coconspirator hearsay might result in much duplication of time and effort -- a trial before the trial.

In practice, it may be possible for the Trial Judge, at an early stage, to rule at least conditionally on the admissibility of the coconspirator hearsay. n16 Such an early ruling might be possible on the basis of documents marked for trial, suppression hearing testimony, argument of the parties, and perhaps a few witnesses. The early conditional ruling would have the effect of providing some predictability for the parties.

Of course, as discussed above, if Trial Judges do find sufficient evidence of conspiracy to admit the hearsay statement, they should not inform the jury about this finding, because this could improperly influence the jury's deliberations on the conspiracy question. n17

[6] Excluding the Jury in the Interests of Justice

Rule 104(c) instructs the Court to exclude the jury from preliminary determinations if the "interests of justice" so require. This provision is deliberately vague, and much discretion is left to the Trial Judge. Generally speaking, four factors are pertinent to whether discretion should be exercised to exclude the jury:

(1) If disclosure to the jury would result in substantial prejudice to one of the parties, this clearly cuts in favor excluding the jury. n18 For example, if there is a viable claim of privilege, this claim should be resolved outside the hearing of the jury; otherwise, the very reason for the privilege is undermined. Likewise, jurors should be excluded from a hearing concerning the admissibility of a statement of a victim that implicates the accused, or evidence of uncharged crimes -- if this type of evidence is found inadmissible, the purpose of the exclusionary rule will be undermined by the jury's presence at the hearing. On the other hand, there is often no reason to exclude the jury from the presentation of foundational evidence as to the qualification of an expert witness. If the Trial Judge finds that the expert is unqualified, there is little risk that the jury will be prejudiced against the party, and moreover the jury will not have heard the opinion.

(2) If the Trial Judge can see in advance that admissibility is doubtful, this cuts in favor of excluding the jury. Conversely, there is little risk in a hearing before the jury if admissibility is essentially a foregone conclusion.

(3) If the evidence offered to prove the preliminary fact is relevant both to weight and admissibility, this should cut in favor of allowing the jury to hear the foundation proof; this will avoid some duplication of effort.

(4) If the jury would draw an adverse inference from its exclusion, this cuts in favor of allowing the jury to be present. For example, the jury may be understandably disenchanted if it is repeatedly and pointedly excluded from what are obviously important decisions. It may also be that the speculations of an excluded juror would be more prejudicial to

one of the parties than the proffered evidence itself. Moreover, a negative inference would not be drawn from the absence of evidence if the jury knew that the party tried to admit the evidence but it was excluded by the Court.

[7] Conspirator Statements

One of the most complex problems associated with *Rule 104(a)*, and to some extent with subdivision (b) of the Rule as well, relates to a preliminary ruling that is mentioned above: What evidence may a Trial Judge consider in ruling on the admissibility of conspirators' statements under *Rule 801(d)(2)(E)*? We are reserving our lengthy discussion on this question for *Rule 801*. For now, it is important to note that the preliminary questions as to the admissibility of a coconspirator statement -- whether the statement was made during the course and in furtherance of the conspiracy and whether the declarant and defendant were in fact coconspirators -- are left to the Trial Judge under *Rule 104(a)*. n19 A contrary rule, leaving the question to the jury as one of conditional relevancy, would undermine the protection otherwise afforded by the hearsay rule, because the jury might consider the coconspirator's statement for its truth even if it finds that the predicate facts are not established.

[8] Testimony By Accused

Rule 104(d) allows criminal defendants to testify upon preliminary matters (such as their standing to contest a search, or the involuntariness of their confessions) without the risk of opening themselves to cross-examination as to other issues in the case, i.e., issues other than those that relate to the preliminary question. But this does not mean that the accused pays no price for testifying on preliminary issues. It is true that the Supreme Court has held in *Simmons v. United States, 390 U.S. 377 (1968)* , that defendants' suppression hearing testimony cannot be used against them as an admission at trial. The Court reasoned that defendants would be deterred from making constitutional claims if they knew that their statement at a suppression hearing could be used as evidence of guilt at trial. But a more difficult question is whether defendants' statements can be used against them for impeachment purposes. The Supreme Court has left this question open. See *United States v. Salvucci, 448 U.S. 83 (1980)* . Most Lower Courts have held that the testimony of the accused on a preliminary matter can be used to impeach a defendant who chooses to testify at trial. n20 It is one thing to use the defendant's statements at a suppression hearing as evidence of guilt. It is another to allow the defendant to perjure himself at trial without fear of impeachment with his prior statements.

Defense counsel must therefore be aware that an accused who has testified on a preliminary matter may have little choice but to exercise the right not to testify at trial. For example, defendants who seek to establish standing at a suppression hearing by testifying that they possessed and controlled the drugs in issue would generally be foolhardy to testify at trial that they did not possess the drugs. Conversely, defendants who wish to testify at trial may well have to forego a suppression motion.

It is important to note that an accused who testifies on a preliminary matter is entitled to testify outside the jury's hearing. However, the Rule appears to suggest that, confession cases aside, an accused "waives" this right by not specifically requesting it.

[9] Burdens of Proof as to Preliminary Facts

Who bears the burden of proof on preliminary fact questions? And what standard of proof is to be employed? Nothing in *Rule 104* specifically answers either of these questions. But the Supreme Court has, in several cases, held that the moving party has the burden of proving admissibility requirements under *Rule 104(a)* by a preponderance of the evidence. Where the objection goes to conditional relevance, the proponent must show that a reasonable juror could believe the preliminary fact by a preponderance of the evidence.

In *Bourjaily v. United States, 483 U.S. 171 (1987)* , the Supreme Court held that the preponderance of the evidence standard governs preliminary factfinding under *Rule 801(d)(2)(E)*. Although the Court addressed only coconspirator

statements in *Bourjaily*, it reasoned that the preponderance standard had been used successfully to determine the admissibility of confessions and evidence seized pursuant to searches conducted under *Fourth Amendment* standards. It also implied that the preponderance standard should be the governing standard for all preliminary questions decided under *Rule 104(a)*. n21

In the later case of *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)* , the Court held that the proponent of expert testimony has the burden of establishing its reliability under *Rule 702* by a preponderance of the evidence. The *Daubert* Court relied on *Rule 104* and *Bourjaily*. Given these cases, it is fair to conclude that the offering party must ordinarily establish admissibility requirements under *Rule 104(a)* by a preponderance of the evidence. Lower Courts have applied the preponderance standard to an array of competency questions. n22

It is also notable that the Advisory Committee in some of the recent amendments to the Evidence Rules has taken the position that the preponderance standard applies to the Court's rulings under *Rule 104(a)*. Thus, *Rule 804(b)(6)* provides a hearsay exception when the opponent engages in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. The Committee Note states that the test for determining forfeiture is "[t]he usual *Rule 104(a)* preponderance standard." And the Committee Note to the 2000 amendment to *Rule 702* provides that "the admissibility of all expert testimony is governed by the principles of *Rule 104(a)*. Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."

While the general rule is that the proponent must show that admissibility requirements are met by a preponderance of the evidence, there is an exception for questions of privilege. Because privilege rules operate to exclude relevant and reliable evidence, they are not favored. Therefore, it is the party seeking to *exclude* the evidence that has the burden of establishing, by a preponderance of the evidence, that a privilege exists. Once this burden has been met, the proponent of the evidence has the burden of establishing, by prima facie evidence, that an exception to the privilege (such as the crime-fraud exception to the attorney-client privilege) exists. See *United States v. Zolin, 491 U.S. 554 (1989)* .

In *Huddleston v. United States, 485 U.S. 681 (1988)* , the defendant challenged the admissibility of other act evidence that was admitted to prove knowledge that he was dealing with stolen property. Chief Justice Rehnquist wrote for a unanimous Court as it concluded that when other act evidence is offered under *Rule 404(b)* for a proper purpose, the relevance of the evidence is conditioned on whether the event actually occurred as alleged by the proponent. The Chief Justice described the proper judicial approach to conditional relevance in the following language: "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact -- here, that the television sets were stolen -- by a preponderance of the evidence." The test for conditional relevance is thus not whether the Judge is convinced by a preponderance, but rather whether a reasonable juror could be convinced by a preponderance.

[10] *In Camera* Review

In *United States v. Zolin, 491 U.S. 554 (1989)* , the Supreme Court held that *Rule 104(a)* does not prohibit use of *in camera* review procedures when a District Court rules on privilege claims. The Court set forth the showing required to warrant in camera review in the context of a claim that the crime or fraud exception to the attorney-client privilege warrants disclosure. The Court's analysis is discussed in the Editorial Explanatory Comment to *Rule 501*. n23

[11] Evidence Relating to Weight

Rule 104(e) provides that, after the Trial Judge makes a determination on a preliminary question of fact, the party opposing the ruling is still entitled to introduce before the jury evidence that relates to the weight or credibility of evidence. For instance, even if the Judge determines that a confession was not coerced, the defendant is entitled to introduce evidence of coercion at trial, because this goes to the weight of the evidence. n24 And where a judge finds an expert's testimony to be sufficiently reliable to be admissible under *Rule 702*, the opponent is still allowed to attack any

defects in the expert's qualifications, basis, methodology, or application when the expert testifies at trial.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004)* (defendant's claim that evidence of growing operations should have been excluded "because the government failed to connect the operations to the conspiracy described in the indictment" "is primarily an argument about conditional relevancy that we evaluate under *Rule 104(b)*"; the Court notes that "[w]hen the relevancy of evidence is conditioned on the establishment of a fact -- in this case, that the other marijuana growing operations were undertaken in furtherance of the charged conspiracy -- the offering party need only introduce sufficient evidence to permit a reasonable jury to find the conditional fact by a preponderance of the evidence to establish that the evidence is relevant."). See also *Ricketts v. City of Hartford, 74 F.3d 1397 (2d Cir. 1996)* (Trial Judge erroneously excluded a tape recording, purportedly of a party in the case, when he determined that he was not satisfied that the voice belonged to that party; this approach was improper since "[s]o long as a jury is entitled to reach a contrary conclusion, it must be given the opportunity to do so"); *United States v. Koontz, 143 F.3d 408 (8th Cir. 1998)* (Trial Judge's responsibility was only to determine whether there is evidence sufficient to support a finding that a proffered piece of evidence was connected to the defendant).

(n2)Footnote 2. See, e.g., Advisory Committee Note to *Rule 104* (if a spoken statement is used to prove notice to X, proof of the statement is irrelevant without proof that X heard the statement; proponent must establish enough evidence to support a finding that the factual predicate has been met, after that the question of relevance is for the jury).

(n3)Footnote 3. For a criticism of the traditional conception of conditional relevancy, see Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 Mich. L. Rev. 439 (1994); Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. Rev. 447 (1990).

(n4)Footnote 4. See *Kingsley Assoc. v. Del-Met, Inc., 918 F.2d 1277 (6th Cir. 1990)* (qualification of witness to testify as expert "unquestionably" raises a preliminary question for the Trial Court under *Rule 104*).

(n5)Footnote 5. See, e.g., *United States v. Lang, 8 F.3d 268 (5th Cir. 1993)* , in which the defendant moved to suppress evidence as illegally obtained, while the prosecution argued that the evidence was found in plain view; the question of whether the evidence was found in plain view was within the sole province of the Trial Court, and it was reversible error to leave this question to the jury:

> The cocaine's relevancy did not depend upon the fulfillment of a condition of fact, as the cocaine would have been relevant to show Lang's guilt of the charged offense notwithstanding whether officer Young saw the cocaine in plain view. Although relevant, the cocaine would have been excluded for policy reasons underlying the *Fourth Amendment*.

(n6)Footnote 6. See Advisory Committee Note to *Rule 602* (noting that the procedure for determining personal knowledge is "a specialized application of the provisions of *FRE 104(b)* on conditional relevancy").

(n7)Footnote 7. See, e.g., *United States v. Branch, 970 F.2d 1368 (4th Cir. 1992)* (the question of authenticity is really one of conditional relevance; a document or tape is not relevant unless it is what the proponent purports it to be; as a question of conditional relevance, the admissibility question is the same as that provided by *Rule 104(b)* -- the proponent must offer a foundation from which the jury could reasonably find that the evidence is what the proponent says it is; this is a liberal standard favorable to admitting the evidence).

(n8)Footnote 8. See, e.g., *United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004)* ("even if the challenged evidence is conditionally relevant under *Rule 104(b)*, we must also consider defendants' contention that the evidence nevertheless should have been excluded under *Rule 403*")

(n9)Footnote 9. See Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact,*

43 Harv. L. Rev. 165, 186 (1929) (noting that the Judge may resolve the preliminary factual issue differently from the jury, and may pre-empt the jury, but concluding that this is justified because the Judge is "ruling for the purpose only of determining whether the jury shall hear the evidence"; the rules that govern the Judge's decision "may be quite different from those governing the jury in its deliberation").

(n10)Footnote 10. *United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993)* (error, but harmless, for the Trial Judge to tell the jury that the government had proved the existence of a conspiracy to the Court's satisfaction, so that coconspirator hearsay was admissible against the defendants).

(n11)Footnote 11. The Rule uses the word "hearing" rather than "presence" in order to specify that the jury need not always be physically excused; a brief sidebar conference may suffice to protect the parties.

(n12)Footnote 12. See, e.g., *United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976)* .

(n13)Footnote 13. *United States v. Fragoso, 978 F.2d 896 (5th Cir. 1992)* (for a statement to be admitted as coconspirator hearsay, the Court must find by a preponderance of the evidence that the declarant and the non-offering party are members of the same conspiracy; however, this finding need not be made before the hearsay statement is heard by the jury; the timing of the admissibility ruling is within the discretion of the Trial Court).

In these circumstances, some defendants have sought a provisional instruction to the jury to disregard the coconspirator statement "for the time being." Most Courts have found such an instruction to be unwise, because if the Judge ultimately finds that the coconspirator exception applies, the provisional instruction must be undone. This may tend to highlight the coconspirator's statement, and may even signal to the jury that the Trial Judge has found the existence of a conspiracy. See *United States v. Drougas, 748 F.2d 8 (1st Cir. 1984)* (Trial Judge properly rejected provisional instruction as to coconspirator hearsay: "the retraction of the limiting instruction can appear to be a judicial endorsement of the conspiracy").

(n14)Footnote 14. See *United States v. Helmel, 769 F.2d 1306 (8th Cir. 1985)* (failure to grant mistrial was error where drug ledger was conditionally admitted as coconspirator hearsay, and the government ultimately failed to connect the defendant to the declarant); *United States v. Vinson, 606 F.2d 149 (6th Cir. 1979)* (if coconspirator hearsay is conditionally admitted and the government subsequently fails to establish the conspiracy, the Trial Court "should, on defendant's motion, declare a mistrial unless convinced that a cautionary jury instruction would shield the defendant from prejudice").

(n15)Footnote 15. See *United States v. Isabel, 945 F.2d 1193 (1st Cir. 1991)* (pretrial hearing may be preferable, but Trial Court has discretion to provisionally admit coconspirator hearsay).

(n16)Footnote 16. See *United States v. Cox, 923 F.2d 519 (7th Cir. 1991)* , in which the Trial Court received a limited pretrial proffer and made a conditional ruling.

(n17)Footnote 17. See *United States v. Peters, 791 F.2d 1270 (7th Cir. 1986)* (error, though harmless, for the Trial Court to give an instruction to the jury explaining its ruling on coconspirator hearsay; such an instruction may alert the jury that the Trial Judge has found a conspiracy and could influence the jury's deliberations; at most, the Trial Court should issue a cautionary instruction that the coconspirator's statement was not subject to cross-examination).

(n18)Footnote 18. See also Federal *Rule 103(c)*, which provides that proceedings on objections and offers of proof must be conducted, "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means."

(n19)Footnote 19. *Bourjaily v. United States, 483 U.S. 171 (1987)* .

(n20)Footnote 20. See, e.g., *United States v. Beltran-Gutierrez, 19 F.3d 1287 (9th Cir. 1994)* (defendant's

suppression hearing statements properly admitted to impeach his inconsistent testimony at trial); *United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982)* ("prior inconsistent statements given at a suppression hearing can be used to impeach a defendant's trial testimony, whether given during direct or cross-examination").

(n21)Footnote 21. *Bourjaily, 438 U.S. at 175 (1987)* (noting that the "preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration").

(n22)Footnote 22. See, e.g., *Miller v. Keating, 754 F.2d 507 (3d Cir. 1985)* (proponent must establish admissibility of an excited utterance by a preponderance of the evidence).

(n23)Footnote 23. See also *United States v. Branch, 970 F.2d 1368 (4th Cir. 1992)* (because authenticity of a document must be established to the jury, an *in camera* hearing cannot replace the presentation of evidence of authenticity at trial; holding a preliminary hearing, as the Court did in this case, cannot be used to streamline the trial by excusing proof of authenticity; still, an *in camera* hearing is not itself error and indeed may be a good idea; it ensures that the jury will not be tainted by hearing prejudicial evidence where the proponent cannot show in advance that he will be able to provide an adequate foundation for admission).

(n24)Footnote 24. See *18 U.S.C. § 3501(a)*:

> If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 104 RULE 104

1-104 Federal Rules of Evidence Manual 104.03

104.03 Annotated Cases

[Go To Supp]

[1] Rule 104(a) -- Questions of Admissibility Generally

[a] Rule 104(a) -- Informing the Jury About Preliminary Determinations

United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993) : In the prosecution of two leaders of a large drug trafficking conspiracy, the Trial Judge told the jury that statements proffered as coconspirator statements were admitted on a conditional basis and later told them that the government had proved the existence of a conspiracy to his satisfaction, so that the statements were admissible against both defendants. The Court held that the Judge's comments were inappropriate because, while it might be proper to alert the jury that there may be a later ruling to disregard conditionally admitted evidence, the jury should not be told what facts the Judge believes have been established when making a determination of admissibility. The error was harmless, however.

[b] Rule 104(a) -- Inapplicability of Rules

Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991) : The Court affirmed a judgment on a directed verdict for the defendants in an antitrust action, holding there was no error in excluding statements offered under *Rule 801(d)(2)(E)* because the preliminary showing of a conspiracy was insufficient. In making that determination, the Trial Judge acted properly in weighing the credibility and reliability of evidence, including hearsay statements.

United States v. York, 933 F.2d 1343 (7th Cir. 1991) : The Court affirmed convictions for mail fraud and arson, holding there was no error in permitting the government to conduct a *voir dire* in the jury's presence focusing on prior unprofessional conduct by a pathologist called as an expert. The defendant had qualified the witness before the jury, the questions were relevant to the weight to be accorded the expert's testimony, the prosecutor had a good-faith basis for the questions, and qualification is a preliminary question to which *Rule 608(b)* does not apply.

[c] Rule 104(a) -- *In Limine* Rulings

United States v. Russell, 919 F.2d 795 (1st Cir. 1990) : In a prosecution for illegal possession of firearms, the Trial Judge granted a motion to suppress a gun found in the arresting trooper's car on the ground that there was no evidence connecting it with the defendants. Reversing, the Court noted that as a general rule, when a pretrial motion raises a question of fact -- especially one involving credibility -- that is intertwined with issues on the merits, resolution of the question of fact thus raised must be deferred until trial.

[d] Rule 104(a) -- Procedure

Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) : When the plaintiffs in a civil rights action offered a state investigation commission report as evidence of the defendant County's failure to investigate and discipline cases of employee misconduct, the Trial Judge made a preliminary finding of the report's trustworthiness under *Rule 803(8)(C)*, but deferred a final ruling on admissibility until after a posttrial hearing. The Court affirmed a judgment for the plaintiffs, holding the defendants were not entitled as a matter of law to a trustworthiness hearing and there was no abuse of discretion in following the procedure in this case, where the defendants had pretrial notice that the report would be offered but did not request an evidentiary hearing until the third day of trial and did not controvert the presumption favoring admission of the report. A dissenting Judge argued that the defendants had not been given an adequate opportunity to challenge the trustworthiness of the report.

United States v. Cox, 923 F.2d 519 (7th Cir. 1991) : In ruling on the admissibility of a coconspirator's statements, the Trial Court followed the permissible procedure of having a pretrial proffer, making a conditional ruling, and making an ultimate ruling at the end of the government's case, but required as a matter of policy that the preliminary proffer be *ex parte*. The procedure withheld the evidence from the defendant's counsel up through oral argument on appeal. Although it expressed its concern and bewilderment over this policy when there was no reasonable justification for sealing, the Court nevertheless held there was no reversible error.

[e] Rule 104(a) -- Relationship to Other Rules

Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83 (2d Cir. 2002) : In an action by a container manufacturer seeking a declaration that the insurer was obligated to provide coverage under certain lost insurance policies issued to the manufacturer's former parent company, the Court affirmed a partial summary judgment for the manufacturer and reversed a partial summary judgment for the insurer. The Court concluded that the question whether the manufacturer could rely on secondary evidence was a question for the Court, to be resolved under *Rule 104(a)*. It declared that the "diligence" requirement of *Rule 1004* is not a matter to be determined by the fact finder.

[f] Rule 104(a) -- Resubmission to Jury

United States v. Lang, 8 F.3d 268 (5th Cir. 1993) : The Court vacated a cocaine possession conviction because the question of whether cocaine seized from the defendant was admissible under the plain view exception to the warrant requirement was submitted to the jury. The dissenting Judge believed that the jury was only given the opportunity to reject the Trial Judge's admissibility decision and argued that while the procedure was improper, it caused no harm to the defendant. In *United States v. Gomez, 947 F.2d 737 (5th Cir. 1991)* (per curiam), the Court affirmed convictions for drug offenses, holding that the issue of whether a telephone conversation with the defendant had been recorded with the consent required for admissibility is decided only by the Trial Judge and need not be resubmitted to the jury.

[g] Rule104(a) -- Standard of Proof

Bourjaily v. United States, 483 U.S. 171 (1987) : This case, discussed in the Editorial Explanatory Comment, *§ 104.02[9]*, establishes the preponderance of the evidence standard for preliminary factfinding associated with coconspirator statements.

United States v. Lang, 364 F.3d 1210 (10th Cir. 2004) : An employee of the District Court clerk's office copied and took home a sealed affidavit, which authorized a tracking device in a narcotics investigation, and discussed it with her husband. The next day an individual visited a man listed in the affidavit, gave it to him, and stated he got it "from somebody that thought he might know the people involved." Although the recipient's heroin use impaired his memory, his description of the individual closely matched the husband. Affirming the couple's convictions for obstruction of justice, the Court held that the recipient's testimony about the individual's statements was properly admitted as a party-admission of the husband, since a preponderance of the evidence indicated that the husband had spoken to the recipient. In *United States v. Harrison, 296 F.3d 994 (10th Cir. 2002)* , the Court affirmed convictions for sexual abuse of a child, and upheld the admission of a statement by the victim to a tribal police officer. Although the Trial Judge had admitted the statement under *Rule 807*, the Court concluded that it was admissible under *Rule 801(d)(2)(B)*. The Court reasoned that "[u]nder *Rule 801(d)(2)(B)*, C.V.'s statement is not hearsay if the Defendant 'manifested an adoption or belief in its truth.' Whether Defendant did so is a preliminary question of fact to be decided by the court, which is not bound by the rules of evidence in its fact finding." Under *Rule 104(a)* the Trial Judge "determines the question under a preponderance-of-the-evidence standard." The Court found the standard to have been met in this case, because when the child made the statement accusing the defendant, he looked at her and said words to the effect, "I told you I was sorry and it wouldn't happen again."

[2] Rule 104(b) -- Relevancy Conditioned on Fact

[a] Rule 104(b) -- Act of Remaining Silent

United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984) : The Court read the Supreme Court's decision in *Doyle v. Ohio, 426 U.S. 610 (1976)* , as holding that "when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion." Since the relevance of the silence depends on the absence of warnings, the Court held that "when a testifying defendant makes an objection to the prosecutor's cross-examination with respect to postarrest silence, it is the prosecutor's burden, under *Rule 104(b)*, to establish that *Miranda* warnings were not given prior to the silence relied upon for impeachment purposes."

[b] Rule104(b) -- Affidavit of Counsel

United States v. Flores Perez, 849 F.2d 1 (1st Cir. 1988) : Affirming a firearms conviction, the Court held that it was permissible to consider facts stated in an affidavit of the defendant's lawyer in determining the admissibility of other acts evidence.

[c] Rule 104(b) -- Experiments, Demonstrations, and Tests

Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997) : The Court affirmed a judgment for the defendant in a product liability action brought by a motorist who had parked an automobile and then suffered injuries when it rolled back, allegedly because of a defect in the gear selection lever. There was no abuse of discretion in excluding testimony by the plaintiff's proffered expert that the shift lever's defective design led to the accident, since there was no *prima facie* showing that the condition of the transmission when the expert tested it was substantially similar to that on the accident date.

United States v. Hart, 729 F.2d 662 (10th Cir. 1984) : The Court affirmed firearms convictions, finding that the Trial Judge properly refused to permit defense counsel to ask a witness, who testified that the defendant opened a gun case with a hairpin, to demonstrate in Court with a pin how the defendant bent and used the pin. The defense made no claim or showing that the pin produced in Court was similar to the one used by the defendant.

[d] Rule104(b) -- Failure To Connect Up

Tate v. Robbins & Myers, Inc., 790 F.2d 10 (1st Cir. 1986) : The Court affirmed a judgment for the defendant in a product liability suit claiming that the manufacturer breached its continuous duty to warn. It found that evidence of a manual published in 1980 was properly excluded, where the plaintiff offered no evidence that the manufacturer knew that the operator possessed a hoist manufactured earlier, in 1943.

United States v. Cote, 744 F.2d 913 (2d Cir. 1984) : In a prosecution for transportation of stolen firearms, the government offered evidence concerning two burglaries and several weapons sales that were never connected to the defendant in any way. The Court reversed the convictions, indicating that it had been offered no explanation for the government's introducing irrelevant evidence that it knew or should have known could not be connected to the defendant. The Court noted that it appreciated "the need for leeway so counsel may select the most persuasive order of proof," but added that "representations, express or implied, that otherwise irrelevant evidence will be tied to a defendant should not be made without a good faith and objectively reasonable belief that the missing links will in fact be supplied."

United States v. Anderson, 933 F.2d 1261 (5th Cir. 1991) : A defendant's conviction for arson of a furniture warehouse was reversed because the Trial Judge had not determined that jurors could find by a preponderance that each of four previous fires involving the defendant's furniture factory had involved arson and that the defendant was involved. The evidence had been admitted over objection, and there was no later proof on the issue, so the objection was sufficient to preserve any error and no motion to strike was necessary.

[e] Rule 104(b) -- Foundation for Knowledge, Notice, Motive, etc.

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) : James Wilson was charged with a postal robbery on the basis of information from a witness who had worn a wire while imprisoned with James. The government turned the tape and a transcript over to James' attorney, who improperly disclosed at least parts to James' wife and his brother Ralph. The tape revealed that the key witness was Leroy Copeland; Ralph and another brother began looking for Copeland, and when they found him, murdered him. On trial for murdering a government witness, the brothers objected that it was improper to admit the whole tape because there was insufficient foundation that Ralph had heard the whole tape. The Court held the foundation sufficient because there was evidence that James had heard the whole tape and had communicated with Ralph before the murder, and there was proof that Ralph heard parts identifying Copeland.

United States v. Ansaldi, 372 F.3d 118 (2d Cir. 2004) : The Court affirmed convictions for conspiracy to distribute a controlled substance and to launder money. It held that certain documents were admissible to prove the defendant's state of mind. It recognized that the relevance of the documents depended on the jury's drawing certain other inferences from the evidence, but concluded that there was sufficient evidence for the jury to conclude that the defendant was aware of the contents of the documents.

[f] Rule 104(b) -- Judge's Role

Ricketts v. City of Hartford, 74 F.3d 1397 (2d Cir. 1996) : The Court affirmed a judgment for police officers and the City in a civil rights action brought by a plaintiff who alleged the use of excessive force. After one police officer testified, the plaintiff proffered a tape recording that he claimed contained a statement by this particular officer. The Trial Court excluded the tape because it was not satisfied that the voice belonged to the police officer who testified. The Court concluded that this approach was improper because "[s]o long as a jury is entitled to reach a contrary conclusion, it must be given the opportunity to do so." The Court found the error harmless, however, since the tape could have been excluded on other grounds.

United States v. Koontz, 143 F.3d 408 (8th Cir. 1998) : In a prosecution for drug and weapons offenses, the defense was that a gun found in the defendant's car belonged to a friend of his son. The government sought to rebut this contention by introducing a computerized booking record that indicated that a person by the friend's name was jailed during the relevant time. The Trial Judge rejected an argument that some person other than the friend might have that name, and concluded that the son's friend and the subject of the booking report were "the same person." The Court held that finding was error, since the Judge's responsibility was only to determine whether there was evidence in the record sufficient to support a finding that the report concerned the son's friend. The error was harmless, however, since there was evidence in the record to support admission of the booking report.

United States v. Platero, 72 F.3d 806 (10th Cir. 1995) : In order to show that the victim had a motive to fabricate rape allegations, the defendant sought to introduce evidence of her romantic relationship with a third party at the time. The Trial Judge determined that witnesses to the alleged relationship were not credible and precluded the defendant from cross-examining on the relationship. Reversing, the Court held that under *Rule 412(b)(1)(C)* the question of whether a relationship existed between the victim and a third person was an issue of conditional relevancy to be finally determined by the jury rather than the Judge.

[g] Rule 104(b) -- Nature of Evidentiary Hearing

United States v. Leight, 818 F.2d 1297 (7th Cir. 1987) : The Court affirmed a mother's conviction for murdering her infant son. Since there was clear and convincing evidence that the defendant had inflicted injuries upon two of her other children, the Court held that the admission of this evidence was proper at trial. It declined "to hold that every *Rule 104* hearing must be a full-blown trial in which both sides may present every available piece of evidence." Instead, the Court concluded that Trial Judges must decide in light of the circumstances of particular cases "what and how much evidence" is necessary to make a finding of clear and convincing evidence.

[h] Rule104(b) -- Personal Knowledge

United States v. Owens-El, 889 F.2d 913 (9th Cir. 1989) : Affirming a conviction for assaulting a prison guard, the Court held that when a question is raised as to whether a witness has sufficient personal knowledge to satisfy *Rule 602*, the testimony will be excluded only when no reasonable jury could conclude that the witness has personal knowledge. In the instant case, the jury could determine that there was evidence -- e.g., placement of wounds -- to support the conclusion that an assault victim had sufficient personal knowledge to make an out-of-court identification, even though the victim was later unable to testify as to the basis upon which he made his identification.

[i] Rule 104(b) -- Standard of Proof

Huddleston v. United States, 485 U.S. 681 (1988) : This case, discussed in the Editorial Explanatory Comment, §

104.02[9], establishes the standard for conditional relevancy: sufficient evidence for a jury to find the fact by a preponderance of the evidence.

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004) : The defendants were charged with a conspiracy to grow marijuana plants after officers raided a warehouse containing a massive marijuana growing operation. On appeal of their convictions they argued that evidence of other growing operations should have been excluded because there was insufficient evidence connecting those operations to the conspiracy described in the indictment. Affirming, the Court observed that the party offering evidence conditioned on establishment of a fact need only introduce sufficient evidence to permit a reasonable jury to find the conditional fact (here, that the other operations were undertaken in furtherance of the charged conspiracy) by a preponderance of the evidence.

MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274 (8th Cir. 1994) : Reversing a judgment for the defendant in an action by a building owner for expenses in removing asbestos fireproofing, the Court held it was error to exclude documents offered to show the defendant's awareness of asbestos dangers in 1968 when the building was constructed. The documents came from the defendant's sole custody and control and the defendant did not provide the plaintiff with evidence necessary for it to establish the date they were received, so the jury could have inferred they were received when the plaintiff said. Furthermore, the documents contained other evidence supporting the inference, so there was a sufficient basis to make a preliminary determination that relevancy had been established and to admit the documents, leaving the question of when the defendant received them, and their relevance to the liability issue, to the jury.

[3] Rule 104(c) -- Hearing of Jury

United States v. Odom, 736 F.2d 104 (4th Cir. 1984) : In a mail fraud prosecution arising out of a fraudulent absentee voting scheme, the Court rejected an argument that the Trial Judge erred in not holding an *in camera* hearing on the competency of residents of a nursing home to testify. The Court cited *Rule 104(c)* and noted that it requires an *in camera* hearing in only one instance. It concluded that a Trial Judge has "great latitude in the procedure he may follow in determining the competency of a witness to testify."

United States v. Bartley, 855 F.2d 547 (8th Cir. 1988) : The Court upheld a cocaine distribution conviction. It found that an expert was qualified to identify cocaine and that "there is no requirement that the court specifically make that finding in open court upon proffer of the offering party," since "[s]uch an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court."

[4] Rule 104(d) -- Testimony by Accused

United States v. Smith, 940 F.2d 710 (1st Cir. 1991) : The defendant, charged with felon firearm possession, asserted that he had been acting as an undercover agent for the Bureau of Alcohol, Tobacco and Firearms, but he did not give testimony at a preliminary hearing after it was suggested that by doing so he would waive his self-incrimination privilege. The Court noted that, although preliminary hearing testimony might have been used for impeachment at trial, the accused would not waive the privilege by testifying at a preliminary hearing.

United States v. Jaswal, 47 F.3d 539 (2d Cir. 1995) : In a drug prosecution, the defendant moved to suppress his confession as involuntary. The Court held that it was permissible to allow the prosecution to cross-examine the

defendant at the suppression hearing about the facts of the offense, and then to confront him with that testimony while cross-examining him at trial. On direct examination at the suppression hearing, the defendant denied having said or read what was in the statement he signed. It was therefore proper to cross-examine the defendant as to the accuracy of the contents of the confession, so as to rebut his claim that the confession came from the police officer, not from the defendant.

United States v. Gomez-Diaz, 712 F.2d 949 (5th Cir. 1983) : The Court affirmed drug convictions, finding that the defendant consented to X-rays of his body. It rejected his contention that the Magistrate should have permitted him to take the stand during a suppression hearing to answer a single question: whether he verbally agreed to the X-ray. The Court reasoned that if appellant chose to testify, he could have been cross-examined "on any matter that occurred during his detention by customs officials which related to the issue of consent," since this was not examination on a new issue.

United States v. Williams, 754 F.2d 672 (6th Cir. 1985) : Affirming a conviction for possessing cocaine, the Court held that the Trial Judge properly compelled the defendant to state during a suppression hearing whether he knew that he was carrying drugs, after he testified that he was not exhibiting signs of nervousness before being stopped by an officer in an airport.

United States v. Roberts, 14 F.3d 502 (10th Cir. 1993) : Affirming the defendant's conviction for drug trafficking offenses, the Court held there was no error in permitting him to be asked at a suppression hearing about the indictment itself. Once the defendant took the stand to challenge the voluntariness of his confession on the ground he was substantially under the influence of drugs, it was appropriate to question him about his awareness and mental capacity to run a business at that time.

United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982) : The Court held that prior inconsistent statements given at a suppression hearing can be used to impeach a defendant's trial testimony, whether those statements were made during direct or cross-examination.

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 104 RULE 104

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104.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term "questions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes: "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the

requirement of *Rule 602* dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. *Rule 47 of the Federal Rules of Criminal Procedure* provides: "An application to the court for an order shall be by motion ... . It may be supported by affidavit." The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows: "In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides: "In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in *Rule 401*.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not [sic] established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. *Morgan, supra*; *California Evidence Code § 403*; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)* . Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to

cross-examination generally. The provision is necessary because of the breadth of cross-examination under *Rule 611(b)*.

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States, 347 U.S. 62 (1954)* ; *Simmons v. United States, 390 U.S. 377 (1968)* ; *Harris v. New York, 401 U.S. 222 (1971)* .

Subdivision (e). For similar provisions see Uniform Rule 8; *California Evidence Code § 406*; Kansas Code of Civil Procedure § 60-408; New Jersey Evidence Rule 8(1).

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Subcommittee adopted the March 1971 draft version of subdivision (c). Although recognizing that in some instances duplication of evidence would occur and that the procedure could be subject to abuse, the Subcommittee felt that a proper regard for the right of an accused not to testify generally in the case requires that he be given an option to testify out of the presence of the jury on preliminary matters.

[3] Report of the House Committee on the Judiciary

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

[4] Report of the Senate Committee on the Judiciary

Under *Rule 104(c)* the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, *Rule 104(d)* provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice might result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

[5] Citations to Hearings and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, March 22, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 3-4 (1973).

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PART TWO: THE RULES THEMSELVES
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1-104 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 104, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 104. Preliminary Questions	**Rule 104. Preliminary Questions**
(a) Questions of admissibility generally. Preliminary	**(a) In General.** The court must decide any preliminary

inary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the pro-

ary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

visions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevan

(b) Relevance That Depends on a Fact. When the

cy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulrelevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the con-

	fillment of the condition.		dition that the proof be introduced later.
(c)	**Hearing of jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on oth-	**(c)**	**Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot

er pre-lim-in-ary mat-ters shall be so con-duc-ted whe n the in-teres ts of justi ce re-quir e, or whe n an ac-cuse d is a wit-ness and so re-ques ts.

hear it if:

(1) the heari ng in-volv es the ad-miss ibil-ity of a con-fes-

			sion;
		(2)	a defendant in a criminal case is a witness and so requests; or
		(3)	justice so requires.
(d)	**Testimony by accused.** The accused does not, by testifying upon a preliminary matter, be-	**(d)**	**Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question,

	come subject to cross-examination as to other issues in the case.		a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
(e)	**Weight and credibility.** This rule does not limit the right of a party to introduce before	**(e)**	**Evidence Relevant to Weight and Credibility.** This rule does not limit a party's right

the jury evidence relevant to weight or credibility.	to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[1] Rule 104(a) -- Questions of Admissibility Generally [Go To Main]

[b] Rule 104(a) -- Inapplicability of Rules

United States v. Mangual-Garcia, 505 F.3d 1 (1st Cir. 2007) : Affirming cocaine convictions, the Court held that there was no plain error in the admission of coconspirator statements despite the Trial Judge's failure to make a final determination at the close of the evidence that the declarant was a member of the conspiracy when the statements were made. The Court noted that an FBI agent provided a "certification letter" that the declarant was a cooperating witness for the FBI before and after the statements were made, but not at the time the statements were made. Although the agent did not testify, a Trial Judge may consider any evidence other than privileged information in making a Rule 104(a) determination as to a preliminary question of fact.

United States v. Morgan, 505 F.3d 332 (5th Cir. 2007) : The Court affirmed a conviction for Medicare fraud, finding no violation of the defendant's *Confrontation Clause* rights when grand jury testimony was used to provide foundation evidence for admission of business records. Based on pre-*Crawford* precedent, the Court's decision that *Crawford* does not apply to sentencing, and "persuasive authority from the Seventh and Ninth Circuits" (*United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006)* ; *United States v. Weiland, 420 F.3d 1062, 1077 (9th Cir. 2005))* , the Court held that "*Crawford* does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence."

[g] Rule 104(a) -- Standard of Proof

United States v. Tatum, 548 F.3d 584 (7th Cir. 2008) : The Court affirmed a conviction for possession of drugs with intent to distribute, finding no abuse of discretion in the admission of drugs allegedly seized from the defendant. There was sufficient evidence connecting the drugs with the defendant at the time of arrest to satisfy the preponderance standard of proof for preliminary questions. Any gaps in the chain of custody went to the weight of the evidence and not to its admissibility.

[4] Rule 104(d) -- Testimony by Accused [Go To Main]

United States v. Hollingsworth, 495 F.3d 795 (7th Cir. 2007) : Affirming a conviction for drug offenses, the Court held it was error (but harmless) to admit testimony given by the defendant at a suppression hearing, after he exercised his *Fifth Amendment* right not to testify at trial.

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105.01 Official Text

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

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105.02 Editorial Explanatory Comment

[1] Purpose of the Rule

Many of the rules of exclusion found in the Federal Rules are purpose-specific -- exclusion depends upon the purpose for which the evidence is offered. For example, the hearsay rule excludes out-of-court statements only if they are offered for the purpose of proving the truth of the statement; and *Rule 404(b)* excludes prior bad acts only if they are offered to prove the propensity of a person to act in accordance with those bad acts. The corollary to these purpose-specific exclusionary rules is that the same evidence may be admissible if offered for one purpose but inadmissible if offered for another. *Rule 105* provides the mechanism with which the Trial Judge must deal with evidence offered for a "good" purpose, where that same evidence could be used by the factfinder for a "bad" purpose. The Rule allows the evidence to be admitted for the limited "good" purpose, but protects the nonoffering party, who will be prejudiced by use of the evidence for the "bad" purpose, by requiring a limiting instruction to the jury.

[2] Burden on Parties to Object

When evidence is admitted for a limited purpose, or against only one party, the Judge must instruct the jury as to the proper scope of the evidence if requested to do so. n1 The plain language of the Rule imposes a mandatory duty to instruct "upon request." *Rule 105* makes clear that the burden is on the party who wants the instruction to ask for it. n2 Thus, the Trial Judge apparently has no discretion to refuse to give an instruction upon request, but also no duty to give a limiting instruction *sua sponte*. n3

There is usually a good reason for the Trial Judge to avoid a limiting instruction if the opponent of the evidence has not asked for one. The opponent may have made a strategic decision not to ask for an instruction. It may well be that an instruction will only serve to highlight the evidence to the jury -- it might do more harm than good. n4 This is especially true if the instruction would be difficult for a layperson to follow, e.g., an instruction to use a bad act for impeachment purposes but not as evidence of the defendant's guilt.

There is another reason for requiring instructions only upon request. The requirement of a request serves much the same function as the requirement of a timely and specific objection -- it enables the Trial Court to avoid error, it provides the proponent with an opportunity to correct any error, and it sharpens the record on appeal.

[3] *Sua Sponte* Instructions

On the other hand, there is nothing in the Rule that *prohibits* the Trial Judge from providing a limiting instruction *sua sponte*. n5 Indeed there could be a case where it would be in the interests of justice for the Judge to give an instruction even if no request is made. n6 The best approach for a Trial Judge who is concerned about impairing the strategy of counsel is to make a record outside the presence of the jury as to the reasons for counsel's failure to seek a limiting instruction, and to give an instruction where justice requires it, unless counsel explicitly waives it as a matter of trial strategy.

Some Judges have suggested that the quality of trial advocacy is quite low, and that many trial lawyers inadequately protect the interests of their clients. We believe that it is consistent with the philosophy of the adversary system and with the impartial posture required of a Trial Judge for the Judge to inquire of counsel whether a limiting instruction has been inadvertently overlooked during the course of the trial. In other words, it should be permissible for a Trial Judge to assure clients that careless lawyers will not deny clients the protection afforded by limiting instructions. A Trial Judge who is too quick to give an instruction *sua sponte* runs the risk that an Appellate Court will find that the Trial Judge invaded the province of counsel by denying the opportunity to forgo an instruction. But the Trial Judge who makes a careful record of the reasons why an instruction was (or was not) given is very likely to be sustained on appeal. See generally Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, *64 Va. L. Rev. 1 (1978)*.

[4] Relationship to Rule 403

Counsel should pay particular attention to the relationship between Rules 105 and 403. The mere fact that evidence is admissible for a limited purpose does not require that the evidence be admitted. *Rule 105* does not purport to state that a limiting instruction is a panacea in all situations. If the prejudicial effect of evidence substantially outweighs its probative value, *even after a limiting instruction*, then the nonoffering party can argue that the evidence should be excluded because any limiting instruction would be inadequate.

Rules 403 and 105 are interrelated, because a Judge in determining the prejudice to be suffered from proffered evidence must necessarily take into account whether a limiting instruction can ameliorate this prejudice sufficiently so that the prejudice does not substantially outweigh the probative value of the proffered evidence. n7 The more effective the instruction would be in controlling prejudice, the less the risk of prejudice needs to be taken into account in the *Rule 403* balancing process. This means that the offering party should be prepared to argue that a limiting instruction will cure the negative effect of the evidence, while the nonoffering party must articulate why the instruction will not suffice. It is well recognized that in some cases a limiting instruction will be insufficient, and proffered evidence must be altogether excluded under *Rule 403*. n8

[5] Form of Requests

The Rule directs the Trial Judge to restrict evidence to its proper scope and to instruct the jury accordingly if a request is made, but it does not articulate the requirements of a proper request. We suggest that an analogy be drawn to *Rule 103*, sections (a)(1) and (2), which require a specific objection or a reasonably definite offer of proof. n9

Counsel should not be permitted to request that "the Court do whatever is legal and correct." Rather, counsel should seek to illuminate all concerns for the Court and to suggest appropriate actions. Moreover, the request should be pinpointed to meet the problematic evidence. For example, if the objection is only to a single statement that is part of more complete testimony, the requested instruction should focus the jury on the problematic statement, rather than to the witness' testimony as a whole. n10

It is our view that lawyers who want a good limiting instruction must suggest specific language to the Court and not just say, "May I have a limiting instruction?"

[6] Timing and Content of Instructions

It is ordinarily preferable to give a limiting instruction immediately when the challenged evidence is introduced. n11 Otherwise, the passage of time and accumulation of other evidence may impair the usefulness of the instruction. However, reviewing Courts have generally held that the timing of an instruction is a matter of Trial Court discretion. n12 Thus, the Trial Judge may decide to delay a limiting instruction and include it with the general charge to the jury at the end of the case. n13 In some cases, though, an immediate instruction may be required, because a delayed instruction would be tantamount to giving none at all. For example, where the failure to give any instruction would be so serious as to amount to plain error, there is a strong argument that a Trial Court must give it immediately upon the introduction of the evidence. n14

Usually, the most effective limiting instruction is one that specifies and prohibits the impermissible use of the evidence; indeed, some Courts have required a "prohibited use" instruction. n15 Despite these rulings, there is no requirement in the language of *Rule 105* that a limiting instruction actually articulate and prohibit the impermissible use of the evidence. Indeed, it may be appropriate in some cases to craft an instruction that specifies only a permissible use, and says nothing about forbidden uses, so as not to give the jury any ideas. n16 Most Courts have held that while a prohibited use instruction is ordinarily preferable, the Trial Judge has discretion in crafting an appropriate limiting instruction. n17

The objecting party has a strategic decision to make in asking for a "prohibited use" or a "permissible use" instruction. Asking for a permissible use instruction will not work unless the party can articulate all the possible permissible uses of the evidence--this may serve to give the adversary an idea on how to use the evidence that the adversary never thought about. On the other hand, asking for a prohibited use instruction risks giving the jury an idea about how to (impermissibly) use the evidence. This is another reason why counsel often choose not to request a limiting instruction even when they are entitled to one.

The Trial Judge is not bound by the exact language of an instruction proffered by counsel, even if it correctly states the law. *Rule 105* imposes a mandatory duty to give a limiting instruction upon request, but it does not require the Court to give the exact instruction requested. n18 It follows, of course, that the Trial Court may refuse a proffered instruction that erroneously or incompletely states the law.

[7] Constitutional Limitations

The doctrine of limited admissibility rests on the assumption that the jury, when instructed to ignore evidence insofar as it proves a certain, impermissible point, will in fact follow the instruction. n19 Professor Damaska, in *Evidence Law Adrift*, has an interesting take on limiting instructions. He agrees with Judge Learned Hand and others that individual jurors are unlikely to follow limiting instructions. However, he argues that an instruction does have some utility during juror deliberations, because a juror would never try to convince other jurors on the basis of evidence or inference that the judge has told the jurors not to use. In other words, a juror may not follow an instruction in his own mind, but he would never explicitly encourage other jurors to disregard the instruction as well. Thus, juror arguments in deliberation will tend to be based solely on permissible uses of the evidence.

The Supreme Court has held that in some egregious circumstances a limiting instruction is constitutionally insufficient to protect the rights of a criminal defendant. The leading case is *Bruton v. United States, 391 U.S. 123 (1968)* , n20 where Bruton's codefendant, Evans, confessed; the confession was admissible against Evans but not against Bruton. The Court held that a limiting instruction -- to use the confession only against Evans, and not against Bruton -- was insufficient to protect Bruton's right to confrontation, because the hearsay statement was "powerfully incriminating" as to Bruton, and the jury would be very unlikely to follow the instruction. The Court reasoned that the instruction was an especially difficult one for laypersons to follow, because it required the jury to affirmatively use the evidence against Evans, but not at all against Bruton. Such mental gymnastics were considered beyond the power of any juror; the jury

was asked to do more than simply ignore evidence that had come before it or to use the evidence for one purpose but not for another. Therefore, Evans' confession could not be admitted, even against Evans, in a joint trial with Bruton, because admission against Evans was tantamount to admission against Bruton. *Bruton* was grounded in the *Confrontation Clause*. The Court specifically held that Bruton's right to confront his accuser, Evans, was violated.

Bruton was extended to "interlocking" confessions (i.e., where both codefendants confess, but neither defendant's confession is admissible against the other) in *Cruz v. New York, 481 U.S. 186 (1987)* ; in these circumstances the confession of the nontestifying codefendant remains powerfully incriminating, and an instruction not to use it against the defendant is constitutionally insufficient to protect the defendant's constitutional rights. However, in *Richardson v. Marsh, 481 U.S. 200 (1987)* , the Court held that the *Confrontation Clause* is not violated where a codefendant's confession is redacted to eliminate any reference to the defendant's existence, and proper limiting instructions are provided. n21 Thereafter, in *Gray v. Maryland, 523 U.S. 185 (1998)* , the Court held that *Bruton* was violated when the codefendant's confession accused the defendant of taking part in the crime, and the confession was "redacted" so that the defendant's name was replaced by a "[deleted]." This was unlike *Marsh*, where the confession was redacted in such a way as to not implicate Marsh either directly or by the use of a "fill in the blanks" procedure. Thus, redaction of the confession is insufficient to satisfy *Bruton* when the jury can see through the redaction and easily conclude that the codefendant has accused the defendant of taking part in the crime. In such circumstances, the confession remains "powerfully incriminating" to the defendant even after redaction.

It is well established that there is no *Bruton* problem if the confessing codefendant takes the stand and is available for cross-examination; in that case, the defendant's right to confrontation is assured. n22 Finally, *Bruton* is not applicable where the confessing defendant's statement is admissible against the codefendant under a hearsay exception that satisfies the *Confrontation Clause*. n23 This is because the statement is properly admitted for its truth against the non-confessing codefendant.

FOOTNOTES:

(n1)Footnote 1. See *United States v. Prawl, 168 F.3d 622 (2d Cir. 1999)* (reversible error where the Trial Judge refused the defendant's request to instruct the jury that a coconspirator's guilty plea was not to be used as evidence of the defendant's guilt).

(n2)Footnote 2. See *Gray v. Busch Entertainment Corp., 886 F.2d 14 (2d Cir. 1989)* (failure to ask for a limiting instruction meant that the proffered evidence could be used for any purpose).

(n3)Footnote 3. *United States v. Rhodes, 62 F.3d 1449 (D.C. Cir. 1995)* (*Rule 105* squarely imposes on counsel the burden of requesting a limiting instruction; counsel may wish to forgo a limiting instruction for tactical reasons, and it is therefore unwarranted to impose a duty on District Courts to give an instruction *sua sponte*), *vacated on other grounds*, *517 U.S. 1164 (1996)* .

(n4)Footnote 4. See, e.g., *United States v. Johnson, 46 F.3d 1166, 1171 (D.C. Cir. 1995)* (no error in failure to give a limiting instruction where none was sought; an instruction might be "inconsistent with a defendant's deliberate trial strategy to minimize the jury's recollection of the unfavorable evidence").

(n5)Footnote 5. See, e.g., *United States v. Mark, 943 F.2d 444 (4th Cir. 1991)* (Trial Court, *sua sponte*, gave limiting instruction as to evidence of uncharged misconduct).

(n6)Footnote 6. See *United States v. Garcia, 530 F.2d 650 (5th Cir. 1976)* (plain error for failure to give limiting instruction after impeachment with a prior inconsistent statement).

(n7)Footnote 7. See Advisory Committee Note to *Rule 403* ("In reaching a decsion whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

(n8)Footnote 8. See, e.g., *Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)* (in suit claiming excessive force during an arrest, it was error to admit evidence of complaints filed against members of the police force who were not defendants in the case; although the Trial Court "gave adequate, if not model, instructions as to the limited purpose for which the evidence should be considered," those instructions were insufficient to protect against the danger of unfair prejudice).

(n9)Footnote 9. See, e.g., *United States v. Dozier, 672 F.2d 531 (5th Cir. 1982)* (in extortion trial, Trial Court instructed the jury to consider a victim's characterization of defendant's conduct as "extortion" only as evidence of the victim's perception and not as a conclusive legal opinion: "If the defense, having lost the argument on general admissibility, desired a more precise limiting instruction on the extent to which the jury should consider such testimony, it could, and should, have requested one. See *Rule 103(a)(1), 105*.").

(n10)Footnote 10. See, e.g., *United States v. Thirion, 813 F.2d 146 (8th Cir. 1987)* (request for limiting instruction was properly refused because it did not specifically identify those portions of the witness' testimony to be limited).

(n11)Footnote 11. See *United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992)* (prosecutor impermissibly vouched for credibility of government witness; instructions did not neutralize the harm where "they did not mention the specific statements of the prosecutor and were not given immediately after the damage was done").

(n12)Footnote 12. See, e.g., *United States v. Misle Bus & Equip. Co., 967 F.2d 1227 (8th Cir. 1992)* (better practice is to provide limiting instruction both at the time prejudicial evidence is admitted at again at the end of trial; but this is a matter of Trial Court discretion and the Court did not abuse its discretion in this case by instructing only at the close of the evidence).

(n13)Footnote 13. *United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* (no error where Trial Judge "chose to delay the limiting instruction until the final charge"); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980)* ("Although generally more effective at the time the evidence is presented, limiting instructions may be requested and given as part of the court's final instructions to the jury.").

(n14)Footnote 14. See, e.g., *Jones v. United States, 385 F.2d 296 (D.C. Cir. 1967)* (plain error not to give immediate instruction that prior inconsistent statement could only be used for impeachment purposes).

(n15)Footnote 15. See, e.g., *Government of the Virgin Islands v. Mujahid, 990 F.2d 111 (3d Cir. 1993)* ("The instruction to the jury must deal precisely with the issue of how the ... evidence can and cannot be used").

(n16)Footnote 16. See Federal Judicial Center Pattern Jury Instruction No. 18 (limiting the jury's consideration to one purpose without disclosing impermissible purposes). See also *Borunda v. Richmond, 860 F.2d 937 (9th Cir. 1988)* , *as amended*, *885 F.2d 1384 (1988)* (while "forbidden use" instruction may be preferred, it is not required by *Rule 105*).

(n17)Footnote 17. See *Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987)* (in product liability suit, Trial Judge instructed jury that certain evidence was offered for the purpose of notice of allegations of claims of defect; although it "would have been better had the trial court specifically directed the jury not to consider the evidence as proof of defect," there was no abuse of discretion; *Rule 105* "does not require all limiting instructions to contain prohibited use language").

(n18)Footnote 18. See *United States v. Dray, 901 F.2d 1132 (1st Cir. 1990)* (no error in refusing to instruct the jury that documents proffered by the government had not been mailed, where the Trial Judge had already instructed the jury that the case was not about mail fraud, but rather that it was a conspiracy case, and the Trial Judge had "painstakingly explained the difference").

(n19)Footnote 19. This assumption has its critics. Judge Learned Hand, in *Nash v. United States, 54 F.2d 1006 (2d Cir. 1932)* , complains that limiting instructions are nothing but "the recommendation to the jury of a mental gymnastic

which is beyond not only their powers, but anybody's else." And yet a purpose-driven system evidence must depend on the assumption that jurors generally can generally follow instructions, because the alternative -- exclusion of evidence whenever it could be used for an impermissible purpose -- is unworkable.

(n20)Footnote 20. See also *Jackson v. Denno, 378 U.S. 368 (1964)* (instruction to jury, to consider defendant's confession only if it finds that it was voluntarily made, held constitutionally insufficient to protect the defendant against the use of an involuntary confession). But see *Spencer v. Texas, 385 U.S. 554 (1967)* (instruction as to appropriate use of prior crimes evidence was constitutionally sufficient).

(n21)Footnote 21. For more discussion of the *Bruton* problem and the role of limiting instructions, see *United States v. Washington, 952 F.2d 1402 (D.C. Cir. 1991)* (limiting instructions are sufficient so long as the codefendant's statement does not create an "inevitable association" with the defendant), and the cases cited therein.

(n22)Footnote 22. See, e.g., *United States v. Morrow, 923 F.2d 427 (6th Cir. 1991)* (no *Bruton* violation "where the codefendant testifies and is subject to cross-examination").

(n23)Footnote 23. See *United States v. Vazquez, 857 F.2d 857 (1st Cir. 1988)* (codefendant's hearsay statement admissible as an excited utterance; admitting it against defendant did not violate the *Bruton* rule).

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105.03 Annotated Cases

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[1] Codefendant's Confession -- Limiting Instruction Required

United States v. Sauza-Martinez, 217 F.3d 754 (9th Cir. 2000) : The Court reversed a defendant's cocaine convictions arising from a trial in which he was tried with three other defendants. One of the codefendants had made statements to the authorities after her arrest, implicating both herself and the defendant. The parties agreed that these statements would be admissible against the codefendant as party-admissions, but not admissible against the defendant. They also agreed that the defendant's confrontation rights under *Bruton v. United States* n1 were not at stake, because the codefendant was going to testify at the trial. The defendant argued nonetheless that severance was required because he would suffer undue prejudice when the codefendant's statements were admitted. The government opposed the severance motion and promised to offer a limiting instruction when the statements were introduced, instructing the jury that the statements could not be used against the defendant. The Trial Judge denied the severance motion, the codefendant testified, and her post-arrest statements were introduced. But the government never offered a limiting instruction, the defendant never asked for one, and the Judge never gave one. Since the defendant failed to object to the statements when they were offered and did not request a limiting instruction, he could claim plain error only with respect to the Judge's failure to give a limiting instruction. The Court found plain error in this case. The error was plain because "both the Supreme Court and this court have made very clear that limiting instructions are necessary to reduce the prejudicial effect of joinder." And the error affected the defendant's substantial rights because (1) the codefendant's statement directly implicated the defendant, (2) the prejudice was accentuated by the government's references to the statement in closing argument, and (3) the other evidence against the defendant "was by no means overwhelming."

[2] Impeachment Evidence

United States v. Rhodes, 62 F.3d 1449 (D.C. Cir. 1995) , *vacated on other grounds*, *517 U.S. 1164 (1996)* : Affirming a narcotics conviction, the Court overruled *United States v. Copelin, 996 F.2d 379 (D.C. Cir. 1993)* , and held there was no obligation on Trial Courts to give a limiting instruction *sua sponte*, since *Rule 105* commands that the instruction shall be available "upon request" and the Supreme Court has taught that the Federal Rules displace

common-law precedents to the extent they are inconsistent.

Gray v. Busch Entertainment Corp., 886 F.2d 14 (2d Cir. 1989) : The Court held that after a witness denied making a statement to a nurse employed by the defendant, it was permissible to offer the defendant's business record which recorded the statement to impeach the witness. Although the record was admissible only for impeachment purposes, the plaintiff failed to request an instruction, and the Court held that the general hearsay objection made by the plaintiff was insufficient to preserve for appeal a complaint that the evidence should have been admitted only for a limited purpose.

United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) : Affirming convictions for drug offenses, the Court held that the Trial Judge did not err in failing to give the jury a limiting instruction on the use of prior inconsistent statements of a codefendant. Except in limited circumstances identified in *United States v. Sisto, 534 F.2d 616 (5th Cir. 1976)* , the Court indicated that in most cases a limiting instruction will be given only upon request. *Rule 105* requires a request for such an instruction and, unless such a request were made, only plain error would require a reversal. Plain error would seem to require a showing of great prejudice in a context in which the need for a limiting instruction is obvious.

Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) : When a witness denied that the defendant had urged him to fire the plaintiff for making an EEOC complaint against the defendant, the plaintiff introduced a surreptitious tape recording in which the witness had previously recounted the conversation with the defendant. The Court held that although an instruction limiting use of the recording to impeachment purposes would have been correct, the Trial Judge had no duty to give the instruction *sua sponte*, and counsel's failure to request one did not result in a manifest miscarriage of justice.

[3] Motive

Staniewicz v. Beecham, Inc., 687 F.2d 526 (1st Cir. 1982) : Affirming a judgment for an employer in an age discrimination suit, the Court found that the results of a telephone audit conducted by the plaintiff's superior were not hearsay, since they were offered only to show why a meeting was called with appellant that ultimately led to his resignation. The Court rejected a complaint that no limiting instruction had been given, as none had been requested.

[4] Other Accidents

Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987) : Although the Court affirmed the liability portion of a judgment for a husband and wife who sued following a wheel rim explosion that injured the husband, it indicated that the Trial Judge's limiting instruction -- that evidence of other accidents was admitted to prove notice of the alleged defect -- would have been better if the Court had included a specific direction that the evidence could not be used to prove a defect.

[5] Other Crimes and Acts

United States v. Echeverri-Jaramillo, 777 F.2d 933 (4th Cir. 1985) : Although the Court stated that ordinarily a limiting instruction should be given when other crimes evidence is admitted, it found that no request for an instruction was made in this case and affirmed a defendant's drug convictions.

United States v. Stevens, 303 F.3d 711 (6th Cir. 2002) : Affirming convictions for arson and related offenses, the

Court held that there was no plain error in the admission of evidence of the defendant's involvement in two prior arsons or in an instruction to the jury that the evidence was admitted to assist the jury "in deciding the defendant's intent, motive, knowledge, and whether the fire was an accident." The defendant claimed on appeal that the evidence was relevant to prove only intent, but the Court rejected the argument, reasoning that "[w]here a single, legitimate purpose supports the admission of the evidence under *Rule 404(b)*, a trial court's admission of that evidence for additional reasons allowed under the rule does not constitute plain error." The Court also held that the Judge did not commit plain error by failing to repeat a limiting instruction each time other acts evidence was introduced.

United States v. Liefer, 778 F.2d 1236 (7th Cir. 1985) : Affirming convictions for conspiracy to distribute marijuana, the Court held that a Trial Judge's failure to give a limiting instruction concerning prior criminal acts will be reversible error only if it qualifies as plain error.

United States v. Unruh, 855 F.2d 1363 (9th Cir. 1987) : In a prosecution for misapplication of bank funds, the Court suggested that defense counsel should have requested a more specific instruction with respect to the use of evidence if counsel believed that the Trial Judge's proposed instruction was inadequate. In *Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988)* , the Court held there was no error in admitting evidence of the plaintiffs' prior acquittals in a state criminal proceeding, which was offered as part of proof that they expended funds following the arrest which they claimed was unlawful. The Court observed that the Trial Judge gave a limiting instruction and that the defendants, who did not request a more elaborate instruction, could not complain on appeal that a more precise instruction was required. In *United States v. Potter*, n2 the Court said that limiting instructions should ordinarily be given when *Rule 404(b)* evidence is admitted against a criminal defendant, but found no error in the failure of the Trial Judge to instruct *sua sponte*.

United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978) : In this drug case, the Court noted that a jury instruction on the proper use of other crimes evidence generally must be given only upon the request of a defendant, not *sua sponte* by the Trial Judge.

Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001) : A former City employee brought a civil rights action against the City and its City Manager (Neal) after Neal sexually harassed and raped her. Neal did not object or request a limiting instruction when the plaintiff introduced evidence that Neal harassed other women and had a reputation as a harasser, to prove that the City had a custom or policy of being indifferent to women. The Court held that there was no plain error in failing to provide a limiting instruction sua sponte. In *United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985)* , the Court indicated that it would have been better practice in a drug prosecution to give a limiting instruction when evidence of guns found on the dashboard of a car was admitted, but it held that it was not error to fail to give an instruction when no request for one was made.

[6] Other Defendants' Convictions

United States v. Prawl, 168 F.3d 622 (2d Cir. 1999) : The Court found reversible error in the Trial Judge's refusal to instruct the jury that a coconspirator's guilty plea was not to be used as evidence of the defendant's guilt. In *United States v. Ramirez, 973 F.2d 102 (2d Cir. 1992)* , the Court reversed the defendant's conviction for narcotics and firearms offenses, holding it was error to refuse to instruct the jury that they should not consider a testifying codefendant's guilty plea as evidence of the defendant's guilt.

United States v. Werme, 939 F.2d 108 (3d Cir. 1991) : Affirming a conviction for conspiracy to violate the Travel

Act, the Court noted that evidence of another party's guilty plea is not admissible to prove the defendant's guilt but may be admitted to show the witness' bias. The Court held it was error, but harmless, to fail to give a requested limiting instruction when a coconspirator's guilty plea was introduced. See also *Government of Virgin Islands v. Mujahid, 990 F.2d 111 (3d Cir. 1993)* (error, but harmless, merely to instruct jury to be cautious in evaluating cooperating witness without telling them witness' guilty plea could not be considered evidence of defendant's guilt).

United States v. Christian, 786 F.2d 203 (6th Cir. 1986) : The Court affirmed drug convictions, holding there was no plain error in the failure to give a limiting instruction *sua sponte* concerning a codefendant's guilty plea.

United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991) : Affirming tax evasion convictions arising out of a "skimming" scheme, the Court held there was no abuse of discretion in giving, at the government's instance, an instruction to carefully consider testimony from a prosecution witness who had been given immunity. Although the instruction is ordinarily given on behalf of the defense, the witness was basically a hostile witness, and *Rule 607* permits any party to attack a witness' credibility.

United States v. Roth, 736 F.2d 1222 (8th Cir. 1984) : The Court affirmed loansharking convictions, observing that admission of "evidence that a codefendant has pled guilty to the same offense is not error unless elicited as substantive proof of the defendant's guilt. Such evidence is clearly admissible to show the witness' acknowledgment of participation in the offense, or to reflect on his credibility." An instruction to the jury on the proper use of the conviction should be given when it is requested.

United States v. Harris, 738 F.2d 1068 (9th Cir. 1984) : The Court said that it was unfortunate that the jury was instructed not to speculate on the reasons why two coconspirators pleaded guilty and testified for the government. The defendants attempted to use the pleas to prove that the coconspirators had a motive to testify as the government wanted, and the instruction tended to undercut the attempt at impeachment. However, the Court found that another instruction fairly informed the jury that it should carefully examine the testimony of confessing codefendants.

United States v. Austin, 786 F.2d 986 (10th Cir. 1986) : The Court reversed two defendants' marijuana convictions because the government informed the jury that ten coconspirators had been previously tried and convicted for their parts in the alleged conspiracy. It concluded that the government engaged in "blatantly impermissible use of these convictions" and that it was plain error for the Trial Judge to have admitted evidence that two of the conspirators who testified had been convicted without giving the jury a limiting instruction.

[7] Right to an Instruction

United States v. Washington, 592 F.2d 680 (2d Cir. 1979) : The Court held that it was error in a case charging assault on a federal officer for the Trial Judge to refuse to instruct the jury that the fact that the defendant was previously convicted of a felony, the nature of which was not disclosed, could be considered only for a limited purpose.

United States v. Werme, 939 F.2d 108 (3d Cir. 1991) : Affirming a conviction for conspiracy to violate the Travel Act, the Court noted that evidence of another party's guilty plea is not admissible to prove the defendant's guilt but may be admitted to show the witness' bias. The Court held it was error (but harmless) to fail to give a requested limiting instruction when a coconspirator's guilty plea was introduced.

Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985) : In a product liability action brought against manufacturers of a tire rim which separated and struck one of the plaintiffs as he attempted to inflate a truck tire, the Court found that the Trial Judge erred in refusing to give a limiting instruction when evidence was admissible for a limited purpose with respect to only one of the defendants. Subsequently, in *Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985)* , the Court reversed a judgment for a plaintiff who brought an action alleging product liability and negligence in the design of automobile brakes, because the Trial Judge erred in admitting videotapes of a hypnotic session and in rejecting the defendant's request for a limiting instruction explaining that the videotapes were admitted only to evaluate the opinions of an expert witness. Since the tapes were important evidence and the jury was permitted to consider the truth of the contents, the Court held that the error was prejudicial to the defendant.

[8] Settlements

Brocklesby v. United States, 767 F.2d 1288 (9th Cir. 1985) : The Court affirmed a judgment against the manufacturer of an approach chart in a case arising out of an airline crash. It held that the Trial Judge properly admitted evidence of a compromise settlement between the manufacturer and the United States to attack the credibility of witnesses for the manufacturer and the government, and that the Trial Judge was not obliged to give a limiting instruction concerning the proper use of the evidence where no request for such an instruction was made.

[9] State of Mind

United States v. Dozier, 672 F.2d 531 (5th Cir. 1982) : In the course of affirming Hobbs Act and RICO convictions, the Court stated that if the defendant wanted a more particularized limiting instruction regarding testimony by government witnesses as to why they gave money to him, he "could, and should, have requested one."

[10] Tactical Choice

United States v. Brandon, 17 F.3d 409 (1st Cir. 1994) : After a witness in a bank fraud prosecution mentioned that two of the defendants were Jewish, defense counsel moved to dismiss and for a mistrial on the grounds that the testimony invited an impermissible inference that members of the same religion would be more likely to join a conspiracy and may have provoked anti-Semitic feelings. When the Trial Judge offered to try to ferret out any anti-Semitism on the jury, the counsel requested only dismissal, not further questioning of the jury, and expressed displeasure with the possibility of providing curative instructions that "would only magnify the problem." Affirming, despite the possible inappropriateness of the testimony, the Court found that the level of prejudice, if any, was not sufficiently significant to overturn the decision to accept "the defendants' tactical choice to forgo more appropriate methods of addressing the potential prejudice in favor of the unrealistic and unnecessary solution of a dismissal or a new trial."

[11] Timing of Instruction

United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988) , rev'd on other grounds, 490 U.S. 858 (1989) : Affirming narcotics-related convictions, the Court held that it was not an abuse of discretion to decline to give a limiting instruction at the time physical evidence was admitted against some, but not all defendants, where the Judge instead instructed the jury on the admissibility of evidence in the general charge at the close of trial. In our judgment, the better practice is to give an instruction at the time evidence is offered, provided that a specific request is made for an instruction. In the instant case, the jury might well have assumed that all physical evidence was admissible against all defendants, especially in view of the fact that when conspirator statements were not admissible against all the Judge had so indicated. A timely limiting instruction works to guarantee that a jury does not incorrectly assume for much of a trial

that evidence is admissible against all defendants and that it is not necessary for the jury to disabuse itself of the assumption at the last moment.

United States v. Chance, 306 F.3d 356 (6th Cir. 2002) : In a prosecution of a sheriff for racketeering offenses, the Court held that the defense had opened the door to cross-examination about the indictment or conviction of employees hired or promoted by the defendant. However, the Court was given "some pause" by the Trial Judge's refusal to give a contemporaneous limiting instruction on the proper uses of the cross-examination evidence. Nevertheless, it reasoned that *Rule 105*'s requirement of an instruction "[w]hen ... [the evidence] is admitted" is ambiguous, so the matter is within the Judge's discretion. In this case, any prejudice the defendant suffered as a result of the timing of the instruction was minimal, so if there was any error in the Judge's refusal, it was harmless.

United States v. Butler, 102 F.3d 1191 (11th Cir. 1997) : The Court held there was no abuse of discretion in refusing to repeat at the end of the trial a limiting instruction given when *Rule 404(b)* evidence was excluded. Repeating the instruction might have unduly emphasized the evidence.

FOOTNOTES:
(n1)Footnote 1. *Bruton v. United States, 391 U.S. 123 (1968)* .

(n2)Footnote 2. *United States v. Potter, 616 F.2d 384 (9th Cir. 1979)* .

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PART TWO: THE RULES THEMSELVES
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CHAPTER 105 RULE 105

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105.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

A close relationship exists between this rule and *Rule 403* which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under *Rule 403*. In *Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1968)* , the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; *California Evidence Code § 355*; Kansas Code of Civil Procedure § 60-406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

[2] Report of the House Committee on the Judiciary

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

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1-105 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 105, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 105. Limited Admissibility	**Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Oth**

	er Purposes
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall	If the court admits evidence that is admissible against a party or for a purpose -- but not against another party or for another purpose -- the court, on timely request, must re-

re- stric t the evid ence to its prop er scop e and in- struc t the jury ac- cord ingl y.	stric t the evid ence to its prop er scop e and in- struc t the jury ac- cord ingl y.

Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 105.03 Annotated Cases

[Go To Main]

[3.1] Multiple Defendants [Go To Main]

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) : Reviewing the convictions of 11 defendants for participating in a cocaine distribution conspiracy, the Court held that it was an abuse of discretion, when admitting evidence that four of the defendants threatened a witness, to refuse to give a limiting instruction that such evidence was not relevant to the other seven defendants.

[3.2] Nonhearsay Purpose [Go To Main]

United States v. Colon-Diaz, 521 F.3d 29 (1st Cir. 2008) : Affirming a conviction for drug distribution, the Court found no plain error in admitting the testimony of an informant that federal agents asked her to go purchase drugs from the defendant's "yellow point" location. The evidence was admitted for the purpose of demonstrating why the informant went to that location, and not to prove that the defendant owned the location. The Court noted that the defense had approved a limiting instruction that the jury "may not take that answer for its veracity, that it was the defendant's yellow point." The Court also pointed out that other testimony by task force members offered to show why they went to the defendant's location or focused on the defendant was admitted to explain their actions, not for its truth, and was accompanied by appropriate limiting instructions.

[5] Other Crimes and Acts [Go To Main]

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : In the prosecution of a check fraud scheme, the government introduced excerpts from a book the defendant had written that detailed a virtually identical scheme. Affirming, the Court held there was no abuse of discretion in admitting the evidence as proof of the defendant's intent. However, it was

plain error to give a limiting instruction that the evidence could be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," because there was no issue concerning motive, opportunity, or identity. The error was harmless, however, because the other listed purposes overlapped with intent, there was no showing that consideration of the book permitted any unfair inferences concerning identity, motive, or opportunity, and the instruction carefully addressed avoiding the propensity inference.

[7] Right to an Instruction [Go To Main]

United States v. Smith, 459 F.3d 1276 (11th Cir. 2006) : Appealing convictions for producing and possessing child pornography, the defendant argued that the Judge did not provide an adequate limiting instruction with regard to an out of court identification. Reviewing only for plain error because this argument was not raised at trial, the Court held that "because *Federal Rule of Evidence 105*, which provides for limiting instructions in appropriate circumstances, only operates upon request, the failure to give a limiting instruction is error only when such an instruction is requested."

[11] Timing of Instruction [Go To Main]

United States v. Beasley, 495 F.3d 142 (4th Cir. 2007) : The Court affirmed convictions for conspiring to distribute and possessing crack cocaine, finding no abuse of discretion in the denial of a request for a contemporaneous limiting instruction when evidence was admitted against one defendant but not another. The Court concluded that "[i]n this case, the district court met its obligation under Rule 105 when it instructed the jury at the conclusion of the trial that it 'is your duty to give separate personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants.' "

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[12] Otherwise Inadmissible Evidence Offered To Complete

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[19] Relevance Requirement

[20] Remainder Not Necessary To Complete

[21] Scientific Articles

[22] Tape Recordings

[23] Television Interviews

[24] Timing

106.04 Legislative History

[1] Advisory Committee's Note

[2] Citations to Hearings and Debates

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106.01 Official Text

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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106.02 Editorial Explanatory Comment

[1] Purpose of the Rule

Rule 106 provides that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or any other writing or recording so closely related that in fairness it too should be admitted. n1 When the Trial Court finds that fairness requires the admission of additional evidence, the proponent must decide between allowing all of the evidence to be admitted and withdrawing the originally proffered portions. n2

The Rule by its terms applies to separate writings and recordings as well as to excised portions of a single writing or recording. n3 Thus, if the offering party proffers a reply letter, a Court might find it necessary to place the letter in context by admitting the letter to which reply was made. n4

The party who wants to complete the record is entitled under the Rule to compel the offer of the additional information at the time the proponent offers the partial evidence, rather than waiting until a later stage of the trial. Thus, *Rule 106* is a procedural device governing the timing of completion evidence. It has been stated that the Rule is "primarily designed to affect the order of proof." n5 As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury. n6 The opponent has discretion, of course, to wait to offer the completing evidence until a later point. But the Rule recognizes that sometimes waiting until later to put an unfair presentation of harmful evidence in context is just not good enough.

The Rule does not mean that an entire writing or recording is automatically admissible whenever part of it is introduced. As one Court put it, the remainder of a writing or recording is admissible only when necessary "to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." n7 As another Court stated, "the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." n8

Rule 106 does not by any means prohibit a party from introducing only part rather than all of a statement. There may be many good reasons for admitting an excerpt, including the possibility that some parts of the entire statement may be irrelevant, inadmissible hearsay, or may even be unduly prejudicial to the opponent. *Rule 106* simply provides that

excerpts will be evaluated to determine whether the proponent has made an unfairly selective presentation.

[2] Oral Statements

While *Rule 106* by its terms applies only to writings and recordings, the principle of completeness embodied in the Rule has been applied to the introduction of oral out-of-court statements as well. Whether this is mandated by *Rule 106* or by *Rule 611* is unimportant. n9 The important point is that where a party introduces a portion of an oral statement, the adversary is entitled to have omitted portions introduced at the same time, insofar as that is necessary to correct any misimpression that the initially proffered portion would create.

[3] Admitting Hearsay

Suppose a portion of an oral or written statement is introduced and the opponent wants to introduce another portion under the completeness principle -- and it is a portion that would be hearsay if offered independently. This situation arises most often when the prosecution in a criminal case introduces a portion of the defendant's confession. That portion is admissible as an admission. Often, however, the defendant's confession is not self-inculpatory in all respects. Defendants when confessing routinely attempt to exculpate or explain their conduct in whole or in part, while admitting to taking some part in a crime. When these exculpatory portions are offered under the completeness principle, they are often met with a hearsay objection. Can *Rule 106* essentially be used as a hearsay exception, assuming that the hearsay statement is necessary to complete an admitted portion of a statement?

The Rule does not on its face state that hearsay is admissible. This has led some Courts to hold that *Rule 106* operates solely as a timing device, affecting the order of proof -- it does not make admissible what would otherwise be excluded. n10

We believe that these rulings are misguided and contrary to the completeness principle embodied in *Rule 106*. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness.

The appropriate way to resolve the hearsay issue is to hold that the party who offers an incomplete statement or document forfeits any hearsay objection to completing evidence that is necessary to correct a misleading impression. *Rule 106* is thus consistent with the "open door" principle. n11 It is up to the proponent of the initial portion to decide whether to forgo that portion, or to forgo the hearsay objection to the remainder.

[4] "Fairness" Under the Rule

The Rule requires admission of completing evidence only when it ought "in fairness" to be considered with the admitted statement. Sometimes it is difficult to determine whether "fairness" mandates the admission of allegedly completing evidence. n12 *United States v. Branch, 91 F.3d 699 (5th Cir. 1996)* , offers a case in point. *Branch* arose out of the notorious gun battle between ATF agents and members of the Branch Davidian sect in Waco, which gave rise to the standoff between FBI agents and the Davidians. After the standoff came to its tragic conclusion, several surviving members of the sect were tried for firearms offenses as well as for conspiracy to murder the four ATF agents who were killed in the initial raid.

One of the defendants who was convicted in *Branch*, Jaime Castillo, had made a confession to a Texas Ranger that contained both inculpatory and exculpatory statements. At trial, the inculpatory statements were testified to by the Ranger, but when Castillo sought to bring out the exculpatory statements, he was prohibited from doing so on grounds of hearsay. A short discussion of the nature of the defense set forth in *Branch*, and the nature of the exculpatory statements, is necessary to understand Castillo's argument on appeal that the Trial Court violated the rule of completeness. Castillo was charged with and convicted of two offenses: using or carrying a firearm during a crime of

violence, and aiding and abetting the voluntary manslaughter of federal agents. Castillo argued, among other things, that he did not know that the men approaching the compound were federal agents; that he acted in self-defense; that the federal agents used excessive force; and that he never fired a shot at any federal agent and did not take part in any violence or aid or abet any manslaughter. The inculpatory statements made by Castillo and testified to by the Texas Ranger included the following: (1) Castillo donned battle dress upon learning of an impending raid by federal agents; (2) Castillo went to retrieve his AK 47 rifle in preparation for a gun battle; (3) When the gun battle started, Castillo's rifle failed, and so he went into a bedroom to obtain a handgun; (4) After a cease fire was declared, Castillo went into the kitchen and picked up an AK 47 rifle; he looked out the window and saw a dead ATF agent; (5) Castillo was given his AK 47 rifle and ammunition a few weeks before the ATF raid.

The exculpatory statements, which Castillo sought to introduce, included the following: (1) When he went to find the handgun in the bedroom, he saw a fellow Davidian lying there dead, with a bullet wound in his head; (2) After retrieving the handgun, he went and hid in another bedroom for the entire time of the gun battle, and he never fired a shot; (3) His duties at the compound were to help construct the tornado shelter, play the drums, and study the Bible.

The *Branch* Court assumed that if the rule of completeness were applicable to Castillo's exculpatory statements, those statements would have been admissible despite the fact that they were hearsay. The question was whether "fairness" required admission of the exculpatory portions. The test employed by the *Branch* Court was whether the omitted portions were "necessary to qualify, explain, or place into context the portion already introduced."

After considering the excluded exculpatory statements, the *Branch* Court found that while each of them was *relevant* to Castillo's defense, none of them was *necessary* to qualify, explain, or place into context the incriminating statements. For example, Castillo argued that his statement about hiding in the bedroom during the gun battle and never firing a shot was necessary to correct the misimpression left from his inculpatory statements. He argued that the jury may have been misled into believing that because Castillo picked up several guns, he might have actually fired a gun on the day of the battle. The Court, however, held that the "cold fact" that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Castillo was charged with using or carrying a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The Court concluded: "We do not doubt the exculpatory nature of the excluded statement, but that does not require its admission under *Rule 106*."

Finally, the Court rejected Castillo's contention that the statement about his Biblical and percussionist duties at the compound was improperly excluded. In light of his unvarnished statements about carrying guns, there was no misimpression that these exculpatory statements could qualify or place into context. On the rule of completeness, the *Branch* Court concluded as follows:

> We acknowledge the danger inherent in the selective admission of post-arrest statements. Neither the Constitution nor *Rule 106*, however, requires the admission of the entire statement once any portion is admitted in a criminal prosecution. We do no violence to criminal defendants' constitutional rights by applying *Rule 106* as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

The *Branch* opinion can usefully be contrasted with the Seventh Circuit's opinion in *United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993)* . *Haddad* was a prosecution for a firearms offense. In a post-arrest confession, the defendant stated that he knew that marijuana was under his bed, but that he did not know that a gun was also under the bed. At trial, the inculpatory statement (knowledge about marijuana) was admitted as an admission, but the exculpatory statement (lack of knowledge about the gun) was excluded as hearsay. The Court of Appeals found that the confession had been improperly (though harmlessly) redacted to exclude the exculpatory statement about the gun. The *Haddad* Court concluded, properly we believe, that "the admission of the inculpatory portion only (i.e., that [Haddad] knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun." That would clearly give an inaccurate account of the defendant's culpability, because he specifically denied knowing about the gun. The

Court concluded therefore that the "whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence."

The more expansive approach of *Haddad* is clearly preferable to that of *Branch*, especially in criminal cases where confessions are obviously so powerfully incriminating. It is critical that defendants be allowed some leeway to place these confessions in context, and Rules 106 and 611(a), when properly read, provide the necessary flexibility. It should also be noted that the more expansive *Haddad* view of *Rule 106* helps to prevent the prosecution from admitting portions of a confession as a way to put pressure on the defendant to take the stand. If the completing portions of the statement are not admitted, defendants may have no choice but to take the stand and explain that the prosecution took their prior statements out of context.

Although post-arrest statements may pose special problems for defendants, prosecutors also have an interest in ensuring that testimony about oral statements is complete. In *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* , it was the prosecutor who offered prior statements on redirect examination to complete what had been adduced on cross-examination. The case of *United States v. Maccini, 721 F.2d 840 (1st Cir. 1983)* , is similar, permitting a prosecutor to have additional portions of a witness' grand jury testimony read after defense counsel introduced some of the testimony.

[5] Timing Aspect of the Rule

Rule 106 is one of the rare examples of an evidence rule that permits one party to require another party to introduce more evidence than the latter desires to offer, or at least to have the latter party's case-in-chief interrupted while additional evidence is offered. Contrast *Rule 106* with the typical approach to oral trial testimony. Questions asked on direct examination may produce a story that is shaded to the advantage of the party calling the witness. However, clarification does not occur until cross-examination. Thus, the Rule provides protection against initial offers of incomplete writings and recordings that is not provided against initial offers of incomplete testimony. The reason for limiting the Rule to writings and recordings, at least as to timing, was that a process of immediate interruption was thought to be unwieldy for witness testimony. The broader principle of completeness applies to writings, recordings, and oral testimony, as discussed above; but the more limited principle of contemporaneous presentation embodied in the Rule can be applied only to writings and recordings.

Under *Rule 106*, a Trial Judge applying concepts of "fairness" must take into account the possible disruption of a party's order of proof, and balance that against the risk to the adversary that a misimpression could not be undone at a later point.

Rule 106 authorizes the introduction of completing evidence during the initial presentation of the writing or recording, but it does not require the adversary to introduce the material at that point. The adversary may in some cases find it more effective to present the completing evidence on cross-examination or rebuttal. n13

[6] Relationship to Best Evidence Rule

Rule 106 serves as a reminder that if a writing is offered, special rules may govern its introduction. *Rule 106* is one of the best examples. See also *Rules 803(5)* and *803(18)*. One theme concerning writings seems to run through the Rules: writings, it is feared, may have undue impact on a trier of fact, especially a jury. Thus, special controls have been developed to govern the admissibility of writings.

One of these controls is the Best Evidence Rule, found in Article X (*Rules 1001*-1008). There is a relationship between the Best Evidence Rule and *Rule 106*, and it has not received much attention. If a witness is permitted to testify about the contents of a missing writing -- when a writing has been lost, for example -- what impact should *Rule 106* have? Plainly, the Rule should be read to permit the questioning of the witness on cross-examination about related writings or

parts of the missing writing that are necessary for a full understanding of the meaning of the terms of the writing already in evidence. But when the production of a writing is excused and oral testimony is accepted, the writing itself is not present and there is no danger that it will have an undue impact on the jury that could not be corrected at a later point. Thus, there is not an immediate need to interrupt direct examination with questions by an opposing party. That is, the timing provisions of *Rule 106* should not be applicable in these circumstances. However, the spirit of both this Rule n14 and *Rule 611* suggests that a broad view of the "scope of direct examination" should be taken to assure that full and fair cross-examination occurs and that testimony about documents is placed in proper context. n15

[7] Tape Recordings

How does the rule of completeness apply to tape recordings where part of the recording is inaudible? The question is whether the inaudible portions would provide important context or alleviate misimpressions. If so, *Rule 106* could be invoked to require the audible portions to be summarized or recharacterized, n16 or to require exclusion of the entire recording. But of course the Trial Court must engage in some supposition in determining whether the inaudible portions are necessary to give a complete account. n17 The admissibility of portions of a tape where other portions are inaudible is necessarily committed to the discretion of the Trial Court. n18 Generally speaking, the chance of exclusion of the entirety should increase with the percentage of inaudible material on the tape. n19 However, the presumption should be that the audible portions are admissible if relevant, and that the risk presented by inaudible portions can be rectified by an appropriate limiting instruction. n20

[8] Prior Consistent Statements

Rule 106 has sometimes been invoked to allow the admission of a prior consistent statement of a testifying witness. This can occur when the witness is impeached with a prior inconsistent statement, and counsel argues that another statement consistent with the in-court testimony will serve to explain away the alleged inconsistency. Thus, the argument is that an inconsistent statement was taken out of context and that a consistent statement must be introduced in order to alleviate the misimpression.

Where both statements -- consistent and inconsistent -- are contained in a writing or recording, then *Rule 106* applies by its terms. For example, in *United States v. Pierre, 781 F.2d 329 (2d Cir. 1986)* , a DEA agent testified to an inculpatory statement made by Pierre in an interview. On cross-examination, he was confronted with the handwritten notes he took during the interview. These notes contained a series of "fragmentary phrases," and did not mention Pierre's inculpatory statement. On redirect, the Trial Court permitted the witness to testify that he had prepared typewritten notes three days after the interview, and he was allowed to read these notes. The typewritten notes included Pierre's inculpatory statement. The Court of Appeals relied on *Rule 106* and held that admission of a prior consistent statement is warranted "when the consistent statement will amplify or clarify the allegedly inconsistent statement." In *Pierre*, the consistent statement could corroborate the agent's explanation of the apparent inconsistency. The agent explained that the inculpatory statement was not included in the original notes because he was just jotting down certain phrases in the heat of the moment; after the interview, and while preparing the formal report, the agent had the opportunity to write down the inculpatory statement for the first time. He did not need to write the statement down initially, since it was something that he was unlikely to forget.

While *Rule 106* does not explicitly apply if either the prior inconsistent statement or the consistent statement is oral rather than written, it is clear that the reasoning of the Rule should still apply. n21 As the Court in *Pierre* put it: "It matters not whether such use is deemed a permissible type of rehabilitation or only an invocation of the principle of completeness, though not a precise use of *Rule 106*."

Note that where the prior consistent statement will explain an alleged inconsistency and thus rehabilitate the witness, it is admissible under the principle of completeness even if it is not admissible for its truth under the terms of *Rule 801(d)(1)(B)*. n22 For example, in *Pierre*, there was no charge that the witness had recently fabricated his testimony, or

that he had an improper motive. These are requirements for admissibility under *Rule 801(d)(1)(B)*; but that Rule deals with the substantive use of prior consistent statements. n23 Where a consistent statement is admitted to explain an inconsistency and is not admissible as substantive evidence under *Rule 801(d)(1)(B)*, the adversary is of course entitled to a limiting instruction as to the appropriate use of the evidence.

FOOTNOTES:

(n1)Footnote 1. For an interesting and thorough discussion of some of the problems that Courts have encountered under *Rule 106*, see Nance, *Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence*, *75 Tex. L. Rev. 51 (1996)*.

(n2)Footnote 2. See *American Bald Eagle v. Bhatti, 9 F.3d 163 (1st Cir. 1993)* (where portions of document were taken out of context, the Trial Court did not err in allowing the proponent of the portions to "choose whether the entire documents or no portion thereof would be admitted").

(n3)Footnote 3. See, e.g., *United States v. Giles, 246 F.3d 966 (7th Cir. 2001)* (tape recording of conversation should have been admitted as completing evidence, even though the conversation occurred some time after the conversations introduced by the government; later conversation served to place previous statements in context).

(n4)Footnote 4. Whether a separate document must be admitted will, of course, depend on the facts. See *Flores v. Cameron County, 92 F.3d 258 (5th Cir. 1996)* (civil rights action alleging the use of excessive force in a juvenile detention center; it was not error to admit log books that recorded that the decedent suffered from a bleeding rectum, possibly due to sex abuse, during a previous incarceration in the detention center, after the County, over the Trial Court's warning that it would apply *Rule 106*, offered into evidence all of the other log books covering the juvenile's stays at the detention center); *United States v. Boylan, 898 F.2d 230 (1st Cir. 1990)* (where certain personnel orders taken from a file were admitted, there was no need to admit other items from the file because the personnel orders were "complete in and of themselves").

(n5)Footnote 5. *United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981)* .

(n6)Footnote 6. See *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)* (the rule of completeness protects against the "danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material").

(n7)Footnote 7. *United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)* (second day of grand jury testimony not admissible under *Rule 106* merely because first day of grand jury testimony was admitted); *United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992)* (Trial Court admitted a statement by the defendant: "If I did it, I wouldn't tell you"; *Rule 106* did not require introduction of the remainder of the statement, "I would consult with an attorney first" because the admitted portion was not misleading); *United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986)* (where portion of tape is introduced, *Rule 106* does not require the introduction of an entirely separate conversation, on a different subject matter, that also happened to be on the tape). See also *United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988)* (where prosecution witness was cross-examined about a report, it was error to allow the prosecution to admit the entire report; defense counsel had not offered any specific portion of the report "for which the remainder was relevant and necessary to harmonize the introduced portions").

(n8)Footnote 8. *United States v. Haddad, 10 F.3d 1252, 1259 (7th Cir. 1993)* .

(n9)Footnote 9. See *United States v. Branch, 91 F.3d 699 (5th Cir. 1996)* (noting that courts have applied completeness principles to oral statements under either *Rule 106* or *Rule 611*).

(n10)Footnote 10. See *United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996)* (defendant's exculpatory statement cannot be admitted under *Rule 106*, since that Rule "would not render admissible the evidence which is otherwise inadmissible under the hearsay rule"); *United States Football League v. National Football League, 842 F.2d 1335 (2d*

Cir. 1988) (*Rule 106* "does not compel admission of otherwise inadmissible hearsay evidence").

(n11)Footnote 11. See *United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986)* ("*Rule 106* can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously."); *United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986)* (otherwise inadmissible evidence is admissible under *Rule 106* where it is "necessary to correct a misleading impression").

(n12)Footnote 12. *United States v. Li, 55 F.3d 325 (7th Cir. 1995)* (noting that "[a] trial judge need not admit every portion of a statement but only those needed to explain portions previously received," and reasoning that "[t]o determine whether a disputed portion is necessary, the district court considers whether (1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence").

(n13)Footnote 13. See Advisory Committee Comment to *Rule 106* ("The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.").

(n14)Footnote 14. The spirit of this Rule has resulted in the admission of documents to which one party has made reference at trial in order to clarify for the trier of fact the contents of the documents. See, e.g., *United States v. Baron, 602 F.2d 1248 (9th Cir. 1979)* , a case in which defense counsel attempted to impeach the key government witness in a bribery case by referring to the witness' prior memoranda in order to suggest that they really were consistent with trial testimony. See also *United States v. Juarez, 549 F.2d 1113 (7th Cir. 1977)* (reports of government agent used by defense counsel in cross-examination properly admitted under Rules 106 and 801(d)(1)(B) even though neither Rule "literally applicable" since witness' testimony not as good as reports in determining whether reports constituted accurate summaries).

(n15)Footnote 15. See, e.g., *United States v. Alvarado, 882 F.2d 645 (2d Cir. 1989)* (*Rule 611(a)* basically applies *Rule 106* to oral statements); *United States v. Castro, 813 F.2d 571 (2d Cir. 1987)* (while *Rule 106* concerns only written or recorded statements, *Rule 611* permits a Court to require a party to provide a fair context for an oral statement).

(n16)Footnote 16. See *United States v. Phelps, 733 F.2d 1464 (11th Cir. 1984)* (Trial Judge read a summary of a tape to a jury, because he was concerned about inaudible portions; no abuse of discretion).

(n17)Footnote 17. Sometimes the problem with a tape recording is not whether inaudible portions render it incomplete, but rather whether the tape "says" what the proponent says it does. The adversary may dispute the proponent's interpretation of what the declarants stated on the tape. This dispute is a question of authentication: is the document or recording what the proponent says it is? For a further discussion of the question of accuracy of a tape recording, see the commentary and annotations to *Rule 901*.

(n18)Footnote 18. *United States v. Devous, 764 F.2d 1349 (10th Cir. 1985)* ("admissibility of tape recordings that are partially inaudible lies within the sound discretion of the trial court"); *United States v. Enright, 579 F.2d 980 (6th Cir. 1978)* (no abuse of discretion where Trial Court carefully considered, and rejected, defense argument that audible portions of a tape could be taken out of context due to the fact that much of the tape, alleged to be clarification, was inaudible).

(n19)Footnote 19. See *United States v. Brinklow, 560 F.2d 1008 (10th Cir. 1977)* (tape recording is admissible unless the inaudible portions are so substantial as to render the tape untrustworthy; this question is left to the sound discretion of the Trial Judge).

(n20)Footnote 20. See *United States v. Arango-Correa, 851 F.2d 54 (2d Cir. 1988)* (there is a "clear preference for the admission of recordings notwithstanding some ambiguity or inaudibility, as long as the recordings are

probative").

(n21)Footnote 21. See *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* ("The opposing party may not pick and choose among prior statements to create an appearance of conflict and then object when this appearance is rebutted by means of a fuller version of the same prior statements.").

(n22)Footnote 22. See *United States v. Brennan, 798 F.2d 581 (2d Cir. 1986)* ("prior consistent statements may be admissible for rehabilitation even if not admissible under *Rule 801(d)(1)(B)*").

(n23)Footnote 23. See *United States v. Pierre, supra* (rules on substantive admissibility do not control use of evidence for rehabilitation).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 106 RULE 106

1-106 Federal Rules of Evidence Manual 106.03

106.03 Annotated Cases

[Go To Supp]

[1] Associated Documents

Phoenix Assocs. III v. Stone, 60 F.3d 95 (2d Cir. 1995) : Reversing a judgment for the defendant in an oral contract dispute between a partnership and a business associate, the Court held that an accountant's work papers should have been admitted to explain how various figures on certain financial statements were derived. It concluded that the jury could not have reached an impartial understanding of the financial statements without the work papers.

[2] Books Relied Upon

United States v. Latham, 754 F.2d 747 (7th Cir. 1985) : The Court found that the Trial Judge properly excluded books that the defendant claimed to have relied on in deciding not to file tax returns and admitted only portions that the defendant quoted during his testimony. The books contained only general criticism of the Tax Code and did not relate to the charges made against the defendant.

[3] Burden of Invoking the Rule

United States v. Sweiss, 814 F.2d 1208 (7th Cir. 1987) : In an arson prosecution, the Court held that *Rule 106* gave a defendant a right to offer a tape recording of a conversation between himself and the main prosecution witness if the recording were relevant to explain later recorded statements that were admitted. In this case, however, the defendant failed to specify the portions of the recording that would qualify or explain the other recordings, so it was no abuse of discretion to refuse to admit the tape recording.

United States v. King, 351 F.3d 859 (8th Cir. 2003) : The Court affirmed a conviction for violating the Foreign Corrupt Practices Act, finding no abuse of discretion in the admission of certain tape-recorded conversations between the defendant and coconspirators and no abuse of discretion in denying the defendant's request to publish all the tapes in

their entirety. The defendant was permitted to present additional tape recordings or transcripts to the jury to provide context to his statements, but he did not specify the remaining portions of the tapes that were relevant to the issue at trial and qualified or explained the portions admitted, nor did he show that the portions admitted misled the jury or provided an incomplete or distorted view.

United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986) : The Court affirmed a perjury conviction, finding no error in the exclusion of the defendant's entire grand jury testimony after the government introduced portions relevant to the perjury charge. The Court found that the defendant had not invoked *Rule 106* and had failed to claim that other portions should have been admitted "in fairness."

[4] Experts' Reports

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994) : Affirming a defendant's judgment in a product liability case, the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under Rules 702 and 703 simply because the experts testified. *Rule 702* permits admission of expert opinion *testimony*, and *Rule 703* permits an expert to base an opinion on inadmissible evidence but not to introduce that evidence for its truth. However, where the plaintiff extensively cross-examined the witnesses regarding the reports, the door was opened to their admission under the rule of completeness.

[5] Films, Movies, etc.

Brewer v. Jeep Corp., 724 F.2d 653 (8th Cir. 1983) : A judgment for the defendant in an action by an injured driver was upheld on appeal, as the Court ruled that the Trial Judge properly refused to admit into evidence a film commissioned by the company, which dealt with Jeep rollovers, unless a companion report written by the film-makers was also admitted.

[6] Hearsay in Documents

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994) : Affirming a defendant's judgment in a product liability case, the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under Rules 702 and 703 simply because the experts testified. *Rule 702* permits admission of expert opinion *testimony*, and *Rule 703* permits an expert to base an opinion on inadmissible evidence but not to introduce that evidence for its truth. However, where the plaintiff extensively cross-examined the witnesses regarding the reports, the door was opened to their admission under the rule of completeness.

Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512 (11th Cir. 1993) : As evidence that the plaintiff had made material misstatements in a claim for fire damage to his house, the defendant insurer offered part of the plaintiff's statement under oath indicating he was current on all of his obligations at the time, which was inconsistent with other evidence indicating that he was delinquent. The Court held it was error (but harmless) to admit under *Rule 106* another part of his statement showing he had a "1A" credit rating, as that hearsay within hearsay was not needed to qualify or place in context the statement about being current on all obligations.

[7] Impeachment Versus Substantive Evidence

United States v. Pierre, 781 F.2d 329 (2d Cir. 1986) : After the defense in a heroin prosecution elicited testimony from an agent that his notes of his interview with the defendant contained no reference to the defendant's refusal to

make a controlled delivery, the Trial Judge admitted evidence that the agent's formal report mentioned the refusal. Holding that the evidence was properly admitted, the Court observed in a footnote that *Rule 106* is silent as to the permissible uses of a document offered for completeness. It reasoned that "[w]here the first document is introduced not as substantive evidence but only to impeach credibility, the document offered for completeness would seem to be appropriately introduced also not as substantive evidence but only to rehabilitate credibility."

United States v. Myers, 972 F.2d 1566 (11th Cir. 1992) : In a civil rights prosecution of an officer for using a stun gun on arrestees, the Court held there was no abuse of discretion in limiting admission of a statement made by the defendant during an internal affairs investigation to the parts concerning the number of times he had used the stun gun, as the prosecutor had introduced the statement only to impeach the defendant on that issue. The parts consistent with the defendant's trial testimony were admitted for rehabilitation, but the parts of the statement dealing with the circumstances and the defendant's motivation were not admissible under the Rule.

[8] Offered To Provide Context for Evidence Introduced by Proponent

Echo Acceptance Corp. v. Household Retail Servs., 267 F.3d 1068 (10th Cir. 2001) : In an action for breach of contract between financing companies, the Court held there was no abuse of discretion in excluding three letters the defendant had sent to the plaintiff. The Court rejected an argument that the letters were nonhearsay because they were offered to provide context for other exhibits. The other exhibits had been admitted either on stipulation or by the defendant, so the defendant could not argue that the letters were necessary to cure a misleading impression.

[9] Opinion in Document

Polk v. Yellow Freight Sys., 876 F.2d 527 (6th Cir. 1989) : The Court held in a wrongful discharge case that the defendant's attempt to rebut a witness' testimony by quoting from an investigator's report was properly conditioned on also admitting the investigator's conclusion in the report about the incident because the conclusion was relevant to whether the defendant's action was pretextual.

[10] Oral Statements

[a] Completing Evidence for Accused

United States v. Castro, 813 F.2d 571 (2d Cir. 1987) : In a cocaine prosecution, the government offered evidence of a statement by the defendant, without references that would implicate a nontestifying codefendant. Rejecting the defendant's argument that *Rule 106* required admission of the omitted references, the Court noted that the Rule governs only writings, but observed that even the substance of oral statements must be presented fairly and that the Trial Judge can utilize *Rule 611(a)* to ensure fairness. In this case the defendant was able to convey to the jury by other means the essential point he wanted to make with the omitted references. Thus, the Judge reasonably balanced interests of judicial economy in trying defendants jointly against the unfairness of using a redacted statement, and any error was harmless. In a narcotics case, *United States v. Terry*, n1 the Court held it was error (but harmless) to admit testimony that defendants refused to supply palm prints pursuant to Court order while excluding statements made by the defendants that they wanted their lawyers present when the prints were taken. Although the statements were not required to be admitted under *Rule 106* since they were oral statements, not writings, they qualified for admission under *Rule 803(3)*.

United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996) : The arresting officer in a bank robbery case testified that he found a suitcase containing some of the bait money in the defendant's car; in response, the defendant sought to admit statements he made to the officer explaining the presence of the bait money. The Court found *Rule 106* inapplicable.

First, the Rule "applies only to writings or recorded statements, not to conversations." Second, the officer's testimony was limited to what he found in the car; therefore, "the rule of completeness, if it applied to oral conversations, would not have applied here where there was no partially introduced conversation that needed clarification or explanation." Third, even if *Rule 106* were to apply, "it would not render admissible the evidence which is otherwise inadmissible under the hearsay rule." In *United States v. Smith*, n2 the Court affirmed a conviction for involvement in burning a barn, holding there was no error in rejecting the defendant's request that a codefendant's prior testimony at his own trial, in which he recanted a confession, be admitted during the government's case at the same time when the codefendant's confession was admitted as evidence.

United States v. Burns, 162 F.3d 840 (5th Cir. 1998) : In order to protect the *Bruton* rights of a nontestifying codefendant, the Trial Judge ordered that investigating agents recount statements made by two defendants in non-custodial interviews without including references in the interviews to the codefendant. The Court found no reversible error in redacting the statements or denying a severance, since most of the omitted references implicated the codefendant without thereby exculpating the declarant, and any error in omission of the few exculpatory statements was harmless. In a prosecution of members of the Branch Davidian sect arising out of the ill-fated raid at Waco by ATF agents, *United States v. Branch, 91 F.3d 699 (5th Cir. 1996)* , the Court found no error in the Trial Judge's exclusion of the exculpatory parts of the post-arrest statement of a defendant -- even though the Judge had admitted the inculpatory parts. See the Editorial Explanatory Comment, *§ 106.02[4]*.

United States v. Li, 55 F.3d 325 (7th Cir. 1995) : In the trial of a kickback scheme between a union and a health care provider, the government called the union president to testify to a conversation in which the defendant admitted making payments to his codefendant. The president was not permitted to testify, however, that when asked why he did not report the codefendant's apparent extortion earlier, the defendant replied that "Danny would put an axe in my head." Reiterating its analysis in *United States v. Haddad* (*infra*), that *Rule 611(a)* gives Trial Judges the same authority regarding oral statements as *Rule 106* grants regarding written and recorded statements, the Court found there was no abuse of discretion. The alleged threat was not necessary to explain or understand the defendant's admission, and it was not needed to avoid misleading the jury, since the defendant had explicitly declined to pursue a coercion defense. In *United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993)* (*see* the Editorial Explanatory Comment, *§ 106.02[4]*), a prosecution for felon firearm possession, an officer testified that the defendant admitted when arrested knowing marijuana was under his bed, but the defense was not permitted to elicit from the officer that the defendant had denied knowledge of a gun found under the bed at the same time. The Court held it was error (but harmless) to preclude the testimony, which was part and parcel of the inculpatory statement.

United States v. Ortega, 203 F.3d 675 (9th Cir. 2000) : The Court affirmed convictions for drug and firearm offenses, finding no error when the defendant was not permitted to introduce exculpatory portions of his oral confession to an INS agent after the prosecution had introduced inculpatory portions. The Court said that "the rule of completeness, *see Rule 106* ..., applies only to written and recorded statements," and that even if it did apply, exclusion was proper "because these statements would still have constituted inadmissible hearsay." The Court later noted that the agent's testimony did not distort the meaning of the defendant's statements because the defendant testified to the facts not mentioned by the agent.

United States v. Ramirez-Perez, 166 F.3d 1106 (11th Cir. 1999) : The Court held that *Rule 106* did not apply to testimony from an officer concerning parts of an oral statement that the defendant made after an arrest. The Court stated that *Rule 106* applies only when a written document is admitted into evidence directly or indirectly. The Court noted that the officer's testimony did not refer, directly or indirectly, to a written statement to the same effect signed by the defendant after he made his oral statement.

[b] Oral Statements -- Completing Evidence for Prosecution

United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988) : Affirming drug conspiracy convictions, the Court held that prior statements by a government witness were properly offered on redirect examination, since the defense had used portions of the statements on cross-examination and the government merely wished to rebut the use of the statements by showing the portions in context.

United States v. Maccini, 721 F.2d 840 (1st Cir. 1983) : Affirming convictions for conspiracy and submitting a false statement, the Court cited *Rule 106* as support for upholding a ruling that permitted the prosecutor, during defense cross-examination of a government witness, to have portions of the witness' grand jury testimony read to the jury in addition to those that defense counsel read. While technically *Rule 106* does not seem to cover oral statements, we believe that the philosophy of the Rule properly extends to this situation and that the Trial Judge has authority under *Rule 611(a)*, as well as *Rule 106*, to control the scope and order of proof so that a jury is not confused or misled.

Government of Virgin Islands v. Archibald, 987 F.2d 180 (3d Cir. 1993) : The mother of a ten-year-old victim of aggravated rape was asked on cross-examination whether she had ever heard the victim discussing the defendant with her fifteen-year-old sister, who was the defendant's girlfriend. Reversing the conviction, the Court held that the question did not open the door to redirect examination of the mother as to whether the fifteen-year-old might have told the mother she observed the defendant and the victim together. The Court stated that "[t]he principle of completeness does not apply ... to separate utterances or occurrences pertaining to a different subject."

United States v. Draiman, 784 F.2d 248 (7th Cir. 1986) : The Court affirmed a defendant's mail fraud conviction arising from his filing fraudulent insurance claims following a burglary. After the defendant elicited on cross-examination of a detective a statement by one of the burglars tending to show that the burglars were capable of hauling away a lot of material, the government was properly permitted to elicit on redirect the burglar's statement that $25,000 of merchandise had been taken. The Court stated that the defendant "could not open it [the statement] up to seek only as much as would leave a favorable, but erroneous, impression with the jury."

United States v. Woolbright, 831 F.2d 1390 (8th Cir. 1987) : In a drug prosecution, the defendant successfully offered a statement by a female companion that a suitcase containing the drugs belonged to her. The government responded by offering her statement that she and the defendant were on a "honeymoon trip." Although the defendant and the woman were not married, the statement was offered to establish that the pair had more than a casual relationship. The Court held that the statement was not admissible under *Rule 106*, since the Rule is limited to writings, and neither it nor *Rule 611* empowers a Court to admit unrelated hearsay even in a writing. The statement was held properly admitted under a residual hearsay exception, however.

[11] Oral Testimony About Writings

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) : The Supreme Court agreed with the Court of Appeals, 784 F.2d 1523 (11th Cir. 1986), *reinstated*, 827 F.2d 1498 (11th Cir. 1987) (en banc), that a Trial Judge had erred in refusing to permit a plaintiff, who had been called as an adverse witness and asked about a letter he had written to a Navy officer concerning his wife's death, to testify on cross-examination as to other aspects of the letter. The Court reasoned that, whether or not *Rule 106* actually applied to the facts, "[c]learly the concerns underlying *Rule 106* are relevant here, but, as the general rules of relevancy permit a ready resolution to this case, we need go no further in exploring the scope and meaning of *Rule 106*." The Court held that "when one party has made use of a portion of a

document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402."

[12] Otherwise Inadmissible Evidence Offered To Complete

United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986) : In a prosecution arising out of a conspiracy to bribe federal officials, the Court reasoned that "*Rule 106* can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." It added, however, that "the provision of *Rule 106* grounding admission on 'fairness' reasonably should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be necessary to qualify or explain the already introduced evidence allegedly taken out of context" and that "[i]n almost all cases we think *Rule 106* will be invoked rarely and for a limited purpose." The Court found error in the exclusion of portions of recorded conversations that the defense offered after the government introduced portions of the recordings, but it found the error to be harmless.

United States v. Nixon, 779 F.2d 126 (2d Cir. 1985) : Although the error was harmless, the Court found in a narcotics case that the government erred in introducing a telex containing a witness' description of a defendant. Since the agent who sent the telex never testified, the telex was hearsay and could not be admitted under any exception. Although the government sought to rely upon *Rule 106*, the Court concluded that the Rule could not be used where the evidence was not admissible under the hearsay rule. In *United States Football League v. National Football League*, n3 the Court affirmed a judgment awarding the plaintiff one dollar on antitrust claims and held that the Trial Judge ruled properly in excluding a letter, even though a reply letter was admitted. It said that "[t]he doctrine of completeness, *Rule 106*, does not compel admission of otherwise inadmissible hearsay evidence."

United States v. Costner, 684 F.2d 370 (6th Cir. 1982) : The Court reversed a conviction for making a false statement to a bank in order to obtain a loan, because the Trial Judge improperly admitted portions of a document that were hearsay and were not related to a portion that appellant had previously offered. The Court observed that "*Rule 106* is intended to eliminate the misleading impression created by taking a statement out of context. The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded."

[13] Post-Arrest Statements

United States v. Millan, 230 F.3d 431 (1st Cir. 2000) : The Court affirmed a defendant's carjacking and firearms convictions. When the government sought to offer evidence of a plea agreement by an accomplice along with a three-page statement of facts, the defendant successfully objected to the statement of facts. Later, defense counsel sought to offer a portion of the statement of facts, but the Trial Judge ruled that if the defendant offered that portion, then the whole version had to be admitted. The Court affirmed, finding that the document was a whole version of facts and that "[s]horn from the context of the entire narrative, the excerpt may have distorted the jury's perception of the government's written version of the events."

United States v. Branch, 91 F.3d 699 (5th Cir. 1996) : In a prosecution of members of the Branch Davidian sect arising out of the ill-fated raid at Waco by ATF agents, the Court found no error in the Trial Judge's exclusion of the exculpatory parts of the post-arrest statement of a defendant -- even though the Judge had admitted the inculpatory parts. See the Editorial Explanatory Comment, *§ 106.02[4]*.

United States v. Ortega, 203 F.3d 675 (9th Cir. 2000) : The Court affirmed convictions for drug and firearm offenses, finding no error when the defendant was not permitted to introduce exculpatory portions of his oral confession to an INS agent after the prosecution had introduced inculpatory portions. The Court said that "the rule of completeness, *see Rule 106 ...*, applies only to written and recorded statements," and that even if it did apply to oral statements, exclusion was proper "because these statements would still have constituted inadmissible hearsay." The Court later noted that the agent's testimony did not distort the meaning of the defendant's statements because the defendant testified to the facts not mentioned by the agent.

[14] Prejudicial Material in Documents

United States v. Rivera, 61 F.3d 131 (2d Cir. 1995) : After the defendant in a heroin conspiracy case had cross-examined the key government witness about his plea agreement and cooperation, the prosecution introduced a two-page stipulation of facts that had been part of the plea agreement. The stipulation included substantial incriminating hearsay information about the defendant, which corroborated the government witness' factual testimony. The Court reversed, reasoning that "[t]he mere fact that the Stipulation was incorporated into [the witness'] plea agreement is insufficient to justify its admission on completeness grounds," and that "[w]e can see no way in which the Stipulation was essential for the jury's understanding of [the] plea agreement, or to place it in context, or correct misleading impressions from it."

United States v. Brown, 720 F.2d 1059 (9th Cir. 1983) : The Court reversed convictions of numerous defendants convicted of a conspiracy to distribute heroin. It found that the government had sufficient evidence of conspiracy and the defendants' connection therewith, but it held that the prosecutor acted improperly in bringing to the jury's attention the fact that as part of plea bargain agreements several government witnesses agreed to submit to polygraph tests. The Court recognized that the government is entitled to bring out the fact that it has made a bargain with a witness, but it refused to permit the government to elicit every fact that might be mentioned in the agreement. And it rejected the government's argument that since the defense insinuated that the witnesses had been made promises not revealed in their written agreements with the government, the polygraph was properly mentioned. The Court found that the defense never implied that the polygraph provision was not in the writing, so there was no reason to offer it as evidence except for the improper purpose of rehabilitating witnesses through reliance on the polygraph.

[15] Previously Excluded Evidence

In re Paoli R.R. Yard PCB Litig., 113 F.3d 444 (3d Cir. 1997) : In its third review of this toxic exposure case (see annotations to *Rule 702*), the Court held that after evidence of "heat-degraded PCBs" was excluded under *Rule 403* as lacking sufficient connection with the plaintiffs, *Rule 106* did not require that the jury be told that these items were mentioned in an expert's report that was used to cross-examine one of the plaintiffs' experts. Once the Trial Judge ruled that the plaintiffs could fairly proceed without any mention of these items, "*Rule 106* did not independently require the admission of additional portions of the text."

[16] Prior Testimony and Depositions

United States v. Soures, 736 F.2d 87 (3d Cir. 1984) : Affirming a defendant's conviction for receiving kickbacks, the Court found that the Trial Judge properly admitted some portions of the defendant's grand jury testimony and excluded others. The Court cited *Rule 106* and commented that "[t]he Rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted."

United States v. Bollin, 264 F.3d 391 (4th Cir. 2001) : The Court affirmed two defendants' convictions arising from their involvement in an investment fraud scheme and the subsequent coverup. It rejected one defendant's contention that the Trial Judge erred in permitting the government to use a redacted version of his grand jury testimony while refusing to permit him to present the omitted portions under the rule of completeness. The Court held that the excerpts admitted by the government were not misleading, so the omitted portions of the defendant's grand jury excerpts were not necessary to clarify any misimpression. "The fact that some of the omitted testimony arguably was exculpatory does not, without more, make it admissible under the rule of completeness."

Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999) : In an action against an express company to recover for damages to a rare wood carving, the defendant introduced part of the plaintiff's deposition testimony, in which the plaintiff recounted the negotiations leading to his purchase of the carving. The defendant was permitted to introduce the part indicating the purchase price was $15,000 (the plaintiff was claiming damages substantially in excess of $80,000) and the plaintiff's statement that he didn't want, like, or have any use for the carving, but the plaintiff was not permitted to introduce other parts of the negotiation that he contended indicated he had no knowledge what the carving was worth. The Court held that on remand if the defendant introduced parts of the deposition, it would be required to introduce enough of the surrounding questions and answers to put the statements into context.

United States v. Glover, 101 F.3d 1183 (7th Cir. 1996) : Affirming a union officer's conviction for misusing benefit funds, the Court held there was no abuse of discretion when the Judge, in a retrial following a mistrial, refused to admit the entire 198-page transcript (less thirty pages of background) of the defendant's testimony in the first trial, after the government offered eleven pages from the defendant's cross-examination. The defendant had made no showing that the entire transcript was relevant to the part admitted or that fairness required its admission, and on appeal was unable to show that the transcript was excluded merely because of its length. In *United States v. Walker, 652 F.2d 708 (7th Cir. 1981)* , a conviction for extortion was reversed because the Trial Judge admitted selected portions of the appellant's testimony in a first trial that ended in a mistrial but excluded other relevant portions that explained the excerpts that were admitted.

[17] Redacted Statements

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : Defendants Yousef and Murad were convicted for a conspiracy to bomb United States commercial airliners in southeast Asia, and defendants Yousef and Ismoil were convicted for crimes relating to the 1993 bombing of the World Trade Center. When Ismoil's statement was introduced, it was redacted for *Bruton* purposes so that "neighbor" was substituted for Yousef's alias and other references to Yousef were omitted. Ismoil argued that the statement as redacted violated *Rule 106*'s rule of completeness because it conveyed the impression he had omitted Yousef's name to protect him. Affirming the convictions, the Court found no abuse of discretion, since it saw no distortion of meaning and the redaction was a reasonable accommodation of competing interests. In *United States v. Marin, 669 F.2d 73 (2d Cir. 1982)* , the Court approved a ruling in a drug case that admitted one defendant's statement without the part attributing possession and control of narcotics to a codefendant. The Court said that "[t]he completeness doctrine does not require introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages" and found that the deleted portion was inadmissible, self-serving hearsay.

United States v. Moussaoui, 382 F.2d 453 (4th Cir. 2004) : In a prosecution of the so-called "20th hijacker" for conspiracy relating to the September 11, 2001, attacks, the Court held that the defendant's *Sixth Amendment* right to compulsory process required the government to provide some kind of access to witnesses held in government custody outside the United States. It also held, however, that substitutions for the testimony of the witnesses, whom the government refused to make available on national security grounds, were available and that they would provide the

defendant with the evidence that otherwise might have been provided by the witnesses. It held that with respect to these written summaries of witness statements, *Rule 106* had to be used carefully in view of the fact that the witnesses were not available:

> In short, we wish to make clear that the rule of completeness is not to be used by the Government as a means of seeking the admission of inculpatory statements that neither explain nor clarify the statements designated by Moussaoui. On the other hand, the defense's ability to propose substitutions based on the language of the [redacted] summaries is not a license to mislead the jury.

One Judge, dissenting in part, argued that the summaries should be offered in more complete form.

Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993) : The Court reversed a judgment for investors who sued an accounting firm, holding, *inter alia*, that the Trial Judge erred in permitting the plaintiffs to compress the defendant's discovery responses into a three-page narrative and in denying the defendant's request to have its statements restored to their original context. The Court stated that "[a]n admission depicts the party in its own words; Peat Marwick was entitled to have the jury see those words rather than a precis that the adverse party thought would depict the speaker in the worst light." In *United States v. Velasco, 953 F.2d 1467 (7th Cir. 1992)* , a cocaine conspiracy prosecution, the government introduced a portion of one defendant's postarrest statement to prove his knowledge, but the defendant was not permitted to introduce the remainder. The Court held there was no abuse of discretion, as the rest of the statement referred only to a nontestifying codefendant (and therefore would be inadmissible under *Bruton*) and others whose activities were irrelevant in the case.

United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985) : In a prosecution for injuring government property and illegally entering a military reservation, the Court held that the Trial Judge properly redacted a defendant's statement to eliminate references to political and religious motivations that were not relevant.

United States v. Range, 94 F.3d 614 (11th Cir. 1996) : After an arresting officer testified that a defendant in a drug trafficking case had admitted that he knew a gun and money were in the car he had been driving, the defendant sought on cross-examination to elicit the defendant's statements that a codefendant had placed the gun and money there and had instructed him to drive to a meeting. The Court held there was no abuse of discretion in limiting the cross-examination, since the statement as redacted was not distorted, the excluded statements were irrelevant to the issue of the defendant's knowledge, and, more importantly, their introduction would violate his non-testifying codefendant's confrontation rights. In *United States v. Lopez, 898 F.2d 1505 (11th Cir. 1990)* , one defendant argued that the rule of completeness was violated by the introduction of his redacted postarrest statement at his joint trial for drug offenses. The Court affirmed the convictions, holding there was no error in admitting the statement, when the redaction was made to protect the *Bruton* rights of a codefendant and it did not distort the meaning of the statement or exclude information substantially exculpatory of the nontestifying defendant.

[18] Relationship to Prior Consistent Statements

United States v. Wilkerson, 411 F.3d 1 (1st Cir. 2005) : In a felon firearm and drug prosecution, the Government contended that the defendant discarded drugs and a gun while fleeing the police after a traffic stop; the defendant argued that the drugs and gun were found in a place that was not on his path of flight. One pursuing officer's testimony was impeached by his previous statements, in which he had given conflicting or uncertain accounts about the flight path.

The government offered the officer's grand jury testimony and other prior statements to rebut the impression that he had been inconsistent, contending that this was permissible under *Rule 106*. The Court held that it was error (but harmless) to admit the prior consistent statements, since "the testimony only bolstered Officer Fleming's credibility generally by restating what had already been said." In order for a consistent statement to be admitted under *Rule 106*, the statement must "tend to show that a statement used to impeach a witness is not really inconsistent when understood in its proper context," and that standard was not met in this case. In *United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001)* , a tax fraud case, a principal prosecution witness was the defendant's accountant, who testified under immunity. On cross-examination, the accountant admitted making inconsistent statements, and committing perjury, in his initial grand jury appearance, when making a subsequent proffer, and at a second grand jury appearance. On redirect the witness was permitted to read testimony he had given to the grand jury that was consistent with his trial testimony; this prior testimony covered both specific points raised in the cross-examination and other points within the scope of the overall cross-exam. The Court held that some of the prior consistent statements were properly admitted because they provided a larger context in which trial testimony could be understood as not really inconsistent with prior statements. However, it was error (but harmless) to admit grand jury statements that simply bolstered trial testimony by presenting again the evidence offered on direct.

United States v. Castillo, 14 F.3d 802 (2d Cir. 1994) : Seeking to discredit an undercover officer's testimony by arguing that he lied about the presence of a gun to justify his snorting cocaine during a drug purchase, defense counsel contrasted the officer's testimony that he told his superior immediately after the buy that he had been forced to ingest cocaine "at gunpoint," with his testimony that the gun was displayed but never removed from an accomplice's waistband. The Court held it was not an abuse of discretion to admit testimony from the superior repeating what the officer had said to him, as the evidence was offered only to rehabilitate credibility rather than for its truth, and thus it did not matter if the officer had a motive to fabricate when he was debriefed by his superior. According to the Court, the superior's testimony helped the jury decide whether "at gunpoint" was shorthand for the presence of the gun in the waistband, but according to the dissenting Judge, the hearsay had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony. In *United States v. Pierre*, n4 the Court affirmed a heroin conviction, finding that the Trial Judge properly admitted evidence that an agent's formal report stated that the defendant refused to make a controlled delivery, after the defense elicited testimony from the agent that his notes of his interview with the defendant contained no reference to the refusal. This case is discussed in the Editorial Explanatory Comment, *§ 106.02[8]*.

United States v. Harris, 761 F.2d 394 (7th Cir. 1985) : Affirming convictions for defrauding the government, the Court held that the requirement that prior consistent statements predate any motive to fabricate need not be met when the statements are offered solely to rehabilitate a witness rather than for their truth. The Court added that rehabilitation use of prior consistent statements "is particularly appropriate where, as here, those statements are part of a report or interview containing inconsistent statements which have been used to impeach the credibility of the witness," since they can be of assistance in deciding "whether the impeaching statements really were inconsistent within the context of the interview, and if so, to what extent ... . This rehabilitative use of prior consistent statements is also in accord with the principle of completeness promoted by *Rule 106*."

United States v. Keltner, 147 F.3d 662 (8th Cir. 1998) : The Court affirmed racketeering convictions, finding no error when the government was permitted to question a witness on redirect examination about prior consistent statements even though they were made after the witness' motive to lie or fabricate had arisen. The Court reasoned that the defendants had cross-examined the witness about prior statements but had omitted portions, which the government was entitled to elicit under the role of completeness rather than under *Rule 801(d)(1)(B)*. In *United States v. Blankinship*, n5 the Court affirmed the admission of an entire extrajudicial written statement of a postal employee who the defendant was charged with assaulting. Since the defendant's counsel used portions of the statement to suggest

recent fabrication, the Court reasoned that it was important for the factfinder to see the entire statement in order to assess the seriousness of any inconsistencies. In *United States v. Andrade*, n6 the Court affirmed convictions arising out of a scheme to use fraudulent credit cards to buy and later cash-in airline tickets. There was no error in admitting evidence of one agent's notes concerning an interview with a defendant, where the defense had questioned two other witnesses concerning the notes and left impressions that there might have been inaccuracies in the notes and collaboration between government witnesses. The Court held that the rehabilitation was proper and it fell within *Rule 106*.

United States v. Collicott, 92 F.3d 973 (9th Cir. 1996) : In cross-examining a prosecution witness in a drug case, the defense asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible as a prior consistent statement. Neither was it admissible under *Rule 106*, since the Rule does not compel admission of otherwise inadmissible hearsay, and the complete statement did not serve to correct a misleading impression created by taking the witness' comments out of context.

United States v. Myers, 972 F.2d 1566 (11th Cir. 1992) : In a civil rights prosecution of an officer for using a stun gun on arrestees, the Court held there was no abuse of discretion in limiting admission of a statement made by the defendant during an internal affairs investigation to the parts concerning the number of times he had used the stun gun, as the prosecutor had introduced the statement only to impeach the defendant on that issue. The parts consistent with the defendant's trial testimony were admitted for rehabilitation, but the parts of the statement dealing with the circumstances and the defendant's motivation were not admissible under the Rule.

[19] Relevance Requirement

United States v. Crosby, 713 F.2d 1066 (5th Cir. 1983) : The Court affirmed convictions for kidnapping offenses, rejecting the defendant's argument that he should have been permitted to play for the jury portions of a tape recording of the negotiations between himself and the police while he was holding a hostage. The Court interpreted the Trial Judge's ruling to require that the defense show that the portion of the tape it wished to play was relevant, and it observed that promises of immunity in a hostage situation are irrelevant to guilt or innocence.

United States v. Harvey, 959 F.2d 1371 (7th Cir. 1992) : The Court affirmed mail fraud convictions, holding there was no abuse of discretion in precluding cross-examination of a postal inspector about statements from the defendant that his funding sources were "hustlers," as the statements were made when he had time to reflect and perhaps misrepresent his thoughts and were, in any event, not probative of whether he had an intent to defraud. Moreover, there was no showing the statements qualified or explained the witness' direct testimony. In *United States v. Lewis*, n7 the defendant, when questioned about a postarrest statement, was asked whether he had told agents that he had not obtained any drugs from an accomplice but that if he had he would not tell the FBI; on redirect, he was not permitted to add that he had said he would not tell the FBI without talking to an attorney first. Affirming the defendant's conviction for a cocaine conspiracy, the Court said it might have admitted the completing statement but held there was no abuse of discretion, as the statement had only minimal significance. In *United States v. Velasco*, n8 a cocaine conspiracy prosecution, the government introduced a portion of one defendant's postarrest statement to prove his knowledge, but the defendant was not permitted to introduce the remainder. The Court held there was no abuse of discretion, as the rest of the statement referred only to a nontestifying codefendant (and therefore would be inadmissible under *Bruton*) and others whose activities were irrelevant in the case.

United States v. Bolden, 92 F.3d 686 (8th Cir. 1996) : A defendant, who was charged with two others in a cocaine distribution conspiracy, had told officers after his arrest that he had transported drugs "for chump change" for men he would not identify because they would kill him if he snitched; when told others had already been arrested, he said he wanted to "tell you guys everything but they'll kill me." After the government introduced the portion in which the defendant admitted transporting drugs, he sought to introduce the balance of the statements to support a defense of coercion. Affirming, the Court found nothing in the statements suggesting that the defendant transported cocaine as a result of coercion -- in fact, they showed his motivation was monetary and his fear related only to cooperation with the authorities -- so admission of the redacted statement did not exclude information that was necessary to clarify the statement.

United States v. Wright, 826 F.2d 938 (10th Cir. 1987) : Affirming fraud convictions, the Court held that portions of a diary were properly excluded while others were admitted. The portions excluded were not relevant to trial issues nor were they explanatory of other portions that were admitted.

[20] Remainder Not Necessary To Complete

United States v. Ramos-Caraballo, 375 F.3d 797 (8th Cir. 2004) : Although the Court affirmed a conviction for possession of cocaine with intent to distribute, it found an abuse of discretion in the admission of the entirety of a police officer's grand jury testimony, suppression hearing testimony, and police report after defense counsel attempted to impeach the officer with portions of those documents. The Court found that this was not a case in which the defense created a misunderstanding or distortion, observed that the government made no attempt to specify which portions of the documents were relevant to the issues raised on cross-examination, and concluded that "this looks more like a government attempt to improperly bolster its witness by admitting the officer's entire testimony again and again through these exhibits."

[21] Scientific Articles

Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989) : Affirming a judgment against a plaintiff who claimed that her son developed oral cancer from using snuff, the Court held that the defendant was properly permitted to introduce scientific articles in addition to those introduced by the plaintiff in order to rebut a claim that the then-existing scientific and medical evidence "as a whole" tended to show that the product was dangerous.

[22] Tape Recordings

In re Air Crash Disaster, 635 F.2d 67 (2d Cir. 1980) : The Court affirmed the Trial Judge's decision refusing to allow the playing of one channel of the cockpit recorder by itself and requiring the entire tape to be played with volume adjustments to make the tape clearer.

United States v. Garrett, 716 F.2d 257 (5th Cir. 1983) : The Court affirmed Travel Act convictions, finding no error in the admission of part of a tape recording for the government and rejection of another part offered by a defendant. The Court said that *Rule 106*'s completeness doctrine "does not require introduction of portions of a statement that are neither relevant to nor explanatory of the admitted passages." In *United States v. Crosby*, n9 the Court affirmed convictions for kidnapping offenses, rejecting the defendant's argument that he should have been permitted to play for the jury portions of a tape recording of the negotiations between himself and the police while he was holding a hostage. The Court interpreted the Trial Judge's ruling to require that the defense show that the portion of the tape it

wished to play was relevant, and it observed that promises of immunity in a hostage situation are irrelevant to guilt or innocence.

United States v. Branham, 97 F.3d 835 (6th Cir. 1996) : Defendants in a marijuana conspiracy case alleged that they had been entrapped and, therefore, moved to have all tape recorded conversations played in a sequential and chronological order so as to present a fair understanding of their respective roles in the attempted drug transaction. The Court found no abuse of discretion in denial of the motion, since the defendants were given an opportunity during presentation of their evidence to play any remaining tapes and develop the record to indicate the magnitude of their roles or any entrapment.

United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986) : Affirming the convictions of a former State Court Judge, the Court found no error in the admission of part of a tape recording and the exclusion of a part offered by the defendant. It found that no misleading impression was created by the playing of only part of the tape, and the part that the defendant desired to play was irrelevant.

United States v. Webber, 255 F.3d 523 (8th Cir. 2001) : Affirming firearms convictions, the Court found no error in permitting the government to play only a portion of the ten hours of recorded conversations between the defendant and an undercover informant. The defendant argued that under *Rule 106* the government was required to play all ten hours of tapes in the order in which they were recorded. The Court noted that the party urging admission of an excluded portion of a conversation "must specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted." Moreover, the Trial Judge "has broad discretion to conduct the trial in an orderly and efficient manner, and to choose among reasonable evidentiary alternatives to satisfy the rule of completeness reflected in *Rule 106*." In this case, the Judge made the tapes available for playing in their entirety by the jury during its deliberations, and also permitted the defense to play all the tapes during its case, which defense counsel chose not to do.

[23] Television Interviews

Lambert v. Fulton County, Ga., 253 F.3d 588 (11th Cir. 2001) : Affirming a judgment for county employees in a reverse discrimination case, the Court held that the introduction of a television interview of some individuals did not warrant the introduction of evidence of an interview with a different person.

[24] Timing

Phoenix Assocs. III v. Stone, 60 F.3d 95 (2d Cir. 1995) : On the question of the proper timing of a proffer of material offered for completeness, the Court stated that "[w]hile the wording of *Rule 106* appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly." In *United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985)* , the Court affirmed convictions of a corporation and a lawyer for conspiring to defraud the United States, although it found that the lawyer should have been permitted to introduce certain portions of grand jury testimony immediately after the prosecutor introduced an excerpt from the testimony. The Court cited *Rule 106* and referred to it as "a principle of simple fairness, long antedating the Federal Rules of Evidence."

FOOTNOTES:

(n1)Footnote 1. *United States v. Terry, 702 F.2d 299 (2d Cir. 1983)* .

(n2)Footnote 2. *United States v. Smith, 792 F.2d 441 (4th Cir. 1986)* .

(n3)Footnote 3. *United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988)* .

(n4)Footnote 4. *United States v. Pierre, 781 F.2d 329 (2d Cir. 1986)* .

(n5)Footnote 5. *United States v. Blankinship, 784 F.2d 317 (8th Cir. 1986)* .

(n6)Footnote 6. *United States v. Andrade, 788 F.2d 521 (8th Cir. 1986)* .

(n7)Footnote 7. *United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992)* .

(n8)Footnote 8. *United States v. Velasco, 953 F.2d 1467 (7th Cir. 1992)* .

(n9)Footnote 9. *United States v. Crosby, 713 F.2d 1066 (5th Cir. 1983)* .

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
CHAPTER 106 RULE 106

1-106 Federal Rules of Evidence Manual 106.04

106.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in *Rule 32(a)(4) of the Federal Rules of Civil Procedure*, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; *California Evidence Code § 356*. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows:

"The amendments are technical. No substantive change is intended."]

[2] Citations to Hearings and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, March 28, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House of Comm. on the Judiciary, 93rd Cong., 1st Sess., at 4-5 (1973).

Letter from W. Vincent Rakestraw to Hon. James O. Eastland, June 14, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 121-22, 126 (1974).

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
Supp. To CHAPTER 106 RULE 106

1-106 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 106, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 106. Remainder or Related Writings or Recorded Statements	**Rule 106. Remainder or Related Writings or Recorded Statements**
When a writ-	If a party in-

ing or re-cor-ded state men t or part there of is in-tro-duce d by a part y, an ad-vers e part y may re-quir e the in-tro-duc-tion at that time of any oth-er part or any oth-er writ-ing or re-cor-ded state tro-duce s all or part of a writ-ing or re-cor-ded state men t, an ad-vers e part y may re-quir e the in-tro-duc-tion, at that time , of any oth-er part -- or any oth-er writ-ing or re-cor-ded state men t -- that

ment which ought in fairness to be considered contemporaneously with it.	in fairness ought to be considered at the same time.

Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article I. General Provisions
Supp. To CHAPTER 106 RULE 106

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Supp. to § 106.03 Annotated Cases

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[3] Burden of Invoking the Rule [Go To Main]

United States v. Phillips, 543 F.3d 1197 (10th Cir. 2008) : The Court affirmed convictions for immigration fraud, finding no abuse of discretion in the admission of documents that the defendants claimed were incomplete. It noted that "Rule 106 does not prohibit admission of an incomplete document. Instead, it allows the party against whom the document is introduced to place the remainder in evidence without additional evidentiary foundation... . If the defendants wanted the remainder of the document to be admitted, they should have offered it."

[10] Oral Statements [Go To Main]

[a] Completing Evidence for Accused

United States v. Garcia, 530 F.3d 348 (5th Cir. 2008) : The Court affirmed a conviction for drug importation, finding no abuse of discretion when the defense was not permitted to introduce the complete transcript of a conversation after an agent had testified to his memory of the conversation. The government had not introduced the transcript or the tape recording of the conversation, and the agent's testimony was not a quotation or reading from the transcript tantamount to introducing it. The Court explained why a witness' testimony regarding his memory of an oral statement is not subject to Rule 106: "A recording played or a document read in isolation is not subject to cross-examination. But an adversary can attack a live witness's credibility, confront the witness with previous inconsistent statements, or demonstrate bias or poor memory." One Judge, concurring, noted that "since the agent did use the transcript to refresh his memory, the portions of the transcript were admissible under *Fed. R. Evid. 612*," and that the Judge "did allow defense counsel to make full use of the transcript in cross-examination of the agent, and I will not fault the ruling or judgment."

[12] Otherwise Inadmissible Evidence Offered To Complete [Go To Main]

United States v. Bucci, 525 F.3d 116 (1st Cir. 2008) : The Court affirmed convictions for firearms and other offenses. Although it found no abuse of discretion in permitting the government to offer redacted portions of a recording and transcript, it rejected the government's argument that "the purview of Rule 106 is limited to the order of proof." The Court observed that although "[o]ther circuits have held differently," its "case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence," and "we adhere to our own precedent."

United States v. Hoffecker, 530 F.3d 137 (3d Cir. 2008) : Affirming convictions for mail and wire fraud arising from a commodities-sales scheme, the Court found no error when the defense was not permitted to play the entirety of a tape recording, portions of which the government had offered as admissions by a party-opponent. The recording was of a presentation made by the defendant to a government undercover operation he was seeking to recruit as a boiler-room. The defendant argued that it was evidence of his state of mind -- that the program was always to be operated in a legitimate manner -- but the Court found that the statements were simply exculpatory, made to people he had every reason to sign on to sell aggressively for his own gain. Furthermore, they were not necessary to explain or place in context the portions admitted or any other evidence or testimony.

United States v. Lentz, 524 F.3d 501 (4th Cir. 2008) : The defendant, arrested for murder, had consulted with another inmate about hiring a hit man to murder some witnesses. In a recorded conversation with his attorney, the defendant asked questions to check on the other inmate's reliability in the scheme. Affirming, the Court found no abuse of discretion in admitting the recorded conversation with certain self-serving statements by the defendant and various hearsay statements by the attorney redacted. The omitted portions were not necessary either to avoid misleading the jury or to place the portions admitted into proper context. The Court noted that "Rule 106 does not ... 'render admissible the evidence which is otherwise inadmissible under the hearsay rules.' "

United States v. Sine, 493 F.3d 1021 (9th Cir. 2007) : The Court held that the rule of completeness in Rule 106 "does not allow the admission of otherwise inadmissible statements." It relied on its prior decision in *United States v. Collicott, 92 F.3d 973 (9th Cir. 1996)* (see *Manual* § 106.03[18]) ("Because [the witness'] out-of-court statements ... do not fall within an exception to the hearsay rule, they are inadmissible, regardless of Rule 106.").

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) : The Court affirmed a conviction for possession of methamphetamine with intent to distribute, holding that the door had been opened to the admission of otherwise inadmissible statements implicating the defendant, which had been made by a codefendant at a change-of-plea hearing, when the officer was questioned about the codefendant's conviction in a way that suggested the codefendant had claimed full and sole responsibility for the crime.

[17] Redacted Statements [Go To Main]

United States v. Phillips, 596 F.3d 414 (7th Cir. 2010) : The Court affirmed a conviction for Medicaid fraud, finding that the defendant had forfeited a claim that the Trial Judge erred in denying her motion to exclude a redacted audio recording without having reviewed the complete version first. The defendant had moved to exclude the evidence only on the ground that it was redacted, and there is no rule requiring the Judge to review a complete recording before admitting a redacted version into evidence. The Court found no plain error in admitting the redacted version, noting that even if it told an incomplete story, the proper remedy would be to supplement it under Rule 106, not exclude it.

[19] Relevance Requirement [Go To Main]

United States v. Kopp, 562 F.3d 141 (2d Cir. 2009) : The Court affirmed convictions for killing a reproductive health service provider, finding no abuse of discretion in the admission of redacted statements that the defendant made to a newspaper and to a state trial court during a sentencing based on the same killing charged in the instant case. Although the defendant claimed that the statements should have been admitted in their entirety, the Court held that to the extent that the statements suggested that the defendant did not intend to kill him, they were not relevant, because the statute required only that the defendant intend to injure the victim.

[20] Remainder Not Necessary To Complete [Go To Main]

United States v. Johnson, 507 F.3d 793 (2d Cir. 2007) : Affirming drug and firearm convictions, the Court found no abuse of discretion in the admission of the defendant's redacted confession concerning the robbery of a drug-dealer by the defendant and a coconspirator. The defendant argued that the redacted portion contained exculpatory information that was necessary to provide a complete understanding of the confession under Rule 106, but the Court reasoned that the admitted portion of the confession "related to Freeman and Newman's *plans* to execute the robbery, while the redacted portion related to the *execution* of the robbery." (Emphasis in original.) Thus, the redacted portion of the confession did not explain the admitted portion or place it in context.

United States v. Price, 516 F.3d 597 (7th Cir. 2008) : The Court affirmed a conviction for a 2002 bank robbery, finding no abuse of discretion in the exclusion of the defendant's statement to the FBI following his arrest for another bank robbery in 2003 that it was the only robbery he ever committed. The defendant argued that the statement was admissible under Rule 106 as clarifying a statement he made in 2005 that he would "cooperate" with the FBI by providing details about the 2002 robbery (including the names of those involved). The proffered statement was not necessary to explain the admission he made nearly two years later, and the two statements were not connected contextually in such a way that the proffered statement was needed to avoid an incomplete, misleading, or distorted picture of the evidence.

United States v. Gordon, 510 F.3d 811 (8th Cir. 2007) : At trial for a marijuana conspiracy, the defense was not permitted to cross-examine a deputy who had taken the defendant into custody for driving with an expired license regarding an affidavit the deputy had filed with respect to cash found in the defendant's truck. Affirming, the Court found no abuse of discretion, as the deputy testified on direct only about the defendant's arrest and made no mention of the affidavit. Rule 106 did not entitle the defendant to offer portions of the affidavit, because there was nothing to complete.

[24] Timing [Go To Main]

United States v. Holden, 557 F.3d 698 (6th Cir. 2009) : In a prosecution for false reporting to the Environmental Protection Agency, certain admissions made by a defendant to an investigating agent were admitted, but the government's objection to other statements from the same conversation was sustained when the defense sought to bring them out during cross-examination, on the ground that the defendant waived his rights under the rule of completeness when the purportedly misleading evidence was introduced. Resolving what had been an open question in the Circuit, the Court held it was error to treat the right to complete as having been waived, since neither the text nor the rationale of Rule 106 requires that offering completing evidence be contemporaneous with the admission of the evidence it completes. The error was harmless, however, because the defendant's proffered evidence was inadmissible hearsay and, in any event, unnecessary to correct a misleading impression.

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[4] Rule 201(e) -- Opportunity to be Heard

[5] Rule 201(f) -- Time of Taking Notice

[6] Rule 201(g) -- Instructing Jury

201.04 Legislative History

[1] Advisory Committee's Note

[2] Note on Judicial Notice of Law

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 272 (1999)

[4] House Subcommittee on Criminal Justice Notes

[5] Report of the House Committee on the Judiciary

[6] Citations to Hearings and Debates

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201.01 Official Text

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope of rule*. -- This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts*. -- A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary*. -- A court may take judicial notice, whether requested or not.

(d) *When mandatory*. -- A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard*. -- A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice*. -- Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury*. -- In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

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PART TWO: THE RULES THEMSELVES
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201.02 Editorial Explanatory Comment

[1] Legislative and Adjudicative Facts

Both at common law and under the Federal Rules, most proof is presented by means of testimonial evidence or by the offering of real evidence. But there is an exception to the requirement that a party who relies on a certain proposition must prove it; the exception is judicial notice. Professor Kenneth Culp Davis has suggested a distinction between two kinds of judicial notice: (1) judicial notice of legislative facts, and (2) judicial notice of adjudicative facts. This distinction is followed in *Rule 201*, which covers the latter but not the former. *Rule 201* does not define the term "adjudicative facts." But courts have often relied on the distinction between "adjudicative" and "legislative" facts espoused by Professor Davis. Professor Davis discussed this distinction in a letter to the House Subcommittee [cited in § 201.04]:

> A rule on judicial notice cannot lump together the facts about the parties and the facts that are used for lawmaking. The two kinds of facts are quite different. *Judicial practices about the two kinds of facts are and always have been quite different*. Facts pertaining to the parties should not be judicially noticed but should be developed through the evidence unless the facts are unlikely to be questioned. But facts that help a judge determine what the law ought to be often cannot be proved with evidence; they are a part of a judge's thinking and they often have to be the subject of judicial notice. (Emphasis in original.) n1

This is the only Rule dealing with judicial notice. It covers only what Davis refers to as adjudicative facts -- facts which concern the "who, what, when, where, and why" of the case before the Court. Judicial notice of legislative facts -- facts and policy assumptions used by the Court in the process of construing a statute or developing the law -- is intentionally left unrestricted. A Court can rely on legislative facts and assumptions even if they are subject to dispute and are not verifiable. Indeed, it could not be otherwise. If a court could only rely on indisputable facts before it could interpret a statute or the Constitution or develop common law, its lawmaking and interpreting powers would grind to a halt. n2

[2] Indisputable Adjudicative Facts

To be judicially noticed an adjudicative fact must either be (1) generally known within the territorial jurisdiction of the

Trial Court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Thus, there are two different types of indisputable adjudicative facts subject to judicial notice under *Rule 201*. The first is a fact so well known that it would be a waste of judicial resources to require proof; reasonably well-informed people simply could not differ as to the fact n3 This indisputability requirement is not satisfied merely because the Trial Judge learns of a fact through personal experience or independent research. The matter must be generally known by reasonably well-informed people. n4 However, it is not required that the fact be *universally* known. The Rule requires general knowledge "within the territorial jurisdiction" of the Trial Court. Thus, it may not be universally known that Nebraska has a unicameral legislature; but that fact is generally known in Nebraska. n5

The second type of adjudicative fact that can be judicially noticed under the Rule is one that is capable of ready verification through sources whose reliability cannot reasonably be questioned. This prong of noticeable adjudicative fact is the one more often relied upon, because a fair argument can be made that most facts are not generally known, but yet that some of these facts can be verified through unquestioned sources. For example, there may be some argument as to whether the names of the current Justices of the United States Supreme Court are "generally known" even to reasonably well-informed people. Yet it is clear that these names can readily be verified through an unimpeachable source. n6 Where the sources of information are questionable, disputable, or spotty, judicial notice cannot be taken. n7

The categories of indisputable adjudicative facts are limited and intentionally so. The point of going to trial is to give both parties a chance to examine each other's evidence and to present all sides to the trier of fact. Our system disfavors short-cutting the trial process. As the Court recognized in *United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002)* :

> In applying *FRE 201*, we are mindful that if a court takes judicial notice of a fact whose application is in dispute, the court removes the weapons of rebuttal evidence, cross-examination and argument from the parties and raises doubt as to whether the parties received a fair hearing. The effect of taking judicial notice is to preclude a party from introducing contrary evidence and, in effect, directing a verdict against him as to the fact noticed.

So for example, a Trial Judge who resorts to outside sources to determine an adjudicative fact should resist the temptation to decide the entire case on the basis of his or her own independent research. Counsel should be permitted to examine the sources relied upon, to suggest other sources, and to present argument about the meaning of the sources upon which the Trial Judge might be prepared to rule. n8

[3] Judicial Records and Findings

A number of cases have considered whether judicial notice can be taken of matters in judicial records. The reliability of judicial records is not in question. However, the underlying facts in a judicial record are not beyond dispute. For example, in *Taylor v. Charter Medical Corp., 162 F.3d 827 (5th Cir. 1998)* , a former patient at a residential hospital sued under *42 U.S.C. § 1983* for alleged mistreatment. The defendant argued that it was not a state actor. The plaintiff responded that the Court was required to take judicial notice that the defendant's predecessor had been found by another court to be a state actor in an unrelated litigation. The Court rejected this argument, holding that "a court cannot take judicial notice of the factual findings of another court." This is so because "(1) such findings do not constitute facts 'not subject to reasonable dispute' within the meaning of *Rule 201*; and (2) were it permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous." n9

The distinction is therefore between the existence of judicial records and the truth of the facts recorded. A Court can take judicial notice that a pleading was filed or that a judgment was entered. Likewise, a Court can take judicial notice that court filings contained certain allegations, or that findings of fact were made by another Court. But the truth of these allegations and findings are not proper subjects of judicial notice. n10

[4] "Legislative" Facts Unregulated

The most serious problem with *Rule 201* may be its total failure to address legislative facts. Thus, if something is a "legislative" fact, it may be judicially noticed even though none of the requirements of *Rule 201* -- most importantly, indisputability and notice -- are met. For example, a Court may decide to extend strict liability in tort on the assumption that defendants and their insurers can spread the cost. Or it may decide to expand the attorney-client privilege to protect the communications between low-level corporate agents and corporate counsel, on the assumption that a less generous privilege would deter the free flow of communication necessary to guarantee the attorney's effectiveness. These are factual assumptions that are disputable, yet they are legislative facts and the Court is not bound, when making policy choices, to adhere to *Rule 201*. If the law is to develop, then Courts must respond to changed conditions and new ideas, before the conditions and ideas become indisputable. n11

Although we do not challenge either the basic distinction between adjudicative and legislative facts or the need to treat them differently for purposes of judicial notice, we are greatly troubled by the implications of the Advisory Committee's Note that it is acceptable for Courts to take judicial notice of important legislative facts without affording the parties an opportunity to be heard. The Note indicates that evidence of legislative facts should be taken in appropriate situations, but implies that such situations will be rare. Certainly no one would seriously contend that evidence should be taken or argument heard on each of the factual assumptions that might be relevant to establishing or developing a legal rule. But at least when a Judge departs from the theories, evidence, and arguments of the parties to embrace a new approach, we favor participation by the parties. The line between relying upon material facts not addressed by the parties and general background reading may be a fine one. Yet if one has to choose between too much or too little participation by the parties, we would favor the former. We do not claim that Judges cannot rely on a broad range of facts to move the law forward. We suggest only that the parties should be permitted to participate in the march. Trial Judges should keep in mind that the dichotomy between adjudicative and legislative facts may be a useful tool, but that it is dangerous to attempt to use the tool as if it were a sharply honed device. n12 If a fact or set of facts is likely to be critical to a decision on the law to be applied to parties, there is every reason to want the parties to be heard on the factual question. Evidence need not always be taken. Briefs may work better in many situations. A trial need not be unduly delayed. But some chance for the parties to be heard on decisive legislative facts is desirable. n13

[5] Procedure

According to the Rule, which is consistent with most common-law authority, a Court may take judicial notice upon its own motion. The reason for this is that if judicial notice is truly a means of conserving scarce judicial resources, the parties should not be totally free to impose unnecessary burdens on the Court. Thus, even without a motion by a party, a Court has the discretion to take judicial notice in appropriate circumstances. In contrast to this discretionary power, a Judge *must* take judicial notice when requested to do so by a party who supplies the necessary information.

In order to be fair to both parties, the party opposing the taking of judicial notice is entitled to be heard. An opposing party who has notice prior to a Court ruling may make a presentation. If prior notification is not given, a request for the abandonment of judicial notice may be made after the Trial Court's ruling. In jury trials, it is clearly preferable for the parties to receive an opportunity to be heard before the judicially noticed matter is introduced.

[6] Effect of Judicial Notice

There has been a great division of authority as to whether a party should have a chance to introduce facts that rebut the facts judicially noticed. According to the Rule, in civil cases the Court shall instruct the jury to accept as conclusive any fact judicially noticed. This means that the opposing party cannot present contradictory evidence on the fact once it has been judicially noticed; the time for presenting such evidence is when the matter is heard by the Trial Judge under *Rule 201(e)*. Allowing rebuttal before the factfinder would undermine the very basis of noticing an adjudicative fact under *Rule 201*, i.e., that the fact is indisputable; it would also contradict the Court's instructions on the matter.

In a criminal case, the Court may only instruct the jury that it may, but is not required to, accept as conclusive the facts judicially noticed. Judicially noticed facts are not binding on the jury in criminal cases because of a concern for the defendant's *Sixth Amendment* right to jury trial. The Trial Judge may not direct a verdict for the prosecution, n14 and it follows that the Judge may not grant a "partial" directed verdict by way of judicial notice. n15 In effect, *Rule 201* treats judicial notice in criminal cases on a par with a permissible inference. n16 This would seem to permit the party, usually the defendant, against whom notice is taken, to offer evidence to rebut the noticed fact (although relevant evidence of a fact not reasonably disputed should be hard to find). The real advantage of judicial notice in a criminal case is to excuse the prosecution (or the defendant in the rare case in which the defense takes advantage of judicial notice) from having to make a formal presentation of evidence to establish a point. Judicial notice spares the expense of proof.

[7] Jury Instructions in a Criminal Case

If the Judge in a criminal case takes judicial notice of facts and instructs the jury that they may find the facts as noticed, what additional instructions may be needed?

It may well be necessary for the Judge to assure the jury that factfinding is its function. Normally the Judge will tell the jury that it is the sole judge of the credibility of the witnesses and that the existence or nonexistence of particular facts is a matter for the jury to decide. If this is the only instruction given, however, and if the Judge attempts to take judicial notice of facts, there is the possibility that an Appellate Court would reverse on the ground that the jury was misled as to precisely what the effect of judicial notice was. The Rule clearly permits the jury to reject the Judge's notice in a criminal case, and there seems to be no reason for the Judge to be anything but explicit on this point. n17

The Federal Judicial Center has proposed the following jury instruction with respect to judicially noticed facts in criminal cases:

> Even though no evidence has been introduced about it, I have decided to accept as proved the fact that [e.g., the city of San Francisco is north of the city of Los Angeles]. I believe that this fact is of such common knowledge [or alternative justification per *rule 201(b)(2) of the Federal Rules of Evidence*] that it would be a waste of our time to hear evidence about it. Thus, you may treat it as proved, even though no evidence was brought out on the point. Of course, with this fact, as with any fact, you will have to make the final decision and you are not required to agree with me. n18

[8] Judicial Notice on Appeal

Because of the special recognition in the Rule of the jury's role, an Appellate Court must be careful not to judicially notice facts in a way that would deprive a litigant of jury consideration of those facts. For example, in reviewing a criminal case tried to a jury, an Appellate Court should not take judicial notice of an adjudicative fact in order to find that the evidence was sufficient for a conviction. To do so would be tantamount to the use of a binding instruction concerning a judicially noticed fact at trial, which is prohibited under *Rule 201(g)*; it would be the same as directing the jury to find a fact. n19 The same concerns would not apply to appellate judicial notice in the context of review of civil trials or criminal bench trials. n20 Likewise, the Appellate Court's use of judicial notice is permissible when addressing a legal challenge to the proceedings in the Trial Court. n21

The provision for mandatory judicial notice in *Rule 201(d)* should not be automatically applied on appeal, if the party could have and yet failed to raise the issue at trial. A requirement of mandatory judicial notice on appeal would, in these circumstances, conflict with the provisions of *Rule 103*, which require timely objection and an offer of proof. Consequently, if the party missed an opportunity to raise the issue at trial, an Appellate Court should judicially notice a fact in the party's favor only if the Trial Court's failure to do so was plain error. This is particularly true where the asserted ground of indisputability is that the fact could have been readily verified by accurate sources. The party's

failure to raise the issue at trial means that the Trial Judge was never directed to any sources.

[9] Judicial Notice of Law

There is no provision in the Rule with respect to so-called judicial notice of law. n22 *Rule 44.1 of the Federal Rules of Civil Procedure* and *Rule 26.1 of the Federal Rules of Criminal Procedure* provide a method for invoking the law of a foreign country. These rules received praise from the Advisory Committee, which concluded that questions involving determination of law are better left for the procedural rules. At common law, it was likely that a Court would take judicial notice of domestic law, i.e., the law of the jurisdiction in which the Court sat. As for the law of sister states (usually noticed by Federal Courts, but not by State Courts) and the law of foreign countries, these were often matters to be pleaded and proved, although various presumptions might be invoked to make proof easier. There seems to be a movement to permit the Judge to decide what the law is in any jurisdiction when it is necessary to determine such law to decide a case. n23

Given the federal procedural rules already enacted and the favorable commentary contained in the Advisory Committee Note, in most cases Federal Judges will utilize a procedure that permits the Judge to determine all questions of law, at least on a federal, state or international level. n24 It does not seem unwise, however, to require a party who asks the Court to take judicial notice of law to do some of the digging that is necessary to discover the law. n25 All that the procedural rules and the current trend provide is that the Court itself is free to consult its own sources and to attempt to determine the appropriate law on the basis of all available statutes, decisions and other sources.

[10] Application of Noticed Facts to the Case

In most cases, there are some underlying facts that are so obvious as to be subject to judicial notice. But this is often of little importance, because the parties disagree as to whether and how a particular judicially noticed fact would be applicable to the facts of the case. For example, in *Wooden v. Missouri P. R. Co., 862 F.2d 560 (5th Cir. 1989)* , the plaintiff was exposed to silicon dust while he worked for a railroad. He contracted silicosis, and sued the railroad for failing to provide him with a respiratory mask. The plaintiff sought judicial notice of the fact that "it was common knowledge in the late 1950's that working in a cloud of silicon dust without respiratory gear could cause severe lung diseases." The Court held that judicial notice was not appropriate, because the *application* of the "indisputable" fact was in dispute:

> The essential defect in Wooden's argument is that the fact he asks be noticed is closely joined to an obviously, and legitimately, controverted issue: even if it was common knowledge in 1955 that inhaling silica dust could lead to lung disease, that does not resolve the crucial question of whether the railroad should have known that the *particular* concentration of dust to which Wooden was exposed entailed a significant risk of silicosis. To notice the fact that some concentrations of silica dusts were known to be harmful would only confuse the jury's consideration of whether the railroad did know, or should have known, a particular substance to be harmful. n26

The result in *Wooden* is consistent with *Rule 403*. Essentially, the Court held that the application of judicial notice would be only marginally probative, because it would not factor in the degree of exposure. For that very reason, the judicially noticed fact might confuse the jury into thinking that the railroad should have known that *any* exposure could be harmful. n27

The differentiation between judicial notice of a fact and the application of that fact has also arisen in the presentation of forensic evidence in criminal cases. Courts have taken judicial notice that certain forensic techniques (e.g., DNA testing) are reliable; however, if the reliable procedures are applied incorrectly in a particular case, exclusion of the test results may be warranted under Rules 403 and 702, at which point the judicially noticed fact is taken out of the case. n28

In other circumstances, a judicially noticed fact may be only conditionally relevant; satisfying *Rule 201* is obviously insufficient in these circumstances. The requirements of *Rule 104(b)* must also be met. For example, in *United States v. Southard, 700 F.2d 1 (1st Cir. 1983)* , the prosecution in an interstate gambling case sought to establish that the defendant knew that a telephone call from a bettor was made to him from out-of-state. The defendant knew that the bettor had made a non-gambling-related call from the New Haven area at 6:35; fifteen minutes later, the bettor called the defendant, who was in Rhode Island, and placed a bet. The Trial Court took judicial notice that "no one could have driven from New Haven, Connecticut to the Rhode Island line in 15 minutes" and therefore that the defendant must have known that the caller was still in Connecticut when he made the betting call. But the Court of Appeals reversed, on the ground that the prosecution presented no evidence from which it could be found that the defendant "knew or should have known the driving time between New Haven, Connecticut and the Rhode Island line." Thus, the prosecution failed to ask "the questions necessary for the judicially-noticed fact to become operative," such as whether the defendant had a car, whether he had ever driven to New Haven, whether he had ever studied geography, etc.

[11] Relationship to Discovery Rules

Counsel in civil cases should be aware of *Rule 36 of the Federal Rules of Civil Procedure*, which permits one party to ask the other to admit certain facts. More can be accomplished by way of admissions than by way of judicial notice. A party who unreasonably refuses to admit a fact after being served with a request to admit is subject to sanctions under *Fed. R. Civ. P. 37*. Alternatively, a pretrial conference may produce agreement on many issues, thus avoiding unnecessary trial issues.

It has been held that the requirements of *Rule 201* are not specifically applicable when a Court is asked to rule on a discovery matter, such as a motion to compel or for a protective order. n29 This does not mean that a Court's use of judicial notice in passing on a discovery motion is unreviewable, however. As one Court put it: "Discovery is not made subject to the same evidence rules that would apply at trial, but *Rule 201* does supply a well-accepted standard for judicial notice, and radical departure from this standard could amount to an abuse of the trial court's discretion in overseeing the discovery process." n30

[12] Relationship to Other Doctrines

The term "judicial notice" is often used to describe an action of a Court that would be better characterized in another way. For example, judicial factfinding may sometimes be confused with the concept of taking judicial notice. When a Trial Judge draws inferences from a writing, the Judge is not taking judicial notice; she is engaging in factfinding and *Rule 201* does not apply. Another example of confusion among concepts is the use of *Rule 201* where another Rule would be more appropriate -- for example, the hearsay rule. A document that qualifies for admission into evidence under an exception to the hearsay rule becomes evidence in the case; it can be used without the necessity of taking judicial notice under *Rule 201*. n31

[13] Relationship to Plain Error

One of the most difficult distinctions to make is that between a ruling on a claim of plain error under *Rule 103(d)* and the taking of judicial notice. By definition, plain error signifies that a point was not properly raised in the Lower Court. Because evidence on the point is not in the record, in deciding whether a miscarriage of justice occurred, a reviewing Court often will go outside the record to evaluate the importance of the error. Although the actions of the reviewing Court look very much like the taking of judicial notice, the Court actually is doing something slightly different from taking notice. The Court is not conclusively finding any facts; it is making an assessment of the significance of an error. Often the reviewing Court will be willing to concede that the question of whether or not the error was harmful is fairly debatable. But having conceded this, the Court may find no plain error, not because it conclusively determines that a fact is true or false, but because it determines that the party who failed to properly preserve the point for appeal has not

been damaged enough to warrant a reversal. n32 Actually, the reviewing Court is not engaged in the kind of factfinding associated with judicial notice of adjudicative facts; it is making a judgment about the requirements of fair procedure based upon an educated guess in an area of uncertainty.

FOOTNOTES:

(n1)Footnote 1. See also Advisory Committee Note to *Rule 201* (quoting Professor Davis' Administrative Law treatise: "Adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to a jury in a case.").

(n2)Footnote 2. See, e.g., *Brown v. Board of Educ., 347 U.S. 483 (1954)* , where the Court cited a number of authorities for the proposition that segregated schools have a detrimental effect on African-American children. One commentator has stated that the authorities relied on in *Brown* were not so indisputable as to "allow the Court to find as a fact, irrefutable in all future cases," that segregation was harmful. Kaplan, *Segregation Litigation and the Schools*, 58 Nw. U. L. Rev. 157 (1963). However, indisputability is not required where a legislative fact is used. The finding in *Brown* was a legislative fact because it was used to support a policy decision and to develop the law.

(n3)Footnote 3. See *Wooden v. Missouri P. R. Co., 862 F.2d 560 (5th Cir. 1989)* ("judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities"; Court could not take judicial notice of the fact that working in a cloud of silicon dust without respiratory gear could cause severe lung disease). See also *Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995)* (District Court refused to take judicial notice that the HIV virus cannot be transmitted by spitting; this ruling was affirmed, because "whether saliva can transmit the HIV virus is not conclusively established and is not free from reasonable dispute"); *United States v. Southard, 700 F.2d 1 (1st Cir. 1983)* (whether the defendant knew of a fact cannot be judicially noticed).

(n4)Footnote 4. See *United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002)* (Trial Court erred in relying on its own research to determine that a fifty gram quantity of drugs will decrease in weight by more than three grams over eight months); *United States v. Sorrells, 714 F.2d 1522 (11th Cir. 1983)* (Trial Court cannot take judicial notice of informant's reliability based on the Court's personal experience with the informant); *United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987)* (Trial Judge erred in taking judicial notice of effects of surgery on the defendant, where the Judge relied solely on his own personal experience).

(n5)Footnote 5. See, e.g., *United States v. Evans, 994 F.2d 317 (7th Cir. 1993)* (no error in taking judicial notice that a certain local area was a high crime area); *Norman v. Housing Auth. of Montgomery, 836 F.2d 1292 (11th Cir. 1988)* (Trial Court properly took judicial notice of the prevailing hourly rate for bookkeepers in the Montgomery area); *United States v. Ceballos, 719 F. Supp. 119 (E.D.N.Y. 1989)* (judicial notice taken that narcotics dealers on the East Coast use beepers and public telephones as tools of the trade).

(n6)Footnote 6. See *Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981)* (proper to take judicial notice of pardons and commutations recommended by Board of Pardons, by reference to information compiled in Department of Corrections Statistical Report).

(n7)Footnote 7. See, e.g., *Cantrell v. Knoxville Community Dev. Corp., 60 F.3d 1177 (6th Cir. 1995)* ("The mental instability of an individual is not capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, as reasonable professionals can disagree as to an individual's mental state."); *United States v. Simon, 842 F.2d 552 (1st Cir. 1988)* (Trial Court refused to judicially notice the existence of a university named the University of the West Indies; this was not error, when the only evidence of the University's existence was a telephone number and an address).

(n8)Footnote 8. See *Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982)* (in an action by Indian tribes to invalidate land purchases executed prior to adoption of the Constitution, the Trial Judge should not have dismissed the claim on the basis of his own interpretation of the Articles of Confederation, their legislative history, and

contemporary accounts; the Trial Court erred in failing to allow the parties to argue the meaning of the sources and to suggest other sources).

(n9)Footnote 9. Other cases are in accord. See, e.g., *General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074 (7th Cir. 1997)* (Trial Court erred in taking judicial notice of a finding that a settlement in a prior proceeding was fair, reasonable and adequate); *United States v. Jones, 29 F.3d 1549 (11th Cir. 1994)* (Court could not take judicial notice of findings of another court establishing the nature of the salary dispute in question in the instant action).

(n10)Footnote 10. See, e.g., *International Star Class Yacht v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66 (2d Cir. 1998)* (error for Trial Judge to rely on statements of fact in a prior opinion to establish prevailing trademark search practices because "facts adjudicated in a prior case do not meet either test of indisputability contained in *Rule 201(b)*"; judicial notice of another proceeding can only be taken to establish the fact and result of the proceeding, not the truth of the matters asserted therein).

(n11)Footnote 11. One of the authors of this *Manual* was the Reporter for the Supreme Court of Alaska when it drafted its evidence code. The following quotation is drawn from the Reporter's Comment that accompanied Alaska *Rule 201*. Although the Alaska Rule does not use the terms adjudicative and legislative fact, it covers approximately the same ground as the Federal Rule, and the Comment may help Judges and lawyers understand when formal procedures are to be employed in taking judicial notice.

> One aspect not covered by *Rule 201* involves assumptions made by the court in its determination of policy; e.g., that a particular change in the law would probably do more harm than good. This is not the sort of fact question that, in a jury trial, would normally be put to the jury, and so is not subsumed by *Rule 201*'s definition of "judicial notice of fact." Rather than findings of fact, these are policy determinations made by the court acting in its lawmaking capacity. The court as lawmaker is held to the same standard as the legislature is for the veracity of its inferences: it must be rational. The court taking judicial notice of a fact as that term is used in *Rule 201* is held to a different and more demanding standard -- the same standard required for it to direct a verdict; it must be right, meaning that rational minds would not dispute the fact that the court notices.

Stated more specifically, *Rule 201* does not bar:

> (1) Common law rule-making on the basis of factual assumptions based on the court's familiarity with non-evidence sources.
>
> (2) Rule-making pursuant to a constitutional grant of authority on the basis of disputable factual assumptions.
>
> (3) Constitutional interpretation based upon disputable factual assumptions -- for example the balancing of interests in the vague area of due process.
>
> (4) Judicial creation of remedies assumed to be necessary to carry out the legislative intent of a statute.

(n12)Footnote 12. See Davis, *Judicial Notice*, 1969 Law and the Social Order, 513, 515:

> The ultimate principle is that extra-record facts should be assumed whenever it is convenient to assume them, except that convenience should always yield to the requirement of procedural fairness that parties should have an opportunity to meet in the appropriate fashion all facts that influence the

disposition of the case.

(n13)Footnote 13. See, e.g., *Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981)* (in ruling on a motion to dismiss for lack of jurisdiction, Trial Court took judicial notice of materials concerning the history and development of multinational corporations like the defendant; the Court issued a provisional ruling and invited the parties "to be heard on the propriety of taking judicial notice and the tenor of the matter noticed").

(n14)Footnote 14. See *Sullivan v. Louisiana, 508 U.S. 275 (1993)* (*Sixth Amendment* prohibits directed verdict for prosecution).

(n15)Footnote 15. While the Rule is intended to protect the accused's right to jury trial, it is written more broadly -- a judicially noticed fact is not conclusive in a criminal case. Thus, conclusive notice is prohibited even when it would benefit the accused.

(n16)Footnote 16. See, e.g., *United States v. Chapel, 41 F.3d 1338 (9th Cir. 1994)* (finding that the Trial Judge properly took judicial notice of the federally insured status of a bank, while leaving to the jury the final decision whether to accept as true what the Judge noticed). For a further discussion of permissible inferences in criminal cases, see S. Saltzburg & D. Capra, American Criminal Procedure 1165-71 (7th ed. West 2004).

(n17)Footnote 17. See *United States v. Anderson, 528 F.2d 590 (5th Cir. 1976)* (Trial Judge instructed the jury after taking judicial notice, "you are allowed to accept that as a fact proven before you just as though there had been evidence to that effect before you"; Appellate Court noted that Trial Judge failed to instruct the jury in the words of subsection (g) that the jury "may, but is not required to, accept as conclusive any fact judicially noticed," but held that the variance in the rule did not amount to reversible error).

(n18)Footnote 18. Federal Judicial Center Pattern Criminal Jury Instructions, No. 7. The Commentary to the Instruction states: "The Committee recommends that the instruction regarding judicial notice be given at the time notice is taken."

(n19)Footnote 19. See, e.g., *United States v. Bliss, 642 F.2d 390 (10th Cir. 1981)* (Appellate Court declines to take judicial notice that bank was member of Federal Reserve System; in absence of proof below, the taking of judicial notice would be tantamount to a partial directed verdict); *United States v. Thomas, 610 F.2d 1166 (3d Cir. 1979)* (provision for judicial notice on appeal "is modified by subsection (g)"; Appellate Court is not permitted to undermine the jury's right to ignore a Court's factual conclusion); *United States v. Jones, 580 F.2d 219 (6th Cir. 1978)* :

> *Rule 201(g)* plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed. This it could not do if this notice were taken for the first time after it had been discharged and the case was on appeal. We, therefore, hold that *Rule 201(f)*, authorizing judicial notice at the appellate level, must yield in the face of the express congressional intent manifested in 201(g) for criminal jury trials.

(n20)Footnote 20. See *Government of Canal Zone v. Burjan, 596 F.2d 690 (5th Cir. 1979)* (Court of Appeals can take judicial notice of a fact in reviewing criminal bench trial, because concerns of *Rule 201(g)* are not at stake).

(n21)Footnote 21. See, e.g., *United States v. Esquivel, 88 F.3d 722 (9th Cir. 1996)* (reviewing a criminal defendant's equal protection challenge to a jury selection process, the Court took judicial notice on appeal of the government's census data, where it was presented to rebut similar data presented by the defendant).

(n22)Footnote 22. But Courts occasionally cite *Rule 201* as authority for judicial notice of law. See *United States v. Holmes, 414 F. Supp. 831 (D. Md. 1976)* (army regulation judicially noticed under *Rule 201(b)(2)*). On the subject of

proof of international and foreign law, see Symposium, 18 Va. J. Int'l 689 (1978).

(n23)Footnote 23. See *Toney v. Burris, 829 F.2d 622, 626 (7th Cir. 1987)* ("Federal courts must take judicial notice of the statutory and common law of any state of the union without pleading or proof.").

(n24)Footnote 24. See, e.g., *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp., 161 F.3d 314 (5th Cir. 1998)* (Federal Judges may "reach their own decisions on the basis of independent examination of foreign legal authorities"); *Conservation Council of Western Australia, Inc. v. Aluminum Co. of America, 518 F. Supp. 270 (W.D. Pa. 1981)* (Court took judicial notice of the laws of Australia, noting that these were the kinds of matters capable of accurate determination by reliable sources). However, it has been held that Federal Courts do not take judicial notice of municipal ordinances and private codes referred to in statutes. See Getty v. *Petroleum Marketing v. Capital Terminal Co., 391 F.3d 312 (1st Cir. 2004)* ("Generally, in the federal system, the law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice without plea or proof. Municipal ordinances and private codes referred to in statutes historically have not been included within this general rule of judicial notice of law. Under traditional rules, even a municipal ordinance must be placed into evidence.").

(n25)Footnote 25. See, e.g., *Universal Sales Co., v. Silver Castle, Ltd., 182 F.3d 1036 (9th Cir. 1999)* (expert's assessment of foreign law should have been credited where adversary had opportunity to proffer its own expert and failed to do so, and Trial Court performed no independent research of foreign law).

(n26)Footnote 26. See also *General Elec. Capital v. Lease Resolution, 128 F.3d 1074 (7th Cir. 1997)* ("A district court may not take judicial notice of fact where its application may be reasonably disputed because use of this evidentiary device in this manner would abrogate the fundamental requirement of due process."); *United States v. Judge, 846 F.2d 274 (5th Cir. 1988)* (judicial notice of DEA inventory regulations would not be helpful because the application of the regulations "to the facts presented here is subject to reasonable dispute").

(n27)Footnote 27. See also *Laster v. Celotex Corp., 587 F. Supp. 542 (S.D. Ohio 1984)* (taking "judicial notice that the inhalation of asbestos *may* cause asbestosis under certain conditions would have no appreciable impact on the length of expert testimony").

(n28)Footnote 28. *United States v. Beasley, 102 F.3d 1440 (8th Cir. 1996)* (DNA testing by the polymerase chain reaction method (PCR) was so reliable that courts could take judicial notice of its reliability in the future; however, in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like.").

(n29)Footnote 29. See *Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987)* (in taking judicial notice of a fact pertinent to plaintiff's discovery demand, "the judge here was not finding the adjudicative facts of the case"; he simply determined, on the basis of the noticed fact, that the defendant probably had custody of certain discoverable information).

(n30)Footnote 30. *Marshall v. Bramer, 828 F.2d 355, 358 (6th Cir. 1987)* (no abuse of discretion where Trial Court took judicial notice of the fact that the Ku Klux Klan is a violent, racist organization).

(n31)Footnote 31. See, e.g., *United States v. Posner, 405 F. Supp. 934 (D. Md. 1975)* (judicial notice taken of an affidavit that might have qualified under *Rule 803(8)*).

(n32)Footnote 32. See *Johnson v. United States, 520 U.S. 461 (1997)* (plain error was committed where the Judge, rather than the jury, decided the question of materiality in a perjury trial; however, reversal was not required because the error did not affect the fairness or integrity of the proceedings; the evidence supporting materiality was "overwhelming," therefore, "no miscarriage of justice will occur if we do not notice the error").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article II. Judicial Notice
CHAPTER 201 RULE 201

1-201 Federal Rules of Evidence Manual 201.03

201.03 Annotated Cases

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[1] Rule 201(a) -- Scope of Rule

[a] Rule 201(a) -- Administrative Notice

Llana-Castellon v. INS, 16 F.3d 1093 (10th Cir. 1994) : Although the Court noted that the scope of administrative notice may be somewhat broader than judicial notice because of an agency's specialized expertise, it held that the Board of Immigration Appeals denied aliens due process by overturning an Immigration Judge's finding that the aliens had a well-founded fear of prosecution on the basis of administrative notice that control of the government in Nicaragua had changed and by denying the aliens an opportunity to be heard on the issue.

[b] Rule 201(a) -- Jurisdictional Questions

United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995) : The defendant, who beat up a fellow inmate at Raybrook penitentiary, was convicted of assault committed within the special territorial jurisdiction of the United States. The defendant argued that a jury instruction that Raybrook "is a place that falls within the territorial jurisdiction of the United States" violated *Rule 201(g)* because it gave the jury no opportunity to reject the judicially noticed fact. Affirming, the Court held that "any factual issues whose resolution is necessary to a determination of a ... geographical/jurisdictional issue would invoke judicial notice of legislative," not adjudicative, facts, so the procedural requirements of *Rule 201(g)* were inapplicable.

[c] Rule 201(a) -- Legislative Facts

Qualley v. Clo-Tex Int'l, Inc., 212 F.3d 1123 (8th Cir. 2000) : The Court vacated a judgment for a plaintiff who sued a corporation and an individual under RICO and state law, alleging a conspiracy to defraud involving a purchase of Nigerian crude oil that was never delivered. The Court found that the Trial Judge erred in taking judicial notice of a congressional report, newspaper articles, and television reports regarding Nigerian fraud scams involving oil. It

concluded that the noticed facts were legislative, not adjudicative, and should not have been used with respect to the particular case. The facts of which the Judge took notice "did not specifically concern the parties before the court." The error was compounded by jury instructions that required the jury to accept the noticed facts as true.

United States v. Wolny, 133 F.3d 758 (10th Cir. 1998) : The Court affirmed convictions for attempted money laundering, finding no error in the Trial Judge's failure to take judicial notice of the regulations governing the filing of Currency Transaction Reports. Those regulations had relevance only to legal reasoning and the law-making process, rather than to the facts of the particular case, so they were legislative facts not subject to the requirement of mandatory judicial notice under *Rule 201(d)*.

[d] Rule 201(a) -- Notice of Law

Getty Petroleum Mktg., Inc. v. Capital Terminal Co., 391 F.3d 312 (1st Cir. 2004) : In an action between a pier owner and operators of a terminal facility serviced by the pier to determine which was responsible for costs of installing a fire suppression system, the Court held that the Trial Judge was not required to take judicial notice of a fire protection standard referenced in a state statute relied upon by the pier owner. The standard was not readily available and the owner did not provide the Judge with a properly certified copy. In a separate opinion, the concurring Judge helpfully discussed the doctrine of judicial notice of law generally and some changes taking place in application of the doctrine to municipal ordinances and mandatory safety codes.

Siderius, Inc. v. M.V. "Amilla," 880 F.2d 662 (2d Cir. 1989): In an action by a manufacturer against a shipowner and ship charterer for cargo damage, the Trial Judge looked to the New York Produce Exchange Interclub Agreement in apportioning damages between the defendants. The Court held that the charterer was not entitled to notice before the Judge referred to the Agreement because it was more like law, to which *Rule 201* has no application, than an adjudicative fact. Even if the Agreement were considered an adjudicative fact, adequate notice was given by its incorporation by reference in one of the parties' key joint exhibits, the charter party between them.

Mutual Serv. Ins. Co. v. Frit Indus., Inc., 358 F.3d 1312 (11th Cir. 2004) : In a insurance coverage dispute contractually governed by Cayman Islands law, the Court found no error when Alabama law was applied to the case after the offshore insurers never offered citations to substantive Cayman law. "Although the court is permitted to take judicial notice of authoritiative statements of foreign law, nothing requires the court to conduct its own research into obscure sources."

[2] Rule 201(b) -- Kinds of Facts

[a] Rule 201(b) -- Business or Government Custom

Nadherny v. Roseland Prop. Co., 390 F.3d 44 (1st Cir. 2004) : In reversing summary judgment for the plaintiff in an action for breach of an employment contract, the Court held it was error to take judicial notice of industry usages in construing the contract. Industry custom and practice was a subject of dispute in the case. In *Rivera-Torres v. Ortiz Velez, 341 F.3d 86 (1st Cir. 2003)* , an action alleging employment discrimination motivated by political animus, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when the Judge refused to take judicial notice of a local law that prohibited converting a "transitory" governmental appointment into a tenured appointment. The Judge's knowledge, based on sixteen years' experience, that the law was frequently disregarded meant that the law could not be treated as stating a fact "not subject to reasonable dispute." In *Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982)* , a suit by a manufacturer of asbestos products for a declaratory judgment as to rights and

liabilities of various insurers, the Court declined to take judicial notice of the drafting history of standardized insurance policies that were at issue.

Kaggen v. IRS, 71 F.3d 1018 (2d Cir. 1995) : Affirming summary judgment for the IRS in an action brought by taxpayers who challenged a levy against their bank accounts for lack of notice, the Court held that it was proper to take judicial notice "that banks send customers monthly statements which inform customers to whom their money was paid." A dissenting Judge argued that other facts, upon which the adequacy of notice depended, were not the proper subjects for judicial notice, e.g., that bank statements are timely read by depositors and reflect that a particular withdrawal represents a seizure by the IRS. In *Pina v. Henderson*, n1 the District Court granted habeas corpus relief to a state prisoner, finding that the prosecution failed to reveal in a timely fashion to the petitioner that a codefendant had admitted sole responsibility for the crime charged. The Judge took judicial notice of the fact that it was common practice for the police to make a record of statements made by suspects and that the record would have been similar to the one found in the petitioner's probation report. The Court of Appeals reversed, holding that judicial notice was inappropriate when the fact noticed was an essential part of the party's case and was not clearly beyond dispute.

United States v. George, 971 F.2d 1113 (4th Cir. 1992) : Remanding a suppression order in a racketeering case for a determination of whether hacksaw blades seized from the defendant's truck would inevitably have been discovered in a lawful inventory search, the Court said that judicial notice should be taken of the county police's published policies and procedures for inventory searches. See also *Raleigh-Durham Airport Auth. v. Delta Air Lines* n2(judicial notice taken in suit for airport landing fees, of nationwide practice of establishing, by process of negotiation, rates to be charged for airport landing fees and space rental).

Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir. 1984) , aff'd en banc , 784 F.2d 665 (5th Cir. 1986) : The Court took judicial notice as to the uniform practice of the clerks of District Courts within the Circuit with respect to signifying the date of entry of an order or a judgment. See also *Lawrence v. Commodity Futures Trading Comm'n* n3(claim of associated person of commodity broker that suspension would cause broker to lose customers and income was not proper subject of judicial notice).

[b] Rule 201(b) -- Business Records

United States v. Cooper, 375 F.3d 1041 (10th Cir. 2004) : The Court affirmed bank robbery and firearm convictions, holding that the Trial Judge did not err in taking judicial notice that Federal Deposit Insurance Corporation certificates were business records.

[c] RULE 201(b) -- Calendar and Time

Lloyd v. Cessna Aircraft Co., 430 F. Supp. 25 (E.D. Tenn. 1976) : When one party to this litigation served notice on opposing parties of an intention to take a deposition, the District Court quashed the notice on the ground that it gave opposing counsel insufficient time to get ready for the depositions. The Court took judicial notice of the fact that one of the days between the time of notice and the scheduled deposition was a national holiday.

[d] Rule 201(b) -- Current Events

Barnes v. Bosley, 568 F. Supp. 1406 (E.D. Mo. 1983) , modified, 745 F.2d 501 (8th Cir. 1984) : In an action by discharged public employees claiming that they were victims of politically motivated action, the Court took judicial notice that the Democratic Party was currently in firm control of political offices within the City of St. Louis.

Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982) : In the course of granting injunctive relief against the Immigration and Naturalization Service's treatment of Salvadoran aliens, the Court took judicial notice that El Salvador was in the midst of a civil war that created a substantial danger of violence to civilians residing there and that both government forces and guerrillas had been responsible for human rights violations and political persecution.

[e] Rule 201(b) -- Dangers of Smoking

Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988) : Affirming a judgment for the defendant in a product liability action to recover for smoking-related disease, the Court noted that the Trial Judge had taken judicial notice that the "[k]nowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community."

Rivera v. Philip Morris, Inc., 395 F.3d 1142 (9th Cir. 2005) : Reversing in part summary judgment for the defendant in a product liability action to recover for a smoker's lung cancer death, the Court held that although the Trial Judge took judicial notice of the fact that the health risks and addictive nature of smoking have been common knowledge in Nevada, it was premature to take judicial notice of the fact that the link between smoking and specific diseases was common knowledge in 1969.

[f] Rule 201(b) -- Economic Information

In re Warfarin Sodium Antitrust Litig., 214 F.3d 395 (3d Cir. 2000) : Plaintiffs suing on behalf of a class of prescription drug consumers alleged that they had paid inflated prices because the defendant had thwarted generic drug manufacturers from entering the market. The Trial Judge dismissed the complaint for failure to allege antitrust injury, relying heavily on facts concerning the effects of third party payor and prescription drug insurance plans on the prices paid, which were not discussed in the plaintiffs' complaint. Reversing, the Court held that the facts relied upon -- that class members were likely being reimbursed to some extent -- were neither generally known nor capable of accurate and ready determination through unquestionably reliable sources. In *Cardio-Medical Assocs. v. Crozer-Chester Med. Center*, n4 the Court, holding that an antitrust plaintiff's allegations were sufficient to state a claim, found that the District Judge erred in taking judicial notice of the proposition that it was "logically inconceivable" that the defendants' conduct affected the interstate movement of patients seeking cardiological therapy. This, said the Court, "[c]learly ... is reasonably disputable." In a personal injury action, *Varlack v. SWC Caribbean, Inc.*, n5 the Court noted that a Trial Judge is empowered to take judicial notice of the appropriate discount rate to be applied to a lump sum payment in a tort action.

Fox v. Kane-Miller Corp., 398 F. Supp. 609 (D. Md. 1975) , *aff'd*, *542 F.2d 915 (4th Cir. 1976)* : The Court took judicial notice of the rate of inflation.

Transorient Navigators Co., S.A. v. M/S Southwind, 788 F.2d 288 (5th Cir. 1986) : The Court held in an admiralty case that a Trial Judge may take judicial notice of prevailing interest rates. See also *Mainline Inv. Corp. v. Gaines* n6(taking judicial notice of economic events in the oil industry, in determining whether breach of contract was excused by "act of God or other extraordinary cause" over which party had no control).

Ohio River Co. v. Peavey Co., 731 F.2d 547 (8th Cir. 1984) : In an admiralty case, the Court held that the Trial Judge could not take judicial notice that a ten percent rate was appropriate for prejudgment interest, where evidence was

offered to the contrary.

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504 (E.D. Cal. 1983) : In the course of denying summary judgment for the plaintiff in an antitrust case using a "monopoly leveraging" theory, the Court took judicial notice that "there is no alternative to which consumers could readily turn should they desire to live their lives as they presently do, but without electricity." This notice led the Court to conclude that the relevant product market was electrical energy and that the relevant geographic market was the area in which the defendant utility operated, since it had no competitors.

[g] Rule 201(b) -- Facts About Litigants

Lussier v. Runyon, 50 F.3d 1103 (1st Cir. 1995) : The plaintiff's judgment for disability discrimination in his firing by the Postal Service was to be reduced by the amount of disability benefits that he would receive from the Civil Service Retirement System. The Court held that it was error to accept, without an adversary hearing, the plaintiff's evidence as to the amount of CSRS benefits he would receive. The level of benefits to be received by the plaintiff was neither generally known, nor capable of accurate and ready determination through unquestionable sources; rather, the Trial Judge acquired the information "through untested unilateral submissions."

City of New Brunswick v. Borough of Milltown, 686 F.2d 120 (3d Cir. 1982) : In a suit by a city against a borough and a county utilities authority to void a contract concerning sewage disposal, the Court refused to take judicial notice of the amount of sewage flowing from the borough into a plant. It observed that "[t]he doctrines of 'legislative facts' and 'judicial notice' are not talismans by which gaps in a litigant's evidentiary presentation before the district court may be repaired on appeal."

United States v. Hawkins, 76 F.3d 545 (4th Cir. 1996) : The Court held that it was error in a criminal contempt prosecution to permit the prosecutor to identify Hawkins as the person who had been recalcitrant and uttered obscenities when called as a witness in a criminal case, since "testimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible." Judicial notice was improper because the defendant's identity was not a fact generally known in West Virginia or capable of determination by resort to sources of unquestionable accuracy. In *Haavistola v. Community Fire Co., 6 F.3d 211 (4th Cir. 1993)* , the Court reversed summary judgment granted to a volunteer fire company in a Title VII and § 1983 sex discrimination action, holding it was an abuse of discretion to take judicial notice of the defendant's status as a State actor.

Cantrell v. Knoxville Community Dev. Corp., 60 F.3d 1177 (6th Cir. 1995) : The Court remanded a Title VII action because the Trial Judge took judicial notice of the plaintiff's attorney's mental instability when holding that the 180-day filing requirement was equitably tolled. An individual's mental state is a fact about which reasonable professionals can disagree, and even if (as the dissenting Judge believed) the attorney's mental instability at the time of the decision was unquestioned and widely known in the jurisdiction, the question remained whether the attorney suffered from mental instability during the 180-day filing period.

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) : The Court held that, in determining the number of the defendant's employees for purposes of assessing damages in an employment discrimination action, there was no error in refusing to take judicial notice of a 10-K form filed with the SEC, since exactly what employees were referred to in the form was a matter of dispute. In *Brown & Williamson Tobacco Corp. v. Jacobson*, n7 the Court held that a Trial Judge could not take judicial notice that media coverage of a verdict in favor of a cigarette

manufacturer who successfully proved actual malice in a television broadcast was "fair." The Court found error in the Judge's reliance on the noticed fact as justification for reducing a compensatory damage award.

Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987) : The Court reversed summary judgments for prison guards and officials in a suit by an inmate who alleged that the defendants used or approved the use of tear-gas that caused him an unconstitutional injury. The Court found that the Trial Judge erred in adopting findings of fact concerning the reasonableness of the defendants' actions that were made in another lawsuit arising out of the same tear-gas incident, since the plaintiff could not be estopped by the findings and they were not the kind of findings as to which judicial notice could be taken.

Ritter v. Hughes Aircraft Co., 58 F.3d 454 (9th Cir. 1995) : The Court held, in a laid-off employee's age discrimination action, that there was no abuse of discretion in taking judicial notice of the employer's widespread layoffs based on a newspaper article, as the fact was generally known in the area and could be capable of sufficiently accurate and ready determination.

Switzer v. Coan, 261 F.3d 985 (10th Cir. 2001) : The plaintiff *pro se* sued a long list of Judges, law clerks, and court personnel. He alleged that they had conspired to deprive him of meaningful access to the courts, including by the issuance of orders written by law clerks and staff attorneys and signed by Judges without having been read. Dismissing the complaint and precluding amendment as futile, the District Court took judicial notice that the Judges review, approve, and sign all orders. The Court held that the Judge's personal knowledge, if any, was not a proper basis for taking judicial notice of such a fact, which was not either generally known or capable of ready determination from incontestable sources. However, the ruling below was affirmed because the plaintiff had never indicated otherwise than that he was standing on his pleading. In *Storm Plastics, Inc. v. United States, 770 F.2d 148 (10th Cir. 1985)* , the Court reversed a judgment for the government in a suit involving excise taxes on fishing lures, holding that the Trial Judge improperly took judicial notice of the quality of the plaintiff's fishing lures. This was neither a subject generally known in the community nor one capable of accurate and ready determination by plainly accurate sources.

Cofield v. Alabama Pub. Serv. Comm'n, 936 F.2d 512 (11th Cir. 1991) : The Court affirmed in part an order requiring an inmate to seek prefiling approval of any complaints or papers he filed in the future, and held that judicial notice should not have been taken of a newspaper article as proof that the inmate had access to thousands of dollars hidden somewhere. Just because a statement appears in a newspaper does not establish that the fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In *Nationalist Movement v. City of Cumming*, n8 the Court held there had been no error in taking judicial notice that the plaintiff organization's rallies were often loud and attracted boisterous and sometimes violent counter-demonstrators. The Trial Judge's observations were apparently based on local and national media accounts, as well as on public records, of the organization's marches and counter-marches in the county. In any event, because the plaintiffs had not requested a hearing under *Rule 201(e)*, the judicial notice issue was nonappealable.

[h] Rule 201(b) -- Fees, Salaries, etc.

Whitman v. Fuqua, 561 F. Supp. 175 (W.D. Pa. 1983) : In considering a joint motion for approval of attorneys' fees in a bitter corporate control contest, the Court observed that it was entitled to "take notice of the customary rates in the community for attorneys of comparable standing, skill and experience."

Rutherford v. Sea-Land Serv., 575 F. Supp. 1365 (N.D. Cal. 1983) : The Court took judicial notice that the eight

dollars per day provided for in a collective bargaining agreement was an unreasonably low sum for obtaining a room and three meals in the San Francisco Bay area.

[i] Rule 201(b) -- General Information

United States v. Simon, 842 F.2d 552 (1st Cir. 1988) : Affirming drug-related convictions, the Court held that the Trial Judge was not required to take judicial notice of the facts that there is a University of the West Indies in Jamaica and that Rastafarians use marijuana as part of their religion. No showing was made that these facts were either generally known or capable of accurate and ready determination by sources that could not reasonably be questioned. See also *United States v. Bourque* n9(not proper for District Court to take judicial notice of whether the Internal Revenue Service ever loses tax returns).

Brennan's Inc. v. Brennan's Restaurant, L.L.C., 360 F.3d 125 (2d Cir. 2004) : The Court affirmed the denial of a preliminary injunction in a trademark infringement case. Noting that "[i]n the case at hand plaintiff and defendant have a common last name," it stated "[w]e take judicial notice that a current Manhattan telephone book lists 184 residences and 20 businesses with the name Brennan."

Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979) : The Court took judicial notice of "the phenomenon known as the counterculture of the seventies." See also *Newark Morning Ledger Co. v. United States* n10(taking judicial notice in income tax case that plaintiff was New Jersey's largest and only statewide newspaper, both on weekdays and on Sunday).

Wooden v. Missouri P. R. Co., 862 F.2d 560 (5th Cir. 1989) : In a suit by a railroad employee alleging that he contracted silicosis from tamping gravel, the Court held that judicial notice could not be taken of the fact that it was common knowledge in the 1950s that working in a cloud of silicon dust without respiratory gear could cause severe lung disease. In *United Klans of Am. v. McGovern*, n11 the District Court took judicial notice that the plaintiff organization was a "white hate" organization. In *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, n12 the District Judge, holding that at-large elections for the mayor and city commissioners unconstitutionally diluted black voting strength, took judicial notice that until recently *de jure* segregation affected the lives of all black persons in ways described by the District Court. The Judge also took judicial notice of a 1974 city-wide census in order to supplement evidence introduced at trial based on the 1970 Census. Finally, the Judge judicially noticed that, in contrast to the government's lack of concern for the condition of streets in black neighborhoods, similar streets located in more affluent neighborhoods were not permitted to lapse into such disrepair. See also *Clark v. South Cent. Bell Tel. Co.* n13(Court refused to take judicial notice of black population of particular parish in employment discrimination suit, where source of information not placed before Court).

United States v. Deckard, 816 F.2d 426 (8th Cir. 1987) : The Court affirmed a defendant's conviction for an illegal wiretap, holding there was no error in taking judicial notice that interstate communications were carried over the telephone company's lines. The Trial Judge had properly instructed the jury that it could, but was not required to, accept as conclusive a fact that was judicially noticed.

United States v. Baker, 641 F.2d 1311 (9th Cir. 1981) : The Court said that nonparties to an injunction must have actual notice of it before they can be held in criminal contempt for violating it and that judicial notice of "actual notice" could not be taken on the basis of "unproved, widespread publicity."

Lozano v. Ashcroft, 258 F.3d 1160 (10th Cir. 2001) : In an employment discrimination action, the Court held it was error to take judicial notice of the date a decision was received by the defendant, where there was a genuine dispute over the accuracy of the receipt date. In *York v. American Tel. & Tel. Co., 95 F.3d 948 (10th Cir. 1996)* , the Court held in a Title VII case that there was no abuse of discretion in refusing to take judicial notice that "few if any women in the Oklahoma City area would be able to satisfy a two-year experience requirement," as that fact is neither generally known nor readily determinable.

Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197 (11th Cir. 2004) : In an action for trade dress infringement brought by the manufacturer of flash-frozen novelty ice cream, the Court held that judicial notice was properly taken of the fact that color is indicative of flavor in ice cream, since the fact is generally known among consumers.

[j] Rule 201(b) -- Geography

United States v. Southard, 700 F.2d 1 (1st Cir. 1983) : The Court reversed a gambling conviction because the District Judge took judicial notice in a bench trial that "no one could have driven from New Haven, Connecticut to the Rhode Island line in 15 minutes," and used this as the basis for concluding that the defendant knew that a key telephone call had been made from out of state. The Court said that notice of the facts might have been proper, but that such notice could not support a finding that the defendant actually knew the facts, since there was no evidence that the defendant knew the distances that were judicially noticed.

United States v. Ramirez, 910 F.2d 1069 (2d Cir. 1990) : Affirming the defendant's sentence for a drug offense, the Court held that the sentencing Judge could take judicial notice that New York had no firearms manufacturers and conclude that a handgun illegally in the defendant's possession came from interstate commerce.

Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874 (3d Cir. 1992) : An admiralty action seeking to recover for loss of umbrellas to be shipped from Taiwan to New Jersey was dismissed for lack of subject matter jurisdiction on the ground that the bill of lading did not contemplate carriage by sea alone. In reversing for further factfinding, the Court held that while it would be proper to notice judicially that a purely maritime route was elongated, it would be inappropriate to take judicial notice that parties would never contract for shipment over that geographical distance. See also *Deary v. Evans* n14(taking judicial notice, in action for a false arrest arising out of a bank robbery investigation, that a downtown business area was small and that two buildings were within several blocks of one another).

United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) : The Court of Appeals approved the District Court's judicial notice that a certain town was within the Cherokee Indian Reservation, but reversed on another ground. See also *Otto v. Alper* n15(judicial notice that Rehoboth Bay in Delaware is navigable waterway for purposes of admiralty jurisdiction).

United States v. Anderson, 528 F.2d 590 (5th Cir. 1976) : Affirming a conviction for assault with intent to do bodily harm, the Court approved taking judicial notice that the Federal Correctional Institution in Tallahassee, Fla., where the assault was proved to have taken place, was "within the special maritime and territorial jurisdiction of the United States." See also *Smith v. Hustler, Inc.* n16(taking judicial notice in admiralty case that lake on which accident occurred was not "navigable," a fact generally known in the community).

Northwest Airlines v. County of Kent, Mich., 955 F.2d 1054 (6th Cir. 1992) , aff'd on other grounds, 510 U.S. 355 (1994) : In an action by airlines over the reasonableness of rates charged by an airport, judicial notice was taken that the airport was located less than an hour and a half from two airports serviced by major airlines. In *United States v. Blunt*, n17 the Court affirmed a conviction for assault with a deadly weapon, noting that the Trial Judge would have been correct in taking judicial notice under *Rule 201* of the fact that the federal prison in which the assault giving rise to the instant prosecution took place was within the special territorial jurisdiction of the United States.

Horton v. Taylor, 585 F. Supp. 224 (W.D. Ark. 1984) , rev'd on other grounds, 767 F.2d 471 (8th Cir. 1985) : The Court took judicial notice that a county was predominantly rural and was located in mountainous regions.

United States v. Coutchavlis, 260 F.3d 1149 (9th Cir. 2001) : Affirming a conviction for disorderly conduct, the Court held that a Magistrate Judge, who actually holds court in Yosemite National Park, could take judicial notice of a map to conclude that the conduct took place with the Park.

United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982) : The Court found that a Trial Judge was entitled to take judicial notice that a location was well beyond the three mile territorial limit of the United States. It also reminded Trial Judges that when they are taking notice they should notify the parties and give them a chance to be heard.

[k] Rule 201(b) -- Historical Information

Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982) : In an action by the Nation to invalidate land purchases by New York from Indian tribes prior to the adoption of the Constitution, the Court said that the District Judge should not have taken judicial notice of various historical materials in order to interpret the Articles of Confederation. The historical material had not been subject to adversarial testing, and the Court of Appeals remanded for an evidentiary hearing.

Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) : In a landmark case, the Court utilized the writ of *coram nobis* to vacate the conviction (which had been affirmed by the Supreme Court in 1944 n18) of an American citizen of Japanese ancestry who had violated an order excluding persons of such ancestry from various places after the United States declared war on Japan in 1941. In making its ruling, the Court declined to take judicial notice of certain adjudicative facts -- i.e., that there was no military necessity for relocation and detention of ethnic Japanese and that the government had failed to disclose crucial information to Courts considering the military necessity question. Even though the government did not oppose judicial notice, the Court expressed its view that notice of the ultimate facts in a case was inappropriate. Instead, the Court suggested that a report of a Congressional Commission on Wartime Relocation could be considered under *Rule 803(8)* and that certain internal government documents either were not hearsay and were admissible to show notice to the government or they satisfied one or more hearsay exceptions.

[l] Rule 201(b) -- Intellectual Property

Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498 (2d Cir. 1982) : Affirming summary judgment for the defendant in a copyright infringement action, the Court said that the traditional features of a "snowman" are generally enough known to be judicially noticed. See also *Nestle Co. v. Chester's Mkt., Inc.* n19(taking judicial notice of dictionary and cookbook excerpts, Court concluded "Toll House" was a generic term that could not be claimed by Nestle as its trademark).

Marcyan v. Nissen Corp., 578 F. Supp. 485 (N.D. Ind. 1982) , *aff'd*, *725 F.2d 687 (1983)* : In the course of finding for the defendants in a patent infringement case involving an exercise device with an invertible handlebar, the Court took judicial notice of the fact that handlebars of bicycles are routinely inverted and have been for some time.

[m] Rule 201(b) -- IRS Materials

American Stores Co. v. Commissioner, 170 F.3d 1267 (10th Cir. 1999) : In a tax dispute, the Court upheld the Trial Judge's refusal to take judicial notice of Private Letter Rulings, unpublished Technical Advice Memoranda, and other related IRS materials. The taxpayer sought to have the Judge take judicial notice that these materials demonstrated that IRS administrative practice was consistent with the position taken by the taxpayer in the instant litigation. But the Court held that none of this information was generally known, nor was it capable of accurate and ready determination; almost all of the information was in the nature of unpublished rulings issued to private taxpayers. The Court noted that the taxpayer's request for judicial notice was "essentially an attempt to introduce evidence after judgment," because the taxpayer had never attempted to introduce the information as evidence in the case. The Court concluded that judicial notice "is not a talisman by which gaps in a litigant's evidentiary presentation may be repaired on appeal."

[n] Rule 201(b) -- Judicial Records and Proceedings

United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) : The Court said: "The District Judge could surely take judicial notice, in a preliminary hearing merely on the admissibility of certain evidence, that ... testimony [read into the record by the government] was in fact presented in a hearing at which he presided on a not unrelated matter."

Guzma'n-Ruiz v. Herna'ndez-Colo'n, 406 F.3d 31 (1st Cir. 2005): The Court affirmed summary judgment for the defendants in a political discharge suit, finding no error in the Judge's refusal to take judicial notice of the record and ruling in another case in which the plaintiffs' counsel represented other dismissed employees. The Court stated that the "plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case" in which the "pleadings, parties, issues, and facts differ." In *Rodi v. Southern New England School of Law, 389 F.3d 5 (1st Cir. 2004)* , a graduate of the law school brought fraudulent misrepresentation claims after the school did not achieve final accreditation. Reversing dismissal of the suit for failure to state a claim, the Court held that it was proper to take judicial notice of a related state proceeding in determining that the statute of limitations for the claim had been tolled. In *Kowalski v. Gagne, 914 F.2d 299 (1st Cir. 1990)* , the Court affirmed a judgment for the plaintiff in a wrongful death action brought by the widow against the man convicted of murdering her husband, holding that the conviction was properly established by judicial notice rather than a certified copy.

International Star Class Yacht Racing v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66 (2d Cir. 1998) : In a Lanham Act case, the Court held it was error to rely on statements of fact in a prior Lanham Act opinion to establish prevailing trademark search practices, since "[f]acts adjudicated in a prior case do not meet either test of indisputability contained in *Rule 201(b)*." In *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384 (2d Cir. 1992)* , the Court reversed a judgment for the subrogee of a bankrupt meat packer, holding it was error to take judicial notice of a Bankruptcy Court's orders in order to prove that a statutory trust had been created, as judicial notice of documents filed in another Court may be used only to establish the fact of the other litigation and related filings, not the truth of matters asserted in the filings.

O'Neill v. Heckler, 579 F. Supp. 979 (E.D. Pa. 1984) : Although the Court dismissed a complaint seeking review of the denial of disability benefits on the ground that the complaint was not filed in a timely manner, it took judicial notice that the complaint was actually filed, along with a motion to proceed *in forma pauperis*, before the Court clerk

stamped "filed" on it.

Taylor v. Charter Med. Corp., 162 F.3d 827 (5th Cir. 1998) : In a § 1983 suit against a psychiatric hospital, the Court found no error in refusing the plaintiff's request, based on the determination made in another suit that the defendant's corporate predecessor was a state actor, to take judicial notice that the defendant was a state actor. The entity's status as state actor was not a fact beyond reasonable dispute, and the status, being a mixed question of fact and law, was not an "adjudicative fact" within the meaning of *Rule 201*. In *In re Missionary Baptist Found. of Am., Inc.*, n20 the Court found no error in a Bankruptcy Judge's taking judicial notice of a record developed in the same bankruptcy case, but in a different proceeding. See also *MacMillan Bloedel Ltd. v. Flintkote Co.* n21(upholding summary judgment for a seller in a suit by the buyer of corporate assets and observing that "[a] court may take judicial notice of related proceedings and records in cases before the same court"); *Kinnett Dairies, Inc. v. Farrow* n22(in absence of any complaint or claim by party that procedure violated due process, no error in Trial Court's taking judicial notice of materials in its files from prior proceedings even though one of the parties in the instant case had not been a party in the prior proceedings).

Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004) : The parents of an autistic child were successful in an administrative proceeding seeking reimbursement for various educational costs, but the Trial Judge rejected the determination after a bench trial at which additional evidence was presented. On appeal, the Court held there was no error with the Judge's refusal to take judicial notice of declarations made in an unrelated California case by one of the testifying experts, which the plaintiffs characterized as suggesting that the expert's positions "can turn on which party is paying his bill." While there was no dispute about occurrence of the California proceeding or the existence of the declarations, the expert's credibility was very much in dispute, so judicial notice on that issue would have been improper; the proper use of the allegedly contradictory declarations was in cross-examination of the expert.

General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074 (7th Cir. 1997) : In a lender's action to collect a deficiency claim against guarantors on the ground of fraudulent transfer and successor liability, the Court held it was an abuse of discretion to take judicial notice of a finding in a prior class action related to the subject matter of this suit. The "fairness" of a proposed settlement is sufficiently different from the issue whether the resulting transfer of assets was for "fair" value that the Trial Judge should have determined that the earlier finding indisputably applied in the later proceeding before dismissing claims on the basis of the finding. The Judge likewise erred in taking judicial notice of recitals in a private settlement agreement in deciding whether continuity of ownership existed between the purchaser and seller of assets in the settlement transaction. In *Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995)* , summary judgment was granted for the plaintiff in a receiver's action to recover funds that had been distributed by the since-convicted mastermind of a Ponzi scheme. Affirming in part, the Court said that judicial notice was properly taken of the mastermind's plea agreement, so as to establish the defendants' liability.

United States v. Daychild, 357 F.3d 1082 (9th Cir. 2004) : Rejecting a motion to dismiss the indictment in a marijuana distribution case, the Trial Judge properly took judicial notice that the indictment had been returned before an open court and that twelve jurors concurred in the indictment. That the indictment had been properly returned is a fact capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. In *Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2002)* , the Court reversed summary judgment against a prisoner challenging hair-length regulations, noting that it was error when the Magistrate Judge took judicial notice of findings in another case regarding justifications for grooming regulations, the adverse impact of accommodating religion by providing an exception to grooming regulations, and the escalating number of searches that must be conducted. In *Lee v. County of Los Angeles, 240 F.3d 754 (9th Cir. 2001)* , a mentally-impaired man was mistakenly arrested in California and extradited to New York as an escaped felon. Reversing dismissal of a civil rights complaint filed on the man's behalf, the Court held it was error to take judicial notice of a waiver of extradition signed by the man and of the transcript of the

extradition hearing. The Judge took judicial notice not only of the undisputed facts that an extradition hearing was held, the waiver was signed, and the man purportedly waived his right to challenge extradition, but also of the disputed facts included in the transcript, that the man had informed the hearing Judge and counsel that he was in fact the person sought in New York. In ruling on a Rule 12(b)(6) motion, judicial notice of another Court's opinion may not be for the truth of the facts recited therein but only for the existence of the opinion. In *United States v. Wilson*, n23 the Court reversed a bail-jumping conviction, holding it was error to take judicial notice of the fact that the defendant was absent from the jurisdiction of the Court for approximately seven months, where the warrant for arrest showed only the date of arrest and not the date on which the defendant was taken into state custody.

Meredith v. Beech Aircraft Corp., 18 F.3d 890 (10th Cir. 1994) : The plaintiff claimed that the defendant discriminated against her on the basis of her sex in connection with a promotion, and the Trial Court granted summary judgment, taking into consideration another case in which a District Judge had decided that the defendant had discriminated on grounds of sex in connection with the very same promotion. The Court held it was error to take judicial notice of the determination in the other action, because the fact that the plaintiff in the other action was the most qualified for the position was not a "kind of universal truth."

United States v. Jones, 29 F.3d 1549 (11th Cir. 1994) : In a suit by the government to recover a medical-student loan, the Court held it was error for the Trial Judge to take judicial notice of facts stated in the opinion from another case between the parties. A Court may take notice of another Court's order only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation, not for the truth of matters asserted in the other litigation. Accord *In re Delta Resources, Inc., 54 F.3d 722 (11th Cir. 1995)* .

[o] Rule 201(b) -- Local Ordinances

Rivera-Torres v. Ortiz Velez, 341 F.3d 86 (1st Cir. 2003) : In an action alleging employment discrimination motivated by political animus, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when the Judge refused to take judicial notice of a local law that prohibited converting a "transitory" governmental appointment into a tenured appointment. The Judge's knowledge, based on sixteen years' experience, that the law was frequently disregarded meant that the law could not be treated as stating a fact "not subject to reasonable dispute."

Demos v. City of Indianapolis, 302 F.3d 698 (7th Cir. 2002) : The Court affirmed summary judgment granted for the City in an action brought by employees suing for failure to pay for overtime work. The Judge rejected an argument that the plaintiffs were not salaried employees because their pay was docked if they failed to work an eight-hour day, on the ground that they were subject to the Department of Labor's "public accountability" exception to the no-docking rule. The Court held it was proper to take judicial notice of a Municipal Code provision and a state statute against "ghost employees" as evidence of the public accountability standard, since city ordinances and state statutes are matters of "common knowledge" and therefore proper subjects for judicial notice.

Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495 (10th Cir. 1997) : The Court dismissed antitrust actions brought by a customer against car rental companies, finding no error when the Trial Judge took judicial notice of a municipal ordinance to conclude that the municipality actively supervised a daily usage fee which was the core of the plaintiff's suit. The Court concluded that where, as here, a party asked the Trial Judge to take notice of the ordinance and supplied the proper information, *Rule 201(d)* "requires the court to comply with the request."

[p] Rule 201(b) -- Medical Information

Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995) : A prison inmate who tested HIV positive was convicted in a State Court for attempted murder because he spat on a prison guard. The Court affirmed denial of the inmate's habeas corpus petition. The petitioner argued that the District Court erred in failing to take judicial notice that HIV cannot be transmitted by spitting. But the Court found no error, stating that "whether saliva can transmit the HIV virus is not conclusively established and is not free from reasonable dispute." In *Hardy v. Johns-Manville Sales Corp.*, n24 an asbestos-related product liability action, the Court refused to take judicial notice that asbestos causes cancer, as that proposition was inextricably linked to a host of disputed issues.

Hines v. Secretary of Health & Human Servs., 940 F.2d 1518 (Fed. Cir. 1991) : Reviewing a Vaccine Act proceeding, the Court noted that the incubation period of measles is the sort of well-known medical fact of which judicial notice may be taken.

[q] Rule 201(b) -- Official Records and Public Reports

Island Software & Computer Serv., Inc. v. Microsoft Corp., 413 F.3d 257 (2d Cir. 2005) : The plaintiff in a copyright infringement action argued that the defendant was not entitled to summary judgment because the only evidence that it owned the copyrights was unauthenticated copies of the federal copyright registrations. Rejecting the argument, the Court noted that the Judge could take judicial notice of the copyright registrations as published in the Copyright Office's registry, because registration is a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," so error, if any, in granting summary judgment based on the unauthenticated copies was harmless. In *Kavowras v. New York Times Co., 328 F.3d 50 (2d Cir. 2003)* , the Court affirmed dismissal of an employee's Labor Management Relations Act complaint as untimely. The Court held that the Trial Judge properly took judicial notice of a charge filed by the employee before the NLRB as indicating that by the date of the charge, at least, the employee had notice of the alleged LMRA violation. In *Kramer v. Time Warner, Inc., 937 F.2d 767 (2d Cir. 1991)* , the Court affirmed dismissal of a securities action, holding that a District Court may consider relevant documents filed with the SEC in determining a motion to dismiss, even though those documents were not part of the complaint. In *Wiscope v. Commodity Futures Trading Comm'n*, n25 the Court held that in proceedings before the Commodity Futures Trading Commission official notice should not have been taken of an edited transcript of a Commission meeting with its staff, since the transcript was not usually kept as a public record. In fact, it was created for the purpose of this proceeding.

United States v. 97. 19 Acres, 511 F. Supp. 565 (D. Md. 1981): In a condemnation case, the Court approved the judicial notice by the Magistrate of the final rate of interest on corporate debt obligations as set forth in the Federal Reserve Bulletin for 1980.

Denius v. Dunlap, 330 F.3d 919 (7th Cir. 2003) : In an employee's § 1983 action against a state-run program for unconstitutionally requiring him to release certain documents as a condition of a contract renewal, it was the plaintiff's burden to prove that the National Personnel Records Center, which was specified in the release, held medical records, which were protected against disclosure, during the period covered by the release. Because the plaintiff's only evidence of that fact was his testimony that he obtained his medical records from the NPRC the day before trial, the defendants claimed it was error to grant JMOL for the plaintiff. Affirming, the Court held that it was an abuse of discretion for the Trial Court to withdraw its judicial notice of the fact that the NPRC maintained medical records. The information came from the NPRC's official website, and was confirmed by the Court from numerous Notices in the *Federal Register*, so it could not reasonably be disputed and was a proper subject of judicial notice.

United States v. Ritchie, 342 F.3d 903 (9th Cir. 2003) : In a proceeding to set aside the forfeiture of property in a

criminal case, the Court held that it was error to take judicial notice of DEA records and documents attached to an affidavit alleging that the claimant had received adequate notice of the forfeiture proceeding. The underlying facts in the documents were neither generally known nor capable of determination by resort to sources whose accuracy cannot be reasonably questioned, so they did "not remotely fit the requirements of *Rule 201*." And while judicial notice may be taken of the records and reports of an administrative body, and the DEA is an administrative body, not all the evidence in the case, e.g., the handwriting on an envelope mailed to the DEA, fit within the exception. In *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429 (9th Cir. 1992)* , an antitrust case in which a defendant claimed immunity under the state action doctrine, the Court held that the Trial Judge could take judicial notice of published decisions of the California Public Power Commission. In *Mack v. South Bay Beer Distribs., Inc.*, n26 the Court reversed a judgment based on collateral estoppel principles in an age discrimination action, but it stated that a Court may take judicial notice of the records and reports of administrative bodies. See also *Haye v. United States* n27(in action to quiet title and enjoin enforcement of federal tax lien, Court took notice of recorded deeds, recorded notice of a lien, and county general index).

Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495 (10th Cir. 1997) : Affirming dismissal of an antitrust class action against defendants who alleged they were complying with a municipal ordinance, the Court held that the District Court had appropriately taken judicial notice of the ordinance's provisions upon a request by a party and that the appeal was a sufficient opportunity to be heard as to the propriety of taking notice and the tenor of the matter noticed.

[r] Rule 201(b) -- Performance of Equipment

Granholm v. TFL Express, 576 F. Supp. 435 (S.D.N.Y. 1983) : In an admiralty action, the Court took judicial notice that service lives of radar sets are finite and that indiscriminate use could cause radar to fail when it was most needed.

[s] Rule 201(b) -- Personal Knowledge of Court

LaSalle Nat'l Bank v. First Conn. Holding Group, L.L.C. XXIII, 287 F.3d 279 (3d Cir. 2002) : The Trial Judge imposed sanctions on an attorney for allegedly representing, in communications with the Judge's law clerk, that "defense counsel" did not object to appointment of a receiver in a foreclosure action when in fact some defending parties did object. The attorney claimed that he had said "borrower's counsel," from whom he had authority. Rather than call the law clerk to testify at a hearing on the order to show cause, the Judge took "judicial notice" that the attorney had used the term "defense counsel." Reversing the sanctions order, the Court held that it was improper for the Judge to take judicial notice of conversations with her law clerk, since "[t]he contents of those conversations are certainly not a matter of common knowledge, nor are they easily provable from a source whose accuracy cannot reasonably be questioned."

United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987) : Reversing an order suppressing a confession, the Court held that the Judge had erred in relying upon his personal experience concerning the effects of a general anesthetic following an operation. The Court observed that the record was silent as to the Judge's surgical procedure and the type of anesthetic with which he had experience, and concluded that the parties had no fair opportunity to respond to the facts that the Judge was noticing.

Switzer v. Coan, 261 F.3d 985 (10th Cir. 2001) : The plaintiff pro se sued a long list of Judges, law clerks, and court personnel alleging that they had conspired to deprive him of meaningful access to the courts, including by the issuance of orders written by law clerks and staff attorneys and signed by Judges without having been read. Dismissing the complaint and precluding amendment as futile, the District Court took judicial notice that the Judges review,

approve, and sign all orders. The Court held that the Judge's personal knowledge, if any, was not a proper basis for taking judicial notice of such a fact, which was not either generally known or capable of ready determination from incontestable sources. However, the ruling below was affirmed because the plaintiff had never indicated otherwise than that he was standing on his pleading.

[t] Rule 201(b) -- Public Preferences

United States v. Hoyts Cinemas Corp., 380 F.3d 558 (1st Cir. 2004) : The Court vacated the Trial Judge's sua sponte grant of summary judgment to the United States in an action seeking declaratory and injunctive relief that wheelchair seating in stadium style movie theaters violated the Americans with Disabilities Act. The Trial Judge's reliance upon judicial notice to establish the preferences of movie theater patrons was improper, since the seating preferences were neither generally known or capable of being determined by an undeniably accurate source.

[u] Rule 201(b) -- Scientific Facts

United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992) : Affirming the defendant's conviction for kidnapping, the Court held that, given the findings made by the District Court and after careful consideration and review on appeal, in future cases, judicial notice could properly be taken of the general acceptability of the general theory and the use of the specific techniques of DNA profiling.

United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004) : Affirming convictions of Hobbs Act robbery and use of a firearm in an extensive opinion examining numerous sources, the Court held that fingerprint evidence was sufficiently reliable to be admitted. However, it found that the Trial Judge improperly took judicial notice that "human friction ridges are unique and permanent throughout the area of the friction ridge skin, including small friction ridge areas, and that ... human friction skin arrangements are unique and permanent." The Court noted that the defendant, at a *Daubert* hearing, disputed the very proposition judicially noticed; "if the question merited such an extensive *Daubert* hearing, it surely was not suitable for resolution by judicial notice." The error was harmless, however, because "the government could have adduced estimable testimony -- both in its quantity and quality -- in place of the District Court's taking judicial notice" and "Mitchell was free to put on evidence to rebut the substance of the Court's judicial notice ... but did not do so."

United States v. Beasley, 102 F.3d 1440 (8th Cir. 1996) : The Court held that DNA testing by the polymerase chain reaction method was reliable under *Daubert*, and that Courts could take judicial notice of its reliability in the future. The Court noted, however, that in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like."

United States v. Boyd, 289 F.3d 1254 (10th Cir. 2002) : The Court vacated the defendant's sentence for distribution of crack cocaine because the Judge took judicial notice that static cling, consumptive testing, evaporation, or particular atmospheric conditions accounted for the full differential of 3.34 grams between the quantity of drug when tested by the government and when tested by the defense eight months later. Being "neither 'generally known ...' nor 'capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned,' that fact is not one amenable to judicial notice."

[v] Rule 201(b) -- SEC Filings

Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999) : The Court vacated the denial of a motion to dismiss a securities class action, holding that documents publicly filed with the SEC could be judicially noticed -- for the statements they contained but not for the truth of those statements -- and considered in deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6).*

[w] Rule 201(b) -- Statutes and Regulations

United States v. Woods, 335 F.3d 993 (9th Cir. 2003) : The defendants were convicted of mail and wire fraud in a telemarketing scheme for selling magazines in which they falsely informed potential customers they had been selected to win certain awards and of the cost of receiving the award. The Court held there was no error when the Trial Judge judicially noticed an FTC Rule governing telemarketing sales, since published rules of federal agencies "shall be judicially noticed," and the jury was instructed that the defendants were not on trial for violating the Rule and that violation of the Rule would not by itself constitute mail or wire fraud.

[x] Rule 201(b) -- Technological Facts

Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) : The defendant manufacturer of a government ambulance involved in a roll-over accident asserted a government contractor defense, which required that it warn the government of dangers in the use of its product known to it but not the government. Reversing summary judgment for the defendant, the Court held it was error to find the government's equal knowledge by taking judicial notice that vehicles with a high center of gravity have rollover problems. Most people probably know little, if anything, about how high centers of gravity cause vehicular accidents.

[y] Rule 201(b) -- Weather

Newman v. Village of Hinsdale, 592 F. Supp. 1307 (N.D. Ill. 1984) , *aff'd*, *767 F.2d 925 (7th Cir. 1985)* : To determine the amount of snowfall on a given day, the Court indicated that it would take judicial notice of the records of the National Oceanic and Atmospheric Administration.

[3] Rule 201(d) -- When Mandatory

United States v. Wolny, 133 F.3d 758 (10th Cir. 1998) : The Court affirmed convictions for attempted money laundering, finding no abuse of discretion in the failure to take judicial notice of the regulations governing the filing of Currency Transaction Reports. Judicial notice was not mandatory under *Rule 201* because the regulations were legislative, rather than judicial, facts. Neither was it mandatory under the Federal Register statute, *44 U.S.C. § 1507*, because the contents of the regulations were not relevant to the proceeding at hand.

[4] Rule 201(e) -- Opportunity to be Heard

United States v. Hoyts Cinemas Corp., 380 F.3d 558 (1st Cir. 2004) : The Court vacated the Trial Judge's sua sponte grant of summary judgment to the United States in an action seeking declaratory and injunctive relief that wheelchair seating in stadium style movie theaters violated the Americans with Disabilities Act. The Judge's reliance upon judicial notice to establish the preferences of movie theater patrons was improper, since the seating preferences were neither generally known or capable of being determined by an undeniably accurate source. The Court also questioned whether the defendant had been given sufficient notice and opportunity to be heard: "The district judge did refer in the hearing to his own experience in a particular stadium theater, but this is less than a clear-cut warning that judicial notice will be used to convert this single instance into a universal proposition that may not be disputed." In

Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993) , the Court held that the Trial Judge improperly dismissed a securities action as time-barred on the basis of judicial notice of articles in the national press that had not been submitted by either party, where the parties had not been given an opportunity to be heard with respect to the material noticed.

Chen v. Metropolitan Ins. & Annuity Co., 907 F.2d 566 (5th Cir. 1990) : In an action on a double indemnity provision in a life insurance policy where the insurer defended on the ground that the insured's death by drinking too much brandy was not an "accident" and was caused by a "drug" within the meaning of the policy, the Court reversed a summary judgment for the defendant, noting that although it is usually the party's burden to request a hearing to challenge the taking of judicial notice, here the judicial notice taken that alcohol is a drug involved a matter of contractual interpretation reviewable as a matter of law.

United States v. Ritchie, 342 F.3d 903 (9th Cir. 2003) : In a proceeding to set aside the forfeiture of property in a criminal case, the Court held that it was error to take judicial notice of DEA records and documents attached to an affidavit alleging that the claimant had received adequate notice of the forfeiture proceeding. The underlying facts in the documents were neither generally known nor capable of determination by resort to sources whose accuracy cannot be reasonably questioned, so they did "not remotely fit the requirements of *Rule 201*." Even if the documents were properly the subject of judicial notice, the claimant should have been given some opportunity to respond to the propriety of taking judicial notice of the facts alleged in them.

American Stores Co. v. Commissioner, 170 F.3d 1267 (10th Cir. 1999) : In a tax dispute, the Court found no error in the Trial Judge's refusal to hold a hearing on whether certain information proffered by the taxpayer should be judicially noticed. The Court noted that the hearing requirement is intended mainly to protect the opponent of the judicially noticed fact. The Court did not "read the rule to require a court to hold a formal hearing every time a *proponent* of judicial notice so demands." In *Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495 (10th Cir. 1997)* , the Court affirmed dismissal of an antitrust class action against defendants who alleged they were complying with a municipal ordinance, and held that the District Court had appropriately taken judicial notice of the ordinance's provisions upon a request by a party and that the appeal was a sufficient opportunity to be heard as to the propriety of taking notice and the tenor of the matter noticed. In *In re Calder*, n28 the Court affirmed denial of discharge in bankruptcy, holding that the Bankruptcy Court was not required to give the debtor prior notice before taking judicial notice of the contents of his petition in deciding whether to deny discharge for material false statements. The burden rested with the debtor to request a hearing to challenge the propriety of taking judicial notice even after notice had been taken.

[5] Rule 201(f) -- Time of Taking Notice

Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981) : Ruling on a motion to dismiss for lack of personal jurisdiction, the District Court said that not only could judicial notice be employed at this stage of the proceeding, but also that the judgment to be made was a mixed question of fact and law which permitted broader, more flexible judicial notice than is typically allowed in connection with standard adjudicative facts.

Colonial Leasing Co. v. Logistics Control Group Int'l, 762 F.2d 454 (5th Cir. 1985) , reh'g granted in part on other grounds, 770 F.2d 479 (5th Cir. 1985) : The Court reversed a judgment for a purported creditor who sued a purported debtor and a third party alleging a fraudulent transfer of assets. It found that the Trial Judge erred in taking judicial notice of an Oregon State Court judgment after a trial in which the Judge had excluded such evidence. Although the judgment was admissible and its existence was the proper subject of judicial notice, the Court of Appeals reasoned

that since the transferee declined to produce evidence at trial when the plaintiff failed to establish a *prima facie* case and since the judicial notice that established the *prima facie* case took place after trial, the transferee was deprived of an opportunity to adduce evidence on a critical fact. The case serves as a reminder that in a jury trial, judicial notice ordinarily will be required before the jury returns its verdict if it is to have any effect.

United States v. Wessels, 12 F.3d 746 (8th Cir. 1993) : During the defendant's sentencing for drug offenses, the Judge took judicial notice that a particular type of methamphetamine had been involved, on the ground that none of the fifty-some cases in the state with which the Judge was familiar involved the alternative type. The Court remanded, holding that the particular type was essential to the calculation of the proper sentence and the government rather than the defendant bore the burden of producing evidence on the issue.

Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999) : The Court vacated the denial of a motion to dismiss a securities class action, holding that documents publicly filed with the SEC could be judicially noticed and considered in deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

[6] Rule 201(g) -- Instructing Jury

United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995) : The Court affirmed an assault conviction, finding that the jury was properly instructed that a prison was within the territorial jurisdiction of the United States and that it was to decide whether the defendant committed an action at the prison. The Court concluded that "resolution of the jurisdictional issue in this case requires the determination of legislative facts, rather than 'adjudicative facts' within the meaning of *Rule 201(a)*, with the result that *Rule 201(g)* is inapplicable." It reasoned that legislative facts are "established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case." The location of the prison was a legislative fact because it "does not change from case to case but, instead, remains fixed."

United States v. Mentz, 840 F.2d 315 (6th Cir. 1988) : The Court reversed a conviction for bank robbery, finding that the Trial Judge invaded the province of the jury and violated the *Sixth Amendment* by instructing the jury that banks were insured by the Federal Deposit Insurance Corporation. One Judge would have found the erroneous instruction to have been harmless error. In *United States v. Jones*, n29 at the defendant's trial for illegally intercepting telephone conversations of his estranged wife, the government introduced evidence that he had tapped a telephone furnished by South Central Bell Telephone Company, but offered no evidence to show that the company was at the time a "person engaged as a common carrier in providing or operating ... facilities for the transmission of interstate or foreign communications." After the jury convicted on three of five counts, the District Judge granted the defendant's motion for a judgment of acquittal on the ground that the government failed to prove that the tapped conversation was a wire communication covered by the statute. The Court examined the legislative history of *Rule 201(g)* and concluded that it could not take judicial notice of the common carrier status of the telephone company involved in the case, because "[a]s enacted by Congress, *Rule 201(g)* plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed. This it could not do if this notice were taken for the first time after it had been discharged and the case was on appeal." To the extent that subdivision (f) authorizes judicial notice at the appellate level, that subdivision, said the Court, "must yield in the face of the express congressional intent manifested in 201(g) for criminal jury trials."

United States v. Chapel, 41 F.3d 1338 (9th Cir. 1994) : The Court affirmed an armed bank robbery conviction, finding that the Trial Judge properly took judicial notice of the federally insured status of a bank while leaving to the jury the final decision whether to accept as true what the Judge noticed.

United States v. Bliss, 642 F.2d 390 (10th Cir. 1981) : In affirming postverdict judgments of acquittal in a case charging falsification of bank records, the Court cited *United States v. Jones, supra* , and concluded that acquittal was proper because the government had offered no evidence that the bank was a member of the Federal Reserve System and had not requested that judicial notice be taken of the fact. In *United States v. Piggie*, n30 the Court found no error in taking judicial notice that Leavenworth Penitentiary is United States territory. Although the Trial Judge did not instruct in the language of subdivision (g), no request for any instruction was made, and there really was no dispute about the fact.

FOOTNOTES:

(n1)Footnote 1. *Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985) , rev'g 586 F. Supp. 1452 (E.D.N.Y. 1984) .*

(n2)Footnote 2. *Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976) .*

(n3)Footnote 3. *Lawrence v. Commodity Futures Trading Comm'n, 759 F.2d 767 (9th Cir. 1985) .*

(n4)Footnote 4. *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68 (3d Cir. 1983) .*

(n5)Footnote 5. *Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) .*

(n6)Footnote 6. *Mainline Inv. Corp. v. Gaines, 407 F. Supp. 423 (N.D. Tex. 1976) .*

(n7)Footnote 7. *Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) .*

(n8)Footnote 8. *Nationalist Movement v. City of Cumming, 913 F.2d 885 (11th Cir. 1990) , vacated & reh'g en banc granted, 921 F.2d 1125 (1990) , panel opinion reinstated, 934 F.2d 1482 (11th Cir. 1991) , aff'd, 505 U.S. 123 (1992) .*

(n9)Footnote 9. *United States v. Bourque, 541 F.2d 290 (1st Cir. 1976) .*

(n10)Footnote 10. *Newark Morning Ledger Co. v. United States, 416 F. Supp. 689 (D.N.J. 1975) , aff'd, 539 F.2d 929 (3d Cir. 1976) .*

(n11)Footnote 11. *United Klans of Am. v. McGovern, 453 F. Supp. 836 (N.D. Ala. 1978) , aff'd, 621 F.2d 152 (5th Cir. 1980) .*

(n12)Footnote 12. *Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 71 F.R.D. 623 (W.D. La. 1976) , remanded on other grounds, 571 F.2d 248 (5th Cir. 1978) .*

(n13)Footnote 13. *Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697 (W.D. La. 1976) .*

(n14)Footnote 14. *Deary v. Evans, 570 F. Supp. 189 (D.V.I. 1983) , aff'd in part, rev'd in part on other grounds, 746 F.2d 185 (3d Cir. 1984) .*

(n15)Footnote 15. *Otto v. Alper, 489 F. Supp. 953 (D. Del. 1980) .*

(n16)Footnote 16. *Smith v. Hustler, Inc., 514 F. Supp. 1265 (W.D. La. 1981) .*

(n17)Footnote 17. *United States v. Blunt, 558 F.2d 1245 (6th Cir. 1977) .*

(n18)Footnote 18. *Korematsu v. United States, 323 U.S. 214 (1944) .*

(n19)Footnote 19. *Nestle Co. v. Chester's Mkt., Inc., 571 F. Supp. 763 (D. Conn. 1983) , vacated on settlement, 609 F. Supp. 588 (D. Conn. 1985) .*

(n20)Footnote 20. *In re Missionary Baptist Found. of Am., Inc., 712 F.2d 206 (5th Cir. 1983)* .

(n21)Footnote 21. *MacMillan Bloedel Ltd. v. Flintkote Co., 760 F.2d 580 (5th Cir. 1985)* .

(n22)Footnote 22. *Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260 (5th Cir. 1978)* .

(n23)Footnote 23. *United States v. Wilson, 631 F.2d 118 (9th Cir. 1980)* .

(n24)Footnote 24. *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982)* .

(n25)Footnote 25. *Wiscope v. Commodity Futures Trading Comm'n, 604 F.2d 764 (2d Cir. 1979)* .

(n26)Footnote 26. *Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279 (9th Cir. 1986)* .

(n27)Footnote 27. *Haye v. United States, 461 F. Supp. 1168 (C.D. Cal. 1978)* .

(n28)Footnote 28. *In re Calder, 907 F.2d 953 (10th Cir. 1990)* .

(n29)Footnote 29. *United States v. Jones, 580 F.2d 219 (6th Cir. 1978)* .

(n30)Footnote 30. *United States v. Piggie, 622 F.2d 486 (10th Cir. 1980)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article II. Judicial Notice
CHAPTER 201 RULE 201

1-201 Federal Rules of Evidence Manual 201.04

201.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts. No rule deals with judicial notice of "legislative" facts. Judicial notice of matters of foreign law is treated in *Rule 44.1 of the Federal Rules of Civil Procedure* and *Rule 26.1 of the Federal Rules of Criminal Procedure*.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, *55 Harv. L. Rev. 364, 404*-07 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, *55 Colum. L. Rev. 945 (1955)*; Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

> My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are "clearly ... within the domain of the indisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.

A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82.

> An illustration is *Hawkins v. United States, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958)*, in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence -- Family Relations, *13 Minn. L. Rev. 675 (1929)*. If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?
>
> If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom "clearly" indisputable.

Davis, *supra*, at 83.

Professor Morgan gave the following description of the methodology of determining domestic law:

> In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present... . [T]he parties do no more than to assist; they control no part of the process.

Morgan, Judicial Notice, *57 Harv. L. Rev. 269, 270-*71 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See *Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934)*, where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of non-adjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

> In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.

Thayer, Preliminary Treatise on Evidence 279-80 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, *105 U. Pa. L. Rev. 139 (1956)*.

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People v. Strook, 347 Ill. 460, 179 N.E. 821 (1932)* , venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People v. Pride, 16 Ill. 2d 82, 156 N.E.2d 551 (1951)* . And in *Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965)* , the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that nonsuit was properly granted. *Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964)* . See also *Brown v. Hale, 263 N.C. 176, 139 S.E.2d 210 (1964)* ; *Clayton v. Rimmer, 262 N.C. 302, 136 S.E.2d 562 (1964)* . It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

> When a court or an agency finds facts concerning the immediate parties -- who did what, where, when, how, and with what motive or intent -- the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. ...
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.

2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

> The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id., 94* .

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, *id*. § 327, and other governmental facts, *id*. § 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. *California Evidence Code §§ 451*, *452*. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of "propositions of generalized knowledge" in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967)* ; *Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966)* ; *Sosna v. Celebrezze, 234 F. Supp. 289 (E.D. Pa. 1964)* ; *Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962)* .

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in *California Evidence Code §§ 451-453* and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all.

The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, *5 U.S.C. § 556(e)*. See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp. 1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; *California Evidence Code § 459*; Kansas Rules of Evidence § 60-412; New Jersey Evidence Rule 12; McCormick § 330 p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore § 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76-77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, *2 Stan. L. Rev. 664, 668 (1950)*; McNaughton, Judicial Notice -- Excerpts Relating to the Morgan-Wigmore Controversy, *14 Vand. L. Rev. 779 (1961)*; Morgan, Judicial Notice, *57 Harv. L. Rev. 269, 279 (1944)*; McCormick 710-11. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People v. Mayes, 113 Cal. 618, 45 P. 860 (1896)* ; *Ross v. United States, 374 F.2d 97 (8th Cir. 1967)* . Cf. *State v. Main, 94 R.I. 338, 180 A.2d 814 (1962)* ; *State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951)* . [This treatment was rejected by the Congress, which provided that notice is not conclusive in criminal cases. Ed.]

[2] Note on Judicial Notice of Law

By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. *Rule 44.1 of the Federal Rules of Civil Procedure*; *Rule 26.1 of the Federal Rules of Criminal Procedure*. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 272 (1999)

Judicial Notice -- Rule 201(g)

Federal Rule 201(g) determines the instructions that a court must give when a fact satisfies the standards for judicial notice proscribed in *Rule 201(b)*. (*Rule 201(b)* provides that a fact is subject to judicial notice when it is cannot be reasonably disputed, either because it is generally known within the jurisdiction or because its accuracy can be readily determined by reference to unimpeachable sources.) The Advisory Committee Note to *Rule 201(g)* states as follows:

> Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases.

In fact, however, the rule does distinguish between civil and criminal cases. The jury must accept a judicially noticed fact as conclusive; in criminal cases, the court must instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." Congress rejected the Advisory Committee proposal on the ground that a mandatory instruction was "contrary to the *Sixth Amendment* right to a jury trial."

[4] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

June 28, 1973

As proposed, Article II was restricted by subdivision (a) to "adjudicative" facts, as contrasted with "legislative" facts. The import of both terms was discussed in the Advisory Committee's note, but the Subcommittee nonetheless felt that the distinction was not clear and would breed litigation. The Subcommittee also felt that differing treatment for the two types of facts was unjustified. Accordingly, subdivision (a) was deleted.

As proposed, subdivision (g) would have precluded a judge from admitting evidence in disproof of facts of which judicial notice had been taken. Believing that judicial notice should be treated on the same basis as any other evidence which is admitted -- subject to refutation -- the Subcommittee deleted this subdivision.

October 10, 1973

Being of the view that a mandatory instruction to a jury in a criminal case to accept as established any fact judicially noticed was inappropriate because contrary to the spirit of the *Sixth Amendment* right to a jury trial, the Subcommittee adopted the 1969 Advisory Committee draft of subsection (g) allowing a mandatory instruction in civil actions and proceedings, but not in criminal cases. [The Reader will note that the June 28 change relating to section (a) was abandoned, and the change relating to section (g) was modified.]

[5] Report of the House Committee on the Judiciary

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the *Sixth Amendment* right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

[6] Citations to Hearings and Debates

Letter from Kenneth Culp Davis to Hon. William L. Hungate, August 7, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 312-17 (1973).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 55-56 (1974).

Testimony of Hon. Charles W. Joiner, June 4, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 35 (1974).

Testimony and Prepared Statement of Richard H. Keating, June 5, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 127, 133-37 (1974).

Letter from W. Vincent Rakestraw to Hon. James O. Eastland, June 14, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 121-23, 126 (1974).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article II. Judicial Notice
Supp. To CHAPTER 201 RULE 201

1-201 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 201, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE II. JUDICIAL NOTICE	**ARTICLE II. JUDICIAL NOTICE**
Rule 201. Judicial Notice of Adju-	**Rule 201. Judicial Notice of Adju-**

dic-at-ive Facts	dic-at-ive Facts		
(a)	**Scope of rule.** This rule governs only judicial notice of adjudicative facts.	(a)	**Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b)	**Kinds of facts.** A judicially noticed fact must be one not subject to reason-	(b)	**Kinds of Facts That May Be Judicially Noticed.** The court may

able dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose

judicially noticea fact that is not subject to reasonable dispute because it:

accuracy cannot reasonably be questioned.

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose

accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial no-

tice if a party requests it and the court is supplied with the necessary information.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the neces-

(d) Timing. The court may take judicial notice at any stage of the proceeding.

sary information.	
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the	**(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the cour

	matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.		t takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
(f)	**Time of taking notice.** Judicial notice may be taken at any stage of the	**(f)**	**Instructing the Jury.** In a civil case, the court must instruct the jury to ac-

proceeding. cept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

(g) Instructing jury. In a civil action or proceed

ing, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as con-

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Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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PART TWO: THE RULES THEMSELVES
Article II. Judicial Notice
Supp. To CHAPTER 201 RULE 201

1-201 Federal Rules of Evidence Manual Supp. to § 201.03

Supp. to § 201.03 Annotated Cases

[Go To Main]

[1] Rule 201(a) -- Scope of Rule [Go To Main]

[d] Rule 201(a) -- Notice of Law

United States v. Dedman, 527 F.3d 577 (6th Cir. 2008) : The defendant was convicted of conspiracy to defraud the government of military pension benefits by arranging a marriage between her adoptive father and her adoptive daughter. Affirming, the Court held it was error for the Judge to take "judicial notice" that the marriage was invalid under the applicable state law, since under modern practice the content of applicable law is to be determined by the court. Following the pattern jury instruction for judicial notice of adjudicative facts in criminal cases, the Judge had erroneously instructed the jury that it was not required to accept the marriage law as he stated it. Had the jury rejected the judicially-noticed statement of law, it should have acquitted, so the error was harmless.

[2] Rule 201(b) -- Kinds of Facts [Go To Main]

[b] Rule 201(b) -- Business Records

Am. Prairie Constr. Co. v. Hoich, 560 F.3d 780 (8th Cir. 2009) : In an action by the creditor of a Chapter 11 debtor against a company that sought to acquire the creditor's claims, an investor in the company, and the debtor for breach of a settlement agreed to in the bankruptcy proceeding, the Court held it was an abuse of discretion to take judicial notice of the corporate records of the defendant company and of a book written by the investor to find that the investor had given an accountant a proxy to act as his agent. The Court found that the documents did not permit a Judge to make such a finding, and it added that "[c]aution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation and hearsay rules."

[f] Rule 201(b) -- Economic Information

O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) : In the bench trial of an employee's action

against a former employer to recover consequential damages arising from a failure to reimburse relocation expenses, the Judge refused to award earnings lost on money withdrawn from the plaintiff's retirement fund, saying there was no evidence of the fund's results. Reversing, the Court held that judicial notice should have been taken of the actual earnings history on the defendant's website, after the plaintiff provided the complete address for the page to which the quarterly reports were linked.

[g] Rule 201(b) -- Facts About Litigants

Fagin v. Gilmartin, 432 F.3d 276 (3d Cir. 2005) : In a shareholders' derivative action, the defendants attached the report of an internal investigation to their motion to dismiss. The District Court denied the shareholders' cross-motion to convert the motion to dismiss into a motion for summary judgment and granted the defendants' motion, expressly stating that it had decided the motion without aid from outside materials. Reversing in part and remanding, because the Judge's opinion contained several items of information that appeared to have come only from the report, the Court noted that the Judge could not have taken judicial notice of that document unless the plaintiffs' claims were based on it, and here the plaintiffs did not even receive the report until after their complaint was filed.

[i] Rule 201(b) -- General Information

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc): Affirming partial summary judgment for an employer sued by a female bartender who was terminated for refusing to wear makeup, the Court refused "to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short."

[l.1] Rule 201(b) -- Internet Information

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007) : In a suit by a former employee and his new employer seeking a declaratory judgment that a non-compete covenant was invalid, the Trial Judge ruled that the covenant was invalid and dismissed most counterclaims of the former employer. The Court reversed and held that the Trial Judge should not have taken judicial notice of facts about the former employer's business based on information contained on its website. The Court reasoned that the information was not properly authenticated: "Anyone may purchase an internet address, and so, without proceeding to discovery or some other means of authentication, it is premature to assume that a webpage is owned by a company merely because its trade name appears in the uniform resource locator." It added that a company's website is a marketing tool that often "is full of imprecise puffery that no one should take at face value," so that "courts should be wary of finding judicially noticeable facts amongst all the fluff." Finally, the Court noted that, while judicial notice may be taken at any stage of a proceeding, "it should be done sparingly at the pleadings stage," and "[o]nly in the clearest of cases should a district court reach outside the pleadings for facts necessary to resolve a case at that point."

United States v. Husein, 478 F.3d 318 (6th Cir. 2007) : The defendant's sentencing memorandum indicated that he was the only family member with a valid driver's license. The Court declined to take judicial notice of the government's post-sentencing facts obtained from an online research site indicating that both the defendant's mother and sister had valid driver's licenses. The Court noted that "[t]he government in the present case ... has offered us nothing but a vague reference to 'westlaw.com,' " and "[a]lthough the relevant information might well be available in one of Westlaw's many online databases, that fact alone, without any guidance from the government as to *where* in Westlaw one might locate the information, hardly fulfills the mandate of Rule 201(d)."

O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) : In the bench trial of an employee's action against a former employer to recover consequential damages arising from a failure to reimburse relocation expenses, the Judge refused to award earnings lost on money withdrawn from the plaintiff's retirement fund, saying there was no evidence of the fund's results. Reversing, the Court held that judicial notice should have been taken of the actual earnings history on the defendant's website, after the plaintiff provided the complete address for the page to which the

quarterly reports were linked. The amount of earnings was not reasonably subject to dispute by the defendant, because the defendant had created the site and had not sought a hearing about its accuracy.

[n] Rule 201(b) -- Judicial Records and Proceedings

Prescott v. Higgins, 538 F.3d 32 (1st Cir. 2008) : Affirming summary judgment for the defendant in an employment discrimination case, the Court found no abuse of discretion in the Judge's refusal to take judicial notice of evidence in another case purporting to show disparate impact. The validity of the statistics and whether they showed disparate impact was at issue in that case, so the proof offered was not a "matter beyond reasonable controversy."

Mangiafico v. Blumenthal, 471 F.3d 391 (2d Cir. 2006) : Affirming dismissal of the complaint in a § 1983 action by a corrections officer who was not provided a defense by the state in a suit for using excessive force, the Court held that the Judge properly took judicial notice of the docket sheet in the excessive-force suit when ruling on the motion to dismiss.

Buck v. Thomas M. Cooley Law School, 597 F.3d 812 (6th Cir. 2010) : The Court affirmed a judgment that a former student's action alleging that her dismissal from a school violated federal and state law was barred by res judicata. It observed that "[a]lthough typically courts are limited to the pleadings when faced with a motion under Rule 12(b)(6), a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment."

United States v. Guerrero-Velasquez, 434 F.3d 1193 (9th Cir. 2006) : Vacating a sentence upon the government's appeal, the Court held that judicial notice should have been taken of the defendant's guilty plea in a state prosecution for burglary, to establish that he had been convicted of unlawfully entering a residence.

[q] Rule 201(b) -- Official Records and Public Reports

Global Network Communs., Inc. v. City of New York, 458 F.3d 150 (2d Cir. 2006) : In an action by a public pay phone supplier challenging City regulations, the Court vacated dismissal of the complaint because the Judge had considered material outside the pleadings and had not treated the proceeding as a motion for summary judgment. The Court noted that judicial notice could not properly be given to a City administrative determination, as the determination was offered not simply to establish its existence but for its truth, to provide a basis for the Judge's conclusion.

Doss v. Clearwater Title Co., 551 F.3d 634 (7th Cir. 2008) : A mortgagor's action against the mortgagee, title company, and others for Truth in Lending Act violations was dismissed on the ground that the plaintiff had sold the property. The Judge relied on a deed of sale attached to the motion to dismiss, explaining that the deed was a public record of which judicial notice could be taken, even though the plaintiff claimed that the recorded deed was a forgery. Reversing, the Court noted that if the Judge were going to consider a matter outside the pleadings, the motion must be treated as one for summary judgment and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. The Court added that taking judicial notice was inappropriate, given that the plaintiff's claim of forgery made the deed "subject to reasonable dispute," and the fact that recorded deeds come within the hearsay exception of Rule 803(15) was insufficient to justify judicial notice.

Noble Sys. Corp. v. Alorica Cent., LLC, 543 F.3d 978 (8th Cir. 2008) : The Court affirmed summary judgment and judgment on the pleadings for a senior creditor in an action by a junior creditor for tortious interference and misrepresentation. It found no error when the Judge granted a motion to take judicial notice of a financing statement filed with the Minnesota Secretary of State. The financing statement was a public record and could be considered in ruling on a motion to dismiss even though it was not mentioned expressly in the pleadings.

United States v. 14.02 Acres of Land More or Less, 547 F.3d 943 (9th Cir. 2008) : The Court affirmed a summary

judgment for the United States in an eminent domain case. It held that a Trial Judge may take judicial notice of records and reports of administrative bodies and it found no abuse of discretion here when judicial notice was taken of a Department of Energy study.

[r] Rule 201(b) -- Performance of Equipment

United States v. Munoz-Tello, 531 F.3d 1174 (10th Cir. 2008) : The defendant had been driving an overcrowded van full of illegal aliens when it overturned, killing four. The Court affirmed upward adjustments in the sentence because of reckless conduct, but held it was plain error for the Judge to have found that the overloading of the van likely adversely affected its handling or maneuverability. There was no evidence in the record supporting the assumption, nor are the rollover propensities of vehicles matters of common knowledge or the kind of readily ascertainable facts satisfying Rule 201(b).

[s] Rule 201(b) -- Personal Knowledge of Court

United States v. Berber-Tinoco, 510 F.3d 1083 (9th Cir. 2007) : Although it affirmed a conviction for unlawful re-entry after deportation, the Court held that the Trial Judge violated Rule 605 when, in a suppression hearing, he interjected his own observations regarding the location of stop signs along a certain road near the border and the narrowness of the road, as well as when he relied on his personal knowledge that no speed limit was posted on a certain road near the border and that the speed limit was therefore 55 miles per hour. It emphasized that a Trial Judge may not take judicial notice relying on personal experience.

[w] Rule 201(b) -- Statutes and Regulations

United States v. Williams, 442 F.3d 1259 (10th Cir. 2006) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when the Trial Judge took judicial notice that a violation of the state statute under which the defendant had previously been convicted was a crime punishable by more than one year of imprisonment.

[3] Rule 201(d) -- When Mandatory [Go To Main]

Cravens v. Smith, 610 F.3d 1019 (8th Cir. 2010) : A medical clinic sought indemnification from a radiologist and the agency that placed him for a malpractice judgment against it entered after it conceded liability and agreed to seek indemnification. The Judge ruled before trial in the indemnification action that the judgment was not preclusive against the defendants. The first issue tried was whether the plaintiff's settlement had increased the risks to the defendants or prejudiced their rights, and the plaintiff requested that judicial notice be taken of the preclusion ruling and that it be permitted to argue the fact to the jury. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in refusing judicial notice. Even though it is proper to take judicial notice of prior orders in a case, here introduction of the ruling would likely have confused the jury.

O'Toole v. Northrop Grumman Corp., 499 F.3d 1218 (10th Cir. 2007) : In the bench trial of an employee's action against a former employer to recover consequential damages arising from a failure to reimburse relocation expenses, the Judge refused to award earnings lost on funds withdrawn from the plaintiff's retirement fund, saying there was no evidence of the fund's results. Reversing, the Court held that judicial notice should have been taken of the actual earnings history on the defendant's website, after the plaintiff provided the complete address for the page to which the quarterly reports were linked.

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
CHAPTER 301 RULE 301

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§ 301.syn Synopsis to Chapter 301: RULE 301

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301.02 Editorial Explanatory Comment

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[2] How the Rule Works

[3] Dispute as to Facts Underlying the Presumption

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[5] Peremptory Instructions

[6] Conflicting Presumptions

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[7] Electronic Communications and Receipt

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[a] Inadequate Foundation for Presumption

[b] Mailing and Receipt -- Presumption Applied

[c] Mailing and Receipt -- Sufficiency of Rebuttal

[d] Mailing and Receipt -- Tax Cases

[13] Miscellaneous Cases

[14] Social Security Cases

[15] Summary Judgment

301.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 273 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the Senate Committee on the Judiciary

[6] Report of the House and Senate Conferees

[7] Citations to Hearing and Debates

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
CHAPTER 301 RULE 301

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301.01 Official Text

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
CHAPTER 301 RULE 301

1-301 Federal Rules of Evidence Manual 301.02

301.02 Editorial Explanatory Comment

[1] Effect of a Presumption

There has been substantial disagreement among common law Courts regarding the proper weight to be given a presumption. In some Courts, a presumption would place the burden of persuasion on the party opposing the fact presumed to establish its nonexistence, once the party invoking the presumption establishes the basic fact giving rise to it. Thus a presumption under this view operates as a burden-shifting device. In other Courts, the presumption vanishes upon the introduction of enough evidence to support a finding of the nonexistence of the presumed fact. The practical difference between these views -- known respectively as the Morgan and Thayer views n1-- is in the quantity and quality of evidence required to overcome the presumption. Under the Morgan view, the opponent of the presumption must establish, by a preponderance of the evidence in a civil case, the nonexistence of the presumed fact. Under the Thayer view, the opponent must merely offer credible evidence sufficient to support a finding contrary to the presumed fact in order to "burst" the presumption and take it out of the case. n2

The Federal Rule provides that a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut the presumption. But the burden of persuasion remains with the party on whom it was originally cast, despite an Advisory Committee preference for shifting the burden. The Advisory Committee was of the view that a presumption would have too slight an effect if it merely served to shift the burden of going forward; the Advisory Committee's proposed Rule 301 thus provided for burden-shifting. n3 But Congress rejected this position. As adopted, *Rule 301* operates merely as a procedural device to shift the burden of producing evidence, exposing the opponent of the presumption to the risk of an adverse result on a directed verdict if he fails to present enough evidence to support a finding of the nonexistence of the presumed fact. n4

Because Congress rejected the Advisory Committee's proposal, the Advisory Committee Note to Rule 301 -- unlike the Notes to most of the other Rules -- is not to be relied upon in construing the Rule. Indeed, the Note operates as a critique of the Rule Congress ultimately adopted.

Rule 301 does not itself determine whether a particular presumption applies; that is left to substantive law. n5 In some cases the substantive law creating the presumption might also specify the effect that the presumption is to have, for example, that it shifts the burden of proof and not merely the burden of production. Where substantive law governs not

only the existence but also the *effect* of the presumption, *Rule 301* is by its terms inapplicable. n6

Generally speaking, presumptions under the substantive law are based on one or more of the following rationales: (1) one party has superior access to proof; (2) social or economic policies warrant a presumption; (3) experience indicates the high probability of a given conclusion from a given set of facts; (4) a presumption will promote efficiency and convenience. The annotated cases under this Rule contain many examples of substantive law presumptions.

The Rule does not say anything about the original placement of the burden of proof, the degree of proof required to meet that burden, n7 or the burden of production. Again, these questions are governed by substantive law. n8

The legislative history is rather clear that the Congress intended the words "civil actions and proceedings" to cover all civil proceedings that are reached by the Federal Rules of Evidence under *Rule 1101*. The Rule does not cover criminal cases. The Advisory Committee proposed a Rule 303 to govern presumptions in criminal cases, but this proposal was rejected by Congress. In criminal cases, the use of presumptions presents a sensitive constitutional inquiry, because of the constitutional right to a jury trial and the due process requirement that the government prove every element of the crime beyond a reasonable doubt. n9

[2] How the Rule Works

An example may help to illustrate how the Rule works in practice. If there is a presumption that a letter once mailed is received, and one party to litigation introduces evidence of mailing, an opposing party must produce evidence of nonreceipt to rebut the presumption or the Judge will find that receipt is established on the basis of the evidence of mailing together with the presumption; if there is no rebuttal evidence, the jury in a civil case should be instructed that it *must* find the presumed fact. n10 If evidence sufficient to support a finding of nonreceipt is offered, the presumption disappears. This is true regardless of the strength of the evidence on mailing, and regardless of whether the Judge actually believes the evidence of nonreceipt. If the presumption disappears, the party who mailed the letter must then offer affirmative evidence of receipt in order to prevail. n11

In instructing the jury, the Court should avoid using the word "presumption." The term is a slippery one, and lay jurors may well misinterpret the import of the evidence when it is labeled as a "presumption" in a jury instruction. While the Senate Report and the Conferees' Report do not explicitly state that the word "presumption" shall not be used before the jury, this certainly seems to be the intent in view of the comments that a presumption is not evidence. n12

[3] Dispute as to Facts Underlying the Presumption

A presumption is established by proof of certain underlying facts. For example, the presumption that a letter once mailed is received comes into play only after proof that the letter was mailed. But what happens if the underlying facts are themselves in dispute? What if the plaintiff testifies that he mailed a letter, but the defendant calls a witness who testifies that he saw the plaintiff throw the letter in the trash? If jurors could decide either way as to the underlying facts, then they must be allowed to do so. It would be proper to instruct on the presumption, assuming no contrary evidence is presented as to the presumed fact -- e.g., no evidence of nonreceipt. But the instruction must be conditional; it must emphasize that the presumption comes into play only if the jury is satisfied that the underlying fact has been proven.

It may also be appropriate in some cases to instruct the jury that if the underlying fact is not found, then the presumed fact *cannot* be found. This will occur where the presumed fact cannot exist without the basic underlying fact, or where there is no other evidence that supports the existence of the presumed fact. Thus, if the jury does not find that a letter was mailed, and there is no other evidence that the letter was delivered by other means, then it cannot find that the letter was received.

[4] Rebuttal Evidence

The Rule does not explicitly state how much opposing evidence is needed to take a presumption out of a case. However, the only logical conclusion is that the opponent must produce the same amount of evidence necessary to avoid a directed verdict or peremptory instruction in the usual context of a civil case. Given the language of the Rule -- requiring as it does that a party opposing a presumption come forward with evidence to rebut it, but not necessarily with sufficient evidence to carry a burden of persuasion -- and given that Congress was trying to give some weight to presumptions but not too much weight -- the requirement of enough evidence for a reasonable person to find the fact is all that is intended. n13 If less proof were satisfactory, the presumption would be worth little because it would be almost automatically rebuttable; and one of the purposes of the Rule as drafted is to give the presumption significant, but not overwhelming, weight.

[5] Peremptory Instructions

Neither the Rule itself nor its legislative history clearly indicates whether a party favored by a presumption is entitled to a peremptory instruction or a partial directed verdict if the party against whom the presumption operates fails to offer any rebuttal evidence. Under the Thayer view of presumptions, where there is no rebuttal evidence the instruction to the jury would be a binding instruction. But the Conferees' Report contains a sentence that states that "the court will instruct the jury that if it finds the basic facts, it *may* presume the existence of the presumed fact" (emphasis added) when "the adverse party offers no evidence contradicting the presumed fact." Despite the language of the Conferees' Report, we believe that the best reading of *Rule 301* is that a peremptory instruction is mandated upon request when the party against whom a presumption operates offers no proof to rebut the presumption. n14 It appears that the Conferees confused a presumption with a permissible inference; but that should have no bearing on how the Rule is applied.

Our reasoning is as follows: The Advisory Committee believed that the choice was between the Thayer approach and the Morgan approach. It spoke of no middle ground. When the Subcommittee on Criminal Justice received the Rule from the Supreme Court, it refused to go along with the Morgan approach of shifting the ultimate burden of persuasion. But it said that it thought that the "bursting bubble" or Thayer approach to presumptions gave presumptions too slight an effect. It made clear its intent to opt for a provision that gave presumptions more force than they would have under the Thayer view. This was the approach taken by the House Judiciary Committee. n15

The Senate Judiciary Committee wisely rejected the confusing language chosen by the House. But the Senate Judiciary Committee was so concerned with demonstrating that a treatment of presumptions as evidence was improper that it failed to explain whether it really meant to say that the traditional Thayer approach was not to be followed. The confusion engendered by the Senate Judiciary Committee Report continued in the Conferees' Report. The only change that the Senate Committee stated that it wanted to make was deletion of the provision in the House draft that would have treated presumptions as evidence. The Senate Committee did not indicate that it wanted to weaken the traditional force of presumptions. Certainly, it is doubtful that the House would have joined in the adoption of an approach to presumptions that gives them less force than the Thayer approach did.

Thus, we conclude that the Senate Committee, and ultimately the Conferees, were confused as to the traditional Thayer approach to presumptions and that there is no demonstrable intention on the part of the Congress to depart from the traditional "bursting bubble" approach. We recognize that the language of both the Senate Committee Report and the Conferees' Report can be read otherwise, but we do not believe that the cryptic wording concerning a permissive instruction to be given a jury represents the view of the House Committee, which wanted to strengthen the force of presumptions, or the Senate Committee, which only wanted to assure that presumptions were not treated as evidence. We believe that both Houses of Congress thought they were adopting the Thayer approach and that the Rule should be read as if they did. n16

[6] Conflicting Presumptions

In some cases, conflicting presumptions may arise. This is not a problem if rebuttal evidence is offered as to both presumptions, since both presumptions then drop out of the case. When no rebuttal evidence is offered as to either presumption, the stronger presumption should predominate. The Court must determine which is the stronger presumption based on policy and probability. n17 In the unlikely situation that the presumptions are in equipoise in terms of social policy and probability, they should both be discarded.

[7] Judicially-created Presumptions

No mention is made in the Rule of judicial power to create presumptions. But the Courts can and have created and applied presumptions as a matter of federal common law. n18 In admiralty cases, where Federal Courts exercise common-law power, judicially created presumptions have been found to be outside the scope of *Rule 301*. n19 Another example of a judicially-created presumption that overrides *Rule 301* is the presumption employed in tax cases that a deficiency determination is entitled to a presumption of correctness, which shifts the burden of proof to the taxpayer. n20

[8] Burdens of Proof Under Statutes

Quite surprisingly, some commentators appear to assume that *Rule 301* requires the plaintiff to bear the burden of proof in civil cases on all issues unless Congress explicitly requires otherwise. n21

We believe that *Rule 301* need not stand in the way of judicial interpretation of legislation so that it places the burden of proof on civil defendants on certain issues; as stated previously, *Rule 301* is simply a procedural device that does not allocate the burden of proof. While the line separating presumptions that shift burdens of persuasion from rulings placing burdens of persuasion in the first instance is not clear, we believe that a judicial decision that requires a civil defendant to bear the burden of proving issue *D* after plaintiff proves issues *A*, *B*, and *C* is generally not a decision about presumptions within the meaning of *Rule 301*. In such a case all four issues are material to the outcome. *Rule 301* will usually apply when one fact is used as a bridge to another, and only by traveling the bridge is a material issue reached. For example, under a statute like *42 U.S.C. § 1982*, plaintiffs might have the burden of proving that (1) African-Americans were treated more poorly than whites under similar circumstances, and (2) that defendants knew or had reason to know of the disparity; and defendants might have the burden of showing a nonracial reason for any disparity in the particular case. One could employ presumptions, but one need not. n22

[9] Conclusive Presumptions

Ordinarily, a "conclusive" presumption is essentially a rule of law, rather than a presumption as that term is used in *Rule 301*. Thus, a conclusive presumption that a child under the age of seven is incapable of forming a criminal intent is really a legal rule that children under seven are not criminally responsible.

FOOTNOTES:

(n1)Footnote 1. The Thayer view, which is the view adopted in *Rule 301*, has also been described as the "bursting bubble" theory. The theory is that the presumption ceases to exist when contrary evidence as to the presumed fact is introduced.

(n2)Footnote 2. For general discussions of presumptions, see Basic Problems Of Evidence, ch. 3 (M. Martin 6th ed. 1988); Ladd, *Presumptions in Civil Actions*, *1977 Ariz. St. L.J. 275*.

(n3)Footnote 3. The Advisory Committee was persuaded by Morgan's critique of the Thayer view on presumptions. Morgan's critique is well stated in the following passage:

> If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing.

> And if the judicial desire for the result expressed in a presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect.

Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 82 (1933).

(n4)Footnote 4. See, e.g., *Valance v. Wisel, 110 F.3d 1269 (7th Cir. 1997)* (warrantless searches are presumptively unreasonable; but it was error in this civil rights action to hold that the defendant police officer had the burden of proving that the challenged warrantless search was reasonable; *Rule 301* shifts the burden of production, not the burden of persuasion, which remained in this case on the plaintiff); *Presbyterian/St. Luke's Med. Center v. NLRB, 653 F.2d 450 (10th Cir. 1981)* (presumption that a single bargaining unit was justified; error to hold that this presumption shifted the burden to the employer to prove that a single unit was unjustified).

(n5)Footnote 5. See, e.g., *Clay v. Traders Bank of Kansas City, 708 F.2d 1347 (8th Cir. 1983)* (applying presumption in *28 U.S.C. § 547(f)*, that an entity is insolvent for the ninety-day period preceding the filing of a bankruptcy petition; Court notes that *Rule 301* controls the effect of this presumption, and therefore the burden of persuasion "remains on the party in favor of whom the presumption applies"). See also *28 U.S.C. § 2254(d)* (habeas corpus actions; presumption of correctness of state Court findings).

(n6)Footnote 6. See, e.g., *Hood v. Knappton Corp., Inc., 986 F.2d 329 (9th Cir. 1993)* (presumption established by admiralty law shifts the burden of both production and persuasion, therefore *Rule 301* is inapplicable); *Alabama By-Products v. Killingsworth, 733 F.2d 1511 (11th Cir. 1984)* (*Rule 301* does not apply to the presumption that a coal miner, employed for ten years and suffering from pneumoconiosis, is totally disabled; under the plain terms of the statute and regulation at issue, "the burden of persuasion or proof shifts to the operator on rebuttal"); *Tenneco Chems., Inc., v. William T. Burnett & Co., 691 F.2d 658 (4th Cir. 1982)* (construing *35 U.S.C. § 282*, the Court concludes that the statutory presumption of patent validity "does not merely shift the burden of coming forward with evidence of invalidity to the party contesting the patent but shifts the ultimate burden of establishing invalidity by clear and convincing evidence"). See also *Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468 (6th Cir. 1980)* :

> It is immediately apparent that *Rule 301* does not affect the burden of proof in Carmack Amendment cases. For well articulated reasons Congress chose to place the burden of proof on a carrier in whose hands goods are damaged rather than on the shipper. This is more than a burden of going forward with the evidence. It is a true burden of proof in the sense of the risk of nonpersuasion and it remains on the carrier once the prima facie showing has been made.

(n7)Footnote 7. See *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)* (noting that the usual burden to prove a presumed fact in a civil case is by a preponderance of the evidence).

(n8)Footnote 8. See, e.g., *Santosky v. Kramer, 455 U.S. 745 (1982)* (Due Process Clause requires that before a state may terminate parental rights of a natural parent, it must establish cause by a standard of clear and convincing evidence).

(n9)Footnote 9. *In re Winship, 397 U.S. 358 (1970)* .For a further discussion of presumptions and burden-shifting in criminal cases, see S. Saltzburg & D. Capra, American Criminal Procedure 1127-71 (West 7th ed. 2004).

(n10)Footnote 10. See the discussion in § 301.02[5] as to the mandatory nature of an unrebutted presumption.

(n11)Footnote 11. See *Witt v. Roadway Express, 136 F.3d 1424 (10th Cir. 1998)* (presumption that the defendant received a right-to-sue letter was rebutted by prima facie evidence of nonreceipt; the defendant therefore needed to

provide affirmative evidence of receipt by the plaintiff in order to prevail on the question of notice); *Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)* (after employer offered proof of legitimate reasons for firing the plaintiff, the presumption of sex discrimination fell away and the plaintiff could not prevail without offering affirmative evidence of discrimination).

(n12)Footnote 12. See *Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984)* (a presumption "does not enjoy the status of evidence"; therefore if the presumed fact has been rebutted, the presumption "does not linger to be weighed against the evidence").

(n13)Footnote 13. See, e.g., *Sinatra v. Heckler, 566 F. Supp. 1354 (E.D.N.Y. 1983)* ("In order to rebut the presumption that a notice of reconsideration is received five days after it is dated, the claimant must adduce evidence that would be sufficient to overcome a directed verdict."); *In re Dodd, 82 B.R. 924 (Bankr. N.D. Ill. 1987)* (under *Rule 301*, "a party may rebut a presumption by introducing evidence which would support a finding of the non-existence of the presumed fact").

(n14)Footnote 14. See *A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992)* (where presumption applies, the presumed fact "*must* be inferred, absent rebuttal evidence").

(n15)Footnote 15. The House Rule provided that in civil cases, a presumption imposed on the party against whom it was directed the burden of going forward with the evidence. Moreover, even if the party produced evidence, a presumption was sufficient evidence of the fact presumed to be considered by the trier of fact. One confusing thing about the House Rule was that it did not indicate whether the Judge was supposed to tell the jury that there was such a thing as a presumption operating in the case. And, if the jury was to be told of the presumption, deciding what it should be told would not have been easy.

(n16)Footnote 16. *Nunley v. City of Los Angeles, 52 F.3d 792 (9th Cir. 1995)* (noting that *Rule 301* "as enacted embodies the Thayer or 'bursting bubble' approach").

(n17)Footnote 17. But see *Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976)* (where two presumptions conflict, the dispute should go to trial and there is no reason to prefer one over the other unless one has a particularly firm grounding in social policy).

(n18)Footnote 18. See, e.g., *A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992)* (presumption of laches upon proof that six years elapsed between infringement and patentee's knowledge); *Neal v. Secretary of Navy, 639 F.2d 1029 (3d Cir. 1981)* (applying presumption that personnel involved in official decisionmaking will faithfully discharge their duties).

(n19)Footnote 19. See, e.g., *James v. River Parishes Co., 686 F.2d 1129 (5th Cir. 1982)* (in an admiralty case, the Court employs the presumption that when a drifting vessel causes damage, the vessel was adrift through negligence).

(n20)Footnote 20. See, e.g., *Anastasato v. Commissioner, 794 F.2d 884 (3d Cir. 1986)* ("the Commissioner's deficiency determination is entitled to a presumption of correctness" that shifts the burden of production as well as the burden of persuasion to the taxpayer).

(n21)Footnote 21. See, e.g., Brown, Giveller, & Lubin, *Treating Blacks As If They Were White: Problems of Definition and Proof in Section 1982 Cases*, U. Pa. L. Rev. 1, 35-42 (1975).

(n22)Footnote 22. For an example of how important it is for the Courts to ascertain the intent of Congress and to allocate burdens of production and persuasion in accordance with congressional intent, see *Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)* . See also *Ansel v. Weinberger, 529 F.2d 304 (6th Cir. 1976)* ; Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan. L. Rev. 1129 (1980).

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PART TWO: THE RULES THEMSELVES
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301.03 Annotated Cases

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[1] Admiralty Cases

City of Boston v. S.S. Texaco Texas, 773 F.2d 1396 (1st Cir. 1985) : The Court held that *Rule 301* does not disturb the well-settled rule that "when a vessel under its own power collides with an anchored vessel or a navigational structure, the burden of proving absence of fault or *vis major* rests on the pilot vessel."

Brunet v. United Gas Pipeline Co., 15 F.3d 500 (5th Cir. 1994) : In an admiralty limitation action brought by owners of a pushboat that came into contact with a gas pipeline, the Court held that a moving vessel colliding with a stationary object, including an obstruction to navigation known to the mariner, is presumed to be at fault and the presumption shifts the burdens of producing evidence and of persuasion onto the moving vessel. In an action by a deckhand on a moored vessel who was injured when it was struck by a drifting barge, *James v. River Parishes Co.*, n1 the plaintiff offered no proof of negligence and instead relied on a presumption of negligence. A majority of the Court held that the law imposed the burden of persuasion on the negligence question on the party whose vessel was adrift. One dissenter argued that *Rule 301* was applicable and that the plaintiff should have borne the burden of persuasion. In our view the majority was correct. Although Congress' decisions concerning burdens of persuasion would provide exceptions to *Rule 301* in other areas, judicial rulings in admiralty cases make up the bulk of admiralty law, and longstanding precedents should not be disturbed absent some indication that in drafting *Rule 301* Congress intended to change prior holdings.

City of Chicago v. M/V Morgan, 375 F.3d 563 (7th Cir. 2004) : The Court affirmed a decision finding the parties equally liable for an accident in which a tugboat pushing four barges struck a city-owned bridge. The defendants complained about the application of the presumption, recognized by *The Oregon, 158 U.S. 186 (1895)* , that a moving vessel, which under its own power collides with a stationary object, is at fault. The Court reasoned that application of the presumption did not relieve the City of the burden of proving negligence; the presumption "merely satisfies the plaintiff's *prima facie* case." The Court stated that "[o]nce fault is presumed the defendant may come forward with

evidence to rebut the presumption," and added that "[r]ebutting the presumption does not necessarily exonerate the vessel from all liability."

Hood v. Knappton Corp., 986 F.2d 329 (9th Cir. 1993) : In a negligence action by boaters against the owner of a log raft that had drifted into collision with their boats, the Court held that the rule in *The Louisiana, 70 U.S. (3 Wall.) 164 (1866)* , that the owner of a drifting vessel bears the burden of persuasion on the fault issue, remains the law of the Circuit, notwithstanding *Rule 301*.

[2] Attorney Disqualification

Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984) : In a patent infringement suit, the Court reversed an order that had disqualified a law firm because one of its attorneys had previously worked on related matters for another firm that had represented an opposing party. The Trial Judge had relied upon the presumptions that a party who performed legal services for a client received confidential information and that attorneys within a firm share each other's confidential information, but the Court found that the presumptions had been rebutted and that under *Rule 301* the burden remained on the party seeking disqualification to demonstrate that it was necessary.

[3] Bankruptcy Cases

In re Yoder Co., 758 F.2d 1114 (6th Cir. 1985) : The Court reversed a judgment that a product liability claim was barred for failure to file a timely proof of claim. The Bankruptcy Court had relied mainly on a presumption of receipt arising from evidence that notice of the "bar date" was sent to the claimant, but the Court of Appeals held that "a presumption has no probative effect once rebutted." There was no evidence that the claimant had received notice, and the only alleged mailing had been to his lawyer, who testified that he received no mailing. Because there was no evidence of notice, the Court concluded that the proof of claim should have been filed.

Clay v. Traders Bank, 708 F.2d 1347 (8th Cir. 1983) : In a bankruptcy appeal, the Court interpreted *11 U.S.C. § 547(f)*, which creates a presumption that a debtor was insolvent ninety days before filing a petition, as imposing a burden on a party claiming that the debtor was solvent during the ninety-day period to offer evidence rebutting the presumption. The burden of persuasion did not shift as a result of the presumption.

In re Carter, 182 F.3d 1027 (9th Cir. 1999) : In ruling that certain earnings of an entertainer should have been found exempt from her estate, the Court set forth the governing presumptions principles:

> A claimed exemption is "presumptively valid." ... Once an exemption has been claimed, it is the objecting party's burden (the trustee in this case) to prove that the exemption is not properly claimed. Initially, this means that the objecting party has the burden of production and the burden of persuasion. The objecting party must provide evidence to rebut the presumptively valid exemption. If the objecting party can produce evidence to rebut the exemption, the burden of production then shifts to the debtor to come forward with unequivocal evidence to demonstrate that the exemption is proper. *Fed.R.Evid. 301*. The burden of persuasion, however, always remains with the objecting party.

In re East Coast Brokers & Packers, Inc., 961 F.2d 1543 (11th Cir. 1992) : The Court reversed an order denying relief from the automatic stay and turnover of property in a bankruptcy proceeding, holding that the evidence presented

was sufficient to raise the presumption of mailing to establish receipt by the debtor of notices of intent to preserve trust benefits under the Perishable Agricultural Commodities Act.

[4] Burden of Proof Distinguished

In re G-I Holdings, Inc., 385 F.3d 313 (3d Cir. 2004) : In reviewing a motion for appointment of a Chapter 11 trustee in a bankruptcy proceeding, the Court noted that its previous reference to "the strong presumption against appointment of an outside trustee" used the term "presumption" not in the technical evidentiary sense expressed in *Rule 301*, of using basic facts to prove presumed facts, but simply as another way of referring to the heavy burden of persuasion (i.e., clear and convincing evidence) faced by a party seeking appointment of an outside trustee.

[5] Civil Rights Cases

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) : In this racial harassment and promotion-discrimination case brought under *42 U.S.C. § 1981*, the Supreme Court held that on the promotion claim the plaintiff had an initial burden of proving, by a preponderance of the evidence, a *prima facie* case of discrimination; that when she did so, by showing she was qualified but defendant filled the position with a white person after rejecting her, an inference of discrimination arose, which imposed a burden on the defendant to present evidence of a legitimate nondiscriminatory reason for the action; and that when the defendant presented evidence the white applicant was better qualified, the presumption of discrimination was rebutted and the plaintiff retained the final burden of persuading the jury of intentional discrimination. The District Court had erred by instructing the jury that the plaintiff was required to show she was better qualified than the person chosen in order to show the defendant's stated reasons were pretextual and satisfy her burden of proof; the Supreme Court held that showing she was better qualified was only one of the ways the plaintiff might prove intentional discrimination.

Jund v. Town of Hempstead, 941 F.2d 1271 (2d Cir. 1991) : In a RICO and civil rights action arising out of a coercive political contributions scheme, the Trial Judge instructed the jurors that they could infer, because there was a coercive policy in 1973-76, that there was such a policy in 1978. Reinstating a verdict for the plaintiff, the Court held that it would have been proper to instruct the jury on the general presumption of the continuance of a status or condition once proved to exist, so it was not improper to shift the burden to the defendants to prove that the coercive practice did not continue in 1978.

Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) : In a civil rights suit alleging false arrest by police officers, the Court held that there is a presumption that a district attorney files complaints on the basis of an independent judgment and, unless rebutted, that presumption immunizes officers from liability for any time period after the complaint is filed. The Court added: "Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an independent intervening cause cuts off his tort liability. *Rule 301*. If for reasons of privilege or otherwise the relevant evidence is not available, no presumption will arise."

[6] Conflicting Presumptions

Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976) : In this patent case the applicant relied on the presumption of regularity of the mails and the Commissioner of Patents relied upon a presumption of regularity in its office. The Trial Judge granted summary judgment on the basis of the first presumption, but a divided Court of Appeals reversed. The majority said that "we perceive no legal or practical justification for preferring either of the two involved presumptions over the other." The Court seemed to recognize that a presumption might survive a battle of presumptions if its

grounding in policy were firm enough, but held that when two presumptions were based on probabilities, proof of the basic facts as to both resulted in their disappearance, leaving only any inferences from the evidence of the basic facts that the trier might wish to draw.

[7] Electronic Communications and Receipt

Kennell v. Gates, 215 F.3d 825 (8th Cir. 2000) : The plaintiff sued a police officer who kept the plaintiff in custody on an arrest warrant for a period of eight days after it was learned that the warrant was for a different person. At the beginning of the eight-day period, an in-house computer message was sent to the police officer notifying her that the wrong person was in custody. The defendant testified that she never received the message and that there must have been some computer glitch. Affirming a judgment for the plaintiff, the Court stated that a jury is permitted to presume that information "sent via a reliable means -- such as the postal service or a telegram -- was received." It saw "no principled reason why a jury would not be able to make the same inference regarding other forms of communication -- such as facsimiles, electronic mail, and in-house computer message systems -- provided they are accepted as generally reliable and that the particular message is properly dispatched." The Court found a sufficient foundation for such a presumption in this case.

[8] Employment Discrimination Cases

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) : The Supreme Court noted that the *McDonnell Douglas* presumption in employment discrimination cases operates like all presumptions under the Rule in that it imposes a burden on the defendant to produce admissible evidence to rebut the *prima facie* case, but it does not shift the plaintiff's ultimate burden of proving that the defendant intentionally discriminated. In *Price Waterhouse v. Hopkins*, n2 the Court held that once a plaintiff in a mixed-motive, disparate-treatment Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not allowed gender to play such a role. See also *Patterson v. McLean Credit Union*, discussed in § 301.03[4]. In *Texas Dep't of Community Affairs v. Burdine*, n3 the Court held that once the plaintiff in a Title VII case makes a showing that she applied for an available position for which she was qualified but was rejected under circumstances that give rise to an inference of unlawful discrimination, there is a presumption of discrimination that imposes upon a defendant the burden of producing evidence that the employment decision was made for a legitimate, nondiscriminatory reason. "It is sufficient if the defendant's evidence raises a genuine issue of fact ... ." The plaintiff retains the burden of persuasion *if* the presumption is rebutted.

Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982) : In an age discrimination suit, the Court affirmed a judgment for the plaintiff. The Court reasoned that although a plaintiff's proof that established a *prima facie* case of discrimination might not be sufficient to warrant sending a case to the jury after an employer submitted evidence of nondiscriminatory reasons for a discharge, in this case the plaintiff offered sufficient evidence to support the jury verdict.

[9] Faxing and Confirmation

Stevens Shipping & Term. Co. v. Japan Rainbow II MV, 334 F.3d 439 (5th Cir. 2003) : The Court affirmed the dismissal of a stevedore's in rem claims against a vessel, seeking payment for agency and stevedoring services. In finding that the plaintiff had actual knowledge that the charter of the vessel contained a prohibition of liens clause, the Trial Judge relied upon the facts that the vessel owners' managing agent had faxed a copy of the prohibition of liens clause to the plaintiff at the fax number listed in the charter and that the agent had received a fax confirmation that a letter and the notice were successfully transmitted. The Court found no error when the Judge adopted a rebuttable

presumption that the plaintiff received the fax notice, analogizing to the presumption that a properly addressed and mailed letter is received within a reasonable time. The plaintiff had failed to rebut the presumption.

[10] Intellectual Property Cases

America Online Inc. v. AT & T Corp., 243 F.3d 812 (4th Cir. 2001) : In an action by AOL alleging that AT & T infringed AOL's trademarks, the Court affirmed summary judgment for AT & T in part but held that AOL had raised a genuine issue of material fact as to whether its use of the phrase "Buddy List" constituted a valid service mark in connection with its instant messaging service. AOL had obtained a certificate of registration from the Patent and Trademark Office, which was *prima facie* evidence of the validity of the mark and its registration and AOL's exclusive right to use the mark in connection with the goods and services set forth in the certificate. Although the Court held that the Trial Judge was not required to defer to the PTO certification, the fact that it was *prima facie* evidence was sufficient to raise a material question of fact. The Court referred to the Advisory Committee Note to *Rule 301* which indicates that evidence may be sufficient to neutralize a presumption (or *prima facie* evidence), but it does not eliminate from the case the evidence that gave rise to the presumption. Affirming a judgment for the defendants in a copyright infringement case, *Keeler Brass Co. v. Continental Brass Co.*, n4 the Court analogized to *Rule 301* in holding that the establishment of a *prima facie* case creates a presumption of copying that can be rebutted with evidence of independent creation. It concluded that if the presumption is rebutted, the plaintiff has the ultimate burden of persuading the trier of fact that there was copying. In *Tenneco Chems., Inc. v. William T. Burnett & Co.*, n5 the Court, reviewing challenges to two patents, observed that the statutory presumption of patent validity requires a party challenging a patent not only to produce evidence of invalidity, but also to prove invalidity by clear and convincing evidence.

Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983) , *aff'd*, *741 F.2d 896 (7th Cir. 1984)* : In a suit alleging the infringement of a copyright on a song, the Court entered a judgment n.o.v. for the defendants. It reasoned that the plaintiff's evidence that his song was similar to one put out by the defendants supported an inference that the defendants might have had access to the plaintiff's song, but that the undisputed testimony demonstrated that the defendants had never heard of the plaintiff or his music. The Court relied on the traditional analysis of presumptions in concluding that "[w]here the case of a plaintiff is based on an inference or inferences, it must fail upon proof of undisputed facts inconsistent with such inference or inferences."

A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992) (en banc): The Court reversed summary judgment for the defendant in a patent infringement case, holding that the presumption of laches arising from a six-year delay in bringing suit may be eliminated by offering evidence to show an excuse for the delay or that the delay was reasonable, and that (contrary to the decision below and suggestions in recent patent cases) at all times the defendant bears the ultimate burden of persuasion on the affirmative defense of laches. In *Solder Removal Co. v. United States Int'l Trade Comm'n*, n6 the Court noted that the statutory presumption of patent validity under *35 U.S.C. § 282* must be given precedence over *Rule 301*. Because a specific statute governs the matter, "a party asserting invalidity [must] bear not only the presumption-generated burden of going forward with proof but also the burden of persuasion on that issue."

[11] Labor Cases

NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978) : A burden of persuasion placed on an employer as a result of a presumption was held to govern, notwithstanding *Rule 301*.

American Coal Co. v. Benefits Review Bd., 738 F.2d 387 (10th Cir. 1984) : The Court affirmed an award of

benefits to an employee claiming a black lung illness. It rejected the employer's argument that *Rule 301* governed administrative proceedings and found that Congress delegated to the Secretary of Labor authority to designate how the presumptions set forth in the statute could be rebutted. In *Presbyterian/St. Luke's Med. Center v. NLRB, 653 F.2d 450 (10th Cir. 1981)* , the Court found that under *Rule 301* the General Counsel must prove that an unfair labor practice occurred and that the burden of persuasion as to the appropriateness of a bargaining unit had been improperly shifted to the employer.

[12] Mailing and Receipt

[a] Inadequate Foundation for Presumption

United States v. Wilson, 322 F.3d 353 (5th Cir. 2003) : The Court reversed a conviction for money laundering because of insufficient evidence that the Justice Department's Office of International Affairs actually sent an official request for assistance to the Commonwealth of the Bahamas, thereby tolling the statute of limitations. The Court held that the presumption of mailing and receipt upon proof of an office's routine correspondence practices was not satisfied in this case because the foundation witness was a paralegal, not a secretary or docketing clerk, and she was not responsible for drafting or mailing assistance requests or for making correspondence log entries. Aside from the witness' lack of personal knowledge of the practices in the OIA during the time in question, her testimony indicated that there were no consistent procedures or practices at that time.

Busquets-Ivars v. Ashcroft, 333 F.3d 1008 (9th Cir. 2003) : To provide notice of a hearing, the Immigration and Naturalization Service used certified mail, although the statute required only regular mail, but it coupled the petitioners' correct street address with an incorrect ZIP code. Expressing no opinion on whether the INS was deprived of the presumption of effective notice because it presented no return receipt for the certified mail, the Court nevertheless found the presumption inapplicable because the incorrect ZIP code meant that the letter was not "properly directed," which is a required predicate for the presumption. One Judge dissented, noting that an absent or incorrect ZIP code does not make mail undeliverable. In *Huizar v. Carey, 273 F.3d 1220 (9th Cir. 2001)* , a habeas corpus proceeding dismissed as untimely because a state petition was never received or filed, the Court held that a prisoner's habeas petition would be deemed filed at the time he delivered it to the prison authorities for forwarding to the appropriate Court's clerk. The case was remanded to determine when the petition was delivered to prison authorities and whether the petitioner had followed up after receiving no reply.

Davis v. United States Postal Serv., 142 F.3d 1334 (10th Cir. 1998) : The Court affirmed in part judgment as a matter of law granted for the defendant in a Rehabilitation Act case, and upheld a finding that an EEO officer had not received the plaintiff's request to file a formal complaint. The plaintiff's testimony that her attorney mailed the letter was insufficient to trigger the presumption of receipt on proof of mailing, since the plaintiff had no personal knowledge and there was no affidavit or other proof of the customary mailing practices in the attorney's office. In a Federal Tort Claims Act case, *Moya v. United States*, n7 the Court affirmed summary judgment against the plaintiff for failure to show that the agency had received notice of the claim. The Court held that an affidavit by the plaintiff's attorney that she mailed the letter certified mail, without evidence regarding the return receipt, did not establish the presumption of receipt for the notice. Where the sender does not receive the return receipt for certified mail, she is on notice that the addressee may not have received the letter.

[b] Mailing and Receipt -- Presumption Applied

Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002) : Reversing a decision refusing to compel arbitration in an action involving long distance telephone charges, the Court rejected the plaintiff's claim that his continued use of the

defendant's service did not constitute an acceptance of an offer that the defendant mailed. The Court reasoned that when a letter is properly addressed and mailed, there is a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. In this case the defendant presented evidence of its mailing procedures, and the plaintiff did not offer evidence that it was not received.

Maghee v. Ault, 410 F.3d 473 (8th Cir. 2005) : Affirming denial of habeas corpus relief because the statute of limitations had run, the Court rejected the petitioner's argument that his state proceeding for post-conviction relief was still pending because he had not received notice it had been dismissed. It found sufficient evidence that the notice was properly addressed and mailed to trigger the presumption of delivery. In *Davis v. U.S. Bancorp, 383 F.3d 761 (8th Cir. 2004)* , the Court affirmed summary judgment for the defendants in a prospective borrower's suit arising from denial of a loan, holding that an officer's affidavit that notice of adverse action was prepared in accordance with the underwriter's procedures and mailed "on or about" a particular date was sufficient to trigger the presumption that a notice properly mailed was received.

Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956 (9th Cir. 2001) : The Plan denied the plaintiff's request for lump-sum distribution of retirement benefits on the grounds that she failed to timely submit the required election form and that it had no record of having received the form. The plaintiff offered proof of mailing the form well in advance of the deadline. The Plan asserted that the common-law mailbox rule was superseded by ERISA and by Plan rules requiring actual receipt. The Court held (2-1) that it was an abuse of discretion for the Plan to fail to apply the presumption, which has long been followed " 'precisely to avoid the type of swearing contest in which the parties are presently involved.' " In *Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197 (9th Cir. 1999)* , the Court affirmed summary judgment against debtors suing under the Fair Debt Collection Practices Act, finding no genuine dispute that the debtors timely received the required collection notice, given unrebutted proof of the defendant's mailing practices for its computer-generated notices and the common-law presumption of receipt on proof of a document's proper and timely mailing.

Konst v. Florida E.C. Ry., 71 F.3d 850 (11th Cir. 1996) : Reversing summary judgment for the railroad in an action by a shipper alleging damage to furniture during a shipment, the Court concluded that the shipper's evidence that it mailed a claim was sufficient to trigger the presumption that the railroad received it.

[c] Mailing and Receipt -- Sufficiency of Rebuttal

Chavis v. Heckler, 577 F. Supp. 201 (D.D.C. 1983) : In an action seeking supplementary social security income, the District Court granted summary judgment for the plaintiff on the ground that the agency's notice of termination was not reasonably calculated to reach the plaintiff. The Judge noted that the statutory presumption that a mailed letter is received is rebuttable and disappeared in this case when the plaintiff testified before an Administrative Law Judge that he never received the notice.

Barrs v. Lockheed Martin Corp., 287 F.3d 202 (1st Cir. 2002) : In an action for breach of fiduciary duties under ERISA, the plaintiff testified that she mailed a change of address postcard to the defendant. Affirming judgment for the defendant after a bench trial, the Court found that the common-law presumption of receipt had been rebutted by testimony from the defendant's employee responsible for the relevant file that the postcard was never received. Although the plaintiff argued that a simple denial should not rebut the presumption, the Court held that here the defendant offered a witness in a position to know, who offered direct testimony and who could be cross-examined. "To demand much more would elevate the presumption into one that is effectively not rebuttable--which would hardly be justified by common experience with the postal system."

Sinatra v. Heckler, 566 F. Supp. 1354 (E.D.N.Y. 1983) : Remanding a case to the Social Security Administration for consideration of whether the plaintiff's request for a hearing was untimely, the Court ruled that the presumption under SSA regulations that a letter is received five days after its date is rebuttable. It declined to decide whether a bare affidavit by a claimant denying receipt of a letter would be sufficient rebuttal evidence, because judicial notice of the usual delay in mail delivery associated with the year-end holiday season supported the claimant.

In re Cendant Corp. Prides Litig., 311 F.3d 298 (3d Cir. 2002) : The Court reversed an order that excluded a mutual funds custodian from a class action settlement fund on the ground that proofs of claims had been filed tardily. The Court noted that the presumption of receipt upon mailing was rebuttable, and that at least one Circuit had held that testimony denying receipt suffices to rebut. As the Court observed, "Although the presumption of mailing rests on the dependability of the U.S. Postal Service, human experience has shown that reliance has not always been justified." On the facts of this case, the Court found application of the presumption "troublesome," and excused the custodian's late filing.

Beck v. Somerset Technologies, Inc., 882 F.2d 993 (5th Cir. 1989) : In a product liability action, the Court affirmed summary judgment for the defendants on the ground that the plaintiff's employer had been given notice of the defects before the injury. The defendant's summary judgment record included a copy of a properly addressed letter to the employer and signed return postcards, and the resulting presumption of receipt was not rebutted by an affidavit from one of the employer's employees that he did not remember receiving the warning letter or the person who signed the return receipt.

Lozano v. Ashcroft, 258 F.3d 1160 (10th Cir. 2001) : In an employment discrimination action, the Court reversed a judgment for the defendant Department of Justice, holding that its rejection of an EEOC decision was untimely. A DOJ employee's affidavit that was not based on personal knowledge, and a photocopy of the decision letter with a partially illegible stamp purportedly indicating the date of receipt were insufficient to rebut the presumption of timely receipt upon proof of mailing. In *Witt v. Roadway Express, 136 F.3d 1424 (10th Cir. 1998)* , the plaintiff's employment discrimination claim against his union was dismissed as untimely, after the Trial Judge presumed that the plaintiff had received his right-to-sue letter within five days after a certified mail receipt showed it was mailed. Reversing, the Court held that the presumption applied, but that in this case the plaintiff had presented evidence that could reasonably be found to have rebutted it.

[d] Mailing and Receipt -- Tax Cases

Carroll v. Commissioner, 71 F.3d 1228 (6th Cir. 1995) : Affirming a Tax Court decision assessing a deficiency against a taxpayer, the Court held that the common-law presumption that a properly addressed and mailed communication is also received "has no application where the IRS is involved," and "[i]n this circuit, a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril."

Anderson v. United States, 966 F.2d 487 (9th Cir. 1992) : In a taxpayer's suit for a refund, the Court held that the government had not rebutted the common-law presumption of receipt that arose on the taxpayer's proof of mailing her return.

[13] Miscellaneous Cases

Pennzoil Co. v. Federal Energy Regulatory Comm'n, 789 F.2d 1128 (5th Cir. 1986) : The Court found that the FERC misconstrued a previous decision, and vacated and remanded proceedings involving rates charged by natural gas producers. The earlier decision affirmed procedures that created a rebuttable presumption that an assertion by a producer and a purchaser that they intended in their contract to permit certain rates to be charged was accurate and not unreasonable. A party protesting the rates must bear the "burden of coming forward with substantial evidence of the lack of contractual authority to overcome the presumption." Once the burden is borne, the presumption disappears, which the Court observed is also true under *Rule 301*.

Howing Co. v. Nationwide Corp., 927 F.2d 263 (6th Cir. 1991) , vacated on other grounds, 502 U.S. 801 (1991) : Reversing a summary judgment for the defendant in a securities action by minority public shareholders arising from a freeze-out merger, the Court held that the specific language of the instructions to SEC proxy rules creates a presumption that a discussion of book, going concern, and liquidation value in the proxy statement would be material to a reasonable investor. In this case, the defendants did not rebut the presumption so as to avoid trial because they did not establish the lack of significance of the omitted information with sufficient clarity. In *Plough, Inc. v. Mason & Dixon Lines*, n8 the Court vacated a judgment for a motor carrier charged with injury to shipped goods, finding that the District Court misallocated the burden of persuasion. Noting that the Supreme Court has interpreted Congress' intent in the 1906 Carmack Amendment to the Interstate Commerce Act as codifying the common-law rule that a carrier is liable for damage to goods except when it can make certain special showings that it was not responsible for the damage, the Court said that *Rule 301* did not bar placement of the burden of persuasion on the carrier, since Congress had placed it there.

Godfrey v. United States, 997 F.2d 335 (7th Cir. 1993) : The Court reversed denial of a taxpayer's claim for interest on a delayed refund check, holding that a computer transcript indicating that refund of an overpayment had been authorized was insufficient to create a presumption of delivery, absent any evidence indicating regular procedures for mailing refund checks after authorization of refunds.

Pennsylvania v. United States, 643 F.2d 758 (Ct. Cl. 1981) : The Court found that since Congress did not provide otherwise, a presumption for reimbursement of a State under the Federal-Aid Highways Act related only to the burden of production of evidence, not to the ultimate burden of persuasion.

[14] Social Security Cases

Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982) : The Court reversed a District Court that had upheld the termination of social security benefits. It recognized that "when a claimant is entitled to the benefit of a presumption that her disability still exists, the burden is still on her to prove her case," but the Court found that there was insufficient rebuttal evidence to warrant disregard of the presumption in this case.

[15] Summary Judgment

America Online Inc. v. AT & T Corp., 243 F.3d 812 (4th Cir. 2001) : In an action by AOL alleging that AT & T infringed AOL's trademarks, the Court affirmed summary judgment for AT & T in part but held that AOL had raised a genuine issue of material fact as to whether its use of the phrase "Buddy List" constituted a valid service mark in connection with its instant messaging service. AOL had obtained a certificate of registration from the Patent and Trademark Office, which was *prima facie* evidence of the validity of the mark and its registration and AOL's exclusive right to use the mark in connection with the goods and services set forth in the certificate. Although the Court held that the Trial Judge was not required to defer to the PTO certification, the fact that it was *prima facie* evidence was sufficient to raise a material question of fact. The Court referred to the Advisory Committee Note to *Rule 301* which

indicates that evidence may be sufficient to neutralize a presumption (or *prima facie* evidence), but it does not eliminate from the case the evidence that gave rise to the presumption.

FOOTNOTES:

(n1)Footnote 1. *James v. River Parishes Co., 686 F.2d 1129 (5th Cir. 1982)* .

(n2)Footnote 2. *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)* .

(n3)Footnote 3. *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)* .

(n4)Footnote 4. *Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063 (4th Cir. 1988)* .

(n5)Footnote 5. *Tenneco Chems., Inc. v. William T. Burnett & Co., 691 F.2d 658 (4th Cir. 1982)* .

(n6)Footnote 6. *Solder Removal Co. v. United States Int'l Trade Comm'n, 582 F.2d 628 (C.C.P.A. 1978)* .

(n7)Footnote 7. *Moya v. Department of Veteran's Affairs, 35 F.3d 501 (10th Cir. 1994)* .

(n8)Footnote 8. *Plough, Inc. v. Mason & Dixon Lines, 630 F.2d 468 (6th Cir. 1980)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
CHAPTER 301 RULE 301

1-301 Federal Rules of Evidence Manual 301.04

301.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

This rule governs presumptions generally. See *Rule 302* for presumptions controlled by state law and Rule 303 for those against an accused in a criminal case. **[The latter rule was deleted by Congress. Ed.]**

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, *50 Harv. L. Rev. 909, 913 (1937)*; Morgan, Instructing the Jury upon Presumptions and Burden of Proof, *47 Harv. L. Rev. 59, 82 (1933)*; Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, *12 Stan. L. Rev. 5 (1959)*. **[This approach was rejected by the Congress. Ed.]**

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. *Morgan and Maguire, supra, at p. 913*. **[This approach was adopted by the Congress. Ed.]**

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (1910)* , the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (1929)* , the Court

overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specific acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for the plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson*. The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1920 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), *69 Yale L.J. 1099 (1960)*.

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by *Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959)* . The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." *359 U.S. at 443, 79 S. Ct. at 925* .

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id. at 446, 79 S. Ct. at 927* .

The rational connection requirement survives in criminal cases, *Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943)* , because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry v. Ramsey, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796 (1928)* . In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was *prima facie* evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id. at 94, 48 S. Ct. at 444* . Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not

encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965)* , but not that Romano should have known that his presence at a still could convict him of possessing it, *United States v. Romano, 382 U.S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965)* .

In his dissent in *Gainey*, Mr. Justice Black put it more artistically:

> It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called "possession" and "carrying on an illegal distillery business" but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry v. Ramsey, 277 U.S. 88, 48 S. Ct. 443, 72 L. Ed. 796* . Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner v. Donnan, 285 U.S. 312, 52 S. Ct. 358, 76 L. Ed. 772* , there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888* , and many other cases.

380 U.S. at 84, n. 12, 85 S. Ct. at 766 .

And the majority opinion in *Romano* agreed with him:

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.

382 U.S. at 144, 86 S. Ct. at 284 .

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 273 (1999)

Presumptions -- Rule 301

Federal *Rule 301* ... is a culmination of a battle between two conflicting views of the effect a presumption should have. The views are known by the law professors who propounded them. Under the "Morgan" view, a presumption shifts the risk of nonpersuasion to the party against whom the presumption operates. Thus, if there is a presumption that a mailed letter is received, the party claiming non-receipt has the burden shifted to it to prove, by a preponderance of the evidence, that the letter was never received. In contrast, under the "Thayer" view, the opponent must merely offer evidence sufficient to support a finding contrary to the presumed fact in order to take the presumption out of the case. (The Thayer view has been termed the "bursting bubble" view of presumptions, because the presumption "bursts" when contrary evidence as to the presumed fact is introduced.) The practical difference between these views is in the quality and quantity of evidence required to overcome the presumption.

The Advisory Committee Note to *Rule 301* is essentially a brief for the Morgan view of presumptions. It states that

presumptions under the rule are given "the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic fact giving rise to it." The Advisory Committee reasoned that presumptions are based on a combination of probability and fairness. If that combination of factors is strong enough to warrant a presumption, it should also be strong enough to shift the risk of nonpersuasion to the party against whom the presumption operates. The Advisory Committee Note has this to say about the Thayer view:

> The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect.

The problem with the Advisory Committee Noted is that Congress rejected the Advisory Committee's view of the matter. *Rule 301* adopts the "bursting bubble" view of presumptions -- the party against whom the presumption operates need only present evidence sufficient to support a finding contrary to the presumed fact. When that occurs, the presumption vanishes from the case. Thus, a lawyer operating with a presumption in her favor should not rely on the Advisory Committee Note; if she did, she would have a misplaced confidence in the ability of the presumption to withstand contrary evidence.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

Being persuaded that the term "cases" might be construed to exclude certain bankruptcy and other civil proceedings, the Subcommittee determined to use the phrase "actions and proceedings" to include all types of civil litigation, and to use the term "cases" to include all criminal litigation. Such changes in terminology appear consistently throughout the Rules.

The word "civil" was added to effectuate the Subcommittee's decision not to deal with the question of presumptions in criminal cases. See Rule 303. **[Proposed Rule 303, governing presumptions in criminal cases, was never adopted. Ed.]**

With respect to the weight to be given a presumption in a civil case, the Subcommittee agreed with the conclusion reflected in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Subcommittee believed that the rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced" a view adopted by only a few courts -- lent too great a force to presumptions. The Subcommittee accordingly adopted an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed to be considered by the jury or other finder of fact.

[4] Report of the House Committee on the Judiciary

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of *Rule 301* to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. [Rejected Rule 303 is set forth in Part Three of this *Manual*. Ed.] With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanishes upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the

burden of persuasion, no matter how much contradicting evidence is introduced -- a view shared by only a few courts -- lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed to be considered by the jury or other finder of fact.

[5] Report of the Senate Committee on the Judiciary

This rule governs presumptions in civil cases generally. *Rule 302* provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck v. Sarver* and was repealed after 93 troublesome years.

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence," to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence.

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

[Footnotes deleted.]

[6] Report of the House and Senate Conferees

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the

presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may **[probably meant "must." Ed.]** presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

[7] Citations to Hearing and Debates

Letter from James F. Schaeffer to Hon. William L. Hungate, June 25, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 130-34 (1973).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 56-58 (1974).

Testimony of Edward W. Cleary, June 4, 1975, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 47-48 (1974).

Testimony and Prepared Statement of Paul F. Rothstein, June 5, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 267-69 (1974).

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
Supp. To CHAPTER 301 RULE 301

1-301 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 301, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS	**ARTICLE III. PRESUMPTIONS IN CIVIL CASES**
AND	
PROCEEDINGS	
Rule 301. Presumptions in	**Rule 301. Presumptions in**
DINGS	**in**

Rule 301. Presumptions in General in Civil Actions and Proceedings	Civil Cases Generally
In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption	In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is

n im- pose s on the part y agai nst who m it is dir- ec- ted the bur- den of go- ing for- ward with evid ence to re- but or meet the pre- sum ptio n, but does not shift to such part y the bur- den of proo f in the dir- ec- ted has the bur- den of pro- duci ng evid ence to re- but the pre- sum ptio n. But this rule does not shift the bur- den of per- sua- sion, whic h re- mai ns on the part y who had it ori- gin- ally.

sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 301.03 Annotated Cases

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[1] Admiralty Cases [Go To Main]

Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206 (2d Cir. 2009) : The Court reversed a judgment for landowners whose waterfront bulkhead had collapsed after a barge hit it, in part because the Judge improperly applied the " *Oregon* rule" presumption regarding contact between moving vessels and anchored or stationary objects. The presumption applies only to the issue of negligence (the moving vessel is presumed to be negligent), but the Judge had also applied it to the issue of causation, finding that defendants failed to disprove that the contact caused collapse of the bulkhead.

[12] Mailing and Receipt [Go To Main]

[.a] Electronic Communications

Laouini v. CLM Freight Lines, Inc., 586 F.3d 473 (7th Cir. 2009) : A Title IV action was dismissed on the ground that the charge had not been timely filed, where the EEOC had processed a hard copy of the charge more than 300 days after the alleged violation, although the plaintiff's counsel claimed that the charge had been sent by fax on the last day of the statutory period. Vacating and remanding, the Court held that the confirmation on the sender's fax machine created a factual dispute sufficient to preclude summary judgment where, as here, it was the defendant's burden to prove absence of receipt.

Am. Boat Co., Inc. v. Unknown Sunken Barge, 567 F.3d 348 (8th Cir. 2009) : The Court held that the appellant failed to rebut the presumption of delivery and receipt of an electronic notice of a ruling by the District Court, so it affirmed denial of a motion to reopen the time to appeal a summary judgment.

[a] Mailing and Receipt -- Inadequate Foundation for Presumption

Duron v. Albertson's LLC, 560 F.3d 288 (5th Cir. 2009) : The Court reversed summary judgment that had been granted for the employer in an employment discrimination action on the ground that the plaintiff had not filed within 90 days of the right-to-sue letter. The plaintiff's affidavit that she did not receive a letter from the EEOC until a specified date and evidence that she and her attorney made several attempts to contact the EEOC to learn the status of her case, together with the absence of any evidence that the EEOC notice was actually mailed to the plaintiff on the date stated in the letter, created a genuine issue of material fact as to whether the plaintiff's action was timely filed.

[b] Mailing and Receipt -- Presumption Applied

In re Oca, Inc., 551 F.3d 359 (5th Cir. 2008) : The Court vacated the denial of a motion in a bankruptcy proceeding to set aside a default judgment entered against a debtor of the bankrupt, but it upheld the decision below that the debtor had failed to present clear and convincing evidence that he had not received process proved to have been properly addressed, stamped, and deposited into the mails.

Rios v. Nicholson, 490 F.3d 928 (Fed. Cir. 2007) : The Court reversed a decision that dismissed as untimely a veteran's appeal from a denial of his claim challenging the reduction of his disability benefits. The veteran produced a copy of a "Page of Registry of Sent Correspondence" maintained by the Puerto Rico Public Advocate for Veterans Affairs and two affidavits from an employee of that organization responsible for handling mail. The form and the affidavits indicated that the notice of appeal was mailed to the Veterans Court and the VA Office of General Counsel well before the deadline. The governing statute provided that a notice of appeal that is mailed to the Veterans Court is deemed received on the date of the United States Postal Service postmark. Relying upon the common law mailbox rule, which it concluded applied absent clear statutory abrogation, the Court reasoned that the presumption of receipt of a properly addressed, stamped, and mailed letter is rebuttable, suggested that evidence of the habit and custom of a court's officers and employees in handling the mail has no appreciable value in rebutting the presumption, and ultimately did "not purport to determine what evidence would be sufficient to overcome a presumption of receipt."

[c] Mailing and Receipt -- Sufficiency of Rebuttal

Kozak v. Gonzales, 502 F.3d 34 (1st Cir. 2007) : The alien petitioner was ordered deported *in absentia* because he did not appear for a hearing on the date specified in a notice sent to him by regular mail. Granting his petition to reopen the order, the Court held that the "strong presumption" of receipt applied to service by certified mail did not apply to service by regular mail. Here, the petitioner's sworn affidavit of non-receipt, the fact that the notice had been properly addressed, and the absence of any evidence that some household breakdown caused loss of the notice were sufficient to raise a factual issue regarding the receipt for the Board of Immigration Appeals to resolve.

Silva-Carvalho v. Mukasey, 517 F.3d 156 (2d Cir. 2008) : The Court vacated and remanded a decision of the Board of Immigration Appeals denying a petitioner's motion to reopen and rescind an *in absentia* order of removal. It held that the BIA improperly employed a strong presumption that the petitioner had received notice to appear at the removal proceeding, and reasoned that, because the petitioner's notice was sent by ordinary mail, "a statement or affidavit by the petitioner stating that he or she had not received notice should ordinarily suffice to overcome the presumption of receipt." The Court added that "[t]his approach appears to us to be sound in light of the reduced reliability of regular mail." The Court concluded that "the presumption of receipt in regular mail cases does no more than shift a tie-breaking burden of proof to the alien claiming non-receipt."

United States v. Ekong, 518 F.3d 285 (5th Cir. 2007) : The Court upheld a writ of garnishment upon the defendant's interest in pension benefits, which was granted after the defendant was convicted of health care fraud. In response to the defendant's claim that the government did not make a demand for payment more than 30 days before seeking the writ, as required by statute, the government introduced evidence that a demand for payment was mailed to the defendant. In a brief opinion on its summary calendar, the Court found that proof that a properly addressed letter was mailed creates a presumption that it was received in the usual time by the person to whom it was sent. The Court then added that the

addressee's "bare assertion of nonreceipt" is insufficient to rebut the presumption, citing *Custer v. Murphy Oil USA Inc., 503 F.3d 415 (5th Cir. 2007)* . We suggest that sworn testimony that a mailing was not received ought to be sufficient to rebut the presumption and require the trier of fact to decide whether the mailing reached the addressee. The Court states that the defendant's "affidavit of non-receipt was not supported by circumstantial evidence." We believe that in most cases there will be no circumstantial evidence regarding non-receipt. If someone does receive a mailing, they may act on it in a way that indicates they did receive it. If a person never receives a mailing, there often will be no possibility of circumstantial evidence to show the absence of receipt.

Crosby v. Rohm & Haas Co., 480 F.3d 423 (6th Cir. 2007) : Affirming summary judgment for the employer in an ERISA action brought by the beneficiary of a deceased employee's life insurance policy, the Court held that the presumption from evidence of mailing plan documents that the employee received them was not rebutted by evidence that the plaintiff was not able to find them in the employee's files a year later.

Sembiring v. Gonzales, 499 F.3d 981 (9th Cir. 2007) : When the alien petitioner appeared for a hearing on her application for asylum, she was told that the hearing had been rescheduled for an earlier date and an order for her removal had been issued *in absentia*. Granting her petition to reopen the order, the Court ruled that notices sent by regular mail are entitled to a lesser presumption of effective service than notices sent by certified mail, and that the petitioner had presented sufficient evidence to overcome the presumption. *Payan v. Aramark Mgmt. Servs. Ltd., 495 F.3d 1119 (9th Cir. 2007)* , involved application of the rule in a Title VII action that the limitations period is measured from the date on which a right-to-sue letter arrives at the claimant's address of record. The plaintiff in this action did not dispute having received the letter, but claimed not to know the date on which it arrived. Affirming summary judgment for the defendant granted because the suit was untimely, the Court applied a presumption that the letter was mailed on the date of its issuance and a presumption (based on the additional time given by *Fed. R. Civ. P. 6(e)* [now, 6(d)] for responding to service of papers made by mail) that it was received three days after it was mailed. The plaintiff's "unsupported conjectures" were insufficient to rebut the presumptions.

Laborers' Int'l Union, Local 578 v. NLRB, 594 F.3d 737 (10th Cir. 2010) : The Court granted the NLRB's petition to enforce its decision holding that a union engaged in unfair labor practices when it persuaded an employer to fire an employee for failing to pay his union dues. The NLRB found that the union failed to provide the employee with a legally sufficient notice about his delinquent dues or a reasonable opportunity to cure the delinquency. Although the union claimed that it sent a letter to the employee and properly addressed it, applied postage, and mailed it, the employee testified he did not receive it. The Court pointed out that, assuming that the NLRB was required to apply the "mailbox rule, " the rule "is not the sort of immutable legal command the union suggests. Rather, it is simply an evidentiary presumption ... that may be rebutted by other evidence suggesting that the addressee did not receive the letter."

[d] Mailing and Receipt -- Tax Cases

Philadelphia Marine Trade Ass'n v. Commissioner, 523 F.3d 140 (3d Cir. 2008) : In an action for refund of tax penalties, summary judgment was granted against the plaintiffs on the ground that the refund request was untimely because they did not produce direct evidence of timely receipt by the IRS, although there was testimony that refund requests had been mailed. Reversing, the Court held there was sufficient evidence to invoke the common-law mailbox rule. It rejected the view taken by the Second and Sixth Circuits that *26 U.S.C. § 7502* preempted the mailbox rule; in the Court's view, that statute, which makes the postmark date the date of delivery, applies only to cases where delivery occurs after the due date. Here, the testimony indicated that the request had been mailed in plenty of time to be delivered timely.

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PART TWO: THE RULES THEMSELVES
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302.01 Official Text

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

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PART TWO: THE RULES THEMSELVES
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302.02 Editorial Explanatory Comment

[1] Deference to State Law

Rule 302 provides that whenever a Federal Court in a civil case looks to state law to find the rule of decision with respect to a claim or a defense, state law will also govern with respect to the effect of a presumption. In other words, just as Federal Courts normally follow state rules regarding burdens of proof and standards of proof, they will also follow state law regarding the treatment of a presumption. n1 This is neither surprising nor unusual, given that a presumption serves an important function in allocating responsibility between parties to bring forth evidence. Moreover, to the extent that a presumption places the burden of persuasion on the party against whom the presumption operates, it seems that it is part and parcel of the state substantive law, proper deference to which requires the Federal Court to follow the state law. *Erie R.R. v. Tompkins, 304 U.S. 64 (1938)* , is, of course, the most relevant case. Although *Erie* involved on its facts only the diversity jurisdiction of the Federal Courts, its general thesis concerning the manner in which Federal Courts must observe state substantive law is clearly important in explaining why Federal Courts follow state law regarding presumptions.

State law may provide the rule of decision even in a nondiversity case, and where that is so, *Rule 302* provides that state law controls the effect of a presumption concerning a fact that is an element of the claim or defense. n2

Where state law applies under *Rule 302*, the state law governs not only the existence of the presumption, but also the effect of the presumption. Thus, if the state gives burden-shifting effect to the presumption, the Federal Court must do so as well -- even though *Rule 301* opts for a "bursting bubble" effect for presumptions under federal law. n3

Nothing in this Comment or elsewhere in this *Manual* is intended to suggest that Congress is without constitutional power to abolish *Rule 302* and to bring all presumptions under the umbrella of *Rule 301*. Congress (not the Supreme Court) may possess such power. See Ely, *The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974)*; *Hanna v. Plumer, 380 U.S. 460 (1965)* . In fact, our proposed treatment of federal-state conflict when federal and state presumptions arise in a single case, which we offer in § 302.02[3], suggests some such power and also suggests that *Rule 301* should be interpreted in some cases as an exercise of the power. Putting the question of power aside, *Rule 302* can be understood as an expression of Congress' concern about comity and respect for state law -- much like Rules 501 and 601 in that regard. See Mishkin, *Some Further Last Words on Erie -- The Thread*, 87 Harv. L. Rev. 1682 (1974).

[2] Element of a Claim or Defense

Because *Rule 302* has not been subjected to much judicial analysis, it remains difficult to determine when "a fact ... is an element of a claim or defense ... to which state law supplies the rule of decision."

Apparently, Congress was of the view that where Federal Courts traditionally deferred to state presumptions, *Rule 302* would require continued deference.

Some have suggested that *Rule 302* should be read restrictively, but it is apparent that Congress intended to defer to state law whenever state law provides the rule of decision and a particular presumption is important to furthering state policies.

Our suggestion is that Federal Judges should defer to state rules on presumptions whenever they are in doubt in a case otherwise governed by state law. n4 Federal Courts should assume that presumptions are expressions of a state's policy toward its litigants. While a certain presumption may appear to be based only on logic and experience, the fact is that most presumptions are based on a combination of logic, probability, policy, and considerations of access to proof. At least some, and probably most of these considerations can be considered substantive. n5 For example, the presumption that a death was the result of accident rather than suicide may be based somewhat on probability; but it also reflects the state's substantive concern that where access to proof is difficult, the burden should be placed on the insurer. Similarly, a presumption that a buyer read an adequate warning may be based somewhat on probability, but it is also based on the substantive premise that adequate warnings *should* be read and should provide protection to manufacturers. n6

Whenever a Federal Judge is compelled to follow state law generally, it makes good sense for the Judge to use state law on presumptions as well. It is difficult to see a substantial federal interest in applying federal law in those circumstances. Perhaps the most that can be said is that if the presumption is clearly designed only to operate only for purposes of judicial convenience, the presumption is purely procedural, and the Court may apply the federal law if there is a conflict.

The distinction proposed by the Advisory Committee -- between "tactical" presumptions to be governed by federal law and presumptions as to an element of a claim or defense to be governed by state law -- is problematic because it is so vague. The distinction also ignores the fact that certain presumptions may embody substantive state policy even if they are "tactical." The distinction proposed by the Advisory Committee is certainly not mandated by the words of the Rule itself. So again, we conclude that state law presumptions are "presumptively" applicable whenever state law provides the rule of decision.

We note, however, that there is a distinction between a presumption, as that term is used in *Rule 302*, and a permissible inference from a given set of facts. If a rule of law simply permits an inference, the federal law will govern in a Federal Court. n7

[3] Federal and State Claims Joined

Where state and federal claims are joined together in a given case, and where the federal law, statutory or otherwise, would treat a presumption one way while state law would treat it differently, the determination of governing law may be difficult. Although *Rule 302* does not address this problem, there are three possible solutions. First, a Court could read *Rule 302* as applying only in cases in which the presumption that relates to a fact that is an element of a claim or defense governed by state law has no bearing on any federal question involved in the case. Such a reading would mean that federal law would predominate whenever there are conflicting presumptions. Or, this Rule could be read literally, in which case the rule of decision would be determined in accordance with state law, meaning that state law would predominate over Federal law whenever there are conflicting presumptions. There is also a third possibility, which is to treat the presumption differently in dealing with the federal and state claims.

The third view is probably the correct view with respect to a presumption that is not met by conflicting evidence. In other words, if the sole issue is whether a presumption standing alone is sufficient for the party utilizing it to take his case to the jury, or perhaps to prevent the other party's case from going to the jury, there is no reason why the presumption cannot be treated differently when it is applied to the federal and to the state claims. The Trial Judge should have little difficulty applying the presumption rules in making the respective peremptory rulings.

Once conflicting evidence is introduced, however, the situation is complicated. If the state law places the burden of proof on the party against whom a presumption operates, it may appear that the Judge can give a simple instruction to the jury with respect to burden of proof on the state claim and then proceed to follow *Rule 301* with respect to the federal claim and tell the jury about the permissible inference it is entitled to draw. But once the jury is told about both the burden of proof and the permissible inference, it is possible that there may be a double burden on the party against whom the presumption operates.

An appropriate solution would be to follow the Federal Rule and to apply it to both claims in most cases. Since *Rule 302* apparently reflects notions of comity and the proper relationship of Federal Courts and State Courts in a federal system, there is no reason to give it a wooden and inflexible reading. Comity works both ways, and one jurisdiction's interests may have to accommodate the other's at times. Given that Congress has firmly expressed its view as to the proper treatment of presumptions in *Rule 301*, given that Congress knew that a choice might have to be made when federal and state claims are brought together, and given the *Supremacy Clause*, it would seem that state law should give way to federal law in the infrequent situation where there is a federal cause of action in the case and the use of conflicting presumptions would be confusing to the jury or unfair to a litigant.

But even this limited assumption need not necessarily be unyielding. It might give way to state interests in cases in which it is apparent that the state presumption is critical to proper application of state law, whereas the federal presumption upon close scrutiny seems relatively unimportant in the federal scheme. In such cases, the state law could govern both claims. Where a presumption expresses both strong state and federal policies, a severance might well be the appropriate course.

For example, suppose both Federal and State Courts have a presumption that a state of affairs, once proved to exist, continues as long as is usual with things of that nature. Assume that a plaintiff sues to recover damages for various violations of federal securities laws from directors and officers of a corporation and that state common-law claims are joined by pendent jurisdiction to the federal claims. Once an illegality is demonstrated to have occurred at one point in time, an issue may arise as to whether it continued for some period. The presumption may be useful to assist a plaintiff in proving a continuing state of affairs. If federal and state law are in conflict as to the effect of the presumption, which governs? Our suggestion is that ordinarily the Federal Rule would govern both claims. This is somewhat analogous to the theory in common-law jurisdictions that when conflicting presumptions appear, often one must predominate. n8 This is also similar to the result adopted by the Courts under *Rule 501*, in pendent jurisdiction cases where the state and federal rules on privilege are in conflict. Courts have held that the federal law of privilege applies to both the federal and the pendent state claims. n9 Applying the general rule that federal law controls the effect of the presumption is justified in the interest of consistency, and in recognition of the importance of the federal cause of action. On the other hand, in cases where state policy is more critical, the Court should have discretion to apply state law to both claims.

The states that have followed the federal lead and adopted codes of evidence have not been quick to adopt identical versions of *Rule 301*. n10 This would seem to suggest that over time the possibility that federal presumption rules will differ from state presumption rules is a real one. It is encouraging, however, to note that to date there are almost no reported cases in which the conflict between federal and state rules appears to have presented a problem for Federal Judges.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Monger v. Cessna Aircraft Co., 812 F.2d 402 (8th Cir. 1987)* (in diversity action for negligence, Court applied state law presumption that a pilot acted with due care, and also held that the evidence presented by the plaintiff was sufficient, under state law, to overcome the presumption).

(n2)Footnote 2. See *Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988)* (state law of presumptions applied to medical malpractice claim brought under the Federal Tort Claims Act).

(n3)Footnote 3. See, e.g., *Tafoya v. Sears, Roebuck & Co., 884 F.2d 1330 (10th Cir. 1989)* (where state law presumption as to lack of defect in a product required a preponderance of the evidence for rebuttal, the Trial Court properly instructed the jury to that effect).

(n4)Footnote 4. Cf. *In re Jackson, 28 B.R. 559 (Bankr. D. Pa. 1983)* (Court applied Pennsylvania law to determine that the burden of proof of establishing the existence of a partnership is placed on the party who seeks to prove its existence).

(n5)Footnote 5. See, e.g., *In re Bahre, 23 B.R. 460 (Bankr. D. Conn. 1982)* (where Court applied the state bankruptcy statute, the effect of the state presumption that an intrafamily conveyance was made without consideration was held a matter of state law).

(n6)Footnote 6. *Daniel v. Ben E. Keith Co., 97 F.3d 1329 (10th Cir. 1996)* (in a product liability case, it was proper to apply the Oklahoma presumption that the plaintiff would have read and heeded an adequate warning).

(n7)Footnote 7. See, e.g., *Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044 (5th Cir. 1990)* (whether a negative inference can arise from an "uncalled witness" was not a matter of state law; *Rule 302* applies to presumptions, not permissible inferences).

(n8)Footnote 8. See the discussion of conflicting presumptions in § 301.02[6].

(n9)Footnote 9. See, e.g., *Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992)* (federal law of privilege provides the rule of decision where the Court's jurisdiction is predicated upon a federal question, even if the testimony is relevant to a pendent state law claim that is controlled by a contrary state law of privilege: "It would be impractical to apply two different rules of privilege to the same evidence before a single jury.").

(n10)Footnote 10. See G. Joseph & S. Saltzburg, Evidence in America § 8.2 (Michie 1989) (only about half of the states with federal-based codes of evidence follow the "bursting bubble" presumption of Federal *Rule 301*).

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PART TWO: THE RULES THEMSELVES
Article III. Presumptions in Civil Actions and Proceedings
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302.03 Annotated Cases

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[1] Conflicting State Presumptions

Melville v. American Home Assur. Co., 443 F. Supp. 1064 (E.D. Pa. 1977) , rev'd on other grounds, 584 F.2d 1306 (3d Cir. 1978) : In a diversity action to recover the proceeds of an insurance policy, the District Court cited *Rule 302* as persuasive authority for its conclusion that presumptions often are more "substantive" than "procedural." The Court carefully observed that although *Rule 302* directs the application of state law, it does not set forth a formula for deciding which state's law should apply in a case when several states' laws arguably govern.

[2] Inference

Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044 (5th Cir. 1990) : Appealing a diversity slip-and-fall case for allegedly inadequate damages, the plaintiff argued that the District Court erred in refusing to draw an adverse inference from the defendant's failure to call a witness purportedly under its control. In the course of affirming, the Court noted that *Rule 302* did not apply to the state uncalled-witness rule, which merely permits an inference and does not create a true presumption.

[3] Presumptive Authenticity

In re Bobby Boggs, Inc., 819 F.2d 574 (5th Cir. 1987) : In a bankruptcy dispute over entitlement to a subcontractor's funds, the Court held that there was ample evidence to authenticate certain bonds issued by a surety that was defunct at the time of trial. It observed in a footnote that state law made the presence of the bonds in a defunct insurer's files presumptively authentic. Without deciding whether the state presumption would, standing alone, have been sufficient to satisfy *Rule 901*, the Court reasoned that the failure of the opposing party to offer any evidence to suggest that the bonds were not authentic supported their admissibility.

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302.04 Legislative History

Advisory Committee's Note

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* , to questions of burden of proof. These decisions are *Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939)* , *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* , and *Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959)* . They involved burden of proof, respectively, as to status as bona fide purchaser, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e., "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R. v. Tompkins: A Projection, 48 Iowa L. Rev. 248, 257 (1963)*; Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice § 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217-18 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

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1-302 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 302, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 302. Applicability of State Law in Civil Actions and Proceedings	**Rule 302. Applying State Law to Presumptions in Civil Cases**
In civil	In a civil

actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accord case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

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Committee Note

The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Foradori v. Harris, 523 F.3d 477 (5th Cir. 2008) : Affirming a judgment for a customer who sued a fast food restaurant operator to recover for injuries sustained on its premises as a result of an assault by an off-duty employee, the Court found no error in permitting the plaintiff to testify as to his medical bills and to introduce the bills in evidence. Because a Mississippi statute specifically provided that such evidence is admissible and establishes a presumption shifting the burden of production to the defendant, the Court reasoned that Rule 302 required the Judge in this diversity case to follow state law on the effect of the presumption.

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PART TWO: THE RULES THEMSELVES
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[20] Irrelevant Evidence

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[i] Civil Rights and Employment Cases

[ii] Irrelevant Evidence -- Civil Cases -- Damages Issues

[iii] Irrelevant Evidence -- Civil Cases -- Insurance Cases

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[v] Irrelevant Evidence -- Civil Cases -- Other Cases

[b] Irrelevant Evidence -- Criminal Cases

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[iii] Irrelevant Evidence -- Criminal Cases -- Other Cases

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[d] Similar Circumstance Evidence -- Miscellaneous Cases

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[29] State of Mind

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PART TWO: THE RULES THEMSELVES
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CHAPTER 401 RULE 401

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401.01 Official Text

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 401 RULE 401

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401.02 Editorial Explanatory Comment

[1] Basic Definition

This Rule defines the term "relevant evidence." The definition provides that evidence is relevant if it has *any* tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. The question for the Trial Judge is whether a reasonable person would find the probability of a consequential fact to be altered, one way or the other, by the proffered evidence. n1

Rule 401 is purely definitional, and has no operational effect on its own. Therefore, *Rule 401* is usually cited together with *Rule 402* (providing that relevant evidence is generally admissible and that irrelevant evidence is inadmissible) or, more frequently, with *Rule 403* (providing that evidence even though relevant may be excluded on grounds of prejudice, confusion or delay).

The important thing for the Judge and for counsel to remember is that the evidence does not by itself have to prove the ultimate proposition for which it is offered; nor does it have to make that ultimate proposition more probable than not. To be relevant it is enough that the evidence has a *tendency* to make a consequential fact even the least bit more probable or less probable than it would be without the evidence. The question of relevance is thus different from whether evidence is *sufficient* to prove a point. n2

An example may help to clarify the difference between relevance and sufficiency. Assume that a defendant is charged with an armed robbery committed by someone carrying a handgun. The prosecution wants to offer into evidence testimony that the defendant owned a handgun prior to the time the robbery was committed. Defendant claims the evidence is irrelevant. Certainly this evidence, standing alone, does not make it more probable than not that the defendant committed the crime. Furthermore, it is *a fortiori* not sufficient to prove beyond a reasonable doubt that the defendant committed the crime. The evidence is clearly insufficient on its own to prove the defendant's guilt. But it is a piece of evidence, the existence of which makes it somewhat more likely that the defendant committed the crime than if there were no such evidence. Therefore it is relevant. Thus, relevancy is a threshold admissibility standard to be applied by the Trial Judge. It is up to the trier of fact to weigh the evidence and to determine whether the entirety of the evidence is sufficient to prove a point.

It should be emphasized that "any tendency" is enough. The fact that the evidence is of weak probative value does not make it irrelevant. n3 When the Judge strikes a balance between the negative and positive features of evidence, as must be done under *Rule 403*, the minimal value of the evidence then becomes important.

[2] Materiality

Notice that the Rule does not explicitly treat "materiality" as a separate concept. Both traditional requirements of relevance analysis -- that evidence must relate to issues that are properly in dispute and that it must shed some light on those issues -- are combined into one rule. Whether an issue is properly in dispute is, of course, determined by the applicable substantive law. n4

[3] Direct and Circumstantial Evidence

The difficult relevance issues involve circumstantial, as opposed to direct, evidence. The only question to be asked in regard to direct evidence is whether it relates to an issue that is properly in dispute -- i.e., one that is of consequence to the action under *Rule 401* (what was called a material issue at common law). If an eyewitness testifies, for instance, that she saw the defendant in our previous robbery example commit the armed robbery, the evidence is clearly relevant, since it relates directly to a proposition disputed in the case. No inferences are required between the proof itself and the ultimate fact to be established. If, however, the testimony proves the robber wore a blue coat and the defendant owns a blue coat, this is circumstantial evidence and the Judge must decide whether, if believed, it makes a disputed fact more or less probable. It is here that hard questions can arise.

There is no litmus test or simple formula for applying the general definition of relevance. Logic and experience together must supply the Judge with skills in determining whether a given piece of evidence tends to prove a disputed proposition. n5 Sometimes expert witnesses may be necessary to assist the Court in making a relevance determination. And the Trial Judge should consider not only whether the admission of evidence is likely to advance the cause, but also whether its absence might produce negative inferences that would unfairly hurt a party -- i.e., the absence of evidence might be probative to a jury. n6

All this is not to say that circumstantial evidence is less important or less significant than direct evidence. To the contrary, in some cases, circumstantial evidence (e.g., a large amount of trace money from a bank robbery) may indeed have more weight than direct evidence (e.g., dubious or cursory eyewitness testimony). n7

[4] Standard of Review

A good argument can be made that the standard of review for pure relevance determinations should be *de novo,* and some Courts have so held. n8 As the First Circuit stated, the question of relevance is different from other evidentiary rulings:

> Yes, the standard of review on appeal of evidentiary rulings is often said to be for "abuse of discretion" ... . But whether a fact tends to make another fact more or less likely depends heavily on the logic of the connection, and there is no "discretion" to ignore a logical relationship.

United States v. Amaya-Manzanares, 377 F.3d 39 (1st Cir. 2004) .

Thus unlike *Rule 403*, which requires a balancing process that is necessarily discretionary and trial-sensitive, the question of whether evidence is relevant is one based in experience and logic. For example, the Appellate Court need not be constrained by a "cold record" in deciding whether a defendant's poor financial condition is probative of a motive to commit a crime, or whether statistical evidence is probative of employment discrimination. The Appellate Court and the Trial Judge are ordinarily in equally good positions to determine whether such an inference can be drawn in logic and experience; trial context is not important. Many Appellate Courts do not see it that way, however. There are a

number of cases stating broadly that the Trial Judge "possesses broad discretion in determining the relevance of proffered evidence." n9

Of course, it must be remembered that very few rulings are "pure" relevance rulings. Ordinarily, the objection to proffered evidence is not that it is totally irrelevant, but rather that the probative value of the evidence is so minimal that it is substantially outweighed by the negative factors of prejudice, confusion, and delay. This is a *Rule 403* question, which for good reason is governed by a deferential, abuse-of-discretion standard of review. n10

[5] Disputed Issues

The first sentence of the final paragraph of the Advisory Committee's Note to *Rule 401* states that "[t]he fact to which the evidence is directed need not be in dispute" and cites the California Evidence Code in a rather cryptic attempt to support its view. In our view, the wording "fact that is of consequence to the determination of the action" requires that all proof be directed to the issues in dispute. Contrary to the suggestion of the Committee, illustrative evidence -- such as evidence provided for background or context -- would not be barred under such a reading, as long as the illustrative evidence was reasonably related to a disputed issue. n11 We believe the Advisory Committee's Note places undue reliance on *Rule 403*. Although we would probably reach the same result as the Committee in most cases, we think that it is important to emphasize that the first step in a relevance analysis is to decide whether the trier of fact conceivably could be helped by evidence. If the answer is "no," the evidence should be excluded without reference to a balancing test that requires a specific demonstration of an extant evil before evidence is excluded. n12

[6] Applicability of State Law

State law in diversity cases determines the issues that are in dispute (what had been called the question of "materiality"), and in that way controls whether proffered evidence is relevant. For example, assume that the plaintiff is a mother whose child was run down and killed by a car. Assume further that the plaintiff proffers compelling evidence of emotional distress that she suffered as a result of losing her child. In many states, this evidence is not relevant unless the mother could prove that she was in the "zone of danger" at the time that her child was killed. Where such a state law provides the rule of decision in Federal Court, the evidence of emotional distress is irrelevant under *Rule 401* if the mother was outside the zone of danger. This is because the mother's emotional distress is not "in dispute" under the state's substantive law unless she was in the zone of danger, and it is the state substantive law that determines the issues in dispute in such cases. n13

[7] Offers of Proof

During the course of a trial, it is often unnecessary to require parties to explain how offered evidence relates to the issues in dispute, because the relationship is obvious. There are times, however, when the Trial Judge may be unclear as to the relationship of the evidence to the issues and may require counsel to explain the purpose of an offer. In order for the Trial Judge to give proper limiting instructions under *Rule 105* and to strike a proper balance between probative value and prejudicial effect under *Rule 403*, the Judge must be sure that there is no doubt as to why evidence is being offered. When a doubt arises, the party offering the evidence should be prepared to explain the reason for the offer. n14

[8] Relevance and Credibility

In determining whether evidence is relevant, the Trial Judge must keep in mind that the credibility of the evidence is a separate issue. For example, in *Ballou v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981)* , a wrongful death action arising from a two-car accident, the plaintiffs filed a motion *in limine* to exclude any evidence that the decedent was intoxicated while driving at the time of the accident. At the hearing the defendants proffered a blood test indicating that the decedent had a blood alcohol content of 0.24% at the time of his death. The plaintiffs sought to refute the test evidence by calling a Mrs. Eisenhower, who saw the decedent just before the accident. Mrs. Eisenhower stated that she had stood right next to the decedent, and that he had no alcohol on his breath. The Trial Judge excluded the blood tests

"because of the lack of credibility of the tests of alcoholism at the time of the wreck, especially in view of the testimony of Mrs. Eisenhower." The Court of Appeals held that the Trial Court abused its discretion in excluding the blood tests. The Court concluded that exclusion of evidence on relevance grounds is not permitted merely because "the judge does not find it credible." It reasoned as follows:

> Although we find the court's skepticism about the test results understandable in light of Mrs. Eisenhower's testimony, we cannot sanction the type of credibility choice made by the district court here... . Rather than discounting the probative value of the test results on the basis of its perception of the degree to which the evidence was worthy of belief, the district court should have determined the probative value of the test results *if true* ... leaving to the jury the difficult choice of whether to credit the evidence. [emphasis in original] n15

It should be noted, however, that the Trial Judge in *Ballou* might have properly excluded the blood tests on other grounds. It is true that the Trial Judge was in error by confusing relevance with credibility. However, evidence is not always admissible merely because it is relevant if believed by the jury. Other rules of evidence may operate to exclude otherwise probative evidence on the ground that it is *unreliable*. Thus, scientific evidence, such as a blood test, can be excluded under *Rule 702* or *Rule 403* if the Trial Judge has legitimate and substantial doubts as to its reliability.

[9] Conditional Relevancy

By its terms, *Rule 401* does not cover the concept of "conditional" relevancy. Evidence is conditionally relevant when its probative value depends upon the existence of another fact. For example, a statement may be probative that a party was aware of a dangerous condition -- but only if the party heard the statement. Under *Rule 104(b)*, the proponent of evidence that is conditionally relevant must provide enough evidence to support a finding of the conditional fact. Then the relevance of the evidence is considered under Rules 401-403. n16

[10] Remoteness

Occasionally, a Trial Judge will exclude evidence on the basis of remoteness, which is to say that the evidence is too far removed in space or time from the proposition that it is offered to prove. For example, assume a two-car accident where the defendant is trying to prove that the plaintiff was not wearing a seatbelt. If the defendant calls a witness who testifies that he saw the plaintiff driving without a seatbelt an hour before the accident, this testimony is undoubtedly relevant; it tends to prove that the plaintiff was not wearing a seatbelt an hour later. n17 On the other hand, if the witness testifies that he saw the plaintiff driving without a seatbelt two years before the accident, the Trial Court is likely to exclude the testimony as too remote. Or assume that the plaintiff must prove icy conditions at 2 a.m. on a road in Montana. Evidence that the road was icy at midnight tends to prove that it was icy two hours later. But evidence that it was icy two weeks before or after the pertinent time is probably too remote, as is evidence of an icy road 20 miles west.

When evidence is excluded as too remote, it is usually not because it fails to fit the definition of relevant evidence. The definition of relevance in *Rule 401* is permissive, to say the least, and the fact that the plaintiff was not wearing a seatbelt two years earlier has at least *some* tendency to prove that he was not wearing one at the time of the accident. n18 Exclusion on grounds of remoteness is better understood as an exercise of the Trial Court's discretion under *Rule 403*. That is, the probative value of the evidence is, while not nonexistent, at least minimal if there is a significant gap in time and/or space between the fact proffered and the event to be proved. Exclusion results because the minimal probative value of remote evidence is substantially outweighed by the confusion and delay that would result from introducing it. n19

[11] Examples of Relevant Evidence

No piece of evidence is relevant in itself. It must be evaluated in the light of the facts that are consequential to the action and in the light of logic and experience. Relevance is relative. So it is not surprising that most rulings on relevance are

case-specific. However, over time, certain fact situations have recurred and some generalizations are possible. Of course, even if a certain class of evidence is relevant in a certain type of case, the evidence in any particular case may be so prejudicial as to warrant exclusion under *Rule 403*. Also, counsel must remember *Rules 404*-412, under which classes of relevant evidence may be excluded because of policy considerations and other concerns. All that said, and with no intent to be comprehensive, the following generalizations on relevance can be made:

1. *Similar occurrences*. Evidence of similar incidents or accidents is often relevant on a number of issues, such as to show notice, causation, or defect in a personal injury case. The relevance of these occurrences depends of course on the degree of similarity and the purpose for which the evidence is offered. If offered to prove causation or defect, the occurrence must share "substantial" similarity with the event at issue in the case. n20 In contrast, if the occurrence is offered to prove notice, substantial similarity is not required; the occurrence need only have been of a type that would give notice to a reasonable person as to the condition in issue. n21 Obviously, even an identical occurrence is not relevant to prove notice if it occurs subsequent to the event in issue. n22

2. *Consciousness of a weak case*. Where a criminal defendant flees prosecution, or bribes a juror, or threatens a witness, or gives a false exculpatory story, this evidence is ordinarily held relevant to the defendant's consciousness of guilt. The inferences work as follows: A person who flees, changes his story, etc., is more likely to believe that he is guilty than a person who has not done any of these things; a person who believes he is guilty is more likely to be guilty than a person who does not; and a person who is guilty is more likely to be guilty of the crime charged than one who is not guilty of any crime. n23 Of course, evidence of consciousness of guilt is prejudicial to the defendant, and as such is subject to exclusion if the probative value of the evidence is diminished by a plausible alternative explanation for the defendant's conduct. n24 The Court must employ logic and experience in assessing whether a defendant's conduct is in fact flight or some other indication of consciousness of guilt. n25

Comparable issues of relevance arise in a civil context, where a party intentionally destroys or fails to preserve relevant evidence. Assuming a proper foundation -- that, for example, the party recognized the potential relevance of the evidence and wilfully destroyed or failed to preserve it -- this type of conduct is admissible to show consciousness of a weak case. n26

3. *Evidence of financial condition*. In criminal cases, evidence of a defendant's poor financial condition before the crime has often been found relevant where the crime charged involved possible financial gain. n27 Conversely, evidence of a sudden acquisition of wealth after the crime charged has been found relevant as tending to prove that the defendant committed the crime. n28

4. *Government, professional, and industry standards*. Government, professional, and industry standards and regulations are usually held relevant to prove customary practice or a standard of care. n29 They have also been found relevant to establish the defendant's knowledge or intent in a criminal case. n30

5. *Comparable sales to show the value of real property*. Where the fact of consequence is the value of property, evidence of recent sales of similarly situated property has been found relevant. n31 Of course, the greater the time differential, the less probative the sale is as to the current value of the subject property, and the more likely the sale will be excluded as a proper comparable under *Rule 403*. n32

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Amaya-Manzanares, 377 F.3d 39 (1st Cir. 2004)* (evidence that the defendant was illegally in the United States was relevant in prosecution for possession of false green card: "It is enough for relevance that unlawful entry increases the likelihood that Amaya did acquire the false green card on the black market and therefore knew it might be forged."); *United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988)* (evidence of child pornography found in the defendant's residence made it somewhat less likely that he ordered other child pornography by accident).

(n2)Footnote 2. See, e.g., *Douglass v. Eaton Corp., 956 F.2d 1339 (6th Cir. 1992)* (Trial Court ruling on whether evidence is relevant may not consider the sufficiency or weight of the evidence; even if the evidence is insufficient to prove the point for which it is offered, the Trial Court "may not exclude the evidence if it has even the slightest probative worth," unless some other Rule such as 403 warrants exclusion); *Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982)* ("Of course, evidence need not prove the proposition for which it is offered to be probative. *Rule 401* states that evidence is relevant if it makes the existence of any fact more probable or less probable than it would be without the evidence."). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* (*Rule 401* relevance standard is "a liberal one").

(n3)Footnote 3. *United States v. Foster, 986 F.2d 541 (D.C. Cir. 1993)* (relevancy means any tendency to make the existence of a fact of consequence more or less probable than without the proffered evidence; under *Rule 401*, there is no such thing as "highly relevant" or "marginally relevant" evidence-evidence is either relevant under *Rule 401* or it is not).

(n4)Footnote 4. See, e.g., *Phillips v. Western Co. of N. Am., 953 F.2d 923 (5th Cir. 1992)* (where substantive law prohibits a setoff for collateral benefits already received by an injury victim, evidence of such benefits has no relevance to the case and is inadmissible).

(n5)Footnote 5. See, e.g., *United States v. Amaya-Manzanares, 377 F.3d 39 (1st Cir. 2004)* (whether circumstantial evidence is actually relevant must be determined in light of "how the world works"; the Court noted that "[t]his is an issue not much discussed in the cases and not subject to very clear standards."); *United States v. Grier, 866 F.2d 908 (7th Cir. 1989)* (in a drug conspiracy case, evidence was presented of a note found in the apartment of Harper's codefendant; the note contained Harper's name and telephone number; this was probative of conspiracy between the codefendant and Harper, and admissible under Rules 401 and 402, because it tended "to make Harper's involvement in the conspiracy more probable than it would be without the evidence" even though the note would not be sufficient to convict; the note was circumstantial evidence that "Harper was participating in the conspiracy and aware of its magnitude"). See also *United States v. Anglin, 169 F.3d 154 (2d Cir. 1999)* (in an armed robbery case, evidence of the defendant's post-robbery cash expenditures was probative circumstantial evidence).

(n6)Footnote 6. See generally Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, *66 Cal. L. Rev. 1011 (1978)*. See also *Blinzler v. Marriott Int'l, 81 F.3d 1148 (1st Cir. 1996)* : "When a document relevant to a case is destroyed, the trier of fact sometimes may infer that the party who obliterated it did so out of a realization that the contents were unfavorable."

(n7)Footnote 7. See, e.g., *United States v. Russell, 919 F.2d 795 (1st Cir. 1990)* (circumstantial evidence is not some form of second-rate evidence, and in appropriate cases it may be given as much or more weight than direct evidence); *Madison v. Deseret Livestock Co., 574 F.2d 1027, 1036 (10th Cir. 1978)* ("inferences from circumstantial facts may frequently amount to full proof of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary").

(n8)Footnote 8. See *United States v. Donley, 878 F.2d 735 (3d Cir. 1989)* ("our standard of review for relevancy rulings is plenary"); *United States v. Torniero, 735 F.2d 725 (2d Cir. 1984)* (pure relevance question is a "question of law").

(n9)Footnote 9. *United States v. Laughlin, 772 F.2d 1382, 1392 (7th Cir. 1985)* . See also *Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983)* (question of relevancy is "committed to the discretion of the trial court"); *United States v. Dunn, 805 F.2d 1275, 1281 (6th Cir. 1986)* ("the trial court has broad discretion in determining the relevancy of evidence and in passing on its admissibility under *Rule 401*").

(n10)Footnote 10. See *United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987)* :

> When the same evidence has legitimate and forbidden uses, when the introduction is valuable yet

> dangerous, the district judge has great discretion. ... Trial judges have a comparative advantage because they alone see all the evidence in context, and the judicial system as a whole takes advantage of the division of labor.

(n11)Footnote 11. See, e.g., *United States v. Daly, 842 F.2d 1380, 1388 (2d Cir. 1988)* . In a racketeering trial against members of an organized crime family, the Trial Court allowed an FBI expert to testify to the nature and structure of the five New York crime families, including membership requirements, rules of conduct, and code of silence; this testimony was relevant background evidence to ultimate issues that were in dispute:

> [T]he trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment. Background evidence may be admitted to show, for example, the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed.

(n12)Footnote 12. See, e.g., *United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990)* (testimony concerning takeover of the local drug trade by Jamaicans was irrelevant, since it did not go to the disputed issue of whether the defendants were involved in drug transactions).

(n13)Footnote 13. See, e.g., *Garland v. Herrin, 724 F.2d 16 (2d Cir. 1983)* (evidence of parents' emotional distress over the murder of their daughter held irrelevant because "New York law does not permit a bystander to recover for psychic injury for harm inflicted on another").

(n14)Footnote 14. An example is *Daskarolis v. Firestone Tire & Rubber Co., 651 F.2d 937 (4th Cir. 1981)* . In this diversity product liability case, the Court declined to consider whether the Trial Judge erred in excluding a tire offered as demonstrative evidence on the ground that it was not necessary, when defense counsel did nothing to explain its importance.

(n15)Footnote 15. See also *United States v. Welsh, 774 F.2d 670, 672 (4th Cir. 1985)* ("The credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact it seeks to prove... . [T]he law does not consider credibility as a component to relevance.").

(n16)Footnote 16. See, e.g., *Blinzler v. Marriott Int'l, 81 F.3d 1148 (1st Cir. 1996)* (destruction by the defendant of a document relevant to litigation can give rise to a negative inference; however, "[b]efore such an inference may be drawn there must be a sufficient foundation showing that the party who destroyed the document had notice both of the potential claim and the document's potential relevance.").

(n17)Footnote 17. See *Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980)* (testimony concerning driver's reckless driving ten minutes before an accident was probative of whether he was engaged in reckless driving at the time of the accident).

(n18)Footnote 18. See, e.g., *United States v. Eagle, 133 F.3d 608 (8th Cir. 1998)* (in a child sexual assault case, medical evidence obtained by a doctor who examined the victim three months after the alleged assault was not so remote that it became irrelevant).

(n19)Footnote 19. See, e.g., *Broaddus v. Florida Power Corp., 145 F.3d 1283 (11th Cir. 1998)* (in an age discrimination action, the Court did not abuse its discretion in excluding a memorandum written by an executive of the defendant that mentioned that older workers are more expensive; the relevance of the memorandum was marginal because it was written four years before the plaintiff's termination; moreover, the jury could draw an improper inference from the evidence because the memorandum did not state that older workers should be terminated; therefore, the memorandum was properly excluded under *Rule 403*); *United States v. Ellzey, 936 F.2d 492 (10th Cir. 1991)* (evidence properly excluded under *Rule 403* due to the "remote and tenuous link" between the evidence and the charged crime).

(n20)Footnote 20. *Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000)* (in a product liability action against the manufacturer of a machine for removing road pavement, there was no abuse of discretion in admitting evidence of six other accidents involving similar machines; the conditions of the other accidents were substantially similar with respect to the claimed defect of lack of visibility); *Barker v. Deere & Co., 60 F.3d 158 (3d Cir. 1995)* (evidence of tractor accidents offered by the plaintiff constituted only "raw numbers and statistical extrapolations"; in the absence of any foundation of substantial similarity, the evidence was irrelevant to prove either a design defect or that a safer design was feasible). Evidence of lack of similar accidents is also relevant if the conditions are substantially similar. See, e.g., *Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996)* , where the Court held that "evidence of the absence of similar accidents or claims is admissible as long as the proponent provides adequate foundation." A proper foundation requires a showing that a substantially similar product was used in settings and circumstances sufficiently similar to those surrounding the accident in dispute, so that a jury can connect past experience with the disputed accident. The Court in *Pandit* found no abuse of discretion in the admission of evidence of absence of similar claims involving the same model of Honda Accord in which the plaintiff was injured.

(n21)Footnote 21. See, e.g., *Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992)* :

> Evidence proffered to illustrate the existence of a dangerous condition necessitates a high degree of similarity because it weighs directly on the ultimate issue to be decided by the jury. The requirement of substantial similarity is relaxed, however, when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect ... .

In this case, the plaintiffs offered evidence to prove a design defect and notice thereof and to refute the defendant's assertion that there was no mechanical failure; the Court found that the incidents, though not identical, were substantially similar and were admissible to indicate the existence of a defect; the incidents also met the relaxed requirement of similarity to prove notice, and therefore the Court found they were admissible for all purposes offered by the plaintiffs. See also *Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993)* (evidence of other accidents held inadmissible even for notice since there was no reasonable similarity to the facts at issue; the accidents involved different vehicle models or different years, and none involved the precise mechanical defect at issue in the litigation).

(n22)Footnote 22. See, e.g., *Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000)* (in a product liability action against the manufacturer of a machine for removing road pavement, evidence of four similar accidents was not admissible to prove notice because they occurred subsequent to the accident at issue).

(n23)Footnote 23. See, e.g., *United States v. Tracy, 989 F.2d 1279 (1st Cir. 1993)* (evidence of flight by a defendant is admissible as probative of a "guilty mind" if "there is an adequate factual predicate creating an inference of guilt of the crime charged"; a sufficient factual predicate was established in this case; the defendant was scheduled for trial but left the state and did not appear; independent evidence established his drug dealings); *United States v. Horton, 873 F.2d 180, 181 (8th Cir. 1989)* (no error in admitting the fact that the defendant gave a false name during his pretrial booking interview; "false identification is relevant and admissible to show consciousness of guilt").

(n24)Footnote 24. The Federal Judicial Center suggests the following instruction to be given when evidence of consciousness of guilt is admitted:

> [Name of witness] testified that, after the crime was supposed to have been committed, the defendant [brief description of behavior, such as flight]. If you believe that the defendant [same brief description], you should keep that in mind when deciding whether the government has proved beyond a reasonable doubt that he committed the crime. On the one hand, you may think that what he did at that time indicated that he knew he was guilty and was attempting to avoid punishment. On the other hand, it is sometimes true that an innocent person will [same brief description] in order to avoid being arrested and charged with a crime.

Federal Judicial Center Pattern Instruction 43 (1982).

(n25)Footnote 25. See, e.g., *United States v. Martinez, 190 F.3d 673 (5th Cir. 1999)* (in a narcotics prosecution, one defendant hid in a closet during a bust; this "flight" evidence was properly admitted and an instruction on flight was warranted; although hiding in a closet "may not be the standard method of escape, it can still constitute flight where, as in this case, the cornered defendant was attempting to elude capture.").

(n26)Footnote 26. See, e.g., *Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446 (4th Cir. 2004)* ("The spoliation of evidence rule allows the drawing of an adverse inference against a party whose intentional conduct causes no just the destruction of evidence ... but also against one who fails to preserve or produce evidence -- including the testimony of witnesses. But such an inference cannot be drawn merely from the negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction."). See also *Caparotta v. Entergy Corp., 168 F.3d 754 (5th Cir. 1999)* (inadvertent destruction of evidence is not relevant to prove consciousness of a weak case).

(n27)Footnote 27. See, e.g., *United States v. Contenti, 735 F.2d 628 (1st Cir. 1984)* (evidence of financial distress was relevant to provide motive for burning down a building to collect insurance proceeds).

(n28)Footnote 28. See, e.g., *United States v. Chagra, 669 F.2d 241 (5th Cir. 1982)* (in narcotics prosecution, evidence that the defendant bought two expensive homes was relevant proof of guilt).

(n29)Footnote 29. See, e.g., *Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993)* (in a product liability case, OSHA regulations requiring warnings to be placed on asbestos were admissible to show state of the art in the industry); *Brown v. Cedar Rapids & I.C. Ry., 650 F.2d 159, 163 (8th Cir. 1981)* (allowing admission of "advisory safety codes promulgated by governmental authority as showing an acceptable standard of care").

(n30)Footnote 30. See, e.g., *United States v. Head, 641 F.2d 174 (4th Cir. 1981)* (IRS manual on employee conduct was relevant to show that the type of conduct the defendant sought to influence was prohibited); *United States v. Klauber, 611 F.2d 512 (4th Cir. 1979)* (in conviction of lawyer for mail fraud and racketeering, the state Code of Professional Responsibility was relevant to the attitude that the defendant "as a member of the Bar, should have maintained toward practices that were proven").

(n31)Footnote 31. See, e.g., United States v. 179. *26 Acres, 644 F.2d 367, 371 (10th Cir. 1981)* ("The best evidence of market value of real property in condemnation is, of course, found in sales of comparable land within a reasonable time before the taking.").

(n32)Footnote 32. See, e.g., United States v. 33. *90 Acres of Land, 709 F.2d 1012 (5th Cir. 1983)* (where there was a time differential of seven or eight years between the proffered sales and the taking, the Trial Court did not err in excluding evidence of the sales).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 401 RULE 401

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401.03 Annotated Cases

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[1] Causation and Damages

Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033 (2d Cir. 1992) : After a jury verdict in an action over breach of a franchise agreement, the Trial Judge ruled that income projections made by the franchiser should not have been admitted in proof of the franchisee's damages because they predated the applicable limitations period. The Court reversed the judgment n.o.v., holding it was error to exclude the documents, as the statute of limitations only bars stale claims and is not a rule of evidence. A suggestion that evidence is too old goes to its relevance and to its weight, which is a matter for the jury.

Blancha v. Raymark Indus., 972 F.2d 507 (3d Cir. 1992) : The plaintiffs' theory in an asbestos case was that all asbestos could cause the decedent's mesothelioma; the defendant's expert indicated that asbestos products containing chrysotile did not cause mesothelioma. Reversing a judgment for the plaintiff, the Court held that the expert's testimony was relevant, given the theory advanced and the plaintiffs' burden of proof on proximate causation, and that the danger of confusion did not so clearly outweigh the probative value of the expert's testimony as to justify exclusion.

Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001) : The estate of a six-year-old sued for his wrongful death, incurred when the minivan in which he was riding was involved in an accident and he was thrown through the rear liftgate, which was allegedly defectively designed. Reversing a judgment for the plaintiff, the Court found no abuse of discretion in excluding evidence that the driver of the minivan was a cause of the accident, but held it was reversible error to exclude evidence that the decedent was not wearing a seatbelt. The driver's negligence was irrelevant because the plaintiff's claim was for defects making the minivan not crashworthy rather than ones causing the accident, and because the driver's contributory negligence would not be imputed to affect the claims for the decedent's pain and suffering. By contrast, the seatbelt evidence was relevant because the use or nonuse of a seatbelt tends to show whether a vehicle is crashworthy as a whole, since the liftgate and its latch were not the only mechanisms designed to secure an occupant inside the vehicle. In addition, the evidence was relevant to damages, since the decedent would have

sustained at most relatively minor injuries had he stayed inside the minivan. One Judge thought the seatbelt evidence relevant only on the damages issue.

Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994) : The Court held in a medical malpractice wrongful death action that evidence showing the decedent's ill health and intemperate lifestyle was relevant to the possible causes of his death and to the issue of damages. His intemperance might have resulted in a reduced life expectancy and, to the extent it included lustful sexual behavior and marital infidelity, was probative of the extent of the survivor's noneconomic loss.

United States v. Morris, 957 F.2d 1391 (7th Cir. 1992) : The Court held, in a prosecution for conspiring to defraud the United States arising out of the purchase of a nursing home at an inflated price, that evidence of a 1980 partnership buyback valuation was relevant to the 1984 value of the nursing home partnership.

O'Dell v. Hercules, Inc., 904 F.2d 1194 (8th Cir. 1990) : In the first phase of a bifurcated trial against a chemical manufacturer for environmental pollution, the Trial Judge excluded evidence of objective symptoms of injury, property marketability, and the plaintiffs' subjective fear resulting from the exposure. The Court found no error, since those facts were not relevant to the causation issues that were the sole focus of that phase of the trial.

Maryland Cas. Co. v. Knight, 96 F.3d 1284 (9th Cir. 1996) : In a declaratory judgment action by an insurer seeking determination of disputes arising out of a fire loss, the insured counterclaimed for emotional distress and tortious breach of contract, and introduced evidence that failure to resolve his claim had caused him to file for Chapter 11 bankruptcy protection to avoid foreclosure, which led to emotional distress. The Court held there was no abuse of discretion in admitting evidence of the insured's favorable settlement with the bank that had been threatening foreclosure, as the settlement tended to show that the bankruptcy filing was more a successful token in negotiating with the bank than a cause of emotional distress, and it tended to show that any delay by the insurer had not damaged the insured.

Haney v. Mizell Mem. Hosp., 744 F.2d 1467 (11th Cir. 1984) : Affirming a judgment for the defendants in a diversity medical malpractice case, the Court upheld the admission of evidence concerning the plaintiff's use of alcohol and drugs. The evidence was relevant to his ability to communicate with medical personnel following an accident and to his claim for damages.

[2] Civil Rights Cases

[a] Civil Rights Cases -- Irrelevant Evidence

Provost v. City of Newburgh, 262 F.3d 146 (2d Cir. 2001) : Affirming a judgment for an arrestee against the arresting officer and reversing a judgment against a supervisor, the Court found no abuse of discretion when the plaintiff was not permitted to testify regarding abuse of other detainees while he was incarcerated at the police station. The evidence was either irrelevant, since there was no showing that the individual defendants took part, or unduly prejudicial.

Blackburn v. United Parcel Serv., Inc., 179 F.3d 81 (3d Cir. 1999) : The plaintiff alleged that he had been discharged from UPS in violation of a state whistleblower statute; the defendant countered that he had violated the company's anti-nepotism policy. In support of his contention that the defense was pretextual, the plaintiff offered testimony that other UPS employees had informed him that certain named employees were related. Affirming summary

judgment for the defendant, the Court held that several of the statements were irrelevant, either because they referred to situations before UPS adopted its anti-nepotism policy or because there was no showing UPS was aware of the relationship.

Chestnut v. Hall, 284 F.3d 816 (7th Cir. 2002) : The Court affirmed a judgment for police officers sued by plaintiffs who alleged civil rights violations while protesting during a strike. It upheld an *in limine* ruling excluding evidence that a defense witness had been involved in a brawl while employed by the Indianapolis Police Department, on the ground that the evidence was irrelevant, especially given the witness' minor role in the case. In *Palmquist v. Selvik, 111 F.3d 1332 (7th Cir. 1997)* , the defendants, sued for using excessive force in making an arrest, argued that the plaintiff's decedent had a "death wish" and sought "suicide by police." The Court held there was no error in excluding evidence of the victim's "mental unraveling" in the six months before he died, as the issue in a case like this is the reasonableness of the police conduct and the only relevant evidence is the facts and circumstances known to the officers at the time of the incident. The Court noted that evidence of the victim's intoxication and marijuana possession a few hours before the incident might have been admissible, but its exclusion could be viewed as cumulative or as harmless error. The Court also concluded that the evidence of the victim's mental state could have been admissible during the damages phase of the trial, as it was directly relevant to his life expectancy, but the defendants did not preserve the argument. One Judge disagreed with the Circuit's narrow approach to the evidence relevant in excessive force cases (see *Sherrod v. Berry*, *infra*) especially as applied in cases like this. In *Hirsch v. Burke*, n1 the plaintiff claimed that the defendant police officer had falsely arrested her deceased husband for public intoxication when, in fact, he was a diabetic in a state of insulin shock. Affirming a judgment for the defendant, the Court held that post-arrest evidence of a blood-alcohol test, which showed no alcohol but substantial amounts of insulin in the decedent's blood, was irrelevant to prove the plaintiff's claim for false arrest. The Court reasoned that "the probable cause determination is made at the moment the arrest is made." In *Sherrod v. Berry*, n2 the Court *en banc* reversed a panel opinion and held it was error to admit evidence that the plaintiff was unarmed in a § 1983 action brought against police officers for use of excessive force. The Court said that the evidence was irrelevant to deciding whether the officer acted reasonably, which under the applicable law depended on the circumstances known to him at the time. The evidence was also irrelevant for impeachment and it tended to lead the jury to make its decision on an improper basis. Two Judges dissented on the ground that the evidence was relevant to how the decedent moved before he was attacked by the police officers. In *Lenard v. Argento*, n3 a civil rights action arising from the plaintiff's arrest at the scene of an auto accident, the Court held it was not error to exclude evidence that defendant police officers had been suspended thirty days following their guilty pleas to bribery charges, as the evidence was not probative of the defendant village's intent to condone misconduct.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) : Affirming a judgment for the defendants in an action by arrestees alleging excessive force by a police officer, the Court found no abuse of discretion in the exclusion of evidence regarding the police department's standard operating procedures. To the extent that the SOPs required an assessment of an officer's choice among various techniques for de-escalating confrontations, the evidence was irrelevant because the law requires only that an officer use reasonable, not optimal, force. Insofar as they restated the reasonableness standards governing excessive force claims, they were irrelevant because to the extent that "the SOP required precisely what the law required of him does not make it more or less likely that Officer Sholtis's use of force was reasonable." In addition, the Supreme Court has held that local police regulations cannot be used as a standard for evaluating the constitutionality of police conduct in the exclusionary rule context, and the same logic would apply equally to damage suits under § 1983. Finally, the Court held that even if the SOPs might be relevant to the plaintiffs' pendent state law claims, there was no abuse of discretion in excluding the evidence because of the risk that the jury would confuse violation of the administrative standards for a constitutional violation. In *Garcia-Martinez v. City & County of Denver, 392 F.3d 1187 (10th Cir. 2004)* , the Court affirmed a judgment for the defendants in a § 1983 action for excessive force, finding no abuse of discretion in the exclusion of evidence that the officers had been disciplined for careless handling of a firearm and for improperly approaching the vehicle during the arrest. The plaintiff failed to show

that the procedures at issue in the disciplinary proceeding involved excessive force as opposed to general weapon safety and officer efficiency.

[b] Civil Rights Cases -- Other Cases

Hobson v. Wilson, 556 F. Supp. 1157 (D.D.C. 1982) , modified on other grounds, 737 F.2d 1 (D.C. Cir. 1984) : In an action awarding damages for deprivation of *First Amendment* rights by police and FBI defendants, the Court concluded that the plaintiffs' FBI files were properly admitted as evidence so that the jury could fully understand the extent of the defendants' efforts to interfere with protected activities. The Court also concluded that a leaflet, anonymously authored by an FBI agent who was not a defendant, that purported to come from an antiwar protester was properly admitted, since there was credible evidence that such a document would not have been prepared without some review by various defendants.

Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) : A journalist was arrested after videotaping a local board meeting; when he retrieved his videotape, the video portion was erased, but the audio portion picked up after he was taken into custody. In a subsequent § 1983 action, the defendant officer objected that the after-the-fact recording necessarily lacked relevance. Noting that "relevancy typically presents a rather low barrier to admissibility," the Court found no abuse of discretion in admission of the tape after the Trial Judge determined that rational jurors might find that some of the statements referred back to what transpired at the time of the arrest

Davis v. Rodriguez, 364 F.3d 424 (2d Cir. 2004) : The Court reversed a judgment in a § 1983 excessive force action because the plaintiff had not been permitted to ask the defendant officer about the charge on which he initially decided to arrest the plaintiff. The question was directly relevant because the reasonableness of the force used was partly dependent on the crime in question, so it was an abuse of discretion to preclude that line of questioning.

Paschal v. Flagstar Bank, FSB, 295 F.3d 565 (6th Cir. 2002) : Affirming in part a Fair Housing Act case that held the defendant engaged in racially discriminatory mortgage lending, the Court found no abuse of discretion in the admission of evidence regarding matched-pair testing conducted by a local fair housing group. The defendant objected that the evidence was irrelevant to prove the charged discrimination because, *inter alia,* the testers did not fill out loan applications. The Court reasoned that the testers were given some of the same financial attributes as the plaintiffs, their experiences suggested that the defendant might treat African-American and white customers differently (at least during the preapplication stage), and while the testing was "inconclusive" on whether the defendant was less likely to grant a mortgage to an African-American, that did not mean the evidence was irrelevant, because it had a "tendency" to make the charged discrimination more likely.

[3] Consciousness of a Weak Case -- Civil Cases

[a] Destruction or Loss of Evidence

Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148 (1st Cir. 1996) : In a negligence action against a hotel for failing to summon aid promptly on behalf of a guest suffering a heart attack, the Court held there was no abuse of discretion in admitting evidence that the hotel had destroyed the relevant printout cataloging all outgoing calls thirty days after the incident. The defendant had knowledge all along that the report would be significant, which gave it ample reason to preserve the report, and when it nevertheless destroyed the report, the jury could reasonably infer that it did so because the report would harm its case.

Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446 (4th Cir. 2004) : The Court affirmed summary judgment for the defendant store in an action by a customer who was injured when a display of mirrors allegedly fell down on her. The plaintiff claimed that she was entitled to an adverse inference because the assistant manager who investigated the accident did not even try to obtain the account of an eyewitness or the witness' identification and contact information. The Court held, however, that while an adverse inference may be proper when a party has deliberately (though not necessarily in bad faith) destroyed or lost evidence in its possession, there is no authority requiring a party to investigate an accident and obtain evidence, at least in the absence of bad faith. In *Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1996)* , a civil rights action on behalf of a person shot by police officers during an armed standoff, the most hotly disputed point was whether the decedent was shot in the chest or in the back. The Court found no abuse of discretion in excluding evidence that a police officer destroyed the decedent's shirt a few days after the shooting, and that when the decedent's body was exhumed for a second autopsy, it was discovered that the bullet wound had been completely excised. The plaintiffs had made no showing that these acts were the result of a deliberate attempt to hide evidence. In *Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995)* , a suit against the manufacturer and seller of a boat that exploded, the Court affirmed judgments for the defendants, holding it was proper to instruct the jury that if they found that the plaintiff's expert caused the destruction or loss of relevant evidence (portions of the boat), they could assume that the evidence made unavailable would have been favorable to the defendants. The Court rejected the argument that a showing of bad faith is necessary to permit an adverse inference, but concluded that "[a]n adverse inference about a party's consciousness of the weakness of his case ... cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction." In *Albrecht v. Baltimore & O. R.R.*, n4 the Court reversed a judgment for an employee in a FELA case because of the erroneous admission of subsequent repair evidence, but it upheld admission of evidence that the railroad destroyed the ladder on which the plaintiff was standing at the time of the accident. The Court stated that "[w]e should not ... sanction the deliberate destruction of highly relevant evidence."

Park v. City of Chicago, 297 F.3d 606 (7th Cir. 2002) : Affirming a judgment for the City in a suit by a former police officer of Korean ancestry who alleged race and national origin discrimination, the Court held there was no error when the Trial Judge declined to give an adverse inference instruction to the jury because the City destroyed or lost documents. The Court noted that there must be evidence of bad faith to justify the giving of such an instruction, and the evidence presented did not require a finding of bad faith. In *S.C. Johnson & Son v. Louisville & N. R.R.*, n5 the Court affirmed a judgment for a rail carrier in an action by a manufacturer for damages to freight, noting that it is not proper to infer that the contents of evidence that a party has destroyed would have been unfavorable to that party unless the destruction was done in bad faith. In *Coates v. Johnson & Johnson*, n6 the Court affirmed a judgment for an employer in an employment discrimination action. It found that no presumption arose that files destroyed by a plant manager would have been unfavorable to the employer where the files were destroyed only after the manager consulted with the EEOC concerning files that must be maintained and the files were destroyed before litigation was foreseen.

Johnson v. Ready Mixed Concrete, Co., 424 F.3d 806 (8th Cir. 2005) : In a discrimination action, the defendant claimed that the former employee was discharged because of dishonesty after the defendant's truck was damaged by acid while the plaintiff was washing it. Affirming summary judgment for the defendant, the Court found no error in the refusal to draw a negative inference from the company's failure to produce pictures of the damage to the truck. Although there was some evidence that the company should have taken pictures and typically did take pictures of truck damage, there was no evidence that any pictures were ever taken in this case, so there was no evidence that the company intentionally destroyed evidence and no basis for a negative inference. Furthermore, the extent of damage was irrelevant, because the defendant was contending that the plaintiff was fired for dishonesty rather than for damaging the truck.

Kieffer v. Weston Land, Inc., 90 F.3d 1496 (10th Cir. 1996) : A few days after the plaintiff allegedly received an

electric shock from touching a defendant's vending machine, the machine was removed and stored at a dump on the defendant's property. By the time it was retrieved over a year later in preparation for the litigation, the electrical plug was missing. The Court held there was no error in permitting the jury to draw an adverse inference against the defendant in assessing the plaintiff's expert's opinion that the shock was caused by a defective plug.

[b] Consciousness of a Weak Case -- Civil Cases -- Other Evidence

Dykes v. Raymark Indus., 801 F.2d 810 (6th Cir. 1986) : In an asbestosis action, the Court held there was no error in admitting documents created by a defendant after the last possible date on which the plaintiff's deceased was exposed to asbestos. The documents were consistent with an attitude that the plaintiff claimed existed prior to the deceased's injury and supported a punitive damage award.

Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) : The Court held that evidence a witness had been threatened in a phone call was admissible, where only one party had a motive to frighten the witness.

[4] Consciousness of Guilt -- Criminal Cases

[a] Flight, Resisting Arrest

United States v. Tracy, 989 F.2d 1279 (1st Cir. 1993) : The Court held that evidence of flight by a defendant is admissible as probative of a "guilty mind" if "there is an adequate factual predicate creating an inference of guilt of the crime charged." A sufficient factual predicate was established in this case: the defendant was scheduled for trial but left the state and did not appear, and independent evidence established his drug dealings.

United States v. Cook, 580 F. Supp. 948 (N.D. W. Va. 1983) , *aff'd*, *782 F.2d 1037 (4th Cir. 1986)* : Rejecting a new trial motion, the Court held that a jury could consider a defendant's flight as evidence, when he knew he was a suspect in a bombing investigation and he fled in response to an officer's approach only three days after being questioned about involvement in the bombing.

United States v. Myers, 550 F.2d 1036 (5th Cir. 1977) : One ground for reversing the defendant's conviction for bank robbery was an erroneous instruction concerning flight. The Court said that the probative value of flight evidence depends upon the degree of confidence with which four inferences can be drawn: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." Because flight evidence is inherently unreliable and dangerous, an instruction regarding the inference to be drawn from flight "is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences." There must be actual evidence of flight, and the government must be able to show that the flight relates to the crime charged. "The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense."

United States v. Touchstone, 726 F.2d 1116 (6th Cir. 1984) : Affirming drug convictions, the Court held that the government was properly permitted to present evidence that the defendants fled after the trial commenced. The Court rejected the argument that flight almost three years after the crime charged was of very low probative value and stated that flight evidence "is generally admissible as evidence of guilt and that juries are given the power to determine 'how much weight should be given to such evidence.' "

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986) : The Court affirmed a conviction for attempted extortion, holding that evidence that the defendant moved to a different hotel in New York City and assumed another alias after a warrant was issued for his arrest was properly admitted to show consciousness of guilt.

United States v. Chipps, 410 F.3d 438 (8th Cir. 2005) : The Court affirmed a conviction for assault, finding no error in the admission of evidence that the defendant had fled from law enforcement. The Court reasoned that although flight evidence is often only marginally probative of guilt, in this case the defendant fled within days of being given a copy of the warrant for his arrest, did not turn himself in, could not be found for two years, and sped away from the police, and other circumstances supported the inference that his consciousness of guilt derived from actually having committed the charged assault. In *United States v. Eggleton*, n7 the Court affirmed a bank robbery conviction, holding that evidence that the defendant used false names and identification and fled after he learned that he was being sought in connection with the robbery was admissible to prove consciousness of guilt. In *United States v. Schepp*, n8 the Court affirmed convictions arising out of a car bombing, holding that evidence of the defendant's flight from the city after learning that the FBI had made inquiries about him was properly admitted.

United States v. Tille, 729 F.2d 615 (9th Cir. 1984) : The Court affirmed RICO convictions, upholding the admission of evidence that the defendant attempted to flee at the time of his arrest. Rejecting an argument that the evidence was not probative absent other evidence that the defendant was aware of the crime for which he was sought, the Court stated that "[t]he probative value of flight evidence depends on all of the circumstances and is a jury question" where "[t]he evidence was sufficient to permit an inference of knowledge of the crime at issue." In *United States v. Guerrero*, n9 the Court affirmed convictions for bank robbery and drug offenses, finding that evidence of an escape one day before the defendants were to be arraigned could be used to support an inference of consciousness of guilt.

United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986) : The Court affirmed extortion convictions, holding that evidence of a defendant's resisting arrest was admissible to demonstrate consciousness of guilt, even though the defendant was suspected of other crimes besides the one charged. Such evidence would be insufficient to prove guilt, however. See also *United States v. Beard* n10(permissible for marshal to testify that defendants switched shirts during trial break).

[b] Consciousness of Guilt -- Criminal Cases -- Other Evidence

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) : In a racketeering case involving procurement of Postal Service contracts, the Court held that a "script" prepared by one defendant for another person, in an effort to influence what he would say about the scheme, was evidence of consciousness of the defendants' role in the criminal scheme.

United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987) : The Court held that evidence that a lawyer-defendant removed files prior to a government search and that the government could not find them was properly admitted, since a jury could infer that the motive for such action by the defendant was something other than to protect client confidences.

United States v. Trala, 386 F.3d 536 (3d Cir. 2004) : At the time the defendant in a robbery case was arrested, his companion made conflicting false statements regarding her identity and the source of money in their car. The Court held it was error (but harmless) to admit the statements as evidence of the defendant's consciousness of guilt, since there was no proof that the defendant was standing at the time in a place where he could have heard the statements and corrected

misstatements. However, evidence that the companion provided the same false name for the defendant when questioned was properly admitted to prove his consciousness of guilt, as the jury could reasonably infer that the two agreed to lie about the defendant's true identity and that they did so to help him avoid apprehension.

United States v. Hall, 565 F.2d 1052 (8th Cir. 1977) : The Court held that evidence the defendant distorted handwriting exemplars was admissible to show consciousness of guilt.

People of Terr. of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985) : The Court held that a burglary defendant's offer to pay damages to the victim if charges were dropped was admissible, since "statements need not be incriminating to be admissions." It found the offer to be relevant to show consciousness of guilt. In *United States v. Miller*, n11 a prosecution for receipt of stolen goods, the Court upheld the introduction of photographs of a stolen trailer that showed alterations made after the theft. The photos supported an inference of knowledge that the property was stolen.

United States v. Nabors, 707 F.2d 1294 (11th Cir. 1983) : The Court found that evidence that a defendant, the named insured of an airplane, did not make a claim concerning the plane after it burned was admissible to show his involvement in a drug scheme in which the plane was used.

[c] Consciousness of Guilt -- Criminal Cases -- Threats, etc. to Witnesses

United States v. Pina, 844 F.2d 1 (1st Cir. 1988) : The Court noted that evidence that the defendant allegedly threatened a witness had no probative value, since the witness had completed giving testimony and could not be influenced by the threat. Although the evidence was inflammatory, the Court held that its admission was harmless error.

United States v. Guerrero, 803 F.2d 783 (3d Cir. 1986) : The Court affirmed drug convictions, holding that evidence that a defendant threatened an alleged coconspirator to discourage him from testifying was properly admitted with an immediate and appropriate limiting instruction. Although threat evidence may be admitted to prove consciousness of guilt, it can be extremely prejudicial, so the Judge should consider before admitting it "the importance and centrality to the ultimate issue in the case of the fact sought to be proved by the threat evidence, and the availability of other evidence to establish the fact sought to be proven by use of the threat evidence."

United States v. Marks, 816 F.2d 1207 (7th Cir. 1987) : The Court affirmed convictions for conspiring to distribute marijuana, holding that evidence that a defendant threatened a government witness during trial was admissible to prove consciousness of a weak case, notwithstanding the assertion that the threat might have represented righteous indignation against a perjurer.

United States v. Hammond, 781 F.2d 1536 (11th Cir. 1986) : In a prosecution of a pharmacist for illegally distributing controlled substances, the Court upheld the government's questioning of the defendant concerning various means, including offers of money, that he used to attempt to dissuade a witness from testifying. In *United States v. Griffin*, n12 the Court found reversible error in the admission of an agent's testimony that a conspirator had been served with a subpoena before he subsequently disappeared, when there was no charge that the defendant was responsible for the disappearance.

[5] Consciousness of Innocence

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) : The Court reversed a defendant's convictions in a political corruption case because evidence that he had denied knowledge of others' wrongdoing, at a time when admitting such knowledge would have secured him immunity, was erroneously excluded. This evidence of "consciousness of innocence" tended to preclude a finding that he had knowledge of the wrongdoing.

[6] Conspiracy Cases

United States v. Smith, 294 F.3d 473 (3d Cir. 2002) : Police officers were found guilty of conspiring to violate the civil rights of an arrestee who died while in custody. After the verdict, the Trial Judge entered an order of acquittal, reasoning among other things that any acts of concealment occurring after the victim's death could not be considered as relevant evidence of conspiracy. The Court reversed the order and reinstated the conspiracy convictions. It held that concerted efforts to conceal a crime are relevant evidence of a conspiracy to commit the crime, and so should not have been disregarded by the Judge in assessing the sufficiency of the evidence: "[I]t is intuitive that concerted actions to cover up the circumstances of Faison's death, taken just minutes after his death, have a tendency to suggest that the acts of brutality were undertaken as part of an agreement, as opposed to having been random, uncoordinated acts."

United States v. Duran, 407 F.3d 828 (7th Cir. 2005) : The defendant was convicted of crimes in connection with a drug trafficking conspiracy. On appeal he challenged the relevance of crimes committed by his brother, who was a cooperating witness, on the ground that while he knew of his brother's dealings, he did not intend to join in all of his individual activities, and that those crimes were his brother's drug dealing alone and not connected to the conspiracy with which the defendant was involved. Affirming, the Court noted that coconspirator liability is determined by the scope of the agreement among the conspirators, that it does not require knowledge of the specific acts performed, and that the record evidence supported the conclusion that the defendant not only knew of but also joined a very broad drug-dealing conspiracy that encompassed the brother's activities as presented to the jury.

[7] Criminal Cases -- Defense Evidence

United States v. Carriger, 592 F.2d 312 (6th Cir. 1979) : Reversing a conviction for income tax evasion, the Court held that certain promissory notes offered by the defendant to show his net worth were relevant and should have been admitted, even though no proof was offered of the underlying transactions.

United States v. Holmes, 413 F.3d 770 (8th Cir. 2005) : Reversing a conviction for felon firearm possession, the Court held that the defendant should have been permitted to offer testimony from three witnesses regarding the circumstances of his presence in the apartment where he was when the gun was found. The excluded testimony provided background and contextual information that would have been useful in assessing the relative credibility of the arresting officers' and the defendant's differing accounts. The Judge had excluded the testimony as irrelevant, but the threshold for relevance is "quite minimal," and this evidence satisfied that requirement because it made the defendant's explanation somewhat more plausible than it was without the evidence. In *United States v. Swink, 21 F.3d 852 (8th Cir. 1994)* , the Court reversed perjury convictions for, *inter alia*, excluding the testimony by the defendant's father. The father was a participant in the events and would have testified that the defendant did not fully understand the bond transactions he had entered into. The Trial Judge erred in concluding that the defendant knew his conduct was illegal, since that was a jury question and the father's testimony might have persuaded the jury that the defendant lacked criminal intent.

United States v. Thompson, 25 F.3d 1558 (11th Cir. 1994) : A defendant charged with firearms offenses presented a defense of entrapment by estoppel, alleging that he had been given an oral grant of immunity in exchange for

testimony in other cases. The Court held it was error to grant the government's motion *in limine* to exclude the evidence, even if the testimony regarding the alleged immunity agreement was not credible; if there were any basis to support the defendant's contention he had been told he could possess a firearm, the jury should have been permitted to hear the testimony and weigh it.

[8] Curative Admissibility

Nguyen v. Southwest Leasing & Rental, Inc., 282 F.3d 1061 (9th Cir. 2002) : In a personal injury action arising from the failure of a tire, the plaintiffs relied solely on a strict liability claim of manufacturing defect. Although they did not need to prove how the defect developed in order to sustain the claim, their expert testified (without objection) to several possible errors and deficiencies in the manufacturing process that could have been responsible. The plaintiffs' objections to defense evidence concerning quality control precautions in the manufacturing process were overruled, and the Court affirmed, finding no abuse of discretion in admitting the evidence under the doctrine of curative admissibility. The defense evidence went to rebut any false impression created by the irrelevant evidence from the plaintiff's expert.

Bearint v. Dorell Juvenile, 389 F.3d 1339 (11th Cir. 2004) : After an infant in a child safety seat was injured during a rear-end collision, a product liability action was brought against the seat's manufacturer on the ground that it was not crashworthy. Affirming a judgment for the defendant, the Court held there was no abuse of discretion in excluding an expert witness report proffered by the plaintiffs that detailed a crash test recreating the conditions of the accident using identical vehicles. The report was untimely and the defendant had not opened the door to its use by asking the expert whether he had recreated the accident conditions by crashing the vehicles together with a different model of child safety seat. The distinction was significant because the defendant asked its question in an effort to show that no child safety seat would have functioned properly in that accident, while the plaintiffs wished to use the report to support their calculations of the movements of the following vehicle and to bolster their version of what happened to the child safety seat after that collision. The jury would not have been misled by any implications from the defendant's question.

[9] Economic Testimony

Kearns v. Ford Motor Co., 726 F. Supp. 159 (E.D. Mich. 1989) : In an action for patent infringement, the Court ruled on a motion *in limine* that evidence of the manufacturer's markup over manufacturing costs was irrelevant in calculating the reasonable royalty that would be negotiated by willing parties in an arm's-length transaction, but that the manufacturer's manufacturing costs would be relevant to that damages computation.

Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362 (9th Cir. 1980) : In a suit for violating federal antitrust and state fair competition laws, the Court held that even though the relevant product market was "pork and pork products," evidence of sales of unrelated products was admissible to show that the defendant's total sales were profitable and that pork sales were generally more profitable than other sales. The evidence undercut the claim that pork products were sold below marginal cost.

[10] Employment Discrimination Cases

[a] Irrelevant Evidence

McDonald v. Piedmont Aviation, Inc., 930 F.2d 220 (2d Cir. 1991) : The Court held there was no error in excluding the defendant airline's evidence of a pilot's qualifications in his suit for violation of preferential hiring requirements. Because the airline did not have any of the information at the time it refused to hire the plaintiff, the

evidence was irrelevant.

Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995) : The Court held there was no abuse of discretion in excluding anecdotal testimony relating to the plaintiffs' pattern-or-practice claim in an age discrimination case. Because the witnesses had different supervisors and worked in different parts of the company, the testimony would simply have been evidence of sporadic and isolated occurrences rather than showing a standard operating procedure similar to that of which the plaintiffs complained. In an employment discrimination action, *Goff v. Continental Oil Co.*, n13 the Court upheld a ruling excluding evidence that the defendant had also discriminated against three other former employees. Since plaintiff alleged individual discrimination, the other acts were irrelevant. Without deciding whether a pattern or practice of discrimination could be proved to support a claim of individualized discrimination, the Court found that the three other claims of discrimination were too sporadic and isolated to establish any pattern or practice.

Turner v. Allstate Ins. Co., 902 F.2d 1208 (6th Cir. 1990) : In a former agent's action for wrongful discharge, the Court held that statistical evidence offered by the defendant insurance company as tending to prove its good faith or reasonableness was properly excluded when the plaintiff conceded good faith and disputed only that he had falsified documents. A dissenting Judge thought the statistical evidence that a particular discount was given the plaintiff's clients at a rate four times the statewide average was probative on whether he was shorting or defrauding his employer.

Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) : The Court reversed judgments for plaintiffs allegedly discharged because of national origin and age discrimination, holding that it was error to admit a videotaped speech by one of the defendant's executives that indicated age discrimination, as none of the plaintiffs was in the executive's group and he had no role in their discharge or in that of any other employee. In those circumstances, his comments had no probative value and, being prejudicial, were inadmissible.

Bradford v. Norfolk S. Corp., 54 F.3d 1412 (8th Cir. 1995) : In an age discrimination action by railroad clerks who alleged that they were constructively discharged by the defendant's moving their positions from St. Louis to Roanoke, Va., the Court held there was no abuse of discretion in excluding evidence of the plaintiffs' personal circumstances, as there was no showing that the defendant had any knowledge of the personal circumstances or that they were a factor in the decision to consolidate work and transfer employees. In *Lee v. Rapid City Area School Dist. No. 51-4, 981 F.2d 316 (8th Cir. 1992)* (en banc), an ADEA action by a teacher whose contract was not renewed, evidence that school administrators had received complaints about the plaintiff from students and parents was admitted but the Trial Judge refused, on grounds that the evidence was hearsay and the witnesses repeatedly volunteered nonresponsive statements, to allow testimony about the substance of the complaints unless they had been documented. The Court held, *inter alia*, that oral complaints were irrelevant because the defendant's agreement with its teachers limited what administrators were permitted to consider in evaluating teachers. Three Judges dissented from this point, on the ground that the ADEA is concerned with whether the defendant's decision was *in fact* based on oral complaints, not with whether such action might have violated the agreement; noncompliance with the agreement might have weakened the administrators' credibility as to their motivation, but it did not render that motive evidence irrelevant.

[b] Employment Discrimination Cases -- Miscellaneous Cases

Cummings v. Standard Register Co., 265 F.3d 56 (1st Cir. 2001) : In an age discrimination case brought by a discharged employee, the Court found no abuse of discretion in the admission of testimony by two other former employees of the company that they had been terminated after having been told they were "too old" and that the company need to make room for "young blood." Although the testimony covered different time periods, different supervisors, and different areas of the company from the plaintiff's situation, it was particularly relevant because the

defendant had introduced evidence of its national corporate practices of nondiscrimination.

Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997) : The Court affirmed a judgment for the defendant in a sexual harassment case, but it found that the Trial Judge excluded relevant evidence in ruling that sexual harassment of other women employees of the defendant would not be admitted unless the plaintiff had personal knowledge of the harassment. The Court reasoned that the issue of a hostile workplace involves the totality of the circumstances, including evidence of harassment directed at employees other than the plaintiff.

Glass v. Philadelphia Elec. Co., 34 F.3d 188 (3d Cir. 1994) : The Court reversed a judgment in an employment discrimination case because the defendant was permitted to offer evidence of the plaintiff's performance at one plant, but the plaintiff was not permitted to cross-examine the witnesses about the racially hostile work environment at that plant. The cross-examination was relevant to the question whether the defendant's reasons for its actions were pretextual.

Rutherford v. Harris County, Tex., 197 F.3d 173 (5th Cir. 1999) : In a deputy constable's Title VII action against her employer for failing to promote her on account of sex, the Court held there was no abuse of discretion in admitting evidence that her sergeant had asked the deputy to have sexual relations with him. The plaintiff had not made a sexual harassment claim, but the evidence was relevant to show her supervisor's discriminatory intent and to suggest a reason why, after she had rebuffed him, her work was more closely scrutinized and heavily criticized.

Jackson v. Quanex Corp., 191 F.3d 647 (6th Cir. 1999) : Reversing a judgment for the employer in a racial harassment case, the Court held that evidence of racial graffiti at the defendant's manufacturing plant and evidence of racially offensive conduct directed at African-American workers should have been admitted, whether or not the graffiti or conduct was directed at the plaintiff: "Comments that single out members of a protected class are relevant not only as to whether a particular work environment was objectively hostile to members of the protected class but also as to whether an employee belonging to the protected class subjectively felt harassed."

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) : In an action by an employee who claimed that she had been denied a promotion because of gender discrimination, the Court found no abuse of discretion in the admission of comments by the plaintiff's supervisor that the plaintiff was "just like a woman to say that" and "you're being a blonde again today." Although the comments were too trivial to constitute harassment and might have been made remote in time from the plaintiff's suit, it was the Judge's call whether they were so stale as to lack any probative value on the supervisor's discriminatory mindset. In *Bell v. Environmental Protection Agency, 232 F.3d 546 (7th Cir. 2000)* , EPA employees who had been denied promotions brought Title VII claims based on race and national origin discrimination. Reversing summary judgment for the defendant, the Court held that the plaintiffs' analysis of all promotions in the upper Midwest region of the EPA, rather than just the sixteen eligible applicants for the position used by the Judge, encompassed the appropriate labor market.

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) : In an employee's race discrimination action, the Court reversed a judgment for the defendant because a statistical report showing a correlation between race and promotion was erroneously excluded. Although the report failed to account for the relative qualifications of the applicant pool, it was not irrelevant in this case alleging a discriminatory pattern or practice; "[a] statistical study may fall short of proving the plaintiff's case, but still remain relevant to the issues in dispute." It was also an abuse of discretion to exclude on the ground of irrelevance a co-worker's testimony that the defendant's officials had made disparaging remarks about the ethnic group to which the plaintiff belonged, as such evidence was relevant to the defendant's prejudice and to whether

the proffered race-neutral reasons were pretextual. In a Title VII class action against a defendant for discrimination in laying off and not rehiring women employees, *EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994)* , the Court held that evidence of sexual harassment by supervisory employees was relevant to prove that the defendant intentionally discriminated.

[c] Employment Discrimination Cases -- Remedial Actions by Employer

Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) : Affirming a judgment for an African-American plaintiff who alleged racial harassment in the workplace, the Court found no error in the exclusion of evidence that the defendant took steps to remedy the discrimination after suit was filed. The Court noted that post-charge remediation may be relevant to whether punitive damages are necessary to "teach the defendant a lesson." However, the evidence proffered here that supervisors underwent anti-harassment training two months after the defendant filed suit would have done little, if anything, to undermine the uncontroverted evidence that none of the supervisors involved in the harassment was ever disciplined.

[d] Employment Discrimination Cases -- Statistical Evidence

Bell v. Environmental Protection Agency, 232 F.3d 546 (7th Cir. 2000) : EPA employees who had been denied promotions brought Title VII claims based on race and national origin discrimination. Reversing summary judgment for the defendant, the Court held it was error not to have considered expert evidence that there were statistically significant differences between native and foreign born applicants in receiving promotions and that there were differences, although not statistically significant, regarding promotion of African-Americans. Although statistics cannot be used as the primary means of establishing discrimination in disparate treatment situations, they can be used in conjunction with other evidence of disparate treatment to show whether the alleged disparity is the result of discrimination.

[e] Employment Discrimination Cases -- Time-Barred Conduct Evidence

Rivera-Torres v. Ortiz Velez, 341 F.3d 86 (1st Cir. 2003) : In an action alleging employment discrimination motivated by political animus, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when evidence was admitted regarding allegations that the Judge had dismissed before trial as time-barred. The evidence was relevant as background for the surviving claims that were being tried.

Taylor v. Western & S. Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992) : Affirming in part a judgment for the plaintiffs in a Title VII action, the Court held that prior acts of racial discrimination not included in the EEOC charge were nevertheless relevant to show the plaintiff's reasonableness in believing he had been compelled to resign.

Kline v. City of Kansas City, Mo., Fire Dep't, 175 F.3d 660 (8th Cir. 1999) : In an employment discrimination action brought by female employees of the Fire Department, the Court held it was error (but harmless) to exclude evidence of incidents predating the limitations period with respect to a plaintiff's hostile environment claim. The plaintiff's offered evidence of discriminatory acts and working conditions was sufficient to constitute a continuing violation that began prior to the limitations period; it should have been admitted as " 'relevant background,' ... at the very least."

[11] Examples of Relevant Circumstantial Evidence

[a] Civil Cases

DCPB, Inc. v. City of Lebanon, 957 F.2d 913 (1st Cir. 1992) : The City defended a breach of contract action on the ground that the plaintiff consultant's charges were exorbitant. The Court held that evidence tending to show that the City withheld payment not because of overcharging but for purposes unrelated to the reasonableness of the invoices was probative of the City's real motives and thus relevant.

Schiavone Constr. Co. v. County of Nassau, 717 F.2d 747 (2d Cir. 1983) : In an action by a construction company to recover the cost of repair work on a sewage pipeline, the Court held it was proper to admit specifications for backfill material that had been revised when the county attempted to lower the cost of the project. The Court found that the superseded specifications were relevant to the contractor's claim that the materials the county decided to use in later specifications were not suitable.

Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521 (5th Cir. 2000) : In a dispute regarding development of a federal oil and gas lease on the Outer Continental Shelf, the applicable law is that of the on-shore State. For those purposes, the State boundaries are extended to the outer margin of the Shelf, with the official lines to be determined and published by a presidential agency. To date, no such determination has been made, so the Court held that boundaries determined by other federal agencies are relevant, because they "make it more probable that if the President does ever 'project boundaries' those boundaries will be consistent with these other agency determinations."

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) : Although the Court reversed a judgment for a landlord in a suit by a tenant's visitor who sustained injuries in a fall from an exterior stairway, it found that a witness was properly permitted to testify that during one evening in the winter of 1979 she had heard two men arguing and had later seen one man lying on the ground near the spot where the plaintiff had fallen. Although she could not place the incident within a strict time frame or identify the fallen man, the Court concluded that the likelihood of two such occurrences happening in one winter was small enough that the evidence was relevant.

Allied Sys., Ltd. v. Teamsters Local 604, 304 F.3d 785 (8th Cir. 2002) : The union was sued for breach of a collective bargaining agreement, after it struck without notice. The Court found no abuse of discretion in admitting evidence that a steward had threatened to kill one of the employer's administrators, since evidence of the threats and the employee's resulting termination was probative of the true reason for the work stoppages and thus whether they were a breach of the agreement. In *Porchia v. Design Equip. Co., 113 F.3d 877 (8th Cir. 1997)* , an employee in a food processing plant brought a product liability action against the manufacturer of a meat tenderizing machine in which his arm was severed. Affirming a judgment for the defendant, the Court held there was no abuse of discretion in admitting evidence that the plaintiff's employer had been cited by OSHA after the accident, since the employer's liability for inadequate training and machinery controls tended to rebut the plaintiff's claim that the defendant's machine was the sole proximate cause of his injuries. In *MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274 (8th Cir. 1994)* , an action by a building owner for expenses in removing asbestos fireproofing, the defendant contended that there was no nonasbestos substitute available when the building was constructed in 1968. The plaintiff presented evidence that replacement with a particular substitute was technologically feasible in the early 1970s, but was not permitted to introduce the product's 1943 trademark because the trademark did not by itself show that the product would be an adequate substitute. The Court held that exclusion was an abuse of discretion, since the defendant was denying that a substitute even existed in 1968, not just that it was not feasible then.

Bearint v. Dorell Juvenile, 389 F.3d 1339 (11th Cir. 2004) : After an infant in a child safety seat was injured during a rear-end collision, a product liability action was brought against the seat's manufacturer on the ground that it was not crashworthy. Affirming a judgment for the defendant, the Court held there was no error in admitting evidence that the car's front seat contributed to the plaintiff's enhanced injuries. Although evidence of the initial conduct causing

the accident is irrelevant in a crashworthiness case (because the suit is not for the initial, but only the enhanced, injuries), here the evidence of the car seat's defect went only to the enhanced injuries, and the only way for the jury to determine the extent, if any, to which the child seat's manufacturer was liable for the enhanced injuries was to also determine the car manufacturer's role in enhancing the injuries.

[b] Examples of Relevant Circumstantial Evidence -- Criminal Cases

United States v. Russo, 104 F.3d 431 (D.C. Cir. 1997) : The defendant was convicted for perjury in telling a grand jury that he had been paid to clean a congressman's office, when in fact the money was paid over an eleven-year period to the defendant's wife for cleaning the congressman's home. Affirming, the Court held it was error (but harmless) to exclude evidence that the defendant's wife had a "penchant for cleaning" and had been observed doing so without charge over the years. Because the evidence was responsive to the prosecutor's expressed doubts that anyone would clean for free over a period of years because "she enjoys doing it," the evidence was not irrelevant.

United States v. Amaya-Manzanares, 377 F.3d 39 (1st Cir. 2004) : A defendant charged with use of a forged green card claimed that he did not know the card was a forgery. The Court reversed an *in limine* ruling that precluded the government from showing that the defendant entered the country illegally. The Court reasoned that an unlawful entrant who has not upgraded his status is more likely to have acquired the forged green card by buying it from someone who was obviously not a government agent authorized to issue it, because an unlawful entrant has a motive to buy a forged green card or because he would have been rebuffed if he had sought a green card from the INS, thus requiring resort to the black market. In a robbery conspiracy case, *United States v. LiCausi, 167 F.3d 36 (1st Cir. 1999)* , the Court held that evidence of a call made to one of the conspirators from a phone outside one of the stores robbed on the day prior to a robbery attempt was relevant circumstantial evidence that the conspirators had cased the store, decided to rob it, and did attempt to rob it. In *United States v. Fahey*, n14 the Court sustained mail and wire fraud convictions, finding that evidence of a television news show's report on the practices of a gold investment company was properly admitted. The company made changes in its sales presentations in response to the broadcast but failed to change the operation of the company. In *United States v. Contenti*, n15 the Court found that the loans made to a defendant before and after a fire were relevant to show his financial position and a motive to burn down his business in order to seek insurance proceeds.

United States v. Anglin, 169 F.3d 154 (2d Cir. 1999) : The Court affirmed an armed robbery conviction, holding that there was no abuse of discretion in admitting evidence of the defendant's post-robbery cash expenditures, as his sudden wealth was relevant to rebut a mistaken identity defense. In a loansharking prosecution, *United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995)* , the Court held that there was no abuse of discretion in excluding evidence of the victim's HIV infection and the defendant's knowledge of it. Although the evidence might have been relevant to whether the defendant would punch the victim in the face, that argument was not made until the parties had rested. In *United States v. Amuso*, n16 a prosecution of a mob boss for RICO and other offenses, the Court held there was no abuse of discretion in admitting evidence that a close associate's safe deposit box contained $200,000 in cash in a dog biscuit box. Together with testimony about the way the crime family's business was conducted and the modest incomes reported on the defendant's and his associate's tax returns, the evidence tended to make it more probable he was involved in illegal racketeering activities. In *United States v. Simmons*, n17 the Court affirmed RICO convictions arising out of a massive heroin distribution conspiracy, holding that evidence that the ringleader referred his attorney to other defendants and made benefactor payments to the attorney on their behalf was probative of a link among them. In *United States v. Diaz,* n18 the Court held that evidence of apparent cocaine-related events near a house on February 20 were relevant in a conspiracy prosecution charging cocaine transactions at that house on May 7 because, with other evidence, it had a tendency to make it more probable that the house was used on the latter date as a money "stash pad" for the charged cocaine operation.

United States v. Leftenant, 341 F.3d 338 (4th Cir. 2003) : The Court affirmed a conviction for possession of counterfeit bills, finding no abuse of discretion in the admission of Secret Service records that documented the passing of counterfeit bills bearing identical serial numbers to those confiscated from the defendant. The fact that the serial numbers on the defendant's bills were identical to those in the Secret Service records made it reasonable to conclude that they were from the same source and were of similar stock and quality, and thus tended to prove that the defendant possessed counterfeit bills of such quality that they could be mistaken for real currency, and were therefore "counterfeit" within the meaning of the statute. In *United States v. Russell, 971 F.2d 1098 (4th Cir. 1992)* , the Court affirmed a murder conviction in a case in which no body or murder weapon was ever found, and held the following evidence relevant to the government's theory that the murder had been committed in a storage shed and the body transported to Pennsylvania and disposed of in a mine shaft: testimony that the defendant had purchased a gun; a tape recording of test firings conducted at the shed; testimony that the defendant had discussed the best means for committing suicide; expert testimony about blood splatter from a point-blank shot behind the ear; and testimony about the defendant's familiarity with Pennsylvania mining regions.

United States v. Brackett, 113 F.3d 1396 (5th Cir. 1997) : The defendant had been charged with knowing possession of marijuana with intent to distribute after marijuana had been found in his truck. He conceded possession but denied knowledge and was acquitted. A subsequent investigation led to his being charged with conspiracy to possess marijuana with intent to distribute, with the incident for which he was acquitted being one of the acts of the conspiracy. The Trial Judge denied his motion to dismiss the indictment on double jeopardy grounds, but granted a suppression motion against evidence from the previously charged incident. The Court reversed the suppression motion, holding that the evidence was highly relevant to whether the defendant participated in the conspiracy, even though it had not been sufficient to prove his guilt of the substantive offense beyond a reasonable doubt.

United States v. Duranseau, 19 F.3d 1117 (6th Cir. 1994) : In a prosecution for making false statements in a financial affidavit supporting a request for court-appointed counsel, the government sought to prove that the defendant used false names in order to conceal income and real estate. The Court held that evidence found in the defendant's home, including the title of a book about getting new ID and disappearing, a note containing references to deceased parties, and a death certificate and automobile license documents containing names the defendant allegedly used was relevant to prove the defendant was using aliases.

United States v. Sweeney, 688 F.2d 1131 (7th Cir. 1982) : In a drug conspiracy case, the Court found that evidence of glassware apparently being used for innocent purposes was properly admitted because it could readily have been assembled into an apparatus for making drugs.

United States v. Westbrook, 896 F.2d 330 (8th Cir. 1990) : The Court held in a prosecution for offenses involving amphetamine that the identity of the substance sold or manufactured could be proven by circumstantial evidence, including the name by which members of the conspiracy referred to the substance.

United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) : The Court reversed a firearm conviction, holding it was error to exclude medical records of the defendant offered to show that he was receiving medical treatment for a bad back at the time of his arrest. These records might have cast doubt on police officers' testimony that they saw the defendant running with a gun in his hand.

United States v. Higgins, 282 F.3d 1261 (10th Cir. 2002) : Affirming convictions for methamphetamine offenses, the Court held that evidence that a defendant made three purchases of iodine from a chemical supply store was relevant

even if it did not dispositively show that the iodine found at the methamphetamine lab was his. The Court quoted with favor from the government's brief: "People who buy large quantities of precursor chemicals are more likely to manufacture methamphetamine than are persons who do not purchase large quantities of precursor chemical."

[12] Experts

United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975) : The defendant's conviction for offenses related to a burglary was reversed because "doodles" that he made during the trial were admitted into evidence for comparison with a photo of a "doodle" found at the scene of the crime. An FBI agent testified that there was insufficient time to make a comparison of the handwriting and that more experienced agents concluded that there were insufficient points of comparison to warrant a conclusion as to whether the same "doodler" did all of the drawings. The Court concluded (2-1) that without expert evidence to support the comparison, "the exhibits, as offered, were not possessed of probative value."

United States v. Onumonu, 967 F.2d 782 (2d Cir. 1992) : The defendant, charged with knowingly smuggling heroin from Nigeria in his alimentary canal, asserted he thought he was smuggling diamonds and offered an expert to testify to the feasibility and prevalence of smuggling diamonds in the same manner from Nigeria. The Court held it was error to exclude the testimony, as it was relevant to the defendant's subjective belief, did not fall under any of the *Rule 403* exceptions to admissibility, and would have been helpful to a New York jury unlikely to be familiar with diamond smuggling out of Nigeria and even less so about the feasibility of smuggling diamonds by swallowing condoms. In *United States v. Torniero*, n19 a prosecution for transportation of stolen goods, the government's motion to exclude expert testimony on compulsive gambling was granted. Affirming, the Court stated that "we do not believe that an hypothesis subscribed to by only a small number of professionals establishes that a proposed defense can carry the day on relevance." Assuming arguendo that compulsive gambling could be a mental disease or defect, the Court agreed that there was no demonstrable connection betweenwith this mental disease or defect and the offense charged in this case, so the proffered evidence was irrelevant. This result anticipated the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, that expert testimony could be excluded on relevance grounds if it did not connect with or "fit" the facts (see the Editorial Explanatory Comment to *Rule 702*, *§ 702.02[6]*).

Saldana v. Kmart Corp., 260 F.3d 228 (3d Cir. 2001) : The Court affirmed a summary judgment granted against the plaintiff in a slip-and-fall case, finding no abuse of discretion in the exclusion of testimony from a safety expert. The expert's conclusion that the defendant was negligent because it failed to follow OSHA regulations applied an incorrect legal standard and was therefore irrelevant. Her conclusion (offered on the issue of constructive notice) regarding the time it would take a bottle of wax to empty and cause a puddle like that in the case was based on tests of questionable accuracy and provided no assistance on the essential question when the spill commenced or concluded. In an asbestos case, *Blancha v. Raymark Indus., 972 F.2d 507 (3d Cir. 1992)* , the plaintiffs' theory was that all asbestos could cause the decedent's mesothelioma; the defendant's expert indicated that asbestos products containing chrysotile did not cause mesothelioma. Reversing a judgment for the plaintiff, the Court held that the expert's testimony was relevant, given the theory advanced and the plaintiffs' burden of proof on proximate causation, and that the danger of confusion did not so clearly outweigh the probative value of the expert's testimony as to justify exclusion.

United States v. Gillis, 773 F.2d 549 (4th Cir. 1985) : The Court affirmed a defendant's convictions for involvement with stolen property and held that expert testimony concerning pathological gambling was properly excluded where there was no causal connection between the condition and the offenses charged.

United States v. Dixon, 413 F.3d 520 (5th Cir. 2005) : In a prosecution for making a false statement to purchase a

firearm, the Court found no abuse of discretion in the exclusion of expert evidence, offered in support of a duress defense, concerning the psychological effects on the defendant of physical abuse by a boyfriend. The expert's testimony described the defendant's subjective perceptions, so it was not relevant to the issue at hand, whether those perceptions were "well-grounded" or objectively reasonable under the circumstances, and wholly conclusory assertions regarding that issue did not make the testimony admissible. In *United States v. Willis, 38 F.3d 170 (5th Cir. 1994)* , the Court held it was not an abuse of discretion to exclude expert evidence that the defendant suffered from battered woman syndrome, which was offered in support of her duress defense to a charge of carrying a firearm during a drug transaction. The syndrome evidence bears on the defendant's subjective susceptibility to coercion, so it is irrelevant to the duress defense, which employs an objective standard.

United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992) : A man was murdered as part of a scheme by his wife and others to defraud life insurance companies. The Court held that even though only fraud was charged, it was not an abuse of discretion to admit expert testimony regarding the brutal manner in which the victim was slain, since the evidence provided corroboration and enhanced the credibility of conspirators' out-of-court admissions. In *United States v. Davis,* n20 the Court upheld convictions for defrauding the government, finding no error in exclusion of expert testimony concerning the defendant's compulsive gambling that was offered to support an insanity defense. The witness had not shown that she was qualified to testify on the disputed issues, and there was no nexus shown between the gambling and the failure to refrain from stealing money.

United States v. Hernando Ospina, 798 F.2d 1570 (11th Cir. 1986) : Affirming convictions for various financial reporting requirement offenses growing out of a scheme to launder drug proceeds, the Court found that testimony by dog handlers that narcotic detector dogs reacted positively to the presence of narcotic residue on currency was relevant.

[13] Failure To Produce Evidence

Simon v. Commissioner, 830 F.2d 499 (3d Cir. 1987) : Affirming a Tax Court determination of deficiencies, the Court reasoned that it was permissible to infer from the failure of the taxpayers to adduce testimony from persons who were substantially involved in structuring financial transactions that their testimony would not have supported the taxpayer's claim that the transactions were engaged in to make a profit. In *Gumbs v. International Harvester, Inc.*, n21 the Court vacated a judgment for the plaintiff in a product liability action, noting that it would be improper to instruct the jury that it could draw an adverse inference from the defendant's failure to produce certain evidence. The Court recognized that "[t]he unexplained failure or refusal of a party ... to produce evidence that would tend to throw light on the issues authorizes, under certain circumstances, an inference or a presumption unfavorable to such party," but it found that there was no indication on the facts that the defendant either had the missing evidence or had wilfully destroyed it.

King v. Illinois Cent. R.R., 337 F.3d 550 (5th Cir. 2003) : In a personal injury action by a motorist who struck boxcars occupying a crossing at night, the plaintiff claimed that an adverse inference should be drawn against the railroad because it allegedly destroyed both a signal and maintenance records before trial. The Court held that federal rather than state law governed the evidentiary effect of spoliation in diversity actions, and that an adverse inference was not called for because there was no showing that the defendant had acted in bad faith. In *United States v. Wilson, 322 F.3d 353 (5th Cir. 2003)* , the Court reversed a conviction for money laundering because of insufficient evidence that the Justice Department's Office of International Affairs actually sent an official request for assistance to the Commonwealth of the Bahamas, thereby tolling the statute of limitations. The government had failed to call a single witness with personal knowledge of the purported official request, even though all three government employees involved were still in the government's employ at the time of the hearing, so the Judge should have drawn a "particularly strong" adverse inference against the government.

Tyler v. White, 811 F.2d 1204 (8th Cir. 1987) : Affirming a judgment for prison officers sued by inmates, the Court found it was error (but harmless) to rule that counsel for some defendants could ask the jury to infer from the plaintiffs' failure to call other defendants as witnesses that their testimony would have been unfavorable to the plaintiffs. Where, as in this case, a witness would likely be prejudiced against a party, no such inference is proper.

United States v. Tory, 52 F.3d 207 (9th Cir. 1995) : In a trial for armed bank robbery, the bank teller testified that the defendant had a gun stuffed in the waist of his pants, but the defendant argued that he was wearing sweatpants during the robbery, and thus he could not have been carrying a gun in his waistband since the gun would have fallen from his sweatpants as he ran from the bank. Reversing, the Court held, inter alia, that it was an abuse of discretion to prohibit defense counsel from arguing that the prosecution could have resolved the factual dispute by simply presenting the bank surveillance photos in its possession. The defense "should have been allowed to argue that the government's failure to produce relevant evidence within its control gives rise to an inference that the evidence would be unfavorable to it."

[14] Identity

United States v. Foster, 986 F.2d 541 (D.C. Cir. 1993) : The Court reversed a conviction for distributing crack cocaine because the defense had not been permitted to cross-examine officers about their ability to identify other persons they mentioned in connection with the transaction. The answers to the questions would have made it more or less probable that the officers had correctly identified the defendant, so relevancy objections should have been overruled. Under the Rules, evidence is either relevant or it is not; there is no such thing as "marginally relevant" evidence.

United States v. Ewings, 936 F.2d 903 (7th Cir. 1991) : Affirming the defendant's conviction for fraudulently procuring insurance policies on his niece's life, the Court held that evidence he engaged in a colorful spending spree with the insurance proceeds should not have been admitted on the issue of his intent or motive, but it was relevant to rebut his argument that insurance agents who took the applications had committed the fraud.

[15] Impeachment

[a] Impeachment -- Generally

United States v. Brown, 938 F.2d 1482 (1st Cir. 1991) : Affirming convictions for passing counterfeit notes, the Court held it was error, but harmless, to exclude evidence that State Court proceedings against a prosecution witness had been dropped the day after he testified, as the evidence clearly went to the issue of bias. In *United States v. Goguen*, n22 the Court held that evidence about the size of a fire was properly admitted in a prosecution for making a false statement to show that the defendant would have remembered whether he was in the vicinity of the fire.

United States v. Goldin, 311 F.3d 191 (3d Cir. 2002) : The Court affirmed convictions of protesters at a National Historic Park, finding no abuse of discretion when the defendants were not permitted to impeach the camera operator who videotaped the demonstration with questions about his membership in a group that had criticized the protesters in the past. Since the tape showed scenes of what actually happened during the discretion, any possible bias of the operator "would have been marginally relevant at best."

United States v. Benson, 941 F.2d 598 (7th Cir. 1991) , *amended*, *957 F.2d 301 (7th Cir. 1992)* : Reviewing a tax evasion conviction, the Court noted that a witness' statement advising jurors in criminal tax cases to vote not guilty regardless of the law was probative on whether the witness might not regard an oath as binding.

United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983) : Affirming convictions on drug charges, the Court found that a book concerning drugs was properly admitted to impeach a father's claim on direct examination that he had no inkling that his son (a defendant) knew about drug dealing, since the father had admitted reading or looking through the book and talking about it with his son.

Whiteley v. OKC Corp., 719 F.2d 1051 (10th Cir. 1983) : The Court affirmed a judgment for the plaintiff in a breach of warranty action for personal injuries from defective propane. The Court noted that as a general rule it is impermissible to admit evidence of a party's financial condition "unless necessary to determine the damages sustained," but it found that the defendant opened the door to testimony about its financial condition by eliciting testimony that was intended to show its impecunious condition.

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) : In a cocaine prosecution the defendant's wife testified that she had never witnessed any drug dealing on their property and that she had been home full time caring for children. When cross-examining the defendant, the prosecutor elicited testimony that the defendant had been charged with beating his wife, and then introduced six color photos taken of the wife shortly after the abuse. Reversing, the Court found that the evidence was irrelevant and unduly prejudicial. The evidence did not impeach the wife's testimony, because she had not testified about her relationship with her husband. The Court also found that cross-examination of the defendant concerning revocation of a handgun permit was irrelevant and reasoned that "the government could not bootstrap irrelevant evidence into the trial by using it to impeach the answers to irrelevant questions."

[b] Impeachment -- Rebuttal

United States v. Edwards, 388 F.3d 896 (D.C. Cir. 2004) : At a trial for felon firearm possession, the arresting officer testified that he apprehended the defendant after a chase that ended when the officer knocked a gun from the defendant's hand. Affirming, the Court found no abuse of discretion when the officer was permitted to testify on redirect examination that he had chased the defendant because the defendant ran from him, and people who had run from him in the past had been carrying guns or drugs. Although the redirect testimony would not have been relevant had it been offered on direct examination, it became relevant to rebut cross-examination that suggested the officer had given chase in order to harass the defendant after having been incensed by the defendant's vulgarity and profanity.

[16] Inconsistent Witnesses

United States v. Roman, 728 F.2d 846 (7th Cir. 1984) : The Court affirmed a conviction for conspiring to distribute LSD, rejecting an argument that it was error not to strike the testimony of two witnesses as being too inconsistent and confusing. The credibility of the witnesses was a question for the jury.

[17] Innocent Explanations

United States v. Martel, 792 F.2d 630 (7th Cir. 1986) : Affirming convictions of a defense contractor and two principal officers for conspiring to make false statements to the United States, the Court held that a letter from an employee of the contractor to one of the individual defendants was properly admitted even though its author testified and offered an innocent explanation for it. The Court observed that "a rule requiring a trial judge to accept as true a

witness' testimony would eviscerate the jury's historic function of assessing the credibility of witnesses."

[18] Intent, Knowledge, Motive, Plan

[a] Civil Cases

Williams v. Borough of West Chester, Pa., 891 F.2d 458 (3d Cir. 1989) : The Court affirmed a summary judgment for the defendants in a civil rights action brought on behalf of an arrestee who hanged himself in his cell, holding that an affidavit stating that the arrestee's suicidal tendencies were widely known in the police department would be admissible to contradict the defendant officers' denial of such knowledge, but it was insufficient to create a genuine issue of material fact.

Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc), *modifying 727 F.2d 506 (1984)* : In an action by a former shipyard worker against manufacturers of asbestos, the Court held that letters written to and by the defendants were relevant on the question whether these defendants knew or should have known of the dangers of asbestos. Although the letters referred to other groups of workers, not to shipyard workers, the Court reasoned that "[a] study indicating that exposure to asbestos fibers is likely to cause harm to one group of workers is at least suggestive of the fact that other groups of workers who are also exposed to asbestos fibers face similar dangers." In *Dartez v. Fibreboard Corp.*, n23 another worker's suit against asbestos manufacturers, the Court held that a physician, who had worked for one manufacturer, could testify as to scientific studies linking exposure to asbestos and disease and the extent of dissemination of these studies throughout the asbestos industry. It concluded that one manufacturer's knowledge was a proper basis for concluding that other manufacturers should have had similar knowledge. In *Aetna Cas. & Sur. Co. v. Guynes*, n24 an insurance company claimed arson by the insureds under a home fire insurance policy, and also that the insureds had misrepresented facts in seeking to recover on the policy. Affirming a judgment for the insureds, the Court held it was proper to exclude evidence that one of the insureds was allegedly involved in a conspiracy with a close relative to commit insurance fraud, since there was no evidence tying that fraud to an intent to commit arson.

Bilski v. Scientific Atlanta, 964 F.2d 697 (7th Cir. 1992) : The Court affirmed a judgment for the defendant in a product liability action for injuries suffered when the plaintiff slipped while cleaning snow and ice off a satellite dish, holding there was no abuse of discretion in excluding testimony by the plaintiff's witnesses about other falls from satellite dishes, as none had resulted in injuries reported to the defendant, so the testimony would have had little if any tendency to prove a risk foreseeable to the defendant.

Borden, Inc. v. Florida E. C. R. Co., 772 F.2d 750 (11th Cir. 1985) : The Court reversed a judgment for a railroad because evidence of a prior incident of vandalism, similar to the one that resulted in the accident giving rise to this case, was improperly excluded. The evidence was relevant to show that the railroad had reason to know of a problem with its equipment. Exclusion was especially damaging because the railroad had argued that no similar vandalism had occurred previously. In a personal injury action arising out of the discharge of an army revolver that had been dropped, *Johnson v. Colt Indus. Operating Corp.*, n25 the Court said that a judicial opinion in another case was admissible to prove the manufacturer's knowledge of similar accidents.

[b] Intent, Knowledge, Motive, Plan -- Criminal Cases

United States v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir. 1989) : In a prosecution of a credit union and its bookkeeper for failing to file currency transaction reports, the government offered evidence that the bookkeeper's

father was involved in a gambling operation as probative of her motive and intent in failing to file the reports. The Court held that the evidence was irrelevant because there was no evidence the bookkeeper knew of her father's gambling activities, and its admission was prejudicial error because she might have been convicted on guilt by association. In *United States v. Nichols*, n26 the Court affirmed convictions for conspiracy and theft of government property, holding that evidence offered by a defendant who was employed as a Customs officer that Customs may have "set him up" in retaliation for an investigation he had made was irrelevant. It observed that no entrapment defense was raised and no motion was made to dismiss the indictment on vindictive prosecution grounds. In *United States v. Goguen*, n27 a prosecution for knowingly making a false statement to a grand jury, the Court upheld the exclusion of recantation evidence. It found that a false statement prosecution, unlike a perjury prosecution, which requires proof of an intent to deceive, requires the government to prove only that the defendant knew he was making false statements. The Court reasoned that a later retraction may be excluded as tangential when the only question is knowledge at the time of the testimony.

United States v. Schultz, 333 F.3d 393 (2d Cir. 2003) : The defendant was convicted of conspiracy to receive stolen property in a scheme to import Egyptian antiquities. The prosecution introduced evidence that persons with whom the defendant had dealt, and the defendant's own employee, were aware that Egypt claimed ownership of all antiquities found after 1983. The Court found no abuse of discretion in admitting the evidence, as widespread awareness of the Egyptian claim was relevant to whether the defendant, who had long worked in the field, knew that Egypt owned the antiquities and thus knew they were stolen. In *United States v. Harwood, 998 F.2d 91 (2d Cir. 1993)* , the Court held it was error to permit DEA agents to testify that they learned from intelligence sources that the defendant had a large supply of LSD. This was inadmissible hearsay and it could not be offered as "background" to explain why the officers approached the defendant for an undercover buy, because the officers' motive in approaching the defendant were irrelevant to the case. In *United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990)* , the Court reversed a defendant's convictions in a political corruption case because evidence that he had denied knowledge of others' wrongdoing, at a time when admitting such knowledge would have secured him immunity, was erroneously excluded. This evidence of "consciousness of innocence" tended to preclude a finding that he had knowledge of the wrongdoing.

United States v. Copple, 24 F.3d 535 (3d Cir. 1994) : In a mail-fraud prosecution arising from a scheme to invest "pre-need" funds of funeral directors, the Court held that evidence of the extent of the victims' losses could be probative of the defendant's intent to convert the funds to his personal use. However, the victims' testimony about the personal tragedies they suffered was unfairly prejudicial (but the error in admitting that evidence was harmless).

United States v. Sanders, 404 F.3d 980 (6th Cir. 2005) : In a prosecution for felon firearm possession, there was evidence that the ammunition in a gun seized from the defendant had moved in interstate commerce but not that the gun itself had. Affirming, the Court held that burglary tools found in a backpack seized from the defendant's car at the time of his arrest were properly admitted as probative of his knowing possession of the ammunition, since the ammunition "could be considered a tool of the burglary trade and useful in protecting ill-gotten booty."

United States v. Ewings, 936 F.2d 903 (7th Cir. 1991) : Affirming the defendant's conviction for fraudulently procuring insurance policies on his niece's life, the Court held that evidence he engaged in a colorful spending spree with the insurance proceeds should not have been admitted on the issue of his intent or motive, but it was relevant to rebut the defendant's argument that insurance agents who took the applications had committed the fraud. In *United States v. Touloumis*, n28 the Court upheld the admission in an extortionate credit prosecution of a gun found on a person other than the defendant. One means of the defendant's collecting a debt was the threat of violence from this other person.

United States v. Yockel, 320 F.3d 818 (8th Cir. 2003) : The Court affirmed a bank robbery conviction, holding the defendant was not denied a fair opportunity to present a defense when evidence of his history of mental illness was excluded. Since intent is not an issue in bank robbery, a general intent crime, and the defendant had withdrawn an insanity defense, the evidence was irrelevant. In *United States v. Swink, 21 F.3d 852 (8th Cir. 1994)* , the Court reversed perjury convictions for, *inter alia*, excluding testimony by the defendant's father. The father was a participant in the events and would have testified that the defendant did not fully understand the bond transactions he had entered into. The Trial Judge erred in concluding that the defendant knew his conduct was illegal, since that was a jury question and the father's testimony might have persuaded the jury that the defendant lacked criminal intent. In *United States v. Eckmann,* n29 the Court reversed a conviction for receiving stolen merchandise, finding it was error to admit evidence showing that other prospective purchasers of the merchandise decided not to buy. This evidence was irrelevant to the appellant's intent and may have suggested to the jury that somehow he should be held to a standard of what others did rather than to a knowledge standard.

United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979) : The Court held it was error (but harmless) to admit evidence that a defendant charged with smuggling heroin in an auto had previously carried marijuana across the border in a backpack, since there was no logical basis to connect the two events. Unfortunately, the definition of relevance used by the Court was that it must be "more probable than not" that a person who has knowingly smuggled marijuana on his person will know of the presence of contraband concealed in a vehicle. This is the wrong test of relevance. The evidence would have been relevant if it had "any tendency" to make intent seem more likely than if there were no such evidence. Of course, a *Rule 403* balancing analysis still might have warranted exclusion, but the Court never reached the stage of balancing in this case.

United States v. Kelly, 888 F.2d 732 (11th Cir. 1989) : The Court reversed a criminal defense attorney's conviction for conspiring with clients to distribute cocaine on the ground, *inter alia*, that he should have been permitted to testify regarding his understanding of his professional obligations as an attorney, as that would have been relevant to the crucial issue of his state of mind regarding his dealings with his clients.

[19] Invocation of Privilege

[a] Nonparty Witness

[i] Civil Cases

Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) : The City brought an action against Brink's claiming that the company's employees stole parking meter revenues. Brink's filed a third-party claim for indemnification against 16 employees. In pretrial depositions the suspected employees invoked the privilege against self-incrimination in response to questions about whether they ever stole money or knew of employees who did. The Trial Judge held that the employees could be called to testify against Brink's at trial even though they might well invoke the privilege again, saying that invocation of the privilege was relevant both in the City's action against Brink's and in the company's action for indemnification. After finding that there is no constitutional bar against drawing adverse inferences in a civil case from a witness' invocation of the self-incrimination privilege, the majority in the Court agreed that the probative value of the adverse inference was not outweighed by the prejudicial effect of the evidence. One Judge dissented, arguing that "permitting the systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination ... allows juries to draw prejudicial inferences from leading questions put to witnesses, denies parties the right to cross-examine, and is an invitation to sharp practices."

RAD Servs. v. Aetna Cas. & Sur. Co., 808 F.2d 271 (3d Cir. 1986) : Affirming a judgment for an insurer in an

action by a company to recover costs incurred in disposing of hazardous waste, the Court held that a jury was properly permitted to infer from company agents' invocation during depositions of the self-incrimination privilege with respect to critical facts that their answers would have been adverse to the company. It reasoned that "[a]n employee's self-interest would counsel him to exculpate his employer, if possible." Although that was not equally true for past employees, the Court declined to hold invocations of the privilege to be *per se* inadmissible, since a witness bent on incriminating a former employer would likely offer damaging testimony rather than hope for an adverse inference, and an employer could stymie the discovery process by discharging employees potentially responsible for wrongdoing. In *Lionti v. Lloyd's Ins. Co.*, n30 an action on a fire insurance policy, the insurer alleged that the insured burned down the building. A former employee called by the insurer to rebut a suggestion that this employee actually might have been responsible for the burning invoked the *Fifth Amendment* when asked whether he was involved in the fire. The insurer subsequently produced an investigator to testify that an hour before testifying, the witness had said that he had nothing to do with the fire. Because the Trial Judge told the jury that the witness' invocation of the privilege had no evidentiary value, the Court concluded that the investigator's testimony could not properly have been used to impeach the witness. Thus, it was hearsay and should not have been admitted, although the error was harmless. The dissenting Judge disagreed with the majority's implicit holding that a nonparty witness' invocation of the privilege could have evidentiary value.

FDIC v. Fidelity & Deposit Co., 45 F.3d 969 (5th Cir. 1995) : Affirming a judgment for the FDIC against a surety on an employee fidelity bond, the Court rejected the insurer's claim that "inferences from the invocation of the *Fifth Amendment* are not allowed when a non-party asserts the privilege." The Court reasoned that a jury could determine that a witness who colluded with a lending officer invoked the *Fifth Amendment* to avoid disclosing the collusion. While recognizing the concern "that a non-party who stands in no special relationship to the party at the time of trial may purposefully invoke the privilege solely to discredit the party," the Court rejected any categorical rule of exclusion and said this concern must be evaluated on a case-by-case basis.

Mayer v. Angelica, 790 F.2d 1315 (7th Cir. 1986) : The Court reversed a judgment for the plaintiff in an action alleging racketeering and fraud in the sale of gemstones, holding that the assertion of the privilege at a deposition by a nonparty witness, a codefendant who had settled, could not be used to authenticate letters written by the codefendant. In *Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co.*, n31 the Court affirmed a judgment for a group insurance fund that had intervened in an action by an insurance company against a bank. The fund claimed a superior right to any recovery that the insurance company obtained. Since the insurance company failed to prove any malfeasance by the fund's trustees, it was unnecessary (although it otherwise would be possible) to draw an adverse inference against the fund from the fact that three trustees exercised their privilege against self-incrimination.

Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) : A charitable trust created by an insured's brother sued to recover the proceeds of life insurance policies after the insured was murdered; the defense was that the policies were obtained as part of a scheme to defraud the insurer. Affirming a judgment for the defendant, the Court held that the company was properly permitted to call the insured's brother to the stand and to question him, despite knowledge that he would invoke his privilege against self-incrimination. Since the brother had been a member of the charitable entity, there was some reason to believe that he retained loyalty to the entity at the time of trial, and there was some evidence that he might have resigned from the entity as a matter of litigation strategy, so the Court held that it was proper to call the brother and permit the jury to infer from his unwillingness to testify that he probably did the acts alleged against him. In *Rosebud Sioux Tribe v. A & P Steel, Inc.*, n32 a suit arising out of a contract to develop an irrigation system on the Tribe's land, the chairperson of a tribal subsidiary responsible for all land owned by the Tribe gave deposition testimony flatly contradicting the Tribe's complaint. The Tribe unsuccessfully objected to admission of the deposition, while the defendant successfully objected to the Tribe's calling the witness to the stand, since it was clear he would invoke his self-incrimination privilege. After entry of judgment for the defendant, the witness admitted before a federal grand jury that he had perjured himself during the deposition. This was enough,

the Court found, to warrant a new trial. The Court went on to say that the Tribe should have been allowed to call the witness to the stand despite his intention to invoke the privilege, reasoning that the Tribe could not cross-examine the witness and "[o]nce the deposition was allowed into evidence, it was necessary to allow the Tribe to call [the] witness in order to offset the unfair advantage A & P gained by being allowed to use the deposition."

[ii] Invocation of Privilege -- Nonparty Witness -- Criminal Cases

United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) : Affirming drug-related convictions, the Court found no abuse of discretion in precluding the defendants from calling an alleged coconspirator to have him invoke his privilege against self-incrimination in the presence of the jury. The Court reasoned that "[v]ery rarely will these rules [401 and 403] allow a party to argue inferences from a witness's privilege invocation," "due to the courtroom drama an invocation creates, the jury is likely to place far too much emphasis upon an ambiguous invocation," and therefore "absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege." In *United States v. Doddington, 822 F.2d 818 (8th Cir. 1987)* , the Court said that "a defendant does not have the right to call a witness to the stand simply to force invocation of the right against self-incrimination in the presence of a jury," since neither side may benefit from inferences drawn from assertion of the privilege. The entire testimony of a defense witness who refused to answer questions on cross-examination was held properly stricken.

United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986) : The Court affirmed a perjury conviction, finding no error in the exclusion of evidence that a government witness previously refused to testify before a grand jury on self-incrimination grounds, as the evidence lacked probative value. In *United States v. Hart,* n33 the Court affirmed firearms convictions, finding that the Trial Judge properly refused to permit the defendant to force a witness to assert his privilege against self-incrimination before the jury. Since the jury could draw no inference from the privilege claim, the Court found that the defendant had no right to have the jury hear the witness claim his privilege.

[b] Invocation of Privilege -- Party Witness

Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) : The City brought an action against Brink's claiming that the company's employees stole parking meter revenues. Brink's filed a third-party claim for indemnification against 16 employees. In pretrial depositions the suspected employees invoked the privilege against self-incrimination in response to questions about whether they ever stole money or knew of employees who did. The Trial Judge held that the employees could be called to testify against Brink's at trial even though they might well invoke the privilege again, saying that invocation of the privilege was relevant both in the City's action against Brink's and in the company's action for indemnification. After finding that there is no constitutional bar against drawing adverse inferences in a civil case from a witness' invocation of the self-incrimination privilege, the majority in the Court agreed that the probative value of the adverse inference was not outweighed by the prejudicial effect of the evidence. One Judge dissented, arguing that "permitting the systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination ... allows juries to draw prejudicial inferences from leading questions put to witnesses, denies parties the right to cross-examine, and is an invitation to sharp practices."

In re Tudor Assoc., Ltd., II, 20 F.3d 115 (4th Cir. 1994) : The Court held, in a bankruptcy proceeding to set aside a transfer of the debtor's property on grounds of fraud, that no inference could be drawn from the transferees' proper invocation of the attorney-client privilege to disqualify them as good-faith purchasers for value. In *Morley v. Cohen*, n34 a civil RICO action arising out of an allegedly fraudulent tax shelter, the Court held there had been no abuse of discretion in denying the defendant's motion *in limine* to restrict the scope of cross-examination if he should testify so that he would not have to assert his self-incrimination privilege before the jury regarding a pending criminal

investigation of another fraudulent scheme. Drawing an adverse inference from a claim of the privilege is permissible in a civil action.

Farace v. Independent Fire Ins. Co., 699 F.2d 204 (5th Cir. 1983) : Affirming judgments for a husband and wife in their suit to recover fire insurance proceeds, the Court held there was no error in excluding evidence, offered to impeach the husband, that he had asserted his privilege against self-incrimination in a fire marshal's investigation. The evidence had little probative value, especially since the defendant conceded that the husband cooperated fully in its investigation, and a jury might attach undue weight to the claim of privilege.

Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) : In a civil rights action arising from the plaintiff's arrest at the scene of an auto accident, the Court upheld a ruling barring any inquiry into whether the defendant police officers invoked their self-incrimination privilege during internal police and grand jury investigations.

Allstate Ins. Co. v. James, 845 F.2d 315 (11th Cir. 1988) : The Court reversed a judgment voiding a home insurance policy, concluding that evidence that the homeowners refused to answer questions during a criminal investigation of a fire should have been excluded. The homeowners had cooperated on two occasions and could have inferred that they were the subject of an investigation, so "[t]he fact that they chose to exercise their Constitutional rights as explained to them upon the advice of their attorney provides little probative evidence of their involvement" and was prejudicial, particularly because the fire marshal testified concerning the refusal to answer questions and the jury was unaware that the homeowners were exercising their constitutional rights upon advice of counsel.

[20] Irrelevant Evidence

[a] Civil Cases

[i] Civil Rights and Employment Cases

See annotations under "Civil Rights Cases -- Irrelevant Evidence," *§ 401.03[2][a]*, and "Employment Discrimination Cases -- Irrelevant Evidence," *§ 401.03[10][a]*.

[ii] Irrelevant Evidence -- Civil Cases -- Damages Issues

Shatkin v. McDonnell Douglas Corp., 727 F.2d 202 (2d Cir. 1984) : In a suit by the mother of an airline passenger killed in a crash, the Court held there was no error in excluding evidence of her financial needs and of the deceased's probable future income. The mother had offered virtually no evidence that the deceased would support her or of the amount of any support he would offer, and because she was only a secondary beneficiary under the deceased's will, she would have received nothing had his wife lived.

Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001) : The estate of a six-year-old sued for his wrongful death, incurred when the minivan in which he was riding was involved in an accident and he was thrown through the rear liftgate, which was allegedly defectively designed. Reversing a judgment for the plaintiff on other grounds, the Court found no abuse of discretion in excluding evidence that the driver of the minivan was a cause of the accident. The driver's negligence was irrelevant because the plaintiff's claim was for defects making the minivan not crashworthy rather than ones causing the accident, and because the driver's contributory negligence would not be imputed to affect the claims for the decedent's pain and suffering.

Phillips v. Western Co. of N. Am., 953 F.2d 923 (5th Cir. 1992) : In an oil rig worker's Jones Act case, the Court granted a new trial to determine whether disability and other payments he received following the accident were collateral benefits. Given the substantive rule under the Act denying a tortfeasor any reduction of its liability for payments from collateral sources, collateral benefits evidence would be irrelevant and should not be admitted. In *Pregeant v. Pan Am. World Airways,* n35 the Court held it was error (but harmless) to admit evidence of cockpit conversations that the passengers could not hear in an action seeking damages for preimpact fear on the part of passengers killed in a plane crash.

Van Bumble v. Wal-Mart Stores, Inc., 407 F.3d 823 (7th Cir. 2005) : A husband and wife moved for a new trial or additur in their slip-and-fall action after the jury found for the wife on her negligence claim, but determined she was 49% responsible, and found for Wal-Mart on the husband's loss of consortium claim. Affirming denial of the motions, the Court found no abuse of discretion in the exclusion of evidence of the plaintiffs' financial situation, including that they lacked medical insurance. Although they argued that the evidence was relevant to prove why the wife did not seek medical treatment for two years, the Court noted that Wal-Mart did not question why the wife did not seek treatment, so the evidence was irrelevant and would have been prejudicial on the damages issue.

[iii] Irrelevant Evidence -- Civil Cases -- Insurance Cases

American Home Assur. Co. v. Sunshine Supermarket, 753 F.2d 321 (3d Cir. 1985) : In an action on a fire insurance policy, the Trial Judge ruled *in limine* that evidence that the insured was not prosecuted for arson could be admitted if the company relied on opinions by local fire officials that the insured was responsible for the fire. Holding the ruling erroneous, the Court said that evidence of nonprosecution is not very probative, given the different standard of proof in civil and criminal cases and the discretion of a prosecutor not to bring charges. The nonprosecution evidence did not rebut the opinion testimony of fire officials and therefore should have been excluded.

Aetna Cas. & Sur. Co. v. Guynes, 713 F.2d 1187 (5th Cir. 1983) : The company claimed arson by the insureds under a home fire insurance policy, and also that the insureds had misrepresented facts in seeking to recover on the policy. Affirming a judgment for the insureds, the Court held it was proper to exclude evidence that one of the insureds was allegedly involved in a conspiracy with a close relative to commit insurance fraud, since there was no evidence tying that fraud to an intent to commit arson.

Kelly's Auto Parts, No. 1, Inc. v. Boughton, 809 F.2d 1247 (6th Cir. 1987) : In an action by insureds to recover on a fire insurance policy, the Court held that evidence that the insured's sole shareholder was not prosecuted for arson was properly excluded. The Court relied on cases that had reasoned as follows: a criminal prosecution might not be brought as a result of the exercise of prosecutorial discretion based upon factors not relevant to a civil suit, the decision not to prosecute was a type of opinion evidence that was not very helpful, and the burden of persuasion in a criminal prosecution is different from a civil suit. See also *Salamey v. Aetna Cas. & Sur. Co., 741 F.2d 874 (6th Cir. 1984)* (evidence that an insured's father changed ownership of his store a year after the insured's store burned down was irrelevant in a suit by the insured to recover on a fire insurance policy).

[iv] Irrelevant Evidence -- Civil Cases -- Liability for Accident, Defective Product, Malpractice, etc.

Connelly v. Hyundai Motor Co., 351 F.3d 535 (1st Cir. 2003) : Affirming a judgment for the plaintiff in an action arising from the death of a child when an airbag deployed in a collision, the Court found no abuse of discretion in the exclusion of evidence that the child's father, who was driving at the time of the accident, had twice been cited for driving his car without fastening the child's seatbelt. The evidence had no tendency to demonstrate that the father's use

of the car was in a manner unforeseeable to the defendant manufacturer. In a seaman's personal injury action, *Richards v. Relentless, Inc., 341 F.3d 35 (1st Cir. 2003)* , the Court affirmed a judgment for the defendant in a Jones Act case, finding no error in the exclusion of evidence from a physician who began seeing the plaintiff three years after the accident. The plaintiff argued that the physician's diagnosis contradicted that of a doctor who had seen him earlier and thus cast doubt on whether he had adequate medical advice when he signed a release. The Court held that in the absence of proof linking the witness' evidence to the adequacy of the medical advice the plaintiff was receiving at the time he signed the release, such as testimony that the then-treating physician erred by failing to make the diagnosis made by the later physician, the evidence was irrelevant.

Schneider v. Revici, 817 F.2d 987 (2d Cir. 1987) : The Court remanded a medical malpractice action for a trial on an assumption of risk defense. The Court identified several items of evidence introduced by the plaintiff that were of doubtful relevance, including a suspension of the defendant's license and a suspension of Medicaid payments to a drug treatment program he administered some twenty years earlier, but declined to disturb the jury's finding of malpractice. Admission of the evidence was harmless, since the jury was told that the license and the payments were reinstated.

Saldana v. Kmart Corp., 260 F.3d 228 (3d Cir. 2001) : The Court affirmed a summary judgment granted against the plaintiff in a slip-and-fall case, finding no abuse of discretion in the exclusion of testimony from a safety expert. The expert's conclusion that the defendant was negligent because it failed to follow OSHA regulations applied an incorrect legal standard and was therefore irrelevant. Her conclusion (offered on the issue of constructive notice) regarding the time it would take a bottle of wax to empty and cause a puddle like that in the case was based on tests of questionable accuracy and provided no assistance on the essential question when the spill commenced or concluded.

Jaurequi v. Carter Mfg. Co., 173 F.3d 1076 (8th Cir. 1999) : The Court held in a product liability case that there was no abuse of discretion in excluding testimony for the plaintiff by a mechanical engineer and a human factors engineer that the farm machinery at issue was unreasonably dangerous because the warnings on it were deficient in placement, design, orientation, and content. The evidence failed the reliability prong of *Daubert*, but an even more serious problem was its irrelevance. It was undisputed that the manufacturer's warnings had twice been painted over by other persons and there was substantial evidence that the plaintiff was fully aware of the danger that a warning would alert him to, so any inadequacies in the warnings could not be considered a cause in fact of his injuries. In *Campbell v. Vinjamuri, 19 F.3d 1274 (8th Cir. 1994)* , the Court affirmed a judgment against the plaintiff in a medical malpractice action, holding there was no abuse of discretion in excluding evidence that a defendant had failed the board-certifying examination in anesthesiology on several occasions, as his performance on a written or oral examination was not probative of his ability to meet the standard of care of properly positioning the plaintiff's head on the specific occasion.

Ahrens v. Ford Motor Co., 340 F.3d 1142 (10th Cir. 2003) : The plaintiff's decedent was killed when the tractor he was driving was hit by an unidentified motorist, throwing him to the ground, where the tractor ran over him. The plaintiff sued the tractor's manufacturer, alleging a defect because the tractor was not equipped with a rollover protection system, which includes a rollover bar and a seat belt, that is designed to protect the operator from rollover accidents and being thrown from the tractor. Affirming summary judgment for the defendant, the Court held that evidence regarding rollover accidents was irrelevant to whether the tractor was unreasonably dangerous because the case did not involve a rollover accident, so the evidence was properly excluded. In a medical malpractice action alleging improper diagnosis and treatment in a hospital emergency room, *Phillips v. Hillcrest Medical Center, 244 F.3d 790 (10th Cir. 2001)* , the Court found no abuse of discretion when the plaintiff's expert was not permitted to testify that prior drug use, which the patient failed to mention when providing his medical history, did not cause the infection from which he died. The Trial Judge had ruled that the cause of the infection was irrelevant to the negligence claim at issue, and the defendants offered no proof on the causation issue, so there was no need to offer the testimony.

[v] Irrelevant Evidence -- Civil Cases -- Other Cases

Fleet Nat'l Bank v. Anchor Media Television, Inc., 45 F.3d 546 (1st Cir. 1995) : After a new trial was granted in an interpleader action related to the sale of a television station, a witness who testified in the first trial was not permitted to testify in the second. The Court held there was no error, as the issues on which the witness had testified had been removed by judgment on them as a matter of law, so the testimony was irrelevant in the second trial.

Redman v. John D. Brush & Co., 111 F.3d 1174 (4th Cir. 1997) : Reversing a judgment against the manufacturer of a safe after it was burglarized and the plaintiff's coin collection was stolen, the Court held it was error to admit an advertisement describing a safe made by the defendant as "burglar deterrent." The advertisement appeared three years after the plaintiff bought his safe, it depicted a different model from the plaintiff's, and there was no showing that the ad, which had been placed by the dealer from whom the plaintiff bought the safe, had been authorized by the defendant.

Columbia Pictures TV, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186 (9th Cir. 2001) : The defendant continued to broadcast four television series after its license was revoked for nonpayment of fees. The defendant was found liable for copyright infringement and the case was submitted to a jury for determination of statutory damages. Affirming, the Court found no error in the exclusion of a witness' testimony, which was relevant only to questions of liability, not to the damages issues before the jury.

Magnivision, Inc. v. Bonneau Co., 115 F.3d 956 (Fed. Cir. 1997) : The Court reversed a judgment for the defendant in a patent infringement action, holding that a defense based on improper procedures by the patent examiner during prosecution of the patent had been resolved by a summary judgment in favor of the plaintiff, so evidence of the allegedly improper procedures was irrelevant and prejudicial when offered at trial.

[b] Irrelevant Evidence -- Criminal Cases

[i] Drug Cases

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) : A black American and two Jamaicans were jointly charged with drug offenses. The Court reversed their convictions, in part because a detective was permitted to testify to the *modus operandi* of Jamaican drug dealers and how the market "has been taken over basically by Jamaicans"; comments of the latter sort had no bearing on any issue in the trial and tended to link the charges to the defendants solely on the basis of the ancestry of two of them.

United States v. Spinosa, 982 F.2d 620 (1st Cir. 1992) : In a prosecution for cocaine distribution, the Court held it was an error (but harmless) to admit testimony by a detective that when he called three New York numbers on the defendant's telephone records, two connected to beepers and the third was disconnected. The calls were made six months after the transactions at issue and the detective had no information about who subscribed to the numbers at the earlier time when they were called from the defendant's phone; neither was there any evidence explaining the relevance to drug dealing that two of the numbers connected to beepers rather than to standard telephones.

United States v. Williams, 205 F.3d 23 (2d Cir. 2000) : The defendant was charged with traveling to Jamaica, buying drugs, and smuggling them into the United States. The Court found no error in the exclusion of evidence that the defendant had taken two previous trips to Jamaica and had not engaged in drug activity on those trips. The evidence was irrelevant, since a defendant "may not seek to establish his innocence through proof of the absence of criminal acts on

specific occasions," and there was no contention that the defendant had engaged in criminal activity on the two previous trips to rebut.

United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) : The Court reversed cocaine convictions because a government witness was permitted to testify that U.S. Customs had identified the defendant as a drug smuggler. The testimony was hearsay and could not be used to prove the state of mind of the witness, a DEA agent, since his state of mind was irrelevant. See also *United States v. Hall* n36(drug convictions reversed because testimony of a drug agent, offered to explain the absence of physical evidence, that it is not always possible to make a "controlled buy" in drug investigations added nothing to the government's case against the defendant).

United States v. Carter, 969 F.2d 197 (6th Cir. 1992) : The Court reversed a conviction for selling cocaine to FBI agents, holding it was error to admit evidence of the defendant's purchase of household items, his two bank loan applications, and his failure to file tax returns. As this prosecution did not involve either a continuing criminal enterprise or an allegation that the defendant lacked a legitimate source of income to support an affluent lifestyle, the evidence was irrelevant and extremely prejudicial.

United States v. Young, 20 F.3d 758 (7th Cir. 1994) : The Court affirmed a conviction for attempted possession of cocaine with intent to distribute, holding there was no error in an *in limine* ruling that precluded the defendant from introducing evidence that one of the people arrested along with him had been released and not criminally charged. Whether or not the other was charged would not make the facts relating to the defendant's knowledge and participation in the attempted purchase more or less probable. In *United States v. Mancillas*, n37 the Court affirmed drug convictions, noting that although testimony concerning an informant's tip to law enforcement agents was not hearsay (because the statement was offered for the purpose of explaining how the enforcement agents determined to make an investigation), the tip was irrelevant because it did not matter why law enforcement officers conducted an investigation. Admission of the evidence was harmless, however.

United States v. Moreno, 102 F.3d 994 (9th Cir. 1996) : The Court held in a prosecution for transporting cocaine base that evidence of the defendant's state of mind was irrelevant in the absence of evidence establishing a *prima facie* case of duress. In *United States v. Robertson, 15 F.3d 862 (9th Cir. 1994)* , *rev'd on other grounds*, *514 U.S. 669 (1995)* , *reinstated in pertinent part*, *73 F.3d 249 (1996)* the Court held it was error (but harmless) to admit evidence that a drug dealer who had been trying to collect a debt from the defendant was never seen again after a car similar to the defendant's was observed at the drug dealer's house. The evidence, as well as evidence of the defendant's drug use and spousal abuse, did not tend to prove any material element of the cocaine distribution and RICO offenses charged. In *United States v. Hernandez-Miranda,* n38 the Court held it was error (but harmless) to admit evidence that a defendant charged with smuggling heroin in an auto had previously carried marijuana across the border in a backpack, since there was no logical basis to connect the two events. Unfortunately, the definition of relevance used by the Court was that it must be "more probable than not" that a person who has knowingly smuggled marijuana on his person will know of the presence of contraband concealed in a vehicle. This is the wrong test of relevance. The evidence would have been relevant if it had "any tendency" to make intent seem more likely than if there were no such evidence. Of course, a *Rule 403* balancing analysis still might have warranted exclusion, but the Court never reached the stage of balancing in this case.

[ii] Irrelevant Evidence -- Criminal Cases -- Fraud and False Statement Cases

United States v. Newman, 49 F.3d 1 (1st Cir. 1995) : The Court affirmed a conviction for fraud in connection with the defendant's acquisition of an insurance company, holding there was no abuse of discretion in excluding

correspondence, offered as evidence of the defendant's state of mind, between the defendant and an investment firm. The correspondence was exchanged four months after the charged conduct, so it was not probative of the defendant's state of mind at the time in issue. In *United States v. Brandon, 17 F.3d 409 (1st Cir. 1994)* , the Court affirmed convictions for bank fraud arising out of a scheme to falsify down payments, holding there was no abuse of discretion in excluding defense evidence that 100% financing was common at the time, as a no-down-payment custom does not establish a fake down payment custom and it would have no relevance to whether the defendants knew of, or intended to violate, the bank's down payment requirement. In *United States v. Goguen*, n39 a prosecution for knowingly making a false statement to a grand jury, the Court upheld the exclusion of recantation evidence. It found that a false statement prosecution, unlike a perjury prosecution, which requires proof of an intent to deceive, requires the government to prove only that the defendant knew he was making false statements. The Court reasoned that a later retraction may be excluded as tangential when the only question is knowledge at the time of the testimony.

United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003) : Affirming a conviction for using a counterfeit visa, the Court held that the defendant had not been denied his constitutional right to present a defense when he was not permitted to present evidence related to his fear of religious persecution. The evidence was irrelevant because the only issue for the jury was whether the defendant actually knew his visa to be counterfeit. While the testimony might have been relevant to counter a "willful blindness" instruction or in support of a duress defense, neither of those theories was made an issue in the case.

United States v. Lane, 323 F.3d 568 (7th Cir. 2003) : The defendant was charged with making false statements in loan applications by not disclosing a large outstanding debt. The Court held there was no abuse of discretion in excluding evidence that the lenders did not rely on the defendant's financial condition and that the lenders suffered no losses, since the statute under which the defendant was charged (*18 U.S.C. § 1014*) excludes any element of materiality or loss. In *United States v. Catalfo, 64 F.3d 1070 (7th Cir. 1995)* , the Court affirmed a conviction for wire fraud in an options trading scheme, holding there was no error in excluding testimony that an accomplice was unstable and that the defendant's mother would have given him any money needed to cover any losses. Evidence of the accomplice's instability did not make it any less likely he would have had a coconspirator, and there was no indication the defrauded firm knew of or had any legal basis for relying on the mother's alleged willingness to provide collateral.

[iii] Irrelevant Evidence -- Criminal Cases -- Other Cases

United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975) : The defendant's conviction for offenses related to a burglary was reversed because "doodles" that he made during the trial were admitted into evidence for comparison with a photo of a "doodle" found at the scene of the crime. An FBI agent testified that there was insufficient time to make a comparison of the handwriting and that more experienced agents concluded that there were insufficient points of comparison to warrant a conclusion as to whether the same "doodler" did all of the drawings. The Court concluded (2-1) that without expert evidence to support the comparison, "the exhibits, as offered, were not possessed of probative value."

United States v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir. 1989) : In a prosecution of a credit union and its bookkeeper for failing to file currency transaction reports, the government offered evidence that the bookkeeper's father was involved in a gambling operation as probative of her motive and intent in failing to file the reports. The Court held that the evidence was irrelevant because there was no evidence the bookkeeper knew of her father's gambling activities, and its admission was prejudicial error because she might have been convicted on guilt by association. In *United States v. Nichols*, n40 the Court affirmed convictions for conspiracy and theft of government property, holding that evidence offered by a defendant who was employed as a Customs officer that Customs may have "set him up" in retaliation for an investigation he had made was irrelevant. It observed that no entrapment defense was raised and no

motion was made to dismiss the indictment on vindictive prosecution grounds.

United States v. Griffith, 284 F.3d 338 (2d Cir. 2002) : The Court affirmed convictions for sexually exploiting a minor, holding there was no error in restricting the cross-examination of the victim as to her relationships with men in general, her father in particular, her drug use, and her sexual history. The evidence was not relevant and the jury was presented with sufficient evidence to assess credibility. In *United States v. Bifield*, n41 the Court held that a defendant charged with escape could not claim the benefit of a duress defense, and upheld a ruling excluding testimony concerning duress. It rejected the defendant's constitutional claim that the exclusion of the evidence denied him the right to testify in his own behalf.

United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996) (en banc): In an assault prosecution arising out of a prison altercation, the defendants argued that they were acting in self-defense against other inmates, including one Davis. The Court held there was no abuse of discretion in excluding evidence that three days after the charged incident one of the defendants was assaulted by Davis' cousin, another inmate. There was no support for the defendant's theory that the later attack occurred because the first attempt had failed and no showing that Davis was associated with the later attack, so the evidence did not serve to illuminate the circumstances of the charged incident.

United States v. Ragsdale, 426 F.3d 765 (5th Cir. 2005) : The Court affirmed convictions for mailing obscene materials, finding no abuse of discretion when an attorney with experience trying obscenity cases in the locality was not permitted to testify about the verdicts in those cases. "Evidence of jury verdicts that declared comparable materials non-obscene does not assist the jury in determining whether the materials in question are obscene or non-obscene." In *United States v. Kang, 934 F.2d 621 (5th Cir. 1991)* , a prosecution for bribing an IRS agent, the defendant had stipulated to willful commission of the offense and asserted only an entrapment defense. The Court reversed his conviction, finding an abuse of discretion in admitting evidence of the defendant's flight. It was not relevant to show his predisposition or the manner of the government's investigation; thus, it was not only inadmissible under *Rule 403* balancing because of the risk of prejudice, but it was also inadmissible under *Rule 401* on relevancy grounds. In *United States v. Reeves, 892 F.2d 1223 (5th Cir. 1990)* , the Court affirmed convictions for extortion, holding there was no abuse of discretion in excluding evidence, offered on an entrapment defense, of a government witness' remote and unrelated contact with State officials, as it was not pertinent to the defendants' predisposition to commit the crimes charged.

United States v. Saadey, 393 F.3d 669 (6th Cir. 2005) : Affirming convictions for attempted extortion and filing false tax returns and credit applications, the Court found no error in the exclusion of evidence that an FBI investigator had a sexual relationship with the wife of a government witness and expressed his personal desire to obtain evidence against the defendant. The agent did not testify at trial or create any exhibits that were used as evidence, and thus his credibility was not relevant.

United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002) : Affirming a conviction of murder-for-hire in connection with drug trafficking, the Court held it was an abuse of discretion (but harmless error) to admit a letter purportedly authored by the defendant's wife and submitted at the sentencing hearing in the defendant's earlier drug trial. The letter was offered in support of the government's contention that the defendant's family sought to obstruct justice on numerous occasions. The Court found no relevance for the letter, since it was well established that the wife had not written it, the true author was never identified, there was no evidence that the defendant authorized or even knew of the letter when it was presented in the hearing, and there was no evidence that the wife used the letter to obstruct justice in this case. In *United States v. Bouye*, n42 the Court found no error in the exclusion of evidence in a bank robbery case that two witnesses would have identified the defendant as the man who robbed another bank, which

was impossible since the defendant was in custody at the time the other bank was robbed. See also *United States v. Hyman*. n43

United States v. Gianakos, 415 F.3d 912 (8th Cir. 2005) : In a trial for kidnapping with a death resulting, the defendant sought to introduce a tape recording of a conversation in which he told his mother that he had received a letter from another inmate who had met the defendant's wife during her incarceration, and the letter stated that the wife admitted that she lied about the defendant's involvement in the crime during her testimony in a state trial. The defendant argued in response to a hearsay objection that his elation about the letter came within the state of mind exception, but the Court held that his elation had no tendency to make any consequential fact more or less probable. In *United States v. Yockel, 320 F.3d 818 (8th Cir. 2003)* , the Court affirmed a bank robbery conviction, holding the defendant was not denied a fair opportunity to present a defense when evidence of his history of mental illness was excluded. Since intent is not an issue in bank robbery, a general intent crime, and the defendant had withdrawn an insanity defense, the evidence was irrelevant. In *United States v. Bear Ribs*, n44 the Court affirmed a conviction for assault with intent to commit rape, and upheld the exclusion of evidence that the victim, when intoxicated, routinely undressed and exposed herself. There was no evidence in this case that the defendant or any other witness saw the victim in a nude or semi-nude condition and the defendant denied seeing the victim at all. In *United States v. Eckmann*, n45 the Court reversed a conviction for receiving stolen merchandise, finding it was error to admit evidence showing that other prospective purchasers of the merchandise decided not to buy. This evidence was irrelevant to the defendant's intent and may have suggested to the jury that somehow he should be held to a standard of what others did rather than to a knowledge standard.

United States v. Springer, 51 F.3d 861 (9th Cir. 1995) : The defendant, a nuclear weapons protester charged with failing to surrender for service of a sentence, asserted an affirmative defense of uncontrollable circumstances. The Court held there was no abuse of discretion in excluding expert testimony on the state of nuclear weapons testing at the time. The evidence was irrelevant because the defendant's beliefs and his desire to protest were not proper grounds for an uncontrollable circumstances defense. In *United States v. Dean, 980 F.2d 1286 (9th Cir. 1992)* , the Court held that statements accusing the defendant of criminal activity, made to a police officer, were improperly admitted for the nonhearsay purpose of explaining why the officer went to the defendant's home to arrest him. The Court stated that the officer's reasons for going to the defendant's home "are not of consequence to the determination of the action, i.e., they do not bear on any issue involving the elements of the charged offense."

United States v. Markey, 393 F.3d 1132 (10th Cir. 2004) : The Court affirmed a conviction for being a felon in possession of explosives. It rejected the defendant's argument that it was error to exclude evidence that the defendant's dynamite could not actually explode. The Court found that the actual explosive capacity of the materials was irrelevant under *18 U.S.C. § 842(i)(1)*.

United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004) : The defendant was convicted for abusive sexual contact with a minor following an incident in which he rubbed a girl's thigh and allegedly masturbated while they were passengers on an airplane. Affirming, the Court found no abuse of discretion in the exclusion of testimony from a doctor at a psychiatric clinic who examined the defendant eleven days after the incident. The doctor would have testified that the defendant suffered from a bipolar disorder and made "bizarre movements" during his hospitalization, which the defense claimed would explain the touching and the alleged masturbation. The Court concluded that the evidence "fails the relevance test" and was properly excluded under *Rule 403*.

[21] Jones Act Cases

Shade v. Great Lakes Dredge & Dock Co., 154 F.3d 143 (3d Cir. 1998) : In a personal injury case brought under the Jones Act, the plaintiff sought to prove that he was employed as a seaman by introducing evidence of his previous employment as a seaman with other employers as well as with the defendant. Reversing, the Court found that the plaintiff was not entitled to invoke the "Fleet Seaman Doctrine," which permits a seaman to aggregate his contacts with multiple vessels, unless the contacts occurred with vessels owned or controlled by the same employer. Therefore, the evidence of employment with other companies was irrelevant. As to evidence of prior employment with the defendant, the Court held that seaman status had to be determined with each new job, so "evidence of an employee's prior assignment with the same employer is not admissible under the Fleet Seaman Doctrine if those assignments were not part of a continuous employment relationship between the employer and the employee."

[22] Real Evidence

United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004) : In a drug smuggling prosecution, the Court found no abuse of discretion when hand-held radios seized from a defendant's home were admitted, although there was no evidence that the radios were functional or that they were compatible either with each other or with radios seized from other codefendants. The presence of the radios, including the specific brand used in the conspiracy, made it more likely that the defendant was heard on the radio and had given them out as witnesses had testified. The evidence was relevant, and the compatibility issue went to its weight, not its admissibility.

[23] Relationship to Other Rules

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : Affirming convictions for robbery and firearms offenses, the Court found it was error (but harmless) to permit a detective to testify that he drove by the defendant's house on the night of the robbery because the defendant met the description of the robber given by eyewitnesses. The prosecution claimed that the testimony was not hearsay because it was offered to prove why the detective drove by the house, but the Court found that his motivation was irrelevant to any fact in dispute.

United States v. Harwood, 998 F.2d 91 (2d Cir. 1993) : The Court held it was error to permit DEA agents to testify that they learned from intelligence sources that the defendant had a large supply of LSD. This was inadmissible hearsay and it could not be offered as "background" to explain why the officers approached the defendant for an undercover buy, because the officers' motive in approaching the defendant was irrelevant to the case.

United States v. Gonzalez-Lira, 936 F.2d 184 (5th Cir. 1991) : At the trial of a defendant charged with smuggling marijuana into the United States in a tractor-trailer, the government introduced evidence that two years earlier a tractor-trailer owned by the defendant and driven by another man was stopped at the same border checkpoint and found to contain 2,000 pounds of marijuana. The Court held that even though the defendant was not charged in that incident, the evidence tended to show the thoroughness of the government's investigation, the defendant's awareness of means used to smuggle large quantities of marijuana, the defendant's awareness that his own rig had been used to smuggle marijuana, and the source of funds used to purchase the tractor involved in this case. The majority held that the evidence was not admissible under *Rule 404(b)*, but was properly admitted under Rules 402 and 403; the concurring Judge believed that the evidence was admissible under *Rule 404(b)* to show knowledge and absence of mistake. In *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, n46 an action for the unpaid price of cattle, the Court analyzed the relationship of *Rules 401*-403, which exclude irrelevant evidence totally and permit relevant evidence to be excluded, with *Rule 105*, which requires a limiting instruction upon request *after* it is decided that evidence is relevant and is to be admitted.

United States v. Fountain, 2 F.3d 656 (6th Cir. 1993) : The Court held that information regarding the defendant's criminal activity, offered not for its truth but rather to explain why the agents searched where they did, was improperly admitted because the "reason Agent Primak searched the back bedroom simply was not a matter of dispute and was not in issue in this case." In *Douglass v. Eaton Corp., 956 F.2d 1339 (6th Cir. 1992)* , an action by an employee who alleged she was discharged on racial grounds following an altercation, the Court found no error when evidence of discipline imposed on other employees for fighting was admitted, as the evidence met the threshold test of relevance and the other situations were not distinguishable in whether the employees had been aggressors or victims in the fights. The concurring Judge believed that the Trial Judge had erred in granting a new trial by treating the admissibility question under *Rule 104(a)* alone instead of as a conditional relevancy issue to be submitted to the jury under *Rule 104(b)*. In *United States v. Williams*, n47 evidence against the defendant, who was charged with attempted cocaine possession, included testimony that $3400 was confiscated from him when he was arrested, money the government claimed was to be used to make a cocaine purchase. The defendant offered testimony by an IRS employee that the defendant had stated that he owed $3300 in taxes and had expressed an intention to repay that amount if his mother sold a house and gave him the money. The defendant's statement to the witness qualified as a statement of a present intention to do a future act, a hearsay exception under *Rule 803(3)*, but the statement was not probative and was inadmissible absent evidence that the mother had sold the house and given him money. This is simply a question of conditional relevance, governed by *Rule 104(b)*.

United States v. Freeman, 816 F.2d 558 (10th Cir. 1987) : Affirming a conviction for dealing in counterfeit notes, the Court held that testimony concerning agents' discussions with an informant were not hearsay, since they were offered to show steps taken in the investigation rather than the truth of any statements that were made. The Court observed, however, that "out-of-court statements by informants offered to explain the background of an investigation, like all evidence, must be evaluated under the criteria in *Rule Rules 401* and *403* for relevance and to prevent confusion or prejudice on the part of the jury."

[24] Relevancy Distinguished From Sufficiency

United States v. Williams, 264 F.3d 561 (5th Cir. 2001) : The Court affirmed the conviction of a former city councilman for conspiracy to commit extortion and solicitation of bribes. It upheld the admission of a summary chart detailing telephone calls between the defendant and other alleged conspirators. The Court agreed with the defendant that *United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982)* , established that telephone records are insufficient evidence to support a conspiracy conviction unless the government can show who participated in the calls and the substance of their conversation, and that the government in this case could not prove who made the calls or their contents. The Court noted, however, that *Galvan* "did not hold that telephone records are inadmissible absent such a showing." It reasoned that, whether or not the government could prove who made the calls or their contents, "[e]vidence that telephone calls were made between phones owned by Defendant and other alleged conspirators, at times consistent with the events alleged to be part of the conspiracy, makes the existence of the conspiracy, and Defendant's participation in it, more likely."

[25] Remote Evidence

Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033 (2d Cir. 1992) : After a jury verdict in an action over breach of a franchise agreement, the Trial Judge ruled that income projections made by the franchiser should not have been admitted in proof of the franchisee's damages because they predated the applicable limitations period. The Court reversed the judgment n.o.v., holding it was error to exclude the documents, as the statute of limitations only bars stale claims and is not a rule of evidence. A suggestion that evidence is too old goes to its relevance and to its weight, which is a matter for the jury.

United States v. Morris, 957 F.2d 1391 (7th Cir. 1992) : The Court held, in a prosecution for conspiring to defraud the United States arising out of the purchase of a nursing home at an inflated price, that evidence of a 1980 partnership buyback valuation was relevant to the 1984 value of the nursing home partnership.

[26] Similar Circumstance Evidence

[a] Accident and Injury Cases

[i] Absence of Other Accidents

DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978) : Reversing on other grounds a judgment for plaintiffs who sued for an alleged airplane accident, the Court noted that the Trial Judge should not have excluded evidence that no other claims arose out of the same flight. The plaintiff's own injury, and other proof the plaintiff introduced of an injurious effect upon the passengers, tended to show that an accident had occurred; the defendant's "proffered proof of an absence of other claims tends to prove the absence of other injuries and is, therefore, comparably relevant."

Hines v. Joy Mfg. Co., 850 F.2d 1146 (6th Cir. 1988) : The Court held that evidence of the lack of prior claims against the manufacturer of a mobile bridge unit was admissible to prove the absence of notice of any design defect in the unit.

Bilski v. Scientific Atlanta, 964 F.2d 697 (7th Cir. 1992) : The Court affirmed a judgment for the defendant in a product liability action for injuries suffered when the plaintiff slipped while cleaning snow and ice off a satellite dish, holding there was no abuse of discretion in admitting the defendant's records of injuries involving its products, which showed no prior accidents of this sort.

Sturm v. Clark Equip. Co., 547 F. Supp. 144 (W.D. Mo. 1982) , *aff'd*, *732 F.2d 161 (8th Cir. 1984)* : Holding that evidence of the absence of prior accidents was admissible where it was limited to the same model of machine involved in the accident giving rise to the suit, the District Court denied the plaintiff's motion for a new trial following a jury verdict for the defendant in a product liability case.

Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996) : Affirming a judgment for an automobile manufacturer in a product liability case, the Court held that "evidence of the absence of similar accidents or claims is admissible as long as the proponent provides adequate foundation." That foundation requires a showing that a substantially similar product was used in settings and circumstances sufficiently similar to those surrounding the accident in dispute, so that a jury can connect past experience with the disputed accident. In this case there was no abuse of discretion in permitting the defendants, sued for defective design of an automobile warning light, to introduce evidence that there had been no other similar claims or accidents, as the evidence related to nearly 1.9 million automobiles using a warning light system of that design and there was no significant dissimilarity between the use of the car in the instant case and normal use of any other car with a system of the same design.

[ii] Similar Circumstance Evidence -- Accident and Injury Cases -- Miscellaneous Cases

Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989) : The Court noted that evidence of similar accidents postdating manufacture of the machine causing the plaintiff's injuries could show that the machine design was more dangerous than users contemplated. See also *Jackson v. Firestone Tire & Rubber Co.* n48(error to exclude evidence of

similar wheel rim accidents); *Ramos v. Liberty Mut. Ins. Co.* n49(error to exclude evidence of a prior, similar collapse of a mast of an offshore oil-drilling rig).

R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985) : In a suit for breach of warranty with respect to glass panels, the Court upheld the admission of evidence concerning other failures of similar panels.

Whiteley v. OKC Corp., 719 F.2d 1051 (10th Cir. 1983) : The Court affirmed a judgment for the plaintiff in a breach of warranty action for personal injuries from defective propane, finding no error in the admission of evidence of a subsequent accident at the defendant's yard, since the accident was consistent with testimony that the defendant had been delivering adulterated gas. In *Ponder v. Warren Tool Corp.*, n50 the Court observed that the decision whether to admit similar circumstance evidence of accidents depends on the theory urged in a case. It found no error in this case where the Trial Judge took a conservative approach and excluded evidence.

[iii] Similar Circumstance Evidence -- Accident and Injury Cases -- Relevance Beyond Showing Defect or Negligence

Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993) : In a suit by estates of helicopter crash victims against the manufacturer of an engine, the Court held that evidence of two other engine failures was properly admitted. The Court noted that other accidents need not have occurred in precisely the same manner to qualify as substantially similar, and the substantial similarity requirement is relaxed when unrelated incidents are offered for a purpose other than to prove that a product was unreasonably dangerous, e.g., to refute a suggestion that a helicopter part could not have been defective if made to a manufacturer's specifications.

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993) : The Court reversed (2-1) a judgment for the plaintiff, whose hand had been injured by an auger when he reached into a clean-out door on farm equipment manufactured by the defendant. Evidence of postsale accidents involving similar machines was admissible to prove defect, causation, and foreseeability of misuse, but in this case the evidence was impermissibly used on the issue of punitive damages.

Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a product liability action against the manufacturer of a machine for removing road pavement, holding there was no abuse of discretion in admitting evidence of six other accidents involving similar machines produced by the same manufacturer. Four of the incidents were incorrectly admitted on the issue of notice because they occurred subsequent to the accident at issue. However, all were relevant to the issue of defect; although some involved different models, all were sufficiently similar with respect to the claimed defect of lack of visibility. Furthermore, all were relevant to the issue of punitive damages, since they indicated the defendant had "rushed" to enter the market, without sufficiently conducting a "human factors" analysis.

[iv] Similar Circumstance Evidence -- Accident and Injury Cases -- Requirement of Similarity

Barker v. Deere & Co., 60 F.3d 158 (3d Cir. 1995) : The plaintiff was injured when a log that he was towing with his tractor got stuck in the ground, rose in the air, and flipped over in a "pole-vault type fashion," striking the plaintiff from behind and causing him to be ejected from the tractor cab and run over by the tractor. At trial, the plaintiff introduced evidence that tractor accidents accounted for thousands of deaths and injuries; that most of the fatalities were caused by rollover accidents; and that thirty percent of the fatalities occurred after the driver was ejected from the tractor cab. The Court found that the admission of this evidence was error requiring reversal of the judgment for the

plaintiff, as there was no foundation that the other accidents were "substantially similar" to his accident. The evidence, consisting only of "raw numbers and statistical extrapolations," was irrelevant to prove either a design defect or that a safer design was feasible. In *Seese v. Volkswagenwerk A.G.*, n51 the Court upheld the introduction of information gathered as part of the Fatal Accident Reporting System operated under the auspices of the National Highway Traffic and Safety Administration in a suit arising from a single-car "roll over" accident. Although the data did not reveal much information about the other accidents, the Court said that missing details went to the weight to be given the evidence, not to its admissibility.

Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993) : The Court held that evidence of other car accidents was inadmissible even for proving notice of a dangerous condition, since there was no reasonable similarity to the facts at issue. The other accidents involved different vehicle models or different years, and none involved the precise mechanical defect alleged in this case. In *McGonigal v. Gearhart Indus.*, n52 a personal injury suit against the manufacturer and assembler of a grenade that exploded prematurely, the Court held that evidence that another grenade manufactured by the defendant exploded prematurely was probative of the plaintiff's claim that the defendant was negligent in approving grenades with short fuses. The Court concluded, however, that it was error (but harmless) to admit evidence concerning explosions of grenades manufactured by others.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) : The Court affirmed a judgment for a manufacturer whose plane crashed. Although it recognized broad discretion on the part of the Trial Judge to rule on the admissibility of other accident evidence, it also recognized that because direct evidence of causation disappears in airplane crash cases, a plaintiff may have a special need for other accident evidence. The Court concluded there was an insufficient showing of substantial similarity between the crash involved in the instant case and another upon which the plaintiff relied, and that admission of the evidence would have forced the defendant to litigate two crashes instead of one.

Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988) : In a suit against the manufacturer of a floor buffer, the Court held that evidence of other lawsuits arising from accidents involving floor buffers made by other manufacturers was properly excluded in an action by a minor who was injured while using gasoline and a buffer to strip paint off a school floor. In *Hale v. Firestone Tire & Rubber Co.*, n53 a product liability action against manufacturers of a tire rim that separated and struck one of the plaintiffs as he attempted to inflate a truck tire, the Court found it was an abuse of discretion to admit evidence concerning defects in a type of Firestone tire that was not involved in the case. In *Held v. Mitsubishi Aircraft Int'l, Inc.*, n54 a suit arising out of an airplane crash, the Judge ruled that an FAA report of an investigation of one model of aircraft made by a manufacturer was admissible in an action involving a different model. Most documents produced in connection with the investigation related to the model in question, and the FAA evaluated all of the manufacturer's models.

Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988) : The Court held that it was not error to allow five witnesses, all of whom had lost limbs in past incidents, to testify as to their experiences with the defendant's defective machines, since their experiences were similar and tended to prove a defect. However, it was error to permit the plaintiff to question the manufacturer's expert about other accidents that had not been determined to involve similar circumstances.

[v] Similar Circumstance Evidence -- Accident and Injury Cases -- Toxic Exposures

Grenier v. Dow Chem. Co., 628 F. Supp. 1529 (D. Me. 1986) : In a product liability action against a herbicide manufacturer, the Court held that the plaintiff could introduce evidence that two of his six coworkers were suffering

from the same neurological disease, as long as the plaintiff could establish that the coworkers' exposure to the defendant's product and their medical condition were substantially similar to the plaintiff's.

[b] Similar Circumstance Evidence -- Civil Rights and Discrimination Cases

Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988) : The Court reversed a judgment for police officers in a civil rights case, holding that it was error to admit evidence of previous lawsuits brought by an arrestee and his wife against the City, when there was no evidence that the suits were fraudulent.

Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987) : In a civil rights action by a prison warden who sued following a five-day suspension without pay, the Court upheld the exclusion of evidence of disciplinary responses to actions by other employees.

Douglass v. Eaton Corp., 956 F.2d 1339 (6th Cir. 1992) : After a jury verdict for an employee who alleged she was discharged on racial grounds following an altercation, the Trial Judge ruled that evidence of discipline imposed on other employees for fighting had been improperly admitted. The Court reversed the grant of a new trial, holding that the evidence met the threshold test of relevance and it was error to find the other situations distinguishable based on an assessment of whether the employees had been aggressors or victims in the fights. In *Schrand v. Federal Pac. Elec. Co.*, n55 the Court reversed a judgment for the plaintiff in an age discrimination action, because of the admission of testimony of two other discharged employees about statements made to them concerning their age. Since the person who made the decision to terminate the plaintiff was not involved in the termination decisions regarding the other two employees, who worked in a different region and division from the plaintiff, the Court reasoned that the evidence was irrelevant and prejudicial.

Roy v. Austin Co., 194 F.3d 840 (7th Cir. 1999) : The plaintiff was fired after he obscenely insulted the lead player for his firm's most important client at a critical meeting. In the plaintiff's Title VII suit, the Trial Judge excluded evidence that four white employees of the defendant had been transferred rather than fired after disagreements with clients. The Court found no abuse of discretion, in light of the finding below that since the other employees had been disciplined by different supervisors and had not held the same position as the plaintiff, the evidence was "irrelevant and likely to confuse the jury." The Court also found no abuse of discretion in excluding, as irrelevant, evidence that all the executives at the defendant's headquarters in Cleveland were white, given that the plaintiff was neither an executive nor part of the Cleveland office.

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) : In an action alleging a hostile work environment and racially-based termination, the defendant argued that evidence of racist remarks, threatening actions directed at black employees, and other discriminatory treatment at the plant should not have been admitted because the plaintiff was not aware of the incidents. Affirming a judgment for the plaintiff, the Court held that, while the evidence was irrelevant to the hostile environment claim, it was admissible to support the credibility of the plaintiff's testimony about the environment he was exposed to, to provide evidence of the company's racial bias or retaliatory motivation in firing him, and to support an award of punitive damages.

Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408 (11th Cir. 1986) : The Court affirmed a judgment for an airline in an age discrimination suit by a former captain. It found no error in the admission of evidence concerning the medical condition of another former captain to show how age could affect a captain, and in the admission of a cockpit tape recording of an emergency aboard a flight to show the problems that might arise if a former captain served as a flight

engineer. The Court found it was error to bar the plaintiff from revealing the names of other major airlines who would have permitted a captain to serve as a flight engineer, but a majority held the error was harmless. A dissenting Judge argued that the condition of the other captain was not shown to be representative of pilots over the age of sixty and that the tape recording amounted to theatrics designed to inflame the jury. In *Murphy v. City of Flagler Beach*, n56 the Court granted a police officer, who claimed that he was fired in bad faith, a new trial because evidence that the police chief had engaged in and not criticized other officers for engaging in the same conduct used to justify the plaintiff's firing was erroneously excluded.

[c] Similar Circumstance Evidence -- Contract Cases

Cibro Petroleum Prods. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520 (N.D.N.Y. 1985) , *aff'd*, *798 F.2d 1421 (Temp. Emer. Ct. App. 1986)* : In a suit by a refining company against a supplier for alleged breach of a crude oil supply contract, the Court held that evidence of the supplier's contracts with other parties was admissible to assist in interpreting the contract with the plaintiff, and that this was true irrespective of a trade usage or course of performance analysis.

Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567 (6th Cir. 1999) : In a breach of contract action, the Court held that the defendant seller was properly permitted to adduce testimony from one of the plaintiff's owners concerning the contracts that he was familiar with between the defendant and the owner's former employer, since the evidence was relevant to show the plaintiff's knowledge of the defendant's standard terms and conditions.

SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188 (8th Cir. 1984) : The Court affirmed a judgment for a lessor who claimed breach of an agreement to use the lessor's barges to transport soybean meal, holding that the Trial Judge properly excluded evidence of earlier contracts between the parties. The lessee's obligation under the earlier contracts shed no light on the dispute in the instant case.

[d] Similar Circumstance Evidence -- Miscellaneous Cases

Marathon LeTourneau Co. v. NLRB, 699 F.2d 248 (5th Cir. 1983) : The Court enforced a Labor Board order based on a finding that an employer had engaged in unfair labor practices during an organizational campaign by discharging certain individuals. Although the Court noted that a summary prepared by the employer setting forth all discharges for a one-year period was admissible under *Rule 1006* if it was relevant, it concluded that the Administrative Law Judge properly rejected the summary because it lacked probative value. The company claimed that the employees were fired because of their attendance records, but the summary failed to quantify the absenteeism or tardiness for which other employees were discharged and neglected to show whether explanations were considered and past violations tolerated.

United States v. Hart, 70 F.3d 854 (6th Cir. 1995) : The Court affirmed a former police chief's conviction for fraud in administering a secret fund, holding there was no abuse of discretion in excluding evidence that an accomplice had "conned" the FBI and the IRS in an unrelated criminal matter. The circumstances when the accomplice had misled agents investigating fraud charges against him were too different to have probative value on whether the accomplice had, in the course of a business relationship, misled the defendant regarding use of the secret fund for legitimate law enforcement purposes. In *Finch v. Monumental Life Ins. Co.*, n57 the Court affirmed a judgment holding an insurer liable on a life insurance policy, ruling that testimony of another insured as to nonreceipt of a premium notice for the same month as that in which the plaintiff's deceased failed to make a payment was relevant and admissible.

Agristor Leasing v. Meuli, 865 F.2d 1150 (10th Cir. 1988) : The Court held there was no error in excluding evidence pertaining to litigation over performance and marketing of a manufacturer's silos more than twenty years earlier, given the danger of confusing the jury with respect to differences between the older and newer experiences with silos.

[27] Standard of Care

Rolick v. Collins Pine Co., 975 F.2d 1009 (3d Cir. 1992) : In a diversity negligence action by a logger, the Court held it was error to exclude evidence of OSHA regulations as evidence of the defendant's standard of care, even though the OSHA law did not govern the relationship between the plaintiff and the defendant. Although the language of the OSHA standard was presented to the jury through evidence of an identical industry standard, the difference from a nationwide legal standard in the "quality" of the proof meant the error was not harmless. In *Josephs v. Harris Corp.*, n58 the Court, applying state law in a product liability case, held it was error to exclude evidence of standards or text materials used by an expert to support a conclusion that a product was defective. State law made the time of sale, not the time of manufacture, critical, so it was error to limit the evidence to material in existence at the time of manufacture. In *Seese v. Volkswagenwerk A.G.*, n59 the Court approved the admission of a Federal Motor Vehicle Safety Standard which was not binding on the vehicle involved in the single-car "roll over" accident, but which was offered as evidence of what was reasonably necessary to make a window resistant to a "pop-out" crash.

Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993) : In a product liability case, the defendant introduced OSHA regulations requiring warnings to be placed on asbestos, to prove that it had issued even stronger warnings before being required to make any warnings under OSHA regulation. The Court found that the regulations were properly admitted as state-of-the-art evidence, even though they were promulgated many years after the plaintiff's exposure to asbestos. The Court stated that "state-of-the-art evidence, because it often is scientific in nature and results from a cumulative review of a field over time, should not be applied retroactively to *discredit* conduct at a given time prior to the culmination of the relevant research." But there was no such concern in this case because the defendant "was using subsequent findings and standards to *credit* prior conduct."

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) : The Court overturned a judgment n.o.v. for the defendant in a personal injury action against the manufacturer of a crawler tractor. The Court declined to decide whether OSHA standards should have been admitted to establish a standard of care where the standards were directed at employers and the defendant was a manufacturer, but it did hold that standards of the American National Standards Institute were admissible. In *Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993)* , the Court held that cautionary letters sent to Ford by the National Highway Traffic Safety Administration were properly excluded, since the letters were merely preliminary inquiries that did not result in action against Ford, and they concerned vehicle models different from that involved in the litigation.

Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992) : In a product liability action arising out of injuries caused by a circular saw, the Court held there was no abuse of discretion in admitting an Underwriters Laboratories standard for saw guards adopted after the saw was manufactured, as it was relevant to the dangerousness of the product.

Smith v. Firestone Tire & Rubber Co., 755 F.2d 129 (8th Cir. 1985) : The Court held that it was not error to admit OSHA standards on behalf of a tire manufacturer as a response to the plaintiffs' claim that the manufacturer should have warned of defects in a rim. See also *Donovan v. General Motors* n60(OSHA standards should have been admitted as evidence of standard of care owed to plaintiff by his employer).

[28] State Law

McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985) : The Court reversed a judgment for a motorcycle manufacturer in an action by a motorcyclist injured when her cycle was struck by a car, but it sustained the admission of evidence that the plaintiff had been drinking prior to the accident. Although this was a diversity case and State Courts required independent proof of intoxication other than evidence of drinking, the Court reasoned that the Federal Rules governed the question of relevance and possible prejudice.

Habecker v. Clark Equip. Co., 942 F.2d 210 (3d Cir. 1991) : The Court reversed a judgment for the defendants in a product liability action arising out of a forklift accident because evidence had been admitted of what was known in the industry when the forklift was manufactured about the desirability of operating restraint systems. The Court believed that evidence of what was known at the time of manufacture about the desirability of a safety feature is irrelevant under the applicable Pennsylvania law in a crashworthiness case. In another product liability action, *Leeds v. Cincinnati, Inc.*, n61 the Court found that a patent document offered by the plaintiff to prove that the defendant had notice of a problem with a machine was properly excluded. New Jersey irrebuttably presumes that a manufacturer has knowledge of the dangerous propensities of its products, so the proffered evidence "was at worst irrelevant and at most cumulative in that it wasted time."

Hottle v. Beech Aircraft Corp., 47 F.3d 106 (4th Cir. 1995) : The Court held in a product liability action that the Virginia rule excluding a party's internal rules and regulations when offered to show negligence was sufficiently bound up with state policy as to require its application in a diversity case governed by Virginia law. The defendant manufacturer's internal manual was therefore properly excluded.

Carter v. Massey-Ferguson, Inc., 716 F.2d 344 (5th Cir. 1983) : The Court sustained a judgment for a woodcutter injured when a skidder manufactured by the defendant backed into him, concluding that Texas law, which governed this product liability case, made industry custom relevant and that it was error to exclude evidence of that custom. Exclusion was harmless error, however, where evidence of industry standards was admitted. In *Caldarera v. Eastern Airlines*, n62 a diversity action arising out of an airplane crash, the Court observed that state law barring evidence of remarriage on the question of damages was binding on a Federal Court. In response to the defendants' claim that the plaintiffs opened the door to the evidence by presenting evidence concerning the emotional problems arising from one plaintiff's loss of his mother, wife, and child, the Court found that there were other ways for the defendants to challenge this evidence and that it was not error to exclude evidence of the remarriage under *Rule 403*.

Barron v. Ford Motor Co. of Can. Ltd., 965 F.2d 195 (7th Cir. 1992) : In an action by an automobile passenger allegedly thrown through a defective sunroof in an accident, the Court held that the state rule barring evidence of seatbelt nonuse was a substantive rule to be applied in diversity cases, but that the rule covered only seatbelt evidence offered to prove the plaintiff's failure to exercise due care. In this case, the manufacturer was using the evidence only to show its reasonableness in not making the sunroof out of laminated glass, so it was admissible. In *In re Air Crash Disaster*, n63 the Court reversed a judgment for the plaintiffs in an action against an airplane manufacturer, holding that evidence of a decedent's income tax liability should have been admitted, since such evidence was relevant to the plaintiff's pecuniary damages under Arizona's wrongful death statute. It also held, however, that the jury should be instructed that its award would not be subject to federal income taxation, even though Arizona Courts would not give such an instruction. The Court found a federal interest in preventing the jury from inflating an award as a result of an erroneous assumption concerning taxation. In a prior decision on interlocutory appeal from *in limine* rulings in the case, *In re Air Crash Disaster Near Chicago*, n64 the Court observed that a state's rule concerning evidence of damages may be so closely linked with the state's view of the proper measure of damages that the evidence rule may involve

substantive rights and may be binding on Federal Courts under the *Erie* doctrine. But the Court also observed that a state's rule concerning proof of damages may represent a judgment concerning a jury's ability to handle evidence, in which case the Federal Rules would govern admissibility decisions in Federal Courts. In a suit by a tenant against a landlord for breach of a duty to keep premises in repair, *American Nat'l Bank & Trust Co. v. K-Mart Corp.*, n65 state law permitted a tenant to sue a landlord who failed to keep premises in repair and to seek as damages the difference in the rental value of the premises in and out of repair. Since state law did not require that the tenant seek to sublet the premises, the Court held that an expert should have been permitted to give an opinion on the amount of the damages notwithstanding the fact that there was no sublease.

Potts v. Benjamin, 882 F.2d 1320 (8th Cir. 1989) : In this personal injury and wrongful death action arising out of a car-truck collision, the Trial Judge excluded evidence that the plaintiff's children were not in child restraint seats at the time of the accident on the ground that the governing Arkansas law made failure to use safety seats inadmissible. The Court held that although the Federal Rules govern admissibility and the state statute is phrased in procedural terms, it is clear that the statute establishes a substantive rule to be followed in a diversity action. In *Adams v. Fuqua Indus.*, n66 the Court reversed a plaintiff's judgment in a product liability suit against the manufacturer of a lawn mower, holding that the defendant was improperly denied the opportunity to offer rebuttal evidence concerning the feasibility of safety features when the mower was made. It also held that state law should govern the question whether the jury should be told that a damage award would not be taxable to the plaintiff.

Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983) : In a product liability action, the Court excluded evidence of contributory negligence since state law recognized only unreasonable use, not contributory negligence, as a defense.

[29] State of Mind

United States v. Hanson, 994 F.2d 403 (7th Cir. 1993) : In a fraud case, the defendant offered an out-of-court statement made to him, to the effect that he did not have to file a certain form. The Trial Judge excluded the statement as hearsay, but the Court held that the statement was not offered for its truth but rather for its impact on the defendant's state of mind. For this nonhearsay purpose, the evidence met the low threshold of relevance set forth in *Rule 401*. Erroneous exclusion of the statement was harmless, however. In a DES product liability action, *Wetherill v. University of Chicago*, n67 the District Court ruled that medical evidence concerning the relationship of DES to cancer could be admitted to prove the reasonableness of the plaintiffs' fears of contracting cancer as a result of exposure to the drug.

United States v. Munoz, 412 F.3d 1043 (9th Cir. 2005) : The Court upheld a defendant's convictions for bringing illegal aliens into the United States, finding no error when a border inspector was permitted to testify as to his reasons for referring the defendant to a secondary inspection at the border crossing. The Court reasoned that the testimony that Munoz was sweating despite cool weather, avoided eye contact, and gave very brief answers to questions was relevant to prove the border inspector's state of mind. In *United States v. Castiglione, 876 F.2d 73 (9th Cir. 1989)* , the Court affirmed a conviction for mailing a letter that threatened a Federal Judge, and held that the Judge's testimony regarding his knowledge of a prior assassination of a Federal Judge, and evidence of steps taken to protect him, showed his state of mind and was relevant to the essential issue of whether the letter could reasonably be read as containing a threat of injury.

[30] Statute of Limitations

Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033 (2d Cir. 1992) : After a jury verdict in an action over breach of a franchise agreement, the Trial Judge ruled that income projections made by the franchiser should not have

been admitted in proof of the franchisee's damages because they predated the applicable limitations period. The Court reversed the judgment n.o.v., holding it was error to exclude the documents, as the statute of limitations only bars stale claims and is not a rule of evidence. A suggestion that evidence is too old goes to its relevance and to its weight, which is a matter for the jury.

FOOTNOTES:

(n1)Footnote 1. *Hirsch v. Burke, 40 F.3d 900 (7th Cir. 1994)*

(n2)Footnote 2. *Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988)* (en banc).

(n3)Footnote 3. *Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983)* .

(n4)Footnote 4. *Albrecht v. Baltimore & O. R.R., 808 F.2d 329 (4th Cir. 1987)* .

(n5)Footnote 5. *S.C. Johnson & Son v. Louisville & N.R.R., 695 F.2d 253 (7th Cir. 1982)* .

(n6)Footnote 6. *Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985)* .

(n7)Footnote 7. *United States v. Eggleton, 799 F.2d 378 (8th Cir. 1986)* .

(n8)Footnote 8. *United States v. Schepp, 746 F.2d 406 (8th Cir. 1984)* .

(n9)Footnote 9. *United States v. Guerrero, 756 F.2d 1342 (9th Cir. 1984)* .

(n10)Footnote 10. *United States v. Beard, 775 F.2d 1577 (11th Cir. 1985)* .

(n11)Footnote 11. *United States v. Miller, 688 F.2d 652 (9th Cir. 1982)* .

(n12)Footnote 12. *United States v. Griffin, 778 F.2d 707 (11th Cir. 1985)* .

(n13)Footnote 13. *Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982)* .

(n14)Footnote 14. *United States v. Fahey, 769 F.2d 829 (1st Cir. 1985)* .

(n15)Footnote 15. *United States v. Contenti, 735 F.2d 628 (1st Cir. 1984)* .

(n16)Footnote 16. *United States v. Amuso, 21 F.3d 1251 (2d Cir. 1994)* .

(n17)Footnote 17. *United States v. Simmons, 923 F.2d 934 (2d Cir. 1991)* .

(n18)Footnote 18. *United States v. Diaz, 878 F.2d 608 (2d Cir. 1989)* .

(n19)Footnote 19. *United States v. Torniero, 735 F.2d 725 (2d Cir. 1984)* .

(n20)Footnote 20. *United States v. Davis, 772 F.2d 1339 (7th Cir. 1985)* .

(n21)Footnote 21. *Gumbs v. International Harvester, Inc., 718 F.2d 88 (3d Cir. 1983)* .

(n22)Footnote 22. *United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983)* .

(n23)Footnote 23. *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* .

(n24)Footnote 24. *Aetna Cas. & Sur. Co. v. Guynes, 713 F.2d 1187 (5th Cir. 1983)* .

(n25)Footnote 25. *Johnson v. Colt Indus. Operating Corp., 609 F. Supp. 776 (D. Kan. 1985)* , *aff'd*, *797 F.2d*

1530 (10th Cir. 1986) .

(n26)Footnote 26. *United States v. Nichols, 820 F.2d 508 (1st Cir. 1987)* .

(n27)Footnote 27. *United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983)* .

(n28)Footnote 28. *United States v. Touloumis, 771 F.2d 235 (7th Cir. 1985)* .

(n29)Footnote 29. *United States v. Eckmann, 656 F.2d 308 (8th Cir. 1981)* .

(n30)Footnote 30. *Lionti v. Lloyd's Ins. Co., 709 F.2d 237 (3d Cir. 1983)* .

(n31)Footnote 31. *Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co., 740 F.2d 1384 (7th Cir. 1984)* .

(n32)Footnote 32. *Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984)* .

(n33)Footnote 33. *United States v. Hart, 729 F.2d 662 (10th Cir. 1984)* .

(n34)Footnote 34. *Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989)* .

(n35)Footnote 35. *Pregeant v. Pan Am. World Airways, 762 F.2d 1245 (5th Cir. 1985)* .

(n36)Footnote 36. *United States v. Hall, 653 F.2d 1002 (5th Cir. 1981)* .

(n37)Footnote 37. *United States v. Mancillas, 580 F.2d 1301 (7th Cir. 1978)* .

(n38)Footnote 38. *United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979)* .

(n39)Footnote 39. *United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983)* .

(n40)Footnote 40. *United States v. Nichols, 820 F.2d 508 (1st Cir. 1987)* .

(n41)Footnote 41. *United States v. Bifield, 702 F.2d 342 (2d Cir. 1983)* .

(n42)Footnote 42. *United States v. Bouye, 688 F.2d 471 (7th Cir. 1982)* .

(n43)Footnote 43. *United States v. Hyman, 741 F.2d 906 (7th Cir. 1984)* (in a prosecution for possession of stolen goods, the defendant's evidence as to prices of types of steel not involved in the case was properly rejected as irrelevant).

(n44)Footnote 44. *United States v. Bear Ribs, 722 F.2d 420 (8th Cir. 1983)* .

(n45)Footnote 45. *United States v. Eckmann, 656 F.2d 308 (8th Cir. 1981)* .

(n46)Footnote 46. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980)* .

(n47)Footnote 47. *United States v. Williams, 704 F.2d 315 (6th Cir. 1983)* .

(n48)Footnote 48. *Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070 (5th Cir. 1986)* .

(n49)Footnote 49. *Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 (5th Cir. 1980)* .

(n50)Footnote 50. *Ponder v. Warren Tool Corp., 834 F.2d 1553 (10th Cir. 1987)* .

(n51)Footnote 51. *Seese v. Volkswagenwerk A.G., 648 F.2d 833 (3d Cir. 1981)* .

(n52)Footnote 52. *McGonigal v. Gearhart Indus., 851 F.2d 774 (5th Cir. 1988)* .

(n53)Footnote 53. *Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985)* .

(n54)Footnote 54. *Held v. Mitsubishi Aircraft Int'l, Inc., 672 F. Supp. 369 (D. Minn. 1987)* .

(n55)Footnote 55. *Schrand v. Federal Pac. Elec. Co., 851 F.2d 152 (6th Cir. 1988)* .

(n56)Footnote 56. *Murphy v. City of Flagler Beach, 761 F.2d 622 (11th Cir. 1985)* .

(n57)Footnote 57. *Finch v. Monumental Life Ins. Co., 820 F.2d 1426 (6th Cir. 1987)* .

(n58)Footnote 58. *Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982)* .

(n59)Footnote 59. *Seese v. Volkswagenwerk A.G., 648 F.2d 833 (3d Cir. 1981)* .

(n60)Footnote 60. *Donovan v. General Motors, 762 F.2d 701 (8th Cir. 1985)* .

(n61)Footnote 61. *Leeds v. Cincinnati, Inc., 732 F.2d 1194 (3d Cir. 1984)* .

(n62)Footnote 62. *Caldarera v. Eastern Airlines, 705 F.2d 778 (5th Cir. 1983)* .

(n63)Footnote 63. *In re Air Crash Disaster, 803 F.2d 304 (7th Cir. 1986)* .

(n64)Footnote 64. *In re Air Crash Disaster Near Chicago, 701 F.2d 1189 (7th Cir. 1983)* .

(n65)Footnote 65. *American Nat'l Bank & Trust Co. v. K-Mart Corp., 717 F.2d 394 (7th Cir. 1983)* .

(n66)Footnote 66. *Adams v. Fuqua Indus., 820 F.2d 271 (8th Cir. 1987)* .

(n67)Footnote 67. *Wetherill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 401 RULE 401

1-401 Federal Rules of Evidence Manual 401.04

401.04 Legislative History

Advisory Committee's Note

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. *Rule 404* and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of *Rule 403*.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, *29 Calif. L. Rev. 689, 696, n. 15 (1941)*, in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular

situation depends.

The standard of probability under the rule is "more ... probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "[a] brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L. Rev. 574, 576 (1956)*, quotes Professor McBaine, "it is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of *California Evidence Code § 210*; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see *Rule 403*), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. *California Evidence Code § 210*, defining relevant evidence in terms of tendency to prove a disputed fact.

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 401 RULE 401

1-401 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 401, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE IV. RELEVANCY AND ITS LIMITS	**ARTICLE IV. RELEVANCE AND ITS LIMITS**
Rule 401. Definition of	**Rule 401. Test for Releva**

"Relevant Evidence"	**Evidence**
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or	Evidence is relevant if:

less probable than it would be without the evidence.

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining

the
ac-
tion.

Committee Note

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 401 RULE 401

1-401 Federal Rules of Evidence Manual Supp. to § 401.03

Supp. to § 401.03 Annotated Cases

[Go To Main]

[2] Civil Rights Cases [Go To Main]

[a] Irrelevant Evidence

Thompson v. City of Chicago, 472 F.3d 444 (7th Cir. 2006) : Affirming a judgment for police officers sued for using excessive force in an arrest, the Court found no abuse of discretion in excluding evidence of a city police department general order regarding use of force. The evidence was irrelevant on the question whether the officers violated the *Fourth Amendment*, since that requires showing that the officers' conduct was objectively unreasonable, and the violation of police regulations or state law is irrelevant to a determination of objective reasonableness.

[3] Consciousness of a Weak Case -- Civil Cases [Go To Main]

[a] Destruction or Loss of Evidence

Allstate Ins. v. Hamilton Beach/Proctor Silex, 473 F.3d 450 (2d Cir. 2007) : In a subrogation action against the manufacturer of a coffee pot to recover money paid to insureds for covered losses sustained from a house fire, the Magistrate Judge excluded evidence that an electric range was not the cause of the fire, on the ground that the insureds had not preserved the electric range. But the Court found that this spoliation sanction was an abuse of discretion. The defendant had been provided a full and fair opportunity to examine the fire scene and all other potential sources of the fire, and the defendant's representative affirmatively disclaimed any interest in the electric range as an alternative source of the fire. The Court rejected the argument that "there is a broad duty to preserve evidence irrespective of the absence of a request by the opposing party."

[4] Consciousness of Guilt -- Criminal Cases [Go To Main]

[a] Flight, Resisting Arrest

United States v. Wallace, 461 F.3d 15 (1st Cir. 2006) : Affirming a conviction for armed robbery, the Court found no error when an airline reservation was admitted as evidence of the defendant's flight. There was a sufficient foundation linking the defendant to the reservation, as it was made in name of the defendant's alias and he admitted that it was "possible" that he had made such a reservation.

[7] Criminal Cases -- Defense Evidence [Go To Main]

United States v. Stever, 603 F.3d 747 (9th Cir. 2010) : The Court reversed the defendant's conviction for having a marijuana growing operation on his property because the Judge precluded evidence that Mexican drug trafficking organizations (DTO) in the defendant's area operate their own growing operations in remote areas without the knowledge of the homeowners. The evidence was excluded on the ground that it was not relevant to whether the defendant was involved in marijuana-growing, but the Court noted that evidence is relevant if it has any tendency to prove a disputed fact, and in this case the DTO evidence "tended to make it more probable that Stever was not involved, as there would then be an alternative explanation for the grow that would not entail the consent, much less the participation, of any of the Stevers." Rejecting the government's argument that the evidence was irrelevant because it would not have eliminated the possibility that Stever cooperated with a Mexican DTO, the Court noted that, while such cooperation was possible, the evidence nonetheless made Stever's guilt less likely.

[10] Employment Discrimination Cases [Go To Main]

[b] Employment Discrimination Cases -- Miscellaneous Cases

Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. 2008) : The Court affirmed a judgment for a former employee who sued his former employer alleging a constructive discharge in violation of the Americans with Disabilities Act and state law. It found no abuse of discretion in admitting evidence of a nationwide consent decree the company agreed to as part of litigation brought by the EEOC. The Trial Judge instructed the jury that it could consider the decree only as an implicit acknowledgment that the company was familiar with the ADA.

Hasan v. Foley & Lardner LLP, 552 F.3d 520 (7th Cir. 2008) : The Court reversed summary judgment for a law firm that dismissed a Muslim associate after September 11, allegedly because of religious and national origin discrimination. The Court held that evidence of a partner's anti-Muslim comments, the timing of the employer's conduct, and the treatment of other Muslims in the department was relevant evidence that should have been considered.

[11] Examples of Relevant Circumstantial Evidence [Go To Main]

[a] Civil Cases

Owner-Operator Ind. Drivers Ass'n v. USIS Commercial Servs., Inc., 537 F.3d 1184 (10th Cir. 2008) : In an action by truck drivers claiming violation of the Fair Credit Reporting Act when a service compiling and disseminating drivers' employment histories included information alleged to be so imprecise as to be willfully inaccurate, the Court held there was no abuse of discretion when the defendant introduced evidence as to how the carriers used the information they received. The evidence tended to show that any ambiguity was not in reckless disregard of statutory duties but a reasonable accommodation to the needs of the industry by providing the carriers with a tool from which to conduct further investigations.

[b] Examples of Relevant Circumstantial Evidence -- Criminal Cases

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006) : In a prosecution for obstructing securities law investigations, the government introduced evidence that the defendant falsely denied knowledge of a grand jury investigation when he was questioned about the matter by his employer's counsel two years later. The defendant sought to explain how he could have been mistaken by offering evidence that he had not been reprimanded by his employer, had been promoted to its executive board, and had not been called as a witness or interviewed in connection with the investigations, and that the investigations had ended without criminal charges against the employer or its employees. Vacating the conviction on other grounds, the Court noted that it was error to exclude the evidence simply on the ground it was not relevant to a fact of consequence in the case, since evidence that it was reasonable for the defendant to have forgotten about the investigation under the circumstances tended to rebut the government's theory that the misstatement was an intentionally false exculpatory statement tending to show the defendant's guilt. On remand, the Judge should "consider the prejudicial offset of this evidence against its probative value before making a decision to accept or reject the evidence."

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) : Two pharmacists were convicted of conspiring with physicians to distribute large quantities of pain medications under cover of false prescriptions written by the physicians. Affirming, the Court found no abuse of discretion in the admission of a state trooper's testimony that he had pulled over a motorist who was under the influence of drugs, and found 39 bottles of pain medications (none bearing the motorist's name) that had labels from a defendant's pharmacy and listed one of the conspiring physicians as the prescriber. The bottles, their labels, and the circumstances of their discovery spoke to the defendant pharmacist's prescription-filling practices.

United States v. Ellis, 548 F.3d 539 (7th Cir. 2008) : The Court affirmed a conviction for failure to remit employment taxes, finding no abuse of discretion in the admission of evidence that the defendant spent two and a half million dollars on a personal residence and over half a million dollars on trips, a luxury car, and home decorations during the period when tax payments were not being made. The evidence was relevant to rebut the defendant's claim that she was too busy to notice or remember her tax obligations and to prove willfulness, since the amount spent was about the same amount she failed to pay, and "most people would inquire as to why they have an unexpected additional two million dollars to spend on themselves." In *United States v. Lee, 502 F.3d 691 (7th Cir. 2007)* , the defendant was arrested when police, after receiving a report that gunshots had been fired on two consecutive mornings, stopped a car in which the defendant was a passenger and found a gun near him. The defendant claimed that the gun was not his and that he was in the wrong place at the wrong time. Affirming a conviction for felon firearm possession, the Court agreed with the defendant that evidence that the car had been involved in prior shootings might well have been relevant to prove that gunshot residue found on the defendant's jacket may have come from inside the car rather than from his possession of a firearm, but it found any error in exclusion of the evidence concerning the prior shootings to be harmless. The Court also held there was no abuse of discretion in admitting testimony from a government fingerprint expert that a partial print found on the gun recovered near the defendant did not belong to the driver of the car and that she could not exclude or identify the defendant as the source of the print. The fact that the testimony excluded the driver rendered the testimony relevant.

United States v. Tucker, 533 F.3d 711 (8th Cir. 2008) : Affirming a conviction for being an accessory after the fact to bank robbery, the Court held that evidence that the defendant knew her boyfriend had robbed banks earlier in the year was relevant to whether she knew he robbed a bank when she waited for him in the car as he entered a bank, ran from the bank to the car, and spilled cash as he went. In *United States v. Kent, 531 F.3d 642 (8th Cir. 2008)* , the Court affirmed drug, firearm, and child pornography convictions. finding no abuse of discretion in the admission of DNA evidence that the defendant could not be excluded as the contributor of DNA found in a 16-year-old victim's room. Although the expert could not testify that the defendant was definitely the contributor because other males in the defendant's family had the same marker on their Y chromosomes, the Court reasoned that "a 'cannot exclude' finding can tell a lot, and can increase the probability that the person's DNA is present." In *United States v. Gardner, 447 F.3d 558 (8th Cir. 2006)* , the court affirmed a conviction for conspiracy to distribute methamphetamine, holding that an airline document showing the numerous flight reservations made in a coconspirator's name was relevant to support the coconspirator's testimony that he was serving as a drug courier by air.

[12] Experts [Go To Main]

Wipf v. Kowalski, 519 F.3d 380 (7th Cir. 2008) : In a medical malpractice case, the plaintiff's counsel asked her expert witness about a 2000 article by another expert regarding the surgery at issue. Affirming a judgment for the defendant, the Court held there was no abuse of discretion when defense counsel asked the witness about a 2005 article in which the author of the 2000 article tempered some of his earlier views. Although plaintiff's operation took place in 2003, the Court commented that "[t]o the extent that Dr. Kleier was questioned on direct examination about Dr. Strasberg's 200 article, cross-examining him about the 2005 article, in which Dr. Strasberg updated his views, strikes us as relevant and fair."

United States v. Wallenfang, 568 F.3d 649 (8th Cir. 2009) : The Court affirmed a conviction for production, distribution, and possession of child pornography, finding no abuse of discretion in the exclusion of expert testimony that the defendant was not a pedophile and was not sexually attracted to young girls. The evidence was not relevant to any of the charges, since the only issue was whether the pictures appeared to be of a sexual character, not whether they appealed or were intended to appeal to the defendant's sexual interests.

United States v. Hickey, 580 F.3d 922 (9th Cir. 2009) : The Court affirmed a conviction for mail and securities fraud, finding no abuse of discretion in the exclusion of testimony by the defendant's expert that if the SEC had not intervened, the investments would have been profitable and the investors would not have lost money. The evidence was irrelevant, as loss to investors is not an element of either fraud charge, nor is an intent to cause loss. In *United States v. 87. 98 Acres of Land, 530 F.3d 899 (9th Cir. 2008)* , the Court, affirming the judgment in an eminent domain proceeding to secure an easement for high-voltage electrical transmission lines, the Court found no abuse of discretion when an environmental planner with extensive experience advising developers regarding the impact of electromagnetic frequencies from power transmission lines on the use and development of property was permitted to testify to public perceptions on the effects of EMFs among residential homeowners and home buyers, but was not permitted to testify to the extent and level of EMFs from the transmission line at issue. While the existence of EMFs was relevant to public perceptions and property values, there was no evidence that EMF measurements affect public perceptions, so a jury could only speculate concerning the effect of a particular measurement on public perception.

[18] Intent, Knowledge, Motive, Plan [Go To Main]

[b] Intent, Knowledge, Motive, Plan -- Criminal Cases

United States v. Leonard, 439 F.3d 648 (10th Cir. 2006) : Affirming a conviction for involuntary manslaughter and assault arising from a head-on collision, the Court held that the defendant's nine citations for driving without a valid license, together with six other citations, over a 15-year period were relevant and admissible to prove malice aforethought.

United States v. Hoffman-Vaile, 568 F.3d 1335 (11th Cir. 2009) : The Court affirmed convictions of a dermatologist for health care fraud, finding no plain error in the admission of testimony by an employee of the Medicare administrator to whom the defendant submitted claims that she repeatedly told the defendant how to bill under a particular code. The evidence was relevant to prove intent and to undermine the defense that the defendant did not know how to bill correctly. The Court found no abuse of discretion in the admission of evidence that some of the defendant's procedures disfigured some patients, because the evidence was probative of whether the defendant performed the procedures that she billed to Medicare.

[20] Irrelevant Evidence [Go To Main]

[a] Civil Cases

[i] Civil Rights and Employment Cases

Arlio v. Lively, 474 F.3d 46 (2d Cir. 2007) : A police officer sued the acting chief of the department, alleging that he had been disciplined in violation of his constitutional rights. The Court reversed a judgment for the plaintiff because evidence was presented that an arbitration panel had overturned the discipline and awarded the officer back pay. The evidence was irrelevant because the arbitration was based solely on the particulars of the union collective bargaining agreement and was not in any way an adjudication of constitutional claims. Furthermore, as an explanation of why the plaintiff was not seeking back wages, it was probative of a non-material issue, since "[l]ost wages were simply not an issue in the federal proceeding." In any event, the prejudicial effect of the evidence would outweigh any probative value, "as the jury might have felt a strong compulsion to conform their verdict to the conclusion of the Arbitration Board 'experts.' "

Keri v. Board of Trustees of Purdue Univ., 458 F.3d 620 (7th Cir. 2006) : A black assistant professor who was not reappointed sued under Title VII. Affirming summary judgment for the defendant, the Court upheld exclusion of statements about the racial climate at the university made by another professor at the University, who also was of African descent, had a doctoral degree, was subject to the same tenure and promotion standards, and was subordinate to the same Vice Chancellor and Chancellor. The Court held that the similarities between the declarant and the plaintiff were too remote for the statements to have any relevance to the plaintiff's claims, since the two men worked at different schools of the university and had different immediate supervisors, the declarant was tenured ten years before the plaintiff was hired, and most of the plaintiff's dealings were with an immediate supervisor whom the declarant had never met.

[ii] Irrelevant Evidence -- Civil Cases -- Damages Issues

Wingert & Assoc. v. Paramount Apparel Int'l, Inc., 458 F.3d 740 (8th Cir. 2006) : The defendant terminated the plaintiff sales representative firm and hired its sales agents. In an action for failure to provide notice of termination required by statute and for business interference, the plaintiff claimed damages arising from its inability to arrange for replacement agents to serve a new replacement line. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in the exclusion of evidence that the plaintiff had noncompete agreements with its former agents that it could have enforced in order to mitigate its damages. The evidence was irrelevant because it was not established that the plaintiff had a duty to enforce such agreements to mitigate losses.

[iv] Irrelevant Evidence -- Civil Cases -- Liability for Accident, Defective Product, Malpractice, etc.

Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007) : The plaintiff's decedent was killed when he attempted to stop a Dodge Ram rolling down a driveway after his two-year-old grandson, who had been left alone in the truck with the key in the ignition and the engine running, apparently shifted the gear out of park. In an action against the manufacturer, the plaintiff alleged that the truck was defective because it did not have a brake-shift interlock device requiring the brake pedal to be depressed in order to shift out of park. Affirming a judgment for the defendant, the Court found no abuse of discretion in the exclusion of evidence that the defendant had voluntarily retrofitted Jeeps with BSI devices. The evidence was irrelevant to prove that the decision not to retrofit the Ram was negligent because there is no independent duty to retrofit under the governing state law. It was also irrelevant to prove feasibility: Chrysler conceded it was feasible to install a BSI device on the Ram, so feasibility was not an issue in the case.

[v] Irrelevant Evidence -- Civil Cases -- Other Cases

Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010) : In a false arrest and malicious prosecution action against police officers who arrested the plaintiffs, the defendants introduced evidence that the prosecutors who prepared the charging documents following the arrests considered the police officers' complaints credible. Vacating a judgment for

the defendants, the Court held that the evidence was inadmissible because the prosecutors' belief in the officers' credibility was irrelevant to whether they had probable cause to make the arrests and because it is improper for one witness to vouch for the credibility of another.

Wall Data Inc. v. Los Angeles County Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006) : The Court affirmed a judgment of copyright infringement against a software customer that installed the program on more computers than it had licenses for. The Court found no abuse of discretion in rulings that the following evidence was irrelevant: (a) a statement in the plaintiff software developer's 10-K report to the SEC that its shrink-wrap licenses "may be unenforceable" was irrelevant because they were clearly enforceable in the jurisdictions involved in this case; (b) the Master Vendor Agreements governing the defendant's purchase of software were irrelevant because they governed the relationship with the defendant's vendor, not with the plaintiff, and the plaintiff had no knowledge of the contents of the agreements; (c) the plaintiff's communications with other customers about another of its software products were irrelevant because the plaintiff used a different licensing system for the other software; and (d) the plaintiff's instructions to sales personnel regarding the licenses were irrelevant because the licenses clearly stated that reliance should not be placed on representations made by the plaintiff's employees.

[b] Irrelevant Evidence -- Criminal Cases

[i] Drug Cases

United States v. Ashton, 555 F.3d 1015 (D.C. Cir. 2009) : The Court affirmed a drug conviction, finding no abuse of discretion in excluding evidence of the *Miranda* rights card that the defendant signed at the police station invoking his rights, because the card was not probative of whether the defendant made an incriminating statement at the time of his arrest: "[T]he fact that Ashton invoked his *Miranda* rights only suggests that after he was transported to the police station and had time to consider his situation, he was unwilling to consent to custodial interrogation, at least without the presence of a lawyer."

United States v. Dunbar, 553 F.3d 48 (1st Cir. 2009) : In a prosecution on drug and firearms charges, the defendant's former girlfriend testified to actions she took to further the defendant's drug trade. She also testified that the defendant beat her and that she was molested at a young age by her stepfather. Holding that the girlfriend's testimony about her sexual abuse was erroneously admitted, the Court rejected a government argument that the testimony was relevant to explain why she acted as she did -- "e.g., moving in with Dunbar after his actions led to her arrest and continuing to follow his instructions despite his controlling and abusive behavior" -- since there had been no attack on the girlfriend's credibility based on the fact she remained with the defendant. "Thus, though the testimony served to make it more plausible that Spaulding remained with Dunbar, this fact was not ultimately 'of consequence to the determination of the action.' " The error was harmless, however. In *United States v. Maldonado-Garcia, 446 F.3d 227 (1st Cir. 2006)* , a marijuana distribution and firearms case, one firearm had been found in a truck that the defendant rented. The defendant proffered evidence that an individual who rented the truck two days before the defendant met a violent death, but the Court found no error in exclusion of this evidence as irrelevant. The defendant "offered no evidence that the prior lessee owned a gun, carried a gun, was observed with a gun, or used a gun at any time." Moreover, the evidence "had no bearing on the key issue in the case: whether the appellant knew that the gun was in the truck and constructively possessed it."

United States v. Ozuna, 561 F.3d 728 (7th Cir. 2009) : In the defendant's first trial for possession of cocaine with intent to distribute, the prosecution introduced evidence of the incident in which the cocaine was found and of the defendant's subsequent flight from prosecution; in the second trial, the government confined its case to the original incident. Affirming, the Court found no abuse of discretion in the exclusion of evidence that the defendant claimed demonstrated that the government fabricated evidence to obtain a conviction. The proffered evidence related only to the alleged flight from prosecution, and was thus irrelevant in the narrower second trial. In *United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006)* , the Court reversed convictions for distributing heroin because the prosecution had

introduced substantial evidence regarding the procedures for obtaining authority to conduct telephone wiretaps in the case. The evidence was irrelevant to any issue in the case, and it was prejudicial in its implication that "there were several senior government attorneys and agents who all believed there was probable cause that the defendants were involved in a drug conspiracy, and, indirectly, that they all believed, in their professional judgment, the defendants were in fact committing drug-related crimes."

United States v. Sells, 477 F.3d 1226 (10th Cir. 2007) : Affirming convictions of a father and son for offenses connected to large-scale methamphetamine manufacture and distribution, the Court held it was error (but harmless) to admit against the son evidence found in a grandson's house located on the same 10-acre property as the two defendants' houses. There was no evidence presented to show a substantial connection between the son and the grandson's house.

[ii] Irrelevant Evidence -- Criminal Cases -- Fraud and False Statement Cases

United States v. Hatch, 514 F.3d 145 (1st Cir. 2008) : The defendant was convicted for filing false tax returns, having not reported income received as the first winner of the "reality-TV" show "Survivor." On appeal, he complained of not being permitted to introduce evidence that the producers had changed the rules of the show, leading him to think that they would pay the taxes on any winnings, thus negating the willfulness element of the charges that he had not reported the income. Affirming, the Court found no abuse of discretion, as the Trial Judge had repeatedly ruled that evidence of anything the producers did or said to induce the defendant's belief they were assuming the tax liability would be admissible, but that evidence simply of changing the rules of the show was irrelevant to the charges and would be inadmissible.

United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007) : The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. Affirming, the Court found no error in the exclusion of evidence that other employees operated similar schemes, which was offered to prove that the defendants were in good faith. The evidence was irrelevant: "Simply stated, evidence of fraudulent acts by other employees including policy making executives would have no tendency to prove that the defendants' acts were innocent."

United States v. Leahy, 464 F.3d 773 (7th Cir. 2006) : Affirming convictions arising from schemes to cheat the City of Chicago out of funds slotted for minority-owned and women-owned businesses and to swindle workers compensation providers out of proper premiums, the Court found no abuse of discretion when evidence of audits showing that a defendant's companies were not responsible for any insurance fraud was excluded. The audits were conducted after one fraudulent scheme had been revealed, and the Court concluded that "[j] st because Leahy did not continue with the fraud after the scheme had been discovered has no bearing on whether he participated before the fraud was out in the open."

United States v. Marston, 517 F.3d 996 (8th Cir. 2008) : The Court affirmed convictions for tax evasion, finding no abuse of discretion in excluding a videotape of a person whose teachings the defendant claimed to have relied on in deciding certain income was not taxable. The tape was created in 2002, while the alleged evasion took place in 1999-2001, so it was irrelevant to the defendant's belief at the time of the charged acts.

United States v. Masferrer, 514 F.3d 1158 (11th Cir. 2008) : A bank CEO was convicted of fraudulently misrepresenting certain transactions related to bank assets that had dramatically lost value. To prove that he reasonably believed the transactions were worth full face value at the time he made them, the defendant offered evidence that some subsequently were paid off in full. Affirming, the Court found no error in excluding the evidence, as it was not relevant to what the defendant believed at the time of the transactions and his intent at that time.

[iii] Irrelevant Evidence -- Criminal Cases -- Other Cases

United States v. Dupre, 462 F.3d 131 (2d Cir. 2006) : The defendants were convicted for wire fraud in a scheme

promising 1000-to-1 returns for funds invested purportedly to unfreeze assets once held by the family of Philippines president Marcos. The Court affirmed, finding no abuse of discretion in the exclusion of testimony from a psychologist that a defendant's "intense, pervasive religious beliefs significantly interfere with her ability to see her involvement in the 'investment project' in a realistic manner and significantly contribute to her ongoing conviction that she has been involved in a legitimate enterprise with benevolent intentions." The expert's report had a "capacity to mislead and confuse the jury, and to permit the defendant to put an impermissible theory of justification before the jury without meeting her burden of presenting the affirmative defense of insanity."

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) : An attorney was convicted for a bribery scheme in which he arranged, guaranteed, and paid off loans for state judges, in order to corruptly influence the outcome of cases he had filed in their courts. Affirming, the Court found no abuse of discretion in the exclusion of testimony from a fellow attorney that the defendant had guaranteed a loan for him in the past, as " 'evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant.'" Likewise, evidence that the attorney did not file the most significant and potentially lucrative case he was working on at the time of the alleged conspiracy in the court of one of the judges was properly excluded as irrelevant. In *United States v. Miller, 576 F.3d 528 (5th Cir. 2009)* , the defendant was convicted of an attempted forcible assault against federal officers, after he backed his pickup truck toward officers making an arrest. Affirming, the Court found no abuse of discretion in the exclusion of a photograph that showed a serious gunshot wound to the face suffered by the defendant in the incident. The photograph was irrelevant on the issue of the defendant's intent, as he "could certainly have formed an intent to assault before he was shot, and this seems to have been the dominant theory at trial." In *United States v. Wofford, 560 F.3d 341 (5th Cir. 2009)* , the Court affirmed a conviction for theft or embezzlement from an employee benefit plan, finding no abuse of discretion when an expert for the defendant was not permitted to testify that the plan was not qualified under Internal Revenue Code provisions permitting corporate deductibility and employee tax deferment for contributions. As the only requirement under the charged statute was that the plan be subject to "any provision of title I" of the ERISA statute, evidence that the plan was not "tax-qualified" was irrelevant.

United States v. Klebig, 600 F.3d 700 (7th Cir. 2009) : The defendant was prosecuted for possession of an unregistered firearm (a rifle with its barrel sawed off and its stock missing) and an unregistered silencer (an automobile oil filter) after the items, along with more than 20 legal firearms, were found in his junk-filled house. Reversing, the Court held it was error to admit evidence of a sign on the defendant's front door that "nothing here is worth dying for," as it had no tendency to prove that the defendant knew the firearm was an illegal modified rifle or a legal modified pistol, or his intent to use the oil filter as an illegal silencer or a legal flash suppressor. In *United States v. Dooley, 578 F.3d 582 (7th Cir. 2009)* , the Court affirmed the conviction of a police officer for theft from the police department evidence vault. It found no abuse of discretion when the defense was precluded from introducing evidence of other thefts from the department's vault, since those thefts occurred at another, less secure facility and were thus irrelevant to supporting the defendant's explanation for the missing evidence in this case. In *United States v. Lee, 502 F.3d 691 (7th Cir. 2007)* , the defendant was arrested when police, after receiving a report that gunshots had been fired on two consecutive mornings, stopped a car in which the defendant was a passenger and found a gun near him. The defendant claimed that the gun was not his and that he was in the wrong place at the wrong time. Affirming a conviction for felon firearm possession, the Court found no abuse of discretion in the exclusion of defense testimony from witnesses to the shootings that occurred on the two mornings before the defendant was arrested. The most that the testimony could establish was that the defendant was not implicated in the shootings, and this was irrelevant to whether the defendant had a firearm when he got out of the car that the police stopped.

United States v. Wallenfang, 568 F.3d 649 (8th Cir. 2009) : The Court affirmed a conviction for production, distribution, and possession of child pornography, finding no abuse of discretion in the exclusion of expert testimony that the defendant was not a pedophile and was not sexually attracted to young girls. The evidence was not relevant to any of the charges, since the only issue was whether the pictures appeared to be of a sexual character, not whether they appealed or were intended to appeal to the defendant's sexual interests. In *United States v. Raplinger, 555 F.3d 687 (8th Cir. 2009)* , the Court affirmed convictions for sexual exploitation of a child and child pornography, finding no abuse of

discretion when the defendant was barred from offering evidence of certain specific instances of conduct and of discussions that he had with the child victim, as well as evidence that the victim kept and uploaded to the internet certain pictures. Because consent was not a defense, the evidence was not relevant. In *United States v. Street, 531 F.3d 703 (8th Cir. 2008)* , the court affirmed convictions for sexual exploitation of a minor and possession of visual depictions of a minor engaging in sexually explicit conduct. It held that evidence that the minor, the eldest daughter of the defendant's wife, set fire to the family house in an effort to kill not only the defendant but also the entire family was irrelevant. The evidence tended to show that the victim was deeply disturbed "but sheds no light on Street's purpose for creating the sexually explicit photographs."

United States v. Oldbear, 568 F.3d 814 (10th Cir. 2009) : Affirming the conviction of an administrative assistant in tribal offices for embezzling from a tribal emergency assistance program, the Court found no abuse of discretion in the exclusion of testimony from three witnesses that they also received emergency assistance funds for similar expenses. Because the witnesses had no knowledge of any tribal guidelines for disbursement of such funds, their testimony was irrelevant on the consequential facts whether the defendant's expenditures were authorized and whether she possessed the requisite intent.

United States v. Duran, 596 F.3d 1283 (11th Cir. 2010) : The Court affirmed a conviction for knowingly acting in the United States as a foreign government's agent without prior notification to the Attorney General, finding no abuse of discretion in the exclusion of evidence that the defendant and his coconspirators did not know of the requirement to notify the Attorney General. Because the offense charged was a general intent offense, the prosecution need not prove the defendant's lack of knowledge and the evidence was irrelevant. In *United States v. Wilk, 572 F.3d 1229 (11th Cir. 2009)* , the defendant, convicted for killing a police officer assisting in execution of a search warrant during a federal investigation, claimed he acted in self-defense. Affirming, the Court found no abuse of discretion in the exclusion of evidence that the officer had ingested steroids, as there was no evidence that the officer had engaged in aggressive or erratic behavior or that he was the aggressor in the shoot-out. The Court also found no abuse of discretion in the exclusion of expert testimony that the officers executing the warrant had not followed proper police procedure, as the evidence relevant to the defendant's self-defense claim was his perception of the officers' actions, not whether they followed proper procedure.

[26] Similar Circumstance Evidence [Go To Main]

[a] Accident and Injury Cases

[i] Absence of Other Accidents

Dortch v. Fowler, 588 F.3d 396 (6th Cir. 2009) : In a personal injury action arising from a car-truck collision, the trial boiled down to whether the accident occurred in the plaintiff's or the defendant's lane of travel, and central to that inquiry was whether either of two gouges (one in each lane) was caused by the accident. To disprove that the gouge in the plaintiff's lane was so caused, the defendant made an extensive search of past accident records in hopes of finding some evidence of an accident that might have caused the gouge. When that search was unsuccessful, the defendant obtained an *in limine* ruling, on the ground of irrelevance, that precluded the plaintiff from asking about the search. Affirming a judgment for the defendants, the Court held that the ruling was an abuse of discretion, but harmless error. Although not strong evidence, the unsuccessful search was probative on the plaintiff's theory: "the absence of any past accident record is exactly what you would expect to find if [the plaintiff]'s theory that the gouge was caused by this accident is correct." A concurring Judge thought "[t]he majority is likely correct" that it was error to exclude the evidence for lack of relevancy, but would have affirmed simply because any probative value the evidence had "was slight and the potential for prejudice and jury confusion significant." In *Croskey v. BMW of No. Am., Inc., 532 F.3d 511 (6th Cir. 2008)* , the plaintiff, who was injured by scalding fluid when the plastic neck on a car's radiator failed, brought product liability claims alleging both that the design of the radiator was defective and that the defendant manufacturer failed to provide warnings after becoming aware that the plastic radiator neck might fail. When the plaintiff offered

evidence of other incidents in which the neck failed, the Judge admitted the evidence only on the failure to warn claim, limiting it to incidents occurring before the plaintiff's accident of which the defendant was notified. Reversing a judgment for the defendant, the Court held that under the governing law evidence of similar incidents was also relevant to prove that the design was defective. The Court cited a state case suggesting that in a case like this evidence of incidents postdating the plaintiff's accident, which would be relevant to a defect claim but irrelevant to a warning claim, could be excluded under Rule 403 as confusing. The Court also noted that on remand the defendant could offer evidence of the total number of cars sold having a radiator with the allegedly defective design. In the Judge's discretion, evidence of a positive safety history might tend to rebut the defect claim; cross-examination could help the jury understand the statistics offered. Finally, the Court held it was error to exclude testimony by non-BMW mechanics regarding performance of the radiator neck on the design defect claim, but proper to exclude their testimony on the warning claim, as knowledge was not notice to the defendant.

[ii] Similar Circumstance Evidence -- Accident and Injury Cases -- Miscellaneous Cases

Croskey v. BMW of No. Am., Inc., 532 F.3d 511 (6th Cir. 2008) : The plaintiff, who was injured by scalding fluid when the plastic neck on a car's radiator failed, brought product liability claims alleging both that the design of the radiator was defective and that the defendant manufacturer failed to provide warnings after becoming aware that the plastic radiator neck might fail. When the plaintiff offered evidence of other incidents in which the neck failed, the Judge admitted the evidence only on the failure to warn claim, limiting it to incidents occurring before the plaintiff's accident of which the defendant was notified. Reversing a judgment for the defendant, the Court held that under the governing law evidence of similar incidents was also relevant to prove that the design was defective. The Court cited a state case suggesting that in a case like this evidence of incidents postdating the plaintiff's accident, which would be relevant to a defect claim but irrelevant to a warning claim, could be excluded under Rule 403 as confusing. The Court also noted that on remand the defendant could offer evidence of the total number of cars sold having a radiator with the allegedly defective design. In the Judge's discretion, evidence of a positive safety history might tend to rebut the defect claim; cross-examination could help the jury understand the statistics offered. Finally, the Court held it was error to exclude testimony by non-BMW mechanics regarding performance of the radiator neck on the design defect claim, but proper to exclude their testimony on the warning claim, as knowledge was not notice to the defendant.

[b] Similar Circumstance Evidence -- Civil Rights and Discrimination Cases

Timmerman v. U.S. Bank, N.A., 483 F.3d 1106 (10th Cir. 2007) : Affirming summary judgment for the defendant in an age and gender discrimination action by a terminated bank manager, the Court found no abuse of discretion in the exclusion of evidence regarding replacement of female branch managers over age 40 two years previously. The Court found that the circumstances were "not remotely comparable" and there was "a logical disconnect" between them: the replacements took place as part of a post-acquisition reorganization, while the plaintiff was terminated for disciplinary reasons; there was a lack of temporal proximity; and there was no showing that the replacements made discriminatorily.

[c] Similar Circumstance Evidence -- Contract Cases

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008) : Small billboard companies alleged that the defendant, a billboard operator acting as leasing agent for railroads, had wrongfully appropriated for itself billboard sites for which the plaintiffs had applied. Affirming in part a judgment for the plaintiffs, the Court held there was no abuse of discretion in permitting two railroad employees to testify that the defendant's process of reviewing site applications internally was outside the industry norm and contrary to their expectations as representatives of the railroads and that it was not fair for the defendant to surreptitiously review applications and appropriate sites. The witnesses spoke from their experience in railroad real estate management and billboard site review and approval, and their testimony was helpful to the jury in refuting testimony by the defendant's witnesses that its process was permissible under the terms of its contracts with the railroads.

[c.1] Similar Circumstance Evidence -- Criminal Cases

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) : An attorney was convicted for a bribery scheme in which he arranged, guaranteed, and paid off loans for state judges, in order to corruptly influence the outcome of cases he had filed in their courts. Affirming, the Court found no abuse of discretion in the exclusion of testimony from a fellow attorney that the defendant had guaranteed a loan for him in the past, as "'evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant.'" Likewise, evidence that the attorney did not file the most significant and potentially lucrative case he was working on at the time of the alleged conspiracy in the court of one of the judges was properly excluded as irrelevant.

[28] State Law [Go To Main]

Moyer v. United Dominion Indus., Inc., 473 F.3d 532 (3d Cir. 2007) : In an action by factory workers alleging serious and permanent hand injuries as a result of using the defendant's "swager" (a machine used to form metal) for years, evidence that the plaintiffs had misused the machine was excluded as irrelevant. Reversing denial of the defendant's motion for a new trial, the Court noted that under Pennsylvania law, "evidence of misuse is generally admissible to defeat causation in a strict liability design defect case." It reiterated its caution in *Gibson v. Mayor & Council of Wilmington, 355 F.3d 215 (3d Cir. 2004)* : "[W]hile *Rule 401* gives judges great freedom to admit evidence, [it] diminishes substantially their authority to exclude evidence as irrelevant."

Hodges v. Mack Trucks, Inc., 474 F.3d 188 (5th Cir. 2006) : The injured driver of a truck sued the manufacturer of the truck and the manufacturer of the seatbelt alleging design defects in the seatbelt and in the passenger-side door latch that caused him to be ejected in the accident. The Court held that a Texas statute stating that "[u]se or nonuse of a safety belt is not admissible evidence in a civil trial ... " was "substantive, rather than procedural." The statute was intended to bar the use of seatbelt evidence to prove contributory negligence, but it was not intended to bar evidence in a case like this, where it was offered to rebut the essential element of causation, whether the door latch was the proximate cause of the injuries. Therefore, it was an abuse of discretion to exclude evidence as to whether the driver was wearing a seatbelt, and so a judgment against the truck manufacturer was vacated.

Sims v. Great Am. Life Ins. Co., 469 F.3d 870 (10th Cir. 2006) : In an action against a life insurer who refused to pay on the ground that the insured committed suicide, the insurer attempted to prove the decedent's state of mind by showing that he was not wearing a seatbelt (although he habitually did) at the time of his one-car accident. Affirming in part a judgment for the plaintiff, the Court held it was error (but harmless) to exclude the evidence pursuant to a state law making evidence of the use or non-use of a seatbelt inadmissible "in any civil suit in Oklahoma." After an extensive analysis of the *Erie* issue, the Court held that the Rules of Evidence "exclusively govern in federal diversity cases," but that the relevancy assessment under *Rule 401* required a determination of whether the seatbelt provision "is a procedural rule or a substantive one." It concluded that the entire purpose of the statute was to regulate primary conduct, and so where, as here, the seatbelt evidence is not being used to affect negligence liability but only to draw an inference of the driver's state of mind in a contract action, the federal "procedural" principles governed. The Trial Judge had also followed state law in excluding expert opinions included in the medical examiner's report, the death certificate, and the investigating officer's report and testimony. The Court held that exclusion of this evidence was also error (but harmless): the state rules reflected state "procedural" policies, which are of no concern when applying the Federal Rules, including its relevancy rules.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 402 RULE 402

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CHAPTER 402 RULE 402

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402.01 Official Text

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

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PART TWO: THE RULES THEMSELVES
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402.02 Editorial Explanatory Comment

[1] Importance of the Rule

Federal Rule of Evidence 402 is one of the most important and yet least invoked of the Evidence Rules. *Rule 401* sets the definition of relevant evidence, but that Rule itself provides no authority for admitting evidence. *Rule 403*, the most invoked Evidence Rule, gives the Trial Court the discretion to exclude evidence if its probative value is substantially outweighed by the risk of prejudice, confusion of the jury, or delay. But like *Rule 401*, *Rule 403* is not a positive source for the admission of evidence. Rather, it is *Rule 402* that provides the authority for admitting every piece of evidence that is ever admitted in a Federal Court.

[2] Relevant Evidence Admissible

Rule 402 makes clear that all relevant evidence is admissible, except as otherwise provided by the Constitution, federal statute, or valid Supreme Court-promulgated rules. All evidence that is not relevant is inadmissible. If evidence is relevant, it is up to the nonoffering party to invoke a specific rule, from the body of rules listed in *Rule 402*, which justifies exclusion of the evidence.

Sometimes it appears that Judges decide doubtful questions of relevance on the side of admissibility, at least where no strong cry of prejudice supports the relevance objection. In view of the rather undemanding standard of relevance in *Rule 401*, this is not surprising. Fearing that evidence may tend to prove a fact in dispute in some hard-to-see way, Judges may be extraordinarily wary of exclusion.

The question arises whether, absent a specific claim of prejudice or confusion or a reasonable concern about undue consumption of time, Judges should worry about basic relevance objections. At first blush it may seem that the answer should be "no," since no harm is apparently done when irrelevant evidence is introduced.

Harm comes in subtle forms, however, as well as in obvious ways. Irrelevant evidence by definition cannot help the trier of fact. It can only hurt. It must be apparent that in offering such evidence the proponent seeks some advantage from it. Whatever the advantage that is sought, it is an edge to which the proponent cannot properly lay claim. Yet the opponent may be helpless to identify the precise mischief at hand. Damage is not always demonstrable. For this reason,

a Court should exclude irrelevant evidence upon proper objection without requiring an articulated demonstration of harm. Even without the showing of damage, the fact remains that at best irrelevant evidence is useless, and at worst it is time-consuming as well as damaging in some indeterminate way. We prefer to err on the side of caution and to exclude anything that cannot satisfy even the low relevance threshold to admissibility.

[3] Irrelevant Evidence in Response to Irrelevant Evidence

As a general proposition it is correct to assert that irrelevant evidence is not admissible in litigation (assuming that a proper objection is made). There is one class of cases in which this general statement must be further refined, however: where one party offers evidence that is properly classified as irrelevant and the other party, after failing to object, offers to meet the irrelevant evidence with additional irrelevancies. The notion of "fighting fire with fire" (also called "curative admissibility") is an old one, and the decision whether to admit irrelevant evidence in order to counter other irrelevant evidence seems to be the same under the Federal Rules of Evidence as at common law. n1

The Trial Judge must decide whether the interests of justice are better served by penalizing the party who failed to object, or by treating the party who began the parade of irrelevant evidence as being in no position to complain. Among the factors that the Trial Judge is likely to take into account in making a ruling are: the damage that can fairly be attributable to the initial offer of irrelevant evidence; whether the party who failed to object intentionally sat on his rights; whether a limiting instruction to disregard all of the irrelevant evidence is likely to work in the particular case; the amount of time that it would take to hear further irrelevant evidence; and the extent to which a failure of one party to respond to irrelevant evidence might mislead a jury untrained in evidence law to think that the irrelevant evidence was beyond challenge and therefore somewhat probative.

One thing, however, is clear: The doctrine of curative admissibility is only applicable where the adversary has already brought forth irrelevant or inadmissible evidence. It does not apply where the adversary's evidence was properly admitted in the first place. One cannot fight "fire with fire" if there was no "fire" to begin with. n2

[4] Sources of Rules Excluding Relevant Evidence

Rule 402 refers to four sources of possible exclusionary rules for relevant evidence: (1) the Constitution; (2) federal statutes; (3) the Federal Rules of Evidence; and (4) other Supreme Court rules, promulgated pursuant to statutory authority.

At the constitutional level, the most often invoked exclusionary rules are those excluding evidence obtained in violation of the *Fourth Amendment* right to be free from unreasonable search and seizure; n3 the *Fifth Amendment* right to be free from compelled self-incrimination; n4 the *Fifth Amendment* right to due process; n5 and the *Sixth Amendment* right to counsel. n6

There are a number of federal statutes that mandate exclusion of relevant evidence. The most often invoked example is the wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as Modified by Title I of the 1986 Electronic Communications Privacy Act. n7 This Act requires the exclusion of evidence obtained through electronic surveillance conducted in violation of the Act, despite the relevance of the information. Other statutes have also been invoked to exclude relevant evidence from time to time. n8

Ordinarily, the statute must expressly provide for the exclusion of evidence; where Congress has not specifically provided for exclusion, the Courts have generally not imposed it as a remedy. n9

The Federal Rules of Evidence contain many exclusionary rules. These rules can be divided into two types: (1) rules that guard against prejudicial or untrustworthy evidence, such as Rules 403, 608, 609, 702, 703, and the hearsay rule -- the policy behind these rules is that even if evidence is relevant, its admission in certain cases could actually harm rather

than advance the search for truth, due to the risk that the jury will be unfairly affected by prejudicial or unreliable evidence; and (2) rules based on the premise that certain policies are more important than the need to admit all relevant evidence, such as Rules 407 through 412, the rules on privileges, and *Rule 606*.

As to other Supreme Court rules that may result in the exclusion of relevant evidence, the most important are those contained in the Federal Rules of Civil and Criminal Procedure. For example, *Rule 37 of the Federal Rules of Civil Procedure* provides that the Trial Judge may sanction a litigant who commits a discovery violation by precluding that litigant from introducing relevant evidence. But most of the Civil and Criminal Rules do not specifically provide for exclusion of any evidence obtained in violation of the requirements set forth. Most Courts have held that in the absence of specific exclusionary language, a violation of a Federal Rule of Civil or Criminal Procedure does not result in exclusion of otherwise relevant evidence. n10 However, certain rules requiring notice or mandating discovery do permit a Trial Judge in the exercise of discretion to exclude evidence as a sanction. See, e.g., *Fed. R. Crim. P. 12.1(d)*, *12.2(d)*, *12.3(d)*, and *16(d)(2)*. Also, *Fed. R. Crim. P. 15* imposes some limits on the use of depositions in criminal cases, even though the testimony is relevant.

[5] Other Sources of Exclusion?

What if the asserted source of exclusion is not specifically mentioned in *Rule 402*? This was a question encountered by the Eleventh Circuit in the important case of *United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999)* .

Lowery was an appeal by the government, challenging rulings from the District Court that suppressed the testimony of alleged coconspirators. The expected testimony was obtained as a result of plea agreements, whereby the government promised to consider recommending a lighter sentence in exchange for the alleged co-conspirators' substantial assistance in the prosecution of the defendants. The District Court held that such agreements, although commonplace in the criminal justice system, were prohibited by *18 U.S.C. § 201(c)(2)*, which makes it a crime for anyone to give or promise anything of value for testimony. The Court also held that the agreements violated Rule 4-3.4(b) of the Florida Bar Rules of Professional Conduct, which states that a lawyer shall not "fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness ... ." The District Court reasoned that both of these sources of authority mandated exclusion of the testimony of the cooperating witnesses, even though that testimony was undoubtedly relevant.

The statutory source of exclusion cited in *Lowery* has been the subject of some controversy. The possible use of the statute as a source of exclusion of cooperating witness testimony came to be known as "the *Singleton* issue," after the now-reversed Tenth Circuit panel decision in *United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) , rev'd en banc, 165 F.3d 1297 (10th Cir. 1999)* . The question posed by *Singleton* was whether plea agreements violate the federal prohibition against bribing witnesses contained in *18 U.S.C. § 201(c)(2)*. The Court of Appeals in *Lowery* made short shrift of the defendants' argument that the statute prohibited prosecutors from offering leniency in exchange for testimony. The Court noted that *Singleton* had been rejected by every Court of Appeals, including the Tenth Circuit itself in an en banc opinion. The *Lowery* Court observed that if the statute clearly prohibited promises of leniency in exchange for testimony, "the legions of attorneys who have represented defendants convicted over the years because of testimony dependent upon such illegal agreements would have raised the issue day in and day out in every district court in every circuit in the country. They did not. The sound of their silence is deafening." Thus, because the statute did not prohibit offering a deal to a cooperating witness, it could not be used as a source of excluding the resulting evidence under *Rule 402*.

The Florida Rule of Professional Conduct prohibiting a lawyer from offering an inducement to a witness presented a somewhat more complicated question. Could that rule be the source of exclusion of relevant evidence in a federal trial? The *Lowery* Court observed that *Rule 402* provides "an exclusive list of the sources of authority for exclusion of evidence in federal court." Thus, the source of exclusion of relevant evidence must come from the Federal Constitution, a federal statute, an Evidence Rule, or another Rule promulgated by the Supreme Court under the Enabling Act. The

Lowery Court concluded simply that state rules of professional conduct "are not included in the list."

But while the state rule itself could not be a source of exclusion, there was another complication: a local rule of the Florida District Court incorporated the Florida Rules of Professional Conduct, and applied those rules to regulate the practice of lawyers in the District Court. Thus, the asserted source of exclusion of relevant evidence was not a state rule of professional responsibility, but rather a federal-based local rule. But the existence of a local rule did not help the defendants in *Lowery*. As the Court noted, local federal court rules are not promulgated by the Supreme Court pursuant to the Enabling Act; nor are they promulgated under any other Act of Congress. The authority for local court rules is found in *Federal Rule of Civil Procedure 83*, which provides authority for District Courts to promulgate local rules, but only if they are not inconsistent with the Federal Rules of Evidence or Procedure. Consequently, the Court concluded that local rules could not provide an independent source of exclusion of relevant evidence under *Rule 402*. n11

The defendant in *Lowery*, in a last-ditch effort at exclusion, relied on a federal statute commonly referred to as the "McDade amendment" (*28 U.S.C. § 530(b)*) which provides that a lawyer for the federal government "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The McDade amendment, as a matter of federal law, requires federal prosecutors to comply with state rules of professional responsibility, to the same degree as any other lawyer. The defendant argued that the McDade amendment incorporated the local rule of professional responsibility as a matter of federal *statutory* law, and that this was a specified source of exclusion under *Rule 402*. The *Lowery* Court obviously recognized that Acts of Congress like the McDade amendment are included on the *Rule 402* list because "Congress has the authority to exclude from evidence in federal courts anything it pleases, subject only to the limits placed upon it by the Constitution." But the important remaining question was whether the McDade amendment reasonably could be construed as a statute excluding evidence.

The McDade amendment by its terms is directed toward controlling the conduct of federal prosecutors and not toward whether evidence should be excluded. The *Lowery* Court stated that "nothing in the language or legislative history of the Act that would support" the "radical notion" that a rule designed to control prosecutorial ethics should also be employed as a source for excluding evidence in federal court. Making state professional conduct rules applicable to federal attorneys is one thing. Letting those rules govern the admission of evidence in federal court is quite another. The *Lowery* Court properly concluded that "[i]f Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms." n12

The resolution in *Lowery* makes a good deal of sense. The Rules of Professional Conduct, whether based in state or federal law, are not designed to control the admissibility of evidence. Rather, they are designed to control the conduct of lawyers. The Preamble to the ABA Model Rules of Professional Conduct states that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Thus, the proper remedy for a violation of a Rule of Professional Conduct is a sanction on the lawyer, not exclusion of any evidence that might have been derived from the misconduct. As one Court stated: "The ethical rules were intended by their drafters to regulate the conduct of the profession, not to create actionable duties in favor of third parties." n13

A possibly different situation arises in criminal cases where defense counsel is operating under a conflict of interest. The most common example in which exclusion might be considered is where the defense counsel has previously represented a witness who is now cooperating with the government. The lawyer in this circumstance is subject to disqualification because she cannot cross-examine the former client with confidential information, leading her to possibly softpedal the cross-examination at the expense of the current client. Defendants have argued that the way to protect against this conflict is simply to exclude the testimony of the cooperating witness. In *United State v. Messino, 181 F.3d 826 (7th Cir. 1999)* , the Court stated that a Trial Court can exclude relevant testimony "on rare occasions" to resolve a conflict of interest. The source of authority for exclusion is not a rule of professional responsibility, but rather *Rule 44 of the Federal Rules of Criminal Procedure*. That Rule gives Trial Courts broad discretion to fashion remedies to avoid defense counsel conflicts of interest. And of course that Rule was promulgated by the Supreme Court pursuant

to statutory authority, so it is a designated source of exclusion in *Rule 402*. As to whether the testimony of the cooperating witness should be excluded in order to alleviate a conflict of interest, the *Messino* Court held that "a balancing of the kind contemplated by *Rule 403* is in order. That is, the probative value of the evidence must be weighed against the negative consequences of admitting the evidence." In *Messino*, the Court balanced the probative value of the testimony of the government witness against the negative effects that would result from disqualification of defense counsel if the witness were to testify. The Court found that the cooperating witness' testimony would be highly probative, while the consequences of disqualification were inconvenience to the defendant and potentially less effective representation. The Court concluded that the costs of disqualification did not substantially outweigh the probative value of the cooperating witness' testimony, and therefore exclusion of that testimony was not warranted under the circumstances.

FOOTNOTES:

(n1)Footnote 1. See generally Graham, *Waiver of Right to Object Other Than by Failure to Make Objection -- The Concept of "Door Opening,"* 16 Crim. L. Bull. 461 (1980).

(n2)Footnote 2. See, e.g., *United States v. Rosa, 11 F.3d 315 (2d Cir. 1993)* (the doctrine of "curative admissibility" is only applicable where the adversary "has introduced inadmissible evidence" and when it is needed to rebut a false impression created: "Properly admitted evidence does not open the door to inadmissible evidence.").

(n3)Footnote 3. *Weeks v. United States, 232 U.S. 383 (1914)* .

(n4)Footnote 4. *Miranda v. Arizona, 384 U.S. 436 (1966)* .

(n5)Footnote 5. *Doyle v. Ohio, 426 U.S. 610 (1976)* (Due Process Clause prohibits the prosecution from using defendant's post-Miranda warning silence).

(n6)Footnote 6. *Massiah v. United States, 377 U.S. 201 (1964)* (confession excluded when obtained in violation of *Sixth Amendment* right to counsel); *United States v. Wade, 388 U.S. 218 (1967)* (postindictment identification excluded where it was obtained in violation of *Sixth Amendment* right to counsel).

(n7)Footnote 7. *18 U.S.C.A. §§ 2510-2520*.

(n8)Footnote 8. See, e.g., *Lusby v. Union Pac. R.R. Co., 4 F.3d 639 (8th Cir. 1993)* (admission of expert testimony was reversible error, because the expert, in formulating his opinion, considered materials the use of which is prohibited under *23 U.S.C. §§ 409*; Section 409 provides that reports, surveys and other materials compiled for the purpose of identifying, evaluating, or planning the safety of railway-highway crossings "shall not be admitted in Federal or State court or considered for any purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports."). See also *10 U.S.C. § 2254* (the opinion of accident investigators for the Armed Services as to the cause or contributing factors of an accident, set forth in an accident report, may not be considered as evidence or as an admission of liability by the person referred to in any criminal or civil proceeding arising from the accident); *18 U.S.C. § 4241* (a finding of mental competence shall not be admissible in a trial for the offense charged).

(n9)Footnote 9. See, e.g., *United States v. Blue Diamond Coal Co., 667 F.2d 510 (6th Cir. 1981)* (no suppression authorized for violation of statute requiring consent or administrative warrant for seizure of lawfully inspected records).

(n10)Footnote 10. See, e.g., *United States v. Schoenheit, 856 F.2d 74 (8th Cir. 1988)* (violation of *Fed. R. Crim. P. 41* requirements concerning nighttime execution of a warrant; exclusion is not required "unless the search would not have otherwise occurred or would not have been so abrasive if the rule had been followed, or there was evidence of an intentional and deliberate disregard" of the rule); *United States v. Charles, 883 F.2d 355 (5th Cir. 1989)* (violation of Rule 41 provision requiring officer to conduct a search with the warrant in hand does not require exclusion where the search would have occurred anyway).

(n11)Footnote 11. See also *United States v. Condon, 170 F.3d 687 (7th Cir. 1999)* ("Like the eleventh circuit in Lowery, we doubt that a local rule can require the exclusion of evidence" because such rules are not mentioned as a source of exclusionary authority in *Rule 402*).

(n12)Footnote 12. See also *United States v. Condon, 170 F.3d 687 (7th Cir. 1999)* (McDade amendment is "a rule of conduct, not a rule of evidence.").

(n13)Footnote 13. *Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991)* .

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402.03 Annotated Cases

[Go To Supp]

[1] Juvenile Delinquency Act

United States v. Delatorre, 157 F.3d 1205 (10th Cir. 1998) : A defendant who was charged with multiple gang-related crimes moved *in limine* to exclude evidence of his alleged participation in a murder before he was 18 years old. The Trial Judge ruled that the evidence was inadmissible to prove guilt on racketeering and conspiracy charges, but reserved ruling on whether the evidence could be introduced under *Rule 404(b)*. Reversing, on an interlocutory appeal, the Court held that the Juvenile Delinquency Act, *18 U.S.C. §§ 5031-5042*, governs only jurisdiction over juvenile offenses, and does not address the individual acts comprising the offense or the evidence necessary to prove the acts. Thus, the Act had no application to the murder as an offense, because the defendant was not separately charged with it; nor did it apply to the racketeering and conspiracy charges, because those offenses continued into the defendant's majority.

[2] Rules of Professional Responsibility

United States v. Messino, 181 F.3d 826 (7th Cir. 1999) : The Court reversed an order based on the rules of professional responsibility that disqualified a government witness from testifying because the witness had been represented previously by one of the defense attorneys. This case is discussed in the Editorial Explanatory Comment, *§ 402.02[5]*.

United States v. Lowery, 166 F.3d 1119 (11th Cir. 1999) : In a case in which the prosecution entered into cooperation agreements with several witnesses, the Trial Judge held that the witnesses would not be permitted to testify because such agreements violated a Florida Bar Rule of Professional Responsibility, which states that a lawyer shall not "offer an inducement to a witness." The Court held, however, that neither the state rule of professional responsibility, nor the local rule of court, nor the federal statute, warranted exclusion of the witnesses' testimony. This case is discussed in the Editorial Explanatory Comment, *§ 402.02[5]*.

[3] Statutory Exclusion

United States v. Griffith, 385 F.3d 124 (2004) : The Court affirmed a conviction for felon firearm possession, holding that statements made by the defendant during a pretrial-services interview could be used to impeach him at trial. The Court held that the bar in *18 U.S.C. § 3153* on use at trial of such statements applied only to their substantive use on the issue of guilt, not their use for impeachment.

Morales v. American Honda Motor Co., 151 F.3d 500 (6th Cir. 1998) : In a product liability action for injuries to a nine-year-old riding a small motorbike, the Court held that *15 U.S.C. § 2074(b)*, which makes inadmissible "[t]he failure of the [Consumer Products Safety] Commission to take any action or commence a proceeding with respect to the safety of a consumer product," does not apply when the CPSC has *decided* not to adopt a proposal. Therefore, it was error (but harmless) to exclude evidence that the CPSC denied a petition to regulate use of unlicensed motorbikes by children under age 14.

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402.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see *California Evidence Code §§ 350, 351*. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges **[Editor's Note: The Advisory Committee proposals on Article V were subsequently rejected by Congress]**; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States, 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957)* ; *18 U.S.C. § 3501(c)*.

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. *8 U.S.C. § 1202(f)*, records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; *10 U.S.C. § 3693*, replacement certificate of honorable discharge from Army not admissible in evidence; *10 U.S.C. § 8693*, same as to Air Force; *11 U.S.C. § 25(a)(10)*, testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; *11 U.S.C. § 205(a)*, railroad reorganization petition, if dismissed, not admissible in evidence; *11 U.S.C. § 403(a)*, list of creditors filed with municipal composition plan not an admission; *13 U.S.C. § 9(a)*, census information confidential, retained copies of reports privileged; *47 U.S.C. § 605*, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914)* ; *Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* ; incriminating statement elicited from an accused in violation of right to counsel, *Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)* .

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

To accommodate the view that the Congress should not acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, and the concern that the Congress must not affect adversely whatever authority the Court does have to promulgate rules, the Subcommittee amended "by other rules adopted by the Supreme Court" to read "by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other rules where the reference appears.

[3] Report of the House Committee on the Judiciary

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court." To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

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1-402 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 402, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	**Rule 402. General Admissibility of Relevant Evidence**

admissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed

Relevant evidence is admissible unless any of the following provides otherwise:

by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

- the United States Constitution;
- a federal statute;
- these rules; or
- other

rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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United States v. De La Torre, 599 F.3d 1198 (10th Cir. 2010) : The Court affirmed a conviction for possessing methamphetamine and marijuana with intent to distribute. It held that the statutory bar on using statements and information obtained in the course of performing pretrial services to prove guilt, *18 U.S.C. § 3153(c)*, did not prohibit the government from offering such statements to impeach the defendant's credibility.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 403 RULE 403

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403.01 Official Text

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 403 RULE 403

1-403 Federal Rules of Evidence Manual 403.02

403.02 Editorial Explanatory Comment

[1] Presumption of Admissibility

This Rule codifies the common-law powers of the Trial Judge and states these powers as explicitly as they ever have been stated. Where the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion, or undue consumption of time, the evidence may be excluded even though it is relevant. The drafters of the Rule provided that the probative value must be "substantially" outweighed by these other factors before evidence is excluded. "Substantially" is not defined and there is nothing in the Advisory Committee's Note or in the congressional material that indicates exactly what this word is intended to mean. But the policy of the Rule is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence. n1 In other words, there is a presumption in favor of admitting relevant evidence. In order to overcome this presumption, the negative countervailing factors must be demonstrably greater than the probative value of the evidence. n2 The rationale is that exclusion amounts to a total deprivation of the offeror's probative evidence, while admission may be accompanied by redaction, limiting instruction, or other safeguard by which both the objector and the offeror can ordinarily be accommodated. n3

[2] Balancing Standard

There has been some dispute as to the proper standard to be used in balancing probative value against prejudicial effect under *Rule 403*. One possibility is to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. Another possibility, recommended by Professor Dolan, is to "resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice." n4

We believe that the proper equation places on one side the maximum reasonable probative force of the offered evidence. n5 Since parties must produce evidence in order to make a case, and since our evidence system allows juries to make all inferences reasonably deducible from the proof presented and allows the parties to argue about those inferences, it is evident to us that the maximum probative force of the evidence is properly viewed as the cost of excluding the evidence.

The other side of the equation should include the *likely* prejudicial impact of the evidence, rather than the minimum or

maximum prejudicial effects. Few of us believe that juries will act perfectly in practice. In fact, *Rule 403* assumes that juries cannot act this way. But there is no reason to assume that they will act as imperfectly as possible. We are confident that Trial Judges can identify the likely harm associated with probative evidence and can estimate its impact on the jury. Thus, the proper balance pits the maximum probative value of evidence against the likely prejudicial effect.

[3] The Meaning of "Prejudice"

Evidence is not "prejudicial" merely because it is harmful to the adversary. After all, if it didn't harm the adversary, it wouldn't be relevant in the first place. Rather, the Rule refers to the negative consequence of "unfair" prejudice. n6 Unfair prejudice is that which could lead the jury to make an emotional or irrational decision, or to use the evidence in a manner not permitted by the rules of evidence. n7 Professor Lempert, in *Modeling Relevance*, *75 Mich. L. Rev. 1021 (1977)*, defines prejudicial evidence as "any evidence that influences jury verdicts without relating logically to the issue of guilt or innocence." We would prefer a slightly different definition: "prejudicial evidence is any evidence that affects the trier of fact in a manner not attributable to the permissible probative force of the evidence." This definition makes clear that evidence that strongly relates to the issue of guilt or liability might still be highly prejudicial, and also that evidence that is probative for a permissible use may nonetheless be prejudicial because the jury could use it for an impermissible purpose.

There are, of course, varying degrees of prejudice, and the Trial Court must take that into account when balancing under *Rule 403*. In a criminal case, any evidence of a defendant's prior criminal activity that is extremely similar to the charges is clearly on the high end of the prejudice scale. The degree of prejudice may well diminish if the evidence might permit some unsavory inferences, and yet does not clearly indicate criminal or highly immoral activity. Thus, in *United States v. Thompson, 990 F.2d 301 (7th Cir. 1993)* , the defendant was charged with being a felon in possession of a gun; the gun was found in an apartment in which he was sleeping. He argued that he neither knew of nor exercised control over the gun and was an infrequent guest at the apartment. The Trial Court permitted an agent to testify that officers found $13,000 cash, and expensive jewelry engraved with the defendant's first name, in the bedroom of the apartment. The defendant argued that this testimony should have been excluded under *Rule 403*, as it prejudiced the jury into thinking the defendant "was a bad guy." The Court of Appeals held that the evidence was properly admitted to show the defendant's control over the premises, and that the probative value was not substantially outweighed by the prejudicial effect because "it is not a crime to keep jewelry or cash in one's bedroom." n8

[4] Where Limiting Prejudicial Effect Would Reduce Probative Value

The Trial Court should of course take all reasonable steps to limit the prejudicial effect of proffered evidence. However, in some cases any measure taken to control prejudice would result in a corresponding loss of probative value. This was the problem confronted by the Court in *United States v. Mackie, 893 F. Supp. 12 (E.D. La. 1995)* . Mackie was charged with money-laundering. The government sought to admit surreptitiously recorded conversations in which the defendant took part. These conversations involved discussions of several schemes to launder money. The defendant argued that under *Rule 403* the tapes should be redacted to exclude the defendant's liberal use of racial and ethnic slurs. The Court recognized that the admission of such language could inflame the jury against the defendant. The problem, though, was that the tape was so "heavily seasoned" with racial and ethnic slurs that redaction of the slurs would severely damage the flow of the taped conversation. Moreover, redaction of some of the ethnic slurs would deprive the tape of probative value on the point of money-laundering, since the tape included discussion of the defendant's plan to deposit cash with insurance companies in the name of deceased African-Americans. Under these circumstances, the tape could not be redacted to limit prejudice since to do so would also limit probative value. And while the presence of racial slurs was undeniably prejudicial, the prejudice did not *substantially* outweigh the probative value of the tape, as is required for exclusion under *Rule 403*. The Court noted, however, that it would take "sufficient steps during voir dire of prospective jurors to ensure that no jurors are seated who would allow their judgment to be influenced by the slurs or who could not disregard race."

[5] Less Prejudicial Alternatives

If other less prejudicial proof is available, or if the prejudice raised by the evidence could be minimized easily without destroying its probative value, the Trial Judge may decide to require such less prejudicial alternatives by excluding the more prejudicial evidence -- at least where the balance between probative value and prejudicial effect of the proffered evidence is close. n9 A Court should be more willing to exclude evidence when there are less prejudicial alternative means to prove the fact in issue. n10

An example of this proposition arose in *United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987)* . Border Patrol Agent Rosario was chasing three suspected illegal aliens when one of them shot at him from a distance of fifty feet, then escaped across the border. Rosario filed a report of the incident, but no investigation was undertaken. Three months later, Rosario was sitting in the Border Patrol locker room, when he happened to look through a stack of nine photographs of men "suspected to be thieves, smugglers, transvestites and the like," taken by Border Patrol agents when the suspects were in custody. He noticed a picture of a man who resembled the man who had shot at him. That man was Torres-Flores. At trial, when Rosario was questioned about the circumstances of his viewing the photographs, he stated that they were "pictures of various people we take, smugglers, transvestites." Eight of the nine photographs had descriptive material handwritten next to the individual's body, such as "robbery suspect," "in slammer for murder," "river bandit," "thief," and "transvestite." The defendant's photograph also had something written on it, but this was covered up by brown paper and tape when the picture was shown to the jury. There was no attempt to cover up the notations on the other photographs, which were also shown to the jury.

The Court of Appeals held that the Trial Judge committed reversible error in admitting the photographs and allowing them to be viewed by the jury in the manner presented by the government. Of course, it was clear that the photographic array was relevant, because Rosario's identification was crucial to the case and the jury would have to be apprised of the circumstances of the prior identification. But the Court reasoned as follows:

> While the photo-array was not without probative value, this value was substantially outweighed, *Fed.R.Evid. 403*, in the circumstances of this case, especially as the pictures could easily have been modified so as to avoid characteristics which would cause the jury to identify the defendant as having a prior record. The masking that was attempted was so inartful and incomplete as merely to invite the jury's attention to these prejudicial matters.

The Court instructed that at a new trial, the government should "take more effective steps than mere taping to disguise the nature of the photographs." n11

Of course, the reality is that the prejudice attendant to the photographs in *Torres-Flores* can never be completely rooted out. The jury would surely surmise that the photographs found by Rosario in the Border Patrol locker room were photographs of suspects with prior criminal contacts with the Border Patrol. Nobody would think that the photographs were culled from a pack of baseball cards or a family photo album. However, the Court in *Torres-Flores* did not require the government to eradicate *all traces* of prejudice before evidence could be admitted; it simply held that in a close case, *Rule 403* may warrant exclusion if the offering party fails to take reasonable steps to control the prejudicial effect of the evidence. n12

[6] Balancing as a Comparative Process

In *Old Chief v. United States, 519 U.S. 172 (1997)* , the Court emphasized the point made in the previous section: that the balancing process under *Rule 403* requires the Trial Judge to consider whether other evidence is available to prove the point, and specifically whether the alternative evidence is less prejudicial than the evidence proffered. The Court explained that a piece of proffered evidence could not be viewed in isolation, because that would "leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice

consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a *Rule 403* objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule." Instead, *Rule 403* requires the Trial Court to consider "evidentiary alternatives."

In *Old Chief*, the defendant was charged with felon-firearm-possession. To prove the felony element, the government offered the defendant's prior conviction for an act of violence. The defendant sought to exclude the evidence by providing an alternative -- he offered to stipulate that he was a felon. The Trial Judge admitted the conviction despite the defendant's proffer. The *Old Chief* Court held that the District Court abused its discretion. Old Chief's stipulation was alternative evidence to prove the felony element. This evidence was just as probative and yet much less prejudicial than the judgment of conviction.

[7] Stipulations

The Court held that Old Chief could force the government to accept a stipulation that he was a felon -- the stipulation rendered the judgment of conviction inadmissible under *Rule 403*. An important question after *Old Chief* is the extent to which an opponent can control the admission of prejudicial evidence by forcing the proponent to accept a stipulation.

Even a cursory reading of *Old Chief* indicates that the Court's holding is limited to the unusual circumstances posed by the case. It by no means held that offers to stipulate can always, or even often, preclude evidence proffered by the proponent. Most of the *Old Chief* majority opinion is devoted to explaining why a proponent ordinarily should be *permitted* to prove its case through evidence rather than forced to accept a stipulation. Justice Souter, writing for the majority, discussed why a proponent might legitimately be concerned about accepting a stipulation:

> Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. ... This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. ... When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, *to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault*. (emphasis added.)
>
> But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the Courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, *66 Calif. L. Rev. 1011, 1019 (1978)*. Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence

> in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

Despite this paean to proof by evidence rather than forced stipulation, the *Old Chief* Court held that the prosecution is required to accept a stipulation of the felony element in a felon-firearm prosecution. Justice Souter reasoned as follows:

> This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. ... Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. ... Congress ... has made it plain that distinctions among generic felonies do not count ...; the fact of the qualifying conviction is alone what matters under the statute. ... Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.
>
> Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. ... What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a *Rule 403* analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

The probable consequence of the analysis in *Old Chief* is that the prosecutor (or for that matter a party in a civil case) will be required to accept a proffered stipulation only in extremely narrow circumstances, such as with a conviction element of a status crime, as in *Old Chief* itself. n13 Another example would be a case where the defendant is charged with escape. Conviction of escape requires proof of a predicate conviction, which the defendant can, after *Old Chief*, stipulate in order to keep the judgment of conviction out of the case. n14

Suppose, however, that the prosecution in a drug case offers the defendant's prior drug conviction to prove intent, and the defendant tries to keep this evidence out by stipulating to intent. After *Old Chief*, the government has a strong argument that it should be permitted to prove the conviction. Otherwise, the government would be forced to suffer a "break in the natural sequence of narrative evidence." Indeed, the *Old Chief* Court stated: "if there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' *Fed. Rule Evid. 404(b)*), *Rule 404(b) guarantees* the opportunity to seek its admission." (Emphasis added.) Thus, while the defendant won in *Old Chief*, the decision probably represents a net loss for defendants in the effort to keep out prejudicial evidence by way of an offer to stipulate. n15

[8] *Old Chief* and Plea Agreements of Cooperating Witnesses

Most Courts have held that *Old Chief* generally precludes defendants from using a concession or stipulation to control prejudicial evidence. An important example of the consequences of *Old Chief* arises when the government enters into a deal with a cooperating witness, and that witness testifies at trial. The usual practice is for the government to introduce the fact and the terms of the plea agreement. A plea agreement is a two-edged sword. The defendant might want to bring out the plea agreement to show that the witness has a reason to lie, because his deal is at least in some way contingent on successful testimony against the defendant. The prosecution might want to bring out the agreement because in some respects it actually supports the witness' credibility, and it may lead the jury to think that because the witness pleaded guilty the defendant must be guilty as well. This latter inference is prejudicial however. The jury should not be permitted to think that because the defendant's associate pled guilty, the defendant must be guilty as well. The Courts under *Rule 403* have held that a defendant has a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. n16

But this does not mean that the prosecution should be prohibited from admitting the plea agreement of a cooperating witness on direct examination. In most cases, the defendant is going to introduce the agreement on cross-examination in an attempt to show the witness is lying as part of his deal. If this attack is going to be made on cross, it is only fair to permit the government to bring out the agreement on direct. n17 If the government cannot refer to the plea agreement on direct, it will suffer a negative inference when the agreement is raised on cross-examination. The jury may think that the government was trying to hide the fact that a deal was made with the witness. Moreover, under *Rule 607*, the prosecution has the right to impeach a witness it calls, and to the extent a plea agreement impeaches a witness for bias, the prosecution would much rather conduct that impeachment in a relatively gentle manner on direct examination -- leaving defense counsel to seem overreactive if she emphasizes the agreement on cross-examination. So where the defendant is going to raise the agreement on cross-examination, the agreement carries substantial probative value for the government's case. As a general rule, this probative value is probably not substantially outweighed by the risk that the jury will use the agreement as evidence of the defendant's guilt even though instructed not to do so.

But is the situation different if the defendant promises not to refer to the agreement on cross-examination or elsewhere in the trial? If the defendant makes such a concession, why should the plea agreement be admissible to remove the sting of a cross-examination that the defendant promises will never occur? This is where the *Old Chief* ruling, generally prohibiting the defendant from controlling the prosecution's proof by way of concession, will have an impact. The en banc consideration by the Third Circuit in *United States v. Universal Rehabilitation Services (PA), Inc.,* n18 provides a good overview and a thorough discussion of both sides of the issue. The defendants were tried for mail fraud and related offenses. Two cooperating witnesses testified and on direct examination, their guilty pleas and plea agreements were offered into evidence.

To head off the prosecution's legitimate concern that the plea agreements would be raised on cross-examination, the defendants in *Universal* promised that at trial they would "not raise the guilty plea/plea agreements on cross examination nor seek to raise any inference on which the accomplices' pleas of guilty would be admissible to rebut." The defendants argued that in light of their concession there was no longer any need to bring out the plea agreements on direct examination. They asserted that their concession robbed the plea agreements of any probative value, so that admitting the agreements would be an abuse of discretion under *Federal Rule of Evidence 403*.

The Trial Court in *Universal* was unpersuaded by the defendants' argument. It reasoned that the agreements were still probative despite the defendants' proffered concession because if the agreements were not introduced, "the jury is going to wonder whether or not [the witnesses] have been charged. It's going to wonder perhaps what they have been promised by the prosecutor if anything and what they may be getting in return for their testimony." This risk of jury speculation would not be ameliorated by the defendants' promise not to bring up the plea agreements.

The jury was instructed not to use the agreements as evidence of the defendants' guilt. The defendants were convicted of

a single count of mail fraud. Notably, they had been charged with a number of counts and acquitted of all but one: the count to which the cooperating witnesses had pleaded guilty. What a coincidence!

On appeal, the question was whether the Trial Court abused its discretion under *Rule 403* when it admitted the plea agreements even though the defendants agreed not to bring them up at the trial. The majority of the en banc Court found no abuse of discretion. It argued that the plea agreements were probative on three points even after the defendants agreed not to raise them. Specifically, the plea agreements were probative: "(1) to allow the jury accurately to assess the credibility of the witness; (2) to eliminate any concern that the jury may harbor concerning whether the government has selectively prosecuted the defendant; and (3) to explain how the witness has first hand knowledge concerning the events about which he/she is testifying."

The defendants responded to the majority's argument that credibility could not be taken out of the case by citing *Old Chief*. But the majority in *Universal* distinguished *Old Chief* as a case where the proffered stipulation "was of equal probative value to the government's proffered evidence." This was not the case with the defendants' offer to refrain from bringing up the plea agreements of the cooperating witnesses. The plea agreements were still probative (1) to counteract the possibility that the jury might believe that the defendants were being selectively prosecuted instead of the equally culpable witnesses, and (2) to explain how the witnesses had first hand knowledge concerning the matters to which they were testifying.

Since the plea agreements retained probative value despite the defendants' concession, the remaining question was whether the Trial Court in *Universal* properly balanced that probative value with the risk of prejudicial effect. The majority argued that the prejudicial effect in this case was diminished by the fact that the jury was instructed a number of times not to use the plea agreements as proof of the defendants' guilt. These instructions minimized the risk that the jury would use the agreements impermissibly. In the majority's view, the Trial Court was within its discretion in finding that the minimized prejudice did not substantially outweigh the probative value of the cooperation agreements.

Despite the majority's decision in *Universal*, there is a strong argument that where the defendant promises not to bring up the plea agreement, it should fall out of the case unless the defendant reneges on that promise.

The analysis of both the Trial Court and the majority in *Universal* basically ends by stating that the proffered concession and the plea agreements are not "equally probative" and therefore the agreements can still be admitted under *Rule 403*. But this is not a very careful *Rule 403* analysis, and it ignores the fundamental teaching of *Old Chief*. As Judge Becker states in dissent in *Universal*, *Old Chief* stands for the proposition that under *Rule 403*, "proffered evidence must not be analyzed as an island unto itself." Rather, admissibility of a piece of evidence under *Rule 403* can only be evaluated in comparison to other available means of proof on the same point. The reason the Court reversed Old Chief's conviction for felon firearm possession was that his proffered stipulation of a felony conviction was just as probative as and far less prejudicial than actual proof of the conviction itself. Put another way, the probative value of the felony conviction was *diminished* by the availability of other proof of the defendant's felony status (i.e., the stipulation).

Applying this more nuanced *Old Chief* analysis to the facts of *Universal*, the question is whether the *diminished* probative value, in light of the defendant's promise not to raise the plea agreements, is substantially outweighed by the obvious risk that the jury will use the agreements as proof that the defendants are guilty. As Judge Roth states in dissent in *Universal*, the evaluation of the probative value of the plea agreements "cannot be made without a consideration of the defendants' commitment" not to raise the agreements.

According to the majority the plea agreements were still probative despite the defendants' concession, (1) to allay any jury concerns that the defendants had been selectively prosecuted, and (2) to establish that the witnesses had personal knowledge of the events to which they were testifying. But what is the probative value of the agreements for these purposes?

As to selective prosecution, evidence of the plea agreements seems at first blush to be very probative. The cooperating witnesses in *Universal* were relatively major players in the charged scheme. The jury may well have wondered why the defendants were being prosecuted and these witnesses were not. Evidence of the plea agreements would explain the situation and diminish any such speculation. The jury would see that the defendants were not being singled out, because the witnesses were charged as well.

But this does not end the inquiry. If the government is concerned about jury speculation, why not just ask the Court to instruct the jury that it should not speculate about selective prosecution? Judge Roth in dissent makes the compelling argument that the best way to avoid jury speculation is "to instruct the jury members that they should concern themselves only with the guilt or innocence of defendants and not with the possibility of selective prosecution or the involvement of any other persons in any alleged scheme." Again, the possibility of less prejudicial alternatives -- in this case a limiting instruction -- did not receive proper consideration by the *Universal* majority.

In fact the use of an instruction is a more efficient way to deal with jury speculation than is introducing the prejudicial plea agreement. Under the prosecution's scenario, the plea agreement must be presented to eliminate the risk of jury speculation. But this evidence carries with it prejudicial effect, so the jury is instructed that it cannot use the plea agreement as evidence of the defendant's guilt. In other words, to allay the risk of jury speculation, the prosecution proposes admission of evidence, and then a limiting instruction to prevent jury speculation on a different subject. (Obviously, the prosecution's view of jury speculation and the curative powers of jury instruction vary depending on which shoe is on which foot). Under the defendants' view, the risk of jury speculation is handled by a cautionary instruction without the need to introduce any evidence. As Judge Becker notes in dissent in *Universal*, the defendants' suggested mode of presentation "takes less time and is more direct." Efficiency is surely a consideration that must be taken into account when balancing the probative value of evidence against the risks of prejudice, confusion and delay under *Rule 403*.

What about the probative value of the plea agreement in establishing that the witnesses had personal knowledge about the matters to which they testified? It seems obvious that the probative value for this purpose is minimal. The plea agreement proves nothing more about the witnesses' personal knowledge than their in-Court testimony already shows. Judge Roth, in dissent points up the flaw in the government's argument on this point:

> I am left wondering ... how the introduction of a witness's guilty plea into evidence establishes the basis for his or her firsthand knowledge of the crime. ... It is the witness's testimony itself that establishes the basis for his or her firsthand knowledge of the crime-the witness has firsthand knowledge because s/he was present during or participated in the crime, not because s/he pleaded guilty to the crime.

Admitting the plea agreement to prove the witness' personal knowledge amounts to impermissible bolstering. The witness has stated on the stand that she witnessed the crime. In the absence of an attack on that assertion (e.g., cross-examination asserting that the witness wasn't really there) there is no reason to introduce the plea agreement. It is simply cumulative on the question of personal knowledge.

So how should the *Rule 403* balancing have come out in *Universal*, where the defendants conceded that they would not raise the plea agreement on cross-examination? The plea agreements carry probative value that is significantly diminished by the defendants' promise not to raise them and the possibility of an instruction to limit jury speculation on the question of selective prosecution. On the other hand, the risk of prejudice is high, albeit somewhat diminished by a limiting instruction not to use the plea agreement as evidence of the defendant's guilt. Despite the instruction, the jury will likely find it hard to ignore the inference that the defendants must be guilty because their associates pleaded guilty to the same crime.

It must be remembered that under *Rule 403*, the evidence is excluded only if the prejudicial effect *substantially* outweighs the probative value. This is where judgment calls are made and reasonable minds often differ. So given the

role of Appellate Judges in reviewing *Rule 403* determinations, the majority's viewpoint in *Universal* is understandable. After all, the Trial Court did explicitly balance the *Rule 403* factors, and it was the Trial Court who saw the witnesses and heard the defendants' proffered concession. It is hard to reverse that decision on a cold record.

But the fundamental problem with affirming the Trial Court in *Universal* is that it means that plea agreements will *always* be admissible on direct examination. The *Universal* facts present the strongest facts possible for exclusion of the plea agreements. The best reasons for admitting the agreements on direct are to remove the sting of anticipated impeachment and to counter the implication that the prosecution is hiding negative evidence. Where these risks are virtually eliminated by the defendants' promise not to raise the agreements, and yet the Trial Court still holds that the agreements are admissible under *Rule 403*, it is apparent that plea agreements will be admissible in every case and there is nothing that the defendant can do to keep them out. The only real prohibition remaining is that the prosecution will not be able to argue explicitly that the witnesses must be telling the truth because they entered into these agreements.

Because affirming the Trial Court in *Universal* means that plea agreements are essentially automatically admissible, the Court of Appeals should have stepped in and found an abuse of discretion. While the abuse of discretion standard is deferential, it should not mean that Trial Court decisions admitting prejudicial evidence are impervious to review, no matter the circumstances. As Judge Sloviter stated in her dissent in *Universal*:

> The majority's holding that a guilty plea is admissible to permit the jury to assess the credibility of the witness, even in the absence of an attack on the witness's credibility, or to dispel jury concern about selective prosecution, even if the defendant has not so contended, transmutes a case-by-case analysis under *Fed.R.Evid. 403* into a general rule of admissibility. I see no justification for such a rule.

It does not follow, however, that the decision in *Universal* means that plea agreements of cooperating witnesses are to be automatically admitted in all trials, no matter what the defendant does. The Court in *Universal* did not hold that Trial Courts *must* admit these agreements. It simply held that the Trial Court did not abuse its wide discretion in admitting the plea agreements. It is very likely that if the Court had reviewed a decision to *exclude* the agreements, it would have found no abuse of the Trial Court's wide discretion.

So it is to be hoped even after *Old Chief* and *Universal* that Trial Courts will use their discretion to exclude plea agreements from jury consideration when the defendant makes a solid, clear commitment that he will not raise (1) the plea or plea agreement, (2) any attack on the witness' motive to falsify that might arise from an interest in cooperation or cutting a deal, or (3) any inference that the defendant was selectively prosecuted. The jury can be instructed upon request not to speculate about selective prosecution.

It must be recognized that a Trial Court might be concerned about how the defendant's commitment not to attack a cooperating witness will be enforced. In *Universal,* the defendants' proffered concession was that they would not "raise the guilty plea/plea agreements on cross examination nor seek to raise any inference on which the accomplices' pleas of guilty would be admissible to rebut." This is not the most crystal-clear of stipulations. By way of contrast, Old Chief's proffered stipulation left no ambiguity. He offered to stipulate that he had been convicted of a felony, which was the precise element of the crime with which he was charged. Now consider the defendants' promise in *Universal* not to "raise" the plea agreement. What does "raise" mean? Does it mean that the defendants will make no *specific* reference to the guilty pleas? What if defense counsel asks the witness "have you ever spoken with a government agent before testifying today?" The prosecution would howl that this is an indirect reference that "raises" the plea agreement. But defense counsel would respond that he was not referring to the agreement at all -- he was just inquiring into whether anyone in the government had helped the witness prepare his trial testimony. What does the Court do then?

Other questions arise about the stipulation procedure in practice. What if the defense counsel simply accuses the witness of being a liar? Does this "raise" the plea agreement? What if counsel charges the witness with being the person who duped the defendant to commit the crime that the witness himself benefitted from? Indeed, where the witness is

obviously involved with the same activity as the defendant, what kind of cross-examination would *not* raise an inference that could be rebutted by the plea agreement?

The above questions raise a legitimate concern that the defendants' proffered concession in *Universal* was too vague and slippery to be enforceable -- or at least raise the possibility that a Court might be wary before holding that the defendants' promise rendered alternative evidence inadmissible. Under these circumstances, the government is justifiably concerned that the defense is impinging on the prosecution's ability to present its evidence in the most meaningful and compelling way.

There is another practical problem with the defendants' proffered concession in *Universal*. Assume it can be determined that the defendants violated the concession by either raising the agreements or raising an inference that the agreements can rebut. To take a simple example, assume the prosecution is not permitted to elicit the agreements on direct, and defense counsel on cross-examination accuses the defendant of being a government snitch, only out for what he can get from the government. The prosecution would then, presumably, get to introduce the plea agreement on re-direct. But that is less protective of the government interest than when the agreement is brought out on direct. The prosecution wants to introduce the agreement on direct in order to remove the sting of anticipated impeachment and prevent the jury from thinking that the prosecution is hiding negative evidence. These legitimate prosecutorial objectives are not protected by the ability to introduce the agreements on *redirect* after defense counsel violates the stipulation. The damage at that point has been done. Perhaps some of the damage can be alleviated by a limiting instruction, in which the trial judge tells the jury that it is not to draw a negative inference from the fact that the prosecutor brought out the agreements on re-direct rather than on direct examination. But this instruction, even if effective, cannot restore the prosecution's interest in removing the sting of anticipated impeachment by bringing out the agreements gently and lovingly on direct examination.

An even more serious practical problem exists if defense counsel attacks the motives of the cooperating witnesses in *closing argument*. Now what is the Court to do? Must it allow the government to reopen its case to introduce proof of the agreements? That remedy will not satisfy the prosecution, because reopening will look like a desperate ploy by the government. The government will look like it has a lack of confidence in the strength of the evidence it has already presented. Again, a limiting instruction might diminish some of the prejudice suffered by the government if it were to reopen its case -- the jury could be instructed not to draw a negative inference about the strength of the government's case or the timing of its presentation of the agreement. But the possibility of having to reopen the case after defense counsel violates its proffered concession might well give a Court pause before holding that the defendant, by proffering such a concession, can prevent the government from bringing out a plea agreement on direct.

Perhaps the real answer to the problems that might arise if defense counsel violates the terms of the concession is this: If the Trial Judge agrees to exclude the agreement conditioned on defense counsel complying with its promise not to raise the agreement, defense counsel is very unlikely to violate that promise. If the defense counsel raises the plea agreements after agreeing not to do so, he certainly risks sanctions from the Court. He also risks a Court holding that the entirety of the plea agreement is admissible, including provisions which defense counsel would rather not have the jury hear about. And finally, if Courts were to hold that defendants could keep plea agreements out of the case by agreeing not to raise them, and then defendants continually reneged on their promises and raised the agreements anyway, Courts over the long run would no longer permit the practice. Defendants would be back to facing the admission of the entire plea agreement on direct examination without any ability to control the risk of prejudice by promising not to mention the agreement on cross.

So perhaps any concern over the costs of the "defense concession" approach is overstated. Even so, the concern is not negligible, and the *Universal* majority may have thought that a rule allowing defendants to control the proof of plea agreements would be fraught with difficulty. If that was the concern, however, the Court should have expressed it plainly. Its reliance on a cramped reading of *Old Chief* leads to unnecessarily complex procedures and unnecessarily prejudicial evidence introduced against defendants.

[9] *Old Chief* and the Moral Reasonableness of a Guilty Verdict

One passage in *Old Chief* indicates that the prosecution should be unfettered by a proffered stipulation because a stipulation would deprive the government of an opportunity "to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." This would seem to mean that the government could proffer evidence beyond the actual facts in dispute, in order to provide a broader perspective on the morality of the defendant's conduct or the morality of the government's objectives. Such a broad analysis of relevance was implicitly adopted by the Court in *Universal*, discussed in § 403.02[8]. The Court there held that the plea agreement of a cooperating witness remained probative even though the defendant conceded that he would not attack the witness' motives for testifying. It was relevant because when the jury hears the testimony from the defendant's cohort, it will wonder why the cohort isn't being punished along with the defendant. In other words, it might speculate -- even though no evidence had been presented on the point -- that the prosecution was acting improperly (immorally) by selectively prosecuting the defendant.

Thus, one reading of *Old Chief* is that evidence can be relevant on broader issues of morality, even if those issues are not contested by the parties. Professor Todd Pettys refers to this reading of *Old Chief* as adopting an "Enhanced Relevance Model." n19 Professor Pettys demonstrates the disastrous consequences that flow from the view that evidence is relevant to prove the moral reasonableness of a litigant's position:

> Imagine two jurors who have conflicting notions of moral behavior. The jurors are asked to determine whether the defendant, an African-American male, is guilty of possessing crack cocaine with the intent to distribute. Juror One believes that recreational drug use is morally neutral behavior -- it is neither blameworthy nor praiseworthy -- and that racist prosecutors use the nation's drug laws to incarcerate as many young African-American males as possible. Juror Two, on the other hand, believes that possessing or distributing illegal drugs is always morally wrong because those drugs might wind up in the hands of people who lack the knowledge to use them responsibly and innocent people might be harmed. The prosecutor offers the testimony of a witness who will say that, one week before the defendant's arrest, she saw the defendant sell several small bags of crack cocaine to another man, who in turn gave the cocaine to children. Though the Government never charged the defendant in connection with that alleged incident, the prosecutor argues that the testimony is relevant because it tends to show that the defendant intended to distribute the small bags of crack cocaine he was carrying at the time of his arrest. The defendant objects under *Rule 403*, arguing that the jury is likely to conclude that he is a dangerous person who should be sent to prison regardless of whether he is guilty of the charged offense.
>
> Might the Enhanced Relevance Model tip the balance more decisively in favor of admission? That is, might the probative weight of the evidence be further increased by its tendency to show that it would be morally reasonable to convict the defendant, thereby increasing the degree of prejudicial risk required to render the evidence inadmissible under *Rule 403*? The answer depends on the moral premises employed in the analysis. In the eyes of Juror One, the testimony might carry little moral weight, while Juror Two might regard the testimony as morally significant. In the language of *Old Chief*, the evidence might provide Juror Two with "concrete and particular" details that "give life to the moral underpinnings of the law's claims." The testimony might confirm for Juror Two that it makes good moral sense to prohibit the possession and distribution of controlled substances, since those dangerous substances might find their way into the hands of youths.
>
> Before one can determine whether evidence tends to establish the moral reasonableness of a guilty verdict in any given case, then, one must identify the moral criteria that describe the conditions when, in fact, it would be morally appropriate to convict. The difficulties one encounters when trying to identify those criteria are so daunting that the very notion of assigning weight to evidence in accordance with its moral probity should probably be abandoned. If the Enhanced Relevance Model requires agreement upon

> a general moral theory, it is surely doomed. While jurors undoubtedly do sometimes render verdicts that best comport with their own notions of morality, those basic conceptions of morality just as surely vary from juror to juror. ...

Besides the problems of moral relativism, Professor Pettys also notes that the "enhanced relevance" view of *Old Chief* might permit defense counsel to present counteractive evidence with a goal toward jury nullification.

> At least three consequences would flow from holding, in any given case, that an item of evidence's probative weight is increased because the evidence tends to show that a guilty verdict would be morally reasonable. First, the Court might have to give the defendant increased leeway to present evidence that a guilty verdict would be morally unreasonable, in order both to ensure that jurors are able wisely to evaluate the Government's implicit moral argument and to preserve the appearance of fairness within the criminal justice system. Second, the defendant would have a limited right, under the *Fifth* and *Sixth Amendments*, to contend in his closing argument that the Government's evidence fails to show that it would be morally reasonable to convict. Third, the defendant would be entitled to a jury instruction that states, at a minimum, that evidence has been admitted in part for the purpose of persuading the jury that a guilty verdict would be morally reasonable.

For all the reasons given by Professor Pettys, it is profoundly hoped that the Court will not take an expansive, "moral reasonableness" view of relevance. The Enhanced Relevance view of *Old Chief* leads to an indeterminate system of evidence, a system that will result in less accurate determination of the facts that are legally in dispute between the parties.

[10] ***Old Chief*** and the Concern Over Forced Acceptance of an Adversary's Proffered Concession

The *Old Chief* Court was rightfully wary about an opponent's attempts to stipulate away relevant evidence. There is a real danger that the proponent of relevant evidence can be "sandbagged" by an opponent who proffers a stipulation. The proffered stipulation may well be crafted in such a way as to deny the proponent the fair effect of the evidence. One problem with forced stipulations is that it is rare for relevant evidence to be offered to prove only a single point in dispute in a trial. n20 A common risk of stipulations is that the opponent will offer to stipulate to the fact in such a way that the stipulation is probative on only one of the multiple points on which the evidence is actually relevant. If the proponent is forced to accept that stipulation, then the stipulation will deprive the proponent of the rightful weight of the evidence. To take an easy example: eyewitness testimony that the defendant shot the victim will usually prove a number of points in issue -- the bare fact of shooting proves the act of shooting, but the circumstances seen by the eyewitness will usually be evocative of the defendant's intent, absence of mistake, etc. Assume that the defendant offers to stipulate that he shot the victim. The Court in *Old Chief* is right to declare that the government should not be forced to accept that stipulation; to do so would rob the evidence of its fair weight in proving intent. And this is not to speak of all the other deleterious consequences of forced stipulations mentioned by the Court in *Old Chief*, e.g., depriving the jury of traditional means of proof and a full narrative.

Another problem with stipulations is that the opponent has an incentive to frame the stipulation in such a way as to give away as little ground as possible. Lawyers being as they are, there is a possibility that a stipulation does not even concede the point on which the evidence is offered. For example, in *United States v. Colon*, n21 the defendant was charged with intent to distribute narcotics, specifically that he was operating as a "steerer" in a drug transaction (i.e., a conspirator who "steered" prospective buyers to the conspirator holding the drugs). The government planned to offer the defendant's prior steering convictions to prove intent. Defense counsel sought to head this off by proffering a stipulation. He offered to stipulate that if the government proved that Colon knew the drug seller and was in fact directing the undercover buyer specifically to that drug seller, "then I will acknowledge that he intended to violate the federal narcotics law and intended to aid in the sale of drugs." But this stipulation was rightly rejected, because in effect, the stipulation said, "if you can prove intent, then I admit intent." The Court concluded that defense counsel's offer

"stipulated nothing." Tactics like these indicate that the *Old Chief* Court was rightfully reluctant to hold that a defendant can always control the government's choice of proof by way of stipulation.

[11] ***Old Chief*** and Continued Limits on Government-proffered Evidence

As discussed above, the Court in *Old Chief* declared that the prosecution ordinarily should be permitted to present evidence unfettered by the defendant's proffered concessions. This does not mean, however, that the prosecution after *Old Chief* is unlimited in its evidentiary choices. While generally not constrained by the defendant, the government is still bound by *Rule 403* and the other rules of evidence. *United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000)* , provides a good illustration. Thomas Rose was serving time and sought to cooperate with the authorities in order to get his sentence reduced. He told FBI agents that Evans was involved in drug trafficking. Thomas Rose then had his uncle George contact Evans, using Thomas' name as a reference. Eventually, George asked Evans to find some drugs for him, and Evans did so. At trial, Evans claimed entrapment.

The government's first witness at trial was FBI agent Darnell. He testified about the origins of the undercover operation, including the FBI's contacts with Thomas and George Rose. The agent was asked how he "came about knowing Mr. Evans." Over defense objection, the agent testified that the FBI had "received information that Mr. Evans was involved in drug trafficking" and that George Rose "was in a position to directly go and approach Mr. Evans about narcotics." Evans claimed that admission of this testimony was error, because it referred to an out-of-Court accusation and thus violated the hearsay rule and *Rule 403*.

The government admitted that the FBI agent's testimony related an out-of-Court statement, i.e., a statement from an unnamed person that Evans was involved in drug trafficking. But the government argued that this statement was not offered to prove that Evans was *in fact* involved in drug trafficking. Rather, it was offered to explain why the FBI suspected Evans and decided to target him for an undercover investigation. The government in *Evans* proffered three interconnected explanations for how the out-of-Court statement could have been used other than for its truth.

First, the government argued that Thomas Rose's accusation was relevant to show that Evans had not been improperly targeted or selectively prosecuted. The contention was that even if the accusation were not in fact true, it could have provided a proper basis for the FBI agents to turn their suspicions and investigative resources toward Evans. The problem for the government, however, was that this not-for-truth purpose was not in dispute in the case; Evans did not contend that he had been selectively prosecuted. Thus, if the statement were in fact offered to rebut an inference of selective prosecution, it should have been excluded as insufficiently probative under *Rule 403*. As the Court noted, "selective prosecution may qualify as an issue of consequence in some proceedings," but "it was not at issue in Evans' trial."

The *Evans* Court declared that if *Rule 403* could not operate to exclude out-of-Court statements when offered to "explain" the uncontested conduct of government agents, it would "open a large loophole in the hearsay rule." As the Court observed: "If we were to accept the government's rationale here, then explaining why the government agents 'did what they did' through reference to statements of absent informants would be acceptable in almost any case involving an undercover operation, and in many others as well."

The government's second explanation in *Evans,* for why the out-of-Court statement was probative of something other than the truth of its contents, fared no better. The government argued that the accusation against Evans was necessary to combat "the threat of jury nullification." The government expressed concern that without the accusation, the jury might miss "the moral significance of the allegations, and thus render an unjustified acquittal." The problem with this argument was that it depended specifically on the *truth* of the accusation that Evans was a drug dealer. If Thomas Rose's allegation were false, then the allegation would have no "moral significance" and acquittal would not be "unjustified." Thus, the government's nullification argument failed to articulate a not-for-truth purpose for the evidence.

The government's final articulation of a not-for-truth purpose for the accusation in *Evans* was that the statement was relevant as "background." This explanation was found infirm as well. It was simply another way of saying "we want to provide an explanation for the actions of the police leading up to the arrest of Evans." The Court found that the probative value of the accusation for "background" was minimal. It was not very important to the case to show why the officers focused on Evans. The background of the investigation was not completely irrelevant, for surely the jury would be curious as to how the government set its sights on Evans. However, the probative value, given the relative lack of importance of the police investigation to the contested issues of guilt, was found substantially outweighed by the risk of prejudice to Evans. Therefore, the accusations should have been excluded under *Rule 403*.

The government's response to the *Evans* Court's *Rule 403* analysis was to invoke *Old Chief*. The government contended that *Old Chief* permitted it to present its case in its own way, and that therefore it was not necessary for the defendant to raise issues of selective prosecution or to address the circumstances of the government investigation in order for the evidence to be probative. The government asserted that it had the right in all cases to present evidence to counteract the possibility of jury nullification and to assure the jury that a guilty verdict was morally reasonable. But the *Evans* Court found that *Old Chief* did not justify the admission of hearsay. It was not enough that the prosecution wanted to tell its story in its own way. The Court explained:

> It is true, of course, that as a general matter the prosecution is entitled to present the "whole story" of criminal misconduct in order to [assure] that the jury does not miss the context of the events and the moral significance of the allegations, and thus render an unjustified acquittal. See *Old Chief v. United States, 519 U.S. 172 (1997)* ; *United States v. Crowder, 141 F.3d 1202, 1207 (D.C. Cir. 1998)* (en banc). n22 But in presenting that story, the government is as much bound by the rules of evidence as it is on any other issue. No matter how important it is for the government to present a complete, morally compelling narrative, it must present that narrative through admissible evidence, not through hearsay.

Thus *Old Chief,* when properly read, is simply a case that prevents an opponent in the ordinary case from controlling the adversary's evidentiary presentation by proffering stipulations and concessions. The premise in *Old Chief* -- that the prosecution generally has the right to tell the story of the crime through evidence rather than stipulation -- should not be used as the springboard to a more dramatic argument that the prosecution has the right to tell the story of the crime *with whatever evidence it chooses to present*. A Court that is suspicious about stipulations is not thereby accepting of hearsay or any other inadmissible evidence. And a defendant who moves to exclude evidence under the Federal Rules is in no sense as problematic as a defendant who tries to control the government's proof by forcing it to accept a stipulation.

[12] Demonstrative Evidence

In order to explain or prove how a disputed event occurred, a party may find it helpful to demonstrate the event in Court, or to provide a videotaped or even a computerized recreation of the disputed event. Such demonstrative evidence is regulated by the Trial Court under *Rule 403*. n23 Obviously, a demonstration can never fully and accurately recreate a real-life event, and so there will be questions of probative value, jury confusion and prejudice; the degree to which the demonstration comes close to recreating a real-life event is crucial in determining admissibility. n24

Trial Courts have often exercised their discretion to admit demonstrations when relevant, so long as they do not create a serious misimpression as to how an event might have occurred. n25 Moreover, some demonstrations may not purport to prove how an event occurred. Instead, they may be proffered to illustrate an expert's opinion, or to illustrate the party's version of the events. In either of these circumstances, the demonstration need not necessarily come close to recreating a disputed event, so long as the jury is made aware of the limited goal of the demonstration. n26

For example, in *Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1996)* , the estate of a person shot by police officers during an armed standoff brought a civil rights action for excessive force and conspiracy. The events surrounding the shooting were heavily contested, the most hotly disputed point being whether the decedent was shot in the chest or in

the back. The Trial Court admitted a computer-animated videotape offered by the defendants. The tape tracked the facts as contended by the defendants, showing the decedent being shot in the chest and spinning around and falling face down. The videotape, which ended with a computer animation of the trajectory of the bullet, was offered to illustrate the expert testimony of a forensic animation technologist, who concluded that the defendants' version of the facts was consistent with the physical evidence. The Court found no error in the admission of the videotape. It reasoned that the jury was properly instructed that the animation was designed merely to illustrate the defendant's version of the shooting and to demonstrate how this version was consistent with the physical evidence. It observed as follows:

> Although there is a fine line between a recreation and an illustration, the practical distinction is the difference between a jury believing that they are seeing a repeat of the actual event and a jury understanding that they are seeing an illustration of someone else's opinion of what happened. The jury understood that the very thing disputed in this trial was the condition under which the shooting occurred. In light of this fact and the Court's cautionary instruction, there was no reason for the jury to credit the illustration any more than they credit the underlying opinion. n27

However, *Rule 403* does provide a limit on such demonstrations in egregious cases. One example is *United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993)* . The defendant's daughter died from shaken baby syndrome, caused by the defendant's having shaken her. The dispositive question was whether the defendant intended to injure or to revive his daughter when he shook her. The Trial Judge allowed a government expert to demonstrate shaken baby syndrome to the jury by shaking an infant mannequin used to practice CPR techniques. The expert shook the doll so forcefully that the head repeatedly swung back against the doll's back and then forward against the doll's chest. The expert testified that the neck of the CPR doll was stiffer than an infant's, and so greater force was required to produce the head movement associated with shaken baby syndrome.

The Court of Appeals held that the courtroom demonstration was reversible error, because the conditions of the demonstration "were not sufficiently similar to the alleged actions of the defendant to allow a fair comparison." While the demonstration did indicate how a baby's head would move during an event leading to shaken baby syndrome, this could have been demonstrated in a less inflammatory manner by a direct manipulation of the doll's head. The Court concluded:

> The sight of an adult male repeatedly shaking a representation of an infant with the degree of force necessary to manipulate the doll's head in the required fashion was likely to form a strong impression upon the jury ... . By displaying a greater degree of force than the level required to produce shaken baby syndrome in a seven month-old infant and by arbitrarily selecting a number of oscillations, the demonstration tended to implant a vision of Gaskell's actions in the jurors' minds that was not supported by any factual basis for the demonstration.

Thus, the Court found that allowing the courtroom demonstration was an abuse of discretion under *Rule 403*. n28

Similarly, demonstrations admitted in the guise of illustrating expert testimony or one side's version of the facts are subject to exclusion under *Rule 403* if there is a substantial risk that the jury, despite instructions, may misuse the evidence as proof of how the disputed event actually occurred. The chance of exclusion is especially high if the "illustrative" demonstration is too close, but yet not close enough, to an approximation of the real-life event. A good example is *Finchum v. Ford Motor Co., 57 F.3d 526 (7th Cir. 1995)* . The Finchums were injured in a car accident when their vehicle was rear-ended and their car seats released from the seat tracks and rotated rearward. In a product liability action in which the plaintiffs unsuccessfully sought to prove that the car seats were defectively designed, the Court upheld the exclusion of a videotape depicting a test conducted by the plaintiffs' expert. In the video, two car seats were attached to a platform sled; one seat was a seat of the type involved in the accident, and the other was an alternative design prepared by the expert. Crash dummies were in each seat but, unlike the accident in which the plaintiffs were involved, neither of the dummies was wearing a seatbelt. When the sleds were pulled into a barrier to

simulate a rear impact, the dummy in the production seat flipped backward, somersaulting through the air. The plaintiffs argued that the demonstration was not offered as proof of how the accident occurred, but rather to illustrate the principles used by the expert in concluding that alternative designs were feasible. But the Court held that the demonstration was "just similar enough to the Finchums' accident to confuse the jury and leave jurors with the prejudicial suggestion that the Finchums flipped over backwards during the crash." n29

[13] Experts

In *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* , the Supreme Court declared that expert testimony "can be both powerful and quite misleading because of the difficulty in evaluating it." The Court concluded that because of the heightened risks attendant to expert evidence, "the judge in weighing possible prejudice against probative force under *Rule 403* ... exercises more control over experts than over lay witnesses." After *Daubert*, some Courts have used *Rule 403* more aggressively to exclude the testimony of experts, especially where the testimony is based on questionable methodology or where it does not completely fit with the issues in the case. n30 *Daubert* is discussed extensively in § 702.02[5].

[14] Bench Trials

Where the case is tried to a Judge, the risk of prejudice is not a proper ground for excluding evidence under *Rule 403*. n31 It is nonsensical to ask the Judge to exclude evidence on the ground that it will prejudice her, since the Judge would have to be exposed to the evidence in order to make such a ruling. n32 Moreover, we presume that Trial Judges are unlikely to rule emotionally, or to misuse evidence, in the way that juries might. n33

Similarly, an objection on the ground that evidence would be confusing has no place in a bench trial. Nor would it be a good idea even to suggest that the Trial Judge should exclude evidence because it would confuse the Judge. Consequently, the only reason for excluding probative evidence under *Rule 403* in a bench trial is that the evidence would be cumulative or a waste of time.

[15] Cumulative Evidence

Rule 403 addresses the possibility that parties may go overboard in trying to prove a point. While generally it is up to the litigants to determine whether they have sufficiently proven a point, the Judge has discretion under *Rule 403* to find that "enough is enough."

The Court in *United States v. Kizeart, 102 F.3d 320 (7th Cir. 1996)* , provided the following useful definition of cumulative evidence:

> Evidence is "cumulative" when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates.

In *Kizeart*, the Court rejected the defendant's contention that a taped statement of a witness was cumulative. The witness was called as a hostile witness by the government, and he denied having given a taped statement to police detectives identifying the defendant as taking part in an armed robbery. The government then called the detectives, who testified that the witness had inculpated the defendant, and then the government introduced the witness' taped statement. The defendant argued that in these circumstances the taped statement was cumulative of the detectives' testimony. The Court found that the tape recording was not cumulative in this case. The tape "added considerable probative force on the issue of [the witness'] veracity because it addressed the contradictions between the statements of [the witness] and the detectives." In other words, the tape was proper corroboration where it was the witness' word against that of the officers; if the government had offered the tape together with corroborating testimony of twelve officers, *that* would have been

cumulative. n34

[16] Relationship to Other Rules

When evidence is absolutely barred by some other Rule, *Rule 403* does not give the Trial Judge the authority to admit evidence. The Rule is one of exclusion of otherwise admissible evidence.

Some specific Rules may take precedence *Rule 403*. The clearest example is *Rule 609(a)(2)*, which provides that *crimen falsi* offenses are admissible for purposes of impeachment of a witness irrespective of the prejudicial impact of such evidence. See *Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989)* (discussed in § 609.02[3]), where the Supreme Court stated that the automatic admissibility provision of *Rule 609(a)(2)* permitted no judicial discretion to exclude evidence on *Rule 403* grounds. n35 Also, for convictions not involving dishonesty or false statement, *Rule 609(a)(1)* provides a special balancing test for criminal defendants, under which the prior conviction is excluded unless the probative value outweighs the prejudicial effect. *Rule 609(b)* provides for a special balancing test for all convictions as to which ten years have passed since the witness' conviction or confinement. Finally, *Rule 703* provides for a restrictive balancing test that is more exclusionary than *Rule 403*, when otherwise inadmissible evidence is offered to illustrate the basis of an expert's opinion.

Where *Rule 403* is not pre-empted by a specific Rule, the Trial Judge must apply it in tandem with other Federal Rules under which evidence would be admissible. This is particularly true with respect to other Rules that distinguish between permissible and impermissible purposes. So for example, *Rule 404(b)* provides that prior bad acts cannot be used to prove the propensity of a person to commit an act, but that they can be used for other purposes. The Trial Court must then determine whether the probative value for the nonpropensity purpose is substantially outweighed by the risk that the jury will misuse the evidence for propensity. See the discussion in § 404.02[21]. Similarly, *Rule 407* provides that evidence of subsequent remedial measures cannot be admitted to prove negligence, fault, or the existence of a defect, but that such evidence can be offered for such purposes as impeachment and feasability if controverted. When subsequent remedial measure evidence is offered for a permissible purpose, the Trial Court must upon request apply *Rule 403* to determine whether the probative value of the evidence for the permissible purpose is substantially outweighed by the risk that the jury will misuse the evidence as proof on an impermissible purpose. See § 407.20[11].

Rule 403 has an interesting and complex relationship with *Rule 801*, the hearsay rule. The hearsay rule is purpose-specific in its exclusion; it operates only where the statement is offered for the truth of the matter asserted. When an out-of-Court statement is offered for something other than its truth the Trial Court, upon appropriate objection, must balance the probative value and the prejudicial effect of the statement under *Rule 403*.

An example of the relationship between *Rule 403* and the hearsay rule is provided in the case of *United States v. Harwood, 998 F.2d 91 (2d Cir. 1994)* . Harwood was tried with McKee for possession and conspiracy to possess LSD with intent to distribute. The defendants were arrested after leaving an annual gathering of the "Rainbow Family" in Vermont. One undercover agent bought a small amount of LSD from McKee, who later drove away in a van. The van was driven by Harwood, who was subsequently found to be the owner. Police stopped the van and a subsequent search uncovered LSD in the door panels, and a large amount of cash in the interior. At trial, government agents were permitted to testify that through their "intelligence" sources they had learned that McKee was the main supplier of LSD at the Rainbow Family gathering.

The government argued that the "intelligence" testimony was not hearsay because it was not offered for its truth. Rather, it was merely offered as "background" evidence to explain the context of the police investigation.

Specifically, the government stated that the "intelligence" testimony was offered only to explain why the undercover agents approached McKee -- as opposed to anyone else at the Rainbow Family gathering -- in order to obtain LSD. However, the Court saw through this artificial construction. It pointed out that if the "intelligence" evidence was really

offered to explain the motivation of the undercover agents, it would have minimal probative value. The motivation of the officers, and the need for the jury to understand the background of the investigation, was not a crucial issue in the context of the case. The contested issue was the identity of the drug dealer, not the police officer's conduct. While the evidence had minimal probative value, it carried a risk of substantial prejudice, in the form of potential misuse by the jury. The risk that the jury would use the intelligence testimony for its truth -- even though it would not be permitted to do so when offered only for background purposes -- substantially outweighed the probative value of the testimony in explaining "background." n36

Harwood illustrates that *Rule 403* provides an important protection when an out-of-Court accusation is offered as nonhearsay for its effect on the person who heard the statement, in this case the law enforcement officer. In order to be admissible nonhearsay, the conduct of the listener in response to the statement must be of some importance in the case, and the statement must be probative to explain the listener's response or state of mind regardless of its truth. In many cases statements accusing defendants of crime are subject to exclusion under *Rule 403* when offered for "background" or "to explain the officer's conduct." When the question is whether the defendant is guilty, there is often only minimal probative value in explaining why an officer acted in a certain way; and in contrast, there is a substantial risk of prejudice because the jury could impermissibly use the statement for its truth, despite a limiting instruction. n37

Unfortunately, there have been many instances in which the Courts have ignored the *Rule 403* questions inherent in "background" evidence, and in which hearsay statements have been offered to "explain" events that are of minimal or no relevance. One example is *United States v. Norquay, 987 F.2d 475 (8th Cir. 1993)* . Norquay was charged with rape, and witnesses testified that the victim told them that she had been raped. The Court held that the statements were properly admitted as not hearsay, because they were offered not for the truth of their content but rather "to explain why the witnesses stopped on the highway late at night, took her to the police station, and sent her to be interviewed by the investigator." This analysis is misguided: the probative value of the statements for the articulated purpose was minimal, because the conduct of the *witnesses* at the time was only marginally relevant to the case. The prosecution really had no need to explain why the witnesses acted as they did, when there was no dispute as to their actions. In contrast, the prejudicial effect of the statement was obvious, because there was a strong likelihood that the jury would impermissibly use the statement for its truth -- that the victim was actually raped.

Perhaps the *Norquay* Court would have ruled differently had defense counsel specifically objected to the statements on *Rule 403* grounds. It appears that defense counsel in *Norquay* made only a hearsay objection. Once the prosecution articulated a legitimate not-for-truth purpose, the hearsay objection was properly overruled, and it was incumbent on defense counsel to argue that the prejudicial effect of the jury's misuse of the statement would substantially outweigh the minimal probative value of the statement for the purpose stated by the prosecution. If such an objection is not specifically made at trial, it ordinarily will not be entertained on appeal. n38

In some cases, of course, out-of-Court accusations offered for "background" will survive a *Rule 403* analysis. *United States v. Freeman, 816 F.2d 558 (10th Cir. 1987)* , is one example. Freeman with charged with taking part in a counterfeiting transaction. The report of a confidential informant was offered to explain why officers had the defendant under surveillance on a day when he received counterfeit money. The officer had received a report from an informant that two people, Martin and Grady, were passing counterfeit money. The informant also stated that Martin and Grady planned to meet with an unidentified white male on a particular weekend for the purpose of passing counterfeit money. The officer then undertook surveillance of Martin and Grady, and in following them he witnessed their meeting with Freeman on the identified weekend. The Court held that it was within the Trial Judge's discretion to find that the probative value of the informant's tip as background was not substantially outweighed by the risk that the jury would consider the accusation for its truth. This analysis seems sound. The jury was bound to wonder how the police could be in the position to testify that they saw a counterfeit money transaction take place. Were they just on patrol and happened to spot suspicious counterfeiters? If that was the purported scenario, the testimony of the officer would be implausible and suspect. The prosecution clearly had a legitimate interest in preventing jury speculation on how the officers came to know what they knew. Of course, there was a risk of prejudice, i.e., that the jury could use the informant's accusation

for its truth. But under *Rule 403* the risk of prejudice must *substantially* outweigh probative value for the accusation to be excluded. A Judge could reasonably conclude that there was no such substantial outweighing under the facts of *Freeman*. This is especially so because the confidential informant did not even identify Freeman by name -- this is hardly a fatal accusation that will surely be misused for its truth. And the jury was instructed not to use the accusation as evidence of Freeman's guilt. While such an instruction doesn't *eliminate* prejudice, it does *reduce* the risk of prejudice that is to be balanced against probative value under *Rule 403*. Moreover, a limiting instruction is probably more effective in a case like *Freeman*, where the out-of-Court statement does not explicitly accuse the defendant by name.

[17] Surprise

If a claim of surprise is made, the Advisory Committee indicates a preference for a continuance, rather than exclusion, and post-Rules decisions support that view. n39 Of course, this does not mean that a party is entitled to a continuance by merely invoking the term "surprise." A claim of surprise will not be considered if the party has not diligently prepared for trial, or if the party had a good indication of the evidence and that it might be presented. n40

It also must be remembered that certain provisions of the Federal Rules of Civil and Criminal Procedure are designed to protect against unfair surprise. One example is a pretrial order entered pursuant to Civil Rule 16. This order controls the subsequent course of the action, and evidence and testimony may be disallowed to the extent that it is contrary to the order; exclusion is warranted without regard to *Rule 403*.

There are also notice provisions throughout the Federal Rules of Evidence, such as those found in *Rules 404(b)*, *412*, *609(b)*, *807*, and *902(11)* and (12). All these notice provisions are designed to protect against unfair surprise, and a failure to comply with these provisions may warrant exclusion irrespective of *Rule 403*. See the discussion in the Editorial Explanatory Comment for each of these Rules.

While surprise is not an independent ground for exclusion under *Rule 403*, it may, in some cases, bear upon the *Rule 403* analysis. If a continuance is required to meet surprising evidence, there is a negative consequence of delay. If the surprising evidence is of marginal probative value, the Trial Judge may decide that the cost of delay substantially outweighs the probative value of the evidence and thus that exclusion is warranted under *Rule 403*.

[18] Procedure for Balancing

The practice in the Federal Courts since the adoption of *Rule 403* leads us to conclude that rulings would probably be sounder at trial and more easily reviewed on appeal if trial counsel would take care to state their theories of relevance and claims of prejudice as clearly as possible before the Trial Judge rules. Along the same line, the Trial Judge would improve the record by stating, if only briefly, his or her reasons for a *Rule 403* ruling. n41 Such reasons could be quickly dictated to the Court reporter outside the presence of the jury unless the Trial Judge wishes to comment on the evidence that is admitted, in which case the reasons may be shared with the jury. If the Trial Court decides to exclude the evidence, a statement of reasons is especially necessary in order to provide counsel an opportunity to try to obviate the objection. n42

Throughout this *Manual*, we note the utility of Trial Judges stating reasons on the record to explain their rulings. n43 Yet, we take exception to *United States v. Dolliole, 597 F.2d 102 (7th Cir. 1979)* . In the course of affirming the appellant's conviction as an accomplice to bank robbery, the Court of Appeals stated that the practice of entering a *written* finding as to the reasons for striking a balance under *Rule 403* "should definitely be encouraged." Our position is that a statement for the record is as useful as a written statement, and that often it saves time during trial. n44

[19] Trial Court Discretion

While the *Rule 403* balancing process should be carefully conducted on the record, this is not to say that the Trial

Judge's decision to admit or exclude evidence is itself strictly scrutinized. *Rule 403* provides that evidence "may" be excluded, thus imparting significant discretion to the Trial Judge. The Appellate Court will not reverse a *Rule 403* decision simply because the Appellate Judges would have ruled differently had they been trying the case. n45 Error will be found only if the Trial Judge's decision cannot be supported by reasonable argument. n46 Appellate Courts recognize that the Trial Judge has a unique vantage point from which to detect and assess the negative factors that might arise from proffered evidence, and from which to balance these factors against the probative value of the evidence. n47 Appellate Courts are also sympathetic to the fact that the Trial Court must ordinarily conduct its *Rule 403* balancing process on the spot, during the trial. The Trial Court does not usually have the luxury of carefully balancing, and even if it had the time, the balance of factors is rarely crystal-clear. As the Court stated in *Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994)* :

> In our review of any trial record, we are mindful that evidentiary questions often require a trial judge to make quick decisions on doubtful questions. This is why we review evidentiary decisions for abuse of discretion. [*Rule 403* challenges] demand swift but judicious weighing and balancing. Indeed, because such questions are often subject to a judge's discretion, this Court often would affirm a judge's evidentiary decision "either way," whether the response to the lawyer's objection had been "sustained" or "overruled."

Essentially, Appellate Courts will check to see that the Trial Court has *conducted* a balancing process. n48 The *result* of a careful balancing process will not itself be second-guessed. n49 See the cases discussed in § 403.03[3].

On the other hand, the Trial Judge's discretion under *Rule 403* is not unlimited. The following are some general limitations that have been imposed upon the Trial Judge's discretion:

(1) *Power to exclude is to be rarely invoked:* Because *Rule 403* provides that the negative factors set forth in the Rule must *substantially* outweigh the probative value, it follows that the discretionary power to exclude should rarely be used. n50 Generally speaking, the Trial Court's decision to exclude evidence is more likely to be found an abuse of discretion than is a decision to admit evidence. n51

(2) *Credibility questions are for the factfinder:* The Trial Judge may not invoke *Rule 403* to exclude evidence merely because he or she finds it unbelievable. n52 Rather, the Trial Judge must assess the probative value of the evidence *if believed by the jury*, and balance that against the risk of prejudice, confusion and delay. n53

(3) *Balancing process must be conducted:* As discussed above, a Trial Court that conducts a balancing process on the record is more likely to be affirmed than one that excludes or admits evidence in a conclusory fashion; at a minimum, remand is a good possibility in the latter instance. n54

(4) *Prejudice must be properly analyzed:* As discussed above, evidence is not prejudicial within the meaning of *Rule 403* merely because it is harmful to the adversary's case. A Trial Court that excludes evidence as "prejudicial" merely because it is harmful -- as opposed to unfair -- runs a substantial risk of reversal. n55

[20] *In limine* Rulings

When a party can anticipate the use of prejudicial evidence, it is often helpful to get a pretrial, *in limine* ruling on the *Rule 403* question. *Rule 103* is very general in setting forth the guidelines for offering and objecting to evidence. The Rule provides sufficient leeway when read in connection with *Rule 403*'s direction to guard against undue prejudice to permit Trial Judges to rule on motions *in limine*. At the same time, it must be remembered that many motions under *Rule 403* are particularly difficult to give final rulings on before trial, depending as they do on assessments of probative value and prejudicial effect that become manifest only in the trial itself. Therefore, it is prudent practice for counsel wishing to admit or exclude evidence that has been subject to a *Rule 403 in limine* motion to renew the offer of proof or

objection at trial. For further discussion on this point, see § 103.02[13], [16].

[21] Limiting Instructions

As discussed in § 105.02[4], the impact of a limiting instruction in controlling prejudice must be considered by the Trial Court when balancing probative value and prejudice under *Rule 403*. The prejudice to be considered is that which remains after a limiting instruction is given. n56 Exclusion is warranted where the remaining prejudice and confusion -- i.e., that which cannot be "instructed away" -- substantially outweighs the probative value of the evidence. n57

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Mende, 43 F.3d 1298 (9th Cir. 1995)* (*Rule 403* is "an extraordinary remedy to be used sparingly" and "the danger of prejudice must not merely outweigh the probative value of the evidence, but must *substantially* outweigh it.").

(n2)Footnote 2. See, e.g., *United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990)* (under *Rule 403*, the balance "should be struck in favor of admissibility"); *United States v. Krenzelok, 874 F.2d 480 (7th Cir. 1989)* (where both probative value and prejudicial effect are high, *Rule 403* requires admission).

(n3)Footnote 3. See, e.g., *United States v. Powers, 59 F.3d 1460 (4th Cir. 1995)* (where the *Rule 403* question is close, evidence should be admitted and prejudicial effect should be limited by a strong jury instruction).

(n4)Footnote 4. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220 (1976).

(n5)Footnote 5. See, e.g., *Robinson v. Runyon, 149 F.3d 507 (6th Cir. 1998)* (in evaluating probative value under *Rule 403*, the Court must give the evidence "its maximum probative force").

(n6)Footnote 6. See *Ballou v. Henri Studios, 656 F.2d 1147 (5th Cir. 1981)* :

> As this Court has consistently held, unfair prejudice as used in *Rule 403* is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be unfair. Unfair prejudice within the context of *Rule 403* means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.

See also *Robinson v. Runyon, 149 F.3d 507 (6th Cir. 1998)* (evidence of supervisor's use of racial epithets should have been admitted in case charging racial discrimination in employment; the evidence was improperly excluded as prejudicial: "the racially inflammatory nature of the evidence involved here is precisely why it is probative of the racially discriminatory motives alleged in this case."); *United States v. Russell, 919 F.2d 795 (1st Cir. 1990)* (defendant was correct that proffered evidence was damaging, but evidence is not offered unless it is damaging; evidence is prejudicial within the meaning of the Rule "only where it is unfairly prejudicial.").

(n7)Footnote 7. See, e.g., *United States v. Hands, 184 F.3d 1322 (11th Cir. 1999)* (cocaine-related convictions reversed due to admission of evidence that the defendant abused his wife: "The domestic violence evidence in this case was particularly likely to incite the jury to an irrational decision because it was graphic and arresting."); *United States v. Irvin, 87 F.3d 860 (7th Cir. 1996)* (evidence of gang membership was improperly admitted, since there was no evidence that the gang was involved in the kind of criminal activity charged to the defendant; the evidence had little probative value, and the prejudicial effect was substantial in light of the "negative connotations" that gang evidence arouses and the fact that the government highlighted the "satanic imagery" associated with the gang).

(n8)Footnote 8. Compare *People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998)* (the Court reversed a conviction for unlawful sexual activity with minors; evidence that the defendant had magazines in his house depicting explicit homosexual activity was unduly prejudicial as it implied sexual deviancy).

(n9)Footnote 9. See, e.g., *United States v. McNeill, 166 F.3d 943 (9th Cir. 1999)* (error, in a robbery case, to permit testimony that the defendant was living in a Work Release Center at the time of the robbery; while evidence of the defendant's residence was probative of the defendant's ability to commit the crime, it would have been possible to call the Work Release Center a "residential program," thus avoiding the prejudicial effect of specifically identifying the center: "Precedent for tailoring of terms to avoid a more prejudicial term exists and should have been adopted in this case"); *United States v. Pace, 10 F.3d 1106 (5th Cir. 1993)* (in a narcotics case, the Trial Court erred when it permitted the prosecution to call the defendant's parole officer solely to establish the defendant's address; the testimony was prejudicial, since it informed the jury that the defendant had previously committed crimes; the probative value was minimal, since the defendant's address was not a major issue in dispute in the case; the Court emphasized the fact that the defendant's address could have been proven in a variety of less prejudicial ways).

(n10)Footnote 10. See, e.g., *Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)* (error to admit prejudicial evidence where "there were certainly other ways the evidence could have been admitted so that relevant aspects were retained and the prejudicial aspect minimized").

(n11)Footnote 11. See also *United States v. Lachman, 48 F.3d 586 (1st Cir. 1995)* : In a criminal prosecution involving the Export Administration Act, the defendants were charged only with exporting technical equipment to the Indian government without a license; the government proffered exhibits indicating that the defendants knew that the Indian government was going to use the equipment in order to make nuclear missiles. The Court noted that a jury, conscious of the risks of nuclear proliferation, "could easily regard the defendants' alleged conduct as highly unattractive even if it turned out to be technically legal." While the exhibits had some probative value as to the defendants' scienter -- to suggest that, knowing the potential military use of the equipment, the defendants had more reason in prudence to have reviewed the pertinent export regulations -- the government had less dangerous evidence available to prove this point. The Court stated that under *Rule 403*, "it is plainly pertinent whether a litigant has some alternative way to establish a fact that involves no (or at least a lesser) risk of prejudice or confusion."

(n12)Footnote 12. See also *Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985)* (damages claim for unauthorized publication of photos in a degrading magazine; the Trial Court abused its discretion by allowing the plaintiff to present a slide show depicting the "worst of Hustler," which was offered to show the damages she suffered when her photos were published in the magazine: "To pick out the 128 worst pictures from many years of the magazine ... was to assail the senses and distract the mind. ... The pictures apparently were selected with a view to highlighting the most offensive features of the magazine."); *United States v. McManaman, 606 F.2d 919 (10th Cir. 1979)* (evidence of conversation not admissible under *Rule 403*, even though parts of the conversation were relevant for impeachment; the government proffered the entire conversation, including inflammatory portions concerning murder plans: "the explosive portions were not excised, as can be done to avoid such dangers of prejudice").

(n13)Footnote 13. *Silva v. Showcase Cinemas Concessions, Inc., 736 F.2d 810 (1st Cir. 1984)* , is a civil case that may survive the *Old Chief* analysis. *Silva* was an action against a movie theater arising from an attack on a movie patron. The defense sought to introduce the fact that the attacker had been convicted of manslaughter for the attack, as a means of proving that such an attack was not foreseeable by the defendant. The Court found that it was not error to exclude evidence of a manslaughter conviction, where the plaintiffs were willing to stipulate that the assault was a "criminal act"; under these circumstances, there was no need to prove the conviction since the stipulation "should have made defendant's point." There seems little difference between a judgment of conviction and a stipulation to a criminal act in these circumstances. The opponent loses nothing in the way of narrative or probative value by being forced to accept the stipulation. The term "manslaughter" is not needed to further the narrative or to assure the jurors that their verdict will be morally reasonable.

(n14)Footnote 14. See *United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976)* (abuse of discretion to admit prior conviction in an escape prosecution, where the defendant offered to stipulate to the conviction).

(n15)Footnote 15. See, e.g., *United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998)* (en banc) (prior drug

conviction properly admitted to prove intent even though the defendant offered to stipulate to intent; noting that *Old Chief* distinguished between "stipulations to the status elements of a crime, which can be forced upon the prosecution, and stipulations to other elements of the crime, which the prosecution should remain free to reject."); *United States v. Velazquez, 246 F.3d 204 (2d Cir. 2000)* (prison guards charged with beating a prisoner and covering up the beating: gory photos of the victim were properly admitted even though the defendants offered to stipulate that the victim was assaulted: "the extent of Pizzutto's injuries established that cruel and unusual punishment had occurred, and underscored the moral blame attaching to Bergen's decision to cover up the crime."); *United States v. Campos, 221 F.3d 1143 (10th Cir. 2000)* (in a child pornography case, jury was properly permitted to view two pictures that the defendant allegedly transported, even though he offered to stipulate that they were pornographic: "*Old Chief's* holding is thus based on peculiarities of the element of felony-convict status and or admissions and the like when used to prove it. ... In contrast to the defendant in *Old Chief*, Mr. Campos's offer to stipulate did not involve his legal status but rather the gist of the government's current case against him-the two pornographic images that he allegedly transported via computer. Mr. Campos's offer thus sought to deprive the prosecution of the very opportunity that should be protected: the opportunity to present the concrete events of later criminal behavior charged against a defendant.").

(n16)Footnote 16. *See, e.g., Government of Virgin Islands v. Mujahid, 990 F.3d 111 (3rd Cir. 1993)* ("It is well established that a co-defendant's guilty plea is not admissible to prove the defendant's guilt.").

(n17)Footnote 17. The rule that a party may "remove the sting" of anticipated cross-examination and impeachment is not solely for the benefit of prosecutors. Defense counsel often find it advisable to refer in direct examination to the prior convictions of their witnesses. See generally *Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999)* (en banc).

(n18)Footnote 18. *United States v. Universal Rehabilitation Services (PA), Inc., 205 F.3d 657 (3rd Cir. 2000)* (en banc).

(n19)Footnote 19. Todd Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, *86 Iowa L.Rev. 467 (2001)*.

(n20)Footnote 20. *Old Chief* was such a case, where proof of a prior conviction was offered on a single point -- the defendant's status as a felon for purposes of a felon-firearm-possession charge. But as the Court in *Old Chief* noted, most relevant evidence cannot be so easily confined to a single issue.

(n21)Footnote 21. *United States v. Colon, 880 F.2d 650 (2nd Cir. 1989)*

(n22)Footnote 22. In *Crowder*, the Court held that the government was not required to accept the defendant's stipulation that he intended to commit the narcotics crime with which he was charged. The proffered stipulation was an attempt to prevent the government from introducing evidence of Crowder's prior drug crimes to prove intent to commit the charged crime. The *Crowder* Court cited *Old Chief*, as well as this Treatise, for the proposition that the government is permitted to prove intent through admissible proof, and is not forced to accept a stipulation on the intent element of a crime. Neither *Crowder* nor *Old Chief*, however, stand for the proposition that the prosecution can tell the story its own way, unconstrained by *rules of admissibility*. Instead, both cases stand for the proposition that the prosecution generally can tell the story in its own way, unconstrained by a *defendant's proffered stipulation*.

(n23)Footnote 23. Computerized evidence may also raise issues of hearsay and authenticity. See the discussions under Rules 801 and 901, as well as the article by Gregory Joseph on internet and email evidence reproduced in Part Four of this Manual.

(n24)Footnote 24. See, e.g., *United States v. Birch, 39 F.3d 1089 (10th Cir. 1994)* : The defendant was charged with shooting a federal officer as his car passed the officer's car. At trial the defendant testified that a passenger in his car had fired at the officer and then fled from the car. On cross-examination, the defendant was asked to demonstrate his version of the shooting. Two chairs were placed side by side, simulating the front seat of the defendant's car, and the defendant was asked to show how the shooting occurred, and to describe the position of the gun when it fired. The

prosecution then called witnesses who testified that the defendant's version of events was impossible, because a bullet fired from a gun in the position demonstrated by the defendant could not possibly have the trajectory of the bullet that wounded the officer. The Court affirmed the defendant's conviction, finding no error in the introduction of the demonstrative evidence. The Court held that the prosecution "met its burden of demonstrating substantial similarity between the courtroom demonstration and the seating in defendant's car" and that the demonstration was "sufficiently similar to actual events to provide a fair comparison."

(n25)Footnote 25. See, e.g., *Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987)* (no error to admit demonstration of mannequin hit by an exploding tire); *Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983)* (in toxic shock syndrome case, there was no error in allowing the plaintiff's expert to conduct a courtroom experiment that purported to show how the defendant's "Rely" component interacted with a female enzyme; the expert's testimony explained the difference between experimental conditions and those that would be found in the female body).

(n26)Footnote 26. See, e.g., *Crossley v. General Motors Corp., 33 F.3d 818 (7th Cir. 1994)* (no error in the admission of a videotape of rollover sequences involving a General Motors car, even though the car was a different model from that involved in the accident, and the conditions of the demonstration were much different from those at the time of the accident; the tape was properly admitted to help illustrate the testimony of the defendant's expert concerning the complicated vehicular dynamics of rollover accidents). The Court in *Crossley* noted with approval that the Trial Court imposed substantial limitations on the use of the tape at trial, including: limiting the defendant to one test of the three it sought to show the jury; prohibiting the defendant from stopping the tape during the expert's testimony; inviting the plaintiff to play any portion of the tape during cross-examination of the expert; instructing the jury that the tape was "not intended to be a reenactment of this accident or the cause of this accident"; and prohibiting the tape from going into the jury room. See also *Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996)* (videotape of experiments conducted by an expert witness was properly admitted even though the experiments were conducted under substantially different conditions from those involved in the case; "the experiments ultimately were used to assist an expert in demonstrating principles which formed the basis of his opinion"; the expert "testified he performed the experiments merely to demonstrate the basic principles underlying his opinion"; and "on three different occasions the Court instructed the jury about the limited purpose for which it could use" the videotape).

(n27)Footnote 27. See also *Montag v. Honda Motor Co., Ltd., 75 F.3d 1414 (10th Cir. 1996)* (Trial Judge properly admitted a videotape depicting a collision between a train and a car to illustrate the physical forces at play in a collision; the Trial Judge "specifically instructed the jury not to consider the videotape as a re-creation of Mrs. Montag's accident").

(n28)Footnote 28. Compare *United States v. Norris, 217 F.3d 262 (5th Cir. 2000)* : The defendant was charged with making false statements in a bankruptcy proceeding. At the bankruptcy proceeding, he claimed that he burned a large amount of currency, after dousing it with gasoline, in order to keep the money from his former law partners. At the defendant's trial, the government offered a videotaped recreation of the burning of currency as the defendant had described it. This recreation demonstrated that most of the cash could not have burned under the defendant's description of the incident. The defendant argued that the reenactment should not have been admitted under *Rule 403* because it was conducted under conditions substantially different from those existing when the defendant burned his currency. Among the differences were: the demonstration occurred at a different time of year in a different part of the country; the government burned the currency under a ceiling while the defendant burned his currency in the open; the government used $5 bills while the defendant used $100 bills, which are not as heavy as $5 bills; the government burned newly-minted bills; the government burned the bills in a new barrel while the defendant burned his in an old barrel; and the government ignited the bills with an electric match while the defendant tossed a kitchen match into the barrel. The Court found no error in admitting the government's reenactment. It noted that in all instances in which the defendant's testimony contained ambiguities on a particular step in his alleged process of burning (including how much gasoline was used and the duration of the burn) the government erred "in favor of a hotter, longer burn." In this case, the Trial Court did not err in finding that the conditions of the government burn were "substantially similar" -- the conditions "need not be precisely reproduced, but they must only be so nearly the same as to provide a fair comparison."

(n29)Footnote 29. See also *Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992)* (in a case arising from a helicopter crash, the defendant claimed that the Trial Court erred in excluding evidence of an experiment conducted by their expert; although experiments purporting to simulate actual events are only admissible if made under substantially similar conditions, filmed evidence may be admitted to show relevant mechanical principles upon a lesser showing "that the experiment [was] conducted under conditions that were at least similar to those which existed at the time of the accident"; here, however, the experiment was not being offered simply to show physical principles but instead to demonstrate what the expert believed occurred in the helicopter engine; thus, substantial similarity was required and the Court held that the Trial Court did not abuse its discretion in excluding the experiment).

(n30)Footnote 30. See, e.g., *Porter v. Whitehall Lab., 9 F.3d 607 (7th Cir. 1993)* ("the suggested scientific testimony must fit the issue to which the expert is testifying"; expert testimony was properly excluded for lack of "fit" where the expert admitted that his conclusion was contingent upon ruling out certain alternative causes for plaintiff's medical condition, which could not in fact be ruled out).

(n31)Footnote 31. *Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994)* (error to exclude evidence in a bench trial on grounds of prejudicial effect).

(n32)Footnote 32. See, e.g., *Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981)* (the portion of *Rule 403* referring to prejudice "has no logical application in bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of unfair prejudice is a useless procedure.").

(n33)Footnote 33. *Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981)* :

> *Rule 403* assumes that a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.

(n34)Footnote 34. See, e.g., *United States v. Scholl, 166 F.3d 964 (9th Cir. 1999)* (Trial Court did not err in limiting the defendant to three character witnesses; additional character witnesses would have been cumulative under the circumstances); *F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987)* (Trial Court properly excluded expert testimony as to excessive fees, where at least four other witnesses had already testified on this point).

(n35)Footnote 35. See also *United States v. Wong, 703 F.2d 65 (3d Cir. 1983)* (*Rule 609(a)(2)* provides for automatic admissibility for convictions involving dishonesty or false statement: "the general balancing test of *Fed.R.Evid. 403* is not applicable to impeachment by *crimen falsi* convictions under *Fed.R.Evid. 609(a)(2)*").

(n36)Footnote 36. For a result similar to *Harwood*, see *United States v. Fountain, 2 F.3d 656 (6th Cir. 1993)* , where information on the defendant's criminal activity, offered not for its truth but rather to explain why the agents searched where they did, was held improperly admitted because the "reason Agent Primak searched the back bedroom simply was not a matter of dispute and was not in issue in this case." The Court stated that "because the agents' action needed no explanation, we can conclude only that Primak's information was offered to prove the truth of the matter asserted -- that guns and narcotics were in the bedroom." See also *United States v. Dean, 980 F.2d 1286 (9th Cir. 1992)* (statements accusing the defendant of criminal activity, made to a police officer, were improperly admitted for the nonhearsay purpose of explaining why the officer went to the defendant's home to arrest him: the officer's reasons for going to the defendant's home "are not of consequence to the determination of the action, i.e., they do not bear on any issue involving the elements of the charged offense"); *United States v. Hanson, 994 F.2d 403 (7th Cir. 1993)* (statement made to the defendant, that he did not have to file a certain form, was not offered for its truth but rather for its impact on the defendant's state of mind, and it was relevant for this purpose; exclusion was error, but harmless).

(n37)Footnote 37. For another case illustrating this point, see *United States v. Reyes, 18 F.3d 65 (2d Cir. 1994)* , reversing a conviction due to error in admitting statements made to a Customs agent which implicated the defendant in a conspiracy. Even though the jury in *Reyes* was instructed that the accusations were admitted only as "background," and even though the statements were somewhat relevant to explain the background of the investigation, the Court found a substantial danger that the jury would have considered the statements for their truth anyway. As the *Reyes* Court stated, "the mere identification of a relevant nonhearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice."

(n38)Footnote 38. See, e.g., *Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991)* (hearsay objection at trial did not specifically request the Trial Court to weigh the prejudicial nature of the evidence against its probative value; therefore the objection to the prejudicial nature of the evidence was not properly preserved for appeal). See the further discussion in § 103.02[1].

(n39)Footnote 39. See, e.g., *Le Maire v. United States, 826 F.2d 949 (10th Cir. 1987)* (no error to admit physician's testimony despite the plaintiff's objection that he was surprised by certain aspects of testimony that were different from the pretrial statement; the remedy for coping with surprise is not to seek reversal after an unfavorable judgment, but rather to seek a continuance at the time the evidence is proffered); *Conway v. Chemical Leaman Tank Lines, Inc., 687 F.2d 108 (5th Cir. 1982)* ("the granting of a continuance is a generally more appropriate remedy than exclusion of evidence when claims of unfair surprise are raised").

(n40)Footnote 40. See, e.g, *Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999)* (defendant was not entitled to relief on grounds of surprise where it had actual knowledge of the existence of the challenged evidence).

(n41)Footnote 41. *United States v. Sampson, 980 F.2d 883 (3d Cir. 1992)* (abuse of discretion to admit prior bad acts of a criminal defendant where the Trial Court's determination of probative value was conclusory, and there was no statement in the record that indicated that the Trial Court had even performed the required *Rule 403* balancing); *United States v. Stovall, 825 F.2d 817 (5th Cir. 1987)* , *amended by*, *833 F.2d 526 (5th Cir. 1987)* (Trial Court's *Rule 403* balancing would not be disturbed where there was an explicit, on-the-record determination that prejudice did not substantially outweigh probative value).

(n42)Footnote 42. See, e.g., *United States v. Jamil, 707 F.2d 638 (2d Cir. 1983)* (Trial Court should provide a clear statement of its reasons for excluding evidence under *Rule 403*, so as to allow counsel to explain or to obviate the objection).

(n43)Footnote 43. See, e.g., *United States v. Collorafi, 876 F.2d 303 (2d Cir. 1989)* (Trial Court making *Rule 403* ruling should provide "a clear statement of its reasons" on the record); *United States v. Robinson, 700 F.2d 205, 213 (5th Cir. 1983)* ("In the absence of on-the-record findings ... we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling.").

(n44)Footnote 44. See also *United States v. Lavelle, 751 F.2d 1266 (D.C. Cir. 1985)* (written findings "assist appellate Courts in determining whether the proper analysis was employed"; however, failure to make written findings does not warrant reversal or remand where no request was made for such findings, or where the relevant factors are apparent and there is no uncertainty as to the correctness of the ruling).

(n45)Footnote 45. See, e.g., *United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999)* (Trial Court did not abuse its discretion in excluding defense-proffered evidence under *Rule 403*; panel states that they would probably have admitted the evidence had they been sitting as District Judges); *United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978)* (Trial Court's *Rule 403* ruling "should not be reversed simply because an appellate Court believes that it would have decided the matter otherwise").

(n46)Footnote 46. See, e.g., *United States v. Coiro, 922 F.2d 1008 (2d Cir. 1991)* (*Rule 403* ruling can be set aside

only if the Trial Judge acted "arbitrarily or irrationally"); *United States v. York, 933 F.2d 1343 (7th Cir. 1991)* (no error unless the Trial Court's decision was "so unprincipled" as to amount to an abuse of discretion); *United States v. Currier, 821 F.2d 52 (1st Cir. 1987)* (the balance of probative value and prejudicial effect is "best left to the sound discretion of the trial judge" and Appellate Court will "impose our judgment only if a complaining party can demonstrate that the district Court's ruling did not fall within the ambit of reasonable debate"); *United States v. De Peri, 778 F.2d 963 (3d Cir. 1985)* (Trial Judge's ruling under *Rule 403* will only be reversed if it was "arbitrary or irrational").

(n47)Footnote 47. See, e.g., *C.A. Associates v. Dow Chem. Co., 918 F.2d 1485 (10th Cir. 1990)* (Trial Judge is uniquely suited to balancing probative value against the harmful effects of proffered evidence, because of his or her familiarity with "the full array of the evidence"); *United States v. Lau, 828 F.2d 871, 874 (1st Cir. 1987)* (Trial Court is "more directly familiar than a Court of appeals with the need for the evidence and its likely effect on the jury").

(n48)Footnote 48. See *United States v. Brooks, 145 F.3d 446 (1st Cir. 1998)* (ruling excluding evidence under *Rule 403* vacated on interlocutory appeal by the government; the Trial Judge had not permitted the government to be heard and had made no specific findings, even though the evidentiary question was complex and the answer was not self-evident; in those circumstances, the Trial Court was not entitled to a deferential standard of review).

(n49)Footnote 49. See, e.g., *United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987)* :

> [A]lthough appellate Courts cannot often tell whether it was best, all things considered, to let in a given piece of evidence, it may be possible to tell whether the district Court and the parties took the right things into account. A flaw in the process is easier to detect than is a flaw in the result ... .

See also *McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987)* (Trial Judge's exercise of discretion under *Rule 403* will rarely be overturned where he "explains the reasoning process behind his conclusion").

(n50)Footnote 50. See, e.g., *Herrington v. Hiller, 883 F.2d 411 (5th Cir. 1989)* (Trial Court's power to exclude relevant evidence should be used "sparingly"; abuse of discretion to exclude highly probative evidence where there was no strong indication that it would have been confusing or distracting).

(n51)Footnote 51. See, e.g., *United States v. Finestone, 816 F.2d 583, 585 (11th Cir. 1987)* (*Rule 403* provides extraordinary remedy that should be used only sparingly, and consequently the Trial Judge's discretion to exclude evidence is more limited than is the discretion to admit evidence). See also *Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224 (3d Cir. 1993)* (Trial Court's use of *Rule 403* to exclude expert testimony, in the context of a pre-trial ruling, was inappropriate, because *Rule 403* is only to be used as a last resort with respect to expert testimony; this is especially true at the pretrial level, where there is a danger that the perceived risk of confusion and prejudice cannot be accurately assessed; in order to exclude expert testimony under *Rule 403*, a Court must have a record complete enough to be considered a "virtual surrogate for a trial record").

(n52)Footnote 52. See, e.g., *Western Indus. v. Newcor Canada, Ltd., 739 F.2d 1198, 1202 (7th Cir. 1984)* (Trial Judge "does not have the right to prevent evidence from getting to the jury merely because he does not think it deserves to be given much weight"; error to exclude under *Rule 403* merely because the Trial Judge did not believe the witnesses); *United States v. Thompson, 615 F.2d 329 (5th Cir. 1980)* ("*Rule 403* does not permit exclusion of evidence because the judge does not find it credible.").

(n53)Footnote 53. See, e.g., *Bowden v. McKenna, 600 F.2d 282, 284 (1st Cir. 1979)* ("Weighing probative value against unfair prejudice under *Fed.R.Evid. 403* means probative value with respect to a material fact if the evidence is believed, not the degree the Court finds it believable.").

(n54)Footnote 54. See, e.g., *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* (where the Trial

Court "did not articulate its reasons for its finding of prejudice" and the evidence was not obviously prejudicial, remand was required).

(n55)Footnote 55. See, e.g., *Borden, Inc. v. Florida E. C. R. Co., 772 F.2d 750 (11th Cir. 1985)* (in property damage action arising from improper switching of a train after vandals had tampered with a switchbox, the Trial Court excluded a prior similar vandalization on the ground that it would be prejudicial to the railroad; this was error, because "unfair prejudice as used in *Rule 403* cannot be equated with evidence that is simply adverse to the opposing party" and the evidence was not unfair simply because the railroad did not know the identities of the vandals in the prior incident).

(n56)Footnote 56. See, e.g., *United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980)* (when balancing probative value and prejudicial effect under *Rule 403*, the Trial Judge "should carefully consider the likely effectiveness of a cautionary instruction that tries to limit the jury's consideration of the evidence to the purpose for which it is admissible"; the Trial Judge, "sensitive to the realities of the courtroom context as in all other trial rulings, must simply include a sound estimate of the likely force of limiting instructions in the overall *Rule 403* determination").

(n57)Footnote 57. See, e.g., *Government of Virgin Islands v. Pinney, 967 F.2d 912 (3d Cir. 1992)* (in trial on rape charge, prior act of rape was unduly prejudicial, despite limiting instruction; a "realistic view of the capabilities of the human mind" requires Courts to acknowledge that in some situations there may be an unacceptable risk that jurors cannot follow limiting instructions).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 403 RULE 403

1-403 Federal Rules of Evidence Manual 403.03

403.03 Annotated Cases

[Go To Supp]

[1] Abuse of Discretion

[a] Admission of Evidence

[i] Association

United States v. Parada-Talamantes, 32 F.3d 168 (5th Cir. 1994) : The Court reversed a drug conviction on the ground that the prosecution was improperly allowed to show that the defendant's brother was a drug dealer. The Court stated that the introduction of the evidence was "a highly prejudicial attempt to taint defendant's character through guilt by association."

United States v. Roark, 924 F.2d 1426 (8th Cir. 1991) : The Court reversed the defendant's conviction for a conspiracy to manufacture methamphetamine because of government argument and two witnesses' testimony linking him to the Hell's Angels motorcycle club. Instructions to the jury at the conclusion of the trial to disregard the witnesses' testimony was completely insufficient to overcome the entire theme of the trial, which was "guilty by association."

[ii] Abuse of Discretion -- Admission of Evidence -- Codefendant's Conviction

United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993) : The Court reversed a conviction for a cocaine distribution conspiracy because the prosecutor referred to and emphasized that the defendant's brother had been convicted for participation in the conspiracy and the Trial Court gave no cautionary instructions. In *United States v. Blevins, 960 F.2d 1252 (4th Cir. 1992)* , the Court held it was error, but harmless beyond a reasonable doubt, to permit mention that six nontestifying codefendants in the charged drug distribution conspiracy had pleaded guilty.

United States v. Leach, 918 F.2d 464 (5th Cir. 1990) : The defendant's conviction for a methamphetamine

conspiracy was reversed in part because of plain error in admitting prosecution evidence that a nontestifying coconspirator had pleaded guilty in the case.

United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990) : During a trial on racketeering, narcotics, civil rights, and tax charges, evidence was elicited that a codefendant had been separately tried and convicted for his involvement in the case. The Court held that although the admission of guilty pleas or convictions of codefendants not subject to cross-examination is generally considered plain error because the jury may regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality, in this case the error was harmless because of prompt and proper curative instructions. See also *United States v. Eason, 920 F.2d 731 (11th Cir. 1990)* (reversing conviction for defrauding the Farmers Home Administration because the government introduced evidence of a nontestifying coconspirator's prior conviction in the scheme).

[iii] Abuse of Discretion -- Admission of Evidence -- Confusing Evidence

Adams v. Providence & Worcester Co., 721 F.2d 870 (1st Cir. 1983) : The Court held it was error in a FELA case to admit a letter to the plaintiff in which the general manager of the defendant railroad stated that he had been apprised by the plaintiff's lawyer that the plaintiff was incapacitated and that the defendant would remove the plaintiff from train-service for the protection of the public in light of the information supplied by the lawyer. During the trial it became clear that the plaintiff was not totally disabled and did not claim to be. The Court found that the letter must have confused the jury, since the question before it was whether the plaintiff had been "medically discharged," not whether he was able to work, and the letter was of little probative value on that issue.

[iv] Abuse of Discretion -- Admission of Evidence -- Criminal Acts

United States v. Dockery, 955 F.2d 50 (D.C. Cir. 1992) : The Court vacated and remanded convictions for drug trafficking and felon firearms possession on the ground that evidence of prior convictions offered on the firearms count and on cross-examination of a defense witness had an unduly prejudicial effect as to the trafficking counts. Reversing a judgment for the plaintiffs in *Jordan v. Medley*, n1 an action for assault and intentional infliction of emotional distress, the Court found that evidence that the defendant had been charged with criminal assault "went directly to the central issue of the case" and held that "where the evidence on that issue was closely balanced (as the hung jury in the first trial would suggest), we do not have the necessary assurance that the jury's judgment was not substantially swayed."

United States v. DiNome, 954 F.2d 839 (2d Cir. 1992) : In a massive RICO prosecution, the Court held that evidence of certain crimes in which various defendants claimed no participation was relevant to prove the existence and nature of the RICO enterprise. Convictions of two defendants were reversed, however, because after RICO charges against them were dismissed, the evidence was irrelevant and highly prejudicial and their mistrial motions should have been granted.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting, *inter alia*, evidence that the defendant previously committed another murder. There was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity.

United States v. Brito, 136 F.3d 397 (5th Cir. 1998) : In a marijuana-importation prosecution, the Court held it was error (but harmless) to admit evidence that a small user-quantity of marijuana was found in the house of one defendant six months after the end of the charged conspiracy. In a narcotics case, *United States v. Pace, 10 F.3d 1106 (5th Cir. 1993)* , the Court held it was error (but harmless) for the prosecution to call the defendant's parole officer as a witness solely to establish the defendant's address. The testimony was prejudicial, since it informed the jury that the defendant had previously committed crimes; and its probative value was minimal, since the defendant's address was not a major issue in dispute in the case and it could have been proved in a variety of less prejudicial ways.

United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003) : The defendant was charged with possessing crack cocaine with intent to distribute, after express mail packages containing crack were delivered to her. She claimed that she did not know what was in the packages, but that she only received them and turned them over (unopened) to a long-time acquaintance for $50 each time. Reversing, the Court held it was an abuse of discretion to admit evidence that she was a current user of crack cocaine, since it was not probative of her knowledge of the contents of the packages and tended only to establish a propensity to commit the charged offense. Furthermore, any probative value of evidence of crack cocaine use was substantially outweighed by the danger of unfair prejudice, given the tendency of drug use evidence to elicit jury opprobrium, the weakness of the other evidence regarding the defendant's knowledge, and the inability of the Judge's limiting instruction to minimize the prejudice. In a prosecution for cocaine base distribution, *United States v. Thomas, 49 F.3d 253 (6th Cir. 1995)* , the Court held it was error (but harmless) to admit a sawed-off shotgun owned by the defendant. Although the gun might tend to show that the defendant was a dealer rather than just a user, it had not been used in any of the charged transactions, there were tape recordings and full testimony regarding the transactions, and the crack and other items seized from the defendant at his arrest were introduced. Thus, the gun had little, if any, incremental probative value and it served only to inflame the jury regarding the violence often associated with crack dealers.

United States v. Sargent, 98 F.3d 325 (7th Cir. 1996) : The defendant, charged with making misrepresentations in connection with purchases of weapons for a street gang, contended that he was coerced into making these purchases. The Trial Court admitted evidence that he had previously pointed a gun at a woman, threatened to kill her, and beat her face with his fists, because it tended "to demonstrate that the defendant was capable of defending himself in that he had no fear of using a revolver." Holding this was an abuse of discretion (but harmless error), the Court said that the prior act was irrelevant to the coercion defense because violent acts do not demonstrate an ability to defend oneself against a street gang, and the evidence was not necessary to prove the defendant's facility with a gun, because there was already evidence that he had been in the army and had worked as a security guard. Finally, the evidence was highly prejudicial: "the unexplained image of Sargent abusing a woman could do much to alienate a jury." In *Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993)* , the plaintiff, who had shot and killed two policemen, brought a civil rights action alleging that police had tortured him in extracting a confession. Reversing a judgment for the individual defendants, the Court held that evidence of the killings was admissible, but that there had been an abuse of discretion in admitting evidence of the ugly details of the crimes. Arguments that the evidence was relevant to show the plaintiff's injuries were self-inflicted or were suffered while arrested were not remotely plausible.

United States v. Fawbush, 900 F.2d 150 (8th Cir. 1990) : The Court reversed a conviction for aggravated sexual abuse of two children, holding that evidence the defendant sexually abused his daughters when they were children, even if relevant, was so inflammatory on its face as to divert the jury's attention from the material issues in the trial.

United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) : The Court reversed a conviction for felon firearm possession because marijuana paraphernalia and methamphetamine recipes found in the defendant's truck at the time of his arrest were erroneously admitted. Evidence of marijuana for personal use was simply irrelevant to knowing possession of the seized gun; and the recipes by themselves were not closely linked to immediate illegal activity, but

were likely to prejudice the defendant by connecting him to the highly charged public issue of drug trafficking. In *United States v. Bland*, n2 the defendant, charged with felon firearm possession, gave notice that his theory at trial would be that an officer planted the gun in order to justify shooting him in making an arrest. At the *voir dire* the Trial Judge told the jury not only that it was anticipated that the officer would testify he shot the defendant to prevent his escape and that he was aware of an outstanding warrant for the defendant, but also that the warrant was for the molestation, torture, and murder of a seven-year-old girl. The Court reversed the conviction because, although the existence of the warrant was relevant to show the officer did not have a motive to plant the gun, the members of the jury panel were not likely to forget details leading them to believe that acquitting the defendant might mean releasing an extremely dangerous child molester and killer into the community.

United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990) : The Court reversed convictions for offenses arising out of a conspiracy to manufacture amphetamine because the Trial Judge permitted a prosecutor to offer evidence despite rulings excluding it and denied a mistrial motion. Testimony that the arresting agents were heavily armed because of a fear that one of the defendants was acting as a sniper at the lab site, and that another defendant had previously participated in an unrelated amphetamine "cook," was more prejudicial than probative.

United States v. Perez, 30 F.3d 1407 (11th Cir. 1994) : The principal witness for the prosecution in a drug case was extensively cross-examined regarding the amount of money the government was paying him; on re-direct he was permitted to testify that he had refused an offer of $5,000 to not testify at trial. The Court held this was error (but harmless), as the witness' own testimony that he refused the offer because he feared for his life meant the evidence had no probative value, and the inherent prejudice of the jury's assumption that the defendants were connected with the offer far outweighed any possible probative value. In *United States v. Hines, 955 F.2d 1449 (11th Cir. 1992)* , the Court reversed convictions for aggravated sexual assault, holding it was an abuse of discretion to admit photospreads from which the complainant had identified the defendants as her assailants, as there was no demonstrable need to introduce the photographs, the photos implied the defendants had prior criminal records, and the agent's testimony highlighted that the photos were of known criminals. In *United States v. Church*, n3 a RICO prosecution for acts, including conspiracy to murder, committed in 1983 and 1984, the Court held it was harmless error to admit a tape recording of a 1979 conversation discussing a defendant's plan to kill a prosecutor.

[v] Abuse of Discretion -- Admission of Evidence -- Domestic Violence

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) : In a cocaine prosecution the defendant's wife testified that she had never witnessed any drug dealing on their property and that she had been home full-time caring for children. When cross-examining the defendant, the prosecutor elicited testimony that the defendant had been charged with beating his wife, and then introduced six color photos taken of the wife shortly after the abuse. Reversing, the Court found that the evidence was irrelevant and unduly prejudicial. The evidence did not impeach the wife's testimony, because she had not testified about her relationship with her husband. The Court concluded that "[t]he domestic violence evidence in this case was particularly likely to incite the jury to an irrational decision because it was graphic and arresting."

[vi] Abuse of Discretion -- Admission of Evidence -- Flight

United States v. Kang, 934 F.2d 621 (5th Cir. 1991) : In a prosecution for bribing an IRS agent, the defendant asserted only an entrapment defense. The Court reversed his conviction, finding an abuse of discretion in admitting evidence of the defendant's flight, as it was not relevant to show his predisposition or the manner of the government's investigation. Thus, it was not only inadmissible under *Rule 403* balancing because of the risk of prejudice, but it was also inadmissible under *Rule 401* on relevancy grounds.

[vii] Abuse of Discretion -- Admission of Evidence -- Hearsay

United States v. Kang, 934 F.2d 621 (5th Cir. 1991) : In a prosecution for bribing an IRS agent, the accused made an entrapment defense. The agent's testimony that his superiors had told him the defendant had violated liquor control commission regulations was admitted as evidence of the agent's state of mind, but the prosecutor argued in summation that it showed a predisposition to cheat on taxes. The Court reversed, as the prosecutor's attempt to exploit the testimony concerning out-of-court statements by linking it explicitly to impermissible propositions only aggravated the inherent prejudice of evidence having little probative value; the government's good faith, motive, or reasonableness is only of secondary significance, if relevant at all, in an entrapment case.

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) : A government witness in a drug case gave testimony that was largely neither inculpatory nor exculpatory of the defendant. The prosecution then introduced testimony by an officer recounting a highly inculpatory statement the witness had earlier given to him. The witness had been released early from jail in return for giving the interview with the officer and had tried to retract the statements after her release. The Court held it was error (but harmless) to admit the officer's testimony, since its value for impeaching the witness was relatively low, while the danger of prejudice from the jury using the prior statements as substantive evidence was very high.

[viii] Abuse of Discretion -- Admission of Evidence -- Hearsay Offered for Background

United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004) : The Court remanded the defendant's case for a hearing on whether his counsel's performance was constitutionally ineffective, where no objection had been made to testimony from the arresting officers that they had pursued the defendant after receiving complaints from nontestifying witnesses that they had been victims of armed robberies. To the extent that the testimony was relevant to a fact of consequence in the trial for felon firearm possession, it was hearsay because it was relevant only for the truth of the assertion that the defendant possessed a weapon. To the extent that the testimony was offered as "background" information, it was inadmissible because its considerable prejudicial effect substantially outweighed its minimal value as background. See also *United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000)* , discussed in the Editorial Explanatory Comment, *§ 403.02[11].*

United States v. Johnston, 127 F.3d 380 (5th Cir. 1997) : The Court held that the prosecutors engaged in misconduct in a massive drug trafficking prosecution when they repeatedly asked law enforcement agents what steps they took during their investigation and why they took those steps. They were thereby able to introduce indirectly hearsay testimony of informants and other law enforcement agents that was damaging to the defendants. The Court said that "[t]he questions were clearly improper and highly prejudicial to the defendants," but concluded that the errors were harmless in the circumstances.

United States v. Lovelace, 123 F.3d 650 (7th Cir. 1997) : The defendant was arrested driving a rental car with its trunk full of cocaine and drug paraphernalia, after police received an informant's tip that the defendant was to be at a particular location with cocaine for sale. Testimony about the tip was admitted over objection at trial. Reversing, the Court held that the prejudicial effect of the tip in connecting the defendant to the drugs substantially exceeded any probative value in giving context to the officers' conduct. The Court noted that it is the Judge's instruction that distinguishes a tip from hearsay for the jury, but that "[a] jury is unlikely to follow an instruction given where the admission of the tip adds little to the context of the investigation or where the substance of the tip is overwhelmingly incriminating," as here.

[ix] Abuse of Discretion -- Admission of Evidence -- Less Prejudicial Alternative

Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986) : In a suit by arrestees asserting brutality claims against police, the Court held it was error for the plaintiffs to present detailed evidence of allegations of misconduct against narcotics officers contained in administrative complaints, pleadings in other cases, personnel files, and newspaper articles. The Court concluded that the plaintiffs could have elicited evidence that allegations were made and could have asked about the police department's response without exploring the alleged events in detail.

Wilk v. American Med. Ass'n, 719 F.2d 207 (7th Cir. 1983) : Reversing on another ground a judgment for the defendants in an antitrust action by chiropractors, the Court indicated that it would have been obliged to reverse also because highly prejudicial evidence about one particular chiropractic school and one plaintiff's one-time arrangement with a furniture store to sell mattresses to his patients was admitted. The Court recognized that the evidence was relevant to the defendants' belief that "chiropractic is quackery," but it concluded that the defendants' beliefs could have been explored in a less prejudicial way with much less emphasis on alleged financial greed. In *United States v. Hansen*, n4 the Court reversed a perjury conviction because the foreman of the grand jury that indicted a defendant was called to testify against him. The Court said that a transcript was to be preferred, because "when the foreman of the grand jury is called without any sufficient reason and in effect justifies the grand jury's actions and the resulting indictment, all precautions about the undue influence of the indictment are very likely for naught."

United States v. Neill, 166 F.3d 943 (9th Cir. 1999) : In a robbery case, the Court held it was an abuse of discretion (but harmless error) to refer to the fact that the defendant was on work release at the time of the robberies. The evidence of the defendant's residence was probative, because it tended to prove that he knew his codefendant, who also resided in the Work Release Center, and because records showed that the defendant had checked out of the Center during the time in which the crimes occurred and returned that night with money. However, it would have been possible to call the Work Release Center a "residential program," thus avoiding the prejudicial effects of specifically identifying the Center. Reversing a conviction for illegally reentering the United States in *United States v. Bejar-Matrecios*, n5 the Court concluded it was error to admit a certified copy of a judgment showing that the appellant once pleaded guilty to the misdemeanor of illegal entry. Although the plea conclusively established that the appellant was an alien when he pleaded guilty, the jury was never told why the prior conviction was being used, the evidence was cumulative, and the jury might have used the evidence as proof of predisposition.

United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993) : In a prosecution arising from a baby's death by shaking, an expert was permitted to demonstrate shaken baby syndrome to the jury by shaking an infant mannequin used to practice CPR techniques. The expert testified that the neck of the CPR doll was stiffer than an infant's, and so greater force was required to produce the head movement associated with shaken baby syndrome. The Court held that the courtroom demonstration was reversible error, because the conditions of the demonstration "were not sufficiently similar to the alleged actions of the defendant to allow a fair comparison." While the demonstration did indicate how a baby's head would move during shaken baby syndrome, this could have been demonstrated in a less inflammatory manner by a direct manipulation of the doll's head.

[x] Abuse of Discretion -- Admission of Evidence -- Miscellaneous Civil Cases

LaPlante v. American Honda Motor Co., 27 F.3d 731 (1st Cir. 1994) : In an action for injuries suffered while operating an all-terrain vehicle, the plaintiff contended that Honda knew that its ATVs would fail to turn properly unless the rider shifted his or her weight in a counterintuitive manner. The Court stated that evidence that Honda had made $73,371,000 in profits from the sale of ATVs over a six-year period was somewhat probative of "the credibility of

Honda's explanation for its inaction" -- i.e., that the failure to provide adequate warnings about plowing may have resulted from greed rather than lack of knowledge. The Court ruled, however, that the risk of prejudice substantially outweighed the "scant probative value" of the evidence, and therefore that the Trial Court had "miscalibrated its *Rule 403* scales" in admitting it.

Annis v. County of Westchester, 136 F.3d 239 (2d Cir. 1998) : The plaintiff brought a civil rights suit against the County and two County police officials for gender discrimination while she served as a police officer. She had joined a City police force in 1977; in 1981 one of the officials became her superior on the City force, and in 1984 both the plaintiff and the official joined the County force. The statute of limitations period for the plaintiff extended back only to 1990, but she introduced evidence of discriminatory practices on the City force in 1977-81 to show notice to the official, and evidence of practices on the City and County forces in 1981-90 to show a continuing violation of her rights. The Court held that the 1977-81 evidence should have been excluded because it was only minimally probative and "fiercely prejudicial" in leading the jury to associate the official with deplorable conditions existing before his tenure. As to the 1981-90 evidence, the Court found that it was insufficient to establish a continuing violation and, being outside the limitations period, it was irrelevant to show the source of the plaintiff's emotional distress; moreover, it would naturally prejudice the jury's views with regard to the events occurring within the limitations period. Thus, admitting the evidence was an abuse of discretion, but the errors were harmless in the circumstances. In *Davidson v. Smith, 9 F.3d 4 (2d Cir. 1993)* , the Court reversed a judgment for the defendants in a prisoner's civil rights action because a defense witness violated an *in limine* order not to refer to the plaintiff's psychiatric history or his treatment at a state hospital for the criminally insane. Given the prejudicial effect of the evidence, the questionable efficacy of a curative instruction, and the relative strength of the plaintiff's case, it was error to deny the plaintiff's motion for a mistrial.

Caparotta v. Entergy Corp., 168 F.3d 754 (5th Cir. 1999) : In an age discrimination action, in-house counsel for the defendant was in custody of the plaintiff's employment records when they were destroyed. The Trial Judge held a hearing and ruled that the records were destroyed inadvertently. At trial, the plaintiff called the in-house counsel to testify to the facts surrounding the destruction of the documents, and both parties mentioned the loss of the documents in argument to the jury. The Court held that it was an abuse of discretion to allow the trial to proceed in this manner, since the prejudicial impact of the testimony was substantial and it was confusing to the jury because it was not clear to which issue the evidence was relevant.

Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998) : In a Title VII race discrimination case, the Court found it was error (but harmless) to permit the plaintiff to introduce evaluations referring to his performance in years after the employment decision at issue. Those evaluations did not aid in determining whether the decision was made on a discriminatory basis, and the prejudicial effect of their suggestion that the plaintiff was considered a valued employee substantially outweighed their probative value. In *Fortino v. Quasar Co.*, n6 the Court reversed judgments for plaintiffs allegedly discharged because of national origin and age discrimination, holding that it was error to admit a videotaped speech by one of the defendant's executives that indicated age bias, as none of the plaintiffs was in the executive's group and he had no role in their discharge or in that of any other employee.

Crane v. Crest Tankers, Inc., 47 F.3d 292 (8th Cir. 1995) : The Court reversed a judgment for the plaintiff in a seaman's Jones Act case because a "Future Damage Calculator" was improperly admitted into evidence. The exhibit was a slide-rule-type device with life and work expectancy and present value tables. The jury was given the device with no instruction about which damages were to be reduced to present value, how the rate of interest was to be determined, or how the device was to be used, and the defendant was given no opportunity to challenge the expertise or methods of calculation of the device's author. There was no showing that the device was generally used and relied upon, but the name of the publisher ("Lawyers and Judges Publishing Co.") suggested that the judiciary had vouched for it. In

Silbergleit v. First Interstate Bank, 37 F.3d 394 (8th Cir. 1994) , the Court reversed a judgment against the plaintiff in an age discrimination suit because the defendant's counsel asked questions and made comments that improperly suggested to or informed the jury that the plaintiff was a millionaire, received unemployment benefits, and was Jewish.

Stump v. Gates, 211 F.3d 527 (10th Cir. 2000) : A decedent's children brought an action under § 1983 and for outrageous conduct against a city, its police chief, and a detective, alleging that they had denied the children access to the State Courts to assert a wrongful death claim against the decedent's wife by bungling an investigation into the decedent's 1984 death and destroying the relevant evidence. At trial the plaintiffs introduced a 1989 state grand jury report, which had concluded that the decedent's death was a homicide and not a suicide as previously characterized by the police department. The report was admitted not for its truth but to show that through the report the plaintiffs had learned there was a cover-up for which they had an outrageous conduct claim. Reversing a judgment for the plaintiffs, the Court held it was an abuse of discretion to admit the grand jury report. It had little if any probative value in establishing when or how the plaintiffs received notice of their claims, since their complaint was filed seven months before they saw the report, and it was highly prejudicial as a hearsay conclusion that the police chief had deliberately and egregiously covered up the cause of the decedent's death.

[xi] Abuse of Discretion -- Admission of Evidence -- Miscellaneous Prosecution Evidence

United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997) : Fulmer had gone to a federal agent to ask him to investigate Fulmer's family members for criminal activity. The agent investigated and informed Fulmer that no charges would be filed. Fulmer then sent the agent a voicemail promising that the agent would receive "silver bullets" in the near future. At his trial for threatening the agent, Fulmer contended that he was not referring to violence when he mentioned "silver bullets," but rather to critical evidence in the case against his family members. The Court reversed the conviction because three pieces of evidence created an unacceptable risk of prejudice. First, the agent was allowed to testify that he considered the voicemail especially threatening due to the fact that the Federal Building in Oklahoma City had recently been bombed and many federal agents had been killed. This evidence had at best "slight" probative value, because Fulmer had not referred to the Oklahoma City bombing nor to any explosives in his voicemail, while the danger of unfair prejudice was "tremendous." Second, the admission of actual bullets of a silvery color, possessed by the agent, was error. It was unnecessary for the prosecution to demonstrate to the jury that silver bullets actually existed, and it was not clear "what possession by the *victim* of these bullets has to do with whether the defendant's statement constituted a threat, particularly since he was unaware of their existence." Finally, it was an abuse of discretion to admit testimony that the agent brought an extra magazine of ammunition home with him on the day that he received Fulmer's voicemail. While this evidence was probative of the agent's reaction, there was an unacceptable risk that it would evoke "an emotional or biased response in the jury that may have confused the issues in the case."

United States v. Irizarry, 341 F.3d 273 (3d Cir. 2003) : Affirming RICO convictions, the Court ruled that it was error (but not plain error) to admit testimony about a high ranking member of a crime family that was completely unrelated to his dealings with the charged enterprise. In a footnote, the Court found it "necessary to once again caution against the dangers of eliciting this kind of evidence and the propriety of admitting it," since "irrelevant references to such notorious figures as the members of the Gambino crime family can poison the deliberative well to an extent that will fatally undermine the integrity of any subsequent conviction." In a mail fraud prosecution arising from a scheme to invest "pre-need" funds of funeral directors, *United States v. Copple, 24 F.3d 535 (3d Cir. 1994)* , the Court held that evidence of the extent of the victims' losses could be probative of the defendant's intent to convert the funds to his personal use, but the victims' testimony about the personal tragedies they suffered as a result of the fraud was unfairly prejudicial. The error was harmless, however.

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001) : The defendant was charged with possession of child

pornography after pictures of nude children were found on his computer. The Court vacated his conviction because two sexually-explicit narratives, also found on the computer, were introduced as evidence of his intent and state of mind. The narratives were relevant to help show that the possession of the photographs was unlikely an accident when a person was also downloading narratives that involved sexual contact between adults and minors. However, their probative value was substantially outweighed by their prejudicial effect; they were "vile in their graphic and violent nature," depicting violent rapes and moderate torture, while the photographs depicted no violence. In *United States v. Riddle, 103 F.3d 423 (5th Cir. 1997)* , the Court, reversing a bank chairman's conviction for fraud in connection with loans in which he was interested, found an abuse of discretion in the admission of bank examination reports detailing violations of laws and regulations in other situations. Although the reports were relevant to the defendant's knowledge of his obligations to fully inform the bank's board, the probative value was slight in comparison to the risk of prejudicing, confusing, or misleading the jury by a four-year history tying the defendant to dozens of regulatory violations. It was also error to admit another participant's plea-bargaining proffer, which included the defendant's name in an unspecific list of institutions, individuals, and situations involving banking violations. In *United States v. Oreira*, n7 the Court reversed convictions for structuring currency transactions, holding it was error to admit evidence that a narcotics-detecting dog alerted on a deposit of cash made by the defendants. Offered to show that the defendants knew the money was drug proceeds, the probative value of the evidence was minimal (since most American currency contains narcotics traces) and was substantially outweighed by the prejudicial impact of injecting the specter of narcotics trafficking into the case.

United States v. Baldwin, 418 F.3d 575 (6th Cir. 2005) : The defendant was convicted of faking his own kidnapping. The Court held it was error (but harmless) to admit a psychological profile of the defendant prepared by the government, which essentially concluded that the defendant lived off his parents and wanted a lot of money without having to work for it. The government argued that the profile was properly admitted to show why the police investigator focused on the defendant as a suspect in his own kidnapping and why the officer conducted the interview with the defendant the way he did. However, the Court noted that the issues of police motivation and techniques used in the interview were not raised at trial, and that the profile "had nothing to do with the *modus operandi* of the staged kidnaping, so it could not have been relevant in that respect." In *United States v. DeSantis, 134 F.3d 760 (6th Cir. 1998)* , the defendant was convicted for mail and securities fraud in selling interests in a limited partnership, which collapsed when bars that it owned lost their liquor licenses. The government contended that the investor loss was caused by the defendant hiding excessive commissions when selling the interests; the defendant claimed that the loss occurred because his partner had sabotaged the business, after they had a falling out, by falsely representing to the state liquor control commission that the defendant still controlled the bars although he was required to dispose of them when convicted of another felony. In counter-rebuttal, the government offered testimony of the partner that he had heard the defendant had been stealing from the bars, which was why he had taken the actions leading to their falling out. Reversing, the Court held that the partner's testimony was irrelevant to challenge the defendant's claim that the investor losses were due to factors other than fraudulent representations at the time of the sale. As its only probative value was for the impermissible purposes of either showing the defendant's bad character or impeaching the defendant's testimony, admission of the testimony was an abuse of discretion. Furthermore, the defendant was prejudiced when he was improperly compelled on cross-examination to read into evidence a State Appellate Court decision affirming liquor control commission findings that he had not relinquished control over the bars. In *United States v. Carter*, n8 the Court reversed a conviction for selling cocaine to FBI agents, holding it was error to admit evidence of the defendant's purchase of household items, his two bank loan applications, and his failure to file tax returns. As this prosecution did not involve either a continuing criminal enterprise or an allegation that the defendant lacked a legitimate source of income to support an affluent lifestyle, the evidence was irrelevant and extremely prejudicial.

United States v. Duran, 407 F.3d 828 (7th Cir. 2005) : Affirming convictions for drug-trafficking offenses, the Court held that evidence of firearms and marijuana recovered at a coconspirator's house used by the conspirators was properly admitted, but it also held that the probative value of guns recovered from the apartment of the coconspirator's

sister was substantially outweighed by its prejudice when no drugs or drug paraphernalia were found in the apartment. Admission of the evidence was harmless error, however. In *United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002)* , a prosecution of murder-for-hire in connection with drug trafficking, the Court held it was an abuse of discretion (but harmless error) to admit a letter purportedly authored by the defendant's wife and submitted at the sentencing hearing in the defendant's earlier drug trial. The letter was offered in support of the government's contention that the defendant's family sought to obstruct justice on numerous occasions. The Court found no relevance for the letter, since it was well established that the wife had not written it, the true author was never identified, there was no evidence that the defendant authorized or even knew of the letter when it was presented in the hearing, and there was no evidence that the wife used the letter to obstruct justice in this case. At the very least, the letter should have been excluded because its prejudicial effect substantially outweighed any probative value.

United States v. LaChapelle, 969 F.2d 632 (8th Cir. 1992) : The defendant, charged with receiving child pornography through the mail, asserted an entrapment defense, and the government introduced a pornographic videotape seized from the defendant's home to show his knowledge of and intent to order child pornography. The Court held admission of the evidence was error (but harmless) because the possession was legal when the defendant first possessed the videotape. Evidence of predisposition to do what was once lawful is not by itself sufficient to show predisposition to do what is now illegal, so the slight probative value of the evidence was outweighed by its prejudicial effect.

United States v. Gonzalez-Flores, 418 F.3d 1093 (9th Cir. 2005) : Reversing a conviction for alien smuggling, the Court held it was an abuse of discretion under *Rule 403* (but harmless error) to admit testimony that two girls transported across the border by the defendant later suffered heat stroke walking through the Arizona desert because they had not been given enough water. The probative value of the testimony was low but it was highly prejudicial because of the jury's likely sympathetic reaction to the girls. In a prosecution for drug importation and possession with intent to distribute, *United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002)* , the defendant denied knowing that he was carrying the drugs and a Customs agent was permitted to testify about the methods and techniques used by narcotics smugglers, including that a smuggler would not risk using an unknowing courier to transport drugs. The Court held that admission of the expert's testimony was reversible error, since it prejudicially portrayed the defendant as a member of an international drug trafficking organization even though he was indicted only as an individual and there was no charge that he was acting in a conspiracy. In a prosecution for felon firearm possession, *United States v. Jimenez*, n9 the government sought to impeach the defendant with his prior felony convictions for burglary and for assault with a deadly weapon. The Trial Judge granted the request, but ordered that the assault conviction be referred to as a "felony involving a firearm." The Court reversed the conviction because the Judge's well-meaning attempt to mitigate the prejudice to the defendant inadvertently made it worse. Altering the nature of the assault conviction from one involving a deadly weapon to one involving a firearm increased rather than decreased the likelihood that the jury would draw an impermissible inference, since the only issue in dispute was whether the defendant in fact possessed a firearm. In a mail fraud case, *United States v. Lawrence*, n10 the defendant had an unconventional "marriage of convenience" to a flight attendant, in which she received tax benefits, he was able to fly for free, they lived apart, and both dated other people. The Court reversed the defendant's conviction because evidence of this marriage was introduced. The circumstances of the relationship were not probative of his guilt or innocence, and any relevance the testimony might have had was easily outweighed by its unfair prejudicial effect on the jury's ability to focus on the issues relevant to the charges. In *United States v. Mitchell*, n11 the Court reversed a bank robbery conviction because the prosecution erroneously introduced evidence that the defendant was in very poor financial condition and unemployed at the time of the robbery. The evidence was offered under *Rule 404(b)* as proof of motive, but the Court found the Rule inapplicable because "[b]eing poor is not a crime, wrong, or act" within the Rule. The poverty evidence in this case was not only of negligible probative value -- "almost everyone, poor or not, has a motive to get more money [a]nd most people, rich or poor, do not steal to get it" -- but it also produced a high danger of unfair prejudice when the prosecutor effectively portrayed the defendant as both poor and feckless, not supporting his wife and children. In *United*

States v. Ellis, n12 the defendant was convicted of receiving and concealing stolen explosives. The Trial Judge admitted the entirety of "The Anarchist Cookbook," a book found in the defendant's possession, which was a primer for "individual actions of destruction" that advocated drug use, anarchy, and violent revolution. An expert was also permitted to testify that the stolen explosives had the capability of destroying an office building. Reversing, the Court held that because the defendant was charged only with the receipt and possession of stolen explosives, there was no issue of intent to use the explosives, so the probative value of the possession of the book and the destructive capacity of the explosives was minimal, while the prejudice was obvious.

United States v. Griffin, 389 F.3d 1100 (10th Cir. 2004) : In a felon firearm possession case, the Court found it was error (but harmless) to admit a document listing all of the terms and conditions of the defendant's probation, one of which was a prohibition on possessing firearms, since "the defendant was not on trial for violating the terms and conditions of his probation but for violating [the statute criminalizing felon firearm possession]. Moreover, his knowledge that he was not to possess a firearm as a convicted felon is not an element" of the crime. In *United States v. Wood, 207 F.3d 1222 (10th Cir. 2000)* , a doctor was charged with murder and lesser included offenses after a patient died from a large dose of potassium chloride the doctor had injected in an attempt to treat the patient. Reversing a conviction for involuntary manslaughter, the Court held it was error to admit testimony of a medical expert that potassium chloride is the drug most commonly used to execute criminals and euthanize animals. The testimony clearly prejudiced the defendant by creating the impression that potassium chloride "is purely an instrument of death and Dr. Wood was acting as an executioner." While the testimony was probative of the potassium chloride's lethal effect, the compound's dangers and benefits were adequately established by other testimony.

[b] Abuse of Discretion -- Exclusion of Evidence

[i] Civil Rights Cases

Doe v. Claiborne County, Tenn., 103 F.3d 495 (6th Cir. 1996) : The Court reversed dismissal of the student-plaintiff's Title IX claims that she had been sexually abused by a teacher, and held it was an abuse of discretion to exclude before trial all of the plaintiff's evidence of incidents that provided the defendants with notice of the teacher's propensity. Because what the defendants knew and when they knew was relevant to material issues in the case, the evidence did not have an undue tendency to suggest a decision on an improper basis, nor was it related to a collateral matter or cumulative. In *Shahid v. City of Detroit*, n13 the Court reversed judgments for the defendants in a civil rights action, brought for alleged failure to provide medical care to a jail inmate prior to his death, because the Trial Judge had excluded black-and-white photographs of the decedent's body in his cell shortly after his death. By depicting paint dustings, bruises, and blood traces, the photos were relevant to whether he had sought assistance and the obviousness of his injuries, and the fact the body may have been moved before the photos were taken did not mean they were an inaccurate representation of what they depicted.

Brown v. City of Hialeah, 30 F.3d 1433 (11th Cir. 1994) : The Court reversed a judgment for defendants in a civil rights action for excessive force in effecting an arrest, because the Trial Court abused its discretion in excluding portions of a tape recording in which the officers used racial slurs.

[ii] Abuse of Discretion -- Exclusion of Evidence -- Criminal Defense

United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978) : The defendant, charged with possession of narcotics with intent to distribute, attempted to introduce evidence that one of the occupants of an apartment in which drugs were found was involved in selling drugs and that the seized drugs belonged to this person, not the defendant. The Court, finding an abuse of discretion in the exclusion of this evidence, emphasized that the jury might have speculated in an

improper way about the meaning of the drugs that were discovered unless it knew that there was some evidence that a person other than appellant might have been selling the drugs.

United States v. Davis, 639 F.2d 239 (5th Cir. 1981) : In reversing marijuana convictions, the Court found it was an abuse of discretion to exclude character evidence offered to impeach the key government witness. The Court warned that the exclusion of admissible evidence offered by defendants raises compulsory process problems and that an abuse of discretion is an error of constitutional dimension. In *United States v. Thompson*, n14 the Court reversed a conviction for violating federal election laws, holding it was error to dismiss a witness from the stand because the Judge did not believe her testimony. "*Rule 403* does not permit exclusion of evidence because the judge does not find it credible"; the Court added that the error also denied the appellant his constitutional right to a fair trial. In *United States v. Riley*, n15 a former national bank examiner was convicted of misapplying bank funds by inducing the bank to issue cashier's checks for his remittance before he paid for them. These transactions differ from a customer's occasional overdraft, because a personal check does not require the bank to disburse any money that it does not have, while a cashier's check is a commitment by the bank to deliver cash to the payee. Reversing, the Court held it was error to exclude evidence of 80 other instances during the same time period in which the bank had issued cashier's checks without contemporaneous payment, which was offered to show that the transactions were regarded as informal loans or extensions of credit to bank officers. "Although the trial judge is traditionally accorded a wide range of discretion in the admission of evidence, ... it is axiomatic that such discretion does not extend to the exclusion of crucial relevant evidence establishing a valid defense."

United States v. Lucas, 357 F.3d 599 (6th Cir. 2004) : The defendant, who was stopped with a large quantity of cocaine in her car, sought to explain her nervousness (which the arresting officer testified to) by evidence that she had been repeatedly raped when she was previously imprisoned. The Judge ruled that the defendant could use the large settlement she received as a result of the rapes to explain the cash she had when arrested, but that she could not mention the rapes. The Court found there was an abuse of discretion (but harmless error), since the rape evidence was "technically relevant, as it suggests that her behavior, which might otherwise be taken as evidence of guilt and was argued as such by the prosecution, was potentially explainable for other reasons," and "the risk of undue sympathy could have been managed to some extent by a limiting instruction." In *United States v. Arthur, 949 F.2d 211 (6th Cir. 1991)* , the Court reversed a conviction for bank robbery, with one Judge considering it was an abuse of discretion to refuse to allow the defendant's brother, a codefendant who was trying to exculpate the defendant at trial, to put on a wig and baseball cap to demonstrate that with the disguise there was a close resemblance. The other Judges, concurring in the judgment, found no abuse of discretion, as all eyewitnesses except the codefendant testified that whoever robbed the bank was not wearing a wig.

United States v. Cavender, 228 F.3d 792 (7th Cir. 2000) : In a trial for conspiring to possess and distribute cocaine base, the principal prosecution witness testified on direct and reiterated on cross that he had not used, sold, or dealt drugs when he previously lived in Chicago. The Trial Judge precluded the defense from introducing evidence that the witness had been convicted of a felony in Chicago for possession of a controlled substance. Reversing, the Court held that it was error under *Rule 609(a)(1)* to exclude the evidence of the narcotics conviction. Under the applicable *Rule 403* balancing test, the evidence was highly probative in contradicting the witness' testimony and would not be cumulative or a waste of time, since the jury had "heard absolutely nothing that would have hinted to them that [the witness] was lying to them right there as he sat in the witness stand." In *United States v. Byrd, 208 F.3d 592 (7th Cir. 2000)* , the Court reversed a conviction for assaulting federal officers because the defendant, appearing *pro se,* had been denied leave to obtain and present to the jury actual shackles and restraints such as the ones used on him at the time of the alleged assault. The Trial Judge ruled that the defendant's description of the restraints would be sufficient, and worth more than showing shackles that were not the ones used on the defendant. The Court noted that the evidence "would have grounded the case in reality and left less to the imagination" and found it "hard to imagine an adequate reason for

failing to obtain shackles or for their exclusion at trial." One Judge dissented on the ground that the evidence was merely cumulative, so its exclusion was not an abuse of discretion. In *United States v. Santos, 201 F.3d 953 (7th Cir. 2000)* , the Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms. The government presented evidence that firms refusing to contribute were denied new business with the City Treasurer's office even though they were low bidders, and argued that previously the office always gave business to the low bidder. However, the defense was not permitted to show that some of the recalcitrant bidders were not cut off and that nonextorted low bidders did not always get the business; the Judge considered the evidence merely evidence of "good acts" that was irrelevant because the government was not contending that every transaction during the period was corrupt. Reversing the defendant's conviction, the Court held it was an abuse of discretion for the Judge, having misunderstood the purpose for which the evidence was being offered, to have failed to balance its probative value (i.e., as tending to show that the requests for campaign contributions were not threats) against its potential for confusing the jury.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed a conviction for aggravated sexual assault because the defense was erroneously prevented from introducing a lay witness' opinion that one of the alleged victims (who testified) "was untruthful" and "didn't always tell the truth." The witness was the foster care parent with whom the child had lived following the initial report and investigation of abuse. She saw him on a daily basis during the four to six months that he resided with her, so her opinion about his credibility was more than a "bare assertion" or "conclusory observation." The evidence was highly probative on the credibility of the victim's testimony, which was one of the central issues of the case, and the Judge's decision to exclude the testimony because "[t]hat's strictly her personal opinion and that would be a slippery slope" did not raise countervailing considerations appropriate under *Rule 403*. In *United States v. Rushing, 313 F.3d 428 (8th Cir. 2002)* , the defendants were charged with immigration fraud in a scheme to import Chinese women to satisfy one defendant's sexual appetite. The government alleged that the defendant had a year-long sexual relationship with one of the women. The defense proffered an expert to testify that since the woman was infected with hepatitis B, it was highly likely that the defendant would also be so infected if they had such a relationship, but he was not. The Trial Judge excluded the evidence on the ground that it was collateral and of little probative value on the central issues of the case. Reversing, the Court concluded that the evidence was highly probative, since evidence that there were no sexual relations would have undermined the government's central theory, leaving it with no explanation of why the defendants engaged in immigration fraud. On remand, the Court left open the question of whether the expert's testimony satisfied *Daubert*. To prove bank fraud in *United States v. Mulder*, n16 the government introduced financial statements given to the allegedly defrauded bank in which the defendant represented that he owned property that he actually rented. The Judge excluded a financial statement prepared by another bank and signed by the defendant that listed the property as rented, on the grounds that the statement had not been relied on by the lending bank (although it was in its files), was "internally inconsistent" and contained a clear error, and was highlighted to mislead the jury. Reversing, the Court found an abuse of discretion in exclusion of the statement, since it was probative of the defendant's intent and good faith. One Judge dissented on the ground that the probative value of the statement, dated before five of the six financial statements introduced by the government, was so slight that any error was harmless.

United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) : Marijuana was found in the defendant's car during a search at a Mexican border checkpoint. His defense was that he was duped to drive the car by Jaramillo, a former owner of the car who was involved in drug trafficking, but he was not permitted to introduce evidence that Jaramillo had previously been convicted of bringing the same amount of marijuana into the country at the same port of entry using the same method of concealment in a different car. Reversing, the Court held it error to exclude the testimony, since it was highly probative to establish the defendant's lack of knowledge that drugs were in the car, and there was little danger of unfair prejudice. In *United States v. Crosby, 75 F.3d 1343 (9th Cir. 1996)* , the Court reversed a conviction for assault resulting in serious bodily harm, finding that it was error to exclude defense evidence that the victim's husband was in the vicinity at the time of the assault and that the husband had beaten both the victim and the defendant on prior

occasions. The excluded evidence tended to show that the husband had the requisite strength and emotional instability to commit the assault, and that the husband was angry about the relationship the victim was having with the defendant. Exclusion denied the defendant a fair opportunity to establish his alternative theory of who committed the crime, for no good reason. In *United States v. Dees*, n17 the Court affirmed a conviction for mail and wire fraud arising out of a scheme to sell the same baby to different people at the same time, holding it was an abuse of discretion (but harmless error) when the defense was not permitted to ask a victim witness on cross-examination whether she had sold to a motion picture company the rights to the story of her experiences with the defendant. The potential pecuniary and nonpecuniary benefits of a movie contract were relevant to the witness' bias, and any prejudice from the evidence would not be unfair. In *United States v. Blaylock*, n18 the Court reversed a firearm conviction, holding it was error to exclude medical records of the defendant offered to show that he was receiving medical treatment for a bad back at the time of his arrest. These records might have cast doubt on police officers' testimony that they saw the defendant running with a gun in his hand. Further, there was no risk justifying exclusion under *Rule 403* that a reasonable jury would be misled by the contents, even without expert interpretation, as the records were written in plain language.

United States v. Austin, 933 F.2d 833 (10th Cir. 1991) : Reversing a conviction for resisting correctional officers, the Court held it was an abuse of discretion when the defense was mental illness to exclude records of prior hospitalizations on the ground solely of remoteness. The Court was unwilling to place a temporal limit on relevant proof of mental illness in view of its frequently long duration, its possible chronicity, and its recurrent manifestations.

[iii] Abuse of Discretion -- Exclusion of Evidence -- Employment Discrimination Cases

Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997) : The Court held it was error (but harmless) in a hostile environment case to exclude evidence of sexual harassment not witnessed personally by the plaintiff. The evidence tended to show the general work atmosphere, and possibly the defendant's notice of that environment, and it was not unfairly prejudicial to the defendant. In *Zaken v. Boerer, 964 F.2d 1319 (2d Cir. 1992)* , the Court reversed a judgment for the defendant, principal owner and executive of a company designing and selling women's clothing, in an action alleging employment discrimination based on pregnancy. The Court held that it was error to exclude a statement by the vice president for sales that the plaintiff's predecessor had been fired because she was pregnant. Where none of the plaintiff's three witnesses testified to the statement or gave objective direct evidence that pregnancy played a role in the defendant's employment decisions, the evidence should not have been excluded as cumulative.

Glass v. Philadelphia Elec. Co., 34 F.3d 188 (3d Cir. 1994) : The Court reversed a judgment in an employment discrimination case because the defendant was permitted to offer evidence of the plaintiff's performance at one plant, but the plaintiff was not permitted to cross-examine the witnesses about the racially hostile work environment at that plant. The cross-examination was relevant to the question whether the defendant's reasons for its actions were pretextual. Because neither the *in limine* objection nor the ruling precluding the cross-examination had been explicitly based on *Rule 403*, the Court left the balancing of particular items of the evidence to the Trial Judge on remand. The dissenting Judge believed that the *Rule 403* ruling had been made sufficiently on the *in limine* motion, that the probative value of the evidence was minimal, and that permitting the proof might have led to a mini-trial and caused substantial unfair prejudice. In *Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994)* , an EEOC employee alleged that a sexually hostile work environment was created when her supervisor demanded and received loans from her, in violation of Title VII employment rules, and that the private meetings between them gave rise to the rumors about an affair. Reversing dismissal of the case, the Court found that it was an abuse of discretion to exclude evidence of the loan transactions. The reason for the private meetings was relevant because it would demonstrate why the supervisor wanted to keep the meetings private, and why the meetings were so frequent. Moreover, the evidence would lend credibility to the plaintiff's assertion that the supervisor made no effort to stop the rumors, because doing so would have required the supervisor to "explain his conduct." The Court recognized the possibility of prejudice because "the evidence would make the jury more likely to turn a breach of ethics into a finding of sexual harassment," but believed traditional tools of

the adversary process were adequate to protect the defendant.

Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179 (4th Cir. 2000) : In a female factory worker's suit for sexual harassment due to a hostile and abusive work environment, the Trial Judge determined that comments like "Are you on the rag?" and "Didn't you get any last night?" were irrelevant, prejudicial, and insufficient to constitute harassment, in light of the "rugged environment of physically demanding work" in the factory. The Court reversed, reasoning that there is no "inhospitable environment" exception to Title VII, so the factual development concerning the work atmosphere was entirely appropriate and necessary. Although it affirmed a judgment for a fire company sued by a plaintiff who alleged that its membership policies were discriminatory in *Mullen v. Princess Anne Volunteer Fire Co.*, n19 the Court stated that racial statements by a decision-maker are relevant to demonstrating racial animus and have great probative value. The Court recognized that "[t]estimony concerning racial remarks is certain to be emotionally charged," but reasoned that "[w]ords produce emotion as a result of the ideas that they represent," and "[t]he epithets involved here are offensive precisely because they convey the idea of racial bigotry."

EEOC v. Manville Sales Corp., 27 F.3d 1089 (5th Cir. 1994) : The Court reversed a judgment for the defendant in an employee's age discrimination action, holding that age-related remarks by the employee's supervisor should not have been excluded. Even though the supervisor did not ultimately decide to terminate the plaintiff, his recommendation was highly influential, so his remarks, made over a four-year period, were clearly probative; and no showing was made that the remarks would be confusing or unduly prejudicial. In *Plemer v. Parsons-Gilbane*, n20 the Court found that the Trial Judge should not have excluded as irrelevant a letter written by a government contract compliance officer to the defendant that gave notice of deficiencies discovered in an on-site review. The letter might have shown widespread discrimination and thus would have tended to show that justifications for salary differences were pretextual.

Jackson v. Quanex Corp., 191 F.3d 647 (6th Cir. 1999) : Reversing a judgment entered for an employer sued for racial harassment, the Court held that evidence of racial graffiti at the defendant's manufacturing plant and evidence of racially offensive conduct directed at African-American workers should have been admitted, whether or not the graffiti or conduct was directed at the plaintiff: "Comments that single out members of a protected class are relevant not only as to whether a particular work environment was objectively hostile to members of the protected class but also as to whether an employee belonging to the protected class subjectively felt harassed."

White v. Honeywell, Inc., 141 F.3d 1270 (8th Cir. 1998) : In a Title VII hostile environment case, the plaintiff offered evidence that a supervisor (since deceased) had made racist remarks when told that the plaintiff had complained of treatment by a co-worker. The Trial Judge excluded the evidence on the grounds that the statement was "so prejudicial and so inflammatory" even though it was of "heavy" relevance, that the statement was not made during the actionable period of time, that the plaintiff had other evidence of the employer's attitude, and that the supervisor could not deny or explain the statement on the stand. Reversing a judgment for the defendant, the Court noted that introduction of alleged racist remarks is not unexpected in a case where race discrimination is at issue, and that the jury was unlikely to decide the case on an unfair basis, since it already heard other racially pejorative appellations. Because the evidence was so highly probative on the issues of the employer's attitude and environment, its value was not substantially outweighed by its potential unfair prejudicial effect. In *Estes v. Dick Smith Ford, Inc.*, n21 the Court reversed a judgment in an employment discrimination case, finding that the plaintiff should have been permitted to introduce evidence of prior acts of discrimination against black customers by the service department for which he formerly worked. This evidence could have assisted the jury in resolving the issue of the employer's motive for discharging the plaintiff.

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) : In an employee's race discrimination action, the Court reversed a

judgment for the defendant because a statistical report showing a correlation between race and promotion was erroneously excluded. Although the report failed to account for the relative qualifications of the applicant pool, it was not irrelevant in this case alleging a discriminatory pattern or practice; "[a] statistical study may fall short of proving the plaintiff's case, but still remain relevant to the issues in dispute." It was also an abuse of discretion to exclude on the ground of irrelevance a co-worker's testimony that the defendant's officials had made disparaging remarks about the ethnic group to which the plaintiff belonged, as such evidence was relevant to the defendant's prejudice and to whether the proffered race-neutral reasons were pretextual. The Judge had also excluded testimony from three co-workers, prepared to testify that they had been denied promotion because of racial discrimination, on the ground that it would essentially require conducting three abbreviated employment discrimination trials. The Court held that exclusion of the testimony was an abuse of discretion, since none of it was excludable as clearly involving undue delay or a waste of time or as being cumulative. In *Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995)* , the Trial Judge excluded testimony regarding the defendant's harassment of employees other than the plaintiff in a quid pro quo sexual harassment action, on the ground that it was relevant only to prove a hostile work environment and was more prejudicial than probative. Reversing, the Court held that the evidence was probative of the employer's motive or intent in discharging the plaintiff, and its probative value was not significantly outweighed by its prejudicial effect. One Judge dissented on the ground that the ruling below was not an abuse of discretion. In an age discrimination case, *Baker v. Delta Air Lines, Inc.*, n22 the Trial Judge excluded memos written in 1978 as having only attenuated relevance to the defendant's policy or practice in the period at issue. Reversing in part, the Court held that the memos were probative both of whether the defendants had a particular policy at that time (a fact put in issue by the defendants) and the motivation behind that policy (which was probative of the rationale for the policy later), and that this probative value outweighed the risks of jury confusion and time wasting. In *Miller v. Fairchild Indus.*, n23 the plaintiffs, who alleged that they were discharged in retaliation for filing discrimination charges with the EEOC, were not permitted to introduce evidence of the defendant's hirings in other job categories after they were laid off, but the defendant was permitted to prove layoffs in other categories in order to show its economic condition. The Court held that excluding the plaintiffs' evidence was an abuse of discretion, but harmless because it would have provided only weak support for their contention that the defendant's economic condition was but a pretext for their layoffs.

Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986) : The Court reversed a judgment for the City in an employment discrimination suit by a black officer who claimed that the City refused to hire him as police chief because of his race. It found clear error in the exclusion of evidence that the Mayor made a racial slur in a statement to the effect that the federal government would not tell him whom to hire. It rejected the Trial Judge's reliance on *Rule 403*, which it said should be used "sparingly," and concluded that reversal was proper, even though the case was tried to an advisory, not a regular, jury.

[iv] Abuse of Discretion -- Exclusion of Evidence -- Miscellaneous Cases

Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989) : The Court ordered a retrial on the damages issue in a defamation action by a Veterans Administration psychologist who alleged that the defendant's libelous newspaper story led to the VA's reassigning him to a position where he had nothing to do. The Court held that a brief filed *pro se* by the plaintiff in a labor grievance proceeding protesting the reassignment should not have been excluded, because his statements there that he had been transferred in reprisal for union activities and prior successful grievances were highly probative admissions directly contrary to his position at trial.

Westfield Ins. Co. v. Harris, 134 F.3d 608 (4th Cir. 1998) : After the defendant's home was destroyed by a suspicious fire, his insurer hired an independent investigator who made factual findings and concluded that the fire had been deliberately set. At the trial of the insurer's declaratory judgment action to disclaim coverage, a state deputy fire marshal testified for the insurer that in his opinion the fire was incendiary, but the witness' testimony was stricken after he said that his opinion was based roughly 90 percent on what the investigator had discovered. Reversing a judgment

for the insured, the Court held it was an abuse of discretion to exclude the marshal's testimony, since the fact that testimony from a "high official" of the state might be given "much credibility" by the jury or that it might "bolster" a similar opinion that was expected from the investigator was not the sort of "prejudice" of concern under *Rule 403*. The Trial Judge also erred in excluding as too prejudicial highly probative evidence of other suspicious fire claims involving the insured, which were offered to negative any argument of accident.

Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352 (6th Cir. 1997) : The plaintiff had confessed to a murder, and was declared incompetent to stand trial; he was detained in a mental institution for ten years as a result of the murder charges. Eventually he was released without being tried for the murder. Reversing a judgment for police officers in the plaintiff's action claiming that his detention had resulted from malicious prosecution and false imprisonment, the Court held it was error to exclude two hours of tape-recorded conversations between the plaintiff and a Baptist minister at whose mission the plaintiff spent two nights during a temporary release following his arrest for the murder. The minister repeatedly urged the plaintiff to confess and fed him facts about the murder. Shortly thereafter, the plaintiff confessed to the police. The Court found that the tapes might have swayed the probable cause calculus in the defendants' favor; the probative value of the tapes was high and although there were portions of the tapes that were confusing, the confusion was due to the plaintiff's mental illness, and the tapes were not likely to lead a jury to decide the case on an improper basis. A dissenting Judge argued that there was no evidence that the defendant officers knew what was on the tapes, so that they could not be relevant to the issue of probable cause.

Western Indus. v. Newcor Canada, Ltd., 739 F.2d 1198 (7th Cir. 1984) : In a suit arising out of a contract to purchase certain machines, the Court found it was reversible error to exclude three expert witnesses who would have testified about customary practice in the specialty welding machine trade. The Court said that a Judge may not listen to cross-examination of witnesses before their testimony is presented to the jury and forbid them to testify because the Judge disbelieves them.

SEC v. Peters, 978 F.2d 1162 (10th Cir. 1992) : The Court reversed a judgment for the defendant in a civil action for insider trading violations, holding the SEC had been improperly precluded from asking the defendant and his character witnesses about allegations of other securities law violations, as the defendant had made his character and his unblemished history a very important part of his defense and the rulings deprived the jury of a fair and balanced opportunity to evaluate his character. The Trial Judge had erroneously assigned the proposed evidence a probative value of "nil" and overemphasized its prejudicial effect and tendencies to raise collateral issues.

Johnson v. United States, 780 F.2d 902 (11th Cir. 1986) : The Court remanded a wrongful death case brought by the parents of an infant who died after being taken to a military hospital, holding it was error to exclude as cumulative the testimony of a third expert witness who arguably had better credentials than the first two and whose analysis was somewhat different from the others.

[v] Abuse of Discretion -- Exclusion of Evidence -- Product Liability Cases

Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990) : The plaintiff in a product liability action alleged that his decedent was killed in a rollover accident caused by a defective axle in the vehicle she was driving. The Court reversed a judgment for the plaintiff, holding that the Trial Judge had not properly weighed probative value and prejudicial effect in excluding evidence relating to the decedent's alcohol consumption and blood alcohol level.

Diehl v. Blaw-Knox, 360 F.3d 426 (3d Cir. 2004) : A road construction worker sued the manufacturer of a road

widener machine that backed over his legs. The Court reversed a judgment for the defendant, holding it was error to exclude evidence that the plaintiff's employer had modified the machine after the accident. The Court held that the alternative ground for exclusion proffered by the District Judge, *Rule 403*, did not apply because the evidence presented no potential for confusion. The precautions taken by the employer were clearly available to the defendant at the time of manufacture, so there was no temporal distinction that the jury might overlook, and there was no dispute that the redesign was done in direct response to the plaintiff's accident and for the sole purpose of preventing the same kind of accident in the future. In an asbestos case, *Blancha v. Raymark Indus., 972 F.2d 507 (3d Cir. 1992)* , the plaintiffs' theory was that all asbestos could cause the decedent's mesothelioma; the defendant's expert indicated that asbestos products containing chrysotile did not cause mesothelioma. Reversing a judgment for the plaintiff, the Court held that the expert's testimony was relevant, given the theory advanced and the plaintiffs' burden of proof on proximate causation, and that the danger of confusion did not so clearly outweigh the probative value of the expert's testimony as to justify exclusion. In *Herber v. Johns-Manville Corp.*, n24 the Court vacated a judgment for a worker who sued several asbestos suppliers but was awarded no damages by a jury. It held that the Trial Judge clearly erred in excluding under *Rule 403* two types of evidence relevant to damages compensable under state law: evidence that the plaintiff would have to undergo preventative monitoring for cancer in the future, and evidence of the plaintiff's fear of future cancer.

Yarbrough v. Sturm, Ruger & Co., 964 F.2d 376 (5th Cir. 1992) : The Court reversed a judgment against the defendant manufacturer in a product liability action for injuries suffered when a pistol stolen by the infant plaintiff accidentally discharged. Excluding evidence that the gun was stolen, which was probative because of the resulting tendency to carry it in a careless, concealed manner predictably increasing the risk of harm, unfairly prevented the defendant from fully making its contributory fault defense. In *Jackson v. Firestone Tire & Rubber Co.*, n25 the Court reversed a part of a judgment against a wife whose husband was killed when a wheel rim exploded, finding that evidence of an alternative design, offered to demonstrate why the rim that caused the injury was defective, had been erroneously excluded. It also found that other evidence should have been admitted: evidence of other wheel components, which was relevant to the plaintiff's claim that a rim with several parts might end up mismatched; evidence of similar accidents; and evidence of various records of the defendants, even though some postdated the accident, since the records tended to show a long and continuous experience with certain tires and rims.

Laney v. Celotex Corp., 901 F.2d 1319 (6th Cir. 1990) : In a worker's action for personal injuries arising from alleged asbestos exposure, the Court reversed a verdict for the plaintiff on the ground that evidence of his exposure to other asbestos products should have been admitted to support the defendant's argument that its asbestos was not a substantial factor in causing the plaintiff's injuries. In *Koloda v. General Motors Parts Div.*, n26 the Court reversed a judgment for an auto mechanic who sued for injuries allegedly arising out of his use of a lubricant and inhalation of its vapors. General Motors should have been permitted to offer evidence that there were no prior claims or accidents brought to its attention concerning the lubricant. The evidence was probative of GM's knowledge, which was important to the plaintiff's theory of a failure to warn, and there was no reason why the evidence would have been unfairly prejudicial.

[vi] Abuse of Discretion -- Exclusion of Evidence -- Prosecution Evidence

United States v. Gilbert, 229 F.3d 15 (1st Cir. 2000) : A nurse at a VA hospital was charged with capital murder after patients in her care died in suspicious circumstances. The prosecution theory was that she had injected the patients with drugs causing cardiac difficulties in order to gain attention, especially from a hospital police officer with whom she was having an affair. Before the trial the Judge granted an *in limine* motion to exclude, *inter alia,* evidence that the defendant had (a) made anonymous threatening calls to the hospital when she knew the officer would be answering the telephone, (b) harassed and threatened the officer after he ended their relationship and agreed to cooperate with authorities, and (c) one time blocked his car in his driveway and pleaded with him not to keep an appointment with

investigators, and when he refused, followed him to the appointment and vandalized his car while he was being interviewed. On an interlocutory appeal, the Court affirmed all the rulings except the last. Since the Judge heard much of the evidence in the defendant's prior trial for making the threatening calls, it was within his discretion to conclude that most of the defendant's conduct was far more likely attributable to anger at the disloyal officer and other co-workers than to a quixotic attempt to head off the criminal investigation, and thus its probative value as consciousness of guilt was substantially outweighed by the risks of undue prejudice and misleading the jury. However, the Court found that the evidence regarding blocking the officer's car was more readily explainable as the product of an obstructive intent and therefore far more probative of a guilty conscience, and at the same time far less inflammatory, so it was an abuse of discretion to exclude the evidence.

United States v. Blyden, 964 F.2d 1375 (3d Cir. 1992) : The Court reversed a ruling *in limine* that evidence of an alleged assault for which the defendants had previously been acquitted could not be introduced in a prosecution for other offenses arising out of the same incident. The evidence was essential to the charge of gun possession during a crime of violence, so it was not "other crime" evidence and it had great probative value. In *United States v. Gatto, 924 F.2d 491 (3d Cir. 1991)* , the Court reversed a ruling that granted a defendant's motion *in limine* to suppress a prospective eyewitness' trial testimony because the witness had allegedly been hypnotized during the criminal investigation. Even if the witness had been hypnotized, the probative value of his identification was substantial and could not be significantly discounted by the prejudice resulting from possibly suggestive police procedures. In a Hobbs Act prosecution, *United States v. Driggs*, n27 a pretrial ruling precluded the government from introducing recorded conversations in which a union officer discussed payments to various public officials, unless they related to the defendant, who had been elected a Judge. The Court concluded that the ruling was an abuse of discretion, because the evidence tended to prove the union officer's payment was made to the defendant because of his official position. In our view, the ruling below was correct. The issue in the case was whether the defendant used his official position to obtain payment, and evidence of the union officer's intent, without evidence the defendant knew of that intent, was irrelevant and tended to confuse the officer's motive with the defendant's. In *United States v. Clifford*, n28 the government was not permitted to introduce correspondence in the defendant's handwriting to show stylistic similarities between it and threatening letters that allegedly were written by the defendant. The Court recognized the broad discretion that *Rule 403* gives a Trial Judge, but found that the Judge had misconstrued the government's offer of proof and confused the question of the sufficiency of the evidence to convict with the question of the admissibility of the correspondence. The Court saw no reason "why jurors cannot examine the documents for themselves and consider the similarities between the documents along with the rest of the evidence presented by the government."

United States v. Hans, 684 F.2d 343 (6th Cir. 1982) : The government had obtained certain ledgers in which the defendant, a lawyer, had personally entered figures that the government claimed represented fees earned for workers' compensation services. To support its claim, the government secured the testimony of 60 of the defendant's clients, who indicated that they endorsed checks, which the defendant second-endorsed and cashed. The figures to the left of each client's name on the ledger coincided with the amounts that each client claimed had been paid to the lawyer. The government wanted to offer several hundred other checks that also had been second-endorsed by the defendant after being endorsed by clients whose names were in the ledger, but the Trial Judge excluded this evidence. The Court reversed, holding that the checks were relevant to prove gross receipts and that it could not be said that the evidence was substantially more prejudicial than probative.

United States v. Centracchio, 265 F.3d 518 (7th Cir. 2001) : In an official corruption RICO prosecution, the defense moved *in limine* to exclude a police officer's testimony that a deceased and unindicted coconspirator had attempted more than 20 years earlier to bribe him to install illegal gambling equipment in his town. The Judge excluded the evidence under *Rule 403* on grounds that it was too remote in time, the declarant was deceased, it probably involved a different conspiracy because it was outside the towns where most of the corruption took place, and it was not

probative. On interlocutory appeal, the Court reversed and remanded for a determination whether the evidence was properly admissible under the coconspirator exception. The evidence was probative, even though remote, because the charged conspiracy was alleged to have begun in 1978. The evidence showed an attempted (but unsuccessful) expansion of the charged conspiracy into a town other than one specifically named in the indictment, so it was an abuse of discretion to exclude the evidence as relating to a separate conspiracy. There was no indication why the declarant's death would create a danger of unfair prejudice, confusion, or misleading the jury. And the testimony was certainly probative of the existence and structure of the conspiracy and its objective of bribing law enforcement and public officials. The fact it tended to make the defendants look guilty was not unfairly prejudicial. In *United States v. Mobley, 193 F.3d 492 (7th Cir. 1999)* , a village mayor and her husband, the village's street superintendent, were charged with theft from the village. The Trial Judge granted a defense motion *in limine* to exclude evidence that the defendants' spending exceeded their combined lawful income. Reversing on an interlocutory appeal, the Court held that the fact the defendants had spent their extra resources on gambling, fur coats, and other extravagances had probative value on their motivation that was not substantially exceeded by any unduly prejudicial effect.

[c] Abuse of Discretion -- Exclusion of Party from Courtroom

Rubert-Torres v. Hospital San Pablo, Inc., 205 F.3d 472 (1st Cir. 2000) : In a medical malpractice action brought on behalf of a woman with cerebral palsy against the doctor who delivered her, the Trial Judge entered an order, without stating reasons, barring the plaintiff from the courthouse after she was briefly introduced to the pool of potential jurors before jury selection. Experts for both sides indicated that the plaintiff's appearance would be the clearest evidence on whether her affliction was caused genetically or by the circumstances of her delivery, but she was not allowed into the courtroom for a physical demonstration during the plaintiff's expert's testimony. The Court reversed a judgment for the defendant, finding it was an abuse of discretion to exclude the plaintiff totally, especially when the Judge had not stated the evidentiary rule relied upon, had not allowed argument on the plaintiff's objection to exclusion, and had not made findings concerning the prejudicial versus probative effect of the evidence. The Court noted that seeing the plaintiff would have been highly probative on the central issue in the case, and that any prejudicial effect could have been minimized by means less restrictive than entirely excluding the plaintiff from the courtroom.

[2] Acquittals and Dismissals

United States v. Candelaria-Silva, 166 F.3d 19 (1st Cir. 1999) : The Court affirmed narcotics convictions, holding that there was no error in excluding defense evidence concerning the dismissal of certain local criminal charges related to conduct involved in the charged conspiracy. The Court reasoned that "[t]he reasons supporting exclusion of evidence about the dismissal of a prior prosecution are even stronger than those that support exclusion with respect to a prior acquittal," and that "cases are dismissed for many reasons unrelated to the defendant's guilt." In *United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1998)* , a drug conspiracy case, the Court held that there was no abuse of discretion in barring the defendant from eliciting on cross-examination of a prosecution witness that local charges related to the defendant's arrest for weapons possession had been dismissed. Because cases are dismissed for a variety of reasons, many of which are unrelated to culpability, such evidence ordinarily does not prove innocence and may have served to confuse the jury rather than assist it.

United States v. Gricco, 277 F.3d 339 (3d Cir. 2002) : Affirming convictions for tax fraud arising from a scheme to skim parking lot revenues, the Court found no abuse of discretion in the exclusion of evidence that the defendants had been acquitted in a state prosecution for theft in the scheme, since the danger of jury confusion would greatly outweigh the evidence's limited probative value. In *United States v. Blyden, 964 F.2d 1375 (3d Cir. 1992)* , the Court reversed a ruling *in limine* that evidence of an alleged assault for which the defendants had previously been acquitted could not be introduced in a prosecution for other offenses arising out of the same incident. The evidence was essential to the charge of gun possession during a crime of violence, so it was not "other crime" evidence and it had great

probative value. Any argument that it would be prejudicial essentially restated the double jeopardy and collateral estoppel claims previously rejected by the Court. It was, therefore, error to exclude the evidence on the possession count; as for the other counts, rulings would have to await the trial context.

United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998) : A defendant in a drug trafficking case was charged with having falsely denied on a visa application that she "[was] or has been a trafficker in any controlled substance." Affirming, the Court found no error in the exclusion of evidence that she had been acquitted of state drug charges arising from her delivery of 40 kg of cocaine. The question for the jury was whether she had falsely denied trafficking, not whether she had denied a conviction, and the acquittal did not establish innocence but only the prosecutor's failure to prove beyond a reasonable doubt at least one element of the charge.

Estate of Moreland v. Dieter, 395 F.3d 747 (7th Cir. 2005) : Affirming a judgment for the plaintiffs in a § 1983 action arising from the death of an inmate in custody, the Court found no abuse of discretion when videotaped interviews with the defendant deputy sheriffs were admitted without disclosing to the jury that the criminal investigation to which the interviews related had been concluded with acquittal of the defendants. Evidence of an acquittal in a criminal action is generally irrelevant and inadmissible in a civil case involving the same incident, because of the differing burdens of proof.

Arizona v. Elmer, 21 F.3d 331 (9th Cir. 1994) : In a state prosecution of a Border Patrol agent for shooting aliens crossing the Mexican border, the Court held it was not an abuse of discretion to exclude, on the defendant's *in limine* motion, evidence of a fatal shooting three months later for which the defendant had been charged and acquitted. The evidence was not relevant to any issue in the case and, while the record of balancing was not clearly articulated, the evidence would be extremely prejudicial, in all probability seizing and holding the jury's attention at trial. In *Borunda v. Richmond*, n29 a civil rights action brought against the arresting officers after the plaintiffs had been acquitted of criminal charges, the plaintiffs introduced evidence of the acquittals solely to show the damages they had incurred. The Court said that, although it would have been inclined to exclude the evidence altogether because of its potential for prejudice and confusion, the Trial Court did not abuse its "very broad" discretion in admitting the evidence with limiting instructions and instructions about the differing burdens of proof.

[3] Appellate Review Standard

United States v. Akers, 702 F.2d 1145 (D.C. Cir. 1983) : The Court affirmed a drug conviction, finding no error in the exclusion of photos of the crime area offered by the defense. The photos were excluded on the ground that they did not reflect the view of the officers who testified concerning their observations from a second-story view. Although the photos were admitted in a first trial in which the jury was unable to reach a verdict, the Court found no requirement that they must be admitted in a second trial. A concurring opinion suggested that when evidence admitted in one trial is excluded in a second trial, the Trial Judge should explain the reasoning carefully and the decision to exclude the evidence should be subjected to heightened judicial review.

United States v. Brooks, 145 F.3d 446 (1st Cir. 1998) : In a perjury prosecution arising out of a grand jury's murder investigation, the Trial Judge granted an eve-of-trial *in limine* motion by the defendant to exclude any evidence of the target's animosity toward the murder victim. The Court vacated the ruling on an interlocutory appeal, because the Judge had not permitted the government to file an opposition or to be heard and had made no specific findings, even though the evidentiary question was highly nuanced and the correct answer was not self-evident. In those circumstances the abuse-of-discretion standard applied by the Court was not as forgiving as in the ordinary case.

United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (en banc): The *en banc* decision of the Court referred to the "remarkable coincidence" of possession of a.38 caliber gun some weeks after a bank robbery and held that it was admissible to corroborate the government's chief witness and to show an opportunity to commit the robbery. Emphasizing the broad discretion afforded the Trial Judge in making *Rule 403* rulings, the Court decided that it would be reluctant to reverse on the basis of a cold record unless it is convinced that the Judge acted "arbitrarily or irrationally." Judge Oakes' dissenting opinion preferred a less deferential "abuse of discretion under the circumstances" standard. Judge Gurfein, who concurred in Judge Oakes' opinion, emphasized his view that the test of appellate review adopted by the majority was far too narrow. The Court reiterated the *Robinson* language in *United States v. Schiff*, n30 but reversed a Trial Judge who admitted a videotape of a talk show in which negative comments about the defendant were made.

Rovegno v. Geppert Bros., 677 F.2d 327 (3d Cir. 1982) : The Court upheld the exclusion of evidence that the driver of a truck involved in an accident had a blood alcohol level that plaintiff's expert said rendered him unfit to drive, saying that its standard of review was "abuse of discretion" and it could find none. In our view, the evidence was obviously probative and it is difficult to see what unfair prejudice it would have worked to the defendant. The standard of abuse of discretion should be utilized so as to assure that a Trial Judge at least had a good reason for excluding evidence that on its face would seem important.

United States v. Johnson, 558 F.2d 744 (5th Cir. 1977) : Affirming convictions for making and subscribing false and fraudulent corporate income tax returns, the Court held that a Trial Judge's ruling balancing the probative value of evidence against its prejudicial effect may not be disturbed unless the decision was clearly erroneous.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : The Court held it was an abuse of discretion in a narcotics prosecution to admit evidence of the defendant's prior narcotics activity. The Court observed that "[a] flaw in the process is easier to detect than is a flaw in the result -- and over the run of cases the consistent operation of process is more important, too." The Court found that the pretrial hearing on the bad acts evidence was "perfunctory" and that the record indicated that the Trial Court had not carefully assessed whether the evidence would be probative for a permissible purpose; nor had it demonstrated "an effort to determine the likely effect of the evidence in poisoning Beasley's character." The Court emphasized that it would probably not have reversed if the record indicated that the evidence was admitted after the Trial Judge carefully considered its probative value and prejudicial effect.

Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988) : In a civil rights action brought against the arresting officers after the plaintiffs had been acquitted of criminal charges, the plaintiffs introduced evidence of the acquittals solely to show the damages they had incurred. The Court said that, although it would have been inclined to exclude the evidence altogether because of its potential for prejudice and confusion, the Trial Court did not abuse its "very broad" discretion in admitting it with limiting instructions and instructions about the differing burdens of proof.

United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999) : The defendant was convicted for knowingly transporting and disposing of hazardous waste that had been stored at his farm. At trial he offered evidence that in 1993 soil testing at the farm did not indicate any characteristics of toxicity or any listed waste. The government responded that he was only charged with transporting the waste from the farm in 1989, so the subsequent condition of the farm soil was irrelevant. The defense countered that the government had introduced a significant amount of evidence regarding the poor condition of the farm, which opened the door to evidence that would rebut the prejudicial impression created by the government. The Court said that they might have admitted the 1993 test results had they been sitting as District Judges, but they found no abuse of discretion in excluding the evidence, since there was no proffer that the 1993 soil tests would indicate the defendant had been properly storing and recycling the material in 1989, which would have

rebutted the government's assertion that the material was not actually being recycled as the defendant claimed. In *United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990)* , the Court rejected the appellant's arguments that the government improperly introduced highly inflammatory evidence under the guise of other acts, noting that the Trial Judge has broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue and only limited discretion to exclude it on grounds of unfair prejudice, so a decision to admit probative evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion.

[4] Arbitration Decisions

Rubens v. Mason, 387 F.3d 183 (2d Cir. 2004) : Rubens' claim that she was injured by using the Dalkon Shield was denied in a proceeding before a single arbitrator. In Rubens' subsequent action for legal malpractice in prosecuting the claim before the arbitrator, the Judge granted summary judgment for the law firm, relying heavily on an affidavit in which the arbitrator stated that none of the alleged acts of malpractice -- either misfeasance or nonfeasance--had or would have affected his decision on the merits. Reversing, the Court held that the arbitrator's affidavit would not be admissible at trial under *Rule 403* because it was "subjective" and "had the potential to usurp the factfinder's responsibilities in the trial within the malpractice trial." We question this result. The arbitrator's affidavit was probative to show that there were no damages suffered as the result of any malpractice; if the arbitrator's decision would be the same even with no malpractice, then Rubens would not satisfy her burden of proving that the malpractice made a difference.

Graef v. Chemical Leaman Corp., 106 F.3d 112 (5th Cir. 1997) : Reversing a judgment for the plaintiff in a retaliatory discharge case, the Court held it was an abuse of discretion to exclude an arbitration award denying the employee's grievance. The arbitrator found that the employer had acted within its contractual rights in removing the plaintiff from a seniority list, because the employee had failed a physical examination. This was the same defense interposed by the employer in the civil action, in response to the plaintiff's allegation that he had been denied seniority because he had filed a workers' compensation claim. The Court found that the arbitration award was probative because it made the defendant's non-retaliatory reason for the discharge more believable, and the evidence was not unduly prejudicial. In *United States v. Fisher, 106 F.3d 622 (5th Cir. 1997)* , the defendants were charged with a fraudulent scheme involving, *inter alia*, repurchase agreements with some professional athletes. Reversing their convictions, the Court held it was error to exclude evidence that they had prevailed in arbitration proceedings by the athletes to enforce the agreements. Whether the defendants were obliged to repurchase the athletes' interests went to the heart of the case, and the arbitrator's unexplained decision was not so inherently confusing or prejudicial that the defense should have been precluded from introducing it. Furthermore, the decision was not being offered to prove the defendants' innocence, but to show that the legal position taken against the athletes was not taken in bad faith.

Elsayed Mukhtar v. California State Univ., Hayward, 299 F.3d 1053 (9th Cir. 2002) : Vacating a judgment in favor of a professor who alleged racial discrimination in the decision to deny him tenure, the Court held that there was no abuse of discretion in admitting evidence that, after two rounds of arbitration, an arbitrator ordered that the plaintiff be granted tenure because the university did not have reasonable support for its decision. The Court concluded that "[w]hile we agree that the prejudice of having the jury hear this marginally relevant evidence would normally outweigh the value of providing the jury with the case's entire factual history, the jury repeatedly heard that a state court had vacated the arbitrator's decision." With the full story before it, "the jury was able to give the arbitrator's decision the weight it merited -- very little."

[5] Attorney as Witness

United States v. Ziesman, 409 F.3d 941 (8th Cir. 2005) : Affirming convictions for manufacturing

methamphetamine and making a false statement to a federal agent, the Court found no abuse of discretion in permitting the government to call the defendant's former lawyer to testify to a conversation he overheard between a government agent and the defendant. The defendant disputed the agent's version of the testimony, making the former lawyer the only corroborative witness available on the false statement charge. The Court agreed that "the mere appearance of an attorney testifying against a former client is distasteful and should only be used in rare instances." But the Court concluded that this was "one of those rare instances" in which the testimony was important enough to be admitted, and it found nothing in the former attorney's testimony that would have signaled to the jury the attorney's belief in the defendant's guilt.

[6] Balancing

[a] Availability of Alternatives

Old Chief v. United States, 519 U.S. 172 (1997) : This case is discussed in the Editorial Explanatory Comment, *§ 403.02[6]-[11]*.

United States v. Lachman, 48 F.3d 586 (1st Cir. 1995) : Deciding an interlocutory appeal of a pretrial ruling that excluded 13 government exhibits from an Export Administration Act prosecution, the Court found no abuse of discretion in excluding the evidence under *Rule 403* since the exhibits posed genuine dangers of prejudice and confusion. The defendants were charged only with exporting technical equipment to the Indian government without a license, but the exhibits indicated that the defendants knew that the Indian government was going to use the equipment in order to make nuclear missiles, and a jury "could easily regard the defendants' alleged conduct as highly unattractive even if it turned out to be technically legal." While the exhibits had some probative value as to the defendants' scienter, the government had less dangerous evidence available to prove this point. Under *Rule 403*, "it is plainly pertinent whether a litigant has some alternative way to establish a fact that involves no (or at least a lesser) risk of prejudice or confusion."

United States v. Belk, 346 F.3d 305 (2d Cir. 2003) : In a felon firearm possession case, the defendant asked the Trial Judge to bifurcate the issues of possession and predicate felony, with the former issue tried first, so that the jury would not be prejudiced by the fact that the defendant had a criminal record. Finding no abuse of discretion in the Judge's refusal to bifurcate, the Court reasoned that the existence of a felony is a critical element of the crime of felon gun possession, as it is not *per se* illegal to possess a gun *unless* the possessor is a felon. As such, proof of the felony element, "when accompanied by a proper curative instruction and limited to the fact of the conviction itself, is *by definition* not prejudicial" so "a district court cannot err by failing to take additional measures, such as bifurcation, intended to mitigate any asserted prejudice."

United States v. Merino-Balderrama, 146 F.3d 758 (9th Cir. 1998) : During a traffic stop of the defendant, the police found film boxes, the covers of which showed children engaged in sex acts. The boxes contained films that the defendant claimed he never viewed. To prove scienter at the defendant's trial for possession of child pornography, the government introduced the film boxes and played the films to the jury. The Court found that the playing of the films was reversible error, under the Supreme Court's analysis in *Old Chief v. United States*. The films were less probative of scienter than their box covers, since the government never proved that the defendant had actually viewed the films, whereas it was clear that he had viewed the boxes. Also, the films carried a greater potential for unfair prejudice than did their packaging. The Judge's limiting instruction did little to alleviate the prejudice, because it gave no indication of how the films were to be used, and the jury was never instructed to disregard the films if it found that the defendant never viewed them.

[b] Balancing -- Bounds of Discretion To Admit

United States v. Li, 206 F.3d 78 (1st Cir. 2000) : In a prosecution for smuggling Chinese nationals into the United States by boat, the defendants objected to evidence of the deplorable conditions on the boat, including the fact that many of the passengers were beaten. The Court recognized that the evidence "had the potential to inflame the jury against those who created and controlled this inhumane environment," but it was also probative. The statute required proof that the defendants engaged in smuggling for a profit; the evidence of shipboard conditions tended to prove the minimal costs to the defendant. And the evidence of beatings was critical in proving the roles of several members of the conspiracy. The Court concluded that "[t]his case simply does not present the type of extraordinarily compelling circumstances that would warrant our upsetting the balance already struck by the district court."

United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) : Affirming convictions arising out of the 1993 terrorist bombing of the World Trade Center, the Court found no error in the admission of a "terrorist kit" seized from one of the conspirators when he tried to enter the country. The "terrorist kit" included such things as instruction books on how to make explosives, a videotape containing a chemistry lesson on explosives, and a book urging acts of terrorism against the enemies of Islam. The Court held that the materials established a link between the conspirators, and provided the jury with "background and an explanation of the understanding or intent with which certain acts were performed." While the materials were prejudicial, there was no abuse of discretion in concluding that the significant probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The Court also found no abuse of discretion in the admission of testimony and photographs concerning the injuries, some fatal, suffered by the victims of the bombing. This evidence was probative of the nature and location of the explosion that killed the victims, which the defendants disputed at trial, and its prejudicial effect did not substantially outweigh the probative value.

United States v. Wilson, 355 F.3d 358 (5th Cir. 2003) : Affirming drug convictions, the Court found no abuse of discretion when evidence that one of the defendants physically abused his female coconspirators was admitted, since it was probative of their fear of him -- and thus of the likelihood that they acted at his behest when picking up money -- and this probative value was not substantially outweighed by the risk that the defendant would be convicted based on his behavior toward the women.

United States v. Cope, 312 F.3d 757 (6th Cir. 2002) : Affirming convictions of two brothers for attempted murder and firearms violations, the Court upheld the admission of three guns recovered from the defendants' father's house and one gun found in one defendant's yard. Although the government could not show that the bullets in the incident were fired from any particular gun, the Court held that the guns could properly have been admitted to prove that one of the brothers had access to the type of gun used in the shooting. It found that "[a] closer issue" was presented by the Trial Judge's permitting the guns to be left on display during the trial, despite testimony by a government ballistics expert that any of 50 to 100 million guns could have been used in the shooting. The Court ultimately concluded that the defendants did not show that the continued display of the guns affected their substantial rights.

United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990) : The Court rejected the appellant's arguments that the government introduced highly inflammatory evidence under the guise of other acts, and noted that the Trial Judge has broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue and only limited discretion to exclude it on grounds of unfair prejudice, so a decision to admit probative evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. In *United States v. Betancourt*, n31 the Court noted that *Rule 403* exclusion is an extraordinary remedy that should be used only sparingly.

[c] Balancing -- Bounds of Discretion To Exclude

United States v. Gilbert, 229 F.3d 15 (1st Cir. 2000) : A nurse at a VA hospital was charged with capital murder after patients in her care died in suspicious circumstances. The prosecution theory was that she had injected the patients with drugs causing cardiac difficulties in order to gain attention, especially from a hospital police officer with whom she was having an affair. Before the trial the Judge granted an *in limine* motion to exclude, inter alia, evidence that the defendant had attempted to murder her husband by giving him a poisonous injection. On interlocutory appeal, the Court found no abuse of discretion in the ruling. The probative value of the evidence was "very much open to question," in both the lack of similarity of circumstances between the alleged attempt and the crimes charged and the fact that the evidence consisted almost entirely of allegations by the husband made months later, after he and the defendant were engaged in a bitter divorce and custody dispute. Furthermore, the evidence would not be very probative on the issues likely to be litigated in the case -- the intent of the perpetrator and the knowledge and opportunity of the defendant were not seriously disputed, and inferring causation from the uncharged crimes would require the impermissible use of a propensity inference. Given that the defendant disputed the incident, its presentation would require a mini-trial, taking time and injecting collateral issues, such as the background of the divorce proceedings to explain the husband's hostility. And the inflammatory nature of the evidence made it highly susceptible to being misused by the jury. In *Williams v. Drake, 146 F.3d 44 (1st Cir. 1998)* , a prisoner brought an action against two correctional officers, claiming the use of excessive force in a dayroom scuffle. The prisoner was charged by the prison disciplinary board with inflicting bodily harm on the officers, and he eventually pleaded guilty to that charge. The Court found no abuse of discretion in the exclusion of the guilty plea; its probative value was minimal, and the potential for confusion was high, because of the procedural and substantive differences between a disciplinary board hearing and a jury trial. Moreover, the plaintiff claimed that he pleaded guilty because the disciplinary board was biased, so introducing the plea would have required delving into the plaintiff's motivation, which could have created "an unwarranted sideshow, drawing attention from the main event." In *Brown v. Trustees of Boston Univ.*, n32 the plaintiff, suing for breach of contract and sexual discrimination after she was denied tenure, offered testimony of several professors comparing her qualifications with those of other faculty considered for tenure at the defendant University. The Court held that even though the professors' testimony was not in the file and thus not available to the University when it decided her case, it was relevant proof of pretext because it showed that the qualifications of others granted tenure were below the plaintiff's known qualifications. Because admitting such comparative evidence presents the risk of improperly substituting a tenure decision with a judicial determination, the evidence must be so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment, as in this case.

United States v. George, 266 F.3d 52 (2d Cir. 2001) : In a prosecution for making a false statement in a passport application, the Court held that there was no abuse of discretion in excluding a videotape of the defendant's wedding ceremony, offered to show that the defendant's slow and unresponsive behavior was consistent with the problems he had in acquiring a passport. There was no dispute that the defendant was married, and the Trial Judge could reasonably have determined that the tape presented a danger of creating undue sympathy for the defendant.

United States v. Mejia, 909 F.2d 242 (7th Cir. 1990) : In affirming a conviction for possession of cocaine with intent to distribute, the Court noted that it is not reversible error to admit irrelevant details that have no probative value but do not prejudice a defendant.

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) : The defendant, convicted of the Oklahoma City Federal Building bombing, claimed error in the exclusion of testimony from a government agent concerning a group of right-wing terrorists who were engaged in building explosives and who had discussed plans to bomb buildings in Oklahoma, including the Federal Building in Oklahoma City. Affirming, the Court found no abuse of discretion, since the probative value of the evidence was "slight because of its highly generalized and speculative nature." Moreover, the evidence had the potential of creating significant confusion, because it would have required the government to attempt

to disprove McVeigh's "nebulous" allegations, tending to lead the jury away from the question whether McVeigh bombed the building. There was also a risk of prejudice, because the evidence would "invite the jury to blame absent, unrepresented individuals and groups for whom there often may be strong underlying emotional responses." Affirming the admission of a document in a suit alleging fraudulent misrepresentation, *K-B Trucking Co. v. Riss Int'l Co.*, n33 the Court observed that exclusion of evidence under *Rule 403* is an extraordinary remedy that is to be used sparingly.

[d] Balancing -- Careful Consideration Required

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) : A black American and two Jamaicans were jointly charged with drug offenses. The Court reversed their convictions, in part because a detective was permitted to testify to the *modus operandi* of Jamaican drug dealers and how the market "has been taken over basically by Jamaicans." The Trial Judge had not balanced the severely prejudicial effect of the references, but had admitted the testimony solely because defense counsel had inquired on *voir dire* whether jurors would have greater difficulty affording Jamaicans a fair trial.

United States v. Delia, 944 F.2d 1010 (2d Cir. 1991) : The Court held there was no abuse of discretion in admitting evidence that the defendant had told the principal prosecution witness he was a member of an organized crime family, as the careful balancing of the probative value of the evidence against its prejudicial effect, done only after the witness' cross-examination had been completed and her credibility vigorously challenged, warranted the decision to admit the evidence.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : The Court held it was an abuse of discretion in a narcotics prosecution to admit evidence of the defendant's prior narcotics activity. It found that the pretrial hearing on the bad acts evidence was "perfunctory" and that the record indicated that the Trial Court had not carefully assessed whether the evidence would be probative for a permissible purpose; nor had it demonstrated "an effort to determine the likely effect of the evidence in poisoning Beasley's character." The Court emphasized that it would probably not have reversed if the record indicated that the evidence was admitted after careful consideration of its probative value and prejudicial effect.

Blind-Doan v. Sanders, 291 F.3d 1079 (9th Cir. 2002) : An arrestee sued a police sergeant, claiming that he sexually assaulted her in a jail cell. Overturning a judgment for the sergeant, the Court found a failure to make a clear record justifying exclusion of evidence regarding alleged improper sexual conduct by the sergeant toward a different detainee, which was offered to rebut his testimony that he had no "opportunity" to assault the plaintiff because another officer was a witness to his conduct. The Court concluded that "[d]etermination of what would have been 'unduly prejudicial' requires a delicate balancing," and that "[i]n the first instance, the balancing must be undertaken by the trial court and, as far as we can see, was not undertaken here." A dissenting Judge did "not agree that a district court *must* explicitly set out its thought processes on the record, even if it is 'important' that it 'make a clear record concerning its decision.' "

[e] Balancing -- Factors To Be Considered

United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994) : In the second trial of a fraud and RICO case, the judgment of conviction on one of the fraud counts, which had been affirmed on appeal, was introduced to prove a predicate act. Reversing because the prior conviction was given preclusive effect, the Court noted that there had not been the required balancing of appropriate factors, such as the value of the conviction for the government, the relatively slight burden of re-proving the facts on which the conviction was based, and the potential prejudicial effect of admitting the judgment; on the remand, the Trial Court was directed to conduct a balancing analysis and state its reasons on the record for

admitting or excluding the judgment of conviction.

United States v. Pizarro, 717 F.2d 336 (7th Cir. 1983) : The Court held that when a defendant raised an entrapment defense in a prosecution for selling heroin, the government was properly permitted to question him as to his supplier. Evidence that the defendant changed suppliers shed light on his disposition to commit the offense. The Court rejected an argument that the defendant should not have had to identify the supplier because he was afraid that a codefendant would seek reprisals against him. The Court noted that any dilemma in which the defendant found himself arose out of his own decision to become involved in illegal activities and was unsympathetic to the defendant's argument that his fear was a "prejudicial factor" to be weighed against the probative value of the answers sought by the government.

[f] Balancing -- Generally

United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991) : The Court affirmed a bank robbery conviction, noting that admission of prior convictions where sanity is the only issue presents different considerations from the usual case. Probativeness is generally unquestionable, since the insanity defense directly puts state of mind in issue, and a prior criminal record is highly relevant to the defendant's appreciation of the unacceptability of his conduct; there is no risk of primary prejudicial effect, since the defendant does not deny commission of the act; and there is a possibility that the evidence will prove prejudicial to the government by permitting the inference that the defendant is insane, since he continues to commit the same easily-detectable crime. Although the Trial Judge's ruling was terse, it appeared from the record as a whole that the relevant factors were considered.

Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990) : In an action by a union member for mistreatment by union officials, the Court held that the emotional appeal of the plaintiff's Vietnam experience did not significantly outweigh its relevance on the issue of damages. It also found no abuse of discretion in allowing the plaintiff to testify he knew one of the defendants carried a gun to union meetings. The evidence made it less probable the plaintiff had assaulted the official, as the official contended.

Hurt v. Coyne Cylinder Co., 956 F.2d 1319 (6th Cir. 1992) : In reversing a product liability judgment for the defendants on other grounds, the Court held there was no abuse of discretion in excluding a film offered by the plaintiffs. There was nothing improper in the Trial Judge's making a subjective determination that the film would be prejudicial, where there was no indication that the Judge's reaction was idiosyncratic and there is an obvious possibility of prejudice from a dramatic film that resembles but does not depict the accident in question.

United States v. McKinney, 954 F.2d 471 (7th Cir. 1992) : In a prosecution for murder in a prison, the government was permitted to introduce some evidence that the gang to which the defendant belonged had committed other murders. The Court held there was no abuse of discretion, as the government's theory was that the murder resulted from a gang contract; thus, how the gang operated was relevant to the charge, and the Trial Judge had been careful to limit the testimony about the gang and to preclude testimony implicating the defendant in any other murders.

United States v. Fleming, 215 F.3d 930 (9th Cir. 2000) : The defendant had filed a lien on all of the property owned by a Federal Judge and his wife, after the Judge dismissed the defendant's civil action for failure to state a claim. At the defendant's trial for attempting to influence a Federal Judge in the discharge of his duties, both the Judge and his wife testified that they became concerned and upset when they were notified that the lien had been filed. The Court found no error in admitting the testimony. The fact that the Judge and his wife were upset and concerned by the

defendant's actions tended to prove that the defendant acted with the intent to influence the Judge -- an intent that was an element of the offense charged. The fact that the Judge and his wife were credible, sympathetic witnesses did not mean that their testimony was unfairly prejudicial to the defendant. Affirming fraud and conspiracy convictions in *United States v. Mende, 43 F.3d 1298 (9th Cir. 1995)* , the Court found no error in admitting evidence that Mende's codefendants were aware that he had been previously involved in a fraudulent scheme similar to that with which all the defendants were charged. The evidence was probative to rebut the codefendants' arguments that they lacked knowledge that Mende's companies were fraudulent. Any prejudice to Mende was lessened by a limiting instruction. The Court stressed that *Rule 403* is "an extraordinary remedy to be used sparingly" and that "the danger of prejudice must not merely outweigh the probative value of the evidence, but must *substantially* outweigh it."

Ross v. Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993) : In an employment discrimination action, evidence that managers who later worked at the plant had made racially derogatory remarks was excluded on the ground that it would open the door to further evidence about another of the defendant's plants, thereby substantially and unnecessarily prolonging the trial. The Court held that although the evidence may have been the "smoking gun" on the disparate treatment issue, there was no clear abuse of discretion where, even after the Trial Court indicated its willingness to admit the evidence if it were significant, plaintiffs' counsel did not highlight the significance of the evidence.

[g] Balancing -- Opportunity To Be Heard

United States v. Brooks, 145 F.3d 446 (1st Cir. 1998) : The Court vacated an *in limine* ruling excluding government evidence in a prosecution for perjury and obstruction of justice. The Trial Judge had granted the defense motion without permitting the prosecution to be heard. The Court held it was an abuse of discretion to make a "hair-trigger evidentiary determination" in a manner that "precluded reasoned consideration." The case was remanded for further proceeding before a different Judge.

[h] Balancing -- Requirement of Record

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984) : Reviewing obscenity convictions, the Court stated that, in assessing the community standards in an obscenity case, comparable material can be viewed as relevant under *Rule 401*. The Court emphasized, however, that *Rule 403* should be used to carefully balance the value of comparable material against the dangers of admitting it. It added that "[e]ffective appellate review of such an issue requires the Trial Court to explain its decision. This is particularly so when the Trial Court decides an evidentiary question under *Rule 403* ... ."

United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991) : Appellants challenging RICO convictions asserted that *Rule 403* objections to evidence of uncharged Mafia crimes had been made by motions *in limine* and that the Trial Judge had erred by not articulating the balance between probative value and prejudicial effect; the government asserted any *Rule 403* errors had been waived by a failure to object explicitly when the evidence was introduced at trial. The Court held that the failure to articulate the balance was not *per se* reversible error. If the *in limine* motions did not constitute specific objections, the Trial Judge was not required to strike the balance on the record *sua sponte*. If the motions were the equivalent to a specific objection, the Appellate Court must decide whether the required balance was implicitly performed and, if not, must perform the balance itself. Repeating its injunction that Trial Judges should make the balancing explicit, the Court held there was no abuse of discretion in admitting the evidence in this case. See also *United States v. Long*, n34 in which the Court likewise observed that "[w]here an objection does invoke *Rule 403*, the trial judge should record his balancing analysis to the extent that his exercise of discretion may be fairly reviewed on appeal. However, where *Rule 403* is not invoked, the trial judge's balancing will be subsumed in his ruling."

Blind-Doan v. Sanders, 291 F.3d 1079 (9th Cir. 2002) : An arrestee sued a police sergeant claiming that he sexually assaulted her in a jail cell. Overturning a judgment for the sergeant, the Court found a failure to make a clear record justifying exclusion of evidence regarding alleged improper sexual conduct by the sergeant toward a different detainee, which was offered to rebut his testimony that he had no "opportunity" to assault the plaintiff because another officer was a witness to his conduct. The Court concluded that "[d]etermination of what would have been 'unduly prejudicial' requires a delicate balancing," and that "[i]n the first instance, the balancing must be undertaken by the trial court and, as far as we can see, was not undertaken here." A dissenting Judge did "not agree that a district court *must* explicitly set out its thought processes on the record, even if it is 'important' that it 'make a clear record concerning its decision.' "

[7] Bench Trials

Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994) : The Court reversed a judgment against the owner of a large boat in a personal injury action because evidence that the operators of the small boat in which the plaintiff was riding had been drinking was improperly excluded. In a bench trial, exclusion of unfairly prejudicial evidence is a useless procedure because the Judge is capable of rejecting any improper inferences; here, exclusion of the evidence prevented the large boat owner from fully developing a material issue.

Buscaglia v. United States, 25 F.3d 530 (7th Cir. 1994) : Summary judgment was granted against the plaintiff in a slip-and-fall case brought under the Federal Tort Claims Act, after the Trial Judge rejected an affidavit from the plaintiff's expert which concluded that the tile on which the plaintiff slipped was unreasonably slippery for use in public buildings. The Judge reasoned that under *Rule 403* the expert's testimony was only marginally probative and was unduly prejudicial because of the "allure of scientific jargon and a witness with an advanced degree." Finding "clear error on the basis of an incorrect weighing of the relevant factors," the Court noted that the Trial Court erred because it had assumed that the case would be tried to a jury, whereas "the trier of fact in FTCA cases *is* the district court judge," so the prejudice factor should weigh "far less heavily" than it would in a jury case.

[8] Bodily Exhibitions

Allen v. Seacoast Prods., Inc., 623 F.2d 355 (5th Cir. 1980) : The Court upheld a ruling allowing an injured seaman to remove and replace his artificial eye in front of the jury.

Harris v. Illinois-California Express, Inc., 687 F.2d 1361 (10th Cir. 1982) : In a wrongful death action, the Court indicated that it might have been improper for the Trial Judge to permit physical identification of the decedent's daughter to the jury, but it found that any error was harmless. In *United States v. Lowe*, n35 a prosecution for kidnapping an infant, the Court held it was not an abuse of discretion to permit the government to bring the tiny infant into the courtroom for identification by the mother, despite the fact that the defendant offered to stipulate as to identity.

[9] Child Party as Witness

Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996) : The Court affirmed a judgment granting only nominal damages for the plaintiff, the daughter of a man killed by the Los Angeles police during a robbery. It held there was no abuse of discretion in excluding the testimony of the five-year-old plaintiff since she could not meaningfully testify as to the distress she had suffered in the past or would suffer in the future. Any probative value of testimony about her impressions of how her father died was outweighed by the clear prejudicial effect of a sympathetic child who knew nothing of the circumstances of the death. The Judge had permitted a psychiatrist who examined the child to testify to

her emotional distress.

[10] Civil Rights Cases

[a] Arrestee's or Prisoner's Evidence

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : Affirming the civil rights conviction of a deputy sheriff for shooting an unarmed arrestee in the back, the Court found no abuse of discretion when the victim was permitted to testify that he fled from the defendant because he knew the defendant had previously shot another man. Although the defendant argued that the victim's state of mind was irrelevant, the Court concluded that the victim's knowledge or belief about the defendant was relevant in assessing whether the victim would have acted as the defendant claimed or as the government claimed. The Court concluded that the testimony was not unduly prejudicial because "[l]aw enforcement officers must shoot suspects sometimes, and the jury just as easily could have believed that the prior shooting was justified and that [the victim's] fear was unfounded."

Vance v. Peters, 97 F.3d 987 (7th Cir. 1996) : In a prisoner's § 1983 action for excessive force and deliberate indifference to medical needs, the Court held there was no abuse of discretion in excluding a hearing officer's final report, which concluded that the corrections officer had used excessive force and recommended a twenty-day suspension. Given that the evidence considered by the hearing officer had already been admitted at the trial, there was a risk that the jury would be confused by and give inordinate weight to the conclusion, which was not based on *Eighth Amendment* criteria.

[b] Civil Rights Cases -- Guard's or Officer's Evidence

Stevenson v. District of Columbia Metro. Police Dep't, 248 F.3d 1187 (D.C. Cir. 2001) : When the plaintiff was asked by police officers to exit the car he was driving, he instead attempted to drive it away, hitting an officer. His § 1983 action for injuries suffered in the ensuing hail of bullets resulted in a judgment for the defendants. Affirming, the Court held there was no abuse of discretion in the admission of evidence that the defendant's companion was carrying a semiautomatic weapon. The plaintiff argued that the evidence was irrelevant to the reasonableness of the officers' actions because they did not know before the shooting that the companion was armed. However, the Court found that it tended to support the proposition that, as a convicted felon on parole in the presence of a firearm, the plaintiff was intent on escaping at all costs and in so doing placed the officers at risk.

Palmquist v. Selvik, 111 F.3d 1332 (7th Cir. 1997) : The defendants, sued for police use of excessive force in making an arrest, argued that the plaintiff's decedent had a "death wish" and sought "suicide by police." The Court held there was no error in excluding evidence of the victim's "mental unraveling" in the six months before he died, as the issue in a case like this is the reasonableness of the police conduct and the only relevant evidence is the facts and circumstances known to the officers at the time of the incident. Evidence of the victim's prior mental state would tend to shift the focus from his actions to his condition, prejudicially overemphasizing the likelihood that he acted in a manner that justified the officers' reaction. The Court noted that evidence of the victim's intoxication and marijuana possession a few hours before the incident might have been admissible, but its exclusion could be viewed as cumulative or as harmless error. The Court also concluded that the evidence of the victim's mental state could have been admissible during the damages phase of the trial, as it was directly relevant to his life expectancy, but the defendants did not preserve the argument. One Judge disagreed with the Circuit's narrow approach to the evidence relevant in excessive force cases, especially as applied in cases like this. In *Wilson v. Groaning, 25 F.3d 581 (7th Cir. 1994)* , a prisoner (Wilson) alleged that a guard (Groaning) used excessive force by punching him in the face in an attempt to return him to his cell. Groaning testified that Wilson spat on him and raised his arms as if to strike him, and that he responded by

punching Wilson. Wilson argued that the evidence of spitting was irrelevant, because Groaning admitted that such an act would not justify the use of force, and that the evidence was extremely prejudicial. Finding no error in the admission of the evidence of spitting, the Court said that "[l]eaving out this evidence would have left the jury with an unduly sanitized and incomplete version of the facts" and that "the evidence that Wilson spat on Groaning was relevant because it had tendency to make Groaning's claims that he felt threatened more probable." Also, there was no *unfair* prejudice from the evidence. The Court did agree with Wilson that Groaning should not have been permitted to testify that Wilson had sprayed him with a mixture of urine and fecal matter some hours after the punching incident. This evidence had no relevance to whether Groaning had previously used excessive force, and it was obviously prejudicial, but the error was immediately rectified by a limiting instruction.

Williams v. Nebraska State Penitentiary, 57 F.3d 667 (8th Cir. 1995) : A prisoner brought a § 1983 action alleging that prison officials disregarded the risk of harm posed by a cellmate, who had savagely beaten him. The Court affirmed a judgment for the defendants, finding no error in the admission of the plaintiff's two murder convictions, since the evidence was probative on the reasonableness of the officials' belief that the plaintiff could protect himself from a potentially violent inmate. The Trial Judge properly conditioned admission of the evidence on proof that the officials were aware of the plaintiff's criminal history.

Ruvalcaba v. City of Los Angeles, 64 F.3d 1323 (9th Cir. 1995) : The plaintiff in a § 1983 action alleged that police officers had used excessive force during a vehicle stop. The Court held there was no abuse of discretion in permitting officers to testify about their knowledge of the plaintiff's criminal history, as that was relevant to the reasonableness of their conduct under the circumstances.

[c] Civil Rights Cases -- Other Evidence

Wills v. Brown Univ., 184 F.3d 20 (1st Cir. 1999) : The Court held in a student's Title IX case that there was no abuse of discretion in excluding evidence of the defendant's failure to take action when other students were harassed by the same instructor subsequent to the single incident for which the plaintiff was suing. Because the plaintiff's hostile environment claim under Title IX required proof of the defendant's actual knowledge of the instructor's illegal conduct and deliberate indifference to it, subsequent incidents were irrelevant to the defendant's prior knowledge and at best of marginal relevance in showing the defendant's "deliberate indifference" to disputed prior incidents, while having a potential for severe prejudice. One Judge dissented, on the ground that the plaintiff was not suing for just the single incident but also for damages caused to her by the defendant's continued inadequate response, as to which the subsequent incidents were relevant evidence.

Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001) : African-American plaintiffs, who had been stopped by a security guard for suspected shoplifting, brought a § 1981 action against the store. Affirming a judgment for the plaintiffs, the Court held there was no abuse of discretion in admitting evidence of (1) racial epithets used by the guard's supervisor in his previous position as director of security for another employer, (2) training received by the security officers regarding treatment of minority shoppers, and (3) the racial makeup of the store's shoppers and shift logs and arrest reports. The evidence was probative of a discriminatory animus.

See also annotations under "Employment Discrimination Cases," § 403.03[27].

[11] Codefendant's or Cooperating Witness' Guilty Plea or Immunity

United States v. Dworken, 855 F.2d 12 (1st Cir. 1988) : The Court noted that a codefendant's plea may be elicited on direct to dampen the likely effects of an attack by a defendant, but cautioned that prosecutors may not use such a plea to support an inference of guilt on the part of other defendants. Although it found misconduct in the prosecutor's statements, reversal was not required.

United States v. Ramirez, 973 F.2d 102 (2d Cir. 1992) : The Court reversed a conviction for narcotics and firearms offenses, holding it was error to refuse to instruct the jury that they should not consider a testifying codefendant's guilty plea as evidence of the defendant's guilt.

United States v. Universal Rehab. Servs. (PA), Inc., 205 F.3d 657 (3d Cir. 2000) : This case is discussed in the Editorial Explanatory Comment, *§ 403.02[8]*. In *United States v. Cohen, 171 F.3d 796 (3d Cir. 1999)* , a mail fraud case arising from a scheme to pay kickbacks, the prosecution introduced evidence that three of its witnesses had pleaded guilty to receiving kickbacks from the defendant. Although the defendant had promised not to attack the witnesses for bias, the Court held there was no abuse of discretion in admitting the evidence, as it would be responsive to the jurors' natural questions why only the defendant was prosecuted and the jury was properly instructed not to draw conclusions or inferences about the defendant's guilt from the witnesses' guilty pleas. In *United States v. Werme*, n36 the Court affirmed a conviction for conspiracy to violate the Travel Act, noting that evidence of another party's guilty plea is not admissible to prove the defendant's guilt but may be admitted to show the witness' bias. The Court held it was error, but harmless, to fail to give a requested limiting instruction when a coconspirator's guilty plea was introduced. See also *Government of Virgin Islands v. Mujahid* n37(error, but harmless, merely to instruct jury to be cautious in evaluating cooperating witness without telling them witness' guilty plea could not be considered evidence of defendant's guilt); *United States v. Frankenberry* n38(government may elicit on direct examination that a witness is in a protection program and has received substantial benefit, as long as it does not exploit any inference of threats by the defendant).

United States v. Countryman, 758 F.2d 574 (5th Cir. 1985) : The Court held that it was permissible for the government to elicit on direct examination an alleged coconspirator's testimony concerning his guilty plea in order to blunt the impact of expected cross-examination, but it observed that the prosecutor may not attempt to use the plea as affirmative evidence of the defendant's guilt.

United States v. Odom, 13 F.3d 949 (6th Cir. 1994) : The Court held that evidence of accomplices' convictions was relevant to the reliability of another accomplice's recantation of grand jury testimony regarding a conspiracy. In *United States v. Lochmondy*, n39 the Court held there was no error in admitting the guilty pleas of codefendants who testified at trial, not as evidence of the defendants' guilt, but as evidence of the witnesses' credibility after it had been attacked. In *United States v. Christian*, n40 the Court affirmed drug convictions, holding there was no plain error in the failure to give a limiting instruction *sua sponte* concerning a codefendant's guilty plea. After observing that a plea by a codefendant can be especially prejudicial, the Court reasoned that the potential for prejudice is greatly reduced where the codefendant testifies regarding the specific facts underlying the crimes in issue.

United States v. Carraway, 108 F.3d 745 (7th Cir. 1997) (per curiam): Affirming convictions for narcotics-related offenses, the Court held it was error (but harmless) to introduce the guilty pleas of five codefendants who did not testify at trial. When the codefendant does not testify, his plea has little probative value because his credibility is not at issue, and it presents the risk that the jury will infer the guilt of the defendants on trial. The jury's curiosity why a codefendant who has been named in the indictment and in the course of the trial does not appear before them can be dealt with simply by instructing them not to concern themselves with that question. In *United States v. Sanders, 893 F.2d 133 (7th Cir. 1990)* , the Court affirmed a fraud conviction, holding that there was no abuse of discretion in admitting former codefendants' guilty pleas during the government's case-in-chief. The Court reasoned that the defendant's trial strategy

was to imply that he was singled out while the former codefendant-witness went unpunished, which made admission of the plea evidence inevitable, and the jury was properly instructed not to consider the pleas as evidence against the defendant.

United States v. Wadlington, 233 F.3d 1067 (8th Cir. 2000) : Affirming a conviction for conspiracy to possess and distribute cocaine, the Court held it was error for the prosecutor to reveal, in examining a case agent, that a codefendant in the case had been convicted. One person's conviction may not be used as substantive evidence of the guilt of another, and defense allegations that the prosecution was a fraud did not open the door to this evidence that would otherwise be inadmissible. The error was harmless, however, because the Judge immediately sustained an objection to the question and later cautioned the jury that questions by lawyers were not to be considered.

United States v. Smith, 893 F.2d 1269 (11th Cir. 1990) : After the beginning of a trial of a drug conspiracy, two codefendants made a plea agreement and testified for the government. The Court held that evidence of the plea agreement was properly offered by the government to counter an anticipated contention of bias and that instructions made it clear that the evidence was not to be used as substantive evidence of guilt.

[12] Collateral Benefits

Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) : In a civil rights action on behalf of an arrestee rendered incompetent allegedly as a result of the arrest, the Court held that there was no error in admitting evidence of an earlier no-fault lawsuit filed against an insurance company, as it was probative of whether the arrestee's condition was caused by a subsequent accident rather than the arrest and there was no showing it was unfairly prejudicial. A dissenting Judge believed that the evidence was not relevant because the claim against the insurer was not inconsistent with the theory that the accident aggravated a preexisting condition and it was prejudicial in suggesting that the plaintiff was making separate and inconsistent assertions regarding the cause of the injuries.

Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998) : In an arrestee's civil rights action against a sheriff and a jailer, the defendants devoted almost all their direct testimony to documenting their limited net worth. Because any judgment against them would be paid by their employer so long as they had been acting within the scope of their employment, the testimony was inadmissible. The plaintiff did not object, but did seek to introduce the indemnification statute in rebuttal. Reversing nominal damages judgments against the defendants, the Court held it was an abuse of discretion not to admit the statute once the defendants' direct testimony opened the door, since the rationale for excluding the evidence -- fear that damages will be inflated when the government, rather than the individual, is paying -- had dissolved. In a suit against an aircraft manufacturer, *In re Air Crash Disaster*, n41 the Court held that evidence of a widow's receipt of insurance benefits was properly excluded as unduly prejudicial, although it was relevant to her claim for nonpecuniary damages.

Cowens v. Siemens-Elema AB, 837 F.2d 817 (8th Cir. 1988) : In a product liability action, the Court held that evidence that the plaintiff received worker's compensation benefits was properly admitted after the plaintiff testified about the financial stress he had undergone following the accident giving rise to the suit.

[13] Collateral Inquiries

Ramos-Melendez v. Valdejully, 960 F.2d 4 (1st Cir. 1992) : In an employment civil rights case, the Court held there was no abuse of discretion in excluding testimony by the plaintiff's fellow employees, as they also had pending

employment discrimination suits against the defendant and for their testimony to be significant it would be necessary in effect to try their cases as well as the plaintiff's.

United States v. LaRouche, 896 F.2d 815 (4th Cir. 1990) : Affirming the defendants' convictions for fraud in obtaining loans they never intended to repay, the Court held that evidence of government intelligence and other activities directed at their organization was properly excluded, except as to unexpected actions frustrating their intent that lenders would be repaid, because any potential relevance was outweighed by the distraction that the inquiry into collateral issues would cause the jury.

[14] Competency Determinations

United States v. Vazquez-Pulido, 155 F.3d 1213 (10th Cir. 1998) : The Court held there was no error in cross-examining a psychiatrist, who testified for the defense that the defendant was suffering from a psychosis, about tests conducted during a pretrial competency examination. The defendant argued that information obtained during a competency examination must be excluded from the trial, because the issues of mental competency and mental capacity to commit a crime are legally distinct, but the Court was unwilling to adopt a *per se* rule of inadmissibility. Because such evidence could be relevant to the question of the defendant's mental capacity to commit the crime, "the better approach to determining whether test results from competency determinations should be admissible at trial is to evaluate the evidence on a case-by-case basis for relevance, prejudice, or confusion of the issues." The safeguards provided by *Rule 403* were considered sufficient to alleviate any concern that defense counsel might not move for a competency determination for fear that the results might be admissible at trial.

[15] Complex Cases and Evidence

United States v. International Business Machs. Corp., 87 F.R.D. 411 (S.D.N.Y. 1980) : In a protracted antitrust case, the District Court denied permission to the defendant to call 124 witnesses not previously identified as part of its direct case. The Court observed that "[p]articularly in a protracted case, *Rule 403* may serve as a predicate for imposition of blanket limits on a party's right to introduce evidence where the indicia of delay and cumulation are, generally, present." In *SCM Corp. v. Xerox Corp.*, n42 a complex antitrust case, the Trial Judge became concerned that the number of trial days was excessive, so he imposed a limit on the number of additional days available to the plaintiff to present its case. Although the Court recognized that *Rule 403* "normally contemplates that the time-consuming nature of evidence will be determined as to each particular item of evidence offered," it concluded that "in a protracted case such as this, the purpose of the rule can best be achieved by considering time in the aggregate and leaving to counsel the initial responsibility for making individualized selections as to the relative degree of probative value from the mass of evidence available."

[16] Confusing Evidence

[a] Civil Cases

[i] Civil Rights and Employment Discrimination Cases

Kinan v. City of Brockton, 876 F.2d 1029 (1st Cir. 1989) : The Court held, in a civil rights action for injuries received after being arrested as a result of an allegedly improper police broadcast, that evidence of two prior judgments against the defendants was properly excluded. The judgments were based on settlements rather than adjudications, and the prior claims involved excessive force rather than recklessly inaccurate police broadcasts, so their probative value on the adequacy of police training would be substantially outweighed by the risks of confusion and prejudice and the consumption of much unnecessary time in essentially retrying part or all of the two prior cases.

Sanders v. New York City Human Resources Admin., 361 F.3d 749 (2d Cir. 2004) : Affirming a judgment for the defendant in a Title VII action, the Court held that exclusion of a statement made by an agency employee who had investigated the plaintiff's complaints, which concluded that the actions of the plaintiff's supervisor were retaliatory and prohibited by law, did not entitle the plaintiff to a new trial. The statement was a legal conclusion concerning one of the ultimate issues to be decided by the jury, so there was no error in the Judge's decision to exclude it under *Rule 403* because its potential for unfair prejudice or confusion substantially outweighed its probative value. In *Hathaway v. Coughlin, 99 F.3d 550 (2d Cir. 1996)* , an inmate brought a § 1983 action alleging deliberate indifference by a prison doctor to his medical needs, based on the failure for two years to disclose and repair broken pins in his hip, despite his frequent complaints of severe pain in the hip. The Court found there was no abuse of discretion in excluding evidence that the doctor also failed to treat the plaintiff's inactive syphilis, since the jury could easily have been confused by equating and interchanging the negligence in treating the syphilis with the deliberate indifference in treating the hip pain.

Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184 (3d Cir. 1990) : The Court affirmed a judgment for the defendant in the second trial of an age discrimination case, holding there had been no error in granting a new trial after testimony indicating the defendant's management might be willing to "violat[e] ... the labor laws of their contract" or do "something illegal." The statements lacked any appreciable link to age discrimination or the ADEA, and they tended to confuse the jury by diverting attention from age discrimination to other unspecified illegality. One Judge dissented, arguing that the evidence was highly relevant to the employer's defense that it at all times tried to conform to the collective bargaining agreement.

Heft v. Moore, 351 F.3d 278 (7th Cir. 2003) : A homeowner sued various police officers who executed a valid warrant at her house. Affirming judgment as a matter of law for a defendant who, the plaintiff claimed, struck her with a battering ram, the Court found no error in the exclusion of evidence that another officer allegedly planted drugs and that the plaintiff believed the officers were searching the wrong house. This other evidence "created the substantial risk of confusion of the issues at trial."

West v. Carson, 49 F.3d 433 (8th Cir. 1995) : The plaintiff in a § 1983 action sought to offer evidence tending to show his innocence of the underlying charge, to support his allegation that arresting officers coerced an involuntary confession. The Court held there was no abuse of discretion in excluding the evidence, as its probative value toward showing he was unlikely to have confessed voluntarily was small, but the jury was likely to be confused into thinking the case turned on the plaintiff's guilt or innocence on the criminal charge rather than on whether his constitutional rights were violated. In a § 1983 action by a pretrial detainee, *Johnson v. Busby*, n43 the Court held it was no abuse of discretion to exclude evidence of state minimum jail standards, as the standards, while helpful and relevant in some cases, do not represent minimum constitutional standards and would tend to mislead and confuse the jury as to the relevant standard of conduct.

Quintanilla v. City of Downey, 84 F.3d 353 (9th Cir. 1996) : An arrestee's § 1983 trial was bifurcated so that the first phase involved only individual officers' use of a police dog in making the arrest. The Court held there was no abuse of discretion in excluding evidence in the first phase of injuries from unrelated incidents of police dog bites, as well as of police dog training procedures. Because the evidence was offered only to show that the Police Chief's and City's policy of using police dogs was unconstitutional, its introduction was premature; its introduction could well have unfairly prejudiced the Chief and the City and confused the jury considering the individual officers' actions.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) : Affirming a judgment for the defendants in an action by arrestees alleging excessive force by a police officer, the Court found no abuse of discretion in the exclusion of evidence regarding the police department's standard operating procedures. The Court held that the SOPs were irrelevant to the plaintiffs' federal law claims, and that even if they might be relevant to the plaintiffs' pendent state law claims, there was no abuse of discretion in excluding the evidence because of the risk that the jury would confuse violation of the administrative standards for a constitutional violation. The Court also held that the risk of jury confusion justified precluding use of the SOPs in examining an expert presenting testimony in rebuttal of defense evidence that the officer had "conformed to his training."

[ii] Confusing Evidence -- Civil Cases -- Intellectual Property Cases

Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25 (1st Cir. 2001) : Having granted summary judgment on all claims except tortious interference to the defendant in a suit by a manufacturer of scented candles that alleged the defendant infringed the plaintiff's copyright and trade dress rights and violated state law, the Trial Judge held that evidence of copyright and trademark infringement would not be admissible in the tortious interference trial. Affirming, the Court recognized that the evidence might have been relevant to show improper motive, but it cited *Rule 403* and found that any inference regarding motive would have been cumulative at best and could have created "substantial confusion and delay, given that the more obvious use of the evidence would be to support the defunct copyright and trade dress claims."

Monotype Corp. v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994) : In an action by a typeface designer against a licensor of typefaces, the Court held that a document prepared by an employee of the designer's customer, which expressed the employee's views that certain typefaces were copies violating a typographical association's "moral code," was properly excluded. The conclusion of copying had little probative value because it was made without seeing the actual typefaces, and the reference to the association's moral code would only confuse the jury as to the proper standard.

Cytologix Corp. v. Ventana Medical Sys., Inc., 424 F.3d 1168 (Fed. Cir. 2005) : In a patent infringement action, the Court noted that it was improper to have expert witnesses testify before the jury regarding claim construction. The risk of confusing the jury is high even when, as here, the jury is instructed that the Judge's claim constructions control. In an action for patent infringement, *Mendenhall v. Cedarapids, Inc., 5 F.3d 1557 (Fed. Cir. 1993)* , the Court held that there was no abuse of discretion in excluding the judgment, opinion, and other evidence of an earlier proceeding in which patents at issue had been held valid. There was a high possibility of prejudice and confusion, since the opinion was not fact evidence on the myriad issues in the present case, and the jury may well have been confused by exposure to another Judge's statements on the law. The dissenting Judge believed that the prior holding of validity had substantial probative value and that the jury should be presumed to take its role seriously and to carry out its factfinding function competently and thoroughly.

[iii] Confusing Evidence -- Civil Cases -- Miscellaneous Cases

Langer v. Monarch Life Ins. Co., 966 F.2d 786 (3d Cir. 1992) : In an action by a physician against his employer and an insurer over disability insurance coverage, the physician and the insurer settled under a loan receipt agreement. The Court held there was no abuse of discretion in excluding evidence of the settlement from the trial of claims against the employer, as it may have confused the jury and misplaced their focus onto the subsidiary mitigation issue whether the settlement was a good deal rather than on the major issues in the case.

Redman v. John D. Brush & Co., 111 F.3d 1174 (4th Cir. 1997) : Reversing a judgment against the manufacturer of a safe after it was burglarized and the plaintiff's coin collection stolen, the Court held it was error to admit a copy of the warranty accompanying the safe. Although offered to impeach the defendant's witness, the warranty was not contrary to the witness' testimony, and it likely confused the jury by reminding them that the defendant had given a warranty when, in fact, the plaintiff's cause of action for breach of warranty had been dismissed. In *Tony Guiffre Distrib. Co. v. Washington Metro. Area Transit Auth.*, n44 the Court affirmed an inverse condemnation, finding no error in the exclusion of evidence concerning certain rents that were payable on property, since the circumstances concerning the rents might confuse the jury. The Trial Judge did permit experts to testify concerning the fair rental value of the property.

Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996 (5th Cir. 1998) : The Court held in a wrongful death action arising from an airplane crash that there was no abuse of discretion in excluding evidence that the decedent's son committed suicide a little more than a year after his father's death. There was a substantial risk that the jury would confuse the mental anguish suffered by family members as a result of the son's suicide with the anguish resulting from the decedent's death. The Court also noted that the probative value of the evidence to show the degree of mental anguish suffered by family members from the decedent's death was tenuous, especially when no claim for mental anguish was asserted on behalf of the son's estate.

City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157 (6th Cir. 1984) : The Court affirmed a judgment for the utility in an antitrust action, holding there was no error in excluding a stipulation, entered into before the first of two trials, that the defendant utility had sponsored a taxpayer's suit that challenged a Federal Power Commission decision to require it to interconnect with the City's utility. The Court found that the stipulation was cumulative of other evidence concerning the defendant's attempts to eliminate competition and that it might have confused the jury by leading it to think that the taxpayer's suit was an anticompetitive act, which it was not. A dissenting Judge argued that sponsorship of the taxpayer suit, standing alone, might not have been anticompetitive, but the jury should have been permitted to consider the defendant's role in the suit as it might bear on a determination of whether the defendant was engaged in anticompetitive behavior.

Harrison v. Dean Witter Reynolds, Inc., 79 F.3d 609 (7th Cir. 1996) : An investor in a Ponzi scheme brought a securities fraud action against the brokerage firm employing the brokers who executed the scheme. Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion in excluding evidence that the investor underreported his income from his investment, as the probative value of the evidence in showing the investor's lack of reliance was substantially outweighed by the risk of jury confusion and undue consumption of time if a complicated tax evasion trial were to begin in the midst of the securities fraud trial.

Moses.com v. Comprehensive Software Sys., Inc., 406 F.3d 1052 (8th Cir. 2005) : A brokerage firm sued a software developer on various tort theories, claiming that the developer failed to produce a software system as promised. The Court affirmed a judgment for the developer, finding no abuse of discretion when evidence as to how the developer's software worked at two other companies was excluded. It reasoned that the evidence might have been confusing and was not probative of the central issues in the case, particularly because the brokerage firm failed to establish an adequate basis for assuming that the other companies' systems were identical to its system. In *Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995)* , a declaratory judgment action to determine whether a fellow-employee exclusion in a liability policy applied to a fatal crash of a company plane, the Court held there was no abuse of discretion in excluding FAA investigation reports that indicated the company's operations director had neglected or falsified logbook entries. The reports had no tendency to show that payroll records at issue were inaccurate, and they were likely to lead the jury away from the question of the decedent's status toward the irrelevant question whether the company was responsible for the decedent's death. The likelihood of jury confusion and prejudice similarly

justified excluding the FAA reports as evidence of the director's motive to falsify the payroll records or of his testimonial credibility.

Thurman Indus. v. Pay'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989) : In an antitrust action the plaintiff offered, as evidence of anticompetitive conduct directed toward realizing monopoly power, testimony that the defendant, a competing chain of home improvement stores, attempted to coerce suppliers to refuse to sell home improvement products to competitors. The Court held the evidence was properly excluded, as the alleged conduct was only ambiguously anticompetitive, so it had little probative value, while it had a great potential to confuse or mislead the jury on the issue of specific intent to monopolize through predatory pricing.

Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998) : A picture of the plaintiff was erroneously misidentified in a magazine article as being that of a person involved in the Pan Am 103 bombing. Reversing a judgment for the defendant on other grounds, the Court held there no abuse of discretion in excluding a memorandum prepared by the defendant's public affairs director that addressed a number of charges that the sources for the article were unreliable. Although the memorandum tended to show that publication of the article may have violated internal policies and procedures, it had little probative value because it did not refer to the particular photograph at issue, and it had a clear potential for confusing and misleading the jury into believing that the lack of care in publishing the article was also the source of the decision to publish the photograph.

[iv] Confusing Evidence -- Civil Cases -- Product Liability and Toxic Tort Cases

Santos v. Sunrise Medical, Inc., 351 F.3d 587 (1st Cir. 2003) : Affirming a judgment for two nursing home workers injured while using a hydraulic lift manufactured by the defendant, the Court found no abuse of discretion in the exclusion of a letter written by the plaintiffs' lawyer to OSHA alleging that the nursing home improperly maintained the lift in violation of OSHA standards. The Court found that the letter would have been potentially confusing and would have opened up the subject of OSHA's investigations and findings.

Blancha v. Raymark Indus., 972 F.2d 507 (3d Cir. 1992) : The plaintiffs' theory in an asbestos case was that all asbestos could cause the decedent's mesothelioma; the defendant's expert indicated that asbestos products containing chrysotile did not cause mesothelioma. After a verdict for the defendant, a new trial was granted, first on the ground that the expert's testimony was irrelevant without evidence that the defendant's product contained chrysotile, and later (on reconsideration) on the ground that the jury might have been confused by the expert testimony in the absence of evidence about the defendant's product. Reversing a judgment for the plaintiff on the new trial, the Court held that the expert's testimony was relevant, given the theory advanced and the plaintiffs' burden of proof on proximate causation, and that the danger of confusion did not so clearly outweigh the probative value of the expert's testimony as to justify exclusion.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (1984) , superseded, 750 F.2d 1314 (5th Cir. 1985) (en banc): In an action by a former shipyard worker for injuries allegedly caused by the defendants' failures to warn of the hazards of exposure to asbestos products, a panel of the Court found that 25-year-old letters that were among the papers of the chairman of the board of one of the defendants should not have been admitted because they shed almost no light on the foreseeability of injury and would have confused and misled the jury. On rehearing *en banc*, the Court said the letters were not so remote in subject matter as to be devoid of probative value, and admission was not an abuse of discretion when the letters were not inflammatory and the defendants had ample opportunity to make the jury aware of their remoteness.

Stull v. Fuqua Indus., 906 F.2d 1271 (8th Cir. 1990) : In a product liability action for injuries suffered when the plaintiff's foot was caught beneath a riding mower, the Court held that a statement in a letter by the plaintiff's counsel to the CPSC that the plaintiff "tried to jump off the mower" was properly excluded under Rules 403 and 611(a) because the word "jump" is ambiguous, with meanings that could support each side's theory of the case. In a product liability action brought on behalf of a child injured by a riding mower, *Ryan v. McDonough Power Equip. Co.*, n45 the defendants were granted a new trial on the issue of liability. At the second trial, the Judge excluded the deposition of an expert who explained the nature of the girl's injury and the medical treatment she received. The Court affirmed, on the ground that the probative value of the deposition on the liability question was low and the possibility that the jury might be distracted by consideration of the extent of the damages was substantial.

McEuin v. Crown Equip. Corp., 328 F.3d 1028 (9th Cir. 2003) : In an action by the operator of a doorless, stand-up forklift against the manufacturer arising from injuries suffered by the operator in a collision, a jury found for the operator. Affirming, the Court found no abuse of discretion in the exclusion of evidence that the United States military specifies that forklifts must be built without doors. The Court noted that the Trial Judge indicated that he would not preclude the designer of the forklift from testifying that he was aware of and relied upon the military standard. That ruling permitted the manufacturer to offer evidence as to its state of mind, but properly excluded the military specifications because they "would appear to carry the imprimatur of government sanction, and might therefore resemble in the jury's mind something akin to an actual regulation."

Wheeler v. John Deere Co., 935 F.2d 1090 (10th Cir. 1991) : Affirming a judgment for the plaintiff in an action for injuries suffered while servicing a combine, the Court rejected the manufacturer's contention that admitting design and product safety manuals diverted the jury's attention from reasonable consumer expectations to manufacturer's fault, which is irrelevant in a strict product liability action. Evidence of the defendant's knowledge of dangers is relevant in considering the adequacy of any warnings.

[b] Confusing Evidence -- Criminal Cases

United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997) : The Court held in a bank fraud prosecution that there was no abuse of discretion in precluding cross-examination of a cooperating witness for the prosecution about the sentences he faced and avoided by his plea bargain. That would have put before the jury the defendant's potential punishment, which could confuse the issues they were supposed to be deciding.

United States v. Thompson, 710 F.2d 915 (2d Cir. 1983) : The Court affirmed the denial of a new trial motion by a former Congressman convicted in one of the ABSCAM prosecutions. It agreed with the Trial Judge that the dangers of confusion and delay associated with evidence offered to prove that a government witness had duped another person, and therefore that it was more likely that he also duped Thompson, substantially outweighed its probative value and did not warrant a new trial.

United States v. Driggs, 823 F.2d 52 (3d Cir. 1987) : In a Hobbs Act prosecution, a pretrial ruling precluded the government from introducing recorded conversations in which a union officer discussed payments to various public officials, unless they related to the defendant, who had been elected a Judge. The Court concluded that the ruling was an abuse of discretion, because the evidence tended to prove the union officer's payment was made to the defendant because of his official position. In our view, the ruling below was correct. The issue in the case was whether the defendant used his official position to obtain payment, and evidence of the union officer's intent, without evidence the defendant knew of that intent, was irrelevant and tended to confuse the officer's motive with the defendant's.

United States v. Iskander, 407 F.3d 232 (4th Cir. 2005) : In a prosecution for tax evasion and structuring financial transactions to avoid reporting, the government alleged that the defendant skimmed cash and credit card proceeds from two corporations, each of which operated a hotel. The government offered evidence showing that the gross receipts of the hotels greatly exceeded the amounts shown on the corporate tax returns. The Court held there was no abuse of discretion in excluding portions of the defendant's expert testimony that his corporations were entitled to take depreciation deductions that were not taken on the corporate tax returns. The Court reasoned that the government charged the defendant with failing to report income on his personal tax return, and the availability of the depreciation deductions did not affect the amount of the gross receipts of the company from which the government alleged the defendant skimmed the cash and credit card proceeds. Thus, the expert's testimony was irrelevant and potentially confusing. In *United States v. Grossman, 400 F.3d 212 (4th Cir. 2005)* , following the defendant's arrest, officers waited inside an apartment to which the defendant had keys. A man knocked on the apartment's door, was admitted and gave a false name to the officers, and at their request wrote a brief statement indicating that he had come to see a man by the defendant's name. Affirming a conviction for possession of cocaine with intent to distribute, the Court held there was no abuse of discretion when the defense was precluded from admitting evidence of the man's criminal history. The probative value of the evidence was weak because the man was not a witness at the trial and--as shown by the facts he had to knock on the door and had no key of his own--his connection to the apartment was minimal compared to the defendant's. The insignificant probative value was easily outweighed by the risk of confusing and distracting the jury. In *United States v. Reevey*, n46 the Court affirmed convictions for carjacking, kidnapping, and possession of a firearm during a violent crime, finding no abuse of discretion in the exclusion of ballistic evidence that the defendant's weapons were inoperable. The defendant claimed that the evidence rebutted testimony by officers who testified that the defendant fired upon them at the scene of the arrest. The Court reasoned that the defendant was not charged with any offense arising out of his arrest, and the Trial Judge was warranted in excluding the evidence as likely to confuse or mislead the jury. In *United States v. Hill*, n47 the defendant, charged with misrepresenting himself as a financial advisor and defrauding a retired history professor of almost $100,000, claimed that the money was a gift, which the victim relabelled as investment only after their relationship dissolved. To support this defense he offered to prove an allegedly similar situation, through a "gift letter" from the victim relating to $10,000 and the victim's complaint in a subsequent lawsuit against the recipient seeking repayment of a "personal loan" for $15,000 that had been advanced in $5,000 and $10,000 installments. The defendant had no concrete evidence as to what happened in these collateral transactions, so the Court held there was no abuse of discretion in excluding the evidence, since it "would have necessitated an exhaustive case within a case that would have confused the jury as to the issues to be decided."

United States v. O'Keefe, 426 F.3d 274 (5th Cir. 2005) : The defendant, charged with "seaman's manslaughter" after he capsized a tugboat causing a passenger to drown, proffered the Coast Guard's accident report of the incident. The Trial Judge ruled that the body of the report could be admitted, but that the conclusory headings in the report would be excluded because, among other things, the jury might be confused as to the different burdens of proof used for the report and at the criminal trial. Affirming, the Court found no abuse of discretion and rejected the argument that this analysis was inappropriate under *Rule 803(8)*, as that rule authorizes exclusion of a public report only if it is untrustworthy and not if it is confusing. It stated that *Rule 803(8)* "is not the only basis upon which a district court may rely to exclude evidence stemming from investigative reports." In *United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001)* , the defendants were convicted for arson of a house containing the office of the victim's family business. The Judge excluded evidence that the neighborhood was not zoned for businesses. Affirming, the Court noted that there is no requirement that a business be lawfully zoned in order to satisfy the statutory interstate commerce nexus, so the proposed testimony would be unduly confusing and misleading to the jury. In *United States v. Morris*, n48 the defendant was acquitted on a charge of money laundering, but the jury was unable to reach a verdict on additional counts of money laundering and conspiracy to commit money laundering, so a mistrial was granted. The Trial Judge ruled *in limine* that evidence of the acts on which the defendant was acquitted would not be admissible in the retrial and the government appealed. The Court held there was no abuse of discretion in excluding the evidence, as the jury might have been misled and confused that the evidence went to a substantive illegal act (for which the defendant was acquitted) rather than an overt act in a conspiracy scheme, and the government did not offer any limiting instruction that

might have reduced the jury's confusion. In *United States v. Valencia*, n49 a drug prosecution, the government and defense joined in a request to play an authenticated tape recording of a conversation between Spanish-speaking conspirators, but the Trial Judge permitted only an English transcript that had been stipulated by the parties. In a careful opinion indicating some doubts about the ruling, the Court held there was no abuse of discretion, where two of the jurors could speak Spanish and hearing the tape might have been confusing. In *United States v. Moody*, n50 a mail and wire fraud prosecution, the defendant argued that absent coconspirators were especially adept at misleading people and that he was especially naive, so he sought to introduce extensive evidence of their character, organization, and practices. The Court held there was no abuse of discretion in excluding much of the evidence because it would shift the focus away from the defendant's culpability.

United States v. Fuller, 387 F.3d 643 (7th Cir. 2004) : Affirming a conviction for threatening to kill the President, the Court found no abuse of discretion when the defendant was denied the opportunity to call a psychiatrist to testify that the defendant made the threat because he wanted to stay in prison, not because he intended to carry it out. The Court reasoned that the defendant's subjective intent was irrelevant to the crime involved, and therefore the testimony "would merely have been confusing to the jury" and was properly excluded under *Rule 403*. In *United States v. Thomas, 11 F.3d 1392 (7th Cir. 1993)* , a defendant charged with bank robbery sought to prove she had been coerced into participation by her codefendant. The Court held there was no abuse of discretion in refusing to allow her to present evidence regarding each specific incident of abuse, as the marginal relevance of the evidence was clearly outweighed by the dangers of confusion of the issues, waste of time, and unnecessary presentation of evidence that would result if the defendant were allowed to conduct minitrials of each alleged incident.

United States v. Hairston, 819 F.2d 971 (10th Cir. 1987) : The Court affirmed convictions for willful failure to file tax returns, holding that the defendant's testimony concerning the impact that tax protest literature and seminars had on his understanding of tax law requirements was more probative than the literature itself and that there was no error in excluding the literature on the ground that it might confuse the jury.

United States v. Costa, 947 F.2d 919 (11th Cir. 1991) : Defendants charged with cocaine importation called a witness who would have testified that he had imported cocaine with three of the government witnesses but he had never known of the defendants in connection with his smuggling. The testimony was excluded on the ground that it related to a different conspiracy than the one alleged at trial, and its admission would therefore tend to confuse the jury. The Court found no abuse of discretion, but expressed concern about the ruling; it noted that excluding evidence of a different conspiracy, on the ground that it might cause jury confusion, will usually be inconsistent with the general rule favoring the admission of such evidence and allowing the jury to decide if it relates to the indicted conspiracy.

[17] Connection Not Established

United States v. Etsitty, 130 F.3d 420 (9th Cir. 1997) : The defendant was convicted of kidnapping and assault, after a trial in which identity was the disputed issue. The Court found no abuse of discretion in the exclusion of a suicide note written by the defendant's brother, which stated that it was better to commit suicide than to serve a five-year prison term. There was no evidence connecting the defendant's brother and his motive for suicide to the crime charged against the defendant. The Court noted that the suicide occurred more than a month after the defendant pleaded no contest to the kidnapping charge in tribal Court, and no steps had been taken to prosecute the brother.

[18] Consciousness of a Weak Case -- Civil Cases

McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985) : The Court reversed a judgment for a seaman

in a Jones Act case, holding it was error to exclude evidence suggesting that the seaman had suborned perjury of a proffered witness. The Court found that "subornation of perjury by a party is strong evidence that the party's case is weak" and that there was little chance of "unfair prejudice" in the use of the evidence.

TY Inc. v. Softbelly's Inc., 353 F.3d 528 (7th Cir. 2003) : Reversing a judgment as a matter of law for a plaintiff who sued the manufacturer of a computer screen cleaner for trademark infringement, the Court held it was error to exclude evidence that a witness who testified in his deposition favorably for the defendant had been asked by the plaintiff not to testify in the case. An attempt by a litigant to persuade a witness not to testify is admissible as an indication that the litigant's claim is weak or unfounded. In a high school student's § 1983 action against a truant officer for nonconsensual sexual relations, *Berry v. Deloney, 28 F.3d 604 (7th Cir. 1994)* , the Court affirmed a judgment for the defendant, holding there was no error in precluding cross-examination of the defendant about a missing report. The evidence was totally out of the defendant's control shortly after he made it, and testimony about it would not so much support inferences that he was lying as simply invite conjecture.

Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997) : Affirming summary judgment for the defendant in an employment discrimination case, the Court held that the defendant's mere negligence in losing or destroying some attendance records did not support an inference of consciousness of a weak case.

Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997) : Affirming the grant of summary judgment against the estate of a pedestrian hit by a train, the Court held that no adverse inference could be drawn from the defendant's failure to preserve the train's speed tape, in the absence of evidence of bad faith.

[19] Consciousness of Guilt -- Criminal Cases

[a] False Statements and Suppression of Evidence

United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990) : The Court affirmed convictions of former Customs officers for robbery-related offenses in connection with the murder of a money courier, holding that there was no abuse of discretion in admitting evidence a defendant had tried to have the barrel on his gun changed. The effort to replace the barrel suggested an effort to eliminate features of the gun that might have linked it with a bullet found in or near the victim's body, which suggested a consciousness of guilt; there is no requirement that the prosecution introduce the much stronger evidence of the gun and the bullet, particularly since there was no showing that the government ever found such a bullet.

United States v. Perez, 387 F.3d 201 (2d Cir. 2004) : Affirming convictions for cocaine offenses, the Court found no abuse of discretion in the admission of testimony by a witness who said that the defendant asked her on four occasions to give a false statement to investigators concerning the circumstances of a search she witnessed. The Court reasoned that the testimony related to the defendant's knowledge and intent and "merely strengthened inferences that were derived from other evidence." In an armed robbery case, *United States v. Burrous, 147 F.3d 111 (2d Cir. 1998)* , the Court held that evidence that the defendant tossed a box containing $128 in cash from his apartment window at the time of his arrest was properly admitted. The jury could infer from the act consciousness of guilt or that the money was stolen. In *United States v. Perrone*, n51 the Court reversed a conviction for conspiring to manufacture cocaine because there was insufficient evidence the defendant knew the illegal purpose for listed chemicals he possessed, and it held that his false exculpatory statement was not usable as direct evidence of guilt when made in circumstances consistent with the innocent proposition that he felt the need to disassociate himself from criminal activity with which he surmised he was implicated.

United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994) : The Court held there was no abuse of discretion in admitting the defendant's false statements given to an agent of the Immigration and Naturalization Service after his arrest, as his lying was probative of consciousness of guilt of narcotics offenses.

United States v. Fozo, 904 F.2d 1166 (7th Cir. 1990) : The Court held there was no abuse of discretion when a "script," written by one defendant for his codefendant's testimony in their trial for giving willfully false testimony to a grand jury, was admitted as evidence of consciousness of guilt.

United States v. Frost, 234 F.3d 1023 (8th Cir. 2000) : The defendant was charged with defrauding a trust by forging the signature of his co-trustee on various financial documents. In a deposition given in a civil action brought by the trust, the defendant denied signing the co-trustee's name or initials on the documents in question. However, in the criminal case the defendant asserted that he had a power of attorney to sign for the co-trustee. Concluding that the jury would be led to convict the defendant solely on the ground that he was untruthful, the Judge granted a motion *in limine* to exclude the defendant's deposition testimony. On interlocutory appeal, the Court reversed, on the ground that the deposition testimony was probative of fraudulent intent and consciousness of guilt, and although it would be damaging to the defendant's case, it would not be unfairly so.

United States v. Ramirez, 176 F.3d 1179 (9th Cir. 1999) : Six days after the defendant was arrested returning from Mexico while driving a rental vehicle that contained marijuana, his sister registered title in her name to vehicles he had owned. The government contended that the transfer showed consciousness of guilt, in that the defendant was trying to cover up the fact that he could have used a personal vehicle rather than a rental car for his trip to Mexico. The Court found admission of the title transfer evidence harmless error: the consciousness of guilt argument was "tenuous, at best," but the fact the defendant chose to use a rental car rather than one he owned was admissible and probative, given evidence that personal vehicles containing narcotics are seized at the border, while rental vehicles are returned to the rental agency.

[b] Consciousness of Guilt -- Criminal Cases -- Flight

[i] Flight Instructions

United States v. Martinez, 190 F.3d 673 (5th Cir. 1999) : In a narcotics prosecution, two defendants challenged instructions to the jury that evidence of flight could reflect a consciousness of guilt. One defendant argued that the instruction was not warranted because he had not fled when officers entered the premises -- he hid in a closet. But the Court found that although hiding in a closet "may not be the standard method of escape, it can still constitute flight where, as in this case, the cornered defendant was attempting to elude capture." The Court held it was error (but harmless) to give a flight instruction as to the other defendant; while he had run around the house when the officers approached, by the time the officers entered he was simply standing in the living room.

United States v. Dixon, 201 F.3d 1223 (9th Cir. 2000) : When a Customs officer at a port of entry became suspicious and requested that the defendant hand over his car keys for a further inspection, the defendant sped away, crashed through a chain link fence, entered the wrong lane of an Interstate, and was arrested shortly after his car was found abandoned in the nearby city. The defendant was charged with unlawfully importing two aliens found in the trunk of the car. Although instructions that flight could be considered evidence of guilt are generally discouraged, the Court found that the required four inferences were sufficiently supported in this case: (1) from the defendant's behavior to

flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

[ii] Consciousness of Guilt -- Criminal Cases -- Flight -- Flight of Another

United States v. Ortland, 109 F.3d 539 (9th Cir. 1997) : Affirming a conviction for mail fraud, the Court found no error in the exclusion of evidence offered by the defendant that one of his business partners had fled prosecution. The Court had already rejected the idea that a codefendant's flight is relevant to show the guilt of anyone other than the fleeing defendant in *United States v. Candoli, 870 F.2d 496, 501 (9th Cir. 1989)* . Similarly, flight does not tend to show that someone else is innocent, at least where there can easily be more than one guilty person, as in this case.

United States v. Borders, 693 F.2d 1318 (11th Cir. 1982) : The Court affirmed the conviction of a lawyer charged with involvement in an effort to bribe a Federal Judge, holding that evidence that the Judge fled once he learned of the defendant's arrest was admissible to prove the Judge's involvement in a conspiracy with the defendant.

[iii] Consciousness of Guilt -- Criminal Cases -- Flight -- Miscellaneous Cases

United States v. Zanghi, 189 F.3d 71 (1st Cir. 1999) : Affirming convictions for securities fraud and tax evasion, the Court found no error in the admission of evidence that the defendant had moved from Connecticut to North Carolina, leased a house for a year, vacated the premises early, called his landlord from Spain to say that he had to leave unexpectedly and was not going to be able to honor the lease because of "problems" in the United States, and that there was no extradition treaty with Spain. "These factual predicates made it sufficiently clear that Zanghi's departure to Spain was in fact flight indicative of a guilty conscience, not normal travel." In *United States v. Candelaria-Silva, 162 F.3d 698 (1st Cir. 1998)* , the Court affirmed convictions for drug trafficking, finding there was an adequate showing that the defendant had fled the area for reasons related to the charged crime and not other offenses, so evidence of his flight and attempts to create a false identity was properly admitted.

United States v. Glenn, 312 F.3d 58 (2d Cir. 2002) : The Court reversed a murder conviction partly because the government's argument that testimony about the defendant's obtaining a ride shortly after the shooting was evidence of flight tending to show consciousness of guilt was unsupported by the record. Any such inference would be improper, given there was no evidence of suspicious conduct, such as running, aggressively demanding a ride, or requesting to be taken to a remote location. In *United States v. Amuso, 21 F.3d 1251 (2d Cir. 1994)* , the defendant mob boss went into hiding upon learning that he and 14 others were to be indicted for RICO offenses and he remained a fugitive during that trial. After he was later arrested and convicted on RICO, murder, and other charges in a subsequent indictment, the Court held there was no abuse of discretion in admitting evidence of his flight, as a jury could as reasonably have found he fled out of consciousness of guilt as that he was concerned about spillover prejudice in being tried with 14 others. However, it was error (but harmless) to instruct the jury that it could consider his "continued absence," where there was an insufficient factual predicate that he remained absent because of his consciousness of guilt with respect to the crimes charged.

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) : Affirming RICO convictions of Mafia members, the Court held that evidence of a defendant's flight soon after a coconspirator became a government informant was properly admitted, and a limiting instruction that the evidence be considered in connection with only one of the predicate acts, because the defendant was in custody at the time the RICO indictment was returned, had been properly rejected.

United States v. Oliver, 397 F.3d 369 (6th Cir. 2005) : In a prosecution for conspiracy to possess methamphetamine with intent to distribute, the Court found no plain error in the admission of evidence that the defendant, while on pretrial release, had left a halfway house and drug treatment program without permission and intending not to return. Together with evidence that the defendant had installed surveillance cameras around his home to tell whether police were approaching and admissions regarding meth manufacture and use, the flight was probative of the defendant's consciousness of guilt of the crime charged. Given the defendant's knowledge of the charges against him, it was not necessary that the flight immediately follow the crime or the defendant's discovery that he was charged in order to show consciousness of guilt. In *United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998)* , the Court affirmed convictions for drug offenses, finding no error in the admission of evidence that after one defendant had been arrested and released, he fled to Mexico. The defendant departed the country immediately after his release, carrying $60,000 and two handguns. This was sufficient to indicate that the defendant was actually fleeing due to a consciousness of guilt as to the crime charged. Affirming drug convictions in *United States v. Dillon*, n52 the Court found that the defendant's flight two years after the alleged crime and before the indictment was admissible, since it occurred within days of his learning of a codefendant's intent to implicate him in grand jury testimony.

United States v. Robinson, 161 F.3d 463 (7th Cir. 1998) : The defendant was charged with a bank robbery committed on April 8. The Trial Judge admitted evidence of the defendant's apprehension after a virtually identical bank robbery that the defendant committed on April 18, a time at which the April 8 robbery was still unsolved. After the April 18 robbery, the defendant was apprehended in a high-speed chase, at the end of which he drew a handgun on his pursuers. In his car was evidence that tied the defendant to both robberies. The defendant argued that the flight evidence was erroneously admitted, since it had minimal relevance to his consciousness of guilt regarding the April 8 bank robbery, the only robbery with which he was charged in the case. Finding no error, the Court stated that "it is not the role of the District Court to parse the mind of a defendant to determine which act may have created a higher consciousness of guilt on a given occasion when the defendant is in possession of evidence linking him to both robberies and when the underlying crimes are virtually identical and separated by a mere ten days." In *United States v. Hunter, 145 F.3d 946 (7th Cir. 1998)* , police sought to approach conspirators in a cocaine deal. The suspects drove away, leading the officers on a high-speed chase before abandoning the car and running away. At the defendant's trial the Judge excluded evidence of the car chase, since the other conspirator was driving the car, but did admit evidence that the defendant attempted to flee from the car on foot. Affirming, the Court found no abuse of discretion, since running away evinced the defendant's consciousness of guilt. Furthermore, admitting the evidence avoided any implication that the defendant had not been running when another conspirator had sought to evade the police and had dropped a jacket containing cocaine packages that were the basis of the charged offenses.

United States v. Richardson, 427 F.3d 1128 (8th Cir. 2005), vacated on other grounds,439 F.3d 421 (8th Cir. 2006) : The Court affirmed a conviction for being a felon and a drug user in possession of a firearms, finding no abuse of discretion in the admission of evidence that the defendant had fled from police when they tried to apprehend him. The flight and the defendant's failure to appear for mandatory drug tests showed a consciousness that his drug use would be discovered if he were tested, which was directly relevant to an element of the crime charged. In *United States v. Chipps, 410 F.3d 438 (8th Cir. 2005)* , the Court affirmed a conviction for assault, finding no error in the admission of evidence that the defendant had fled from law enforcement. The Court reasoned that although flight evidence is often only marginally probative of guilt, in this case the defendant fled within days of being given a copy of the warrant for his arrest, did not turn himself in, could not be found for two years, and sped away from the police, and other circumstances supported the inference that his consciousness of guilt derived from actually having committed the charged assault. In *United States v. Lupino*, n53 an officer testified that he was alone and out of uniform when he encountered the defendant the morning after the charged assault and the defendant asked if he were interested in buying some "smoke." Not wishing to effect an arrest without his weapon, handcuffs, or backup, he said he was interested in buying marijuana and would be back, but when he returned, the defendant was no longer there and was shortly thereafter found hiding in a neighbor's house. The Court held that the officer's testimony was relevant to show the

factual context for the arrest and as evidence of consciousness of guilt, but depiction of the defendant as a drug dealer was unnecessary and prejudicial; however, the error was harmless.

United States v. King, 200 F.3d 1207 (9th Cir. 1999) : Affirming bank and mail fraud convictions, the Court held that evidence that the defendant fled to Mexico shortly before an extradition hearing in Canada was admissible to show consciousness of guilt. The flight related to the charges in the United States for which he would have been extradited.

United States v. Lacey, 86 F.3d 956 (10th Cir. 1996) : The Court held there was no abuse of discretion in admitting evidence that the defendant, charged with drug offenses, fled on the eve of his scheduled trial. Although remote from the commission or accusation of the offense, the flight was in close proximity to another significant event in the course of the prosecution, so it was probative of the defendant's guilt. In *United States v. Martinez*, n54 a prosecution for sending explosives through the mail, the Court held it was error to exclude evidence of the defendant's flight. Flight evidence is often highly relevant, and "[t]he fact that the accused may seek to rebut flight evidence in a way that would create new evidentiary problems is not a justification for excluding it, where, as here, it has highly probative value."

United States v. Blakey, 960 F.2d 996 (11th Cir. 1992) : In reversing a conviction for bank fraud and counterfeiting, the Court noted that there was no abuse of discretion in admitting evidence of the defendant's flight when FBI agents tried to arrest him. The flight occurred in the city where the crime had been committed when the defendant was with a coconspirator he knew was being prosecuted for the crime, and there was some evidence he knew an indictment had been issued against him. One Judge dissented in part, believing that, on balance, admission of the flight evidence was reversible error.

[c] Consciousness of Guilt -- Criminal Cases -- Other Evidence

United States v. Edwards, 342 F.3d 168 (2d Cir. 2003) : The defendant, charged with conspiring to import a substance containing cocaine, admitted that after his arrest he went to the DEA to volunteer as an informer. The Court found no error when the prosecution was permitted to cross-examine the defendant about whether his visit to the DEA violated his bond, since the evidence tended to prove consciousness of guilt: i.e., "he was so desperate to find a way to avoid prosecution that he was willing to violate his bail bond conditions." In a RICO prosecution, *United States v. Padilla, 203 F.3d 156 (2d Cir. 2000)* , the Court held there was no clear error when a note from one defendant to a bribed witness was admitted against the other defendant as tending to prove his consciousness of guilt. A reference to the second defendant in the note demonstrated a relationship between the defendants not existing in a vacuum but in the context of what the jury could find was a conspiracy to suborn perjury, and so was independent evidence sufficient to corroborate the substantial hearsay evidence that the second defendant was a member of the conspiracy to obstruct justice. Thus, the statements to the bribed witness in furtherance of the conspiracy were highly probative of both defendants' consciousness of guilt. In *United States v. Bein*, n55 the Court affirmed convictions for fraud and conspiracy growing out of a scheme to sell illegal commodity option contracts, upholding the admission of evidence that one defendant attacked a fellow corporate officer when the officer complained of an improper transfer of funds. The evidence was relevant to show consciousness of guilt.

United States v. Allee, 299 F.3d 996 (8th Cir. 2002) : Affirming convictions for bank robbery, carjacking, and related offenses, the Court found no abuse of discretion in the admission of excerpts from taped telephone calls made by the defendant while he was in jail awaiting trial. The excerpts permitted the jury to infer that the defendant was attempting to create an alibi, implicate others in the crimes, or persuade witnesses to remain silent.

United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002) : The Court affirmed a conviction for smuggling illegal aliens, finding no abuse of discretion in the admission of evidence that defendant's index finger was badly defaced, since this tended to prove that he sought to evade the Border Patrol's identification system.

United States v. Wright, 392 F.3d 1269 (11th Cir. 2004) : The Court affirmed a conviction for felon firearm possession, holding that evidence of the defendant's resistance to arrest following a traffic stop and his battery on a law enforcement officer was inextricably intertwined with the discovery of the weapon. The Court also found that the evidence was relevant to showing consciousness of guilt.

[d] Consciousness of Guilt -- Criminal Cases -- Threats to Witnesses

United States v. Gilbert, 229 F.3d 15 (1st Cir. 2000) : A nurse at a VA hospital was charged with capital murder after patients in her care died in suspicious circumstances. The prosecution theory was that she had injected the patients with drugs causing cardiac difficulties in order to gain attention, especially from a hospital police officer with whom she was having an affair. Before the trial the Judge granted an *in limine* motion to exclude, inter alia, evidence that the defendant had (a) made anonymous threatening calls to the hospital when she knew the officer would be answering the telephone, (b) harassed and threatened the officer after he ended their relationship and agreed to cooperate with authorities, and (c) one time blocked his car in his driveway and pleaded with him not to keep an appointment with investigators, and when he refused, followed him to the appointment and vandalized his car while he was being interviewed. On an interlocutory appeal, the Court affirmed all the rulings except the last. Since the Judge heard much of the evidence in the defendant's prior trial for making the threatening calls, it was within his discretion to conclude that most of the defendant's conduct was far more likely attributable to anger at the disloyal officer and other co-workers than to a quixotic attempt to head off the criminal investigation, and thus its probative value as consciousness of guilt was substantially outweighed by the risks of undue prejudice and misleading the jury. However, the Court found that the evidence regarding blocking the officer's car was more readily explainable as the product of an obstructive intent and therefore far more probative of a guilty conscience, and at the same time far less inflammatory, so it was an abuse of discretion to exclude the evidence. Affirming a conviction for felon firearm possession in *United States v. Bartelho, 71 F.3d 436 (1st Cir. 1995)* , the Court held that evidence that the defendant threatened to kill a witness was properly admitted. Before trial the witness testified on tape that the defendant had a gun, but at trial the witness denied this. The evidence of the death threats was important as the jury decided which version of events to believe. In *United States v. Pina*, n56 the Court held it was error (but harmless) to admit evidence of alleged threats made by the defendant to a witness after he testified, since the inflammatory potential outweighed any probative value, given that the witness had completed the testimony and could not be influenced by the threat.

United States v. Guerrero, 803 F.2d 783 (3d Cir. 1986) : The Court affirmed drug convictions, holding that evidence that a defendant threatened an alleged coconspirator to discourage him from testifying was properly admitted with an appropriate limiting instruction. Although threat evidence may be admitted to prove consciousness of guilt, it can be extremely prejudicial. The factors that should be weighed "include the importance and centrality to the ultimate issue in the case of the fact sought to be proved by the threat evidence, and the availability of other evidence to establish the fact sought to be proven by use of the threat evidence."

United States v. Savage, 390 F.3d 823 (4th Cir. 2004), vacated on other grounds, 545 U.S. 1102 (2005) : The Court affirmed convictions arising out of a scheme to defraud several investors, especially single, older women, by inducing them to invest in phony business ventures. It found no abuse of discretion when evidence of recorded calls on the defendant's ex-wife's answering machine, in which the defendant threatened her for cooperating with the government, was admitted. In a prosecution on charges of interstate kidnapping and causing the death of another through the use of a firearm, *United States v. Young, 248 F.3d 260 (4th Cir. 2001)* , the Judge admitted evidence that

the defendant had threatened and intimidated the victim's mother. Affirming the convictions, the Court found that this evidence was properly admitted to demonstrate the defendant's consciousness of guilt: "Young did not chase and assault a random bystander; he assaulted the victim's mother, who was a potential witness against him in a federal prosecution for murder."

United States v. Copeland, 321 F.3d 582 (6th Cir. 2002) : Affirming convictions for conspiracy to distribute a controlled substance, the Court found an abuse of discretion (but harmless error) when the prosecution was permitted to introduce testimony from a jailhouse informant that he overheard two defendants discuss their intention to pay someone $500 to "get" an Assistant United States Attorney. While the threat could indicate that the defendants believed the AUSA would succeed in obtaining guilty verdicts, and thus possessed some probative value as to the defendants' consciousness of guilt, "the lack of specificity linking the statements to the charged conduct permits only a weak inference." The slight probative value of the statements was substantially outweighed by their tendency to cast an extremely negative light upon the defendants' characters and to cause the jury to make impermissible inferences.

United States v. Miller, 276 F.3d 370 (7th Cir. 2002) : Affirming fraud convictions, the Court found no error in the refusal to grant a mistrial after the jury heard that Miller's husband had threatened a codefendant who was thinking about cooperating with the prosecution. The Court held that threats to potential government witnesses made by a person connected with the defendant are admissible to show the defendant's consciousness of guilt. In this case, the threat was relevant to show that the defendant was conscious that the codefendant's potential cooperation with the prosecution could damage her case, and thus that she was conscious of her guilt. In *United States v. Holly, 167 F.3d 393 (7th Cir. 1999)* , the Court affirmed fraud convictions, finding no error when the government was permitted to bring out on direct examination that the defendant had threatened witnesses, since defense counsel indicated that he intended to use the witnesses' prior statements exculpatory of the defendant on cross-examination. In a drug trafficking prosecution, *United States v. Thomas*, n57 the Court held that it was an abuse of discretion (but harmless error) to admit evidence of threats against witnesses by the ringleader's brother and other unidentified individuals. The threat evidence did not explain specific behavior of the witnesses, such as inconsistent statements, delays in testifying, or courtroom demeanor; rather, it was offered only to aid in evaluating the witnesses' "general credibility." For that latter purpose, the evidence had extremely limited probative value, while it could be highly prejudicial in appealing to the jury's sympathies, arousing a sense of horror, and provoking an instinct to punish.

United States v. Davis, 154 F.3d 772 (8th Cir. 1998) : The Court affirmed convictions for drug and firearm offenses. It held that taped telephone conversations in which one defendant tried to convince his girlfriend not to cooperate with authorities were properly admitted, where the Trial Judge redacted the tapes and related transcripts to limit possible references to other defendants.

[20] Conviction Offered in Civil Case

Gray v. Genlyte Group, Inc., 289 F.3d 128 (1st Cir. 2002) : Affirming a judgment for the employer in a sexual harassment action, the Court upheld the exclusion of the harasser's misdemeanor conviction for "accosting" the plaintiff by making tongue gestures mimicking oral sex. Although the Court found that the conviction was relevant, the accosting statute and the sexual harassment statute set different standards, so it was "easy to imagine violations of the [accosting] statute that would *not* constitute serious harassment." In *Gil de Rebollo v. Miami Heat Ass'n, 137 F.3d 56 (1st Cir. 1998)* , a spectator at a professional basketball game was injured when a team mascot pulled her from her front row seat. As a result of charges filed by the spectator, the mascot was convicted of misdemeanor battery. The Court found no abuse of discretion when evidence of the conviction was excluded in this personal injury action based on the same incident. The jurors had sufficient other evidence to gauge the seriousness of the mascot's actions, and there was a risk that admission of the conviction would allow the jury to substitute the judgment reached in the criminal proceeding

for its own.

[21] Courtroom Identifications

United States v. Brien, 59 F.3d 274 (1st Cir. 1995) : The Court affirmed an armed bank robbery conviction, holding there was no abuse of discretion in rejecting defense counsel's proposal to have the defendant seated in the spectator section of the courtroom and to salt the audience with three or four individuals of the same general description as the bank robber. The proposed plan, which counsel had ample invitations to modify, was fully capable of misleading the jury.

[22] Cultural Stereotypes

United States v. Verduzco, 373 F.3d 1022 (9th Cir. 2004) : Affirming a conviction for illegal drug importation, the Court found no abuse of discretion in excluding testimony of a sociologist expert, in support of a duress defense, about the pervasiveness and violence of the Tijuana drug cartels. The Court held that the testimony was properly excluded under *Rule 403* because the defendant was asking the jury to draw inferences based on cultural stereotypes. Moreover, the testimony lacked connection to the facts of the case: the defendant testified that he lacked a reasonable opportunity to escape threatened harm because of distrust of police authorities who previously stopped him and asked for money, but he did not mention fear of drug cartels.

[23] Cumulative Evidence

[a] Civil Cases

Miller v. Town of Hull, 878 F.2d 523 (1st Cir. 1989) : In this action by members of a town redevelopment authority alleging violation of *First Amendment* rights by the defendant Town and its Board of Selectmen in removing them, the Trial Court did not abuse its discretion in excluding the Board's 95-page final decision. The Judge weighed the document's probative value against its prejudicial and cumulative effects and permitted the defendants to put the information it contained, which the plaintiffs were not attacking, before the jury through testimony.

International Minerals & Resources, S.A. v. Pappas, 96 F.3d 586 (2d Cir. 1996) : In an action for tortious interference with a contract to acquire a ship, the Court held there was no abuse of discretion in excluding letters relating to the plaintiffs' plans for the ship, which were relevant to damages, as the evidence was already before the jury in the form of testimony from witnesses. In *Zaken v. Boerer, 964 F.2d 1319 (2d Cir. 1992)* , an action alleging employment discrimination based on pregnancy, the Court reversed a judgment for the defendant, principal owner and executive of a company designing and selling women's clothing, on the ground that it was error to exclude a statement by the vice president for sales that the plaintiff's predecessor had been fired because she was pregnant. Where none of the plaintiff's three witnesses testified to the statement or gave objective direct evidence that pregnancy played a role in the defendant's employment decisions, the evidence should not have been excluded as cumulative.

Robert S. v. Stetson School, Inc., 256 F.3d 159 (3d Cir. 2001) : The plaintiff, who had been placed in a school specializing in the treatment and education of juvenile sex offenders, alleged that staff members subjected him to physical and psychological abuse in violation of the school's policy against "horseplay." The Court found no abuse of discretion in precluding testimony by an expert in child abuse on grounds that would result in undue delay, waste of time, or needless presentation of cumulative evidence, since two other witnesses, both psychologists, testified at length about the impact that the alleged abuse could have.

City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157 (6th Cir. 1984) : The Court affirmed a judgment for the utility in an antitrust action, holding there was no error in excluding a stipulation, entered into before the first of two trials, that the defendant utility had sponsored a taxpayer's suit that challenged a Federal Power Commission decision to require it to interconnect with the City's utility. The Court found (2-1) that the stipulation was cumulative of other evidence concerning the defendant's attempts to eliminate competition and that it might have confused the jury by leading it to think that the taxpayer's suit was an anticompetitive act, which it was not.

Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000) : A plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to show videotapes of tests he conducted demonstrating how various objects were thrown from a moving mower and how vibration from a running mower would not cause a properly tightened wingnut to loosen. The videos were cumulative of the witness' testimony regarding the tests and a therefore a waste of the jury's time. A videotape showing proper assembly of a lawnmower was likewise cumulative, since the mower was in plain view of the jury and assembly of the wingnut in question could be readily demonstrated.

Tran v. Toyota Motor Corp., 420 F.3d 1310 (11th Cir. 2005) : In a product liability action the Court held there was no abuse of discretion when testimony from an expert witness for the plaintiff was excluded on the ground that the expert's opinions, and the bases for those opinions, were the same as those of another expert who was permitted to testify. The Judge had considered the excluded expert's deposition and expert witness report and had extensively examined his qualifications, and while the Court suggested that it might have reached a contrary conclusion, it found the decision that the evidence was cumulative was within the Judge's permissible "range of choice."

[b] Cumulative Evidence -- Criminal Cases

United States v. Crosby, 713 F.2d 1066 (5th Cir. 1983) : The Court affirmed convictions for kidnapping offenses, finding no error in the exclusion of out-of-court writings in a journal and oral statements by the defendant that were offered in support of his defense that he suffered posttraumatic stress syndrome as a result of his service in Vietnam. Expert witnesses were permitted to rely on this evidence and it was disclosed to the jury. Admission of additional testimony would have been cumulative. The Court also upheld the exclusion of records of a Veterans Outreach Center that contained opinions by counselors without training in psychiatry and were cumulative of testimony provided by experts for the defense. In *United States v. Edwards*, n58 the Court upheld extortion and mail fraud convictions, finding that a Trial Judge who admitted the testimony of five character witnesses for the defense did not abuse his discretion in refusing a continuance so that the defendant could present 25 additional character witnesses.

United States v. Williamson, 202 F.3d 974 (7th Cir. 2000) : Affirming a conviction for cocaine possession, the Court rejected an argument that cross-examination of the informant who purchased cocaine from the defendant was impermissibly curtailed. The Court observed that the defendant had numerous opportunities to attack the witness, and noted that a Trial Judge has discretion to exclude cumulative evidence even though the evidence is offered to impeach an important witness. See also *United States v. Kizeart*, n59 discussed in the Editorial Explanatory Comment, *§ 403.02[15]*. In *United States v. Williams*, n60 a long drug conspiracy trial, prisoner witnesses testified that they had been separated in jail and had no opportunity to coordinate their testimony, but the defendants found out that the witnesses had in fact been assigned for a year to a unit in which they could mingle 16 hours a day. The Trial Judge refused to admit this evidence, on the ground that it was merely cumulative of evidence that the witnesses had been let out of their cells for an hour each day in which they could freely mingle. Vacating and remanding for further proceedings on a motion for new trial, the Court held that there was a significant difference between one and 16 hours daily freedom in coordinating testimony, and therefore in the impeaching effect of the evidence, so it was not merely

cumulative.

United States v. Koessel, 706 F.2d 271 (8th Cir. 1983) : The Court found no error in a cocaine possession case in limiting the defense to three character witnesses.

United States v. Scholl, 166 F.3d 964 (9th Cir. 1999) : Appealing convictions for filing false tax returns and currency structuring, the defendant contended that it was error to limit him to three character witnesses. The Court found no error in the Judge's reasoning that additional character witnesses would be cumulative under the circumstances. In *United States v. Ives*, n61 the Court said it was error (but harmless) to reject defense evidence of past mental condition in support of an insanity defense and emphasized that Judges should not be quick to exclude (as cumulative) evidence of medical history that supports such a defense.

United States v. Shelton, 736 F.2d 1397 (10th Cir. 1984) : The Court held it was not an abuse of discretion to reduce the number of defense witnesses from 78 to five where each witness would have said the same thing -- i.e., the defendant did not ask for kickbacks and none were paid -- even though the defendant was charged with 177 counts of mail fraud and extortion.

United States v. Johnson, 730 F.2d 683 (11th Cir. 1984) : Upholding convictions involving the filing of false statements with a federal agency, the Court affirmed a ruling that the defense could only present three character witnesses to testify as to a government witness' character for untruthfulness.

[24] Defendant's Exculpatory Evidence

United States v. Reynolds, 268 F.3d 572 (8th Cir. 2001) : The Court affirmed convictions for dealing in stolen property, finding no error in the exclusion of evidence that syringes were found in the vehicle of a cooperating witness. Because the witness admitted stealing property, the evidence, which tended to show he stole to support his drug habit, was irrelevant on the issue of whether the witness stole it alone or with the defendant. The Court also found no error in refusing to admit the syringes to impeach the witness's testimony, since the evidence was cumulative of the impeachment evidence offered, including a prior drug conviction and purchases of methamphetamine with a fraudulent credit card. In *United States v. Flaherty, 76 F.3d 967 (8th Cir. 1996)* , the defendant, who owned the business that was destroyed by two deliberately set fires, argued that a high school student, T.E.H., set the fire in retaliation for being fired by the defendant, and as part of a long-standing dispute with the defendant's son. The defendant proffered evidence that T.E.H. had started a fire in the defendant's son's locker three months before the defendant's business was destroyed. Affirming a conviction for aiding and abetting arson, the Court found no abuse of discretion in exclusion of the evidence, noting that at the time of the ruling, the defendant had made only a "weak" offer of proof, i.e., a dismissed arson charge as to the locker incident. Moreover, the fire in the locker was lit with a match while the fires at the defendant's business were "of more sophisticated origin." The dissenting Judge argued that the evidence of the locker fire was relevant to prove that someone else did the crime, and that the evidence would not have influenced the jury to decide the case on an improper basis.

United States v. Spencer, 1 F.3d 742 (9th Cir. 1992) , *amended* (9th Cir. 1993): The defendant was charged with felon firearm possession after a gun was found in a search of a car in which he was a passenger. When Miller, the owner of the car, was arrested five days later, a gun was found in the car he was driving. Pursuing a theory that the gun charged to him belonged to Miller, the defendant offered police reports of Miller's arrest to show that Miller possessed a gun similar to the one attributed to the defendant. A divided Court held there was no error in excluding the police

reports under *Rule 403*. The dissenting Judge argued that the reports clearly were probative of mistaken identity and that there was no reason to believe that evidence relating to Miller would have confused the issues, misled the jury, or prejudiced the government, and that the Court was perpetuating "an increasingly common double-standard in criminal cases -- a standard that allows prosecutors inordinate leeway with respect to the introduction of evidence harmful to the defendant while precluding defendants from introducing evidence that would tend to establish their innocence."

[25] Dog Sniff Evidence

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999) : Customs officials boarded the defendants' nearby vessel after bales of cocaine were found floating on the high seas. They found no drugs, but a drug-detecting dog gave a positive alert. Affirming, the Court noted that opinions indicating that a positive dog sniff is not probative because most of the currency in the United States is contaminated by trace amounts of cocaine were "irrelevant" because the dog in this case was sniffing a vessel, not currency. The possibilities that the dog might have alerted to a different drug than the cocaine found floating in the ocean, or to a drug contamination occurring months previously, went only to the weight of the evidence. While the evidence of a positive dog sniff was detrimental to the defendants' case, this was not "unfair" prejudice within the meaning of *Rule 403*. In *United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995)* , the Court affirmed convictions arising from a conspiracy to launder drug money, holding that evidence that a drug-detecting dog alerted to the presence of drugs in bundles of cash brought to local banks by the conspirators was properly admitted. Although the probative value of a dog's positive alert is subject to question, the Court reasoned that a trained dog's alert has some probative value, and the dog's frenzied reaction in this case was caused by more than a mere trace of contamination. In addition, several human witnesses detected a funny smell on the money. The Court also observed that the defendant called experts who questioned the protocol used by the dog's handler.

United States v. Carr, 25 F.3d 1194 (3d Cir. 1994) : The Court held in a money laundering prosecution that evidence, including the reactions of drug-sniffing canines, was sufficient to show that the defendants knew the money involved was derived from illegal drug trafficking. One Judge believed that unrefuted studies indicating a trained dog will alert to all bundles of used currency, because a substantial portion of currency now in circulation is tainted with controlled substances, mean that it is not reasonable to infer that a person in possession of used currency bundles was a drug trafficker or associated with one, and that it is unfairly prejudicial to admit dog-alert evidence.

United States v. Buchanan, 213 F.3d 302 (6th Cir. 2000) : In a drug conspiracy case, the prosecution was permitted to introduce evidence that dogs trained to detect the scent of narcotics had reacted positively to currency seized from the defendants. A majority of the Court concluded that there should be a presumption against the admissibility of dog sniff evidence -- because of the widespread contamination of currency with narcotics residues and the likely prejudicial effect of the evidence -- and that admission of the evidence was an abuse of discretion in this case, but held that the error was harmless.

United States v. Hubbard, 61 F.3d 1261 (7th Cir. 1995) : In a drug trafficking prosecution, the government introduced evidence that after the defendant was arrested a narcotics detection dog alerted to the scent of narcotics on a speaker cover camouflaging a secret compartment in the back of the defendant's vehicle. Agreeing that the canine alert was presumptively inadmissible to show that the defendant had trafficked in cocaine 17 months earlier, the Court held nevertheless that the evidence was relevant to rebut the defendant's contention that the compartment had been used solely to carry cash from his gas stations, and that the existence of innocent explanations for the dog's alerting did not make the evidence unduly prejudicial.

[26] Drugs; Drug and Alcohol Use

[a] Civil Cases

Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990) : The plaintiff in a product liability action alleged that his decedent was killed in a rollover accident caused by a defective axle in the vehicle she was driving. The Court reversed a judgment for the plaintiff, holding that the Trial Judge had not properly weighed probative value and prejudicial effect in excluding evidence relating to the decedent's alcohol consumption and blood alcohol level.

Burke v. Spartanics Ltd., 252 F.3d 131 (2d Cir. 2001) : In a product liability action by a worker whose fingers were amputated in a metal shearing machine, the plaintiff's pretrial motion to preclude evidence of his illegal drug use was granted after he agreed not to pursue a damages theory based on his increased drug use in the aftermath of the accident. However, at trial his psychiatrist, answering a cross-examination question concerning the number of sessions conducted with the plaintiff, referred to the plaintiff's "increasing use of marijuana and alcohol." The Court held there was no abuse of discretion when defense counsel immediately followed with further questions about the plaintiff's preaccident drug use. The psychiatrist, not the defense, had opened the door to the inquiry, and the Trial Judge gave appropriate limiting instructions to minimize the danger of unfair prejudice. In an investor's action against his broker for selling securities to satisfy a margin call in October 1987, *Conway v. Icahn & Co., 16 F.3d 504 (2d Cir. 1994)* , the defendant sought to introduce records that the plaintiff had been hospitalized in 1978, 1986, 1987, and 1988 for alcohol abuse, to show that he was incapable of making investment decisions during the relevant period. The Court held there was no abuse of discretion in admitting the 1987 records, since they related to hospitalization immediately after the relevant period, and in excluding the other records, which would have been more prejudicial than probative.

Estate of Larkins v. Farrell Lines, Inc., 806 F.2d 510 (4th Cir. 1986) : In an action by a sailor's estate against a shipowner, the Court held that evidence of the sailor's prior alcoholism was relevant to the cause, severity, and treatment of epileptic seizures, to his complaint of medical malpractice, and to the allegations of the shipowner's negligence in failing to take special precautions in his behalf.

Harless v. Boyle-Midway Div., 594 F.2d 1051 (5th Cir. 1979) : In a wrongful death action resulting from a youth's death from inhaling a Freon propellant in a household product, the Court said that evidence that the youth used marijuana should not have been admitted on the issue of the value of the loss sustained by the mother, since it was more prejudicial than probative.

Grimes v. Mazda North Am. Operations, 355 F.3d 566 (6th Cir. 2004) : In a product liability action against the manufacturer of a truck involved in a rollover accident, an important question was whether the plaintiff was wearing a seatbelt at the time. The plaintiff testified that she always wore a seatbelt and was wearing one at the time of the accident. But when she was brought to the hospital after the accident, she told hospital personnel that she had not been wearing a seatbelt. Affirming a judgment for the defendant, the Court found no abuse of discretion in admitting evidence that the plaintiff had consumed alcohol, marijuana, and cocaine before the accident. It reasoned that the evidence would help the jury sort out which of the plaintiff's accounts of seat belt usage was accurate, since alcohol or drug use before the accident "could have impaired plaintiff's memory of the evening or caused her to not use a seatbelt even if she would normally use it." In *Diamond v. Howd, 288 F.3d 932 (6th Cir. 2002)* , a civil rights action against a police officer for an illegal arrest, the Court held that there was no abuse of discretion in admitting an audiotape of the arrestee's hysterical telephone conversation with a police dispatcher. The tape showed the arrestee's state of mind prior to the officer's arrival and "was no more prejudicial than [the officer's] account of her drunken behavior."

Jenkins v. Chrysler Motors Corp., 316 F.3d 663 (7th Cir. 2002) : Affirming a judgment for a truck manufacturer

in a suit by a plaintiff injured by a fire while sleeping in a truck, the Court found no abuse of discretion when evidence of the plaintiff's past alcohol use was admitted. A pretrial motion *in limine* had excluded evidence of the past alcohol use and drunk driving convictions, but at trial the plaintiff's father testified that before the fire the defendant was a happy person with a "twinkle in his eye" and afterwards he was depressed. The Court held that the alcohol evidence was admissible because it "purportedly showed that he couldn't have been all that happy before, either." The father's testimony opened the door to the alcohol evidence. In a personal injury action arising from an automobile accident, *Mankey v. Bennett, 38 F.3d 353 (7th Cir. 1994)* , the defendant sought to introduce evidence of the plaintiff's drug and alcohol abuse and expert testimony regarding the effect of such abuse on the plaintiff's life expectancy and earning capacity. The Trial Judge excluded the expert testimony because the expert had not been listed on the pretrial order and excluded the substance abuse evidence. Affirming a judgment for the plaintiff, the Court upheld exclusion of the expert testimony and held that without the expert testimony, any probative value of the substance abuse evidence was substantially outweighed by the danger of unfair prejudice.

Simco v. Ellis, 303 F.3d 929 (8th Cir. 2002) : The Court affirmed a judgment for the plaintiffs in an automobile accident case, finding no abuse of discretion in the exclusion of evidence that the driver of a tractor-trailer involved in the accident had ingested cocaine on the morning of the accident. The Trial Judge had found that the drug test was incomplete and the results unreliable, and that there was no evidence that the driver was intoxicated or impaired at the time of the accident. In a product liability case brought by a passenger who was injured while riding in a vehicle manufactured by the defendant, *Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993)* , the Court affirmed a judgment for the defendant, holding that evidence of the plaintiff's cocaine and marijuana use was properly admitted as a possible cause for the aggressive and hostile behavior that the plaintiff attributed to the accident. In *O'Dell v. Hercules, Inc.*, n62 an action for personal injuries from exposure to a toxic landfill, the defendant called one plaintiff as an adverse witness and asked about his use of marijuana and cocaine. The Court held there was no abuse of discretion, as the evidence had some tendency to indicate the plaintiff's attitude to risks from exposure to toxic chemicals, and in the circumstances was not harmfully prejudicial.

Phillips v. Hillcrest Medical Center, 244 F.3d 790 (10th Cir. 2001) : In a medical malpractice action alleging improper diagnosis and treatment in a hospital emergency room, the Court found no abuse of discretion in the admission of evidence that the patient failed to inform the defendants of his prior drug use. This failure to give a complete medical history was clearly relevant to the defense of contributory negligence, and any prejudicial effect did not unfairly and substantially outweigh the probative value.

Fitzgerald v. McDaniel, 833 F.2d 1516 (11th Cir. 1987) : Affirming a judgment for an arrestee in a suit alleging excessive force, the Court upheld the exclusion as unduly prejudicial of evidence of marijuana cultivation as well as threats allegedly made by the plaintiff to the arresting officer.

[b] Drugs; Drug and Alcohol Use -- Criminal Cases

United States v. Carlos Cruz, 352 F.3d 499 (1st Cir. 2003) : The Court affirmed drug-trafficking convictions, finding no abuse of discretion in the admission of testimony from an arresting officer that the site of the incident in question was a drug point. The evidence "was probative not only to explain [the agent's] presence at the scene but also to corroborate the inference that [the defendants] were involved in a drug-trafficking scheme ... . So understood, the district court could have concluded that the prejudice caused by such testimony was not unfair; it was, instead, merely the negative result of the testimony's probative value." In a drug conspiracy case, *United States v. Gonzalez-Vazquez, 219 F.3d 37 (1st Cir. 2000)* , the Court found no error in the admission of testimony from a police officer that he had arrested the defendant for a traffic violation as the defendant left the housing project where the drug activity occurred, and the defendant was found to be carrying drug paraphernalia. The testimony was relevant because it suggested that the

defendant was a member of the drug ring at the housing project and the evidence did not create any "unfair" prejudice within the meaning of *Rule 403*.

United States v. Ruggiero, 934 F.2d 440 (2d Cir. 1991) : The Court affirmed convictions for conspiring to obstruct a grand jury investigation into the former whereabouts of a deceased narcotics fugitive, holding there had been no abuse of discretion when an FBI agent testified on redirect that many of those who attended the fugitive's memorial service, including the defendants, had been arrested for drug offenses. After defense counsel suggested repeatedly on cross-examination that the FBI acted improperly in observing the service, it was proper to correct this misimpression by testimony as to the reasons for the surveillance, including prior arrests. The Court also held that evidence of the fugitive's narcotics activities was relevant to the defendants' motives for conspiring to obstruct justice; it was not an abuse of discretion to determine that this probative value outweighed any possible prejudicial effect of guilt by association.

United States v. Blandina, 895 F.2d 293 (7th Cir. 1989) : In a tax evasion prosecution, the government offered evidence of large marijuana transactions involving the defendant. The Court held that the evidence was clearly relevant in a "net worth" case, where the government was required to prove a likely source of income; the Trial Judge had made a finding that the witness was credible before allowing him to testify and had given a careful instruction about the limited purpose for the evidence, which abated any possible unfair prejudice.

United States v. Lupino, 301 F.3d 642 (8th Cir. 2002) : An officer testified that he was alone and out of uniform when he encountered the defendant the morning after the charged assault and the defendant asked if he were interested in buying some "smoke." Not wishing to effect an arrest without his weapon, handcuffs, or backup, he said he was interested in buying marijuana and would be back, but when he returned, the defendant was no longer there and was shortly thereafter found hiding in a neighbor's house. The Court held that the officer's testimony was relevant to show the factual context for the arrest and as evidence of consciousness of guilt, but depiction of the defendant as a drug dealer was unnecessary and prejudicial: "[b]y disclosing the content of the conversation, the government risked creating an undue tendency for the jury to reach a decision on an improper basis." However, the error in permitting mention of the marijuana was harmless. In *United States v. Gundersen, 195 F.3d 1035 (8th Cir. 1999)* , the defendant was charged with conspiring to possess methamphetamine with intent to distribute after he showed up for a controlled delivery. The Court found no error in asking the defendant on cross-examination whether he used the drug. Use would have been relevant, because "[t]he fact that one uses a certain drug places one in proximity to that drug and can make it more likely than it otherwise would be, depending on the other proof in the case, that the same person was dealing in the drug."

United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) : The Court reversed a conviction for felon firearm possession because marijuana paraphernalia and methamphetamine recipes found in the defendant's truck at the time of his arrest were erroneously admitted. It stated that "[t]he reasons the Courts have been willing to assume that *drug-trafficking* is relevant to the question whether the defendant possessed a firearm do not support drawing a connection between the possession of marijuana for personal use and the possession of a firearm." The recipes by themselves were not closely linked to immediate illegal activity, and they were likely to prejudice the defendant by connecting him to the highly charged public issue of drug trafficking.

United States v. Espinoza, 244 F.3d 1234 (10th Cir. 2001) : Affirming a marijuana conviction, the Court held that evidence that the defendant's wife had a pending drug charge and accompanied the defendant when he previously transported drugs was properly admitted as probative of the defendant's knowledge that drugs were in his truck. However, it held that it was error (but harmless) to admit evidence that the defendant's sons had drug convictions and

one had escaped from a halfway house. There was no suggestion at trial that the sons were involved in the drug transaction at issue. Moreover, even if the evidence had some tangential relevance, that was substantially outweighed by the prejudicial impression that most if not all members of the defendant's immediate family were involved in drug trafficking.

[27] Employment Discrimination Cases

[a] Administrative Determinations

Coleman v. Home Depot, Inc., 306 F.3d 1333 (3d Cir. 2002) : The Court affirmed a judgment for an employer sued by a discharged African-American female employee, finding no abuse of discretion in the exclusion of an EEOC right-to-sue letter. The Court noted that the admissibility of such reports under the hearsay exception for public records was dependent in part on an analysis of the *Rule 403* factors. Although some prior decisions intimated that the probative value of EEOC determinations almost always outweighs any prejudicial impact, the Court noted that the other *Rule 403* factors could be dispositive, especially where the report has low probative value. In this case, the "proof value could be said to be low, given the fact that it would have been introduced to the jury after all the evidence had been offered (which evidence was at odds with the EEOC report), and was more conclusory than factual in nature," while "a great deal of time would have had to have been consumed to counter the report's conclusion about the fate of other employees, male and female."

Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995) : In a former employee's Title VII action alleging constructive discharge as a result of sexual harassment, the Court held there was no abuse of discretion in excluding a report by a state agency concluding that the plaintiff was not entitled to unemployment benefits because she left her job voluntarily. The parties to the report were available to testify at the trial, and the jury might have placed undue weight on the official report.

Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) : In an employment discrimination case, the Court indicated there was no error in excluding the plaintiff's evidence of an administrative settlement indicating that another woman had been paid discriminatorily, since this shed almost no light on whether the plaintiff's salary resulted from discrimination. However, the Trial Judge should not have excluded as irrelevant a letter written by a government contract compliance officer to the defendant that gave notice of deficiencies discovered in an on-site review. The letter might have shown widespread discrimination and thus would have tended to show that justifications for salary differences were pretextual.

White v. Honeywell, Inc., 141 F.3d 1270 (8th Cir. 1998) : The Court reversed a judgment for the employer in a Title VII action on other grounds, but it found no abuse of discretion in the admission of evidence regarding the outcome of three administrative charges brought by the plaintiff. Admission or exclusion of EEOC determinations is a matter left to the sound discretion of the Trial Judge, and here they were relevant to an expert diagnosis of the plaintiff's mental condition, the sequence of events, and the plaintiff's testimony of improper acts on behalf of the defendant. The plaintiff was given an opportunity to discredit the agency determinations, and the jury was warned not to consider the agency findings as binding.

Beachy v. Boise Cascade Corp., 191 F.3d 1010 (9th Cir. 1999) : In a disability discrimination case, the Judge admitted a state agency determination that there was insufficient evidence to continue its investigation of the plaintiff's case without balancing probative value and prejudicial effect of the determination, apparently feeling compelled to admit the evidence by *Plummer v. Western Int'l Hotels Co.*, n63 which held that probable cause determinations were *per*

se admissible in employment discrimination cases. The Court held that the two types of determination are distinguishable, since there is much greater risk of prejudice to the plaintiff's case with a final agency determination of insufficient facts than to the defendant's case with a finding of probable cause, which is not a finding of discrimination but only a preliminary finding. In this case, however, the failure to balance was at worst harmless error.

Walker v. NationsBank of Fla. N.A., 53 F.3d 1548 (11th Cir. 1995) : In a Title VII and ADEA action by a discharged bank manager, the Court held there was no abuse of discretion in excluding a letter from the EEOC finding reasonable cause to believe the bank had discriminated. Although it is well established in the Circuit that EEOC determinations are generally admissible in bench trials, the Judge was properly concerned in this jury trial that the determination by another EEOC office that there was no probable cause would shift the jury's focus away from the issue of whether the bank had discriminated and towards the procedural adequacy of the two investigations.

[b] Employment Discrimination Cases -- Balancing Required

Lyons v. England, 307 F.3d 1092 (9th Cir. 2002) : The Trial Judge granted summary judgment for the Secretary of the Navy in a suit by male African-American military veterans alleging that they were subjected to disparate treatment because of their race and were subjected to retaliation in violation of Title VII. Affirming in part and reversing in part, the Court held that although pre-limitations period claims are time-barred under *AMTRAK v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)* , it looked to the Supreme Court's decision in *United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)* , and concluded that untimely evidence of the employer's discriminatory acts may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, subject to *Rule 403*.

Heno v. Sprint/United Mgmt. Co., 208 F.3d 847 (10th Cir. 2000) : Remanding an employment discrimination action, the Court observed that if a fake employment application incorporating sterotypes of African-Americans, which was discovered on the desks of one or more of the defendant company's employees, were again offered by the plaintiff, the Judge should require a foundation showing a causal nexus between the document and the defendant company (particularly through the defendant supervisor) that is substantial, because of the highly prejudicial nature of the document. If such a foundation is laid and the Judge determines that the probative value of the document is not substantially outweighed by the danger of unfair prejudice, it should be admitted in its entirety rather than merely referred to as a "one page racially defamatory document," as was done at the first trial; such a reference, made repeatedly, served only to heighten the jury's view of the document's importance.

[c] Employment Discrimination Cases -- Evidence of Discrimination Admissible

Fredrick v. District of Columbia, 254 F.3d 156 (D.C. Cir. 2001) : Affirming a judgment for black police officers in a Title VII action alleging discrimination in assignment and promotion, the Court upheld the admission of evidence regarding the actions of a lieutenant who was allegedly responsible in part for the discrimination in dealing with another black officer involved in an altercation with a white officer. The evidence was relevant to show racial bias on the part of the lieutenant and there was little danger that evidence concerning this isolated incident would lead to a "mini-trial" or would confuse the jury.

Cummings v. Standard Register Co., 265 F.3d 56 (1st Cir. 2001) : In an age discrimination case brought by a discharged employee, the Court found no abuse of discretion in the admission of testimony by two other former employees of the company that they had been terminated after having been told they were "too old" and that the company needed to make room for "young blood." Although the testimony covered different time periods, different

supervisors, and different areas of the company from the plaintiff's situation, it was particularly relevant because the defendant had introduced evidence of its national corporate practices of nondiscrimination. Because the plaintiff had more direct evidence of age discrimination, the Court found that the anecdotal testimony was not so central to his case that it overwhelmingly influenced the jury's verdict and thus its probative value was not substantially outweighed by the potential for prejudice. In *Kelley v. Airborne Freight Corp., 140 F.3d 335 (1st Cir. 1998)* , the Court affirmed a judgment for the plaintiff, who alleged that he was fired due to age discrimination, finding no error in the admission of age-related comments made by supervisors in the company. These statements were relevant to show an age-related basis for the plaintiff's termination, and were also probative to show a "discriminatory atmosphere" at the company.

Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997) : Although the Court affirmed a judgment for the defendant in a sexual harassment case, it found that the Trial Judge excluded relevant evidence in ruling that sexual harassment of other women employees of the defendant would not be admitted unless the plaintiff had personal knowledge of the harassment. The issue of a hostile workplace involves the totality of the circumstances, which includes evidence of harassment directed at employees other than the plaintiff. The Court criticized the Judge's approach to *Rule 403*, treating evidence as unfairly prejudicial when it establishes the defendant's liability, rather than only when it had an undue tendency to lead to the case being decided on an improper basis.

Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) : In a sexual discrimination case brought by a female police officer, the Court held there was no abuse of discretion in admitting evidence of other women's experiences at the police department and of derogatory comments made by male officers about women generally, even though the plaintiff was not aware of any of the alleged harassment until after she commenced suit. The evidence created a basis for an inference that the plaintiff was targeted for abuse because she was a woman and gave reason to infer that the department knew or should have known not only what was happening to its female officers but also that its written sexual harassment policy was patently ineffective. Because the evidence was highly probative for those purposes, it was unlikely that any putative prejudice from it would be unfair or would outweigh its value. In an age discrimination case, *Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995)* , the Court affirmed a judgment for the plaintiff, holding that statements by the plaintiff's supervisor indicating an age animus were properly admitted. "Because discriminatory comments by an executive connected with the decisionmaking process will often be the plaintiff's strongest circumstantial evidence of discrimination, they are highly relevant and a Trial Court's decision to admit such evidence should ordinarily be upheld."

Robinson v. Runyon, 149 F.3d 507 (6th Cir. 1998) : In a Title VII action by a Postal Service employee who alleged that she had been subjected to a racially discriminatory discharge, the Magistrate Judge excluded evidence that a fake employment application incorporating a litany of racial stereotypes of African-Americans had been widely circulating through the facility where the plaintiff worked and that no disciplinary action had been taken. Reversing, the Court found an abuse of discretion, since the evidence was relevant to show the racially hostile attitudes in the office and the racial insensitivity among the supervisors within the office, while the racially inflammatory nature of the evidence did not give rise to prejudice unfair in the context of a race discrimination claim. In an age discrimination case, *Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994)* , the Court held it was no abuse of discretion (or was harmless error) to admit evidence that the plaintiff's supervisor had said two decades earlier, in his teen years, that he wanted to put older people in "a concentration camp," and that some years later he had said he did not want to go to a Thanksgiving Day dinner where his grandmother would be because he "[did not] like to be around old people." The comments were probative of the supervisor's state of mind and reflected a deep-rooted ongoing pattern that was anything but isolated.

Deters v. Equifax Credit Information Servs., 202 F.3d 1262 (10th Cir. 2000) : The plaintiff in a sexual harassment case alleged that she had been harassed by three male coworkers and her male supervisor. The plaintiff offered evidence

that one of the men who harassed her also harassed a female coworker, including a videotape of this man describing how he leered at the other female coworker during a cab ride. Although the company argued that this harassment was different in nature, the Court found that it related to events that occurred about the time of the plaintiff's harassment and was relevant to show notice on the part of the company. In *McCue v. Kansas Dep't of Human Resources, 165 F.3d 784 (10th Cir. 1999)* , the plaintiff brought a Title VII retaliation action, arguing that she was fired for having filed a claim of sexual harassment. The Court found no abuse of discretion in the admission of evidence that the plaintiff had been sexually harassed by her supervisor. The evidence was probative to rebut the defendant's claim that the plaintiff had been fired for poor performance, since it supported the plaintiff's claim that her decreased productivity was the direct result of the ongoing sexual harassment. Although the evidence of sexual harassment was highly prejudicial, its prejudicial effect did not substantially outweigh its probative value.

[d] Employment Discrimination Cases -- Evidence of Discrimination Excludable or Required To Be Excluded

Annis v. County of Westchester, 136 F.3d 239 (2d Cir. 1998) : The plaintiff brought a civil rights suit against the County and two County police officials for gender discrimination while she served as a police officer. She had joined a City police force in 1977; in 1981 one of the officials became her superior on the City force, and in 1984 both the plaintiff and the official joined the County force. The statute of limitations period for the plaintiff extended back only to 1990, but she introduced evidence of discriminatory practices on the City force in 1977-81 to show notice to the official, and evidence of practices on the City and County forces in 1981-90 to show a continuing violation of her rights. The Court held that the 1977-81 evidence should have been excluded because it was only minimally probative and "fiercely prejudicial" in leading the jury to associate the official with deplorable conditions existing before his tenure. As to the 1981-90 evidence, the Court found that it was insufficient to establish a continuing violation and, being outside the limitations period, it was irrelevant to show the source of the plaintiff's emotional distress; moreover, it would naturally prejudice the jury's views with regard to the events occurring within the statute of limitations. Thus, admitting the evidence was an abuse of discretion, but the errors were harmless in the circumstances.

Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) : In a sexual discrimination case brought by a female police officer for harassment occurring from 1987 to 1992, the Court held it was an abuse of discretion, but harmless error, to admit evidence of alleged acts of discrimination that occurred in 1979-81, because they were too distant in time from the events at the center of the department's liability. In *West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995)* , a worker suing for injuries from a racially hostile work environment attempted to prove that while he was attending a high school gym meet, his truck was vandalized when a freshly killed deer's head was tied to its hood. The Court held there was no abuse of discretion in excluding the evidence, since the incident occurred more than 40 miles from the workplace and there was no direct showing that linked the defendant's employees to it, although some of them enjoyed deer hunting, they discussed hunting at work, and one of them ate venison at work. Thus, the probative value was slight, while the fact that the incident was appallingly grotesque and abusive of the plaintiff created a risk of inducing unfair bias in favor of him and against the defendant.

Williams v. Nashville Network, 132 F.3d 1123 (6th Cir. 1997) : In a suit alleging race discrimination in refusing to hire an African-American, the Court found no error in the exclusion of testimony concerning rejection of another African-American's application. That applicant had applied for a different position, with different qualifications and hiring requirements; he applied six years prior to the plaintiff; and his application was rejected by different personnel.

Manuel v. City of Chicago, 335 F.3d 592 (7th Cir. 2003) : In a Title VII action, the Judge ruled *in limine* that a witness for the plaintiff could only testify about an allegedly racist supervisor's treatment of the plaintiff. At trial, the supervisor testified that he had not treated either the plaintiff or "anyone" differently because they were

African-American. The Judge agreed that this opened the door to evidence regarding the supervisor's treatment of other employees, but out of a concern for "trying cases that ... have no relationship to this," instructed the jury to strike the question and the supervisor's answer about his treatment of others, rather than admitting the plaintiff's evidence. Affirming a judgment for the City, the Court found no abuse of discretion in the initial *in limine* ruling, since the lack of specific examples in the plaintiff's offer of proof significantly limited the probative value of the offered evidence, while labeling the supervisor a "racist" had the potential for being unfairly prejudicial, and the significant prospect of engaging in a series of mini-trials over the other accusations of discrimination had the potential for confusing or misleading the jury. Even after the door was opened by the supervisor's testimony, the potential for undue delay, confusion, and prejudice remained, so the decision to continue to exclude the evidence was not an abuse of discretion. In *Speedy v. Rexnord Corp., 243 F.3d 397 (7th Cir. 2001)* , a union steward alleged that he had been fired in retaliation for accompanying two union members when they went to the EEOC office to file sex discrimination charges against the employer for harassment by their supervisor. Affirming a judgment for the defendant, the Court found no abuse of discretion in the exclusion of evidence that two other employees had made complaints against the supervisor and that the plaintiff had confronted the supervisor and met with management in relation to those complaints. The excluded evidence would have been relevant if the plaintiff had based his claim on the part of the statute making it unlawful to retaliate for "oppos[ing]" an unlawful employment practice, but his allegations implicated the part barring retaliation for "participat[ing]" in a proceeding, and the litigation had been conducted along that theory, for which the evidence had little probative value. At the same time, the evidence could have been highly prejudicial, with the jury confused into thinking that the impropriety of the supervisor's actions was the issue rather than the employer's retaliation. In *Roy v. Austin Co.*, n64 the plaintiff was fired after he obscenely insulted the lead player for his firm's most important client at a critical meeting. In the plaintiff's Title VII suit, the Trial Judge excluded evidence that four white employees of the defendant had been transferred rather than fired after disagreements with clients. The Court found no abuse of discretion, in light of the finding below that, since the other employees had been disciplined by different supervisors and had not held the same position as the plaintiff, the evidence was "irrelevant and likely to confuse the jury."

Williams v. City of Kansas City, Mo., 223 F.3d 749 (8th Cir. 2000) : Affirming in part a judgment for the plaintiff in a hostile work environment case, the Court held it was an abuse of discretion (but harmless error) to admit evidence that the plaintiff's supervisor had made a sexually explicit comment to a co-worker and had two prior consensual relationships that began on the job. The comment to the co-worker took place after the plaintiff had left the City's employ, so it was irrelevant to the plaintiff's state of mind in failing to use the City's internal grievance procedure and to whether the City had an effective sexual harassment policy in place while the plaintiff was employed. The supervisor's prior relationships were at best minimally relevant, since both took place on other jobs, one was with a customer rather than a co-worker, and the one with a co-worker took place 19 years previously. Whatever probative value the evidence might have was outweighed by its inflammatory nature. In *LaClair v. City of St. Paul, 187 F.3d 824 (8th Cir. 1999)* , a sexual harassment action brought by a police officer, the plaintiff sought to introduce evidence of alleged retaliation by the defendant after she had reported prior harassment incidents. The Trial Judge excluded the evidence as part of a blanket ruling against all evidence regarding the defendant's policy or custom prior to a date 11 months before the charged incident, a date when the police department's new Chief took office. Although the Court reiterated that "proof of incidents other than those actually in suit should, in general, be freely allowed in discrimination cases," it found no abuse of discretion in this case because of special circumstances. First, because most of the evidence related to two incidents in which impartial decisionmakers had found against the plaintiff, it would not only have taken considerable time to bring out the facts of the incidents but the jury would also learn of the unfavorable results. Furthermore, the fact that the incidents occurred during the administration of a prior Chief was important. In *Kline v. City of Kansas City, Mo., Fire Dep't*, n65 an employment discrimination action brought by female employees of the Fire Department, the Court held that evidence of incidents predating the limitations period was properly excluded with respect to a plaintiff's disparate treatment claim. Because the incidents involved isolated acts, they could not be part of a continuing violation relevant to the claim. Similar evidence from another plaintiff was properly excluded on her hostile environment claim because the isolated nature of the acts kept them from being parts of a continuing violation. In *Easley v. American Greetings Corp.*, n66 when an employee complained about sexual harassment by her supervisor, the employer

investigated and fired the supervisor within five days. The employee and the replacement supervisor did not get along -- he was a friend of the man fired -- and when she was eventually terminated herself, allegedly for poor performance, she sued claiming retaliation for complaining about the harassment. Before trial the Judge granted motions *in limine* to exclude (1) evidence regarding the specific details of the first supervisor's harassment and (2) evidence of overtures made to the plaintiff by the second supervisor before he held that position. Affirming a judgment for the defendant, the Court found no abuse of discretion in exclusion of the first evidence, because the severity of harassment had little probative value on the likelihood of retaliation but it created a risk of unfair prejudice, both in minimizing the employer's prompt and serious response to the complaint and in confusing the plaintiff's harm from the harassment with harm from retaliation. Likewise, there was no abuse of discretion in excluding the second evidence, which had little relevance to the plaintiff's theory that she was fired for making her original complaint and would have opened the door to collateral issues and created a risk of unfair prejudice by confusing the jury about the theory of the plaintiff's claim. In a disparate treatment gender discrimination case, *Callanan v. Runyun*, n67 the Court held there was no abuse of discretion in excluding evidence of other acts of alleged discrimination in the facility where the plaintiff was employed. The evidence consisted largely of generalized, subjective assertions of perceived bias; and to the extent discrete acts of discrimination were identified, they did not involve the plaintiff's own supervisors. In *Slathar v. Sather Trucking Corp.*, n68 the Court held there was no abuse of discretion in excluding evidence that a former human resources manager of the defendant's had told the defendant's director of personnel after the decision to terminate the plaintiff had been made that it was a risky decision because of his age. The evidence was irrelevant because the manager had not participated in the decision and her opinion was offered only after the decision had been made, and the director's response that the company "would take care of it" was too ambiguous to be considered a company admission and did not indicate discriminatory intent. At the same time, the testimony would have been quite prejudicial.

Tennison v. Circus Circus Enters., Inc., 244 F.3d 684 (9th Cir. 2001) : In a suit by casino employees alleging sexual harassment by a co-worker and the employer's failure to take proper corrective action, the Court found no abuse of discretion in the exclusion of evidence about complaints concerning the co-worker made six or seven years before the plaintiffs complained. The evidence of the earlier complaints was relevant to the plaintiffs' contention that the employer was on constructive notice and should have taken more drastic measures in response to their complaints, but determining the facts about the prior complaints might well have resulted in a wasteful "mini-trial" and there was a significant danger that the jury would base its assessment of liability on remote events involving other employees rather than on the recent events concerning the plaintiffs.

Palmer v. Board of Regents of Univ. Sys., 208 F.3d 969 (11th Cir. 2000) : The Court affirmed a judgment for the defendant in an employment discrimination action by a college professor who alleged that she had been denied a permanent appointment because she was Jewish. The Court found no abuse of discretion in the exclusion of evidence of other suits filed against the defendant for discriminating against Jewish people, since they involved different decision-makers, different departments, and different hiring processes from the ones about which the plaintiff complained.

[e] Employment Discrimination Cases -- Other Evidence

Rivera-Torres v. Ortiz Velez, 341 F.3d 86 (1st Cir. 2003) : In an action alleging employment discrimination motivated by political animus, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when evidence was admitted regarding allegations that the Judge had dismissed before trial as time-barred. The evidence was relevant as background for the surviving claims that were being tried, and its probative value was not outweighed by the risk of jury confusion or prejudice. "The dismissed claims involve employment decisions that resulted in inconvenience or brief financial hardship; the surviving claims implicate adverse employment acts that threatened plaintiff's livelihood." In an age discrimination case, *Kelley v. Airborne Freight Corp., 140 F.3d 335 (1st Cir. 1998)* , the Court

affirmed a judgment for the plaintiff, holding there was no error in admitting the defendant's employee relations guidelines, which required managers to take specific steps prior to discharging poorly performing employees. The guidelines were probative because they were not followed in the plaintiff's case, thus rendering less plausible the defendant's claim that the plaintiff was fired for incompetence.

Leopold v. Baccarat, Inc., 174 F.3d 261 (2d Cir. 1999) : The plaintiff claimed she was fired because of her age. The Court found no error in the admission of bigoted comments that the plaintiff had made to co-workers while on the job, including saying to a Jewish co-worker that "they should have made a lamp shade out of you like the rest of your people." The evidence had substantial probative value, because the defendant contended that the plaintiff was fired because of chronic conflicts with other personnel.

Ansell v. Green Acres Contracting Co., 347 F.3d 515 (3d Cir. 2003) : In an age discrimination case, the Court affirmed a judgment for the defendants, finding no abuse of discretion in the admission of evidence that two years after terminating the 45-year-old plaintiff, the foreman hired a 45-year-old man into a position similar to the plaintiff's former position. The Court reasoned that "[e]vidence of an employer's conduct towards other employees has long been held relevant and admissible to show that an employer's proffered justification is pretext." It concluded that the subsequent hiring was admissible not to prove propensity, but to negate the theory that the defendants were trying to get rid of older workers to increase productivity. In *Goodman v. Pennsylvania Turnpike Comm'n, 293 F.3d 655 (3d Cir. 2002)* , the Court affirmed a judgment for a public employee who alleged that the Commission failed to promote him because of his political affiliation. It found no error in the admission of a report of a legislative committee, which indicated that promotion practices at the Commission were not optimum and should be different. The suggestion in the report that the Commission used patronage to make promotions was probative and not unfairly prejudicial.

Brown v. McLean, 159 F.3d 898 (4th Cir. 1998) : The plaintiff, who was terminated from a city job when its functions were combined with another position, claimed reverse discrimination in the elimination of his position and the failure to hire him for the combined position. Affirming a judgment for the defendant, the Court found no abuse of discretion in the exclusion of the city's affirmative action plan. Although one might infer a nexus between the plan and the employment decisions at issue, it was not error to conclude, when there was no other evidence of such a connection, that the prejudicial effect of admitting the plan substantially outweighed its probative value.

Tisdale v. Federal Express Corp., 415 F.3d 516 (6th Cir. 2005) : The Court affirmed a judgment for the plaintiff in a Title VII retaliation case, finding no abuse of discretion in the exclusion of evidence regarding the plaintiff's post-termination employment history. Any probative value of the evidence, which included his being disciplined for misappropriating company property (the offense for which the defendant allegedly terminated him), was outweighed by the prejudicial effect of showing a propensity for misappropriating property.

Hasham v. California State Bd. of Equalization, 200 F.3d 1035 (7th Cir. 2000) : Affirming a judgment that the defendant discriminated against the plaintiff on the basis of his Pakistani national origin, the Court upheld the exclusion of testimony regarding an administrator's friendly interaction with an employee of Iranian descent and an employee married to an Iranian, as well as a photograph of the administrator's son's Bar Mitzvah showing "minority friends." The exclusion "was proper because of the apparent prejudice and lack of relevance to the case such evidence demonstrates."

Sellers v. Mineta, 350 F.3d 706 (8th Cir. 2003) : Affirming a judgment for a former air traffic controller who brought an action alleging sexual harassment and assault against the Secretary of Transportation and a coworker, the Court found no abuse of discretion in the admission of evidence that the FAA issued a letter to a supervisor who

investigated the plaintiff's charges reprimanding the supervisor for inadequately handling the matter. The letter was relevant to show that the FAA did not take adequate steps to respond to the plaintiff's allegations, not to prove that sexual harassment had actually occurred.

Cadena v. Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a hostile environment sexual harassment case, holding there was no abuse of discretion in admitting evidence that the harassing supervisor and another manager in the office were having an affair and that the manager had lied about the relationship in her deposition. The evidence was relevant to indicate why the plaintiff did not report the harassment to the manager, even though she was the plaintiff's only female supervisor, and the danger of prejudicing the jury did not substantially outweigh the probative value of the evidence.

Lambert v. Fulton County, Ga., 253 F.3d 588 (11th Cir. 2001) : Affirming a judgment for county employees in a reverse discrimination case, the Court held that the probative value of newspaper articles and a television broadcast about the disciplining of the plaintiffs was sufficiently great on the issue of public humiliation to outweigh any prejudicial effect.

[f] Employment Discrimination Cases -- Prior Misconduct of Employee

Janes v. Wal-Mart Stores, Inc., 279 F.3d 883 (9th Cir. 2002) : Affirming a judgment for a former employee who alleged breach of an implied-in-fact employment contract, the Court found no abuse of discretion in the exclusion of evidence that the employee was fired from a different job eight years earlier for stealing cigarettes. The defendant offered the incident to prove that the plaintiff knew he could be fired for stealing, but that proposition was undisputed. The Court found that the evidence posed the risk of unfair prejudice because the jury might have concluded the plaintiff was a person of bad character.

[28] Experiments and Demonstrations

[a] Aircraft

Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408 (3d Cir. 2002) : The plaintiffs, suing for wrongful death in a helicopter crash, alleged that a shaft seal was installed backwards and leaked flammable fluid, which was ingested by an engine as the craft was attempting to land. The defendant manufacturer's expert did tests to determine whether reversed seals would leak. When the defendant sought to introduce videotapes of the tests, the plaintiffs objected that the conditions were not substantially similar to conditions on the helicopter that crashed. The Court found no abuse of discretion in admitting the videotapes, since the expert testified to the substantial similarity of conditions and the plaintiffs presented no evidence, even after being given an opportunity to take late depositions, that differences between the crash and the tests rendered the conditions meaningfully dissimilar.

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994) : The Court upheld admission of expert testimony regarding post-incident tests. Although the tests were not intended to duplicate the airplane landing that injured the plaintiff, the Court found they had probative value in showing what happened during the incident.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) : The Court affirmed a judgment for the manufacturer in an airplane crash case, holding that the defendant's videotape, which was used to demonstrate how ice accumulated and was removed from a plane, was admissible. Seventy-three hours of flight time went into the experiment, 40 hours of that were taped, and a 51-minute, edited film was made. The Court emphasized the Trial

Judge's discretion and the fact that the tape was not offered to reenact the accident or to suggest that the experiment simulated actual events.

Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992) : In a wrongful death action arising out of a helicopter crash, the Court held there was no abuse of discretion in excluding videotape evidence of an experiment conducted by the defendant's expert, as there were substantial dissimilarities from the situation at issue. An experiment used simply to demonstrate the principles used in forming an expert's opinion need not strictly adhere to the facts, but this experiment was also used to demonstrate what the defendant believed occurred in the helicopter's engine.

[b] Experiments and Demonstrations -- Automobiles and Auto Parts

Hall v. General Motors Corp., 647 F.2d 175 (D.C. Cir. 1980) : The Court affirmed a plaintiff's judgment in this product liability suit, upholding a ruling excluding some of the defendant's experimental test results as not having been conducted under circumstances sufficiently similar to the plaintiff's accident.

Jodoin v. Toyota Motor Corp., 284 F.3d 272 (1st Cir. 2002) : In an action for injuries suffered when a light truck rolled over, the Trial Judge rejected evidence that the plaintiffs' expert had tested another Toyota truck to determine its rollover propensity, because there was no foundation that the exemplar was "virtually identical" with the plaintiff's truck. The Court vacated a judgment for the defendant, holding that a "substantial similarity" standard should have been applied and that the plaintiffs had satisfied the standard by testimony from an expert that he had performed a thorough inspection of the tested truck, which was of the same model and year, and detected no evidence of accidents, damage, or modification. In a product liability action, *Fusco v. General Motors Corp., 11 F.3d 259 (1st Cir. 1993)* , a videotape in which the defendant purportedly demonstrated what would have happened had the product failed in the manner contended by the plaintiff was excluded. The Court found no abuse of discretion, as the demonstration was rife with the risk of misunderstanding by the jury. In *Swajian v. General Motors Corp.*, n69 the Court reversed a judgment for the plaintiff in a wrongful death action arising from a rollover accident, but held there was no error in excluding a videotape demonstration prepared by the defendant, as it depicted an experienced test driver knowing what to expect in tests at controlled facilities involving axles that had been rigged to fracture. In *Szeliga v. General Motors Corp.*, n70 the Court affirmed a judgment for an automobile manufacturer, holding there was no error in finding films -- prepared by the manufacturer and offered to support its theory that a wheel fell off because of impact, not because of the loss of lug nuts -- to be more probative than prejudicial. Dissimilarities between experimental and actual conditions went to the weight a jury might give the films, not admissibility.

Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988) : The Court reversed a judgment in a product liability case, finding that a videotape of braking tests performed by the National Highway Transportation Safety Administration should have been excluded. The conditions of the test were not similar to the conditions existing at the time of the accident. The Court also held that a videotape of braking tests made by the company's expert was properly excluded because of insufficient similarities between the test and accident conditions.

Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985) : The Court affirmed a judgment against the defendant in an action by the owner-driver of a car injured in a rollover accident, holding that the Trial Judge properly admitted the plaintiff's film and photographs depicting an automobile similar to the one involved in the plaintiff's accident being dropped onto the driver's side of its roof from an elevation of one foot and also properly excluded the defendant's film illustrating unrestrained occupant movement in a rollover accident. The Court concluded that the plaintiff's film was relevant in that it obviously related to the kind of accident that occurred, while the defendant's involved a different vehicle with a substantially different roof and passenger compartment from the one involved in the

accident. Moreover, the defendant's film portrayed multiple rollovers, rather than a single rollover such as that which occurred in the accident.

Finchum v. Ford Motor Co., 57 F.3d 526 (7th Cir. 1995) : The Court upheld exclusion of a videotape depicting a test conducted by the plaintiffs' expert simulating a rear impact accident. The case is discussed in the Editorial Explanatory Comment, *§ 403.02[12]*. In *Crossley v. General Motors Corp., 33 F.3d 818 (7th Cir. 1994)* , a product liability action arising from a single automobile rollover accident, the Court found no error in the admission of a videotape of rollover sequences involving a General Motors car, even though the car was a different model from that involved in the accident and the conditions of the demonstration were much different from those at the time of the accident. The tape helped illustrate the testimony of a defense expert who testified about the complicated vehicular dynamics of rollover accidents. The Court noted with approval that substantial limitations were imposed on the use of the tape at trial, including: limiting the defendant to one test of the three it sought to show the jury; prohibiting the defendant from stopping the tape during the expert's testimony; inviting the plaintiff to play any portion of the tape during cross-examination of the expert; instructing the jury that the tape was "not intended to be a reenactment of this accident or the cause of this accident"; and prohibiting the tape from going into the jury room.

McKnight v. Johnson Controls, Inc., 36 F.3d 1396 (8th Cir. 1994) : The Court held, in a personal injury action against the manufacturer by the user of a car battery that exploded, that it was an abuse of discretion (but harmless error) to admit evidence of an experiment conducted by the plaintiff's expert, where there were significant differences between the test conditions and the accident. Although the plaintiff argued that substantial similarity was not required where the experiment was intended only to demonstrate scientific principles, the Court noted that the closer the experiment gets to simulating the accident, the more similar the conditions of the experiment must be to the accident conditions. In *Hale v. Firestone Tire & Rubber Co.*, n71 an action for injuries caused by a wheel rim explosion, the Court held that a videotape of an explosion of a wheel rim striking a mannequin was properly admitted, even though the tire was inflated more than the tire involved in the explosion. The fact that the photographer did not retain a tape of six unsuccessful attempts to explode the tire was an issue for cross-examination, not a bar to admissibility. The Court had reversed a plaintiffs' judgment in the first trial of the action because a film was admitted that involved substantially different conditions from those giving rise to the suit. n72

Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996) : Plaintiffs in a wrongful death action alleged that the driver's injuries were caused when a seat belt proved defective in an automobile-train collision. The Court held there was no abuse of discretion in admitting a videotape prepared by the defendant that depicted a collision between a train and an automobile, even though it was substantially dissimilar from the accident. The videotape was introduced for the limited purpose of portraying the forces at work in such a collision, and the jury was specifically instructed not to consider it as a recreation of the accident. The videotape was not inflammatory or misleading when considered with the limiting instructions that were given. In *Pandit v. American Honda Motor Co., 82 F.3d 376 (10th Cir. 1996)* , the Court held there was no abuse of discretion in permitting an expert for the defendants sued for defective design of an automobile warning light to demonstrate the principles of his opinion by showing a videotape of an experiment he had conducted. The jury was repeatedly instructed that the videotape was merely demonstrative of basic principles, so there was no impermissible risk of the plaintiff being unfairly prejudiced by the jury thinking that the expert had recreated the events leading up to the accident. See also *Gilbert v. Cosco Inc.* n73(no abuse of discretion to admit "sled" tests of child restraint to illustrate scientific principles); *Hinds v. General Motors Corp.* n74(no abuse of discretion in excluding the defendant's crash test, where the test was not substantially similar to the accident in question and the defendant proffered no articulable engineering principles that the test demonstrated).

[c] Experiments and Demonstrations -- Computer Animations

Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1996) : In a civil rights action on behalf of a person shot during an armed standoff, the defendants introduced a computer-animated videotape, which tracked the facts as contended by the defendants, showing the decedent being shot in the chest and spinning around and falling face down. The videotape, which ended with a computer animation of the trajectory of the bullet, was offered to illustrate the expert testimony of a forensic animation technologist, who testified that the defendants' version of the facts was consistent with the physical evidence. The Court found no error in the admission of the videotape, since the jury was properly instructed that the animation was designed merely to illustrate the defendants' version of the shooting and to demonstrate how this version was consistent with the physical evidence.

[d] Experiments and Demonstrations -- Criminal Cases

United States v. Lopez-Lopez, 282 F.3d 1 (1st Cir. 2002) : Affirming drug convictions resulting from a seizure of cocaine on a boat, the Court held there was no abuse of discretion when the Trial Judge made a *sua sponte* request for a demonstration as to the use of one of two spotlights used on the night of the arrests. The demonstration was "highly relevant," because the defendants put into dispute the extent to which the spotlight would have permitted the officers to view the defendants' actions. The Court noted that the light was flashed under "controlled conditions," only for a few seconds, only in a corner of the courtroom, and not on any of the defendants.

United States v. Moreno, 897 F.2d 26 (2d Cir. 1990) : In a drug distribution prosecution in which an issue was whether a warrantless seizure of a brick of cocaine wrapped in brown paper and tape came within the plain view doctrine, the Court held there was no error in denying a defendant's requests to make a physical demonstration with the brick and the bag from which it was seized, since the defense was accorded considerable leeway to explore their characteristics on cross-examination.

United States v. Verna, 113 F.3d 499 (4th Cir. 1997) : The Court held in a firearms case that there was no error in admitting a videotape that depicted the detonation of a laboratory-constructed bomb almost identical to the one that the defendant was charged with constructing. The demonstration was relevant to show that the defendant's bomb, which never exploded, was a destructive device, and the only differences were those required to protect the safety of the experimenters and to ensure that, unlike the actual bomb, the experimental bomb would detonate.

United States v. Norris, 217 F.3d 262 (5th Cir. 2000) : The Court upheld the convictions of a lawyer for false declarations in a bankruptcy proceeding in which he testified that he had burned almost a half million dollars in cash in order to spite his former partners; the government contended that this statement was false and that the defendant had kept the money. The prosecution introduced a videotape in which an ATF agent reenacted the steps that the defendant allegedly took when he burned the cash. The reenactment showed that most of the bills would not have burned. Although the reenactment was not an exact duplication of the defendant's alleged burning, whenever there were inconsistencies in the defendant's statements the agent erred in favor of a longer, hotter burn. The Court found that the reenactment was substantially similar and therefore admissible under *Rule 403*.

United States v. Baldwin, 418 F.3d 575 (6th Cir. 2005) : The defendant was convicted of faking his own kidnapping. When he was found by police, he gave an account of his captivity that the government argued was implausible because, for one thing, the defendant stated that he urinated while bound in the back seat of a car and the government argued that he could not have unzipped his pants under the circumstances described. The Court found no abuse of discretion in the exclusion of a videotaped demonstration proffered by the defendant in which he was shown to be physically able to unzip his pants while bound in the back seat of a car. The Court noted the dissimilarities between the conditions of the demonstration and the circumstances described by the defendant to the police, but it acknowledged

"that the video is not so far removed from reality that we would have found an abuse of discretion had the district court reached the opposite result and admitted the evidence." In *United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002)* , the Court affirmed an embezzlement conviction, finding no error in permitting the government to show the jury coin bags from the bank, some stuffed with styrofoam peanuts, to demonstrate the amount of coinage stolen from the bank. Although the defendant complained that the bags were bigger than those filled with coins, the Court observed that the Trial Judge heard expert testimony indicating that the bags were representative of those filled with coins, and the defense had the opportunity to cross-examine. In a prosecution for manufacturing marijuana and using a destructive device during drug trafficking, *United States v. Jones*, n75 the Court held that there was no abuse of discretion in permitting the government to show the videotaped explosion of a bomb that had been built as a replica of the bomb discovered near the defendant's property. An expert testified that the replica was constructed to be identical to the bomb in question. Any prejudicial effect was minimized by permitting the jury to see the explosion but turning the videotape off immediately thereafter, so as not to show styrofoam silhouettes set up nearby and how they were hit by shrapnel and gravel. In *United States v. Metzger*, n76 the Court affirmed a conviction for crimes relating to an automobile explosion that killed two people, and upheld the admission of a videotape of an experiment in which another car was destroyed by explosion. It stated that "the substantially similar standard is a flexible one which, even when construed strictly, does not require that all variables be controlled."

United States v. Birch, 39 F.3d 1089 (10th Cir. 1994) : This case is discussed in the Editorial Explanatory Comment, *§ 403.02[12]*.

United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993) : The Court reversed the defendant's conviction for involuntary manslaughter of his infant daughter, holding that an expert's demonstration of "shaken baby syndrome" using a rubber infant mannequin was not sufficiently similar to the circumstances of the infant's death to afford a fair comparison, and that the unfairly prejudicial nature of the demonstration outweighed any probative value. In *United States v. Rackley*, n77 the Court affirmed a conviction for cocaine offenses, finding that the Trial Judge properly exercised his discretion to allow a demonstration of how a trained dog sniffed out narcotics after the defendant questioned the dog's ability to sniff out cocaine.

[e] Experiments and Demonstrations -- Miscellaneous Cases

Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) : In Starter's declaratory judgment action to establish its right to use a "star" trademark on athletic footwear, Converse introduced a prototype shoe it had designed, to illustrate how the marks at issue might appear on a shoe that Starter might offer. Starter argued that the prototype created a danger of unfair prejudice because it had not actually marketed shoes yet, but the Court found no abuse of discretion in admitting the evidence. The prototype was sufficiently similar to shoes about which testimony was given; Starter had offered its own prototype and could argue (as it did) that Converse's prototype was a gross exaggeration; and by bringing a declaratory judgment action before actually producing shoes bearing the disputed marks, Starter opened itself up to prototype evidence from Converse.

Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984) : The Court affirmed a judgment for an inmate against prison guards in a civil rights suit, finding no error in the admission of videotape evidence depicting a hose squirting water. The tape was properly used to demonstrate how the guards' actions could have injured an inmate; the water pressure and hose nozzle on the hose depicted were the same as those on the hose used against the plaintiff; and an expert was present to explain the tape.

Paschal v. Flagstar Bank, FSB, 295 F.3d 565 (6th Cir. 2002) : Affirming in part a Fair Housing Act case that held

the defendant engaged in racially discriminatory mortgage lending, the Court found no abuse of discretion in the admission of evidence regarding matched-pair testing conducted by a local fair housing group. The defendant objected that any probative value the evidence had was substantially outweighed by the prejudicial effect of its focus on the discriminatory conduct of a loan officer who was not involved in processing the plaintiffs' applications. Although extrapolation from one racist loan officer to the institutional defendant would be unfairly prejudicial, making admission "a close question," the Court found no abuse of discretion, noting both that the Trial Judge had excluded part of the testing evidence as excessively inflammatory and that the animus of the loan officer was directed against Arab-Americans, while the plaintiffs were African-Americans. In *Persian Galleries, Inc. v. Transcontinental Ins. Co., 38 F.3d 253 (6th Cir. 1994)* , the Court affirmed a judgment for the plaintiff rug dealer in an action against its insurer for the alleged theft of oriental rugs from its store, finding no abuse of discretion in the admission of a videotaped reenactment of the theft, where the experiment and the actual conditions at the scene were substantially similar, even though not identical.

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) : In a negligence action brought by a truckdriver against a forklift operator, the Court found no error in the decision to admit a videotape made by the defendant's president several years after the accident, which attempted to depict how logs are unloaded, in support of a contributory negligence claim. The Trial Judge permitted the film to be shown but did not allow the jury to hear the sound portion of the tape. Although the level of background noise was an issue in the case, the Court recognized that the microphone used to record the sound on the tape was not placed where the plaintiff had been and there was no indication that the courtroom volume control would have produced the same sound level as actually recorded. It commended the Judge "for not taking the easy way out, which would have been to let in all the minimally relevant nonprivileged evidence either party cared to offer."

Jones v. Ralls, 187 F.3d 848 (8th Cir. 1999) : The Court held there was no abuse of discretion in a civil rights case when defendant officers were permitted to demonstrate a "kneeling wristlock" such as they had applied to the plaintiff when taking him into custody. Although the demonstration did not accurately reflect the entire course of events, it was not intended to be a reenactment so much as a demonstration of a technique unfamiliar to the jurors. The plaintiff had an adequate opportunity on cross-examination to explore differences between the demonstration and the actual events. In *Borough v. Duluth, M. & I.R. Ry.*, n78 the Court affirmed a judgment for an injured railway worker, finding that the Trial Judge properly excluded the railroad's film, which demonstrated the proper way of stepping from a moving locomotive, as cumulative and as "carefully staged by the railroad for the purpose of this litigation."

Robinson v. Missouri Pac. R.R., 16 F.3d 1083 (10th Cir. 1994) : The Court affirmed a judgment for the plaintiffs in a wrongful death action arising out of a train's collision with a car, but found that a video animation illustrating the plaintiff's expert's theory about how the collision had occurred presented a close question. The Court was not concerned that certain details were left out of the animation, since they did not bear on the purpose of the exhibit, i.e., to illustrate the expert's testimony. It was bothered, however, with the tape's showing the car angling toward the approach of the train and rotating at impact and spinning off the tracks, since it was also possible that the train impaled the car on its front. On balance, the Court found no abuse of discretion, as the exhibit was entered for the limited purpose of illustrating expert testimony, a cautionary instruction was given, and the defendant was given opportunity for vigorous cross-examination.

[f] Experiments and Demonstrations -- Other Product Liability Cases

Lubanski v. Coleco Indus., 929 F.2d 42 (1st Cir. 1991): The Court affirmed a judgment for the defendant toy manufacturer in an action brought by the mother of a child who was killed while riding on a three-wheeled riding apparatus. The Court held there was no error in admitting a series of photographic enlargements portraying a staged

version of the accident scene. The Trial Judge made the required preliminary determination that the photographs depicted a correct likeness and the plaintiff had not objected to the photographs in their original five-by-seven-inch format.

Hurt v. Coyne Cylinder Co., 956 F.2d 1319 (6th Cir. 1992) : The Court reversed a judgment for the defendants on other grounds, but held there was no abuse of discretion in excluding a film offered by the plaintiffs. There was nothing improper in the Trial Judge's making a subjective determination that the film would be prejudicial, where there was no indication that the Judge's reaction was idiosyncratic and there is an obvious possibility of prejudice from a dramatic film that resembles but does not depict the accident in question.

Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000) : A plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to show videotapes of tests he conducted demonstrating how various objects were thrown from a moving mower and how vibration from a running mower would not cause a properly tightened wingnut to loosen. The videos were cumulative of the witness' testimony regarding the tests and a therefore a waste of the jury's time.

Pullman v. Land O'Lakes, Inc., 262 F.3d 759 (8th Cir. 2001) : Affirming a judgment for dairy farmers against a dairy consultant whose employee negligently prepared feed that sickened and killed dairy cows, the Court upheld the admission of an experimental test conducted at a college which sought to recreate the situation that occurred at the plaintiffs' farms when the cows became sick and died. The test was done under conditions substantially similar to the actual conditions at the farm, since the cows were the same breed, the feed formula was the same, the feed was prepared by the same procedure, and the study was conducted at the same time of the year. In *Patterson v. F.W. Woolworth Co.,* n79 the Court affirmed a judgment for the defendants in an action alleging damage from an electric-fan fire, finding that expert testimony concerning experiments the witness conducted was properly admitted, since admissibility "does not depend on perfect identity between actual and experimental conditions." In *Cowens v. Siemens-Elema AB*, n80 the Court affirmed a judgment for a manufacturer and distributor of an electronic lung ventilator. It held that evidence of experiments was properly excluded in the absence of proof that screens used in the experiment were manufactured at or near the time of the screen used in the ventilator. In *Randall v. Warnaco, Inc.*, n81 a suit by a tent user injured by a fire in the tent, the Court observed that admissibility "does not depend on perfect identity between actual and experimental conditions. Ordinarily, dissimilarities affect the weight of the evidence, not its admissibility." The Court found no abuse of discretion in the admission of an experiment shown to the jury via videotape, but it warned that since the film duplicated the accident scene and almost reenacted the accident, it could have been deemed unduly prejudicial.

Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989) : The Court affirmed a judgment for the defendant in a suit by a plaintiff who claimed that her son developed oral cancer from using snuff. It held there was no error in excluding a videotape deposition of a severely disfigured, postsurgical cancer patient whose case was similar to the son's in many respects. The proof of causation of injury was weak while the possibility of prejudice was great.

[29] Experts

[a] Civil Cases -- Evidence Admissible or Required To Be Admitted

Sinai v. New England Tel. & Tel. Co., 3 F.3d 471 (1st Cir. 1993) : Affirming a judgment for the plaintiff in an employment discrimination action, the Court held there was no abuse of discretion in permitting certain testimony by the plaintiff's psychologist. Prognosis evidence about the plaintiff's depression was very important to the damages issue,

and the Trial Judge took care to ensure that the jury would not reach a verdict on improper grounds; evidence of the plaintiff's wife's own harassment and discrimination claims was proper on redirect in response to implications that the plaintiff's depression stemmed from preexisting marital difficulties.

Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996) : The Court held it was an abuse of discretion to preclude an expert in educational and value testing from testifying on behalf of the plaintiff in an employment discrimination case that the employer had improperly used screening tests to confirm his preexisting notions about the plaintiff.

Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) : The Court reversed in part a judgment against a discharged black employee of a city police department, holding that the plaintiff's expert witness should have been permitted to introduce testimony and a graph summarizing and explaining raw data introduced at trial in support of the plaintiff's claim of racial discrimination; without the witness' testimony there was no way for the jury to discern the meaning of the data accurately, so the evidence clearly was not cumulative. The witness, a psychological counselor, should also have been permitted to give testimony on the psychological impact of the termination, as it was directly relevant to the issue of damages and there was no other testimony regarding the psychological impact. In *Johnson v. United States*, n82 the Court remanded a wrongful death case brought by the parents of an infant who died after being taken to a military hospital, holding it was error to exclude as cumulative the testimony of a third expert witness who arguably had better credentials than the first two and whose analysis was somewhat different from the others'.

[b] Experts -- Civil Cases -- Evidence Excludable or Required To Be Excluded

Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) : The Court affirmed a judgment for the client in an attorney malpractice action, holding there was no abuse of discretion in excluding testimony by the defendant's psychological expert that a mental condition possibly existing years before the expert examined the defendant might have affected his ability to perceive the harm he was causing a client. The weak probative value of the evidence was substantially outweighed by the likelihood the jury would improperly consider it on the negligence issue. In a product liability action arising out of injuries allegedly caused by an IUD, *Nickerson v. G.D. Searle & Co.*, n83 the Court held that there was no abuse of discretion in prohibiting the plaintiff's counsel from cross-examining a defense expert witness about his experience in the abortion field, given the fierce emotional reaction engendered in many people by the subject.

Robert S. v. Stetson School, Inc., 256 F.3d 159 (3d. Cir. 2001) : The plaintiff, who had been placed in a school specializing in the treatment and education of juvenile sex offenders, alleged that staff members subjected him to physical and psychological abuse in violation of the school's policy against "horseplay." The Court found no abuse of discretion in precluding testimony by an expert in child abuse on grounds that it would result in undue delay, waste of time, or needless presentation of cumulative evidence, since two other witnesses, both psychologists, testified at length about the impact that the alleged abuse could have on someone with the plaintiff's history.

Dixon v. CSX Transp., Inc., 990 F.2d 1440 (4th Cir. 1993) : In a FELA and state tort law action arising out of a train's collision with an automobile, the Court held it was reversible error to admit evidence from a human factors expert of an observational survey showing that 98 percent of motorists did not stop at the crossing and 64 percent did not look left. According to the Court, the evidence was wholly irrelevant to whether the plaintiff fulfilled the burden imposed by state law to act as a reasonably prudent person and, when taken with evidence that the plaintiff had looked left, it was prejudicial to the defendant because it strongly suggested the plaintiff was a more careful driver than most and could not be considered contributorily negligent. The dissenting Judge believed that because local custom is relevant to the duty of care, the evidence was properly admitted. In *Lohrmann v. Pittsburgh Corning Corp.*, n84 the Court affirmed a

judgment against a shipyard pipe fitter who claimed he contracted asbestosis from exposure to the defendants' products, holding that the Trial Judge properly ruled that the danger of unfair prejudice from mention of the plaintiff's fear of contracting cancer outweighed its probative value in light of the inability of the plaintiff's medical expert to state, with a reasonable degree of certainty, that the plaintiff would develop cancer.

Wallace v. Mulholland, 957 F.2d 333 (7th Cir. 1992) : In a civil rights action for excessive force used by police in enforcing a commitment petition, the Court held there was no error in excluding evidence of the committed person's psychiatric history. Where the issue in the case was his actual behavior and how the officers responded to it, evidence about the general nature of his condition and the likelihood that someone with that condition would act aggressively was probably irrelevant and certainly prejudicial.

United States v. Pend Oreille County Public Util. Dist. No. 1, 135 F.3d 602 (9th Cir. 1998) : The Judge trying the damages phase of a trespass action refused to allow proof on rebuttal from an expert who would have provided an estimate of acreage relevant to the plaintiffs' damages. The Court held there was no abuse of discretion, as the Judge had already heard from two other experts on the point and "reasonably could have concluded that introducing in rebuttal yet a third, much higher estimate ... would needlessly complicate the issue and unduly delay the proceeding." In a product liability wrongful death case arising out of World War II shipyard asbestos exposure, *Rogers v. Raymark Indus., 922 F.2d 1426 (9th Cir. 1991)* , the Trial Judge had excluded testimony by one of the plaintiff's experts as minimally probative, confusing, and cumulative. The Court found no abuse of discretion, rejecting the plaintiff's argument that she needed the testimony because it would be more articulate, eloquent, and clear than that from coworkers who had forgotten the details or were too unsophisticated to describe their working conditions accurately.

Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996) : In an employment discrimination case, the Court held it was an abuse of discretion to preclude an expert in educational and value testing from testifying on behalf of the plaintiff in an employment discrimination case that the employer had improperly used screening tests to confirm his preexisting notions about the plaintiff. However, there was no abuse of discretion in precluding a psychologist from explaining what the employer's notations of age and reliance on second-hand reports indicated about his decision-making process in hiring, as the jury had other testimony about those practices.

Tran v. Toyota Motor Corp., 420 F.3d 1310 (11th Cir. 2005) : In a product liability action, the Court held there was no abuse of discretion when testimony from an expert witness for the plaintiff was excluded on the ground that the expert's opinions, and the bases for those opinions, were the same as those of another expert who was permitted to testify. The Judge had examined the excluded expert's deposition and expert witness report and had extensively examined his qualifications, and while the Court suggested that it might have reached a contrary conclusion, it found the decision that the evidence was cumulative was within the Judge's permissible "range of choice." In an action brought by a pretrial detainee for deliberate indifference to his medical needs, *Peterson v. Willie, 81 F.3d 1033 (11th Cir. 1996)* , the defendants called an expert who the plaintiff had retained and designated as an expert witness expected to testify, but who had subsequently been discharged by the plaintiff's counsel. The expert was permitted to testify and to state that he had been previously retained by the plaintiff. The Court noted that some decisions have permitted experts initially retained by one side to be called by the other but have prohibited reference to the initial retainer; others have refused to permit such experts to testify absent a showing of need. The Court concluded that the issue is committed to the discretion of the Trial Judge, but cautioned that leave to call such experts should not ordinarily be granted if other experts are readily available. As to whether the expert can refer to the previous retention, the Court concluded that "the unfair prejudice resulting from disclosing this fact usually outweighs any probative value"; however, a reference would be warranted if the adversary were to attack the qualifications of the expert. Since the plaintiff made no such attack in this case, the Court found it was error (but harmless) to permit evidence that the expert had previously been retained by the plaintiff.

Cytologix Corp. v. Ventana Medical Sys., Inc., 424 F.3d 1168 (Fed. Cir. 2005) : In a patent infringement action, the Court noted that it was improper to have expert witnesses testify before the jury regarding claim construction. The risk of confusing the jury is high even when, as here, the jury is instructed that the Judge's claim constructions control.

[c] Experts -- Criminal Cases

[i] Defense Evidence

United States v. Onumonu, 967 F.2d 782 (2d Cir. 1992) : The defendant, charged with knowingly smuggling heroin from Nigeria in his alimentary canal, asserted he thought he was smuggling diamonds and offered an expert to testify to the feasibility and prevalence of smuggling diamonds in the same manner from Nigeria. The Court held it was error to exclude the testimony, as it was relevant to the defendant's subjective belief, did not fall under any of the *Rule 403* exceptions to admissibility, and would have been helpful to a New York jury unlikely to be familiar with diamond smuggling out of Nigeria and even less so about the feasibility of smuggling diamonds by swallowing condoms.

United States v. Mathis, 264 F.3d 321 (3d Cir. 2001) : Affirming convictions for bank robbery and conspiracy, the Court found it was error (but harmless) to exclude some expert testimony by a clinical psychologist regarding eyewitness identification. Relying heavily on its decision in *United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)* , the Court found that expert testimony regarding "double identification" or "post-event information" and about the relationship between accuracy of identification and confidence of a witness fit the facts of the case and should have been admitted. Testimony about "weapons focus" was relevant and should have been admitted, even though the witness who saw the defendant was a police officer. The Court declined to affirm exclusion of the evidence under *Rule 403* because "the District Court explained its ruling with little more than a series of conclusions" about an "aura of reliability that's attached to an expert witness" and a danger of usurping the jury's function.

United States v. Sutton, 337 F.3d 792 (7th Cir. 2003) : A defendant charged with several robberies sought to introduce reports made by the police laboratory indicating that his fingerprints did not match fingerprints taken from the crime scenes. The Court held that under *Rule 803(8)(C)* the reports were not excludable as hearsay, but there was no abuse of discretion in excluding the reports under *Rule 403*. Without an expert to explain them, the reports' probative value was outweighed by the risk that the jury would improperly rely on the reports in the absence of context and believe that the reports proved the negative, that the defendant had not been at the crime scene. In a prosecution of a banker for making false statements in loan applications, *United States v. Swanquist, 161 F.3d 1064 (7th Cir. 1998)* , the Court held there was no abuse of discretion in preventing an accountant called by the defendant from testifying about "off balance sheet financing." As an accountant with no banking experience, the witness was not qualified to tell the jury that a practice of omitting certain assets and liabilities was acceptable within the banking community. Furthermore, the applications at issue specifically requested the information, so testimony about this sort of financing was clearly intended to throw smoke in the jurors' eyes.

United States v. Rushing, 313 F.3d 428 (8th Cir. 2002) : The defendants were charged with immigration fraud in a scheme to import Chinese women to satisfy one defendant's sexual appetite. The government alleged that the defendant had a year-long sexual relationship with one of the women. The defense proffered an expert to testify that since the woman was infected with hepatitis B, it was highly likely that the defendant would also be infected if they had such a relationship, but he was not. The Trial Judge excluded the evidence on the ground that it was collateral and of little probative value on the central issues of the case. Reversing, the Court concluded that the evidence was highly probative, since evidence that there were no sexual relations would have undermined the government's central theory, leaving it

with no explanation of why the defendants engaged in immigration fraud. In *United States v. Kime, 99 F.3d 870 (8th Cir. 1996)* , the Court affirmed drug conspiracy convictions, finding no abuse of discretion in the exclusion of expert testimony on the unreliability of eyewitness identification, which was proffered by a defendant. There was an insufficient basis for finding that the proposed testimony qualified as "scientific knowledge" under *Daubert*; the testimony intruded into the jury's domain when it opined that the in-court identification in the case was "inherently untrustworthy"; and there was a "very real danger that the proffered expert testimony could either confuse the jury or cause it to substitute the expert's credibility assessment for its own."

United States v. Petrie, 302 F.3d 1280 (11th Cir. 2002) : Affirming a conviction for conspiracy to launder money in a scheme involving venture capital funding contracts, the Court held there was no abuse of discretion when the defense was not permitted to call a lawyer to testify that the contracts were legal. The legality of the contracts was not at issue in the case, and any probative value the testimony might have had "did not outweigh the potential jury confusion that would have arisen from the presentation of contract issues in the context of a criminal case." In *United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993)* , the Court reversed the defendant's conviction for involuntary manslaughter of his infant daughter, holding that it was an abuse of discretion to exclude expert testimony on the general lack of public awareness of the dangers of shaking an infant. Where the dispositive issue in the case was whether the defendant intended to revive the infant or to injure her, the evidence would be probative of his knowledge and intent, helpful to the trier, and not cumulative.

[ii] Experts -- Criminal Cases -- Prosecution Evidence

United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997) : Hidden in the car in which the defendant was arrested were drugs, weapons, and a roll of duct tape. Affirming a conviction for drug trafficking offenses, the Court held there was no abuse of discretion in permitting a detective knowledgeable about narcotics to testify that duct tape was often used in the drug trade to bind people being robbed or who otherwise needed to be restrained. The evidence was helpful to the jury in determining the defendant's intent to distribute the drugs found in his possession, and its probative value was not substantially outweighed by its tendency to suggest he was a violent person who binds people with duct tape.

United States v. Rutland, 372 F.3d 543 (3d Cir. 2004) : Convicted for defrauding an elderly brokerage customer by forging her signature on financial forms, the defendant argued that in light of the government handwriting expert's extensive qualifications and impressive experience, "the probative value of his opinion on authorship was substantially outweighed by the danger that the jury would accept his opinion based on his extraordinary experience rather than on his underlying analysis." Affirming, the Court rejected this "novel argument," noting that "[a]n expert's experience and credentials are properly taken into account by jurors when determining how much weight to give the expert's testimony," and that the defendant's argument would lead to an absurd result, requiring parties to find experts who have less than stellar qualifications.

United States v. Katz, 178 F.3d 368 (5th Cir. 1999) : The defendant, charged with receiving child pornography, filed a motion to exclude all expert witness testimony purporting to determine the age of persons portrayed in the videotapes and computer files at issue on the basis of applying the "Tanner Scale" (which is a recognized scientific test for determining the age of postpubescent Caucasian females according to pubic hair and breast development). On interlocutory appeal, the Court held there was no abuse of discretion in excluding several of the computer images at issue, where the government witness' expertise was linked to the Tanner Scale method and he testified that the method was not scientifically useful in determining the age of the models depicted because the range of ages for each stage was too broad and extended beyond the critical age of 18.

United States v. Webster, 125 F.3d 1024 (7th Cir. 1997) : In a bankruptcy fraud prosecution, the Court held there was no abuse of discretion in excluding expert testimony as to the value of allegedly concealed property, since the opinion could have at best only tangential relevance either to the defendant's opinion as to that value years earlier or to the defendant's intent to conceal assets, and its potential to confuse the jury was significant. In *United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)* , a man had been murdered as part of a scheme by his wife and others to defraud life insurance companies. The Court held that even though only fraud was charged, it was not an abuse of discretion to admit expert testimony regarding the brutal manner in which the victim was slain, since the evidence provided corroboration and enhanced the credibility of conspirators' out-of-court admissions.

United States v. Sdoulam, 398 F.3d 981 (8th Cir. 2005) : The defendant, an operator of convenience stores, was charged with conspiring to distribute pseudophedrine with reason to believe it would be used to manufacture methamphetamine. The prosecution offered testimony from a statistician who, using local and national census and marketing data, compared the pseudophedrine sales at the defendant's stores with the estimated monthly average at convenience stores nationwide and opined that the difference was so great that the possibility of its occurring by chance was infinitesimal. Affirming, the Court found no abuse of discretion, since the evidence was relevant to whether the defendant had reason to believe that the pseudophedrine was being used to manufacture a controlled substance, and the expert made no statement regarding the mathematical probability that the defendant was guilty of the crimes charged, leaving it to the jury to draw whatever conclusions it wished from the comparison he made.

United States v. Pineda-Torres, 287 F.3d 860 (9th Cir. 2002) : The Court reversed convictions for importation and possession of marijuana, finding that it was an abuse of discretion to admit expert testimony regarding the structure of drug trafficking organizations and the futility of collecting fingerprints because of the compartmentalized nature of drug trafficking organizations in a simple, non-conspiracy importation case. The Court noted that it had rejected the notion that evidence of the structure of drug organizations could prove that a particular defendant had knowledge that drugs were in his car, in *United States v. Vallejo, infra*. In *United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002)* , a prosecution for drug importation and possession with intent to distribute, the defendant denied knowing that he was carrying the drugs and a Customs agent was permitted to testify about the methods and techniques used by narcotics smugglers, including that a smuggler would not risk using an unknowing courier to transport drugs. The Court held that admission of the expert's testimony was reversible error, since it prejudicially portrayed the defendant as a member of an international drug trafficking organization even though he was indicted only as an individual and there was no charge that he was acting in a conspiracy. In *United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001)* , the Court reversed convictions for importation of marijuana and possession of marijuana with intent to distribute because expert testimony regarding the structure of drug trafficking organizations was improperly admitted. Under *United States v. Vallejo, infra,* such expert testimony is not admissible unless the defendant is charged with being part of a drug conspiracy. Without a conspiracy charge, the expert testimony is substantially more prejudicial than probative. The government argued that the defense opened the door to the expert testimony by asserting that the defendant's fingerprints were not found on the packages of drugs, and the expert testimony was necessary to explain that the defendant's fingerprints would not be found because drug conspiracies operate in such a way that the driver does not touch the drugs. But the Court found that the defense counsel only questioned defense agents about whether they used gloves when examining the evidence, which was not enough to affirmatively raise a lack-of-fingerprint defense. The Court distinguished *United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001)* , where expert testimony on the operation of a drug conspiracy was allowed after the defendant designated a fingerprint expert and argued in his defense at trial that no fingerprints were found on the drug packages. In *United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001)* , *amended, 246 F.3d 1150 (9th Cir. 2001)* , marijuana was found in the defendant's car during a search at a Mexican border checkpoint. His defense was that he was duped to drive the car by Jaramillo, a former owner of the car who was involved in drug trafficking. The government offered extensive testimony from a law enforcement expert regarding the structure of drug trafficking organizations and the wages earned by drug couriers. Reversing, the Court held that admission of this testimony was error under *Rule 403*. Although the government argued that this testimony was admissible to explain why the

defendant's fingerprints were not found on the drugs, the defendant had not indicated that he planned to, and in fact did not, raise the lack of fingerprint evidence as probative of his lack of knowledge. The Court noted that Vallejo was not charged with conspiracy and emphasized that this was a simple case; therefore the expert testimony was not "needed to assist the jury's understanding of a complex criminal case." See also *United States v. Echavarria-Olarte* n85(an abuse of discretion (but harmless error) for DEA agent to give expert testimony on the operations of the Medellin drug cartel, which were unrelated to the offenses with which the defendant was charged).

United States v. Tinoco, 304 F.3d 1088 (11th Cir. 2002) : The defendants were convicted of drug offenses after their boat, carrying more than 1,000 kilos of cocaine, was intercepted in the Pacific Ocean west of the Colombia-Ecuador border. The Court found no abuse of discretion when experienced narcotics agents were permitted to describe the defendants' vessel as a "go-fast," which was Coast Guard workplace vernacular. Although the term may have been somewhat prejudicial, it was not unfairly so, since it was used in the context of permissible testimony showing the significance of conduct or operation methods unique to the drug distribution business. There was also no abuse of discretion when an agent was permitted to testify to the market value of the cocaine in the United States, since it was relevant to the defendants' knowing participation in the conspiracy and to show that the cocaine was most likely intended for large-scale distribution rather than for personal consumption.

[30] Failure To Prosecute

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for the defendants in a price-fixing case, the Court noted that the defendants could not use the Justice Department's failure to move against this conspiracy as evidence that there was no conspiracy. The Department has limited resources; the evidence in the case might not have been strong enough to establish guilt beyond a reasonable doubt; and the Department may have thought that its antitrust enforcement aims were sufficiently advanced by its prosecution of many of the defendants for another price-fixing conspiracy.

[31] Family Relationships

United States v. Nguyen, 284 F.3d 1086 (9th Cir. 2002) : The Court affirmed methamphetamine convictions, finding no error in the admission of evidence that the defendants were related to the holder of a driver's license bearing the same address as on a label attached to an express mail container that contained the drugs. The evidence tended to prove that the defendants did not just accidentally pick up and open a package mailed by mistake from an unknown address.

[32] Fraudulent Activities

United States v. Cusack, 229 F.3d 344 (2d Cir. 2000) : In a prosecution for fraud in a scheme to sell forged documents falsely attributed to President Kennedy, the Trial Judge admitted evidence that the defendant had lied to a dealer in historical memorabilia by concocting a distinguished military career and sometimes wearing military uniforms and medals in the dealer's presence. Finding no abuse of discretion, the Court held that the evidence was properly admitted "as evidence of the fraudulent scheme and to rebut the defense that Cusack did not know the documents were forged," since the lies were made to bolster the defendant's credibility with the dealer. The evidence was not unduly prejudicial when compared to "the audacious fraud with which Cusack was charged."

[33] Gang Membership

United States v. Liranzo, 385 F.3d 66 (1st Cir. 2004) : The Court affirmed a conviction for felon firearm

possession, finding no abuse of discretion when the arresting officers were permitted to testify that they were members of a gang task force. Their assignment helped explain why they were conducting surveillance of a known gang member's house when they first observed the defendant and why the procedures used in stopping the defendant's car were not those usually used for a traffic stop. The evidence was also relevant to rebut a defense argument implying racial profiling by the officers. Any risk of unfair prejudice was minimized by the Judge's limiting instruction and the prosecutor's explanation that the case was not about gang membership.

United States v. Barnes, 158 F.3d 662 (2d Cir. 1998) : The defendant was charged in a single count of a 33-count indictment, which generally charged members of the Latin Kings street gang with a racketeering enterprise engaged in narcotics trafficking, murder, and other acts of violence. The defendant was named only as part of a conspiracy to distribute drugs; he was not charged as a member or associate of the Latin Kings. During the defendant's trial, a photograph and testimony were introduced regarding guns and ammunition seized during a search of a Latin Kings meeting place. Although acknowledging that the evidence "could have been excluded without in any way weakening the case against the defendant," the Court held there was no error in its admission. Since the jury was fully aware, from the evidence and from both defense and prosecution summations, that the defendant was not a member of the Latin Kings and was not connected with the weapons or any violence associated with them, "the prejudicial effect of the evidence was simply undermined by its lack of probative value."

United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) : The defendants allegedly formed a gang ("SNP") to effectuate a drug conspiracy. The Court found no abuse of discretion in the admission of photographs of two T-shirts found in a defendant's bedroom during execution of a search warrant. The shirts contained references to SNP, which were highly probative of the defendant's membership, and any prejudicial effect of violent language also on the T-shirts did not substantially outweigh that probative value. The Court did find, however, that it was an abuse of discretion (but harmless error) to admit photographs of graffiti-covered buildings in the area in which the gang operated. Although the graffiti included references to SNP, it also included writings such as "cop killer," "slob killer," and "Crips." The graffiti provided no circumstantial evidence that SNP was the charged drug conspiracy and it was not connected with any of the defendants. Given that the jury could have improperly attributed the violent references to the defendants, any probative value was substantially outweighed by the potential for unfair prejudice.

United States v. Montgomery, 390 F.3d 1013 (7th Cir. 2004) : Affirming a conviction for felon firearm possession, the Court found no plain error in the admission of evidence of the defendant's membership in a gang. The Court found the required "strong and direct link between the gang activity introduced and the possession of the firearm" here, as the defendant was charged with possessing a gun while at a street festival; there were problems between the defendant's gang and another gang that were expected to break out at the festival; and therefore the defendant's gang connection made it more likely that he was carrying a gun to the festival in anticipation of a confrontation. The Court also noted that the Judge "took the useful precaution of giving the jury a limiting instruction" to the effect that the jury could consider the defendant's gang membership only as it related to a motive for possessing the gun, and not for any other purpose. In *United States v. Suggs, 374 F.3d 508 (7th Cir. 2004)* , the Court affirmed narcotics convictions, finding no abuse of discretion in the admission of evidence of the defendants' gang affiliations. The evidence tended to demonstrate the existence of a conspiracy and the connections between members of the gang and the conspiracy; evidence of their group's affiliation with a major Chicago gang tended to disprove the defense theory that they were merely members of a rap group. Exhibits showing the defendants' tattoos and one defendant's gold tooth helped to establish gang membership that was circumstantial support for the existence of a conspiracy (as opposed to unconnected drug transactions). In *United States v. Hodges, 315 F.3d 794 (7th Cir. 2003)* , the defendant was convicted for being a felon in possession, as a result of selling stolen firearms. The Court found no abuse of discretion in admitting evidence of the defendant's affiliation with a street gang, since it corroborated testimony that he had said he could sell the guns through connections in Chicago, and evidence that the guns were recovered by a Chicago police tactical gang unit

further corroborated the testimony. In *United States v. Westbrook*, n86 at the defendant's trial for conspiracy to distribute cocaine base, he testified that a cooperating witness was a gang member and that he was afraid of the witness, which was why he initially misidentified the witness to the police. He was not, however, permitted to ask other witnesses about the gang affiliations of two men who were not called to testify and who were not involved in the events at issue, nor was he permitted to elicit general information about the gang. Affirming, the Court noted that this was not like the usual case, in which the defendant is concerned about the prejudicial effect of gang membership evidence. The Court found no abuse of discretion in the rulings, since the defendant was permitted to introduce evidence of gang membership where it was relevant and not permitted to where there was no showing of relevance. See also *United States v. Sargent* n87(evidence of gang membership tended to undermine the coercion defense and explain the defendant's illegal behavior); *United States v. Irvin* n88(reversing conviction for improper admission of motorcycle gang membership, which had little value in proving the defendants were engaged in a common venture to distribute drugs, yet posed a substantial risk of arousing negative connotations and invoking images of criminal activity); *United States v. Butler* n89(gang membership evidence properly admitted to prove defendant knowingly possessed a firearm, since it showed that he served as a gang security guard, which made it more probable that he knowingly possessed a gun).

United States v. Hull, 419 F.3d 762 (8th Cir. 2005) : The defendant, charged with marijuana traffficking, testified that he had no reason to deal in drugs because he had several successful businesses, including a record company. Affirming, the Court held that, after the defendant's attorney characterized the company's music as "hip-hop" in his opening statement, the government's cross-examination of the defendant as to whether the music could be characterized as "gangster rap" and introduction of one of the company's CDs was within the scope of direct examination. The Court noted that the jury was instructed that the evidence was not to be used to prove either Hull's association with a gang or guilt in this case. In *United States v. Bradford, 246 F.3d 1107 (8th Cir. 2001)* , the Court affirmed drug conspiracy convictions, finding no error when evidence of gang membership was admitted to clarify the connections between the defendants. The Trial Judge had prohibited the government from mentioning gang membership in its opening and closing argument, but did not impose a blanket prohibition on all such evidence. In *United States v. Lemon*, n90 the defendant was charged with constructive possession of narcotics and ammunition found in a house where he was arrested. The Court found no abuse of discretion in the admission of evidence that he was a member of a gang called the Family Mob, when offered to prove his ownership of a Family Mob ring that was found on a dresser in the room where the narcotics and ammunition were located. The Trial Judge had excluded evidence of the defendant's prior conviction for gang-related activity, so "gang evidence did not become a pervasive theme of the trial." See also *United States v. Sills* n91(defendant's gang-related activities were probative of his knowledge that a sawed-off shotgun was under the seat of the car he was driving when arrested); *United States v. Johnson* n92(evidence of gang-related activities served to establish the historical, geographical, and business connections the defendants had with each other).

United States v. Fernandez, 388 F.3d 1199 (9th Cir. 2004) : In a prosecution of RICO and drug trafficking charges related to the defendants' involvement with the "Mexican Mafia," the Court found no abuse of discretion when photographs of defendants' gang-related tattoos were introduced. The tattoos tended to prove gang membership, which the government alleged was a precursor to membership in the Mexican Mafia, and the Court concluded that admission of the relevant photographs did not unfairly prejudice the defendants. In *United States v. Padilla, 387 F.3d 1087 (9th Cir. 2004)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when a detective having extensive experience with local gangs was permitted to testify regarding gang punishment for junior members who fail to support senior members. The testimony was admitted for the limited purpose of impeaching exculpatory testimony offered by a passenger in the defendant's car, who testified that both he and the defendant were gang members and that the gun found in the car was his rather than the defendant's. The probative value of the expert's testimony on the witness' truthfulness was not substantially outweighed by any prejudicial effect. Affirming a conviction for drug possession with intent to distribute in *United States v. Takahashi*, n93 the Court found no abuse of discretion in the admission of evidence that the defendant and a favorable witness belonged to a secretive Japanese

organized crime group whose members will perjure themselves for one another. The evidence was probative of bias, and the Judge both gave a limiting instruction and induced the government not to show photographs of the gang's distinctive tattoos on the defendant. See also *United States v. Hankey* n94(expert testimony on gang retribution for informing was highly probative to explain a codefendant's motive for testifying in Hankey's favor; testimony was not proffered to prove a substantive element of the crime and the jury received an "adamant" limiting instruction); *United States v. Easter* n95(testimony that the defendants were all affiliated with the same gang was probative of identity, because the person who admitted planning both robberies was also a member of the same gang; the government refrained from inquiring into the nature and history of the gang, and did not emphasize the gang affiliation in its closing argument, the Trial Judge on *voir dire* probed for bias about gang affiliation, and a cautionary instruction was given).

United States v. Brown, 200 F.3d 700 (10th Cir. 1999) : Affirming a conviction for carjacking, the Court held there was no abuse of discretion in admitting evidence that the two defendants and a cooperating witness, who was driving the victim's vehicle, were members of a gang. The evidence tended to rebut the defendants' argument that they had no part in the theft by showing identity, joint venture, and existence of a conspiracy, and it illuminated the relationship between the cooperating witness and the defendants as to both the charged crimes and the witness' subsequent testimony. In *United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992)* , the Court affirmed convictions for cocaine base possession and conspiracy, and held that expert evidence tending to show that the defendants were active members of a gang whose main purpose was to sell cocaine was not impermissible "profile" evidence. Although the Trial Judge had admitted the evidence under *Rule 404(b)*, a majority of the Court suggested that the evidence might not qualify under the Rule and concluded that the pertinent test is relevancy. The majority rejected the argument that evidence concerning gang membership tends only to show propensity and reasoned that "associational evidence may be directly relevant on the issues of formation, agreement and purpose of a conspiracy." The dissenting Judge believed that the government had impermissibly sought to prove that by exhibiting the characteristics of gang members, the defendants were members of a gang with criminal purposes and therefore were guilty of the charged conspiracy and underlying crimes; in any event, the gang affiliation evidence should have been inadmissible because it is inherently and unfairly prejudicial.

United States v. Jernigan, 341 F.3d 1273 (11th Cir. 2003) : Two defendants were convicted for felon firearms possession, after one was permitted to introduce evidence that the other was a member of the Bloods gang and that the gang used the color red as a symbol of membership. Affirming, the Court found that evidence of gang membership was "especially probative in this case because the weapon was found wrapped in a red bandanna," but added that "we do not wish to understate the prejudicial effect that evidence of a criminal defendant's gang membership may entail" and "the *Rule 403* calculus was in our view a close one, and the district court would have been justified in the deciding this issue either way."

[34] Grand Jury Report

Stump v. Gates, 211 F.3d 527 (10th Cir. 2000) : A decedent's children brought an action under § 1983 and for outrageous conduct against a city, its police chief, and a detective, alleging that they had denied the children access to the state Courts to assert a wrongful death claim against the decedent's wife by bungling an investigation into the decedent's 1984 death and destroying the relevant evidence. At trial the plaintiffs introduced a 1989 state grand jury report, which had concluded that the decedent's death was a homicide and not a suicide as previously characterized by the police department. The report was admitted not for its truth but to show that through the report the plaintiffs had learned there was a cover-up for which they had an outrageous conduct claim. Reversing a judgment for the plaintiffs, the Court held it was an abuse of discretion to admit the grand jury report. It had little if any probative value in establishing when or how the plaintiffs received notice of their claims, since their complaint was filed seven months before they saw the report, and it was highly prejudicial as a hearsay conclusion that the police chief had deliberately and egregiously covered up the cause of the decedent's death.

[35] Guilt by Association

United States v. Felton, 417 F.3d 97 (1st Cir. 2005) : In a prosecution for bank robbery, counterfeiting, and planning construction of an explosive device, the Court held there was no abuse of discretion in admitting evidence of the defendants' white supremacist beliefs and of their associations with like-minded organizations and activities. The evidence was highly probative of one defendant's participation in the entire conspiracy and of another's purpose in manufacturing a bomb to use it to kill or injure persons or to destroy property. In *United States v. Flemmi, 402 F.3d 79 (1st Cir. 2005)* , the Court affirmed the convictions of a retired Boston police officer arising from his assistance in hiding weapons and impeding an investigation of a criminal enterprise in which his brother was a controlling member. It held that testimony concerning the criminal enterprise and the defendant's relationship to it was relevant and not unduly prejudicial and demonstrated the close connection of the defendant with the enterprise and his knowledge of criminal acts of the enterprise. In a prosecution for violating arms export controls in connection with terrorist activities in Northern Ireland, *United States v. Johnson*, n96 the Court held there was no abuse of discretion in admitting evidence about the Provisional Irish Republican Army and the history of the Irish conflict. The evidence was probative of the indictment's characterization of the PIRA as a "body of insurgents" and, given the other evidence of the defendants' approval of and contribution to the methods and goals of the PIRA, presented at most a remote risk of guilt by association.

SEC v. Warde, 151 F.3d 42 (2d Cir. 1998) : The SEC charged the defendant Warde and one Downe in a civil enforcement proceeding with insider trading based on nonpublic information received by Downe as director of the affected company. Although Downe settled, he and Warde denied that any nonpublic information had been used in their trading, and Warde went to trial. Affirming a judgment against Warde, the Court found no abuse of discretion in the admission of evidence that Downe illegally attempted to conceal his trading by using offshore accounts and accounts of others. The probative value of the evidence on the issue of whether Downe was trading illegally on inside information was not substantially outweighed by the risk of condemning Warde by association in the eyes of the jurors. In *United States v. Ruggiero, 934 F.2d 440 (2d Cir. 1991)* , the Court affirmed convictions for conspiring to obstruct a grand jury investigation into the former whereabouts of a deceased narcotics fugitive, holding that evidence of the fugitive's narcotics activities was relevant to the defendants' motives for conspiring to obstruct justice; it was not an abuse of discretion to determine that this probative value outweighed any possible prejudicial effect of guilt by association.

United States v. Irizarry, 341 F.3d 273 (3d Cir. 2003) : Affirming RICO convictions, the Court ruled that it was error (but not plain error) to admit testimony about a high ranking member of a crime family that was completely unrelated to his dealings with the charged enterprise. In a footnote, the Court found it "necessary to once again caution against the dangers of eliciting this kind of evidence and the propriety of admitting it," since "irrelevant references to such notorious figures as the members of the Gambino crime family can poison the deliberative well to an extent that will fatally undermine the integrity of any subsequent conviction."

United States v. Taylor, 210 F.3d 311 (5th Cir. 2000) : The Court reversed the defendant's convictions for drug trafficking offenses because two prior state convictions of the purported head of the conspiracy, who was not tried with or called as a witness against the defendant, were improperly admitted. The Court held that the convictions were excessively prejudicial because they permitted the jury to infer that the defendant must be guilty because she associated with convicted felons and to assume that if the conspiracy's leader had delivered drugs, he must have delivered them to the defendant. In *United States v. Polasek, 162 F.3d 878 (5th Cir. 1998)* , the defendant, who operated a service that transferred motor vehicle documents from dealers to purchasers, was charged with fraudulently altering the mileage on titles and related documents. After the defendant's testimony denying any fraudulent alteration, the government called a special agent of the National Highway Traffic Safety Administration, who testified that the defendant had done title work for persons who were subsequently convicted of odometer fraud. Reversing, the Court held that the rebuttal

testimony was improper evidence of guilt by association. In *United States v. Parad-Talamantes*, n97 the Court reversed a drug conviction on the ground that the prosecution was improperly allowed to show that the defendant's brother was a drug dealer. Introduction of the evidence was "a highly prejudicial attempt to taint defendant's character through guilt by association."

United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005) : The Court affirmed a conviction for a murder committed in the mid-1970s, finding no abuse of discretion in the admission of evidence regarding the American Indian Movement and its violent activities at that time. The evidence was probative of the prosecution theory that the defendant and the victim were associated with the Movement and that the murder was committed because of concerns in the Movement that the victim had become a government informant, and any prejudicial effect was minimal because Movement violence was not a focus of the trial but was elicited only in a matter-of-fact and non-inflammatory way.

United States v. Haynes, 372 F.3d 1164 (10th Cir. 2004) : When officers went to the defendant's home to arrest him on an unrelated warrant, they found equipment and supplies frequently used in manufacturing methamphetamine, as well as P2P, a controlled substance with no commercial use that can be used in manufacturing methamphetamine. After his arrest, the defendant told a DEA agent that he knew a woman who manufactured methamphetamine using P2P. The Court held that the agent's testimony about that statement was properly admitted although it might pose a danger that the jury would convict on the ground the defendant apparently associated with drug dealers, since it was highly probative on the defendant's knowledge of methamphetamine manufacture, and thus could shed light on why he possessed the items seized from his home. In *United States v. Espinoza, 244 F.3d 1234 (10th Cir. 2001)* , the Court affirmed a marijuana conviction, holding that evidence that the defendant's wife had a pending drug charge and had accompanied the defendant when he previously transported drugs was properly admitted as probative of the defendant's knowledge that drugs were in his truck. However, it held that it was error (but harmless) to admit evidence that the defendant's sons had drug convictions and one had escaped from a halfway house. There was no suggestion at trial that the sons were involved in the drug transaction at issue. Moreover, even if the evidence had some tangential relevance, that was substantially outweighed by the prejudicial impression that most if not all members of the defendant's immediate family were involved in drug trafficking.

[36] High Crime Neighborhood

United States v. Quinn, 230 F.3d 862 (6th Cir. 2000) : Affirming a defendant's convictions for drug trafficking and firearms possession offenses, the Court found no error in admission of an officer's testimony that the neighborhood in which the defendant was arrested was a high drug-trafficking area. The evidence was at least marginally probative to explain why the arresting officers acted as they did, so the Court did not find an abuse of discretion.

[37] Hypnotized Witness

Mersch v. City of Dallas, 207 F.3d 732 (5th Cir. 2000) : A Magistrate Judge held that the plaintiff's hypnotically refreshed testimony about what happened during her arrest was sufficient to create a triable issue of fact in her suit against police officers for using excessive force. The Trial Court reversed and the Court of Appeals affirmed the grant of summary judgment to the defendants, holding that the hypnotically-enhanced evidence was *per se* inadmissible under *United States v. Valdez*, *infra*. In this case, the plaintiff did not initially accuse the police of beating her, but after her sister visited her in the hospital and expressed a suspicion that the police had caused her injuries, she "remembered" an alleged assault under hypnosis. In *United States v. Valdez*, n98 the Court reversed a conviction for extortion, finding that "when, as here, a hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session." The use of hypnosis in this context presents dangers of undue suggestiveness and the resulting

evidence is more prejudicial than probative. The Court went on to state that its holding did not make a hypnotized witness incompetent for all purposes and that "[i]f a sufficiently reliable method exists for the witness to separate pre-hypnotic memory from post-hypnotic pseudomemory, such testimony may be admissible." It also observed that it was not adopting a *per se* rule excluding the use of hypnosis under all circumstances, since "[i]n a particular case, the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect." See also *United States v. Harrelson* n99(in a prosecution charging defendants with conspiring and killing a Federal Judge, the Court distinguished *Valdez* on the ground that two witnesses who made identifications had either identified or described a defendant prior to being hypnotized).

Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985) : The Court reversed a judgment for a plaintiff who alleged product liability and negligence in the design of automobile brakes because the Trial Judge erred in admitting videotapes of a hypnotic session and rejecting the defendant's request for a limiting instruction explaining that the videotapes were admitted only to evaluate the opinions of an expert witness. The Court also rejected a *per se* rule barring the use of hypnosis to refresh the recollection of a witness. Instead, it held that hypnotically-refreshed testimony may be admitted if its proponent bears the burden of demonstrating that the procedures utilized were sufficient to guarantee reliability.

[38] Illness or Disease

Sinai v. New England Tel. & Tel. Co., 3 F.3d 471 (1st Cir. 1993) : Affirming a judgment for the plaintiff in an employment discrimination action, the Court held there was no abuse of discretion in permitting certain testimony by the plaintiff's psychologist. Prognosis evidence about the plaintiff's depression was very important to the damages issue, and the Trial Judge took care to ensure that the jury would not reach a verdict on improper grounds; evidence of the plaintiff's wife's own harassment and discrimination claims was proper on redirect in response to implications that the plaintiff's depression stemmed from preexisting marital difficulties. In *Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991)* , the Court affirmed a judgment for the client in an attorney malpractice action, holding there was no abuse of discretion in excluding testimony by the defendant's psychological expert that a mental condition possibly existing years before the expert examined the defendant might have affected his ability to perceive the harm he was causing a client. The weak probative value of the evidence was substantially outweighed by the likelihood the jury would improperly consider it on the negligence issue.

United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995) : The Court held in a loansharking prosecution that there was no abuse of discretion in excluding evidence of the victim's HIV infection and the defendant's knowledge of it. Although the evidence might have been relevant to whether the defendant would punch the victim in the face, that argument was not made until the parties had rested. The only argument made when the government objected referred to the victim's drug habits and sexual proclivities, and since those were already in evidence, examination concerning HIV infection was at best cumulative and at worst highly prejudicial, especially given the risk that a juror might discredit the victim's testimony solely because of his HIV status. In *Davidson v. Smith, 9 F.3d 4 (2d Cir. 1993)* , the Court reversed a judgment for the defendants in a prisoner's civil rights action because a defense witness violated an *in limine* order not to refer to the plaintiff's psychiatric history or his treatment at a state hospital for the criminally insane. Given the prejudicial effect of the evidence, the questionable efficacy of a curative instruction, and the relative strength of the plaintiff's case, it was error to deny the plaintiff's motion for a mistrial.

Wallace v. Mulholland, 957 F.2d 333 (7th Cir. 1992) : In a civil rights action for excessive force used by police in enforcing a commitment petition, the Court held there was no error in excluding evidence of the committed person's psychiatric history. Where the issue in the case was his actual behavior and how the officers responded to it, evidence about the general nature of his condition and the likelihood that someone with that condition would act aggressively was

probably irrelevant and certainly prejudicial.

Cisar v. Home Depot U.S.A., Inc., 351 F.3d 800 (8th Cir. 2003) : In a personal injury action arising from the sale of an allegedly defective chain saw, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the admission of "embarassing and damaging pre-accident and post-accident incidents involving [the plaintiffs husband and wife]. Given the nature of [their] claims, Home Depot could legitimately attack the claims that Cisar's brain injury caused his post-accident behavior and damaged his familial relationships."

United States v. Ives, 609 F.2d 930 (9th Cir. 1979) : The Court said that it was error (but harmless) to reject defense evidence of past mental condition in support of an insanity defense and emphasized that Trial Judges should not be quick to exclude (as cumulative) evidence of medical history that supports such a defense.

O'Banion v. Owens-Corning Fiberglas Corp., 968 F.2d 1011 (10th Cir. 1992) : Affirming a judgment for the defendants in an action for asbestos-related disease, the Court held there was no abuse of discretion in prohibiting mention of the word "cancer" where the plaintiff offered no expert evidence that there was a reasonable medical probability of his developing cancer. In *United States v. Austin, 933 F.2d 833 (10th Cir. 1991)* , the Court reversed a conviction for resisting correctional officers, holding it was an abuse of discretion when the defense was mental illness to exclude records of prior hospitalizations solely on the ground of remoteness. The Court was unwilling to place a temporal limit on relevant proof of mental illness in view of its frequently long duration, its possible chronicity, and its recurrent manifestations.

United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004) : The defendant was convicted for abusive sexual contact with a minor following an incident in which he rubbed a girl's thigh and allegedly masturbated while they were passengers on an airplane. Affirming, the Court found no abuse of discretion in the exclusion of testimony from a doctor at a psychiatric clinic who examined the defendant eleven days after the incident. The doctor would have testified that the defendant suffered from a bipolar disorder and made "bizarre movements" during his hospitalization, which the defense claimed would explain the touching and the alleged masturbation. The Court concluded that the evidence "fails the relevance test" and was properly excluded under *Rule 403*. In *Wright v. Commercial Union Ins. Co., 818 F.2d 832 (11th Cir. 1987)* , the Court affirmed a judgment for an insured who sued to recover on a policy covering business property, and held that evidence that the insured was suffering from terminal cancer when his building was damaged was admissible to rebut the defendant's claim that the insured had failed to comply with certain policy requirements.

[39] Impeachment and Rebuttal Evidence -- Civil Cases

Connelly v. Hyundai Motor Co., 351 F.3d 535 (1st Cir. 2003) : Affirming a judgment for the plaintiff in a suit for the death of a child caused when an airbag deployed in a collision, the Court found no abuse of discretion in the exclusion of evidence that the child's father, who was driving at the time of the accident, had twice been cited for driving his car without fastening the child's seatbelt. The defense argued that the evidence should have been admitted to impeach the father's testimony on cross-examination that he did not remember a police officer advising him that the child was to be wearing a seatbelt when the car was moving, but the Court found the father was sufficiently impeached by a prior inconsistent statement from his deposition, and that the Judge could reasonably have concluded that the citation evidence would have been excessively prejudicial. In *Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999)* , the sole shareholder of a corporation that had a contract to maintain the defendant's parking lot alleged violation of § 1983 by a hostile work environment. Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion in precluding impeachment of the individual plaintiff on the basis of a 15-year-old incident, as the probative

value of the incident was minimal and a danger of prejudice existed.

Pitasi v. Stratton Corp., 968 F.2d 1558 (2d Cir. 1992) : In a suit against a ski resort, the defendant offered testimony that it had never placed ropes between two trails where the plaintiff was injured. When the plaintiff recalled one of the defendant's employees, evidence that ropes had been placed between the trails the previous year was excluded on the grounds it was improper rebuttal and any probative value was outweighed by the prejudicial effect. The Court reversed, holding the evidence was both proper rebuttal, as not necessary to the plaintiff's *prima facie* case, and highly relevant to impeach the defendant's employee witnesses on the central issue of the defendant's negligence.

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : In a personal injury action arising from a slip and fall, the Trial Judge admitted evidence that one of the plaintiff's expert witnesses had pleaded guilty to embezzlement, but the Judge forbade questions regarding the amount embezzled or the facts and circumstances of the crimes. Reversing a judgment for the plaintiff on other grounds, the Court noted that the guilty pleas were properly admitted under *Rule 609(a)(2)*. The underlying misconduct, involving dishonesty, was probative of the witness' character for truthfulness, and thus admissible, at the Judge's discretion, under *Rule 608(b)*. That discretion is governed by *Rules 403* and *611*. The Court found no abuse of discretion in excluding reference to the underlying acts, but it noted that the amount of money misappropriated and the manner in which it was done were certainly relevant to prove the witness' dishonesty. On remand, the Judge was free to balance once again whether the gain from this probative value justified the time required to ask about the details.

Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977) : The Court reversed a judgment for the defendant in a product liability action because of an erroneous ruling that a defense witness, who testified that the instrument used by the deceased was safe to operate, could not be impeached by a letter the witness sent to dealers selling the instrument warning them about its "death-dealing propensities" when used in the fashion it was used by the deceased. Finding error in the exclusion of the evidence under *Rule 407*, the Court stated that the evidence should not have been excluded under *Rule 403* because there was no danger of *unfair* prejudice to the defendant.

Fort v. C. W. Keller Trucking, Inc., 330 F.3d 1006 (7th Cir. 2003) : The plaintiff in a wrongful death action arising from a truck accident had entered received $2.25 million under a loan receipt agreement with the contractor for which the truck was operating. The agreement released all defendants except the trucking company, and provided that the plaintiff would pay the contractor one-third of money recovered from the trucking company or its insurer. At trial the defendant sought to introduce the agreement to impeach a manager for the contractor. The Court held there was no abuse of discretion in excluding the evidence, since (1) the witness had no personal knowledge of the agreement, (2) the defendant had ample opportunity otherwise to expose the witness' bias resulting from his employer's potential liability, and (3) "the jury might have been unable to limit its consideration of the loan receipt agreement to the issue of bias, and instead inferred that the plaintiff had already been fully compensated for her loss through the loan receipt agreement." In a breach of contract action between a manufacturer and a sales representative, *Jabat, Inc. v. Smith, 201 F.3d 852 (7th Cir. 2000)* , the plaintiff was permitted to introduce the defendant's income tax returns and to cross-examine him on the information they contained, but was prohibited from showing that the defendant had not timely filed his tax returns. The Court found no abuse of discretion: the returns were relevant to the issues of mitigation of damages and the claim that the representative was receiving income from the manufacturer's competitor, but the timeliness of the returns' filing was irrelevant to those issues and would raise collateral questions likely to confuse the jury and be unduly prejudicial.

Lampkins v. Thompson, 337 F.3d 1009 (8th Cir. 2003) : The plaintiff in a civil rights action alleged that federal agents had unconstitutionally detained him at an airport. When the agents testified that they had seen the plaintiff's ticket before the stop and it had another passenger's name on it, the plaintiff sought unsuccessfully to introduce the

agents' prior sworn statement, which said nothing about seeing the name on the ticket until after the stop. Affirming a judgment for the defendants, the Court found no abuse of discretion in exclusion of the evidence, since the omission was not probative to impeach in the absence of a statement that the affidavits contained all the facts the declarant knew about the incident, and since the affidavits were likely to mislead or confuse the jury. In *Swan v. Interstate Brands Corp., 333 F.3d 863 (8th Cir. 2003)* , a terminated employee suing for age discrimination sought to introduce a severance agreement and release that he had signed, ostensibly only to impeach the testimony of a witness for the defendant regarding the date of the termination decision. The Court held there was no abuse of discretion in excluding the evidence: the timing of the decision was collateral to whether the defendant discriminated on the basis of age; without a valid exception such as impeachment, the agreement was inadmissible evidence of discrimination under *Rule 408*; and the evidence was unduly prejudicial to the defendant. In a product liability action involving a pneumatic nailer, *Drabik v. Stanley-Bostitch, Inc.*, n100 the Court held there was an abuse of discretion in admitting extensive evidence of dissimilar nailer accidents to impeach the defendant's expert. To hold that an expert who simply offers an opinion that the product is "generally safe" opens the door to all other accident evidence would create an exception swallowing the general rule requiring substantial similarity.

Glover v. BIC Corp., 6 F.3d 1318 (9th Cir. 1993) : In a product liability wrongful death action in which the defendant manufacturer of a cigarette lighter attempted to show that the decedent was the victim of a cooking accident, the Court held it was an abuse of discretion to exclude evidence of past fires in the victim's home.

SEC v. Peters, 978 F.2d 1162 (10th Cir. 1992) : The Court reversed a judgment for the defendant in a civil action for insider trading violations, holding the SEC had been improperly precluded from asking the defendant and his character witnesses about allegations of other securities law violations committed by the defendant, as he had made his character and his unblemished history a very important part of his defense and the rulings deprived the jury of a fair and balanced opportunity to evaluate his character. The Trial Judge had erroneously assigned the proposed evidence a probative value of "nil" and overemphasized its prejudicial effect and tendencies to raise collateral issues.

Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 37 F.3d 1460 (11th Cir. 1994) : The Court reversed a judgment on a jury verdict of no damages in a suit by a business selling yellow pages advertising that alleged the defendant had committed antitrust and state law violations. The plaintiff relied upon an expert lawyer-CPA to testify about lost profits, and the Magistrate Judge permitted the defendant to question the expert about his bankruptcy, an accusation of forgery, and a sanction in 1969 by a state board of accountancy. The Court found that the evidence was unduly prejudicial.

[40] Impeachment and Rebuttal -- Criminal Cases

[a] Accused Witness

United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996) : A defendant charged with arson and insurance fraud testified on direct that, when previously faced with an unprofitable business venture, he had duly paid his debts, had never had a fire connected with any other enterprise, and had never made a claim for fire damage on any of his other properties. On cross-examination, he was asked about his prior attempt to solicit arson of a different property. The Court held that the question was proper, even though the prosecutors knew that he would deny it (based on his direct testimony) and they would be prohibited under *Rule 608(b)* from proving the event through extrinsic evidence. "[C]ross-examination of this kind is part of a system of checks and balances that the law has developed to caution a credulous jury against possible perjury." The requirement that the government have a good-faith basis for the question, the preclusion of extrinsic evidence to contradict the witness' denials, and the balancing of *Rule 403* provide the defendant sufficient protection. The Court found reversible error, however, when the prosecutor insinuated that the

person solicited by the defendant for the prior arson had been convicted of the crime, when in fact this was not the case.

United States v. Markarian, 967 F.2d 1098 (6th Cir. 1992) : The Court affirmed a conviction for conspiracy to possess heroin with intent to distribute, holding there was no abuse of discretion in permitting rebuttal testimony about an incident connecting the defendant with drugs, as it was relevant to his knowledge or intent to deal and was introduced in response to the defendant's sweeping statements (going far beyond the particular crimes charged) on direct examination concerning his experiences with drugs.

United States v. Woodard, 315 F.3d 1000 (8th Cir. 2003) : In a prosecution for Medicaid fraud, the Court found no abuse of discretion when the defendant was cross-examined about receiving the proceeds of an irregular business loan through a series of related partnerships. The evidence was relevant both to the financial condition of the defendant's business and to the defendant's credibility, which he placed in issue by testifying about the loan during direct examination.

United States v. Jimenez, 214 F.3d 1095 (9th Cir. 2000) : In a trial for felon firearm possession, the government sought to impeach the defendant with his prior felony convictions for burglary and for assault with a deadly weapon. The Trial Judge granted the request, but ordered that the assault conviction be referred to as a "felony involving a firearm." The Court reversed because the Judge's well-meaning attempt to mitigate the prejudice to the defendant inadvertently made it worse. Altering the nature of the assault conviction from one involving a deadly weapon to one involving a firearm increased rather than decreased the likelihood that the jury would draw an impermissible inference, since the only issue in dispute was whether the defendant in fact possessed a firearm. In *United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000)* , the Court affirmed a conviction for drug possession with intent to distribute, finding no abuse of discretion in the admission of evidence that the defendant and a favorable witness belonged to a secretive Japanese organized crime group whose members will perjure themselves for one another. The evidence was probative of bias, and the Judge both gave a limiting instruction and induced the government not to show photographs of the gang's distinctive tattoos on the defendant.

United States v. Smith, 63 F.3d 956 (10th Cir. 1995) , *vacated on other grounds*, *516 U.S. 1105* , *on remand*, *82 F.3d 1564 (1996)* : The Court affirmed drug trafficking convictions, holding that photographs showing the defendant and others posing with firearms and making gang signals were properly admitted during cross-examination to impeach the defendant's testimony that he was not a gang member and that he possessed the guns only for protection from another gang.

[b] Impeachment and Rebuttal -- Criminal Cases -- Defense Witnesses

United States v. Mercado, 412 F.3d 243 (1st Cir. 2005) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion in permitting the prosecution to cross-examine the defendant's ex-girlfriend about why she waited nine months to come forward if her exculpatory evidence were true. In the course of the cross-examination, the prosecution established that the witness knew the defendant was facing proceedings in State Court arising from the same gun possession giving rise to the federal prosecution and failed to come forward to assist the defendant in the state case. The Court noted that the jury was properly instructed that the state proceedings were only relevant to "action or inaction" by the witness. In *United States v. Bartelho, 71 F.3d 436 (1st Cir. 1995)* , the defendant was charged with felon firearm possession after a domestic dispute. The Court held there was no abuse of discretion when the prosecutor asked the defendant's girlfriend on rebuttal whether the defendant had threatened to kill her, as she was the best witness to his physical possession of the gun and the evidence was highly relevant to the jury's decision whether to credit her recorded pretrial testimony that he in fact possessed the gun or her in-court denial of that

fact. Furthermore, only the bare facts, not sensational details, of the threats were elicited.

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) : The prosecutor asked character witnesses for a defendant charged with racketeering about an incident where a State Judge the defendant was promoting for appointment to the federal bench had approved a 60 percent legal fee for him in the settlement of a personal injury case. Reversing the convictions on other grounds, the Court noted that the government had a good faith reason for inquiring into the matter to challenge the basis for the character witnesses' opinions, but that the prosecutor argued the evidence to the jury in a manner well beyond the bounds of propriety and relevance.

United States v. Bradley, 173 F.3d 225 (3d Cir. 1999) : The Court affirmed a public official's conviction for corruption, holding there was no abuse of discretion in admitting evidence that $157,000 in cash was found in lockboxes in the attic of his girlfriend's home. She claimed that the money had been found in her father's house after his death and it was in her house until she could discuss it with her sister. The Court found that the evidence properly impeached the girlfriend's testimony that $3,600 she had received from the defendant had been lent to her father, since he was unlikely to have borrowed if he had so much money, and it also impeached her testimony that payments the defendant made to her were loans, since she did not repay him when she found the cash. The Trial Judge properly gave limiting instructions that the evidence was admitted only to impeach and that it was not offered to show any connection between the cash, the defendant, and any crime.

United States v. Thompson, 359 F.3d 470 (7th Cir. 2004) : The defendant was charged with possession of ammunition by a felon after bullets were found in a jacket in a car in which he and his girlfriend had been traveling. Shortly after the arrest, she told police that the jacket and the bullets belonged to the defendant, but at trial she testified for the defense that they were hers. Although an *in limine* ruling precluded mention of the defendant's prior convictions and status as a suspect in uncharged crimes, the government was permitted to ask the girlfriend on cross-examination about past threats the defendant had made against her and past charges she had brought against him. Affirming, the Court found no abuse of discretion, since even without evidence that the witness was intimidated, the evidence of threats was probative of the witness' bias and its probative value was not substantially outweighed by the danger of unfair prejudice.

United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) : The Court affirmed a conviction for drug possession with intent to distribute, finding no abuse of discretion in the admission of evidence that the defendant and a favorable witness belonged to a secretive Japanese organized crime group whose members will perjure themselves for one another. The evidence was probative of bias, and the Judge both gave a limiting instruction and induced the government not to show photographs of the gang's distinctive tattoos on the defendant. In a fraud prosecution, *United States v. Bush, 58 F.3d 482 (9th Cir. 1995)* , after a witness said, in response to a question from defense counsel, that he had never known the defendant union official to have any problems, the government asked whether he was aware that civil RICO charges accusing the defendant of financial misconduct had been filed. Although the prosecutor appeared to be referring to a separate incident, in fact the civil charges arose out of the same situation as the criminal charges. The Court held it was error (but harmless) under *Rule 403* to permit the question: the evidence lacked probative value because the witness' knowledge of the civil RICO case was entirely consistent with his original testimony that he had never known the defendant to be in trouble before, and it was prejudicial because it falsely suggested that the RICO charges represented a separate incident of misconduct somewhere in the defendant's past.

[c] Impeachment and Rebuttal -- Criminal Cases -- Opinions on Credibility

United States v. Torres-Galindo, 206 F.3d 136 (1st Cir. 2000) : Although the Court affirmed carjacking and

firearms convictions, it noted that it was troubled by the testimony of an FBI special agent whose "vouching" the Court had criticized in *United States v. Rosario-Diaz, 202 F.3d 54 (1st Cir. 2000)* . The agent opined with respect to custodial statements made by one defendant that "it is difficult for me to remember a time when a defendant or a suspect in a case has immediately told me the truth" and that "[m]ost of the time they always start with a lie." The Court observed that the agent appeared to be giving improper expert testimony, and it added that "any effort to test the basis for Agent Huff's opinion by examining the individual instances involving other confessions in the prior ten years obviously created a threat of a distracting exploration of the facts in unrelated cases. *See Rule 403*." Any error in admission of the testimony was harmless, however.

[d] Impeachment and Rebuttal -- Criminal Cases -- Prosecution Witnesses

[i] Defense Evidence or Questioning

United States v. Watson, 409 F.3d 458 (D.C. Cir. 2005) : The defendant, an African-American, was stopped by an officer for a window-tint violation, and a search of his car uncovered drugs and firearms. At trial for weapons and drug offenses, the defendant wanted to cross-examine the officer about 30 instances in which he stopped black men for window-tint violations but eventually arrested them on drug charges. Affirming, the Court found no error in prohibiting this inquiry: the relevance of the evidence to impeach the witness for bias "was not readily apparent given the lack of information regarding [the officer's] arrests of members of other demographic groups, and its probative value was substantially outweighed by the threat of undue delay or confusion of issues inherent in a drawn-out inquiry into the details of [the officer's] history of arrests."

United States v. Zaccaria, 240 F.3d 75 (1st Cir. 2001) : During the investigation of a counterfeiting scheme, a principal prosecution witness at the defendant's trial had elected to remain silent after receiving *Miranda* warnings. The Court held there was no abuse of discretion when the defendant was precluded from introducing evidence of this prior silence to impeach the witness. In the Court's view, "[s]ilence per se generally has little or no probative value for impeachment purposes[;] ... evidence of the invocation of the right to remain silent is inherently prejudicial"; and there were no "special trappings that might imbue [the witness'] silence with unaccustomed probative force" or other special circumstances that called for making an exception to the usual rule. In a bank fraud prosecution, *United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997)* , the Court held that there was no abuse of discretion in precluding cross-examination of a cooperating witness about the sentences he faced and avoided by his plea bargain. That would have put before the jury the potential punishment the defendant faced, which could confuse the issues that the jury was supposed to be deciding.

United States v. Holland, 381 F.3d 80 (2d Cir. 2004) : In a Mann Act prosecution, the defense sought to introduce the indictment, plea agreement, and judgment in the Mann Act prosecution of another pimp who had employed some of the prosecution witnesses after they stopped working for the defendant. The defendant argued that the evidence showed the witnesses lied in order to protect the other pimp or were confused about who had transported them on particular occasions, but the Court found no abuse of discretion when the evidence was excluded, since it would have added nothing to the defendant's efforts to discredit the witness' testimony through cross-examination. The excluded filings did not even name the women transported. In *United States v. Harvey, 547 F.2d 720 (2d Cir. 1976)* , the Court reversed a conviction for bank robbery on the ground that a key prosecution identification witness was improperly protected against evidence that the witness once had accused the appellant of fathering a child of hers. The Court emphasized that "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely," and said that "given the importance of ... biased testimony to the defense, whatever confusion or delay that may have resulted from its admission would have to have been overwhelming to satisfy *Rule 403*'s balancing test."

United States v. Cropp, 127 F.3d 354 (4th Cir. 1997) : The Court held in a crack distribution conspiracy prosecution that there was no abuse of discretion in prohibiting cross-examination of cooperating witnesses regarding the specific penalties that they would have received absent cooperation or that they hoped to receive due to their cooperation. Defense counsel were permitted to ask the witnesses whether they faced a "severe penalty" prior to cooperating and whether they expected to receive a lesser sentence because of their cooperation. Any additional probative value from quantitative questions was outweighed by the certain prejudice that would result when a sympathetic jury learned that a finding of guilt results in 10-20 years of imprisonment.

United States v. Dixon, 413 F.3d 540 (6th Cir. 2005) : In a prosecution for attempted bank extortion, the Trial Judge granted a defense motion *in limine* to exclude testimony by the defendant's son and former wives that, in their respective opinions, the person depicted in a bank surveillance photograph was the defendant. The Court affirmed on interlocutory appeal, finding no abuse of discretion in the rulings. Testimony from one of the former wives was properly excluded because her potential bias could not be explored on cross-examination without bringing in highly prejudicial information concerning the defendant, such as his alleged spousal abuse and nonpayment of child support.

United States v. Re, 401 F.3d 828 (7th Cir. 2005) : The chief prosecution witness in an extortion trial had identified the defendant in a photo line-up but had made an inaccurate identification of another man as the defendant's accomplice. The Court held there was no error when the defense was barred from asking the witness on cross-examination, "You don't see [the person you identified as the accomplice] in the courtroom today?" The defense was properly permitted to (and did) cross-examine the witness about his ability to identify the perpetrators, but the objectionable question went to the government's exercise of prosecutorial discretion, which is not a proper subject of cross-examination. In a prosecution for conspiring to possess and distribute cocaine base, *United States v. Cavender*, n101 the principal prosecution witness testified on direct and reiterated on cross that he had not used, sold, or dealt drugs when he previously lived in Chicago. The Trial Judge precluded the defense from introducing evidence that the witness had been convicted of a felony in Chicago for possession of a controlled substance. Reversing, the Court held that it was error under *Rule 609(a)(1)* to exclude the evidence of the narcotics conviction. Under the applicable *Rule 403* balancing test, the evidence was highly probative in contradicting the witness' testimony and would not be cumulative or a waste of time, since the jury had "heard absolutely nothing that would have hinted to them that [the witness] was lying to them right there as he sat in the witness stand." In *United States v. Santos*, n102 the Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms. At trial the defense was not permitted to cross-examine one of the Treasurer's office employees, a lesbian, about her alleged hostility to the defendant because he had fired her lover, whom the witness had recruited as the defendant's campaign manager, breaking up their relationship. Reversing, the Court held that although there was some risk that anti-homosexual stigmatization could lead jurors to be distracted or to make them irrationally doubt the witness' truthfulness, the evidence sought would be highly probative in rebutting the government's contention that the witness was testifying only out of disgust at the defendant's behavior. Even the government's offer to permit cross-examination as to the firing of the campaign manager would not have had the probative force on credibility of knowing that the defendant had broken up the witness' relationship.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed a conviction for aggravated sexual assault because the defense was erroneously prevented from introducing a lay witness' opinion that one of the alleged victims (who testified) "was untruthful" and "didn't always tell the truth." The witness was the foster care parent with whom the child had lived following the initial report and investigation of abuse. She saw him on a daily basis during the four to six months that he resided with her, so her opinion about his credibility was more than a "bare assertion" or "conclusory observation." The evidence was permissible under *Rule 608(a)*, and highly probative on the credibility of the victim's testimony, which was one of the central issues of the case. The Judge's decision to exclude the testimony because "[t]hat's strictly her personal opinion and that would be a slippery slope" did not raise countervailing

considerations appropriate under *Rule 403*.

United States v. Dees, 34 F.3d 838 (9th Cir. 1994) : The Court affirmed a conviction for mail and wire fraud arising out of a scheme to sell the same baby to different people at the same time, holding it was an abuse of discretion (but harmless error) when the defense was not permitted to ask a victim witness on cross-examination whether she had sold to a motion picture company the rights to the story of her experiences with the defendant. The potential pecuniary and nonpecuniary benefits of a movie contract were relevant to the witness' bias, and any prejudice from the evidence would not be unfair.

[ii] Impeachment and Rebuttal -- Criminal Cases -- Prosecution Witnesses -- Prosecution Evidence or Questioning

United States v. Edwards, 388 F.3d 896 (D.C. Cir. 2004) : At a trial for felon firearm possession, the arresting officer testified that he apprehended the defendant after a chase that ended when the officer knocked a gun from the defendant's hand. Affirming, the Court found no abuse of discretion when the officer was permitted to testify on redirect examination that he had chased the defendant because the defendant ran from him, and people who had run from him in the past had been carrying guns or drugs. Although the redirect testimony would not have been relevant had it been offered on direct examination, it became relevant to rebut cross-examination that suggested the officer had given chase in order to harass the defendant after having been incensed by the defendant's vulgarity and profanity. The Court concluded that the probative value of the testimony in countering the implication of bias was not substantially outweighed by the danger of unfair prejudice.

United States v. Richardson, 421 F.3d 17 (1st Cir. 2005) : The defendant was convicted for perjury before a grand jury investigating Medicare/Medicaid fraud, when she lied about illegal discounts for pharmaceuticals from her employer. The prosecution introduced testimony from a former supervisor that the employer expected accurate reports from employees and gave bonuses to increase sales, and it also introduced evidence that the witness had pleaded guilty to charges of fraud against the government based on conduct while working for the employer. The defendant argued that the guilty plea evidence was prejudicial in suggesting guilt by association, the risk of prejudice substantially outweighed the weak probative value of the substantive testimony, and the preemptive impeachment was unnecessary because the defendant offered to forgo impeachment of the witness. Affirming, the Court held there was no abuse of discretion, since the evidence was relevant, and any risk of undue prejudice was minimized by lengthy and repeated cautionary instructions to the jury. In *United States v. Coviello, 225 F.3d 54 (1st Cir. 2000)* , the Court affirmed convictions for transporting stolen property, holding there was no abuse of discretion when the prosecution was permitted to ask a cooperating witness on redirect whether a defendant was paying her attorney's fees and whether the defendant's trial attorney had represented her at her grand jury appearance. On cross-examination, the witness had minimized the defendant's role in the conspiracy, and the redirect examination was relevant to the witness' bias. In a bank robbery prosecution, *United States v. Balsam*, n103 one defendant made a motion *in limine* announcing his intention to offer, as proof that the principal cooperating witness was biased against him, evidence that after his arrest the witness attempted to have the defendant murdered; the defendant sought to exclude any evidence that the basis for the witness' animus was a mistaken belief that the defendant had implicated the witness in the robbery scheme in order to obtain favorable treatment in an unrelated extortion case then pending against the defendant. The Court found no abuse of discretion when the government was permitted to rebut the defendant's evidence that the witness was biased against him with evidence that the defendant was then faced with a criminal case on unspecified charges. Absent an explanation, the jury might have been misled to conclude that the witness' feelings were irrational or arbitrary. The Court also found no abuse of discretion when a prosecution witness was permitted to testify to her fear of a defendant who was a former boyfriend. The witness was not permitted to describe the bad acts causing this fear, and any prejudicial effect was slight, since she testified she feared him on but one occasion, while the evidence was relevant to explain her reluctance to testify as a government witness.

United States v. Vasquez, 267 F.3d 79 (2d Cir. 2001) : A witness in a prosecution for murder in aid of racketeering testified on direct about two violent confrontations he had with the defendant, one of which involved gunshots through an apartment's door after the witness had observed the defendant through the peephole. On cross-examination, defense counsel brought out that the witness went and got a gun although he had not seen a gun on the defendant, and suggested that the witness had started the shooting. On redirect, the witness was permitted to explain that he got the gun because he knew the defendant's reputation for killing people. The Court affirmed and found no abuse of discretion, noting that the balance of probative value and prejudicial effect is altered when evidence that might be inadmissible on direct is necessary to rebut testimony elicited on cross-examination that created a false impression. Here, the cross-examination tended to show that the witness had gone for his gun in aggression and the redirect questioning merely clarified why the witness acted as he did. In *United States v. Eisen, 974 F.2d 246 (2d Cir. 1992)* , the Court affirmed RICO convictions for a law firm's fraudulent conduct in prosecuting personal injury litigations, holding there was no abuse of discretion in allowing the government to call witnesses that it had said "have refused to give up the lie." Where the government has called a witness whose corroborating testimony is instrumental in constructing its case, it has a right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government's account of the same events. The prejudicial effect of the impeachment in this case did not substantially outweigh the probative value of the evidence.

United States v. Universal Rehabilitation Servs. (PA), Inc., 205 F.3d 657 (3d Cir. 2000) (en banc): This case is discussed in the Editorial Explanatory Comment, *§ 403.02[8]*.

United States v. Ince, 21 F.3d 576 (4th Cir. 1994) : The Court reversed a conviction for assault with a dangerous weapon, finding that "the United States' only apparent purpose for impeaching one of its own witnesses was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence of [the defendant]'s alleged confession." The Court noted that when the prosecution attempts to introduce a prior inconsistent statement to impeach its own witness, the statement's likely prejudicial impact often substantially outweighs its probative value for impeachment purposes because the jury may ignore limiting instructions and consider the "impeachment" testimony for substantive purposes.

United States v. Segines, 17 F.3d 847 (6th Cir. 1994) : In a prosecution for cocaine distribution offenses, the Court held there was no abuse of discretion in admitting redirect testimony by a government witness that his apartment had been firebombed by friends of a defendant. Although the probative value of the evidence might have been outweighed by its prejudicial effect if offered on direct examination, here the defense opened the door by eliciting on cross-examination that the government had been supporting the witness for three months before the trial. The firebombing evidence addressed the witness' need for government support and protection and rebutted the suggestion that he was selling his testimony.

United States v. Henderson, 337 F.3d 914 (7th Cir. 2003) : The defendant was convicted for distributing cocaine base after he sold drugs to an informant, who was cooperating in a transaction for the first time. The informant did not testify, but the defendant introduced evidence suggesting that the informant had framed him in order to improve a plea bargain. On rebuttal, the government was permitted to introduce evidence that the informant subsequently cooperated in cases concerning approximately 20 other individuals, resulting in guilty pleas in three of the six cases that had been resolved to that time. The Judge gave a cautionary instruction that guilty pleas in the other cases could not be considered as evidence of the defendant's guilt. Affirming, the Court found no abuse of discretion in admitting the evidence, since it tended to rebut the attack on the informant's credibility. Even though the informant did not testify, the argument that he had framed the defendant was an attack on his credibility, and the evidence tended to make it less

likely that the defendant's case was the informant's only "bargaining chip" in negotiating a lesser sentence. In *United States v. Holly, 167 F.3d 393 (7th Cir. 1999)* , the Court affirmed fraud convictions, finding no error when the government was permitted to bring out on direct examination that the defendant had threatened witnesses, since defense counsel indicated that he intended to use the witnesses' prior statements exculpatory of the defendant on cross-examination.

United States v. Perez, 30 F.3d 1407 (11th Cir. 1994) : The principal witness for the prosecution in a drug case was extensively cross-examined regarding the amount of money the government was paying him; on re-direct he was permitted to testify that he had refused an offer of $5,000 to not testify at trial. The Court held this was error (but harmless), as the witness' own testimony that he refused the offer because he feared for his life meant the evidence had no probative value, and the inherent prejudice of the jury's assumption that the defendants were connected with the offer far outweighed any possible probative value.

[41] Impeachment with Collateral Matter

United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988) : Affirming drug conspiracy convictions, the Court held that the "specific contradiction" rule, which bars impeachment of a witness on a collateral issue, is a particular example of balancing under *Rule 403* and may be invoked by a Trial Judge.

United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997) : A prosecution witness in a bank fraud case explained differences between his trial testimony and pretrial statements he gave to an attorney on the ground that the attorney had said the purpose of the interview was to "protect" the defendant. The Court held there was no abuse of discretion in precluding the defense from calling the attorney to impeach the witness' explanation, since the evidence would be collateral because it would go only to the witness' credibility and would not be material to the defendant's guilt or innocence. In *United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993)* , the Court affirmed a forged check conviction, holding there was no error in precluding the defendant from calling a witness to testify that a government witness did not live at the address he testified to. Drawing an analogy to *Rule 608(b)*'s ban on extrinsic evidence, the Court reasoned that "[i]t is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter." The Court concluded that the power to exclude evidence offered to impeach on a collateral matter is a particular example of the Trial Judge's authority to exclude evidence under *Rule 403*.

United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978) : Reviewing a ruling that permitted other crimes evidence to be introduced in a public corruption case, the Court observed that "[o]nce a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." The Court cited both *Rule 607* and *Rule 403* and noted in a footnote that "*Rule 607* appears to allow the continuation of federal practice in admitting extrinsic evidence to impeach specific errors or falsehoods in a witness' direct testimony, subject to *Rule 403* considerations."

United States v. Montgomery, 262 F.3d 233 (4th Cir. 2001) : In the prosecution of a drug distribution conspiracy, the defendant proffered certain housing administration documents and testimony by a former girlfriend to refute testimony that he received drugs at a residence in late 1992. The records would have shown that the girlfriend did not rent the premises until March 1993. Affirming exclusion of the evidence, the Court agreed with the Trial Judge that this was impeachment on a collateral matter.

United States v. Bitterman, 320 F.3d 723 (7th Cir. 2003) : On cross-examination in an armed bank robbery case, a cooperating witness admitted that he told authorities that the defendant had purchased a 9-mm. handgun from one Pantaleo. Then, during the defense case-in-chief, Pantaleo was called to testify that he had never sold the gun, but the Trial Judge ruled that the evidence was collateral because there was no question that the gun used in the robbery was a BB gun. Since the evidence regarding the 9-mm. gun was irrelevant except for impeachment by contradiction, the Court held there was no abuse of discretion in excluding it as "collateral." In *United States v. Bonner, 302 F.3d 776 (7th Cir. 2002)* , the defendant swindled a widow out of her VA benefit payments. Affirming his conviction for fraud, the Court held there was no abuse of discretion in excluding testimony of a defense witness, which was offered to rebut the widow's testimony that she had not spoken to the witness on the telephone. The evidence was relevant only for impeachment, so it was a collateral matter and properly excluded. In *United States v. Kozinski*, n104 the Court affirmed drug trafficking convictions, holding there was no abuse of discretion in excluding testimony by witnesses that would contradict government witnesses only on matters irrelevant to issues in the trial. In *Taylor v. National R.R. Passenger Corp*., n105 a judgment for the plaintiff in a FELA case was reversed because 14-year-old military medical records indicating complaints of back pain and a job application not mentioning back injuries had been erroneously admitted. The Court held that the records were irrelevant to the plaintiff's injury claim and were collateral extrinsic evidence inadmissible to impeach his testimony.

United States v. Grooms, 978 F.2d 425 (8th Cir. 1992) : The Court affirmed a conviction for abusive sexual contact, holding there was no abuse of discretion in excluding extrinsic evidence of an alleged prior inconsistent statement offered to impeach a government witness, as the disputed statement related only to a collateral matter not affecting the substantive issues of the case.

[42] Inadequate Police Investigation

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001) : In a RICO prosecution, the defendant offered handwritten notes found in police files, which recorded tips the police had received about a murder with which the defendant was eventually charged, indicating that the murder might have been committed by someone else. The defense argued that the notes were probative of an inadequate police investigation, but the Court held there was no abuse of discretion in excluding the notes. The Court explained that "speculative evidence of the inadequacy of the police investigation would have shifted the jury's focus from the accusations against Arthur to accusations against the police, thus creating a real danger of unfair prejudice and jury confusion."

[43] Incarceration

Battle v. Memorial Hosp., 228 F.3d 544 (5th Cir. 2000) : After the infant plaintiff suffered extensive neurological injuries from viral encephalitis, he and his parents brought a medical malpractice action against the physicians and hospitals that had treated him. Before trial the plaintiffs made a motion *in limine* to exclude evidence that the father was in prison at the time of the incident. The Magistrate Judge trying the case ruled that the danger of undue prejudice did not outweigh the fact and duration of incarceration, but ordered the defendants not to name or refer to the specific felonies. Ultimately, the father chose not to testify and the only evidence admitted on the issue was a handwritten note on a social service report at page 98 of approximately 1000 pages of medical records, which stated that the father was not part of the family unit because he was in jail and had been denied leave to visit; no one referred to the note in front of the jury. The Court held there was no abuse of discretion in admitting the note, since the fact that the father was not part of the family unit during the infant's illness and its aftermath was relevant to the father's individual claim for damages.

[44] ***In Limine*** Rulings

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered by the District Court. In the course of its opinion the Court expressed approval of the Judge's substantial use of *in limine* hearings on evidence questions "not only because the Court's *in limine* consideration was far more efficient than if the rulings were deferred until the trial, with consequent interruptions, but also because the *in limine* procedure permitted more thorough briefing and argument than would have been likely had the rulings been deferred." Although the Court noted that there are "countervailing considerations, especially with respect to relevancy rulings under *Rule 403* that may be made pre-trial without the benefit of the flavor of the record developed at trial," it found that the Trial Judge has discretion to make those rulings prior to trial and that the discretion was properly exercised in this case.

[45] Insurance

Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706 (8th Cir. 2001) : In an action for damages to steel kept in the defendant's warehouse when the Mississippi River flooded, the Court reversed a judgment for the defendant, but found no abuse of discretion in the exclusion of statements by the defendant's president which might have been read as admissions of liability. The statements were ambiguous as to fault, and explaining them would have required devoting substantial time to questions of insurance coverage, diverting the jury's attention from the real dispute in the case and potentially causing unfair prejudice to the defendant.

[46] Invocation of Privilege

LiButti v. United States, 178 F.3d 114 (2d Cir. 1999) : The daughter of a delinquent taxpayer brought an action against the IRS seeking a permanent injunction against enforcing a levy against a racehorse that the IRS believed the daughter owned only as a nominee for the taxpayer. The Court held that the Trial Court did not abuse its discretion in giving considerable weight to an adverse inference arising from the taxpayer's refusal to answer questions on *Fifth Amendment* grounds.

United States v. Morris, 988 F.2d 1335 (4th Cir. 1993) : The Court reversed an attorney's conviction for narcotics offenses because the prosecutor had been allowed to cross-examine the accused's wife about her invocation of the marital privilege before the grand jury. To permit the inference that she would have testified before the grand jury if she had something exculpatory to say would, in the Court's view, destroy the privilege.

Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999) : In an action by refinery workers for injuries from benzene exposure, the Trial Judge excluded evidence that the president of a defendant company had invoked his self-incrimination privilege and refused to answer deposition questions, reasoning that evidence of the president's invocation of the privilege in his individual capacity would be unfairly prejudicial against the defendant corporation. The Court found the ruling an abuse of discretion, since there would be no unfairness in drawing an adverse inference against the corporation when it had designated the president as a witness to give a deposition on its behalf. In an action on a fidelity bond, *FDIC v. Fidelity & Deposit Co., 45 F.3d 969 (5th Cir. 1995)* , the Court held that there was no abuse of discretion in admitting evidence that nonparties, with whom a corrupt bank officer had been associated in a fraudulent loan scheme, had invoked their *Fifth Amendment* privilege. Any danger that the jury might have found the officer had committed dishonest acts merely from his association with the witnesses was avoided by an instruction not to find liability absent evidence corroborating the relationship between the invoking witnesses and the officer. In *Harrell v. DCS Equip. Leasing Corp.*, n106 the Court affirmed judgments in fraud suits arising out of a computer leasing program, holding there was no error in excluding evidence that a defendant had invoked his *Fifth Amendment* privilege at a deposition, although he subsequently complied with an order compelling him to answer. The evidence

might have had some probative value on his credibility and the alleged fraud, but that was substantially outweighed by the potential prejudice because the jury might attach undue weight to the privilege claim or misunderstand the decision to invoke it.

United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980) : After reversing a conviction for operating a gambling business on another ground, the Court discussed the difficulties that arise when codefendants, previously tried and convicted, are to be identified as part of the government's case, but have indicated that, if called, they will refuse to testify on self-incrimination grounds. If they assert the privilege in the presence of the jury, there is a danger of prejudice to the defendant. If, however, they do not testify at all once they are identified, the jury may wonder why they were not called. One suggestion by the Court was that the words "*fifth amendment*" not be used by the witnesses; instead, they simply could indicate before the jury that they will not testify.

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for the defendants in a price-fixing case, the Court held it was error for the Judge to disregard the fact that three officers of one defendant had asserted their privilege against self-incrimination when asked about the conspiracy. The Court noted that an adverse inference can be drawn from such a refusal in a civil case. Here, the Judge had erred by incorrectly assuming there was no other evidence of the conspiracy to support the adverse inference. In *Harris v. City of Chicago, 266 F.3d 750 (7th Cir. 2001)* , a civil rights suit arising from an allegedly unlawful arrest, the defendant police officer refused to answer any questions in discovery, claiming his *Fifth Amendment* privilege. At trial he was permitted to testify, and the Judge, apparently relying on *Rule 403*, refused to admit evidence of his prior invocation of privilege. The Court found that this was reversible error, since the ruling effectively allowed the defendant to avoid discovery altogether. The Judge should either have prevented the witness from testifying to matters about which he had previously refused to testify or allowed the plaintiff to impeach him with his prior silence.

United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) : Affirming drug-related convictions, the Court found no abuse of discretion in precluding the defendants from calling an alleged coconspirator to have him invoke his privilege against self-incrimination in the presence of the jury. The Court reasoned that "[v]ery rarely will these rules [401 and 403] allow a party to argue inferences from a witness's privilege invocation"; "due to the courtroom drama an invocation creates, the jury is likely to place far too much emphasis upon an ambiguous invocation," and therefore "absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege."

Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000) : The plaintiff brought an action on behalf of her minor daughter for alleged sexual abuse. At his deposition, the defendant was asked whether he had ever taken a penile plethysmograph test; this test is used by therapists to help determine whether a person has a sexual interest in children. The defendant refused to answer on *Fifth Amendment* grounds. Affirming a judgment for the defendant, the Court found no error when the plaintiff was precluded at trial from referring to the defendant's assertion of the privilege. Under *Rule 403* such evidence is not sufficiently probative "unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information." The Court also noted that there was no evidence that the defendant had submitted to the penile plethysmograph test; nor was there any showing that the results of such a test would have been admissible if offered.

[47] Joint Parties

United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980) : Acosta, Lebron, and Figueroa were charged with conspiracy to possess and distribute heroin. At trial they suggested that the substance they had was not really heroin, but

was brown sugar used to "rip off" a purchaser. The Court held that Acosta's prior conviction for selling heroin could not be used to show the identity of a substance in dispute, nor could it be offered to show that Acosta intended to join a conspiracy between Figueroa and Lebron, since Acosta's counsel clearly stated that he was not disputing the fact that Acosta was involved with the other two. The Court said the Trial Judge erred in not conducting a proper *Rule 403* balancing as to all three defendants. Because the evidence concerning the nature of the substance the defendants had was the same as to all, the risk of prejudice to Figueroa and Lebron was almost the same as the risk to Acosta, and all three won reversal. The Court noted that it was a close question whether, had the prior conviction been properly admitted against Acosta, a severance as to the others would have been required.

United States v. Bodden, 736 F.2d 142 (4th Cir. 1984) : Affirming drug convictions, the Court upheld a ruling that barred one defendant from eliciting on cross-examination of a government agent a statement this defendant had made concerning the financial temptation of poor Colombians to engage in the smuggling business. The Court found that the statement would have been prejudicial to the Colombian defendants and that its value to the one defendant was not very great.

Gross v. Black & Decker, Inc., 695 F.2d 858 (5th Cir. 1983) : In an action by an employee of a furniture company who lost fingers while using a radial arm saw, the manufacturer claimed that the injury was the result of the employer's failure to warn and to provide safety equipment. The Court held that evidence of the employer's activities was properly admitted. The probative value of the evidence, which was essential to the defendant's claim that it was the employer who was responsible for the accident, outweighed any prejudicial effects.

In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982) : Although it reversed a judgment for defendant manufacturers of aluminum wiring alleged to be responsible for a supper club fire in which many persons died, the Court upheld a ruling that certain documents, which would have been admissions as to some defendants but hearsay as to others, should be excluded or redacted. The Court noted that the Trial Judge had severed the issue of causation from the question of liability and that the excluded evidence was cumulative on the causation issue. If the issues were combined, some of the evidence might be admitted with appropriate limiting instructions.

United States v. Davis, 154 F.3d 772 (8th Cir. 1998) : The Court affirmed convictions for drug and firearm offenses. It held that taped telephone conversations in which one defendant tried to convince his girlfriend not to cooperate with authorities were properly admitted, where the Trial Judge redacted the tapes and related transcripts to limit possible references to other defendants.

[48] Judgments, Court Orders, and Judicial Opinions

[a] Civil Cases

Faigin v. Kelly, 184 F.3d 67 (1st Cir. 1999) : In a defamation action against a former professional athlete who implied that his former agent had been dismissed for unlawful conduct, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the exclusion of a Rule 11 sanctions order in another proceeding that found no factual support for the athlete's claims that the agent had misled him about certain investments. The order stemmed from an undeveloped record on a matter that had not been litigated; the probative value of the order on the truth or falsity of the defamatory statement was slight, especially where additional evidence regarding the agent's misconduct had been introduced; and there was a substantial risk that the jury would give undue weight to the prior judicial findings and be confused about their significance. In a civil rights action for injuries received after being arrested as a result of an allegedly improper police broadcast, *Kinan v. City of Brockton*, n107 the Court held that evidence of two prior

judgments against the defendants was properly excluded. The judgments were based on settlements rather than adjudications, and the prior claims involved excessive force rather than recklessly inaccurate police broadcasts, so their probative value on the adequacy of police training would be substantially outweighed by the risks of confusion and prejudice and the consumption of much unnecessary time in essentially retrying part or all of the two prior cases. In *Silva v. Showcase Cinemas Concessions, Inc.*, n108 the Court upheld a judgment against a movie theater for the wrongful death of the plaintiff's son, who was killed in a parking lot after a movie, rejecting the defendant's argument that it should have been permitted to show that the assailant was convicted of manslaughter. Since the plaintiff stipulated that the killing was criminal, the manslaughter conviction was unnecessary to prove that it was an intentional act.

Carter v. Burch, 34 F.3d 257 (4th Cir. 1994) : The plaintiff in a § 1983 action had been released on a writ of habeas corpus after serving four years on a malicious wounding conviction, because material exculpatory evidence had not been disclosed to him. After his acquittal in a second trial, he sued the prosecutor and a police officer for civil rights violations. The Court held there was no abuse of discretion in excluding the opinion by the Judge who granted the writ of habeas corpus, and expert testimony to interpret that opinion. Because the opinion decided the precise issue before the jury in the civil rights suit, the jury would likely give it undue weight.

Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000) : In a malpractice action against attorneys who had represented the plaintiffs in connection with a property transaction that led to a Tax Court deficiency proceeding, the Court held there was no abuse of discretion in excluding the Tax Court's opinion. The opinion, which stated that one of the plaintiffs "failed to tell the truth" even though she did not testify at the trial and was absent from the entire proceeding, could mislead the jury into thinking the Tax Court had some particular expertise in judging credibility, and thus into thinking the plaintiff incredible in this case. Admission of the opinion would also be confusing, because it had been reversed in part on appeal. Affirming judgments in fraud suits arising out of a computer leasing program in *Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir. 1992)* , the Court held there was no error in excluding evidence of a nonfinal judgment in another case as proof of a predicate act under RICO, as the jury might give undue value to the previous determination. In a suit for recovery of the unpaid purchase price of cattle, *Brumley Estate v. Iowa Beef Processors, Inc.*, n109 the Court affirmed a judgment for the defendant based on a finding that the person who bought the cattle was not the defendant's agent. In two other cases, juries had found the same person to be an agent of the defendant, and in one other case a jury reached a no-agency conclusion as in this case. The Court held that the judgments entered pursuant to thoese findings were properly excluded under *Rule 403*, because they would have confused the jury. In *Rozier v. Ford Motor Co.*, n110 a product liability action arising out of a fatal automobile accident, the Court held it was improper to admit evidence that the driver of the other car had pleaded guilty to involuntary manslaughter. Although it recognized that the convictions were admissible under *Rule 803(22)*, the Court said that they should have been excluded under *Rule 403*. The admission of responsibility was made in the context of a criminal action to deter reckless driving and therefore "its relevance in a civil action based on a legal doctrine presumably intended to deter the negligent manufacture of automobiles is attenuated at best." The guilty plea would tend to confuse the jury into thinking that the manufacturer could not be the legal cause, in the civil action, of the plaintiff's decedent's death if the other driver was found to be the cause in the criminal action.

Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530 (10th Cir. 1986) : The Court upheld a judgment for the plaintiff against a manufacturer of a revolver that discharged when dropped. It found that a judicial opinion in another action was relevant to impeach the testimony of the manufacturer's officer that he was unaware of any other drop-fire lawsuits and also to show indifference toward known risk for punitive damage purposes. A majority of the Court held, however, that admission of the opinion was error (but harmless): The jury might have been confused by its relationship to the instant case, and the evidence of the accident giving rise to the other case and its results could have been accepted without using the opinion. A concurring Judge argued that admission of the full opinion was not error, since it had

special probative value.

U.S. Steel, LLC, v. Tieco, Inc., 261 F.3d 271 (11th Cir. 2001) : In a RICO action against an equipment vendor for an alleged fraudulent billing scheme, the defendants asserted civil rights and state law counterclaims alleging improper cooperation between the plaintiffs and the state attorney general's office during a criminal investigation and prosecution of the defendants. The Court reversed judgments for the defendants on the counterclaims because a State Judge's opinion dismissing an indictment against the defendants was improperly admitted. The opinion, which adopted *in toto* a memorandum of facts prepared by the defendants, was hearsay, and although the plaintiffs had not objected on that ground, its unreliability only added to the prejudicial effect of its self- serving presentation. The risk of unfair prejudice, and the likelihood that the jury would be misled by the inclusion of the defendants' memorandum in a judicial opinion, substantially outweighed any probative value and made admission reversible error. In a suit for damages on an injunction bond, *Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966 (11th Cir. 2001)* , the Court noted in a footnote that the Trial Judge erred in allowing the jury to receive two of its published opinions reviewing the ICC's orders and charging the jury that it was to decide the effect of the prior opinions.

Mendenhall v. Cedarapids, Inc., 5 F.3d 1557 (Fed. Cir. 1993) : The Court held, in an action for patent infringement, that there was no abuse of discretion in excluding the judgment, opinion, and other evidence of an earlier proceeding in which patents at issue had been held valid. There was a high possibility of prejudice and confusion, since the opinion was not fact evidence on the myriad issues in the present case, and the jury may well have been confused by exposure to another Judge's statements on the law. The dissenting Judge believed that the prior holding of validity had substantial probative value and that the jury should be presumed to take its role seriously and to carry out its factfinding function competently and thoroughly.

[b] Judgments, Court Orders, and Judicial Opinions -- Criminal Cases

United States v. Ebner, 782 F.2d 1120 (2d Cir. 1986) : The Court affirmed tax evasion convictions, upholding the admission of portions of a State Court opinion revealing that the defendants had been given an authoritative statement that their bogus religion did not qualify for a tax exemption. The Trial Judge excluded portions of the opinion reciting facts and instructed the jury to consider the opinion only on the issue of intent.

United States v. Blood, 806 F.2d 1218 (4th Cir. 1986) : The Court affirmed an embezzlement conviction and upheld permitting an IRS agent to support his expert opinion by reading portions of a prior Tax Court decision involving the defendant. The 1976 opinion involved similar issues and was relevant to proving that the defendant willfully violated the law in the instant case.

United States v. Cook, 557 F.2d 1149 (5th Cir. 1977) : The Court reversed a fraud conviction because an injunction order entered in another case was erroneously admitted.

United States v. Merklinger, 16 F.3d 670 (6th Cir. 1994) : The defendant, charged with fraud, sought to introduce evidence that he had previously been acquitted of similar charges in a similar case. He argued that he made admissions to investigators in this case because he was despondent and that the previous acquittal was relevant to his state of mind. The Court held there was no abuse of discretion in excluding the evidence, as there was no logical connection between the favorable verdict and the alleged despondency, and evidence of the verdict could confuse the jury.

United States v. Vitek Supply Corp., 144 F.3d 476 (7th Cir. 1998) : Affirming convictions for a conspiracy to defraud Customs and the FDA by smuggling misbranded animal drugs, the Court held there was no abuse of discretion in excluding evidence of an opinion and stipulations entered by the government in a prior Court of International Trade proceeding, since the evidence could well have led to a complex mini-trial focusing on the significance of the CIT opinion and the actions taken by the parties in its aftermath.

United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980) : Reversing a conviction for illegally reentering the United States, the Court concluded it was error to admit a certified copy of a judgment showing that the appellant once pleaded guilty to the misdemeanor of illegal entry. Although the plea conclusively established that the appellant was an alien when he pleaded guilty, the jury was never told why the prior conviction was being used, the evidence was cumulative, and the jury might have used the evidence as proof of predisposition.

United States v. Alahmad, 211 F.3d 538 (10th Cir. 2000) : The defendant was charged with violating the International Parental Kidnapping Crime Act after he removed his daughter to Jordan in 1996 despite a 1993 order affirming the visitation rights of the child's mother and grandmother. The defendant argued that a 1997 order transferring custody to the child's mother was not relevant to his intent in 1996 and was in any event excessively prejudicial. Affirming, the Court held there was no abuse of discretion, since the 1997 order, which recited that the defendant had violated the 1993 order, tended to rebut the defendant's claim that he had been acting within the earlier order's custody provisions. Further, there was no indication that the jury gave exaggerated or controlling weight to the 1997 order when determining the defendant's intentions in 1996, given his opportunities to argue his compliance with the 1993 order and the abundant additional proof of his intentions in 1996.

[49] Learned Treatises

Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2d Cir. 2000) : In a medical malpractice action against an obstetrician for injuries during delivery, the defendant introduced a 15-minute videotape put out by the American College of Obstetricians and Gynecologists to educate physicians and show various techniques used with the condition at issue. Affirming a judgment for the defendant, the Court held that the videotape was a learned treatise and there was no abuse of discretion in its admission. The tape was highly probative of the applicable standard of care, and that value was not substantially outweighed by any risks that the jury would be confused by seeing the depiction of births other than the one at issue or that it would be prejudiced by seeing procedures suggesting that the condition at issue raised a complicated problem seemingly requiring drastic measures. The Court mentioned that although no objection had been made, the Judge should have redacted a statement in the closing credits that "[t]his video does not define a standard of care," since it and other allusions to litigation in other learned treatises offered at the trial tended to suggest that the condition at issue was the source of much unjustified litigation.

[50] Legislative Materials

Goodman v. Pennsylvania Turnpike Comm'n, 293 F.3d 655 (3d Cir. 2002) : Affirming a judgment for a public employee who alleged that the Commission failed to promote him because of his political affiliation, the Court found no error in the admission of a report of a legislative committee, which discussed the fact that promotion practices at the Commission were not optimum and should be different. The Court concluded that the suggestion in the report that the Commission used patronage to make promotions was probative and not unfairly prejudicial.

[51] Litigation Conduct

W.V. Realty Inc. v. Northern Ins. Co., 334 F.3d 306 (3d Cir. 2003) : The Court reversed a judgment for the owner-operator of a hotel banquet hall who sued its insurer to recover for business interruption losses that occurred when the roof collapsed from the weight of snow, finding error in the admission of evidence that the insurer failed in discovery to disclose other bad faith actions brought against it. The plaintiffs did not explain why the defendant's discovery violation constituted insurance bad faith rather than a pure discovery violation, and that there was no evidence that the failure to disclose was an effort to avoid paying the plaintiffs' claim. The Court added that, even if it were to assume that the discovery violation was committed by the defendant to avoid its obligations under the policy, the evidence would have been inadmissible under *Rule 403*, because "[t]he jury may well have concluded, in contravention of the strictures of the Rules of Evidence, that the fact that hundreds of bad faith lawsuits had been filed against Northern made it more likely that it committed bad faith in this lawsuit."

Timberlake Constr. Co. v. United States Fid. & Guar. Co., 71 F.3d 335 (10th Cir. 1995) : Reversing a judgment for a contractor who sued his builder's risk insurer claiming bad faith in handling a fire loss claim, the Court held it was error to admit evidence of the insurer's alleged litigation misconduct in the current action to serve as evidence of the insurer's bad faith in handling the underlying claim. The Court noted that the civil procedure rules provide adequate means to redress and deter litigation misconduct, and it concluded that "while evidence of an insurer's litigation conduct may, in some rare instances, be admissible on the issue of bad faith, such evidence will generally be inadmissible because it lacks probative value and carries a high risk of prejudice."

[52] Money from Unexplained Sources

United States v. Le'on- Delfis, 203 F.3d 103 (1st Cir. 2000): In a prosecution for embezzlement from the Department of Veterans Affairs, the government offered evidence that a defendant made two large bank deposits in 1996, which allegedly related to money laundering charges against him. The defendant's wife testified on his behalf that their family finances in 1996 were such that the deposit could have come from personal funds. On cross-examination she was asked about money seized in a civil forfeiture proceeding related to the criminal case; she said the amount seized was the family's entire savings, and she did not think the sum exceeded $200,000. When questioned about the legitimate sources of the money seized, she could explain only $105,500. On rebuttal the government proved that the amount seized was $203,000; it argued that this evidence impeached the wife's testimony and was circumstantial evidence of the defendant's wrongdoing. The Court found no abuse of discretion, since evidence of possession or control over substantial sums of money from unexplained sources is relevant in criminal cases involving money, and this was "not one of those rare circumstances" to reverse the Trial Judge's judgment concerning the relative weighing of probative value and unfair effect.

[53] Nicknames and Aliases

United States v. Mitchell, 328 F.3d 77 (2d Cir. 2003) : During the defendant's trial for illegal firearms dealing, the prosecutor referred to the defendant's nickname, "Phox," asked him whether "a fox is an animal that is considered sly," and noted in summation that he had "outfox[ed]" questions while testifying. The Court noted that references to the defendant's nickname were arguably inappropriate, where his identity was not at issue and the nickname did not directly relate to the proof of the acts alleged, but the references were not prejudicial because they were brief and isolated and the evidence of guilt was substantial.

[54] Notice and Knowledge

Exum v. General Elec. Co., 819 F.2d 1158 (D.C. Cir. 1987) : In a product liability suit by an employee injured while using a french fryer, the Court held that it was error to exclude evidence concerning 15 similar incidents. All but

one occurred before the plaintiff was injured, and the Court reasoned that to prove notice, prior acts need not be as similar as they would have to be to prove the dangerousness of a product. Although the Court recognized that the incident arising after the plaintiff was injured could not prove notice, it concluded that it was so similar to the plaintiff's accident that it was probative of dangerousness.

Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986) : Affirming a judgment for an arrestee in a civil rights suit against a city and police officers, the Court stated that it had no doubt that, in the context of a claim that the City negligently supervised its officers in the use of force, evidence that a number of claims of brutality had been made by other persons was admissible. Even if the claims were invalid, the Court reasoned that the City was on notice of a possibility that its officers were using excessive force. In *United States v. Ebner*, n111 the Court affirmed tax evasion convictions, upholding the admission of portions of a State Court opinion revealing that the defendants had been given an authoritative statement that their bogus religion did not qualify for a tax exemption. The Trial Judge excluded portions of the opinion reciting facts and instructed the jury to consider the opinion only on the issue of intent.

Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989) : A letter from the French aviation authorities to the defendant manufacturer warning of certain defects was held properly excluded. The letter was offered to show the defendant's knowledge, but there was no showing that the letter applied to the type of airplane in issue and that the defect had manifested itself in circumstances substantially similar to the case at bar.

Koloda v. General Motors Parts Div., 716 F.2d 373 (6th Cir. 1983) : The Court reversed a judgment for an auto mechanic who sued for injuries allegedly arising out of his use of a lubricant and inhalation of its vapors. General Motors should have been permitted to offer evidence that there were no prior claims or accidents brought to its attention concerning the lubricant. The Court agreed with GM that the evidence was probative of its knowledge, which was important to the plaintiff's theory of a failure to warn, and it stated that it could see no reason why the evidence would have been unfairly prejudicial.

McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987) : Affirming a judgment for a hotel owner sued by a guest who was assaulted in her room, the Court held that the Trial Judge did not err in excluding evidence of criminal activity at the hotel that did not involve an entry like the one alleged in the instant case, while admitting evidence of prior similar entries.

Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987) : In a suit involving the explosion of a wheel rim, the Trial Judge admitted evidence of 13 prior claims to prove notice of a defect, but excluded the defendant's evidence concerning the disposition of the claims, which was offered to demonstrate that the extent of the notice was exaggerated. Although the Court did not deem the limitation on the defendant's proof an abuse of discretion, it declared that "if this case is retried, the evidence should be admitted."

United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976) : The defendant, charged with knowingly importing cocaine, testified that he had no knowledge that cocaine was in a suitcase that he carried. He attempted to call a DEA agent to testify as an expert that narcotics smugglers commonly plant narcotics in secret compartments of suitcases and have an unwary traveler bring them into this country. Although the Court agreed with the Trial Judge that this evidence would have had no probative value in tending to disprove the defendant's guilt, we have some doubts. While it may be true that the defendant at trial had an opportunity to protest his innocence, a jury unschooled in narcotics traffic may find a story about planted drugs more incredible than it really is.

Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241 (11th Cir. 2001) : Affirming a judgment for African-American high school students and an adult chaperone against a restaurant for intentional infliction of emotional distress caused by a white cook employed at the restaurant, the Court found no error in the admission of evidence of the cook's altercation with a customer on a previous occasion. The evidence was relevant to the issues of negligent hiring and retention and punitive damages. In *Hendrix v. Raybestos-Manhattan, Inc.*, n112 the Court emphasized the leeway afforded the Trial Judge in making *Rule 403* rulings, as it upheld the introduction of studies concerning asbestos dust exposure and asbestosis to prove knowledge of harm in personal injury actions. In *Worsham v. A.H. Robins Co.*, n113 the Court affirmed a judgment against the manufacturer of the Dalkon Shield IUD, finding no error in rulings admitting documents and permitting cross-examination that mentioned other litigation involving the Shield. The documents and cross-examination tended to show the kind of notice that the company had about problems caused by the Shield and the mention of the other litigation was not unduly prejudicial.

[55] Official Findings

Daigle v. Maine Med. Center, Inc., 14 F.3d 684 (1st Cir. 1994) : The Trial Court in a diversity medical malpractice action ordered that the plaintiff present her case to a prelitigation screening panel as required by state law, and when the panel unanimously found no acts of negligence, followed the state law by admitting the findings into evidence without providing an opportunity for impeachment. Affirming a judgment for the defendant, the Court held that the federal evidence rules governing hearsay and impeachment do not seek to displace the state's substantive policy implemented by the screening panel procedure. Furthermore, the official seal of the State Court and the Court caption were redacted, to avoid unfairly prejudicial impact.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997) : Reversing a bank chairman's conviction for fraud in connection with loans in which he was interested, the Court found an abuse of discretion in the admission of bank examination reports detailing violations of laws and regulations in other situations. Although the reports were relevant to the defendant's knowledge of his obligations to fully inform the bank's board, the probative value was slight in comparison to the risk of prejudicing, confusing, or misleading the jury by a four-year history tying the defendant to dozens of regulatory violations.

Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994) : The Court held in an employee's action against his union for breach of the duty of fair representation that there was no abuse of discretion in excluding an NLRB decision refusing to issue a complaint in the case. Lacking any stated factual basis, the decision had almost no probative value, and the jury would be quite likely to assign it greater value than it was worth, given that it was the product only of an administrative investigation and not of an adjudicatory procedure.

United States v. Sutton, 337 F.3d 792 (7th Cir. 2003) : A defendant charged with several robberies sought to introduce reports made by the police laboratory indicating that his fingerprints did not match fingerprints taken from the crime scenes. The Court held that under *Rule 803(8)(C)* the reports were not excludable as hearsay, but there was no abuse of discretion in excluding the reports under *Rule 403*. Without an expert to explain them, the reports' probative value was outweighed by the risk that the jury would improperly rely on the reports in the absence of context and believe that the reports provee the negative, that the defendant had not been at the crime scene. In a prisoner's § 1983 action for excessive force and deliberate indifference to medical needs, *Vance v. Peters, 97 F.3d 987 (7th Cir. 1996)* , the Court held there was no abuse of discretion in excluding a hearing officer's final report, which concluded that the corrections officer had used excessive force and recommended a 20-day suspension. Given that the evidence considered by the hearing officer had already been admitted at the trial, there was a risk that the jury would be confused by and give inordinate weight to the conclusion, which was not based on the appropriate constitutional criteria.

Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995) : In a declaratory judgment action to determine whether a fellow-employee exclusion in a liability policy applied to a fatal crash of a company plane, the Court held there was no abuse of discretion in excluding FAA investigation reports that indicated the company's operations director had neglected or falsified logbook entries. The reports had no tendency to show that payroll records at issue were inaccurate, and they were likely to lead the jury away from the question of the decedent's status toward the irrelevant question whether the company was responsible for the decedent's death. The likelihood of jury confusion and prejudice similarly justified excluding the FAA reports as evidence of the director's motive to falsify the payroll records or of his testimonial credibility.

Jetcraft Corp. v. Flight Safety Int'l, 16 F.3d 362 (10th Cir. 1993) : In a negligence action arising out of a pilot-training accident, the Court held there was no error in excluding evidence of FAA enforcement actions taken against the defendants following the accident. The FAA's own characterization of the violation as a record-keeping omission undermined its relevance, and the spectre of any regulatory violation, however collateral to the alleged violation, has a potential for prejudice or confusion.

[56] Opening the Door

United States v. Baird, 29 F.3d 647 (D.C. Cir. 1994) : In a prosecution for conflict of interest violations, the government showed that a legal officer had advised the defendant against his conduct, and the defendant attempted to introduce evidence that other legal and contracting officers had given contrary advice, which was relayed to the defendant by another officer. The evidence was excluded as irrelevant, on the grounds that the crime contained no scienter element and that the legal officer called by the government was the only one it was proper for the defendant to consult. Reversing, the Court held that the government had opened the door on the matter of the defendant's state of mind, and he was entitled to introduce otherwise irrelevant evidence to remove any unfair prejudice.

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : Affirming convictions for terrorist conspiracies, the Court held there was no abuse of discretion in admitting evidence of fingerprints on documents handled by one defendant to demonstrate a match with prints found in an apartment. The defendant argued that the fingerprint evidence exaggerated the government's case, since it had already offered evidence of fingerprints obtained by Jordanian officials for the same purpose. But the Court held that the defendant's challenge to the integrity of the government's procedures in collecting evidence opened the door to additional evidence.

Bender v. Brumley, 1 F.3d 271 (5th Cir. 1993) : In a pretrial detainee's action against officers who allegedly beat him, the Court held there was no abuse of discretion in admitting inflammatory details of the murder for which the detainee had been arrested, as he had discussed the facts in great detail on direct examination.

United States v. Khalil, 279 F.3d 358 (6th Cir. 2002) : The Court affirmed RICO conspiracy convictions that arose from the defendant's role as national president of the Avengers Motorcycle Club. After the defense suggested in cross-examination of an FBI agent that the FBI had improperly targeted the defendant because of his presidency, the government elicited that the agent had interviewed witnesses and had discussions with other agents, all of whom indicated that the defendant was engaged in drug trafficking. The Court found that the evidence was not offered for its truth but to explain the FBI's focus on the defendant and to rebut the suggestion made on cross-examination.

Manuel v. City of Chicago, 335 F.3d 592 (7th Cir. 2003) : In a Title VII action, the Judge ruled *in limine* that a witness for the plaintiff could only testify about an allegedly racist supervisor's treatment of the plaintiff. At trial, the

supervisor testified that he had not treated either the plaintiff or "anyone" differently because they were African-American. The Judge agreed that this opened the door to evidence regarding the supervisor's treatment of other employees, but out of a concern for "trying cases that ... have no relationship to this," instructed the jury to strike the question and the supervisor's answer about his treatment of others, rather than admitting the plaintiff's evidence. Affirming a judgment for the City, the Court found no abuse of discretion in the initial *in limine* ruling, since the lack of specific examples in the plaintiff's offer of proof significantly limited the probative value of the offered evidence, while labeling the supervisor a "racist" had the potential for being unfairly prejudicial, and the significant prospect of engaging in a series of mini-trials over the other accusations of discrimination had the potential for confusing or misleading the jury. Even after the door was opened by the supervisor's testimony, the potential for undue delay, confusion, and prejudice remained, so the decision to continue to exclude the evidence was not an abuse of discretion. In *Jenkins v. Chrysler Motors Corp., 316 F.3d 663 (7th Cir. 2002)* , the Court affirmed a judgment for a truck manufacturer in a suit by a plaintiff injured by a fire while sleeping in a truck, finding no abuse of discretion when evidence of the plaintiff's past alcohol use was admitted. A pretrial motion *in limine* had excluded evidence of the past alcohol use and drunk driving convictions, but at trial the plaintiff's father testified that before the fire the defendant was a happy person with a "twinkle in his eye" and afterwards he was depressed. The Court concluded that the father's testimony opened the door to the alcohol evidence, which was admissible because it "purportedly showed that he couldn't have been all that happy before, either." In *United States v. Alwan*, n114 the Court affirmed a defendant's contempt of court conviction for failure to testify before a grand jury, and held that the prosecution was properly permitted to mention the defendant's involvement with the terrorist group Hamas. The evidence was only offered by the government as rebuttal in response to the defendant's efforts to establish a coercion defense regarding a statement he had made to authorities concerning his involvement with that group. In an arrestee's civil rights action against a sheriff and a jailer, *Lawson v. Trowbridge*, n115 the defendants devoted almost all their direct testimony to documenting their limited net worth. Because any judgment against them would be paid by their employer so long as they had been acting within the scope of their employment, the testimony was inadmissible. The plaintiff did not object, but did seek to introduce the indemnification statute in rebuttal. Reversing nominal damages judgments against the defendants, the Court held it was an abuse of discretion not to admit the statute once the defendants' direct testimony opened the door, since the rationale for excluding the evidence -- fear that damages will be inflated when the government, rather than the individual, is paying -- had dissolved.

Westcott v. Crinklaw, 68 F.3d 1073 (8th Cir. 1995) : Reversing a judgment for the defendant in a civil rights action brought by the widow of a man shot and killed by a police officer, the Court found an abuse of discretion in the exclusion of evidence that the officer had been suspended for a prior shooting incident. While testifying, the defendant had made an issue of his employment record by stating that before shooting the plaintiff's husband, he had never fired his weapon in the line of duty, and that his service as an officer had been uninterrupted. Exclusion of the evidence of a prior shooting incident and suspension was inappropriate because it "permitted Crinklaw's testimony to go before the jury uncontested."

United States v. Baron, 94 F.3d 1312 (9th Cir. 1996) : Reversing a drug conviction on non-evidentiary grounds, the Court held that "profile" testimony from an expert on drug transactions was properly admitted. Defense counsel suggested, in cross-examining one of the arresting officers, that the defendant was not a drug courier because when arrested he did not have with him the items that a typical drug courier might be expected to carry. In rebuttal, an expert on drug transactions testified that it was not unusual for a drug courier to be found without large sums of cash, drug ledgers, or drug paraphernalia. While profile testimony is usually inadmissible to prove guilt, the defendant opened the door in this case.

[57] Other Cases Involving Party

Hemphill v. Washington Metro. Area Transit Auth., 982 F.2d 572 (D.C. Cir. 1993) : The Court, in three separate

opinions, held that a judgment for a defendant in an automobile accident case must be reversed, because the Magistrate Judge erroneously instructed the jury that it could consider whether the plaintiff, whose prior accidents were admitted as relevant to the cause of her injuries, "was merely unlucky or whether or not she is claims minded." The Court unanimously agreed that when no charge of fabrication is made, it is improper to permit a jury to infer that a plaintiff is claims minded.

Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988) : The Court reversed a judgment for police officers in a civil rights case, holding that it was error to admit evidence of previous lawsuits by an arrestee and his wife against the City when there was no evidence that the suits were fraudulent. In *Raysor v. Port Auth.*, n116 a civil rights action for false arrest and malicious prosecution, the Court upheld the rejection of evidence concerning the plaintiff's litigiousness, since such evidence raised a substantial danger of jury bias.

W.V. Realty Inc. v. Northern Ins. Co., 334 F.3d 306 (3d Cir. 2003) : The Court reversed a judgment for the owner-operator of a hotel banquet hall who sued its insurer to recover for business interruption losses that occurred when the roof collapsed from the weight of snow, finding error in the admission of evidence that the insurer, in a separate subrogation action against the contractor who built the banquet facility, alleged that it had paid the plaintiffs $1,200,000 for repairs when in reality the insurer had paid $318,000 and refused to pay more. The Court found that the subrogation complaint by the insurer had minimal probative value in showing bad faith while its prejudicial effect was great.

Bufford v. Rowan Cos., 994 F.2d 155 (5th Cir. 1993) : When an employee sued for workplace injuries, the defendants contended that the action was fraudulent, copying a claim by the employee's former co-worker. In reversing a judgment for the defendants, the Court recognized it is a perfectly legitimate and valid defense to assert that a personal injury claim is fabricated or exaggerated, but it is not permissible to make an unsupported attack on the integrity of opposing counsel by relying on the identity of counsel in the two cases as a basis for contending the claim was fraudulent.

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771 (7th Cir. 2001) : The plaintiff sued for age and race discrimination after he was not hired as a car salesman. The defendant sought to introduce evidence that the plaintiff had applied for positions at other dealerships about the same time and had sued after he was denied the jobs. The Trial Judge excluded the evidence on the ground that it was relevant only to show a propensity to file baseless discrimination suits, but the Court found that it could have been used to show a scheme to harass area car dealerships and a similar *modus operandi* in doing so to that used in this situation. However, the Court found no abuse of discretion in excluding the evidence, since the Judge had also noted that any probative value the evidence had was substantially outweighed by the prejudice to the plaintiff. Furthermore, disputes over whether the other suits were baseless could consume far more time than the evidence justified. In a sexual discrimination lawsuit, *Gastineau v. Fleet Mtge. Corp., 137 F.3d 490 (7th Cir. 1998)* , the plaintiff introduced a memorandum that, if authentic, showed that the employer intended to fire the plaintiff because he was complaining of being sexually harassed. The Court found that evidence of two other lawsuits brought by the plaintiff against prior employers was admissible, as the evidence went beyond showing the plaintiff's litigiousness by also showing the reasons one defendant kept a diary in this case, casting doubt on the plaintiff's credibility, and establishing a *modus operandi* of creating fraudulent documents in anticipation of litigation against his employers.

Porous Media Corp. v. Pall Corp., 173 F.3d 1109 (8th Cir. 1999) : In an unfair competition case between filter manufacturers, the Trial Judge bifurcated the trial, deferring claims of trade libel until after the jury had resolved Lanham Act claims. The Court held there was no abuse of discretion in excluding evidence of other litigation between

the parties until the libel part of the trial, when it was relevant to the "actual malice" issue. Any probative value the evidence would have in the Lanham Act part to show the defendant's "willful and bad faith conduct" under the Act was slight because the types of filters involved in the two litigations were used in fundamentally different industries and the underlying events were separated by at least four years, while it could be highly prejudicial and confusing or misleading.

Koch v. Koch Indus., Inc., 203 F.3d 1202 (10th Cir. 2000) : Two brothers involved in a family-run business bought out their other two brothers. The sellers claimed that they had been defrauded by understatements of the corporation's value. On appeal of a judgment for the defendants, the Court held that it was error to admit the fact that one of the plaintiffs had brought a number of other suits against the defendant, and had even sued his mother in one of these litigations. The Court noted that the evidence of other lawsuits might show that the plaintiff was biased against his brothers if the other lawsuits were frivolous, but no such showing was made. Moreover, evidence that the plaintiff had sued his own mother had no bearing on whether he was biased against his brothers. Evidence of the other lawsuits could not help to prove that the plaintiff would not rely on any assertion as to corporate value that the defendants would have made, since the agreement at issue was executed well before the plaintiff brought any lawsuits.

[58] Photographs, Movies, Videotapes

[a] Events at Issue

United States v. Weisz, 718 F.2d 413 (D.C. Cir. 1983) : The Court affirmed convictions involving conspiracy to commit bribery, as it found that videotape evidence showing a Congressman stuffing money in his pockets was properly admitted to prove the crime that the defendants were charged with committing. See also *United States v. Perry* n117(affirming Trial Judge who declined to edit audiotape containing one defendant's racially derogatory remark where defense tried to discredit tape and its totality was important).

United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982) : Reviewing a conviction for food stamp offenses, the Court found no abuse of discretion in the admission of a videotape that recorded only part of a transaction and that was ambiguous.

United States v. Begay, 42 F.3d 486 (9th Cir. 1994) : The Court affirmed convictions for various offenses arising out of a civil disturbance on a Navajo reservation, holding there was no abuse of discretion in permitting an officer to narrate a videotape that was a half-speed version, with color-coded circles and arrows added, of an original videotape of the incident. The officer had reviewed the original over 100 times, aided by a magnifying glass, so his testimony and the enhanced tape were helpful to the jury in evaluating the original tape, and they were neither cumulative nor invasive of the province of the jury.

[b] Photographs, Movies, Videotapes -- Fair Depiction of the Evidence

Lubanski v. Coleco Indus., 929 F.2d 42 (1st Cir. 1991) : Affirming a judgment for the defendant toy manufacturer in a product liability action brought by the mother of a child killed when struck by a car while using a three-wheeled riding apparatus, the Court found no error in admitting a series of photographic enlargements portraying a staged version of the accident scene. The Trial Judge made the required preliminary determination that the photographs depicted a correct likeness and the plaintiff had not objected to the photographs in their original five-by-seven-inch form.

United States v. Diaz, 176 F.3d 52 (2d Cir. 1999) : In a prosecution for killing a rival drug dealer, the defendant's former girlfriend testified that she could see the flashes from the guns during the killing, from a window in the defendant's apartment. To contradict this testimony, the defendant offered a photograph showing a building between the apartment and the scene of the murder. The Court found no abuse of discretion in excluding the photograph, since the owner of the blocking building had testified that at the time of the murder, his building had suffered a fire, making it possible to see right through the building to the scene of the murder. Thus, the photograph was properly excluded because it was not a fair depiction of the scene. In contrast, a government exhibit depicting the murder scene was properly admitted because the defendant's girlfriend testified that it was a fair depiction of the scene.

Shahid v. City of Detroit, 889 F.2d 1543 (6th Cir. 1989) : The Court reversed judgments for the defendants in a civil rights action, brought for alleged failure to provide medical care to a jail inmate prior to his death, because the Trial Judge had excluded black-and-white photographs of the decedent's body in his cell shortly after his death. By depicting paint dustings, bruises, and blood traces, the photos were relevant to whether he had sought assistance and the obviousness of his injuries, and the fact the body may have been moved before the photos were taken did not mean they were an inaccurate representation of what they depicted.

[c] Photographs, Movies, Videotapes -- Inflammatory Depictions

[i] Civil Cases

Navarro de Cosme v. Hospital Pavia, 922 F.2d 926 (1st Cir. 1991) : Affirming a judgment for the defendants in an action by the parents of a stillborn fetus, the Court held there was no error in excluding photographs of the fetus taken just before the autopsy, when it was already macerated and had begun to decompose.

Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996 (5th Cir. 1998) : The Court held in a wrongful death action arising from the crash of a plane being used to conduct an aerial survey that there was no abuse of discretion in excluding photographs of the crash scene, which showed the decedent's remains decapitated and badly burned. Although there was no dispute as to the manner of the decedent's death and the plaintiffs did not pursue a claim for conscious pain and suffering on behalf of the estate, the evidence was probative of the plaintiffs' mental anguish upon knowing the decedent was decapitated and badly burned in the crash. However, the risk that the jury's decision would be based on a visceral response to the images justified the Judge's exercise of discretion. In contrast, it was an abuse of discretion to preclude testimony regarding the condition of the decedent's remains, since the testimony's potential to inflame the jury would not substantially outweigh the probative value of the evidence.

Walker v. Norris, 917 F.2d 1449 (6th Cir. 1990) : Affirming a judgment for the plaintiff in a civil rights action against prison guards who failed to prevent an inmate's stabbing death, the Court held there was no abuse of discretion in admitting photographs of the inmate's body as evidence of conscious pain and suffering.

Aliotta v. Amtrak, 315 F.3d 756 (7th Cir. 2003) : In a wrongful death action arising from a high-speed train hitting a railroad patron at a station, the Court found no abuse of discretion in the exclusion of a photograph of the victim's body. Because there was no reconstructive testimony based on the position of the body, the position of the body in the picture did not support any theory of where the victim was when he was struck by the train, so the prejudicial effect of the picture significantly outweighed any probative value. In *Haley v. Gross, 86 F.3d 630 (7th Cir. 1996)* , the Court affirmed a judgment for an inmate who sued prison officials after another inmate set his cell on fire and severely burned the plaintiff. It held there was no abuse of discretion in admitting a photograph of the plaintiff taken after the fire that showed ankle shackles around his burned legs. The jury was aware that he was a convicted felon, necessitating the

shackles, and counsel never drew attention toward them or implied that the defendants were responsible. There was no abuse of discretion in admitting a picture of the burned-out cell showing the body of the other inmate, as the photograph was highly probative of the cause and extent of the fire.

BE & K Constr. Co. v. United Bhd. of Carpenters, 90 F.3d 1318 (8th Cir. 1996) : The Court reversed a judgment for the plaintiff in a nonunion contractor's suit against a union for tortious interference with a contract with an employer, because of the erroneous admission of a videotape of a pro-union riot that occurred several years earlier when another employer hired the plaintiff. There was no showing that the videotape or the events it recorded affected the employer's understanding or state of mind in the situation at issue, which was the ostensible reason for its being admitted, and its focus on violence on another occasion was prejudicial and misleading.

Quintanilla v. City of Downey, 84 F.3d 353 (9th Cir. 1996) : In an arrestee's § 1983 trial regarding officers' use of a police dog in making the arrest, the Court held there was no abuse of discretion in excluding evidence of unrelated incidents of police dog bites. The numerous photographs of dog bite victims and a videotape of another arrestee being attacked by a police dog were unusually graphic and probably unfairly prejudicial.

[ii] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Defendants and Their Surroundings in Criminal Cases

United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) : The defendants allegedly formed a gang ("SNP") to effectuate a drug conspiracy. The Court found no abuse of discretion in the admission of photographs of two T-shirts found in a defendant's bedroom during execution of a search warrant. The shirts contained references to SNP, which were highly probative of the defendant's membership, and any prejudicial effect of violent language also on the T-shirts did not substantially outweigh that probative value. The Court did find, however, that it was an abuse of discretion (but harmless error) to admit photographs of graffiti-covered buildings in the area in which the gang operated. Although the graffiti included references to SNP, it also included writings such as "cop killer," "slob killer," and "Crips." The graffiti provided no circumstantial evidence that SNP was the charged drug conspiracy and it was not connected with any of the defendants. Given that the jury could have improperly attributed the violent references to the defendants, any probative value was substantially outweighed by the potential for unfair prejudice.

United States v. Thompson, 76 F.3d 166 (7th Cir. 1996) : In a prosecution of a secretary charged with delivering five kilos of cocaine at a business office, the Court held there was no abuse of discretion in admitting photographs of a storage room at the office in which FBI agents found an additional 20 kilos on the same day as the charged transaction. The secretary's conduct had been consistent with her retrieving the bag containing cocaine from this storage room, and the presence of additional cocaine similarly packaged was highly probative of her knowledge that she was distributing cocaine.

United States v. Hester, 140 F.3d 753 (8th Cir. 1998) : A defendant appealing convictions for conspiracy to manufacture and distribute methamphetamine argued that it was error to admit two photographs, taken by the defendant's coconspirators at the farm where the methamphetamine was manufactured, which showed the defendant proudly holding his young children in front of large quantities of the drug. The Court found no abuse of discretion, because the photographs were relevant to defining the defendant's role in the conspiracy, and served to refute the defendant's claim that his only involvement was as a mere user. The fact that his children were in the pictures "demonstrates his comfort with handling large amounts of methamphetamine in his home with the conspirators, tending to refute his claim that he was not part of the conspiracy." In *United States v. Smith, 63 F.3d 766 (8th Cir. 1995)* , the Court affirmed cocaine convictions, holding there was no abuse of discretion in admitting albums seized at the

defendant's house which contained "family-type" photographs of the defendant posing with cash or cars. The presence of the albums tended to prove that the house was the defendant's home and that he had control over its contents, including cocaine found in a safe there. In a drug prosecution, *United States v. Thomlinson*, n118 the Court held there was no abuse of discretion in admitting evidence of the defendant's motorcycle club membership and photographs of his tattooed torso, as the evidence tended to prove his ownership of a briefcase discovered in his office, which contained notes of drug transactions, business cards for tattoo parlors, and a motorcycle club brochure.

United States v. Chambers, 918 F.2d 1455 (9th Cir. 1990) : The Court affirmed a cocaine distribution conviction, holding there was no abuse of discretion in admitting pictures of the defendant wearing expensive clothing and gold jewelry. The photos were probative of his connection with another person in the case and it was highly unlikely that jurors would attach the same meaning to his dress as would a DEA agent, even though his dress may fit the agency's drug courier profile.

United States v. Smith, 63 F.3d 956 (10th Cir. 1995), vacated on other grounds, 516 U.S. 1105, on remand, 82 F.3d 1564 (10th Cir. 1996): The Court affirmed drug trafficking convictions, holding that photographs showing the defendant and others posing with firearms and making gang signals were properly admitted during cross-examination to impeach the defendant's testimony that he was not a gang member and that he possessed the guns only for protection from another gang.

[iii] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Miscellaneous Evidence in Criminal Cases

United States v. Hitt, 981 F.2d 422 (9th Cir. 1992) : The Court reversed a conviction for possessing a machine gun, holding it was reversible error to admit a photograph that showed a dozen weapons in addition to the one charged. Because the photo did not depict the weapon's mechanism, it was of marginal probative value, and it "could do no more than arouse irrational fears and prejudices." In *United States v. Carpenter, 933 F.2d 748 (9th Cir. 1991)* , the Court affirmed convictions for killing migratory birds, holding there was no abuse of discretion in admitting an hour-and-a-half videotape showing federal agents digging up pits where the birds' bodies were buried and opening an incinerator containing charred bird parts, as the pictures, although gruesome, tended to refute the defenses that only a few hundred birds had been killed.

[iv] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Victims in Criminal Cases

United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998) : Affirming a conviction for air piracy, the Court found no abuse of discretion in the admission of autopsy photographs of two passengers shot during the hijacking. The photographs had probative value, because the fact that passengers were killed was an element of the offense with which the defendant was charged. The photographs were also relevant to the "force and intimidation" element of the statute, because they "corroborated the government's account of the way in which Rezaq used systematic executions to maintain control of passengers and airport personnel." As to prejudice, all but one of the photographs were "fairly antiseptic." The remaining photograph, showing a close-up of the removal of a bullet from the skull of a victim, presented a "harder case," but its admission was no abuse of discretion. The fact that it was taken in a clinical setting "somewhat reduced its prejudicial effect," and it did have some probative value.

United States v. Velazquez, 246 F.3d 204 (2d Cir. 2001) : In a civil rights prosecution of a corrections officer for being an accessory after the fact to the fatal beating of an inmate, the Court found there was no abuse of discretion when autopsy photographs of the victim were introduced, despite the defendant's offer to stipulate that the beating occurred.

By showing the extent of the injuries, the photographs established that a cruel and unusual punishment had occurred and underscored the moral blame attaching to the defendant's decision to cover up the crime; they also tended to prove that the victim's signature on the defendant's cover-up report was coerced by the beating he had just received.

Government of Virgin Islands v. Albert, 241 F.3d 344 (3d Cir. 2001) : Affirming a felony murder conviction, the Court found no error in the admission of a videotape of the crime scene which included graphic views of the victim. The defendant claimed that another person killed the victim without assistance. The videotape was therefore "clearly relevant to demonstrate the government's theory that one small man could not have subdued the struggling [victim] and have inflicted the massive injuries on her unassisted." While the tape was graphic, its prejudicial effect did not substantially outweigh its probative value. A concurring Judge argued that it was error (but harmless) to admit the tape because it was unnecessarily graphic, no effort was made to redact the 45-minute-long videotape, and the government's theory of the case was already established by less inflammatory still photographs.

United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983) : The Court affirmed murder and robbery convictions, finding no abuse of discretion in admitting photographs of the murder victim that were used to show that a crescent wrench might have been used to strike the fatal blows.

United States v. Lewis, 92 F.3d 1371 (5th Cir. 1996) , *vacated on other grounds*, *523 U.S. 155 (1998)* : Affirming convictions of parents for murdering their child, the Court held that photographs of the victim, including autopsy photographs, were properly admitted. The photos were relevant to the defendants' intent, since the defendants argued at trial that they had no reason to know that their discipline of the child had caused serious injury. The Court also found that the prejudice was minimized by the Trial Judge's requirement that the government reduce the number of pictures to be admitted from 130 to 16. In *United States v. Hall, 152 F.3d 381 (5th Cir. 1998)* , the Court affirmed a conviction for kidnapping resulting in death, and found no error in the introduction of photos of the victim's body in the grave dug by the defendant. The photos were relevant to prove the victim's identity and the cause of her death. The defendant's offer to stipulate to these facts did not render the photos irrelevant, under the Supreme Court's decision in *Old Chief v. United States* (see the Editorial Explanatory Comment, *§ 403.02[8]*).

United States v. Ortiz, 315 F.3d 873 (8th Cir. 2002) : The Court found no abuse of discretion in a murder prosecution when graphic photographs of the victim's bloody corpse were introduced. The photos corroborated witness testimony that the victim had been bound with duct tape and beaten before his murder, and supported the government's contention that the crime was particularly heinous and depraved. In a capital murder case, *United States v. Allen, 247 F.3d 741 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002)*, the Court held that there was no abuse of discretion in admitting four victim autopsy photographs. The photos had substantial probative value in showing the entry angles of the bullets, the locations of each wound, and the extent of injuries caused by hollow point bullets, thus assisting the jury in determining the relative positions of the victim and the shooters (a key issue directly impacting on each defendant's culpability) and in determining intent, since the choice of using hollow point ammunition also bears on culpability. See also *United States v. Kime* n119(photographs of robbery scene and of gunshot wounds and head injuries incurred by the robbery victim tended to corroborate testimony implicating the defendant in the robbery and to show why the victim would have misidentified one of the participants); *United States v. Ingle* n120(photographs of the victim taken at the crime scene and during the autopsy tended to corroborate testimony of the defendant and an informant, to demonstrate the extent of the defendant's knowledge of the crime, and to assist in understanding the medical examiner's testimony -- and they were not unfairly prejudicial or inflammatory); *United States v. Davidson* n121(no error to admit four autopsy photographs of murder victim that were less gruesome than the crime scene photographs already admitted, to help explain the testimony of the witness who performed the autopsy).

United States v. Sarracino, 340 F.3d 1148 (10th Cir. 2003) : Affirming murder convictions, the Court found no abuse of discretion in the admission of a photo of the victim's body in the autopsy room. Although somewhat gruesome because towels around the head made it look like the victim had been decapitated, the photo was admitted for the proper purpose of assisting the pathologist in describing the injuries and the pathologist had explained that the towels were placed only to cover blood, assuring the jury that the head had not been severed. The Court also upheld admission of a photo of the victim's body after it was found. Although the prosecutor incorrectly argued that the photo showed the victim's appearance when the defendants left him some hours earlier, the government's pathologist testified that discoloration and swelling would have increased in the period before the body was found. The Court concluded that because the bloodied head and face gave some indication of the victim's appearance when he was abandoned, the photo had probative value, which was not substantially outweighed by the risk of unfair prejudice. In *United States v. Naranjo, 710 F.2d 1465 (10th Cir. 1983)* , the Court affirmed a murder conviction, holding that a photograph of the victim's head and torso, while gruesome, was properly admitted since it shed light on the pathologist's finding as to the cause of death and also was probative on the defense of accident.

United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991) : In the trial of a drug smuggling conspiracy, the government introduced a photograph of a plane crash involved in the conspiracy that clearly showed the torso of a burned body with an arm extending over a faceless head. The Court held that the photo was not probative of whether anyone else was willing to risk death to engage in smuggling, but there was not sufficient prejudice to find an abuse of discretion. The convictions were reversed on other grounds and the Trial Judge was urged to give greater focus to *Rule 403* determinations on retrial. See also *United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986)* (photos of murder victim's badly decomposed body properly admitted to identify the victim, prove the means of death, and corroborate a crucial government witness).

[d] Photographs, Movies, Videotapes -- Miscellaneous Cases

United States v. Long, 328 F.3d 655 (D.C. Cir. 2003) : Affirming a conviction for possession of visual depictions of minors engaged in sexually explicit conduct, the Court upheld the admission of 250 photos showing the minor victims and other young males in sexually explicit positions, noting that the Trial Judge had painstakingly reviewed *in camera* 301 photos, and permitted the 250 to be admitted for four specific purposes, carefully explaining the reason for admitting each photo. The Court found that this was the type of "thoughtful consideration" required by *Rule 403* and *United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992)* . The photos were relevant because Long denied possession of the photos alleged in two counts of the indictment, and his possession of other photos demonstrated intent to possess such photographs. The Judge instructed the jury that it could not consider the photos as evidence of bad character.

United States v. Schiff, 612 F.2d 73 (2d Cir. 1979) : The Court reversed the conviction of a tax protester who challenged the government's right to compel him to answer questions on a tax return and to pay his taxes because the Trial Judge admitted a videotape of a talk show appearance during which the host and a former assistant United States Attorney (who prosecuted tax cases) predicted with assurance that the defendant would be convicted and concluded that he ought to be. The Court found the evidence to be of limited probative value, since the defendant admitted nothing on the show, and concluded that there was a substantial chance of prejudice in the "fervid commentary that conveyed an air of incontestable truth."

United States v. Tibbetts, 646 F.2d 193 (5th Cir. 1981) : The Court approved admission of a videotape of a talk show in which the taxpayer-defendant participated when there were no prejudicial remarks by anyone else on the tape.

Estate of Moreland v. Dieter, 395 F.3d 747 (7th Cir. 2005) : Affirming a judgment for the plaintiffs in a § 1983

action arising from the death of an inmate in custody, the Court found no abuse of discretion in the admission of videotapes made when the defendant deputy sheriffs were interviewed by investigators. The Court observed that the tapes were highly probative of the defendants' actions, state of mind, and credibility and were "not so dramatic, confusing, or misleading as to induce the jury to disregard the other evidence or to decide the case on an improper basis." In *United States v. Allen, 390 F.3d 944 (7th Cir. 2004)* , the Court affirmed a conviction for aiding and abetting a bank burglary, finding no plain error in the admission of a photo of the defendant standing in front of a police car with his hands behind his back and his arm held by a police officer. The photo was probative because it showed that the defendant's appearance was consistent with the description the police gave of the suspect; there was nothing in the photo to suggest that the defendant was involved in uncharged criminal activity; and the jury already knew that the defendant was arrested by the police on the night of the burglary. In *United States v. Adames*, n122 a defendant attempted to support an alibi that he was Christmas shopping on December 23 with a videotape showing his children opening gifts from him on Christmas morning. The Court upheld exclusion of the tape, since it was not only irrelevant to show his location on the 23rd, but was also prejudicial in leading the jury to feel sympathy for the defendant or his children.

Saturn Mfg. Co. v. Williams Patent Crusher & Pulverizing Co., 713 F.2d 1347 (8th Cir. 1983) : In a patent infringement action, the Court upheld the admission of a motion picture of the plaintiff's device and the allegedly infringing product. The Court said that "[m]otion pictures of commercial devices are admissible to aid the jury in understanding the language of patent claims provided they are properly authenticated and are shown to have been made in substantial compliance with the teachings and claims of the patent alleged to be infringed." It also approved exclusion of the defendant's movie of another device, which was offered to show obviousness. This movie was not discovered until the second week of trial, and the Trial Judge had found that there was a danger of "ambush" sufficient to require a ruling that the risk of unfair prejudice outweighed the probative value of the film.

United States v. Binder, 769 F.2d 595 (9th Cir. 1985) : The Court reversed a conviction for sexual offenses upon minor children, holding (2-1) that it was error to permit the jury to replay during deliberations the videotaped testimony of the victims. The majority reasoned that the procedure unduly emphasized the victims' testimony and suggested that permitting the jury to replay the tape in an abridged fashion compounded the unfairness.

Wolfgang v. Mid-America Motorsports, Inc., 111 F.3d 1515 (10th Cir. 1997) : A race car driver alleged that the defendants' wanton conduct in failing to provide adequate fire safety and rescue operations had made his injuries in a crash more serious. Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion in excluding video and audio tapes of speeches made after the crash by the plaintiff. Although the speeches were party admissions under *Rule 801(d)(2)(A)*, they would be unfairly prejudicial because they went to the plaintiff's comparative fault, which was not an issue in the case. In *Durflinger v. Artiles*, n123 the Court found no abuse of discretion when the Trial Judge, in a wrongful death action against doctors responsible for releasing a mental patient who killed his mother and brother, admitted a videotaped confession by the patient on the day of the murders to show the patient's state of mind near the time of the crimes.

[e] Photographs, Movies, Videotapes -- Mug Shots

United States v. Lewis, 40 F.3d 1325 (1st Cir. 1994) : In a prosecution for drug and firearms offenses, the Court held that any error in admitting a folder consisting of the defendants' booking photographs stapled alongside photographs of the guns and cocaine discovered near them when arrested was harmless. Although the array prejudicially suggested an as-yet-unproven connection between the defendants and the contraband, overwhelming evidence of the connection was ultimately supplied.

Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) : The Court reversed a damages award in a civil rights action by an arrestee who alleged that excessive force was used, because a mug shot photograph ostensibly offered to show the plaintiff was going through booking was irrelevant to false arrest damages. The photo related to events after arraignment and it prejudicially fastened the jury's attention on injuries for which the plaintiff had already been fully compensated.

United States v. Carrillo, 20 F.3d 617 (5th Cir. 1994) : Affirming a conviction for distribution of cocaine and heroin, the Court held there was no abuse of discretion in admitting photographs of the defendant that were mug shots separated into front and side views and cropped and enlarged so that no identifying marks or measuring lines were visible. As altered, the photos minimized the implication that the defendant had a criminal record, and the manner of their introduction did not prejudicially draw attention to their source. See also *United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987)* , discussed in the Editorial Explanatory Comment, *§ 403.02[5]*, where an assault conviction was reversed because mug shots of the defendant had been admitted. The Court observed that mug shots should only be admitted where the government has a genuine need for the evidence, the photos do not imply that the defendant has a prior criminal record, and the use at trial does not draw particular attention to the source or implications of the photos.

United States v. Hines, 955 F.2d 1449 (11th Cir. 1992) : Reversing convictions for aggravated sexual assault, the Court held it was an abuse of discretion to admit photospreads from which the complainant had identified the defendants as her assailants, as there was no demonstrable need to introduce the photographs, the photos implied the defendants had prior criminal records, and the agent's testimony highlighted that the photos were of known criminals.

[f] Photographs, Movies, Videotapes -- Pornography Cases

United States v. Katz, 178 F.3d 368 (5th Cir. 1999) : The defendant, charged with receiving child pornography, filed a motion to exclude all expert witness testimony purporting to determine the age of persons portrayed in the videotapes and computer files at issue on the basis of applying the "Tanner Scale" (which is a recognized scientific test for determining the age of postpubescent Caucasian females according to pubic hair and breast development). On interlocutory appeal, the Court held there was no abuse of discretion in excluding several of the computer images at issue, where the government witness' expertise was linked to the Tanner Scale method and he testified that the method was not scientifically useful in determining the age of the models depicted because the range of ages for each stage was too broad and extended beyond the critical age of eighteen.

United States v. Becht, 267 F.3d 767 (8th Cir. 2001) : The defendant was charged with possessing and disseminating child pornography, after numerous pornographic files were found on his computer. At trial the prosecution introduced 39 images from the pornographic files, although there was some indication that the government had offered and the defendant had accepted a stipulation that the images were child pornography. The Court held that regardless of any stipulation, the images were also relevant to the defendant's knowledge of what was on his computer. For that purpose the images were highly probative, and the Trial Judge took pains, by limiting the number shown and the time they were shown to the jury, to limit any prejudicial effect. As there were no satisfactory evidentiary alternatives to prove knowledge, the Court found no abuse of discretion in admitting the images.

United States v. Dodds, 347 F.3d 893 (11th Cir. 2003) : The Court affirmed convictions for knowingly possessing child pornography and receiving obscene pictures, holding there was no abuse of discretion when 66 of the 3,400 images of child pornography found in the defendant's possession were admitted. There was evidence indicating that the defendant placed the images in a particular computer file, and the images tended to prove that they constituted child pornography and that the defendant would have known the nature of the images. The Court noted that "[d]uring voir

dire, prospective jurors were warned of the nature of the images and the court excused for cause three jurors who stated that they 'would not be able to view such images without prejudicing the defendant.' "

[g] Photographs, Movies, Videotapes -- Surveillance and "Day in the Life" Films

Grothusen v. National R.R. Passenger Corp., 603 F. Supp. 486 (E.D. Pa. 1984) : The Court held that a surveillance film of the plaintiff, showing him without a limp, was properly admitted in a FELA case.

DeBiasio v. Illinois Cent. R.R., 52 F.3d 678 (7th Cir. 1995) : Affirming a judgment for the plaintiff in a FELA action, the Court held there was no abuse of discretion in admitting a "day in the life" video that included scenes of the plaintiff interacting with his family, even though the family's loss was not compensable under the Act. The jury was explicitly instructed not to consider the accident's harm to the family, and the plaintiff was subject to cross-examination, which significantly reduces the possibility of prejudice from a film.

Bannister v. Town of Noble, 812 F.2d 1265 (10th Cir. 1987) : The Court affirmed a judgment for a plaintiff injured in an automobile accident, upholding the admission of a "day in the life" film offered to prove how the plaintiff's paralysis adversely affected his daily life. The Trial Judge had examined the film outside the jury's presence to make a *Rule 403* determination as to its admissibility; the film accurately portrayed the plaintiff's daily routine and was not unduly prejudicial, even though it contained a couple of scenes that showed the plaintiff doing things he would not frequently do.

[59] Physical Evidence

[a] Civil Cases

Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) : In Starter's declaratory judgment action to establish its right to use a "star" trademark on athletic footwear, Converse introduced a prototype shoe it had designed, to illustrate how the marks at issue might appear on a shoe that Starter might offer. Starter argued that the prototype created a danger of unfair prejudice because it had not actually marketed shoes yet, but the Court found no abuse of discretion in admitting the evidence. The prototype was sufficiently similar to shoes about which testimony was given; Starter had offered its own prototype and could argue (as it did) that Converse's prototype was a gross exaggeration; and by bringing a declaratory judgment action before actually producing shoes bearing the disputed marks, Starter opened itself up to prototype evidence from Converse.

Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984) : A novelty entertainer who performed an act with a swimming pig at an amusement park sued the publisher of *Chic Magazine*, a publication that emphasized female nudity, alleging defamation and invasion of privacy. Although the Court vacated a judgment for the plaintiff and remanded for a new trial on damages, it upheld a ruling that the jury should see the entire magazine in which her picture appeared "so that the jury could, in effect, be placed in the position of the ordinary reader." The Court rejected an argument that the evidentiary impact of the other portions of the magazine was unfairly prejudicial.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) : The Court reversed an actress' judgment against a magazine for invasion of privacy, finding that it was error to permit an expert to show the jury the most offensive 128 photos from various years of the magazine, since the sample was not representative.

[b] Physical Evidence -- Criminal Cases

United States v. Alston, 112 F.3d 32 (1st Cir. 1997) : The defendant was arrested carrying a very rusty, inoperable handgun. During a subsequent investigation, ATF agents cleaned up the weapon and restored it to operable condition. The Court held there was no abuse of discretion in admitting the cleaned-up gun, even though its changed condition may have affected the defendant's scienter argument that he thought he had just picked up a rusty piece of metal in the dark, since the evidence was patently relevant and important and testimony about its prior condition was available to mitigate prejudice.

United States v. Arango-Correa, 851 F.2d 54 (2d Cir. 1988) : Affirming cocaine convictions, the Court held there was no error in permitting the government to display 500 pounds of cocaine to the jury. The Trial Judge carefully limited the duration of the display, and the cocaine was the principal physical evidence in the case.

United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982) : In the prosecution of a former Army doctor for the murder of his wife and children, the Court found that the government proceeded properly in introducing the defendant's pajama top, which had been found draped over the wife's body, in order to show icepick wounds and to compare the pattern of the wounds with the pattern of wounds in the murdered wife's chest.

United States v. Kapp, 419 F.3d 666 (7th Cir. 2005) : The defendant was convicted of trafficking in and killing tigers and other exotic cats, in violation of endangered species laws. Affirming, the Court found no abuse of discretion when mounted tigers and leopards were admitted into evidence. Although the evidence may have had some potential to arouse antipathy against the defendant for killing beautiful animals, that effect did not outweigh the probative value in helping the jury understand and evaluate the testimony of government witnesses regarding identification of the animals in question. In *United States v. Smith, 415 F.3d 682 (7th Cir. 2005)* , the Court affirmed a conviction for aiding and abetting an armed bank robbery, finding no abuse of discretion in the admission of a gun that was found in the trunk of one of the getaway cars. Even though it was not used inside the bank, it was available to assist in warding off police, and thus was part of the plan for escape, so it was probative of the charged crime. In *United States v. Gonzalez*, n124 the Court held there was no abuse of discretion in permitting the display for a few hours of the 2,248 kilograms of cocaine seized from the defendants, as the evidence was relevant to establish the magnitude of the conspiracy and the likely purpose for possessing it, while the short period it was displayed and cautionary instructions regarding the purpose limited any prejudicial effect. In *United States v. Davis*, n125 a prosecution for conspiracy to distribute marijuana, the Court said that it could see no reason why the jury was permitted to examine a container filled with cash. The defendants did not challenge the fact that there was cash in the container, and the jury's examination added nothing to the case. There was no plain error, however.

United States v. Parks, 364 F.3d 902 (8th Cir. 2004) : In a trial for aiding and abetting the making of false statements in connection with firearms purchases, the Court held there was no abuse of discretion when the prosecution was permitted to introduce handguns similar to those purchased. The guns did not go to the jury room during deliberations, and any risks of jury confusion were avoided by instructions that the guns were not the actual guns purchased and were admitted only "so you get a sense of what the guns looked like, what type of gun it was." In *United States v. Barry, 133 F.3d 580 (8th Cir. 1998)* , the Court found no abuse of discretion in the admission of a handgun seized from the defendant, who was charged with a drug distribution conspiracy. The evidence supported an inference that the possessor needed to protect his drugs and money, and therefore had an intent to distribute drugs. In a drug conspiracy case, *United States v. Kime*, n126 the Court found no abuse of discretion when the prosecution introduced books seized at the conspiracy's cover business, including "Marijuana Grower's Guide," "Psychedelic Chemistry," and "The Complete Guide to Lockpicking by 'Eddie the Wire.' " Although there was no evidence that the conspirators had ever read the books, the opportunity to read the books and exploit the techniques therein was clearly probative of the

defendant's criminal intent. In *United States v. Thomlinson*, n127 the Court held there was no abuse of discretion in admitting in a drug prosecution evidence of the defendant's motorcycle club membership and photographs of his tattooed torso, as the evidence tended to prove his ownership of a briefcase discovered in his office, which contained notes of drug transactions, business cards for tattoo parlors, and a motorcycle club brochure.

[60] Plea Agreements

United States v. Sua, 307 F.3d 1150 (9th Cir. 2002) : Affirming convictions for methamphetamine involvement, the Court held that a plea agreement between the government and a codefendant who pled to a cocaine charge in exchange for dismissal of other counts was properly excluded. The Court noted the decision of the Eleventh Circuit in *United States v. Delgado, 903 F.2d 1495 (11th Cir. 1990)* , but declined to address "the soundness of *Delgado*'s suggestion that plea agreements are not admissions because they do not necessarily establish the government believed the defendant was innocent of the charges dropped." The Court "embrace[d] *Delgado*'s holding that a district court may properly exclude, under *Rule 403*, a plea agreement offered for the purpose of establishing the government's belief in a person's innocence."

[61] Police, Probation, and Parole Officer Testimony

United States v. Cruz, 326 F.3d 392 (3d Cir. 2003) : In a prosecution for distributing cocaine base, the government called his parole officer and others who gave testimony indicating that the defendant was on parole at the time. The Court found no abuse of discretion in admission of the evidence, since his parole status was relevant to explain why he used codefendants to perform the hand-to-hand street transactions. Additionally, the Trial Judge had been very careful to minimize the possibility of any unfair prejudice by, for example, making sure that the jury was never given any hint as to the type of crime leading to the defendant's parole status or as to whether he had served time in prison.

United States v. Garrison, 849 F.2d 103 (4th Cir. 1988) : The Court held it was proper to allow a probation officer to testify concerning the defendant's weight loss after the time of the robbery for which he was being tried. In *United States v. Allen*, n128 the Court upheld the admission of testimony by a police officer and a parole officer identifying two defendants from bank surveillance films. The witnesses were able to provide the jury "a perspective it could not acquire in its limited exposure to the defendants." The jury was not told that the witnesses were law enforcement officers, but the defendants complained that cross-examination concerning the witnesses' occupations and bias would necessarily elicit testimony concerning the defendants' criminal activities. The Court observed that "[n]othing in the Rules of Evidence or any other source is intended to relieve criminal defendants from difficult strategic choices."

United States v. Jackson, 339 F.3d 349 (5th Cir. 2003) : In a prosecution for transporting stolen goods from a jewelry store burglary, the government introduced evidence that the defendant had a previous felony conviction for stealing watches, and it elicited testimony from his parole officer (ostensibly called only to prove his address) regarding the defendant's parole status. Reversing, the Court held that the parole officer's testimony had minuscule probative value, because the defendant's residence was not really at issue and there was other evidence on the point, while it had substantial potential for prejudice. In a narcotics case, *United States v. Pace, 10 F.3d 1106 (5th Cir. 1993)* , the Court found it was error (but harmless) to permit the prosecution to call the defendant's parole officer solely to establish the defendant's address. The testimony was prejudicial, since it informed the jury that the defendant had previously committed crimes; and its probative value was minimal, since the defendant's address was not a major issue in dispute in the case, and since the fact could have been proved in less prejudicial ways.

United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976) : The Court reversed a conviction for armed bank robbery

because the defendant's parole officer was permitted to testify that the defendant was the person shown in photographs of the robbery. Although the government did not reveal the officer's relationship with the defendant, to avoid prejudicing the jury, the Court reasoned that the defendant could not effectively cross-examine the witness without risking undue prejudice. Note that cases from other Circuits have disapproved *Calhoun* to the extent that it implies "that a Trial Court's decision to allow a defendant's parole officer to testify against the defendant is a per se violation of *Rule 403*." n129 In most Circuits, the parole officer's testimony will be admissible if it is important to the case and if it cannot reasonably be provided by another person.

United States v. Stormer, 938 F.2d 759 (7th Cir. 1991) : In the prosecution of a former police officer for bank robbery, the Court held there was no abuse of discretion in permitting other police officers to give opinion testimony as to the identity of the robber in the bank surveillance photographs. The testimony was helpful because the person pictured had made efforts to alter his appearance; this probative value was not substantially outweighed by the risk of disclosing rumors of the defendant's alleged impropriety during the course of examining the witnesses as to their possible bias and prejudice.

United States v. Wright, 904 F.2d 403 (8th Cir. 1990) : The Court held there was no abuse of discretion in admitting testimony from witnesses familiar with the defendant from his previous involvement in the criminal justice system, where that connection was not disclosed and the witnesses' contacts were extensive enough to be helpful in identifying the person depicted in surveillance films of bank robbery. The Court also held there was no confrontation violation where the failure to cross-examine the witnesses for bias resulted from a tactical decision, not a prohibition by the Trial Judge. In *United States v. Farnsworth*, n130 the Court affirmed a bank robbery conviction, holding it was no abuse of discretion to admit testimony by parole officers who identified the defendant in surveillance films. The parole officers' status was not revealed nor was the defendant's prior record. The Court suggested that the use of lay opinion identification by police or parole officers should only be used where no other adequate identification testimony is available, since the defendant obviously is severely restricted in cross-examining officers who might reveal a prior record.

United States v. Beck, 418 F.3d 1008 (9th Cir. 2005) : Affirming a conviction for bank robbery, the Court found no error in the admission of testimony by the defendant's probation officer, who identified him as the person in the bank surveillance photograph. The Court noted that the witness was instructed to conceal from the jury his status as a probation officer -- he testified that he had a "professional relationship" with the defendant, which limited the prejudicial effect that otherwise would arise. In *United States v. Henderson, 68 F.3d 323 (9th Cir. 1995)* , the Court found no abuse of discretion when a police officer was permitted in a bank robbery case to identify the defendant in surveillance photographs, where the officer testified to having seen the defendant on a daily, weekly, or biweekly basis throughout a 15-year period and to having seen him wear a heavy overcoat like that worn by the robber in the surveillance photos. The Court noted that although there is a significant degree of prejudice whenever a police officer offers lay opinion identification of a defendant, in this case there were no identification witnesses to one of the robberies and there were two eyewitnesses identifying the defendant as the robber in the other, so there was no reason to overturn either conviction. In *United States v. LaPierre*, n131 the Court noted, in vacating the defendant's conviction for bank robbery and firearms offenses, that it was an abuse of discretion to permit an investigating officer to give an opinion that the individual pictured in the bank surveillance photographs was the defendant. The testimony was unnecessary because the defendant's appearance had not changed, and it ran the risk of invading the province of the jury and prejudicing the defendant, especially because the officer had never seen the defendant in person. In *United States v. Butcher*, n132 two police officers and a parole officer were permitted to testify, because the defendant's appearance at the time of trial was slightly different from his appearance when arrested and prior to the robbery, that the defendant was the individual depicted in bank surveillance photographs. The Court upheld the opinions under *Rule 701*, but noted two problems: First, the witnesses were testifying on the basis of contact with the defendant at a time when his

appearance was even less similar to the appearance of the person in the surveillance photos than it was at the time of trial, so it was arguable that the jury needed no help. More importantly, the use of police and parole officers could be prejudicial to the defendant by suggesting prior prolonged contact with law enforcement officials. The Court warned "that use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution."

United States v. Pierce, 136 F.3d 770 (11th Cir. 1998) : The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in permitting the defendant's probation officer to give an opinion that the defendant was the person depicted in surveillance photographs. Although the defendant's appearance had not changed between the robbery and trial, and the subject was not obscured from view in the photograph, the witness' greater familiarity with the defendant's appearance meant that her testimony could be of assistance to the jury. The probation officer testified that she knew the defendant in that capacity, but her testimony was neither the sole nor even the primary source of evidence about the defendant's criminal history.

[62] Polygraph and Similar Evidence

[a] Civil Cases

Dowd v. Calabrese, 585 F. Supp. 430 (D.D.C. 1984) : In a libel action, the Court rejected the defendants' request that polygraph evidence supporting a reporter's claims concerning his interviews with the plaintiffs and confidential sources be admitted as evidence. Although bound by precedent to exclude the evidence, the Court indicated that, in any event, "the scientific reliability of such evidence is substantially outweighed by its confusing effect on the jury."

deVries v. St. Paul Fire & Marine Ins. Co., 716 F.2d 939 (1st Cir. 1983) : Affirming a judgment for the plaintiffs in a suit alleging bad faith denial of coverage under an insurance policy, the Court upheld a ruling excluding evidence that the plaintiffs refused to take a polygraph test. It reasoned that polygraph evidence has been deemed to be of dubious value by Federal Courts, and that any probative value that the evidence would have had on the question of the company's good faith was substantially outweighed by the prejudicial impact it might have had on the jury.

Joubert v. Travelers Indem. Co., 736 F.2d 191 (5th Cir. 1984) : Affirming a judgment for the defendant insurer, which alleged that an insured was responsible for setting two fires in his home, the Court stated that the plaintiff's "argument that the Trial Court erred in holding that a voice stress test was inadmissible is without merit."

Wolff v. Moore, 199 F.3d 324 (6th Cir. 1999) : The Court held it was error (but harmless) to admit testimony in an inmate's § 1983 action against correction officers that another inmate, who allegedly was an eyewitness, had agreed to take a polygraph test. The testimony was not relevant to the proof developed by the probative evidence. Affirming a Tax Court finding that the taxpayers had substantially understated their income in *Conti v. Commissioner, 39 F.3d 658 (6th Cir. 1994)* , the Court found no error in the exclusion of polygraph evidence offered by the taxpayers. The Court noted that the taxpayers had unilaterally arranged for polygraph tests after the Commissioner refused to agree to such tests. Under Circuit precedent, unilaterally obtained polygraph tests are excluded under *Rule 403* because the results of the tests would not be disclosed if they were unfavorable, and therefore the party offering them does not have a sufficiently "adverse interest at stake while taking the test." In *Wolfel v. Holbrook*, n133 the Court reversed a judgment for an inmate who sued a corrections officer for an alleged beating. It observed that polygraph evidence is generally inadmissible absent a stipulation of the parties. Here, it was error to admit evidence that the inmate was willing to take a lie detector test and to permit the inmate to interrogate a corrections officer concerning his refusal to submit to a polygraph examination regarding the alleged beating of another prisoner. In *Murphy v. Cincinnati Ins. Co.*, n134 the

Court affirmed a judgment for an insured on a fire policy, finding no error when the plaintiff was permitted to testify about his willingness to take a lie detector test and to cooperate with the company. The Court found that the testimony was relevant both to his credibility and to the company's claim of good faith in rejecting a claim.

United Fire & Cas. Co. v. Historic Preservation Trust, 265 F.3d 722 (8th Cir. 2001) : After the Trust submitted a fire damage claim, the insurer brought an action seeking a declaration of nonliability on grounds that the sole trustee intentionally set the fire and otherwise violated the policy terms. At trial the insurer sought to offer evidence that the trustee had refused to take a lie detector test, as requested by the state fire marshal; the evidence was offered to show the insurer's reasonableness, which was relevant to the Trust's counterclaim for vexatious refusal to pay. The Court held that exclusion of the evidence was not an abuse of discretion, since the refusal to take a lie detector test has little probative value and may be highly prejudicial to the insured.

Palmer v. City of Monticello, 31 F.3d 1499 (10th Cir. 1994) : The plaintiff brought a § 1983 action alleging that he had been denied due process when he was terminated from employment as a police officer, allegedly for falsifying a speeding ticket. The Court found no abuse of discretion in the exclusion of evidence that the plaintiff, before he was terminated, had taken a polygraph test in connection with the false speeding ticket charge. Although the polygraph evidence had some relevance as an operative fact, to show the precautions taken by the City before deciding to fire the plaintiff, the Trial Judge was justifiably concerned that improper inferences would likely be drawn that the plaintiff failed the polygraph.

[b] Polygraph and Similar Evidence -- Criminal Cases

[i] Defense Evidence Admissible

United States v. Lynn, 856 F.2d 430 (1st Cir. 1988) : The Court reversed drug convictions, holding it was error to deny the defendant an opportunity to question a government witness concerning "inconclusive" answers on two polygraph tests. Since the government presented the plea agreement, which required that the defendant successfully complete a polygraph examination, the Court concluded that the defendant should have been permitted to demonstrate that the witness had a reason to curry favor with the government to avoid nullification of his agreement as a result of the tests.

United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991) : In a prosecution for false claims fraud, the principal government witness had taken polygraph tests in which the government examiner concluded he was "not truthful." A government motion *in limine* to exclude polygraph evidence was granted, and at trial the defense was not permitted to inquire about the tests while cross-examining a government expert whose report (entered in evidence) concluded that the key witness was competent. The Court reversed, holding that as a panel it could not overturn the Circuit's rule excluding polygraph evidence offered to prove the examinee's truthfulness, but that under *Rule 705* the expert could be examined on the polygraph report he had considered in reaching his opinion on competency.

United States v. Weiner, 988 F.2d 629 (6th Cir. 1993) : The Court held there was no error in admitting evidence that the defendant in a fraud case had taken a polygraph examination, as it was offered only to show why he was no longer being used as an informant. In *United States v. Barger, 931 F.2d 359 (6th Cir. 1991)* , the Court affirmed the conviction of a motorcycle gang member for arson and related offenses, holding there was no abuse of discretion in admitting evidence of a polygraph test given to an informant-witness, as it was relevant to his credibility and the test was part of his contract with the FBI, which the defense put in issue several times, and it was the defense rather than the government that elicited the results of the test.

[ii] Polygraph and Similar Evidence -- Criminal Cases -- Defense Evidence Excludable

United States v. Kwong, 69 F.3d 663 (2d Cir. 1995) : Affirming a conviction for attempted murder of an Assistant U.S. Attorney, the Court held it was proper to exclude evidence that the defendant "passed" a polygraph examination. The questions posed to the defendant by the polygraph examiner were so ambiguous that the responses, while apparently exculpatory, did not preclude the defendant's participation in the crime charged. Thus, the risk of confusion and prejudice substantially outweighed the probative value of the polygraph test.

United States v. Sanchez, 118 F.3d 192 (4th Cir. 1997) : Affirming cocaine conspiracy convictions, the Court held there was no error in precluding the defendant from introducing evidence that a cooperating witness had failed a polygraph test in the course of her cooperation. The Court noted that the Circuit, unlike some others, continues to exclude absolutely polygraph evidence to impeach the credibility of a witness.

United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996) : In a bank fraud prosecution, the Court noted its *Posado* decision (§ 403.03[62][b][iii]) and held there was no abuse of discretion in excluding results of a polygraph examination taken by the defendant. Some of the results were simply immaterial; as to others, the testing lacked safeguards that operate to counterbalance the prejudicial effect of polygraph results.

United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995) : The defendant argued that polygraph results were admissible pursuant to *Rule 702* following the *Daubert* decision (see the Editorial Explanatory Comment to *Rule 702*, *§ 702.02[5]*). However, the Court held there was no abuse of discretion in excluding results of a unilaterally-taken polygraph, since *Rule 403* offers a basis for exclusion independent of *Daubert*. The Court observed that "in the absence of a prior agreement between the parties that the results of an examination would be admissible, the probative value of the polygraph is substantially less because the defendant would have no adverse interest at stake in the polygraph." See also *United States v. Harris, 9 F.3d 493 (6th Cir. 1993)* (no abuse of discretion to exclude evidence that the defendant offered to take a polygraph exam; because he did not agree to allow the results of any such examination, whatever they might be, to be admitted at trial, the evidence was at best marginally relevant on the credibility issue).

United States v. Ross, 412 F.3d 771 (7th Cir. 2005) : The Court affirmed a conviction for felon firearm possession and found no abuse of discretion in the exclusion under *Rule 403* of evidence that two weeks before trial the defendant passed a polygraph test indicating that he did not possess the gun. Observing that the test was administered at the eleventh hour without notice to the government and was "highly suspect," the Court noted that "courts have routinely rejected unilateral and clandestine polygraph examinations like the one taken here, citing concern that a test taken without the government's knowledge is unreliable because it carries no negative consequences, and probably won't see the light of day if a defendant flunks." See also *United States v. Feldman* n135(upholding exclusion of test that defendant passed four days before trial); *United States v. Tucker* n136(no error to exclude polygraph results where the defendant refused to agree to the admissibility of the results before taking the test). In *United States v. Brown, 289 F.3d 989 (7th Cir. 2002)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when the defendant was precluded from cross-examining a witness about his failure to appear for a scheduled voice stress test. The Court noted that "[v]oice stress tests are if anything less reliable than polygraphs, and the evidence was simply that [the witness] failed to show up for the interview without explanation, not that he had affirmatively refused to take the test. The jury therefore could have read more into this than there was." In *United States v. Lea*, n137 after a business deal went sour, the defendant was charged with contaminating a rendering works and causing a massive recall of its products. Affirming, the Court held there was no abuse of discretion in excluding evidence offered by the defense that another person had failed a polygraph test regarding the incident. The Trial Judge had not been provided with information about the accuracy rate of the test, and had been concerned that the examiner had been unable to complete

the examination and determine why it was he considered the examinee "deception indicated." In *United States v. Robbins*, n138 the Court affirmed convictions arising out of a large-scale marijuana operation. It found no abuse of discretion when the defense was barred from asking witnesses, whose plea agreements and proffer letters stated that each of them was willing to submit to a polygraph examination at the request of the government, whether they had taken the polygraph tests. The Court reasoned that "even the threshold question as to whether a polygraph test had been administered would confuse and cause speculation among the jury." In a cocaine prosecution, *United States v. Pulido*, n139 the Court held that there was no abuse of discretion in excluding evidence that the police examiner had noted "deception indicated" on a polygraph report of the principal government witness when he had been examined about murders tangentially connected with the case. Because the report did not remark on the degree or extent of deception "indicated" or on the answers thought deceptive, it did not provide an adequate basis for inferring that the witness had lied to police or had been involved in the murders. The polygraph exam was peripheral to the core issues of the case and the defendant was able to impeach the witness successfully without use of the report.

United States v. Gianakos, 415 F.3d 912 (8th Cir. 2005) : The Court affirmed a conviction of kidnapping with a death resulting, finding no abuse of discretion when the defendant was precluded from cross-examining a detective, who said that two witnesses had always been consistent, about the witnesses' failed polygraph tests. The Court reasoned that the defense could cross-examine about consistency without reference to the tests. In *United States v. Williams, 95 F.3d 723 (8th Cir. 1996)* , the Court held there was no abuse of discretion in excluding a polygraph examination offered to show that the government's chief witness in a kidnapping case had lied about the events. Because the questions asked had dealt only with peripheral details and the defendants rejected an offer to conduct a second test regarding the critical facts, the probative value of evidence that the witness had lied on any questions was outweighed by the potential for prejudice and misleading the jury.

United States v. Ramirez-Robles, 386 F.3d 1234 (9th Cir. 2004) : The Court affirmed convictions for methamphetamine distribution. Although the Trial Judge did not cite a specific evidence rule in excluding polygraph testimony, the Court concluded that the Judge appeared to rely on *Rule 403* and did not abuse discretion in excluding the testimony. The testimony was potentially confusing, because the defendant was asked by the polygrapher whether he owned the methamphetamine that was sold and whether he ordered it, but was not asked whether he masterminded the sale, which was sufficient to convict him. In *United States v. Falsia*, n140 the Court sustained a cocaine conspiracy conviction and upheld the refusal to admit evidence of a polygraph test that was favorable to the defendant, reasoning that the Trial Judge could have concluded that the evidence might have been time-consuming, prejudicial, and confusing. In *United States v. Solomon*, n141 the Court affirmed murder convictions, finding no error in the exclusion of a defense psychiatrist's testimony concerning narcoanalysis of one defendant. Since narcoanalysis does not reliably induce truthful statements, the Trial Judge had discretion to exclude the evidence as not being helpful and as being more prejudicial than probative.

[iii] Polygraph and Similar Evidence -- Criminal Cases -- Generally

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) : Concluding that the Circuit's *per se* rule against admission of polygraph testimony could not survive the Supreme Court's opinion in *Daubert* (see the Editorial Explanatory Comment to *Rule 702*, *§ 702.02[5]*), the Court reversed drug convictions because defense polygraph evidence had been excluded, and remanded the case for further proceedings. The Court emphasized that it was not holding that polygraph examinations are scientifically valid or that they always will assist the trier of fact; furthermore, it observed that *Rule 403* might appropriately be invoked in some cases, even though polygraph evidence was no longer inadmissible *per se*.

United States v. Dietrich, 854 F.2d 1056 (7th Cir. 1988) : The Court affirmed convictions for dealing in counterfeit notes, observing that "[d]istrict judges generally exercise their discretion in this area in favor of excluding

polygraph evidence, because doubts about the probative value and reliability of this evidence are usually found to [be outweighed by] the risk of prejudice." In this case, the Trial Judge struck a witness' mention of having taken a polygraph test and admonished the jury to disregard the testimony. Although the defendant claimed that the Judge should have given a more elaborate instruction, he failed to request one and the instruction given was deemed adequate.

United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) : The Court revisited the Circuit's rule that unstipulated polygraph evidence is *per se* inadmissible. The Court held that after the "flexible inquiry" mandated by the Supreme Court's decision in *Daubert*, such a *per se* rule of exclusion was no longer tenable. The Court reasoned further that while *Daubert* did not deal directly with *Rule 403*, a *per se* rule of inadmissibility under that Rule is equally inconsistent with *Daubert*. The Court remanded for a determination of whether the defendant's exculpatory polygraph examination was sufficiently reliable under *Daubert* and sufficiently probative under *Rule 403*.

United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc): Overturning its prior rule holding polygraph evidence inadmissible *per se*, the Court *en banc* vacated a conviction for knowingly making false statements to a grand jury and held that polygraph evidence was now sufficiently accepted as reliable that it could be admitted on stipulation or for impeachment or corroboration under *Rule 608* upon adequate notice and opportunity for the opponent also to conduct a polygraph examination, subject to the discretion of the Trial Judge.

[iv] Polygraph and Similar Evidence -- Criminal Cases -- Prosecution Evidence

United States v. Brevard, 739 F.2d 180 (4th Cir. 1984) : The Court reversed a bank robbery conviction because an FBI agent made statements while testifying that the jury might have interpreted as indicating that the defendant had failed a polygraph test. The Court found that the defendant's credibility was crucial and that the instruction to the jury to disregard the agent's references was not sufficient protection against the possibility of prejudice.

United States v. Bowen, 857 F.2d 1337 (9th Cir. 1988) : In a prosecution for violating civil rights and conspiracy to defraud the government, the government alleged as overt acts one defendant's meeting with a polygrapher who prepared a false report. The Trial Judge ruled that evidence concerning the polygraphy would be excluded, even though it was offered to prove a conspiracy rather than to prove the falsity of statements made. The Court affirmed, finding that the evidence had the potential to confuse the jury, especially in light of defense evidence that the defendant whose report was allegedly falsified passed a second polygraph test. Moreover, the Court found that the prosecution had represented on numerous occasions that it would not seek admission of the evidence and that its change of heart was "beneath the standards we expect of our public prosecutors." In *United States v. Miller*, n142 the Court held that a limiting instruction was insufficient to cure the erroneous admission of evidence that the defendant had made false statements on a polygraph test. In *United States v. Candoli*, n143 the Court found error (harmless, however) in a police agent's reference to asking an unindicted suspect in an arson case to take a lie detector test, since the jury might have improperly inferred that the suspect took a test, passed it, and was therefore properly eliminated as a suspect.

United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987) : The Court reversed a murder conviction on other grounds, but indicated that no reference should be made on retrial to a polygraph examination that appeared to indicate that a witness' statement to FBI agents that he saw the defendant beat the victim was true and his trial testimony to the contrary was false.

[63] Prejudice

[a] Duty To Minimize

Old Chief v. United States, 519 U.S. 172 (1997) : See the discussion in the Editorial Explanatory Comment, *§ 403.02[6]*.

[b] Prejudice -- Limiting Instruction

Shanklin v. Norfolk & S. Ry., 369 F.3d 978 (6th Cir. 2004) : During the trial of a wrongful death case arising from a grade-crossing accident, a videotaped deposition of the defendant's president, taken in another case, was admitted on the issue of the defendant's knowledge of the importance of identifying and eliminating hazardous conditions at its grade crossings. Although the deposition had been redacted to eliminate inadmissible evidence, a statement that the defendant had the highest rate of grade-crossing accidents in the industry was inadvertently shown to the jury. "Notwithstanding the undoubtedly prejudicial nature of the erroneously admitted information," the Court held that the Judge's immediate response by striking the evidence and issuing a curative instruction sufficiently minimized the prejudice to the defendant.

United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) : The defendant in a drug case claimed that he was entrapped, after a man who owed him money introduced an informant with the suggestion that he should sell the informant drugs in order to pay off the debt, and that feeling pressured and realizing it was the only way to get his money back, the defendant arranged the charged transaction as a middleman. In the government's rebuttal, the informant testified that he did not entrap the defendant, but that the defendant was eager to sell. He also testified that he and the debtor had previously been engaged in a marijuana transaction, for which, according to what he was told by the debtor and the debtor's mother, the defendant was the supplier. The Court concluded that "[w]hether or not such testimony [regarding the statements from the debtor and his mother] was relevant or admissible as nonhearsay, we recognize that the prejudicial aspect of this testimony is clear, even if it might be outweighed by its probative value," so it was error (but harmless) not to "contain[] the force of this evidence with a limiting instruction."

[c] Prejudice -- "Prejudice" Covered by the Rule

United States v. Gartmon, 146 F.3d 1015 (D.C. Cir. 1998) : When the defendant's girlfriend, who had been helping him defraud her employer, indicated that she wanted to get out of the scheme, he threatened her by inserting a gun into her vagina. The Court held there was no abuse of discretion in admitting evidence of the incident, since the defendant's conduct, although clearly outrageous, was probative of his intent and controlling role, and the evidence was not offered for an unfair purpose, on an ancillary issue, or to inflame the jury. Although there was some risk that recitation of the facts would evoke emotions in the courtroom, there was no "unfair prejudice" or "undue tendency to suggest decision on an improper basis."

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1998) : Noting that "[v]irtually all evidence is meant to be prejudicial, and it is only *unfair* prejudice against which *Rule 403* protects," the Court found no abuse of discretion in the admission of evidence about a shooting incident that tended to show the defendant was a member of the charged drug conspiracy.

United States v. Sprick, 233 F.3d 845 (5th Cir. 2000) : The Court affirmed fraud and money laundering convictions arising out of the defendant's service as a financial advisor. The government had searched the defendant's home and had discovered a failed e-mail transmission addressed to a radio personality in which the defendant admitted that he misappropriated a large amount of money and that he had been contacted by the government. The Court held

that the e-mail "did not influence the jury in any improper way; rather its effect corresponds with the purpose for its admission, namely its bearing on Sprick's guilt. ... Thus the e-mail had no *unfairly* prejudicial effect." In *Dollar v. Long Mfg., N.C., Inc.*, n144 the Court reversed a judgment for the defendant in a product liability action because of an erroneous ruling that a defense witness, who testified that the instrument used by the deceased was safe to operate, could not be impeached by a letter that the witness had sent to dealers selling the instrument warning them about its "death-dealing propensities" when used in the fashion it was used by the deceased. The Court stated that the evidence should not have been excluded under *Rule 403* because there was no danger of *unfair* prejudice to the defendant. The Court said that "[o]f course, 'unfair prejudice' as used in *Rule 403* is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.' "

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a suit between the airline and the aircraft manufacturer for contribution and reimbursement for settlements arising from the crash of an airplane on takeoff, the Court held there was no abuse of discretion in admitting records of the pilot in command's training and of the training practices of the airline's corporate predecessor. The Court found the records probative to show the pilot's longstanding problems with checklist usage and the airline's failure to correct them. It rejected the argument that the records were prejudicial to the airline, saying "*Rule 403* does not exclude evidence because it is strongly persuasive or compellingly relevant -- the rule only applies when it is likely that the jury will be moved by a piece of evidence in a manner that is somehow unfair or inappropriate."

United States v. Wipf, 397 F.3d 632 (8th Cir. 2005) : The Court affirmed a conviction for involuntary manslaughter arising from the defendant's driving while intoxicated. Evidence that the defendant's blood alcohol content was.214 was "certainly prejudicial because it was strong evidence that he committed the crime of involuntary manslaughter" but it "was not unfairly prejudicial because it would not lead the jury to find Wipf guilty on an 'improper basis.' " Thus, the evidence was not subject to exclusion under

Rule 403.

United States v. Cruz-Garcia, 344 F.3d 951 (9th Cir. 2003) : The Court reversed a drug conviction because the defendant was not permitted to introduce evidence of the facts underlying a cooperating witness' prior convictions. In his plea allocution the witness had not mentioned the defendant, but at trial he testified that the defendant was the drug dealer and he was just along for the ride; the prosecutor argued that the witness was "dumb as a box of rocks" and would have needed the defendant's help to pull off the crime. The Court held that the underlying facts were not offered to show the witness' propensity to commit the charged crime but to show his ability to commit the crime on his own, which the prosecutor had made the central issue. Proving the underlying facts could only have prejudiced the government's case by undermining its theory that the witness was too dumb to act on his own, and that would not be *unfair* prejudice.

[d] Prejudice -- Prejudice to Prosecution

United States v. Malpeso, 115 F.3d 155 (2d Cir. 1997) : Defendants, charged with offenses arising from a war between competing factions of a crime family in which they were members, sought to introduce evidence that an FBI agent had leaked information to a member of a rival faction during that time, in order to show that there was no mob war but rather "one nut running amok" and everyone else "taking cover." The Court held there was no abuse of discretion in excluding the evidence, since it was of at best marginal relevance, and the likely (and presumably intended) effect of admitting it would have been to shift the focus away from the defendants' wrongdoing to the tangentially related misdeeds of one government agent, which not only risked needlessly delaying the trial but also created a real possibility that the jury would improperly discredit the government's case.

United States v. Cropp, 127 F.3d 354 (4th Cir. 1997) : The Court held in a crack distribution conspiracy prosecution that there was no abuse of discretion in prohibiting cross-examination of cooperating witnesses regarding the specific penalties that they would have received absent cooperation or that they hoped to receive due to their cooperation. Defense counsel were permitted to ask the witnesses whether they faced a "severe penalty" prior to cooperating and whether they expected to receive a lesser sentence because of their cooperation. Any additional probative value from quantitative questions was outweighed by the certain prejudice that would result when a sympathetic jury learns that a finding of guilt results in 10-20 years of imprisonment.

United States v. Cruz-Garcia, 344 F.3d 951 (9th Cir. 2003) : The Court reversed a drug conviction because the defendant was not permitted to introduce evidence of the facts underlying a cooperating witness' prior convictions. In his plea allocution the witness had not mentioned the defendant, but at trial he testified that the defendant was the drug dealer and he was just along for the ride; the prosecutor argued that he witness was "dumb as a box of rocks" and would have needed the defendant's help to pull off the crime. The Court held that the underlying facts were not offered to show the witness' propensity to commit the charged crime but to show his ability to commit the crime on his own, which the prosecutor had made the central issue. Proving the underlying facts could only have prejudiced the government's case by undermining its theory that the witness was too dumb to act on his own, and that would not be *unfair* prejudice.

[64] Prison Disciplinary Decision

United States v. Thomas, 155 F.3d 833 (7th Cir. 1998) : In a prosecution for mailing threatening letters, the Court held it was error (but harmless) to admit a prison counselor's testimony that a prison disciplinary hearing concluded that the defendant was responsible for writing one of the letters. The risk of unfair prejudice was substantial, since the jury learned that the hearing decided one element of the offense, even though the hearing did not decide whether the defendant was guilty beyond a reasonable doubt and the defendant was not given the procedural protections afforded at trial.

[65] Privacy and Confidential Information

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002) : Although the Court affirmed a judgment for a professional soccer league and its investor-owners in an antitrust suit brought by soccer players, it found an abuse of discretion (but harmless error) when the cross-examination of a defense witness was restricted. The witness was the co-owner of a minor league team, who testified that he was competing with Major League Soccer for two specific players. The plaintiffs asked for the names of the players on cross-examination, but the witness claimed he wanted to keep the information confidential. The Court held that, while a Trial Judge has authority to protect witnesses from an invasion of privacy, it was not clear that any substantial privacy interest was at stake in this case.

[66] Product Design

United States Fid. & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24 (1st Cir. 1995) : In an action arising out of a fatal accident involving a forklift, the Court held that *Rule 407* did not bar evidence of a design change made after manufacture of the forklift but before the accident. However, there was no abuse of discretion in excluding the evidence under *Rule 403*, because the dissimilarities between the redesigned forklift and the model involved in the accident could have been misleading to the jury and unfairly prejudicial to the defendant.

Alevromagiros v. Hechinger Co., 993 F.2d 417 (4th Cir. 1993) : In an action brought by a consumer injured by an

allegedly defective ladder, the Court held there was no error in excluding evidence of a competing ladder with more safety features. The jury did not need to see examples of competing products to understand the nature of the product at issue and could easily have been misled or confused by the assumption that the competing product represented the relevant industry-wide standard.

[67] "Profile" Evidence

United States v. Simpson, 910 F.2d 154 (4th Cir. 1990) : The Court reversed a conviction for unlawfully possessing a firearm and attempting to board an aircraft with a concealed weapon, holding it was an abuse of discretion to admit drug courier profile testimony. Even giving the evidence its maximum probative value and minimizing its prejudicial effect, the evidence had *de minimis* relevance but highly prejudicial impact in its insinuation of drug crimes in the trial.

United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003) : In the defendant truck driver's trial for possession of marijuana, a DEA agent testified about how drug traffickers recruit smugglers. The witness suggested that such smugglers knew they were transporting drugs, and he mentioned specifically facts closely paralleling the case, including the amount of drugs given to new recruits and the presence of wives and children to mask the trafficking offense. Affirming, the Court found that admission of the agent's testimony was an abuse of discretion (but harmless error). The testimony was closely akin to drug courier profile evidence, which is inadmissible because it is inherently prejudicial and violates *Rule 704(b)*'s bar on expert testimony to prove a mental element: in these cases, the courier's knowledge that he was transporting drugs. In a marijuana-importation prosecution, *United States v. Brito, 136 F.3d 397 (5th Cir. 1998)* , the Court held it was an abuse of discretion (but harmless error) to admit testimony from a law enforcement expert regarding the structure of family drug gangs generally and then, based on the testimony of other witnesses, to permit him to ascribe certain roles to the members of the family in this case. This type of profile evidence is inadmissible to prove substantive guilt based upon similarities between the defendants and a profile.

United States v. Carter, 901 F.2d 683 (8th Cir. 1990) : The Court held in a cocaine possession case that drug courier profiles are investigative tools, not evidence of guilt, and that their admission is inherently prejudicial, but that the error in admitting the evidence in this case, where there was no need to establish the validity of a search before the jury, was harmless. In *United States v. Wilson, 930 F.2d 616 (8th Cir. 1991)* , a drug trafficking prosecution, the Court held that introducing evidence of frequent flights, which was part of a drug courier profile, was relevant to rebut the defendant's argument he was ignorant of the contents of a package picked up from an airline; it was error (but harmless), however, for the prosecutor to argue in summation that the defendant fit the profile.

United States v. Baron, 94 F.3d 1312 (9th Cir. 1996) : Reversing a drug conviction on non-evidentiary grounds, the Court held that "profile" testimony from an expert on drug transactions was properly admitted. Defense counsel suggested, in cross-examining one of the arresting officers, that the defendant was not a drug courier because when arrested he did not have with him the items that a typical drug courier might be expected to carry. In rebuttal, an expert on drug transactions testified that it was not unusual for a drug courier to be found without large sums of cash, drug ledgers, or drug paraphernalia. While profile testimony is usually inadmissible to prove guilt, the defendant opened the door in this case. In *United States v. Lui, 941 F.2d 844 (9th Cir. 1991)* , the Court held it was an abuse of discretion, but harmless, to admit drug courier profile evidence to show *modus operandi*, where the defendant was caught red-handed with suitcases full of heroin and the government had no need to explain a complex criminal scheme. See also *United States v. Gomez-Norena* n145(no plain error to admit drug courier profile testimony where it was not offered to prove that the defendant was guilty, and the jury was twice cautioned to consider it only as background material).

United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992) : Affirming convictions for cocaine base possession and conspiracy, the Court held that expert evidence tending to show that the defendants were active members of a gang whose main purpose was to sell cocaine was not impermissible "profile" evidence. Profiles only help investigators decide whether to pursue a matter, but the expert in this case was explaining the physical evidence so as to connect the defendants to the charged crime. The dissenting Judge believed that the government had impermissibly sought to prove that by exhibiting the characteristics of gang members, the defendants were members of a gang with criminal purposes and therefore were guilty of the charged conspiracy and underlying crimes.

[68] Race and Ancestry

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) : A black American and two Jamaicans were jointly charged with drug offenses. The Court reversed their convictions, in part because a detective was permitted to testify to the *modus operandi* of Jamaican drug dealers and how the market has been taken over basically by Jamaicans. The Trial Judge had not balanced the severely prejudicial effect of the references, but had admitted the testimony solely because defense counsel had inquired on *voir dire* whether jurors would have greater difficulty affording Jamaicans a fair trial.

United States v. Rodriguez Cortes, 949 F.2d 532 (1st Cir. 1991) : The Court held it was reversible error to admit an unauthenticated Colombian identification card seized from a defendant charged with importing cocaine. In the majority's view, prosecution argument based on the card appealed to the jury to find the defendant guilty by reason of his national origin, inviting them to believe that if a person is born in Colombia he must be involved in drug trafficking. One Judge, concurring *dubitante*, agreed that the card's prejudicial effect substantially exceeded its probative value, but disagreed that the prosecutor's argument crossed the line.

United States v. Blackwood, 913 F.2d 139 (4th Cir. 1990) : Affirming a conviction for possessing crack cocaine with intent to distribute, the Court held there was no abuse of discretion in admitting two Jamaican passports in the defendant's name found in one of the rooms where the drugs were located, as the value of the evidence in showing control of the room was not substantially outweighed by the risk that the passports would incite xenophobic hostility.

United States v. Bonty, 383 F.3d 575 (7th Cir. 2004) : The Court affirmed convictions of two men for interstate transportation of minors with intent to commit aggravated sexual abuse, after one of them raped one of a pair of girls they had enticed to go with them. The Court found no abuse of discretion in the admission of evidence that the rapist's accomplice had made sexual advances toward the other girl. Although the accomplice argued that evidence a 31-year-old black man propositioned a 15-year-old white girl inflamed the jury, the Court found that the evidence was relevant to whether the accomplice knew the purpose of picking the girls up at a mall was to later engage in a sexual encounter, and that any prejudicial effect was lessened because the testimony was not repeated and the jury was instructed not to be "influenced by any person's race, color, religion, national ancestry, or sex." In *United States v. Kibler, 279 F.3d 511 (7th Cir. 2002)* , the Court affirmed cocaine-related convictions. It concluded that evidence that the defendant obtained sex from both black and white girls in exchange for drugs was probative because it concerned the drug transactions that formed the basis for the indictment, and that it was not unduly prejudicial because "the race of the women involved was raised only incidentally when witnesses were identifying the persons involved."

United States v. Jankowski, 194 F.3d 878 (8th Cir. 1999) : The Court found no abuse of discretion in an armored car robbery trial when a witness was permitted to testify that one of the conspirators spoke Polish on the telephone. The evidence was relevant to showing that she was communicating with her Polish-speaking husband and that she was seeking not to be understood if overheard. The probative value of the evidence was not substantially outweighed by any prejudicial effect, as the evidence was not linked with any argument or other evidence implying she was more likely to

have committed the crime because of her national origin. In *EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998)* , the Court affirmed a judgment for the plaintiffs in an action alleging racial discrimination and retaliatory discharge by a hotel owned by the defendant. It upheld the admission of various statements by company employees concerning the racial views of the man who was the controlling figure in running the hotel. However, the Court found that evidence that the general manager of the hotel referred to his co-worker as a "camel jockey" and made anti-Semitic statements should not have been admitted, but the error was harmless. In *United States v. Vue*, n146 the Court reversed the Hmong defendants' convictions for opium smuggling because a customs officer was permitted to testify that much of the opium smuggling in the area involved Hmongs.

Jinro America Inc. v. Secure Investments, Inc., 266 F.3d 993 (9th Cir. 2001) : In a breach of contract and fraud action by a South Korean company, the Court reversed summary judgment granted for the defendants after a jury, in the first stage of a bifurcated trial, found for the defendants on their claim that the contract at issue was a sham designed to cover up a high-risk investment scheme that circumvented South Korea's currency regulations. The Court held that the trial "was prejudicially infected by ethnically biased, 'xenophobic' expert testimony" by a private investigator, alleging a *modus operandi* of Korean businessmen to seek to circumvent laws that restrict their money-making ability and to use the United States as a safe haven for schemes to evade currency requirements. On cross-examination, he stated that "the prevalence of corruption and fraud in the Korean business community is very great and very extensive." The Court found that the testimony "was so tinged with ethnic bias and stereotyping that it should have been excluded under *Rule 403*'s balancing test." The Court rejected as "both astonishing and irrelevant" the defense argument that the testimony could not have been racist because the expert was married to a Korean. In *United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000)* , the Court reversed the drug convictions of two defendants of Cuban origin, finding plain error in the admission of extensive testimony by the arresting officer concerning the number of Cubans in the drug trade, the "typical way that Cubans do their drugs," and the flight risk posed by Cuban suspects. Such generalizations were unnecessary and prejudicial, because persons "cannot be tried on the basis of their ethnic backgrounds or national origin." In *Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000)* , the Court affirmed a judgment against police officers in favor of three teenaged boys, two African-American and one white, who alleged an illegal stop of their vehicle followed by use of excessive force. The Court found that the relevance of racial bias evidence was "readily apparent": "proving the officers' actions were racially motivated could explain why they stopped the boys' vehicle without probable cause or reasonable suspicion and also why they used excessive force without cause"; "[e]stablishing the officer's racial motivation tends to demonstrate why the plaintiffs' testimony, and not the officers', should be deemed credible by the jurors"; and racial bias was important to proving the malicious, wanton, or oppressive behavior of the officers.

United States v. Bowman, 302 F.3d 1228 (11th Cir. 2002) : Affirming the racketeering conviction of the international president of a motorcycle club, the Court held it was an abuse of discretion (but harmless error) to disclose the whites-only policy in several iterations of the club's constitution. The only relevance of the evidence was that its repetition tended to show the uniformity of the enterprise, but that was outweighed by the danger of unfair prejudice from the introduction of irrelevant and inflammatory racial issues. In a civil rights action for excessive force in effecting an arrest, *Brown v. City of Hialeah, 30 F.3d 1433 (11th Cir. 1994)* , the Court reversed a judgment for the defendants, because portions of a tape recording in which the officers used racial slurs were excluded.

[69] Reading Materials

United States v. Walters, 351 F.3d 159 (5th Cir. 2003) : Affirming a conviction for sending an explosive package to an Air Force officer, the Court found no abuse of discretion in admitting portions of a book, *The Anarchist's Cookbook*, including a title page with the defendant's name written on it and a chapter detailing the making of a device similar to that sent to the officer. The Court concluded that the evidence was relevant to prove knowledge and ability to make the type of device at issue in the case. Noting that the Judge instructed the jury on the limited use it could make of the evidence, the Court suggested that the defendant "understates the probative value of the excerpts admitted and

overstates their prejudicial impact."

People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998) : The Court reversed a conviction for unlawful sexual activity with minors, because of the improper admission of testimony regarding the contents of sexually explicit gay adult magazines found in the defendant's house. While the magazines could possibly have been relevant to whether the defendant had the purpose of being sexually aroused, or was actually sexually aroused, by the charged improper touching of underage boys, the statute under which he was prosecuted applied only an objective test, which made the character of the touching, not the purpose of the toucher, at issue. Furthermore, possession of the magazines was not probative of whether the conduct with which the defendant was charged was intentional. Even if the evidence were somehow relevant, its suggestion of the defendant's sexual orientation, and implication of sexual deviancy, was highly prejudicial and substantially outweighed any probative value.

[70] Rebutting Negative Inference

United States v. Pinillos-Prieto, 419 F.3d 61 (1st Cir. 2005) : The Court affirmed cocaine convictions, holding that a law enforcement officer was properly permitted to testify as a lay witness that drug organizations were dangerous and that they protected their drugs with firearms, and that the moment when drugs and money were handed over was the most dangerous part of the work of an undercover agent. The evidence tended to explain why an organization's leader would not be present at an exchange, why a defendant present at a meeting was unlikely to be an innocent bystander, and other aspects of a drug arrest, and any danger of unfair prejudice was substantially dissipated.

United States v. Christians, 200 F.3d 1124 (8th Cir. 1999) : The Court affirmed firearm convictions, finding no error when the government was permitted to elicit testimony that the defendant had an opportunity in the jailhouse video room to erase videotapes of an alleged confession. Because the defense challenged the officers' testimony that they provided *Miranda* warnings to the defendant and repeatedly alluded to the fact that the confession was videotaped, the Court held there was no error in permitting the government to clarify the reason that it could not present the videotapes to the jury.

[71] Relationship to Other Rules

[a] Hearsay Rules

Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998) : An inmate, suing for civil rights violations following an alleged assault by corrections officers, sought to introduce deposition testimony given by another inmate, who refused to testify at trial. Although the deposition qualified as former testimony under *Rule 804(b)(1)*, the Court found no abuse of discretion in excluding the deposition under *Rule 403*. On the basis of the deponent's testimony (out of the jury's presence) that his answers had not been full, complete, and truthful, and in light of other evidence very much along the same lines, there was no abuse of discretion in concluding that the potential prejudicial effect of the evidence substantially outweighed its probative value.

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : In an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, the Court held there was no abuse of discretion in redacting references to mesothelioma in the death certificate, autopsy report, and hospital records. Although documents admissible under Rules 803(6), (8), and (9) may contain opinions, the difficulty of diagnosing mesothelioma meant that unexamined references to the disease were not helpful to and could potentially have misled the jury.

Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) : Affirming a judgment for the plaintiff in a Title VII sexual harassment action, the Court held there was no abuse of discretion in excluding the EEOC's determination of no probable cause for the charge. Although agency reports are presumptively admissible under *Rule 803(8)(C)*, this report did not contain detailed evidentiary statements and findings of fact; rather, it was a conclusory determination that could have unfairly prejudiced the plaintiff's case.

United States v. Linwood, 142 F.3d 418 (7th Cir. 1998) : When officers entered the defendant's house to arrest her for selling cocaine base, the defendant was not there but her 12-year-old daughter was. When the defendant returned to the house minutes later and was told that her daughter had told the officers that her mother had been selling crack, the defendant began to pound her fists and yell at her daughter that she was not a cocaine dealer and to insist that the drugs belonged to her live-in boyfriend. The daughter also told the officers where the "dope money" was kept. The Court held there was no abuse of discretion in admitting the daughter's statements, since they were offered only to establish why the defendant reacted as she did upon hearing the first statement and to show why an officer found the money where it was hidden. Any prejudicial effect from the jury's using the statements for their truth was minimized by repeated and careful instructions as to the proper non-hearsay purposes for which the statements could be used. Furthermore, the daughter testified at trial and could be cross-examined about the facts asserted in her statements.

McEuin v. Crown Equip. Corp., 328 F.3d 1028 (9th Cir. 2003) : The Court affirmed a judgment for the plaintiff in an action by the operator of a doorless, stand-up forklift against the manufacturer for personal injuries suffered in a collision. It held there was no error in excluding independent engineering reports as inadmissible hearsay. Although the manufacturer suggested that the reports would not be used for their truth, but only to show its state of mind when designing the forklift, the Court found no abuse of discretion when the Judge decided that the jury would be unable to use the reports in a limited way. One Judge dissented, arguing that the plaintiff's argument about reckless indifference made it an abuse of discretion to exclude the reports.

Wolfgang v. Mid-America Motorsports, Inc., 111 F.3d 1515 (10th Cir. 1997) : A race car driver alleged that the defendants' wanton conduct in failing to provide adequate fire safety and rescue operations had made his injuries in a crash more serious. Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion in excluding video and audio tapes of speeches made after the crash by the plaintiff. Although the speeches were party admissions under *Rule 801(d)(2)(A)*, they would be unfairly prejudicial because they went to the plaintiff's comparative fault, which was not an issue in the case.

United States v. King, 713 F.2d 627 (11th Cir. 1983) : Reversing a ruling that prior testimony of a key witness would be excluded in a retrial, the Court rejected the government's argument that the Trial Judge lacked authority to exclude evidence under *Rule 403* that was admissible under *Rule 804(b)(1)*, but it found that the Judge had reached an incorrect balancing ruling. The Court pointed out that evidence should be excluded only sparingly under *Rule 403* and that the greater the need for the evidence the less likely it is to be excluded. The Court recognized the legitimacy of the Judge's concern that without seeing and hearing a key witness the jury might have trouble evaluating his credibility, but it concluded that the probative value of the testimony was extremely high and the risk of prejudice was low.

[b] Relationship to Other Rules -- Other Rules

United States v. Long, 917 F.2d 691 (2d Cir. 1990) : The Court reversed RICO convictions, holding that an FBI agent had been improperly permitted under *Rule 702* to testify about organized crime families. The extensive descriptions had a highly prejudicial effect and only marginal relevance when the enterprise alleged was not a crime family and had only a single connection with organized crime.

United States v. Salmon, 944 F.2d 1106 (3d Cir. 1991) : A defendant charged with cocaine offenses was precluded from cross-examining a codefendant regarding the confidential informant's use of cocaine with them on the ground that it was extrinsic evidence inadmissible under *Rule 608*. The Court held that the evidence might have been relevant to the defendant's entrapment defense, but its probative value was at best slight and it was potentially prejudicial to the codefendant.

United States v. Young, 248 F.3d 260 (4th Cir. 2001) : In a prosecution related to a kidnapping, the Court found no error in the exclusion of a prior statement made by a government witness in a conversation with the defendant that the defendant surreptitiously taped. The statement could have been construed as an admission that the witness and not the defendant committed the crime. Although the defendant had established a foundation for admitting the statement as inconsistent under *Rule 613(b)*, the Trial Judge still had discretion to exclude it under *Rule 403*. In this case, the witness did not make an unequivocal statement that was inconsistent with his trial testimony, but instead answered affirmatively to leading questions posed by the defendant, in a tape replete with the defendant's self-serving hearsay.

United States v. Crawford, 130 F.3d 1321 (8th Cir. 1997) : In a trial on charges of felon firearm possession, the prosecution admitted evidence of the predicate felony convictions, even though the defendant offered to stipulate that he was a felon. This was error under the Supreme Court's decision in *Old Chief v. United States* (see the Editorial Explanatory Comment, *§ 403.02[7]*), which was decided after Crawford's conviction. On appeal the Court found the *Old Chief* error to be harmless, because the defendant testified at trial and thus the convictions could have been admitted anyway, to impeach the witness under *Rule 609(a)(1)*. In *Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306 (8th Cir. 1997)* , following a collision between a truck driven by the plaintiff and the defendant's train, the plaintiff's employer paid the defendant for damages to the train. In the plaintiff's personal injury action, the Court held there was no error in excluding evidence of the employer's settlement. It was not relevant because it was not binding in any way on the plaintiff's legal action, and even if relevant, the risk that the jury would be unfairly swayed made its prejudicial effect substantially outweigh its probative value. Since the evidence was properly excluded, it was not necessary to decide whether the Trial Judge had properly excluded it under *Rule 408* although no litigation was even threatened at the time.

Breeden v. ABF Freight Sys., Inc., 115 F.3d 749 (10th Cir. 1997) : A jury found that the defendant's truck driver was 10 percent negligent in causing an accident while a third party was 90 percent negligent. The plaintiffs had settled with the third party before trial. The defendant argued that it was error to exclude evidence of the settlement after the plaintiffs testified that they did not seek additional medical treatment in part because of financial inability. Although the Court recognized that *Rule 408* did not require exclusion of the settlement evidence, it mentioned that plaintiffs had settled for only $17,000 and found no error in the conclusion that the prejudicial effect of the evidence would far outweigh its probative value. In *Orth v. Emerson Elec. Co., 980 F.2d 632 (10th Cir. 1992)* , the Court affirmed a judgment for the plaintiffs in a product liability action arising out of a gas heater explosion, holding that there was no abuse of discretion in informing the jury that the plaintiffs had settled claims against the regulator manufacturer and instructing them to disregard any further reference to the settlement. Although mention of the settlement was not barred by *Rule 408*, the Court upheld the instruction because many of the same concerns about prejudice and deterrence to settlements exist regardless of the purposes for which the evidence is offered, and further reference to the settlement would tend to confuse the jury.

[c] Relationship to Other Rules -- Rules 412-415

Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960 (8th Cir. 2002) : The Court affirmed a judgment for a

former employee who alleged that she was sexually harassed by a supervisor and constructively discharged. The defendant sought to introduce evidence that the plaintiff used swear words, wore suggestive clothing, and once said that she liked to pick up men in bars for sex. Upholding exclusion of the evidence, the Court noted that the plaintiff's language was not shown to be an inducement to harassment, the comment about meeting men in bars was not known to the supervisor, and the defendant never admonished the plaintiff about her dress. Moreover, evidence concerning the plaintiff's dress was inadmissible under *Rule 412* and could also have been excluded under *Rule 403*. In *United States v. One Feather*, n147 the Court upheld a rape conviction, finding no error when the defendant was prohibited from asking the victim, who testified on direct examination that she was divorced and had an infant son, where her marriage and divorce took place. The defendant had been unable to find applicable records and believed that the witness had lied. Using *Rule 412* as persuasive authority, the Court found that the Judge properly relied on *Rule 403* to bar the questioning, since it would have prejudicially suggested that the victim had an illegitimate child.

[72] Religious Affiliations and Beliefs

United States v. Brandon, 17 F.3d 409 (1st Cir. 1994) : After a witness in a bank fraud prosecution mentioned that two of the defendants were Jewish, defense counsel moved to dismiss and for a mistrial on the grounds that the testimony invited an impermissible inference that members of the same religion would be more likely to join a conspiracy, and may have provoked anti-Semitic feelings. When the Trial Judge offered to try to ferret out any anti-Semitism on the jury, the counsel requested only dismissal, not further questioning of the jury, and expressed displeasure with the possibility of providing curative instructions that "would only magnify the problem." Affirming despite the possible inappropriateness of the testimony, the Court found that the level of prejudice, if any, was not sufficiently significant to overturn the decision to accept "the defendants' tactical choice to forgo more appropriate methods of addressing the potential prejudice in favor of the unrealistic and unnecessary solution of a dismissal or a new trial."

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) : The Court upheld convictions related to the 1993 World Trade Center bombing, finding no error in the exclusion of expert testimony offered to suggest that it would have been contrary to the teachings of Islam for the lead defendant, a cleric, to have conspired in acts of terrorism. Such testimony was of marginal relevance and was likely to confuse the jury. In *United States v. Sun Myung Moon*, n148 the Court affirmed convictions arising from the filing of false tax returns, as it found that evidence of certain religious practices of the Unification Church was properly admitted on the central issue of whether stock and bank accounts belonged to the Church or to its leader personally.

Munn v. Algee, 924 F.2d 568 (5th Cir. 1991) : An automobile accident victim, following the tenets of her Jehovah's Witnesses faith, refused blood transfusions and died of her injuries. In the trial of the ensuing wrongful death action, her husband was asked about the Jehovah's Witnesses' refusal to "do service to their country" and to salute the flag. One Judge concluded that admission of the evidence was an abuse of discretion under the Rule primarily because it was utterly irrelevant to how sincerely the victim and her husband adhered to the faith, but believed that the error did not affect the party's substantial rights. The concurring Judge disagreed that the evidence was irrelevant and said nothing about its prejudicial effect. The dissenting Judge considered that the calculated inflammatory effect of cross-examination regarding the views of other members of the faith had a prejudicial effect far beyond the probative value of the examination on the personal beliefs of the plaintiff-witness.

Silbergleit v. First Interstate Bank, 37 F.3d 394 (8th Cir. 1994) : The Court reversed a judgment against the plaintiff in an age discrimination suit because the defendant's counsel asked questions and made comments that improperly suggested to or informed the jury that the plaintiff was a millionaire, received unemployment benefits, and was Jewish.

United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996) : Affirming RICO convictions arising from murders and other crimes committed by members of a religious cult, the Court found no error in admitting evidence about the practices and beliefs of the cult. The evidence was relevant "to show the background of the RICO enterprise, which the defendants used to carry out acts of murder and arson," and admission of the evidence did not result in putting the defendants' religion "on trial."

[73] Remoteness

Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) : In a sexual discrimination case brought by a female police officer for harassment occurring from 1987 to 1992, the Court held it was an abuse of discretion, but harmless error, to admit evidence of alleged acts of discrimination in 1979-81, because they were too distant in time from the events at the center of the department's liability.

United States v. Chavez, 119 F.3d 342 (5th Cir. 1997) : Affirming convictions for a marijuana distribution conspiracy, the Court held there was no abuse of discretion in admitting a defendant's 15-year-old conviction for conspiring to distribute cocaine. In light of the similarity of the offenses and the paucity of other evidence of intent, the probative value of the conviction, though weakened by its age, was not substantially outweighed by any prejudicial effect. In *Jackson v. Johns-Manville Sales Corp.*, n149 an action by a former shipyard worker for injuries allegedly caused by the defendants' failures to warn of the hazards of exposure to asbestos products, the Court affirmed admission of 25-year-old letters that were among the papers of the chairman of the board of one of the defendants. The letters were not so remote in time or subject matter as to be devoid of probative value, they were not inflammatory, and the defendants had ample opportunity to make the jury aware of their remoteness.

Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994) : In an age discrimination case the Court held it was no abuse of discretion (or harmless error) to admit evidence that the plaintiff's supervisor had said two decades earlier, in his teen years, that he wanted to put older people in "a concentration camp," and some years later that he did not want to go to a Thanksgiving Day dinner where his grandmother would be because he "[did not] like to be around old people." The comments were probative of the supervisor's state of mind and reflected a deep-rooted ongoing pattern that was anything but isolated.

Walker v. Soo Line R.R., 208 F.3d 581 (7th Cir. 2000) : In a FELA action by an employee suing for injuries allegedly sustained when lightning struck a railroad tower, the defendant introduced records showing that the plaintiff was a patient at a state hospital in 1972, 1973, and 1978. Rejecting the plaintiff's argument that the records were too remote to be relevant, the Court found no abuse of discretion in admitting the records, since the plaintiff's expert psychologist acknowledged at trial that he would have liked to have known about the hospital stays when preparing his report of the plaintiff's pre-incident abilities.

Fortune Funding, LLC v. Ceridian Corp., 368 F.3d 985 (8th Cir. 2004) : In a dispute arising out of a lease of a commercial building, including a claim of fraudulent representation as to the condition of the premises, the lessee claimed that the glass wall at the front of the building was defective. The lessee attempted to introduce evidence of the glass wall's condition in 1998 to prove that the condition also existed in 1985, at the time the building was leased. The Court found no error in excluding this evidence and affirmed a judgment for the lessor. The evidence of the wall's condition in 1998 was "obviously too remote" to be probative of its condition in 1985. In an aggravated sexual assault case, *United States v. Eagle, 133 F.3d 608 (8th Cir. 1998)* , the Court found no abuse of discretion in admitting

evidence from a physician who examined the victim three months after the incident. The evidence was not so remote that it became irrelevant and the jury was made aware of the flaws in the physician's examination.

United States v. Austin, 933 F.2d 833 (10th Cir. 1991) : Reversing a conviction for resisting correctional officers, the Court held it was an abuse of discretion when the defense was mental illness to exclude records of prior hospitalizations on the ground solely of remoteness. The Court was unwilling to place a temporal limit on relevant proof of mental illness in view of its frequently long duration, its possible chronicity, and its recurrent manifestations.

Broaddus v. Florida Power Corp., 145 F.3d 1283 (11th Cir. 1998) : In an action by an employee who alleged that he had been illegally terminated as a result of age discrimination, the Court found no abuse of discretion in the exclusion of a memorandum written by an executive of the defendant that mentioned that older workers are more expensive. The relevance of the memorandum was marginal because it was written four years before the plaintiff was terminated. Further, it did not suggest that older, more expensive workers be terminated, but only that new workers should be hired below the midpoint salary level in order to compete better with other firms that had eliminated "older and higher paid employees."

[74] Restricted Admission of Evidence

Clausen v. Sea-3, Inc., 21 F.3d 1181 (1st Cir. 1994) : In an employee's action for personal injuries caused by a fall on a ramp, the Court found no plain error in admission of evidence that a defendant had replaced the ramp with steps three years later. The evidence was probative on the issue of which defendant controlled the premises, and the cautionary instruction sufficiently informed the jury as to the limited purpose for which it was admitted.

United States v. Reyes, 18 F.3d 65 (2d Cir. 1994) : The Court reversed a conviction for conspiring to import narcotics, holding it was error to admit as nonhearsay a Customs agent's testimony regarding statements by two persons who implicated the defendant in the conspiracy, even though the declarants' exact words were not repeated. Although the jury was instructed that the statements were not admitted for their truth, the likelihood was sufficiently high that the jury would have treated the evidence for its truth anyway. The Court also rejected the argument that the evidence was properly admitted as "background" and observed that "contrary to the government's contention, the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice."

Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993) : In a civil rights action for false arrest, evidence of the plaintiff's character and reputation was admitted to show his damages, with the jury instructed not to consider it in deciding what the plaintiff had done. The Court, believing the issue a close one, held there was no abuse of discretion in admitting the evidence; although the jury may have been more inclined to believe the plaintiff once they heard of his good reputation, there was plenty of evidence that the defendant was the aggressor and the cautionary instruction blunted any improper impact of the testimony.

[75] Self-serving Statements

United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) : During an investigation of public corruption, an FBI agent who was posing as a businessperson taped a conversation in which one of the defendants (not prompted by any reference to corruption) referred the agent to another person with the recommendation that the other was "honest as the day is long" and an injunction that if the agent was asked for anything to call the defendant, who would have the man

arrested. The defendant sought to introduce this tape as evidence of his state of mind, but the Court upheld its exclusion as self-serving. The statements were at best relevant of the declarant's state of mind at the time they were made, and even that was doubtful, given his statement toward the end of the recording that "He's [i.e., the agent] probably an FBI agent."

Healey v. Chelsea Resources Ltd., 947 F.2d 611 (2d Cir. 1991) : In a securities fraud action, the Court held that the plaintiff's testimony regarding his reliance should not have been curtailed on the ground it was self-serving, as that goes to weight rather than admissibility, but the error was harmless because the ruling may only have prevented a cumulative summary.

[76] Settlement Agreements

Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306 (8th Cir. 1997) : Following a collision between a truck driven by the plaintiff and the defendant's train, the plaintiff's employer paid the defendant for damages to the train. In the plaintiff's personal injury action, the Court held there was no error in excluding evidence of the employer's settlement. It was not relevant because it was not binding in any way on the plaintiff's legal action, and even if relevant, the risk that the jury would be unfairly swayed made its prejudicial effect substantially outweigh its probative value. Since the evidence was properly excluded, it was not necessary to decide whether the Trial Judge had properly excluded it under *Rule 408* although no litigation was even threatened at the time. In *Hose v. Chicago N.W. Transp. Co., 70 F.3d 968 (8th Cir. 1995)* , the Court affirmed a judgment for an employee who brought a FELA action alleging that his employer was liable for his suffering from manganese encephalopathy, upholding the exclusion of the plaintiff's settlement with two other defendants who manufactured the employer's welding equipment. Although the employer contended that evidence of the fact that the plaintiff initially sued other defendants was evidence that they were responsible for the injuries, and that the ultimate amounts of the settlements were admissible to rebut the plaintiff's claim that certain treatment was not obtained because of its cost, the Court found no abuse of discretion in the exclusion of the evidence as unduly prejudicial.

Breeden v. ABF Freight Sys., Inc., 115 F.3d 749 (10th Cir. 1997) : A jury found that the defendant's truck driver was 10 percent negligent in causing an accident while a third party was 90 percent negligent. The plaintiffs had settled with the third party before trial. The defendant argued that it was error to exclude evidence of the settlement after the plaintiffs testified that they did not seek additional medical treatment in part because of financial inability. Although the Court recognized that *Rule 408* did not require exclusion of the settlement evidence, it mentioned that plaintiffs had settled for only $17,000 and found no error in the conclusion that the prejudicial effect of the evidence would far outweigh its probative value. In *Orth v. Emerson Elec. Co., 980 F.2d 632 (10th Cir. 1992)* , the Court affirmed a judgment for the plaintiffs in a product liability action arising out of a gas heater explosion, holding that there was no abuse of discretion in informing the jury that the plaintiffs had settled claims against the regulator manufacturer and instructing them to disregard any further reference to the settlement. Although mention of the settlement was not barred by *Rule 408*, the Court upheld the instruction because many of the same concerns about prejudice and deterrence to settlements exist regardless of the purposes for which the evidence is offered, and further reference to the settlement would tend to confuse the jury.

[77] Sexual Activities

[a] Civil Cases

Berry v. Deloney, 28 F.3d 604 (7th Cir. 1994) : A high school student brought a § 1983 action against a truant officer for nonconsensual sexual relations; the plaintiff's *in limine* motion to exclude evidence of her sexual activity

with others was denied. Affirming a judgment for the defendant, the Court held there was no error in admitting evidence of other sexual activity and prior and subsequent abortions with instructions that it be considered solely on the issues of the amount of damages and whether alleged damages were attributable to the defendant. In *Campbell v. Ingersoll Milling Mach. Co., 893 F.2d 925 (7th Cir. 1990)* , the Court affirmed a judgment n.o.v. for the defendant employer in a suit alleging race and sex discrimination in the plaintiff's termination, holding that evidence of an alleged sexual assault on the plaintiff by her supervisor was of little or no probative value on the motivation for her discharge or on her damages and was likely to lead the jury to a decision on an improper basis, such as sympathy.

Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960 (8th Cir. 2002) : The Court affirmed a judgment for a former employee who alleged that she was sexually harassed by a supervisor and constructively discharged. The defendant sought to introduce evidence that the plaintiff used swear words, wore suggestive clothing, and once said that she liked to pick up men in bars for sex. Upholding exclusion of the evidence, the Court noted that the plaintiff's language was not shown to be an inducement to harassment, the comment about meeting men in bars was not known to the supervisor, and the defendant never admonished the plaintiff about her dress. Moreover, evidence concerning the plaintiff's dress was inadmissible under *Rule 412* and could also have been excluded under *Rule 403*. In a prisoner's civil rights action for excessive force during a prison investigation, *Cummings v. Malone, 995 F.2d 817 (8th Cir. 1993)* , the Court upheld the exclusion, as irrelevant and highly prejudicial, of evidence that the investigation centered on an allegation that the plaintiff had attempted to rape a prison employee. The Court also held that the defendants were properly permitted to show the plaintiff's possible bias because they had testified against him on felony charges, but not that the charges were for attempted rape and assault arising out of the investigation incident.

Stahl v. Sun Microsys., Inc., 19 F.3d 533 (10th Cir. 1994) : In an action alleging sex discrimination in employment by means of a hostile work environment, the Court held there was no abuse of discretion in excluding evidence of a sexual relationship between the supervisor whose conduct was at issue and another defense witness. The evidence was not relevant to the merits, as there was no *quid pro quo* harassment claim, and its probative value as to the two witness' credibility was slight while its potential for unfair prejudice was obvious.

Aetna Cas. & Sur. Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986) : The Court reversed a judgment for the insurer in a dispute with its insured concerning the cause of a fire. Although it upheld the introduction of motive evidence that the insured had been charged with burglary and needed money to mount a defense, the Court held that evidence of pimping, pandering, and drug charges was unduly prejudicial.

[b] Sexual Activities -- Offered by Accused

United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995) : The Court held in a loansharking prosecution that there was no abuse of discretion in excluding evidence of the victim's HIV infection and the defendant's knowledge of it. Although the evidence might have been relevant to whether the defendant would punch the victim in the face, that argument was not made until the parties had rested. The only argument made when the government objected referred to the victim's drug habits and sexual proclivities, and since those were already in evidence, the proffered evidence was at best cumulative and at worst highly prejudicial, especially given the risk that a juror might discredit the victim's testimony solely because of his HIV status.

United States v. McMillon, 14 F.3d 948 (4th Cir. 1994) : The Court held that it was not an abuse of discretion to preclude a defendant in a drug case from cross-examining a cooperating coconspirator about the witness' use of drugs to force men to engage in sexual acts with him. Testimony regarding a witness' sexual life is not probative of his character for truthfulness; rather, it impairs the search for truth and harasses, annoys, or humiliates the witness in the process. In

United States v. Saunders, n150 the Court affirmed a prisoner's assault conviction, but it rejected the government's argument that a prison evaluation report, which tended to prove the alleged victim's homosexual tendencies, should have been excluded under *Rule 403*. The report lent credence to the defendant's self-defense theory and bolstered his claim that the incident was sexually related.

In *United States v. Davila, 704 F.2d 749 (5th Cir. 1983)* : The Court upheld convictions for depriving illegal aliens of their liberty by coercing sexual favors from them and for sexually abusing illegal aliens. It found no abuse of discretion in the exclusion of evidence that the complaining witnesses had previously engaged in prostitution: "[W]hatever probative value lay in the evidence as to possible prostitution was minuscule and the potential for confusion was substantial."

United States v. Lucas, 357 F.3d 599 (6th Cir. 2004) : The defendant, who was stopped with a large quantity of cocaine in her car, sought to explain her nervousness (which the arresting officer testified to) by evidence that she had been repeatedly raped when she was previously imprisoned. The Judge ruled that the defendant could use the large settlement she received as a result of the rapes to explain the cash she had when arrested, but that she could not mention the rapes. The Court found there was an abuse of discretion (but harmless error), since the rape evidence was "technically relevant, as it suggests that her behavior, which might otherwise be taken as evidence of guilt and was argued as such by the prosecution, was potentially explainable for other reasons," and "the risk of undue sympathy could have been managed to some extent by a limiting instruction."

United States v. Ford, 17 F.3d 1100 (8th Cir. 1994) : The Court held it was not an abuse of discretion to preclude evidence that the felony conviction of the prosecution's primary witness had been for a sex offense against a minor. Introduction of the specific felony could easily have distracted the jury without adding any real probative information. In *United States v. One Feather*, n151 the Court upheld a rape conviction, finding no error when the defendant was prohibited from asking the victim, who testified on direct examination that she was divorced and had an infant son, where her marriage and divorce took place. The defendant had been unable to find applicable records and believed that the witness had lied. Using *Rule 412* as persuasive authority, the Court found that the Judge properly relied on *Rule 403* to bar the questioning, since it would have prejudicially suggested that the victim had an illegitimate child.

United States v. Bautista, 145 F.3d 1140 (10th Cir. 1998) : The Court affirmed a conviction for murder, holding there was no abuse of discretion in excluding defense evidence that the victim was homosexual. The victim's sexual orientation was irrelevant -- since a homosexual advance could not legally justify so great a rage as to support a heat-of-passion defense, and homosexuality by itself is not evidence that a person will make aggressive advances -- and the evidence was potentially highly prejudicial.

[c] Sexual Activities -- Offered by Prosecution

United States v. Pindell, 336 F.3d 1049 (D.C. Cir. 2003) : The Court affirmed a police officer's conviction for civil rights violations and armed robbery of prostitutes and their customers, finding no abuse of discretion in the admission of testimony by two of the prostitutes that the defendant had previously paid them to engage in sexual acts. The evidence showed the prostitutes' familiarity with the defendant, thus supporting their ability to identify him, and its probative value on the contested identity issue was not substantially outweighed by the danger of unfair prejudice. In *United States v. Long, 328 F.3d 655 (D.C. Cir. 2003)* , the Court affirmed convictions for sexual offenses involving minors and possession of visual depictions of minors engaged in sexually explicit conduct. It upheld the admission of testimony by two witnesses that the defendant had engaged in similar patterns of conduct with them, which tended to rebut defense allegations that the six victims fabricated the story of sexual abuse. The Court also upheld the admission

of 250 photos showing the minor victims and other young males in sexually explicit positions, noting that the Trial Judge had painstakingly reviewed the photos *in camera* and had carefully explained the reason for admitting each photo. The photos were relevant because Long denied possession of the photos alleged in two counts of the indictment, and his possession of other similar photos demonstrated intent to possess such photographs. The Judge had instructed the jury that it could not consider the photos as evidence of bad character. Finally, the Court upheld the admission of testimony by an FBI agent concerning "the typology, identification, characteristics and strategies of a sexual offender, particularly preferential sex offenders, and the characteristics and behavior of child victims of sexual abuse." The Court rejected the contention that the testimony was profile evidence that should have been excluded under *Rule 403*, finding that it shed light on a critical issue.

United States v. Adams, 375 F.3d 108 (1st Cir. 2004) : Affirming convictions for firearms offenses, the Court found no abuse of discretion in the admission of evidence that the 33-year-old African-American defendant had engaged in an interracial sexual relationship with a 15-year-old girl while staying with an acquaintance during the time of the charged offenses. Although there was some potential for prejudice associated with the evidence, the jury already knew that the defendant slept in the same bed with the girl and that a lockbox with a firearm and ammunition was under the bed. The Court was not persuaded either that the evidence of sexual relations added much to the evidence of where the defendant slept or that the probability of unfair prejudice was high given the evidence that the defendant and the girl slept in the same bed. Ultimately, the Court said that "[v]iewed in the cold light of post-trial reflection, the judges on this panel might well have excluded the sexual relationship evidence," but "[i]n this case, the trial judge's call, although debatable, was not an egregious error."

United States v. McDermott, 245 F.3d 133 (2d Cir. 2001) : The defendant, charged with insider trading offenses, allegedly gave insider information to a woman (Gannon) with whom he was having an extramarital affair. The Court found no abuse of discretion when the government was permitted to show that Gannon was a dancer, model, and actress who used a stage name, since the stage name "Marilyn Star" did not necessarily imply that Gannon was an adult-film actress. The Court held, however, that it was error to admit evidence that Gannon "knew a clientele of lawyers, stockbrokers, and such, high level people" and that she had obtained stock trading tips from a "client" or "boyfriend client," since "references to Gannon's 'clientele' unfairly prejudiced McDermott by casting an illicit light on his relationship with her by suggesting that her occupation was of a 'sleazy' nature." In *United States v. Harvey, 991 F.2d 981 (2d Cir. 1993)* , the Court reversed a conviction for knowingly receiving child pornography, holding that testimony concerning other pornography seized from the defendant's residence was irrelevant and so overwhelmingly prejudicial as to deny him a fair trial.

United States v. Savage, 390 F.3d 823 (4th Cir. 2004), vacated on other grounds, 545 U.S. 1102 (2005) : The Court affirmed convictions arising out of a scheme to defraud several investors, especially single, older women, by inducing them to invest in phony business ventures. It found no abuse of discretion in the admission of testimony by the defendant's ex-wife that he had dressed up as one of the women victims. The Court reasoned that, while the incident might have been distasteful to some jurors, it was probative of the defendant's fraudulent activities as to this victim. In *United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996)* , the Court affirmed in part the fraud conviction of the former CEO of United Way of America, holding there was no abuse of discretion in admitting evidence of the defendant's sexual advances toward female employees. The evidence was relevant to motive, as it tended to prove that he defrauded UWA in order to seek sexual pleasure at no financial cost to himself, and it presented no risk of unfair prejudice, particularly since the Trial Judge excluded the "gory details" and gave a cautionary instruction. In *United States v. Ham*, n152 the Court reversed convictions for racketeering and mail fraud, holding that implications of child molestation, homosexuality, and abuse of women were unfairly prejudicial when they were not directly implicated in the crimes charged. In *United States v. Kilbourne*, n153 the Court affirmed a murder conviction, holding that evidence of the defendant's sexual relations with the victim was relevant to show motive and that the probative value was not

substantially outweighed by the danger of prejudice.

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001) : The defendant was charged with possession of child pornography after pictures of nude children were found on his computer. The Court vacated his conviction because two sexually-explicit narratives, also found on the computer, were introduced as evidence of his intent and state of mind. The narratives were relevant to help show that the possession of the photographs was unlikely an accident when a person was also downloading narratives that involved sexual contact between adults and minors. However, their probative value was substantially outweighed by their prejudicial effect; they were "vile in their graphic and violent nature," depicting violent rapes and moderate torture, while the photographs depicted no violence. In *United States v. Frick*, n154 the Court reversed conspiracy and fraud convictions on the ground that testimony concerning the defendant's sexual relations with a codefendant's secretary was highly prejudicial to him. The government's contention that the evidence was properly admitted to show motive failed because there was no evidence that the defendant knew that the secretary had been instructed to make herself available to him. In *United States v. Grassi*, n155 a prosecution for interstate transportation of obscene material, defense counsel offered to stipulate that the films were obscene. The prosecutor objected, and the jury was shown three films that portrayed "homosexual acts of the most bizarre and repulsive nature." The Court said that a *Rule 403* balancing analysis must be used and sustained the Trial Judge, finding that the films had probative value above and beyond the stipulation.

United States v. Bonty, 383 F.3d 575 (7th Cir. 2004) : The Court affirmed convictions of two men for interstate transportation of minors with intent to commit aggravated sexual abuse, after one of them raped one of a pair of girls they had enticed to go with them. The Court found no abuse of discretion in the admission of evidence that the rapist's accomplice had made sexual advances toward the other girl. Although the accomplice argued that evidence a 31-year-old black man propositioned a 15-year-old white girl inflamed the jury, the Court found that the evidence was relevant to whether the accomplice knew the purpose of picking the girls up at a mall was to later engage in a sexual encounter, and that any prejudicial effect was lessened because the testimony was not repeated and the jury was instructed not to be "influenced by any person's race, color, religion, national ancestry, or sex."

United States v. Carter, 410 F.3d 1017 (8th Cir. 2005) : Affirming convictions for child sexual abuse, the Court found no error in the admission of pornography found in the defendant's home. The evidence of pornography was probative because the defendant's *modus operandi* was to have young girls watch pornographic movies featuring young adult women. The Court noted that the prejudice of this evidence diminished because the testimony was limited to the movie titles and a description of the movies' general theme of depicting young women. In *United States v. Chipps, 410 F.3d 438 (8th Cir. 2005)* , the Court affirmed a conviction for assault, finding no abuse of discretion when the defendant was cross-examined about an affair he had had with a woman who was having a relationship with the victim at the time of the assault. The defendant had denied on direct that he had any motive to assault the victim, so the evidence was relevant, and its probative value was not outweighed by the danger of unfair prejudice. In *United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004)* , the Court reversed a conviction for sexual abuse of a minor, holding that the victim's testimony that she was a virgin when she had sexual intercourse with the defendant was irrelevant to the case and unduly prejudicial given its lack of probative value on any relevant issue. The Court ruled, however, that there was no error in the admission of the minor's panties, which were covered with menstrual blood and had dried semen on them. Because the panties had pictures of Winnie-the-Pooh on them and the minor testified that the defendant had removed them, they could have been highly probative on the hotly contested issue of the defendant's belief about the victim's age. Any prejudicial effect of the blood was mitigated by informing the jury that it was menstrual and by the absence of any testimony that the encounter had been any way violent. In *United States v. LaChapelle*, n156 the defendant, charged with receiving child pornography through the mail, asserted an entrapment defense and the government introduced a pornographic videotape seized from the defendant's home to show his knowledge of and intent to order child pornography. The Court held admission of the evidence was error (but harmless) because the possession was legal when

the defendant first possessed the videotape. Evidence of predisposition to do what was once lawful is not by itself sufficient to show predisposition to do what is now illegal, so the slight probative value of the evidence was substantially outweighed by its prejudicial effect. In *United States v. Fawbush*, n157 a conviction for aggravated sexual abuse of children was reversed, the Court holding that evidence the defendant sexually abused his daughters when they were children, even if relevant, was so inflammatory on its face as to divert the jury's attention from the material issues in the trial. See also *United States v. Abodeely* n158(probative value of evidence of the defendant's receipt of income from prostitution and of gambling activities outweighed any prejudicial effects in income tax evasion prosecution).

People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998) : The Court reversed a conviction for unlawful sexual activity with minors, because of the improper admission of testimony regarding the contents of sexually explicit gay adult magazines found in the defendant's house. While the magazines could possibly have been relevant to whether the defendant had the purpose of being sexually aroused, or was actually sexually aroused, by the charged improper touching of underage boys, the statute under which he was prosecuted applied only an objective test, which made the character of the touching, not the purpose of the toucher, at issue. Furthermore, possession of the magazines was not probative of whether the conduct with which the defendant was charged was intentional. Even if the evidence were somehow relevant, its suggestion of the defendant's sexual orientation, and implication of sexual deviancy, was highly prejudicial and substantially outweighed any probative value. In *United States v. Bland*, n159 the defendant, charged with felon firearm possession, gave notice that his theory at trial would be that an officer planted the gun in order to justify shooting him in making an arrest. At the *voir dire*, the Trial Judge told the jury not only that it was anticipated that the officer would testify he shot the defendant to prevent his escape and that he was aware of an outstanding warrant for the defendant, but also that the warrant was for the molestation, torture, and murder of a seven-year-old girl. The Court reversed the conviction because, although the existence of the warrant was relevant to show the officer did not have a motive to plant the gun, the members of the jury panel were not likely to forget details leading them to believe that acquitting the defendant might mean releasing an extremely dangerous child molester and killer into the community. In *United States v. Gillespie*, n160 the Court reversed a conviction for importing an alien for immoral purposes, holding it was error to admit evidence that the defendant had a homosexual relationship with the father who adopted him. This evidence was not relevant to any claim made by the defendant and was extremely prejudicial.

United States v. Garot, 801 F.2d 1241 (10th Cir. 1986) : The Court affirmed convictions for mailing obscene matter and dealing in material exploiting minors, holding there was no error in admitting evidence of an envelope postmarked in Sweden that contained a brochure showing a color slide of explicit child pornography and a box containing hard-core films of child pornography. The evidence was relevant to prove scienter.

United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992) : The Court held that it was harmless error when the government suggested that the defendant in a cocaine importation conspiracy engaged in frequent "partying" and fathered an illegitimate child.

[78] Similar Circumstances

[a] Absence of Accidents or Complaints

Espeaignnette v. Gene Tierney Co., 43 F.3d 1 (1st Cir. 1994) : The Court reversed a judgment for the defendant manufacturer on other grounds in a product liability action brought after the plaintiff's arm was severed in a lumber company's saw, but held there was no error in admitting evidence concerning lack of similar accidents involving saws designed by the defendant. The evidence tended to disprove causation by making less likely the plaintiff's account of how the accident happened; it was also probative on whether the saw as designed was unreasonably dangerous. In

Harrison v. Sears, Roebuck & Co., 981 F.2d 25 (1st Cir. 1992) , a product liability suit involving a carpentry tool, the defendant's expert testified that the accident described by the plaintiff could not have occurred as alleged and that there had never been a similar complaint made to the manufacturer. The Court rejected an argument that the negative evidence was irrelevant on the issue of causation.

Klonowski v. International Armament Corp., 17 F.3d 992 (7th Cir. 1994) : The Court affirmed a judgment for the plaintiff in a product liability action for injuries when a shotgun misfired, finding no abuse of discretion in excluding evidence that the defendant had imported 50,000 shotguns of the type involved in the accident without receiving any report of an accident, as there was no showing that all the guns imported had substantially identical trigger mechanisms. The Court also noted that negative evidence "is generally held inadmissible because of its insignificant probative qualities and its tendency to introduce a multitude of collateral inquiries." In *Bilski v. Scientific Atlanta, 964 F.2d 697 (7th Cir. 1992)* , the Court affirmed a judgment for the defendant in a product liability action for injuries suffered when the plaintiff slipped while cleaning snow and ice off a satellite dish, holding there was no abuse of discretion in admitting the defendant's records of injuries involving its products, which showed no prior accidents of this sort.

[b] Similar Circumstances -- Civil Rights Cases

Foley v. City of Lowell, Mass., 948 F.2d 10 (1st Cir. 1991) : The Court held there was no abuse of discretion in admitting in an arrestee's civil rights case evidence of a particularly vile incident of police brutality six months after the plaintiff's arrest. Evidence of subsequent incidents can provide reliable insight into the policy in force at a previous time; the fact the later conduct was egregious is a hallmark of its probative value not its prejudicial effect, as the more outrageous the occurrences, the more probable that a policy of tolerance of brutality was in place.

Morgan v. City of Marmaduke, Ark., 958 F.2d 207 (8th Cir. 1992) : In a civil rights suit alleging a police officer had used excessive force when making an arrest by intentionally colliding his patrol car with the plaintiff's motorcycle, the Court held it was error to admit evidence that the officer had three years earlier accidentally collided with a motorcycle whose driver he was attempting to arrest. Admitting evidence of the remote and dissimilar situation had a prejudicial effect against the officer. The Trial Judge also had excluded evidence of another situation involving the officer's using his patrol car as a roadblock to stop a motorcyclist. The Court held that although the circumstances were not entirely dissimilar from the plaintiff's case, exclusion was not an abuse of discretion.

Cook ex rel. Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092 (11th Cir. 2005) : In an action brought after an inmate hanged himself, the plaintiff offered evidence that five other inmates had hanged themselves in a 23-month period. The Court found no error in the exclusion of all five suicides. Two of the suicides occurred after the decedent's and so could not have put the defendant on notice that jail procedures were faulty. The facts and circumstances of the other three suicides "differed materially" from those surrounding the decedent's, most importantly because those three inmates were incarcerated for a far shorter period than was the decedent.

[c] Similar Circumstances -- Criminal Cases

United States v. Perez, 325 F.3d 115 (2d Cir. 2003) : The defendant was convicted for violating currency reporting requirements after money was found secreted in aerosol cans in his luggage as he began a flight to the Dominican Republic. The Court found no abuse of discretion in the admission of evidence that another man had engaged in a virtually identical scheme, since the other man was a client of the lawyer for whom the defendant was working as a paralegal. Moreover, the defendant had some role in assisting the lawyer on the other man's case, so the evidence was relevant to the defendant's knowledge of a means to smuggle currency and of the probability that the five

aerosol cans in his luggage contained reportable currency.

[d] Similar Circumstances -- Employment Discrimination Cases

Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037 (D.C. Cir. 1983) : The plaintiff claimed that he was discharged as a transit police officer because of his criticism of racial discrimination by the Authority. Reversing a judgment for the defendant, the Court held that testimony by other employees offered to prove a custom or policy of retaliation by the Authority against employees who complained about the Authority's employment practices was improperly excluded. Likewise, it was error to exclude the plaintiff's testimony concerning disciplinary action against him following each of his complaints to the Authority. He should have been permitted "to testify to the discipline in a way that made evident the retaliatory motivation for the discipline."

Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989) : The plaintiff, suing for breach of contract and sexual discrimination after she was denied tenure, offered testimony of several professors comparing her qualifications with those of other faculty considered for tenure at the defendant University. The Court held that, even though the professors' testimony was not in the file and thus was not available to the University when it decided her case, it was relevant proof of pretext because it showed that the qualifications of others granted tenure were below the plaintiff's known qualifications. Because admitting such comparative evidence presents the risk of improperly substituting a judicial determination for a tenure decision, the evidence must be so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment, as in this case.

Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997) : Although the Court affirmed a judgment for the defendant in a sexual harassment case, it held that the Trial Judge excluded relevant evidence in ruling that sexual harassment of other women employees of the defendant would be excluded unless the plaintiff had personal knowledge of the harassment. The Court reasoned that the issue of a hostile workplace involves the totality of the circumstances, including evidence of harassment directed at employees other than the plaintiff. The Court criticized the Trial Judge's use of *Rule 403* and stated that it is not unfairly prejudicial that evidence establishes liability on the part of a defendant, and that unfairness indicates an undue tendency to decide a case on an improper basis.

Anderson v. WBMG-42, 253 F.3d 561 (11th Cir. 2001) : In support of her race discrimination claim, an African-American employee discharged for "unprofessional behavior" proffered evidence that two similarly situated white employees, likewise guilty of "unprofessional behavior," had not been terminated. The Court rejected the defendant's argument that the other employees must have been involved in or accused of the same or nearly identical conduct in order for the evidence to be relevant, since dissimilar treatment of "similar" conduct is an important indicator of discrimination when the employer's decisionmaking process depends on the application of subjective criteria. However, even if the other situations were comparable, the Court found no abuse of discretion in exclusion of the evidence, since presentation would have required a lengthy examination of matters that had not been developed during discovery.

[e] Similar Circumstances -- Miscellaneous Cases

CPC Int'l v. Northbrook Excess & Surplus Ins. Co., 144 F.3d 35 (1st Cir. 1998) : An excess insurer appealed from a verdict holding it liable for environmental response costs incurred by the insured. The insurer's defense was that the insured should have known about the property damage resulting from a toxic spill far earlier than it did. To prove notice, the insurer proffered judicial decisions in two previous coverage suits involving contamination from toxic spills at two of the insured's facilities, but the Trial Judge excluded this evidence under *Rule 403*. The Court found no error,

because the other judicial proceedings involved different facilities and different toxins; the inquiry into the other proceedings would have resulted in "a replay of the litigation of those other two cases"; and the evidence was prejudicial because "[c]itizens do not look fondly on industrial polluters, particularly where the industries have been found to be such by a Court."

Gerber v. Computer Assocs. Int'l, Inc., 303 F.3d 126 (2d Cir. 2002) : Shareholders of an acquired corporation brought a class action alleging that the CEO was paid more for his shares than they were in a tender offer. To prove that an additional payment to the CEO was legitimate consideration for a non-compete agreement, the defendants offered evidence of other transactions in which they had made substantial payments to individuals in exchange for non-compete agreements. The Court found no abuse of discretion in the exclusion of most of this evidence, since it would have had minimal probative value because "every deal is a different deal," and going into the details would lead to a waste of time.

Davidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238 (5th Cir. 1990) , *amended*, *917 F.2d 185 (5th Cir. 1990)* : In an action for breach of warranty against the distributor of well tubing, the Trial Judge granted the defendant's motion *in limine* excluding evidence that other substantially similar tubing made by the same manufacturer, but sold by other distributors, had failed in a similar manner. The Court reversed a judgment for the defendant, holding that the plaintiff should have been permitted to use the excluded evidence to show that the tubing had a latent manufacturing defect making it unmerchantable, that the defendant had knowledge of the defect, and that it had dealt with the plaintiff's claims in bad faith.

McCarty v. Pheasant Run, Inc., 826 F.2d 1554 (7th Cir. 1987) : Affirming a judgment for a hotel owner sued by a guest who was assaulted in her room, the Court found no error in excluding evidence of criminal activity at the hotel that did not involve an entry like the one alleged in the instant case, while admitting evidence of prior similar entries. In *Will v. Comprehensive Accounting Corp.*, n161 the Court found no error in an antitrust-contracts case in the exclusion of evidence of how a franchiser acted with respect to 22 franchisees besides the plaintiff.

[f] Similar Circumstances -- Other Accident Cases

Edwards v. Consolidated Rail Corp., 567 F. Supp. 1087 (D.D.C. 1983) , *aff'd*, *733 F.2d 966 (D.C. Cir. 1984)* : Summary judgment was granted for the railroad in a suit brought by a child trespasser injured when he was exposed to high voltage lines. The Court found that evidence of other accidents, offered to show that the defendant should have known of the danger on its tracks, would be excluded as dissimilar and insufficiently probative to justify admission in light of its prejudicial aspects.

Amatucci v. Delaware & H. Ry., 745 F.2d 180 (2d Cir. 1984) : The Court reversed a FELA judgment for an engineer who claimed that work conditions caused him to sustain a heart condition that rendered him unable to continue work. It found error in the admission of testimony that seven or eight other engineers had suffered heart attacks, since the circumstances and family histories concerning the other engineers was unknown.

Mihailovich v. Laatsch, 359 F.3d 892 (7th Cir. 2004) : The Court vacated a judgment for an attorney in a legal malpractice case in which the former client claimed that, but for the attorney's failure to adequately investigate a negligence case, he would have prevailed. This required a showing by the plaintiff that his underlying action had merit. The Court held it was an abuse of discretion to exclude all evidence of other accidents that occurred on the curve where the plaintiff was injured, since the other accidents were substantially similar to the plaintiff's and thus relevant to show

the roadway was hazardous. In the Court's view, concerns about collateral issues did not require excluding all evidence of the other accidents. In an action arising out of a truck-train collision, *Gardner v. Southern Ry., 675 F.2d 949 (7th Cir. 1982)* , the Court found there was no abuse of discretion in excluding evidence of a prior collision between a train and truck since the prior accident was not similar enough to be of much probative value on the question whether the railroad was on notice of a dangerous condition. The Court noted that the Trial Judge admitted other, less prejudicial evidence that certain dangerous conditions had been evident for some time. See also *Kelsay v. Consolidated Rail Corp., 749 F.2d 437 (7th Cir. 1984)* (judgment for railroad in train-car crash was sustained, as Court held that there was no error in the exclusion of two accidents, 12 and 30 years earlier, at the same crossing).

First Sec. Bank v. Union Pac. R.R., 152 F.3d 877 (8th Cir. 1998) : Affirming a judgment for the defendant in a wrongful death action arising from a fatal accident at a train crossing, the Court found no abuse of discretion in the exclusion of evidence of three other accidents that occurred at the crossing. Even if offered as in this case to prove notice rather than causation, evidence of other accidents must be substantially similar to the facts of the case at bar. In one of the accidents, the warning lights at the crossing malfunctioned; there was no such claim in the instant case. In the other two accidents, the drivers approached the crossing from a different direction than the decedent, "giving the drivers an entirely different perspective of the crossing." In *Hicks v. Six Flags Over Mid-America*, n162 the Court held that evidence of an accident six years before the plaintiff's was properly excluded.

[g] Similar Circumstances -- Product Liability Cases

[i] Automobiles, Aircraft, etc.

Brooks v. Chrysler Corp., 786 F.2d 1191 (D.C. Cir. 1986) : The Court affirmed a judgment for an auto manufacturer in an action claiming that an auto crashed into a telephone pole as a result of brake-piston seizure. Ruling *in limine*, the Trial Judge excluded five exhibits relating to a National Highway Safety Administration investigation into brake-piston seizures and barred the plaintiffs' expert from relying on the exhibits. The exhibits were drawn from complaints by Chrysler's customers, correspondence between the government agency and Chrysler, internal Chrysler memoranda, and Chrysler correspondence with the Canadian government. The Court agreed that the exhibits were minimally probative and potentially prejudicial.

Freund v. Fleetwood Enters., 956 F.2d 354 (1st Cir. 1992) : The Court affirmed a judgment for the defendant in an action arising out of a fire in a recreational vehicle, holding there was no abuse of discretion in excluding recall documents tending to show that propane gas could leak from the vehicle's refrigerator. The probative value of the offered documents was undermined because the accidents they reported involved different brands of refrigerator, trailers rather than RVs, and different years and places of manufacture.

Gumbs v. International Harvester, Inc., 718 F.2d 88 (3d Cir. 1983) : The Court held that the plaintiff's evidence of other accidents involving similar bolts on trucks manufactured by the defendant was inadmissible, since there was no showing that the accidents took place under similar circumstances and some of the evidence involved vehicles with different parts.

Ridge v. Cessna Aircraft Co., 117 F.3d 126 (4th Cir. 1997) : The Court affirmed a judgment for the widow of an airplane pilot killed in a crash against the manufacturer of the plane. It held that evidence of other accidents involving the same model of plane was properly admitted where the Trial Judge held a pretrial evidentiary hearing and ruled that the other accidents were substantially similar to the accident that gave rise to the suit. "Any dissimilarities do not go to the question of admissibility but rather to its weight."

Guy v. Crown Equip. Corp., 394 F.3d 320 (5th Cir. 2004) : In a product liability action by a forklift operator injured when she lost her balance and her left leg came out through the operator-compartment opening and was crushed against a railing, the Court affirmed a judgment for the manufacturer. During adverse witness testimony by the defendant's expert, the plaintiff offered 2400 reports produced by the defendant concerning accidents involving its forklifts, but only 360 were admitted. The Court found no abuse of discretion, since only the admitted reports involved left-leg injuries like the plaintiff's, and the plaintiff's "theatrics" in offering boxes of accident reports, some of which did not even concern injuries while operating a forklift, would be prejudicial and likely to lead to confusing and misleading the jury. In *Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993)* , the Court affirmed a judgment for a manufacturer, holding there was no abuse of discretion in excluding evidence of other accidents that did not involve the alleged mechanical defect relied upon by the plaintiff. See also *Mills v. Beech Aircraft Corp.* n163(letter from the French aviation authorities to the defendant manufacturer warning of certain defects, offered to show the defendant's knowledge, properly excluded in absence of showing that letter applied to the type of airplane in issue and that the defect had manifested itself in circumstances substantially similar to case at bar); *Soden v. Freightliner Corp.* n164(upholding admission of evidence concerning other lawsuits brought against the manufacturer to show notice of a possible defect in the fuel tank of the truck).

Morales v. American Honda Motor Co., 151 F.3d 500 (6th Cir. 1998) : In a product liability action for injuries to a nine-year-old riding a small motorbike, the Court held there was no abuse of discretion in admitting motorcycle-related accident statistics from the Consumer Product Safety Commission. The statistics were relevant to opinions by the plaintiffs' experts regarding the age appropriateness of motorbike operation, and any prejudicial effect was limited by excluding accident data related to all-terrain vehicles and permitting only data pertaining to the small, two-wheeled class of minibikes similar to that involved in this case. One Judge dissented, arguing that the facts underlying the accident statistics were not substantially similar to this case. In *Brock v. Caterpillar, Inc., 94 F.3d 220 (6th Cir. 1996)* , the Court reversed a judgment for the plaintiff in a personal injury action arising out of an accident in which a bulldozer's brakes failed, holding it was error to admit as evidence of a feasible, available design that the defendant used a different braking system on later, heavier bulldozers. Although this "comparison" evidence might have been tenuously relevant, the dissimilarities in the models meant that its relevance was substantially outweighed by its prejudicial effect.

Lovett v. Union Pac. R.R., 201 F.3d 1074 (8th Cir. 2000) : In an action for personal injuries sustained in a collision between a Jeep Cherokee and a locomotive, the Court found there was no error in excluding the plaintiff's offered evidence of four other incidents involving Jeep Cherokees. None of the incidents involved the same year model, none involved a collision with a locomotive, none occurred at a railroad crossing, none resulted in a rollover, and none involved similar speeds. In a suit involving the explosion of a wheel rim, *Hale v. Firestone Tire & Rubber Co.*, n165 the Trial Judge admitted evidence of 13 prior claims to prove notice of a defect, but excluded the defendant's evidence concerning the disposition of the claims, which was offered to demonstrate that the extent of the notice was exaggerated. Although the Court did not deem the limitation on the defendant's proof an abuse of discretion, it declared that "if this case is retried, the evidence should be admitted."

Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103 (9th Cir. 1991) : In an action arising out of the explosion of a multipiece truck tire rim, the Court held there was no error in admitting evidence of dissimilar accidents involving the same type of rim. When an expert testifies that a product is generally safe, as the defendant's experts did, the witness' credibility can be undermined by showing that the witness had knowledge of prior accidents caused by the product, since evidence of other accidents, whether similar or not, tends to show the witness' claims of product safety are overstated and the witness therefore may not be reliable.

Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996) : Plaintiffs in a wrongful death action alleged that the driver's injuries were caused when a seat belt proved defective in an automobile-train collision. The Court held there was no abuse of discretion in admitting a videotape prepared by the defendant that depicted a collision between a train and an automobile, even though it was substantially dissimilar from the accident. The videotape was introduced for the limited purpose of portraying the forces at work in such a collision, and the jury was specifically instructed not to consider it as a recreation of the accident. Furthermore, the videotape was not inflammatory or misleading when considered with the limiting instructions that were given. In an action for injuries allegedly caused by a child restraint, *Gilbert v. Cosco Inc., 989 F.2d 399 (10th Cir. 1993)* , the Court held that there was no abuse of discretion in excluding memoranda of the defendant pertaining to child restraint models that were not the subject of the suit, where the memoranda were mainly probative of "corporate mentality," which would be relevant only to punitive damages if liability were established. In *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, n166 a wrongful death action arising out of a helicopter crash, the Court held there was no abuse of discretion in admitting evidence of other incidents involving defects in the manufacturer's helicopter engines, as there was sufficient similarity in the circumstances to be probative of defect, notice, and causation in this case.

Tran v. Toyota Motor Corp., 420 F.3d 1310 (11th Cir. 2005) : In a product liability action arising from injuries allegedly caused by an automobile seatbelt, the Court found no abuse of discretion when the defendant was permitted to introduce results of a study regarding accidents involving that car model. Although the accidents were not necessarily substantially similar to the plaintiff's, the evidence was offered on the general point that the restraint system was not defectively designed, and its probative value on that point was not outweighed by any possible prejudicial effect. In *Heath v. Suzuki Motor Corp., 126 F.3d 1391 (11th Cir. 1997)* , the Court affirmed a judgment for the defendant in an action arising from a rollover accident, finding no error in the admission of defense evidence of other rollover incidents involving dissimilar vehicles. The "substantial similarity" rule was not applicable, because the other incidents were offered only to explain how rollovers occur, not to reenact the incident in dispute. In fact, the defendant pointedly chose dissimilar vehicles for its illustration, so as not to confuse the jury.

[ii] Similar Circumstances -- Product Liability Cases -- Drugs, Medical Supplies, etc.

Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14 (1st Cir. 1994) : The Court held that reports of prosthesis failures received by the defendant manufacturer of prostheses were properly excluded. They were irrelevant to notice, being received after the alleged failure of the plaintiff's prosthesis, and they were also irrelevant to the existence of a design defect, since there was no indication whether the reports involved substantially similar circumstances.

Wolf v. Procter & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982) : The Court ruled *in limine* in an action against the manufacturer and distributor of a tampon to recover for toxic shock syndrome that evidence of other injuries associated with the use of the tampon would be excluded. The other injuries were not similar enough to be helpful.

Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995) : In a consumer's action for severe liver damage caused by the combination of alcohol and acetaminophen, the Court held there was no abuse of discretion when the Trial Judge admitted Drug Experience Reports. The reports were highly probative on the contested issue of whether the defendant had notice of dangers associated with therapeutic doses of its product, and dissimilarities (e.g., whether doses were therapeutic or overdoses and whether the person taking the drug was a chronic alcoholic or not) went to the weight rather than the admissibility of the evidence.

Worsham v. A.H. Robins Co., 734 F.2d 676 (11th Cir. 1984) : The Court affirmed a judgment for the plaintiff in a

suit against the manufacturer of the Dalkon Shield IUD, finding no error in rulings admitting documents and permitting cross-examination that mentioned other litigation involving the Shield. The documents and cross-examination tended to show the kind of notice that the company had about problems caused by the Shield and the mention of the other litigation was not unduly prejudicial.

[iii] Similar Circumstances -- Product Liability Cases -- Miscellaneous Products

Exum v. General Elec. Co., 819 F.2d 1158 (D.C. Cir. 1987) : In a suit by an employee injured while using a french fryer, the Court held that it was error to exclude evidence concerning 15 similar incidents. All but one occurred before the plaintiff was injured, and the Court reasoned that to prove notice, prior acts need not be as similar as they would have to be to prove the dangerousness of a product. Although the Court recognized that the incident arising after the plaintiff was injured could not prove notice, it concluded that it was so similar to the plaintiff's accident that it was probative of dangerousness.

Moulton v. Rival Co., 116 F.3d 22 (1st Cir. 1997) : Affirming a judgment for an infant who was severely burned when liquid spilled from an electric "potpourri pot," the Court held that other accidents involving infants and the same or similar model of potpourri pot were properly admitted. Although the circumstances surrounding the other accidents were different from the instant case, the evidence satisfied the admissibility test of "substantial similarity," which is "a function of the theory of the case." Here, the plaintiff offered the other accidents to show that the product as designed allowed the rapid escape of a significant amount of extremely hot liquid and so was defective. For this purpose, the dissimilarities in how the potpourri pots tipped over were of no moment.

Crump v. Versa Prods., Inc., 400 F.3d 1104 (8th Cir. 2005) : The Court affirmed a judgment for the defendant in an action brought after one of the plaintiffs died in a fall from a ladder, which was allegedly caused by the failure of a hinge on the ladder while the ladder was in a straight position. The Court found no abuse of discretion when evidence of 44 other incidents involving alleged hinge failure of the same model ladder was excluded, since the incidents excluded had occurred after the date of the accident or resulted when the ladder was not in a straight position and the plaintiffs had been allowed to present evidence of accidents involving the ladder in a straight position that occurred before the date of the plaintiff's accident. In *Mattis v. Carlon Elec. Prods., 295 F.3d 856 (8th Cir. 2002)* , the Court affirmed a judgment for an electrician who claimed that vapors from polyvinyl chloride cement at a construction site caused his reactive airways dysfunction syndrome, holding there was no abuse of discretion in excluding field monitoring studies performed by the defendant to measure air quality at another site. The studies were done under significantly different working conditions and using different product types, and the exposures were not substantially similar but "confusingly similar."

Glover v. BIC Corp., 6 F.3d 1318 (9th Cir. 1993) : In a product liability wrongful death action in which the defendant manufacturer of a cigarette lighter attempted to show that the decedent was the victim of a cooking accident, the Court held it was an abuse of discretion to exclude evidence of past fires in the victim's home related to the victim's intoxication.

Bitler v. A.O. Smith Corp., 391 F.3d 1114 (10th Cir. 2004) : The Court affirmed a judgment for the plaintiffs in an action arising from a propane explosion, allegedly caused by copper sulfide contamination from the gas pipe that kept a valve from seating. Although the valve at issue had a screen intended to protect against such contamination, the Court held there was no abuse of discretion in admitting evidence of accidents involving unscreened valves. The evidence was relevant to the possibility that contamination from the gas pipe could impede a valve and to the issue of the defendant's notice of the risk. In a product liability action against the manufacturer of a machine for removing road pavement,

Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000) , the Court affirmed a judgment for the plaintiff, holding there was no abuse of discretion in admitting evidence of six other accidents involving similar machines produced by the same manufacturer. Four of the incidents were incorrectly admitted on the issue of notice because they occurred subsequent to the accident at issue. However, all were relevant to the issue of defect; although some involved different models, all were sufficiently similar with respect to the claimed defect of lack of visibility. Furthermore, all were relevant to the issue of punitive damages, since they indicated the defendant had "rushed" to enter the market, without sufficiently conducting a "human factors" analysis. In an action concerning an allegedly defective masonry mortar additive used on the plaintiff's building, *C.A. Assoc. v. Dow Chem. Co.*, n167 the Trial Judge limited the plaintiff's proof regarding other buildings at which the mortar was used. The Court held there was no abuse of discretion, as the ruling was appropriate to avoid significant delay, confusion, and prejudice attendant on proof regarding numerous other buildings. In *Marsee v. United States Tobacco Co.*, n168 a suit by a plaintiff who claimed that her son developed oral cancer from using snuff, the Court held that testimony of another cancer victim who used snuff products would be excluded, given its weak probative value on the question of causation and the great possibility of prejudice.

[iv] Similar Circumstances -- Product Liability Cases -- Tools

Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992) : In an action arising out of injuries caused by a circular saw, the Court held there was no abuse of discretion in admitting evidence of two other accidents involving the defendant's saw that occurred after the plaintiff's accident, as the circumstances were substantially similar and the fact the accidents occurred subsequently does not make them any less probative of the saw's unreasonably dangerous design or of the cause of the accident.

Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) : In an action involving a pneumatic nailer, the Court held there was an abuse of discretion in admitting extensive evidence of dissimilar nailer accidents to impeach the defendant's expert. To hold that an expert who simply offers an opinion that the product is "generally safe" opens the door to all other accident evidence would create an exception swallowing the general rule requiring substantial similarity.

[h] Similar Circumstances -- Requirement of Similarity

Bilski v. Scientific Atlanta, 964 F.2d 697 (7th Cir. 1992) : The Court affirmed a judgment for the defendant in a product liability action for injuries suffered when the plaintiff slipped while cleaning snow and ice off a satellite dish, holding there was no abuse of discretion in excluding testimony by the plaintiff's witnesses about other falls from satellite dishes, as none had resulted in injuries reported to the defendant, so the testimony would have had little if any tendency to prove a risk foreseeable to the defendant. In *Estate of Carey v. Hy-Temp Mfg., Inc., 929 F.2d 1229 (7th Cir. 1991)* , the Court remanded a product liability action for a new trial, noting that "substantially similar" circumstances does not mean "identical," that the range between similar and identical is a matter to be addressed on cross-examination, and that the range is especially broadened when the similar events are offered to show notice as opposed to showing defect.

Wilson v. Bicycle South, Inc., 915 F.2d 1503 (11th Cir. 1990) : The Court affirmed judgments for the defendants in a product liability action, holding there was no abuse of discretion in excluding evidence of an allegedly similar accident because of the necessity for a considerable amount of extrinsic evidence to determine whether the incidents were sufficiently similar.

[79] Standard of Conduct

Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991) : In a § 1983 action by a pretrial detainee, the Court held it was no abuse of discretion to exclude evidence of state minimum jail standards, as the standards, while helpful and relevant in some cases, do not represent minimum constitutional standards and would tend to mislead and confuse the jury as to the relevant standard of conduct.

Fulton v. St. Louis-S.F. Ry., 675 F.2d 1130 (10th Cir. 1982) : In a FELA case, the Court held that the Trial Judge properly admitted evidence of a railroad association's loading rules, not as a legal standard of care but as evidence of the appropriate measure of caution required under certain circumstances.

United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984) : In a prosecution for illegally dispensing drugs, two doctors were properly permitted to testify for the government as to the applicable standard of conduct for medical practice.

[80] State Law

Fitzgerald v. Expressway Sewerage Constr., Inc., 177 F.3d 71 (1st Cir. 1999) : The Court held, in this diversity action, that the Massachusetts collateral source rule "must be given full credit in this case as a rule of damages." However, the "evidentiary implications flowing from that rule" are governed by the Federal Rules of Evidence. The Court found no abuse of discretion in admitting evidence that the plaintiff's medical bills had been paid by an insurer. This evidence was admissible under *Rule 403* after the plaintiff testified that payment of medical bills had put a severe financial strain on her family.

Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980) : A rock music star was killed in an airplane crash, and his family brought a wrongful death action. The Court upheld the introduction of evidence concerning future earnings, saying that admissibility of particular evidence should be determined as a matter of federal, not state, law.

Blanke v. Alexander, 152 F.3d 1224 (10th Cir. 1998) : The Court affirmed a judgment for the plaintiffs in a diversity action brought against the driver, owner, and excess liability insurer of the truck for injuries received in a car-truck collision. The Court found no error when the plaintiffs were permitted to make references to the insurer, as that was consistent with the governing state law authorizing direct actions and state precedent that identification of the insurer in such actions is not prejudicial. Although the admissibility of evidence in diversity cases is generally governed by federal law, Congress did not intend to pre-empt "substantive" state rules of evidence. In *Romine v. Parman*, n169 the Court held that federal law governed the determination whether evidence was too prejudicial to be admitted and that evidence of a driver's drinking of beer on the day of an accident and his payment of a fine resulting from a traffic citation was properly admitted. Although the Court was aware that payment of a traffic citation has been viewed as of little probative value, it found that the preferable approach was to admit the evidence and to permit the driver to explain why the fine was paid.

[81] Statistical Evidence

United States v. Twitty, 72 F.3d 228 (1st Cir. 1995) : To show that members of a conspiracy to violate firearms laws had resold guns, statistical evidence was presented that during a particular period there was a sharp increase in police recoveries of particular models of guns with serial numbers obliterated in the same manner. The Court held there was no abuse of discretion in admitting the evidence: the inference from the statistics, the weapon types, and the timing showed a connection with the conspiracy; it reinforced the defendant's connection to the conspiracy, which he sought to

deny at trial; and it was not prejudicial in connecting the defendant with a gun epidemic, since that was implicit in proof that the defendant's financial condition improved sharply as guns were delivered to another conspirator for the defendant.

Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) : In a professor's suit against a university for disparate treatment on the basis of sex and age in promotion and pay practices, the Court found no abuse of discretion in the exclusion of a statistical study offered by the plaintiff. The study was based on the entire population of the University faculty, including all departments and the University's seven regional campuses, so it bore little relation to the practices in the plaintiff's department and their effects on the plaintiff.

Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000) : Employees terminated or demoted during a downsizing program brought suits for age discrimination against their employers. The Trial Judge granted summary judgment for the defendants, after excluding evidence from a statistician that showed correlations between the ages of employees and the companies' decisions to terminate. Reversing, the Court noted that "statistical evidence can be very useful to prove discrimination in either or both of those two kinds of cases, but it will likely not be sufficient in itself," and held that the statistical studies "were prepared in a reliable and statistically sound way, such that they contained relevant evidence that a trier of fact would have been entitled to consider." The Court added that "while it is not unheard of to exclude evidence under *Rule 403* at the summary judgment stage, ... normally the balancing process contemplated by that rule is best undertaken at the trial itself."

[82] Stipulations

[a] Civil Cases

Silva v. Showcase Cinemas Concessions, 736 F.2d 810 (1st Cir. 1984) : Upholding a judgment against a movie theater for the wrongful death of the plaintiff's son, who was killed in a parking lot after a movie, the Court rejected the defendant's argument that it should have been permitted to show that the assailant was convicted of manslaughter. Since the plaintiff stipulated that the killing was criminal, the manslaughter conviction was unnecessary to prove that it was an intentional act. We note that this decision may be questionable after *Old Chief v. United States*, discussed in the Editorial Explanatory Comment, *§ 403.02[7]-[11]*.

Heath v. Cast, 813 F.2d 254 (9th Cir. 1987) : The Court affirmed a judgment for police officers in a suit alleging illegal arrest and excessive use of force. Although the plaintiff offered to stipulate that he was biased against the police, the Trial Judge admitted evidence that the police had previously arrested the plaintiff and his brother. The Court affirmed, holding that the evidence was properly admitted to enable the jury to determine the extent of the bias.

Noel Shows, Inc. v. United States, 721 F.2d 327 (11th Cir. 1983) : Affirming a judgment against a taxpayer seeking to recover an excise tax paid on a coin-activated amusement device, the Court upheld the exclusion of the plaintiff's patent on the device, which both parties had stipulated to be admissible. A majority of the Court held that the Trial Judge did not act unreasonably in determining that the patent might confuse the jury when it came to decide the only issue in dispute -- i.e., whether the device involved a "substantial element of chance." A dissenting Judge noted that the stipulation had been approved by the Court and opined that the government, which objected to the evidence despite the stipulation, ought to be bound by its stipulations.

[b] Stipulations -- Criminal Cases

[i] Firearms Cases

Old Chief v. United States, 519 U.S. 172 (1997) : This case is discussed in the Editorial Explanatory Comment, *§§ 403.02[6]-[11].*

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998) : The defendant was charged with violation of *18 U.S.C. § 922(g)(3)*, which prohibits possession of firearms by an illegal drug user. At trial, he objected to admission of evidence of his illegal drug use, arguing that he had already stipulated to being a user of a controlled substance for purposes of the charges brought under *18 U.S.C. § 922(g)(3)*, and that the drug use evidence was substantially more prejudicial than probative in light of his stipulation. Finding no error, the Court distinguished *Old Chief*: "The evidence of illegal drug use related not to facts far removed in time from the underlying criminal firearm possession with which Dunford was charged. On the contrary, it was ... a relevant part of the very transactions leading to Dunford's arrest and indictment *in this case*." In *United States v. Grimmond, 137 F.3d 823 (4th Cir. 1998)* , the Court affirmed a conviction for felon firearm possession, and found no error in the admission of prior convictions for shooting two individuals. The defendant stipulated to the fact that he was a felon, and this rendered the prior convictions inadmissible to prove the defendant's felony status under *Old Chief v. United States*. However, *Old Chief* did not prohibit the government from offering the prior crimes to prove the element of possession. The Court stated that the Supreme Court "intended its decision in *Old Chief* to be limited to stipulations involving a defendant's status as a convicted felon."

United States v. De Leon, 170 F.3d 494 (5th Cir. 1999) : At trial for being a convicted felon in possession of ammunition, the prosecution introduced a document that indicated the defendant was under parole supervision. The document had been found in his girlfriend's home along with the ammunition at issue. Despite the defendant's willingness to stipulate that he was a convicted felon, the Court held that the document was properly admitted. The parole document was relevant, because it was probative of the defendant's dominion and control over his girlfriend's house, and it was not unduly prejudicial, because it had been redacted to avoid mentioning the nature of the prior felony.

United States v. Hawkins, 215 F.3d 858 (8th Cir. 2000) : In a felon firearm possession case, the defendant offered to stipulate to his status as a felon, but the Trial Judge ruled that the stipulation would have to reflect the defendant's multiple felony convictions. Affirming, the Court held that the defendant waived any claim under *Old Chief* by accepting a stipulation that he had been convicted of "several crimes" that were felonies, rather than "press[ing] on appeal the government and district court's refusal to accept his stipulation." In *United States v. Bass*, n170 a defendant convicted for firearms violations claimed that the government should have been required to accept a stipulation as to identity and should have been barred from offering evidence of crimes committed by the defendants. Affirming, the Court observed that "a proper *Rule 403* balancing analysis will incorporate some assessment of the need for the allegedly prejudicial information in light of a valid stipulation," but found that the stipulation was insufficient where the crimes the government offered were interconnected with those charged and proved more than identity.

[ii] Stipulations -- Criminal Cases -- Generally

United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998) : Appealing a conviction for air piracy, the defendant argued that it was error to admit evidence, including autopsy photographs, of the death of two passengers. The defendant offered at trial to stipulate that the passengers had died, and he contended that under *Old Chief v. United States* the Trial Judge should have compelled the prosecution to accept the stipulation. Finding no error, the Court concluded that *Old Chief* reaffirmed the general rule that the prosecution "is entitled to prove its case free from any defendant's option to stipulate the evidence away," and that *Old Chief* established a limited exception to this rule "for crimes like possession of a firearm by a convicted felon, in which the evidentiary issue is one of status." Since the

exception did not apply in this case, the prosecution was free to decline to stipulate that the passengers had died.

United States v. Balsam, 203 F.3d 72 (1st Cir. 2000) : At a trial for multiple bank robberies, the government introduced the colloquy of one defendant when he pleaded guilty to state charges in an abortive robbery, despite the defendant's agreement to stipulate to the guilty pleas. The Court found no abuse of discretion, since the abortive robbery was the subject matter of a Hobbs Act conspiracy count in this case, which made the facts underlying the conviction (and not just the status of the defendant, as in *Old Chief*) relevant to the charges.

United States v. Velazquez, 246 F.3d 204 (2d Cir. 2001) : In a civil rights prosecution of a corrections officer for being an accessory after the fact to the fatal beating of an inmate, the Court found there was no abuse of discretion when autopsy photographs of the victim were introduced, despite the defendant's offer to stipulate that the beating occurred. By showing the extent of the injuries, the photographs established that a cruel and unusual punishment had occurred and underscored the moral blame attaching to the defendant's decision to cover up the crime; they also tended to prove that the victim's signature on the defendant's cover-up report was coerced by the beating he had just received. In *United States v. Pedroza*, n171 the Court reversed kidnapping convictions on another ground, but held that the admission of evidence concerning one defendant's involvement in a cocaine transaction, which explained the motive for the kidnapping, was proper. Although the defendants offered to stipulate that the ransom demanded for return of the kidnapped child was narcotics, the Court found that the stipulation "hardly sufficed to provide an understandable backdrop for the rather unusual theories offered to explain the events."

United States v. Hall, 152 F.3d 381 (5th Cir. 1998) : Affirming a conviction for kidnapping resulting in death, the Court found no error in the introduction of photos of the victim's body in the grave dug by the defendant. The photos were relevant to prove the victim's identity and the cause of her death. The defendant's offer to stipulate to these facts did not render the photos irrelevant, because under the Supreme Court's decision in *Old Chief v. United States*, "the government must be given the opportunity to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." In a prosecution for interstate transportation of obscene material, *United States v. Grassi*, n172 defense counsel offered to stipulate that the films were obscene. The prosecutor objected, and the jury was shown three films that portrayed "homosexual acts of the most bizarre and repulsive nature." The Court said that a *Rule 403* balancing analysis must be used and sustained the Trial Judge, finding that the films had probative value above and beyond the stipulation.

United States v. Mackey, 265 F.3d 457 (6th Cir. 2001) : To prove that a house where the defendant was arrested was a crack house and that therefore the cocaine possessed by the defendant and his codefendant was for distribution, the government offered testimony by an officer that a confidential informant purchased cocaine in front of the house the previous day. When counsel for the codefendant asked to question the informant, the prosecutor, seeking to protect the informant's identity and to avoid calling him, agreed to stipulate that the informant did not purchase the cocaine from the codefendant. The defendant objected to the stipulation on the ground that it implied the informant purchased the cocaine from him. Affirming, the Court found no abuse of discretion, or at most harmless error, since the unchallenged testimony about a controlled buy helped establish the house as a crack house, and a reasonable juror could find the amount of crack seized from the defendant was for resale and not for personal use, so the stipulation could not materially affect the verdict. In *United States v. Owens, 159 F.3d 221 (6th Cir. 1998)* , the defendant was convicted of drug, prostitution, and gambling offenses arising out of his operation of topless bars. He objected to the introduction of evidence indicating that he enforced certain racist policies in his clubs, arguing that the racial bias evidence was made irrelevant by his offer to stipulate to the fact that one witness was biased against him as the result of a racial incident. Finding no abuse of discretion, the Court held that *Old Chief* simply carved out "the limited exception of felony-convict status" to the general rule "that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." The evidence was relevant to the bias of the witness, and also to prove the control that the

defendant exercised over the clubs.

United States v. Becht, 267 F.3d 767 (8th Cir. 2001) : The defendant was charged with possessing and disseminating child pornography, after numerous pornographic files were found on his computer. At trial the prosecution introduced 39 images from the pornographic files, although there was some indication that the government had offered and the defendant had accepted a stipulation that the images were child pornography. The Court held that regardless of any stipulation, the images were also relevant to the defendant's knowledge of what was on his computer. For that purpose the images were highly probative, and the Trial Judge took pains, by limiting the number shown and the time they were shown to the jury, to limit any prejudicial effect. As there were no satisfactory evidentiary alternatives to prove knowledge, the Court found no abuse of discretion in admitting the images. In *United States v. Hiland, 909 F.2d 1114 (8th Cir. 1990)* , the Court affirmed convictions related to unlawful sales of pharmaceuticals, holding that evidence regarding the drug's effects on premature infants was properly admitted despite the defendants' offered stipulation, because the stipulation reached only the drug's overall dangerousness, not its dangerousness when used as labeled, which was also part of the government's burden of proof. The Court also found that the evidence was not presented in an inflammatory manner and its use was carefully controlled.

United States v. Campos, 221 F.3d 1143 (10th Cir. 2000) : The Court affirmed a conviction for transporting child pornography on the Internet, finding no abuse of discretion when the jury was shown two of the images that were the subject of the charges. Although the defendant offered to stipulate that the images were child pornography, the prosecution was entitled under *Old Chief* to an opportunity to present the concrete events of the defendant's criminal behavior.

[iii] Stipulations -- Criminal Cases -- Mental Elements

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) : James Wilson was charged with a postal robbery on the basis of information from a witness who had worn a wire while imprisoned with James. The government turned the tape and a transcript over to James' attorney, who improperly disclosed at least parts to James' wife and his brother Ralph. The tape revealed that the key witness was Leroy Copeland; Ralph and another brother began looking for Copeland, and when they found him, murdered him. On trial for murdering a government witness, the brothers objected that it was improper to admit the whole tape, which, *inter alia*, described the Wilson family as a "family-run organized gang," because the tape was unduly prejudicial in disclosing other crimes and that they were prepared to stipulate they knew Copeland would be a witness. The Court found that there was no abuse of discretion in rejecting the offered stipulation, since hearing the tape provided "descriptive richness" to testimony that Ralph had heard the tape. The Court concluded that the *Rule 403* challenge presented a close question, because half of the tape was prejudicial and only marginally probative, but because there was no incremental prejudice and editing the tape would have fragmented the narrative, there was no abuse of discretion.

United States v. Palmer, 37 F.3d 1080 (5th Cir. 1994) : Affirming a conviction for felon firearm possession, the Court held there was no error in permitting the government to call the defendant's parole supervisor to testify that she explained the parole rules to the defendant, including a rule barring possession of any weapon, even though the defendant had offered to stipulate to the fact of a predicate felony conviction. The government witness did not testify as to the nature or details of the prior conviction, and only provided relevant evidence concerning the defendant's knowledge, so there was no abuse of discretion under *Rule 403* in admitting the evidence.

United States v. Frost, 234 F.3d 1023 (8th Cir. 2000) : The defendant was charged with defrauding a trust by forging the signature of his co-trustee on various financial documents. In a deposition given in a civil action brought by

the trust, the defendant denied signing the co-trustee's name or initials on the documents in question. However, in the criminal case the defendant asserted that he had a power of attorney to sign for the co-trustee. In effect planning to hinge his whole defense and focus the trial on the issue of authority, the defendant offered not to contest criminal intent if the jury determined that he was not authorized to sign the documents. Concluding that the jury would be led to convict the defendant solely on the ground that he was untruthful, the Judge granted a motion *in limine* to exclude the defendant's deposition testimony in which he denied signing the documents. On interlocutory appeal, the Court reversed, on the ground that the deposition testimony was probative of fraudulent intent and consciousness of guilt, and although it would be damaging to the defendant's case, it would not be unfairly so. The defendant's offer to stipulate did not remove the issue of intent from the case.

United States v. Tan, 254 F.3d 1204 (10th Cir. 2001) : On interlocutory appeal in a prosecution for alcohol-related vehicular homicide, the Court reversed an *in limine* ruling that excluded the defendant's prior convictions for drunk driving. Although the Trial Judge reasoned that the convictions were not offered for any proper purpose under *Rule 404(b)*, the Court found that they were probative of malice. The case was remanded to determine whether the convictions were admissible under *Rule 403*, and the Trial Judge was instructed to disregard the fact that the defendant offered to stipulate that he "knows that drunk driving is dangerous." This stipulation was not a substitute for the convictions in proving malice, because they showed both that the defendant knew that drunk driving was dangerous and that he did not care about the danger to others. Moreover, regardless of the stipulation, the government is permitted under *Old Chief* to prove malice with its own evidence.

[iv] Stipulations -- Criminal Cases -- Predicate Convictions

Old Chief v. United States, 519 U.S. 172 (1997) : In a felon-firearm prosecution, the Court held that where the defendant had offered to stipulate to the felony element of the crime, it was an abuse of discretion under *Rule 403* to permit the government to offer the judgment of conviction to prove the defendant's prior felony. This case is discussed in the Editorial Explanatory Comment, *§ 403.02[7]*.

United States v. Joost, 133 F.3d 125 (1st Cir. 1998) : The defendant, charged with felon firearm possession, stipulated to his prior conviction for interfering with civil rights. After he testified in his own defense, the government was permitted to show the nature of the prior felony on cross-examination. The Court found no abuse of discretion, both because the defendant had opened the door by describing the prior felony on direct examination and had waived the error by failing to make a contemporaneous objection and because *Rule 609(a)* permits evidence of a prior conviction to impeach the credibility of a testifying defendant if its probative value outweighs its prejudicial effect. In *United States v. Tavares, 21 F.3d 1 (1st Cir. 1994)* (en banc), a defendant charged with felon firearm possession offered to stipulate that he had a prior felony conviction, but the prosecutor refused to accept the stipulation and was permitted to prove the fact of the conviction and its nature. Vacating in a careful *en banc* opinion anticipating *Old Chief v. United States* (see the Editorial Explanatory Comment, *§ 403.02[7]*), the Court held it was an abuse of discretion to permit the government to reject the stipulation and to admit evidence beyond the fact of the prior conviction. The nature of the predicate felony is wholly unrelated to the crime charged and, except in unusual circumstances of which the Court could not conceive, the prejudice to the defendant substantially outweighs the probativeness of the facts surrounding the prior conviction. The Court noted that its decision was limited: The defendant may not keep the *fact* of the predicate felony from the jury by stipulation or other procedural device; the prosecution ordinarily cannot be forced to accept a stipulation if it prefers to introduce a judgment of conviction properly redacted; in some cases evidence concerning the nature of the prior conviction will be admissible for impeachment or other reasons; and a stipulation to a defendant's status as a felon is easily distinguishable from those relating to his actions or state of mind in committing the crime.

United States v. Bender, 265 F.3d 464 (6th Cir. 2001) : One charge against a defendant in a drug distribution case

was felon firearm possession. Rather than requiring the government to introduce evidence of the prior conviction, the parties agreed to stipulate that the defendant was convicted of a felony in 1987, and the defendant's cross-examination was to be limited to getting her to confirm she agreed to the stipulation. However, after the defendant twice testified that she never sold drugs, the government was permitted to bring out on cross-examination the fact that her prior conviction was for distribution of powder cocaine. Affirming, the Court found no abuse of discretion, since the defendant's misleading testimony opened the door to the impeachment proof, and limiting instructions minimized any prejudicial effect. In a felon firearm possession case, *United States v. Daniel, 134 F.3d 1259 (6th Cir. 1998)* , the Court found that the admission of the defendant's predicate felonies was error (but harmless) under *Old Chief v. United States*, because the defendant had offered to stipulate to the convictions at trial. The Court rejected the prosecution's attempt to distinguish *Old Chief* on the ground that the defendant's convictions were very old and unrelated to the crimes charged.

United States v. Einfeldt, 138 F.3d 373 (8th Cir. 1998) : The Court held there was no abuse of discretion when the defendant was required, in his stipulation for purposes of *18 U.S.C. § 922(g)(1)*, to stipulate not just that he was a convicted felon, but that he had been convicted of "one or more felony offenses," so that the jury was not misled as to his criminal history. That did not lead to unfair prejudice, in contrast to description of the prior conviction in *Old Chief*. In *United States v. Blake, 107 F.3d 651 (8th Cir. 1997)* , the Court reversed convictions for felon firearm possession and methamphetamine possession, holding it was error under *Old Chief* to admit evidence of burglary, stealing, driving while intoxicated, and motor vehicle theft convictions after the defendant had offered to stipulate to his status as a felon.

United States v. Wilson, 107 F.3d 774 (10th Cir. 1997) : Affirming convictions for felon firearm possession and cocaine possession, the Court held it was error (but harmless) to admit evidence of a conviction for cocaine possession after the defendant had offered to stipulate to his status as a felon. The conviction was inadmissible under *Old Chief* on the firearm count and its prejudicial effect substantially outweighed its probative value on the drug count.

[83] Summary Judgment

Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000) : Employees terminated or demoted during a downsizing program brought suits for age discrimination against their employers. The Trial Judge granted summary judgment for the defendants, after excluding evidence from a statistician that showed correlations between the ages of employees and the companies' decisions to terminate. Reversing, the Court noted that "while it is not unheard of to exclude evidence under *Rule 403* at the summary judgment stage, ... normally the balancing process contemplated by that rule is best undertaken at the trial itself." It read the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods, Inc.*, n173 as "a cautionary note not to grant summary judgment too readily when facts are susceptible to two interpretations, and not to dismiss as irrelevant damaging remarks like the one there (plaintiff so old he 'must have come over on the Mayflower,' ...) or, in our case, [a manager]'s proclaimed desire to hire people under the age of 45."

[84] Surprise

Szeliga v. General Motors Corp., 728 F.2d 566 (1st Cir. 1984) : The Court affirmed a judgment for an automobile manufacturer, holding there was no error in finding films -- prepared by the manufacturer and offered to support its theory that a wheel fell off because of impact, not because of the loss of lug nuts -- to be more probative than prejudicial. Although a question was raised as to whether the films should have been disclosed before trial pursuant to a pretrial order, the Trial Judge could have decided the question either way. The Court commented that "the remedy for coping with surprise is not to seek reversal after an unfavorable verdict, but a request for continuance at the time the surprise occurs."

Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) : In a sexual discrimination case brought by a female police officer, the plaintiff's psychological expert prepared one report and, in response to the report of the defendant's expert, a second report that the Magistrate Judge rejected as untimely. At trial, the plaintiff's expert testified, over an objection of "unfair surprise," to the diagnosis contained in his second report. The Court found no abuse of discretion, since the "second diagnosis" was hinted at strongly in the first report, the defendants had actual knowledge of the contents of the second report and an adequate opportunity to prepare rebuttal testimony, there was no need to call any witnesses out of order or otherwise to disrupt the trial, and there was no evidence of bad faith. In *United States v. DiPasquale*, n174 the Court affirmed loansharking convictions, finding no error in the admission of evidence of overt acts in addition to those alleged in the indictment. The Court stated that "[g]enerally speaking, surprise is not a ground for the exclusion of evidence in a criminal trial."

Black v. J.I. Case Co., Inc., 22 F.3d 568 (5th Cir. 1994) : In a product liability case, the plaintiffs objected to allowing Case to add a new defense on the first day of trial. The Court rejected the plaintiffs' claim that they were unfairly surprised, noting that the Trial Judge offered the plaintiffs a continuance, which they declined, and that where a party claims unfair surprise, "the granting of a continuance is a more appropriate remedy than exclusion of the evidence." In a diversity case arising out of a crash between two trucks, *Conway v. Chemical Leaman Tank Lines, Inc.*, n175 the Court found there was no abuse of discretion in granting a new trial on the grounds of unfair surprise, after a witness called without any forewarning testified as to a new theory concerning asphalt marks on the highway. The Court said that the evidence was offered when the trial was almost completed and that "[a]lthough this Court has acknowledged that continuance is a preferable remedy for prejudicial error from unfair surprise, there is no ironclad rule requiring it."

[85] Surveys and Opinion Polls

Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) : In Starter's declaratory judgment action to establish its right to use a "star" trademark on athletic footwear, Starter offered a consumer survey to prove the unlikelihood of confusion between the parties' trademarks. Finding no abuse of discretion in exclusion of the survey, the Court held that the survey was irrelevant because the method used did not test or demonstrate likelihood of consumer confusion, and any probative value was easily outweighed by its potential to confuse the issues.

United States v. Local 560, 780 F.2d 267 (3d Cir. 1985) : In a civil RICO action, the Court held it was error to admit testimony concerning the violent reputation of the union's executive board that was based on interviews the witness had with 15 former and current members of the union, since no attempt at random selection was made; the witness had approached only persons known to be hostile to the leadership.

[86] Terrorist Activities

United States v. Felton, 417 F.3d 97 (1st Cir. 2005) : In a prosecution for bank robbery, counterfeiting, and planning construction of an explosive device, the Court held there was no abuse of discretion in allowing the government to use the word "terrorist" to describe the defendants and their activities. The Court reasoned that although it is "a provocative term, freighted with images of terrible events," in this case the description "was certainly an accurate lay use of the term 'terrorist,' and it is not easy to think of some softer description to summarize the gist of what the government's evidence suggested." Any prejudice was "a function of the acts that the defendants engaged in, not the government's inaccurate description of those acts."

United States v. Khalil, 214 F.3d 111 (2d Cir. 2000) : The defendant, charged with conspiring and threatening to

use a weapon of mass destruction, claimed that he made bombs as a ploy to obtain funds from a government rewards program by pretending to prevent a terrorist attack. The Court found that photographs showing the defendant holding a shotgun over his forehead, wearing the garb of a terrorist, and kneeling on the floor in the posture of a martyr in prayer were relevant to rebut the defense portrayals of the defendant as a person having no destructive objective, and they were not unduly prejudicial. Similarly, there was no abuse of discretion in the admission of expert testimony that a mock-up bomb replicating those made by the defendant had been detonated and had fragmented into small pieces, spewing nails in all directions. Evidence as to the massively destructive effect of the defendant's bombs was clearly relevant to his "scam" defense, and any prejudice he might have suffered was not "unfair" within the meaning of *Rule 403*.

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc): The defendant was convicted for activities supporting Hizballah, a designated foreign terrorist organization. The Court found no abuse of discretion in the admission of videotapes found in the defendant's apartment, which depicted, inter alia, speeches by Hizballah leaders praising Hizballah military operations and men who martyred themselves. The evidence was probative of the defendant's intention during "prayer meetings" to solicit donations to Hizballah and of his knowledge of and agreement with the terrorist objectives of Hizballah. The evidence was not unfairly prejudicial toward the defendant and there was no less prejudicial alternative for the prosecution in proving the defendant's knowledge of Hizballah's activities.

[87] Threats

United States v. Perez-Montanez, 202 F.3d 434 (1st Cir. 2000) : Affirming carjacking and firearm convictions, the Court held that a coconspirator who testified as a government witness was properly permitted to testify about threats that he received and believed were from a defendant, since "[t]he evidence was admitted not to prove the truth of the threats or their origin but to show Serrano's [the witness's] motivation for having changed his version of events, which he did several times before trial."

United States v. Bicaksiz, 194 F.3d 390 (2d Cir. 1999) : In a prosecution of a conspiracy to commit murder for hire, the Court held there was no abuse of discretion in admitting evidence that a defendant made a death threat against his wife, as the wife's brother was the intended victim of the conspiracy and the government's theory was that murder of the brother was part of a scheme to intimidate the wife into accepting a disadvantageous settlement in divorce proceedings.

Tompkins v. Cyr, 202 F.3d 770 (5th Cir. 2000) : The Court affirmed a judgment for a doctor and his wife who claimed injuries as a result of harassment by abortion foes, holding there was no plain error in the admission of evidence of anonymous threats made against the plaintiff, even though there was no evidence that the defendants were responsible for the threats. The Court reasoned that under state law the defendants "take their victims as they find them," so that the anonymous threats made the plaintiffs particularly vulnerable to psychological harm from the defendant's unlawful conduct.

United States v. Mayes, 370 F.3d 703 (7th Cir. 2004), vacated on other grounds, 543 U.S. 1107 (2005) : Though affirming drug convictions, the Court found error in allowing a witness to testify that he and his family had been threatened with death by an anonymous caller. The prosecution argued that the threat evidence was necessary to explain why the witness was groggy and upset on the stand. But the Court found that the probative value in supporting the witness's credibility was "highly questionable" as the witness also testified that during the preceding 48 hours he had not slept and had worked three full shifts. Thus, the prejudicial effect of the threat evidence substantially outweighed its probative value. In *United States v. Thompson, 359 F.3d 470 (7th Cir. 2004)* , the defendant was charged with possession of ammunition by a felon after bullets were found in a jacket in a car in which he and his girlfriend had been

traveling. Shortly after the arrest, she told police that the jacket and the bullets belonged to the defendant, but at trial she testified for the defense that they were hers. Although an *in limine* ruling precluded mention of the defendant's prior convictions and status as a suspect in uncharged crimes, the government was permitted to ask the girlfriend on cross-examination about past threats the defendant had made against her and past charges she had brought against him. Affirming, the Court found no abuse of discretion, since even without evidence that the witness was intimidated, the evidence of threats was probative of the witness' bias and its probative value was not substantially outweighed by the danger of unfair prejudice.

United States v. Davis, 357 F.3d 726 (8th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005) : In a prosecution for drug trafficking offenses, the Court found no abuse of discretion when evidence was admitted that the defendant had threatened and beaten women, including a young girl, for the purpose of silencing potential witnesses and furthering the drug conspiracy. "Because drug dealing is often a violent vocation, and because the evidence of threats and violence was presented to show the lengths that Davis would go to protect the conspiracy, its probative value was substantial and far outweighed any prejudicial effect."

[88] Time Limits

MCI Commun. Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983) : In this complex antitrust case, the Court found no error in the Trial Judge's limiting each side to 26 days for presentation of its case-in-chief. The Court commented that

> [t]his exercise of discretion may be appropriate in protracted litigation provided that witnesses are not excluded on the basis of mere numbers ... . Moreover, where the proffered testimony is presented to the Court in the form of a general summary, the time limits should be sufficiently flexible to accommodate adjustment if it appears during trial that the Court's initial assessment was too restrictive.

Johnson v. Ashby, 808 F.2d 676 (8th Cir. 1987) : In a medical malpractice case, the Trial Judge imposed in advance of trial a strict time limit on the presentation of evidence. The Court affirmed, noting that the unsuccessful plaintiff made no timely objection to the time limit. However, "it may be an abuse of the Trial Court's discretion to exclude probative, noncumulative evidence simply because its introduction will cause delay, and any time limits formulated in advance of trial must be fashioned with this in mind." The Court disapproved of "rigid hour limits such as those initially suggested here," but found that there was no showing that the Trial Judge would not have extended the time if a proper objection had been made.

General Signal Corp. v. MCI Telecomm. Corp., 66 F.3d 1500 (9th Cir. 1995) : In a breach of contract and fraud action between a telecommunications device developer and a long-distance telephone company, the developer was not permitted to offer rebuttal evidence or conduct some cross-examination because it had exceeded time limits imposed by the Trial Judge. The Court noted that generally evidence may not be excluded solely to avoid delay and that it would have been advisable for the Judge to have weighed explicitly the probative value of the proposed evidence in deciding whether to grant additional time, but held that the developer was not prejudiced by the exclusion on account of the time limit.

[89] Tools of the Crime

United States v. Savage, 390 F.3d 823 (4th Cir. 2004), vacated on other grounds, 545 U.S. 1102 (2005) : The

Court affirmed convictions arising out of a scheme to defraud several investors, especially single, older women, by inducing them to invest in phony business ventures. It found no abuse of discretion in the admission of testimony that the defendant was arrested with more than $12,000 in cash and items relating to false identifications. The Trial Judge instructed the jury that the evidence was admitted only for the purpose of determining whether the items were tools and materials used in the conspiracy.

[90] Victim Impact Testimony

United States v. Sokolow, 91 F.3d 396 (3d Cir. 1996) : In a prosecution for a fraudulent scheme to market underfunded health plans to small businesses, the government called several witnesses whose claims for medical insurance were denied because the medical plans marketed by the defendant were unable to pay them. These witnesses testified not only that they were denied payment, but also to the collateral consequences they suffered from unreimbursed medical expenses. The Court noted that actual loss by the victim is not an element of the crime of mail fraud, though it recognized that evidence of loss is sometimes probative of the defendant's intent to defraud. It criticized the government's attempt "to highlight the personal tragedies of the victims" because such testimony has "little, if any, probative value and may be unfairly prejudicial." However, in this case the error, if any, was harmless.

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) : During the guilt phase of the defendant's trial for bombing the Oklahoma City Federal Building, the government presented 18 witnesses who identified deceased victims of the blast and described the impact of the explosion, the destruction caused by the bombing, and the long-term effects of the bombing. The Court affirmed, finding no abuse of discretion in the admission of most of this testimony. Some provided background information relevant to credibility about the testifying witnesses; some described activity of the witnesses and other victims just before the bombing, setting a foundation for testimony describing the bombing and its aftermath. The testimony about the immediate impact of the bombing was probative to prove that the bomb was a weapon of mass destruction, that it substantially interfered with interstate commerce, and that it was detonated with a malicious intent to kill. While all this testimony about the explosion was prejudicial, the Court noted that the emotional impact of the testimony "stemmed directly from the enormity of the crime itself," and that the government "exercised considerable restraint in avoiding overly emotional testimony." The Court held that the testimony about the long-term effects of the bombing was prejudicial and "was not particularly relevant to the issues presented during the guilt phase." However, the error in admitting this evidence was harmless.

[91] Violent Crimes

Gray v. Genlyte Group, Inc., 289 F.3d 128 (1st Cir. 2002) : The Court affirmed a judgment for an employer in a sexual harassment action, finding no abuse of discretion when the plaintiff was permitted to testify only that a co-worker told her something that greatly enhanced her fear of her harasser, but not specifically that the co-worker said that the harasser had physically assaulted his wife so severely that she required emergency treatment. The Judge could properly have found that the jury might have assumed the truth of the co-worker's statement rather than focus on its impact on the plaintiff, and the "compromise reached by the district court was a perfect example of a reasonable call that is not an abuse of discretion." In a carjacking prosecution, *United States v. Cruz-Kuilan, 75 F.3d 59 (1st Cir. 1996)* , the Court found no error in the admission of evidence that the defendant murdered the owner of the car before getting into the car and driving it away, noting that the federal carjacking statute requires proof that the car was taken "by force and violence or by intimidation." In this case, the evidence of murder "was so tightly linked to guilt as defined by the elements of the offense, that it would be surpassingly difficult to justify a finding of unfair prejudice stemming from its introduction."

United States v. Noe, 411 F.3d 878 (8th Cir. 2005) : Affirming convictions for drug offenses, the Court held that

evidence of a brutal beating one defendant ordered inflicted on a "sub-dealer" was not unfairly prejudicial. The evidence "was highly probative of the conspiracy itself and Schultz's leadership role within it." In *United States v. Al-Dabbi, 388 F.3d 1145 (8th Cir. 2004), vacated on other grounds, 126 S. Ct. 590 (2005)* , a cocaine distribution conspiracy prosecution, the Court found no plain error when a cooperating coconspirator was permitted to testify that the defendant had assaulted his wife and that the wife had asked the witness to dispose of her husband's gun because she feared for her life. As the wife was a member of the conspiracy, the evidence was probative of the defendant's control over the conspiracy through violence and fear, and that probative value was not substantially outweighed by the danger of prejudice. In a drug trafficking case, *United States v. Davis*, n176 the Court found no abuse of discretion when evidence was admitted that the defendant had threatened and beaten women, including a young girl, for the purpose of silencing potential witnesses and furthering the drug conspiracy. "Because drug dealing is often a violent vocation, and because the evidence of threats and violence was presented to show the lengths that Davis would go to protect the conspiracy, its probative value was substantial and far outweighed any prejudicial effect."

[92] Waste of Time and Undue Delay

Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) : Affirming a judgment for the plaintiff in a sex discrimination suit, the Court upheld rulings that permitted the defendants' expert to offer three statistical studies regarding the raises and salaries given to men and women at the defendant commission, but refused to permit the expert to offer six other studies comparing the salaries at other lighting commissions. Any probative value of these studies, the Court found, would have been so tangential as to warrant exclusion as a "waste of time."

Barrett v. Orange County Human Rights Comm'n, 194 F.3d 341 (2d Cir. 1999) : The Commission's former executive director alleged in a suit under § 1983 that he was dismissed for exercising *First Amendment* rights in relation to his handling of an August 1996 complaint to the Commission. At trial he was precluded from introducing, as proof that the reasons offered for his termination (violation of guidelines adopted in December 1996) were pretextual, evidence that the Commission had adopted guidelines for his conduct in March 1996 in retaliation for his exercise of free-speech rights in a prior controversy. The Court found no abuse of discretion, as any probative value the evidence might have could have been outweighed by the waste of time if the trial were diverted into an inquiry into an entirely different incident involving to a significant extent different people, places, and events.

In re Paoli R.R. Yard PCB Litig., 113 F.3d 444 (3d Cir. 1997) : In its third review of this toxic exposure case (see §§ 702.02[6]; 702.03[84][a]), the Court held there was no abuse of discretion in excluding evidence about "heat-degraded PCBs." The plaintiffs did not establish that the excluded evidence would have probative value, given the paucity of evidence that the plaintiffs sustained any abnormal exposure to PCBs, and admitting the evidence would require extensive mini-trials on the plaintiffs' exposure to these chemicals and the harm they cause.

United States v. Smithers, 212 F.3d 306 (6th Cir. 2000) : The Court reversed a conviction for bank robbery because the Trial Judge excluded an experienced psychologist from testifying about weaknesses in eyewitness identifications on behalf of the defense without conducting a *Daubert* hearing. The Trial Judge had commented that the proffer was "too late in the day," and the dissenting Judge argued that *Rule 403* provided a basis for exclusion, but the Court held that "undue delay" in *Rule 403* referred to prolongation of the trial, not delay in submission of motions or proffers. Besides, in this case the defendant had filed a ten-page motion *in limine* seeking admission of the testimony a full month before trial, and had renewed the motion orally at the beginning of trial. Given the importance of eyewitness testimony in the case, it was an abuse of discretion to exclude the testimony based on its supposed tardiness.

Wyninger v. New Venture Gear, Inc., 361 F.3d 965 (7th Cir. 2004) : The Court affirmed summary judgment for

the defendant in a Title VII action, holding there was no abuse of discretion when the Judge excluded evidence of another employee's gender discrimination charge, which the plaintiff offered five months after the close of discovery and the submission of the defendant's summary judgment motion. The evidence had limited probative value because it involved a different employment decision in a different department made by different decisionmakers, and, because it consisted of contested allegations, it would have required undue consumption of time to decide the merits of the "case within a case." In *United States v. Thomas, 11 F.3d 1392 (7th Cir. 1993)* , a defendant charged with bank robbery sought to prove she had been coerced into participation by her codefendant. The Court held there was no abuse of discretion in refusing to allow her to present evidence regarding each specific incident of abuse, as the marginal relevance of the evidence was clearly outweighed by the dangers of confusion of the issues, waste of time, and unnecessary presentation of evidence that would result if the defendant were allowed to conduct mini-trials of each alleged incident. In *Scaggs v. Consolidated Rail Corp.*, n177 the defendant in an employee's personal injury action had conducted surveillance of the plaintiff but found no indication of malingering that it wished to introduce as evidence. The Court held there was no error in granting the defendant's motion *in limine* barring mention of the defendant's surveillance practices, as evidence of no evidence was a waste of time and possibly prejudicial in this case.

United States v. Pend Oreille County Public Util. Dist. No. 1, 135 F.3d 602 (9th Cir. 1998) : The Judge trying the damages phase of a trespass action refused to allow proof on rebuttal from an expert who would have provided an estimate of acreage relevant to the plaintiffs' damages. The Court held there was no abuse of discretion, as the Judge had already heard from two other experts on the point and "reasonably could have concluded that introducing in rebuttal yet a third, much higher estimate ... would needlessly complicate the issue and unduly delay the proceeding." In a fraud case, *United States v. Rewald*, n178 the defendant claimed that he was a CIA agent who had been instructed to spend investor funds to cultivate foreign intelligence sources. The Court held there had been no abuse of discretion in excluding classified documents regarding his meetings with foreign businessmen and government officials, because they were of little probative value on whether he had been instructed to spend the money; presentation of the extensive evidence, and rebuttal to it, would have drawn out the proceedings and confused the jury.

Ross v. Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993) : In an employment discrimination action, evidence that managers who later worked at the plant had made racially derogatory remarks was excluded on the ground that it would open the door to further evidence about another of the defendant's plants, thereby substantially and unnecessarily prolonging the trial. The Court held that although the evidence may have been the "smoking gun" on the disparate treatment issue, there was no clear abuse of discretion where, even after the Trial Judge indicated willingness to admit the evidence if it were significant, plaintiffs' counsel did not highlight the significance of the evidence and only stated it was important to impeach testimony counsel had hoped unsuccessfully to elicit from another witness.

[93] Wealth or Poverty

Tesser v. Board of Educ., 370 F.3d 314 (2d Cir. 2004) : In an action by a school administrator who alleged religious discrimination and retaliation, the plaintiff claimed it was an abuse of discretion to admit into evidence unredacted copies of her joint tax return. The Court noted that evidence of wealth is generally not admitted in cases not involving punitive damages, but a party may open the door to wealth evidence. Although it did not decide whether the door was opened in this case by expert testimony concerning the income tax effect of a lump sum award, the Court observed that it might have been, but that any error in admitting the evidence was harmless. In *Reilly v. NatWest Markets Group Inc., 181 F.3d 253 (2d Cir. 1999)* , an investment banker with an employment contract in which his income was based on deals closed by the bank sued contending that his income was improperly diminished by the bank's unreasonably tight credit decisions during 1995. The defendant's officer testified that the credit decisions were reasonable because there was a recession in the early 1990s. The Court found no error when the plaintiff responded with evidence that the bank made a $457 million profit in 1995. While wealth evidence is generally inadmissible in trials not involving punitive damages because it "can be taken as suggesting that the defendant should respond in damages

because he is rich," it can be admitted to impeach the testimony of a witness who opens the door to the subject. In this case, although the wealth evidence did not "directly contradict" the defense witness' testimony, and its introduction "may have been somewhat opportunistic," it was sufficiently inconsistent with that testimony to impeach the witness' credibility. In *United States v. Weiss, 914 F.2d 1514 (2d Cir. 1990)* , the Court held there was no error in a prosecution for Medicare and Medicaid fraud when the government presented evidence regarding a defendant's wealth and income, as the defendant sought to portray himself as virtually indigent and as not having profited from the alleged misconduct so not deserving punishment, and the Trial Judge twice instructed that the evidence was admitted only on credibility.

United States v. Sanchez-Gonzalez, 294 F.3d 563 (3d Cir. 2002) : Affirming cocaine-related convictions, the Court held that the defendant was not entitled to introduce evidence of impoverishment, where he failed to explain its relevance.

United States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002) : Affirming fraud convictions arising from false claims made to government agencies, the Court upheld the admission of evidence of the defendant's extravagant life style, involving expenditures of almost $4 million, to prove motive. Although the Court noted that in many cases such evidence is problematic to prove motive because extravagant expenditures may be made possible by legitimate means, it found that the evidence was properly admitted because (1) there was other evidence of the illegal activity, (2) the money spent by the defendant was not available to her from a legitimate source, and (3) the accumulation of wealth and extravagant spending occurred during the period of the illegal activity. That the defendant's "specified lavish expenditures far exceeded her legitimate income while her net worth almost doubled" was enough "to raise an inference of unlawful activity and made her participation in the fraud scheme more likely." In *United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984)* , the Court reversed a conviction for fraudulently appropriating money belonging to an estate, and strongly suggested that the Trial Judge should reconsider the decision to admit records from the appellant's divorce proceedings to prove that he committed the offense because he needed money. The Court noted that extreme caution is called for in admitting such evidence, "lest the poor be in position of being at greater suspicion of having committed a crime, even if a theft offense, because of the very fact of their impecuniosity."

Van Bumble v. Wal-Mart Stores, Inc., 407 F.3d 823 (7th Cir. 2005) : Affirming the denial of motions for a new trial or additur in a couple's slip-and-fall action, the Court found no abuse of discretion in the exclusion of evidence of the plaintiffs' financial situation, including that they lacked medical insurance. Although they argued that the evidence was relevant to prove why the wife did not seek medical treatment for two years, the Court noted that Wal-Mart did not question why the wife did not seek treatment, so the evidence was irrelevant and would have been prejudicial on the damages issue.

United States v. Mitchell, 172 F.3d 1104 (9th Cir. 1999) : The Court reversed a bank robbery conviction because the prosecution erroneously introduced evidence that the defendant was in very poor financial condition and unemployed at the time of the robbery. The evidence was offered under *Rule 404(b)* as proof of motive, but the Court found the Rule inapplicable because "[b]eing poor is not a crime, wrong, or act" within the Rule. The poverty evidence in this case was not only of negligible probative value -- "almost everyone, poor or not, has a motive to get more money[, a]nd most people, rich or poor, do not steal to get it" -- but it also produced a high danger of unfair prejudice when the prosecutor effectively portrayed the defendant as both poor and feckless, not supporting his wife and children.

United States v. Weller, 238 F.3d 1215 (10th Cir. 2001) : In a bank manager's trial for embezzlement, the prosecution introduced evidence that the defendant had an empty bank account and "maxed out" credit cards prior to the incident and had substantial cash in the weeks following. The Court found no abuse of discretion in admission of the evidence. Although ordinarily evidence of the defendant's poverty is inadmissible to show a motive for crime, a

significant change in the defendant's financial status, as in this case, can be quite probative of the commission of a crime.

Shaps v. Provident Life & Acc. Ins. Co., 244 F.3d 876 (11th Cir. 2001) : In an action on a disability insurance policy, the Court held there was no abuse of discretion when the insurer was permitted to introduce evidence concerning the plaintiff's financial situation. The door was opened by counsel's remarks in his opening statement that the plaintiff had been expecting to receive her check from the defendant and had been relying on it to meet her needs, and by her testimony on direct about her inability to pay for treatment because her COBRA insurance had run out.

[94] Welfare Recipients

United States v. Jones, 72 F.3d 1324 (7th Cir. 1995) : Affirming convictions arising out of a counterfeiting scheme, the Court found no error in the admission of evidence that the defendants had received a small amount of public aid in the months prior to their arrests. The evidence was offered to establish the lack of a legitimate source of income for the $300 found in the pocket of one of the defendants when he was arrested in his home. The Court recognized that "testimony about a defendant's public aid history regrettably may pose a danger that the defendant will be stigmatized in the eyes of the jury," but "the source of the cash found on Mr. Jones' person after a day-long series of apparent sales of counterfeit was a significant issue in the case," and the evidence of public aid was especially probative because there was no genuine currency other than the $300 found in the defendants' home.

FOOTNOTES:

(n1)Footnote 1. *Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983)* .

(n2)Footnote 2. *United States v. Bland, 908 F.2d 471 (9th Cir. 1990)* .

(n3)Footnote 3. *United States v. Church, 955 F.2d 688 (11th Cir. 1992)* .

(n4)Footnote 4. *United States v. Hansen, 583 F.2d 325 (7th Cir. 1978)* .

(n5)Footnote 5. *United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980)* .

(n6)Footnote 6. *Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991)* .

(n7)Footnote 7. *United States v. Oreira, 29 F.3d 185 (5th Cir. 1994)* .

(n8)Footnote 8. *United States v. Carter, 969 F.2d 197 (6th Cir. 1992)* .

(n9)Footnote 9. *United States v. Jimenez, 214 F.3d 1095 (9th Cir. 2000)* .

(n10)Footnote 10. *United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999)* .

(n11)Footnote 11. *United States v. Mitchell, 172 F.3d 1104 (9th Cir. 1999)* .

(n12)Footnote 12. *United States v. Ellis, 147 F.3d 1131 (9th Cir. 1998)* .

(n13)Footnote 13. *Shahid v. City of Detroit, 889 F.2d 1543 (6th Cir. 1989)* .

(n14)Footnote 14. *United States v. Thompson, 615 F.2d 329 (5th Cir. 1980)* .

(n15)Footnote 15. *United States v. Riley, 550 F.2d 233 (5th Cir. 1977)* .

(n16)Footnote 16. *United States v. Mulder, 147 F.3d 703 (8th Cir. 1998)* .

(n17)Footnote 17. *United States v. Dees, 34 F.3d 838 (9th Cir. 1994)* .

(n18)Footnote 18. *United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994)* .

(n19)Footnote 19. *Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988)* .

(n20)Footnote 20. *Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983)* .

(n21)Footnote 21. *Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988)* .

(n22)Footnote 22. *Baker v. Delta Air Lines, Inc., 6 F.3d 632 (9th Cir. 1993)* .

(n23)Footnote 23. *Miller v. Fairchild Indus., 885 F.2d 498 (9th Cir. 1989)* .

(n24)Footnote 24. *Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986)* .

(n25)Footnote 25. *Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070 (5th Cir. 1986)* .

(n26)Footnote 26. *Koloda v. General Motors Parts Div., 716 F.2d 373 (6th Cir. 1983)* .

(n27)Footnote 27. *United States v. Driggs, 823 F.2d 52 (3d Cir. 1987)* .

(n28)Footnote 28. *United States v. Clifford, 704 F.2d 86 (3d Cir. 1983)* .

(n29)Footnote 29. *Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988)* .

(n30)Footnote 30. *United States v. Schiff, 612 F.2d 73 (2d Cir. 1979)* .

(n31)Footnote 31. *United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984)* .

(n32)Footnote 32. *Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989)* .

(n33)Footnote 33. *K-B Trucking Co. v. Riss Int'l Co., 763 F.2d 1148 (10th Cir. 1985)* .

(n34)Footnote 34. *United States v. Long, 574 F.2d 761 (3d Cir. 1978)* .

(n35)Footnote 35. *United States v. Lowe, 569 F.2d 1113 (10th Cir. 1978)* .

(n36)Footnote 36. *United States v. Werme, 939 F.2d 108 (3d Cir. 1991)* .

(n37)Footnote 37. *Government of Virgin Islands v. Mujahid, 990 F.2d 111 (3d Cir. 1993)* .

(n38)Footnote 38. *United States v. Frankenberry, 696 F.2d 239 (3d Cir. 1982)* .

(n39)Footnote 39. *United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989)* .

(n40)Footnote 40. *United States v. Christian, 786 F.2d 203 (6th Cir. 1986)* .

(n41)Footnote 41. *In re Air Crash Disaster, 803 F.2d 304 (7th Cir. 1986)* .

(n42)Footnote 42. *SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977)* .

(n43)Footnote 43. *Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991)* .

(n44)Footnote 44. *Tony Guiffre Distrib. Co. v. Washington Metro. Area Transit Auth., 740 F.2d 295 (4th Cir. 1984)* .

(n45)Footnote 45. *Ryan v. McDonough Power Equip. Co., 734 F.2d 385 (8th Cir. 1984)* .

(n46)Footnote 46. *United States v. Reevey, 364 F.3d 151 (4th Cir. 2004)* .

(n47)Footnote 47. *United States v. Hill, 322 F.3d 301 (4th Cir. 2003)* .

(n48)Footnote 48. *United States v. Morris, 79 F.3d 409 (5th Cir. 1996)* .

(n49)Footnote 49. *United States v. Valencia, 957 F.2d 1189 (5th Cir. 1992)* .

(n50)Footnote 50. *United States v. Moody, 903 F.2d 321 (5th Cir. 1990)* .

(n51)Footnote 51. *United States v. Perrone, 936 F.2d 1403 (2d Cir. 1991)* , *clarified*, *949 F.2d 36 (2d Cir. 1991)* .

(n52)Footnote 52. *United States v. Dillon, 870 F.2d 1125 (6th Cir. 1989)*

(n53)Footnote 53. *United States v. Lupino, 301 F.3d 642 (8th Cir. 2002)* .

(n54)Footnote 54. *United States v. Martinez, 681 F.2d 1248 (10th Cir. 1982)* .

(n55)Footnote 55. *United States v. Bein, 728 F.2d 107 (2d Cir. 1984)* .

(n56)Footnote 56. *United States v. Pina, 844 F.2d 1 (1st Cir. 1988)* .

(n57)Footnote 57. *United States v. Thomas, 86 F.3d 647 (7th Cir. 1996)* .

(n58)Footnote 58. *United States v. Edwards, 702 F.2d 529 (5th Cir. 1983)* .

(n59)Footnote 59. *United States v. Kizeart, 102 F.3d 320 (7th Cir. 1996)* .

(n60)Footnote 60. *United States v. Williams, 81 F.3d 1434 (7th Cir. 1996)* .

(n61)Footnote 61. *United States v. Ives, 609 F.2d 930 (9th Cir. 1979)* .

(n62)Footnote 62. *O'Dell v. Hercules, Inc., 904 F.2d 1194 (8th Cir. 1990)* .

(n63)Footnote 63. *Plummer v. Western Int'l Hotels Co., 656 F.2d 502 (9th Cir. 1981)* , annotated under *Rule 803(8)* "Administrative Findings -- Investigations -- Employment Cases," *§ 803.03[8][a][i][A]*.

(n64)Footnote 64. *Roy v. Austin Co., 194 F.3d 840 (7th Cir. 1999)* .

(n65)Footnote 65. *Kline v. City of Kansas City, Mo., Fire Dep't, 175 F.3d 660 (8th Cir. 1999)* .

(n66)Footnote 66. *Easley v. American Greetings Corp., 158 F.3d 974 (8th Cir. 1998)* .

(n67)Footnote 67. *Callanan v. Runyun, 75 F.3d 1293 (8th Cir. 1996)* .

(n68)Footnote 68. *Slathar v. Sather Trucking Corp., 78 F.3d 415 (8th Cir. 1996)* .

(n69)Footnote 69. *Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990)* .

(n70)Footnote 70. *Szeliga v. General Motors Corp., 728 F.2d 566 (1st Cir. 1984)* .

(n71)Footnote 71. *Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987)* .

(n72)Footnote 72. *756 F.2d 1322 (8th Cir. 1985)* .

(n73)Footnote 73. *Gilbert v. Cosco Inc., 989 F.2d 399 (10th Cir. 1993)* .

(n74)Footnote 74. *Hinds v. General Motors Corp., 988 F.2d 1039 (10th Cir. 1993)* .

(n75)Footnote 75. *United States v. Jones, 124 F.3d 781 (6th Cir. 1997)* .

(n76)Footnote 76. *United States v. Metzger, 778 F.2d 1195 (6th Cir. 1985)* .

(n77)Footnote 77. *United States v. Rackley, 742 F.2d 1266 (11th Cir. 1984)* .

(n78)Footnote 78. *Borough v. Duluth, M. & I.R. RR. Co., 762 F.2d 66 (8th Cir. 1985)* .

(n79)Footnote 79. *Patterson v. F.W. Woolworth Co., 786 F.2d 874 (8th Cir. 1986)* .

(n80)Footnote 80. *Cowens v. Siemens-Elema AB, 837 F.2d 817 (8th Cir. 1988)* .

(n81)Footnote 81. *Randall v. Warnaco, Inc., 677 F.2d 1226 (8th Cir. 1982)* .

(n82)Footnote 82. *Johnson v. United States, 780 F.2d 902 (11th Cir. 1986)* .

(n83)Footnote 83. *Nickerson v. G.D. Searle & Co., 900 F.2d 412 (1st Cir. 1990)* .

(n84)Footnote 84. *Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986)* .

(n85)Footnote 85. *United States v. Echavarria-Olarte, 904 F.2d 1391 (9th Cir. 1990)* .

(n86)Footnote 86. *United States v. Westbrook, 125 F.3d 996 (7th Cir. 1997)* .

(n87)Footnote 87. *United States v. Sargent, 98 F.3d 325 (7th Cir. 1996)* .

(n88)Footnote 88. *United States v. Irvin, 87 F.3d 860 (7th Cir. 1996)* .

(n89)Footnote 89. *United States v. Butler, 71 F.3d 243 (7th Cir. 1995)* .

(n90)Footnote 90. *United States v. Lemon, 239 F.3d 968 (8th Cir. 2001)* .

(n91)Footnote 91. *United States v. Sills, 120 F.3d 917 (8th Cir. 1997)* .

(n92)Footnote 92. *United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994)* .

(n93)Footnote 93. *United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000)* .

(n94)Footnote 94. *United States v. Hankey, 203 F.3d 1160 (9th Cir. 2000)* .

(n95)Footnote 95. *United States v. Easter, 66 F.3d 1018 (9th Cir. 1995)* .

(n96)Footnote 96. *United States v. Johnson, 952 F.2d 565 (1st Cir. 1991)* .

(n97)Footnote 97. *United States v. Parada-Talamantes, 32 F.3d 168 (5th Cir. 1994)* .

(n98)Footnote 98. *United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984)* .

(n99)Footnote 99. *United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985)* .

(n100)Footnote 100. *Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993)* .

(n101)Footnote 101. *United States v. Cavender, 228 F.3d 792 (7th Cir. 2000)* .

(n102)Footnote 102. *United States v. Santos, 201 F.3d 953 (7th Cir. 2000)* .

(n103)Footnote 103. *United States v. Balsam, 203 F.3d 72 (1st Cir. 2000)* .

(n104)Footnote 104. *United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994)* .

(n105)Footnote 105. *Taylor v. National R.R. Passenger Corp., 920 F.2d 1372 (7th Cir. 1990)* .

(n106)Footnote 106. *Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir. 1992)* .

(n107)Footnote 107. *Kinan v. City of Brockton, 876 F.2d 1029 (1st Cir. 1989)* .

(n108)Footnote 108. *Silva v. Showcase Cinemas Concessions, Inc., 736 F.2d 810 (1st Cir. 1984)* .

(n109)Footnote 109. *Brumley Estate v. Iowa Beef Processors, Inc., 704 F.2d 1351 (5th Cir. 1983)* .

(n110)Footnote 110. *Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978)* .

(n111)Footnote 111. *United States v. Ebner, 782 F.2d 1120 (2d Cir. 1986)* .

(n112)Footnote 112. *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492 (11th Cir. 1985)* .

(n113)Footnote 113. *Worsham v. A.H. Robins Co., 734 F.2d 676 (11th Cir. 1984)* .

(n114)Footnote 114. *United States v. Alwan, 279 F.3d 431 (7th Cir. 2002)* .

(n115)Footnote 115. *Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998)* .

(n116)Footnote 116. *Raysor v. Port Auth., 768 F.2d 34 (2d Cir. 1985)* .

(n117)Footnote 117. *United States v. Perry, 731 F.2d 985 (D.C. Cir. 1984)* .

(n118)Footnote 118. *United States v. Thomlinson, 897 F.2d 971 (8th Cir. 1990)* .

(n119)Footnote 119. *United States v. Kime, 99 F.3d 870 (8th Cir. 1996)* .

(n120)Footnote 120. *United States v. Ingle, 157 F.3d 1147 (8th Cir. 1998)* .

(n121)Footnote 121. *United States v. Davidson, 122 F.3d 531 (8th Cir. 1997)* .

(n122)Footnote 122. *United States v. Adames, 56 F.3d 737 (7th Cir. 1995)* .

(n123)Footnote 123. *Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984)* .

(n124)Footnote 124. *United States v. Gonzalez, 933 F.2d 417 (7th Cir. 1991)* .

(n125)Footnote 125. *United States v. Davis, 838 F.2d 909 (7th Cir. 1988)* .

(n126)Footnote 126. *United States v. Kime, 99 F.3d 870 (8th Cir. 1996)* .

(n127)Footnote 127. *United States v. Thomlinson, 897 F.2d 971 (8th Cir. 1990)* .

(n128)Footnote 128. *United States v. Allen, 787 F.2d 933 (4th Cir. 1986)* , *vacated on other grounds*, *479 U.S. 1077 (1987)* .

(n129)Footnote 129. E.g., *United States v. Pace, 10 F.3d 1106 (5th Cir. 1993)* (*supra*).

(n130)Footnote 130. *United States v. Farnsworth, 729 F.2d 1158 (8th Cir. 1984)* .

(n131)Footnote 131. *United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993)* .

(n132)Footnote 132. *United States v. Butcher, 557 F.2d 666 (9th Cir. 1977)* .

(n133)Footnote 133. *Wolfel v. Holbrook, 823 F.2d 970 (6th Cir. 1987)* .

(n134)Footnote 134. *Murphy v. Cincinnati Ins. Co., 772 F.2d 273 (6th Cir. 1985)* .

(n135)Footnote 135. *United States v. Feldman, 711 F.2d 758 (7th Cir. 1983)* .

(n136)Footnote 136. *United States v. Tucker, 773 F.2d 136 (7th Cir. 1985)* .

(n137)Footnote 137. *United States v. Lea, 249 F.3d 632 (7th Cir. 2001)* .

(n138)Footnote 138. *United States v. Robbins, 197 F.3d 829 (7th Cir. 1999)* .

(n139)Footnote 139. *United States v. Pulido, 69 F.3d 192 (7th Cir. 1995)* .

(n140)Footnote 140. *United States v. Falsia, 724 F.2d 1339 (9th Cir. 1983)* .

(n141)Footnote 141. *United States v. Solomon, 753 F.2d 1522 (9th Cir. 1985)* .

(n142)Footnote 142. *United States v. Miller, 874 F.2d 1255 (9th Cir. 1989)* .

(n143)Footnote 143. *United States v. Candoli, 870 F.2d 496 (9th Cir. 1989)* .

(n144)Footnote 144. *Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977)* .

(n145)Footnote 145. *United States v. Gomez-Norena, 908 F.2d 497 (9th Cir. 1990)* .

(n146)Footnote 146. *United States v. Vue, 13 F.3d 1206 (8th Cir. 1994)* .

(n147)Footnote 147. *United States v. One Feather, 702 F.2d 736 (8th Cir. 1983)* .

(n148)Footnote 148. *United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983)* .

(n149)Footnote 149. *Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985)* (en banc).

(n150)Footnote 150. *United States v. Saunders, 886 F.2d 56 (4th Cir. 1989)* .

(n151)Footnote 151. *United States v. One Feather, 702 F.2d 736 (8th Cir. 1983)* .

(n152)Footnote 152. *United States v. Ham, 998 F.2d 1247 (4th Cir. 1993)* .

(n153)Footnote 153. *United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977)* .

(n154)Footnote 154. *United States v. Frick, 588 F.2d 531 (5th Cir. 1979)* .

(n155)Footnote 155. *United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979)* , *vacated & remanded on other grounds*, *448 U.S. 902 (1980)* .

(n156)Footnote 156. *United States v. LaChapelle, 969 F.2d 632 (8th Cir. 1992)* .

(n157)Footnote 157. *United States v. Fawbush, 900 F.2d 150 (8th Cir. 1990)* .

(n158)Footnote 158. *United States v. Abodeely, 801 F.2d 1020 (8th Cir. 1986)* .

(n159)Footnote 159. *United States v. Bland, 908 F.2d 471 (9th Cir. 1990)* .

(n160)Footnote 160. *United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988)* .

(n161)Footnote 161. *Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985)* .

(n162)Footnote 162. *Hicks v. Six Flags Over Mid-America, 821 F.2d 1311 (8th Cir. 1987)* .

(n163)Footnote 163. *Mills v. Beech Aircraft Corp., 886 F.2d. 758 (5th Cir. 1989)* .

(n164)Footnote 164. *Soden v. Freightliner Corp., 714 F.2d 498 (5th Cir. 1983)* .

(n165)Footnote 165. *Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987)* .

(n166)Footnote 166. *Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992)* .

(n167)Footnote 167. *C.A. Assoc. v. Dow Chem. Co., 918 F.2d 1485 (10th Cir. 1990)* .

(n168)Footnote 168. *Marsee v. United States Tobacco Co., 639 F. Supp. 466 (W.D. Okla. 1986)* , *aff'd*, *866 F.2d 319 (10th Cir. 1989)* .

(n169)Footnote 169. *Romine v. Parman, 831 F.2d 944 (10th Cir. 1987)* .

(n170)Footnote 170. *United States v. Bass, 794 F.2d 1305 (8th Cir. 1986)* .

(n171)Footnote 171. *United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984)* .

(n172)Footnote 172. *United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979)* , *vacated & remanded on other grounds*, *448 U.S. 902 (1980)* .

(n173)Footnote 173. *Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133 (2000)* .

(n174)Footnote 174. *United States v. Di Pasquale, 740 F.2d 1282 (3d Cir. 1984)* .

(n175)Footnote 175. *Conway v. Chemical Leaman Tank Lines, Inc., 687 F.2d 108 (5th Cir. 1982)* .

(n176)Footnote 176. *United States v. Davis, 357 F.3d 726 (8th Cir. 2004), vacated on other grounds, 543 U.S. 1099 (2005)* .

(n177)Footnote 177. *Scaggs v. Consolidated Rail Corp., 6 F.3d 1290 (7th Cir. 1993)* .

(n178)Footnote 178. *United States v. Rewald, 889 F.2d 836 (9th Cir. 1989)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 403 RULE 403

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403.04 Legislative History

Advisory Committee's Note

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, *5 Kan. L. Rev. 1, 12*-15 (1956); Trautman, Logical or Legal Relevancy -- A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319-21. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in *California Evidence Code § 352* or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 **[Ed. Note: This is now Rule 105.]** and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate

factor.

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 403 RULE 403

1-403 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 403, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion,	**Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or**

or Waste of Time	Other Reasons
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading	The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the

ing the jury, or by con-sid-era-tions of un-due dela y, wast e of time , or need less pres enta-tion of cu-mu-lat-ive evid en-ce.	is-sues, mis-lead-ing the jury, un-due dela y, wast ing time , or need lessl y pres ent-ing cu-mu-lat-ive evid en-ce.

Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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1-403 Federal Rules of Evidence Manual Supp. to § 403.03

Supp. to § 403.03 Annotated Cases

[Go To Main]

[1] Abuse of Discretion [Go To Main]

[a] Admission of Evidence

[iv] Abuse of Discretion -- Admission of Evidence -- Criminal Acts

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006) : In a prosecution for obstructing securities law investigations by, inter alia, sending an e-mail that endorsed another e-mail regarding document retention, the defendant claimed that his endorsement e-mail was sent in a flurry of e-mails at the end of the day and he was not thinking of the then-pending investigation. The government cross-examined the defendant about one of the accompanying e-mails, which sought a disputed $2 million fee, in a way that intimated he had run afoul of the securities laws because the compensation was not disclosed in SEC filings. Vacating the conviction on other grounds, the Court held that evidence about the accompanying e-mail was relevant to show the defendant was contemplating significant, important issues around the time he sent the endorsement e-mail and to rebut his testimony implying that the fee dispute was a simple matter. However, the government's focus on the failure to make SEC disclosures simply "went too far" in creating the prospect that the jury might consider the evidence as further proof of the defendant's desire to obstruct the SEC in the pursuit of its regulatory responsibilities.

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) : The Court reversed a conviction for felon firearm possession and possession of a sawed-off shotgun because "the government's repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process." Although the defendant was never charged with any drug offenses, the government contended that some discussion of drugs was necessary for background and it would show the shotgun was possessed to protect a drug dealing enterprise. However, the prosecution repeatedly went beyond that purpose to inject inadmissible drug evidence, such as evidence of heroin dealing not connected with the defendant and evidence of the defendant's drug use problem, even though the Judge declared at least five times that the evidence was "too prejudicial." "Nevertheless, the District Court ultimately failed to prevent the rampant injection of inadmissible evidence into the trial and its single limiting instruction to the jury was

inadequate to cure the prejudice."

[viii] Abuse of Discretion -- Admission of Evidence -- Hearsay Offered for Background

United States v. Davis, 449 F.3d 842 (8th Cir. 2006) : In a prosecution for felon firearm possession, the government introduced the first page of the warrant issued in the case. The government argued that the face sheet of the warrant was introduced for the limited purpose of explaining why the officers were present at the residence where the gun was found. The Court found that while the face sheet was offered for a non-hearsay purpose, it should have been excluded under *Rule 403*. The face sheet of the warrant indicated that there was probable cause to believe that there were weapons at a specific residence and that the defendant lived there. "Since a key issue in the case was whether the house was Davis' residence, there was a danger that the face sheet could unduly influence the jury in its factfinding. ... Given the danger that the jury could be confused and that the prejudicial effect of the exhibit could outweigh its probative value, we conclude that it was an abuse of discretion to admit the face sheet of the warrant, particularly when Davis was willing to admit that the officers had a legal basis to search." The error was harmless, however.

[x] Abuse of Discretion -- Admission of Evidence -- Miscellaneous Civil Cases

Arlio v. Lively, 474 F.3d 46 (2d Cir. 2007) : A police officer sued the acting chief of the department, alleging that he had been disciplined in violation of his constitutional rights. The Court reversed a judgment for the plaintiff because evidence was presented that an arbitration panel had overturned the discipline and awarded the officer back pay. The evidence was irrelevant because the arbitration was based solely on the particulars of the union collective bargaining agreement and was not in any way an adjudication of constitutional claims. Furthermore, as an explanation of why the plaintiff was not seeking back wages, it was probative of a non-material issue, since "[l]ost wages were simply not an issue in the federal proceeding." In any event, the prejudicial effect of the evidence would outweigh any probative value, "as the jury might have felt a strong compulsion to conform their verdict to the conclusion of the Arbitration Board 'experts.' "

[xi] Abuse of Discretion -- Admission of Evidence -- Miscellaneous Prosecution Evidence

United States v. Massino, 546 F.3d 123 (2d Cir. 2008) : Affirming racketeering convictions, the Court held it was error (but harmless) to allow the government to pursue a line of questioning with a government witness (a former high-ranking member of a crime family) that was designed to "prompt the witness to declare that anyone linked to organized crime who is charged with a crime is guilty of that crime," as the potential for unfair prejudice substantially outweighed the probative value.

United States v. Klebig, 600 F.3d 700 (7th Cir. 2009) : The defendant was prosecuted for possession of an unregistered firearm (a rifle with its barrel sawed off and its stock missing) and an unregistered silencer (an automobile oil filter) after the items, along with more than 20 legal firearms, were found in his junk-filled house. Reversing, the Court held it was error to admit evidence of a sign on the defendant's front door that "nothing here is worth dying for," as it had no tendency to prove that the defendant knew the firearm was an illegal modified rifle or a legal modified pistol, or his intent to use the oil filter as an illegal silencer or a legal flash suppressor. Any slight relevance it might have was outweighed by the dangers of unfair prejudice and confusion of the issues. The Court also held it was error to admit an accumulation of evidence that made the defendant "appear to be a dangerous and perhaps unbalanced man, an oddball, perhaps a survivalist or a gun nut," and to permit presentation of evidence regarding his legal firearms in a way that played into jurors' apprehensions about guns. Finally, the Court found prosecutorial misconduct when in closing argument the government attorney demonstrated that the alleged silencer fit on to the sawed-off rifle, where there was no evidence in the record that tied the items together.

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) : The Court held that testimony that one defendant in a cocaine distribution conspiracy had appeared on the television shows "Crimestoppers" and "America's Most Wanted" was

improperly admitted, since it was unfairly prejudicial, telling the jurors to believe that the defendant was guilty of the charged offenses.

[b] Abuse of Discretion -- Exclusion of Evidence

[iii] Abuse of Discretion -- Exclusion of Evidence -- Employment Discrimination Cases

Mattenson v. Baxter Healthcare Corp., 438 F.3d 763 (7th Cir. 2006) : The plaintiff in an ADEA case, who was terminated just days before retirement benefits vested, claimed that all his performance evaluations had been satisfactory until the last. The defendant claimed that the plaintiff was terminated because he refused to comply with a "performance" plan, but the plaintiff argued that the plan was just a subterfuge to fire him. Reversing a judgment for the plaintiff, the Court held it was error to exclude evidence that the plaintiff had been placed on a performance plan five years previously, since that would have undermined his claim that the employer always fires employees it places on performance plans.

[iv] Abuse of Discretion -- Exclusion of Evidence -- Miscellaneous Cases

Henderson v. George Washington Univ., 449 F.3d 127 (D.C. Cir. 2006) : The plaintiff sued a doctor for malpractice in performing stomach-shrinking surgery, contending that a connection he added (called an anastomosis) was too wide for the surgery to be effective. Evidence that the doctor performed the same surgery in which the anastomosis was too wide on another patient, and the doctor's deposition testimony in which he said that he always used that same width for the anastomosis in every surgery, were excluded at trial on the grounds they were minimally probative, would prejudice the defendants' case, and would confuse the jury. Reversing a judgment for the defendant, the Court held it was an abuse of discretion to exclude the evidence. It found that the Judge "greatly overestimated the potential for prejudice and confusion, and seriously underestimated the probative value in light of appellant's need to impeach and rebut the case presented by appellees as well as to rehabilitate her expert witness." The evidence was probative because it provided direct proof of the width of the anastomosis in the plaintiff's surgery; the Judge mischaracterized the evidence as prejudicial when in fact the only "harm" caused to the defendant's case was that the evidence was probative; and the evidence could have been easily understood by the jury.

[2] Acquittals and Dismissals [Go To Main]

Munoz v. State Farm Lloyds of Texas, 522 F.3d 568 (5th Cir. 2008) : In an action on a fire insurance policy, the insurer defended on the ground that the plaintiffs had intentionally set the fire. Reversing a judgment for the plaintiffs, the Court held it was reversible error to admit evidence that a grand jury did not indict the husband for arson, as such evidence is highly prejudicial. Although the plaintiffs argued that the insurer had opened the door to the evidence by introducing evidence that the husband had failed a polygraph examination, which they said was per se inadmissible, the Court noted that *Daubert* governs the admissibility of polygraph examination results, that neither party alleged that the results in this case were improperly admitted under *Daubert*, and that the plaintiffs had not objected to the introduction of the results at trial. Therefore, there was no support for the contention that the polygraph evidence was inadmissible and the door was not opened to the evidence of non-indictment.

[2.1] Alternative Perpetrator Evidence [Go To Main]

United States v. Jordan, 485 F.3d 1214 (10th Cir. 2007) : The Court affirmed the defendant's conviction for the stabbing murder of a fellow inmate, finding no abuse of discretion (although "[i]n hindsight, we might have evaluated [the] proffer somewhat differently") in the exclusion of evidence proffered to support an argument that another inmate

was the perpetrator. The evidence -- that the other inmate had possessed shanks in the past, that he was near the victim ten minutes prior to the stabbing, and that there was unidentified DNA on the murder weapon -- failed sufficiently to establish "a non-speculative 'nexus' between the crime charged and the alleged perpetrator."

[3] Appellate Review Standard [Go To Main]

United States v. Awadallah, 436 F.3d 125 (2d Cir. 2006) : In a prosecution for perjury before a grand jury, the Trial Judge ruled *in limine* that the government could call grand jurors to testify about the defendant's physical condition and the objective conditions surrounding his testimony, but could not ask the grand jurors about their subjective impressions of the defendant's demeanor and appearance. Affirming on interlocutory appeal, the Court observed that "the Government has tried hundreds, if not thousands, of perjury cases without eliciting opinion evidence from a grand juror to prove knowledge," and "[n]one of our opinions indicate that a grand juror has ever previously been called in this Circuit to give such testimony." The Court concluded that it was "well within the broad discretion afforded" a Trial Judge to rule that grand juror testimony could be interpreted as giving the petit jurors advice on how to determine the central issue in the case. It emphasized that only rarely "and in extraordinarily compelling circumstances" will a Trial Judge's *Rule 403* rulings be reversed, and held that "[b]ecause the testimony, although relevant, indisputably has potential to be highly prejudicial, we cannot say that the district court's limitation on the testimony of grand jurors was arbitrary or irrational."

United States v. Cerno, 529 F.3d 926 (10th Cir. 2008) : Affirming a conviction for aggravated sexual abuse, the Court found no abuse of discretion in the admission of testimony that, upon returning home from a wake, the victim and other family members found the defendant passed out on a couch with his penis exposed while a pornographic videotape played on the television. The Trial Judge found that the evidence tended to impeach the defendant's testimony that drinking did not impair his judgment. The Court stated that "this is a close question and we may well have come to a different conclusion ourselves" but "our own view of the issue is not relevant under the applicable standard of review." The Court found the exposure evidence "had some relevance as impeachment by contradiction." And while the evidence was prejudicial, "it is not enough that the risk of unfair prejudice be greater than the probative value of the evidence; the danger of that evidence must *substantially* outweigh the evidence's probative value." The Court noted that in reviewing a decision under Rule 403, it gives the evidence "its maximum reasonable probative force and its minimum reasonable prejudicial value."

[4] Arbitration Decisions [Go To Main]

Arlio v. Lively, 474 F.3d 46 (2d Cir. 2007) : A police officer sued the acting chief of the department, alleging that he had been disciplined in violation of his constitutional rights. The Court reversed a judgment for the plaintiff because evidence was presented that an arbitration panel had overturned the discipline and awarded the officer back pay. The evidence was irrelevant because the arbitration was based solely on the particulars of the union collective bargaining agreement and was not in any way an adjudication of constitutional claims. Furthermore, as an explanation of why the plaintiff was not seeking back wages, it was probative of a non-material issue, since "[l]ost wages were simply not an issue in the federal proceeding." In any event, the prejudicial effect of the evidence would outweigh any probative value, "as the jury might have felt a strong compulsion to conform their verdict to the conclusion of the Arbitration Board 'experts.' "

[6] Balancing [Go To Main]

[b] Balancing -- Bounds of Discretion To Admit

United States v. Starnes, 583 F.3d 196 (3d Cir. 2009) : The Court affirmed convictions for violating EPA work-practice standards for handling disposal of asbestos-containing materials and making false representations, finding no abuse of discretion in the admission of testimony by an EPA technical coordinator regarding samples of ceiling material that contained unacceptable levels of asbestos, even though the samples were from a structure on the project site in which the defendants did not work and were taken a year after the conduct charged in the indictment. The government supported the introduction of the evidence by demonstrating that the ceilings in all the buildings on the site were made of the same materials and that no structural changes or significant renovations had been made.

United States v. Clark, 577 F.3d 273 (5th Cir. 2009) : The Court affirmed tax fraud convictions, finding no abuse of discretion in admitting evidence that the IRS audited the taxpayers whose returns the defendant prepared, and all taxpayers filed amended returns or agreed to deficiency assessments and were thereafter assessed additional tax liabilities. The evidence was probative of the materiality of the false information on the returns, and it was not unfairly prejudicial because there was nothing unfair about the inference that if the taxpayers had to make adjustments, it was due to the defendant's wrongdoing.

United States v. Caver, 470 F.3d 220 (6th Cir. 2006) : Affirming convictions for cocaine offenses, the Court found no plain error in the admission of various letters that two defendants wrote to coconspirators. The defendants were charged with obstruction of justice, and the letters could be construed as an on-going attempt to influence witnesses. Although the defendants complained that the letters contained foul language and derogatory terms for counsel and the criminal justice system, the Court found that any improper prejudice was slight, and in a case where the probative value was low and the prejudice was slight there was no plain error in admitting the evidence. In *United States v. Whittington, 455 F.3d 736 (6th Cir. 2006),* a prosecution for conspiracy to distribute cocaine base, the Trial Judge denied a defense motion *in limine* to exclude evidence from two officers that, at times when the defendant was unemployed, one officer found him with $500 cash and a cell phone and the other officer found him with $600 cash and a cell phone. While admitting the evidence, the Trial Judge required the government to question one officer without revealing that he was the defendant's parole officer. Affirming, the Court noted that in *United States v. Rey, 923 F.2d 1217 (6th Cir. 1991)* , it had held that a mobile phone, beeper, and answering machine did not tend to inflame the passions of a jury. It concluded that cash and a cell phone were similar neutral items.

[f] Balancing -- Generally

United States v. Cooper, 591 F.3d 582 (7th Cir. 2010) : In a prosecution for heroin distribution, the government was permitted to introduce evidence that a number of the defendant's customers died from heroin overdose. The Judge reasoned that the evidence was "relevant"; but nothing on the record indicated that the Judge had considered the risk of prejudice or the minimal probative value of the deaths to the question of drug distribution. The Court held that the Trial Court "erred by failing altogether to conduct a Rule 403 analysis, which was part of the process that it had no discretion to omit."

United States v. McCourt, 468 F.3d 1088 (8th Cir. 2006) : In a prosecution for attempted distribution and receipt of child pornography over the Internet, seven three-second video clips containing child pornography that were found on the defendant's computer were admitted. Affirming, the Court rejected a defense argument that the Judge had failed to conduct a *Rule 403* balancing in deciding whether to admit the video clips rather than the defendant's stipulations that they contained child pornography. Although the Judge did not enter into a lengthy analysis during the motion *in limine* conference, "the Trial Court's mere failure to make a record of its rule 403 weighing is not reversible error." Moreover, a more thorough balancing evaluation would not have changed the result because " *Rule 403* requires a preliminary showing of unfair prejudice before the need to balance the probative value of the evidence and its alternatives arises," and here there was no showing that the evidence was *unfairly* prejudicial. While video may be more prejudicial than still photographs, the Court concluded that "we see no reason here that the Government must limit its evidence to still images because McCourt did not so limit his collection."

United States v. Lyons, 472 F.3d 1055 (9th Cir. 2007) : Affirming convictions for mail fraud and money laundering arising from a telemarketing scheme, the Court held that the prejudicial effect of evidence that 80-90% of solicited funds went to telemarketers' fees did not substantially outweigh the probative value of the evidence. The evidence tended to show that the charities for which money was solicited spent virtually no money on charitable activities promised to donors.

United States v. Smith, 459 F.3d 1276 (11th Cir. 2006) : Affirming convictions for producing and possessing child pornography, the Court found no abuse of discretion in admitting photographs of the defendant naked by himself; the defendant with other women engaged in sexually explicit conduct; and other women striking sexually explicit poses. The Court recognized that balancing under *Rule 403* "should be struck in favor of admissibility," so Judges should "look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." Here, although there was a possibility of prejudice, the jury could have evaluated the evidence as probative of identity, knowledge, and sexual content. Furthermore, while "the nature of the crime itself, and therefore the nature of the evidence tending to prove it, is emotionally charged," this "does not mean that the prosecution must be deprived of its most probative evidence," and that "this is particularly true when the Trial Court ... offers limiting instructions as to the proper purpose of admitting evidence."

[9.1] Circumstantial Evidence [Go To Main]

United States v. Williams, 445 F.3d 724 (4th Cir. 2006) : In a trial for felon firearm possession, the prosecution proved the defendant's possession of the weapon (which was never found) through evidence linking the defendant to a murder. Arguing that the evidence of the uncharged crime was unfairly prejudicial, the defendant attempted to distinguish this case from others in which a shooting was used to prove weapons charges on the ground that here the evidence connecting him to the murder was purely circumstantial, while in the other cases the evidence linking the accused to a murder was overwhelming. The Court affirmed the conviction, noting that "circumstantial evidence is not inherently less valuable or less probative than direct evidence" and that there is no basis in *Rule 403* for applying a heightened standard for circumstantial evidence. It further noted, however, that both the circumstantial nature of the evidence and the fact it pointed to an uncharged murder bore on the *Rule 403* calculus of probative value and prejudicial effect. It concluded that the Judge's balancing here was not an abuse of discretion.

[10] Civil Rights Cases [Go To Main]

[a] Arrestee's or Prisoner's Evidence

Shepherd v. Dallas County, 591 F.3d 445 (5th Cir. 2009) : The Court affirmed a judgment for a pretrial detainee who sued the county alleging that he was improperly denied pills needed to ameliorate chronic hypertension, finding no abuse of discretion in the admission of a Department of Justice report regarding the conditions at the jail and the County's provision of medical care. The credibility of the authors of the report was for the jury to decide, the relevance of the report could not be "seriously doubted" given that the County did not challenge the findings in meetings with the Department in Washington, and the report was not unfairly prejudicial.

[c] Civil Rights Cases -- Other Evidence

Nolan v. Memphis City Schools, 589 F.3d 257 (6th Cir. 2009) : The Court affirmed a judgment for defendants in an action by a high school basketball player and his father who alleged excessive use of corporal punishment against the player. It found no abuse of discretion in the Judge's refusal to allow the plaintiffs to recall the school superintendent to rebut testimony that no one other than the plaintiffs ever complained about the basketball coaches. The testimony that

the superintendent would have given was on the subject of sexual harassment as opposed to corporal punishment and thus was properly excluded under Rule 403.

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010) : Affirming a judgment for the plaintiff in an action for sex discrimination in housing, the Court found no abuse of discretion in the admission of evidence regarding sexual harassment committed by the defendant landlord against other tenants. The Court found that the evidence was sufficiently closely related to the circumstances and theory of the case, and that the Judge had exercised discretion in excluding testimony from another former tenant as being too remote. The Court also found no abuse of discretion in admitting a probable cause determination made in the case by a state agency, particularly because the jury was instructed that it, not the agency, was responsible for determining if the plaintiff had proved her case.

[11] Codefendant's or Cooperating Witness' Guilty Plea or Immunity [Go To Main]

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) : In a False Claims Act case arising from a bid-rigging conspiracy, the Court held there was no abuse of discretion in admitting one defendant's guilty plea to violating the Sherman Act by engaging in the conspiracy, and the accompanying memorandum, which explained the roles of the other defendants. Because this was a civil case, the guilty plea could be admitted against persons other than the pleader (i.e., the other defendants) to prove any fact essential to sustain the judgment, including the facts stated in the memorandum. To avoid prejudice to the other defendants in the FCA case, the Judge redacted the names of the other conspirators from the criminal case caption and the memorandum and instructed the jury that the fact of the defendant's guilty plea did not permit any inference against the others.

[13] Collateral Inquiries [Go To Main]

Olson v. Ford Motor Co., 481 F.3d 619 (8th Cir. 2007) : The plaintiff, whose decedent was killed when he lost control of his Ford Explorer, sued the manufacturer alleging that a defect in the cruise control caused a sudden acceleration that the driver could not overcome even with hard braking. Affirming a judgment for the manufacturer, the Court held there was no abuse of discretion when the plaintiff was not permitted to offer testimony from two witnesses who had experienced difficulty braking when the Explorers they were driving suddenly accelerated. The probative value of the testimony was outweighed by the danger that it would lead to mini-trials regarding the other incidents, diverting the jury's attention from the issues in the case.

[16] Confusing Evidence [Go To Main]

[a] Civil Cases

[i] Civil Rights and Employment Discrimination Cases

Torres-Arroyo v. Rullan, 436 F.3d 1 (1st Cir. 2006) : In an action by former contractors with the Puerto Rican Correctional Health Program, who alleged that nonrenewal of their contracts was due to political discrimination, the Court found no abuse of discretion in the exclusion of documents from a long-running inmate class action case, which had resulted in certain duties being assigned to the contractors. While the documents provided relevant background information for the political discrimination claims, the Court noted that relevance "is a condition precedent to admissibility, not an ironclad guarantee of admissibility." The documents might have erroneously led the jury to draw unwarranted inferences concerning an official's capacity to make contract renewal determinations, and the plaintiffs' arguments for admitting the documents "indicate[d] that they wished to introduce them precisely for these (improper)

purposes." Accordingly, there was "a legitimate risk that the jury might have been confused about the import of the proffered documents."

Suarez v. Town of Ogden Dunes, 581 F.3d 591 (7th Cir. 2009) : The Court affirmed a judgment for police officers sued by a mother and her son who alleged that the officers used excessive force after entering their home to make arrests. It found no abuse of discretion in the exclusion of recorded conversations concerning a police officer's decision to seek a search warrant for the arrestees' home, where the sole issue for the jury was whether the officers used excessive force after entering the home, not whether they had probable cause to enter. The Judge admitted the recording beginning with the entry into the home, but found that the earlier conversations would engender confusion.

[iii] Confusing Evidence -- Civil Cases -- Miscellaneous Cases

Galarneau v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 504 F.3d 189 (1st Cir. 2007) : The Court affirmed a judgment for a stockbroker who sued her former brokerage firm for defamation in a notice filed with the National Association of Securities Dealers in which the firm explained the termination of the broker. The Court found no abuse of discretion in the exclusion of evidence of communications between the broker's counsel and the firm's counsel with respect to the language that the firm proposed to use in the notice. Although the evidence was probative of both parties' contentions as to liability, it would likely require testimony from the attorneys as to the motivations behind the broker's proposed language and the firm's refusal to adopt it, which could well be more confusing than probative.

R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper, 462 F.3d 690 (7th Cir. 2006) : In an action alleging that a discounter violated trademarks by reimporting cigarettes originally sold abroad, the defendant counterclaimed for antitrust violations. Affirming judgments for the plaintiff, the Court found no abuse of discretion in the exclusion of evidence that the defendant's retail rivals and the plaintiff intended to deal it a fatal blow. Intent is not an issue in a Robinson-Patman Act claim: a bad intent is not part of the claimant's *prima facie* case and a good intent does not excuse price discrimination. Even if the evidence were marginally relevant to some issue, it would likely confuse the jury "who, not being professional economists, may not have understood that markets respond to deeds rather than thoughts or hopes or words."

Cincinnati Ins. Co. v. Bluewood, Inc., 560 F.3d 798 (8th Cir. 2009) : Affirming a judgment for an apartment complex manager against a commercial property insurer in an action for breach of contract and unreasonable refusal to pay in connection with water damage to apartments, the Court found no abuse of discretion in excluding evidence regarding the fair market value of the damaged property before and after the loss, given the fact that the jury was asked to award damages on the basis of replacement cost minus depreciation (the formula under the insurance policy).

[iv] Confusing Evidence -- Civil Cases -- Product Liability and Toxic Tort Cases

Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007) : The plaintiff's decedent was killed when he attempted to stop a Dodge Ram from rolling down a driveway after his two-year-old grandson, who had been left alone in the truck with the key in the ignition and the engine running, apparently shifted the gear out of park. In an action against the manufacturer, the plaintiff alleged that the truck was defective because it did not have a brake-shift interlock device requiring the brake pedal to be depressed in order to shift out of park. Affirming a judgment for the defendant, the Court found no abuse of discretion in the exclusion of evidence that the defendant had voluntarily retrofitted Jeeps with BSI devices. Given that the Jeep-retrofit evidence involved an entirely different vehicle, its probative value for negligence and strict liability claims was minimal, and was substantially outweighed by dangers of unfair prejudice, confusion of the issues, and misleading the jury.

[b] Confusing Evidence -- Criminal Cases

United States v. St. Pierre, 599 F.3d 19 (1st Cir. 2010) : The Court affirmed tax evasion convictions, finding no abuse

of discretion in the exclusion of evidence regarding the standard of care accountants owed to the defendant. The government's evidence allowed the jury to find that the defendant had acted against warnings and used accounts not disclosed to the accountants, that the accountants were unaware of most of what was occurring, and that the defendant created false documents to cover her tracks. "By contrast, St. Pierre's proposed accounting standards evidence, by shifting the focus to whether the accountants were doing a good job, did have a potential to confuse and mislead a jury - precisely because her accountants' failure to prevent the fraud would not be a defense." In *United States v. Ahrendt, 560 F.3d 69 (1st Cir. 2009)* , the Court affirmed a conviction for cocaine conspiracy, finding no abuse of discretion in the exclusion of expert testimony that the defendant (whose competency was questionable) viewed drug use as "sacramental consumption." The testimony about the defendant's beliefs in a higher law was not probative of his ability to form the requisite intent for conviction on a conspiracy charge, and it had a significant potential to confuse or mislead the jury into thinking that the defendant's " 'idiosyncratic philosophy amounts to a form of temporary insanity or ameliorates the offense.' " In *United States v. Anthony, 545 F.3d 60 (1st Cir. 2008)* , the Court affirmed a conviction for tax evasion, finding no abuse of discretion when the defendant was not permitted to introduce legal materials on which he claimed to have relied in forming his good-faith belief that he did not have a duty to pay taxes. The probative value of the documents themselves was limited because the defendant's testimony listing, summarizing, and reading from the documents was more probative of his beliefs. The risks of confusion from admitting them was high because, in addition to the usual risk with legal materials that the jury might substitute its own view of the law, many of the materials were old or outdated, and the jury would likely be confused when the defendant claimed that careful study of the materials over a period of years was the basis for a view of the law that was at odds with the law instructed by the Judge. In *United States v. Brown, 500 F.3d 48 (1st Cir. 2007)* , the defendant was arrested for drug offenses based on a tip from a confidential informant. Affirming, the Court held there was no abuse of discretion in excluding evidence about a tip regarding the defendant that the informant had provided three weeks earlier. Because the government's case made no reference to the earlier events, any slight value that the testimony might possess regarding the informant's reliability was substantially outweighed by the danger of confusing the issues and misleading the jury.

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) : The Court affirmed mail and wire fraud convictions arising from submission of false claims to a mass tort settlement, finding no abuse of discretion in the exclusion of exhibits purportedly showing that other attorneys also represented fraudulent claimants, as the evidence had no bearing on whether the defendant had actual knowledge of the fraud or was deliberately indifferent to the fraud, and so was likely to confuse the jury and waste time.

United States v. Winkle, 477 F.3d 407 (6th Cir. 2007) : Investigation of the check-kiting scheme for which the defendant was convicted had led to discovery of long-running embezzlement by an officer of one of the affected banks. The defendant attempted to introduce an FDIC report regarding the failure of that bank, as minimizing his involvement and "pointing the causative finger" at others, but the Court found no abuse of discretion in exclusion of the report. The report had at most slight probative value on the issues in this case and presented "a danger of confusing the jury by presenting it with information about an entirely different crime in an already complicated case."

United States v. Savage, 505 F.3d 754 (7th Cir. 2007) : The defendant, charged with crack cocaine distribution, sought to offer threatening letters sent to him by his codefendant after the date of the drug purchase as evidence that he had been coerced into committing the offense. Affirming, the Court found no abuse of discretion in excluding the letters. "The threats occurred well after the drug deal, which, though not a dispositive factor, lessens the probative value of the letters." More importantly, because the threats were made at a time when the defendant was cooperating with the government against his codefendant, the jury may have been confused whether the codefendant was coercing the defendant to do the drug deal or to end the cooperation. In *United States v. Dabney, 498 F.3d 455 (7th Cir. 2007)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when the Judge admitted the defendant's statement in a state court proceeding admitting possession of the gun in question, but excluded the defendant's state court guilty plea. The Court reasoned that "[t]he district court diminished any possibility of confusion regarding the separate state and federal judicial proceedings by taking the unnecessary precaution of excluding any reference to the fact that Dabney's statements were made during a guilty plea hearing."

United States v. Gustafson, 528 F.3d 587 (8th Cir. 2008) : The Court affirmed convictions for failing to file tax returns, finding no abuse of discretion in excluding various documents the defendants offered to support their claim of a good faith belief that they were not required to file tax returns. The documents included an entry from *Am. Jur.*, documents discussing Supreme Court decisions, and documents defining terms used in certain tax statutes. The Court concluded that the documents were cumulative of testimony offered by the defendants and, to the extent that the documents were legal materials, they would have a high potential to confuse the jury.

United States v. Hinkson, 585 F.3d 1247 (9th Cir. 2009) (en banc): In a prosecution for soliciting the murder of three officials, a witness who claimed the defendant had solicited him to do the murders stated on cross examination that a medal on his lapel was a Purple Heart and, when defense counsel showed him an official letter saying that his military file did not list him as entitled to any decorations, produced a "replacement" form stating he had been awarded several medals, including a Purple Heart. Later, the Judge, saying that a mistake had been made, instructed the jury that it should completely disregard all testimony regarding the medal. When further official records evidence became available, including some indicating the witness had not been awarded any medals, the Judge permitted defense counsel to re-open the cross-examination and to inquire about the witness' military record but cautioned that extrinsic evidence would be excluded under Rule 608(b). Defense counsel chose not to re-open cross-examination. Affirming denial of the defendant's new trial motion, the *en banc* Court found no abuse of discretion in excluding the extrinsic evidence under Rule 403. The limited probative value of the evidence, to impeach testimony about the Purple Heart medal that the jury had already been told to disregard, was substantially outweighed by the time it would take to authenticate and explain the military file (which the Judge had found facially indecipherable) and by the risk of confusing the jury with the tangential evidence. Four Judges, dissenting, argued that it was an abuse of discretion to exclude documentary evidence that would have contradicted the witness' claim on the stand that he was a decorated combat veteran and to deny a new trial motion based on the defendant's discovery after trial of new evidence conclusively establishing that the witness had lied.

United States v. Oldbear, 568 F.3d 814 (10th Cir. 2009) : Affirming the conviction of an administrative assistant in tribal offices for embezzling from a tribal emergency assistance program, the Court found no abuse of discretion in the exclusion of testimony from three witnesses that they also received emergency assistance funds for similar expenses. Even if the evidence were relevant, this "attempt to establish an 'everybody-is-doing-it defense,' " would serve only to sidetrack the jury into tangential factual disputes.

[17] Connection Not Established [Go To Main]

United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007) : Reversing a conviction arising from participation in an insurance fraud scheme, the Court found an abuse of discretion in the admission of testimony by the cooperating witness as to his and others' knowledge of the fraud, which the government contended was circumstantial evidence of what the defendant knew. In the Court's view, evidence regarding the knowledge of individuals other than the defendant should be admitted only if there is some other evidence in the record -- concerning, for example, the nature of the fraud or the relationship of the parties -- from which to conclude that the defendant would have had the same knowledge. Here, the required connection was not established, as there was no evidence that the knowledge of others had been communicated to the defendant, and much of the testimony regarding knowledge of the fraud was speculative. The limited probative value of the testimony was substantially outweighed by the risk of unfair prejudice.

[19] Consciousness of Guilt -- Criminal Cases [Go To Main]

[a] False Statements and Suppression of Evidence

United States v. Kemp, 500 F.3d 257 (3d Cir. 2007) : The Court affirmed convictions in a public corruption case, finding no abuse of discretion in the admission of evidence disproving claims of great wealth that the defendant had made in grand jury testimony. The defendant's claims had been made to support an argument that he would not deign to involve himself in the paltry corruption alleged in the case, and the Court held that the falsity of the claims tended to show his consciousness of guilt of the underlying charges. The high probative value of the evidence was not substantially outweighed by any prejudicial effect.

[b] Consciousness of Guilt -- Criminal Cases -- Flight

[i] Flight Instructions

United States v. Mundy, 539 F.3d 154 (2d Cir. 2008) : The defendant in a drug and firearms case claimed that he had sublet the apartment in which he and his codefendant were arrested to another, who sublet it to the codefendant, and that the drugs found in the apartment belonged to the codefendant. Affirming, the Court found no abuse of discretion in the failure to give the defendant's requested instruction that the jury could infer his codefendant's consciousness of guilt from his attempt to flee when the police entered, as the circumstances supported other inferences as well. The Court noted that although the instruction was denied, the defense was permitted to comment on the codefendant's attempted flight, and it suggested that the better practice in most cases was to rely on argument and avoid the instruction.

United States v. Webster, 442 F.3d 1065 (8th Cir. 2006) : When officers attempted a traffic stop, the defendant sped away; when they finally succeeded in stopping him, they found a large plastic bag of marijuana and a pistol on the floor in front of the driver's seat. At his trial for felon firearm possession, the Judge instructed that the jury could consider flight as evidence of consciousness of guilt. The defendant argued that the instruction allowed the jury to infer consciousness of guild with respect to the charged firearm possession when the evidence suggested that he had other reasons to flee, i.e., that he had illegal drugs in the car and had violated a traffic law. Affirming, the Court found no error in the instruction, since it directed the jury to consider all the evidence in the case and determine what significance, if any, to give to the flight evidence; it reminded the jury that there were any number of reasons for flight "fully consistent with innocence"; and the jury heard the defendant's evidence on other possible motives for flight.

United States v. Williams, 541 F.3d 1087 (11th Cir. 2008) : A distribution amount of cocaine was found in the defendant's vehicle after a high-speed chase, which occurred when an officer -- aware of outstanding warrants for the defendant's arrest -- pulled up behind the defendant, and the defendant responded by taking off at a high speed. The defendant argued that it was error to give a flight instruction to the jury, since a reasonable juror could not have inferred the defendant's consciousness of guilt concerning the crime charged as opposed to his more generalized consciousness of guilt based on his knowledge of outstanding warrants for his arrest. Affirming, the Court found no error, as the jury was "expressly instructed ... that it could take into consideration Defendant's flight from the police as circumstantial evidence of guilt *only if* it found, beyond a reasonable doubt, that he fled to avoid the charged crime." (Emphasis in original.)

[iii] Consciousness of Guilt -- Criminal Cases -- Flight -- Miscellaneous Cases

United States v. Benedetti, 433 F.3d 111 (1st Cir. 2005) : The defendant, indicted for felon firearm possession, promised through his attorney to self-surrender but did not appear and was a fugitive for four years in Florida. The Trial Judge ruled *in limine* that the flight evidence was inadmissible on the government's case in chief, but admitted it during the defense case and on the government's rebuttal, after the defense emphasized that the events to which prosecution witnesses testified had occurred almost five years previously and presented exculpatory evidence from the defendant's ex-wife and his friend. Affirming, the Court found no abuse of discretion, since the Judge's initial calculus that the prejudicial effect of the evidence outweighed its probative effect was properly adjusted when the evidence became relevant to rebut an implication of trumped-up charges and to impeach the exculpatory witnesses who would normally have been expected to come forward immediately if they knew their friend had been falsely accused.

United States v. Al-Sadawi, 432 F.3d 419 (2d Cir. 2005) : In a prosecution for currency violations, the Court held it was error (but harmless) to admit the government's flight evidence. The evidence showed that the defendant's wife attempted to obtain passports and airline tickets around the time that the defendant was complying with a grand jury subpoena. The Court held that the evidence failed to connect the defendant to his wife's activity: "While it may be possible that Al-Sadawi instructed his wife to obtain a different passport and purchase tickets to assist him to flee prosecution, this was not demonstrated and we have held that the flight evidence must provide the jury with more than an opportunity for mere conjecture and speculation." Furthermore, the defendant had known for a long time that he was under government surveillance, yet during that period "he did nothing consistent with an intention to flee." Finally, when the defendant was arrested about an hour before the scheduled flight was to depart, there was no evidence that he had bags packed or a ticket in his possession.

United States v. Johnson, 535 F.3d 892 (8th Cir. 2008) : The Court affirmed a conviction for drug and weapons offenses, finding no abuse of discretion in admitting evidence that a marked police vehicle had followed him after a controlled buy, he had not stopped his car when the cruiser activated its siren but only when he collided with another vehicle and injured its driver, and he had fled the scene on foot. The evidence supported all the necessary inferences for consciousness of guilt, as well as providing context for connecting evidence from the controlled buy that was found on him when apprehended after the transaction. Any prejudice from the evidence did not substantially outweigh its probative value.

[c] Consciousness of Guilt -- Criminal Cases -- Other Evidence

United States v. Mangual-Santiago, 562 F.3d 411 (1st Cir. 2009) : The Court affirmed convictions for drug and money laundering conspiracies, holding that evidence of a gun, drugs, a scale, and cash found in an apartment along with the defendant was evidence of the crime charged and was therefore admissible. But, it held that evidence of drugs found with the defendant when he was arrested four years after the charged conspiracy ended was not admissible to prove "consciousness of guilt." The Court could see "no relation between the drugs and Mangual's consciousness of guilt." Any error was harmless, however, because the jury was instructed not to consider the drug evidence for the purpose of determining the defendant's guilt.

United States v. Lentz, 524 F.3d 501 (4th Cir. 2008) : The defendant, arrested for murder, had consulted with another inmate about hiring a hit man to murder some witnesses. In a recorded conversation with his attorney, the defendant asked questions to check on the other inmate's reliability in the scheme. Affirming, the Court found no abuse of discretion in admitting the recorded conversation over a Rule 403 objection, as it was highly probative in demonstrating the defendant's consciousness of guilt, and there was no risk of unfair prejudice that would substantially outweigh the probative value.

United States v. White, 563 F.3d 184 (6th Cir. 2009) : The Court affirmed a conviction for conspiracy to distribute cocaine, finding no abuse of discretion in admitting evidence that the defendant took a grand jury witness to a lawyer to administer a polygraph test to see if she snitched on him to the government. The evidence was admissible to show consciousness of guilt. In *United States v. Cody, 498 F.3d 582 (6th Cir. 2007)* , the defendant appealed from convictions related to a robbery, contending that it was error to admit a statement he made to police that he was considering suicide as an alternative to going to prison for what he had done. The Court found that this evidence was properly admitted to prove consciousness of guilt -- "roughly analogous" to evidence of flight. Under the circumstances, the defendant's statement was probative of consciousness of guilt because it was made while under arrest for the crime charged, and it was not unduly prejudicial because there was nothing in it that would have inflamed the jury: "It might have equally made him appear to be a more sympathetic character."

United States v. Dodds, 569 F.3d 336 (7th Cir. 2009) : Affirming a felon-firearm conviction, the Court found no error in admitting evidence that the defendant did not give his legal name to police when he was arrested. He had been

convicted of two felonies under that name, so the evidence was probative of his consciousness of guilt, as he may have hidden his legal name to "disguise his firearms disability."

United States v. El-Alamin, 574 F.3d 915 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when a flight instruction was given. Although the defendant may have had other possible reasons for fleeing from police, the flight instruction was proper, when the defendant had been standing still until he saw the search team, at which time he began to run. In *United States v. Abdul-Aziz, 486 F.3d 471 (8th Cir. 2007)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of evidence that the defendant had said to an agent executing a search warrant that "officers cold not lock him up forever and that when he gets out somebody will be sorry." The probative value of the evidence to show the defendant's consciousness of guilt was not substantially outweighed by the danger of unfair prejudice. In *United States v. McAtee, 481 F.3d 1099 (8th Cir. 2007)* , the Court affirmed a conviction for attempting to manufacture methamphetamine, finding no abuse of discretion when the defendant's statement, made to a police officer shortly after being arrested, that now he was "fucked" was admitted. While an individual may make such a statement simply on the basis of being arrested, "it is just as likely that the sentiment reflected McAtee's consciousness of guilt." As to prejudice, "there is no reason to believe that the introduction of a single profanity would have swayed the jury improperly by leading them to believe that McAtee was therefore guilty of the offenses charged."

[d] Consciousness of Guilt -- Criminal Cases -- Threats to Witnesses

United States v. Burnett, 579 F.3d 129 (1st Cir. 2009) : The Court affirmed drug and firearms convictions, finding no abuse of discretion in admitting evidence that the defendant made a death threat against his former girlfriend and her daughter. The evidence tended to prove that the defendant was going to great lengths to try to keep damaging evidence out of his trial, and also explained the girlfriend's motive for testifying against the defendant.

United States v. Calabrese, 572 F.3d 362 (7th Cir. 2009) : The Court affirmed robbery and firearm convictions, finding no abuse of discretion when an audiotape in which the defendant threatened a witness was admitted to show consciousness of guilt. The Court stated: "There's just not much to the argument that the conversation lacked relevance because it didn't explicitly refer to one of the crimes at issue. As a practical matter, specifics were unlikely to come up because Calabrese was worried about a wire. And the possibility that they were talking about another crime only made the conversation incrementally less relevant, not irrelevant altogether."

United States v. Begay, 567 F.3d 540 (9th Cir. 2009) : The Court affirmed a conviction for using a firearm in relation to a crime of violence, finding no error in the admission of evidence that the defendant intimidated two of the witnesses to the crime. "[A] defendant's threats against a witness are admissible to show consciousness of guilt," and there was no error in the conclusion that the probative value of the threats outweighed any unfair prejudice.

[20] Conviction Offered in Civil Case [Go To Main]

Doe v. Smith, 470 F.3d 331 (7th Cir. 2006) : In a suit for alleged child molestation by a school official, evidence was admitted that the child had been convicted of three felonies, together with evidence of the nature of the felonies, the sentence for each, and the length of incarcerations and probation. Rejecting the plaintiffs' argument that the evidence was racially inflammatory and would confuse the jury, the Court found no error, as the evidence was relevant to rebut the claim that the child's post-traumatic stress disorder was due to the abuse.

[21.1] Criminal Record [Go To Main]

United States v. Rose, 522 F.3d 710 (6th Cir. 2008) : Affirming a conviction for selling a firearm to a known felon, the Court held that evidence that the defendant and the man to whom he sold a firearm were in prison together was relevant to prove that the defendant knew the other man was a convicted felon, and the probative value of the evidence significantly outweighed any prejudice that would arise from the jury's learning that the defendant had been imprisoned.

[23] Cumulative Evidence [Go To Main]

[a] Civil Cases

Olson v. Ford Motor Co., 481 F.3d 619 (8th Cir. 2007) : The plaintiff, whose decedent was killed when he lost control of his Ford Explorer, sued the manufacturer alleging that a defect in the cruise control caused a sudden acceleration that the driver could not overcome even with hard braking. Affirming a judgment for the manufacturer, the Court held there was no abuse of discretion when the plaintiff was not permitted to offer testimony from two witnesses who had experienced difficulty braking when the Explorers they were driving suddenly accelerated. The probative value of the testimony was outweighed by the danger that it would lead to mini-trials regarding the other incidents, diverting the jury's attention from the issues in the case, and the evidence was cumulative of testimony by an expert explaining his difficulty in bringing an accelerating Explorer under control by braking and the reasons for that difficulty.

[b] Cumulative Evidence -- Criminal Cases

United States v. Frabizio, 459 F.3d 80 (1st Cir. 2006) : The Court reversed a pre-trial order excluding three photographs containing child pornography from jury consideration, finding an abuse of discretion when the Trial Court failed to "properly weigh its concerns about cumulativeness against the probative value of the evidence."

United States v. Fields, 483 F.3d 313 (5th Cir. 2007) : In a capital murder prosecution, the Court found no abuse of discretion in the admission of photos of the victim's body, showing it in an advanced state of decomposition. Most of the 19 crime-scene photos were relevant to rebut the defendant's contention that there was little physical evidence connecting him to the murder, while others were probative to corroborate witnesses who testified that the defendant had dragged the body, and others helped explain to the jury why the body was not found until weeks after the murder. The 13 autopsy photos "helped the jury understand the medical examiner's testimony" and supported the government's theory of the cause of death. The 32 photos were not cumulative because many photos had different relevance from other photos; furthermore, the Court noted that Rule 403 "does not ban per se all cumulative evidence" as "it is not required that each piece of evidence admitted have an entirely unique theory of relevancy." Finally, the marginal prejudice of any particular photo was trivial, given the fact that most of the photos were clearly admissible, so a replication of the same gruesome scene in another photo could not have had much impact on the jury.

United States v. Lloyd, 462 F.3d 510 (6th Cir. 2006) : Affirming a bank robbery conviction, the Court found no abuse of discretion in the admission of a tape recording of the 911 calls from the bank during and immediately after the robbery. Although the information in the tapes was presented through testimony of the bank employees, thus lessening the tapes' probative value, the emotions evidenced in the employees' voices on the tape were quite unlikely to so incense and inflame the jury that it would convict simply to punish someone for the horrors suffered by the employees.

[23.1] Death Penalty Cases [Go To Main]

United States v. Pepin, 514 F.3d 193 (2d Cir. 2008) : In a prosecution for murders committed while engaged in drug trafficking, for which the government sought the death penalty, the Trial Judge granted pretrial motions to exclude evidence at the penalty phase of the defendant's " 'continuing pattern of violence,' including 'child abuse' " and his prior conviction for child endangerment and related behavior, as well as photographs of the victims' dismembered bodies at

either the guilt phase or the penalty phase. On interlocutory appeal, the Court held that, although the Rules of Evidence do not apply to sentencing proceedings, the federal death penalty act, *18 U.S.C. § 3593(c)*, gives the Trial Judge discretion to exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." The Court found no abuse of discretion in the exclusion of evidence of child abuse by the defendant and of his child endangerment conviction, as the Trial Judge had "conscientiously balanced" the probative value -- "[This evidence does] not relate to the homicidal characteristics which form the basis of the prosecution," and because of the probability that the defendant, if convicted and spared, would spend the rest of his life in prison, his potential dangerousness to minor children and women is of little relevance -- with the risks of the jury overvaluing the evidence in light of recent publicity, the necessity of a diversionary trial within the trial regarding the abuse evidence, and the jury's passions becoming inflamed. The Court, however, reversed the ruling excluding evidence of post-mortem dismemberment at the guilt phase. It first held that "a district court ordinarily has somewhat less latitude to exclude probative evidence based on unfair prejudice at the guilt phase, under Rule 403, than it does where the evidence is offered only at the penalty phase," because Rule 403 permits exclusion only when the probative value is "substantially outweighed" by the countervailing dangers. Thus, to the extent the Judge had excluded the photographs at the guilt phase because they would be inadmissible at the penalty phase, it was an error of law. The Court also held it was an abuse of discretion to exclude the photographs at the guilt phase, because, as the Judge had concluded, they were highly probative of the defendant's mental state when committing the murders.

[24] Defendant's Exculpatory Evidence [Go To Main]

United States v. Milk, 447 F.3d 593 (8th Cir. 2006) : The Court affirmed a conviction for second-degree murder, finding no abuse of discretion in the exclusion under *Rule 403* of evidence that the victim had violently stabbed the defendant's acquaintance five years earlier. The Judge had admitted evidence concerning the victim's reputation for aggression and violence, and evidence of two assaults committed by the victim on the day of his murder.

[26] Drugs; Drug and Alcohol Use [Go To Main]

[a] Civil Cases

Alpha v. Hooper, 440 F.3d 670 (5th Cir. 2006) : Affirming summary judgment for the defendants in an action by relatives of a deceased motorist who alleged that excessive force was used when a deputy sheriff shot the motorist to death, the Court held that admitting evidence that the deceased motorist was under the influence of methamphetamine at the time of the shooting was not an abuse of discretion, because it corroborated the deputy's testimony about the events in dispute.

[b] Drugs; Drug and Alcohol Use -- Criminal Cases

United States v. Bermudez, 529 F.3d 158 (2d Cir. 2008) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when an officer was permitted to testify on direct that, before the officers approached and arrested the defendant, he heard the defendant make statements suggestive of narcotics trafficking. Given that the defense had made clear beginning with the suppression hearing that it would challenge the police account of the incident, the testimony provided a foundation for the officers' credibility by showing why their attention was focused on the defendant as opposed to any number of other individuals in the high crime area. Furthermore, any prejudicial effect was minimized by two detailed limiting instructions. One Judge dissented in part, on the ground that the witness' credibility had not been attacked in the trial, and Circuit precedent required that potentially prejudicial evidence such as this await a credibility attack and be presented only in rebuttal.

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) : The Court reversed a conviction for felon firearm possession

and possession of a sawed-off shotgun because "the government's repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process." Although the defendant was never charged with any drug offenses, the government contended that some discussion of drugs was necessary for background and it would show the shotgun was possessed to protect a drug dealing enterprise. However, the prosecution repeatedly went beyond that purpose to inject inadmissible drug evidence, such as evidence of heroin dealing not connected with the defendant and evidence of the defendant's drug use problem, even though the Judge declared at least five times that the evidence was "too prejudicial." "Nevertheless, the District Court ultimately failed to prevent the rampant injection of inadmissible evidence into the trial and its single limiting instruction to the jury was inadequate to cure the prejudice."

United States v. Leonard, 439 F.3d 648 (10th Cir. 2006) : Affirming a conviction for involuntary manslaughter and assault arising from a head-on collision, the Court held that the defendant's prescription medication history was relevant and admissible to prove malice aforethought in a case in which the defendant consumed prescription drugs before the accident.

[27] Employment Discrimination Cases [Go To Main]

[a] Administrative Determinations

Lewis v. City of Chicago Police Dep't, 590 F.3d 427 (7th Cir. 2009) : Affirming a judgment for the defendants in an action by a police officer who alleged that she had been retaliated against for making complaints of gender discrimination, the Court found no abuse of discretion in the exclusion of the EEOC's probable cause decision. It stated only a conclusion, without additional probative information, and it could have confused the jury into thinking that the question the jury was tasked with answering had already been decided. For similar reasons, the City's internal investigation was also properly excluded.

[b] Employment Discrimination Cases -- Balancing Required

Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2008) : In this age discrimination case, the Trial Judge excluded so-called "me too" evidence, testimony by nonparties alleging discrimination at the hands of supervisory employees of the defendant who played no role in the adverse employment decision challenged by the plaintiff. The Court of Appeals concluded that the Judge improperly applied a *per se* rule excluding the evidence; it did its own balancing analysis under Rule 403, and remanded with instructions to admit the challenged testimony. The Supreme Court agreed that a *per se* rule of admissibility or inadmissibility is not permissible, given that Rule 403 requires balancing the probative value of evidence against the dangers of prejudice, confusion, and delay. However, it was "not entirely clear" that the Judge in this case had excluded the evidence under a *per se* rule, so the case was remanded "to conduct the relevant inquiry under the appropriate standard." The Court noted that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case" and that "[a]pplying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry."

[c] Employment Discrimination Cases -- Evidence of Discrimination Admissible

King v. McMillan, 594 F.3d 301 (4th Cir. 2010) : In a Title VII sexual harassment action by a former deputy sheriff, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion in the admission of testimony by two other women who said they had been sexually harassed by the sheriff while working for him in the sheriff's office. The evidence was probative of whether the sheriff's unwelcome conduct was because of the plaintiff's sex and of whether the conduct was sufficiently severe or pervasive to create a hostile work environment. Any prejudice was limited by admitting only testimony of harassment that occurred during the same time frame as the plaintiff's employment. The Court found that there was no need to give a specific instruction that the testimony could not be considered on a

state-law battery claim against the sheriff in his individual capacity.

Cobbins v. Tennessee DOT, 566 F.3d 582 (6th Cir. 2009) : The Court reversed a summary judgment for the state agency in a suit by an African-American employee alleging racial discrimination in the denial of a promotion. It held that the Trial Judge abused discretion in excluding evidence concerning other discrimination by the defendant against the plaintiff that took the form of disparate discipline, unfair job assignments, and racial harassment. This other evidence was relevant to a prior lawsuit by the plaintiff against the defendant in which summary judgment was granted against the plaintiff because he failed to file a timely response to the defendant's summary judgment motion. The Court rejected the defendant's argument that the evidence should have been excluded because it related to the alleged animus of a supervisor who was not the plaintiff's supervisor when he applied for the promotion. The Court agreed with the plaintiff that the evidence was relevant to prove that the former supervisor's conduct marred his work record and opportunity for promotion and concluded that, because the earlier judgment was a dismissal for failure to prosecute as opposed to a dismissal on the merits, the earlier judgment did not preclude the plaintiff from relying on the evidence. In *Morgan v. New York Life Ins. Co., 559 F.3d 425 (6th Cir. 2009)* , an age discrimination action, the Court found no abuse of discretion in the admission of evidence of managers' statements regarding the need to bring young people into the company and about the age of certain employees. Although the Court observed that most of the statements were not particularly probative of discrimination, it concluded that there was little risk in admitting them given that they were vague or isolated remarks that were not proximate in time to the plaintiff's termination.

[d] Employment Discrimination Cases -- Evidence of Discrimination Excludable or Required To Be Excluded

Price v. Rosiek Constr. Co., 509 F.3d 704 (5th Cir. 2007) (per curiam): The Court affirmed a judgment against a former employee who alleged that he had been discharged because of his race. It found no abuse of discretion in the exclusion of evidence from a co-worker relating to discriminatory jokes and other discrimination not involving the plaintiff that he had experienced. Because the witness had not been fired and because the plaintiff's case had not been brought on a hostile environment theory, the testimony was not relevant to whether the plaintiff's discharge racially motivated; but to the extent the testimony was marginally relevant, its probative value would be outweighed by its prejudicial effect.

[e] Employment Discrimination Cases -- Other Evidence

Stover v. Hattiesburg Public School Dist., 549 F.3d 985 (5th Cir. 2008) : The Court affirmed judgments for a school district sued by a former employee who alleged discrimination and retaliation, finding no abuse of discretion in the admission of evidence of a pattern of conduct by the plaintiff that showed a deteriorating professional attitude and work ethic as well as her deletion of computer information on the day she resigned. The plaintiff had portrayed herself as a victim, and her work attitude was an issue in the case.

Lewis v. City of Chicago Police Dep't, 590 F.3d 427 (7th Cir. 2009) : Affirming a judgment for the defendants in an action by a police officer who alleged that she had been retaliated against for making complaints of gender discrimination, the Court found no abuse of discretion in the exclusion of evidence that the plaintiff had been seriously injured on an assignment that she claimed was retaliatory. Since there was no dispute that the injury, inflicted by a fellow officer, was completely accidental, the prejudicial effect of the evidence substantially outweighed any probative value. In *Mattenson v. Baxter Healthcare Corp., 438 F.3d 763 (7th Cir. 2006)* , an ADEA case, the plaintiff, who was terminated just days before retirement benefits vested, claimed that all his performance evaluations had been satisfactory until the last. The defendant claimed that the plaintiff was terminated because he refused to comply with a "performance" plan, but the plaintiff argued that the plan was just a subterfuge to fire him. Reversing a judgment for the plaintiff, the Court held it was error to exclude evidence that the plaintiff had been placed on a performance plan five years previously, since that would have undermined his claim that the employer always fires employees it places on performance plans.

Finan v. Good Earth Tools, Inc., 565 F.3d 1076 (8th Cir. 2008) : The plaintiff, who suffered from epilepsy, sued his former employer under the ADA for "regarded as" discrimination when he was terminated. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in the admission of evidence that he was not given a reasonable accommodation for his condition. Although an employee who is "regarded as disabled" is not entitled to a reasonable accommodation, the defendant vigorously contended that the plaintiff was actually disabled (and unable to perform the essential functions of his job), so its responses to his request for accommodation were probative as to whether it harbored animosity toward him because of his epilepsy. The defendant failed to indicate how any prejudice from the limited amount of the accommodation evidence that was admitted outweighed its probative value.

[f] Employment Discrimination Cases -- Prior Misconduct of Employee

Desmond v. Mukasey, 530 F.3d 944 (D.C. Cir. 2008) : The Court affirmed a judgment for the FBI on a retaliation claim in an employment discrimination suit brought by a trainee, finding no abuse of discretion in the admission of a document compiled by a supervising special agent at the FBI Academy during his inquiry into the trainee's suitability. The document summarized the trainee's infractions and indiscretions at the Academy. The Court stated that "the report's probative value is obvious" because it showed what the decisionmaker had before him when he made his initial decision regarding the trainee. It found that the Trial Judge took steps to limit the possible prejudice: admitting the report only to prove the information before the decisionmaker, barring both sides from bolstering or attacking the report, and instructing the jury on the limited purpose for which the report was admitted.

[28] Experiments and Demonstrations [Go To Main]

[b] Experiments and Demonstrations -- Automobiles and Auto Parts

Muth v. Ford Motor Co., 461 F.3d 557 (5th Cir. 2006) : The Court found no abuse of discretion when a defense expert was not permitted to testify with video and photographs illustrating the results of an accident simulation (CRIS test), because the tests were "not conducted under substantially the same conditions as those that were involved in this particular litigation." The Court noted that "[w]hen demonstrative evidence is offered only as an illustration of general scientific principles, not as a reenactment of disputed events, it need not pass the substantial similarity test." However, a demonstration can be misleading when it resembles the disputed accident, so it was appropriate to exclude the demonstration that too closely resembled the accident, but yet was not conducted under substantially similar circumstances.

[d] Experiments and Demonstrations -- Criminal Cases

United States v. Smith, 502 F.3d 680 (7th Cir. 2007) : The Court affirmed convictions arising from the defendant's sending a pipe bomb via Federal Express, finding no abuse of discretion in permitting an explosives expert to use a replica of the pipe bomb in a demonstration that caused a small flash. The expert's testimony fairly showed the jury how the bomb was intended to work, and rebutted the defendant's theory that the bomb was designed so as not to explode. The Court observed that there was nothing inflammatory in the presentation and the Trial Judge reminded the jury that the bomb did not actually explode when it was delivered and opened by the intended victim. In *United States v. Jackson, 479 F.3d 485 (7th Cir. 2007)* , a felon firearm possession case, the defendant claimed that he could not have picked up his girlfriend at the time to which she testified (2:43 p.m.) if he had fired a handgun at a government witness at the time the witness stated (sometime after 2:00 p.m.). In rebuttal, the government offered testimony from an officer that it took him 12 minutes to drive the route from the place of the shooting to the girlfriend's place of employment. He conducted the experiment shortly after 7:00 p.m., he took the shortest route, and he exceeded the speed limit over part of the route in order to stay with the traffic. Although the experiment was not based on the actual route taken by the defendant, it was conducted at a different time of day, and the officer exceeded the speed limit, the Court held that the evidence of the experiment was properly admitted. When the proponent is attempting to prove exactly how an event

occurred, the experiment must use conditions substantially similar to those of the event. But "where the purpose of the experiment is not to recreate events but simply to rebut or falsify the opposing party's sweeping hypothesis, the substantial similarity requirement is relaxed." The Court noted that had the testimony been offered in the government's case-in-chief, rather than in rebuttal of the defendant's story, "a different result might be warranted."

United States v. Two Elk, 536 F.3d 890 (8th Cir. 2008) : The Court affirmed a conviction for aggravated sexual abuse of a child, finding no abuse of discretion when three photographs of the normal structures in the genitalia of a small female child were admitted in connection with expert testimony. The Court noted that the doctors confirmed that the photographs would assist them in explaining to the jury the results of their respective examinations of the victim.

United States v. Spoerke, 568 F.3d 1236 (11th Cir. 2009) : The Court affirmed convictions relating to destructive devices, finding no abuse of discretion when evidence of video recordings of pipe bombs exploding was admitted. It stated that the "video demonstration was relevant to prove the nature of the devices Spoerke constructed and the characteristics of those devices, which supported the charge that the devices were designed as weapons." The Judge was entitled to credit an agent's testimony that the devices used in the video were virtually identical in almost every respect to the defendant's.

[29] Experts [Go To Main]

[c] Experts -- Criminal Cases

[i] Defense Evidence

United States v. Dupre, 462 F.3d 131 (2d Cir. 2006) : The defendants were convicted for wire fraud in a scheme promising 1000-to-1 returns for funds invested purportedly to unfreeze assets once held by the family of Philippines president Marcos. The Court affirmed, finding no abuse of discretion in the exclusion of testimony from a psychologist that a defendant's "intense, pervasive religious beliefs significantly interfere with her ability to see her involvement in the 'investment project' in a realistic manner and significantly contribute to her ongoing conviction that she has been involved in a legitimate enterprise with benevolent intentions." The expert's report had a "capacity to mislead and confuse the jury, and to permit the defendant to put an impermissible theory of justification before the jury without meeting her burden of presenting the affirmative defense of insanity."

[ii] Experts -- Criminal Cases -- Prosecution Evidence

United States v. Benkahla, 530 F.3d 300 (4th Cir. 2008) : The defendant was part of a network of individuals the government was investigating for crimes connected to radical Islamic terrorism and violent jihad. Affirming a conviction for making false statements and obstructing justice, the Court found no abuse of discretion in the admission of expert testimony on radical Islam and jihad, given the fact that "[t]he evidence in this case was complicated, touching by necessity on a wide variety of ideas, terms, people, and organizations connected to radical Islam." The Court observed that the jury acquitted the defendant of several alleged falsehoods, which was "not exactly the mark of irrational fervor." The Court also upheld the admission of testimony by an FBI agent regarding the agency's investigation and laying the foundation for several dozen videos, documents, and photographs, as the evidence was important to prove the materiality of the defendant's false statements. In *United States v. Forrest, 429 F.3d 73 (4th Cir. 2005)* , the court, affirming a conviction for production and possession of child pornography, found it "troubling," but any error harmless, that an expert was permitted to testify about the behavioral patterns of child sexual abusers. Although the defendant was not on trial for sexual abuse, the expert described a general profile of a serial child molester that closely resembled the defendant's behavior.

United States v. Lloyd, 462 F.3d 510 (6th Cir. 2006) : Affirming a bank robbery conviction, the Court found no abuse of discretion in the admission of testimony by an expert in footwear impression analysis comparing a shoeprint taken

from the teller's counter and the shoes the defendant was wearing when he was arrested shortly after the robbery. Although the expert was not able to positively identify the defendant's shoe as the source of the shoeprint, she testified it had the same tread design and was the same length from heel to toe. That evidence was highly probative, given the small number of such shoes likely present in the vicinity of the crime scene shortly after the robbery, and there was no indication of any danger of unfair prejudice.

United States v. Keiser, 578 F.3d 897 (8th Cir. 2009) : The defendant, a licensed commodities broker, was convicted of securities fraud in promoting fraudulent bank trading programs. Affirming, the Court held there was no abuse of discretion in admitting testimony from an expert witness regarding the ethical training the defendant would have received as a commodities broker. Although the testimony concerned the fiduciary duties of commodities brokers rather than securities brokers, the evidence was not offered to demonstrate that the defendant actually violated any specific fiduciary duties, but only to show that he probably knew that the programs were potentially fraudulent and that he was obligated to disclose information to investors about the risks incumbent in the investments he marketed. The Court concluded that any prejudice or tendency to confuse the issues was insufficient to outweigh the probative value of the evidence in showing the defendant's general knowledge of fiduciary responsibility principles in investing.

United States v. Feingold, 454 F.3d 1001 (9th Cir. 2006) : In a prosecution for illegal distribution of controlled substances against a naturopathic physician who claimed that his prescribing practices were simply attributable to his incompetence, the Court found no abuse of discretion when a naturopathic physician and a medical doctor were permitted to testify about the standard of care applicable to the distribution of opioid and other drugs. Evidence of prevailing standards of care is relevant to support the absence of any legitimate medical purpose in the prescription of controlled substances.

United States v. Nevels, 490 F.3d 800 (10th Cir. 2007) : The Court affirmed firearm convictions, finding no abuse of discretion in admitting expert testimony based on the reconstruction of the crime scene. The defense claimed that the victim was a violent, armed fugitive and that the defendant acted in self-defense. The reconstruction evidence was probative as it showed that the defendant was the only one with a weapon and that the victim was shot at close range and in a defensive position. Moreover, the expert's testimony was not especially prejudicial, given the fact that defense counsel conceded the shooting in her opening argument.

[31] Family Relationships [Go To Main]

United States v. Bright, 578 F.3d 547 (7th Cir. 2009) : The Court affirmed a conviction for bank robbery, finding no abuse of discretion when a birth certificate showing that a relative of defendant worked in the bank was admitted, as the evidence tended to show why the defendant picked that particular bank and knew that an armored truck delivery was scheduled on the day the bank was robbed.

[31.1] Firearms and Ammunition [Go To Main]

United States v. Wescott, 576 F.3d 347 (7th Cir. 2009) : The Court affirmed a conviction for possession of a firearm by a person subject to a protective order, finding no abuse of discretion in the admission of evidence regarding 22 firearms in the defendant's possession and of photographs of the considerable amount of ammunition found at the defendant's house. Although the defense argued that proof of a single firearm would be sufficient to convict, the Court held that proof of the additional weapons was not unduly prejudicial, where the defendant would not stipulate to the possession and the prosecution was limited to proof regarding only the weapons listed in the indictment, and not all of those seized. The evidence of the ammunition was probative of the defendant's knowing possession of the firearms, and the prejudicial effect was limited by precluding the most alarming pictures of the ton and a half of ammunition found

and by confining the prosecutions argument to the proper purpose of demonstrating the defendant's knowing possession.

[32] Fraudulent Activities [Go To Main]

United States v. Jackson, 546 F.3d 801 (7th Cir. 2008) : The Court affirmed fraud convictions arising from a scheme to submit inflated insurance claims in connection with three motor vehicles that were stolen or damaged. It held that evidence that tires and rims for which the defendants sought compensation were obtained by fraud, even if the fraud was committed by another person, was relevant to prove that the defendants were seeking recovery for a loss that they had not suffered.

[33] Gang Membership [Go To Main]

United States v. Jones, 566 F.3d 353 (3d Cir. 2009) : The Court affirmed convictions for racketeering, conspiracy to commit murder, and other offenses, finding no abuse of discretion in the admission of assorted gang-related evidence that the government used to prove guilt under the Violent Crimes in Aid of Racketeering Act. The Court noted that the "expansive definition" of "enterprise" in VICAR meant that "the gang-related evidence Jones complains of went to proving the VICAR offenses, specifically the expansive elements of 'enterprise' and racketeering activity."

United States v. Harris, 587 F.3d 861 (7th Cir. 2009) : The Court affirmed drug and firearm convictions, finding no abuse of discretion in admitting testimony by a police sergeant regarding the defendant's post-arrest statements that connected him to a gang. The evidence was relevant to the defendant's motive for possessing firearms, and the Judge took steps to reduce the prejudicial impact of evidence of gang membership. In *United States v. Alviar, 573 F.3d 526 (7th Cir. 2009)* , the Court affirmed convictions for drug conspiracy charges, finding no abuse of discretion in the admission of gang membership evidence, where the majority of individuals employed by the conspiracy's leader to obtain and distribute drugs were in gangs with the leader, and the government did not simply equate membership in the gangs with being a coconspirator but showed how the operation used gang members in certain defined roles.

United States v. Street, 548 F.3d 618 (8th Cir. 2008) : The Court reversed a conviction for aiding and abetting murder in furtherance of drug trafficking, holding it was error to admit testimony from a police expert about outlaw motorcycle gangs, including their violence toward women and "snitches." The defendant was not, however, a member of the gang on which the testimony focused, nor had he ever set foot in the gang's headquarters. The evidence indicated that two gang members had occasionally worked on motorcycles with the defendant, supplied him with precursor chemicals, and purchased and used the final product, but there was no factual grounding for the prosecutor's claim in his closing argument that the gang's lifestyle had "started to rub off on [the defendant]." All in all, the expert's gang testimony "was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses." In *United States v. McKay, 431 F.3d 1085 (8th Cir. 2005)* , the Court affirmed drug distribution convictions, finding no abuse of discretion in the admission of evidence that a defendant was a gang member. The limited testimony was relevant on redirect to explain why the government had not attempted a controlled buy, and the jury was cautioned against using gang affiliation as a ground for conviction.

United States v. Bradberry, 466 F.3d 1249 (11th Cir. 2006) : Affirming a conviction for possession of a firearm in a school zone, the Court held that evidence of the defendant's membership in a gang tended to explain why he and the driver of the car in which the gun was found were at the school at that time. Because such evidence carries the potential for undue prejudice, "[t] is case presents a close question," but the Trial Court did not abuse its discretion.

[33.1] Grand Juror Testimony [Go To Main]

United States v. Awadallah, 436 F.3d 125 (2d Cir. 2006) : In a prosecution for perjury before a grand jury, the Trial Judge ruled *in limine* that the government could call grand jurors to testify about the defendant's physical condition and the objective conditions surrounding his testimony, but could not ask the grand jurors about their subjective impressions of the defendant's demeanor and appearance. Affirming on interlocutory appeal, the Court observed that "the Government has tried hundreds, if not thousands, of perjury cases without eliciting opinion evidence from a grand juror to prove knowledge," and "[n]one of our opinions indicate that a grand juror has ever previously been called in this Circuit to give such testimony." The Court concluded that it was "well within the broad discretion afforded" a Trial Judge to rule that grand juror testimony could be interpreted as giving the petit jurors advice on how to determine the central issue in the case. The Court agreed with the defense argument that the grand jurors were not better witnesses than the court reporter, the interpreter, or the Assistant United States Attorneys who were present in the grand jury room: "nothing about the grand jurors ... makes them clearly more reliable than other witnesses to the events that transpired in the grand jury room."

[35] Guilt by Association [Go To Main]

United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006) : The Court vacated a conviction for conspiracy to distribute a mixture of cocaine for the improper admission of evidence that acquaintances of the defendant had been convicted of drug crimes, which was nothing more than guilt by association.

United States v. Bright, 578 F.3d 547 (7th Cir. 2009) : The Court affirmed a conviction for bank robbery, finding no abuse of discretion in the admission of testimony that when a companion boasted of committing a bank robbery, the defendant said, "Sound[s] like something I want to do." The evidence was not an attempt to taint the defendant's character through his association with an admitted bank robber; rather, the companion's boast provided context for the defendant's admission.

[35.1] Hearing on Admissibility [Go To Main]

Guerra v. North East Ind. School Dist., 496 F.3d 415 (5th Cir. 2007) (per curiam): The plaintiff in an ADEA action sought to introduce the EEOC's right-to-sue letter, the EEOC file, and the defendant's response to the EEOC charge. Affirming a judgment for the defendant, the Court held that the Judge was not required to hold a hearing at which the plaintiff could make rebuttal arguments against a determination that the risk of prejudice outweighed the probative value of the evidence. The Court also held there was no abuse of discretion in excluding the evidence, as the EEOC letter was created under questionable conditions, and all the evidence spoke directly to the ultimate issue in the case, which would likely have prejudiced the jury required to make its own factual determination.

[38.1] Illustrative Evidence [Go To Main]

United States v. Howe, 538 F.3d 842 (8th Cir. 2008) , overruled in part on other grounds, 562 F.3d 892 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession arising from a kidnapping and murder conspiracy. It found no abuse of discretion in the admission of a photograph of a pistol similar to that used in committing the murder. The government correctly used the photograph as demonstrative evidence and did not suggest that it pictured the actual firearm; rather, the witnesses were questioned about the similarities and differences between the two weapons. Thus, the photograph had probative value in identifying the type of pistol possessed by the defendant, and was

not unfairly prejudicial because the jury could only have understood that it was being used as illustrative.

[38.2] Immigration Status [Go To Main]

United States v. Yi, 460 F.3d 623 (5th Cir. 2006) : The Court affirmed a conviction for trafficking in counterfeit goods, finding no abuse of discretion in the admission of evidence that the defendant was an illegal alien. The evidence explained why the arresting officer in a counterfeiting case was an immigration enforcement agent and "any prejudice from the evidence was insubstantial." Although the defendant argued that there is "strong public sentiment against illegal immigration in this country," the Court concluded that immigration status is not "the type of information that is 'of a heinous nature, likely to incite the jury to an irrational decision.' "

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) : The Court affirmed a conviction for possession of methamphetamine with intent to distribute, holding there was no abuse of discretion when the government elicited on cross-examination of the defendant that he had been illegally in the United States for over 13 years. The evidence was relevant to rebut efforts on direct exam to portray the defendant as a nice, law-abiding person who had never committed a crime.

[39] Impeachment and Rebuttal Evidence -- Civil Cases [Go To Main]

Fryar v. Curtis, 485 F.3d 179 (1st Cir. 2007) : Affirming a judgment in favor of a corrections officer sued by a prisoner for an alleged assault, the Court found no abuse of discretion in the exclusion of evidence, offered to impeach a witness, concerning the training of officers and the conditions at the jail, since such evidence might have confused the issues and misled the jury and appeared to be collateral. The Court noted that it had repeatedly observed that " 'a party may not present extrinsic evidence to impeach a witness by a contradiction on a collateral matter,' " and concluded that even if the evidence was of consequence to the defendant officer's conduct as to the plaintiff, any error was harmless.

SR Int'l Bus. Ins. Co. v. World Trade Center Properties, LLC, 467 F.3d 107 (2d Cir. 2006) : In litigation over whether destruction of the World Trade Center towers constituted one or two "occurrences" for purposes of insurance coverage, one of the defense witnesses was an insurance executive who was responsible for adjusting the WTC claims. The Court held there was no abuse of discretion when the witness was cross-examined about the insurer's treatment of claims associated with four fires that were set to four separate courthouses in California by a single arsonist. The witness had been responsible for adjusting the California claims and he had been well aware by the time of the WTC disaster that the insurer had decided to treat the California claims under a similar policy form as separate occurrences (to which separate deductibles applied), even though two of the four fires were set at closely situated buildings only minutes apart. The comparison he drew between the two claims was relevant to the insurer's pre-9/11 intent.

Gaillard v. Jim's Water Serv., Inc., 535 F.3d 771 (8th Cir. 2008) : After he was injured in a motorcycle accident, the plaintiff filed supplemental tax returns claiming additional income of as much as $120,000 per year. He produced the supplemental returns in the course of discovery in his personal injury action and used them in the first trial of the action (which ended with a hung jury) to support his lost income claim. Before the retrial, he moved unsuccessfully to exclude the returns as more prejudicial than probative. Affirming a judgment for the defendants, the Court found no abuse of discretion in allowing the returns to be admitted and utilized to impeach the credibility of the plaintiff and his expert witness. The Court explained that the returns were "highly relevant to the defense of this case. First, past income as established by tax returns is highly relevant to a loss of income claim. Second, the tax returns were probative of his character for truthfulness and thus relevant to keeping any damage award to a reasonable and fair level." Although the Court cited Rule 608(b) for the latter proposition, we observe that no attention was apparently paid to the Rule's bar on extrinsic evidence. And as to the first proposition, the supplemental return in particular was not being offered in that

trial to prove the loss of income, but only to affect credibility. The Court also noted that the returns "were relevant to impeach the credibility of [the plaintiff's] economic expert, who testified he typically relies upon an individual's income tax return as the most reliable source of wage verification, yet ignored" the plaintiff's, "because he could not 'trust them' and they might be 'pure fiction.' " The Court said, "It matters not that [the plaintiff's] expert did not rely on the returns. The district court properly found the tax returns were admissible as impeachment evidence under Rule 608(b)," but it did not reconcile its ruling with either the "cross examination" or the "witness's own conduct" provisions of the Rule.

Harsco Corp. v. Renner, 475 F.3d 1179 (10th Cir. 2007) : Affirming a judgment for the plaintiff in a Title VII action claiming hostile work environment sexual harassment, the Court found no abuse of discretion when the defendant was precluded from cross-examining the plaintiff about an allegedly false statement in a document she signed in a bankruptcy proceeding and from introducing the document into evidence. The Court concluded that a conflict between the parties over whether the statement was in fact false "could have created a virtual mini-trial." Since "the sole point [the defendant] sought to prove by introducing the form is that [the plaintiff] has signed forms without verifying that their content is accurate," and the plaintiff "admitted this precise fact in her testimony," it was a proper exercise of discretion "to avoid a mini-trial over a collateral issue that the plaintiff already conceded."

[40] Impeachment and Rebuttal -- Criminal Cases [Go To Main]

[a] Accused Witness

United States v. Penney, 576 F.3d 297 (6th Cir. 2009) : The Court affirmed convictions for felon firearm possession and attempting to kill a federal agent, which arose from an incident in which the defendant shot an agent during execution of a search warrant. It found no abuse of discretion in the admission on rebuttal of testimony by fellow inmates that the defendant had said he wished he had killed the police officers he had shot so that they could not testify against him. The Court rejected the government's argument that the statement, made months after the incident, was relevant to establishing the defendant's intent at the time of the offense, but it agreed that the statement was relevant to the defendant's credibility, since it contradicted his testimony denying that he had said he wished he had killed the officers.

[b] Impeachment and Rebuttal -- Criminal Cases -- Defense Witnesses

United States v. Durham, 470 F.3d 727 (8th Cir. 2006) : A prosecution witness was asked whether he had made statements to a detective regarding the defendants' use and manufacture of methamphetamine at a cooperating witness' apartment. He denied making any such statements and on cross-examination he reiterated the point, adding that he had never seen the defendants cook, sell, or buy methamphetamine. Affirming, the Court found no abuse of discretion when the detective was permitted to testify that the witness had told him that he had seen the defendants use and manufacture the drug at the apartment. The detective's testimony carried a risk of prejudice to the defendants, as it recounted inculpatory statements that would not otherwise have been admissible, but it had probative value to impeach both the witness' denial of having made the statements to the detective and his testimony favoring the defense that he had not seen them on any occasion handling methamphetamine, and the potential prejudice was lessened by a limiting instruction given prior to the detective's testimony. In *United States v. Davis, 457 F.3d 817 (8th Cir. 2006)* , the Court affirmed a conviction for conspiracy to distribute crack cocaine, finding no abuse of discretion in the exclusion of testimony by the federal public defender regarding substantial assistance and the federal sentencing process, which had been offered to impeach the credibility of the government's cooperating witnesses. The jury already was aware that each witness testified that he was facing a lengthy prison term and hoped to reduce his sentence by testifying against the defendant, and the jury did not need to know the details of sentencing procedures to understand that the witnesses might have an incentive to incriminate the defendant.

[c] Impeachment and Rebuttal -- Criminal Cases -- Opinions on Credibility

United States v. Jumper, 497 F.3d 699 (7th Cir. 2007) : The Court affirmed marijuana convictions, holding there was no abuse of discretion when portions of a videotape of the defendant's postarrest interrogation were admitted. The defendant argued that the videotape was unduly prejudicial because the interrogating agent stated that he thought the defendant was lying. The Court noted that the agent did not directly comment on the defendant's guilt, and added that "the jury could reasonably have viewed these comments as a strategic interrogating tactic of the agent."

[d] Impeachment and Rebuttal -- Criminal Cases -- Prosecution Witnesses

[i] Defense Evidence or Questioning

United States v. Bunchan, 580 F.3d 66 (1st Cir. 2009) : The Court affirmed a mail fraud conviction, finding no abuse of discretion when the defense was permitted to ask a government witness about pending state criminal charges for assault but was not permitted to bring out that the charges were for indecent assault and battery of a child. The Judge's ruling permitted elicitation of the witness' motive to ingratiate himself with the government but avoided unnecessary and unfair prejudice against the witness. The Court also noted that reference to the particular nature of the charges was not admissible under Rule 608(b) because it was not relevant to the witness' character for truthfulness. In *United States v. Van Anh, 523 F.3d 43 (1st Cir. 2008)* , in a prosecution for using extortionate means to collect a debt, a defendant claimed that the victim had a temper and had used "fighting words" to incite him. The defense was not permitted to introduce evidence of two incidents occurring nine months after the events at issue that allegedly supported its claim. Affirming, the Court found no abuse of discretion, as the evidence was both "too far afield" and "not very conclusive." In *United States v. DeCologero, 530 F.3d 36 (1st Cir. 2008)* , the Court affirmed convictions for conspiracy, racketeering, and other crimes relating to a criminal enterprise that controlled a portion of Boston's drug trade, finding no abuse of discretion when a defense witness was precluded from recounting a conversation in which a government witness allegedly tried to coerce the defense witness into testifying for the government. The evidence was only relevant to impeaching the government witness, the impeachment went to a collateral matter, and the Judge has discretion to bar such impeachment. In *United States v. Bishop, 453 F.3d 30 (1st Cir. 2006)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in limiting the cross-examination of a government witness whom the defendant alleged had on another occasion falsely accused him of rape. The Court reasoned that the cross-examination posed the likelihood of diversion and prejudice and the unlikelihood that the defendant would be able to counter any denial by the witness in light of *Rule 608(b)*. We question the reliance on *Rule 608(b)*, given that the defendant's apparent motive in cross-examination was to suggest that the witness was biased against him. Extrinsic evidence of specific acts tending to show bias (as opposed to untruthfulness) is not excluded by *Rule 608(b)*.

United States v. Smith, 451 F.3d 209 (4th Cir. 2006) : In a drug case, police officers testified that the defendant had been arrested in two previous cases with drugs on his person and that the drugs found in the previous arrests had been destroyed by the police. Defense efforts to cross-examine each witness about the circumstances of the destruction were denied on the grounds of limited relevance and waste of time. The Court found that precluding this cross-examination violated the defendant's constitutional right to an effective defense, although it was harmless error. The Court noted that "the availability of appropriate cross-examination by an accused is ... essential when the physical evidence, about which the witnesses are testifying, no longer exists," and explained that "the examination Smith sought to conduct was highly relevant to the issues in the case, in that the prosecution witnesses were testifying that the substances were contraband and had been seized from Smith. The trustworthiness and competence of these witnesses related directly to the charges in the indictment, and their credibility was crucial to the jury's assessment of the prosecution's case." In particular, an officer's testimony that drugs were destroyed when state charges were dismissed because of pending federal charges "raised obvious concerns." Where the officer testified that he was unaware of the pending federal charges when the evidence was destroyed, but the state charges were dismissed precisely because of the pending federal charges, cross-examination "would have cut to the core of [the officer's] credibility and was highly relevant to the issues before the jury. And any resulting prejudice to the prosecution from a thorough examination on the facts surrounding the evidence's destruction was plainly outweighed by Smith's right to inquire into the pertinent circumstances." The Judge's contrary conclusion -- that the relevance of such cross-examination would have been "extremely slight" -- was thus

based on a "clearly erroneous assessment of the evidence" and constituted an abuse of discretion.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : Affirming convictions for drug offenses, the Court found no abuse of discretion when certified copies of court records showing convictions of a testifying confidential informant were excluded. The exhibits were "repetitious" and a "waste of time," given that the witness admitted the impeaching offenses and defense counsel cross-examined him about the convictions and why deferred adjudication probation was revoked.

United States v. Acosta, 534 F.3d 574 (7th Cir. 2008) : During the FBI investigation of a drug distribution conspiracy, two of the witnesses made reference to an arson fire. At trial, a defendant was precluded from cross-examining the witnesses about vacillations in their answers to the agent's questions about the fire, which was wholly unrelated to the case being tried. Affirming, the Court found there was no abuse of discretion in precluding the cross-examination, as the defendant had ample opportunity to impeach the witnesses' credibility, and the examination would have sidetracked the trial and risked confusing the jury. In *United States v. Seymour, 472 F.3d 969 (7th Cir. 2006)* , the court affirmed a conviction for felon firearm possession, holding there was no abuse of discretion in precluding the defense from cross-examining the arresting officer who found the gun about his failure to mention in a report about arresting a jaywalker that he had used force causing a concussion. Learning that he used excessive force against a minor lawbreaker was likely to prejudice the jury, but even though his omission was dishonest in the circumstances, the Court concluded that the evidence had "no probative value at all," since the defendant did not contest the officer's testimony or impugn his conduct.

United States v. Beal, 430 F.3d 950 (8th Cir. 2005) : Affirming a drug conviction, the Court found no error when the defendant was prohibited from impeaching a cooperating witness with the fact that he had testified in other criminal trials, in which the defendants were acquitted. This evidence was properly excluded because "[m]any factors influence a verdict, including the strength of each side's case, the instructions given to the jury, and the context in which the individual witnesses testify. Introduction of evidence about jury verdicts in unrelated cases would have prolonged the trial and confused the jury."

[ii] Impeachment and Rebuttal -- Criminal Cases -- Prosecution Witnesses -- Prosecution Evidence or Questioning

United States v. Massino, 546 F.3d 123 (2d Cir. 2008) : Affirming racketeering convictions, the Court found no abuse of discretion in the admission of testimony about a statement made by a leader of the defendant's crime family about "killing kids." On direct examination, a witness testified about the contents of two tape recorded conversations he had made at the direction of the government. On cross-examination, the defense attempted to show, through the witness' lack of recollection regarding 38 other conversations he recorded for the government, that his testimony had been coached. The government sought to rehabilitate the witness by asking about a recorded statement in which a leader of the crime family discussed killing the children and wives of cooperators. In light of "the abundance" of alternative evidence that could have been used to rehabilitate this witness, the Court was "troubled by" the government's reliance on such "highly inflammatory" evidence, but, because the record reflected the Judge's careful balancing of the probative value with the risk of prejudice, there was no abuse of discretion. In *United States v. Bermudez, 529 F.3d 158 (2d Cir. 2008)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when an officer was permitted to testify on direct that, before the officers approached and arrested the defendant, he heard the defendant make statements suggestive of narcotics trafficking. Given that the defense had made clear beginning with the suppression hearing that it would challenge the police account of the incident, the testimony provided a foundation for the officers' credibility by showing why their attention was focused on the defendant as opposed to any number of other individuals in the high crime area. Furthermore, any prejudicial effect was minimized by two detailed limiting instructions. One Judge dissented in part, on the ground that the witness' credibility had not been attacked in the trial, and Circuit precedent required that potentially prejudicial evidence such as this await a credibility attack and be presented only in rebuttal.

United States v. Durham, 470 F.3d 727 (8th Cir. 2006) : A prosecution witness was asked whether he had made statements to a detective regarding the defendants' use and manufacture of methamphetamine at a cooperating witness' apartment. He denied making any such statements and on cross-examination he reiterated the point, adding that he had never seen the defendants cook, sell, or buy methamphetamine. Affirming, the Court found no abuse of discretion when the detective was permitted to testify that the witness had told him that he had seen the defendants use and manufacture the drug at the apartment. The detective's testimony carried a risk of prejudice to the defendants, as it recounted inculpatory statements that would not otherwise have been admissible, but it had probative value to impeach both the witness' denial of having made the statements to the detective and his testimony favoring the defense that he had not seen them on any occasion handling methamphetamine, and the potential prejudice was lessened by a limiting instruction given prior to the detective's testimony.

United States v. Rizvanovic, 572 F.3d 1152 (10th Cir. 2009) : Affirming a conviction for international parental kidnapping, the Court found no abuse of discretion in the admission of evidence that a state court judge found in a custody proceeding that the defendant had committed emotional and domestic abuse against his children and their mother, and of testimony by the defendant's 17-year-old step-daughter that the defendant had been the sole source of domestic violence in the home. The evidence was properly admitted to rebut the defendant's explanation that he took the children out of the country to protect the children from abuse by the mother. The Court added that, although the defendant denied any abuse when questioned on cross-examination, Rule 608(b)'s bar on extrinsic evidence did not require exclusion of evidence that rebutted a defense and thus was admissible as substantive evidence. In *United States v. Doddles, 539 F.3d 1291 (10th Cir. 2008)* , the Court affirmed drug and firearms convictions, finding no abuse of discretion in the admission of a witness' testimony that he feared retaliation, where the testimony explained prior inconsistent statements. The Court also found no abuse of discretion when -- after defense counsel suggested that a witness would testify to whatever he thought would keep him out of trouble -- the witness was permitted to testify that he had experienced negative consequences after providing similar testimony at a previous trial and was reluctant to testify at the defendant's trial.

[41] Impeachment with Collateral Matter [Go To Main]

United States v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010) : The Court affirmed drug trafficking convictions, finding no abuse of discretion when the defense was precluded from introducing evidence that a witness, who had denied having handled a gun, had shot and killed another man with a gun. The Trial Judge had properly excluded the extrinsic evidence for use in impeachment by contradiction, and the Court held that because the government was not aware of the shooting until the defense brought it up, the evidence had no tendency to impeach by showing bias. In *United States v. Fonseca, 435 F.3d 369 (D.C. Cir. 2006)* , a prosecution witness in a trial for unlawful possession of a firearm and ammunition testified that she had not used drugs since she suffered a heart attack in 2002. The defense questioned her about a positive test for crack cocaine in January 2003, refreshed her recollection by showing her a police report of her arrest which gave rise to the test, and had the test results admitted into evidence. The Court found no abuse of discretion when the defense was then barred from cross-examining the witness about a crack pipe found in her purse when she was arrested in January 2003, as the evidence was weaker than that actually admitted and its use for any other purpose would likely have led to confusion and delay.

Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010) : The Court affirmed a judgment for the defendants in a patient's action alleging that her civil rights had been violated when an emergency room physician sexually assaulted her by digital penetration of her vagina. It found no abuse of discretion when the plaintiff was cross-examined using records from her chiropractor's office, over an objection that they were collateral. "Her claim that she feared being treated by male practitioners went to both the credibility of her story and the extent of her damages." Showing that she had visited the chiropractor's office 18 times, including two days after the alleged assault, undermined those parts of her claim.

United States v. White, 563 F.3d 184 (6th Cir. 2009) : In a prosecution for conspiracy to distribute cocaine, the driver of a car in which the defendant was riding when it was stopped by police testified that the car belonged to a third person with whom she sometimes swapped cars. On rebuttal, the government presented a witness who denied ever seeing the driver in a car such as she described. Affirming, the Court held that the rebuttal evidence was not impeachment on a collateral matter, but rather went directly to the question whether the duffel bag containing drugs and tools of the drug trade that was found in the car belonged to the third person or to the defendant.

United States v. Jackson, 540 F.3d 578 (7th Cir. 2008) : In a prosecution for bank fraud arising from a scheme by bank employees to create false mortgage documents, one of the conspirators implicated another in her guilty plea proffer and her plea hearing, but then recanted the incriminating statements just before the trial. The Judge granted a government motion to preclude the defense from presenting evidence of the recantation and ruled that it was not admissible under Rule 804(b)(3) because of insufficient corroborating circumstances. Affirming, the Court observed that, since the incriminating statements related only to charges that had been dismissed and those statements were not before the jury, the only purpose for introducing the recantation was to impeach the declarant by contradiction. However, because the contradiction regarded collateral or irrelevant matters, the evidence could properly be excluded under Rule 403 because its tendency to mislead and confuse the jury outweighed its negligible probative value. The recanting conspirator never testified as a witness, but the Court stated that the rule barring impeachment by contradiction regarding collateral matters "is equally applicable where a party attempts to put a non-testifying person's statement before the trier of fact solely to impeach that person."

United States v. Ndiaye, 434 F.3d 1270 (11th Cir. 2006) : Affirming convictions for immigration offenses involving fraudulent Social Security documents, the Court found no abuse of discretion when a coconspirator who provided the false documents was precluded from offering testimony on the ground that it would be "collateral" to the proceeding. The Court found that most of the proffered testimony would serve only to impeach the star prosecution witness on matters irrelevant to the charges at issue, and the remainder would have been cumulative or of little assistance.

[46] Invocation of Privilege [Go To Main]

Hinojosa v. Butler, 547 F.3d 285 (5th Cir. 2008) : In an arrestee's civil rights action for excessive force, the Judge ruled *in limine* that the officer could be impeached by inquiry into incidents in which he had filed false reports, but that because he planned to invoke his *Fifth Amendment* right in response, the plaintiff's questions about the prior conduct should be done outside the presence of the jury. Reversing a judgment for the officer, the Court held that the ruling was an abuse of discretion, confusing the standard governing a defendant's invocation of the privilege in the criminal context with that applicable in the civil context. In criminal trials it is impermissible to require the defendant to invoke the self-incrimination privilege before the jury, but in civil cases a witness' refusal to testify on *Fifth Amendment* grounds permits an adverse inference against him.

[48] Judgments, Court Orders, and Judicial Opinions [Go To Main]

[a] Civil Cases

Athridge v. Aetna Cas. & Sur. Co., 604 F.3d 625 (D.C. Cir. 2010) : In an action by an accident victim against the driver's insurer, the plaintiff sought to introduce a judgment against the vehicle's owners, and a statement from the Judge's opinion in that other trial, as proof that the driver was acting with the owners' consent at the time of the accident. Affirming a judgment for the defendant, the Court found no abuse of discretion in excluding the judgment, which, because it reflected only the owners' failure to show by a preponderance that they did not consent, could have been confusing to the jury. Likewise, there was no abuse of discretion in excluding the opinion, as it had little probative

value on the proposition for which it was offered compared to other available evidence.

Engquist v. Oregon Dep't of Agriculture, 478 F.3d 985 (9th Cir. 2007) , aff'd, 128 S. Ct. 977 (2008) : In a laid-off state employee's discrimination trial, the plaintiff sought to introduce the jury verdict from a co-worker's similar trial in state court. The Court found no abuse of discretion in exclusion of the verdict, as there was a danger that the jury would give the verdict more weight than warranted, deferring to the earlier result. "The verdict itself did not possess such additional probative value, beyond the [evidence from the earlier trial presented to the jury in this case], to overcome the risk of prejudice and confusion that the verdict posed."

[b] Judgments, Court Orders, and Judicial Opinions -- Criminal Cases

United States v. Higuera-Llamos, 574 F.3d 1206 (9th Cir. 2009) : The Court affirmed a conviction for illegal reentry following deportation, finding no abuse of discretion in the admission of a prior judgment against the defendant for the same offense. The judgment was probative of, and provided independent evidence corroborating the defendant's admission of, his alienage, and its prejudicial effect was minimized by redacting it to eliminate information regarding sentencing and by instructing the jury that it was to be used only on the issue of alienage. In *United States v. Higuera-Llamos, 574 F.3d 1206 (9th Cir. 2009)* , the Court affirmed a conviction for illegal reentry after deportation, finding no abuse of discretion in the admission of a judgment related to the defendant's prior conviction for the same offense, which was offered to prove his alienage. The defendant's admission of alienage to the arresting officers was insufficient to prove that fact, so the judgment was highly probative; and its prejudicial effect was minimized by redacting extraneous information such as the sentence, and by instructions to the jury as to the limited purpose for its admission. In *United States v. Sine, 493 F.3d 1021 (9th Cir. 2007)* , a mail fraud prosecution, the Court held it was error, but not reversible plain error, to permit the government to ask witnesses on cross-examination questions that incorporated adverse findings by a Judge in related civil litigation. Factual determinations by a Judge in a civil action are inadmissible hearsay not coming within any hearsay exception, and a Judge's findings can unduly affect a jury, which is likely to defer to credibility determinations made by an authoritative, professional factfinder rather than determine those issues for themselves.

[51] Litigation Conduct [Go To Main]

McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006) : Affirming a judgment for the plaintiff in a Title VII retaliation action, the Court found no error in the exclusion of evidence that the plaintiff had lost a previous lawsuit against the City. Although the City claimed that this showed that the plaintiff was "litigious and had a history of bringing meritless lawsuits," the Court noted that "ordinarily proof that the plaintiff filed prior similar lawsuits is admissible to show the plaintiff's litigiousness only if there is also evidence that the prior lawsuits were fraudulently filed." Here, there was only a single lawsuit, and while it was unsuccessful, there was nothing suggesting that it was fraudulently filed.

[53] Nicknames and Aliases [Go To Main]

United States v. Farmer, 583 F.3d 131 (2d Cir. 2009) : In a prosecution for various offenses arising from a murder and an attempted murder, the Court affirmed the convictions arising from the murder and reversed the convictions arising from the attempted murder because "the prosecutors, in their addresses to the jury, invited prejudice by repeatedly emphasizing Farmer's nickname [Murder] in a manner designed to suggest that he was known by his associates as a murderer and that he acted in accordance with that propensity in carrying out the acts charged in the indictment." This was an "abuse of Farmer's nickname."

[54] Notice and Knowledge [Go To Main]

Dominguez v. Hendley, 545 F.3d 585 (7th Cir. 2008) : The Court affirmed a judgment for the plaintiff in a § 1983 action against a municipality and its police officer, whose misconduct had led to the plaintiff's conviction for sexual assault, which was vacated after he was incarcerated for four years. The Court found no abuse of discretion in the admission of a memorandum by a state prosecutor cautioning careful scrutiny of cases involving the officer, "because of questions which exist about his credibility." The Court concluded that "[n]aturally, this was quite prejudicial," but it was relevant and highly probative for the question of whether the municipality was aware that there were problems with the officer.

[55] Official Findings [Go To Main]

Chamberlin v. Town of Stoughton, 601 F.3d 25 (1st Cir. 2010) : The plaintiff police officers alleged that they were victims of retaliation for cooperating with an investigation into police misconduct and disclosing a hostile work environment. Affirming judgments for the defendants, the Court found no abuse of discretion in the exclusion of a report from an attorney commissioned by the Town in response to the plaintiffs' letters alleging a hostile work environment. The evidence upon which the attorney relied was available to the plaintiffs, and it would have served no useful purpose to "superimpose Terry's [the lawyer's] evaluation on what the jury was expected to decide." The Court added that it did not matter whether the report qualified over a hearsay objection as a public record or an agent's statement, because it was properly excluded under Rule 403.

[56] Opening the Door [Go To Main]

Grossmith v. Noonan, 607 F.3d 277 (1st Cir. 2010) : In a civil rights action by an arrestee who shot his neighbor's dog, the plaintiff argued that he shot the dog to protect himself, his own dog, and his livestock, and that the dog was "vicious" and "bloodthirsty" and looked like a wolf or coyote. Affirming a judgment for the defendants, the Court found no abuse of discretion in the admission of testimony from a witness who had frequent contact with the dog that the dog was "a great dog" and "a nice dog" who was "well-fed and well-groomed," since the plaintiff's testimony made the dog's appearance and character relevant to the case. In *Martinez-Velez v. Rey-Hernandez, 506 F.3d 32 (1st Cir. 2007)* , in an action by employees of the Puerto Rico Department of Education alleging political discrimination in violation of the *First Amendment*, the Court held that the plaintiffs had properly been permitted to cross-examine the Secretary of the Department concerning officials he had appointed, after he testified on direct examination that he was unaware of the political affiliations of the plaintiffs and had no connection to a political party or to partisan politics. The Court found that "the questions went directly to Rey's own characterization of his relationship to partisan politics."

United States v. Elfgeeh, 515 F.3d 100 (2d Cir. 2008) : The Court affirmed convictions for operating an unlicensed money-transmitting business and for structuring financial transactions, finding no abuse of discretion in a ruling that if the defendants testified that they merely helped Yemeni immigrants to send money home to their family and friends, the testimony would open the door to allow the government to show that the defendants sent money for purposes of fostering violence. The Court noted that a defendant "has no right to avoid cross-examination into the truth of his direct examination, even as to matters not related to the merits of the charges against him." There was, therefore, no error when, after a defendant testified to an innocent purpose for the transactions, the government inquired into a possible violent purpose.

Stover v. Hattiesburg Public School Dist., 549 F.3d 985 (5th Cir. 2008) : The Court affirmed judgments for a school

district sued by a former employee who alleged discrimination and retaliation, finding no abuse of discretion in the admission of evidence of a pattern of conduct by the plaintiff that showed a deteriorating professional attitude and work ethic, as well as her deletion of computer information on the day she resigned. The plaintiff had portrayed herself as a victim, and her work attitude was an issue in the case. In *Munoz v. State Farm Lloyds of Texas, 522 F.3d 568 (5th Cir. 2008)* , an action on a fire insurance policy, the insurer defended on the ground that the plaintiffs had intentionally set the fire. Reversing a judgment for the plaintiffs, the Court held it was reversible error to admit evidence that a grand jury did not indict the husband for arson, as such evidence is highly prejudicial. Although the plaintiffs argued that the insurer had opened the door to the evidence by introducing evidence that the husband had failed a polygraph examination, which they said was per se inadmissible, the Court noted that *Daubert* governs the admissibility of polygraph examination results, that neither party alleged that the results in this case were improperly admitted under *Daubert*, and that the plaintiffs had not objected to the introduction of the results at trial. Therefore, there was no support for the contention that the polygraph evidence was inadmissible and the door was not opened to the evidence of non-indictment.

Gibson v. Moskowitz, 523 F.3d 657 (6th Cir. 2008) : The Court affirmed the liability portion of a judgment for the estate of a mentally disabled inmate that sued a prison psychiatrist and others alleging deliberate indifference to medical needs and malpractice. After the psychiatrist testified that he did everything within the standard of care and within his power to help the deceased inmate, the Judge admitted as impeachment evidence the fact that the prison discharged him for violating medical-treatment rules. The Court found no abuse of discretion, because the psychiatrist opened the door to the evidence. In another ruling, the Court upheld the exclusion of defense evidence that the deceased inmate had sexually assaulted a minor. Although the estate had offered evidence that the inmate worked hard, behaved responsibly, and helped others while in prison, the Court found that this did not open the door to evidence of the "highly charged crime." It reasoned that "[t]he estate's evidence concerned [the deceased's] behavior once he was in prison, not what he had done before he entered prison, and the court fairly could restrict any impeachment evidence to his conduct in jail."

Wright v. Ark. & Mo. R.R. Co., 574 F.3d 612 (8th Cir. 2009) : The plaintiff, a railroad employee injured on the job, appealed a favorable verdict in an FELA case on the ground that evidence he was subsequently terminated was irrelevant and prejudicial because it suggested his lost wages resulted from his termination and not from his injuries. Affirming, the Court found no abuse of discretion in the admission of the evidence, as the plaintiff had opened the door when he testified that he was physically unable to go back to work for the railroad and "had to leave work because [he] couldn't any longer do that work." Evidence of the dismissal was permissible to rebut the unfair impression that physical limitations were the only reason he no longer worked at the defendant. Likewise, evidence that he went to a casino after leaving work early and missed work without calling a supervisor was admissible to shed light on the plaintiff's credibility when he testified he left work early due to illness and that he loved his job. In *United States v. Eagle, 515 F.3d 794 (8th Cir. 2008)* , the Court affirmed convictions for aggravated sexual abuse in Indian country, finding no abuse of discretion in permitting the prosecution to cross-examine the defendant about drinking alcohol before being injured in a car accident and failing to cooperate with authorities in the prosecution of the other car's driver. The Court noted that on direct examination the defendant testified that he never met an FBI agent, which opened the door to questions concerning whether he had met with an agent when he was in the hospital with injuries relating to the car accident. The Court observed that the defendant only objected on relevance grounds, not Rule 403 grounds, and found that there was no plain error.

Byrd v. Maricopa County Sheriff's Dep't, 565 F.3d 1205 (9th Cir. 2009) : The Court affirmed a judgment against a detainee who alleged that a female training cadet groped him during a strip search. It found no abuse of discretion when the defense introduced a "video yearbook" produced for the cadets, despite the plaintiff's claims that it was irrelevant because it did not include footage of any searches performed by the cadet, prejudicial because it presented the cadets in a highly flattering light, and misleading because it showed searches performed on fully clothed supervisors rather than the search of the plaintiff in his underwear. The Court held that the plaintiff had opened the door to introduction of the videotape by insinuating in the opening and in a witness examination that the County had videotaped the incident and then erased the tape; the video yearbook was properly admitted so the jury could determine whether the original

videotape was likely or unlikely to contain what the plaintiff alleged.

[57] Other Cases Involving Party [Go To Main]

United States v. Raplinger, 555 F.3d 687 (8th Cir. 2009) : The Court affirmed convictions for sexual exploitation of a child and child pornography, finding no abuse of discretion when the defendant was barred from offering evidence that he had been convicted in state court of sexual abuse of the same child involved in the federal prosecution. The evidence was of little or no probative value, and might have appealed to the passions of the jury by leading it to falsely conclude that convicting the defendant on the federal charges would impermissibly punish him twice for the same conduct. In *Batiste-Davis v. Lincare, Inc., 526 F.3d 377 (8th Cir. 2008)* , in a Title VII action by an employee alleging that she was discharged because of her race, the Court held it was an abuse of discretion (but harmless error) to admit evidence that the plaintiff had filed a pro se Title VII and ADA suit, which she subsequently voluntarily dismissed, against a former employer six years earlier. Since there was no indication that the prior lawsuit was fraudulently filed, any probative value of the evidence was substantially outweighed by the risk of unfair prejudice.

United States v. Chisum, 502 F.3d 1237 (10th Cir. 2007) : The Court affirmed convictions on four counts of tax evasion, finding no abuse of discretion in admitting evidence of the defendant's prior lawsuits against tax judges. The Court noted that the intent requirement in criminal tax cases is particularly strict and concluded that "[t]he lawsuits tended to show that he was not acting in good faith in continuing his scams."

[58] Photographs, Movies, Videotapes [Go To Main]

[a] Events at Issue

United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) : The Court affirmed convictions for carjacking and firearms offenses, finding no abuse of discretion in admitting a videotape of the pursuit of the defendant's car, given that the video demonstrated a crime in progress and the defendant was charged with that crime.

United States v. Williams, 512 F.3d 1040 (8th Cir. 2008) : Affirming drug and gun convictions, the Court found no abuse of discretion in a determination that audio and video recordings of controlled drug buys were not more prejudicial than probative despite their poor quality and inclusion of graphic and obscene language. The videos showed the residence at issue, there was no dispute about the accuracy of transcripts of the audio, and the understandable portions of the audio were consistent with witness testimony.

[b] Photographs, Movies, Videotapes -- Fair Depiction of the Evidence

United States v. Perez-Gonzalez, 445 F.3d 39 (1st Cir. 2006) : The Court affirmed convictions arising from violent and destructive conduct at the former U.S. Navy base at Vieques, Puerto Rico. A celebration on the night before the Navy was to transfer the lands making up the base to the U.S. Fish and Wildlife Service turned into a riot that was captured on film by news cameras. The Trial Judge admitted videotapes and photographs of the riot, which showed the defendant smashing a Humvee with a sledgehammer, scuffling with police, and repeatedly crashing a water truck into the guard post until it collapsed. The Court concluded that the photographs were only "prejudicial" in the sense that they showed the offense as it occurred and that this was not unfair prejudice.

United States v. Smith, 502 F.3d 680 (7th Cir. 2007) : The Court affirmed convictions arising from the defendant's sending a pipe bomb via Federal Express to the boyfriend of the defendant's former girlfriend. It found not abuse of discretion in the admission of a photograph taken by the intended victim showing the defendant making an obscene gesture, as the photo was probative of the acrimonious nature of the relationship between the defendant and the intended

victim.

United States v. Howe, 538 F.3d 842 (8th Cir. 2008) , overruled in part on other grounds, 562 F.3d 892 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession arising from a kidnapping and murder conspiracy. It found no abuse of discretion in the admission of a photograph of a pistol similar to that used in committing the murder. The government correctly used the photograph as demonstrative evidence and did not suggest that it pictured the actual firearm; rather, the witnesses were questioned about the similarities and differences between the weapons. Thus, the photograph had probative value in identifying the type of pistol possessed by the defendant, and was not unfairly prejudicial because the jury could only have understood that it was being used as illustrative.

[c] Photographs, Movies, Videotapes -- Inflammatory Depictions

[ii] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Defendants and Their Surroundings in Criminal Cases

United States v. Hunter, 558 F.3d 495 (6th Cir. 2009) : The Court affirmed most of the defendant's convictions for drug distribution offenses, finding no abuse of discretion in admitting a photograph of him holding a gun. The gun in the photo was identical to one found in his hotel room, and the photo was provided by the defendant's girlfriend, who testified she took it, that the gun in the photo was the same gun found in the hotel room, and that the defendant possessed the gun in the photo on that night. The photo was highly relevant because it tended to establish the defendant's ownership of the gun as well as to corroborate the girlfriend's testimony, and even if the pose in the photo was "menacing," it was not unduly prejudicial. In *United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008)* , the Court affirmed cocaine convictions, finding no abuse of discretion in the admission of a photo showing a gun found at one of three houses associated with the defendant and others, even though there was no evidence that the defendant ever possessed the gun. While there was no evidence linking the defendant to the gun, there was substantial evidence linking him to the three houses in which drugs, firearms, and other drug paraphernalia were found on the day of his arrest. The Court noted that the prejudicial effect of the photo was "considerably weakened by the fact that the district court gave two limiting instructions related to the gun" which "explicitly stated that the handgun was found where Wheaton was alleged to have frequented or been at certain moments in time, and cautioned the jury that the gun could not be used as proof of Wheaton's character."

United States v. Berndt, 530 F.3d 553 (7th Cir. 2008) : Affirming a conviction for possession of unregistered pipe bombs, the Court held that the probative value of a video showing the defendant's living quarters in his parents' home where the bombs were found was not substantially outweighed by the danger of unfair prejudice even though the video showed images of Nazi memorabilia. The video showed the various alarms and motion detectors that had been rigged around the bombs, and the jury knew that the defendant had a collection of American and German World War II memorabilia.

[iii] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Miscellaneous Evidence in Criminal Cases

United States v. Joseph, 542 F.3d 13 (2d Cir. 2008) : In a prosecution for using the Internet to entice an underage girl to engage in unlawful sexual activity, the defendant testified that he had joined numerous Internet groups concerned with bodybuilding, including a site called "Muscleteens." He testified that when he joined the group the picture on the front was an adult bodybuilder, that he normally looked at photos of 18- to 21-year-olds, and that when the site "started to change" he "didn't go back and visit" anymore. The Government introduced, to rebut testimony that the photos on the site were predominately of 18- and 19-year-old girls, a group of photos taken from the site in the period before the defendant was arrested, in which many of the girls pictured appeared to be under 18. The defense was not permitted to question whether the defendant had seen any of the photos that were introduced. Reversing the conviction on other grounds, the Court stated that "[a]lthough admission of the Muscleteens photos was not erroneous, if they become

relevant at a retrial, the defendant must be accorded an opportunity to present evidence that he did not view them."

United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) : Affirming a conviction for production and possession of child pornography, the Court found no abuse of discretion in the admission of pornographic and nonpornographic photos of adult males. Even if the implication of the defendant's homosexuality were prejudicial, the photos were highly relevant to rebut the suggestion that an album in which some were found (and which also contained photos of the victim) had been "manufactured," since photos bearing the same logo were also found on the defendant's computers.

United States v. Sinks, 473 F.3d 1315 (10th Cir. 2007) : In a prosecution for knowingly possessing stolen explosive materials and being a felon in possession of explosives, the Trial Judge ruled *in limine* that photographs of the dynamite found in the car which the defendant was driving would be admitted, after the government indicated that it would not discuss any "improvised explosive device." Affirming, the Court found no abuse of discretion in admitting the photograph, which showed the dynamite wrapped in tape with protruding wires, to prove the defendant's possession of the dynamite. The Court also held that evidence of the way the bomb squad handled the dynamite was relevant to prove that it believed the dynamite was an explosive (something that the defendant refused to stipulate) and to lay a chain of custody for the dynamite. The Court added that "[t]he government could have overstepped its bounds by lingering on this evidence or attempting to paint Sinks as some sort of mad bomber, but it did not."

[iv] Photographs, Movies, Videotapes -- Inflammatory Depictions -- Victims in Criminal Cases

United States v. Fields, 483 F.3d 313 (5th Cir. 2007) : In a capital murder prosecution, the Court found no abuse of discretion in the admission of photos of the victim's body, showing it in an advanced state of decomposition. Most of the 19 crime-scene photos were relevant to rebut the defendant's contention that there was little physical evidence connecting him to the murder, while others were probative to corroborate witnesses who testified that the defendant had dragged the body, and others helped explain to the jury why the body was not found until weeks after the murder. The 13 autopsy photos "helped the jury understand the medical examiner's testimony" and supported the government's theory of the cause of death. The 32 photos were not cumulative, because many photos had different relevance from other photos; furthermore, the Court noted that Rule 403 "does not ban per se all cumulative evidence" as "it is not required that each piece of evidence admitted have an entirely unique theory of relevancy." Finally, the marginal prejudice of any particular photo was trivial, given the fact that most of the photos were clearly admissible, so a replication of the same gruesome scene in another photo could not have had much impact on the jury.

United States v. Pettigrew, 468 F.3d 626 (10th Cir. 2006) : The Court affirmed a conviction for involuntary manslaughter after the defendant drove his truck while intoxicated and collided with a family van, killing the mother and injuring the father and two young daughters. A photograph of the family was relevant, since a photograph of a victim may be used to prove identity, and all four of the family members were victims. However, the Court was troubled by the government's using the photo of the mother "with the rest of her family while saying that she did not make it home that night." Although it did not disturb the Trial Judge's balancing, the Court said "we must admonish the Government -- the proffering of a photograph of the deceased victim, while living and posed with her family, as opposed to a photo depicting only the decedent, needlessly pushes the prosecutorial envelope, and could, if coupled with errors not present here, jeopardize a conviction."

[d] Photographs, Movies, Videotapes -- Miscellaneous Cases

Grossmith v. Noonan, 607 F.3d 277 (1st Cir. 2010) : In a civil rights action by an arrestee who shot his neighbor's dog, the plaintiff argued that he shot the dog to protect himself, his own dog, and his livestock, and that the dog was "vicious" and "bloodthirsty" and looked like a wolf or coyote. Affirming a judgment for the defendants, the Court found no abuse of discretion in the admission of a photo of the dog, in which the dog's appearance was inconsistent with the description given by the plaintiff, since the photo was useful to the jury in evaluating the credibility of the plaintiff's account.

Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) : The Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It found no abuse of discretion in admitting photos depicting dead bodies and victims of military atrocities, since the photos proved crimes against humanity and established liability under a theory of command responsibility, and also demonstrated that the defendant had notice of the human rights violations committed by his subordinates.

United States v. Pruneda, 518 F.3d 597 (8th Cir. 2008) : The Court affirmed drug and firearm convictions, finding no unfair prejudice in the admission of photographs of one defendant's basement showing the firearms and drug paraphernalia seized by law enforcement. The photos also showed also that the defendant had a *Hustler* magazine and CD, but the Court held that this was unlikely to be prejudicial because these items were lawfully possessed and the government did nothing to draw attention to them.

United States v. Pintado-Isiordia, 448 F.3d 1155 (9th Cir. 2006) : Affirming a conviction for unlawful re-entry into the United States, the Court found no abuse of discretion in excluding a photograph of the defendant in his Army National Guard uniform. Evidence of his enlistment in the Guard had been admitted, and the Court "agree[d] with the district court that the only apparent purpose behind introducing the photograph was to elicit the jury's sympathy and patriotism, which runs afoul of *Rule 403*."

[e] Photographs, Movies, Videotapes -- Mug Shots

United States v. Castaldi, 547 F.3d 699 (7th Cir. 2008) : Affirming a conviction for mail fraud and embezzlement, the Court found no abuse of discretion when the prosecution was permitted to use a mug shot of the defendant during opening and closing statements as part of a demonstrative aid showing the flow of funds between the defendant and others involved in the embezzlement scheme. Although the Court expressed "reservations" about the need to introduce the mug shot and noted that prosecutors would be "well advised" to simply use the defendant's name or a different picture in the future, it found no error because the mug shot did not indicate that the defendant was incarcerated and the photo "lacked prejudicial features" (e.g., the defendant was wearing "street clothes" in the photo).

United States v. Condrin, 473 F.3d 1283 (10th Cir. 2007) : The Court affirmed a conviction for conspiracy to transport illegal aliens, finding no abuse of discretion in the admission of a photograph of the defendant taken at the time of his arrest. The photo, which showed the defendant nearly bald, was relevant to help explain the discrepancy between the defendant's full head of hair at the time of trial and witness testimony identifying him as the "bald man," and lacked the prejudicial markers of mug shots held inadmissible, such as police identification boards and prison garb.

[f] Photographs, Movies, Videotapes -- Pornography Cases

United States v. Vosburgh, 602 F.3d 512 (3d Cir. 2010) : The Court affirmed a conviction for possession of child pornography, finding no abuse of discretion in the introduction of non-pornographic child erotica found on the defendant's computer. The evidence suggested that the defendant harbored a sexual interest in children, and tended to disprove any argument that he unknowingly possessed the charged pornography or attempted to access the source link by accident. A limiting instruction avoided the risk of unfair prejudice.

United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) : In a prosecution for knowing possession of child pornography, the Court found no abuse of discretion when the government showed short clips of videos seized from the defendant showing adult bestiality. Clips from videos being downloaded when agents entered the defendant's home were relevant to the defendant's knowledge (which he denied) that the program he was accessing provided pornography. A clip downloaded several weeks previously and last viewed three days before the defendant's arrest was "more troubling," but it tended to rebut any argument of accident or mistake regarding the videos viewed the day of the arrest.

United States v. Zawada, 552 F.3d 531 (7th Cir. 2008) : The Court affirmed a conviction for attempting to entice a minor to engage in criminal sexual activity and for knowingly transferring obscene material to a person under the age of 16, finding no abuse of discretion in the admission of images the defendant sent to a person posing as a minor in a chat room. The photographs were relevant to both crimes and helped to prove that the defendant was trying to entice the minor into unlawful sexual activity, and they were not unfairly prejudicial.

United States v. Sewell, 457 F.3d 841 (8th Cir. 2006) : In a child pornography case, the government proposed showing 23 or fewer of the images that had been found on the defendant's computer for 3-4 seconds each in its case in chief, if the defendant would stipulate that each of the images met the legal definition of child pornography and that 25 of the images in a computer folder depicted known child victims as recognized and maintained in the National Center for Missing and Exploited Children and/or Child Victim Identification databases. After the defendant refused to so stipulate, the Trial Judge ruled before trial that the government could describe the images and file names and field descriptions, but that the jury could not see the images unless it so requested at the time of deliberations. On an interlocutory appeal the defendant offered to stipulate that the images met the' legal definition of child pornography, but the Court concluded that limits on the government's proof were an abuse of discretion: "His now-tendered offer is not dispositive, for the government is entitled to prove its case with evidence of its own choice and is not required to accept the offer."

United States v. Schales, 546 F.3d 965 (9th Cir. 2008) : The Court affirmed a conviction for possession of child pornography and related offenses by a defendant who surreptitiously took photographs of minor girls in his community and "morphed" the images by pasting the faces onto sexually explicit images of other girls that he downloaded from the Internet. The Court found no abuse of discretion in the admission of images found on his camera when he was first apprehended after placing his camera underneath the miniskirt of a 14-year-old at a Wal-Mart and taking a photograph, as the photographs were part of the *res gestae* of the charged offense, and the Judge had taken steps to limit the cumulation and prejudicial effect of the evidence. In *United States v. Ganoe, 538 F.3d 1117 (9th Cir. 2008)* , the Court affirmed a conviction for receipt and possession of child pornography, finding no abuse of discretion in permitting a short display of selected images found on the defendant's home computer, where the defendant refused to stipulate that the file titles alone would convey to a reasonable user that the files contained child pornography.

United States v. Burgess, 576 F.3d 1078 (10th Cir. 2009) : A computer and two hard drives seized when the defendant was arrested on drug charges contained thousands of images of child pornography. At the trial for possession and transportation of child pornography, the defense stipulated to the admission of four images appearing on both hard drives (the four images on the Maxtor drive were specifically named in the indictment). To prove the defendant's knowledge that the defendant knew the drives contained pornography, the government introduced images from the Seagate drive, including some that showed the 14-year-old ward of the defendant's friend. The images were sexually suggestive or borderline pornographic, and some had lewd text superimposed. Affirming, the Court rejected the argument that the images were inadmissible because they were not "vital" to the government's case, there being ample other evidence connecting the hard drives with the defendant. "Although it may be a factor, the test is not necessarily whether the evidence is vital to the government's case. Vitality is often a matter of perspective. Within limits delineated in the Federal Rules of Evidence the government is entitled to introduce all relevant, probative evidence at its disposal." As to 12 images of the ward with superimposed lewd text, the Court noted that they were not admitted until the defendant's friend had testified that the defendant had no opportunity to take the pictures and other witnesses had testified they had never seen him behave inappropriately with children. Although the Court suggested that it might have concluded that fewer than 12 of the images might have been sufficient for impeachment, it found no abuse of discretion.

United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010) : The Court affirmed a conviction for possession of child pornography, finding no abuse of discretion in permitting the government to show five images of child pornography to the jury. Although the defendant stipulated that there was child pornography on his DVD, the Court observed "that the prosecution is entitled to prove its case by evidence of its own choice" and concluded that the images tended to prove that the defendant knew he possessed child pornography, something to which he did not stipulate. In

United States v. Smith, 459 F.3d 1276 (11th Cir. 2006) , the Court affirmed convictions for producing and possessing child pornography, finding no abuse of discretion in the admission of photographs of the defendant naked by himself, the defendant with other women engaged in sexually explicit conduct, and other women striking sexually explicit poses. The naked pictures of the defendant were relevant because they were the actual photos the victim singled out as photographs of the defendant, and "[g]iven that Smith's defense was that another person took the pictures, the photographs were certainly relevant in establishing the photographer's identity." Similarly, the pictures of the defendant with other women were relevant to establish the defendant's role in the photograph's production because they were in a room identical to the one where the victim was photographed. The Court also held that "the pictures of other women in similar poses in the same setting as those of the victim were relevant to establishing that ... Smith knowingly, as opposed to inadvertently, possessed the pictures of the victim as required by [statute]."

[g] Photographs, Movies, Videotapes -- Surveillance and "Day in the Life" Films

Baker v. Canadian Nat'l/Ill. Cent. R.R., 536 F.3d 357 (5th Cir. 2008) : Affirming judgment for the defendant in an action brought by a workman injured in a grade-crossing collision with a train, the Court found no abuse of discretion in the admission of surveillance videos of the plaintiff, as they rebutted the plaintiff's claims as to his post-accident quality of life.

[59] Physical Evidence [Go To Main]

[b] Physical Evidence -- Criminal Cases

United States v. Nadeau, 598 F.3d 966 (8th Cir. 2010) : The Court affirmed a conviction for assault with a dangerous weapon, finding no abuse of discretion in the admission of a metal pipe recovered from a car parked in the defendant's yard. Witnesses had testified that the defendant assaulted the victim with a pipe-like object and the car in which the pipe was found was the one in which the defendant was riding on the night of the assault; that there was no blood, tissue, or fingerprint evidence on the pipe did not render it inadmissible.

United States v. Hall, 473 F.3d 1295 (10th Cir. 2007) : Affirming a conviction for conspiracy to distribute crack cocaine, the Court found no abuse of discretion in admitting evidence of a shotgun discovered in an inoperable car parked outside the defendant's residence and various ammunition (but not shotgun shells) found inside the residence. The Court reasoned that "[s]ome items like 'firearms, large sums of cash, weighing scales, and uncharged quantities of illegal drugs' are generally viewed as 'tools of the trade' -- 'that is, means for the distribution of illegal drugs.' " It added that "[t]he Government is not required to prove that the firearms or ammunition were used for a particular transaction in order for the evidence to be probative." Here, although the shotgun was found in an abandoned car, it was itself oiled, cleaned, and spotless, and it was sitting on top of other items in the car and easily accessible to the defendant.

[61] Police, Probation, and Parole Officer Testimony [Go To Main]

United States v. Brown, 510 F.3d 57 (1st Cir. 2007) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in denying the defendant's motion *in limine* to preclude police officers from testifying that they identified the defendant's voice in a cell phone conversation. The officers, although not trained in voice identification, had listened in on "hundreds of hours" of the defendant's telephone conversations and had debriefed him in person during an investigation in the early 1990s. The defendant had subsequently undergone cancer surgeries on his tongue, but one of the officers had later spoken with him on a couple of occasions, and even if his voice had changed, he also had a distinctive manner of speech. The Court also held that references to the prior investigation had been handled in a way that avoided undue prejudice.

United States v. Contreras, 536 F.3d 1167 (10th Cir. 2008) : The Court affirmed a conviction for bank robbery, finding no abuse of discretion when a probation officer familiar with the defendant was permitted to identify the defendant as the perpetrator of the robbery from surveillance video footage. The Court noted that in this case the defendant could have cross-examined the witness regarding past interactions without eliciting testimony about her status as a probation officer, and concluded that the defendant had made a tactical decision not to cross-examine.

[62] Polygraph and Similar Evidence [Go To Main]

[a] Civil Cases

Munoz v. State Farm Lloyds of Texas, 522 F.3d 568 (5th Cir. 2008) : In an action on a fire insurance policy, the insurer defended on the ground that the plaintiffs had intentionally set the fire. Reversing a judgment for the plaintiffs, the Court held it was reversible error to admit evidence that a grand jury did not indict the husband for arson, as such evidence is highly prejudicial. Although the plaintiffs argued that the insurer had opened the door to the evidence by introducing evidence that the husband had failed a polygraph examination, which they said was per se inadmissible, the Court noted that *Daubert* governs the admissibility of polygraph examination results, that neither party alleged that the results in this case were improperly admitted under *Daubert*, and that the plaintiffs had not objected to the introduction of the results at trial. Therefore, there was no support for the contention that the polygraph evidence was inadmissible and the door was not opened to the evidence of non-indictment.

[b] Polygraph and Similar Evidence -- Criminal Cases

[ii] Polygraph and Similar Evidence -- Criminal Cases -- Defense Evidence Excludable

United States v. Dinga, 609 F.3d 904 (7th Cir. 2010) : Affirming a conviction for making a false statement to a federal law enforcement officer, the Court found no error in the exclusion of evidence that the defendant offered to take a polygraph test. It noted that the evidence showed the defendant did not offer to take the test; rather, he was "backed into a corner until, as a last resort, he agreed to take a test because he felt that he had no better options." Furthermore, there was no advance agreement that the test results would be admissible, so the defendant's offer would be only "marginally probative" of his credibility because he may have thought there would be little at stake if he failed the test.

United States v. Apperson, 441 F.3d 1162 (10th Cir. 2006) : Affirming a conviction for conspiring to manufacture LSD, the Court found no error in prohibiting the defendant from cross-examining a cooperating witness about the witness' failing a polygraph test during the investigation. The defendant was intending to impeach the witness's character for truthfulness, but the Court noted that a failed polygraph test "had the potential to be overvalued by the jury, and thus was excludable under *Rule 403*."

[iv] Polygraph and Similar Evidence -- Criminal Cases -- Prosecution Evidence

United States v. Blake, 571 F.3d 331 (4th Cir. 2009) : The Court affirmed a carjacking conviction, finding no abuse of discretion when the prosecution was permitted to introduce evidence that the defendant had taken a polygraph examination. The evidence was admitted only on redirect to counter a defense implication that a one-on-one interrogation of the defendant was coercive, so the defense "essentially forced the court to admit the evidence"; the results of the examination were not disclosed; and jury instructions not to speculate on the results and to use the evidence only to consider the circumstances of the interrogation greatly minimized any danger of unfair prejudice.

United States v. Allard, 464 F.3d 529 (5th Cir. 2006) : The defendant had confessed to making a false claim of consumer product tampering after she was informed that she had failed a polygraph test, but at trial she claimed the confession was coerced. In response, the government introduced statements made during the examination and called the agent who administered it to explain the process and recount the events. The jury was instructed that it could consider

the statements surrounding the test to determine the witness' credibility but that the results of the test were not admissible. Affirming, the Court found no abuse of discretion. The requirements of *Rule 702* did not apply because no technical, scientific, or expert testimony was being offered, and the probative value of the evidence to rebut the defendant's claim of a coerced confession was not substantially outweighed by any risk of prejudice to the defendant.

United States v. Street, 548 F.3d 618 (8th Cir. 2008) : The Court reversed a conviction for aiding and abetting murder in furtherance of drug trafficking, holding it was error to deny the defendant a mistrial after a jailhouse informant testified that the defendant had said he failed a polygraph test regarding the murder. Although the Judge immediately instructed the jury that "polygraph examinations are not scientifically reliable and they're not admissible in evidence," the Court held that the instruction was insufficient protection for the defendant, whose credibility was vital to his defense in this case, which was largely built on the testimony of cooperating witnesses and jailhouse informants.

[62.1] Post-Event Conduct [Go To Main]

Foradori v. Harris, 523 F.3d 477 (5th Cir. 2008) : The Court affirmed a judgment for a customer who sued a fast food restaurant operator to recover for injuries sustained on its premises as a result of an assault by an off-duty employee. It found no abuse of discretion in admitting evidence of the operator's post-accident conduct, since "[t]he trial judge reasonably could have concluded that the evidence of Captain D's lack of concern and precautions for customer safety post-episode had probative value tending to show managerial attitudes at the time of the altercation and assault that was not substantially outweighed by its prejudicial effects."

[62.2] Predicate Felonies [Go To Main]

United States v. Banks, 553 F.3d 1101 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when the names of the predicate felonies were introduced. The particular felonies were relevant because the statute excludes certain felonies from serving as predicates, and the Judge gave a limiting instruction to minimize prejudice.

[63] Prejudice [Go To Main]

[c] Prejudice -- "Prejudice" Covered by the Rule

United States v. Harper, 463 F.3d 663 (7th Cir. 2006) : Affirming mail fraud convictions, the Court found no abuse of discretion in the admission of a letter sent by the government to his previous attorney, which reported that the defendant had deposited unexplained cash into his accounts. The letter was offered to prove that the defendant knew of the government's awareness and responded by covering his tracks. The defendant testified that he never heard about the letter, and argued that it was impermissible and prejudicial to allow the jury to infer his receipt of it merely because it was addressed to his then-attorney. The Court noted that the prejudicial effects that the defendant alleged, such as having to take the stand in his own defense, were strategic decisions and not within the realm of *Rule 403*. The Court concluded that the "only prejudicial effect which would have been apparent to the factfinder was the letter's strong probative value -- the prejudice was not unfair and did not outweigh the probative value -- as such there is no basis for exclusion under *Rule 403*." The Court also noted that lawyers are expected to confer with their clients, and that it is not unreasonable to infer that they do so.

United States v. McCourt, 468 F.3d 1088 (8th Cir. 2006) : In a prosecution for attempted distribution and receipt of child pornography over the Internet, seven three-second video clips containing child pornography that were found on

the defendant's computer were admitted. Affirming, the Court rejected a defense argument that the Judge had failed to conduct a *Rule 403* balancing in deciding whether to admit the video clips rather than the defendant's stipulations that they contained child pornography. Although the Judge did not enter into a lengthy analysis during the motion *in limine* conference, "the Trial Court's mere failure to make a record of its rule 403 weighing is not reversible error." Moreover, a more thorough balancing evaluation would not have changed the result because " *Rule 403* requires a preliminary showing of unfair prejudice before the need to balance the probative value of the evidence and its alternatives arises," and here there was no showing that the evidence was *unfairly* prejudicial. While video may be more prejudicial than still photographs, the Court concluded that "we see no reason here that the Government must limit its evidence to still images because McCourt did not so limit his collection."

[66.1] Product Warnings [Go To Main]

Giles v. Wyeth, Inc., 556 F.3d 596 (7th Cir. 2009) : In a product liability action alleging inadequate warnings regarding an antidepressant drug that allegedly caused the decedent's death, the Court found no abuse of discretion in the exclusion of evidence regarding warnings attached to the drug after the death. The subsequent warnings had little, if any, probative value, since they mainly referred to risks to children and young adults and disclaimed any increased risk to patients of the decedent's age (46); in any event, there was no showing they reflected information the defendant knew or reasonably knew at the time of the decedent's death. At the same time, the evidence could have confused the jury into thinking that warnings of increased suicidal thinking and behavior in adolescents and young adults also had some application to the decedent, when there was no evidence to support that.

[68] Race and Ancestry [Go To Main]

United States v. Orenuga, 430 F.3d 1158 (D.C. Cir. 2005) : The Court affirmed a bribery conviction, finding no abuse of discretion in the admission of a videotape in which the defendant told a confidential informant not to set up transactions with Jews, black Americans, or white men. The evidence tended to rebut an entrapment defense by showing, through the defendant's statements about future deals and the types of people with whom he preferred to deal, that he was a willful participant in the charged criminal activity.

United States v. Seale, 600 F.3d 473 (5th Cir. 2010) : In the prosecution of a fatal kidnapping committed in 1964, the prosecution introduced contemporaneous statements regarding the defendant's racial animus and membership in the KKK. Affirming, the Court found no abuse of discretion in admitting the evidence. The victims had been abducted because of their race by a band of men who shared membership in a group hostile to African-Americans and the Civil Rights movement, so even though the evidence was racially inflammatory, it was relevant to show the defendant's motive and intent and to identify his relationship to others in the conspiracy. In *United States v. Anderson, 560 F.3d 275 (5th Cir. 2009)* , the Court affirmed a conviction for sex trafficking of children, holding it was error (but harmless) when the testimony of an FBI special agent regarding the culture of prostitution implied that all pimps are black males. An implication that persons of the same race as the defendant are more likely to commit certain crimes is impermissible both on constitutional grounds and because its probative value is outweighed by its danger of unfair prejudice.

Farfaras v. Citizens Bank & Trust, 433 F.3d 558 (7th Cir. 2006) : In an action for sexual harassment, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion in the admission of evidence regarding the defendants' comments about the plaintiff's Greek ancestry. The comments led to, and were intertwined with, the defendants' sexually harassing statements and "[g]iven the egregious nature of the defendants' sexual comments, ... [there was no evidence] that the defendants' less severe, discriminatory comments had an injurious effect or prejudiced the jury's verdict."

[69] Reading Materials [Go To Main]

United States v. Parr, 545 F.3d 491 (7th Cir. 2008) : In a conversation with a fellow prisoner, the defendant threatened to blow up a federal building. At trial the government introduced *The Anarchist Cookbook,* a manual containing recipes for making homemade explosives and weaponry, which had been found in the defendant's possession before his imprisonment. Affirming, the Court held it was an abuse of discretion (but harmless error) to admit the entire book, as opposed to those sections the defendant had discussed in his conversation. The remaining portions, a hodgepodge of instructions for committing an array of illegal activities, many of which having nothing to do with explosives, could only risk inflaming the jury.

United States v. Caraway, 534 F.3d 1290 (10th Cir. 2008) : The defendant was convicted of mailing an explosive to a man who was dating his ex-wife. At trial a government witness testified that he found a book in the defendant's workshop that contained instructions and illustrations for making explosives. He never saw the defendant with the book, and noted that he found it near "some stuff that somebody was storing there." That "somebody" was a person other than the defendant. The defendant argued that it was error to admit this testimony under Rule 403, but the Court disagreed. The testimony was probative, because an issue in the case was whether the defendant had the knowledge to construct an explosive device, and "[e]vidence that there was at one time a book in Mr. Caraway's workshop that explained how to make an explosive device similar to the one sent to Mr. Owens makes his possession of that knowledge more probable." And the evidence was not *unfairly* prejudicial, since "[i]f the jury inferred that Mr. Caraway had read the book, that inference [of knowledge] was properly inculpatory. If the jury did not believe that he had read it, the jury was highly unlikely to hold against him that such a book was found on his property."

[72] Religious Affiliations and Beliefs [Go To Main]

United States v. Ahrendt, 560 F.3d 69 (1st Cir. 2009) : The Court affirmed a conviction for cocaine conspiracy, finding no abuse of discretion in the exclusion of expert testimony that the defendant (whose competency was questionable) viewed drug use as "sacramental consumption." The testimony about the defendant's beliefs in a higher law was not probative of his ability to form the requisite intent for conviction on a conspiracy charge, and it had a significant potential to confuse or mislead the jury into thinking that the defendant's #x201c; 'idiosyncratic philosophy amounts to a form of temporary insanity or ameliorates the offense.' "

[76] Settlement Agreements [Go To Main]

United States v. Miller, 588 F.3d 897 (5th Cir. 2009) : The defendant physician was convicted for tax evasion related in part to his embezzlement from his employer. Affirming, the Court found no abuse of discretion in the exclusion of evidence regarding a settlement agreement between the defendant and the employer, as the evidence did not relate to his alleged embezzlement activities and its "minimal probative value [was] outweighed substantially to confuse the jury, as it is unrelated to the specific charges of tax evasion in the indictment."

United States v. Roti, 484 F.3d 934 (7th Cir. 2007) : The defendant, charged with bankruptcy fraud and concealing assets from a bankruptcy trustee, claimed that his lawyer put him up to the scheme. The Trial Judge excluded, under Rule 408, evidence that the defendant had sued the lawyer and the lawyer settled that litigation, but also indicated that the evidence would have been excluded under Rule 403. Affirming, the Court found no abuse of discretion in the Rule 403 analysis; it doubted that the evidence was even relevant, because the defendant was not arguing that he was duped by the lawyer into believing that his course of conduct was legal. "The problem is not only that Werth's culpability

would not excuse Roti's but also that the settlement of a civil claim does not say anything helpful about Roti's state of mind."

[77] Sexual Activities [Go To Main]

[a] Civil Cases

Fox v. Hayes, 600 F.3d 819 (7th Cir. 2010) : After a three-year-old was abducted, sexually assaulted, and murdered, her father was arrested and detained for seven months before DNA tests showed that he was not the assailant. In a § 1983 action alleging false arrest and other state law claims, the defendant police officers claimed that they had probable cause for the arrest. Affirming a judgment for the plaintiffs, the Court held there was no abuse of discretion in excluding evidence that the father told the officers before he was arrest that he was "horny" on the night of the child's disappearance and had masturbated into a condom while watching an adult video, offered to show that he changed his story about not being able to remember what he watched that night. "Even putting aside the defendants' testimony that they did *not* know about the supposed change," they had been permitted to elicit the only fact they needed to demonstrate the supposed change, that the father had watched an adult video. The additional details were not simply "dramatic," as the defendants described them, but prejudicial.

Littleton v. McNeely, 562 F.3d 880 (8th Cir. 2009) : Littleton, the driver of a boat struck in a night-time collision with another boat driven by McNeely, brought an action against McNeely. McNeely counterclaimed for contribution and filed a third-party claim against the owner of Littleton's boat. The Court found no abuse of discretion in the exclusion of photographs that showed the Littletons and the boat owner and his wife in a place called "Party Cove," with the wives depicted without their bikini tops. The Court reasoned that "[i]t is readily apparent jurors might consider such conduct lewd, offensive or immoral; the photographs did not reveal whether or not the beverages were alcoholic; they did not actually depict anyone drinking anything; and they were not date-stamped so there was no way to be certain they depicted activity on the day of the accident."

[c] Sexual Activities -- Offered by Prosecution

United States v. Brockenborrugh, 575 F.3d 726 (D.C. Cir. 2009) : In a prosecution for wire fraud arising from a scheme to file a fraudulent deed to obtain a property, the defendant explained on direct examination that his relationship with the other conspirator was that she did taxes for half of the court security officers (of which he was one) and was his property manager. Affirming, the Court found no abuse of discretion when the government was permitted to cross-examine the defendant about his extramarital sexual relationship with the conspirator. The cross-examination was reasonable given the suggestion on direct examination that the conspirators had only a business relationship, and the only possible prejudicial effect arose from the inference that a person who "cheats" on his wife cannot be trusted; "[a]ny such effect was mitigated by the district court's instruction to the jury to disregard the relationship as evidence of bad character."

United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008) : Affirming convictions for holding another in involuntary servitude and harboring a juvenile alien, the Court found no abuse of discretion in admitting evidence that the defendant's former husband physically and sexually abused the victim, because the "abuse of the victim was one of the forms of force used to keep the minor victim in the condition of involuntary servitude."

United States v. Stout, 509 F.3d 796 (6th Cir. 2007) : On interlocutory appeal in a prosecution for possession of child pornography, the Court (2-1) affirmed an *in limine* ruling precluding the government from introducing evidence that the defendant had previously been convicted for installing a hidden camera in the home of family friends and videotaping their 14-year-old daughter in the shower. While the prior act evidence might have some probative value on the question whether the defendant knew that the images he was charged with possessing were of children, that probative value was slight. The government's need for the evidence to prove intent and knowledge to possess child pornography was

likewise slight, since it had other means of proof, such as testimony by the defendant's ex-wife that she had discovered on his computer that he had been searching for child pornography. On the other hand, in the words of the Trial Judge, "[t]he prior bad acts evidence is prejudicial because it is both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct. As a consequence, the jury is likely to pay undue attention to it... . [T]here is a strong possibility that the jury will be improperly distracted from the primary evidence at hand." In *United States v. Chambers, 441 F.3d 438 (6th Cir. 2006)* , the court affirmed a conviction for interstate transportation of a minor for criminal sexual activity, finding no abuse of discretion in the admission of the defendant's notebooks, which contained graphic descriptions of sex acts between him and his victims. The evidence was relevant to show that the defendant knew that the victims were minors and that he engaged in sexual acts with a particular victim. The evidence painted the defendant in a bad light, but it went to elements of proof essential to the prosecution's case.

United States v. Betcher, 534 F.3d 820 (8th Cir. 2008) : The defendant, charged with taking pornographic pictures of his minor granddaughters and distributing them, claimed that the girls took the pictures themselves. The Court found no abuse of discretion in admitting several pictures and a video of one or more of the girls, none of which contained graphic depictions of child pornography. The video was relevant "to show Betcher was in control of production and distribution" and that the photos indicated that they were taken in the defendant's home by someone other than the children themselves. The Court found no unfair prejudice in the evidence, and therefore "it is not necessary for us to evaluate the availability of evidentiary alternatives." In *United States v. Anwar, 428 F.3d 1102 (8th Cir. 2005)* , the court affirmed a conviction for conspiring to evade immigration laws by arranging fraudulent marriages, holding that evidence of the defendant's romantic relationship with two women who entered into the marriages was properly admitted to prove that they were sham arrangements, since it was unlikely that the defendant would solicit women with whom he was romantically involved to marry other men.

United States v. Curtin, 489 F.3d 935 (9th Cir. 2007) (en banc): The defendant engaged in sexually explicit conversation in an Internet chat room with an agent posing as a 14-year-old girl. When he was arrested after traveling to another state to meet her, his personal digital assistant was found to contain over 140 stories about adults having sex with children. Five of the stories (all of which involved incest) were introduced at his trial for interstate travel to engage in sex with a minor. A panel of the Court had reversed the conviction on the ground that the evidence was inadmissible under Rule 404(b) to prove intent, *443 F.3d 1084 (9th Cir. 2006)* ; guided by *People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154, 1159 (9th Cir. 1998)* (*Manual* § 403.03[77][c]), the panel concluded, " 'Possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b).' " On *en banc* review, the Court held that the some of the stories in the defendant's possession were relevant to rebut his contention that he was intending to meet a 30- to 40-year-old woman who liked to pretend that she was an inexperienced teenage girl, and could thus be admitted under Rule 404(b). However, it was an abuse of discretion under Rule 403 for the Judge to admit all five of the stories without reading them through completely, as they contained portions with graphic descriptions of sexual conduct bearing no relation at all to the scenarios presented by the parties. As to one story, the Court commented: "Had the district court read Exhibit 7C, the court would no doubt have spotted this excrescence and required that it be edited out of the exhibit as both irrelevant and dangerously prejudicial." Five Judges concurred, but argued that "what people read or fantasize should not be used to prove what they intend to do," and thus would not overrule *Shymanovitz*; in any event, they would find evidence of a person's fantasies prejudicial. On remand, only one carefully redacted story, which explicitly described prurient sexual activity between an adult and a child, was admitted. The defense brought out on cross-examination that the defendant's PDA contained other stories pertaining to innocent subjects that did not involve sex with juveniles or children. The agent then testified on redirect that the total number of child/sex stories in the PDA was 140. Affirming, the Court found no abuse of discretion. *United States v. Curtin, 588 F.3d 993 (9th Cir. 2009)* . The Judge had faithfully followed the en banc opinion in admitting the story, and the redirect examination was more relevant than prejudicial in countering the inference the defendant attempted to create that the story introduced was only a small, insignificant part of the PDA's total content.

United States v. Burgess, 576 F.3d 1078 (10th Cir. 2009) : A computer and two hard drives seized when the defendant

was arrested on drug charges contained thousands of images of child pornography. At the trial for possession and transportation of child pornography, the defense stipulated to the admission of four images appearing on both hard drives (the four images on the Maxtor drive were specifically named in the indictment). To prove the defendant's knowledge that the defendant knew the drives contained pornography, the government introduced images from the Seagate drive, including some that showed the 14-year-old ward of the defendant's friend. The images were sexually suggestive or borderline pornographic, and some had lewd text superimposed. Affirming, the Court rejected the argument that the images were inadmissible because they were not "vital" to the government's case, there being ample other evidence connecting the hard drives with the defendant. "Although it may be a factor, the test is not necessarily whether the evidence is vital to the government's case. Vitality is often a matter of perspective. Within limits delineated in the Federal Rules of Evidence the government is entitled to introduce all relevant, probative evidence at its disposal." As to 12 images of the ward with superimposed lewd text, the Court noted that they were not admitted until the defendant's friend had testified that the defendant had no opportunity to take the pictures and other witnesses had testified they had never seen him behave inappropriately with children. Although the Court suggested that it might have concluded that fewer than 12 of the images might have been sufficient for impeachment, it found no abuse of discretion. In *United States v. Cerno, 529 F.3d 926 (10th Cir. 2008)* , the Court affirming a conviction for aggravated sexual abuse, found no abuse of discretion in the admission of testimony that, upon returning home from a wake, the victim and other family members found the defendant passed out on a couch with his penis exposed while a pornographic videotape played on the television. The Trial Judge found that the evidence tended to impeach the defendant's testimony that drinking did not impair his judgment. The Court stated that "this is a close question and we may well have come to a different conclusion ourselves" but "our own view of the issue is not relevant under the applicable standard of review." The Court found the exposure evidence "had some relevance as impeachment by contradiction." And while the evidence was prejudicial, "it is not enough that the risk of unfair prejudice be greater than the probative value of the evidence; the danger of that evidence must *substantially* outweigh the evidence's probative value."

[78] Similar Circumstances [Go To Main]

[a] Absence of Accidents or Complaints

Moyer v. United Dominion Indus., Inc., 473 F.3d 532 (3d Cir. 2007) : In an action by factory workers alleging serious and permanent hand injuries as a result of using the defendant's "swager" (a machine used to form metal), evidence that there had been no prior claims against the defendant for injuries like those claimed by the plaintiffs was excluded. Reversing denial of the defendant's motion for a new trial, the Court held that exclusion of the evidence was an abuse of discretion because all swagers sold were basically the same, the defendants sold thousands of swagers, and the defendant kept a comprehensive database of claims and lawsuits involving swagers.

Croskey v. BMW of No. Am., Inc., 532 F.3d 511 (6th Cir. 2008) : The plaintiff, who was injured by scalding fluid when the plastic neck on a car's radiator failed, brought product liability claims alleging both that the design of the radiator was defective and that the defendant manufacturer failed to provide warnings after becoming aware that the plastic radiator neck might fail. When the plaintiff offered evidence of other incidents in which the neck failed, the Judge admitted the evidence only on the failure to warn claim, limiting it to incidents occurring before the plaintiff's accident of which the defendant was notified. Reversing a judgment for the defendant, the Court held that under the governing law evidence of similar incidents was also relevant to prove that the design was defective. The Court cited a state case suggesting that in a case like this evidence of incidents postdating the plaintiff's accident, which would be relevant to a defect claim but irrelevant to a warning claim, could be excluded under Rule 403 as confusing. The Court also noted that on remand the defendant could offer evidence of the total number of cars sold having a radiator with the allegedly defective design. In the Judge's discretion, evidence of a positive safety history might tend to rebut the defect claim; cross-examination could help the jury understand the statistics offered. Finally, the Court held it was error to exclude testimony by non-BMW mechanics regarding performance of the radiator neck on the design defect claim, but proper to exclude their testimony on the warning claim, as knowledge was not notice to the defendant.

[b] Similar Circumstances -- Civil Rights Cases

Quigley v. Winter, 598 F.3d 938 (8th Cir. 2010) : Affirming a judgment for the plaintiff in an action for sex discrimination in housing, the Court found no abuse of discretion in the admission of evidence regarding sexual harassment committed by the defendant landlord against other tenants. The Court found that the evidence was sufficiently closely related to the circumstances and theory of the case, and that the Judge had exercised discretion in excluding testimony from another former tenant as being too remote. The Court also found no abuse of discretion in admitting a probable cause determination made in the case by a state agency, particularly because the jury was instructed that it, not the agency, was responsible for determining if the plaintiff had proved her case.

[d] Similar Circumstances -- Employment Discrimination Cases

King v. McMillan, 594 F.3d 301 (4th Cir. 2010) : In a Title VII sexual harassment action by a former deputy sheriff, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion in the admission of testimony by two other women who said they had been sexually harassed by the sheriff while working for him in the sheriff's office. The evidence was probative of whether the sheriff's unwelcome conduct was because of the plaintiff's sex and of whether the conduct was sufficiently severe or pervasive to create a hostile work environment. Any prejudice was limited by admitting only testimony of harassment that occurred during the same time frame as the plaintiff's employment. The Court found that there was no need to give a specific instruction that the testimony could not be considered on a state-law battery claim against the sheriff in his individual capacity.

Harris v. Chand, 506 F.3d 1135 (8th Cir. 2007) : Affirming a judgment for the employer in a Title VII race discrimination action, the Court found no abuse of discretion in the exclusion of evidence regarding a white employee who had a different position, in a different department, with a different supervisor. The circumstances were not sufficiently similar because there were different decision makers.

Josephs v. Pacific Bell, 432 F.3d 1006 (9th Cir. 2005) : The Court affirmed a judgment for a former employee who alleged that the defendant's refusal to reinstate him after his discharge for fraudulent entries on his employment application violated the Americans with Disabilities Act and the California Fair Employment and Housing Act. It found no abuse of discretion when evidence of three other employees' grievance settlements with the defendant was admitted. The other employees had similar jobs and displayed similar conduct, so their settlements were properly admitted to show that the defendant treated similarly situated employees more favorably than the plaintiff. The dissenting Judge argued that none of the other employees displayed similar conduct and their settlements distracted the jury from determining whether the plaintiff was qualified for his position.

[e] Similar Circumstances -- Miscellaneous Cases

Brazos R. Auth. v. GE Ionics, Inc., 469 F.3d 416 (5th Cir. 2006) : The plaintiff sued for breach of warranty after a retrofitted desalinization plant supplied by the defendants suffered several fires. At trial, evidence of fires at similar plants was excluded on the ground that it was barred by *Rule 404(b)*. Vacating a judgment for the defendants, the Court held it was error to exclude evidence of fires at similar plants under *Rule 404(b)*, as that Rule does not apply to inanimate objects, and that the evidence was not excludable under *Rule 403*, either. The other fires involved substantially similar products under substantially similar circumstances, there was no risk of unfair prejudice, and any differences between the situations went to the weight of the evidence and not its admissibility.

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008) : Small billboard companies alleged that the defendant, a billboard operator acting as leasing agent for railroads, had wrongfully appropriated for itself billboard sites for which the plaintiffs had applied. Affirming in part a judgment for the plaintiffs, the Court held there was no abuse of discretion in permitting two railroad employees to testify that the defendant's process of reviewing site applications internally was outside the industry norm and contrary to their expectations as representatives

of the railroads, and that it was not fair for the defendant to surreptitiously review applications and appropriate sites. The witnesses spoke from their experience in railroad real estate management and billboard site review and approval, and their testimony was helpful to the jury in refuting testimony by the defendant's witnesses that its process was permissible under the terms of its contracts with the railroads. The Court also found there was no abuse of the Judge's "considerable discretion" in determining that the probative value of testimony by billboard-site applicants other than the plaintiffs regarding their experiences with the defendant were not substantially outweighed by its prejudicial effect.

[f] Similar Circumstances -- Other Accident Cases

Surles v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007) : The plaintiff, suing for personal injuries incurred when a deranged passenger attacked the driver of an interstate bus with a box cutter and caused a serious accident, argued that the defendant was on notice of incidents likely to lead to the kind of injury suffered by the plaintiff. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in admitting evidence of 42 incidents in the prior four years in which a passenger had attempted to interfere with the operation of a moving bus. The Court rejected a defense argument that the evidence was not sufficiently similar because only five resulted in an accident and none involved armed passengers attacking and seriously injuring a driver, and noted that if a " 'prior occurrence is offered to prove notice, ... a lesser degree of similarity is required provided the accident would have tended to warn the defendant." The Court also rejected the plaintiff's argument on a cross-appeal that it was an abuse of discretion to exclude evidence of incidents more than four years before the plaintiff's accident.

[g] Similar Circumstances -- Product Liability Cases

[i] Automobiles, Aircraft, etc.

Croskey v. BMW of No. Am., Inc., 532 F.3d 511 (6th Cir. 2008) : The plaintiff, who was injured by scalding fluid when the plastic neck on a car's radiator failed, brought product liability claims alleging both that the design of the radiator was defective and that the defendant manufacturer failed to provide warnings after becoming aware that the plastic radiator neck might fail. When the plaintiff offered evidence of other incidents in which the neck failed, the Judge admitted the evidence only on the failure to warn claim, limiting it to incidents occurring before the plaintiff's accident of which the defendant was notified. Reversing a judgment for the defendant, the Court held that under the governing law evidence of similar incidents was also relevant to prove that the design was defective. The Court cited a state case suggesting that in a case like this evidence of incidents postdating the plaintiff's accident, which would be relevant to a defect claim but irrelevant to a warning claim, could be excluded under Rule 403 as confusing. The Court also noted that on remand the defendant could offer evidence of the total number of cars sold having a radiator with the allegedly defective design. In the Judge's discretion, evidence of a positive safety history might tend to rebut the defect claim; cross-examination could help the jury understand the statistics offered. Finally, the Court held it was error to exclude testimony by non-BMW mechanics regarding performance of the radiator neck on the design defect claim, but proper to exclude their testimony on the warning claim, as knowledge was not notice to the defendant.

United States Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131 (10th Cir. 2009) : Reversing and remanding judgment for the plaintiffs in a product liability action arising from an accident when an aircraft's engine shut down, the Court held it was an abuse of discretion to admit evidence of other in-flight shutdowns, where the incidents did not involve any of the causes alleged by the plaintiffs in this case.

[ii] Similar Circumstances -- Product Liability Cases -- Drugs, Medical Supplies, etc.

Chlopek v. Federal Ins. Co., 499 F.3d 692 (7th Cir. 2007) : The Court affirmed a judgment for the defendants in a product liability action arising from injuries allegedly caused by a device that delivers cooling therapy to postoperative patients. The plaintiff had offered incident reports of injuries related to the device and a prior model; the Judge had admitted only one of the ten reports involving the device at issue and none of those involving the other. The Court found no abuse of discretion, as the Judge had carefully considered each report and found only the one as being

sufficiently similar in terms of the body part involved, the type of injury, and the nature of the complaint. Furthermore, no information was given in the excluded reports about the warnings provided, although the plaintiff's theory of the case was failure to warn.

[iii] Similar Circumstances -- Product Liability Cases -- Miscellaneous Products

Bryte v. American Household, Inc., 429 F.3d 469 (4th Cir. 2005) : The Court affirmed a summary judgment for the manufacturer of an electric throw in a wrongful death action. It found no abuse of discretion in the exclusion of evidence of other accidents, where there was no showing that they were similar to the accident in question. The Court noted that "plaintiffs sought to introduce such evidence without establishing their premise: the salient characteristics of this incident, as well as the incident to which comparison is sought."

Daniel v. Coleman Co, Inc., 599 F.3d 1045 (9th Cir. 2010) : In a wrongful death action alleging that a defective heater caused deaths by carbon monoxide poisoning, the Court held there was no abuse of discretion in excluding evidence that users of different heaters manufactured by the defendant were killed by carbon monoxide poisoning. The evidence of other occurrences was not admissible to prove notice, because the parties had stipulated to the defendant's awareness of other deaths resulting from operation of its heaters in closed spaces, and that stipulation was read to the jury several times. Furthermore, because the heater at issue in this case was more powerful and larger, was designated for a different kind of use, and included different warning language from those involved in the other deaths, it was permissible to find that accidents caused by the other heater models were not "substantially similar" to the accident at issue.

[78.1] Sound Recordings [Go To Main]

United States v. Calabrese, 572 F.3d 362 (7th Cir. 2009) : The Court affirmed robbery and firearm convictions, finding no abuse of discretion when an audiotape in which the defendant threatened and beat a witness was admitted to show consciousness of guilt. The Court noted that there was a risk of prejudice because letting the jury " *hear* the sounds of the beating, as opposed to providing a transcript, might, in some minds, seem over the top." But it also noted that voices "can reveal meaning that words alone might mask." It concluded that "a reasonable judge could have decided to use a transcript instead, or even to eliminate some of the vulgarities, but that's just the point -- reasonable minds can differ."

[82] Stipulations [Go To Main]

[a] Civil Cases

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) : Remanding for a new trial in a False Claims Act case arising from a bid-rigging conspiracy, the Court held that it was an abuse of discretion to admit evidence contrary to a stipulation of the parties, as the jury would not be able to see the distinction that the proponent asserted between the evidence and the stipulated facts.

[b] Stipulations -- Criminal Cases

[ii] Stipulations -- Criminal Cases -- Generally

United States v. Morales-Aldahondo, 524 F.3d 115 (1st Cir. 2008) : The defendant, convicted of possessing child pornography, argued that it was error to admit 12 photographs and ten video clips of child pornography seized from a computer at his house. The defendant had offered to stipulate that the images met the legal definition of pornography, and he claimed that the stipulation obviated the government's need to introduce the photos and videos. Finding no error,

the Court stated that the government "need not accept a defendant's attempt to use a stipulation to overcome the right of the government to make a full presentation of the crime currently charged." In this case, the evidence supported the government expert's description of how the photos and videos were organized on the computer in the defendant's home. This was probative because the defendant argued that the photos and videos were his brother's -- but his brother's storage methods were far less organized. Finally, the Court noted that under Rule 403, the Trial Court "is not required to scrub the trial clean of all evidence that may have an emotional impact, where the evidence is part of the government's narrative."

United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009) : The defendant interposed an insanity defense to charges that he received and possessed child pornography. The Court found no error when the government was permitted to introduce a number of pictures of child pornography that were found on the defendant's external hard drives. Although the defendant contended that the images were not probative of a disputed fact because he did not contest that he had received or possessed child pornography, the Court concluded that "the stipulation was not an adequate substitute for the evidence offered. The specific nature and content of the images were relevant to the jury's evaluation of Polizzi's claim that he did not understand the wrongfulness of receiving and possessing those images. Indeed, the Supreme Court has noted specifically that the government generally has a right to present evidence, rather than accept a stipulation, to establish the 'human significance' of the fact and 'to implicate the law's moral underpinnings.' " Moreover, the risk of unfair prejudice was minimized by the mode of presentation.

United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) : In a prosecution for knowing possession of child pornography, the defendant complained that admission of short clips from pornography found on his computer violated Rule 403 because he had stipulated that the videos "contain[ed] visual depictions of minors under the age of eighteen, engaging in sexually explicit conduct." Affirming, the Court found no abuse of discretion, noting that the stipulation "does not have the same evidentiary value [in meeting jurors' expectations] as actually seeing the particular explicit conduct of the specific minors." Furthermore, the specific videos presented "reflected how likely it was that the defendant knew that the video depicted child pornography (which knowledge the stipulation did not mention)."

United States v. McCourt, 468 F.3d 1088 (8th Cir. 2006) : In a prosecution for attempted distribution and receipt of child pornography over the Internet, seven three-second video clips containing child pornography that were found on the defendant's computer were admitted. Affirming, the Court rejected a defense argument that in light of a stipulation that the video clips contained child pornography, they should have been excluded as a matter of law under *Old Chief v. United States, 519 U.S. 172 (1997)* . The Court held that *Old Chief* was expressly limited to "cases where proof of convict status is at issue," and that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." In a child pornography case, *United States v. Sewell, 457 F.3d 841 (8th Cir. 2006)* , the government proposed showing 23 or fewer of the images that had been found on the defendant's computer for 3-4 seconds each in its case in chief, if the defendant would stipulate that each of the images met the legal definition of child pornography and that 25 of the images in a computer folder depicted known child victims as recognized and maintained in the National Center for Missing and Exploited Children and/or Child Victim Identification databases. After the defendant refused to so stipulate, the Trial Judge ruled before trial that the government could describe the images and file names and field descriptions, but that the jury could not see the images unless it so requested at the time of deliberations. On an interlocutory appeal the defendant offered to stipulate that the images met the legal definition of child pornography, but the Court concluded that limits on the government's proof were an abuse of discretion: "His now-tendered offer is not dispositive, for the government is entitled to prove its case with evidence of its own choice and is not required to accept the offer."

United States v. Schene, 543 F.3d 627 (10th Cir. 2008) : The Court affirmed a child pornography conviction, despite the defendant's argument that images of child pornography found on a computer in his home should not have been admitted because he had offered to stipulate that they were child pornography. The Court found no error in admitting the images, noting that the images "were the gist of the government's case against Schene. The government was entitled to prove its case, and given the charges against Schene, those images were not unfairly prejudicial under Rule 403."

United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010) : The Court affirmed a conviction for possession of child pornography, finding no abuse of discretion in permitting the government to show five images of child pornography to the jury. Although the defendant stipulated that there was child pornography on his DVD, the Court observed "that the prosecution is entitled to prove its case by evidence of its own choice" and concluded that the images tended to prove that the defendant knew he possessed child pornography, something to which he did not stipulate.

[86] Terrorist Activities [Go To Main]

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) : The Court vacated convictions for a conspiracy to provide material support to designated terrorist organizations (Hamas and Al-Qaeda). The Court held it was an abuse of discretion to admit extensive testimony about a bus bombing by Hamas and about an Al-Qaeda training camp. The defendants were not charged with planning or carrying out the bus bombing and no evidence connected them to that or any other terrorist act, and they never denied knowledge of Hamas' involvement in violent acts, so the evidence had "questionable probative value," which was substantially outweighed by the effect of the "blatant appeal to the jury's emotions and prejudices." The Court found that the testimony regarding the training camp was highly inflammatory and irrelevant, since there was no evidence tying the defendant against whom the evidence was offered to the camp.

United States v. Benkahla, 530 F.3d 300 (4th Cir. 2008) : The defendant was part of a network of individuals the government was investigating for crimes connected to radical Islamic terrorism and violent jihad. Affirming convictions for making false statements and obstructing justice, the Court found no abuse of discretion in the admission of expert testimony on radical Islam and jihad, given the fact that "[t]he evidence in this case was complicated, touching by necessity on a wide variety of ideas, terms, people, and organizations connected to radical Islam." The Court observed that the jury acquitted the defendant of several alleged falsehoods, which was "not exactly the mark of irrational fervor." The Court also upheld the admission of testimony by an FBI agent regarding the agency's investigation and laying the foundation for several dozen videos, documents, and photographs, as the evidence was important to prove the materiality of the defendant's false statements.

[87] Threats [Go To Main]

United States v. Diaz, 592 F.3d 467 (3d Cir. 2010) : The Court affirmed drug and firearms convictions, finding that testimony by government witnesses that they feared what members of their community might do to them in retaliation for their cooperation with the government had little probative value, "as it only helped explain why certain Government witnesses were uncooperative," and that the danger of unfair prejudice from the testimony did not substantially outweigh its probative value, given that it did not state that the defendant himself was violent.

[89] Tools of the Crime [Go To Main]

United States v. Carr, 560 F.3d 849 (8th Cir. 2009) : The Court affirmed a conviction for conspiring to possess cocaine with intent to distribute, finding no error in the admission of evidence that the defendant was carrying a firearm and a false I.D. at the time of arrest. It stated that "the fact that Carr was carrying a loaded firearm when he carried ten kilograms of cocaine to McGill's car was relevant to the charge that he knowingly participated in a drug conspiracy offense." And the use of false identification "is relevant and admissible to show consciousness of guilt, and in this case the use of similar false IDs tended to link the four conspirators." Any prejudicial "impact of this evidence was not *unfair* prejudice," and a government stipulation that the firearm was not stolen and had not been involved in any other crimes

minimized any risk of unfair prejudice. In *United States v. Jiminez, 487 F.3d 1140 (8th Cir. 2007)* , the Court (in an opinion by retired Justice O'Connor) affirmed drug convictions, finding no error in the admission of evidence that the defendant, when arrested, was found with the driver's license of an accomplice. This evidence was more probative than prejudicial because "drug traffickers often carry another person's identification to conceal their identity."

[89.1] Training Manuals [Go To Main]

Foradori v. Harris, 523 F.3d 477 (5th Cir. 2008) : Affirming a judgment for a customer who sued a fast food restaurant operator to recover for injuries sustained on its premises as a result of an assault by an off-duty employee, the Court found no plain error in the admission of the operator's training manual which contained an instruction that employees should "never admit fault." The Judge had "admitted the training manual's statement for the relevant purpose of showing Captain D's failure to train and inculcate its employees in their responsibility for protecting customers from risks attendant to on-premises conflicts."

[89.2] Transcripts of Conversations [Go To Main]

United States v. Burt, 495 F.3d 733 (7th Cir. 2007) : The Court affirmed convictions for child pornography offenses, finding no error when "chat log" transcripts of chat room conversations between the defendant and a witness were admitted. The government had altered the chat logs by replacing the participants' screen names with their real names, but the Trial Judge had admonished the jury that it must independently evaluate whether the screen names were actually used by the two men. The Court found no abuse of discretion in permitting the altered logs to be used as demonstrative exhibits: "We see no reason not to extend the logic of allowing models, maps, sketches, and diagrams to incorporate these particular chat excerpts as well. In this case, the excerpted chat logs were used to aid two witnesses in interpreting and explaining the raw computer chat logs, which forensic examiners had recovered from Martin's computer. Just as a sketch or model of a crime scene can be used to help a witness to recount aspects of testimony and to make that testimony more accessible and understandable for the jury, so might affixing the names of real people in place of their aliases put the computer chat comments into a more useful context for the witnesses and the jury." The Court also found that attaching the real names to a sexually explicit conversation was not unfairly prejudicial, since the defendant "was being prosecuted for exactly what this chat log depicts: creating, trading, and distributing photos of children for the sexual satisfaction of himself and his online partners," and the Judge "very clearly instructed the jury about the limited extent to which that substitution of names could be considered by the jury."

[91] Violent Crimes [Go To Main]

United States v. Rivera Calderon, 578 F.3d 78 (1st Cir. 2009) : The Court affirmed drug conspiracy convictions, finding no abuse of discretion in the admission of evidence that a defendant murdered another conspirator because of his refusal to adhere to the conspiracy's rules about drug packaging and a defendant murdered an individual who had threatened to take over the defendants' "drug points." The evidence tended to show there was a single cohesive conspiracy in which members protected their territory, and its presentation was not calculated to arouse the passions of the jury. In *United States v. Dunbar, 553 F.3d 48 (1st Cir. 2009)* , in a prosecution on drug and firearms charges, the defendant's former girlfriend testified to actions she took to further the defendant's drug trade when she was a minor. Affirming, the Court found no error when the witness also testified that the defendant once beat her. One of the charges was that the defendant "employed, hired, persuaded, induced, enticed, or coerced a person under eighteen years of age" to violate federal drug laws, so the assault was probative of the fact that the defendant coerced the girlfriend to follow his instructions in implementing acts in furtherance of their conspiracy. The evidence was not unfairly prejudicial,

because it went "directly and precisely to the proposition of coercion that it sought to establish."

United States v. Royer, 549 F.3d 886 (2d Cir. 2008) : The Court affirmed convictions for crimes arising out a scheme in which one defendant (Royer), who worked for the FBI when the scheme began, provided information that the other defendant (Elgindy) used to manipulate stock trading. It found no abuse of discretion in the admission of evidence that when Elgindy used his connection with Royer to learn whether he was under investigation, he discovered that he was suspected (wrongly) of having connections to the 9/11 attacks. The evidence was directly relevant to the racketeering and obstruction charges, and the Trial Judge "was at pains to limit the amount and impact of such evidence because of the risk of prejudice."

[92] Waste of Time and Undue Delay [Go To Main]

United States v. Dohan, 508 F.3d 989 (11th Cir. 2007) : The Court affirmed convictions arising from a Ponzi scheme, finding no abuse of discretion in excluding a chart offered by the defense showing the defendant's profits from the scheme compared to those of a cooperating witness. Admitting the chart would have required extensive government cross-examination, and defense counsel was permitted to compare the relative profits in closing argument based on other admitted evidence.

[93] Wealth or Poverty [Go To Main]

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) : Remanding for a new trial in a False Claims Act case arising from a bid-rigging conspiracy, the Court held it was an abuse of discretion to admit evidence of the defendants' wealth. The evidence had no probative value on any material issue and was prejudicial to the defendants. One Judge dissented, arguing that more deference should be given to the Trial Judge's finding that the evidence was probative of relationships among the defendants and was not unduly prejudicial.

United States v. Griffin, 524 F.3d 71 (1st Cir. 2008) : The Court affirmed a conviction for filing a false tax return, finding no error in the admission of evidence that the defendant had a penchant for gambling, jewelry, and fine foods. The defendant's spending habits were probative of whether her tax returns, which reported incomes of less than $20,000, were false.

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006) : In a prosecution for obstructing securities law investigations, the Court held that references to the defendant's substantial salary were relevant to his motive to protect his reputation and that of his business groups. The evidence was not unduly prejudicial, since references to it in the government's opening statement and summation specified that it was to be used only for the limited purpose of establishing a motive to obstruct, and could not be used to convict the defendant simply because of his wealth.

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) : The Court affirmed mail and wire fraud convictions arising from submission of false claims to a mass tort settlement, finding no abuse of discretion in the admission of evidence regarding the defendant's lavish spending, as it was relevant to money laundering counts. The "spillover" prejudicial effect was found not substantial, as the prosecution did not use the evidence inappropriately and the jury actually acquitted on a fraud count as well as on the money laundering counts.

United States v. Harris, 536 F.3d 798 (7th Cir. 2008) : Affirming convictions for drug and firearms offenses, the Court found no abuse of discretion in admitting evidence that the defendant drove numerous luxury autos. "Evidence of unexplained wealth, such as the testimony about Harris's luxury vehicles, is admissible as relevant circumstantial evidence of drug trafficking if the unexplained wealth was acquired contemporaneously with the alleged drug

trafficking, if the wealth created an inference that the defendant was involved in drug trafficking, and if the government presents evidence that the wealth was not obtained through legitimate means." In *United States v. Whiting, 471 F.3d 792 (7th Cir. 2006)* , the Court affirmed a conviction for diverting employment benefit funds, finding no abuse of discretion in admitting evidence of the management fees and expense reimbursements the defendant obtained from the company (which he owned) and of his substantial personal expenditures. The evidence that the defendant withdrew significant amounts for his own benefit, leaving insufficient funds to cover the benefit obligations, was relevant to his intent to defraud, as was the evidence of his wealth, which showed the manner in which he directed company funds to be spent. In the Court's view, the prejudicial effect of the wealth evidence was not great, since this was not a civil lawsuit seeking money damages. In *United States v. Kuzlik, 468 F.3d 972 (7th Cir. 2006)* , the court affirmed a conviction for mail fraud, rejecting the defendant's argument that evidence pertaining to his financial distress before the crime should not have been admitted because the "jury was unable to appreciate the extremely fine distinction between propensity and motive," and "as a result, the jury was confused and misled by the evidence of his financial condition." The Court held that "[t]he sorry state of Kuzlik's finances, his debts, default judgments, and bank overdrafts, was offered as evidence of his motive to embezzle the $44,246.44, not as evidence that Kuzlik had a taste or compulsion for financial fraud." Any even remote potential for unfair prejudice was cured by an instruction that the financial condition evidence was to be considered "only for the purpose of establishing his motive."

White v. Ford Motor Co., 500 F.3d 963 (9th Cir. 2007) : The Court reversed punitive damages awarded to parents of a child who was killed when a pickup truck rolled over him in the family driveway. It held, however, that there was no abuse of discretion in the admission of a redacted one-page balance sheet showing the defendant manufacturer's net worth, since Nevada law makes the defendant's wealth relevant in considering punitive damages, and there was no danger of unfair prejudice in the jury's consideration of the balance sheet.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual 404.syn

§ 404.syn Synopsis to Chapter 404: RULE 404

404.01 Official Text

404.02 Editorial Explanatory Comment

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[aaa] Rule 404(b) -- Witness' Credibility

404.04 Legislative History

[1] Advisory Committee's Note

[2] 1987 Amendment Committee Note

[3] 1991 Amendment Committee Note

[4] 2000 Amendment Committee Note

[5] House Subcommittee on Criminal Justice Notes

[6] Report of the House Committee on the Judiciary

[7] Report of the Senate Committee on the Judiciary

[8] Citations to Hearings and Debates

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual 404.01

404.01 Official Text

[Go To Supp]

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. -- Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. -- Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. -- Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts*. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial,

or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual 404.02

404.02 Editorial Explanatory Comment

[1] Permissible and Impermissible Uses of Character Evidence

Character questions arise in two different ways in litigation. First, character may be an element of a crime, a claim, or a defense. When this occurs, Courts say that character is "in issue." An example is the competency of a driver in an action for negligently entrusting a motor vehicle to an incompetent driver; another is an action for defamation in which the defendant referred to the plaintiff as a dishonest person. In such cases, it is clear that character evidence is more than relevant. It is essential under the pertinent substantive law to prove character in order to prove the crime, claim, or defense. n1 These cases are not covered by the exclusionary principles of *Rule 404*. While not *explicitly* outside the Rule, they are *implicitly* excluded by the definition of "the purpose" of offering evidence in subdivision (a).

Sometimes character evidence is offered for an entirely different purpose: to demonstrate that because a person has a certain character trait, that person acted on a specific occasion in conformity with this trait. In other words, a proponent might wish to prove a person's character as circumstantial evidence of that person's actions on a particular occasion. That is, people with a certain character trait are more likely to act consistently with that trait than people who don't have it. It is these cases that are covered by *Rule 404(a)*. Subdivision (b) covers the use of particular acts of a person that may be indicative of the person's character.

[2] The General Rule and its Exceptions

Subdivision (a) of the Rule states the general rule, which is that evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. The rationale behind the general rule is set forth in the classic case of *Michelson v. United States, 335 U.S. 469, 482 (1948)* . The discussion in *Michelson* is in the context of a criminal case, but its rationale is equally applicable to excluding evidence of character in a civil case:

> The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends

to prevent confusion of issues, unfair surprise and undue prejudice.

However, there are important exceptions to the general rule prohibiting character evidence when offered circumstantially to prove conduct. One is that defendants in criminal cases are given the right to introduce evidence of their own pertinent character traits. Thus, in a fraud case the criminal defendant is permitted to call witnesses to testify that the defendant is an honest person, as proof that the defendant was unlikely to have committed the dishonest act charged. The rationale for permitting character evidence from the accused is that the accused deserves the benefit of all reasonable doubts and that good character may produce a reasonable doubt. This exception is covered in subdivision (a)(1) of the Rule. Subdivision (a)(1) also gives the government the right to admit pertinent character evidence to rebut the defendant's character evidence. Thus, while the government cannot introduce character evidence to prove propensity in the first instance, it can do so if the defendant "opens the door" to the circumstantial use of character evidence. n2

Rule 404(a)(2) provides another exception. It permits the accused to introduce evidence of a pertinent character trait of the victim of a crime. The most common example is in a self-defense case. Under the Rule, the defendant is permitted to introduce evidence of the victim's character for aggressiveness (subject to the limitations on form provided by *Rule 405*), to create the inference that the victim acted in accordance with that character trait on the occasion in question. n3 Admissibility is not dependent on the defendant's prior awareness of the victim's character trait; the evidence is admissible to show how the *victim* acted. n4 The exception to the character evidence exclusion provided in *Rule 404(a)(2)* is not applicable in rape and sexual assault cases; *Rule 412* governs such cases. n5

Another common exception, provided for in the Rule in subdivision (a)(3), is that when a witness is impeached (i.e., the witness's credibility is attacked) or rehabilitated (i.e., the witness's credibility is bolstered), this may be done by using character evidence, subject to rules governing impeachment. The forms of permissible and impermissible attack and rehabilitation are discussed under Rules 607, 608, 609, 610, and 613.

Finally, the limitations on circumstantial use of character evidence found in *Rule 404* are generally inapplicable in cases where a civil or criminal defendant is charged with or being sued for sexual assault, molestation, etc. See the Editorial Explanatory Comments for Rules 413-415.

[3] Prohibition on Circumstantial Use of Character Evidence in Civil Cases

It is clear that the original Advisory Committee intended that the circumstantial use of character evidence would be prohibited in criminal cases. The only contemplated use of such character evidence was that the "accused" could admit it and the "prosecution" could rebut it. Despite this relatively clear language, a number of Courts have held that *Rule 404(a)* does not completely prohibit the circumstantial use of character evidence in civil cases. This led to a split in the Circuits.

In 2005, the Advisory Committee proposed an amendment to *Rule 404(a)* that would make it absolutely clear that the circumstantial use of character evidence is prohibited in civil cases. At this writing, the amendment has been approved by the Judicial Conference and the Supreme Court. The amendment is not controversial, and so it is all but certain that Congress will not act and therefore that the amendment will become law on December 1, 2006. The text of the amendment, and the Committee Note, is as follows:

> (a) Character evidence generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused.-- The material within the following brackets is overstruck in the original. [Evidence] In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the

accused offered by the prosecution;

(2) Character of alleged victim.-- The material within the following brackets is overstruck in the original. [Evidence] In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. -- Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

* * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982)* ("when a central issue in a case is close to one of a criminal nature, the exceptions to the *Rule 404(a)* ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp., 966 F.Supp. 203 (S.D.N.Y. 1997)* (relying on the terms "accused" and "prosecution" in *Rule 404(a)* to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co., 576 F.Supp. 627, 629-30 (D. Ky.1984)* ("It seems beyond peradventure of doubt that the drafters of *F.R.Evi. 404(a)* explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States, 335 U.S. 469, 476 (1948)* ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U.Pa.L.Rev. 845, 855 (1982)* (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under *Rule 404(a)(2)* may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of *Rule 412*.

Nothing in the amendment is intended to affect the scope of *Rule 404(b)*. While *Rule 404(b)* refers to the "accused", the "prosecution" and a "criminal case", it does so only in the context of a notice requirement. The admissibility standards of *Rule 404(b)* remain fully applicable to both civil and

criminal cases.

[4] Character Trait Must Be Relevant

While criminal defendants have the option of introducing their character traits, or those of the victim, the character traits must be "pertinent" -- that is, they must be relevant to the case, or else they will be excluded under Rules 402 and 403. For example, in *United States v. Martinez, 988 F.2d 685 (7th Cir. 1993)* , the defendants were charged with murder arising from a prison conflagration. Evidence of the violent character of the victims was held properly excluded as not relevant where there was no viable self-defense claim. The evidence showed that the victims were rendered defenseless and were repeatedly stabbed while lying motionless on the ground. The defendants argued that they were acting in self-defense at the beginning of the fight; but this was not relevant to the subsequent conduct that was at the heart of the murder charge.

[5] What is a Character Trait?

The term "character" is susceptible to several meanings. For example, is "law-abidingness" a character trait? The government has often argued that "being prone to law-abiding conduct" is not an "actual" character trait but is rather a conclusion that must be drawn from other character traits such as honesty, reliability, and rectitude. However, the Courts have generally held that "character traits admissible under *Rule 404(a)(1)* need not constitute specific traits of character but may include general traits such as lawfulness and law-abidingness." n6

This does not mean, however, that the defendant has unbounded freedom to define a character trait. For example, in *United States v. Diaz, 961 F.2d 1417 (9th Cir. 1992)* , the defendant was charged with possession with intent to distribute more than 500 grams of cocaine. The Trial Court prohibited defense counsel from asking a defense witness whether Diaz had a "character trait for being prone to large-scale drug dealing." The Court of Appeals found no error because a defendant's propensity (or lack thereof) to engage in large-scale drug-dealing "is not an admissible character trait." The proposed testimony was not the same as testimony that the defendant was law-abiding, because it was in effect too specific. The Court reasoned that an inquiry into a propensity to engage in large-scale drug-dealing

> would be misleading if addressed to a defendant with a record of criminal offenses other than drug-dealing: If answered in the negative [as the defendant in *Diaz*, of course, anticipated] the impression may be given that the defendant is a law-abiding person although the defendant has a record of other crimes.

[6] Opening the Door to Character Evidence

The prosecution cannot, in the first instance, introduce character evidence to show that a person acted in accordance with a character trait. n7 However, the prosecution can introduce character evidence responsively. As the *Michelson* Court put it: "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Thus, defense counsel must consider whether introduction of character evidence is worth the risk of rebuttal. n8

If defense counsel decides that the benefit of character evidence is not worth the cost of rebuttal, then counsel must guard against presenting any testimony that could be interpreted as character evidence. The character door can be deemed opened by means less obvious than calling a witness who testifies explicitly to a person's character trait. For example, in *United States v. Dahlin, 734 F.2d 393 (8th Cir. 1984)* , the defendant was charged with robbery; his alibi was that he was babysitting his sister's infant child at the time of the robbery. The prosecution argued that Dahlin could still have committed the robbery by leaving the infant at home, unattended, for a period of time. Dahlin took the stand and testified that he was deeply devoted to his niece and that he never left the child alone. The prosecution rebutted this claim of Dahlin's family relations by questioning Dahlin about a knife fight that he had had with his father. The Court of Appeals held that Dahlin had opened the door to this evidence because he had "put at issue his reliability, responsibility

and familial devotion, which were traits pertinent to the jury's appraisal of his defense."

We think that *Dahlin*, while a close case, was correctly decided. Certainly a simple denial of guilt, or testimony in support of an alibi, cannot open the door to negative character evidence; if it could then the limitations in *Rule 404(a)* would be meaningless. n9 However, Dahlin did not simply deny that he left his niece unattended -- he testified that he was too devoted to his niece to leave her unattended, and that he *never* did so. That is just another way of saying that he was "not the type of guy" to leave an infant family member unattended. n10 Thus, Dahlin's testimony was far enough removed from the specific act at issue, and close enough to testimony about his personality and general conduct, to justify a ruling that he had opened the door to negative character evidence. n11 Dahlin said essentially that he "couldn't" or "wouldn't" have done the act charged by the prosecution; if he had simply said he "didn't do it" then that testimony would not have opened the door to rebuttal with character evidence.

Of course, even if the defendant opens the character door, the prosecution's rebuttal is limited to that which is responsive. So for example, if a defendant introduces positive evidence concerning one of the defendant's character traits, the prosecution cannot respond with negative evidence concerning a different character trait. n12 It makes sense, of course, for defense counsel to open the door only so far as is necessary to introduce favorable character evidence. While it is permissible, as discussed above, to introduce evidence that the defendant has a "law-abiding" character, this obviously opens the door about as broadly as it can be opened. Defense counsel might consider whether some subset of "law-abidingness" (such as honesty) would cover the favorable character evidence and yet limit the scope of rebuttal.

[7] Self-Defense Issues

Intricate questions of character evidence arise when the defendant claims self-defense. Suppose a defendant is charged with murdering a victim in a fight, and he claims self-defense. Suppose further that he wants to admit evidence that he knew: (1) that the victim had previously beaten up a number of people; (2) that the victim usually carried a knife; and (3) that the victim had a reputation in the community as a violent person. Is this evidence barred by *Rule 404*?

The answer should be no. A defendant in these circumstances is not seeking to prove that the alleged victim was a violent person, but that at the time of the fight he had specific reason to fear for his safety. This does not qualify as an attempt to attack a character trait of the alleged victim under *Rule 404(a)*. n13 Thus evidence of the defendant's knowledge about the acts of an alleged victim does not amount to proof of the victim's character. This distinction is important for two reasons: (1) if the evidence is treated as proof of the victim's character, then the prosecution would have the right to rebut with character evidence; and (2) if it is character evidence, *Rule 405* provides that permissible form is limited to opinion and reputation -- specific acts are not allowed.

The result is different if the defendant seeks to introduce information about the victim of which the defendant was unaware at the time of their encounter. To take the above examples, assume that the defendant wants to introduce evidence that the victim had previously beaten up a number of people; that the victim usually carried a knife on his person; and that the victim had a reputation in the community as a violent person. If the defendant did not know of any of this at the time the defendant encountered the victim, then this is character evidence. It is offered to show that the victim had a violent and aggressive character, and acted in accordance with that character on the occasion in question. As such, evidence that the victim had previously beaten up a number of people and that the victim usually carried a knife will be inadmissible -- this is specific act evidence that is barred by *Rule 405*. n14 Evidence of the victim's reputation for violence would be admissible, but it would come at a cost. It would give the prosecution the right to rebut with evidence of the victim's peaceable character. And it would give the prosecution the right to prove the *defendant's* violent character, under the amendment to *Rule 404(a)* that took effect in 2000 (discussed in § 404.02[9]).

The lesson for defense counsel is to be clear when they offer evidence in support of a self-defense claim whether they (1) are content to focus on what the defendant believed at the time the defendant acted or (2) intend to claim that the alleged victim possesses a certain trait.

[8] Character Evidence "Standing Alone" Instruction

Should the defendant be entitled to an instruction that positive character evidence, "standing alone," can be sufficient to create a reasonable doubt? The Federal Courts are in dispute about whether it is proper to give such a "standing alone" instruction. Some Courts have held that a "standing alone" instruction is never necessary and often, if not always, improper, because it misleads the jury. As the Seventh Circuit put it in *United States v. Burke, 781 F.2d 1234, 1239 (7th Cir. 1985)* :

> The "standing alone" instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks that defendant is a liar, if it also concludes that he has a good reputation this may be the "reasonable doubt" of which other instructions speak. A "standing alone" instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider *any* evidence "standing alone." n15

Other Courts have stated that "standing alone" instructions are required where the defendant has presented positive character evidence. n16 Another variation is that a "standing alone" instruction is required where the accused has presented character evidence and "the only evidence linking the defendant to the crime is the victim's word." n17 Most Courts have held that while a defendant is never entitled to a "standing alone" instruction, it is ordinarily not an abuse of discretion to give one. n18

We agree with the majority position that character evidence is rarely so probative or compelling as to require it to be considered apart from the other evidence in the case. This does not mean, however, that the giving of a "standing alone" charge should always be considered an abuse of discretion. We think that there could be some limited instances in which the evidence of good character is so central to the case, and so compelling, that the Trial Judge could consider a "standing alone" instruction to be an appropriate exercise of discretion. This is nothing more than an exercise of the Judge's power to comment on the evidence. We think that the danger of a "standing alone" instruction -- that other evidence might be disregarded -- can be tempered by reminding the jury that it must consider all the evidence in the case. n19 Of course, the jury should in all cases be informed of the limited purpose for which the character evidence is offered. n20

[9] Rebutting Character of the Victim With Character of the Accused

Rule 404(a) was amended in 2000 to provide that if the defendant offers evidence of a negative character trait of the victim, the prosecution can counter with evidence that the defendant has the same negative character trait. Under prior law, an attack on the victim opened the door to evidence that rehabilitated the victim's character, but it did not open the defendant's character to attack. Now, defense counsel must think harder about whether to attack the victim's character -- the risk to the defendant is greater than before.

The amendment to *Rule 404(a)(2)* was a brainchild of the Department of Justice. DOJ members on the Advisory Committee convinced a majority of Committee members that the government is often prejudiced by a one-way presentation of character evidence. They argued that all too often a defendant attacks the character of the victim and the prosecution is not allowed to attack the character of the defendant in kind. What follows, according to the DOJ, is that jurors are misled; they think that the defendant must have a great character if the government says nothing about it.

The flaw in DOJ's analysis is that even without this amendment, the government will usually be able to find a way to introduce negative evidence about the defendant's character. The most obvious way is through the gaping loophole of *Rule 404(b)*. That Rule permits negative evidence to be admitted, though ostensibly only for a not-for-character purpose. In fact, however, this evidence is often misused by the jury to draw inferences about the defendant's character. Moreover, if the defendant testifies as a witness, character evidence can often be introduced under Rules 608 and 609.

So it is questionable whether the amendment was needed to "protect" the government from negative inferences in what is probably a small number of cases.

Note that the amendment specifies that the prosecution's rebuttal is limited to the "same" character trait that the defendant raises as to the victim. For example, assume a case in which the prosecution brings two charges against the accused: one for a violent act and one for fraud. As to the violent act, the defendant claims self-defense and proffers evidence that the victim was a violent person. Under the amendment, the government can offer character evidence that the defendant is a violent person, but it cannot offer character evidence that the defendant is a dishonest person. The character trait must be more than simply "pertinent" to the case -- it must be the same character trait raised by the defendant.

[10] Other Crimes, Wrongs, or Acts: Offered for Propensity or for a Proper Purpose?

The first sentence of *Rule 404(b)* basically restates the principle that character evidence is forbidden when offered to prove that a person acted in conformity with a character trait. This sentence is probably unnecessary in light of *Rule 404(a)*. It is the second sentence of *Rule 404(b)* that gets all the attention. *Rule 404(b)* provides that if evidence of other crimes or wrongs or acts (often referred to as "uncharged misconduct" or "prior bad acts") is offered for some purpose "other" than to prove character -- some not-for-character purpose -- the Rule does not exclude the evidence. n21 In effect, *Rule 404(b)* provides a basis for admitting evidence, not excluding it.

It is no great surprise to find the second sentence of subdivision (b) receiving the most attention in the decided cases. While the second sentence is permissive and not mandatory, Courts have traditionally been very willing to let evidence of other crimes in, even when the prosecution's theory of relevance is quite weak.

It is obviously not an easy task to distinguish between acts offered to prove propensity and acts offered for another purpose. Perhaps the most difficult distinction is between "intent" and "propensity." Assume the typical case in which the defendant is on trial for drug distribution, and the government offers evidence that the defendant has engaged in uncharged acts of drug distribution. The defendant objects that this evidence is offered only to prove character -- once a drug dealer, always a drug dealer. The government responds that the bad acts are offered to prove that the defendant intended to distribute drugs at the time of the event in dispute in the case. According to the government, the fact that a defendant intentionally distributed drugs on other occasions is probative that the defendant had the same state of mind at the time of the disputed event. Is this really a not-for-character purpose, or is it simply another way of saying "once a drug dealer always a drug dealer"? The Court in *United States v. Jones, 389 F.3d 753 (7th Cir. 2004)* , discussed this difficult distinction in the following passage:

> [T]he government argues that Jones's prior convictions demonstrate intent to possess the cocaine in this case because they show that he has, in the past, possessed other illegal drugs with the intent to distribute. But this argument fails to shed any light on the difference between propensity and intent. Propensity, according to Webster's Third International Dictionary, refers to "a natural inclination; innate or inherent tendency." Intent, in contrast, has a volitional overtone to it: synonyms in common usage include purpose, design, or plan. Our prior decisions have not always distinguished carefully between these two meanings. It is possible, on some facts, that prior convictions may reveal a common method of operation, an economic incentive, or other facts that might permit an inference that the same purpose or design motivated the current transaction. In [*United States v.*] *Macedo*, for example, the prior conviction was used to show intent to possess distribution amounts of the drug. In many situations, however, the existence of prior drug convictions will show nothing more than a propensity to deal in drugs. If that is all that can be inferred, then the evidence is inadmissible.
>
> It will be difficult, if not impossible, to know on which side of the line any particular past conviction falls without both specific evidence about the prior conviction and a well articulated theory of the

> legitimate purpose that it allegedly serves for the present case. Here, unfortunately, the government did not introduce any facts or details associated with Jones's prior convictions. The Assistant U.S. Attorney then repeatedly told the jury that Jones's prior convictions showed that he was a drug dealer, and that they should, therefore, find that he intended to deal drugs in this case. This looks, walks, and sounds like the argument "once a drug dealer, always a drug dealer."
>
> The government has tried to salvage its position by noting, correctly enough, that all crimes charging intent to distribute are specific intent crimes and that this evidence was admissible to show intent. It also notes correctly that it has the burden of proving the specific intent element beyond a reasonable doubt. But these observations do nothing to help us tell the difference between the illegitimate use of a prior conviction to show propensity and the proper use of a prior conviction to prove intent. To do that, the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime.

In deciding whether bad acts evidence is offered to prove character or for some not-for-character purpose, we think that it is helpful to consider whether the factfinder is asked to engage in a two-step reasoning process: to infer from behavior on one occasion something about the nature of a person and then to infer from that how the person probably would have behaved on another occasion when the only connection between the two occasions is that the factfinder believes that people of a certain type would act the same way both times. If so, then the evidence is character evidence. If the factfinder can reason from one act about another without going through the first step, the evidence is not character evidence. n22

It is critical to note that finding a not-for-character purpose is only the first step in admitting bad acts evidence. The second, critical step is to consider the probative value of the evidence for its not-for-character purpose, as balanced against the risk that the jury will use the evidence as proof of bad character. This analysis is mandated under *Rule 403*. n23

The Trial Judge should also be careful to ensure that the purpose for which the evidence is offered is more than just a sham for introducing the evidence and using it as proof of character. n24 In particular, Trial Judges should be wary when the proponent of bad act evidence cites a "laundry list" of possible purposes, without being able to articulate how the evidence is probative of those purposes or even that those matters are in issue in the case. n25 For example, in *United States v. Rivera, 837 F.2d 906 (10th Cir. 1988)* , *modified on other grounds en banc*, *874 F.2d 754 (10th Cir. 1989)* , the appellant's conviction was reversed after bad act evidence was admitted to show (according to the prosecutor) "four or five things, one of which is absence of mistake, motive, intent, identity, I forget what all, there are four or five." Neither the prosecutor nor the Judge articulated which if any of the elements were disputed in the case. n26 The Court of Appeals panel found an abuse of discretion, due to the Trial Judge's failure to conduct an inquiry as to the appropriate (if any) not-for-character purpose for the evidence. While the panel opinion was vacated on other grounds by *en banc* review, *Rivera* stands as a lesson to lawyers and Judges about the need for specific articulation of not-for-character purposes under *Rule 404(b)*.

[11] "Back Door" Admission

Counsel should be careful not to let the adversary squeeze other crimes evidence through a back door when such crimes, if offered explicitly under *Rule 404(b)*, would be rejected. For example, in *United States v. Williams, 739 F.2d 297 (7th Cir. 1984)* , the prosecution called a police detective to testify about the investigation leading to the defendant's arrest. In the course of his testimony, the detective stated, over objection, that he knew the defendant by the sobriquet "Fast Eddie." The Court of Appeals found that this testimony constituted reversible error, because it was an impermissible reference to the defendant's character. The Court rejected the argument that "Fast Eddie" was a neutral name, concluding that it would "suggest to the jury that the defendant had some sort of history of or reputation for unsavory activity." The Court recognized that other cases had permitted evidence of a defendant's alias or nickname if it "aids in

the identification of the defendant or in some other way directly relates to the proof of the acts charged in the indictment." n27 However, in this case, "the detective's testimony about the defendant's nickname was completely unrelated to any of the other proof against the defendant." n28 Counsel should be on guard against attempts such as that in *Williams* to sneak in references to other crimes, either by witnesses or by argument. n29

[12] Acts That Are Inextricably Intertwined With the Crime Charged

In a criminal case *Rule 404(b)* operates to assure that the jury convicts only on the offense charged, and not for general bad character. However, it is sometimes difficult to determine which acts are part of the offense charged, and which are uncharged acts subject to *Rule 404(b)*. The test used by the Courts is whether the acts that are the subject of the proof are "inextricably intertwined" with the basic elements of the crime charged. If so, *Rule 404(b)* is inapplicable and there is no need to articulate a "not-for-character" purpose for the evidence. Nor is there any need to give prior notice of the intent to use the evidence, as is required if the evidence is covered by *Rule 404(b)*. Of course, *Rule 403* will still apply to the evidence. n30 However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under *Rule 403*.

Sometimes it is pretty clear that bad act evidence is "inextricably intertwined" with the charge. Consider *United States v. Pace, 981 F.2d 1123 (10th Cir. 1992)*. Three defendants -- Pace, Leonard, and Carter -- were charged in a four-count indictment alleging violations of the federal drug laws. Pace claimed on appeal that the trial judge erred in admitting evidence concerning codefendant Leonard's distribution of methamphetamine on October 26, 1990. According to Pace, the evidence should have been excluded because the transaction occurred after the conspiracy ended. The problem for Pace was that the indictment charged Pace with a conspiracy to attempt to manufacture and distribute methamphetamine/amphetamine that ended on or about October 26, 1990. Thus, even though codefendant Carter was arrested before October 26, the fact remained that the other coconspirators remained free to carry on the objectives of the conspiracy. Thus, the conspiracy had not terminated. The Court of Appeals reasoned as follows:

> *Rule 404(b)* only applies to evidence of acts extrinsic to the charged crime. Evidence of Leonard's sale was direct evidence of the conspiracy, which the indictment charged as occurring between July 1 and October 26, 1990. Conduct during the life of a conspiracy that is evidence of the conspiracy is not *Rule 404(b)* evidence. *United States v. Merida, 765 F.2d 1205, 1221 (5th Cir. 1985)*. n31

This reasoning makes some sense. Any act that was part of the conspiracy would seem to be sufficiently related to the conduct that the government alleged in the indictment so that there is no concern that it is primarily used to prove propensity. This would be true whether or not the act was specifically alleged as an overt act.

The notion of "intricably intertwined" evidence becomes more complicated when it is examined in cases such as *United States v. Hilgeford, 7 F.3d 1340 (7th Cir. 1993)*. Hilgeford suffered what the Court described as "hard times." He had borrowed over one million dollars from a bank and the Farmer's Home Administration using the two farms he owned as security for the debt. When he suffered financial difficulties, the bank foreclosed on the mortgage it held on one of his farms. The bank then bought the farm at the foreclosure sale and evicted Hilgeford. The United States foreclosed on his other farm.

Hilgeford retaliated by sending bills to employees of the bank and the FHA and then taking deductions on his tax return for the unpaid bills. Among the charges brought against him were counts alleging willful filing of false tax returns. To prove the tax counts, the government offered evidence that in the years prior to the challenged tax returns, Hilgeford had generated "a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms." Hilgeford objected at trial under *Rule 404(b)*. The Court held that *Rule 404(b)* was not applicable to this evidence, because it was "intricately related to the fact of the case at hand."

Cases such as *Hilgeford* are more difficult than a conspiracy case like *Pace*, where the bad acts offered occurred while

the conspiracy was ongoing. n32 The bad acts in *Hilgeford* did not occur in the time period covered by the indictment. The fact that the groundless litigation was probative of an element of the prosecution's case does not distinguish it from bad act evidence covered by *Rule 404(b)*; presumably all evidence offered by the prosecution in a criminal trial must be somehow probative of an element of the crime. The Court's statement that the groundless litigation concerning the farm was "intricately related" to the tax counts is vague and conclusory.

We note that there is no significant cost to requiring a *Rule 404(b)* analysis: all the prosecution must do is establish a not-for-character purpose for the bad acts evidence, and give pretrial notice, as discussed below. Nor does avoiding *Rule 404(b)* absolve the Court of the duty, upon request, to provide a limiting instruction. Therefore, we suggest that *Rule 404(b)* should apply to all specific bad acts proffered by the prosecution, unless such acts occurred in the time period covered by the indictment and are substantively related to the charges. n33

The D.C. Circuit has gone one step further, questioning the notion that there should even be an exception from *Rule 404(b)* for acts that are inextricably intertwined with charged offenses. In *United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000)* , a counterfeiting prosecution, the money that led to the charges was discovered on May 16, 1997, when a joint Federal Bureau of Investigation/Metropolitan Police Department narcotics task force executed a search warrant at a Washington, D.C. apartment. An officer outside the apartment approached a man sitting in the passenger side of a parked car. The man consented to a search of the car and indicated that the car belonged to "Boo," who was upstairs in the apartment building. In indicating where "Boo" was, the man motioned toward the apartment where the search was underway. The officers conducting the search found Bowie in the apartment. Bowie identified himself as "Boo" but denied owning the car below. A search of the car resulted in the discovery of more than $3,000 of counterfeit twenty and fifty dollar bills. These were contained inside a console between the driver's and passenger's seats, underneath a pager activation form signed by Bowie and dated May 16, 1997. Other items found included a Maryland traffic ticket issued ten days earlier with Bowie's name and the license number of the car both on it, and a court document that had Bowie's name printed on it and a signature purporting to be his. As the search continued, an additional $90 in counterfeit fifty and twenty dollar bills were inside the pocket of a black leather jacket in the trunk. All of the serial numbers on all of the bills found anywhere in the car were identical.

In order to prove Bowie's guilt, the prosecution sought to use evidence of Bowie's earlier arrest for possession of counterfeit money. On the morning of April 17, 1997, Bowie was involved in an automobile accident in a Washington suburb. The police later did an inventory search of the car and found approximately $1,300 in counterfeit currency inside the pocket of a jacket. This counterfeit currency matched the serial number of the currency later seized from "Boo's" car.

The Trial Court overruled Bowie's *Rule 404(b)* objection to the introduction of the April 17th evidence. The Court ruled that *Rule 404(b)* did not apply because the acts were inextricably intertwined with the charged crime. The court reasoned that, because the serial numbers on the bills seized in April were identical to those seized in May, the April evidence was "in some sense really evidence of the same crime." However, the Court of Appeals criticized the "inextricably intertwined" analysis as an unnecessary limitation on the exclusionary language in the first sentence of *Rule 404(b)*:

> As a practical matter, it is hard to see what function this interpretation of *Rule 404(b)* performs. If the so-called "intrinsic" act is indeed part of the crime charged, evidence of it will, by definition, always satisfy *Rule 404(b)*. ... So far as we can tell, the only consequences of labeling evidence "intrinsic" are to relieve the prosecution of *Rule 404(b)*'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request.

The Court of Appeals also questioned whether the distinction between intrinsic and extrinsic facts was workable.

> Bifurcating the universe into intrinsic and extrinsic evidence has proven difficult in practice. Which

> of a defendant's acts should be considered the charged crime and which should not is often uncertain. In order to brighten the line separating intrinsic and extrinsic evidence, many courts have focused on the connection between a given crime or act and the charged crime. When evidence is "inextricably intertwined" with the charged crime, courts typically treat it as the same crime. Every circuit now applies some formulation of the inextricably intertwined "test." See *United States v. Rodriguez- Estrada, 877 F.2d 153, 156 (1st Cir. 1989)* ; *United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000)* ; *United States v. Gibbs, 190 F.3d 188, 217-218 (3d Cir. 1999)* ; *United States v. Lipford, 203 F.3d 259, 268 (4th Cir. 2000)* ; *United States v. Morgan, 117 F.3d 849, 861 (5th Cir. 1997)* ; *United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995)* ; *United States v. Hughes, 213 F.3d 323, 329 (7th Cir. 2000)* ; *United States v. O'Dell, 204 F.3d 829, 833-834 (8th Cir. 2000)* ; *United States v. Matthews, 226 F.3d 1075, 1082 (9th Cir. 2000)* ; *United States v. O'Brien, 131 F.3d 1428, 1432 (10th Cir. 1997)* ; *United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997)* .

The Court of Appeals concluded that not only is the line between intrinsic and extrinsic offenses difficult to draw, but that there is a danger when trial judges seek to find the line:

> [T]reating evidence as inextricably intertwined not only bypasses *Rule 404(b)* and its attendant notice requirement, but also carries the implicit finding that the evidence is admissible for all purposes notwithstanding its bearing on character, thus eliminating the defense's entitlement, upon request, to a jury instruction. There is, as well, a danger that finding evidence "inextricably intertwined" may too easily slip from analysis to mere conclusion. What does the "inextricably intertwined" concept entail? When is a defendant's crime or act so indistinguishable from the charged crime that an item of evidence is entirely removed from *Rule 404(b)*?
>
> We have not defined "inextricably intertwined" in the few *Rule 404(b)* cases in which we used those terms. Our sister circuits have attempted various formulations. The Seventh Circuit, for instance, examines "whether the evidence is properly admitted to provide the jury with a complete story of the crime on trial, whether its absence would create a chronological or conceptual void in the story of the crime or whether it is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of, the charged crime." *United States v. Hughes, 213 F.3d 323, 329 (7th Cir. 2000)* . According to the Second Circuit, "evidence of uncharged criminal activity is not considered other crimes evidence under *Rule 404(b)* if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000)* .
>
> We do not find these formulations particularly helpful. Some are circular: inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined. Others are over-broad. The "complete the story" definition of "inextricably intertwined" threatens to override *Rule 404(b)*. A defendant's bad act may be only tangentially related to the charged crime, but it nevertheless could "complete the story" or "incidentally involve" the charged offense or "explain the circumstances." If the prosecution's evidence did not "explain" or "incidentally involve" the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant.

In the end, the *Bowie* Court concluded that "there is no general 'complete the story' or 'explain the circumstances' exception to *Rule 404(b)* in this Circuit. Such broad exclusions have no discernible grounding in the 'other crimes, wrongs, or acts' language of the Rule. *Rule 404(b)*, and particularly its notice requirement, should not be disregarded on such a flimsy basis."

To demonstrate its concerns, the Court turned to the *Bowie* facts and concluded that the Trial Court was wrong to have

concluded that the April 17th events were inextricably intertwined with the May 16th charged offense. Therefore, *Rule 404(b)* applied and the prosecution was required to: (1) articulate a not-for-character purpose for the evidence, and (2) provide notice of its intended use at trial. The Court reasoned as follows:

> As to Bowie's case, we do not see how his acts on April 17 constituted the same crime as that charged in the indictment. The authorities seized the counterfeit bills he had in possession on April 17, so the bills he possessed on May 16 could not have been the same ones. *Contrast United States v. Towne, 870 F.2d 880, 886 (2d Cir. 1989)* ("The continuous possession of the same gun does not amount to a series of crimes, but rather constitutes a single offense."). Eleven of the bills -- those recovered in April and those seized in May -- were doubtless from the same supplier and possibly the same batch, and the evidence indicated that Bowie purchased them at one time. But the indictment charged him only with possession of the counterfeit bills found on May 16. Given the charge, the April evidence was relevant [to prove intent and knowledge]. But it cannot be that all evidence tending to prove the crime is part of the crime. If that were so, *Rule 404(b)* would be a nullity.

The analysis in *Bowie* has much to recommend it. The "inextricably intertwined" exception substitutes a careful analysis with boilerplate jargon. It may also lead to a trial judge's failure to consider the possible prejudicial effect of other act evidence, since judges are unlikely to exclude evidence that is perceived as part of the charge brought by the government.

The *Bowie* opinion recognized that in a "narrow range" of cases, a bad act can be so close in time and space as to be part of the charged crime. "*Rule 404(b)*, for instance, would not have barred testimony from a witness who saw Bowie put the counterfeit currency in the Pontiac's console. Although such testimony relates to one of defendant's acts, the act is the charged crime of possessing counterfeit currency." In other words, if the evidence is of an act that is part of the charged offense, it is properly considered intrinsic. The same is true of the *Pace* case discussed above. The overt acts, whether or not all are alleged in the charging instrument or must be proved, are the acts of a conspiracy and there is no need to subject them to a *Rule 404(b)* analysis.

Bowie is a signal that it is unnecessary to create an exception to *Rule 404(b)* in order to permit the government to offer relevant evidence that supports its case. The *Bowie* opinion affirmed the District Court's admission of the April 17th evidence to show knowledge and intent. Similarly, the *Hilgeford* opinion did not need to remove the other act evidence from *Rule 404(b)* to find it relevant and to hold that the District Court did not err in admitting it.

[13] Purposes For Bad Acts Evidence Not Listed in the Rule

Rule 404(b) provides a list of proper purposes for admitting bad acts evidence. This list is illustrative only; it is not intended to be exclusive. n34 A plain reading of *Rule 404(b)* indicates that it is satisfied whenever bad act evidence is offered for a purpose other than proving character. n35 Once the not-for-character purpose is articulated, admissibility becomes a *Rule 403* question -- whether the probative value as to the not-for-character purpose is substantially outweighed by the risk that the jury will use the uncharged misconduct as evidence of bad character.

United States v. Reme, 738 F.2d 1156 (11th Cir. 1984) , provides an interesting example of the "inclusiveness" of *Rule 404(b)*. Reme and Pierrot were charged with transporting illegal aliens to the United States. The defendants, Haitian nationals, arrived by boat with eighty of their countrymen. Their defense was that they were merely passengers and not transporters. The government called other occupants of the boat to testify that Pierrot made the passengers sing voodoo songs; that Pierrot made them submit to searches for valuables and black magic; that Pierrot conducted a voodoo ceremony that led to the disappearance of two passengers; and that Reme beat the passengers. The Court of Appeals held that all this testimony was properly admitted under *Rule 404(b)* to show "control"; the Court was unconcerned that "control" was not specifically listed as a proper purpose in the Rule, because the Rule permits bad acts to be admitted for any not-for-character purpose -- subject to *Rule 403*. On the *Rule 403* question, the *Reme* Court found no abuse of

discretion in admitting the bad acts, since control was a contested issue in the case, the evidence was strongly probative of the government's argument that the defendants controlled the boat, and the prejudice, though significant, did not substantially outweigh the probative value.

[14] Prior Bad Acts Offered by the Accused: "Reverse 404(b)"

The second sentence of *Rule 404(b)* is not confined to evidence offered by a prosecutor. A defendant who claims that bad act evidence committed by a third party is probative of a not-for-character purpose is also able to take advantage of this part of the Rule. *United States v. James, 169 F.3d 1210 (9th Cir. 1999)* (en banc), provides a good example. James was convicted of aiding and abetting manslaughter. The victim was James's boyfriend, Ogden. After a night of drinking, Ogden had attacked James's daughter's boyfriend and knocked him unconscious. Both James and her daughter were in the vehicle where this violent confrontation occurred. In response to the attack, James gave her daughter a loaded gun, and the daughter used it to kill Ogden. James claimed self-defense, and testified that Ogden had previously told her that he had stabbed a person in the neck with a ballpoint pen; ripped the sideview mirror off a car and beat a man unconscious with it; and robbed an old man by holding him down with a knife in his face and threatening to cut his eyes out. The Trial Judge allowed the testimony, but refused to permit the defendant to offer proof that these events described by Ogden had actually occurred; nor was the defendant permitted to offer proof of any other specific act of violence perpetrated by Ogden. The Court held that the exclusion of proof of Ogden's specific acts of violence was reversible error. It stated that the evidence, if admitted, would have had two legitimate functions: "to corroborate James' own testimony that she had heard Ogden tell her these things and to corroborate her statement that she had reason to be afraid of Ogden in his vicious drunken mood." The evidence proved that Ogden had actually committed the acts, "so that the stories of his wild exploits would have had the ring of truth" to the defendant. Thus, the evidence should have been admitted under *Rule 404(b)* because it went to the credibility of the defendant's testimony, and not solely to the victim's character. n36

[15] Civil Cases

Civil litigants should remember that they too can use *Rule 404(b)*. n37 For example, *Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993)* , was a personal injury action, where the plaintiff claimed emotional injuries as a result of the accident. The plaintiff's drug use was held properly admitted for the not-for-character purpose of providing an alternative explanation for his emotional turmoil. n38

In employment discrimination cases, bad acts of the defendant are often admitted to prove intent to discriminate. See the Annotated Cases, § 404.03[2][n][v], [bb][iii].

[16] Stipulating to a Mental Element

One of the not-for-character purposes listed in *Rule 404(b)* is intent and another is knowledge. Often the prosecution seeks to admit a bad act similar to that with which the defendant is charged, as proof that the defendant intended to commit the act charged, or had the knowledge required by the statute. n39 Certainly, this can be probative evidence where defendants dispute intent or knowledge, for example by contending that they were duped or mistaken, or that "it was an accident." However, what if defendants contend instead that they did not commit the crime, were never at the scene, were falsely identified, that the witnesses are lying, etc.? To what extent does the defendant's refusal to contest intent or knowledge -- or offer to stipulate to these elements -- prevent the prosecution from proving it through uncharged misconduct?

Until the decision in *Old Chief v. United States, 519 U.S. 172 (1997)* , most Circuits had held that a defendant could prevent the use of uncharged acts to prove a mental element by offering an explicit stipulation, generally at the outset of the case. For example, in *United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996)* (en banc), the Court held that it was error to admit prior bad act evidence to prove intent and knowledge, because the defendant had made an "unequivocal

concession of both intent and knowledge." The majority reasoned that "a defendant's offer to concede knowledge and intent combined with an explicit jury instruction that the Government no longer needs to prove either element gives the Government everything the evidence could show with respect to those two elements, doing so without risk that the jury will use the evidence for impermissible propensity purposes." The dissenting Judges in *Crowder* argued that the majority erred in focusing solely on what the defendant conceded rather than on the nature of the evidence the government offers, and that the government's evidence remains relevant notwithstanding an offer to stipulate because the government bears the burden of proof as to all elements of all crimes charged.

Old Chief provides strong support for the dissenters' view of the matter in *Crowder*. n40 The Court in *Old Chief* held that under *Rule 403*, a defendant's proffered stipulation to the felony element in a felon-firearm prosecution rendered the evidence of the predicate conviction inadmissible. This was because the stipulation was as probative of the felony element of the crime as was the judgment of conviction, and yet was substantially less prejudicial. The stipulation deprived the government of nothing in the way of narrative or weight of the evidence. However, the Court took pains to emphasize that the prosecution is generally free to prove its case through evidence rather than forced stipulation. This is because in most cases, a stipulation does not carry the same weight as actual evidence; it can deprive the government of narrative power, and rob the government of the ability to prove that a conviction is morally reasonable. Most importantly, the Court in *Old Chief* specifically declared: "if there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' *Fed. Rule Evid. 404(b)*), *Rule 404(b) guarantees the opportunity to seek its admission*." (Emphasis added.)

The *Old Chief* Court distinguished between stipulations to the status element of a crime, which can be forced upon the prosecution, and stipulations to other elements of a crime, which the prosecution should remain free to reject. The rationale for the distinction is "that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." In contrast, the intent and knowledge elements go directly to what the defendant was thinking and doing to commit the charged offense; if forced to accept a stipulation on these matters, the prosecution may be hampered in telling the entire story about the defendant's conduct in a meaningful way to the jury.

It is true that *Old Chief* is not a *Rule 404(b)* case. However, the fact that the Court went out of its way to state that the prosecution need not accept a stipulation as to a mental element of a crime makes it unlikely that a defendant can keep bad acts out of the case by forcing the prosecution to stipulate to intent or knowledge (as opposed to the status element) of a crime. n41 So it was not surprising that when *Crowder* came back to the D.C. Circuit (for reconsideration in light of *Old Chief*), the Court held that the defendant's offer to stipulate intent did not render the prior bad act inadmissible. n42 The *Crowder* court read *Old Chief* as distinguishing between stipulations as to the status element of a crime -- where the stipulation and the proof of status have equal probative value -- and stipulation to the elements of intent and knowledge -- where the stipulation is not as probative as actual evidence. It concluded that replacing proof of intent and knowledge with a stipulation "creates a gap in the story of a defendant's subsequent criminality." The Court stated that "[e]vidence about what the defendant said or did at other times can be a critical part of the story of a crime" and that "*Old Chief* establishes that the prosecution cannot be forced to stipulate away the force of such evidence." The Court concluded as follows:

> [W]e hold that a defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under *Rule 404(b)* to prove that element, even if the defendant's proposed stipulation is unequivocal.

Other courts, post-*Old Chief*, have reached similar results, holding that bad acts evidence offered for proof of a mental element can be admitted despite the defendant's offer to concede that mental element. The notion in *Old Chief* that the prosecution can be forced to accept a stipulation in lieu of introducing probative yet prejudicial evidence has been limited to proof of status -- as apparently was the *Old Chief* Court's intent. n43

Even assuming that a prosecutor can be forced to accept a stipulation to intent or knowledge after *Old Chief* (or is asked by the defendant to do so), the stipulation offered must be sufficient to take the relevant element out of the case; not every stipulation will do that. For example, in *United States v. Garcia, 983 F.2d 1160 (1st Cir. 1993)* , the defendant was arrested while sleeping in an apartment in which a large quantity of drugs was found. He was charged with possession of narcotics with intent to distribute. In an attempt to keep his prior drug transactions out of the trial, he offered to stipulate to "knowledge about cocaine trafficking." The proffered stipulation was rejected and the prior drug transactions were admitted. The Court found that the prosecution was free to reject the proffered stipulation of knowledge about cocaine trafficking, because it would not have removed the entire element of knowledge from the case to which the bad acts would be relevant. Stipulation to knowledge about cocaine trafficking is not the same as stipulating to knowing possession of narcotics at the time of the arrest. n44

Again assuming arguendo that the prosecution must accept a stipulation to an element of the crime (or agrees to do so), the jury would still have to be made aware that the charged crime contains that element. The defendant is not entitled to recharacterize the crime with which he is charged. For example, in *United States v. Gilliam, 994 F.2d 97 (2d Cir. 1993)* , the defendant was charged with being a felon in possession of a firearm -- the same crime charged in *Old Chief*. His proffered stipulation to the fact of his prior felony was accepted. However, he also sought to take the element of the felony out of the case. He asked the judge to instruct the jury that if it found that the defendant knowingly possessed the gun, it should find the defendant guilty. The Court held that such an instruction was inappropriate because it would deny the jury the right to know the crime for which it was convicting the defendant. The Court noted that "Gilliam is not charged with mere possession of a weapon, but with possession by a convicted felon. The jury speaks for the community in condemning such behavior, and it cannot condemn such behavior if it is unaware of the nature of the crime charged."

[17] Acts Committed After the Act Charged

Evidence offered under *Rule 404(b)* is often referred to as evidence of "prior bad acts." This is a misnomer, because it seems to imply that to be admissible under the Rule, the acts must have preceded those that are the subject of the lawsuit. Yet this is not always the case. For example, in *United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995)* , the defendant was charged with conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana. The Trial Judge admitted, as probative of intent, evidence that 185 pounds of marijuana was seized from the defendant's car more than a year after the charged conspiracy was terminated. The Court affirmed the defendant's conviction and stated that "*Rule 404(b)* does *not* specifically exclude acts subsequent to the incident or incidents giving rise to the indictment." The admissibility question was "close" given the long time between the charged offense and the uncharged misconduct, but the Court relied on other cases in which "extrinsic evidence separated by more than a year from the charged conduct has been found probative of intent."

It should be noted, however, that bad acts may be more probative of how a person *will act* than of how a person *has acted*. This is especially true of bad acts offered to prove knowledge. Suppose that a defendant is charged with transporting drugs in the back of a moving van in 2004; the drugs were hidden behind furniture. The defendant claims that he thought the van was full of furniture. Evidence that he had transported a similar shipment of furniture and drugs in 2003 is more probative of his knowledge in 2004 than is evidence of drug and furniture transportation in 1992. n45

The Court in *United States v. Procopio, 88 F.3d 21 (1st Cir. 1996)* , was confronted with the problem of the diminished probative value of uncharged misconduct occurring subsequent to the charged activity. The defendants were convicted of armed robbery and argued that it was error to admit evidence of armed robberies committed by them two years after the robbery that was the subject of the trial. The Court held that the evidence was properly admitted for the not-for-character purpose of proving a criminal association between the defendants. The inference of criminal association went "somewhat beyond the mere implication that either man was of bad character." The decision of the Trial Judge to admit the evidence was, however, a close one under *Rule 403*. The "need to reason backward from 1993

to 1991" weakened the probative value of the evidence as to criminal association in the charged crime. "And here, as is often the case with *Rule 404(b)* evidence, the permissible inference (criminal association) overlapped with, and went only a small step beyond, the forbidden one (criminal character)." However, because the issue was close, and a reasonable Judge might have decided either way, the Court found no abuse of discretion in admitting the evidence. Still, the case would not have been as close had the evidence of uncharged misconduct been a criminal association between the defendants that had occurred two years *before* the crime charged.

[18] Standard of Proof

In the early years of the Federal Rules, many Courts required "clear and convincing evidence" that a criminal defendant committed an uncharged act before proof of the act could be admitted. However, the Supreme Court rejected this standard as unduly stringent, and inconsistent with the language of *Rule 104(b)*, in *Huddleston v. United States, 485 U.S. 681 (1988)* . Huddleston was charged with selling stolen goods and possessing stolen property, charges relating to video cassette tapes. To prove the defendant's knowledge that the items were stolen, the government offered evidence concerning Huddleston's previous offer to sell new black and white television sets and a large quantity of home appliances. Huddleston challenged the admission of the evidence concerning the televisions, because the government's proof that these items were stolen was based solely upon the defendant's failure to produce a bill of sale and their low selling price.

In the lower Courts, Huddleston had argued that the bad act evidence could not be admitted unless the government proved by clear and convincing evidence that the sets had been stolen. In the Supreme Court, however, he conceded that the clear and convincing evidence argument must fail in light of the Court's ruling in *Bourjaily v. United States* (discussed in § 104.02[9]), which held that admissibility requirements in the Federal Rules are determined by a preponderance of the evidence standard. The defendant in *Huddleston* argued instead that the evidence could not have been properly admitted unless the *Trial Judge* found by at least a preponderance of the evidence that the sets were stolen. The Supreme Court, however, unanimously rejected the argument.

Chief Justice Rehnquist's opinion for the Court reasoned that when evidence is offered for a proper purpose under *Rule 404(b)*, "the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403." The Chief Justice declared that the question of whether the defendant had committed the bad act was simply one of conditional relevancy -- the bad act is relevant only if the defendant committed it. Questions of conditional relevancy are governed by *Rule 104(b)*, under which the evidence is admitted if the proponent establishes enough evidence to support a finding of the conditional fact. As the Court put it in *Huddleston:* "The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact -- here, that the television sets were stolen -- by a preponderance of the evidence." The Trial Court need not *itself* be convinced by a preponderance that the defendant committed the bad act.

Responding to the defendant's argument that other act evidence might be unduly prejudicial, Chief Justice Rehnquist wrote as follows:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under *Rule 404(b)*. ... We think, however, that the protection against such unfair prejudice emanates not from a requirement of preliminary factfinding by the trial court, but rather from four other sources: first, from the requirement of *Rule 404(b)* that the evidence be offered for a proper purpose; second, from the relevancy requirement of *Rule 402* -- as enforced through *Rule 104(b)*; third, from the assessment the trial court must make under *Rule 403* to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice ...; and fourth, from *Federal Rule of Evidence 105*, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

The *Huddleston* decision establishes that *Rule 404(b)* rulings on whether uncharged misconduct occurred fall within the conditional relevancy (subdivision (b)) rather than the preliminary factfinding (subdivision (a)) portion of *Rule 104*. It also highlights the importance of making *Rule 403* objections when other act evidence is offered, and of explicitly seeking appellate review of *Rule 403* objections that are overruled. The Court observed that the defendant had failed to explicitly seek such review in *Huddleston*.

[19] Effect of Prior Acquittals

In *Dowling v. United States, 493 U.S. 342 (1990)* , the Court strongly suggested that uncharged misconduct could be admissible under *Rule 404(b)* even if the defendant has been acquitted of that conduct. Dowling was charged with bank robbery. The perpetrator wore a ski mask and carried a gun. The Trial Court allowed a witness to testify that Dowling and a man named Christian assaulted her two weeks after the bank robbery and that during the assault Dowling was wearing a ski mask and carrying a handgun. This testimony was admitted to strengthen the identification of Dowling as the masked, gun-toting bank robber, and to link Dowling with Christian, who was the getaway driver for the bank robbery. Dowling had been acquitted of charges arising from that assault. The Third Circuit held that conduct for which the defendant had been acquitted could not be admitted under *Rule 404(b)*.

The *Rule 404(b)* question was not raised in the Supreme Court in *Dowling*. Rather, Dowling argued that the collateral estoppel component of the *Double Jeopardy Clause* prohibited the government from introducing evidence of conduct for which he had been acquitted. In rejecting that claim, the Court relied heavily on the fact that the standard of proof governing the admissibility of *Rule 404(b)* evidence is considerably less than the beyond a reasonable doubt standard applied to determine guilt at a criminal trial. The Court noted that after *Huddleston*, the prosecution need only provide evidence sufficient to support a finding by a preponderance of the evidence that the defendant committed the prior bad act. Therefore, when the government offered evidence of the assault at the bank robbery trial, the government was not trying to relitigate the question of whether Dowling had committed the assault beyond a reasonable doubt: "Because a jury might reasonably conclude that Dowling was the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral estoppel component of the *Double Jeopardy Clause* is inapposite."

Dowling is not technically a *Rule 404(b)* case. But the Court's rationale leads to the conclusion that bad acts are not inadmissible under *Rule 404(b)* simply because the defendant has been acquitted of those acts. An acquittal is not dispositive given the significantly lower standard of proof applied to *Rule 404(b)* evidence after *Huddleston*. (See the cases admitting acquitted conduct in § 404.03[2][c].) However, the defendant should be prepared to argue that the probative value of the bad act is diminished in light of the acquittal. As the Court stated in *Huddleston*, "[T]he strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the *Rule 403* balancing."

[20] Effect of Prior Arrests

If a bad act can be admitted even when the defendant has been acquitted of charges arising from the act, what should the result be if the defendant has simply been arrested for the act? A cogent answer was provided by the Court in *United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992)* . *Robinson* was a narcotics case in which conspiracy and intent were contested issues. The Trial Judge admitted evidence that two of the defendants had previously been arrested for narcotics violations. The Court of Appeals held that the mere evidence of arrest, without any showing of the underlying act or circumstances, was not probative of intent, knowledge, or any other of the permissible purposes for bad act evidence under *Rule 404(b)*. It concluded: "*Rule 404(b)* allows evidence concerning the prior activity of a particular defendant, not simply testimony that records indicate an arrest took place." Put another way, the mere fact of arrest did not show sufficiently, under *Huddleston*, that the bad act was committed and that the defendant committed it.

In contrast, officers in *Robinson* testified with respect to another defendant not merely about prior arrests but about

specific acts of the defendant and the circumstances that culminated in the arrest (i.e., that drugs were found in the apartment and that the defendant was apprehended while trying to jump from a second-story window). This evidence was found properly admitted because it was probative on the subject of intent and knowledge, and because the prosecution provided enough evidence to support a finding that the act was committed and that the defendant committed it. n46

[21] A Balancing Test for Evidence of Uncharged Misconduct

Bad act evidence is not automatically admissible simply because the proponent has articulated a not-for-character purpose to which the evidence could be put. The Supreme Court in *Huddleston* emphasized that the decision to admit evidence under *Rule 404(b)* depends as well on "whether the danger of unfair prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under *Rule 403*." Thus, the Court has recognized that exclusion is mandated if the probative value of the bad act, in proving the permissible, not-for-character purpose, is substantially outweighed by the risk that the jury would misuse the evidence as proof of bad character.

Most Courts have applied a four-part test in assessing bad acts evidence. As stated by the Court in *United States v. Rackstraw, 7 F.3d 1476, 1479 (10th Cir. 1993)* , the basic test is as follows:

> (1) the evidence must be offered for a proper [not-for-character] purpose; (2) the evidence must be relevant [for that purpose]; (3) the trial court must make a *Rule 403* determination of whether the probative value of the [bad] acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to *Rule 105*, the trial court shall, upon request, instruct the jury that the evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

n47

Under the *Rule 403* test, evidence in a criminal case of serious uncharged criminal activity by the accused must be examined very carefully. The more heinous the uncharged acts, the more likely the jury will misuse the evidence and treat the defendant as a generally bad person, something the Rule does not permit. n48 Also, the more similar the bad act is to the act charged, the more likely the jury is to draw the impermissible inference that the defendant has a propensity to commit such acts.

Under Rules 403 and 404(b), the uncharged misconduct evidence should be admitted when the balance between probative value and prejudicial effect is close. n49 On the other hand, where the evidence is plainly prejudicial and is not very important to the government's case, it should be excluded. n50

As discussed in § 403.02[5], the Trial Court must take into account whether the same point can be proved with evidence that does not refer to uncharged bad acts. The cost of admitting prejudicial evidence is unacceptable if equally probative and less prejudicial evidence is reasonably available. n51 For example, it may be necessary in many cases to introduce the defendant's handwriting exemplar; but it is usually not necessary to do so by way of a document that refers to the defendant's uncharged crimes. n52

It is very important that counsel make clear to the Trial Judge why other crimes evidence is being offered and why it is opposed so that the Judge is able to articulate for the record the reasons for reaching a certain balance. If both sides clearly state their reasons for offering and objecting to evidence, and if the Trial Judge makes a diligent attempt to weigh the competing concerns and to reach an appropriate balance, the correct result will be reached in most cases. We think that this approach is basically what the Appellate Courts have been suggesting to their Trial Judges. The Court in *United States v. Merriweather, 78 F.3d 1070, 1076 (6th Cir. 1996)* , summed up the appropriate procedure as follows:

We undertake, once more, to explain how *Rule 404(b)* is properly applied:

> Upon objection by the defendant, the proponent of the evidence, usually the government, should be required to identify the specific purpose or purposes for which the government offers the evidence of "other crimes, wrongs, or acts." By so requiring, we do not mandate hypertechnicality.
>
> ... [T]he government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove.
>
> After requiring the proponent to identify the specific purpose for which the evidence is offered, the district court must determine whether the identified purpose, whether to prove motive or intent or identity [or] some other purpose, is "material"; that is, whether it is "in issue" in the case. If the court finds it is, the court must then determine, before admitting the other acts evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under *Rule 403*. If the evidence satisfies *Rule 403*, then, after receiving the evidence, the district court must "clearly, simply, and correctly" instruct the jury as to the specific purpose for which they may consider the evidence.

The *Merriweather* Court stated, as many other Courts have done, that the *Rule 404(b)*/403 analysis must be conducted on the record. n53 However, to be entitled to on-the-record findings on the probative value and prejudicial effect of uncharged misconduct evidence, the defendant must specifically request an on-the-record articulation of these factors. Thus, in *United States v. Fox, 69 F.3d 15 (5th Cir. 1995)* , the defendant objected to the admission of uncharged misconduct evidence, but did not specifically request an on-the-record articulation of probative value and prejudice; the Court therefore found no error in the Trial Judge's failure to make on-the-record findings.

[22] Preliminary Rulings

One way of avoiding problems at trial with bad act evidence is to seek a ruling by the Trial Judge before the bad acts are mentioned. One case recommending this is *Grimaldi v. United States, 606 F.2d 332, 340 n.9 (1st Cir. 1979)* . Of course, as discussed in § 103.02[12], a Trial Judge might not rule definitively *in limine* on questions involving a balancing of probative value and prejudicial effect. Accordingly, it behooves counsel to renew at trial an objection to evidence (or to reargue a decision to exclude it) previously considered by the Court in an *in limine* ruling.

[23] Limiting Instructions

Counsel, especially those representing criminal defendants, must be diligent if they are to limit the prejudicial effect of bad act evidence. If a Trial Judge is inclined to admit bad act evidence, defense counsel may want a limiting instruction. Although such an instruction may not work in some cases and even may be undesirable because it might call attention to the dangerous evidence, in other cases a caution to the jury from the Judge may be beneficial. Unless the defendant requests a limiting instruction, it is unlikely that one will be given -- though, as discussed in § 105.02[3], a Trial Judge may find it worthwhile in some cases to give a cautionary instruction *sua sponte* in order to protect against a reversal for plain error. If a proper request is made and the Trial Judge fails to give an instruction, an Appellate Court may well reverse. n54

Trial Judges should be alert to the possible ineffectiveness of defense counsel; the failure to request a limiting instruction may be the result of negligence rather than considered strategy. n55 Although a Court is entitled to rely to a great extent on the parties' attorneys to protect their own clients' interests, the Court, too, has a duty to ensure that a criminal defendant receives a fair trial. By asking whether defense counsel wants a limiting instruction in circumstances when one would seem desirable, Trial Judges might avoid plain error.

It is important that instructions concerning *Rule 404(b)* evidence specifically inform the jury of the permissible purpose

for the evidence, and also specifically indicate that the uncharged misconduct is not to be used as evidence of bad character. n56 It is also important that the instruction be given contemporaneously with the introduction of the evidence. A Court that gives a fuzzy and/or untimely instruction risks reversal. A case in point is *United States v. Jobson, 102 F.3d 214 (6th Cir. 1996)* , in which evidence of gang activity was offered to show the defendant's increased opportunity to commit a firearms offense. The Court held that while the evidence was probative of opportunity, the Trial Judge's failure to give a proper limiting instruction deprived the defendant of a fair trial. The Trial Judge had rejected the defendant's proffered instruction, and gave the following instruction instead:

> You've heard testimony that the defendant committed some other acts other than the ones charged in the indictment. You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now.
>
> Instead, you can only consider it in deciding for the purposes stated to you. You may only consider it for the purpose stated to you. Do not consider it for any other purpose.
>
> Remember the defendant is on trial here only for the offense of felon in possession of a firearm, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

The Court had this to say about the Trial Judge's instructions:

> These instructions were inadequate to safeguard against the impermissible use of the gang evidence because they do not inform the jury of the proper purpose for which the gang evidence could be considered. While the instructions indicate that the jury should consider the evidence only "for the purposes stated to you," the court never told the jury what these purposes were. In addition, no limiting instructions were given at the time the gang evidence was admitted. This is not a case, moreover, where the jurors would necessarily be aware of the other acts to which the court was referring so that the error could be found to be harmless. It is not enough for a district court to instruct jurors not to consider *Rule 404(b)* evidence as "evidence that the defendant committed the crime that he is on trial for now." The district court must expressly indicate the precise purpose for the other acts evidence. In this case, the District Court was obliged to instruct the jurors that they could consider the evidence of defendant's gang membership only to establish his opportunity to possess the firearm. Given the court's failure to provide an effective limiting instruction, the jurors could not have had the vaguest notion of the limited proper purpose for which [they] might have considered the evidence. n57

The Federal Judicial Center has approved the following model instruction for dealing with *Rule 404(b)* evidence: n58

> As you know, the defendant _____, is on trial here for [e.g., knowingly sending gambling material in interstate commerce]. In order for you to find the defendant guilty of this crime, the government must prove each of the following elements of the crime beyond a reasonable doubt. [First, the defendant sent gambling materials. Second, the defendant sent those materials in interstate commerce. Third, the defendant knew that these were gambling materials he was sending.]
>
> As I said, one of the things the government must prove beyond a reasonable doubt is that the defendant [knew that these were gambling materials]. You have heard testimony indicating that [on prior occasions the defendant sent gambling materials between two states]. That testimony is not evidence that [the defendant sent gambling materials in interstate commerce] on this particular occasion. The government must prove that from *other* evidence beyond a reasonable doubt. But if you conclude on the basis of other evidence that [the defendant did send gambling materials in interstate commerce as charged], you may consider the testimony about prior occasions in deciding whether [he knew that these were gambling materials].

> I remind you that the defendant is on trial here only for [description of the charge that distinguishes it from the earlier acts]. Do not convict him if the government has failed to prove this charge beyond a reasonable doubt.

The FJC commentary to the instruction states that "the best way to limit the confusion occasioned by evidence admitted under [*Rule 404(b)*] is to outline with clarity the elements of the offense and describe the testimony. The jury would then be told that after it has found the other elements beyond a reasonable doubt, the jury could look to the evidence to prove the remaining element."

[24] Notice

Rule 404(b) requires the prosecution, upon the defendant's request, to give notice in advance of trial of the "general nature" of any bad acts evidence it intends to introduce at trial. The purpose of the amendment is to prevent unfair surprise and to make it easier for the defendant to obtain a pretrial *in limine* ruling on bad acts evidence. The amendment plainly envisions that the notice requirement is to be flexibly applied.

No specific time limits are set, and indeed the amendment permits notice to be given as late as during trial upon a showing of good cause. n59 As to the substance of the notice, the prosecution need only disclose the "general nature" of the bad acts evidence. n60 However, it is not enough to simply inform defense counsel that the government's files are open for counsel's perusal. As one Court put it: "Simply making available mountains of documents without specifying which will likely be submitted has elements of unfairness causing needless expense to the defendant." n61 There is no requirement that the notice be in writing.

Several additional points can be made about the notice provision in *Rule 404(b)*. First, the Rule requires that an accused request notice of uncharged acts. Defense counsel have reason to request pretrial notice in every case. Such notice permits defense counsel to advise the accused on the reasonableness of going to trial in the face of possibly devastating evidence of uncharged misconduct. The Rule does not state how specific a defense request must be to trigger the government's notice obligation. In one case, the defense simply requested a list of witnesses, and contended that this triggered the notice requirement under *Rule 404(b)*. The Court stated that such a request was "so broad that it is questionable that it should have fairly alerted the government to supply evidence under *Rule 404(b)*." The Court found it unnecessary to decide whether the request was specific enough, however, because it was clear under the circumstances that the government considered the request as pertaining to *Rule 404(b)* evidence. The Court cautioned nonetheless that "the lesson that might be gleaned from this case is that it is more prudent for defense counsel to include a reference to *Rule 404(b)* in the boilerplate request for discovery under *Fed.R.Crim.P. 16*." n62

Second, the amendment is a one-way street. Although defendants may use *Rule 404(b)* to introduce other act evidence in their favor, the amendment does not provide the government with any discovery right. The difference in treatment of prosecutors and defendants reflects the different degrees of prejudice that might be anticipated when the defendant's personal acts are admitted as evidence (raising the possibility that they might be misused as propensity evidence) and when acts of persons not on trial are admitted (which are less likely to be misused, since the propensity of these persons to commit crimes is typically not relevant).

Third, the amendment is purely a notice provision. It does not supersede the Trial Judge's right to permit *in limine* motions by either the defense or the prosecution with respect to *Rule 404(b)* evidence or the Judge's power to bar mention of such evidence, even in an opening statement, unless and until the Judge has made a determination that the evidence is admissible.

Fourth, what happens if the government gives pretrial notice of its intent to proffer a prior bad act, and then subsequently discovers a *different* bad act that it wants to use as well? Or what if the government responds to a defense request by stating that it does not intend to use *Rule 404(b)* evidence, and then uncovers a bad act committed by the

defendant that it does intend to use? The notice requirement of *Rule 404(b)* does not state whether the prosecution has a continuing obligation to notify the defendant should it discover *Rule 404(b)* evidence after an initial response to the defendant's request. However, it has been held that the Rule imposes a continuing obligation of notice. In *United States v. Barnes, 49 F.3d 1144, 1148 (6th Cir. 1995)* , the Court held that *Rule 404(b)* requires "a continuing obligation on the government to comply with the notice requirement ... whenever it discovers information that meets the previous defense request." The Court reasoned that a contrary reading "would force the defense to make numerous, periodic requests until the trial has been completed -- surely a wasteful procedure."

Fifth, the notice requirement is inapplicable in civil cases. However, other discovery provisions in the Federal Rules of Civil Procedure might well require pretrial disclosure.

Sixth, where the notice requirement is not complied with, the prosecution will be forced to argue that the uncharged misconduct evidence is not covered by *Rule 404(b)* at all. The government might, for example, try to argue that the evidence is "inextricably intertwined" with the crime charged. n63 Or it might seek to admit the evidence solely for impeachment purposes, since there is no similar notice requirement under Rules 608 or 609(a).

[25] Relationship to Rule 608

The basic distinction between evidence offered under *Rule 404(b)* and impeachment attempted under *Rule 608(b)* is that evidence is generally offered under the former Rule as affirmative proof of a disputed issue while evidence may only be offered under the latter Rule to impeach a witness. This basic distinction gives rise, therefore, to five general principles:

(1) Evidence may be admitted under *Rule 404(b)* even if the defense presents no evidence. Admissibility of *Rule 404(b)* evidence for the prosecution is not tied to the credibility of defense witnesses. In contrast, questions may not be asked with respect to a defendant's prior acts under *Rule 608(b)* unless the defendant testifies, in which case no extrinsic evidence may be admitted to contradict a denial of the uncharged act. Similarly, evidence may be admitted under *Rule 404(b)* for the defendant even if it does not purport to challenge the credibility of a prosecution witness.

(2) As a logical corollary of principle (1), it is clear that impeachment under *Rule 608(b)* cannot occur unless and until the witness who is to be impeached testifies, whereas evidence admissible under *Rule 404(b)* need not await the testimony of any particular witness.

(3) Extrinsic evidence is admissible, and indeed necessary, to prove acts that are relevant and admissible under *Rule 404(b)*, but is not admissible under *Rule 608(b)*. When the witness denies the occurrence of a bad act offered to impeach the witness' character for veracity, the opponent must accept the denial -- extrinsic evidence cannot be offered to prove the act occurred.

(4) In some cases, a prior act by a defendant or another witness may be admissible under both *Rule 404(b)* and *Rule 608(b)* if the defendant or witness testifies, and in these cases the prosecutor or defense counsel seeking to elicit evidence of the act should be clear which Rule is relied upon.

(5) In some cases, a prior act is not initially admissible under either *Rule 404(b)* or *Rule 608(b)(1)*, but it may become admissible because a party "opens the door" to proof of the act as a result of a suggestion made in a question or information volunteered in an answer.

FOOTNOTES:
(n1)Footnote 1. See, e.g., *United States v. Keiser, 57 F.3d 847 (9th Cir. 1995)* (character is "in issue" within the meaning of the Rule when "proof, or failure of proof, of the character trait by itself [would] actually satisfy an element of the charge, claim or defense").

(n2)Footnote 2. See, e.g., *United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994)* (doctor charged with illegally prescribing drugs; it was error to allow the government to ask witnesses about the doctor's reputation in the community for being an easy source of drugs; this was character evidence, and while the prosecution is permitted to offer such evidence in rebuttal, in this case the defendant never offered evidence of his good character).

(n3)Footnote 3. See *United States v. Smith, 230 F.3d 300 (7th Cir. 2000)* (*Rule 404(a)* permits the accused to offer evidence of the victim's violent character in a self-defense case; however, *Rule 405* limits the form of the evidence to reputation and opinion; therefore, evidence of specific acts of violence by the victim was properly excluded).

(n4)Footnote 4. *United States v. Keiser, 57 F.3d 847, 854 (9th Cir. 1995)* ("The rule does not contemplate that the character evidence will somehow reveal the defendant's state of mind at the time he acted in self-defense.").

(n5)Footnote 5. See the Advisory Committee Note to the amendment to *Rule 404(a)*, to take effect on December 1, 2006 (noting that one of the purposes of the amendment is to clarify that *Rule 412* takes precedence over *Rule 404(a)* in the case to which *Rule 412* is applicable).

(n6)Footnote 6. *United States v. Diaz, 961 F.2d 1417, 1419 (9th Cir. 1992)* . Indeed, the defendant in the landmark case of *Michelson* was permitted to prove his "law-abiding" character trait, and the Court held that a defendant may introduce favorable testimony concerning "the general estimate of his character." *335 U.S. at 476* . See also *United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981)* (reversible error to exclude character evidence offered to show that the defendant was a law-abiding citizen).

(n7)Footnote 7. See, e.g., *United States v. Utter, 97 F.3d 509 (11th Cir. 1996)* (where defendant was charged with burning his restaurant to collect insurance proceeds, it was error to admit evidence that the defendant had a dispute with a tenant and threatened to burn her belongings if she did not vacate the premises; this evidence was probative only to show the defendant's propensity to commit arson); *United States v. Whittington, 26 F.3d 456 (4th Cir. 1994)* (error committed where prosecution witness was allowed to testify that the defendant was a "dangerous woman," a "snake," and a "rat"); *United States v. Wright, 901 F.2d 68 (7th Cir. 1990)* (error to admit evidence of prior drug dealings where the only relevance of the evidence was to prove the defendant's propensity to commit the charged crime).

(n8)Footnote 8. See, e.g., *United States v. Gaertner, 705 F.2d 210 (7th Cir. 1983)* (where defendant tried to depict himself as a "clean-liver," he opened the door to negative character evidence concerning drug involvement).

(n9)Footnote 9. Compare *United States v. Fountain, 768 F.2d 790 (7th Cir. 1985)* :

> To deny that one intended harm on a particular occasion is not to claim a generally peaceable character. And it cannot be right that merely by claiming self-defense ... a defendant puts his whole character in issue; that would make mincemeat of the limitations in *Rule 404(a)* on the use of character evidence.

(n10)Footnote 10. See also *United States v. McHorse, 179 F.3d 889 (10th Cir. 1999)* (in a child molestation case, the defendant's son testified that the defendant "couldn't" do anything bad to anyone, and "would not do anything like" the conduct he was charged with; by this testimony, the defendant's son became a character witness, opening the door to negative character evidence).

(n11)Footnote 11. The character door can be opened during defense counsel's opening statement as well. See, e.g., *United States v. Inserra, 34 F.3d 83 (2d Cir. 1994)* (prosecution can offer character evidence in its case-in-chief, where defense counsel's opening statement made reference to the defendant's good character).

(n12)Footnote 12. See, e.g., *United States v. Fountain, 768 F.2d 790 (7th Cir. 1985)* (while the door was opened for evidence concerning the defendant's credibility, the prosecution's reference to the defendant's violent character trait

was not responsive: "Violent men are not necessary liars, and indeed one class of violent men consists of those with an exaggerated sense of honor.").

(n13)Footnote 13. See *United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972)* (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"); *United States v. James, 169 F.3d 1210 (9th Cir. 1999)* (in a self-defense case a defendant may show her state of mind at the time of an attack by testifying that she knew about a victim's past acts of violence).

(n14)Footnote 14. See *United States v. Keiser, 57 F.3d 847 (9th Cir. 1995)* (evidence of previous violent activity by the victim is inadmissible where the defendant was not aware of that activity).

(n15)Footnote 15. See also *United States v. Winter, 663 F.2d 1120 (1st Cir. 1981)* ("standing alone" instruction disapproved in all cases); *Black v. United States, 309 F.2d 331 (8th Cir. 1962)* (disapproved in all cases).

(n16)Footnote 16. See, e.g., *United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973)* ("standing alone" instruction required where the defendant offers pertinent evidence of his good character).

(n17)Footnote 17. *United States v. John, 309 F.3d 298 (5th Cir. 2002)* .

(n18)Footnote 18. See, e.g., *United States v. Pujana-Mena, 949 F.2d 24, 28 n.2 (2d Cir. 1991)* .

(n19)Footnote 19. See the instruction approved by the Third Circuit in *United States v. Logan, 717 F.2d 84, 92 (3d Cir. 1983)* :

> Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.
>
> Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

Compare *United States v. Pujana-Mena, 949 F.2d 24, 31 (2d Cir. 1991)* ("standing alone" instruction is within Trial Judge's discretion so long as it is accompanied with a qualifying instruction that character evidence is to be considered together with the other evidence in the case; but "such a hybrid charge would be less than ideal in most cases" because it is "inherently confusing and contradictory").

(n20)Footnote 20. See, e.g., *United States v. Burke, 781 F.2d 1234 (7th Cir. 1985)* (while a "standing alone" instruction is not permitted in this Circuit, the Trial Court should tell the jurors that they may use character evidence "to help evaluate the credibility of the innocent explanation" that the defendants offer for their acts).

Federal Judicial Center Pattern Criminal Jury Instruction 51 suggests the following when the defendant introduces positive character evidence:

> You have heard the testimony of _____, who said that the defendant, _____, (has a good reputation for [e.g.: honesty] in the community where he lives and works) (in his opinion is an [honest] person). Along with all the other evidence you have heard, you may take into consideration what you believe about the defendant's [honesty] when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. Evidence of the defendant's [honesty] alone may create a reasonable doubt whether the government proved that the defendant committed the crime.

(n21)Footnote 21. In a criminal case, for example, evidence of bad acts can be introduced to show identity through a distinctive *modus operandi*. See, e.g., *United States v. Connelly, 874 F.2d 412 (7th Cir. 1989)* (prior robbery admitted to prove identity due to distinctive *modus operandi*, in particular that "it is much more than coincidence that [duct] tape was used and applied in exactly the same manner as the prior crime"; similarities relied upon must be "sufficiently idiosyncratic to permit an inference of pattern for purposes of proof").

(n22)Footnote 22. Kuhns, *The Propensity to Misunderstand the Character of Specific Act Evidence*, 66 IOWA L. REV. 777 (1981), is an excellent analysis of the problem of differentiating between acts offered to prove propensity and acts offered for another purpose. See also *United States v. Mejia-Uribe, 75 F.3d 395 (8th Cir. 1996)* (error, though harmless, in admitting the defendant's fifteen-year-old conviction for another cocaine offense; the conviction was not admissible to prove intent because it was (1) too remote in time, and (2) involved a single sale, while the instant case involved a large scale, ongoing operation; the prior conviction "offered little, if any, probative value beyond the tendency to show that Uribe was the type of person with a propensity to commit this type of crime."); *United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003)* (evidence of prior drug use is not admissible to prove intent to distribute drugs or knowledge about drug distribution; the acts, though both involving drugs, are too dissimilar to justify a not-for-character inference, leaving only evidence of propensity).

(n23)Footnote 23. *Huddleston v. United States, 485 U.S. 681 (1988)* (admissibility of bad act evidence is dependent not only on *Rule 404(b)* but also on "whether the danger of unfair prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under *Rule 403*").

(n24)Footnote 24. See, e.g., *United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996)* (emphasizing the need for a "close and careful" analysis of evidence of uncharged misconduct).

(n25)Footnote 25. See, e.g., *United States v. Hogue, 827 F.2d 660 (10th Cir. 1987)* , in which a conviction was reversed where no proper purpose was articulated or evident for bad acts evidence:

> In demonstrating the relevance of proffered other acts evidence, the Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. There must be a clear and logical connection between the alleged earlier offense or misconduct and the case being tried.

(n26)Footnote 26. See also *United States v. Harvey, 845 F.2d 760, 762 (8th Cir. 1988)* :

> Initially, we observe the district court's laundry list approach to *Rule 404(b)* is of little help to us. Rather than making a broad reference which merely restates the components of the rule, the district court should specify which components of the rule form the basis of its ruling and why. To that end the court should require the party invoking the rule to explain clearly its 404(b) analysis.

See also *Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000)* (reversible error in admitting bad acts evidence offered by the plaintiff; the plaintiff simply cited to *Rule 404(b)* without articulating the particular not-for-character purpose for which the bad acts evidence would be probative).

(n27)Footnote 27. See, e.g., *United States v. Kalish, 690 F.2d 1144 (5th Cir. 1982)* (defendant's alias admissible where he had used it to conceal his identity from the arresting officer).

(n28)Footnote 28. See also *United States v. Shelton, 628 F.2d 54 (D.C. Cir. 1980)* , where the Court reversed a

conviction for assault on a federal officer because the defendant and a defense witness were cross-examined in a way that was intended to suggest that they "were members of the drug underworld involved in all sorts of skullduggery." The Court said that the conduct of the prosecutor "is not rendered more acceptable by the fact that it is less focused and more subtly addressed than traditional 'other crimes' evidence." Compare *United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996)* (the defendant, whose nickname was "Monster," was not deprived of a fair trial when the jury heard wiretaps in which people referred to him by his nickname; unlike in *Williams*, there was no way for the jury to avoid hearing the defendant's nickname, because the wiretaps were critical evidence, and the defendant was referred to in the wiretaps almost exclusively as "Monster").

(n29)Footnote 29. See also *United States v. Vargas, 583 F.2d 380 (7th Cir. 1978)* :

> The fact that in this case the reference to other crimes came not from evidence but from the prosecutor's argument and his suggestions does not undermine the need for [*Rule 404* and *403*] protections but rather enhances it, since coming from the mouth of the representative of the United States, the statements carry much weight against the accused when they should properly carry none.

(n30)Footnote 30. See *United States v. Hilgeford, 7 F.3d 1340 (7th Cir. 1993)* :

> When deciding if the other acts evidence was admissible without reference to *Rule 404(b)*, we must determine whether such evidence was intricately related to the facts of the case at hand. If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by *Rule 403*.

(n31)Footnote 31. See also *United States v. Royal, 972 F.2d 643 (5th Cir. 1992)* (holding that background information concerning a conspiracy is not extrinsic evidence because it was "inextricably intertwined" with the crime charged); *United States v. Stouffer, 986 F.2d 916 (10th Cir. 1993)* (evidence relevant to establish the existence of a criminal enterprise is not extrinsic evidence).

(n32)Footnote 32. A similarly problematic case is *United States v. Simon, 767 F.2d 524 (8th Cir. 1985)* (drug-related evidence was "closely and integrally related" to the charges concerning ownership and possession of firearms, even though no drug-related activity was included in the indictment).

(n33)Footnote 33. For an application of the "inextricably intertwined" test in accordance with our suggestion, see *United States v. Stotts, 792 F.2d 1318 (5th Cir. 1986)* (no error to compare handwriting exemplars with extortion letters written by the defendants; *Rule 404(b)* was not applicable because the extortion letters were specifically described in the indictment: "There was no crime not alleged in the indictment which was testified to by the handwriting expert."). See also *United States v. Vizcarra-Martinez, 66 F.3d 1006 (9th Cir. 1995)* (defendant charged with conspiring to possess and for possessing a listed chemical knowing it was to be used to manufacture methamphetamine; the government offered evidence that when the defendant was arrested, he was carrying a small amount of methamphetamine on his person; admission of this evidence was reversible error; the evidence was not "inextricably intertwined" with the charged crime, because possession of the substance was not "part of the transaction" with which the defendant was charged).

(n34)Footnote 34. See, e.g., *United States v. Simon, 767 F.2d 524 (8th Cir. 1985)* ("*Rule 404(b)* is a rule of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition.").

(n35)Footnote 35. See *United States v. James, 169 F.3d 1210 (9th Cir. 1999)* (bad acts evidence admissible for corroboration under *Rule 404(b)*, even though corroboration is not listed as a permissible purpose); *United States v. Copelin, 996 F.2d 379, 382 (D.C. Cir. 1993)* ("Although it is not one of the listed permissible purposes, an attempt to

impeach through contradiction is indisputably a legitimate reason to introduce evidence of other crimes or wrongs.").

(n36)Footnote 36. See also *United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)* (reversible error to exclude other crimes committed by a third party in the same area in which the defendant was alleged to have committed similar crimes); *United States v. Cruz-Garcia, 344 F.3d 951 (9th Cir. 2003)* (in a drug prosecution, the details of prior crimes of a prosecution witness were erroneously excluded; the prosecution's theory was that the witness was not smart enough to conduct the drug deals himself, and the bad act evidence would have rebutted that assertion). Compare *United States v. Seals, 419 F.3d 600 (7th Cir. 2005)* (no error to exclude reverse *Rule 404(b)* evidence, which was offered to show that other people robbed a bank using the same modus operandi used in the bank robbery charged; there was not enough similarity between the two robberies to indicate a modus operandi).

(n37)Footnote 37. See, e.g., *West v. Love, 776 F.2d 170 (7th Cir. 1985)* (inmate brought civil rights action alleging that he had been attacked by prison guards; evidence that, before the attack, the plaintiff had been placed in an isolated ward due to his violent temper, was not impermissible character evidence; rather, it was offered to show the reasonableness of the guards' assessment of the danger presented by the plaintiff).

(n38)Footnote 38. See also *Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978)* (bad acts were admitted to show intent in a civil case involving a claim that a trustee breached a fiduciary duty).

(n39)Footnote 39. See, e.g., *United States v. Hernandez, 84 F.3d 931 (7th Cir. 1996)* (prior large-scale marijuana transactions held probative of intent to engage in large-scale cocaine and heroin transactions; Court noted that it had "oft held that when a defendant is charged with a specific intent crime, the government may present other acts to prove intent"). See also *United States v. Robichaux, 995 F.2d 565 (5th Cir. 1993)* (prior fraudulent transaction properly admitted to rebut the defendant's claim that he did not know "what was going on" in the transaction for which he was charged); *United States v. Arambula-Ruiz, 987 F.2d 599 (9th Cir. 1993)* (prior conviction for possession of heroin with intent to distribute is probative of knowledge where the defendant is charged with conspiring to possess heroin, and claims that he was an innocent bystander in the wrong place at the wrong time).

(n40)Footnote 40. *Old Chief* is discussed extensively in the Editorial Explanatory Comment to Rule 403, § 403.02[6]-[11].

(n41)Footnote 41. Some Circuits, even before *Old Chief*, had held that if the crime charged requires a showing of specific intent, the defendant can *never* keep prior bad acts out of the case by stipulating to intent. See, e.g., *United States v. Kramer, 955 F.2d 479 (7th Cir. 1992)* (Cudahy, J., concurring) ("the specific-intent exception of this circuit automatically precludes defendants charged with specific-intent crimes from *ever* removing intent as an issue in the case, even by stipulation").

(n42)Footnote 42. *United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998)* .

(n43)Footnote 43. See, e.g, *United States v. Grimmond, 137 F.3d 823 (4th Cir. 1998)* (bad act evidence can be admitted to prove possession of a firearm, even if defendant offers a stipulation: "We believe that the Supreme Court intended its decision in *Old Chief* to be limited to stipulations involving a defendant's status as a convicted felon."); *United States v. Hill, 249 F.3d 707 (8th Cir. 2001)* (*Old Chief* requires the government to accept a stipulation only where the purpose of the government's evidence is to prove the element of prior conviction in a felon-firearm-possession case).

(n44)Footnote 44. See also *United States v. Colon, 880 F.2d 650 (2d Cir. 1989)* (the government alleged that Colon "steered" an undercover buyer to a drug source; Colon's defense was that he had merely responded to the buyer's request for drugs by innocently pointing to the general direction of drug activity down the street; Colon's counsel offered a stipulation that if the government proved that Colon knew the drug seller and was in fact directing the undercover buyer specifically to that drug seller, "then I will acknowledge that he intended to violate the federal narcotics law and intended to aid in the sale of drugs"; this stipulation was insufficient to take the issue of intent out of

the case; the stipulation "conceded nothing" on the issue of intent, "as the government would still have had to prove that Colon meant to point the detective to [the drug seller] and not down the street").

(n45)Footnote 45. See the excellent discussion of this issue in *United States v. Latney, 108 F.3d 1446, 1449-1450 (D.C. Cir. 1997)* . The Court set forth two contrasting hypotheticals to illustrate the differing probative value of bad acts that occur after the conduct charged:

> Suppose the defendant is charged with committing a murder in 1990. The fatal bullet contains distinctive rifle markings. In 1993 the defendant is arrested for illegal possession of a pistol. When the pistol is test fired, the bullets contain the same markings. No one would suppose that because the defendant was found in possession of the pistol three years after the murder this evidence is not relevant. ...
>
> ... [P]roof that a defendant knew how to make crack cocaine in 1995 is strong evidence that he also knew this at the time of a 1996 offense charged in an indictment. The assumption that people do not forget forms the connection. On the other hand, proof that the defendant was making crack in 1997 is weaker evidence that he knew how to do so in 1996. Here the connection comes from an assumption, not only about memory, but about the acquisition of knowledge -- if he knew it then, he may have learned it before. The evidence is weaker because the link is weaker.

(n46)Footnote 46. See also *United States v. Williams, 244 F.3d 1208 (10th Cir. 2001)* ("Past arrests for drug possession are admissible under *Rule 404(b)* if certain clearly defined conditions are met, but the rule requires more than simply testimony that records indicate an arrest took place.").

(n47)Footnote 47. A slightly different four-pronged test is applied by some circuits. For example, the *Court in United States v. Kern, 12 F.3d 122 (8th Cir. 1993)* , set forth the following test for assessing bad acts evidence offered under *Rule 404(b)*:

> To properly admit *Rule 404(b)* evidence for purposes other than to prove propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value.

We note that the second (similarity and proximity) factor is more significant to some uses -- e.g., *modus operanti* to prove identity -- than to others -- e.g., motive.

(n48)Footnote 48. See, e.g., *United States v. Williams, 985 F.2d 634 (1st Cir. 1993)* (evidence of prior murder was admitted solely for propensity; no attempt was made to link the murder to a plan of intimidation, which would have been relevant; nor was the murder admissible to show *modus operandi*, since the identity of the perpetrator of the charged crime was not in dispute); *United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993)* (evidence of uncharged, unrelated murder is not probative of motive for attempted murder, where uncharged act occurred after the act charged; uncharged act only shows propensity).

(n49)Footnote 49. See, e.g., *United States v. Leahy, 82 F.3d 624 (5th Cir. 1996)* : The defendants, members of a construction firm, were charged with presenting false invoices to the Veterans' Administration. They objected to the introduction of other bad acts, specifically their submission of false invoices on construction projects for the Department of Defense. The Court held that the bad acts evidence was properly admitted to prove intent: "because the defendant had unlawful intent in the extrinsic offense, it is more likely that he had unlawful intent in the present offense." Nor was the probative value as to intent substantially outweighed by the risk of prejudice. Exclusion under *Rule 403* "should occur only sparingly" and in this case the prejudice was minimized by a limiting instruction. See also

United States v. Clark, 988 F.2d 1459 (6th Cir. 1993) (where the defendant was charged with killing a witness to a crime the defendant committed, evidence of the underlying crime, even though highly prejudicial, was properly admitted under *Rule 404(b)* and *Rule 403* to prove motive).

(n50)Footnote 50. See, e.g., *United States v. Gordon, 987 F.2d 902 (2d Cir. 1993)* (prior minor drug transaction is not sufficiently probative of the defendant's participation in a major drug conspiracy; none of the alleged coconspirators were participants in the prior transaction; evidence should have been excluded under *Rule 403*).

(n51)Footnote 51. See, e.g., *United States v. Varoudakis, 233 F.3d 113 (1st Cir. 2000)* (in an arson case, the Trial Judge erred in allowing the defendant's girlfriend to testify that the defendant burned a car in her presence; this evidence was offered not to prove character, but rather to show that the defendant and the witness once had a relationship of trust and confidence; however, the girlfriend testified at length about her close relationship to the defendant, so the government did not need the car fire evidence to establish that fact, which was "the only legitimate purpose of the evidence under 404(b)"); *United States v. Merriweather, 78 F.3d 1070, 1078 (6th Cir. 1996)* (uncharged drug transactions were probative of intent, but admitting them was an abuse of discretion, because the government "had a number of means available to it to prove Merriweather's specific intent to distribute and possess cocaine, without showing that he was involved in another, uncharged, drug conspiracy.").

(n52)Footnote 52. See, e.g., *United States v. Turquitt, 557 F.2d 464 (5th Cir. 1977)* (reversible error to admit document referring to other crimes in order to authenticate defendant's handwriting, since "other known and less prejudicial specimens would have achieved the same result").

(n53)Footnote 53. See, e.g., *United States v. Robinson, 700 F.2d 205 (5th Cir. 1983)* (requiring an on-the-record determination on the admissibility of uncharged misconduct evidence); *United States v. Roberts, 88 F.3d 872 (10th Cir. 1996)* (remanding for an explicit on-the-record determination); *United States v. Nagib, 56 F.3d 798 (7th Cir. 1995)* (same).

(n54)Footnote 54. See, e.g., *United States v. Yopp, 577 F.2d 362 (6th Cir. 1978)* (reversible error for failure to give instruction, upon request, that bad acts evidence could be used only as proof of intent, and not as a reflection on the defendant's character).

(n55)Footnote 55. See, e.g., *United States v. Bosch, 584 F.2d 1113, 1124 (1st Cir. 1978)* (reversible error where defense counsel introduced an exhibit that made reference to the defendant's prior crimes, and made no attempt to delete these crimes, which were not probative on any point in the case; the Trial Judge should have known that defense counsel was incompetent because it was clear, based on statements defense counsel made in conference, that he had never even given any thought to deleting the references to prior crimes before admitting the exhibit)

(n56)Footnote 56. See *United States v. Spikes, 158 F.3d 913 (6th Cir. 1998)* (error, though harmless, when Trial Judge instructed the jury that it could not use bad act evidence for "guilt of the crimes charged" but did not tell them what the evidence could be properly used for).

(n57)Footnote 57. See also *United States v. Hardwell, 80 F.3d 1471 (10th Cir. 1996)* (the Trial Judge's limiting instructions as to other act evidence "were deficient," because some instructions "listed all of the purposes listed by the rule, others listed all but identity or absence of mistake or accident, and one stated that the evidence could be used only as proof of knowledge"; the Court disapproved of "laundry list" limiting instructions, but found that the erroneous instructions were harmless).

(n58)Footnote 58. Federal Judicial Center Pattern Criminal Jury Instruction 50.

(n59)Footnote 59. See, e.g., *United States v. Smith, 383 F.3d 700 (8th Cir. 2004)* (good cause found for providing notice during trial, where the bad act became relevant only after trial testimony indicated that the defendant had used a certain alias that connected him to the uncharged misconduct); *United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th*

Cir. 1996) (good cause for failure to give pretrial notice was found because the government was not made aware of the evidence until an interview with one of its witnesses the night before trial; the defendant was notified the next day, and the witness was made available to the defense before the evidence was put before the jury).

(n60)Footnote 60. As to how specific the notice must be, see *United States v. Jackson, 850 F. Supp. 1481 (D. Kan. 1994)* (government's notice must be sufficiently clear so as "to permit pretrial resolution" of the admissibility of evidence of uncharged misconduct).

(n61)Footnote 61. *United States v. Swinton, 75 F.3d 374 (8th Cir. 1996)* (notice requirement not complied with when the government, after receiving a request for *Rule 404(b)* material, responded that its files were open and the *Rule 404(b)* evidence could be found in those files). Notably, however, the *Swinton* Court found that most of the evidence requested was not *Rule 404(b)* material in the first place -- rather, it was evidence concerning acts "inextricably intertwined" with the crime charged, rendering *Rule 404(b)* and its notice requirement inapplicable.

(n62)Footnote 62. *United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995)* ("The request need not be in technical terms, but it must be such as to be, in an objective sense, reasonably understandable."). See also *United States v. Tuesta-Toro, 29 F.3d 771 (1st Cir. 1994)* (omnibus defense motion requesting "confessions, admissions, and statements that in any way exculpate, inculpate or refer to the defendant" was insufficiently specific to trigger the *Rule 404(b)* notice requirement; defense request "must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification").

(n63)Footnote 63. See, e.g., *United States v. Gorman, 312 F.3d 1159 (10th Cir. 2002)* (notice requirement not applicable because evidence proffered by the government was "intertwined" with the facts of the crime); *United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995)* (while the government might have failed to provide sufficient notice, the disputed testimony was held not within the scope of the Rule, because it referred to acts that were "intrinsic" to the charged offense).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual 404.03

404.03 Annotated Cases

[Go To Supp]

[1] Rule 404(a) -- Character Evidence Generally

[a] Rule 404(a) -- Animals

Durst v. Newby, 685 F. Supp. 250 (S.D. Ga. 1988) : The Judge denied a summary judgment motion by a defendant whose tractor-trailer collided with a cow, ruling that evidence of the wanderlust of cows is not character evidence excluded by *Rule 404*.

[b] Rule 404(a) -- Character of Accomplice

United States v. Wright, 363 F.3d 237 (3d Cir. 2004) : The Court affirmed a conviction for conspiracy to transport stolen property, holding there was no error in the exclusion of evidence, offered to show the absence of a conspiracy, which tended to show the good character of an unindicted coconspirator. The Court held that the term "accused" in *Rule 404(a)(1)* denotes only a criminal defendant and was not intended to sweep more broadly.

United States v. Hart, 70 F.3d 854 (6th Cir. 1995) : The Court affirmed a former police chief's conviction for fraud in administering a secret fund, holding there was no abuse of discretion in excluding evidence that an accomplice had "conned" the FBI and the IRS in an unrelated criminal matter. Offered to support a claim that the accomplice had conned the defendant, the evidence was an impermissible attempt to show that the accomplice possessed a deceptive character and that he acted in conformity with that character in his dealings with the defendant.

[c] Rule 404(a) -- Character of Accused

[i] Rule 404(a) -- Background

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991) : In affirming RICO convictions, the Court held there was no abuse of discretion in preventing a defendant from introducing evidence that his teenage son was born with cerebral palsy and he would never do anything to risk disabling himself from caring for the boy. The defendant had been allowed to present four character witnesses to his honesty and integrity, and testimony about the son, which had no bearing on those traits, could well influence the jury by sympathies having no bearing on the merits of the case. In *United States v. Blackwell*, n1 the Court ruled that a defendant may introduce evidence of a lack of prior convictions or arrests as background evidence rather than to prove good character, but that that the exclusion of such evidence in this case was harmless error.

United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) : The Court reversed a conviction for importing an alien for immoral purposes, ruling that a defendant did not open the door to character evidence by offering limited background testimony concerning his childhood, and that it was error for the prosecution to call an expert to testify to the characteristics of child molesters.

[ii] Rule 404(a) -- Character of Accused -- Cross-Examination of Character Witness

United States v. Bruguier, 161 F.3d 1145 (8th Cir. 1998) : Witnesses testified on behalf of a defendant charged with child abuse that he was a good father. The Court held there was no error when the government was permitted to ask on cross-examination whether the witnesses were aware that the family had been supervised for two years by Child Protective Services, as the question was relevant to determining the credibility of the witnesses' opinions. However, the government should have established its good-faith basis for asking the question outside the presence of the jury. Another character witness, the defendant's wife, was asked on cross-examination whether she thought "it is a good father to be arrested thirty-six times." Objection to the question was sustained, and the Court agreed that the question was improper (since arrests do not show that a crime was committed or even that there is reasonable cause to believe one was), but the defendant was not harmed in the circumstances.

United States v. McHorse, 179 F.3d 889 (10th Cir. 1999) : The defendant, charged with child sexual abuse, called his adult son, who testified that he knew his father "couldn't" do anything bad to anybody and "would not do anything like that." Affirming, the Court found no error in asking the son on cross-examination whether he was aware that his sister and half-sister had said the defendant had abused them from a young age. Regardless of the purpose for which the son was called as a witness, he became a witness to his father's good character, so the government was entitled under *Rule 405(a)* to demonstrate that he was not fully informed as to his father's character by inquiring into the son's knowledge of specific instances of the father's conduct. Furthermore, the evidence was admissible to rebut any misleading impression from the son's direct testimony that his father had never taken any inappropriate sexual actions with him or his brother.

[iii] Rule 404(a) -- Character of Accused -- Defense Evidence

In re Sealed Case, 352 F.3d 409 (D.C. Cir. 2003) : The Court held, in a prosecution of a conspiracy to illegally purchase firearms, that it was error (but harmless) to exclude evidence offered by the defense of the defendant's good reputation for honesty and truthfulness. Because the indictment charged the defendant with being part of a conspiracy in which he recruited eligible firearms purchasers to "knowingly make false and fictitious statements" in order to purchase firearms for him, and because the government's proof of the conspiracy made his truth and honesty a part of the charged conspiracy, the defendant was "invited ... to introduce character evidence for those traits." The Judge had ruled that the evidence would be admissible only if the defendant testified. Evidence of the defendant's good reputation for lawabidingness was properly admitted.

United States v. Smith, 46 F.3d 1223 (1st Cir. 1995) : The Court affirmed fraud convictions, holding it was error (but harmless) when the Trial Judge ruled that a defendant could not elicit evidence of his reputation for truth and veracity until he had taken the stand, as the character traits were pertinent to the offense charged. Reversing a conviction for possession of methaqualone in *United States v. Angelini*, n2 the Court said that the defendant should have been permitted to offer character evidence that he was "a law-abiding person," since such evidence showed a pertinent trait of character. The Court equated "pertinent" with "relevant."

United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982) : In the prosecution of a former Army doctor charged with killing his wife and children, the Court held there was no abuse of discretion in excluding the testimony of a forensic psychiatrist who would have testified that the defendant's personality configuration was inconsistent with an outrageous murder. Exclusion came after 13 lay witnesses had vouched for the defendant's nonviolent character.

United States v. Roberts, 887 F.2d 534 (5th Cir. 1989) : The Court held it was error, but harmless, to exclude testimony by a psychologist that the personality of a defendant charged with cocaine offenses was consistent with his claimed activity as a self-appointed vigilante. In *United States v. Hewitt*, n3 the Court held that a defendant always may offer evidence that he is a "law-abiding citizen" and is not limited to more specific character traits. In *United States v. Jackson*, n4 the Court held there was no error in barring evidence of a defendant's good character for truthfulness, since truthfulness "is not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin."

United States v. Cylkouski, 556 F.2d 799 (6th Cir. 1977) : The Court affirmed a conviction for conspiracy to facilitate an illegal gambling business. Discussing the relationship between Rules 404(a) and 608(a), the Court noted that the former Rule permits a criminal defendant (whether or not he testifies) to open the door to character evidence relating to substantive issues, while the latter permits a criminal defendant, like any other party, to rehabilitate any witness' credibility *only* after the witness is attacked. Thus, the defendant's credibility is treated like that of any other witness: only after he testifies and is impeached may it be rehabilitated. This case is a reminder of the importance of citing the correct evidentiary theory: defense counsel who cites *Rule 608* as authority for offering character evidence faces that Rule's limitation on the use of the evidence, but the limitation can be avoided if *Rule 404(a)* can be utilized.

United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977) : The defendant's conviction for assaulting a federal officer was reversed because a psychologist was not permitted to testify that the defendant was more likely to hurt himself than to direct his aggressions toward others. Because *Rule 404(a)* permits an accused to introduce evidence of a pertinent character trait and the relevant federal statute required the government to prove a subjective intent to commit an assault, it was error to rule the psychologist's testimony irrelevant.

United States v. Diaz, 961 F.2d 1417 (9th Cir. 1992) : In a prosecution for possession of cocaine with intent to distribute, the Court held it was error (but harmless) to preclude the defendant from asking his pastor about the defendant's "being prone to criminal conduct," as the inquiry was encompassed within permissible "law-abidingness." There was no error in precluding inquiry of his mother about his "being prone to large-scale drug dealing," as that specific propensity is not simply the converse of general "law-abidingness."

[iv] Rule 404(a) -- Character of Accused -- Demeanor Evidence

United States v. Cortez, 935 F.2d 135 (8th Cir. 1991) : To help the jury understand the defendant's in-court testimony and the events surrounding his arrest and interrogation, the defense offered a psychologist to testify that the defendant had mental and emotional disorders manifested in an "inability to recall certain facts" and a withdrawn

demeanor. The Court held there was no abuse of discretion in excluding the evidence, as it did not refer to a character trait encompassed by the Rule and it would not be helpful to the jury because those aspects of the defendant's personality would be readily apparent when he testified.

United States v. Schuler, 813 F.2d 978 (9th Cir. 1987) : In a prosecution for threatening the life of the President, the prosecutor referred during closing argument to the nontestifying defendant's courtroom conduct -- including laughing during testimony regarding his threats. Reversing, the Court held that the argument violated *Rule 404(a)* by "suggesting to the jury that Schuler's laughter was relevant apparently for the purpose of showing that he was of bad character because he considered the charges of threatening the life of the President to be a joke." One Judge dissented on the grounds that a defendant's courtroom demeanor is properly considered as evidence and that the laughter was evidence of mental state.

[v] Rule 404(a) -- Character of Accused -- Prosecution Evidence

United States v. Long, 328 F.3d 655 (D.C. Cir. 2003) : Affirming convictions for sexual offenses involving minors, the Court upheld the admission of testimony by an FBI agent concerning "the typology, identification, characteristics and strategies of a sexual offender, particularly preferential sex offenders, and the characteristics and behavior of child victims of sexual abuse." The Court rejected the contention that the testimony was inadmissible profile evidence, explaining that it was designed to aid the jury in understanding the modus operandi of preferential sex offenders, as well as to help rebut defenses of innocent intent and fabrication.

United States v. Vasquez, 267 F.3d 79 (2d Cir. 2001) : A witness in a prosecution for murder in aid of racketeering testified on direct about two violent confrontations he had with the defendant, one of which involved gunshots through an apartment's door after the witness had observed the defendant through the peephole. On cross-examination, defense counsel brought out that the witness went and got a gun although he had not seen a gun on the defendant, and suggested that the witness had started the shooting. On redirect, the witness explained that he got the gun because he knew the defendant's reputation for killing people. Affirming, the Court found that the government offered the testimony to rebut the impression created during cross-examination, not as character evidence that would be inadmissible under *Rule 404(a)*.

United States v. Hans, 738 F.2d 88 (3d Cir. 1984) : Reversing a bank robbery conviction on another ground, the Court ruled that it was error for the prosecution to elicit evidence concerning the government's focusing on the defendant as a suspect because agents in Detroit thought he was a likely suspect. The Court said that this testimony tended to establish only that the defendant was a known bank robber and that it was highly prejudicial to the defendant.

United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994) : Reversing a doctor's conviction for illegal distribution of controlled substances, the Court held it was error to permit the prosecutor to cross-examine a witness about the defendant's reputation for being an easy source of drugs, where the defendant had not offered any evidence of his good character.

United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) : In a bribery and extortion prosecution, the Court held it was error (but harmless) to permit the prosecutor to question a defense witness, beyond the scope of direct examination, about the defendant's involvement with bankrupt restaurants. The questioning, the Court decided, did not relate to any issue other than the defendant's character, and the witness had not testified as a character witness.

Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) : The Court reversed the denial of habeas corpus relief where the prosecutor in a sexual abuse case had explicitly urged the jurors in closing argument to consider the petitioner's unseemly character when rendering their verdict. Although much of the character evidence had been introduced as part of a defense strategy and some was relevant as to why the victim had not promptly informed others of the petitioner's alleged acts, the prosecutor went far beyond the bounds of permitted conduct when presenting the evidence to the jury and articulating "perhaps the paradigm of the improper 'bad character' argument -- that the alleged criminal acts 'fit' the evidence of [the petitioner]'s character and lifestyle." Affirming a conviction for bank robbery in *United States v. Andrea*, n5 the Court stated that the deliberate injection into the record by government witnesses of information pertaining to a defendant's incarceration on a different charge is offensive to the fair administration of justice; in this case, however, the error was harmless.

United States v. Bonner, 302 F.3d 776 (7th Cir. 2002) : The defendant swindled a widow out of her VA benefit payments. Affirming his conviction for fraud, the Court held there was no plain error (and no abuse of discretion, had the defendant objected) when the prosecution asked about the defendant's reputation for truthfulness, honesty, and generosity. The defense opened the door to the prosecution's questioning by introducing evidence of the defendant's honesty and generosity, harping on the bonds of trust between the defendant and the widow and pointing out that he did things for her that no one else bothered to do. In *United States v. Williams, 739 F.2d 297 (7th Cir. 1984)* , the Court reversed a conviction for dealing in stolen motor vehicles on the ground that the government impermissibly elicited character evidence when a detective testified that he knew the defendant as "Fast Eddie."

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996) : Affirming a conviction arising out of drug activity and gang rivalry, the Court rejected the defendant's argument that repeated reference to his nickname (which unfortunately was "Monster") throughout the trial was tantamount to testimony about his character. Citing *United States v. Williams, supra* , the Court noted that "in some cases, the use of a defendant's irrelevant nickname to suggest his bad character or unsavory proclivities may be prejudicial." However, in this case "there was no way for the jury to avoid hearing Delpit's nickname," since he was referred to in admissible wiretapped conversations almost exclusively as "Monster."

United States v. Mendoza-Prado, 314 F.3d 1099 (9th Cir. 2002) : The defense in a drug-trafficking case claimed entrapment and the prosecution offered evidence that the defendant had admitted uncharged offenses, including theft, extortion, and assisting a prison escape. The Court noted that an entrapment defense puts predisposition in issue, character is an essential element when determining predisposition, and *Rule 405(b)* permits proof of specific instances of conduct when a trait of character is an essential element of a defense. However, bad acts are not relevant to prove predisposition unless they are similar to the charged crime. The Court found "little relationship" between the charged and uncharged offenses in this case, but it concluded that the defendant opened the door to the prosecution evidence by offering character evidence that he was a working man and a family man who worked hard, had a substantial legitimate income, was law-abiding, and was afraid to get involved in drugs. We question this result: the defendant's testimony that he was not interested in narcotics and was a working man is hardly contradicted by evidence of theft, extortion, and assisting escape. It is true that the testimony that the defendant was law-abiding could have been subjected to cross-examination, but *Rule 405* adopts the familiar *Michelson* rule that the cross-examiner is bound by a character witness's answer and extrinsic evidence is not permitted. In *United States v. Pavon, 561 F.2d 799 (9th Cir. 1977)* , the Court affirmed cocaine distribution convictions despite the fact that the government used a probation officer as a witness, apparently to establish the amount of income that the defendant was legally earning. The Court indicated that direct evidence of the defendant's criminal record could not have been admitted under *Rule 404(b)* or under *Rule 404(a)(1)*, so evidence pointing to an inference to the same effect should also have been excluded. Although it found the error to be harmless, the Court issued a stern warning for future cases.

[d] Rule 404(a) -- Character of Victim

[i] Rule 404(a) -- Civil Cases

Prior decisions permitting the circumstantial use of character evidence in civil cases are inconsistent with the 2006 amendment of the Rule. See the Editorial Explanatory Comment, *§ 404.02[3]*.

[ii] Rule 404(a) -- Character of Victim -- Criminal Cases

United States v. Bailey, 834 F.2d 218 (1st Cir. 1987) : The Court held that a defendant convicted of corruptly endeavoring to influence a juror had no right to introduce evidence that, while serving on the jury, the juror spoke about the case to neighbors in violation of her oath. The Court rejected the defendant's analysis of the juror as a victim whose character could be explored by the defense, and found that the neighbor's testimony involved specific instances of extrinsic conduct that were barred under *Rule 608*.

United States v. Schatzle, 901 F.2d 252 (2d Cir. 1990) : In the prosecution of a Secret Service agent for willfully depriving a citizen of his constitutional rights by subjecting him to excessive force, the defendant was permitted to prove that the victim had previously been arrested after an altercation with a police officer and, in order to rebut the victim's claim that failure to mention it on a bar application was inadvertent, to have the officer testify about the victim's attempt to have the charges dropped so as not to prejudice his bar application; however, the officer was not permitted to give details of the incident. The Court affirmed, holding that although *Rule 404(a)(2)* permits introduction of pertinent traits of a victim's character, it was no abuse of discretion under *Rule 403* to exclude evidence posing a genuine risk of focusing the jury upon the wrong event.

United States v. Smith, 230 F.3d 300 (7th Cir. 2000) : The defendant was charged with retaliating against a witness who had given evidence against him in another proceeding by pushing the witness during a barroom encounter. At trial, the defense was precluded from offering evidence of the witness' prior misdemeanor conviction for domestic battery. Affirming, the Court held that the conviction was probative of the witness' character for violence, thus satisfying *Rule 404(a)(2)*, but that it was evidence of a specific act, rather than reputation or opinion as required by *Rule 405(a)*. The Court held that the victim's character for violence is not an essential element of a self-defense claim, so specific acts evidence is not admissible under *Rule 405(b)*. In *United States v. Martinez, 988 F.2d 685 (7th Cir. 1993)* , the Court affirmed convictions for murder and assault in a prison, holding that even if some evidence of the victims' past violent acts and racism was theoretically relevant to prove self-defense, exclusion was not prejudicial in this case, as there could not have been a rational finding of self-defense.

United States v. Emeron Taken Alive, 262 F.3d 711 (8th Cir. 2001) : Reversing a conviction for assaulting a federal officer, the Court held that it was error to exclude evidence that the officer had a reputation for aggression and violence. Because this evidence tended to show that the officer was the first aggressor, it was critical to the defendant's self-defense claim.

United States v. Geston, 299 F.3d 1130 (9th Cir. 2002) : The Court affirmed a police officer's convictions for unreasonable use of force and assault with a dangerous weapon. It held that the Trial Judge properly excluded evidence that the victim was previously involved in two violent incidents after drinking alcohol, since specific instances of conduct are not admissible to prove the character of a victim. In *United States v. Keiser, 57 F.3d 847 (9th Cir. 1995)* , the Court affirmed an assault conviction, finding it was proper to exclude specific act evidence of the victim's character, which had been offered by the defendant to prove that he was acting in response to an attack by the victim. The Court observed that the defendant had the right under *Rule 404(a)(2)* to offer evidence to show that the alleged victim was a

violent and angry person, and that because the evidence is not limited to its bearing on the defendant's state of mind, his personal knowledge of a victim's propensity is not a prerequisite to its admissibility. The Court concluded, however, that the victim's character is not an essential element of a self-defense claim; therefore, under the terms of *Rule 405*, character evidence of the victim must be limited to reputation and opinion testimony.

United States v. Yazzie, 188 F.3d 1178 (10th Cir. 1999) : Reversing murder convictions for inadequate instructions, the Court upheld rulings that permitted the defense to introduce evidence of the deceased's reputation for violence and permitted the woman with whom he lived to testify that the deceased routinely picked fights, manipulated and intimidated people, and carried a gun. It also upheld the introduction of rebuttal testimony by the deceased's mother to the effect that her son was in a good state of mind when she last spoke to him. The Court observed that "[a]lthough it is difficult to imagine any other purpose for calling a victim's mother to testify about her knowledge of her son's 'state of mind' than to backdoor some expression of his character," *Rule 404(a)(2)* permits the prosecution to offer rebuttal character evidence. In *United States v. Bautista, 145 F.3d 1140 (10th Cir. 1998)* , the Court affirmed a conviction for murder, holding there was no abuse of discretion in excluding defense evidence that the victim had made a homosexual pass at a friend of the defendant. The defendant was properly permitted to testify that he feared the victim's aggressive sexual advances, but evidence of the victim's pertinent traits of character could be proved only through reputation or opinion evidence.

[e] Rule 404(a) -- Civil Cases

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995) : In a female lawyer's Title VII action against a law firm, the Court held it was error (but harmless) to admit evidence that the plaintiff had had difficulty in getting along with staff and in meeting deadlines at a firm where she had worked previously. The evidence went only to her character and did not fall within any of the *Rule 404* exceptions; neither did it properly impeach her by showing character for untruthfulness or by contradicting her explanation of why she left the prior firm. In *Rauh v. Coyne, 744 F. Supp. 1181 (D.D.C. 1990)* , an action by a woman alleging sex and marital status discrimination in her discharge from employment, the Judge held she would not be permitted to give evidence of her performance at prior and subsequent jobs. Even though it would have a slight probative value on her performance for the defendants, it would be inadmissible character evidence vastly complicating the trial of the case.

Moorhead v. Mitsubishi Aircraft Int'l, Inc., 828 F.2d 278 (5th Cir. 1987) : In a suit by survivors of passengers killed in an airplane crash, the Court held it was error to admit evidence of the pilot's records from a flight school refresher course and testimony of one of the instructors. This was inadmissible character evidence, but its admission was harmless since the Judge did not rely upon it in making findings in a bench trial.

Ginter v. Northwestern Mut. Life Ins. Co., 576 F. Supp. 627 (E.D. Ky. 1984) : In an action to recover on a life insurance policy, the company claimed that the deceased omitted material facts when he applied for insurance. The Court ruled *in limine* that the plaintiff could not offer testimony of witnesses "that the deceased was a man of good character who would be unlikely to submit a fraudulent or erroneous application," since "it is the intention of *Rule 404(a)* to exclude evidence of a character trait in civil cases, except where character itself is an element of the claim or defense, as in cases involving defamation."

McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924 (7th Cir. 1984) : The plaintiff was fired after he threatened to resign if the secretary he had in North Carolina was not transferred to his new assignment in Wisconsin. In his civil rights employment action he claimed he was fired because he opposed the defendant's transfer policy on the ground that it discriminated against women. Affirming a judgment for the defendant, the Court held that evidence concerning other

alleged discrimination against women and the plaintiff's sincere and honest concern for female employees was properly excluded as an attempt to establish the plaintiff's good character. If offered under *Rule 404(b)*, the evidence would have consumed far too much time in light of its limited probative value.

Blake v. Cich, 79 F.R.D. 398 (D. Minn. 1978) : Denying a new trial motion in a civil rights action against police officers, the District Court noted that character evidence proffered by plaintiffs to prove their own actions could not properly have been admitted because character evidence cannot be used circumstantially in a civil case.

Gates v. Rivera, 993 F.2d 697 (9th Cir. 1993) : In a civil rights action against a police officer for using excessive force, the Court held it was harmless error for the defendant to testify that in his 16 and a half years as a police officer, he had never shot anyone. The only issue in the case was whether the force used was excessive, not the officer's intent. In *Palmerin v. Riverside*, n6 the Court held it was not error, in a civil rights case alleging that police officers used excessive force, to admit the plaintiffs' guilty pleas that admitted that they had used excessive force against the officers. The pleas were not character evidence, but were relevant to an assessment of the propriety of the officers' response to the plaintiffs' actions. In *Cohn v. Papke*, n7 a civil rights action brought against police officers who arrested the plaintiff and charged him with soliciting a homosexual act, the Court found that it was reversible error to have permitted an inquiry into whether the plaintiff was bisexual. The Court found that this was impermissible under *Rule 404* and also that it was too prejudicial to be permitted under *Rule 403*.

Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907 (10th Cir. 1986) : In an action by a helicopter buyer and its insurer against a manufacturer, the Court affirmed a judgment that the buyer and the seller were each negligent, holding there was no error in excluding evidence that the buyer had been warned that the pilot of its helicopter might be dangerous and that the pilot overloaded helicopters. Since the buyer stipulated that its helicopter was overloaded at the time of the crash, the Court reasoned that the Trial Judge properly determined that the excluded evidence might have been viewed as character evidence by the jury and thus misused.

[f] Rule 404(a) -- Jury Instructions

United States v. Pujana-Mena, 949 F.2d 24 (2d Cir. 1991) : Resolving apparently contradictory Circuit precedent and adopting the majority view, the Court held that under *Rule 404(a)(1)* the defendant may introduce evidence of good character to rebut an inference of guilt, but he is not entitled to an instruction that such evidence "standing alone" may be sufficient to create a reasonable doubt.

United States v. John, 309 F.3d 298 (5th Cir. 2002) : The Court reversed a conviction for sexual contact with a minor because the Trial Judge refused to instruct the jury that the defendant's evidence of good character should be considered and that character evidence "may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime." The Court noted that the defendant "offered a host of admissible character evidence," that his good character was a central part of his defense that he did not commit the crime, and that the case boiled down to a credibility contest between the defendant and the victim.

United States v. Borders, 693 F.2d 1318 (11th Cir. 1982) : In the course of affirming a lawyer's conviction for involvement in a scheme to bribe a Federal Judge, the Court held that the jury was properly instructed to consider defense character evidence along with, not after, the other evidence in the case.

[g] Rule 404(a) -- Pertinent Traits

United States v. Nazzaro, 889 F.2d 1158 (1st Cir. 1989) : In a mail fraud conspiracy prosecution, the Court held there was no error in excluding evidence of commendations received by the defendant police officer because, even if they were character evidence, the traits of bravery, attention to duty, and community spirit they purported to show were not pertinent to the crimes of which he was accused.

United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979) : The Court held there was no error in barring evidence of a defendant's good character for truthfulness, since truthfulness "is not pertinent to the criminal charges of conspiracy to distribute heroin or possession of heroin."

[h] Rule 404(a) -- Reputation Relevant to Another's State of Mind

United States v. Certain Real Prop. Known as 890 Noyac Rd., 945 F.2d 1252 (2d Cir. 1991) : In reversing an order of forfeiture against a mother whose son allegedly used the property for drug dealing, the Court noted that the son's reputation as a supplier of drugs was relevant to the mother's knowledge. Because the factual issue involved the son's reputation rather than his character, Rules 404 and 405 were inapplicable.

[i] Rule 404(a) -- Witness' Character

United States v. Lanza, 790 F.2d 1015 (2d Cir. 1986) : In a prosecution charging three defendants with wire fraud in a scheme to stage a fraudulent burglary at a jewelry store owned by the key prosecution witness, the Trial Judge prevented the defense from examining the witness concerning various loans and debts. The Court affirmed, finding that these were not bad acts under *Rule 608(b)*, and that the evidence was not admissible under *Rule 404(a)* to show that the witness was the kind of person who borrowed money and did not repay it.

United States v. Bocra, 623 F.2d 281 (3d Cir. 1980) : The Court held that a defendant who wanted to ask an IRS agent questions about the agent's soliciting bribes in other tax cases to support his claim that the agent entrapped him was seeking to elicit only bad character evidence that was inadmissible.

[2] Rule 404(b) -- Other CRIMES, WRONGS, Or Acts

[a] Rule 404(b) -- Ability or Opportunity

United States v. Scott, 270 F.3d 30 (1st Cir. 2001) : The Court affirmed convictions for false claims and bank fraud, holding that testimony that the defendant had been an inmate in a halfway house was relevant to show that he had the opportunity to make withdrawals from an ATM near the house. In *United States v. Carty, 993 F.2d 1005 (1st Cir. 1993)* , the Court held there was no abuse of discretion in admitting evidence of the defendant's prior purchase of cocaine, as it was probative of his opportunity to commit the charged offense of possession with intent to distribute. The dissenting Judge believed proof of the prior purchase was only improper propensity evidence, and even though the defendant was acquitted of the possession offense, the evidence could have led the jury to believe him a drug dealer and thus guilty of the charged firearms offenses. See also *United States v. Barrett* n8(reversing conviction on other grounds, Court approved introduction of evidence that appellant had knowledge of the workings of alarm systems, to show his ability to commit crimes related to stolen postage stamps).

United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (en banc): The Court referred to the "remarkable

coincidence" of possession of a .38 caliber gun some weeks after the charged bank robbery and held that it was admissible to corroborate the government's chief witness and to show an opportunity to commit the robbery. See also *United States v. Sliker* n9(in a bank fraud prosecution, testimony about a similar attempt to defraud explained the defendant's ability to get phony checks).

United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) : The Court held that a government witness' testimony that he had encountered the defendant one year before the charged conspiracy, when both went to a location to purchase substantial quantities of cocaine, was admissible to prove that the defendant had a source of such cocaine.

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) : The defendant was convicted of being a felon in possession of an assault weapon. The Court held that evidence of his membership in a gang could be properly admitted to show opportunity, because gang membership "undoubtedly made it easier and more likely for him to possess an assault rifle than for the average citizen." However, the conviction was reversed because of failure to give an effective limiting instruction on the use of the evidence of gang membership.

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002) : Affirming convictions for drug trafficking, the Court found no abuse of discretion in the admission of evidence regarding the forfeiture of assets and the value of jewelry found in a defendant's home at the time of a prior narcotics offense, to which he had pleaded guilty. The evidence tended to demonstrate the defendant's ability to engage in substantial drug transactions involving large amounts of money, and the jury was properly instructed as to the limited purposes for which it was offered. In *United States v. Yusufu, 63 F.3d 505 (7th Cir. 1995)* , the Court affirmed a fraud conviction, holding there was no abuse of discretion in admitting evidence that the defendant had been incarcerated on three occasions, since the defendant's domicile during specific periods of time was relevant to his opportunity to execute parts of the scheme, to explain chronological voids in the account of events, and to trace his identity. Affirming convictions for crimes arising out of a shop robbery in *United States v. Covelli*, n10 the Court upheld the admission of testimony that one of the defendants had previously been in possession of a small caliber pistol, saying that "evidence of prior possession of a weapon can be used to prove opportunity and identification even where it cannot be directly identified as the weapon used in the crime."

United States v. Conrad, 320 F.3d 851 (8th Cir. 2003) : The defendant was charged with unlawful possession of a sawed-off shotgun found in an apartment, after the renter of the apartment said the gun was the defendant's. The Court held there was no abuse of discretion in admitting real evidence seized from the apartment that was connected with the defendant, including drug paraphernalia, since it tended to show possession and control of the apartment. The Court did express "serious reservations about whether possession of drug paraphernalia without evidence of drug trafficking is admissible to show possession of an illegal weapon." In *United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997)* , the Court reversed the defendant's conviction for knowingly possessing sexually explicit photographs of his minor stepdaughter because evidence that the defendant had sexual contact with his stepdaughter was erroneously admitted. Rejecting the argument that the evidence was admissible to prove the defendant's "opportunity," the Court noted that "[o]pportunity was hardly an issue in this case: the defendant lived in the same house with the victim, was in contact with her every day, and was often home alone with her." Consequently, the probative value of the uncharged misconduct evidence in proving opportunity was substantially outweighed by its prejudicial effect.

United States v. Green, 648 F.2d 587 (9th Cir. 1981) : The Court approved the introduction of evidence that the appellants were involved in certain past drug transactions on the ground that it established an opportunity for them to obstruct justice by attempting to frame others. Trial Judges were reminded, however, that they must carefully restrict the other crimes evidence to that which actually is probative and that they must be concerned about the prejudicial effect of other crimes evidence.

United States v. Garcia, 880 F.2d 1277 (11th Cir. 1989) (per curiam): In a prosecution for making false statements on a loan application, a former employee had been permitted to testify that, as a joke, the defendant had signed the employee's name to a paper purporting to sell the employee's apartment to the defendant and had then ripped up the paper. Affirming, the Court said the evidence was relevant to demonstrate the defendant's ability to prepare documents with faked signatures, it did not tend to show bad character, and the defendant was not prejudiced by proof of his tendency to make jokes.

[b] Rule404(b) -- Accident or Mistake

[i] RULE 404(b) -- Civil Cases

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996) : In an inmate's § 1983 action against prison guards, the Court held that although the inmate's disciplinary record might have been properly admitted had he argued that he had struck a guard reflexively and by accident, it was reversible error to admit the record where the plaintiff denied having struck the officer at all and did not raise any issue of his intent, and the defendants repeatedly argued that the plaintiff's violent character tended to show he was the aggressor.

Westfield Ins. Co. v. Harris, 134 F.3d 608 (4th Cir. 1998) : In a declaratory judgment action by an insurer disclaiming liability on the ground that a fire that destroyed the insured's home had been deliberately set, the Trial Judge granted a motion *in limine* excluding evidence of six prior house-fire claims and one truck-fire claim in which the insured had been involved. Reversing a judgment for the insured, the Court held it was an abuse of discretion to exclude the evidence. It was particularly relevant not only because of the "doctrine of chances," but also because of the striking similarities among the incidents. The Judge had erred in improperly treating the high probative value of the evidence as making it "prejudicial" under *Rule 403*.

Dial v. Travelers Indem. Co., 780 F.2d 520 (5th Cir. 1986) : The Court affirmed a judgment against insureds suing to collect on a fire insurance policy on their house. It upheld admission of evidence that the plaintiffs had been burned out of their previous home and that after the fire in this case two properties they occupied had burned. The Court applied the same test it uses in criminal cases to conclude that the evidence was relevant since "the essential issue is the difference between an accident and an intended act."

King v. Ahrens, 16 F.3d 265 (8th Cir. 1994) : In a medical malpractice case, the Court held there was no abuse of discretion in excluding evidence that the defendant's medical license had been suspended eight years earlier, as any probative value the evidence had on the absence of mistake in failing to note critical information on the medical chart and on the doctor's credibility was substantially outweighed by its prejudicial effect, given the remoteness in time and the dissimilarity between the incidents.

[ii] Rule 404(b) -- Accident or Mistake -- Criminal Cases

United States v. Linares, 367 F.3d 941 (D.C. Cir. 2004) : Affirming a conviction for felon firearm possession, the Court held it was error (but harmless) to admit testimony from a police officer that four-and-a-half years before the charged events she had arrested the defendant after seeing him drop a loaded handgun onto the ground. Because there was eyewitness testimony that the defendant was holding a gun in his hand and firing it, no reasonable argument could be made that his possession was unknowing or accidental, so the officer's testimony served only as impermissible propensity evidence.

United States v. Houle, 237 F.3d 71 (1st Cir. 2001) : The defendant was charged in a cocaine conspiracy arising from activities of a motorcycle club, which had been infiltrated by an informant who assisted the government in setting up a sham cocaine deal for which the defendant provided security. Affirming, the Court found no abuse of discretion in the admission of evidence that a few days after providing security for the cocaine deal the defendant provided security for the same government agent while he purportedly collected a gambling debt. The evidence was relevant to prove intent and absence of mistake.

United States v. Livoti, 196 F.3d 322 (2d Cir. 1999) : Affirming a police officer's conviction for violating the civil rights of an arrestee by putting him in a choke hold and causing his death, the Court held that evidence that the defendant had choked another arrestee in the past was properly admitted to rebut the defendant's assertion that he choked the victim in this case accidentally.

United States v. Naylor, 705 F.2d 110 (4th Cir. 1983) : The Court affirmed convictions for transporting a stolen car and other offenses, noting there was no error in an *in limine* ruling that a prior conviction for attempting to steal a car would be admitted if the defendant testified. The Court found that the Trial Judge relied on *Rule 404*, not *Rule 609*, and that the evidence was admissible to prove absence of mistake. In *United States v. Greenwood*, n11 the Court affirmed a defendant's convictions for submitting false vouchers to his employer, the FBI. It held that two prior acts of bank loan misstatements and meal reimbursement cover-up were properly admitted to prove the absence of mistake.

United States v. Hernandez-Guevara, 162 F.3d 863 (5th Cir. 1998) : The defendant was arrested after he was observed on several occasions following a truck that was found to carry undocumented aliens. The Court held there was no abuse of discretion in admitting evidence that the defendant had previously engaged in smuggling aliens, since it tended to rebut the argument that the defendant was simply in the wrong place at the wrong time when he was arrested. In *United States v. Powell, 124 F.3d 655 (5th Cir. 1997)* , the Court affirmed a conviction for evading fuel excise taxes, holding there was no abuse of discretion in admitting evidence about the defendant spending large sums of money in topless clubs and a photograph of him posing in front of a car trunk filled with a large amount of cash. The evidence rebutted his argument that his tax evasion happened by accident or mistake, by showing that he was reaping the benefits and supporting an extravagant lifestyle.

United States v. Leight, 818 F.2d 1297 (7th Cir. 1987) : The Court affirmed a mother's conviction for murdering her infant son, finding no error in admitting evidence of injuries suffered by two other of the defendant's children to prove that the death was not an accident. See also *United States v. Wormick* n12(evidence of prior falsification of records properly admitted to prove the absence of mistake).

United States v. Wonderly, 70 F.3d 1020 (8th Cir. 1995) : The defendant was charged with defrauding five people by promising high-yield, but virtually risk-free, investment opportunities. The Court held there was no abuse of discretion when two witnesses were permitted to testify that they invested money with the defendant after the dates charged in the indictment and never saw the money again. The evidence tended to rebut a defense of mistake, since the defendant's claim that she was merely an innocent messenger for another was belied by her continuing to seek out other investors and make the same promises even after the first five investors lost all their money. In *United States v. Shannon*, n13 the Court held that other instances in which currency reports were not filed were admissible to negate lack of mistake with respect to the defendant's actions.

United States v. Ogles, 406 F.3d 586 (9th Cir. 2005) , adopted in part, vacated in part, 440 F.3d 1095 (9th Cir. 2006) (en Banc) : The defendant was convicted for transferring a weapon at a gun show outside the state in which he was licensed. Affirming, the Court found no abuse of discretion in the admission of evidence that the defendant transferred other weapons in a similar manner at the same gun show, as it tended to diminish the likelihood that the charged transfer was a mistake or was made through inadvertence. In *United States v. Harris, 185 F.3d 999 (9th Cir. 1999)* , the Court affirmed a conviction for embezzling from an ERISA pension plan, finding no abuse of discretion in the admission of evidence that the defendant had misappropriated money from several limited partnerships of which he was the general partner. Both the charged and uncharged situations involved breach of fiduciary duty, and the evidence of stealing from partnerships tended to rebut the defendant's claim that he took the pension fund money only because he did not understand the technicalities of his ERISA responsibilities. In *People of Terr. of Guam v. Camacho*, n14 a schoolbus driver was convicted for official misconduct in pinching a student's buttocks. The Court held (2-1) that there was no abuse of discretion in admitting evidence of other incidents of sexual misconduct by the defendant against students, as it was probative on whether the charged contact was accidental. In *United States v. Boise*, n15 the Court affirmed a conviction for murder of a six-week-old child, holding that evidence of the victim's prior injuries when the defendant was the primary caretaker and of the victim's suffering from battered-child syndrome was properly admitted as evidence of intent and of the absence of accident.

United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998) : In a trial for receiving child pornography over the Internet, the government introduced other images of child pornography on the defendant's computer at the time of his arrest besides those for which he was charged. The Court found no abuse of discretion, since the evidence tended to show that his possession of pornographic images was not an accident or mistake and that he had knowledge of the nature of the material he was receiving. In *United States v. Cummings*, n16 the Court affirmed a conviction for selling a stolen cab portion of a tractor-trailer, finding that evidence that the defendant was involved in a pattern or practice of dealing in stolen trucks and parts was admissible to prove intent and the absence of mistake.

[c] Rule404(b) -- Acquittals

Dowling v. United States, 493 U.S. 342 (1990) , aff'g 855 F.2d 114 (3d Cir. 1988) : To identify the perpetrator in a bank robbery case, the government offered evidence that the defendant had committed a house robbery two weeks later for which he had been charged and acquitted. The Court of Appeals held that the error in admitting the evidence was harmless; the Supreme Court held that there was no constitutional error. The Supreme Court's analysis is discussed in the Editorial Explanatory Comment, § 404.02[19].

United States v. Blyden, 964 F.2d 1375 (3d Cir. 1992) : The Court reversed a ruling *in limine* that evidence of an alleged assault for which the defendants had previously been acquitted could not be introduced in a prosecution for other offenses arising out of the same incident. The evidence was essential to the charge of gun possession during a crime of violence, so it was not "other crime" evidence and it had great probative value. Any argument that it would be prejudicial essentially restated the double jeopardy and collateral estoppel claims previously rejected by the Court. It was, therefore, error to exclude the evidence on the possession count; rulings with respect to other counts for which the evidence was not essential must await the trial context.

United States v. Carney, 387 F.3d 436 (6th Cir. 2004) : The Court affirmed convictions for falsifying paperwork in connection with firearms sales, holding that evidence of uncharged firearms transactions was properly admitted to prove that the defendants actually knew the true purchaser of the firearms that they sold in the transactions at issue in the case. The Court ruled that the fact that some acts were the subject of acquittal in a prior criminal trial did not bar their use as *Rule 404(b)* evidence. The proof of uncharged misconduct "must merely be sufficiently compelling such that the jury can conclude that the act occurred and that the defendant was the actor."

United States v. Hazelett, 32 F.3d 1313 (8th Cir. 1994) : The Court reversed a conviction for possessing cocaine with intent to distribute, but it found no abuse of discretion in admitting evidence that the defendant had previously been arrested for possession of seven ounces of crack cocaine. Even though his conviction for the prior offense was overturned for insufficient evidence, the burden of proof under *Rule 404(b)* is significantly less stringent than the "beyond a reasonable doubt" standard required for conviction, so the holding that there was insufficient proof on the criminal charge did not preclude a finding by a preponderance that he was involved in the prior acts.

United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982) : The Court affirmed bank robbery convictions, finding that the Trial Judge properly admitted evidence of a second bank robbery involving the two defendants. The Court said that the crime charged and the other crime possessed "signature quality" and were therefore proper evidence, even though one of the defendants had been acquitted on the other charge.

[d] Rule 404(b) -- Acts Charged

[i] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode

[A] Rule 404(b) -- Drug Cases

United States v. Badru, 97 F.3d 1471 (D.C. Cir. 1996) : In a prosecution for conspiracy to distribute heroin, the Court found no abuse of discretion in the admission of evidence that the defendants had smuggled heroin from Nigeria to the United States through couriers during the relevant time period of the indictment. The smuggling evidence was "intrinsic" evidence not regulated by *Rule 404(b)*, since the defendants "had to obtain heroin from a source before they could distribute it."

United States v. McGuire, 389 F.3d 225 (1st Cir. 2004) , vacated on other grounds, 544 U.S. 946 (2005) : In a drug conspiracy case, the defendant objected to evidence that he had threatened a woman with a gun because he believed that the woman and her boyfriend had tried to rob him, and he also objected to evidence that he broke into another person's house to retrieve drugs that were stolen from him. Affirming, the Court held that this evidence was not *Rule 404(b)* evidence. These episodes occurred during the time of the charged drug conspiracy, and demonstrated an intent to protect the conspiracy. The probative value of this evidence in proving the conspiracy was not substantially outweighed by its prejudicial effect. In *United States v. Taylor, 284 F.3d 95 (1st Cir. 2002)* , the court affirmed crack cocaine convictions, holding that testimony by a police informant that he saw a gun in the defendant's waistband during a drug transaction was "part and parcel" of the charged transactions and not "other crime" evidence. The Court noted that any potential prejudice arising from the gun evidence was diminished by a limiting instruction.

United States v. Birbal, 62 F.3d 456 (2d Cir. 1995) : Although the Court reversed heroin convictions on other grounds, it held that the prosecutor was properly permitted to elicit testimony concerning a drug user's death, as it was "inextricably intertwined" with the crime charged, narcotics distribution. In *United States v. Levy*, n17 the Court reversed a conviction for distribution of heroin, finding it was error to admit evidence concerning a "sample transaction" in which the defendant supplied heroin to an informant earlier in the day on which he was charged with distribution. The Court reasoned that the words "inextricably intertwined" are not always applicable to transactions that are related to one another. It was error to admit the evidence of the other transaction without considering the purpose of its admission and weighing its potential prejudicial effect against its probative value.

United States v. Sumler, 294 F.3d 579 (3d Cir. 2002) : Affirming convictions for conspiracy to distribute cocaine base and use of a firearm, the Court found no error in the admission of evidence that the defendant pointed a gun at individuals on three occasions during disagreements over the conduct of drug trafficking at a crack house. The Court found that these incidents were conduct connected with and occurring during the conspiracy. In *United States v. Adams*, n18 the Court held that weapons were properly introduced to show the scale of the charged narcotics conspiracy and the type of protection the defendants thought they needed.

United States v. Chin, 83 F.3d 83 (4th Cir. 1996) : The Court held in a drug trafficking case that the defendant's mention of murder-for-hire in the course of a recorded conversation setting up a heroin sale was an intrinsic part of the charged drug deal, it was not admitted solely to demonstrate the defendant's bad character, and its prejudicial effect did not outweigh its probative value in showing the extent to which the defendant indicated he would go to ensure that the drug deal went smoothly.

United States v. Morgan, 117 F.3d 849 (5th Cir. 1997) : Affirming convictions for drug-related offenses, the Court found no error in the admission of testimony by one of the undercover officers that when he bought drugs from the defendants, one of them held a shotgun to his head. This evidence was not extrinsic to the drug crimes charged. In *United States v. Maceo, 947 F.2d 1191 (5th Cir. 1991)* , the Court affirmed cocaine conspiracy convictions, holding that evidence of a defendant's personal use of cocaine and receipt of cocaine as legal fees was not extrinsic evidence but inextricably intertwined with the evidence used to prove the crimes charged, so was properly admitted to prove he knew about the drug trafficking conspiracy and knowingly participated in it. Affirming convictions for cocaine distribution in *United States v. Torres,* n19 the Court held that two "sample transactions" involving sales of cocaine were not extrinsic offenses and were properly admitted where they were "inextricably intertwined" with the crime charged.

United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995) : Defendants who had claimed a UPS package containing drugs were convicted of narcotics offenses. Affirming, the Court held that *Rule 404(b)* did not apply to a defendant's statement to a cellmate that the drugs picked up on the day of his arrest were sent to him to make up for a previous "short" drug shipment. Evidence of the previous shipment was directly connected to the one for which the defendants were charged, and thus was part of a single criminal episode, so the government did not have to give the advance notice required by *Rule 404(b)*.

United States v. Harris, 271 F.3d 690 (7th Cir. 2001) : Affirming a conviction for selling powdered cocaine, the Court found no error in admission of evidence of prior drug transactions between the defendant and the government witness who was the purchaser in the drug transaction charged in the case. The evidence was necessary to explain to the jury the significance of the cryptic language used by the defendant during the drug transaction at issue, and it was admissible "under the intricately related doctrine" because it "completes the story of the crime, its absence would create a conceptual void, and the evidence is so blended with the charged offense that it explains the surrounding circumstances." In *United States v. Gibson, 170 F.3d 673 (7th Cir. 1999)* , the Court affirmed a conviction for crack cocaine distribution, holding there was no abuse of discretion in admitting the defendant's conversations with the undercover agent regarding the possible sale of handguns. The handgun discussions were "intricately related" to conversations leading to crack sales, and by showing that the agent came to a meeting expecting to buy guns and therefore had excess money when the defendant did not want to sell guns, they helped to explain why the agent purchased substantially more crack than the initial negotiations contemplated. In a prosecution for conspiracy and attempt to possess with intent to distribute cocaine, *United States v. Ramirez, 45 F.3d 1096 (7th Cir. 1995)* , the Court held that evidence of 64 pounds of marijuana found in the apartment in which the defendants were arrested was properly admitted as "intricately related" to the charged crime, as it gave the jury a more accurate picture of the circumstances surrounding the charged crime and arrests.

United States v. Beltz, 385 F.3d 1158 (8th Cir. 2004) : Affirming methamphetamine-related convictions, the Court held that testimony about the defendant's prior involvement in production of methamphetamine at his residence was direct evidence of the charged crimes. The evidence provided a connection between the defendant and materials seized from his residence. In *United States v. Alaniz, 148 F.3d 929 (8th Cir. 1998)* , the Court affirmed convictions of conspiracy with intent to distribute marijuana, finding no error in allowing a cohort to testify that during the course of the conspiracy she was given methamphetamine to distribute in addition to marijuana. The testimony "showed methamphetamine was an integral part of the conspiracy's distribution system, and it was therefore not *Rule 404(b)* evidence of other crimes."

United States v. Lillard, 354 F.3d 850 (9th Cir. 2003) : The Court affirmed a conviction for conspiracy to possess and distribute cocaine, finding no abuse of discretion in admitting evidence that the defendant stole eight kilos from the 150-kilo shipment that he was transporting. The theft was inextricably intertwined with the charged conspiracy, and it also tended to prove the defendant's knowledge of the contents of the shipment. In *United States v. Beckman, 298 F.3d 788 (9th Cir. 2002)* , the Court affirmed marijuana-related convictions, holding that the testimony of a drug courier recruiter concerning the defendant's prior "drug run" was properly admitted to show the relationship between the defendant and the recruiter and was necessary to provide a "coherent and comprehensible story." Thus, the evidence was inextricably intertwined with the charged offense and not subject to *Rule 404(b)* exclusion. In *United States v. Vizcarra-Martinez*, n20 the Court reversed a conviction for possession of chemicals to be used in the manufacture of methamphetamine, holding that evidence the defendant possessed a small, personal-use amount of methamphetamine when arrested was neither part of the transaction serving as the basis for the criminal charge, nor necessary in offering a coherent and comprehensible story regarding the commission of the crime, so the drug use and possession could not be treated as inextricably intertwined with the charged offense.

United States v. Young, 39 F.3d 1561 (11th Cir. 1994) : The Court held that it was error (but harmless) to admit evidence of a family's use of an illegal still in a marijuana conspiracy case, since the marijuana and alcohol offenses were "neither similar nor intertwined, as the government suggests." In *United States v. Leavitt*, n21 the Court held, in affirming convictions for offenses committed in a narcotics importation conspiracy, that evidence of a threatened kidnapping and illegal gun purchases not charged in the indictment was not extrinsic evidence under *Rule 404(b)* because it was inextricably intertwined with evidence of the charged offenses or necessary to complete the story of the charged offenses. See also *United States v. Martin* n22(evidence of guns on a vessel carrying marijuana was direct evidence of crimes charged; no limiting instruction was required); *United States v. Cole* n23(videotaped conversations among conspirators admissible in drug prosecution despite references to money laundering, since the laundering was inextricably intertwined with the drug evidence).

[B] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Firearms Cases

United States v. Alexander, 331 F.3d 116 (D.C. Cir. 2003) : The Court affirmed a conviction for unlawful possession of a firearm and ammunition by a felon, holding there was no abuse of discretion in admitting a statement by the defendant's girlfriend in a 911 call that the defendant had a gun on him. The gun that resulted in the charges was found in the defendant's car not long after the 911 call. Although the Court has recognized problems with the breadth of the "inextricably intertwined" analysis that some courts use in interpreting *Rule 404(b)*, it held that in this case the statement related to the actual charge and did not involve another act.

United States v. Ridlehuber, 11 F.3d 516 (5th Cir. 1993) : The Court reversed a conviction for possession of a short-barreled shotgun, finding it was error to admit evidence which suggested that the defendant had been engaged in drug manufacturing when the weapon was seized. The drug manufacturing was not "inextricably intertwined" with the

weapon possession in the sense that other acts furthering a conspiracy are, since the evidence did not arise out of the weapons charge; under the government's theory the opposite was true. Nor was the drug manufacturing part of a "single criminal episode," as the only episode proved was the weapon possession. One Judge dissented on the ground that the drug manufacturing evidence was intrinsic circumstantial evidence of knowledge and possession of the short-barreled shotgun.

United States v. Price, 329 F.3d 903 (6th Cir. 2003) : Affirming a conviction for being a felon in possession of firearms and ammunition, the Court held that a certificate found in the nightstand near the firearms and ammunition, which indicated that the defendant had completed a handgun safety course, was not other act evidence. Rather, it was evidence of the crime charged and inextricably intertwined with the charged offense.

United States v. Hite, 364 F.3d 874 (7th Cir. 2004) , vacated on other grounds, 543 U.S. 1103 (2005) : The Court affirmed a conviction for unlawful possession of firearms, holding that evidence that the defendant had played Russian roulette with one of the weapons two years before the charged offense was properly admitted. The Court concluded that the evidence was not evidence of other crimes; rather, because it was offered to satisfy the prosecution burden of showing knowing possession, by proving the defendant's knowledge and intention to exercise control over the prohibited weapons, the evidence was "inextricably intertwined" with the offenses. In *United States v. Murray, 89 F.3d 459 (7th Cir. 1996)* , crack cocaine and a gun were found when the defendant was arrested for a traffic violation after he had been observed at a suspected drug deal. The Court affirmed his conviction for felon firearm possession, finding no abuse of discretion in admitting evidence regarding the crack cocaine, since it enabled the jury to better understand that the defendant may have made a drug purchase while the officers watched and why he might want to be armed. In *United States v. Roberts*, n24 the Court affirmed convictions for armed bank robbery and felon firearm possession, holding there was no error in admitting evidence that the defendant was arrested two days after the robbery carrying a gun similar to the one used in the robbery. The evidence was not of extraneous other acts but rather "intricately connected" with the very crimes charged.

United States v. Rock, 282 F.3d 548 (8th Cir. 2002) : The Court affirmed convictions for felon firearm possession and tampering with a witness, holding that the defendant's burglary to obtain the firearms and subsequent display of the firearms merely completed the entire story of the criminal conduct and were not excluded by *Rule 404(b)*. In a prosecution for weapons violations, *United States v. Tate*, n25 the Court held that the government properly proved that a defendant shot state troopers, since the shootings were intertwined with the weapons charges.

United States v. Matthews, 240 F.3d 806 (9th Cir. 2001) : The defendant was charged with felon firearm possession after he sold weapons to an informant. At trial the informant testified to meeting the defendant in a motel room, where there were "weapons, cameras, TVs, VCRs" for sale. The Court found that testimony was not all necessary to explain the weapons deal, but was done to portray the defendant as an individual who deals in goods that are presumably stolen. Thus, it was the government's obligation to give notice of its intent to introduce the evidence, and error (but not plain error) not to strike the material for failure to give notice.

United States v. Gorman, 312 F.3d 1159 (10th Cir. 2002) : Affirming a conviction for felon firearm possession, the Court held that marijuana evidence found in the defendant's vehicle was not "other act" evidence. Rather, "the testimony relating to the marijuana ... was intertwined with the discovery of the firearm and therefore necessary to understand the flow of events and put police conduct in context."

United States v. Wright, 392 F.3d 1269 (11th Cir. 2004) : The Court affirmed a conviction for felon firearm

possession, holding that evidence of the defendant's resistance to arrest following a traffic stop and his battery on a law enforcement officer was inextricably intertwined with the discovery of the weapon; it was also relevant to showing consciousness of guilt.

[C] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Fraud and False Statements Cases

United States v. Lane, 323 F.3d 568 (7th Cir. 2003) : The defendant was charged with making false statements in loan applications by not disclosing a large outstanding debt. The Court held there was no abuse of discretion in admitting evidence of other debts the defendant owed at the same time, since the evidence (1) demonstrated his complete financial situation and lack of liquidity to meet his obligations, (2) showed his financial statements were incomplete, and (3) tended to show his intent to defraud because more than just his large debt had been omitted from his financial statements.

[D] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Limitations on the Doctrine

United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000) : In a prosecution for possession of counterfeit obligations discovered in May, the government offered evidence that the defendant was arrested a month earlier and counterfeit bills with the same serial numbers as the May bills were found. The Court rejected the notion that this evidence was "intextricably intertwined" with the charged offense so that it did not fall within *Rule 404(b)*, although it was admissible under *Rule 404(b)*, because it was relevant and not offered for the forbidden inference of propensity. In a detailed and thoughtful opinion, the Court suggested that all that the distinction did was relieve the government of the Rule's notice requirement, and it questioned whether the distinction should have the widespread recognition that it does. This case is discussed in the Editorial Explanatory Comment, § 404.02[12].

United States v. Cross, 308 F.3d 308 (3d Cir. 2002) : The defendants were convicted of mail fraud and civil rights conspiracy in connection with a scheme to fix State-Court cases, but the fraud convictions were reversed. After resentencing, the defendants claimed that they had received ineffective assistance from appellate counsel, on the ground that counsel should have argued that dismissal of the fraud counts required dismissal of the civil rights count, because evidence offered on the vacated counts would not have been admissible on the latter count, and had a prejudicial spillover effect. Rejecting the government's argument that no analysis under *Rule 404(b)* was required because the evidence was "intrinsic" to the civil rights charge, the Court noted that while "[t]he distinction between intrinsic and extrinsic (i.e., 'other acts' or 'other crimes') evidence is often fuzzy," in this Circuit "acts are intrinsic when they directly prove the charged conspiracy." The challenged evidence here was not intrinsic in that sense, but it would be probative of motive and intent; much of it would have been excluded as cumulative, but any error in its admission would be harmless. *United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997)* : The Court reversed the defendant's conviction for knowingly possessing sexually explicit photographs of his minor stepdaughter because evidence that the defendant had sexual contact with his stepdaughter was erroneously admitted. The sexual misconduct was not "inextricably intertwined" with the crime charged, since it was offered at trial only to explain why the victim's mother became suspicious about the defendant's having taken photographs of the victim. The mother's motivation had "nothing whatsoever to do with the factual setting of the *crime* charged in this case." In *United States v. Forcelle*, n26 the Court reversed a conviction for fraud arising out of the defendant's use of his employer's funds for a racing chassis and a beach-front house, holding it was error to admit evidence that he had stolen platinum from the employer. The evidence provided only a discrete example of the defendant's misappropriation of company resources and no additional context for the crime charged.

United States v. Ramirez-Lopez, 315 F.3d 1143 (9th Cir. 2003) : In a trial for alien smuggling, the government elicited from a prosecution witness that just before he began to testify, the defendant made a threatening gesture by moving his finger back and forth, indicating that the witness was not to say anything. Holding it was error (but not plain error) when the government failed to give notice required by *Rule 404(b)* of its intent to elicit the threat evidence, the Court rejected the argument that the threat was not *Rule 404(b)* evidence because it was "inextricably intertwined," since a threat at trial cannot be viewed as inextricably intertwined with the charged offense of alien smuggling.

[E] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Other Cases

United States v. Zanghi, 189 F.3d 71 (1st Cir. 1999) : Affirming convictions for securities fraud, tax evasion, and other offenses, the Court concluded that evidence of the defendant's theft of money by misrepresentation was relevant to one tax count and properly admitted, since the income from the theft was unreported. "In cases where a defendant is charged with under reporting income, there often will be instances where evidence of his acquisition of unreported income overlaps with evidence of other, uncharged acts." The Court also held that evidence of a theft of furniture was relevant and admissible as part of the defendant's fraudulent scheme to mislead prospective investors. In *United States v. Shea, 159 F.3d 37 (1st Cir. 1998)* , the Court affirmed a conviction for attempted bank robbery, finding no error in the admission of a gun found on the defendant when he was arrested for a different bank robbery. Although the gun was admitted as proof of identity under *Rule 404(b)*, analysis under that Rule was unnecessary because the government sought to introduce the gun "as intrinsic, direct evidence of the charged crime -- not as *Rule 404(b)* evidence." Proceeding directly to the *Rule 403* determination, the Court found no abuse of discretion in admitting the gun.

United States v. Parker, 699 F.2d 177 (4th Cir. 1983) : In a prosecution for impersonating an IRS agent, the person to whom the impersonation was addressed (Brooks) reported it to the IRS. A real IRS agent phoned the defendant, pretended to be Brooks and had a follow-up conversation in which the defendant again claimed to work for the IRS. Although the Court referred to this as other act evidence, it found that it was admissible. We believe that this was not evidence of an unrelated transaction, but was proof of the very impersonation charged and, as the Court ruled, was plainly admissible. In *United States v. Black, 692 F.2d 314 (4th Cir. 1982)* , the Court reversed a conviction for assaulting and impeding a correctional officer on another ground, but held that the Trial Judge properly admitted evidence that after the assault, the defendant returned to his cell and threw human feces at the victim. This was not another bad act, but proof of an act that arguably was committed to enable the defendant to conceal a knife. Thus, it was proof of the crime charged.

United States v. Walker, 148 F.3d 518 (5th Cir. 1998) : The defendant Quinn was charged with firearms possession, and his friend Walker testified that Quinn was not at the scene where the firearm was found. Quinn was then charged with suborning the perjurious testimony of Walker. At the perjury trial, a prosecution witness (Taylor) testified that Quinn had approached him and asked Taylor to lie for him in the firearms possession trial. Affirming Quinn's conviction for suborning perjury, the Court found that *Rule 404(b)* was not applicable. "Quinn's attempt to suborn perjury from Taylor was part of the same transaction of shopping for an alibi of which the subornation of Walker's perjury was a part." In *United States v. Stovall*, n27 the Court held that a purchase made with the money received from a loan was inextricably intertwined with the charge of receiving a benefit from the loan.

United States v. Vincent, 681 F.2d 462 (6th Cir. 1982) : In a prosecution for threatening the President, the Court held that, although it might have reached a different conclusion, there was no abuse of discretion in admitting additional threats made by the defendant at a psychiatric hospital after his arrest to educate the jury as to the entire setting of the case. See also *United States v. Reynolds* n28(videotape of the defendant's conversation in which he mentioned future criminal activity in addition to the crime charged was admissible; statement involved intertwined events).

United States v. Senffner, 280 F.3d 755 (7th Cir. 2002) : The defendant in a fraud case repeated other Courts' criticism of the Circuit's "complete the story" definition of "inextricably intertwined," but the Court rejected the invitation to narrow the doctrine. Acts sharing a relationship with and connection (even in the broad sense) to the crime do not raise the same problem as that to which *Rule 404(b)* is addressed, evidence probative solely of bad character. In the Court's view, *Rule 403* sufficiently protects against unnecessarily prejudicial presentation of barely probative evidence. In *United States v. Bogan, 267 F.3d 614 (7th Cir. 2001)* , the Court affirmed convictions for assaulting a corrections officer, holding there was no abuse of discretion in admitting evidence that just before the assault the officer had confiscated a small quantity of sugar and a few postage stamps from the inmates' cell. The evidence was "intricately related" to the charged incident and, together with the officer's testimony that sugar was used to make illegal intoxicants and stamps were used in prison for purchasing intoxicants, enabled the jury to fully understand and make sense of the defendants' vicious attack. In *United States v. Ryan*, n29 the Court affirmed a conviction for bank fraud, finding no abuse of discretion in the admission of evidence that the defendant failed to report on his tax returns $136,000 received as kickbacks and commissions for his part in the scheme. The evidence was of a cover-up "intricately related" to the acts charged and tended to prove the defendant's required specific intent to defraud, as well as to cast doubt on his defense of being ignorant of the fraudulent aspects of the transactions. In *United States v. Lahey*, n30 the Court affirmed convictions for conspiracy to obstruct justice by providing false testimony to a grand jury, finding no error in the admission of evidence that one of the defendants, a lawyer, had destroyed records of fee payments in furtherance of a tax fraud. This evidence was inextricably intertwined with the conspiracy to obstruct justice, which was the culmination of the lawyer's continuous efforts to conceal the gross receipts of his law practice from the IRS and the grand jury. In a prosecution for arson resulting in the deaths of the defendant's two children, *United States v. Menzer*, n31 the Court held that evidence that the defendant was on probation for a 1986 conviction for sexual exploitation of a child was "intricately related" to the charged offense because it was the government's theory that the defendant burned down the house where his wife and children were sleeping in order to prevent their reporting his sexual abuse of the children, which would result in revocation of his probation. In our view, this was other crime evidence admissible under the Rule to prove motive, and the Court's characterization of it as "intricately related" (and therefore outside the Rule) is confusing, especially given the Court's conclusion that there was no abuse of discretion in admitting the evidence "because it was intricately related to the arson prosecution as probative evidence of Menzer's intent (motive)." The problem the Court was apparently trying to get around arises from its current test for admissibility under *Rule 404(b)*, which requires that "the other act is similar enough and close enough in time to be relevant to the matter in issue." n32 Similarity, however, is the measure of probative value for only some of the purposes listed in the Rule; rather than continue its confusing resort to "intricately related," the Court would be better off modifying its test to accommodate all the purposes permissible under the Rule.

United States v. Rolett, 151 F.3d 787 (8th Cir. 1998) : Affirming a conviction for conspiracy to commit murder in aid of racketeering, the Court found no abuse of discretion in the admission of evidence that the defendant stole trucks for a chopshop operation, burglarized houses, and stole consumer electronics and guns. Although the evidence was admitted to show "motivation, intent, knowledge, mode and manner of operation, the absence of mistake or accident or the relationship between" the defendant and a cooperating witness, the Court held it was properly admitted "as intrinsic evidence" inextricably intertwined in the charged racketeering enterprise. In *United States v. McGuire*, n33 a murder-for-hire conspiracy prosecution, the Court held that prior bank robberies committed by conspirators were properly admitted as inextricably intertwined with the charged crimes because they clarified the relationship among defendants, and helped to explain why one would entrust others with knowledge concerning murders that had been committed. In *Carter v. United States, 549 F.2d 77 (8th Cir. 1977)* , the Court affirmed a conviction for unlawfully receiving a firearm that had been transported in interstate commerce, finding no error in admitting a druggist's testimony that the defendant had presented him with a forged prescription for narcotic drugs, since that explained why the druggist was chasing the defendant at the time he abandoned the weapon on which the charges were based.

United States v. Chase, 301 F.3d 1019 (9th Cir. 2002) : Affirming a conviction for threatening to murder federal law enforcement officers, the Court held that threats made to individuals other than federal agents were properly admitted as inextricably bound to the acts charged, since the defendant's anger at the FBI arose from the agency's failure to act against the defendant's perceived enemies (targets of the threats). In *United States v. Williams, 291 F.3d 1180 (9th Cir. 2002)* , the Court affirmed convictions for interstate travel in aid of racketeering and transporting a minor for prostitution, and held that evidence that the defendant engaged in beatings of prostitutes was not other-act evidence, but rather was evidence of how the defendant maintained control of his victims. The evidence was thus "inextricably intertwined" with the crimes charged and not excluded by *Rule 404(b)*. In *United States v. Kallin*, n34 the Court reversed a tax evasion conviction on other grounds, but noted that certain corporate tax returns for the defendant's business would be admissible on retrial even though the statute of limitations prevented prosecution regarding those returns, as the defendant had been indicted with respect to his personal returns for those years and the under-reporting of his business income was integral to his scheme to evade personal income taxes. In *United States v. Warren*, n35 the defendant stabbed two men in a fight; one victim died and the other recovered. The defendant was charged only with the murder. The Court found no error in the introduction of evidence that he had stabbed another person in the fight, since the two acts of stabbing were "inextricably intertwined" because both were "part of a single course of action and occurred within moments of each other."

United States v. Fallen, 256 F.3d 1082 (11th Cir. 2001) : Affirming a conviction for assaulting two federal officers, the Court found that the agents' awareness of the defendant's prior firearms convictions made it more apparent to them that he was armed with a gun and reinforced their apprehension that the defendant might shoot them. In the Court's view, this established that the convictions were inextricably intertwined with the charged offense. In *United States v. Prosperi, 201 F.3d 1335 (11th Cir. 2000)* , the defendant, who represented an overseas investor in substantial financial matters, was charged with mail fraud, money laundering, counterfeiting, and tax fraud in connection with a scheme to misappropriate funds from the investor for his personal use. At the close of a two-month trial, the mail fraud and money laundering counts were dismissed. The defendant argued that his conviction on the counterfeiting and tax counts was impermissibly tainted by the substantial evidence admitted on the dismissed counts, but the Court found all the evidence related to an ongoing plan to deceive the investor and plunder his assets. In *United States v. Calderon, 127 F.3d 1314 (11th Cir. 1997)* , a defendant appealing a conviction for narcotics offenses complained that it was error to admit, as proof of intent, evidence of his guilty plea for kidnapping and marijuana trafficking. The Court found no abuse of discretion, although it stated that it might not have made the same ruling as the Trial Judge. The kidnapping portion of the conviction was "intertwined" with the prior drug conviction, because the kidnapping was part of a plan to collect on a drug debt; "the only realistic way for the government to explain to the jury how it was that appellant came to be in possession of a van loaded with 3,000 pounds of marijuana, that is that he was not just merely present in that situation as well, was to divulge some details of the kidnapping." In *United States v. Veltmann*, n36 the defendants, charged with setting a fire in which their wife and mother (respectively) had died, alleged that the victim had committed suicide. The Court held that evidence of a prior fire on the defendants' property was properly admitted, as it was inextricably intertwined with the charged crime because both defendants had mentioned it in such a way as to direct the investigation toward another suspect. In *United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984)* , a defendant's importation of cocaine formed part of a series of cocaine offenses with which he was charged.

[ii] Rule 404(b) -- Acts Charged -- Conspiracy

United States v. Soto-Beniquez, 356 F.3d 1 (1st Cir. 2003) : Affirming convictions in a complex drug conspiracy case, the Court found no abuse of discretion in the admission of evidence regarding 15 murders, since there was sufficient evidence that each was committed in furtherance of the conspiracy. The Court also found no abuse of discretion when evidence that a gun was seized from one defendant was admitted as an overt act in furtherance of the charged conspiracy, even though the seizure occurred one day after the date the indictment stated was "on or about" the end of the conspiracy. In a drug conspiracy prosecution, *United States v. Candelaria-Silva, 162 F.3d 698 (1st Cir.*

1998) , the Court held that there was no abuse of discretion in admitting evidence that a passenger in a car driven by the defendant brandished and discarded a handgun during a police car chase. The evidence of the car chase and the passenger's actions was relevant to the defendant's participation in the charged conspiracy. In a drug prosecution charging a conspiracy and substantive offenses, *United States v. Moosey*, n37 the Court found no error in admission of specific acts not charged as substantive offenses to prove the conspiracy. It observed that the Trial Judge explained to the jury that the acts could be considered only on the conspiracy count.

United States v. Baez, 349 F.3d 90 (2d Cir. 2003) (per curiam): The Court affirmed convictions for murder, racketeering, and conspiracy, finding no abuse of discretion when evidence of 16 uncharged crimes committed by the defendant was admitted. The uncharged criminal activity was not other-crimes evidence subject to *Rule 404(b)* because it went to establish the existence of the charged racketeering enterprise and of the charged conspiracy. In a massive drug conspiracy prosecution, *United States v. Miller, 116 F.3d 641 (2d Cir. 1997)* , the Court held that evidence of numerous killings not alleged in the indictment was not "other" act evidence within the meaning of *Rule 404(b)*, but rather was proof of the existence of the RICO enterprise alleged in the indictment which used such acts of violence in furtherance of its narcotics conspiracy. In *United States v. Thai*, n38 the Court affirmed RICO convictions, holding that evidence of a beating administered to a member of the conspiracy, although it was uncharged, was not evidence of "other" crimes but was evidence as to the structure of the enterprise and the discipline imposed by the defendant leaders on the members.

United States v. Cross, 308 F.3d 308 (3d Cir. 2002) : The defendants were convicted of mail fraud and civil rights conspiracy in connection with a scheme to fix state-court cases, but the fraud convictions were reversed. After resentencing, the defendants claimed that they had received ineffective assistance from appellate counsel, on the ground that counsel should have argued that dismissal of the fraud counts required dismissal of the civil rights count, because evidence offered on the vacated counts would not have been admissible on the latter count, and had a prejudicial spillover effect. Rejecting the government's argument that no analysis under *Rule 404(b)* was required because the evidence was "intrinsic" to the civil rights charge, the Court noted that while "[t]he distinction between intrinsic and extrinsic (i.e., 'other acts' or 'other crimes') evidence is often fuzzy," in this Circuit "acts are intrinsic when they directly prove the charged conspiracy." The challenged evidence here was not intrinsic in that sense, but it would be probative of motive and intent; much of it would have been excluded as cumulative, but any error in its admission would be harmless.

United States v. Lipford, 203 F.3d 259 (4th Cir. 2000) : The Court held there was no abuse of discretion in a drug trafficking conspiracy prosecution when evidence was admitted that one of the defendants shot a police officer, who was executing a search warrant at the defendant's residence. The evidence confirmed the defendant's promise to defend the conspiracy's drug supply, it corroborated other evidence establishing his involvement in the conspiracy, and it demonstrated the scope of the conspiracy. In a marijuana importation case, *United States v. Wooten*, n39 the Court found that a prosecutor acted in good faith in asking a question concerning one defendant's possession of cocaine, where the defendant claimed to have withdrawn from a conspiracy and the question concerned the defendant's conduct at the time he claimed to have withdrawn.

United States v. Taylor, 210 F.3d 311 (5th Cir. 2000) : The Court reversed convictions for drug trafficking offenses because two prior state convictions of the purported head of the conspiracy, who was not tried with or called as a witness against the defendant, were improperly admitted. Although the convictions were based on delivery of drugs during the life of the charged conspiracy, the only proof offered was the judgments themselves, and "[c]riminal judgments are not acts in furtherance of a conspiracy." In *United States v. Navarro, 169 F.3d 228 (5th Cir. 1999)* , the Court affirmed convictions for conspiracy to possess methamphetamine, holding there was no error in admitting evidence of drugs found at a conspirator's residence in another state four months after the alleged end of the charged

conspiracy. The evidence demonstrated the structure of the drug organization, as well as the continuing contact between the conspirators. Because the evidence was "intrinsic" to the charged crimes, there was no error in failing to make the required "*Beechum* findings" on the record. In a bank robbery conspiracy case, *United States v. Silva*, n40 the Court held that evidence that one conspirator kidnapped the bank president's wife and held her hostage was properly admitted to show the nature of the conspiracy and to connect the defendant to it.

United States v. Copeland, 304 F.3d 533 (6th Cir. 2002) : The Court affirmed convictions for conspiracy to distribute a controlled substance, finding no abuse of discretion in the admission of evidence that one defendant had been arrested for drug possession three times during the course of the charged conspiracy. His repeated arrests, "especially with the presence of a firearm, significant amounts of cash, and a pager are relevant to the question of whether he knowingly and voluntarily participated in a drug conspiracy."

United States v. Mancari, 875 F.2d 103 (7th Cir. 1989) : The government had offered other crimes evidence under *Rule 404(b)* rather than as proof of the conspiracy charged. Because the evidence was not offered to prove the conspiracy charged, the Court ultimately found insufficient evidence to support that charge and remanded with directions to acquit. It observed that the government might have avoided the problem by offering the evidence without restricting the offer to an extremely narrow theory.

United States v. Hill, 410 F.3d 468 (8th Cir. 2005) : In the prosecution of a conspiracy to manufacture and distribute methamphetamine and marijuana, the Court held that testimony by a coconspirator that the defendant had three times given him a firearm with orders to kill or maim an individual was properly admitted as substantive evidence of the conspiracy, where two of the intended victims were slated to testify against the conspiracy before the grand jury and a third had stolen drugs and other property from it. In *United States v. Maynie, 257 F.3d 908 (8th Cir. 2001)* , the Court affirmed convictions for conspiracy to possess and distribute crack cocaine, finding no abuse of discretion in admitting evidence that the defendant was driving a car from which gunshots were fired at a former coconspirator suspected of stealing from the operation. The evidence was relevant to the existence of a conspiracy and demonstrated acts in furtherance of the conspiracy. In *United States v. O'Dell*, n41 the Court affirmed convictions for money laundering and conspiracy to distribute methamphetamine and found no abuse of discretion in the admission of evidence that the defendant had left behind a small coin purse containing individual packets later determined to be methamphetamine when he applied for general assistance. The defendant's possession of even a small amount of methamphetamine "during the period in which he is accused of conspiring to distribute the *same* drug is direct evidence that the defendant participated in the conspiracy, and therefore *Rule 404(b)* is not implicated." In *United States v. Dierling*, n42 the Court affirmed convictions for conspiring to manufacture and distribute methamphetamine, holding there was no abuse of discretion in admitting evidence that conspirators had slain one member who incurred a drug debt, that a leader had burned down a barn containing manufacturing equipment, that conspirators had been pursued in high-speed chases by law enforcement officials, and that a large cache of weapons had been found at the leader's home. All the evidence tended to show that a conspiracy existed among the defendants and the manner in which it operated; the probative value of the evidence for these purposes was not substantially exceeded by any prejudicial effect. In *United States v. Tran*, n43 the Court affirmed a conviction for conspiracy to traffic in counterfeit checks, finding no error in the admission of evidence that the defendant was involved in attempts to threaten and intimidate people who wanted to withdraw from the conspiracy. This was not "other crimes" evidence, but rather was evidence of the very crime charged.

United States v. Hill, 953 F.2d 452 (9th Cir. 1991) : The defendant's conviction for conspiracy to distribute cocaine was reversed because a coconspirator had been permitted to testify to having used cocaine with the defendant five years previously. The Court held that the evidence was not probative of the background and development of, nor inextricably intertwined with, the conspiracy. Although it might have been relevant to the defendant's knowledge and

intent, when admitted as direct evidence of the conspiracy it was given more weight than it deserved and its prejudicial and confusing effect substantially outweighed its probative value. In *United States v. Lai, 944 F.2d 1434 (9th Cir. 1991)* , the Court held that evidence of drug transactions in late 1982 and around Thanksgiving 1985 were direct evidence of a drug conspiracy charging specific acts as early as July 1983 and "continuing to in or about October 1985." See also *United States v. Patterson* n44(evidence of a shooting properly admitted in prosecution of narcotics distribution conspiracy, as it showed that the conspirators used violence to control the members of the conspiracy).

United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992) : Affirming cocaine base possession convictions, the Court held that evidence of the defendants' membership in a gang was not barred by the Rule, but was directly relevant on the issues of formation, agreement, and purpose of the conspiracy. The dissenting Judge believed that the government had impermissibly sought to prove that by exhibiting the characteristics of gang members, the defendants were members of a gang with criminal purposes and therefore were guilty of the charged conspiracy and underlying crimes.

[iii] Rule 404(b) -- Acts Charged -- Criminal Enterprises

United States v. Baez, 349 F.3d 90 (2d Cir. 2003) (per curiam): The Court affirmed convictions for murder, racketeering, and conspiracy, finding no abuse of discretion when evidence of 16 uncharged crimes committed by the defendant was admitted. The uncharged criminal activity was not other-crimes evidence subject to *Rule 404(b)* because it went to establish the existence of the charged racketeering enterprise and of the charged conspiracy.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting evidence that the defendant had previously committed another murder. There was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity.

United States v. Stitt, 250 F.3d 878 (4th Cir. 2001) : In the prosecution of a CCE operating a large drug distribution ring during 1990-98, the Court found no abuse of discretion in the admission of testimony about a 1991 traffic stop in which the defendant and others were found to possess guns, bullets, and crack cocaine, and the defendant gave false pedigree information. The evidence was not "other crimes," but an integral component of the charged conspiracy, and it was also probative in connecting the defendant with an alias used on other occasions.

United States v. Flynn, 852 F.2d 1045 (8th Cir. 1988) : In a racketeering case, the Court upheld the admission of evidence concerning the defendant's acts of retaliation against a family, since it demonstrated his relationship to the enterprise. It concluded, however, that discussions among members of the enterprise concerning contemplated murders was unduly prejudicial, and that "[t]he RICO statute has a tremendous potential for guilt by association." Error in admitting the evidence was harmless, however.

United States v. Rubio, 727 F.2d 786 (9th Cir. 1983) , *amended* (9th Cir. 1984): The Court affirmed a racketeering conviction, finding no error in the admission of evidence concerning the defendant's prior narcotics conviction despite the defense's stipulation concerning the conviction. The Court distinguished convictions used for impeachment purposes under *Rule 609* and other crimes offered under *Rule 404(b)*. Details concerning convictions used for impeachment rarely may be proved, but details concerning other crimes may be important -- e.g., to prove a pattern of racketeering.

The Court also found that evidence that the defendant possessed firearms in addition to those charged in the indictment was properly admitted, since the firearms were relevant to show involvement in the narcotics trade.

United States v. Finestone, 816 F.2d 583 (11th Cir. 1987) : The Court held that evidence of an execution-style murder was properly admitted in proving a pattern of racketeering activity.

[iv] Rule 404(b) -- Acts Charged -- Dealing

United States v. Giraldo, 822 F.2d 205 (2d Cir. 1987) : The Court held that tapes from the defendant's answering machine that contained orders for cocaine were admissible to prove the defendant's intent to distribute.

United States v. Masters, 622 F.2d 83 (4th Cir. 1980) : In a prosecution for dealing in firearms without a license, the Court approved the admission of taped conversations between the defendant and undercover agents despite references to other sales and acts, since the evidence was necessary to complete the story of the crime charged and to prove that the defendant actually was "dealing."

[v] Rule 404(b) -- Acts Charged -- Fraud

United States v. Anzalone, 783 F.2d 10 (1st Cir. 1986) : The Court affirmed a defendant's mail fraud convictions, finding that evidence of his prior dealings with insurance companies was admissible to prove the deception of the insurance companies that gave rise to the indictment.

United States v. Heinemann, 801 F.2d 86 (2d Cir. 1986) : Affirming convictions for conspiracy to defraud the United States in connection with the sale of "ministries" in purported tax-exempt churches, the Court found that evidence that a defendant had lied to a grand jury was proof of the conspiracy charged rather than an unrelated other act.

United States v. Brownlee, 890 F.2d 1036 (8th Cir. 1989) : In affirming convictions for fraud offenses involving stolen and retitled automobiles, the Court held that proof the defendant used a false address when applying for a title to a stolen car was not other crimes evidence, but proof of part of the fraudulent scheme.

United States v. Soliman, 813 F.2d 277 (9th Cir. 1987) : The Court upheld a conviction arising out of a scheme to forge death certificates and collect insurance proceeds, finding that a summary chart of 102 fraudulent insurance claims was direct evidence of the scheme alleged and not "other crimes" evidence. See also *United States v. Vaccaro* n45(evidence of specific uncharged jackpot cheating incidents was properly admitted to prove the conspiracy charged, i.e., to rig jackpots in hotels and casinos).

United States v. Roylance, 690 F.2d 164 (10th Cir. 1982) : Affirming mail and securities fraud convictions, the Court found that evidence that certain investors were defrauded in intrastate transactions was admissible to prove the very scheme that the government alleged was also taking place in interstate transactions.

[e] Rule 404(b) -- Acts of Third Persons

[i] Rule 404(b) -- Civil Cases

Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999) : The Court affirmed a judgment in favor of police officers alleged to have used excessive force in making an arrest at the plaintiff's home while investigating whether the plaintiff's husband was abusing their daughter. The Trial Judge, concluding that *Rule 404(b)* does not apply to third-party acts, admitted testimony regarding the husband's beating the daughter. The Court held that "*Rule 404(b)* does apply to third parties" because the Rule "speaks not of the parties to the case, but of a 'person.' " It found, however, that the error in holding *Rule 404(b)* inapplicable was harmless, because the husband's acts of abuse were properly admitted to provide context for the arrest and an alternative source of the plaintiff's injuries.

[ii] Rule 404(b) -- Acts of Third Persons -- Criminal Cases

United States v. Candelaria-Silva, 162 F.3d 698 (1st Cir. 1998) : The Court held in a drug conspiracy prosecution that there was no abuse of discretion in admitting evidence that a passenger in a car driven by the defendant brandished and discarded a handgun during a police car chase. The evidence of the car chase and the passenger's actions was relevant to the defendant's participation in the charged conspiracy.

United States v. Lynch, 367 F.3d 1148 (9th Cir. 2004) , modified on other grounds, 437 F.3d 902 (9th Cir. 2005) : At the defendant's trial for violating the Hobbs Act after he and another were involved in killing a third man, the Judge granted a motion *in limine* precluding the defendant from cross-examining his accomplice (a cooperating witness) about violent acts or threats of violence unknown to the defendant at the time of the murder. Affirming, the Court held that the accomplice's violence known to the defendant was relevant to why the two stayed together after the killing. However, other violence by the accomplice showed only a propensity on the part of him, rather than the defendant, to kill the victim, and the identity of the killer was not relevant to the Hobbs Act charge or any defense thereto.

United States v. Sellers, 906 F.2d 597 (11th Cir. 1990) : In affirming convictions for violating a theft suspect's civil rights by allowing a codefendant to beat him, the Court held there was no abuse of discretion in admitting evidence of the codefendant's violent acts and reputation for violence, as it supported the government's theory that the defendants knew of the codefendant's violent proclivities and intended to use him to beat a confession out of the suspect.

[f] Rule 404(b) -- Acts Relevant to Another's State of Mind

United States v. Miller, 895 F.2d 1431 (D.C. Cir. 1990) : The Court affirmed a conviction for bank fraud, holding it was error (but harmless) to admit a witness' testimony as to her knowledge that the defendant had recently been released from jail, ostensibly to show her innocent motivation in agreeing to cash a forged check for him, because her state of mind had not been made relevant in the case, and any probative value was greatly outweighed by the prejudicial effect.

United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) : Affirming a conviction for holding a household servant in involuntary servitude, the Court held there was no error in admitting evidence of the defendant's abusive behavior toward his wife, as it was relevant to the reasonableness of the servant's stated fear that she would be a target of the defendant's physical violence should she disobey him. In *United States v. DeVincent*, n46 the Court, affirming loansharking convictions, held it was proper to allow testimony on the appellant's 20-year-old conviction for armed robbery and his ten-year-old murder indictment. The evidence was not admitted to show that the appellant was a bad man, but to show that the debtor understood that any default on the loan would be punished with violence. The Court stated that it had "qualms still, for this testimony was remote and cumulative ... However, the [trial] court, under these circumstances, may have reasoned that the testimony making these matters remote and cumulative also reduced their prejudicial impact."

United States v. Gigante, 729 F.2d 78 (2d Cir. 1984) : The Court held that evidence that the debtor believed a loanshark had organized crime connections, and evidence of other credit transactions, was admissible to show the reasonableness of the debtor's fears.

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) : Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that evidence of the defendant's beating of the daughter and other family members was properly admitted to explain why the daughter failed to report the sexual abuse for 18 months.

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : Affirming the civil rights conviction of a deputy sheriff for shooting an unarmed arrestee in the back, the Court found no abuse of discretion when the victim was permitted to testify that he fled from the defendant because he knew the defendant had previously shot another man. Although the defendant argued that the victim's state of mind was irrelevant, the Court concluded that the victim's knowledge or belief about the defendant was relevant in assessing whether the victim would have acted as the defendant claimed or as the government claimed. The Court concluded that the testimony was not unduly prejudicial because "[l]aw enforcement officers must shoot suspects sometimes, and the jury just as easily could have believed that the prior shooting was justified and that [the victim's] fear was unfounded."

United States v. Hattaway, 740 F.2d 1419 (7th Cir. 1984) : The Court, upholding kidnapping convictions, found that evidence of the lifestyle of a motorcycle gang that held the woman victim was properly admitted to show how she was intimidated into remaining with the gang. See also *United States v. Blackwood* n47(statements by Judge concerning the defendant's admission of past acts held admissible in extortion case to prove why the victim would believe that the defendant was in a position to exercise official power).

[g] Rule 404(b) -- Acts Relevant To Prove Agency

United States v. Morgan, 354 F.3d 621 (7th Cir. 2003) : The defendant was convicted for distributing crack cocaine after a witness, Green, called him requesting a delivery and another man, Jones, delivered the drug to the witness. Affirming, the Court found no abuse of discretion in admitting testimony from Green that he bought cocaine from the defendant three or four times a week for an extended period and that Jones frequently delivered the merchandise. To prove that Jones was the defendant's agent in the charged transaction, it was necessary to show that Green and the defendant had an established business relationship in which the defendant used Jones as a courier for delivery.

[h] Rule 404(b) -- Alibi Witness

United States v. Walker, 272 F.3d 407 (7th Cir. 2001) : In a bank robbery case, cross-examination of the defendant's alibi witness elicited that defendant and the witness were selling drugs that day, as they did every day. The Court held there was no abuse of discretion in permitting the cross-examination, since an accused who proffers an alibi witness opens the door to the prosecutor establishing exactly what the accused and the witness were doing that day and when they were doing it. Although the evidence may have reflected poorly on the defendant's character, it was used to refute the alibi and not to show his propensity to commit crimes. Further, the jury was instructed not to consider evidence of any drug dealing or to use it as evidence that the defendant committed the charged crimes.

[i] Rule 404(b) -- Appellate Review

United States v. Gessa, 971 F.2d 1257 (6th Cir. 1992) (en banc): The Court said that it would apply a clearly-erroneous standard of review to the factual determinations required by *Rule 404(b)* and an abuse-of-discretion standard to the required balancing of probative value and prejudicial effect, and held that evidence of other crimes was properly admitted in this case.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : The Court affirmed a conviction for attempting to obtain a controlled substance by misrepresenting the name of the person to appear on prescriptions, but reversed the defendant's convictions for obtaining the substance with the intent to distribute. The Court found that evidence that the defendant had acquired and distributed other drugs was erroneously admitted, since the other acts were not similar to the scheme alleged in the instant case. The Court observed that it might be better able "to tell whether the district court and the parties took the right things into account" than to decide whether a given piece of evidence should have been admitted. The Court added that "[d]iscretion, when exercised, will rarely be disturbed." It found that the record failed to demonstrate that the Trial Judge adequately considered the potential of the bad act evidence to impugn the defendant's character.

[j] Rule 404(b) -- Arrests

United States v. James, 555 F.2d 992 (D.C. Cir. 1977) : The Court reversed a conviction for possession of heroin with intent to distribute on the ground that evidence of an arrest 16 days before the charged offense was improperly admitted. After rejecting the argument that the defense opened the door to the evidence, the Court found that the probative value of the arrest, if offered on the issue of intent, was very weak, and in view of its lurid details, concluded that "we perceive no balance on which it properly could have been admitted."

United States v. Alarcon, 261 F.3d 416 (5th Cir. 2001) : Affirming convictions for narcotics trafficking, the Court held there was no error in admitting evidence that one defendant, who was arrested while driving a truck with marijuana in a hidden compartment, was previously arrested for transporting 131 pounds of marijuana concealed in a borrowed truck's hidden compartment. This evidence was admissible to prove intent, knowledge, and absence of mistake. We note that in many cases the mere fact of arrest might not be sufficient to warrant admission of other act evidence, but here it seems that the presence of the defendant and the marijuana in the two trucks is what mattered.

United States v. McCarthur, 6 F.3d 1270 (7th Cir. 1993) : The Court held it was an abuse of discretion (but harmless error) to admit evidence that the defendant, who was charged with possessing three kilos of cocaine with intent to distribute, had previously been arrested for possession of a small amount of cocaine. Where the witness knew nothing of the circumstances of the arrest or the disposition of the charge, the arrest by itself did not establish any conduct by the defendant shedding any light on her intent or absence of mistake with respect to the charged offense.

United States v. Wilson, 244 F.3d 1208 (10th Cir. 2001) : Although the Court affirmed cocaine-related convictions, it found that it was error (but harmless) to permit cross-examination of one defendant about his past drug-related arrests. While *Rule 404(b)* authorizes admission of other acts for certain purposes, the Rule requires more evidence than simply that an arrest took place. In *United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992)* , the Court held it was error (but harmless) to admit evidence that two defendants charged with possession of cocaine base had previously been arrested, as the mere fact an arrest was made is not by itself an admissible "prior bad act." With respect to a third defendant, the Court upheld evidence of arrests, supported by testimony about specific drug-related acts, which was offered to prove knowledge and intent.

[k] Rule 404(b) -- Background

[i] Rule 404(b) -- Civil Cases

Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999) : The Court affirmed a judgment in favor of police officers alleged to have used excessive force in making an arrest at the plaintiff's home while investigating whether the plaintiff's husband was abusing their daughter. The Trial Judge, citing *Rule 404(b)*, prevented the daughter from testifying that days before the arrest she heard one of the defendants say that he was going to ruin her parents, but the Court held that "the statement is part and parcel of the case at hand and thus is not covered by *Rule 404(b)*." The Court noted that the Judge also appeared to exclude the testimony under *Rule 403*, but concluded that it would find any error in excluding the testimony to be harmless.

Williams v. Mensey, 785 F.2d 631 (8th Cir. 1986) : The Court affirmed a judgment against a prisoner who claimed he was assaulted in jail, holding that evidence that the plaintiff was involved in other fights was properly admitted to show his problems with other inmates before one of the defendants allegedly labeled him a "snitch."

[ii] Rule 404(b) -- Background -- Context Events

United States v. Traitz, 871 F.2d 368 (3d Cir. 1989) : The Court held uncharged acts of violence were relevant to show the background of a conspiracy.

United States v. Wells, 163 F.3d 889 (4th Cir. 1998) : The defendant was charged in a scheme that involved paying liabilities to the IRS with funds obtained by depositing fraudulent "comptroller warrants." The Court held there was no abuse of discretion in admitting evidence that the IRS liabilities arose out of a prior tobacco fraud and tax evasion scheme, since the evidence provided context for the charged crimes. In *United States v. Percy*, n48 The Court held that evidence of prior drug activity was properly used to prove the background of subsequent activity. In *United States v. Martin*, n49 the Court affirmed a conviction for tax evasion, finding that evidence of the defendant's receipt of money from various activities, including bookmaking, was properly admitted to prove unreported income.

United States v. Shaw, 701 F.2d 367 (5th Cir. 1983) : Upholding convictions for murder and other offenses, the Court found that the prosecutor properly asked the defendant whether he had been drinking prior to the offenses charged and if he had become violent when drinking. This was not an attempt to establish character, but was a proper inquiry into whether intoxicants affected the defendant's behavior on the very night in question. On a petition for rehearing, n50 the Court observed that the evidence was relevant to show intent and to counter a defense of accident. See also *United States v. Tafoya* n51(evidence of defendant's assassination efforts was admissible in a tax prosecution to show that the defendant had earned money that he claimed was a gift).

United States v. Cunningham, 103 F.3d 553 (7th Cir. 1996) : A nurse was convicted for tampering with syringes by replacing Demerol with a saline solution. The Court held there was no abuse of discretion in admitting evidence that the nurse's license had four years earlier been suspended as a result of Demerol addiction and her theft of Demerol from another hospital. The addiction provided a motive for the charged tampering, and the suspension provided essential context for evidence that she had previously falsified drug test results, which had permitted her to continue to work as a nurse, with access to Demerol. In *United States v. Jordan*, n52 the Court held it was proper to refer to the defendant's acts that caused him to be barred from an airbase, to show the background for a subsequent charge of aggravated battery upon a security officer.

United States v. Fleck, 413 F.3d 883 (8th Cir. 2005) : In a prosecution for felon firearm possession arising out of guns observed when officers were investigating the alleged possession of stolen property, the Court held it was error (but harmless) to permit a detective to testify that the search for stolen property arose from an insurance fraud investigation and to explain the alleged fraud. The fraud testimony in no way completed the story of the defendants' gun possession, since the facts did not "provide any context for and were not inextricably intertwined--indeed they had nothing to do with--the commission of the crime of possessing firearms as a felon." In a prosecution for gang-related murder and drug trafficking, *United States v. Jefferson, 215 F.3d 820 (8th Cir. 2000)* , the Court held that evidence of one defendant's felony conviction for witness tampering and another defendant's juvenile conviction for assault were properly admitted as background evidence. The government proved that the defendants decided to kill a witness after they concluded that assaulting him was insufficient retaliation. In *United States v. Forcelle*, n53 the Court reversed a conviction for fraud arising out of the defendant's use of his employer's funds for a racing chassis and a beach-front house, holding it was error to admit evidence that he had stolen platinum from the employer. The evidence provided only a discrete example of the defendant's misappropriation of company resources and no additional context for the crime charged.

United States v. Parks, 285 F.3d 1133 (9th Cir. 2002) : Affirming bank robbery and firearm convictions, the Court held that it was error (but harmless) when a police detective testified that he had been conducting "robbery surveillance" on the defendant prior to the robbery for which the defendant was arrested. The Court agreed that the testimony related to "prior crimes evidence," because "[t]he statement was directly related to other crimes and a jury would likely infer from the statement that Parks had committed bank robberies in the past." In *United States v. Andaverde, 64 F.3d 1305 (9th Cir. 1995)* , the Court affirmed a felon firearm possession conviction, holding there was no abuse of discretion in admitting police officers' mention of a burglary that was the basis of a search warrant, since the weapon was found during execution of that warrant. References to the burglary were not extensive, so not prejudicial, and they supplied background for the officers' behavior. In *United States v. O'Connor*, n54 the Court upheld the introduction of evidence concerning an aborted narcotics venture, which showed the background of subsequent cocaine activity that was the target of a government "sting" operation. See also *United States v. Nadler* n55(evidence of previous counterfeiting operation admissible in case charging counterfeiting offense to show background of conspiracy and common scheme).

United States v. Sarracino, 131 F.3d 943 (10th Cir. 1997) : While a fugitive after committing the two charged murders, the defendant violently assaulted two babysitters at his wife's house. During the attack he threatened to kill them, saying, "I'm down for two, what's two more." The Court held that although the context evidence of the assault related to the defendant's admission rather than directly to the charged crime (as in the usual case), it did not show merely that the defendant had a tendency to violence, and was admissible. In a prosecution for misappropriation of bank funds, *United States v. Harenberg*, n56 the Court held that evidence of the defendant's handling of other funds was admissible to show how the bank's funds were typically handled and who had authority to move funds.

United States v. Leichtman, 742 F.2d 598 (11th Cir. 1984) : The Court held that where a kidnapping conspiracy grew out of a marijuana transaction, marijuana evidence was not extrinsic or "other crime" evidence. See also *United States v. Williford* n57(evidence of cocaine transaction admissible to explain events in marijuana prosecution).

[iii] Rule 404(b) -- Background -- Miscellaneous Cases

United States v. Childs, 598 F.2d 169 (D.C. Cir. 1979) : The Court upheld a conviction for obstruction of mailed matter, but warned that it did not "subscribe to the broad proposition that evidence of other offenses may be introduced simply because it recounts events temporally related to the commission of a crime for which the accused is on trial."

United States v. Hicks, 389 F.3d 514 (5th Cir. 2004) : Affirming a conviction for a firearms violation, the Court found no abuse of discretion in the admission of evidence that an officer was shot to death in a high speed chase, the defendant was arrested for this crime, a search of his house turned up a.30-.30 rifle, and casings from such a rifle were found at the scene of the shooting. The evidence was relevant because it would explain to the jury why the officer was not available to testify, and the prejudice from the evidence was minimal, because the jury could not have concluded that the defendant was responsible for the officer's death unless it also concluded that he possessed the ammunition in question.

United States v. Boykin, 679 F.2d 1240 (8th Cir. 1982) : The Court upheld cross-examination of the defendant in a mail fraud case about his dating two women at the same time, as it showed the "blind trust" of one of them, which the defendant had exploited in his scheme.

United States v. DeGeorge, 380 F.3d 1203 (9th Cir. 2004) : The Court affirmed conspiracy, fraud, and perjury convictions of a defendant alleged to have participated in as scheme to defraud by purchasing a yacht, inflating its value through a series of sham transactions, obtaining insurance on the inflated value, and attempting to collect on the insurance after scuttling the vessel. The Trial Judge admitted evidence that the defendant had previously lost three insured vessels at sea, but excluded evidence that the defendant had collected on the insurance on those occasions. The Court rejected the argument that the loss of the boats constituted a part of the transaction giving rise to the charge, but it upheld the argument that the evidence was necessary for the prosecutor to explain to the jury why the defendant could not obtain insurance in his own name. In *United States v. Beckman, 298 F.3d 788 (9th Cir. 2002)* , the Court affirmed convictions for importing and possessing marijuana for distribution, holding there was no abuse of discretion in admitting a codefendant's testimony regarding prior drug runs by the defendant. The evidence helped provide a "coherent and comprehensible story" regarding the charged crimes, since it tended to establish the codefendant's relationship to the defendant, to show that the relationship was ongoing, to refute the defendant's claim that he had no knowledge of marijuana in a trailer, and to explain why he was entrusted with marijuana valued at more than $1,000,000.

United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990) : The Court reversed convictions for a conspiracy to manufacture amphetamine because of the erroneous admission of testimony that a defendant had previously participated in an unrelated amphetamine "cook." Although the prosecutor offered the evidence as "part of the history of the conspiracy," he made no effort to explain its probative purpose or to connect it to the charged crimes.

United States v. Chilcote, 724 F.2d 1498 (11th Cir. 1984) : The Court upheld cocaine convictions, although it found error in the admission of testimony by an undercover agent that the defendant had told him he had flown a plane to Colombia. The agent's testimony would have been completely comprehensible without mention of the defendant's statement, which was totally unrelated to the crimes charged.

[iv] Rule 404(b) -- Background -- Relationship of Participants

United States v. Gaviria, 116 F.3d 1498 (D.C. Cir. 1997) : The Court held in a prosecution for distribution of cocaine that evidence of separate heroin transactions was admissible to show a relationship among parties to the cocaine conspiracy.

United States v. Tse, 375 F.3d 148 (1st Cir. 2004) : The Court affirmed a conviction for distributing cocaine, finding no abuse of discretion in admitting evidence that the defendant engaged in a drug transaction with a confidential

informant several months after the charged transaction, since it tended to refute the defendant's claim that his earlier meeting with the informant was innocent. In *United States v. Flecha-Maldonado, 373 F.3d 170 (1st Cir. 2004)* , the Court affirmed drug and firearm convictions, holding that the probative value of an informant's testimony that he had committed several crimes with the defendant was not substantially outweighed by its prejudicial effect. The testimony explained why the defendant initially trusted the informant and was willing to participate in the criminal venture. In *United States v. Balthazard*, n58 the Court affirmed convictions for a conspiracy involving a massive marijuana growing operation, finding no error when one of the bud-pickers was asked whether he had ever received marijuana from one of the defendants. Even if the witness was not a member of the conspiracy when he received the marijuana, the evidence was admissible to show the background, formation, and development of his subsequent illegal relationship with the defendant. In *United States v. Santana*, n59 the Court affirmed cocaine convictions, finding no error in the admission of evidence that the defendant supplied drugs to a government witness for years prior to the charged conspiracy. The evidence was admissible to explain the background and formation of the conspiracy. Although the Court stated that it was "concerned" about the length of time between the first meeting of the defendant and the witness, it did not find the testimony unduly prejudicial in view of its importance in explaining how the drug conspiracy was formed. In *United States v. Perrotta*, n60 the Court affirmed convictions involving extortionate extensions of credit, finding no error in the admission of evidence that guns, brass knuckles, and a fake bomb were seized from the defendant's home and a billy club was seized from his car. Together with a recording of a conversation between the defendant and an accomplice the day after the searches and seizures in which the accomplice said that he was afraid that these very items had been taken from the defendant, the evidence tended to establish the connection between the defendant and the accomplice, to show that the accomplice was alarmed by the seizures, and thus to prove that the defendant was an important part of the racketeering conspiracy. In *United States v. Morris*, n61 the Court affirmed convictions on prostitution-related charges, upholding the admission of a witness' testimony that one of the defendants had broken into her apartment, abducted her, and beaten her on different occasions, to show the relationship of the witness to the defendant and the purpose behind any interstate transportation.

United States v. Williams, 205 F.3d 23 (2d Cir. 2000) : In a prosecution for conspiracy to import narcotics, the Court held that evidence of uncharged misconduct committed by the defendant with two of his conspirators in the crime charged was properly admitted "to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed." In a fraud prosecution arising out of a stolen check scheme, *United States v. Pascarella, 84 F.3d 61 (2d Cir. 1996)* , the Court held that there was no abuse of discretion in admitting evidence of one defendant's past gambling dealings with some of the coconspirators. Although the prior bad acts were not similar to those charged, similarity is required only when the evidence is used to prove knowledge, intent, or a common scheme or plan; wholly different acts may be used to show the background of a conspiracy or the development of a relationship of trust between the participants, as here. In *United States v. Brennan*, n62 the Court affirmed bribery and corruption convictions of a former State Judge, finding that evidence of the alleged fixing of cases not charged in the indictment was properly admitted to prove the relationship of the defendant and another person. In *United States v. Bufalino*, n63 the Court upheld a conviction for conspiracy to violate civil rights, finding that the government was properly permitted to question the defendant about organized crime connections to show that he might have prevailed upon a member of a crime organization to commit a murder as a matter of "professional courtesy."

United States v. Vega, 285 F.3d 256 (3d Cir. 2002) : Affirming a conviction for heroin distribution offenses, the Court held that testimony of a witness regarding the defendant's participation in another conspiracy and notebook pages containing references to the defendant with regard to the other conspiracy were properly admitted over a *Rule 404(b)* objection. The evidence was relevant to prove the defendant's knowledge of the uncharged conspiracy and his relationship with a particular member in that conspiracy, which tended to support the government's claim of a continuing relationship in the charged conspiracy. In *United States v. Butch, 256 F.3d 171 (3d Cir. 2001)* , a dispatcher for a courier service was convicted of conspiring to possess and distribute drugs stolen from the service in June. The

Court held there was no abuse of discretion in admitting evidence that in the preceding January the defendant had solicited one of the men actually involved in the drug theft to steal a drug shipment, as the evidence tended to show the background of the charged conspiracy and the relationship of the alleged conspirators. In *United States v. Palma-Ruedas*, n64 the defendants were charged with a conspiracy to sell 30 kilos of cocaine and with kidnapping a middleman after the purchaser absconded without paying. The deal had been set up after an earlier 14-kilo deal had been frustrated by the arrest of the courier. Affirming convictions, the Court held that evidence of the 14-kilo deal was admissible to show the relationship of the parties, who the government contended set up the later deal to offset the loss caused earlier. The Court expressed concern, but did not find reversible error, as to the admission of evidence concerning five other earlier deals, also offered to show relationships among the participants, because the risk of prejudice was significant.

United States v. Hardy, 228 F.3d 745 (6th Cir. 2000) : The Court held it was error (but harmless) to admit, in the prosecution of a 1996-97 cocaine distribution conspiracy, evidence that a cooperating witness had engaged in drug transactions with the defendant in 1990. The evidence had been admitted as "background" showing the development of the relationship between the witness and the defendant, but the Court noted that admissible background evidence is subject to "severe limitations in terms of temporal proximity, causal relationship, or special connections." In this case, the uncharged acts occurred six years prior to the charged conspiracy, did not establish the inception of the charged conspiracy, did not involve the same parties, and were not necessary to explain the charged offense or complete the story of the witness' testimony. Affirming a conviction for assisting an escaped felon in *United States v. Fraser*, n65 the Court held that evidence of occasions prior to the indictment when the defendant met with the escapee were properly admitted to show their relationship. See also *United States v. Ismail* n66(prior hashish and cocaine transactions admissible in heroin prosecution to demonstrate relationship between the defendant and another man and to demonstrate a scheme to import substances).

United States v. Hughes, 310 F.3d 557 (7th Cir. 2002) : Affirming convictions for offenses involving the production and distribution of counterfeit currency, the Court held that evidence of the defendants' involvement in an odometer tampering scheme was properly admitted to prove that the two "had a working relationship prior to the commission of this crime, a matter that might have been of some interest to the jury in light of the finger-pointing that took place between the defendants." The Court noted, however, that the admissibility issue was "a relatively close one." In *United States v. Ward, 211 F.3d 356 (7th Cir. 2000)* , the Court affirmed convictions for a large-scale drug distribution conspiracy, finding no abuse of discretion in the admission of testimony by two cooperating witnesses regarding drug involvement with the defendant prior to the charged conspiracy. While there was no dispute that the defendant knew the witnesses, the testimony was integral to the complete story of the charged conspiracy, in that it outlined the development of the relationship of trust that led to the men's respective roles in the conspiracy. In a prosecution for murder in a prison, *United States v. McKinney*, n67 the Court found no abuse of discretion in the admission of evidence that the gang to which the defendant belonged had committed other murders. The government's theory was that the murder resulted from a gang contract, so how the gang operated was relevant to the charge, and the Trial Judge had been careful to limit the testimony about the gang and to preclude testimony implicating the defendant in any other murders. See also *United States v. Potts* n68(evidence of the defendant's involvement in prison drug smuggling was admissible in prosecution for conspiracy to transport and present altered postal money orders, since the smuggling involved the same network of conspirators whose interests were intertwined).

United States v. Orozco-Rodriguez, 220 F.3d 940 (8th Cir. 2000) : A witness testified that he operated as a go-between in the charged narcotics transactions, and that the defendant had sold the witness drugs on prior occasions. The Court held that the evidence of uncharged misconduct was properly admitted, because it established a relationship between the defendant and the witness that helped explain why the witness could act as a go-between for drug transactions between the defendant and someone whom the defendant did not know. In *United States v. Horvath*, n69

the Court affirmed tax evasion convictions, finding that evidence of one defendant's participation in a drug conspiracy was properly admitted to show that he had knowledge of and involvement in the concealment of other defendants' drug income. See also *United States v. DeLuna* n70(various other crimes evidence was properly admitted in a prosecution for casino skimming conspiracy to show relationship of various people and interests in the casino).

United States v. Ramirez, 176 F.3d 1179 (9th Cir. 1999) : The Court affirmed a conviction for conspiring to import marijuana, finding no abuse of discretion in the admission of evidence that the defendant had previously crossed the Mexican border in a vehicle rented by the unindicted coconspirator, where the defendant was listed on the rental contract as an additional driver. Although there was no evidence of illegal conduct on the prior occasion, the repetition of similar border crossings tended to show an ongoing conspiracy. In *United States v. Normandeau*, n71 the Court held that evidence that defendants who imported marijuana in motor mounts had previously imported such mounts was admissible to show their prior relationship, whether or not it involved marijuana. See also *United States v. McKoy* n72(evidence that a defendant charged with involvement in stolen goods previously bought stolen merchandise from a codefendant was properly admitted to prove background).

United States v. Neal, 718 F.2d 1505 (10th Cir. 1983) : Evidence of the relationship between a government witness and the defendant's relatives was properly admitted to show a scheme to defraud.

United States v. McCrimmon, 362 F.3d 725 (11th Cir. 2004) : Affirming a conviction for conspiring to bring investors into an illegal scheme and to launder the proceeds, the Court found no error in admitting testimony by the scheme ringleader that the defendant and a coconspirator had worked together on other schemes, since the prior relationship was relevant to explain the chain of events leading to the charged scheme. In *United States v. Alonso*, n73 the defendants' personal use of cocaine was relevant to show why drug suppliers accepted their aid in criminal ventures.

[v] Rule 404(b) -- Background -- Relationship to Hearsay Rule

United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000) : In a drug prosecution, the Trial Judge permitted an FBI agent to testify that he had received information from a federal inmate that the defendant was involved in drug trafficking. The testimony was ostensibly admitted not for its truth, but only as "background," to explain the agent's conduct in arresting the defendant. Finding admission of the out-of-court statements to be error (but harmless), the Court reasoned that the statement was of limited use as background evidence, and "[t]here was considerable danger that the jury would consider the information about Evans' prior drug crimes for its truth, and hence as evidence of his propensity to commit the crimes with which he was charged."

[l] Rule 404(b) -- Balancing

[i] Rule 404(b) -- Discretion To Admit

United States v. Kramer, 955 F.2d 479 (7th Cir. 1992) : Affirming convictions for conspiring to distribute marijuana as part of a continuing criminal enterprise that imported marijuana, the Court held that the Trial Judge exercised principled discretion in admitting evidence that one of the defendants had imported 15 tons of marijuana in 1981, as the evidence showed specific intent, was not too remote to be relevant, and its prejudicial effect, if any, did not substantially outweigh its probative value. In *United States v. Chaverra-Cardona*, n74 the Trial Judge properly admitted evidence of the underlying drug case and of the defendant's drug trafficking and finances to show motive, intent, and opportunity to carry out a charged conspiracy to murder a government attorney and a government witness. The Court held that details of most of the other acts were highly probative on those issues, so the value of the evidence was not

significantly outweighed by the prejudicial effect of the image created of Colombian drug dealers; some of the minute details elicited regarding the investigation were not probative of the issues, but neither were they prejudicial.

United States v. Meester, 762 F.2d 867 (11th Cir. 1985) : Affirming drug conspiracy convictions, the Court held there was no error in admitting evidence that certain conspirators killed a pilot who refused to return an airplane until he was paid, as the evidence tended to show a continuing conspiracy. In *United States v. Terebecki*, n75 the Court affirmed a conviction for aiding and abetting wire fraud, finding no error in the admission of evidence concerning a questionable transaction that occurred some 15 months after the charged fraud. The Court found that the testimony of a participant in the later transaction was enough for the jury to find that it actually occurred and held that the Trial Judge's decision to admit such evidence despite a claim of unfair prejudice under *Rule 403* "will not be disturbed on appeal absent a clear showing of an abuse of discretion." See also *United States v. Messersmith* n76(upholding, despite a *Rule 403* challenge, admission of evidence that a defendant charged with unlawful possession and importation with intent to distribute methaqualone previously went out of the country to smuggle quaaludes).

[ii] Rule 404(b) -- Balancing -- Error To Admit

[A] Rule 404(b) -- Doubts About Other Act

United States v. Rhodes, 886 F.2d 375 (D.C. Cir. 1989) : In reversing a conviction for bank fraud and forgery, the Court held it was plain error to admit evidence of other fraudulent activity. Because the activity was not sufficiently connected with the defendant, it did not undermine his defense that he did not know that the check he presented was bad.

United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988) : The Court reversed convictions for offenses allegedly committed when the defendant placed a small explosive device on a car belonging to his ex-wife's father. It concluded that evidence of a series of attacks against the ex-wife, her attorney, her father, and others was improperly admitted for several reasons: The evidence concerned highly prejudicial acts, the government had no evidence that the defendant committed the acts, there was not even evidence that all were committed by the same person, and the so-called pattern did not appear to prove any fact in dispute in light of the defendant's concession of motive and opportunity to commit the charged crimes. In *United States v. Shavers*, n77 an assault with a deadly weapon case, the Court found an abuse of discretion in the admission of ambiguous evidence regarding a prior act -- making an arguably threatening statement while using a knife to slice a grapefruit -- which "permitted the jury to infer that Shavers is a violent person with a propensity to use knives against people."

United States v. Latouf, 132 F.3d 320 (6th Cir. 1997) : The defendant was charged with an insurance fraud scheme to burn down her restaurant. The government introduced, as evidence of the defendant's motive and plan, testimony that she earlier had offered $5,000 to two employees to burn down her house. The Court found that admission of the evidence was error, but harmless. There was no factual finding below that the overtures allegedly made by the defendant had actually been made; the availability of ample more direct evidence of the defendant's financial problems and of the defendant's planning made the testimony unneeded and unduly prejudicial; and the limiting instruction, albeit appropriate in specifying the purpose for which the evidence might be considered, was poorly timed, being given only on Monday after the evidence was introduced on Friday. One Judge did not consider admission of the evidence to be error.

United States v. Heath, 188 F.3d 916 (7th Cir. 1999) : The Court reversed drug and firearm convictions, finding error in the admission of evidence that in an unrelated incident the defendant's companion was arrested on drug charges

and the defendant was arrested on firearms charges related to a stop of the defendant's truck in which the police found two handguns and a bottle of pills on the defendant. At trial, the defendant claimed he was a drug user and buyer, not a seller, and that he lacked the intent to distribute. The Court found that the government had offered no evidence to demonstrate that the defendant intended to aid his companion in the prior incident or knew what the companion was doing with respect to drugs. It concluded that the prior incident failed to demonstrate that the defendant was knowingly in the company of a large-scale drug distributor or intentionally sought to protect such a distributor, and therefore the prior incident was not relevant to proving intent with respect to the charged offense.

United States v. Dozal, 173 F.3d 787 (10th Cir. 1999) : In a trial on cocaine charges, evidence that the defendant had previously been a passenger in a car in which police found bundles of marijuana stored in the door panels was admitted to show knowledge and intent. Finding admission of the evidence to be error (but harmless), the Court stated that "without either a conviction or some evidence that Mr. Dozal was knowingly involved with the concealed drugs, his prior arrest does not constitute a crime or wrong." The evidence was not probative of intent or knowledge because the government never demonstrated that the defendant was involved in the prior drug transaction or that he knew the door panels contained contraband.

[B] Rule 404(b) -- Balancing -- Error To Admit -- Inflammatory Evidence

United States v. Pratt, 73 F.3d 450 (1st Cir. 1996) : In a prosecution for mailing a threatening communication (a dead and badly mutilated pig) to a police chief, the Court held it was error (but not plain error) to admit evidence that the defendant had also called the chief's house and left a threatening message with a young friend of the chief's ten-year-old daughter. The evidence tended to show the identity of the person who mailed the pig, but the prosecution's use to show the emotional effect of the threats on the chief's family was not relevant and magnified the prejudice the Rule was designed to minimize.

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001) : The defendant was charged with possession of child pornography after pictures of nude children were found on his computer. The Court vacated his conviction because two sexually-explicit narratives, also found on the computer, were introduced as evidence of his intent and state of mind. The narratives were relevant to help show that the possession of the photographs was unlikely to have been accidental when a person was also downloading narratives that involved sexual contact between adults and minors. However, their probative value was substantially outweighed by their prejudicial effect; they were "vile in their graphic and violent nature," depicting violent rapes and moderate torture, while the photographs depicted no violence. In a prosecution for misapplication of savings and loan funds, *United States v. Hays*, n78 the Court held that prejudicial error was committed when the government was permitted to introduce evidence concerning one defendant's allegedly improper activities during a time he was attempting to secure sufficient deposits to permit continued operation of another, provisionally chartered savings and loan association. The Court concluded that the evidence was cumulative, inflammatory and unduly prejudicial, and that it represented an effort to attack the character of the defendants.

United States v. Best, 250 F.3d 1084 (7th Cir. 2001) : In a prosecution for possession of crack cocaine with intent to distribute, the Court found it was error (but harmless) to admit an officer's testimony that on a prior occasion he had come upon the defendant while pursuing a homicide suspect into a house and that he saw ammunition there. The evidence that distribution levels of crack were also present was relevant and admissible to show the defendant's intent on the charged occasion, but the testimony about the homicide suspect and the ammunition "invited the jury to infer that Best associated with suspected murderers and possessed firearms, thereby potentially raising the specter of unfair prejudice."

United States v. Flynn, 852 F.2d 1045 (8th Cir. 1988) : In a racketeering case, the Court upheld the admission of evidence concerning the defendant's acts of retaliation against a family, since it demonstrated his relationship to the enterprise. It concluded, however, that discussions among members of the enterprise concerning contemplated murders was unduly prejudicial, and that "[t]he RICO statute has a tremendous potential for guilt by association." Error in admitting the evidence was harmless, however.

People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998) : The Court reversed a conviction for unlawful sexual activity with minors, because of the improper admission of testimony regarding the contents of sexually explicit gay adult magazines found in the defendant's house. While the magazines could possibly have been relevant to whether the defendant had the purpose of being sexually aroused, or was actually sexually aroused, by the charged improper touching of underage boys, the statute under which he was prosecuted applied only an objective test, which made the character of the touching, not the purpose of the toucher, at issue. Furthermore, possession of the magazines was not probative of whether the conduct with which the defendant was charged was intentional. Even if the evidence were somehow relevant, its suggestion of the defendant's sexual orientation, and implication of sexual deviancy, was highly prejudicial and substantially outweighed any probative value. In a suit for unpaid withholding taxes, *Phillips v. United States IRS, 73 F.3d 939 (9th Cir. 1996)* , the Court held that it was error (but harmless) to admit evidence that an airline administrator had said, when advised to hire more pilots for safety reasons, "Let's live dangerously." Such a comment would tend to make a jury think that he purposely endangered passengers, and would encourage the jury to punish him, but would have little tendency to prove he willfully caused withholding-tax reserves to be diverted to other creditors. In *United States v. Robertson*, n79 the Court held it was error (but harmless) to admit evidence that a drug dealer who had been trying to collect a debt from the defendant was never seen again after a car similar to the defendant's was observed at the drug dealer's house. The evidence, as well as evidence of the defendant's drug use and spousal abuse, did not tend to prove any material element of the cocaine distribution and RICO offenses charged. One Judge, specially concurring, noted that reversal might have been warranted in a closer case and that prosecutors should "focus their attention more carefully on prosecuting the defendant under charges appropriate to his crimes, and on distinguishing legitimate substantive evidence from evidence of bad acts that serves principally to prejudice the jurors."

United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995) : In reversing a defendant's drug-related convictions for violation of his right to self-representation, the Court held that evidence that the defendant had threatened to kill an associate's girlfriend should not have been admitted. Even if relevant to prove that the defendant was part of a criminal organization, the evidence was unduly prejudicial. In *United States v. Soundingsides*, n80 the Court reversed a murder conviction, finding, *inter alia*, that it was error to admit testimony by the defendant's former girlfriend that he frequently beat her and caused her to lose her baby. The testimony involved five-year-old events, and the Court concluded that the evidence was of little probative value. There was no real dispute that whoever killed the victim in the instant case did so with malice, and the prior act evidence was extremely prejudicial.

[C] Rule 404(b) -- Balancing -- Error To Admit -- Low Probative Value

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004) : Affirming a conviction for a conspiracy involving a massive marijuana growing operation, the Court held it was error (but harmless) to admit evidence that the defendant had used a false tax return to secure a loan for buying an expensive boat at a time when he was reporting limited income. The false return had no connection to the defendant's drug dealing; it added nothing to the prosecution evidence that his earnings had exceeded his legitimate income; and the government did not identify any other reason why the false return was relevant.

United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) : The Court reversed a conviction for participation in a cocaine distribution conspiracy because a cooperating witness was permitted to testify during the government's direct

case that the defendant had told him she had a special recipe for cooking crack because she "used to do that, sell that in New York." The relevance of the evidence to show intent was at best slight. The evidence was not necessary to show the context of the crime, and it was barely reliable. The Court held that, in any event, the balance of probative value and prejudicial effect was so one-sided that admission of the evidence was error. In *United States v. Melia*, n81 the Court found it was an abuse of discretion in a prosecution for receipt of stolen property to admit testimony that a government witness had been to the defendant's house on other occasions for illegal purposes. The Court emphasized that even though the defendant was tried for a "specific intent" crime, the other crime evidence offered against him was insufficiently probative to warrant admission in light of its prejudicial impact.

United States v. Jackson, 339 F.3d 349 (5th Cir. 2003) : Reversing a conviction for transporting stolen goods from a jewelry store burglary, the Court held it was an abuse of discretion to admit evidence that the defendant had a previous felony conviction for stealing watches and testimony from his parole officer (ostensibly called only to prove his address) regarding the defendant's parole status. While prior conviction evidence has a tendency to prove the difficult intent element in conspiracy cases, that the defendant knowingly joined a plan to further an unlawful objective, in this case, where there was other evidence going to intent and only the identification issue was contested, the evidence had very little probative value. Moreover, it had a substantial potential to cause unfair prejudice, because of the great danger that the jury would decide that he was involved in the conspiracy because of his prior criminal conduct. Similarly, the parole officer's testimony had minuscule probative value, because the defendant's residence was not really at issue and there was other evidence on the point, while it had substantial potential for prejudice In a fraud case arising out of a scheme to sell and pass "Certified Money Orders," *United States v. Mikolajczyk, 137 F.3d 237 (5th Cir. 1998)* , the defendants included two of the scheme's instigators who, in representing themselves, attempted to justify their conduct by attacking the monetary system. The Court held it was an abuse of discretion (but harmless error) to admit evidence that another defendant had filed a public notice "rescinding" her tax returns: the defendant's past protest activity did not impugn her credibility because it did not involve any fraud or illegal activity; its relevance to her intent or motive was only slight, since there was no suggestion she had a protest motive when using the CMOs; and the evidence presented an implication of the defendant's guilt by association with the two instigators. A concurring Judge would have found that the "rescinding" public notice, being filed within a month of the defendant's passing the CMO, was relevant to rebut her defense of good faith and lack of intent.

United States v. Haywood, 280 F.3d 715 (6th Cir. 2002) : The Court reversed a conviction for possession of crack cocaine with intent to distribute because the defendant's conviction for possession of crack four months later was erroneously admitted. The latter offense involved 1.3 grams of crack, while the charged offense was for 18 grams. Possession of the smaller amount, which was consistent with personal use, shed no light on the defendant's intent to distribute, so the only value of the evidence would be to show a propensity toward illegal drug possession. The dissenting Judge argued that "[e]vidence that a defendant carries a certain kind of drug with him suggests a degree of involvement in the trade that tends to support an inference of intent to distribute that drug at another time," and, in his view, it also tended to show that possession on the earlier (charged) occasion was knowing.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : The Court affirmed a conviction for attempting to obtain a controlled substance by misrepresenting the name of the person to appear on prescriptions, but reversed the defendant's convictions for obtaining the substance with the intent to distribute. Evidence that the defendant had acquired and distributed other drugs was erroneously admitted, since the other acts were not similar to the scheme alleged in the instant case.

United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004) : The Court affirmed convictions for murder in aid of racketeering although the government had been erroneously permitted to introduce a certified copy of one defendant's prior conviction for shooting another man. While evidence that the defendant was incarcerated along with a member of

the gang that he joined had probative value, evidence of the charge for which he was incarcerated had little relevance. The prior conviction also had some probative value to prove an intent to murder, but there was no showing that theory was relied on by the government proffering, or the Judge in admitting, the evidence. In any event, the probative value of the evidence was limited, and substantially outweighed by its prejudicial effect. In a narcotics case, *United States v. Vaughn, 111 F.3d 610 (8th Cir. 1997)* , the Court found it was error (but harmless) to admit evidence that the defendant purchased vehicles and put the titles in the names of other people. The government offered this evidence on the premise that drug dealers "frequently mistitle assets to conceal ill-gotten gains." However, the Court found that "Vaughn's past mistitling of assets creates at best only a weak inference that he has trafficked in drugs in the past," while the potential for unfair prejudice was high.

United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993) : The Court reversed the defendants' convictions for conspiring and attempting to kill a witness scheduled to testify against one of their associates. Evidence of their involvement in another murder plot (in which a homicide actually occurred, although the wrong man was killed) had little probative value because the evidence connecting them with that murder was vague, the motivations in the two cases were dissimilar, and the evidence implicating their associate in the homicide was so weak that the testimony did little to advance the jurors' knowledge of the crucial relationship between the defendants and the associate. At the same time, the evidence was highly and unfairly prejudicial, especially in suggesting that the defendants were incompetent hired guns who could not even kill the right person. In *United States v. Hill, 953 F.2d 452 (9th Cir. 1991)* , a conviction for conspiracy to distribute cocaine was reversed because a coconspirator had been permitted to testify to having used cocaine with the defendant five years previously. The Court held that the evidence was not probative of the background and development of, nor inextricably intertwined with, the conspiracy. Although it might have been relevant to the defendant's knowledge and intent, when admitted as direct evidence of the conspiracy it was given more weight than it deserved and its prejudicial and confusing effect substantially outweighed its probative value. See also *United States v. Hodges* n82(reversing a conviction for conspiracy to defraud lending institutions; evidence that approximately five months after the last alleged act of the conspiracy the defendant attempted to extort money from an alleged coconspirator to paint a favorable picture of her involvement was not highly probative of the defendant's state of mind at the time of the alleged conspiracy).

United States v. Oberle, 136 F.3d 1414 (10th Cir. 1998) : In a bank robbery case the prosecution introduced a letter, written after his arrest by the defendant to his brother, that said: "Just tell her I'm going back to prison on a violation. *Don't* tell her that I have a new case." Because a natural reading of the statement is not particularly inculpatory on the crime charged and because it informed the jury of the defendant's prior record, the Court considered that "it may have been an abuse of discretion to conclude that the statement's probative value outweighed its prejudice," but any error was harmless.

[D] Rule 404(b) -- Balancing -- Error To Admit -- Miscellaneous Cases

United States v. James, 555 F.2d 992 (D.C. Cir. 1977) : The Court reversed a conviction for possession of heroin with intent to distribute on the ground that evidence of an arrest 16 days before the charged offense was improperly admitted. After rejecting the argument that the defense opened the door to the evidence, the Court found that the probative value of the arrest, if offered on the issue of intent, was very weak, and in view of its lurid details, concluded that "we perceive no balance on which it properly could have been admitted."

United States v. Gilbert, 229 F.3d 15 (1st Cir. 2000) : A nurse at a VA hospital was charged with capital murder after patients in her care died in suspicious circumstances. The prosecution theory was that she had injected the patients with drugs causing cardiac difficulties in order to gain attention, especially from a hospital police officer with whom she was having an affair. On interlocutory appeal of an *in limine* ruling that excluded evidence that the defendant had

attempted to murder her husband by giving him a poisonous injection, the Court found no abuse of discretion. The probative value of the evidence was "very much open to question," and, given that the defendant disputed the incident, its presentation would require a mini-trial, taking time and injecting collateral issues. And the inflammatory nature of the evidence made it highly susceptible to being misused by the jury. In a prosecution for unlawful possession of a firearm, *United States v. Currier*, n83 the Court found error (albeit harmless) in the admission of portions of a tape recording in which the defendant offered to sell Valium, since the prejudicial effect of the evidence outweighed its probative value.

United States v. Latouf, 132 F.3d 320 (6th Cir. 1997) : The Court found it was error (but harmless) to admit, as evidence of the defendant's motive and plan to commit insurance fraud by burning down her restaurant, testimony that she earlier had offered $5,000 to two employees to burn down her house. There was no factual finding below that the overtures allegedly made by the defendant had actually been made; the availability of ample more direct evidence of the defendant's financial problems and of the defendant's planning made the testimony unneeded and unduly prejudicial; and the limiting instruction, albeit appropriate in specifying the purpose for which the evidence might be considered, was poorly timed, being given only on Monday after the evidence was introduced on Friday. In *United States v. Ebens*, n84 the Court reversed a conviction for interfering with the civil rights of a citizen of Chinese descent. It found that evidence that a man who might have been the defendant had made a derogatory remark about a black man some eight years earlier should have been excluded. There was a danger that the jury would use the evidence as character evidence, it was remote in time, and the showing that it was the defendant who made the statement was weak.

United States v. Forcelle, 86 F.3d 838 (8th Cir. 1996) : The Court reversed a conviction for fraud arising out of the defendant's use of his employer's funds for a racing chassis and a beach-front house, holding it was error to admit evidence that he had stolen platinum from the employer, since this act was not similar to the crimes charged. The Court found that the government emphasized this evidence and that its admission was prejudicial. In *United States v. Sandow, 78 F.3d 388 (8th Cir. 1996)* , the defendant, an insurance agent and broker, was tried on two fraud charges, one arising out of his inducing a customer in 1990 to pledge an annuity and the other arising out of a 1991-93 scheme to collect premiums without providing insurance. The government introduced evidence that in 1990 the defendant's insurance license was suspended for misappropriating customer funds, in order to show "motive, intent, or plan." The defendant conceded that the license suspension was properly admitted in the annuity pledge case. The Court held it was error (but harmless) to admit the evidence in the insurance fraud case, since any probative value it might have was far outweighed by its potential for generating unfair prejudice.

United States v. Brooke, 4 F.3d 1480 (9th Cir. 1993) : A conviction for offenses arising out of a pipe bombing was reversed for improper admission of evidence that the defendant had falsely claimed to friends to be suffering from terminal cancer. Any probative value the evidence had to show the defendant's efforts to gain help in disrupting the victim's relationship with the defendant's former boyfriend was substantially outweighed by the prejudicial effect of inducing resentment against one feigning cancer.

United States v. Shepherd, 739 F.2d 510 (10th Cir. 1984) : A conviction for transporting an explosive and conspiracy was overturned, as the Court found that an accomplice should not have been permitted to testify about the defendant's prior use of explosives. The Court concluded that the jury might have been led by the prior crime evidence to overlook the fact that the accomplice's uncorroborated testimony was the only evidence linking the defendant to the crime charged and to the prior crimes.

[E] Rule 404(b) -- Balancing -- Error To Admit -- Other Purposes Not in Issue

United States v. Miller, 895 F.2d 1431 (D.C. Cir. 1990) : The Court affirmed a conviction for bank fraud, holding it was error (but harmless) to admit a witness' testimony as to her knowledge that the defendant had recently been released from jail, ostensibly to show her innocent motivation in agreeing to cash a forged check for him, because her state of mind had not been made relevant in the case, and any probative value was greatly outweighed by the prejudicial effect.

United States v. Ferreira, 821 F.2d 1 (1st Cir. 1987) : The Court reversed a bank robbery conviction, finding that it was not harmless error to admit evidence concerning weapons seized from the defendant upon his arrest. The evidence of firearms was irrelevant in a prosecution for an unarmed robbery in which there was no indication that the defendant had a gun at the time of the robbery.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting, *inter alia*, evidence that the defendant had previously committed another murder. The prosecutor had only said that the evidence "wasn't just [offered for] identity. Role in the organization, common scheme, plan, a number of different reasons," and the Trial Judge's most complete explanation (in the jury charge) why it was admitted was "for the very limited purpose to show identity, role in the conspiracy, a common scheme or plan." However, there was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity.

[F] Rule 404(b) -- Balancing -- Error To Admit -- Purpose Uncertain

United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988) : The Court found an abuse of discretion in the admission of evidence that the defendant possessed cocaine at the time he was arrested, since the indictment charged a conspiracy that took place 17 months earlier. The Court faulted the Trial Judge for not requiring the prosecutor to show the relevance of the evidence and the need for its use.

United States v. Harvey, 845 F.2d 760 (8th Cir. 1988) : The Court reversed a conviction for avoiding payment of taxes relating to the sale of an airplane because the government introduced evidence that ten years earlier the defendant made large sums of money from drug transactions. The Court criticized the Trial Judge's "laundry list" approach to admissibility, "which merely restates the components of the rule," and stated that "the district court should specify which components of the rule form the basis of its ruling and why." The Court added that federal prosecutors should never have offered this other crime evidence.

United States v. Sullivan, 919 F.2d 1403 (10th Cir. 1990) : The Court reversed convictions for offenses arising out of a conspiracy to manufacture amphetamine because of the erroneous admission of testimony that a defendant had previously participated in an unrelated amphetamine "cook." Although the prosecutor offered the evidence as "part of the history of the conspiracy," he made no effort to explain its probative purpose or connect it to the charged crimes.

[G] Rule 404(b) -- Balancing -- Error To Admit -- Similarity to Crime Charged

United States v. Nichols, 781 F.2d 483 (5th Cir. 1986) : The defendant had previously been tried and convicted of two conspiracies arising out of the charged cocaine trafficking, and the Trial Judge admitted the conviction as evidence of intent and identity. The Court reversed, reasoning that "these convictions told the jury that Nichols had been found

guilty of conspiring to commit the very crimes for which he was then on trial. The highly prejudicial nature of such evidence substantially outweighed its probative value for intent and identity."

United States v. Aguilar-Aranceta, 58 F.3d 796 (1st Cir. 1995) : The Court reversed a conviction for possession of cocaine with intent to distribute, which arose out of the defendant's having picked up two parcels from the Post Office that contained narcotics. Although a 1986 misdemeanor conviction for possession of cocaine was relevant to prove knowledge, the prejudicial effect of the similarity of the prior conviction to the crime charged "is likely to have significantly overshadowed any legitimate probative value." The probative value of the prior conviction was minimal because the conviction was remote in time, and the evidence of the defendant's knowledge that drugs were in the packages was ambiguous at best.

[iii] Rule 404(b) -- Balancing -- Generally

United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991) : Affirming a bank robbery conviction, the Court noted that admission of prior convictions where sanity is the only issue presents different considerations from the usual case. Probativeness is generally unquestionable, since the insanity defense directly puts state of mind in issue, and a prior criminal record is highly relevant to the defendant's appreciation of the unacceptability of his conduct; there is no risk of primary prejudicial effect, since the defendant does not deny commission of the act; and there is a possibility that the evidence will prove not to the government's advantage, by permitting the inference that the defendant is insane, since he continues to commit the same easily-detectable crime. Although the Trial Judge's ruling was terse, it appeared from the record as a whole that the relevant factors were considered.

United States v. Siegel, 717 F.2d 9 (2d Cir. 1983) : The Court found that evidence that one defendant arranged a bribe to assure peaceful union relations was properly admitted in a mail and wire fraud case. An important part of the government's case was using the $30,000 bribe to prove that a secret cash fund existed. The Court reasoned that "if the jury believed that the bribe money came from the fund, the evidence was damaging to the defendants' case; this, however, is not the type of unfair prejudice against which defendants are protected by *Rule 403*." The Court emphasized that the jury was instructed that if it did not find that a payment was made from the alleged fund, it could not consider that payment.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : The Court affirmed a conviction for attempting to obtain a controlled substance by misrepresenting the name of the person to appear on prescriptions, but reversed the defendant's convictions for obtaining the substance with the intent to distribute. Evidence that the defendant had acquired and distributed other drugs was erroneously admitted, since the other acts were not similar to the scheme alleged in the instant case. The Court observed that "[a]lmost any bad act evidence simultaneously condemns by besmirching character and by showing one or more" of the items listed in *Rule 404(b)*. Therefore, it is important for the Judge both to identify the exception applying to the evidence and to evaluate whether the evidence is "sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant's character."

[iv] Rule 404(b) -- Balancing -- Inclusionary Approach

United States v. Benedetto, 571 F.2d 1246, 1248-1250 (2d Cir. 1978) : The Court indicated that it favored an "inclusionary" approach toward other crimes evidence, but noted the dangers of accepting such evidence. Referring to its past decisions, the Court wrote that "we have emphasized that admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance the

probative worth of, and the Government's need for, such testimony against the prejudice to the defendant."

United States v. Long, 574 F.2d 761 (3d Cir. 1978) : The Court indicated that it followed an "inclusionary" approach and, while recognizing the need for balancing probative value against prejudicial effect, concluded that "[t]he draftsmen of *Rule 404(b)* ... intended to emphasize admissibility of 'other crime' evidence."

United States v. Roberts, 88 F.3d 872 (10th Cir. 1996) : Reviewing three pretrial evidentiary rulings in a prosecution for aggravated sexual abuse and abusive sexual conduct, the Court held that the Trial Judge should have analyzed individually the proposed testimony of nine women not named in the indictment before ruling that their testimony would be excluded as unduly prejudicial. Although the Court noted that it gives substantial deference to a Judge's *Rule 403* balancing, it cautioned that exclusion under *Rule 403* is an extraordinary remedy that should be used sparingly. Here, the government claimed that the totality of the evidence demonstrated a pattern of verbal and physical conduct by the defendant while the victims were employed by the Choctaw Nation of Oklahoma. Not all *Rule 404(b)* matters require hearings, but the unique and specific circumstances presented in this case required a witness-by-witness evaluation of evidence.

[v] Rule 404(b) -- Balancing -- Requirement of Record

United States v. Lavelle, 751 F.2d 1266 (D.C. Cir. 1985) : The Court upheld perjury and obstruction convictions of a former Assistant Administrator of the Environmental Protection Agency as it found that evidence of prior false statements by the defendant was properly admitted to prove intent. Although the Court expressed a preference for a statement of reasons by Trial Judges when admitting other act evidence over objection, it noted that the defendant made no request that the Judge state reasons on the record.

United States v. Rawle, 845 F.2d 1244 (4th Cir. 1988) : The Court affirmed a marijuana conviction, even though the Trial Judge did not identify the reason for admitting evidence of prior acts by the defendant that involved transportation of marijuana. The Court stated that "[w]hile an explicit ruling may be preferable and may indeed aid this Court in reviewing the record," it would not require such a ruling in every case.

United States v. Elwood, 993 F.2d 1146 (5th Cir. 1993) : The Court remanded a conviction for drug trafficking offenses with instructions to make (as the defendant had requested *in limine*) record findings regarding the probative value and prejudicial effect of other crimes evidence. This was a close case and there was nothing in the record to reflect that the Trial Judge applied the correct test for admission of the evidence. On remand, the evidence was found admissible; that finding was affirmed, *999 F.2d 814 (5th Cir. 1993)* . In *United States v. Zabaneh*, n85 the Court remanded a drug case for a determination whether other acts of the defendant should have been admitted. It stated that in the absence of balancing on the record "we must remand unless the factors upon which the probative value/prejudice evaluation was made were readily apparent from the record and there was no substantial uncertainty about the correctness of the ruling."

United States v. Acosta-Cazares, 878 F.2d 945 (6th Cir. 1989) : The Court held in a cocaine conspiracy prosecution that the failure to make findings on the record was not reversible error where counsel did not request any balancing and review of the record indicated that the probative value of other acts evidence was not substantially outweighed by its potential for prejudice.

United States v. Nagib, 56 F.3d 798 (7th Cir. 1995) : The defendant had accompanied two others when a package subsequently found to contain drugs was shipped at an airport. At trial, the Judge, reciting the exceptions in *Rule 404(b)*, admitted proof that police had previously found a package containing drugs when they stopped the defendant's van to question him. The jury was told that this evidence could be considered only on the question of motive; on appeal, the government indicated that the evidence was introduced to demonstrate knowledge or motive. Finding that the Trial Judge did not adequately explain the basis for the *Rule 404(b)* ruling or discuss the danger of unfair prejudice under *Rule 403*, the Court remanded for reconsideration and explanation. In *United States v. Archer*, n86 the Court observed that it was helpful for Trial Judges to state their balancing on the record in the course of admitting or excluding *Rule 404(b)* evidence, but affirmed a Judge who admitted, without balancing on the record, other crimes evidence to prove intent in a prosecution of a prisoner for possessing objects with intent to escape. See also *United States v. Hudson* n87(convictions for entering a credit union with the intent to commit larceny were reversed because some evidence of other crimes should not have been admitted; the Court noted that the Trial Judge did not engage in a careful on-the-record balancing of the relevant factors).

United States v. Evans, 697 F.2d 240 (8th Cir. 1983) : The Court recognized that an explicit finding by the Trial Judge would be helpful, but it declined to require one and assumed instead that the Judge who admitted evidence applied the correct standard. In this prosecution for conspiracy to possess marijuana, evidence of a witness' prior drug-related relationship with the defendant was offered to prove the defendant's motive and intention for meeting with the witness.

United States v. Dorsey, 819 F.2d 1055 (11th Cir. 1987) : The Court affirmed marijuana-related convictions, holding that a Trial Judge is not required to engage in on-the-record balancing in ruling on the admissibility of other act evidence.

[m] RULE 404(b) -- Circumstances Indicating Criminality

United States v. Tafoya, 757 F.2d 1522 (5th Cir. 1985) : The Court held that evidence of the defendant's assassination efforts was admissible in a tax prosecution to show that he earned money that he claimed was a gift.

United States v. Wood, 834 F.2d 1382 (8th Cir. 1987) : The Court upheld admission of evidence that the defendant purchased an airplane for cash to prove he was engaged in drug trafficking.

United States v. Saintil, 753 F.2d 984 (11th Cir. 1985) : Evidence that defendants charged with attempted smuggling of illegal aliens had murdered, battered, and starved illegal immigrants was relevant to prove that they were in control of a smuggling vessel.

[n] RULE 404(b) -- Civil Cases

[i] Rule 404(b) -- Accidents

Hemphill v. Washington Metro. Area Transit Auth., 982 F.2d 572 (D.C. Cir. 1993) : The Court, in three separate opinions, held that a judgment for a defendant in an automobile accident case must be reversed, because the Magistrate Judge erroneously instructed the jury that it could consider whether the plaintiff, whose prior accidents were admitted as relevant to the cause of her injuries, "was merely unlucky or whether or not she is claims minded." The Court unanimously agreed that when no charge of fabrication is made, it is improper to permit a jury to infer that a plaintiff is claims minded.

In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994) : In this action by relatives of passengers killed in an aircraft bombing, the Court affirmed the jury's finding of liability against the airline for willful disregard of safety measures concerning security checks of baggage. Evidence of other security failures by the defendant was properly admitted to prove the cause of the disaster, since the other acts tended to prove "a contempt for security" which would permit the jury to infer willful misconduct.

Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991) : In a product liability wrongful death action brought after a tractor-trailer overturned, the defendant offered the driver-decedent's personnel file, which showed that he had received citations for speeding, as evidence of habit or as proof of intent. The Court held that there was no error in declining to admit traffic citations unrelated to the incident in question against a dead man unable to defend himself.

Jones v. Southern Pac. R.R., 962 F.2d 447 (5th Cir. 1992) : The Court held there was no error in excluding evidence of the defendant's engineer's prior safety infractions in a personal injury action arising out of a truck-train collision, as the evidence had slight probative value and would tend to distract the trier of fact from the main question of what actually happened.

King v. Ahrens, 16 F.3d 265 (8th Cir. 1994) : In a medical malpractice case, the Court held there was no abuse of discretion in excluding evidence that the defendant's medical license had been suspended eight years earlier, as any probative value the evidence had on the absence of mistake in failing to note critical information on the medical chart and on the doctor's credibility was substantially outweighed by its prejudicial effect, given the remoteness in time and the dissimilarity between the incidents. In *Monger v. Cessna Aircraft Co.*, n88 the Court affirmed a judgment for an aircraft manufacturer in a wrongful death case, holding that evidence of prior accidents is not admissible to prove that a party is accident prone and therefore likely to have been at fault. It also held that a letter from the FAA to the manufacturer reciting prior misconduct and containing a warning was properly excluded where it was unclear whether the letter related to the fuel system at issue in the case.

[ii] Rule 404(b) -- Civil Cases -- Antitrust, Franchises, Distributorships, etc.

Jay Edwards, Inc. v. New England Toyota Distrib., 708 F.2d 814 (1st Cir. 1983) : An automobile dealership sued its distributor claiming that the distributor engaged in several bad faith actions against it. The Court found that evidence that the distributor engaged in harsh treatment against other dealers who had joined the plaintiff in forming an "Alliance" was properly admitted: "By suggesting a pattern of retaliatory practices against Alliance members, it was probative of NET's motive and intent, and its possible bad faith, in dealings with Edwards."

United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988) : The Court affirmed a judgment awarding the plaintiff $1 in an antitrust action, holding that prior antitrust judgments against the defendant were properly excluded pursuant to *Rule 403*, even though "[p]rior antitrust violations and the history of competition in a market may, in appropriate cases, be admissible to establish market power and intent to monopolize."

J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994) : In a franchisee's action against a franchiser for fraud and negligence in making representations about the financial prospects of a restaurant franchise, other franchisees testified that the defendant had made similar representations to them. Reversing a judgment for the plaintiff, the Court held it was error to admit the testimony as evidence of a common plan or scheme.

"Common plan" acts may be part of a single series of events -- thus tending to show a motive that will establish the commission of a disputed act, the identity of the actor, or his intention -- or they may be sufficiently similar and distinctive as to constitute signature evidence of identity. Since neither motive, intent, nor identity was in dispute, the evidence served only the impermissible purpose of showing the defendant's propensity to commit the charged act.

Coast-to-Coast Stores, Inc. v. Womack-Bowers, Inc., 818 F.2d 1398 (8th Cir. 1987) : The Court found no error in the exclusion of testimony by other franchise owners concerning complaints that were different in kind from those of franchisees involved in the instant suit.

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003) : Affirming summary judgment for the defendant cigarette manufacturers in an antitrust action by wholesalers, the Court found no error in the exclusion of evidence alleged by the plaintiffs to show that the defendants conspired to fix prices in ten foreign countries during and prior to the conspiracy at issue. In the absence of a showing of a tie between the defendants' overseas and domestic pricing actions, the evidence did not tend to exclude the possibility of independent action in the setting of domestic cigarette prices. Further, the evidence did not establish a prior crime, wrong, or act, since the plaintiffs failed to show that the foreign conduct was a crime or wrong under the laws of the foreign sovereigns.

[iii] Rule 404(b) -- Civil Cases -- Civil Rights Cases

[A] Rule 404(b) -- Miscellaneous Civil Rights Cases

Miller v. Poretsky, 595 F.2d 780 (D.C. Cir. 1978) : Although it affirmed a judgment for the defendant in a tenant's civil rights suit, the Court concluded that it was an abuse of discretion to exclude testimony that the landlord had similarly discriminated against other black tenants. As the landlord had been permitted to offer evidence that he had not discriminated against other tenants, the tenant should have been able to rebut this evidence. Judge Robinson, concurring, emphasized that whether or not the landlord had offered evidence concerning treatment of other tenants, the tenant should have been permitted to show discrimination against others. Citing *Rule 404(b)*, he argued that discriminatory practices have grown more subtle and "victims may find it virtually impossible to prove [discriminatory purpose] unless permitted to introduce evidence that the defendant has engaged in one or more acts of discrimination against others." The Court's opinion indicated that the other Judges on the panel "concur in Judge Robinson's separate opinion."

Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (en banc): In a *parens patriae* civil rights action, the Court found that events occurring more than two years prior to the filing of the suit could be offered to show a pattern or practice of violating constitutional rights.

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc): The plaintiff in a civil rights action, alleging that he had been intimidated on racial grounds at a roller skating rink, introduced a prior consent decree in which the rink agreed to post signs of a nondiscriminatory policy and to instruct employees not to discriminate, as well as evidence that the rink had not complied with the decree. The Court held there was no error in admitting the decree, as it was not offered to prove that the rink had previously discriminated and was likely to do so again but to show, through the evidence of noncompliance, the rink's motive or intent on the present occasion.

Hitt v. Connell, 301 F.3d 240 (5th Cir. 2002) : In a civil rights action by a deputy constable who was discharged for his union activity, an associational right protected by the *First Amendment*, the Court found no abuse of discretion in

admitting evidence that the constable took disciplinary action against other deputies for their union activities. The evidence was admissible as proof of the constable's motive in firing the plaintiff and to impeach the constable's statements that he was "a union man" and had no animus against the union. In *Brown v. Miller*, n89 a civil rights action brought by a police chief against a town mayor, the Court reversed a punitive damage award on the ground that an independent bad act of the mayor was erroneously introduced as evidence.

Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) : In a suit by a discharged employee who claimed that the discharge was the result of protected political activity, the Court held that testimony by another employee that she was told she was being terminated because of her support for a former incumbent was admissible to prove intent on the part of the defendants, whether or not the other employee was one who could be fired on the basis of political affiliation.

Treece v. Hochstetler, 213 F.3d 360 (7th Cir. 2000) : In a § 1983 action against a police officer for malicious prosecution of a complaint that the plaintiff threatened the officer, the plaintiff argued that the officer solicited a bribe on the occasion in question and attempted to show prior "bad acts" of the officer that would allegedly have shown a pattern of soliciting bribes and falsely charging individuals with crimes when the bribes were not paid. Affirming a judgment for the officer, the Court found no abuse of discretion in exclusion of the evidence, since the alleged incidents were not sufficiently idiosyncratic to permit an inference of pattern and did not bear a singular strong resemblance to the pattern of the offense charged.

McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990) : In a former police officer's civil rights suit for wrongful discharge, the plaintiff offered evidence that other officers were harassed and intimidated by the defendant police chief. The Court held that there was no abuse of discretion in excluding the evidence, as its admission could have led to a series of mini-trials regarding the other officers' grievances, and it did not rise to the level of a habit of harassing officers who exercised their *First Amendment* rights.

[B] Rule 404(b) -- Civil Cases -- Civil Rights Cases -- Officers' Conduct

Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) : In a civil rights action for injuries suffered when the plaintiff was shot by plainclothes police officers, the Court held that evidence of past civilian complaints against one of the officers was properly admitted only to show gross lapses in supervising and disciplining the officer by defendant superior officers and that, particularly with the limiting instructions given, the probative value of the evidence was not significantly outweighed by its prejudicial effect.

Berkovich v. Hicks, 922 F.2d 1018 (2d Cir. 1991) : In an arrestee's civil rights action, the Court held that there was no abuse of discretion in excluding evidence of seven prior civilian complaints against a defendant police officer, where the officer had been exonerated on all charges in six of the complaints and the seventh only involved using abusive language.

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) : The Court reversed a judgment in favor of a sheriff and four deputies who allegedly used excessive force in making an arrest. It found error in the exclusion of a sheriff's department performance evaluation report on one deputy that stated that the deputy tended to get into arguments with inmates and let his temper flare up quickly. According to the Court, the report should have been admitted under *Rule 404(b)* to show the deputy's intent. In our view, this evidence was more akin to character evidence than to specific conduct that might tend to show intent. Thus it was properly excluded, although it might have been admitted to show that the sheriff was on notice of a problem regarding this deputy.

Woodward v. Correctional Medical Servs. of Ill., Inc., 368 F.3d 917 (7th Cir. 2004) : In an action on behalf of a pretrial detainee who committed suicide in a county jail, the jury found that the contractor administering the jail and a nurse working there had acted with deliberate indifference to the deceased's health and safety. Finding no abuse of discretion in the admission of evidence concerning intake backlogs, evidence that a nurse employed by the contractor was under the influence of drugs, and evidence that other inmates did not receive medical care or had their care delayed, the Court concluded that the evidence tended to prove knowledge and state of mind because it showed that the County had notice that its employees ignored the medical needs of inmates and that such practices could result in suicide. In *Okai v. Verfuth, 275 F.3d 606 (7th Cir. 2001)* , the Court affirmed a judgment for corrections officers sued by an inmate who claimed that he was beaten while being moved during a transfer that followed a prison riot. It found no abuse of discretion in excluding evidence that the officers had been suspended following the riot, since the plaintiff made no showing of the basis for the officers' discipline and had no evidence of his theory that the suspensions served to establish the defendants' motive to retaliate against inmates who participated in riots or whom they disliked. In *Wilson v. City of Chicago*, n90 the plaintiff, who had shot and killed two policemen, alleged that police had tortured him in extracting a confession. Reversing a judgment for the individual defendants, the Court held that it was an abuse of discretion to exclude evidence that the officers had tortured two other suspects, since the other incidents tended to prove, *inter alia*, the defendants' intent and opportunity.

Clark v. Martinez, 295 F.3d 809 (8th Cir. 2002) : The Court affirmed a judgment against an arrestee suing for use of excessive force, holding there was no abuse of discretion in excluding evidence that the defendant officer had on another occasion used excessive force and demonstrated racially discriminatory animus. Given that the officer conceded that he struck the plaintiff intentionally, the evidence had little probative value on the issue of intent, which was substantially outweighed by the prejudicial effect of being used impermissibly to show propensity. The Court noted that the propensity to batter African-American males in custody might tend to show that the officer's "actions were motivated by hostility against African-Americans, but hostile motive is not an element" of assault or battery under the applicable state law. In *Berry v. Oswalt, 143 F.3d 1127 (8th Cir. 1998)* , the Court reversed judgment for a female prisoner claiming sexual harassment by a corrections officer because evidence of prior uncharged sexual misconduct by the corrections officer was erroneously admitted. The evidence was not admissible to prove intent to harass and absence of mistake, because it was highly inflammatory, and not similar in kind to the acts charged by the plaintiff. Nor was it admissible to prove a discriminatory motive, because motive is irrelevant to a charge of sexual harassment by a prison guard: a "guard who propositions an inmate cannot have a motive that the law would recognize as proper." In a civil rights action by a woman claiming she had been falsely arrested and sexually assaulted by a police officer, *Parrish v. Luckie*, n91 the Court held that evidence of the officer's prior violent behavior was properly admitted as relevant to the police chief's knowledge of the officer's violent propensities. In *Tyler v. White*, n92 a suit by prisoners alleging that guards injured them, the Court held that cross-examination of a defendant guard concerning his carrying brass knuckles after the incident was properly barred as calling for inadmissible character evidence.

Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982) : In a civil rights action brought after a Native American was found hanged in a jail cell, the Court upheld a ruling excluding evidence that a deputy had engaged in violent and brutal conduct toward Native Americans on previous occasions. The Court found the evidence inadequate to establish identity of the victim's killer by *modus operandi* and concluded that the Judge properly could have excluded the evidence so that it would not be improperly used as character evidence.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) : Affirming a judgment for the defendants in an action by arrestees alleging excessive force by a police officer, the Court found no abuse of discretion in the exclusion of evidence regarding three other occasions on which the officer allegedly arrested individuals without probable cause or used excessive force. To prove the officer's intent, the evidence was irrelevant because an objective standard is used to

determine whether there is a constitutional violation. And to the extent that the evidence might have been relevant on pendent state law claims, the risk of prejudice in suggesting that the officer was prone to using excessive force outweighed any probative value.

[C] Rule 404(b) -- Civil Cases -- Civil Rights Cases -- Prisoners' and Arrestees' Conduct

Lewis v. District of Columbia, 793 F.2d 361 (D.C. Cir. 1986) : In a civil rights action by a person who was shot by an arresting officer, the Court held that evidence of the plaintiff's prior arrests and drug use was properly admitted. The arrests were probative of whether the plaintiff ran from the officer because he thought the officer was a thief or because he wanted to avoid arrest. The drug use was relevant because it might have accounted for some of the injuries that the plaintiff attributed to the shooting.

Surprenant v. Rivas, 424 F.3d 5 (1st Cir. 2005) : Affirming a judgment for the plaintiff in a civil rights action by a pretrial detainee, the Court found no abuse of discretion in the exclusion of evidence that seven years before the incident giving rise to the lawsuit the plaintiff "converged" on a correctional officer while incarcerated in a state prison. The evidence was clearly inadmissible as propensity evidence for the purpose offered by the defendant--i.e., that because the plaintiff converged on an officer in 1995, he was likely to do so again in 2002. In *Senra v. Cunningham, 9 F.3d 168 (1st Cir. 1993)* , an action against police officers for using excessive force in arresting a man at his home after his auto struck a parked car, the Court held there was no abuse of discretion in admitting evidence of the defendants having previously responded to domestic disturbances resulting from the plaintiff's drunken and violent behavior, since it shed light on the reasonableness of the officers' responses. The plaintiff's prior conviction for driving while intoxicated had been admitted to show the plaintiff's motivation for leaving the scene, but the Court reasoned that the arrest would have been justified merely because he had departed, so the evidence was of no probative value; the error was harmless, however. In a civil rights action against police officers, *Pittsley v. Warish*, n93 the Court held that evidence of a plaintiff's prior arrest on gun-possession charges of which she was acquitted was properly admissible to show her motive and bias in bringing the lawsuit in light of one of the defendants' involvement in the prior proceeding. In *Wierstak v. Heffernan*, n94 a suit for use of excessive force in an arrest, the Court held there was no error in the exclusion of evidence concerning the plaintiff's involvement in a house-break and drug transaction earlier in the day of the arrest. Although the evidence was relevant to motive, it was unduly prejudicial. In *Lataille v. Ponte*, n95 the Court reversed a judgment for corrections officers in an action by a plaintiff who alleged that the officers had beaten him, because evidence of the plaintiff's disciplinary record was improperly admitted to prove that the plaintiff was a violent person and, therefore, probably was the first aggressor.

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996) : In an inmate's § 1983 action against prison guards, the Court held that although the inmate's disciplinary record might have been properly admitted in response to his argument that he had struck a guard reflexively and by accident, it was reversible error to admit the record where the plaintiff denied having struck the officer at all and he did not raise any issue of his intent, and the defendants repeatedly argued that the plaintiff's violent character tended to show he was the aggressor.

Young v. Rabideau, 821 F.2d 373 (7th Cir. 1987) : The Court affirmed a judgment for corrections officers sued for allegedly using excessive force against an inmate, holding that evidence of the inmate's disciplinary history was admissible to rebut the inmate's contention that he did not intend to poke an officer in the face or snatch a chain from the officer's hand. It also noted that past misconduct of the inmate, as reflected in his disciplinary history, was not admissible to show "bias" against authority, since this type of bias is too likely to be used as propensity evidence. In *Harris v. Davis*, n96 the Court found it was error in a suit by a prisoner who alleged cruel and unusual punishment with respect to medical treatment to admit photographs of the prisoner that depicted him in suggestive poses and to admit evidence (ostensibly offered to show an alternative source of his injuries) concerning discipline for possession of

moonshine.

Lewis v. Sheriff's Dep't, 817 F.2d 465 (8th Cir. 1987) : The Court held that the defendants should not have been permitted to cross-examine the plaintiff concerning a prior fight with a deputy sheriff. The evidence appeared relevant only to create an impression that the plaintiff had a violent disposition. The error was harmless, however.

[iv] Rule 404(b) -- Civil Cases -- Contracts

Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985) : In an action on promissory notes, the Court held that evidence concerning four other joint ventures was properly admitted since the defendants claimed an *in pari delicto* defense and the evidence was relevant to show knowledge and absence of mistake.

Pressman v. Franklin Nat'l Bank, 384 F.3d 182 (6th Cir. 2004) : The Court affirmed a judgment against an unsuccessful applicant for a loan, finding no abuse of discretion in the exclusion of testimony that the Bank's president corruptly made personal loans to certain customers at high interest rates and on condition of kickbacks. The plaintiff claimed that the evidence supported his contract claim by showing that the Bank breached its obligation of good faith and fair dealing, but the Court found that the allegations of corruption were completely unrelated to the activity at issue in the case, so the probative value of the evidence was substantially outweighed by its prejudicial effect.

[v] Rule 404(b) -- Civil Cases -- Employment Discrimination Cases

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995) : In a female lawyer's Title VII action against a law firm, the Court held it was error (but harmless) to admit evidence that the plaintiff had had difficulty in getting along with staff and in meeting deadlines at a firm where she had worked previously. The Court reasoned that to permit the defendant to show that the plaintiff had "the same problem" with a prior employer and to claim that the problem resulted in the plaintiff's termination was to admit character evidence, for which none of the *Rule 404* exceptions applied.

Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989) : In an employment discrimination action brought after the plaintiff was denied tenure, the Court held that remarks derogatory to women made by the University's president were properly admitted as evidence of a discriminatory animus in making the tenure decision.

Ansell v. Green Acres Contracting Co., 347 F.3d 515 (3d Cir. 2003) : In an age discrimination case, the Court affirmed a judgment for the defendants, finding no abuse of discretion in the admission of evidence that two years after terminating the 45-year-old plaintiff, the foreman hired a 45-year-old man into a position similar to the plaintiff's former position. The Court concluded that the subsequent hiring was admissible not to prove propensity, but to negate the theory that the defendants were trying to get rid of older workers to increase productivity. Thus, it was probative of the defendants' lack of intent to discriminate. In *Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000)* , the Court reversed a judgment for the plaintiff, who alleged age discrimination in his termination, because he had erroneously been permitted to testify regarding the "manner" in which the defendant allegedly had earlier terminated another employee. The evidence was not relevant to whether the defendant discriminated against the plaintiff absent the impermissible inference that the defendant had a propensity to act in a certain way. The evidence was not admissible as proof of a "plan," since where a plan or design is not an element of an offense, the evidence showing a plan must be relevant to some ultimate issue in the case, and this evidence was not relevant except under the impermissible propensity inference. Further, the evidence was not admissible as *modus operandi,* since identity was not a disputed

issue in the case and the similarities between the two events were not sufficient to show a distinctive *modus operandi*. In a diversity action brought under a state disability law, *Kelly v. Boeing Petroleum Servs., Inc.,* n97 the Court affirmed a judgment for an employer, finding no error in the exclusion of evidence that the plaintiff's supervisor engaged in other discriminatory acts and made discriminatory utterances. Acts of discrimination against those other than the disabled were irrelevant, and the supervisor's statements were at most "in typical, blue-collar (as distinguished from executive suite) workplace kidding, well short of cruel disparagement or mockery."

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) : In a Title VII action by a preoperative transsexual police officer who alleged that he was demoted because he failed to conform to gender stereotypes, the Court affirmed a judgment for the plaintiff, holding that a supervisor's derogatory statements about lesbians and use of the word "fag" were properly admitted as evidence of the supervisor's intent to ensure that the plaintiff was demoted. In *Jackson v. Quanex Corp., 191 F.3d 647 (6th Cir. 1999)* , the Court reversed a judgment for an employer sued by an employee who claimed racial harassment. It held that evidence of racial graffiti at the defendant's manufacturing plant and evidence of racially offensive conduct directed at African-American workers should have been admitted, whether or not the graffiti or conduct was directed at the plaintiff: "Comments that single out members of a protected class are relevant not only as to whether a particular work environment was objectively hostile to members of the protected class but also as to whether an employee belonging to the protected class subjectively felt harassed."

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771 (7th Cir. 2001) : The plaintiff sued for age and race discrimination after he was not hired as a car salesman. The defendant sought to introduce evidence that the plaintiff had applied for positions at other dealerships about the same time and had sued after he was denied the jobs. The evidence was excluded on the ground that it was only relevant to show a propensity to file baseless discrimination suits, but the Court found that it could have been used to show a scheme to harass area car dealerships and a similar *modus operandi* in doing so to that used in this situation. However, there was no abuse of discretion in excluding the evidence, since any probative value the evidence had was substantially outweighed by the prejudice to the plaintiff. Furthermore, disputes over whether the other suits were baseless could consume far more time than the evidence justified. In *Molnar v. Booth, 229 F.3d 593 (7th Cir. 2000)* , the Court affirmed a judgment for the plaintiff, who claimed that she was sexually harassed by her supervisor, and found no error in admission of evidence that the supervisor had made sexual advances toward another employee. This evidence was probative of intent to establish a sexual relationship with the plaintiff, and tended to prove that the supervisor "was not accidentally engaged in behavior that could be misconstrued." It was also admissible to impeach the supervisor's testimony that he had never asked out any female employee and would never do so. In *Gastineau v. Fleet Mtge. Corp.*, n98 a sex discrimination lawsuit, the plaintiff introduced a memorandum that, if authentic, showed that the employer intended to fire the plaintiff because he was complaining of being sexually harassed. The defendants challenged the authenticity of the memorandum, and introduced a contract between the plaintiff and a former employer, very favorable to the plaintiff, that the former employer denied was authentic. The Court held there was no abuse of discretion in admitting the contract for the plaintiff's "credibility, motive, interest, knowledge, common scheme and plan." It showed that the plaintiff "has a common scheme or plan in disputes with his former employers -- creating false documents in anticipation of litigation," and also showed his "motive in creating false documents as revenge against former employers and the hope of monetary gain." The Court also found that evidence of two other lawsuits brought by the plaintiff against prior employers was admissible, as the evidence went beyond showing the plaintiff's litigiousness by also showing the reasons one defendant kept a diary in this case, casting doubt on his credibility, and establishing a *modus operandi* of creating fraudulent documents in anticipation of litigation against his employers. Affirming a judgment for the plaintiff in an employment discrimination action, *Hunter v. Allis-Chalmers Corp.,* n99 the Court upheld the admission of evidence that black workers other than the plaintiff had been harassed, as it found that the other acts tended to support the claim that the employer must have known that white workers were systematically harassing black workers.

Kline v. City of Kansas City, Mo., Fire Dep't, 175 F.3d 660 (8th Cir. 1999) : The Court held in an employment discrimination action brought by female employees of the Fire Department that evidence of discrimination against other women in the Department was properly excluded. Evidence that the City employees who allegedly discriminated against the plaintiffs also discriminated against other women was properly admitted to show the defendant's knowledge of unlawful conduct toward the plaintiffs and its refusal to remedy it. However, evidence of acts by people who did not supervise or allegedly discriminate against the plaintiffs was not probative of the City's motive, opportunity, intent, or knowledge, and any probative value the evidence might have would be substantially outweighed by the threat of confusion of the issues and unfair prejudice. Affirming a judgment for an employer in an employment discrimination case, *Hogan v. American Tel. & Tel. Co.*, n100 the Court noted that evidence of past acts of discrimination may be relevant to prove intent. It added, however, that such evidence may be excluded under *Rule 403*; it determined that any error in excluding evidence of prior acts of discrimination was harmless in this case, since the past acts involved facts substantially different from the demotion of the plaintiff.

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995) : The Trial Judge excluded testimony regarding the defendant's harassment of female employees other than the plaintiff in a *quid pro quo* sexual harassment action, on the ground that it was relevant only to prove a hostile work environment and was more prejudicial than probative. Reversing, the Court noted that "[i]t is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." The Court held that the evidence was probative of the employer's motive or intent in discharging the plaintiff, and its probative value was not significantly outweighed by its prejudicial effect.

Minshall v. McGraw Hill Broadcasting Co., 323 F.3d 1273 (10th Cir. 2003) : In an age discrimination action brought by a former employee whose contract was not renewed by a television station, the Court held that the testimony by three other employees that they were subjected to discrimination by the station was properly admitted to show discriminatory intent, even though those employees were not discharged. The supervisor was involved in all the situations, and all the witnesses were over 40, which tended to support the plaintiff's claim that the supervisor, a new news director, intended to reduce the presence of on-air reporters who were over 40 years old. Comments made by the news director were also properly admitted to show discriminatory intent, because they were not stray comments but were consistent with the discriminatory intent alleged by the plaintiff. In a nurse's sexual harassment action, *Wilson v. Muckala, 303 F.3d 1207 (10th Cir. 2002)* , the Court held that alleged past instances of sexual harassment were not admissible under *Rule 404(b)*, because "alleged previous harassment cannot be used to show that a defendant harassed a plaintiff on a specific subsequent occasion," and "because these alleged prior incidents of sexual harassment occurred in places outside the Hospital, they were not relevant to establish a hostile work environment." In an action by a former employee who alleged that he had been discharged in retaliation for making a workers' compensation claim, *Sanjuan v. IBP, Inc.*, n101 the plaintiff introduced testimony by the defendant's supervisors that they had heard complaints by injured employees to the effect that they were harassed following injuries or medical benefit claims. The Court held that the evidence was not barred by *Rule 404(b)* because it was circumstantial evidence of the defendant's retaliatory motive or intent regarding employees with work-related injuries. However, the evidence was inadmissible hearsay. In *Spulak v. K Mart Corp.*, n102 the Court affirmed a judgment for the plaintiff in an age discrimination case, holding that testimony of other employees about their treatment by the defendant employer was relevant to the issue of the employer's discriminatory intent and that there was no abuse of discretion in finding the relevance of the evidence was not substantially outweighed by its prejudicial effect.

Allen v. County of Montgomery, 788 F.2d 1485 (11th Cir. 1986) : The Court overturned a judgment for the defendants in a suit by a black female employee who claimed discrimination in employment because evidence of prior discrimination, which was important in proving intent, had been erroneously excluded. In *Phillips v. Smalley Maint. Servs.*, n103 the Court affirmed a judgment for an employee on a Title VII claim, finding that the Trial Judge properly

admitted testimony by another former employee that the defendant had subjected her to treatment similar to that experienced by the plaintiff. The evidence was admissible to show intent, motive, or plan.

[vi] Rule 404(b) -- Civil Cases -- Evidence Relevant to Sanction

Colon v. Howard, 215 F.3d 227 (2d Cir. 2000) : The Court affirmed a judgment against a prisoner who alleged he had been denied a fair disciplinary hearing, holding that it was proper for the prisoner's disciplinary record to be considered because it explained the penalty that was imposed by the hearing officer.

[vii] Rule 404(b) -- Civil Cases -- Fraud, Forgery, etc.

Jenkins v. TDC Mgt. Corp., 21 F.3d 436 (D.C. Cir. 1994) : The Court reversed a judgment for a plaintiff who claimed that a developer fraudulently induced him to enter into an employment contract and induced him to continue work by falsely promising to pay him fully for services rendered. The Court found error in the admission of testimony by three subcontractors that the developer had failed to pay them for their work. It noted that none of the subcontractors had indicated that their disputes with the developer were unusual in the construction industry, none indicated any indicia of fraud, and their disputes were remote in time from the plaintiff's. The Court observed that the line between inadmissible character evidence and evidence sufficient to show intent or a common scheme is imprecise, but reasoned that "when one must, in order to find similarity, define the character of the acts at such a high level of generality as here (greed, strategic behavior), and many of the events occur years after the conduct in dispute, we cannot find the conditions of admissibility under *Rule 404(b)* satisfied." In *Faison v. Nationwide Mtg. Corp.*, n104 a suit by debtors against, *inter alia*, a settlement attorney to recover for the loss of a home alleged to have resulted from fraud, the Court found error in the admission of prior acts involving members of the defendant's law firm, which were not clearly tied to the defendant. The error was harmless, however.

Veranda Beach Club L.P. v. Western Sur. Co., 936 F.2d 1364 (1st Cir. 1991) : In an action by a partnership after its contract to purchase a resort fell through because of forgery by the defendant surety company's independent authorized agent, the Court held that evidence the agent's license had previously been suspended and that the defendant knew of the suspension was properly admitted under the Rule. Details of the event, including the fact that it arose from the agent's similar forgery, were properly excluded, as they would not have tended to show the agent's apparent authority or any other relevant fact.

Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989) : In a civil RICO action arising out of an allegedly fraudulent tax shelter, the Court held there had been no abuse of discretion in admitting evidence of the defendant's other business dealings, which were probative on the issue of intent.

Tschira v. Willingham, 135 F.3d 1077 (6th Cir. 1998) : Affirming a jury verdict for investors claiming breach of fiduciary duty and intentional misrepresentation arising from the sale and leaseback of certain buildings, the Court found no error in the admission of evidence that the defendant's false bank statements had been sent to other investors. The practice of sending false bank statements "tends to establish the existence of a plan or scheme whereby [the defendant] would provide false documentation of transactions to convince investors that their dealings with [the defendant] were more profitable than they, in fact, were."

Jordan v. Clayton Brokerage Co., 861 F.2d 172 (8th Cir. 1988) , vacated on other grounds, 499 U.S. 914 (1991) : The Court affirmed a judgment for a commodities investor who sued his brokerage company. It held that evidence of a

larger plan pursued by a trader for the company was properly admitted to show knowledge and absence of mistake on the part of the company. See also *Austin v. Loftsgaarden* n105(no error to admit, in a securities fraud action, evidence of a prior fraud allegedly committed by the defendant, who denied any fraudulent intent).

Price v. Seydel, 961 F.2d 1470 (9th Cir. 1992) : In a fraud action by the purchaser of a hotel, the plaintiff attempted to show that the defendant kept two sets of books, one accurate and the other showing greater income in order to induce purchase of the property. The Magistrate Judge excluded evidence of the first set, presuming they were kept for the purpose of defrauding the IRS, as impermissible evidence of other fraud. Reversing on other grounds, the Court noted that exclusion may well have been an abuse of discretion because the evidence was the linchpin of the plaintiff's misrepresentation theory.

Hill v. Bache Halsey Stuart Shields Inc., 790 F.2d 817 (10th Cir. 1986) : Reversing a judgment for a customer against a commodities futures broker, the Court held it was an abuse of discretion to exclude evidence of the plaintiff's trading five months after he closed his account with the defendant. The trading was similar to that done with the defendant, and the Court found that it was highly probative on the issue of whether the plaintiff authorized trades by the defendant.

[viii] Rule 404(b) -- Civil Cases -- Insurance Claims

Westfield Ins. Co. v. Harris, 134 F.3d 608 (4th Cir. 1998) : In a declaratory judgment action by an insurer disclaiming liability on the ground that a fire that destroyed the insured's home had been deliberately set, the Trial Judge granted a motion *in limine* excluding evidence of six prior house-fire claims and one truck-fire claim in which the insured had been involved. Reversing a judgment for the insured, the Court held it was an abuse of discretion to exclude the evidence. It was particularly relevant not only because of the "doctrine of chances," but also because of the striking similarities among the incidents. The Trial Judge had erred in improperly treating the high probative value of the evidence as making it "prejudicial" under *Rule 403*.

Dial v. Travelers Indem. Co., 780 F.2d 520 (5th Cir. 1986) : The Court affirmed a judgment against insureds suing to collect on a fire insurance policy on their house. It upheld admission of evidence that the plaintiffs had been burned out of their previous home and that after the fire in this case two properties they occupied had burned. The Court applied the same test it uses in criminal cases to conclude that the evidence was relevant since "the essential issue is the difference between an accident and an intended act."

American Home Assur. Co. v. American President Lines, Ltd., 44 F.3d 774 (9th Cir. 1994) : In an insurer's subrogation action for freeze damage to fruit, the defendant carrier attempted to offer evidence that a surveyor who assessed the damage had a 12-year-old Hong Kong fraud conviction. The Court found no abuse of discretion in exclusion of the evidence, where there was doubt (because of the surveyor's claims that the conviction was coerced) that he had committed the offense, the motive and intent issues on which the evidence was offered were not material to the case, and the conviction was remote in time.

Turley v. State Farm Mut. Auto. Ins. Co., 944 F.2d 669 (10th Cir. 1991) : The Court reversed a judgment for the owner of an allegedly stolen automobile against the insurer following denial of coverage for damage to the car, holding it was error to exclude evidence offered by the defendant that the plaintiff and his coinsured had previously conspired to fake "slip-and-fall" accidents. The evidence was probative of whether the coinsured had an intent to defraud and whether there was collusion on the part of the plaintiff.

Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309 (11th Cir. 1987) , *modified* (11th Cir. 1989): In an action by a restaurant owner on a fire insurance policy, the plaintiff attempted to rebut an arson defense by evidence that the prior owner had retained an interest as an insured party, and by showing similar fires at two other restaurants in which the prior owner had also retained a similar interest. The Court held that this evidence was properly admitted as relevant to whether the third party had a motive to set the fire.

[ix] Rule 404(b) -- Civil Cases -- Miscellaneous Cases

Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990) : In an action by a union member alleging mistreatment by local union officials, the Court held there was no abuse of discretion in admitting evidence that other locals mistreated their members who were associated with the plaintiff, as the fact that the other locals' actions were communicated to the defendants might have had a tendency to show that mistreatment of the plaintiff was motivated by a desire to suppress dissent in the union.

Howard Opera House Assoc. v. Urban Outfitters, Inc., 322 F.3d 125 (2d Cir. 2003) : The building landlord and a fellow tenant sued a retail chain because excessively loud music was being played at its store. The Court held that evidence of excessive noise problems at other stores in the chain was relevant to prove that the defendant "had intentionally breached the implied covenant of good faith and fair dealing, because it tended to show that Urban Outfitters knew that its music had a disruptive effect and insisted on playing it at excessive levels despite that knowledge."

Robert S. v. Stetson School, Inc., 256 F.3d 159 (3d Cir. 2001) : The plaintiff, who had been placed in a school specializing in the treatment and education of juvenile sex offenders, alleged that staff members subjected him to physical and psychological abuse in violation of the school's policy against "horseplay." At trial the plaintiff proffered evidence of prior bad acts by members of the school's staff, to show that the school had a permissive attitude regarding inappropriate behavior toward students by staff. The Court found no abuse of discretion in excluding evidence of incidents that did not involve the plaintiff or the defendant staff members, since there was a distinct possibility that the jury would have considered the excluded evidence to show that the defendants acted in conformity with those prior bad acts on the occasions alleged by the plaintiff.

Morganroth & Morganroth v. DeLorean, 123 F.3d 374 (6th Cir. 1997) : In an action against a former client for attorney's fees, the defendant's ex-wife testified that he had forged documents and signatures. Affirming, the Court held that the evidence was relevant to demonstrate the complexity of the representation and the difficulties that the client created for the attorneys, as well as to rebut a defense of negligence in conducting investigations by showing that the defendant's forgery impeded the investigations.

Blankenship & Assocs. v. NLRB, 999 F.2d 248 (7th Cir. 1993) : The Court, enforcing the NLRB's cease-and-desist order against a consultant to an employer, held that the agency did not violate *Rule 404(b)* in taking notice of the facts of seven prior proceedings in which the consultant was involved although not named as a party. The Court said that the use of the previous decisions was "questionable," but emphasized that the consultant did not present any reason to the agency or to it to suggest that the earlier decisions contained erroneous findings of fact. See also *Chicago Coll. of Osteopathic Medicine v. George A. Fuller Co.* n106(although the evidence could have been admitted, there was no error in excluding under *Rule 403* evidence of the defendant contractor's practices on other projects in this litigation involving disputes over various aspects of construction work on a medical clinic).

Elliot v. Turner Constr. Co., 381 F.3d 995 (10th Cir. 2004) : In a worker's action for injuries suffered during the installation of a temporary bridge, the Court found no abuse of discretion in the admission of evidence regarding the defendant's unpreparedness for the project and their lack of planning for it. The defendant's claim that the evidence was inadmissible under *Rule 404(b)* was rejected because the evidence was intrinsic to the plaintiff's negligence claim and essential to portraying the events leading up to his injury. In a nuisance action against a waferboard manufacturer, *Orjias v. Stevenson, 31 F.3d 995 (10th Cir. 1994)* , the Court affirmed a judgment for the plaintiffs, holding there was no abuse of discretion in admitting evidence of air quality violations at the defendant's waferboard plant in another state, as the evidence tended to show knowledge and notice relevant to the plaintiffs' punitive damages claims. In *Bradbury v. Phillips Petroleum Co.*, n107 the Court affirmed judgments for plaintiffs who sued a mineral exploration company for trespass, assault, and outrageous conduct. It found that evidence of other incidents in which the defendant trespassed or destroyed property was admissible to prove recklessness and to negate any claim of accident of mistake. Although the other incidents did not involve the same types of injuries as the plaintiffs alleged, they involved the same area, the same time period, and similar conduct.

[x] Rule 404(b) -- Civil Cases -- Securities Actions

SEC v. Happ, 392 F.3d 12 (1st Cir. 2005) : Affirming a judgment for the SEC in an action against a former corporate director who sold stock while in possession of nonpublic information, the Court found no abuse of discretion in the admission of evidence of two 1997 letters the defendant wrote to another company while he was a director. The letters were a response to a request by the company that the defendant sell stock he purchased improperly and to disgorge the profits to the company. The defendant acknowledged that he would confirm in advance with the company that a trading window was open before purchasing its stock. The Court reasoned that the letters were admissible to prove the defendant's state of mind in trading in the stock at issue in the instant case, and to show the defendant's understanding of what he could do under the securities laws.

[o] Rule 404(b) -- Common Plan or Scheme

[i] Rule 404(b) -- Evidence Admissible

United States v. Lewis, 693 F.2d 189 (D.C. Cir. 1982) : The Court upheld convictions on 20 counts of transporting forged money orders, finding that evidence of cashing other money orders from the same stolen shipment was properly admitted to prove a scheme of which the defendant was the mastermind.

United States v. DeCicco, 370 F.3d 206 (1st Cir. 2004) : In a case charging fraud and use of fire to commit a felony, the Court reversed a pretrial ruling that excluded evidence of an arson-related fire occurring in March 1992. The Court found that the 1992 fire was probative of a common scheme: it was similar in circumstances to the two fires charged against the defendant, and the object of all the fires was the same property. The Court concluded that "the previous offense leads in progression to the two charged fires, or, put more simply, that DeCicco had one common scheme to burn the Heard Street warehouse, which had previously proven financially unsuccessful." In *United States v. Lau*, n108 the Court held that evidence of the defendants' prior importation of cocaine was admissible to establish ownership of a plane and a common scheme. In *United States v. Cepulonis*, n109 the Court affirmed bank robbery convictions, upholding the admission of testimony that, in the course of their getaway after the robbery, the defendants fired at a police officer and a passing motorist, and of evidence of a shotgun not used in the robbery. The evidence was not admitted to show that the defendants were bad men, but to show that their plan was to distract the police by firing and that they had assembled weapons to be available for the task.

United States v. Levy, 865 F.2d 551 (3d Cir. 1989) : The Court held that the use of a false passport was properly admitted to show common plan in a heroin distribution case.

United States v. Billups, 692 F.2d 320 (4th Cir. 1982) : The Court affirmed convictions for violating the Hobbs Act, the Travel Act, and two criminal provisions in the Taft-Hartley Act. It found that evidence that the defendant had received other payoffs, which had been the subjects of counts dismissed by the Trial Judge, was admissible to show a common plan or scheme.

United States v. Colvin, 614 F.2d 44 (5th Cir. 1980) : The Court held that where the jury could conclude that the defendant was responsible for injuries previously sustained by her infant daughter, evidence of the prior injuries was admissible to show a pattern of abuse.

United States v. Hill, 898 F.2d 72 (7th Cir. 1990) : The defendant was charged with conspiring to manufacture marijuana after he was arrested near a marijuana garden in July 1988. The Court held that evidence he was arrested in December 1987 with six pounds of marijuana seeds was probative of his plan and intent to grow marijuana in the spring of 1988. See also *United States v. Anderson* n110 (in a prosecution for offenses relating to a scheme to fix cases involving driving under the influence, the Court held that evidence of a defendant's involvement in some bribery incidents could be used to prove a common plan involving another person).

United States v. Paul, 217 F.3d 989 (8th Cir. 2000) : The Court affirmed a murder conviction, finding no abuse of discretion in the admission of evidence that the defendant had given the witness a gun and talked about using it to rob a liquor store and kill the owners. The evidence was relevant to establish that the defendant had access to a gun, as well as to show a plan to perform a robbery similar in kind and close in time to (only two weeks before) the charged robbery and murder. Affirming bank robbery convictions in *United States v. Warfield, 97 F.3d 1014 (8th Cir. 1996)* , the Court held there was no abuse of discretion in admitting evidence that a defendant had been stopped in the vicinity of a bank on other occasions in an automobile containing stocking masks, work gloves, and a pillowcase, which were similar to items used in the charged robberies as the evidence tended to show a common pattern or scheme. In *United States v. Miller*, n111 the Court affirmed convictions for offenses arising out of a fraudulent cattle transaction, finding that a transaction not charged in the indictment was part of a scheme or plan and helped to prove the intent of the defendants to defraud.

United States v. Jackson, 845 F.2d 880 (9th Cir. 1988) : The Court held that evidence that the defendant submitted a first set of false claims concerning checks that he had received was admissible to prove the charged scheme, which involved a second set of claims relating to the checks. In *United States v. Winters,* n112 a prosecution for kidnapping and transporting two women for immoral purposes, the Court held that evidence of the defendant's actions toward other women was properly admitted to show his common scheme of using physical force and threats to compel women to engage in acts of prostitution.

United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003) : In a prosecution for theft from an ATM machine, the government's evidence showed that the defendant and others had removed an ATM machine from a mall and had attempted to remove another from a convenience store before they committed the charged crime. The Court held that evidence of the earlier theft efforts was admissible to prove the defendant's plan. In *United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999)* , the Court affirmed a conviction for sexual abuse, by the Principal Chief of the Choctaw Nation, of three female employees of the Nation. The Court found no abuse of discretion in the admission of testimony regarding similar abuse of six other women, as it showed "a common scheme of sexually abusive behavior committed

against female employees of the Choctaw Nation, and the defendant's knowledge he could, by virtue of his position, abuse young female employees without fear of reprisal." Affirming convictions on 13 of 38 counts of mail fraud in *United States v. Primrose*, n113 the Court upheld the admission of evidence concerning 45 kickbacks not charged in the indictment. It concluded that the fact that some of the kickbacks occurred beyond the statute of limitations did not require that they be excluded, since the indictment charged a scheme that began before the 38 overt acts charged and the additional kickbacks were probative of that scheme.

[ii] Rule 404(b) -- Common Plan or Scheme -- Evidence Inadmissible

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting, *inter alia*, evidence that the defendant had previously committed another murder. The prosecutor had only said that the evidence "wasn't just [offered for] identity. Role in the organization, common scheme, plan, a number of different reasons," and the Trial Judge's most complete explanation (in the jury charge) why it was admitted was "for the very limited purpose to show identity, role in the conspiracy, a common scheme or plan." However, there was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity. In *J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994)* , a franchisee's action against a franchiser for fraud and negligence in making representations about the financial prospects of a restaurant franchise, other franchisees testified that the defendant had made similar representations to them. Reversing a judgment for the plaintiff, the Court held it was error to admit the testimony as evidence of a common plan or scheme. "Common plan" acts may be part of a single series of events -- thus tending to show a motive that will establish the commission of a disputed act, the identity of the actor, or his intention -- or they may be sufficiently similar and distinctive as to constitute signature evidence of identity. Since neither motive, intent, nor identity was in dispute, the evidence served only the impermissible purpose of showing the defendant's propensity to commit the charged act. In *United States v. Himelwright*, n114 the Court reversed a postal worker's conviction for interstate threats and extortionate demands, which arose from the defendant's failed attempt to get a transfer to a post office near his children, because evidence of his purchase and possession of firearms was improperly admitted at his trial. The government offered the evidence as proof of plan, but the Court held that the purchase of firearms could not have been part of a preconceived plan to threaten violence and extort a transfer, since it was not until well after the firearms purchase that it became apparent that the defendant would not receive the transfer he sought.

United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981) : In a forgery case the Court found reversible error in the admission of 32 extrinsic forgeries, since the additional forgeries did not tend to establish a plan of which the charged forgeries were a smaller part. The Court noted also the possibility that a jury would be overwhelmed by the sheer number of the offenses.

United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) : In a prosecution for attempting to obtain a controlled substance by misrepresenting the name of the person to appear on prescriptions, the Court reversed convictions for obtaining the substance with the intent to distribute, finding that evidence that the defendant had acquired and distributed other drugs was erroneously admitted, since the other acts were not similar to the scheme alleged in the instant case. Although "[s]ome language in the government's brief suggests that any commission of similar crimes is the sort of 'pattern' that permits the evidence to come in," "[u]nless something more than a pattern and temporal proximity is required, the fundamental rule is gone" and "a pattern is not itself a reason to admit the evidence."

United States v. Carroll, 207 F.3d 465 (8th Cir. 2000) : The Court held, in a bank robbery prosecution, that it was

an abuse of discretion (but harmless error) to admit evidence that the defendant had committed a bank robbery ten years previously. The evidence could not show a plan or pattern because it did not show the full context of the charged crime, was not necessary to prove a plan or scheme element in the charged crime, and did not have such unusual and distinctive characteristics as to be like a signature identifying the perpetrator. In *United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996)* , the Court reversed a conviction for abusive sexual contact with a minor, holding it was error to admit evidence of the defendant's prior acts of sex abuse with minors. The Trial Judge admitted the bad acts as evidence of "plan," but the Court noted that "the victims were different, and the events were far apart in time." Absent more specific linkage, the bad act evidence was relevant to "plan" "only insofar as it tends to prove a propensity to commit crimes, which *Rule 404(b)* prohibits."

[p] Rule 404(b) -- Connecting Accused with Instrumentalities or Fruits of Crime

United States v. Moreno, 991 F.2d 943 (1st Cir. 1993) : The Court affirmed a defendant's conviction for unlawful firearms possession, holding that evidence of gunshots heard prior to his companion's arrest and the companion's possession of a pistol when arrested made it more likely that the object the defendant was seen to pass along to a third companion was the sawed-off shotgun later found nearby. The dissenting Judge believed that the evidence at most showed the defendant's presence during the commission of other crimes by other persons, which is both irrelevant and highly prejudicial. In *United States v. Walters*, n115 the Court held that a photograph showing the defendant holding a weapon was properly admitted in his trial for using a firearm during drug trafficking to show the connection between him and guns that had been seized. In *United States v. D'Alora*, n116 the Court upheld the admission of evidence that the government gave marked money to a codefendant in connection with a drug sale several days before the purchase of larger amounts of drugs that it attributed to the appellant and the codefendant, and that the appellant ended up with some of the marked bills.

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) : Affirming convictions for murder and related offenses, the Court held that evidence of a nightclub shooting involving the defendant was properly admitted because both the charged murders and the uncharged shooting involved a.38 caliber weapon, the defendant told another that he could not plead guilty to the shooting because authorities would try to use the gun in another case, and the bullet from the shooting was forensically similar to those recovered in the murders. Moreover, the shooting evidence placed the murder weapon in the defendant's hands shortly before the murders, which was important because the weapon had been thrown into a river after the murders and was never found.

United States v. Miller, 688 F.2d 652 (9th Cir. 1982) : In a prosecution for theft of a trailer, the Court found no error in admitting evidence that three conveyor belts, stolen from the trailer's owner, were in the defendant's possession. The evidence tended to establish that the trailer found with the defendant was the same trailer that had been stolen. See also *United States v. Calhoun* n117(reversible error to admit evidence of "bait bills" taken in a bank robbery different from that charged in the instant case).

[q] Rule 404(b) -- Consciousness of Guilt

United States v. Levy-Cordero, 67 F.3d 1002 (1st Cir. 1995) : Immediately after a defendant charged in a drug trafficking conspiracy was notified of his impending arrest, he was seized carrying a false passport and social security card. The Court held it was error to admit the evidence with an instruction that it could be used "for the limited purpose of showing whether [he] had the required intent or knowledge." However, because there was no logical reason why possession of the false documents in 1992 would demonstrate his intent or knowledge with respect to drug trafficking in 1987, the error was more favorable to the defendant than would have been a proper instruction admitting the evidence solely on the issue of consciousness of guilt. In *United States v. Boyle*, n118 an armed bank robbery case, the Court held

evidence that the defendant used an alias and had false identification cards six days after the robbery was admissible to show consciousness of guilt.

United States v. Gatto, 995 F.2d 449 (3d Cir. 1993) (en banc): Affirming racketeering convictions, the Court held there was no abuse of discretion in permitting the prosecutor to question a witness as to whether he had seen threatening looks from a courtroom spectator and the defendant. The government contended that these looks intimidated the witness and caused him to become hostile to the government and accommodating to the defense. Although testimony that a defendant looks unhappy during trial or appears irritated at someone testifying for the government will in many instances have little probative value and may be prejudicial, in this case the defendant did not ask for a *Rule 403* ruling and the Trial Judge pointed out that the defendants had an opportunity to examine the witness with respect to any gestures or looks.

United States v. Young, 248 F.3d 260 (4th Cir. 2001) : In a trial on charges of interstate kidnapping and causing death through the use of a firearm, the Court admitted evidence that the defendant had threatened and intimidated the victim's mother. Affirming the convictions, the Court found that this evidence was properly admitted under *Rule 404(b)* to demonstrate the defendant's consciousness of guilt. The Court noted that "Young did not chase and assault a random bystander; he assaulted the victim's mother, who was a potential witness against him in a federal prosecution for murder." In a drug trafficking prosecution, *United States v. Hayden, 85 F.3d 153 (4th Cir. 1996)* , the Court held that evidence of a defendant's threatening a witness was properly admitted to show consciousness of guilt and criminal intent. In *United States v. Kibler*, n119 the Court, upholding a conviction for endeavoring to intimidate a witness, found that evidence of an attempt by the appellant to persuade another witness to change testimony was properly admitted.

United States v. Rocha, 916 F.2d 219 (5th Cir. 1990): Affirming convictions for kidnapping, extortion, and conspiracy, the Court held that evidence a defendant made a death threat against a government witness during the trial was probative of his guilt and of the validity of his duress defense.

United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) : The defendant, who was charged with fraudulently altering money orders, was ordered to provide handwriting exemplars but refused to do so. The Trial Judge granted the defendant's motion *in limine* against introducing evidence of his refusal. Affirming, on interlocutory review, the defendant's conviction of contempt for refusing to furnish the exemplars, the Court reversed the *in limine* ruling, holding that refusal to comply with a lawful order to provide exemplars was probative of the defendant's consciousness of guilt and not likely to produce an improper emotional decision by the jury.

[r] Rule 404(b) -- Conspiracy

[i] Rule 404(b) -- Background Evidence

United States v. Escobar-de Jesus, 187 F.3d 148 (1st Cir. 1999) : Affirming a defendant's convictions for drug-related offenses and engaging in a continuing criminal enterprise, the Court noted that "[i]n a conspiracy case, evidence of other bad acts, subject always to the requirements of *Rule 403*, can be admitted to explain the background, formation, and development of the illegal relationship, ... and, more specifically, to help the jury understand the basis for the co-conspirators' relationship of mutual trust."

United States v. Mathis, 264 F.3d 321 (3d Cir. 2001) : Affirming a conviction for bank robbery, the Court found no error in the admission of an unindicted coconspirator's testimony as to eleven uncharged bank robberies that he and

the defendant committed. The witness was the only person who could describe the conspiracy directly and the evidence regarding the other robberies tended to show the trust that the defendant had in the witness and thus to prove the conspiracy. In *United States v. Echeverri*, n120 the Court held that a government witness' testimony that he had encountered the defendant one year before the charged conspiracy, when both went to a location to purchase substantial quantities of cocaine, was admissible to prove that the defendant had a source of such cocaine.

United States v. Nichols, 750 F.2d 1260 (5th Cir. 1985) : Evidence of the defendants' previous involvement in transporting cocaine was admissible in a conspiracy prosecution to prove the way in which the conspiracy was established and carried out.

United States v. Passarella, 788 F.2d 377 (6th Cir. 1986) : The Court affirmed counterfeiting and drug convictions, finding that testimony concerning prior drug deals was admissible to show the background and the development of the conspiracy charged.

United States v. Al-Dabbi, 388 F.3d 1145 (8th Cir. 2004) , vacated on other grounds, 546 U.S. 973 (2005) : In a cocaine distribution conspiracy prosecution, the Court found no plain error when a cooperating coconspirator was permitted to testify that the defendant had assaulted his wife and that the wife had asked the witness to dispose of her husband's gun because she feared for her life. As the wife was a member of the conspiracy, the evidence was probative of the defendant's control over the conspiracy through violence and fear, and that probative value was not substantially outweighed by the danger of prejudice. In *United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004)* , the Court affirmed convictions for murder in aid of racketeering although the government had been erroneously permitted to introduce a certified copy of one defendant's prior conviction for shooting another man. While evidence that the defendant was incarcerated along with a member of the gang that he joined had probative value, evidence of the charge for which he was incarcerated had little relevance.

United States v. Mora, 845 F.2d 233 (10th Cir. 1988) : The Court held that evidence of conspirator statements about an uncharged drug transaction one month before the charged transaction was admissible to explain how the conspiracy started. See also *United States v. Orr* n121(evidence of other acts explained how conspiracy started).

[ii] Rule 404(b) -- Conspiracy -- Particular Relevance and Problems

United States v. Manner, 887 F.2d 317 (D.C. Cir. 1989) : The Court stated that a conspiracy charge "increases the probativeness of *Rule 404(b)* evidence," although it remanded for an on-the-record ruling under *Rule 403*. In *United States v. Moore*, n122 a majority of the Court affirmed convictions for conspiracy to sell cocaine, despite a vociferous dissent. The government's key witness, who had lived with one of the defendants, had set up a meeting for an undercover agent to purchase marijuana and cocaine. One defendant noticed that the agent's currency appeared to be marked, and no sale was actually made. The government arrested the defendants and charged them with conspiracy and a variety of substantive offenses. At trial, the witness detailed her former housemate's drug dealings. The majority found that the testimony was properly used to prove intent, especially since the defendants' theory was that the sale was a sham, not a real attempt to sell drugs, and the housemate raised an entrapment defense. The dissenting Judge observed that the witness could recall few specifics about any prior trafficking on the part of the housemate and expressed grave concern that the "vague and inferential bad acts testimony could not help but to aggravate the confusion, complexity and 'inherent dangers' that can be associated, even under the best of circumstances, with a conspiracy charge."

United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993) : In the prosecution of two leaders of a large drug trafficking

conspiracy, the government introduced a copy of the complaint in the case that was annotated by one of the defendants with death threats against informant and agent sources of the allegations. The annotations had apparently been made after all the other conspirators had been arrested. The document was admitted against the conspirator making the annotations as evidence he had sufficient familiarity with the operation to identify the unnamed informants; the Trial Judge instructed that it was not binding on the other defendant on trial, but that acts and statements of coconspirators could be considered against any defendant in determining whether the government had proved the charges. The Court held that the annotated complaint should not have been admitted against the codefendant who did not make it because the statements were not made during and in furtherance of the conspiracy and that the instruction was insufficient to protect the codefendant from its use against him, but the error was harmless.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting, *inter alia*, evidence that the defendant had previously committed another murder. The prosecutor had only said that the evidence "wasn't just [offered for] identity. Role in the organization, common scheme, plan, a number of different reasons," and the Trial Judge's most complete explanation (in the jury charge) why it was admitted was "for the very limited purpose to show identity, role in the conspiracy, a common scheme or plan." However, there was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity.

United States v. Jackson, 339 F.3d 349 (5th Cir. 2003) : Reversing a conviction for transporting stolen goods from a jewelry store burglary, the Court held it was an abuse of discretion to admit evidence that the defendant had a previous felony conviction for stealing watches. While prior conviction evidence has a tendency to prove the difficult intent element in conspiracy cases, that the defendant knowingly joined a plan to further an unlawful objective, in this case, where there was other evidence going to intent and only the identification issue was contested, the evidence had very little probative value. Moreover, it had a substantial potential to cause unfair prejudice, because of the great danger that the jury would decide that he was involved in the conspiracy because of his prior criminal conduct.

United States v. Dudek, 560 F.2d 1288 (6th Cir. 1977) : The Court upheld a ruling admitting evidence of crimes not charged in the indictment to show the appellant's intent. The Court suggested that in conspiracy cases, other crimes evidence might be "particularly probative" to show a system of criminal activity.

United States v. Grabiec, 563 F.2d 313 (7th Cir. 1977) : In a prosecution for conspiracy to extort money under color of official right, the government offered evidence that on four other occasions the appellant's coconspirator accepted money in exchange for providing state licenses. The majority held that two of the occasions fell within the conspiracy charged, that the other two were properly admitted as a part of a pattern of conduct, and that instructions to the jury that the evidence of the four other occasions was admissible only to show the coconspirator's intent and was not to be used against the appellant were adequate. The dissenting Judge emphasized that there was no evidence that the appellant was involved on the other occasions or that they related in any way to the conduct that was at the heart of the charged conspiracy, that the evidence was not really probative on the intent issue, and that jury instructions in a conspiracy case were of little value.

Moore v. United States, 178 F.3d 994 (9th Cir. 1999) : In a trial on bank robbery and conspiracy charges, the defendant argued that it was error to admit a statement made by the defendant to an accomplice just before the robbery. The accomplice expressed misgivings about committing the bank robbery, and the defendant told the accomplice that he had robbed a bank before and that it was easy. The Court found that this evidence was properly admitted to prove that

the defendant had used his prior success as a bank robber to persuade the accomplice to enter into a conspiracy. In *United States v. Bronco*, n123 the Court reversed convictions for conspiracy to sell and possession and passing of counterfeit money, finding error in the refusal to grant a severance so that the conspiracy charge would be tried separately. The Court was concerned that evidence that the appellant was a violent man, admitted on the conspiracy charge, might have prejudiced the jury on the other charges.

United States v. Gamble, 541 F.2d 873 (10th Cir. 1976) : The Court approved the introduction of other crimes evidence in a criminal prosecution, noting that "[s]uch evidence is particularly relevant in a conspiracy case."

United States v. Glen-Archila, 677 F.2d 809 (11th Cir. 1982) : Glen-Archila was a crew member of a ship found by the Coast Guard to be carrying marijuana in 1979. At his conspiracy trial, the government introduced evidence that he had been aboard a ship that the Coast Guard found carrying marijuana in 1976. According to the Court, "the government often has [difficulty] in proving intent in conspiracy cases," so there was no error in admitting the evidence. We question whether this balance gave sufficient weight to the possibility that a jury would misuse the evidence as character evidence.

[s] Rule 404(b) -- Corroboration

United States v. Bailey, 319 F.3d 514 (D.C. Cir. 2003) : In a prosecution for conspiring to distribute cocaine, the government offered evidence of the defendant's uncharged drug deals, including two specific episodes in New York. The defendant argued that, while the incidents may have properly been admitted to show knowledge, intent, etc., the Trial Judge erred in instructing the jury that it could use the incidents to corroborate another witness' testimony that the defendant also engaged in uncharged drug transactions with the witness. Distinguishing between corroborating the defendant's propensity, which is impermissible, and corroborating inferences for proper purposes (e.g., knowledge, intent), the Court concluded that "the evidence had little probative value for permissible corroborative purposes" and "there were risks of unfair prejudice, confusion and misleading the jury," but the error was harmless.

United States v. Figueroa, 976 F.2d 1446 (1st Cir. 1992) : The Court held that evidence tending to show welfare fraud by defendants in a drug case was properly admitted as direct corroboration of significant conspiracy-related conversations with an informant.

United States v. Everett, 825 F.2d 658 (2d Cir. 1987) : Although the Court affirmed bank robbery convictions and the admission of testimony concerning a prior robbery, it indicated that when other crimes evidence is admitted for corroborative purposes, the corroboration must be "direct" and the matter corroborated must be "significant." In *United States v. Williams*, n124 the Court affirmed a conviction for conspiracy to commit bank larceny, observing that other crimes evidence could be admitted to directly corroborate a significant matter in a case.

United States v. Hans, 738 F.2d 88 (3d Cir. 1984) : The Court held that evidence seized from one codefendant was admissible against another, where the evidence corroborated a government witness' testimony about how the bank robbery occurred.

United States v. McCarty, 36 F.3d 1349 (5th Cir. 1994) : The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in admitting evidence of a prior house burglary by the defendant, as weapons taken in the burglary were used in the robbery and the evidence corroborated admissions the defendant made to a fellow inmate while awaiting trial.

United States v. Copeland, 51 F.3d 611 (6th Cir. 1995) : Although finding that it was a close question, the Court held in a drug distribution prosecution that evidence of the defendant's arrest in 1988 for possessing a weapon was not too attenuated to corroborate a witness' testimony that he had been attacked by the defendant with a pistol in 1991.

[t] Rule 404(b) -- Duress Defense

United States v. Verduzco, 373 F.3d 1022 (9th Cir. 2004) : Affirming a conviction for illegal drug importation, the Court found no abuse of discretion in admitting evidence of the defendant's prior drug smuggling to disprove the defendant's claim of duress. The defendant argued that evidence offered to rebut an affirmative defense should not be as readily admitted as evidence offered to prove a material element of a crime, but the Court concluded that "we are not persuaded that bad acts evidence admitted against an affirmative defense is somehow more troubling than when the same evidence is admitted to help prove a material element of the statutorily defined defense."

[u] Rule 404(b) -- Entrapment Defense

United States v. Ramsey, 165 F.3d 980 (D.C. Cir. 1999) : The Court affirmed a conviction for possession of cocaine with intent to distribute, holding there was no error in admitting evidence of the defendant's past criminal history. The evidence was not offered to show the defendant's propensity to commit a crime but to respond to defendant's attempts to challenge the voluntariness of a confession and to rebut defense arguments that he was entrapped by an informant.

United States v. Van Horn, 277 F.3d 48 (1st Cir. 2002) : The defendant was convicted for being a felon in possession of explosives, and the Court affirmed, holding that "in situations where the defendant employs entrapment as a defense to criminal liability, prior bad acts relevant to a defendant's predisposition to commit a crime are highly probative and can overcome the *Rule 404(b)* bar." Although the defendant complained about the admission of detailed evidence concerning his prior act, the Court observed that in an entrapment case the details are especially important if there was no conviction, to make the incident meaningful to the predisposition issue. In *United States v. Houle, 237 F.3d 71 (1st Cir. 2001)* , the defendant was charged in a cocaine conspiracy arising from activities of a motorcycle club, which was infiltrated by an informant who assisted the government in setting up a sham cocaine deal for which the defendant provided security. Affirming, the Court found no abuse of discretion in the admission of evidence that a few days after providing security for the cocaine deal, the defendant provided security for the same government agent while he purportedly collected a gambling debt. The evidence was relevant to prove intent and absence of mistake, and "other acts that bear on a defendant's predisposition are highly probative when, like here, the defendant claims entrapment."

United States v. Knox, 112 F.3d 802 (5th Cir. 1997) : In a trial for money laundering, the government responded to the defendant's claim of entrapment with evidence that he had solicited undercover agents to commit murder. The Court found no error, noting that "[t]he jury could conclude that a person just 'funnin' ' " would not solicit murder and, therefore, the real Knox was on the undercover tapes, not in the courtroom. If the jury believed the government's portrayal of Knox, it could infer that he was predisposed to launder money."

United States v. Higham, 98 F.3d 285 (7th Cir. 1996) : In a murder-for-hire prosecution, the defendant pursued an entrapment defense. In rebuttal, the prosecution offered several uncharged acts of extreme violence committed by the defendant against other individuals. The Court found no error, "for the government had a right to meet Higham's claim of entrapment with evidence that he was predisposed to engage in a murder-for-hire scheme."

United States v. Coleman, 284 F.3d 892 (8th Cir. 2002) : Where the defendant, charged with cocaine offenses, raised an entrapment defense, the Court held that evidence of a previous sale of crack cocaine by the defendant to the same undercover agent involved in the charged offense was properly admitted to show the defendant's predisposition to commit the charged crime.

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) : The defendant claimed that he was entrapped into participation in the charged sale of three pounds of methamphetamine. The government offered as proof of his predisposition that he was a methamphetamine user and that he had at some point in the past sold another participant a couple of single $20 doses of methamphetamine. However, the defendant was not permitted to testify that he had no prior arrest or conviction record and certainly no record of any past criminal behavior suggesting in any way that he might be predisposed to engage in large-scale drug trafficking. Reversing, the Court held that the excluded evidence was relevant to the defendant's intent, especially since a government informant had initiated the transaction, determined the type and volume of drugs involved, and arranged the meeting with the "buyer." It was also important to counter any prejudicial effect of the evidence of prior small sales. Because the defendant's character is an essential element of the entrapment defense, exclusion of the evidence was an abuse of discretion. One Judge dissented, arguing that an absence of arrests or criminal record is not relevant on the question of predisposition, because it may simply mean he has never been caught.

[v] Rule 404(b) -- Explaining Conduct

United States v. Roe, 210 F.3d 741 (7th Cir. 2000) : Affirming a conviction for conspiring to distribute cocaine, the Court found no error in the admission of the defendant's 1989 conviction for the same offense. The defendant had introduced testimony from police officers that no drug paraphernalia was ever found at his house and no evidence of drug activity was ever found in his trash because the defendant never placed trash in front of his house. The Court found that the earlier conviction helped to explain why the defendant would not keep drug paraphernalia at his house and why he did not put out trash in front of his home for collection by municipal crews.

[w] Rule 404(b) -- Foundation for Other Acts

Huddleston v. United States, 485 U.S. 681 (1988) : This important Supreme Court case holds that evidence offered under *Rule 404(b)* is to be assessed under *Rule 104(b)*, the conditional relevance rule. The Court noted that the defendant was to be protected against undue prejudice by *Rule 403*, not by the Trial Judge's application of a preponderance or clear and convincing standard under *Rule 104*. The case is discussed in the Editorial Explanatory Comment, § 404.02[18].

United States v. Gilan, 967 F.2d 776 (2d Cir. 1992) : The Court reversed a conviction for conspiring to steal a shipment of shoes, holding it was error to admit evidence of an earlier similar theft because there was no evidence linking the defendant to the earlier theft.

United States v. Kenny, 973 F.2d 339 (4th Cir. 1992) : In a prosecution for obstructing a grand jury investigation,

the Court held that testimony that a significant piece of paper had been taken in a burglary of a witness' apartment shortly after she appeared before the grand jury was not admissible under the Rule, as there was no evidence connecting the defendant to the break-in. The testimony was relevant and admissible, however, to explain the absence of the piece of paper at the trial. The Court also held it was an abuse of discretion (but harmless) to admit evidence that the defendant possessed checks made out to another, as there was no showing in the record that the checks were stolen or that the defendant was not authorized to endorse them.

United States v. Floyd, 343 F.3d 363 (5th Cir. 2003) : The Court affirmed a conviction for insurance fraud in a scheme involving staged automobile accidents, finding no abuse of discretion when evidence was admitted that the defendant participated in uncharged staged auto accidents, since there was sufficient proof that she committed the other offenses, which were relevant to her intent and knowledge. In *United States v. Anderson, 933 F.2d 1261 (5th Cir. 1991)* , a conviction for arson of a furniture warehouse was reversed because the Trial Judge made no ruling that jurors could find by a preponderance that each of four previous fires in the defendant's furniture factory had been acts of arson and that the defendant was involved. In *United States v. Fortenberry*, n125 the Court reversed convictions for offenses allegedly committed when the defendant placed a small explosive device on a car belonging to his ex-wife's father. It concluded that evidence of a series of attacks against the ex-wife, her attorney, her father, and others was improperly admitted because, *inter alia*, the government had no evidence that the defendant committed the acts and there was not even evidence that all were committed by the same person.

United States v. Burke, 425 F.3d 400 (7th Cir. 2005) : The Court affirmed a conviction for perjury before a grand jury investigating a prisoner's escape from custody. It found no error in the admission, as proof of motive and method, of evidence that the defendant had offered to sell a handcuff key to another prisoner, finding that the Judge properly used a preponderance standard in determining whether the defendant had made the offer. It rejected the argument that *Huddleston* did not apply where the government proffers evidence that neither a Judge nor a jury had previously determined was committed and that proof beyond a reasonable doubt was required. The Court suggested, however, that proof beyond a reasonable doubt might be required if the fact to be proved was a substantive offense rather than just an offer as in this case. In *United States v. DeGeratto*, n126 a conviction for transporting and receiving stolen truckloads of food products was reversed because the Trial Judge permitted the defendant to be cross-examined at length regarding a prostitution ring about which he denied any knowledge and in which there was no showing he had any involvement. In *United States v. Meeker*, n127 the Court reversed a conviction for failing to report income, holding that the prosecutor's questions, which suggested prior misconduct on the part of the defendant and that the defendant was guilty of engaging in the very conduct for which he was being tried, were unsupported by evidence and required reversal.

United States v. Worthon, 315 F.3d 980 (8th Cir. 2003) : Affirming a Postal Service employee's conviction for mail theft, the Court held it was an abuse of discretion (but harmless error) to admit evidence of previous thefts and disappearances of items from the post office. The government had not shown a connection between the defendant and those other acts by clear and convincing evidence. In *United States v. Adediran, 26 F.3d 61 (8th Cir. 1994)* , a prosecution for using false Social Security numbers in St. Louis as part of a check-kiting scheme, the Court held there was sufficient evidence connecting the defendant with uncharged crimes in Rockford, Ill., as checks issued in St. Louis were deposited in Rockford, false SSNs used at different banks in the two cities all began with the same first five digits, and there were similarities in identifications and in handwriting.

United States v. Dickerson, 248 F.3d 1036 (10th Cir. 2001) : Affirming drug convictions, the Court held that evidence of post-conspiracy drug activity was properly admitted to prove intent. The Court stated that "the uncorroborated word of an accomplice provides a sufficient basis for concluding that the defendant committed extrinsic acts admissible under *Rule 404(b)*."

[x] Rule 404(b) -- Identity

[i] Rule 404(b) -- Generally

[A] Rule 404(b) -- Circumstances Insufficiently Probative

United States v. Pisari, 636 F.2d 855 (1st Cir. 1981) : The Court reversed a conviction for committing a robbery with a knife because the government introduced a statement made by the defendant to a government agent admitting a prior robbery in which such a knife was used. There was no showing of identifying characteristics that would have tended to prove identity: there was no evidence of the kind of knives used, no proof of the timing of the other crime, and no similarity of motive. "The single fact that in committing a robbery, one invokes the threat of using a knife falls far short of a sufficient signature or trademark upon which to posit an inference of identity."

United States v. Sampson, 385 F.3d 183 (2d Cir. 2004) : The Court vacated convictions for drug possession offenses that took place in 1998 because evidence of drug trafficking and firearms offenses in 2000 was improperly admitted at a joint trial on all the charges. The 1998 charges arose from an officer's testimony that he saw a man in a yellow jacket making a drug transaction; when the defendant was arrested a short while later, he was not wearing a yellow jacket, but the yellow jacket (with marijuana and cocaine in the pockets) was found in an area where the defendant had been observed. The 2000 charges arose from a drug sale (recorded on videotape) by the defendant to an undercover officer. The Court held that evidence of the defendant's being a drug dealer in 2000 had no tendency, except through the impermissible propensity inference, to prove that the defendant was the man in the yellow jacket in 1998. In *United States v. Edwards, 342 F.3d 168 (2d Cir. 2003)* , the Court affirmed a conviction for conspiring to import a substance containing cocaine, holding that evidence of a cocaine-cutting recipe found in the defendant's car when he was arrested was properly admitted to prove knowledge and intent, but not to prove identity. The Court reasoned that the defendant admitted that he used the name Darnell Johnson, so the fact that the note was found among papers containing that name did not tend to make a witness's identification of the defendant more accurate. The Court explained that for a rational juror to conclude that the recipe supported the identification, the juror would have had to reason first that the defendant was a cocaine dealer and second that a cocaine dealer was more likely to participate in the charged scheme than a person not involved in the cocaine trade; "[s]uch reasoning, of course, calls for the very propensity inference prohibited under *Rule 404(b)*," and "[t]hus, the recipe was not properly received as proof of defendant's identity." In *United States v. Neary*, n128 the Court overturned a defendant's convictions for destroying his restaurant in 1981 with an explosive, finding that the Trial Judge improperly admitted evidence concerning two fires (in 1976 and 1977) at a tenement house he owned and another fire (in 1980) that destroyed his dry cleaning business. The issue in the case was the identity of the person who set fire to the building, and the Court reiterated that prior acts used to prove identity must be more similar than acts offered for other purposes. Since the government had no evidence that the prior fires were incendiary in origin, the Court concluded that the acts were improperly used. The fact that the defendant might have collected insurance from the prior fires was not relevant to the question of identity; it is common knowledge that an insured can collect on a fire insurance policy covering property.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : The Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting, *inter alia*, evidence that the defendant had previously committed another murder. The prosecutor had only said that the evidence "wasn't just [offered for] identity. Role in the organization, common scheme, plan, a number of different reasons," and the Trial Judge's most complete explanation (in the jury charge) why it was admitted was "for the very limited purpose to show identity, role in the conspiracy, a common scheme or plan." However, the similarities between the two killings were not sufficient to be relevant on the identity issue. Even if the evidence had some slight probative value, it would be substantially outweighed by the prejudicial effect of showing the defendant's murderous propensity.

United States v. Brown, 71 F.3d 1158 (5th Cir. 1995) : The Court reversed a conviction for possession with intent to distribute crack cocaine, finding error when the prosecution elicited the defendant's prior cocaine conviction in cross-examining the sole defense witness about her knowledge of the defendant. The Court concluded that the only way the cross-examination "could help identify Mr. Brown was through the inference that because Mr. Brown committed the crime of possession with intent to distribute before, he had done so again." In *United States v. Carrillo, 981 F.2d 772 (5th Cir. 1993)* , the Court reversed a defendant's drug convictions, finding it was error to admit two other sales of controlled substances. The sales did not involve the kind of "signature" that would prove identity.

United States v. Wright, 901 F.2d 68 (7th Cir. 1990) : The Court reversed a conviction for cocaine distribution because a tape-recorded telephone conversation in which the defendant claimed to be a wholesale drug dealer did not tend to show the identity of a perpetrator charged with a retail cocaine sale.

United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998) : The defendant was convicted of a marijuana offense, the government's allegation being that he fled from a car full of marijuana. Reversing the conviction on other grounds, the Court expressed concern over the admission of the defendant's prior conviction for possession with intent to distribute marijuana. The government argued that the uncharged misconduct was probative of identity, since in both instances the defendant fled a vehicle containing a large amount of marijuana. However, the Court concluded that this conduct was not unique enough to constitute "a personal signature." In *United States v. Luna, 21 F.3d 874 (9th Cir. 1994)* , the Court reversed bank robbery convictions, finding it was error to admit evidence of two subsequent bank robberies attributable to two of the defendants. The Court found that "the common features in this case were largely generic," since they involved use of guns, masks, gloves, and bags in a typical "takeover robbery," in which people are intimidated by loud entry, profanity, and abuse of bank employees. Differences in personnel among the robberies undermined the supposed distinctiveness of the crimes.

United States v. Jones, 28 F.3d 1574 (11th Cir. 1994) , *modified*, *74 F.3d 275 (11th Cir. 1996)* : In a prosecution for drug trafficking offenses, the Court held it was error (but harmless) to admit evidence of the defendant's prior convictions for gambling offenses to prove that he occupied an apartment in which slips that evidenced illegal commercial gambling were found. There was no showing of a distinctive *modus operandi* connecting the prior offenses and the slips in the apartment, and the evidence, which had low probative value, had a great potential to prejudice the defendant.

[B] RULE 404(b) -- Identity -- Generally -- Circumstances Sufficiently Probative

United States v. Pindell, 336 F.3d 1049 (D.C. Cir. 2003) : The Court affirmed a police officer's conviction for civil rights violations and armed robbery of prostitutes and their customers, finding no abuse of discretion in the admission of testimony by two of the prostitutes that the defendant had previously paid them to engage in sexual acts. The evidence showed the prostitutes' familiarity with the defendant, thus supporting their ability to identify him, and its probative value on the contested identity issue was not substantially outweighed by the danger of unfair prejudice.

United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995) : The Court affirmed a conviction on various charges resulting from a bomb explosion, finding no error in the admission of evidence that the defendant had built another bomb five years earlier. There was extensive evidence showing both similarities and significant differences between the bombings; given the number of comparable factors, it was proper to admit the evidence and let the discrepancies go to its weight. In *United States v. Ingraham*, n129 the Court upheld the admission of evidence of prior threatening phone calls to prove identity in a prosecution for threatening to kidnap or injure. In *United States v. Andiarena*, n130 the Court affirmed a drug conviction, holding that evidence of the defendant's prior involvement in a network was admissible to

prove that he was the source of cocaine.

United States v. Muniz, 60 F.3d 65 (2d Cir. 1995) , *amended on other grounds on reh'g, 71 F.3d 93 (2d Cir. 1995)* : The Court affirmed a conviction for possession of heroin with intent to distribute. Police found the heroin in a mailbox, to which both the defendant and his mother had access; they also found a large number of empty glassine envelopes in the bedroom where the defendant was arrested. Concluding there was no error in admitting the empty glassines, the Court reasoned that the defendant's possession of the tools of the heroin trade at the time heroin was found in his mailbox "increases the likelihood that it was he, rather than another person having possible access, who in fact controlled the drugs in the mailbox." In *United States v. Cruz*, n131 evidence that a defendant had 13 vials of cocaine on the day after a sale was held properly admitted to prove that the defendant was the person who made the sale of similar vials. In *United States v. Gubelman*, n132 the Court held that evidence from others who had given the defendant bribes tended to make the defense argument of mistaken identity less likely.

United States v. Bailey, 111 F.3d 1229 (5th Cir. 1997) : Affirming a defendant's convictions for aggravated sexual abuse, burglaries, and a firearms offense, the Court held that evidence of another break-in was properly admitted to prove identity as to the two charged break-ins, since all three events took place in the homes of single women living in the same area, all occurred during pre-dawn hours, and each victim was physically touched in some way without consent. In *United States v. Evans*, n133 the Court held that evidence that a firearm defendant had a gun, glasses, a wig, and false identification when she was arrested was properly admitted to prove, in connection with similar evidence found in an apartment, that the defendant was the person who illegally obtained firearms. The Court reasoned that there are proper ways to prove identity other than by proving a *modus operandi*, and that the similarity of the evidence in the instant case was probative of identity. In *United States v. Torres-Flores*, n134 the Court reversed a conviction for assaulting a Border Patrol agent because of the improper use of mug shots, but it held that evidence that shortly after the assault the defendant had been apprehended at a point known for its high volume of illegal alien traffic was admissible. The evidence was probative of identity because it showed the defendant's connection with the location where the charged act occurred.

United States v. Lattner, 385 F.3d 947 (6th Cir. 2004) : The Court affirmed a cocaine conviction, finding no abuse of discretion when evidence was admitted that certain heroin packets bearing a particular stamp were seized from the defendant on two prior occasions. The evidence was probative of identity, intent, and a common plan or scheme, because it connected the defendant to the charged drug transactions, where a similar stamp was found. In *United States v. Monsour, 893 F.2d 126 (6th Cir. 1990)* (per curiam), a bank security guard was permitted to testify at the defendant's trial for bank robbery that the person in the robbery surveillance films was the same person whose car license number he secured eight days earlier after seeing him acting suspiciously at another nearby branch of the bank that was robbed. The Court held there was no error, stating that this was admissible because it was part of the investigative linkage that led the FBI to the defendant.

United States v. White, 368 F.3d 911 (7th Cir. 2004) : The Court affirmed a conviction for felon firearm possession, holding that evidence of numerous customer invoice forms from the newspaper where the defendant had worked, which were seized from the defendant's residence and tended to prove identity theft, was properly admitted to prove that the defendant kept his belongings in the dresser where the guns were found. The Court noted that the evidence was "highly probative of White's identity" and that the bad act of identity theft "was not of the type which typically arouses strong passions in jurors." In *United States v. Joseph, 310 F.3d 975 (7th Cir. 2002)* , the defendant was convicted of bank fraud after he opened accounts under his aliases, stole checks, made them out to his aliases, and then deposited and withdrew funds from the fraudulent accounts. The Court held there was no abuse of discretion in admitting evidence that the defendant had stolen a check mailed to one Donnell Cooper, since that tended to identify him as the person who had used that name as an alias in establishing one of the accounts. In *United States v. Chong*

Won Tai, n135 the Court affirmed a conviction for extortion, holding that evidence of the defendant's uncharged actions was relevant to prove identity and to prove that he intended to threaten by using the words he chose. This was not a case in which identity was proved by similar conduct, but rather by showing the defendant's connection with certain other individuals who were involved in the uncharged actions. In *United States v. Townsend*, n136 the prosecution offered evidence that one defendant sold cocaine to an undercover agent before the charged conspiracy began. The Court held that the evidence was properly admitted as proof of identity because it demonstrated the defendant responded to a beeper number paged by another defendant during the conspiracy. In *United States v. Covelli*, n137 the Court affirmed convictions for crimes arising out of the robbery of a shop and the disposition of stolen goods, upholding the admission of testimony that one of the defendants had previously been in possession of a small caliber pistol. It said that "evidence of prior possession of a weapon can be used to prove opportunity and identification even where it cannot be directly identified as the weapon used in the crime."

United States v. Jackson, 714 F.2d 809 (8th Cir. 1983) : The Court approved the use of irregularities in invoices and time sheets to prove identity and lack of mistake in a prosecution for making false statements in federal invoices.

United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) : In a prosecution for unauthorized excavation of a prehistoric grave site, the Court held there was no error in admitting evidence that the defendant had illegally excavated at the site seven years earlier. The Court concluded that the evidence was admissible to prove identity, reasoning that "the remoteness of the location, the difficulty of access, and the varying concentration of artifacts, all suggest the person who committed both the prior act and the charged acts was one possessing distinctive, unique and unusual skills necessary to locate and excavate the artifacts."

[ii] Rule 404(b) -- Identity -- *Modus Operandi*

[A] Rule 404(b) -- Bank Robbery

United States v. Lawson, 410 F.3d 735 (D.C.Cir. 2005) : Affirming a conviction for bank robbery, the Court found no error in the admission, as proof of identity, of evidence regarding a bank robbery the day following the charged robbery. The two robberies "shared sufficient characteristics to permit an inference of identity. Both were executed by a taller man wielding a distinctive silver-hammered handgun and a shorter man who collected money from the tellers, and the taller individual appeared to wear the same clothes during both crimes."

United States v. Myers, 550 F.2d 1036 (5th Cir. 1977) : A conviction for bank robbery was reversed because, *inter alia*, evidence of a subsequent bank robbery in another state was improperly admitted. The Court said that to prove *modus operandi*, the charged and other crimes need not be identical, but they must possess common features, and the more distinctive each of the common features is, the fewer required for the probative value of the evidence to be significant. The Court also said "a much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind."

United States v. Mack, 258 F.3d 548 (6th Cir. 2001) : In a bank robbery trial, evidence was admitted of an uncharged bank robbery committed by the defendant. Affirming, the Court found no abuse of discretion, since identity was in issue and the defendant did not dispute committing the other robbery involving the same "signature" characteristics -- the combination of wearing a ski mask and a hooded sweatshirt, bursting into the bank and leaping over the teller counter, and then leaping over the counter again to leave -- together with similarities in the location of the robberies, the descriptions of the robbers, the commands used, the methods of escape, and the days and times of the

robberies. However, the Court also held it was error (but harmless) to admit evidence that the uncharged robbery was followed by a high-speed chase involving seven or eight police cars.

United States v. Rollins, 301 F.3d 511 (7th Cir. 2002) : The Court affirmed bank robbery convictions, finding no abuse of discretion in denying a motion to sever, since evidence of the other robberies, and a robbery to which the defendant had separately pleaded guilty, were admissible to establish identity or *modus operandi*. Common to most, if not all, of the robberies was: (1) donning thick, dark-framed glasses; (2) wearing a beige, three-quarter-length down coat; (3) the ruse of asking seemingly innocuous customer questions before and during the robbery; and (4) using a black and grey handgun placed calmly on the teller counter. Moreover, the witnesses to those robberies gave similar descriptions of the perpetrator. In a bank robbery prosecution, *United States v. Robinson, 161 F.3d 463 (7th Cir. 1998)* , the Court held it was not an abuse of discretion to admit evidence of an uncharged bank robbery. The similarities between the two robberies made them "clearly distinctive from the thousands of other bank robberies committed each year." In both cases, the robber wore an orange ski mask prior to entering the bank, entered the bank carrying a distinctive Louis Vuitton duffel bag in one hand and a gun in the other, vaulted over the teller counter, and emptied the drawers himself after placing the gun down. The getaway vehicle in each case was a blue Chevrolet Cavalier. Finally, the crimes were committed within ten days of each other, and the banks were within 25 miles of each other. In *United States v. Moore*, n138 the Court affirmed convictions for robbing two financial institutions, holding that evidence of the defendant's prior bank robbery conviction was properly admitted. The Court found a number of significant similarities: two men of the same race and height committed the crimes within a few months of each other, in the morning, by emptying cash drawers largely by themselves, stuffing money into their pants, using hoods or masks and dark clothing, targeting small savings institutions in residential neighborhoods with no drive-up window, and casing the institutions by having the defendant enter a half hour to an hour before the robbery to politely ask for directions or a job application. In *United States v. Smith*, n139 the Court held there was no abuse of discretion in a bank robbery case in admitting evidence of another bank robbery, where both were committed by slender young white males, the robbers were both driven to the bank by another person, both brandished knives (an atypical holdup weapon), both moved around the counter to help themselves rather than demanding money from the teller, both targeted small branches, and the robberies were close in time and location.

United States v. Almendares, 397 F.3d 653 (8th Cir. 2005) : The Court affirmed a bank robbery conviction, finding no abuse of discretion in admitting evidence that the defendant had committed a robbery seven months earlier at a variety store in a town 15 miles away. In both cases the robber wore a black ski mask, a gray sweatshirt, and white gloves, "spoke very few words, used a handgun aggressively to direct the victims, and pushed his gun into their shoulders." In a bank robbery prosecution, *United States v. Carroll, 207 F.3d 465 (8th Cir. 2000)* , the Court held that it was an abuse of discretion (but harmless error) to admit evidence that the defendant had committed a bank robbery ten years previously. In both the prior and the charged crimes the perpetrator wore a nylon stocking mask, carried a gun, and vaulted over the counter to put the bank's money in a bag. However, those characteristics are too common to form a *modus operandi* uniquely identifying the defendant as the perpetrator.

United States v. Luna, 21 F.3d 874 (9th Cir. 1994) : The Court reversed bank robbery convictions, finding it was error to admit evidence of two subsequent bank robberies attributable to two of the defendants. The "common features in this case were largely generic," since they involved use of guns, masks, gloves, and bags in a typical "takeover robbery," in which people are intimidated by loud entry, profanity, and abuse of bank employees. Differences in personnel among the robberies undermined the supposed distinctiveness of the crimes. In *United States v. Johnson*, n140 the Court affirmed convictions for two bank robberies, holding that evidence of a third bank robbery was properly admitted to prove identity by showing a *modus operandi*, i.e., orally asking for change and then demanding money.

United States v. Oberle, 136 F.3d 1414 (10th Cir. 1998) : In a bank robbery case the prosecution introduced the

defendant's acknowledgment to an FBI agent that "the robberies were his MO." The Court found no abuse of discretion in admitting the statement, since information that the defendant had committed bank robberies in a similar manner was relevant to the identity of the robber in this case, where identity was a main issue. Affirming a bank robbery conviction in *United States v. McGuire, 27 F.3d 457 (10th Cir. 1994)* , the Court held there was no error in admitting evidence that the defendant, with one or both of the government's principal witnesses, had committed seven other robberies. Evidence that each involved traveling in a van to a medium-sized Midwest city, staying a day or two to purchase an inexpensive car and find a small bank with few employees close to a shopping area and interstate highway access, and committing the robbery when no customers were in the bank tended to show that the defendant was involved and that the charged robbery was part of a larger plan. A dissenting Judge agreed with the *Rule 404(b)* ruling, but believed the jury should have been cautioned about accepting uncorroborated accomplice testimony regarding the *modus operandi*. In *United States v. Gutierrez*, n141 the Court affirmed bank robbery convictions, finding no error in admitting evidence of a second bank robbery involving the two defendants. The crime charged and the other crime possessed "signature quality" and were therefore proper evidence, even though one of the defendants had been acquitted on the other charge.

United States v. Lail, 846 F.2d 1299 (11th Cir. 1988) : The Court reversed a bank robbery conviction because evidence of an uncharged bank robbery was improperly admitted. Despite some similarities between the robberies -- a lone gunman, use of a handgun, lack of disguise, proximity in time of occurrence -- the Court concluded that the dissimilarities were so great that it was an abuse of discretion to admit the evidence.

[B] Rule 404(b) -- Identity -- *Modus Operandi* -- Miscellaneous Cases

United States v. Medina, 761 F.2d 12 (1st Cir. 1985) : The Court affirmed a conviction for conspiracy to commit extortion and actual extortion based upon a kidnapping, holding that evidence of a prior kidnapping involving the defendant was admissible to prove *modus operandi*.

United States v. Allen, 76 F.3d 1348 (5th Cir. 1996) : In a bank fraud prosecution, the Court held there was no abuse of discretion in admitting forged letters of credit. They were issued from the same bank, bore the forged signature of the same bank officer, and went to the benefit of the same person as documents in issue, so they were so similar as to evince a signature quality marking the documents as the handiwork of the accused. In *United States v. Sanchez, 988 F.2d 1384 (5th Cir. 1993)* , the Court stated, "It is well-settled that extraneous acts evidence offered to prove identity is admissible in the Fifth Circuit only if the circumstances of the extraneous act were so similar to the offense in question that they evince a signature quality," and concluded that evidence that the defendant acted with a second man in selling heroin in pink balloons was "not very compelling." However, evidence that the charged and uncharged transactions took place in the identical location and in the presence of the same car with the same license plate was "of signature quality." In an arson prosecution, *United States v. Scott*, n142 the Court affirmed the admission of evidence of other acts of arson because the devices used to commit the acts established a "signature" that was identical to the devices used to commit the arson for which the defendants were charged.

United States v. Connelly, 874 F.2d 412 (7th Cir. 1989) : The Court affirmed convictions relating to stolen goods, finding that evidence of a prior break-in to a home was properly admitted to prove *modus operandi* and to establish the identity of the defendant in the case.

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996) : The Court reversed a conviction for abusive sexual contact with a minor, finding that the Trial Judge erred in admitting the defendant's prior acts of sex abuse with minors as evidence of *modus operandi*. The Court assumed that *modus operandi* evidence could be offered to prove that the defendant committed a crime even where identity was not seriously contested. However, the bad act evidence admitted

by the Trial Judge did not rise to the level of *modus operandi* evidence. The government argued that the defendant exhibited a pattern of playing games with minors to win their trust, then sexually assaulting them. However, the Court found this conduct "common to all too many child molesters." In *Durns v. United States*, n143 the Court affirmed a kidnapping conviction, upholding as proper identity proof the introduction of evidence that the defendant unsuccessfully attempted to abduct another person in a similar manner.

United States v. Andrini, 685 F.2d 1094 (9th Cir. 1982) : In a prosecution for malicious destruction of a building, the Court upheld the introduction of testimony that during a camping trip the defendant had demonstrated his familiarity with techniques for starting fires. The demonstration bore sufficient similarity to the method of starting the fire that destroyed the building that it was admissible to prove the identity of the arsonist. In *United States v. Powell*, n144 the Court reversed a marijuana conspiracy conviction, in part because the Trial Judge admitted prior marijuana offenses against the defendant. The evidence was not admissible to show identity because the other offenses were not sufficiently distinctive.

United States v. Patterson, 20 F.3d 809 (10th Cir. 1994) : The Court affirmed a conviction for aircraft piracy arising out of the hijacking of a small plane, holding that evidence of a similar hijacking by the defendant n145 was probative of identity where that issue was contested.

United States v. Miller, 959 F.2d 1535 (11th Cir. 1992) (en banc): The panel had reversed the defendant's conviction for cocaine trafficking on the ground that evidence of a second transaction was not sufficiently similar and distinctive to prove identity. n146 The Court *en banc* affirmed the defendant's conviction, holding that the similarity of the two offenses, including the same supplier and same location, was sufficient to mark them as the handiwork of the accused. See also *United States v. Stubbins* n147(in a prosecution for distributing crack cocaine, evidence of a prior crack offense was properly admitted on the issue of identity, where both offenses occurred at the same address and the defense had argued mistaken identity and had made much of the fact that the DEA agent's report had a different address from the one given in his testimony). In *United States v. Morano*, n148 the government claimed that Morano and another man burned the building containing Morano's business. The Court found no unfair prejudice to Morano in the admission of the other man's prior arson, as the prior arson was so similar to the one charged as to mark them as the work of the same individual.

[iii] RULE 404(b) -- Identity -- Names

United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989) , *vacated on other grounds*, *498 U.S. 954 (1990)* : In this prosecution of a drug-importation conspiracy, the prosecutor and the witnesses referred to one of the defendants as "Guillo el Perro" and "Checo el Perro." After the defendant's witness testified the defendant was known by the former name, but he had a brother known by the latter, a prosecution witness testified that he had sold five kilos of cocaine to the defendant, whom he called "Checo el Perro." The Court reversed the defendant's conviction, holding that this evidence lacked the "highly distinctive quality" necessary when introducing other bad acts to show identity.

United States v. Edwards, 342 F.3d 168 (2d Cir. 2003) : Affirming a conviction for conspiring to import a substance containing cocaine, the Court held that evidence of a cocaine-cutting recipe found in the defendant's car when he was arrested was properly admitted to prove knowledge and intent, but that it could not be admitted to prove identity. The defendant admitted that he used the name Darnell Johnson, so the fact that the recipe was found among papers containing that name did not tend to make a witness's identification of the defendant more accurate. The Court explained that for a rational juror to conclude that the recipe supported the identification, the juror would have had to reason first that the defendant was a cocaine dealer and second that a cocaine dealer was more likely to participate in the

charged scheme than a person not involved in the cocaine trade; "[s]uch reasoning, of course, calls for the very propensity inference prohibited under *Rule 404(b)*."

United States v. Morsley, 64 F.3d 907 (4th Cir. 1995) : A witness in a drug and firearms prosecution testified that, on the day Morsley was arrested, the witness was talking with "Raleek" when the police arrived; "Raleek" panicked, handed the witness her pocketbook, and asked her to leave; outside, the witness was stopped by the police, who discovered a bag of cocaine in her pocketbook. The Court held that the evidence might have been probative of motive and intent in connection with the charged acts, but it was hardly necessary because the charged conduct alone made the perpetrator's intent abundantly clear. However, the evidence did tend to rebut the defense contention that Morsley and "Raleek" were not the same person, so it was properly admitted.

United States v. Aguirre Aguirre, 716 F.2d 293 (5th Cir. 1983) : In a drug prosecution, an issue arose as to whether a codefendant was referring to the defendant when he used the name "Compadre" in conversations with an undercover agent. The codefendant said that he and Compadre had been arrested in Chicago together. The Court found that the government was properly permitted to prove that the defendant was arrested with the codefendant in Chicago in order to show that the defendant was Compadre.

United States v. Bowman, 798 F.2d 333 (8th Cir. 1986) : Affirming a conviction arising out of the robbery of a pharmacist, the Court held that evidence that the defendant had documents in someone else's name was admissible to prove that he was the person identified by witnesses as having several different names.

[y] Rule 404(b) -- Illegally Obtained Evidence of Other Acts

United States v. Hill, 60 F.3d 672 (10th Cir. 1995) : The Court held that evidence of the defendant's prior drug activity, even though admissible to prove intent and knowledge, would have to be excluded if the evidence were illegally obtained. Rejecting the government's contention that the *Fourth Amendment* exclusionary rule applies only if evidence is offered in a trial on the very crime being investigated by the offending officer, the Court concluded that "the exclusionary rule does apply where, as here, the alleged unlawfully obtained evidence is being used to prove an essential element of a charged offense -- at least where there is some nexus between the initial search and seizure and the subsequent charged offense." However, any error was harmless.

[z] Rule 404(b) -- "Inadvertent" Disclosure of Other Acts

United States v. Terry, 729 F.2d 1063 (6th Cir. 1984) : Although it affirmed conspiracy convictions arising out of involvement with stolen vehicles, the Court expressed concern about law enforcement officers making "inadvertent" remarks about a defendant's criminal history. It opined that "if the government took appropriate caution to instruct its witnesses before trial, these types of remarks would occur with less frequency."

United States v. Gray, 730 F.2d 733 (11th Cir. 1984) : The Court held that reversal was not required where a prosecutor, relying on a ruling in a prior trial of the case, mentioned in an opening statement that the defendant had a motive for robbery because he was behind on payments to a probation officer; the Trial Judge subsequently decided not to admit any evidence regarding the probation officer.

[aa] Rule 404(b) -- Insanity Defense

United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991) : Affirming a bank robbery conviction, the Court noted that admission of prior convictions where sanity is the only issue presents different considerations from the usual case. Probativeness is generally unquestionable, since the insanity defense directly puts state of mind in issue, and a prior criminal record is highly relevant to the defendant's appreciation of the unacceptability of his conduct; there is no risk of primary prejudicial effect, since the defendant does not deny commission of the act; and there is a possibility that the evidence will prove not to the government's advantage, by permitting the inference that the defendant is insane, since he continues to commit the same easily-detectable crime. Although the Trial Judge's ruling was terse, it appeared from the record as a whole that the relevant factors were considered.

United States v. Emery, 682 F.2d 493 (5th Cir. 1982) : The defendant in a bank robbery case conceded the robbery, but claimed he was insane at the time. The Court upheld the introduction of evidence that he had robbed another bank a month previously, on the ground that the evidence helped to explain a psychiatrist's diagnosis that the defendant had the capacity to conform his conduct to legal requirements.

United States v. Brown, 785 F.2d 587 (7th Cir. 1986) : Affirming a conviction for failure to appear at sentencing, the Court upheld admission of evidence of the defendant's fraud upon two trucking companies after the date of the sentencing hearing. The evidence was properly admitted to respond to the defendant's insanity defense.

United States v. Ruster, 712 F.2d 409 (9th Cir. 1983) : The Court upheld the introduction of evidence, offered to rebut an insanity defense, that the defendant, who was charged with filing false and fraudulent Social Security claims, had previously submitted false claims and engaged in break-ins. The Court found that the evidence shed light on his mental state.

[bb] Rule 404(b) -- Intent

[i] RULE 404(b) -- Assault, Homicide, Abuse, etc., Cases

United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989) : The Court vacated a conviction for interfering with a flight attendant because evidence that the defendant had been convicted of attempted robbery and sentenced as a predicate violent felon had been erroneously admitted. It was not relevant, other than to show propensity, to the defendant's argument that he did not intend to interfere. The Court criticized the Trial Judge's rote restatement of the *Rule 404(b)* exceptions and once again stated that the Rule excludes other acts relevant only to show criminal propensity.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998) : The defendant, charged with kidnapping a young woman, asserted that his victim traveled across state lines consensually with him, and then he killed her after a sexual disagreement. The Court found no error in the admission of a prior kidnapping and sexual assault of a different victim, since it tended to show that the defendant abducted his victim with the intent to sexually assault her. The uncharged misconduct was similar enough to the crime charged (e.g., similar victims and *modus operandi*) and close enough in time (eleven days) to raise a strong inference of intent. While the evidence of a prior sexual assault and rape was undoubtedly prejudicial, this prejudice was lessened by a limiting instruction and by the fact that the defendant himself admitted to killing the victim. In *United States v. Sanders, 964 F.2d 295 (4th Cir. 1992)* , the Court reversed a conviction for assault with a dangerous weapon in a prison, holding it was error to admit evidence of the defendant's prior convictions for inmate assault and contraband possession. As the defendant admitted the stabbing and claimed only self-defense, the only issue was whether that was the reason for the admitted act; the prior offenses had no probative value on his intent and could show only his general criminal disposition. The dissenting Judge thought that

the defendant's admission did not eliminate the need for determining whether self-defense provided the motive, as the defendant claimed, or the stabbing was accompanied by assaultive intent, as the government claimed.

United States v. Levario Quiroz, 854 F.2d 69 (5th Cir. 1988) : The Court held that admission of evidence of a separate and unrelated shooting was plain error in a prosecution for assault of a federal officer with a deadly weapon that turned on the credibility of the defendant and a Border Patrol Agent.

United States v. Romero, 189 F.3d 576 (7th Cir. 1999) : The defendant was charged with kidnapping and transporting a minor with intent to engage in criminal sexual activity after developing a relationship with a 12-year-old boy over the Internet. The Court found no abuse of discretion in admitting tape recordings of six conversations the defendant had with other boys at about the same time, in which he expressed his desire to have sex with the boys and used many of the same seduction techniques he used with the victim in this case. The conversations were highly probative of his intent with the victim. One of the conversations, in which the defendant recounted a brutal rape, might have been unduly prejudicial, but any error was harmless. In *United States v. Pirovolos*, n149 the Court held that evidence that the defendant had guns on other occasions was admissible to show intent, after the defendant claimed self-defense. See also *United States v. Shoffner* n150(evidence that the defendant had made one threat against his wife to discourage her testimony was admissible to disprove his claim that a second threat was a joke).

United States v. Haukaas, 172 F.3d 542 (8th Cir. 1999) : In a prosecution for stabbing two people in a car after a long night of drinking, the defendant's girlfriend testified that two years prior to the event at issue, the defendant had ripped a phone off the wall and attacked her by brandishing a knife, holding it to her throat, and threatening to kill her. The Court affirmed, holding that the testimony was properly admitted to prove the defendant's intent; it noted that the defendant testified at trial that he was holding the knife stationary when the victims thrust themselves on it. A dissenting Judge argued that evidence of an unrelated act of domestic violence, two years earlier, was nothing more than proof of the defendant's propensity toward violence. In *United States v. Sumner, 119 F.3d 658 (8th Cir. 1997)* , the Court reversed a conviction for sexual abuse because evidence that the defendant had previously sexually assaulted two young girls was erroneously admitted under *Rule 404(b)*. The evidence had been admitted as relevant to intent, but in this case intent was not at issue because the accused had clearly and unequivocally defended only on the ground that the alleged acts never occurred. The Court declined to consider whether the evidence might have been admitted under *Rule 414*, believing that the Trial Judge should have the first opportunity to consider the admissibility of the evidence over a *Rule 403* objection should the government offer the evidence at a retrial. In *United States v. Burk*, n151 the Court affirmed a conviction for assaulting an IRS officer, holding that evidence the defendant had been convicted in 1982 of threatening to assault a police officer was properly admitted, after the defendant's counsel said in his opening statement that the defendant had no intention of hurting the officer. See also *United States v. Engleman* n152(in a prosecution for a plot to kill a man in order to collect insurance proceeds, there was no error in admitting evidence concerning another killing in which one defendant was involved some 13 years earlier that also involved an attempt to obtain insurance money).

United States v. Dhingra, 371 F.3d 557 (9th Cir. 2004) : The defendant was convicted of using the Internet to solicit sexual activity from a minor, after he used instant messaging to arrange a meeting with a 14-year-old girl, whom he fondled and forced into having sexual intercourse. Affirming, the Court found no abuse of discretion in the admission of evidence that the defendant had three years earlier used instant messaging to meet a 17-year-old girl and have a sexual encounter with her, as the evidence tended, because of the similarity, to show his intent and *modus operandi* with respect to the act charged. In *People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998)* , the Court reversed a conviction for unlawful sexual activity with minors, because of the improper admission of testimony regarding the contents of sexually explicit gay adult magazines found in the defendant's house. While the magazines could possibly have been relevant to whether the defendant had the purpose of being sexually aroused, or was actually sexually aroused, by the charged improper touching of underage boys, the statute under which he was

prosecuted applied only an objective test, which made the character of the touching, not the purpose of the toucher, at issue. Furthermore, possession of the magazines was not probative of whether the conduct with which the defendant was charged was intentional. Even if the evidence were somehow relevant, its suggestion of the defendant's sexual orientation, and implication of sexual deviancy, was highly prejudicial and substantially outweighed any probative value. In *United States v. Boise*, n153 the Court affirmed a conviction for murder of a six-week-old child, holding that evidence of the victim's prior injuries when the defendant was the primary caretaker and of the victim's suffering from battered-child syndrome was properly admitted as evidence of intent and of the absence of accident. See also *United States v. Bettencourt* n154(error to admit evidence that an attorney charged with interfering with a federal officer was arrested for interfering with local officers 21 months earlier, because it proved only propensity, especially since there was no proof of his intent on the prior occasion).

United States v. Wooten, 377 F.3d 1134 (10th Cir. 2004) : Affirming the defendant's conviction for assaulting and kidnapping his ex-wife, the Court found no abuse of discretion in admitting evidence of another violent attack the defendant made on the victim a few weeks before the charged incident, as it tended to prove his intent, the victim's lack of consent (relevant to the kidnapping charge), "and the long-standing personal animosities between" them, and thus was admitted not merely to show the defendant's conformity to the prior bad acts. In *United States v. Segien, 114 F.3d 1014 (10th Cir. 1997)* , the defendant testified in his assault trial for spitting upon and physically injuring a corrections officer in a federal penitentiary that he did not assault the officer and that any spitting or other physical injury he caused was an unintentional byproduct of a verbal argument. In rebuttal, the prosecution introduced previous incidents in which the defendant beat and spit upon prison officers. The Court found that these incidents were properly admitted to prove intent and absence of mistake. In *United States v. Soundingsides*, n155 the Court reversed a murder conviction, finding that it was error to admit testimony by the defendant's former girlfriend that he frequently beat her and had caused her to lose her baby. The testimony involved five-year-old events, and the Court concluded that the evidence was of little probative value. There was no real dispute that whoever killed the victim in the instant case did so with malice, and the prior act evidence was extremely prejudicial.

United States v. Utter, 97 F.3d 509 (11th Cir. 1996) : The Court reversed a conviction arising from an alleged arson of the defendant's restaurant in which two firefighters were killed. The government introduced evidence that, two years after the alleged arson, the defendant threatened to burn the residence that another individual rented from the defendant if she did not vacate the residence voluntarily. Although the government argued that the threat to the renter "demonstrate[s] how the defendant reacts to financial stress," the Court found that the statement did not relate, as did the charged crime, to a threat to use arson to collect insurance. Therefore it was not properly offered to prove intent, and was nothing more than inadmissible character evidence. In *United States v. Church, 955 F.2d 688 (11th Cir. 1992)* , a RICO prosecution for acts, including conspiracy to murder, committed in 1983 and 1984, the Court held it was harmless error to admit a tape recording of a 1979 conversation discussing a defendant's plan to kill a prosecutor. Any probative value the evidence might have had on the defendant's intent was diminished by the remoteness of the conversation and was substantially outweighed by the likelihood that the jury would draw prejudicially impermissible inferences about the defendant's character. In *United States v. Williams*, n156 the Court affirmed a conviction for assault with a dangerous weapon, holding that evidence of two prior rapes was properly admitted to prove the defendant's intent, since the facts surrounding the rapes were "strikingly similar" to those surrounding the assaults and the possibility of prejudice was not too great to permit the evidence to be introduced. The Court stated that "[t]he rule in this circuit is that extrinsic evidence of similar acts will possess great probative value if the defendant's intent is in issue and if the government lacks other strong evidence of defendant's intent."

[ii] Rule 404(b) -- Intent -- Civil Cases

Sparks v. Gilley Trucking Co., 992 F.2d 50 (4th Cir. 1993) : The defendant in a personal injury action arising out of a car-truck collision introduced evidence of the plaintiff's prior speeding convictions "to show intent, preparation,

plan or motive to race or speed on the day in question." The Court reversed a judgment for the defendant, holding that intent was not relevant to the contributory negligence defense being asserted and that there was no foundation for any theory of "plan," "motive," or "preparation." The dissenting Judge considered intent relevant to the defendant's attempt to prove the plaintiff had been racing.

Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry & Expert Restorations, 140 F.3d 661 (7th Cir. 1998) : A lawyer appealed from sanctions imposed for his efforts in preventing a party from collecting lawful debts owed by his client, including evasion of service of process, baseless appeals, and transferring assets to another corporation. Upholding the sanctions, the Court found no error in the admission of evidence of the lawyer's similar sharp practices during his representation of one of the client's earlier corporations. The similar conduct showed the lawyer's "intent to delay the proceedings as he had successfully done in the prior suit five years ago." The effect of the evidence was, of course, prejudicial to the lawyer, "but not unduly or unfairly."

Sanjuan v. IBP, Inc., 160 F.3d 1291 (10th Cir. 1998) : In an action by a former employee who alleged that he had been discharged in retaliation for making a worker's compensation claim, the plaintiff introduced testimony by the defendant's supervisors that they had heard complaints by injured employees to the effect that they were harassed following injuries or medical benefit claims. The Court held that the evidence was not barred by *Rule 404(b)*, because it was circumstantial evidence of the defendant's retaliatory motive or intent regarding employees with work-related injuries. However, the evidence was inadmissible hearsay.

[iii] Rule 404(b) -- Intent -- Civil Rights and Employment Discrimination Cases

United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) : The defendants were convicted for forced labor offenses after they lured Jamaican laborers to New Hampshire through fraud, mistreated them during their employ, and coerced them to stay. Most of the charges related to workers during the 2001 season. Affirming, the Court found no abuse of discretion in admitting evidence relating to the defendants' treatment of Jamaican laborers brought in during the 2000 season. Evidence that one of the earlier workers fled and was pursued by threats and that his compatriot's passport was then seized gave "a malign motive for, and provide[d] the context of," the seizure of the victims' passports in 2001 and of threats made to them based on a defendant's supposed intention to "destroy" a former worker. The Court noted that evidence of the abusive treatment of the 2000 season workers -- including isolation from medical care and efforts to intimidate them and minimize their outside contact -- was "closer to the margin" but arguably probative of the defendants' intent. Its probative value was minimized because there was similar evidence that the 2001 workers were abused, and the customary limiting instruction was given. In an employment discrimination action brought after the plaintiff was denied tenure, *Brown v. Trustees of Boston Univ.*, n157 the Court held that remarks derogatory to women made by the University's president were properly admitted as evidence of a discriminatory animus in making the tenure decision.

United States v. Dise, 763 F.2d 586 (3d Cir. 1985) : In a civil rights prosecution of a hospital aide, the Court held that evidence of other instances in which he abused inmates was properly admitted to show willfulness and intent.

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) : In a Title VII action by a preoperative transsexual police officer who alleged that he was demoted because he failed to conform to gender stereotypes, the Court affirmed a judgment for the plaintiff, holding that a supervisor's derogatory statements about lesbians and use of the word "fag" were properly admitted as evidence of the supervisor's intent to ensure that the plaintiff was demoted.

[iv] Rule 404(b) -- Intent -- Conspiracy

United States v. Jackson, 339 F.3d 349 (5th Cir. 2003) : Reversing a conviction for transporting stolen goods from a jewelry store burglary, the Court held it was an abuse of discretion to admit evidence that the defendant had a previous felony conviction for stealing watches. While prior conviction evidence has a tendency to prove the difficult intent element in conspiracy cases, that the defendant knowingly joined a plan to further an unlawful objective, in this case, where there was other evidence going to intent and only the identification issue was contested, the evidence had very little probative value. Moreover, it had a substantial potential to cause unfair prejudice, because of the great danger that the jury would decide that he was involved in the conspiracy because of his prior criminal conduct. In *United States v. Prati, 861 F.2d 82 (5th Cir. 1988)* , the Court said that "in a conspiracy case the mere entry of a not guilty plea raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence."

[v] Rule 404(b) -- Intent -- Drug Cases

[A] Rule 404(b) -- Evidence of Different Drugs

United States v. Garza, 42 F.3d 251 (5th Cir. 1994) : The Court held in a money-laundering prosecution that it was not an abuse of discretion to admit evidence that a defendant heavily used cocaine. Although the evidence was prejudicial where the government's theory was that the money was the proceeds of trafficking in marijuana, it tended to show that the defendant had an impressive source of income despite a lack of wage-earning employment and was therefore relevant to his intent. Without endorsing the government's questionable judgment in introducing such highly prejudicial evidence where the evidence of guilt was so overwhelming that there was no need for its introduction, the Court held there was no reversible error.

United States v. Macedo, 406 F.3d 778 (7th Cir. 2005) : Affirming drug convictions, the Court found no abuse of discretion when evidence of two cocaine sales by one defendant nine years before the charged offenses was admitted. It rejected the defendant's argument that the prior acts were not sufficiently similar because they involved cocaine while the current conviction involved methamphetamine, noting that "[t]he similarity inquiry focuses on the purpose for which evidence is offered." The Court ultimately held that the government needed the evidence to prove specific intent and to rebut the defendant's claim that he lacked the intent to enter into a conspiracy and was simply present at the airport when the drugs were found by accident. In *United States v. Hernandez, 84 F.3d 931 (7th Cir. 1996)* , the Court affirmed a conviction for possession of cocaine and heroin with intent to distribute, finding no error in the admission of evidence that the defendant was once arrested with 43 pounds of marijuana in his car. Possession of a distribution amount of an illegal drug was probative of the defendant's specific intent to distribute the drugs in this case.

United States v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982) : The Court affirmed a conviction for importing heroin and possessing it with intent to distribute, holding that the defendant's conviction for smuggling hashish five years earlier was admissible on the issue of intent to distribute, and that evidence that large quantities of other drugs were seized at the defendant's residence was properly admitted to demonstrate an intent to distribute.

United States v. Pollock, 926 F.2d 1044 (11th Cir. 1991) : The Court upheld admission of the defendant's prior conviction for conspiracy to import marijuana in a cocaine conspiracy prosecution, noting that if the government can do without other crimes evidence in proving intent, it should, but if the evidence is essential to obtain a conviction, it may come in. "This may seem like a 'heads I win; tails you lose' proposition, but it is presently the law." In this case, because of the limited evidence of conspiratorial intent, the prior convictions were that much more probative.

[B] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Different Quantities

United States v. Thomas, 398 F.3d 1058 (8th Cir. 2005) : The Court affirmed a conviction for possessing 57.8 grams of crack cocaine with intent to distribute, finding no abuse of discretion in the admission of evidence that the defendant had pleaded guilty to possessing 2.2 grams of crack in 1994 and 0.25 grams of crack in 1998. The evidence was relevant to his intent to distribute and the time lapse was not unreasonable given the similarities in locale and acts charged between the prior convictions and the charged offense. In *United States v. Arias, 252 F.3d 973 (8th Cir. 2001)* , the Court affirmed drug-related convictions, finding no error in the admission of evidence that the defendant pleaded no contest in 1997 to possession of methamphetamine, the drug involved in this case. The prior conviction was relevant to proving intent to join a conspiracy, even if the methamphetamine involved in the 1997 conviction was a personal use amount. In *United States v. Hardy, 224 F.3d 752 (8th Cir. 2000)* , the Court affirmed a conviction for intent to distribute more than 400 grams of cocaine base, finding no error in the admission of evidence of the defendant's two prior cocaine convictions, which involved much smaller quantities of cocaine (less than ten grams). The Court stated that "evidence of prior possession of drugs, even in an amount consistent with only personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime in which intent to distribute drugs is an element."

[C] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Possession Where Distribution Is Charged

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) : The Court affirmed a conviction for distribution of more than one kilo each of heroin and methamphetamine and held there was no error in the admission of evidence that the defendant had previously been stopped with "a personal amount" of methamphetamine. In the Court's view, evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime involving intent to distribute drugs, and this is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent.

United States v. Ramirez-Robles, 386 F.3d 1234 (9th Cir. 2004) : The Court affirmed convictions for distribution and conspiracy to distribute methamphetamine, but it found an abuse of discretion when evidence of the defendant's prior conviction for simple possession of methamphetamine was admitted, because "[t]he rule of this circuit is that evidence of prior drug use is not ordinarily relevant under *Rule 404(b)* to prove conspiracy and possession with intent to distribute narcotics."

United States v. Butler, 102 F.3d 1191 (11th Cir. 1997) : A defendant charged with conspiracy to possess cocaine with intent to distribute objected to admission of his prior conviction for cocaine possession. The Court concluded that evidence of prior personal drug use is relevant to prove intent in a subsequent prosecution for conspiracy to distribute narcotics.

[D] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Similar Drugs

United States v. Foskey, 636 F.2d 517 (D.C. Cir. 1980) : The Court reversed a drug conviction after the government introduced evidence that two years previously the defendant was arrested for possession of similar drugs. After noting that the only purpose for which the evidence might have been offered permissibly was to show intent, the Court found that there was insufficient similarity between the two events to justify admission of the evidence and that even if it were relevant, the evidence should have been excluded under *Rule 403*.

United States v. Hernandez, 975 F.2d 1035 (4th Cir. 1992) : The Court reversed a conviction for participation in a

cocaine distribution conspiracy because a cooperating witness was permitted to testify during the government's direct case that the defendant had told him she had a special recipe for cooking crack because she "used to do that, sell that in New York." The relevance of the evidence to show intent was at best slight. The evidence was not necessary to show the context of the crime, and it was barely reliable. The Court held that, in any event, the balance of probative value and prejudicial effect was so one-sided that admission of the evidence was error. See also *United States v. Davis* n158(in a case charging conspiracy to distribute heroin it was error to admit evidence that the defendant was involved in selling heroin six years earlier; the evidence did not tend to prove intent and was not part of a common plan or scheme, but the error was harmless).

United States v. Peters, 283 F.3d 300 (5th Cir. 2002) : Affirming convictions for crack cocaine offenses, the Court held that evidence that a defendant operated a crack house and sold cocaine 10 years earlier was admissible to prove knowledge and experience with cocaine and his continuing intent to sell crack cocaine. In *United States v. Leal, 74 F.3d 600 (5th Cir. 1996)* , the Court held there was no abuse of discretion in admitting evidence that one defendant, charged with driving a truck in a marijuana distribution conspiracy, had previously been convicted of transporting marijuana. The similarity and proximity of the charged and uncharged incidents would help the jury decide whether his conduct was innocent or intentional.

United States v. Lattner, 385 F.3d 947 (6th Cir. 2004) : The Court affirmed a cocaine conviction, finding no abuse of discretion when evidence that certain heroin packets bearing a particular stamp were seized from the defendant on two prior occasions was admitted. The evidence was probative of identity, intent, and a common plan or scheme, because it connected the defendant to the drug transactions at issue in the case, in which a similar stamp was found. In *United States v. Elkins*, n159 the Court upheld admission of prior cocaine transactions to prove intent in a cocaine prosecution.

United States v. Puckett, 405 F.3d 589 (7th Cir. 2005) : The Court affirmed a conviction for possession of powder cocaine with intent to distribute, finding no error when evidence of the defendant's conviction for trafficking in crack cocaine was admitted. The difference between powder and crack cocaine did not render the previous conviction inadmissible, since both crimes involved the possession with intent to distribute a chemical composition of cocaine. The Court concluded that "[d]ifferences in the form of the drug involved in a prior crime or even type or category of narcotics is irrelevant to the admissibility of that evidence when both incidents concerned distribution amounts of drugs." See also *United States v. Toro, 359 F.3d 879 (7th Cir. 2004)* (evidence of the defendant's prior possession of PCP with intent to distribute, and another act of possession of the drug, properly admitted to prove intent to distribute PCP). In *United States v. Kramer, 955 F.2d 479 (7th Cir. 1992)* , the Court affirmed convictions for conspiring to distribute marijuana as part of a continuing criminal enterprise that imported marijuana, holding that the Trial Judge exercised principled discretion in admitting evidence that one of the defendants had imported 15 tons of marijuana in 1981. The evidence showed specific intent, it was not too remote to be relevant, and its prejudicial effect, if any, did not substantially outweigh its probative value.

United States v. Mejia-Uribe, 75 F.3d 395 (8th Cir. 1996) : Affirming cocaine-related convictions, the Court held it was error (but harmless) to admit the defendant's 15-year-old conviction for another cocaine offense. The Court reasoned that the prior conviction was not admissible to prove intent, both because it was too remote in time and because it involved a single sale, while the instant case involved a large-scale, ongoing operation. See also *United States v. Nichols* n160(it was error, but harmless, to admit evidence of prior unrelated cocaine transactions in a prosecution for cocaine distribution).

United States v. Johnson, 734 F.2d 503 (10th Cir. 1984) : The Court held that a witness' testimony about the

defendant's prior cocaine transactions and the amounts thereof was admissible to prove intent to distribute.

[E] Rule 404(b) -- Intent -- Drug Cases -- Firearms Evidence

United States v. Payne, 805 F.2d 1062 (D.C. Cir. 1986) : The Court affirmed a conviction for possession of marijuana with intent to distribute, finding that evidence of guns found in the defendant's apartment was properly admitted to prove intent to distribute.

United States v. Johnson, 137 F.3d 970 (7th Cir. 1998) : Affirming a drug distribution conviction, the Court held that a prior drug offense was properly admitted against the defendant to prove intent. However, it was an abuse of discretion to admit two details surrounding the prior offense, i.e., that the defendant had been in possession of an illegal firearm and had scuffled with police. The prior gun possession and fight with the police "did not help the jury to analyze Johnson's intent to possess drugs" on a later date, but the error in admitting the evidence was harmless.

United States v. Bracy, 67 F.3d 1421 (9th Cir. 1995) : In a prosecution for drug trafficking, the Court held it was error (but harmless) to admit evidence of unrelated incidents in which a defendant had used or possessed firearms. Although as a general matter firearms are relevant to prove involvement in the drug trade and intent to distribute, in this case the prosecutor essentially argued that the evidence showed the defendant's predisposition and propensity to violence.

[F] Rule 404(b) -- Intent -- Drug Cases -- Miscellaneous Cases

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) : In support of his argument that drugs and a weapon seized from his mother's house when he was arrested there were not his, but rather belonged to a cousin living in the house, the defendant claimed that he had "turned his life around" after his brother died the previous year. On cross-examination of the defendant's girlfriend, the prosecutor asked about a letter she had sent to the defendant while he was jailed on unrelated charges. In the letter she indicated she was upset that the defendant was letting his cousin use his mother's house "to do this s_____." Reversing, the Court held that the letter was not probative of the defendant's intent to possess crack cocaine with intent to distribute, because it was not clear that the letter referred to drug selling or just drug use, to crack cocaine, or even to narcotics at all.

United States v. Rubio-Estrada, 857 F.2d 845 (1st Cir. 1988) : A majority held that evidence of a prior drug conviction was admissible to prove knowledge and intent in a prosecution for possession of cocaine with intent to distribute. A dissenting Judge argued that the prior conviction was improperly admitted, constituted character evidence, and was more prejudicial than probative. See also *United States v. Molinares Charris* n161(the defendant's prior smuggling was admissible to prove intent to transport marijuana).

United States v. Garcia, 291 F.3d 127 (2d Cir. 2002) : The Court reversed convictions for cocaine distribution offenses because the defendant's 12-year-old conviction for selling two grams of cocaine was improperly admitted. The principal prosecution witness was an informant who had been arrested for heroin offenses and, while cooperating with the government, had completed an asbestos trade program and began working in the asbestos industry, where he sought to involve a co-worker in drugs. The informant testified that the co-worker connected him with the defendant, and that a transcript of a conversation between the accomplice and the defendant in which they discussed a potential asbestos project involved the use of code words to arrange a drug trade. The defendant denied any intention of being involved in a drug deal, and police searches uncovered no drugs, paraphernalia, or substantial amount of money. The prior

conviction was offered ostensibly to show that the defendant knew that the conversation was a coded discussion of a drug deal. The Court concluded that, although knowledge and intent were disputed, the government did not establish any similarity or connection making the convictions relevant on those issues: "Nothing in the record explains how Garcia's participation in a minor drug sale twelve years earlier is any more than marginally probative of the fact that Garcia must have known that drug dealers speak in code and must have known that the July 10, 2000, conversation was a coded conversation about a drug deal."

United States v. Morsley, 64 F.3d 907 (4th Cir. 1995) : A witness in a drug and firearms prosecution testified that, on the day Morsley was arrested, the witness was talking with "Raleek" when the police arrived; "Raleek" panicked, handed the witness her pocketbook, and asked her to leave; outside, the witness was stopped by the police, who discovered a bag of cocaine in her pocketbook. The Court held that the evidence might have been probative of motive and intent in connection with the charged acts, but it was hardly necessary because the charged conduct alone made the perpetrator's intent abundantly clear. However, the evidence did tend to rebut the defense contention that Morsley and "Raleek" were not the same person. See also *United States v. Tedder* n162(prior drug transactions with a codefendant were admissible to prove knowledge and intent in a marijuana prosecution).

United States v. Saucedo-Munoz, 307 F.3d 344 (5th Cir. 2002) : Affirming a conviction for drug and immigration crimes, the Court held that evidence of the defendant's prior conviction for smuggling cocaine in the wheel well of a pickup truck was admissible to prove that he knew that drugs were concealed in the gas tank of a vehicle and that he intended to transport drugs in a hidden spot. In a prosecution for using the mails to facilitate drug trafficking, *United States v. Williams, 900 F.2d 823 (5th Cir. 1990)* , the Court reversed for error in granting the defendant's motion *in limine* to exclude evidence of 19 prior similar mailings from fictitious Los Angeles addresses. The evidence, which was connected to the defendant, tended to show knowledge and intent, even if the packages did not contain drugs, because they might have been used as test deliveries; so long as it is not suggested to the jury that there were 20 deliveries of cocaine, there would be little danger that the probative value of the evidence on knowledge and intent would cause unfair prejudice or confusion.

United States v. Spiller, 261 F.3d 683 (7th Cir. 2001) : Affirming a conviction for distributing crack cocaine, the Court found no abuse of discretion in admitting handwritten ledgers. They were "tools of the trade" relevant to the defendant's intent to operate a crack house. In *United States v. Wash, 231 F.3d 366 (7th Cir. 2000)* , the Court affirmed convictions for possession of cocaine base with intent to distribute and possession of a firearm in relation to a drug trafficking offense, finding no abuse of discretion in admitting evidence of the defendant's prior possession of cocaine base. The charged crimes involved a crack house containing firearms. The defendant argued that the prior acts were distinguishable because (1) they happened at different locations with different people; (2) one involved a stop-and-frisk on the street and the other a search after arrest that revealed drugs in his anus; and (3) neither took place in a dwelling. Further, he argued that they were too remote in time, having occurred at least two or three years before the charged conspiracy. The Court held, however, that the prior incidents implicated the defendant in possessing distribution amounts of drugs, and thus were probative of his intent to distribute on the charged occasion. In *United States v. Heath*, n163 the Court reversed drug and firearm convictions, finding error in the admission of evidence that, in an unrelated incident, the defendant's companion was arrested on drug charges and the defendant was arrested on firearms charges. The charges related to a stop of the defendant's truck in which the police found two handguns and a bottle of pills on the defendant. At trial, the defendant claimed he was a drug user and buyer, not a seller, and that he lacked the intent to distribute. The Court found there was no evidence that the defendant intended to aid his companion in the prior incident or knew what the companion was doing with respect to drugs. It concluded that the prior incident failed to demonstrate that the defendant was knowingly in the company of a large-scale drug distributor or intentionally sought to protect such a distributor, so the prior incident was not relevant to proving intent with respect to the charged offense.

United States v. Ruiz-Estrada, 312 F.3d 398 (8th Cir. 2002) : The Court affirmed a conviction for conspiracy to distribute drugs, holding it was not an abuse of discretion to admit evidence of the defendant's 1998 conviction for possession of 20 grams of cocaine. The defense contended at trial that the defendant was merely present at the apartment where large amounts of cocaine as well as scales and money were found. The Court found that the prior conviction demonstrated knowledge of drugs and intent to commit drug offenses and rebutted the "mere presence" defense. In *United States v. Jones, 255 F.3d 916 (8th Cir. 2001)* , the Court found no error in admitting evidence that the defendant sold cocaine base in the past and knew what it looked like, as the evidence tended to prove the defendant's intent to distribute cocaine base. In *United States v. Logan*, n164 the Court affirmed a conviction for distribution of more than one kilo each of heroin and methamphetamine and held there was no error in the admission of evidence that the defendant had previously been stopped with "a personal amount" of methamphetamine. In the Court's view, evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime involving intent to distribute drugs, and this is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent.

United States v. Romero, 282 F.3d 683 (9th Cir. 2002) : Affirming a conviction for cocaine conspiracy, the Court held that evidence of the defendant's previous drug activities was properly admitted to show that, as a result of his prior relationship to a government informant, the defendant was aware of the informant's distribution methods. The evidence was relevant to refute the defendant's claim that he intended to steal money rather than distribute cocaine. In *United States v. Adrian, 978 F.2d 486 (9th Cir. 1992)* , the Court held, on an interlocutory appeal of an *in limine* ruling to exclude evidence of prior narcotics convictions in a drug case on the ground they were not probative of anything but propensity, that prior possession and sale of narcotics may be probative of intent to distribute. The case was remanded to allow the government to develop the record and to permit the Judge an opportunity to weigh the danger of unfair prejudice against the probative force of the evidence.

United States v. Becker, 230 F.3d 1224 (10th Cir. 2000) : Affirming convictions for manufacturing methamphetamine, the Court found it was an abuse of discretion (but harmless error) to admit, as proof of motive and intent, evidence that the defendant was previously convicted of drug offenses and evidence that drug-related items were found in a prior raid on his home. The prior acts were removed in time and involved possession and distribution only, not manufacturing. In *Fitzgerald v. United States*, n165 the Court held that evidence of drugs belonging to one defendant was properly admitted against another defendant where there was concerted action and the evidence was probative of intent to distribute.

[G] Rule 404(b) -- Intent -- Drug Cases -- Whether Intent at Issue

United States v. Sampson, 385 F.3d 183 (2d Cir. 2004) : The Court vacated convictions for drug possession offenses that took place in 1998 because evidence of drug trafficking and firearms offenses in 2000 was improperly admitted at a joint trial on all the charges. The 1998 charges arose from an officer's testimony that he saw a man in a yellow jacket making a drug transaction; when the defendant was arrested a short while later, he was not wearing a yellow jacket, but the yellow jacket (with marijuana and cocaine in the pockets) was found in an area where the defendant had been observed. The 2000 charges arose from a drug sale (recorded on videotape) by the defendant to an undercover officer. The Court held that evidence of the defendant's being a drug dealer in 2000 was not admissible to prove his intent in 1998, since in the Second Circuit " '[w]hen a defendant unequivocally relies on [a defense that he did not do the charged act at all], evidence of other acts is not admissible for the purpose of proving intent.' " Not severing the trials practically precluded the defendant from "ensur[ing] that evidence of the 2000 acts would not be admitted for the purpose of proving intent to commit the 1998 acts by stipulating to intent and challenging only identity -- which was the linchpin of his defense."

United States v. Gadison, 8 F.3d 186 (5th Cir. 1993) : Affirming convictions for conspiracy to distribute cocaine base, the Court held there was no error in admitting a defendant's prior conviction for cocaine possession because he put his intent in issue by entering a not guilty plea to the conspiracy charge.

United States v. Johnson, 27 F.3d 1186 (6th Cir. 1994) : In a prosecution for possession of cocaine with intent to distribute, the defendant denied possession of cocaine altogether. The Court held, following thorough consideration of the issue, that evidence of prior similar acts was admissible to prove intent, subject only to the balancing of probative value and prejudicial effect. In this case the Trial Judge did not make an explicit finding on the balance of prejudicial effect and probative value and erroneously gave instructions that the evidence was admissible to show motive, "method of operations," knowledge, preparation, and plan. However, the Court affirmed the defendant's conviction because an instruction including reference to the proper purpose of intent was ultimately given and the evidence of guilt was overwhelming.

United States v. Foster, 344 F.3d 799 (8th Cir. 2003) : The Court affirmed a conviction for possession of cocaine base with intent to distribute, finding no abuse of discretion in the admission of the defendant's 1993 conviction for selling crack cocaine on the same city block. The defendant argued that neither his knowledge nor his intent was at issue, since he denied both possessing the bag in which the drugs were found near him and engaging in an illegal drug transaction. However, the Court considered this a general-denial or a "mere presence" defense, both of which have "long been recognized as placing intent or state of mind into question and allowing the admission of prior criminal convictions to prove both knowledge and intent." The prior conviction was relevant to his intent to control the crack in the paper bag and to distribute it. In *United States v. Norton*, n166 the Court rejected a defendant's claim that it was improper to admit his prior cocaine transactions to prove intent in a drug prosecution, since he asserted only a coercion defense. The Court stated that "the government is not limited in its proof of its case by a defendant's representations of what his defense will be after the government rests," and that intent was an element that the government was required to prove.

United States v. Jones, 982 F.2d 380 (9th Cir. 1992) , *amended* (9th Cir. 1993): In a prosecution for conspiring to import marijuana, the Court held that evidence of the defendant's involvement in prior marijuana smuggling operations was not made irrelevant by the defendant's complete denial of participation in the crime. Intent is an element of the charged crimes, and the fact that he did not contest those particular elements did not relieve the government of its burden of proving them beyond a reasonable doubt, which it was entitled to do by probative evidence.

United States v. Matthews, 411 F.3d 1210 (11th Cir. 2005) , vacated, 431 F.3d 1296 (11th Cir. 2005) : The Court reversed the defendant's conviction for a major cocaine distribution conspiracy because evidence of his 1991 conviction for street-level drug selling was improperly admitted. The Court considered the suggestion "preposterous" that the jurors would believe the witnesses' descriptions of large cocaine sales by the defendant over two years and yet doubt that he did in fact intend to involve himself in a conspiracy to distribute cocaine. The Court reasoned:

> What the Government really means is that it "needed the extrinsic evidence to satisfy its heavy burden" because it feared that the jurors would not believe its witnesses *at all*. The Government wanted the jury to infer that Matthews was dealing drugs [in] 1991 and was still dealing drugs in 1999, 2000, and 2001. [...] This is precisely the inference the law does not allow.

The Court concluded that "if the conduct charged is not open to a plausible innocent explanation, then extrinsic

offense evidence is not admissible to show intent."

[vi] Rule 404(b) -- Intent -- Extortion Cases

United States v. Zeuli, 725 F.2d 813 (1st Cir. 1984) : Another extortion transaction was held properly admitted to prove intent in a prosecution for conspiracy to extort.

United States v. Himelwright, 42 F.3d 777 (3d Cir. 1994) : The Court reversed a postal worker's conviction for interstate threats and extortionate demands, which arose from the defendant's failed attempt to get a transfer to a post office near his children, because evidence of his purchase and possession of firearms was improperly admitted at his trial. The firearms evidence could not be used as proof of intent on the interstate threat charge, since "the statute requires proof of a defendant's general intent to threaten injury, but does *not* require proof of a specific intent to injure another or the present ability to carry out his threat." While the defendant's possession of firearms was perhaps probative of his intent to carry out his threat, it was not probative of whether he intended to make a threat, which is the proof that the statute requires. As to the extortion charge, the Court recognized that the defendant's capability of carrying out the threats "might be relevant to his intent to extort a job transfer." However, the probative value was minimal and was substantially outweighed by the prejudicial effect of the firearms evidence.

United States v. Wilkes, 685 F.2d 135 (5th Cir. 1982) : In a prosecution for extortion against a justice of the peace who used his official stationery to threaten arrest of those who did not respond to his letters, the Court upheld the introduction of proof of prior unlawful collection practices. Even though the defendant offered to stipulate that the letters were sent with the intent to collect payment of debts, the Court found that the issue of intent to extort remained in the case, and that the evidence was appropriately received on that issue.

United States v. Benton, 852 F.2d 1456 (6th Cir. 1988) : The Court upheld the admission of evidence that a defendant previously received kickbacks for ignoring bootlegging violations to establish his intent with respect to receipt of money from cocaine dealers. The defendant had claimed that he was investigating the dealers, and the prior act evidence tended to establish a plan of extortion. See also *United States v. Davis* n167(testimony by a witness that he was coerced into performing work at a sheriff's residence was properly admitted in the sheriff's RICO and Hobbs Act trial to show the sheriff's intent to extort similar labor from his deputies).

United States v. Schweihs, 971 F.2d 1302 (7th Cir. 1992) : The Court affirmed extortion convictions, holding there was no abuse of discretion in admitting other act evidence during the government's case-in-chief where there was ample reason to believe that the defendant would raise intent or knowledge as an issue, even though the Hobbs Act does not necessarily involve specific intent.

United States v. Haskins, 737 F.2d 844 (10th Cir. 1984) : The Court held that evidence of kickbacks outside the period covered by the indictment was admissible to prove intent in an extortion prosecution.

[vii] Rule 404(b) -- Intent -- Firearms Cases

United States v. Cassell, 292 F.3d 788 (D.C. Cir. 2002) : Affirming convictions for possession of guns by a felon and during drug trafficking, the Court held that prior instances of firearm possession were relevant to show the defendant's knowledge and intent to possess the firearms found in a bedroom he occupied in his uncle's house: "A prior history of intentionally possessing guns, or for that matter chattels of any sort, is certainly relevant to the determination

of whether a person in proximity to such a chattel on the occasion under litigation knew what he was possessing and intended to do so."

United States v. Swiatek, 819 F.2d 721 (7th Cir. 1987) : The Court found harmless error in the admission of a defendant's willingness to deal in stolen property and cars in a prosecution for firearms offenses.

United States v. Hooton, 662 F.2d 628 (9th Cir. 1981) : The Court held it was proper for the government to use other acts to show the defendant's intent to engage in a business of dealing in firearms as opposed an intent to enhance his gun collection.

United States v. Mittleider, 835 F.2d 769 (10th Cir. 1987) : Evidence of the defendant's subsequent conversation with an undercover agent concerning a gun purchase was admissible to show intent and absence of mistake in a prosecution for firearms violations.

[viii] Rule 404(b) -- Intent -- Fraud, Forgery, Counterfeiting, False Statements, etc., Cases

United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000) : In a prosecution for possession of counterfeit obligations discovered in May, the government offered evidence that the defendant was arrested a month earlier and counterfeit bills with the same serial numbers as the May bills were found. Rejecting the notion that this evidence was "intextricably intertwined" with the charged offense so that it did not fall within *Rule 404(b)*, the Court found that the evidence was admissible to prove intent and knowledge. Affirming a conviction for bank fraud arising from a check-kiting scheme in *United States v. Pless, 79 F.3d 1217 (D.C. Cir. 1996)* , the Court held that evidence of the defendant's failure to pay taxes during the period of the check-kiting was properly admitted. The evidence was offered to rebut the defendant's contention that he believed that the bank had consented to his transactions. The Court stated: "Although the issue is close, we think the government's argument that it is more likely that the defendant intended to defraud [the bank] if at the same time he was failing to pay other corporate liabilities, is plausible. And the prosecutor's carefully constrained use of the evidence, in conjunction with the judge's limiting instruction, renders any potential for prejudice minor." In *United States v. Nicely*, n168 the Court reversed the defendants' convictions because a conspiracy involving a scheme to defraud a seller of computers into offering money to secure contracts and a separate conspiracy to launder money were improperly joined. The misjoinder was prejudicial because evidence of one scheme would be inadmissible in proving the other; it was not probative of intent and could not have survived a *Rule 403* balancing.

United States v. Oppon, 863 F.2d 141 (1st Cir. 1988) : The Court held that evidence of other occasions when defendant falsely represented his citizenship was admissible to prove intent in the instant case. See also *United States v. McNeill* n169(evidence that the defendant in a mail fraud case gave a false address to the city retirement board from whom he sought disability benefits was admissible to show intent to defraud); *United States v. Cardillo* n170(the defendant's efforts to sell counterfeit coins were held admissible in a prosecution for possession of counterfeit coins with intent to defraud).

United States v. Inserra, 34 F.3d 83 (2d Cir. 1994) : The Court held that evidence of the defendant's prior conviction for making a false statement to a labor investigator was admissible in his trial for making a false statement to his probation officer, where the defense opening statement indicated there was an innocent explanation for his conduct and his intent was in issue. One Judge believed that the difference in circumstances was so great that the prior conviction had little if any probative value. In *United States v. Caputo*, n171 the Court held evidence of previous credit card schemes admissible to prove intent in a prosecution for possession of an unauthorized credit card. See also *United*

States v. Smith n172(similar act evidence could be used to prove intent to commit fraud in a securities and wire fraud case, especially since the defendant claimed that he was the victim of other brokers and of market forces).

United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986) : Affirming a conviction for making false statements on a loan application, the Court held that evidence concerning a similar transaction (in which the defendant used his status as a retired FBI agent to obtain special treatment from a car rental agency) three months after the application as well as evidence of conduct prior to the application was admissible to prove intent. See also *United States v. Bice-Bey* n173(upholding a conviction for credit card fraud involving a telephone order for electronic equipment, and finding that evidence of earlier calls was admissible to prove intent).

United States v. Sanders, 343 F.3d 511 (5th Cir. 2003) : The Court affirmed convictions for bank fraud and making a false statement to the SBA, holding that evidence that the defendant and his wife did not disclose certain payments and reimbursements in a corporate bankruptcy petition was properly admitted to prove the defendant's intent to do the acts charged in the indictment. The Court also found no error in the admission of extrinsic evidence that the defendant was doing manual labor at a job during the period when he submitted a claim to his employer stating that he was unable to work. The defendant's fraudulent claim was related to his failure to disclose his known debt on his bank loan application and tended to prove intent. In *United States v. Riddle, 103 F.3d 423 (5th Cir. 1997)* , the Court reversed a bank chairman's conviction for fraud in connection with loans in which he was interested, finding error in the admission of evidence concerning four other loan transactions. The evidence may have suggested that the defendant took improper advantage of his position to encourage the bank to extend credit unwisely and for the benefit of his non-banking endeavors, but it did not establish that he had intentionally kept the bank board in the dark on his personal interest in having the bank extend credit.

United States v. Brown, 147 F.3d 477 (6th Cir. 1998) : The Court affirmed a conviction for fraud in connection with a telemarketing scheme, holding there was no error in admitting evidence of the defendant's activities at other telemarketing agencies. The evidence tended to show the defendant's specific intent to defraud and its probative value was not substantially outweighed by its prejudicial effect. In *United States v. Campbell*, n174 the Court held that evidence regarding the billing of other patients was admissible to prove an intent to defraud Medicare. See also *United States v. Crachy* n175(evidence of prior acts relating to counterfeit bills was admissible to prove intent); *United States v. Hamilton* n176(in a prosecution for uttering altered obligations of the United States, evidence of previously passing a $2 bill altered to look like a $20 bill was properly admitted to prove intent and identity).

United States v. Ryan, 213 F.3d 347 (7th Cir. 2000) : The Court affirmed a conviction for bank fraud, finding no abuse of discretion in the admission of evidence that the defendant failed to report $136,000 received as kickbacks and commissions for his part in the scheme on his tax returns. The evidence was of a cover-up "intricately related" to the acts charged and tended to prove the defendant's required specific intent to defraud, as well as to cast doubt on his defense of being ignorant of the fraudulent aspects of the transactions. In *United States v. Gellene, 182 F.3d 578 (7th Cir. 1999)* , the prosecution of an attorney for making false statements regarding conflicts of interest in a bankruptcy proceeding, the Court found no abuse of discretion in the admission of evidence that the defendant had misrepresented his status as a member of the bar on numerous occasions and had made misrepresentations regarding billing and discovery matters in this and another bankruptcy case. The evidence of his intentional deception on those other occasions was relevant to whether his false statements in this case were intentional, as the government charged, or only trivial or a matter of neglect, as the defendant maintained. In *United States v. Macey*, n177 the Court held it was error (but harmless) to admit evidence in a fraud trial that the defendant had previously changed an employee's records in an attempt to avoid paying compensation owed. The evidence did not so much show the defendant's intent as his willingness to break the law in a pinch, which is exactly what the Rule prohibits. In *United States v. Draiman*, n178 the Court affirmed a mail fraud conviction arising from the defendant's filing false insurance claims after a burglary.

Upholding the admission of evidence of prior fraudulent claims, it reasoned that mail fraud requires proof of specific intent and that a defendant cannot unilaterally remove intent as an element. The Court cautioned, however, that the government should not be permitted to "flood the courtroom" with other crimes evidence merely because specific intent must be proved. See also *United States v. Chaimson* n179(admission of prior bribe payments to a county assessor was upheld in a mail fraud prosecution involving bribery of officials as part of a scheme to fraudulently reduce real estate assessments).

United States v. Mora, 81 F.3d 781 (8th Cir. 1996) : In the trial of a defendant charged with insurance fraud in relation to claims made after her house was burned, the government offered evidence that the fire was caused by arson, and that the defendant had foreknowledge of the arson. The Court held that the evidence was properly admitted because "[i]f Mora knew that the fire was to take place, her misrepresentations to Safeco were more likely intentional and part of a coordinated plan, rather than inadvertent, isolated misstatements." In *United States v. Fitterer*, n180 the Court held that evidence of an earlier insurance fraud was probative of intent in a mail fraud case. See also *United States v. Hardrich* n181(evidence of a prior conviction for uttering a forged instrument was properly admitted to show intent in a prosecution for uttering forged treasury checks).

United States v. Faust, 850 F.2d 575 (9th Cir. 1988) : Evidence that the defendant forged a letter was held admissible to prove an intent to forge checks.

United States v. Cook, 745 F.2d 1311 (10th Cir. 1984) : The defendant's false identification and attempts to evade identification were admitted to show knowledge and intent in a prosecution for making false representations in a currency transaction report.

United States v. Mills, 138 F.3d 928 (11th Cir. 1998) : The Court affirmed the convictions of a husband and wife for Medicare fraud, but held that it was error (albeit harmless) to admit evidence that the wife concealed a jewelry purchase from Customs inspectors when returning to the United States from Europe. The Customs incident was only relevant to show that the wife was disposed to lie and the differences between the falsification of the Customs declaration and the falsification alleged against her in the instant case were too great. In *United States v. Simon*, n182 the Court held that evidence that salespersons charged with fraud worked at other companies and that some were instrumental in accomplishing a fraud was admissible to prove intent. See also *United States v. Jackson* n183(in a prosecution of a physician for using the mails to effectuate a scheme to defraud insurance companies, evidence that the defendant had accepted money for providing fraudulent medical excuses for employees to document absences was admissible to prove fraudulent intent); *United States v. Scott* n184(instances in which the defendant used a name other than his own to obtain credit were admissible to demonstrate intent in making false statements to banks and misusing the mails).

[ix] Rule 404(b) -- Intent -- General Principles

United States v. O'Connor, 580 F.2d 38 (2d Cir. 1978) : The Court reversed a conviction of a government inspector for taking money from meatpacking companies in connection with his official duties, finding that evidence of other bribes allegedly received by the defendant was improperly received as evidence of intent, since there really was no issue of intent in the case. In dealing with *Rule 404(b)* problems, the Court stated that, although other crimes evidence may be admitted, "caution and judgment are called for, and a Trial Judge faced with an other crimes evidence problem should require the Government to explain why the evidence is relevant and necessary."

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc): In this leading case, the central issue at trial was whether the defendant took a silver dollar from the mail with the intent to keep it or whether he was planning to turn the coin in to postal authorities. To prove intent, the government offered evidence that the defendant had two credit cards in his pocket which were not issued to him and which were unsigned. Holding the evidence properly admitted, the *en banc* Court stated that *Rule 404(b)* requires a two-part analysis: first, whether the evidence is relevant to an issue other than the defendant's character, and second, whether it possesses probative value that is not substantially outweighed by its undue prejudice and otherwise satisfies *Rule 403*. Similarity is an important consideration in the first step, and it varies depending on the theory of admissibility put forward. At the second step, the Court cautioned that the risks of prejudice are particularly great when the extrinsic activity was not the subject of a conviction. Abjuring mechanical solutions, the Court called "for a commonsense assessment of all the circumstances surrounding the extrinsic offense." Five dissenters argued that the majority's approach tended to admit propensity evidence despite the first sentence of subdivision (b), that its approach was inconsistent with the restrictions found in Rules 608 and 609, and that other Circuits utilized tests that were more protective of criminal defendants and more likely to produce fairer trials. However, the principal difference was that on the issue of intent, the dissenters favored an objective test of similarity of the elements of both offenses, while the majority did not require the extrinsic offense to include the same essential physical elements as the charged offense; it was enough that the government's evidence was sufficient to convince a jury that the defendant had the same state of mind when committing both offenses.

United States v. Jones, 389 F.3d 753 (7th Cir. 2004) , vacated on other grounds, 545 U.S. 1125 (2005) : At the defendant's trial for possession of cocaine with intent to distribute, the government introduced his prior convictions for possession of marijuana with intent to distribute and for attempted delivery of a controlled substance, to prove intent. Noting that there is only "a fine line" between evidence of intent and evidence of propensity, the Court found that the evidence showed nothing more than that the defendant had a propensity to commit drug crimes (but the error was harmless). In a careful opinion (discussed in the Editorial Explanatory Comment, § 404.02[10]), the Court explained that to tell the difference between the illegitimate use of a prior conviction to show propensity and the proper use to prove intent,

> the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime. A prior conviction may be relevant to show intent if the defendant concedes that he possessed the drugs but denies that he planned to distribute them, or if he denies knowing that the substance was contraband. Merely introducing prior convictions without more, however, can prove nothing but propensity, which is not enough to take the evidence out of the exclusionary principle established by *Rule 404(b)*.

United States v. Pollock, 926 F.2d 1044 (11th Cir. 1991) : The Court upheld admission of the defendant's prior conviction for conspiracy to import marijuana in a cocaine conspiracy prosecution, noting that if the government can do without other crimes evidence in proving intent, it should, but if the evidence is essential to obtain a conviction, it may come in. "This may seem like a 'heads I win; tails you lose' proposition, but it is presently the law." In this case, because of the limited evidence of conspiratorial intent, the prior convictions were that much more probative.

[x] Rule 404(b) -- Intent -- Miscellaneous Cases

United States v. Long, 328 F.3d 655 (D.C. Cir. 2003) : Affirming convictions for sexual offenses involving minors, the Court upheld the admission of testimony by two witnesses that the defendant had engaged in similar patterns of conduct with them, which tended to rebut defense allegations that the six victims fabricated the story of sexual abuse. The Court also upheld the admission of 250 photos showing the minor victims and other young males in sexually explicit positions, noting that the Trial Judge had painstakingly reviewed the photos *in camera* and had carefully explained the reason for admitting each photo. The photos were relevant because Long denied possession of the child pornography alleged in two counts of the indictment, and his possession of other similar photos demonstrated intent to possess such photographs. The Judge had instructed the jury that it could not consider the photos as evidence of bad character.

United States v. Gray, 405 F.3d 227 (4th Cir. 2005) : The defendant was convicted of insurance fraud, resulting from her murdering her second husband, and later her lover, and collecting the life insurance proceeds after each murder. The Court found no error in the admission of evidence that she had also murdered her first husband and had collected the insurance proceeds, offered to prove intent. In *United States v. Blount*, n185 the defendant was convicted of obstruction of justice arising from his behavior during the courtroom sentencing of his mother. The Court found no error in admitting evidence that the defendant was forcibly escorted from the building after an encounter with the court clerk in the clerk's office before the mother's scheduled trial, as well as evidence of the plea agreement entered into by the mother. This evidence was properly admitted to show the defendant's intent and motive in disrupting the court during the sentencing. In *United States v. Mohr*, n186 the defendant was convicted of unlawfully releasing a police dog on an arrestee, who was allegedly not resisting or attempting to flee. The Court found no error in the admission of evidence that the defendant had released the dog on other suspects who presented no danger. The evidence was strongly probative of intent and willfulness, and this probative value for a purpose other than character was not substantially outweighed by any prejudice arising from the events.

United States v. Rubio, 834 F.2d 442 (5th Cir. 1987) : The Court held that evidence of prior child pornography was admissible in a child pornography prosecution to prove the defendant's intent to receive items through the mail. See also *United States v. Westmoreland* n187(testimony concerning the defendant's financial records in a prior term as judge were admissible to prove intent with respect to receipt of money while serving as county supervisor); *United States v. Wilson* n188(extraneous acts of terrorism were properly admitted to show intent where the defendant denied intent and claimed he was working for the CIA); and *United States v. Roberts* n189(the defendant's prior conviction for a gambling offense was properly admitted to prove that he intended to join a conspiracy).

United States v. Shearer, 379 F.3d 453 (7th Cir. 2004) : The defendant, charged with dealing in display fireworks without a license, claimed that he was keeping the fireworks for his personal use. Affirming, the Court held that evidence that the defendant sold display fireworks both before and after the time set out in the indictment "was properly directed towards proving Shearer's intent to deal by demonstrating that Shearer engaged in regular and repeated transactions involving display fireworks with a consistent group of buyers." In *United States v. Saunders, 166 F.3d 907 (7th Cir. 1999)* , the defendant sent a threatening letter, and later an explosive device, to a federal Judge. The Trial Judge refused to redact prejudicial and offensive language from the letter, including the defendant's admission that he had already stabbed a correctional officer. The Court found no error, noting that "the derogatory language and the reference to the stabbing incident were probative of Mr. Saunders' intent to instill fear in his victim." Limiting instructions were sufficient to protect the defendant against undue prejudice. In *United States v. Arnold*, n190 the Court held that a taped conversation discussing a prior unsuccessful attempt to bribe a witness was admissible to prove specific intent to obstruct a grand jury investigation. See also *United States v. Radseck* n191(prior acts of the defendant in soliciting kickbacks in return for insurance business were admissible to prove intent).

United States v. Hambrick, 299 F.3d 911 (8th Cir. 2002) : The Court affirmed a conviction for escape, finding no error in the admission of evidence that the defendant previously escaped from a halfway house in 1998 and was returned to prison as a result. The evidence was relevant to prove intent. The Court also held that evidence that the defendant tested positive for cocaine after his escape from the halfway house was properly admitted, since evidence that the defendant knowingly violated a condition of his weekend pass was probative of intent to commit a knowing escape.

United States v. Johnson, 132 F.3d 1279 (9th Cir. 1997) : The defendant was charged with transporting a minor boy from Norway with intent to engage in criminal sexual activity. The Court found no error in the admission of testimony from two witnesses concerning sexual contact in which the defendant had engaged them 13 years earlier, when each witness was in his teens. The testimony was properly admitted to prove intent, even though the conduct was not identical to the conduct charged. The testimony indicated that the defendant had obtained the trust of the victims in order to engage in sexual contact with them, and in that sense was sufficiently similar to the conduct charged to be probative of intent. In *United States v. Miller*, n192 the Court held that evidence that the defendant, an FBI agent, had previously sold information to an FBI informant was not sufficiently similar to the charged espionage conspiracy to be admissible as proof of intent.

United States v. Viefhaus, 168 F.3d 392 (10th Cir. 1999) : The defendant was convicted of conspiracy to use and use of a telephone to transmit a bomb threat, after a message on his hotline (which espoused White Supremacist propaganda) stated that 15 cities would be bombed on a certain day. The Court held that racially inflammatory materials that were seized by the police in a search of his home were properly admitted as probative of the defendant's intent, because they helped to prove that he was serious when he made his statement on the hotline, and showed that the threat "represented the culmination of considerable planning for a racial holy war."

United States v. Hurley, 755 F.2d 788 (11th Cir. 1985) : The Court held that evidence that the defendant was with her husband after his escape was admissible to prove her intent to help him escape.

[xi] Rule 404(b) -- Intent -- Tax Cases

United States v. Johnson, 893 F.2d 451 (1st Cir. 1990) : The Court held that evidence of filing blatantly false tax exemption claims and failing to file an income tax return in 1987 was admissible to negate the defendant's defense to charged tax evasion in 1982-86 that he had relied in good faith on the advice of others in filing false returns for those years.

United States v. Bok, 156 F.3d 157 (2d Cir. 1998) : Affirming convictions for attempted tax evasion and filing false statements on income tax returns, the Court found that evidence of the defendant's failure to file tax returns in other years was properly admitted. The government had to prove that the defendant acted "willfully," and the uncharged misconduct was admissible to prove willfulness circumstantially. In *United States v. Tarricone, 996 F.2d 1414 (2d Cir. 1993)* , the Court affirmed a defendant's convictions arising from participation in a scheme to evade gasoline excise taxes, holding there was no error in admitting, as proof of intent, evidence that the defendant controlled New York City's bootleg gas operations. In a prosecution for tax evasion, *United States v. Collorafi*, n193 the Court reversed *in limine* orders excluding memorandum decisions dismissing the defendant's earlier civil challenges to the income tax laws as meritless and frivolous, holding they were admissible on the issue of the defendant's knowledge and wrongful intent and their probative value was not substantially outweighed by any dangers of prejudice or confusion.

United States v. Gricco, 277 F.3d 339 (3d Cir. 2002) : Affirming convictions for tax fraud arising from a scheme

to skim airport parking lot revenues, the Court expressed its doubts as to the admissibility of evidence of one defendant's role in an earlier, separate scheme to embezzle money from the airport: "While the evidence of the prior thefts may have been relevant to show an intent to commit further thefts, it is questionable whether this evidence was relevant to show an intent to commit the tax offenses," and it was likewise questionable whether evidence of the earlier scheme was "particularly relevant to show Gricco's opportunity to carry out his tax offenses or the knowledge needed to do so."

United States v. McClain, 934 F.2d 822 (7th Cir. 1991) : In a public corruption case, the Court held that any error was harmless when the government introduced evidence of illegal taps on gas lines as probative of intent to evade taxes. See also *United States v. Micke* n194(evidence that the defendant offered to backdate documents to support fraudulent tax claims was admissible to prove intent with respect to other taxpayers); *United States v. Birkenstock* n195(upholding admission of evidence regarding the defendant's earlier tax returns as bearing upon his intent in a willful failure to file prosecution).

United States v. Richards, 723 F.2d 646 (8th Cir. 1983) : The defendant's communications with the IRS concerning 1983 taxes were admissible to prove intent in a prosecution involving his 1981 return.

United States v. Rothbart, 723 F.2d 752 (10th Cir. 1983) : Evidence that the defendant previously filed late personal tax returns was held admissible to show intent in a prosecution for failure to file timely quarterly employer's returns.

United States v. Dixon, 698 F.2d 445 (11th Cir. 1983) : The Court affirmed, using evidence that tax liability was understated in 1977 as evidence of an intent to evade taxes in 1975 and 1976.

[xii] Rule 404(b) -- Intent -- Theft, Robbery, and Stolen Property Offenses

United States v. Jackson, 339 F.3d 349 (5th Cir. 2003) : Reversing a conviction for transporting stolen goods from a jewelry store burglary, the Court held it was an abuse of discretion to admit evidence that the defendant had a previous felony conviction for stealing watches. Prior conviction evidence has a tendency to prove the difficult intent element in conspiracy cases, that the defendant knowingly joined a plan to further an unlawful objective. In this case, however, where there was other evidence going to intent and only the identification issue was contested, the evidence had very little probative value. Moreover, it had a substantial potential to cause unfair prejudice, because of the great danger that the jury would decide that he was involved in the conspiracy because of his prior criminal conduct. In *United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)* (en banc), the crucial question at trial was whether the appellant took a silver dollar from the mail with the intent to keep it, or whether he was planning to turn the coin in to postal authorities. The Court held there was no error when the government offered evidence on the intent issue that the defendant had two Sears credit cards in his pocket which were not issued to him and which were unsigned.

United States v. Owens, 424 F.3d 649 (7th Cir. 2005) : Reversing a conviction for bank robbery, the Court held it was an abuse of discretion to admit evidence that the defendant robbed the same bank seven years earlier (a robbery for which he was never charged). The evidence was inadmissible to prove intent, since bank robbery is a general intent crime and the defendant offered an alibi defense and did not place his intent in issue.

United States v. Mothershed, 859 F.2d 585 (8th Cir. 1988) : The Court reversed a conviction for aiding and

abetting a bank robbery, because the Trial Judge admitted evidence of a previous conviction for possession of stolen bank money. The prior act was not relevant with respect to intent, since there was no showing that the defendant intended at the time of his earlier crime that a bank be robbed. In *United States v. Krapp*, n196 the Court held that evidence of other violations of postal regulations was relevant to prove an intent to defraud or mislead on the part of a postmaster who claimed that she was not properly instructed on the correct procedures for reporting shortages. See also *United States v. Burkett* n197(evidence of unrelated burglaries was properly admitted to prove intent in a prosecution for a break-in at a post office, even though the defendant had indicated he intended to rely solely on alibi).

United States v. McCollum, 732 F.2d 1419 (9th Cir. 1984) : The Court upheld a defendant's conviction for attempting a 1982 bank robbery, finding that a 1970 conviction for armed robbery, admitted under *Rule 609*, was admissible under *Rule 404(b)* to prove intent, where the defendant claimed that he committed the instant crime under the influence of hypnosis. A dissenting Judge argued that it was inappropriate to sustain admission of evidence on a theory never argued below and that the prejudicial effect of the evidence outweighed its probative value. In *United States v. Albuquerque*, n198 a prosecution for interstate transportation of a vehicle knowing it to be stolen, the Court concluded that "hotwiring" tools, admitted on the theory that they demonstrated the defendants' intent, were not relevant to any element in the case; they did not demonstrate the defendants' knowledge that the automobile was, in fact, stolen.

United States v. Cummings, 798 F.2d 413 (10th Cir. 1986) : The Court affirmed a conviction for selling a stolen cab portion of a tractor-trailer, finding that evidence that the defendant was involved in a pattern or practice of dealing in stolen trucks and parts was admissible to prove intent and the absence of mistake.

[cc] RULE 404(b) -- Joint Defendants

United States v. Hernandez, 780 F.2d 113 (D.C. Cir. 1986) : The Court held that evidence that one of two defendants was involved in a fight hours before being arrested for possession of a firearm was relevant to prove motive. It also found, however, that there was insufficient evidence to conclude that the other defendant was involved in the fight. Thus, the admission of the evidence against him was prejudicial error.

United States v. David, 940 F.2d 722 (1st Cir. 1991) : The Court affirmed convictions in connection with a drug conspiracy, holding that evidence of violence by one member of the conspiracy was properly admitted. The *Rule 404(b)* objection by the defendant was properly rejected, because the challenged evidence was independently admissible as proof that he ran a continuing criminal enterprise and thus was not "other crimes" evidence. Other defendants lacked standing to raise *Rule 404(b)* objections to evidence of conduct not attributable to them, and the evidence did not have a prejudicial spillover effect.

United States v. Danzey, 594 F.2d 905 (2d Cir. 1979) : One of two defendants convicted of bank robbery confessed to 15 bank robberies, and the evidence "was so plainly relevant as to be classic similar act evidence admissible under the rule ... to show a *modus operandi*." The Court concluded, however, that an inadequately redacted form, which included the word "Blank" as a substitute for the name of the accomplice identified by the defendant who confessed, required reversal as to the codefendant, because of possible spillover effects. Compare *United States v. Rosenwasser*, n199 where the appellant was not permitted to cross-examine an FBI agent who testified that he had arrested the codefendant for a similar offense three weeks after the charged hijacking. The jury was instructed that the other crimes evidence was admissible only against the codefendant and not against the appellant. Because the other crime involved a building in which the defendant conducted his business, however, the case presented "a close question," but the Court concluded that the limiting instruction was sufficiently strong to protect the appellant. One Judge dissented.

United States v. Johnson, 610 F.2d 194 (4th Cir. 1979) : One defendant's cross-examination of a government witness brought out inadmissible other crimes evidence about a codefendant. The Court held (2-1) that, since the evidence did not carry the imprimatur of the government and was the subject of a cautionary instruction, its admission was not prejudicial error. See also *United States v. Smith Grading & Paving, Inc.* n200(in a prosecution for conspiracy to rig bids, introduction of one defendant's previous bidrigging to prove knowledge and intent to enter a conspiracy was more probative than it was prejudicial to other defendants).

United States v. Salomon, 609 F.2d 1172 (5th Cir. 1980) : The Court found it was error not to grant a severance when a codefendant testified about other crimes involving the defendant.

United States v. Phillips, 599 F.2d 134 (6th Cir. 1979) : The Court reversed a bank robbery conviction because an unindicted accomplice was permitted to testify that the defendant was involved in three other bank robberies. The Court recognized that it might be probative on the issue of identity that a defendant committed three other crimes with the same person, if this person were also charged with the fourth crime, but it found no "necessariness of association" in the instant case.

United States v. Kramer, 955 F.2d 479 (7th Cir. 1992) : The Court affirmed convictions for conspiring to distribute marijuana as part of a 1983-87 continuing criminal enterprise that imported marijuana, holding that the Trial Judge exercised principled discretion in admitting evidence that one of the defendants had imported 15 tons of marijuana in 1981, as the evidence showed specific intent and was not too remote to be relevant, and its prejudicial effect, if any, did not substantially outweigh its probative value.

United States v. Cardall, 885 F.2d 656 (10th Cir. 1989) : In reversing one defendant's fraud conviction, the Court held that there was insufficient evidence the defendant was actually involved in bad acts of codefendants that the government offered against him and the others. In *United States v. Warledo*, n201 convictions for conspiracy to set fire to a railroad bridge were reversed because the government was improperly permitted to ask one of the defendants whether he possessed a rifle found in his automobile and to introduce the rifle together with a clip and bullets to rebut his denial of possession. The Court rejected the government's opening of the door for this dangerous form of impeachment on an irrelevant matter, and it reversed all the appellants' convictions because the conspiracy charges made it likely that the evidence would have affected each of them.

United States v. Bovain, 708 F.2d 606 (11th Cir. 1983) : The Court affirmed heroin convictions, finding no spillover prejudice in the admission of evidence offered by one defendant that he had been convicted of another offense and was serving time during the early part of the conspiracy alleged by the government. The Court emphasized that the Trial Judge took "great pains" to advise the jury as to the proper use of the prior conviction.

[dd] RULE 404(b) -- Jury Instructions

See also the annotations in § 404.03[2][pp], "Purposes for Admission To Be Specified."

United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) : The Court affirmed convictions for forced labor offenses, finding the probative value of other act evidence was not substantially outweighed by its prejudicial effect. Noting that "the customary limiting instruction" had been given, the Court commented: "Without being naive about the effect of

such instructions, they are still worth something--especially where, as here, the fairly debatable evidence had at least some relevance and was not dramatically prejudicial." In *United States v. Randazzo, 80 F.3d 623 (1st Cir. 1996)* , the defendant, convicted of misbranded and adulterated food and tax fraud offenses, did not challenge the admission of similar prior uncharged offenses, but claimed that a requested standard jury instruction -- that evidence of uncharged crimes may not be considered as evidence of the defendant's propensity to commit crimes -- should have been given. The Court recognized that under its case law a limiting instruction was not required where the uncharged crimes were closely entangled with the events constituting the charged offense, since the permitted inference may effectively submerge the forbidden propensity inference. When, as in this case, there may be doubt as to whether some of the other crimes are distinct enough to call for an instruction, the safer course may be to give a closing general instruction that bad character is not a permissible inference; however, omission of the limiting instruction was at worst harmless error in this case.

United States v. Everett, 270 F.3d 986 (6th Cir. 2001) : Affirming an accountant's conviction for bank fraud arising from a scheme to sign checks on a client's account without authorization, the Court held it was error (but harmless) to admit evidence that she had also improperly received the proceeds from checks signed by an authorized signatory, since the Trial Judge told the jury only that "certain testimony and certain exhibits [had been admitted during the trial] for a limited purpose," without making a specific statement as to what the jury could use the evidence at issue for, or even what evidence was restricted to a specific purpose. In a drug case, *United States v. Spikes, 158 F.3d 913 (6th Cir. 1998)* , the Court held it was error (but harmless) when the Trial Judge's instruction accompanying the admission of *Rule 404(b)* evidence only informed the jury on what it could not use the evidence for ("guilt of the crimes charged") and did not tell them what specific purpose would be proper. The Judge also erred in another instruction, which explained that other acts evidence was admitted for purposes "including" "opportunity, intent, or knowledge." "Opportunity" was never at issue, and use of the word "including" invited the jury to use the evidence for purposes other than those the Judge identified, which poses the same problems as providing the jury with no specific purpose at all for considering the evidence. In *United States v. Jobson*, n202 the Court held that evidence of the defendant's membership in a gang could be properly admitted in a felon firearm possession trial to show opportunity. Nonetheless, the conviction was reversed because the instruction to the jury at the close of the case, that they could not consider "acts other than the ones charged in the indictment ... as evidence that the defendant committed the crime that he is on trial for now. Instead, you can consider it in deciding for the purposes stated to you," was "inadequate to safeguard against the impermissible use of the gang evidence because they do not inform the jury of the proper purpose for which the gang evidence could be considered." Moreover, no limiting instruction was given at the time the evidence was offered. In *United States v. Steele*, n203 a narcotics case in which a government witness stated that one of the defendants had previously spent time in a South American jail and the Trial Judge immediately instructed the jury to disregard the statement, the Court found that the defendant's rights were protected and that no mistrial was required.

United States v. Lane, 323 F.3d 568 (7th Cir. 2003) : In a prosecution for making false statements in loan applications by not disclosing a large outstanding debt, the Court held there was no abuse of discretion in admitting evidence of other debts the defendant owed at the same time, but even if some of the evidence was improperly admitted, it was harmless error because any prejudicial effect was mitigated by a limiting instruction stating: "You have heard the evidence of acts of the defendant other than those charged in the indictment. You may consider this evidence only on the question of the defendant's motive, intent, knowledge, and absence of mistake or accident. You should consider this evidence only for this limited purpose."

United States v. Brown, 327 F.3d 867 (9th Cir. 2003) : In a trial for wire fraud committed by overcharging a wood chip client by two percent, the government introduced evidence of uncharged misconduct, including the defendant's manipulation of chip measurements, underpaying of truckers, and other instances of manipulation. In closing argument, the prosecutor argued: "And my question to you is, if a man is willing to cheat a little bit over there, wouldn't he be

willing to cheat just a little bit over here?" The Court reversed because the Judge "did not instruct the jury to disregard the prosecutor's statements insofar as they suggested that Brown had a criminal propensity." A dissenting Judge argued that the prosecutor's statement did not require reversal, because the Judge adequately cautioned the jury by telling it to "consider only the charges in this case in reaching its decision, the 28 counts in the indictment."

United States v. Gonzalez, 975 F.2d 1514 (11th Cir. 1992) : The defendant was charged with conspiring to conduct money laundering and with money laundering on or about July 27. The Court reversed the defendant's conviction on the latter count because the Trial Judge had erroneously refused to give an instruction that limited the use of evidence of money laundering in May and June to showing the defendant's intent and guilty knowledge.

[ee] RULE 404(b) -- Knowledge

[i] Rule 404(b) -- Assault, Homicide, Abuse, etc., Cases

United States v. Sanders, 964 F.2d 295 (4th Cir. 1992) : Reversing a conviction for assault with a dangerous weapon in a prison, the Court held it was error to admit evidence of the defendant's prior convictions for inmate assault and contraband possession. As assault is not the kind of crime in which knowledge is even implicitly in issue, the evidence was not probative of anything except criminal propensity. In *United States v. Fleming, 739 F.2d 945 (4th Cir. 1984)* , the Court affirmed a murder conviction arising from an automobile collision, finding that evidence of the defendant's previous convictions for driving while intoxicated was properly admitted to show "that defendant had grounds to be aware of the risk his drinking and driving while intoxicated presented to others."

[ii] Rule 404(b) -- Knowledge -- Civil Rights Cases

United States v. White, 788 F.2d 390 (6th Cir. 1986) : The Court affirmed a conviction for conspiring and aiding and abetting in violating the housing rights of a black family, holding that evidence of a fire at a codefendant's home prior to the burning of the victimized family's house was relevant to the defendant's knowledge of his codefendant's propensity to engage in arson and was admissible to prove why the defendant went to the codefendant for help. The Court also held that evidence of a subsequent arson by the codefendant should not have been admitted even if the defendant learned of it, since later knowledge did not prove what the defendant knew at the time of the relevant acts.

[iii] Rule 404(b) -- Knowledge -- Conspiracy Cases

United States v. Rodriguez, 215 F.3d 110 (1st Cir. 2000) : The Court affirmed drug conspiracy convictions and held that evidence of the prior drug importation activities of the defendants was properly admitted to show their knowing participation in the conspiracy charged. The Court observed that in a conspiracy prosecution, "it is essential for the government to prove the defendant's knowledge of and voluntary participation in the conspiracy. In particular, the government's evidence must overcome the possibility that a particular defendant's association with criminal co-conspirators was wholly innocent or that, if he was with them at the scene of criminal activity, he was 'merely present' without guilty knowledge or intent." In this case, the prior drug activities among the defendants permitted the jury to view skeptically the defendants' claims that they were simply innocent bystanders.

[iv] Rule 404(b) -- Knowledge -- Drug Cases

[A] Rule 404(b) -- Different Amounts

United States v. Williams, 340 F.3d 563 (8th Cir. 2003) : The defendant, convicted for aiding and abetting the

distribution of cocaine base, argued that a prior conviction for delivery of cocaine base should have been excluded because it involved sales of small quantities for personal use, as opposed to the large quantities at issue in the current case, and because it was too remote to be probative. Affirming, the Court held that the "discrepancy in quantity between Williams' prior conviction and the present prosecution does not change the prior conviction's probative value as to Williams's knowledge and intent," and that the 5 1/2-year-old conviction was sufficiently probative: "We believe he could recognize cocaine base with the same accuracy in 2001 as he did in 1996." In *United States v. Logan, 121 F.3d 1172 (8th Cir. 1997)* , the Court affirmed a conviction for distribution of more than one kilo each of heroin and methamphetamine, holding there was no error in the admission of evidence that the defendant had previously been stopped with "a personal amount" of methamphetamine. In the Court's view, evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime involving intent to distribute drugs, and this is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent.

United States v. Ramirez-Robles, 386 F.3d 1234 (9th Cir. 2004) : The Court affirmed convictions for a methamphetamine distribution conspiracy, holding that the defendant's prior conviction for possession of methamphetamine for sale was properly admitted to prove specialized knowledge. Because the defendant was in the house during the transaction, his prior conviction tended to establish that he would be able to identify a drug deal taking place in his own house. The evidence also tended to support a witness' claim that the defendant was the mastermind of the operation because it showed that he had the knowledge necessary to sell large quantities of methamphetamine and would have known of business practices common in that field, such as "fronting" the methamphetamine.

[B] Rule 404(b) -- Knowledge -- Drug Cases -- Different Drugs

United States v. Givan, 320 F.3d 452 (3d Cir. 2003) : The defendant was charged with a drug distribution conspiracy after the car in which he was riding was found to contain more than 100 grams of heroin. Affirming, the Court found no abuse of discretion in the admission of the defendant's prior conviction for transporting cocaine, as it indicated his knowledge of drugs and drug distribution, making more probable his knowledge of the heroin's presence in the car and less "likely that he was simply in the wrong place at the wrong time." Limiting instructions minimized any prejudicial effect. One Judge dissented, arguing that the logical connection "would be tenuous at best even if the prior conviction involved heroin," and that *Rule 404(b)* precludes an inference that "one who has previously been convicted of dealing drugs is more likely to have something to do with drugs hidden in his vicinity than someone with no prior drug involvement[,] ... absent some other proper relationship" between the prior conviction and the charged crime.

United States v. Gonzalez, 328 F.3d 755 (5th Cir. 2003) : The Court affirmed a conviction for possession of cocaine with intent to distribute, finding no error in the admission of the defendant's earlier conviction for possession of marijuana with intent to distribute. The transportation in the earlier case was similar to the instant case, so the prior conviction was relevant to prove knowledge. Some differences between the earlier facts and those here did not negate the relevance of the earlier conviction, because both offenses involved the concealment of drugs in hidden compartments of cars. In *United States v. McDonald, 905 F.2d 871 (5th Cir. 1990)* , the Court held it was error (but harmless) to cross-examine a defendant charged with importing marijuana about his prior use of speed and cocaine, as that would not lead to an inference that he knew his car contained marijuana when he was arrested and would only be probative of his character as a drug user.

United States v. Martinez, 182 F.3d 1107 (9th Cir. 1999) : The defendant was charged with smuggling amphetamine, after he picked up a friend at the airport who was carrying large quantities of the drug on her person. The Court found no error in the admission of the defendant's prior conviction for heroin importation, since it was probative of his knowledge that drug smuggling was taking place: the conviction tended to prove "knowledge of how drugs are

imported, a specialized sort of knowledge most people lack." The Court rejected the argument that the heroin conviction should not have been admitted because it involved the smuggling of a different drug, since "there must be a lot of knowledge of smuggling that would carry over from one compact, relatively odorless, extremely expensive, illegal powder to another." In *United States v. Garcia-Orozco*, n204 the Court reversed convictions for importing and possessing marijuana, holding that evidence of the defendant's prior arrest for possession with intent to distribute heroin, which arose from an incident when he was riding as a passenger in a car that contained drugs, was irrelevant. Although the defendant was arrested while driving a car in the instant case, the Court reasoned that there was no logical basis to infer that he knew that drugs were in his vehicle simply because previously drugs were found in a car in which he was a passenger, especially where the defendant was convicted on the earlier occasion only of resisting arrest, and there was no demonstrated connection between the defendant and the drugs. In *United States v. Bibo-Rodriguez*, n205 the Court affirmed the defendant's conviction for importing cocaine, holding there was no error in admitting evidence he imported marijuana in a similar manner nine weeks later to prove that the charged importation was knowing. In *United States v. Lopez-Martinez*, n206 the Court reversed a conviction for importing heroin on other grounds, but ruled that evidence that the appellant was arrested in 1974 for possessing 600 pounds of marijuana and that he stated at the time that he was being paid $1,000 to haul the marijuana was admissible to rebut his claim that in the instant case he thought he was carrying marijuana rather than heroin. Since he received $1,000 for bringing a package weighing one and one-half pounds into the country, it was reasonable to infer that he knew he was carrying something worth more than marijuana.

[C] Rule 404(b) -- Knowledge -- Drug Cases -- Miscellaneous Cases

United States v. Arias-Montoya, 967 F.2d 708 (1st Cir. 1992) : The Court held it was error (but harmless) to admit the defendant's ten-year-old conviction for cocaine possession to negate his assertion that he had no knowledge of the cocaine packaged for distribution that was found in the trunk of the car he was driving, as the evidence had no probative value for that purpose. One Judge concurred in the result, on the ground that the Rule bars other crimes evidence to show action in conformity with character, but not to prove intent and knowledge. In *United States v. Garcia-Rosa*, n207 the Court reversed a conviction for offenses in connection with a drug-importation conspiracy, holding that evidence of drugs found in the defendant's home at the time of his arrest, 16 months after the events in issue, was not admissible because he had never put his knowledge of drugs at issue, so it could not be used to rebut implications that he "knew nothing about drugs"; it was not probative to imply his knowledge that a loan given at the earlier time was to be used for an illegal drug-related purpose; and the prejudicial effect of the evidence far exceeded any probative value it might have. In *United States v. Moccia*, n208 a prosecution for possession of marijuana and diethylpropion with intent to distribute, the Court upheld the admission of evidence of a State Court conviction to prove knowledge. The drugs were found buried under some dog food in the freezer room of a farmhouse where the defendant lived. The Court said that the prior conviction might have helped the jury because a prior marijuana user might have been more likely to spot marijuana and more likely to associate with those who use it.

United States v. Gordon, 987 F.2d 902 (2d Cir. 1993) : The Court reversed a conviction for cocaine offenses arising out of the defendant's arrival at an airport to pick up a person who was carrying cocaine and marijuana, holding that his arrest a year earlier while in possession of crack cocaine did virtually nothing to prove what he knew at the airport and that the evidence was clearly prejudicial. The dissenting Judge thought there was sufficient similarity to show knowledge of drug dealing activity and it was unnecessary to show specific knowledge of importation. See also *United States v. Arango-Correa* n209(records obtained in searches of the defendant's car and apartment were admissible to prove knowledge of contents of a shipment); *United States v. Da Silva* n210(evidence of similar importation of drugs were admissible to show knowledge).

United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003) : The defendant truck driver, charged with possession of marijuana with intent to distribute, claimed that it was his first time smuggling drugs for his employer, Ramirez, who had a history of narcotics trafficking. At trial, a DEA agent testified that agents seized $368,000 in cash

from Ramirez after a trip hauling freight that he and the defendant had made two months before the charged incident. The agent opined that the money was drug related and reported Ramirez's statements to him that, when they arrived at the end of the trip, he got out of the cab to open the gate while defendant parked the truck and unhitched the trailer. Ramirez claimed that he found the money in boxes by the road, that he took the boxes and left in his car, and that defendant was not aware that he had found the cash. The agent also opined that Remirez had lied about finding the cash. The Court found no abuse of discretion in admitting this testimony as conspirator statements in furtherance of the conspiracy, and (under *Rule 404(b)*) to prove the defendant probably knew of the drugs on the charged occasion, since the fact the coconspirator Ramirez had been found with a large amount of cash immediately following a trip with the defendant suggested that the defendant had been involved with drug trafficking before. In *United States v. Garcia-Flores, 246 F.3d 451 (5th Cir. 2001)* , where the driver of a tractor-trailer disclaimed knowledge of 343 pounds of marijuana found in the trailer, the Court held that evidence he had forged bills of lading relating to his cargo was probative of his knowledge of the drugs. See also *United States v. Nichols* n211(evidence of previous importation of marijuana was admissible in a cocaine conspiracy prosecution to rebut the defendant's claim of lack of knowledge of illicit drug trade and denial of any previous trafficking); *United States v. Contreras* n212(evidence of the defendant's drug use subsequent to the charged events was admissible to show knowledge at the relevant time).

United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003) : The defendant was charged with possessing crack cocaine with intent to distribute, after express mail packages containing crack were delivered to her. She claimed that she did not know what was in the packages, but that she only received them and turned them over (unopened) to a long-time acquaintance for $50 each time. The prosecution introduced evidence that she was a current user of crack cocaine, but not that she obtained her crack from someone other than the acquaintance. Reversing, the Court held it was an abuse of discretion to admit the other crime evidence, since her admission to smoking crack was not probative of her knowledge of the contents of the packages and tended only to establish a propensity to commit the charged offense. Furthermore, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, given the tendency of drug use evidence to elicit jury opprobrium, the weakness of the other evidence regarding the defendant's knowledge, and the inability of the Judge's limiting instruction to minimize the prejudice. In *United States v. Hitow*, n213 the Court held that evidence a defendant had previously purchased several thousand pounds of marijuana was relevant to show his knowledgeable participation in the charged conspiracy to possess more than 1,000 pounds of marijuana with intent to distribute.

United States v. Davis, 838 F.2d 909 (7th Cir. 1988) : The Court held that other drug transactions were admissible to prove knowledge of a conspiracy.

United States v. Eggleston, 165 F.3d 624 (8th Cir. 1999) : In a prosecution for possession of crack cocaine with intent to distribute, the government introduced evidence that the defendant had been arrested previously with wrapped packages of cocaine and a scale in his car. The Court held it was error (but harmless) to admit the evidence to prove knowledge, since he was denying knowledge that cocaine packages were in the trunk of the car in which he was riding, not knowledge that the packages contained cocaine. In *United States v. O'Connell*, n214 the Court held that uncharged drug activity was admissible in a drug prosecution to prove a knowing contribution to the conspiracy.

United States v. Plancarte-Alvarez, 366 F.3d 1058 (9th Cir. 2004) : The Court affirmed marijuana convictions, holding that a prior incident in which the defendant imported marijuana and claimed duress was admissible in this case to prove absence of mistake. The defendant claimed that he was unaware that drugs were in his newly purchased car. In *United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001)* , the Court affirmed a conviction for possessing drugs with intent to deliver, holding there was no abuse of discretion in admitting evidence that the defendant had taken several long road trips (between the same areas) in a short time frame in a rental car. The evidence was relevant to show the defendant's knowledge that drugs were secreted in the rental car in which he was arrested and to rebut his defense that

he was driving a long distance in a short time period to pick up his mother. In a trial for possession of a listed chemical knowing it was to be used to manufacture methamphetamine, *United States v. Vizcarra-Martinez*, n215 the Court held it was reversible error to admit evidence that the defendant was carrying a small amount of methamphetamine on his person when he was arrested. The majority rejected the government's contention that possession of the drug tended to prove the defendant's knowledge that the chemicals in his possession would be used to manufacture methamphetamine, reasoning that most people who use drugs "do so without having the faintest idea as to how the substance is produced or what ingredients are required to manufacture it." The dissenting Judge argued that evidence of knowledge of how a drug is manufactured could be inferred from possession of that very drug. In *United States v. Mayans*, n216 the Court reversed cocaine convictions, finding, *inter alia*, that it was error to admit evidence of an earlier drug deal to show the defendant's knowledge, without requiring the government to demonstrate a logical connection between involvement in the prior acts and the knowledge alleged in the instant case.

United States v. Lazcano-Villalobos, 175 F.3d 838 (10th Cir. 1999) : The defendant was convicted for possession of cocaine with intent to distribute, after drugs were found in a secret compartment behind the dash of a car he was driving. Affirming, the Court found no abuse of discretion in the admission of evidence that the defendant had been arrested 19 months previously driving a car carrying marijuana in secret compartments in the rear bumper. The evidence was probative of the defendant's knowledge of the hidden compartment containing the cocaine because the prior conduct was close in time and similar to the activity charged, and the probative value was not substantially outweighed by the potential for unfair prejudice. In *United States v. Wilson, 107 F.3d 774 (10th Cir. 1997)* , the Court affirmed convictions for felon firearm possession and cocaine possession, but held it was error (albeit harmless) to admit evidence of a prior conviction for cocaine possession. The similarity between the situations had at most slight probative value on the issue of the defendant's knowledge of cocaine's presence on the premises, but it would be highly prejudicial. In *United States v. Kendall*, n217 the Court held that uncharged drug activity was properly used to show knowledge and absence of mistake in a drug prosecution.

United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983) : The Court affirmed convictions arising out of a drug importation conspiracy. It found that one defendant's statements concerning his involvement in prior drug smuggling were admissible to prove knowledge of importation and distribution.

[v] Rule 404(b) -- Knowledge -- Firearms Cases

United States v. Linares, 367 F.3d 941 (D.C. Cir. 2004) : Affirming a conviction for felon firearm possession, the Court held it was error (but harmless) to admit testimony from a police officer that four-and-a-half years before the charged events she had arrested the defendant after seeing him drop a loaded handgun onto the ground. Because there was eyewitness testimony that the defendant was holding a gun in his hand and firing it, no reasonable argument could be made that his possession was unknowing or accidental, so the officer's testimony served only as impermissible propensity evidence. In *United States v. Cassell, 292 F.3d 788 (D.C. Cir. 2002)* , the Court affirmed convictions for possession of guns by a felon and during drug trafficking, and held that prior instances of firearm possession were relevant to show the defendant's knowledge and intent to possess firearms that were found in a bedroom he occupied in his uncle's house: "A prior history of intentionally possessing guns, or for that matter chattels of any sort, is certainly relevant to the determination of whether a person in proximity to such a chattel on the occasion under litigation knew what he was possessing and intended to do so." In *United States v. Moore*, n218 the Court upheld denial of a motion to sever the defendant's trial on possession of a sawed-off rifle from a charge for possessing a semi-automatic rifle the previous night. It held that evidence of the latter possession tended to negate his defense, that he thought the sawed-off rifle was a BB gun, by showing his knowledge of guns.

United States v. Flores Perez, 849 F.2d 1 (1st Cir. 1988) : The Court reversed a conviction for aiding and abetting

a firearms transaction, finding that evidence of the defendant's pending firearm charges in Puerto Rico was erroneously admitted. There was no evidence, aside from the fact that charges were brought, that the Puerto Rico case involved an unlicensed or stolen weapon, so it was questionable whether the other charges were relevant to a case in which the firearms offense involved an obliterated serial number.

United States v. Mitchell, 328 F.3d 77 (2d Cir. 2003) : The Court affirmed a conviction for dealing in firearms without a license, finding no abuse of discretion in the admission of evidence that the defendant had been arrested in 1991 for possession of a firearm. The evidence tended to rebut the defendant's contention that he was unaware that purchasing and selling firearms without a license was illegal and to show that he knew that the laws of New York, where the firearms were ordered and delivered, were very strict.

United States v. Teague, 737 F.2d 378 (4th Cir. 1984) : The Court held that the defendant's prior offer to sell a gun was admissible to prove knowledge and intent in a case in which he denied knowing that a pistol was in his car.

United States v. Carney, 387 F.3d 436 (6th Cir. 2004) : The Court affirmed convictions for falsifying paperwork in connection with the sales of firearms, holding that evidence of uncharged firearms transactions was properly admitted to prove that the defendants actually knew the true purchaser of the firearms that they sold in the transactions at issue in the case. In *United States v. Murphy, 107 F.3d 1199 (6th Cir. 1997)* , the Court affirmed a conviction for felon firearm possession, finding no error in the admission of evidence that a handmade ski mask was found in the car in which the defendant was driving when he was arrested. The presence of the ski mask (which was found on the front seat) tended to prove that the defendant was aware of the presence of the gun (which was concealed in the back of the car), because it suggested that he had an intent to use the gun. In *United States v. Chesney*, n219 the Court held that evidence that the defendant had earlier committed an armed robbery was relevant in his trial for felon firearm possession to prove that he knowingly possessed a similar firearm found in the trunk of the car in which he was arrested.

United States v. Whitlow, 381 F.3d 679 (7th Cir. 2004) : The defendant was charged with possessing automatic weapons in 2001, some of which were found only after they had been stolen from his storage unit. He objected to evidence that he had assembled machineguns in 1996 and 1997, but the Court held that the evidence was probative of his knowledge how to convert semiautomatic weapons into automatic weapons and of his knowledge that the weapons in his possession were machineguns. Any prejudicial effect of the evidence was minimized by an instruction limiting its use to establish the defendant's knowledge and lack of mistake, so admission of the evidence was no abuse of discretion. In *United States v. Poole, 207 F.3d 893 (7th Cir. 2000)* , the Court affirmed convictions for making false statements in connection with firearms purchases and upheld a ruling admitting evidence of the defendant's attempt to purchase firearms within a few months of the charged conduct. The evidence tended to show that the defendant knew what he was doing when he gave false statements.

United States v. Johnson, 562 F.2d 515 (8th Cir. 1977) : The Court upheld using the defendant's previous possession of weapons to show knowledge on a firearms charge.

United States v. Carrasco, 257 F.3d 1045 (9th Cir. 2001) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in admitting evidence of drugs and drug trafficking paraphernalia found in the car the defendant was driving when arrested. The evidence of drug trafficking was relevant to show that the defendant's possession of the firearm and ammunition found in the car was knowing. In *United States v. Kindred, 931 F.2d 609 (9th Cir. 1991)* , the Court reversed a conviction for possession of an unregistered firearm, an inoperable World War I German machine gun, holding it was an abuse of discretion to admit evidence of an 11-year-old misdemeanor

conviction for failing to register a handgun. General knowledge of a requirement that firearms must be registered was not a material element of the offense charged, which required the defendant's specific knowledge that he possessed a dangerous device of a type that would alert one to the likelihood of regulation.

United States v. Shomo, 786 F.2d 981 (10th Cir. 1986) : The Court reversed a conviction for felon firearm possession, finding that evidence that a rifle had been confiscated within two weeks of the crime charged in this case was improperly admitted to show the defendant's knowledge that it was illegal for him to possess a firearm, since knowledge was not an element of the offense.

United States v. Jernigan, 341 F.3d 1273 (11th Cir. 2003) : Affirming convictions for felon firearm possession, the Court found no plain error in the admission of evidence that one defendant had been convicted of aggravated assault and being a felon in possession of a firearm, where both offenses involved the *knowing* possession of a firearm in a car. The Court added that the Judge gave the jury two separate limiting instructions regarding the impermissibility of considering the prior convictions as propensity evidence. In *United States v. Pearson*, n220 evidence of the large number of guns found in the defendant's residence was admitted to prove that the defendant, charged with violating a firearms statute, must have known that the weapons were on the premises.

[vi] Rule 404(b) -- Knowledge -- Fraud, Forgery, Counterfeiting, False Statements, etc., Cases

United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000) : In a prosecution for possession of counterfeit obligations discovered in May, the government offered evidence that the defendant was arrested a month earlier and counterfeit bills with the same serial numbers as the May bills were found. Rejecting the notion that this evidence was "intextricably intertwined" with the charged offense so that it did not fall within *Rule 404(b)*, the Court found that the evidence was admissible to prove intent and knowledge. In *United States v. Rhodes*, n221 the Court reversed a conviction for bank fraud and forgery, holding it was plain error to admit evidence of other fraudulent activity. Because the activity was not sufficiently connected with defendant, it did not undermine his defense that he did not know that the check he presented was bad.

United States v. Crocker, 788 F.2d 802 (1st Cir. 1986) : The Court affirmed a conviction for conspiracy to commit bank theft, holding that the fact that a defendant had previously been arrested while riding in a car with a codefendant and counterfeit checks was highly probative of the defendant's knowledge in a prosecution arising out of the transportation of the codefendant to a bank to cash the counterfeit checks.

United States v. Zedner, 401 F.3d 36 (2d Cir. 2005) , rev'd on other grounds, 126 S. Ct. 1976 (2006) : Affirming convictions for attempting to defraud a financial institution, the Court held that evidence that the defendant defrauded two individuals to obtain title to their homes was properly admitted to prove his financial sophistication and to rebut his claim that he did not know bonds were counterfeit. In *United States v. Downing, 297 F.3d 52 (2d Cir. 2002)* , the Court affirmed convictions for conspiracy to commit wire fraud and securities fraud, holding there was no abuse of discretion in admitting evidence that one defendant-accountant had previously prepared a false audit report for a similar securities fraud scheme. The probative value of the evidence was high to rebut the defendant's claim that he did not understand the nature of the scheme for which he was prosecuted and to demonstrate why his coconspirators trusted him to prepare the false audit reports. In a prosecution of a scheme to defraud potential distributors of home security and energy saving devices, *United States v. Wiley*, n222 the Court held that it was error, but harmless, to admit a document that indicated that a State Court had enjoined the mastermind of the scheme (who testified for the government) and one of the defendants from doing business because of their false statements in the course of selling other distributorships. Even a cautionary instruction could not remove the risk that the jury would treat the evidence as proof of a propensity. See also

United States v. Nemes n223(similar transactions after the charged events were properly introduced to show knowledge and intent in a prosecution for Medicare and Medicaid fraud).

United States v. Morley, 199 F.3d 129 (3d Cir. 1999) : At the defendant's trial for fraud and conspiracy arising from his attestation to a forged signature on a fake will, the prosecution introduced evidence that 14 months earlier the defendant had asked his parents (both notaries) to notarize signatures on more than a hundred U.S. Savings Bonds that had been signed out of their presence. Although the government did not offer evidence that the defendant knew the signatures were forgeries, it argued that the fact the defendant was working with the same person concerning the savings bonds and the will tended to show he knew that his attestation on the will was criminal. The Court vacated the conviction, finding an abuse of discretion in admitting the evidence, since it tended to show guilt only because the defendant had previously engaged in a "similar" impropriety, the very evil *Rule 404(b)* seeks to prevent.

United States v. Brainard, 745 F.2d 320 (4th Cir. 1984) : The Court held that evidence of a prior investment scheme was admissible to rebut the defendant's claim that he had been serving his client's interests in good faith.

United States v. York, 888 F.2d 1050 (5th Cir. 1989) : In a complex fraud prosecution, the defendant suggested that he was unaware of the details of certain transactions and that another man was really the key player and decisionmaker. The Court held that evidence the defendant received a million-dollar check from the other man was admissible to show the defendant's knowledge of the transactions and to rebut the suggestion he was merely a pawn in the scheme.

United States v. Studley, 892 F.2d 518 (7th Cir. 1989) : In a prosecution for knowingly disposing of farm equipment pledged by another farmer to the Farmers Home Administration, the Trial Judge denied a motion *in limine* to exclude evidence that the defendant had previously sold grain through a third person in order to bypass the requirement of obtaining an FHA endorsement on the check received for sale of the grain. The Court held that the other acts were sufficiently similar to the crime charged to be probative on the defendant's knowledge of the practice of selling property through third parties to avoid having to get FHA releases and of how to dispose of pledged property without detection. In a fraud prosecution, *United States v. Weisman*, n224 the Court found that the defendant's entry of a guilty plea on behalf of a corporation in 1980, the transcript of the plea proceeding, and other evidence concerning past investigations of the corporation and statements by the defendant regarding his fear of an FTC investigation were properly admitted to respond to the defendant's claim that he had no personal knowledge of any fraud committed by the corporation's employees.

United States v. Anderson, 879 F.2d 369 (8th Cir. 1989) : In a public-contract fraud prosecution, evidence that the defendants had previously confessed to state antitrust charges of collusive and noncompetitive bidding for public construction projects was properly admitted to show the defendants had knowledge of each other's activities and had acted in accordance with each other's actions. In *United States v. Popow*, n225 the Court held that a prior deportation was admissible to prove knowledge in a prosecution for making false representations to the INS and for misrepresenting identity at the border. See also *United States v. Hutchings* n226(it was permissible to present evidence in a fraud case of the defendant's previous acts showing that he had knowledge of proper procedure regarding disclosure to an insurance premium finance company of fees charged).

United States v. Blitz, 151 F.3d 1002 (9th Cir. 1998) : Affirming a conviction for fraud in a telemarketing scheme, the Court held that evidence of the defendant's prior employment by another telemarketing firm was properly admitted as probative of his knowledge that the scheme was fraudulent. It also held that there was no abuse of discretion in the

finding that the probative value of the evidence was not substantially outweighed by any prejudicial effect.

[vii] Rule 404(b) -- Knowledge -- Illegal Aliens Cases

United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) : The Court held that records of the appellant's prior illegal entries into the country were properly admitted to show his knowledge and state of mind, and were more probative than prejudicial. See also *United States v. Ortega-Chavez* n227(evidence that the defendant, charged with involvement in smuggling aliens into United States, went to Mexico on other occasions for smuggling purposes was admissible to show knowledge and intent).

United States v. Fujii, 301 F.3d 535 (7th Cir. 2002) : The Court affirmed convictions for smuggling aliens, noting that the defendant's prior plea of guilty to a similar crime giving an identical explanation for his acts tended to establish that he knew that his acts were in violation of the law.

United States v. Eufracio-Torres, 890 F.2d 266 (10th Cir. 1989) : The Court affirmed a conviction for transporting illegal aliens, holding that evidence of the defendant's prior conviction of illegally entering the United States was probative of his requisite knowledge that the aliens he transported were in this country illegally and that the prejudicial effect of the evidence was minimal, since the jury was already aware that he had entered the country illegally from his presentation of evidence regarding participation in the amnesty program.

United States v. Saldivar, 710 F.2d 699 (11th Cir. 1983) : The Court held that evidence that a father and son charged with aiding and abetting transportation of illegal aliens repeatedly paid for transportation knowing their illegal status was admissible as probative of knowledge.

[viii] Rule 404(b) -- Knowledge -- Miscellaneous Cases

United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986) : In a prosecution arising out of a conspiracy to bribe federal officials, the Court reasoned that convictions for obstruction of justice and conspiracy to obstruct justice that involved events that took place 18 months before the charged conspiracy were relevant to prove the defendant's knowledge that transfers of money he had authorized were used to bribe federal officials.

United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996) : The Court affirmed in part a conviction for persuading a witness to destroy evidence shortly before it was subpoenaed by a grand jury, holding there was no abuse of discretion in admitting evidence that the defendant had been convicted in 1987 for obstruction of justice. Although the remoteness in time may have lessened the overall probative value of the evidence, the great similarity between the conduct charged in 1987 and that in 1994 tended to show that the defendant knew his later conduct was illegal and that he therefore acted corruptly with the specific intent to violate the law in 1994. Although one Judge thought that the use of the evidence went beyond what was necessary, raising a threat of confusion and undue prejudice, all agreed that there was no prejudicial error.

United States v. Perez, 325 F.3d 115 (2d Cir. 2003) : The defendant was convicted for violating currency reporting requirements after money was found secreted in aerosol cans in his luggage as he began a flight to the Dominican Republic. The Court found no abuse of discretion in the admission of evidence that another man had engaged in a virtually identical scheme, since the other man was a client of the lawyer for whom the defendant was working as a paralegal. Moreover, the defendant had some role in assisting the lawyer on the other man's case, so the

evidence was relevant to the defendant's knowledge of a means to smuggle currency and of the probability that the five aerosol cans in his luggage contained reportable currency. In *Howard Opera House Assocs. v. Urban Outfitters, Inc., 322 F.3d 125 (2d Cir. 2003)* , the building landlord and a fellow tenant sued a retail chain because excessively loud music was being played at its store. The Court held that evidence of excessive noise problems at other stores in the chain was relevant to prove that the defendant "had intentionally breached the implied covenant of good faith and fair dealing, because it tended to show that Urban Outfitters knew that its music had a disruptive effect and insisted on playing it at excessive levels despite that knowledge."

United States v. Walters, 351 F.3d 159 (5th Cir. 2003) : Affirming a conviction for sending an explosive package to an Air Force officer, the Court found no abuse of discretion in admitting portions of a book, *The Anarchist's Cookbook*, including a title page with the defendant's name written on it and a chapter detailing the making of a device similar to that sent to the officer. The evidence was relevant to prove knowledge and ability to make the type of device at issue in the case. In *United States v. Walker*, n228 the Court upheld a conviction for conspiracy to intimidate a grand jury witness, holding that evidence of the defendant's boasts to a fellow conspirator concerning prior violent acts was admissible to show his knowledge of the purposes of the conspiracy and that the probative value of the evidence exceeded any prejudicial effects.

United States v. Owens, 424 F.3d 649 (7th Cir. 2005) : Reversing a conviction for bank robbery, the Court held it was an abuse of discretion to admit evidence that the defendant robbed the same bank seven years earlier (a robbery for which he was never charged). The prior robbery was not admissible to prove knowledge of the robbed bank, because knowledge was not at issue either as an element of the crime or in rebuttal to a defense, and a witness could testify that the defendant expressed knowledge of the bank.

United States v. Koski, 424 F.3d 812 (8th Cir. 2005) : The Court affirmed convictions for mailing threatening communications, finding no abuse of discretion in the admission of evidence that the defendant had been convicted in 1996 for mailing threatening communications. The essential issue under the statute, *18 U.S.C. § 876*, is whether a reasonable recipient, familiar with the context of the communication, would interpret it as a threat. The defendant testified that his letters were merely a "cry for help," and not threats, but the prior conviction demonstrated that he was aware that his previous correspondence had been found threatening. In *United States v. Marshall*, n229 the Court approved a ruling that two reports by Department of Agriculture employees concerning visits to the defendant's grocery store in 1976 and 1978, which suggested that he might have been violating federal law concerning redemption of food stamps, could be used in a prosecution for food stamp improprieties that took place in 1981. The dissenting Judge found that the reports did not establish clearly enough that any violations had occurred in the earlier years and that they were unduly prejudicial. In our view, the preferable procedure would have been to redact the reports, admitting only those portions indicating that the defendant had been informed of certain requirements of federal law. Reference to past violations was not needed to prove knowledge.

United States v. Fuchs, 218 F.3d 957 (9th Cir. 2000) : The defendants were convicted of conspiring to commit offenses against the laws of the United States, based on their participation in a program in which government airplanes were transferred to a private entity. The defendants contended that they did not know that such transfers were illegal. The Court held that evidence that one of the defendants did not report the income he received from the transfers on his tax returns was properly admitted to prove that he knew the transactions were illegal. In *United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990)* , the Court held that previous convictions for molesting young girls were properly admitted to show that a defendant charged with child pornography knew that the girl pictured with him performing sex acts was a minor.

United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998) : In a trial for receiving child pornography over the Internet, the government introduced other images of child pornography on the defendant's computer at the time of his arrest besides those for which he was charged. The Court found no abuse of discretion, since the evidence tended to show that his possession of pornographic images was not an accident or mistake and that he had knowledge of the nature of the material he was receiving. In *United States v. Bornfield, 145 F.3d 1123 (10th Cir. 1998)* , the defendant, a CPA, was charged with money laundering after he issued a check in exchange for $13,000 in cash received from the wife of a couple who had been engaged in drug trafficking with a third person. The Court held it was error (but harmless) to admit evidence that the defendant had used cocaine with the husband on 30 to 40 occasions, since it was unclear how the evidence could establish, directly or circumstantially, the defendant's knowledge that cash received from the wife on behalf of the third person was criminally derived property. In any event, the defendant's knowledge of the third person's participation in drug trafficking was sufficiently shown by the third person's testimony that the defendant had discussed the trafficking with him and the husband.

[ix] Rule 404(b) -- Knowledge -- Tax Cases

United States v. Middleton, 246 F.3d 825 (6th Cir. 2001) : Affirming a conviction for failing to file tax returns for five years, the Court held that evidence of a tax return filed by the defendant 20 years earlier and of the contents of the return were admissible to prove his awareness of income tax forms and instructions that made clear his obligation to file returns. The defendant was not, contrary to his claim, barred from testifying as to how his beliefs changed over twenty years; any failure to explain was a result of the his "own narrative and unresponsive answers to the questions of his attorney."

United States v. Verkuilen, 690 F.2d 648 (7th Cir. 1982) : The Court affirmed convictions for failing to file income tax returns for 1976 and 1977, upholding the admission of evidence that in 1974 the appellant had filed a form indicating the correct number of withholding allowances, but that in 1976 his withholding form claimed more allowances than he was entitled to. The Court found that the evidence tended to show knowledge of what was required and supported the government's claim that the failures to file were willful. See also *United States v. Serlin, 707 F.2d 953 (7th Cir. 1983)* (the defendant's failure to file a 1979 tax return was admissible in a prosecution for willful failure to file returns in 1976 and 1977).

[x] Rule 404(b) -- Knowledge -- Theft and Stolen Property Offenses

United States v. Pascarella, 84 F.3d 61 (2d Cir. 1996) : The Court held, in a fraud prosecution based on a stolen check scheme, that there was no abuse of discretion in admitting evidence that two stolen checks (not part of the charged scheme) had been deposited in a defendant's bank account. The evidence was probative of the defendant's knowledge and tended to rebut his argument that he had been duped by a codefendant, who was his business partner.

United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982) : The Court, in a prosecution for aiding and abetting theft from an interstate shipment, upheld the admission of testimony about other occasions when the defendant was involved in similar situations, as it tended to establish that the defendant knew he was dealing with stolen goods. The evidence was admissible even though it involved acts that occurred eighteen months after the crime charged. A dissent charged that the evidence was unnecessary and that it was little more than propensity evidence.

United States v. Falco, 727 F.2d 659 (7th Cir. 1984) : The Court, although it recognized the closeness of the question, upheld a ruling that four prior interstate theft convictions (two in 1952, one in 1962, and one in 1978) could be used to prove knowledge in a prosecution for a similar offense. The Trial Judge was not clearly wrong in reasoning that

a person involved in prior similar offenses would have recognized a shipment of stolen goods. The Court observed that the defendant could have brought out at an *in limine* hearing any differences between the prior events and the crime charged, and agreed with the Trial Judge that the pattern of conduct, rather than the age of the convictions, was significant. One Judge dissented, arguing that the balance between probative value and unfair prejudice was "so lop-sided in the direction of unfair prejudice" that reversal was required. See also *United States v. Hyman* n230(evidence that the defendant had discussed ways of manipulating paperwork to make purchases of stolen steel look legitimate was admissible to prove knowledge).

United States v. Daly, 716 F.2d 1499 (9th Cir. 1983) : Evidence that the defendant sold a stolen car, although not charged in the indictment, was admissible to show the defendant's knowledge in a prosecution alleging a car theft scheme. In *United States v. Albuquerque*, n231 a prosecution for interstate transportation of a vehicle knowing it to be stolen, the Court concluded that "hotwiring" tools, admitted on the theory that they demonstrated the defendants' intent, were not relevant to any element in the case; they did not demonstrate the defendants' knowledge that the automobile was in fact stolen.

United States v. Robinson, 687 F.2d 359 (11th Cir. 1982) : The Court held that testimony of two convicted silver burglars concerning their use of the appellant as a "fence" was properly admitted to prove knowledge, intent, and *modus operandi* in a prosecution for transporting stolen goods.

[ff] Rule 404(b) -- Malice

United States v. Tan, 254 F.3d 1204 (10th Cir. 2001) : On interlocutory appeal in a prosecution for alcohol-related vehicular homicide, the Court reversed an *in limine* ruling that excluded the defendant's prior convictions for drunk driving. Although the Trial Judge reasoned that the convictions were not offered for any proper purpose under *Rule 404(b)*, the Court concluded that a jury could infer from the prior convictions that the defendant was "especially aware of the problems and risks associated with drunk driving" and that "he knows better than most that his conduct is not only illegal, but entails a substantial risk of harm to himself and others." Thus, the convictions were highly probative of malice and were not being offered for the sole purpose of proving that the defendant had a propensity to drive while drunk.

[gg] Rule 404(b) -- *Modus Operandi*

United States v. Williams, 985 F.2d 634 (1st Cir. 1993) : After arguing at sidebar that the evidence showed "how bad [defendant and a coconspirator] are," the government introduced evidence that the defendant had told a witness that "he had killed a couple of people." On appeal of convictions for cocaine distribution offenses, the government argued that the evidence showed the defendant's *modus operandi* of intimidation. Concluding that the impermissible propensity ground first asserted was the only justification supported in the record, the Court found admission of the evidence error (but harmless). *Modus operandi* evidence is admissible to prove identity, but identity was not disputed; moreover, the evidence was not placed into any context, other than temporal, related to the development or operation of the conspiracy. One Judge, concurring, wrote separately "simply to express my exasperation at the repeated abuse of *Rule 404(b)* by government prosecutors."

United States v. Anifowoshe, 307 F.3d 643 (7th Cir. 2002) : Affirming a conviction for bank and mail fraud, which arose from a scheme that involved depositing stolen and forged credit card access checks into fictitious bank accounts, the Court held that the defendant's state fraud conviction was properly admitted to show a *modus operandi,* even though the act at issue there occurred subsequent to the acts giving rise to the federal prosecution. The perpetrator

used the same address to open fraudulent accounts in both the federal and state schemes, two checks deposited in the state account displayed an address identical to an address used to open the federal accounts, and both schemes involved the same methods. In *United States v. Vaughn, 267 F.3d 653 (7th Cir. 2001)* , after the defendant lost his driving privileges, he used his girlfriend to make cocaine sales for him. Testifying against him, she recounted his instructions regarding the procedures to be followed, particularly his direction to conduct sales only when she was alone with the customer. The Court affirmed his conviction for conspiracy to distribute crack, holding there was no abuse of discretion in admitting evidence of cocaine sales the defendant had previously made to an undercover officer, since the evidence was relevant *inter alia* to prove *modus operandi* because it demonstrated four distinctive characteristics of the defendant's trafficking: "(1) Vaughn's method of arranging a drug transaction; (2) Vaughn's desire to avoid suspicious transactions; (3) Vaughn's customers; and (4) Vaughn's preferred location for completing the drug transactions." In a § 1983 action against a police officer for malicious prosecution of a complaint that the plaintiff threatened the officer, *Treece v. Hochstetler*, n232 the plaintiff argued that the officer solicited a bribe on the occasion in question and attempted to show a pattern of soliciting bribes and falsely charging individuals with crimes when the bribes were not paid. Affirming a judgment for the officer, the Court found no abuse of discretion in exclusion of the evidence, since the alleged incidents were not sufficiently idiosyncratic to permit an inference of pattern and did not bear a singular strong resemblance to the pattern of the offense charged. In *United States v. Montoya*, n233 a defendant was charged in a drug conspiracy after he and another had been stopped in a car in which $44,000 was discovered hidden in the trunk. To rebut his claim that he had no knowledge of the money, and thus lacked requisite intent to be a participant in the conspiracy, the government offered evidence that the two men had earlier been arrested traveling together and heroin had been found hidden in the other man's shoes. The Court held that the similarities between the events established a *modus operandi* for transporting contraband and proceeds from the sale thereof, and that limiting instructions mitigated the unfair prejudicial effect, if any, of the evidence.

United States v. McDowell, 250 F.3d 1354 (11th Cir. 2001) : Customs agents intercepted a shipping container containing cocaine, removed the drugs and resealed the container, and placed the container in the seaport delivery yard. The defendants were arrested after they entered the yard in a transport company truck, having given a false driver number to access the containers, and examined the resealed container. The Court held there was no abuse of discretion in admitting evidence of a similar incident two weeks earlier when a driver using false identification used the same company's truck to gain access to another container from the same shipper and the high security seals on the container were subsequently found missing. Although the defendants were not positively identified as involved on the prior occasion, circumstantial evidence supported that inference, and the prior acts showed a *modus operandi* probative of the defendants' knowledge and intent in the charged incident.

[hh] Rule 404(b) -- Motive

[i] Rule 404(b) -- Arson

United States v. Varoudakis, 233 F.3d 113 (1st Cir. 2000) : The Court reversed a defendant's convictions for arson and conspiracy to commit arson arising from the burning of his restaurant, finding error in the admission, to prove motive, of evidence that the defendant burned a leased car 16 months earlier. In this case, the argument that the car fire testimony was probative of a motive to burn the restaurant impermissibly "involve[d] an inference of propensity as 'a necessary link in the inferential chain.' "

Underwood v. Colonial Penn Ins. Co., 888 F.2d 588 (8th Cir. 1989) : The Court held in an action on a fire insurance policy that a sheriff was properly permitted to testify that the insured refused to take a polygraph test in connection with a claim that personal property had been stolen, as the sheriff's suspicions implicit in the request may have provided a motive for arson and the evidence impeached the insured's testimony that he had cooperated and had no reason not to cooperate in the theft investigation.

United States v. Buchanan, 787 F.2d 477 (10th Cir. 1986) : The Court affirmed a conviction for unregistered firearm possession and conspiracy, finding that evidence of the defendant's prior hostility toward the victim of an arson was relevant to prove motive.

Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309 (11th Cir. 1987) , *modified* (11th Cir. 1989): In an action by a restaurant owner on a fire insurance policy, the plaintiff attempted to rebut an arson defense by evidence that the prior owner had retained an interest as an insured party and by showing similar fires at two other restaurants in which the prior owner had also retained a similar interest. The Court held that this evidence was properly admitted as relevant to whether the third party had a motive to set the fire. In *Aetna Cas. & Sur. Co. v. Gosdin*, n234 the Court reversed a judgment for the insurer in a dispute with its insured concerning the cause of a fire. Although it upheld the introduction of motive evidence that the insured had been charged with burglary and needed money to mount a defense, the Court held that evidence of pimping, pandering, and drug charges was unduly prejudicial. In *United States v. Kerr*, n235 the Court affirmed fraud convictions arising out of a scheme to burn two businesses to collect insurance. It found that evidence that one defendant, a pharmacist, engaged in irregular activities in the dispensing of drugs was admissible to prove a motive for the scheme. A strong dissent argued that the other act evidence was probative only of character and should have been excluded.

[ii] Rule 404(b) -- Motive -- Assault, Homicide, Kidnapping, etc.

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) : James Wilson was charged with a postal robbery on the basis of information from a witness who had worn a wire while imprisoned with James. The government turned the tape and a transcript over to James' attorney, who improperly disclosed at least parts to James' wife and his brother Ralph. The tape revealed that the key witness was Leroy Copeland; Ralph and another brother began looking for Copeland, and when they found him, murdered him. On trial for murdering a government witness, the brothers objected that it was improper to admit the whole tape, which, *inter alia*, described the Wilson family as a "family-run organized gang," because the tape was unduly prejudicial in disclosing other crimes. The Court found that by identifying Copeland for the brothers, the tape was relevant to motive, and although it did convey an unsavory impression of the family, the portions that Ralph might not have heard did not substantially magnify the unfavorable light cast by the portions proved to have been played for him.

United States v. Bufalino, 683 F.2d 639 (2d Cir. 1982) : The Court upheld a conviction for conspiracy to violate civil rights, finding that the Trial Judge properly admitted a tape recording of an extortion attempt for which the defendant had previously been convicted, where the victim was the person whose civil rights the defendant was charged with conspiring to violate and the tape tended to show a motive for the conspiracy.

United States v. Sriyuth, 98 F.3d 739 (3d Cir. 1996) : The Court held, in a kidnapping prosecution arising out of a purported arranged marriage between Laotians, that evidence the defendant had raped the victim was probative of the defendant's motive for the kidnapping and of the victim's lack of consent. The probative value of the evidence was not substantially outweighed by the risk of unfair prejudice.

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) : The Court affirmed a conviction for murder and related offenses, holding that evidence of a bank fraud scheme involving the defendant was properly admitted to prove motive, since there was evidence that the defendant was concerned about the possibility that the murder victims might implicate him in the scheme. In *United States v. Russell, 971 F.2d 1098 (4th Cir. 1992)* , the Court affirmed a murder conviction

in a case in which no body or murder weapon was ever found, holding there was no abuse of discretion in admitting evidence of the defendant's less-than-honorable discharge from the Marine Corps and of his extramarital affairs, as the defendant may have seen the victim, his ex-wife and a Marine officer, as a symbol of an institution he had come to resent. In *United States v. Lewis*, n236 the Court affirmed a hospital patient's conviction for assaulting a fellow patient, holding that evidence of a prior altercation between the two patients was admissible as motive evidence. In *Roshan v. Fard*, n237 the Court reversed a judgment for a plaintiff suing for injuries suffered in a fight. The defendant's evidence establishing that he had been an informant for the government and had supplied information that led to the conviction of the plaintiff should have been admitted to show a motive for the plaintiff to attack him, since it could not be said that the prejudicial effect of the evidence substantially outweighed its probative value.

United States v. Benton, 637 F.2d 1052 (5th Cir. 1981) : In a prosecution charging the defendant with involvement in killing a fellow prison inmate, the Court upheld the admission of evidence that the defendant was involved in several murders of which the victim allegedly had knowledge.

United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005) : The Court held that evidence that the defendant had five months earlier assaulted his wife because of jealousy when she had talked to a former boyfriend was properly admitted as probative of motive in his trial for murdering his wife. In *United States v. Vance*, n238 the Court held that prior bad acts by the defendant were admissible to show a motive to assist the wife of a convicted drug dealer in the murder of a state prosecutor.

United States v. Bogan, 267 F.3d 614 (7th Cir. 2001) : The Court affirmed convictions of inmates for assaulting a corrections officer, holding there was no abuse of discretion in admitting evidence that the officer had seized intoxicants from their cell before the beating. The evidence that the officer had disrupted their illegal wine-making activities tended to prove a motive for the assault. In a prosecution for arson resulting in the deaths of the defendant's two children, *United States v. Menzer, 29 F.3d 1223 (7th Cir. 1994)* , the Court held that evidence that the defendant was on probation for a 1986 conviction for sexual exploitation of a child was "intricately related" to the charged offense because it was the government's theory that the defendant burned down the house where his wife and children were sleeping in order to prevent their reporting his sexual abuse of the children, which would result in revocation of his probation. In our view, this was other crime evidence admissible under the Rule to prove motive, and the Court's characterization of it as "intricately related" (and therefore outside the Rule) is unnecessarily confusing, especially given the Court's conclusion that there was no abuse of discretion in admitting the evidence "because it was intricately related to the arson prosecution as probative evidence of Menzer's intent (motive)." In *United States v. Hattaway*, n239 the Court, upholding kidnapping convictions, found that evidence of the murder of the victim's boyfriend was properly admitted to show a motive for the abduction.

Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) : In an action to recover the proceeds of life insurance policies, the company defended on the theory that the insured's brother killed him after arranging the policies on his life. The Court affirmed the admission of evidence of numerous other life insurance policies covering the insured, as tending to show a motive for murder. In *United States v. Turpin*, n240 the Court affirmed a conviction for attempting to make railroad facilities hazardous. It found that evidence that the defendant had killed a man was properly admitted, since the government alleged that the defendant placed the man's body in a car at a railroad crossing in the hope that the car would be demolished and the cause of the man's death hidden. See also *United States v. Wagoner* n241(evidence of involvement in an auto theft ring was properly admitted to show a motive for participation in a scheme to bomb a state trooper's car); *United States v. Gomez* n242(proof that the defendant, convicted of aiding and abetting a kidnapping, asked the kidnapper to commit another violent act was admissible as evidence of the defendant's motive to gain custody of his son from his estranged wife).

United States v. Santiago, 46 F.3d 885 (9th Cir. 1995) : Affirming a conviction for murder of a fellow prisoner, the Court held that evidence of the defendant's affiliation with the Mexican Mafia, a prison gang, was properly admitted, where the evidence showed that the defendant committed the murder in order to gain entry into the gang. The gang-related evidence "was necessary to explain the reason that Santiago would kill a stranger -- to be accepted into the gang -- and to show how and why other inmates assisted him in obtaining the weapon." In *United States v. Brown*, n243 the Court reversed murder and firearm convictions, finding that evidence of the defendant's attempt seven years earlier to recover his property at gunpoint and his shooting into a home was inadmissible in a prosecution for shooting a mail carrier as she delivered mail to his parents' home. The government had said the evidence showed that the motive behind the killing was the defendant's desire to obtain the thrill he received from creating violence. In *United States v. Bowman*, n244 the Court sustained a conviction for assault, finding that evidence of the defendant's earlier assault conviction was properly admitted to show his motive for attacking the victim in this case. The government contended that the defendant believed that the victim was responsible for his earlier conviction. See also *United States v. Bradshaw* n245(upholding a kidnapping conviction, and finding that evidence as to the defendant's sexual activity with the kidnapped child was relevant to show a motive for the kidnapping).

United States v. Morris, 287 F.3d 985 (10th Cir. 2002) : Affirming convictions for assaulting an FBI undercover agent and attempted escape, the Court held that the defendant's statement to the FBI in which he said that a friend told him that the FBI was looking for him in connection with a murder and that he decided not to turn himself in because he had been incarcerated before and did not want to return to prison was admissible to prove motive to flee arrest and to use deadly force. In *United States v. Buchanan*, n246 the Court affirmed a conviction for unregistered firearm possession and conspiracy, finding that evidence of the defendant's prior hostility toward the victim of an arson was relevant to prove motive. In *United States v. Franklin*, n247 the Court affirmed a conviction for killing two black men for using a public facility, holding that a prior racial incident involving the defendant was properly admitted to prove a racial motive for the killings.

United States v. Abraham, 386 F.3d 1033 (11th Cir. 2004) (per curiam): The defendant was convicted for kidnapping a postal worker as a means to secure entry into his girlfriend's home. Affirming, the Court held there was no abuse of discretion in admitting that the defendant had previously assaulted his girlfriend and had threatened her mother and sister with a gun in an attempt to gain entry to her home. The evidence was admissible not to prove the defendant's character, "but his motive, intent, or lack of mistake."

[iii] Rule 404(b) -- Motive -- Civil Rights Cases

United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) : The defendants were convicted for forced labor offenses after they lured Jamaican laborers to New Hampshire through fraud, mistreated them during their employ, and coerced them to stay. Most of the charges related to workers during the 2001 season. Affirming, the Court found no abuse of discretion in admitting evidence relating to the defendants' treatment of Jamaican laborers brought in during the 2000 season. Evidence that one of the earlier workers fled and was pursued by threats and that his compatriot's passport was then seized gave "a malign motive for, and provide[d] the context of," the seizure of the victims' passports in 2001 and of threats made to them based on a defendant's supposed intention to "destroy" a former worker. In *Bowden v. McKenna*, n248 the Court reversed a judgment for the plaintiffs in a civil rights action arising out of an incident in which two policemen fatally shot a robbery suspect, holding that the defendants should have been permitted to offer identification testimony to establish that the suspect committed the robbery, as this might have established the suspect's motive to resist and thus might have corroborated the officers' story.

United States v. Bufalino, 683 F.2d 639 (2d Cir. 1982) : The Court upheld a conviction for conspiracy to violate civil rights, finding that the Trial Judge properly admitted a tape recording of an extortion attempt for which the

defendant had previously been convicted, where the victim was the person whose civil rights the defendant was charged with conspiring to violate and the tape tended to show a motive for the conspiracy.

Hitt v. Connell, 301 F.3d 240 (5th Cir. 2002) : In a civil rights action by a deputy constable who was discharged for his union activity, an associational right protected by the *First Amendment*, the Court found no abuse of discretion in admitting evidence that the constable took disciplinary action against other deputies for their union activities. The evidence was admissible as proof of the constable's motive in firing the plaintiff and to impeach the constable's statements that he was "a union man" and had no animus against the union.

Hernandez v. Cepeda, 860 F.2d 260 (7th Cir. 1988) : In an arrestee's civil rights action against police officers, the Court held that evidence that the arrest was for rape and aggravated kidnapping was admissible to prove the plaintiff's motive to resist arrest.

United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983) : The Court affirmed a conviction for killing two black men for using a public facility, holding that a prior racial incident involving the defendant was properly admitted to prove a racial motive for the killings.

[iv] Rule 404(b) -- Motive -- Drug Activity

United States v. Masse, 816 F.2d 805 (1st Cir. 1987) : The Court affirmed a cocaine distribution conviction, holding that evidence that the defendant was in possession of cocaine while on bail for the charges on which he was convicted in this case was properly admitted to prove a drug habit and to establish a motive for distributing drugs. See also *United States v. Kadouh, 768 F.2d 20 (1st Cir. 1985)* (the defendant's use of cocaine was admissible to show a motive for him to become involved in drug activity).

United States v. Cruz, 326 F.3d 392 (3d Cir. 2003) : Affirming a conviction for distributing cocaine base, the Court found no abuse of discretion in the admission of evidence that the defendant was on parole at the time, since his parole status was relevant to explain why he used codefendants to perform the hand-to-hand street transactions.

United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001) , modified on other grounds, 309 F.3d 274 (5th Cir. 2002) : Upholding the convictions of defendants for a drug trafficking conspiracy and weapons offenses, the Court held that evidence of uncharged murders and attempted murders of rival gang members was relevant to prove that defendants were trying to protect their drug conspiracy.

United States v. Cunningham, 103 F.3d 553 (7th Cir. 1996) : A nurse was convicted for tampering with syringes by replacing Demerol with a saline solution. The Court held there was no abuse of discretion in admitting evidence that the nurse's license had four years earlier been suspended as a result of Demerol addiction and her theft of Demerol from another hospital. The addiction provided a motive for the charged tampering, and the suspension provided essential context for evidence that she had previously falsified drug test results, which had permitted her to continue to work as a nurse, with access to Demerol. In *United States v. Troop*, n249 to show the defendant's motive to participate in the charged conspiracy to sell cocaine, the Court held there was no error in admitting evidence that he previously worked at a drug house where he skimmed cocaine for his personal use off large amounts of the drug before they were sold.

United States v. Galyen, 798 F.2d 331 (8th Cir. 1986) : The Court affirmed a conviction for obtaining a controlled

substance by misrepresentation and for possession with intent to distribute, holding that evidence suggesting that the defendant was involved in drug dealing was admissible to prove a motive for using misrepresentations to obtain controlled substances.

United States v. Palmer, 3 F.3d 300 (9th Cir. 1993) : Affirming a conviction for manufacturing marijuana plants, the Court held it was error (but harmless) to admit the defendant's postarraignment statement to law enforcement officials that "I don't want any deals. I have been through this before. I just want to get it behind me." The Court rejected the government's argument that the statement, which tended to prove prior acts, was admissible to prove motive, since motive did not establish a material element of any offense charged. In *United States v. Saniti*, n250 the Court held that evidence that a bank robbery defendant had a $250 a day drug habit was properly admitted to show his motive for robbery.

United States v. Becker, 230 F.3d 1224 (10th Cir. 2000) : Although the Court affirmed convictions for manufacturing metamphetamine, it found error in the admission, to prove motive and intent, of evidence that the defendant was previously convicted of drug offenses and that evidence of drug-related items were found in a prior raid on his home. The prior acts were removed in time (his convictions were six years old and the raid was four years old) and involved possession and distribution only, not manufacturing, so it was an abuse of discretion (but harmless error) to admit the evidence.

United States v. Harrell, 737 F.2d 971 (11th Cir. 1984) : The Court found that evidence concerning a motorcycle club's way of life was admissible to prove the motive and object of a drug-trafficking conspiracy.

[v] Rule 404(b) -- Motive -- Firearms Offenses

United States v. Weems, 322 F.3d 18 (1st Cir. 2003) : In a prosecution for felon firearm possession in which a principal issue was whether the defendant possessed a firearm found in the house where was arrested, the Court held that testimony suggesting the house was used for drug dealing was relevant, since the drug dealing would give the defendant a motive to have the gun on him. In *United States v. Smith, 292 F.3d 90 (1st Cir. 2002)* , the Court affirmed a conviction for being a felon in possession of a firearm and ammunition. It held that evidence of the defendant's drug dealing in his apartment was probative of his constructive possession of the firearm, because it provided a motive for his possession. The Court distinguished its decision in *United States v. Currier, 821 F.2d 52 (1st Cir. 1987)* , which found error in admission of statements by the defendant regarding Valium when the defendant did not argue that the gun belonged to someone else in the apartment and narcotics evidence was therefore only "marginally relevant" on issues of possession.

United States v. Pelusio, 725 F.2d 161 (2d Cir. 1983) : In a prosecution for unlawful receipt of firearms, the Court found that the government properly cross-examined a defendant about whether the defendant's brother had been shot by someone connected with organized crime, whether the defendant had been involved in gambling, and whether he had heard there was a contract out on him. The questions were relevant to proving a motive for receiving a firearm.

United States v. Hatfield, 815 F.2d 1068 (6th Cir. 1987) : The Court upheld the admission of evidence of burglary paraphernalia seized from a defendant charged with being a felon in possession of a firearm. The defendant had denied knowledge of the presence of the gun, and the Court found that the burglary evidence was relevant to show that the defendant had a motive to possess a gun.

United States v. Joy, 192 F.3d 761 (7th Cir. 1999) : In a felon firearm possession case, the Court held that a tape of a 911 call made by the defendant's brother, indicating that the defendant was brandishing a gun and had just committed some burglaries, was properly admitted. That evidence was relevant to prove that he had a motive for possessing a gun. In a prosecution for possession of an unregistered machine gun and silencer, *United States v. Taylor*, n251 the Court found that other evidence discovered in a search of the appellant's residence -- cocaine, other weapons, stereo and video equipment without serial numbers, and fur and leather jackets without labels -- was properly admitted to show a motive for possession of the machine gun and silencer.

United States v. Conrad, 320 F.3d 851 (8th Cir. 2003) : The Court reversed a conviction for possession of an unregistered firearm, but held that it was not an abuse of discretion to admit evidence of the defendant's drug use, after the defendant testified that he did not have exclusive control over the residence where the gun was found and that the gun did not belong to him. The Court stated that it had "serious reservations about whether the possession of drug paraphernalia without evidence of drug trafficking is admissible to show possession of an illegal weapon," but found itself bound by *United States v. Fuller, 887 F.2d 144 (8th Cir. 1989)* , which concluded that evidence of drug paraphernalia was admissible to prove motive to possess a firearm. See also *United States v. Claybourne, 415 F.3d 790 (8th Cir. 2005)* (evidence of drug paraphernalia admissible in felon firearm possession case to show motive to possess a firearm). In *United States v. Jordan*, n252 the Court affirmed a conviction for felon firearm possession, holding that there was no abuse of discretion in admitting evidence that the defendant possessed $3,900 at the time of his arrest, as it was probative of motive for possession of a weapon, which the government had to prove. In *United States v. Moore*, n253 the Court noted that it was improper for the prosecutor to argue in closing that a defendant, charged with illegal possession of firearms, had shotguns in his possession because he was involved with drugs. "The fact that the defendant possessed drugs does not necessarily make it likely that the guns found during the raid were his."

United States v. Collins, 90 F.3d 1420 (9th Cir. 1996) : The Court affirmed a firearm conviction, holding that evidence that the defendant was acting as a lookout for a burglary was properly admitted to show why he would want a gun, and to rebut the defendant's evidence that he was in the neighborhood for dancing.

[vi] Rule 404(b) -- Motive -- Fraud, False Statements, etc.

United States v. Sebaggala, 256 F.3d 59 (1st Cir. 2001) : Affirming a Ugandan national's conviction for making false statements to Customs regarding monetary instruments he was carrying, the Court found no abuse of discretion in admitting the mass of checks that the defendant was carrying. The fact that the checks were stolen or altered was probative of the defendant's motive for trying to conceal his possession from the authorities and thus of his scienter.

United States v. Birney, 686 F.2d 102 (2d Cir. 1982) : The Court upheld a conviction for making false entries in bank records, finding that evidence that the defendant had embezzled money was properly admitted to show a motive for the falsification. See also *United States v. Sliker* n254(evidence of the defendant's loansharking was admissible to show a motive for defrauding a bank).

United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996) : The Court affirmed in part the fraud conviction of the former CEO of United Way of America, holding there was no abuse of discretion in admitting evidence of the defendant's sexual advances toward female employees. The evidence was relevant to motive, as it tended to prove that he defrauded UWA in order to seek sexual pleasure at no financial cost to himself, and it presented no risk of unfair prejudice, particularly since the Trial Judge excluded the "gory details" and gave a cautionary instruction.

United States v. Cordell, 912 F.2d 769 (5th Cir. 1990) : The Court held that evidence that the defendant bank official had previously violated lending limits was properly admitted in a prosecution for making false entries in bank records to show his motivation for concealing the lending violations involved in the case.

United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994) : In a prosecution for obstruction of justice arising from the alteration of logbooks for police aircraft that had been subpoenaed by the grand jury, the Court held that evidence of kickbacks and unauthorized use of the airplanes was relevant to the defendant's motive to suppress information. In *United States v. Tager*, n255 the Court affirmed fraud convictions arising out of securities transactions, holding that evidence of an unpaid tax judgment against the defendant exceeding $500,000 was properly admitted to prove motive.

United States v. Kosth, 257 F.3d 712 (7th Cir. 2001) : Affirming convictions for making false statements in connection with Small Business Administration loans, the Court held that it was proper to admit evidence of the defendant's prior conviction and the terms of his supervised release to show his motive for establishing a sham ownership arrangement with his wife and for lying on his SBA loan application. In *United States v. O'Brien, 119 F.3d 523 (7th Cir. 1997)* , the Court affirmed a fraud conviction, holding that testimony concerning the defendant's diversion of insurance proceeds from business to personal use was properly admitted to prove motive, not to prove a propensity to defraud. In *United States v. Shriver*, n256 a prosecution for making false statements to a bank, the Court held that evidence that the defendant defaulted on a franchise agreement was properly admitted to prove a motive for making the false statements. The Court noted that "similarity is not an appropriate requirement" for other acts used to prove motive.

United States v. Sandow, 78 F.3d 388 (8th Cir. 1996) : The defendant, an insurance agent and broker, was tried on two fraud charges, one arising out of his inducing a customer in 1990 to pledge an annuity and the other arising out of a 1991-93 scheme to collect premiums without providing insurance. The Court held that evidence of judgments outstanding against the defendant in 1990 was relevant to motive in the annuity pledge case; in the insurance fraud case, admission of the evidence was error, but harmless. In *United States v. Conners*, n257 the Court affirmed convictions for bank fraud and embezzlement, holding there was no abuse of discretion in admitting evidence of frauds against another bank, as the circumstances were probative of motive because they showed the defendant's need for a large amount of money. In *United States v. Galyen*, n258 the Court affirmed a conviction for obtaining a controlled substance by misrepresentation and for possession with intent to distribute, holding that evidence suggesting that the defendant was involved in drug dealing was admissible to prove a motive for using misrepresentations to obtain controlled substances. See also *United States v. Poston* n259(evidence of a "check kite" scheme was admissible in a prosecution for misapplication of federally insured funds as tending to prove motive; the misapplication would have covered the amount of the "kited" check).

United States v. Wales, 977 F.2d 1323 (9th Cir. 1992) : The Court affirmed the defendant's conviction for making a false declaration to Customs about the amount of currency he was carrying, holding that evidence he attempted after his arrest to clean out his safe deposit box before the government could examine its contents was clearly an attempt to conceal the $150,000 in gold coins there, which was consistent with the government's theory that he had as a motive for submitting a false declaration concealing his assets and avoiding an explanation of their source. See also *United States v. Conners* n260(in a prosecution for currency violations, the defendant's cocaine activities tended to supply a motive for concealing money). In *United States v. Brown*, n261 a bank fraud prosecution, the Court held that evidence that the recipient of funds illegally channeled through a defendant shortly thereafter served as a similar illegal conduit of funds to the defendant was properly admitted as tending to show why the defendant participated in the charged transaction.

United States v. Key, 76 F.3d 350 (11th Cir. 1996) : The Court held that evidence of outstanding judgments was admissible in a fraud prosecution as demonstrating the defendant's motive to lie about his identity in making a loan

application; people against whom large and still enforceable judgments are outstanding are unlikely to be extended credit. In *United States v. Kerr*, n262 the Court affirmed fraud convictions arising out of a scheme to burn two businesses to collect insurance. It found that evidence that one defendant, a pharmacist, engaged in irregular activities in the dispensing of drugs was admissible to prove a motive for the scheme. A strong dissent argued that the other act evidence was probative only of character and should have been excluded.

[vii] Rule 404(b) -- Motive -- Miscellaneous Cases

United States v. Lamberty, 778 F.2d 59 (1st Cir. 1985) : The Court reversed a postmaster's conviction for opening another person's package, finding that the government improperly elicited testimony that the postmaster was suspected of taking packages from the post office. The motive of the investigators was not relevant to the prosecution's case.

United States v. Fakhoury, 819 F.2d 1415 (7th Cir. 1987) : The Court found a prosecutor's closing argument to have been "reprehensible" (but not plain error) in its prejudicial and inflammatory use of other act evidence that had been admitted to prove motive. Rather than arguing simply about motive, the prosecutor made broadside attacks on the defendant's character.

United States v. Palmer, 3 F.3d 300 (9th Cir. 1993) : Affirming a conviction for manufacturing marijuana plants, the Court held it was error (but harmless) to admit the defendant's postarraignment statement to law enforcement officials that "I don't want any deals. I have been through this before. I just want to get it behind me." The Court rejected the government's argument that the statement, which tended to prove prior acts, was admissible to prove motive, since motive did not establish a material element of any offense charged.

United States v. Martinez, 890 F.2d 1088 (10th Cir. 1989) : The Court held, in a prosecution for knowingly failing to surrender for service of sentence, that evidence of the defendant's prior conviction and subsequent indictment for cocaine trafficking was relevant to his motive to commit the offense and that an instruction to consider it only for that purpose meant that the potential prejudice did not substantially outweigh the probative value of the evidence.

[viii] Rule 404(b) -- Motive -- Obstruction of Justice and Perjury

United States v. Freeman, 208 F.3d 332 (1st Cir. 2000) : In the trial of a police officer on charges of witness tampering and of conspiring to take bribes from the owner of a striptease club, the prosecution introduced evidence of the defendant's "bad acts" at the club, including excessive drinking, invading the dancers' dressing room, and erupting in fits of violence. The Court held that the evidence was relevant to the witness-tampering charge because it showed the defendant was aware of the illegality of the conspiracy or extortion in which he was engaged at the club, and thus had a motive for witness tampering.

United States v. Willoughby, 860 F.2d 15 (2d Cir. 1988) : Affirming convictions for conspiracy to obstruct justice and witness tampering, the Court held that evidence of a robbery by the defendants demonstrated a motive to prevent witnesses from testifying at the robbery trial. In *United States v. Bufalino*, n263 the Court upheld a conviction for conspiracy to violate civil rights, finding that the Trial Judge properly admitted a tape recording of an extortion attempt for which the defendant had previously been convicted, where the victim was the person whose civil rights the defendant was charged with conspiring to violate and the tape tended to show a motive for the conspiracy.

United States v. Ruhbayan, 406 F.3d 292 (4th Cir. 2005) : The defendant was charged with obstruction of justice

after he induced his girlfriend to testify falsely in his drug trial that she, and not he, possessed a pistol found in his van. The Court held there was no abuse of discretion in admitting evidence of the defendant's physical abuse of women, since it was probative of the girlfriend's motive for being willing to testify falsely at the drug trial. In *United States v. Blount, 364 F.3d 173 (4th Cir. 2004)* , the Court affirmed a conviction for obstruction of justice arising from the defendant's behavior during the courtroom sentencing of his mother. It found no error in admitting evidence that the defendant was forcibly escorted from the building after an encounter with the court clerk before the mother's scheduled trial, as well as evidence of the plea agreement entered into by the mother, to show the defendant's intent and motive in disrupting the court during the sentencing. In *United States v. Boone*, n264 the Court held that evidence of other crimes was admissible to prove the motive for the defendant's perjury.

United States v. Maggitt, 784 F.2d 590 (5th Cir. 1986) : The Court affirmed witness-tampering convictions as it found that one defendant's prior incarceration was admissible to prove a motive to threaten a witness. See also *United States v. Chagra* n265(charges of conspiracy to obstruct justice and to possess marijuana with intent to distribute were properly joined with charges involving the murder of a Federal Judge, since they related to the defendant's motive to kill the Judge and efforts to finance a jail break following the murder); *United States v. Barron* n266(evidence of a tax evasion scheme was admissible as proof of the motive behind the charged perjury).

United States v. Vance, 871 F.2d 572 (6th Cir. 1989) : The Court held that prior bad acts by the defendant were admissible to show a motive to assist the wife of a convicted drug dealer in the murder of a state prosecutor.

United States v. Wagoner, 713 F.2d 1371 (8th Cir. 1983) : The Court held that evidence of the defendant's involvement in an auto theft ring was properly admitted to show a motive for participating in the charged scheme to bomb a state trooper's car.

[ix] Rule 404(b) -- Motive -- Terrorism Cases

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : In a prosecution for a conspiracy to bomb United States commercial airliners in southeast Asia and for crimes relating to the 1993 bombing of the World Trade Center, the Court held that a letter found in one defendant's apartment that contained evidence of uncharged and unrelated crimes and threats against other countries was strong evidence of motive.

[x] Rule 404(b) -- Motive -- Theft, Robbery, and Stolen Property Offenses

United States v. LaFlam, 369 F.3d 153 (2d Cir. 2004) : The Court affirmed convictions for bank robbery and witness tampering, holding that evidence of the defendant's drug use and drug debts was properly introduced to prove motive: "LaFlam concedes that because the identity of the bank robber was in dispute, evidence establishing that he had a motive to commit those robberies was material and relevant."

United States v. Madden, 38 F.3d 747 (4th Cir. 1994) : The Court reversed a conviction for bank robbery because the prosecution was erroneously allowed to call a witness to testify to the defendant's use of cocaine. Although the government conceded that the defendant and his wife were gainfully employed, it argued that the defendant's cocaine use was probative of motive because it tended to establish his financial need. The Court responded that "it is not drug use *per se* that supports the underlying inference of financial need that makes the evidence relevant . . ., but rather a demonstration by the government both that the accused has a significant drug habit or addiction and that he did not have the financial means to support it that makes such evidence of drug use relevant to establish a motive." Here, the

government had introduced "highly imprecise evidence of drug usage with no corresponding evidence of financial need."

United States v. Smith, 605 F.2d 839 (5th Cir. 1979) : The Court held that evidence of prior convictions and an impending prison sentence were properly introduced to show a defendant's motive in dealing with cars with the intent not to pay for them.

United States v. Swan, 250 F.3d 495 (7th Cir. 2001) : In a case involving financial crimes, the Court found it error (but harmless) to admit evidence of the defendant's gambling activity as proof of motive. "[T]he fact that Swan gambled did little to explain why he wanted to steal money. Most people want money for a variety of reasons, and the government did not attempt to show any special circumstances such as a large gambling debt hanging over Swan's head that would have provided him with a particularly weighty motive to steal." In *United States v. Brooks, 125 F.3d 484 (7th Cir. 1997)* , the Court affirmed convictions for bank robbery, finding no error in the admission of evidence that the defendants used crack cocaine and that their desire to obtain more crack motivated the bank robbery. The Court held that the evidence was probative of motive, and that there was no abuse of discretion in determining that the prejudicial effect of the evidence did not substantially outweigh its probative value. In *United States v. Cunningham*, n267 a nurse was convicted for tampering with syringes in a hospital by replacing Demerol with a saline solution. The Court held there was no abuse of discretion in admitting evidence that the nurse's license had four years earlier been suspended as a result of Demerol addiction and her theft of Demerol from another hospital. The addiction provided a motive for the charged tampering, and the suspension provided essential context for evidence that she had previously falsified drug test results, which had permitted her to continue to work as a nurse, with access to Demerol. In *United States v. Holt*, n268 the Court affirmed a defendant's convictions for masterminding a bank robbery. It found that evidence of his thefts of checks was admissible to prove financial problems that provided a motive for the robbery. In *United States v. Cyphers*, n269 a bank robbery case, the Court held it was proper to admit testimony that a defendant asked a government informer to purchase $1,000 worth of heroin for him shortly after a robbery occurred, since the testimony was offered to show the defendant's motive for the robbery.

United States v. Sutton, 41 F.3d 1257 (8th Cir. 1994) : In a bank robbery prosecution, the Court held it was error (but harmless) to admit evidence of the defendant's prior drug use, dismissing the probative value of the evidence to prove motive because "it could hardly come as a surprise to the jury that Mr. Sutton was robbing a bank because he needed money for *some* reason." In *United States v. Mays*, n270 the Court upheld the introduction in a bank robbery case of evidence of another bank robbery as part of proving a motive for the crime charged. It also held, however, that it was error (but harmless) to admit evidence of a subsequent breaking and entering.

United States v. Mitchell, 172 F.3d 1104 (9th Cir. 1999) : The Court reversed a bank robbery conviction because the prosecution erroneously introduced evidence that the defendant was in very poor financial condition and unemployed at the time of the robbery. The evidence was offered under *Rule 404(b)* as proof of motive, but the Court found the Rule inapplicable because "[b]eing poor is not a crime, wrong, or act" within the Rule. The poverty evidence in this case was not only of negligible probative value -- "almost everyone, poor or not, has a motive to get more money[, a]nd most people, rich or poor, do not steal to get it" -- but it also produced a high danger of unfair prejudice when the prosecutor effectively portrayed the defendant as both poor and feckless, not supporting his wife and children. In *United States v. Labansat, 94 F.3d 527 (9th Cir. 1996)* , the Court held it was error (but not plain error) to admit evidence of drugs found in the defendant's possession when arrested, as evidence of his motive for committing bank robberies. In the absence of a showing that he was addicted to or habitually used drugs, the evidence by itself was insufficient to support an inference of financial need creating a motive to rob a bank. In *United States v. Feldman*, n271 the Court, affirming a bank robbery conviction, upheld the admission of testimony offered to prove motive that a defendant was living beyond his means and owed money.

[ii] Rule 404(b) -- Multiple Permissible Uses

United States v. Stevens, 303 F.3d 711 (6th Cir. 2002) : Affirming convictions for arson and related offenses, the Court held that there was no plain error in the admission of evidence of the defendant's involvement in two prior arsons or in an instruction to the jury that the evidence was admitted to assist them "in deciding the defendant's intent, motive, knowledge, and whether the fire was an accident." The defendant claimed on appeal that the evidence was only relevant to prove intent, so admission for other reasons was error. The Court concluded that "[w]here a single, legitimate purpose supports the admission of the evidence under *Rule 404(b)*, a trial court's admission of that evidence for additional reasons allowed under the rule does not constitute plain error."

[jj] Rule 404(b) -- Notice of Intention To Introduce Evidence

United States v. Watson, 409 F.3d 458 (D.C. Cir. 2005) : The Court affirmed weapons and drug convictions, finding no abuse of discretion when the government was permitted to offer evidence concerning the defendant's prior acts. A week before trial, the government warned in a status conference that it would offer the testimony of a cooperating witness, but it did not state the witness's name or the facts and circumstances of the testimony. Following *voir dire* (48 hours before the witness was scheduled to testify), the prosecutor turned over a large amount of information about the witness to defense counsel. The Court noted that *Rule 404(b)* requires only that the prosecutor provide notice as to the "general nature" of the bad act evidence, and it held that the defendant had not shown any prejudice from the notice given.

United States v. Tuesta-Toro, 29 F.3d 771 (1st Cir. 1994) : The Court affirmed a drug trafficking conviction, holding that the defendant had not made a cognizable *Rule 404(b)* request with a motion calling for "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant." At a minimum the defense must present a timely request sufficiently clear and particular to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification of the general nature of all *Rule 404(b)* evidence the prosecution intends to introduce.

United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) : The Court held, in a prosecution for bribery and extortion, that the government was not required to comply with the notice requirement of *Rule 404(b)* when it cross-examined the defendant about alleged acts of fraud, bribery, and embezzlement, as the acts were probative of his character for truthfulness and the questions were permissible under *Rule 608(b)*.

United States v. Holmes, 111 F.3d 463 (6th Cir. 1997) : Affirming a fraud conviction, the Court found no violation of the *Rule 404(b)* notice requirement where the government informed the defense of its intent to offer *Rule 404(b)* evidence during the trial. The government made a reasonable argument that the evidence concerned acts intrinsic to the crime charged, so it was unclear whether *Rule 404(b)* was even applicable; furthermore, the witness presenting the evidence had been mentioned by the prosecution during *voir dire*, and the Trial Judge had postponed the witness' testimony for five days to give the defense time to prepare. In *United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995)* , the Court affirmed drug and firearms convictions, finding it "questionable" whether the defendant's request for a list of government witnesses and their anticipated testimony was sufficiently specific to trigger the notice requirement with respect to a witness who was discovered during the course of the trial. While not insisting on a request that specifically cites *Rule 404(b)*, the Court declared that it is "prudent for defense counsel to include a reference to *Rule 404(b)* in the boiler-plate request for discovery under *Fed. R. Crim. P. 16*." If the defense has made a proper request at the outset, the government has a continuing obligation to provide notice of *Rule 404(b)* evidence. In *United States v. French*, n272 the Court, affirming convictions for marijuana offenses, found timely notice of other crimes evidence where counsel was

told a week before trial, giving ample opportunity to prepare for the damaging consequences of the evidence. Furthermore, there had been no motion to continue.

United States v. Smith, 383 F.3d 700 (8th Cir. 2004) : The Court affirmed a drug conviction, finding no abuse of discretion in admitting rebuttal testimony about other drug transactions with the defendant. The Court found good cause for the failure to give pretrial notice of the evidence, which had been obtained in a separate investigation, because the government did not become aware the evidence was relevant until testimony was offered regarding an alias used by the defendant. At that point the government immediately notified defense counsel and provided an opportunity to question the witness. In a drug case, *United States v. Green, 275 F.3d 694 (8th Cir. 2001)* , the Court held that the defendant received reasonable pretrial notice regarding the intended use of an arrest. The government provided a printout of the defendant's criminal record that included the arrest four months prior to trial; a week before trial it supplemented the printout with information about the disposition of the arrest that had just become available and notified counsel of its intent to introduce the arrest under *Rule 404(b)*. We note that generally the mere fact of an arrest is not sufficient to warrant admission of other act evidence. Affirming cocaine convictions in *United States v. Robinson*, n273 the Court held that the government had given adequate *Rule 404(b)* notice when it disclosed that it would offer evidence that the defendant was in possession of cocaine base on two specific dates but did not indicate the details that would be elicited. In a bank fraud case, *United States v. Swinton*, n274 the Court held that the government had not given proper notice when, in response to a request for disclosure of *Rule 404(b)* material, it responded that its files were open and the *Rule 404(b)* evidence could be found in those files. The Court stated that "making available mountains of documents without specifying which will likely be submitted has elements of unfairness causing needless expense to the defendant." The error was harmless, however. In *United States v. Sutton*, n275 the Court held there was no abuse of discretion in excusing the government's late notification of its intent to offer evidence of the defendant's prior narcotics use in a prosecution for bank robbery. Although the defendant received this notice only two days before trial, the government had discovered the evidence only five days before trial, on a Friday. Also, the government had given a month's notice of its intent to introduce evidence regarding a narcotics transaction on the day of the robbery, so "the defendant was on notice that his involvement with drugs would be an issue at the trial and had adequate time to prepare for this type of evidence." In *United States v. Kern*, n276 the Court affirmed bank robbery convictions, holding there was adequate notice of a prior robbery where the government informed the defendants at a hearing before the Magistrate Judge more than two weeks before the trial that it might use evidence from some local robberies and provided the defendants with state reports concerning these robberies approximately a week before trial.

United States v. Ramirez-Lopez, 315 F.3d 1143 (9th Cir. 2003) : In a trial for alien smuggling, the government elicited from a prosecution witness that just before he began to testify, the defendant made a threatening gesture by moving his finger back and forth, indicating that the witness was not to say anything. Holding it was error (but not plain error) when the government failed to give notice as required under *Rule 404(b)* of its intent to elicit the threat evidence, the Court rejected the argument that the threat was not *Rule 404(b)* evidence because it was "inextricably intertwined," since a threat at trial cannot be viewed as inextricably intertwined with the charged offense of alien smuggling.

United States v. Kravchuk, 335 F.3d 1147 (10th Cir. 2003) : In a prosecution for theft from an ATM machine, the government's evidence showed that the defendant and others had removed an ATM machine from a mall and had attempted to remove another from a convenience store before they committed the charged crime. The Court held that there was no violation of *Rule 404(b)*'s notice requirement when one of the co-participants unexpectedly testified that the defendant threatened to kill them if they ever spoke of the crimes they committed with him. Because the government did not intend to offer this evidence and did not know about it, it could not give notice. In *United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th Cir. 1996)* , the Court affirmed a drug conviction, holding that the government was properly permitted to offer evidence about an uncharged marijuana transaction, even though the defendant did not receive notice of this evidence until after the start of the trial. The required good cause for excusing pretrial notice was

that the government was not made aware of the evidence until an interview with one of its witnesses the night before trial. The defendant was notified the next day, and the witness was made available to the defense before the evidence was put before the jury.

United States v. Carrasco, 381 F.3d 1237 (11th Cir. 2004) : Reversing a cocaine-related conviction on the ground that the government's failure to give notice of its intent to rely upon prior acts of drug dealing was prejudicial, the Court interpreted *Rule 404(b)* as requiring the government to provide notice of all prior act evidence it intended to use, even in rebuttal. The defendant testified that he had gone to meet with a codefendant because he was concerned that the codefendant had a drug problem and he wanted to help; the government responded with evidence that the codefendant had past dealings with the defendant and had "fronted" drugs to him for distribution. This evidence "went to the heart of Carrasco's defense, his intent," and "[t]he Government's failure to provide the required *Rule 404(b)* notice therefore prejudiced Carrasco's ability to defend himself." Affirming drug convictions in *United States v. Lampley, 68 F.3d 1296 (11th Cir. 1995)* , the Court held that under *Rule 404(b)* the government need only give notice of the "general nature" of prior bad acts, and that the notice requirement is not violated simply because a witness' testimony adds or changes certain details. In *United States v. Perez-Tosta*, n277 the Court affirmed drug convictions, holding that notice of prior bad acts given to a defendant just before *voir dire* was timely, where the prosecution did not learn of the evidence until the preceding business day, and the defense had six days after the notice until the evidence was offered and could point to no specific actions that might have been taken with more preparation time, and the evidence was significant to the government's case.

[kk] Rule 404(b) -- Opportunity To Rebut Likely Jury Speculation

United States v. Bailey, 319 F.3d 514 (D.C. Cir. 2003) : In a prosecution for conspiring to distribute cocaine, the government offered evidence of the defendant's uncharged drug deals, including two specific episodes in New York. The Court held that it was error (but harmless) to preclude the defendant from eliciting testimony that he had not yet been tried for the New York offenses. The defendant argued that because the government elicited testimony from the arresting officers in New York, the jury would infer that he had been convicted. The Court noted that it "can find no case directly holding that evidence is relevant solely to refute a likely mistaken jury inference," but cited some cases "where that appears to be the dominant purpose." Ultimately, it wrote, "[w]e think that if the jury inference is plausible, evidence to rebut that inference is relevant."

[ll] Rule 404(b) -- Plain Error To Admit

United States v. Moore, 375 F.3d 259 (3d Cir. 2004) : Reversing arson and firearm convictions, the Court made a rare finding of plain error, after the prosecution had offered evidence that the defendant was physically violent with his ex-girlfriend and punched, kicked, and choked her 13-year-old daughter after she refused to sell drugs for him, and had emphasized the evidence and called the defendant a "terrorist" in closing argument. The Court was clearly concerned that "[i]nadmissible evidence and highly inflammatory statements came rolling in unimpeded at Moore's trial, without any hesitation by the prosecutor, complaint by defense counsel, or correction by the District Court."

[mm] Rule 404(b) -- Predisposition

United States v. Armendariz-Mata, 949 F.2d 151 (5th Cir. 1991) : Where a defendant charged with cocaine possession claimed entrapment, the Court held that evidence of his association with a drug trafficker was properly admitted to prove his predisposition.

United States v. Nolan, 910 F.2d 1553 (7th Cir. 1990) : The Court held it was error, but harmless in the circumstances, to instruct that evidence of a bank robbery defendant's prior bank robberies could be considered on his "predisposition," as well as on identity and intent. Mention of that purpose in the pattern jury instruction is proper only when the defendant puts the matter in issue, as in an entrapment defense.

United States v. LaChapelle, 969 F.2d 632 (8th Cir. 1992) : The defendant, charged with receiving child pornography through the mail, asserted an entrapment defense and the government introduced a pornographic videotape seized from the defendant's home to show his knowledge of and intent to order child pornography. The Court held admission of the evidence was error (but harmless) because the possession was legal when the defendant first possessed the videotape. Evidence of predisposition to do what was once lawful is not very probative of whether there is a predisposition to do what is now illegal; the Court concluded that the slight probative value of the evidence was outweighed by its prejudicial effect.

United States v. Simtob, 901 F.2d 799 (9th Cir. 1990) : The defendant's conviction for distribution of cocaine was affirmed, the Court finding no abuse of discretion in admitting evidence of a 1973 conviction for LSD distribution and a 1974 conviction for marijuana distribution to show predisposition rebutting an entrapment defense.

[nn] Rule 404(b) -- Preparation

United States v. Sliker, 751 F.2d 477 (2d Cir. 1984) : The Court held in a bank fraud prosecution that testimony about a similar attempt to defraud explained the defendant's ability to get phony checks in preparation for the charged fraud.

United States v. McCarty, 36 F.3d 1349 (5th Cir. 1994) : The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in admitting evidence of a prior house burglary by the defendant, as weapons taken in the burglary were used in the robbery and the evidence corroborated admissions the defendant made to a fellow inmate while awaiting trial.

United States v. Gano, 560 F.2d 990 (10th Cir. 1977) : The defendant, employed as a social worker at a Veterans Hospital, had sexual relations with the wife of a patient and subsequently with her daughter. In a prosecution for having carnal knowledge of a female under the age of 16, the Court upheld admission of evidence that the defendant sold marijuana to the mother and gave it to the child himself, as the evidence showed preparation for the crime -- i.e., lowering the child's resistance. The Court also commented that evidence of the defendant's sexual relations with the mother was admissible because of its close connection with the criminal conduct involving the child.

[oo] Rule 404(b) -- Propensity Evidence

United States v. Williams, 985 F.2d 634 (1st Cir. 1993) : After arguing at sidebar that the evidence showed "how bad [the defendant and a coconspirator] are," the government introduced evidence that the defendant had told a witness that "he had killed a couple of people." On appeal of convictions for cocaine distribution offenses, the government argued that the evidence showed the defendant's *modus operandi* of intimidation. Concluding that the impermissible propensity ground first asserted was the only justification supported in the record, the Court found admission of the evidence error (but harmless). *Modus operandi* evidence is admissible to prove identity, but identity was not disputed; moreover, the evidence was not placed into any context, other than temporal, related to the development or operation of the conspiracy. One Judge, concurring, wrote separately "simply to express my exasperation at the repeated abuse of

Rule 404(b) by government prosecutors." In *United States v. Cortijo-Diaz*, n278 the Court vacated a conviction for interfering with a flight attendant because evidence that the defendant had been convicted of attempted robbery and sentenced as a predicate violent felon had been erroneously admitted. It was not relevant, other than to show propensity, to the defendant's argument that he did not intend to interfere. The Court criticized the Trial Judge's rote restatement of the *Rule 404(b)* exceptions and once again stated that the Rule excludes other acts relevant only to show criminal propensity.

J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259 (3d Cir. 1994) : In a franchisee's action against a franchiser for fraud and negligence in making representations about the financial prospects of a restaurant franchise, other franchisees testified that the defendant had made similar representations to them. Reversing a judgment for the plaintiff, the Court held it was error to admit the testimony as evidence of a common plan or scheme. "Common plan" acts may be part of a single series of events -- thus tending to show a motive which will establish the commission of a disputed act, the identity of the actor, or his intention -- or they may be sufficiently similar and distinctive as to constitute signature evidence of identity. Since neither motive, intent, nor identity was in dispute, the evidence served only the impermissible purpose of showing the defendant's propensity to commit the charged act.

United States v. Brown, 71 F.3d 1158 (5th Cir. 1995) : The Court reversed a conviction for possession with intent to distribute crack cocaine, finding error when cross-examination of the sole defense witness about her knowledge of the defendant elicited testimony about the defendant's prior cocaine conviction. The Court concluded that the only way the cross-examination "could help identify Mr. Brown was through the inference that because Mr. Brown committed the crime of possession with intent to distribute before, he had done so again." The error was not harmless, since the jury had been instructed that it could consider the prior conviction "as evidence of character or as a propensity to commit a crime."

United States v. Jones, 389 F.3d 753 (7th Cir. 2004) , vacated on other grounds, 545 U.S. 1125 (2005) : At the defendant's trial for possession of cocaine with intent to distribute, the government introduced his prior convictions for possession of marijuana with intent to distribute and for attempted delivery of a controlled substance, to prove intent. Noting that there is only "a fine line" between evidence of intent and evidence of propensity, the Court found that the evidence showed nothing more than that the defendant had a propensity to commit drug crimes (but the error was harmless). In a careful opinion (discussed in the Editorial Explanatory Comment, § 404.02[10]), the Court explained that to tell the difference between the illegitimate use of a prior conviction to show propensity and the proper use to prove intent,

> the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime. A prior conviction may be relevant to show intent if the defendant concedes that he possessed the drugs but denies that he planned to distribute them, or if he denies knowing that the substance was contraband. Merely introducing prior convictions without more, however, can prove nothing but propensity, which is not enough to take the evidence out of the exclusionary principle established by *Rule 404(b)*.

United States v. Falls, 117 F.3d 1075 (8th Cir. 1997) : In a trial for taking part in a large-scale drug distribution network, the Court found it was error (but harmless) when evidence that the defendant took part in an unrelated drug conspiracy was admitted on the ground that it was "relevant" to the issue of whether the defendant was a member of the drug conspiracy charged in the indictment. The question was not whether the evidence was probative, but whether it had a tendency to "distract[] the trier of fact from the main question of what actually happened on a particular occasion and

create[] instead a reliance on the probability that the defendant acted in accordance with his or her general character or previous criminal behavior." In *United States v. LeCompte*, n279 the Court reversed a conviction for abusive sexual contact with a minor, holding it was error to admit evidence of the defendant's prior acts of sex abuse with minors. The Trial Judge admitted the bad acts as evidence of "plan," but the Court noted that "the victims were different, and the events were far apart in time." Absent more specific linkage, the bad act evidence was relevant to "plan" "only insofar as it tends to prove a propensity to commit crimes, which *Rule 404(b)* prohibits."

United States v. Bracy, 67 F.3d 1421 (9th Cir. 1995) : In a prosecution for drug trafficking, the Court held it was error (but harmless) to admit evidence of unrelated incidents in which a defendant had used or possessed firearms. Although as a general matter firearms are relevant to prove involvement in the drug trade and intent to distribute, in this case the prosecutor essentially argued that the evidence showed the defendant's predisposition and propensity to violence.

[pp] Rule 404(b) -- Purposes for Admission To Be Specified

United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989) : The Court reversed a conviction for assault on a flight attendant, finding that evidence of the defendant's earlier robbery conviction was likely to be used as propensity evidence and was not properly admitted under *Rule 404(b)*. It added that the laundry-list instruction given to the jury by the Trial Judge was undecipherable, and that the supplementary instructions were worse.

Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000) : The Court reversed a judgment for the plaintiff, who alleged age discrimination in his termination, because the plaintiff had erroneously been permitted to testify regarding the "manner" in which the defendant allegedly had earlier terminated another employee. At trial the plaintiff's mere citation to *Rule 404(b)* fell woefully short of the proponent's obligation when offering evidence purportedly for a non-character purpose. The Trial Judge's instruction to the jury, admitting the evidence as proof of "motive, intent, preparation, plan or knowledge," increased the likelihood that the evidence would be used for an improper purpose, i.e., to find the defendant liable based on an impermissible inference concerning the defendant's "character" and its propensity to fabricate or trump up problems with its employees. In *United States v. Murray, 103 F.3d 310 (3d Cir. 1997)* , the Court reversed a conviction for intentional killing in furtherance of a continuing criminal enterprise because of error in admitting evidence that the defendant had previously committed another murder. The prosecutor had only said that the evidence "wasn't just [offered for] identity. Role in the organization, common scheme, plan, a number of different reasons," and the Trial Judge's most complete explanation (in the jury charge) why it was admitted was "for the very limited purpose to show identity, role in the conspiracy, a common scheme or plan." However, there was no showing that the uncharged murder was connected to the charged CCE or that the two killings were planned together or involved a common design, nor were the similarities between the two sufficient to be relevant on the identity issue. In *United States v. Sampson*, n280 the Court reversed a conviction for marijuana possession because evidence of prior drug crimes had been admitted without the government articulating, and without the Trial Judge putting into the record and instructing the jury as to, the permissible inferences. Where the government has not clearly stated reasons why the evidence is relevant to any legitimate purpose, there is no basis to believe the jury will cull the proper inferences from the evidence, and by simply repeating the entire litany of permissible theories under the Rule, the Judge's instruction gave the jury inadequate guidance.

Sparks v. Gilley Trucking Co., 992 F.2d 50 (4th Cir. 1993) : The defendant in a personal injury action arising out of a car-truck collision introduced evidence of the plaintiff's prior speeding convictions "to show intent, preparation, plan or motive to race or speed on the day in question." The Court reversed a judgment for the defendant, holding that intent was not relevant to the contributory negligence defense being asserted and that there was no foundation for any theory

of "plan," "motive," or "preparation." The dissenting Judge considered intent relevant to the defendant's attempt to prove the plaintiff had been racing.

United States v. Hernandez-Guevara, 162 F.3d 863 (5th Cir. 1998) : Affirming convictions for smuggling aliens into the country, the Court held there was no plain error in an instruction to the jury that it could only use the defendant's prior smuggling convictions for the purposes set out in *Rule 404(b)*. After noting that it had found no plain error when a Trial Judge gave no limiting instruction, n281 the Court reasoned that "[i]f a district court does not commit plain error by neglecting to give a limiting instruction, we do not see how it does so by reciting the permissible uses of extrinsic evidence as laid out in *Rule 404(b)*." The Court observed that it had implied in *United States v. Anderson, 933 F.2d 1261, 1272-1273 (5th Cir. 1991)* , that an instruction listing all of the permissible purposes was too broad, but it found that case distinguishable.

United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996) : The Court reversed cocaine convictions for the erroneous admission of taped telephone conversations relating to another conspiracy for which the defendant was separately indicted. Noting that in *United States v. Johnson, 27 F.3d 1186 (6th Cir. 1994)* , it had explained that prior act evidence should not be admitted to prove something that is not in dispute, the Court stated that "[t]his case requires that we explain, once again, the close and careful analysis trial courts should undertake before ruling on the admissibility of 'other crimes, wrongs or acts' under *Federal Rule of Evidence 404(b)*." The Court reiterated that: (1) upon objection, the proponent of *Rule 404(b)* evidence "should be required to identify the *specific* purpose or purposes" for offering the evidence (emphasis in original); (2) the Judge must determine whether the identified purpose is in issue; and (3) if it is in issue, the Judge must engage in a *Rule 403* balancing test; and (4) the Judge must explain to the jury the specific purpose for which it may use the evidence. The Court criticized the government's "unhelpful recitation ... of the shifting purposes" for offering the taped conversation, and the Trial Judge's recitation of "seven of the nine purposes named in *Rule 404(b)* in the precise order as they appear in the text of that rule." It found that opportunity, preparation, plan, knowledge, and absence of mistake were all improper grounds for admitting the evidence, since none of these issues were in dispute. While intent and identity were disputed by the defendant, the Court concluded that the taped conversation concerning other drug deals was substantially more prejudicial than probative on these issues, and the prejudice was exacerbated by the Trial Judge's "all purpose" instruction, which did not limit consideration of the bad acts evidence to the particular purposes in issue.

United States v. Kern, 12 F.3d 122 (8th Cir. 1993) : Affirming bank robbery convictions, the Court held that evidence of a prior robbery was properly admitted on the issue of intent to conspire, but noted that it "[did] not countenance the district court's use of this virtual laundry list of permissible *Rule 404(b)* purposes." In *United States v. Harvey*, n282 the Court reversed a conviction for avoiding payment of taxes relating to the sale of an airplane because the government introduced evidence that ten years earlier the defendant made large sums of money from drug transactions. The Court criticized the Trial Judge's "laundry list" approach to admissibility, "which merely restates the components of the rule," and stated that "the district court should specify which components of the rule form the basis of its ruling and why." In *United States v. Mothershed*, n283 the Court observed that "[w]e have not been aided in our review of the relevancy issue in this case by the 'laundry list' approach taken at trial."

United States v. Hardwell, 80 F.3d 1471 (10th Cir. 1996) : The Court held that limiting instructions given in a drug trafficking case were deficient because they were overbroad, giving the "laundry list" of permitted purposes under the Rule rather than being tailored to the purposes properly in issue, and because they did not expressly advise the jury that it could not consider prior misconduct as proof of criminal disposition or propensity. The error was harmless, however. See also *United States v. Doran* n284("laundry list" not the best way to proceed, but the defendant did not object and the instruction was not plain error). In *United States v. Morales-Quinones*, n285 the Court affirmed a conviction for transporting illegal aliens, observing that before admitting evidence of other criminal acts, "the trial court

must specifically identify the purpose for which such evidence is offered; a broad statement merely invoking or restating *Rule 404(b)* will not suffice." Although the Judge's ruling in this case was somewhat general, the Court found that the defendant's prior acts were admissible to prove the absence of mistake or accident.

[qq] Rule 404(b) -- Rebuttal Evidence

[i] Rule 404(b) -- Bias

United States v. Balsam, 203 F.3d 72 (1st Cir. 2000) : At a trial for multiple bank robberies, one defendant made a motion *in limine* announcing his intention to offer, as proof that the principal cooperating witness was biased against him, evidence that after his arrest the witness attempted to have the defendant murdered. The defendant sought to exclude any evidence that the basis for the witness' animus was a mistaken belief that the defendant had implicated the witness in the robbery scheme in order to obtain favorable treatment in an unrelated extortion case then pending against the defendant. The Court found no abuse of discretion when the government was permitted to rebut the defendant's evidence that the witness was biased against him with evidence that the defendant was then faced with a criminal case on unspecified charges. Absent an explanation, the jury might have been misled to conclude that the witness' feelings were irrational or arbitrary.

United States v. Powell, 124 F.3d 655 (5th Cir. 1997) : Affirming a conviction for evading fuel excise taxes, the Court held that evidence of the defendant's participation in a scam involving tickets to entertainment events was relevant to the alleged bias of a prosecution witness. The fact that the witness had lost money in the scam could have been a ground for the defense to impeach his testimony, so it was proper for the government to bring out the nature of the relationship to the defendant on direct examination of the witness.

[ii] Rule 404(b) -- Rebuttal Evidence -- Contradiction

[A] Rule 404(b) -- Assault, etc., Cases

United States v. Hogue, 827 F.2d 660 (10th Cir. 1987) : The Court reversed a conviction for voluntary manslaughter, holding that the defendant's assaults upon his girlfriend and her children prior to and after the stabbing of the victim were not admissible to rebut the claim that the stabbing was accidental, but were impermissible propensity evidence. See also *United States v. Naranjo* n286(the defendant's previous batteries of the murder victim were admissible to rebut his testimony that the shooting was an accident, even though a gun had not been used in the previous batteries); *United States v. Dysart* n287(evidence of previous threats were properly admitted to rebut a claim that the defendant lacked the capacity to have an intent to commit the offense of threatening the President); *United States v. Harris* n288(when a defendant charged with murdering his child claimed the death was accidental, it was permissible to admit evidence of injuries suffered by the child on other occasions).

[B] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Civil Cases

Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980) : In a wrongful death action arising out of an airline crash, the Court held it was proper to allow the plaintiffs to offer evidence of the pilot's past conduct to rebut the defendant's various efforts to paint the pilot as a careful and safe operator.

Williams v. Mensey, 785 F.2d 631 (8th Cir. 1986) : Affirming a judgment against a prisoner who claimed he was assaulted in jail, the Court held that evidence that the plaintiff was involved in other fights was properly admitted to show his problems with other inmates before one of the defendants allegedly labeled him a "snitch."

[C] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Drug Cases

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) : In support of his argument that drugs and a weapon seized from his mother's house when he was arrested there were not his, but rather belonged to a cousin living in the house, the defendant claimed that he had "turned his life around" after his brother died the previous year. On cross-examination of the defendant's girlfriend, the prosecutor asked about a letter she had sent two months before his arrest to the defendant while he was jailed on unrelated charges. In the letter she indicated she was upset that the defendant was letting his cousin use his mother's house in connection with drugs. Reversing, the Court held that using the letter to show that the defendant remained a criminal after his brother died was exactly the sort of purpose forbidden by *Rule 404(b)*. Further, the letter did not serve to impeach the witness, who did not deny before the letter was introduced that she had been upset with the use of the mother's house. In a drug trafficking case, *United States v. Johnson, 46 F.3d 1166 (D.C. Cir. 1995)* , the prosecution introduced evidence that the defendant, in an apparent attempt to explain his ability to acquire an expensive car, a gun, and various items of jewelry, had stated during booking that he was employed at a sporting goods store. The Court held there was no error in admitting evidence that the statement about his employment was false, as it suggested he was concealing the actual source of his income. In *United States v. Johnson*, n289 the Court affirmed a cocaine conviction, finding that a defendant opened the door to other crime rebuttal evidence when he presented evidence that he ran a legitimate business.

United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985) : The Court found that a defendant charged with drug offenses opened the door to evidence about prior convictions as a result of an opening statement and examination of witnesses that suggested that he was only a gambler, not a person involved with drugs. The convictions were used to support the government's claim of criminal intent.

United States v. Carter, 953 F.2d 1449 (5th Cir. 1992) : Affirming convictions for drug offenses, the Court held it was not error to introduce evidence that a defendant had been in prison for a misdemeanor, as the evidence was used to contradict his testimony that he had been continuously employed during that period. See also *United States v. Nichols* n290(evidence of a previous importation of marijuana was admissible in cocaine conspiracy prosecution to rebut the defendant's claim of lack of knowledge of illicit drug trade and denial of any previous trafficking); *United States v. Mortazavi* n291(after the defendant testified that he had no intent to deliver drugs and had never been involved with drugs, evidence of a drug transaction nine years earlier was properly admitted).

United States v. Acosta-Cazares, 878 F.2d 945 (6th Cir. 1989) : The Court held in a cocaine conspiracy prosecution that the defendant's counsel, by stating in his opening statement that his client was not involved in any conspiracy to distribute cocaine but was merely a "victim of circumstance," had opened the door to evidence during the prosecution's direct case of defendant's prior drug transactions.

United States v. Poole, 207 F.3d 893 (7th Cir. 2000) : The Court affirmed convictions for making false statements in connection with firearms purchases and upheld a ruling permitting the prosecution to question the defendant regarding a 1996 arrest which led to a guilty plea for felony possession of marijuana. On direct examination, the defendant testified that he did not know anything about guns. To impeach this testimony, the prosecutor asked the defendant whether the police found five guns in his apartment at the time of his 1996 arrest. The Court noted that this evidence was unlikely to be unduly prejudicial, since the charged offenses alleged that the defendant was a "straw purchaser," so that any earlier evidence of personal possession of guns by the defendant was unlikely to be misused by the jury. In *United States v. Laughlin*, n292 the Court held that photographs of the defendant in the presence of cash and marijuana plants were properly admitted to rebut a defense theory that he was a recreational user, but photos of the defendant using marijuana should have been excluded since they were consistent with the defense. See also *United*

States v. Gaertner n293(a claim on direct examination by a defendant charged with possession of cocaine with intent to distribute that he was not into "the drug thing" opened the door to rebuttal evidence of his prior convictions involving marijuana and tax evasion).

United States v. Thomas, 58 F.3d 1318 (8th Cir. 1995) : The Court held that evidence of the defendant's prior narcotics activity was properly admitted in a narcotics case because the defendant offered a "mere presence" defense, which had left in controversy issues with respect to his intent and knowledge, and evidence of prior narcotics activity was responsive to those issues. See also *United States v. Vitale* n294(where the defendant in a drug case testified, his version of the facts was subject to rebuttal, even though the rebuttal might involve mention of possession of a stolen weapon); *United States v. Koessel* n295(permitting cross-examination of the defendant concerning an earlier cocaine conviction to rebut a defense of a frame-up).

United States v. Lopez-Martinez, 725 F.2d 471 (9th Cir. 1984) : Reversing a conviction for importing heroin on other grounds, the Court ruled that evidence that the appellant was arrested in 1974 for possessing 600 pounds of marijuana and that he stated at the time that he was being paid $1,000 to haul the marijuana was admissible to rebut his claim that in the instant case he thought he was carrying marijuana rather than heroin. Since he received $1,000 for bringing a package weighing one and one-half pounds into the country, the Court reasoned that a jury could infer that he must have known he was carrying something worth more than marijuana. See also *United States v. Spetz* n296(evidence that the defendant had written a book describing drug dealing and had shown it to his father was properly admitted to rebut the father's testimony that he had no knowledge that his son knew about such dealing).

United States v. Harris, 903 F.2d 770 (10th Cir. 1990) : The Court affirmed a conviction for marijuana trafficking, holding that failure to file reports of large cash transactions with the IRS was properly admitted to rebut the defendant's argument that the cash was derived from legitimate coin sales. See also *United States v. Lewis* n297(in a marijuana importation case, evidence that the defendant had been involved in a similar, prior smuggling incident was properly admitted to refute his claim that he had no prior experience in importing or selling drugs); *United States v. Pilling* n298(it was permissible for the government to ask the defendant, who testified that his sole interest in transactions leading to the prosecution was innocent, whether he had smoked marijuana and sniffed cocaine).

[D] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Firearms Cases

United States v. Powell, 50 F.3d 94 (1st Cir. 1995) : The defendant, charged with felon firearm possession during a shooting incident, offered testimony that he had come into possession of the weapon as a matter of necessity during the incident. The Court held there was no abuse of discretion in admitting evidence of contemporaneous constructive possession of other firearms to rebut the defense and show he was armed at the time the shooting began.

United States v. Beverly, 5 F.3d 633 (2d Cir. 1993) : A defendant charged with crack cocaine and firearms offenses testified that he had never possessed a gun in Albany, N.Y., had only very limited familiarity with guns, and was not in Albany on specified dates. Affirming, the Court held there was no abuse of discretion in permitting rebuttal evidence that he had committed two shootings on specified dates in Albany, although it noted "with distress" that the government overreached by including in its impeachment evidence the facts that the defendant had fired guns in Albany into a house, at a woman, and into the leg of a man. In *United States v. Pelusio*, n299 a prosecution for unlawful receipt of firearms, the Court found that the government properly cross-examined a defendant about prior instances in which he had been present in an auto with a shotgun, after he testified on direct examination that he was unaware of the presence of a gun in a car and would not have gotten in had he been aware.

United States v. Tate, 715 F.2d 864 (4th Cir. 1983) : The Court reversed a conviction for receipt of a firearm by a convicted felon. The defendant, who was stopped by police while driving his wife's car, testified at trial that he did not know that two guns were in the trunk of the car. In rebuttal, the government offered evidence that the defendant had been seen in possession of some other gun at some earlier time. The Court found that the earlier possession could have shed no light on the state of the defendant's knowledge on the day he was stopped.

United States v. Conley, 291 F.3d 464 (7th Cir. 2002) : Affirming a conviction for felon firearm possession, the Court held that, after the defendant presented testimony that he had studiously avoided handling firearms or weapons around his home, two photographs depicting defendant in actual possession of firearms were properly admitted. The photographs were relevant to whether the defendant was in constructive possession of firearms while they were in his home or on his property.

United States v. Lego, 855 F.2d 542 (8th Cir. 1988) : The Court held that evidence that the defendant had previously been in possession of a firearm was admissible to negate his claim that he was carrying the weapon on the day charged only because of government inducements.

[E] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Fraud Cases

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) : In a securities fraud prosecution centering on the defendant's characterization of funds used to purchase stock, the government elicited from an accountant who had prepared the defendant's tax returns that the defendant had stated the source was personal funds. On cross-examination, the defense sought to establish that the source was irrelevant for tax purposes and the tax returns were correct. The Court held that, although the deficiency was not relevant to the charges, there was no error in permitting the government to elicit on redirect that the defendant had underreported his income from the transaction by approximately $4 million, as the door had been opened to correct a false impression.

United States v. Brainard, 745 F.2d 320 (4th Cir. 1984) : The Court held that evidence of a prior investment scheme was admissible to rebut the defendant's claim that he had been serving his client's interests in good faith.

United States v. Dunn, 805 F.2d 1275 (6th Cir. 1986) : The Court held (2-1) that it was error to admit evidence that the defendant, a contract egg producer charged with mail fraud involving insurance claims made following a fire, had previously stolen eggs. The evidence was irrelevant to rebut his claim that an egg wholesaler had a motive to burn his buildings; in fact, it tended to support the claim. Moreover, the Court found that the prosecutor argued to the jury that the evidence was character evidence.

United States v. O'Brien, 119 F.3d 523 (7th Cir. 1997) : In a prosecution for fraud in connection with disposition of a business, the Court held that the defendant's testimony regarding how much she expected to realize from the sale of a building opened the door to evidence that she had solicited arson of the property, as it tended to show that she did not actually expect to realize that value, which showed a motive to commit fraud. In *United States v. Weisman*, n300 a fraud prosecution, the Court held that the defendant's entry of a guilty plea on behalf of a corporation in 1980, the transcript of the plea proceeding, and other evidence concerning past investigations of the corporation and statements by the defendant regarding his fear of an FTC investigation were properly admitted to respond to the defendant's claim that he had no personal knowledge of any fraud committed by the corporation's employees.

United States v. Gustafson, 728 F.2d 1078 (8th Cir. 1984) : The Court held that a bank examiner's 1975 letter to the board of directors of a bank was properly admitted in a prosecution for a fraudulent check floating scheme that involved the bank in 1977 and 1978, since the letter put various defendants on notice of the problems with handling checks in certain ways and tended to rebut their defense that any improprieties were attributable to subordinates.

United States v. Gering, 716 F.2d 615 (9th Cir. 1983) : Where the defendant took the stand and attempted to create a defense in a mail fraud prosecution, the Court held that testimony could be offered to rebut the defense even though it might involve other acts. See also *United States v. Riggins* n301(evidence of a fingerprint on other forged money orders was admissible to rebut a defense of a frame-up).

United States v. Flanagan, 34 F.3d 949 (10th Cir. 1994) : Affirming a conviction for fraud and money laundering arising out of a scheme involving a sham medical supply company, the Court held it was error (but harmless) to admit evidence of the defendant's involvement in a 1980 scam after a witness described him as a "salesman's salesman." The description referred only to the defendant's success in his occupation and had no connotations as to his truthfulness, and so did not put his good character in issue. In *United States v. Lara, 956 F.2d 994 (10th Cir. 1992)* , the Court held there was no error in bringing out on cross-examination that the defendant in a construction fraud case was being prosecuted for an offense arising out of another construction project, as the defendant had opened the door by denying on direct examination that he had ever been prosecuted in any other case.

United States v. Plotke, 725 F.2d 1303 (11th Cir. 1984) : The Court found that when a defendant in a mail fraud and conspiracy case testified that he never had anything to do with burning his house or houses of others, the door had been opened to cross-examination asking the defendant whether he had been scarred at a fire at another person's house.

[F] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Miscellaneous Cases

United States v. Fortes, 619 F.2d 108 (1st Cir. 1980) : The defendant opened the door to other crimes evidence by claiming an innocent relationship with a codefendant.

United States v. Bari, 750 F.2d 1169 (2d Cir. 1984) : The Court held that a defendant charged with escape opened the door for evidence of previous and subsequent escape attempts by claiming that he was physically unable to make an escape attempt.

United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988) : The Court held that evidence of child pornography in the defendant's apartment was relevant to rebut his claim that material received in the mail was received by mistake. In *United States v. Johnson*, n302 a doctor charged with tax evasion offered character evidence in her behalf, after which the government responded with evidence that her Medicaid billings reported four times as many services per patient as other Virginia doctors. A majority of the Court held that where a defendant has attempted to portray her character as being "completely at odds with the possession of a state of mind requisite to guilt," the government should be entitled to rebut this portrayal.

United States v. Johnson, 542 F.2d 230 (5th Cir. 1976) : The Court affirmed an escape conviction, holding that evidence of a previous felony conviction and the existence of an arrest warrant at the time of the offense was properly admitted to impeach the defendant's testimony that the only reason he should not have been carrying a gun at the time was that he was not a law enforcement agent.

United States v. Czarnecki, 552 F.2d 698 (6th Cir. 1977) : A government witness was asked whether he was paid by the defendant for efforts not involving collections. The Court upheld the question on the ground that the defendant had opened the door to proof of the employment relationship by claiming that someone else had hired the witness to extort payments.

United States v. Mobley, 193 F.3d 492 (7th Cir. 1999) : A village mayor and her husband, the village's street superintendent, were charged with theft from the village. Reversing on an interlocutory appeal an *in limine* ruling excluding evidence that the mayor had caused the village not to remit its payroll taxes, the Court found an abuse of discretion. The government did not intend to offer the evidence during its case-in-chief, but only in rebuttal, if the defendant argued that the excess she received was compensation earned during earlier periods that she had deferred accepting pending improvement in the village's financial standing. The evidence would tend to show that the village's financial standing had not improved, and the unconditional ruling excluding the evidence would preclude its use for this proper purpose. In *United States v. Fountain*, n303 the Court held that a defendant who made an issue of his purpose in having a knife in prison opened the door to evidence concerning his previous use of the knife. See also *United States v. Stump* n304(evidence of improper prescriptions issued by the defendant prior to the date of the crimes charged was admissible to show a continuing scheme and to rebut his claim that he never intended to act unlawfully).

United States v. Burkett, 821 F.2d 1306 (8th Cir. 1987) : The Court held that after a defendant in a break-in testified that he had solved other burglaries for authorities, he opened the door to cross-examination concerning his involvement in other burglaries. See also *United States v. Bartley* n305(evidence of the defendant's prior activity was admissible to rebut his claim that he did not know two people who identified him).

United States v. Wales, 977 F.2d 1323 (9th Cir. 1992) : The Court affirmed the defendant's conviction for making a false declaration to Customs about the amount of currency he was carrying, holding there was no error in admitting evidence that the defendant was carrying false drivers' licenses after he had offered evidence his passport and other documents were legitimate. One Judge concurred in the judgment on this point, but noted there is no authority in the Rules for this "opening the door" doctrine, and that the doctrine as announced provides neither a clear rule nor a basis for extrapolating a rule by analogy.

United States v. Boon San Chong, 829 F.2d 1572 (11th Cir. 1987) : The Court held in an extortion case that evidence that the defendant had previously invaded a home while armed to demand money was admissible to rebut the defendant's claim that he acted under duress in the instant case. See also *United States v. Bent* n306(the defendant, who testified on direct examination that his previous voyages to the United States were for legitimate reasons, could be asked on cross-examination about prior involvement in a drug smuggling scheme); *United States v. Killingsworth* n307(in a prosecution for conspiracy to defraud the government, evidence that employees whom the defendant was to train were actually conducting training in another program was properly admitted to rebut the defendant's claim of unawareness of the training requirement as a condition of government funding).

[iii] Rule 404(b) -- Rebuttal Evidence -- Cross-Examination by Accused Opening the Door to Rebuttal

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004) : Affirming convictions for a conspiracy to grow marijuana plants, the Court found that a defendant had opened the door to questioning of an agent on redirect regarding the defendant's nolo contendere plea to a charge of stealing electricity. On cross-examination of the witness, defense counsel suggested to the witness that the only investigative report linking the defendant to unrelated criminal activity

was a report concerning stolen auto parts, thereby creating an impression with the jurors that the defendant had had only limited prior contacts with law enforcement.

Government of Virgin Islands v. Martinez, 847 F.2d 125 (3d Cir. 1988) : Although the Court affirmed a conviction for cocaine trafficking, it held that the defendant did not open the door to an inquiry into his prior drug transactions with an informant simply by cross-examining the informant regarding the informant's own drug dealing.

United States v. Senffner, 280 F.3d 755 (7th Cir. 2002) : The defendant, charged with criminal contempt and obstruction of an SEC proceeding arising out of a fraud scheme, had previously been found in civil contempt for failing to return certain monies as ordered by the SEC. On cross-examination of a government witness, defense counsel asked whether the monies had been returned. The Court held that the defendant thereby opened the door to mention in the witness' answer and in the redirect examination that the repayment had been made only after the finding of civil contempt. In *United States v. Draiman*, n308 the Court affirmed a conviction arising from filing fraudulent insurance claims following a burglary. It upheld the admission of evidence concerning the defendant's possession of "hot" or "pirated" tapes because of the manner in which defense counsel cross-examined a government witness. The Court observed that " '[o]pening the door' is a risk even a skilled defense counsel, as in this case, assumed when a calculated effort is made to tiptoe over thin ice to gain some evidentiary advantage." In *United States v. Peco*, n309 the Court affirmed convictions of drug-related offenses, concluding that the Trial Judge carefully and properly ruled that the government could introduce evidence concerning death threats to an agent, since the defendant opened the door to the evidence by inquiring on cross-examination into the agent's promise of immunity to an informant and the evidence tended to explain the agent's reasons for promising. In *United States v. Wynn*, n310 the Court held that a postal employee charged with embezzlement opened the door to questioning about other allegations made against him when he attempted to impeach a witness by questioning his motive for investigating the defendant. See also *United States v. Weston* n311(defendants, who were convicted of involvement with stolen property taken from a couple who were murdered, opened the door to mention of the murders by cross-examining a government witness to demonstrate that she did not tell the FBI everything she knew immediately after the murders and robbery).

United States v. Womochil, 778 F.2d 1311 (8th Cir. 1985) : The Court affirmed cocaine convictions, finding that the government was properly permitted to elicit on redirect examination of an agent testimony concerning other information that had been obtained relating to the defendant's activities, since the defendant's cross-examination had left the misleading impression that the defendant had never been under suspicion. See also *United States v. Large* n312(the government's reference to money found in the defendant's suitcase as the fruit of a prior drug transaction was permissible where defense counsel brought out the prior transaction in cross-examining a government witness).

United States v. Johnson, 730 F.2d 683 (11th Cir. 1984) : The Court held that defense cross-examination of a government witness opened the door to extrinsic evidence, since the cross-examination might have created a false impression of one defendant's relationship to another.

[iv] Rule 404(b) -- Rebuttal Evidence -- Government or Civil Party Opening the Door to Rebuttal

United States v. Simpson, 992 F.2d 1224 (D.C. Cir. 1993) : The Court held it was plain error to permit "impeachment" of the defendant's denial on cross-examination that he knew how Dilaudid was packaged with evidence of his prior arrest for possession of Dilaudid, as the only issue in the present case was his possession of Dilaudid and neither his knowledge of how it was packaged nor his prior possession was relevant to that issue.

Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (1st Cir. 1992) : Reversing a judgment for the defendant in a product liability action arising out of a motorcycle accident, the Court held that it was error to cross-examine the plaintiff about speeding violations inadmissible under *Rule 404(b)* simply in the hope that he would deny them, thus opening up the "red herring" for impeachment. See also *United States v. Ruiz-Batista, 956 F.2d 351 (1st Cir. 1992)* (strongly condemning government procedure of asking defendant whether he had possessed cocaine on other occasions and, after receiving a denial, seeking to show such occasions for purpose of impeachment).

United States v. Warledo, 557 F.2d 721 (10th Cir. 1977) : Convictions for conspiracy to set fire to a railroad bridge, conspiracy to obstruct interstate commerce, and possession of an incendiary bomb were reversed because the government was improperly permitted to ask one of the defendants whether he possessed a rifle found in his automobile and to introduce the rifle together with a clip and bullets to rebut his denial of possession. The Court refused to permit the government to open the door for this dangerous form of impeachment on an irrelevant matter, and it reversed all the defendants' convictions because the conspiracy charges made it likely that the evidence would have affected all of them.

[v] Rule 404(b) -- Rebuttal Evidence -- Specific Acts To Impeach

United States v. Copelin, 996 F.2d 379 (D.C. Cir. 1993) : The Court held that the prosecution was properly permitted to ask a defendant charged with cocaine distribution about testing positive on drug tests in order to impeach his statements that he had only seen drugs advertised on television. In *United States v. Simpson, 992 F.2d 1224 (D.C. Cir. 1993)* , the Court held it was plain error to permit "impeachment" of the defendant's denial that he knew how Dilaudid was packaged with evidence of his prior arrest for possession of Dilaudid, as the only issue in the present case was his possession of Dilaudid and neither his knowledge of how it was packaged nor his prior possession was relevant to that issue. In *United States v. Eaton*, n313 testimony by a defendant that he lacked knowledge of or familiarity with drugs opened the door to cross-examination as to the defendant's prior conviction and drug use.

Hitt v. Connell, 301 F.3d 240 (5th Cir. 2002) : In a civil rights action by a deputy constable who was discharged for his union activity, an associational right protected by the *First Amendment*, the Court found no abuse of discretion in admitting evidence that the constable took disciplinary action against other deputies for their union activities. The evidence was admissible as proof of the constable's motive in firing the plaintiff and to impeach the constable's statements that he was "a union man" and had no animus against the union.

United States v. McFadyen-Snider, 552 F.2d 1178 (6th Cir. 1977) : The Court reversed bank fraud convictions, holding that the prosecutor improperly attempted to impeach the appellant with proof of her sexual conduct, which the Court said was irrelevant, "especially ... where the conduct does not involve a substantive issue of the case."

United States v. Pacione, 950 F.2d 1348 (7th Cir. 1991) : The Court affirmed a conviction for threatening a revenue officer, holding there was no abuse of discretion in permitting rebuttal witnesses to testify about the defendant's reputation for untruthfulness and their opinions of his untruthfulness. Although he had been convicted in connection with the business out of which their knowledge arose, it was defense counsel who brought out his prior bad acts.

[rr] Rule 404(b) -- Relationship to Other Rules

[i] Rule 404(b) -- Miscellaneous Rules

United States v. Brown, 31 F.3d 484 (7th Cir. 1994) : In the prosecution of a scheme to defraud banks by third-party processing of telemarketing charges, testimony regarding three persons' statements that they had furthered

the scheme was admitted over a hearsay objection on the government's assurance that it would show they were unindicted coconspirators. When the government failed to make this showing, however, the Trial Judge let the testimony stand, on the ground it was "other bad acts" evidence admissible to show the defendants' knowledge and intent. The Court held that this was error (but harmless), since the government's *Rule 404(b)* argument was a concession that there was no showing a conspiracy existed, as required for *Rule 801(d)(2)(E)*, and even "other acts" evidence is inadmissible if it is also hearsay.

United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) : In the course of remanding a drug conviction on other grounds, the Court announced that it would not entertain a challenge to the admission of bad acts evidence under *Rule 404(b)* where that evidence had been properly admitted to impeach the defendant under *Rule 609*. The Court reasoned that when a conviction is properly admitted under *Rule 609*, any error in admitting the conviction under *Rule 404(b)* is automatically harmless.

[ii] Rule 404(b) -- Relationship to Other Rules -- Rules 413-415

United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) : Affirming a conviction for transporting a minor for sexual activity, the Court held that the Trial Judge properly admitted evidence that the defendant had committed a previous sexual act on the victim several years earlier, as well as evidence that he molested his two step-daughters when they were young girls more than 30 years earlier. The evidence was admitted under both *Rule 404(b)* and *Rule 414* because of some uncertainty about the effective date of the latter Rule. In affirming, the Court indicated that a *Rule 403* balancing is required under both Rules and that in this case the evidence was properly admitted on the issue of intent and to show plan and preparation. It observed that the Trial Judge instructed the jury not to use the evidence for propensity to molest, which would be allowed under *Rule 414*.

[ss] Rule 404(b) -- Remoteness

United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983) : In a prosecution charging a scheme to defraud city and state tax officials, the Court rejected a defendant's claim that evidence of other acts should not have been used to prove intent because the acts were outside the five-year limitations period for the offenses charged.

United States v. Arnold, 890 F.2d 825 (6th Cir. 1989) : Affirming a conviction for conspiracy to distribute marijuana, the Court held that although it was a close question, there was no abuse of discretion in permitting the defendant's alibi witness to be asked about a minor marijuana transaction with the defendant 18 years previously, as it was unlikely the witness or the defendant was seriously or unfairly prejudiced, especially considering the government's strong evidence of the defendant's involvement in the charged offense.

United States v. Gometz, 879 F.2d 256 (7th Cir. 1989) : Evidence that the defendant in this prosecution for assault and possessing dangerous weapons in prison had been convicted of abetting the murder of a prison guard in 1983 was too remote in time, and there was no showing the acts were similar, to be admissible on defendant's intent in this case. The error was harmless, however.

United States v. Love, 419 F.3d 825 (8th Cir. 2005) : In a cocaine base distribution case, the Court found no abuse of discretion in the admission of the defendant's three prior convictions for selling cocaine base. Although two of the convictions occurred in 1991 and 1994, the offenses were very similar, so they were probative of his knowledge and intent, and were not overly remote. In *United States v. Strong, 415 F.3d 902 (8th Cir. 2005)* , the Court affirmed a

conviction for felon firearm possession, finding no abuse of discretion in the admission of the defendant's 1987 conviction for robbery and felon firearm possession. The evidence was relevant to rebut a claim of "mere presence" and it was not too remote, given "the facts of this case" and that his "history of firearms convictions directly bears on his knowledge of, and intent to[,] possess a firearm at the time of the charged offense." In *United States v. Adams, 401 F.3d 886 (8th Cir. 2005)* , the Court held that evidence of the defendant's 1986 conviction for possession of heroin with intent to distribute was properly admitted in his trial for conspiring to distribute heroin in 2001. Since the defendant had been incarcerated from 1986 to 1997, the effective four-year interval was "well within the bounds of admission." In a medical malpractice case, *King v. Ahrens*, n314 the Court held there was no abuse of discretion in excluding evidence that the defendant's medical license had been suspended eight years earlier, as any probative value the evidence had on the absence of mistake in failing to note critical information on the medical chart and on the doctor's credibility was substantially outweighed by its prejudicial effect, given the remoteness in time and the dissimilarity between the incidents. In *United States v. Johnson*, n315 the Court held that evidence that the defendant in this murder prosecution had previously threatened his aunt with a knife could be relevant to his awareness of the risk his actions posed to the victim, thus tending to show the required element of malice, but the threat six years previously was too remote from the defendant's state of mind at the time of the offense. The error was harmless, however.

United States v. Simtob, 901 F.2d 799 (9th Cir. 1990) : The defendant's conviction for distribution of cocaine was affirmed, the Court finding no abuse of discretion in admitting evidence of a 1973 conviction for LSD distribution and a 1974 conviction for marijuana distribution to show predisposition rebutting an entrapment defense. In *United States v. Spillone, 879 F.2d 514 (9th Cir. 1989)* , there was no abuse of discretion in admitting evidence of the defendant's 1971 conviction of a similar crime to show intent in a loansharking prosecution. Rejecting an inflexible rule with respect to the remoteness of other acts, the Court held that given the similarity of the offenses, the prior conviction was not so remote as to require its exclusion.

United States v. Hernandez, 896 F.2d 513 (11th Cir. 1990) : The Court held that evidence of a six-year-old conviction otherwise admissible under the Rule might carry far less probative weight due to its temporal remoteness were it not for the fact the defendant spent much of the interim period in prison and was still on probation when arrested.

[tt] Rule 404(b) -- Stipulations -- Criminal Cases

[i] Rule 404(b) -- Generally

Old Chief v. United States, 519 U.S. 172 (1997) : The Court held that a defendant must be permitted, under *Rule 403*, to stipulate to the felony element in a felon firearm possession prosecution, and thereby keep out evidence of the judgment of conviction. However, the Court emphasized that the government is generally allowed to prove its case through evidence rather than by forced stipulation: "If there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' *Fed. Rule Evid. 404(b)*), *Rule 404(b) guarantees* the opportunity to seek its admission." (Emphasis added.) Therefore, it is unlikely after *Old Chief* that a defendant can force the prosecution to stipulate to the intent element (as opposed to the status element) of a crime. This case is discussed in the Editorial Explanatory Comments, *§§ 403.02[6]-[11], 404.02[16].*

United States v. Clark, 184 F.3d 858 (D.C. Cir. 1999) : In a prosecution for felon firearm possession and bribery, a stipulation was entered that Clark had been convicted of a felony; the nature of the conviction was not mentioned. Clark argued that the Trial Judge was required to "bifurcate" the trial, so that the jury would first hear only the evidence bearing on bribery and possession of the firearm and then, if the jury found these charges established, it would be

informed of his felon status. Finding no abuse of discretion in rejecting this bifurcation remedy, the Court noted that the proposal went beyond anything required by *Old Chief*. The Judge had done exactly what *Old Chief* required, keep from the jury the name and nature of Clark's felony. The Court also noted that the bifurcation alternative might prejudice the prosecution, because it would "keep from the jury the fact that the reason it was unlawful for Clark to possess a gun was that he was an ex-felon." In *United States v. Crowder, 141 F.3d 1202 (D.C. Cir. 1998)* (en banc), two defendants had been convicted in separate prosecutions for possession of drugs with intent to distribute. In each case, the defendant objected to evidence of other drug crimes on the ground that he had offered to stipulate to knowledge and intent elements and was defending only on the ground of, in one case, a police frame-up or, in the other, mistaken identity. On a first appeal (*Crowder I*), n316 the *en banc* Court reversed and remanded. The decision was vacated by the Supreme Court in light of its decision in *Old Chief v. United States*. On remand, the Court of Appeals observed (citing this *Manual)* that the theory of its earlier decision failed when tested against *Old Chief*. *Crowder I* was premised on the defendant's stipulation to an element making other evidence on the element irrelevant. However, *Old Chief* explicitly rejected that view. Thus, the *Rule 404(b)* evidence could not be excluded because it was irrelevant, although it could be excluded if its probative value were substantially outweighed by its prejudicial effect or other countervailing factors under *Rule 403*. Affirming the convictions, the Court held that the other crimes evidence had probative value that was not substantially outweighed by the "ambiguous, conditional, and tentative" stipulations that were offered. Four Judges dissented, arguing that *Crowder I* had not held that a defendant's concession renders bad acts irrelevant under *Rule 402*, but rather that it makes the evidence inadmissible under *Rule 404(b)* because it would serve only to show propensity, once the defendant concedes the purpose for which the government seeks to introduce the evidence.

United States v. Hebeka, 25 F.3d 287 (6th Cir. 1994) : A grocer was charged with food stamp fraud. He had been previously convicted for food stamp fraud, and banned for life from participating as a grocer in the food stamp program. To prove that the defendant's sale of his grocery store after his first conviction was a sham, the government introduced his prior food stamp conviction, as relevant to his motivation, intent, and plan in setting up a sham transfer of the grocery store. The defendant offered to stipulate that he had been disqualified from the food stamp program, arguing that this made the actual conviction irrelevant, but the Court stated that "the defendant has no right to selectively stipulate to particular elements of the offense." Accordingly, the prior conviction was relevant to motive and was properly admitted.

United States v. Jefferson, 215 F.3d 820 (8th Cir. 2000) : The Court affirmed gang-related convictions involving murder and drug trafficking, holding that evidence of one defendant's felony conviction for witness tampering and another defendant's juvenile conviction for assault were properly admitted as background evidence. The Court held that the government was not required to accept the defendants' proffered stipulations as to their felony convictions, since *Old Chief* applied only where the purpose of the government's evidence is to prove the element of prior conviction in a felon firearm possession charge.

[ii] Rule 404(b) -- Stipulations -- Criminal Cases -- Intent

United States v. Queen, 132 F.3d 991 (4th Cir. 1997) : In a trial for witness tampering, the defendant admitted meeting with the witness, but denied threatening her. The Court held that evidence that the defendant had threatened and intimidated witnesses nine years earlier in an unrelated case was properly admitted to show intent, and it rejected the argument that the uncharged misconduct evidence was irrelevant because the defendant had offered to stipulate intent if the jury found the witness' testimony that she had been threatened to be true, and held that the government was not required to accept the stipulation. The conditional stipulation could become a source of jury confusion and it would interfere with the prosecution's freedom to decide how to discharge its burden of proving every element of the crime charged. "It could well have believed that prior-act evidence was necessary, in view of attacks on witness credibility, to bolster its proof of intent."

United States v. Bilderbeck, 163 F.3d 971 (6th Cir. 1999) : The defendant was charged with attempted possession of cocaine with intent to distribute, after negotiations with an informant for a drug deal fell through. The Court held there was no abuse of discretion in admitting evidence of prior drug deals between the defendant and the informant, even though the defendant was willing to stipulate that he intended to attempt to possess the cocaine, since the evidence was probative of his intent and was not unfairly prejudicial.

United States v. Hill, 249 F.3d 707 (8th Cir. 2001) : The Court held that there was no error in admitting, in a prosecution of cocaine possession with intent to distribute, evidence of the defendant's prior drug conviction, despite the defense assertion that "[w]e intend to limit the scope of our defense so as not to raise any issue concerning mental state." The Court concluded that its precedents beginning with *United States v. Jenkins, 7 F.3d 803 (8th Cir. 1993)* , which permitted a defendant to preclude *Rule 404(b)* rebuttal evidence by testimony or stipulation removing a mental element as an issue in the case, had been "overruled, or at least substantially limited," by *Old Chief v. United States*. In this case, where the defendant was essentially claiming that his presence at the crime scene was fortuitous, the government was entitled to prove his intent to possess for distribution, and the prejudicial effect of the evidence did not substantially outweigh its probative value. In a prosecution for aiding and abetting firearms sales to a convicted felon, *United States v. Crouch*, n317 the Court held that evidence of the defendant's previous gun sales to convicted felons was properly admitted in the government's case-in-chief to prove intent. It held that uncharged misconduct can be admissible to prove intent during the government's case-in-chief, "even if the defendant plans to present a general denial defense."

[iii] Rule 404(b) -- Stipulations -- Criminal Cases -- Predicate Convictions

Old Chief v. United States, 519 U.S. 172 (1997) : In a felon firearm prosecution, the Court held that where the defendant had offered to stipulate to the felony element of the crime, it was an abuse of discretion under *Rule 403* to permit the government to offer the judgment of conviction to prove the defendant's prior felony. This case is discussed in the Editorial Explanatory Comments, *§§ 403.02[6]-[11]*, *404.02[16]*.

[uu] Rule 404(b) -- Subsequent Acts

[i] Rule 404(b) -- Association

United States v. Procopio, 88 F.3d 21 (1st Cir. 1996) : The Court found there was no abuse of discretion in an armed robbery case in admitting evidence of armed robberies committed by the defendants two years after the robbery that was the subject of the trial. The evidence showed a criminal association between the defendants. Noting that "the inference goes somewhat beyond the mere implication that either man was of bad character," the Court said that the decision to admit the evidence was, however, a close one under *Rule 403*. The "need to reason backward from 1993 to 1991" weakened the probative value of the evidence as to criminal association in the charged crime. "And here, as is often the case with *Rule 404(b)* evidence, the permissible inference (criminal association) overlapped with, and went only a small step beyond, the forbidden one (criminal character)."

[ii] Rule 404(b) -- Subsequent Acts -- Intent

United States v. Latney, 108 F.3d 1446 (D.C. Cir. 1997) : The Court held there was no error in admitting evidence of the defendant's drug activity eight months after the drug crimes charged. There is no special rule governing the admissibility of acts occurring after, as opposed to before, uncharged misconduct; the question in every case is "whether the bad acts evidence is relevant to something provable other than the defendant's character." Here, the subsequent activity was probative of the defendant's knowledge and intent. In *United States v. Brown, 16 F.3d 423 (D.C. Cir. 1994)* , the Court rejected the defendant's argument that it was error to join counts related to drug and firearms

possession in November 1990 with counts related to similar possession in February 1991, holding that a pager and firearms seized in February were relevant to show intent, knowledge, or absence of mistake with respect to the November offenses. One Judge dissented on the ground that there was insufficient temporal nexus between the two events for the latter to shed significant light on the defendant's intent at the earlier time and there were no circumstances suggesting the subsequent acts were materially connected with the prior event.

United States v. Germosen, 139 F.3d 120 (2d Cir. 1998) : In a prosecution for conspiracy to commit fraud arising from travel agency defaults, the Court held there was no abuse of discretion in admitting evidence that the defendant's travel agency defaulted after he was arrested. Although the default occurred after the conspiracy ended, it was probative of the defendant's intent in other travel agency defaults with which he was connected.

United States v. Boyd, 595 F.2d 120 (3d Cir. 1978) : The Court reversed convictions on conspiracy and substantive drug counts, holding it was error to admit proof of postconspiracy actions by two defendants. The Court found that the later actions shed no light on the defendants' intent at an earlier time.

United States v. Whaley, 786 F.2d 1229 (4th Cir. 1986) : Affirming a conviction for making false statements on a loan application, the Court held that evidence concerning a similar transaction (in which the defendant used his status as a retired FBI agent to obtain special treatment from a car rental agency) three months after the application, as well as evidence of conduct prior to the application, was admissible to prove intent.

United States v. Peterson, 244 F.3d 385 (5th Cir. 2001) : The Court affirmed fraud convictions arising out of a telemarketing scheme, holding there was no abuse of discretion in admitting evidence that after the scheme was shut down, one of the defendants was engaged in training other telemarketers to make misrepresentations. The evidence would not have been admissible to prove the defendant's conduct in the charged scheme. However, once the jury concluded that he committed the conduct at issue, "they could consider evidence of similar subsequent conduct (relatively closely linked in time), and evidence of his intent on that subsequent occasion, to draw inferences" about his intent in the charged scheme.

United States v. Haywood, 280 F.3d 715 (6th Cir. 2002) : The Court reversed a conviction for possession of crack cocaine with intent to distribute because the defendant's conviction for possession of crack four months later was erroneously admitted. The latter offense involved 1.3 grams of crack, while the charged offense was for 18 grams. The Court held that possession of the smaller amount, which was consistent with personal use, shed no light on the defendant's intent to distribute, so its only value would be the impermissible one of showing a propensity toward illegal drug possession. The dissenting Judge found no abuse of discretion, since possession of a drug "suggests a degree of involvement in the trade that tends to support an inference of intent to distribute that drug at another time," and, in his view, it also tended to show that possession on the earlier (charged) occasion was knowing.

United States v. Radtke, 415 F.3d 826 (8th Cir. 2005) : Affirming tax fraud convictions, the Court found no abuse of discretion when a defendant was precluded from introducing an amended tax return as proof of his good faith when filing the original return. Particularly when, as here, the amended return is filed post-indictment, it has minimal probative value on the defendant's state of mind at the time of the offense and it presents a substantial danger of confusing the issues and misleading the jury. Affirming the conviction of an antiabortion protester for interfering with a Deputy U.S. Marshal in *United States v. Shedlock, 62 F.3d 214 (8th Cir. 1995)* , the Court held there was no error in admitting evidence of the defendant's vociferous conduct at a clinic protest 29 days later, as it tended to show his intent during the earlier confrontation. In *United States v. Johnson*, n318 the Court affirmed convictions for aiding and

abetting in heroin distribution, holding that evidence of the defendant's participation in subsequent drug transactions was admissible to prove his prior knowledge and intent.

United States v. Rodriguez, 45 F.3d 302 (9th Cir. 1995) : The Court reversed, on nonevidentiary grounds, a conviction for possession of a prohibited object in prison. It indicated that on retrial the Trial Judge should exclude evidence that the defendant was involved in a fight with another inmate more than a month after the object in question was taken from him. The Court stated that "there is no support for the conclusion that evidence of a fight one month after the confiscation of the item could prove, other than by impermissible use of character evidence, Rodriguez's intent in possessing the object." In *United States v. Ayers, 924 F.2d 1468 (9th Cir. 1991)* , the Court affirmed convictions for a 1985 tax evasion conspiracy, holding that evidence one defendant submitted a Customs declaration in 1987 falsely denying possession of more than $10,000 in currency was highly probative of his intent to defraud the government.

United States v. Zamora, 222 F.3d 756 (10th Cir. 2000) : Affirming a conviction for aiding and abetting an armed robbery of a credit union, the Court found no error in the admission of evidence that the defendant robbed a restaurant two hours after the unsuccessful attempt to rob the credit union. The robbery was probative of the defendant's intent to rob the credit union, even though the robbery was subsequent to the crime charged. The Court noted that the closeness in time between the charged crime and the subsequent uncharged misconduct was "highly significant," because it was reasonable "to infer that within such a short span of time Zamora's state of mind remained the same." In *United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995)* , *supplemented*, *80 F.3d 1466 (10th Cir. 1996)* , the Court affirmed a conviction for conspiracy to possess with intent to distribute 1000 kilograms or more of marijuana, finding no error in the admission of 185 pounds of marijuana seized from the defendant's car more than a year after the charged conspiracy was terminated. Stating that "*Rule 404(b)* does *not* specifically exclude acts subsequent to the incident or incidents giving rise to the indictment," the Court considered the admissibility question "close" given the long time between the charged offense and the uncharged misconduct, but it relied on other cases in which "extrinsic evidence separated by more than a year from the charged conduct has been found probative of intent." In *United States v. Mittleider*, n319 evidence of the defendant's subsequent conversation with an undercover agent concerning a gun purchase was admissible to show intent and absence of mistake in a prosecution for firearms violations.

[iii] Rule 404(b) -- Subsequent Acts -- Knowledge

United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989) , *vacated on other grounds*, *498 U.S. 954 (1990)* : The Court held, in reversing a conviction for offenses in connection with a drug-importation conspiracy, that evidence of drugs found in the defendant's home at the time of his arrest, 16 months after the events in issue, was not admissible because he had never put his knowledge of drugs at issue, so it could not be used to rebut implications that he "knew nothing about drugs"; it was not probative to imply his knowledge that a loan given at the earlier time was to be used for an illegal drug-related purpose; and the prejudicial effect of the evidence far exceeded any probative value it might have.

United States v. Ramirez, 894 F.2d 565 (2d Cir. 1990) : In affirming a conviction for cocaine offenses, the Court rejected any *per se* rule that subsequent similar act evidence inherently lacks relevancy and held that evidence of the defendant's participation in a cocaine sale in September 1988 was relevant to establish his knowledge and mental state at the time of the charged offense in December 1987.

United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982) : The Court, in a prosecution for aiding and abetting theft from an interstate shipment, upheld the admission of testimony about other occasions when the defendant was involved in similar situations as tending to establish that the defendant knew he was dealing with stolen goods. The evidence was

admissible even though it involved acts that occurred 18 months after the crime charged.

United States v. Contreras, 602 F.2d 1237 (5th Cir. 1979) : The Court held that evidence of the defendant's drug use subsequent to the charged events was admissible to show knowledge at the relevant time.

United States v. White, 788 F.2d 390 (6th Cir. 1986) : The Court affirmed a conviction for conspiring and aiding and abetting in violating the housing rights of a black family, holding that evidence of a subsequent arson by the codefendant should not have been admitted even if the defendant learned of it, since later knowledge did not prove what the defendant knew at the time of the relevant acts.

United States v. Johnson, 934 F.2d 936 (8th Cir. 1991) : The Court affirmed convictions for aiding and abetting in heroin distribution, holding that evidence of the defendant's participation in subsequent drug transactions was admissible to prove his prior knowledge and intent.

United States v. Hinostroza, 297 F.3d 924 (9th Cir. 2002) : Affirming convictions for making false statements on a firearms application, the Court held that false statements on two firearms applications made after those charged in the indictment were properly admitted to prove "the defendant's knowledge that his earlier attempts were based on false statements as well." In *United States v. DeSalvo*, n320 as part of an investigation into fraud in connection with Medicare billing, the government induced the defendant to make a promotional videotape in which she described her business and her knowledge and proficiency in performing "lost charge audits." The Court held there was no error in introducing the videotape to prove the defendant's knowledge that prior Medicare claims were fraudulent. In *United States v. Corona*, n321 the Court held that drug customer lists found in the defendant's wallet 11 months after the charged crime were admissible to prove knowledge inconsistent with his defense that he was an innocent bystander to a drug transaction. In *United States v. Bibo-Rodriguez*, n322 the Court affirmed the defendant's conviction for importing cocaine, holding there was no error in admitting evidence that he imported marijuana in a similar manner nine weeks later to prove that the charged importation was knowing.

[iv] Rule 404(b) -- Subsequent Acts -- Miscellaneous Cases

United States v. Watson, 894 F.2d 1345 (D.C. Cir. 1990) : The Court affirmed a conviction for cocaine possession, holding that evidence that the defendant participated in a cocaine transaction three months after the charged offense was relevant to his knowledge and intent on the occasion in question. The Court rejected the argument that *Rule 404(b)* automatically barred evidence of subsequent acts, but noted that the temporal (as well as the logical) relationship between a later act and a defendant's earlier state of mind attenuates the relevance of such proof.

United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) : The Court held that evidence of cocaine in the defendant's apartment 18 months after the termination of the alleged conspiracy was not probative, but its admission was harmless error.

United States v. Morsley, 64 F.3d 907 (4th Cir. 1995) : A witness in a drug and firearms prosecution testified that, on the day Morsley was arrested, the witness was talking with "Raleek" when the police arrived; "Raleek" panicked, handed the witness her pocketbook, and asked her to leave; outside, the witness was stopped by the police, who discovered a bag of cocaine in her pocketbook. The Court held that the evidence might have been probative of motive and intent in connection with the charged acts occurring previously, but it was hardly necessary because the charged

conduct alone made the perpetrator's intent abundantly clear. However, the evidence did tend to rebut the defense contention that Morsley and "Raleek" were not the same person.

United States v. Bakke, 942 F.2d 977 (6th Cir. 1991) : The Court reversed a defendant's conviction for participation in a drug conspiracy ending in October 1987 because evidence had been admitted that he pleaded guilty to possessing drugs in April 1988, and there was no showing of any relationship between the charged conspiracy and subsequent drug transactions. The government's argument that he must have "learned the ropes" of the marijuana trade by participating in the earlier conspiracy would be mere speculation.

United States v. Betts, 16 F.3d 748 (7th Cir. 1994) : The Court held it was error (but harmless) to admit evidence of 16 pounds of marijuana and related paraphernalia seized at the defendants' home 18 months after the end of the charged marijuana distribution conspiracy, since it had little or no probative worth in establishing knowledge or intent regarding the conspiracy. The concurring Judge suggested the evidence may have shown the defendants were in the drug business on a continuing basis and thus were more likely to have participated in the charged conspiracy, but the majority rejected a distinction between proof of a propensity to commit drug offenses (clearly inadmissible under the Rule) and proof that drug trafficking was a person's occupation. We note that proof of a continuing business may be probative in showing knowledge or intent, but that in this case acts 18 months apart with nothing to connect them would not be probative of a continuing business.

United States v. Fischel, 693 F.2d 800 (8th Cir. 1982) : In a prosecution for possession of methamphetamine with intent to distribute and for conspiracy, the Court upheld the introduction of evidence showing that the defendant provided the drug at a party two months after the conspiracy ended. The evidence was used to rebut a suggestion that another person was the real drug dealer, not the defendant.

United States v. Hodges, 770 F.2d 1475 (9th Cir. 1985) : The Court reversed a conviction for conspiracy to defraud lending institutions, finding error in the admission of testimony that approximately five months after the last alleged act of the conspiracy the defendant attempted to extort money from an alleged coconspirator to paint a favorable picture of her involvement. The Court reasoned that the defendant's state of mind five months later was not highly probative of his state of mind at the time of the alleged conspiracy.

Hill v. Bache Halsey Stuart Shields Inc., 790 F.2d 817 (10th Cir. 1986) : Reversing a judgment for a customer against a commodities futures broker, the Court held it was an abuse of discretion to exclude evidence of the plaintiff's trading five months after he closed his account with the defendant. The trading was similar to that done with the defendant, and the Court found that it was highly probative on the issue of whether the plaintiff authorized trades by the defendant.

United States v. Miller, 959 F.2d 1535 (11th Cir. 1992) (en banc): The panel had reversed the defendant's conviction for cocaine trafficking on the ground that evidence of a second transaction nine months later was not sufficiently similar and distinctive to prove identity. n323 The Court *en banc* affirmed the conviction, holding that the similarity of the two offenses, including the same supplier and same location, was sufficient to mark them as the handiwork of the accused. In *United States v. Terebecki*, n324 the Court affirmed a conviction for aiding and abetting wire fraud, finding no error in the admission of evidence concerning a questionable transaction that occurred some 15 months after the charged fraud.

[v] Rule 404(b) -- Subsequent Acts -- *Modus Operandi*

United States v. Anifowoshe, 307 F.3d 643 (7th Cir. 2002) : The Court affirmed a fraud conviction arising from a scheme that involved depositing stolen and forged credit card access checks into fictitious bank accounts. The Court held that the defendant's state fraud conviction was properly admitted to show a *modus operandi,* even though the act at issue there occurred subsequent to the acts giving rise to the federal prosecution. The perpetrator used the same address to open fraudulent accounts in both the federal and state schemes, two checks deposited in the state account displayed an address identical to an address used to open the federal accounts, and both schemes involved the same methods.

[vv] Rule 404(b) -- Tax Returns

United States v. Layne, 192 F.3d 556 (6th Cir. 1999) : In a narcotics prosecution, the Court found no error under *Rule 404(b)* in the introduction of the defendant's tax information, indicating that he failed to file tax returns for a number of years and reported only $1442 in income for another year. Although the Court "frowns on the admission of income tax returns in narcotics cases where the government has not charged the defendant with both narcotics and tax law violations," tax information is admissible "(1) where the government has charged the defendant with operating a continuing criminal enterprise, or (2) in narcotics cases where the defendant engaged in extravagant spending or possessed massive unreported wealth." In this case, the tax information was probative to show that the defendant had "great unreported wealth."

[ww] Rule 404(b) -- Threats

United States v. Runnels, 93 F.3d 390 (7th Cir. 1996) : Police officers were convicted of various offenses resulting from terrorizing and robbing citizens. Affirming these convictions, the Court held that evidence of a threat made by one of the officers to one of the victims was properly admitted under *Rule 404(b)*. After unrelated charges against the victim had been dropped, one of the defendants encountered the victim outside the courtroom and said "I'm still gonna get you, punk." This threat was probative of motive, and also tended to prove "a plan or an intent to avenge the dismissal of the charges" against the victim.

United States v. Ramirez-Lopez, 315 F.3d 1143 (9th Cir. 2003) : In a trial for alien smuggling, the government elicited from a prosecution witness that just before he began to testify, the defendant made a threatening gesture by moving his finger back and forth, indicating that the witness was not to say anything. Holding it was error (but not plain error) when the government failed to give notice as required by *Rule 404(b)* of its intent to elicit the threat evidence, the Court rejected the argument that the threat was not *Rule 404(b)* evidence because it was "inextricably intertwined," since a threat at trial cannot be viewed as inextricably intertwined with the charged offense of alien smuggling.

United States v. Nichols, 374 F.3d 959 (10th Cir. 2004) : In a prosecution for drug possession, evidence was admitted of a threat the defendant made against an officer at the time of his arrest. The Court noted that threats against witnesses imply an intention to destroy evidence and are thus an implicit acknowledgment of guilt, but this threat against an arresting officer did not indicate a similar intent. It might, nevertheless, be admissible under *Rule 404(b)*, but the Court declined to determine whether one of the listed purposes was satisfied, since even if admission of the evidence was an abuse of discretion, any error was harmless.

[xx] Rule 404(b) -- Timing for Introduction

United States v. Colon, 880 F.2d 650 (2d Cir. 1989) : In reversing a defendant's conviction of aiding a heroin sale for improper admission of prior sales after the defendant had in effect stipulated intent out of the case, the Court noted

that the prosecutor should have waited until it was clear what theory the defense was asserting before introducing the other acts evidence. In *United States v. Benedetto*, n325 the Court indicated that it favored an "inclusionary" approach toward other crimes evidence, but noted the dangers of accepting such evidence. Referring to its past decisions, the Court wrote that "we have emphasized that admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance the probative worth of, and the Government's need for, such testimony against the prejudice to the defendant." We question whether *Colon* and *Benedetto* can be reconciled with *Old Chief v. United States* (see the Editorial Explanatory Comments, *§§ 403.02[6]-[11]*, *404.02[16]*).

United States v. Smith Grading & Paving, Inc., 760 F.2d 527 (4th Cir. 1985) : In a prosecution for a conspiracy to rig bids, the Court upheld the introduction of one defendant's previous bidrigging to prove knowledge and intent to enter a conspiracy. It held that extrinsic evidence may be properly admitted under *Rule 404(b)* even though it could not be used under *Rule 608(b)*, but it suggested that "the better practice is for the prosecutor to introduce this type of evidence in his or her case in chief" rather than on rebuttal in an effort "to have the last say through evidence of a defendant's prior misconduct."

United States v. Schweihs, 971 F.2d 1302 (7th Cir. 1992) : The Court affirmed extortion convictions, holding there was no abuse of discretion in admitting other act evidence during the government's case-in-chief where there was ample reason to believe that the defendant would raise intent or knowledge as an issue, even though the Hobbs Act does not necessarily involve specific intent.

United States v. Southwest Bus Sales, Inc., 20 F.3d 1449 (8th Cir. 1994) : In a prosecution for conspiring to suppress competition in school bus sales and mail fraud, the Trial Judge excluded evidence of an earlier Sherman Act conspiracy and false bid bonds during the government's case-in-chief and admitted it only during the government's rebuttal, on the ground that the defendants' testimony had put in issue the questions of intent to conspire, motive and opportunity, lack of mistake, and knowledge. Affirming, the Court found no abuse of discretion, but noted that the government should have been allowed to introduce the other acts in its case-in-chief, since intent was an element of the charges and thus an issue relevant to the government's burden of proving its case. In *United States v. Olsen*, n326 the Court held that because counsel's opening statement raised lack of knowledge as a defense, the government could offer *Rule 404(b)* evidence in its case-in-chief.

United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) : The Court affirmed admission of other crimes evidence to show intent, observing that the government justified its introduction of the evidence as part of its case-in-chief on the ground that it was clear from the outset of the trial that the accused would raise a duress defense, and there was no basis for assuming any undue prejudice from the timing of the government's proof. We note that any implication that the defendant would have to raise the intent issue first, before the government is permitted to offer bad act evidence, is questionable after *Old Chief*.

United States v. Chirinos, 112 F.3d 1089 (11th Cir. 1997) : In a trial on firearms charges, the defendants moved *in limine* to exclude uncharged misconduct evidence and to prevent the prosecution from referring to that misconduct in opening argument. The Trial Judge deferred a ruling and informed the prosecution that it would have to "take its chances on opening statement." The prosecution referred to the uncharged misconduct on opening statement, and the Trial Judge eventually ruled to exclude the evidence at trial. Although the Court observed that the better course of action would have been to rule on the admissibility of the *Rule 404(b)* evidence prior to allowing the government to mention the incident in its opening argument, it concluded, in light of the Judge's numerous cautionary instructions, that there was no abuse of discretion in allowing mention of the evidence.

[yy] Rule 404(b) -- Unfair Use

United States v. Sauseda, 24 F.3d 97 (10th Cir. 1994) : In a prosecution for possession of marijuana with intent to distribute and for using a firearm during a drug transaction, the government introduced the fact that the defendant was carrying a small amount of cocaine when he was arrested. The Trial Judge admitted the cocaine into evidence on the ground that "whatever he's got on him when he's arrested, the Government can go into that." In an opinion by Retired Supreme Court Justice White, sitting by designation, the Court of Appeals held that reasoning "inadequate." Justice White stated that *Rule 404(b)* nowhere suggests that evidence of uncharged crimes is admissible "solely because that evidence is found on the body of the person when arrested." However, the Court found any error to be harmless, and accordingly refused to consider whether the evidence might have been admissible on grounds consistent with *Rule 404(b)*.

United States v. Crutchfield, 26 F.3d 1098 (11th Cir. 1994) : In a prosecution of a married couple for illegal importation of Figi banded iguanas, the Court held that pervasive prosecutorial misconduct required reversal of the conviction. The Court mentioned, as one of the most egregious acts of misconduct, the questioning of a prosecution witness about the fact that the female defendant "was pregnant with another man's child" before she married the male defendant: "The prosecutor's decision to place the 'sexual character' of Penny Crutchfield before the jury in a case involving the importation of iguanas is simply inexcusable." In *United States v. Philibert, 947 F.2d 1467 (11th Cir. 1991)* , the Court held that the defendant, charged with making a threatening telephone call, had been deprived of a fair trial by the admission of evidence that he had purchased certain firearms two months before the call, as the weapons were entirely unrelated to the call. Although the purchases may have been additional evidence of his paranoid schizophrenia, such use is barred by the Rule; the error was exacerbated because the only weapon displayed was the one he never had in his possession.

[zz] Rule 404(b) -- Use by Accused

[i] Rule 404(b) -- Accused's Bad Acts

United States v. Wiman, 77 F.3d 981 (7th Cir. 1996) : In a felon firearm possession case, the prosecution gave notice of intent to offer evidence that at the time the defendant was found with the firearm, he was carrying burglary tools and was attempting to burglarize a gas station. The Court found no plain error in excluding the evidence, noting that the ruling below barred only the government from introducing the burglary-related evidence; the defendant remained free to present the evidence, and had made no attempt to do so at trial.

[ii] Rule 404(b) -- Use by Accused -- Bad Acts by Prosecution Witness

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980) : The Court reversed convictions for assassinating a former Chilean Ambassador to the United States on another ground, but held it was proper to exclude *modus operandi* evidence offered to show that the key government witness, a participant in the assassination, had carried out other acts working alone. The Court noted that *modus operandi* evidence can be offered by the defense, but observed that the link between the government witness and other acts was tenuous, the other acts were not done in the same manner, and the witness had not yet met the defendants when the other acts took place.

United States v. Reeves, 892 F.2d 1223 (5th Cir. 1990) : In affirming a conviction for extortion, the Court held there was no abuse of discretion in excluding evidence, offered on an entrapment defense, of a government witness' remote and unrelated contact with state officials, as it was not pertinent to the defendants' predisposition to commit the

crimes charged, nor was it evidence of the sort of "systematic campaign of threats and intimidation" held admissible in *United States v. McClure*. n327 In *McClure,* the Court reversed convictions for selling heroin for erroneous exclusion of evidence that the same government informant who allegedly coerced the defendant into making the sales of heroin resulting in his prosecution subsequently coerced three other individuals into making narcotics sales. Noting that *Rule 404(b)* is generally used by the government to introduce evidence, the Court in *McClure* indicated that the defendant should have been able to take advantage of the Rule and to have introduced evidence of the informant's scheme because "a jury could not properly convict him absent the opportunity to hear the proffered testimony bearing upon his theory of defense and weigh its credibility along with the other evidence in the case."

United States v. Perez, 870 F.2d 1222 (7th Cir. 1989) : The Court upheld exclusion of defense evidence concerning an arrest of a government witness, since the defendant did not make a showing that the witness was the source of narcotics on the earlier occasion and did not support an argument that she was the "head" of the drug operation.

United States v. Cruz-Garcia, 344 F.3d 951 (9th Cir. 2003) : The Court reversed a drug conviction because the defendant was not permitted to introduce evidence of the facts underlying a cooperating witness' prior convictions. In his plea allocution the witness had not mentioned the defendant, but at trial he testified that the defendant was the drug dealer and he was just along for the ride; the prosecutor argued that the witness was "dumb as a box of rocks" and would have needed the defendant's help to pull off the crime. The Court held that the underlying facts were not offered to show the witness' propensity to commit the charged crime but to show his ability to commit the crime on his own, which the prosecutor had made the central issue. Proving the underlying facts could only have prejudiced the government's case by undermining its theory that the witness was too dumb to act on his own, and that would not be *unfair* prejudice.

United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005) : Officers at a border checkpoint stopped a truck co-driven by the defendants and found marijuana packed in duffle bags beneath the mattress in the sleeping compartment. The defendants, charged with possession, obtained an *in limine* ruling excluding evidence that a few months before they were arrested, a truck owned by the same owner had been stopped and marijuana packed in duffle bags was found hidden in the sleeping compartment. The co-drivers in that case claimed that they had found the marijuana by the side of the road and had hidden it themselves; the owner was not charged in the case. At trial in this case the owner testified for the government that he had inspected the truck just before the defendant picked it up and had found no marijuana in it. The defendants sought to cross-examine the owner about the prior incident, as evidence that he was operating a drug ring of which they were unaware, but the Judge ruled that the cross-examination was not permissible under *Rules 404(b)* and 608(b). Reversing, the Court held that the cross-examination should have been permitted as "reverse-404(b)" evidence: the similarities between the two crimes, and the possibility that the jury might have disbelieved the "somewhat incredible" story of the drivers in the first incident and have concluded that the owner himself packed it in the truck, tended to make it less probable that the defendants knowingly possessed the marijuana, while concerns about prejudice were less than when other-acts evidence is offered against a defendant and there was no substantial risk of confusing the jury or wasting time.

United States v. Cohen, 888 F.2d 770 (11th Cir. 1989) : The Court reversed convictions for fraud and tax evasion because the defendants were not permitted to show that the government's primary witness, who pleaded guilty in connection with the scheme, had previously participated in a similar scheme, which would have shown his ability to concoct and conduct such a scheme without aid from the defendants. In *United States v. Rodriguez*, n328 the Court affirmed convictions for drug-related offenses, holding there was no abuse of discretion in excluding evidence offered by the defendants in support of an entrapment defense that government agents and an informant in the undercover operation had "hounded" another man into smuggling marijuana on another occasion. The defendants provided no

specifics; moreover, the other man had pleaded guilty and denied any enticements had been offered by the agents.

[iii] Rule 404(b) -- Use by Accused -- Bad Acts by Third Party

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986) : In a kidnapping case, the Court held that one defendant was properly precluded from cross-examining another concerning his pulling a gun on a business partner. Although the Court referred to this as character evidence, it appears that the defendant who sought to cross-examine was doing so in support of a duress defense. Knowledge of the codefendant's previous act with a gun might have been relevant to prove the reasonableness of fear on the part of the cross-examining defendant. It does not appear, however, that this theory was advanced in the case.

United States v. Aboumoussallem, 726 F.2d 906 (2d Cir. 1984) : To support a defense that he had been unwittingly duped by relatives into carrying heroin from Lebanon into the United States, the defendant offered testimony concerning another instance in which his relatives smuggled hashish oil into an innocent woman's suitcase. The Court stated that "the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword," since "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." However, the Court found no abuse of discretion in the ruling that the probative value of evidence about the other incident was insufficient in light of the confusion and delay that would result were the evidence admitted.

United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991) : A defendant charged with robbery and sexual assault tried to introduce testimony by the victim of a similar crime three days later that the defendant was not the assailant. The two crimes took place within a few hundred yards of one another and were otherwise so similar that the investigators initially believed that the same person had committed both crimes. Moreover, the fruits of both robberies, which occurred in New Jersey, surfaced near Ft. Meade, Maryland. Reversing, the Court held that it was error to exclude this "reverse 404(b)" evidence, as its probative value was not substantially outweighed by the prospect of undue delay or confusion of the issues.

United States v. Lucas, 357 F.3d 599 (6th Cir. 2004) : The defendant, charged with possession of cocaine found in her car, claimed that the drugs were placed there when an acquaintance, Presley, had borrowed and used the car a few hours before. The defendant sought to introduce evidence of Presley's prior conviction (arising from another incident) for cocaine possession and distribution, but the Court found no abuse of discretion in exclusion of the evidence. Any propensity inference, even against a third party, is precluded by *Rule 404(b)*; Presley's knowledge of cocaine and intent to sell were not at issue; and any probative value would have been outweighed by the prejudicial effect of leading the jury to decide on the improper basis that Presley's propensity to possess cocaine to sell made it less likely that the defendant was guilty. The concurring Judge believed that the propensity bar of *Rule 404(b)* does not apply to the acts of third parties; rather, the admissibility of third parties' acts is governed only by the relevance/prejudice analysis of *Rules 401* and *403*. The Judge noted that a majority of Circuits take that view rather than the "plain language" approach of the majority. In *United States v. Hart, 70 F.3d 854 (6th Cir. 1995)* , the Court affirmed embezzlement and income tax convictions, holding there was no error in excluding evidence offered by the defendant, the former Chief of Police in Detroit, that another participant in the scheme, a former Deputy Chief, had misled government agents previously. The Court concluded that the evidence could not be used to show propensity on the part of the Deputy Chief and that the alleged prior deception was irrelevant to the present case.

United States v. Seals, 419 F.3d 600 (7th Cir. 2005) : The defendants in a bank robbery case unsuccessfully sought to introduce evidence of another bank robbery two weeks later and 31 miles from the charged crime. Affirming,

the Court held it was an abuse of discretion to hold the defense offering "reverse-404(b)" evidence to the same standard of similarity applied to the prosecution offering other crimes evidence, but the error was harmless because the evidence was irrelevant. The similarities between the robberies were only generic; there were differences in the number of robbers involved, the disguises worn, the guns used, and the *modus operandi* (the robbers vaulted over the teller counter in one case and waited on the customer side in the other). One Judge, concurring, disputed the characterization of the evidence as "irrelevant," and would have objected to its exclusion under *Rule 403*, but agreed that exclusion was harmless error. In *United States v. Wilson, 307 F.3d 596 (7th Cir. 2002)* : the Court affirmed convictions for wire fraud, finding no error when testimony of an SEC agent regarding the consent and stipulation of a third party was excluded. The Court noted that "[u]nder what has come to be known as 'reverse 404(b) evidence,' a defendant can introduce evidence of someone else's conduct if it tends to negate the defendant's guilt," but added that this evidence may still be excluded under *Rule 403*. Here, the evidence "would not have played a major role in disproving his [the defendant's] guilt." In *United States v. Reed,* n329 the Court affirmed a conviction for manufacturing methamphetamine, finding no abuse of discretion in excluding evidence proffered by the defendant that his brother manufactured the drug on multiple occasions. Although the defendant argued that the evidence supported his theory that the brother owned the manufacturing equipment found in the defendant's house, the defendant testified that he had not seen his brother for months and a chemist testified that the residue contained in coffee filters and inside the house indicated that the drug had been recently manufactured.

United States v. Bowman, 215 F.3d 951 (9th Cir. 2000) : The Court affirmed bank robbery convictions and upheld the exclusion of evidence that other parties were convicted of two bank robberies for which the defendant and his partner were suspects. The persons convicted of those robberies were in custody when four of the five robberies charged in this case were committed, so the other defendants could not have committed those charged crimes. The Court found no abuse of discretion "as the proffered evidence lacked probative value and would have been confusing and diverting to the jury." See also *United States v. James, 169 F.3d 1210 (9th Cir. 1999)* (en banc), discussed in the Editorial Explanatory Comment, § 404.02[14] and *United States v. Saenz*, n330 where the Court noted that "*Rule 404(b)* does *not* apply when a defendant seeks to introduce evidence *that he knew of* a victim's other acts to show the *defendant's state of mind*," and reversed the defendant's conviction because exclusion of evidence of his knowledge of the victim's prior acts of violence prevented him from supporting his claim of self-defense. In *United States v. Spencer*, n331 the defendant was charged with felon firearm possession after a gun was found in a search of a car in which he was a passenger. When Miller, the owner of the car, was arrested five days later, a gun was found in the car he was driving. Pursuing a theory that the gun charged to him belonged to Miller, the defendant offered police reports of Miller's arrest to show that Miller possessed a gun similar to the one attributed to the defendant. A divided Court held there was no error in excluding the police reports under *Rule 403*. The majority conceded in its amended opinion that defendants could use *Rule 404(b)*, but said that because hiding a gun under a car seat is not a distinctive crime, the evidence would not be probative on the issue of identity and would otherwise be time-wasting and confusing. The dissenting Judge argued that the reports clearly were probative of mistaken identity and that there was no reason to believe that evidence relating to Miller would have wasted time, confused the issues, or prejudiced the government, and that the Court was perpetuating "an increasingly common double-standard in criminal cases -- a standard that allows prosecutors inordinate leeway with respect to the introduction of evidence harmful to the defendant while precluding defendants from introducing evidence that would tend to establish their innocence."

United States v. Serrata, 425 F.3d 886 (10th Cir. 2005) : The defendant corrections officers were convicted of civil rights violations for assaulting an inmate. They claimed that he resisted being handcuffed, and introduced evidence that he had previously refused to be handcuffed when arrested. Affirming, the Court found no abuse of discretion when the defendants were precluded from offering evidence of two other occasions when the inmate resisted being handcuffed. It agreed with the government that it was "not at all clear" that his intent was even relevant to the charges, so the evidence would be used only to establish a propensity, and in any event exclusion was a proper balancing of prejudicial effect and probative value. Affirming convictions arising out of a scheme to defraud banks in *United States*

v. Puckett, n332 the Court held there was no error in excluding testimony that a codefendant had conned others, which was offered by one defendant to bolster a claim that the codefendant conned the defendant into taking certain actions. The Court found that the excluded testimony concerned acts that were unrelated and dissimilar to the crimes charged.

United States v. Stephens, 365 F.3d 967 (11th Cir. 2004) : Reversing drug convictions, the Court found an abuse of discretion in the exclusion of evidence that a drug dealer, who claimed that the defendant sold him his drugs, had access to drugs from sources other than the defendant, and was involved in the drug trade even while cooperating with a state investigative bureau. The Court held that *Rule 404(b)* did not bar this evidence, because it was not offered to show the dealer's propensity. Rather, the evidence was offered to show that the dealer "could have obtained the metamphetamine he turned over to the Government from a source other than Stephens."

[iv] Rule 404(b) -- Use by Accused -- Good Acts by Accused

United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988) : Affirming a conviction for conspiring to unlawfully use electronic devices, the Court recognized that a defendant might be able to offer evidence of good conduct under *Rule 404(b)* to rebut an allegation of illicit intent, but it found that the exclusion of other act evidence offered by the defense was not reversible error because it was cumulative of evidence that was admitted.

United States v. Burke, 781 F.2d 1234 (7th Cir. 1985) : The Court affirmed extortion convictions relating to a defendant's scheme to get victims to pay him money that he claimed he would give to the FBI, which was investigating the victims. The defendant offered not only character evidence, but also his own testimony that he had planned to squeal on his clients and that he had given tips and leads to law enforcement officers in the past. Since the defendant's intent was in dispute and the government asked him about whether he had ever misled law enforcement officers, the Court was troubled by the exclusion of the evidence but found no abuse of discretion. In our view, the evidence should have been admitted to negate the intent alleged, pursuant to *Rule 404(b)*. In *United States v. Payne*, n333 defense evidence that the defendant had bought cars in Detroit below "redbook value" was deemed properly excluded in a prosecution for conspiracy to transport stolen motor vehicles, as having only dubious relevance to prices of cars coming to Indiana from Kentucky and as having a tendency to confuse the issues.

United States v. Radtke, 415 F.3d 826 (8th Cir. 2005) : Affirming tax fraud convictions, the Court found no abuse of discretion when a defendant was precluded from introducing an amended tax return as proof of his good faith when filing the original return. Particularly when, as here, the amended return is filed post-indictment, it has minimal probative value on the defendant's state of mind at the time of the offense and it presents a substantial danger of confusing the issues and misleading the jury. In *United States v. Garvin*, n334 a conviction for mail fraud was reversed in part because the Court concluded that the appellant was unfairly denied an opportunity to introduce evidence of truthful responses to questions on insurance applications to rebut the government's theory that his false answers on some applications represented a scheme to defraud.

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) : The defendant claimed that he was entrapped into participation in the charged sale of three pounds of methamphetamine. The government offered as proof of his predisposition that he was a methamphetamine user and that he had at some point in the past sold another participant a couple of single $20 doses of methamphetamine. However, the defendant was not permitted to testify that he had no prior arrest or conviction record and certainly no record of any past criminal behavior suggesting in any way that he might be predisposed to engage in large-scale drug trafficking. Reversing, the Court held that evidence was relevant to the defendant's intent, especially since a government informant had initiated the transaction, determined the type and volume of drugs involved, and arranged the meeting with the "buyer." It was also important to counter any prejudicial

effect of the evidence of prior small sales. Because the defendant's character is an essential element of the entrapment defense, exclusion of the evidence was an abuse of discretion. One Judge dissented, arguing that an absence of arrests or criminal record is not relevant on the question of predisposition, because it may simply mean he has never been caught.

[v] Rule 404(b) -- Use by Accused -- Unsolved Other Crimes

United States v. Walton, 217 F.3d 443 (7th Cir. 2000) : Affirming convictions for theft from an ATM machine, the Court found no error in the exclusion of evidence proffered by the defendant of an unsolved ATM theft from the same bank that occurred four months before the charged offense. Although evidence of someone else's crimes is sometimes admissible to negate the defendant's guilt, here the earlier theft was irrelevant "because it was unsolved and occurred four months prior to the instant theft and neither tended to prove nor disprove the defendants' involvement in the charged offense." The Court also noted that "the evidence might conceivably be interpreted as prejudicial to the defendants because it might have suggested to some that the defendants committed the unsolved ATM theft."

[aaa] Rule 404(b) -- Witness' Credibility

United States v. Miller, 895 F.2d 1431 (D.C. Cir. 1990) : The Court affirmed a conviction for bank fraud, holding that evidence that a witness who participated in the defendant's check-forging scheme knew of his prior robbery conviction was admitted not to show his propensity but to lend credence to the witness' claim that she feared for her safety if she did not comply with his demands, a state of mind relevant to her credibility.

United States v. Everett, 825 F.2d 658 (2d Cir. 1987) : Although the Court affirmed bank robbery convictions and the admission of testimony concerning a prior robbery, it indicated that when other crimes evidence is admitted for corroborative purposes, the corroboration must be "direct" and the matter corroborated must be "significant."

United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988) : The Court affirmed an extortion and conspiracy conviction, holding it was proper to admit evidence of the defendant's involvement in various murders. Two cooperating witnesses had been granted immunity from prosecution with respect to these murders, and evidence of the defendant's involvement was important for fair jury consideration of their credibility. See also *United States v. Hans, 738 F.2d 88 (3d Cir. 1984)* (evidence seized from one codefendant was admissible against another where the evidence corroborated a government witness' testimony about how a bank robbery occurred).

United States v. Bratton, 875 F.2d 439 (5th Cir. 1989) : The Court held, in affirming a conviction for aiding and abetting commission of wire fraud and possession of stolen property, that it was not an abuse of discretion to allow the government to cross-examine the defendant's wife regarding past physical abuse by him against her, because that tended to show a motivation to falsify or fabricate her testimony. The Trial Judge gave a limiting instruction that the evidence could be considered only in assessing the witness' credibility.

United States v. Serlin, 538 F.2d 737 (7th Cir. 1976) : The Court concluded that testimony regarding other acts by the defendant was necessary to prepare the jury for the witness' very damaging testimony that he acted as a "set-up man" for the defendant in luring new customers into the fraudulent scheme.

United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004) : The Court affirmed convictions for murder in aid of racketeering, but found it was error to admit evidence of a defendant's 1995 conviction for shooting another man. The evidence was not admissible to attack the credibility of an alibi witness, who was in a romantic relationship with the

defendant at the time of the crimes: her references to the defendant's interaction with her family in describing the events she witnessed did not turn her into a character witness, and the conviction was irrelevant to any bias she might have, as they were not romantically involved in 1995.

FOOTNOTES:

(n1)Footnote 1. *United States v. Blackwell, 853 F.2d 86 (2d Cir. 1988)* .

(n2)Footnote 2. *United States v. Angelini, 678 F.2d 380 (1st Cir. 1982)* .

(n3)Footnote 3. *United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981)* .

(n4)Footnote 4. *United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979)* .

(n5)Footnote 5. *United States v. Andrea, 538 F.2d 1255 (6th Cir. 1976)* .

(n6)Footnote 6. *Palmerin v. Riverside, 794 F.2d 1409 (9th Cir. 1986)* .

(n7)Footnote 7. *Cohn v. Papke, 655 F.2d 191 (9th Cir. 1981)* .

(n8)Footnote 8. *United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)* .

(n9)Footnote 9. *United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* .

(n10)Footnote 10. *United States v. Covelli, 738 F.2d 847 (7th Cir. 1984)* .

(n11)Footnote 11. *United States v. Greenwood, 796 F.2d 49 (4th Cir. 1986)* .

(n12)Footnote 12. *United States v. Wormick, 709 F.2d 454 (7th Cir. 1983)* .

(n13)Footnote 13. *United States v. Shannon, 836 F.2d 1125 (8th Cir. 1988)* .

(n14)Footnote 14. *People of Terr. of Guam v. Camacho, 103 F.3d 863 (9th Cir. 1996)* .

(n15)Footnote 15. *United States v. Boise, 916 F.2d 497 (9th Cir. 1990)* .

(n16)Footnote 16. *United States v. Cummings, 798 F.2d 413 (10th Cir. 1986)* .

(n17)Footnote 17. *United States v. Levy, 731 F.2d 997 (2d Cir. 1984)* .

(n18)Footnote 18. *United States v. Adams, 759 F.2d 1099 (3d Cir. 1985)* .

(n19)Footnote 19. *United States v. Torres, 685 F.2d 921 (5th Cir. 1982)* .

(n20)Footnote 20. *United States v. Vizcarra-Martinez, 66 F.3d 1006 (9th Cir. 1995)* .

(n21)Footnote 21. *United States v. Leavitt, 878 F.2d 1329 (11th Cir. 1989)* .

(n22)Footnote 22. *United States v. Martin, 794 F.2d 1531 (11th Cir. 1986)* .

(n23)Footnote 23. *United States v. Cole, 755 F.2d 748 (11th Cir. 1985)* .

(n24)Footnote 24. *United States v. Roberts, 933 F.2d 517 (7th Cir. 1991)* .

(n25)Footnote 25. *United States v. Tate, 821 F.2d 1328 (8th Cir. 1987)* .

(n26)Footnote 26. *United States v. Forcelle, 86 F.3d 838 (8th Cir. 1996)* .

(n27)Footnote 27. *United States v. Stovall, 825 F.2d 817* , *modified*, *833 F.2d 526 (5th Cir. 1987)* .

(n28)Footnote 28. *United States v. Reynolds, 762 F.2d 489 (6th Cir. 1985)* .

(n29)Footnote 29. *United States v. Ryan, 213 F.3d 347 (7th Cir. 2000)* .

(n30)Footnote 30. *United States v. Lahey, 55 F.3d 1289 (7th Cir. 1995)* .

(n31)Footnote 31. *United States v. Menzer, 29 F.3d 1223 (7th Cir. 1994)* .

(n32)Footnote 32. *United States v. Shackleford, 738 F.2d 776, 779 (7th Cir. 1984)* .

(n33)Footnote 33. *United States v. McGuire, 45 F.3d 1177 (8th Cir. 1995)* .

(n34)Footnote 34. *United States v. Kallin, 50 F.3d 689 (9th Cir. 1995)* .

(n35)Footnote 35. *United States v. Warren, 25 F.3d 890 (9th Cir. 1994)* .

(n36)Footnote 36. *United States v. Veltmann, 6 F.3d 1483 (11th Cir. 1993)* .

(n37)Footnote 37. *United States v. Moosey, 735 F.2d 633 (1st Cir. 1984)* .

(n38)Footnote 38. *United States v. Thai, 29 F.3d 785 (2d Cir. 1994)* .

(n39)Footnote 39. *United States v. Wooten, 688 F.2d 941 (4th Cir. 1982)* .

(n40)Footnote 40. *United States v. Silva, 748 F.2d 262 (5th Cir. 1984)* .

(n41)Footnote 41. *United States v. O'Dell, 204 F.3d 829 (8th Cir. 2000)* .

(n42)Footnote 42. *United States v. Dierling, 131 F.3d 722 (8th Cir. 1997)* .

(n43)Footnote 43. *United States v. Tran, 122 F.3d 670 (8th Cir. 1997)* .

(n44)Footnote 44. *United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987)* .

(n45)Footnote 45. *United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987)* .

(n46)Footnote 46. *United States v. DeVincent, 546 F.2d 452 (1st Cir. 1976)* .

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(n289)Footnote 289. *United States v. Johnson, 802 F.2d 1459 (D.C. Cir. 1986)* .

(n290)Footnote 290. *United States v. Nichols, 750 F.2d 1260 (5th Cir. 1985)* .

(n291)Footnote 291. *United States v. Mortazavi, 702 F.2d 526 (5th Cir. 1983)* .

(n292)Footnote 292. *United States v. Laughlin, 772 F.2d 1382 (7th Cir. 1985)* .

(n293)Footnote 293. *United States v. Gaertner, 705 F.2d 210 (7th Cir. 1983)* .

(n294)Footnote 294. *United States v. Vitale, 728 F.2d 1090 (8th Cir. 1984)* .

(n295)Footnote 295. *United States v. Koessel, 706 F.2d 271 (8th Cir. 1983)* .

(n296)Footnote 296. *United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983)* .

(n297)Footnote 297. *United States v. Lewis, 700 F.2d 1328 (10th Cir. 1983)* .

(n298)Footnote 298. *United States v. Pilling, 721 F.2d 286 (10th Cir. 1983)* .

(n299)Footnote 299. *United States v. Pelusio, 725 F.2d 161 (2d Cir. 1983)* .

(n300)Footnote 300. *United States v. Weisman, 736 F.2d 421 (7th Cir. 1984)* .

(n301)Footnote 301. *United States v. Riggins, 539 F.2d 682 (9th Cir. 1976)* .

(n302)Footnote 302. *United States v. Johnson, 634 F.2d 735 (4th Cir. 1980)* .

(n303)Footnote 303. *United States v. Fountain, 768 F.2d 790 (7th Cir. 1985)* .

(n304)Footnote 304. *United States v. Stump, 735 F.2d 273 (7th Cir. 1984)* .

(n305)Footnote 305. *United States v. Bartley, 855 F.2d 547 (8th Cir. 1988)* .

(n306)Footnote 306. *United States v. Bent, 707 F.2d 1190 (11th Cir. 1983)* .

(n307)Footnote 307. *United States v. Killingsworth, 719 F.2d 1130 (11th Cir. 1983)* .

(n308)Footnote 308. *United States v. Draiman, 784 F.2d 248 (7th Cir. 1986)* .

(n309)Footnote 309. *United States v. Peco, 784 F.2d 798 (7th Cir. 1986)* .

(n310)Footnote 310. *United States v. Wynn, 845 F.2d 1439 (7th Cir. 1988)* .

(n311)Footnote 311. *United States v. Weston, 708 F.2d 302 (7th Cir. 1983)* .

(n312)Footnote 312. *United States v. Large, 729 F.2d 636 (8th Cir. 1984)* .

(n313)Footnote 313. *United States v. Eaton, 808 F.2d 72 (D.C. Cir. 1987)* .

(n314)Footnote 314. *King v. Ahrens, 16 F.3d 265 (8th Cir. 1994)* .

(n315)Footnote 315. *United States v. Johnson, 879 F.2d 331 (8th Cir. 1989)* .

(n316)Footnote 316. *United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996)* .

(n317)Footnote 317. *United States v. Crouch, 46 F.3d 871 (8th Cir. 1995)* .

(n318)Footnote 318. *United States v. Johnson, 934 F.2d 936 (8th Cir. 1991)* .

(n319)Footnote 319. *United States v. Mittleider, 835 F.2d 769 (10th Cir. 1987)* .

(n320)Footnote 320. *United States v. DeSalvo, 41 F.3d 505 (9th Cir. 1994)* .

(n321)Footnote 321. *United States v. Corona, 34 F.3d 876 (9th Cir. 1994)* .

(n322)Footnote 322. *United States v. Bibo-Rodriguez, 922 F.2d 1398 (9th Cir. 1991)* .

(n323)Footnote 323. *United States v. Miller, 883 F.2d 1540 (11th Cir. 1989)* .

(n324)Footnote 324. *United States v. Terebecki, 692 F.2d 1345 (11th Cir. 1982)* .

(n325)Footnote 325. *United States v. Benedetto, 571 F.2d 1246, 1248-1250 (2d Cir. 1978)* .

(n326)Footnote 326. *United States v. Olsen, 589 F.2d 351 (8th Cir. 1978)* .

(n327)Footnote 327. *United States v. McClure, 546 F.2d 670 (5th Cir. 1977)* .

(n328)Footnote 328. *United States v. Rodriguez, 917 F.2d 1286 (11th Cir. 1990)* (per curiam), *vacated in part on*

other grounds, *935 F.2d 194 (11th Cir. 1991)* (per curiam).

(n329)Footnote 329. *United States v. Reed, 259 F.3d 631 (7th Cir. 2001)* .

(n330)Footnote 330. *United States v. Saenz, 179 F.3d 686 (9th Cir. 1999)* .

(n331)Footnote 331. *United States v. Spencer, 1 F.3d 742 (9th Cir. 1992)* , *amended* (9th Cir. 1993).

(n332)Footnote 332. *United States v. Puckett, 692 F.2d 663 (10th Cir. 1982)* .

(n333)Footnote 333. *United States v. Payne, 635 F.2d 643 (7th Cir. 1980)* .

(n334)Footnote 334. *United States v. Garvin, 565 F.2d 519 (8th Cir. 1977)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual 404.04

404.04 Legislative History

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[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 **[Editor's Note: The correct reference is to Rules 608 and 609]** for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, **[Editor's Note: The Rules on attacking the character of a rape victim have been changed by *Rule 412*]** and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis

lies more in history and experience than in logic, an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L. Rev. 574, 584 (1956)*; McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L. Rev. 574, 581*-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.*, 615:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* . It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, *41 Iowa L. Rev. 325 (1956)*.

[2] 1987 Amendment Committee Note

1987 Amendment Committee Note

The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."

[3] 1991 Amendment Committee Note

1991 Amendment Committee Note

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. In many criminal cases evidence

of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g.*, *United States v. McClure, 546 F.2d 670 (5th Cir. 1977)* (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution of the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g.*, Rule 412 (written notice of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. *Compare Fla.Stat.Ann. § 90.404(2)(b)* (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf. Fla.Stat.Ann. § 90.404(2)(b)* (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, *18 U.S.C. § 3500, et. seq.* nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under *Federal Rule of Criminal Procedure 16*.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, *see United States v. Williams, 900 F.2d 823 (5th Cir. 1990)* (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston, 485 U.S. 681, 108 S. Ct. 1496 (1988)* .

[4] 2000 Amendment Committee Note

2000 Amendment Committee Note

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g.*, *United States v. Fountain, 768 F.2d 790 (7th Cir. 1985)* (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit

proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks, 470 F.2d 432, 434-435 (D.C. Cir. 1972)* (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

[5] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

In the March 1971 draft the second sentence of (b) began "It may, however, be admissible for other purposes ... ." The Subcommittee preferred the 1971 formulation as placing greater emphasis on admissibility than did the final Court version.

[6] Report of the House Committee on the Judiciary

The second sentence of Rule 404(b) as submitted to the Congress began with the words. "This subdivision does not exclude the evidence when offered." The Committee amended this language to read. "It may, however, be admissible," the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

[7] Report of the Senate Committee on the Judiciary

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or

waste of time.

[8] Citations to Hearings and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, April 13, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 21-22 (1973).

Letter from W. Vincent Rakestraw to Hon. James O. Eastland, June 14, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 121, 123, 126 (1974).

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 404 RULE 404

1-404 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 404, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions;	**Rule 404. Character Evidence; Crimes or Other Acts**

Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity there with on a particular occa-

(a) Character Evidence.

sion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character

character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution or trait.

secution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offer

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

ed by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence

that the alleged victim was the first aggressor;

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

- **(i)** offer evidence to rebut it; and
- **(ii)** offer evidence of the defendant's same trait; and

(C) in a

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(3) **Ch arac ter of wit- ness .** Evid ence of the char

(3) ***Ex- cep- tion s for a Wit- ness***

	acter of a witness, as provided in Rules 607, 608, and 609.		. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.
(b)	**Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the char	**(b)**	**Crimes, Wrongs, or Other Acts.**

acter of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, kno

wledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if

the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act

is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Crimin-***

al Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so be-

fore trial -- or during trial if the court, for good cause, excuses lack of pretrial notice.

Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. To CHAPTER 404 RULE 404

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Supp. to § 404.01 Official Text

[Go To Main]

Rule 404(a) has been amended, effective December 1, 2006. The amendment is discussed in the Main Volume at *§ 404.02[3]*. The amendment clarifies that the circumstantial use of character evidence is prohibited in civil cases. The Committee Note is set forth *infra* at § 404.04[4.1]. Following is the text of the amended *Rule 404(a)*:

Rule 404. **Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

(a) Character evidence generally. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. -- The material within the following brackets is overstruck in the original. [Evidence] In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. -- The material within the following brackets is overstruck in the original. [Evidence] In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. -- Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

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Supp. to § 404.03 Annotated Cases

[Go To Main]

[1] Rule 404(a) -- Character Evidence Generally [Go To Main]

[c] Rule 404(a) -- Character of Accused

[iii] Rule 404(a) -- Character of Accused -- Defense Evidence

United States v. Taylor, 604 F.3d 1011 (7th Cir. 2010) : The Court affirmed a conviction for armed robbery, finding no abuse of discretion in the exclusion of testimony by a pastor that the defendant had a good reputation for truthfulness. The charged crime did not involve the trait of truthfulness, and the evidence was irrelevant to the defendant's truthfulness as a witness, since he did not testify.

United States v. Yarbrough, 527 F.3d 1092 (10th Cir. 2008) : The Court reversed the conviction of a police officer for obstructing justice by leaking information to the target of an investigation, because the defendant was not permitted to introduce character evidence of his "integrity and status as a law-abiding, trusted police officer." The Judge had excluded the evidence because the underlying facts were not in dispute and the only issue was whether the defendant acted with a prohibited mind set, but the Court held that where the defendant " 'defends solely on the lack of wilful intent, the character of the defendant is an important element,' " evidence of which is made admissible under Rule 404(a)(1).

[iv] Rule 404(a) -- Character of Accused -- Demeanor Evidence

United States v. Harris, 491 F.3d 440 (D.C. Cir. 2007) : Affirming a conviction for possession with intent to distribute cocaine base, the Court found no abuse of discretion when the defendant's mother and girlfriend were not permitted to testify about his family and that on the night in question he lacked the demeanor of a man about to sell drugs The defendant's attempt to portray himself as a dedicated family man was not evidence of a pertinent character trait. The Court questioned whether there was such a thing as the demeanor of a man about to sell drugs, and found that the Trial Judge properly focused on the excessively prejudicial nature of the proposed testimony. Further, there was no error in precluding the defendant from eliciting testimony as to his character for truthfulness and for law abidingness, as his

truthfulness was not pertinent to his propensity to commit a drug crime, and the defense never mentioned law abidingness, so the Judge never had a chance to consider whether character testimony addressing this trait should be admitted.

[v] Rule 404(a) -- Character of Accused -- Prosecution Evidence

United States v. Farmer, 583 F.3d 131 (2d Cir. 2009) : In a prosecution for various offenses arising from a murder and an attempted murder, the Court affirmed the convictions arising from the murder and reversed the convictions arising from the attempted murder because "the prosecutors, in their addresses to the jury, invited prejudice by repeatedly emphasizing Farmer's nickname [Murder] in a manner designed to suggest that he was known by his associates as a murderer and that he acted in accordance with that propensity in carrying out the acts charged in the indictment." This was an "abuse of Farmer's nickname."

United States v. Steele, 550 F.3d 693 (8th Cir. 2008) : The Court affirmed a conviction for assault on a federal officer and assault with a dangerous weapon, finding no abuse of discretion in the admission of evidence that the defendant had previously been convicted for assault with a dangerous weapon and had previously resisted arrest. The Court held that the evidence was relevant to whether the officer used lawful force to arrest the defendant, and whether the defendant was acting reasonably in self-defense, as he claimed, and that it could affirm the decision to admit the evidence on this ground "even if the government did not fully develop such a theory at trial."

[d] Rule 404(a) -- Character of Victim

[ii] Rule 404(a) -- Character of Victim -- Criminal Cases

United States v. Bordeaux, 570 F.3d 1041 (8th Cir. 2009) : The Court affirmed a conviction for assault with a dangerous weapon, finding no abuse of discretion when the defendant was permitted to testify in support of a claim of self-defense about numerous acts by a victim of which he was aware, because these acts were not admitted to prove the victim's character. The defendant was also properly precluded from testifying to other acts by the victims of which he was unaware, because those acts were offered to prove the victim's violent character and therefore were barred by Rule 405(b), which prohibits using specific acts to prove character when character is not in issue.

[e] Rule 404(a) -- Civil Cases

Kebede v. Hilton, 580 F.3d 714 (8th Cir. 2009) : The Court affirmed a judgment for the defendant in an action for alienation of affections, finding no abuse of discretion in the exclusion of evidence that the defendant had conducted extramarital affairs with two men other than the plaintiff's ex-husband. The evidence was inadmissible under Rule 404(a) to show the defendant's "propensities for this type of activity," and in the absence of evidence that the defendant either alienated the affections of the other men or was aware that their affections had been alienated, it was inadmissible to prove intent under Rule 404(b).

[g] Rule 404(a) -- Pertinent Traits

United States v. Harris, 491 F.3d 440 (D.C. Cir. 2007) : Affirming a conviction for possession with intent to distribute cocaine base, the Court found no abuse of discretion when the defendant's mother and girlfriend were not permitted to testify about his family and that on the night in question he lacked the demeanor of a man about to sell drugs The defendant's attempt to portray himself as a dedicated family man was not evidence of a pertinent character trait. The Court questioned whether there was such a thing as the demeanor of a man about to sell drugs, and found that the Trial Judge properly focused on the excessively prejudicial nature of the proposed testimony. Further, there was no error in precluding the defendant from eliciting testimony as to his character for truthfulness and for law abidingness, as his truthfulness was not pertinent to his propensity to commit a drug crime, and the defense never mentioned law abidingness, so the Judge never had a chance to consider whether character testimony addressing this trait should be

admitted.

[2] Rule 404(b) -- Other Crimes, Wrongs, or Acts [Go To Main]

[a] Rule 404(b) -- Ability or Opportunity

United States v. Canady, 578 F.3d 665 (7th Cir. 2009) : The Court affirmed a conviction for felon firearm possession, finding no plain error in the admission of evidence regarding a violent home invasion shortly before the defendant was found by an officer in an overturned vehicle. The defendant challenged the officer's testimony about finding the gun, and the home invasion tended to prove that the defendant possessed the gun, because he had it during the home invasion. In *United States v. Orozco, 576 F.3d 745 (7th Cir. 2009)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in admitting an agent's testimony about a prior incident that gave rise to the defendant's conviction for unlawful possession of a firearm. Because in that incident the defendant, who was left-handed, had handled his gun with his right hand, the evidence was probative to show that the gun discovered in the search of the defendant's home belonged to him, even though its holster was set up for a right-handed shooter. Any prejudicial effect was minimized by an instruction to consider the evidence only on the question of whether the defendant used his right hand to handle guns.

Boyd v. City & County of San Francisco, 576 F.3d 938 (9th Cir. 2009) : In a § 1983 excessive force action arising from an incident in which the plaintiff's decedent was fatally shot at the end of a high-speed chase when he reached into his vehicle rather than obeying an instruction to get down on the ground, the defendants argued that the victim had been attempting to commit "suicide by cop." Affirming a judgment for the defendants, the Court found no abuse of discretion in the admission of evidence regarding a similar high-speed chase three days earlier, since the victim's promptly getting down on the ground when instructed in that case tended to rebut the plaintiffs' argument that he had hesitated in obeying police commands because of a lack of mobility caused by prosthetic legs.

[b] Rule 404(b) -- Accident or Mistake

[ii] Rule 404(b) -- Accident or Mistake -- Criminal Cases

United States v. Cooper, 482 F.3d 658 (4th Cir. 2007) : In a prosecution for violation of the Clean Water Act by discharging pollutants, the Court held there was no abuse of discretion in admitting evidence that the defendant had a history of discharging pollutants and had been subject to state regulatory actions regarding those discharges. The evidence was not extrinsic to the crime being charged, because it established the context for the charged crimes and explained how he came to be without permission to discharge. Even if the evidence came within the ambit of Rule 404(b), it would be admissible to prove the defendant's knowledge of the discharges and the absence of mistake or accident.

United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) : In a prosecution for knowing possession of child pornography, the Court found no abuse of discretion when the government showed short clips of videos seized from the defendant showing adult bestiality. Clips from videos being downloaded when agents entered the defendant's home were relevant to the defendant's knowledge (which he denied) that the program he was accessing provided pornography. A clip downloaded several weeks previously and last viewed three days before the defendant's arrest was "more troubling," but it tended to rebut any argument of accident or mistake regarding the videos viewed the day of the arrest.

United States v. Bell, 516 F.3d 432 (6th Cir. 2008) : In the defendant's trial for possession of marijuana and cocaine with intent to distribute, residents of the house where the drugs were found testified that he lived there most of the time, while the defendant's fiancee testified that he stayed with her "[b]asically every night." His conviction was reversed because prior convictions for possession of marijuana and cocaine base with intent to distribute were improperly admitted as evidence of intent and of absence of mistake or accident. The Court held (2-1) that the convictions were not

probative of intent to possess and distribute because they were neither part of the same scheme nor involved a similar *modus operandi* as the present offense. And the defendant had not asserted a defense based on some type of mistake or accident, so that purpose for admitting the convictions was not material or "in issue." In any event, the probative value of the convictions several years prior to the instant offense was slight, the government had ample available means to prove the defendant's specific intent to possess and distribute the drugs, and the prejudicial effect was significant. In *United States v. Abboud, 438 F.3d 554 (6th Cir. 2006)* , the Court affirmed convictions for income tax offenses in connection with a check kiting scheme, finding no abuse of discretion in the admission of evidence that the defendants paid employees "under the table." The evidence of failure to pay employment taxes tended to rebut the good-faith defense claiming that the employer's failure to file income tax returns and underreporting were caused by sloppy bookkeeping and the illness of an employee.

United States v. Zahursky, 580 F.3d 515 (7th Cir. 2009) : The Court affirmed a conviction for attempting to entice a minor to engage in sexual activity, finding no abuse of discretion in admitting evidence of the defendant's prior Internet chat room conversations with minor girls to prove his knowledge and absence of mistake as to the victim's age. In *United States v. Webb, 548 F.3d 547 (7th Cir. 2008)* , officers, executing a search warrant for drugs at a house, found the defendant, wearing workout clothes, in the driveway. In the basement of the house they found exercise gear, along with drugs in plain view, and they also found drug packaging equipment through the house. At his trial for possession of drugs with intent to distribute, the defendant claimed he was only at the house by chance; in response the prosecution introduced his prior conviction for distributing cocaine, to show intent and absence of mistake. The Court affirmed, but held it was error (albeit harmless) to admit the other crimes evidence, as the defendant was denying not intent but possession for any purpose, and it tended to show absence of mistake only via the prohibited inference that someone who distributes drugs once is likely to do it again. In *United States v. Perkins, 548 F.3d 510 (7th Cir. 2008)* , a parolee was charged with possession of crack cocaine and marijuana with intent to distribute after drugs were found at his residence during a compliance check search. Affirming, the Court found no abuse of discretion in the admission of an arrest and prior convictions for cocaine-related offenses. The evidence tended to prove his knowledge of crack cocaine and its value, and the absence of any mistake or accident in its presence in his residence. In *United States v. Wheeler, 540 F.3d 683 (7th Cir. 2008)* , the Court affirmed a conviction for embezzling withheld employee health insurance and pension contributions, finding no abuse of discretion in the admission of evidence that the defendant had been involved in the nonpayment of withheld health insurance premiums at another company he controlled. The evidence was relevant to show his knowledge of how insurance premium withholdings must be handled and to show the absence of mistake or accident.

United States v. Littlewind, 595 F.3d 876 (8th Cir. 2010) : The Court affirmed a conviction for assault with a dangerous weapon, finding no abuse of discretion in admitting evidence of the defendant's prior convictions for assault and battery, domestic abuse, and public intoxication, where the convictions involved intoxication and physical abuse with respect to the same victim as the crimes charged. The defense presented some evidence suggesting that the victim's injuries resulted from a drunken fall, and the prior convictions tended to rebut this defense. In *United States v. Myers, 503 F.3d 676 (8th Cir. 2007)* , the Court affirmed a prisoner's conviction for mailing threatening communications, finding no error in the admission of evidence that the defendant mailed new threatening letters during the litigation, a year later. The evidence was probative to rebut the contention that the charged letters had been mailed by prison officials without the defendant's consent. In *United States v. Johnson, 463 F.3d 803 (8th Cir. 2006)* , a social services worker who submitted false records, which resulted in payments of public benefits to individuals who then kicked back some of the money to the defendant, was convicted of mail fraud for submitting the false records. Affirming, the Court found no error in the admission of evidence of uncharged fraudulent overpayments and kickbacks in which the defendant was involved, as the evidence tended to rebut the defendant's claim that she made an innocent mistake.

United *States v. Lamons, 532 F.3d 1251 (11th Cir. 2008)* : The Court affirmed the convictions of a former flight attendant for making a threatening telephone call regarding a bomb on one occasion and setting fire to the lavatory of a plane on another occasion. The charges had been severed and the defendant was convicted for making the threatening phone call before he was tried for setting the fire. In the latter trial, the Court found no abuse of discretion in admitting

evidence of the conviction, because the evidence was relevant to both intent and the absence of mistake or accident.

[d] Rule 404(b) -- Acts Charged

[i] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode

[A] Rule 404(b) -- Drug Cases

United States v. Chavis, 429 F.3d 662 (7th Cir. 2005) : The Court affirmed a crack cocaine conviction, finding no abuse of discretion in admitting evidence of the defendant's prior dealings with a cooperating coconspirator. The evidence completed the story for the jury and explained not only how the defendant and the coconspirator knew each other, but also how they ended up together in the parking lot where they were arrested.

[B] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Firearms Cases

United States v. Samuels, 521 F.3d 804 (7th Cir. 2008) : Affirming a conviction for aiding and abetting a felon in possession of a firearm, the Court held that evidence that the defendant had loaned a gun to his cousin who did not return it, and that the defendant and his brothers beat up the cousin in an effort to obtain return of the gun, was inextricably intertwined with the charge because it explained how the defendant gave a gun to one brother who was a convicted felon. In *United States v. Strong, 485 F.3d 985 (7th Cir. 2007)* , the court affirmed a conviction for being a felon in possession of ammunition, holding that evidence of the defendant's involvement in drug trafficking in the house in which he was arrested was properly admitted. It stated that "[w]hen a defendant has been charged with possession of a firearm by a felon, we repeatedly have held that evidence of contemporaneous uncharged drug trafficking is admissible under the 'inextricably intertwined' doctrine because such evidence tends to prove 'knowing possession' of the firearm." In *United States v. Lott, 442 F.3d 981 (7th Cir. 2006)* , when the defendant's car was stopped by police, a pistol was found hidden on top of a package of white powder, which was later established to be a crushed allergy medicine. Affirming a conviction for felon firearm possession, the Court held there was no abuse of discretion in admitting the bag of white powder and testimony regarding the defendant's practice of selling "dummy drugs," as the evidence was inextricably intertwined with the evidence of gun possession and tended to connect the gun with the defendant by explaining that he needed a gun because his business practices "made people mad."

[C] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Fraud and False Statement Cases

United States v. Kaiser, 609 F.3d 556 (2d Cir. 2010) : In a securities fraud case, the Court held that there was no error in admitting evidence of uncharged frauds without prior Rule 404(b) notice, because the prior frauds were inextricably intertwined with the charged fraud. The prior frauds had continuing effect on the charged crime, and "it would have been impossible to intelligently present a case about much of what went on [during the time covered by the charges] without starting at the beginning." Thus, the prior frauds were not "other crimes" subject to the Rule 404(b) notice requirement.

United States v. Hoffecker, 530 F.3d 137 (3d Cir. 2008) : The Court affirmed convictions for mail and wire fraud in connection with a scheme telemarketing purported interests in physical commodities, finding no abuse of discretion in the admission of evidence that the FTC had obtained a civil injunction against the defendant "forever enjoin[ing] and restrain[ing him] from telemarketing precious metals." The evidence was intrinsic to the charge that he had intentionally concealed and failed to disclose to investors that he was subject to the civil injunction. Furthermore, it was probative of his intent to misrepresent his commodities program and to explain why he had structured the program as he had.

United States v. Stephens, 571 F.3d 401 (5th Cir. 2009) : In a prosecution for wire fraud and identity theft arising from

a fake website soliciting donations for the Salvation Army following Hurricane Katrina, the Court held that evidence of the defendants' creating a fake website soliciting donations to the Red Cross was not inextricably intertwined with evidence of the Salvation Army website, nor was it part of a single criminal episode or a necessary preliminary step in the Salvation Army website scheme. However, the Court found no plain error in admission of the evidence, as it helped establish the defendants' intent, planning, preparation, and knowledge, and its probative value for those purposes was not so substantially outweighed by any prejudicial effect as to constitute plain error.

United States v. Hagerman, 555 F.3d 553 (7th Cir. 2009) : The Court affirmed convictions of a corporation and its president for making materially false statements in Clean Water Act reports. It held that when a defendant commits two criminal acts simultaneously but is charged only with one, the other cannot be disentangled from the charged crime, so evidence of the uncharged act is admissible without having to find a non-character purpose under Rule 404(b). In *United States v. Heath, 447 F.3d 535 (7th Cir. 2006)* , the Court affirmed a conviction for fraud arising from a scheme to use counterfeit checks to pay for cars, finding no abuse of discretion in admitting evidence of counterfeit checks and a note seized in the defendant's brother's home. An accomplice had written an almost identical note at the defendant's direction. The checks were made from the same template as those taken from the defendant and the accomplice. The Court concluded that the evidence was inextricably intertwined with the crimes charged. In this case, we suggest that the evidence was of the crimes charged and that there was no need for an inextricably intertwined analysis.

United States v. Hall, 604 F.3d 539 (8th Cir. 2010) : The Court affirmed fraud convictions in connection with a real estate trust, holding that evidence of the defendant's involvement with another trust was inextricably intertwined with the charges, given that the two trusts "were integral parts of the same fraudulent scheme." The two trusts had been created in Texas at the same time, and evidence regarding operation of the other trust explained why the charged trust lay dormant for three years and its operations had been moved to Missouri. In *United States v. Johnson, 463 F.3d 803 (8th Cir. 2006)* , a social services worker who submitted false records, which resulted in payments of public benefits to individuals who then kicked back some of the money to the defendant, was convicted of mail fraud for submitting the false records. Affirming, the Court found no error in the admission of evidence that she had received the kickbacks, although she was only charged with submitting the false records, as the evidence concerning kickbacks was an "inextricable part of the government's case" because it provided an explanation for why the defendant submitted the false records.

[D] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Limitations on the Doctrine

United States v. Conner, 583 F.3d 1011 (7th Cir. 2009) : Affirming a conviction for distributing crack cocaine, the Court held it was an abuse of discretion (but harmless error) to admit evidence of the defendant's prior and subsequent drug dealing with codefendants as "inextricably intertwined" or "intricately related" to the crime charged. No conspiracy was charged; the government had no need to show that the defendant had a relationship with the codefendants in order to prove that he distributed drugs on the specific occasion charged; and the uncharged transactions were not necessary to "complete the story" of the charged crime. The " 'complete the story' theory of the 'intricately related' doctrine was not meant to be used, as it was in this case, to circumvent Rule 404(b) and allow the government to use evidence of other acts to show propensity." Rather, an act admissible to "complete the story" must be "intrinsic to the charged crime." In this case, separate transactions that took place at separate times had been admitted. In *United States v. Taylor, 522 F.3d 731 (7th Cir. 2008)* , the Court, affirming narcotics trafficking convictions, held it was error (but harmless) for the arresting officer to testify that he recognized the defendant as a result of having known him "throughout [the officer's] career as a police officer and as a drug and gang officer." The arrestee's identity was not in doubt, and the legitimacy of the arrest was not questioned, so the evidence was irrelevant and damaging. The Court rejected a government argument that this and other bad act evidence was "inextricably intertwined" with admissible evidence and so admissible without regard to the specific exceptions of Rule 404(b). The Court said that the "inextricably intertwined" formula is "unhelpfully vague" in most situations, except when "a defendant commits two criminal acts at the same time and is charged with only one, [and] the evidence of the charged crime may unavoidably

reveal the uncharged one."

[E] Rule 404(b) -- Acts Charged -- Acts Inextricably Interwoven, Intrinsic, or Part of a Single Criminal Episode -- Other Cases

United States v. Siegel, 536 F.3d 306 (4th Cir. 2008) : The defendant had a 20-year history of identity theft and fraud that culminated in her defrauding a widower 30 years her senior and murdering him to prevent the reporting of her crimes. Shortly before trial on charges of defrauding and murdering the widower (and defrauding the United States by cashing his Social Security checks), the defendant moved *in limine* to exclude evidence of her other crimes. The motion was granted and the government brought an interlocutory appeal. Reversing, the Court held that evidence that she had been convicted for stealing three wallets and using the information contained therein to drain funds from the wallet owners' bank accounts was intrinsic to the charged crimes, since she was still on probation for those offenses and "her personal freedom depended on her ability to extricate herself from the relationship with [the widower] without his discovering and reporting her crimes." Evidence of her other frauds, which could lead to a lengthy prison term if she were caught, tended to establish her motive for murdering the widower "for the purpose of preventing him or anyone else from providing law enforcement with information about the federal crimes she had committed," which was an element of the offense charged. The evidence likewise tended to show her *modus operandi* in committing frauds. One Judge dissented, on the ground that the majority erroneously failed to apply the "abuse of discretion" level of review.

United States v. Skelton, 514 F.3d 433 (5th Cir. 2008) : The Court affirmed an extortion conviction, holding that the defendant was adequately permitted to explore the potential bias of the alleged victim of the extortion. The Court rejected the defendant's argument that the fact that victim may have stolen money and lied to the IRS was "intrinsic" to the crime charged, since the extortion charge related to the defendant's conduct, not the victim's. In *United States v. Simmons, 470 F.3d 1115 (5th Cir. 2006)* , the court affirmed a conviction for sexual assault under color of law, holding that the defendant police officer's failure to log marijuana seized during a traffic stop of an automobile containing the victim and her boyfriend was admissible to explain the events and support the victim's version of what happened. The marijuana seizure was "integral to the events leading to [the plaintiff's] sexual assault."

United States v. Wantuch, 525 F.3d 505 (7th Cir. 2008) : Affirming convictions for conspiracy to defraud the United States, bribery, fraudulent receipt of temporary alien registration stamps, and making false statements, the Court held that evidence of the defendant's sale of contraband cigarettes to a cooperating witness was properly admitted, because it tended to show how the defendant's relationship with the witness began and how it blossomed into the charged conspiracy. The Court found that the evidence was "intricately related to the acts charged in the indictment" because it "complete[d] the story of the crime on trial." As such it was not other acts evidence covered by Rule 404(b). In *United States v. Griffin, 493 F.3d 856 (7th Cir. 2007)* , the Court affirmed a conviction for conspiracy to commit armed robberies, finding no error in the admission of evidence that the defendant was on a day-reporting status with the Cook Country Department of Corrections during the time that the conspiracy was operating. It reasoned that this evidence was inextricably intertwined with the charged offense because it explained why the defendant was not able to participate in several robberies with his coconspirators. The Court declared that evidence is inextricably intertwined with the crime charged, and thus not subject to Rule 404(b), "if it helps complete the story of the crime on trial, if its absence would create a conceptual or chronological void in the story of the crime on trial, or if it is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove an element of the charged crime." We believe that this definition of "inextricably intertwined" is far too broad, as it would appear to encompass virtually any act of uncharged misconduct that is relevant to the prosecution's case. For example, it would cover evidence of uncharged conduct offered to prove intent, as intent is an element of the crime; but evidence offered to prove intent is clearly subject to Rule 404(b).

United States v. US Infrastructure, Inc., 576 F.3d 1195 (11th Cir. 2009) : In the prosecution of a corporation and its officers for bribery arising from a scheme in which they made payments to a public official who had awarded them no-bid contracts, the Court found no abuse of discretion when a witness testified that after having done work for free on

the official's private business premises using plans provided by the defendants, the official arranged a no-bid contract project for him. The Court held that the evidence was inextricably intertwined with and relevant to the chain of events surrounding the charged crimes, showing the appellant's knowledge of the official's willingness to exchange his influence for things of value as well as the opportunity to take advantage of that willingness.

[ii] Rule 404(b) -- Acts Charged -- Conspiracy

United States v. Becton, 601 F.3d 588 (D.C. Cir. 2010) : Affirming drug convictions, the Court found no abuse of discretion in admitting testimony regarding the defendant's activities while incarcerated from 2003 to 2005 on an unrelated charge, because the evidence showed that the defendant managed the charged drug conspiracy while in jail and thus the evidence was not Rule 404(b) "other crimes" evidence.

United States v. Mangual-Santiago, 562 F.3d 411 (1st Cir. 2009) : Affirming convictions for drug and money laundering conspiracies, the Court held that evidence of a gun, drugs, a scale, and cash found in an apartment along with the defendant was evidence of the crime charged and was therefore admissible. It also noted that evidence of bank account activity could be considered within the scope of the charged money-laundering conspiracy given that the indictment listed only an approximate date when the conspiracy ended.

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) : Two pharmacists were convicted of conspiring with physicians to distribute large quantities of pain medications under cover of false prescriptions written by the physicians. Affirming, the Court found no abuse of discretion in the admission of evidence that the defendants filled illegitimate prescriptions from physicians who were not named as coconspirators. The evidence could be seen as intrinsic to the charged conspiracy with a named physician and "others known and unknown," and although the physicians were in a sense competitors, "their activities were mutually advantageous, as the behavior of each doctor expanded operations for all by encouraging more dealers and pharmacists to get into the business." It could also be seen as probative of the defendants' knowledge that the named physician's prescriptions were illegitimate, as their "experience in filling piles of similar false prescriptions from a different doctor would speak directly to that issue."

United States v. Gallardo, 497 F.3d 727 (7th Cir. 2007) : The Court affirmed convictions for drug distribution offenses, holding that evidence of one defendant's giving false identity information at a traffic stop was properly admitted as relevant to a charge that the conspirators had used "means to avoid detection and apprehension by law enforcement authorities." In *United States v. Gougis, 432 F.3d 735 (7th Cir. 2005)* , the Court affirmed drug and theft convictions of law enforcement officers who were targeted in a sting operation set up by the government with the help of a confidential informant. It found no abuse of discretion in admitting a tape recording of a conversation in which one defendant and the informant discussed a gold watch that the defendant stole while executing a search warrant five years earlier. The taped conversation was "intricately related" to the charged crimes, because it tended to explain the defendant's participation in the conspiracy and his relationship with two of his three coconspirators. The evidence was not "too tenuously connected to the present charges," since the defendant was recruited as a potential coconspirator because of his previous participation with two others in an on-duty theft while a member of the Chicago Housing Authority police.

United States v. Parker, 553 F.3d 1309 (10th Cir. 2009) : The Court affirmed a conviction for a conspiracy to sell defective airplane engines with false documentation, finding no abuse of discretion in the admission of evidence regarding uncharged sales both during and outside the conspiracy period. The sales during the conspiracy period, although not specified in the indictment, were intrinsic acts substantiating the charged conspiracy and not within Rule 404(b). The sales outside the conspiracy time-frame tended to show the defendant's intent and knowledge regarding the charged offenses. In *United States v. Smith, 534 F.3d 1211 (10th Cir. 2008)* , the Court affirmed convictions on charges related to a drug conspiracy, finding no error in admitting evidence of two murders ordered by the defendant. This was not "bad act" evidence covered by Rule 404(b): "Because the evidence supported the conclusion that the double murder occurred during the life of the conspiracy and was part of it, ... the district court did not abuse its discretion in admitting

the evidence, finding that Rule 404(b) did not apply." In *United States v. Portillo-Quezada, 469 F.3d 1345 (10th Cir. 2006)* , the Court affirmed a defendant's convictions arising from his leadership role in a methamphetamine distribution ring. It held that evidence of a murder was properly admitted, as it was committed in furtherance of the conspiracy charged in the case. In a conspiracy prosecution, "conduct which occurs during the life of the conspiracy and is a part of the same is direct evidence of the conspiracy and therefore not subject to *Rule 404(b)*."

[vi] Rule 404(b) -- Acts Charged -- Other Cases

United States v. Martinez-Rodriguez, 472 F.3d 1087 (9th Cir. 2007) : Affirming a conviction for re-entering the United States after removal, the Court held that proof that the defendant had twice been deported was admissible to prove the charged offense without regard to *Rule 404(b)*. Because evidence of each deportation was dissimilar, the Court reasoned that the government was entitled to prove both to hedge the risk that the jury would reject the offered proof as to one deportation but not the other.

[vii] Rule 404(b) -- Acts Charged -- Predicate Offenses

United States v. Cruz-Escoto, 476 F.3d 1081 (9th Cir. 2007) : The Court affirmed a conviction for being a deported alien found in the United States, finding no error in the admission of evidence that the defendant had previously entered the United States illegally and had been removed. As a necessary element of the crime charged, the evidence was not propensity evidence barred by Rule 404(b). The use of multiple prior deportations was not error, although proof of only one was required.

[d.1] Rule 404(b) -- Acts Legal Where Performed

United States v. Kapordelis, 569 F.3d 1291 (11th Cir. 2009) : The Court affirmed a conviction for producing, receiving, and possessing child pornography, finding no abuse of discretion in the admission of evidence that the defendant solicited sex from boys in exchange for money while in Prague. He argued that his actions were legal under the law of the Czech Republic, but the Court held that the Rule's specification of "other crimes, wrongs, or acts" means that it is not limited to criminal acts. It held that the evidence was probative of his knowledge, intent, and identity when he traveled with boys and sexually explicit images of the boys were created, and any prejudicial effect of the evidence did not outweigh its probative value.

[f] Rule 404(b) -- Acts Relevant to Another's State of Mind

United States v. York, 600 F.3d 347 (5th Cir. 2010) : In a prosecution for arson offenses, the defendant's former girlfriend testified that he had told her he had tried to bomb a courthouse with a Molotov cocktail. When asked on cross-examination why she had not used those words in her statement to police, she testified that he had previously assaulted her. Affirming, the Court held there was no abuse of discretion in permitting the testimony about the assault, since it was relevant to explain the omissions in the police statement and was unlikely to cause confusion or unfair prejudice.

[i] Rule 404(b) -- Appellate Review

United States v. Cook, 454 F.3d 938 (8th Cir. 2006) : The Trial Judge in a cocaine distribution case granted the defendant's motion *in limine* to exclude evidence of four prior drug convictions. The Court affirmed the ruling on interlocutory appeal, using an abuse of discretion standard. It rejected "the government's unsupported suggestion that *de novo* review is appropriate because this is an interlocutory appeal," reasoning that "[w]e see no good reason why our standard of review should differ because the evidentiary ruling was made and appealed before trial."

[k] Rule 404(b) -- Background

[ii] Rule 404(b) -- Background -- Context Events

United States v. Cooper, 482 F.3d 658 (4th Cir. 2007) : In a prosecution for violation of the Clean Water Act by discharging pollutants, the Court held there was no abuse of discretion in admitting evidence that the defendant had a history of discharging pollutants and had been subject to state regulatory actions regarding those discharges. The evidence was not extrinsic to the crime being charged, because it established the context for the charged crimes and explained how he came to be without permission to discharge. Even if the evidence came within the ambit of Rule 404(b), it would be admissible to prove the defendant's knowledge of the discharges and the absence of mistake or accident.

United States v. Rice, 607 F.3d 133 (5th Cir. 2010) : The Court affirmed two defendants' convictions for carjacking, finding no abuse of discretion when evidence of other attempted robberies shortly before the carjacking was admitted. It reasoned that "evidence of those offenses helped to explain how the conspiracy came together, placed the charged crimes in context, and completed the story behind the criminal activity." In *United States v. Yi, 460 F.3d 623 (5th Cir. 2006)* , the Court affirmed a conviction for trafficking in counterfeit goods, finding no abuse of discretion in the admission of evidence that the defendant was an illegal alien. The evidence explained why the arresting officer in a counterfeiting case was an immigration enforcement agent: at the time of the arrest no warrant had been issued for the defendant in connection with the counterfeiting charges, and he was initially taken into custody on the immigration violation.

United States v. Algee, 599 F.3d 506 (6th Cir. 2010) : In the prosecution of a postal employee for theft from the post office, the defendant objected to admission of evidence regarding a sting operation directed specifically against him, on the ground that "the government would try to buttress the theft counts by implying to the jury that Algee, the only person with access to a vending machine that had indisputably experienced cash shortages in the past, had actually succeeded in stealing cash in the past, thus prompting the integrity test aimed at Algee." Affirming, the Court found no error in admission of the evidence, since "[i]f there had been no context as to why the investigators were there with marked currency and undercover surveillance, the jury would likely have been confused."

[iii] Rule 404(b) -- Background -- Miscellaneous Cases

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) : The Court reversed a conviction for felon firearm possession and possession of a sawed-off shotgun because "the government's repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process." Although the defendant was never charged with any drug offenses, the government contended that some discussion of drugs was necessary for background and it would show the shotgun was possessed to protect a drug dealing enterprise. However, the prosecution repeatedly went beyond that purpose to inject inadmissible drug evidence, such as evidence of heroin dealing not connected with the defendant and evidence of the defendant's drug use problem, even though the Judge declared at least five times that the evidence was "too prejudicial." "Nevertheless, the District Court ultimately failed to prevent the rampant injection of inadmissible evidence into the trial and its single limiting instruction to the jury was inadequate to cure the prejudice."

United States v. Basham, 561 F.3d 302 (4th Cir. 2009) : The Court upheld the convictions and death sentence of a defendant charged with carjacking and kidnapping resulting in death. It found no abuse of discretion in the admission of evidence regarding the defendant's use of alcohol and drugs, as well as of consensual sex with others than the victims. This evidence helped to complete the story of the crime and explain the relationship of the parties in the case.

United States v. Morris, 498 F.3d 634 (7th Cir. 2007) : The Court affirmed drug convictions, finding no abuse of discretion in admitting testimony that a police officer stopped the defendant's van because he knew that there was an active bench warrant for the defendant's arrest. The testimony established the reason that the officer stopped the van and a motive for the defendant to give drugs to a cousin who was with him in the van and to tell the cousin to flee.

United States v. Spoerke, 568 F.3d 1236 (11th Cir. 2009) : The Court affirmed convictions relating to destructive devices, holding that evidence regarding the search of the vehicle in which the defendant was riding at the time of his arrest was not other crime evidence under Rule 404(b). The Court declared that "[t]he government was permitted to refer to the chain of events, including the search of the vehicle and the arrest of Spoerke, that was an integral part of the account of the crime, completed the story for the jury, and supported a finding that the devices found in the vehicle were designed as weapons." In *United States v. Richardson, 532 F.3d 1279 (11th Cir. 2008)* , the Court affirmed a conviction for conspiracy to distribute cocaine, holding that there was no material variance between the single conspiracy charged in the indictment and the evidence proved at trial, but added that even if there was such a variance it was not prejudicial since the evidence that was outside the charged conspiracy would have been admissible under Rule 404(b) as background evidence to show how the defendant developed into a major drug dealer in Atlanta.

[iv] Rule 404(b) -- Background -- Relationship of Participants

United States v. Mercado, 573 F.3d 138 (2d Cir. 2009) : The Court affirmed a conviction for drug offenses, finding no abuse of discretion when evidence of the defendant's prior firearm crimes was admitted to show the background of the relationship between the defendant and a coconspirator and to prove the basis for trust between them. One Judge dissented, on the grounds that the long and strong relationship and friendship between the conspirators was undisputed, and that unrelated prior participation in gun sales had no bearing on the disputed issue of the defendant's role in, and intent to enter into, the charged drug conspiracy. In *United States v. Guang, 511 F.3d 110 (2d Cir. 2007)* , the Court affirmed two defendants' convictions for extortion, holding it was not an abuse of discretion to admit evidence of uncharged misconduct involving one defendant, because it tended to prove the existence of the illegal relationship between the defendants and also to describe how the relationship between the two defendants developed.

United States v. Maldonado, 472 F.3d 388 (5th Cir. 2006) : Affirming a conviction for conspiracy to distribute marijuana, the Court held that the defendant opened the door to evidence concerning another incident in which he and a coconspirator were found driving behind a truck that contained marijuana and a two-way radio that bore the same serial number as the one in the defendant's car. The defendant claimed on direct examination, with respect to the instant case, that he never suspected that the coconspirator would store marijuana in his trailer and that he did not know who put the marijuana in the trailer. The Court held that this opened the door to testimony concerning the prior relationship of the defendant and the coconspirator.

United States v. Johnson, 584 F.3d 731 (7th Cir. 2009) : Affirming a defendant's convictions for a continuing criminal enterprise and drug crimes, the Court found no abuse of discretion in the admission of evidence regarding the defendant's gang and drug activity prior to the period of the charged conduct. The evidence explained how the defendant gained control of at least five other people and why the lower-ranking gang members were willing to take direction from him. In *United States v. Gilmer, 534 F.3d 696 (7th Cir. 2008)* , the Court affirmed convictions for conspiracy and drug possession, finding no abuse of discretion in the admission of testimony by one conspirator regarding prior drug deals with a defendant. The evidence, admitted as "intricately related" to the charged crimes and thus subject only to the limitations of Rule 403 and not to Rule 404(b), helped to explain the development of the relationship between the two men that led to their roles in the conspiracy. In *United States v. Ortiz, 474 F.3d 976 (7th Cir. 2007)* , the Court affirmed a conviction for felon firearm possession, but held it was an abuse of discretion (albeit harmless error) to admit evidence that the defendant and an informant had robbed a drug dealer six years before the charged offense. The government argued that the prior robbery was probative of whether the defendant and the informant might have had a code they used in conversations. The Court found no evidence that any code was used and added that, even assuming that code or slang was used six years earlier, it requires "another leap" to conclude that the defendant would pick up on the same terminology six years later. In *United States v. Holt, 460 F.3d 934 (7th Cir. 2006)* , a defendant in a methamphetamine case was also charged with intimidation of a witness, based on his having driven his long-time girlfriend to where the grand jury was meeting, despite an order of protection barring contact with her. He was acquitted of the intimidation charge, and the Court affirmed the conviction on the other charges, finding no abuse

of discretion in admitting evidence that the defendant had begun an abusive sexual relationship with his girlfriend when she was just 14 years old and he was in his mid-thirties, that he had helped make her a methamphetamine addict, and that he had beaten her within weeks of her grand jury appearance. The evidence could help explain the defendant's hold over a woman more than 20 years his junior and suggest why giving a ride to the grand jury proceeding might not be innocuous as it first appears. Even if some of the evidence, such as the origins of the relationship and of her addiction, were excessively prejudicial, any error was harmless, as the jury acquitted on the intimidation count and the evidence was not likely to have affected their evaluation of the drug count, given the strength of the government's case. In *United States v. McLee, 436 F.3d 751 (7th Cir. 2006)* , the court affirmed convictions for drug trafficking, finding no error in the admission of evidence of pre-conspiracy criminal conduct involving a defendant and the leader of the conspiracy. The evidence was "intricately related" to the charged conspiracy, in that it showed the origins of the relationship between the conspirators and helped explain the defendant's role as a most trusted coconspirator. The Court found that the evidence "filled what otherwise would have been a chronological and conceptual void in the jury's understanding of the genesis and nature of their relationship."

United States v. Aldridge, 561 F.3d 759 (8th Cir. 2009) : The Court affirmed convictions of a husband and wife for aiding and abetting the filing of false tax returns, holding that evidence of an affair between the husband and his secretary was admissible to demonstrate that the secretary perjured herself before the grand jury at the husband's request and to explain how she obtained detailed knowledge of the husband's business and a trust he controlled. In *United States v. Gettel, 474 F.3d 1081 (8th Cir. 2007)* , the Court affirmed convictions for firearms offenses, finding no abuse of discretion in the admission of evidence that the defendant and a third party jointly possessed a stolen rifle weeks after possessing a stolen handgun. The evidence tended to show a connection between the defendant and the third party near the time of the charged crime and to rebut the defendant's contention that the third party was not credible.

United States v. Sanchez, 586 F.3d 918 (11th Cir. 2009) : The Court affirmed two defendants' convictions for conspiracy to possess marijuana with the intent to distribute, finding no abuse of discretion in the admission of evidence regarding the defendants' prior convictions for committing a burglary together. The prior convictions rebutted the defendants' post-arrest statements that they did not know each other and that their riding together in a truck containing items that could be used as burglary tools was innocent behavior.

[l] Rule 404(b) -- Balancing

[i] Rule 404(b) -- Discretion To Admit

United States v. Hicks, 575 F.3d 130 (1st Cir. 2009) : The Court affirmed cocaine-related convictions, finding no error in the admission of three prior cocaine-related convictions, since all the convictions were relevant to rebut the defense in the current case that the defendant was innocently in a home babysitting children when the officers searched it and found cocaine. A person with previous experience with cocaine-trafficking "would have been more likely to recognize the drug trade paraphernalia that was scattered about the home, such as baking powder, plastic baggies, digital scales, and cash." The Court found no abuse of discretion in admitting all three prior convictions under Rule 403, though the author of the opinion expressed concern about "the 'piling on' of multiple criminal convictions when a lesser number might suffice to establish the proposition of concern to the government." In *United States v. Pagan-Santini, 451 F.3d 258 (1st Cir. 2006)* , the defendant was charged with obstruction of justice after he, *inter alia,* assisted in preparing a witness at another trial to give false testimony. Evidence was introduced at the obstruction trial that the defendant had gotten drunk and on multiple occasions sexually harassed the witness he was preparing. Affirming, the Court found no abuse of discretion in admitting the evidence. It was probative to show how important to the conspiracy was the defendant's continued involvement as the best available coach with the detailed knowledge to get the witness prepared. And although the evidence had a capacity to prejudice the defense, the Trial Judge gave the usual cautionary instruction not to misuse the testimony after carefully limiting it so that it "probably could not have been stripped down further and remained useful."

United States v. Adair, 436 F.3d 520 (5th Cir. 2006) : The Court affirmed a conviction for conspiring to commit money laundering, finding no abuse of discretion in the admission of evidence regarding a prior similar scheme to commit money laundering, as the evidence was highly probative to rebut the defendant's claim that he was merely trying to set up a drug transaction for the DEA, and it had little opportunity to create unfair prejudice.

[ii] Rule 404(b) -- Balancing -- Error To Admit

[A] Rule 404(b) -- Doubts About Other Act

United States v. Sumlin, 489 F.3d 683 (5th Cir. 2007) : The defendant was stopped by an officer on drug interdiction duty, but searches recovered only a loaded pistol and a partially-smoked marijuana cigarette. The Court reversed the defendant's conviction for felon firearm possession because the officer had been permitted to detail his unproven suspicions that the defendant had been transporting narcotics, including that: the body of the car had several loose or worn screws (and that traffickers frequently hide drugs in the bodies of their vehicles); he had spent some time trying to remove the speakers to see if anything was hidden beneath them; he had questioned the defendant about a friend called to retrieve the car because drug couriers frequently travel in pairs; he had followed the car to the impound lot and contacted the district attorney to assist in drafting a search warrant; a canine unit came to the lot and the dog alerted on the vehicle; and he had questioned the defendant about drugs when he was brought from the jail to the impound lot. The Court concluded that the testimony implied extrinsic uncharged crimes, which were irrelevant to prove any issue aside from the defendant's character, as it was insufficient to prove the other crimes.

[B] Rule 404(b) -- Balancing -- Error To Admit -- Inflammatory Evidence

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) : The Court reversed a conviction for felon firearm possession and possession of a sawed-off shotgun because "the government's repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process." Although the defendant was never charged with any drug offenses, the government contended that some discussion of drugs was necessary for background and it would show the shotgun was possessed to protect a drug dealing enterprise. However, the prosecution repeatedly went beyond that purpose to inject inadmissible drug evidence, such as evidence of heroin dealing not connected with the defendant and evidence of the defendant's drug use problem, even though the Judge declared at least five times that the evidence was "too prejudicial." "Nevertheless, the District Court ultimately failed to prevent the rampant injection of inadmissible evidence into the trial and its single limiting instruction to the jury was inadequate to cure the prejudice."

United States v. Stout, 509 F.3d 796 (6th Cir. 2007) : On interlocutory appeal in a prosecution for possession of child pornography, the Court (2-1) affirmed an *in limine* ruling precluding the government from introducing evidence that the defendant had previously been convicted for installing a hidden camera in the home of family friends and videotaping their 14-year-old daughter in the shower. While the prior act evidence might have some probative value on the question whether the defendant knew that the images he was charged with possessing were of children, that probative value was slight. The government's need for the evidence to prove intent and knowledge to possess child pornography was likewise slight, since it had other means of proof, such as testimony by the defendant's ex-wife that she had discovered on his computer that he had been searching for child pornography. On the other hand, in the words of the Trial Judge, "[t]he prior bad acts evidence is prejudicial because it is both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct. As a consequence, the jury is likely to pay undue attention to it... . [T]here is a strong possibility that the jury will be improperly distracted from the primary evidence at hand."

United States v. Curtin, 489 F.3d 935 (9th Cir. 2007) (en banc): The defendant engaged in sexually explicit conversation in an Internet chat room with an agent posing as a 14-year-old girl. When he was arrested after traveling to another state to meet her, his personal digital assistant was found to contain over 140 stories about adults having sex

with children. Five of the stories (all of which involved incest) were introduced at his trial for interstate travel to engage in sex with a minor. A panel of the Court had reversed the conviction on the ground that the evidence was inadmissible under Rule 404(b) to prove intent, *443 F.3d 1084 (9th Cir. 2006)* ; guided by *People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154, 1159 (9th Cir. 1998)* (*Manual* § 404.03[2][l][ii][B]), the panel concluded, " 'Possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b).' " On *en banc* review, the Court held that the some of the stories in the defendant's possession were relevant to rebut his contention that he was intending to meet a 30- to 40-year-old woman who liked to pretend that she was an inexperienced teenage girl, and could thus be admitted under Rule 404(b). However, it was an abuse of discretion under Rule 403 for the Judge to admit all five of the stories without reading them through completely, as they contained portions with graphic descriptions of sexual conduct bearing no relation at all to the scenarios presented by the parties. As to one story, the Court commented: "Had the district court read Exhibit 7C, the court would no doubt have spotted this excrescence and required that it be edited out of the exhibit as both irrelevant and dangerously prejudicial." Five Judges concurred, but argued that "what people read or fantasize should not be used to prove what they intend to do," and thus would not overrule *Shymanovitz*; in any event, they would find evidence of a person's fantasies prejudicial.

[D] Rule 404(b) -- Balancing -- Error To Admit -- Miscellaneous Cases

United States v. McCallum 584 F.3d 471 (2d Cir. 2009) : Affirming a conviction for crack cocaine offenses, the Court held it was an abuse of discretion (but harmless error) to admit evidence of the defendant's two prior convictions for cocaine offenses. The Court observed: "The convictions were offered for the ostensible purpose of proving knowledge and intent. Even though those issues were not conceded, we are unable to discern from the record why the District Court thought the issues were seriously in dispute or why the prior convictions were appropriate proof. ... Given all [the] evidence, we are at a loss to understand how the court or the government could believe that the prior convictions were necessary to prove McCallum's intent and knowledge and that they passed muster under Rule 403."

[iii] Rule 404(b) -- Balancing -- Generally

United States v. Cook, 454 F.3d 938 (8th Cir. 2006) : The Trial Judge in a cocaine distribution case granted the defendant's motion *in limine* to exclude evidence of four prior drug convictions. The Court affirmed the ruling on interlocutory appeal. One conviction, for marijuana possession, was functionally dissimilar to the charged offense and six years remote, so there was no abuse of discretion in concluding that its "very minimal probative value was substantially outweighed by the danger of unfair prejudice." The other convictions, for distribution offenses, were relevant to material issues such as knowledge and intent, and not so remote as to be inadmissible on that ground. However, the government wanted to introduce police reports and testimony related to those convictions in order to bolster testimony regarding "hand-to-hand transactions" that led to issuance of the search warrant in this case. Thus, the evidence "presented the prospect of mini-trials over the events underlying three prior convictions for five relatively remote drug transactions, all for the purpose of bolstering *background* evidence in this case." The Court concluded that "[t]his posed a substantial risk of distracting the jury from its central task of determining whether it was Cook who possessed the distribution quantity of crack cocaine found on the night stand," so exclusion was not an abuse of discretion, especially when the government moved for admission of the four prior convictions on an "all or nothing" basis.

[iv] Rule 404(b) -- Balancing -- Inclusionary Approach

United States v. Douglas, 482 F.3d 591 (D.C. Cir. 2007) : Affirming a conviction for possession of crack cocaine with intent to distribute, the Court found no abuse of discretion in the admission of evidence regarding the defendant's arrest for the same offense a year earlier. Applying the approach that "the balance should generally be struck in favor of admission when the evidence indicates a close relation to the event charged," the Court concluded that the government's "other evidence ... was not without holes" and the prejudicial effect was minimized by careful and repeated limiting instructions.

[n] Rule 404(b) -- Civil Cases

[iii] Rule 404(b) -- Civil Cases -- Civil Rights Cases

[C] Rule 404(b) -- Civil Cases -- Prisoners' and Arrestees' Conduct

Boyd v. City & County of San Francisco, 576 F.3d 938 (9th Cir. 2009) : In a § 1983 excessive force action arising from an incident in which the plaintiff's decedent was fatally shot at the end of a high-speed chase when he reached into his vehicle rather than obeying an instruction to get down on the ground, the defendants argued that the victim had been attempting to commit "suicide by cop." Affirming a judgment for the defendants, the Court found no abuse of discretion in the admission of evidence regarding a similar high-speed chase three days earlier, since the victim's promptly getting down on the ground when instructed in that case tended to rebut the plaintiffs' argument that he had hesitated in obeying police commands because of a lack of mobility caused by prosthetic legs. The Court also found no abuse of discretion in the admission of evidence concerning: a 1993 high-speed chase that ended with the victim's losing both legs; two kidnapping attempts by the victim on the day he was shot and killed; the victim's statement to police to "kill me" during a arrest three days prior to the shooting; drugs in his system at the time he was shot; and prior lawsuits filed by the victim or his mother against law enforcement agencies. The evidence tended to make the defendants' claim of the victim's resistance and provocation and the "suicide by cop" theory of defense more probable. However, the Court found that admission of evidence that the suspect wrote rap lyrics praising the murder of police officers and advocated prostitution was error (but harmless).

[v] Rule 404(b) -- Civil Cases -- Employment Discrimination Cases

Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008) : The Court reversed a judgment for the defendant and granted a new trial to a DEA agent who brought a Title VII race and gender discrimination and retaliation suit. The plaintiff had not been permitted to introduce evidence regarding her participation in a long-running race discrimination class action against the DEA, on the ground that it tended only to show propensity. The Court held that by precluding the plaintiff from showing the pendency of the class litigation and the long history of its burden on the DEA, she was prevented from demonstrating why her participation in that litigation so rankled the relevant DEA decisionmakers that they were provoked to retaliate against her.

Alaniz v. Zamora-Quezada, 591 F.3d 761 (5th Cir. 2009) : In an action by four female employees against a doctor and his clinics for sex discrimination and retaliation, the Court concluded that the testimony by the individual plaintiffs and by two non-party employees was admissible to establish a *modus operandi* of an intimidating boss making sexual overtures to female subordinates.

Batiste-Davis v. Lincare, Inc., 526 F.3d 377 (8th Cir. 2008) : In a Title VII action by an employee alleging that she was discharged because of her race, the Court held it was an abuse of discretion (but harmless error) to admit evidence that the plaintiff had filed a pro se Title VII and ADA suit, which she subsequently voluntarily dismissed, against a former employer six years earlier. Since there was no indication that the prior lawsuit was fraudulently filed, any probative value of the evidence was substantially outweighed by the risk of unfair prejudice.

[ix] Rule 404(b) -- Civil Cases -- Miscellaneous Cases

Kebede v. Hilton, 580 F.3d 714 (8th Cir. 2009) : The Court affirmed a judgment for the defendant in an action for alienation of affections, finding no abuse of discretion in the exclusion of evidence that the defendant had conducted extramarital affairs with two men other than the plaintiff's ex-husband. The evidence was inadmissible under Rule 404(a) to show the defendant's "propensities for this type of activity," and in the absence of evidence that the defendant either alienated the affections of the other men or was aware that their affections had been alienated, it was inadmissible to prove intent under Rule 404(b).

[x] Rule 404(b) -- Civil Cases -- Securities Actions

SEC v. DiBella, 587 F.3d 553 (2d Cir. 2009) : The Court affirmed a judgment for the SEC in an enforcement action against a former state Senator and his business for aiding and abetting violations of federal securities laws by the state Treasurer. It found no abuse of discretion in admitting evidence of the Treasurer's prior bad acts, as the evidence tended to rebut any claim of absence of mistake and to prove that the Treasurer knew how to take advantage of his position for personal gain.

[o] Rule 404(b) -- Common Plan or Scheme

[i] Rule 404(b) -- Evidence Admissible

United States v. Edwards, 581 F.3d 604 (7th Cir. 2009) : The Court affirmed a crack cocaine conviction, finding no abuse of discretion in admitting testimony by the government's principal witness as to the procedures used by the defendant when he sold drugs to the witness on previous occasions and on the occasion leading to prosecution. The past practices tended to show a pattern between the buyer and seller in this case. And the fact that the pattern was followed provided an answer to the assertion that the witness had fabricated a drug sale in order to curry favor with the government.

United States v. Gipson, 446 F.3d 828 (8th Cir. 2006) : Affirming a conviction for possession with intent to distribute cocaine base, the Court found no abuse of discretion in admitting evidence of the defendant's two other arrests for drug offenses at the same apartment complex involved in the charged offense. The evidence tended to prove knowledge and intent, and to demonstrate a common plan or scheme to sell cocaine base from that apartment complex.

United States v. Padron, 527 F.3d 1156 (11th Cir. 2008) : The Court affirmed a mail fraud conviction arising from a scheme to stage auto accidents and make false insurance claims. It found no abuse of discretion in the admission of evidence regarding an uncharged staged accident two months prior to the charged staged accidents, as the evidence tended to show the defendant's plan and intent.

[q] Rule 404(b) -- Consciousness of Guilt

United States v. Kemp, 500 F.3d 257 (3d Cir. 2007) : The Court affirmed convictions in a public corruption case, finding no abuse of discretion in the admission of evidence disproving claims of great wealth that the defendant had made in grand jury testimony. The defendant's claims had been made to support an argument that he would not deign to involve himself in the paltry corruption alleged in the case, and the Court held that the falsity of the claims tended to show his consciousness of guilt of the underlying charges. The high probative value of the evidence was not substantially outweighed by any prejudicial effect.

United States v. Yi, 460 F.3d 623 (5th Cir. 2006) : The Court affirmed a conviction for trafficking in counterfeit goods, finding no abuse of discretion in the admission of evidence that the defendant offered a bribe to an arresting officer. The evidence tended to show consciousness of guilt and was highly probative of intent, knowledge, and absence of mistake.

[t] Rule 404(b) -- Duress Defense

United States v. Dunkin, 438 F.3d 778 (7th Cir. 2006) : The defendant claimed that he had been coerced into committing a charged bank robbery by a gang holding his mother hostage. Affirming his conviction, the Court found no error in the admission of evidence that the defendant had committed an unsolved bank robbery five years previously, which he also claimed (likewise without confirming evidence) was done under coercion by the gang.

United States v. Ceballos, 605 F.3d 468 (8th Cir. 2010) : The Court affirmed the defendant's conviction for aiding and abetting the distribution of methamphetamine, finding no abuse of discretion in the admission of testimony concerning

prior drug sales in which the defendant translated for her boyfriend and others. The evidence tended to rebut her defense that she was coerced into translating for her boyfriend because she feared he would harm her or her children, since participation in multiple sales over time rendered less credible her claim to have acted only because of threats of force ... Moreover, even if participation in earlier transactions had been coerced, the evidence tended to show she had reasonable opportunity to extricate herself before participating in the charged offenses.

[u] Rule 404(b) -- Entrapment Defense

United States v. Santiago, 566 F.3d 65 (1st Cir. 2009) : The Court affirmed a conviction for possessing crack cocaine with intent to distribute, finding no abuse of discretion in the admission of the defendant's 1997 conviction for possession of powder cocaine to rebut his entrapment defense.

United States v. Brand, 467 F.3d 179 (2d Cir. 2006) : The Court affirmed a conviction for interstate travel to engage in illegal sexual conduct, finding no abuse of discretion in the admission of child pornography found on the defendant's computer. Because of the relationship between child pornography and abnormal sexual attraction to children, the evidence was probative of his intent when he went to meet what he thought was an under-age girl. The evidence was also relevant, by showing propensity, to rebut his entrapment defense.

United States v. Emerson, 501 F.3d 804 (7th Cir. 2007) : Two defendants were convicted of offenses arising from a conspiracy to commit "licks" (robbing drug dealers of their drugs). A detective, called by one defendant to support his entrapment defense, testified on cross-examination about a murder case arising from a drug lick in which both defendants (who were not named in the testimony) had been charged. Affirming, the Court held there was no abuse of discretion in admitting the evidence against the defendant asserting entrapment, as his predisposition had been put in issue and the evidence was probative on that point. As to the other defendant, the evidence was inadmissible under Rule 404(b), but the error was harmless.

United States v. Abumayyaleh, 530 F.3d 641 (8th Cir. 2008) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of evidence that the defendant had previously been convicted for receiving a stolen firearm and for possession of a firearm as a felon and removing the identification numbers. The evidence was highly probative of the defendant's predisposition to possess a firearm when legally prohibited from doing so, and thus to rebut his entrapment defense.

United States v. Duran, 596 F.3d 1283 (11th Cir. 2010) : The Court affirmed a conviction for acting in the United States as a foreign government's agent without prior notification to the Attorney General, finding no abuse of discretion in the admission of evidence that the defendant had paid illegal kickbacks to various Venezuelan government officials. It held that the evidence was probative to establish the relationship between the defendant and the Venezuelan government, and thus was properly admitted to show his intent and motive to act as a government agent and to rebut his entrapment defense by showing his predisposition to act as a foreign government agent.

[v] Rule 404(b) -- Explaining Conduct

United States v. Banks, 514 F.3d 959 (9th Cir. 2008) : The Court affirmed convictions for use of a firearm in a crime of violence and felon firearm possession, finding no plain error in the admission of the facts regarding the defendant's prior felony conviction for a retaliatory stabbing. It reasoned that the evidence was probative of the defendant's commitment to maintaining his gang status even if he had to engage in violence to do so.

[w] Rule 404(b) -- Foundation for Other Acts

United States v. Cooks, 589 F.3d 173 (5th Cir. 2009) : The Court affirmed fraud and money laundering convictions, finding no abuse of discretion in admitting evidence that the defendant engineered five fraudulent real estate schemes

that were substantially similar to those charged in the indictment and so were probative of intent as well as other proper purposes. The Court noted that the defense argument that the government was required to show that the defendant personally submitted fraudulent documents to lenders before the other act evidence could be admitted "overstates the Government's burden"; "it is sufficient to show that Cooks was knowingly involved in those deals."

United States v. Zahursky, 580 F.3d 515 (7th Cir. 2009) : The defendant was convicted for attempting to entice a minor to engage in sexual activity, following an exchange of messages with an agent posing as a 14-year-old on an Internet chat room. Affirming, the Court found no abuse of discretion in the admission of evidence of other chats between underage girls and the computer at the defendant's home. Although there were others with access to the computer, circumstantial evidence was sufficient that the defendant had conducted the chats. In *United States v. Reyes, 542 F.3d 588 (7th Cir. 2008)* , the defendant, though absent from the charged bank robbery, was a former employee of the bank who provided key details about the functioning of the bank to the actual perpetrators. Affirming convictions for bank robbery and conspiracy, the Court found it was error (but harmless) to admit testimony from two coconspirators that they had previously participated in robberies with the defendant, when they could not recall the exact geographic location of the robberies or when they were committed and no corroborating evidence was submitted to support their vague allegations. The Court observed that evidence admitted under Rule 404(b) must be "sufficient to support a jury finding" that the defendant committed the alleged prior act, and held that the government had not met that standard.

United States v. Edelmann, 458 F.3d 791 (8th Cir. 2006) : The Court affirmed a fraud conviction, finding no error in the admission of evidence that the defendant had forged a court order to have her husband's truck released by a creditor. The government met its burden of proving by a preponderance of the evidence that the defendant had committed the "other bad act."

United States v. Estrada, 453 F.3d 1208 (9th Cir. 2006) : The Court affirmed a methamphetamine-related conviction, finding no error in admission of evidence that on a previous occasion the defendant's fingerprint was found on a type of flask that is used in manufacturing methamphetamine. The flask was found during a search of a storage locker that contained materials used for making methamphetamine. Although the fingerprint was insufficient "to conclusively show" that the defendant committed the uncharged misconduct, "the standard for admissibility is only that the evidence is sufficient to support a finding that the defendant committed the other act." The Court also held that the evidence was properly admitted for the non-character purpose of showing that the defendant knew which materials are used to make methamphetamine.

[x] Rule 404(b) -- Identity

[i] Rule 404(b) -- Generally

[A] Rule 404(b) -- Circumstances Insufficiently Probative

United States v. Simpson, 479 F.3d 492 (7th Cir. 2007) : The Court reversed a conviction for a single delivery of crack cocaine because the Judge had allowed evidence of prior unrelated crack cocaine transactions and had permitted the prosecutor to argue in closing that the defendant had admitted to officers that he had done so many cocaine transactions that he didn't even remember doing the one for which he was charged. The evidence and argument "improperly appealed to Simpson's propensity to deal drugs." The Court rejected the argument that the uncharged cocaine transactions were admissible to prove identity, because there was not a "singularly strong resemblance" between the uncharged transactions and the transaction charged; evidence of uncharged misconduct does not become admissible to prove identity simply because the defendant disputes identity.

United States v. Phaknikone, 605 F.3d 1099 (11th Cir. 2010) : Affirming a conviction for seven armed bank robberies, the Court held it was an abuse of discretion (but harmless error) to admit evidence from the profile page, subscriber

report, and photographs from the defendant's MySpace.com account to prove that he committed a string of bank robberies "like a gangster." The Court observed that "evidence offered to prove identity must satisfy a 'particularly stringent' analysis"; "[t]he physical similarity must be such that it marks the offenses as the handiwork of the accused"; and although a "photograph may portray a 'gangster-type personality,' the photograph does not evidence the modus operandi of a bank robber who commits his crimes with a singular trait." The Court concluded that "[t]he MySpace evidence is classic evidence of bad character."

[B] Rule 404(b) -- Identity -- Generally -- Circumstances Sufficiently Probative

United States v. Gallo-Moreno, 584 F.3d 751 (7th Cir. 2009) : The Court affirmed a drug conspiracy conviction, finding no abuse of discretion in the admission of evidence regarding another drug transaction involving the defendant. Statements he made during that transaction connected him to the charged transaction and to the confidential informant who participated in both and who provided a voice identification.

United States v. Brandon, 521 F.3d 1019 (8th Cir. 2008) : The Court upheld the convictions of two defendants on drug and firearms charges. The guns were found in the car in which one defendant was a passenger, after a police chase. The Court found no abuse of discretion in the admission of a post-arrest statement by one defendant that he wished he would have caught an unmarked police car alone and would have unloaded on it. The Court explained that the jury "could conceivably have doubts about whether the weapons belonged to Phillip Ellis, the driver of the Nissan. To resolve those doubts, the jury could interpret Johnson's statements as an admission he had a gun. Thus, the statements were relevant and admissible to identify Johnson as the possessor of a firearm."

[ii] Rule 404(b) -- Identity -- *Modus Operandi*

[A] Rule 404(b) -- Bank Robbery

United States v. Perry, 438 F.3d 642 (6th Cir. 2006) : Affirming a conviction for armed bank robbery, the Court held there was no abuse of discretion in admitting evidence that the defendant subsequently robbed a bank, having similarly entered carrying a gun in a bookbag, seeking change for $50, seeking to purchase money orders, and only then displaying the gun. The evidence was sufficiently distinctive to show the perpetrator of the charged crime and it was not sufficiently prejudicial to render it inadmissible.

United States v. Stenger, 605 F.3d 492 (8th Cir. 2010) : The Court affirmed bank robbery and firearms convictions of two defendants who were tried separately. In both trials evidence of two similar, uncharged bank robberies was offered, and the Court found no abuse of discretion in admitting the evidence to prove identity. All the robberies targeted relatively small banks with several teller windows and a small drive-up window; all involved a tall Caucasion male conducting a takeover-style robbery, wearing a mask and hooded sweatshirt, and carrying a black powder pistol, which was a highly unusual weapon. In addition, in one of the uncharged robberies and in the charged robbery, the perpetrator threatened to "cap" anyone who did not cooperate with his orders.

[B] Rule 404(b) -- Identity -- *Modus Operandi* -- Miscellaneous Cases

United States v. Fanfan, 468 F.3d 7 (1st Cir. 2006) : Affirming a conviction for conspiracy to distribute cocaine, the Court assumed that the conspiracy had been terminated by the arrest of most of its members, but held that even so a post-conspiracy transaction in which the defendant attempted to distribute cocaine was admissible to prove *modus operandi* and identity. The arrested conspirator had paged the defendant, the government recorded the call, the arrested conspirator ordered cocaine and met the defendant by prearrangement, and the defendant had cocaine and cocaine base in his car. This evidence was especially important because only one witness could identify the defendant as the man who supplied drugs and this witness had a plea deal with the government.

[y.1] Rule 404(b) -- Improper Joinder of Charges

United States v. Shellef, 507 F.3d 82 (2d Cir. 2007) : In the prosecution of two defendants, the Court vacated and remanded the convictions on the ground that wire fraud, money laundering, and conspiracy charges leveled against both defendants were improperly joined with unrelated charges of income tax evasion and filing false tax returns against one of them. The Court reasoned that, if the non-tax counts had been tried separately, the evidence of the unrelated tax charges would have been excluded under Rule 403 as unduly prejudicial, and their improper joinder in this case was similarly unduly prejudicial.

[z.1] Rule 404(b) -- Inanimate Objects

Brazos R. Auth. v. GE Ionics, Inc., 469 F.3d 416 (5th Cir. 2006) : The plaintiff sued for breach of warranty after a retrofitted desalinization plant supplied by the defendants suffered several fires. At trial, evidence of fires at similar plants was excluded on the ground that it was barred by *Rule 404(b)*. Vacating a judgment for the defendants, the Court held that *Rule 404(b)* does not apply to the propensities of inanimate objects, as it specifically bars only the use of acts to show "the character of a *person*" (emphasis added). The Court also found that the evidence should not have been excluded under *Rule 403* and that the error was not harmless.

[aa] Rule 404(b) -- Insanity Defense

United States v. Diekhoff, 535 F.3d 611 (7th Cir. 2008) : The defendant, who kidnapped a woman for whom he had romantic feelings after she began dating another man, pleaded insanity. The Court found no abuse of discretion in the admission of evidence that the defendant had previously been convicted for kidnapping a former girlfriend. The defendant argued that because he stipulated to the kidnapping, the prior conviction showed only propensity. But the Court disagreed, noting that the only issue in the case was whether the defendant appreciated the wrongfulness of his conduct, and the conviction for the prior kidnapping tended to show that the defendant would be aware of the wrongfulness of his behavior. In addition, the prior conviction showed that he was mentally capable of planning a complicated criminal act, which tended to belie his insanity defense. The Court also noted that the danger of unfair prejudice "is lessened somewhat in a case where the only issue is the defendant's sanity." It explained that "the prejudice from a showing of prior criminality would not likely interfere with the jury's assessment of the proof in the case before it. The question is whether the defendant knew right from wrong. And the evidence of the defendant's prior criminal acts is not likely to unfairly tilt the jury towards a conclusion that he did," since "prior criminal acts could just as easily show the defendant's insanity" as show that he understood the wrongful nature of his acts. Thus, given the high probative value and the low risk of prejudice, there was no abuse of discretion in admitting the evidence.

[bb] Rule 404(b) -- Intent

[i] Rule 404(b) -- Assault, Homicide, Abuse, etc., Cases

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The Court affirmed the defendant's conviction for the fatal carjacking of his ex-wife, finding no error in the admission of evidence regarding his prior abuse and stalking of the victim. "The evidence of [his] intentional physical harm of the victim in the past had 'special relevance' [citation], because it was probative of his intent to cause her harm at the time he seized her car." "[T]he evidence of appellant's stalking had special relevance because it demonstrated [his] motive to commit the crime -- his intense jealousy."

United States v. Brand, 467 F.3d 179 (2d Cir. 2006) : The Court affirmed a conviction for interstate travel to engage in illegal sexual conduct, finding no abuse of discretion in the admission of child pornography found on the defendant's computer. Because of the relationship between child pornography and abnormal sexual attraction to children, the evidence was probative of his intent when he went to meet what he thought was an under-age girl. The evidence was also relevant, by showing propensity, to rebut his entrapment defense.

United States v. Burt, 495 F.3d 733 (7th Cir. 2007) : In a trial for child pornography offenses, one child witness

testified about molestation that was recorded on a video that was the basis for one of the counts against the defendant, but another testified to molestation that was not documented in any of the photos giving rise to the charges. The defendant objected that the latter witness' testimony lacked probative value and was likely to unfairly prejudice the jury. Affirming, the Court found no abuse of discretion in admitting the testimony, as the fact that the molestation occurred behind locked doors, in the same rooms of the house where the defendant's photography sessions had been conducted, was directly relevant to the question whether the defendant was a "professional photographer; taking pictures for a legitimate 'non-pornographic website,' " as the defense contended, "or whether he took pictures of naked children because they 'elicit a sexual response' in him or his online partners." In *United States v. Hale, 448 F.3d 971 (7th Cir. 2006)* (per curiam), the Court affirmed a conviction for obstructing justice and soliciting a crime of violence in connection with a plot to have a federal District Judge murdered. It found no abuse of discretion in admitting evidence of the defendant's positive comments about a follower of the defendant's white supremacist organization who went on a shooting rampage that left two people dead and nine others wounded. The Court concluded that, in a solicitation case, evidence about how the defendant expected his followers to act was probative of the defendant's intent in dealing with a cooperating witness (i.e., whether he intended to solicit the witness to arrange for the killing of the judge). The Court recognized that the potential prejudice of the evidence was "significant," concluding, "We find it to be a close question but cannot quarrel with the district court's deliberative decision to admit the challenged evidence."

United States v. Erickson, 610 F.3d 1049 (8th Cir. 2010) : The Court held there was no abuse of discretion in denying a motion to sever charges arising from separate incidents in which the defendant allegedly committed knife assaults, since "[e]vidence of other recent knife assaults sharing a number of common characteristics would likely have been admissible in a separate trial." In *United States v. Jourdain, 433 F.3d 652 (8th Cir. 2006)* , the Court affirmed a conviction for aiding and abetting an assault that resulted in serious bodily injury, finding no abuse of discretion in the admission of evidence that earlier on the day of the incident the defendant and his friends had solicited a companion to kill another man. The evidence tended to rebut the defendant's argument that the was merely present at the charged incident, as it was relevant to establish whether the defendant and his friends had a joint criminal purpose, whether the defendant had knowledge of the violence potential of his friends, and whether the charged shooting (after the defendant confronted the victim) could have been a mistake or accident.

[iv] Rule 404(b) -- Intent -- Conspiracy

United States v. Ross, 510 F.3d 702 (7th Cir. 2007) : The Court affirmed convictions on conspiracy and related charges arising from the robbery of a postal truck docked at a post office annex, finding no abuse of discretion in admitting testimony that one defendant conspired to rob the post office on two occasions five and six years earlier. The Court reasoned that "[b]ecause conspiracy is a specific intent crime, whether Wilson intended to conspire to rob the post office was automatically in issue." Moreover, the bad acts were similar enough to the charged crime to "be relevant to the matter in issue." Specifically, "the prior conspiracies are also sufficiently similar to, and close in time with the charged offenses," and "[a]ll of the robberies targeted the same post office, occurred on the same day of the week, required the use of scissors, and involved two of the same participants."

[v] Rule 404(b) -- Intent -- Drug Cases

[A] Rule 404(b) -- Evidence of Different Drugs

United States v. Benitez, 531 F.3d 711 (8th Cir. 2008) : The Court affirmed convictions for possessing methamphetamine with intent to distribute methamphetamine, finding no abuse of discretion in admitting evidence of the defendant's prior conviction for possession of cocaine. The fact that the prior conviction was for a different drug than the one charged and did not involve the substantial amount of drugs involved in the instant case did not require exclusion of the evidence: "[E]vidence of prior possession of even personal-use quantities of drugs is admissible as evidence of knowledge and intent in a drug distribution prosecution."

[B] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Different Quantities

United States v. Benitez, 531 F.3d 711 (8th Cir. 2008) : The Court affirmed convictions for possessing methamphetamine with intent to distribute methamphetamine, finding no abuse of discretion in admitting evidence of the defendant's prior conviction for possession of cocaine. The fact that the prior conviction was for a different drug than the one charged and did not involve the substantial amount of drugs involved in the instant case did not require exclusion of the evidence: "[E]vidence of prior possession of even personal-use quantities of drugs is admissible as evidence of knowledge and intent in a drug distribution prosecution."

[C] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Possession Where Distribution Is Charged

United States v. Benitez, 531 F.3d 711 (8th Cir. 2008) : The Court affirmed convictions for possessing methamphetamine with intent to distribute methamphetamine, finding no abuse of discretion in admitting evidence of the defendant's prior conviction for possession of cocaine. The fact that the prior conviction was for a different drug than the one charged and did not involve the substantial amount of drugs involved in the instant case did not require exclusion of the evidence: "[E]vidence of prior possession of even personal-use quantities of drugs is admissible as evidence of knowledge and intent in a drug distribution prosecution."

[D] Rule 404(b) -- Intent -- Drug Cases -- Evidence of Similar Drugs

United States v. Hawkins, 548 F.3d 1143 (8th Cir. 2008) : The Court affirmed a conviction for distributing cocaine base within 1000 feet of a school, finding no error in the admission of prior convictions for drug distribution. The Court found that the prior convictions were not barred simply because they involved different (though similar) drugs, and noted that "[p]rior felony drug convictions are relevant to show intent and knowledge in a drug prosecution when a defendant makes a general denial defense, which necessarily places the defendant's state of mind at issue."

[F] Rule 404(b) -- Intent -- Drug Cases -- Miscellaneous Cases

United States v. Yearwood, 518 F.3d 220 (4th Cir. 2008) : Affirming a conviction for conspiring to distribute and possess with intent to distribute 50 grams or more of cocaine base, the Court found no abuse of discretion in admitting evidence of the defendant's prior conviction for possession with intent to distribute cocaine and conspiracy to distribute cocaine, because the defendant put his knowledge and intent in issue by contending he was selling music instead of drugs.

United States v. Cockrell, 587 F.3d 674 (5th Cir. 2009) : The Court affirmed a conviction for conspiracy to possess heroin with intent to distribute, finding no abuse of discretion in admitting evidence of the defendant's prior conviction for using a telephone to conduct narcotics transactions, as the prior offense involved the same intent required to prove the charged offense. Evidence that the defendant was caught conducting a drug transaction on his cell phone while at a police station on an unrelated charge was likewise properly admitted, as this too was probative of intent. The Court emphasized that entry of a not guilty plea in a conspiracy case sufficiently raises the issue of intent to warrant introduction of Rule 404(b) evidence.

United States v. Bell, 516 F.3d 432 (6th Cir. 2008) : In the defendant's trial for possession of marijuana and cocaine with intent to distribute, residents of the house where the drugs were found testified that he lived there most of the time, while the defendant's fiancee testified that he stayed with her "[b]asically every night." His conviction was reversed because prior convictions for possession of marijuana and cocaine base with intent to distribute were improperly admitted as evidence of intent and of absence of mistake or accident. The Court held (2-1) that the convictions were not probative of intent to possess and distribute because they were neither part of the same scheme nor involved a similar *modus operandi* as the present offense. And the defendant had not asserted a defense based on some type of mistake or accident, so that purpose for admitting the convictions was not material or "in issue." In any event, the probative value of the convictions several years prior to the instant offense was slight, the government had ample available means to

prove the defendant's specific intent to possess and distribute the drugs, and the prejudicial effect was significant. In *United States v. Matthews, 440 F.3d 818 (6th Cir. 2006)* , the court affirmed drug and firearm convictions, finding no abuse of discretion in admitting evidence regarding earlier drug sales by the defendant. The earlier sales were probative of whether the defendant knew that the clear plastic bag in his possession contained cocaine and whether he intended to distribute the drug.

United States v. Harris, 587 F.3d 861 (7th Cir. 2009) : The Court affirmed drug and firearm convictions, finding no abuse of discretion in admitting testimony by the defendant's girlfriend about prior drug sales to prove intent and to rebut the defendant's claims that he was only holding drugs for another person. In *United States v. Vargas, 552 F.3d 550 (7th Cir. 2008)* , when the defendant's refrigerated semi-trailer truck was stopped while he was hauling produce, 282 kilograms of cocaine were found concealed in a hidden compartment. Affirming a conviction for possession of the cocaine with intent to distribute, the Court found no abuse of discretion in the admission of evidence that the defendant had on prior occasions transported drugs hidden under loads of produce in refrigerated semi-trailers. His prior involvement in drug trafficking was probative of his possession being knowing, and the similarity between the incidents was sufficient to produce an inference of criminal intent. In *United States v. Moore, 531 F.3d 496 (7th Cir. 2008)* , the Court affirmed convictions for drug and firearm offenses, finding no abuse of discretion in admitting evidence of the defendant's prior drug dealing and flight from the police. The evidence related to an event that occurred just two weeks before the charged offense and tended to prove the defendant's intent to control the drugs he later threw from a car, as he admitted at the time of the prior offense to throwing crack cocaine from his car while attempting to evade police. In *United States v. Hurn, 496 F.3d 784 (7th Cir. 2007)* , the court affirmed a conviction for possession of cocaine with intent to distribute, finding no abuse of discretion in admitting evidence of the defendant's 10-year-old cocaine distribution conviction to prove intent. The defendant claimed that he only occasionally stayed in the home where the drugs were found, thus raising an issue of intent, and the Court found that the previous conviction was very similar to the conduct charged and was not too remote.

United States v. Jongewaard, 567 F.3d 336 (8th Cir. 2009) : Affirming a conviction for transmitting in interstate commerce a communication containing a threat to injure, the Court found no abuse of discretion in admitting evidence that the defendant had two years previously confronted the same person and remarked, "[I] might commit a double murder tonight." The defendant had made his intent a material issue by claiming intoxication affected his specific intent to commit the crime, and the evidence of the prior threat was probative of his intent. In *United States v. James, 564 F.3d 960 (8th Cir. 2009)* , the Court affirmed cocaine convictions, holding that evidence of the defendant's prior conviction for delivery of cocaine was admissible to prove intent and knowledge where the defendant claimed to be merely present at the scene of the crime and to have obtained marked currency by panhandling. In *United States v. Ironi, 525 F.3d 683 (8th Cir. 2008)* , the Court affirmed a conviction for aiding and abetting the possession with intent to distribute cocaine, finding no abuse of discretion in admitting the defendant's two prior cocaine possession convictions to rebut his claim that he lacked intent to participate in the charged cocaine dealings and to prove that he had knowledge about cocaine and the types of materials and objects typically found in the presence of cocaine. The Court declared that "a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." In *United States v. Lucas, 521 F.3d 861 (8th Cir. 2008)* , the Court affirmed methamphetamine and firearms convictions, finding that the defendant's previous methamphetamine conviction, possession of a handgun, and manufacture of methamphetamine were "highly probative of [his] unmistakable knowledge and intent to manufacture methamphetamine and possess a firearm in the instant case."

United States v. Cardinas Garcia, 596 F.3d 788 (10th Cir. 2010) : The Court affirmed a conviction for possession of methamphetamine with intent to distribute, holding that an officer's testimony to seeing the defendant sell cocaine and methamphetamine a month before the charged crime was properly admitted to prove his intent to distribute.

United States v. Brown, 587 F.3d 1082 (11th Cir. 2009) : The Court affirmed drug and firearm convictions, finding no abuse of discretion in admitting a defendant's prior convictions for cocaine offenses to prove intent. It noted that "[p]rior

convictions for drug trafficking are considered highly probative of intent to commit current drug trafficking offenses."

[G] Rule 404(b) -- Intent -- Drug Cases -- Whether Intent at Issue

United States v. Pettiford, 517 F.3d 584 (D.C. Cir. 2008) : Affirming a conviction for possession of cocaine base with intent to distribute, the Court found no abuse of discretion in admitting evidence that three weeks before the defendant's arrest in his car where the drugs were found the defendant also possessed crack cocaine with intent to distribute. The Court held that the evidence was admissible to prove that the defendant knowingly and intentionally possessed the cocaine with the intent to distribute, and noted that "[t]he fact that the government produced probative evidence of Pettiford's knowledge and intent does not preclude it from offering additional evidence to establish those elements beyond a reasonable doubt." It distinguished *United States v. Linares, 367 F.3d 941 (D.C. Cir. 2004)* (*Manual* § 404.03[2][ee][v]), a case in which eyewitness testimony that the defendant had a gun in his hand and fired it made it virtually certain that the jury, if it believed the testimony, would find that the defendant knowingly possessed the gun, from the instant case, which "is not a case in which the jury had to either believe the witnesses and conclude that the defendant knowingly possessed the crack with intent to distribute it, or disbelieve them and find that he did not possess the crack at all." In *United States v. Douglas, 482 F.3d 591 (D.C. Cir. 2007)* , the court affirmed a conviction for possession of crack cocaine with intent to distribute, finding no abuse of discretion in the admission of evidence regarding the defendant's arrest for the same offense a year earlier. That the defendant was not disputing the elements of intent and knowledge did not make the evidence irrelevant, since the government has the burden of proving every element of the offense beyond a reasonable doubt and may prove its case by evidence of its choice.

United States v. McCall, 553 F.3d 821 (5th Cir. 2008) : The Court affirmed in part a conviction for selling crack cocaine, finding no abuse of discretion in admitting evidence of previous cocaine sales by the defendant. The Court noted that the plea of not guilty made evidence of the defendant's general intent relevant, absent "enforceable pre-trial assurances that he intend[ed] not to dispute criminal intent," but that extrinsic act evidence showing absence of mistake is not relevant unless the defendant raises the issue, since "[u]nlike intent, absence of mistake or accident need not be proved by the government unless raised by the defense." However, when other crimes evidence is relevant only to the issue of general intent, special attention should be given to concerns of prejudice, for "there will almost always be other evidence."

United States v. Webb, 548 F.3d 547 (7th Cir. 2008) : Executing a search warrant for drugs at a house, officers found the defendant, wearing workout clothes, in the driveway. In the basement of the house they found exercise gear, along with drugs in plain view, and they also found drug packaging equipment through the house. At his trial for possession of drugs with intent to distribute, the defendant claimed he was only at the house by chance; in response the prosecution introduced his prior conviction for distributing cocaine, to show intent and absence of mistake. The Court affirmed, but held it was error (albeit harmless) to admit the other crimes evidence, as the defendant was denying not intent but possession for any purpose, and it tended to show absence of mistake only via the prohibited inference that someone who distributes drugs once is likely to do it again. In *United States v. Jones, 455 F.3d 800 (7th Cir. 2006)* , the Court affirmed a conviction for possession with intent to distribute cocaine base, finding no abuse of abuse discretion in admitting, as evidence of intent, the defendant's prior conviction for unlawful delivery of a controlled substance. It noted that "the district court's consideration of the matter does not appear to reflect the sort of critical evaluation of the issue that we believe ought to be undertaken in determining whether, in an exercise of discretion, such evidence ought to be admitted on the issue of intent," since "the court recited the governing principles from our case law, but otherwise revealed little in the way of critical analysis as to how those principles ought to apply to the facts of this particular case." The Court suggested that it might share the blame for the state of the record: "This lapse well may be attributable, in part at least, to our own treatment of such matters on occasion; our cases have not always reflected a critical application of the principles reflected in the case law to the facts of the individual case." It observed that "[t]he most obvious justifiable situation in which prior convictions are admissible in drug prosecutions on the issue of intent are in those situations in which the defendant, while admitting possession of the substance, denies the intent to distribute it," and "[o]ur case law also has recognized that evidence of earlier drug trafficking convictions also can be relevant and

probative when the defendant flatly contests all elements of the charge of possession with intent to distribute." The Court was persuaded by the government's argument on appeal that because the defendant claimed that only a small amount of the drugs were his and they were for personal use, his intent to distribute the greater amount was in dispute. The concurring Judge stated, "I have grave doubts about the prosecution's theory of relevance in this prosecution," explaining:

> Jones argued that he did not own the distribution-size cache of drugs that investigators found; he admitted only to the personal-use-size cache that was in a different location. According to the prosecutor Jones's conviction shows that he had learned to separate stocks of drugs in order to throw the hounds off the scent. Yet *how* does the conviction show this? Is it that every drug dealer knows this trick of the trade? Of that there is no evidence, and it is not something that a jury could find without proof. Is it that Jones's conviction shows that his former strategy had flopped, so he hit upon this as something new? Of that there is no evidence either; we don't know the facts underlying the 1994 conviction. Thus the prosecutor's theory boils down to a belief that a drug conviction always is relevant in any later drug prosecution, and [*United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987)]* disapproves that perspective.

The concurring Judge concluded: "Allowing a prosecutor routinely to introduce drug convictions in the case in chief without demonstrating relevance to some concrete dispute between the litigants creates needless risk that a conviction will rest on the forbidden propensity inference." Thus, it is prudent to exclude prior convictions "under *Rule 403* unless in opening argument the defendant's lawyer makes an argument (such as the defendant's supposed inability to recognize a white powder as cocaine) that highlights intent, knowledge, or some other appropriate use of bad acts. If the evidence is excluded during the opening presentation, and something unexpected comes up during the defense case, the prosecutor can wheel out the conviction during rebuttal; by then its relevance (or irrelevance) should be apparent." In *United States v. Chavis, 429 F.3d 662 (7th Cir. 2005)* , the Court affirmed crack cocaine convictions, finding no abuse of discretion in admitting evidence of the defendant's 1997 conviction for possession of crack cocaine with intent to distribute. It noted that the defendant claimed he was in the wrong place at the wrong time, which made evidence of intent especially probative.

United States v. Matthews, 431 F.3d 1296 (11th Cir. 2005) : This opinion supersedes the one annotated in the Main Volume of the *Manual*. On rehearing the Court affirmed the conviction, holding that under Circuit precedent there was no abuse of discretion in admitting the defendant's 1991 conviction for street-level drug selling as evidence of his intent in a major cocaine distribution conspiracy. The Court noted that "circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy," that an appellant bears a heavy burden of demonstrating abuse of discretion in determinations of remoteness, and that, despite the defendant's argument that the government otherwise present a strong case on the issue of intent, "the jury may have concluded that Matthews engaged in all of the substantive drug offenses about which the witnesses testified without believing that Matthews intended to join a conspiracy." One Judge concurred specially, arguing that the evidence "was admitted for no purpose other than to show propensity to engage in criminal activity," yet affirming on the ground that its admission was a correct application of the Circuit's precedent in conspiracy cases, which "has evolved into one that undermines *Rule 404(b)* itself and represents a perversion of the origins of the circuit's doctrine in this context."

[vii] Rule 404(b) -- Intent -- Firearms Cases

United States v. Jones, 484 F.3d 783 (5th Cir. 2007) : The Court reversed a conviction for felon firearm possession, finding an abuse of discretion in the admission of evidence that the defendant had previously been convicted for the same crime, committed under circumstances virtually identical to those alleged in the instant case -- in both cases an eyewitness testified that he saw the defendant take a gun from his waistband and throw it under a house. The evidence had been admitted to show knowledge and intent, but because the case was one of actual rather than constructive possession, intent was not an element, and "once the government has shown that the defendant had a firearm under his

immediate control, any contention that he did not know the nature of what he possessed is effectively precluded."

United States v. Dennis, 497 F.3d 765 (7th Cir. 2007) : The defendant was convicted of conspiring to violate firearms laws after he agreed to travel with another who was buying illegal guns. Affirming, the Court held that once the defense argued that the purpose of the trip was to defraud the alleged seller, evidence that he had previously traveled with the coconspirator on a gun-trafficking trip was relevant to his intent on the charged occasion.

[viii] Rule 404(b) -- Intent -- Fraud, Forgery, Counterfeiting, False Statements, etc., Cases

United States v. Brown, 597 F.3d 399 (D.C. Cir. 2010) : The Court affirmed a conviction for bank fraud and passing fictitious financial instruments, finding no abuse of discretion in the admission of evidence that the defendant had previously been warned by a detective from the Secret Service that financial instruments he attempted to use in purchasing autos and real estate were bogus and that it was unlawful to use them. The uncharged conduct bore "a close relation to the offense charged" and was relevant to intent because it "tended to rebut Brown's claim that he acted in good faith in twice attempting to deposit a 'bill of exchange' at the credit union."

United States v. Kelley, 551 F.3d 171 (2d Cir. 2009) : The Court affirmed convictions for securities and wire fraud, finding no abuse of discretion in the admission of bogus account statements sent by the defendant stock broker to his clients two to four years after the purchase of the related securities. Although the statements did not themselves constitute securities violations, they were relevant to prove an intent to defraud by showing that the defendant continued efforts to avoid detection by deceiving clients as to the value of their investments.

United States v. Kellogg, 510 F.3d 188 (3d Cir. 2007) : The Court affirmed a mail fraud conviction against the owner of an environmental laboratory who falsely certified that certain tests had been conducted, finding no abuse of discretion in the admission of evidence that the lab had been decertified for drinking water testing a few years earlier. The fact that the defendant had represented that deficiencies had been corrected when they had not was probative of his intent to defraud. The Court also found that evidence of false statements the defendant made to the state Department of Environmental Protection regarding the lab's quality control officer was properly admitted as evidence of fraudulent intent.

United States v. Crawley. 533 F.3d 349 (5th Cir. 2008) : The Court affirmed a defendant's convictions relating to voter fraud in connection with his being elected president of a union local. It found no abuse of discretion in admitting evidence that the defendant had committed acts of voter fraud in a prior election, since the jury could rationally conclude that because the defendant had unlawful intent in the extrinsic offense, it was less likely that he had lawful intent in the present offense. In *United States v. Nguyen, 504 F.3d 561 (5th Cir. 2007)* , the court affirmed convictions arising from a fraudulent home buying scheme, finding no abuse of discretion in the admission of evidence that the conspirators used the same scheme in connection with two unrelated properties, as the other incidents demonstrated how the operation worked and established knowledge and intent.

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : As evidence of the defendant's intent in a check fraud scheme, the prosecution introduced excerpts from a book he had written that detailed a virtually identical scheme. Affirming, the Court held there was no abuse of discretion in the admission of the evidence, as the defendant's description of the scam as the "sweetest hustle in the world" tended to rebut his claim of being an innocent dupe, and the Judge had taken great care to avoid argumentation or admission of any parts likely to cause unfair prejudice.

United States v. Sparkman, 500 F.3d 678 (8th Cir. 2007) : The Court affirmed a defendant's convictions arising from a scheme to defraud his business' insurer by burning an office building and two vehicles. The defendant attempted to defend the charges by placing the blame for the fire on Smith, an employee of another business the defendant owned. The Court found no abuse of discretion in the admission of testimony by Smith that the defendant told him that he had run an unsold truck into a pond and reported it stolen to collect on the insurance a couple of months before the arson

giving rise to the instant case, as the evidence was admissible to prove intent.

United States v. Caldwell, 560 F.3d 1214 (10th Cir. 2009) : The defendant was convicted of wire fraud in a scheme that enabled people with weak credit to obtain loans that covered the entire purchase price of their homes and gave them money back. Affirming, the Court found no abuse of discretion in the admission of evidence regarding two uncharged transactions, one involving the defendant's own home and the other involving a loan in which a company owned by the defendant's wife lent the down payment and received a large check in return. The Court reasoned that the evidence was probative of the defendant's intent to defraud.

United States v. Padron, 527 F.3d 1156 (11st Cir. 2008) : The Court affirmed a mail fraud conviction arising from a scheme to stage auto accidents and make false insurance claims. It found no abuse of discretion in the admission of evidence regarding an uncharged staged accident two months prior to the charged staged accidents, as the evidence tended to show the defendant's plan and intent. In *United States v. Ellisor, 522 F.3d 1255 (11th Cir. 2008)* , the Court affirmed a mail fraud conviction arising from the defendant's soliciting funds for a Christmas extravaganza in Miami that never occurred. It found no abuse of discretion in admitting evidence that four years earlier the defendant had sold tickets for a Utah show that was canceled and that he was fined by the State for failing to pay refunds within 30 days and for committing a deceptive act. There was a high degree of similarity between the Utah event and the charged conduct.

[x] Rule 404(b) -- Intent -- Miscellaneous Cases

United States v. Hensley, 574 F.3d 384 (7th Cir. 2009) : The defendant was charged with attempting to solicit a minor for sex after a sting operation in which he established multiple online relationships with a fictitious 13-year-old girl. Affirming, the Court found no abuse of discretion in the admission of evidence regarding his prior online relationship with a 13-year-old girl, as the defendant made his intent a central issue at trial by persistently claiming that he believed the chats forming the basis for the charge were with an 18-year-old.

United States v. Cvijanovich, 556 F.3d 857 (8th Cir. 2009) : The Court affirmed a conviction for making threats against the President, finding no abuse of discretion in the admission of evidence that the defendant previously was armed with a gun in a parking lot of a venue where the President was speaking, as well as of journal entries that the defendant wrote while incarcerated referring to that prior conduct. The evidence was relevant to prove intent and the seriousness of the threats.

United States v. Cherer, 513 F.3d 1150 (9th Cir. 2008) : The defendant, charged with attempting to entice a minor to engage in sexual acts with him, claimed that he did not believe that the person he was chatting with online was underage. Affirming, the Court held that evidence of the defendant's prior conviction for lewdness with a child under 14, as well as evidence of complaints by chat room users that a person with the defendant's screen name had been using inappropriate sexual language, was properly admitted to show intent to have sex with a minor. It noted that the facts underlying the prior conviction were "strikingly similar to those of his current conviction" and that the language he used in the chat room closely resembled the language he used in the communications with his target in the instant case. In *United States v. Curtin, 489 F.3d 935 (9th Cir. 2007)* (en banc), the defendant engaged in sexually explicit conversation in an Internet chat room with an agent posing as a 14-year-old girl. When he was arrested after traveling to another state to meet her, his personal digital assistant was found to contain over 140 stories about adults having sex with children. Five of the stories (all of which involved incest) were introduced at his trial for interstate travel to engage in sex with a minor. A panel of the Court had reversed the conviction on the ground that the evidence was inadmissible under Rule 404(b) to prove intent, *443 F.3d 1084 (9th Cir. 2006)* ; guided by *People of Terr. of Guam v. Shymanovitz, 157 F.3d 1154, 1159 (9th Cir. 1998)* (*Manual* § 403.03[77][c]), the panel concluded, " 'Possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b).' " On *en banc* review, the Court held that the some of the stories in the defendant's possession were relevant to rebut his contention that he was intending to meet a 30- to 40-year-old woman who liked to pretend that she was an inexperienced teenage girl, and could thus be admitted under

Rule 404(b). However, it was an abuse of discretion under Rule 403 for the Judge to admit all five of the stories without reading them through completely, as they contained portions with graphic descriptions of sexual conduct bearing no relation at all to the scenarios presented by the parties. As to one story, the Court commented: "Had the district court read Exhibit 7C, the court would no doubt have spotted this excrescence and required that it be edited out of the exhibit as both irrelevant and dangerously prejudicial." Five Judges concurred, but argued that "what people read or fantasize should not be used to prove what they intend to do," and thus would not overrule *Shymanovitz*; in any event, they would find evidence of a person's fantasies prejudicial. On remand, only one carefully redacted story, which explicitly described prurient sexual activity between an adult and a child, was admitted. The defense brought out on cross-examination that the defendant's PDA contained other stories pertaining to innocent subjects that did not involve sex with juveniles or children. The agent then testified on redirect that the total number of child/sex stories in the PDA was 140. Affirming, the Court found no abuse of discretion. *United States v. Curtin, 588 F.3d 993 (9th Cir. 2009)* . The Judge had faithfully followed the en banc opinion in admitting the story, and the redirect examination was more relevant than prejudicial in countering the inference the defendant attempted to create that the story introduced was only a small, insignificant part of the PDA's total content.

United States v. Schene, 543 F.3d 627 (10th Cir. 2008) : The Court affirmed a child pornography conviction, finding no abuse of discretion when images not linked to a specific count in the indictment were admitted to prove knowledge and intent.

United States v. Brannan, 562 F.3d 1300 (11th Cir. 2009) : In a prosecution for indecent exposure and public lewdness in a federal wildlife refuge, the Court found no abuse of discretion in the admission of evidence that the defendant had previously engaged in sexual acts at the wildlife refuge. The evidence tended to rebut the defendant's testimony that he only exposed himself at an undercover agent's repeated request and that he would not otherwise have engaged in the offenses. In *United States v. Perez, 443 F.3d 772 (11th Cir. 2006)* , the Court affirmed a conviction for smuggling aliens, finding no error in the admission of the defendant's prior conviction for alien smuggling. The defendant's not guilty plea made intent a material issue in the case: "In fact, by his theory of defense -- that he did not know the aliens' illegal status -- he expressly made his knowledge and intent a focal point of the case, making the evidence of his prior conviction admissible for non-propensity purposes."

[xi] Rule 404(b) -- Intent -- Tax Cases

United States v. Griffin, 524 F.3d 71 (1st Cir. 2008) : Affirming a conviction for filing a false tax return, the Court held there was no error in the admission of evidence that the defendant sold audio-tapes that instructed listeners how to avoid paying taxes, as this evidence was "probative of her state of mind when reporting her income."

United States v. Daraio, 445 F.3d 253 (3d Cir. 2006) : The Court affirmed a tax evasion conviction, finding no abuse of discretion when evidence of the defendant's prior tax evasion was admitted to rebut the contention that documents prepared by the defendant's daughter were prepared "in error without fraudulent intent."

United States v. Miller, 520 F.3d 504 (5th Cir. 2008) : Affirming a conviction for evading taxes in 2000, the Court found no abuse of discretion in admitting evidence that in 1997 the defendant opened a bank account under a false name and with fraudulent identification. The Court found the earlier act probative of intent because the financial planner upon whom the defendant said he relied in 2000 had advised him not to do the 1997 transaction. The past act was not too remote in time, since it occurred shortly before the defendant began the course of conduct that led to the evasion charges, and "there were common actors ... involved in both schemes."

United States v. Abboud, 438 F.3d 554 (6th Cir. 2006) : The Court affirmed convictions for income tax offenses in connection with a check kiting scheme, finding no abuse of discretion in the admission of evidence that the defendants paid employees "under the table." The evidence of failure to pay employment taxes tended to show that the defendants also acted willfully in failing to file returns for and pay income taxes, and the testimony regarding the violations "was

sufficiently succinct so as to minimize prejudice."

United States v. Ellis, 548 F.3d 539 (7th Cir. 2008) : The Court affirmed a conviction for failure to remit employment taxes, finding no abuse of discretion in the admission of evidence that the defendant failed to pay individual and corporate taxes before and during the charged period. The evidence tended to negate a defense of willfulness and to show that the defendant acted willfully, in that she was aware of her duties to pay taxes and disregarded those duties.

[xii] Rule 404(b) -- Intent -- Theft, Robbery, and Stolen Property Offenses

United States v. Bradshaw, 580 F.3d 1129 (10th Cir. 2009) : The Court held there was no abuse of discretion in a bank robbery case when the Judge admitted a BB gun, which was found underneath the defendant's backpack along his escape route and proved to have been purchased by the defendant a week or two before the robbery. Although the gun was never displayed during the robbery, it was relevant to prove the defendant's intent to intimidate during the robbery.

[dd] Rule 404(b) -- Jury Instructions

United States v. Hemphill, 514 F.3d 1350 (D.C. Cir. 2008) : In a prosecution for various crimes arising from the theft of millions of dollars from the Washington Teachers Union, the government charged six specific acts of embezzlement as well as a conspiracy to embezzle to commit fraud, and offered evidence of thousands of transactions in which one defendant took money from the union. All of these transactions, except the six charged, were relevant to prove the conspiracy but were Rule 404(b) evidence as to the six embezzlement charges. Therefore, the Court concluded that it was error (but harmless) to decline to give a limiting instruction as to the use of the other transactions in proving the six embezzlements. The Court noted that when the prosecution "introduces evidence of prior bad acts and the defendant requests a limiting instruction, a trial court must immediately provide one."

United States v. Garcia, 567 F.3d 721 (5th Cir. 2009) : The Court affirmed marijuana trafficking and conspiracy convictions, finding no plain error in the admission of evidence regarding one defendant's cocaine trafficking and use, as it was relevant to issues of intent and knowledge. The Court also found no plain error in the Judge's failure to instruct the jury on the limited purpose for which the evidence was admitted, commenting that "[f]or trials to function effectively, parties themselves must play an active role in creating the jury charge; the inclusion of Rule 404(b) instructions is no exception."

United States v. Davis, 547 F.3d 520 (6th Cir. 2008) : The Court reversed crack cocaine convictions, holding it was error to admit evidence of an uncharged drug transaction, and to instruct the jury to consider the evidence in deciding whether the transaction was committed in preparation for the instant offense, where preparation was not at issue in the case. Additionally, the Court found the jury instruction flawed because it instructed the jury that the prior drug transaction was "part of the pattern of related conduct." Pattern evidence is admissible only as "a way of demonstrating one of the purposes permissible under 404(b)," such as identity, and is not itself a basis for admissibility. The prior act evidence could have been admissible for intent but an intent basis for admission was not adequately conveyed to the jury; "[u]sing pattern to show intent is different from using it to show propensity, but it is close enough that it increases the importance of a clear instruction." In *United States v. Newsom, 452 F.3d 593 (6th Cir. 2006)* , a felon firearm possession case, the Court took issue with the Trial Judge's *Rule 404(b)* instruction, which allowed consideration of uncharged misconduct "for other limited purposes such as proof of motive, intent, identity, or absence of mistake." No explanation was given on what acts the instruction was referring to, nor did the instruction inform the jury why any of the designated uses were relevant to the issues in the case. The Court found that "three of the four permissible uses for uncharged misconduct that were enumerated by the district court were not at issue in this case. One use listed by the jury instructions [intent] was actually at issue, however, compelling the conclusion that the district court did not commit plain error." The Court expressed concern with the state of the law on *Rule 404(b)* instructions, noting that some existing Circuit precedent warns "district courts about how carefully they must instruct juries regarding *Rule 404(b)* evidence," while other cases have held that "so long as the district court includes in its instructions at least one

permissible use, reversal is not warranted, at least where the plain-error standard of review applies." It noted that so long as the latter cases "continue to embody the law of this circuit, the district courts will have little incentive to heed the warnings" about careful *Rule 404(b)* instructions: "The district courts might attempt to protect their judgments from reversal under such circumstances simply by including the entire list from *Rule 404(b)*, hoping that this scattershot approach will hit the mark with at least one relevant use for the evidence. A resolution of this tension, however, is beyond the power of the present panel."

United States v. Sparkman, 500 F.3d 678 (8th Cir. 2007) : The Court, affirming convictions arising from the defendant's scheme to defraud his business's insurer by burning an office building and two vehicles, found no abuse of discretion in admitting testimony that the defendant had admitted to previously running an unsold truck into a pond and reporting it stolen to collect on the insurance, as the evidence was probative of fraudulent intent. The Court found no plain error in the limiting instruction given to the jury, which did not follow the model in the Eighth Circuit Manual of Model Jury Instructions. The Model Instruction tells the jury to refrain from considering "other acts" evidence unless and until it has determined that the defendant has committed the acts charged in the indictment. The Court explained that the "evident purpose of such an instruction is to ensure that the jury does not use uncharged acts improperly as propensity evidence to conclude that the defendant committed the charged acts." But, "the model instruction is not the only permissible means to convey that message to the jury." In this case, the jury was told that the "other acts" evidence was admitted to show the defendant's "scheme, pattern, or plan" and that "the mere fact that the defendant may have committed a similar act in the past is not evidence that he committed such acts in this case." This instruction was "adequate to inform the jury of the limited permissible use of the evidence of prior bad acts." The Court also held that the Trial Judge need not give a specific instruction on the preponderance standard of proof for other act evidence so long as the jury understands that it must find that the defendant did commit the other act before giving it any weight.

[ee] Rule 404(b) -- Knowledge

[iv] Rule 404(b) -- Knowledge -- Drug Cases

[B] Rule 404(b) -- Knowledge -- Drug Cases -- Different Drugs

United States v. Hawkins, 548 F.3d 1143 (8th Cir. 2008) : The Court affirmed a conviction for distributing cocaine base within 1000 feet of a school, finding no error in the admission of prior convictions for drug distribution. The Court found that the prior convictions were not barred simply because they involved different (though similar) drugs, and noted that "[p]rior felony drug convictions are relevant to show intent and knowledge in a drug prosecution when a defendant makes a general denial defense, which necessarily places the defendant's state of mind at issue." In *United States v. Marquez-Alvarado, 501 F.3d 971 (8th Cir. 2007)* , the Court affirmed a conviction for conspiring to distribute marijuana, finding no abuse of discretion in the admission of evidence regarding the defendant's involvement in prior cocaine transactions. The evidence demonstrated that the defendant knew and had relationships with out-of-state drug dealers and that he had familiarity with techniques for the clandestine transportation of drug-related contraband between states.

[C] Rule 404(b) -- Knowledge -- Drug Cases -- Miscellaneous Cases

United States v. Pettiford, 517 F.3d 584 (D.C. Cir. 2008) : Affirming a conviction for possession of cocaine base with intent to distribute, the Court found no abuse of discretion in admitting evidence that three weeks before the defendant's arrest in his car where the drugs were found the defendant also possessed crack cocaine with intent to distribute. The Court held that the evidence was admissible to prove that the defendant knowingly and intentionally possessed the cocaine with the intent to distribute, and noted that "[t]he fact that the government produced probative evidence of Pettiford's knowledge and intent does not preclude it from offering additional evidence to establish those elements beyond a reasonable doubt." It distinguished *United States v. Linares, 367 F.3d 941 (D.C. Cir. 2004)* (*Manual* § 404.03[2][ee][v]), a case in which eyewitness testimony that the defendant had a gun in his hand and fired it made it virtually certain that the jury, if it believed the testimony, would find that the defendant knowingly possessed the gun,

from the instant case, which "is not a case in which the jury had to either believe the witnesses and conclude that the defendant knowingly possessed the crack with intent to distribute it, or disbelieve them and find that he did not possess the crack at all." In *United States v. Douglas, 482 F.3d 591 (D.C. Cir. 2007)* , the court affirmed a conviction for possession of crack cocaine with intent to distribute, finding no abuse of discretion in the admission of evidence regarding the defendant's arrest for the same offense a year earlier. That the defendant was not disputing the elements of intent and knowledge did not make the evidence irrelevant, since the government has the burden of proving every element of the offense beyond a reasonable doubt and may prove its case by evidence of its choice.

United States v. Hicks, 575 F.3d 130 (1st Cir. 2009) : The Court affirmed cocaine-related convictions, finding no error in the admission of three prior cocaine-related convictions and of a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine, since the evidence was relevant to rebut the defense in the current case that the defendant was innocently in a home babysitting children when the officers searched it and found cocaine. A person with previous experience with cocaine-trafficking "would have been more likely to recognize the drug trade paraphernalia that was scattered about the home, such as baking powder, plastic baggies, digital scales, and cash." The telephone conversation was also relevant to the defendant's "knowledge of the accouterments of the drug trade in the home and his intent to exercise control over the drugs." The Court found no abuse of discretion in admitting all three prior convictions under Rule 403, though the author of the opinion expressed concern about "the 'piling on' of multiple criminal convictions when a lesser number might suffice to establish the proposition of concern to the government."

United States v. Paulino, 445 F.3d 211 (2d Cir. 2006) : A search of the defendant's father's house uncovered drugs; the defendant was in the house at the time of the search, but claimed that he did not know that drugs were present. Affirming a conviction for possession of cocaine with intent to distribute, the Court found no abuse of discretion when the defendant's 2000 state conviction for a drug sale was admitted as proof of knowledge and intent. The Court noted that defense counsel emphasized that the defendant's fingerprints were not on the ziploc bag in which the drugs were kept and that the defendant did not remove the issue of knowledge from the case. Even had the defendant had sought to remove knowledge and intent as issues, the charge against the defendant involved constructive possession, which "necessarily raised questions as to his knowledge and intent."

United States v. Yearwood, 518 F.3d 220 (4th Cir. 2008) : Affirming a conviction for conspiring to distribute and possess with intent to distribute 50 grams or more of cocaine base, the Court found no abuse of discretion in admitting evidence of the defendant's prior conviction for possession with intent to distribute cocaine and conspiracy to distribute cocaine, because the defendant put his knowledge and intent in issue by contending he was selling music instead of drugs.

United States v. Jenkins, 593 F.3d 480 (6th Cir. 2010) : Police searched a house and found drugs all through the house in open view. The defendant was arrested outside the house, which was owned by his father. The contested issue at trial was whether the defendant (as opposed to someone else) constructively possessed the drugs in the house. Reversing, the Court held it was error to admit evidence of a prior conviction for marijuana distribution as probative of the defendant's knowledge, as knowledge was not "at issue in any meaningful sense. Whoever possessed all these drugs laying [*sic*] in plain view throughout the house obviously did not do so inadvertently. Thus, as a practical matter, the issue of knowledge was subsumed by that of possession. Knowledge did not stand on its own bottom as an issue in Jenkins's trial; and thus admission of his prior conviction cannot be bottomed on it either." In *United States v. Matthews, 440 F.3d 818 (6th Cir. 2006)* , the Court affirmed drug and firearm convictions, finding no abuse of discretion when earlier drug sales by the defendant were admitted. The earlier sales were probative of whether the defendant knew that the clear plastic bag in his possession contained cocaine and whether he intended to distribute the drug.

United States v. Vargas, 552 F.3d 550 (7th Cir. 2008) : When the defendant's refrigerated semi-trailer truck was stopped while he was hauling produce, 282 kilograms of cocaine were found concealed in a hidden compartment. Affirming a conviction for possession of the cocaine with intent to distribute, the Court found no abuse of discretion in

the admission of evidence that the defendant had on prior occasions transported drugs hidden under loads of produce in refrigerated semi-trailers. His prior involvement in drug trafficking was probative of his possession being knowing, and the similarity between the incidents was sufficient to produce an inference of criminal intent. In *United States v. Perkins, 548 F.3d 510 (7th Cir. 2008)* , a parolee was charged with possession of crack cocaine and marijuana with intent to distribute after drugs were found at his residence during a compliance check search. Affirming, the Court found no abuse of discretion in the admission of an arrest and of prior convictions for cocaine-related offenses. The evidence tended to prove his knowledge of crack cocaine and its value and the absence of any mistake or accident in its presence in his residence.

United States v. Turner, 583 F.3d 1062 (8th Cir. 2009) : The Court affirmed convictions for methamphetamine offenses, upholding the admission of testimony by a police officer about the defendant's presence at a fire she investigated that was associated with manufacture of methamphetamine, as well as testimony by a witness about the defendant's prior manufacture for her of methamphetamine on a weekly basis. The evidence was relevant to prove knowledge and intent and to rebut the defendant's claim that he was "merely present" in the residence for five minutes before detectives arrived and had no awareness of the manufacture of methamphetamine or the conspiracy. In *United States v. Voegtlin, 437 F.3d 741 (8th Cir. 2006)* , the Court affirmed a conviction for conspiring to possess a listed chemical used to manufacture methamphetamine, finding no abuse of discretion in the admission of evidence that, before entering into the charged conspiracy, the defendant supplied ingredients to a codefendant who used them to cook methamphetamine that the defendant sold. The evidence was probative of the defendant's knowledge, because the prior agreement was virtually identical to the charged conduct and the prior acts occurred the year before the beginning of the charged conspiracy.

[v] Rule 404(b) -- Knowledge -- Firearms Cases

United States v. McCarson, 527 F.3d 170 (D.C. Cir. 2008) : The defendant, charged with drug possession and felon firearm possession after a gun and drugs were found in a dresser in an apartment he occupied, argued that prior convictions for possessing firearms and selling crack cocaine should not have been admitted to prove intent and knowledge because the only issue was his possession. Affirming, the Court explained that proving constructive possession involves not only a physical element of dominion and control but also a mental element of "knowing" possession. In *United States v. Johnson, 519 F.3d 478 (D.C. Cir. 2008)* , the Court held it was error (but harmless) to admit in a firearms prosecution evidence of the defendant's previous firearms conviction on the ground that it tended to prove that he knowingly possessed the gun in the instant case. Since government witnesses had testified that they saw the defendant with the handgun in his waistband, the Court did "not understand how [the defendant's] previous possession makes it more likely that he knowingly possessed a gun this time." The Court reasoned that if the jury believed the eyewitnesses, then the defendant possessed the gun knowingly; if it did not, "then it should have acquitted based on the government's failure to prove possession rather than its failure to prove knowledge."

United States v. Uzenski, 434 F.3d 690 (4th Cir. 2006) : After evidence connected the defendant to two pipe bombs, he was convicted for manufacturing and possessing unregistered firearms. Affirming, the Court found no abuse of discretion in admitting his prior statements that he had attempted to make pipe bombs as a teenager, as the evidence tended to show his knowledge in making the devices, and its probative value was not substantially outweighed by its prejudicial nature.

United States v. Jones, 484 F.3d 783 (5th Cir. 2007) : The Court reversed a conviction for felon firearm possession, finding an abuse of discretion in the admission of evidence that the defendant had previously been convicted for the same crime, committed under circumstances virtually identical to those alleged in the instant case -- in both cases an eyewitness testified that he saw the defendant take a gun from his waistband and throw it under a house. The evidence had been admitted to show knowledge and intent, but because the case was one of actual rather than constructive possession, intent was not an element, and "once the government has shown that the defendant had a firearm under his immediate control, any contention that he did not know the nature of what he possessed is effectively precluded."

United States v. Rendon-Duarte, 490 F.3d 1142 (9th Cir. 2007) : After the defendant's arrest, two loaded handguns were recovered from under the floor carpet of the vehicle in which he was riding. Affirming a conviction for felon firearm possession, the Court held it was error (but harmless) to admit evidence of prior incidents in which weapons were found in the cars he drove or rode in. Absent any indication he knew of the presence of those weapons, the evidence had no tendency to suggest that his possession on this occasion was intentional and knowing.

United States v. Moran, 503 F.3d 1135 (10th Cir. 2007) : Affirming a conviction for felon firearm possession, the Court acknowledged that using the defendant's prior conviction of the same offense to prove that he knowingly possessed the firearm in this case involved a kind of propensity inference. However, "the inference is specific and does not require a jury to first draw the forbidden general inference of bad character or criminal disposition; rather it rests on a logic of improbability that recognizes that a prior act involving the same knowledge decreases the likelihood that the defendant lacked the requisite knowledge in committing the charged offense."

[vi] Rule 404(b) -- Knowledge -- Fraud, Forgery, Counterfeiting, False Statements, etc., Cases

United States v. Whitney, 524 F.3d 134 (1st Cir. 2008) : Affirming a conviction for making a false statement to a firearms dealer while attempting to purchase a firearm, the Court found no plain error in the admission of evidence that the defendant was arrested for violating the protective order that resulted in the charge (since defendant signed a form stating that he was not under any protective order). The evidence was probative of the defendant's awareness of the order when he signed the form.

United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007) : The Court affirmed convictions for securities fraud, finding no abuse of discretion in admitting the defendant's statement to an associate, four years after the charged conspiracy, about his desire to push up the stock price in a company that he owned. The Court concluded that the charged scheme and the later statement displayed efforts to manipulate a thinly traded stock in a certain manner and that the defendant's understanding of the later scheme made it more likely that he understood aspects of the charged scheme.

United States v. Nguyen, 504 F.3d 561 (5th Cir. 2007) : Affirming convictions arising from a fraudulent home buying scheme, the Court found no abuse of discretion in the admission of evidence that the conspirators used the same scheme in connection with two unrelated properties, as the other incidents demonstrated how the operation worked and established knowledge and intent.

United States v. Wheeler, 540 F.3d 683 (7th Cir. 2008) : The Court affirmed a conviction for embezzling withheld employee health insurance and pension contributions, finding no abuse of discretion in the admission of evidence that the defendant had been involved in the nonpayment of withheld health insurance premiums at another company he controlled. The evidence was relevant to show his knowledge of how insurance premium withholding must be handled and to show the absence of mistake or accident.

[viii] Rule 404(b) -- Knowledge -- Miscellaneous Cases

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) : Two pharmacists were convicted of conspiring with physicians to distribute large quantities of pain medications under cover of false prescriptions written by the physicians. Affirming, the Court found no abuse of discretion in the admission of evidence that the defendants filled illegitimate prescriptions from physicians who were not named as coconspirators. The evidence could be seen as intrinsic to the charged conspiracy with a named physician and "others known and unknown," and although the physicians were in a sense competitors, "their activities were mutually advantageous, as the behavior of each doctor expanded operations for all by encouraging more dealers and pharmacists to get into the business." It could also be seen as probative of the defendants' knowledge that the named physician's prescriptions were illegitimate, as their "experience in filling piles of similar false prescriptions from a different doctor would speak directly to that issue."

United States v. Lee, 558 F.3d 638 (7th Cir. 2009) : The Court affirmed convictions for conspiracy to commit money laundering, arising as the defendants separately became involved with "spas" that were fronts for prostitution businesses. It found no abuse of discretion in the admission of one defendant's prior operation of a "spa," which was offered to prove knowledge and rebut the defense that the defendant was unaware of the prostitution at the spa giving rise to the charges against her. Although the Court observed that testimony regarding "forced sex" at the prior spa was arguably more prejudicial than evidence of prostitution generally, it declined to find that admission of this aspect of the evidence was plain error.

United States v. Walker, 470 F.3d 1271 (8th Cir 2006) : Affirming a conviction for felon firearm possession, the Court found no error when the defendant's prior armed robbery conviction was admitted to prove knowledge and intent to possess the firearm in issue. Although the defendant argued that his defense was that he was not present when the gun was found, the Court reasoned that by pleading not guilty he placed his knowledge of the firearm's presence at issue.

United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006) : The defendant was convicted for violating the Clean Water Act by building dikes in a river. Affirming, the Court held that evidence he had previously attempted to divert the river's flow and had been required by the Corps of Engineers to remove the debris was admissible as tending to show that his violation of the CWA on this occasion was done knowingly.

[viii.1] Rule 404(b) -- Knowledge -- Pornography Cases

United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) : In a prosecution for knowing possession of child pornography, the Court found no abuse of discretion when the government showed short clips of videos seized from the defendant showing adult bestiality. Clips from videos being downloaded when agents entered the defendants home were relevant to the defendant's knowledge (which he denied) that the program he was accessing provided pornography. A clip downloaded several weeks previously and last viewed three days before the defendant's arrest was "more troubling," but it tended to rebut any argument of accident or mistake regarding the videos viewed the day of the arrest.

United States v. Stout, 509 F.3d 796 (6th Cir. 2007) : On interlocutory appeal in a prosecution for possession of child pornography, the Court (2-1) affirmed an *in limine* ruling precluding the government from introducing evidence that the defendant had previously been convicted for installing a hidden camera in the home of family friends and videotaping their 14-year-old daughter in the shower. While the prior act evidence might have some probative value on the question whether the defendant knew that the images he was charged with possessing were of children, that probative value was slight. The government's need for the evidence to prove intent and knowledge to possess child pornography was likewise slight, since it had other means of proof, such as testimony by the defendant's ex-wife that she had discovered on his computer that he had been searching for child pornography. On the other hand, in the words of the Trial Judge, "[t]he prior bad acts evidence is prejudicial because it is both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct. As a consequence, the jury is likely to pay undue attention to it... . [T]here is a strong possibility that the jury will be improperly distracted from the primary evidence at hand."

United States v. Burgess, 576 F.3d 1078 (10th Cir. 2009) : A computer and two hard drives seized when the defendant was arrested on drug charges contained thousands of images of child pornography. At the trial for possession and transportation of child pornography, the defense stipulated to the admission of four images appearing on both hard drives (the four images on the Maxtor drive were specifically named in the indictment). To prove the defendant's knowledge that the defendant knew the drives contained pornography, the government introduced images from the Seagate drive, including some that showed the 14-year-old ward of the defendant's friend. The images were sexually suggestive or borderline pornographic, and some had lewd text superimposed. Affirming, the Court rejected the argument that the images were inadmissible because they were not "vital" to the government's case, there being ample other evidence connecting the hard drives with the defendant. "Although it may be a factor, the test is not necessarily

whether the evidence is vital to the government's case. Vitality is often a matter of perspective. Within limits delineated in the Federal Rules of Evidence the government is entitled to introduce all relevant, probative evidence at its disposal." As to 12 images of the ward with superimposed lewd text, the Court noted that they were not admitted until the defendant's friend had testified that the defendant had no opportunity to take the pictures and other witnesses had testified they had never seen him behave inappropriately with children. Although the Court suggested that it might have concluded that fewer than 12 of the images might have been sufficient for impeachment, it found no abuse of discretion. In *United States v. Schene, 543 F.3d 627 (10th Cir. 2008)* , the Court affirmed a child pornography conviction, finding no abuse of discretion when images not linked to a specific count in the indictment were admitted to prove knowledge and intent. In *United States v. Shaffer, 472 F.3d 1219 (10th Cir. 2007)* , the defendant was convicted for possessing and distributing child pornography when he obtained pornography on the Internet and made it available to other users through a file-sharing application. Affirming, the Court found no abuse of discretion in admitting evidence of a written narrative found on the defendant's computer which involved a story about adult sex with children. The story was relevant to rebut the defense that the defendant did not knowingly possess or distribute child pornography.

[gg] Rule 404(b) -- *Modus Operandi*

United States v. Fanfan, 468 F.3d 7 (1st Cir. 2006) : Affirming a conviction for conspiracy to distribute cocaine, the Court assumed that the conspiracy had been terminated by the arrest of most of its members, but held that even so a post-conspiracy transaction in which the defendant attempted to distribute cocaine was admissible to prove *modus operandi* and identity. The arrested conspirator had paged the defendant, the government recorded the call, the arrested conspirator ordered cocaine and met the defendant by prearrangement, and the defendant had cocaine and cocaine base in his car. This evidence was especially important because only one witness could identify the defendant as the man who supplied drugs and this witness had a plea deal with the government.

United States v. Siegel, 536 F.3d 306 (4th Cir. 2008) : The defendant had a 20-year history of identity theft and fraud that culminated in her defrauding a widower 30 years her senior and murdering him to prevent the reporting of her crimes. Shortly before trial on charges of defrauding and murdering the widower (and defrauding the United States by cashing his Social Security checks), the defendant moved *in limine* to exclude evidence of her other crimes. The motion was granted and the government brought an interlocutory appeal. Reversing, the Court held that evidence that she had been convicted for stealing three wallets and using the information contained therein to drain funds from the wallet owners' bank accounts was intrinsic to the charged crimes, since she was still on probation for those offenses and "her personal freedom depended on her ability to extricate herself from the relationship with [the widower] without his discovering and reporting her crimes." Evidence of her other frauds, which could lead to a lengthy prison term if she were caught, tended to establish her motive for murdering the widower "for the purpose of preventing him or anyone else from providing law enforcement with information about the federal crimes she had committed," which was an element of the offense charged. The evidence likewise tended to show her *modus operandi* in committing frauds. One Judge dissented, on the ground that the majority erroneously failed to apply the "abuse of discretion" level of review.

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : As evidence of the defendant's intent in a check fraud scheme, the prosecution introduced excerpts from a book he had written that detailed a virtually identical scheme. Affirming, the Court noted that it was not relying on the Trial Judge's reasoning that the book was evidence of the defendant's *modus operandi*: "Proof of 'modus operandi' is generally used to demonstrate identity, and Kahari's identity was not at issue in this case."

United States v. Price, 516 F.3d 597 (7th Cir. 2008) : The Court affirmed a conviction for bank robbery, finding no abuse of discretion in the admission of evidence, offered as *modus operandi*, that the defendant had subsequently committed another bank robbery five months later. Although some of the similarities between the offenses (disguise, gun, and a bag for the loot) were generic for bank robberies, and there were some differences in the crimes (the later was a solo job from which the defendant escaped on foot, while the charged crime involved four robbers communicating with walkie-talkies who escaped in a getaway vehicle), the Court focused on the distinctive

commonalities: each was an early weekday morning ambush of an employee opening a bank for business, and in each the robber(s) forced the employee(s) at gunpoint to enter the bank, turn off the alarm, access the vault, and hit the ground before the robber(s) made their escape. Furthermore, the banks were located only 5.4 miles apart.

United States v. Howe, 538 F.3d 842 (8th Cir. 2008) , overruled in part on other grounds, 562 F.3d 892 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession arising from a kidnapping, robbery, and murder conspiracy in which the victim was forced to strip naked. It found no abuse of discretion in the admission of evidence that the defendant had previously been involved in the robbery of people who had stolen his drugs and the victims had been forced to strip naked, as "the prior robbery was unusual and distinctive enough as to be like a signature, and Howe provides no support for his assertion that this method of stripping and robbing a person is common among drug dealers."

United States v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008) : At the trial of a sheriff's officer for acting under color of law to deprive three women of their right to bodily integrity by committing sexual assaults upon them, the prosecution introduced evidence of two similar attacks on other women. Affirming, the Court found no abuse of discretion in admitting the uncharged crimes evidence, as the commonalities of the modus operandi were probative of the perpetrator's identity, which was contested.

[hh] Rule 404(b) -- Motive

[i] Rule 404(b) -- Arson

United States v. Rayborn, 495 F.3d 328 (6th Cir. 2007) : The Court affirmed the arson and mail fraud convictions of a church pastor charged with setting his church on fire and attempting to collect money from the church's insurance company after the fire. It found no abuse of discretion in admitting evidence of the pastor's use of church funds to create a lavish pastoral facility and his use of the church's tax-exempt status for personal purposes, as the evidence tended to show the pastor's access to and control over church finances, which helped to explain a motive for the pastor's arson and attempt to obtain the insurance proceeds.

United States v. Farish, 535 F.3d 815 (8th Cir. 2008) : The defendant was convicted for arson committed against the property of a woman whom he believed had scratched his car with a key. Affirming the conviction, the Court found there was no abuse of discretion in admitting evidence that the defendant had committed domestic abuse against his girlfriend, as the fact the arson victim had given the girlfriend refuge on that occasion tended to explain what motivated the defendant to suspect the victim had keyed his car and to retaliate against her. One Judge, concurring in the judgment, concluded that the link between the domestic abuse evidence and the defendant's "motive" was "extremely tenuous and that any probative value is substantially outweighed by its unfair prejudicial effect."

[ii] Rule 404(b) -- Motive -- Assault, Homicide, Kidnapping, etc.

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The Court affirmed the defendant's conviction for the fatal carjacking of his ex-wife, finding no error in the admission of evidence regarding his prior abuse and stalking of the victim. "The evidence of [his] intentional physical harm of the victim in the past had 'special relevance' [citation], because it was probative of his intent to cause her harm at the time he seized her car." "[T]he evidence of appellant's stalking had special relevance because it demonstrated [his] motive to commit the crime -- his intense jealousy."

United States v. Siegel, 536 F.3d 306 (4th Cir. 2008) : The defendant had a 20-year history of identity theft and fraud that culminated in her defrauding a widower 30 years her senior and murdering him to prevent the reporting of her crimes. Shortly before trial on charges of defrauding and murdering the widower (and defrauding the United States by cashing his Social Security checks), the defendant moved *in limine* to exclude evidence of her other crimes. The motion was granted and the government brought an interlocutory appeal. Reversing, the Court held that evidence that she had

been convicted for stealing three wallets and using the information contained therein to drain funds from the wallet owners' bank accounts was intrinsic to the charged crimes, since she was still on probation for those offenses and "her personal freedom depended on her ability to extricate herself from the relationship with [the widower] without his discovering and reporting her crimes." Evidence of her other frauds, which could lead to a lengthy prison term if she were caught, tended to establish her motive for murdering the widower "for the purpose of preventing him or anyone else from providing law enforcement with information about the federal crimes she had committed," which was an element of the offense charged. The evidence likewise tended to show her *modus operandi* in committing frauds. One Judge dissented, on the ground that the majority erroneously failed to apply the "abuse of discretion" level of review.

United States v. Covington, 565 F.3d 1336 (11th Cir. 2009) : The Court affirmed the defendant's conviction for conspiring to murder for hire his ex-girlfriend, finding no abuse of discretion in admitting her testimony describing how he beat her, the handgun with which he threatened her, and his jailhouse correspondence concerning the assault. The evidence tended to show that the motive for the intended murder for hire was to silence her with respect to the assault, including showing that he was aware that her testimony against him would likely lead to a long prison sentence. The jury was properly instructed about the limited purpose for which the evidence was admitted.

[iv] Rule 404(b) -- Motive -- Drug Activity

United States v. Morena, 547 F.3d 191 (3d Cir. 2008) : The Court reversed a conviction for felon firearm possession and possession of a sawed-off shotgun because "the government's repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process." Although the defendant was never charged with any drug offenses, the government contended that some discussion of drugs was necessary for background and it would show the shotgun was possessed to protect a drug dealing enterprise. However, the prosecution repeatedly went beyond that purpose to inject inadmissible drug evidence, such as evidence of heroin dealing not connected with the defendant and evidence of the defendant's drug use problem, even though the Judge declared at least five times that the evidence was "too prejudicial." "Nevertheless, the District Court ultimately failed to prevent the rampant injection of inadmissible evidence into the trial and its single limiting instruction to the jury was inadequate to cure the prejudice."

United States v. Finley, 477 F.3d 250 (5th Cir. 2007) : The defendant was charged with aiding and abetting possession with intent to distribute a controlled substance, after he drove a friend to a meeting where the friend sold methamphetamine. Affirming, the Court held there was no abuse of discretion in admitting evidence of the defendant's recent use of methamphetamine bought or received from the friend, as it tended to show he agreed to drive in exchange for extra methamphetamine.

[iv.1] Rule 404(b) -- Motive -- Financial Distress

United States v. Kuzlik, 468 F.3d 972 (7th Cir. 2006) : Affirming a conviction for mail fraud, the Court rejected the defendant's argument that evidence pertaining to his financial distress before the crime should not have been admitted because the "jury was unable to appreciate the extremely fine distinction between propensity and motive," and "as a result, the jury was confused and misled by the evidence of his financial condition." The Court held that "[t]he sorry state of Kuzlik's finances, his debts, default judgments, and bank overdrafts, was offered as evidence of his motive to embezzle the $44,246.44, not as evidence that Kuzlik had a taste or compulsion for financial fraud." Any even remote potential for unfair prejudice was cured by an instruction that the financial condition evidence was to be considered "only for the purpose of establishing his motive."

[v] Rule 404(b) -- Motive -- Firearms Offenses

United States v. Robinson, 473 F.3d 387 (1st Cir. 2007) : Affirming drug and firearms convictions, the Court held that the government's cross-examination of the defendant about his history in dealing and using drugs was proper, because

the questions were intended to demonstrate why the defendant would bring a firearm to a drug deal.

United States v. Till, 434 F.3d 880 (6th Cir. 2006) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of evidence that drugs were found in the car in which the defendant was riding when arrested and in which the gun was found. In addition to being part of the background completing the story of the charged offense, the drugs provided a motive for possession of the weapon, and the probative value of the evidence was not substantially outweighed by any prejudicial effect.

United States v. Butler, 594 F.3d 955 (8th Cir. 2010) : The Court affirmed a felon firearm possession conviction, finding no abuse of discretion in the admission of evidence that the defendant possessed drug paraphernalia to show motive to possess a firearm.

[vii] Rule 404(b) -- Motive -- Miscellaneous Cases

United States v. Brown, 597 F.3d 399 (D.C. Cir. 2010) : Affirming a conviction for bank fraud and passing fictitious financial instruments, the Court held it was an abuse of discretion (but harmless error) to admit evidence that the defendant failed to pay a $700 home inspection fee. "The government's suggestion that this bad acts evidence establishes Brown's motive 'to get money' ... is too far removed from the charged offenses" and "showed only his bad character in 'stiffing' the agent for the fee."

United States v. DeCicco, 439 F.3d 36 (1st Cir. 2006) : The Court affirmed a mail fraud conviction arising from an arson and submission of fraudulent insurance claims, finding no error in the admission of testimony from the defendant's accountant that the defendant failed to supply him with documentation supporting expense deductions that he claimed for income tax purposes. The evidence related to the defendant's motive to commit arson or mail fraud (i.e., to pay for tax liabilities) and to show that the defendant's net income was less than necessary to pay what he owed.

Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008) : The Court reversed a judgment for the defendant and granted a new trial to a DEA agent who brought a Title VII race and gender discrimination and retaliation suit. The plaintiff had not been permitted to introduce evidence regarding her participation in a long-running race discrimination class action against the DEA, on the ground that it tended only to show propensity. The Court held that by precluding the plaintiff from showing the pendency of the class litigation and the long history of its burden on the DEA, she was prevented from demonstrating why her participation in that litigation so rankled the relevant DEA decisionmakers that they were provoked to retaliate against her.

United States v. Morris, 498 F.3d 634 (7th Cir. 2007) : The Court affirmed drug convictions, finding no abuse of discretion in the admission of a police officer's testimony that he stopped the defendant's van because he knew that there was an outstanding warrant for the defendant's arrest. The testimony established the reason that the officer stopped the van and a motive for the defendant to give drugs to a cousin who was with him in the van and to tell the cousin to flee. In *United States v. Sebolt, 460 F.3d 910 (7th Cir. 2006)* , a prosecution for advertising and transporting child pornography online, the Court found no error in admitting evidence that the defendant had molested a young male relative. The defendant's sexual interest in children provided a motive for committing a charged offense involving sexual exploitation of children, and while the motive to molest children does not completely overlap with the propensity to deal in child pornography, the conceptual gap between the offenses is not so wide as to induce the jury to decide the case on an improper basis rather than on the evidence. The prosecution had also introduced a pair of young boy's Pokemon underwear that the defendant had stated he put on his face when masturbating. The Court found that introducing the underwear into evidence was unfairly prejudicial -- the defendant's use was well established and unrebutted, so "there was no probative value for admitting the physical evidence of his motive" -- but the error was harmless.

[jj] Rule 404(b) -- Notice of Intention To Introduce Evidence

United States v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010) : The Court affirmed drug trafficking convictions, finding no error in the prosecution's failure to give notice of intent to introduce evidence of certain offenses. Because the acts were intrinsic (i.e., part of crimes charged), no notice was required under Rule 404(b).

United States v. Gonzalez, 501 F.3d 630 (6th Cir. 2007) : The Court affirmed a conviction for possession with intent to distribute cocaine, holding that the government's failure to give notice of other acts committed by the defendant did not require exclusion of the other acts because they were part of "a continuing pattern of illegal activity that is intrinsic to the charged offense and thus not subject to Rule 404(b)." The Court added that, even if the prior acts were extrinsic and subject to Rule 404(b), the government's failure to give notice was not prejudicial. In *United States v. Franco, 484 F.3d 347 (6th Cir. 2007)* , a prosecution for cocaine possession, the Court noted that when the defendant raised an entrapment defense he placed his character in issue, making specific instances of his conduct admissible. Because evidence of his prior drug trafficking crimes was thus admissible under Rules 404(a) and 405(b) rather than Rule 404(b), the government was not required to provide notice of its intention to introduce the evidence.

United States v. Blount, 502 F.3d 674 (7th Cir. 2007) : In a prosecution for firearm possession in furtherance of a drug crime, the government gave notice a week before trial that it would introduce prior bad acts involving drug activity, but there was no reference to gun possession. However, when the witness testified, he stated that the defendant carried a gun at all the drug transactions. Affirming, the Court held that the notice was timely, and, although it implied that the notice was insufficient because it did not fairly describe the extent of the prior bad acts evidence, it held that any error was not plain error.

United States v. Faust, 456 F.3d 1342 (11th Cir. 2006) : The Court affirmed a cocaine conviction, finding that the government's notice seven months before trial of an intent to rely on *Rule 404(b)* evidence "was certainly sufficient."

[kk.1] Rule 404(b) -- Permissible Purposes

United States v. Taylor, 522 F.3d 731 (7th Cir. 2008) : Affirming a drug trafficking conviction, the Court found no error when a witness, who testified that she was with the defendant on their way to "hit a lick" when they were stopped, explained that meant he was going to sell drugs, which she knew because she had been with the defendant on previous "licks." The government argued that the reference to other crimes was permissible because they were "inextricably intertwined" and the testimony filled a "conceptual void" and "form[ed] an integral part of the witness's account of the circumstances surrounding the offenses of which the defendant was indicted," but the Court commented that "[t]hese windy formulas do no work." The justification for asking the witness how she knew what the term meant was to avoid a challenge to the accuracy of her definition of the term. The Court noted that "[t]he list of permissible uses of bad-acts evidence in Rule 404(b) is introduced by 'such as,' and so is not exhaustive. ... The aim of the rule is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person ... No other use of prior crimes or other bad acts is forbidden by the rule, and the draftsmen did not try to list every possible other use."

[nn] Rule 404(b) -- Preparation

United States v. Jimenez, 507 F.3d 13 (1st Cir. 2007) : The Court affirmed a conviction for misappropriating the identities of two people long dead, finding no abuse of discretion in the admission of evidence found in the defendant's home, including birth and death certificates and high school transcripts of other people, lists of names with biographical data, and electronic documents detailing how to establish a false identity, how to search the Social Security death database, and related topics. The evidence showed preparation and plan, and there was no unfair prejudice in its presentation.

United States v. Street, 531 F.3d 703 (8th Cir. 2008) : Affirming convictions for sexual exploitation of a minor and possession of visual depictions of a minor engaging in sexually explicit conduct, the Court held that evidence that the

defendant took sexually explicit photographs of another minor was admissible to show opportunity and plan and to disprove the defendant's claim that he produced the photographs to show a mutual and loving relationship.

[oo] Rule 404(b) -- Propensity Evidence

Hudson v. Dist. of Columbia, 558 F.3d 526 (D.C. Cir. 2009) : Reversing a judgment for an arrestee who sued for excessive force, the Court found it was error to admit evidence that the arresting officer had previously been disciplined for misconduct involving arrestees and then to allow the plaintiff's counsel to argue to the jury that the misconduct showed that the officer was a "bad cop" and would always be a bad cop. The Court concluded that "[t]he cumulative effect of the inadmissible evidence and the inflammatory argument based on it is precisely what Rule 404(b) prohibits: exhorting a jury to find against a defendant because he acted 'in conformity' with his bad acts -- here, a purported history of physical violence, improper use of force and filing false reports."

United States v. Williams, 585 F.3d 703 (2d Cir. 2009) : The Court reversed a conviction for felon firearm possession, holding it was an abuse of discretion to admit, as background evidence, the firearms, other weapons, drugs, and cash found in an apartment the day after the defendant's arrest. The Court reasoned that the government's case was "simple and complete": police responded to a 911 reported shooting, the defendant fled, an officer saw a gun in the defendant's pocket, and an officer found a gun near where the defendant had fled. The Court concluded that "the evidence more likely confused the jury than assisted its understanding of the case." It also rejected the argument that the evidence was relevant to prove opportunity and motive, as opportunity and motive were not put in issue at trial. Thus, the evidence tended only to prove the defendant's propensity to commit crime.

United States v. Ricardo, 472 F.3d 277 (5th Cir. 2006) : Affirming marijuana-related convictions, the Court held it was plain error (but no violation of substantial rights) to admit a video recording of the traffic stop of two defendants, which recorded the statements of a dispatch officer telling the officers who stopped the vehicle that each defendant had prior criminal charges. The evidence of prior criminal charges was relevant only to the defendants' character.

United States v. Newsom, 452 F.3d 593 (6th Cir. 2006) : In a felon firearm possession prosecution, the Court held it was an abuse of discretion (but harmless error) to admit evidence of the defendant's firearm-related tattoos. The government argued that the evidence was properly admitted for the non-character purpose of challenging a witness's testimony that she had never seen the defendant with a firearm. But the Court noted that the witness's knowledge of pictures of firearms on the defendant "presents a completely different issue than whether Craig had ever seen Newsom possess an *actual* firearm. Even if Newsom had a pistol tattooed on his forehead and Craig admitted that she had seen it, that does not make Craig's testimony that she had never seen Newsom with a firearm more or less believable." Thus, the tattoo evidence was nothing more than proof that the defendant had a propensity to possess firearms.

United States v. Simpson, 479 F.3d 492 (7th Cir. 2007) : The Court reversed a conviction for a single delivery of crack cocaine because the Judge had allowed evidence of prior unrelated crack cocaine transactions and had permitted the prosecutor to argue in closing that the defendant had admitted to officers that he had done so many cocaine transactions that he didn't even remember doing the one for which he was charged. The evidence and argument "improperly appealed to Simpson's propensity to deal drugs." The Court rejected the argument that the uncharged cocaine transactions were admissible to prove identity, because there was not a "singularly strong resemblance" between the uncharged transactions and the transaction charged; evidence of uncharged misconduct does not become admissible to prove identity simply because the defendant disputes identity.

United States v. Johnson, 439 F.3d 884 (8th Cir. 2006) : The Court reversed a conviction for possession of child pornography because evidence that the defendant possessed printed stories about rapes of young girls was erroneously admitted. The evidence that he had a particular "type of interest" simply showed he had a propensity, "predisposition," or "inherent tendency" (as the Trial Judge had said) to possess child pornography and to commit the crimes charged, which is impermissible under *Rule 404(b)*. The evidence had no tendency to show that he knew that the computer files

he downloaded contained prohibited material or any tendency to rebut his contention that he inadvertently downloaded the images while searching for legitimate online material.

United States v. Commanche, 577 F.3d 1261 (10th Cir. 2009) : The Court reversed a conviction for assault with intent to do bodily harm arising from a fight in which the defendant, who claimed self-defense, used a box cutter. The Court held it was error to admit evidence that the defendant had twice been convicted of aggravated battery after altercations in which he brandished sharp cutting instruments, concluding that this case was one in which "bad act evidence bears on a permissible purpose only if a jury first concludes that the defendant likely acted in conformity with a particular character trait," because "a prior assault or battery conviction is immaterial to a self defense claim in a separate incident except to suggest conformity" and "the details of Commanche's prior aggravated battery convictions demonstrate nothing about his intent; they simply show that he is violent."

[pp] Rule 404(b) -- Purposes for Admission To Be Specified

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : In the prosecution of a check fraud scheme, the government introduced excerpts from a book the defendant had written that detailed a virtually identical scheme. Affirming, the Court held there was no abuse of discretion in admitting the evidence as proof of the defendant's intent. However, it was plain error to give a limiting instruction that the evidence could be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," because there was no issue concerning motive, opportunity, or identity. The error was harmless, however, because the other listed purposes overlapped with intent, there was no showing that consideration of the book permitted any unfair inferences concerning identity, motive, or opportunity, and the instruction carefully addressed avoiding the propensity inference.

United States v. Edwards, 540 F.3d 1156 (10th Cir. 2008) : Affirming a conviction for possession of various drugs with intent to distribute, the Court held it was an abuse of discretion (but harmless error) to admit evidence that the defendant had previously been convicted after small, personal-user amounts of drugs were discovered in his vehicle during traffic stops. The government had argued only that the evidence was admissible to prove the purposes specified in Rule 404(b), the Judge had not required the prosecutor to clarify how the evidence was relevant for these purported purposes, and on appeal the government had "again assert[ed] with little explanation that the evidence was obviously relevant for all of these purposes." Reviewing each of the purposes, the Court concluded that the defendant's prior drug possession was not relevant in this distribution case. In *United States v. Avalos, 506 F.3d 972 (10th Cir. 2007) , vacated for reconsideration of sentencing, 129 S. Ct. 993 (2009)* , a prosecution for methamphetamine offenses, the Trial Judge admitted the defendant's statement to a DEA agent that he had sold drugs on another occasion but could not remember the specific deal, but the Judge did not indicate, and the government did not articulate, the reason for admitting the evidence of uncharged misconduct. The Court rejected the government's argument that no Rule 404(b) analysis is required when the defendant admits a prior act: "To the contrary, an admission that falls within the scope of Rule 404(b) must be separately analyzed under that rule." The error was harmless, however.

[qq] Rule 404(b) -- Rebuttal Evidence

[ii] Rule 404(b) -- Rebuttal Evidence -- Contradiction

[A] Rule 404(b) -- Assault, etc., Cases

United States v. Steele, 550 F.3d 693 (8th Cir. 2008) : The Court affirmed a conviction for assault on a federal officer and assault with a dangerous weapon, finding no abuse of discretion in the admission of evidence that the defendant had previously been convicted for assault with a dangerous weapon and had previously resisted arrest. The Court held that the evidence was relevant to whether the officer used lawful force to arrest the defendant, and whether the defendant was acting reasonably in self-defense, as he claimed, and that it could affirm the decision to admit the evidence on this ground "even if the government did not fully develop such a theory at trial."

[C] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Drug Cases

United States v. Mejia, 600 F.3d 12 (1st Cir. 2010) : The Court affirmed a conviction for conspiracy to distribute cocaine, finding no abuse of discretion in the admission of drug ledgers apparently in the defendant's handwriting, as the evidence tended to rebut his central defense that he was "merely present" at a drug deal and otherwise uninvolved in the charged conspiracy.

[F] Rule 404(b) -- Rebuttal Evidence -- Contradiction -- Miscellaneous Cases

United States v. Lombardozzi, 491 F.3d 61 (2d Cir. 2007) : Affirming a loansharking conviction, the Court found no abuse of discretion in admitting the testimony of two witnesses as to prior extortionate loans. The defendant attempted to distance himself from a coconspirator and claim that he was not involved in the loans to the victim in the instant case, and the testimony regarding prior loans rebutted his claim by demonstrating the defendant's connection to the coconspirator.

United States v. Cox, 577 F.3d 833 (7th Cir. 2009) : The Court affirmed convictions for prostitution offenses, finding no abuse of discretion in admitting evidence of credit card fraud offenses to which the defendant pled guilty. Since Cox's theory of the defense was that he had little money, "which he apparently thought indicated that he could not be a pimp," evidence of credit card fraud "was essential for the Government both to rebut Cox's defense and to buttress its theory that Cox was a pimp who hosted hotel 'parties' for the purpose of prostitution."

United States v. Pierson, 544 F.3d 933 (8th Cir. 2008) : The Court affirmed a conviction for attempted production of child pornography and attempting to induce a child to engage in criminal sexual activity, finding no abuse of discretion when the government was permitted to cross-examine the defendant as to his 20-year-old prior conviction for indecent contact with a child. It found that the defendant opened the door to the cross-examination by testifying on direct examination that he had never acted on sexual attraction to young girls.

[iii] Rule 404(b) -- Rebuttal Evidence -- Cross-Examination by Accused Opening the Door to Rebuttal

United States v. Eagle Bear, 507 F.3d 688 (8th Cir. 2007) : The Court affirmed convictions for burglary, assault with a dangerous weapon, and assault by striking, beating, or wounding. The assault with a dangerous weapon count arose from an incident involving the defendant's girlfriend that occurred in South Dakota. The defendant had assaulted her six days later in California and pleaded guilty to the assault there. The Trial Judge originally ruled that the California incident was more prejudicial than probative, but when the girlfriend testified defense counsel asked why she had waited several days to report the South Dakota beating. Testimony regarding the California beating was then admitted so that the girlfriend could explain that the second beating prompted her to reveal the earlier beating. The Court held there was no abuse of discretion in allowing the government to rehabilitate the girlfriend's credibility with the evidence.

[rr] Rule 404(b) -- Relationship to Other Rules

[i] Rule 404(b) -- Miscellaneous Rules

United States v. Morgan, 505 F.3d 332 (5th Cir. 2007) : The Court affirmed a conviction for Medicare fraud, finding no abuse of discretion in admitting evidence that the defendant had violated conditions of her pretrial release by opening a bank account in her daughter's name. The Court noted that the evidence of dishonest conduct was sufficient to impeach the defendant's testimony, but that Rule 608(b) does not permit extrinsic evidence of specific instance of misconduct solely to impeach. However, here the evidence was also probative of the defendant's intent and knowledge in committing the charged fraud, so the evidence was admissible under Rule 404(b).

[rr.1] Rule 404(b) -- Relevant to Sentencing

United States v. Whorley, 550 F.3d 326 (4th Cir. 2008) : The Court affirmed a conviction for knowingly receiving material depicting minors engaging in sexually explicit conduct and knowingly sending or receiving obscene e-mails. It held that evidence of the defendant's prior conviction for child pornography and the terms of his probation, which prohibited him from possessing pornography, was admissible to establish that he received the charged images knowingly and not by mistake, and also to prove that he was previously convicted and subject to enhanced sentences.

[ss] Rule 404(b) -- Remoteness

United States v. Arnold, 467 F.3d 880 (5th Cir. 2006) : The Court affirmed convictions for drug and firearm offenses, finding no abuse of discretion in the admission of evidence of the defendant's nine-year-old conviction for drug possession. The conviction was relevant to show the defendant's knowledge and intent and to prove constructive possession of the drugs and weapon found at a residence rented to him. Stating that "the amount of time that has passed since the previous conviction is not determinative," the Court noted that it had "upheld the admission of *Rule 404(b)* evidence where the time period in between was as long as 15 and 18 years."

United States v. Millbrook, 553 F.3d 1057 (7th Cir. 2009) : The Court affirmed a conviction for possession of crack with intent to distribute, finding no abuse of discretion in the admission of the defendant's 12-year-old conviction for delivery of a controlled substance. The evidence was relevant to the issue of the defendant's intent and, although the temporal gap diminished the probative value of the prior sale, it was not fatal to admissibility when the defendant had spent much of the intervening time incarcerated.

United States v. Trogdon, 575 F.3d 762 (8th Cir. 2009) : The Court found no abuse of discretion in the admission of an 11-year-old conviction for virtually identical drug activity to prove knowledge and intent. In *United States v. Myers, 503 F.3d 676 (8th Cir. 2007)* , the Court affirmed a prisoner's conviction for mailing threatening communications, finding no error in the admission of evidence that the defendant mailed new threatening letters during the litigation, a year later. The evidence tended to rebut the contention that the charged letters had been mailed by prison officials without the defendant's consent and the one-year gap did not destroy its probative value. In *United States v. Edelmann, 458 F.3d 791 (8th Cir. 2006)* , the Court affirmed a fraud conviction, finding no error in the admission of evidence that the defendant had previously been convicted of fraud. Although the three prior convictions were approximately 15 years old, they were not too remote in time because they involved conduct similar to the crime charged. In *United States v. Cook, 454 F.3d 938 (8th Cir. 2006)* , cocaine distribution case, the Trial Judge granted the defendant's motion *in limine* to exclude evidence of four prior drug convictions. The Court affirmed the ruling on interlocutory appeal. One conviction, for marijuana possession, was functionally dissimilar to the charged offense and six years remote, so there was no abuse of discretion in concluding that its "very minimal probative value was substantially outweighed by the danger of unfair prejudice." The other convictions, for distribution offenses, were relevant to material issues such as knowledge and intent and not so remote as to be inadmissible on that ground. However, the government wanted to introduce police reports and testimony related to those convictions in order to bolster testimony regarding "hand-to-hand transactions" that led to issuance of the search warrant in this case. Thus, the evidence "presented the prospect of mini-trials over the events underlying three prior convictions for five relatively remote drug transactions, all for the purpose of bolstering *background* evidence in this case." The Court concluded that "[t]his posed a substantial risk of distracting the jury from its central task of determining whether it was Cook who possessed the distribution quantity of crack cocaine found on the night stand," so exclusion was not an abuse of discretion, especially when the government moved for admission of the four prior convictions on an "all or nothing" basis.

United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006) : The Court affirmed a conviction for aggravated carjacking, finding no abuse of discretion in the admission of evidence from a 1991 car stop and 1991 burglaries. The evidence tended to show an intent to murder as well as rob, and it was not too remote, particularly because the defendant was incarcerated most of the ten-year period between the prior and charged crimes and because the charged crime was committed approximately six weeks after his release from prison.

[tt] Rule 404(b) -- Stipulations -- Criminal Cases

[ii] Rule 404(b) -- Stipulations -- Criminal Cases -- Intent

United States v. Dorsey, 523 F.3d 878 (8th Cir. 2008) : Affirming a conviction for possession with intent to distribute heroin, the Court noted that the defendant claimed that drugs were planted on him, and found no abuse of discretion in the admission of evidence that the defendant had been convicted of possession of heroin and other drugs. Although the defendant offered to stipulate to intent if the jury found that he possessed heroin, the Court found that the evidence was probative of whether the drugs had been planted and the defendant knew and intended to possess them. In *United States v. Walker, 428 F.3d 1165 (8th Cir. 2005)* , the court affirmed a conviction for felon firearm possession and possession of an unregistered firearm arising out of an arson incident, and held that there was no error in admitting evidence of the defendant's 1994 felony conviction for making terrorist threats against the same victim, despite his offer to stipulate to the conviction. While the stipulation would have been sufficient on the felon firearm possession count, the conviction also had probative value as to the defendant's intent and was not unduly prejudicial on the other count, even though he did not actively contest motive or intent.

[ii.1] Rule 404(b) -- Stipulations -- Criminal Cases -- Knowledge

United States v. Phillippi, 442 F.3d 1061 (7th Cir. 2006) : The Court affirmed a conviction for making false statements in a firearms application, finding no abuse of discretion in the admission of evidence of multiple felony charges pending against the defendant. Although the defendant offered to stipulate to one pending charge, the government was entitled to produce all its evidence that tended to prove not simply the defendant's status but also his knowledge that made his statements in the application knowingly false.

[uu] Rule 404(b) -- Subsequent Acts

[iii] Rule 404(b) -- Subsequent Acts -- Knowledge

United States v. Rutkoske, 506 F.3d 170 (2d Cir. 2007) : Affirming convictions for securities fraud, the Court found no abuse of discretion in admitting the defendant's statement to an associate, four years after the charged conspiracy, about his desire to push up the stock price in a company that he owned. The Court concluded that the charged scheme and the later statement displayed efforts to manipulate a thinly traded stock in a certain manner and that the defendant's understanding of the later scheme made it more likely that he understood aspects of the charged scheme.

United States v. Thomas, 593 F.3d 752 (8th Cir. 2010) : The Court affirmed crack cocaine convictions, finding no error in admitting evidence of the defendant's participation in crack cocaine transactions four years after the charged crimes. The later transactions were extremely similar to those charged and were probative of knowledge and intent. The Court noted that "[t]he terms of Rule 404(b) draw no distinction between prior and subsequent acts that would support different analyses, nor have we applied different analyses to evaluate the admission of prior and subsequent acts."

United States v. Mares, 441 F.3d 1152 (10th Cir. 2006) : The defendant was found with marijuana hidden in her gas tank at a Border Patrol checkpoint. Affirming her conviction, the Court found no error in admitting evidence that, while awaiting trial on the charges, she was once again found with marijuana stashed in her gas tank at a different Border Patrol checkpoint. The subsequent act rebutted her defense of lack of knowledge, "because it shows conduct bearing the same hallmarks of the earlier border crossing: the drugs were smuggled in the same secretive way, in both cases she claimed to be borrowing a car for which no registration was available, she had a prepared cover story regarding her plans in the United States, and finally in both cases she claimed Alejandro Dominguez was the mastermind." As such, the evidence was properly admitted for a purpose other than character, and its probative value was not substantially outweighed by the risk of the jury drawing a propensity inference.

[iv] Rule 404(b) -- Subsequent Acts -- Miscellaneous Cases

United States v. Savage, 505 F.3d 754 (7th Cir. 2007) : The defendant, charged with crack cocaine distribution, sought to offer threatening letters sent to him by his codefendant after the date of the drug purchase as evidence that he had been coerced into committing the offense. Affirming, the Court found no abuse of discretion in excluding the letters. "The threats occurred well after the drug deal, which, though not a dispositive factor, lessens the probative value of the letters." More importantly, because the threats were made at a time when the defendant was cooperating with the government against his codefendant, the jury may have been confused whether the codefendant was coercing the defendant to do the drug deal or to end the cooperation. In *United States v. James, 464 F.3d 699 (7th Cir. 2006)* , a prosecution for drug and firearm offenses, evidence of other acts was admitted on the government's mistaken representation that they occurred only a few days after the charged crimes and were "intricately related" thereto. In fact, the other acts took place a month later, but the defendant did not object to the admission of the evidence on *Rule 404(b)* grounds until the appeal. Affirming, the Court held that it was error to admit the evidence, since the story of the crime was complete on the date of its occurrence, the subsequent acts did nothing to explain the circumstances of the charged offenses nor to prove any element of the charged conduct, and the only link between the later acts and the charged offenses was propensity. However, the error was not "plain error," as required when no timely objection was made, because the defendant could not demonstrate that the outcome probably would have been different without the error.

[v] Rule 404(b) -- Subsequent Acts -- *Modus Operandi*

United States v. Perry, 438 F.3d 642 (6th Cir. 2006) : Affirming a conviction for armed bank robbery, the Court held there was no abuse of discretion in admitting evidence that the defendant subsequently robbed a bank, having similarly entered carrying a gun in a bookbag, seeking change for $50, seeking to purchase money orders, and only then displaying the gun. The evidence was sufficiently distinctive to show the perpetrator of the charged crime and it was not sufficiently prejudicial to render it inadmissible.

[zz] Rule 404(b) -- Use by Accused

[i.1] Rule 404(b) -- Use by Accused -- Bad Acts by Codefendant

United States v. Bistrup, 449 F.3d 873 (8th Cir. 2006) : A husband and wife were convicted of a fraud scheme. The wife's defense was that she was an unwitting participant, and she sought to introduce evidence of her husband's extramarital affair, in support of her defense that her husband had concealed information from her concerning the fraudulent nature of the transactions. But the Court found no error, reasoning that the wife was asking for a propensity inference: because the husband concealed his affair, he also concealed information about the fraud.

[ii] Rule 404(b) -- Use by Accused -- Bad Acts by Prosecution Witness

United States v. Myers, 589 F.3d 117 (4th Cir. 2009) : The Court affirmed cocaine convictions, finding no error in the exclusion of "reverse 404(b) evidence" that a drug informant had a number of drug sources and so could readily have purchased cocaine from someone other than the defendant. The Court noted that the jury had already received evidence that the informant was a convicted drug felon and had access to drugs in the area where the charged transaction occurred.

United States v. Lynch, 437 F.3d 902 (9th Cir. 2006) : Affirming Hobbs Act and related convictions, the Court found no error in excluding evidence that a cooperating government witness had committed prior acts of threats and violence. This evidence was offered solely to prove propensity. The Court noted that the acts at issue were not known to the defendant, and therefore were not probative to show that the defendant was fearful of the witness and so stayed with him after a murder.

[iii] Rule 404(b) -- Use by Accused -- Bad Acts by Third Party

United States v. Williams, 458 F.3d 312 (3d Cir. 2006) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in excluding evidence that another person present when a weapon was found near the defendant had recently been convicted for felon firearm possession. Here, the evidence had no tendency to show anything except the other person's propensity, which is not allowed.

United States v. Savage, 505 F.3d 754 (7th Cir. 2007) : The defendant, charged with crack cocaine distribution, sought to offer threatening letters sent to him by his codefendant after the date of the drug purchase as evidence that he had been coerced into committing the offense. Affirming, the Court found no abuse of discretion in excluding the letters. "The threats occurred well after the drug deal, which, though not a dispositive factor, lessens the probative value of the letters." More importantly, because the threats were made at a time when the defendant was cooperating with the government against his codefendant, the jury may have been confused whether the codefendant was coercing the defendant to do the drug deal or to end the cooperation. In *United States v. Murray, 474 F.3d 938 (7th Cir. 2007)* , a prosecution for participating in a drug conspiracy in which a gun was used and a death resulted from that use, the defendant contended that a coconspirator actually fired the fatal shot, and offered proof that on another occasion that coconspirator killed a person who stole drugs. Affirming, the Court found that this evidence of the prior killing was properly excluded, because fatal violence was not a distinctive method of resolving drug disputes, and the manner of and reasons for the two killings were different. The Court noted that "unless the other crime and the present crime are sufficiently alike to make it likely that the same person committed both crimes, so that if the defendant did not commit the other crime he probably did not commit this one, the evidence will flunk *Rule 403*'s test."

United States v. Mock, 523 F.3d 1299 (11th Cir. 2008) : The Court affirmed convictions for arson, finding no abuse of discretion when evidence of two unrelated fires, which the defendant sought to offer to prove that someone else committed the charged crimes, was excluded. Neither of the other fires was set in the stairwell of an occupied building, which was a common feature of the charged crimes. Thus, the Court found that the Trial Judge could have properly found the evidence to be "irrelevant." We note that the evidence was probably relevant under the definition of Rule 401, because it at least tended to prove that someone else might have committed the crime charged; a better ruling would be that the evidence was properly excluded under Rule 403.

[zz.1] Rule 404(b) -- Voice Identification

United States v. Eckhardt, 466 F.3d 938 (11th Cir. 2006) : Affirming a conviction for making annoying, abusive, harassing, or threatening telephone calls in violation of the Communications Decency Act, the Court found no error in the admission of tape recordings of telephone calls that the defendant made during a period not relevant to the crime charged. The recordings of the uncharged telephone calls to the same victim were properly admitted under *Rule 404(b)* because the defendant denied making the charged calls, and the recorded calls were relevant "in identifying his voice."

[aaa] Rule 404(b) -- Witness' Credibility

United States v. Gilmore, 553 F.3d 266 (3d Cir. 2009) : Affirming crack cocaine convictions, the Court found no error in the admission of prior conviction evidence to impeach the defendant's testimony that he "never" sold drugs. While Rule 404(b) prohibits evidence of prior crimes to prove character, it does not "bar the use of such evidence for other purposes," including impeachment. The Court noted that there was a risk of unfair prejudice under Rule 403 but found that the Judge limited this risk by allowing the government to enter the certified convictions only if the defendant denied the prior convictions and by instructing the jury that the conviction could only be considered for credibility purposes.

United States v. Culver, 598 F.3d 740 (11th Cir. 2010) : The Court affirmed a conviction for producing child pornography, finding no abuse of discretion in the admission of evidence that on another occasion the defendant had drugged and attempted to drug the victim with Valium, Xanax, and Ambien and when she awakened from the shock of a stun gun on her upper back the defendant was in her bed. The evidence was relevant to overcoming any doubt

generated by the victim's inability to remember the events in question and because of the overall similarity between the evidence and acts depicted in one of the items of pornography.

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[4.1] 2006 Amendment Committee Note [Go To Main]

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982)* ("when a central issue in a case is close to one of a criminal nature, the exceptions to the *Rule 404(a)* ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp., 966 F.Supp. 203 (S.D.N.Y. 1997)* (relying on the terms "accused" and "prosecution" in *Rule 404(a)* to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co., 576 F.Supp. 627, 629-30 (D. Ky.1984)* ("It seems beyond peradventure of doubt that the drafters of *F.R.Evi. 404(a)* explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States, 335 U.S. 469, 476 (1948)* ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). *See also* Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U.Pa.L.Rev. 845, 855 (1982)* (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under *Rule 404(a)(2)* may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of *Rule 412*.

Nothing in the amendment is intended to affect the scope of *Rule 404(b)*. While *Rule 404(b)* refers to the "accused," the "prosecution" and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of *Rule 404(b)* remain fully applicable to both civil and criminal cases.

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405.04 Legislative History

[1] Advisory Committee's Note

[2] 1987 Amendment Committee Note

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the House and Senate Conferees

[6] Citations to Hearings and Debates

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405.01 Official Text

Rule 405. Methods of Proving Character

(a) *Reputation or opinion*. -- In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. -- In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

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405.02 Editorial Explanatory Comment

[1] Different Uses of Character Evidence

The Editorial Explanatory Comment accompanying *Rule 404* discussed two different uses of character evidence. In some cases, character is itself in issue, in the sense that a person's character is an element of a claim, charge, or defense; in these cases, character evidence is necessary if an issue is to be correctly decided. In other cases, a proponent seeks to introduce character evidence as circumstantial proof of conduct on a particular occasion; this use of character evidence is generally barred. An exception to this rule of exclusion is that the defendant is given the right to open an inquiry into character in a criminal action. Also, special provision is made in cases of sexual abuse (see Rules 412-415), and character evidence may be used to impeach or support the credibility of a witness (a matter governed by Rules 607, 608, and 609). *Rule 404* deals only with the circumstantial use of character evidence, while *Rule 405* is not so limited. *Rule 405* deals with the proper form of character evidence, assuming that it is admissible.

[2] Reputation Evidence

The Rule provides that when evidence of a character trait is admissible, reputation evidence is one permissible means of proof. Reputation evidence is usually presented by calling a witness to the stand who is familiar with the reputation of the person whose character is to be proved, and asking the witness to state what the reputation is in the person's community. The foundation for such testimony comes in the form of establishing that the witness has sufficient familiarity with the people in the community so that the witness can make a valid attempt at assessing reputation. n1

Courts have permitted testimony as to the person's reputation where that person works or commonly associates, as well as where the person lives. The Federal Rule does not indicate the scope of reputation evidence, nor does it define "community." Generally, Courts have developed the law of reputation testimony much as they were doing prior to the adoption of the Rules. n2 Common-law requirements as to requisite experience in the community and knowledge of community talk have been carried forward. Hearsay exceptions found in *Rule 803(19)* and *(21)* suggest that associates in a community are qualified to give reputation evidence.

[3] Opinion Evidence

The provision of *Rule 405(a)* permitting opinion evidence spawned great controversy. Opinion evidence was generally not permitted in common-law jurisdictions, and the House Committee on the Judiciary deleted the language about the admissibility of opinion evidence of character in its proposed draft of the Rules. The Committee indicated its concern that opinion testimony might turn a trial into a swearing contest between conflicting character witnesses. However, during House debate the Advisory Committee's language was reinstated, and the Senate concurred in the reinstatement. The Rule now permits the use of opinion evidence to prove character. As with reputation witnesses, a foundation must be laid for opinion witnesses; the proponent must establish that the witness is sufficiently familiar with the person whose character is being proved. n3

Most commentators applaud the inclusion of opinion as a proper means of proving character. We are less sanguine about the benefits of this expansion of the common law, because we fear that many people who harbor grudges against litigants may too freely express negative opinions as to character. Cross-examination demonstrating bias may be some protection, but is it sufficient? There is no way to know for sure. We are also a little concerned about the ability of some influential citizens to command "popular" character witnesses to offer favorable opinions that will be perhaps unduly influential with a jury. The common-law rule may have been a little bit wooden and a rather imperfect screen against opinion, n4 but it did symbolize a general distrust of character evidence and a specific distrust of personalized character evidence that we may well seek to reconsider in the future.

Another cause for concern exists: Is it wise to expand the scope of opinion evidence to cover psychiatric opinion and other expert opinion, as the last two sentences of the Advisory Committee's Note state that this Rule does? Arguably, the answer is "yes," because such evidence is more meaningful than lay opinion evidence. On the other hand, character evidence is suspect because it threatens to turn trials away from an inquiry into the facts and toward an inquiry into the moral worth of individuals. Expert character testimony seems likely to accentuate that threat. Nonetheless, the Rule contemplates the use of experts as character witnesses, and some Courts have so applied the Rule. n5 Of course, the proffered expert testimony must satisfy the standards for expert witnesses set forth in Rules 702 through 704, n6 as well as the standards of *Rule 403*. n7

[4] Specific Acts Evidence

Where character is "in issue," it may be proved by specific acts indicating the character trait. However, if evidence of character is offered circumstantially to prove propensity, it may be directly proved only through reputation or opinion. Proof by way of specific acts is not permitted. n8 Thus, in a fraud case, a character witness can testify that the witness knows the defendant to be an honest person, and that the defendant has a reputation in the community for honesty. But the witness cannot testify that the defendant returned a wallet full of money to a person who had dropped it on the street. Specific acts are admissible to prove character only when character is an element of the claim, charge, or defense. n9

In some sense it is odd that a character trait can be proven by reputation or opinion and not by specific acts. Most people would probably say that what a person actually did is a better indication of that person's character trait than what other people think of the person. However, the Advisory Committee was concerned, and properly so, that proof of specific acts would be very time-consuming, might inflame the jury in some circumstances, and might distract the jury from the issues in dispute. n10

It must be noted, however, that counsel can inquire into relevant specific acts while cross-examining character witnesses. The Rule permits inquiry into specific acts in order to test the knowledge and, thus, the qualification and credibility of the character witness. n11 For example, a character witness who testifies to the defendant's good reputation for peaceableness may be asked: "Have you heard that the defendant committed a murder three years ago?" If the witness has not heard of it, then an implication is created that the witness is not sufficiently qualified to attest to the defendant's reputation in the community. If the witness has heard about the specific act, and still testifies to the defendant's good reputation in the community, then an implication is created that the community itself is suspect, or that

the witness is lying about the good reputation. n12 Similarly, if the witness expresses the opinion that the defendant is a peaceloving person, the witness can be asked whether the witness knows about a previous murder committed by the defendant. If the witness did not know about it, then the basis for the opinion is suspect. If the witness did know about it, and yet still had a favorable opinion about the defendant, then the witness is suspect. n13

While ostensibly the Rule permits the use of specific acts only to test character witnesses, the cross-examination permitted by the Rule can be a powerful prosecution weapon in a criminal case, allowing the jury to consider specific bad acts that might not otherwise have been admissible. n14

Defense counsel may wish to note, however, that sometimes the damage done on cross-examination may be repaired on redirect. For example, if a reputation witness is asked whether the witness had heard "that the defendant had previously been charged with an assault," defense counsel may, if the facts support it, ask the character witness: "Have you also heard that charges were dropped against the defendant for lack of evidence?" n15

[5] Good Faith Proof of Specific Acts

While a party may cross-examine a character witness with relevant specific acts, the party may not offer proof that these acts occurred, if the only purpose is to test the character witness. Subdivision (a) of the Rule provides that "inquiry is allowable" into relevant specific instances of conduct. This language does not permit extrinsic proof of the conduct. The rationale is that the probative value of proof of such a collateral matter is substantially outweighed by the risk of prejudice, confusion, and delay. After all, the bad act is only probative in these circumstances to test the character witness. It is not worth it, under the circumstances, to prove to the jury that the act really occurred.

Nonetheless, counsel must have some proof in hand that the act occurred, before the act can be used to test the witness on cross-examination. There would be an obvious risk of abuse if a party were permitted to inquire about specific acts with no proof at all that the acts even occurred. Consequently, Courts have required that the "alleged bad act must have a good faith basis in fact." n16 Upon request by the opposing party, the Trial Judge should require the cross-examiner to lay a foundation out of the presence of the jury before asking the character witness about specific acts. n17

The "good faith basis" test is not a strenuous one; it does not require that proof of the specific act be admissible under the rules of evidence, for the obvious reason that the act is not being admitted as a fact. Consequently, the good faith basis test has often been met through hearsay statements of law enforcement officers implicating the defendant in criminal activity. n18 Still, it is clear that such questions cannot be asked if there is no proof at all that the act occurred. n19

[6] Specific Acts Must Be Relevant To Test the Character Witness

The Court in *United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996)* , encountered an interesting problem in the operation of *Rule 405*: a bad act offered to test the witness that was not relevant for that purpose. Monteleone was convicted for disposing of a firearm to a convicted felon. At the trial, the defendant called a character witness who testified that Monteleone had a good reputation in the community for truthfulness and lawfulness. During cross-examination, over defense objections, the prosecutor asked whether the witness had heard that Monteleone had lied under oath when testifying before a federal grand jury twenty-five years earlier.

The Court of Appeals held it was reversible error to permit this question to be asked. The government in *Monteleone* argued that there was good faith proof that Monteleone perjured himself, and his act of perjury was obviously relevant to the character trait of truthfulness attested to by the witness. However, the Court found a fundamental flaw in the government's argument. The only legitimate reason for inquiring into specific acts on cross-examination of a character witness is to test the knowledge and credibility of the witness. Therefore, the prosecution must not only have a good faith belief that the specific acts occurred. It must also have a good faith belief that the specific acts are of the type that

the witness should have known about (if the witness is an opinion witness) or that the community should have known about (if the witness is a reputation witness). Thus, if the specific acts are essentially private in nature, they "cannot possibly be intended to test the accuracy, reliability, or credibility" of the character witness.

Applying these principles to Monteleone's perjury before the grand jury, the Court held that the prosecution lacked a good faith basis for believing that the act was of such a type as to be known by the witness or by the community. The Court noted that grand jury testimony is protected by an obligation of secrecy, and that the only person who could have disclosed the perjury legitimately would have been Monteleone himself. The Court doubted that Monteleone would "blazon his own prevarication." Obviously, the result in the case would have been different if Monteleone had been *convicted* of perjuring himself before the grand jury, because the conviction would be a public matter that the character witness could be expected to know about.

[7] Permissible Form of Questions on Cross-Examination

Ostensibly, a witness who gives an opinion, rather than testimony as to the person's reputation, is testifying to what he knows about the person, rather than what he has heard. However, it is not as clear as the Advisory Committee suggests that the "have you heard" question is inappropriate for opinion character witnesses. What a witness has heard about the defendant (or the victim) is probably relevant to the witness' opinion. Thus, the questioner should in most cases be permitted to ask an opinion witness either a "do you know" or a "have you heard" question, or both. n20 Likewise, since testimony as to reputation is often thinly disguised opinion testimony, and since one's knowledge of reputation may be affected by specific acts that one has heard about, the Trial Court should be flexible in permitting the use of "do you know" questions on cross-examination of reputation witnesses. n21

[8] Relationship to Rule 607

One of the confusing aspects of the Rules is their loose use of the words "impeachment" and "cross-examination." *Rule 607* provides that any party can attack the credibility of any witness. However, *Rules 405(a)* and 608(b)(2) only provide for an inquiry into specific instances of conduct on the *cross-examination* of a character witness -- i.e., a witness testifying as to the character of a defendant or a victim. It is sensible to distinguish between the impeachment needs on direct and cross-examination of character witnesses. The cross-examiner needs to and is entitled to probe the knowledge of the witness by asking about specific events. In contrast, the direct examiner is barred from such an inquiry lest "impeachment" of one's own witness becomes an excuse for using specific acts instead of the required reputation or opinion evidence to prove character. Because the direct examiner usually has a choice of character witnesses, this form of "testing" the witness is seldom if ever necessary during direct examination.

[9] Character in Issue

When a character trait is an essential element of one party's case, greater freedom to inquire into specific instances of conduct is permitted by subdivision (b). n22 The rationale is that substantive law has recognized the trait as important and the most probative evidence should be utilized. In some rare instances, proof of specific acts may not merely be permitted, but it may even be required -- e.g., to prove the incompetence of an employee in a negligent entrustment case. Special proof requirements find their roots in the underlying substantive law.

A complicated question of whether character is "in issue" arises when a criminal defendant puts forth an entrapment defense. An entrapment defense puts the defendant's predisposition "in issue," and so the question is whether "predisposition" is interchangeable with "character." Most authorities treat "predisposition" and "character" as equivalent terms. n23 But assuming this equivalence, an entrapment defense may or may not present an issue of whether the defendant possessed a certain kind of character: If the government seeks to rebut the defense by showing the defendant's predisposition (i.e., character), the parties should be able to offer specific act evidence under *Rule 405*. On the other hand, if the government only denies that the allegedly entrapping events took place, predisposition is not in

dispute and specific act evidence should be inadmissible on simple grounds of relevance. Probably, a judicious use of *Rule 403* will be necessary to balance the government's right to prove predisposition when the defendant claims entrapment against the danger of prejudice that accounts for *Rule 404(b)*. n24

[10] Jury Instructions

The Supreme Court recognized in *Michelson v. United States, 335 U.S. 469 (1948)* , that the evidence rules on character testimony are not as logical as one might wish them to be. It is reasonable for juries to wonder why they hear about reputation and opinion, but not about details to back up the more general testimony. Rarely are juries told the reason for the absence of specific evidence.

More troublesome is the occasional failure to give a jury instruction concerning the proper use of questions put on cross-examination to a character witness. If a cross-examiner asks a "have you heard" or "do you know" question and the witness answers "yes," there is not much to worry about. The "yes" answer will either be explained or the witness' testimony will be weakened by the force of the cross-examination. However, if the witness answers "no," what is the jury to do with the answer? The cross-examiner is not allowed to prove that the act asked about actually occurred. And if the witness denies hearing or knowing about it, how can the jury conclude that the witness' answer weakens testimony unless it knows that the act actually happened? Now, if some character witnesses answer "yes," while others answer "no," this may be helpful in assessing the credibility of those who respond in the negative. Still, a problem of prejudice and confusion remains when all of the witnesses answer "no" or where there is only one character witness. n25 Perhaps the demeanor of the witnesses in answering will be important, but it is also true that the question is not evidence.

To help jurors understand the character rules, the following instruction has been proposed for use in Alaska:

> Do not be surprised that these witnesses limit their testimony to reputation and opinion and do not describe the specific acts of the person that they know or have heard about. The law does not allow them to testify about the specific past actions of a person. It would take too long for us to consider all the good and bad things that a person may ever have done.
>
> However, a person who testifies about another's reputation or who gives his opinion about a witness' may be asked whether he has heard or knows specific things about the witness. If he answers "yes," he may be asked to explain how these things have affected the reputation or his opinion of the witness. If he answers "no," you may consider how this answer bears on what he has said, remembering that what is stated in a question is not evidence and should not be assumed to be true.

n26

[11] Relationship to Rule 403

Trial Judges must keep in mind that *Rule 403* governs the impeachment of character witnesses by introducing bad acts of the accused. There is no more reason to allow one party to obtain an unfair advantage through cross-examination than through direct examination.

An example of the need for *Rule 403* balancing is *United States v. Dawson, 556 F. Supp. 418 (E.D. Pa. 1982)* , where the Court held that the government properly asked one defendant's character witness whether he knew that the defendant had been convicted of murder, even though the conviction had been reversed on appeal. The Court reasoned that the witness could have been asked about bad acts resulting in an arrest not followed by a conviction, so therefore the witness also could be asked about a conviction that had been overturned. This reasoning fails to consider the prejudice that might arise from the mention of a conviction. One would expect character witnesses for the defendant to answer questions about the conviction by saying that it had little or no effect on reputation or opinion because it had been declared invalid. Such answers would suggest that the conviction has little probative value when used to impeach

the character witnesses. Its prejudicial effect on a jury might well be great however, since the jury may assume, no matter what instructions the Judge gives, that the defendant is a murderer who escaped on a technicality. The admissibility question is close. Defense counsel should seek an *in limine* ruling on the scope of cross-examination before offering character witnesses to testify on behalf of a defendant whose conviction has been reversed on appeal.

[12] Guilt-assuming Questions

The qualification and credibility of a witness who testifies to the defendant's good character can be tested by inquiring into the defendant's relevant specific acts. A more difficult question is whether the witness can be tested by an assumption of the defendant's guilt as to the crime charged. For example, in *United States v. Wilson, 983 F.2d 221 (11th Cir. 1993)* , the defendant was convicted of bank fraud and possessing and selling unauthorized credit card numbers. At trial, he admitted the sale of the numbers, but denied fraudulent intent. He called character witnesses who testified to their good opinion of his honesty and integrity. On cross-examination, the witnesses were asked whether their opinion would change if they knew that Wilson had sold credit card numbers to an undercover agent, which was the very offense for which he was being prosecuted. The Court found that these questions were proper.

Most Courts have found it to be impermissible to ask guilt-assuming hypothetical questions of any witnesses who have testified about the defendant's good character. n27 The rationale is that "[s]ince character evidence is admitted only as bearing upon guilt or innocence, an opinion based upon the assumption that the defendant is guilty cannot have any probative value in deciding that issue." n28 And, of course, the defendant is likely to suffer prejudice if guilt is assumed, albeit hypothetically, by the prosecution and by the defense witness. n29

In our view, the cross-examiner already has sufficient ways to examine character witnesses concerning things they have heard or know about the defendant. There is no reason to allow hypothetical questions to be based on the facts of the case being tried. Such a hypothetical is contrary to the presumption of innocence. n30

However, the limitation on guilt-assuming hypotheticals is only triggered if the question put to the character witness actually *presumes* guilt. The Court in *Wilson* held that the questions put by the prosecutor did not assume guilt because "the witnesses were asked about nothing more than Wilson already had admitted during his time on the stand: he sold credit card numbers to an undercover Secret Service agent." The question did not assume the issue that was in dispute, i.e., whether Wilson sold the credit cards with fraudulent intent. n31

[13] Relationship to Rule 412

It must be remembered that proof of sexual activity on the part of a rape victim is covered by *Rule 412*, and not by this Rule. *Rule 412* imposes far stricter limitations on proof of character than are imposed by Rules 404 and 405. See the Editorial Explanatory Comment to *Rule 412*, *§ 412.02[2]*.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Perry, 643 F.2d 38 (2d Cir. 1981)* (it was no error to exclude testimony by a private investigator as to the defendant's good reputation in the community, where the witness was "merely going to testify as to a few conversations he had with one of Perry's coworkers at the barbershop, with the minister of Perry's church, and with a laundry proprietor"; a character witness "must be able to demonstrate his own familiarity with the defendant's reputation and his competence to speak for the community").

(n2)Footnote 2. See, e.g., *United States v. Oliver, 492 F.2d 943, 946 (8th Cir. 1974)* ("courts have readily extended the concept of community to include the community in which one works, as well as where one lives").

(n3)Footnote 3. See, e.g., *United States v. Gil, 204 F.3d 1347 (11th Cir. 2000)* (no error in excluding the defendant's character witness; the witness knew the defendant's family, but he did not know the witness, and therefore he did not have an adequate basis for expressing an opinion about the defendant's character).

(n4)Footnote 4. See *Government of the Virgin Islands v. Petersen, 553 F.2d 324, 328 (3d Cir. 1977)* (*Rule 405* "reflects the reality that reputation evidence has been largely opinion in disguise").

(n5)Footnote 5. See, e.g., *United States v. Roberts, 887 F.2d 534 (5th Cir. 1989)* (Trial Court erred in excluding expert testimony that the defendant's naive and autocratic personality traits were consistent with his claimed activity as a self-appointed vigilante).

(n6)Footnote 6. See, e.g., *United States v. Webb, 625 F.2d 709 (5th Cir. 1980)* (expert testimony that the defendant was nonviolent was properly excluded as unhelpful, since such a character trait is a proper subject of lay, rather than expert, testimony).

(n7)Footnote 7. See, e.g., *United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982)* (Trial Court did not commit error in excluding proffered expert testimony that the defendant had a "personality configuration inconsistent with the outrageous and senseless murders of his family"; the testimony was properly excluded under *Rule 403*, since because it would be confusing to the jury, it was cumulative of testimony from lay witnesses, and it would foster a battle of the experts).

(n8)Footnote 8. See, e.g., *United States v. Talamante, 981 F.2d 1153 (10th Cir. 1992)* (in a self-defense case, the defendant could not offer specific acts to prove the victim's character trait for aggressiveness; the victim's character was not "in issue" as it was not an element of the crime or defense, and where character is not in issue, it can only be proved through reputation and opinion evidence)); *United States v. Camejo, 929 F.2d 610 (11th Cir. 1991)* (specific acts of good conduct cannot be introduced by positive character witnesses); *United States v. Hill, 40 F.3d 164 (3d Cir. 1994)* ("[a]ssuming law abidingness was a pertinent character trait ... the proper method of proof would have been by reputation or opinion testimony").

(n9)Footnote 9. See, e.g., *United States v. Keiser, 57 F.3d 847 (9th Cir. 1995)* (Trial Judge properly excluded specific act evidence of the victim's character, offered by the defendant to show that he was responding to an attack by the victim; the victim's character is not an "essential element" of a self-defense claim and therefore evidence of the victim's character must be limited in such cases to reputation and opinion testimony).

(n10)Footnote 10. See *United States v. Piche, 981 F.2d 706 (4th Cir. 1992)* (when character evidence can be introduced to prove propensity, it cannot take the form of specific acts; specific acts are the most probative evidence of character, but proof of specific acts is also the most likely to arouse prejudice, confuse the jury, and consume time).

(n11)Footnote 11. See, e.g., *United States v. Holt, 170 F.3d 698 (7th Cir. 1999)* (where the defendant called a witness to testify to his honest and law-abiding character, the government could properly ask whether the witness knew that the defendant was behind on child support payments and had committed sexual harassment at his workplace; these questions were relevant to determine "the extent of the witness' familiarity" with the defendant's character); *United States v. Glass, 709 F.2d 669 (11th Cir. 1983)* (the defendant in a drug case was a sheriff, who called favorable character witnesses; it was proper to question these witnesses as to whether they were aware that the defendant had accepted a bribe to dispose of a pending drug case: "In bringing forth character witnesses, Glass initiated the subject of his character and good name; government counsel merely attempted to test the credibility of the witnesses by asking them about specific instances of misconduct going to the nature of their character testimony.").

(n12)Footnote 12. See *United States v. Boone, 279 F.3d 163 (3d Cir. 2002)* (after a character witness testified that the defendant had a reputation for being law-abiding, the prosecution was properly permitted to ask whether the witness was aware of the defendant's prior drug conviction, as this was a proper way to test the qualifications of the witness).

(n13)Footnote 13. See, e.g., *United States v. West, 58 F.3d 133 (5th Cir. 1995)* (the government was properly permitted to cross-examine the defendant's character witnesses by asking them whether they knew about the defendant's indictment for tax evasion; the witnesses had given their favorable opinion as to the defendant's veracity, and the specific act was a proper test of the witnesses' qualifications and credibility).

(n14)Footnote 14. See, e.g., *United States v. Apfelbaum, 621 F.2d 62 (3d Cir. 1980)* (character witnesses were not called because of threatened impeachment with defendant's bad acts); *United States v. Davenport, 753 F.2d 1460, 1463 (9th Cir. 1985)* ("The danger in such a situation is that the prosecution will use the question to waft an unwarranted innuendo into the jury box.").

(n15)Footnote 15. See generally Note, *Have You Heard? Cross-Examination of a Criminal Defendant's Good Character Witness: A Proposal for Reform*, 9 U.C. DAVIS L. REV. 365 (1976). The Note makes a useful suggestion that Trial Judges should feel free to exercise the discretionary authority to exclude evidence provided by *Rule 403* in dealing with cross-examination of character witnesses.

(n16)Footnote 16. *United States v. Nixon, 777 F.2d 958, 970 (5th Cir. 1985)* . See also *United States v. Adair, 951 F.2d 316, 319 (11th Cir. 1992)* (reputation witness may be asked on cross-examination whether he has heard about relevant bad conduct by the defendant, but "the government must have a good faith factual basis for the incidents").

(n17)Footnote 17. See, e.g., *United States v. Bruguier, 161 F.3d 1145 (8th Cir. 1998)* :

> When this sort of "did you know" question is asked, and the fact inquired about would be injurious to defendant's character and is not otherwise in evidence, preliminary proceedings outside the presence of the jury should be conducted first. At these proceedings, either in camera or at the bench, the government could privately state its evidence that a finding of neglect had been made, defense counsel could argue with the evidence or attempt to rebut it in some way, and the Court could satisfy itself that the government had a reasonable, good-faith basis for asking its question.

See also *United States v. Davenport, 753 F.2d 1460, 1464 (9th Cir. 1985)* (the government must have "a good faith belief in the misconduct of the defendant which was the subject of the question. If mistrial is to be avoided, this good faith must be established to the satisfaction of the court, outside the presence of the jury, before the question is asked."); *United States v. Reese, 568 F.2d 1246 (6th Cir. 1977)* (the better practice is for the Trial Judge to conduct *voir dire* to determine good faith basis exists as to alleged bad acts, before allowing the prosecutor to cross-examine defense witnesses).

(n18)Footnote 18. See, e.g., *United States v. Nixon, 777 F.2d 958 (5th Cir. 1985)* (good faith basis found where the prosecutor relied on hearsay statements of police officers, implicating the defendant in drug activity); *United States v. Bright, 588 F.2d 504 (5th Cir. 1979)* (government's proffer of a letter of reprimand for stipulation, and its willingness to reopen the case in order to prove the fact of the defendant's reprimand by a Judge, demonstrated the necessary good faith factual basis for cross-examination of a defense witness concerning the reprimand).

(n19)Footnote 19. See, e.g., *United States v. Davenport, 753 F.2d 1460, 1464 (9th Cir. 1985)* (abuse of discretion where the prosecutor was permitted to inquire about a bad act without establishing any basis in fact that the act occurred).

(n20)Footnote 20. See, e.g., *United States v. Collins, 779 F.2d 1520 (11th Cir. 1986)* (opinion witness could be asked whether he had heard of defendant's arrests and convictions).

(n21)Footnote 21. See *SEC v. Peters, 978 F.2d 1162, 1172 (10th Cir. 1992)* (*Rule 405* "dismantled the distinction" between reputation and opinion testimony, and therefore opinion and reputation witnesses should be treated similarly on cross-examination).

(n22)Footnote 22. See, e.g., *Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977)* (specific acts are admissible where relevant to the plaintiff's character in an action for defamation).

(n23)Footnote 23. See, e.g., *United States v. Thomas, 134 F.3d 975 (9th Cir. 1998)* (specific acts admissible to

prove defendant's predisposition, or lack of it, in an entrapment case, because defendant's character is in issue in such a case); *United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986)* (probative specific acts can be offered to rebut an entrapment defense because such a defense puts the defendant's character "in issue").

(n24)Footnote 24. See, e.g., *United States v. Washington, 106 F.3d 983 (D.C. Cir. 1997)* (a police officer, claiming entrapment in a drug conspiracy case, proffered several commendations he had received for his work on the police force; these commendations were not admissible evidence of character, because the defendant's dedication and bravery were neither pertinent to nor an essential element of his lack of predisposition to engage in the corrupt activity with which he was charged).

(n25)Footnote 25. See, e.g., *United States v. Davenport, 753 F.2d 1460, 1463 (9th Cir. 1985)* (witness' denial leaves "uncontroverted the insinuation that the defendant had planned to engage in additional bank robberies. The prejudice to the defendant was, thus, created by the question itself rather than by the testimony given in response.").

(n26)Footnote 26. See also *United States v. Birney, 686 F.2d 102, 108 (2d Cir. 1982)* (cross-examination of character witnesses, by asking about bad acts committed by the defendant, was proper where the jury was instructed that the cross-examination was directed solely at the weight that should be given to the testimony of the character witness, and not to prove that the defendant was a bad person or that the acts really occurred).

The Federal Judicial Center has approved the following instruction (Instruction #52) for such occasions:

> After (the witness) testified about [e.g., the defendant's reputation for honesty; his opinion of the defendant's honesty], _____, the government attorney, asked (the witness) some questions about whether (the witness) [knew; heard] that (the defendant) had been [e.g., convicted of fraud on an earlier occasion]. These questions were asked of (the witness) only to help you decide if he really knew about the defendant's [e.g.: reputation for honesty; honesty].
>
> The possibility that the defendant may have [e.g.: committed other crimes] is not evidence that he committed the crime of _____. I remind you that the government must prove that the defendant committed *this* crime, and must prove it beyond a reasonable doubt.

(n27)Footnote 27. See, e.g., *United States v. Shwayder, 312 F.3d 1109 (9th Cir. 2002)* (the Court followed the lead of "almost every other circuit that has addressed the question" and held "that the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process."); *United States v. Mason, 993 F.2d 406 (4th Cir. 1993)* (hypothetical questions to character witnesses assuming the defendant's guilt are impermissible).

(n28)Footnote 28. *United States v. Morgan, 554 F.2d 31 (2d Cir. 1977)* (Mansfield, J., concurring).

(n29)Footnote 29. One Circuit has distinguished between opinion witnesses, where guilt-assuming questions may be permissible, and reputation witnesses, where they are not. See *United States v. White, 887 F.2d 267 (D.C. Cir. 1989)* . The rationale for such a distinction is obscure. Compare *United States v. Guzman, 167 F.3d 1350 (11th Cir. 1999)* (guilt-assuming hypotheticals prohibited, finding it irrelevant that the witness was an opinion rather than reputation witness, because "these questions are equally inappropriate when asked of opinion witnesses").

(n30)Footnote 30. See *United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977)* (guilt-assuming hypotheticals are improper because they strike at the very heart of the presumption of innocence).

(n31)Footnote 31. See also *United States v. Smith-Bowman, 76 F.3d 634 (5th Cir. 1996)* (Trial Judge did not err in permitting the prosecutor to ask a defense character witness whether he had heard that the defendant took her employer's credit card and used it for personal reasons; the defendant did not contest the fact that she used the credit

cards; her defense was that the use was authorized); *United States v. Velasquez, 980 F.2d 1275 (9th Cir. 1992)* (in a prosecution for bank robbery, it was proper to ask character witnesses whether their opinion would change if it were established that the defendant had taken a grenade into a bank and inquired about money; the defendant admitted this act, and merely denied that he had the intent to rob the bank).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 405 RULE 405

2-405 Federal Rules of Evidence Manual 405.03

405.03 Annotated Cases

[Go To Supp]

[1] Rule 405(a) -- Reputation or Opinion

[a] Rule 405(a) -- Basis for Opinion

United States v. Gil, 204 F.3d 1347 (11th Cir. 2000) : Affirming a narcotics conviction, the Court found no error in the exclusion of the testimony of a witness proffered as a character witness by the defendant. The witness knew the defendant's family, but he did not know the defendant. Therefore, the witness did not have an adequate basis for expressing an opinion as to the defendant's character.

[b] Rule 405(a) -- Certificate of Good Conduct

United States v. Candelaria-Silva, 166 F.3d 19 (1st Cir. 1999) : Affirming drug trafficking convictions, the Court held there was no error in excluding a "certificate of good conduct" certified by the Puerto Rico Police regarding a defendant, since the certificate was neither reputation nor opinion evidence.

[c] Rule 405(a) -- Cross-Examination

[i] Rule 405(a) -- Generally

United States v. Martorano, 557 F.2d 1 (1st Cir. 1977) : In a prosecution for loansharking, the Court upheld a ruling that precluded the defense from asking a witness who testified to the defendant's reputation for collection practices the names of the persons who were his sources of information. The Court was especially concerned about the risk of reprisal, and noted that the defendant had alternative traditionally accepted devices available to cast doubt on the reputation testimony, e.g., asking the witness to specify the rumors that he had heard and the number of people from whom he had heard them.

United States v. Boone, 279 F.3d 163 (3d Cir. 2002) : Affirming convictions of drug conspiracy, the Court held that, after the defendant called a character witness to testify that the defendant had a reputation for being law-abiding and truthful, the prosecutor was properly permitted to ask whether the witness was aware of the defendant's prior drug conviction and that his nightclub had been searched by narcotics agents. The Court noted that a Trial Judge has broad discretion regarding cross-examination of character witnesses. In *United States v. Beros*, n1 the Court held that the government was properly permitted to cross-examine defense character witnesses in a prosecution for conversion of union funds concerning their knowledge of the defendant's false swearing on a marriage license application.

United States v. Moore, 27 F.3d 969 (4th Cir. 1994) : The defendant, charged with several fraudulent schemes to obtain real estate loans, called several witnesses who described him as honest and trustworthy in his personal and business dealings. The Court held there was no error in permitting one of the witnesses to be cross-examined about the defendant's declaring bankruptcy and defaulting on loans totaling hundreds of thousands of dollars.

United States v. West, 58 F.3d 133 (5th Cir. 1995) : Affirming convictions for conspiracy to avoid gasoline excise taxes, the Court held there was no abuse of discretion in permitting character witnesses to be asked whether they had heard of a defendant's indictment on state charges similar to those for which he was on trial. The government had a good faith factual basis for its questions, and evasion of state taxes is relevant to honesty, the character trait as to which the witnesses were testifying. In *United States v. Ochoa*, n2 a defendant's conviction on a heroin charge was reversed because the government had been permitted to cross-examine her about the prior bad conduct of her relatives. The Court noted that although the defendant had offered two character witnesses, the government should have been restricted to rebutting their testimony about *her* character.

United States v. Holt, 170 F.3d 698 (7th Cir. 1999) : The defendant, charged with conspiring to illegally transfer an automatic weapon, called character witnesses who testified to his reputation as an honest and law-abiding individual. The Court found no error in cross-examining those witnesses as to their familiarity with allegations that the defendant was behind on child support payments and allegations of sexual harassment at his workplace, since the questions were relevant to determining the extent of the witnesses' familiarity with his reputation and character. However, it was improper (but harmless error) to question the witnesses about books explaining how to convert semi-automatic weapons into automatics and how to make explosives that were sold in the defendant's gun shop. The evidence had no relevance either to the character witnesses' credibility or to the defendant's knowledge regarding semi-automatic and fully automatic weapons. In a prosecution for aggravated battery, *United States v. Jordan*, n3 the Court found it was proper for the government to ask a witness, who testified that the defendant's character for law-abidingness was good, whether he had heard of the defendant's prior arrest.

United States v. Bruguier, 161 F.3d 1145 (8th Cir. 1998) : Witnesses testified on behalf of a defendant charged with child abuse that he was a good father. The Court held there was no error when the witnesses were asked on cross-examination whether they were aware that the family had been supervised for two years by Child Protective Services, as the question was relevant to determining the credibility of the witnesses' opinions. However, the government should have established its good faith basis for asking the question outside the presence of the jury. The Court held it was improper (but harmless error) when another character witness, the defendant's wife, was asked on cross-examination whether she thought "it is a good father to be arrested 36 times," since arrests do not show that a crime was committed or even that there is reasonable cause to believe one was.

United States v. Bush, 58 F.3d 482 (9th Cir. 1995) : After a witness in a fraud prosecution said that he had never known the defendant union official to have any problems, the government asked whether he was aware that civil RICO charges accusing the defendant of financial misconduct had been filed. Although the prosecutor appeared to be referring

to a separate incident, in fact the civil charges arose out of the same situation as the criminal charges. The Court held it was error (but harmless) under *Rule 403* to permit the question: the evidence lacked probative value because the witness' knowledge of the civil RICO charges was entirely consistent with his original testimony that he had never known the defendant to be in trouble before, and it was prejudicial because it falsely suggested that the RICO charges represented a separate incident of misconduct somewhere in the defendant's past.

United States v. McHorse, 179 F.3d 889 (10th Cir. 1999) : The defendant, charged with child sexual abuse, called his adult son, who testified that he knew his father "couldn't" do anything bad to anybody and "would not do anything like that." Affirming, the Court found no error in asking the son on cross-examination whether he was aware that his sister and half-sister had said the defendant had abused them from a young age. Regardless of the purpose for which the son was called as a witness, he became a witness to his father's good character, so the government was entitled under *Rule 405(a)* to demonstrate that he was not fully informed as to his father's character by inquiring into the son's knowledge of specific instances of the father's conduct. Furthermore, the evidence was admissible to rebut any misleading impression from the son's direct testimony that his father had never taken any inappropriate sexual actions with him or his brother.

United States v. Adair, 951 F.2d 316 (11th Cir. 1992) : In a Hobbs Act prosecution of a former police chief for protecting cocaine and illegal liquor sales, the Court held there was no abuse of discretion in an *in limine* ruling permitting character witnesses to be cross-examined about their knowledge of the defendant's prior conviction for hindering the apprehension of a felon. The prosecution had a good faith basis for the questions, they would have tested the witnesses' knowledge of the defendant's reputation, and they were relevant to the character traits raised at trial. See also *United States v. Glass* n4(the prosecutor was properly permitted to ask defense character witnesses in drug case whether they knew that the defendant, a sheriff, had accepted money to dispose of a pending drug case and whether they knew about his ticket fixing).

[ii] Rule 405(a) -- Cross-Examination -- Good Faith Basis

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) : The prosecutor asked character witnesses for a defendant charged with racketeering about an incident in which a State Judge, whom the defendant was promoting for appointment to the federal bench, had approved a 60 percent legal fee for him in the settlement of a personal injury case. Reversing the convictions on other grounds, the Court noted that the government had a good faith basis for inquiring into the matter to challenge the basis for the character witnesses' opinions, but that the prosecutor argued the evidence to the jury in a manner well beyond the bounds of propriety and relevance. In *United States v. Bermudez*, n5 the Court affirmed convictions for conspiracy to distribute cocaine, holding that it was proper to permit cross-examination of character witnesses for a defendant by asking them whether they had heard that he was arrested on a marijuana charge in 1974. Before cross-examining the witnesses, the prosecutor had informed the Judge of the proposed line of inquiry and supplied documentary proof of the arrest.

United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990) : In reversing the defendant's bank fraud convictions on other grounds, the Court noted that error was also committed when the government was permitted to impeach character witnesses by questions referring to other crimes for which no factual basis had been laid.

United States v. Reese, 568 F.2d 1246 (6th Cir. 1977) : The Court, affirming a conviction for receiving stolen property, suggested that before character witnesses who testify as to a defendant's reputation are asked about community rumors, the Trial Judge should have "a voir dire examination to determine whether there were actually such rumors before permitting the cross-examination. This would have avoided any random shots to the prejudice of the

appellant."

United States v. Finley, 934 F.2d 837 (7th Cir. 1991) : In the RICO and Hobbs Act prosecution of a State Court clerk, a government witness testified on cross-examination to his opinion that the defendant was an honest and dedicated public servant. The Court held there was no abuse of discretion when the witness was asked on redirect whether he had previously said the defendant lost his position on an election ticket because of an extortion incident. Because the prosecutor asked what the witness had said, not what the witness had heard, the question had a factual basis, even if the extortion incident was only unsubstantiated rumor. In *United States v. Alvarez*, n6 a narcotics prosecution, the Court upheld cross-examination of two defense character witnesses about certain events, since the defendant had spoken about these events to the witnesses and the government had a good faith basis for its questions.

United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996) : The Court reversed a firefighter's conviction for disposing of a firearm to a convicted felon, finding that the government asked an improper question during cross-examination of a fellow firefighter who testified to the defendant's reputation for truthfulness and lawfulness over a 20-year period. This case is discussed in the Editorial Explanatory Comment, § 405.02[6].

[iii] Rule 405(a) -- Cross-Examination -- Guilt-Assuming Hypotheticals

United States v. White, 887 F.2d 267 (D.C. Cir. 1989) : Although the Court reversed a bribery conviction, it held there had been no error in permitting cross-examination of a character witness with hypotheticals that assumed the defendant was guilty of the crimes for which he was on trial. The Court asserted that it may be improper to cross-examine a witness testifying only to community reputation with hypotheticals, but that is not true for witnesses expressing their own opinion of the defendant's character.

United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990) : After the defendant in a tax fraud case elicited favorable opinion testimony regarding his character, the prosecutor asked the witnesses whether their opinions would change if they knew the defendant had committed the charged crimes. The Court reaffirmed the prohibition of *United States v. Morgan*, n7 on guilt-assuming hypothetical questions of lay character witnesses, noting that any probative value is greatly outweighed by the risk of impairing the presumption of innocence. The error was harmless, however. One Judge, concurring in the result, disagreed on the grounds that such questions are extremely helpful in probing the witness' bias and standards and that the risks of prejudice cited by the majority are nonexistent or overstated.

United States v. Curtis, 644 F.2d 263 (3d Cir. 1981) : When a defendant charged with narcotics offenses claimed entrapment and offered reputation evidence through character witnesses, the prosecution responded by asking the witnesses how their opinions of the defendant's character would be affected by an admission by the defendant of participation in the narcotics activity. The Court held it was error to permit the government's examination because a reputation witness should be impeached only on matters relating to reputation.

United States v. Mason, 993 F.2d 406 (4th Cir. 1993) : The Court reversed convictions for cocaine offenses, finding that the prosecutor improperly questioned defense character witnesses by asking them whether their opinion of the defendant would change if they believed he distributed drugs. The Court reasoned that "an opinion elicited by a question that assumes that the defendant is guilty can have only negligible probative value as it bears on the central issue of guilt," and that "adherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning."

United States v. Smith-Bowman, 76 F.3d 634 (5th Cir. 1996) : The Court affirmed a conviction for mail fraud resulting from unauthorized use of credit cards, holding there was no error in permitting a defense character witness to be asked whether he had heard that the defendant took her employer's credit card and used it for personal reasons. The Court reasoned that the questions did not ask the witness to assume that the defendant was guilty or that she would be convicted, but tested whether the witness had heard of some of the defendant's alleged misbehavior. In *United States v. Candelaria-Gonzalez*, n8 the Court reversed convictions for narcotics violations, holding that character witnesses who testified on behalf of one defendant were improperly impeached. Although the Trial Judge did not permit asking whether the indictment would affect the witness' opinion of the defendant, the government was permitted to ask whether the defendant's reputation would be affected if he were convicted of trafficking in narcotics. The Court concluded that the "hypothetical questions struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial." The Court also held that it was improper to ask a character witness whether it would be inconsistent with his knowledge of the defendant if a DEA agent testified that the defendant was known as a major narcotics trafficker.

United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984) : The Court affirmed convictions for offenses involving false entries in bank records, holding that after character witnesses gave their opinions of one defendant and his reputation, they were properly asked whether they knew of a pending civil suit against him charging that he and others had engaged in unfair trade practices. The Court observed, however, that "it would be error to allow the prosecution to ask the character witness to assume defendant's guilt of the offenses for which he is then on trial."

United States v. Williams, 738 F.2d 172 (7th Cir. 1984) : The Court found error (harmless, however) in the government's cross-examining defense character witnesses by asking them whether their opinions would change if it were shown the defendant were guilty.

United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc): The Court affirmed a conviction for making false statements to federal investigators, holding that there was no plain error when a defense character witness was asked on cross-examination whether her opinion of the defendant's reputation for truthfulness would change if she knew that he had made the false statement he was alleged to have made to the investigators. The Court noted that "[a] number of courts have condemned prosecutor questions that assume the defendant's guilt of the offense being tried as contrary to the accused's presumption of innocence," and that "we do not endorse the practice, and suspect that a timely objection to this question would have been sustained." In *United States v. Barta*, n9 the Court held it was error, but harmless, to ask a witness who testified in a tax evasion case to the defendant's reputation for high character and trustworthiness whether his opinion of that reputation would change if the defendant had acted as charged; such a question undermined the presumption of innocence.

United States v. Shwayder, 312 F.3d 1109 (9th Cir. 2002) : Affirming a conviction for racketeering and other offenses, the Court held it was error (but not plain error) to permit cross-examination of two defense character witnesses by asking each "whether his opinion would change if Shwayder had committed certain acts alleged in the indictment." The Court followed the lead of "almost every other circuit that has addressed the question" and held "that the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process."

United States v. James, 728 F.2d 465 (10th Cir. 1984) : The Court affirmed convictions for fraud and extortion, but found error in the prosecution's redirect examination of a witness who had been asked on cross-examination by the defense about the defendant's reputation. The prosecutor asked whether the reputation would be as good if its charges were true, and the Court said that it was improper to have asked the witness to assume the guilt of the defendant. See

also *United States v. Primrose* n10(a guilt-assuming hypothetical on cross-examination of a reputation witness was harmless error); *United States v. Polsinelli* n11(drug convictions were reversed because the prosecutor improperly asked defense character witnesses what their opinions would be if they assumed the defendant was guilty of the acts charged by the government).

United States v. Guzman, 167 F.3d 1350 (11th Cir. 1999) : The defendant, charged with conspiracy to import large quantities of cocaine, called a witness who testified to his opinion that the defendant was a law-abiding person. On cross-examination, the witness was asked whether his opinion would change if he learned that the defendant was involved in transporting multikilogram quantities of cocaine. The Court found that it was error (but harmless) to permit this question, because the government may not "pose hypothetical questions that assume the guilt of the accused in the very case at bar." The Court found it irrelevant that the witness was an opinion rather than reputation witness, since "these questions are equally inappropriate when asked of opinion character witnesses."

[iv] Rule 405(a) -- Cross-Examination -- Remote Specific Acts

United States v. Edwards, 549 F.2d 362 (5th Cir. 1977) : The Court noted that a cross-examiner attempting to test whether the character witness is credible can ask the witness about events that are more than ten years old, because the ten-year limitation of *Rule 609(b)* has no application to such questioning.

United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988) , adhered to on reh'g, 868 F.2d 201 (7th Cir. 1989) : In a narcotics prosecution, the Court upheld cross-examination of two defense character witnesses about events occurring in and before 1973. It observed that the government allegations of continuing violations of the immigration laws included the earlier time period.

[v] Rule 405(a) -- Cross-Examination -- Reputation and Opinion Witnesses Distinguished

United States v. Curtis, 644 F.2d 263 (3d Cir. 1981) : When a defendant charged with narcotics offenses claimed entrapment and offered reputation evidence through character witnesses, the prosecution responded by asking the witnesses how their opinions of the defendant's character would be affected by an admission by the defendant of participation in the narcotics activity. The Court held it was error to permit the government's examination because a reputation witness should be impeached only on matters relating to reputation.

United States v. Frost, 914 F.2d 756 (6th Cir. 1990) : The Court affirmed convictions for banking offenses, holding there was no abuse of discretion in permitting character witnesses, who testified to the defendants' community reputations, to be asked on cross-examination whether their opinions of those reputations would change if they had heard of specific acts of conduct. Describing the situation as a textbook application of the Rule, the Court rejected the defendants' argument that, because only reputation evidence had been elicited, cross-examination could mention only acts likely to have been known in the community.

United States v. Manos, 848 F.2d 1427 (7th Cir. 1988) : The Court affirmed a defendant's racketeering and extortion convictions, as it found that defense character witnesses were properly cross-examined about specific instances of conduct. It concluded that both reputation and opinion witnesses may be cross-examined about specific instances.

SEC v. Peters, 978 F.2d 1162 (10th Cir. 1992) : The Court reversed a judgment for the defendant in a civil action

for insider trading violations, holding the SEC had been improperly precluded from asking the defendant's opinion character witnesses whether they had heard of other securities law claims made against him. "Have you heard" questions are as relevant to opinion as to reputation character testimony, and it is clear that the Rule intends to treat the two types similarly.

[d] Rule 405(a) -- Expert Testimony

United States v. Gonzalez-Maldonado, 115 F.3d 9 (1st Cir. 1997) : In a money laundering and cocaine prosecution, the government's case depended heavily on taped conversations involving a conspirator who had been found mentally incompetent to stand trial and to testify. The Court held it was error to exclude testimony from an appointed psychiatrist that the conspirator had a mental illness that led to verbosity, "*grandeza*," and exaggeration, since an untrained layperson would not be qualified to determine intelligently, and to the best degree, the weight to place on the recorded statements without enlightenment from the expert.

United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990) : In ruling that guilt-assuming hypothetical questions of lay character witnesses are improper, the Court left open the possibility that they might be asked on cross-examination of expert character witnesses. One Judge, concurring only in the judgment, said that expert character testimony is one of those ideas whose time has not yet come, and with common sense and a modicum of luck never will.

United States v. Hill, 655 F.2d 512 (3d Cir. 1981) : The Court reversed drug convictions because the Trial Judge excluded a psychologist's expert testimony, offered to support an entrapment defense, that the defendant was uniquely susceptible to government inducements. Citing its prior decision in *United States v. Curtis*, n12 the Court said that *Rule 405(a)* permits "two kinds of character evidence, now allowing testimony by an expert witness on traits of character which may be substantively relevant."

United States v. Webb, 625 F.2d 709 (5th Cir. 1980) : The Court held, in a prosecution for shooting at a flying helicopter, that there was no error in excluding expert testimony that the defendant lacked "propensity to commit a violent act," as that was a character trait plainly within the ken of lay jurors.

[e] Rule 405(a) -- Extrinsic Specific Act Evidence To Rebut Character Testimony

United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978) : Citing *Rule 405*, the Court observed in dictum that the fact "[t]hat the defense improperly attempted to establish defendant's good character by reference to specific good acts did not justify the prosecution's use of testimony [extrinsic evidence] concerning bad acts either in its direct case or in rebuttal."

United States v. Reed, 700 F.2d 638 (11th Cir. 1983) : The Court reversed convictions for embezzlement because the defendant was asked on cross-examination whether he recalled being in possession of marijuana at the time of arrest and making a statement regarding marijuana use, and the prosecutor then presented testimony to contradict the defendant's answers. The government claimed that the defendant opened the door to negative character evidence by offering character witnesses who testified as to his general reputation and his reputation for truth and veracity. The Court noted that the government could have offered evidence that would have rebutted the evidence of good character for honesty and truthfulness, but that possession of marijuana was not such evidence. We note also that the government may respond to defense character evidence by asking the character witnesses if they have heard or know of specific acts of bad character, but it may not introduce extrinsic evidence to prove the acts.

[f] Rule 405(a) -- Jury Instructions

United States v. Benally, 756 F.2d 773 (10th Cir. 1985) : Reversing a conviction for vehicular homicide, the Court held it was error to give an instruction on other crimes evidence when the only mention of prior arrests and convictions came in the prosecution's cross-examination of a defense character witness. Since the jury was not to assume that the facts stated in questions were true, the instruction, which stated that testimony of other acts, wrongs, or crimes had been introduced, was incorrect.

[g] Rule 405(a) -- Relevant Community

United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) , *vacated*, *602 F.2d 653 (4th Cir. 1979)* (en banc): Although it overturned mail fraud and racketeering convictions on other grounds, the Court of Appeals panel cited this *Manual* and indicated to Trial Judges that character evidence offered to impeach a witness (or to respond to impeachment evidence) could take the form of reputation or opinion based in the locality where a witness worked as well as the locality where the witness lives. An equally divided *en banc* Court reinstated the convictions, but did not comment on this point.

[h] Rule 405(a) -- Religious Beliefs

Government of Virgin Islands v. Petersen, 553 F.2d 324 (3d Cir. 1977) : Affirming a murder conviction, the Court held there was no error in prohibiting the defendant from introducing testimony regarding his religious affiliation to demonstrate that he rejected violence. The Court recognized that the defendant's religious beliefs rejecting violence would "be logically probative of the proposition that defendant acted in conformity with his belief on the night of the homicide," but observed that a person "may or may not act in accordance with a professed belief; it is the observation of the defendant's *behavior* over a length of time which is the recognized basis for both reputation and opinion testimony." Because *Rule 405(a)* "reflects an accommodation between logical relevance on the one hand and the desire to avoid prejudice, confusion, surprise and consumption of trial time on the other," the Court held "that the appropriate means to elicit opinion testimony under the rule is to inquire directly as to the witness' opinion concerning the relevant character trait of the accused."

[i] Rule 405(a) -- Specific Good Acts

United States v. Hill, 40 F.3d 164 (3d Cir. 1994) : Affirming a conviction for stealing and cashing a check, the Court held there was no error in excluding evidence that the defendant did not steal three "test letters" several months after the charged embezzlement. The Court noted that "the proper method of proof would have been by reputation or opinion testimony."

United States v. Barry, 814 F.2d 1400 (9th Cir. 1987) : The Court affirmed convictions for unauthorized sale of government property. It found no error in the exclusion of defense evidence of an FBI rap sheet showing only one prior arrest, which ended in dismissal of charges, and two commendation letters written twelve years prior to the unauthorized sales. The Court cited *Government of Virgin Islands v. Grant, 775 F.2d 508 (3d Cir. 1985)* , for the proposition that testimony of multiple instances of good conduct appears to violate a strict reading of *Rule 405* and is generally less probative than reputation or opinion evidence. The Court left open the question of whether specific acts of good conduct might be admissible under *Rule 404(b)* to support an entrapment defense.

United States v. Russell, 703 F.2d 1243 (11th Cir. 1983) : The Court affirmed convictions in a marijuana

conspiracy case, finding that evidence of specific good acts offered on behalf of a defendant was properly excluded, since evidence of other noncriminal conduct is generally not probative of whether a defendant committed the acts charged.

[j] Rule 405(a) -- Testimony of Accused

United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996) : In an arson and insurance fraud case, the Court held that the government was properly permitted to ask the defendant on cross-examination about his prior attempt to solicit arson of a different property. The defendant had testified on direct that, when previously faced with an unprofitable business venture, he had duly paid his debts, had never had a fire connected with any other enterprise, and had never made a claim for fire damage on any of his other properties. The Court concluded that the defendant was offering evidence of good character, which opened the door to prior acts of soliciting arson. Although the defendant's character evidence was "improper in form since the rules limit the proponent to offering an opinion or reputation witness," this did not affect the use of bad acts on cross-examination, since "the detail simply made Cudlitz' testimony more effective for him."

United States v. Solomon, 686 F.2d 863 (11th Cir. 1982) : The Court affirmed convictions for a truck hijacking conspiracy, holding that the Trial Judge properly sustained objections to defense attempts to have a defendant answer questions about the composition of his family and his service in the military. The answers would not have amounted to reputation or opinion evidence, which is the exclusive means of proving good character.

[k] Rule 405(a) -- Victim's Character

United States v. Piche, 981 F.2d 706 (4th Cir. 1992) : In a prosecution for conspiring to violate civil rights of Asian-Americans, the Court held that, even though evidence of two victims' character was admissible to prove that they were predisposed to participate in violent acts, character was not in dispute and only reputation or opinion evidence could have been admitted.

United States v. Smith, 230 F.3d 300 (7th Cir. 2000) : The defendant was charged with retaliating against a witness who had given evidence against him in another proceeding by pushing the witness during a barroom encounter. At trial, the defense was precluded from offering evidence of the witness' prior misdemeanor conviction for domestic battery. Affirming, the Court held that the conviction was probative of the witness' character for violence, thus satisfying *Rule 404(a)(2)*, but that it was evidence of a specific act, rather than reputation or opinion as required by *Rule 405(a)*. The Court held that the victim's character for violence is not an essential element of a self-defense claim, so specific acts evidence is not admissible under *Rule 405(b)*.

United States v. Cournoyer, 118 F.3d 1279 (8th Cir. 1997) : Affirming a conviction for aggravated sexual abuse, the Court found no error in the exclusion of testimony that the complainant "always accuses guys of that," since the testimony lacked the foundation required under *Rule 405(a)* for reputation or opinion character evidence or was inadmissible specific conduct character evidence. In *United States v. Kills Ree*, n13 the Court upheld a conviction for involuntary manslaughter, finding that the Trial Judge properly excluded evidence concerning specific instances in which one victim allegedly beat another. This was not reputation or opinion evidence.

United States v. Keiser, 57 F.3d 847 (9th Cir. 1995) : The Court affirmed an assault conviction, finding it was proper to exclude specific act evidence of the victim's character, which had been offered by the defendant to prove that he was acting in response to an attack by the victim. The defendant had the right under *Rule 404(a)(2)* to offer evidence

to show that the alleged victim was a violent and angry person, but the victim's character is not an essential element of a self-defense claim; therefore, under the terms of *Rule 405*, character evidence of the victim must be limited to reputation and opinion testimony.

United States v. Yazzie, 188 F.3d 1178 (10th Cir. 1999) : Although the Court reversed murder convictions, it held that the Trial Judge properly excluded testimony that the deceased routinely got into fights in a bar, used drugs, carried a knife, and kept the woman with whom he lived for a year in a "hostage relationship" as inadmissible specific act character evidence. The Judge permitted the defense to introduce evidence of the deceased's reputation for violence and permitted the woman with whom he lived to testify that the deceased routinely picked fights, manipulated and intimidated people, and carried a gun. In *United States v. Bautista, 145 F.3d 1140 (10th Cir. 1998)* , the Court affirmed a conviction for murder, holding there was no abuse of discretion in excluding defense evidence that the victim had made a homosexual pass at a friend of the defendant. The defendant was properly permitted to testify that he feared the victim's aggressive sexual advances, but evidence of the victim's pertinent traits of character could only be proved through reputation or opinion evidence. In *United States v. Talamante*, n14 the Court upheld an assault conviction, finding no error in the exclusion of specific acts offered by the defense to prove that the victim was the first aggressor. Since the defendant was attempting to prove the victim's character, which was not in issue, the defendant was limited to reputation and opinion evidence.

[2] Rule 405(b) -- Specific Instances of Conduct

[a] Rule 405(b) -- Competence of Employee

Webb v. City of Chester, 813 F.2d 824 (7th Cir. 1987) : Affirming a plaintiff's judgment in a sex discrimination suit arising out of her discharge from a police department, the Court upheld exclusion of evidence that two years after her discharge the plaintiff demonstrated incompetence while employed as a part-time officer in another city. Although the plaintiff's competence was an issue in the case, the Court concluded that the Trial Judge did not err in finding that the evidence was too remote in time and too prejudicial.

In re Aircrash, 684 F.2d 1301 (9th Cir. 1982) : In a suit by survivors of passengers killed in an airplane crash, the Court held that training records of a pilot were admissible to prove that he was incompetent to fly and that the airline was on notice of this before the accident. Once the competence of an employee is in issue, specific instances of conduct are permissible to prove incompetence; indeed, it may be the only proof available.

[b] Rule 405(b) -- Defamation

Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998) : A picture of the plaintiff was erroneously misidentified in a magazine article as being that of a person involved in the Pan Am 103 bombing. Reversing a judgment for the defendant on other grounds, the Court held there was no error in permitting cross-examination of the plaintiff about a felony conviction, a possible parole violation, and other bad acts. Because under the applicable libel law an assertion of damage to reputation makes the plaintiff's character an issue, evidence of specific acts reflecting on the plaintiff's character was admissible under *Rule 405(b)*.

[c] Rule 405(b) -- Entrapment

United States v. Washington, 106 F.3d 983 (D.C. Cir. 1997) : The defendant, a police officer, was charged with furthering a drug conspiracy. He claimed entrapment; the government introduced evidence of his previous drug activity under *Rule 404(b)*. His proffer in rebuttal of several commendations he had received for his work on the police force

was excluded. Affirming the conviction, the Court held that the commendations were not admissible evidence of character, since the defendant's dedication and bravery were neither pertinent to nor an essential element of his lack of predisposition to engage in the corrupt activity with which he was charged.

United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986) : The Court affirmed cocaine convictions, finding that evidence of one defendant's prior cocaine purchases was admissible to rebut an entrapment defense.

United States v. Toner, 728 F.2d 115 (2d Cir. 1984) : Affirming convictions for firearms offenses, the Court found there was no error in excluding evidence, offered to support an entrapment defense, that a defendant had twice rejected an informant's proposals to engage in firearms transactions. Since the defendant's evidence showed only that he lacked funds necessary to pursue the informant's proposals, the Court found that it was not probative of a predisposition not to commit firearms offenses. In *United States v. Williams*, n15 the corruption prosecution of a former United States Senator, the Court held that the Trial Judge properly permitted the government to respond to an entrapment defense with evidence that the Senator used his influence on behalf of himself and his wife even when no government agent asked him to. This evidence tended to establish his predisposition.

United States v. Manzella, 782 F.2d 533 (5th Cir. 1986) : Affirming racketeering convictions, the Court found that extrinsic evidence of a defendant's prior crimes was admissible to show predisposition in response to an entrapment defense. In *United States v. Parrish*, n16 the Court held that evidence of a prior drug offense conviction was admissible in a drug prosecution to prove predisposition once a defendant raised an entrapment defense.

United States v. Roper, 135 F.3d 430 (6th Cir. 1998) : In a trial for crack distribution, the government provided direct evidence of the charges on its case-in-chief and the defendant argued entrapment in his direct testimony. On his cross-examination and in its rebuttal case, the government introduced evidence of the defendant's prior drug activity. The defendant's motion for a mistrial on ground of prosecutorial misconduct in failing to give notice of his other crimes despite a pretrial request was denied. Affirming, the Court held that the notice requirement of *Rule 404(b)* does not apply when the other crimes are admissible evidence for character traits in issue, as here, where the defendant put his character in issue by asserting an entrapment defense.

United States v. Swiatek, 819 F.2d 721 (7th Cir. 1987) : The Court held that it was error (but harmless) to introduce evidence that the defendant was willing to deal in stolen jewelry and cars to rebut an entrapment defense in a prosecution for firearms offenses. Such evidence was only minimally relevant to a predisposition to sell firearms. In *United States v. Moschiano*, n17 the Court affirmed convictions for drug-related offenses, holding that evidence of subsequent similar acts could be admitted to prove predisposition in response to an entrapment claim. Here, the Court found that one defendant's attempt to purchase large amounts of Preludin three months after the events leading to heroin charges was relevant to the entrapment defense offered against those charges.

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) : The defendant claimed that he was entrapped into participation in the charged sale of three pounds of methamphetamine. The government offered as proof of his predisposition that he was a methamphetamine user and that he had at some point in the past sold another participant a couple of single $20 doses of methamphetamine. However, the defendant was not permitted to testify that he had no prior arrest or conviction record and no record of any past criminal behavior suggesting a predisposition to engage in large-scale drug trafficking. Reversing, the Court held that the excluded evidence was relevant to the defendant's intent and was important to counter any prejudicial effect of the evidence of prior small sales. Because the defendant's character is an essential element of the entrapment defense, exclusion of the evidence was an abuse of discretion. One

Judge dissented, arguing that an absence of arrests or criminal record is not relevant on the question of predisposition, because it may simply mean he has never been caught. In *United States v. Barry*, n18 the Court found no abuse of discretion in the exclusion of evidence offered in support of an entrapment defense, since even if the evidence could properly be admitted as specific good act evidence, it was hearsay and remote.

United States v. Badolato, 710 F.2d 1509 (11th Cir. 1983) : Where a defendant charged with involvement in cocaine trafficking urged in his opening statement that he was entrapped by government agents, the Court found that a videotape of a meeting between the defendant and government agents in which marijuana was discussed was admissible to show predisposition. See also *United States v. Roper* n19(other crimes evidence was admissible to rebut an entrapment defense).

[d] Rule 405(b) -- Self-defense -- Victim's Character for Violence

United States v. Smith, 230 F.3d 300 (7th Cir. 2000) : The defendant was charged with retaliating against a witness who had given evidence against him in another proceeding by pushing the witness during a barroom encounter. At trial, the defense was precluded from offering evidence of the witness' prior misdemeanor conviction for domestic battery. Affirming, the Court held that the conviction was probative of the witness' character for violence, thus satisfying *Rule 404(a)(2)*, but that it was evidence of a specific act, rather than reputation or opinion as required by *Rule 405(a)*. The Court held that the victim's character for violence is not an essential element of a self-defense claim, so specific acts evidence is not admissible under *Rule 405(b)*.

FOOTNOTES:

(n1)Footnote 1. *United States v. Beros, 833 F.2d 455 (3d Cir. 1987)* .

(n2)Footnote 2. *United States v. Ochoa, 609 F.2d 198 (5th Cir. 1980)* .

(n3)Footnote 3. *United States v. Jordan, 722 F.2d 353 (7th Cir. 1983)* .

(n4)Footnote 4. *United States v. Glass, 709 F.2d 669 (11th Cir. 1983)* .

(n5)Footnote 5. *United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975)* .

(n6)Footnote 6. *United States v. Alvarez, 860 F.2d 801 (7th Cir. 1988)* , *adhered to on reh'g*, *868 F.2d 201 (7th Cir. 1989)* .

(n7)Footnote 7. *United States v. Morgan, 554 F.2d 31 (2d Cir. 1977)* (see the Editorial Explanatory Comment, § 405.02[12]).

(n8)Footnote 8. *United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977)* .

(n9)Footnote 9. *United States v. Barta, 888 F.2d 1220 (8th Cir. 1989)* .

(n10)Footnote 10. *United States v. Primrose, 718 F.2d 1484 (10th Cir. 1983)* .

(n11)Footnote 11. *United States v. Polsinelli, 649 F.2d 793 (10th Cir. 1981)* .

(n12)Footnote 12. *United States v. Curtis, 644 F.2d 263 (3d Cir. 1981)* .

(n13)Footnote 13. *United States v. Kills Ree, 691 F.2d 412 (8th Cir. 1982)* .

(n14)Footnote 14. *United States v. Talamante, 981 F.2d 1153 (10th Cir. 1992)* .

(n15)Footnote 15. *United States v. Williams, 705 F.2d 603 (2d Cir. 1983)* .

(n16)Footnote 16. *United States v. Parrish, 736 F.2d 152 (5th Cir. 1984)* .

(n17)Footnote 17. *United States v. Moschiano, 695 F.2d 236 (7th Cir. 1982)* .

(n18)Footnote 18. *United States v. Barry, 814 F.2d 1400 (9th Cir. 1987)* .

(n19)Footnote 19. *United States v. Roper, 874 F.2d 782 (11th Cir. 1989)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 405 RULE 405

2-405 Federal Rules of Evidence Manual 405.04

405.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in *Rule 404*.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.' " It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948)* ; Annot., 47 A.L.R.2d 1258 . The theory is that, since the reputation

witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case-in-chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under *Rule 608(b)*. Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

[2] 1987 Amendment Committee Note

1987 Amendment Committee Note

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

June 28, 1973

The Subcommittee approved subdivision (b) as proposed by the Court, with the specific understanding that the Rule applies only in those relatively rare situations where character is truly an issue in the case.

October 10, 1973

The Court's version of subdivision (a) had proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Predicated in part on the view that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses the Subcommittee decided to delete from this Rule, as well as from *Rule 608*, reference to opinion testimony.

[Editor's Note: This deletion was subsequently reinstated in the Rule as ultimately passed].

[4] Report of the House Committee on the Judiciary

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from *Rule 608(a)* which involves a related problem, reference to opinion testimony. **[Editor's Note: This deletion was subsequently reinstated in the Rule as ultimately passed]**.

[5] Report of the House and Senate Conferees

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

[6] Citations to Hearings and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, April 13, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 21-22 (1973).

Letter from Edward W. Cleary to Herbert E. Hoffman, April 17, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 40-41 (1973).

Debate in the House of Representatives, 120 Cong. Rec. H546--H549 (daily ed. February 6, 1974).

Letter from W. Vincent Rakestraw to Hon. James O. Eastland, June 14, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 121, 123-24, 126 (1974).

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2-405 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 405, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 405. Methods of Proving Character	**Rule 405. Methods of Proving Character**
(a) Reputation or opinion. In all cases in which	**(a) By Reputation or Opinion.** When evidence

evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquir

of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the char

	y is allowable into relevant specific instances of conduct.		acter witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b)	**Specific instances of conduct.** In cases in which character or a trait of character of a per-	**(b)**	**By Specific Instances of Conduct.** When a person's character or character trait is an es-

son is an es-sen-tial ele-men t of a char ge, clai m, or de-fens e, proo f may also be mad e of spe-cific in-stan ces of that per-son's con-duct.	sen-tial ele-men t of a char ge, clai m, or de-fens e, the char acter or trait may also be prov ed by rel-evan t spe-cific in-stan ces of the per-son's con-duct.

Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 405.03 Annotated Cases

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[1] Rule 405(a) -- Reputation or Opinion [Go To Main]

[c] Rule 405(a) -- Cross-Examination

[i] Rule 405(a) -- Generally

United States v. Bah, 574 F.3d 106 (2d Cir. 2009) : In a prosecution for operating an unlicensed money transmitting business, a witness, who had testified to the defendant's reputation for truthfulness in the community, was asked about a letter in which a former customer had accused the defendant of fraud. The witness responded that he was unaware of the accusation and that it did not impact his view of the defendant or his reputation. Although it reversed the conviction for improper jury instructions, the Court held that the cross-examination of the character witness was not an abuse of discretion, given "the 'substantial latitude' afforded the government to rebut character witness testimony offered by the defense."

United States v. Kellogg, 510 F.3d 188 (3d Cir. 2007) : The Court affirmed a mail fraud conviction against the owner of an environmental laboratory who falsely certified that certain tests had been conducted. It found no abuse of discretion when a defense character witness was asked whether he had any knowledge about the way the defendant ran his lab, as the question simply allowed the prosecution to test the foundation for the witness' opinion that the defendant was a law-abiding citizen.

United States v. Ndiaye, 434 F.3d 1270 (11th Cir. 2006) : In a prosecution for immigration offenses and Social Security fraud, the Court held it was error (but harmless) to allow cross-examination of a defendant's character witnesses regarding a letter that the defendant sent to a female neighbor requesting a "get-together" while their respective spouses were at work. Some of the circumstances surrounding the letter were unknown and, while the letter did perhaps suggest that the defendant was not being entirely candid with his wife, it did not directly relate to his truthfulness and honesty.

[ii] Rule 405(a) -- Cross-Examination -- Good Faith Basis

United States v. Matthews, 440 F.3d 818 (6th Cir. 2006): Affirming drug and firearm convictions, the Court found no error when the government was permitted to ask a character witness whether she was aware of the defendant's drug activities in 1995 and 1997. There was no need for the Trial Judge to conduct an independent voir dire as to whether the prior sales occurred, because the issue of the defendant's drug activity had been fully explored in pretrial proceedings relating to *Rule 404(b)* issues.

[iii] Rule 405(a) -- Cross-Examination -- Guilt-Assuming Hypotheticals

United States v. Kellogg, 510 F.3d 188 (3d Cir. 2007) : The Court affirmed a mail fraud conviction against the owner of an environmental laboratory who falsely certified that certain tests had been conducted. It found no abuse of discretion when a defense character witness was asked whether his opinion that the defendant was a law-abiding citizen would different if he knew that lab reports misstated the analytical tests used. The Court noted that a guilt-assuming hypothetical is irrelevant in testing a character witness' reputation testimony, but for opinion testimony "[s]uch evidence may aid in the jury's ultimate credibility determinations and in deciding how much weight to give to a defendant's character evidence." While such a question "may prove problematic if it arises in circumstances that implicate the presumption of innocence or otherwise undermine due process, ... there is nothing inherent in guilt-assuming hypotheticals, in the abstract, that makes them unfairly prejudicial, let alone so prejudicial as to constitute a *per se* violation of due process." One Judge thought that the particular question asked was not sufficiently hypothetical.

United States v. Parker, 553 F.3d 1309 (10th Cir. 2009) : The Court affirmed a conviction for conspiracy to sell unsafe airplane engines with false documentation, finding no abuse of discretion when a defense character witness was asked on cross-examination if it would change his opinion of the defendant "if you found out he had been selling aircraft engines ... that were unairworthy," since the questions "did not assume Parker was 'convicted of the crimes alleged in his case.' "

[v] Rule 405(a) -- Cross-Examination -- Reputation and Opinion Witnesses Distinguished

United States v. Reich, 479 F.3d 179 (2d Cir. 2007) : The Court affirmed convictions for obstruction of justice and related offenses, finding no abuse of discretion when the prosecution was permitted to ask the defendant's character witness if his opinion would change if the defendant changed the beneficiary of a life insurance policy in violation of a partnership agreement. The Court rejected the defense argument that this question was improper because the change to the insurance policy was a private matter and it would be unlikely that any character witness would know about it, reasoning that the witness testified both to opinion and reputation, and "because the question to which Reich objects was directed at least in part to his opinion testimony, it was proper regardless of whether it was generally known in the community."

[e.1] Rule 405(a) -- Fact Witness Treated as Character Witness

United States v. Matthews, 440 F.3d 818 (6th Cir. 2006) : Affirming drug and firearm convictions, the Court found no error when the defendant's first witness was treated as a character witness, after she testified on direct examination that "he's a good person, and ... I've never known him to anything to get in trouble or anything like that or to do any illegal activities," and "I don't believe the charges that are against him."

[k] Rule 405(a) -- Victim's Character

United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) : The Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion when evidence of the victim's prison disciplinary records, proffered in support of a self-defense claim, were excluded. The specific acts could not be admitted to prove that the victim was the first aggressor, because to do so would violate the ban on specific acts to prove character. There was extensive testimony as to the victim's reputation for violence in the prison community, but

specific act testimony was properly excluded in the absence of a showing that the acts were known by the defendant and therefore admissible for the non-character purpose of proving the reasonableness of the defendant's belief that the victim was a violent person.

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant was convicted for sexual abuse of his sister-in-law and his niece. Affirming, the Court found no abuse of discretion in the exclusion of testimony by the defendant's friend that he had seen the adult victim and the defendant hugging and kissing two years after the alleged sexual assault. The defendant argued that the testimony was admissible under *Rule 405*, but the Court found that it was specific act evidence in a case in which the victim's character was not an essential element of a charge or defense.

United States v. Visinaiz, 428 F.3d 1300 (10th Cir. 2005) : The Court affirmed a conviction for murder, finding no abuse of discretion in the exclusion of evidence, offered to prove the victim was the first aggressor, that the victim had a history of driving under the influence and had a high blood alcohol content when involved in an automobile accident. This was improper character evidence in the form of specific instances of conduct, instead of permissible reputation or opinion evidence.

[2] Rule 405(b) -- Specific Instances of Conduct [Go To Main]

[b] Rule 405(b) -- Defamation

World Wide Ass'n of Specialty Programs v. PURE, 450 F.3d 1132 (10th Cir. 2006) : An association of treatment programs for troubled teenagers sued a rival organization and other individuals for sending defamatory e-mails to potential customers. Affirming a judgment for the defendants, the Court found no error in the admission of various media reports that were critical of the plaintiff and that related horror stories from teenagers who had been mistreated while attending programs sponsored by the plaintiff. The plaintiff argued that this was inadmissible evidence of "specific instances of conduct," but the Court reasoned that character is an essential element of the claim in a defamation action, and *Rule 405* permits the admission of specific acts when character is an essential element of the case.

[c] Rule 405(b) -- Entrapment

United States v. Franco, 484 F.3d 347 (6th Cir. 2007) : Affirming a conviction for cocaine possession, the Court noted that when the defendant raised an entrapment defense he placed his character in issue, making specific instances of his conduct admissible. Because evidence of his prior drug trafficking crimes was thus admissible under Rules 404(a) and 405(b) rather than Rule 404(b), the government was not required to provide notice of its intention to introduce the evidence.

[d] Rule 405(b) -- Self-defense -- Victim's Character for Violence

United States v. Bordeaux, 570 F.3d 1041 (8th Cir. 2009) : The Court affirmed a conviction for assault with a dangerous weapon, finding no abuse of discretion when the defendant was permitted to testify in support of a claim of self-defense about numerous acts by a victim of which he was aware, because these acts were not admitted to prove the victim's character. The defendant was also properly precluded from testifying to other acts by the victim of which he was unaware, because those acts were offered to prove the victim's violent character and therefore were barred by Rule 405(b), which prohibits using specific acts to prove character when character is not in issue. In *United States v. Gregg, 451 F.3d 930 (8th Cir. 2006)* , the Court affirmed convictions arising from a murder on an Indian reservation, finding no error in the exclusion of evidence of specific acts of violence committed by the victim on other occasions, which the defendant sought to admit to prove the victim's propensity for violence. A victim's character trait for violence "is not an essential element of a claim of self-defense," and where character evidence is used only circumstantially, *Rule 405* prohibits proof through specific acts.

[i] Rule 405(b) -- Specific Good Acts

United States v. Ellisor, 522 F.3d 1255 (11th Cir. 2008) : The Court affirmed a mail fraud conviction arising from the defendant's soliciting funds for a Christmas extravaganza in Miami that never occurred. It found no abuse of discretion in excluding evidence offered by the defendant that he had produced other shows over a ten-year period. The evidence of good conduct on other occasions did not bear on his intent with respect to the charged incident, and was inadmissible even though the government had introduced bad acts evidence in proving his fraudulent intent.

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406.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 274 (1999)

[3] Report of the House Committee on the Judiciary

[4] Citations to Hearing and Debates

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406.01 Official Text

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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406.02 Editorial Explanatory Comment

[1] Rule and Rationale

As discussed in the Editorial Explanatory Comment to *Rule 404*, *§ 404.02[2]*, character evidence is ordinarily inadmissible when offered to prove the conduct of a person on a particular occasion. In contrast, *Rule 406* provides that evidence of a habit of a person is ordinarily admissible to prove that the conduct of the person on a particular occasion was in conformity with the habit. The Rule also provides admissibility for "organizational" practice: evidence of the routine practice of a business organization is admissible to show that the organization acted on a particular occasion in conformity with its routine practice. n1

Habit evidence is treated differently from character evidence because of its greater probative value. It is not always, or even often, the case that a person acts in accordance with a character trait. Violent people, for example, do not act violently on every conceivable occasion. In contrast, a habit by definition is conduct that is consistent, automatic, and specific. If a person acts habitually in a certain specific situation, and the question in the case is how that person acted in the specific situation, there is a pretty high likelihood that that person acted in that situation as he always did. n2 If a person has a habit of wearing a seatbelt, for example, this is much more probative evidence of the person wearing a seatbelt on a certain occasion than is evidence that the person is generally a safety-oriented person. n3

[2] Character Distinguished

Courts have generally proceeded cautiously in permitting the admission of a pattern of conduct as habit, "because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting *Rule 404*'s prohibition against the use of character evidence except for narrowly prescribed purposes." n4 That is, Courts are concerned that the rule admitting evidence as habit will swallow the rule that excludes character evidence. n5

Although it is difficult to delineate the difference between character and habit, n6 generally it may be said that the more particular and the more regular the performance of an act, the more likely it is to be regarded as habit. In other words, the easier it is to describe with particularity what it is that someone does and the more routine the action, the more likely a Court is to hold the activity to be a habit. Another factor is the degree of volition required for the activity; the more

thought and planning required for the act, the less likely it will be found to be a habit; the more reflexive and automatic the conduct, the more likely it will be found to be habit. n7

One Court has stated the test for habit as follows: "To offer evidence of a habit, a party must at least demonstrate a regular practice of meeting a particular kind of situation with a specific type of response." n8 Another Court has added that "habit refers to the type of non-volitional activity that occurs with invariable regularity. It is the non-volitional character of habit evidence that makes it probative." n9 Thus, activity that is extremely complicated is unlikely to be considered habit, since such activity would ordinarily be dependent on a significant thought process, and a number of contingencies, and all of this is inconsistent with the notion of habit as reflexive and automatic. n10 Also, activity that is dependent on cooperation from other individuals, or that is dependent on a number of instrumentalities, is unlikely to be considered as habit, because the circumstances will ordinarily be subject to too much variation. n11

[3] Routine Organizational Practice

With respect to a business or other type of organization, greater emphasis is placed on the routine nature of the activity than on its particularity. The problem of drawing a line between general and specific qualities that arises with natural persons is not present when it comes to structured organizations. Because the line between habit and character is not so problematic with respect to organizations, Courts admit routine organizational practice more liberally, noting that there is significant probative value in the routinized aspects of organizational activity. n12 However, in order to invoke the more liberal admissibility requirements attendant to organizational activity, the proponent must at least show that the activity is that of a structured organization; a loose-knit, *ad hoc* alliance of individuals does not give rise to the same inference of consistent, routinized activity. n13

[4] Eyewitnesses and Corroboration

Note that habit evidence is admissible even though there may be eyewitnesses to the event sought to be proved. So for example, if the question is whether the defendant was negligent in a car accident for failing to signal a turn, evidence that the defendant had a habit of using a turn signal is admissible even if there are eyewitnesses to the accident. This reflects the drafters' view that habit can indeed be highly probative evidence, and that it is not some second-rate or last alternative means of proving conduct. In fact, since habit evidence need not be corroborated, the Rule recognizes that in some cases it may be decisive. n14

[5] Proof of Habit

The draft of *Rule 406* prepared by the Advisory Committee and approved by the Supreme Court provided that habit or routine practice could be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that a habit existed or that a practice was routine. This provision was, however, deleted in the Congress. Apparently, Congress wished to allow Courts to develop and consider methods of proof on a case-by-case basis. One would suspect that the best proof of a habit is that someone acted in a particular way at specific and frequent instances, and also that the person did not act otherwise at other similar instances. n15 Probably the best testimony will be by a witness who has personal knowledge of the conduct of the relevant actor on numerous separate occasions.

Whatever the mode of proof, the touchstone of admissibility is to provide an "adequacy of sampling and uniformity of response" in specific circumstances. n16 The burden of proving that conduct is a habit is placed on the proponent of the evidence. n17 So if only a few instances are shown, and the conduct has occurred over the course of a long period of time, it is unlikely that sufficient evidence of habit will be found; and this is especially so if the instances of conduct are not exactly identical in detail. n18 Conversely, habit is more likely to be found if the proponent can provide multiple instances of specific, identical conduct over a relatively short period of time.

[6] Relationship to Other Rules

Because character evidence is generally excluded when offered to prove conduct, and habit evidence is admitted, Judges will probably want to ensure that they are indeed dealing with a habit and not general character before permitting any evidence to be introduced. It is likely, therefore, that a Judge will look to *Rule 104* and decide to make a preliminary determination that a habit exists before permitting the evidence to be introduced.

Rule 403 should be kept in mind by the conscientious Trial Judge when evaluating habit evidence. n19 When the habit to be proved is likely to be used by a jury as an indication of moral worth, the Judge may exclude proof of habit if its value in the case is substantially outweighed by its potential to distort the jury's factfinding function. In drawing the line between character and habit, it may be wise for the Judge to make the difficult, but useful, attempt to establish a sliding scale for conduct evidence, with totally neutral evidence at one end and highly charged evidence at the other. Evidence falling close to the former may be deemed habit in close cases, and evidence falling close to the latter should be treated as character evidence in close cases.

In attempting to authenticate evidence, the careful lawyer will notice the relationship that potentially exists between *Rule 406* and *Rule 901(b)(4)*. One of the ways that evidence can be authenticated is to show that a particular person or organization habitually produces similar evidence. For example, in a case in which a particular document inadvertently has been removed from its place in an organization's records, authentication might be accomplished by showing that the business routinely records certain information, that the information usually recorded is of the same type that appears in the questioned document, and that the record that would usually exist is missing. The routine practice evidence might be enough to get the document before the trier of fact.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Hall v. Arthur, 141 F.3d 844 (8th Cir. 1998)* (action against a doctor and hospital alleging improperly performed operation; evidence that other patients did not receive warnings concerning the danger of the operation was properly admitted as the routine practice of the organization); *Mobil Exploration & Producing U.S., Inc. v. Cajun Constr. Servs., 45 F.3d 96 (5th Cir. 1995)* (complaint about short-loading of limestone; where the plaintiff provided invoices of over 3400 loads of limestone shipped by the supplier, and demonstrated that "Cajun invariably loaded its trucks in the same manner and to the same level when Cajun obtained limestone from a third-party supplier," this was sufficient evidence of routine organizational practice to be admitted under *Rule 406*).

(n2)Footnote 2. See *Jones v. Southern Pac. R.R., 962 F.2d 447, 449 (5th Cir. 1992)* ("Habit evidence is superior to character evidence because the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character.").

(n3)Footnote 3. See *Babcock v. General Motors Corp., 299 F.3d 60 (1st Cir. 2002)* (evidence that a decedent always wore his seatbelt was properly admitted as habit evidence to prove that the decedent was wearing a seatbelt at the time of the accident in question).

(n4)Footnote 4. *Simplex, Inc. v. Diversified Energy Sys., 847 F.2d 1290, 1293 (7th Cir. 1988)* .

(n5)Footnote 5. See, e.g., *United States v. Mascio, 774 F.2d 219 (7th Cir. 1985)* (there is no such thing as a habit of committing insurance fraud, because evidence of such "habits" "would be identical to the kind of evidence that is the target of the general rule against character evidence").

(n6)Footnote 6. See, e.g., *Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)* ("Character and habit are closely akin."). In *Perrin*, the Court held there was no error in a finding that the plaintiff's previously violent encounters with police officers evidenced a habit, rather than a character trait for violence.

(n7)Footnote 7. See *United States v. Angwin, 271 F.3d 786 (9th Cir. 2001)* (proof that the defendant routinely took the least confrontational course in dangerous situations "was not sufficiently reflexive and specific to constitute habit evidence"); *Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000)* (the fabrication of reasons to justify the

dismissal of employees is not the sort of automatic, non-volitional, situation-specific conduct admitted as habit under *Rule 406*).

(n8)Footnote 8. *Jones v. Southern Pac. R.R., 962 F.2d 447, 449 (5th Cir. 1992)* .

(n9)Footnote 9. *Weil v. Seltzer, 873 F.2d 1453, 1460 (D.C. Cir. 1989)* . See also *United States v. Rangel-Arreola, 991 F.2d 1519 (10th Cir. 1993)* (the defendant was a trucker; a large amount of marijuana was found in his fuel tank; he objected to exclusion of evidence that it was common practice for truck drivers to accept jobs without checking the fuel tanks; the Court holds that the common practice did not constitute habit, because the behavior of truck drivers upon the acceptance of a job is volitional and "not of the reflexive nature or consistency required" to constitute habit).

(n10)Footnote 10. See, e.g., *United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987)* (evidence of past official conduct was not admissible as habit because "extortion or refraining from extortion is not a semi-automatic act and does not constitute habit"); *Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989)* (testimony that the defendant doctor had prescribed steroids to other patients held not admissible as habit because it is "not of the non-volitional, habitual type that ensures its probative value").

(n11)Footnote 11. See, e.g., *Halloran v. Virginia Chemicals Inc., 41 N.Y.2d 386, 393 N.Y.S.2d 341 (1977)* ("On no view ... can conduct involving not only oneself but particularly other persons or independently controlled instrumentalities produce a regular usage because of the likely variation of the circumstances in which such conduct will be indulged."). In *Halloran*, the plaintiff, a car mechanic, was injured when a can of freon exploded while he was servicing an automobile's air conditioning unit. The Court in *Halloran* held that evidence of the plaintiff's "usual practice" of using an immersion coil to heat the water in which he then placed the freon was admissible as habit evidence, to show that the plaintiff followed this (dangerous) practice on the day he was injured. The Court noted that the plaintiff was in "complete control" of the circumstances attendant to the act.

(n12)Footnote 12. See, e.g., *Rosenburg v. Lincoln Am. Life Ins. Co., 883 F.2d 1328 (7th Cir. 1989)* (evidence that an insurance company waived certain standard conditions when issuing a policy was admissible as evidence of routine practice); *Garvey v. Dickinson College, 763 F. Supp. 799 (M.D. Pa. 1991)* (in a Title VII action, evidence of a college's routine procedures for screening faculty applicants, processing applications, and reviewing candidates for tenure were was admissible under *Rule 406*).

(n13)Footnote 13. See, e.g., *United States v. Rangel-Arreola, 991 F.2d 1519 (10th Cir. 1993)* (defendant was a trucker who was found with a large amount of marijuana in the fuel tank of the truck he was driving; he objected to exclusion of evidence that it was common practice for truck drivers to accept jobs without checking the fuel tanks; the Court holds that *Rule 406* was not applicable because a loose-knit group such as freelance truck drivers did not form a cohesive organization with a structure and routinized practice).

(n14)Footnote 14. See, e.g., *Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1523 (11th Cir. 1985)* ("Evidence of habit or routine is to be weighed and considered by the trier of fact in the same manner as any other type of direct or circumstantial evidence.").

(n15)Footnote 15. See, e.g., *Simplex, Inc. v. Diversified Energy Sys., 847 F.2d 1290, 1294 (7th Cir. 1988)* (the *Rule 406* inquiry "necessitates some comparison of the number of instances in which any such conduct occurs with the number in which no such conduct took place"; evidence of late performance of contracts was not admissible under *Rule 406* where the proponent made no attempt at "a comparison of the number of late and defectively performed contracts relative to those without such inadequacies"). See also *Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994)* (the plaintiff was properly precluded from offering evidence that the defendant had a habit of using excessive force while making arrests; the plaintiff was prepared to show that the defendant acted excessively on a number of occasions, but offered no evidence of the total number of arrests that the defendant had performed; thus, the plaintiff "failed to establish that the requisite regularity is tested by the ratio of reaction to situations"; there was insufficient evidence to prove that "the

behavior at issue occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances").

(n16)Footnote 16. *McWhorter v. City of Birmingham, 906 F.2d 674, 679 (11th Cir. 1990)* (evidence of harassment did not constitute habit where only a few instances were shown).

(n17)Footnote 17. See, e.g., *Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989)* (the fact that evidence of specific instances was uncontradicted was held not dispositive, because "the admissibility of habit evidence under *Rule 406* does not hinge on the ability of the party seeking exclusion of the evidence to disprove the habitual character of the evidence. Rather, the burden of establishing the habitual nature of the evidence rests on the proponent of the evidence.").

(n18)Footnote 18. See, e.g., *Jones v. Southern Pac. R.R., 962 F.2d 447 (5th Cir. 1992)* (in a negligence action arising out of a train accident, the plaintiff offered evidence of prior safety infractions of the conductor; these were not admissible as habit evidence because the plaintiff had not demonstrated a regular practice of meeting a particular kind of situation with a specific type of conduct; the conductor was cited for nine safety infractions over a twenty-nine-year period, and the infractions arose from differing circumstances).

(n19)Footnote 19. See, e.g., *United States v. Brechtel, 997 F.2d 1108 (5th Cir. 1993)* (evidence of routine business practice properly excluded under *Rule 403*, where the habit practice was of "tenuous relevance" to the issues, and where "the chain of analogies required to ground relevance of this evidence might well have rendered it confusing to the jury").

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 406 RULE 406

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406.03 Annotated Cases

[Go To Supp]

[1] Custom or Practice of a Particular Organization

Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989) : Vacating a judgment for the plaintiff in a malpractice suit, the Court held that the plaintiff failed to justify as habit evidence proof that the defendant had prescribed steroids to five other allergy patients while representing the drugs to be something else. The evidence was not of the "nonvolitional, habitual type that assures its probative value."

United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988) : Affirming a judgment awarding $1 to the plaintiff in this antitrust action, the Court held that evidence of three or four antitrust judgments against a defendant over a 20-year period was not admissible as habit evidence. In *United States v. Angelilli*, n1 the Court discussed the relationship among *Rule 404(b)* evidence offered to prove a continuing scheme, evidence offered as conspiratorial acts, and habit evidence offered to show conformity to a habit. The Court counseled some caution in jumping from the fact that someone has done similar acts to the conclusion that the person has a habit of doing such acts and concluded that special care is needed to prevent evidence of past practice of some members of an organization from being used to show how others acted at different times. In *United States v. General Foods Corp.*, n2 the FDA brought an action alleging that adulterated food was introduced into interstate commerce by the defendants. The Court held that to refute the allegations the defendants could introduce evidence of routine business practices involving cleanup, sanitation, and maintenance.

Pasack Valley Hospital, Inc. v. Local 464A UFCW Welfare Reimb. Plan, 388 F.3d 393 (3d Cir. 2004): Remanding a removed action to State Court, the Court found that the plaintiff failed to show that a benefits claim had been assigned. A certification by the defendant's director of medical benefits that the defendant had consistently followed the claims and claim review procedures contained in a Summary Plan Description failed to demonstrate that the defendant routinely received assignments prior to payment of claims. Because the certification failed to mention the execution of assignments by plan participants or beneficiaries, there was no proof of a business custom regarding

assignments.

Wilson v. Volkswagen of Am., Inc., 561 F.2d 494 (4th Cir. 1977) : Reversing a default judgment that was granted for willful failure to comply with a discovery order, the Court was critical of the Judge's finding that the defendants demonstrated a habit or pattern of conduct designed to avoid discovery. The Court stated that "habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." It also noted that in evaluating the frequency and the number of actions that are alleged to constitute a habit, the Judge must keep in mind that the key criteria are adequacy of sampling and uniformity of response.

United States v. Wilson, 322 F.3d 353 (5th Cir. 2003) : The Court reversed a conviction for money laundering because of insufficient evidence that the Justice Department's Office of International Affairs actually sent an official request for assistance to the Commonwealth of the Bahamas, thereby tolling the statute of limitations. The Court held that the presumption of mailing and receipt upon proof of an office's routine correspondence practices was not satisfied because there was no evidence of consistent procedures or practices at that time. Reversing a judgment for a supplier sued for allegedly "short-loading" deliveries of limestone in *Mobil Exploration & Producing U.S., Inc. v. Cajun Constr. Servs., 45 F.3d 96 (5th Cir. 1995)* , the Court held it was error to exclude evidence of the supplier's routine practice in loading its trucks. The Trial Judge had reasoned that routine practice evidence must be limited to evidence of practice between the defendant and the plaintiff, but the Court held that the evidence need only establish "regularity over substantially all occasions or with substantially all other parties with whom the defendant has had similar business transactions." In *United States v. West*, n3 a bankruptcy fraud prosecution, the Court found no error in the exclusion of evidence that in the 1980s it was the routine practice of the FDIC to sell notes held by a failed institution at a discount and that the FDIC routinely allowed parties to purchase their own discounted notes through "straw" purchasers. The evidence proffered to prove the routine practice fell "far short of the adequacy of sampling and uniformity of response which are the controlling considerations governing admissibility" under *Rule 406*. The Court also held that evidence of FDIC policies, as distinct from routine practice, could not be introduced under *Rule 406*.

Simplex, Inc. v. Diversified Energy Sys., 847 F.2d 1290 (7th Cir. 1988) : Affirming a judgment for a supplier who sued a purchaser for breach of contract, the Court held that evidence of the supplier's conduct with respect to other contracts was not admissible to prove a routine practice of late deliveries and defective performance. Not only did the Court doubt whether the evidence "approaches the level of specificity to be considered semi-automatic conduct," but it also reasoned that the defendant failed to compare the number of late or defective contract performances with the number of adequate performances. In *Rosenburg v. Lincoln Am. Life Ins. Co.*, n4 the defendant disputed coverage under a group life insurance policy on the ground that 40 percent of the group had not enrolled. The Court held that evidence that defendant's agents had a habit of selling conditional insurance, waiving such conditions, and later asserting them as defenses was admissible as routine practice evidence relevant to whether defendant had waived the conditions.

Hall v. Arthur, 141 F.3d 844 (8th Cir. 1998) : In a suit alleging that a back operation was improperly performed, the Court held that evidence that other patients did not receive warnings concerning the danger of the surgery was admissible as the routine practice of an organization.

Vining v. Enterprise Fin. Group, Inc., 148 F.3d 1206 (10th Cir. 1998) : When the surviving spouse of the insured under a credit life insurance policy made a claim after the insured died of a sudden heart attack, the insurer refused to pay on the ground that the insured's health condition had been misstated. Affirming a judgment for compensatory and punitive damages against the insurer for breach of contract, the Court held there was no abuse of discretion in admitting a report prepared by staff of the state insurance department regarding the defendant's business practices. Offered to

prove that the defendant engaged in a pervasive, consistent pattern of abusive rescissions, the Court said the report was clearly relevant under *Rule 406* on the question of how the defendant acted in this case.

United States v. Sheffield, 992 F.2d 1164 (11th Cir. 1993) : Reversing a conviction for embezzling Air Force property, the Court held that the defendant was wrongly denied his right to introduce evidence that it was the custom of the air base to produce authorized retirement gifts for high-ranking employees. Evidence of the custom was relevant to the defendant's state of mind in ordering the production of certain items. In *G.M. Brod & Co. v. U.S. Home Corp.*, n5 an action by a management company against a condominium developer, the Court held that it was error (but harmless) to admit testimony on behalf of the management company concerning an alleged practice of breaching contracts with small businesses. It found that the number of specific instances, when compared with the thousands of contractual dealings of the developer with small businesses, failed to establish a habit.

[2] Customs of an Industry or Business

United States v. Seelig, 622 F.2d 207 (6th Cir. 1980) : One ground given for reversing pharmacists' convictions for improperly dispensing controlled drugs was that the defendants were erroneously denied an opportunity to offer expert testimony "as to the custom of pharmacists regarding the sales of over-the-counter exempt drugs."

Anderson v. Malloy, 700 F.2d 1208 (8th Cir. 1983) : A rape victim sued the owners and operators of a motel claiming they did not take adequate measures to protect motel guests. The Court reversed a judgment for the defendants, partly because the Trial Judge erred in excluding evidence of the custom and practice of other area hotels and motels.

United States v. Rangel-Arreola, 991 F.2d 1519 (10th Cir. 1993) : The defendant, charged with importing marijuana after it was found in his truck's fuel tanks, sought to support his defense that he had no knowledge of the marijuana by offering evidence that it was common practice for truck drivers to accept jobs without checking the fuel tanks. The Court held the evidence was not admissible under the Rule because it neither showed the defendant's conduct nor that of an organization from which consistent conduct might be inferred. Furthermore, the defendant was not offering to show a regular practice of meeting a particular situation with essentially reflexive behavior.

[3] Distinction Between Habit and Character Evidence

United States v. Yazzie, 188 F.3d 1178 (10th Cir. 1999) : Although the Court reversed murder convictions, it held that the Trial Judge properly excluded testimony that the deceased routinely got into fights in a bar, used drugs, carried a knife, and kept the woman with whom he lived for a year in a "hostage relationship" as inadmissible specific act character evidence. The Judge permitted the defense to introduce evidence of the deceased's reputation for violence and permitted the woman with whom he lived to testify that the deceased routinely picked fights, manipulated and intimidated people, and carried a gun. The Court held that the Judge properly exercised discretion in admitting habit evidence while excluding evidence that did not amount to routine conduct.

[4] Habits of Individuals

[a] Drinking

Reyes v. Missouri P. R. Co., 589 F.2d 791 (5th Cir. 1979) : Reversing a judgment for the defendant in a diversity action for damages suffered by a plaintiff run over by a train, the Court found "that four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of 'habit'

evidence."

Keltner v. Ford Motor Co., 748 F.2d 1265 (8th Cir. 1984) : In an action by a motorist alleging enhancement of injuries following an accident as a result of the doors of his van jamming, the Court sustained a judgment for the manufacturer. It found no error in the admission of testimony concerning the plaintiff's drinking habit -- i.e., he regularly drank a six-pack of beer four nights a week -- especially in view of the fact that there was evidence that the plaintiff smelled of alcohol after the accident and the plaintiff testified that he could not remember if he had been drinking on the night of the accident.

United States v. Pinto, 755 F.2d 150 (10th Cir. 1985) : The Court affirmed a defendant's convictions for burglary and assault with intent to rape. It held that the Trial Judge did not err in excluding evidence concerning four instances of conduct over an eight-year period in which the defendant entered premises uninvited on the ground that it was insufficient to establish a habit of wandering into wrong houses while intoxicated.

Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985) : Affirming a manufacturer's judgment in a product liability action brought by a tire mechanic injured when parts of a rim-wheel assembly separated while being remounted, the Court upheld the admission of testimony concerning the mechanic's routine practice of drinking. There was no direct testimony that he had been drinking on the day of the accident, but the Court reasoned that proof of habit may be presented through indirect evidence. The Court stressed that habit and pattern evidence is never to be lightly established and admitted, and that the key criteria are "adequacy of sampling and uniformity of response or ratio of reactions to situations."

[b] Habits of Individuals -- Financial Matters

Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716 (4th Cir. 1977) : The Court reversed a judgment against a defendant held liable as a guarantor of a contract, on the ground that it was improper to admit evidence that on a previous occasion the person acted as a guarantor for the defendant company.

[c] Habits of Individuals -- Seatbelt Use

Babcock v. General Motors Corp., 299 F.3d 60 (1st Cir. 2002) : The plaintiff's decedent was thrown from a pickup truck in a collision, allegedly because of a defect in the locking mechanism of his seatbelt that permitted it to become unbuckled as soon as pressure was exerted upon it. To prove that the decedent was wearing his seatbelt immediately prior to the impact, the plaintiff presented three witnesses, who all testified that he always wore his seatbelt, regardless of whether he was the driver or a passenger and regardless of the length of the trip. One witness also testified that the decedent always put on his seat belt before the vehicle in which he was riding started. Affirming a judgment for the plaintiff, the Court found no error in the admission of this habit evidence to prove seatbelt use.

[d] Habits of Individuals -- Similarity To Conduct At Issue

United States v. Angwin, 271 F.3d 786 (9th Cir. 2001) : In a prosecution for transporting illegal aliens, the defendant contended that he acted under duress, transporting the aliens only after they stormed into his motorhome when he had pulled over to walk his dog. The Court held there was no error in excluding evidence regarding the defendant's training in the Coast Guard Auxiliary, which was proffered to show his consistent reaction to taking the least confrontational course in dangerous situations. Indicating that the ruling on habit evidence is highly fact-specific, the Court observed that the Judge had ruled that the training was not sufficiently similar to the conduct on the day of the

crime and that the "proffered evidence of his [the defendant's] training was not sufficiently reflexive and specific to constitute habit evidence."

[e] Habits of Individuals -- Use of Force or Coercion

United States v. Callahan, 551 F.2d 733 (6th Cir. 1977) : In a Hobbs Act prosecution charging extortion by a union official from a construction contractor, the defendant was not permitted to cross-examine the government's principal witness about past confrontations with union representatives. The Court reversed the convictions on the ground that the evidence might have established under *Rule 406* a routine practice of paying off local unions for the sake of expediency and might have established that there was no fear involved.

United States v. Serrata, 425 F.3d 886 (10th Cir. 2005) : The defendant corrections officers were convicted of civil rights violations for assaulting an inmate. They claimed that he resisted being handcuffed, and offered evidence that he had previously refused to be handcuffed when arrested. Affirming, the Court held that evidence of the inmate's resistance to being handcuffed on three occasions when being arrested was not admissible as habit evidence because it was not a "semi-automatic act" and the number of instances was insufficient to establish the existence of a habit. In *Perrin v. Anderson*, n6 the Court affirmed a judgment for police officers sued by the estate of a man killed when the officers attempted to obtain information about a traffic accident. It held that testimony by four officers concerning five violent acts by the deceased against police officers was admissible, even though five events would ordinarily not establish a habit. The defendants had made an offer of proof that eight officers would testify as to numerous incidents, and the Trial Judge limited the proof to four witnesses in order to avoid undue prejudice. In *United States v. Troutman*, n7 the Court affirmed a conviction for conspiracy to commit extortion, finding no error in exclusion of evidence that the defendant had not previously conditioned an award of state business upon the making of political contributions. The Court reasoned that "[e]xtortion or refraining from extortion is not a semi-automatic act and does not constitute habit."

United States v. Holman, 680 F.2d 1340 (11th Cir. 1982) : In a prosecution arising out of marijuana smuggling, one of the defendants testified that his son, a government witness, coerced him into participating. The Court held that the Trial Judge properly excluded evidence that on another occasion the son, while serving as a crew member on a ship, tried to persuade his captain to take marijuana aboard. According to the Court, this was not evidence sufficient to establish a habit on the part of the son to force people to smuggle drugs.

[5] Proof of Habit

[a] Miscellaneous Cases

Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994) : In an action for damages for use of excessive force, the Court held that the plaintiff was properly precluded from offering evidence that the defendant had a habit of using excessive force while making arrests. The plaintiff had offered affidavits from five other people who had been arrested by the defendant, but three were conclusory as to the use of excessive force, and two concerned factual circumstances different from those involved in the instant case. The proof of habit also failed because the plaintiff offered no evidence of the total number of arrests that the defendant had performed. Thus, the plaintiff "failed to establish that the requisite regularity is tested by the ratio of reaction to situations." The Court concluded that there was insufficient evidence to prove that "the behavior at issue occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances."

Camfield v. City of Oklahoma City, 248 F.3d 1214 (10th Cir. 2001) : In an action under § 1983 and the Video

Privacy Protection Act by a video store customer whose copy of a video was seized by officers conducting a raid to enforce state pornography laws, the Court held there was no abuse of discretion in excluding testimony, offered by the plaintiff as habit evidence to bolster his claim that he did not voluntarily surrender his copy of the movie, by five video store clerks and one customer that an officer had told them he was there to seize their copies because a Judge had ruled it contained either obscenity or child pornography. "Announcing the seizure of child pornography upon walking into a video rental store is not a semi-automatic act and could not serve as a basis for habit evidence." Further, it was not clear whether each witness would testify to a separate event, and five incidents is not ordinarily sufficient to establish the existence of a habit.

[b] Proof of Habit -- Sufficient Number of Instances

United States v. Newman, 982 F.2d 665 (1st Cir. 1992) : The Court affirmed a conviction of a correctional officer for violating the civil rights of an inmate, holding that the Trial Judge had properly excluded the testimony of another correctional officer concerning how prisoners were handcuffed to cell bars. Although the witness would have testified that he had seen between 75 and 100 inmates handcuffed to certain cell bars, there was no indication as to the total number of instances in which handcuffing took place. Thus, there was no way for the Judge to determine whether the witness was testifying to a virtually invariable practice.

Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716 (4th Cir. 1977) : The Court reversed a judgment against a defendant held liable as a guarantor of a contract on the ground that it was improper to admit evidence that on a previous occasion the person acted as a guarantor for the defendant company. The Court noted that "[p]roof of something done in [*sic*] a single occasion is hardly proof of a habit. Particularly is this so when proof is lacking that the occasion on which the habit was supposedly formed and the occasion on which it is claimed that the habit was followed are related or even similar."

Reyes v. Missouri P. R. Co., 589 F.2d 791 (5th Cir. 1979) : Reversing a judgment for the defendant in a diversity action for damages suffered by a plaintiff run over by a train, the Court found "that four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of 'habit' evidence."

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) : The Court affirmed a judgment for police officers sued by the estate of a man killed when the officers attempted to obtain information about a traffic accident. It held that testimony by four officers concerning five violent acts by the deceased against police officers was admissible, even though five events would ordinarily not establish a habit. The defendants had made an offer of proof that eight officers would testify as to numerous incidents, and the Trial Judge limited the proof to four witnesses in order to avoid undue prejudice. In *United States v. Pinto*, n8 the Court affirmed a conviction for burglary and assault with intent to rape. It held that the Trial Judge did not err in excluding evidence concerning four instances of conduct over an eight-year period in which the defendant entered premises uninvited on the ground that it was insufficient to establish a habit of wandering into wrong houses while intoxicated.

G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985) : In an action by a management company against a condominium developer, the Court held that it was error (but harmless) to admit testimony on behalf of the management company concerning an alleged practice of breaching contracts with small businesses. It found that the number of specific instances, when compared with the thousands of contractual dealings of the developer with small businesses, failed to establish a habit.

[c] Proof of Habit -- Uniform Response

Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000) : The Court reversed a judgment for the plaintiff, who alleged age discrimination in his termination, because the plaintiff had erroneously been permitted to testify regarding the "manner" in which the defendant allegedly had earlier terminated another employee. This testimony could not be admitted as habit evidence. The fabrication of reasons to justify employees' dismissals is not the sort of semi-automatic, situation-specific conduct admitted under *Rule 406*, and the one other instance was insufficient proof that the defendant's behavior was repetitive.

Jones v. Southern Pac. R.R., 962 F.2d 447 (5th Cir. 1992) : The Court held there was no error in excluding evidence of the defendant's engineer's prior safety infractions in a personal injury action arising out of a truck-train collision, as the evidence, of several incidents over a long career, could hardly be characterized as a habit.

United States v. Angwin, 271 F.3d 786 (9th Cir. 2001) : A defendant charged with smuggling aliens found in his motorhome claimed that they had approached him at a rest stop by the road and that he only picked them up to deliver them to a Border Patrol checkpoint. The defendant offered as habit evidence testimony regarding his training and experience in the Coast Guard Auxiliary, where he was taught to take the least confrontational course of action in potentially dangerous situations. The Court found no abuse of discretion in excluding the evidence, first, because the difference from rescuing distressed boats at sea made his training irrelevant to the context at issue, and second, because the defendant's training was not sufficiently reflexive and specific to constitute habit evidence deciding what to do when approached by a group of men involves a volitional calculation and a deliberate assessment.

Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985) : Affirming a manufacturer's judgment in a product liability action brought by a tire mechanic injured when parts of a rim-wheel assembly separated while being remounted, the Court upheld the admission of testimony concerning the mechanic's routine practice of drinking. There was no direct testimony that he had been drinking on the day of the accident, but the Court reasoned that proof of habit may be presented through indirect evidence. The Court stressed that habit and pattern evidence is never to be lightly established and admitted, and that the key criteria are "adequacy of sampling and uniformity of response or ratio of reactions to situations."

FOOTNOTES:

(n1)Footnote 1. *United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981)* .

(n2)Footnote 2. *United States v. General Foods Corp., 446 F. Supp. 740 (N.D.N.Y. 1978), aff'd, 491 F.2d 1332 (2d Cir. 1978)* .

(n3)Footnote 3. *United States v. West, 22 F.3d 586 (5th Cir. 1994)* .

(n4)Footnote 4. *Rosenburg v. Lincoln Am. Life Ins. Co., 883 F.2d 1328 (7th Cir. 1989)* .

(n5)Footnote 5. *G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985)* .

(n6)Footnote 6. *Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)* .

(n7)Footnote 7. *United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987)* .

(n8)Footnote 8. *United States v. Pinto, 755 F.2d 150 (10th Cir. 1985)* .

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PART TWO: THE RULES THEMSELVES
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406.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). [Editor's Note: As proposed by the Advisory Committee, Rule 406 contained two subdivisions; subdivision (b) was deleted by Congress.] An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character.

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.

Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

> Character may be thought of as the sum of one's habits though doubtless it is more than this. However, unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether *X* did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for

this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, *16 Syracuse L. Rev. 39, 49 (1964)*. While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103 , and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806 . In *Levin v. United States, 338 F.2d 265, 119 U.S. App. D.C. 156 (1964)* , testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded:

> It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature and hence its probative value.

Id. at 272 .

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, *6 Kan. L. Rev. 38*-41 (1957). Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 151 P.2d 670 (1944)* , upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, *5 Kan. L. Rev. 404*-449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste v. New York, N.H. & H.R. Co., 231 F.2d 50 (2d Cir. 1956)* , *cert. denied, 351 U.S. 951, 76 S. Ct. 848, 100 L. Ed. 1475* , *10 Vand. L. Rev. 447 (1957)*; McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, *California Evidence Code § 1105*.

Subdivision (b). [Editor's Note: This subdivision was deleted by Congress.] Permissible methods of proving habit or routine conduct include opinion and specific instances sufficient in number to warrant a finding that the habit or routine practice in fact existed. Opinion evidence must be "rationally based on the perception of the witness" and helpful, under the provisions of Rule 701. Proof by specific instances may be controlled by the overriding provisions of Rule 403 for exclusion on grounds of prejudice, confusion, misleading the jury, or waste of time. Thus the illustrations following A.L.I. Model Code of Evidence Rule 307 suggest the possibility of admitting testimony by *W* that on numerous occasions he had been with *X* when *X* crossed a railroad track and that on each occasion *X* had first stopped and looked in both directions, but discretion to exclude offers of 10 witnesses, each testifying to a different occasion.

Similar provisions for proof by opinion or specific instances are found in Uniform Rule 50 and Kansas Code of Civil Procedure § 60-450. New Jersey Rule 50 provides for proof by specific instances but is silent as to opinion. The California Evidence Code is silent as to methods of proving habit, presumably proceeding on the theory that any method is relevant and all relevant evidence is admissible unless otherwise provided. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Rep., Rec. &

Study, Cal. Law Rev. Comm'n, 620 (1964).

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 274 (1999)

Rule 406 -- Habit

Rule 406 provides that evidence of habit is admissible to prove conduct in accordance with the habit. The Advisory Committee Note to *Rule 406* refers to a subdivision (b) of the rule governing the permissible methods of proving habit. The note states that habit can be proven only through opinion evidence or by proof of specific instances of conduct.

The problem is that there is no subdivision (b) to *Rule 406*. Congress believed that the method of proof of habit should be left to the courts on a case-by-case basis. So the Advisory Committee Note should not be relied on as a correct statement of the only possible means of proving habit. For example, habit could potentially be proven through reputation evidence.

[3] Report of the House Committee on the Judiciary

Rule 406 as submitted to Congress contained a subdivision (b) providing that the method of proof of habit or routine practice could be "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." The Committee deleted this subdivision believing that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area.

[4] Citations to Hearing and Debates

Letter from Edward W. Cleary to Herbert E. Hoffman, May 18, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 84-87 (1973).

Letter from Edward W. Cleary to Herbert E. Hoffman, May 29, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 96-97 (1973).

Letter from James F. Schaeffer to Hon. William L. Hungate, June 5, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 100-104 (1973).

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 406 RULE 406

2-406 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 406, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 406. Habit; Routine Practice	**Rule 406. Habit; Routine Practice**
Evidence of the habit of a person or of the routine pract	Evidence of a person's habit or an organization's routi

ice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular

ne practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence

occasion was in conformity with the habit or routine practice. regardless of whether it is corroborated or whether there was an eyewitness.

Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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2-406 Federal Rules of Evidence Manual Supp. to § 406.03

Supp. to § 406.03 Annotated Cases

[Go To Main]

[1] Custom or Practice of a Particular Organization [Go To Main]

United States v. Warner, 498 F.3d 666 (7th Cir. 2007) : The Court affirmed the racketeering conviction of a former Illinois Governor, which arose from his earlier service as Secretary of State and alleged improprieties in awarding leases and contracts for his office. The Court found no abuse of discretion in excluding evidence of rate hikes on leases by other Secretaries of State. It did not amount to routine practice evidence because it was not a regular response to a repeated specific situation.

United States v. Oldbear, 568 F.3d 814 (10th Cir. 2009) : Affirming the conviction of an administrative assistant in tribal offices for embezzling from a tribal emergency assistance program, the Court found no abuse of discretion in the exclusion of testimony from three witnesses that they also received emergency assistance funds for similar expenses. The witnesses had no personal knowledge whether it was a routine practice of the tribe, as opposed to an improper deviation from tribal policy, to approve such expenditures. By the same token, the three instances known to the witnesses would not be sufficient to demonstrate a habitual pattern.

[4] Habits of Individuals [Go To Main]

[c] Habits of Individuals -- Seatbelt Use

Sims v. Great Am. Life Ins. Co., 469 F.3d 870 (2006) : In an action against a life insurer who refused to pay on the ground that the insured committed suicide, the insurer attempted to prove the decedent's state of mind by showing that he was not wearing a seatbelt (although he habitually did) at the time of his one-car accident. Affirming in part a judgment for the plaintiff, the Court held it was error (but harmless) to exclude the habit evidence. Because "the very nature of habit evidence is that it is done reflexively," the evidence would be probative on the question whether he failed to buckle up because he was suicidal or because he was intoxicated.

[5] Proof of Habit [Go To Main]

[a] Miscellaneous Cases

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007) : The Trial Judge ruled in a bench trial that insureds who sued their homeowners' insurer to recover for damage to their residence caused by wind and storm surge from Hurricane Katrina had coverage for some losses, but not others. Although the Court affirmed, it said that "to do so we must work through some erroneous reasoning." It found a clear abuse of discretion in admitting statements made by an insurance agent to five policy holders about the need for additional flood coverage, to prove that the same advice was given to other policyholders. The agent had 1500 customers, so statements made to five of them over the course of a decade "do not remotely qualify or quantify as a habit within the meaning of Rule 406."

[b] Proof of Habit -- Sufficient Number of Instances

United States v. Oldbear, 568 F.3d 814 (10th Cir. 2009) : Affirming the conviction of an administrative assistant in tribal offices for embezzling from a tribal emergency assistance program, the Court found no abuse of discretion in the exclusion of testimony from three witnesses that they also received emergency assistance funds for similar expenses. The witnesses had no personal knowledge whether it was a routine practice of the tribe, as opposed to an improper deviation from tribal policy, to approve such expenditures. By the same token, the three instances known to the witnesses would not be sufficient to demonstrate a habitual pattern.

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[c] Impeachment or Rebuttal -- Evidence Excludable or Required To Be Excluded

[d] Impeachment or Rebuttal -- Product Liability Cases

[10] Libel Case

[11] Product Liability Cases

[12] Reference to State Law

[13] Relationship to Rule 403

[14] Remedial Measures Before Accident

[15] Remedial Measures by Plaintiff

[16] Remedial Measures by Third Party

[17] Remedial Measures Ordered Before Accident

[18] Remedial Measures Required by Law

[19] "Remedial Measures" Under the Rule

[20] Safety Policy

407.04 Legislative History

[1] Advisory Committee's Note

[2] 1997 Amendment Advisory Committee's Note

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407.01 Official Text

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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407.02 Editorial Explanatory Comment

[1] Subsequent Repairs and Remedial Measures

Judges and lawyers are perhaps most familiar with this Rule when it is expressed in the following terms: If someone makes repairs after an accident, those repairs are not admissible against the person making them to prove that person was negligent prior to or at the time of the accident. *Rule 407* is written more broadly, however. It provides that any measures that are taken after an injury or harm, which if they had been taken previously would have made the injury or harm less likely to occur, cannot be introduced as evidence to prove negligence or culpable conduct, defective product or design, or failure to warn. This expansion beyond evidence of subsequent repairs covers such evidence as subsequent installation of safety devices, a change in company rules, and discharge of employees. n1 And the Rule obviously covers more than negligence cases.

However, in order to qualify for exclusion under *Rule 407*, the action taken by the defendant must at least have been a "measure." For example, in *Prentiss & Carlisle v. Koehring-Waterous, 972 F.2d 6 (1st Cir. 1992)* , the plaintiff was injured when a product manufactured by the defendant caught fire. The defendant sent employees to the site of the accident to investigate. These investigations resulted in reports concerning the cause of the fire. The Court held that the reports were not subject to exclusion under *Rule 407*, because they did not constitute remedial measures. According to the Court, it "would strain the spirit of the remedial measure prohibition in *Rule 407* to extend its shield to evidence contained in post-event tests or reports." A product analysis or postaccident report might *lead* to the taking of remedial measures; but that does not mean that the report or analysis itself is excluded under the Rule. n2

[2] The Social Policy Basis of the Rule

The principal argument made in favor of the Rule is based in social policy: that without the Rule, remedial measures would not be taken after an injury or harm, for fear that such measures could be used as an admission of fault, culpability, defective design, etc., on the part of the defendant. The conclusion is that the absence of a rule such as *Rule 407* would put the public safety at risk. As Judge Posner has put it: "A major purpose of *Rule 407* is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability." n3 Thus, the Rule is a response to the negative social consequences that would allegedly arise in the *absence* of an exclusionary rule.

We believe that the articulated social policy does not justify the Rule. First, the policy argument presumes that a person or organization would know that there is no exclusionary rule for subsequent remedial measures in the relevant jurisdiction, and would also know that in the absence of such a rule, a subsequent remedial measure could constitute an admission that could be used at a trial that has not yet begun. Second, even if the informed defendant assumption is correct, a defendant with that kind of knowledge of the rules of evidence would also know that the failure to correct a situation in which an injury occurred could be admissible if another injury were to occur, with far more serious consequences to the defendant. That is, if a remedial action is not undertaken, and *another* accident occurs, the well-informed defendant would know that there would be a strong case of gross negligence or recklessness, and the possibility of punitive damages. The defendant would balance the relatively contained cost of remedying the condition (use of that evidence against the defendant in the case arising from the past accident) against the potentially dramatic cost of not remedying the condition (use of that evidence against the defendant in all cases arising from future accidents). So a well-informed defendant, even in the absence of a rule such as *Rule 407*, would be very likely to take corrective measures in order to avoid more serious liability for future accidents. Since the defendant is highly likely to take corrective measures even in the absence of *Rule 407*, it follows that the social policy argument behind *Rule 407* is flawed. If the policy of promoting safety were the only basis for the Rule, then *Rule 407* would be nothing more than a windfall for defendants, who would probably take corrective action even in the absence of any exclusionary Rule.

Judge Posner disagrees with this analysis. He argues as follows:

> One might think it not only immoral but reckless for an injurer, having been alerted by the accident to the existence of danger, not to take steps to correct the danger. However, accidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger. n4

We think that most defendants, having become aware of a dangerous condition after an accident, would not be as easily persuaded as Judge Posner that a future accident is a low-probability event. More importantly, even if a future accident is considered unlikely, we think that most defendants would conclude that the risk of substantially higher liability resulting from an uncorrected condition would be too great to bear, should the low-probability event ever come to pass. The defendant must factor in not only the likelihood of injury but the amount of liability should an injury occur. And if the defendant is aware of a dangerous condition but does nothing to correct it, the amount of liability for future injuries is bound to be high. We believe that most defendants would correct a dangerous condition after an injury even if *Rule 407* did not exist.

Despite the weakness of the social policy argument, both the Advisory Committee comments and the subsequent cases rely on social policy as the principal rationale for the Rule. This is important to remember, because a subsequent remedial measure may then be admissible in situations where the "no disincentive to repair" rationale is clearly inapplicable. See the discussion of permissible purposes in §§ 407.02[7]-[8].

[3] The Relevance Basis of the Rule

The more persuasive basis for the Rule is that subsequent remedial measures are of marginal relevance in assessing the defendant's liability, and that this marginal relevance is almost always substantially outweighed by the risk of jury confusion created by the introduction of a subsequent remedial measure. n5 The balance so often favors exclusion that it probably makes sense to impose a generalized rule of exclusion rather than to rely initially on a case-by-case approach under *Rule 403*.

We believe that to understand *Rule 407* it is imperative to focus on why a lawyer would want to offer subsequent remedial measures following an event in order to argue that this evidence proves negligence, product defect, defective

design, or failure to warn. The only reason is to make an argument something like the following one (in the context of a negligence case):

> Ladies and gentlemen of the jury, you have heard that the defendant in this case actually repaired his (insert property) following the accident. Now what does this mean to you? It must mean that the defendant thought the (insert property) was inadequate in the condition it was in at the time of the accident. Now, I ask you, if it was in need of repair after the accident, what about at the time of the accident? If this defendant indicated by making the repair after the accident that repair was needed, have you any doubt that it was also needed before the accident took place? Well, no repair was made at that time. And I tell you that you are therefore justified in finding the failure to make the repair that was made later before this tragedy occurred to be negligence.

The problem with this argument is that negligence is properly assessed according to what the defendant knew or should have known *prior to the accident*, not what the defendant knew as a result of the accident. However, it is likely to be difficult for a jury to draw this distinction. The very fact of an accident is likely to influence the jury to think that the repair should have been made earlier. What *Rule 407* does is to keep the jury's attention on the defendant's information and conduct at the relevant time -- i.e., prior to the accident. n6

[4] Permissible Uses of Evidence of Subsequent Remedial Measures

The second sentence of the Rule specifically provides that evidence of remedial measures need not be excluded if it is offered for some purpose other than showing negligence, culpability, product defect, design defect, or failure to warn. Permissible purposes include proof of ownership or control, or the feasibility of precautionary measures, where those issues are controverted by the defendant. If, for example, *D* is driving a vehicle that collides with the car of *P*, and *P* brings an action for damages against *D*, to determine whether evidence of subsequent remedial measures will be admitted it is necessary to look to the purpose for which the evidence is offered. Assume that *P* contends that *D* was driving a car with unsafe brakes. If *P* wants to introduce the fact that after the accident *D* had the brakes repaired, and the purpose for offering the evidence is to show that prior to the accident *D* failed to exercise reasonable care to inspect the brakes, the evidence will be excluded. If, however, *D* defends against *P* and urges that *D* had no duty because the car belonged to someone else, *P* may very well be able to introduce the fact that after the accident it was *D* who had the brakes repaired in order to show that *D* had control of the vehicle. If the evidence is admitted, the defendant is entitled upon request to a limiting instruction as to the proper use of the evidence. n7

[5] Issues in Controversy

In cases where a party wants to introduce evidence of subsequent remedial measures ostensibly for a purpose other than those precluded by the Rule, the Judge should make certain that the evidence is offered to prove a point that is actually in controversy. If, for example, control is not controverted, there is no reason to allow evidence to come in on that issue; it is not relevant, because it is cumulative in proving control, and at best its probative value in proving control is substantially outweighed by the risk that the jury will use the evidence impermissibly. n8 Because evidence of subsequent remedial measures might be used by a jury as an admission of liability no matter what sort of limiting instruction the Trial Judge gives, the Judge should attempt to ensure that the purpose for which such evidence is offered is a valid one. This is what the Rule means when it sets forth permissible purposes for evidence of subsequent remedial measures, but only "if controverted." On the other hand, if an issue such as control is truly placed in controversy, then the jury can profit from knowing that repairs were made by the defendant after an accident. There is little danger that the jury will misuse the evidence by focusing on the wrong time period when these issues are raised by the defendant. Moreover, if the defendant places an issue such as control in controversy, it is only fair to allow the plaintiff to respond with whatever relevant evidence is available.

[6] Product Liability Cases

The concept of "product liability" includes many different kinds of actions. It becomes clearer all the time that proving that a design was defective is not much different in many jurisdictions from proving negligence and that design changes made years after a product is sold are not very probative on the state of the earlier art.

Up until 1997, Courts had been divided on whether *Rule 407* was applicable to product liability cases. The original *Rule 407* prohibited evidence of subsequent remedial measures only if offered to prove "negligence or culpable conduct." Despite the language of the Rule, however, most Courts had held that *Rule 407* excluded subsequent remedial measures when offered to prove defective manufacture, defective design, or failure to warn in product liability cases.

Some of these Courts reasoned that the social policy basis of the Rule is as applicable to defendants in product liability cases as it is in negligence cases. Other Courts reasoned that the relevance-based aspects of the Rule are equally applicable to strict liability cases and negligence cases. As the Fifth Circuit stated:

> The real question is whether the product or design was defective at the time the product was sold. The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured. ... The introduction of evidence about subsequent changes in the product or its design threatens to confuse the jury by diverting its attention from whether the product was defective at the relevant time to what was done later. n9

In a product liability case, if the issue in dispute concerns the design of a product, and if liability is to be measured on the basis of the state of the art when the product was made, there is a danger that introduction of subsequent design changes will confuse the jury with respect to the knowledge they are to require of the defendant, in much the same way that a jury might be confused by subsequent repair evidence in a negligence case. It seems to us that a jury would have difficulty in understanding that what a defendant learned as a result of an accident or from new information in an industry is not probative of whether a product was defective in design when it was made.

In 1997, *Rule 407* was amended to specify that subsequent remedial measures are not admissible to prove "a defect in a product, a defect in a product's design, or a need for a warning or instruction."

[7] Permissible Purposes -- Feasibility

Rule 407 by its terms is not applicable if the feasibility of making a suggested change to a product or condition is controverted by the defendant. For example, assume that the plaintiff has been injured by a product and claims that it was defectively designed. Ordinarily, to prove defective design, the plaintiff will have to suggest some alternative design that would have made the product less dangerous. If the defendant claims that the alternative suggested was not feasible -- either because it would have been prohibitively expensive, or that it was not within the state of the art at the time of manufacture -- then feasibility is controverted and the Rule does not prevent the admission of subsequent changes to the product or condition made by the defendant, offered solely to prove feasibility. Of course, the defendant is entitled to a limiting instruction as to the permissible use of the evidence; and in rare cases, the probative value of the subsequent remedial measure as proof of feasibility might be substantially outweighed by the risk of prejudice and confusion, so that the evidence could still be excluded under *Rule 403*. n10

The feasibility "exception" to *Rule 407* is rarely applicable, however, because feasibility is a weak defense if the defendant has in fact made a change to the product or condition after the plaintiff's injury. It is difficult, if not foolhardy, to argue that a suggested change was prohibitively expensive or beyond the state of the art when the change was in fact made after the injury. Consequently, most defendants concede feasibility when subsequent remedial measures have been taken. n11 Such a concession prevents the plaintiff from arguing that feasibility is in controversy, and therefore precludes the use of subsequent remedial measures on that point. n12 The defendant remains free to defend on the ground that the suggested change, while feasible, would not have made the condition significantly safer, or would have resulted in other disadvantages such that the defendant's original conduct was reasonable. As one Court has put it,

"[W]here a defendant argues about the trade-offs involved in taking precautionary measures, it is not placing *feasibility* in issue." n13

[8] Permissible Purposes -- Impeachment

Impeachment of witnesses is specifically listed as a permissible purpose for admitting subsequent remedial measures. Presumably, the mode of impeachment contemplated is that of contradiction -- the subsequent remedial measure may be relevant to contradict testimony from the defendant's witness, thus making that witness less credible before the jury.

The problem is that almost any testimony given by defense witnesses could be contradicted at least in some minimal way by a subsequent remedial measure. If the defendant's expert testifies that the product was safe, a subsequent remedial measure could be seen as contradicting that testimony. If the defendant is asked on cross-examination whether the defendant thinks that all reasonable safety precautions had been taken at the time of the accident, and answers in the affirmative, then a subsequent remedial measure can be seen as contradicting that testimony.

If "impeachment" means simple contradiction, then the impeachment exception to *Rule 407* would threaten to swallow the Rule itself. n14 Accordingly, most Courts have held that a subsequent remedial measure is not admissible for impeachment if it is offered for simple contradiction of a defense witness' testimony. n15 Essentially, the limited probative value of the evidence for impeachment is substantially outweighed by the risk of prejudice and confusion resulting from the possible misuse of the subsequent remedial measure by the jury. If the defense witness simply testifies that a product was safe, a subsequent remedial measure does contradict that testimony, but not very much so -- there could be many reasons, other than a recognition of safety concerns, for the decision to change a product or condition after an accident.

On the other hand, if the defendant's witnesses testify in superlatives -- e.g., "this is the safest product on the market" -- then the evidence of a subsequent remedial measure provides more than simple contradiction. It shows that the witness puffed and exaggerated while on the stand. As such, the remedial measure provides a more direct and probative form of impeachment, which justifies a limited exception to the Rule. n16 Likewise, if defense witnesses testify that the product or condition has not been changed since the accident, then evidence of subsequent remedial measures provides a more direct and probative, and hence a permissible, form of impeachment through contradiction. n17

[9] Measures Taken By Parties Not Responsible For the Harm

Is a subsequent remedial measure excluded by *Rule 407* if the action is taken by someone other than the defendant? For example, in *Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985)* , the plaintiff was injured while working on a tractor, after an object entered the tractor cab through an open area between the support bar and the dashboard. After the accident, the owner of the tractor added screening and a metal plate to close off this open area of the tractor cab. The plaintiff sued International Harvester, alleging defective design. Harvester sought to exclude the tractor owner's remedial measure, but the Court held that *Rule 407* was inapplicable. The Court relied on the policy basis for the Rule, which is "to avoid discouraging defendants from making necessary repairs or changes to products or dangerous conditions." It concluded that since the remedial measure "was made by a non-defendant, *Rule 407* does not bar the evidence."

The reasoning of *Dixon* is questionable insofar as it is based on policy arguments -- because *Rule 407* itself is questionable on policy grounds. Even on relevance grounds there is a strong argument can be made that *Dixon* is wrongly decided. If the probative value of a defendant's own remedial change is generally substantially outweighed by the risk of jury confusion, then this should *a fortiori* be true with respect to a change by someone who is not responsible for the accident. Also, there is nothing in the language of *Rule 407* that distinguishes between measures taken by defendants and nondefendants. The Rule excludes *any* measure which, if taken, would have made the event less likely to occur, if offered to show negligence, culpability, product defect, defective design, or failure to warn.

Despite these arguments, the Courts have usually held that *Rule 407* is inapplicable to changes made by parties who are not responsible for the injury or harm. n18

[10] Pre-accident Remedial Measures

Suppose the plaintiff bought a snowblower in January 2005. Then in November 2005 the defendant changed the design of the snowblower. Then in January 2006 the plaintiff was injured when using the (unmodified) snowblower. The modification would have made the accident less likely to occur. Is the modification excluded under *Rule 407* if offered to prove that the initial product was defectively designed?

Before the 1997 amendment to the Rule, the Courts were in dispute as to whether a defendant's pre-injury design change was excluded by *Rule 407*. The pre-1997 Rule applied to measures taken "after an event" that would have made the event less likely to occur. This created confusion as to whether the relevant "event" was the sale or creation of a product, or rather the accident or injury. Most Courts refused to exclude pre-injury remedial measures under the Rule, arguing that the social policy basis of the Rule was inapplicable to safety measures taken before an injury occurred. The reasoning was that a manufacturer will not be deterred from making safety improvements before an injury has even occurred: if the defendant is concerned about the use of a remedial measure in some hypothetical future case, then it could "limit its liability by recalling the unimproved product."

The 1997 amendment to the Rule limits exclusion to measures taken "after an injury or harm." This clarifies that the Rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing the plaintiff's "injury or harm" do not fall within the exclusionary scope of *Rule 407* even if they occurred after the manufacture or design of the product.

This amendment creates a possible inequity between similarly situated plaintiffs. Suppose that Bill and Ted each buy a lawnmower. Both suffer identical injuries. Bill is injured on June 15, while Ted is injured on June 20. Suppose further that the design of the lawnmower was changed on June 18. According to the Rule as amended, Ted can admit the design change as evidence of defective design, failure to warn, etc., because it precedes his injury, while Bill cannot. This seems inequitable, because the litigation position of Bill and Ted is basically the same. The design change was simply a happenstance unrelated to either accident. Certainly it cannot be argued that the defendant put out a hasty design change in response to Bill's accident; it is unlikely that the defendant even knew about an accident so recent. The probative value of the remedial measure, or the lack thereof, is the same for both litigants.

We realize that the Rule as amended differentiates between pre- and post-injury design changes. We note, however, a Court has the discretion to exclude pre-injury design changes under *Rule 403* when they are not probative of defective design or failure to warn; and this should often be the case where the design change is unresponsive to any indication of a problem with the product, or any other indication that the original design is unsafe. n19

[11] Relationship to Rule 403

The Rule does not say that when evidence is offered for a purpose not prohibited by the Rule, it must be admitted. Rather, it says that exclusion is not required if the evidence is offered for a purpose that is not prohibited. In deciding whether or not to admit evidence of remedial measures taken after an injury or harm, the Trial Judge must weigh the probative value of the evidence on the issue for which it is offered against the possibility that the jury will misuse the evidence as an implicit admission of culpability, defective design, etc. n20 As the Advisory Committee note to the 1997 amendment states: "Evidence of subsequent remedial measures that is not barred by *Rule 407* may still be subject to exclusion on *Rule 403* grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence." n21

It is important for the Trial Court first to assure itself that the issue on which the subsequent remedial evidence is offered is actually in dispute; then it must make a *Rule 403* balancing judgment, keeping in mind that the *Rule 403* balancing test establishes a strong presumption in favor of admitting probative evidence. As discussed in § 403.02[21], the Trial Court in conducting its balance must consider the prejudicial effect remaining after a limiting instruction is given. In the context of remedial measures, the Court must consider the risk that the jury will use the evidence as proof of negligence, defective design, etc., even though it is instructed not to do so.

[12] ***Erie*** Concerns

Most cases in which *Rule 407* is applicable are personal injury cases that are brought in Federal Court under the diversity jurisdiction. However, not all states have a rule identical to *Rule 407*. For example, Hawaii Rule 407 permits subsequent remedial measures in product liability cases. n22 Where the State and Federal rules on subsequent remedial measures are in conflict, which rule should apply?

Whether *Rule 407* presents an *Erie* problem depends to some extent on the basis of the Rule. If the Rule is based on the social policy of not discouraging repairs, then an argument can be made that it is "substantive" under *Erie* because the Rule would be designed to control primary conduct (the decision whether to improve a product or condition) rather than courtroom procedure. Thus, one Circuit has held that state law should govern in a conflict with *Rule 407*, on the ground that the Rule is based "on policy considerations rather than relevancy or truthseeking," and that these policy considerations are a fundamental part of the state law of tort liability. n23

As discussed above, however, the social policy basis of the Rule is questionable, and the Rule is more properly justified on relevance grounds. If the Rule is actually relevance-based, then it is undoubtedly procedural in *Erie* terms. As one Court put it: "Congress's judgment that juries are apt to give too much weight to [subsequent remedial measures] evidence is a procedural judgment, that is, a judgment concerning procedures designed to enhance accuracy or reduce expense in the adjudicative process." n24

Remember that the Federal Rules are "presumptively procedural" after *Hanna v. Plumer, 380 U.S. 460, 472 (1965)* (finding no *Erie* violation as to Federal Rules covering "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either"). At a minimum, there is a sufficient relevancy basis in the Rule to justify it as "procedural" after *Hanna*. Consequently, most Courts see no *Erie* violation in applying *Rule 407* where a state rule is in conflict. n25 And this is so, for the most part, even in those Courts that remain enamored of the social policy basis for the Rule. Even if the social policy basis is predominant, the relevance basis for the Rule is at least a subsidiary purpose, sufficient to qualify the Rule as procedural after *Hanna*. n26

FOOTNOTES:

(n1)Footnote 1. See, e.g., *In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996)* (memorandum dated two months after a plane crash, recommending to buyers of certain planes that they should perform a takeoff warning system check prior to takeoff, was inadmissible under *Rule 407*; a "change in policy is a subsequent remedial measure within the meaning of *Rule 407*"); *Specht v. Jensen, 863 F.2d 700 (10th Cir. 1988)* (civil rights action for damages resulting from allegedly illegal search; a city press release announcing that disciplinary action would be taken against the offending officer was held properly excluded as evidence of a subsequent remedial measure).

(n2)Footnote 2. See also *Dow Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481 (10th Cir. 1990)* (internal memorandum of the defendant, concluding that the defendant should remain in a line of business without conducting further product research, could not be excluded as evidence of a subsequent remedial measure, because the report did nothing that would have made the harm less likely to occur: "Remedial measures are those actions taken to remedy any flaws or failures."); *Rocky Mt. Helicopters v. Bell Helicopters, 805 F.2d 907 (10th Cir. 1986)* :

> It would strain the spirit of the remedial measure prohibition in *Rule 407* to extend its shield to

> evidence contained in post-event tests or reports. ... [S]uch tests are usually conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right. Remedial measures are those actions taken to remedy any flaws or failures indicated by the test.

(n3)Footnote 3. *Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984)* .

(n4)Footnote 4. *Flaminio v. Honda Motor Co., 733 F.2d at 470* .

(n5)Footnote 5. See, e.g., *In re Air Crash Disaster, 86 F.3d 498, 529 (6th Cir. 1996)* ("Independent of its effect on safety upgrades by alleged torfeasors, the rule bars a class of evidence that is very poor proof of negligence or defectiveness."); *Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983)* (in a product liability case, the Court reasoned that "evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time," and that such evidence "threatens to confuse the jury by diverting its attention from whether the product was defective at the relevant time to what was done later").

(n6)Footnote 6. See, e.g., *Cook v. McDonough Power Equip., Inc., 720 F.2d 829 (5th Cir. 1983)* (function of *Rule 407* is to "focus the evidence to that most relevant" to proving liability at the time of the accident).

(n7)Footnote 7. See, e.g., *Clausen v. SEA-3, Inc., 21 F.3d 1181 (1st Cir. 1994)* (subsequent remedial measure was properly admitted because it was probative of which defendant controlled the premises, and the Trial Court instructed the jury as to the limited purpose which the evidence was admitted). See also *Pitasi v. Stratton Corp., 968 F.2d 1558 (2d Cir. 1992)* (subsequent remedial measures were admissible when offered to rebut the defendant's charges that the plaintiff was contributorily negligent for failing to recognize an open and obvious condition on a ski slope).

(n8)Footnote 8. See, e.g., *Hull v. Chevron U.S.A., Inc., 812 F.2d 584 (10th Cir. 1987)* (subsequent remedial measure was not admissible to prove the defendant controlled a forklift, where the defendant "acknowledged not only that its employees operated the forklift, but also its responsibility for hiring and firing" the employees who worked the forklift; thus, the proffered evidence "would be either cumulative or trespass inferentially into the *Rule 407* prohibited terrain of proof of culpable conduct.").

(n9)Footnote 9. *Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883, 888 (5th Cir. 1983)* .

(n10)Footnote 10. Exclusion under *Rule 403* in this scenario would be rare because the defendant is affirmatively contesting feasibility, and the plaintiff is simply providing a fair response.

(n11)Footnote 11. See, e.g., *Cameron v. Otto Bock Orthopedic Indus. Inc., 43 F.3d 14 (1st Cir. 1994)* ("Dear Customer" letters sent out after the plaintiff's accident were properly excluded; the defendant offered to stipulate to the feasibility of providing the information set forth in the letters, so the letters were not admissible to prove feasibility).

(n12)Footnote 12. See, e.g., *Mills v. Beech Aircraft Corp., 886 F.2d 758, 764 (5th Cir. 1989)* (revised manual, offered to show the feasibility of providing a better installation instruction, held properly excluded under *Rule 407*: "The feasibility exception to *Rule 407* does not apply when feasibility is not in controversy. The defendants in the present case did not contest the feasibility of a better installation instruction, but rather maintained that the instructions in the [original] manual were acceptable."); *Middleton v. Harris Press & Shear, Inc., 796 F.2d 747 (5th Cir. 1986)* (in a product liability suit where the plaintiff claimed that the product was defectively designed by failing to include a circuit interrupt device, a design change by the defendant to include such a device was not admissible to prove feasibility: "Though Harris contended that circuit interrupt devices were unreliable and not a safety device of first choice, the feasibility of installing them was not called into dispute," since the defendant stipulated that the change was feasible "in the sense of being physically possible"); *Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir. 1986)* (subsequent remedial measures were properly held not admissible to prove feasibility where "the plaintiff does not contend that the defendants testified that the material used in the end cap was either the best material available or that the use of another

material would not have been feasible").

(n13)Footnote 13. *Gauthier v. AMF, Inc., 788 F.2d 634, 638 (9th Cir. 1986)* , *amended*, *805 F.2d 337 (9th Cir. 1986)* :

> In this case, AMF conceded that the safety devices were technologically and economically feasible but then argued that they concluded that the safety problem was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device.

See also *Fish v. Georgia-Pacific Corp., 779 F.2d 836, 840 (2d Cir. 1985)* :

> Nor was the evidence of the warning admissible on the limited issue of the feasibility of providing a warning in 1977. Georgia-Pacific states that it was willing to admit the feasibility of providing a warning in 1977; it simply contended that it did not have a legal duty to do so.

(n14)Footnote 14. See, e.g., *Harrison v. Sears, Roebuck & Co., 981 F.2d 25 (1st Cir. 1992)* ("*Rule 407*'s impeachment exception must not be used as a subterfuge to prove negligence or culpability"; a desire merely to undercut an expert's qualifications cannot be sufficient to trigger the impeachment exception, or else the exception could swallow the rule of exclusion).

(n15)Footnote 15. See, e.g., *Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992)* (the impeachment exception does not apply merely because the expert testified that the product was of an excellent and proper design; if the impeachment exception applied to simple contradiction, the exception would swallow the rule); *Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984)* (no impeachment with subsequent remedial measures was permissible where defense witnesses merely testified to the safety of the product under normal circumstances).

(n16)Footnote 16. See, e.g., *Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995)* (post-accident change to the design of a woodchipper was admissible for impeachment where the president of the corporate defendant testified that the woodchipper contained "the safest length chute you could possibly put on the machine"); *Muzyka v. Remington Arms Co., 774 F.2d 1309 (5th Cir. 1985)* (subsequent remedial measures, offered for impeachment purposes, were erroneously excluded where defense witnesses testified that the product "embodied the ultimate in gun safety" and that it was "*the* best and *the* safest rifle of its kind on the market"; the jury was improperly denied "evidence in impeachment of the experts who spoke in those superlatives").

(n17)Footnote 17. See, e.g., *Stevens v. Bangor & A. R.R., 97 F.3d 594 (1st Cir. 1996)* (statements made during a post-accident safety meeting were properly admitted as impeachment evidence, after a witness testified that he remembered that the rails found in a certain railroad car were arranged neatly before the accident, and he had never stated otherwise; the statements directly contradicted this testimony); *Harrison v. Sears, Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992)* ("A more direct impeachment use of subsequent remedial measure evidence would exist if Appellees' witness stated that he did not change the product after the alleged accident was brought to his employer's attention.").

(n18)Footnote 18. See, e.g., *Diehl v. Blaw-Knox, 360 F.3d 426 (3d Cir. 2004)* (following authority in other circuits allowing evidence of third-party measures, reasoning that this was not prohibited by the policy of the rule, which is to prevent remedial measures from being used as an admission against the defendant; a party's fault cannot be "admitted" by a third party); *TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397 (4th Cir. 1994)* (in an action arising from the installation of a defective ventilation system in a city construction project, the defendant objected to the introduction of a subsequent design change in the ventilation system; the change was properly admitted because it was made by the city, not by the defendant who originally designed the system; a third party "will not be inhibited from taking remedial measures if such actions are allowed into evidence against a defendant").

(n19)Footnote 19. See *Trull v. Volkswagen of Am., Inc., 187 F.3d 88 (1st Cir. 1999)* (pre-accident design change was properly excluded; while measures taken before the plaintiff's accident do not fall within the prohibition of *Rule 407*, the Trial Court properly exercised its discretion to exclude the evidence under *Rule 403*; there was no indication that the alternative design was employed to remedy any defects in the model in which the plaintiff was injured).

(n20)Footnote 20. See, e.g., *Middleton v. Harris Press & Shear, Inc., 796 F.2d 747 (5th Cir. 1986)* (remedial measure was not excluded under *Rule 407* because it was made by someone other than the defendant; however, exclusion of the evidence was proper under *Rule 403* due to its tendency to divert the jury's attention away from the defendant's conduct at the time of manufacture).

(n21)Footnote 21. See also *In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996)* , where the airline sought to introduce evidence of remedial changes made to a flight director after the product was designed, but before the plane accident. The Court found that *Rule 407* does not bar such evidence. It affirmed the Trial Judge's exclusion of the evidence, however, as unduly confusing under *Rule 403*, because the remedial measure related to a different model of flight director than that employed in the plane that crashed.

(n22)Footnote 22. On the state versions of Rule 407, see generally G. Joseph & S. Saltzburg, Evidence in America, ch. 17.

(n23)Footnote 23. *Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984)* .

(n24)Footnote 24. *Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984)* .

(n25)Footnote 25. See, e.g., *Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992)* (*Rule 407* is "arguably procedural" because it "operates on the presumption that undue prejudice is likely in certain situations, expressing a distrust of a jury's ability to draw the proper inferences from the evidence").

(n26)Footnote 26. See *Flaminio v. Honda Motor Co., 733 F.2d 463, 472 (7th Cir. 1984)* :

> *Rule 407* is not based on substantive considerations only. An important though not the primary reason for the rules was distrust of juries' ability to draw correct inferences from evidence of subsequent remedial measures. Although it was a mild distrust, as shown by the exceptions built into the rule, it is enough to establish the rule's constitutionality in diversity cases.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 407 RULE 407

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407.03 Annotated Cases

[Go To Supp]

[1] Admiralty Cases

Hall v. American Steamship Co., 688 F.2d 1062 (6th Cir. 1982) : In a personal injury action by a seaman claiming unseaworthiness as a result of being injured when he was not told to leave the deck in rough weather, evidence was admitted concerning changes in the procedures that he was undertaking at the time he was injured. Reversing a judgment for the plaintiff, the Court found that "[s]ince there was no dispute as to the physical and weather conditions at the time Hall was injured, even if the change of policy were relevant as proof of these prior conditions, the policy change could not, under the terms of *Rule 407*, be admitted for such purpose." The Court reasoned that the evidence had been offered to prove culpable conduct, something not permitted by the Rule.

[2] Antitrust Cases

Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975) , *vacated on other grounds*, *433 U.S. 904 (1977)* : One of the issues raised by the plaintiffs was whether certain provisions in distributorship contracts violated the antitrust laws. The District Court refused to admit evidence that after the termination of the plaintiffs' distributorship the defendants deleted the provisions in the lease that were objected to by the plaintiffs. Citing *Rule 407*, the Court approved this ruling, saying that "it is well settled that evidence of subsequent remedial measures is not admissible to prove culpability of prior conduct."

[3] Control

Clausen v. Sea-3, Inc., 21 F.3d 1181 (1st Cir. 1994) : In an employee's action for personal injuries caused by a fall on a ramp, the Court found no plain error in admission of evidence that a defendant had replaced the ramp with steps three years later. The evidence was probative on the issue of which defendant controlled the premises, and the cautionary instruction sufficiently informed the jury as to the limited purpose for which it was admitted.

Hull v. Chevron U.S.A., Inc., 812 F.2d 584 (10th Cir. 1987) : The Court affirmed a judgment for a drilling company employee injured in a forklift accident. It held that evidence that after the accident the drilling company discharged the employee who had operated the forklift and changed its operating procedures was inadmissible against the company as a subsequent remedial measure. Although another defendant offered the evidence ostensibly to prove that the company had the right to control the forklift, the Court held that this was an undisputed fact so that the evidence was not needed to prove control.

[4] Disciplinary Proceedings

Maddox v. City of Los Angeles, 792 F.2d 1408 (9th Cir. 1986) : In a civil rights suit against police officers and the City growing out of the death of an arrestee, the Court held there was no error in excluding evidence that a defendant officer admitted during a disciplinary proceeding that he violated City policy with respect to a choke hold. The Court reasoned that the disciplinary proceeding was a subsequent remedial measure by the City, and that the evidence would have been unduly prejudicial if offered against the officer since the jury might have inferred that the officer was guilty of wrongdoing simply because there was a proceeding. Evidence of the City policy was admitted for the jury's consideration.

Specht v. Jensen, 863 F.2d 700 (10th Cir. 1988) : In a civil rights suit arising out of searches of the plaintiff's home and office, the Court held that the Trial Judge properly excluded a press release issued by city officials which stated that officers exercised poor judgment in failing to read a "writ of assistance" thoroughly and that disciplinary action would be taken.

[5] Discontinued Practice

Hickman v. Gem Ins. Co., 299 F.3d 1208 (10th Cir. 2002) : The Court affirmed summary judgment for an insurer in a class action by insureds under ERISA to recover unreimbursed hospitalization charges. It held that evidence that the insurer at one point decided to discontinue its practice of limiting payment of hospital room and board charges was inadmissible as a subsequent remedial measure and was not relevant to prove whether the earlier practice was an abuse of discretion.

[6] Employment Discrimination Case

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) : In an action by an employee who claimed that she had been denied a promotion because of gender discrimination, the defendant claimed it was because she lacked interpersonal skills. To prove that the reason was pretextual, the plaintiff introduced evidence that an account was reclassified as a key account in order to make her a Key Account Manager after she accused the company of discrimination and seemed about to sue. The Court observed that the evidence probably violated *Rule 407*, but that the defendant had not invoked it, so any objection on that basis was waived.

[7] Evidence Not Identified by Date

Stevens v. Bangor & Aroostook R.R., 97 F.3d 594 (1st Cir. 1996) : Affirming a judgment for an employee in a FELA case, the Court held that a post-accident photograph was properly admitted. The photograph was used to illustrate the plaintiff's testimony, and the jury was not told when it was taken.

[8] Feasibility

Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14 (1st Cir. 1994) : Affirming a judgment for a manufacturer of a prosthetic leg, the Court held that "Dear Customer" letters sent out after the plaintiff's accident were properly excluded. The defense offered to stipulate to the feasibility of providing the information set forth in the letters, and the Court found that neither feasibility nor control was disputed in this case.

In re Joint E.D. & S.D. Asbestos Litig., 995 F.2d 343 (2d Cir. 1993) : The Court held that, since feasibility was not contested, it was error to admit evidence that a manufacturer placed warnings on its product after a worker's last exposure to asbestos. " 'Feasibility' is not an open sesame whose mere invocation parts *Rule 407* and ushers in evidence of subsequent repairs and remedies."

Whitehead v. St. Joe Lead Co., 729 F.2d 238 (3d Cir. 1984) : Reversing a summary judgment for the defendant in a product liability action, the Court observed that warnings to users of products containing lead, which were included with products manufactured after the plaintiff was exposed to lead during her employment, could be considered on the question of whether warnings were feasible at a reasonable cost.

Albrecht v. Baltimore & O. R.R., 808 F.2d 329 (4th Cir. 1987) : The Court reversed a judgment for an employee in a FELA case, holding it was error to admit evidence that after the accident that injured the plaintiff the railroad made improvements to the area in which the accident occurred. It concluded that the feasibility of repairs was stipulated by the railroad, and that the plaintiff was the one who attempted to make it appear that feasibility was disputed while examining a railroad employee. In *Werner v. Upjohn Co.*, n1 the Court reversed a plaintiff's judgment in an action against an ophthalmologist and drug manufacturer, holding it was error to admit evidence of a revised warning issued by the manufacturer the year after the plaintiff visited the defendant doctor. Feasibility, said the Court, was not a disputed issue.

Reese v. Mercury Marine Div., 793 F.2d 1416 (5th Cir. 1986) : Affirming a judgment for the plaintiffs in a wrongful death action against the manufacturer of an outboard motor, the Court held that a manual containing warnings about the absence of a switch, published a year after the accident giving rise to the suit, was admissible to prove feasibility. The manufacturer had offered evidence that only a retailer could properly instruct the consumer with respect to such a switch. In *Middleton v. Harris Press & Shear, Inc.*, n2 the Court affirmed a judgment for a manufacturer in a product liability case, finding that evidence of remedial modifications to a machine was properly excluded where feasibility was not disputed. See also *Grenada Steel Indus. v. Alabama Oxygen Co.* n3(where feasibility was not controverted in a product liability case, evidence of subsequent repairs was properly excluded). In *Gardner v. Chevron U.S.A., Inc.*, n4 the Court affirmed an employer's judgment in a wrongful death action, concluding it was not error to exclude evidence that a broken pipe was replaced with a heavier grade of pipe following the accident that gave rise to the litigation, even though the employer's foreman testified that he would have used the original size of pipe if he were constructing a well like the one involved in this case. The Court said that because the employer never contested that a larger sized pipe could feasibly have been used, the evidence was inadmissible to controvert feasibility.

Probus v. K-Mart, Inc., 794 F.2d 1207 (7th Cir. 1986) : In a suit by a plaintiff who fell from a ladder, the Court held it was proper to exclude evidence that after the accident the manufacturer strengthened a cap on the ladder. Although the manufacturer claimed that the cap used on the plaintiff's ladder was adequate, the evidence was not admissible to controvert that claim, since the manufacturer was not contending that a stronger cap would not have been feasible.

Anderson v. Malloy, 700 F.2d 1208 (8th Cir. 1983) : Reversing a judgment in an action by a rape victim against

the owners and operators of a motel, the Court held that the defendants disputed the feasibility of installing "peep hole and safety chains" and that the plaintiff should have been permitted to show that they were installed after she was raped. A dissenting Judge argued that the defendant had questioned only the necessity of further precautions, not their feasibility.

Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986) , *amended*, *805 F.2d 337 (9th Cir. 1986)* : The Court reversed a judgment for the plaintiff in a product liability action against the manufacturer of a snow thrower. It held that admitting evidence of design changes by the defendant and by the industry after the accident was prejudicial error. The defendant conceded that safety devices were feasible, but argued that the safety problem was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device. The Court held that this was not an attack on feasibility, but was an argument that the design was reasonable at the time. In its opinion denying rehearing, the Court added that the evidence should have been excluded under *Rule 403*. In *Transgo, Inc. v. Ajac Transmission Parts Corp.*, n5 the Court affirmed a trademark and copyright infringement judgment for the plaintiff, finding that the plaintiff properly introduced evidence of revised instruction sheets distributed by the defendant in connection with a kit. The evidence rebutted the defendant's claim that it was not feasible to produce instructions that differed from the plaintiff's.

Meller v. Heil Co., 745 F.2d 1297 (10th Cir. 1984) : The Court held that evidence of subsequent design changes in a dump bed assembly for a dump truck was properly admitted to show feasibility of alternative designs and that the evidence, accompanied by a limiting instruction, was not unduly prejudicial.

Wood v. Morbark Indus., Inc., 70 F.3d 1201 (11th Cir. 1995) : In a product liability action arising out of a fatal wood chipper accident, the Court held that testimony by the chipper's designer that it was the "safest" possible design did not put feasibility in issue, but did open the door to impeachment of the witness by evidence of subsequent changes.

[9] Impeachment or Rebuttal

[a] Contributory or Comparative Negligence

Pitasi v. Stratton Corp., 968 F.2d 1558 (2d Cir. 1992) : In a personal injury action against a ski resort, the plaintiff alleged the defendant had been negligent in failing to rope off the side entrances to a closed trail. The Court held it was error to exclude evidence that the defendant closed off the side entrance after the plaintiff's accident, as it tended to rebut the defense that the plaintiff had been contributorily negligent in entering an area where the dangerous conditions were so obvious that warnings or ropes were unnecessary. This decision illustrates the thin line separating inadmissible subsequent remedial measure evidence from admissible impeachment evidence. In our view, had the resort limited its evidence to testimony that the risks were sufficiently obvious that no warning devices were needed, the subsequent remedial measures would not have been admissible, since there really would be no "impeachment"; in reality, the evidence would have served no purpose other than to suggest that the defendant's denial of negligence was inconsistent with taking subsequent remedial measures, which the Rule prohibits. However, in asserting that the plaintiff was so careless that no reasonable person would have failed to appreciate the risk, the defendant opened the door to impeachment.

Rimkus v. Northwest Colorado Ski Corp., 706 F.2d 1060 (10th Cir. 1983) : An injured skier, claiming that a ski resort was negligent in failing to mark an outcropping of rock onto which he fell, introduced evidence (including photos) showing that the resort set up bamboo poles above the outcropping after the accident. The jury was instructed that it could not consider the evidence on the question of negligence. The Court affirmed, reasoning that although "[t]he

trial judge might well have excluded the evidence," it was not an abuse of discretion to admit it to undermine the testimony of a defense witness who claimed that the plaintiff, an experienced instructor, was contributorily negligent in not seeing the rocks, which were visible.

[b] Impeachment or Rebuttal -- Evidence Admissible or Required To Be Admitted

Stevens v. Bangor & A. R.R., 97 F.3d 594 (1st Cir. 1996) : Affirming a judgment for an employee in a FELA case, the Court held that statements made during a post-accident safety meeting were properly admitted. The statements were admitted as impeachment evidence, after a witness testified that he remembered that the rails found in a certain railroad car were arranged neatly and he had never stated otherwise. The proffered statements directly contradicted this testimony.

Kenny v. Southeastern Pa. Transp. Auth., 581 F.2d 351 (3d Cir. 1978) : The Court set aside a j.n.o.v. for the defendant in an action alleging negligence on the part of a transit system when the plaintiff was raped in a station. Citing this *Manual*, the Court held that there was no error in allowing testimony that new lighting had been installed on the platform a few days after the attack against the plaintiff, because the defendant had opened up the issue by claiming that all reasonable care was being exercised at the time. This is another reminder that simply claiming that the conduct of a defendant was reasonable under the circumstances does not open the door to subsequent repair evidence, while claiming that all reasonable care was being taken opens the door to such evidence.

Jones v. Benefit Trust Life Ins. Co., 800 F.2d 1397 (5th Cir. 1986) : In an action by an insured alleging tortious breach of a disability insurance contract, the Court held that evidence of the defendant's policy with a different insured was properly admitted to impeach the claim of the defendant's witnesses that the plaintiff's policy was ambiguous. In *Bickerstaff v. South Cent. Bell Tel. Co.*, n6 a personal injury action by a telephone customer who sued the company for failing to give warnings against the use of a telephone during an electrical storm, the plaintiff argued that evidence that the defendant put a warning in its monthly note to subscribers should have been admitted to impeach two witnesses who said that a warning was not advisable and that it was unnecessary since everyone was aware of the danger. Although the Court observed that the impeachment exception to *Rule 407*, if applied broadly, may swallow up the basic limitation on the use of subsequent repair evidence found in the Rule, it concluded that the impeachment probably should have been permitted. The error was harmless, however.

Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192 (6th Cir. 1980) : The Court held that postaccident repairs could be offered to rebut a claim that there was no need for improvement in the situation.

Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983) : Affirming a plaintiff's judgment in a personal injury action against an architectural firm resulting from a construction site accident, the Court upheld the introduction of photographs of a portion of a stairway that was involved in the accident. Although the photographs showed that the portion involved in the accident had been replaced, the Court reasoned that they were properly used to impeach defense witnesses who testified concerning the specifications for the stairway.

Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985) : In a trademark and copyright infringement action, the Court held that the evidence of the defendant's changed instruction sheet was properly admitted to impeach or rebut its claim that it could not have modified its sheet to make it look different from the plaintiff's.

[c] Impeachment or Rebuttal -- Evidence Excludable or Required To Be Excluded

Complaint of Consolidation Coal Co., 123 F.3d 126 (3d Cir. 1997) : Following a seaman's accident, the employer issued a safety memorandum stating that an employee fell after a line broke (apparently referring to the accident in question) and cautioning all employees to inspect ropes carefully before using them. The Court held, with one Judge dissenting, that there was no error in excluding the memorandum, or even just the part dealing with the investigation of the accident, as a subsequent remedial measure. The memorandum was not admissible to impeach a foreman's testimony that the line "appeared ... to have been cut by an ax," since that testimony was not directly contradicted by the memorandum's statement that the line "broke."

Reddin v. Robinson Property Group Ltd., 239 F.3d 756 (5th Cir. 2001) : In a slip-and-fall case, the defendant elicited testimony that guards crawled through the entire floor and found no defect. The plaintiff argued that evidence that the defendant's employees taped off the area where the accident occurred would impeach that testimony because no scanning of the area could have occurred if the area were taped off. The Court held that while the evidence "may have touched tangentially on the credibility of testimony that security guards traversed the area, such does not establish that its exclusion by the trial judge constituted an abuse of discretion." The plaintiff failed to establish the time at which the tape was put up around the area, and the security guards might have checked the area before the tape was put up. In a Jones Act case, *Kerr-McGee Corp. v. Ma-Ju Marine Servs.*, n7 the plaintiff elicited testimony from a supervisor called as an adverse witness that a handrail was not necessary to make the deck safe and then sought to impeach the witness with evidence that a handrail was added to the deck after the plaintiff's accident. The Court upheld exclusion of the evidence, as there was no showing that the supervisor had ordered the addition of the rail, and the risk of confusion and prejudice might well have substantially outweighed its probative value.

Cooper v. Carl A. Nelson & Co., 211 F.3d 1008 (7th Cir. 2000) : A worker was injured when he fell while traversing a drainage ditch at a construction site. It was unclear whether he slipped on planks that were across the ditch or on a muddy incline leading to the planks. The defendant presented testimony by the plaintiff's supervisor that on the day of the fall the ditch was spanned by a man bridge, not planks. The Trial Judge excluded, on the ground it was subsequent remedial measure evidence, the deposition testimony of a plaintiff's witness who would have contradicted the supervisor and said that the man bridge was built after the fall. The Court upheld this ruling, reasoning that the plaintiff's counsel could have asked the witness simply to describe the condition of the ditch at the time of the accident and did not need to inquire into when the bridge was built. Thus, evidence of the subsequent remedial measure was not necessary for contradicting the supervisor or attacking his credibility.

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991) : The Court reversed a judgment for the plaintiff in an action brought for injuries suffered when an automatic sliding glass door ran over her foot. Evidence the door was left open for the remainder of the cruise was improperly admitted, as it did not impeach testimony that the door was in normal operating condition at the time of the accident. Citing this *Manual*, the Court noted that the witness had not asserted that the defendants had exercised "all reasonable care" in maintaining the door, nor had he represented that it was in the "safest" or "best" condition.

[d] Impeachment or Rebuttal -- Product Liability Cases

Harrison v. Sears, Roebuck & Co., 981 F.2d 25 (1st Cir. 1992) : In a suit involving a carpentry tool, the defendant's expert testified that the accident described by the plaintiff could not have occurred as alleged and that there had never been a similar complaint made to the manufacturer. The Court held there was no error in excluding evidence, including the expert's statement that he had worked on design changes for the tool, offered to impeach him, since the danger that the jury would misuse the evidence as proof of negligence outweighed the impeachment value of the

evidence.

Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408 (3d Cir. 2002) : The plaintiffs, suing for wrongful death in a military helicopter crash, alleged that a shaft seal was installed backwards and leaked flammable fluid, which was ingested by an engine as the craft was attempting to land. The Court found no abuse of discretion in the exclusion of evidence that a seal that could not be installed backwards was used in that model helicopter following the crash. Although the defendants argued that the seal used was reasonable and the later type of seal more difficult to install and "not suited for the military environment," the Court concluded that the plaintiffs had sufficient other opportunities to impeach the defense witnesses' testimony regarding the reasonableness of the design at issue, "without resort to prejudicial post-incident evidence."

Muzyka v. Remington Arms Co., 774 F.2d 1309 (5th Cir. 1985) : The Court held it was error to exclude evidence of a design change in a rifle several months after an accident, since the manufacturer claimed that the design was the best and safest at the time of the accident. In *Dollar v. Long Mfg., N.C., Inc.*, n8 a defense witness testified that the instrument used by the deceased was safe to operate. Reversing, the Court held that the plaintiff should have been permitted to impeach with a letter sent by the witness to dealers selling the instrument, warning them about its "death-dealing propensities" when used in the fashion it was used by the deceased.

Wood v. Morbark Indus., Inc., 70 F.3d 1201 (11th Cir. 1995) : In an action arising out of a fatal wood chipper accident, the Court held that testimony by the chipper's designer that it was the "safest" possible design did not put feasibility in issue, but did open the door to impeachment of the witness by evidence of subsequent changes.

[10] Libel Case

World Boxing Council v. Cosell, 715 F. Supp. 1259 (S.D.N.Y. 1989) : In this libel action, the Court held that evidence that language in the contested passage had been altered in a subsequent paperback edition of the book was inadmissible under the policy of the Rule, because elimination of defamatory language in a subsequent edition limits the extent of damage to an individual's reputation by keeping injurious material from the eyes of new readers.

[11] Product Liability Cases

McFarlane v. Caterpillar, Inc., 974 F.2d 176 (D.C. Cir. 1992) : In a product liability action arising out of the alleged brake failure of a bulldozer, the Court held it was error (but harmless) to exclude as a subsequent remedial measure a postaccident service report containing a statement that indicated a spool in the hydraulic system did not meet manufacturing specifications, as that portion of the report reflected only the unaltered state of the spool at the time it was inspected.

Fish v. Georgia-Pacific Corp., 779 F.2d 836 (2d Cir. 1985) : The Court reversed a judgment for homeowners who sued a manufacturer of particle board, alleging that it failed to warn them of hazards associated with a floor used to build their home. The Court concluded it was error to admit evidence that the defendant issued warnings six or seven years after the plaintiffs built their home.

Diehl v. Blaw-Knox, 360 F.3d 426 (3d Cir. 2004) : A road construction worker sued the manufacturer of a road widener machine that backed over his legs. The Court reversed a judgment for the defendant, holding it was error to exclude evidence that the plaintiff's employer modified the machine after the accident. The Judge had excluded the

evidence on the ground that the text of *Rule 407* makes no exception for subsequent remedial measures taken by a nonparty. The Court held, however, that the consistent authority admitting evidence of third-party repairs was supported by the policy of the Rule, which is to prevent repairs from being used as proof of an admission of fault -- and a party's fault cannot be "admitted" by a third party.

Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995) : In a consumer's product liability action for severe liver damage caused by the combination of alcohol and acetaminophen, the plaintiff introduced evidence that prior to the plaintiff's injury the defendant had discussions with the FDA about providing warnings of the dangers of a similar product. The Court held that any error in a reference to the fact that the defendant changed the warning on the product taken by the plaintiff after his injury was harmless, since the evidence of the prior discussions was proper and far more damaging.

Stahl v. Novartis Pharms. Corp., 283 F.3d 254 (5th Cir. 2002) : Affirming summary judgment for the defendant in an action alleging inadequate warnings on a prescription drug, the Court held there was no error in refusing to consider, as evidence that the warnings were inadequate, the current version of the drug's package insert. Changes in the warnings made after the plaintiff's injury are inadmissible to show a defect, under *Rule 407*.

Kloepfer v. Honda Motor Co., 898 F.2d 1452 (10th Cir. 1990) : In an action arising out of the death of a passenger on an all-terrain vehicle (ATV), the Court held that a consent decree relating to ATV safety entered between the United States and major ATV manufacturers (including the defendant) two years after the accident in question was properly excluded as irrelevant to the case.

[12] Reference to State Law

Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992) : In a diversity action arising out of a worker's injuries on a forklift, the Court held that evidence of subsequent changes was inadmissible, regardless of allegedly conflicting state law, as the Rule is "arguably procedural" and therefore governs.

Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984) : The Court decided that *Rule 407* properly was applied in a product liability action arising under Wisconsin law, even though Wisconsin State Courts might have admitted subsequent remedial measure evidence. Although the Court recognized that there is a substantive aspect to the Rule, it concluded that substantive and procedural concerns both support exclusion of subsequent remedial measure evidence and that "[a]n important -- reason for the rule was distrust of juries' ability to draw correct inferences from evidence of subsequent remedial measures."

Monger v. Cessna Aircraft Co., 812 F.2d 402 (8th Cir. 1987) : In the course of affirming a judgment for an aircraft manufacturer in a wrongful death case, the Court observed that it is unclear whether federal or state law should govern the admissibility of subsequent remedial measures in a diversity case. It found that any error in the admission of such evidence was harmless in the instant case.

Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984) : The Court affirmed judgments for defendants in a wrongful death action arising out of a plane crash, but it disagreed with the analysis used by the Trial Judge in ruling that a circular published by the airplane's manufacturer following the crash was inadmissible under *Rule 407*. The Court held, however, that in a diversity case when there is a conflict between *Rule 407* and state law, state law

should govern "because *Rule 407* is based primarily on policy considerations rather than relevancy or truth seeking," and the policy considerations are a fundamental part of the state's law of liability. Nonetheless, there was no error in excluding the circular, since negligence and product liability theories were both involved in the case, and state law permitted use of the evidence only on the latter theory. Thus, *Rule 403* would have permitted exclusion, especially since the plaintiffs were permitted to paraphrase the circular in cross-examining the defendants' pilot-experts. The decision relies heavily on the idea that *Rule 407* and similar state rules are intended to promote repairs; we suggest, however, that they rest mostly on relevance grounds, which calls the Court's reasoning into question. See also *Wheeler v. John Deere Co.* n9(reiterating that in diversity strict liability cases the admissibility of subsequent remedial measures is governed by state law).

Wood v. Morbark Indus., Inc., 70 F.3d 1201 (11th Cir. 1995) : The Court held that *Rule 407* applied to a product liability action because the Federal Rules apply to procedural matters, including the admissibility of evidence. The Court rejected the Tenth Circuit's view (*supra*) that conflicting state law should apply in a diversity case because *Rule 407* is based primarily on policy considerations.

[13] Relationship to Rule 403

Trull v. Volkswagen of Am., Inc., 187 F.3d 88 (1st Cir. 1999) : In a product liability action arising out of a crash that occurred when the plaintiffs' vehicle slid on ice, the Court found no error in the exclusion of evidence concerning a Volkswagen auto manufactured for sale in Europe before the time of the accident. Although the Court recognized that "measures that take place before the accident at issue do not fall within the prohibition" of *Rule 407*, it found a proper exercise of discretion in excluding the evidence under *Rule 403*. There was no dispute in this case that an alternative design was feasible and no evidence that Volkswagen specifically designed the European car to remedy any known problems in the American version. In *Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997)* , the Court affirmed a judgment for the defendant in a product liability action arising from an alleged defect in a car's gear selection lever. The Trial Judge had excluded evidence of a design change made by the manufacturer after the car was sold but before the date of the accident. The Court held that although *Rule 407* applies only to post-accident repairs, there was no abuse of discretion. Because a strict liability claim centers on the product's condition at the time it leaves the seller's hands, evidence of post-manufacture, pre-accident design modifications may be prejudicial to the defendant and misleading to the jury, and thus is excludable under *Rule 403*. In *United States Fid. & Guar. Co. v. Baker Material Handling Corp.,* n10 a product liability action arising out of a fatal accident involving a forklift, the Court held that *Rule 407* did not bar evidence of a design change made after manufacture of the forklift but before the accident. However, there was no abuse of discretion in excluding the evidence under *Rule 403*, because the dissimilarities between the redesigned forklift and the model involved in the accident could have been misleading to the jury and unfairly prejudicial to the defendant.

Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87 (2d Cir. 1980) : The Court reversed a judgment against a manufacturer of oral contraceptives, concluding that changes on warning labels to patients should not have been admitted against the manufacturer when the changes were largely attributable to FDA requirements. The Court appeared to favor the manufacturer's analogy to *Rule 407* when it concluded that under *Rule 403* the evidence was too prejudicial to have been admitted.

Diehl v. Blaw-Knox, 360 F.3d 426 (3d Cir. 2004) : A road construction worker sued the manufacturer of a road widener machine that backed over his legs. The Court reversed a judgment for the defendant, holding it was error to exclude evidence that the plaintiff's employer modified the machine after the accident, since *Rule 407* does not bar evidence of subsequent remedial measures by a third party. The alternative ground for exclusion proffered by the District Judge, *Rule 403*, did not apply because the evidence presented no potential for confusion. The precautions taken

by the employer were clearly available to the defendant at the time of manufacture, so there was no temporal distinction that the jury might overlook, and there was no dispute that the redesign was done in direct response to the plaintiff's accident and for the sole purpose of preventing the same kind of accident.

Roberts v. Harnischfeger Corp., 901 F.2d 42 (5th Cir. 1989) : The Court affirmed a plaintiff's judgment against the manufacturer of a hydraulic crane, noting that *Rule 407* would not exclude evidence that subsequent to manufacturing the crane involved, but before the plaintiff was injured, the defendant had made a protective device standard equipment on that type of crane. The evidence was held irrelevant under Rules 402 and 403 to the reasonableness of the design at the time of manufacture, however.

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a suit between the airline and the aircraft manufacturer for contribution and reimbursement for settlements arising from the crash of an airplane on takeoff, the Court held that *Rule 407* did not bar evidence of remedial changes made to a flight director after the product was designed, but before the accident. However, the evidence was properly excluded under *Rule 403* as unduly confusing, since it related to a different model of flight directors.

Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986) , *amended*, *805 F.2d 337 (9th Cir. 1986)* : The Court reversed a judgment for the plaintiff in a product liability action against the manufacturer of a snow thrower. It held that admitting evidence of design changes by the defendant and by the industry after the accident was prejudicial error. The defendant conceded that safety devices were feasible, but argued that the safety problem was not great enough to warrant the trade-off of consumer frustration, increased complexity of the product, and risk of consumer efforts to disconnect the safety device. The Court held that this was not an attack on feasibility, but was an argument that the design was reasonable at the time. In its opinion denying rehearing, the Court added that the evidence should have been excluded under *Rule 403*.

Rockwood Ins. Co. v. Clark Equip. Co., 713 F.2d 577 (10th Cir. 1983) : The Court affirmed a judgment for an insurer against the bailee of a logging machine for the amount paid to its insured for the loss of the machine by fire. An expert for the insurance company originally concluded that the design of the machine was not defective. He changed his opinion, however, when he received a letter from the manufacturer after the fire suggesting certain design modifications. The manufacturer succeeded in excluding the evidence and it was dismissed as a defendant. The Court reasoned that there was no evidence concerning the manufacturer's motivation in sending the letter or the exact date when the letter was sent. It upheld the exclusion of the evidence under *Rule 403*, since the evidence against the bailee was strong.

Stallworth v. Illinois Cent. G. R.R., 690 F.2d 858 (11th Cir. 1982) : Although the Court reversed a judgment for the railroad in an action brought by a motorist injured at a crossing at night, it upheld a ruling excluding evidence that the railroad placed flares at the crossing immediately following the collision. The Court said that even though the plaintiff urged that the evidence tended to show feasibility of repair and to impeach, the Trial Judge "has broad discretion under *Rule 403*."

[14] Remedial Measures Before Accident

Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997) : The Court affirmed a judgment for the defendant in a product liability action arising from an alleged defect in a car's gear selection lever. The Trial Judge had excluded evidence of a design change made by the manufacturer after the car was sold but before the date of the

accident. The Court held that although *Rule 407* applies only to post-accident repairs, there was no abuse of discretion. Because a strict liability claim centers on the product's condition at the time it leaves the seller's hands, evidence of post-manufacture, pre-accident design modifications may be prejudicial to the defendant and misleading to the jury, and thus excludable under *Rule 403*. In *United States Fid. & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24 (1st Cir. 1995)* , a product liability action arising out of a fatal accident involving a forklift, the Court held that *Rule 407* did not bar evidence of a design change made after manufacture of the forklift but before the accident. However, there was no abuse of discretion in excluding the evidence under *Rule 403*, because the dissimilarities between the redesigned forklift and the model involved in the accident could have been misleading to the jury and unfairly prejudicial to the defendant.

City of Richmond v. Madison Mgt. Group, Inc., 918 F.2d 438 (4th Cir. 1990) : In an action for fraud and breach of contract brought by the City against the successor to the manufacturer of a concrete water pipe that burst, the Court held that a change made after the sale in the kind of reinforcing wire used in that type of pipe was properly admitted, as the relevant event for purposes of the Rule was the bursting of the pipe, not its sale to the City.

Cates v. Sears, Roebuck & Co., 928 F.2d 679 (5th Cir. 1991) : In a product liability action by a consumer injured while operating a radial arm saw, the plaintiff offered evidence that changes in warning labels on that model were authorized before, but implemented after, he bought the saw. The Court held that exclusion of the evidence was error (but harmless) because, although the focus of a product liability case is on the dangers inherent in the product as it leaves the manufacturer, the relevant time under the Rule is the accident, which occurred after implementation. In *Roberts v. Harnischfeger Corp.*, n11 the Court affirmed a plaintiff's judgment against the manufacturer of a hydraulic crane, noting that *Rule 407* would not exclude evidence that subsequent to manufacturing the crane involved, but before the plaintiff was injured, the defendant had made a protective device standard equipment on that type of crane. The evidence was held irrelevant under Rules 402 and 403 to the reasonableness of the design at the time of manufacture, however.

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a suit between the airline and the aircraft manufacturer for contribution and reimbursement for settlements arising from the crash of an airplane on takeoff, the Court held that *Rule 407* did not bar evidence of remedial changes made to a flight director after the product was designed, but before the accident. However, the evidence was properly excluded under *Rule 403* as unduly confusing, since it related to a different model of flight directors.

Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993) : The Court reversed (2-1) a judgment for the plaintiff, whose hand had been injured by an auger when he reached into a clean-out door on farm equipment manufactured by the defendant. Post-sale, pre-accident evidence that the defendant had installed warning decals and modified similar equipment was admissible to prove the existence of a dangerous defect in the product, but in this case the evidence was impermissibly admitted as ostensibly relevant to punitive damages.

[15] Remedial Measures by Plaintiff

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a contribution action between the airline and the aircraft manufacturer following an airplane crash, the airline sought to introduce evidence that after the accident it rewired all aircraft of the type that crashed, as proof of its claim that the wiring had been unsafe. Affirming exclusion of the evidence under *Rule 407*, the Court reasoned that "[t]here is nothing that makes evidence of a subsequent remedial measure by a plaintiff (or someone in the position of a plaintiff, like Northwest) better proof of culpable conduct than evidence of a remedial measure by a defendant. Indeed, measures taken by a plaintiff -- especially one contemplating

litigation -- strike us as *more* dubious because of the possibility that the plaintiff is only 'repairing' an item in order to create helpful evidence." The Court also indicated it would have affirmed exclusion under *Rule 403*.

Public Serv. Co. v. Bath Iron Works Corp., 773 F.2d 783 (7th Cir. 1985) : Reversing a judgment for plaintiffs who sued a manufacturer for damages resulting from the failure of a device purchased from the manufacturer in 1979, the Court found error in the exclusion of evidence of the plaintiffs' 1983 plans for the device. Observing that it is unclear whether the exclusionary policy of *Rule 407* applies when a plaintiff's remedial measures are offered to refute allegations that a defendant was negligent, since a "party who is not in danger of being sued may be less likely to be deterred from making subsequent improvements by the possibility that the improvements will be used against it," the Court did not reach the question because the subsequent improvements in the instant case were admissible to impeach the plaintiffs' claim that the directions to the defendant in 1979 were adequate.

[16] Remedial Measures by Third Party

Espeaignnette v. Gene Tierney Co., 43 F.3d 1 (1st Cir. 1994) : The Court reversed a judgment for the defendant manufacturer in a product liability action brought after the plaintiff's arm was severed in a lumber company's saw. The lumber company had modified the saw after the accident to provide a guard over the opening. The Court held that, because the repair was made by a third party, it was not excludable under *Rule 407* and that it did not pose any risk of unfair prejudice. In *Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991)* , a strict product liability action against the manufacturer arising out of a fatal accident involving a sideloader, the Court held that subsequent repairs undertaken by the defendant's employer were not excluded by the Rule, but there was no abuse of discretion in excluding the evidence under *Rule 403*.

Diehl v. Blaw-Knox, 360 F.3d 426 (3d Cir. 2004) : A road construction worker sued the manufacturer of a road widener machine that backed over his legs. The Court reversed a judgment for the defendant, holding it was error to exclude evidence that the plaintiff's employer modified the machine after the accident. The Judge had excluded the evidence on the ground that the text of *Rule 407* makes no exception for subsequent remedial measures taken by a nonparty. The Court held, however, that the consistent authority admitting evidence of third-party repairs was supported by the policy of the Rule, which is to prevent repairs from being used as proof of an admission of fault -- and a party's fault cannot be "admitted" by a third party.

TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397 (4th Cir. 1994) : In an action arising from the installation of a defective ventilation system in a city construction project, the defendant objected to the introduction of a subsequent design change in the ventilation system. The Court held that the evidence was properly admitted, because the design change was made by the city, not by the defendant who originally designed the system. The Court reasoned that a third party "will not be inhibited from taking remedial measures if such actions are allowed into evidence against a defendant."

Herrington v. Hiller, 883 F.2d 411 (5th Cir. 1989) : In an action for birth injuries allegedly caused by the defendant hospital's failure to provide 24-hour anesthesia services, the Court held it was an abuse of discretion under *Rule 403* to exclude evidence that the third-party provider of anesthesia services had refused to provide such services because of hospital policy regarding nurses administering anesthesia, but that 24-hour services were provided two years after the accident. Furthermore, the evidence was not barred by *Rule 407*, because the changes were made by the third party. In *Myers v. Pennzoil Co.*, n12 the Court held there was no error in excluding evidence offered by the defendant of postaccident remedial measures by the plaintiff's employer. Although *Rule 407* does not apply to measures by nonparties, the ruling was not an abuse of discretion because under the applicable law the employer was immune from

tort liability, so the employer's fault was immaterial to the determination of liability. In *Dixon v. International Harvester Co.*, n13 the Court overturned a judgment n.o.v. for the manufacturer of a "crawler tractor" in a suit for damages occurring when a pine sapling entered the cab of the tractor. The Court held that changes in the tractor made after the accident by the employer, rather than the manufacturer, were not excluded by *Rule 407*.

Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991) : The Court reversed a judgment for the defendant bicycle rental company in a wrongful death action arising out of an accident in a national park, holding it was error to exclude evidence that the Park Service erected warning signs at the site after the accident. The Rule does not bar evidence of remedial measures by third parties, and the evidence was relevant to express warranty claims against the defendant. In *In re Aircrash in Bali, Indonesia*, n14 the Court held that an FAA report after an accident was not a subsequent remedial measure, since it was not a repair by the defendant airline.

Mehojah v. Drummond, 56 F.3d 1213 (10th Cir. 1995) : In a personal injury action against the owner of cattle whose straying led to a collision with the plaintiffs' automobile, the Court held it was error (but harmless) to exclude evidence that the nonparty owner of the property on which the cattle had been grazing repaired the fence surrounding the property on the day after the accident. The majority relied on the proposition that *Rule 407* does not exclude subsequent remedial measures made by someone other than the defendant, but the dissenting Judge believed that because the property owner was a potential defendant at the time he made the repairs, the Rule's policy of encouraging repairs should also apply to him. However, the dissenter would also have found that the defendant contested the issues of control and feasibility.

[17] Remedial Measures Ordered Before Accident

Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991) : In a strict product liability action arising out of a fatal accident involving a sideloader, the Court held that the design changes offered in evidence were not excludable under *Rule 407* because they had been ordered before the accident. However, the Court found there was no abuse of discretion in excluding them under *Rule 403*.

Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055 (7th Cir. 1987) : In an action by a truck driver who was doused while unloading sulfuric acid, the Court declined to create an exception to *Rule 407* for remedial measures ordered before but implemented following an accident.

Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579 (D. Minn. 1988) : In an action for injuries from an intrauterine device received in June 1977, the defendants moved *in limine* to exclude mention of a November 1977 warning issued pursuant to the Food & Drug Administration's May 1977 regulation. The motion was denied, both because the defendant knew in May that a warning would be required and the policy of the Rule "is inapplicable when the determination to make the change is made prior to a plaintiff's injury," and because the policy is inapplicable when the remedial measure is mandated rather than voluntary.

[18] Remedial Measures Required by Law

Villari v. Terminix Int'l, Inc., 692 F. Supp. 568 (E.D. Pa. 1988) : In a homeowner's action against an exterminator alleging that the defendant contaminated a house, the Court held that evidence that the defendant discontinued use of termiticides was inadmissible. The discontinuation took place at the same time the EPA was negotiating with the primary manufacturer to discontinue their sale. Although the plaintiff argued that the discontinuance was involuntary

and that exclusion of evidence of involuntary measures cannot promote safety measures, the Judge observed that the strong policy justification for *Rule 407* counseled against exceptions that might deter efforts to remove potential hazards and concluded that voluntariness of a measure should be presumed absent a clear showing of coercion. In this case, the defendant stopped using the products at a time when they could lawfully be used. Thus, the discontinuance was a voluntary subsequent remedial measure.

Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988) : The Court reversed a judgment in a product liability case, finding, *inter alia*, that evidence of a recall following an accident should not have been admitted.

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) : In a wrongful death action alleging the defendant's negligent design of a fuel tank, the Court reversed a judgment for the defendant because the defendant had withheld an engineer's report that should have been disclosed in discovery. The Court said that the report, which discussed alternative fuel tank designs in an apparent effort to anticipate a revised National Highway Traffic Safety Administration standard, would not have been excluded by *Rule 407* and that to invoke the exclusionary rule "here is particularly inappropriate since the estimate was prepared not out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority."

Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579 (D. Minn. 1988) : In an action for injuries from an intrauterine device received in June 1977, the defendants moved *in limine* to exclude mention of a November 1977 warning issued pursuant to the Food & Drug Administration's May 1977 regulation. The motion was denied, because the policy of the Rule is inapplicable when the remedial measure is mandated rather than voluntary.

[19] "Remedial Measures" Under the Rule

Prentiss & Carlisle Co. v. Koehring-Waterous Div., 972 F.2d 6 (1st Cir. 1992) : The Court affirmed a judgment for the purchaser of a timber harvesting machine that caught fire, holding there was no error in admitting an interoffice memo from the defendant analyzing the cause of the accident, since even though remedial measures followed, the analysis itself was not a remedial measure of the sort excluded by the Rule.

Dow Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481 (10th Cir. 1990) : In an equitable subrogation action brought by the manufacturer of a grain fumigant against the marketer after settlement of product liability claims, the Court held that an internal report on the question whether the manufacturer should withdraw from the market should not have been excluded as evidence of subsequent remedial measures, because the conclusion of the report was that the company should remain in the business, and thus there was nothing in the report to make the harm less likely to occur. In *Rocky Mt. Helicopters, Inc. v. Bell Helicopters Textron*, n15 the Court affirmed a judgment in a suit by a helicopter buyer and its insurer against a manufacturer that was based upon a jury verdict finding that the buyer and the seller were each negligent. It found that evidence that the manufacturer had conducted a stress study after the accident giving rise to the suit was properly admitted, since *Rule 407* "does not read so broadly as to exclude post-accident tests or reports" and "[i]t would strain the spirit of the remedial measure prohibition in *Rule 407* to extend its shield to evidence contained in post-event tests or reports."

[20] Safety Policy

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a suit between the airline and the aircraft manufacturer for contribution and reimbursement for settlements arising from the crash of an airplane on takeoff, the Court held that

an internal memorandum dated two months after the crash in which the manufacturer recommended to buyers that they should perform a certain warning system check prior to takeoff was properly excluded under *Rule 407*. "[A] change in policy is a subsequent remedial measure within the meaning of *Rule 407*."

FOOTNOTES:

(n1)Footnote 1. *Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980)* .

(n2)Footnote 2. *Middleton v. Harris Press & Shear, Inc., 796 F.2d 747 (5th Cir. 1986)* .

(n3)Footnote 3. *Grenada Steel Indus. v. Alabama Oxygen Co., 695 F.2d 883 (5th Cir. 1983)* .

(n4)Footnote 4. *Gardner v. Chevron U.S.A., Inc., 675 F.2d 658 (5th Cir. 1982)* .

(n5)Footnote 5. *Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985)* .

(n6)Footnote 6. *Bickerstaff v. South Cent. Bell Tel. Co., 676 F.2d 163 (5th Cir. 1982)* .

(n7)Footnote 7. *Kerr-McGee Corp. v. Ma-Ju Marine Servs., 830 F.2d 1332 (5th Cir. 1987)* .

(n8)Footnote 8. *Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977)* .

(n9)Footnote 9. *Wheeler v. John Deere Co., 862 F.2d 1404 (10th Cir. 1988)* .

(n10)Footnote 10. *United States Fid. & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24 (1st Cir. 1995)* .

(n11)Footnote 11. *Roberts v. Harnischfeger Corp., 901 F.2d 42 (5th Cir. 1989)* .

(n12)Footnote 12. *Myers v. Pennzoil Co., 889 F.2d 1457 (5th Cir. 1989)* .

(n13)Footnote 13. *Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985)* .

(n14)Footnote 14. *In re Aircrash in Bali, Indonesia, 871 F.2d 812 (9th Cir. 1989)* .

(n15)Footnote 15. *Rocky Mt. Helicopters, Inc. v. Bell Helicopters Textron, 805 F.2d 907 (10th Cir. 1986)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 407 RULE 407

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407.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L. Rev. 574, 590 (1956)*.

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296 . Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961)* , an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964)* , an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for

consideration under Rule 403.

For comparable rules, see Uniform Rule 51; *California Evidence Code § 1151*; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

[2] 1997 Amendment Advisory Committee's Note

1997 Amendment Advisory Committee's Note

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988)* .

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of the majority of the circuits that have interpreted Rule 407 to apply to products liability cases. See *Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991)* ; *In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993)* ; *Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981)* , *cert. denied*, *456 U.S. 960 (1982)* ; *Kelly v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992)* ; *Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980)* , *cert. denied*, *449 U.S. 1080 (1981)* ; *Grenada Steel Industries, Inc., v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983)* ; *Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980)* ; *Flaminio v. Honda Motor Company, Ltd., 733 F.2d 463, 469 (7th Cir. 1984)* ; *Gauthier v. AMF, Inc., 788 F.2d 634, 636-637 (9th Cir. 1986)* .

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent remedial measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

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2-407 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 407, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 407. Subsequent Remedial Measures	**Rule 407. Subsequent Remedial Measures**
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ible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequen

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Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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Supp. to § 407.03 Annotated Cases

[Go To Main]

[2.1] Contract Action [Go To Main]

Brazos R. Auth. v. GE Ionics, Inc., 469 F.3d 416 (5th Cir. 2006) : The plaintiff sued for breach of warranty after a retrofitted desalinization plant supplied by the defendants suffered several fires. Vacating a judgment for the defendants, the Court held that it was error to exclude, on *Rule 407* grounds, evidence of a defendant's documents showing its investigations of and recognition of the problems with the plant components at issue. First, *Rule 407* is directed at safety-related harms, not the failure of a product to perform as promised, which was involved in this case. Second, *Rule 407* bars only evidence of remedial measures to prove culpability, and this evidence would have been relevant to rebut a defense contention that the fires were caused by the plaintiff's poor maintenance. Finally, the Rule bars only evidence of "remedial measures," and the excluded documents detailed investigations, which by themselves to not make the accident less likely to occur.

Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042 (7th Cir. 2007) : A dispute arose in this class action over the meaning of the term "day" in an insurance contract. The plaintiff's interpretation relied on a subsequent version of the clause in which State Farm made explicit that "day" means 24 hours. The plaintiff contended that this change amounted to a "confession" that her interpretation of the original clause was correct. The Court rejected the argument, reasoning that the change was "[o]bviously ... not a confession," and "to use at a trial a revision in a contract to argue the meaning of the original version would violate *Rule 407 of the Federal Rules of Evidence*, the subsequent-repairs rule, by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract. Rule 407 is not limited to 'repair' in the literal sense." The problem with the Court's analysis is that Rule 407 applies to actions taken after "an injury or harm allegedly caused by an event." This language does not appear applicable to a breach of contract action in which the dispute is over the meaning of a contractual provision.

[3.1] Discharging Responsible Employee [Go To Main]

Nolan v. Memphis City Schools, 589 F.3d 257 (6th Cir. 2009) : Affirming judgment for the defendants in an action by a high school basketball player and his father who alleged excessive use of corporal punishment against the player, the Court found no abuse of discretion in excluding evidence that the high school principal and a coach were no longer employed at the high school: "Evidence that an employer subsequently discharged an employee accused of causing a plaintiff's injury may be properly excluded under Rule 407."

[8] Feasibility [Go To Main]

Baker v. Canadian Nat'l/Ill. Cent. R.R., 536 F.3d 357 (5th Cir. 2008) : Affirming judgment for the defendant in an action brought by a workman injured in a grade-crossing collision with a train, the Court found no abuse of discretion in the exclusion of evidence that the defendant installed lights and gates at the crossing two years after the accident. The plaintiff argued that the door was opened to the evidence by a locomotive engineer's testimony that "gates are probably not as safe as just a stop sign and crossbuck" and that any crossing design expert who believes otherwise "could come ride that train with me and they will see I'm right." The Court, however, "decline[d] to analogize the analysis of ... numerous experts [in another case] to the lone opinion of Illinois Central's locomotive engineer, a lay witness." It also noted that "when the decision to admit or exclude evidence of a design change is a close call, a district court's decision to exclude the evidence is within its discretion."

[9] Impeachment or Rebuttal [Go To Main]

[c] Impeachment or Rebuttal -- Evidence Excludable or Required To Be Excluded

Henning v. Union Pac. R.R., 530 F.3d 1206 (10th Cir. 2008) : In a suit by the estate of a motorist whose car collided with the defendant's train, the Court affirmed summary judgment for the defendant on claims relating to the adequacy of warning devices based on federal preemption. It held that evidence that the railroad installed lights and gates after the accident was properly excluded. The negligence claim as to the warning devices was preempted, so whether another type of warning device would be safer was irrelevant, and the railroad did not controvert control or feasibility. The Court agreed that the estate's attempt to offer the evidence as impeachment evidence was "nothing more than an attempt to circumvent the preempted claim challenging the adequacy of warning devices at the grade crossing."

[d] Impeachment or Rebuttal -- Product Liability Cases

Minter v. Prime Equip. Co., 451 F.3d 1196 (10th Cir. 2006) : In a product liability action for injuries incurred in a fall from a scissor lift, the plaintiff offered evidence that after the accident the defendant modified the lift in a way that would have prevented the accident. The Court affirmed exclusion of this evidence under *Rule 407*, and rejected the plaintiff's argument that the impeachment exception applied. The Court noted that the impeachment exception "must be read narrowly, lest it swallow the rule. Applied loosely, any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a party's testimony." Thus, it is "confined to evidence of subsequent remedial measures that is necessary to prevent the jury from being misled." Here, the defendant's witness testified that the condition of the scissor lift at the time of the accident was "basically equivalent" to the modification subsequently implemented by the defendant; the witness did not testify that such a modification would have been unsafe or would not have prevented the accident, so the exception did not apply.

[10.1] Misrepresentation or Concealment of Negligence [Go To Main]

Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315 (1st Cir. 2008) : A buyer of custom-built trucks sued the engine manufacturer after the engines proved defective. Breach of warranty claims were dismissed as time-barred and summary judgment was granted for the defendant on a negligence claim because the warranty for the engines disclaimed liability for negligence. The plaintiff argued that the exclusionary clause was void as unconscionable because the defendant had misrepresented the quality of its engines or concealed their negligent design. To prove the design was negligent, the plaintiff offered evidence that the defendant subsequently obtained a patent for an improved version of the part at issue. Affirming, the Court upheld rejection of the evidence, noting that the defendant's "effort to improve on a piece of equipment can not be viewed as evidence that unimproved equipment was negligently designed or manufactured."

[11] Product Liability Cases [Go To Main]

Chlopek v. Federal Ins. Co., 499 F.3d 692 (7th Cir. 2007) : The Court affirmed a judgment for the defendants in a product liability action arising from injuries allegedly caused by a device that delivers cooling therapy to postoperative patients. It found no abuse of discretion in the exclusion of evidence that the manufacturer changed the warning label some time after the plaintiff's injury: Although the plaintiff argued that the change was not prompted by safety concerns, the Court noted that Rule 407 does not speak to the motive for the change but only whether it "would have made the injury or harm less likely to occur."

[16] Remedial Measures by Third Party [Go To Main]

Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293 (11th Cir. 2007) : Affirming a judgment for coffee traders on a bailment claim against a warehouseman for damage to bags of coffee beans, the Court held there was no error in allowing the tenant who leased the warehouse after the defendant vacated the premises to testify that he required the landlord to install new basins, pumps, and drains, as "Rule 407 does not apply to a remedial measure that was taken without the voluntary participation of the defendant."

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[2] The 2006 Amendment to Rule 408

[3] Scope of the Rule

[4] Evaluative Reports

[5] Relationship to Other Rules and Statutes

[6] Use By Party Making Settlement Offer

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[a] Miscellaneous

[b] Special Circumstances of Admissibility -- Negotiations as Basis for Estoppel

[c] Special Circumstances of Admissibility -- Settlement Agreement in Issue

[d] Special Circumstances of Admissibility -- State Law

[20] Statements and Materials in Settlement Negotiations

[21] Statute of Frauds Defense

[22] Statute of Limitations Defense

[23] Undisputed Claims

408.04 Legislative History

[1] Advisory Committee's Note

[2] Report of the House Committee on the Judiciary

[3] Report of the Senate Committee on the Judiciary

[4] Report of the House and Senate Conferees

[5] Citations to Hearings and Debates

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408.01 Official Text

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Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

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408.02 Editorial Explanatory Comment

[1] Rationale for the Rule

It has long been the policy of the law to promote settlements. *Rule 408* effectuates this policy by providing that in most cases an offer of settlement (and statements made during settlement negotiations) will be excluded from trial when offered to show the validity or amount of a claim. The Federal Rule also recognizes, as a subsidiary rationale, that compromise evidence often has little or no probative value when used to prove the validity or amount of a claim. An offer to compromise may well represent a desire to buy peace rather than an admission of liability. n1

At common law, a line was drawn between offers to settle and admissions of fact made during settlement negotiations. Factual admissions could be introduced against the party making the admissions unless they were inextricably bound up with offers to settle. As a result, negotiations were often couched in hypothetical form, purely to avoid factual admissions. This created a trap for the unwary. It also impeded the free-flowing, informal discussion that is often necessary for effective settlement negotiations. The Federal Rule avoids these problems by excluding statements made in settlement negotiations when offered to prove the validity or amount of a claim. An amendment to *Rule 408*, discussed below, restores at least a part of the common-law distinction when a statement in civil compromise negotiations is offered as an admission of guilt at a subsequent criminal trial.

[2] The 2006 Amendment to Rule 408

The Advisory Committee has proposed an extensive amendment to *Rule 408*. The amendment reorganizes the Rule and solves various disputes in the Courts about its meaning and scope. The amendment will become law on December 1, 2006. The amendment was made necessary because Federal Courts have long been divided on three important questions concerning the scope of *Rule 408*:

(1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

(2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior

inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

(3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

Over a number of meetings, the Advisory Committee unanimously agreed that *Rule 408* should be amended to (1) limit the impeachment exception to use for bias, and (2) exclude compromise evidence even if offered by the party who made an offer of settlement. The reason for the former amendment is that a broader impeachment exception is likely to chill settlement negotiations, as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial. The reason for the latter amendment is that a rule permitting a party to admit its own statements and offers in compromise could result in the strategic manufacturing of evidence, and also could lead to attorneys having to testify about just what statements and offers were made in alleged compromise.

The remaining issue -- whether compromise evidence should be admissible in subsequent criminal cases -- was the subject of extensive discussion at Evidence Rules Committee meetings over a number of years. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed a crime. But other Committee members argued that any rule permitting compromise evidence to be admitted in a criminal case would deter the settlement of civil cases.

Eventually a compromise was reached that distinguished between statements made in settlement negotiations (admissible in a subsequent criminal case) and the offer or acceptance of the settlement itself (inadmissible in a subsequent criminal case if offered to prove the validity or amount of the claim). It was noted -- from the personal experience of several lawyers -- that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. In such cases the settlement itself should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities. So the Committee voted to release a proposed amendment to *Rule 408* that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to *Rule 408* was negative. Criticisms included: (1) the rule would deter settlement discussions; (2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; (3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; (4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and (5) it would raise a problematic distinction between protected offers and unprotected statements and conduct -- a distinction that was rejected as unworkable when *Rule 408* was originally enacted. The public comment supported a rule providing that statements as well as offers and acceptances made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

In reviewing this public comment, most of the Evidence Rules Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the public comment was misguided. He made the following points: (1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; (2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; (3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case -- the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; and (4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were sympathetic to the government's position that statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a compromise provision was proposed that would permit statements in compromise to be admitted as evidence of guilt, but only when made in an action brought by a government regulatory agency.

The reworked amendment was approved by the Advisory Committee, the Standing Committee, the Judicial Conference, and the Supreme Court. The amendment and the accompanying Committee Note, to be effective December 1, 2006, provides as follows:

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. -- Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnishThe material within the following brackets is overstruck in the original. [,] --or The material within the following brackets is overstruck in the original. [(2)] accepting or offering or promising to acceptThe material within the following brackets is overstruck in the original. [,] --a valuable consideration in compromising or attempting to compromise The material within the following brackets is overstruck in the original. [a] the claim The material within the following brackets is overstruck in the original. [which was disputed as to either validity or amount]; and, The material within the following brackets is overstruck in the original. [is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of]

(2) conduct or statements made in compromise negotiations The material within the following brackets is overstruck in the original. [is likewise not admissible] regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

The material within the following brackets is overstruck in the original. [This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.]

(b) Permitted uses. -- This rule The material within the following brackets is overstruck in the original. [also] does not require exclusion The material within the following brackets is overstruck in the original. [when] if the evidence is offered for The material within the following brackets is overstruck in the original. [another purpose, such as] purposes not prohibited by subdivision (a). Examples of permissible purposes include provinga witness's bias or prejudice The material within the following brackets is overstruck in the original. [of a witness,] ; The material within the following brackets is overstruck in the original. [negativing] negating a contention of undue delayThe material within the following brackets is overstruck in the original. [,] ; The material within the following brackets is overstruck in the original. [or] and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read and apply. First, the amendment provides that *Rule 408* does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994)* (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator, or an attorney for the government.

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under *Rule 403*. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by *Rule 408*.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle private matters. Such a chill on settlement negotiations would be contrary to the policy of *Rule 408*.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding *Rule 408* inapplicable when compromise evidence is offered for a

purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g.*, *Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000)* (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349 (4th Cir. 1992)* (evidence of settlement is not precluded by *Rule 408* where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683 (7th Cir. 1985)* (*Rule 408* does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997)* (threats made in settlement negotiations were admissible; *Rule 408* is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, *Rule 408* is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that *Rule 408* is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g.*, *United States v. Austin, 54 F.3d 394 (7th Cir. 1995)* (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987)* (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in *Rule 408*, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir. 1991)* (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that *Rule 408* excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of *Rule 408* cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co., 955 F.2d 820, 828 (2d Cir. 1992)* (settlement offers are excluded under *Rule 408* even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada*

Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981) . But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by a government regulatory agency. Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee. The Committee Note was altered to accord with the change in the text, and also to clarify that fraudulent statements made during settlement negotiations are not protected by the Rule.

"Clean Copy" of the Amendment to Rule 408

What follows is a "clean copy" of the amended rule as it will exist on December 1, 2006:

> (a) Prohibited uses. -- Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnish -- or accepting or offering or promising to accept -- a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
>
> (b) Permitted uses. -- This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

[3] Scope of the Rule

Six general points can be made about the scope of the Rule:

(1) Compromise evidence is inadmissible only when offered to prove liability for or invalidity of a claim or its amount. It is not inadmissible under the Rule when offered for some other purpose, such as proving the bias or prejudice of a witness, n2 or some separate wrong. n3 Of course, the evidence still might be excludable under *Rule 403*. See the discussion of relationship to other Rules, at § 408.02[5].

(2) If the "other purpose" is really an issue that bears ultimately on an element of liability, then the rule of exclusion will apply. For example, in *Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506 (2d Cir. 1989)* , the defendant interposed a statute of frauds defense to the plaintiffs' breach of contract claim. In response, the plaintiffs offered a proposed draft agreement written by the defendant after the dispute between the parties had already arisen. The draft agreement was sent to "resolve the current issues and allow us to go forward with our business relationship," and legal action was threatened if the plaintiffs did not sign the agreement. The plaintiffs argued that the draft agreement was admissible despite *Rule 408*, since it was offered not to prove the validity of the claim, but only in order to meet the statute of frauds defense. But the Court rejected this argument, on the ground that "satisfying the statute of frauds was the first step to proving, ultimately, the validity of [the] claims of breach of contract." The Court concluded that "since

the two questions were so closely intertwined, admission of the documents even initially for the purpose of meeting the statute of frauds requirement would, under the circumstances of this case, militate against the public policy considerations which favor settlement negotiations and which underlie *Rule 408*."

(3) Statements are excluded under the Rule only when they relate to a "claim which was disputed" as to either validity or amount at the time the statements were made. For example, where a debtor admits the validity and amount of a debt, and simply tries to negotiate debt relief or a payment plan, the statements made pursuant to such negotiations are not protected by the Rule. n4 See the fourth paragraph of the original Advisory Committee's Note, at § 408.04[1]. Similarly, statements or conduct occurring before a controversy has even arisen are not excluded by the Rule. n5 The Courts appear to agree on the following propositions in construing the term "claim which was disputed" in *Rule 408*: (a) communications and offers can be protected even though litigation has not yet been filed; (b) business negotiations, occurring before any clear disagreement between the parties, are not protected; and (c) communications are protected if made after a clear difference of opinion has been expressed by both parties.

The case that best summarizes the case law on "claim which was disputed" is *Affiliated Manufacturers, Inc. v. Aluminum Co. of America, 56 F.3d 521, 527 (3rd Cir. 1995)* . This was an action for payment of certain invoices. The plaintiff sought to exclude portions of correspondence, memoranda, and deposition testimony referring to compromises. The defendant argued that these were just business communications and that the discussions between the parties "had not crystallized to the point of threatened litigation." But the Court noted that *Rule 408* requires only "an apparent difference of view between the parties concerning the validity or amount of a claim." The Court concluded that "the *Rule 408* exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation" and that the Rule is triggered when there is "a clear difference of opinion between the parties." n6

(4) *Rule 408* applies even if the settlement is between a party to the litigation and a nonparty. A party's settlement with another is not admissible to prove the validity or amount of the claim currently before the Court. The Rule is drafted to provide every incentive for compromise, and without such a broad rule of exclusion, litigants would be deterred from free-flowing settlement negotiations where multiple suits have been or might be brought. n7 Similarly, when the parties to a suit have engaged in settlement negotiations in previous related litigation between themselves, the compromise evidence is excluded when offered to prove the validity or amount of the claim currently before the Court. n8

(5) Offers to furnish or to accept valuable consideration are protected, not other offers. But the term "valuable consideration" should be construed broadly to effectuate the Rule's policy of encouraging uninhibited settlement negotiations. For example, offers to apologize, or admit liability without payment of damages, should be considered valuable considerations, because such offers can be legitimate bases for settling a case.

(6) Unconditional offers (i.e., offers made without any condition that a claim be released or defense terminated) are not considered settlement offers, and therefore are not covered by the Rule. n9

[4] Evaluative Reports

In some cases, parties in the course of settlement negotiations mutually retain the services of a consultant, who is commissioned to prepare an independent evaluative report designed to facilitate the settlement process. For example, in a suit arising from a complex securities transaction, the parties might commission an independent accountant to determine whether generally accepted accounting methods were used in the preparation of an important financial statement. The purpose would be to determine the strength of the plaintiff's claim that improper accounting methods were used. In these circumstances, the resulting report should be as protected under *Rule 408* as is any statement made by the parties in settlement negotiations. This is because such a report is used by all parties to determine the appropriate settlement, if any. As one Court put it, such a report is "intended to be part of the negotiations toward compromise." n10

[5] Relationship to Other Rules and Statutes

The mere fact that compromise evidence is offered for a "not-for-validity-or-amount of-the-claim" purpose (such as bias) does not mean that it is automatically admissible. The Trial Court still has discretion to exclude compromise evidence under *Rule 403* if its probative value for the permissible purpose is substantially outweighed by the risk that the jury will use the compromise evidence as proof of the validity or amount of the claim, even though instructed not to do so. n11

It should be noted that some statutes bar disclosure of settlement-type evidence. These statutes may be more protective than *Rule 408*, since they may control discovery as well as trial use of evidence. One such statute, *42 U.S.C. § 2000e-5(b)* (covering EEOC conciliation efforts), is discussed in *Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981)* . n12

[6] Use By Party Making Settlement Offer

The policy behind *Rule 408* is to assure that statements and offers made in settlement negotiations do not come back to haunt the party who made them. But what if the party who makes a settlement offer wants to use it as evidence at trial? This problem was encountered by the Second Circuit in *Pierce v. F.R. Tripler & Co., 955 F.2d 820 (2d Cir. 1992)* . *Pierce* was an employment discrimination suit arising out of the elimination of the plaintiff's position. The employer contended that the plaintiff was the victim of a realignment, not discrimination. The employer sought to introduce the fact that it had offered to settle the case by giving the plaintiff a job in a different subsidiary. The purpose for introducing the offer was to prove the employer's lack of intent to discriminate, and to show that the plaintiff, who rejected the offer, had failed to mitigate damages. The employer argued that the exclusion mandated by *Rule 408* was inapplicable because it was designed to protect those who *made* offers of settlement, not those who received them. In effect the defendant was trying to waive the protection of *Rule 408*.

Rejecting the defendant's policy argument, the *Pierce* Court held that settlement offers are subject to *Rule 408* even if it is the offeror who seeks to admit them. The Court noted that settlement negotiations are almost always conducted between and among opposing attorneys, and that these attorneys are likely to have different interpretations of the seriousness of offers and negotiations, and are also likely to disagree on what terms were set forth in any proposed settlement. These disputes of fact would have to be resolved by the factfinder, probably through testimony of the attorneys themselves. The Court was thus concerned that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial." The Court concluded that "we prefer to apply *Rule 408* as written and exclude evidence of settlement offers to prove liability for or the amount of a claim regardless of which party attempts to offer the evidence."

The 2006 amendment to *Rule 408* codifies the result in *Pierce* and clearly prohibits a party from introducing its own settlement offers and statements made in compromise, when this evidence is offered to prove the validity or amount of a claim.

[7] Applicability to Criminal Cases

A number of cases have held that compromise evidence can be admitted in related criminal litigation. For example, in *United States v. Prewitt, 34 F.3d 436 (7th Cir. 1994)* , the defendant's securities activity subjected him to a civil investigation by a state securities office and to a criminal investigation for mail fraud. In an attempt to settle the civil suit, the defendant admitted certain conduct; these statements were used against him in the subsequent criminal trial. The Court found no error, holding that *Rule 408* does not prevent admissions and statements made in a civil settlement conference from being used in a criminal case. As discussed above, the 2006 amendment to *Rule 408* provides that settlement evidence is generally inadmissible in subsequent criminal litigation, with one exception: where the accused previously made a statement admitting criminal liability in the course of settlement discussions with a government

regulator, that statement can be offered as an addmission of guilt in the criminal case. But offers to compromise made in the course of civil litigation with a regulator, as well as both statements and offers in compromise of private civil litigation, are not admissible under the amended rule when offered as a recognition of the validity or amount of the civil claim (and therefore as evidence of the validity of the criminal charge).

Of course, compromise negotiations in a civil case might be properly admitted in a criminal case when offered for a purpose other than to show the validity of the civil claim. For example, in *United States v. Austin, 54 F.3d 394 (7th Cir. 1995)* , the defendant was charged with knowingly buying and selling counterfeit works of art. At an earlier point he had entered into a consent decree with the FTC, under which he admitted to selling forged artwork and promised not to do so in the future; yet he thereafter sold more forgeries. The Court held that the Trial Court did not err in admitting extensive evidence of the FTC settlement, including the terms of the consent decree and the defendant's stipulation admitting to the allegations of the FTC's complaint. *Rule 408* did not preclude admission of this evidence because it was offered for purposes other than proving the validity of the FTC's (and hence the government's) claim. Rather, it showed that Austin was on notice that his conduct was wrong when he subsequently sold forged artwork, and it provided important background for the facts alleged in the indictment. n13 *Austin* is cited favorably in the Committee Note to the 2006 amendment to *Rule 408*.

FOOTNOTES:

(n1)Footnote 1. See Martin, *Offers of Settlement*, N.Y.L.J. Aug. 14, 1992, at 3, col. 1.

(n2)Footnote 2. See, e.g., *Bituminous Constr., Inc. v. Rucker Enters., 816 F.2d 965 (4th Cir. 1987)* (letters containing settlement offers were properly admitted to show the defendant's understanding of its obligations under a joint check agreement); *Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976)* (evidence of "Mary Carter" settlement agreements between the plaintiff and other defendants should have been admitted to show the bias of the witness). See also Martin, *Offers of Settlement*, N.Y.L.J. Aug. 14, 1992, p. 3, col. 1 ("[W]hile *FRE 408* may appear at first to be a stringent prohibition on admissibility, in truth it bars evidence only when offered for relatively narrow purposes and otherwise leaves the door open for a trial judge to admit relevant evidence at his or her discretion.").

(n3)Footnote 3. See *Carney v. American Univ., 151 F.3d 1090 (D.C. Cir. 1998)* (in an action for race discrimination and retaliation, it was error to exclude settlement letters sent by the defendant to the plaintiff; the letters were offered not to prove that the defendant discriminated against the plaintiff, but rather to prove that the defendant committed an entirely separate wrong by conditioning the plaintiff's benefits on a waiver of her constitutional rights).

(n4)Footnote 4. See, e.g., *In re B.D. Int'l Discount Corp., 701 F.2d 1071 (2d Cir. 1983)* (statements made before bankruptcy, by which the bankrupt sought to arrive at a mutually satisfactory schedule of repayments, were not excluded under *Rule 408*, since at the time the statements were made the bankrupt did not dispute the debts, but "was simply endeavoring to get more time in which to pay").

(n5)Footnote 5. See, e.g., *Deere & Co. v. International Harvester Co., 710 F.2d 1551 (Fed. Cir. 1983)* ("*Rule 408*, on its face, is limited to actual disputes over existing claims and, accordingly, cannot be applicable to an offer, albeit one ultimately rejected, to license an, as yet, uncontested patent."). Compare *Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521 (3d Cir. 1995)* ("the meaning of 'dispute' as employed in the rule includes both litigation and less formal stages of a dispute"; the Trial Court properly "interpreted the scope of the term 'dispute' to include a clear difference of opinion between the parties here concerning payment of two invoices").

(n6)Footnote 6. See also *Johnson v. Land O'Lakes, Inc., 181 F.R.D. 388, 392 (N.D. Iowa 1998)* , where the Court reviewed the case law and found that while there is a difference in language used by some Courts, the cases can be reconciled by the following standard:

> Thus, the "trigger" for application of *Rule 408*, the existence of an actual dispute as to existing claims, appears to be whether the parties have rejected each other's claims for performance, or, to put it

another way, whether the parties have reached a clear difference of opinion as to what performance is required. When this point is reached depends upon the circumstances, and thus a determination of whether *Rule 408* bars admission of discussions cannot be made without hearing evidence as to the context of the challenged discussions.

(n7)Footnote 7. See, e.g., *Branch v. Fidelity & Cas. Co., 783 F.2d 1289, 1294 (5th Cir. 1986)* ("The spectre of a subsequent use to prejudice a separate and discrete claim is a disincentive which *Rule 408* seeks to prevent."); *United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982)* (settlement by the plaintiff with another defendant, of a closely related but separate claim, held inadmissible under *Rule 408*).

(n8)Footnote 8. See, e.g., *Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988)* (prior settlement negotiations in related litigation between the parties held inadmissible under *Rule 408* in current litigation).

(n9)Footnote 9. See, e.g., *Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997)* (in an employment case, the defendant's unconditional offer to reinstate the plaintiff was admissible, because it could not be considered an offer of settlement or compromise).

(n10)Footnote 10. *Blu-J, Inc., v. Kemper C.P.A. Group, 916 F.2d 637, 639 (11th Cir. 1990)* (report by an independent accountant concerning an important financial statement was protected by *Rule 408*, since the parties, while engaged in settlement negotiations, commissioned the accountant to prepare the report in order to determine whether the plaintiff "had a case").

(n11)Footnote 11. See, e.g., *Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir. 1995)* (settlement between the plaintiff and two other defendants was properly excluded; although the amounts of the settlements were probative to rebut the plaintiff's claim that certain treatment was not obtained because of its cost, there was no abuse of discretion in the exclusion of the evidence as unduly prejudicial under *Rule 403*); *Myers v. Pennzoil Co., 889 F.2d 1457 (5th Cir. 1989)* (Trial Judge did not abuse his discretion in excluding compromise evidence offered to impeach witnesses for bias, where the Trial Judge determined that the probative value of the evidence as to bias was substantially outweighed by the risk of prejudice and confusion); *Williams v. Chevron U.S.A., Inc., 875 F.2d 501 (5th Cir. 1989)* (no error to exclude the plaintiff's settlement with a third party, even where it was offered to impeach the plaintiff's testimony that he lacked financial means to pay for a surgical procedure; the jury might have "confused" this purpose with the one prohibited by *Rule 408*, and this risk of confusion justified exclusion under *Rule 403*).

(n12)Footnote 12. See also *42 U.S.C. § 3610(a)* (in connection with disputes under the Fair Housing Act, statements made in informal resolution proceedings are not admissible in subsequent proceedings, without written consent of the parties).

(n13)Footnote 13. See also *United States v. Hauert, 40 F.3d 197 (7th Cir. 1994)* (in a tax evasion prosecution, the Trial Judge properly admitted evidence that the defendant signed settlement documents with the IRS relating to earlier years in which he abandoned a contention that his wages or salary were not taxable; this was properly admitted to show knowledge on the part of the defendant that his earnings were taxable, not to prove civil tax liability or the amount of such liability).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 408 RULE 408

2-408 Federal Rules of Evidence Manual 408.03

408.03 Annotated Cases

[Go To Supp]

[1] Ambiguity of "Settlement"

Winchester Packaging, Inc. v. Mobil Chem. Co., 14 F.3d 316 (7th Cir. 1994) : Where use of the term "settlement" in correspondence between parties to a contract dispute was ambiguous between "to pay a bill" and "to compromise a legal dispute," the Court held there was no abuse of discretion under the circumstances in excluding the correspondence.

[2] Appellate Review

Trans Union Credit Information Co. v. Associated Credit Servs., 805 F.2d 188 (6th Cir. 1986) : In a suit by a computer service company seeking specific performance of an agreement with a credit bureau, the Court, applying the clearly erroneous standard, upheld exclusion of evidence concerning an alleged oral repudiation of the agreement as settlement negotiations.

[3] Bad Faith Insurance Denial

Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000) : In an action brought against an insurer for breach of contract and bad faith, the Court affirmed a judgment for the insured. At trial, evidence was submitted that the insurer offered a settlement of the breach of contract claim on the condition that the insured release the bad faith claim. The Court found that *Rule 408* did not preclude this evidence. Under the applicable state law, "an insurer's attempt to condition the settlement of a breach of contract claim on the release of a bad faith claim may be used as evidence of bad faith."

Lampliter Dinner Theater v. Liberty Mut. Ins. Co., 792 F.2d 1036 (11th Cir. 1986) : Affirming dismissal of a claim by an insured that the defendant acted in bad faith in denying coverage in two suits against the insured, the Court held that evidence could not be admitted that the defendant ultimately settled the two suits, since such evidence was

barred by *Rule 408*. Moreover, the Court concluded that "an eventual settlement does not indicate that an initial denial of coverage was in bad faith."

[4] Bias and Impeachment Evidence

John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977) : In an action arising out of two accidents involving a plane purchased by the plaintiff from the defendant, the Court held there was no error in admitting evidence of the plaintiff's entering into a compromise with a company that repaired the plane. The settlement evidence properly showed the bias of an expert witness called by the plaintiff, since a sister corporation of the witness' employer entered into the settlement in exchange for the expert testimony.

Myers v. Pennzoil Co., 889 F.2d 1457 (5th Cir. 1989) : The defendant in this product liability action sought to impeach witnesses called by the plaintiff by showing they had originally been named as defendants and had settled with the plaintiff. The Court held there was no error in excluding the evidence, as it could have led to jury confusion and the defendant was otherwise given wide latitude in bringing out the witnesses' possible bias. In *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, n1 a declaratory judgment action by an insurer to determine whether coverage applied to an accident involving its insured's aircraft, the Court held that evidence the insurer had settled fraud claims against the insured's mechanic was admissible to show that the mechanic, whose testimony had been impeached on cross-examination by showing inconsistencies with his previous deposition, was at trial a more neutral, unbiased witness. In *Williams v. Chevron U.S.A., Inc.*, n2 the Court held that evidence of an employee's settlement with a contractor could be excluded on grounds of likely jury confusion in a suit by the employee against the owner of the platform, even though the evidence was offered to rebut testimony by the employee that he did not have the financial means to pay for a recommended surgical procedure.

Fort v. C. W. Keller Trucking, Inc., 330 F.3d 1006 (7th Cir. 2003) : The plaintiff in a wrongful death action arising from a truck accident had received $2.25 million under a loan receipt agreement with the contractor for which the truck was operating. The agreement released all defendants except the trucking company and provided that the plaintiff would pay the contractor one-third of money recovered from the trucking company or its insurer. At trial the defendant sought to introduce the agreement to impeach a manager for the contractor. The Court held there was no abuse of discretion in excluding the evidence, since (1) the witness had no personal knowledge of the agreement, (2) the defendant had ample opportunity otherwise to expose the witness' bias resulting from his employer's potential liability, and (3) "the jury might have been unable to limit its consideration of the loan receipt agreement to the issue of bias, and instead inferred that the plaintiff had already been fully compensated for her loss through the loan receipt agreement." In an action by a taxicab passenger against the driver of an auto that struck the cab, *Bachenski v. Malnati, 11 F.3d 1371 (7th Cir. 1993)* , the Court affirmed exclusion of evidence that the driver and taxicab company had settled a third-party claim against the company with an agreement that the company would pay 90 percent of any judgment rendered against the driver. The driver was not told of the settlement, thus making it of little value to show bias, and the potential prejudice from the evidence was enormous.

Swan v. Interstate Brands Corp., 333 F.3d 863 (8th Cir. 2003) : A terminated employee suing for age discrimination sought to introduce a severance agreement and release that he had signed, ostensibly only to impeach the testimony of a witness for the defendant regarding the date of the termination decision. The Court held there was no abuse of discretion in excluding the evidence because the timing of the decision was collateral to whether the defendant discriminated on the basis of age. Without a valid exception, such as impeachment, the agreement was inadmissible evidence of discrimination under *Rule 408*; and the evidence was unduly prejudicial to the defendant.

Hudspeth v. Commissioner, 914 F.2d 1207 (9th Cir. 1990) : Reversing an income tax deficiency finding, the Court held that evidence the Commissioner's expert had given significantly different values to similar timber in a case that was settled was inadmissible on the proper value of the timber in this case but was admissible to show bias on the part of the expert.

[5] Consent Decrees

Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc): The plaintiff in a civil rights action, alleging that he had been intimidated on racial grounds at a roller skating rink, introduced a prior consent decree in which the rink agreed to post signs of a nondiscriminatory policy and to instruct employees not to discriminate, as well as evidence that the rink had not complied with the decree. The Court held the consent decree was not inadmissible evidence of a compromise, as it was not offered to prove that the rink had previously discriminated but to show, through the evidence of noncompliance, the rink's motive or intent on the present occasion.

United States v. Cohen, 946 F.2d 430 (6th Cir. 1991) : In a prosecution for making and selling pirated videotapes, the Court held there was no error in admitting a consent judgment from the companion civil copyright infringement suit. The judgment was the defendant's personal admission agreeing to be enjoined permanently from infringing the plaintiffs' copyrights. The dissenting Judge noted that the consent judgment did not contain an admission of liability or wrongdoing and would have characterized it as a settlement agreement offered only to prove liability and therefore inadmissible under *Rule 408*.

United States v. Austin, 54 F.3d 394 (7th Cir. 1995) : The defendant was convicted for knowingly buying and selling counterfeit works of art. He had entered into a consent decree with the FTC, under which he admitted to selling forged artwork and promised not to do so in the future; yet he thereafter sold more forgeries. The Court held it was not error to admit extensive evidence of the FTC settlement, including the terms of the consent decree and the defendant's stipulation admitting to the allegations of the FTC's complaint. *Rule 408* did not preclude admission of this evidence, because it was offered not to prove liability, but to show that Austin was on notice when he subsequently sold forged artwork, to provided background for the indictment, and to lay the evidentiary foundation for many of the government's exhibits.

Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir. 1984) : Affirming the plaintiff's judgment in an action alleging fraud in the sale of commodities, the Court found that a consent decree that the defendant had entered into with the Commodity Futures Trading Commission in 1976 was properly admitted to show knowledge and intent to commit fraud in 1977 and 1978.

Kloepfer v. Honda Motor Co., 898 F.2d 1452 (10th Cir. 1990) : In a product liability action arising out of the death of a passenger on an all-terrain vehicle (ATV), the Court held that a consent decree relating to ATV safety entered between the United States and major ATV manufacturers (including the defendant) two years after the accident in question was properly excluded as irrelevant to the case. In *Wegerer v. First Commodity Corp.*, n3 a successful fraud action by investors against a commodity option brokerage firm and its principals, the Court upheld the admission of a 1976 consent decree between the defendants and the Commodity Futures Trading Commission, which was used to show the defendants' knowledge and intent to defraud.

Reynolds v. Roberts, 202 F.3d 1303 (11th Cir. 2000) : The Court held that statements admitting liability made by defense attorneys during negotiations could not be used as evidence to interpret the meaning of the terms of a consent

decree that the plaintiffs claimed admitted liability for discrimination. The Court stated that "while normally a court may use as evidence statements made during negotiations to interpret ambiguous gaps in consent decrees, *Rule 408* precludes such evidence to prove liability for or invalidity of a claim or its amount."

[6] Criminal Cases

United States v. Peed, 714 F.2d 7 (4th Cir. 1983) : The Court affirmed convictions for mail fraud and making false statements to the government, finding that recorded statements in which the defendant attempted to get a complainant to drop charges against her were not part of an offer to settle a disputed claim, but were part of an effort to obstruct a criminal investigation and were admissible.

United States v. Hays, 872 F.2d 582 (5th Cir. 1989) : The Court held that the erroneous admission of evidence regarding a settlement between defendants charged with conspiracy and misapplication of funds and their savings and loan association was prejudicial. It concluded that the government's offer of the evidence to assist the jury in understanding the breadth of the alleged conspiracy "stands at direct odds with the clear mandates of *Rule 408*."

United States v. Hauert, 40 F.3d 197 (7th Cir. 1994) : Affirming convictions for tax evasion and failure to file returns, the Court held that it was proper to admit evidence that the defendant signed settlement documents with the IRS relating to earlier years in which he abandoned a contention that his wages or salary were not taxable. The Court held that the evidence was properly admitted to show knowledge on the part of the defendant that his earnings were taxable, not to prove civil tax liability or the amount of such liability.

[7] Damage Issues

Branch v. Fidelity & Cas. Co., 783 F.2d 1289 (5th Cir. 1986) : In litigation arising from an offshore platform accident, the Court held it was error (but harmless) to admit evidence of a settlement agreement between the families of workers who were killed and one of the parties to an indemnity agreement. In *Belton v. Fibreboard Corp.*, n4 the Court reversed a plaintiffs' judgment in a products liability suit because the Trial Judge told the jury when it returned its verdict that the amount awarded was less than the amount of the settlement with other defendants, so that the plaintiffs would receive nothing as a result of the verdict, and then permitted the jury to deliberate further and return another verdict. The Judge violated *Rule 408* by permitting the jury to consider the plaintiffs' settlements with other defendants as part of the proof of the amount of the claim. In *McHann v. Firestone Tire & Rubber Co.*, n5 the Court reversed a judgment for a tire manufacturer in a personal injury action, holding it was error to admit evidence of a settlement between the plaintiff and the service station where he was injured, since the jury might have erroneously concluded that the service station would not have settled unless it was at fault in the accident. Rather than admit the settlement, the Court suggested that the Trial Judge should deduct the amount of the settlement from any recovery the plaintiff might obtain.

United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982) : The United States supplied the water needs of the District. After an adjoining landowner did work on his land that imperiled a canal system, the United States sued him and the District for the cost of repair. Ultimately, the landowner settled with the government. The settlement took the following form: The landowner paid $30,000 and received an offset in the amount of $45,000 for the diminution in the value of his property. The District claimed that the total of $75,000 should be a credit in its dispute with the government, whereas the government only permitted a credit of $30,000. The Court held that *Rule 408* barred evidence of settlement negotiations. In our view, this is a misreading of the Rule. The only question in the case was a legal one: What portion, if any, of the amount paid by the landowner ought to be credited to the District? The settlement

with the landowner was a fact. If the District was entitled to a credit, it should have been entitled to show that fact as evidence of the proper amount of the credit.

[8] "Dispute"

Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521 (3d Cir. 1995) : The Court held in a contract action that there was no abuse of discretion in excluding certain documents under *Rule 408*, since there was evidence that at the time they were made there was an actual dispute or difference of opinion between the parties concerning the validity of a claim, even though the dispute had not crystallized to the point of threatened litigation. According to the Court, "[T]he meaning of 'dispute' as employed in the rule includes both litigation and less formal stages of a dispute," and "[t]he district court clearly interpreted the scope of the term 'dispute' to include a clear difference of opinion between the parties here concerning payment of two invoices."

[9] Foreign Law

Morris v. LTV Corp., 725 F.2d 1024 (5th Cir. 1984) : The Court affirmed a judgment for the defendant in an action by a real estate broker to recover a commission on the sale of a hotel located in Mexico. It upheld the exclusion of a letter from the corporation to the plaintiff offering a settlement, finding that federal evidence law, not Mexican law, governed the admissibility ruling.

[10] Instructions Concerning Missing Parties

Kennon v. Slipstreamer, Inc., 794 F.2d 1067 (5th Cir. 1986) : The Court reversed a judgment for a moped rider against a windshield manufacturer, finding that the Trial Judge erred in telling the jury that the plaintiff had settled with other defendants for the nominal sum of ten dollars. The Court reasoned that "[i]n a case such as this one, where the absence of defendants previously in court might confuse the jury, the district court may, in its discretion, inform the jury of the settlement in order to avoid confusion." But it found that "disclosing the amount of the settlement serves no such purpose," and that it might have prejudiced the remaining defendant by suggesting that the others were not liable and that the plaintiff would receive compensation, if any, only from the remaining defendant.

Arhart v. Micro Switch Mfg. Co., 798 F.2d 291 (8th Cir. 1986) : In a product liability suit, various defendants sought indemnity and contribution under state law. The Court described various approaches used in State Courts in dealing with settling and nonsettling tortfeasors. It upheld the Trial Judge's telling the jury that various defendants who had started the case had settled, so that the jury would understand their absence.

[11] Internal Documents

Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521 (3d Cir. 1995) : After determining that the Trial Judge properly found that a dispute had arisen between the parties that triggered application of *Rule 408* as of a specific date, the Court held that the exclusionary rule applied to internal documents that were used as the basis for compromise negotiations.

[12] Mitigation of Damages

Pierce v. F.R. Tripler & Co., 955 F.2d 820 (2d Cir. 1992) : To show a failure to mitigate damages in an age discrimination action, the defendant proffered evidence that the plaintiff had been offered another job after he was

denied a promotion. Affirming a judgment for the plaintiff, the Court held the evidence was properly excluded as it went to the amount of the claim and the job offer was an attempt to compromise the claim. In the Court's view, to admit such settlement offers, even at the instance of the offeror, could inhibit settlement discussions and interfere with the effective administration of justice by often necessitating that counsel become witnesses at trial. This case is discussed in the Editorial Explanatory Comment, at § 408.02[6].

[13] Notice and Knowledge

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987) : The Court affirmed a jury's verdict finding both an officer and the City liable for use of excessive force in making an arrest. It held that evidence of a prior settlement by the City of another brutality claim brought by a different plaintiff, and of arrest quotas, was properly admitted to prove that the City was aware of a practice and that it fostered an atmosphere of aggressive and lawless behavior.

Breuer Elec. Mfg. Co. v. Toronado Sys., 687 F.2d 182 (7th Cir. 1982) : The Court upheld the entry of a default judgment, finding that evidence of settlement negotiations was properly admitted to show that the defendants were on notice of the nature of the issues of which the plaintiff complained.

Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987) : Affirming judgments for plaintiffs who sued a mineral exploration company for trespass, the Court held that evidence that the defendant had settled with other landowners who had complained concerning trespass or destruction of property was properly admitted. The Court reasoned that the evidence tended to show that the defendant was notified of a problem with its conduct and that the conduct was reckless. In our view, however, evidence of the complaints would have established recklessness, so the settlement evidence was unnecessary.

[14] Offer Made Before Claim Disputed

S. Leo Harmonay v. Binks Mfg. Co., 597 F. Supp. 1014 (S.D.N.Y. 1984), aff'd, 762 F.2d 990 (2d Cir. 1985) : In a breach of contract action by a subcontractor against a general contractor, the Court held that a letter from the defendant's counsel to the plaintiff's informing him that the defendant was contemplating a lawsuit against a third party and inquiring whether the plaintiff wished to join was not barred by *Rule 408*. The Court found that there was no dispute between the plaintiff and the defendant at the time the letter was written and that it was not an attempt to compromise. Regarding another letter, written by the plaintiff's attorney to the defendant's and offering, "[i]n accordance with our prior discussions and without prejudice to our clients' respective legal positions," a summary of damages suffered by the plaintiff, the Court recognized that the "magic" phrase "without prejudice" is not dispositive of whether a statement was an offer to compromise, but reasoned that "its use may still be evidence of the intent of the speaker which we may rely upon to determine whether the statement was made 'in compromise.' "

S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476 (7th Cir. 1995) : The construction contract at issue contained a disputes clause providing that the contractor should submit all claims to the District's engineer, who would issue a determination subject to review by the agency's executive director. The Court held there was no error in admitting evidence of a statement by the engineer that the contractor's claim "probably had merit," as there was no dispute for purposes of *Rule 408* until the agency had rejected the claim at some level.

Cassino v. Reichhold Chem., 817 F.2d 1338 (9th Cir. 1987) : Affirming a judgment for the plaintiff in an age discrimination case, the Court upheld admission of a settlement agreement and release that the employer offered to the

plaintiff at the time of termination. The Court approved the finding that there was no disputed claim at the time the agreement was offered and added that "[w]here, as here, the employer tries to condition severance pay upon the release of potential claims, the policy behind *Rule 408* does not come into play." *Cassino* was distinguished in *Mundy v. Household Fin. Corp.*, n6 another age discrimination case, where the Court held there was no abuse of discretion in a finding that a proposed release agreement sought in exchange of $25,000 for "outplacement services" was part of a settlement offer, since the plaintiff had already received severance pay and other benefits upon his discharge and, although he had not yet filed any claims, had already retained legal counsel.

Deere & Co. v. International Harvester Co., 710 F.2d 1551 (Fed. Cir. 1983) : In a patent infringement action the Trial Judge excluded evidence offered by Harvester as to a licensing arrangement between Deere and a third party, as well as royalty offers that Deere made to Harvester concerning a license for the patented equipment. The Court held that although Deere and Harvester might have been involved in dealings that could have led to litigation, no actual dispute arose between them until the instant litigation, so it was error to exclude the evidence under *Rule 408*. However, there was no error in excluding the evidence, because it was of little probative value.

[15] Offers To Settle

[a] By Defendant

North Am. Biologicals Inc. v. Illinois Employers Ins., 931 F.2d 839 (11th Cir. 1991) , amended, 938 F.2d 1265 (11th Cir. 1991) : In a suit seeking indemnification from an insurer for legal fees incurred in defending a class action, the Court held that the insurer's letter after dismissal of the class action offering to pay one-tenth of the fees and to consider the action as one claim subject to a single deductible was properly excluded as an offer of settlement.

[b] Offers To Settle -- By Plaintiff

Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3d Cir. 1977) : Remanding a Title VII employment discrimination case for reconsideration of a claim of religious discrimination, the Court cited *Rule 408* and noted that the District Judge should not consider a settlement offer made by the plaintiff one week before the trial on the issue of liability. We note that the problem in this case was that the offer came several years after the employee requested the religious accommodation, so it was not relevant to the question of what the burden was on the employer at the time the employee made the request.

[c] Offers To Settle -- Required by Law

Reeder v. American Economy Ins. Co., 88 F.3d 892 (10th Cir. 1996) : After a car accident involving an insured, the insurer brought a declaratory action to determine whether the insured was entitled to recover uninsured motorist benefits. The jury awarded the insured $612,000 on the question of liability, but the insured appealed on the ground that this figure was too low, arguing that it was error to exclude the insurer's offer to pay $1,000,000 on the liability claim. She contended that this offer was mandated under a state law requiring insurers to evaluate a claim and make prompt payment under certain conditions. The Court held that the offer was properly excluded, since "*Rule 408* does not distinguish between settlement offers made pursuant to a company's statutory or public policy responsibilities and offers made for other purposes. Both types of offers advance the policy behind *Rule 408*, namely, to promote the out-of-court settlement of claims."

[16] Relationship to Rule 403

Myers v. Pennzoil Co., 889 F.2d 1457 (5th Cir. 1989) : The defendant in this product liability action sought to impeach witnesses called by the plaintiff by showing they had originally been named as defendants and had settled with the plaintiff. The Court held there was no error in excluding the evidence, as it could have led to jury confusion and the defendant was otherwise given wide latitude in bringing out the witnesses' possible bias. In *Williams v. Chevron U.S.A., Inc.*, n7 the Court held that evidence of an employee's settlement with a contractor could be excluded on grounds of likely jury confusion in a suit by the employee against the owner of the platform, even though the evidence was offered to rebut testimony by the employee that he did not have the financial means to pay for a recommended surgical procedure. In *Reichenbach v. Smith*, n8 a pre-Rules case citing *Rule 408* as persuasive authority, the Court held that the Rule would not bar use of a "Mary Carter" settlement for impeachment purposes, but emphasized that the Trial Judge had discretion to determine whether the probative value was substantially outweighed by the prejudicial effect.

Bachenski v. Malnati, 11 F.3d 1371 (7th Cir. 1993) : In an action by a taxicab passenger against the driver of an auto that struck the cab, the Court held inadmissible evidence that the driver and taxicab company had settled a third-party claim against the company with an agreement that the company would pay 90 percent of any judgment rendered against the driver. The driver was not told of the settlement, thus making it of little value to show bias, and the Trial Judge reasoned that the potential prejudice from the evidence was enormous.

Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306 (8th Cir. 1997) : Following a collision between a truck driven by the plaintiff and the defendant's train, the plaintiff's employer paid the defendant for damages to the train. In the plaintiff's personal injury action, the Court held there was no error in excluding evidence of the employer's settlement. It was not relevant because it was not binding in any way on the plaintiff's legal action, and even if relevant, the risk that the jury would be unfairly swayed made its prejudicial effect substantially outweigh its probative value. Since the evidence was properly excluded, it was not necessary to decide whether the Trial Judge had properly excluded it under *Rule 408* although no litigation was even threatened at the time. In an FELA action, *Hose v. Chicago N.W. Transp. Co., 70 F.3d 968 (8th Cir. 1995)* , the Court affirmed a judgment for an employee who alleged that his employer was liable for his suffering from manganese encephalopathy, and upheld the exclusion of the plaintiff's settlement with two other defendants who manufactured the employer's welding equipment. Although the employer contended that the ultimate amounts of the settlements were admissible to rebut the plaintiff's claim that certain treatment was not obtained because of its cost, the Court found no abuse of discretion in the exclusion of the evidence as unduly prejudicial.

Breeden v. ABF Freight Sys., Inc., 115 F.3d 749 (10th Cir. 1997) : A jury found that the defendant's truck driver was ten percent negligent in causing an accident while a third party was 90 percent negligent. The plaintiffs had settled with the third party before trial. The defendant argued that it was error to exclude evidence of the settlement after the plaintiffs testified that they did not seek additional medical treatment in part because of financial inability. Although the Court recognized that *Rule 408* did not require exclusion of the settlement evidence, it mentioned that plaintiffs had settled for only $17,000 and found no error in the conclusion that the prejudicial effect of the evidence would far outweigh its probative value. In *Weir v. Federal Ins. Co.*, n9 the Court reversed a judgment for a fire insurer in a subrogation suit against a dryer manufacturer. Reviewing the exclusion of evidence concerning a settlement between the insurer and the insureds, which was offered to prove that part of the settlement involved a "voluntary" payment that could not be recovered, the Court observed that *Rule 408* does not prohibit evidence of the circumstances of a settlement to prove voluntariness, but added that "many of the same concerns about prejudice and deterrence to settlements exist regardless of the purpose for which the evidence is offered." It suggested that on remand the Trial Judge should engage in an analysis of the evidence under *Rule 403*.

Deere & Co. v. International Harvester Co., 710 F.2d 1551 (Fed. Cir. 1983) : In a patent infringement action the Trial Judge excluded evidence offered by Harvester as to a licensing arrangement between Deere and a third party and

royalty offers that Deere made to Harvester concerning a license for the patented equipment. The Court held that although Deere and Harvester might have been involved in dealings that could have led to litigation, no actual dispute arose between them until the instant litigation, so it was error to exclude the evidence under *Rule 408*. However, there was no error in excluding the evidence, because it was of little probative value.

[17] Settlement by Nonparty

Alexander v. City of Evansville, Ind., 120 F.3d 723 (7th Cir. 1997) : In a long-running dispute over the City's liability for overtime pay under the Fair Labor Standards Act, the plaintiffs offered evidence of settlement agreements with other firefighters ostensibly to show the City's own interpretation of the relevant collective bargaining agreement. The Court held there was no abuse of discretion in excluding the evidence, since the purpose of showing the City's interpretation was to show that it was liable for the overtime hours, which was precisely the liability issue in the case.

Breeden v. ABF Freight Sys., Inc., 115 F.3d 749 (10th Cir. 1997) : A jury found that the defendant's truck driver was ten percent negligent in causing an accident while a third party was 90 percent negligent. The plaintiffs had settled with the third party before trial. The defendant argued that it was error to exclude evidence of the settlement after the plaintiffs testified that they did not seek additional medical treatment in part because of financial inability. Although the Court recognized that *Rule 408* did not require exclusion of the settlement evidence, it mentioned that the plaintiffs had settled for only $17,000 and found no error in the conclusion that the prejudicial effect of the evidence would far outweigh its probative value. In *Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758 (10th Cir. 1997)* , a Miller Act suit by a subcontractor against a prime contractor and its surety for sums owed under a subcontract, the Court held that *Rule 408* did not bar admission of evidence that the prime contractor submitted claims to the government for damages caused by government delay and disruption of a construction project and that the government paid the prime contractor an undisclosed sum of money in settlement of those claims. "*Rule 408* does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated, ... though admission of such evidence may nonetheless implicate the same concerns of prejudice and deterrence of settlements which underlie *Rule 408*." In this case, the evidence was not admitted to prove liability for or the amount of the plaintiff's claim, but was admitted to show that the plaintiff was not at fault for any delay and that the prime contractor acted in bad faith in so contending.

[18] Settlement -- Exclusion Required or Permitted

[a] Inadmissible to Prove Invalidity of Claim

McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985) : The Court reversed a judgment for a motorcycle manufacturer in an action by a motorcyclist injured in a collision with a car, finding error in the admission of evidence that the plaintiff had released the driver of the car from liability prior to suing the defendant. Although under *Rule 408* the settlement could not be used as proof that the car, rather than the defendant's cycle, caused the plaintiff's injuries, the amount of the settlement could be deducted from any award that the jury might return.

Quad/Graphics, Inc. v. Fass, 724 F.2d 1230 (7th Cir. 1983) : The plaintiff brought a breach of contract suit against several corporations and two individual defendants, but one of the individual defendants settled with the plaintiff before trial. Affirming a judgment for the plaintiff, the Court upheld exclusion of the settlement evidence, since it was offered to show the invalidity of the plaintiff's claim and the settling defendant was not called to testify at trial.

[b] Settlement -- Exclusion Required or Permitted -- Inadmissible to Prove Liability

Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) : The Court found in a discrimination

action that the Trial Judge did not err in excluding evidence concerning the settlement of two prior discrimination suits involving the defendant. See also *Fiberglass Insulators, Inc. v. Dupuy* n10 (statements made by attorneys in the course of settling a prior related litigation between the parties were held properly excluded).

Richards v. City of Topeka, 173 F.3d 1247 (10th Cir. 1999) : When a female firefighter became pregnant, she was immediately placed on light duty pursuant to the collective bargaining agreement between her union and the City. She filed a grievance and ultimately sued the City for violation of her rights under the Pregnancy Discrimination Act. At trial she sought to rebut the City's bona fide occupational qualification defense by introducing the subsequent collective bargaining agreement, which did not make pregnancy grounds for an immediate light duty assignment. Affirming a judgment for the City, the Court held there was no abuse of discretion in excluding the contract or evidence of the negotiations leading up to it, since it was the result of settlement negotiations between the City and female firefighters arising out of the grievance process initiated by the plaintiff.

[19] Special Circumstances of Admissibility

[a] Miscellaneous

Carney v. American Univ., 151 F.3d 1090 (D.C. Cir. 1998) : A former university administrator alleged race discrimination and retaliation by her former employer. Reversing a grant of summary judgment for the defendant on the retaliation claim, the Court held that it was error to exclude settlement letters sent by the defendant to the plaintiff. The correspondence was offered not to prove that the defendant discriminated against the plaintiff, but rather to show that the defendant committed an entirely separate wrong by conditioning the plaintiff's benefits on a waiver of her constitutional rights.

Sage Realty Corp. v. Insurance Co. of N. Am., 34 F.3d 124 (2d Cir. 1994) : During a dispute over rent due on a commercial lease, the tenant's lawyer sent a letter setting forth the tenant's understanding of how electric costs (a factor in the rent) should be calculated. The Court held that the letter was not inadmissible under *Rule 408*, as it was not proffered to show an offer of compromise or an admission made in compromise negotiations; rather, it was used to show that the tenant had access to all documents it needed to compute the electric costs.

Bituminous Constr., Inc. v. Rucker Enters., 816 F.2d 965 (4th Cir. 1987) : The Court affirmed a judgment for a subcontractor who sued the owner of parking lots for paving work. It held that evidence of settlement negotiations was properly admitted to show that the subcontractor had made a demand for payment and to prove that the owner understood that checks were to be made jointly payable to the general contractor and to the subcontractor. In *United States v. Peed*, n11 the Court affirmed convictions for mail fraud and making false statements to the government, finding that recorded statements in which the defendant attempted to get a complainant to drop charges against her were not part of an offer to settle a disputed claim, but were part of an effort to obstruct a criminal investigation and were admissible.

Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997) : An employer was charged with unfair labor practices by, *inter alia*, threatening to terminate its third shift if the union pursued a grievance. The Court held that the alleged threatening statements were admissible, although they were made during negotiations intended to resolve the grievance, because the Rule is inapplicable when the claim is based upon a wrong that is committed in the course of settlement negotiations. Here, the threats were not offered to prove the validity of the grievance but were themselves the basis for the NLRB's claim.

Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682 (7th Cir. 2005) : In an action by an insurer against its insured to compel arbitration of a dispute between them, the insurer introduced a letter from the insured written to settle a related coverage action in State Court as evidence that the instant dispute was within the scope of the arbitration agreement because the insured had "anticipatorily repudiated" part of the insurance contract. Affirming a judgment for the insurer, the Court held there was no abuse of discretion in admitting the letter since it was not being used to prove the validity or invalidity, but only the scope, of the claim under negotiation. In *Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477 (7th Cir. 2000)* , two companies that secured merchants for a credit card processing bank had a contract that provided that, in case of its termination, the defendant was prohibited for a year from steering merchants it had signed up to competitors of the plaintiff. The contract was terminated in a dispute between the parties; they attempted to negotiate a settlement, but it fell through, and an action was brought with reciprocal breach of contract claims. At trial the defendant explained that it had steered merchants during the one-year period because it believed, based on discussions between the parties' attorneys, that there was an understanding permitting the practice. The Court found no error in the admission of the evidence regarding the anticipated settlement, since it would be an abuse of *Rule 408* to allow a party to lead his opponent in negotiations to believe he would not enforce applicable limitations and then object when the opponent attempts to prove waiver; similarly, it would be unfair to let the plaintiff lull the defendant into breaching the contract and then prevent the defendant from explaining its actions because the lulling took place around the settlement table. In *Board of Trustees of Knox County Hosp. v. Shalala*, n12 a proceeding to review a determination by the Secretary of Health and Human Services regarding a hospital's Medicare reimbursement, the Court found that evidence of an arrangement between the Secretary and another hospital was not excludable under *Rule 408*, because it was admitted only on the issue of whether the Secretary administered the program even-handedly, not to prove that a claim was valid or what its amount was. In *Raybestos Prods. Co. v. Younger*, n13 a defamation and RICO action in which the plaintiff alleged that the defendants conditioned their not issuing defamatory statements about the plaintiff's products on the plaintiff's agreeing to pay the defendants money and hire a defendant as a consultant, the Court held there was no abuse of discretion in admitting a letter from the defendants containing a plan that the defendants contended would obviate the need for litigation. The contents of the letter, the timing of its delivery, and the context in which it was sent supported the conclusion that it was not a settlement proposal but evidence of the defendants' continued efforts to intimidate and extort the plaintiff. In *Kritikos v. Palmer Johnson, Inc.*, n14 the Court found it was error (but harmless) to rely upon letters written by the plaintiff's representative during settlement negotiations as substantive evidence that the plaintiff was primarily the cause of the delay in the completion of a yacht. The letters had been admitted for other purposes, and the Court held that they should not have been used as substantive proof of liability.

Hose v. Chicago N.W. Transp. Co., 70 F.3d 968 (8th Cir. 1995) : Affirming a judgment for an employee who brought a FELA action alleging that his employer was liable for his suffering from manganese encephalopathy, the Court upheld the exclusion of the plaintiff's settlement with two other defendants who manufactured the employer's welding equipment. Although the employer contended that the ultimate amounts of the settlements were admissible to rebut the plaintiff's claim that certain treatment was not obtained because of its cost, the Court found no abuse of discretion in the exclusion of the evidence as unduly prejudicial. In *Freidus v. First Nat'l Bank, 928 F.2d 793 (8th Cir. 1991)* , an action against a bank for allegedly refusing unreasonably to consent to the sale of the plaintiff's farmland, the Court held there was no error in admitting letters exchanged during settlement negotiations to rebut testimony for the plaintiff that the bank never gave any reason for the conditions it imposed for consenting to the sale; the evidence also negatived a contention that the bank unduly delayed in acceding to the plaintiff's request. In *County of Hennepin v. AFG Indus.*, n15 the County sued a manufacturer alleging defects in insulated glass windows placed in a public building and also sued its insurance carrier, claiming that a storm damaged the building. After the County and the carrier reached a settlement, the manufacturer was permitted to introduce evidence of the settlement to show that the County was alleging that the storm contributed to the problems with the windows. The Court upheld admission of the settlement evidence, finding it was relevant to impeaching the County's claim that the manufacturer caused the damage to the building. We believe that the fact that the County alleged in another suit that the storm caused damage was plainly admissible under *Rule 801(d)(2)(A)*, but admitting additional evidence concerning the settlement posed a risk of confusing the jury as to

exactly what damages the settlement covered. In *Vulcan Hart Corp. v. NLRB*, n16 an appeal from an NLRB order, the Court found no error in the admission of evidence that the company sought to make an employee's reinstatement conditional on his resignation from union office. The evidence was not offered to show a wrongful discharge, which would have been impermissible under the Rule. Rather, it was proof that the company attempted to coerce the employee into restricting his participation in organizational activities in violation of the labor statute.

Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183 (10th Cir. 1992) : In an action by a securities clearing firm against a corporation for refusing to transfer and register a stock certificate, the Court held there was no error in admitting evidence of settlement discussions, where they related to an entirely different claim and were not admitted to prove the validity or amount of the claim under negotiation. In *Eisenberg v. University of New Mexico, 936 F.2d 1131 (10th Cir. 1991)* , the Court affirmed the imposition of Rule 11 sanctions against an attorney, holding that the attorney's statements at a settlement conference on the show cause order were not excluded by the Rule, because they were "evidence offered for another purpose." In *Weir v. Federal Ins. Co.*, n17 the Court reversed a judgment for a fire insurer in a subrogation suit against a dryer manufacturer. Reviewing the exclusion of evidence concerning a settlement between the insurer and the insureds, which was offered to prove that part of the settlement involved a "voluntary" payment that could not be recovered, the Court observed that *Rule 408* does not prohibit evidence of the circumstances of a settlement to prove voluntariness, but added that "many of the same concerns about prejudice and deterrence to settlements exist regardless of the purpose for which the evidence is offered." It suggested that on remand the Trial Judge should engage in an analysis of the evidence under *Rule 403*.

[b] Special Circumstances of Admissibility -- Negotiations as Basis for Estoppel

Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999) : In Starter's declaratory judgment action to establish its right to use a "star" trademark on athletic footwear, Converse asserted that Starter was contractually and equitably estopped by virtue of a 1990 agreement that settled a prior trademark dispute between them. At trial, Converse introduced evidence of the 1990 agreement and the negotiations leading to it. The Court found no abuse of discretion in admission of the evidence: although it would have been inadmissible to prove the validity or invalidity of a claim of trademark infringement, the issues of material misrepresentation, reliance, and damage involved in the estoppel claims were quite different. Introducing the evidence on those issues would not discourage future negotiations; in fact, exclusion on *Rule 408* grounds in this case would flout the policy of promoting compromises.

[c] Special Circumstances of Admissibility -- Settlement Agreement in Issue

Catullo v. Metzner, 834 F.2d 1075 (1st Cir. 1987) : The Court held that testimony concerning the terms of a settlement agreement was properly admitted in a suit alleging breach of fiduciary duty in contravention of the court-approved settlement.

Coakley & Williams Constr., Inc. v. Structural Concrete Equip., Inc., 973 F.2d 349 (4th Cir. 1992) : The Court affirmed a summary judgment granted on ground of a previous release in a construction dispute, holding that a settlement offer was properly considered as evidence of the parties' intent when the release was given.

Basha v. Mitsubishi Motor Credit of Am., Inc., 336 F.3d 451 (5th Cir. 2003) : In interpreting a Rule 68 offer of judgment accepted by the plaintiff that settled claims against three defendants, the Trial Judge considered two letters sent by one defendant to the plaintiff's lawyer a week before and several days after the offer was accepted. The Court found no error, since the letters were not used to establish liability but to interpret the parties' settlement agreement.

Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683 (7th Cir. 1985) : In a breach of contract case, the Court reasoned that "a settlement agreement is admissible to prove the parties' undertakings in the agreement, should it be argued that a party broke the agreement." In *Central Soya Co. v. Epstein Fisheries, Inc.*, n18 the Court indicated that where a settlement has been reached and a suit claims breach of the settlement agreement, nothing in *Rule 408* bars admission of the agreement.

Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co., 119 F.3d 1505 (11th Cir. 1997) : In an action by an insured against its insurance broker, the Court found no error in the admission of settlement agreements that the insured entered into with other insurers. Because the broker was entitled to offset an appropriate amount of the settlements against any recovery awarded by the jury against the broker, the settlement agreements were admitted for the permissible purpose of resolving a factual dispute about the meaning of the settlement agreements' terms. In a footnote the Court observed that bifurcating the trial may be useful in such cases to avoid prejudice.

[d] Special Circumstances of Admissibility -- State Law

Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990) : The defendant in an asbestosis wrongful death action concluded its case by introducing evidence that the plaintiff had received a $98,471 settlement with other defendants. The Court affirmed a judgment for the defendant, holding that the Federal Court was bound to follow the governing state law, which made settlement with a joint tortfeasor admissible for consideration when assessing damages.

[20] Statements and Materials in Settlement Negotiations

Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521 (3d Cir. 1995) : The Court held in a contract action that there was no abuse of discretion in excluding certain internal memoranda under *Rule 408*, since they had been made in the course of an effort to compromise and served as a basis for calculation of compromise figures, even though they had not been communicated to the other side.

Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988) : In an antitrust suit, the Court held that statements made by attorneys in the course of settling prior related litigation between the parties were inadmissible. The prior litigation and the current case were closely related, and the Court emphasized the strong public policy favoring exclusion of settlement negotiations between the same parties litigating against each other.

Ramada Dev. Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981) : One of the parties to a construction contract hired an architect to prepare a report alleging certain construction defects to be used in settlement negotiations. The Court held that the report was not admissible against the party commissioning it since the report would not have existed but for the settlement negotiations. The report was thus excluded by *Rule 408*, whether or not there was a pretrial understanding or agreement among the parties as to its nature.

Russell v. PPG Indus., 953 F.2d 326 (7th Cir. 1992) : Affirming summary judgment for the defendant in an employee's personal injury action, the Court noted that it was improper for the plaintiff to reveal the results of a summary jury trial on appeal. Regardless of the desirability of the procedure, any potential it might have as a settlement tool would be undermined if participating parties do not adhere to the basic stricture that the results be kept confidential. In an antitrust case, *General Leaseways, Inc. v. National Truck Leasing Ass'n*, n19 the Court held that a telephone call was properly admitted pursuant to a finding that it was not made as a part of settlement negotiations, even though a

subsequent letter offering a settlement referred to the call.

EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir. 1991) : Affirming a judgment for the defendant in an age discrimination action, the Court held that letters from the defendant to the EEOC indicating a discriminatory basis for its decision were properly excluded under the Rule because the parties were engaged in the conciliation process, even though the EEOC was still conducting an investigation at the time. Citing this *Manual*, the Court also rejected the argument that the letters were admissible for impeachment purposes.

Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637 (11th Cir. 1990) : In an action by an investor against an accounting firm for issuing allegedly erroneous and fraudulent financial statements, the Court held that materials relating to an evaluation, conducted by independent accountants pursuant to a mutual agreement of the parties as part of settlement negotiations, of whether the defendants had followed generally accepted accounting methods were properly excluded under the Rule.

[21] Statute of Frauds Defense

Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506 (2d Cir. 1989) : In a breach of contract action, the Court affirmed a ruling that excluded settlement documents that were offered to meet a statute of frauds defense. The Court concluded that admission of the documents for the limited purpose would undermine the policies favoring settlements. A dissenting Judge argued that the exclusionary rule should not be applied, since the documents were not offered to prove the validity or amount of a claim, but to demonstrate compliance with the statute of frauds.

[22] Statute of Limitations Defense

Michals v. Baxter Healthcare Corp., 289 F.3d 402 (6th Cir. 2002) : The Court affirmed an order of summary judgment, granted for failure to comply with the statute of limitations, against a plaintiff who claimed injury from silicone breast implants. The plaintiff argued that the defendant had waived the limitations defense by including the plaintiff in settlement negotiations and extending an offer to her after the limitations period had run out. But the Court declared that this was tantamount to using compromise evidence to prove liability, which is prohibited by *Rule 408*.

[23] Undisputed Claims

In re B.D. Int'l Discount Corp., 701 F.2d 1071 (2d Cir. 1983) : Affirming a bankruptcy decision granting a creditor relief, the Court observed that the debtor's financial statements containing an entry "Payable to Bank $7,269,052" were not rendered inadmissible by *Rule 408*, since the entry was not made as part of settlement negotiations. Moreover, at the time of negotiations there was no dispute as to the validity or amount of the bank's claim. The debtor was simply endeavoring to get more time in which to pay.

Dallis v. Aetna Life Ins. Co., 768 F.2d 1303 (11th Cir. 1985) : Affirming a widower's judgment in an action to recover the costs of his wife's cancer treatment at a Bahamian clinic, the Court held that evidence that the defendant had reimbursed another insured for similar treatment was properly admitted, since the reimbursement did not involve a settlement of a disputed claim.

FOOTNOTES:
(n1)Footnote 1. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990)* .

(n2)Footnote 2. *Williams v. Chevron U.S.A., Inc., 875 F.2d 501 (5th Cir. 1989)* .

(n3)Footnote 3. *Wegerer v. First Commodity Corp., 744 F.2d 719 (10th Cir. 1984)* .

(n4)Footnote 4. *Belton v. Fibreboard Corp., 724 F.2d 500 (5th Cir. 1984)* .

(n5)Footnote 5. *McHann v. Firestone Tire & Rubber Co., 713 F.2d 161 (5th Cir. 1983)* .

(n6)Footnote 6. *Mundy v. Household Fin. Corp., 885 F.2d 542 (9th Cir. 1989)* .

(n7)Footnote 7. *Williams v. Chevron U.S.A., Inc., 875 F.2d 501 (5th Cir. 1989)* .

(n8)Footnote 8. *Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976)* .

(n9)Footnote 9. *Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987)* .

(n10)Footnote 10. *Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652 (4th Cir. 1988)* .

(n11)Footnote 11. *United States v. Peed, 714 F.2d 7 (4th Cir. 1983)* .

(n12)Footnote 12. *Board of Trustees of Knox County Hosp. v. Shalala, 135 F.3d 493 (7th Cir. 1998)* .

(n13)Footnote 13. *Raybestos Prods. Co. v. Younger, 54 F.3d 1234 (7th Cir. 1995)* .

(n14)Footnote 14. *Kritikos v. Palmer Johnson, Inc., 821 F.2d 418 (7th Cir. 1987)* .

(n15)Footnote 15. *County of Hennepin v. AFG Indus., 726 F.2d 149 (8th Cir. 1984)*

(n16)Footnote 16. *Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983)* .

(n17)Footnote 17. *Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987)* .

(n18)Footnote 18. *Central Soya Co. v. Epstein Fisheries, Inc., 676 F.2d 939 (7th Cir. 1982)* .

(n19)Footnote 19. *General Leaseways, Inc. v. National Truck Leasing Ass'n, 830 F.2d 716 (7th Cir. 1987)* .

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408.04 Legislative History

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[1] Advisory Committee's Note

Advisory Committee's Note

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in *Rule 407*, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of *Rule 68 of the Federal Rules of Civil Procedure* that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-41. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see *California Evidence Code §§ 1152*, *1154*.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see *Annot., 161 A.L.R. 395* , contra, *Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E.2d 402 (1952)* , and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; *California Evidence Code §§ 1152*, *1154*; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

[2] Report of the House Committee on the Judiciary

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

[3] Report of the Senate Committee on the Judiciary

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements -- the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

...

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

[4] Report of the House and Senate Conferees

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

[5] Citations to Hearings and Debates

Letter from William A. Carey to Hon. William Hungate, August 7, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 311-12 (1973).

Testimony of Paul F. Rothstein, June 5, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 269-70 (1974).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 58-60 (1974).

Testimony of Edward W. Cleary, June 4, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 49 (1974).

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2-408 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 408, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 408. Compromise and Offers to Compromise	**Rule 408. Compromise Offers and Negotiations**
(a) Prohibited uses. Evidence of	**(a) Prohibited Uses.** Evidence of

the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach

the following is not admissible -- on behalf of any party -- either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contra-

through a prior inconsistent statement or contradiction:

through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish -- or accepting or offering or promising to accept -- a valuable consideration

(1) furnishing, promising, or offering -- or accepting, promising to accept, or offering to accept -- a valuable consideration in order to compromise the claim; and

tion in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case

(2) conduct or a statement made during compromise negotiations about the claim -- except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require

(b) Exceptions. The court may admit this

e exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of

evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The Committee deleted the reference to "liability" on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

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Supp. to § 408.01 Official Text

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Rule 408 has been amended, effective December 1, 2006. The issues giving rise to the amendment are discussed in the Main Volume at *§ 408.02[2]*. The Committee Note is set forth *infra* at § 408.04[1.1]. Following is the text of the Rule as amended:

Rule 408. **Compromise and Offers to Compromise**

(a) Prohibited uses. -- Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish -- or accepting or offering or promising to accept -- a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. -- This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

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Supp. to § 408.03 Annotated Cases

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[2.1] Attorneys' Fee Disputes [Go To Main]

Rein v. Socialist People's Libyan Arab Jamahiriya, 568 F.3d 345 (2d Cir. 2009) : Vacating an order that one law firm involved in the Lockerbie bombing case pay a portion of its negotiated contingency fee to a plaintiff's committee appointed by the Judge to oversee the plaintiff's side of the litigation, the Court held that a letter from the firm to the Judge during settlement negotiations was erroneously admitted. The Court reasoned that "[t]he fact that [the firm] notified the court of its settlement position did not justify the court's use of the information in a manner forbidden by law"; it emphasized that it was not relying on Rule 408 because of questions whether the Rule is applicable to attorneys' fees disputes, but "the rule forbidding ... use of settlement negotiations is a matter of fundamental policy."

Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009) : The Court affirmed an attorney fee award in a wrongful discharge case, finding no abuse of discretion when the Judge considered a settlement offer that was larger than the judgment obtained after trial in reducing the lodestar amount for limited success. The materials in the settlement negotiations were not being used to determine the validity of the plaintiff's claims, which would be off limits under the Rule, and, in the Court's view, "the thought that settlement discussions will not now occur because an attorney could be penalized if he or she achieves less than was demanded makes little sense."

[4] Bias and Impeachment Evidence [Go To Main]

Croskey v. BMW of No. Am., Inc., 532 F.3d 511 (6th Cir. 2008) : The plaintiff, who was injured by scalding fluid when the plastic neck on a car's radiator failed, brought product liability claims alleging both that the design of the radiator was defective and that the defendant manufacturer failed to provide warnings after becoming aware that the plastic radiator neck might fail. When the plaintiff offered evidence of other incidents in which the neck failed on the failure to warn claim, the defendant offered evidence "the reason [witnesses in three of those cases] are coming forward

to testify is because they are unhappy with the settlement. They wanted more." Reversing a judgment for the defendant on other grounds, the Court held that evidence of the disposition of the three similar cases was properly admitted to show evidence of the witnesses' bias. The settlement evidence was not offered as a defense to the plaintiff's negligence claims, but to show the state of mind of the witnesses, and thus not barred by Rule 408.

[6] Criminal Cases [Go To Main]

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010) : The national treasurer of a fraternity was charged with writing checks to cash and depositing them into his personal bank account. When confronted with evidence of his embezzlement by his successor and told that he needed to repay whatever he took, the defendant asked "what if I split the $29,000?," and when told that the missing money was more than $100,000, he responded, "Oh, I can't pay that much." Vacating the conviction, the Court held that the evidence of this exchange should not have been admitted, since under Rule 408 the defendant was offering to compromise a disputed claim, and the proposed compromise was not with a government agency or for the purpose of obstructing a criminal investigation.

United States v. Roti, 484 F.3d 934 (7th Cir. 2007) : The defendant, charged with bankruptcy fraud and concealing assets from a bankruptcy trustee, claimed that his lawyer put him up to the scheme. The Trial Judge excluded, under Rule 408, evidence that the defendant had sued the lawyer and the lawyer settled that litigation. Applying plain error review, the Court held that the Judge's failure to follow Circuit precedent holding that Rule 408 does not apply to criminal cases did not seriously affect the fairness of the proceeding because, for one thing, the Circuit law had been abrogated by the 2006 amendment to Rule 408, under which a civil settlement is inadmissible in a subsequent criminal case.

United States v. Arias, 431 F.3d 1327 (11th Cir. 2005) : In a prosecution for Medicare fraud, the Court held it was error (but harmless) to admit evidence that one of the defendants, a pharmacist, had settled a state administrative complaint brought by the Department of Health by admitting as true allegations of drug alterations and permitting the Department to enter a fine and final order, in order to avoid more formal administrative proceedings and the potential penalties arising therefrom. The Court joined Circuits holding *Rule 408* applicable to criminal proceedings based on the structure of the Rules, especially *Rule 1101(b)*, on the reference in the last sentence of the Rule to the admission of settlement evidence in criminal proceedings, and on the policies behind the Rule of excluding irrelevant evidence and encouraging settlements. We note that under the 2006 amendment (*see Manual § 408.02[2]*), *Rule 408* would not bar admission of statements made in the settlement negotiations in this case, since they "related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

[8] "Dispute" [Go To Main]

Wall Data Inc. v. Los Angeles County Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006) : The Court affirmed a judgment of copyright infringement against a software customer that installed the program on more computers than it had licenses for. The Court found no abuse of discretion in the admission of a memorandum in which an employee of the defendant admitted that he did not know how to tell on which computers the program was used. The memo recounted a meeting between the parties' employees to discuss possible over-use of the licenses, and was prepared a week before settlement discussions between the parties began.

[9.1] Grievance Proceedings [Go To Main]

Josephs v. Pacific Bell, 443 F.3d 1050 (9th Cir. 2006) : The plaintiff claimed that he had been terminated and denied reinstatement after his employer learned that he had 15 years earlier been found not guilty of murder by reason of insanity and treated in a mental hospital. Affirming a judgment for the plaintiff in his ADA action, the Court held there was no error in admitting statements made by the employer in a grievance proceeding, as the plaintiff had not yet filed a discrimination claim at the time of the proceeding.

[11.1] Mistake [Go To Main]

Orr v. City of Albuquerque, 531 F.3d 1210 (10th Cir. 2008) : In an action by two female police officers claiming discrimination in the application of pregnancy leave policies, the City asserted as a legitimate, non-discriminatory reason for the adverse employment action suffered by the plaintiffs that its personnel director had mistakenly but honestly believed that she was following the applicable policies in the plaintiffs' cases. Reversing summary judgment granted for the defendants, because there was evidence the defendants' explanation was pretextual, the Court held it was error to exclude testimony of another officer indicating the personnel director had previously treated others just as she had the plaintiffs. The Judge had ruled the evidence inadmissible under Rule 408 because it implicated compromise discussions with the City in the other officer's case. However, the Court noted that "by its terms Rule 408 and our case law permit the use of [compromise] evidence to show not liability *per se* but the absence of mistake."

[15] Offers To Settle [Go To Main]

[a] By Defendant

Bridgeport Music, Inc. v. Justin Combs Publishing, 507 F.3d 470 (6th Cir. 2007) : In an infringement action brought against publishers of a rap song containing an unlicensed sample of a copyrighted song, the Court held there was no abuse of discretion in excluding evidence offered by the defendants during the liability phase of their post-litigation settlement offers. The defendants argued that the evidence showed that the infringement had not been committed willfully, but the Court held that the evidence did nothing to rebut the plaintiffs' evidence of willfulness and therefore did not come within the "another purpose" exception to Rule 408. By contrast, the "plaintiffs' evidence of its pre-litigation settlement offers was probative of the fact that defendants had knowledge of, but disregarded, the infringement." In any event, the defendants were permitted "to offer their evidence of settlement offers during the punitive phase of the trial, where that evidence actually might have been relevant."

[16] Relationship to Rule 403 [Go To Main]

United States v. Roti, 484 F.3d 934 (7th Cir. 2007) : The defendant, charged with bankruptcy fraud and concealing assets from a bankruptcy trustee, claimed that his lawyer put him up to the scheme. The Trial Judge excluded, under Rule 408, evidence that the defendant had sued the lawyer and the lawyer settled that litigation, but also indicated that the evidence would have been excluded under Rule 403. Affirming, the Court found no abuse of discretion in the Rule 403 analysis; it doubted that the evidence was even relevant, because the defendant was not arguing that he was duped by the lawyer into believing that his course of conduct was legal. "The problem is not only that Werth's culpability would not excuse Roti's but also that the settlement of a civil claim does not say anything helpful about Roti's state of mind."

McCabe v. Parker, 608 F.3d 1068 (8th Cir. 2010) : In a civil rights action arising from arrests and searches following a political demonstration, the Court found no abuse of discretion when the plaintiffs were not permitted to refer to their settlement with two arresting officers who testified as adverse witnesses. While settlement evidence may be admitted as

evidence of a witness' bias, it was within the Judge's discretion not to change an *in limine* ruling for the plaintiffs that excluded any evidence of settlement negotiations, even when the plaintiffs subsequently settled with the witnesses. Here, counsel was permitted to ask other questions related to the witnesses' alleged bias.

Millenkamp v. Davisco Foods Int'l, Inc., 562 F.3d 971 (9th Cir. 2009) : In a breach of warranty action for a defective product, the Court held it was error to admit the seller's letter responding to the buyers' pre-suit request for a $500,000 settlement. The letter "was not relevant for any admissible purpose and should not have been admitted." Rejecting the buyers' argument that the letter had probative value as to the seller's knowledge of the buyers' intended use of the product at the time of sale, the Court cited Rule 403 and noted that the letter was unduly prejudicial because it contained language threatening that the seller would "aggressively pursue remedies" against the buyers if they sued.

[19] Special Circumstances of Admissibility [Go To Main]

[a] Miscellaneous

PRL USA Holdings, Inc., v. U.S. Polo Ass'n, 520 F.3d 109 (2d Cir. 2008) : In a trademark dispute involving the Ralph Lauren Polo logo, owned by the plaintiff, the defendant had marketed a logo with two horsemen rather than one. A few years before this litigation, the parties appeared to resolve their dispute, and the plaintiff gave the defendant a release, permitting the defendant to market the two-horsemen logo. Subsequently, however, the plaintiff brought this action, alleging infringement. At trial the defendant was permitted to admit the release signed by the plaintiff, in order to prove an affirmative defense of estoppel. The plaintiff claimed on appeal that Rule 408 barred the evidence because it was a settlement that was being offered to prove the invalidity of the plaintiff's claim, since establishing the estoppel defense would invalidate the infringement claim. The Court responded that the problem with this "clever argument is that it would deprive Rule 408's exception of all meaning" because "all evidence offered seeks either to prove liability for or invalidity of a claim or its amount." Distinguishing between the elements of a claim and an affirmative defense, the Court noted that Rule 408 bars compromise evidence to prove the former but not the latter. Finally, the Court observed that the defendant was entitled to protection against "spillover prejudice" -- that the jury might misuse the compromise evidence as proof of that the plaintiff was admitting, by signing the release, that the two-horsemen mark was not infringing -- which could be alleviated by a limiting instruction or by bifurcating the trial.

Rising-Moore v. Red Roof Inns, Inc., 435 F.3d 813 (7th Cir. 2006) : The Court affirmed a summary judgment for a motel sued by a customer for a slip and fall injury. On appeal, the question arose whether there was a sufficient amount in controversy to support federal jurisdiction. The complaint did not claim a specific amount of damages, but the plaintiff's lawyer estimated that the damages were between $180,000 and $200,000 before making a settlement demand of $160,000. The Court concluded that the Trial Judge could consider the estimate and the offer in determining whether a jury could value the claim at more than $75,000. *Rule 408* did not prohibit the use of the offer and estimate to prove jurisdiction, because the settlement evidence was not used to show either liability for or invalidity of the claim. The Court also found that the fact that the plaintiff offered to settle for $60,000 after removal to federal court supported a conclusion that the "controversy" exceeded $75,000.

Rhoades v. Avon Prods., Inc., 504 F.3d 1151 (9th Cir. 2007) : The Court held that Rule 408 does not apply to compromise evidence when offered to prove the jurisdictional requirements of an action for declaratory relief, as the evidence is not offered to prove the validity or amount of a claim.

[20] Statements and Materials in Settlement Negotiations [Go To Main]

Rein v. Socialist People's Libyan Arab Jamahiriya, 568 F.3d 345 (2d Cir. 2009) : Vacating an order that one law firm involved in the Lockerbie bombing case pay a portion of its negotiated contingency fee to a plaintiff's committee

appointed by the Judge to oversee the plaintiff's side of the litigation, the Court held that a letter from the firm to the Judge during settlement negotiations was erroneously admitted. The Court reasoned that "[t]he fact that [the firm] notified the court of its settlement position did not justify the court's use of the information in a manner forbidden by law"; it emphasized that it was not relying on Rule 408 because of questions whether the Rule is applicable to attorneys' fees disputes, but "the rule forbidding ... use of settlement negotiations is a matter of fundamental policy."

Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009) : The Court affirmed an attorney fee award in a wrongful discharge case, finding no abuse of discretion when the Judge considered a settlement offer that was larger than the judgment obtained after trial in reducing the lodestar amount for limited success. The materials in the settlement negotiations were not being used to determine the validity of the plaintiff's claims, which would be off limits under the Rule, and, in the Court's view, "the thought that settlement discussions will not now occur because an attorney could be penalized if he or she achieves less than was demanded makes little sense."

Lyondell Chem. Co. v. Occidental Chem. Corp., 608 F.3d 284 (5th Cir. 2010) : In a CERCLA apportionment and contribution action, it was necessary to calculate disposal volumes for each liable company based on uncertain input data, so minimum, intermediate, and maximum input values were established from evidence in the case. One source included reports prepared during negotiations among companies involved in this case to allocate and settle claims among them regarding another site. Noting that "Courts vary widely in their understanding of the term ['claim'], and thus in their understanding of when evidence is introduced to prove liability for, invalidity of, or the amount of *the claim* subject to compromise," the Court rejected any strict "transaction" test in favor of an application of Rule 408 that "remains fact-specific, and tethered to the rationales underlying the rule." Because the disputes for which the reports were created and for which the evidence was being offered, although separated by time and location, arose from the same events, the same relevant parties, the same waste-generating facilities, the same waste hauler, and the same intended disposal site, the Court had no difficulty concluding that they were created for use in negotiations regarding the "claim" now being litigated. Thus, admission of the report was an abuse of discretion.

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2-408 Federal Rules of Evidence Manual Supp. to § 408.04

Supp. to § 408.04 Legislative History

[Go To Main]

[1.1] 2006 Amendment Committee Note [Go To Main]

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read and apply. First, the amendment provides that *Rule 408* does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994)* (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator, or an attorney for the government.

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under *Rule 403*. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by *Rule 408*.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle private matters. Such a chill on settlement negotiations would be contrary to the policy of *Rule 408*.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against the defendant as an

admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity," "invalidity," or "amount" of the disputed claim. The intent is to retain the extensive case law finding *Rule 408* inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000)* (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349 (4th Cir. 1992)* (evidence of settlement is not precluded by *Rule 408* where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp., 780 F.2d 683 (7th Cir. 1985)* (*Rule 408* does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997)* (threats made in settlement negotiations were admissible; *Rule 408* is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, *Rule 408* is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that *Rule 408* is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin, 54 F.3d 394 (7th Cir. 1995)* (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987)* (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in *Rule 408*, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir. 1991)* (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that *Rule 408* excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of *Rule 408* cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co., 955 F.2d 820, 828 (2d Cir. 1992)* (settlement offers are excluded under *Rule 408* even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of *Rule 408* and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981)* . But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

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§ 409.syn Synopsis to Chapter 409: RULE 409

409.01 Official Text

409.02 Editorial Explanatory Comment

[1] Distinguished from Rule 408

[2] Statements of Remorse

[3] Other Purposes

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409.01 Official Text

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

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2-409 Federal Rules of Evidence Manual 409.02

409.02 Editorial Explanatory Comment

[1] Distinguished from Rule 408

Under this Rule, evidence that a party paid or offered to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove that party's liability for the injury. This is much like the exclusion of offers to compromise. The reason usually provided for this Rule is that without it, people would be reluctant to make the humane gesture of paying or offering to pay an injured person's medical expenses. It is important to note, however, that unlike *Rule 408*, this Rule does not exclude opinions or admissions of liability when made in connection with an offer to pay hospital or other expenses covered by this Rule. It is only the offer and the payment itself that are protected. The Advisory Committee and the Congress apparently felt that exclusion of statements beyond the offer or payment itself was not necessary, because any further statements need not be made in connection with the kind of offer or action covered by this Rule. They are not necessary in the same way that factual statements are necessary for the negotiations covered by *Rule 408*.

It would seem, however, that if offers of payment covered by this Rule are made as part of a settlement offer, *Rule 408* should govern, and statements made in connection with the offers should be excluded as well. Also, statements that are "a part of the act" covered by the Rule may be protected, according to the second paragraph of the Advisory Committee's Note. In deciding what is part of an act, Courts may have to fall back on cases involving offers to compromise that protected, prior to enactment of *Rule 408*, statements inextricably bound up with settlement offers.

Unlike *Rule 408*, *Rule 409* is not limited to offers or promises related to a disputed claim. Any offer, promise, or actual payment is inadmissible whether or not a dispute over obligation to pay had arisen at the time of the humane gesture.

[2] Statements of Remorse

It should be noted that neither *Rule 408* nor *Rule 409* specifically excludes statements of remorse made by someone who is involved in an accident. For example, testimony that one driver in an automobile accident states to another injured driver, "I am terribly sorry that you are injured," is not barred by any specific Rule. It is not an offer of compromise; nor is it an offer to pay medical expenses. However, in most jurisdictions, such a statement is deemed to be of very low relevance and is excluded as the kind of statement that a good Samaritan would make and one for which

no one should be penalized. We would urge that the same policies that underlie *Rule 409* would support exclusion of such a statement on the ground that, although it might be slightly probative of consciousness of fault, the statement's probative value is substantially outweighed by the unfairness of using such evidence against a citizen who expresses the kind of concern that a society expects of its best citizens. We recognize that *Rule 409* allows into evidence statements made in connection with payment of or offers to pay medical expenses. But we view the simple statement of remorse as having close to no probative value -- saying "I am sorry that you are injured" is not the same thing as saying "I am sorry that my careless conduct injured you." A statement of remorse is of such little probative value that the danger that the jury could misinterpret it and misuse it justifies exclusion.

[3] Other Purposes

Like *Rules 408* and 407, the *Rule 409* exclusionary principle applies only if the evidence is offered for a specified purpose. If it is offered to prove anything other than liability, the Rule is inapplicable and the opponent of the evidence is left to argue for exclusion under *Rule 403*. For example, if the defendant in a personal injury case offers its own payment of the plaintiff's medical expenses as proof of mitigation of damages, the proof will not be excluded under *Rule 409*.

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409.03 Annotated Cases

Savoie v. Otto Candies, Inc., 692 F.2d 363 (5th Cir. 1982) : In a Jones Act case the crucial issue was whether the plaintiff was a seaman on the date of his injury. To show that the defendant regarded the plaintiff as a seaman, the plaintiff introduced letters sent by the defendant's attorney and insurance carrier revealing that the defendant had paid the plaintiff maintenance after the injury. Affirming a judgment for the plaintiff, the Court found that this evidence did not violate *Rule 409*, since the "maintenance" payments were not shown to be medical expense payments of any kind and the evidence was not offered to show liability for the injury. The evidence might not have been admissible were the only issue entitlement to medical or hospital or similar expenses. Although careful instructions on the proper use of the evidence would have been desirable, none were requested. The Court declined to find that the evidence should have been excluded under *Rule 403*.

Williams v. Missouri Pac. R.R., 11 F.3d 132 (10th Cir. 1993) : Remanding a FELA case, the Court noted that the jury should be advised that past medical expenses had been paid. Although evidence of paying past medical expenses is inadmissible to prove liability, there would be no question of liability on the retrial of damages issues only.

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409.04 Legislative History

Advisory Committee's Note

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in *Annot., 20 A.L.R.2d 291, 293* :

> [G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.

Contrary to *Rule 408*, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; *California Evidence Code § 1152*; Kansas Code of Civil Procedure § 60-452; New Jersey Evidence Rule 52.

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2-409 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 409, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 409. Payment of Medical and Similar Expenses	**Rule 409. Offers to Pay Medical and Similar Expenses**
Evidence of furnishing or of-	Evidence of furnishing, promis-

fer-	ing
ing	to
or	pay,
pro	or
mis-	of-
ing	fer-
to	ing
pay	to
med	pay
ical,	med
hos-	ical,
pit-	hos-
al,	pit-
or	al,
sim-	or
ilar	sim-
ex-	ilar
pens	ex-
es	pens
oc-	es
ca-	res-
sion	ult-
ed	ing
by	from
an	an
in-	in-
jury	jury
is	is
not	not
ad-	ad-
miss	miss
ible	ible
to	to
prov	prov
e li-	e li-
abil-	abil-
ity	ity
for	for
the	the
in-	in-
jury.	jury.

Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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410.01 Official Text

410.02 Editorial Explanatory Comment

[1] Scope of the Rule

[2] State Proceedings

[3] Waiver of Rule 410 Protections

410.03 Annotated Cases

[1] Administrative Proceeding

[2] Breach of Agreement by Accused

[3] Collateral Estoppel in Civil Cases

[4] Convictions

[5] "Fruits" of Plea Discussions

[6] Impeachment

[7] Joint Defendants

[8] Nolo Contendere Pleas

[9] Plea Bargaining Distinguished from Volunteered Offers of Cooperation and Other Discussions

[10] Plea Bargaining Offered Against the Government

[11] Plea Bargaining with Foreign Authorities

[12] Post-Conviction Bargaining

[13] Relationship to Other Rules

[a] Rule 404(b)

[b] Relationship to Other Rules -- Rule 408

[14] Sentencing Proceedings

[15] Statements Made After Plea Agreement Is Reached

[16] Statements to Investigators

[17] Statements to Presentence Officer

[18] Voice Identification Based on Plea Negotiations

[19] Waiver

410.04 Legislative History

[1] Advisory Committee's Notes

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

[4] Report of the Senate Committee on the Judiciary

[5] Report of the House and Senate Conferees

[6] Citations to Hearings and Debates

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410.01 Official Text

Rule 410. Inadmissibility of Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 410 RULE 410

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410.02 Editorial Explanatory Comment

[1] Scope of the Rule

Rule 410 is the criminal counterpart to *Rule 408*, designed to protect guilty plea negotiations in the way that *Rule 408* is designed to protect compromise negotiations in civil cases. *Rule 410* covers withdrawn pleas, *nolo contendere* pleas, and statements made in connection with the pleas covered by the Rule. The Rule does not cover pleas that have been accepted and not subsequently withdrawn; n1 nor does it cover statements made in the course of negotiations which lead to binding plea agreements. n2 If the defendant accepts an offer and pleads guilty, this fact is admissible as an admission, assuming that it passes the threshold of *Rule 403*. n3 Moreover, the Rule does not cover statements made after bargaining has been completed -- even if the guilty plea is later withdrawn. Post-bargaining statements are not made "in the course of plea discussions." n4

The Rule makes clear that the bargaining that is covered is that done with an attorney for the government, thus generally excluding statements to police officers from the reach of the Rule. n5 It does not matter that the police officer promises to recommend leniency, or suggests that charges may be dropped. While the police officer's statements concerning cooperation may have some bearing on the voluntariness of the confession, they have nothing to do with *Rule 410*, since the defendant cannot reasonably view such statements as part of an authorized plea offer. n6 On the other hand, if law enforcement officials have actually been delegated the authority to engage in plea bargaining, then *Rule 410* should apply to the same extent as if the defendant were communicating directly with the prosecutor. n7

Rule 410 provides for only two limited exceptions. n8 First, a statement that would otherwise be excluded can be admitted if other evidence of pleas or plea discussions is introduced and the statement should in fairness be considered together with the evidence that has been introduced. This is a principle similar to that found in *Rule 106*. Second, a statement made under oath, on the record, and in the presence of counsel may be introduced in a subsequent perjury-type prosecution.

Nine additional points can be made concerning the scope of the Rule:

(1) The Rule clearly covers both extrajudicial and in-court statements by defendants and their counsel.

(2) The Rule, as interpreted, provides two-way protection for statements made in plea negotiations where an agreement is not reached or a plea is withdrawn. Thus, statements or offers made by the prosecutor during plea negotiations are inadmissible against the government if an agreement is not reached or the plea withdrawn. The policy of the Rule is to encourage the free-flow of communication and compromise from both sides. n9 Also, a plea offer from the government may signal a desire for an efficient resolution rather than a recognition of a weak case, and is therefore thought to have minimal probative value. n10

(3) The Rule does not speak of pleas that are set aside on appeal or on collateral attack. Nor does it explicitly cover pleas that are rejected by the Court under *Fed.R.Crim.P. 11*. Presumably, pleas that are rejected or vacated for one reason or another should be treated as "withdrawn" pleas, and thus statements and offers made in the course of negotiating such pleas should be inadmissible under *Rule 410*.

(4) The Rule protects not only the person who utters certain words during plea bargaining or an attempt to enter a plea; it also covers anyone else who was a participant in the plea discussions at the time that the relevant statement or offer was made.

(5) The Rule protects only those who are, at the time the evidence is proffered, parties to a criminal or civil case. n11 Thus, nonparty witnesses can be impeached with evidence of an attempted plea, an offer to plead, or statements made during plea bargaining, unless the impeachment evidence would be offered in the case of a coparticipant in the plea negotiations whom the Rule protects. n12

(6) Unlike *Rule 408*, *Rule 410* contains no exception for impeachment of party-witnesses. Thus, statements made by defendants during plea discussions cannot be used to impeach their subsequent inconsistent trial testimony (subject to waiver of *Rule 410* protections, as discussed below). n13

(7) The Rule applies not only in an ensuing criminal prosecution, but also in any subsequent civil case in which the defendant is a party. So, for example, if a defendant enters into plea negotiations concerning a charge of vehicular homicide, and no agreement is reached or a plea is withdrawn, the evidence of compromise is not admissible in a subsequent personal injury action against the defendant arising out of the accident. Again, however, completed guilty pleas are admissible in civil litigation where relevant.

(8) Because the Federal Rules of Evidence are inapplicable to sentencing proceedings (see *Rule 1101*), admissions made in plea negotiations can be used against the defendant at sentencing. n14 Admission of such statements at sentencing undermines the policy of *Rule 410*, of course; and that is especially so under the Federal Sentencing Guidelines, where sentences can be increased dramatically for obstruction of justice and other conduct that was not within the indictment. n15 Defense counsel must therefore approach plea negotiations cautiously. It is certainly in the client's interest to get an agreement from the government that statements during the plea negotiations will not be proffered at a sentencing hearing. Whether the government will make such an agreement is a question for the plea bargaining marketplace.

(9) It has been held that the protections of *Rule 410* are not applicable to plea bargaining with foreign authorities. n16

[2] State Proceedings

Can statements made by a defendant in the course of negotiating a plea with federal officials be used against the defendant in state Courts? If the Federal Rule is to work, presumably the accused must feel confident that nothing said in the course of bargaining will later be used against them at any trial. The possibility of a state proceeding in which statements could be used might threaten the proper application of the Rule. Under the *Supremacy Clause*, Congress could bar state Courts from admitting against defendants statements that are covered by the Rule. Whether Congress intended this result in *Rule 410* is open to question. One way of avoiding the problem is for federal prosecutors and investigators to protect against disclosure of statements made during negotiations. If information is to be shared in a

case of joint federal-state investigative procedures, the federal government should seek to ensure that state Courts will not use information falling under *Rule 410* that has been shared by the federal government against those whom the Rule is drafted to protect. One must hope that state officials, who should themselves be aware of the importance of plea bargaining in the criminal justice system as it now exists, will never force the issue.

It should be noted that many states have a Rule that is substantively identical to *Rule 410*, so that the evidence subject to the Rule would be inadmissible even if the plea proceedings occurred in a federal jurisdiction. n17 The conflict referred to in the preceding paragraph does not arise in these states. Similarly, the language of Federal *Rule 410* referring to "comparable state procedure" means that the protections of *Rule 410* are applicable to federal litigation occurring after guilty plea negotiations in state proceedings.

[3] Waiver of Rule 410 Protections

In *United States v. Mezzanatto, 513 U.S. 196 (1995)* , the Court held that an agreement to waive the protections of *Rule 410* (and the substantively identical *Fed. R. Crim. P. 11(e)(6)*) n18 is valid and enforceable absent some affirmative indication that the defendant entered the agreement unknowingly or involuntarily.

Mezzanatto was charged with a drug offense and, at his request, the government held a plea bargaining meeting with him. Before the discussions began, Mezzanatto was warned that negotiations were contingent on his agreement that any statements he made would be used to impeach him at a subsequent trial on the drug charges, should the case ever go that far. Mezzanatto conferred with his counsel and agreed to this arrangement; discussions began, but were fruitless. At trial, Mezzanatto testified inconsistently with statements he made during the plea negotiations. Over Mezzanatto's objection, he was impeached with those prior statements, and was subsequently convicted.

Justice Thomas, writing for the majority, rejected the defendant's argument that waiver was not permitted because not expressly provided for in the Rule. He concluded that *Rule 410* was enacted "against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties."

The defendant in *Mezzanatto* sought to overcome the presumption of waivability by a policy argument: he argued that if the protections of *Rule 410* were waivable, defendants would be less likely to bargain. But Justice Thomas reasoned, correctly we believe, that the power to waive the protections of *Rule 410* can in fact benefit defendants. It gives them another chip to use in the bargaining process. If prosecutors were precluded from securing waiver agreements, they might refuse to enter into plea discussions at all -- especially if they are concerned that the defendant might be less than forthcoming in those discussions. Essentially, waiver agreements tell prosecutors that defendants are willing to put their money where their mouth is, so that prosecutors will not just be wasting their time. As Justice Thomas stated, the way to encourage settlement "is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips." n19

The Court in *Mezzanatto* stressed that a waiver of *Rule 410* protections would not be recognized unless the prosecution can establish that the defendant made a knowing and voluntary waiver. This was no problem for the prosecution under the facts of *Mezzanatto*, where the defendant initiated discussions with the government, and conferred with an attorney before agreeing to waive the protections of *Rule 410*.

Mezzanatto's agreement with the government waived the protections of *Rule 410* only insofar as the statements could be offered to impeach him at trial. This leaves open the question whether defendants have the power to agree that their statements during plea negotiations can be used against them as substantive evidence should the case go to trial. The majority in *Mezzanatto* found it unnecessary to address this question. Justice Ginsburg, in a concurring opinion, expressed the view that if such a waiver were enforceable, it would "severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." Justice Souter, in dissent, pointed out that the free market rationale of

the majority opinion in *Mezzanatto* extended to permitting the defendant to agree to the substantive use of plea negotiation statements at trial. We agree with Justice Souter's take on the majority's decision: if the plea process is to be left to the market, the defendant should be able to waive the protections of *Rule 410 in toto*. The appropriate regulation of the plea process is not in some arbitrary rule preventing waiver, but rather in assuring that waivers are upheld only if they are knowing and voluntary.

Several Courts after *Mezzanatto* have upheld agreements by in which the defendant waived his right to exclude substantive evidence under *Rule 410*. For example, the Court in *United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998)* , reasoned that the holding in *Mezzanatto* logically extended to agreements to use the defendant's statements as substantive evidence:

> On reflection, ... we cannot discern any acceptable rationale for not extending the majority opinion in *Mezzanatto* to this case. Justice Thomas' opinion rests on three principles. First, it finds that in the absence of an affirmative indication that Congress intended to preclude or to limit the waiver of statutory protections, including evidentiary rules, voluntary agreements to waive these protections are presumptively enforceable. Second, the opinion rejects the argument that [the Rule expresses] congressional disfavor towards waivability. Finally, the opinion stresses that in weighing whether to override a presumption of waivability, a court should assess the public policy justifications, if any, which counsel in favor of departing from that norm. Cumulatively, we believe these principles do not countenance drawing any distinction in this case between permitting waivers for purposes of impeachment or rebuttal and permitting waivers for the prosecution's case-in-chief. n20

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Brewer v. City of Napa, 210 F.3d 1093 (9th Cir. 2000)* (plaintiff in a civil rights action was properly impeached with convictions based on pleas; *Rule 410* "by its terms prohibits only evidence of *pleas*" and *Rule 609* "permits admission for impeachment purposes of evidence of *convictions*").

(n2)Footnote 2. See, e.g., *United States v. Paden, 908 F.2d 1229 (5th Cir. 1990)* (*Rule 410* does "not prohibit statements made during plea negotiations that lead to" an unrevoked guilty plea).

(n3)Footnote 3. See *United States v. Benson, 640 F.2d 136 (8th Cir. 1981)* (*Rule 410* does not apply where the guilty plea is accepted and not withdrawn).

(n4)Footnote 4. See, e.g., *United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994)* (the protections of *Rule 410* are not applicable to statements made pursuant to the terms of an agreement that has already been reached: where the defendant entered into an agreement, then made statements implicating himself and others, then withdrew from the agreement, his later statements could be used against him at trial).

(n5)Footnote 5. See, e.g., *United States v. Mangine, 302 F.3d 819 (8th Cir. 2002)* (statements to a police officer made with the request that the officer help the defendant out were not excluded by *Rule 410* because they were not made in negotiation with an attorney for the government and there was no indication that the officer had authority to conduct plea negotiations); *United States v. Greene, 995 F.2d 793 (8th Cir. 1993)* (statements made to DEA agent were not covered by *Rule 410*, where the agent had no express or apparent authority to plea bargain with the defendant).

(n6)Footnote 6. See, e.g., *United States v. Posey, 611 F.2d 1389 (5th Cir. 1980)* (DEA agent's statement that he would bring the defendant's cooperation to the attention of the prosecutor did not trigger the protections of *Rule 410*, since the defendant could not reasonably believe that the agent had the authority to bargain on the prosecutor's behalf). For a discussion of the constitutional regulation of involuntary confessions, see S. Saltzburg & D. Capra, American Criminal Procedure 672-86 (7th ed. 2004).

(n7)Footnote 7. See, e.g., *United States v. Sitton, 968 F.2d 947 (9th Cir. 1992)* (stating that conversations between

the accused and police officers can constitute plea bargaining where the police obtain authority from the government attorney to negotiate; no such showing on the facts of this case); *Rachlin v. United States, 723 F.2d 1373 (8th Cir. 1983)* (recognizing the principle that *Rule 410* applies if agents have authority to bargain, but finding it inapplicable to the facts).

(n8)Footnote 8. See *United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999)* (error to admit statement made in plea negotiations to establish notice but not guilt; *Rule 410* contains only two limited exceptions, and "notice" or "issues other than guilt" are not among them).

(n9)Footnote 9. See, e.g., *United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976)* (criminal defendant could not introduce evidence of plea bargaining by the Government to show consciousness of a weak case). See also *United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999)* (prosecuting attorney's statement to defendant during plea negotiations cannot be admitted to prove notice).

(n10)Footnote 10. See, e.g., *United States v. Delgado, 903 F.2d 1495 (11th Cir. 1990)* (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, since the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon *Rule 403*). Cf. *United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990)* , where the defendant sought to prove his own "consciousness of innocence" by the fact that he rejected a grant of complete immunity and refused to testify because he knew nothing about the charged wrongdoing. The Court noted that a rejection of immunity under these circumstances was far more probative of an innocent state of mind than a rejection of a plea offer made by the government. The Court found it unnecessary to determine whether a plea offer by the government would be excluded under *Rule 410*.

(n11)Footnote 11. See, e.g., *United States v. Sonny Mitchell Center, 934 F.2d 77 (5th Cir. 1991)* (under *Rule 609*, a nonparty witness may be impeached with a felony conviction based on a plea of *nolo contendere*).

(n12)Footnote 12. See *United States v. Mathis, 550 F.2d 180 (4th Cir. 1976)* (*Rule 410* does not apply to impeachment of a nonparty witness, because the plea negotiations are not offered "against" the witness in this circumstance).

(n13)Footnote 13. See, e.g., *United States v. Acosta-Ballardo, 8 F.3d 1532 (10th Cir. 1993)* (impeachment use of defendant's plea negotiations is contrary to the text and the legislative history of *Rule 410*).

(n14)Footnote 14. See, e.g., *United States v. Simmons, 164 F.3d 76 (2d Cir. 1998)* (District Judge did not err in enhancing the defendant's sentence on the basis of admissions made by the defendant during a guilty plea hearing where the plea was later withdrawn; the Federal Rules of Evidence do not apply to sentencing proceedings); *United States v. Medina-Estrada, 81 F.3d 981 (10th Cir. 1996)* (*Rule 410* does not apply at sentencing proceedings, since *Rule 1101(d)(3)* expressly states that the rules of evidence are not applicable in such proceedings).

(n15)Footnote 15. See, e.g., *United States v. Upton, 91 F.3d 677 (5th Cir. 1996)* (*Rule 410* does not preclude statements made during plea negotiations from being considered during sentencing; therefore it was permissible to increase the defendant's offense level for obstruction of justice, where he admitted during plea negotiations that he had lied to the grand jury).

(n16)Footnote 16. *United States v. Orlandez-Gamboa, 320 F.3d 328 (2d Cir. 2003)* (reasoning that language in the Rule limits protection to guilty pleas in state and federal prosecutions).

(n17)Footnote 17. See G. Joseph & S. Saltzburg, Evidence in America § 20.1.

(n18)Footnote 18. At the time *Mezzanatto* was decided, Criminal Rule 11(e)(6) was a detailed rule that was substantially similar to, but not identical to *Rule 410*. Subsequently, the Criminal Rule was amended to delete the substantive provisions; now it simply incorporates *Rule 410* by reference.

(n19)Footnote 19. In *United States v. Krilich, 159 F.3d 1020, 1024 (7th Cir. 1998)* , Judge Easterbrook explained why it was important to permit the defendant to waive the protections of *Rule 410*:

> By authorizing the prosecutor to use his statements if he should contradict himself, Krilich made his representations more credible and thus strengthened his hand in negotiations. A prosecutor may be reluctant to negotiate; what has the defendant to offer? A statement that shows how the defendant's aid could assist the prosecutor in other cases (or lead to the appropriate sentence in this one) may get negotiations under way and set the stage for a favorable bargain. But a prosecutor needs assurance that the defendant is being candid. A conditional waiver of the kind Krilich signed tends to keep the defendant honest, which makes the proffer device more useful to both sides. For this strategy to work, the conditional waiver must be enforceable; its effect depends on making deceit *costly*.

(n20)Footnote 20. See also *United States v. Barrow, 400 F.3d 109 (2d Cir. 2005)* (upholding an agreement that provided for substantive use of the defendant's statements made in plea bargaining, and noting that such a ruling provided assurances that the defendant was being truthful by making deceit costly, and therefore the rule promoted plea bargaining.).

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 410 RULE 410

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410.03 Annotated Cases

[Go To Supp]

[1] Administrative Proceeding

Myers v. Secretary of Health & Human Servs., 893 F.2d 840 (6th Cir. 1990) : In reviewing an administrative determination excluding the appellants from participation in the Medicare program, the Court held that the Rule did not bar evidence that they had previously been convicted on a plea of *nolo contendere* of Medicare fraud, because it does not apply to use of a conviction, nor does it prohibit use of a *nolo* plea in an administrative proceeding.

[2] Breach of Agreement by Accused

United States v. Stirling, 571 F.2d 708 (2d Cir. 1978) : One defendant in a securities law case had agreed to a plea bargain in which he promised to "at all times give complete, truthful and accurate information and testimony," and which provided that if he breached, he could be prosecuted and any information he provided could be used against him. The defendant testified before a grand jury pursuant to the agreement, but subsequently withdrew from the bargain and went to trial, where his grand jury testimony was admitted against him. The Court concluded that, although a literal reading of the Rule (and its counterpart, *Fed. R. Crim. P. 11(e)(6)*) might bar use of the grand jury testimony, the policy of free and open negotiations upon which the Rule is premised did not require exclusion of statements made by a person who agreed to the use of the statements against him in the event of a breach of the plea bargain agreement.

United States v. Swick, 262 F.3d 684 (8th Cir. 2001) : In a prosecution for tampering with consumer products, the Court reversed an order that suppressed inculpatory statements made by the defendant in a plea agreement and a plea colloquy. The defendant signed an agreement providing that if he breached the plea agreement, all testimony and other information he provided to the government "may and will be used against him in any prosecution or proceeding." The Trial Judge granted the defendant's motion to withdraw his plea before sentencing. The Court found that a knowing and voluntary waiver permits the government to use the defendant's statements in the government's case-in-chief, and indicated that it was "not persuaded by Swick's assertion that because he was under pressure to accept the plea agreement or be forced to go to trial and face severe consequences, his plea was involuntary." In *United States v. Young*

, 223 F.3d 905 (8th Cir. 2000) , a defendant charged with drug trafficking had entered into a plea agreement but then absconded before his guilty plea hearing. When he was later apprehended, the government declared a breach of the agreement and chose to try him for the original crime. The Trial Judge excluded the statements that the defendant made at the guilty plea hearing, on the ground that the defendant was never specifically informed of his right under *Rule 410* to exclude the statements he was making should the parties not agree and the case go to trial. On interlocutory appeal, the Court reversed, finding that the defendant had waived his protections under *Rule 410* by breaching the agreement, which specifically stated that if the defendant breached its terms he could be tried and all of the statements that he had made to the authorities would be admissible against him.

[3] Collateral Estoppel in Civil Cases

Walker v. Schaeffer, 854 F.2d 138 (6th Cir. 1988) : The Court held that *Rule 410* did not bar a Court from holding that a plea of *nolo contendere* estopped a defendant from bringing a civil suit based upon a claim that the officers who arrested him lacked probable cause.

[4] Convictions

Myers v. Secretary of Health & Human Servs., 893 F.2d 840 (6th Cir. 1990) : In reviewing an administrative determination excluding the appellants from participation in the Medicare program, the Court held that the Rule did not bar evidence that they had previously been convicted on a plea of *nolo contendere* of Medicare fraud, because it does not apply to use of a conviction, nor does it prohibit use of a *nolo* plea in an administrative proceeding.

[5] "Fruits" of Plea Discussions

United States v. Ware, 890 F.2d 1008 (8th Cir. 1989) : Affirming drug offense convictions, the Court noted that proof that a defendant identified a potential witness to the government during plea discussions is not within the bar of *Rule 410*.

[6] Impeachment

United States v. Wood, 879 F.2d 927 (D.C. Cir. 1989) : In a prosecution of a drug trafficking conspiracy, the Court held that statements made during plea bargaining negotiations were inadmissible to impeach a defendant who testified. The Court vacated the defendant's conspiracy conviction, on which a concurrent sentence was imposed, without deciding whether she waived her objection by signing a letter from the prosecutor warning her that statements in the bargaining process could be used at trial to cross-examine her.

United States v. Lawson, 683 F.2d 688 (2d Cir. 1982) : Reversing a bank robbery conviction, the Court held that statements falling within *Rule 410* could not be used for impeachment purposes. It commented that the legislative history on the point was "unusually clear." One Judge dissented on the ground that the statements had not been made in plea discussions.

United States v. Acosta-Ballardo, 8 F.3d 1532 (10th Cir. 1993) : The defendant's conviction for possessing cocaine with intent to distribute was reversed because statements he made during plea discussions were introduced to impeach his inconsistent testimony at trial. Impeachment use of plea negotiations is contrary to the text and the legislative history of the Rule.

[7] Joint Defendants

United States v. Rosario, 111 F.3d 293 (2d Cir. 1997) : In a multiple defendant narcotics prosecution, Basciano sought to admit a statement by Bottone made during Bottone's plea negotiations. Bottone had stated that he and Basciano were involved in the gambling business, not the drug business. Bottone argued that the admission of this statement violated *Rule 410*, but the Court found no error. The statement was offered in favor of Basciano rather than against Bottone; because it did nothing to implicate Bottone in narcotics activity, *Rule 410* did not apply. In *United States v. Serna*, n1 the Court held that a codefendant's statement that the defendant was the wrong man was inadmissible in a joint trial of the two defendants for drug smuggling, since it was made in the course of plea negotiations. No limiting instruction would have been adequate to protect the codefendant. The Court also held that it was not required that the government attorney be present when a statement is made as long as the attorney is participating in the plea bargaining.

[8] ***Nolo Contendere*** Pleas

Olsen v. Correiro, 189 F.3d 52 (1st Cir. 1999) : The plaintiff had been convicted of murder, but the conviction was reversed because the prosecution failed to disclose exculpatory evidence. Rather than go through another trial, he pleaded *nolo contendere* to a charge of manslaughter, and was sentenced to time served. He then brought a civil rights action, arguing that he was unconstitutionally subjected to imprisonment on murder charges. The defendants proffered the *nolo contendere* plea as evidence that the plaintiff would have been incarcerated anyway. Affirming a finding that the *nolo* plea to the lesser charge precluded damages for imprisonment on the murder charge, the Court noted that the *Rule 410* limitation on the admissibility of *nolo* pleas was inapplicable, because the evidence was not offered to show underlying culpability but only that he was incarcerated for something other than the murder conviction.

United States v. Adedoyin, 369 F.3d 337 (3d Cir. 2004) : Affirming convictions for mail fraud and improper entry into the United States by an alien, the Court held that evidence of the defendant's 1981 California felony conviction was properly admitted to prove that the defendant lied on his visa application when he denied he had any criminal convictions. The defendant argued that the conviction was inadmissible because it was based on a *nolo contendere* plea, but the Court reasoned that while *Rule 410* precludes admission of a *nolo contendere* plea, it does not operate to exclude the conviction that results from such a plea, since "a plea of nolo contendere has the same legal consequences as a plea of guilty and results in a conviction."

Myers v. Secretary of Health & Human Servs., 893 F.2d 840 (6th Cir. 1990) : In reviewing an administrative determination excluding the appellants from participation in the Medicare program, the Court held that the Rule did not bar evidence that they had previously been convicted on a plea of *nolo contendere* of Medicare fraud, because it does not apply to use of a conviction, nor does it prohibit use of a *nolo* plea in an administrative proceeding.

Brewer v. City of Napa, 210 F.3d 1093 (9th Cir. 2000) : The Court held that the plaintiff in a civil rights action was properly impeached with convictions based on *nolo contendere* pleas. The Court reasoned that *Rule 410* did not preclude such impeachment, because that Rule "by its terms prohibits only evidence of *pleas*" while *Rule 609* "permits admission for impeachment purposes of evidence of *convictions*." The Court also noted that the Advisory Committee considered an exception to *Rule 609* for *nolo* convictions and ultimately rejected it.

Rose v. Uniroyal Goodrich Tire Co., 219 F.3d 1216 (10th Cir. 2000) : The plaintiff was terminated for violation of his employer's Drug-Free Workplace Policy after he pleaded *nolo contendere* to a misdemeanor charge of marijuana

possession. The termination was upheld as justified by the employer's Fair Treatment Panel procedure. Affirming summary judgment for the employer on a wrongful discharge complaint, the Court held there was no abuse of discretion in denying the plaintiff's motion *in limine* to exclude evidence of the plea. *Rule 410* does not apply to the personnel decisions of private companies, so the plea could properly be used as a basis for the termination decision, and it would be unjust to preclude the employer from introducing the very evidence it relied upon in deciding to discharge the plaintiff.

[9] Plea Bargaining Distinguished from Volunteered Offers of Cooperation and Other Discussions

United States v. Penta, 898 F.2d 815 (1st Cir. 1990) : The Court held that *Fed. R. Crim. P. 11(e)(6)* (the counterpart to *Rule 410*) did not exclude the defendant's statements to a government attorney and an investigator, with whom he had a number of conferences in which the prosecutor was openly trying to build a case against the defendant's associates and (in the prosecutor's unexpressed belief) the defendant was trying to avoid prosecution or a long jail sentence. Because the defendant made no such request and the attorney made no offer, there were no plea discussions within the meaning of the Rule.

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) : Reversing a defendant's convictions in a political corruption case on the ground that evidence was erroneously excluded that he "rejected" immunity, by denying knowledge of others' wrongdoing at a time when admitting such knowledge would have secured him immunity, the Court noted that the evidence was far more evidence of an innocent state of mind than it was a rejected plea bargain, the admissibility of which it was unnecessary to decide. In *United States v. Cunningham*, n2 the Court upheld a conviction for making false statements to the IRS and members of the United States Attorney's office. It found that statements made by the defendant after he stipulated that anything he said could be used against him were not part of a plea agreement, but were an effort to convince the government that he was not guilty of a crime and should not be prosecuted.

United States v. Conaway, 11 F.3d 40 (5th Cir. 1994) : The Court held that the defendant had not been engaged in plea negotiations when he turned over records to a grand jury investigating currency transaction structuring, so the records were not thereby made inadmissible. The prosecutor had given the defendant an opportunity to corroborate grand jury testimony that he had not evaded taxes by furnishing the records and had several times reminded him that they could be used against him.

United States v. Hare, 49 F.3d 447 (8th Cir. 1995) : The Court affirmed an attorney's conviction for fraud, holding there was no error in admitting statements made to agents and an Assistant U.S. Attorney. Knowing that the offenses with which he could be charged were serious, the defendant offered the statements unconditionally in an effort to cooperate at a time when no plea bargain was offered or even contemplated by the government.

United States v. Guerrero, 847 F.2d 1363 (9th Cir. 1988) : The Court concluded that statements made by a defendant to the FBI and to a federal prosecutor were admissible, since they were made when the defendant admitted paying kickbacks and offered to cooperate in exchange for the prosecutor's promise to consider such cooperation in the handling of any future cases. The Court reasoned that "[a] statement was made in the course of plea discussions if: (1) the suspect exhibited an actual subjective expectation that he was negotiating a plea at the time of the discussion; and (2) the suspect's expectation was reasonable given the totality of the circumstances." It found that neither part of the test was met in this case.

[10] Plea Bargaining Offered Against the Government

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) : Reversing a defendant's convictions in a political corruption case on the ground that evidence was erroneously excluded that he "rejected" immunity, by denying knowledge of others' wrongdoing at a time when admitting such knowledge would have secured him immunity, the Court noted that the evidence was far more evidence of an innocent state of mind than it was a rejected plea bargain, the admissibility of which it was unnecessary to decide.

United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976) : Affirming convictions for conspiracy and various substantive offenses arising out of a theft of an interstate shipment of beef, the Court cited *Rule 408* and *Fed. R. Crim. P. 11(e)(6)* for the proposition that criminal defendants cannot introduce evidence of plea bargaining by the government to show consciousness of a weak case.

[11] Plea Bargaining with Foreign Authorities

United States v. Orlandez-Gamboa, 320 F.3d 328 (2d Cir. 2003) : On interlocutory appeal in a drug case, the Court reversed a ruling that suppressed statements that the defendant had made to Colombian prosecutors in a procedure that the Trial Judge found was a form of plea bargaining. Reasoning that subdivision (4) of *Rule 410* could be no broader than subdivision (3), which specifically refers only to federal and state proceedings, the Court held that the Rule did not extend to statements made in plea bargaining with foreign authorities.

[12] Post-Conviction Bargaining

United States v. Graham, 91 F.3d 213 (D.C. Cir. 1996) : Affirming drug-related convictions, the Court held that testimony by an Assistant U.S. Attorney that, even after the defendant was sentenced to life imprisonment, he rejected the government's offer of a possible sentence reduction in exchange for his cooperation, was properly admitted in a § 2255 hearing at which the defendant challenged the effectiveness of his counsel. The Court stated that *Rule 410* applies only to "plea" negotiations, not to every offer of cooperation or post-conviction bargaining.

[13] Relationship to Other Rules

[a] Rule 404(b)

United States v. Wyatt, 762 F.2d 908 (11th Cir. 1985) : The Court affirmed a defendant's drug convictions, holding that evidence of other crimes was properly admitted under *Rule 404(b)*. Although the defendant had pleaded *nolo contendere* to the other crimes, *Rule 410* bars only use of the plea, but not other evidence of the underlying acts.

[b] Relationship to Other Rules -- Rule 408

United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999) : The Trial Judge in a mail fraud and money laundering case excluded evidence of all statements made in plea negotiations except the AUSA's warning that the defendant's insurance sales were illegal. Analogizing to *Rule 408*, which permits use of statements in compromise on issues other than liability, the Judge limited use of the warnings to establish notice but not guilt. The Court held this was error (but harmless), since *Rule 410* bars any use of plea negotiation statements, with only two specific exceptions inapplicable in this case.

[14] Sentencing Proceedings

United States v. Simmons, 164 F.3d 76 (2d Cir. 1998) : The Court found no error when the defendant's sentence for possession of a firearm was enhanced on the basis of his statements made during his guilty plea hearing. The guilty plea was later withdrawn, and *Rule 410* would preclude the admission of such statements at trial. But the Court held that under *Rule 1101(d)(3)*, *Rule 410* is not applicable in sentencing proceedings. The Court also relied on *18 U.S.C. § 3661*, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

United States v. Paden, 908 F.2d 1229 (5th Cir. 1990) : The Court held that statements made in plea negotiations that were unilaterally broken off by the government eight months before the defendant's ultimate guilty plea were admissible in sentencing on that plea, as the Rule looks only to the end result of the process, which is often not smooth and unbroken.

United States v. Medina-Estrada, 81 F.3d 981 (10th Cir. 1996) : Affirming a conviction for possession of methamphetamine with intent to distribute, the Court held that *Rule 410* does not apply at sentencing proceedings, since *Rule 1101(d)(3)* expressly states that the Rules of Evidence are not applicable in such proceedings. In *United States v. Ruminer*, n3 the Court affirmed drug convictions, holding that the Trial Judge properly considered in sentencing the fact that defendants supplied false leads to the government during plea discussions. The Court, citing *Rule 1101(d)(3)*, observed that *Rule 410* did not override the general principle that a defendant's conduct could be considered in sentencing.

[15] Statements Made After Plea Agreement Is Reached

United States v. Ventura-Cruel, 356 F.3d 55 (1st Cir. 2003) : The defendant in a cocaine smuggling case entered a guilty plea pursuant to a plea bargain, but a year later the Judge withdrew the guilty plea during sentencing procedures. At trial, the government introduced a letter accepting responsibility that the defendant had written to his probation officer as part of the pre-sentencing process under the plea bargain. Vacating the conviction, the Court held it was unfair to deprive the defendant of the benefit of his plea bargain but allow use of incriminating statements that the plea agreement had encouraged him to make in order to receive a shorter sentence. In the absence of any provision in the agreement permitting use of admissions if the plea was subsequently overturned or one of the parties withdrew from the agreement, both sides should have been returned to their positions before the Judge initially accepted the guilty plea.

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994) : Affirming drug convictions, the Court held that the protections of *Rule 410* are not applicable to statements made pursuant to the terms of an agreement that has already been reached. Such statements are not made "in the course of plea discussions." Accordingly, where the defendant entered into a plea agreement, then made statements implicating himself and others, then repudiated the agreement, his statements could be used against him at trial.

[16] Statements to Investigators

United States v. Aponte-Suarez, 905 F.2d 483 (1st Cir. 1990) : In affirming drug-importation conspiracy convictions, the Court held that statements to government investigators were properly admitted, as they were not made in the course of plea negotiations nor were they made to an attorney for the prosecuting authority.

United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985) : The Court found that statements made by a defendant to

an FBI agent could not have been within the Rule, since there was no intention of bargaining during the meeting and the defendant could not have believed the agent had any authority to bargain.

United States v. Mangine, 302 F.3d 819 (8th Cir. 2002) : The Court affirmed a conviction for felon firearm possession, holding there was no error in admitting testimony from a sheriff's lieutenant regarding statements the defendant made while in custody. Although the defendant prefaced the statements with requests that the lieutenant "help him out," the statements were not plea negotiations inadmissible under *Rule 410* because they were not made in negotiations with an attorney for the government and there was no suggestion that the lieutenant had any authority to engage in plea negotiations. In a drug prosecution, *United States v. Kummer, 15 F.3d 1455 (8th Cir. 1994)* , the Court held that detectives' statements that they could "put in a good word for" the defendant could neither be reasonably construed to mean that their discussions were plea negotiations nor that they had express authority to enter into such negotiations, so the defendant's inculpatory statements to them were properly admitted. In *United States v. Greene*, n4 the Court affirmed convictions for drug offenses, holding there was no error in denying the defendant's motion to suppress statements made to a DEA agent, allegedly in plea bargaining, as the agent had no express or apparent authority from the prosecuting attorney to plea bargain with the defendant. In *Rachlin v. United States*, n5 the Court affirmed a conviction for passing a counterfeit note, finding that statements made by the defendant to Secret Service agents were not barred by the Rule, since the defendant was never told that the agents had authority to plea bargain and they never offered any "deal."

United States v. Sitton, 968 F.2d 947 (9th Cir. 1992) : The Court affirmed convictions for drug charges, holding that a defendant's statements to deputy sheriffs in which he offered "a trade" were properly admitted, as the deputies were not attorneys for the prosecuting authority and the defendant did not exhibit a subjective belief, reasonable under the circumstances, that he was negotiating a plea. In *United States v. Karr*, n6 the Court held that a defendant's statements to an officer were not covered by the Rule, where the defendant never offered to plead guilty and never inquired into whether the officer had authority to bargain.

United States v. Ceballos, 706 F.2d 1198 (11th Cir. 1983) : Affirming convictions for marijuana offenses, the Court held there was no error in admitting a letter, which one defendant gave to a Marshal for delivery to the agent in charge of the case, that expressed awareness of the details of a major smuggling operation and offered to cooperate with the government. No plea discussions were underway and the letter was not sent to an attorney for the government.

[17] Statements to Presentence Officer

United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989) : In examining sentencing guidelines, the Court held that *Rule 410* does not protect statements made to a presentence officer preparing a presentence report.

[18] Voice Identification Based on Plea Negotiations

United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995) : The Court held there was no error in admitting incriminating audio tapes in a drug prosecution. The defendant objected that one witness had gained his knowledge of the defendant's voice during plea negotiations, but the Court held that the Rules limit admissibility of statements, not just sounds, in plea bargaining.

[19] Waiver

United States v. Mezzanatto, 513 U.S. 196 (1995) : The Court in a 7-2 decision held that the protections of *Rule*

410 can be knowingly and voluntarily waived by the defendant. Accordingly, statements made in plea negotiations were properly used to impeach the defendant at trial, where he, with the assistance of counsel, signed a written agreement allowing such use before beginning the plea bargaining process. The Court did not decide whether an agreement to admit plea negotiation statements in the case-in-chief would be enforceable. Justice Souter, joined by Justice Stevens, dissented. This case is discussed in the Editorial Explanatory Comment, at *§ 410.02[3]*.

United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998) : The defendant entered a guilty plea to one count of a multiple count indictment, and agreed to waive his right to exclude evidence under *Rule 410*. The Trial Judge granted the defendant's subsequent motion to withdraw his guilty plea, but held the defendant to his waiver of *Rule 410* protections. The Court held there was no error in admitting the defendant's statements made at his plea hearing and at a subsequent debriefing during the prosecution's case-in-chief. It noted that the Supreme Court had upheld a waiver of *Rule 410* protections in *United States v. Mezzanatto, supra* , at least insofar as the defendant's statements were offered for impeachment. The Court could not discern any "acceptable rationale" for limiting the *Mezzanatto* rule to impeachment; it specifically found that the defendant's waiver of *Rule 410* protections was both knowing and voluntary.

United States v. Barrow, 400 F.3d 109 (2d Cir. 2005) : The Court affirmed a conviction for distribution of cocaine, finding no abuse of discretion when statements made by the defendant pursuant to a proffer agreement were admitted against him. The Court held that the waiver provision in the agreement, which permitted use of his statements "to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of" the defendant, had been triggered by defense counsel's opening statement and by cross-examination of an undercover officer that implied he had fabricated his testimony regarding some of the relevant events. Once counsel triggered the waiver provision, the Judge enjoyed the broad discretion to admit the proffer statements. In *United States v. Velez, 354 F.3d 190 (2d Cir. 2004)* , a felon firearm possession case, the defendant agreed at a proffer session that the government could use any statements made at the session to rebut arguments or evidence offered by the defendant at trial. Affirming, the Court held that the waiver provision was effective, despite not being limited to situations in which the defendant himself testified. The Court rejected arguments that the waiver provision prevented any sort of meaningful defense and exploited a disparity of bargaining power between the government and the defendant, noting rather that it provided assurances that the defendant was being truthful in the proffer by making deceit costly and promoted the plea bargaining and cooperation policies noted in *Mezzanatto*.

United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998) : The defendant in a RICO fraud case had made a proffer subject to a conditional waiver agreement, which permitted the government to use his statements if he should subsequently testify contrary to the substance of the proffer "or otherwise present a position inconsistent with the proffer." Affirming, the Court found no error in admission of statements from the proffer after the defense had elicited inconsistent testimony from prosecution witnesses on cross-examination. The Court concluded that the waiver become operative whenever the testimony advanced a position that could not be true if the proffer was; it rejected both the defense view, which would limit the clause to evidence presented by defense witnesses, and the prosecutor's position, which would allow the government to introduce the proffer if the defendant presented or elicited any evidence regarding the facts of the case.

United States v. Millard, 139 F.3d 1200 (8th Cir. 1998) : The Court affirmed convictions for conspiracy to distribute methamphetamine, holding it was error (but not plain error) to admit evidence of statements made during plea discussions with a government attorney. The defendant's attorney had not "invited the error" by mentioning the plea discussions in his opening statement, since the prosecution's opening statement had prompted defense counsel's mention of the subject.

United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002) : The defendant in a prosecution for filing false tax returns had executed a waiver permitting statements in a proffer made during plea negotiations to be used "should [he] testify, or to rebut any evidence, argument or representations offered" by him or on his behalf. The defendant did not testify but did call four witnesses in support of his case. The Court found no error in admission of the statements, since they were offered in the government's rebuttal case and the waiver had been agreed to voluntarily and with the advice of counsel.

FOOTNOTES:

(n1)Footnote 1. *United States v. Serna, 799 F.2d 842 (2d Cir. 1986)* .

(n2)Footnote 2. *United States v. Cunningham, 723 F.2d 217 (2d Cir. 1983)* .

(n3)Footnote 3. *United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986)* .

(n4)Footnote 4. *United States v. Greene, 995 F.2d 793 (8th Cir. 1993)* .

(n5)Footnote 5. *Rachlin v. United States, 723 F.2d 1373 (8th Cir. 1983)* .

(n6)Footnote 6. *United States v. Karr, 742 F.2d 493 (9th Cir. 1984)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 410 RULE 410

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410.04 Legislative History

[1] Advisory Committee's Notes

[The following material is the Note accompanying the Committee's draft of the latest versions of the Rule. The Rule was changed slightly after the Note was written.]

The major objective of the amendment to rule [*Fed. R. Crim. P.] 11(e)(6)* [virtually identical to *Rule 410*] is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States v. Herman, 544 F.2d 791 (5th Cir. 1977)* , discussed herein.

Fed. R. Ev. 410, as originally adopted by Pub. L. 93-595, provided in part that 'evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere* or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer.' (This rule was adopted with the proviso that it 'shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.') As the Advisory Committee Note explained: 'Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise.' The amendment of *Fed. R. Crim. P. 11*, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the 'attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching' a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not 'discourage defendants from being completely candid and open during plea negotiations.' Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that 'Rule 11(e)(6) deals with the use of statements made in connection with plea agreements.' (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements for purposes of impeachment and in a prosecution for perjury, and with the qualification that the inadmissible statements must also be 'relevant to' the inadmissible pleas

or offers. Pub. L. 94-64; *Fed. R. Ev. 410* was then amended to conform. Pub. L. 94-149.) [Note the mistake here regarding impeachment. Ed.]

While this history shows that the purpose of *Fed. R. Ev. 410* and *Fed. R. Crim. P. 11(e)(6)* is to permit the unrestrained candor which produces effective plea discussions between the 'attorney for the government and the attorney for the defendant or the defendant when acting pro se,' given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because 'statements' are generally inadmissible if 'made in connection with, and relevant to' an 'offer to plead guilty,' it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States v. Herman, 544 F.2d 791 (5th Cir. 1977)* (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not 'in position' to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because the defendant 'made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea'); *United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976)* (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made 'in the course of or as a consequence of' a later withdrawn guilty plea, a plea of *nolo contendere*,' or 'plea discussions with the attorney for the government' which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. It thus fully protects the plea discussion process authorized by Rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arraignment Procedure art. 140 and § 150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if 'a law enforcement officer induces any person to make a statement by promising leniency'). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the *per se* rule 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

> Unless the defendant subsequently enters a plea of guilty or *nolo contendere* which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

> The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. *State v. Christian, 245 S.W.2d 895 (Mo. 1952)* . If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif. R. Crim. P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances 'no discussion between the parties or statement by the defendant or his lawyer under this Rule,' i.e., the rule providing 'the parties may meet to discuss the possibility of pretrial diversion ... or of a plea agreement,' are admissible. The

amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill. S. Ct. Rule 402(f).

The 'in the course of or as a consequence of such pleas or plea discussions' language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinion in *United States v. Herman, 544 F.2d 791 (5th Cir. 1977)* , concerning the meanings and effect of the phrases 'connection to' and 'relevant to' in the present rule. Moreover, by relating the statements to 'plea discussions' rather than 'an offer to plead,' the amendment ensures 'that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.' *United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976)* .

"The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible 'in any proceeding wherein statements made in the course of or as a consequence of the same plea or plea discussions have been introduced.' This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not 'against' the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. This change conforms to the general rule that a privilege terminates when the holder by his own act destroys the confidentiality with which it is endowed. 8 J. Wigmore, Evidence §§ 2242, 2327-2329, 2374, 2389-2390 (McNaughton rev. 1961).

The phrase 'in any civil or criminal proceeding' has been moved from its present position, following the word 'against,' for purposes of clarity. An ambiguity presently exists because the word 'against' may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the later construction is correct.

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible 'in favor of' the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as *United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976)* , holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

[What follows next is the Advisory Committee's Note on the original version of Rule 410.]

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927)* . The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961)* , reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval*, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326 .

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous

States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, *15 U.S.C. § 16(a)*, recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964)* ; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963)* , *cert. denied*, *376 U.S. 939, 84 S. Ct. 794, 11 L. Ed. 2d 659* ; *Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967)* ; *City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964)* . See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314 .

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543, "Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises." See also *People v. Hamilton, 60 Cal. 2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963)* , discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in *California Evidence Code § 1153*.

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

October 10, 1973

The Subcommittee added the phrase "Except as otherwise provided by Act of Congress" after being advised of the existence of a specific statute in the antitrust field permitting the introduction into evidence of a *nolo contendere* plea in certain circumstances. The Subcommittee did not believe that it should be the intent of the Rules to alter any such particular congressional policy judgment.

[There was no note regarding the June 28, 1973 draft.]

[3] Report of the House Committee on the Judiciary

[This is the Report on the original Rule.]

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of *nolo contendere*. See *15 U.S.C. § 16(a)*. The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

[The House Report, No. 94-247, 94th Cong., 1st Sess., at 7, on Criminal Procedure Rule 11(e)(6), which superseded Rule 410 until it was amended, is very similar to the Conference Report on the procedure rule quoted *infra*.]

[4] Report of the Senate Committee on the Judiciary

[This is the Report on the original Rule.]

As adopted by the House, Rule 410 would make inadmissible pleas of guilty or *nolo contendere* subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie with impunity. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions. [Footnote deleted.]

[The Senate Report, No. 94-336, 94th Cong., 1st Sess., at 10, on Criminal Procedure Rule 11(e)(6), which superseded Rule 410 until it was amended, includes the same two paragraphs as the Conference Report on the procedure rule, quoted *infra*.]

[5] Report of the House and Senate Conferees

[This is the Report on the original Rule.]

The House bill provides that evidence of a guilty or *nolo contendere* plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed *Rule 11(e)(6) of the Federal Rules of Criminal Procedure* presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or *nolo contendere*, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and *nolo contendere* pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of *Rule 11(e)(6) of the Federal Rules of Criminal Procedure*. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

[As explained in our Editorial Explanatory Comment, at *§ 410.02[1]*, Rule 410 was superseded by Criminal Procedure Rule 11(e)(6), until it was amended on December 12, 1975. The Conference Report on the Criminal Procedure Rule, No. 94-414, 94th Cong., 1st Sess., at page 10, contains a joint explanatory statement of the Committee of Conference, part of which is set forth below.]

Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or *nolo contendere*, offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or in connection with an offer of a guilty or *nolo contendere* plea.

[6] Citations to Hearings and Debates

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109, 112 (1974).

Debate in the House of Representatives, 120 Cong. Rec. H12253 (daily ed. December 18, 1974).

[For debates on the amendments to the Rule see the citations that follow.]

Debate in the House of Representatives, 121 Cong. Rec. H7859-H7860, H7863-H7864 (daily ed. July 30, 1975).

Debate in the Senate, 121 Cong. Rec. S12875 (daily ed. July 17, 1975), and 121 Cong. Rec. S14031 (daily ed. July 30, 1975).

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
Supp. To CHAPTER 410 RULE 410

2-410 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 410, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements	**Rule 410. Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

plea dis-cus-sion s:

(1)	a plea of guilty which was later with drawn;	**(1)**	a guilty plea that was later with drawn;
(2)	a plea of nolo con-tend ere;	**(2)**	a nolo con-tend ere plea;
(3)	any state men t mad e in the cour se of any pro-ceed ings un-der Rule 11 of the Fed-eral Rule s of Cri min-	**(3)**	a state men t mad e dur-ing a pro-ceed ing on eithe r of thos e plea s un-der Fed-eral Rule of Cri min-

	al Pro-ced-ure or com par-able state pro-ced-ure re-gard ing eithe r of the fore-go-ing plea s; or		al Pro-ced-ure 11 or a com par-able state pro-ced-ure; or
(4)	any state men t mad e in the cour se of plea dis-cus-sion s with an at-tor-ney for the pro-secu ting au-thor-ity	**(4)**	a state men t mad e dur-ing plea dis-cus-sion s with an at-tor-ney for the pro-secu ting au-thor-ity if the

	which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.	discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.
However, such a statement is admissible (i) in any proceeding wherein another statement made in	**(b) Exceptions.** The court may admit a statement described in Rule 410(a)(3) or (4):	

the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or

false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(1) in any proceeding in which another statement made during the sam

e plea or plea dis- cus- sion s has been in- tro- duce d, if in fair- ness the state men ts oug ht to be con- sider ed to- geth er; or

(2) in a crim inal pro- ceed ing for per- jury or false state men t, if the de- fend ant mad e the

state
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t un-
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Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[8] ***Nolo Contendere*** **Pleas** [Go To Main]

United States v. Nguyen, 465 F.3d 1128 (9th Cir. 2006) : The defendant was convicted of violating an order of supervision requiring that he not "commit any crimes," based on pleas of *nolo contendere* to two State misdemeanors. Reversing, the Court held that *Rule 410* prohibits the admission of *nolo* pleas and the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged. " *Rule 410*'s exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." The evidence was also not admissible under *Rule 803(22)*, which "allows judgments of felony convictions resulting from guilty pleas to be admitted into evidence but not convictions resulting from *nolo contendere* pleas and not misdemeanor convictions."

[9] Plea Bargaining Distinguished from Volunteered Offers of Cooperation and Other Discussions [Go To Main]

United States v. Edelmann, 458 F.3d 791 (8th Cir. 2006) : The Court affirmed a fraud conviction, finding no error in the admission of statements made in discussions with an AUSA and investigators. The defendant's attorney had voluntarily contacted the prosecutor; even if the attorney had mentioned a § 5K1.1 motion, there was at most a general discussion of the Guidelines and there was no in-depth discussion of the defendant's Guidelines range; the defendant was not seeking to plead but to avoid an indictment altogether; and no specific deal was offered, no deadline to plead was ever imposed by the government, and no deal was ever reduced to writing, "which undermines the idea that formal plea negotiations occurred."

[15] Statements Made After Plea Agreement Is Reached [Go To Main]

United States v. Jones, 469 F.3d 563 (6th Cir. 2006) : A defendant charged with cocaine offenses entered into a conditional plea agreement and, pursuant thereto, provided a detailed statement of his criminal activities in an FBI interview. After his conviction was reversed for denial of his suppression motion, he withdrew his guilty plea and went to trial. Affirming his conviction, the Court held there was no error in his statement to the FBI at the trial, as it was made after the plea agreement and not "in the course of plea discussions."

[16] Statements to Investigators [Go To Main]

United States v. Olson, 450 F.3d 655 (7th Cir. 2006) : Affirming convictions for racketeering, the Court held that a defendant's statements to police officials at a meeting were not covered by *Rule 410* and were properly admitted at trial. The defendant argued that he had a subjective belief that he was engaging in plea discussions, because one agent led him to believe that a plea bargain might be discussed at the meeting. But the Court noted that the agent "was not an attorney for a prosecuting authority and did not purport to be speaking on behalf of the United States Attorney. To the contrary, Agent Craft made clear that he could, at most recommend a plea agreement." Thus, nothing the agent did or said could have led the defendant "to reasonably believe" that the meeting was a plea discussion.

[19] Waiver [Go To Main]

United States v. Newbert, 504 F.3d 180 (1st Cir. 2007) : The defendant entered a plea agreement with the government under which he agreed to waive all of his rights under Rule 410 if he was allowed to withdraw his guilty plea "under circumstances constituting a breach of this agreement." Subsequently the defendant was granted permission to withdraw his guilty plea based on new plausible evidence of innocence. A government motion *in limine* for a ruling that it would be able to admit the statements the defendant made during plea negotiations, as well as the guilty plea itself, was denied on the ground that the defendant had not breached the plea agreement by moving for leave to withdraw the plea. Affirming on interlocutory appeal, the Court construed the language of the plea agreement against the government, and found that moving for leave to withdraw on the basis of new evidence of innocence was not a breach of the plea agreement, so there was no waiver of rights under Rule 410.

United States v. Oluwanisola, 605 F.3d 124 (2d Cir. 2010) : The defendant, charged with heroin-related offenses, had entered into a proffer agreement permitting the government to "use any statements made by [the defendant] as substantive evidence to rebut directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [the defendant] at any state of a criminal prosecution " The Court vacated the conviction, holding that defense counsel should not have been as limited as he was by the Trial Judge's approach to "opening the door" while making the opening statement, but "should have been permitted during his opening statement to reference certain elements of the crime and argue that the government would be unable to sustain its burden of proof as to those elements." The Court also emphasized that the defense should have been free to attack the testimony of government witnesses on cross-examination without opening the door to the proffer statements as long as the attack did not implicitly assert facts that were inconsistent with those statements.

United States v. Hardwick, 544 F.3d 565 (3d Cir. 2008) : The Court affirmed conspiracy, drug, and firearms convictions. It held that the waiver clause in the defendant's proffer agreement, which permitted the government to offer the proffer statement in its case-in-chief to rebut any evidence offered or arguments made by the defense, was enforceable.

United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009) : The Court affirmed convictions for murder and a cocaine conspiracy, holding that statements made by the defendant during plea negotiations were admissible in the government's

case-in-chief, since the defendant knowingly and voluntarily waived all rights to object to such use. The Court found no material difference between a "case-in-chief waiver" and the waiver permitting impeachment use that was upheld by the Supreme Court in *United States v. Mezzanatto* (*Manual* § 410.02[3]).

United States v. Quiroga, 554 F.3d 1150 (8th Cir. 2009) : The defendant pleaded guilty to methamphetamine distribution but later was permitted to withdraw his plea. His motion *in limine* to exclude incriminating statements in the initial plea agreement was denied on the ground that he had waived his rights under Rule 410 in that agreement. On appeal, the defendant argued that there was an inconsistency between the Judge's ruling that his plea was not knowing and voluntary, and thus could be withdrawn, and the ruling that the waiver of Rule 410 rights was knowing and voluntary. Affirming, the Court found no error, noting that the former ruling could not be appealed by the government and thus was not the law of the case to which the latter ruling must conform.

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[e] Admissible for Other Purposes -- Punitive Damages

[f] Admissible for Other Purposes -- Rebuttal

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411.04 Legislative History

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411.01 Official Text

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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411.02 Editorial Explanatory Comment

[1] The Basic Rule

Evidence that a person carried or failed to carry liability insurance is not admissible on the issue of whether the person acted negligently or wrongfully on a particular occasion. This Rule bars the evidence, for example, when it is offered by a plaintiff against the defendant on the theory that because the defendant was insured the defendant was probably careless. Evidence is likewise excluded when offered by the defendant to show that the defendant lacked adequate insurance and therefore had every incentive to be careful. No matter who offers the evidence of the presence or absence of insurance, if it is offered on the issue of negligence it is excluded. If it is offered for some other purpose, however, it may be admitted -- subject to the *Rule 403* balancing process. n1 For instance, if insurance investigators take the stand to testify at trial, it is permissible to bring out the fact that they may be interested witnesses because of their interest in pleasing their employer -- at least where the probative value as to credibility is not substantially outweighed by the risk of prejudice and confusion. n2

Rule 411 is based on two independent grounds. First, evidence of insurance, or the lack of it, is of minimal relevance in determining whether a person acted carelessly on a certain occasion. For instance, most people certainly do not view the fact that they have insurance as a license to act carelessly. More importantly, there is the concern that if the jurors hear about insurance coverage, or the lack of it, they may decide the case on the basis of the deepest pocket, rather than on the facts. n3 This is the risk of prejudice and confusion that must be taken into account by the Trial Court when evidence of insurance is offered for a purpose other than proving negligence or wrongful conduct. n4

[2] Distinction Between Prejudicial and Harmless Error

Assuming that counsel manages to find a way improperly to introduce evidence of insurance, should Appellate Courts adopt a general rule that such an error is harmless on the ground that the jury is likely to assume the existence of insurance even without the evidence?

The answer obviously must be "no." If the Rule is to mean anything, it must have some teeth. There is no point in a rule excluding evidence of insurance if it makes no difference in any case. In essence, there is no reason to treat erroneous admission of evidence of insurance differently from any other evidentiary error. See Rule 103 for a discussion of

harmless error. n5 In assessing whether the error is harmless, it is of course relevant that the jury might have assumed the existence of insurance, even if not told about it directly. This would be especially true where the defendant is a large corporation, or some other person or entity that is highly likely to carry insurance (e.g., a doctor or a lawyer). But the question of harmlessness should be decided on a case-by-case basis.

[3] Discovery

In order to encourage pretrial settlement, *Fed. R. Civ. P. 26* provides that a party shall produce for inspection and copying any insurance or indemnity agreement that may be pertinent to payment of a resulting judgment. This provision is intended to give the parties important information for settlement and litigation strategy. But the procedural rule does not make insurance information admissible at trial. If discovery of insurance takes place, it may be wise during any pretrial conference, or off the record at the outset of a trial, for the insured party to request that the Trial Judge remind counsel of *Rule 411* and to indicate that violation of the Rule will not be tolerated. This will help to prevent any "slips of the tongue" that reveal insurance information to the jury.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Palmer v. Krueger, 897 F.2d 1529 (10th Cir. 1990)* (in an intrafamily suit arising out of an airplane crash that killed the father and mother, the Trial Court did not abuse its discretion in excluding the fact that the family members were squabbling over insurance proceeds; this was a "collateral issue," and the Trial Judge did not err in finding that the risk of prejudice, confusion, and delay substantially outweighed the probative value of the evidence).

(n2)Footnote 2. See, e.g., *Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977)* (where a defense witness testified that the plaintiff's expert had a bad reputation for truth and veracity, it was reversible error to prevent the plaintiff from showing that the defense witness was employed by the liability carrier that represented the defendant in the action; the fact of employment was "clearly admissible to show possible bias" of the defense witness under *Rule 411*); *Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991)* (in a legal malpractice suit, the Trial Court properly admitted evidence that the defendant-lawyer had discussed insurance issues with the plaintiff's husband; the evidence was offered not to prove wrongful conduct, but rather to prove the extent to which the defendant had become involved in the husband's business dealings).

(n3)Footnote 3. See, e.g., *Ouachita Nat'l Bank v. Tosco Corp., 616 F.2d 485 (8th Cir. 1982)* ("[I]t is generally thought that the jury's knowledge that a plaintiff is receiving insurance benefits, or that a defendant is carrying liability insurance, might serve to decrease or increase, respectively, the amount of damages awarded by the jury.").

(n4)Footnote 4. See, e.g., *Granberry v. O'Barr, 866 F.2d 112 (5th Cir. 1988)* (no error to exclude evidence of insurance where it was only minimally probative to show bias of a witness; the witness was employed by a life insurance company, which was a separate entity from the liability carrier; any judgment against the liability carrier would not directly impact the witness' company; and the witness had given an identical account of the accident at the scene, before he could have known whether the defendant had insurance coverage or who provided it).

(n5)Footnote 5. See, e.g., *Reed v. General Motors Corp., 773 F.2d 660 (5th Cir. 1985)* (applying *Rule 103*, the Court finds it was reversible error to admit evidence that a defendant had coverage in the amount of only $5,000 per person and $10,000 per accident; the jury could not otherwise have known of these coverage limits).

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[1] Admissible for Other Purposes

[a] Bias of Witness

Conde v. Starlight I, Inc., 103 F.3d 210 (1st Cir. 1997) : Affirming a plaintiff's judgment in a seaman's injury case, the Court held there was no abuse of discretion in permitting repeated references to one of the defendant's witnesses as an "adjuster." The witness had taken a statement from the plaintiff on behalf of the defendant's insurer. It was not clear that the jurors inferred that the witness was an insurance adjuster; even if they did, it would be proper under the Rule to show the connection to an insurer, as it would be relevant to the bias of the witness, whose credibility regarding the statement was a central issue in the case.

Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) : The Court approved the mention of insurance coverage as part of laying a foundation to impeach a witness who had given a statement to an insurance investigator. Interestingly, the Court stated that "[w]e assume without deciding that the rule is applicable when the judge is the trier of fact." In our view, the policy underlying the Rule of avoiding prejudice with evidence of low probative value does not apply in a bench trial. The Trial Judge can be expected to exclude prejudice from her mind.

Ouachita Nat'l Bank v. Tosco Corp., 686 F.2d 1291 (8th Cir. 1982) , adhered to on reh'g en banc, 716 F.2d 485 (8th Cir. 1983) : Although it vacated a judgment in an automobile accident case, the Court indicated that it was either permissible or harmless error for a party planning to call an insurance adjuster as a witness to indicate to the jury that the adjuster was employed by its insurance company. This was viewed as bias evidence, and although the Court did not mention the point, it would appear that the party was attempting to bring out the impeaching fact before it was elicited by an opponent. In *Charter v. Chleborad*, n1 a medical malpractice action, one of the plaintiff's trial witnesses was an orthopedic surgeon who was impeached by means of character testimony from an attorney who resided in the same city as the surgeon. Reversing a judgment for the defendant, the Court held it was error to preclude the plaintiff from showing the possible bias of the attorney by bringing out the fact that he was employed by the liability carrier

representing the defendant in this case.

[b] Admissible for Other Purposes -- Generally

Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991) : Affirming a judgment for the client in an attorney malpractice action, the Court held there was no abuse of discretion in refusing to grant a mistrial after the plaintiff mentioned that the attorney had discussed liability and other insurance for lawyers with her husband, as the reference was unlikely to have been perceived by the jury as indicating there was insurance coverage in this case and it was in any event relevant to issues in the case other than negligence.

[c] Admissible for Other Purposes -- Intention To Be Bound by Contract

B.H. Morton v. Zidell Explorations, Inc., 695 F.2d 347 (9th Cir. 1982) : Tugboat owners sued a shipyard for negligence after their ship was almost completely destroyed by fire while being converted into a fish-processing vessel. The defendant relied on an exculpatory clause in its agreement with the owners that provided the defendant was to be exculpated from all risks of loss or damage. The Court held that the shipyard was properly permitted to show that the owners took out insurance on their vessel before the fire as evidence proving that the owners considered that the agreement with the exculpatory clause was intended to be binding upon them.

[d] Admissible for Other Purposes -- Knowledge of Trade Usage

Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976) : The Court remanded a breach of warranty and negligence action arising out of the plaintiff's purchase of motion picture film for a new trial on the issues of limitation of liability and of damages, because the Trial Judge erroneously excluded evidence that one of the owners of the plaintiff corporation had purchased insurance indemnifying the corporation against defective film. Citing *Rule 411*, the Court stated that the evidence was relevant to the knowledge of the defendant of the trade usage of the words used to limit liability, and that in this action between commercial entities, "exclusion of this relevant evidence was far more prejudicial to the defense than its admission would have been to the plaintiffs."

[e] Admissible for Other Purposes -- Punitive Damages

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) : The Court affirmed a judgment for police officers sued by the estate of a man killed when the officers attempted to obtain information about a traffic accident. Defense counsel had commented in closing argument that any judgment would be paid by the officers and not by the State or anybody else. The Court held the comments were not an impermissible mention of lack of insurance because the plaintiff requested punitive damages, so the ultimate source of payment was relevant.

[f] Admissible for Other Purposes -- Rebuttal

Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998) : In an arrestee's civil rights action against a sheriff and a jailer, the defendants devoted almost all their direct testimony to documenting their limited net worth. Because any judgment against them would be paid by their employer so long as they had been acting within the scope of their employment, the testimony was inadmissible. The plaintiff did not object, but did seek to introduce the indemnification statute in rebuttal. Reversing nominal damages judgments against the defendants, the Court held it was an abuse of discretion not to admit the statute once the defendants' direct testimony opened the door, since the rationale for excluding the evidence -- fear that damages will be inflated when the government, rather than the individual, is paying -- had dissolved.

[2] Amount of Insurance

Reed v. General Motors Corp., 773 F.2d 660 (5th Cir. 1985) : The Court reversed a judgment against a driver and his insurer in a personal injury case because the Trial Judge erroneously admitted evidence of the amounts of insurance carried by the defendant. The fact that the insurer was named as a defendant did not mean that the amount of insurance was relevant, and the Court found that the error was not cured by a jury instruction not to consider the amount of the insurance in deciding the negligence of the defendant.

[3] Fidelity Bond

Garnac Grain Co. v. Blackley, 932 F.2d 1563 (8th Cir. 1991) : In an action against an accounting firm for malpractice arising out of an employee's embezzlement, the Court held it was an abuse of discretion to deny the plaintiff's motion *in limine* to exclude evidence that the plaintiff received payment under a two-million-dollar fidelity bond. The Trial Judge concluded that receipt of the proceeds was admissible on whether the plaintiff maintained adequate internal controls, but the Court held that although the bond is not technically "insurance against liability," it is insurance that might lead the jury improperly to reduce the plaintiff's damages, the kind of prejudice the Rule was intended to eliminate.

[4] Foundation for Offer of Evidence

Hunziker v. Scheidemantle, 543 F.2d 489 (3d Cir. 1976) : Reversing and remanding a wrongful death action, the Court noted that *Rule 411* is not a total bar to evidence of insurance, but suggested that the Trial Judge should require the necessary foundation to be established outside the presence of the jury so that it might determine the admissibility of the evidence without prejudice to the rights of the parties.

[5] Intercompany Discussions

American Ins. Co. v. North American Co., 697 F.2d 79 (2d Cir. 1982) : In an action by a primary insurer against a reinsurer for reimbursement of portions of a settlement, the Court found that evidence of the reinsurer's discussions with another company over commutation was inadmissible.

[6] State Law

Blanke v. Alexander, 152 F.3d 1224 (10th Cir. 1998) : The Court affirmed a judgment for the plaintiffs in a diversity action brought for injuries received in a car-truck collision against the driver, owner, and excess liability insurer of the truck. The Court found no error when the plaintiffs were permitted to make references to the insurer, as that was consistent with the governing state law authorizing direct actions, and with state precedent that identification of the insurer in such actions is not prejudicial. Although admissibility of evidence in diversity cases is generally governed by federal law, Congress did not intend to pre-empt "substantive" state rules of evidence, according to the Court.

FOOTNOTES:
(n1)Footnote 1. *Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977)* .

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Advisory Committee's Note

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761 . The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id*.

For similar rules see Uniform Rule 54; *California Evidence Code § 1155*; Kansas Code of Civil Procedure § 60-454; New Jersey Evidence Rule 54.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

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Scope

The chart below shows the proposed style amendments for Rule 411, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 411. Liability Insurance	**Rule 411. Liability Insurance**
Evidence that a person was or was not insured agai	Evidence that a person was or was not insured agai

nst liab- ility is not ad- miss ible upo n the is- sue whet her the per- son ac- ted neg- li- gent ly or oth- er- wise wro ng- fully . This rule does not re- quir e the ex- clu- sion of evid ence of in- sur- ance agai nst liab- nst liab- ility is not ad- miss ible to prov e whet her the per- son ac- ted neg- li- gent ly or oth- er- wise wro ng- fully . But the cour t may ad- mit this evid ence for an- oth- er pur- pose , such as prov ing a wit-

ility when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

ness's bias or prejudice or proving agency, ownership, or control.

Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

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[4.1] Indemnification [Go To Main]

In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1014 (9th Cir. 2008) : Reviewing the trial of claims by bellwether plaintiffs alleging that radioiodine emissions by plutonium producers at a nuclear facility caused cancers and other life-threatening diseases, the Court held there was no error in a ruling that precluded the plaintiffs from telling the jury that the federal government would indemnify the defendants for any liability imposed. While the evidence might have been admissible to show bias of a witness, the only evidence to which a question of government bias might have arisen was a report to whose accuracy the plaintiffs had stipulated before trial.

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412.02 Editorial Explanatory Comment

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[2] The Exclusionary Principle and its Exceptions

[3] Constitutional Problems in Criminal Cases

[4] "Sexual Behavior" and False Allegations of Rape

[5] Notice Requirement

[6] In Camera Hearing

412.03 Annotated Cases

[1] Civil Cases

[2] Constitutionally Required Evidence

[3] Jury Instructions

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412.04 Legislative History

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 412 RULE 412

2-412 Federal Rules of Evidence Manual 412.01

412.01 Official Text

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible -- The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions --

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility --

(1) A party intending to offer evidence under subdivision (b) must --

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 412 RULE 412

2-412 Federal Rules of Evidence Manual 412.02

412.02 Editorial Explanatory Comment

[1] Background to the Rule

Rule 412 was originally enacted as part of the Privacy Protection for Rape Victims Act of 1978, Public Law 95-540. Most recently, it was amended by Congress as part of the Violent Crime Control and Enforcement Act of 1994. That amendment took effect on December 1, 1994. The Rule is consistent with a point that we try to make in our Comment accompanying *Rule 102*: The quest for fair and just procedures is not necessarily served by the admission of all evidence that is offered by parties to litigation, even though the evidence is tangentially relevant to the issues being tried.

Rule 412 follows the lead of the states that have enacted statutes or rules of Court to protect the privacy of rape victims when they testify in Court. n1 It is a rule of great symbolic value, as well as one of practical significance. n2 It represents a departure from a 200-year-old view typified by Lord Chief Justice Hale, who said that rape was "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent." 1 M. Hale, The History of the Pleas of the Crown at 635 (1778).

The Rule represents a Congressional judgment that it is necessary for Federal Courts to indicate clearly to sex offense victims that their self-esteem will not be unnecessarily impaired in judicial proceedings and that their privacy will be respected to the extent that such respect does not denigrate the constitutional rights of accused defendants. n3 As one Court has put it, the purposes of the Rule are "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives, to encourage reporting of sexual assaults, and to prevent wasting time on distractive collateral and irrelevant matters." n4

As amended by Congress in 1994, *Rule 412* applies in all civil and criminal cases "involving alleged sexual misconduct." n5 This term is left undefined. Clearly it applies to cases alleging rape and sexual abuse, whether civil or criminal. But the breadth of the term "involving alleged sexual misconduct" seems also to cover such claims as for sexual harassment in employment. n6 As such, the amended Rule is far broader that the original Rule, which was limited to criminal cases in which a sex crime was charged.

[2] The Exclusionary Principle and its Exceptions

Rule 412(a) states that, in any case involving alleged sexual misconduct, evidence concerning the past "sexual behavior" or "sexual predisposition" of an alleged victim must be excluded, with certain limited exceptions. For criminal cases, subdivision (b)(1) provides exceptions for specific acts offered to prove the "source of the semen" or other physical evidence, and for specific sexual activity between the defendant and the victim when offered by the defendant to prove consent, or by the prosecution. Sexual activity between the victim and persons other than the defendant cannot be admitted to prove that the alleged victim consented to sexual activity with the defendant. n7 There is also a "residual" exception covering evidence of the sexual behavior or predisposition of the victim which is required by the constitution to be admitted. n8

For civil cases, subdivision (b)(2) provides an exception for evidence of the victim's sexual behavior or predisposition, but only so long as the probative value of the evidence substantially outweighs the danger of harm to any victim and the danger of prejudice to any party. Subdivision (b)(2) mandates a "reverse 403" test, similar to that provided in *Rule 609(b)*, but with one important variation: the danger of harm to the victim (such as the danger the victim will be humiliated) is specifically weighed together with prejudice to a party on the exclusionary side of the scale. The balancing test set forth in subdivision (b)(2) consequently provides for a strong presumption of exclusion. This is in contrast to *Rule 403*, which provides for a strong presumption of admissibility. Furthermore, evidence of the victim's reputation concerning sexual behavior is never admissible in a civil case unless the victim has placed that reputation "in controversy."

Interestingly, in a criminal case, if a specific act is offered for one of the two limited purposes provided, the act is admissible so long as it also satisfies *Rule 403*. n9 That is, there is no heightened exclusionary balancing test applied. This makes sense, because if the evidence is narrow enough and important enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test.

If not for *Rule 412(a)*, the governing rule as to the form of proof admissible would be *Rule 405(a)*. *Rule 405(a)* would have provided that when character evidence is used circumstantially, *only* reputation or opinion evidence could be admitted, not specific acts. *Rule 412* takes a different approach, at least in criminal cases; it admits *only* evidence of specific instances of conduct and limits the circumstances in which even that evidence may be received.

[3] Constitutional Problems in Criminal Cases

We must note that there are problems with the evidentiary limitations imposed by the Rule in criminal cases. In some instances, the Rule will undeniably restrict the defendant from bringing in highly probative evidence, particularly where the defense is one of consent. n10

Consider the following example. In a sex offense case, the government must allege that the defendant acted intentionally. To challenge the proof on intent, the defendant wants to offer evidence that the victim's reputation was brought to his attention prior to a sexual encounter, in order to support a claim that he either acted without knowingly using force or that he acted under a reasonable mistake of fact concerning the attitude of the victim toward the sexual encounter. In such a case, a serious constitutional question would be presented if the defendant were denied an opportunity to present a defense that, based on what he knew about the victim, he interpreted her behavior in a reasonable way.

Similarly, if the defendant was made aware of a particular act or acts between the victim and others prior to a sexual encounter, he may wish to argue that these prior acts affected his interpretation of the victim's behavior. Yet this specific act evidence is excluded under the Rule, because it would not be offered to show the source of semen or injury as to the incident charged, nor would it be a specific act between the *defendant* and the victim, offered to prove consent.

The constitutional problems with the Rule arise because the Supreme Court has held that a criminal defendant has a

constitutional right to "a meaningful opportunity to present a complete defense." n11 The Court has on occasion invalidated *per se* rules of exclusion that prohibit a criminal defendant from introducing an entire line of essential evidence, without regard to how probative and reliable the evidence may be. n12

On the other hand, the constitutional right to an effective defense does not guarantee that defendants can introduce whatever evidence they might desire. n13 The state clearly has an interest in excluding evidence that is not sufficiently probative or reliable enough to justify the costs of admitting the evidence -- including, in the rape shield context, the costs to the victim and to the state's interest in having sex crimes reported and prosecuted. n14

We suggest that the proper balance in a criminal case is as follows: Evidence concerning the victim's prior sexual activity (whether by way of opinion, reputation, or specific act) must be admitted when the defendant shows that the evidence has substantial probative value on the issue of consent or identity of the perpetrator, and where alternative evidence to prove the point is not reasonably available. n15 This proposal would protect the victim from an undifferentiated "blame the victim" defense. n16 It would also prohibit the defendant from trying to draw the unjustifiable inference that the claimant was sexually promiscuous and, thus, more likely to have consensual sex with the defendant. n17 Finally, the requirement of proof through a "less onerous alternative" would prevent unnecessary humiliation and harassment of the victim. At the same time, this balancing test would allow limited use of reputation, opinion, and specific act evidence of sexual behavior where necessary and critical to the defendant's defense. n18

Even when evidence of the victim's sexual behavior is highly probative and necessary, the Trial Judge has discretion under *Rule 412* to redact the evidence "to a sanitized version ... sufficient to support the purpose for which it was offered." n19 For example, in *United States v. Payne, 944 F.2d 1458, 1469 (9th Cir. 1991)* , Payne was charged with sexually abusing his foster child. Payne proffered evidence that the child had engaged in sexual activity with another person. He argued that the evidence was probative of bias, because Payne had disciplined the child for engaging in the sexual activity. The Trial Court permitted Payne's counsel to conduct a "sanitized cross-examination" of the child, which apprised the jury of the fact that the child had been disciplined by Payne, but did not reveal the nature of the incident that was the basis of the discipline. The Court found no error, reasoning that the "underlying facts of the incident simply were not relevant to [the victim's] purported motivation to fabricate the charges."

Of course, a sanitized version of the victim's sexual activity will not solve the constitutional problem if the version is so sanitized as to substantially diminish probative value. The redaction must not be disproportionate to the purposes it is designed to serve. n20

The Trial Court should also consider whether the evidence of sexual behavior, if required to be admitted, can be proved in some way other than through the victim's own testimony, so long as the alternate sources for the evidence are sufficient to get the defendant's point across. For example, in *United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993)* , the defendant offered evidence that the child-victim had been sexually attacked by three boys. The purpose was to provide an alternative explanation for the victim's having exhibited signs of sexual abuse. The Trial Court restricted the evidence to such an extent that the jury was never made aware of the time and place of the attack, nor the age and sex of the perpetrators, nor the type of sexual assault that occurred. Only a few general references to the attack were made by three witnesses at trial; one witness, an expert, only considered the attack as a hypothetical. The Court found that the restriction of the evidence violated the defendant's constitutional right to an effective defense. The Court reasoned as follows:

> The district court's concerns regarding the admission of the evidence were valid. Restricting the testimony regarding the sexual assault by the three boys to only the references volunteered by the grandmother and Dr. Peterson, and the hypotheticals asked of Dr. Bean was, however, disproportionate to those concerns. Because the evidence of the incident with the three older boys was uncontroverted, the potential for jury confusion and for a distracting "mini-trial" about the event was minimal. To avoid the intrusion on [the victim's] privacy, testimony about the basic facts of the incident could have been

> introduced through [the victim's] mother who discovered the sexual assault by the three older boys and stopped it, or through any other witness other than [the victim] who had knowledge about it. Because of both its relevance and its uncontroverted nature, the evidence would also be a likely candidate for stipulation.

There is clearly a legitimate interest in protecting the victim from the trauma of having to relate or address prior sexual activity on the stand. But that interest is diminished, at least somewhat, if the evidence can be presented in a less invasive manner, and if this can be accomplished there is a stronger case for admitting probative evidence of the victim's sexual behavior.

[4] "Sexual Behavior" and False Allegations of Rape

Suppose the victim has made previous allegations of rape that turned out to be false. It is conceivable that the Constitution would require that such evidence be admitted in some cases -- e.g., where the previous claim was demonstrably false, the victim's credibility is critical and the defendant has no alternative evidence with which to contest the victim's account. n21

But assuming that the Constitution does not require its admission, does the rape shield law exclude evidence of prior false allegations of rape?

This depends in part on whether a false allegation of rape is "sexual behavior" within the meaning of the Rule. The Advisory Committee Note to the amended Rule states flatly that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by *Rule 412*," though it might be barred by Rules 404 and 403. Yet the Advisory Committee Note also describes the sexual behavior excluded by the Rule quite broadly. It states that the word "behavior" "should be construed to include activities of the mind, such as fantasies or dreams." It could certainly be argued that false allegations are related to activities of the mind of a sexual nature, and so are covered by the exclusionary language of *Rule 412*. There is something to the government's argument in *United States v. Cournoyer, 118 F.3d 1279 (8th Cir. 1997)* , that evidence of prior false rape allegations is "inseparable from evidence of the victim's past sexual behavior, which *Rule 412* was designed to exclude."

In the end, however, we believe that prior false rape allegations are sufficiently distinguishable from sexual activity that they should not be covered by *Rule 412*. Evidence of a false rape allegation does not intrude into the zone of private and personal activity that the Rule is trying to protect. Moreover, such evidence clearly goes to an important matter of credibility, independent of its sexual content. It is one thing to argue that a rape complainant is not credible because she has engaged in sexual activity -- this is clearly prohibited by the Rule. But it is another thing to argue that she is not credible because she has falsely accused someone of a crime. Professor Clifford Fishman, in *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior,* 44 Cath. L. Rev. 711, 770 (1995), puts the argument this way:

> Rape shield legislation should not exclude evidence that the complainant previously made false sex offense accusations. ... Rape shield legislation is designed to protect a complainant from exposure of her prior sexual conduct. A prior false accusation is not "sexual conduct," thus the statute should not protect the complainant from exposure of prior lies or falsehoods. ... It is appropriate for the law to protect a woman's decision to have sex with other men from unnecessary exposure because, among other reasons, it has only minimal probative value as to whether or not she consented with the defendant. A false accusation of rape, by contrast, reveals flaws in character -- a ruthless disregard of the truth and a willingness to use sexual allegations unjustly -- which are highly relevant as to whether she has falsely accused the defendant. Such conduct deserves exposure, not protection. n22

The *Cournoyer* Court ultimately found it unnecessary to decide whether prior false rape allegations "must survive the

rigors of *Rule 412* scrutiny." It reasoned that even if *Rule 412* did not apply, the evidence of false allegations would have to pass muster under Rules 404 and 403. In *Cournoyer*, the evidence of false allegations was to be brought in through an opinion witness, but the defense made no effort to establish a foundation for the witness' testimony. Given "defense counsel's failure to follow up, for example, with foundation testimony to support an opinion as to reputation, or with an offer of proof to show relevant, specific prior conduct," the evidence was properly excluded. Other Courts, without mentioning the Advisory Committee Note to *Rule 412*, have held that the Rule excludes false accusations of rape. n23

While a false allegation of rape should not be considered "sexual behavior" within the meaning of the Rule, the term "sexual behavior" is clearly intended to mean more than actual participation in sexual activity. A good example of the proper breadth of the term "sexual behavior" is found in *Wolak v. Spucci, 217 F.3d 157 (2d Cir. 2000)* . The plaintiff, a female police officer, alleged a hostile work environment. The plaintiff claimed among other things that fellow officers placed pornography throughout the police station -- often just before she came to work. A jury found that there was a hostile work environment but that it did not injure the plaintiff. The Trial Court had permitted the defendants to introduce the fact that the plaintiff had watched sex acts and pornographic videos at several parties. The articulated purpose was to show that the plaintiff could not have been as upset about the pornography in the workplace as she claimed. The defendants argued that *Rule 412* did not apply, because the plaintiff's viewing of sex acts did not constitute "sexual behavior" within the meaning of the Rule. But the Court rejected this argument, noting that the Advisory Committee Note to the amendment explains that the term "sexual behavior" encompasses "activities of the mind, such as fantasies," and concluding that because "viewing pornography falls within *Rule 412*'s broad definition of behavior, defendants' extensive questions were subject to the Rule." In the context of a civil case, this meant that the special exclusionary balancing test applied to the evidence. The Court held that the Trial Court abused its discretion in admitting the evidence, because its probative value did not substantially outweigh the risk of prejudice and harm to the victim.

[5] Notice Requirement

Before evidence is admitted under *Rule 412*, the offering party must make a written motion indicating an intent to offer the evidence. The motion must describe the evidence with specificity and must state the purpose for which the evidence is offered. n24 The motion cannot be made later than fourteen days before the date on which the trial is scheduled to begin, unless the Court permits a "tardy" motion either before or during trial for "good cause." Any motion made prior to trial by the offering party must be served on all the other parties in the case, and the offering party must also notify the victim of the intended use.

The constitutionality of rape shield notice provisions as applied against criminal defendants was discussed by the Supreme Court in *Michigan v. Lucas, 500 U.S. 145 (1991)* . The Court rejected a constitutional attack on the notice provision of a state rape shield law. The Michigan rape shield statute required that the defense give notice to the prosecution within ten days of the arraignment of the intent to present evidence of past sexual conduct with the victim. The defendant did not comply with that requirement, and the Trial Court excluded the evidence of past sexual conduct because of the violation of the notice requirement. The Supreme Court treated the case as presenting a limited question: whether the lower State Court had erred in adopting a *per se* rule that it is *always* unconstitutional to exclude evidence for the defendant's failure to comply with the notice requirement of a rape shield law. The Court held that such a *per se* rule of unconstitutionality was overbroad. It reasoned that a notice requirement in a rape shield law serves a legitimate state purpose, and that a defendant's violation of a notice requirement could in some cases be so egregious as to warrant the sanction of preclusion.

But the Court in *Lucas* took pains to note that it was not deciding the circumstances under which the sanction of preclusion might be "arbitrary or disproportionate" to the violation of a notice requirement. Thus, the Court left room for a federal defendant to argue that a minimal violation of the *Rule 412* notice requirement should result in some remedy short of preclusion of the evidence (e.g., a continuance) and that a rigid rule of preclusion as applied against an

accused might be unconstitutional. n25 In light of *Lucas* and as a matter of policy, we think that the "good cause" provision of the *Rule 412* notice requirement should be applied flexibly in the manner of the notice requirements found in Rules 404(b) and 807.

[6] *In Camera* Hearing

Subdivision (c)(2) indicates that, in connection with the motion to admit evidence under *Rule 412*, the Court must order an *in camera* hearing, at which time the parties may call witnesses and offer other relevant evidence. The victim has a right to be heard at the *in camera* hearing. In order to protect the victim's privacy interest, the Rule provides that the record of the hearing must be sealed and remain under seal unless the Court orders otherwise.

The 1994 amendment to the Rule deleted the provision in the old Rule which addressed the problem of conditional facts, i.e., where the relevance of the evidence proffered by the defendant depends upon the fulfillment of a condition of fact. The old Rule directed the Trial Judge at the *in camera* hearing to exclude the proffered evidence unless all necessary conditional facts were proven to the Judge's satisfaction. The Advisory Committee recognized that the previous language impinged on the defendant's right to a jury trial, because that language apparently authorized the Trial Judge to exclude evidence of past sexual conduct between an alleged victim and accused simply because the Trial Judge did not believe that the acts occurred. The amended *Rule 412* makes no reference to conditional facts, thus leaving the matter to standard principles of Judge and jury allocation set forth in *Rule 104*. Thus, conditional facts are to be admitted if there is evidence sufficient to support a finding that the condition has been met.

The decision in *United States v. Platero, 72 F.3d 806 (10th Cir. 1995)* , represents a proper application of the factfinding responsibilities under *Rule 412*. The defendant contended that the alleged victim was having a sexual relationship with one Laughlin, and therefore that she had a motive to claim falsely that her sexual contact with the defendant was coerced. The probative value of this evidence was conditioned on the existence of a sexual relationship between Laughlin and the victim. To prove the condition at the *in camera* hearing, the defendant proffered testimony from Laughlin's former girlfriend; the prosecution called Laughlin and the victim, who both denied the existence of an affair. The Trial Judge found that proffered testimony of Laughlin's former girlfriend was not credible and that the testimony by Laughlin and the alleged victim was credible. On the basis of this finding, the Judge precluded the defendant from cross-examining either Laughlin or the alleged victim at trial about their sexual relationship. The Court of Appeals, reversing the conviction, relied upon the Advisory Committee's Note concerning the amendment to subdivision (c) of *Rule 412* that eliminated language permitting the Trial Judge to exclude defense evidence because the Judge did not believe it was credible. It also relied extensively on this *Manual*. The Court concluded that the question for the Trial Judge is whether there is sufficient evidence for a jury to find the fact upon which the defendant relies. If so, and if the evidence of the victim's sexual activity falls into any of the exceptions to exclusion provided in *Rule 412(b)(1)*, the evidence must be admitted: "If instead the trial judge proceeds to decide the preliminary relevancy-conditioned-on-fact issue against the proponent where the jury *could* reasonably find the fact to exist, the judge has violated the proponent's right to a jury trial, contrary to clear precedent from the Supreme Court and our court applying the rules of evidence."

FOOTNOTES:

(n1)Footnote 1. For a discussion of state rape-shield laws, see G. Joseph & S. Saltzburg, Evidence in America ch. 22.

(n2)Footnote 2. For an interesting discussion on whether the rape shield laws are effective in protecting the victim, see Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 Loyola L.A. L. Rev. 757 (1992).

(n3)Footnote 3. As Representative Holtzman stated in the discussion of the proposed *Rule 412*:

> Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of

the defendant's innocence or guilt, it is not surprising that it is the least reported crime.

124 Cong. Rec. H11945 (daily ed. Oct. 10, 1978).

(n4)Footnote 4. *United States v. Torres, 937 F.2d 1469, 1472 (9th Cir. 1991)* .

(n5)Footnote 5. Extension of the rape shield law to civil cases has been criticized by some Courts. See, e.g., *Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992)* (noting that a civil plaintiff is a "voluntary participant" and declaring it unfair that "one party may seek recovery from another based on evidence it selects while precluding opposing relevant evidence").

The Advisory Committee proposal to extend the *Rule 412* protection to civil cases was originally rejected by the Supreme Court. Several Justices believed that the amendment would violate the Enabling Act because it could render evidence on accepted substantive defenses to sexual harassment completely inadmissible, thus making the defenses impossible to prove. See letter from Chief Justice Rehnquist to the Chair of the Judicial Conference, H.R. Doc. No. 103-250 (1994). Congress thereafter enacted an amendment identical to that originally proposed by the Advisory Committee, as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322.

(n6)Footnote 6. See, e.g, *Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999)* (in a Title VII action for sexual harassment arising from a hostile work environment, the Trial Court properly applied *Rule 412* to exclude evidence that the plaintiff had consensual sex with her alleged harasser outside the workplace); *Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998)* (in a Title VII action for sexual harassment, the Trial Court properly applied *Rule 412* to exclude evidence of the plaintiff's sexual affairs and sexual diseases).

(n7)Footnote 7. See, e.g., *United States v. Johns, 15 F.3d 740 (8th Cir. 1994)* (victim's sexual history is admissible to prove consent only where the sexual activity was with the defendant).

(n8)Footnote 8. There is an anomaly in this "constitutional rights" exception. *Rule 412(b)(1)* provides three exceptions for evidence to which the rape shield law does not apply. Those exceptions are (A) proof of source of semen or injury, (B) proof of prior sexual activity between the defendant and the victim where pertinent to consent, and (C) where the Constitution requires admission. When the Advisory Committee crafted the first two exceptions, it was concerned that a Court might think it was required to admit evidence falling under these two exceptions, even if the evidence would be excluded under some other rule (such as the hearsay rule or *Rule 403*). So the Committee added a qualifying clause at the beginning of subdivision (b)(1): the evidence is admissible "if otherwise admissible under these rules." But that language creates an anomaly when applied to subpart (C), the exception for evidence constitutionally required to be admitted. It seems to say that evidence, if *not* admissible under other rules, must be excluded *even if* its exclusion would violate the constitutional rights of the defendant. This anomaly could be solved by placing the qualifier "if otherwise admissible under these rules" directly into subparts (A) and (B) only. In 2002 the Advisory Committee considered proposing what amounts to a technical change to rectify the anomaly. But it found that the textual anomaly has not created a problem for litigants or in the case law. No Court has relied on *Rule 412* to exclude evidence that is constitutionally required to be admitted -- nor could a Court do so. Consequently the Committee determined that resolving a technical anomaly in the Rule did not justify the cost of an amendment.

(n9)Footnote 9. See, e.g., *United States v. One Feather, 702 F.2d 736 (8th Cir. 1983)* (evidence that fits one of the *Rule 412* exceptions can nonetheless be excluded if the probative value is substantially outweighed by the prejudicial effect: "The policy of *Rule 412*, to guard against unwarranted intrusion into the victim's private life, may be taken into account in determining the amount of unfair prejudice under *Rule 403*.").

(n10)Footnote 10. See *Sandoval v. Acevedo, 996 F.2d 145 (7th Cir. 1993)* (noting that "a rape shield statute cannot constitutionally be employed to deny the defendant an opportunity to introduce vital evidence").

(n11)Footnote 11. *California v. Trombetta, 467 U.S. 479 (1984)* (noting that several clauses of the Constitution work together to provide what might be loosely called a right to an effective defense); *Faretta v. California, 422 U.S. 806 (1975)* (stating that the *Sixth Amendment* "*constitution*alizes the right in an adversary criminal trial to make a defense as we know it").

(n12)Footnote 12. See, e.g., *Rock v. Arkansas, 483 U.S. 44 (1987)* (per se rule excluding hypnotically refreshed testimony violates the defendant's constitutional rights: "Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve"). For an incisive discussion of *Rock* and the right to an effective defense, see Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369 (1991).

(n13)Footnote 13. See *Rock v. Arkansas, 483 U.S. 44, 55 (1987)* (noting that the right to an effective defense "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal justice system").

(n14)Footnote 14. See, e.g., *Michigan v. Lucas, 500 U.S. 145 (1991)* (noting that rape shield laws represent "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

(n15)Footnote 15. See, e.g., *United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993)* (constitutional error to exclude evidence relating to the victim's sexual assault by other parties; this evidence was highly probative to establish an alternative explanation for why the victim exhibited behavioral manifestations of a sexually abused child; there was no other evidence reasonably available). Compare *United States v. Torres, 937 F.2d 1469, 1474 (9th Cir. 1991)* (evidence of the child-victim's past sexual conduct was not admissible to prove an alternative source of the child's sexual sophistication; the evidence was not sufficiently probative because the victim's testimony did not demonstrate any unusual knowledge of sexual techniques or nomenclature). See also Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, *70 Minn. L. Rev. 763 (1986)*, for a discussion of the balancing of interests required when a criminal defendant in a rape case proffers evidence of the victim's sexual history.

(n16)Footnote 16. See, e.g., *United States v. Powers, 59 F.3d 1460 (4th Cir. 1995)* (evidence of the minor-victim's sexual relations with her boyfriend was properly excluded, because the victim's sexual relations with her boyfriend occurred long after the acts of abuse for which the defendant was tried; the evidence was "irrelevant because it did not provide a reasonable alternative explanation" to the defendant's guilt); *United States v. Duran, 886 F.2d 167 (8th Cir. 1989)* (the fact that the victim gave birth to a child out of wedlock was properly excluded where the birth took place six months before the charged incident; the defendant simply wished to reveal that the victim had been a participant in past sexual relations with another, and this was not probative for any permissible purpose).

(n17)Footnote 17. See, e.g., *Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992)* (constitutional right to an effective defense does not require admission of evidence of the victim's prior sexual activity when offered only to show a propensity to have sex with the defendant; such evidence is rejected as "reflecting outdated views of women and sexuality"; the evidence "only tends to show that she was willing to have sex, not that she was willing to have sex with this particular man at this particular time").

(n18)Footnote 18. See, e.g., *Olden v. Kentucky, 488 U.S. 227 (1988)* (finding a *Sixth Amendment* violation where the Trial Court excluded evidence of a rape complainant's sexual relationship with another man; the complainant was a crucial prosecution witness, and evidence of the relationship would have provided strong evidence of a motive to lie about being raped; the Court noted that there was no alternative evidence that would have established the motive to lie). Compare *Wood v. Alaska, 957 F.2d 1544 (9th Cir. 1992)* (holding that evidence of the victim's sexual activity was properly excluded as being more prejudicial than probative, but noting that the result might have been different if the evidence "were the only evidence Wood could present to establish a prior sexual relationship such that he would be effectively precluded from presenting his whole theory to the jury").

(n19)Footnote 19. *United States v. Bear Stops, 997 F.2d 451, 455 (8th Cir. 1993)* .

(n20)Footnote 20. *United States v. Bear Stops, supra, 997 F.2d at 455* (finding constitutional error because the evidence of the victim's prior sexual abuse "was so sanitized that it was insufficient to support the purpose for which it was offered").

(n21)Footnote 21. It appears that only one reported Federal case has held that the Constitution would be violated if evidence of a false claim was excluded under *Rule 412*. In *United States v. Stamper, 766 F.Supp. 1396, 1400 (W.D.N.C.1991)* , the defendant moved for permission to show that prior false accusations revealed the accuser's motive to move her residence from the home of one parent to another; the defendant argued that the complainant had a similar motive with respect to the accusation at issue in the instant case. The Trial Court assumed that evidence of false claims was prohibited by the pre-1994 *Rule 412*. But because the defendant was entitled "to set before the jury the proffered evidence of ulterior motives of the complainant," the Trial Court held that the *Sixth Amendment* required the evidence of false claims to be admitted. The *Stamper* Court emphasized that Stamper did not wage a general credibility attack aimed to show a "propensity to fabricate," but instead sought to develop evidence of ulterior motive.

The *Stamper* Court also relied on the fact that there was no doubt that the prior claims were false -- the complainant admitted in writing that she had lied when she accused three others of sexually assaulting her, and she admitted her motive for doing so as well.

(n22)Footnote 22. See also Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 145 (1998) (arguing that "prior false rape accusations represent evidence of lies, not sex, and do not fall within the protections of the rape shield statutes"); Hon. Denise Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus? 7 Yale J. L. and Feminism 243 (1995)* (arguing that false claims of rape should be treated the same as any other false claim when offered for impeachment)

(n23)Footnote 23. See, e.g., *United States v. Withorn, 204 F.3d 790 (8th Cir. 2000)* ("In the absence of an applicable exception, *Rule 412* specifically bars admission of evidence of the past sexual behavior of an alleged victim."). Note that the quoted language in *Withorn* assumes that a false allegation *is* sexual behavior. It is clear that there is no explicit exception in the Rule for false allegations. But if a false allegation is not sexual behavior, the Rule does not apply at all.

(n24)Footnote 24. See *United States v. Shaw, 824 F.2d 601 (8th Cir. 1987)* (notice describing proof related to one sexual injury does not permit the defendant to introduce proof of another sexual injury at trial).

(n25)Footnote 25. See *United States v. Ramone, 218 F.3d 1229 (10th Cir. 2000)* (*Rule 412* notice requirement found constitutional as applied; preclusion of the evidence was not disproportionate, because the defendant was permitted to testify about his prior consensual relationship of the victim -- preclusion of the details did not disable the defense; the Court notes that the notice requirement "is not arbitrary" because it protects "both the victim and the prosecution against surprise and prejudice due to late disclosure of evidence").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 412 RULE 412

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412.03 Annotated Cases

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[1] Civil Cases

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998) : In a Title VII action based on allegations that the plaintiff was fired after complaining about sexual harassment by a customer, the Court affirmed a judgment against the employer, finding no error in the exclusion of evidence that the plaintiff engaged in multiple affairs with married men, carried on a lesbian relationship, and had contracted a sexually transmitted disease, although evidence of the plaintiff's flirtatious behavior toward the customer was admitted. The Court held that the Trial Judge "struck an acceptable balance between the danger of undue prejudice and the need to present the jury with relevant evidence, particularly in light of *Rule 412*'s special standard of admissibility."

Wolak v. Spucci, 217 F.3d 157 (2d Cir. 2000) : In a gender discrimination action by a female police officer who alleged a hostile work environment when fellow officers placed pornography throughout the police station, the Court found it was error (but harmless) to permit the defendants to question the plaintiff about two parties she attended where pornographic videos were shown and about two or three other occasions when she watched sexual acts as they were performed.

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002) : Affirming a judgment for a female employee alleging sex discrimination in her termination as a youth specialist at a social services facility, the Court found that the plaintiff's testimony that she had not sexually harassed a male contract specialist was not "sexual behavior" within the meaning of the Rule, and therefore was admissible to rebut the defendant's evidence purporting to establish a relationship between the plaintiff and the other specialist. In *Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960 (8th Cir. 2002)* , the Court affirmed a judgment for a former employee who alleged that she was sexually harassed by a supervisor and constructively discharged. It upheld exclusion of evidence that the plaintiff used swear words, wore suggestive clothing, and once said that she liked to pick up men in bars for sex, noting that the plaintiff's language was not shown to be an inducement to harassment, the comment about meeting men in bars was not known to the supervisor, and the defendant

never admonished the plaintiff about her dress. Moreover, evidence concerning the plaintiff's dress was inadmissible under *Rule 412* and could also have been excluded under *Rule 403*.

B.K.B. v. Maui Police Dep't, 276 F.3d 1091 (9th Cir. 2002) : A female former police officer sued for sexual harassment by a deputy chief who eventually raped her. To prove that the deputy chief's advances were not unwelcome, the defense offered testimony by another officer that the plaintiff had once after a party described her use of a female sexual device, said she had had an orgasm at work while using the device and thinking of him, and said that she thought he would be "fun in bed" and that she wanted to "teach him things" and "hurt" him. Reversing a judgment against the plaintiff, the Court held it was error under *Rule 412* to admit the testimony. The plaintiff's alleged statements regarding her sexual habits or fantasies were not probative as to the welcomeness of any harassing conduct by coworkers, so their probative value certainly could not substantially outweigh the prejudice to her.

Davis v. DeKalb County School Dist., 233 F.3d 1367 (11th Cir. 2000) : The Court affirmed summary judgments for the District and a principal in a sexual harassment/discrimination suit arising from the acts of a physical education teacher, but noted that the Trial Judge committed error in commenting on a plaintiff's sexual history. The prejudicial effect substantially outweighed any possible probative value, especially since the plaintiff was a minor who lacked legal capacity to consent to sexual abuse. In *Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997)* , the plaintiff, suing for contracting genital herpes from the defendant, objected to introduction of evidence regarding her sexual history. Affirming a judgment for the defendant, the Court held that because the herpes virus can be dormant for a long time and an infected person can be asymptomatic, evidence of prior sexual relationships and the type of protection used during intercourse was highly relevant to liability. Thus, the balancing test of *Rule 412(b)(2)* was satisfied and there was no abuse of discretion in admitting the evidence.

[2] Constitutionally Required Evidence

United States v. Saunders, 943 F.2d 388 (4th Cir. 1991) : Affirming the defendant's conviction for aggravated sexual abuse, the Court held there was no error in excluding evidence of prior sexual relations between the victim and the defendant's friend. Leaving open the question whether its decision in *Doe v. United States, 666 F.2d 43 (4th Cir. 1981)* , holding that evidence of the victim's reputation could be admitted when offered solely to show the accused's state of mind, was correct, the Court held it could discern no constitutional basis requiring admission of evidence about a three-day relationship between the victim and some third person. In this case, even evidence that the defendant had sexual relations with the victim was of marginal relevance, because consent was not the basis of his defense.

United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993) : The Court affirmed a defendant's conviction for sexual abuse of one victim, but reversed as to another victim. The Constitution required admission of evidence that the second victim was sexually assaulted by three boys during the approximate time period of the defendant's alleged abuse, which the defendant offered as an alternative explanation for the victim's behaviors that the government had relied upon to prove that abuse had occurred. The Court distinguished the constitutional basis for its decision in this case from the decision in *United States v. Shaw, 824 F.2d 601 (8th Cir. 1987)* , where it had held that a defendant may not offer evidence of a victim's sexual past to prove emotional injuries generally.

United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) : Affirming a conviction for carnal knowledge of a female under age 16, the Court held it was no violation of confrontation rights to exclude evidence of the victim's prior sexual conduct that was irrelevant or only tenuously probative of the claims asserted by the defendant.

United States v. Platero, 72 F.3d 806 (10th Cir. 1995) : In order to show that the victim had a motive to fabricate rape allegations, the defendant sought to introduce evidence of her romantic relationship with a third party at the time. The Trial Judge determined that witnesses to the alleged relationship were not credible, and precluded the defendant from cross-examining on the relationship. Citing the Advisory Committee's Note to the 1994 amendments and its reliance on commentary in this *Manual*, the Court reversed. Under the amended *Rule 412*, the Trial Judge does not determine whether sexual conduct evidence offered by the defense is true, but only whether its admission would be constitutionally required if there is evidence sufficient to support a finding that it is true.

[3] Jury Instructions

B.K.B. v. Maui Police Dep't, 276 F.3d 1091 (9th Cir. 2002) : A female former police officer sued for sexual harassment by a deputy chief who eventually raped her. To prove that the deputy chief's advances were not unwelcome, the defense offered testimony by another officer that the plaintiff had once after a party described her use of a female sexual device, said she had had an orgasm at work while using the device and thinking of him, and said that she thought he would be "fun in bed" and that she wanted to "teach him things" and "hurt" him. Reversing a judgment against the plaintiff, the Court held it was error under *Rule 412* to admit the testimony. Even though the Trial Judge granted a motion to strike the testimony on the day after it was given, the Court concluded that the curative instruction given "was neither as forceful nor as comprehensive as warranted under the circumstances"; in any event, "no matter what the instruction, it was impossible to dispel the effect of [the witness'] lurid and prejudicial testimony," so it was error to deny a mistrial motion.

[4] Motion and Record To Be Under Seal

S.M. v. J.K., 262 F.3d 914 (9th Cir. 2001) : Affirming a judgment for a housekeeper who charged her former employer with attempted sexual assault, the Court upheld the exclusion of evidence of the housekeeper's prior sexual history as a sanction for the defendant's failure to file his motion to introduce the evidence under seal. The Court agreed with the Magistrate Judge that the failure to file under seal was a flagrant violation and that "[e]ven though the evidence was ultimately excluded, Plaintiff may have suffered prejudice from the public airing of the allegation of the extramarital affair."

[5] Notice

United States v. Eagle, 137 F.3d 1011 (8th Cir. 1998) : The Court affirmed a conviction for aggravated sexual abuse of a minor, finding no abuse of discretion in the exclusion of evidence of the victim's prior sexual activity. The defendant gave the government notice of his intent to use the evidence only six days before trial, and failed to notify the victim of his intent. While the Trial Judge gave the defendant the opportunity to show cause for the late notice, the defendant made no attempt to show why he should be able to introduce the evidence, and never moved for a continuance to allow compliance with the notice requirements. In *United States v. Rouse, 111 F.3d 561 (8th Cir. 1997)* , the Court affirmed convictions for sexual abuse of children, and held that the Trial Judge properly excluded evidence of the victims' past sexual activity because the defendants had not given 14 days' notice prior to trial. The Court observed that the defendants were aware of the evidence three months before trial and made no showing of cause for not giving timely notice. Affirming a rape conviction in *United States v. Eagle Thunder*, n1 the Court held that evidence of a nonrecent tear in the victim's hymenal ring was properly excluded, as the defendant failed to file a written notice of intent to offer the evidence and, in any event, it was not relevant to the source of tears that were hours old or to impeach the victim's credibility.

United States v. Ramone, 218 F.3d 1229 (10th Cir. 2000) : In a rape prosecution, the Court found no violation of

the defendant's right to an effective defense when evidence of prior sexual activity between the defendant and the victim was excluded on the ground that the defendant had not given timely notice of his intent to proffer the evidence. The Court noted that the notice requirement "is not arbitrary" because it protects "both the victim and the prosecution against surprise and prejudice due to late disclosure of evidence." Nor was preclusion of the evidence disproportionate: the defendant was permitted to testify in general about his prior consensual sexual relationship with the victim; preclusion of the details did not disable his defense.

B.K.B. v. Maui Police Dep't, 276 F.3d 1091 (9th Cir. 2002) : A female former police officer sued for sexual harassment by a deputy chief who eventually raped her. To prove that the deputy chief's advances were not unwelcome, the defense offered testimony by another officer that the plaintiff had once after a party described her use of a female sexual device, said she had had an orgasm at work while using the device and thinking of him, and said that she thought he would be "fun in bed" and that she wanted to "teach him things" and "hurt" him. Reversing a judgment against the plaintiff, the Court noted that the defense "flouted [the] procedural guidelines [for notice]. Having failed in two previous motions to obtain the court's approval to introduce *Rule 412* material, [they] instead simply sprang the offending testimony upon the court and then misrepresented the nature of [the] testimony to the trial judge in response to plaintiff's objections that the defense intended to violate *Rule 412*."

[6] Prior Accusations by the Victim

United States v. Cardinal, 782 F.2d 34 (6th Cir. 1986) : The Court affirmed a defendant's conviction for the rape of his 13-year-old niece, finding there was no abuse of discretion in exclusion of other instances in which the victim reported sexual assaults by family members and withdrew the charges. Assuming that the evidence was directed at credibility, not prior sexual behavior, the Court found that the basic policy of *Rule 412* supported exclusion. On the facts of the case, exclusion would appear to have been warranted in light of evidence that the charges were true and were withdrawn because of fear of retaliation from the victim's mother.

United States v. Withorn, 204 F.3d 790 (8th Cir. 2000) : In a prosecution for forcible rape of a 12-year-old, the defendant sought to introduce evidence of a sexual assault accusation by the victim made several years earlier against a teenage friend of the defendant. The friend had committed suicide before the accusation could be adjudicated. The Court found no abuse of discretion in excluding the evidence, since a conclusion that the unadjudicated accusation was untrue "would have required the jury to rely on sheer speculation." Further, in the Court's view, impeaching the victim's truthfulness and showing her capability to fabricate a story are not recognized exceptions to *Rule 412*. Affirming a conviction for aggravated sexual abuse in *United States v. Cournoyer, 118 F.3d 1279 (8th Cir. 1997)* , the Court assumed, without deciding, that its 1989 decision in *United States v. Provost,* n2 holding that evidence of prior false rape allegations is barred by *Rule 412*, had been overruled by the 1994 amendments to the Rule. In any event, the Court found no error in the exclusion of testimony that the complainant "always accuses guys of that," since the testimony lacked the foundation required under *Rule 405(a)* for reputation or opinion character evidence or was inadmissible specific conduct character evidence. In *United States v. Bartlett*, n3 the Court affirmed a conviction of assault with intent to commit rape, concluding that it was proper to exclude evidence of a prior false accusation of rape by the victim, because the circumstances were very different from this case and the evidence of a single bad act was of marginal relevance to the victim's credibility.

[7] Prior Virginity

United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004) : Reversing a conviction for sexual abuse of a minor, the Court held that the victim's testimony that she was a virgin when she had sexual intercourse with the defendant was irrelevant to the case and unduly prejudicial. Furthermore, the testimony was inadmissible under *Rule 412* because it did

not fit into any of the narrowly defined circumstances specified in the Rule. The Court noted that "[i]f the defendant ... is prohibited from playing on the potential prejudices of a jury by introducing evidence of the alleged victim's promiscuity, the government should also be forbidden to play on potential prejudices by introducing evidence of the alleged victim's chastity."

United States v. Duncan, 855 F.2d 1528 (11th Cir. 1988) : Affirming a conviction for kidnapping, the Court held that testimony by the victim regarding her conversation with the defendant following an uncharged rape in which she referred to her prior virginity was properly admitted as part of a chronological reconstruction of the evening and to respond to a defense argument about her failure to escape.

[8] Psychiatric Examinations

Government of Virgin Islands v. Scuito, 623 F.2d 869 (3d Cir. 1980) : The Court cited the spirit of *Rule 412* as authority for upholding the Trial Judge's decision denying a rape defendant's motion for a psychiatric examination of the victim.

[9] Relationship to Other Rules

United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) : The Court upheld a rape conviction, finding no error in precluding the defendant from asking the victim, who testified on direct examination that she was divorced and had an infant son, where her marriage and divorce took place. The defendant had been unable to find applicable records and believed that the witness had lied. Citing *Rule 412* as persuasive authority, the Court found that the Trial Judge properly relied on *Rule 403* to bar the questioning, since it would have suggested that the victim had an illegitimate child, which might be unfairly prejudicial against her.

[10] Scope of the Rule

United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) : In a child sexual abuse case, evidence offered by the defendant that another person had committed the assaults was excluded for failure to comply with the notice requirements of *Rule 412*. The Court held that exclusion was error (but harmless), as the evidence was not of sexual behavior "other than" the offense charged.

[11] Sexual Activity with Others

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) : Affirming a conviction for aggravated sexual abuse of a minor, the Court held that evidence of the minor's sexual relations with her boyfriend was properly excluded. Since the victim's sexual relations with her boyfriend occurred long after the acts of abuse for which the defendant was tried, the evidence was "irrelevant because it did not provide a reasonable alternative explanation" to the defendant's guilt.

United States v. Blue Horse, 856 F.2d 1037 (8th Cir. 1988) : The Court upheld the exclusion of a sexual abuse victim's medical records. A physician testified about the nature of the victim's injuries, and the report contained prejudicial information concerning the victim's last sexual intercourse.

[12] Source of Semen or Injury

United States v. Richards, 118 F.3d 622 (8th Cir. 1997) : In a prosecution for aggravated sexual abuse, the defense rather than the government brought out that semen was found inside the complainant; the parties stipulated that the source of the semen was indeterminable. The Court held there was no error in excluding evidence that the complainant had had intercourse with several others the same evening. To permit a defendant to initiate the introduction of semen evidence and then offer evidence of other sources would permit him to evade the restrictions of *Rule 412* by bootstrapping himself into the exceptions in subdivision (b)(1). In *United States v. White Buffalo, 84 F.3d 1052 (8th Cir. 1996)* , the Court affirmed two brothers' convictions for sexual abuse. Although the victim told a hospital doctor that she had not engaged in consensual sexual intercourse within 72 hours of the rape she reported, test results showed otherwise. The Trial Judge excluded evidence of the victim's statement and test results, holding that the test results were not relevant to show that a person other than the accused was the source of semen. The government had not offered evidence of semen as part of its case, and the evidence was therefore irrelevant for rebuttal purposes. The Court also concluded that admission of the evidence was not necessary to assure a fair trial for the defendants, since "the victim's statement about unrelated consensual sexual intercourse was of little or no probative value on the question whether she falsely accused Ernest [one defendant] of rape." In *United States v. Azure*, n4 the Court held that evidence that a 13-year-old boy had had sexual relations with the ten-year-old victim was properly excluded as irrelevant to the source of a laceration on the victim's vaginal wall, since the victim did not express discomfort at the time of the prior sexual activity and physicians testified that the laceration would have been inflicted by force and have been painful.

United States v. Torres, 937 F.2d 1469 (9th Cir. 1991) : The Court, in affirming a conviction for aggravated sexual abuse, held that the Rule includes sexual behavior of the victim after the alleged incident, but that evidence of an incident involving the victim six months later was not relevant in the cross-examination of the victim or in determining the source of semen found in the victim's panties. In *United States v. Begay, 937 F.2d 515 (10th Cir. 1991)* , the Court reversed a conviction for sexual abuse of a child because the defendant had been precluded from cross-examining the witness about prior sexual contacts. Particularly where there was physical evidence that the victim's conditions could have resulted from earlier conduct with another person, examination regarding the prior incidents was relevant and probative on the central issue of whether the victim's memory was clear and accurate on critical details about the charged incident as contrasted with the earlier incidents.

[13] Standard of Proof

United States v. Platero, 72 F.3d 806 (10th Cir. 1995) : In order to show that the victim had a motive to fabricate rape allegations, the defendant sought to introduce evidence of her romantic relationship with a third party at the time. The Trial Judge determined that witnesses to the alleged relationship were not credible, and precluded the defendant from cross-examining on the relationship. Citing the Advisory Committee's Note to the 1994 amendments and its reliance on commentary in this *Manual*, the Court reversed. Under the amended *Rule 412*, the Trial Judge does not determine whether sexual conduct evidence offered by the defense is true, but only whether its admission would be constitutionally required if there is evidence sufficient to support a finding that it is true.

[14] Waiver of Protections

S.M. v. J.K., 262 F.3d 914 (9th Cir. 2001) : Affirming a judgment for a housekeeper who charged her former employer with attempted sexual assault, the Court upheld the exclusion of evidence of the housekeeper's prior sexual history as a sanction for the defendant's failure to file his motion to introduce the evidence under seal. The Court observed that a sanctions ruling should be reconsidered if the plaintiff "opens the door" at trial, and that the Magistrate Judge did reconsider the ruling. Because the plaintiff offered evidence of prior instances of sexual assault, the Court reasoned that the defendant would have been able to offer "further related evidence" but that the door was not opened to evidence of an extramarital affair.

FOOTNOTES:

(n1)Footnote 1. *United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990)* .

(n2)Footnote 2. *United States v. Provost, 875 F.2d 172 (8th Cir. 1989)* .

(n3)Footnote 3. *United States v. Bartlett, 856 F.2d 1071 (8th Cir. 1988)* .

(n4)Footnote 4. *United States v. Azure, 845 F.2d 1503 (8th Cir. 1988)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 412 RULE 412

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412.04 Legislative History

[Editor's Note: There is no legislative history to the original Rule 412. The amendment to Rule 412 was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. Congress in that Act adopted verbatim the version of Rule 412 that had been recommended by the Advisory Committee but rejected by the Supreme Court. The Advisory Committee proposal had been rejected by the Supreme Court in favor of a slightly different version, but Congress chose the Advisory Committee's version over that adopted by the Supreme Court. House Conference Report 103-711 notes that the "Conferees intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section." Thus, the Advisory Committee Note to the amendment is the legislative history of the version of Rule 412 directly enacted by Congress in 1994. That Advisory Committee Note is produced below.]

Advisory Committee's Note to 1994 Amendment to Rule 412

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. *Rule 412* applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. *Rule 412* extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not

within the ambit of *Rule 412*. The witness will, however, be protected by other rules such as *Rules 404* and *608*, as well as *Rule 403*.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. *Rule 412* does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither *Rule 404* nor this rule will operate to bar the evidence; *Rule 401* and *403* will continue to control. *Rule 412* will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by *Rule 412*. However, this evidence is subject to the requirements of *Rule 404*.

Subdivision (a). As amended, *Rule 412* bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if *Rule 412* so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. *Cf.* Committee Note to 1991 amendment to *Rule 404(b)*.

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway, 937 F.2d 542 (10th Cir. 1991) , cert. denied, 113 S. Ct. 418 (1992)* (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather, 702 F.2d 736 (8th Cir. 1983)* (birth of an illegitimate child inadmissible); *State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986)* (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure,* § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of *Rule 412* is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene *Rule 412*'s objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending *Rule 412* to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, *Rule 412* applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, *Rule 412* will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including *Rule 403*. *Subdivisions (b)(1)(A)* and *(b)(1)(B)* require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991)* . Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988)* (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to *Rule 404(b)* to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the *Confrontation Clause*. *See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988)* (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for

sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in *Rule 403*. First, it reverses the usual procedure spelled out in *Rule 403* by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the *Rule 412* test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf. Fed. R. Civ. P. 35(a).*

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The Rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by *Rule 412* will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of *Rule 412(a)*, the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by *Fed. R. Civ. P. 26*. In order not to undermine the rationale of *Rule 412*, however, courts should enter appropriate orders pursuant to *Fed. R. Civ. P. 26(c)* to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962-63 (8th Cir. 1993)* (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of *Rule 104*, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the *Sixth* and *Seventh Amendments*. *See* 1 S. Saltzburg & M. Martin, *Federal Rules Of Evidence Manual*, 396-97 (5th ed.

1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

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2-412 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 412, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Be-	**Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition**

havior or Alleged Sexual Predisposition

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

misconduct except as provided in subdivisions (b) and (c):

(1)	Evidence offered to prove that any alleged victim engaged in other sexual behavior.	**(1)**	evidence offered to prove that a victim engaged in other sexual behavior; or
(2)	Evidence offered to prove any alleged vic-	**(2)**	evidence offered to prove a victim's sexual predisposition.

tim's sexual predisposition.

(b) Exceptions.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(1) ***Criminal Cases.*** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of sexu

(A) evidence of specific instances of a vic-

	al behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;		tim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(B)	evidence of specific instances	**(B)**	evidence of specific instances

of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence the

(C) evidence who

exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim

(2) ***Civil Cases.*** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexu

se exclusion would violate the defendant's constitutional rights.

is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.

al prejudicial disposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputa-

		Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.			tion only if the victim has placed it in controversy.
(c)	**Procedure To Determine Admissibility.**	**(c)**	**Procedure to Determine Admissibility.**		
	(1)	A party intending	**(1)**	***Motion.*** If a party in-	

to offer evidence under subdivision (b) must --

tends to offer evidence under Rule 412(b), the party must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered under

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

less the court, for good cause requires a different time for filing or permits filing during trial; and

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate,

the victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be hear

(2) ***Hearing***. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be hear

d. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

d. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." " In this rule, "victim" includ

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Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[2] Constitutionally Required Evidence [Go To Main]

United States v. Hitt, 473 F.3d 146 (5th Cir. 2006) : In a Mann Act prosecution for sexual abuse of a teenage boy, the defendants argued that they were constitutionally entitled to cross-examine the victim regarding sexual abuse that had been perpetrated on him by another man. The evidence was offered to impeach the victim by pointing out inconsistencies in his statements regarding the type of abuse the defendants perpetrated and to impeach his testimony that he did not come forward sooner because he feared reporting the abuse. Affirming, the Court found no abuse of discretion when the cross-examination was precluded, as some of the assumptions of the intended cross-examination were factually inaccurate, the evidence was only marginally probative on the victim's credibility, its reception would have required time-consuming and confusing inquiries, and it would have been prejudicial toward the victim. The Court found that the defendants had ample opportunity to impeach the witness through cross-examination regarding inconsistencies in his statements and his motives to lie.

United States v. Elbert, 561 F.3d 771 (8th Cir. 2009) : The Court affirmed a conviction for sex trafficking of a child, finding no error in the exclusion of evidence that the victims had engaged in prostitution before and after the charged offense. Exclusion of the evidence did not implicate the defendant's *Fifth Amendment* right to present a defense, as it would not have provided a defense to charges that did not require proof of fraud, force, or coercion but only proof that the defendant knew the minor would be caused to engage in commercial sex acts. Furthermore, the defendant's *Sixth Amendment* right to confrontation was not implicated, as the evidence was not probative on the crimes charged or on the victims' credibility and would, in any event, have prejudicial effect substantially outweighing any probative value.

United States v. Culver, 598 F.3d 740 (11th Cir. 2010) : The Court affirmed a conviction for producing child pornography, finding no abuse of discretion in the exclusion of evidence regarding the victim's sexual history, which the defendant argued would rebut prosecution evidence that he was responsible for condoms and a broken abstinence card found in the victim's room. Whether the defendant was the source of the items was not relevant, since the key issue in the case was the identity of the female portrayed, and admission of the evidence would have confused the jury and

harassed the victim. Furthermore, the defendant was permitted to cross-examine the victim on every issue concerning her sexual history that was potentially relevant to the charged conduct (e.g., when and why she shaved her pubic region, where the female portrayed had a shaved pubic region). In *United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009)* , the Court affirmed a defendant's conviction for inducing his minor step-daughter to engage in sexually explicit conduct for the purpose of producing photos of the conduct. It found no abuse of discretion in the exclusion of evidence of the step-daughter's post-abuse sexual relationship with her boyfriend. Her testimony that she was traumatized by the defendant's sexual abuse did not open the door to questions about her sexual history, since "victims of sexual abuse can be traumatized whether or not they have had other sexual relations" and the victim's relationship with her boyfriend was irrelevant because "[t]he only issue is the identity of the male in the photos." The defendant had been permitted a constitutionally adequate opportunity to explore the step-daughter's possible motives for framing him.

[5] Notice [Go To Main]

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant was convicted for sexual abuse of his sister-in-law and his niece. Affirming, the Court found no abuse of discretion in the exclusion of testimony by the defendant's friend that he had seen the adult victim and the defendant hugging and kissing two years after the alleged sexual assault. The testimony was not admissible to prove consent under *Rule 412(b)(2)*, since the defendant failed to give 14 days pretrial notice of his intent to rely upon such evidence.

[6] Prior Accusations by the Victim [Go To Main]

United States v. Tail, 459 F.3d 854 (8th Cir. 2006) : Appealing convictions for sexual abuse of a minor, the defendant argued that the Trial Judge violated his right to confrontation by excluding evidence that a victim had previously made false allegations of sexual abuse. Affirming, the Court noted that although the *Confrontation Clause* may require the admission of evidence otherwise barred by the rules of evidence, "it is clear that not all evidence that is the least bit probative of credibility must be admitted." Here, the evidence of false claims was "weak" and admission of the evidence "would have triggered mini-trials concerning allegations unrelated to Tail's case, and thus increased the danger of jury conviction and speculation."

[11] Sexual Activity with Others [Go To Main]

United States v. Seed, 572 F.3d 552 (8th Cir. 2009) : The Court affirmed convictions for aggravated sexual abuse, finding no abuse of discretion in the exclusion of evidence that the complainant was involved in at least two sexual encounters with different men, one of whom was married, within days of the incident giving rise to the charges. The Court held that the defendant's claim that the complainant had a motive to falsely accuse him to protect her married paramour in the event she became pregnant or contracted a sexually transmitted disease was weak. The complainant had a tubal ligation, which made it extremely unlikely that she would have become pregnant during the course of her relationship with the married man. And a sexually transmitted disease is not readily observable and would only be known to the complainant's physician or married paramour, making it unlikely that the complainant would feel a need to make a false accusation to conceal the identity of the source of a feared disease that would not be publicly known.

United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009) : The Court affirmed a defendant's conviction for inducing his minor step-daughter to engage in sexually explicit conduct for the purpose of producing photos of the conduct. It found no abuse of discretion in the exclusion of evidence of the step-daughter's post-abuse sexual relationship with her boyfriend. Her testimony that she was traumatized by the defendant's sexual abuse did not open the door to questions

about her sexual history, since "victims of sexual abuse can be traumatized whether or not they have had other sexual relations" and the victim's relationship with her boyfriend was irrelevant because "[t]he only issue is the identity of the male in the photos." The defendant had been permitted a constitutionally adequate opportunity to explore the step-daughter's possible motives for framing him.

[12] Source of Semen or Injury [Go To Main]

United States v. Seed, 572 F.3d 552 (8th Cir. 2009) : The Court affirmed convictions for aggravated sexual abuse, finding no abuse of discretion in the exclusion of evidence that the complainant was involved in at least two sexual encounters with different men, one of whom was married, within days of the incident giving rise to the charges. The Judge had found that the argument that consensual sex with a third person might have caused the injuries to the complainant was too weak to justify admission of the evidence and the defendant did not make any offer of proof concerning the circumstances of the two sexual encounters that would have enabled the Judge to assess the likelihood of the injuries being caused by consensual sexual activity. In *United States v. Tail, 459 F.3d 854 (8th Cir. 2006)* , the defendant, appealing convictions for sexual abuse of a minor, argued that the Trial Judge committed error in excluding evidence that one of the victims had tested positive for Hepatitis B. The defendant reasoned that Hepatitis B is sometimes acquired through sexual contact, and he had tested negative, so the evidence suggested that a person other than the defendant was the source of semen, injury, or other physical evidence. Affirming, the Court held that the "exception to the general prohibition on admission of a victim's past sexual behavior permits only the introduction of specific instances of sexual behavior," and because the defendant had not offered any specific instance, the evidence was properly excluded.

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[4] Relationship to Rule 404(b)

[5] Subsequent Offenses

[413.04] Legislative History

[1] Public Law 103-322

[2] Report of Judicial Conference of United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases

[3] Statements on the Floor of Congress Concerning Rules 413-415

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413.01 Official Text

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraph (1)-(4).

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413.02 Editorial Explanatory Comment

[1] Background of the Rule

This Rule is intended to provide for more liberal admissibility in cases involving sexual assault where the defendant has committed a prior act or acts of sexual assault. Congress passed this Rule, together with Rules 414 and 415 (which are substantively identical but applicable to different types of cases), as part of a general Crime Bill package, and bypassed the ordinary rulemaking process in doing so. n1 As a compromise, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rule embodied bad policy and recommended its reconsideration; Congress refused to do so.

As an alternative, the Advisory Committee drafted amendments to Rules 404 and 405 that would "both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415, and yet still effectuate Congressional intent." n2 The Advisory Committee proposal would have: (1) expressly applied the other rules of evidence, such as *Rule 403* and the hearsay rule, to evidence offered under the new rules; (2) expressly allowed rebuttal; (3) expressly enumerated the factors that a Court must take into account in balancing under *Rule 403*; (4) rendered the notice provisions consistent with the existing notice provision of *Rule 404(b)*; (5) eliminated the notice provisions in civil cases, so that notice would be required as provided in the Federal Rules of Civil Procedure; and (6) permitted reputation and opinion evidence only after such evidence has been offered by the defendant. (The Advisory Committee proposal is set forth in the legislative history to this Rule, § 413.04[3]). Congress did not adopt any of these proposed changes, and so Rules 413-415, as originally enacted by Congress and set forth above, became effective on July 9, 1995.

[2] Scope of the Rule

Rule 413 applies only to sexual assault cases, and only covers evidence of the defendant's prior sexual assaults. So for example, if the defendant is charged with kidnapping, a prior sexual assault on the victim (or on any other victim, for that matter) is not covered by this Rule. Presumably the Rule is inapplicable even if the defendant kidnapped the victim with a motive of sexual assault. The Rule is limited to criminal cases "in which the defendant is accused of an offense"

of sexual assault. A fair reading of the provision is that the defendant must actually be charged with a sexual assault. Likewise, if the defendant is charged with sexual assault, a previous act of kidnapping or aggravated battery is not covered by this Rule. n3

This is not to say that uncharged misconduct outside Rules 413-415 will be inadmissible. It is simply to say that admissibility is dependent upon Rules 404(b) and 403 and, if the defendant takes the stand, Rules 608 and 609.

Rule 413 appears to be an attempt to create an exception to *Rule 404(b)* in sexual assault cases, where the prosecution wishes to offer a previous act of sexual assault committed by the defendant. n4 If *Rule 404(b)* were applicable, the prosecution would have to articulate a not-for-character purpose for a prior act of sexual assault, such as intent or motive. The prosecution would be prohibited by *Rule 404(b)* from offering the prior sexual assault simply to prove that the defendant has a propensity to commit sex crimes. Under *Rule 413*, however, the prosecution can offer a prior act of sexual assault explicitly to prove the defendant's propensity to commit the sexual assault charged. n5 A limiting instruction is not required, because the jury is free to use the prior act of sexual assault as evidence that the defendant has a propensity to commit sex crimes. This is what the Rule means when it says that a prior sexual assault "may be considered for its bearing on any matter to which it is relevant." Given the liberal standard of relevance employed by the Federal Rules, a propensity to commit sex crimes is certainly relevant to whether the defendant committed the sex crime with which he is charged.

Rule 413 is unusual as compared to other Evidence Rules, in that it singles out sexual assault crimes for special treatment. Assume that a defendant is being tried for a rape-murder, and has two different prior bad acts in his past -- a rape and a murder. Under the Rule, the prior rape can be admitted even if it is offered solely to prove propensity, while the murder cannot be admitted without the articulation of a not-for-propensity purpose.

One justification for this differentiation, however, is that sexual assault crimes usually pose unique difficulties of proof. Often there is no physical evidence that ties the defendant to the charged crime; often the jury must make a credibility determination between the victim and the defendant. Given these limitations, one can at least understand, if not agree with, Congress' desire to single out sexual assault crimes for special treatment. n6

On the other hand, if *Rule 413* is merely an exception to *Rule 404*, the necessity for the Rule is questionable. In the relatively few sex crime cases that have been tried in the Federal Courts, prosecutors have rarely had difficulty in articulating a not-for-character purpose for a prior act of sexual assault. As discussed in § 404.02[10], the Courts have looked on *Rule 404(b)* as a rule of inclusion. So long as the prosecution can articulate any colorable not-for-propensity purpose (e.g., intent, motive, absence of mistake), the Courts generally consider *Rule 404(b)* satisfied, and proceed to balance the probative value of the evidence against its prejudicial effect under *Rule 403*. Thus there is little evidence that an exception to *Rule 404(b)* was needed for prior sexual assault crimes. n7

[3] Relationship to Rule 403

The most important question about the scope of *Rule 413* is whether the Rule permits the Trial Judge to invoke *Rule 403* to exclude sexual assault evidence that is unduly prejudicial. It is unclear from the statutory language whether *Rule 413* pre-empts *Rule 403*; but clearly the better reading of the Rule is that the Trial Judge retains discretionary power under *Rule 403* to exclude some instances of sexual misconduct.

Some clues about the meaning of *Rule 413* can be derived by comparing it with other Federal Rules that clearly displace *Rule 403*. The most prominent example, *Rule 609*, provides that *crimen falsi* convictions (covered by *Rule 609(a)(2)*) "*shall* be admitted." In addition, special balancing tests are specifically provided for convictions offered against the accused (*Rule 609(a)(1)*), and for convictions more than ten years old (*Rule 609(b)*). Similarly, *Rule 412* sets forth an explicit balancing test for civil cases, different from that provided in *Rule 403*, for evidence of the victim's sexual activity, and *Rule 703* does the same for otherwise inadmissible evidence relied upon by an expert in reaching an

opinion.

In contrast to these Rules, *Rule 413* contains neither mandatory language nor a special balancing test. The Rule states that evidence of a prior act of sexual assault "is admissible," not that it "shall be admitted." It further states that such evidence "*may* be considered for its bearing on any matter to which it is relevant." Notably, there is no specific balancing test set forth in the Rule, which would undoubtedly displace the *Rule 403* test.

It should also be noted that the sponsors of the Rule indicated that it was not intended to pre-empt *Rule 403*. n8 While this is slender legislative history, it does support the conclusion that *Rule 413* does not displace the *Rule 403* balancing test. On the other hand, when the Advisory Committee received comments about Rules 413-415, many of the commentators were of the view that the Rules as drafted are mandatory; the Advisory Committee found that this position was "arguable because Rules 413-415 declare without qualification that such evidence 'is admissible.' " n9 Another contrary indicator to be mentioned is that *Rule 412* provides that evidence thereunder "is admissible *if it is otherwise admissible under these Rules*." There is no such proviso in *Rule 413*.

Every Court to decide the matter has held that *Rule 403* remains applicable to acts covered by Rules 413-415. n10 Some Courts have held that *Rules 413 and 414* might be unconstitutional if the Trial Judge had no power to exclude evidence of an accused's prior sexual misconduct. Thus, these Courts read *Rule 403* into the Rules as a kind of saving clause. n11

Assuming, as now seems clear, that *Rule 403* remains applicable to prior acts of sexual assault, it appears that *Rule 413* mandates a change in the way Courts have traditionally balanced the probative value and prejudicial effect of such acts. Under *Rule 404(b)* and *Rule 403*, the Trial Court must balance the probative value of the uncharged misconduct for the not-for-character purpose; it cannot consider, and weigh in favor of admissibility, the probative value for the forbidden propensity inference. In contrast, *Rule 413* provides that the Trial Court must consider the prior act of sexual assault as probative of the defendant's propensity to commit the crime charged. Thus the propensity inference is part of the probative value that the Judge must balance under the *Rule 403* test. Moreover, under *Rules 404(b)* and *403*, the Trial Court, in weighing the risk of prejudice, must consider the possibility that the jury will convict the defendant because of his propensity to commit the crime charged -- this is "prejudice" because those Rules do not permit the jury to draw the propensity inference. In contrast, under *Rules 413-415*, the jury is allowed to draw the inference that because the defendant has committed sex crimes before, he has a propensity to commit them and therefore is more likely to have committed a sex crime on the occasion in question. Thus, the risk of drawing the propensity inference cannot be considered "prejudicial" when the Trial Judge conducts the *Rule 403* balance in sexual misconduct cases under *Rule 413*. Consequently, the *Rule 403* balancing test is far less likely to result in the exclusion of prior acts of sexual assault than was the case before *Rules 413-415* were passed. Congress has instructed the Courts to find more probative value and less prejudicial effect in such evidence than the Courts were previously permitted to find. n12

In effect, a *Rule 403* objection to sexual misconduct evidence is likely to be successful only in exceptional cases. One factor supporting exclusion is where the prior act is completely dissimilar from the charged act (e.g., the defendant is charged with molesting a child at his home, and the prior sexual misconduct involved a workplace incident with an adult). Another factor supporting exclusion is where the prior sexual misconduct occurred a long time ago, and there are no intervening acts of sexual misconduct. n13 Where these circumstances arise -- and especially if remoteness and dissimilarity are combined -- the propensity inference is weak and, for similar reasons, the evidence would seem to have minimal if any probative value for any *Rule 404(b)*-type not-for-character purpose. Most importantly the evidence of the dissimilar and/or remote act is prejudicial independent from any propensity inference -- it encourages the jury to convict the defendant not because he has a propensity to commit the crime charged (which is permissible) but rather because he is a bad person (which is impermissible even under Rules 413-15).

[4] Proof of Uncharged Sexual Assaults

The Rule states that evidence of the defendant's "commission" of an uncharged offense is admissible. Thus, the

relevance of the prior act of sexual assault is conditioned on the defendant having committed it. There is every reason to believe that the conditional relevance analysis employed as to other acts of uncharged misconduct (see the Editorial Explanatory Comment to *Rule 404(b)*, § 404.02[18]) applies as well to evidence offered under this Rule. Thus, a prior sexual assault can be admissible even if the defendant was never convicted of the act. Applying *Rule 104(b)*, evidence of prior sexual assaults should be admissible under this Rule (subject, again, to a potential *Rule 403* analysis) when the government presents sufficient evidence to support a finding, by a preponderance of the evidence, that the defendant committed the prior act. n14

[5] Notice

The Rule requires the prosecution to notify the defendant of the intended use of sexual assault evidence. Notice must be provided at least fifteen days before the scheduled date of trial, unless the Court allows later notice for good cause shown.

FOOTNOTES:

(n1)Footnote 1. See 113 Cong. Rec. H5439 (statement of Representative Hughes), noting that the "existing rule-making process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none. This is an amendment offered on the floor of the Senate after about 20 minutes' debate, without very much thought, and it is procedurally and substantively flawed." See also Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule,* 1997 Wis. L. Rev. 1221, 1236 (arguing that Rules 413-15 "are an example of the politicization of the Federal Rules of Evidence").

(n2)Footnote 2. Judicial Conference Report, set forth in the legislative history to this Rule, § 413.04.

(n3)Footnote 3. See, e.g., *United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004)* (prior acts of soliciting sex from minors were not admissible under *Rule 413*, because the conduct did not involve touching any of the areas prohibited under 18 U.S.C. ch. 109A, and did not involve a "substantial attempt" toward commission of the prohibited crimes so as to constitute an "attempt".)

(n4)Footnote 4. See the statement of Senator Biden in § 413.04[3].

(n5)Footnote 5. See *United States v. Withorn, 204 F.3d 790 (8th Cir. 2000)* (stating that Courts must consider probative value of sexual misconduct evidence in light of Congress' policy judgment that such evidence is "exceptionally probative" of a propensity to commit sexual assaults).

(n6)Footnote 6. See 133 Cong. Rec. H5439 (statement of Representative Kyl): "In most rape or molestation cases, it is the word of the defendant against the word of the victim. If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults."

(n7)Footnote 7. See Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, *110 Harv. L. Rev. 563 (1997)* (arguing that *Rule 413* is a "dangerous means of securing more rape convictions" because it is likely that defendants will be convicted because of their bad character; concluding that the "motive" and "absence of mistake" exceptions to *Rule 404(b)* "hold a great deal of promise" for obtaining fair convictions in rape cases).

(n8)Footnote 8. See 140 Cong. Rec. S12990 (Sept. 20, 1994) (statement of Senator Dole: evidence of past sexual misconduct will still be governed by the rules of evidence, "including the restrictions on hearsay evidence and the court's authority under *Rule 403* to exclude evidence whose probative value is substantially outweighed by its prejudicial effect"). See also 140 Cong. Rec. H8968-01 (Aug. 21, 1994) (statement of Representative Molinari, indicating that the Rule was drafted with the intent to permit the Trial Court to exclude prior acts of sexual misconduct under *Rule 403*).

(n9)Footnote 9. Report of the Judicial Conference of the United States on the Admission of Character Evidence in

Certain Sexual Misconduct Cases 5 (1995), set forth in § 413.04[2].

(n10)Footnote 10. See, e.g., *United States v. Larson, 112 F.3d 600 (2d Cir. 1997)* (construing the parallel *Rule 414*: "We view *Rule 403* analysis in connection with evidence offered under *Rule 414* to be consistent with Congress's intent."). The Court in *Larson* upheld two evidentiary rulings by the Trial Court. One excluded evidence of child molestation occurring 21-23 years before trial. The other ruling admitted evidence of child molestation occurring 16-20 years before trial, where the events "closely paralleled the events complained of" by the victim in the instant trial. It is notable that the government in *Larson* agreed that *Rule 414* did not "eliminate the need for the court to conduct the analysis required under *Rule 403*."

See also *Frank v. County of Hudson, 924 F. Supp. 620 (D.N.J. 1996)* (statement concerning child molestation was excluded under *Rule 403*, despite the fact that *Rule 415* held such evidence "admissible"); 113 Cong. Rec. H5438 (1993) (statement of Representative Kyl), stating that under the Rule, the "judge still has total discretion to exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant."

(n11)Footnote 11. See, e.g., *United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998)* : The Court recognized that "*Rule 413* raises a serious constitutional due process issue" because it creates a danger that the defendant will be convicted because he is a bad person, not because he commtted the crime charged. The Court stated that "without the safeguards embodied in *Rule 403*, we would hold [*Rule 413*] to be unconstitutional." However, because *Rule 403* is still applicable to prior sex crimes, the Rule provides sufficient protection to answer any due process concerns.

(n12)Footnote 12. See, e.g., *United States v. Withorn, 204 F.3d 790 (8th Cir. 2000)* (applying the *Rule 403* test to acts covered by *Rules 413-415*, the Trial Court must consider as part of the probative value the Congressional assumption that prior sexual misconduct is exceptionally probative of a propensity to commit similar acts; nor is the propensity inference prejudicial, since Congress has provided that the evidence is probative because it creates an inference of propensity); *United States v. Gabe, 237 F.3d 954 (8th Cir. 2001)* (no error in admitting prior sexual assaults under Rules 414 and 403; there was no risk of prejudice because the evidence was "prejudicial to Gave for the same reason it is probative -- it tends to prove his propensity to molest young children in his family when presented with an opportunity to do so undetected."). See also Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule, 1997 Wisconsin L.Rev. 1221* (evaluating the substantively identical *Rule 415*):

> *Rule 415* is not affected by *Rule 404*'s character bar: inferring present behavior from past bad acts is allowed under *Rule 415*. Therefore, if the objection to *Rule 415* evidence is based on alleged unfairness caused by the possibility that the jury would find the defendant liable based on a general propensity theory, a *Rule 403* objection should fail because *Rule 415* specifically allows the jury to draw those conclusions. The effect of broadening the basis for establishing probative value and narrowing the basis for finding prejudice should weaken a *Rule 403* objection.

(n13)Footnote 13. See, e.g., *Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000)* (construing *Rule 415*; no error in excluding prior act of sexual misconduct where there was a significant time lapse between the two incidents, there was no evidence of any sexual misconduct in the interim, and the circumstances of the incidents were not similar). Compare *United States v. Eagle, 137 F.3d 1011 (8th Cir. 1998)* (construing *Rule 414*; prior act of sexual abuse of a minor was properly admitted; the fact that it occurred 10 years ago was of little moment because the defendant had spent six of those years incarcerated for that crime); *United States v. Gabe, 237 F.3d 954 (8th Cir. 2001)* (construing *Rule 414*; prior act of sexual abuse of a minor was properly admitted, even though 20 years old; the victim was the same age as the victim in the case, both were related to the defendant, and the acts were each committed in similar fashion when the defendant first got an opportunity to be with the victim alone).

(n14)Footnote 14. See, e.g., *United States v. Mann, 193 F.3d 1172 (10th Cir. 1999)* (construing *Rule 414*: prior sexual assault of a child was properly admitted; the testimony of the child-victim provided enough information for a

reasonable juror to believe by a preponderance of the evidence that the defendant committed the prior sexual assault).

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 413 RULE 413

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413.03 Annotated Cases

[Go To Supp]

[1] Constitutional Issues

United States v. Julian, 427 F.3d 471 (7th Cir. 2005) : Affirming convictions for traveling in foreign commerce to engage in sex with minors, the Court found no error in the admission of the defendant's 12-year-old conviction for sexually molesting his stepson. The Court rejected the argument that *Rule 413* is a deprivation of equal protection and due process, noting that "*Rule 413* implicates neither a fundamental right nor a suspect class," and it has a rational basis. Any due process concerns are answered by the Judge's authority under *Rule 403* to exclude evidence of a prior assault if its probative value is substantially outweighed by the danger of unfair prejudice.

United States v. Mound, 149 F.3d 799 (8th Cir. 1998) : The Court affirmed a conviction for sexual abuse of a minor, in a case in which evidence of the defendant's prior sexual abuse conviction had been admitted. Following *United States v. Enjady*, *infra*, the Court found that *Rule 413* does not violate the Due Process Clause; it also found no equal protection violation, since sex-offense defendants are not a "suspect class" and the classification implicit in the Rule bears a rational relation to the legitimate end of making decisions in these distinctive and difficult cases.

United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998) : Appealing from a rape conviction in which consent was the disputed issue, the defendant argued that admission of evidence of a prior rape under *Rule 413* violated his rights to due process and equal protection. The Court affirmed, although it recognized that "*Rule 413* raises a serious constitutional due process issue," since it creates a danger that the defendant will be convicted because he is a bad person, not because he committed the crime charged. The Court stated that "without the safeguards embodied in *Rule 403*, we would hold [*Rule 413*] unconstitutional." However, the Court concluded that *Rule 403* does apply to evidence offered under *Rule 413*, and this provided sufficient protection to answer any due process concerns. As to the equal protection argument, the Court found that *Rule 413* was rationally based on Congress's legitimate interest in enhancing effective prosecution for sex assaults, because sex offense prosecutions frequently involve "victim-witnesses who are traumatized and unable to effectively testify, and offenders often have committed many similar crimes before their

arrest on the crime charged."

[2] Offense of Sexual Assault

United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004) : The Court reversed a conviction for sexual abuse of a minor because evidence was improperly admitted of prior incidents in which the defendant solicited sexual acts with minors. Because the defendant's prior conduct did not involve touching any of the areas prohibited under 18 U.S.C. ch. 109A, and did not involve a "substantial step" toward commission of the prohibited crimes so as to be an "attempt," the evidence was inadmissible under *Rule 413*. The Court also held that the evidence was not admissible under *Rule 404(b)* and should have been excluded in any event under *Rule 403*.

[3] Relationship to Rule 403

United States v. Crawford, 413 F.3d 873 (8th Cir. 2005) (per curiam): Affirming a conviction for abusive sexual contact with an eight-year-old girl, the Court found no abuse of discretion in the admission of the defendant's 1994 conviction for abusive sexual contact of an eight-year-old girl. The evidence was relevant because it involved a similar crime, and the Judge gave two cautionary instructions not to consider the conviction solely as propensity evidence, which decreased the danger of unfair prejudice. In a prosecution for forcible rape of a 12-year-old, *United States v. Withorn, 204 F.3d 790 (8th Cir. 2000)* , the Court found no abuse of discretion when evidence was admitted that the defendant had forcibly raped his cousin when she was 12 years old. Considering the "strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible," the Court noted the similarities between the incidents: the victims were approximately the same age, both assaults involved force, both occurred after the defendant had isolated the victim from others, in both the victims were threatened not to inform anyone what had occurred, and in each case the defendant had claimed that the victim had consented to the sexual activity. In *United States v. Mound*, n1 the Court affirmed a conviction for sexual abuse of a minor, finding no error in the admission of evidence that the defendant had previously been convicted of sexual abuse of a minor. The Trial Court was aware of its duty to apply *Rule 403* and performed it, as shown by its exclusion of other evidence that the defendant had committed a sexual abuse offense and by its cautionary instruction to the jury when the conviction was introduced. The conviction was based on an offense similar to the one charged, and the prejudicial effect was not beyond "that which 'all propensity evidence in such trials presents,' but is now allowed by *Rule 413*."

United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998) : The Court found no error in the exclusion of prior acts of sexual misconduct offered under *Rule 413*. The Court held that evidence admissible under *Rule 413* can still be excluded under *Rule 403*, and that the Trial Judge properly considered that the prior acts of sexual misconduct offered against the defendant might unduly confuse the jury. The defendant was charged with committing sexual abuse in the course of conducting gynecological exams, and the uncharged activity was conducted under similar but distinct circumstances. Because the case depended on the medical propriety of the defendant's procedures, the introduction of the uncharged misconduct would have transformed the trial of two incidents "into the trial of six incidents, each requiring description by lay witnesses and explanation by expert witnesses. The subtle factual distinctions among these incidents would make it difficult for the jury to separate the evidence of the uncharged conduct from the charged conduct." The Court emphasized that in conducting a *Rule 403* analysis with respect to evidence offered under *Rule 413*, the Trial Judge must recognize that evidence indicating a propensity to commit sex crimes is probative of whether the defendant committed the crime charged.

[4] Relationship to Rule 404(b)

United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004) : Affirming a conviction for abusive sexual contact

with a minor, the Court stated that evidence that the defendant had previously engaged in sexual conduct with children

> was relevant to show [his] motive, intent, knowledge, plan and preparation, and lack of mistake when he touched A.B. The evidence was substantial, and it was not more prejudicial than it was probative. Because the evidence is admissible under *Rule 404(b)*, we do not consider the admissibility of the evidence under *Rule 413*.

[5] Subsequent Offenses

United States v. Sioux, 362 F.3d 1241 (9th Cir. 2004) : The Court affirmed a conviction for sexual abuse, holding that evidence of a similar sexual assault subsequently committed by the defendant was properly admitted. Looking at the plain language of *Rule 413* and analogizing to the interpretation of "other" in *Rule 404(b)*, the Court reasoned that "another" in *Rule 413* imposed no temporal limit on the offenses that may be admitted under the Rule.

FOOTNOTES:
(n1)Footnote 1. *United States v. Mound, 149 F.3d 799 (8th Cir. 1998)* .

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PART TWO: THE RULES THEMSELVES
Article IV. Relevancy and its Limits
CHAPTER 413 RULE 413

2-413 Federal Rules of Evidence Manual [413.04]

[413.04] Legislative History

[1] Public Law 103-322

[Editor's Note: *Rule 413* is not a product of the usual procedure by which Federal Rules of Evidence are crafted. It was added to the Federal Rules of Evidence by Public Law 103-322, the Violent Crime Control and Law Enforcement Act of 1994. Public Law 103-322 was adopted September 13, 1994, and became effective July 9, 1995. The implementation procedure of the rule was set forth in section 320935 of Public Law 103-322 as follows:]

(b) Implementation. The amendments made by subsection (a) [adding Rules 413-415] shall become effective pursuant to subsection (d).

(c) Recommendations by Judicial Conference. Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) Congressional action.

(1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a) [adding Rules 413-415], then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a) [adding Rules 413-415], the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) [adding Rules 413-415] shall become effective 150 days after the date the

recommendations were due under subsection (c) unless otherwise provided by law.

(e) Application. The amendments made by subsection (a) [adding Rules 413-415] shall apply to proceedings commenced on or after the effective date of such amendments.

[2] Report of Judicial Conference of United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases

[Editor's Note: In accordance with subsection (c), the Judicial Conference submitted its report concerning the proposed rules on February 9, 1995; its recommendations differed from the proposed rules. Congress neither followed the Conference's recommendations nor otherwise altered the proposed rules. As a result, according to subsection (d), the proposed rules became effective on July 9, 1995.

What follows is the Judicial Conference Report on Rules 413-15, including the Advisory Committee's alternative proposal to amend the existing Rules to accommodate Congressional concerns. Selected statements by members of Congress are included after the Judicial Conference Report.]

INTRODUCTION

This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit "a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation."

Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below.

If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends incorporation of the provisions of new Rules 413-415 as amendments to *Rules 404* and *405 of the Federal Rules of Evidence*. The amendments would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities.

BACKGROUND

Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act (codified at *28 U.S.C. §§ 2071-2077*). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough.

The new rules would apply to both civil and criminal cases. Accordingly, the Judicial Conference's Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994. At the same time and in preparation for its consideration of the new rules, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415. The notice was sent to

the courts, including all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations.

DISCUSSION

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence *Rule 404(b)* now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory -- that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the *Rule 403* balancing test. The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence "is admissible." In contrast, the new *Rule 412*, passed as part of the same legislation, provided that certain evidence "is admissible if it is otherwise admissible under these Rules." *Rule 412(b)(2)*. If the critics are right, *Rules 413-415* free the prosecution from rules that apply to the defendant -- including the hearsay rule and *Rule 403*. If so, serious constitutional questions would arise.

The Advisory Committees on Criminal and Civil Rules unanimously, except for representatives of the Department of Justice, also opposed the new rules. Those committees also concluded that the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs. After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.

It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.

For these reasons, the Standing Committee recommended that Congress reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415.

However, if Congress will not reconsider its decision on the policy questions, the Standing Committee recommended that Congress consider an alternative draft recommended by the Advisory Committee on Evidence Rules. That

Committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 yet still effectuate Congressional intent. In particular, the proposed amendments:

> (1) expressly apply the other rules of evidence to evidence offered under the new rules;
>
> (2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;
>
> (3) expressly enumerate the factors to be weighed by a court in making its *Rule 403* determination;
>
> (4) render the notice provisions consistent with the provisions in existing *Rule 404* regarding criminal cases;
>
> (5) eliminate the special notice provisions of *Rules 413-415* in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and
>
> (6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the attached amendments to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes, which explain them in detail.

Attachment to Judicial Conference Report Advisory Committee's Proposal to Amend Rule 404 In Lieu of Adoption of Rules 413-15

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

[New matter is underlined.]

(a)

...

> (4) Character in sexual misconduct cases. Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.
>
> (A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision,

(i) "sexual assault" means conduct -- or an attempt or conspiracy to engage in conduct -- of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or ratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim -- regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct -- or an attempt or conspiracy to engage in conduct -- of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person -- regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a) ... .

Advisory Committee Note to Proposed Amendment to Rule 404

The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence. These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision (a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII, and the expert testimony rules in Article VII. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision 'if otherwise admissible under these rules' is needed to clarify the relationship between subdivision (a)(4) and other evidentiary provisions.

The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

In order to minimize the need for extensive and time-consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor -- "other relevant similarities or differences" -- is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself -- "the danger of unfair prejudice, confusion of the issues, ... misleading the jury, ... undue delay, waste of time, or needless presentation of cumulative evidence." In addition, the Advisory Committee Note to Rule 403 reminds judges that "The availability of other means of proof may also be an appropriate factor."

The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

The definition section was simplified with no change in meaning. The reference to "the law of a state" was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a)(4) must relate to a form of conduct proscribed by either chapter 109A or *110 of title 18, United States Code*, regardless of whether the actor was subject to federal jurisdiction.

Advisory Committee's Proposal to Amend Rule 405 In Lieu of Adoption of Rules 413-15

Rule 405. Methods of Proving Character [New matter is underlined.]

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion except as provided in subdivision (c) of this rule. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

...

(c) Proof in sexual misconduct cases. In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Advisory Committee Note to Proposed Amendment to Rule 405

The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponent's proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.

[3] Statements on the Floor of Congress Concerning Rules 413-415

Statement of Senator Dole:

... [T]oo often, crucial evidentiary information is thrown out at trial because of technical evidentiary rulings. This amendment is designed to clarify the law and make clear what evidence is admissible, and what evidence is not admissible, in sex crime cases.

The amendment would create a new *rule 413 of the Federal Rules of Evidence*. This new rule would provide that in a criminal case in which the defendant is accused of assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

... .

... I think if somebody is a repeat offender, if you brought in eight or nine women, for example,... and he had one offense after another, it would be probative. If it had not happened for 10 years, it probably would not have any value.

We also provide protection for the defendant because we require the Government to disclose the evidence to the defendant, including a statement of witnesses or a summary of the substance of any testimony expected to be offered at least 15 days before the scheduled date or trial, or at such later time as the court may allow for good cause.

... [I]f we are really going to get tough, and if we are really going to try to make certain that justice is provided for the victim as well as the defendant, of course, then I think we ought to look seriously at this.

113 Cong. Rec. S15072-3.

Statement of Senator Biden:

... [W]hat the Republican leader is doing is changing 404(b) of the Federal Rules of Criminal Procedure [*sic*] ... . Right

now the rule in a courtroom in a Federal court is you go in and if you wish to introduce evidence of a similar crime ... you can only do it under very limited circumstances ... as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. These are the only circumstances in which you can offer this as evidence ... . There is a reason for that. These rules of relevancy ... it took essentially 800 years to develop the rules of evidence under our English jurisprudence system ... . We found out from 800 years of experience that [evidence of prior crimes] tends to blind people [from] looking at the real facts before them and making an independent judgment, at this time, at this circumstance, at this situation, that this defendant did that thing.

113 Cong. Rec. S15072.

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2-413 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 413, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases	**Rule 413. Similar Crimes in Sexual-Assault Cases**
(a) In a criminal case in	**(a) Permitted Uses.** In

which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be consider

	sidered for its bearing on any matter to which it is relevant.		ed on any matter to which it is relevant.
(b)	In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evid	**(b)**	**Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defend

ence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at

ant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

	such later time as the court may allow for good cause.	
(c)	This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c) Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d)	For purposes of	**(d) Definition of**

this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved --	**"Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:
(1) any conduct	**(1)** any conduct

	pro-scribed by chapter 109A of title 18, United States Code;		pro-hibited by 18 U.S.C. chapter 109A;
(2)	con-tact, without con-sent, between any part of the de-fendant's body or an ob-ject and the gen-itals or anus of an-oth-er per-son;	**(2)**	con-tact, without con-sent, between any part of the de-fendant's body -- or an ob-ject -- and an-oth-er per-son's gen-itals or anus;

(3)	contact, without consent, between the genitals or anus of the defendant and any part of another person's body;	**(3)**	contact, without consent, between the defendant's genitals or anus and any part of another person's body;
(4)	deriving sexual pleasure or gratification from the infliction of death, bod-	**(4)**	deriving sexual pleasure or gratification from inflicting death, bodily in-

	ily in- jury, or phys ical pain on an- oth- er per- son; or		jury, or phys ical pain on an- oth- er per- son; or
(5)	an at- tem pt or con- spir- acy to en- gage in con- duct de- scrib ed in para grap hs (1)-(4).	**(5)**	an at- tem pt or con- spir- acy to en- gage in con- duct de- scrib ed in sub- para grap hs (1)-(4).

Committee Note

The language of Rule 413 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[Go To Main]

[.1] Balancing Factors [Go To Main]

United States v. Hawpetoss, 478 F.3d 820 (7th Cir. 2007) : Affirming a conviction for sexual assaults on three minor children, the Court found no abuse of discretion in the admission of evidence regarding uncharged instances of molestation of two other children. The defendant argued that not all of the five factors listed by the Ninth Circuit in *United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001)* -- similarity of the conduct, proximity in time, frequency of prior acts, presence or lack of intervening circumstances, and necessity for the evidence beyond the evidence already offered at trial -- had been satisfied. The Court took a more "flexible" approach because it was "hesitant to cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test," although it considered the factors identified in *LeMay* "a helpful guide in making the discretionary determination on admissibility." Here, the Judge had given "careful, measured consideration" to the disputed evidence, determining it to be both relevant and non-violative of Rule 403.

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010) : The Court affirmed a conviction for interstate transportation of a minor for unlawful sexual relations, finding no abuse of discretion in the admission of evidence that the defendant had previously been convicted for oral sex with a 14-year-old boy. The offense charged encompassed "sexual assault," the prior act was highly probative because of the similarity with the "grooming" and sexual assault charged in this case, and any prejudicial effect was minimized by clear jury instructions.

[1.1] Notice Requirement [Go To Main]

United States v. Guidry, 456 F.3d 493 (5th Cir. 2006) : A police officer was convicted for violating civil rights by sexually assaulting several women. Affirming, the Court found no abuse of discretion when the Trial Judge excused the15-day notice requirement of *Rule 413(b)* in admitting testimony regarding an uncharged sexual assault committed

by the defendant. The government did not learn of the other offense until the trial had already started; it alerted defense counsel immediately; and it provided the content of the testimony in time for defense counsel to have at least three days to prepare before a hearing on admitting the testimony. Furthermore, the government was ordered to procure records and make available individuals that could shed light on the testimony.

United States v. Benais, 460 F.3d 1059 (8th Cir. 2006) : Affirming a conviction for sexual abuse of a minor, the Court held that the notice requirement of *Rule 413* was satisfied when the government disclosed the contents of the witness' testimony more than 15 days before trial, even though it did not specifically declare the intention to rely upon *Rule 413* for admissibility.

[2] Offense of Sexual Assault [Go To Main]

United States v. Guidry, 456 F.3d 493 (5th Cir. 2006) : A police officer was convicted for violating civil rights by sexually assaulting several women. Affirming, the Court found no error in the admission under *Rule 413* of evidence that the defendant sexually assaulted another woman. It held that the plain language of the Rule allowed evidence of other offenses even if they did not result in conviction.

United States v. Rogers, 587 F.3d 816 (7th Cir. 2009) : In a prosecution for attempting to entice a minor to engage in sexual activity and for using the Internet to attempt to transfer obscene material to a minor, the Court reversed on interlocutory appeal an order excluding evidence of the defendant's prior conviction for solicitation of a minor and of his prior conduct involving sexually explicit Internet conversations with a 14-year-old girl. The Court disagreed with the Trial Judge's interpretation of "without consent" in Rule 413 and held that "[m]inors lack the capacity to consent, and so sexual contact with a minor is always 'without consent.' " On remand, the Judge should reconsider whether the evidence should be excluded under Rule 403.

United States v. Blazek, 431 F.3d 1104 (8th Cir. 2005) : Affirming a conviction for attempted enticement of a minor for sex and for interstate travel to engage in prohibited sex acts with a minor, the Court found no error in the admission of evidence that the defendant had previously been convicted of abusive sexual conduct for fondling his 11-year-old nephew. Although the charged crimes are not defined by 18 U.S.C. ch. 109A, the second count involves "conduct proscribed by" that chapter, so the defendant was charged with an "offense of sexual assault" as defined by *Rule 413(d)* and the evidence was made admissible under the Rule.

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010) : The Court affirmed a conviction for interstate transportation of a minor for unlawful sexual relations, finding no abuse of discretion in the admission of evidence that the defendant had previously been convicted for oral sex with a 14-year-old boy. The offense charged encompassed "sexual assault," the prior act was highly probative because of the similarity with the "grooming" and sexual assault charged in this case, and any prejudicial effect was minimized by clear jury instructions.

[2.1] Propensity Evidence [Go To Main]

United States v. Tail, 459 F.3d 854 (8th Cir. 2006) : Affirming convictions for sexual abuse, the Court found no abuse of discretion when evidence of the defendant's prior state court conviction for second-degree rape was admitted. The prior conviction was probative "because it involved the same victim and an act that occurred close in time and under circumstances similar to the crime charged in [the case at issue]." Although the prior conviction was harmful to the defendant's case, because it suggested propensity, that did not constitute unfair prejudice because "the policy articulated in *Rule 413*, unique to cases involving sexual assaults, renders the general prohibition on propensity evidence in *Rule 404(b)* inapposite." Thus, "to require the exclusion of this evidence based on the asserted inflammatory nature of sexual

offenses would be at odds with the strong legislative judgment in favor of admitting such evidence that Congress expressed in adopting *Rule 413*."

United States v. Benally, 500 F.3d 1085 (10th Cir. 2007) : Affirming a conviction for aggravated sexual abuse of a minor under the age of 16 while in Indian country, the Court found no abuse of discretion in admitting as propensity evidence the testimony of four witnesses regarding the defendant's prior acts of sexual assault. The incidents all involved young females, the prior victims were of similar age to the victim of the charged offense, and many of the incidents involved either the use of force or a weapon as did the charged offense. The significant time lapse between three of the prior acts and the charged offense did not negate the probative value of the acts. The Court also observed that the jury was permitted to consider that all of the prior acts occurred while the defendant was drinking, and that the defendant claimed to have changed his drinking habits by the time of the charged offense.

[3] Relationship to Rule 403 [Go To Main]

United States v. Dillon, 532 F.3d 379 (5th Cir. 2008) : The Court affirmed the conviction of a former assistant city attorney for depriving two women of their right to bodily integrity under color of law, after he sexually assaulted them. It found no abuse of discretion in the admission of evidence regarding two uncharged sexual assaults allegedly committed by the defendant against two other women, although in one case there was no force or threat of force and in the other there was no act under color of law. The latter assaults were close in time to the charged offenses and probative of the defendant's intent to engage in sexual contact without the woman's consent. That probative value was not substantially outweighed by any risk of unfairly prejudicial effect.

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant was convicted for sexual abuse of his sister-in-law and his niece. Affirming, the Court found no abuse of discretion in the admission of evidence regarding prior sexual assaults against two adult victims. Although the fact the niece was only seven years old at the time of the alleged assault made the evidence less probative as to propensity on that count, the fact that other victims' testimony was markedly similar to the claims of the victims in this case enhanced its probative value. As all four victims were part of the defendant's extended family and all four were allegedly assaulted on a bed after he arrived in an intoxicated state, there was no error in the determination that the probative value of the testimony outweighed the danger of unfair prejudice to the defendant.

United States v. Rogers, 587 F.3d 816 (7th Cir. 2009) : In a prosecution for attempting to entice a minor to engage in sexual activity and for using the Internet to attempt to transfer obscene material to a minor, the Court reversed on interlocutory appeal an order excluding evidence of the defendant's prior conviction for solicitation of a minor and of his prior conduct involving sexually explicit Internet conversations with a 14-year-old girl. The prior conduct was probative in three ways: First, it made it more likely that by chatting with the person he thought was a 13-year-old girl he intended to commit the charged crimes. Second, the evidence tended to prove motive. Third, the evidence demonstrated propensity. The Court observed that "Rule 413 affects the Rule 403 analysis of past sexual offenses introduced in sexual assault cases" because "Rule 404(b) identifies the propensity inference as improper in all circumstances, and Rule 413 makes an exception to that rule." Thus, "[b]ecause Rule 413 identifies this propensity inference as proper, the chance that the jury will rely on that inference can no longer be labeled as 'unfair' for purposes of the Rule 403 analysis." The Court cautioned, however, that "evidence of prior sexual offenses may still pose significant dangers against which the district court must diligently guard," because "[e]ven if the evidence does not create unfair prejudice solely because it rests on propensity; it may still risk a decision on the basis of something like passion or bias -- that is, an improper basis." The Court concluded that the Trial Judge did not acknowledge the probative value of the propensity inference or explain what about the defendant's prior conduct made it more prejudicial than probative, and remanded for reconsideration of the Rule 403 ruling.

United States v. Rodriguez, 581 F.3d 775 (8th Cir. 2009) : The Court affirmed a conviction for kidnapping resulting in death, finding no abuse of discretion in the admission of evidence regarding the defendant's two prior sexual assault convictions that involved conduct similar to the charged offense -- approaching a young woman by herself, forcing her into a vehicle under threat of violence, and sexually assaulting her. In *United States v. Benais, 460 F.3d 1059 (8th Cir. 2006)* , the Court, affirming a conviction for sexual abuse of a minor, found no abuse of discretion in the admission of evidence that the defendant raped another girl the same evening. The other assault was probative because it was very close in time and occurred under circumstances similar to the charged crime, "and the only prejudice was that prejudice made admissible by *Rule 413*," so there was no unfair prejudice. In *United States v. Medicine Horn, 447 F.3d 620 (8th Cir. 2006)* , the Court affirmed a conviction for aggravated sexual abuse of a minor, finding no error in the admission of evidence of four other incidents in which the defendant allegedly assaulted a teenage girl after a party at which the victim had consumed alcohol, the defendant removed the victim's pants, and the defendant had used force and stopped the victim from crying out. There was no abuse of discretion in the Trial Judge's determination that in each instance the probative value of the evidence was not substantially exceeded by its unfair prejudicial effect.

[4.1] Relationship to Rule 414 [Go To Main]

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant, convicted for sexual abuse of his sister-in-law and his niece, argued that evidence of prior sexual assaults against adult victims was inadmissible to prove the child molestation charge, on the ground that *Rule 414* is the exclusive rule governing child molestation cases and it speaks only of evidence of prior sexual offenses against children. Affirming, the Court noted that both *Rule 413* and *Rule 414* specifically state that "[t] is rule shall not be construed to limit the admission or consideration of evidence under any other rule."

[4.2] Relevance of the Evidence [Go To Main]

United States v. Hitt, 473 F.3d 146 (5th Cir. 2006) : Affirming a Mann Act conviction arising from sexual abuse of a teenage boy, the Court found no abuse of discretion in the admission of evidence that a defendant had sexually abused another victim. Although a Mann Act violation does not require proof that a sexual assault occurred, evidence that the other abuse occurred in the same way as the victim in this case charged was relevant to whether sexual activity occurred between the defendants and the victim, which was relevant to whether the defendants had the requisite intent to engage in illicit sexual activities across state lines.

[4.3] Remote Offenses [Go To Main]

United States v. Horn, 523 F.3d 882 (8th Cir. 2008) : Affirming convictions for abusive sexual contact, the Court found no abuse of discretion when testimony by the mother of one of the victims that the defendant raped her more than 11 years earlier was admitted. Congress expressly rejected any time limit in Rule 413 and the Rule reflects a strong legislative judgment that prior sexual offenses ordinarily should be admissible to prove the defendant's propensity to commit the crime charged. Nor was the probative value of the evidence substantially outweighed by the prejudicial effect. The testimony was "prejudicial" for the same reason it was probative: "[I]t tends to prove his propensity to commit sexual assaults on vulnerable female members of his family when presented with an opportunity to do so undetected."

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414.04 Legislative History

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414.01 Official Text

Rule 414. Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraph (1)--(5).

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414.02 Editorial Explanatory Comment

[1] Background of the Rule

This Rule is intended to provide for more liberal admissibility in criminal cases of child molestation where the defendant has committed a prior act or acts of child molestation. Congress passed this Rule, together with *Rules 413* and *415* (which are substantively identical but applicable to different types of cases), as part of a general Crime Bill package, and bypassed the ordinary rulemaking process in doing so. As a compromise, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rule embodied bad policy, and recommended its reconsideration; Congress refused to do so.

As an alternative, the Advisory Committee drafted amendments to Rules 404 and 405, that would "both correct ambiguities and possible constitutional infirmities identified in new *Evidence Rules 413, 414, and 415*, and yet still effectuate Congressional intent." n1 This proposal is discussed in the Editorial Explanatory Comment to *Rule 413*, *§ 413.02[1]*, and is completely set forth in the Legislative History section to that Rule, § 413.04[2]. Congress did not adopt any of these proposed changes, and as a result, *Rules 413-415*, as originally enacted by Congress, and set forth above, became effective on July 9, 1995.

[2] Scope of the Rule

Rule 414 is essentially identical to *Rule 413*, with the exception that the term "child molestation" is substituted for the term "sexual assault." As such, the questions of scope considered under *Rule 413* are equally applicable to *Rule 414*, and cases construing either Rule are applicable to both. For a full discussion of the scope of these Rules, see the Editorial Explanatory Comment to *Rule 413*, *§§ 413.02[2]-[5]*. To summarize:

1. *Rule 414* does not apply unless the defendant is charged with child molestation and the prior act offered is one of child molestation.

2. *Rule 414* provides an exception to *Rule 404(b)*. The prior act can be admitted explicitly to prove the propensity of the

defendant to commit an act of child molestation.

3. The Rule is unclear on whether the Judge can use *Rule 403* to exclude a prior act of child molestation on the ground that its probative value is substantially outweighed by its prejudicial effect. The better reading of the Rule, receiving support from statements by its sponsors in Congress, indicates that *Rule 403* remains applicable, and the Courts have so held. n2

4. Even if *Rule 403* is applicable, the balancing test is different from that traditionally applied to uncharged misconduct evidence. The Trial Judge must consider, as part of the probative value of a prior act of child molestation, the fact that it tends to establish a propensity to commit similar acts of sexual misconduct. And in assessing prejudice, the Trial Judge cannot consider the risk that the jury may draw a propensity inference, because the jury is specifically permitted to draw such an inference under *Rule 414*. The Trial Judge should consider, however, whether the jury might convict the defendant simply because he did something bad before or because he is a bad person, without respect to any current propensity to sexually assault children. Exclusion is thus left for exceptional cases in which the circumstances of the uncharged misconduct are completely different from those surrounding the crime charged, and/or the uncharged misconduct occurred long ago and there has been no misconduct in the interim.

5. Evidence of uncharged child molestation is admissible if the prosecution provides enough evidence to support a finding, by a preponderance of the evidence, that the defendant committed the act.

6. The Rule contains a notice requirement.

FOOTNOTES:
(n1)Footnote 1. Judicial Conference Report, set forth in the legislative history to *Rule 413*, § 413.04[2].

(n2)Footnote 2. See, e.g., *United States v. Larson, 112 F.3d 600 (2d Cir. 1997)* ("We view *Rule 403* analysis in connection with evidence offered under *Rule 414* to be consistent with Congress's intent."). The Court in Larson upheld two evidentiary rulings by the Trial Court. One excluded evidence of child molestation occurring 21-23 years before trial. The other ruling admitted evidence of child molestation occurring 16-20 years before trial, where the events "closely paralleled the events complained of" by the victim in the instant trial. It is notable that the government in Larson agreed that *Rule 414* did not "eliminate the need for the court to conduct the analysis required under *Rule 403*."

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[1] Balancing Factors

United States v. Gabe, 237 F.3d 954 (8th Cir. 2000) : The defendant was charged with sexual abuse of his adopted daughter. The Court held that evidence of a 20-year old incident in which the defendant sexually abused another minor was properly admitted. The evidence was highly probative of the defendant's propensity: the victims were the same age; both were related to the defendant; and the manner of perpetrating the offenses was similar. The Court found that the evidence was not unfairly prejudicial under *Rule 403*: it "is prejudicial to Gabe for the same reason it is probative -- it tends to prove his propensity to molest young children in his family when presented with an opportunity to do so undetected." Finally, the Court rejected the argument that the evidence was inadmissible because of the 20-year lapse of time, noting that when *Rule 414* was enacted, "Congress expressly rejected imposing any time limit on prior sex offenses." In *United States v. Sumner, 204 F.3d 1182 (8th Cir. 2000)* , the Court found no abuse of discretion in admitting the defendant's prior acts of child molestation in a prosecution arising out of sexual abuse of a minor. The Trial Judge had conducted a *Rule 403* balancing analysis, and "the prior acts were relatively recent in time and were substantially similar to the charged assaults, while the prejudice was that which is presented by all propensity evidence in cases of child abuse."

United States v. Mann, 193 F.3d 1172 (10th Cir. 1999) : The Court affirmed a conviction for aggravated sexual abuse of a minor, finding no error in the admission of testimony concerning a prior act of sexual assault committed by the defendant on another child. The Court stated that "in the sexual assault context, *Rule 403* requires district courts to consider the following factors: (1) how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence." In this case, the child-victim's testimony provided enough information for a juror to believe by a preponderance of the evidence that the sexual assault occurred; the prior sexual assault was extremely similar to the acts with which the defendant was charged; there was a serious dispute over the allegations; and the government did not have access to any less prejudicial evidence.

[2] Constitutional Challenges

United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001) : Affirming convictions for child molestation arising from oral sex between the defendant and his cousins while the defendant was babysitting, the Court rejected due process and equal protection arguments against the admission of evidence of similar conduct with his nieces that occurred a decade earlier when the defendant was 12 years old. As to due process, the Court declared that as long as the protections of *Rule 403* "remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded." As to equal protection, the Court found that "*Rule 414* does not discriminate against any group of individuals on the basis of a suspect or quasi-suspect class," and any disproportionate impact on Native Americans, "if true, would arise simply because the federal government only has jurisdiction over crimes such as child molestation when they arise on Indian Reservations, military bases, or other federal enclaves." On the *Rule 403* question, the Court found no abuse of discretion in admitting the evidence.

United States v. Castillo, 140 F.3d 874 (10th Cir. 1998) : In a prosecution for sexual abuse of a minor, the Court found no violation of constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment in the admission of uncharged acts of child sex abuse. The defendant's due process claim was rejected because of the "existence of procedural protections in *Rule 402* and, in particular, *Rule 403*." The equal protection claim was rejected because child molesters are not a suspect class, and the decision to provide more liberal admissibility against child molesters had a rational basis, i.e., the particular need "for corroborating evidence in cases of sexual abuse of a child because of the highly secretive nature of these sex crimes and because often the only available proof is the child's testimony." Finally, the *Eighth Amendment* argument was rejected because *Rule 414* is simply an evidentiary rule, not a rule of punishment. The Court nonetheless remanded for a determination of whether the uncharged sexual misconduct was properly admitted under *Rule 403*.

[3] Foundation for Other Acts

United States v. Norris, 428 F.3d 907 (9th Cir. 2005) : In a prosecution for sexually abusing a child, the defendant argued that evidence of an uncharged act of child molestation was improperly admitted, because the only evidence of its occurrence was his own confession to police officers when he was arrested on the instant charge. Affirming, the Court rejected the argument that *Rule 414* incorporated the *corpus delicti* requirement applicable to convictions, i.e., that a conviction cannot stand solely on the confession of the accused. It declared that the Supreme Court's decision in *Huddleston v. United States,* n1 which held that the admissibility of other act evidence is governed by the conditional relevance standard of *Rule 104(b)*, applies to *Rules 413-415* as well as to *Rule 404(b)*.

[4] Relationship to Other Rules

[a] Rule 403

United States v. Larson, 112 F.3d 600 (2d Cir. 1997) : In the defendant's trial for interstate transportation of a minor with intent to engage in criminal sexual conduct, the Judge applied a *Rule 403* analysis to evidence offered under *Rule 414*, admitting evidence of similar acts of child molestation 16-20 years before trial and excluding evidence of acts 21-23 years previously. Affirming, the Court indicated that a *Rule 403* analysis in connection with evidence offered under *Rule 414* was consistent with Congress' intent. The Court also noted from the legislative history the presumption that evidence admissible under *Rules 413-415* is relevant and that its probative value is not outweighed by any risk of prejudice, as well as the congressional intent that the temporal scope of the Rules be broad.

United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001) : Affirming convictions for child molestation arising from oral sex between the defendant and his cousins while the defendant was babysitting, the Court found no abuse of discretion in admitting evidence of similar conduct with his nieces that occurred a decade earlier when the defendant was 12 years old. The evidence was highly relevant because the prior acts of sexual misconduct were very similar to the charged crimes, and the evidence was also relevant to bolster the credibility of the witnesses; while this bolstering depended on the propensity inference (that because the defendant did it before it was more likely that the witnesses were being truthful in saying he did it again), this was the very sort of inference that Congress permitted under *Rule 414*. Though the evidence of prior sexual misconduct was prejudicial, the Court concluded that the Trial Judge "struck a careful balance between LeMay's rights and the clear intent of Congress that evidence of prior similar acts be admitted in child molestation prosecutions." In *United States v. Withorn, 204 F.3d 790 (8th Cir. 2000)* , a prosecution for forcible rape of a 12-year-old, the Court found no abuse of discretion when evidence was admitted that the defendant had forcibly raped his cousin when she was 12 years old. The Court noted the similarities between the incidents: the victims were approximately the same age, both assaults involved force, both occurred after the defendant had isolated the victim from others, in both the victims were threatened not to inform anyone what had occurred, and in each case the defendant had claimed that the victim had consented to the sexual activity. On retrial of the defendant in *United States v. LeCompte* n2 for abusive sexual contact with a minor, the government gave timely notice of an intent to offer evidence of prior incidents in which the defendant had committed sex offenses in a similar manner against another minor. The Trial Judge granted an *in limine* motion to exclude the evidence under *Rule 403*, on the grounds that there were some differences between the prior incidents and the charged offenses, the prior and charged acts were separated by eight years, and the evidence was "obviously highly prejudicial." On interlocutory appeal, the Court reversed, finding that "[i]n light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible, we think the District Court erred in its assessment that the probative value of [the] testimony was substantially outweighed by the danger of unfair prejudice." The prior and charged acts were substantially similar, and the time lapse was less significant than might appear, given that the defendant was imprisoned for a portion of the intervening time. As to excluding the evidence because of the "unique stigma" of child sexual abuse, "it is precisely such holdings that Congress intended to overrule." In *United States v. Eagle*, n3 the Court affirmed a conviction for aggravated sexual abuse of a minor, finding no abuse of discretion in the admission of the defendant's prior conviction for the federal crime of carnal knowledge, which involves sexual abuse of a minor. The Trial Judge properly balanced the probative value and prejudicial effect of the prior crime under *Rule 403*. The defendant's claim that the conviction should not have been admitted because it was ten years old was "seriously weakened by the fact that he had spent six of those years incarcerated for that crime."

United States v. Charley, 189 F.3d 1251 (10th Cir. 1999) : The Court held that findings that invoked the stated general reasons for *Rule 414*'s enactment -- specifically, by allusion to the similarity between the defendant's prior crime and the present charges and to the fact there was little corroborating evidence -- were sufficient to satisfy the *Rule 403* balancing required for evidence offered under *Rule 414*. In *United States v. Meacham*, n4 the Court, affirming a conviction for transporting a minor for sexual activity, held that the Trial Judge properly admitted evidence of the defendant's prior sexual misconduct with children. The evidence was admitted under both *Rule 404(b)* and *Rule 414* because of some uncertainty about the effective date of the latter Rule. The Court indicated that a *Rule 403* balancing is required under both Rules.

[b] Relationship to Other Rules -- Rule 404(b)

United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) : Affirming a conviction for transporting a minor for sexual activity, the Court held that the Trial Judge properly admitted evidence that the defendant had committed a previous sexual act on the victim several earlier, as well as evidence that he molested his two step-daughters when they were young girls more than 30 years earlier. The evidence was admitted under both *Rule 404(b)* and *Rule 414* because of some uncertainty about the effective date of the latter Rule. The Court indicated that a *Rule 403* balancing is required

under both Rules and that in this case the evidence was properly admitted on the issue of intent and to show plan and preparation. It observed that the Trial Judge instructed the jury not to use the evidence for propensity to molest, which would be allowed under *Rule 414*.

[5] Remote Acts

United States v. Drewry, 365 F.3d 957 (10th Cir. 2004) : Affirming the defendant's convictions for physical and sexual abuse of four children, the Court found no abuse of discretion in the admission of testimony regarding acts of child molestation that occurred 25 years earlier. The Court reasoned that "[s]ufficient factual similarity can rehabilitate evidence of prior uncharged offenses that might otherwise be inadmissible due to staleness."

FOOTNOTES:

(n1)Footnote 1. See the Editorial Explanatory Comment, *§ 404.02[18]*.

(n2)Footnote 2. *United States v. LeCompte, 131 F.3d 767 (8th Cir. 1997)* .

(n3)Footnote 3. *United States v. Eagle, 137 F.3d 1011 (8th Cir. 1998)* .

(n4)Footnote 4. *United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997)* .

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414.04 Legislative History

[Editor's Note: *Rule 414* is not a product of the usual procedure by which Federal Rules of Evidence are crafted adopted. It was added to the Federal Rules of Evidence by Public Law 103-322, the Violent Crime Control and Law Enforcement Act of 1994. Public Law 103-322 was adopted September 13, 1994, and became effective July 9, 1995. For full discussion of the implementation of this Rule, as well as Congressional discussion and the Report of the Judicial Conference of the United States on responding to this Rule, see the Legislative History of *Rule 413*, § 413.04.]

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2-414 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 414, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases		**Rule 414. Similar Crimes in Child-Molestation Cases**	
(a)	In a criminal case in	**(a)**	**Permitted Uses.** In

which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be

a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be consider

	considered for its bearing on any matter to which it is relevant.		considered on any matter to which it is relevant.
(b)	In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the	**(b)**	**Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the de-

evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial

fendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

			or at such later time as the court may allow for good cause.
(c)	This rule shall not be construed to limit the admission or consideration of evidence under any other rule.	**(c)**	**Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
(d)	For purpose	**(d)**	**Definition**

s of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of

of "Child" and "Child Molestation." In this rule and Rule 415:

title 18, United States Code) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(1) "child" means a person below the age of 14; and

(2) any conduct proscribed by

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(4) contact between the genitals or anus of the de-

(B) any conduct prohibited by 18 U.S.C. chapter

fendant and any part of the body of a child;

110;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(C) contact between any part of the defendant's body -- or an object -- and a child's genitals or anus;

(6) an attempt or conspir-

(D) contact between the de-

acy to engage in conduct described in paragraphs (1)-(5).

fendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or con-

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Committee Note

The language of Rule 414 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 414.03 Annotated Cases

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[1] Balancing Factors [Go To Main]

United States v. Kelly, 510 F.3d 433 (4th Cir. 2007) : Affirming a conviction for traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a 12-year-old child, the Court found no abuse of discretion in the admission of the defendant's prior conviction for attempted rape of a 12-year-old child based on conduct that occurred 22 years before the acts charged in the instant case. The Court found that the similarity between the two offenses was "striking," so the fact that the conviction was 22 years old did not render it inadmissible. While the prior conviction was undoubtedly prejudicial, it was not unfairly so, because "it was prejudicial for the same reason it is probative -- it tends to prove the defendant's propensity to molest young children." The Court added that the government did not seek to elicit inflammatory testimony about the prior conviction, but instead presented only the official conviction record.

United States v. Hawpetoss, 478 F.3d 820 (7th Cir. 2007) : Affirming a conviction for sexual assaults on three minor children, the Court found no abuse of discretion in the admission of evidence regarding uncharged instances of molestation of two other children. The defendant argued that not all of the five factors listed by the Ninth Circuit in *United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001)* -- similarity of the conduct, proximity in time, frequency of prior acts, presence or lack of intervening circumstances, and necessity for the evidence beyond the evidence already offered at trial -- had been satisfied. The Court took a more "flexible" approach because it was "hesitant to cabin artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test," although it considered the factors identified in *LeMay* "a helpful guide in making the discretionary determination on admissibility." Here, the Judge had given "careful, measured consideration" to the disputed evidence, determining it to be both relevant and non-violative of Rule 403.

United States v. Bentley, 561 F.3d 803 (8th Cir. 2009) : The Court affirmed convictions for sexual exploitation of children and possession of child pornography, finding no abuse of discretion in the admission of evidence regarding the defendant's abuse of other children. The similarities between the incidents tended to show his propensity to molest young girls who were actual or virtual members of his family or living in his home when presented with an opportunity

to do so undetected, and those similarities outweighed the differences in the nature of the offenses -- the defendant had penetrated the other victims and had not taken photographs of them. The Judge had also taken precautions to limit the prejudicial nature of the evidence, including repeated instructions about its permissible uses, explanations of the presumption of innocence and the applicable standard of proof, and cautions not to convict simply because the defendant may have committed other crimes.

[4] Relationship to Other Rules [Go To Main]

[a] Rule 403

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant was convicted for sexual abuse of his sister-in-law and his niece. Affirming, the Court found no abuse of discretion in the admission of evidence regarding prior sexual assaults against two adult victims. Although the fact the niece was only seven years old at the time of the alleged assault made the evidence less probative as to propensity on that count, the fact that other victims' testimony was markedly similar to the claims of the victims in this case enhanced its probative value. As all four victims were part of the defendant's extended family and all four were allegedly assaulted on a bed after he arrived in an intoxicated state, there was no error in the determination that the probative value of the testimony outweighed the danger of unfair prejudice to the defendant.

United States v. Summage, 575 F.3d 864 (8th Cir. 2009) : The Court affirmed child pornography convictions, finding no abuse of discretion in admitting evidence that the defendant had photographed himself molesting his then-girlfriend's seven-year-old daughter in 1997. Although the prior conviction was overturned on appeal, the conduct was similar enough to the charged conduct (photographing abuse of an infant and toddler) to be admitted. The Court rejected the defendant's argument that he should have been permitted to offer evidence that his conviction had been overturned, noting that the government introduced the victim's testimony and did not rely on the fact that there had been a conviction. "In the absence of evidence of the conviction, evidence of the subsequent reversal would have confused the jury."

[c] Relationship to Other Rules -- Rule 413

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant, convicted for sexual abuse of his sister-in-law and his niece, argued that evidence of prior sexual assaults against adult victims was inadmissible to prove the child molestation charge, on the ground that *Rule 414* is the exclusive rule governing child molestation cases and it speaks only of evidence of prior sexual offenses against children. Affirming, the Court noted that both *Rule 413* and *Rule 414* specifically state that "[t] is rule shall not be construed to limit the admission or consideration of evidence under any other rule."

[5] Remote Acts [Go To Main]

United States v. Kelly, 510 F.3d 433 (4th Cir. 2007) : Affirming a conviction for traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a 12-year-old child, the Court found no abuse of discretion in the admission of the defendant's prior conviction for attempted rape of a 12-year-old child based on conduct that occurred 22 years before the acts charged in the instant case. The Court found that the similarity between the two offenses was "striking," so the fact that the conviction was 22 years old did not render it inadmissible. While the prior conviction was undoubtedly prejudicial, it was not unfairly so, because "it was prejudicial for the same reason it is probative -- it tends to prove the defendant's propensity to molest young children." The Court added that the government did not seek to elicit inflammatory testimony about the prior conviction, but instead presented only the official conviction record.

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§ 415.syn Synopsis to Chapter 415: RULE 415

415.01 Official Text

415.02 Editorial Explanatory Comment

[1] Background of the Rule

[2] Scope of the Rule

415.03 Annotated Cases

[1] Clear Record Required

[2] Notice

[3] Offense of Sexual Assault

[4] Relationship to Rule 403

415.04 Legislative History

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415.01 Official Text

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

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415.02 Editorial Explanatory Comment

[1] Background of the Rule

This Rule is intended to provide for more liberal admissibility in civil cases in which the plaintiff is alleging child molestation or sexual assault, and the defendant has committed a prior act or acts of child molestation or sexual assault. Congress passed this Rule, together with *Rules 413 and 414* (which are substantively identical but applicable to different types of cases), as part of a general Crime Bill package, and bypassed the ordinary rulemaking process in doing so. As a compromise, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rule embodied bad policy, and recommended its reconsideration; Congress refused to do so.

As an alternative, the Advisory Committee drafted amendments to Rules 404 and 405, that would "both correct ambiguities and possible constitutional infirmities identified in new *Evidence Rules 413, 414, and 415*, and yet still effectuate Congressional intent." n1 This proposal is discussed in the Editorial Explanatory Comment to *Rule 413*, *§ 413.02[1]*, and is completely set forth in the Legislative History section to that Rule, § 413.04[2]. Congress did not adopt any of these proposed changes, and as a result, *Rules 413-415*, as originally enacted by Congress, and set forth above, became effective on July 9, 1995.

[2] Scope of the Rule

Rule 415 simply applies the admissibility principle of *Rules 413 and 414* to civil cases involving sexual assault or child molestation. As such, the questions of scope considered under Rules 413 and 414 are equally applicable to *Rule 415*. To summarize:

1. *Rule 415* does not apply unless relief is predicated on a party's commission of sexual assault or child molestation. n2 It does not apply to sexual discrimination or sexual harassment that does not involve sexual assault, as that term is defined in *Rule 413*. Moreover, the only bad acts admitted under the Rule are those involving sexual assault or child molestation (as defined in *Rules 413 and 414*). Other bad acts are not covered by the Rule, even if they would be probative to prove a claim of sexual assault or child molestation.

2. *Rule 415* (by way of incorporating *Rules 413 and 414*) provides an exception to the limitation on character evidence set forth in *Rule 404(b)*. A prior act of sexual assault or child molestation can be admitted explicitly to prove the propensity of the party to commit the act alleged by the offering party.

3. The Rule is unclear on whether the Judge can use *Rule 403* to exclude a prior act of child molestation on the ground that its probative value is substantially outweighed by its prejudicial effect. The better reading of the Rule, receiving support from statements by its sponsors in Congress, indicates that *Rule 403* remains applicable to *Rules 413-15*, and the Courts have so held. n3

4. Even if *Rule 403* is applicable, the balancing test is different from that traditionally applied to uncharged misconduct evidence. The Trial Judge must consider, as part of the probative value of a prior act of sexual assault or child molestation, the fact that it tends to establish a propensity to commit similar acts of sexual misconduct. And in assessing prejudice, the Trial Judge cannot consider the risk that the jury may draw a propensity inference, because the jury is specifically permitted to draw such an inference under *Rule 415*. The Trial Judge should consider, however, whether the jury might hold the defendant liable simply because he did something bad before or because he is a bad person, without respect to any current propensity to sexually assault children. Exclusion is thus left for exceptional cases in which the circumstances of the uncharged misconduct are completely different from those surrounding the crime charged, and/or the uncharged misconduct occurred long ago and there has been no misconduct in the interim.

5. Evidence of uncharged child molestation or sexual assault is admissible if the proponent provides enough evidence to support a finding, by a preponderance of the evidence, that the defendant committed the act.

6. The Rule contains a notice requirement. The notice requirement apparently supplants the usual timetable for disclosure provided by the Federal Rules of Civil Procedure. The Advisory Committee suggested that the notice provision be deleted because it "did not believe that Congress intended to alter the usual timetable" provided by the Civil Rules; but Congress rejected all suggestions for change to the Rule. n4

See the Editorial Explanatory Comment to *Rule 413*, *§ 413.02*, for further discussion.

FOOTNOTES:

(n1)Footnote 1. Judicial Conference Report, set forth in the legislative history to *Rule 413*, § 413.04[2].

(n2)Footnote 2. Professor Aiken notes, however, that the definition of sexual assault in *Rule 413* is broad enough to cover a good number of sexual harassment claims. She contends that *Rule 415* will reach more sexual harassment cases than Congress might have thought about or intended. See Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule, 1997 Wisconsin L. Rev. 1221, 1231*:

> The Code's definition of sexual assault ... greatly enlarges the number of claims in which sexual character evidence could be offered because the rule applies to more cases than just damage suits over criminal acts of sexual assault. Typical tort actions arising from sexual misconduct include claims of assault, battery, intentional infliction of emotional distress, false imprisonment, seduction, sexual harassment, transmission of sexually transmitted disease, negligent entrustment and negligent supervision. Sexual harassment suits often include allegations of unwanted sexual touching ... thus invoking the possibility of admission of other similar acts against harassers and their employers. Because *Rule 415* will apply in sexual harassment cases in which there has been physical contact, it is likely to have a greater impact on the admission of evidence in federal courts than its companion rules 413 and 414. ... The application of *Rule 415* to sexual harassment cases is likely to come as a surprise both to proponents of the new rules and to affected parties. ... The rule's justification, though perhaps politically appealing when describing child molesters, loses much of its impact when describing a fanny-pinching

sexual harasser in the workplace.

(n3)Footnote 3. See, e.g., *Johnson v. Elk Lake School Dist., 283 F.3d 138 (3d Cir. 2002)* (in a case of alleged sexual abuse, the Trial Court did not abuse discretion in excluding a prior act of sexual misconduct under *Rule 403*; the equivocal nature of the prior act made its probative value low, as did its dissimilarity from the facts at issue; and the evidence might have unfairly prejudiced the defendant and confused the jury).

(n4)Footnote 4. See the discussion of the Legislative History of *Rules 413-415* in § 413.04.

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415.03 Annotated Cases

[Go To Supp]

[1] Clear Record Required

Blind-Doan v. Sanders, 291 F.3d 1079 (9th Cir. 2002) : An arrestee sued a police sergeant claiming that he sexually assaulted her in a jail cell. Overturning a judgment for the sergeant, the Court found a failure to make a clear record justifying exclusion of evidence regarding alleged improper sexual conduct by the sergeant toward a different detainee. The Court noted that the trial occurred before its decision in *Doe v. Glanzer, 232 F.3d 1258 (9th Cir. 2000)* (§ 415.03[4]), setting forth a Trial Judge's obligations under *Rule 415*. A dissenting Judge argued that "it is most unfortunate that the hortatory language of *Glanzer* has now become an absolute rule--so absolute that it is now used to reverse a trial court decision which was made before the opinion even issued."

[2] Notice

Johnson v. Elk Lake School Dist., 283 F.3d 138 (3d Cir. 2002) : In a § 1983 action arising from alleged sexual abuse of a high school student by a guidance counselor, the plaintiff offered testimony from a friend of the counselor that on one occasion the counselor picked her up and threw her over his shoulder, during which his hand went up her skirt and touched her in the crotch area. He soon let her down and the two of them proceeded to sit down and eat lunch together. As an alternative ground for excluding the testimony, the Trial Judge relied on the notice provision of *Rule 415(b)*, ruling that the plaintiff gave no special notification of her intent to introduce the evidence. While recognizing the desirability of special notice from a trial management standpoint, the Court found that the Rule's purpose of avoiding unfair surprise was adequately satisfied because defense counsel was present at the friend's deposition, where the incident had been inquired into by both parties, and because the deposition was included on the defendant's pretrial list of exhibits. The Court held that exclusion of the testimony was nevertheless justified as an exercise of discretion under *Rule 403*.

[3] Offense of Sexual Assault

Johnson v. Elk Lake School Dist., 283 F.3d 138 (3d Cir. 2002) : In a § 1983 action arising from alleged sexual abuse of a high school student by a guidance counselor, the plaintiff offered testimony from a friend of the counselor that on one occasion the counselor picked her up and threw her over his shoulder, during which his hand went up her skirt and touched her in the crotch area. He soon let her down and the two of them proceeded to sit down and eat lunch together. The Trial Judge excluded the evidence on the ground that the incident did not qualify as an "offense of sexual assault" under the applicable definition of *Rule 413(d)*, because there was a serious question whether the touching was intentional. The Court noted that whether the defendant's conduct was intentional, and thus an offense of sexual assault, was a question of conditional relevancy under *Rule 104(b)*, following *Huddleston v. United States* (*see* § 104.02[9]). It was not clear whether the Judge had employed that or the stricter standard of *Rule 104(a)*, but in any event exclusion of the evidence was a proper exercise of discretion under *Rule 403*.

[4] Relationship to Rule 403

Johnson v. Elk Lake School Dist., 283 F.3d 138 (3d Cir. 2002) : In a § 1983 action arising from alleged sexual abuse of a high school student by a guidance counselor, the plaintiff offered testimony from a friend of the counselor that on one occasion the counselor picked her up and threw her over his shoulder, during which his hand went up her skirt and touched her in the crotch area. He soon let her down and the two of them proceeded to sit down and eat lunch together. The Trial Judge excluded the evidence on the grounds that the incident did not qualify as an "offense of sexual assault" under the applicable definition of *Rule 413(d)* and because there was insufficient notice given pursuant to *Rule 415(b)*. Although the Court disagreed with those two grounds, it upheld exclusion as a proper balancing under *Rule 403* of probative value against countervailing factors. The equivocal nature of the incident made the probative value of the evidence low, as did the substantial dissimilarity from the alleged abuse at issue, while admission of the evidence might have unfairly prejudiced the defendant, misled the jury, confused the issues, and wasted valuable trial time.

Doe v. Glanzer, 232 F.3d 1258 (9th. Cir. 2000) : Affirming a judgment for the defendant in an action for alleged sexual abuse, the Court upheld the exclusion of evidence of a 15-year-old incident in which the defendant allegedly sexually assaulted a minor at a party. The Court reviewed the legislative history of Rules 413-415 and determined that the sexual misconduct covered by these Rules remains subject to exclusion under *Rule 403*. The Trial Court had properly exercised its discretion under *Rule 403* in this case: there was a significant time lapse between the two incidents; there was no evidence of any sexual misconduct in the interim; the alleged victims, while both minors, differed substantially in age; and the circumstances of the alleged incidents were not similar.

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415.04 Legislative History

[Editor's Note: *Rule 415* is not a product of the usual procedure by which Federal Rules of Evidence are enacted. It was added to the Federal Rules of Evidence by Public Law 103-322, the Violent Crime Control and Law Enforcement Act of 1994. Public Law 103-322 was adopted September 13, 1994, and became effective July 9, 1995. For full discussion of the implementation of this Rule, as well as Congressional discussion and the Report of the Judicial Conference of the United States on this Rule, see the Legislative History of *Rule 413*, § 413.04.]

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Scope

The chart below shows the proposed style amendments for Rule 415, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Chil	**Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molesta**

d Molestation	**tion**		
(a)	In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or chil	**(a)**	**Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party

d molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a sum

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses'

	mary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.	statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
(c)	This rule	**(c) Effect**

shall not be construed to limit the admission or consideration of evidence under any other rule.	**on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

Committee Note

The language of Rule 415 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[2] Notice [Go To Main]

Doe v. Smith, 470 F.3d 331 (7th Cir. 2006) : In a suit for alleged child molestation by a school official, the Court held it was an abuse of discretion to exclude the testimony of another victim who did not come forward until ten days before this trial was originally scheduled. The Judge barred the witness from testifying for failure to comply with the *Rule 415* notice requirement, even though the trial was eventually continued. The Court found the Judge's refusal to reconsider the ruling, once the trial was continued, was unreasonable. It reasoned that any prejudice to the defendants could have been mitigated by permitting the witness to be deposed during the period of the continuance.

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Doe v. Smith, 470 F.3d 331 (7th Cir. 2006) : In a suit for alleged child molestation by a school official, the Court held it was an abuse of discretion to exclude evidence that the official had been convicted of indecent solicitation of another child. It concluded, 2-1, that soliciting a minor for a sex act constituted a substantial step toward committing a sexual assault, and therefore qualified as an attempt; as such, it was within the crimes covered by *Rules 413-415*. The Court rejected the school district's contention that, even if the conviction was probative against the official it was not probative against the school district. The Court concluded that the official's "pedophilic conduct is a fact of consequence that is intertwined with the school district's potential civil liability."

Seeley v. Chase, 443 F.3d 1290 (10th Cir. 2006) : In a § 1983 action against a police officer for raping a woman in his patrol car, the plaintiff introduced testimony from two witnesses who had separately been stopped by the officer and fondled, in the one case, and had her underwear pulled down, in the other. Reviewing a judgment for the plaintiff, the Court held that these were "sexual assaults" as defined in *Rule 413(d)*, although they did not involve touching of the genitals, because they qualified as "attempts" to do so. However, the case was remanded for the limited purpose of

making the required on-the-record *Rule 403* balancing with respect to the other sexual assault evidence.

[4] Relationship to Rule 403 [Go To Main]

Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010) : The Court affirmed a judgment for the defendants in a patient's action alleging that her civil rights had been violated when an emergency room physician sexually assaulted her by digital penetration of her vagina. Finding no abuse of discretion in the exclusion of evidence that the physician had inserted his finger in another woman's vagina during a postoperative examination, for which he had been charged with (although acquitted of) professional misconduct, the Court applied the usual rules regarding discretion under Rule 403, even though this evidence was being offered under Rule 415, and found that the evidence had minimal probative value because of the significantly different treatment situations and a high probability of consuming excessive time and confusing the issues.

Seeley v. Chase, 443 F.3d 1290 (10th Cir. 2006) : In a § 1983 action against a police officer for raping a woman in his patrol car, the plaintiff introduced testimony from two witnesses who had separately been stopped by the officer and fondled, in the one case, and had her underwear pulled down, in the other. Reviewing a judgment for the plaintiff, the Court held that these were "sexual assaults" as defined in *Rule 413(d)*, although they did not involve touching of the genitals, because they qualified as "attempts" to do so. However, the case was remanded for the limited purpose of making the required on-the-record *Rule 403* balancing with respect to the other sexual assault evidence.

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PART TWO: THE RULES THEMSELVES
Article V. Privileges
CHAPTER 501 RULE 501

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501.01 Official Text

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 501 RULE 501

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501.02 Editorial Explanatory Comment

[1] Federal and State Law

This Rule is the only one that deals with the subject of privileges. It prescribes the common-law privileges as they may be interpreted by the Courts of the United States in the light of reason and experience for most cases. But if in a civil case a claim, defense, or an element of either a claim or defense is governed by state law, state rules of privilege apply.

This last provision reflects a deliberate attempt to establish an appropriate relationship between Federal Courts and state lawmaking bodies, both Courts and Legislatures. While deference in the Federal Rules to the state laws of privilege may not be constitutionally required, n1 Congress concluded that federal law should not supersede that of the States in arguably "substantive" areas such as privilege, absent a compelling reason. In civil cases, no compelling reason was found when state law provided the basis of decision. Similar concerns led to deference to state law in Rules 302 and 601.

A problem is presented when state and federal privilege laws conflict in cases in which state and federal claims are tried together, most commonly in cases of supplemental jurisdiction, but also where diversity claims are joined with federal question claims. n2 Where the privilege rules are in conflict, it makes no sense to apply the state law of privilege to the state claims and the federal law of privilege to the federal claims. To do so would confuse the jury, n3 and would subvert the policy of the jurisdiction that would apply the privilege.

Almost all Federal Courts, when confronted with this question, have held that the federal law of privilege applies to both the federal claim and the state claim. n4 These Courts reason that it would be impractical to apply two separate sets of privilege laws to federal and state claims; and since only one privilege law can apply, it should be federal law in a Federal Court. Application of federal law is considered consistent with the goal of national uniformity embodied in the Federal Rules.

[2] Supreme Court's Approval of Specific Rules

As originally approved by the Supreme Court, Article V of the Federal Rules contained thirteen Rules. These Rules defined nine separate privileges and delineated certain rules for controlling the use of privileges. All are set forth in Part

Three of this Manual. Aside from the Lawyer-Client privilege (proposed Rule 503), the Communications to Clergy privilege (proposed Rule 506), and the Political Vote privilege (proposed Rule 507), each of the nine privilege Rules was vigorously attacked by at least one critic.

Rule 502 (Required Reports Privileged by Statute) was attacked on the ground that states should not be permitted to tell the federal government what rules of privilege should apply in federal cases; a state may have a privilege that the federal government should be free to reject in federal question cases. Rule 504 (Psychotherapist-Patient Privilege) was one of the most controversial. In writing this privilege, the Advisory Committee rejected the traditional physician-patient privilege (which two-thirds of the states had) and substituted a narrower privilege dealing with psychotherapists. The medical profession attacked this move on the ground that it demonstrated an insensitivity to the problems of medicine and to the needs of both patients and doctors. Rule 505 (Husband-Wife Privilege) was attacked on the ground that, while it might represent the majority rule, it made no sense to give the spousal immunity privilege to the defendant spouse, when a marriage is surely in jeopardy if the nondefendant spouse is willing to testify. The proposed rule was also attacked because it recognized no privilege for confidential spousal communications. Rule 508 (Trade Secrets) was attacked as changing existing law.

Rule 509 (Secrets of State and Other Official Information) was perhaps the Rule that received the most criticism. Throughout the debates, it was contended that this Rule went well beyond anything that the Supreme Court had theretofore recognized. Rule 510 (Identity of Informer) was also criticized on the ground that it may have changed existing law.

Proposed Rule 511 would have provided that a voluntary disclosure of confidential information destroys a privilege. Rule 512 would have provided that erroneous compulsion of disclosure or disclosure by someone under circumstances where the holder of the privilege had no opportunity to claim the privilege would not result in any loss of the privilege. Rule 513 would have codified the majority view that no comment or inference is permissible when a testimonial privilege is invoked. States deal with these subjects in a variety of ways, and unanimity as to the wisdom of the proposed rules, if anticipated, certainly was never approached.

News reporters, social workers, and accountants complained of the failure to provide them with privileges.

But the major complaint with the Supreme Court draft was that the proposed Rule 501 would have applied the federal law of privilege to every claim heard in federal court. This was considered an affront to the states in cases where the state law provided the rule of decision. Given all the dispute over the privileges, Congress opted for a single Rule -- a minimal codification that mandates a common-law approach to privileges and defers to state privileges where state law provides the rule of decision.

[3] The Common Law and the Proposed, But Unenacted, Rules

One of the great ironies of the Rules is that privileges, many of which find their justification in the reliance of the public upon them, are left in the confused state they were in prior to the enactment of the Rules. Arguably, certainty here is more necessary than in other areas of evidence. n5 Yet neither the Supreme Court nor the Congress has indicated very much interest in tackling this controversial area in the years since enactment of the Federal Rules of Evidence. n6 The Advisory Committee has taken a cautious approach, partly due to the provision in the Enabling Act requiring affirmative approval by Congress of any rules of privilege (as opposed to the usual rulemaking process under which rules become law unless Congress affirmatively intervenes to reject or change the rule). n7

While common-law development is now mandated, the question remains whether the Federal Courts in developing the law of privileges should consider the proposed-but-rejected privileges as either persuasive or controlling. Most Courts have held that the recommendations of the Advisory Committee and the Supreme Court are a useful guide, though not controlling in determining the existence and scope of a federal privilege. As Judge Becker put it:

> [T]he proposed rules prove a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts. ... The [Proposed rules] are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. ... Finally, they were adopted by the Supreme Court. ... The Advisory Committee in drafting the [Proposed rules] was for the most part restating the law currently applied in the federal courts. n8

The Supreme Court in *Jaffee v. Redmond, 518 U.S. 1 (1996)* , strongly supported Judge Becker's view of the matter. In adopting a psychotherapist-patient privilege, the Court relied heavily on the fact that it was one of the nine specific privileges originally recommended by the Advisory Committee. The Court also stressed the reverse proposition -- that if a privilege was not one of those proposed by the Advisory Committee, this would cut against its recognition under federal common law.

It would not be wise, however, to treat the Advisory Committee proposals as a totally accurate description of existing federal common law. For example, federal common law protects confidential marital communications. As noted above, the proposed Federal Rule 505 did not. Under *Rule 501*, the common law governs and the privilege for confidential marital communications continues, something one would not know from looking at the proposed Rule 505. Moreover, the proposed marital privilege rule gave the criminal defendant the right to bar a spouse's testimony, whereas the Supreme Court has since held that the testifying spouse has the sole right to claim the spousal immunity privilege. n9 And even in *Jaffee*, the Court, by extending the privilege to cover statements to social workers as well as statements to psychotherapists, went further than the Advisory Committee's proposal.

The most accurate statement about the relevance of the proposed rules on privilege is that they are a useful reference point for determining whether *new* privileges should be established under federal common law.

[4] New Privileges

Rule 501 adopts the privileges as they existed at common law, and provides that the federal common law of privilege shall be "interpreted" in the "light of reason and experience." An important question is whether *Rule 501* permits the Federal Courts to promulgate and develop privileges that did not exist at common law. For example, neither the doctor-patient privilege nor the psychotherapist-patient privilege is a common-law privilege; both are creatures of statute in most states. Also, litigants sometimes argue for the development of a new privilege that has not been recognized either by statute or by common law. Some have argued for a "self-evaluation" privilege; others have argued for a "scholar's" privilege. Does *Rule 501* circumscribe the authority of the Federal Courts with respect to privileges not recognized under the common law?

Before *Jaffee v. Redmond, 518 U.S. 1 (1996)* , many Federal Courts rejected attempts to develop privileges that were not recognized by common law at the time the Federal Rules were adopted. The Supreme Court in *Jaffee*, however, stressed that *Rule 501* authorizes, and indeed requires, Federal Courts to establish new privileges where the need for the privilege outweighs the cost of the loss of reliable evidence that the privilege would impose. The Court stated as follows:

> *Rule 501 of the Federal Rules of Evidence* authorizes federal courts to define new privileges by interpreting "common law principles ... in the light of reason and experience." ... The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States, 445 U.S. 40, 47 (1980)* .

The *Jaffee* Court laid out the following blueprint for establishing new privileges under federal common law: (1) the privilege must promote "sufficiently important interests to outweigh the need for probative evidence," i.e., the benefits of the privilege must outweigh the costs to the search for truth that the privilege would impose; (2) recognition of the

privilege by the states cuts in favor of finding a privilege under federal law (due to the interest in promoting "comity"), while lack of recognition cuts against it; and (3) if the privilege was included in the original list of privileges proposed by the Advisory Committee (and subsequently rejected by Congress), this cuts in favor of adopting the privilege as a matter of federal law, while non-inclusion in the original Advisory Committee list cuts against adoption. (The relevance of this third factor, as discussed above, stems from the Court's recognition that the original Advisory Committee was composed of outstanding lawyers and scholars who spent considerable time determining just which privileges were appropriate for the federal courts).

The *Jaffee* opinion does not mean that new privileges should be recognized lightly. The burden of establishing the privilege is on the party who seeks to invoke it. For example, in *University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)* , the EEOC issued a subpoena to investigate a claim of employment discrimination after an associate professor was denied tenure. The University asked the Court to establish a new privilege to protect the confidentiality of the peer review process. The Court rejected the University's claim, and began its analysis with a discussion of *Rule 501*:

> We do not create and apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence. Inasmuch as testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence, any such privilege must be strictly construed.
>
> Moreover, although *Rule 501* manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively.

The Court in *EEOC* unanimously refused to establish the peer process privilege sought by the University. According to the Supreme Court, a new privilege may not be an impossibility, but it is a rarity.

We believe that *Rule 501* provides a limited authority to Federal Courts to develop new privileges as circumstance and policy may warrant. However, the Federal Courts should not lightly adopt a new privilege. Simple claims of social policy should not suffice. Because a privilege is in derogation of the search for truth, new privileges should be limited to those that are critical to promoting *both* important public policy and substantial private interests. n10 Under *Jaffee*, the proponent of a new privilege has the burden of establishing that the benefits of the privilege outweigh the cost of the loss of reliable evidence that the privilege would entail.

Among the relationship-based privileges that have been rejected as failing to meet these stringent requirements are: an accountant-client privilege; n11 a doctor-patient privilege; n12 a probationer-probation officer privilege; n13 and a union member-representative privilege. n14

The Third Circuit opinion in *Pearson v. Miller, 211 F.3d 57 (3d Cir. 2000)* , is a good example of the approach that should be taken to new privileges after *Jaffee*. Pearson's daughter was sexually assaulted by Miller; at the time of the assault, Miller was a foster child under the supervision of two public agencies. Pearson brought a civil rights action against the agencies for a "state-created danger," alleging that the agencies knew that Miller had violent sexual propensities toward young girls, and yet permitted him to attend public school and to ride the school bus without supervision. During the discovery period, Pearson sought information concerning Miller's supervision and placement by the agencies, including the files kept by the agencies concerning Miller. The agencies filed motions for protective orders on the ground that this information would require the release of sensitive information concerning Miller.

In response to these motions, Pearson obtained from Miller an authorization to release the records. Miller signed the release voluntarily, apparently as part of a settlement of claims against him. The agencies argued that interests other than Miller's were at stake, requiring the protection of the sensitive information in the files despite Miller's waiver. Specifically, the agencies argued that three separate state statutes mandated confidentiality of placement and foster care

records, whether or not the particular juvenile chose to waive his personal privacy interests. These statutes were: (1) a statute mandating the confidentiality of reports of child abuse; (2) a statute restricting access to files and records of juvenile courts, including child delinquency proceedings; and (3) a statute promoting mental health, providing that "all documents concerning persons in treatment shall be kept confidential."

The question for the *Pearson* Court was whether the confidentiality interests embodied in the state statutes should be recognized as a matter of federal law "in the light of reason and experience." The Court began its analysis by noting that privileges are in derogation of the search for truth. Therefore in assessing new privileges, "only the most compelling candidates will overcome the law's weighty dependence on the availability of relevant evidence."

Jaffee provides that the case for a new privilege is generally stronger if that privilege is widely recognized by the states. Yet the Court in *Pearson* perceptively recognized that the state's self-interest in creating and invoking a particular privilege should be taken into account as well. As the Court put it, the need for deference to the state law of privilege is diminished "in cases in which a defendant state actor alleged to have violated citizens' federal rights is asserting the privilege." n15 Thus, the fact that states recognize privileges for records of juveniles, child abuse reports, and mental health treatment carried little weight in the Court's analysis, because it was the state as an interested party that was invoking these privileges.

The *Pearson* Court proceeded to analyze just what confidentiality-based interests might be implicated -- other than those waived by Miller -- by disclosure of records concerning Miller's supervision. One interest asserted by the agencies was protection of the confidentiality of mental health records. But the Court held that any such privilege "is held by the patient, who is permitted to waive it and to allow the protected information to be released." In this sense, the asserted "mental health records" privilege was akin to the psychotherapist-patient privilege recognized in *Jaffee*, and notably the *Jaffee* Court found the psychotherapist-patient privilege to be held by, and waivable by, the patient.

The asserted privileges associated with juvenile records and reports of child abuse were not so readily dismissed, however, because parties other than the juvenile might have interests in maintaining the confidentiality of these records. For example, the privilege protecting reports of child abuse might protect not only the child, but also those who file child abuse reports, those who work with the child, and the state agencies themselves. The same might be true for information in juvenile records -- confidentiality may be necessary to protect those who report to the authorities about the juvenile, as well as those public officials and agencies who make decisions about the juvenile.

Unfortunately for the agencies, the very fact that would allow these privileges to survive after a waiver by the juvenile -- i.e., the fact that there are many individuals and entities with a confidentiality-based interest in the material -- rendered them "poor candidates" for privilege status under *Rule 501*. The *Pearson* Court explained that the privileges sought by the agencies "would be unlike any currently recognized *Rule 501* privilege." Privileges such as attorney-client, husband-wife, and psychotherapist-patient are found in "bilateral confidential relations." In contrast "[c]omplex multilateral privileges such as the ones here sought would necessarily be extremely broad and unwieldy to enforce." For example, if there is a privilege protecting all who file child abuse reports, as well as all who maintain the reports, then the privilege could not be waived without the consent of a potentially vast number of privilege holders -- making the privilege effectively unwaivable. Clearly a Federal Court must give pause before establishing a privilege that could never be waived.

The *Pearson* Court considered the possibility of establishing a privilege for child abuse and juvenile records that would be held by the state, rather than by individual reporters and interested citizens. This would make the waiver power easier to wield and might protect against overbroad application, since it would be held by only one entity. However, even this state-based privilege was found to be a "poor fit" for the framework of *Rule 501*. If the waiver power were placed with the state, the individuals interested in confidentiality (such as those who report child abuse or those who work with the child) would not be able to control its application. The state might waive the privilege (perhaps to obtain some concession in litigation) without considering the confidentiality interests of these individuals. This would result in an

uncertain privilege with respect to these interested parties -- they could never know, in advance of a confidential communication, whether it would or would not be disclosed at some later point. As the Court stated in *Jaffee*, an uncertain privilege "is little better than no privilege at all."

In sum, the confidentiality-based records privileges asserted by the agencies were either too unwieldy (therefore too costly), or too uncertain (therefore insufficiently beneficial). The *Pearson* Court concluded that "*Rule 501* is unsuited for the kind of privilege that [the agencies] have requested: one that mandates its protection despite the express waiver of the primary holder of interests in confidentiality. Given the caution with which federal courts are to approach all questions of novel privileges, we have little trouble rejecting any such privilege."

An analysis under *Evidence Rule 501* led the *Pearson* Court to a kind of all-or-nothing result. In rejecting the privilege, did the Court ignore the legitimate confidentiality interests that would be protected by privileges protecting child abuse reports in foster care records, as well as juvenile records, even after a waiver by the "primary holder"? If privilege law leads one to an all-or-nothing result, shouldn't the Court have opted for establishing an absolute privilege rather than rejecting the privilege absolutely?

The *Pearson* Court considered such an all-or-nothing dilemma a false dichotomy. In a particularly innovative section of the opinion, the Court reasoned that confidential information in the records could be protected without the necessity of establishing an absolute, overbroad, and unwieldy privilege. It was unnecessary to recognize an absolute privilege because there was a much more measured and precise remedial tool at hand: the District Court's power under *Federal Rule of Civil Procedure Rule 26(c)* to issue protective orders limiting or precluding the release of sensitive information. The Court stated that "Rule 26(c) provides district courts with the power to formulate a detailed solution that reflects the concerns of particular individual disputes" and therefore "provides a superior mechanism for the resolution of the present dispute than does *Federal Rule of Evidence 501*." Instead of an absolutist approach, a Court applying Rule 26(c) can tailor an order to the circumstances, so that particularly sensitive information can be protected without unnecessarily sacrificing the search for truth. Alternatively, the Court can order disclosure but under such conditions as will protect particular privacy interests, such as by redacting especially sensitive material or precluding the adversary from making a public disclosure.

The Court in *Pearson* used a well-reasoned and measured approach to evaluate a demand for a new privilege. It is an approach that should be emulated by other Courts. Specifically, (1) the burden is on the party seeking to invoke the new privilege to make a compelling showing that the benefits of the privilege are so substantial as to outweigh the cost to the search for truth that the privilege would impose; (2) if the new privilege would be held by more than one person or entity, the Court should consider the possibility that the privilege would be practically unwaivable and therefore overbroad; and (3) the Court should consider the possibility of a more tailored protection of confidentiality interests through the use of a protective order. By following *Pearson*, a Court can protect legitimate interests in confidentiality and yet refrain from carelessly establishing an overbroad and absolute privilege in derogation of the search for truth.

In *Jaffee* the Supreme Court, in recognizing the psychotherapist-patient privilege, stressed that the privilege was absolute where it applied. That is to say, where applicable, the privilege operates to exclude evidence without regard to the need of the adversary for the evidence. The Court reasoned that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." Fairly read, this means that if a new privilege is to be recognized, the Court must be prepared to hold it absolute -- otherwise it is not worth establishing the privilege. Before *Jaffee*, it might have been permissible to limit the cost of a new privilege by recognizing it as a qualified one; this no longer seems an option after *Jaffee*. In our view, this means that a Court should be even more reluctant to establish a new privilege. An absolute privilege, while somewhat more certain in its application (though not absolutely certain given the possibility of waiver or exceptions such as crime-fraud), is also significantly more costly to the search for truth than is a qualified privilege.

[5] Attorney-Client Privilege

[a] Common-Law Privilege

The attorney-client privilege retains its position as the most widely accepted and applied common-law privilege. That it should be popular with Judges and lawyers is not surprising; they are naturally sympathetic to and understanding of the needs of the legal profession. n16

The shape of the basic privilege has not changed over the years. The client has a privilege with respect to communications made between the lawyer and client in confidence for the purpose of enabling the lawyer to render legal services to the client.

Analysis of the privilege can be broken down into eight relevant factors, taken roughly from the classic definition of the privilege set forth by Wigmore: n17

1. Advice must be sought on a legal matter;

2. From an attorney acting in his/her legal capacity;

3. The privilege protects only communications;

4. The communications must be made in confidence;

5. The communications protected are those of the client;

6. The protection is permanent;

7. The privilege protects against disclosure by both the client and the attorney; and

8. The privilege may be waived or subject to an exception.

A short discussion of each of these factors follows.

[b] Attorney-Client Privilege -- Legal Advice

A client may not "buy" a privilege by retaining an attorney to do something that a non-lawyer could do just as well. n18 The client must be seeking legal advice and assistance from the lawyer. n19 Accordingly, Courts have found that communications are not privileged when the lawyer is retained to do tasks that nonlawyers can also do. Examples of nonprivileged situations include:

(1) Preparation of tax returns is not legal advice, so communications made in the course of tax return preparation are not generally privileged. n20 However, the situation is different if the lawyer is retained to determine whether a tax position taken by a client could subject the client to legal liability. As one Court put it, " '[A] lawyer's analysis of the soft spots in a tax return and his judgments on the outcome of litigation on it" do constitute legal advice. n21

(2) The minutes of a board of directors meeting are not privileged merely because an attorney was in attendance or conducted the meeting. n22

(3) Where business documents are prepared and sent to attorneys to keep them apprised of business developments and not as a request for legal advice, the documents are not privileged. n23

(4) Where the client is communicating as part of a personal friendship or animus, and not in the course of seeking legal advice, the privilege will not apply. n24

(5) Where the attorney is merely acting as a conduit for information, i.e., as a messenger, the privilege is inapplicable. n25

(6) Communications made primarily to secure business rather than legal advice do not qualify under the privilege. For example, there is no privilege if the attorney is acting as a stockbroker, money manager, or business agent. n26

(7) Where patent attorneys are acting more like engineers or market analysts than like lawyers, the privilege will not attach. n27

The "legal advice" requirement can present difficult problems of line-drawing. One case presenting a very close question is *In re Feldberg, 862 F.2d 622 (7th Cir. 1988)* . A grand jury was investigating sports agents who signed amateur athletes to undisclosed professional contracts. The grand jury subpoenaed the agents' corporation for all contracts the agents had entered into with college football players. The corporate president engaged Feldberg, a lawyer, to assist with compliance. Feldberg turned over fifty-one contracts to the grand jury. These contracts appeared legal on their face. The grand jury was not satisfied and made a further request. Feldberg then turned over six more contracts, which had all been postdated to falsely indicate that they had been executed after the players' college careers had ended. The grand jury, suspecting obstruction of justice by the corporation (not by Feldberg), then subpoenaed Feldberg to determine why it had not received the six suspicious contracts with the original batch of fifty-one. Feldberg declared the privilege with respect to all information concerning why he thought the fifty-one contracts first produced were all the contracts responsive to the original subpoena.

The *Feldberg* Court reasoned that if Feldberg were retained solely to transmit a box of prepackaged documents to the grand jury, then no privilege would apply to any communication made to him. Similarly, if Feldberg were hired to search the files pursuant to instructions and act as a record custodian or a file clerk in turning over the documents, no privilege would attach. n28

However, if Feldberg were hired to determine which documents were responsive to the subpoena, and whether a document had to be produced assuming it was covered by the subpoena, that would call for legal advice; that is something a file clerk does not do. n29 If Feldberg were hired as both file clerk *and* attorney, we have an oft-recurring problem of the attorney wearing "two hats."

Given all the possible scenarios, the Seventh Circuit in *Feldberg* held that the claim of attorney-client privilege had to be evaluated on a question-by-question basis, and disclosure was prohibited only if the attorney's legal adviser role predominated as to the subject matter of any particular question. The Court held that the District Court would have to make a preliminary determination after an *in camera* hearing about Feldberg's role in producing the documents. It also noted the general rule that the party seeking to invoke the privilege has the burden of establishing that the requirements of the privilege are met. n30

Most Courts hold, in accordance with *Feldberg*, that if the client had a mixed motivation for consulting an attorney, the confidential communications are privileged if it can be shown that the client's predominant motivation was to seek legal advice. n31

A problem arising with increasing frequency is where a corporation retains counsel to conduct an investigation into suspected internal corporate misconduct. The question is whether communications made by corporate employees to the investigating lawyer are privileged. The argument against the privilege is that the lawyer is acting essentially as a factual investigator. But this argument has usually been rejected. Most Courts have held that the investigating attorney

is rendering predominantly legal advice, given the important legal ramifications surrounding an investigation into internal corporate misconduct. The reason that the corporation seeks a lawyer rather than a factual investigator is that legal expertise is necessary to determine whether facts exist that can be proved in a Court. n32

A finding of privilege for a lawyer's internal investigation of misconduct receives strong support from the result in *Upjohn Co. v. United States, 449 U.S. 383, 1980-81 Trade Cas. (CCH) P63797 (1981)* . In *Upjohn*, a law firm was retained to conduct an internal investigation into corporate misconduct. The question addressed by the Court, and discussed below, was whether statements from low-level employees to corporate counsel constituted statements from the "client." But in the course of its opinion, the Court never questioned the premise under which both parties were obviously operating -- that a factfinding investigation by a lawyer pertains to legal advice.

What if a law firm conducts an investigation of misconduct within the firm itself? This was the question in *United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996)* . The senior partner of a law firm heard rumors that another attorney was mishandling client funds. The senior partner instructed two associates to conduct an internal investigation. A grand jury subpoenaed the associates, hoping to question them about their conversations with the senior partner. They claimed the privilege. The *Rowe* Court first cited *Upjohn* for the proposition that a lawyer's investigation into misconduct implicates legal advice. Then the Court addressed the government's argument that the privilege should not apply because the associates were simply employees of the law firm:

> The government argues that upholding the privilege in this case would reward a law firm just for being a law firm because another type of company that uses its own employees to investigate internal wrong-doing would not get the benefit of the privilege. But a firm whose employees are physicians or computer programmers would probably not use its own employees to investigate legal wrongdoing; they would likely hire lawyers to do the job. Here, the firm happens to have employees who are lawyers, which made it easier for the senior partner to "hire" a lawyer -- he needed only to walk down the hall. This, however, did not change the fact that he asked lawyers -- not secretaries, paralegals, librarians or other of the firm's employees -- to conduct the investigation.

The fact is that corporations (and law firms) hire lawyers, rather than private eyes, to investigate misconduct because they want to know what the legal consequences are. The chances of litigation arising from corporate misconduct approach 100%. Under these circumstances, corporations don't want to know what happened as much as they want to know what can be proved. Therefore, confidential internal communications received by a lawyer engaged in a factual investigation of corporate misconduct generally should be privileged.

[c] Attorney-Client Privilege -- Attorney Acting in Legal Capacity -- Necessary Agents

An attorney in the course of a representation often must retain non-lawyer agents, such as private investigators and psychiatric and forensic experts. If communications to these agents resulted in a loss of privilege, then the agents could not be used to their full effect, and the effectiveness of the representation (which the privilege serves to strengthen) would suffer. Accordingly, Courts have held that communications from the client to and through agents hired by the attorney in furtherance of the representation can qualify for the attorney-client privilege. n33

It is important for the attorney and the client to structure the agent's relationship correctly in order to preserve the privilege. For example, assume that the client is charged with securities fraud. If the client hires an accountant to determine his situation, any statements made to the accountant are not privileged. n34 But if the attorney hires the accountant to assist in the representation, then communications to the accountant can qualify for the privilege. n35

Sometimes it is difficult to determine whether the non-lawyer to whom the communication is made is the kind of agent whose services are necessary to further the legal representation. An example is *United States v. Ackert, 169 F.3d 136 (2d Cir. 2001)* , which arose after Goldman, Sachs, an investment banking firm, approached Paramount with an

investment proposal. The proposed transaction was expected to reduce Paramount's federal income tax liability by generating significant capital losses that would offset Paramount's recent capital gains from the sale of a subsidiary. Ackert was employed by Goldman, Sachs and pitched the investment proposal to representatives of Paramount at an initial meeting. Subsequently, Eugene I. Meyers, Paramount's senior vice president and tax counsel, conducted legal research and analysis in order to advise Paramount about the tax implications of the proposed investment. In the course of this research, Meyers contacted Ackert, and the two men had several follow-up meetings to discuss various aspects of the Goldman, Sachs proposal. Meyers initiated these discussions to learn more about the details of the proposed transaction and its potential tax consequences, so that he could advise his client, Paramount, about the legal and financial implications of the transaction. Paramount ultimately decided to enter into the proposed investment. Seven years later the I.R.S. conducted an audit of Paramount and issued a summons to Ackert seeking his testimony about the 1989 investment proposal. Paramount asserted the attorney-client privilege with respect to questions concerning any conversations Ackert had with Meyers or in Meyers' presence.

Paramount argued that "it was impossible for Mr. Meyers to advise Paramount without these further contacts with Mr. Ackert, because he could not otherwise fully define the factual, and therefore legal, nature of the proposal." But the Court disagreed. The Court recognized that "the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client." However, in this case, "Meyers was not relying on Ackert to translate or interpret information given to Meyers by his client. Rather, Meyers sought out Ackert for information Paramount did not have about the proposed transaction and its tax consequences." The fact that the non-lawyer had information *important* to the lawyer was not sufficient to render the non-lawyer a necessary agent for the representation. Because Ackert's role "was not as a translator or interpreter of client communications with Meyers," the Court held that the communications with Ackert were not privileged.

[d] Attorney-Client Privilege -- Protection of Communications

The privilege protects communications, not underlying facts. Thus, in *In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992)* , corporate employees were instructed by counsel to analyze certain contracts in anticipation of litigation. The Court held that the "underlying factual information" obtained by these employees was not protected by the privilege. They were not communications to an attorney. However, questions such as "With whom did you discuss this analysis?" were impermissible because the employee, in responding, "might be understood to be implying ... that he had conveyed privileged information to the lawyer."

Similarly, the privilege does not protect documents that were prepared independently of any communication between the attorney and the client -- such as corporate or business records preexisting the attorney-client relationship. n36

Nor does the privilege protect factual observations made by an attorney that are not dependent on client communications. n37

[e] Attorney-Client Privilege -- Communications Made in Confidence

[i] Expectation of Confidentiality

The attorney-client privilege applies only if the client communicates to the attorney with the reasonable expectation that the communication is, and will remain, confidential. If a person other than the attorney or an agent necessary to the effectuation of the attorney-client relationship could with reasonable effort hear the client's communication when it was made, then the communication as a general rule is not privileged. n38

The attorney-client privilege does not apply if the client anticipates that the attorney will disclose the information to a third party, even if the third party is not present at the time of the client's communication. n39 For example, if the client

unconditionally gives the attorney information with which to prepare a prospectus, none of the information is privileged, even if the attorney later determines that some of the information need not be included in the prospectus. Under these circumstances, there is no reasonable expectation at the time of the communication that the information would remain with the lawyer. n40 The privilege will apply, however, if the client consults counsel about *whether* information must be disclosed. For example, the client might say, "Does this information have to be included in the prospectus? If so, then disclose it, if not, don't." Counsel is well-advised to structure client disclosures so that release of information is conditioned upon counsel's decision that disclosure is necessary to meet the client's legal obligations. n41

[ii] Attorney-Client Privilege -- Confidences -- Common Interest Doctrine

As discussed above, there is no privilege if the communication is made under circumstances where access is given to persons outside the attorney-client "unit" (which might be defined as the attorney, the client, and necessary agents). Furthermore, even if the communication was originally made in confidence, a later disclosure of the communication to third parties will ordinarily be deemed a waiver of the privilege. n42

Despite these limitations, the privilege can still apply where the "third party" and the communicating client share a common interest in a representation. n43

The rationale of the common interest rule is consistent with that of the attorney-client privilege. The privilege exists to promote full disclosure of the truth between client and attorney, in order to facilitate effective representation. n44 In many cases, it is necessary for clients to pool information in order to obtain effective representation. n45 So, to encourage information-pooling, the common interest rule treats all involved attorneys and clients as a single attorney-client unit, at least insofar as a common interest is pursued. n46 At a minimum, a privilege for exchanged information between allied parties promotes efficiency since it "makes savings in expense and effort likely." n47

Of course, even if a statement was made to further a common interest, all the other requirements of the privilege must be satisfied, e.g., the client must be seeking legal advice; only communications are protected; no disclosure must be anticipated beyond the attorney-client unit; and the communication must not be in furtherance of crime or fraud. n48

The justification for the common interest rule is not limited to codefendants in litigation, despite the frequent reference to the "joint defense" rule in the cases and literature. The need to protect the free flow of information from clients to attorneys, so as to facilitate effective representation, exists whenever multiple clients share a common interest about a legal matter. Wherever the privilege itself would apply, the common interest rule is applicable if the clients agree to share confidential information in pursuit of a common goal. n49

It follows that the common interest rule applies to allied plaintiffs in litigation to the same extent that it applies to allied defendants. n50 Likewise, the common interest rule applies to allied parties who pool information in anticipation of a lawsuit, because effective representation through information-pooling is equally important before and after litigation has begun. n51 And for similar reasons, the common interest rule applies to joint efforts to avoid litigation, even if the confidences are exchanged well before litigation has become probable. Information-pooling is every bit as necessary to avoid litigation as it is to pursue litigation. So, for example, in *Davis v. Costa-Gavras, 580 F. Supp. 1082 (S.D.N.Y. 1984)* , the plaintiff claimed that he had been libeled in the movie *Missing*. He sought disclosure of statements made by the author at a preproduction meeting with attorneys for several parties involved in making the movie. The Court held that the author's statements were protected by the common interest rule. While the statements were made before the movie was even made, all parties at the preproduction meeting had a common interest in avoiding a later libel suit, and the confidential communications were made pursuant to that end. n52

The fact that clients are present at a consultation in the common interest certainly should not preclude the application of the common interest rule, so long as the statements are otherwise intended to remain confidential and are made for purposes of obtaining legal advice in the common interest. n53 Thus, in *United States v. McPartlin, 595 F.2d 1321 (7th*

Cir. 1979) , the Court applied the common interest privilege to shield communications from the client to an attorney who was representing another party in the common interest. The Court held that the other attorney was the communicating client's counsel for purposes of a communication made in the common interest. n54 This is consistent with the theory of the common interest doctrine -- that multiple clients and their lawyers are acting as a single attorney-client unit.

It should be noted, however, that the presence of clients at a conference in the common interest may create an undue risk. The client may make statements extraneous to the common interest, and these communications would not be privileged. Also, if the client is going to communicate to another attorney directly, it is crucial that the client consult with his own attorney before and after disclosure. Without such consultation, a Court is likely to find that the client was not acting pursuant to an agreed-upon common interest. As the First Circuit stated in rejecting the argument that a statement from a client to another attorney was protected by the common interest rule:

> When a person provides information to another without first consulting his own attorney, it is difficult to see how the information was given as part of a joint defense, even when the recipient may be viewed as a party with similar interests. The difficulty grows when the person fails to inform his attorney of what he has done for several months. This raises the inference that the information was not intended to be used for that person's defense much less a joint defense. Under these circumstances, the joint defense privilege is not available. n55

For similar reasons, Courts have refused to apply the common interest rule to statements made from one client to another when no attorneys are present; such communications among laypersons are not likely to be sufficiently tied to pursuing a legal matter in a common interest. n56

Given all these risks, the preferred approach to sharing client confidences is for each attorney individually to confer with his or her client, and then share the information with allied attorneys outside the presence of clients.

Relationships between clients are often more ambiguous than the extremes of united in interest and completely adverse. Sometimes it will occur that clients share a mutual interest as to one issue (such as discrediting a witness) but are adversarial as to many or all other issues. Most Courts have held that the common interest privilege can apply even if the clients are in conflict on some or most points, so long as the communication itself deals with a matter on which the parties have agreed to work toward a mutually beneficial goal. n57 Thus, in *United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979)* , codefendants with antagonistic positions pooled information for the purpose of discrediting a diary offered by the prosecution. The Court held that the communications respecting the diary were protected by the common interest doctrine. Although the codefendants had conflicting defenses in general, they had a common interest in having the diary discredited. n58

The mere fact that communications are made between parties with similar interests is insufficient to trigger the common interest rule. n59 It must be shown by the party claiming the privilege: (1) that all clients and attorneys with access to the communication had in fact agreed upon a joint approach to the matter communicated; and (2) that the information was imparted with the intent to further the common purpose. n60 As one Court has stated: "Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." n61 Where the parties have not yet agreed to proceed jointly on the matter communicated, the common interest rule will not apply. n62 For example, in *United States v. Melvin, 650 F.2d 641 (5th Cir. 1981)* , statements made by certain codefendants in the presence of another codefendant were held not protected by a common interest privilege. The statements were made to *enlist* the codefendant in a common defense. But they were not protected because the codefendant had not yet agreed to cooperate with the others. n63 Thus, multiparty discussions must be approached with caution where it is not clear that the parties have agreed to pursue a common position on the matters to be discussed. n64 Any preliminary conversation to determine whether a joint strategy should be employed will not be privileged.

The parties need not agree in *writing* to pursue a common interest; the doctrine permits an exchange of confidential information when the parties have clearly and specifically agreed in some manner to pool information for a common goal. n65 Nonetheless, it is certainly prudent (and common) practice to execute a written agreement before significant communications are exchanged. n66 This would eliminate any doubt about whether the parties to the discussion were pursuing a common goal with respect to the matters communicated. Without a written agreement, the party's burden of proving that a statement was made in the common interest will undoubtedly be more difficult. n67

Even where the parties have agreed to pursue a common goal, the privilege will not apply if the statement is extraneous to the common interest and thus does not further the agreed-upon goal. Most typically this occurs where the communication deals with the communicating client's personal situation or motivations. Courts have held that statements concerning one client's individual situation are separate from the common purpose and thus not privileged when made in the presence of other parties. n68 This point again indicates that it is better for information-pooling to occur between attorneys, in the absence of clients.

The common interest doctrine, as stated above, protects confidential communications within the unit that shares a common interest. However, if members of that unit become adversaries in a later suit, the privilege does not apply *inter sese*. n69 This is because the exchange of information within the unit is inconsistent with later asserting a privilege over the exchanged information. So, before pooling information, counsel should inform the client that there is a risk that the client's communications can later be used against him if his "friends" become "enemies." Counsel who foresees later litigation between parties currently sharing a common interest must decide whether the advantage of a unified presentation at the present time is outweighed by the danger of a later suit by a former member of the unit, in which the client's communications would not be privileged.

The risk that statements made in the common interest could later be used against the client by those within the client "unit" can be eliminated by a provision in the common interest agreement providing that the signatories agree to waive all civil actions that they may now or later have against one another -- or, more narrowly, that they waive the right to use information shared in the common interest unit against any member of the unit. Of course, many parties would be unwilling to sign such provisions, depending on the nature of the common interest and the nature of anticipated adverse litigation. n70

Even if parties who once had a common interest later become adverse, the privilege still protects communications insofar as they are sought to be used by others outside the unit; the only parties who can use the communications are the parties who originally shared the common interest. Allowing "outsiders" to use the communications would create an undue risk for any discussion in the common interest, and would tend to destroy the utility of the common interest privilege. n71

The common interest privilege is not destroyed by action short of the drastic step of adversary litigation between the parties in the common unit. So, for example, if two criminal defendants pool information, and then one defendant decides to make a deal and testify against the other, the communications that were made by the remaining defendant at joint defense consultations remain privileged and cannot be used as evidence against the remaining defendant. The act of testifying as an adverse witness is not enough to destroy the unity of interest that was the basis for the privilege. If actions short of adversary litigation could destroy the privilege that had existed between parties with a common interest, the privilege would be so fragile that information-pooling could rarely occur. n72

The opposite side of this coin is that counsel who was privy to a common interest arrangement might not be permitted to use statements made by a former member of the group who is now an adverse witness. A former member of a common interest unit, who is now an adverse witness, has been considered by most Courts to be a former client of all attorneys in the unit. The reasoning is that those pursuing a common interest are conceptualized as being a single attorney-client unit. What follows from this reasoning is that an attorney cross-examining a withdrawn member of the common interest unit would be facing a conflict of interest. To zealously represent his "real" client, he might have to

cross-examine the witness with confidential communications made by the witness during a common interest discussion; but such cross-examination would be unethical because a lawyer cannot use confidential information against a former client. This conflict between duties to current client and former client creates a potential for disqualification of counsel. As the Court stated in *United States v. Anderson, 790 F. Supp. 231 (W.D. Wash. 1992)* : "an attorney who acquires information from a potential witness pursuant to a joint defense agreement is in no different position than would be an attorney who acquires such information from a prior or jointly represented client." n73 In *Anderson* the Court ultimately decided against disqualification, after the defendant knowingly waived his right to conflict-free counsel. But it is notable that a Court can, in its discretion, reject the defendant's waiver and disqualify a counsel who is subject to a conflict of interest. n74

The Committee on Professional Responsibility of the Association of the Bar of the City of New York has raised the possibility that the risk of disqualification could be headed off by a written agreement among the members of the common interest unit, which provides for consent in advance to the use of confidential information during the cross-examination of any of the clients, i.e., prospective consent permitting disclosure of a participant's confidential communications upon leaving the common interest unit. The Committee notes, however, that there have been "no reported decisions as to the effect of this model agreement," and notes further "the practical flaw that this model would likely discourage the open dialogue among participants that the [common interest] doctrine is designed to protect." n75 The Eleventh Circuit has "solved" the disqualification problem by holding that when one of the members of a joint defense "flips" and cooperates with the government, he thereby waives his right to demand that the communications he made in the joint defense remain privileged. Therefore the attorney of a client remaining in the joint defense has no conflict because she is free to cross-examine the witness with communications he made while part of the joint defense. n76

[iii] Attorney-Client Privilege -- Confidences -- Incidents of Representation

For obvious reasons, the privilege protects preliminary communications with an attorney about the subject of the representation, even if an attorney-client relationship has not been formalized at that point. This is because confidentiality may be necessary in order to determine whether the attorney can take on the representation. n77

On the other hand, the privilege ordinarily does not protect the preliminary aspects of the attorney-client relationship itself. These matters, which have been referred to as the "incidents of representation," include the client's name, the amount and payment of a fee, and the fact of consultation. The identity of the client, the fee, and the fact and extent of representation generally have nothing to do with the free flow of information once that relationship has been established. n78 Thus, the focus of the privilege in most Courts is on those communications that the attorney can influence by informing the client that a free flow of information will not prejudice the client. Communications and information respecting the incidents of representation do not meet this standard. n79 As Judge Winter stated in the leading case of *In re Shargel, 742 F.2d 61 (2d Cir. 1984)* :

> Absent special circumstances, disclosure of the identity of the client and fee information stand on a footing different from communications intended by the client to explain a problem to a lawyer in order to obtain legal advice. ... A general rule requiring disclosure of the fact of consultation does not place attorneys in the professional dilemma of cautioning against disclosure and rendering perhaps ill-informed advice or learning all the details and perhaps increasing the perils to the client of disclosure. n80

A limited exception to the above rule exists, however: If information concerning the incidents of representation would, directly or indirectly, disclose a confidential communication, then this preliminary information is privileged. One example is where the disclosure of the fee payment or the fact of representation would reveal a confidential motive for seeking representation. n81 Another example is where communications have been disclosed, and yet they remain confidential as a practical matter because they have not been connected to an identifiable person. If disclosure of the client's identity would tie the client to the previously disclosed communications, then the client's identity is privileged.

n82 It is apparent from the mere delineation of this exception that it is very limited; in the vast majority of cases, disclosure of fee, identity, etc., says nothing about the motive for seeking representation, nor does it tie the client to a previously disclosed yet unattributed communication. n83 As the Court stated in *Lefcourt v. United States, 125 F.3d 79 (2d Cir. 1997)* :

> Although the contours of the special circumstance exception [to the rule that identity of the client is unprotected by privilege] have not been exhaustively developed, no doubt due to the fact special circumstances are seldom found to exist, it is clear that there is no special circumstance in this circuit simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid.

[f] Attorney-Client Privilege -- Communication From the Attorney

The privilege is designed to encourage full disclosure between the client and the attorney. Some Courts consider the privilege as client-centered and have held that the privilege directly protects only the communication from the client to the attorney, and not vice-versa. Thus, communications by an attorney to the client are not automatically privileged in these Courts, even if they reflect legal advice. n84 However, the attorney's communication will be protected in these Courts if disclosure of that communication to the client would indirectly reveal the content of the client's confidential communication to the attorney. n85 But most Courts have held more broadly that an attorney's communication to a client in confidence can qualify as privileged in its own right, regardless of whether it would reveal a confidential statement from the client. n86 These Courts believe that the purpose of the privilege is to encourage two-way communication in the attorney-client relationship. They reason that it is just as important for the client to receive effective legal advice as it is for the attorney to receive all pertinent information from the client. n87

[g] Attorney-Client Privilege -- Corporate Representation

The privilege does not extend to information learned from individuals other than the client, even if the information forms the basis of legal advice given from the attorney to the client. n88 In the corporate context, the Courts have struggled with the question of who, within the corporate structure, can be considered the client for purposes of the attorney-client privilege.

The Supreme Court rendered a major decision on the scope of corporate attorney-client privilege in *Upjohn Co. v. United States, 449 U.S. 383 (1981)* . In that case, Upjohn conducted an internal investigation to discover whether its officers were making "questionable payments" to foreign officials. The company voluntarily submitted a preliminary report to the SEC disclosing certain preliminary payments. A copy of the report was sent to the IRS, which began an investigation into the tax consequences of the payments. Upjohn refused to turn over to the IRS written statements that corporate employees had submitted to the company attorney and notes of interviews conducted with officers and employees.

The government in *Upjohn* asked the Court to adopt the "control group" test, under which only members of the corporate control group would be deemed "the client" for purposes of the privilege. But the Court declared that the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to the attorneys seeking to render legal advice to the client corporation." Opting for a case-by-case approach rather than some broad statement of principle, the Court found that the communications by corporate officers and employees made at the direction of corporate superiors to counsel, so that counsel would be in a position to render legal advice, were privileged. n89

The *Upjohn* Court's failure to set forth a definitive test sparked an objection from Chief Justice Burger, who concurred in the judgment. The Chief Justice stated that "the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an

attorney regarding conduct or proposed conduct within the scope of employment."

Chief Justice Burger's articulation of the privilege in the corporate context has been borne out in cases after *Upjohn*. It is generally accepted that the privilege applies if the following criteria are met:

(1) the communications are made by corporate agents;

(2) the agents are communicating at the direction of corporate superiors;

(3) the communications are made to counsel for the corporation, who is rendering legal advice;

(4) the communications concern matters within the scope of the agents' corporate duties;

(5) the communications are reasonably anticipated to remain confidential when made and are kept confidential thereafter. n90

Lower Courts have generally applied *Upjohn* expansively, holding, for example, that: (1) the privilege can apply to communications made by agents of a subsidiary to an attorney for the parent corporation; n91(2) the privilege can apply to statements given to corporate counsel by former corporate employees; n92 and (3) the privilege can apply even if the corporate employees invoke their *Fifth Amendment* privilege and there is no access to the underlying facts, as the Court assumed there would be in *Upjohn*. n93

While *Upjohn* expands the corporate attorney-client privilege, it does nothing to protect the agent communicating to the corporate attorney. That is, the privilege is the corporation's, not the agent's. Corporate agents have often tried to argue that they have a privilege for their communications to the corporate attorney because: (1) the corporate attorney was also representing them personally; or (2) the corporation and the agent were pursuing a common interest at the time of the communication. But Courts have usually rejected these arguments. A recent example is *In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005)* , where a grand jury subpoenaed documents by three former employees of AOL TimeWarner who claimed that the subpoenaed documents were protected by the attorney-client privilege. AOL Time Warner did not invoke its corporate privilege -- it was cooperating with the government and leaving the employees to fend for themselves. The Court agreed with the Trial Judge that the internal investigation in which the documents were created was conducted by the company's general counsel and outside counsel, who represented only the company and not the employees. The Court noted that the investigating attorneys never told employees they represented the employees, the employees did not ask the attorneys for representation or seek legal advice from the attorneys, and the employees were fully apprised that the information they provided could be disclosed at the company's discretion. The Court also held that there was no joint client or joint defense privilege, because the employees were unable to show that they shared a common interest about a legal matter when they were interviewed. It quoted from *United States v. Weissman, 195 F.3d 96 (2d Cir. 1999)* , and reasoned that "[a]n employee's cooperation in an internal investigation is not sufficient to establish a common interest; rather 'some form of joint strategy is necessary.' " n94

Of course it is unlikely that the corporate attorney would be permitted to represent both the corporation and the employee. To do so would usually lead to a conflict of interest. As the Court put it in *In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005)* :

> Had the investigating [corporate] attorneys, in fact, entered into an attorney-client relationship with [the employees] they would not have been free to waive the appellants' privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report

> to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel were constrained by ethical obligations to individual employees.

The bottom line is that communications made by employees to corporate counsel are privileged, but the privilege is held by the corporation, not by the employee.

[h] Attorney-Client Privilege -- Government Attorneys

Suppose a government official makes a confidential statement to a government attorney for the purpose of obtaining legal advice as to an appropriate course of conduct for the government, or the agent himself, to take. Is this information privileged?

By analogy to *Upjohn*, confidential statements from government agents to government attorneys, in the pursuit of legal advice, should be covered by an attorney-client privilege. The case law on this question is surprisingly sparse, however. There are a few civil cases applying an attorney-client privilege where the government is the "client," n95 at least where the communications were made for purposes of obtaining legal advice, as distinct from political or policy advice. n96 But the Courts are divided on whether the privilege will apply in a criminal prosecution of a government official.

In *In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997)* , the question was whether the privilege applied to notes taken at a meeting held after Hilary Rodham Clinton, the First Lady, testified in a grand jury proceeding in the Whitewater matter. Attorneys and officials representing the White House (i.e., the institution of the Presidency) were at the meeting with Mrs. Clinton and her lawyers. The White House argued on the basis of *Upjohn* that communications from government agents to government attorneys, made in confidence, were entitled to the privilege. But the Court rejected that argument, at least in the context of a grand jury investigation. The Court declared that "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment," and that the "difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case." The Court concluded as follows:

> We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. n97

The *Grand Jury* Court was not very concerned that its refusal to recognize a privilege in the criminal context would chill discussions between government officials and government attorneys:

> Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official -- except for potential criminal wrongdoing by that official -- without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

We are somewhat more concerned than the *Grand Jury* Court about the risk of chilling frank communications between government officials and government attorneys. It is true that a government official has no right to consult a government attorney about the official's personal legal problems. Yet the lines between the personal and the institutional, and between the civil and the criminal, are not so easy to draw at the time when the official is deciding whether to disclose information to a government attorney. We are concerned that, in the absence of a privilege, government officials will be forced to turn to private counsel at even the hint of criminal implications for a proposed course of action. This would deprive officials of the special expertise that government attorneys would provide. It might

also mean that the official, concerned about the prohibitive expense of private counsel, would proceed without any advice at all; and an uncounselled course of conduct is bound to have a negative effect not only on the official, but also on the government and the public.

In contrast to the Eighth Circuit, the Second Circuit has upheld a claim of government attorney-client privilege in a criminal prosecution. In *In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005)* , the Court reversed an order of the District Court that would have required the former chief legal counsel in the office of the Governor of Connecticut to reveal to a federal grand jury the contents of private conversations she had with the Governor and members of his staff for the purpose of providing them legal assistance. The grand jury was investigating possible criminal violations by the Governor and the staff members in receiving gifts from private parties who did business with the State. The government conceded (and the Court agreed) that a governmental attorney-client privilege may be invoked in civil suits between government agencies and private litigants. The government argued, however, that the privilege should not extend to criminal cases, and relied on the Eighth Circuit ruling as well as the views of two other circuits. But the Court rejected the government's argument and held that the governmental attorney-client privilege applies in criminal cases. It reasoned as follows:

> It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

Essentially the Second Circuit held that the *Upjohn* rationale for applying the corporate attorney-client privilege to communications from employees applied with equal measure to the government context.

[i] Attorney-Client Privilege -- Permanent Protection

The traditional rule is that the privilege survives the termination of the attorney-client relationship, and it even survives the client. n98 But the concept that the privilege outlives the client is questionable if the justification for the privilege is to encourage full communication from the client to the lawyer. The assumption of the survival rule is that the client would be concerned about posthumous use of confidential information. This assumption seems dubious when applied as of the time the communication is made; most clients at that point would hardly be concerned with the consequences of after-death revelation. And this is especially so in criminal cases, because the client by definition cannot be concerned that communication to an attorney will land him in jail after he dies. n99

Nonetheless the Supreme Court in *Swidler & Berlin v. United States, 524 U.S. 399 (1998)* , held that the attorney-client privilege survives the death of the client. Consequently, counsel for Vincent Foster was not required to disclose confidential communications that Foster made to him shortly before his suicide. The Court rejected the argument of the Independent Counsel that the traditional rule -- providing that the privilege survives the client -- would unnecessarily thwart criminal investigations. The Court noted that scholars have criticized the traditional rule holding that the privilege survives the client, but declared as follows:

> Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Court concluded that "the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing case law. Interpreted in the light of reason and experience, that body of law requires that the attorney client privilege prevent disclosure of the notes at issue in this case."

[j] Attorney-Client Privilege -- Invocation

While the privilege is held by the client, the attorney has the implicit authority to invoke it unless the client has made a decision to waive the privilege. Indeed, the attorney has an ethical duty to invoke the privilege, unless he or she hears to the contrary from the client. n100

[k] Attorney-Client Privilege -- Waiver

[i] Waiver as Forfeiture

Even where all the elements of the privilege are otherwise present, the privilege will not be recognized if it has been waived. The term "waiver" as used by the Courts actually encompasses more than the traditional definition of a knowing and voluntary waiver of a right. Courts often find a "waiver" that is really more appropriately considered a "forfeiture." Judge Posner has stated that many of the waiver doctrines -- such as the doctrine finding a waiver of the privilege in some circumstances when the party has mistakenly disclosed the privileged information -- are not "waiver in the standard sense in which the word is used in the law: the deliberate relinquishment of a right." Rather, a "waiver" of the privilege is sometimes found "in order to punish the person claiming the privilege for a mistake." n101"Waiver" in this broad sense includes the concept of forfeiture and follows from any conduct by the client that would make it unfair for the client thereafter to assert the privilege. n102 We use the term "waiver" herein because that is the term most often used by Courts and litigants.

[ii] Attorney-Client Privilege -- Waiver -- Who Can Waive the Privilege?

The client holds the privilege and the power to waive it. The lawyer generally has implicit authority to waive the privilege as well in the course of the representation. The identity of the client for purposes of waiver is a problematic issue in the corporate context. The Supreme Court held in *CFTC v. Weintraub, 471 U.S. 343, 349 (1985)* , that "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." Therefore, in *Weintraub*, a person who had resigned as an officer no longer had authority to exercise or waive the privilege. n103 The *Weintraub* Court further stated that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Applying this rule, the *Weintraub* Court held that a trustee in bankruptcy succeeded to management's authority to waive the corporate privilege, over the objection of former and present corporate officers. n104 A sale of assets, however, generally does not transfer the power to waive the attorney-client privilege to the buyer. n105

[iii] Attorney-Client Privilege -- Waiver -- Selective Waiver

Waiver occurs when privileged information is disclosed to a third party. One controversial question is whether a party can "selectively" waive the privilege. For example, if a corporation discloses an internal report to the SEC in order to ward off an investigation, does this disclosure operate as a complete waiver of the privilege, or can the privilege be retained against other parties? And does it matter whether the SEC has signed a confidentiality agreement?

An example of the selective waiver problem arose in *Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)* , where Westinghouse received a report from outside counsel who had conducted an internal corporate investigation. The internal investigation was in response to an inquiry by the SEC into allegations that Westinghouse had obtained certain contracts by bribing officials of the Philippine Government. Westinghouse cooperated with the SEC inquiry by turning over outside counsel's report. Later, the Department of Justice began to

investigate whether Westinghouse obtained contracts from the Philippines through bribery. Again, Westinghouse cooperated by turning over the investigative report prepared by counsel. Thereafter, the Republic brought suit against Westinghouse for damages stemming from the alleged bribery of Philippine officials by agents of Westinghouse. The Republic sought access to counsel's investigative report.

The Court rejected the Westinghouse argument that the attorney-client privilege could be selectively waived. In doing so, it sided with the D.C. Circuit (see *Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981))* , and disagreed with the result reached by the Eighth Circuit in *Diversified Industries v. Meredith, 572 F.2d 596, 1978-1 Trade Cas. (CCH) P61879 (8th Cir. 1977)* (en banc). n106 The Court in *Diversified Industries* had reasoned that if disclosure to government agencies were to constitute a complete waiver, it would deter corporations from conducting internal investigations and from voluntarily cooperating with government investigations. But the Court in *Westinghouse* noted that the interest in conducting internal investigations had little to do with whether a waiver is found when the report is subsequently turned over to the government. That is, the decision whether to conduct an internal investigation is separate from whether to turn the completed investigative report over to the government. As to the interest in encouraging voluntary cooperation with government investigations, the *Westinghouse* Court found this policy objective to be "beyond the intended purposes of the attorney-client privilege." The Court noted voluntary disclosure of confidential information to the government does not serve the goal of the privilege, which is to enable clients to obtain informed and effective legal advice. The *Westinghouse* Court concluded that "because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine."

It could be argued that *Westinghouse* places the client in a dilemma: If the client wants to cooperate with the government, it can do so but only at the expense of completely waiving the privilege. However, this supposed "tough choice" is one that attorneys and clients routinely make in a variety of contexts. Waiver of the privilege often has advantages and disadvantages. For example, in *In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982)* , a corporation conducted through counsel an internal investigation of its business practices. The resulting investigative report was shown to a lawyer representing an underwriter in connection with a public offering of the corporation's securities, so that underwriter's counsel could complete a due diligence review. The corporation argued that disclosure to underwriter counsel should not be considered a waiver because disclosure was "required" by the legal duty of due diligence and the millions of dollars riding on the public offering of registered securities. Hence the waiver, according to the corporation, was not voluntary. The Second Circuit responded:

> We view this argument with no sympathy whatsoever. A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes. Once a corporate decision is made to disclose them for commercial purposes, no matter what the economic imperatives, the privilege is lost ... We hold that the calculated use of otherwise privileged materials for commercial purposes will waive the privilege. n107

The fact is that corporations will decide to turn over confidential information when it is beneficial to do so, even if the consequence is a waiver of the privilege. The *Diversified* rule of selective waiver is not required to encourage voluntary cooperation. As the Court in *Westinghouse* noted, Westinghouse disclosed the investigative report to the government even though the selective waiver rule was far from clearly established at the time. n108 It may be that rejection of selective waiver will discourage cooperation with the government at the margins, because the risk of a total waiver does indeed make cooperation more costly. But whatever lack of cooperation will result must be balanced against the inherent unfairness of allowing selective waiver. It is simply unfair to allow a party to use the privilege so strategically. In essence, the Court in *Westinghouse* found that disclosure to one party constituted a *forfeiture* of the privilege, because it would be unjust to allow Westinghouse to use the privilege in such a strategic and one-sided manner.

It is notable that the *Westinghouse* Court found a waiver of the privilege even though applicable SEC regulations

indicated that the investigative report would "be deemed non-public" and even though the Department of Justice entered into a confidentiality agreement with Westinghouse. As the Court stated, the traditional waiver doctrine provides that a voluntary disclosure to a third party "waives the privilege even if the third party agrees not to disclose the communications to anyone else." Thus, the confidentiality arrangements did not bind third parties. n109 It should also be noted that the Court found the Westinghouse disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Again, traditional waiver doctrine provides that compliance with a subpoena waives the privilege. To preserve the privilege, the attorney must move to quash the subpoena, and produce the information only after being ordered by a Court to do so.

[iv] Attorney-Client Privilege -- Waiver -- Advice of Counsel Defense

The rule concerning waiver of the attorney-client privilege, as it relates to an advice of counsel defense, is easily stated: "Where a party asserts reliance on advice of counsel as an element of his defense, the party thereby waives the attorney-client privilege as to all communications to and from counsel concerning the transaction for which counsel's advice was sought." n110 Again, the use of the term "waiver" is somewhat of a misnomer. Courts are really holding that by referring to advice of counsel as a defense, the client is then disentitled from invoking the privilege to preclude any inquiry into the very issue that the client brought up. This is a forfeiture. n111 There is a compelling notion that the adversary "cannot be stonewalled by the simultaneous assertion of the [advice of counsel] defense and the privilege." n112 Put another way, the attorney-client privilege can be used to shield information, but it cannot be used as a sword against the adversary. n113

Accordingly, if an advice of counsel defense is asserted, it results in a waiver of all communications between the client and attorney that are pertinent to the subject matter of that defense. Moreover, the waiver applies to all communications on the subject matter that the client has made to any counsel, whether or not the client's defense is based upon reliance on the advice of that particular counsel. "Otherwise, a claim of reliance on counsel would be immune from a showing that, in fact, the defendant had received overwhelming advice to the contrary." n114 The waiver does not apply, however, to communications outside the subject matter that is the basis for the advice of counsel defense. n115

It is sometimes difficult to determine whether a litigant has interposed an advice of counsel defense. n116 The easy case is where a criminal defendant is charged with violating a statute that requires proof of wilfulness, and testifies that he consulted counsel about his prospective conduct, and counsel told him that his proposed course of conduct would be legal. This is clearly an advice of counsel defense, and both the adversary and the factfinder are entitled to know what was said between the client and the attorney to warrant such advice -- or indeed whether such advice was ever given. But what is the rule if the same defendant merely denies guilt, including the wilfulness element of the crime? Can a simple denial of guilt or liability, without an explicit attempt to defend with privileged communications, ever be deemed a reliance on an advice of counsel defense and a consequent waiver of the privilege?

Most Courts have answered this question in the negative. For example, in *In re Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987)* , the plaintiff sued numerous railroad companies for conspiring to prevent construction of a pipeline by filing and defending lawsuits. The defendants asserted a *Noerr-Pennington* defense, under which an antitrust defendant may successfully defend a claim arising from litigious or petitioning activities by proving a genuine intent to influence government action in undertaking these activities. The Court found that the assertion of the *Noerr-Pennington* defense was not an interjection of an advice of counsel defense, but was instead a simple denial of liability. It stated that "this is not a case in which a party has asserted a claim or defense that explicitly relies on the existence or absence of the very communications for which he claims a privilege." Thus, under *Burlington*, a simple denial of liability is not enough to constitute a waiver. This rule makes sense, as a contrary rule would virtually require the defendant to confess judgment in order to retain the privilege.

The advice of counsel issue becomes more complex when the client goes beyond a simple denial of guilt or liability, and yet does not specifically refer to the fact that he received advice from an attorney. For example, in *United States v.*

Bilzerian, 926 F.2d 1285 (2d Cir. 1991) , the defendant was charged with violation of the securities laws. Bilzerian denied criminal intent and moved *in limine* for a ruling allowing him to testify without being subject to cross-examination concerning attorney-client communications. He argued that he would testify to his good-faith attempt to comply with the securities laws, without disclosing the content or even the existence of any privileged communications or reliance on the advice of counsel. The Trial Judge denied the motion and stated that if Bilzerian testified to his good faith on any ground, "it would open the door to cross-examination with respect to the basis for his belief, and that such cross-examination would allow inquiry into communications with his attorney." The Court of Appeals agreed with the Trial Judge that by testifying to good faith, a defendant puts "his knowledge of the law and the basis for his understanding of what the law required in issue," and that conversations with counsel are "directly relevant in determining the extent of his knowledge and, as a result, his intent." That is, when the defendant affirmatively testifies to his innocent state of mind, the jury is entitled "to know the basis of his understanding that his actions were legal." Thus, Bilzerian's attempt to carefully tailor his direct testimony was unavailing, because the advice of counsel issue, and the communications, if any, made to counsel, would be a fair topic for the prosecutor to address on cross-examination.

Thus, *Bilzerian* allows the defendant to testify to elements of the crime other than his state of mind, and to prove lack of intent through other witnesses and proof and through counsel's argument, but does not allow the defendant to testify to any aspect of his good faith.

[v] Attorney-Client Privilege -- Waiver -- Inadvertent Disclosure

One of the most difficult problems of waiver occurs when the disclosure of confidential information is a mistake. For example, the lawyer hits the wrong speed dial on the fax machine, and privileged information is thereby sent to the adversary. Or the lawyer painstakingly complies with a voluminous electronic discovery request, and privileged information (perhaps background or "meta" data) is mistakenly included in the cd sent to the adversary. Again, the loss of privilege that might occur here is really grounded in a theory of forfeiture rather than traditional waiver. The question is, what sort of conduct should be subject to the sanction of the loss of a privilege? The Courts have adopted various views on inadvertent disclosure, ranging from completely permissive to completely merciless.

Representative of the "strict liability" approach is *In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989)* . There, the Court held that the inadvertent disclosure of a few privileged documents in the course of a massive discovery response not only constituted a waiver of the privilege with respect to the documents, but also worked a "subject matter" waiver. So the client was forced to make a further production of *all* previously privileged documents covering the subject matter set forth in the documents inadvertently disclosed. The Court reasoned that the privilege was costly to the search for truth, and therefore that privileged information must be guarded "like the crown jewels." n117 The problem with this draconian rule is that it increases the costs of discovery and hence the costs of legal services; lawyers are likely to spend inordinate amounts of time making sure that privileged material does not slip through. This is probably not an efficient discovery model, in economic terms. Moreover, parties might fight tooth and nail during discovery over materials -- parties will be loath to produce a document in discovery, no matter how inconsequential, if a court might find it later on to be privileged, with the consequence being a subject matter waiver. Thus the D.C. Circuit view on inadvertent waiver is likely to lead to an increase in the number of privilege issues that a court will have to hear.

The clear trend in the Courts is to adopt a "culpability" approach to unintentional disclosure. Most Courts focus on whether reasonable precautions had been taken to avoid mistaken disclosure of privileged information, and on whether the party with the privilege moved quickly to rectify its error. For example, in *Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993)* , the City inadvertently sent privileged tapes to the plaintiff in the course of complying with a massive discovery demand. The Court rejected a strict liability approach and held that the question of whether a waiver occurred must be assessed under a five-factor test. n118 These factors are: (1) the reasonableness of precautions taken to prevent disclosure of privileged material; (2) the amount of time taken to remedy the error; (3) the scope of discovery (the more massive the discovery, the more excusable the disclosure); (4) the extent of the disclosure of privileged

information; and (5) the overriding issue of fairness. The Court held that under the circumstances the privilege had not been waived. It relied most heavily on the facts that the City had immediately asserted the privilege upon discovering the disclosure, and that considerations of fairness counseled in favor of the privilege. n119

Under the fault-based view of inadvertent waiver, there will be cases where the lawyer's work is so sloppy and inattentive that a mistaken disclosure will result in a forfeiture. Illustrative is *SEC v. Cassano, 189 F.R.D. 83 (S.D.N.Y.1999)* . The SEC was proceeding against investors for insider trading. The case was brought in New York but was handled by the Boston office of the SEC. A discovery protocol was set up under which all of the unprivileged SEC documents would be sent to New York, defense counsel would be allowed to investigate the documents, and then an SEC paralegal on the premises would copy whatever documents defense counsel selected, and send those documents to counsel within a month. Defense counsel, combing through the sea of boxes, found a smoking gun document -- an SEC staff memorandum, clearly privileged. He asked the paralegal if she could photocopy the document immediately so that he could take it with him that day. The paralegal telephoned SEC counsel in Boston, who immediately agreed to the unusual request, without checking the document number against the privilege log. A few weeks later, the SEC discovered its gaffe and sought an order requiring defense counsel to return the document. The Court held that the SEC's actions in response to defense counsel's request to photocopy the memorandum were so careless as to surrender any claim that it took reasonable steps to ensure its confidentiality; hence the privilege as to the document was forfeited. The Court noted that inadvertent production will constitute a forfeiture of the privilege only if the producing party's conduct was "so careless as to suggest that it was not concerned with the protection of the asserted privilege." The Court declared that the "circumstances of the request clearly should have suggested to the SEC attorney that defense counsel had found what they regarded as gold at the end of the proverbial rainbow. Any attorney faced with such a request in comparable circumstances should have reviewed the document immediately, if only to find out what the other side thought so compelling. ...Yet the SEC attorney authorized production of this document, sight unseen." SEC counsel was also found delinquent in discovering the disclosure of the privileged memorandum. n120

The risks of mistaken disclosure are obviously profound, and these risks increase in complex cases with voluminous discovery, especially discovery of electronic information. This has led parties in some cases to agree in advance that inadvertent disclosure of privileged documents by either side will not constitute a waiver. Courts have enforced these agreements, though such rulings would appear to be inconsistent with the rule of *Westinghouse*, that a party cannot limit waiver by agreement with a third party. n121 In a similar vein, the Manual for Complex Litigation encourages Courts in complex cases with massive discovery to enter a pretrial order providing that inadvertent disclosure will not constitute a waiver of the privilege unless the disclosure is completely reckless; if memorialized in a court order, a confidentiality agreement would appear to be binding on third parties. n122

[l] Attorney-Client Privilege -- Exceptions

[i] Attorney Self-Defense

The attorney may disclose a confidential client communication when it is necessary to defend himself from a charge of wrongful conduct, such as malpractice, ineffective assistance, or conspiring with the client. n123 In these circumstances, the privilege cannot be invoked, because it is unfair to render the attorney defenseless when charged with wrongful conduct in the course of the representation. The attorney may also use confidential communications to the extent necessary to establish a claim for compensation against the client -- though the fairness rationale becomes tenuous when applied to fee cases. n124

[ii] Attorney-Client Privilege -- Exceptions -- Fiduciaries

A "fiduciary exception" to the attorney-client privilege was established in the famous Fifth Circuit case of *Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)* . The fiduciary exception has come to be known as the *Garner* doctrine. *Garner* was a derivative action in which the plaintiffs sought access to confidential communications made between

management and counsel for the corporation. The Court found two competing principles at stake when the shareholders in a derivative action seek access to confidential communications from management to corporate attorneys. On the one hand, management does not manage for itself, it manages for the shareholders; so it seems anomalous to deny the shareholders access to communications presumptively made on their behalf. On the other hand, if shareholders were given an unlimited right of access on a mere showing of commonality of interest, this might chill the free flow of communications between management and corporate counsel, possibly leading to a deterioration of corporate legal representation. n125

To balance these competing considerations, the Court in *Garner* held that management had no absolute privilege to shield confidential communications from the shareholders, but that the shareholders must establish "good cause" for access to the communications. The Court set forth a nonexclusive list of factors that are pertinent to the determination of "good cause." The most important of these factors are: (1) the number of shareholders and the percentage of stock they represent; (2) whether the shareholders are in good faith; (3) the merits of the shareholders' claims; (4) the shareholders' need for the information; (5) whether the communications relate to past or prospective activity; (6) whether the advice concerned the instant litigation; and (7) whether the shareholders have made a particularized request or appear to be engaged in a fishing expedition. n126

A few Courts have held that the *Garner* doctrine should not be expanded beyond the peculiar circumstances of a shareholder derivative action. These Courts reason that the justification for the *Garner* doctrine is dubious when the action is not brought on behalf of the corporation, but rather on behalf of individual claimants. Under this view, the mutuality of interest at the heart of *Garner* does not exist outside the derivative suit. n127

Most Courts, however, have extended the *Garner* principle well beyond the derivative action, to any suit in which a fiduciary relationship is at issue. Thus, *Garner* has been applied beyond its facts to the following situations, among others: (1) individual shareholder actions for fraud; n128(2) actions against majority shareholders owing a fiduciary duty to the minority; n129(3) actions brought by employees for breach of fiduciary duty owed by the trustee of a pension plan under ERISA; n130(4) actions brought against a bank acting pursuant to a power of attorney in a commercial land transaction; n131 and (5) actions against a union and its officers brought by union members. n132

While *Garner* has received an expansive application in most Courts, we find the justification for the *Garner* doctrine to be questionable. It is of course true that a fiduciary acts on behalf of a beneficiary; but it hardly follows that the fiduciary should be deterred from seeking legal advice. Yet this is what occurs if the fiduciary cannot communicate with an attorney safe in the knowledge that what he says will not come back to haunt him. n133 The fact that fiduciaries have special duties of care provides more and not less reason to give them the opportunity to consult freely with counsel concerning the performance of their duties. Under *Garner*, the fiduciary's representation of the beneficiary may suffer in the long run, because the fiduciary may find it preferable to go without legal advice. n134 Therefore, we suggest that if *Garner* is to apply at all, it should be limited to the particular context of shareholder derivative litigation in which it arose. n135

It is important to note that the *Garner* doctrine is based on the premise that the fiduciary is communicating with the attorney on behalf of the beneficiaries. It follows that the *Garner* doctrine does not apply -- and the communication will be privileged -- if the fiduciary is communicating with an attorney out of concern for the fiduciary's own personal liability. Illustrative is *United States v. Mett, 178 F.3d 1058 (9th Cir. 1999)* , where administrators of pension plans were charged with embezzlement. The government argued that communications between the defendants and counsel concerning administration of the plans were not privileged under *Garner*. But the Court disagreed. At the time the defendant sought legal advice, "employees had begun asking difficult questions regarding the financial condition of the plans. Trouble was in the air. The defendants thus had good reason to seek advice from [the lawyer] regarding their personal exposure to additional civil and criminal liabilities resulting from the pension plan withdrawals."

[iii] Attorney-Client Privilege -- Exceptions -- Crime-Fraud

Statements made by the client to the attorney, even though in confidence, are not privileged if the purpose of the communication is to further crime or fraud. The crime-fraud exception is triggered when the party seeking the information provides *prima facie* evidence that the client was seeking the attorney's advice and services in furtherance of a preconceived plan of wrongdoing. n136 While the exception is referred to as the "crime-fraud exception," it has also been applied by some Courts where communications were made to further tortious conduct such as employment discrimination and intentional infliction of emotional distress. n137

In *United States v. Zolin, 491 U.S. 554 (1989)* , the Court noted that there was "some confusion" in the Lower Courts concerning the application of the *prima facie* standard to the crime-fraud exception. There is dispute about the quantum of proof required, and about whether the privilege holder must be given an opportunity to rebut the *prima facie* case. n138 The Court in *Zolin* found it unnecessary to determine the specific quantum of proof required to establish a *prima facie* case of crime or fraud, or whether the proponent of the privilege should be allowed an opportunity to rebut a *prima facie* showing.

These ambiguities notwithstanding, it is clear that the *prima facie* standard is not an exacting one. For example in *In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987)* , the Court found that a *prima facie* case was shown by a good-faith affidavit of the prosecutor describing the evidence submitted to a grand jury. n139

The Court in *Zolin* held that the Trial Judge, in determining whether a *prima facie* case of crime or fraud has been met, may take into account the allegedly privileged statements themselves. The Court reasoned that "no matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence," and that a "per se rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process." n140 Of course, the Court's review of the allegedly privileged statements must be conducted *in camera* and outside the presence of the party demanding production of the statements. Otherwise the privilege will be lost before the Court even rules on the privilege question. n141 In some cases it might be possible that a Judge does not even need to hold an *in camera* review, because the client's plan of crime or fraud is so obvious. However, "district courts should be highly reluctant to order disclosure without conducting an *in camera* review of allegedly privileged materials." n142 This is because "a threshold showing of facts supporting the crime-fraud exception followed by an *in camera* review of the privileged materials helps ensure that legitimate communications ... are not deterred by the risk of compelled disclosure under the crime-fraud exception." n143

The crime-fraud exception can apply even if the attorney is an unwitting instrument in the crime or fraud. The basis of the exception is that the client cannot in bad faith exploit the privilege by using the attorney as an instrument of crime or fraud. Therefore it does not matter whether the attorney was knowingly involved in the client's scheme. n144 Yet some Courts have held that the crime-fraud exception applies if the *attorney* is the wrongdoer, even if the client is not knowingly involved. n145 This application of the exception makes little sense, because the privilege is held by the client and the exception is designed to prevent the *client* from abusing the relationship.

The crime-fraud exception applies only when the attorney is being used to further a future or ongoing scheme of misconduct. It does not apply to communications seeking legal representation with respect to a past act of crime or fraud; such statements are at the heart of the protection provided by the privilege. n146 Moreover, the exception will not apply if the client consulted with an attorney to determine whether a prospective course of conduct was lawful. As one Court put it:

> The crime-fraud exception has a precise focus: It applies only when the communications between the client and his lawyer further a crime, fraud or other misconduct. ... [The exception should not be applied to deny a client] the privilege where even its stern critics acknowledge that the justification for the shield is strongest -- where a client seeks counsel's advice to determine the legality of conduct *before*

the client takes any action. n147

On the other hand, the crime-fraud exception will apply if the client already knows that a prospective course of conduct is impermissible and is simply using counsel in an attempt to effectuate the plan. n148 Likewise, any communications made with a view to covering up past acts of misconduct are in fact made with the purpose of perpetrating a crime or fraud, and hence are not privileged. n149

The fact that a communication with counsel can be used to *prove* a crime or fraud is not sufficient to trigger the exception. n150 Timing is critical, and unless the scheme of crime or fraud was afoot at the time of the communication, the statements remain privileged. For example, assume that a corporation seeks legal advice to determine whether a large account receivable is, in fact, legally collectible. Counsel investigates and informs the corporation that the receivable is not legally collectible. A few months later, the corporation sells the receivable without informing the buyer about the advice received from counsel. Of course, counsel's report would be relevant to prove that the seller-client acted fraudulently. But in order for the crime-fraud exception to apply, the seller must establish a *prima facie* case that the seller had a fraudulent intent at the time that counsel's advice was sought. If not, the privilege will apply even though the client acted fraudulently subsequent to receiving the legal advice. n151

[6] Psychotherapist-Patient and Related Privileges

In *Jaffee v. Redmond, 518 U.S. 1 (1996)* , the Court established a psychotherapist-patient privilege under federal common law, and held that this privilege also applied to protect confidential statements made to a clinical social worker in a therapy session. The case arose after a police officer, responding to a call about a fight in an apartment complex, shot and killed the plaintiff's decedent. The facts of the shooting were hotly disputed between the parties. After the incident the defendant police officer received counseling from a clinical social worker. The plaintiff sought discovery of the communications made in these counseling sessions, in order to contradict the account of the shooting given by the defendant at trial. The Trial Court held that the communications were not privileged, and when both the defendant and the social worker refused to comply with a disclosure order, the Trial Court instructed the jury that it could draw a negative inference from this failure to disclose. The jury returned a verdict for the plaintiff.

The Court of Appeals reversed, finding that a psychotherapist-patient privilege existed under federal law and was fully applicable to statements made to clinical social workers. That Court held, however, that the privilege was a qualified one, i.e., the communications would be protected unless the adversary could establish a substantial need for them. The Court of Appeals found that no showing of substantial need had been made.

The Supreme Court affirmed the Court of Appeals, but held in contrast to that Court that the psychotherapist-patient privilege is absolute, not qualified. Justice Stevens, writing for the majority, made the following points:

(1) *Rule 501* does not "freeze" the common law of privileges but rather provides an affirmative grant of authority to Federal Courts to develop new privileges where dictated by reason and experience.

(2) A new privilege can be adopted when the private and public interests supporting the privilege outweigh the cost to the search for truth that the privilege would impose.

(3) The private interests supporting a psychotherapist-patient privilege are substantial, because confidentiality is at the heart of the psychotherapist-patient relationship. The physician-patient relationship is distinguishable, because treatment for a physical ailment "can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests." In contrast, effective psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."

(4) To establish a privilege there must be more than private interests at stake; the privilege must also "serve public ends." The psychotherapist-patient privilege meets this requirement. The privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." The public interest is especially furthered by protecting communications of law enforcement officials during therapy sessions. "The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job."

(5) The cost of the psychotherapist-patient privilege is minimal because the privilege will protect only those statements that are generated by a reliance on confidentiality. "Without a privilege, much of the desirable evidence to which litigants ... seek access -- for example, admissions against interest by a party -- is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged."

(6) Federal recognition of this privilege is especially appropriate because a psychotherapist-patient privilege has been legislatively enacted in all fifty states and the District of Columbia. If a federal privilege were not recognized, the state privileges would be undermined because psychotherapists could not provide an absolute guarantee of confidentiality.

(7) Federal recognition of this privilege receives strong support from the fact that the psychotherapist-patient privilege was one of the privileges originally recommended by the Advisory Committee on the Federal Rules of Evidence. It is more difficult to establish a new privilege if it was not recognized in the Advisory Committee proposal.

(8) The rationale supporting the psychotherapist-patient privilege applies equally to statements made in confidence to clinical social workers. "Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist but whose counseling sessions serve the same public goals." While the recognition of such a privilege among the states is not unanimous, it is predominant.

(9) The psychotherapist-patient privilege is not a qualified privilege. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." Therefore, where the privilege applies, it is absolute, unless it is waived by the patient.

There are several open questions left by the Court's decision in *Jaffee*. The Court specifically declined to define the precise contours of the privilege, other than to say in a footnote that "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." n152

One important question is whether the privilege applies to confidential communications to any social worker, or whether it is limited to statements made for purposes of therapy to licensed clinical social workers. As pointed out by Justice Scalia in his dissent (joined in this respect by Chief Justice Rehnquist), the term "social worker" is broad, and therapy is only a small part of the job of most social workers. Social workers differ from psychotherapists in this respect. The precise holding of *Jaffee* appears limited to statements made for purposes of therapy. It would appear, therefore, that Courts must now hold *in camera* hearings to determine which statements made to social workers were for therapeutic purposes and which were not. The Court in *Jaffee* failed to take this into account as one of the real costs of a social worker privilege.

Another question is whether a physician-patient privilege can or should be recognized as a matter of federal law after *Jaffee*. On the one hand, the Court distinguished the physician-patient relationship from the psychotherapist-patient relationship on the ground that confidential communications are more critical to the latter relationship than to the former. On the other hand, virtually every state has legislatively recognized a physician-patient privilege, n153 and this

factor was important to the Court's recognition of the psychotherapist-patient privilege in *Jaffee*. But then again, the physician-patient privilege was not one of those recommended by the Advisory Committee, and the Court found this factor relevant in *Jaffee* as well. In the end, it seems unlikely that *Jaffee* can be used as a springboard to establish a federal physician-patient privilege -- a privilege that has not yet been recognized by any Federal Court. n154

Another question is whether *Jaffee* can be read as a complete rejection of the concept of a "qualified" privilege. Some well-established privileges have been recognized as qualified, in the sense that the information covered by the privilege must be disclosed if the adversary can establish a substantial need for the information. Most importantly, the privilege protecting the "deliberative process" of government officials has been recognized as a qualified privilege. (See the discussion in § 501.02[7].) While the *Jaffee* Court did not purport to Rule on the qualified nature of any privilege other than that before it, its categorical statement -- that an uncertain privilege is little better than none at all -- bodes ill for any qualification of a privilege that is found to exist. At a minimum, as discussed above, any "new" privilege recognized by the Courts will probably have to be found absolute after *Jaffee* -- making it less likely that the privilege will be recognized in the first place.

A final question about the scope of *Jaffee* revolves around the fact that the Court adopted the psychotherapist-patient privilege in a civil case. n155 In a criminal case, where a prosecution witness has made statements in therapy, the analysis might have to be different due to the criminal defendant's constitutional rights to confrontation and an effective defense. The Second Circuit, before *Jaffee*, adopted a psychotherapist privilege but held that the star prosecution witness' records of psychiatric commitment were nonetheless subject to disclosure and use by the criminal defendant in cross-examination. n156 That Court was clearly concerned that the privilege would unduly restrict the defendant's ability to cross-examine the witness. Thus, the *Jaffee* Court's promulgation of an "absolute" privilege must be tempered by constitutional considerations in criminal cases; a case-dependent balance between the need for the privilege and the defendant's need for the evidence will have to be conducted.

[7] Executive and Governmental Privileges

Several different privileges for the government (other than the attorney-client privilege in the government context, discussed in § 501.02[5][h]) have been recognized by Federal Courts. Most deference is given to claims of military secrets or national security. n157 If the claim on its face does seem to involve these matters, Federal Courts usually sustain the privilege claim. n158

Moreover, where the state secret privilege is applicable, it is absolute, not qualified. The privilege applies even if access to the information is essential to sustain a civil claim or a criminal conviction. n159 For example, in *Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992)* , the plaintiffs brought a manufacturing and design defect suit against the manufacturer of a military weapons system, for failure of the weapons system to intercept two missiles fired upon the *U.S.S. Stark*. The government intervened and moved to dismiss the complaint on the ground that the subject of the lawsuit was a state secret. The plaintiffs argued that they could bring their case on the basis of nonprivileged information in the public domain, including affidavits of the former captain of the *Stark* and affidavits from former employees of the defendant. However, the Court held that the plaintiffs could not prove their case without "proof of what the [weapons] system was intended to do and the ways in which it fails to accomplish these goals." The Court concluded: "Such an analysis of the capabilities of an advanced Navy frigate's defensive systems is the type of judicial disclosure of state secrets the doctrine blocks." Therefore the Court upheld the dismissal of the claim. n160

Another example of the draconian effect of the state secrets privilege arose in *Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005)* . The Court upheld the dismissal of a former CIA agent's employment discrimination claim, on the ground that pursuit of the suit would inevitably result in the disclosure of classified state secrets. The plaintiff was a covert operative, and the Court noted that "[t]here is no way for Sterling to prove employment discrimination without exposing at least some classified details of the covert employment that gives context to his claim." The Court also noted that many of the relevant witnesses would be covert CIA operatives, and that calling them to testify would risk their cover.

The Court recognized the drastic nature of the remedy of dismissal, but found no alternative:

> But where the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy.
>
> Needless to say, litigation centering around a covert agent's assignments, evaluations and colleagues meets this test. Here, the whole object of the suit and of the discovery is to establish a fact that is a state secret, namely, the methods and operations of the Central Intelligence Agency.

The state secrets privilege may preclude a prosecution or a civil claim even if the party can show sufficient independent evidence to proceed with the case. For example, in *Bareford* the plaintiff had established a *prima facie* case with nonprivileged information, but the Court dismissed the case anyway. This was because the privileged and the nonprivileged information was "inextricably linked." Cross-examination at trial would be required as to witnesses who had access to highly sensitive and privileged data. The Court stated: "We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed." n161

The state secrets privilege also applies to preclude a claim if the privileged material is necessary to mount a defense. In other words, the choice is made to place the cost of the state secrets privilege on the prosecution and the civil plaintiff, rather than on the civil or criminal defendant. n162

Less deference is given to claims of agency or government privilege that do not involve state secrets and national security. The privileges for official information outside the national security context are generally grouped under the term "deliberative process privilege." n163 The deliberative process privilege protects the free flow of ideas, comments, and expressions necessary for the government to make informed decisions. As the Supreme Court has stated, the "ultimate aim" of the privilege is to "prevent injury to the quality of agency decisions." n164

The Courts assume that confidentiality is required because government officials will be "chilled" if they know that their internal communications are subject to public disclosure. The fear is that officials may pull punches, and this will hurt the quality of advice that they give to their superiors. A secondary argument in support of the privilege is that it "protects the integrity of the decision-making process itself by confirming that officials would be judged by what they decided, not for matters they considered before making up their minds." n165 The concern is that the integrity of the government official's final decision -- which is public -- would be undermined if the public finds out about the way in which the decision was reached. The analogy is that nobody would eat sausage if they know how it is made.

Courts have applied the deliberative process privilege to protect a wide variety of information prepared by government officials. Some examples include: an intra-agency memorandum proposing underground storage of nuclear arms; n166 Navy cost estimates prepared in the course of selecting a port for a battleship group; n167 a report by an Inspector General on allegations that a Regional Administrator for the EPA interfered with enforcement actions of the EPA's Hazardous Waste Division regarding a hazardous waste site; n168 personal notes and evaluations used in preparing an EEOC report; n169 internal agency memos concerning strategy discussions with respect to a pending discrimination lawsuit; n170 and a report concerning an investigation of alleged wrongdoing by National Guard Officers, on which the Army ultimately took no action. n171

To qualify for the deliberative process privilege, the information prepared by the government must be both *predecisional* and *deliberative*. The "predecisional" requirement limits the privilege to the process of decisionmaking; the privilege is not designed to protect the final decision itself. The "deliberative" requirement protects the free flow of official opinions and advice and the exercise of judgment; the privilege is not designed to protect simple fact-gathering or action by the official as to which there is no discretion or thought. n172 While the "predecisional" and "deliberative"

requirements appear straightforward, they are often difficult to apply to individual documents.

A Court will find a document to be predecisional if it was designed to assist a government official in arriving at a final decision. In contrast, if the document was prepared to explain or justify a decision that has already been made, it is not protected. However, the "future/past" time line is not an absolute. The privilege may apply even if the report was prepared after a final decision. This is because an agency may be in a continuing process of examining its standing policies and regulations. For example, in *Mary Imogene Bassett Hospital v. Sullivan, 136 F.R.D. 42 (N.D.N.Y. 1991)* , the hospital brought an action challenging the validity of regulations concerning Medicare reimbursement. The hospital sought six documents. Four documents were prepared while the challenged regulations were being drafted, and these were found predecisional. Two documents were drafted several years after the regulations were finalized, but the government argued that these documents were predecisional as well, because they were part of an "ongoing process of resolving policy issues that relate to the regulation." The Trial Judge noted the Supreme Court's view that "the line between predecisional documents and postdecisional documents may not always be a bright one," and that Lower Courts should be "wary of interfering" with an agency's "continuing process" of examining its policies. n173 The Judge examined the documents, and found that one of them merely dealt with "the application and implementation of the established policies in a given instance"; this document did not involve a reevaluation of an existing policy, but rather the simple implementation of existing policy to a certain fact situation. It was therefore postdecisional and unprotected by the privilege. The other document evaluated the challenged regulations and explored options in drafting new regulations on the point. This was found to be part of the agency's continuing process of evaluation and hence was predecisional. So, if a government document is crafted in terms of an ongoing review or critique of a final decision, it will be difficult for counsel to obtain it. On the other hand, if the document is merely implementing an unquestioned policy or directive, the deliberative process privilege will not apply.

Counsel seeking production of an internal government report must focus on the relationship between the author of the report and its recipient. If the report is traveling "upstream" from junior to senior official, then it is likely to have no binding effect and thus more likely to be considered predecisional. By contrast, a report traveling downstream "is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking, rather than part of its give-and-take." n174

In determining whether government material is "deliberative," the Courts have applied a rough-hewn distinction between "opinion," which is protected, and "fact," which is not. The reasoning is that "the prospect of disclosure is less likely to make an adviser omit or fudge raw facts, while it is quite likely to have just such an effect" on the assertion of opinions. n175

Difficulties arise if a report contains both fact and opinion. It is possible that the report could be redacted, but this is only viable if the opinion and fact are segregable. As the Supreme Court has stated, "[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and *severable from its context* would generally be available for discovery." n176 By negative implication, this means that if the factual material is so intertwined with the opinions and the process of judgment that it cannot be severed, then the factual material is privileged as well. n177

Facts can be within the deliberative process privilege if disclosure of the facts would also disclose the judgment or discretion that has been exercised in compiling the facts. For example, in *Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993)* , the plaintiffs sought access to the "Waldheim Report." The Waldheim report was a 204-page report with twenty-six photographs attached, prepared by a DOJ attorney for use by the Attorney General in making his decision to exclude former Austrian President Kurt Waldheim from the United States and place him on a "watchlist" of excludable aliens. The report was clearly predecisional. But the plaintiffs argued that most of the report was not deliberative because it was essentially a compilation of facts about Waldheim's war activities. They contended that these statements of fact could be segregated from the conclusions and recommendations at the end of the report. The DOJ argued in response that the facts contained in the Waldheim report were the result of a process by which the DOJ

attorney separated "the significant from the insignificant and the truthful from the untrue." Thus, according to the DOJ, disclosure of the facts in the report would reveal the thought process of the preparer -- what he thought would be most significant for the Attorney General to have before him.

The Court of Appeals in *Mapother* sided with the DOJ and concluded that a summary of factual material is ordinarily protected by the privilege. It reasoned that the process of separating relevant fact from irrelevant fact or rumor is a deliberative process, and that the privilege "was intended to protect not simply deliberative material, but also the deliberative process of agencies."

Most Courts have held, consistently with *Mapother*, that if the report is one that sifts through information, then the factual findings are privileged because their disclosure would expose the thought process of the official as to which facts were relevant. n178 Yet we think that this view is overbroad. It threatens to place a shroud over the government. We note that it is the rare government report that is a simple tabulation of unalloyed fact. The junior government official's job is usually to separate the relevant from the irrelevant -- to protect the busy and important senior official from having to look through "too much" information. If this winnowing-out process is considered deliberative, then virtually all predecisional reports are privileged. Such an expansive approach to the privilege is at odds with the axiom that privileges are in derogation of the search for truth and, as such, should be narrowly construed.

Unlike the state secrets privilege, the deliberative process privilege is, at least at this point, qualified rather than absolute -- though as discussed above, the Supreme Court's decision in *Jaffee* brings into question whether any privilege can be recognized as qualified rather than absolute. By "qualified," what is meant is that the information loses its protection if the government's need for secrecy is outweighed by the citizen's need for the information.

To determine whether the need for the evidence outweighs the government's interest in secrecy, most Courts apply a five-factor balancing test, taken from Judge Weinstein's opinion in *In re Franklin National Bank Securities Litigation, 478 F. Supp. 577, 588 (E.D.N.Y. 1979)* . Judge Weinstein found that the following factors should be balanced:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. n179

Judge Weinstein's essential point is that the Court must assess the need for the information by the party seeking it (including its availability through reasonable alternatives), and whether the deliberative process will in fact be "chilled" in the future by disclosure today.

Walsh v. Chittenden Corp., 799 F. Supp. 405 (D. Vt. 1992) , provides an example of the balancing process leading to disclosure. The plaintiffs in a securities fraud litigation sought disclosure of examination reports prepared by the Vermont Department of Banking, Insurance and Securities. These reports concerned the allegedly unsafe and unsound banking practices by the defendant. The plaintiffs agreed that if they could obtain access to the reports, they would submit to a protective order under which the report would be used solely for purposes of the litigation and not disclosed to others, and that any confidential information filed with the Court would be under seal. But the Department nonetheless objected to disclosure even with these limits.

The *Walsh* Court found that the plaintiffs had a strong need for the evidence, because the plaintiffs would have to show that the defendant acted with scienter, and "information contained in the Department's records of Chittenden Corporation, probably unavailable elsewhere, may support the allegation of scienter." The Court recognized that in many cases, the government is the sole repository of information relevant to litigation.

The *Walsh* Court found that the plaintiffs' need for the evidence outweighed the governmental interests in secrecy and

the integrity of the deliberative process. The Court noted that because of the confidentiality agreement between the parties, the public was unlikely to obtain access to the reports and thus there was no risk of a loss of public confidence in the bank review process. The moral of *Walsh* is that a party who agrees to some kind of tailored protective order is more likely to overcome the qualified deliberative process privilege than a party who refuses to compromise. n180

The government privileges are properly invoked only when asserted by a formal claim lodged by a high-level official of the department having control over the requested information -- many Courts require the invocation to be made by the actual head of the department. n181 Some Courts allow a qualified official to delegate his or her authority to claim the privilege, but only to a subordinate of high authority, and the delegation must be accompanied by specific guidelines on the use of the privilege. The assertion of the privilege must be based upon actual personal consideration of the facts by the relevant official. n182 It follows that the assertion of the privilege by a government attorney participating in the litigation is insufficient. n183 It also follows that the privilege cannot be invoked by a private litigant. n184 Finally, the agency claiming the privilege must provide "precise and certain" reasons for preserving the confidentiality of the information. n185

The reason for these formal procedural requirements is that the government privileges are in derogation of the search for truth, and are also in tension with the fundamental principle of access to government. As one Court has stated, the formal procedural requirements "are not merely technical requirements. Rather, their purpose is to insure that the privilege is claimed by someone in the executive branch with sufficient authority that the court can rely upon his judgment that the claim was prudently invoked." n186

Another government privilege is that protecting confidential communications to and by the President and the President's immediate advisers. The Supreme Court considered this privilege in *United States v. Nixon, 418 U.S. 683 (1974)* . The Court found a qualified privilege to exist. The presidential communications privilege is analytically similar to the deliberative process privilege, but the former has been applied in the context of executive decisionmaking while the latter has been applied to agency decisionmaking. Moreover, the presidential privilege has been held to protect communications of purely factual information as well as deliberations. n187

A final government-based privilege is the law enforcement privilege. The law enforcement privilege is designed to protect informants and other confidential law enforcement activity, on the ground that disclosure would deter effective investigation. However, as the Supreme Court held in *Roviaro v. United States, 353 U.S. 53 (1957)* , the privilege will not apply where the state interest in the free flow of information is outweighed by an individual's right to prepare an effective defense. In *Roviaro*, the Court held that an informant's identity could not remain confidential where the informer was "the sole participant, other than the accused, in the transaction charged," and thus was "the only witness in a position to amplify or contradict the testimony of Government witnesses." n188 In contrast, the Court in *United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993)* , held that disclosure of an informant's identity was not required where the informant would simply have corroborated the testimony of the government's star witnesses.

In *United States Dep't of Justice v. Landano, 508 U.S. 165 (1993)* , the Supreme Court held that the government has the burden of establishing that an informant reported information to law enforcement officials with the expectation that his or her identity would be kept anonymous. Without such an expectation of anonymity, the privilege will not apply. The Court recognized, however, that the expectation need not be one of total and permanent anonymity. Obviously, an informant should reasonably anticipate that his identity would be disclosed if the matter ever went to trial. The Court stated: "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes."

The *Landano* Court held that the government was not entitled to a presumption that *all* informants who report to law enforcement do so with an expectation of confidentiality. The Court explained: "It may be true that many, or even most, individual sources will expect confidentiality. But the Government offers no explanation, other than ease of administration, why that expectation should always be presumed."

The Court noted, however, that "more narrowly defined circumstances" may justify a presumption of expectation of confidentiality. As an example, the Court stated that "when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality, the Government is entitled to a presumption." n189 The Court cited approvingly *Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir. 1984)* , where prison officials who provided information to law enforcement about an attack on an inmate risked a "high probability of reprisal"; under those circumstances it was reasonable to presume those who made the report did so with the expectation that the report would not be disclosed to the community except when necessary for law enforcement purposes. And, of course, the privilege will apply if the government can demonstrate that the informer gave information on the express assurance that his identity would remain confidential until disclosure would become necessary at a criminal trial. n190

[8] Marital Privileges

Federal Courts have consistently recognized two separate privileges arising from the marital relationship. The adverse testimonial privilege prohibits testimony by one spouse against another in criminal cases; it is designed to protect marital harmony at the time the testimony is demanded and to protect a witness from the difficult choice of incriminating a spouse or going to jail for contempt. The confidential communications privilege prohibits disclosure, in civil and criminal cases, of confidential communications from one spouse to another; it is designed to protect and further marital intimacy as of the time the communication is made between the spouses. Notably, the original Advisory Committee's proposals included an adverse testimonial privilege, but did not include a privilege for confidential communications between spouses. As to the latter privilege, the Advisory Committee stated that it cannot "be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware." Yet Federal Courts have consistently recognized a privilege for confidential marital communications.

The different policies behind the two privileges result in substantially different application. In *Trammel v. United States, 445 U.S. 40 (1980)* , the Court held that the adverse testimonial privilege does not apply if the witness-spouse voluntarily takes the stand. This changed the previous Rule, under which the litigant had the right to keep his spouse off the stand. The Court's rationale was that "[w]hen one spouse is willing to testify against the other in a criminal proceeding -- whatever the motivation -- their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." So, after *Trammel*, the witness-spouse cannot be compelled to give adverse testimony against the litigant-spouse, but if the witness-spouse chooses to testify, the adverse testimonial privilege is simply inapplicable. The privilege, as reconstituted by *Trammel*, is basically designed to protect the witness-spouse from an uncomfortable choice: to send a spouse to jail with incriminating testimony, or to go to jail herself for refusing to give incriminating testimony.

In contrast, the confidential communications privilege can be invoked by the litigant spouse to prevent disclosure of confidential communications between spouses made during the marriage, even if the other spouse is willing to testify. n191 This is because even if there is no marital harmony at the time of the testimony, the communicating spouse had the right to rely on marital intimacy at the time the confidential communication was made. n192 Consequently, where a spouse is willing to testify, he or she can generally testify about acts and nonconfidential communications, but not about confidential communications made during the marriage. n193 Like the privilege, the party asserting the privilege for confidential marital communications has the burden of showing that the communication was made with a reasonable expectation of confidentiality. n194

The adverse testimonial privilege does not apply if the witness and litigant are divorced or permanently separated at the time of the testimony. n195 Nor does the privilege apply to bar the introduction of a spouse's out-of-court statements under a hearsay exception. The reasoning is that the spouse is not being compelled to take the stand, and moreover, any damage to the marital relationship from a hearsay statement occurs at the time the spouse's out-of-court statement is made. n196

The adverse testimonial privilege does not apply if the marriage is a sham, i.e., if the parties married with the dominant intent of invoking the privilege. One Court, however, has held that the difficult proof problems that arise in determining a sham marriage warrant an exception to the adverse testimonial privilege for *all* premarital acts. n197 In fact, after *Trammel* the likelihood that a person will enter a sham marriage in order to invoke the privilege is remote. Under *Trammel*, the litigant-spouse has no right to keep the witness off the stand. Before *Trammel*, one could enter into a sham marriage secure in the knowledge that the "spouse" would never testify. But this is no longer the case.

The Federal Courts are split on the so-called "joint participants" exception to the adverse testimonial privilege. Some Courts have held that if the witness-spouse is a participant in the crime with which the litigant spouse is charged, then the witness is not entitled to invoke the privilege. The reasoning is that the marriage of persons jointly involved in crime is not worth protecting. n198 In *Appeal of Koecher, 755 F.2d 1022 (2d Cir. 1985)* , however, the Second Circuit rejected a joint participant exception to the adverse testimonial privilege. Judge Friendly, writing for the Court, reasoned that the exception would tend to swallow the Rule of privilege, because if the spouses have such a close relationship that one refuses to testify against the other, it is likely that they will also have some mutual involvement in the charged activity. n199 Therefore the joint participants exception would likely swallow the Rule.

The marital privilege for confidential communications focuses on the intent of the communicating spouse at the time of the communication. Consequently, the parties must be married at the time of the communication, but they need not be married at the time of trial. If the parties were divorced or permanently separated at the time of the communication, the privilege will not apply even if it was made in confidence. n200

Because the focus of the confidential communications privilege is on the intent of the communicating spouse, it follows that the privilege will not apply if the spouse is communicating in order to further a crime or fraud. Such a communication is no more worthy of protection than a similar statement made to an attorney. n201

Many Courts have, in apparent confusion, held that the confidential communications privilege is inapplicable where the spouses are *joint participants* in criminal activity. n202 While a joint participants exception may be applicable to the adverse testimonial privilege, which focuses on preservation of marital harmony at the time of the testimony (see the discussion of *Koecher, supra*), such an exception is not consistent with the rationale of the confidential communications privilege.

The confidential communications privilege is analogous to the attorney-client privilege, because it is communication-based. Like the privilege, there is good reason for a crime-fraud exception to the interspousal communications privilege. If the communication is in furtherance of crime or fraud, then it is not worthy of protection. However, a joint participant exception is not the same as a crime-fraud exception. The crime-fraud exception evaluates the intent behind the *communication*, while the joint participant exception looks solely to the *status* of the witness. n203 The distinction is important where one spouse makes a confession concerning a past event to a joint participant. Assuming that such a confession does not further a plan of crime or fraud, and was made in confidence, it should be protected by the confidential communications privilege. But it would not be protected under a joint participant exception. Conversely, if one spouse is using the other as a dupe in furtherance of a crime or fraud, the communications should not be protected by the privilege, even though it is questionable whether the duped spouse could be considered a joint participant in criminal activity.

Both the adverse testimonial privilege and the confidential communications privilege contain an exception for an action brought against a spouse for victimizing a family member. n204

[9] Parent-Child Privilege

While the interspousal privileges are well-established, Courts have refused to provide privilege similar protection for

the parent-child relationship. Thus, a parent can be forced, on pain of contempt, to testify against her child, and vice-versa. n205 And neither a parent nor a child has the right to invoke a privilege for confidential communications made from one to the other. n206

It might be argued that after the Supreme Court's decision in *Jaffee v. Redmond* (see § 501.02[6]), which recognized a privilege for confidential statements made to psychotherapists and social workers, the Federal Courts should be more receptive to claims that the parent-child relationship is entitled to a privilege. But this has not been the case. In *In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997)* , the Court refused to recognize either an adverse testimonial privilege or a confidential communications privilege for the parent-child relationship. The Court noted that even after *Jaffee*, privileges are to be strictly construed because they are in derogation of the search for truth. As to an adverse testimonial privilege, the *Grand Jury* Court considered it so costly to the search for truth that it was hardly worth discussing. As to a confidential communications privilege, the Court made the following points: (1) the overwhelming majority of Federal and State Courts have rejected a parent-child privilege for confidential communications; (2) unlike the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee*, the parent-child privilege was not included in the list of privileges submitted by the Advisory Committee and approved by the Supreme Court, and it is not generally accepted in the states; (3) it is unlikely that parents and children would even be aware of an evidentiary privilege, much less rely on the existence of a privilege in determining whether to confide in each other; (4) recognition of a parent-child privilege might prevent a parent from acting in the child's best interest in circumstances where it might be necessary to notify the authorities about the child's misconduct -- the parent would become a prisoner of the privilege; and (5) there are many questions about the scope of such a privilege (e.g., whether it applies only to unemancipated minors, whether it applies to step-parents, grandparents, etc.), which counsel deference to the legislature. The Court concluded: "Sympathy alone cannot justify the creation of a new and unprecedented privilege which does not meet the standards set by Congress, the Supreme Court and this court."

The *Grand Jury* Court's point on lack of reliance is a sound one; unlike the attorney-client relationship, where the attorney informs the client that information is privileged, a parent and child are ordinarily not aware of the rules of evidence when they are communicating. Moreover, even if parent and child know about the privilege, this knowledge will almost certainly not affect the parties' decision on whether to communicate. It is unlikely that a parent or child's thought process is so litigation-driven when they are deciding whether to share confidences. At least we can hope that it is not.

The real concern of supporters of a parent-child privilege is that forcing a parent to testify against the child, or the child against the parent, would ruin the relationship. Thus, Judge Mansmann, in her dissent in *Grand Jury*, notes that Roman law and ancient Jewish law "entirely barred family members from testifying against one another based on a desire to promote the solidarity and trust that support the family unit." Moreover, the parent or child witness, without a privilege, is put in a difficult situation. As Judge Mansmann put it: "[A] family member who is forced to testify against her will would face the unpleasant choice of aiding the criminal conviction of a loved one, perjuring herself on the stand, or risking a citation for contempt of court for refusing to testify."

Yet these arguments are really arguments for a broader privilege protecting a witness from being compelled to give *any* testimony adverse to a parent or child. They are not confidentiality-based. The harm to the parent-child relationship, the sense of betrayal, occurs when the parent testifies against the child, or vice versa, on any material fact. The trilemma of a parent or child witness -- testify and harm the relationship, don't testify and go to jail, or lie and go to jail -- is the same whether the negative information is a confidential communication or some other material fact. This raises the question whether a privilege against adverse parental or child testimony should be recognized instead of a confidential communications privilege. This broader privilege should not be lightly adopted, as it would be even more costly to the search for truth than a privilege protecting only confidences. On the other hand, one can certainly sympathize with the dilemma of a parent called to testify against his or her child, and vice-versa. Yet witnesses are often placed in a difficult situation during the course of litigation; they often have negative information about someone they love or like. Adverse testimony might well destroy friendships, business relationships, sexual relationships, and partner-associate

relationships.

The question is whether the parent-child relationship is sufficiently special that it should be given protection from the harm caused by compelled adverse testimony. That is a difficult question for a Court to assess. In the end, the message of the *Grand Jury* majority is correct: where the existence of a privilege depends on sensitive social policy considerations, and difficult questions of scope, the whole matter is better left to the legislature.

The real protection against undue interference into the parent-child relationship comes from a proper exercise of prosecutorial discretion. If family relationships are abused in an attempt to obtain evidence, "the remedy lies not in the adoption of an exclusionary Rule, but instead in taking administrative or legal steps against those causing the abuse." n207

[10] Clergy-Communicant Privilege

Few members of the clergy are called to testify against those who have sought religious counseling from them. The cases rejecting privilege claims tend to involve clergy involved in nonreligious counseling. For example, in *United States v. Dube, 820 F.2d 886 (7th Cir. 1987)* , the Court refused to protect a statement made by the defendant to a pastor, where the defendant was seeking advice about his tax liability. The Court stated that "the taxpayer is not a penitent seeking spiritual relief from his sins, only a citizen seeking relief from his obligation to pay taxes." Where a communicant is seeking religious solace or counseling, the Courts have recognized a privilege. n208 Not only are the communications worthy of protection, but a rule requiring disclosure of confidential communications would put the cleric in an impossible position -- see, e.g., Montgomery Clift in *I Confess*.

[11] Trade Secrets Privilege

Proposed Rule 508 (set forth in Part Three of this *Manual infra*) appears to state the approach that Federal Courts have taken toward trade secrets. The privilege involves balancing the legitimate competitive interests of the privilege holder against someone else's need for evidence. Where possible, Courts try to provide access to evidence while simultaneously seeking to control what is done with the evidence. This can minimize the competitive harm associated with disclosure of business secrets. n209

In connection with the trade secrets privilege, one case to keep in mind is *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)* . There, the Supreme Court held that the states may protect the kinds of intellectual property that may make up the subject matter of trade secrets, as long as state rules do not conflict with the operation of federal patent and copyright laws. The Court said that

> [t]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business... . The protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse.

The Court analyzed the policies underlying patent law and the different considerations underlying trade secrets law and decided that "[c]ertainly the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention." Moreover, the Court concluded that a trade secrets privilege is not inconsistent with the patent policy of encouraging disclosure of inventions to the public. Important to the Court's reasoning was the fact that "[t]rade secret law provides far weaker protection in many respects than the patent law." Presumably, a federal trade secrets privilege also would be consistent with federal patent policy.

[12] Tax Preparer Privilege

As discussed above, there is no privilege for accountants or tax preparers under common law. But Congress has

established a limited privilege for confidential communications between tax preparers and clients. The IRS Restructuring and Reform Act added a new *Section 7525 of the Internal Revenue Code*, providing that "[w]ith respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner [CPA, enrolled agent, enrolled actuary] to the extent that the communication would be considered a privileged communication if it were between a taxpayer and an attorney." This privilege applies only in noncriminal matters and only protects against disclosure to the IRS, not to other regulatory agencies or third parties in private actions. Tax shelter advice is not covered by this privilege.

[13] Journalist's Privilege

The Supreme Court held in *Branzburg v. Hayes, 408 U.S. 665 (1972)* , that the *First Amendment* does not guarantee the protection of a newsreporter's confidential sources. The Court in *Branzburg* (in a divided decision with Justice Powell casting the deciding vote in a concurring opinion) held that a journalist has no privilege to withhold from a grand jury information relevant to an investigation that was gained from confidential sources. n210 Despite continual assertions of a privilege, most Courts adhere to *Branzburg* and hold that a newsreporter can be compelled to disclose confidential sources if necessary to aid a criminal investigation or prosecution. Many Courts, however, appear to recognize a journalist's privilege outside the grand jury setting, and some go further and recognize a privilege even for nonconfidential information. Judge Posner, in *McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003)* , described the state of the law as follows:

> A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope. See, e.g., *In re Madden, 151 F.3d 125, 128-29 (3d Cir. 1998)* ; *United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998)* ; *Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir. 1993)* ; *In re Shain, 978 F.2d 850, 852 (4th Cir. 1992)* ; *United States v. LaRouche Campaign, 841 F.2d 1176, 1181-82 (1st Cir. 1988)* ; *von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987)* ; *United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986)* . A few cases refuse to recognize the privilege, at least in cases, which *Branzburg* was but this case is not, that involve grand jury inquiries. *In re Grand Jury Proceedings, 5 F.3d 397, 402-03 (9th Cir. 1993)* ; *In re Grand Jury Proceedings, 810 F.2d 580, 584-86 (6th Cir. 1987)* . ...
>
> Some of the cases that recognize the privilege, such as *Madden*, essentially ignore *Branzburg*; some treat the "majority" opinion in *Branzburg* as actually just a plurality opinion, such as *Smith*; some audaciously declare that *Branzburg* actually created a reporter's privilege, such as *Shoen*, and *von Bulow v. von Bulow*. The approaches that these decisions take to the issue of privilege can certainly be questioned. A more important point, however, is that the Constitution is not the only source of evidentiary privileges, as the Supreme Court noted in *Branzburg* with reference to the reporter's privilege itself. And while the cases we have cited do not cite other possible sources of the privilege besides the *First Amendment* and one of them, *LaRouche*, actually denies, though without explaining why, that there might be a federal common law privilege for journalists that was not based on the *First Amendment*, other cases do cut the reporter's privilege free from the *First Amendment*. See *United States v. Cuthbertson, 630 F.2d 139, 146 n. 1 (3rd Cir. 1980)* .
>
> ...
>
> Some cases that recognize a reporter's privilege suggest that it can sometimes shield information in a reporter's possession that comes from a nonconfidential source; in addition to the *Madden, Schoen*, and *La Rouche* cases cited above see *Gonzales v. National Broadcasting Co., 194 F.3d at 33* ; *United States v. Burke, 700 F.2d 70, 76, 78 (2d Cir. 1983)* . Others disagree. *United States v. Smith, supra* ; *In re Grand Jury Proceedings, supra*. The cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth.

> Since these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice.

Instead of recognizing a privilege either in the constitution or under common law, Judge Posner found the protections applicable to any demand for information to be sufficient:

> It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. *Fed. R. Crim. P. 17(c)*. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist. The approach we are suggesting has support in *Branzburg* itself, where the Court stated that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the *First Amendment*. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the *First Amendment* as well as the Fifth." *408 U.S. at 707* -08. n211

The journalist's privilege, if and where it exists, is a qualified privilege. Once the privilege is properly invoked, "the burden shifts to the requesting party to demonstrate a sufficiently compelling need for the journalist's materials to overcome the privilege." n212 The privilege is likely to be outweighed in libel cases, otherwise the privilege would be tantamount to immunity from suit. Again, the whole question of qualified privileges has been brought into doubt by *Jaffee*, where the Court held that the psychotherapist-patient privilege had to be absolute rather than qualified, otherwise it would be an uncertain privilege that is little better than none at all. The same question of uncertain applicability arises with a qualified newsreporter's privilege. On the other hand, if a newsreporter's privilege has to be absolute, it is far less likely that Courts will recognize it in the first place -- an absolute newsreporter's privilege may impose significant costs on people harmed by the media.

[14] Miscellaneous Privileges

As noted above, claims for new privileges have not fared well in the Federal Courts. Accountant-client, bank-depositor, and parent-child privilege claims are among those that have been rejected. n213 And, in *University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)* , the Court refused to establish a privilege to protect the peer review process.

A handful of Courts have adopted a qualified privilege for self-critical analysis (also called the self-evaluation privilege), which protects internal reports prepared by an institution evaluating past performance of that institution. n214 The leading case is *Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970)* , in which the Court shielded from discovery a hospital investigation of a patient's death. The rationale for the privilege is that unimpeded self-criticism serves a social good that outweighs the cost of excluding the evidence. n215

Most Courts, however, have rejected the self-evaluation privilege as insufficiently compelling to overcome the costs to the search for truth. n216 The status of the self-evaluation privilege is questionable at best in light of *EEOC, supra* , where the Supreme Court rejected a peer review privilege; a privilege for self-critical analysis is similar, though not identical, to the peer-review privilege unanimously rejected by the Court.

At any rate, the privilege for self-critical analysis, assuming it exists, is inapplicable if the report is demanded by a government agency. The interest in expeditious administrative investigations outweighs any interest in unimpeded private investigation. n217

For a discussion of the scope of the federal *Speech or Debate Clause*, see *United States v. Helstoski, 439 U.S. 1045*

(1979) (barring any use of evidence of legislative votes); *Hutchinson v. Proxmire, 439 U.S. 1066 (1979)* (refusing to extend protection to press releases and newsletters to constituents); *United States v. Gillock, 445 U.S. 360 (1980)* (no common-law speech or debate privilege prohibits federal authorities from using evidence of legislative acts at the state level in federal prosecutions).

[15] ***In Camera*** Review

In *United States v. Zolin, 491 U.S. 554 (1989)* , the Supreme Court held that *Rule 104(a)* does not prohibit use of *in camera* review procedures when a District Court rules on privilege claims. The Court declined, however, to approve *in camera* review absent a threshold showing by the party opposing a privilege claim that such review is appropriate. It recognized (in the factual context of the crime-fraud exception to the privilege) that "[a] blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception ... would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." Accordingly, the Court ruled that

> [b]efore engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person, that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

The Court added as follows:

> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of the materials the district court has been asked to review, the relevant importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together, with other available evidence that is before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

The Court also held that "the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not 'independent' of the contested communications... ." Thus, partial transcripts or other evidence that incompletely reflects the contents of contested communications may be considered by the District Court, even though it has not yet been determined whether the privilege should apply to such communications. The Supreme Court reasoned that "deterring the aggressive pursuit of third-party sources is not sufficiently central to the policies of the privilege to require us to adopt the exclusionary rule urged by respondents [who objected to reliance upon information that was derived from presumptively privileged communications]."

The "good faith belief" requirement of *Zolin* is applicable only when the party seeking the assertedly privileged information is asking the Court to consider that information as part of the submission. The *Zolin* Court was concerned that unlimited *in camera* review could impinge on the privilege, even though only the Court would have access to the assertedly privileged information. Where the party seeking the assertedly privileged information makes a submission solely on the basis of independent evidence, the privileged information is not at risk and therefore no "good faith belief" requirement is necessary. n218

FOOTNOTES:

(n1)Footnote 1. Compare *Testimony of Arthur Goldberg, Hearings on Rules of Evidence Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess., 142-158, with Ely, *The Irrepressible Myth of Erie*, *87 Harv. L. Rev. 693 (1974)*; see also Mishkin, *Some Further Last Words on Erie -- The Thread*, *87*

Harv. L. Rev. 1682 (1974). Remember that the Federal Rules are "presumptively procedural" after *Hanna v. Plumer, 380 U.S. 460, 472 (1965)* (finding no *Erie* violation as to Federal Rules covering "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

(n2)Footnote 2. Obviously, if there is no conflict, then it does not matter which jurisdiction's privilege law will apply. See *Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997)* (state claims joined with federal claims in a federal question case; because both federal and Kansas law support the application of the attorney-client privilege,"we need not articulate an analytical solution here for conflicts in attorney-client privilege rules").

(n3)Footnote 3. *Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992)* (applying federal rule of privilege to both federal and state claims, on the ground that the Federal Rules control federal claims, and "it would be impractical to apply two different rules of privilege to the same evidence before a single jury").

(n4)Footnote 4. See, e.g., *Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992)* (existence of pendent state claim did not relieve the Court of its obligation to apply the federal law of privilege); *United States v. Prouse, 945 F.2d 1017 (8th Cir. 1991)* (Minnesota statutory privilege against use of test result from employer's drug or alcohol testing program not applied due to *Rule 501* instruction to apply federal common law to federal claims); *von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987)* (federal law controlled question of the existence of a journalist's privilege, in a case where state claims were joined with civil RICO claims); *In re Combustion, Inc., 161 F.R.D. 51 (W.D. La. 1995)* (holding that "the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discoverability of evidence in this federal question case involving pendent state law claims"; this result is consistent with "the general policies of the federal rules favoring uniformity and simplicity"); *Hansen v. Allen Mem. Hosp., 141 F.R.D. 115 (S.D. Iowa 1992)* (a Federal Court in a claim arising under federal law with pendent state law claims need not apply a limited confidentiality privilege created solely under state law; the application of federal law to claims of state privilege in this context prevents the inconsistent application of state law privilege claims in the same case).

(n5)Footnote 5. See, e.g., *Upjohn Co. v. United States, 449 U.S. 383, 1980-81 Trade Cas. (CCH) P63797 (1981)* ("An uncertain privilege, or one which purports to be certain but which results in widely varying applications, is little better than no privilege at all.").

(n6)Footnote 6. As discussed infra, Congress has from time to time proposed the codification of a few discrete privileges, but it has shown no interest in a general codification of the privilege rules.

(n7)Footnote 7. See *28 U.S.C. § 2072(b)*.

(n8)Footnote 8. *In re Grand Jury Investigation, 918 F.2d 374, 380 (3d Cir. 1990)* (adopting a clergy-penitent privilege and relying on the Advisory Committee's proposed rule). See also *United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979)* (applying the common interest rule of the attorney-client privilege, citing Proposed Rule 503(b)(3): "Although the Congress, in its revision of the Federal Rules of Evidence, deleted the detailed privilege rules ... the recommendations of the Advisory Committee, approved by the Supreme Court, are a useful guide to the federal courts in their development of a common law of evidence.").

(n9)Footnote 9. *Trammel v. United States, 445 U.S. 40 (1980)* .

(n10)Footnote 10. See, e.g., *In re Grand Jury Proceedings, 103 F.3d 1140 (3d Cir. 1997)* (rejecting a parent-child privilege and noting that the interests that would be protected by such a privilege do not overcome the heavy presumption against establishing new privileges and the strong interests in admitting relevant evidence: "privileges are tolerable only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth").

(n11)Footnote 11. *United States v. Frederick, 182 F.3d 496 (7th Cir. 1999)* (no accountant-client privilege under federal law); *William T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100 (3d Cir. 1982)* .

(n12)Footnote 12. See, e.g., *Patterson v. Caterpillar, Inc., 70 F.3d 503 (7th Cir. 1995)* (rejecting doctor-patient privilege); *United States v. Bercier, 848 F.2d 917 (8th Cir. 1988)* (rejecting doctor-patient privilege; collecting cases).

(n13)Footnote 13. *United States v. Holmes, 594 F.2d 1167 (8th Cir. 1979)* .

(n14)Footnote 14. See, e.g., *Walker v. Huie, 142 F.R.D. 497 (D. Utah 1992)* (communications between union member and nonlawyer union representative, during disciplinary proceedings, are not privileged: "While counseling at police disciplinary hearings is important, it simply does not rise to the level of the special relationships heretofore protected by the federal common law of privileges.").

(n15)Footnote 15. See also *ACLU v. Finch, 638 F.2d 1336 (5th Cir. 1981)* (noting a "special danger in permitting state governments to define the scope of their own privilege when the misconduct of their agents is alleged").

(n16)Footnote 16. See *Developments in the Law: Privileged Communications, 98 Harv. L. Rev. 1450 (1985)* (arguing that privileges are established by lawyers, so that it is not surprising that there is an aggressively enforced attorney-client privilege, but no accountant-client privilege). See also Thornburgh, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 Notre Dame L. Rev. 157 (1993)* (arguing that the attorney-client privilege gives unjustified protection to entrenched interests); Zacharias, *Rethinking Confidentiality, 74 Iowa L.Rev. 351 (1989)* (criticizing the attorney-client privilege as a means of driving up lawyer fees, because clients pay a premium so that they can obtain a privilege for their communications, even though non-lawyers may be able to provide similar services more cheaply).

(n17)Footnote 17. See 8 Wigmore, Evidence § 2292 at 554 (McNaughton rev. 1961).

(n18)Footnote 18. See, e.g., *In re Feldberg, 862 F.2d 622, 626 (7th Cir. 1988)* ("A business that gets marketing advice from a lawyer does not acquire a privilege in the bargain; so too a business that obtains the services of a records custodian from a member of the bar.").

(n19)Footnote 19. See, e.g., *In re Grand Jury Subpoena, Peek, 682 F. Supp. 1552, 1556 (M.D. Ga. 1987)* (personal loan transaction between attorney and another person is not privileged: "Otherwise, everything that a lawyer does for himself or herself would be cloaked with a privilege just because he or she is a lawyer."); *SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515, 1976-2 Trade Cas. (CCH) P61207 (D. Conn. 1976)* ("Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality.").

(n20)Footnote 20. See, e.g., *United States v. Frederick, 182 F.3d 496 (7th Cir. 1999)* ("There is no common law accountant's or tax preparer's privilege, and a taxpayer must not be allowed, by hiring a lawyer to do the work that an accountant, or other tax preparer, or the taxpayer himself or herself, normally would do, to obtain greater protection from government investigators than a taxpayer who did not use a lawyer as his tax preparer would be entitled to do. To rule otherwise would be to impede tax investigations, reward lawyers for doing nonlawyers' work, and create a privileged position for lawyers in competition with other tax preparers -- and to do all this without promoting the legitimate aims" of the privilege); *In re Schroeder, 842 F.2d 1223, 1224 (11th Cir. 1987)* ("Courts generally have held that the preparation of tax returns does not constitute legal advice within the scope of the privilege.").

(n21)Footnote 21. *United States v. Rockwell Int'l, 897 F.2d 1255 (3d Cir. 1990)* .

(n22)Footnote 22. See, e.g., *Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987)* (minutes of business meetings attended by attorneys are not automatically privileged); *Misek-Falkoff v. International Bus. Machs. Corp., 144 F.R.D. 48 (S.D.N.Y. 1992)* (corporate minutes did not indicate that legal, rather than business, advice was given, and the privilege did not apply merely because an attorney's name was included in the minutes).

(n23)Footnote 23. See, e.g., *Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987)* (document of risk management department, compiling aggregate risk management figures for pending litigation, was prepared for

business planning purpose -- to assess company's total possible liability -- and passing it to an attorney does not create a privilege).

(n24)Footnote 24. See, e.g., *United States v. Tedder, 801 F.2d 1437 (4th Cir. 1986)* (the defendant's admission of perjury to a fellow associate in his law firm was not privileged where the evidence indicated that the associate was consulted as a friend and not as a legal adviser; associate was not a criminal attorney, the conversation occurred in informal circumstances, no notes were taken, and the defendant asked for no advice); *United States v. Fisher, 692 F. Supp. 488 (E.D. Pa. 1988)* (general conversation about the effect of a conviction upon holding union office, where no legal advice was sought, was just a conversation among friends; since the attorney was not consulted in a legal capacity, statements made to him were not privileged). See also *United States v. Alexander, 287 F.3d 811 (9th Cir. 2002)* (client threatened to injure an attorney appointed to represent him; the threats were not privileged as they were not made in order to obtain legal advice).

(n25)Footnote 25. *United States v. Johnston, 146 F.3d 785 (10th Cir. 1998)* (lawyer's communications to his client's drug suppliers was not privileged; the lawyer was simply relaying a message from the client); *In re Grand Jury Testimony of Attorney X, 621 F. Supp. 590 (E.D.N.Y. 1985)* (information respecting a grand jury investigation given to the attorney from a third party and relayed by the attorney to his client is not privileged, since the attorney is not acting as a legal adviser but rather as a conduit for information). Compare *United States v. Bauer, 132 F.3d 504 (9th Cir. 1997)* (lawyer's communications to client instructing him that the client was signing a bankruptcy petition under penalty of perjury was privileged; the lawyer was not simply acting as the Court's messenger, but rather was delivering legal advice; moreover, the lawyer's communication would disclose communications from the client concerning the import of signing the petition).

(n26)Footnote 26. See, e.g., *United States v. Huberts, 637 F.2d 630 (9th Cir. 1980)* (no privilege where attorney's role was simply to oversee the sale of equipment).

(n27)Footnote 27. See, e.g., *SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 1976-2 Trade Cas. (CCH) P61207 (D. Conn. 1976)* .

(n28)Footnote 28. See *In re Feldberg, 862 F.2d 622, 627 (7th Cir. 1988)* :

> Most corporate records custodians are not lawyers. Answers to questions such as "where did you look for the documents?" will not reveal legal advice. ... Since questions about the adequacy of the search do not entail legal advice, the topic is not off limits just because an attorney plays a role.

(n29)Footnote 29. *In re Feldberg, 862 F.2d at 627* :

> It is easy for a firm such as World Sports to hire an attorney to render advice on all legal matters while hiring a clerk to look through the records. The categories would merge if the clerk should find a questionable document, leading the firm to inquire of the lawyer whether the document fell within the scope of the subpoena (and whether, if it did, it had to be produced). Perhaps some of the conversations in this case were of that character, and if so they are privileged.

(n30)Footnote 30. See also *United States v. Landof, 591 F.2d 36 (9th Cir. 1978)* (party asserting the privilege has the burden of establishing that the communication was protected).

(n31)Footnote 31. See, e.g., *In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2d Cir. 1984)* (communications concerning a proposed corporate reorganization were primarily for the purpose of obtaining legal advice, even though the reorganization was proposed for business purposes); *United States v. IBM, 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974)* (the test is whether the element of legal advice predominates; even legal advice may not be

privileged if it is only incidental to business advice).

(n32)Footnote 32. See, e.g., *In re Allen, 106 F.3d 582 (4th Cir. 1997)* (attorney's factual investigation was privileged; the question is not whether the attorney was retained to conduct an investigation, but rather whether the investigation was related to the rendition of legal services); *Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984)* ("The [attorney's] report resulted from the [corporation's] efforts to investigate allegations of prior misconduct. Allowing disclosure of the report could deter such inquiries, which should not be chilled as a matter of public policy.").

(n33)Footnote 33. See, e.g., *Winchester Capital Mgt. Co., v. Manufacturers Hanover Trust Co., 144 F.R.D. 170 (D. Mass. 1992)* (communications between a corporate attorney and a corporate consultant were privileged, where the consultant provided the attorney with necessary factual information and advice attendant to the drafting of an opinion letter); *Golden Trade v. Lee Apparel Co., 143 F.R.D. 514 (S.D.N.Y. 1992)* (communications with a patent agent assisting the attorney in the patent application process are protected by the attorney-client privilege). For a discussion of the relationship of lawyers and psychiatrists, see Saltzburg, *Privileges and Professionals*: *Lawyers and Psychiatrists*, 66 Va. L. Rev. 597 (1980).

(n34)Footnote 34. *United States v. Adlman, 68 F.3d 1495 (2d Cir. 1995)* (where the evidence showed that the corporate client, and not the corporate lawyer, retained an accountant for tax advice, the communications between the accountant and the lawyer were not privileged).

(n35)Footnote 35. *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)* (the privilege extends to communications by an attorney's client to an accountant hired by the attorney to assist the attorney in understanding the client's financial information).

(n36)Footnote 36. See, e.g., *United States v. Robinson, 121 F.3d 971 (5th Cir. 1997)* (written notice that was discoverable in the defendant's hands "did not become less so" when transferred by the defendant to his lawyer); *In re Grand Jury, 959 F.2d 1158 (2d Cir. 1992)* (telephone records transmitted to the attorney from the client are not privileged, since the records are preexisting documents, not attorney-client communications); *United States Postal Service v. Phelps Dodge Refining Corp., 852 F.Supp. 156 (E.D.N.Y. 1994)* (correspondence between corporate agents does not become privileged simply because counsel is sent copies).

(n37)Footnote 37. See, e.g., *United States v. Sayan, 968 F.2d 55 (D.C. Cir. 1992)* (statement by an accountant that, based on his conversation with the client, she was a "sly fox," did not breach the privilege; the accountant was covered by the attorney-client privilege because his services were necessary to further the attorney's representation; still, the testimony did not breach the privilege because it was merely based on observations, not the content of any communications).

(n38)Footnote 38. See, e.g., *United States v. Hatcher, 323 F.3d 666 (8th Cir. 2003)* (jailhouse conversations between inmates and counsel were not privileged because the parties were aware that their conversations were being recorded); *Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)* ("It is clear that the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party"); *United States v. Gann, 732 F.2d 714, 723 (9th Cir. 1984)* (no privilege where the defendant was speaking to his attorney while officers were searching his house; because "Gann knew, or should have known, that third parties were present, his attorney-client privilege claim must fail").

(n39)Footnote 39. See, e.g., *United States v. Hubbard, 16 F.3d 694 (6th Cir. 1994)* (information was not protected by the privilege because what the client communicated was to be conveyed to the bankruptcy trustee and the Court via a written pleading; thus, there was no expectation of confidentiality).

(n40)Footnote 40. See, e.g., *In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994)* (information used by counsel to prepare SEC filings was not privileged, since all that was revealed were matters communicated to the

attorneys "for their use in connection with public disclosures, which made the communications and data underlying them non-privileged under the relevant case law").

(n41)Footnote 41. See, e.g., *United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984)* (communications were not privileged where they were to be used by the attorney to prepare a public document, and where the client did not impose a conditional limitation on the disclosure of the information).

(n42)Footnote 42. See, e.g., *In re von Bulow, 828 F.2d 94 (2d Cir. 1987)* (privilege was waived as to communications set forth in a book written by the attorney and promoted by the client).

(n43)Footnote 43. See generally Capra, *The Attorney-Client Privilege in Common Representations*, 20 Trial Law. Q. 20 (1989); Kopta, *Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. Rev. 151 (1988).

(n44)Footnote 44. See *Upjohn Co. v. United States, 449 U.S. 383 (1981)* (privilege exists to protect "the giving of information to the lawyer to enable him to give sound and informed advice").

(n45)Footnote 45. See Welles, *A Survey of Attorney-Client Privilege in Joint Defense, 35 U. Miami L. Rev. 321 (1981)* (discussing the benefits of information-pooling).

(n46)Footnote 46. See *In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 388 (S.D.N.Y. 1975)* :

The layman's course through litigation must be evened by the assurance that he may, without penalty, invest his confidence in a professional counsellor. That assurance is no less important or appropriate where a cooperative program of joint defense is helpful ... to form and inform the representation of clients whose attorneys are each separately retained.

(n47)Footnote 47. *In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981)* .

(n48)Footnote 48. See *Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002)* ("One cannot create a privilege, where previously there was none, simply by introducing a third party (with or without a common interest) into the circle within which documents are shared."). See also Kopta, *Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. Rev. 151, 197 (1988) ("The analysis begins as it always has: *All* attorney client communications ... must satisfy existing requirements before they become or remain privileged. Once these requirements are satisfied, exchanged or jointly created material must pass an *additional* test: attorney-client communications must be disclosed pursuant to a common interest.").

(n49)Footnote 49. See, e.g., *In re Regents of Univ. of California, 101 F.3d 1386 (Fed. Cir. 1996)* (common interest doctrine applies to protect legal advice and communications between a patent applicant or patentee and attorneys of its optionee/licensee).

(n50)Footnote 50. See, e.g., *Schachar v. American Academy of Opthalmology, Inc., 106 F.R.D. 187, 1985-2 Trade Cas. (CCH) P66681 (N.D. Ill. 1985)* (the exchange of confidences among coplaintiffs sharing a common interest is protected from disclosure).

(n51)Footnote 51. See, e.g., *United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)* (common interest doctrine applied where the communications were made to prepare for a government investigation that could lead to indictment of two clients).

(n52)Footnote 52. See also *SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976)* ("The privilege need not be limited to legal consultations ... in litigation situations. ... [Clients] should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it."). But see *In re Santa Fe Int'l Corp., 272 F.3d 705*

(5th Cir. 2001) (communications made with common interest to protect against antitrust liability were not protected by the common interest doctrine because there was no litigation that was imminent).

(n53)Footnote 53. See *United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)* (common interest protection exists where a party communicates with a codefendant's counsel, even though the communicating party's counsel was not present).

(n54)Footnote 54. See Kopta, *Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. Rev. 151, 173 (1988):

> A client who directly confides in an allied lawyer in furtherance of a common interest ... is divulging confidences to, in effect, his lawyer to facilitate his legal representation. For that purpose and within the limited confines of the common interests of both clients, the allied lawyer should be considered the allied client's attorney.

(n55)Footnote 55. *United States v. Bay State Ambulance & Hosp. Rent. Serv., 874 F.2d 20, 29 (1st Cir. 1989)* .

(n56)Footnote 56. See, e.g., *United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991)* ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.").

(n57)Footnote 57. See, e.g., *Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)* (husband and wife were represented by separate counsel due to the likelihood that their interests would conflict in a criminal prosecution; at a joint meeting, the husband made statements with respect to pleading guilty; these statements were held privileged, since they dealt with a matter of common interest between the parties -- whether the husband should plead guilty to avoid prosecution of the wife).

(n58)Footnote 58. See also *Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985)* (statements by one defendant about another more culpable defendant are privileged; even though the defendants' interests are partially adverse, the communication dealt with a matter on which the defendants shared a common purpose).

(n59)Footnote 59. See, e.g., *United States v. Bay State Ambulance & Hosp. Rent. Serv., 874 F.2d 20, 29 (1st Cir. 1989)* (even though parties shared similar interests, the common interest privilege did not apply where the parties had not agreed to pursue a joint defense and the information was imparted without intent to further the joint defense); *In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005)* (communications made by corporate agent to corporate counsel were not privileged as to the corporate agent; even if the agent was pursuing a common interest with the corporation, the communications were made before the parties agreed on a common defense).

(n60)Footnote 60. See, e.g., *United States v. Furst, 886 F.2d 558 (3d Cir. 1989)* (no common interest privilege where the defendant was called into the office to explain himself to new associates; the meeting was adversarial, and concerned matters that directly involved the defendant and not the other members at the meeting: "It was not a meeting at which the participants consulted with an attorney as to how to approach a common problem.").

(n61)Footnote 61. *United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)* .

(n62)Footnote 62. See, e.g., *United States v. Weissman, 195 F.3d 96 (2d Cir. 1999)* (rejecting the defendant's argument that there was an implied joint defense agreement in place when he communicated with other corporate officials; at the time of the communications, the officials did not know that the defendant had acted unlawfully, so there was no cooperative effort to assist him in his defense at that point); *In re Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120 (3d Cir. 1986)* (statements by a corporate official to the attorney for the corporation were not covered by

the common interest privilege; the official made no showing that, at the time of the communication, the corporation had agreed with him to pursue a joint defense strategy).

(n63)Footnote 63. See also *In re Colocotronis Tanker Sec. Litig., 449 F. Supp. 828 (S.D.N.Y. 1978)* (banks that were participants in a loan of a lead bank could not invoke the common interest rule with respect to communications made to the lead bank's attorney; no showing was made that a common defense was ever instituted or agreed upon by the participant banks and the lead bank, even though the participants paid part of the lead bank's attorney's fees in litigation respecting the loan).

(n64)Footnote 64. See *United States v. Lopez, 777 F.2d 543 (10th Cir. 1985)* (communications at a meeting between codefendants were not privileged, where the parties maintained potentially adverse interests, and no showing was made that the purpose of the meeting was to plan a joint defense).

(n65)Footnote 65. See, e.g., *United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)* (applying common interest doctrine even though the parties had no written agreement to pursue a common interest).

(n66)Footnote 66. See Wilson, *Using the Joint Defense Privilege*, Nat'l L.J., March 14, 1983, at 13:

> It is therefore important at the outset to state clearly that the communications that will occur are in the interests of a joint effort, and to establish that each of the parties understands that his statements are being made within the context and in furtherance of a joint defense. Irreversible damage can occur at the first meeting of counsel if the requisite precautions are not taken.

For a good example of a common interest agreement, see the Report of the Committee on Professional Responsibility of the Association of the Bar of the City of New York, *Ethical Implications of Joint Defense/Common Interest Agreements*, 51 Record of the Association of the Bar of the City of New York 115 (1996).

(n67)Footnote 67. See, e.g., In re Shopping Carts Antitrust Litig., 1984-1 Trade Cas. (CCH) & 65,823, at 67,451 (S.D.N.Y. 1983) (common interest privilege rejected where no written agreement had been made: "normally, when a joint defense is conducted in substantial litigation by competent and experienced counsel ... the co-defendants memorialize an agreement in writing which specifically addresses the issue of privileged communications of confidential materials, before any such data is surrendered.").

(n68)Footnote 68. See, e.g., *United States v. Furst, 886 F.2d 558 (3d Cir. 1989)* ("The meeting concerned matters which directly involved only Furst and not the other participants at the meeting ..."; the common interest privilege was inapplicable); *United States v. Cariello, 536 F. Supp. 698, 702 (D.N.J. 1982)* ("Palmieri did not communicate his desire to testify as part of a joint strategy of all defendants but simply in furtherance of his own defense.").

(n69)Footnote 69. See, e.g., *Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir. 1974)* (statements made by an insurer defending an insured can later be used by the insured in an action against the insurer for disclaimed coverage).

(n70)Footnote 70. See Uelmen, *The Joint Defense Privilege: Know the Risks*, 14 Litig. 35, 38 (Summer, 1988):

> This kind of agreement can be very helpful, but you may not be able to get it. Few lawyers would agree to a broad waiver of any civil actions against other signatories. Ultimately, how much you seek in a written agreement depends on how much you trust or mistrust your prospective allies.

(n71)Footnote 71. See, e.g., *In re Grand Jury Subpoena, 406 F. Supp. 381 (S.D.N.Y. 1975)* (statements made by a former CEO while the CEO and the corporation pursued a common interest cannot later be used by the government,

even though the corporation subsequently sued the CEO; only those parties who were pursuing a common interest at the time the statements were made can later use the statements).

(n72)Footnote 72. As the Court stated in *In re Grand Jury Subpoena, 406 F. Supp. 381, 394 (S.D.N.Y. 1975)* : "How well could a joint defense proceed in the light of each co-defendant's knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus?"

(n73)Footnote 73. See also *United States v. Henke, 222 F.3d 633 (9th Cir. 2000)* (defendant entered into joint defense agreement and then one of them made a deal and testified for the government; at trial defense counsel conducted no cross-examination of the witness, for fear that the examination would lead to inquiries into material covered by the common interest privilege; the Court reversed the defendants' convictions on the ground that counsel was operating under a conflict of interest that impaired the representation).

(n74)Footnote 74. *Wheat v. United States, 486 U.S. 153 (1988)* (upholding disqualification of counsel who had previously represented a government witness, despite the defendant's waiver).

(n75)Footnote 75. *Ethical Implications of Joint Defense/Common Interest Agreements*, 51 The Record of the Association of the Bar of the City of New York 115, 121 (1996).

(n76)Footnote 76. *United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003)* (cooperating witness "does not get the benefit of the attorney-client privilege").

(n77)Footnote 77. See, e.g., *In re Auclair, 961 F.2d 65 (5th Cir. 1992)* (where three people go to an attorney on a matter that concerns them all, in order to determine whether the attorney can represent them all, the preliminary discussions with the attorney are presumptively protected under the common interest doctrine).

(n78)Footnote 78. See, e.g., *In re Grand Jury Proceedings, 33 F.3d 1060 (9th Cir. 1994)* (upholding a judgment of contempt resulting from an attorney's refusal to produce records pertaining to fee information and fee arrangements with a client; while that information might have indicated that the client retained the attorney to represent him in a grand jury investigation, this fact did not "in and of itself reveal any confidential information"); *United States v. Olano, 62 F.3d 1180 (9th Cir. 1995)* (no privilege where the testimony provided "only general descriptions of the work" that the lawyer performed; the lawyer did not disclose the defendant's "motives, strategies or goals").

(n79)Footnote 79. For more on this topic, see Capra, *Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, *4 Geo. J. Legal Ethics 235 (1990)*.

(n80)Footnote 80. See also *United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992)* (information concerning payment of more than $10,000 cash from a client to an attorney is not privileged, and can be obtained through enforcement of an IRS summons; fee arrangements and disclosure of the identity of the client are part of the preliminaries and incidents of the representation, and in the absence of extraordinary circumstances, they do not satisfy the requirement of the privilege that a communication must be made in the course of seeking legal advice); *In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992)* (identity of a client who paid the attorney with counterfeit bills held not privileged, where disclosure of identity "will not provide the government with a necessary link to, or revelation of, any confidential matters which fall within the attorney-client privilege"; disclosure of identity will only link the client with a payment by counterfeit money,"which is not a communication at all"); *Tornay v. United States, 840 F.2d 1424 (9th Cir. 1988)* (fee information not privileged as it is not a communication necessary to further legal advice).

(n81)Footnote 81. See, e.g., *In re Subpoenaed Grand Jury Witness, 171 F.3d 511 (7th Cir. 1999)* (fee payment and client identity privileged where "disclosure of this information would identify a client of Hagen's who is potentially involved in a targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the

legal bills for some of Hagen's other clients"). Compare *Clarke v. American Commerce Nat'l Bank, 974 F.2d 127 (9th Cir. 1992)* (billing statements containing information on the identity of the client, the case name for which the fee was paid, and the general nature of the services performed, are not protected by the attorney-client privilege; nothing in the statements reveals research or litigation strategy, or otherwise discloses the motive of the client in seeking representation); *Vingelli v. United States, 992 F.2d 449 (2d Cir. 1993)* (benefactor payment made by an attorney on behalf of a client is not privileged; the fact that the attorney made a benefactor payment does not indicate why the client may have sought the attorney's advice).

(n82)Footnote 82. See, e.g., *United States v. Liebman, 742 F.2d 807 (3d Cir. 1984)* (where the substance of a communication was already known, but not the identity of the communicator, then disclosure of identity would be tantamount to disclosure of a privileged communication).

(n83)Footnote 83. See, e.g., *United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995)* (upholding an order enforcing an IRS summons requiring an attorney to identify a client paying more than $10,000 in cash and the nature of the services rendered in exchange for the cash: "We have repeatedly held that the attorney-client privilege does *not* apply where disclosure might incriminate the client or fee-payer, but *only* where it would convey information tantamount to a confidential communication."). The *Blackman* Court declared itself "hard pressed" to imagine a case in which the receipt of fees could be so intertwined with the subject of the representation as to obviate compliance with Treasury Department reporting requirements.

(n84)Footnote 84. See, e.g., *American Std. Inc. v. Pfizer Inc., 828 F.2d 734, 745 (Fed. Cir. 1987)* (opinion letter on the invalidity of another's patent was not privileged because "it did not reveal, directly or indirectly, the substance of the confidential communication"); *In re Fischel, 557 F.2d 209 (9th Cir. 1977)* (attorney's summaries of the client's business transactions with third parties were held not privileged because they did not reveal confidential client communications).

(n85)Footnote 85. See, e.g., *United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984)* ("Because the privilege protects the substance of communications, it may also be extended to protect communications by the lawyer to his client, agents, or superiors or to other lawyers in the case of joint representation, if those communications reveal confidential client communications.").

(n86)Footnote 86. See *Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997)* (holding that any confidential communication from an attorney to the client in the course of giving legal advice is protected by the privilege).

(n87)Footnote 87. See, e.g., *United States v. Amerada Hess Corp., 619 F.2d 980 (3d Cir. 1980)* ("Legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the privilege."); *In re LTV Sec. Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981)* (attorney-client privilege "protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice").

(n88)Footnote 88. See, e.g., *United States v. Ackert, 169 F.3d 136 (2d Cir. 2001)* (no privilege where attorney obtained information from someone outside the attorney-client relationship; the fact that the information was critical to the attorney's legal representation did not make it privileged); *United States v. Bonnell, 483 F. Supp. 1070 (D. Minn. 1979)* (information obtained through sources other than the client held not privileged).

(n89)Footnote 89. For a critique of *Upjohn*, see Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, *12 Hofstra L. Rev. 279 (1984)*.

(n90)Footnote 90. See, e.g., *Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486 (9th Cir. 1989)* (*Upjohn* held that "the privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the

information is being furnished to enable the attorney to provide legal advice to the corporation").

(n91)Footnote 91. *Id.* (rejecting the claim that *Upjohn* would not apply if the corporate employee was employed by a subsidiary and spoke to an attorney for the parent corporation; noting that *Upjohn* rejected a mechanistic approach to applications of the attorney-client privilege in the corporate context).

(n92)Footnote 92. See, e.g., *In re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1981-2 Trade Cas. (CCH) P64323, 1981-2 Trade Cas. (CCH) P64323 (9th Cir. 1981)* ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties."); *In re Allen, 106 F.3d 582 (4th Cir. 1997)* (statement made by former employee was privileged where the former employee was directed to speak to corporate counsel and the communication was about a matter within the scope of the former employment).

(n93)Footnote 93. See, e.g., *Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486 (9th Cir. 1989)* (no "hardship" exception to the attorney-client privilege).

(n94)Footnote 94. See also *In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001)* (corporate agent has personal privilege only if this was clearly understood by corporate counsel and only if the communications concern the agent's personal liability; no common interest pursued).

(n95)Footnote 95. See, e.g., *Town of Norfolk v. Corps of Engineers, 968 F.2d 1438 (1st Cir. 1992)* (communications by agents of the Corps of Engineers to government attorneys were privileged, where made in confidence on matters in which litigation was foreseeable).

(n96)Footnote 96. See, e.g., *Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980)* (to claim an attorney-client privilege, the agency must show that communications were made to obtain legal advice, not for policy-making purposes).

(n97)Footnote 97. See also *In re Lindsey, 148 F.3d 1100 (D.C. Cir. 1998)* (noting that a government attorney-client privilege does exist, but refusing to apply it to protect communications from the President to White House counsel concerning possible criminal activity: "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. ... Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency. ... [N]othing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel.").

(n98)Footnote 98. See generally Frankel, *The Attorney-Client Privilege After the Death of the Client*, *6 Geo. J. Legal Ethics 45 (1992)*.

(n99)Footnote 99. For a criticism of the survival rule, see Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, *7 Geo. J. Legal Ethics 741 (1994)*.

(n100)Footnote 100. See *Republic Gear v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967)* :

> Not only may an attorney invoke the privilege in his client's behalf when the client is not a party to the proceeding in which disclosure is sought, ... but he should do so, for he is duty-bound to raise the claim in any proceeding in order to protect communications made in confidence.

See also *Schnell v. Schnall, 550 F. Supp. 650 (S.D.N.Y. 1982)* (attorney-client privilege applies even though attorney disclosed the communication, where the client did not authorize the disclosure implicitly or explicitly). On the pertinent ethical standards, see ABA Model Rule of Professional Conduct 1.6 and Comment.

(n101)Footnote 101. International Oil, Chem. & Atomic Workers Local 7-517 v. *Uno-Ven Co., 170 F.3d 779 (7th Cir. 1999)* .

(n102)Footnote 102. See *United States v. Yerardi, 192 F.3d 14 (1st Cir. 1999)* ("The concept of waiver by conduct exists, but often amounts simply to a determination that the privilege holder's conduct makes it unfair to allow subsequent assertion of the privilege."). See also *United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997)* (inaccurate disclosure of an attorney's communication found to be a waiver). See generally Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605 (1986).

(n103)Footnote 103. See also *In re Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120 (3d Cir. 1986)* (communication by a corporate agent to a corporate attorney is privileged; the privilege is held by the corporation, and the agent has no authority to waive it, even though he made the communication); *In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001)* (waiver by corporation was effective as to any privilege asserted by corporate agents)..

(n104)Footnote 104. See also *United States v. Campbell, 73 F.3d 44 (5th Cir. 1996)* (a partnership, like a corporation, is an artificial person that can act only through its agents: "Accordingly, the same rule that applies to corporations in bankruptcy should apply to a bankrupt limited partnership."); *Odmark v. Westside Bancorp., Inc., 636 F. Supp. 552 (W.D. Wash. 1986)* (after a bank's failure, the FSLIC was held to control the privilege).

(n105)Footnote 105. *Yosemite Investment Inc. v. Floyd Bell Inc., 943 F.Supp. 882 (S.D. Ohio 1996)* .

(n106)Footnote 106. See also *United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995)* (corporation's disclosure of report to the government constituted a waiver of the privilege: "A risk of unfairness is evident where information is provided to one side in a case (here, the United States) and then an inquiry into its origin is shielded by a claim of privilege."); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002)* (rejecting the concept of selective waiver, even in the face of an express confidentiality agreement).

(n107)Footnote 107. See also *In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988)* (disclosing confidential reports to government officials in order to avoid indictment works a waiver not only as to the disclosed reports, but also as to all confidential information concerning the same subject matter).

(n108)Footnote 108. See Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, *36 Stan. L. Rev. 789 (1984)* (noting that in 1979, over 425 corporations took part in the SEC voluntary disclosure program, despite the absence of a limited waiver doctrine).

(n109)Footnote 109. Some courts have enforced selective waiver if the disclosure of the privileged information is made subject to an express confidentiality agreement. See, e.g., *In re M & L Bus. Mach. Co., 161 B.R. 689, 697 (D. Colo. 1993)* (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

(n110)Footnote 110. *Kelsey-Hayes Co. v. Motor Wheel Corp., 155 F.R.D. 170 (W.D. Mich. 1991)* .

(n111)Footnote 111. See *In re von Bulow, 828 F.2d 94 (2d Cir. 1987)* (privilege waived where the client's selective use of privileged information would be unfair to the adversary).

(n112)Footnote 112. *Moskowitz v. Lopp, 128 F.R.D. 624, 638 (E.D. Pa. 1989)* .

(n113)Footnote 113. See *United States v. Workman, 138 F.3d 1261 (8th Cir. 1998)* (defendant could not selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with his attorney for his own benefit); *Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996)* (privilege was waived where an employer relied on an attorney's investigation as a defense against a claim that the employer had created a hostile work environment; the corporation cannot use the fact of the lawyer's

investigation as an affirmative defense without giving the plaintiff an opportunity to examine the investigation's content to determine whether it was adequate).

(n114)Footnote 114. *SEC v. Forma, 117 F.R.D. 516 (S.D.N.Y. 1987)* .

(n115)Footnote 115. See, e.g., *Naglak v. Pennsylvania State Univ., 133 F.R.D. 18 (M.D. Pa. 1990)* (where the plaintiff alleges that she and her attorney were misled into signing a release, the advice of counsel waiver applies only to communications concerning the release, and "does not permit blanket disclosure of all communications between her and her attorney").

(n116)Footnote 116. See, e.g., *Chase Manhattan Bank v. Drysdale Sec. Corp., 587 F. Supp. 57 (S.D.N.Y. 1984)* (no waiver where opposing party's pleading raises issues of reliance on counsel).

(n117)Footnote 117. See also *In re Grand Jury Proceedings, 727 F.2d 1352 (4th Cir. 1984)* (inadvertent disclosure of privileged information constitutes a waiver of the privilege regardless of the circumstances).

(n118)Footnote 118. See also *Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985)* (adopting a similar five-part test to determine whether inadvertent disclosure constitutes a waiver); *McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163 (D.Md. 1998)* (discovery of privileged materials by person sifting through trash did not constitute a waiver; the client had taken sufficient precautions to preserve confidentiality by shredding documents and disposing of them in a sealed plastic bag in a private dumpster on private property).

For more detailed descriptions of the various approaches to inadvertent waiver, see John T. Hundley, Federal Law, 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts, *1998 U. Ill. L. Rev. 643, 659.*

(n119)Footnote 119. See also *Parkway Gallery v. Kittinger/Pennsylvania House Group, 116 F.R.D. 46 (M.D.N.C. 1987)* (applying a similar five-part test); *Eigenheim Bank v. Halpern, 598 F. Supp. 988 (S.D.N.Y. 1984)* (where privileged documents were inadvertently disclosed a second time, the privilege would not apply; the first disclosure was excusable, the second one was not).

(n120)Footnote 120. See also *United States v. Gangi, 1 F. Supp.2d 256 (S.D.N.Y.1998)* : In a prosecution for racketeering, securities fraud, wire fraud, extortion, and bank fraud, the government moved for the return of a prosecution memorandum that requested Department of Justice approval of an indictment. The Trial Court held that under the circumstances, the disclosure of the report amounted to a forfeiture of the attorney-client privilege. The government had failed to label the memo as confidential, acted without due care in its dissemination especially since the memo revealed witnesses and victims, and inadequately trained the FBI agent who distributed it while attached to the indictment. Nor did the government have the excuse of producing thousands of documents, so that it might be understandable that a few privileged documents might slip through. The Court also reasoned that fairness considerations supported disclosure, since (1) some defendants had not seen the memo (thus putting those who had not seen it at a competitive disadvantage); (2) redaction was possible to protect victims and witnesses; and (3) the defendants would eventually discover much of the information in the memo at any rate. The Court concluded that the Government "did not treat the document with the care required to protect its privilege. As a result, two defendants and their lawyers have seen it and dozens of copies are circulating in the public domain."

(n121)Footnote 121. See, e.g., *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., 1997 U.S. Dist. LEXIS 18818 (S.D.N.Y. 1997)* (enforcing a confidentiality agreement and refusing to find a waiver from an inadvertent disclosure of privileged information).

(n122)Footnote 122. See *Rainer v. Union Carbide Corp., 402 F.3d 608 (6th Cir. 2005)* (mistaken disclosure did not constitute a waiver because a stipulated protective order signed by all the parties "was clear in stating that a producing party waived no rights in the event a privileged document was accidentally produced."). See also Leslie, *The*

Costs of Confidentiality and the Purpose of Privilege, 2000 Wis. L. Rev. 31, 73 (noting an "increasingly popular protective order" that allows parties protection from mistaken disclosures).

(n123)Footnote 123. See, e.g., *Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974)* (privilege is no longer applicable where the client charges counsel with ineffective assistance); *First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986)* (where counsel was charged by a third party with securities fraud in an action arising out of the client's transactions, counsel was permitted to disclose confidential communications to defend himself). For a criticism of this doctrine, see Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 15 HOFSTRA L. Rev. 783 (1987).

(n124)Footnote 124. See, e.g., *Cannon v. U.S. Acoustics Corp., 532 F.2d 1118 (7th Cir. 1976)* (attorney is permitted to reveal confidences to collect his fee).

(n125)Footnote 125. See, e.g., *Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 483 (E.D. Pa. 1978)* . For an extensive criticism of the *Garner* doctrine, see Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases:* Garner *Revisited*, 12 HOFSTRA L. Rev. 817 (1984).

(n126)Footnote 126. For a critique of the "good cause" factors, see *Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 390 (D. Conn. 1986)* (the "rather vague" good cause exception "was ill-defined in origin and has been troublesome in application.").

(n127)Footnote 127. See, e.g., *Weil v. Investment/Indicators Research & Mgt., 647 F.2d 18 (9th Cir. 1981)* (*Garner* doctrine is limited to derivative suits).

(n128)Footnote 128. See, e.g., *In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982)* (class action for fraud by former shareholders of the corporation).

(n129)Footnote 129. See, e.g., *Fausek v. White, 965 F.2d 126 (6th Cir. 1992)* (*Garner* doctrine applied in an action brought by minority shareholders against the majority for fraud and breach of fiduciary duty; communications by the majority shareholder to an attorney, concerning corporate transactions, were held not privileged vis-a-vis the minority).

(n130)Footnote 130. See, e.g., *Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982)* .

(n131)Footnote 131. See, e.g., *Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357 (S.D.N.Y. 1983)* (*Garner* doctrine applies to communications occurring during a fiduciary relationship, but not to communications occurring before the relationship is begun or after it is terminated; *Garner* doctrine applies even to communications made to determine the extent of the obligations owed by the fiduciary to the beneficiary).

(n132)Footnote 132. See, e.g., *Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68 (E.D. Va. 1992)* (*Garner* doctrine applied where airline pilots sued their union for breach of duty of good faith representation).

(n133)Footnote 133. See Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases:* Garner *Revisited*, 12 HOFSTRA L. Rev. 817, 846 (1984):

> The word "fiduciary" has no talismanic quality that dictates abdication of the usual approach to attorney-client privilege whenever the word is invoked. Those who have fiduciary responsibility often want legal advice concerning their responsibilities. They should have the same opportunity to consult with counsel and to speak freely and without fear of making admissions as other clients.

(n134)Footnote 134. See, e.g., *Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 391 (D. Conn. 1986)* ("Indeed, a curtailment or confusion of traditional privilege concepts eventually may not lead to more endpoint disclosure at all, but result instead in less open and candid attorney-client communication in the first place.").

(n135)Footnote 135. For a further discussion of the *Garner* doctrine, see Capra, *Deterring the Formation of the Attorney-Client Privilege: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, *4 Geo. J. Legal Ethics 235 (1990)*.

(n136)Footnote 136. See, e.g., *In re Grand Jury, 845 F.2d 896 (11th Cir. 1988)* :

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime of fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Note that the exception can apply even if the client never actually committed a fraudulent or criminal act. The exception is triggered when the client communicates with the attorney with the intent to further a plan of crime or fraud. See *United States v. Collis, 128 F.3d 313 (6th Cir. 1997)* ("the crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client's communication"); *In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996)* (government is not required to show that the client's plan succeeded, nor that the attorney's advice in fact helped the client in his plan).

(n137)Footnote 137. See, e.g., *Coleman v. American Broadcasting Cos., 106 F.R.D. 201 (D.D.C. 1985)* (referring to the "crime-fraud-tort exception," and collecting cases that have expanded the exception to cover tortious conduct). Contra *Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995)* (memorandum furthering racial discrimination was held privileged; finding no exception for communications made in furtherance of tortious conduct generally).

(n138)Footnote 138. See, e.g., *In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)* :

> A prima facie violation is shown if it is established that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme. ... The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.

See also *In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986)* (Court did not err in considering only the evidence submitted by the party seeking access to statements; the *prima facie* standard is not designed to allow a mini-trial); *In re Grand Jury Proceedings, 857 F.2d 710 (10th Cir. 1988)* (Court rejects the argument that privilege holder must have an opportunity to rebut the *prima facie* evidence); *Parkway Gallery Furn. v. Kittinger Pa. House Group, 116 F.R.D. 46 (M.D.N.C. 1987)* (*prima facie* standard serves to subject the privilege holder to the risk of nonpersuasion); *Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1220 (4th Cir. 1976)* (*prima facie* showing requires a party to present enough evidence to "subject the opposing party to the risk of non-persuasion if the evidence is left unrebutted."). See generally *In re Feldberg, 862 F.2d 622 (7th Cir. 1988)* (discussing the conflict in the circuits concerning the appropriate definition of the *prima facie* standard).

(n139)Footnote 139. See also *In re Grand Jury Proceedings (Vargas), 723 F.2d 1461 (10th Cir. 1983)* (*prima facie* foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury); *White v. American Airlines, 915 F.2d 1414 (10th Cir. 1990)* (*prima facie* proof that the corporate attorney asked a corporate employee to perjure himself was found solely on the basis of the corporate employee's self-serving testimony). Compare *In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985)*

(party's failure to produce two out of 800 demanded documents is not *prima facie* evidence of crime or fraud).

(n140)Footnote 140. See also *White v. American Airlines, 915 F.2d 1414 (10th Cir. 1990)* (easily finding a *prima facie* case of crime-fraud on the basis of the allegedly privileged statements themselves; assuming that state law, applicable in this diversity case, would follow *Zolin*).

(n141)Footnote 141. See, e.g., *In re General Motors Corp., 153 F.3d 714 (8th Cir. 1988)* (where the Trial Court required the party asserting the privilege to produce the statements for the purpose of conducting an *in camera* hearing on the crime-fraud exception, it was error to conduct that hearing with both sides present: "By ordering disclosure, the district court effectively destroyed the confidentiality of the communications. Until it is established that the crime/fraud exception applies, the district court may not compel disclosure of allegedly privileged communications to the party opposing the privilege.").

(n142)Footnote 142. *In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 643 (8th Cir. 2001)* .

(n143)Footnote 143. Id.

(n144)Footnote 144. See, e.g., *In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996)* : "Inasmuch as today's privilege exists for the benefit of the client, not the attorney, it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity for the exception to apply."

(n145)Footnote 145. See, e.g., *In re Impounded Case, 879 F.2d 1211 (3d Cir. 1989)* (crime-fraud exception defeats the client's privilege where the pertinent illegality is that of the law firm; reasoning that the search for truth outweighs the client's interest in confidentiality); *White v. American Airlines, 915 F.2d 1414 (10th Cir. 1990)* (crime-fraud exception applies where attorney urges a corporate employee to commit perjury).

(n146)Footnote 146. See, e.g., *Coleman v. American Broadcasting Cos., 106 F.R.D. 201 (D.D.C. 1985)* ("Only communications in regard to ongoing or future misconduct fall outside the scope of the privilege. This distinction goes to the very core of the policies underlying the privilege.").

(n147)Footnote 147. *United States v. White, 887 F.2d 267 (D.C. Cir. 1989)* . See also *In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996)* (crime-fraud exception should not be applied in such a way as to "discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas").

(n148)Footnote 148. See, e.g., *United States v. Reeder, 170 F.3d 93 (1st Cir. 1999)* (client conferred with counsel in order to obtain "some ideas" on how to cover up a series of questionable loans, and proposed that the loans could be backdated; these communications were within the crime-fraud exception and not privileged; the Court rejected the defendant's argument that he was simply seeking the attorney's advice on whether a legal problem could be solved in a particular manner; the defendant did not merely ask whether backdating documents would be legal -- rather, he affirmatively sought the lawyer's assistance in a cover-up); *United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997)* (crime-fraud exception was found where "the wrong-doer had set upon a criminal course *before* consulting counsel").

(n149)Footnote 149. See, e.g., *In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985)* :

> Communications with Doe and Roe concerning past crimes, including misconduct that occurred during the California litigation, remain privileged. To the limited extent that past acts of misconduct were the *subject* of the cover-up that occurred during the period of representation, however, the past violations properly may be a subject of grand jury inquiry.

See also *United States v. Edwards, 303 F.3d 606 (5th Cir. 2002)* (crime-fraud exception applied where the legal

services sought by the defendant were "to conceal and cover up the crimes committed"; "[r]ather than merely defending himself from wrongdoing, [the client] was actively continuing the cover-up of extortion and perpetuating his tax fraud.").

(n150)Footnote 150. *In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995)* (it was improper for the Trial Court to order disclosure of privileged communications simply because they were relevant evidence of activity in furtherance of crime).

(n151)Footnote 151. See, e.g., *Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984)* :

> That the report may help *prove* that a fraud occurred does not mean that it was *used* in perpetrating the fraud. ... Timing is critical, for the prima facie showing requires that the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme.

See also *In re Sealed Case, 107 F.3d 46 (D.C. Cir. 1997)* (the mere fact that a person commits a fraud after consulting with counsel does not establish a *prima facie* case that the consultation was in furtherance of the fraud); *Parkway Gallery Furn. v. Kittinger Pa. House Group, 116 F.R.D. 46 (M.D.N.C. 1987)* ("The crime or fraud exception does not apply if the fraud occurred subsequent to the advice and that fact alone will not support further inquiry.").

(n152)Footnote 152. Most Courts after *Jaffee* have applied a "dangerous patient" exception only where disclosure of the communication *at the time demanded* is necessary to avoid serious harm to the patient or another. Assume a criminal case in which the defendant is charged with murder. The defendant told a psychiatrist the day before the murder that he was going to kill the victim. Most Courts hold that the "dangerous patient" exception would not apply to permit admission of this statement at the defendant's criminal trial. This is because disclosure at the trial is not necessary to protect against harm to the patient or another. That harm has already occurred. The "dangerous patient" exception would apply, however, in a proceeding to commit the patient on the ground that he was a danger to himself or others. See, e.g., *United States v. Hayes, 227 F.3d 578 (6th Cir. 2000)* ("dangerous patient" exception applies only when disclosure of communications is necessary to protect against imminent risk of harm at the time the disclosure is demanded; "compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings, other than directly related to the patient's involuntary hospitalization"); *United States v. Chase, 340 F.3d 978 (9th Cir. 2003)* (en banc) (noting that the Advisory Committee's proposed privilege contained no dangerous patient exception, and that such an exception "would significantly injure the interests justifying existence of the privilege"). In contrast, the Tenth Circuit has held that a psychotherapist may testify about a patient's threat if it was serious when made and disclosure was the only means of averting harm. *United States v. Glass, 133 F.3d 1356 (10th Cir. 1998)* . See also Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote,* 74 Wash. L. Rev. 33 (1999).

(n153)Footnote 153. See *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1533 (1985) (collecting state statutes).

(n154)Footnote 154. See, e.g., *United States v. Bercier, 848 F.2d 917 (8th Cir. 1988)* (rejecting a doctor-patient privilege, collecting federal cases); *Patterson v. Caterpillar, Inc., 70 F.3d 503 (7th Cir. 1995)* (holding that there is no doctor-patient privilege under federal law, and that any state privilege was inapplicable in an ERISA case).

While a federal privilege does not generally exist for doctor-patient relationships, statutes may protect certain information -- e.g., *42 U.S.C. § 290ee-3(a)* (prohibition on revealing confidential information obtained in a drug abuse prevention program).

(n155)Footnote 155. *The Court in In re Grand Jury Proceedings (Violette), 183 F.3d 71 (1st Cir. 1999)* , held that the psychotherapist-patient privilege is inapplicable if the communications by the patient are made for the purpose of furthering a crime or fraud. See also *United States v. Chase, 340 F.3d 978 (9th Cir. 2003)* (finding it unnecessary to

decide whether a crime-fraud exception applies, because patient's threats, made to his psychotherapist, were not intended to further a crime).

(n156)Footnote 156. *In re Doe, 964 F.2d 1325 (2d Cir. 1992)* .

(n157)Footnote 157. The Classified Information Procedures Act, 18 U.S.C. App., enacted in 1980, directs the Chief Justice, in Consultation with the Attorney General, the Director of the CIA, and the Secretary of Defense, to "prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the" Courts of the United States. The Chief Justice submitted rules to Congress which became effective in 1981. Key among the procedures is the designation by the Court of a "court security officer" in any case or appeal in which classified information may be in the Court's custody.

(n158)Footnote 158. See, e.g., *Linder v. Department of Defense, 133 F.3d 17 (D.C. Cir. 1998)* (upholding claim of state secrets privilege with respect to documents held by the CIA; the Agency had provided detailed information on the potential harm to national security, which the Judge considered *in camera* along with the withheld documents).

(n159)Footnote 159. See, e.g., *United States v. Koreh, 144 F.R.D. 218 (D.N.J. 1992)* (where the government shows that there is a reasonable danger that harm to the national security will result from disclosure, "the privilege is absolute and may not be pierced by any demonstration of need, no matter how compelling").

(n160)Footnote 160. See also *Black v. United States, 62 F.3d 1115 (8th Cir. 1995)* (dismissing the plaintiff's claim because the continuation of the plaintiff's suit presented a "reasonable danger" to the intelligence-gathering capabilities and diplomatic relations of the United States). The plaintiff in *Black* made an interesting argument: that the state secrets privilege was simply "a creature of the Cold War" that had outlived its usefulness. But the Court responded that "the *absence* of a relatively stable world order of the sort that prevailed during the Cold War makes the availability of the privilege in appropriate cases all the more important."

(n161)Footnote 161. See also *Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998)* (claims concerning inventory and removal of hazardous nuclear waste from nuclear testing sites had to be dismissed because information implicating national security interests was critical to pursuing the claims and defenses).

(n162)Footnote 162. See, e.g., *Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)* (dismissing a claim because the state secrets privilege would have deprived the defendant of a defense). See also *United States v. North, 920 F.2d 940 (D.C. Cir. 1990)* (noting the dismissal of certain criminal charges where state secrets would have been necessary to mount a defense).

(n163)Footnote 163. See *In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)* ("The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.").

(n164)Footnote 164. *NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)* (stating that the privilege shelters "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated").

(n165)Footnote 165. *Jordan v. Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978)* .

(n166)Footnote 166. *EPA v. Mink, 410 U.S. 73 (1973)* .

(n167)Footnote 167. *Quarles v. Department of Navy, 893 F.2d 390 (D.C. Cir. 1990)* .

(n168)Footnote 168. *Mehl v. EPA, 797 F. Supp. 43 (D.D.C. 1992)* .

(n169)Footnote 169. *Scott v. PPG Indus., 142 F.R.D. 291 (N.D. Va. 1992)* .

(n170)Footnote 170. *Bobkoski v. Board of Educ. of Cary Consol. Sch. Dist., 141 F.R.D. 88 (N.D. Ill. 1992)* .

(n171)Footnote 171. *Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552 (1st Cir. 1992)* .

(n172)Footnote 172. See *In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)* ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.").

(n173)Footnote 173. Quoting *NLRB v. Sears, 421 U.S. at 151* , nn.18-19.

(n174)Footnote 174. *Access Reports v. Department of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991)* .

(n175)Footnote 175. *Quarles v. Department of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990)* .

(n176)Footnote 176. *EPA v. Mink, 410 U.S. 73 (1973)* (emphasis added).

(n177)Footnote 177. See, e.g., *United States v. Fernandez, 231 F.3d 1240 (9th Cir. 2000)* (in a case challenging the death penalty, the prosecution could not be ordered to turn over its predecisional death penalty evaluation form and memorandum; these documents were deliberative because they contained opinions, recommendations and advice about Justice Department policies; while the documents contained factual statements, the factual material was "so interwoven with the deliberative material that it is not severable").

(n178)Footnote 178. See, e.g., *Providence Journal Co. v. United States Dep't of Army, 981 F.2d 552 (1st Cir. 1992)* (report prepared by the Army Inspector General was privileged, even though it was largely factual, because the Inspector was faced with conflicting accounts of the event, so that the Inspector's findings of fact were a matter of judgment); *Lead Indus. Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979)* (fact summaries prepared by OSHA officials were held privileged because disclosure would demonstrate "which facts in the massive Rule-making record were considered significant by the decisionmaker"); *Dudman Commun. v. Department of Air Force, 815 F.2d 1565 (D.C. Cir. 1987)* (preliminary drafts of military history were privileged, because disclosure would reveal editorial changes that were based on "creative thinking and candid exchange of ideas").

(n179)Footnote 179. See also *In re Subpoena Served upon the Comptroller of the Currency, 967 F.2d 630 (D.C. Cir. 1992)* (applying this five-part test).

(n180)Footnote 180. Compare *Hinckley v. United States, 140 F.3d 277 (D.C. Cir. 1998)* (action for release from mental hospital; the deliberative process privilege shielded the discussions that took place among members of the hospital review board before the board made its decision to deny release; the petitioner could not show a sufficient need for disclosure of these predecisional discussions; he had already received all the information that the review board had before it in making its decision, and he had received the board's ultimate decision complete with a written explanation; the petitioner could not show a compelling need for disclosure of the discussions that led to the board's conclusion).

(n181)Footnote 181. See, e.g., *Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003)* , *rev'd on other grounds, 544 U.S. 1 (2005)* (state secrets privilege was not properly invoked by government official other than the head of the relevant department: "It is invocation at the [head of department] level of the executive hierarchy, and with that degree of personal assurance, that lessens the possibility of reflexive invocation of the doctrine as a routine way to avoid adverse judicial decisions.").

(n182)Footnote 182. See *Martin v. Albany Bus. Journal, 780 F. Supp. 927 (N.D.N.Y. 1992)* (discussing and applying the formal requirements in detail).

(n183)Footnote 183. See, e.g., *Resolution Trust Corp. v. Diamond, 137 F.R.D. 634 (S.D.N.Y. 1991)* (privilege cannot be invoked by the government attorney who is litigating the case).

(n184)Footnote 184. See, e.g., *Walker v. Huie, 142 F.R.D. 497 (D. Utah 1992)* (police officer sued for excessive force cannot invoke an official information privilege to shield a preliminary investigation).

(n185)Footnote 185. See, e.g., *Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1992)* (requiring a formal index, known as a "Vaughn" index, for assertion of governmental privilege claims); *Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)* (requiring a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure).

(n186)Footnote 186. *National Lawyers Guild v. Attorney Gen., 96 F.R.D. 390 (S.D.N.Y. 1982)* .

(n187)Footnote 187. See *Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108 (D.C. Cir. 2004)* (executive privilege does not cover internal pardon documents held by the Department of Justice, because those documents were not solicited or received by the Office of the President; as such the documents were covered, if at all, by the deliberative process privilege); *In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)* (distinguishing between the deliberative process privilege and the presidential communications privilege; finding that the presidential communications privilege "extends to cover communications which do not themselves directly engage the President, provided the communications are either authored or received in response to a solicitation by presidential advisers in the course of gathering information and preparing recommendations on official matters for presentation to the President").

(n188)Footnote 188. A variant of the informer's privilege is the "observation post" privilege. See, e.g., *United States v. Foster, 986 F.2d 541 (D.C. Cir. 1993)* , where a law enforcement officer in a drug case tried to invoke the "observation post" privilege to refuse to answer questions about the location from which the officer made his observations of the defendant's drug activity. The Court found that the observation post privilege is analogous to the informer's privilege; disclosing the names of persons who allowed the police to use their premises as observation posts might make such persons less willing to cooperate. However, the privilege is qualified, and it could not apply in this case, because the officer's testimony was crucial, and the defendant made a credible challenge to the accuracy of his identification; therefore the officer's distance from the scene and his line of vision were important matters for cross-examination. Compare *United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982)* (observation post privilege precludes cross-examination in a criminal trial where the witness was not essential, no question was raised about the witness' ability to observe events, the government produced a tape of the surveillance so that sight lines could be evaluated, and the officers had received assistance from unidentified citizens in setting up their observation post).

(n189)Footnote 189. See, e.g., *Mays v. DEA, 234 F.3d 1324 (D.C. Cir. 2000)* (report by informant concerning the defendant's distribution of cocaine was made under circumstances indicating an implied grant of confidentiality: "The pertinent question is whether the violence and risk of retaliation that attend this type of crime warrant an implied grant of confidentiality for such a source. They most assuredly do.").

(n190)Footnote 190. *Manna v. United States Dep't of Justice, 51 F.3d 1158 (3d Cir. 1995)* : "If a district court determines that a source provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality can reasonably be inferred, then *all* information provided by the source is protected."

(n191)Footnote 191. See *United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004)* (surveying case law and concluding that "either spouse may assert the privilege to prevent testimony regarding communications between spouses" and noting that "[v]esting the privilege in both spouses recognizes that allowing the communicating spouse to disclose one side of the conversation would eviscerate the privilege.").

(n192)Footnote 192. See, e.g., *United States v. Lofton, 957 F.2d 476 (7th Cir. 1992)* (noting that the

communications privilege is "assertable by the defendant himself").

(n193)Footnote 193. See, e.g., *United States v. Espino, 317 F.3d 788 (8th Cir. 2003)* (no privilege where a willing spouse testifies to conduct by the defendant that was not communicative); *United States v. Short, 4 F.3d 475 (7th Cir. 1993)* (statements from the defendant to the witness-spouse were not protected by the confidential communications privilege, because they were made in the presence of third parties; also, much of the witness' testimony was not protected by the privilege because it dealt with the witness' observations rather than with the defendant's confidential communications; these acts would have been protected by the adverse testimonial privilege, but that privilege was inapplicable because the spouse chose to testify); *United States v. Estes, 793 F.2d 465 (2d Cir. 1986)* (where a spouse willingly testifies, acts observed by the spouse are not protected by any interspousal privilege).

(n194)Footnote 194. *United States v. Strobehn, 421 F.3d 1017 (9th Cir. 2005)* (no confidential communications privilege where husband wrote a letter, left in the kitchen, addressed to his wife and to other family members); *United States v. Madoch, 149 F.3d 596 (7th Cir. 1998)* (confidential privilege for marital communications was inapplicable where wife visited husband in prison and they talked over the prison telephone; the Court noted "the well-known need for correctional institutions to monitor inmate conversations").

(n195)Footnote 195. See, e.g., *In re Witness Before Grand Jury, 791 F.2d 234 (2d Cir. 1986)* (no privilege where the Court finds that the witness-spouse and the litigant-spouse are permanently separated at the time the testimony is demanded, even though they are not legally separated or divorced).

(n196)Footnote 196. See, e.g., *United States v. Archer, 733 F.2d 354 (5th Cir. 1984)* (introduction of the wife's hearsay statement, otherwise admissible under a hearsay exception, does not violate the adverse testimonial privilege).

(n197)Footnote 197. *United States v. Clark, 712 F.2d 299 (7th Cir. 1983)* (even though the parties clearly had a loving relationship, the witness-spouse could be compelled to testify to acts that occurred prior to the marriage).

(n198)Footnote 198. See, e.g., *United States v. Byrd, 750 F.2d 585 (7th Cir. 1984)* (spouse has no privilege to refuse to testify where she was a participant in the defendant's charged activity).

(n199)Footnote 199. The Supreme Court granted certiorari in *Koecher* to determine the status of the joint participant exception to the adverse testimonial privilege, but the case was mooted after oral argument when the Koechers, alleged spies for the then-Communist Czech government, were traded for Natan Scharansky. See also *United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997)* (rejecting a joint participants exception to the adverse testimonial privilege).

(n200)Footnote 200. See, e.g., *United States v. Porter, 986 F.2d 1014 (6th Cir. 1993)* (the defendant's former wife testified that, shortly after she had moved out of the marital home, the defendant called her and admitted criminal activity; the confidential communications privilege is inapplicable if the communication was made at a time when the spouses were permanently separated, even if they were not legally separated or divorced; the status of the marriage at the time of the communication is a question of fact to be decided by the Judge; in this case, the witness had moved out at the time of the communication, and the defendant had not visited her during a time in which she was hospitalized; the Court found that the Trial Court did not abuse its discretion in finding a permanent separation, even though the spouses had not been separated for very long). See also *United States v. Roberson, 859 F.2d 1376 (9th Cir. 1988)* (requiring the Trial Court to undertake a specific detailed investigation into the irreconcilability of the marriage). The Court in

United States v. Murphy, 65 F.3d 758 (9th Cir. 1995) , after declaring that the marital communications privilege "does not apply if the couple was separated and the marriage was irreconcilable at the time of the communication," set forth the following approach for determining whether the marriage was irreconcilable at the time a confidential statement was made:

> Several factors guide a court's determination whether a marriage is irreconcilable. Those factors

> include the duration of the separation, the stability of the marriage at the time of the communication, whether a divorce action had been filed and the conduct of the parties since that filing, whether a property settlement had been proposed, and, finally, any statement by the parties regarding irreconcilability or the reasons for separation.

In *Murphy*, the marriage was found irreconcilable. When the defendant made the communication, he had already told his wife he did not want to be married, he had filed for divorce, and the couple had been separated for seven years.

(n201)Footnote 201. See, e.g., *United States v. Estes, 793 F.2d 465 (2d Cir. 1986)* (no privilege where the defendant communicated with his wife in order to plan a crime).

(n202)Footnote 202. See, e.g., *United States v. Bey, 188 F.3d 1 (1st Cir. 1999)* (confidential communications not protected by privilege where the witness spouse had accepted drug proceeds from the defendant and had maintained his cover story for the benefit of the defendant's unsuspecting couriers); *United States v. Hill, 967 F.2d 902 (3d Cir. 1992)* (the defendant's confidential communications to his wife, concerning drug activity, were not protected by the interspousal privilege because the wife was a joint participant in the drug activity; the wife had accepted deliveries of drugs, informed the defendant of these deliveries, and counted drug proceeds; the witness-spouse need not be prosecuted in order to be considered a joint participant).

(n203)Footnote 203. *Id.* ("The admissibility of this testimony is governed by Mrs. Hill's role in Hill's criminal activity.").

(n204)Footnote 204. See, e.g., *United States v. White, 974 F.2d 1135 (9th Cir. 1992)* (marital confidential communications privilege is inapplicable where the litigant-spouse admits crime or abuse of a family member, or threatens such abuse: "Protecting threats against a spouse or a spouse's children is inconsistent with the purposes of the marital communications privilege: promoting confidential communications between spouses in order to foster marital harmony."); *United States v. Allery, 526 F.2d 1362 (8th Cir. 1975)* (applying a similar exception to the marital privilege against adverse testimony). See also *United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997)* (finding an exception to the privilege for confidential marital communications where the defendant is charged with sexually assaulting a relative visiting the home: "It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime."). But see *United States v. Jarvison, 409 F.3d 1221 (10th Cir. 2005)* (refusing to establish an exception to the spousal testimonial privilege for acts of child abuse).

(n205)Footnote 205. See, e.g., *United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985)* (child has no right to refuse to testify against his parent).

(n206)Footnote 206. See, e.g., *In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997)* (no privilege for confidential communications from child to parent).

(n207)Footnote 207. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption, 19 St. Mary's L.J. 35, 69 (1987).*

In the absence of common-law development of a parent-child privilege, Members of Congress have taken to proposing the codification of both a privilege for confidential communications and a privilege to refuse to give adverse testimony. The Judicial Conference has opposed each Bill that has proposed a codification of a parent-child privilege. See generally Sarson, *The Child-Parent Testimonial Privilege: Attempts at Codification Have Missed Their Mark, 12 Geo. J. Leg. Eth. 861 (1999).*

(n208)Footnote 208. See *In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990)* (recognizing a clergy-communicant privilege, in light of "reason and experience," under *Federal Rule 501*).

(n209)Footnote 209. Federal law may bar agencies from revealing trade secrets. See *18 U.S.C. § 1905*, discussed in *Chrysler Corp. v. Brown, 441 U.S. 281 (1979)* .

(n210)Footnote 210. See also *United States v. Smith, 135 F.3d 963 (5th Cir. 1998)* (in criminal cases, *Branzburg* will protect the press only if "the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.").

(n211)Footnote 211. Compare *In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004)* (applying *Branzburg* but noting that outside the grand jury context, disclosure of confidential information from journalists "may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source").

(n212)Footnote 212. *Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993)* (compelling need not found where the plaintiffs failed to exhaust all alternative means of obtaining the evidence).

(n213)Footnote 213. See, e.g., *In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993)* (rejecting a scholar's privilege); *William T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 1982-1 Trade Cas. (CCH) P64564 (3d Cir. 1982)* (rejecting an accountant-client privilege); *Harris v. United States, 413 F.2d 316 (9th Cir. 1969)* (rejecting a banker-customer privilege); *United States v. Holmes, 594 F.2d 1167 (8th Cir. 1979)* (rejecting a probationer-probation officer privilege). See also *In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998)* (refusing to recognize a "protective function" privilege that would protect Secret Service agents from being compelled to give testimony about possible criminal acts of public officials).

(n214)Footnote 214. See, e.g., *In re Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992)* (privilege for self-critical analysis applies to prevent disclosure of an internal review of an accountant's auditing practices in a securities fraud case).

(n215)Footnote 215. See *Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506 (D. Or. 1982)* (privilege based on need for unimpeded criticism).

(n216)Footnote 216. See, e.g., *In re Kaiser Aluminum & Chem. Co., 214 F.3d 586 (5th Cir. 2000)* (rejecting claim of self-evaluation privilege, at least with respect to preaccident reports); *Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992)* (voluntary routine preaccident safety reviews are not protected by the privilege for self-critical analysis; the privilege is not necessary to encourage these reports, since corporations would find it crucial to prepare such reports anyway); *Davidson v. Light, 79 F.R.D. 137 (D. Colo. 1978)* (hospital report following discovery of patient's gangrenous leg is not privileged).

(n217)Footnote 217. See, e.g., *In re Kaiser Aluminum & Chem. Co., 214 F.3d 586 (5th Cir. 2000)* (rejecting claim of self-evaluation privilege where report is sought by a government agency); *Federal Trade Com. v. TRW, Inc., 628 F.2d 207, 1980-2 Trade Cas. (CCH) P63374 (D.C. Cir. 1980)* (assuming that a privilege for self-critical analysis exists, it does not protect against a demand by the FTC).

(n218)Footnote 218. See, e.g., *In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994)* (where the government did not offer the privileged documents themselves as proof of crime or fraud, the "good faith belief" requirement for an *in camera* hearing was inapplicable: "*Zolin* does not proscribe all *in camera* reviews of *in camera* submissions absent the requisite threshold [good faith] showing. Rather, *Zolin* proscribes *in camera* review of the documents that are the subject of the subpoena and the asserted privilege in the absence of the requisite threshold showing.").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article V. Privileges
CHAPTER 501 RULE 501

2-501 Federal Rules of Evidence Manual 501.03

501.03 Annotated Cases

[Go To Supp]

[1] Accountant-Client

United States v. Arthur Young & Co., 465 U.S. 805 (1984) , rev'g 677 F.2d 211 (2d Cir. 1982) : The Court of Appeals denied enforcement of an IRS summons to a taxpayer's accountant seeking tax accrual workpapers prepared by the accountant, reasoning that if the IRS could reach such papers, clients might conceal tax vulnerability from accountants, to the detriment of securities laws policies. The decision was grounded on the work product doctrine, not a privilege. Reversing, the Supreme Court distinguished the work product of a lawyer, "a loyal representative whose duty it is to present the client's case in the most favorable possible light," from that of the certified public accountant serving as an independent auditor, who "assumes a *public* responsibility transcending any employment relationship with the client." The Court observed that Congress gave the IRS broad investigative and enforcement powers and found that the public interest in full disclosure of all information relevant to tax liability outweighs the private need for work product protection.

Summit Ltd. v. Levy, 111 F.R.D. 40 (S.D.N.Y. 1986) : The Court held that a client who sent his accountant a copy of a letter from the client to his lawyer could not claim a privilege to prevent the accountant from disclosing the letter. It ruled that there is no accountant-client privilege and that the accountant was not serving as an agent of the lawyer.

Scotty's Contr. & Stone, Inc. v. United States, 326 F.3d 785 (6th Cir. 2003) : The Court affirmed an order denying a motion to quash summonses issued by the IRS to a taxpayer's accountant. The Kentucky accountant-client privilege did not protect the information sought by the IRS because the IRS's summonsing authority is not limited by any state-law accountant-client privilege and because the Kentucky statute has an exception for a "validly issued ... summons enforceable by order of a court."

United States v. Frederick, 182 F.3d 496 (7th Cir. 1999) : Frederick, a lawyer and an accountant, provided legal representation to and prepared the tax returns of taxpayers being investigated by the IRS. The Court upheld enforcement

of an order directing Frederick to turn over documents created in connection with preparation of the taxpayers' returns. The Court reasoned that because there is no accountant's privilege under federal law, a taxpayer may not hire a lawyer to do the work that an accountant or other tax preparer normally would do and thereby obtain, through the privilege, greater protection than a taxpayer who does not use a lawyer as his tax preparer would be entitled to.

In re International Horizons, Inc., 689 F.2d 996 (11th Cir. 1982) : The Court held that there was no accountant-client privilege in federal law and that a Federal Court would not recognize out of comity a state privilege in a bankruptcy proceeding. To do so would "undermine the important federal interest in assuring complete and accurate disclosure in federal bankruptcy proceedings."

[2] Attorney-Client

[a] Comment on Exercise

United States v. Layton, 549 F. Supp. 903 (N.D. Cal. 1982) , *rev'd on other grounds*, *720 F.2d 548 (9th Cir. 1983)* : Defense attorneys had retained a psychiatrist, Sukhdeo, to examine a murder suspect and the Court treated the doctor as an agent of the attorneys, so that all communications to the doctor were within the privilege. The government wished to ask any defense psychiatrists called at trial whether they had relied on Sukhdeo's materials in reaching a judgment concerning the defendant's mental condition. Although the Court indicated that if the testifying doctors had relied on the materials, they could be fully examined about them, it found that where they had not relied on them, the materials could not be mentioned. Any mention might be tantamount to a suggestion that the materials should be produced, and the privilege protects against such a suggestion.

[b] Attorney-Client -- Common Interest

[i] Action Between Joint Clients

Eureka Inv. Corp. v. Chicago Title Ins. Co., 743 F.2d 932 (D.C. Cir. 1984) : At one time an apartment building owner and a title insurance company were joint clients represented by a single firm, but the firm recognized that the interests of the parties diverged and undertook separate representation of the owner against the insurance company. In the action between the owner and the title insurance company, the Court held that communications made pursuant to this separate representation were privileged and did not fall within the exception to the privilege for disputes among clients who consulted counsel jointly. The Court noted that even if the law firm should not have continued to represent the owner, the client who relied on the privilege should not lose its protection.

Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215 (1st Cir. 2005) : The plaintiff and the defendant were involved in the development of a drug that treats vision loss. In intellectual property litigation between them, the Court affirmed a ruling that the plaintiff had a right to production of certain communications between the defendant and its counsel. The Court reasoned that the parties had both been represented by the one law firm regarding two matters in which they had a common interest, and although they also had some divergent interests during that time, they were joint clients and a joint-client relationship continues until an event affirmatively terminates it or readily implies that the joint relationship is over.

In re Sunrise Sec. Litig., 130 F.R.D. 560 (E.D. Pa. 1989): In securities litigation related to an insolvent savings and loan association, the Court held that the defendants' privilege for documents disclosed to the Federal Savings and Loan Insurance Corporation (successor to the insolvent association) in the course of a joint defense effort was waived when FSLIC subsequently asserted claims on behalf of the association against members of the joint defense group.

[ii] Attorney-Client -- Common Interest -- Attorney Conflict of Interest

United States v. Moscony, 697 F. Supp. 888 (E.D. Pa. 1988) : The Court disqualified counsel from representing defendants because the firm had jointly represented the defendants and three government witnesses. It also ruled that statements made by the witnesses to counsel during the period of joint representation could not be used by successor counsel for the defendants. The communications were privileged, and the witnesses were not adverse parties in a criminal proceeding against the defendants.

United States v. Henke, 222 F.3d 633 (9th Cir. 2000) : A prosecution for securities fraud and related offenses was originally brought against three defendants; these defendants and their attorneys engaged in joint defense strategy sessions. When one of the defendants decided to cooperate with the government, attorneys for the remaining defendants sought to withdraw on the ground that the duty to preserve the confidences of the government witness prevented them from cross-examining the witness with information learned during the pretrial meetings. The Trial Judge denied the motion to withdraw, reasoning that any privileged information would not even be learned by new counsel, so the defendants were no worse off in having current counsel cross-examine the witness without using that privileged information. At trial defense counsel conducted no cross-examination of the witness, for fear that the examination would lead to inquiries into material covered by the common interest privilege. The Court reversed the defendants' convictions on the ground that counsel were operating under a conflict of interest that impaired the representation. Noting that joint defense meetings are not "in and of themselves disqualifying," the Court emphasized that in this case defense counsel timely moved for disqualification, and the Judge erred in not fully acknowledging the conflict.

[iii] Attorney-Client -- Common Interest -- Government Attorneys

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) : Deputy White House Counsel Bruce Lindsey refused to answer certain questions before the grand jury investigating perjury and obstruction of justice charges against President Clinton. Among other things, Lindsey claimed that communications between and among himself, the President, and the President's personal lawyer were protected under the common interest privilege. Rejecting Lindsey's claim, the Court noted that Lindsey was an attorney for the Office of the President, not the President's personal attorney. The Court reasoned that government attorneys are obligated by law and by their oath to report criminal misconduct of government officials. Therefore, a government official's communications with a government attorney about possible criminal activity cannot be privileged in a criminal case. The Court concluded that "although the President in his personal capacity has at least some areas of common interest with the Office of the President, and although there may thus be reason for official and personal counsel to confer, the overarching duties of Lindsey in his role as a government attorney prevent him from withholding information about possible criminal misconduct from the grand jury."

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) : The District Court quashed a grand jury subpoena for notes taken at a meeting held after the First Lady testified before a grand jury in the Whitewater matter. Present at the meeting were Mrs. Clinton, her personal attorneys, and White House counsel. The Office of Independent Counsel, which sought the notes, argued that the communications recorded were not privileged, because Mrs. Clinton was speaking to her attorney in the presence of others outside the unit. Mrs. Clinton responded that she and the White House were pursuing a common interest. Reversing, the Court reasoned that the interests of Mrs. Clinton and the White House (that is, the Presidency itself) were not sufficiently aligned: Mrs. Clinton's interest was in avoiding criminal prosecution, whereas "one searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest."

[iv] Attorney-Client -- Common Interest -- Miscellaneous Civil Cases

Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) : Taxpayers resisted enforcement of an IRS summons addressed to accountants on the ground that the requested documents were privileged because they were communications related to legal services provided by attorneys (assisted by the accountants) who had been retained by some of the taxpayers in matters of common interest. Affirming enforcement of the subpoenas, the Court did not find it

necessary to determine whether the taxpayers' interests were all aligned and whether the fact that some were not represented by counsel was significant, since the participation of the accountants -- who were found not to be assisting the attorneys and who had no privilege of their own -- meant that the communications were not confidential, vitiating the privilege.

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993) : In an action by purchasers of common stock against a corporation, its subsidiary, and the chief executive officer, the District Court held that documents containing communications from two multi-member organizations created to handle asbestos-related personal injury claims against member companies were not within a joint defense privilege. The documents related generally to statistics concerning litigation and were not communications pertaining to a defense strategy. In a libel action, *Davis v. Costa-Gavras*, n1 the District Court ruled that the privilege covered communications made at a "pre-production libel review" on behalf of a movie studio, even though the author of the book that was being made into a movie was present. The author and the studio were treated as potential codefendants entitled to claim a privilege as joint parties. In *SCM Corp. v. Xerox Corp.*, n2 the District Court held that conversations and negotiations between joint-venturer corporations would be privileged only if the joint venturers had sufficiently common interests in the subject of the otherwise privileged information to warrant maintaining the privilege. In applying the common interest concept, the Court found that some relationships involved common interests and others did not. In *In re Colocotronis Tanker Sec. Litig.*, n3 the District Court held that the privilege protected a lead lender's communications with its attorney over a now-defaulted loan against discovery by a bank that participated in making the loan. The Judge found that the participating bank was not a joint client along with the local bank and that no special fiduciary relationship existed.

In re Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120 (3d Cir. 1986) : Affirming a discovery ruling, the Court held that corporate officers could not assert a privilege after the corporation waived it, and that no joint defense privilege could be claimed where there was no showing that the corporation and the officers agreed to pursue a joint defense strategy. In a suit by investors against organizers of limited partnerships, *Eisenberg v. Gagnon*, n4 the Court held that "[c]ommunications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests." In *North River Ins. Co. v. Philadelphia Reins. Corp.*, n5 the District Court affirmed a Magistrate Judge's denial of a motion to compel discovery of documents created in connection with alternative dispute resolution proceedings between the plaintiff reinsured and a third party. The defendant reinsurer asserted that it had been in a common interest situation with the plaintiff when the documents were created, but the Court held that the doctrine did not apply because the plaintiff had retained its own counsel wholly independent from the defendant and the defendant had no input into that relationship.

Sheet Metal Workers Int'l Ass'n v. Sweeney, 29 F.3d 120 (4th Cir. 1994) : The Court affirmed findings that communications between retained counsel for a union pension fund and outside counsel specially retained to represent the fund in connection with a grand jury investigation of it were not covered by the privilege. The retained counsel had been clearly informed both that the outside lawyers were representing only the fund and that the fund's interests were or would be adverse to his.

In re Santa Fe Int'l Corp., 272 F.3d 705, 2001 Trade Cas. (CCH) P73491 (5th Cir. 2001) : Denying a writ of mandamus to a defendant sued for conspiring with other companies to fix wages and employee benefits, the Court upheld a ruling that denied the privilege to a memo from the defendant's general counsel that had been shared with a codefendant. The Court found that the exchange of information between the companies was not privileged because there was no showing that at the time the communication was made the companies were potential codefendants acting under an actual or perceived threat of lititgation. In *Hodges, Grant & Kaufmann v. United States Gov't*, n6 the Court overturned the denial of an IRS request to enforce a subpoena, noting that the privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication."

Russell v. General Elec. Co., 149 F.R.D. 578 (N.D. Ill. 1993) : In a whistleblower action, the Court granted a motion to

compel a management consultant hired by the defendant to answer deposition questions seeking to elicit what defense counsel told the consultant; the consultant was not entitled to claim a joint defense privilege since he was simply a potential witness. In an ADEA action, *Bauman v. Jacobs Suchard, Inc.*, n7 the District Court held that the privilege applied to confidential communications between the EEOC and a plaintiff represented by a retained attorney, where the EEOC had brought a separate suit on behalf of other former employees. The privilege also extended to communications directed to an EEOC investigator acting as an agent for the attorneys. See also *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co.* n8(disclosure of privileged communications to an actual or potential codefendant or to their counsel in the course of a joint defense is not a waiver; disclosure of communications by a patentee to a related corporation did not amount to a waiver of the privilege).

Waller v. Financial Corp. of Am., 828 F.2d 579 (9th Cir. 1987) : The Court observed that communications by a client to his lawyer remain privileged when the lawyer shares them with codefendants pursuing a common defense. It held that a settlement between plaintiffs and one or more codefendants does not breach the privilege, even if the settling defendants have some financial incentive to assist the plaintiffs, as long as the settlement does not require disclosure of privileged information.

In re Regents of Univ. of Cal., 101 F.3d 1386 (Fed. Cir. 1996) : In a multidistrict patent litigation, the Court vacated a discovery order for communications between the university that had applied for a patent and attorneys for the company that was exclusive optionee (and subsequently became exclusive licensee) for the patent. The university and the company had substantially identical interests in obtaining strong and enforceable patents because of the potentially and ultimately exclusive nature of the license agreement, and thus the communications, made in order to meet legal requirements and plan conduct in compliance with law, were privileged.

[v] Attorney-Client -- Common Interest -- Miscellaneous Criminal Cases

In re Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005) : In the course of a grand jury investigation, Lawyer I directed Client A to commit perjury before the grand jury after initially advising him to tell the truth. Lawyer I also represented Client B who might have had some connection with the perjury. Lawyer I consulted with Lawyer II and told Client A to recant the false testimony. Lawyer II represented other clients (Group C) connected with Client B and pertinent events; Lawyer II had a joint-defense arrangement with Lawyer I, which allowed them to exchange confidences that their clients may have confided to them separately. The grand jury summoned Lawyer I and asked him about the prior perjury of Client A, but Lawyer I invoked Client B's attorney-client privilege and the joint-defense privilege shared with Group C. The District Court ordered Lawyer I to answer specific questions before the grand jury and forbade him to disclose to anyone what he had been asked by the grand jury or other information relating to "the subject matter" of the grand jury investigation. The Court affirmed the grant of the motion to compel, based on the crime-fraud exception, as to Client B's privilege, vacated (without prejudice to the government) as to the Group C clients' privilege, and modified the order limiting disclosure. The Court noted that some difficult questions remained: "Now that Client B's privilege has been pierced, some of what the government seeks can conceivably be obtained by questions directed to Lawyer I tailored to avoid disclosures that would invade Group C's privilege; arguably Lawyer I-Client B conversations can be reached regardless of what information Lawyer I passed on to the Group C clients. How far Lawyer I may be questioned about the source of the information -- if it came from Lawyer II or the Group C clients -- may be more debatable." In *United States v. Bay State Ambulance & Hosp. Rental Serv.*, n9 the Court held that a party claiming a joint defense privilege failed to demonstrate that his confidential communication was made as part of a joint defense and with the expectation that it would be kept confidential.

United States v. Weissman, 195 F.3d 96 (2d Cir. 1999) (per curiam): The defendant was the CFO of a health care insurer (Empire), which was being investigated by the U.S. Senate Permanent Subcommittee on Investigations (PSI). At the request of Empire's counsel, the defendant assisted Empire's presentation to the PSI. As evidence of personal wrongdoing by the defendant began to surface, he hired his own counsel, and they worked with Empire and its counsel to present information to the PSI. After an Empire auditor had a conversation with the defendant and was not satisfied

with his answers, the defendant's counsel invited attorneys for Empire to meet with him and the defendant. They met on two consecutive days, during which the defendant made damaging admissions. Affirming convictions for perjury and obstruction of justice, the Court held there was no error in rejecting the defendant's claim that the conversations on both days were covered by a joint defense agreement. Although the parties had made an agreement by the second day, the Court found that on the first day there was no joint defense agreement applicable because before that day's revelations Empire had no reason to know of the defendant's wrongdoing. The defendant failed to show any more than that on the first day Empire and he cooperated with respect to the PSI investigation into Empire. The Court noted that "[s]ome form of joint strategy is necessary to establish a [joint defense agreement], rather than merely the impression of one side as in this case." In *United States v. Schwimmer*, n10 a prosecution for conspiracy to illegally influence operations of employee benefit plans, the Court remanded for an evidentiary hearing to determine whether the government had violated the defendant's privilege by using information provided by an accountant who was hired by a codefendant's attorney to serve joint interests of the defendant and the codefendant. On remand, n11 no violation of the privilege was found. In *In re Grand Jury Subpoena Duces Tecum*, n12 the Court relied heavily on two Ninth Circuit opinions -- *Continental Oil Co. v. United States* n13 and *Hunydee v. United States* n14-- in concluding "that the privilege covers communications to a prospective or actual co-defendant's attorney when those communications are engendered solely in the interests of a joint defense effort." The Court said that a codefendant's personal attorney need not be present for statements made in interviews in furtherance of the joint defense to be privileged, and that the privilege may still apply when the clients have some adverse interests. It also noted that the fact that one codefendant waived the privilege and elected to sue other codefendants did not destroy the privilege in the government's action against them.

United States v. Moscony, 697 F. Supp. 888 (E.D. Pa. 1988) : The Court disqualified counsel from representing defendants because the firm had jointly represented the defendants and three government witnesses. It also ruled that statements made by the witnesses to counsel during the period of joint representation could not be used by successor counsel for the defendants. The communications were privileged, and the witnesses were not adverse parties in a criminal proceeding against the defendants.

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) : In the course of an investigation regarding a related company, attorneys for AOL Time Warner interviewed three AOL employees. Before each interview, the employee was told that the attorneys represented the company, that the conversations were privileged but the privilege was the company's and it would decide whether to waive it, and that the employee was free to consult his own attorney. Subsequently the SEC began an investigation of AOL and the related company. Shortly thereafter AOL and one of the employees entered into a "common interest agreement." When the SEC later deposed the employees, they asserted the attorney-client privilege regarding the interviews with AOL's attorneys. Finally, a grand jury issued a subpoena to AOL to provide records reflecting the interviews; AOL agreed to waive the privilege, but the employees moved to quash. Affirming denial of the motion to quash, the Court found no error in rejection of the one employee's assertion of the joint defense privilege, since the agreement to share information pursuant to a common interest did not exist at the time of the interviews.

In re Auclair, 961 F.2d 65 (5th Cir. 1992) : At the instance of a lawyer allegedly involved in a fraud scheme, the lawyer's secretary and her husband, together with the lawyer, consulted another attorney to see whether he would represent them in a pending grand jury investigation. After interviewing each of the three separately and together, the attorney declined to represent the secretary and her husband. The attorney was subsequently ordered to testify about the interviews, but the Court reversed, holding that: confidential communications made with a view to employing a lawyer are privileged even if employment is not accepted; this principle applies equally when persons with common interests consult an attorney together seeking common representation; the existence of a matter of common interest is presumed in the prerepresentation phase; the participants in this case had a reasonable expectation of confidentiality; and any waiver by the secretary or her husband did not defeat any privilege possessed by the client-lawyer.

United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) : Before he was indicted for racketeering, the defendant went with a friend (Holden), who was a lawyer and who had represented his family in several matters, to meet with a criminal

defense attorney. Holden was not permitted to represent Evans in this case because Holden was a police officer. The Court affirmed an *in limine* ruling that the defense attorney could be called to testify by the government because Holden was not present at the meeting in his capacity as legal adviser to Evans. Evans argued that, because Holden was required as a police officer to report what he learned about any crime to the Department and therefore was required to report what Evans confided to him, Holden and Evans shared a common interest, but the Court wrote that "it is difficult to imagine what necessity there could possibly be for the pooling or exchange of any information between Evans' defense attorneys and Holden *vis-a-vis* Holden's potential defense to a Departmental disciplinary proceeding." In *United States v. McPartlin*, n15 one defendant objected on privilege grounds when another defendant attempted to elicit testimony in their bribery trial from an investigator concerning information supplied to him by the first. The Court held that the objecting defendant was entitled to claim the privilege, since the statements were made in confidence to a representative of an attorney for a codefendant for a common purpose related to the defense of both the declarant and the client for whom the investigator's lawyer worked. Citing proposed Rule 503(b)(3), the Court concluded that the codefendants' defenses need not be compatible in all respects; it was sufficient that the clients had some interests in common. Affirming fraud convictions in *United States v. Keplinger*, n16 the Court stated that a person's subjective belief that he is represented individually by corporate counsel is not necessarily sufficient to entitle him to claim the privilege. The joint defense doctrine did not apply in this case to protect communications made by individuals to attorneys, since the individuals did not understand that their communications would be kept in confidence.

United States v. Zolin, 809 F.2d 1411 (1987) , modified en banc, 842 F.2d 1135 (9th Cir. 1988) , vacated on other grounds, 491 U.S. 554 (1989) : In a tax investigation the Court affirmed an order to a State Court clerk to produce some, but not all, sealed documents sought by the IRS that had been filed in a State Court action. The Court found that tapes of a meeting of nonlawyer church members were privileged, since all church members present were employees of the church who "had a common interest" in sorting out its affairs.

United States v. Lopez, 777 F.2d 543 (10th Cir. 1985) : The Court reversed a drug conviction because testimony by the attorney for the defendant's companion was erroneously excluded. The government failed to show that the companion's statements, which were made in the presence of the defendant, were for the purpose of pursuing a joint defense and that they were made with an expectation of confidentiality.

[vi] Attorney-Client -- Common Interest -- Waiver Issues

In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001) : When a grand jury subpoenaed a corporation's records, the corporation waived its privilege, but two of its former officers and its former attorney intervened and moved to quash. The intervenors claimed that the attorney had represented the officers as well as the corporation and that the representation of all was pursuant to an oral joint defense agreement making communications among the three clients jointly privileged. The Court affirmed denial of the motion to quash, holding that the individuals held no privilege as to communications made in their corporate capacities; therefore, any joint defense agreement was irrelevant and the corporation's waiver of its privilege was effective.

In re Grand Jury Subpoenas Duces Tecum, 406 F. Supp 381 (S.D.N.Y. 1975) : The Court concluded "that the attorney-client privilege covers communications to a prospective or actual co-defendant's attorney when those communications are engendered solely in the interests of a joint defense effort." The Court also noted that the fact that one codefendant waived the privilege and elected to sue other codefendants did not destroy the privilege in the government's action against them.

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990) : Reviewing a motion to quash subpoenas for papers held by a movant and its previously wholly owned subsidiary, the Court held that upon its divestiture the subsidiary's managers could waive the privilege with respect to documents it generated, but that to the extent the documents were generated in a matter of common interest with the movant, even if the parties were not joint defendants in that matter, waiver of the privilege required the movant's consent.

United States v. Newell, 315 F.3d 510 (5th Cir. 2002) : In a prosecution for money-laundering, the government introduced a letter from the defendant's in-house accountant to the accountant's attorney that recounted statements the defendant had made to the defendant's senior employees regarding communications between the defendant and the defendant's attorney. Holding that the privilege had been waived by disclosure of the communications to the employees, the Court noted that although the communications dealt with methods to alter billing procedures in order to avoid liability, there was no common interest among the defendant and the employees in defending against a pending or imminent investigation or prosecution, so the common interest privilege did not apply.

John Morrell & Co. v. Local Union 304A, 913 F.2d 544 (8th Cir. 1990) : In settling a prior action concerning a plant closing, the plaintiff employer had made a joint defense agreement with an employee class regarding cross-claims asserted by the defendant union. The employer waived its privilege as to certain documents given the employees for that case; five other documents were inadvertently turned over to the union by the employees. The Court held in this action for breach of a no-strike clause that the employees, sharing a joint defense privilege, could not waive the employer's privilege as to the five documents and that the employer's waiver as to the others did not extend to the five because the subject matter of the two sets was insufficiently linked.

United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003) : Reversing in part a conviction for participating in a cocaine distribution scheme, the Court held it was error to limit the cross-examination of a government witness on the ground that the defendant and the witness at one time had a joint defense agreement. Counsel examining a witness with whom his client has had a joint defense agreement faces a potential conflict of interest because of the risk that the examination will disclose confidential attorney-client communications. However, when, as here, the witness has turned state's evidence, the witness has waived the privilege, so the potential conflict disappears. In essence, the Court held that the attorney-client privilege for communications by one client to another client's lawyer in a joint defense situation does not apply in a proceeding when the clients become adverse.

[c] Attorney-Client -- Communications from Attorney

Murphy v. Tennessee Valley Auth., 571 F. Supp. 502 (D.D.C. 1983) : In a Freedom of Information Act case, the Court held that the privilege covers communications from attorney to client based upon the client's confidential disclosures to the attorney. In *Attorney General v. Covington & Burling, 430 F. Supp. 1117 (D.D.C. 1977)* , the Court noted that a communication from the attorney to the client "is privileged not only if disclosure would tend to reveal a prior confidence of the client, but also if it would tend to reveal a subsequent communication -- an admission by adoption."

O'Brien v. Board of Educ., 86 F.R.D. 548 (S.D.N.Y. 1980) : The Court found that the privilege covered counsel's responses that would reveal the client's communications, even if the client's questions were put in hypothetical form.

Potts v. Allis-Chalmers Corp., 118 F.R.D. 597 (N.D. Ill. 1987) : The Court rejected a claim that all communications from a lawyer to a client are privileged, ordering a lawyer to answer questions unless the answers would disclose or rely upon confidential communications from a client.

In re Fischel, 557 F.2d 209 (9th Cir. 1977) : The Court affirmed a decision holding an attorney in contempt for refusing to produce certain summaries of business transactions with third party entities undertaken by a client to effectuate tax planning. Information in the summaries prepared by counsel was derived from the entities themselves, records maintained by counsel, and documents of the clients. After noting that the privilege protected an attorney's advice in response to confidential communications from the client, including papers prepared by an attorney that would

tend to reveal the client's confidential communications, the Court held there was no adequate showing that the summaries would tend to reveal any confidential client communications.

Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997) : Affirming a grant of summary judgment in favor of the employer in a Title VII action, the Court held that a memorandum from in-house counsel to management, concerning charges of disparate treatment of employees, was properly found privileged. The Court noted a split of authority with respect to the privilege. The "narrow view" is that the privilege only protects communications from the client to the attorney, with the attorney's communications protected only insofar as they would disclose confidential client communications. The "broad view" provides independent protection for confidential communications from the attorney to the client. The Court opted for the broad view. Thus, the memorandum was protected by the privilege even though it did not disclose or refer to any confidential client communications.

American Standard, Inc. v. Pfizer, Inc., 828 F.2d 734 (Fed. Cir. 1987) : In a patent infringement case, the Court held that an opinion letter by outside counsel on the validity of a patent was not privileged, since it was based on nonconfidential, public records or documents and did not reveal, directly or indirectly, the substance of client communications.

[d] Attorney-Client -- Compulsory Process

Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1984) : In a habeas corpus proceeding by a state prisoner, the Court found that the *Sixth Amendment* right to compulsory process did not compel a State Court to permit a defendant to offer a confession by another person that fell within the protection of that other person's privilege.

[e] Attorney-Client -- Confidential Communications

[i] Failure To Prevent Third-Party Reception

United States v. Lechoco, 542 F.2d 84 (D.C. Cir. 1976) : Reversing a conviction for kidnapping on other grounds, the Court upheld a ruling that a tape-recorded conversation between the defendant and his lawyer made while he was engaged in his illegal activity was admissible. The lack of privacy between attorney and client was entirely within the defendant's control.

United States v. Gann, 732 F.2d 714 (9th Cir. 1984) : The Court held there was no privilege where a suspect made a telephone call to his attorney while a search was ongoing and an officer was in a position to hear what the suspect said. In *United States v. Landof, 591 F.2d 36 (9th Cir. 1978)* , the Court held that no privilege covered communications between a client and lawyer when another lawyer was present who was not acting as an attorney or an agent.

United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990) : Denying a television news network relief from an order prohibiting it from broadcasting intercepted communications between a detainee and his counsel, the Court noted that whether the detainee reasonably expected the communications to be confidential, after signing a release evidencing his understanding that all telephone conversations would be recorded, was an issue to be addressed by the District Court.

[ii] Attorney-Client -- Confidential Communications -- Intention that Attorney Will Disclose Information Communicated

United States v. Bohonnon, 628 F. Supp. 1026 (D. Conn. 1985) , *aff'd*, *795 F.2d 79 (2d Cir. 1985)* : Enforcing an IRS summons, the Court ruled that "information transmitted to an attorney with the intention that it be included in the tax return is not covered by the privilege." The Court recognized that "the underlying papers or legal advice" might be

protected.

United States v. Rockwell Int'l, 897 F.2d 1255 (3d Cir. 1990) : The District Court enforced an IRS subpoena, holding that a taxpayer's file analyzing potential tax liabilities and tax problems, which might be disclosed to independent auditors or the SEC, was not protected by the privilege. The Court vacated the order and remanded for specific factual findings as to the nature of the material in the file, who prepared and controlled it, and to whom it was disclosed, so that the Court could determine whether the conditions for the privilege were met or whether it was waived.

United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996) : The Court affirmed in part the fraud conviction of the former CEO of the United Way of America, holding that communications with an investigative firm hired by UWA's general counsel to conduct an internal investigation were not privileged because, *inter alia*, there had been discussions from the time the firm was hired about making its report public. In *In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994)* , a subsidiary, responding to a grand jury subpoena, refused to produce drafts, notes, and memoranda generated in connection with audit responses to an outside auditor. These documents were used by counsel for the subsidiary to prepare SEC filings. The Court held that the subsidiary's motion to quash the subpoena on grounds of privilege was properly rejected, since the documents revealed matters communicated to the attorneys "for their use in connection with public disclosures, which made the communications and data underlying them non-privileged under the relevant case law." In *United States v. Oloyede*, n17 the Court affirmed a lawyer's conviction for defrauding the Immigration and Naturalization Service by falsifying documents for citizenship applications, holding there was no violation of the privilege when the defendant's office was searched, because the information communicated by the clients was specifically intended to be used to file the applications and they had no intention that their communications be kept confidential. In *United States v. Jones*, n18 the Court affirmed denial of a motion to quash grand jury subpoenas issued to attorneys, expressing doubts as to whether the privilege attached when legal opinions were sought for inclusion in a lease promotion brochure. The Court relied upon *Jones* in *In re Grand Jury Proceeding*, n19 as it held that statements by a client and his joint-venturers relating to the subject matter of a prospectus that was being prepared were not privileged, since the statements were made with the expectation that they would be revealed. It did not matter, said the Court, whether or not the prospectus was ever published. In *United States v. (Under Seal)*, n20 the Court cited its prior cases for the proposition that there is no privilege for communications made by a client who expects them to be used in a publication or distribution to others. The Court concluded, however, that the privilege does attach "if the client subsequently decides not to publish his communications and tells his attorney before the release of any of the communications," because in this situation the client's change of mind often will result from full and frank discussions with the attorney, and the privilege should promote such discussions.

United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) : With respect to preparation of tax returns, the Court stated that "since part of the information that passes between the attorney and client will be disclosed on the tax returns directly or indirectly, that part at least is not a confidential communication and hence is not privileged."

United States v. Hubbard, 16 F.3d 694 (6th Cir. 1994) , *rev'd in part on other grounds*, *514 U.S. 695 (1995)* : The Court affirmed a conviction for fraud and perjury in bankruptcy proceedings, holding that information elicited from the defendant's attorney was not protected by the privilege because what the defendant had communicated was to be conveyed to the bankruptcy trustee and the Court via a written pleading, so there was no expectation of confidentiality.

United States v. White, 950 F.2d 426 (7th Cir. 1991) : Affirming a defendant's conviction for bankruptcy fraud, the Court held that documents containing only information transmitted by the client so that it might be used on the bankruptcy schedules did not contain confidential communications protected by the privilege. See also *United States v. White, 970 F.2d 328 (7th Cir. 1992)* (companion case). In *United States v. Windfelder*, n21 the Court affirmed a defendant's conviction for understating his income in his federal tax return and for understating the estate of his aunt on an estate tax return. It found that documents submitted by the defendant to a law firm were not privileged, where the firm informed the defendant that it intended to comply with the IRS's request for information to explain discrepancies between the aunt's income tax returns and the estate return. Since the documents were provided for disclosure to the

IRS, they were not confidential.

United States v. Spector, 793 F.2d 932 (8th Cir. 1986) : Affirming a cocaine conviction, the Court held that tapes made by an informant-witness concerning his daily activities on behalf of the government were protected by the privilege. The tapes had been made to assist the informant's lawyer in representing him and they were not given to the government. A dissenting Judge argued that the privilege did not apply because the tapes were ultimately to be given to the government to corroborate the witness' cooperation.

United States v. Abrahams, 905 F.2d 1276 (9th Cir. 1990) : Ordering enforcement of an IRS subpoena to an attorney-tax preparer, the Court held that the attorney had failed to show that his clients had communicated with him in confidence when they gave him information for their tax returns.

In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370 (Fed. Cir. 2001) : Monsanto sued Pioneer, its licensee of certain plant patents, alleging that the licenses did not survive the merger of Pioneer into a wholly-owned subsidiary of duPont. Monsanto sought in discovery to depose Pioneer's in-house counsel and obtain documents concerning information provided regarding the tax and intellectual property implications of the merger. The Trial Judge granted the request, on the ground that the privilege never applied because the information was intended to be disclosed in a proxy statement. Vacating most of the discovery order, the Court stated that "[a] party does not forego the privilege with respect to merger negotiations by disclosing the existence of the merger, the negotiations between the parties concerning the merger, or the property rights of the respective parties, and a waiver occurs only when a party relies on or discloses advice of counsel or other privileged information in connection with the merger." In this case such reliance and disclosure occurred only in the limited area of tax advice, where the proxy stated that the discussion of federal income tax consequences was the opinion of special counsel.

[iii] Attorney-Client -- Confidential Communications -- Miscellaneous Cases

In re Sealed Case, 737 F.2d 94, 1984-1 Trade Cas. (CCH) P66062 (D.C. Cir. 1984) : The Court held that a former corporate attorney could be asked about hunches he had concerning the company's activities as long as the hunches were not based on information submitted confidentially by the company for the purpose of obtaining legal services. The Court also found that conversations on an airplane between the company's president and the attorney were privileged even though the president did not expressly state that his communications were confidential.

United States v. Moscony, 927 F.2d 742 (3d Cir. 1991) : During the grand jury investigation of a RICO fraud case, the defendant and several of his employees were all represented by a single lawyer. The employees made communications to the attorney, which he incorporated into affidavits and had them sign in the presence of the defendant, who notarized them. Affirming suppression of the affidavits, the Court held that the ultimate key to confidentiality is intent. There was ample support for the findings that the employees were unsophisticated lay persons who were not advised by counsel or anyone else that the information divulged would not be confidential, and that they did not intend to waive confidentiality by signing the affidavits.

United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) : Before he was indicted for racketeering, the defendant went with a friend, who was a lawyer and who had represented his family in several matters, to meet with a criminal defense attorney. The friend was not permitted to represent the defendant in this case because the friend was a police officer. Affirming an *in limine* ruling to admit testimony by the defense attorney, the Court held there was no error in the findings below that the friend was not acting as a professional legal advisor and that the defendant knew that his friend's presence in the consultation threatened the confidentiality required for the privilege to apply.

United States v. Hatcher, 323 F.3d 666 (8th Cir. 2003) : The Court remanded a robbery conviction because the government had not been ordered to turn over tapes of jailhouse conversations between the cooperating coconspirators and their attorneys. The conversations were not privileged because the inmates and their counsel were aware that they

were being recorded and thus could not reasonably expect that their conversations would remain private. The concurring Judge believed that the evidence in the record of whether the coconspirators knew that all phone calls were recorded was insufficient to conclude that the privilege had been waived, but that the government lacked standing to claim the privilege in resisting the discovery request. Affirming a cocaine conviction in *United States v. Spector*, n22 the Court held that tapes made by an informant-witness, who was cooperating with the government, concerning his daily activities on behalf of the government were protected by the privilege. The tapes had been made to assist the informant's lawyer in representing him and they were not given to the government. A dissenting Judge argued that the privilege did not apply because the tapes were ultimately to be given to the government to corroborate the witness' cooperation.

Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) : In the course of a civil rights action in which plaintiffs claimed that prison officials had retaliated against inmates who filed lawsuits or availed themselves of grievance procedures, defense counsel authorized and encouraged prison employees to search for and copy letters from opposing counsel that were kept in the inmates' legal files in the prison library. Appealing the imposition of sanctions for improper use of privileged materials, the defendants argued that any privilege had been waived because the inmates stored the files in an area accessible to prison employees. The Court found no error in the determination below that the inmates did all they could, in a prison context, to secure the documents' confidentiality by marking the binders with the name of the case, placing them on a restricted-access shelf, and requiring a sign-out procedure for use of the files. In *United States v. Flores*, n23 the Court held that an attorney was required to answer questions as to whether his client had provided information about an administrative claim the attorney filed alleging that a weapon had been improperly seized from the client, since the Court was entitled to ask whether the attorney had authority to file a document. However, confidential communications to the attorney were not a proper subject of inquiry. In *United States v. Palmer*, n24 the Court upheld a ruling that an attorney hired to transfer the defendant's personal effects from Utah to Washington could be required to answer questions concerning the material that was given to him by a third person to be shipped to the defendant, saying that "the communication was not confidential since a third party was involved."

In re Grand Jury Subpoena (Leen), 642 F. Supp. 230 (S.D. Fla. 1986) : The Court enforced a grand jury subpoena to an attorney-witness, holding that the identities of individuals who supplied counterfeit bills that the attorney placed in his bank account were not protected by the privilege. It expressed doubt that the payment was a confidential communication or something that was expected to be confidential, and reasoned that an attorney "cannot be used as a means of shielding potentially illegal activity, especially where the attorney/witness is a witness to a possible crime separate and apart from his representation of a client."

[f] Attorney-Client -- Corporate Privilege

[i] Former Employees

Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987) : The Magistrate indicated that under some circumstances privilege will protect communications between former employees and corporate counsel. In *Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94 (D. Mass. 1987)* , the Court applied state law in a diversity case, but concluded that State Courts would follow federal decisions, which indicated that communications between corporate counsel and a former employee were privileged.

In re Allen, 106 F.3d 582 (4th Cir. 1997) : Reversing a judgment of civil contempt against an attorney representing a state Attorney General and his Office, the Court held it was error to reject the privilege claim related to communications from a former Chief Deputy Attorney General, who had left the Office between the time of the relevant events and the time of the communications. Privileging such communications is consistent with the "need to know" focus of the *Upjohn* decision.

[ii] Attorney-Client -- Corporate Privilege -- Generally

Upjohn Co. v. United States, 449 U.S. 383, 1980-81 Trade Cas. (CCH) P63797 (1981) : The Court held that the privilege extended in the corporate context to communications with employees beyond the "control group." This case is discussed in the Editorial Explanatory Comment, *§ 501.02[5][g]*.

Dowd v. Calabrese, 101 F.R.D. 427 (D.D.C. 1984) : In a libel action by former prosecutors against a reporter and his paper, the Court relied upon *Upjohn* to hold that information that an attorney related to the managing editor of the paper, which was the product of the attorney's talking with the paper's employees, was within the privilege.

Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 1986-2 Trade Cas. (CCH) P67327 (D. Mass. 1986) : The Court held that interrogatories submitted by an antitrust plaintiff that sought to compel the defendant's attorney to reveal the names, dates, and places of witness interviews invaded the privilege to the extent that they sought memoranda summarizing the results of interviews with corporate employees.

Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987) : In an employment discrimination action, a Magistrate ruled that if a corporation is to prevail on a claim of privilege with respect to documents, "in a situation where the author or recipient of allegedly privileged documents functions as a corporate manager as well as an attorney, efforts must include clear designation of those communications sent or received in his capacity as a legal advisor." In a patent infringement suit, *Cuno, Inc. v. Pall Corp.*, n25 the District Court held that the privilege applied where an employee who communicated with counsel did so at the direction of a superior in order for the corporation to obtain legal advice, the subject matter of the communication related to the employee's duties, and the communication was not disseminated beyond the persons having a need to know. In *Leucadia, Inc. v. Reliance Ins. Co.*, n26 the District Court ruled that where employees spoke to corporate counsel so that the corporation could obtain legal advice during its investigation of fraud by a former employee, their communications were privileged, whether or not the employees individually spoke in reliance on confidentiality. Ruling on discovery matters in *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, n27 the District Court found that employee interviews occurring during an internal investigation by the defendant company were privileged.

Tucker v. Fischbein, 237 F.3d 275 (3d Cir. 2001) : Affirming in part summary judgment for the defendants in a defamation action brought against news magazines and others, the Court held that the plaintiffs' motions to depose in-house counsel at the magazines were correctly denied. Where the communications with counsel were clearly for the purpose of rendering legal advice, the Court characterized the plaintiffs' argument that the privilege was waived because counsel reviewed stories "in the regular course of business" as "frivolous." In *United States v. Amerada-Hess Corp.*, n28 the IRS sought to subpoena a report of the corporation's internal investigative committee (four outside directors) that interviewed officers and employees about possible improper foreign payments. Although the Court found that outside counsel's confidential report to the committee could fall within the privilege, it concluded that a list of persons interviewed that was attached to the report did not qualify as legal advice, nor did it threaten to disclose what anyone in the control group told outside counsel.

United States v. Mobil Corp., 149 F.R.D. 533 (N.D. Tex. 1993) : The Court denied an IRS petition to enforce a summons, finding that various documents were privileged, including a letter from tax counsel for a subsidiary to tax counsel for a parent, an internal memorandum from the tax department regarding foreign taxing authority, and other documents analyzing foreign tax law.

Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502 (N.D. Ill. 1986) : In an employment discrimination claim by a discharged train attendant, the Court held that the privilege did not bar the defendant's former EEO investigator (i.e., the person who received complaints from other employees, investigated them, and reported to the legal department) from talking to the plaintiff's lawyer about the complaints made to her. The Court reasoned that the complaints were not privileged because they were antagonistic to the employer and they were not confidential, as the employees expected them to be relayed to third parties. In *In re Sealed Case*, n29 a securities fraud case arising when Seller Corporation sold stock of a Subsidiary to Purchaser, the Magistrate resolved disputes as to who held the privilege

by reasoning that "[i]t is reasonable ... to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its privilege." However, as to a matter in which Seller and Subsidiary were joint clients prior to the sale, the rule requiring both clients to waive the privilege with respect to third parties applied.

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) : Although various privilege questions turned on state law under *Rule 501* in this product liability action, the Court applied federal law that: "the minutes of business meetings attended by attorneys are not automatically privileged"; "business documents sent to corporate officers and employees, as well as the corporation's attorneys, do not become privileged automatically"; and "[w]hen a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or indirectly." In *Diversified Indus. v. Meredith*, n30 after discussing and pointing out problems with the two then-prevailing tests of corporate privilege -- the control group and the scope of employment tests -- a majority of the *en banc* Court concluded that an employee's communications to a lawyer are privileged if the corporation bears the burden of showing: (1) that the communication was made for the purpose of securing legal advice by (2) an employee who was directed by a superior to make a communication (3) relating to his employment duties (4) so that the corporation could secure legal advice, (5) as long as the communication is not disseminated beyond those corporate persons who need to know its contents. This approach is similar to that advocated by Chief Justice Burger in his concurring opinion in *Upjohn Co. v. United States*.

United States v. Plache, 913 F.2d 1375 (9th Cir. 1990) : Affirming a conviction for securities fraud offenses, the Court held that the defendant could not assert the privilege for communications he had with attorneys who were representing not him but corporate entities in which he was interested, where the entities had been placed in receivership before the trial. Granting mandamus to vacate an order compelling production of statements obtained by the plaintiff's counsel in anticipation of a securities fraud action in *Admiral Ins. Co. v. United States Dist. Court*, n31 the Court held that the fact that one employee expressed an intent to invoke his self-incrimination privilege at a deposition did not abrogate the corporation's attorney-client privilege. The Court also held that the privilege was not lost even if the company planned to terminate an employee following his interview with counsel, and that communications between an employee of a subsidiary corporation and counsel for the parent corporation were privileged if the employee possessed information critical to the representation of the parent company and the communication concerned matters within the scope of employment.

[iii] Attorney-Client -- Corporate Privilege -- Intracorporate Dissemination of Privileged Information

FTC v. GlaxoSmithKline, 294 F.3d 141, 2002-2 Trade Cas. (CCH) P73728 (D.C. Cir. 2002) : The Court reversed an order requiring the company to produce documents in the course of an FTC investigation concerning whether the company properly listed patented drugs in a compilation maintained by the FDA. The FTC argued that the attorney-client privilege was waived because documents were distributed too widely within the company, but the Court found that they went only to specifically named employees and contractors, most of whom were attorneys or managers and all of whom "needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel." The Court also noted that the company was under no obligation to explain why each employee possessing a confidential document needed it to carry out his or her work, since a confidential document given to an employee with directions not to disseminate further can be presumed necessary for the employee's work.

[iv] Attorney-Client -- Corporate Privilege -- Shareholder Suits

In re Atlantic Fin. Mgt. Sec. Litig., 121 F.R.D. 141 (D. Mass. 1988) : The Court held that communications between former corporate officers and their counsel were privileged in a securities fraud action, since the conversations concerned corporate merger activity and sale of stock, and they occurred prior to the time stock was actually purchased and before a fiduciary relationship arose between the officers and shareholders.

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993) : In an action by purchasers of common stock against a corporation, its subsidiary, and the chief executive officer, the Trial Judge held that the *Garner* doctrine (*infra*) applied to actions by stock purchasers as well as to derivative suits and that good cause to abrogate the privilege was shown for eleven documents that he had reviewed *in camera*.

Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) : The Court held in a shareholders' derivative action that the plaintiffs could obtain access to confidential communications between management and corporate counsel upon a showing of good cause. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[5][l][ii]*. In *In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981)* , a securities fraud class action, the Trial Judge recognized a "good cause" exception to the privilege in actions brought by shareholders, but noted that no decision "subjects post-event communications to disclosure."

Fausek v. White, 965 F.2d 126 (6th Cir. 1992) : In an action by former shareholders alleging that the former majority shareholder, director, and CEO had abused his position, the corporation, which had not been sued, asserted the privilege when the plaintiffs attempted to depose the attorney who had advised the corporation and the defendant about his dealings in the corporation's stock. The Court affirmed denial of the privilege, holding that: the *Garner* doctrine (*supra*) applies to individual as well as derivative actions; the doctrine applies in actions to which the corporation is not a party when, as here, the defendant is the corporation's alter ego; and the corporation had a fiduciary duty to its shareholders under state law, which makes application of the privilege inappropriate when the plaintiffs have no other way to obtain the information.

Weil v. Investment/Indicators, Research & Mgt., Inc., 647 F.2d 18 (9th Cir. 1981) : The Court limited the *Garner* doctrine to the particular circumstances of derivative suits.

[g] Attorney-Client -- Death of Client

Swidler & Berlin v. United States, 524 U.S. 399 (1998) : The Court held that the privilege survives the death of the client. Consequently, counsel for a presidential aide was not required to disclose confidential communications that the aide made to him shortly before the aide committed suicide. The Court rejected the argument of the Independent Counsel that the traditional rule -- providing that the privilege survives the client -- should not be applied to thwart criminal investigations. It saw no reason to apply a different privilege rule for civil and criminal cases.

United States v. Osborn, 561 F.2d 1334 (9th Cir. 1977) :

> [T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged [not only] during the testator's lifetime [but] also after the testator's death, unless sought to be disclosed in litigation between the testator's heirs, legateees, devisees, or other parties, all of whom claim under the deceased client.

[h] Attorney-Client -- Evidence Delivered to Attorney

Fisher v. United States, 425 U.S. 391 (1976) : Upon learning that taxpayers had transferred to their lawyers documents from their accountants relating to the accountants' preparation of tax returns, the IRS served summonses on the attorneys directing them to produce the documents. In upholding the validity of the summonses, the Supreme Court established that preexisting documents that can be demanded from the client cannot be secreted by transfer to a lawyer.

United States v. Strahl, 590 F.2d 10 (1st Cir. 1978) : The Court held that the privilege did not bar an attorney's

testimony that a client passed him counterfeit bills, when there was no showing that the client sought legal advice with respect to the bills.

In re Grand Jury Subpoenas Dated Oct. 22, 1991 & Nov. 1, 1991, 959 F.2d 1158 (2d Cir. 1992) : The Court affirmed an order to counsel for a grand jury target that required production of telephone records of the target's wholly owned corporations. As documents created by and received from an unrelated third party, the records did not become privileged by being given to an attorney in the course of seeking legal advice.

United States v. Robinson, 121 F.3d 971 (5th Cir. 1997) : The defendant was convicted of perjury after he denied that he had received a notice of forfeiture in connection with drug-related offenses. He did not claim that the government notice which he delivered to his counsel at the time was privileged; but he did assert that the fact of his transfer of the document, as well as his statements contemporaneous with that transfer, came within the privilege. Affirming the conviction, the Court found that delivering the document was intended merely to facilitate the representation and was not intended as a statement of communication. The defendant's receipt of the notice (which had been mailed to him at the jail) was quite public, so his subsequent possession of it was not intrinsically confidential; and he delivered it to the attorney seeking a representation in which it would reasonably be expected to be disclosed to others, so the possession was not in confidence. As for the contemporaneous statements, they were only a request for legal representation, which is generally not within the privilege.

[i] Attorney-Client -- Exceptions

[i] Crime or Fraud

[A] Civil Cases

Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992) : Based on an *in camera* review and other evidence, the District Court had reversed a Magistrate Judge's order and held that the plaintiff in a cigarette wrongful death case would be entitled over a privilege claim to discovery of documents created by the special products division of the Council on Tobacco Research. The District Court held that there was *prima facie* evidence that the defendants were engaged in an ongoing fraud and that they had obtained attorney assistance to further that fraud. On petition for mandamus, the Court vacated the opinion because the District Court had improperly considered evidence that had not been presented to the Magistrate Judge, but noted that there had been no error in allocating the appropriate burdens and defining the quantum of proof necessary.

Horizon of Hope Ministry v. Clark County, 115 F.R.D. 1 (S.D. Ohio 1986) : The Court overruled motions for a protective order in a civil rights action, concluding that various materials were not privileged, because a *prima facie* showing had been made that they were prepared in order to perpetrate a tort.

Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991) : In an action by limited partners alleging securities fraud in connection with a real estate partnership, the District Court found that the plaintiffs' reasonable belief that the advice sought by the defendants referred to future wrongdoing was insufficient to invoke the crime-fraud exception. In *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, n32 the District Court held that a client's communications concerning use and concealment of information obtained by wiretapping a telephone came within the crime or fraud exception where the client knew or recklessly disregarded the illegality of tapping. It also held that communications with attorneys concerning the installation and recording were privileged since they were not made in furtherance of illegal acts. In *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co.*, n33 the District Court ruled that a *prima facie* case of fraud was made as to a patentee allegedly withholding information from the Patent Office in making a patent application and that, therefore, the exception applied.

In re BankAmerica Corp. Securities Litig., 270 F.3d 639 (8th Cir. 2001) : The Court granted a writ of mandamus to defendants in a securities fraud class action against a bank formed by a merger and individual officers of the merged and pre-merger banks. The Trial Judge had found that the crime-fraud exception applied to certain allegedly privileged communications, but the Court held that the plaintiffs had not made an adequate showing that the defendants had sought attorney help in furtherance of a fraud. Even if the defendants failed to disclose certain information about losses to shareholders, this did not establish that the defendants so informed their counsel and sought legal assistance to conceal information. In *Pritchard-Keang Nam Corp. v. Jaworski*, n34 the purchaser of subsidiaries, alleging that the insolvent parent corporation had committed fraud, sued the parent's counsel for negligently rendering an opinion letter without disclosing the companies' "sensitive payments" problems. The defendant resisted disclosing the report of an internal investigation into those problems that it had received from the parent's board some time before rendering the opinion letter. The Court held that the parent's failure to deliver the privileged report to the defendant counsel was not in furtherance of a fraud, and the privilege is not lost just because the client ultimately commits fraud with respect to matters in a privileged communication.

Motley v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995) : Affirming a judgment for the defendant in an employment discrimination case brought by a plaintiff who was laid off, the Court found no error in upholding a claim of privilege as to a memorandum prepared by the employer's counsel concerning termination decisions. The plaintiff argued that the memorandum furthered illegal racial discrimination by urging layoffs of white employees and retention of underperforming minority employees. The Court, while recognizing some contrary authority on the point, held that the crime-fraud exception does not extend to tortious conduct generally. In *White v. American Airlines, Inc., 915 F.2d 1414 (10th Cir. 1990)* , an action by an employee alleging that he was wrongfully discharged in retaliation for refusing to commit perjury at the request of the defendant's outside counsel, the Court held that the alleged communications with the counsel were not privileged because of the crime-fraud exception. The employee's testimony provided a sufficient *prima facie* showing to trigger the exception.

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) , *modified on other grounds*, *30 F.3d 1347 (11th Cir. 1994)* : In an action by union members against the union and an employer, the Court held that the exception did not apply because there was no evidence that the union's communications with attorneys furthered or were closely related to any crime or fraud, even though the plaintiffs had evidence that might have demonstrated that the union was engaged in criminal or fraudulent conduct.

In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed. Cir. 2000) : The Magistrate Judge in a patent infringement suit ordered the plaintiff, assignee of the patent, to produce the invention record submitted by the inventors named on the patent to the plaintiff's corporate legal department. Granting the plaintiff's petition for mandamus, the Court held that the record was privileged and the crime-fraud exception did not apply. "Inequitable conduct" in a patent application is not the equivalent of common-law fraud because it does not require proof of a clear intent to deceive the examiner, and although there may have been a misrepresentation made to the Patent and Trademark Office in this case, there was no showing that the invention record at issue was made in furtherance of fraud during the prosecution of the patent.

[B] Attorney-Client -- Exceptions -- Crime or Fraud -- Criminal Cases

In re Sealed Case, 107 F.3d 46 (D.C. Cir. 1997) : Reversing an order to compel production of documents subpoenaed by a grand jury investigating campaign contribution violations, the Court held that the mere fact that a corporation's vice president violated the laws subsequent to a meeting with the corporation's counsel did not provide a sufficient showing that the corporation intended to further and commit a crime. Moreover, there was no way of knowing whether the vice president was acting on his own, against the advice of counsel, when he committed his violation. Therefore, on the material available at the *in camera*, *ex parte* review, it was improper to apply the crime or fraud exception to the privilege.

United States v. Reeder, 170 F.3d 93 (1st Cir. 1999) : Affirming convictions for wire fraud and interstate

transportation of stolen property, the Court found no error when the defendant's former attorney was permitted to recount a conversation between the defendant and the attorney, in which the defendant proposed backdating documents and asked the attorney for "some ideas" on how to cover up a series of questionable loans. The Court held the testimony admissible under the crime-fraud exception and rejected the defendant's argument that he was simply seeking the attorney's advice about whether he could solve a problem in a particular manner. The defendant did not merely ask whether backdating documents would be legal; he affirmatively asked for the attorney's assistance in a cover-up. In *United States v. Rakes, 136 F.3d 1 (1st Cir. 1998)* , the victim of an extortion scheme lied under oath about why he sold his business; he testified that he did so voluntarily when in fact he was threatened with death unless he sold the business at below market value. In a perjury prosecution, the government sought to obtain privileged communications made by the victim to his attorney concerning the sale of the business and the reasons for the sale, on the theory that the communications were in furtherance of the extortion. The Trial Judge suppressed the communications, and the Court affirmed, declaring that under the crime-fraud exception, "it takes wrongful complicity by the privilege holder, not innocent or involuntary action, to forfeit the privilege."

In re Richard Roe, Inc., 168 F.3d 69 (2d Cir. 1999) : The Court reversed an order granted after remand n35 that required disclosure of documents from a major civil action to a grand jury investigating two corporations. The government's theory viewed the act of defending the lawsuit as itself being in furtherance of a fraud, but the Court believed that approach would collapse its two-part test for the crime-fraud exception, which requires both that the communication *itself* be in furtherance of the crime or fraud and that the communication was intended to facilitate or conceal the criminal activity. Absent a showing that the litigation had little or no factual or legal basis and was carried on substantially for the purpose of furthering the crime or fraud, the requisite finding that an otherwise privileged communication was intended to further the fraud cannot be made. In this case the defense hardly lacked any legal or factual basis, *in camera* examination of the subpoenaed material revealed only the kind of documents typically generated in the course of a legitimate defense of the particular kind of litigation, and there was no indication of an intent to create or present misleading or false evidence. In *United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997)* , the Court held there was no abuse of discretion in admitting letters to the defendant, who was charged with fraud, from his attorney, where there was evidence that the defendant knew the scheme was illegal and had set upon an illegal course before seeking the lawyer's advice, and where evidence showed that the defendant intended to use the lawyer's communications to further the scheme and did so. In *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983 (Marc Rich & Co.)*, n36 the Court found a *prima facie* case that communications by a client to an attorney were in aid of a fraudulent sale of stock, but it rejected government claims that other communications were made for an improper purpose.

United States v. Inigo, 925 F.2d 641 (3d Cir. 1991) : The Court, reviewing Hobbs Act convictions, held there was no error in admitting testimony by a defendant's lawyers, as it all dealt with an extortion scheme that was ongoing at the time of the communications. In *In re Impounded Case (Law Firm)*, n37 the Court held that the crime or fraud exception applies even where the client is innocent and the only criminal acts suspected are those of a lawyer.

United States v. Ruhbayan, 406 F.3d 292 (4th Cir. 2005) : The defendant was charged with obstruction of justice after he induced his girlfriend to testify falsely in his drug trial that she, and not he, possessed a pistol found in his van. Affirming, the Court held there was no error in admitting evidence that before his drug trial the defendant had asked his attorney about the possible sentences for possession of a firearm as a convicted felon and had told the attorney that the girlfriend claimed responsibility for the pistol. The communications were not privileged because they were made for the purpose of committing a crime or fraud upon the tribunal in the drug case. Affirming rulings upholding grand jury subpoenas to a bank being investigated for fraud in *In re Grand Jury Proceedings, 102 F.3d 748 (4th Cir. 1996)* , the Court held that the exception applies when the client communicates for purpose of committing or furthering a crime or fraud, regardless of the attorney's knowledge, and that the government made a *prima facie* case that the bank had acted with such a purpose.

In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005) : The appellant's girlfriend expressed surprise when a pistol

was seized in the house they shared, but shortly before his trial for felon firearm possession, she filed an affidavit claiming ownership of the weapon. As part of an investigation into whether the appellant and his girlfriend had conspired to obstruct justice or commit perjury, the appellant's attorney was subpoenaed to provide all written statements of the appellant and girlfriend and "all notes, records, and recordings of interviews" of them. Meanwhile, the girlfriend waived her rights and admitted that her pretrial affidavit was false, that she and the appellant had agreed she would change her original story, and that she had asked the attorney about the respective penalties for committing perjury and felon firearm possession. Based on the government's *ex parte* representations, the Judge conducted an *in camera* examination of the attorney and then denied the appellant's motion to quash the subpoena. The Court held that the government had made the required factual-basis showing to hold an *in camera* examination and the required *prima facie* showing to support application of the crime-fraud exception. However, it vacated the order to compel as being overbroad in applying to all communications with the appellant. The crime-fraud exception is limited to "those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct"; here, the record did not indicate that the attorney's entire criminal representation of the appellant was based upon or sought for the sole purpose of perpetuating a crime or fraud. In *United States v. Edwards, 303 F.3d 606 (5th Cir. 2002)* , the Court affirmed convictions for racketeering and other offenses arising from schemes to make money from Louisiana's riverboat gambling licence process by using the governor's influence. Rejecting one defendant's argument that it was error to admit wiretapped conversations because of the attorney-client privilege, the Court found no clear error in the determination that the legal services sought by the defendant were "to conceal and cover up the crimes committed" with respect to extortion monies paid. Thus, "[r]ather than merely defending himself against wrongdoing, Brown was actively continuing the cover-up of extortion and perpetuating his tax fraud." In *United States v. Neal*, n38 the Court held there was no error in admitting evidence in a drug conspiracy prosecution that an attorney consulted by members of the conspiracy had informed them that their documents indicated an illegal money-laundering operation in which he would not become involved. Sufficient evidence supported the conclusion that the attorney had been consulted for advice to aid continuing or future illegal conduct. In *United States v. Aucoin*, n39 the Court held that the privilege had properly been denied to intercepted communications between the defendant bookmaker and his counsel, where the counsel, knowing of his client's participation in illegal activity and desiring to continue those activities, orchestrated a plan to recover seized gambling records and otherwise assisted the enterprise in its efforts to insulate itself from further raids by local authorities. In *United States v. Soudan*, n40 the Court noted that the "crime exception" applies whether or not the attorney knew that the client was seeking his services in aid of criminal acts. In *United States v. Dyer*, n41 the Court observed that an indictment charging fraud does not itself warrant disregard of the privilege.

United States v. Collis, 128 F.3d 313 (6th Cir. 1997) : The defendant was charged with obstruction of justice for submitting a forged letter from his employer to a Judge who was considering whether to revoke the defendant's parole. At trial the defendant's counsel at the parole revocation hearing testified that he received the letter from the defendant, who had stated that it was signed by his employer, and that counsel then submitted the letter to the Judge. The Court found that because the letter was undisputedly forged and there was probable cause to believe that the defendant was responsible for the fraudulent letter, the communications were in furtherance of the crime of obstruction of justice, and thus properly admitted. Even though there was no certainty, at the time the letter was submitted, that it would have any effect on the Judge's decision on whether to revoke parole, "the crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client's communication."

United States v. Hamilton, 128 F.3d 996 (6th Cir. 1997) : The defendant was convicted of tax evasion after the Judge excluded proffered receipts in reliance on a sealed pleading by a former defense counsel, which stated that she had reason to believe the defendant intended to commit perjury when testifying at trial. The Court held that the sealed pleading was not a breach of the privilege, because the counsel had an ethical obligation to disclose facts material to preventing a fraud being perpetrated upon the Trial Court.

United States v. Davis, 1 F.3d 606 (7th Cir. 1993) : The Court affirmed denial of the defendant's motion *in limine* to preclude questioning of his attorney, who had represented him during a portion of the grand jury investigation that he was charged with obstructing. Because there was a *prima facie* case that the defendant had tricked the attorney into

providing false information to the grand jury, the crime or fraud exception applied, and their conversations were not protected by the privilege.

United States v. Townsley, 843 F.2d 1070 (8th Cir. 1988) , *modified on other grounds*, *856 F.2d 1189 (8th Cir. 1988)* (en banc): In a voting fraud case, the Court held that conversations between an attorney and various witnesses were not privileged, since the attorney "was interested in presenting a uniform, knowingly untruthful, story from the witnesses and actually coached them to that end." It also stated that "[a] conversation will not be cloaked with privilege when it is for the purpose of committing a crime." See also *United States v. Horvath, 731 F.2d 557 (8th Cir. 1984)* (testimony by an attorney did not violate the privilege, where the defendant-clients attempted to use the attorney to further ongoing criminal activity).

United States v. Martin, 278 F.3d 988 (9th Cir. 2002) : The defendant operated a fraudulent scheme in which he created an ostensible subsidiary office of a legitimate Hong Kong corporation. Without disclosing the scheme, he hired a lawyer to become counsel for the subsidiary. The lawyer also did a few small legal jobs for the defendant personally. When the lawyer began to suspect that the subsidiary was fraudulent, he disclosed his suspicions to the U.S. Attorney's office, which led to an investigation and the defendant's arrest, indictment, and conviction. Affirming, the Court held that the attorney's disclosures to the authorities were not privileged, so there was no error in refusing to suppress them. Even if there were an attorney-client communication, the privilege would not apply because the communications disclosed were all made for the purposes of furthering a crime or fraud, although the lawyer did not know that at the time. Reviewing a corporation's motion to quash a grand jury subpoena in *United States v. Chen, 99 F.3d 1495 (9th Cir. 1996)* , the Court held that there was sufficient evidence that privileged communications were in furtherance of crime or fraud to justify an *in camera* review. It reasoned that "[t]he privilege is the client's, so 'it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity for the exception to apply. It is therefore irrelevant ... that [the lawyers] may have been in the dark.' " (The quotation is from *In re Grand Jury Proceedings*, n42 where the Court upheld a determination that communications were within the crime-fraud exception to the privilege, even though the attorney was unaware of the client's crimes and took no affirmative step that actually furthered them.) In *United States v. Zolin*, n43 the Court held on remand (after its prior decision was vacated by the Supreme Court, *see* the Editorial Explanatory Comment, *§ 501.02[5][l][iii]*) that partial transcripts of the communications at issue indicated that the purpose of the discussions was to cover up past wrongdoing and to plan for future frauds against the IRS, so the exception to the privilege applied.

In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998) : A hospital, its president, and others were targets of a grand jury investigation. When attorneys who had provided legal services to the hospital during the relevant period were called to testify, the president intervened to quash the subpoenas, and after that motion was denied, the attorneys asserted the privilege in response to virtually every question during their appearance. The Court held that the president could claim a personal privilege, but upheld a finding that the attorneys' legal services had been used in furtherance of the crimes under investigation, so the privilege was vitiated. In a prosecution for obstruction of justice and conspiracy, *United States v. Sutton*, n44 the Court held that the defendant's statement to his attorney that he could destroy certain records so the government would not get them was in furtherance of an illegal act and not privileged.

In re Federal Grand Jury Proceedings 89-10 (MIA), 938 F.2d 1578 (11th Cir. 1991) : The Court reversed a document production order in connection with the grand jury investigation of a failed savings and loan association, holding that confidential memoranda between a client and his attorney were privileged even to the extent that they merely memorialized information that might be discoverable by other means under the crime-fraud exception. In *In re Grand Jury Investigation*, n45 the Court held that the crime-fraud exception applies when there is evidence that, if believed, would establish the elements of a criminal or fraudulent violation that is ongoing or about to be committed, and the communication is related to the violation. Here, an attorney was required to answer questions as to sources of income disclosed by a client during the time that the client was seeking legal advice related to his tax evasion.

[C] Attorney-Client -- Exceptions -- Crime or Fraud -- Procedures

United States v. Zolin, 491 U.S. 554 (1989) : The Supreme Court held that *Rule 104(a)* does not prohibit use of *in camera* review procedures in ruling on privilege claims and set forth the showing required to warrant *in camera* review in the context of a claim that the crime or fraud exception to the privilege warrants disclosure. See the Editorial Explanatory Comment, *§ 501.02[15]*.

In re Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005) : In the course of a grand jury investigation, Lawyer I directed Client A to commit perjury before the grand jury after initially advising him to tell the truth. Lawyer I also represented Client B who might have had some connection with the perjury. Lawyer I consulted with Lawyer II and told Client A to recant the false testimony. Lawyer II represented other clients (Group C) connected with Client B and the pertinent events; Lawyer II had a joint-defense arrangement with Lawyer I, which allowed them to exchange confidences that their clients may have confided to them separately. The grand jury summoned Lawyer I and asked him about the prior perjury of Client A, but Lawyer I invoked Client B's attorney-client privilege and the joint-defense privilege shared with Group C. The District Court ordered Lawyer I to answer specific questions before the grand jury and forbade Lawyer I to disclose to anyone what he had been asked by the grand jury or other information relating to "the subject matter" of the grand jury investigation. The Court affirmed the grant of the motion to compel as to Client B's privilege, vacated (without prejudice to the government) as to the Group C clients' privilege, and modified the order limiting disclosure. The government argued that the crime-fraud exception defeated the privilege claims of both Client B and the Group C clients, so a central issue was what showing was required to pierce the privilege. The Court noted that while *United States v. Zolin* (see § 501.02[5][l][iii]) indicated the prescribed showing to obtain an *in camera* review of allegedly privileged communications, it did not prescribe the level of proof needed to pierce the privilege itself. The Court concluded that "it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud." The Court emphasized that it is the client's engagement in crime or fraud and the client's intent that governs, and that "[f]orfeiture of the privilege requires the client's *use or aim to use* the lawyer to foster the crime or the fraud." The Court was satisfied that the reasonable cause standard was satisfied as to Client B, but noted that the compelled testimony of Lawyer I or other evidence could vindicate Client B in which case "there may well be room for protective remedies if the privilege is initially pierced but this turns out to have been in error." The Court found, however, that there was scant evidence that Group C clients retained Lawyer II in furtherance of a crime or fraud. It indicated that the government could ask the District Court to make an *in camera* inquiry as to Group C clients.

In re John Doe, Inc., 13 F.3d 633 (2d Cir. 1994) : The Court affirmed an order compelling a grand jury's targets' former attorney to testify before it, holding the targets were not denied due process when they were excluded from *in camera* proceedings at which the Judge reviewed a sealed affidavit from an FBI agent setting out the factual basis for the government's invocation of the crime-fraud exception. Disclosure of the affidavit might have jeopardized the investigation, nothing in it indicated a special need for adversary examination, and there was no danger the Trial Court relied on privileged material in making its determination. The Court also held there was no due process violation when the targets were excluded from the *in camera* examination of the attorney regarding applicability of the exception and were prohibited from questioning him afterwards.

In re Grand Jury Subpoena, 223 F.3d 213 (3d Cir. 2000) : The Court affirmed denial of a motion to quash a subpoena compelling testimony and production of documents by the target of a grand jury investigation and his attorney, holding that it was within the District Court's discretion, and not violative of due process, to rely on an *ex parte* government affidavit in determining that the crime-fraud exception applies and to deny the witnesses access to the affidavit. In *Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992)* , the District Court, based on an *in camera* review and other evidence, had reversed a Magistrate Judge's order and held that the plaintiff in a cigarette wrongful death case would be entitled over a privilege claim to discovery of documents created by the special products division of the Council on Tobacco Research. The District Court found that there was *prima facie* evidence that the defendants were engaged in an ongoing fraud and they had obtained attorney assistance to further that fraud. On petition for mandamus, the Court

vacated the opinion because the District Court had improperly considered evidence that had not been presented to the Magistrate Judge, but noted that there had been no error in allocating the appropriate burdens and defining the quantum of proof necessary. A party challenging the privilege must present evidence that, if believed by the factfinder, would be sufficient to support a finding that the exception applies, at which point the party invoking the privilege has a right to be heard. When an *in camera* inspection is requested, however, only the presentation made by the party challenging the privilege need be considered and only a factual basis sufficient to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud is required.

In re Grand Jury Proceedings #5, 401 F.3d 247 (4th Cir. 2005) : In a proceeding in which an attorney sought to quash a grand jury subpoena for documents and testimony relating to his representation of two individuals and their corporation, the individuals intervened and sought to quash the subpoena, asserting the attorney-client privilege. The Trial Judge conducted an *in camera*, *ex parte* hearing in which the government presented evidence. Without examining the documents that were the subject of the privilege claim, the Judge found that the government made out a *prima facie* case that the crime-fraud exception applied and ordered disclosure. Reversing, the Court held that the government had made out a *prima facie* case for an *in camera* examination of the documents, but it was an abuse of discretion to hold the documents not privileged without an *in camera* examination, since there was no other evidence that the documents were connected to crime or fraud. Likewise, it was an abuse of discretion to order the attorney to testify regarding communications, because there was an insufficient showing that the communications bore a close relationship to criminal conduct. The Court remanded for an *in camera* examination of the allegedly privileged documents. In *In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994)* , the government made an *in camera* submission to the Trial Court to demonstrate a factual basis that allegedly privileged documents were subject to the crime-fraud exception. However, the government did not offer the privileged documents themselves. The Court held that under these circumstances, the "good-faith belief" requirement for an *in camera* hearing, established in *United States v. Zolin, supra* , was inapplicable. The Court asserted that "*Zolin* does not proscribe all *in camera* reviews of *in camera* submissions absent the requisite threshold [good faith] showing. Rather, *Zolin* proscribes *in camera* review of the documents that are the subject of the subpoena and the asserted privilege in the absence of the requisite threshold showing."

In re BankAmerica Corp. Securities Litig., 270 F.3d 639 (8th Cir. 2001) : The Court granted a writ of mandamus to defendants in a securities fraud class action against a bank formed by a merger and against individual officers of the merged and pre-merger banks. The Trial Judge had found that the crime-fraud exception applied to certain allegedly privileged communications, but the Court held that the plaintiffs had not made an adequate showing that the defendants had sought attorney help in furtherance of a fraud. The Court also held it was an abuse of discretion to order the disclosure of the documents without conducting an *in camera* review. In a wrongful death action, *In re General Motors Corp., 153 F.3d 714 (8th Cir. 1998)* , the plaintiffs sought disclosure of certain documents that had been identified by GM in a privilege log in an unrelated lawsuit in another jurisdiction. The District Judge found a reasonable basis to believe that the crime-fraud exception applied, reviewed eight documents *in camera*, and then ordered GM to produce six of the eight for an additional "*in camera* hearing" at which the plaintiffs would participate. Granting GM's motion for mandamus, the Court held that it was error to order disclosure of the documents, even under a protective order, before it was established that the exception applied.

United States v. Chen, 99 F.3d 1495 (9th Cir. 1996) : Reviewing a corporation's motion to quash a grand jury subpoena, the Court held that an ex-employee could not waive the privilege, which belonged to the corporation with respect to communications made by employees to corporate counsel at the direction of corporate superiors. Since the ex-employee had no authority to reveal communications made to corporate counsel, it was error to disclose these communications to the District Court before it made a *Zolin* finding and ordered disclosure for an *in camera* review. The error was harmless, however, since there was sufficient evidence aside from the privileged communications to make the required threshold showing and to justify *in camera* review. In *In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826 (9th Cir. 1994)* , the Court affirmed the denial of a motion to quash a grand jury subpoena served on corporate counsel to the target of a grand jury investigation; it also affirmed an order to submit the subpoenaed documents for *in*

camera review to establish whether they fell within the crime-fraud exception. The Court held that in the first step of the *Zolin* analysis -- determining whether there is an adequate factual basis to support a good faith reasonable belief that an *in camera* review would reveal evidence to establish that the exception applies -- the District Court should focus only on evidence presented by the party seeking review. The Judge may, but is not required to, consider evidence presented by the party asserting the privilege only at the second stage, when it determines whether to order the review in light of the facts and circumstances of the particular case. In a money laundering prosecution, *United States v. de la Jara*, n46 the Court held it was error to make a *sua sponte* ruling admitting a letter to the defendant from his attorney under the crime-fraud exception based on an *in camera* review of the letter, where there had been no *prima facie* showing by nonprivileged evidence sufficient to support the need for an *in camera* review. The error had been waived, however, because the defendant made no effort to recover the letter or protect its confidentiality during the six months between the government's seizure of it and its introduction into evidence. In *In re Grand Jury Investigation*, n47 which involved an investigation into possible Medicaid fraud, the Court held that a corporation met its burden of making a *prima facie* showing that 11 documents were within the privilege, but it was error to refuse an *in camera* review to determine whether the documents were privileged or the crime-fraud exception applied. The Judge had declined to engage in "speculation"; the proper threshold allows some speculation, as it requires only a showing that *in camera* review *may* reveal evidence to establish that the exception applied or the privilege was inapplicable. There was no abuse of discretion, however, as the government's showing was not so strong as to require review.

In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998) : A hospital, its president, and others were targets of a grand jury investigation. When attorneys who had provided legal services to the hospital during the relevant period were called to testify, the president intervened to quash the subpoenas, and after that motion was denied, the attorneys asserted the privilege in response to virtually every question during their appearance. The Court held that the president could claim a personal privilege, but upheld a finding that the attorneys' legal services had been used in furtherance of the crimes under investigation. The Court found no abuse of discretion when the president was not permitted to review the contents of the government's *ex parte*, *in camera* submission or to present rebuttal evidence at a hearing.

[ii] Attorney-Client -- Exceptions -- Defense of Lawyer

First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) : In a securities action against a securities dealer, its partners, and house counsel, the Court said that an attorney's compelling interest in defending himself may provide "good reason for recognizing a self-defense exception to the privilege in appropriate circumstances." Although the exception could be abused, the Court determined that a standard of "reasonable necessity" for disclosure, when combined with *in camera* review, could assure that the client's interests in confidentiality are not unnecessarily trampled. It held that fairness to the client required disclosure of all documents relating to communications revealed by the lawyer under the exception. In *In re Friend*, n48 the District Court held that an attorney could turn client documents over to a grand jury apparently investigating both the client and the lawyer, in order to defend himself against a potential accusation of wrongdoing.

Willy v. Administrative Review Board, 423 F.3d 483 (5th Cir. 2005) : An attorney claimed that he had been discharged from employment because of his report following an internal environmental audit, not really because of lying about contacts with a state agency, as the employer claimed. In a Department of Labor proceeding for violation of federal whistleblower statutes, the attorney sought the report in discovery, but the employer's claim of attorney-client privilege was ultimately upheld by the Administrative Review Board. Vacating that ruling, the Court held that the client's privilege in this case was subject to the exception for communications relevant to an issue of breach of duty between client and attorney, and that this exception could be asserted both defensively (when the lawyer is charged with breaching a duty) and offensively, as here (when the lawyer is claiming the client breached a duty to him). In *United States v. Ballard*, n49 the Court affirmed a conviction for making false statements in a bankruptcy application, noting that the defendant had not waived the privilege by suing the lawyer for malpractice, except to the extent necessary to permit the lawyer to defend against the claim.

In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig., 120 F.R.D. 687 (C.D. Cal. 1988) : In a suit by third parties against a law firm and its client based upon allegations of fraud in the sale of mortgage-backed certificates, the Judge held that federal common law recognizes a self-defense exception entitling attorneys to disclose otherwise privileged communications when reasonably necessary to vindicate their innocence of alleged wrongdoing.

[iii] Attorney-Client -- Exceptions -- Will Contests

United States v. Osborn, 561 F.2d 1334 (9th Cir. 1977) :

> [T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged [not only] during the testator's lifetime [but] also after the testator's death, unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client.

[j] Attorney-Client -- Fact of Consultations

United States v. Olano, 62 F.3d 1180 (9th Cir. 1995) : Affirming a bank fraud conviction, the Court found no error in the admission of the testimony by a lawyer in the defendant's office that he opened a bank account for the defendant and reviewed and completed certain documents relating to the sale of condominiums. This testimony disclosed no privileged communications, since it provided "only general descriptions of the work" that the lawyer performed and did not disclose the defendant's "motives, strategies or goals." In *United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994)* , on cross-examination of the defendant, who was charged with cocaine distribution, the prosecutor asked whether he had discussed his testimony with his attorney prior to taking the stand and, after the defendant admitted he had, asked about an event the defendant had discussed during direct examination that was interrupted by a court recess. The prosecutor used this line of questioning to expose a subtle difference in the direct testimony before and after the recess and thus to create an inference that the defendant's attorney had coached him during the recess. The Court held that there was no violation of the defendant's privilege, as the prosecutor's questions did not reach the substance of the legal advice given and coaching is a proper subject of impeachment. We are concerned about this sort of cross-examination, since the witness' denial of having a conversation could only be corroborated by having the attorney testify and the implication of coaching from an admission could only be rebutted by revealing privileged communications.

[k] Attorney-Client -- Fees, Client Identity and Address, etc.

[i] Attorney-Client -- Fees, Client Identity and Address, etc. -- Attorney Billing Issues

Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238 (4th Cir. 1999) : In a breach of contract action, the plaintiff sought to recover as damages attorneys' fees in an agency proceeding, but claimed privilege when the lawyer was asked about the factual investigation and legal research that had been done. Finding the plaintiff thereby prevented any inquiry into the reasonableness of the lawyer's bills, the Trial Judge excluded the fee expenditure from any recoverable damages. Affirming, the Court noted that the privilege protects only confidential communications, not every aspect of the lawyer-client relationship, and held that the plaintiff's blanket assertion of privilege did not satisfy its burden of establishing that the information sought was protected, so there was no error in striking the request to recover attorneys' fees. In *Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999)* , the plaintiffs brought an action under the Fair Debt Collection Practices Act, alleging that they were overbilled for work performed by a law firm representing a bank during negotiations after the plaintiffs' default on a loan. They sought unredacted copies of the firm's billing records. Because the bills revealed the identity of federal statutes researched by the firm in planning for future litigation arising out of the default, the Court found they would have divulged confidential information regarding legal advice, so the Trial Judge did not err in holding them privileged.

Clarke v. American Commerce Nat'l Bank, 974 F.2d 127 (9th Cir. 1992) : The Court affirmed an order enforcing an administrative subpoena for billing statements from outside counsel, holding that statements containing only the identity of the client, the case name, the amount of the fee, and the general nature of the services performed were not privileged. In a proceeding to recover funds illegally obtained from a bankrupt savings and loan, *Federal Sav. & Loan Ins. Corp. v. Ferm*, n50 a preliminary injunction freezing the defendant's assets was modified to permit withdrawal of reasonable fees, and FSLIC, alleging that unreasonable fees were being charged, then obtained an accounting order against the defendant's law firm. The Court affirmed the order, holding there was no violation of the privilege, as fees are not generally privileged and the order amply protected confidential communications by an *in camera* review of the invoices.

O'Neal v. United States, 258 F.3d 1265 (11th Cir. 2001) : In an action by a decedent's estate to obtain a refund of federal estate taxes and interest, the Court held that the estate was not entitled to deductions for attorney's fees paid before and after the decedent's death. The Trial Judge found that a proper accounting was lacking, after the estate declined on privilege grounds to produce copies of legal fee invoices. Affirming, the Court noted that "it is the law of this circuit that information involving receipt of attorney's fees from a client is generally not privileged," and reasoned "that the estate may not assert entitlement to a monetary benefit on the one hand, and then hide behind a claim of privilege on the other."

[ii] Attorney-Client -- Fees, Client Identity and Address, etc. -- Benefactor Payments

In re Grand Jury Subpoena for Attorney Representing Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990) : The Court reversed a decision that had quashed a grand jury subpoena seeking disclosure of the amount of a fee and the identity of the person who agreed to pay it to an attorney representing a drug defendant. Noting that fee and client identity matters generally are not privileged, the Court concluded that the exceptions to that principle were not applicable in the case because the attorney described only the known defendant as his client and presented no evidence of confidential communications with any third-party fee payer nor evidence that any such communications were for the purpose of obtaining legal advice for the third party. The Court also held that, when properly read, its prior decision in *In re Grand Jury Proceedings (United States v. Jones)* n51 created no "last link doctrine" independent of confidential communications. On remand, the attorney appeared before the grand jury and revealed the identity and fee arrangements made for the drug defendant by a nonclient third party, but refused to reveal the identity or fee arrangements of a client. The Trial Judge then gave the attorney an *in camera*, *ex parte* hearing, concluded that documents submitted under seal revealed a relationship prior to the representation of the drug defendant, and denied a government motion to hold the attorney in contempt. The Court affirmed, *926 F.2d 1423 (5th Cir. 1991)* , agreeing that revelation of the client's identity and fee arrangements would breach confidential communications inextricably intertwined with the client's confidential purpose for retaining the attorney.

In re Subpoenaed Grand Jury Witness, 171 F.3d 511 (7th Cir. 1999) : The Court relied on its decision in *In re Grand Jury Proceeding (Cherney)* (*infra*) to hold that a benefactor payment was protected by the privilege. The lawyer's client paid the legal bills for other clients, and the government demanded that the lawyer disclose the identity of the bill-paying client. The Court was convinced that disclosure would lead to revealing the client's "motive to pay the legal bills" for some of the lawyer's other clients. In *In re Grand Jury Proceeding, Cherney*, n52 the Court affirmed the quashing of a subpoena that ordered an attorney to disclose the identity of the person who paid the legal fees for a person he represented in a drug conspiracy case. *In camera* review of pertinent documents revealed that the fee payer sought legal advice concerning his involvement in the conspiracy and that he paid the legal fees for representation in the very same matter that gave rise to his client relationship with the attorney; thus, disclosure of his identity would necessarily reveal his motive for seeking legal advice and would in effect expose the substance of a confidential communication.

In re Grand Jury Subpoenas, 906 F.2d 1485 (10th Cir. 1990) : The Court affirmed orders holding attorneys in contempt for refusing to provide client identity and fee information to a grand jury investigating whether a third party

may have paid the legal fees for their clients. The legal advice, last link, and confidential communication exceptions to the general rule holding client identity and fee information not privileged were inapplicable because the attorneys had not claimed that their fees were paid by a client or that legal advice about the matter under investigation had been sought by the source of the fees.

In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983) : The Court found that the identities of persons who paid lawyers' fees for others were not covered by the privilege. Even if the fee payers sought advice from the lawyers and became clients, they were not clients in the matters for which the fees were paid.

[iii] Attorney-Client -- Fees, Client Identity and Address, etc. -- Currency Transaction Reporting

Lefcourt v. United States, 125 F.3d 79 (2d Cir. 1997) : A law firm, reporting the receipt of a cash payment in excess of $10,000, refused to disclose the name of the client from whom it received the cash. The firm argued that it could not be penalized because it had reasonable grounds to believe that the identity of the client was protected by the privilege. Upholding the penalty assessment, the Court reiterated its position that the identity of the client is generally unprotected by the privilege. The mere fact that the client could be incriminated by the disclosure of his name is not enough to trigger the privilege, and there was no "special circumstance" that could apply in this case to protect the identity of the client. In *United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991)* , the Court upheld IRS summonses requiring attorneys to report names of clients who paid them cash fees over $10,000, finding that the reports did not require disclosure of confidential information.

United States v. Sindel, 53 F.3d 874 (8th Cir. 1995) : In an action to enforce an IRS summons requesting an attorney to provide identifying information regarding sources of cash payments over $10,000, the Court found after examining the attorney's *in camera* testimony about his clients' special circumstances that the attorney could not release information on behalf of one client without revealing the substance of a confidential communication, but found no similar constraints upon disclosure of information about payments from another client.

United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995) : The Court upheld an order enforcing an IRS summons that required an attorney to identify a client paying more than $10,000 in cash and the nature of the services rendered in exchange for the cash. The Court found no evidence that any of the lawyer's clients were currently the subject of an ongoing investigation, so its "last link" exception did not apply; nor would the disclosure of client identity be tantamount to disclosing any client's motivation for retaining a lawyer, or any other confidential communication.

United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) : An attorney resisted IRS summonses for information necessary to complete currency transaction returns on the ground that compliance would violate the privilege. The Court ordered enforcement of the summons *in toto*, holding that client identity and fee information are generally outside the scope of the privilege, and that the "last link" doctrine did not apply when the authorities were aware of the clients' identities, having already secured indictments against them for drug offenses.

[iv] Attorney-Client -- Fees, Client Identity and Address, etc. -- Incriminating Client

In re Grand Jury Proceedings (Doe), 602 F. Supp. 603 (D.R.I. 1985) : The Court compelled a lawyer to answer questions about the identity of a client and the source of fees, although it recognized that in some circumstances information about fees might be privileged if it would incriminate a client on the same charges for which the client sought legal assistance.

Vingelli v. United States, 992 F.2d 449 (2d Cir. 1993) : Where a grand jury inquired about the identity of the source of funds that one attorney transmitted to another who represented a third party, the Court affirmed a contempt finding against the first attorney. Neither exception to the rule holding client identity or fee information outside the privilege applied: disclosure of the client's name in this case would not be tantamount to disclosure of a confidential

communication, nor would it result in disclosure of the source of a confidential communication that had already been revealed. Although the source of the funds might be concerned that disclosure would lead to guilt by association, revelation of the source's identity would not be tantamount to exposing the purposes for which legal advice had been sought.

In re Grand Jury Investigation, 723 F.2d 447 (6th Cir. 1983) : Affirming a contempt citation against a lawyer who failed to disclose to a grand jury the identity of a client who had given him a check for services rendered, the Court rejected the argument that identity need not be disclosed where it would be the last link in a chain of evidence to incriminate the client. Because the privilege exists to protect confidential communications, it may not be claimed unless disclosure of information would threaten to reveal such communications.

In re Witnesses Before Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) : The Court held that the privilege attaches only to records that might tend to reveal confidential communications. Although "billing sheets or time tickets which indicate the nature of documents prepared, issues researched or matters discussed could reveal the substance of confidential discussions between attorney and client," and thus could be privileged, the Court declined to accept the argument that fee information that would not reveal communications or discussions is subject to a claim of privilege simply because it might incriminate clients.

In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039 (11th Cir. 1990) : The Court noted that the "last link" doctrine extends the privilege's protection to nonprivileged information (i.e., client identity) when disclosure would necessarily disclose other, privileged communications (e.g., motive or strategy), and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.

[v] Attorney-Client -- Fees, Client Identity and Address, etc. -- Miscellaneous Cases

United States v. Legal Services for New York City, 249 F.3d 1077 (D.C. Cir. 2001) : The Court upheld summary enforcement of a subpoena requiring a Legal Service Corporation grantee to provide case service information to the LSC Inspector General. The grantee did not show that the subpoena called for the disclosure of a privileged communication, and merely requiring disclosure of the identity of clients and the subject matter of the representations does not violate the privilege.

DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005) : The Court affirmed judgments in a libel action, holding there was no error in permitting use of an unredacted time record of the plaintiff's attorney to prove that a meeting between the parties had taken place. Under the applicable New York law, attorney time records and billing statements that do not contain detailed accounts of the legal services rendered are not privileged. In *In re Shargel*, n53 the Court affirmed an order enforcing a subpoena requiring a lawyer to produce records of all fee arrangements and property transfers from, to, or on behalf of named individuals. It stated that fee information and client identity are generally outside of the scope of the privilege.

Gannet v. First Nat'l State Bank, 410 F. Supp. 585 (D.N.J. 1976) , rev'd on other grounds, 540 F.2d 619 (3d Cir. 1976) : Where an attorney sent the IRS a letter in which he enclosed a cashier's check for more than $142,000, the Court held that the privilege did not embrace the client's identity, and that the IRS summons to produce bank records did not invade the relationship, because it was directed at a third party.

In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000) : A grand jury investigating allegations that a property was being used as an open air drug market issued a subpoena to the lawyer who had responded to requests for information addressed to the property's title holder of record. The subpoena sought testimony regarding, *inter alia,* the identity of the attorney's client. The Court upheld denial of the attorney's and client's motions to quash, finding that the client's purpose for the representation (which the client had authorized to be disclosed in the attorney's response) -- to retitle the property

in his name and deal with the problems on the property -- contemplated a disclosure of his identity. That was inconsistent with his argument that disclosure would reveal a confidential communication, his motive or purpose for seeking legal advice, so no exception applied to the general rule that client identity is not protected by the privilege.

In re Grand Jury Proceedings (Doe), 575 F. Supp. 197 (N.D. Ohio 1983) , aff'd, 754 F.2d 154 (6th Cir. 1985) : The Court held that a retainer agreement was not privileged and must be disclosed to determine whether the attorney was retained to perform ministerial or clerical, as opposed to legal, services.

In re Walsh, 623 F.2d 489 (7th Cir. 1980) : The Court ruled that an attorney called to testify before a grand jury about his clients must appear, and could not refuse on privilege grounds to answer questions about: the number of years of legal service to the clients, the general nature of the legal services, the fact of communication (not the contents), the whereabouts of the client, meetings where third persons were present, information received from third parties, and matters regarding legal fees.

In re Grand Jury Proceedings, 791 F.2d 663 (8th Cir. 1986) : The Court held that an attorney could be compelled to testify to the authenticity of a client's signatures and photograph on documents bearing the signature of the attorney attesting that she prepared them. These matters were observable to the public and the attestations negated any assumption that the matters were intended to be concealed from third parties.

In re Subpoena to Testify Before Grand Jury, 39 F.3d 973 (9th Cir. 1994) : Upholding denial of an attorney's motion to quash a grand jury subpoena that demanded disclosure of the identity of a client who paid the attorney with counterfeit money, the Court noted that the communication of the client's name and counterfeit payment "were entirely distinct" from the traffic and assault matters on which the attorney represented the client. Accordingly, disclosure of the identity and payment of the client would not be "in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney."

In re Grand Jury Matter No. 91-01386, 969 F.2d 995 (11th Cir. 1992) : The Court held that an attorney was required to disclose the identity of two of his clients, one of whom may have paid him with counterfeit money. Disclosure of client identity, which is usually nonprivileged information, would not result in linking the clients with, or the disclosure of, protected confidences, so it was error to quash the subpoena.

[vi] Attorney-Client -- Fees, Client Identity and Address, etc. -- Revealing Confidential Communications

United States v. Liebman, 742 F.2d 807 (3d Cir. 1984) : The Court reversed an order granting enforcement of an IRS summons to a law firm seeking the names of all clients who paid fees over a three-year period in connection with the acquisition of certain tax shelters. Although the Court stated that "[i]f the summons merely requested the names of clients who paid fees, the information would not be protected by the privilege," it reasoned that the IRS sought to have the firm indicate the names of persons whom it had given certain advice concerning deductions relating to a tax shelter. In effect, the IRS sought the substance of confidential communications and thus invaded the area of privileged communications.

United States v. Sanders, 979 F.2d 87 (7th Cir. 1992) : Testimony was admitted in a drug case that the defendant's attorney visited two alleged coconspirators who were incarcerated; he told them he represented the defendant and asked whether they had made statements to the police. The Court noted that since the defendant had not been charged at the time the lawyer made the visit, disclosing the representation might have conveyed the substance of the defendant's confidential communications. However, any privilege claim was waived by objecting only on (unavailing) hearsay grounds.

In re Grand Jury Proceedings, 33 F.3d 1060 (9th Cir. 1994) : The Court upheld a judgment of contempt resulting from an attorney's refusal to produce records pertaining to fee information and fee arrangements with a client. While

that information might have indicated that the client retained the attorney to represent him in a grand jury investigation, the Court concluded that this fact did not "in and of itself reveal any confidential information." By contrast, in *Ralls v. United States, 52 F.3d 223 (9th Cir. 1995)* , the Court ordered that a subpoena served on Ralls, a defense attorney, be quashed on the basis of the privilege. The subpoena sought disclosure of the identity of the person who paid the fee for a criminal defendant represented by Ralls. Upon examination of Ralls' sealed affidavit, the Court held that the identity of the fee payer was privileged because the fee payer was also Ralls' client, and had specifically discussed his own criminal liability in connection with the same crime charged against the client whose fee was paid. The Court found that the client-fee payer's identity and the fee arrangements were "so intertwined with confidential communications that revealing either the identity or the arrangements would be tantamount to revealing a privileged communication." In *In re Horn*, n54 the Court reversed an order finding a criminal defense attorney in contempt for failing to satisfy a grand jury subpoena seeking production of, *inter alia*, any records relating to fee arrangements between him and named individuals and records of trust accounts, as well as all records pertaining to financial transactions by the clients. In order to comply fully with the subpoena, the attorney would have to produce retainer agreements and other documents that might reveal the client's motivation for seeking legal representation; this would be an unjustifiable intrusion into the relationship. The breadth of the subpoena excused the attorney from listing and describing even for the District Court the content of documents the government knew in advance were beyond its reach and from producing the requested documents for an *in camera* inspection. In *Dole v. Milonas*, n55 an action to enforce a subpoena under ERISA, the Court held that an attorney providing legal services was required to identify the recipients of the services, because his argument that the information might lead to disclosure that they had applied for amnesty and presumably were undocumented aliens was insufficient to show that disclosure of the client's identity would be tantamount to a disclosure of a confidential communication. The case was remanded, however, because the subpoena requiring production of documents "reflecting the nature and extent of the services rendered" would be virtually certain to result in disclosure of confidential communications.

[l] Attorney-Client -- Fiduciary Litigation

In re Long Island Lighting Co., 129 F.3d 268 (2d Cir. 1997) : In an action seeking relief under ERISA, the employees sought disclosure of communications made by the employer to counsel with respect to amendments to the employee benefit plan. The employer retained the same attorney for matters concerning both the administration of the plan and amendments to the plan. With respect to the administration of the plan, the employer acts in a fiduciary capacity under ERISA; however, the employer does not act as a fiduciary with respect to amendments to the plan. The employees argued that since communications pursuant to fiduciary duties are not privileged as against the beneficiary, the employer waived the right to protect the communications respecting amendments to the plan by using the same attorney for both fiduciary and non-fiduciary functions. But the Court disagreed. Since the tasks were divisible, there was no reason to find a loss of the privilege simply because the same lawyer was hired for both functions.

Wildbur v. Arco Chem. Co., 974 F.2d 631 (5th Cir. 1992) : In employees' ERISA litigation, the Court held that communications between the employer's trial counsel and the plan administrator were privileged because there had never been a mutuality of interest creating a fiduciary relationship with the plan beneficiaries and the communications all dealt with defending the pending lawsuit and not with plan administration. The Court expressed no opinion on the decision below that communications made after the lawsuit had been filed between in-house counsel and the plan administrator were also privileged, as they were in any event protected by the work product doctrine. In *Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)* , the Court held that shareholders in derivative litigation could obtain access to privileged communications by corporate management on a showing of good cause. This case is discussed in § 501.02[5][l][ii].

Bland v. Fiatallis No. Am., Inc., 401 F.3d 779 (7th Cir. 2005) : Retired employees sued their former employer for breach of ERISA obligations after it replaced their health benefits plan with one less favorable to them. Although the

Court reversed summary judgment that had been granted for the employer, it held that the plaintiffs were properly denied access to communications between the employer and its counsel regarding the replacement health plan. The plaintiffs argued that the communications came within the exception under which a fiduciary of an ERISA plan must make available to a beneficiary any communications with an attorney "that are intended to assist in the administration of the plan." Holding that the fiduciary-duty exception to the privilege was inapplicable in this case, the Court reasoned that "an employer acts as a fiduciary only when it undertakes plan management or administration," but it

> acts in a dual capacity as both the manager of its business and as a fiduciary with respect to unaccrued welfare benefits[; it] is free to alter or eliminate such benefits without considering employees' interests[;] and [it] does not owe its employees a fiduciary duty when it amends or abolishes unaccrued benefits.

United States v. Mett, 178 F.3d 1058 (9th Cir. 1999) : The Court reversed convictions for embezzling from a pension plan because of the erroneous admission of legal memoranda advising the defendants, as trustees of the pension plan, about their personal civil and criminal exposure in light of their undocumented withdrawals of plan funds. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[5][l][ii]*. In *In re Grand Jury Proceedings, 162 F.3d 554 (9th Cir. 1999)* , the Court held that the privilege did not protect communications between a trustee of an ERISA pension fund and the fund's attorney concerning allegations that the trustee was involved in receiving kickbacks. The Court relied on a line of cases beginning with *Riggs National Bank v. Zimmer*, n56 which hold that "trustees may not block inquiry by their own beneficiaries into the proper management of the assets entrusted to them by relying on the privilege." Although in this case it was the government, and not the beneficiaries, that was seeking access to the attorney-trustee communications, the *Riggs* doctrine was still applicable, because the government was standing in the shoes of the beneficiaries by investigating and prosecuting malfeasance in the administration of an ERISA fund. In *In re Subpoenas Duces Tecum Dated March 16, 1992*, n57 a corporate principal, sued by a creditors' committee appointed during the corporation's bankruptcy proceedings, subpoenaed documents relating to the corporation and the committee. Reversing a ruling that the privilege did not apply to confidential communications between a creditors' committee and its attorneys, the Court held that the committee's need for competent and effective representation justified recognizing the privilege even though the committee's activities were for the benefit of all creditors, especially where disclosure was sought by a person engaged in adversarial litigation with the committee and its counsel.

[m] Attorney-Client -- Government Attorneys

[i] Civil Cases

Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997) : A non-profit organization sought to compel the IRS to disclose memoranda that were prepared by the Office of Chief Counsel for the IRS in response to requests from field personnel for legal guidance. Although there is a relationship between the Office of Chief Counsel and the IRS, the Court held that the memoranda were simply statements of the IRS's legal position, as they did not reveal any confidential information about the IRS itself. To the extent that information about an individual taxpayer was revealed, this would not be privileged, since the taxpayer is not a client. The Court recognized, however, that any information in the memoranda concerning "the scope, direction or emphasis of audit activity" would be protected by the privilege, and that those portions, if they existed, would be exempt from disclosure. In *Schlefer v. United States*, n58 a Freedom of Information Act case, the Court held that indexed Chief Counsel Opinions of the Maritime Administration, which recorded important legal advice from the Chief Counsel concerning agency rulings on various matters, did not come within the privilege because the factual information contained in the opinions came from third parties seeking rulings, not from officials of the agency, and the officials added no new or confidential information when they transmitted the relevant facts to the Chief Counsel. In *Coastal States Gas Corp. v. Department of Energy*, n59 another FOIA case, the Court held that the privilege did not apply to memoranda prepared by the Department's lawyers in response to requests by

Department auditors, responsible for checking compliance by private firms with agency regulations, for interpretations of the pertinent regulations. "If the auditors should encounter a problem of regulatory interpretation, a request for advice would be sent to the regional counsel, couched in a specific factual context, either real or hypothetical. The response would be a legal memorandum ... ." There was insufficient showing that the memoranda reflected confidential information or that they were kept confidential.

Maine v. United States Dep't of Interior, 298 F.3d 60 (1st Cir. 2002) : In an action by the State under the Freedom of Information Act seeking disclosure of documents from federal agencies relating to the listing of certain fish populations that are protected by the Endangered Species Act, the Court affirmed a ruling that various documents were not protected by the attorney-client privilege. The Court noted that the Department of the Interior "failed to explain, or even attempt to explain except in conclusory statements, how the documents claimed to be protected establish that they relate to a confidential client communication." In *Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995)* , the Court affirmed denial of the Department's petition for restitution of profits accrued during pendency of an injunction against enforcement of a Department regulation. It held there was no clear error in a ruling that certain correspondence between the Department and its outside counsel was not covered by the privilege, since the Department had delegated policymaking authority to counsel to such an extent that counsel ceased to function as lawyers and began to function as regulators. In *Town of Norfolk v. United States Army Corps of Eng'rs*, n60 an action under the Clean Water Act challenging the Corps' grant of a permit to fill wetlands, the Court held that communications between the Corps and the United States Attorney were protected by the privilege and properly not made part of the administrative record, as there was a relationship between the agencies, the communications were for the purpose of providing legal advice in reasonably anticipated litigation, and they had not been disclosed to third parties.

Department of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295 (S.D.N.Y. 1991) : Rejecting claims of privilege by the Department, an agency of the British government, the Court held that although government agencies can be clients with agency lawyers functioning as attorneys, the Department failed to meet its burden of presenting the underlying facts or circumstances demonstrating the existence of the privilege. In *Resolution Trust Corp. v. Diamond, 773 F. Supp. 597 (S.D.N.Y. 1991)* , the District Court, ruling on privilege claims by the RTC in an action to repudiate leases, noted that the privilege does not protect communications between client and counsel where counsel are acting as regulatory decision-makers rather than as attorney advisors. In *Mobil Oil Co. v. Department of Energy*, n61 the District Court rejected for the most part the Department's privilege claim against production of certain documents, since neither the index of documents nor the documents themselves made clear "whether the communication relates to a fact of which the attorney was informed for the purpose of securing *primarily* either an opinion of law or legal services or assistance in some legal proceeding."

Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980) : Rejecting the Department of Energy's claim of privilege in an action by oil refiners challenging DOE regulations, the Court noted that to claim the privilege the agency must show that documents were intended to be confidential and were kept confidential and that they were prepared in order to get legal advice, not for policy-making purposes.

Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005) : The plaintiff, a black police officer, was one of 52 officers who were engaged in a long-running Title VII lawsuit against the City regarding a compromised promotion exam. As a result of disciplinary proceedings related to compromise of the exam, she was demoted in rank but subsequently restored to her previous position. She brought a civil rights action against the City and its former police director (as an individual) for her demotion. In discovery the director claimed that he went forward with the plaintiff's disciplinary proceeding upon the advice of counsel for the City, but the City objected that the communications were privileged. On interlocutory review of an order ordering the director to disclose the communications, the Court reversed. It held that municipalities may claim the attorney-client privilege for confidential legal communications between their attorneys and their employees, at least in civil actions, and that the City's interest was not to be balanced against the adversary's need for the information in pursuing her claim against the individual former employee, so his advice of counsel defense did not waive the City's privilege. However, there was some indication that the director had sought the advice in an

individual capacity; if that were found on remand, the City would have no privilege and the director's defense would operate to waive his privilege. In a reverse discrimination case, *Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)* , the plaintiffs sought inquiry into statements made at a meeting between the city attorney, the city manager, and some city councilmen, which was called by the councilmen to seek some explanation after they had received complaints from constituents concerning the promotion process for public employees. The Court, assuming without deciding that the privilege applies to municipal corporations, found reversible error in a protective order against inquiry into the communications at the meeting. The privilege could not apply because the councilmen were not part of the client represented by the city attorney; as elected officials investigating the reasons for executive misbehavior, their interests and those of the city executives were not the same. Thus, the councilmen were third parties to the relationship between the city attorney and the city manager and communications made in their presence were not confidential.

Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) : The Court affirmed judgments for library employees alleging that the county library board and library director engaged in racial discrimination in transferring the employees to other jobs. The Court found no error in admitting memoranda from the county attorney to the library director concerning the advisability and legality of the transfers, since the defendants had not satisfied their burden in showing that the memoranda were intended to be confidential. The memos were not designated as "privileged"; the defendants presented no evidence on how widely the memos were distributed, or whether there was any understanding that the memos were to be and remain confidential. And, most importantly, "it was not reasonable under the circumstances to expect the memoranda to be confidential because the memoranda might have been public records under the Georgia Open Records Act."

[ii] Attorney-Client -- Government Attorneys -- Criminal Cases

In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam): A Deputy White House Counsel refused on grounds of the attorney-client and executive privileges to give testimony before a grand jury investigating the President. Affirming an order compelling the testimony, the Court held that a government attorney may not invoke the privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. One Judge dissented on the grounds of the Presidency's unique need for confidential legal advice and the adverse consequences of abrogating the privilege for the President.

In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005) : The Court reversed an order that would have required the former chief legal counsel in the office of the Governor of Connecticut to reveal to a federal grand jury the contents of private conversations she had with the Governor and members of his staff for the purpose of providing them legal assistance. The grand jury was investigating possible criminal violations by the Governor and the staff members in receiving gifts from private parties who did business with the State. The government conceded that a governmental attorney-client privilege may be invoked in civil suits between government agencies and private litigants, but it argued that such a privilege does not extend to criminal cases, and relied on rulings to that effect in three Circuits. The Court held that the governmental attorney-client privilege applies in criminal, as well as civil, cases, reasoning:

> It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

In re Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002) : The Court affirmed an order compelling a state government attorney to testify before a grand jury concerning legal advice he provided to the Illinois Secretary of State's office. The Court noted that "at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client," but it held that "the privilege between a government attorney and her official client does not extend to criminal proceedings, such as a grand jury investigation." The Court expressed

no opinion on the decision below that the current Secretary of State was the holder of any privilege and had the authority to waive the privilege.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) : The District Court quashed a grand jury subpoena for notes taken at a meeting after the First Lady testified before a grand jury in the Whitewater matter. Present at the meeting were Mrs. Clinton, her personal attorneys, and White House counsel. The White House argued that communications from government agents to government attorneys, made in confidence, were entitled to the privilege. Reversing, the Court held that the privilege does not protect statements made to government attorneys, at least in the context of a grand jury investigation.

[n] Attorney-Client -- Holder of Privilege

[i] Generally

United States v. De Lillo, 448 F. Supp. 840 (E.D.N.Y. 1978) : When the former attorney of a union pension fund was called to testify about communications between himself and members (mostly former members) of the fund's board of trustees, the Court held that the "client" protected by the privilege could be viewed as the pension fund or possibly its board of trustees, but that, whichever view was taken, the "client" was not any individual trustee. Since the board of trustees in power at the time that the privilege was claimed was willing to waive it, the attorney could testify about the communications.

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990) : Reviewing a motion to quash subpoenas for papers held by a movant and its previously wholly owned subsidiary, the Court held that upon its divestiture the subsidiary's managers could waive the privilege with respect to documents it generated, but that to the extent the documents were generated in a matter of common interest with the movant, even if the parties were not joint defendants in that matter, waiver of the privilege required the movant's consent.

In re Auclair, 961 F.2d 65 (5th Cir. 1992) : At the instance of a lawyer allegedly involved in a fraud scheme, the lawyer's secretary and her husband, together with the lawyer, consulted another attorney to see whether he would represent them in a pending grand jury investigation. After interviewing each of the three separately and together, the attorney declined to represent the secretary and her husband. The attorney was subsequently ordered to testify about the interviews, but the Court reversed, holding, *inter alia*, that any waiver by the secretary or her husband did not defeat any privilege possessed by the client-lawyer.

United States v. Layton, 855 F.2d 1388 (9th Cir. 1988) : The Court affirmed a conviction for conspiring to kill a Congressman, holding that the defendant could not claim the privilege for statements made by a cult leader to the cult's counsel, where the defendant made no showing that he was, or sought to be, represented by the lawyer. See also *In re Boileau* n62(a debtor who had been removed from any substantial participation in the management of his business during the pendency of a bankruptcy case retained no authority to assert the privilege; on the facts presented, waiver authority resided in an independent examiner who had been appointed to investigate the business).

In re Diasonics Sec. Litig., 110 F.R.D. 570 (D. Colo. 1986) : The Court held that where one corporation was acquired by another, and the officers of the acquired corporation became officers of the acquiring corporation, the right to claim the privilege rested with the acquiring corporation. It concluded that where two officers violated their fiduciary duty to the acquired corporation by seeking legal advice contrary to their responsibilities, the privilege would give way to the shareholders' right to discover the communications.

[ii] Attorney-Client -- Holder of Privilege -- Individual or Entity

In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001) : When a grand jury subpoenaed a corporation's records, the

corporation waived its privilege, but two of its former officers and its former attorney intervened and moved to quash. The intervenors claimed that the attorney had represented the officers as well as the corporation and that the representation of all was pursuant to an oral joint defense agreement making communications among the three clients jointly privileged. The Court affirmed denial of the motion to quash, holding that the individuals held no privilege as to communications made in their corporate capacities; therefore, any joint defense agreement was irrelevant and the corporation's waiver of its privilege was effective.

United States v. International Bhd. of Teamsters, 119 F.3d 210 (2d Cir. 1997) : During an investigation of a union election, the campaign organization of one candidate waived its privilege for communications with the organization's counsel. However, the campaign manager claimed a personal privilege for communications in which he participated. The Court upheld a ruling denying the manager's claim, holding that he held no privilege, where the communications concerned only matters relevant to the campaign and not to him as an individual and he neither sought nor received legal advice from the attorneys on personal matters. Although recognizing that the attorneys had not been as clear as they might have been regarding the possibility of conflicts and the fact that they represented the organization alone, the Court refused the manager's invitation to adopt a "reasonable belief" standard for employee disclosures to corporate counsel on corporate matters.

In re Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120 (3d Cir. 1986) : Affirming a discovery ruling, the Court held that corporate officers could not assert a privilege after the corporation waived it, and that no joint defense privilege could be claimed where there was no showing that the corporation and the officers agreed to pursue a joint defense strategy.

Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005) : The plaintiff, a black police officer, was one of 52 officers who were engaged in a long-running Title VII lawsuit against the City regarding a compromised promotion exam. As a result of disciplinary proceedings related to compromise of the exam, she was demoted in rank but subsequently restored to her previous position. She brought a civil rights action against the City and its former police director (as an individual) for her demotion. In discovery, the director claimed that he went forward with the plaintiff's disciplinary proceeding upon the advice of counsel for the City, but the City objected that the communications were privileged. On interlocutory review of an order ordering the director to disclose the communications, the Court reversed. It held that municipalities may claim the attorney-client privilege for confidential legal communications between their attorneys and their employees, at least in civil actions, and that the City's interest was not to be balanced against the adversary's need for the information in pursuing her claim against the individual former employee, so his advice of counsel defense did not waive the City's privilege. However, there was some indication that the director had sought the advice in an individual capacity; if that were found on remand, the City would have no privilege and the director's defense would operate to waive his privilege. In *United States v. Dakota, 197 F.3d 821 (6th Cir. 1999)* , at the trial of an agent of a tribal organization for tax fraud and receiving kickbacks, the attorney for the tribe testified that he conferred with the defendant on two occasions and told him that payments he was receiving had to be disclosed to and approved by the tribal council. Affirming, the Court found that there was no evidence that the defendant contacted the lawyer "for legal advice as an individual as opposed to seeking advice from O'Leary in his position as tribal attorney," so the defendant had no right to claim a privilege.

United States v. Chen, 99 F.3d 1495 (9th Cir. 1996) : Reviewing a corporation's motion to quash a grand jury subpoena, the Court held that an ex-employee could not waive the privilege, which belonged to the corporation with respect to communications made by employees to corporate counsel at the direction of corporate superiors.

In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998) : A hospital, its president, and others were targets of a grand jury investigation. When attorneys who had provided legal services to the hospital during the relevant period were called to testify, the president intervened to quash the subpoenas, and after that motion was denied, the attorneys asserted the privilege in response to virtually every question during their appearance. The Court held that the president could claim a personal privilege, but that it extended only to the very small portion of communications in which he

sought legal advice as to his personal liability without regard to any corporate considerations. The Court noted that a corporate officer claiming a personal privilege must show that it was clear when counsel was approached that the advice sought was in an individual rather than representative capacity, that counsel agreed to communicate in that capacity despite the possibility of conflicts, and that the communications did not concern company matters; the officer's reasonable belief that the representation by corporate counsel was on an individual basis is not sufficient to create a personal privilege.

In re Grand Jury Investig. No. 83-30557, 575 F. Supp. 777 (N.D. Ga. 1983) : Former corporate employees moved to intervene to stop the corporation's attorney from revealing their communications made to him while they worked for the corporation. The corporation waived its privilege and the Court ruled that the attorney would be permitted to testify unless the former employees could establish that they sought legal advice from the attorney, they made it clear they did so in their individual capacities, the attorney understood he was asked to advise them as individuals, and their communications were confidential and did not involve the corporation's business or their official corporate duties.

[iii] Attorney-Client -- Holder of Privilege -- Trustee

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) , *rev'g 722 F.2d 338 (7th Cir. 1983)* : In a suit by the CFTC against a brokerage corporation, the parties agreed to a consent decree that provided for the appointment of a receiver and an investigation by the Commission. The receiver filed a voluntary petition in bankruptcy on behalf of the corporation and was named trustee in bankruptcy. When the Commission sought to subpoena records held by the former corporate counsel, counsel invoked the corporation's privilege. Thereafter, the trustee in bankruptcy agreed to waive the privilege. Reversing a decision that the trustee held the privilege, the Court of Appeals found instead that where the corporation had officers and directors, it continued to hold the privilege and that the officers and directors, not the trustee, had authority to assert or waive the privilege. A unanimous Supreme Court reversed. Because the Bankruptcy Code gives the trustee wide-ranging management power while limiting severely the power of the debtor's directors, the trustee plays the role most closely analogous to a solvent corporation's management and should be able to assert or waive the debtor corporation's privilege.

Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982) : Even though an employee benefit plan was established and funded by an employer, the employer appointed the trustees who administered the plan, and the same law firm represented the employer and the plan, the privilege covering communications between the trustees and the plan's counsel was held by the plan, not the employer, and the trustees were free to waive the privilege.

United States v. Campbell, 73 F.3d 44 (5th Cir. 1996) : Affirming a conviction for bankruptcy fraud, the Court held that the bankruptcy trustee for a partnership has authority to waive the privilege on behalf of the partnership.

United States v. Evans, 796 F.2d 264 (9th Cir. 1986) : In a mail fraud and embezzlement prosecution, the Court held that an attorney hired by the defendant in his capacity as trustee of a pension plan was properly permitted to testify. The plan, not the defendant, was the client, so the defendant had no claim of privilege.

In re Foster, 188 F.3d 1259 (10th Cir. 1999) : A Chapter 7 trustee for an involuntary debtor sought documents prepared in connection with pending, pre-petition civil litigation by counsel that represented the debtor in both the civil litigation and related criminal litigation. The Bankruptcy Court ordered the turnover of all documents, and the District Judge affirmed. The Court of Appeals rejected the notion that a trustee always controls an individual's privilege as to pre-petition civil claims, since "[t]o let trustees do so may discourage client confidences; violate individuals' reasonable expectations that, so long as they do not abuse the privilege, they alone will decide when to waive it; and ignore the distinction that, while a trustee may control a corporate debtor as would its pre-bankruptcy management, a trustee can no more control an individual debtor than could someone who bought all of the debtor's assets." The Court remanded to the Bankruptcy Court to balance the harm to the debtor and to the privilege with the trustee's need for information.

[o] Attorney-Client -- Legal Advice or Services

[i] Generally

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) : The Court affirmed income tax convictions, finding no privilege attached to a document sent by a former client to an attorney who was serving as a negotiator in connection with the buy-out of the defendant's interest in a corporation. No relationship existed at the time the document was sent, and the attorney was not providing legal advice to the defendant. In *United States v. Strahl, 590 F.2d 10 (1st Cir. 1978)* , the Court held that the privilege did not bar an attorney's testimony that a client passed him counterfeit bills, when there was no showing that the client sought legal advice with respect to the bills.

Montgomery County v. Microvote Corp., 175 F.3d 296 (3d Cir. 1999) : In a contract dispute related to electronic voting machines, the County interviewed election "consultants" and ended up retaining the law firm of which the only consultant holding both computer science and law degrees, Dr. Shamos, was a member. When the defendant manufacturer subsequently sought discovery of Dr. Shamos' reports to the County, the Trial Judge held they were not protected by the privilege because he was acting as a "consultant." The Court reversed, on the grounds that Dr. Shamos' firm was retained to perform legal services, and that the services he performed, principally negotiating and drafting an addendum agreement with the defendant's counsel, were legal services. The fact that the County initially explored retaining a consultant who was not a member of the bar was not relevant, given the subsequent relationship with Dr. Shamos. One Judge concurred in the result, on the ground that the documents sought were protected by the work-product privilege.

United States v. Clemons, 676 F.2d 124 (5th Cir. 1982) : In a prosecution for wilfully failing to appear for trial, the Court found that an attorney's message to his client concerning the date of trial is not a privileged communication because it does not constitute legal advice.

United States v. Spector, 793 F.2d 932 (8th Cir. 1986) : Affirming a cocaine conviction, the Court held that tapes made by an informant-witness concerning his daily activities on behalf of the government were protected by the privilege. The tapes had been made to assist the informant's lawyer in representing him and they were not given to the government. In *United States v. Horvath*, n63 the Court affirmed tax evasion convictions, holding that testimony by an attorney concerning financial transactions he conducted on behalf of two defendants did not disclose privileged communications, since the transferring of funds and related activities did not involve confidential communications made for the purpose of obtaining legal services.

United States v. Alexander, 287 F.3d 811 (9th Cir. 2002) : The defendant was convicted for making threats to injure others, including threats to an Assistant Federal Defender who had been appointed to represent the defendant on mail and wire fraud charges. The appointed lawyer was called to testify before a grand jury, he asserted the attorney-client privilege, and the Trial Judge ordered him to testify solely about the threats. The Court affirmed, holding that the threats were not communications made in order to obtain legal advice and were therefore not protected by the attorney-client privilege. In *United States v. Martin, 278 F.3d 988 (9th Cir. 2002)* , the defendant operated a fraudulent scheme in which he created an ostensible subsidiary office of a legitimate Hong Kong corporation. Without disclosing the scheme, he hired a lawyer to become counsel for the subsidiary. The lawyer also did a few small legal jobs for the defendant personally. When the lawyer began to suspect that the subsidiary was fraudulent, he disclosed his suspicions to the U.S. Attorney's office, which led to an investigation and the defendant's arrest, indictment, and conviction. Affirming, the Court held that the attorney's disclosures to the authorities were not privileged, so there was no error in refusing to suppress them. The Court held, *inter alia,* that there was no showing that any communication disclosed was made for the purpose of obtaining legal advice. In *United States v. Bauer*, n64 the Court reversed a conviction for making false statements in a bankruptcy petition because the defendant's attorney had been required to give testimony that he instructed his client that the petition and its attachments were signed under penalty of perjury. The Trial Judge had ruled that no privilege applied when the attorney is "acting as an officer of the court" and "simply advising the client of the

rules of court that apply to the proceeding." That was erroneous, since the privilege applies to the attorney's advice given in response to confidential disclosures, and the attorney in giving this advice was not acting merely as a messenger but was delivering legal advice in the course of preparing the petition. Reviewing a corporation's motion to quash a grand jury subpoena in *United States v. Chen*, n65 the Court held that lawyers act in their legal capacity when they communicate their clients' positions to government agencies. Thus, the client's communications with a lawyer to enable the lawyer to be a spokesperson in representing the client were protected by the privilege. In *United States v. Palmer*, n66 the Court upheld a ruling that an attorney hired to transfer the defendant's personal effects from Utah to Washington could be required to answer questions concerning the material that was given to him by a third person to be shipped to the defendant, as "the testimony involved his attorney's role as a transfer-shipping agent dealing with material real evidence, not as a legal advisor concerning a confidential communication."

United States v. Johnston, 146 F.3d 785 (10th Cir. 1998) : The defendant, a lawyer, was charged with conspiracy to distribute marijuana by assisting a marijuana-selling client in evading debts owed to the client's drug suppliers. The Court found no error in the admission of wiretapped conversations, since the attorney's role was simply as a messenger to the drug suppliers, not to provide legal advice to the client. Alternatively, the communications between attorney and client were unprivileged because they were for the purpose of furthering a crime.

In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed. Cir. 2000) : The Magistrate Judge in a patent infringement suit ordered the plaintiff, assignee of the patent, to produce the invention record submitted by the inventors named on the patent to the plaintiff's corporate legal department. Granting the plaintiff's petition for mandamus, the Court held that although the invention record contained technical information, it was made for the purpose of obtaining legal advice. The communication was submitted to the legal department for the purpose of making patentability determinations, and the information communicated was relevant to making those determinations.

[ii] Attorney-Client -- Legal Advice or Services -- Business Advice

United States v. Knoll, 16 F.3d 1313 (2d Cir. 1994) : The Court held in a prosecution for bankruptcy fraud that letters seized from an attorney with whom a defendant had a business relationship were not privileged because their contents related purely to business transactions.

Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000) : Affirming a judgment for the City in a police officer's action under the Americans with Disabilities Act, the Court found no clear error in a determination that the general counsel to the superintendent of police was acting in a legal capacity, and not in a business capacity as a decisionmaker on personnel matters, when he advised members of the police department about the plaintiff's reassignment. Although the applicability of the privilege to the facts was "a close question," the Judge's ruling was supported by evidence that the general counsel was not empowered to make a business decision.

[iii] Attorney-Client -- Legal Advice or Services -- Investigations

In re Grand Jury Subpoena, 599 F.2d 504 (2d Cir. 1979) : The Court held that to the extent that an internal corporate investigation is made by management itself, there is no privilege to cover the information that is discovered. To claim a privilege, the corporation must show that information was communicated for the purpose of securing legal advice, not for management purposes.

Hanson v. United States Agency for Int'l Dev., 372 F.3d 286 (4th Cir. 2004) : A lawyer representing a contractor embroiled in a dispute concerning a USAID-funded project in Egypt sought access under FOIA to a document prepared at USAID's request by a lawyer-engineer, Roy, to evaluate the negotiation process in the contracting dispute, the parties' positions, and the impediments to settlement. USAID argued that FOIA Exemption 5, which protects attorney-client communications, precluded production of the evaluation. Rejecting the plaintiff's argument that Roy was hired not as a lawyer, but as a construction consultant to observe the dispute negotiations, the Court concluded that "[s]o long as Roy

was being asked to exercise his extensive legal skills, his engineering experience does nothing to disqualify him as an attorney." In *In re Allen, 106 F.3d 582 (4th Cir. 1997)* , the Court reversed a judgment of civil contempt against an attorney who withheld communications with her client, a state Attorney General and his Office, holding that it was error to reject the privilege claim on the ground that the communications were made in the course of an investigation conducted by the attorney. *Upjohn* makes it clear that an attorney's investigation may constitute a legal service, and here the record unequivocally supported the conclusion that the attorney was retained to conduct an investigation using her legal expertise. In *United States v. Aramony*, n67 the Court affirmed in part the fraud conviction of the former CEO of United Way of America, holding that communications made during the course of an internal investigation to UWA's general counsel, whom the defendant had known for 30 years, were not privileged because, *inter alia*, there was no indication the defendant was seeking legal advice.

Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986) : In a dispute over a fire insurance policy, the District Court ruled that the insurer could not claim privilege with respect to documents prepared by outside counsel acting as a claims investigator as well as a legal advisor. Although "[i]t would not be fair to allow the insurer's decision in this regard to create a blanket obstruction to discovery of its claims investigation," work product protection was available for the mental processes and opinions of counsel.

United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996) : A law firm's senior partner, hearing of possible irregularities in another partner's handling of client funds, assigned two associates to conduct an investigation. The two were later subpoenaed by a grand jury and asked about the investigation. Reversing an order compelling the associates to testify, the Court held that the privilege applied, since factfinding that pertains to legal advice counts as "professional legal services."

[iv] Attorney-Client -- Legal Advice or Services -- Tax Services

In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983 (Marc Rich & Co.), 731 F.2d 1032 (2d Cir. 1984) : Reviewing denial of an intervenor's motion to quash a grand jury subpoena duces tecum, the Court held the following as being made for the purpose of securing legal services, and therefore privileged: communications concerning tax consequences under Swiss and American law for various forms of employee compensation plans; communications concerning the tax consequences of a reorganization; and communications concerning the lawfulness of selling stock in a subsidiary to an officer of a corporation.

United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) : The Court said that "although preparation of tax returns by itself may require some knowledge of the law, it is primarily an accounting service. Communications relating to that service should therefore not be privileged even though performed by a lawyer."

United States v. Frederick, 182 F.3d 496 (7th Cir. 1999) : Frederick, a lawyer and an accountant, provided legal representation to and prepared the tax returns of taxpayers being investigated by the IRS. The Court upheld enforcement of an order directing Frederick to turn over documents created in connection with preparation of the taxpayers' returns. The Court reasoned that because there is no accountant's privilege under federal law, a taxpayer may not obtain a privilege by simply hiring a lawyer to do the work that an accountant or other tax preparer normally would do. Only communications made for the purpose of obtaining a lawyer's professional advice or assistance are privileged, and that does not include information furnished for the purpose of enabling the preparation of a tax return. The Court rejected the government argument that there was no privilege simply because the information from the client was to be transmitted to the IRS in a return; where the tax preparer was also the client's lawyer, it could not be assumed that everything communicated to the lawyer was to be transmitted to the IRS, so inquiry must be made whether the communication was related to the tax-preparation function or to the legal-representation function. The Court also rejected the government argument that numerical information could never fall within the privilege. The Court held that dual-purpose documents, created for use both in preparing tax returns and in litigation, are not privileged because of their unprivileged purpose. Even with documents prepared in connection with tax audits the relevant question is

whether the attorney-accountant is doing attorney's or accountant's work -- if the audit is merely verifying the accuracy of a return, it is accountant's work and there is no privilege; but if the taxpayer is accompanied to the audit by a lawyer to deal with issues of statutory interpretation or case law raised by the revenue agent, the lawyer is doing lawyer's work and the privilege may attach.

[p] Attorney-Client -- Limited Partnership

Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991) : In an action by limited partners alleging securities fraud in connection with a real estate limited partnership, the Court extended the *Garner* doctrine but found that in this case the plaintiffs had not shown good cause why the privilege should not be invoked against their document requests and proposed deposition questions.

[q] Attorney-Client -- Patent Cases -- Law Applied

In re Spalding Sports Worldwide, Inc., 203 F.3d 800 (Fed. Cir. 2000) : Upholding application of the privilege to an invention record submitted to the petitioner's legal department, the Court held that Federal Circuit, rather than First Circuit, law applies, because the privilege question "implicates, at the very least," substantive patent issues that should be subject to a uniform national standard.

[r] Attorney-Client -- Patent Counsel

Status Time Corp. v. Sharp Elec. Corp., 95 F.R.D. 27 (S.D.N.Y. 1982) : The Court held that communications to a foreign patent agent are not privileged.

Glaxo, Inc. v. Novopharm Ltd., 148 F.R.D. 535 (E.D.N.C. 1993) : In a patent infringement action, the Court held that a patent agent in the United Kingdom was an independent agent and not part of the corporate client for purposes of the privilege. Thus, communications between the agent and a United States attorney were not privileged unless the patent agent was either registered with the U.S. Patent Office or was acting under the control of an attorney. In *Burroughs Wellcome Co. v. Barr Labs., 143 F.R.D. 611 (E.D.N.C. 1992)* , a patent infringement action, the Trial Judge ruled that: the privilege may extend to communications with foreign patent agents; the privilege extends to prior art searches and discussions relating to prior art; and the privilege also extends to drafts of replies and responses prepared in response to questions or decisions of a patent examiner.

Foseco Int'l Ltd. v. Fireline, Inc., 546 F. Supp. 22 (N.D. Ohio 1982) : The Court said that "communications between an attorney and a patent agent, foreign or domestic, are privileged where the patent agent is acting under the direction and control of an attorney as his agent."

Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982) : Observing that the law is unclear as to whether communications between lawyers and patent agents ordinarily are privileged, the Court concluded that the privilege should extend to a situation in which the patent agent acts as a functionary of the lawyer or where the patent agent under foreign law is rendering legal services. The privilege would not apply if the client's communications were passed from lawyer to patent agent for ultimate transmission to a patent office.

[s] Attorney-Client -- Procedures

[i] Identification of Privileged Items

United States v. Construction Prods. Research, Inc., 73 F.3d 464 (2d Cir. 1996) : The Court affirmed an order to enforce a Nuclear Regulatory Commission subpoena, holding that the parties claiming privilege had not identified each document and the individuals who were party to the communication in sufficient detail to permit a judgment as to whether the document was potentially protected from disclosure.

United States v. Rockwell Int'l, 897 F.2d 1255 (3d Cir. 1990) : The District Court enforced an IRS subpoena, holding that a taxpayer's file analyzing potential tax liabilities and tax problems, which might be disclosed to independent auditors or the SEC, was not protected by the privilege. The Court vacated the order and remanded for specific factual findings as to the nature of the material in the file, who prepared and controlled it, and to whom it was disclosed, so that the Court could determine whether the conditions for the privilege had been met or whether it had been waived. The Court also noted that privilege claims must be asserted document by document, rather than in a single, blanket assertion.

Holifield v. United States, 909 F.2d 201 (7th Cir. 1990) : The Court held that a taxpayer could not resist an IRS subpoena served upon his attorney on privilege grounds without making a document-by-document assertion of the specific facts supporting the privilege claim.

PaineWebber Group v. Zinsmeyer Trusts Partnership, 187 F.3d 988 (8th Cir. 1999) : An arbitration award was vacated on the ground it was obtained by "undue means," because PaineWebber had hidden four documents from discovery by not fully and accurately describing them in its privilege log. Reversing, the Court reasoned that: (1) a party seeking to claim privilege must assert privilege as to all covered documents; (2) the tribunal conducting the proceeding may have to resolve the privilege claim if the parties cannot agree; (3) because the party seeking discovery cannot see the documents claimed to be privileged, the dispute is usually resolved by an *in camera* examination; (4) to make the process work, most tribunals require the party asserting privilege to provide a list or log that describes each document and the allegedly privileged communications each contains; and (5) this practice is now codified in *Fed. R. Civ. P. 26(b)(5)*. In this case, the Court found that PaineWebber did not employ "undue means" in asserting its privilege claims, since it provided a log listing most documents covered by the claims and showed others with a blue sheet in place of pages in a compliance officer's file.

Clarke v. American Commerce Nat'l Bank, 974 F.2d 127 (9th Cir. 1992) : Affirming an order enforcing an administrative subpoena for attorney billing statements from outside counsel, the Court held there was no error when the District Judge conducted an *in camera* inspection of attorney billing statements and ordered a line-by-line justification for assertion of the privilege.

FDIC v. United Pac. Ins. Corp., 152 F.3d 1266 (10th Cir. 1998) : In the course of remanding a case for improper denial of a motion seeking relief from judgment, the Court added in a footnote that the Trial Judge too quickly accepted the FDIC's claim that the detailed billing information that the defendants sought was privileged because it contained descriptions of work performed. A party seeking to claim the privilege has the burden of establishing its applicability and cannot simply claim that documents contain privileged information; the Trial Judge may review documents *in camera* to protect against disclosure of privileged matters but may not impose a blanket prohibition on discovery based on a party's bare assertion that documents contain privileged information.

[ii] Attorney-Client -- Procedures -- Immediate Appeal

United States v. Philip Morris Inc., 314 F.3d 612 (D.C. Cir. 2003) : In this lawsuit alleging racketeering violations by tobacco companies, the Trial Judge ordered defendant BATCo to produce a memorandum written by a British attorney for use in a deposition, after ruling that BATCo waived the privilege by not listing the memorandum on a privilege log. The Court held, 2-1, that the order was appealable under the collateral order doctrine, reasoning that the practical value of the attorney-client privilege would be destroyed if a party could not appeal an order compelling discovery until a final judgment is rendered. The majority declined to require a party to refuse to obey an order and suffer a civil

contempt citation in order to be able to appeal, reasoning that there is no guarantee that a civil contempt order rather than a criminal contempt order or some other order would be entered in such circumstances, and the risk of a severe penalty might discourage parties with meritorious claims from pursuing them.

In re Grand Jury Subpoenas, 123 F.3d 695 (1st Cir. 1997) : The Court held that a client could immediately appeal the denial of a motion to quash a subpoena of assertedly privileged documents in the custody of the client's lawyer. Neither the lawyer nor the client had been cited for contempt, and ordinarily such a citation is required before an immediate appeal can be granted. However, where the subpoenaed documents are in the hands of a third party, a client may immediately appeal a privilege claim without waiting for the third party to be cited for contempt, since the third party, with no direct interest at stake, may turn over the materials to avoid the risk of a contempt citation and thus render any appeal a nullity. The Court found this rationale is no less applicable when the third party is an attorney, especially since "allowing an appeal only if the attorney accepts a contempt citation pits lawyers against their clients in a manner that we do not believe is in the interests of justice."

United States v. Amlani, 169 F.3d 1189 (9th Cir. 1999) : The Court held that neither the client nor the lawyer had the right to immediate appeal of the denial of a motion to quash a subpoena of allegedly privileged materials held by the client and the lawyer. The general rule is that a privilege ruling is not appealable until the party subpoenaed refuses to comply with a court order and has been held in contempt. An exception to the general rule arises when third parties are holding the assertedly privileged materials, since third parties cannot be expected to risk a citation for contempt in order to secure the client an opportunity for judicial review. The exception could not apply to the client, and the Court has refused to apply the "third party" exception "where the subpoena is directed at an attorney who is currently representing the party moving to quash the subpoena." The Court observed that nine other Circuits have taken a contrary position. See *In re Grand Jury Subpoenas, 123 F.3d 695, 698 (1st Cir. 1997)* (collecting cases; discussed *supra*). Ultimately, however, the Court did choose to exercise jurisdiction over the privilege claim by way of mandamus.

[iii] Attorney-Client -- Procedures -- *In Camera* Inspection

United States v. Zolin, 491 U.S. 554 (1989) : The Supreme Court held that *Rule 104(a)* does not prohibit use of *in camera* review procedures in ruling on privilege claims, but required a threshold showing that such review is appropriate. See the Editorial Explanatory Comment, *§ 501.02[15]*.

[t] Attorney-Client -- Protected Communications

In re Sealed Case, 737 F.2d 94, 1984-1 Trade Cas. (CCH) P66062 (D.C. Cir. 1984) : The Court held that a former corporate attorney could be asked about hunches he had had concerning the company's activities as long as the hunches were not based on information submitted confidentially by the company for the purpose of obtaining legal services. The Court also found that conversations on an airplane between the company's president and the attorney were privileged even though the president did not expressly state that his communications were confidential.

In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992) : When a subcontractor learned it was suspected of defrauding the government, its counsel had company employees analyze the work performed to show that fair value had been received. Those employees were subsequently called before the grand jury and asked about the analyses they had done, but they refused to answer on grounds of privilege and work product. The Court affirmed an order compelling them to answer the questions, except as to what they had told attorneys, since the privileges do not protect underlying factual information.

In re Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 633 (S.D. Ohio 1984) : The Court found that highly leading interrogatories in which the plaintiffs asked whether the defendants met with counsel to discuss particular subjects

would, if answered, reveal the substance of communications. Therefore, the defendants did not have to answer the interrogatories as written, although they could be asked whether they had consulted with counsel and the general topics or reasons for consultation.

United States v. Weger, 709 F.2d 1151 (7th Cir. 1983) : The Court found no infringement of the privilege when a letter from the defendant to a former attorney was introduced for the limited purpose of comparing the characteristics of the style of type with another letter typed on the defendant's typewriter.

United States v. Spector, 793 F.2d 932 (8th Cir. 1986) : Affirming a cocaine conviction, the Court held that tapes made by an informant-witness concerning his daily activities on behalf of the government were protected by the privilege. The tapes had been made to assist the informant's lawyer in representing him and they were not given to the government. A dissenting Judge argued that the witness had waived the privilege by telling the government of the tapes' existence. In *In re Grand Jury Proceedings*, n68 the Court held that an attorney could be compelled to testify to the authenticity of a client's signatures and photograph on documents bearing the signature of the attorney attesting that she prepared them. These matters were observable to the public and the attestations negated any assumption that the matters were intended to be concealed from third parties.

United States v. Flores, 628 F.2d 521 (9th Cir. 1980) : The Court held that an attorney must answer questions concerning whether his client had provided information about an administrative claim filed by the attorney that alleged a weapon had been improperly seized from the client, since the Court is entitled to ask whether the attorney had authority to file a document. However, confidential communications to the attorney were not a proper subject of inquiry.

[u] Attorney-Client -- Protective Order

In re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001) : Although it denied a writ of mandamus, the Court held that a protective order is an inadequate surrogate for the attorney-client privilege. The Court noted that if an adverse party is provided access to privileged information, even subject to a protective order, "a pertinent aspect of confidentiality will be lost." Therefore, once the Trial Judge found that the privilege applied, he should not have ordered a deposition without a prior finding that the privilege had been waived or that an exception applied.

[v] Attorney-Client -- Reasonable Belief by Client

United States v. Ostrer, 422 F. Supp. 93 (S.D.N.Y. 1976) : "The testimonial privilege ... is applicable where the client entertains good faith beliefs (even if erroneous) that the person consulted is a lawyer, *and* is acting on his behalf."

In re Auclair, 961 F.2d 65 (5th Cir. 1992) : At the instance of a lawyer allegedly involved in a fraud scheme, the lawyer's secretary and her husband, together with the lawyer, consulted another attorney to see whether he would represent them in a pending grand jury investigation. After interviewing each of the three separately and together, the attorney declined to represent the secretary and her husband. The attorney was subsequently ordered to testify about the interviews, but the Court reversed, holding that: confidential communications made with a view to employing a lawyer are privileged although employment is not accepted; this principle applies equally when persons with common interests consult an attorney together seeking common representation; the existence of a matter of common interest is presumed in the prerepresentation phase; and the participants in this case had a reasonable expectation of confidentiality.

[w] Attorney-Client -- Relationship of Client and Attorney

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) : The Court affirmed income tax convictions, finding no privilege attached to a document sent by a former client to an attorney who was serving as a negotiator in connection with the buy-out of the defendant's interest in a corporation. No relationship existed at the time the document was sent, and the attorney was not providing legal advice to the defendant.

United States v. Dennis, 843 F.2d 652 (2d Cir. 1988) : The Court held that statements made while a potential client intended to employ counsel were privileged, even though the employment was not accepted. See also *United States v. Demauro, 581 F.2d 50 (2d Cir. 1978)* (an attorney retained by a bank, who investigated an employee and warned him that the bank expected cooperation and that any employee who lied during the investigation might be terminated, was not consulted by the employee for the purpose of rendering legal services).

In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005) : In the course of an investigation regarding a related company, attorneys for AOL Time Warner interviewed three AOL employees. Before each interview the employee was told that the attorneys represented the company, that the conversations were privileged but the privilege was the company's and it would decide whether to waive it, and that the employee was free to consult his own attorney. Subsequently the SEC began an investigation of AOL and the related company. Shortly thereafter, AOL and one of the employees entered into a "common interest agreement." When the SEC later deposed the employees, they asserted the attorney-client privilege regarding the interviews with AOL's attorneys. Finally, a grand jury issued a subpoena to AOL to provide records reflecting the interviews; AOL agreed to waive the privilege, but the employees moved to quash. Affirming denial of the motion to quash, the Court held that the communications were not privileged because the employees could not have reasonably believed AOL's attorneys represented them personally. There was no evidence that the employees were told they were represented or that they asked for representation; there was no evidence that the employees sought or were rendered legal advice; and the employees were explicitly told that the information could be disclosed at the company's discretion. The Court rejected the employees' claim that being told "we *can* represent you as long as no conflict appears" created a privileged relationship; that was quite distinct from being told "we *do* represent you," especially in the context of the entire warning from the investigating attorneys. In *United States v. Tedder*, n69 the Court found that a defendant in a marijuana prosecution failed to carry the burden of showing that he had a relationship with a lawyer to whom he admitted perjury. The defendant spoke to the lawyer as a friend and did not seek legal advice or expect communications to be confidential.

In re Auclair, 961 F.2d 65 (5th Cir. 1992) : See annotation in *§ 501.03[2][b][v].*

United States v. Martin, 278 F.3d 988 (9th Cir. 2002) : The defendant operated a fraudulent scheme in which he created an ostensible subsidiary office of a legitimate Hong Kong corporation. Without disclosing the scheme, he hired a lawyer to become counsel for the subsidiary. The lawyer also did a few small legal jobs for the defendant personally. When the lawyer began to suspect that the subsidiary was fraudulent, he disclosed his suspicions to the U.S. Attorney's office, which led to an investigation and the defendant's arrest, indictment, and conviction. Affirming, the Court held that the attorney's disclosures to the authorities were not privileged, so there was no error in refusing to suppress them. The Court held, *inter alia,* that there was no sufficient showing of an attorney-client relationship, since the lawyer was hired to represent the bogus subsidiary rather than the defendant, and the information disclosed had nothing to do with the personal matters on which the lawyer worked. In *United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000)* , a key government witness in a mail fraud trial arising from a Ponzi scheme was an attorney who had prepared an opinion letter for the corporate vehicle of the scheme. The attorney had been referred to the corporation by one of the individual defendants whom he had previously represented in an unrelated matter. The Court held there was no error in admitting the attorney's testimony that the defendant had told him the corporation was inadequately funded and in financial

trouble, since the defendant did not sufficiently establish a relationship with the attorney. There was no evidence the attorney provided personal legal advice and all the evidence indicated that the attorney was retained by, communicating with, and being paid by only the corporation, not the defendant.

United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991) : The defendant, an Air Force reserve officer charged with violating conflict of interest statutes, went to a JAG office seeking legal advice. He filled out a card describing himself as a client and the attorneys as his lawyers, and the attorneys spent an hour answering his questions and explaining conflict of interest regulations to him. Rejecting the government's argument that the attorneys were just giving a "briefing" about standards of conduct, the Court held the communications were privileged, but that the error in admitting them was harmless.

Shearing v. Iolab Corp., 975 F.2d 1541 (Fed. Cir. 1992) : The Court affirmed a judgment for the plaintiff in an action for breach of a patent licensing agreement, holding there was no error in permitting an attorney to testify about communications with an alleged prior inventor whom he had interviewed as a potential witness in a trial involving the attorney's corporate client, as the inventor was not the attorney's client at the time of the communications.

[x] Attorney-Client -- Representative of the Attorney

Federal Trade Com. v. TRW, Inc., 628 F.2d 207, 1980-2 Trade Cas. (CCH) P63374 (D.C. Cir. 1980) : A credit reporting agency engaged the Stanford Research Institute to prepare a study of the company's complex computerized credit reporting system. The Court held that documents prepared by SRI were not shown to have been prepared as a "translation" of material for corporate attorneys rendering legal advice and that the ambiguous state of facts meant that the company had not demonstrated the validity of its privilege claim.

Cavallaro v. United States, 284 F.3d 236 (1st Cir. 2002) : Taxpayers resisted enforcement of an IRS summons addressed to accountants on the ground that the requested documents were privileged because the accountants were assisting attorneys who were providing legal services to the taxpayers. The Court affirmed enforcement of the summons because the taxpayers had retained the accountants before consulting the attorneys, they had made no contemporaneous record that the accountants' engagement had changed to assisting the attorneys, and throughout the process the accountants were providing accounting advice rather than assisting the attorneys in providing legal services.

United States v. Adlman, 68 F.3d 1495 (2d Cir. 1995) : In planning for the combination of two subsidiaries, a corporation's Vice President for Taxes (an attorney) obtained from the corporation's auditor a detailed technical analysis of the tax implications of the proposed reorganization. When the IRS subsequently issued an administrative subpoena for the analysis, the Vice President asserted that it was privileged, on the ground that the corporation had imparted its information to him in confidence for the purpose of receiving his legal advice, and that he in turn had hired the auditor to help him understand the problem and had shared the client's information with the auditor for that limited purpose. Upholding a finding that the corporation had failed to sustain its burden of showing the privilege applied, the Court noted that the facts were subject to competing interpretations. The evidence supported the conclusion that the corporation consulted the auditors for tax advice, rather than that the Vice President, as the corporation's counsel, consulted the auditor to help him reach the understanding needed to furnish legal advice. The Vice President served not only as counsel but also as one of the corporation's officers. And the auditors regularly, and in connection with this merger, furnished extensive advisory services, including tax advice. There was no contemporaneous documentation supporting the view that the auditor, in this task alone, was assisting counsel rather than providing accounting and advisory services.

United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975) : The Court found that a psychiatrist retained by defense counsel was sufficiently within the defense team so that the defendant's statements to the psychiatrist could not be used against him without violating the privilege. The Court rejected the government's claim that by pleading insanity the defense waived the right to claim this privilege.

Foseco Int'l Ltd. v. Fireline, Inc., 546 F. Supp. 22 (N.D. Ohio 1982) : The Court said that "communications between an attorney and a patent agent, foreign or domestic, are privileged where the patent agent is acting under the direction and control of an attorney as his agent."

Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982) : The Court observed that the law is unclear as to whether communications between lawyers and patent agents ordinarily are privileged. It concluded that the privilege should extend to a situation in which the patent agent acts as a functionary of the lawyer or where the patent agent under foreign law is rendering legal services. The privilege would not apply if the client's communications were passed from lawyer to patent agent for ultimate transmission to a patent office.

[y] Attorney-Client -- Representative of the Client

Miller v. Haulmark Transp. Sys., 104 F.R.D. 442 (E.D. Pa. 1984) : In an action to recover insurance benefits under a group policy, the Court held that an agent of the defendant insurer was present at a meeting with counsel for one of the individual defendants to assist in preparing an answer, so the agent's presence did not destroy confidentiality and abrogate the privilege.

United States v. Ackert, 169 F.3d 136 (2d Cir. 1999) : In order to advise his corporate client regarding the tax implications of a proposed investment, the corporation's tax counsel contacted an investment banker who had recommended the investment to the corporation for its tax advantages. Subsequently, the IRS audited the corporation and issued a summons to the investment banker seeking his testimony about the investment proposal. The Magistrate Judge upheld the corporation's assertion of the privilege concerning any conversations the investment banker had with the tax counsel. The corporation argued that the investment banker was interpreting the factual nature of the proposal on behalf of the client so that counsel could provide legal assistance. Reversing, the Court noted that not every communication to counsel for the benefit of a client is protected by the privilege and found that the investment banker in this case was not translating or interpreting information so much as providing information that the client did not have and therefore could not provide to counsel.

In re Grand Jury Proceedings, 947 F.2d 1188 (4th Cir. 1991) : The Court modified orders denying motions to quash a grand jury subpoena issued to an accountant. The Court held that discussions between the accountant and the target of the grand jury's investigation as they drove together to meet an attorney recommended by the accountant but not yet retained by the target were privileged, but that prior conversations between them about matters subsequently discussed at the meeting with the attorney were not protected because at the time of the conversations only accounting services were contemplated.

In re Bieter Co., 16 F.3d 929 (8th Cir. 1994) : The Court granted mandamus relief against an order compelling discovery, holding that an independent consultant's relationship to a land development partnership was such that the consultant was acting as representative of the client in dealing with counsel. Thus, confidential communications involving the consultant for purposes of providing legal assistance to the partnership were within the privilege.

[z] Attorney-Client -- Search Warrants

Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984) : The Court affirmed an injunction requiring the return of documents and records seized at a law office pursuant to search warrants directed at an attorney who was the target of an investigation into an insurance fraud conspiracy. The Court found that the search was overbroad and expressed concern for privileged material, noting that no effort was made to protect privileged communications and that lawyers other than the one who was under investigation and their clients were affected by the search.

[aa] Attorney-Client -- Standing To Assert the Privilege

United States v. Ortega, 150 F.3d 937 (8th Cir. 1998) : At a trial on drug charges, the defendant's accomplice testified against him. On cross-examination, defense counsel questioned the accomplice about the nature of the deal he struck with the government. The prosecutor objected to some of these questions on the ground that they called for disclosure of communications between the accomplice and his attorney that took place as the deal was being negotiated. The Trial Judge sustained the objections, but the Court found this to be error. The prosecutor had no standing to assert the witness' privilege. The error was harmless, however.

[bb] Attorney-Client -- Testimony by Attorney

United States v. Bollin, 264 F.3d 391 (4th Cir. 2001) : Affirming convictions arising from an investment fraud scheme and the subsequent coverup, the Court rejected one defendant's contention that it was error to permit his former attorney to testify for the government. The Court observed that the defendant did not identify any testimony that was allegedly privileged and noted that "[t]he privilege does not prevent an attorney from testifying as to non-confidential matters."

[cc] Attorney-Client -- Trial Restriction on Material Privileged in Discovery

Refuse & Environmental Sys. v. Industrial Servs., 120 F.R.D. 8 (D. Mass. 1988) : Expressing concern that the defendants might otherwise obtain an unfair advantage at trial, the Magistrate ruled in an antitrust case that the defendants could assert the privilege during a deposition to bar questions concerning advice of counsel, but "only on the condition that defendants will be barred from offering testimony from any witness with regard to the content of these communications."

Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 891 (S.D.N.Y. 1990) : The Court held, in ruling on discovery motions related to a cross-claim for bad-faith adoption of an insurance premium structure, that references by the insurer to advice of counsel in adopting the structure did not waive the privilege, but that, unless the insurer made full and immediate disclosure of all legal opinions pertaining to the decision, it would be precluded at trial from asserting an advice-of-counsel defense.

Clark v. City of Munster, 115 F.R.D. 609 (N.D. Ill. 1987) : The Court upheld a privilege claim with respect to certain reports prepared by investigators employed by counsel. It ruled, however, that if the plaintiffs adhered to their privilege claim and did not produce the reports during discovery, they would not be permitted to waive the privilege and call the investigators as trial witnesses.

[dd] Attorney-Client -- Union Members

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) , *modified on other grounds*, *30 F.3d 1347 (11th Cir. 1994)* : In a class action by union members against the union and an employer, the Court held that, even if the *Garner* doctrine (discussed in the Editorial Explanatory Comment, *§ 501.02[5][l][ii]*) should apply to union members, its exception to the privilege would not apply when only a tiny percentage of the Union's members were members of the plaintiff class, and the interests of the class were adverse to those members who were not in the class.

[ee] Attorney-Client -- Waiver

[i] Agreement To Waive

Tennenbaum v. Deloitte & Touche, 77 F.3d 337 (9th Cir. 1996) : The agreement settling a class action that arose from a conspiracy to oversell resort timeshares provided that the trustee for the bankrupt entities would waive the privilege as to pre-petition communications between the entities and their counsel. Plaintiffs in a parallel action against the entities' auditors and three former officers sought to discover certain of those communications. Reversing an order to disclose, the Court held that a mere agreement in one action to waive the privilege, unaccompanied by any disclosure of privileged documents, did not constitute a waiver of the right to claim the privilege subsequently in another action.

[ii] Attorney-Client -- Waiver -- Disclosure of Privileged Communication

[A] Common Interest

FDIC v. Ernst & Whinney, 137 F.R.D. 14 (E.D. Tenn. 1991) : In an action arising out of various bank failures, the Magistrate Judge held, *inter alia*, that the FDIC had not waived its privilege by producing documents to other federal and state agencies that had an absolute commonality of interest with the FDIC in dealing with potentially criminal acts that occurred at the banks.

[B] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Contents or Fact of Communication

United States v. White, 887 F.2d 267 (D.C. Cir. 1989) : The Court reversed a defendant's conviction because privileged communications were erroneously admitted, noting that "[a] general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the privilege ... . An averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice."

United States v. Rakes, 136 F.3d 1 (1st Cir. 1998) : The victim of an extortion scheme was charged with perjury or lying under oath about why he sold his business; he testified that he did so voluntarily when in fact he was threatened with death unless he sold the business at below market value. The government sought to obtain privileged communications made by the victim to his attorney concerning the sale of the business and the reasons for the sale, arguing that the victim had waived the privilege because he had also told a friend about his reasons for selling the business. The Court affirmed suppression of the communications, holding that disclosure of the underlying facts was not enough to constitute a waiver where the victim had neither disclosed the communications nor disclosed the underlying information so completely and pervasively as to undermine a claim of privilege.

In re: Grand Jury Subpoena, 341 F.3d 331 (4th Cir. 2003) : The Court affirmed the denial of a motion to quash a subpoena that had been issued to the attorney representing a subject of a grand jury investigation. It held that the questions of whether the subject had consulted with the attorney regarding the filing of an immigration form and whether the attorney had advised a negative answer to a question on the form were protected by the attorney-client privilege, but that the client had waived the privilege by telling investigating FBI agents that he had answered "no" to the question under the advice of the attorney. That statement disclosed the substance of the attorney's advice and did not

merely reveal that the subject acted in a particular way relying on the legal advice of an attorney. In *United States v. Bollin, 264 F.3d 391 (4th Cir. 2001)* , the Court affirmed convictions arising from an investment fraud scheme and the subsequent coverup. Rejecting one defendant's contention that it was error to permit his former attorney to testify for the government, the Court observed that the defendant "waived any privilege that may have attached when he testified to the grand jury regarding the same transactions and communications about which [the attorney] testified."

Industrial Clearinghouse, Inc. v. Browning Mfg. Div., 953 F.2d 1004 (5th Cir. 1992) : The Court reversed an order compelling former counsel for the plaintiff to produce certain documents concerning the representation, holding that the privilege was not waived when the plaintiff had brought a legal malpractice action against the attorneys. Although the petition in that action revealed some things that the attorneys told the plaintiff, it revealed no communication from the client either directly or by reference to the attorneys' statements.

United States v. O'Malley, 786 F.2d 786 (7th Cir. 1986) : Affirming a conviction for extortion, the Court found no error in the disqualification of a lawyer who had previously represented one of the two key government witnesses. The Court observed that the witness had not waived the privilege with respect to the former representation, since disclosure of the facts discussed with the lawyer did not waive the privilege where he did not disclose the actual communications made to the lawyer.

United States v. Spector, 793 F.2d 932 (8th Cir. 1986) : Affirming a cocaine conviction, the Court held that tapes made by an informant-witness concerning his daily activities on behalf of the government were protected by the privilege. The tapes had been made to assist the informant's lawyer in representing him and they were not given to the government. A dissenting Judge argued that the witness had waived the privilege by telling the government of the tapes' existence.

[C] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Court Order To Disclose

In re Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) : In ruling on a corporation's motion to terminate derivative claims, the District Judge ordered disclosure (with privilege claims expressly reserved) to the Judge and opposing counsel of the report made by the corporation's Special Litigation Committee, which had recommended termination. When news reporters were later granted access to the report, the Court affirmed, although it stated that it "need not go so far as to hold that the [attorney-client and work product] privileges are waived," since the corporation might have thought that the District Judge's order protected its privilege claims even after the report was admitted as evidence in connection with the motion.

[D] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Disclosure by Agent or Attorney

In re Richard Roe, Inc., 168 F.3d 69 (2d Cir. 1999) : The Court reversed an order granted after remand n70 that required disclosure of documents from a major civil action to a grand jury investigating two corporations. The Court found that a document written by a former attorney for a corporation, which reflected knowledge obtained in a relationship with the corporation, was privileged. Although the attorney no longer worked for the company when preparing the document, the information contained therein belonged to the client, not to the former attorney, and the former attorney had no authority to waive the client's privilege. In *Schnell v. Schnall, 550 F. Supp. 650 (S.D.N.Y. 1982)* , a securities action, the District Court reversed a Magistrate's order that a defendant produce an unredacted transcript of its attorney's testimony before the SEC. The Court held that there was no waiver when the attorney testified, since the client was not present at the SEC proceedings and there was no showing that the client had authorized disclosure.

United States v. Titchell, 261 F.3d 348 (3d Cir. 2001) : Affirming mail fraud convictions arising from a scheme to bill for fictitious renewals of Yellow Pages advertising, the Court held that the government was properly permitted to call the defendant's former attorney to testify about statements that the defendant had made to him, because the former attorney had testified for the defendant on the subject at a worker's compensation hearing. The Court reasoned that by

calling the former attorney as a witness, the defendant waived the privilege "at least regarding the subject of the testimony adduced in the prior proceeding."

Velsicol Chem. Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) : The Court held that testimony by a corporation's senior house counsel (himself also a target) before a grand jury waived the corporation's privilege, even though outside counsel had informed the government that the corporation claimed the privilege as to any conversations between itself and its outside counsel.

Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) : In a civil rights action for wrongful arrest, the Court held that the city waived its claim of privilege when the mayor testified about privileged communications.

United States v. Bump, 605 F.2d 548 (10th Cir. 1979) : A defendant who failed to establish that disclosures his lawyer made to the prosecutor during discovery were made without his consent was not permitted to complain that the prosecutor's use of the disclosures during cross-examination violated the privilege.

GFI, Inc. v. Franklin Corp., 265 F.3d 1268 (Fed. Cir. 2001) : Applying the law of the Fifth Circuit on the issue of attorney-client privilege, the Court affirmed a judgment that a patent was not enforceable due to inequitable conduct. It held that the patentee waived the attorney-client privilege for purposes of his patent infringement suit when his patent attorney testified in an earlier trial regarding the patentee's state of mind, knowledge of prior art, and communications with the patentee (including conversations about the duty of disclosure and nondisclosure of prior art).

[E] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Disclosure to Auditors, etc.

In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) : The Court held that a corporation had waived the privilege as to a report by counsel investigating its business practices when it showed the report to an outside accounting firm in connection with its annual audit. Rejecting a "pick and choose" theory of waiver, the Court said that once a decision to disclose privileged information is made "no matter what the economic imperatives, the privilege is lost, not because of voluntariness or involuntariness, but because the need for confidentiality served by the privilege is inconsistent with such disclosure."

United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) : The Court enforced an IRS subpoena for workpapers that analyzed potential tax liabilities or tax problems, finding that disclosure of the tax pool analysis to independent auditors destroyed the confidentiality of the papers and removed them from the protection of the privilege.

Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) : The defendant in a Williams Act case asserted that it had, on the advice of its lawyers, acquired the plaintiff's stock for investment purposes only. In seeking discovery of documents supporting the defendant's position, the plaintiff asserted that any privilege had been lost because, *inter alia*, documents discussing the question had been disclosed to an outside auditor. Deciding that discovery should have been compelled, the Court held that disclosure to the auditor constituted waiver only as to communications about the matter actually disclosed and not every document touching on the general question.

Enforce Admin. Subpoenas of SEC v. Coopers & Lybrand, 98 F.R.D. 414 (S.D. Fla. 1982) : The Court held that disclosure of privileged communications to an accounting firm effected a waiver.

[F] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Failure to Assert Privilege

In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C. Cir. 1979) : The Court held the privilege had been waived for documents that a corporation's original counsel produced without claiming the privilege, and for documents marked with a *P* that the counsel said at the time were not privileged, although a year later it said they had been produced inadvertently.

United States v. Fisher, 692 F. Supp. 488 (E.D. Pa. 1988) : The Court found that any privilege that might have existed with respect to conversations between union officers and lawyers for their prepaid legal services plan was waived by the officers when they did not object to the introduction of tapes at their own trial.

Edens v. Goodyear Tire & Rubber Co., 858 F.2d 198 (4th Cir. 1988) : The Court held that a litigant waived the privilege by producing a memorandum during discovery.

Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) : In a Fair Labor Standards Act case, the defendant asserted a statutory good faith defense that its pay policy conformed to applicable administrative practices and enforcement policies. During depositions of the defendant's executives, they were unable to articulate the basis for the company's good faith belief without stating their reliance on counsel or taking a break to consult with counsel. As a result, the Magistrate Judge granted the plaintiffs' request to depose defense counsel. Affirming the order, the Court found it unnecessary to decide whether mere assertion of a good faith defense or generic references to communications with counsel would operate to waive the privilege. Rather, the defendant had waived the privilege when it failed to object to each question that was designed, by touching on the directions given to counsel and the legal material reviewed in addressing the question presented, to elicit information about the substance of an communication.

United States v. Dakota, 197 F.3d 821 (6th Cir. 1999) : Affirming a defendant's convictions arising out of paying kickbacks to an agent of an Indian tribal organization, the Court held that an Indian tribe's implicit consent to inspection of its documents obtained through subpoenas directed at tribal offices, which were occupied by a group that included people who were not tribal officers, waived the privilege as to the documents.

United States v. de la Jara, 973 F.2d 746 (9th Cir. 1992) : The Court held in a money laundering prosecution that an error in ruling a letter from the defendant to his attorney came within the crime-fraud exception had been waived because the defendant made no effort to recover the letter or protect its confidentiality during the six months between the government's seizure of it and its introduction into evidence. In *United States v. Plache, 913 F.2d 1375 (9th Cir. 1990)* , the Court affirmed a securities fraud conviction, holding that the defendant had waived the privilege for advice received from an attorney by testifying about the advice before the grand jury.

[G] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Government Investigations

In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) : The Court rejected a claim of corporate privilege, holding that where a corporation submitted its investigative counsel's report to the SEC and otherwise complied with a voluntary disclosure program, it had waived any privilege claim with respect to the documents necessary for the SEC to evaluate the report, and that the waiver extended to a subsequent grand jury investigation. The Court relied and expanded upon *In re Sealed Case* in *In re Subpoenas Duces Tecum*, n71 which involved suits alleging manipulation of the sale of a company's stock. The Court held that voluntary disclosure to the SEC of the results of an investigation conducted by outside counsel was a waiver of privilege and work product claims as to material revealed. It stated that if voluntary disclosure programs are deemed important enough to be exempt from waiver principles, Congress or the SEC ought to so indicate.

In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16 (1st Cir. 2003) : When XYZ Corp., a distributor of a medical device, learned that the device did not always function properly, it decided to withdraw the device from the market, but it first consulted its co-venturer, as their agreement required. In a telephone conference between the two companies that included their respective officers, XYZ's counsel argued for its position over the other side's strong counter-arguments. In a subsequent grand jury investigation of the incident, XYZ claimed attorney-client privilege regarding certain documents, but the government argued that the privilege had been waived by disclosures in discussions between XYZ and the government over the course of two years before the motion was made to compel production of the disputed documents. Reversing an order to compel production, the Court noted the circumstances of

the case: XYZ repeatedly and consistently repeated its reservation of privilege, and the government did not raise the slightest question when these reservations were stated but rather kept the dialogue going and invited additional disclosures. Under these circumstances, the Court held that XYZ reasonably interpreted the government's silence as an acceptance of the reservations, which it would be unfair to allow the government to contradict at this late date. The Court noted that, besides being equitable, this conclusion comported with sound policy, since it would encourage arm's-length negotiations between the government and private parties in advance of an indictment, which would aid the truth-seeking process. In *United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997)* , which involved an investigation regarding MIT's tax exempt status, the IRS issued a summons for billing statements of law firms that had represented MIT and for minutes of MIT governing boards. MIT redacted the documents to avoid turning over materials it claimed were covered by the privilege. Affirming an order enforcing the subpoena for the documents without redaction, the Court held that the privilege had been waived when MIT gave the unredacted documents to the Defense Department audit agency pursuant to contracts with Department entities. In *United States v. Billmyer*, n72 a former employee of American Honda Motor Company, charged in an alleged commercial bribery scheme involving Honda dealers, served a subpoena duces tecum on Honda for a file containing an investigative report by Honda's outside counsel concerning internal corporate misconduct. Because the report contained factual information that Honda had turned over to the prosecution, the Court upheld a ruling that Honda had waived the privilege with respect to the factual information.

In re Grand Jury Subpoenas, 561 F. Supp. 1247 (E.D.N.Y. 1982) : The Court found a waiver where a corporation, without any attempt to reserve a privilege, disclosed to the House of Representatives Ethics Committee privileged documents concerning a pension agreement with a Congressman who was a former Chairman of the Board.

Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991) : The Court held that after a corporation had confidentially disclosed to the SEC and the Justice Department documents generated in an internal investigation by its outside counsel into bribery of foreign officials, it could not claim the privilege when discovery of the documents was sought in an action by the foreign government. According to the Court, allowing selective waiver does not serve the purpose of encouraging full disclosure to the attorney in order to obtain informed legal assistance; it only encourages voluntary disclosure to government agencies, thus extending the privilege beyond its intended purpose. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[5][k][iii]*.

In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) : Reviewing an attempt by a mail fraud defendant to discover certain documents held by his employer, the Court rejected a selective waiver argument, holding that prior disclosures to the government of quotations from the documents in an effort to resolve a criminal investigation resulted in a waiver of the disclosed information and the details underlying the information that was disclosed.

In re Grand Jury Proceedings, Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) : The Court held that the owner and president of a laboratory waived the privilege when they told two government investigators that they had given a detailed description of a marketing plan to a Medicare attorney who advised them that there was "no problem" with it. Although the laboratory argued that it had not disclosed the substance of the attorney's advice, the Court concluded that the owner and president did discuss the substance of the attorney's advice and waived the privilege by revealing privileged communications to third parties. However, the Court reversed a ruling that the laboratory necessarily waived the privilege with respect to legal advice on parts of the marketing plan that were not disclosed to the investigators. On remand, the Trial Judge would have to decide whether the remaining points in the marketing plan constituted the same subject matter.

[H] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Inaccurate Disclosure

United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997) : The Court held in a fraud prosecution that the defendant's extrajudicial disclosure of his attorney's advice, albeit in such a way as to distort the advice by 180 degrees, operated as a waiver of any privilege otherwise applicable to the letters disclosed (and distorted). Citing *United States v.*

Mendelsohn, 896 F.2d 1183, 1188-89 (9th Cir. 1990) , the Court stated: "An inaccurate statement of a privileged communication waives the privilege with respect to that communication."

[I] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Inadvertent Disclosure

In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) : The Court held that a company's disclosure of one of six documents subject to a claim of privilege to a government auditor constituted a waiver, even if the disclosure was inadvertent. The Court concluded that the waiver applied to all communications relating to the same subject matter and remanded the case for a further assessment of how to define the subject matter of the disclosed document.

Texaco P.R., Inc. v. Department of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995) : Affirming denial of the Department's petition for restitution of profits accrued during pendency of an injunction against enforcement of a Department regulation, the Court held there was no abuse of discretion in a ruling that the Department had waived the privilege for 18 documents by inadvertently turning over four other privileged documents when complying with an order to permit Texaco counsel to review the administrative file.

Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76 (S.D.N.Y. 1986) : The Magistrate stated that "[t]he inadvertent disclosure of one isolated document among many produced does not automatically effect a waiver." In *Eigenheim Bank v. Halpern*, n73 the District Court denied a motion by the defendants to compel the plaintiff to return a document. The defendants had inadvertently disclosed the document in a previous suit and later claimed privilege with respect to it, and the plaintiffs had specifically asked for this document, so the Court denied the privilege claim because the defendants had been lax and careless.

Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46 (M.D.N.C. 1987) : The Magistrate indicated that limited inadvertent disclosure would not necessarily result in waiver, and that inadvertent disclosure of documents did not require disclosure of other documents relating to the same subject matter where the disclosing party was not seeking to obtain unfair advantage from the disclosure. But see *Thomas v. Pansy Ellen Prods., Inc.* n74(holding that inadvertent disclosure of documents waived the privilege). See also *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.* n75(no unusual circumstances warranted holding that a party had not waived its privilege for inadvertently disclosed documents).

Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993) : The Trial Judge had ordered the plaintiffs in a Fair Labor Standards Act suit to return privileged communications that the City inadvertently produced during discovery. Affirming a judgment for the City, the Court found no clear error in the order, considering the reasonableness of precautions taken to avoid disclosure, the short time taken to remedy the error, the scope of the discovery sought, the extent of disclosure, and the overriding issue of fairness.

Rainer v. Union Carbide Corp., 402 F.3d 608 (6th Cir. 2005) : The Court found that a mistaken disclosure did not constitute a waiver because a stipulated protective order signed by all the parties "was clear in stating that a producing party waived no rights in the event a privileged document was accidentally produced."

Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1997-2 Trade Cas. (CCH) P71962 (7th Cir. 1997) : The Court wrote:

> What selective and inadvertent (also partial) disclosure have in common, however, is that neither is waiver in the standard sense in which the word is used in the law: the deliberate relinquishment of a right ... . When "waiver" is found in either type of case, the inadvertent or the selective, it is in order to punish the person claiming the privilege for a mistake, rather than to prevent him from changing his mind and retracting a benefit that he had consciously granted to the person from whom he wants to retract it ... . But failing to be careful -- committing a mistake that while careless may also be harmless -- is not by

> itself a compelling reason for stripping a person of his privilege; and when we consider the reasons that the courts give for imposing such a harsh sanction for mistake or incaution, we find that they are inapplicable to a case such as this ... . [T]he severity of punishment for a mistake should be proportioned to the gravity of the mistake.

United States v. Zolin, 809 F.2d 1411 (1987) , modified en banc, 842 F.2d 1135 (9th Cir. 1988) , vacated on other grounds, 491 U.S. 554 (1989) : In a tax investigation, the Court affirmed an order to a State Court clerk to produce some, but not all, sealed documents sought by the IRS that had been filed in a State Court action. The Court found that there was no waiver resulting from the erroneous delivery of tapes of a privileged meeting to a third party.

Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409 (Fed. Cir. 1997) : This proceeding before the Commission arose from Genentech's complaint that certain foreign companies were importing human growth hormone produced by processes that infringed its patents. At the same time, Genentech was involved in a multi-district consolidated patent infringement suit in District Court that related to the same patents. During the course of the latter litigation, Genentech erroneously produced 12,000 pages of documents it considered privileged. The District Court held that the privilege was waived as to the documents, although not as to their subject matter. n76 Because the documents were not produced in the Commission proceeding until the Administrative Law Judge learned of the District Court's ruling, the ALJ dismissed Genentech's complaint. The Court reversed the dismissal sanction, but held that because the disclosure was the result of inadequate screening procedures, the privilege for the documents had been lost for all purposes and in all forums, not just in the District Court suit.

[J] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Intent To Waive

United States v. Moscony, 927 F.2d 742 (3d Cir. 1991) : During the grand jury investigation of a RICO fraud case, the defendant and several of his employees were all represented by a single lawyer. The employees made communications to the attorney, which he incorporated into affidavits and had them sign in the presence of the defendant, who notarized them. Affirming suppression of the affidavits, the Court held that the ultimate key to confidentiality is intent. There was ample support for the findings that the employees were unsophisticated lay persons who were not advised by counsel or anyone else that the information divulged would not be confidential, and that they did not intend to waive confidentiality by signing the affidavits.

United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) : The Court affirmed convictions for interstate gambling offenses, holding that the defendant waived his privilege by telling an undercover detective that his attorney had said selling a computer program for gambling was legal, even though the defendant did not intend to waive and he misstated what the attorney told him. In *Weil v. Investment/Indicators, Research & Mgt., Inc.*, n77 the plaintiff in a securities action alleged that the defendant fund intended to defraud purchasers of its stock. During a deposition one of the fund's officers referred to legal advice received by the fund, and subsequently the fund disclosed a privileged communication from its attorney. The Court found a waiver by disclosure, whether or not waiver was intended, but reasoned that since the disclosures were early in the proceedings and made to opposing counsel rather than to the Court, waiver should be limited to the communications about the matter actually disclosed.

Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328 (N.D. Ga. 1980) : The Court observed that a party who discloses privileged information may lose the benefits of the privilege even though there may be no intent to waive the privilege, but found that the slight disclosure made in this case did not amount to a waiver.

[K] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Miscellaneous Cases

In re von Bulow, 828 F.2d 94 (2d Cir. 1987) , modifying 114 F.R.D. 71 (S.D.N.Y. 1987) : In a suit on behalf of a wife whose husband had been acquitted of attempting to murder her, the District Judge held that the husband waived his privilege with respect to the subject matter and conversations published in a book written by one of the attorneys who

represented him in the criminal prosecution. Although the husband refused to read the manuscript prior to publication, he actively encouraged the attorney to publish the book, which took the reader "inside" the criminal trial. The Court granted a writ of mandamus modifying the waiver decision. It distinguished between waivers in proceedings when a litigant seeks to disclose some, but not all, of privileged matter, and waivers outside of proceedings. Fairness requires that parties in litigation not be permitted to waive selectively; however, an extrajudicial disclosure does not involve this potential unfairness, so waiver in such cases extends only to the portions of confidential communications that are actually disclosed.

Hawkins v. Stables, 148 F.3d 379 (4th Cir. 1998) : In the plaintiff's suit against his former spouse for illegally wiretapping his phone while they were going through their divorce, the plaintiff called the defendant's divorce attorney as a witness, and asked the attorney whether he had ever told the defendant to take the wiretap off the phone. The Trial Judge sustained a claim of privilege, but the Court held this reversible error. The defendant's deposition testimony that she had never spoken to her attorney about any wiretap constituted a waiver of any privilege concerning the wiretap. Moreover, based on her own testimony, the defendant could not meet her burden of proving that there was any confidential communication to protect. In *United States v. Jones*, n78 the Court affirmed denial of a motion to quash grand jury subpoenas issued to attorneys, expressing doubts as to whether the privilege attached when legal opinions were sought for inclusion in a lease promotion brochure. Even if it did attach, the privilege was waived when the clients publicized portions of the legal opinions in the brochures and invited others to rely on them.

United States v. Newell, 315 F.3d 510 (5th Cir. 2002) : In a prosecution for money-laundering, the government introduced a letter from the defendant's in-house accountant to the accountant's attorney that recounted statements the defendant had made to the defendant's senior employees regarding communications between the defendant and the defendant's attorney. The Trial Judge rejected a privilege objection on the ground that the defendant had waived the attorney-client privilege by putting her good faith in issue. The Court noted that the privilege is not waived by a good faith defense in cases like this, where the defense is not based on advice of counsel but rather on a simple lack of knowledge of the wrongdoing and absence of intent to participate in it. However, the Court found that the defendant had waived the privilege by disclosing the communications to the employees. In a Fair Labor Standards Act case, *Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999)* , the defendant asserted a statutory good faith defense that its pay policy conformed to applicable administrative practices and enforcement policies. During depositions of the defendant's executives, they were unable to articulate the basis for the company's good faith belief without stating their reliance on counsel or taking a break to consult with counsel. As a result, the Magistrate Judge granted the plaintiffs' request to depose defense counsel. Affirming the order, the Court found it unnecessary to decide whether mere assertion of a good faith defense or generic references to communications with counsel would operate to waive the privilege. Rather, the defendant had waived the privilege when the executives testified about the directions they provided their attorneys and the legal research undertaken by their attorneys, since disclosure of any significant portion of the communication waives the privilege as a whole.

In re Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 468 (S.D. Ohio 1984) : The Court declined to find a waiver of the privilege when a newspaper published portions of a diary prepared by a corporate employee at the direction of a superior during an investigation. Neither counsel nor client had given the diary to the paper, and efforts had been made to restrict access to it.

Burden-Meeks v. Welch, 319 F.3d 897 (7th Cir. 2003) : Former city employees brought a civil rights action against the city and the mayor, and sought a report prepared by lawyers of an intergovernmental agency. The agency was created by municipalities to pool liability risks; it was not a party to the action. The report related to an investigation of whether the defendant city was doing enough to curtail litigation exposure. The Court affirmed a ruling that the agency waived any claim of attorney-client privilege by showing a copy of the report to the defendant mayor.

United States v. Willis, 565 F. Supp. 1186 (S.D. Iowa 1983) : The Court held that disclosure of information on a tax return effects a waiver as to the details that underlie the information actually reported, including "(1) the amount,

character and source of the components represented by the reported figure, and (2) the mathematical computations employed to derive the reported figures and such figures' components." The Court concluded that preliminary drafts of legal instruments and even preliminary drafts of tax forms and schedules involved more than "mere underlying detail," so the privilege had not been waived as to them.

Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 460-61 n.4 (N.D. Cal. 1978) : The District Court said that to avoid a waiver of the privilege during a deposition, "[t]he attorney should ... halt the deposition and apply for a protective order."

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) , *modified on other grounds*, *30 F.3d 1347 (11th Cir. 1994)* : In an action by union members against the union and an employer, the Court held that the union did not waive its privilege merely because it permitted its counsel to testify in an earlier criminal trial and to file affidavits in certain other lawsuits. In *United States v. Suarez*, n79 the Court affirmed a firearms conviction, holding that once the defendant waived the privilege in order for his attorney to testify at a hearing on a motion to withdraw a guilty plea, the privilege could not be reinvoked at trial to bar the attorney from testifying to the same subject matter to which he previously testified. It declined to consider the defendant's claim that he should not have been compelled to choose between exercising his right to withdraw a guilty plea and his privilege, since the claim had not been raised in the District Court.

In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370 (Fed. Cir. 2001) : Monsanto sued Pioneer, its licensee of certain plant patents, alleging that the licenses did not survive the merger of Pioneer into a wholly-owned subsidiary of duPont. Monsanto sought in discovery to depose Pioneer's in-house counsel and obtain documents concerning information provided regarding the tax and intellectual property implications of the merger. The Trial Judge granted the request, on the ground that the privilege never applied because the information was intended to be disclosed in a proxy statement. Vacating most of the discovery order, the Court stated that "[a] party does not forego the privilege with respect to merger negotiations by disclosing the existence of the merger, the negotiations between the parties concerning the merger, or the property rights of the respective parties, and a waiver occurs only when a party relies on or discloses advice of counsel or other privileged information in connection with the merger." In this case such reliance and disclosure occurred only in the limited area of tax advice, where the proxy stated that the discussion of federal income tax consequences was the opinion of special counsel.

[iii] Attorney-Client -- Waiver -- Raising a Claim or Defense

[A] Civil Cases

Byers v. Burleson, 100 F.R.D. 436 (D.D.C. 1983) : In a legal malpractice action, the Court ruled that where the plaintiff claimed that she did not and could not reasonably have discovered the malpractice prior to a certain time she had waived the privilege with respect to a statute of limitations issue that she "has interjected into the case."

In re Bairnco Corp. Sec. Litig., 148 F.R.D. 91 (S.D.N.Y. 1993) : In an action by purchasers of common stock against a corporation, its subsidiary, and the chief executive officer, the Trial Judge reasoned that, although the company disclaimed any intention to raise a defense of advice of counsel, the public disclosures the plaintiffs relied upon specifically referred to the belief of both management and counsel. Moreover, the company had relied on conclusions of counsel in its motion papers to defeat a fraud exception to the privilege. Ruling on discovery motions related to a cross-claim for bad-faith adoption of an insurance premium structure in *Vicinanzo v. Brunschwig & Fils, Inc.*, n80 the District Court held that references by the insurer to advice of counsel in adopting the structure did not waive the privilege, but that, unless the insurer made full and immediate disclosure of all legal opinions pertaining to the decision, it would be precluded at trial from asserting an advice-of-counsel defense. In a suit to recover on fidelity bonds, *Leucadia, Inc. v. Reliance Ins. Co.*, n81 Leucadia moved for a protective order to prevent documents generated in its investigation of losses and fraud involving a former employee. Although the Court ruled that disclosure of information

by the former employee to the insurer was not a waiver, it found that the plaintiff's claim of loss was based in large part on the results of an investigation and that it was necessary for the report containing those results to be shared with the insurer.

United States Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201 (3d Cir. 1999) : The Court reversed a ruling in an interpleader action that the plaintiffs had waived their attorney-based privileges by arguing that their delay in filing the interpleader was justified. The plaintiffs had not asserted any claim or taken any affirmative step that placed the advice of counsel at issue; rather their argument was based on the record and a claim that the delay was objectively justified. In *Livingstone v. North Belle Vernon Borough, 91 F.3d 515 (3d Cir. 1996)* , a suit by a husband and wife against police officers and a municipality, the Court held that, under *Town of Newton v. Rumery*, n82 a party challenging a release agreement waives any claim of privilege with respect to communications between the party and the lawyer who negotiated the agreement. In *Glenemede Trust Co. v. Thompson*, n83 the Trust Company asserted as a defense in a suit arising from its role in a stock repurchase transaction that it was relying on counsel's advice that the Internal Revenue Code prohibited it from taking certain actions. Denying mandamus against orders directing the Trust Company's law firm to produce all files relating to the repurchase transaction, the Court held that the privilege was waived not only as to the cited opinion letter and communications pertaining to the letter, but also as to all communications regarding the transaction that was the subject of the letter, since fairness requires that the opponent be able to test whether counsel had been provided with all material facts, whether counsel gave a well-informed opinion, and whether the advice was heeded by the client. In *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, n84 a declaratory judgment action to determine coverage for AIDS-related claims arising from the insured's blood products, the insurers sought documents in which the insureds, their attorneys, and their accountants evaluated the insureds' potential liability before purchasing the coverage. The District Court affirmed the Magistrate Judge's order that the documents be disclosed, on the ground that any privilege had been waived by filing the action and putting in issue the insureds' knowledge of facts relating to the claims. On petition for mandamus, the Court vacated the order, holding that a party does not lose the privilege any time the client's state of mind is put in issue or the attorney's advice may be relevant to the matters in issue, but only when the client has taken the affirmative step of placing the advice of the attorney in issue.

Ross v. City of Memphis, 423 F.3d 596 (6th Cir. 2005) : The plaintiff, a black police officer, was one of 52 officers who were engaged in a long-running Title VII lawsuit against the City regarding a compromised promotion exam. As a result of disciplinary proceedings related to compromise of the exam, she was demoted in rank but subsequently restored to her previous position. She brought a civil rights action against the City and its former police director (as an individual) for her demotion. In discovery the director claimed that he went forward with the plaintiff's disciplinary proceeding upon the advice of counsel for the City, but the City objected that the communications were privileged. On interlocutory review of an order ordering the director to disclose the communications, the Court reversed. It held that municipalities may claim the attorney-client privilege for confidential legal communications between their attorneys and their employees, at least in civil actions, and that the City's interest was not to be balanced against the adversary's need for the information in pursuing her claim against the individual former employee, so his advice of counsel defense did not waive the City's privilege.

Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095 (7th Cir. 1987) : The Court reversed a judgment for insureds suing for bad faith failure to honor a claim, holding that the Magistrate erroneously admitted communications between the insurer and its former attorney. The insurer did not waive the privilege merely by denying the plaintiff's allegations, nor by listing the former attorney as a witness and permitting him to answer deposition questions without revealing confidential communications.

Sedco Int'l, S.A. v. Cory, 683 F.2d 1201 (8th Cir. 1982) : In a dispute growing out of an oil producing venture, the Court upheld a ruling that the company was not entitled to inquire into certain confidential communications between an opposing party, who alleged fraud by the company, and his counsel. Although the privilege may be waived by implication, the Court found that nothing that the party's attorney told him would have been relevant to assessing his reliance on information he had, so the fraud claim did not by implication open the door to an inquiry into confidential

communications.

Columbia Pictures TV, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186 (9th Cir. 2001) : The defendant in an action for copyright infringement, which arose from broadcasting four TV series after the license had been revoked, argued that the advice of counsel made the infringement non-willful. The Court held there was no abuse of discretion in precluding the defense because the defendant had refused to make himself available for deposition on the issue. Since the attorney-client privilege is waived by assertion of an advice of counsel defense, the defendant must either submit to examination on that advise or forgo the defense. In *Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir. 1995)* , the plaintiff insurer settled an action against it for bad faith refusal to settle a personal injury/wrongful death claim and then sued the law firm it had retained to represent the insureds in the underlying action for malpractice and contribution on the ground that the firm had negligently failed to convey the insurer's offer to the plaintiffs in the underlying action. The Court held that the plaintiffs in the underlying action did not waive the privilege by bringing the bad-faith claim, as their state of mind in making a settlement request was not relevant in light of the request they made. The Court also held that the insurer did not waive its privilege with respect to settlement of the bad-faith action by attempting to prove the reasonableness of the settlement amount, as the settlement amount was defended at trial on objective terms without relying on privileged communications. In a Williams Act case, *Chevron Corp. v. Pennzoil Co.*, n85 the defendant asserted that it had, on the advice of its lawyers, acquired the plaintiff's stock for investment purposes only. The Court held that the defendant had waived its privilege by relying on the advice of counsel as support for its position on the merits.

Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994) , *modified on other grounds*, *30 F.3d 1347 (11th Cir. 1994)* : In an action by union members against the union and an employer, the Court held that, even though the union could have denied any criminal intent in changing its pension fund policy without specifically claiming that it believed that its change was lawful, it "injected the issue of its knowledge of the law into the case and thereby waived the privilege."

Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985) : Reversing a waiver ruling below, the Court held that the government had not waived its privilege by asserting it had been damaged by a preliminary injunction, subsequently dissolved, that Zenith had secured.

[B] Attorney-Client -- Waiver -- Raising a Claim or Defense -- Criminal Cases

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) : The defendant in a securities fraud prosecution, who argued that he did not intend to violate the securities laws and believed his conduct was lawful, moved *in limine* for a ruling that would permit him to testify regarding his belief in the lawfulness of certain conduct without being subject to cross-examination on confidential communications he had with his attorney on this subject. The Court held there was no error in the ruling that, if the defendant so testified, he would open the door to cross-examination with respect to the basis for his belief, including inquiry into communications with his attorney. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[5][k][iv]*.

United States v. Newell, 315 F.3d 510 (5th Cir. 2002) : In a prosecution for money-laundering, the government introduced a letter from the defendant's in-house accountant to the accountant's attorney that recounted statements the defendant had made to the defendant's senior employees regarding communications between the defendant and the defendant's attorney. The Trial Judge rejected a privilege objection on the ground that the defendant had waived the attorney-client privilege by putting her good faith in issue. The Court noted that the privilege is not waived by a good faith defense in cases like this, where the defense is not based on advice of counsel but rather on a simple lack of knowledge of the wrongdoing and absence of intent to participate in it. However, the Court found that the defendant had waived the privilege by disclosing the communications to the employees. In a bankruptcy fraud case, *United States v. Moody, 923 F.2d 341 (5th Cir. 1991)* , when one defendant's counsel ran out of time in his opening statement, he stated that counsel representing a codefendant (the defendant's employee) would present certain information during his

opening; the latter then indicated the defendant knew nothing about what went into the bankruptcy schedules except what his attorney in the bankruptcy had told him. The Court held there was no error when the bankruptcy attorney testified that the defendant had not objected to her listing certain items as assets, since the opening statement and subsequent examination indicated the privilege was being used improperly as a sword. In *United States v. Miller*, n86 the Court held that when a defendant asserts good faith reliance on advice of counsel as a defense, the government is entitled to examine the relevant communications between client and counsel.

United States v. Workman, 138 F.3d 1261 (8th Cir. 1998) : The defendant was charged with endorsing his father's railroad pension checks for six years after his father's death. He claimed that he had endorsed the checks on the advice of his attorney, but when his attorney was called as a witness at trial, the Judge ruled that the attorney could not testify about the content of the advice given the defendant. A mistrial was granted after the attorney gave testimony that included information the Judge considered privileged, and the government made an interlocutory appeal after the Judge denied a motion *in limine* to either bar the defendant from claiming advice of counsel or to permit the attorney to testify to his advice. Reversing, the Court held that the defendant could not selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with his attorney for his own benefit.

United States v. Amlani, 169 F.3d 1189 (9th Cir. 1999) : The defendant claimed that the prosecutor violated his right to counsel by disparaging his attorney in his presence, leading him to dismiss the attorney. In preparation for a hearing on the disparagement claim, the government sought to inquire into communications between the defendant and his attorneys regarding the circumstances of the defendant's dismissal of his counsel. The defendant's motion to quash the subpoena demanding privileged materials was dismissed, and the Court affirmed, finding that the defendant had waived his privilege. By claiming it was the disparaging remarks that caused him to discharge the attorney, the defendant put the communications between them in issue insofar as they related to his reasons for changing counsel.

[C] Attorney-Client -- Waiver -- Raising a Claim or Defense -- Habeas Corpus Cases

In re Lott, 424 F.3d 446 (6th Cir. 2005) : The Court held that a death row inmate seeking habeas corpus relief does not waive the attorney-client privilege by claiming actual innocence. It reasoned "that the contention of a habeas petitioner that he is innocent is not all that different from a criminal defendant's assertion that he is not guilty of a crime."

Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) (en banc): The Court affirmed a ruling that precluded use of privileged attorney-client materials for any purpose other than litigating a state prisoner's habeas corpus claim for ineffective assistance of counsel. Despite the long-established principle that a party waives attorney-client privilege by putting the lawyer's performance in issue, the Court emphasized that "[s]uch waivers by implication differ materially from the more traditional express waivers." The waiver by implication should be no broader than necessary to ensure fair proceedings, so the holder of the privilege may preserve it by abandoning the claim against the lawyer. Moreover, "if a party complies with the court's conditions and turns over privileged materials, it is entitled to rely on the contours of the waiver the court imposes, so that it will not be unfairly surprised in the future by learning that it actually waived more than it bargained for in processing its claims." The Court concluded that, in a habeas corpus proceeding, a narrow waiver rule should apply so that defendants with genuine constitutional claims are not deterred or precluded from bringing them. The majority held that California courts must respect the protective order and cannot claim waiver of the privilege by disclosure during the habeas action. Two concurring Judges were not convinced that the state attorney-client privilege must remain intact after the attorney-client privilege is waived in Federal Courts, and would have left to the states the first determination of whether a waiver occurred.

[iv] Attorney-Client -- Waiver -- Scope of Waiver

In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) : The Court held that a company's inadvertent disclosure of one of six privileged documents constituted a waiver as to all communications relating to the same subject matter.

In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16 (1st Cir. 2003) : When XYZ Corp., a distributor of a medical device, learned that the device did not always function properly, it decided to withdraw the device from the market, but it first consulted its co-venturer, as their agreement required. In a telephone conference between the two companies that included their respective officers, XYZ's counsel argued for its position over the other side's strong counter-arguments. In a subsequent grand jury investigation of the incident, XYZ claimed attorney-client privilege regarding certain documents, but the government argued that the privilege had been waived when XYZ's counsel had given legal advice in the presence of third parties and had disclosed legal advice previously provided to XYZ. In the government's view, this effected a waiver of the privilege as to all communications regarding the marketing and withdrawal of the device. Reversing an order compelling compliance with the subpoena, the Court held that the waiver did not extend beyond privileged information actually revealed during the telephone conference. To the contrary, it held that "the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter." The attorney's participation in an extrajudicial meeting or negotiation "does nothing to cause prejudice to the opposition or to subvert the truth-seeking process" that would require revelation of all related exchanges. Furthermore, requiring broad subject matter waivers would provide perverse incentives, to exclude attorneys from participating out of fear that their inclusion would lead to wholesale disclosure of confidential information.

In re von Bulow, 828 F.2d 94 (2d Cir. 1987) : In a suit on behalf of a wife whose husband was acquitted of attempting to murder her, the District Judge held that the husband waived his privilege with respect to the subject matter and conversations published in a book written by one of the attorneys who represented him in the criminal prosecution. Although the husband refused to read the manuscript prior to publication, he actively encouraged the attorney to publish the book, which took the reader "inside" the criminal trial. The Court granted a writ of mandamus modifying the waiver decision. It distinguished between waivers in proceedings when a litigant seeks to disclose some, but not all, of privileged matter, and waivers outside of proceedings. Fairness requires that parties in litigation not be permitted to waive selectively; however, an extrajudicial disclosure does not involve this potential unfairness, so waiver in such cases extends only to the portions of confidential communications that are actually disclosed.

Smith v. Alyeska Pipeline Serv. Co., 538 F. Supp. 977 (D. Del. 1982) , *aff'd*, *758 F.2d 668 (3d Cir. 1984)* : The Court held that when the plaintiff's former attorney sent the defendants in a patent infringement action a copy of an opinion letter written for the plaintiff, any privilege was lost as to all documents relating to the patent addressed in the letter. In another patent case, *Hercules, Inc. v. Exxon Corp.*, n87 the District Court said that although voluntary waiver by the client as to one or more privileged documents waives the privilege as to all communications between the same attorney and the same client on the same subject, and although even inadvertent disclosure of facts or documents might waive a privilege, the waiver exception is to be narrowly construed and waiver is found "only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter."

Nye v. Sage Products, Inc., 98 F.R.D. 452 (N.D. Ill. 1982) : In a patent infringement action, the Court held that the plaintiffs' disclosure of privileged documents to the defendants waived the privilege as to the subject matter of the documents. The waiver extended to communications not only with the counsel involved in preparing the disclosed documents, but also with other counsel. The Court declined to hold, however, that the waiver extended to communications made after the disclosure. See also *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co.* n88(company waived by voluntarily disclosing selected portions of otherwise privileged communications, so other documents relevant to the subject matter of the disclosed communications were discoverable).

Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) : The defendant in a Williams Act case asserted that it had, on the advice of its lawyers, acquired the plaintiff's stock for investment purposes only. In seeking discovery of documents supporting the defendant's position, the plaintiff asserted that any privilege had been lost, first, because documents discussing the question had been disclosed to an outside auditor and, second, because the defendant had

affirmatively placed at issue the very information for which it was claiming the privilege. Deciding that discovery should have been compelled, the Court held that disclosure to the auditor constituted waiver only as to communications about the matter actually disclosed and not every document touching on the general question, but that the privilege as to all the documents had been waived by relying on the advice of counsel as support for its position on the merits. In *United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990)* , the Court affirmed convictions for interstate gambling offenses, holding that the defendant waived his privilege by telling an undercover detective that his attorney had told him that selling a computer program for gambling was legal, even though the defendant did not intend to waive and he misstated what the attorney told him. The Trial Judge was properly careful to confine the attorney's testimony to the particular matter disclosed to the detective and not to permit inquiry generally about the representation of the client. In a securities action, *Weil v. Investment/Indicators, Research & Mgt., Inc.*, n89 the plaintiff alleged that the defendant fund intended to defraud purchasers of its stock. During a deposition one of the fund's officers referred to legal advice received by the fund, and subsequently the fund disclosed a privileged communication from its attorney. The Court found a waiver by disclosure, whether or not waiver was intended, but reasoned that since the disclosures were early in the proceedings and made to opposing counsel rather than to the Court, waiver should be limited to the communications about the matter actually disclosed.

Fort James Corp. v. Solo Cup Co., 412 F.3d 1340 (Fed. Cir. 2005) : During discovery in patent litigation, the plaintiff produced an opinion of counsel, which it had also produced in previous litigation, and related documents. The defendant sought to compel production of an additional document, an invention disclosure statement. Reversing a ruling that the disclosure statement was privileged, the Court held that the plaintiff had waived the protection, reasoning that "[t]he widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter," and "[t]he waiver extends beyond the document initially produced out of concern for fairness, so that a party is prevented from disclosing communications that support its position while simultaneously concealing communications that do not." In *GFI, Inc. v. Franklin Corp., 265 F.3d 1268 (Fed. Cir. 2001)* , the Court applied the law of the Fifth Circuit on the issue of attorney-client privilege, and affirmed a judgment that a patent was not enforceable due to inequitable conduct. It held that the patentee waived the attorney-client privilege for purposes of his patent infringement suit when his patent attorney testified in an earlier trial regarding the patentee's state of mind, knowledge of prior art, and communications with the patentee (including conversations about the duty of disclosure and nondisclosure of prior art). The Court concluded that "[w]hen a party voluntarily waives attorney-client privilege, that waiver extends to all communications pertaining to the subject matter of the communications."

[v] Attorney-Client -- Waiver -- Stolen Documents

Suburban Sew N'Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981) : The plaintiffs in an antitrust action obtained what otherwise would have been privileged communications between client and attorney by taking documents from the defendant's trash dumpster. Although it noted a trend toward protecting privileged communications divulged without notice to the holder, the Court concluded that the threat to future communications presented by the plaintiffs' conduct was insufficient to justify recognizing a privilege with respect to documents already discovered.

In re Grand Jury Proceedings, 466 F. Supp. 863 (D. Minn. 1979) , aff'd, 629 F.2d 548 (8th Cir. 1980) : The Court indicated that it would entertain a privilege claim as to documents removed from a grand jury target's corporate offices, even if stolen by an ex-employee, and would afford the parties an opportunity to address whether the corporation adequately protected the confidentiality of the documents.

[3] Clergy-Penitent

United States v. Gordon, 493 F. Supp. 822 (N.D.N.Y. 1980) , aff'd, 655 F.2d 478 (2d Cir. 1981) : Ruling *in limine* before the trial of a criminal case, the Trial Judge rejected a defendant's claim of the priest-penitent privilege regarding

conversations relating to business transactions between the defendant and his salaried employee who was on a leave of absence from the priesthood.

In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990) : The Court vacated the denial of a government motion to compel a Lutheran clergyman to testify before a grand jury regarding subjects discussed during a family counseling session. The case was remanded for findings whether a husband, his wife, her adult son by a previous marriage, and the son's fiancee had communicated with the pastor in his spiritual or professional capacity with a reasonable expectation of confidentiality.

United States v. Dube, 820 F.2d 886 (7th Cir. 1987) : The Court affirmed income tax evasion convictions, holding that conversations the defendant had with a pastor were not privileged, since they involved efforts to avoid income taxes rather than religious counseling.

United States v. Webb, 615 F.2d 828 (9th Cir. 1980) : Without deciding whether *Rule 501* recognizes a priest-penitent privilege, the Court said that any privilege could not be claimed when a confession was made in the presence of both a prison chaplain and a security officer.

[4] Government

[a] Deliberative Process

[i] Federal Agencies

[A] Banking Agencies

In re Subpoena Duces Tecum, 145 F.3d 1422 (D.C. Cir. 1998) , *on reh'g*, *156 F.3d 1279 (D.C. Cir. 1998)* : A bankruptcy trustee sued the FDIC to void, as fraudulent conveyances, the FDIC's transfers to an insolvent bank. The FDIC refused to produce documents in response to a subpoena requesting information as to the FDIC's decisionmaking process concerning the transfers to the bank. The Court held that the subpoena was enforceable, declaring that the deliberative process privilege does not apply "when a plaintiff's cause of action turns on the government's intent." The privilege "was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit," while here the agency was itself the defendant in the underlying suit, and the government's intent was critical to the plaintiff's case. In *First Eastern Corp. v. Mainwaring, 21 F.3d 465 (D.C. Cir. 1994)* , the Court reversed an order quashing a subpoena for records related to a bank that was served on an independent management consultant that federal regulators required the bank to retain. The deliberative process privilege was inapplicable because the consultant's client was the bank; even if the consultant were somehow said to be working for the regulators, the government was not asserting the privilege, which belongs to it. In *In re Subpoena Served upon Comptroller of Currency*, n90 shareholders bringing a class action and derivative suit against a bank holding company subpoenaed bank examination reports and examiners' notes and memoranda, which the Trial Judge ordered produced to the extent they had previously been given to the company or were factual portions of the notes and memoranda. The Court affirmed in part, holding that the factual portions were not protected by the deliberative process privilege, but that sharing an examination report with the subject depository institution did not operate as a waiver of the bank examination privilege because providing such information is a fundamental part of the regulatory process.

Resolution Trust Corp. v. Diamond, 773 F. Supp. 597 (S.D.N.Y. 1991) : The Court, ruling on privilege claims by the RTC in an action to repudiate leases, held that certain of the documents were not privileged because they were neither predecisional nor deliberative, either because they involved mere instructions to subordinate officers as to the

implementation of policy or because they contained purely factual information. In *In re Franklin Nat'l Bank Sec. Litig.*, n91 the FDIC, as receiver, sought to compel the Office of the Comptroller of the Currency to produce its periodic examination reports and related documents concerning the failed Bank. In an opinion thoroughly discussing the privilege protecting intragovernmental expressions of opinion, the District Court held that the reports must be disclosed, since most of the information, even in the section labeled confidential, amounted to shorthand descriptions of what the bank examiner observed; however, the summaries and analyses of the reports were protected. The Judge suggested that the factors to be considered in balancing the interests include: the relevance of the evidence sought to be protected; the availability of other evidence; the seriousness of the litigation and the issues involved; the role of the government in the litigation; and the possibility of future intimidation of government employees. It also suggested that an *in camera* examination of the documents generally would be necessary to balance properly.

Franklin Sav. Ass'n v. Ryan, 922 F.2d 209 (4th Cir. 1991) : In an action by a savings association to remove a conservator appointed by the Director of the Office of Thrift Savings, the Court vacated a finding that the Director was in contempt for failing to answer deposition questions, since the questions went to the Director's mental processes and sought information given him by subordinates, information that was clearly inadmissible in the absence of extraordinary circumstances not present in this case.

[B] Government -- Deliberative Process -- Federal Agencies -- Miscellaneous Cases

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) : A unanimous Court held that the Freedom of Information Act exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" covered confidential statements, conclusions, findings, and recommendations in a safety investigation of an aircraft failure in flight. Although the Court recognized an established privilege and did not create a new one, its opinion referred to the legislative history of the FOIA as recognizing "a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations." The Court noted that Congress' failure to enact specific privileges does not represent rejection of any particular privilege.

Hinckley v. United States, 140 F.3d 277 (D.C. Cir. 1998) : An insanity acquittee's motion for conditional release was denied. On appeal, he argued that the District Judge erroneously considered the conclusions of a Hospital Review Board after ruling that the deliberative process privilege shielded a discussion among members of the Hospital Review Board before they ultimately decided to oppose his release. Affirming, the Court held that the Board's discussion was both predecisional and deliberative, and thus qualified for protection under the deliberative process privilege. The appellant could not show a superior need for the evidence, since he had already received all the information that was before the Board, as well as its ultimate decision. During a grand jury investigation of the former Secretary of Agriculture in *In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)* , a subpoena was issued for documents pertaining to the White House Counsel's investigation of the Secretary. The District Judge upheld claims of deliberative process and presidential communications privileges for certain documents after reviewing them *in camera*, but the decision was vacated and remanded for a more detailed review. The Court concluded that the presidential communication privilege is narrower than the privilege for executive deliberative processes. In *Tax Analysts v. IRS*, n92 a non-profit organization sought to compel the IRS to disclose memoranda that were prepared by the Office of Chief Counsel for the IRS in response to requests from field personnel for legal guidance. The Court held that the memoranda were not protected by the deliberative process privilege, since they were neither "predecisional" nor "deliberative." They were statements of the agency's legal position and did not "reflect the 'give-and-take' that characterizes deliberative materials."

Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438 (1st Cir. 1992) : In an action under the Clean Water Act challenging the Corps' grant of a permit to fill wetlands, the Court held that a draft letter from the Corps' district engineer to a local agency was protected from disclosure by the deliberative process privilege, as it contained no factual information and reflected a preliminary position by the Corps that was subsequently rejected.

Tigue v. United States Dep't of Justice, 312 F.3d 70 (2d Cir. 2002) : In an FOIA suit by lawyers who represented clients in grand jury tax investigations and IRS proceedings, the plaintiffs sought a memorandum prepared by an Assistant United States Attorney in New York that was circulated to a task force established by the IRS to gather information and make suggestions on how to reform its Criminal Investigations Department. Affirming summary judgment for the Justice Department, the Court held that the document was a "predecisional document" that was protected by the deliberative process privilege. The circulation to the task force was to assist the IRS in its decisionmaking regarding the future of the Criminal Investigations Department. The fact that the author of the memorandum knew that the task force would issue a published report did not amount to a waiver of the privilege, nor did minor references to the memorandum in the task force's report.

United States v. Farley, 11 F.3d 1385, 1993-2 Trade Cas. (CCH) P70441 (7th Cir. 1993) : In a proceeding arising out of the defendant's alleged violation of the Hart-Scott-Rodino reporting requirements, the Court held that the deliberative process privilege applied to FTC staff memoranda that led to the decision to sue. The fact that one document, the referral memorandum to the Department of Justice, was passed to another agency did not terminate its privileged status.

Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir. 1994) : To support its defense in actions brought against it for the *Exxon Valdez* oil spill, Exxon commenced a discovery proceeding against five federal agencies. The District Court ruled that the federal housekeeping statute, *5 U.S.C. § 301*, authorizes agency heads to prohibit their employees from testifying or producing documents in litigation in which the United States is not a party. Reversing, the Court held the statute does not provide such authority, but the government's concerns about its efficient functioning can be sufficiently balanced under the general rules of discovery and the qualified deliberative process privilege.

United States v. West, 672 F.2d 796 (10th Cir. 1982) : A criminal defendant, moving for a new trial on grounds of prosecutorial harassment, obtained an order requiring the Justice Department's Office of Professional Responsibility to turn over relevant files. Granting mandamus to vacate the order, the Court recognized that claims of governmental privilege involve balancing, but found the files to be irrelevant to the criminal defense and concluded that dealing with claims of attorney misconduct should be confined to the Department's OPR.

Moye, O'Brien, O'Rourke, Hogan & Pickert, v. AMTRAK, 376 F.3d 1270 (11th Cir. 2004) : In an FOIA action, the Court held it was error to conclude that certain materials generated in an audit of Amtrak were not protected by the deliberative process privilege. The Court rejected as too restrictive the view that the privilege protects only those documents reviewed by the final decisionmaker, since it "fail[ed] to account for the significant role during the auditing process which the lower level staff play in Amtrak's ... deliberative process." The Court concluded that "the district court should have considered whether the documents reflected advisory opinions, recommendations, and deliberations comprising part of a process by which Amtrak's OIG auditing policies were formulated." In *Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941 (11th Cir. 1992)* , the Court reversed summary judgment for the plaintiffs on their FOIA request, holding that block level census data developed by the Department in the course of the 1990 census was deliberative process material within Exemption 5 of the Act, and that there had been no waiver of the privilege when the data had been disclosed pursuant to Court order and under threat of a congressional subpoena.

Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985) : In an action by the government to recover interest it had lost because of a delay in implementing a settlement, the Court reversed a ruling that required the government to disclose information concerning meetings where officials decided whether to seek interest. It reasoned that the privilege protecting deliberations among government officials involved "subtle and sensitive questions," and should not be breached simply because the government files suit.

[ii] Government -- Deliberative Process -- Prosecutors

United States v. Fernandez, 231 F.3d 1240 (9th Cir. 2000) : The Trial Judge had precluded the government from seeking the death penalty for defendants charged with committing murders in furtherance of racketeering, as a sanction for failing to turn over its confidential predecisional death penalty evaluation form and memorandum. Reversing, the Court reasoned that the documents are predecisional because they are submitted to a Justice Department Committee before the Attorney General makes the final decision on the death penalty; and they are deliberative because they contain opinions, recommendations, and advice about agency policies. Although the documents contained factual material not directly protected by the deliberative process privilege, the factual material was "so interwoven with the deliberative material that it is not severable."

[iii] Government -- Deliberative Process -- State Agencies and Governments

Walsh v. Chittenden Corp., 799 F. Supp. 405 (D. Vt. 1992) : Denying a motion by the state Department of Banking, Insurance, and Securities to quash a subpoena served by the plaintiffs in a securities fraud case, the Judge held that the deliberative process privilege did not bar discovery because the plaintiffs' interest in disclosure outweighed any claim of confidentiality. Noting that the privilege must be formally asserted and delineated, the Judge expressed doubts about whether the procedural prerequisites for assertion of the privilege were satisfied and about whether bank examination reports could ever be deemed predecisional material. In a civil rights action alleging excessive force by police, *Skibo v. City of New York*, n93 the District Court ruled that a police department's internal affairs procedural manual and effectiveness evaluations, as well as files of a civilian complaint review board containing complaints for the relevant years against officers in the precinct involved in this case, were discoverable. The plaintiffs' allegations of misconduct and of the City's acquiescence gave rise to an obvious need for the evidence and the defendants were unlikely to decline to investigate complaints as a result of disclosure, so the balance favored disclosure. Because the plaintiffs sought too many files created in response to complaints, the Court ordered a random sampling of a designated number of files plus all files containing complaints against the individual officers named in the suit.

Castle v. Jallah, 142 F.R.D. 618 (E.D. Va. 1992) : The Court held in a prisoner's civil rights action that governmental privilege did not bar discovery of factual statements in investigative reports concerning the incident, absent any indication that disclosure of the statements would have a chilling effect on police internal investigation candor or that the plaintiff's case was brought in bad faith. In a civil rights action by a pretrial detainee against police officers, *Spell v. McDaniel*, n94 the District Court held that documents relating to the police department's investigations into the plaintiff's injuries and into other incidents of police misconduct were not immune from discovery. Under the qualified privilege that covered the documents, the plaintiff's need for discovery outweighed any government interest in secrecy. However, the Court indicated that information from confidential informants might justifiably be deleted following an *in camera* examination of the documents. It also concluded that supervisory evaluations would not be protected or edited unless the defendants made "a strong showing that confidentiality is vital to the decision-making process of the municipality."

Bobkoski v. Board of Educ. of Cary Consol. School Dist. 26, 141 F.R.D. 88 (N.D. Ill. 1992) : The Court held in an age discrimination action against a school board that the deliberative process privilege extended to a board meeting at which the plaintiff's performance was not the central issue but which dealt more with case preparation, settlement options, and trial strategy.

Sanchez v. City of Santa Ana, 936 F.2d 1027 (9th Cir. 1990) , *amended,* (9th Cir. 1991): Affirming in part a judgment for the defendants in a civil rights action brought by Hispanic police officers, the Court held that police department personnel files are within the qualified privilege for official information. A protective order limiting discovery in the files to certain statistical information was properly granted.

Sirmans v. City of South Miami, 86 F.R.D. 492 (S.D. Fla. 1980) : In a civil rights action, the Court recognized a qualified governmental privilege to protect the files relating to ongoing criminal investigations.

[b] Government -- Evidentiary Procedures

Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217 (D.C. Cir. 1993) : The plaintiffs in a shareholder class action against a bank subpoenaed bank examination reports and other documents relating to the bank from federal bank regulatory agencies. The District Court, after holding a hearing but without conducting an *in camera* inspection, refused to enforce the subpoenas. The Court reversed for a failure to make findings about the factual (unprivileged) versus evaluative (qualifiedly privileged) nature of the documents sought; it noted that such findings are usually based on an *in camera* inspection of documents selected with the aid of a *Vaughn* index. The Court suggested if the subpoenas were enforced on remand, a protective order would be appropriate.

Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984) : The Court vacated a summary judgment for the defendants in a suit charging them with transferring prison inmates in retaliation for exercising *First Amendment* rights. The Trial Judge had properly considered *in camera* the plaintiffs' request for certain prison files and had not abused his discretion in finding that the files were privileged under the informant's privilege, a law enforcement investigation privilege, and/or a privilege for intra-governmental memoranda containing opinions or recommendations. Once the files were found to be privileged, however, it was error to consider information in them when ruling on the summary judgment motion. The Court suggested that if the defendants wanted to protect sensitive information without abandoning reliance on data also found in the files, the Judge might be able to protect legitimate governmental interests without denying the plaintiffs relevant information by editing or sanitizing the files, or by preparing a summary of the relevant information in the files and distributing it to the parties.

Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980) : In an action seeking review of Energy Department regulations covering oil refiners, the Court noted that an agency head might be able to establish specific guidelines to govern privilege claims so that every document need not be personally inspected, but it was not proper for an agency to allow counsel to make the privilege claim without some form of specific direction from the agency head.

United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979) : The Court upheld *in camera* scrutiny of documents as to which a national security claim was made.

United States v. Amador-Galvan, 9 F.3d 1414 (9th Cir. 1993) : The Court reversed convictions for cocaine possession, remanding the case for, *inter alia*, an *in camera* hearing to determine whether confidential informants in fact had information that would have been relevant and helpful to the defendants. The Trial Judge had denied a request for a hearing on the ground that the defendants did not have any evidence independent of the informants themselves to support the defendants' theory, but the informants might have been able to provide eyewitness testimony or information leading to a firsthand source or circumstantial evidence that would have been helpful to the defense.

United States v. Feeney, 641 F.2d 821 (10th Cir. 1981) : After a criminal defendant sought information about sentencing and his motion for judgment of acquittal, the Deputy Attorney General directed federal officials to answer some questions but to refuse to answer others. The District Judge expressed reservations about the government's request that proceedings with respect to the privilege claim should all be *in camera*. When the government sought mandamus, it offered to provide certain testimony *in camera* with the defendant and his counsel present; in light of this offer, the Court remanded the case.

[c] Government -- Foreign Agencies and Governments

Department of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295 (S.D.N.Y. 1991) : Rejecting claims of executive privilege by the Department, an agency of the British government, the Court held that either the privilege was waived by the agency bringing the action or the balance of interests tipped in favor of disclosure, especially given the strict order of confidentiality in place in the case and the defendants' need to learn the extent of the government's knowledge and reliance when they were charged with fraud.

[d] Government -- Informant's Privilege

[i] Civil Cases

United States Dep't of Justice v. Landano, 508 U.S. 165 (1993) : The Supreme Court held that the government has the burden of establishing an informant's expectation that his identity would be kept secret when making a report to law enforcement officials, if the privilege is to apply. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[7]*.

Mays v. DEA, 234 F.3d 1324 (D.C. Cir. 2000) : After being convicted for distributing cocaine, the defendant brought an action under FOIA to obtain documents from the DEA relating to its criminal investigation of him. DEA claimed Exemption 7(D), which protects against the disclosure of "information furnished by a confidential source," if the source was expressly or impliedly granted confidentiality by law enforcement officials. The government argued that the source reported to law enforcement about the defendant's distribution of cocaine, and the danger involved in making such a report implies that the source would have received an implied grant of confidentiality. The Court agreed that the violence and risk of retaliation that attend this type of crime warrant an implied grant of confidentiality for such a source.

Hoffman v. Reali, 973 F.2d 980 (1st Cir. 1992) : In a § 1983 action against a police officer for an allegedly unlawful arrest, the Court held there was no error in granting summary judgment for the defendant before allowing the plaintiff an opportunity to discover the identity of informants relied on in the defendant's application for an arrest warrant. A party seeking to force the state over its objection to reveal informers' identities and further particulars must establish relevance and a clear need, which the plaintiff failed to do. In *United States v. One 1986 Chevrolet Van, 927 F.2d 39 (1st Cir. 1991)* , the Court affirmed an order for forfeiture of a van used in a drug transaction, holding there was no error in denying the claimant's request for the name of an informant referred to in a search warrant affidavit. The Court noted that the qualified privilege applies in civil forfeiture as well as in criminal cases, but the question is whether the informant's identity is essential to a fair determination of the civil party's claim (which it seldom is) rather than whether it is necessary to the accused's defense, so the privilege is less likely to yield in a civil case.

Halpern v. FBI, 181 F.3d 279 (2d Cir. 1999) : A researcher sought disclosure under FOIA of files concerning the FBI investigations of the meatpacking industry -- including investigations of allegations of Communist activity made during the McCarthy era. The Court found that the government had made a sufficient, particularized showing that the disclosure of these files would expose the identity of informants who had been given an implied guarantee of confidentiality, so the documents were exempt from disclosure. Although it was not reasonable to infer that all FBI criminal investigative sources are confidential, an implied guarantee of confidentiality could be inferred on the basis of "the nature of the crime that was investigated and the source's relation to it." The Court rejected the argument that confidentiality of the source was no longer necessary given the passage of time and the end of the Cold War, since "what counts is whether then, at the time the source communicated with the FBI, the source understood that confidentiality would attach."

Manna v. United States Dep't of Justice, 51 F.3d 1158 (3d Cir. 1995) : A federal prisoner convicted of RICO offenses brought an action under the Freedom of Information Act to obtain records in reference to himself, including records of electronic surveillance. Affirming summary judgment for the DOJ, the Court held, *inter alia*, that some of the records were protected from disclosure under FOIA Exemption 7(D), which authorizes the withholding of records compiled for

law enforcement purposes to the extent necessary to protect a confidential source. DOJ showed that it had given these sources express assurances of confidentiality. The Court stated: "If a district court determines that a source provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality can reasonably be inferred, then *all* information provided by the source is protected." The Court distinguished *United States Dep't of Justice v. Landano, supra* , on the ground that in this case the informants gave information after an express assurance of confidentiality. In *Pickel v. United States*, n95 the Court held it was error to quash IRS summonses for failure to disclose an informant's identity, where the taxpayers did not show how the knowledge of the informant's identity would help establish their claim that the summonses were issued in aid of an FBI embezzlement investigation rather than for a proper tax investigation. The Court observed that if the IRS acted improperly in its investigation, the taxpayers would be protected by suppression of improperly acquired evidence in a criminal proceeding.

OKC Corp. v. Williams, 461 F. Supp. 540 (N.D. Tex. 1978) : The Court applied *Fourth Amendment* principles in a civil case, holding it would recognize an informant's conditional privilege as it would in a criminal case. The informant's testimony was to be filed and sealed and made available only to the Court.

Holman v. Cayce, 873 F.2d 944 (6th Cir. 1989) : In a suit by a burglary suspect who was shot by an officer acting on information provided by a confidential informant, the Court reversed an order holding the officer in contempt for refusing to reveal the informant's identity. A party must bear a considerable burden in establishing a justification for disclosure of an informant's identity where the informant was neither a witness to nor an active participant in the event that gives rise to a cause of action.

Simmons v. Police & Fire Comm'n, 37 F.3d 325 (7th Cir. 1994) : An arrestee, acting pro se in a § 1983 action, obtained a discovery order compelling disclosure to him of the identity of the informant upon whose information the defendant police officers had relied in conducting a strip search for narcotics. The Court dismissed the defendants' appeal of the order for lack of jurisdiction, but expressed great concern that the Magistrate Judge and the District Court had insufficiently considered the informant's safety in making the order. In *Dole v. Local 1942*, n96 the Court reversed dismissal of a suit by the Secretary of Labor against a union, finding that the union failed to establish a substantial need to overcome the Secretary's assertion of the informer's privilege to protect the names of witnesses who gave statements to the Secretary's investigators.

Brock v. Gingerbread House, Inc., 907 F.2d 115 (10th Cir. 1989) : An action for violation of the Fair Labor Standards Act was dismissed because the Secretary of Labor refused during discovery to disclose the identities of two employee informants. The Court reversed, holding there was a qualified privilege for the informants' identities that the defendants had not sufficiently shown a need to override.

[ii] Government -- Informant's Privilege -- Criminal Cases

United States v. Foster, 986 F.2d 541 (D.C. Cir. 1993) : The Court reversed a conviction for distributing crack cocaine because the government's objection to disclosing the location from which the principal witness had seen the transactions had been sustained under the "observation post privilege." Where, as here, the surveillance officer's testimony is crucial to the prosecution and the officer's identification of the defendant is challenged, the defendant's confrontation right to cross-examine the officer prevails over the government's interest in preserving the secrecy of the observation post. The "observation post privilege" was established in *United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981)* , where the Court, drawing an analogy to the informant's privilege, concluded that there should be a qualified privilege to protect police surveillance locations from disclosure in a suppression hearing. The Court noted that a Trial Judge may consider *in camera* information about the location or observations or may direct the government to identify the location of an observation post to the defendant's counsel, who may be subject to a protective order not to disclose the location to his client or anyone else.

United States v. Lewis, 40 F.3d 1325 (1st Cir. 1994) : The Court held there was no abuse of discretion in failing to disclose the identity of, or in failing to give a missing witness instruction regarding, a confidential informant who merely provided information to arresting officers that the defendants possessed drugs and illegal weapons. The informant was not present when the arrests took place and thus was in no position to provide relevant, noncumulative testimony amplifying, contradicting, or clearing up the testimony of any government witness. In *United States v. Cintolo*, n97 the Court affirmed a lawyer's conviction for conspiring to obstruct justice, finding no error in the refusal to permit cross-examination of government witnesses as to the precise location of an electronic surveillance device used to record conversations. The Court recognized a qualified privilege for confidential surveillance information and concluded that the defendant was able to demonstrate through other cross-examination that not every person inside an apartment necessarily was in a position to hear all conversations. In *United States v. Hemmer*, n98 the Court affirmed bank robbery convictions, finding it was proper to sustain a government claim of informer privilege to protect the identity of a person who told authorities that three other people had robbed a bank. Since the informant's statement was hearsay and inadmissible, he had no personal knowledge of the crime for which the defendants were charged, and it was unclear what bank the informant referred to, the Court found no unfairness in the ruling.

United States v. Blevins, 960 F.2d 1252 (4th Cir. 1992) : The Court affirmed drug distribution conspiracy convictions, holding there was no error in refusing to disclose the identity of a government informant, where the defendants had made a strategic decision to forgo any attempt to convince the Trial Judge that disclosure was necessary.

United States v. Sanchez, 988 F.2d 1384 (5th Cir. 1993) : The Court affirmed heroin distribution convictions, holding the defendant was not entitled to discover the identity of an informant who was merely an observer of the transaction, whose identification would inculpate the defendant, and who feared for his and his children's lives if his identity became known to the defendant. In *United States v. Silva*, n99 a drug distribution conviction was reversed because the government had not disclosed the identity of an informant who supposedly had introduced the appellant to an undercover narcotics agent. Given his defense of mistaken identity, "the appellant needed the absent information in order to refute the undercover DEA Agent's testimony. Alternatively, assuming the absent informant would corroborate the Agent's testimony, the informant was essential to enable the appellant to develop his theory that he had been framed." In *United States v. Doe*, n100 the Court held that protection of an informant's identity was not a violation of the defendant's rights, where the Trial Judge's *in camera* interview of the informant indicated neither that he was unable to positively identify the defendant nor that he possessed some other evidence tending to exonerate the defendant.

In re Grand Jury Investigation (Detroit Police Dep't Special Cash Fund), 922 F.2d 1266 (6th Cir. 1991) : A grand jury investigating police department corruption in connection with a secret cash fund subpoenaed a witness to force disclosure of the names of confidential informers to whom he allegedly paid money from the fund. The Court affirmed a finding of contempt made after the witness refused to disclose the names, holding the informer's privilege inapplicable because it would not protect the informer from those who would have cause to resent his conduct, but rather would shield corrupt governmental bodies from scrutiny, thus distorting rather than preserving the interests protected by the privilege.

United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990) : The Court held that the government did not waive its privilege to keep confidential the identity of an informant when it disclosed the informant's identity and the subject of his statements to the defendant's counsel during a sidebar conference and the Trial Judge issued a protective order against disclosure to the defendant.

United States v. Large, 729 F.2d 636 (8th Cir. 1984) : In a drug case, the Court upheld denial of the defendant's motion to compel disclosure of the current address of a confidential informant. Defense counsel knew the identity of the informant and that he had previously cooperated with the government, the defendant had known the informant for three years, and there was reasonable apprehension that disclosure might endanger the informant's family. Thus, the Court found that the defense was in a position to cross-examine the informant and that its need for the address was insufficient to warrant disclosure. In *United States v. Partyka*, n101 the Court held it was error to suppress the identity of an

informant in a drug prosecution. Because the defendant claimed that someone named Faircloth might have framed him, it was vital to disclose to the defense whether Faircloth was the informant.

United States v. Amador-Galvan, 9 F.3d 1414 (9th Cir. 1993) : The Court reversed convictions for cocaine possession, remanding the case for, *inter alia*, an *in camera* hearing to determine whether confidential informants in fact had information that would have been relevant and helpful to the defendants. The Trial Court had denied a request for a hearing on the ground that the defendants did not have any evidence independent of the informants themselves to support the defendants' theory, but the informants might have been able to provide eyewitness testimony or information leading to a firsthand source or circumstantial evidence that would be helpful to the defense.

United States v. Martinez, 979 F.2d 1424 (10th Cir. 1992) : Affirming drug trafficking convictions, the Court held that the defendants, who asserted entrapment defenses, were not entitled to disclosure of an informant's identity, as an *in camera* hearing made it clear that the informant's testimony would not assist the defendants. In *United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991)* , the Court affirmed a conviction for selling crack cocaine, holding there was no violation of confrontation rights when the defendant was not permitted to obtain the identity of a confidential informant, as the informant did not testify at trial nor did (s)he witness the alleged sales. Moreover, the defendant made no showing that direct confrontation with the informant would assist in establishing his duress defense at trial or that his case was prejudiced by the government's refusal to identify the informant.

[e] Government -- Invocation by Head of Department

Landry v. FDIC, 204 F.3d 1125 (D.C. Cir. 2000) : A bank officer petitioned for review of an order of the FDIC removing him from his position and barring him from further participation in bank operations. In support of his petition, he sought information under FOIA, but the Administrative Law Judge upheld the FDIC's claim that the materials were protected by the deliberative process privilege and the law enforcement privilege. The Court held that the privileges were properly asserted by the regional director of the FDIC's office of supervision, rather than by the head of the FDIC, since "the head of the appropriate regional division of the FDIC's supervisory personnel is of sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process and law enforcement privileges." The Court noted that "decisions involving the more sensitive and absolute privilege for state and military secrets have been more insistent on assertion at the highest level."

Resolution Trust Corp. v. Diamond, 773 F. Supp. 597 (S.D.N.Y. 1991) : Ruling on privilege claims by the RTC in an action to repudiate leases, the Court held that certain of the documents were predecisional and deliberative material, but that there was no indication the head of the agency had inspected the individual documents and made the required determination that the public interest in confidentiality (as distinct from the government's interest in this litigation) outweighed the public interest in disclosure. The agency's blanket approach, asserting the privilege for all predecisional deliberative documents, was found unacceptably inflexible. In *Mobil Oil Co. v. Department of Energy*, n102 the District Court granted a portion of Mobil's motion to compel the Department to produce certain documents. Although the Court recognized a predecisional privilege, which protects "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" and referred to the privilege as a "subcategory of the executive or governmental privilege," it denied the privilege claim because the head of the Department did not claim the privilege, the index of documents was not specific enough, and the Department failed to explain the need for confidentiality.

In re Nelson, 131 F.R.D. 161 (D. Neb. 1989) : The Court affirmed the Magistrate's order compelling production of documents belonging to a non-party, the Federal Intermediate Credit Bank, over a deliberative process privilege objection by the defendant's counsel. Even assuming the FICB is an agency of the government able to assert the privilege, only a head of the department after actual personal consideration may invoke the privilege; there must be a

specific designation and description of the documents claimed to be privileged; and there must be specification of precise and certain reasons for the need to preserve the confidentiality of the documents.

[f] Government -- Law Enforcement Investigation -- Waiver

Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1997-2 Trade Cas. (CCH) P71962 (7th Cir. 1997) : Plaintiffs in an antitrust class action brought against agricultural producers subpoenaed tape recordings made by the FBI as part of a criminal investigation into the producers' alleged conspiracy. Reversing a ruling that denied the government's motion to quash the subpoena, the Court held that the privilege had not been waived when some of the tapes were played for counsel representing a producer's outside directors in order to induce a guilty plea. The selective disclosure in this case did not require forfeiture of the privilege because: (a) maintaining the privilege would only delay, rather than permanently suppress, the evidence, since the tapes would eventually be disclosed in the criminal proceedings; (b) the privilege was not giving the government any strategic advantage, since it was not an adversary of the movants in the civil case; and (c) the circumstances of the disclosure did not raise questions whether the government had a good faith non-strategic interest in keeping the information confidential. It was a mistake not to subject the disclosure to a confidentiality agreement or protective order, but since there was no indication that the government was acting in bad faith or that the movants were hurt, the severity of the mistake did not call for forfeiture of the privilege.

[g] Government -- Presidential Communications

Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108 (D.C. Cir. 2004) : The Court held, 2-1, that the presidential communications privilege applies only to documents solicited and received by the President or the President's immediate White House advisers. Thus, the privilege did not justify nondisclosure in response to a FOIA request of internal pardon documents in the Justice Department's Office of the Pardon Attorney and Office of the Deputy Attorney General, as those documents were not solicited or received by the President or the Office of the President. The Court concluded that such documents are properly analyzed under the deliberative process privilege. The dissenting Judge argued that "documents originated for the sole purpose of advising the President on his pardon power are protected by the presidential communications privilege." During a grand jury investigation of the former Secretary of Agriculture in *In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997)* , a subpoena was issued for documents pertaining to the White House Counsel's investigation of the Secretary. The District Court upheld claims of deliberative process and presidential communications privileges for certain documents after reviewing them *in camera*, but the decision was vacated and remanded for a more detailed review. The Court concluded that the presidential communication privilege is narrower than the privilege for executive deliberative processes, but that it extends to communications that do not themselves directly engage the President, if they are written or received in response to solicitation by presidential advisors in the course of gathering information and preparing recommendations on official matters for presentation to the President. It also extends to communications by or solicited and received by members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter. The Court found that the privilege applied to all the withheld documents, but the Office of Independent Counsel had not yet sufficiently demonstrated specifically why the evidence contained in the communications was important to the ongoing grand jury investigation and why the evidence was not available from another source. The Court held that the privilege had not been waived except to the extent that the specific text of the allegedly privileged communication had been disclosed. In *Nixon v. Administrator of Gen. Servs.*, n103 the Court rejected former President Nixon's constitutional challenge to the statute that directed the Administrator to take custody of his presidential papers and tape recordings, and noted that despite some authority for the proposition that only an incumbent President can invoke a claim of presidential or executive privilege, it was assuming a former President could do so, although "such a claim is not as forceful as one raised by an incumbent."

[h] Government -- Protective Function

In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998) (per curiam): Secret Service officers, subpoenaed to give testimony for a grand jury conducted by the Office of Independent Counsel investigating the President, asserted a "protective function privilege" against providing information obtained while performing their protective function in physical proximity to the President, except concerning observations providing reasonable grounds for believing that a felony had been, was, or would be committed. Affirming an order requiring the officers to testify, the Court held that the Secret Service had failed to carry its heavy burden of establishing the need for the privilege. The record raised doubts about the need for the proposed privilege, e.g., former Presidents were split on the question, Presidents have self-interest in effective protection, and agents do not now have confidentiality agreements. The Court also expressed concern about the efficacy of the proposed privilege, with its exception for felonies.

[i] Government -- State or Military Secrets

[i] Civil Cases

Linder v. Department of Defense, 133 F.3d 17 (D.C. Cir. 1998) : Reviewing subpoenas issued in connection with a family's wrongful death action against Nicaraguan Contra leaders operating out of Florida, the Court found no abuse of discretion in the Judge's determination that the CIA had properly justified its statutory claims of privilege over seven withheld documents. The Agency had provided detailed information as to the potential harms to national security, which the Judge considered *in camera* along with the withheld documents. In *In re United States*, n104 the Court denied a petition for mandamus filed by the government after the Trial Judge declined to dismiss on state secret grounds a suit in which the plaintiff alleged injuries to her and her deceased husband as a result of FBI intelligence activities. The majority held that an item-by-item determination of the state secrets privilege would accommodate the government's national security concerns and that an FBI official's affidavit did not demonstrate that evidence of the government's activities 20-30 years earlier would necessarily disclose state secrets today. The dissenting Judge argued that any further discovery would inevitably lead to disclosure of state secrets. See also *Halkin v. Helms* n105(upholding privilege claim of National Security Agency against request to disclose whether plaintiffs' international communications had been acquired by NSA and disseminated to other federal agencies).

Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991) : The Court held that the state secrets privilege was properly invoked in an action for the death of a Navy seaman arising out of an antimissile defense system's alleged failure. Privileged information about the weapons systems and the rules of engagement was essential to the plaintiff's *prima facie* case, so dismissal of the claim was affirmed.

Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005) : The Court upheld the dismissal of a former CIA agent's employment discrimination claim, on the ground that pursuit of the suit would inevitably result in the disclosure of classified details of his covert employment. In addition, many of the relevant witnesses would be covert CIA operatives, and calling them to testify would risk their cover. Although the remedy of dismissal is drastic, the Court found no alternative, since "the whole object of the suit and of the discovery is to establish a fact that is a state secret, namely, the methods and operations of the Central Intelligence Agency."

In re Under Seal, 945 F.2d 1285 (4th Cir. 1991) : Summary judgment was granted for the defendants in an action by a former government contractor alleging malicious interference with a business opportunity that involved highly secret defense contracts. Affirming, the Court held that the state secrets privilege had been properly invoked by the government and that it was not possible to modify the protective discovery order in a way to permit the plaintiffs to develop a factual basis for their claim without endangering national security. See also *Bowles v. United States, 950 F.2d 154 (4th Cir. 1991)* (per curiam) (affirming dismissal of the United States as a party in a Federal Tort Claims action arising from an accident involving a U.S. Embassy vehicle in Oman, where the Secretary of State had properly invoked the state secrets privilege in response to discovery requests and the Court concluded that no amount of effort or care would safeguard the privileged information); *Fitzgerald v. Penthouse Int'l, Ltd.* n106(upholding dismissal of a defamation suit against a magazine that had charged the plaintiff with espionage, since "there was simply no way this

particular case could be tried without compromising sensitive military secrets").

Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992) : Survivors of sailors killed when missiles penetrated the defenses of a Navy ship during the Iran-Iraq war brought an action against defense contractors responsible for the missile defense system. When the government intervened and asserted the state secret privilege, the Court upheld dismissal of the plaintiffs' case, holding that the privilege had been properly asserted and the action would necessarily threaten disclosure of important state secrets.

Tenenbaum v. Simonini, 372 F.3d 776 (6th Cir. 2004) : The Court affirmed summary judgment for the defendants in an action alleging that federal agency employees had conducted a criminal espionage investigation against one of the plaintiffs solely because he was Jewish. After reviewing materials produced by the defendants under seal, the Court agreed that the state secrets doctrine applied because of a reasonable danger that disclosing the information in court proceedings would harm national security interests, impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments. Because the state secrets doctrine would deprive the defendants of a valid defense to the plaintiffs' claims, it was proper to enter summary judgment.

Black v. United States, 62 F.3d 1115 (8th Cir. 1995) : The plaintiff alleged that he was the target of harassment and psychological attacks in retaliation for his contacts with a Soviet mathematician. Affirming dismissal of the case, the Court held that state secrets were implicated by the plaintiff's lawsuit, the Director of the CIA had properly invoked the state secrets privilege, and the continuation of the plaintiff's suit presented a "reasonable danger" to the intelligence-gathering capabilities and diplomatic relations of the United States. Rejecting the argument that the state secrets privilege was simply "a creature of the Cold War" that had outlived its usefulness, the Court stated that "the *absence* of a relatively stable world order of the sort that prevailed during the Cold War makes the availability of the privilege in appropriate cases all the more important."

Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998) : Former workers at a classified facility operated by the United States Air Force brought citizen suits under the Resource Conservation and Recovery Act, RCRA, seeking to compel compliance with hazardous waste inventory, inspection, and disclosure responsibility. The Trial Judge held that the state secrets privilege invoked by the Secretary of the Air Force made discovery and trial impossible, and granted summary judgment in favor of the Air Force. The Court affirmed, noting that the privilege was properly invoked by the Secretary, after a personal inspection of the documents. The Court rejected the argument that RCRA's provision authorizing the President to exempt certain sites from its requirements amounted to a preemption of the state secrets privilege; it found "no Congressional intent to replace the government's evidentiary privilege to withhold sensitive information in litigation by providing an exemption from RCRA's regulation of hazardous waste."

McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003) : In an action arising from termination of a government contract to develop stealth aircraft, the Court held that the contractors were properly precluded from pursuing a claim that the government's "superior knowledge" required it to disclose certain information related to other stealth aircraft, since that information was classified and the government had satisfied the requirements of the military and state secrets privilege. In *Guong v. United States*, n107 the Court upheld dismissal of a suit by an alleged recruit of the CIA, who sued to recover for breach of an employment contract. It found that the state secrets privilege excluded evidence of military matters affecting the national security, and that the plaintiff could not prevail without compromising state secrets.

[ii] Government -- State and Military Secrets -- Criminal Cases

United States v. Wilson, 586 F. Supp. 1011 (S.D.N.Y. 1983) : In a case alleging plots to assassinate witnesses, prosecutors, and others involved in prosecutions against the defendant, the District Court ruled pursuant to the Classified Information Procedures Act, 18 U.S.C.A. App., that classified information was not relevant to the defendant's claim that he lacked a motive to enter into the alleged plots.

United States v. Moussaoui, 382 F.2d 453 (4th Cir. 2004) : In a prosecution of the so-called "20th hijacker" for conspiracy relating to the September 11, 2001, attacks, the Court held that the defendant's *Sixth Amendment* right to compulsory process required the government to provide some kind of access to the testimony of possible exculpatory witnesses, even though the witnesses were in government custody outside the United States. The Court also held, however, that summaries of the witnesses' statements, which the government refused to make available on national security grounds, were available and they would provide the defendant with the evidence that otherwise might have been provided by the witnesses. One Judge, dissenting in part, argued that the summaries should be offered in more complete form. In *United States v. Smith, 780 F.2d 1102 (4th Cir. 1985)* (en banc), *rev'g 592 F. Supp. 424 (E.D. Va. 1984)* , a prosecution for violating the Espionage Act, the defendant asserted that he thought he was authorized by CIA officials to disclose information. The government sought to prohibit introduction of any classified material, on the ground that the defense was patently frivolous and that the defendant was attempting to use "greymail" -- i.e., needlessly to expose classified information in an effort to force the government to drop the prosecution. The District Court held that the Classified Information Procedures Act, 18 U.S.C. App., was not intended to deny the defendant the use of relevant and admissible classified documents. In its view, harm to national security was not a type of prejudice that would warrant exclusion under *Rule 403*, and whether the defense was not believable was a question for the jury. A panel of the Court of Appeals affirmed, n108 but the Court *en banc* reversed, holding (7-5) that harm to national security could be balanced against the probative value of evidence. The majority analogized to the informer's privilege in holding that "[t]he government has a substantial interest in protecting sensitive sources and methods of gathering information" such that the government has a qualified privilege to protect against disclosure, even though the defendant had access to the information before trial. The dissenting Judges argued that the Court's opinion was unnecessary and that Congress provided sufficient protection for the government in the CIPA, which the Trial Judge had followed.

United States v. Baptista-Rodriguez, 17 F.3d 1354 (11th Cir. 1994) : A defendant charged in a cocaine importation conspiracy had worked for the FBI and claimed he believed he was working as an authorized undercover civilian operative when he arranged the smuggling venture in 1987. Because the defendant's pre-1984 FBI work was classified, the Trial Judge held a hearing pursuant to the Classified Information Procedures Act, found that the details of the work were irrelevant to any legitimate defense, and allowed disclosure only of the fact of a relationship. The Court found no abuse of discretion in this conclusion. However, it reversed the defendant's conviction because after an FBI agent gave rebuttal testimony that there was documentary evidence the defendant's relationship with the FBI ended in 1983, the Trial Judge refused to order production of the classified document or to permit cross-examination about its contents. The Court found the defendant's confrontation rights were violated when he was not permitted to explore fully the witness' testimony regarding his alleged termination.

[iii] Government -- State and Military Secrets -- Invoking the Privilege

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) : Plaintiffs complaining of warrantless surveillance were denied detailed information concerning the surveillance when the government asserted a state secrets privilege. The Court upheld the privilege claim except as to the identities of the Attorneys-General responsible. The Court noted that the privilege must be claimed by the head of the department, that "[w]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter," and that a showing of "reasonable danger" that harm to the national security will ensue from disclosure of secrets is sufficient to sustain a privilege claim. The party seeking disclosure has no right to be present for an *in camera* examination, but where a party shows a great need for information claimed to be privileged, close judicial scrutiny of the privilege claim is appropriate and is aided by a public disclosure of the basis for the claim prior to an *in camera* examination. Public disclosure is not required, however, where it might threaten the interests protected by the privilege.

[5] Marital

[a] Adverse Testimony

[i] Acts Prior to Marriage

In re Grand Jury Proceedings (86-2), 640 F. Supp. 988 (E.D. Mich. 1986) : The Court held that the marital privilege applied and that a spouse did not have to testify, even about things that occurred prior to the marriage, where the marriage was not a sham or collusive.

United States v. Clark, 712 F.2d 299 (7th Cir. 1983) : The defendant and his wife were indicted for stealing from a savings and loan association before their marriage. Affirming a judgment of criminal contempt against him for refusing to testify at her trial, the Court held the privilege could not be asserted with respect to acts occurring before the marriage, even when there was no evidence the marriage was collusive.

[ii] Marital -- Adverse Testimony -- Civil Cases

United States v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995) : In a civil forfeiture case, the wife of a drug trafficker claimed she was an innocent owner of property. The Trial Judge held that the spousal immunity rule did not apply in a civil action. Without reaching that question, the Court held that the rule does not apply except in proceedings where one spouse is a party and the other is called to testify. Thus, the privilege could not be claimed in this forfeiture action, brought against property belonging to the wife, who was the testifying spouse. See also *United States v. Yerardi, 192 F.3d 14 (1st Cir. 1999)* , discussed in § 501.03[5][a][iv].

Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977) : The Court affirmed a decision holding taxpayers in contempt for refusing to answer interrogatories. Although the Tax Court had held the spousal immunity privilege was only available in criminal cases, the Court observed that the distinction between civil and criminal cases was not wholly satisfying, so a case-by-case policy-oriented approach was preferable. In this case it refused to expand the spousal immunity privilege to the civil context because the spouses were granted use immunity against criminal prosecution, the threat of criminal prosecution was minimal (if existent at all), the spouses did not complain of a threat to their marriage, and all other avenues for securing information were unavailable to the government.

[iii] Marital -- Adverse Testimony -- Joint Participants in Crime

In re Grand Jury Subpoena (Koecher), 755 F.2d 1022 (2d Cir. 1985) , *rev'g 601 F. Supp. 385 (S.D.N.Y. 1984)* , *vacated & remanded as moot*, *475 U.S. 133 (1986)* : The Court of Appeals vacated an order holding a wife in contempt for refusing to answer questions before a grand jury concerning her husband's alleged conspiracy to communicate national defense documents and information to a foreign government. It declined to join other Courts that have recognized an exception to the spousal immunity privilege when the government makes a *prima facie* showing that spouses jointly participated in criminal activity. The Court observed that the privilege is aimed more broadly at protecting marital harmony than the marital communications privilege and that it often is difficult to consider whether the exception applies without first invading the privilege.

In re Malfitano, 633 F.2d 276 (3d Cir. 1980) : The Court held that a wife had a privilege not to answer questions of a grand jury that might implicate her husband in wrongdoing even though the government claimed that she was involved in her husband's criminal acts, since "recognition of an exception where it can be said that both spouses are involved will tend to undermine the marriage precisely in the manner that the privilege is designed to prevent." The government's offer not to use the wife's testimony against her husband in future proceedings was also insufficient to warrant disregard of the privilege, since her testimony might result in an indictment.

United States v. Freeman, 694 F. Supp. 190 (E.D. Va. 1988) : The Trial Judge denied a severance to a married couple jointly charged with cocaine offenses, noting that "the privilege against testifying adversely against a spouse does not apply to joint criminal participants."

United States v. Clark, 712 F.2d 299 (7th Cir. 1983) : The Court affirmed a criminal contempt finding, holding that a husband, who had been convicted in a bench trial of robbing a savings and loan, could not invoke the spousal immunity privilege in his wife's trial because the privilege did not apply where the spouses were joint participants in the robbery.

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) : A husband and wife involved in a drug conspiracy were tried separately for their crimes. After the wife was convicted, she was called to testify at her husband's trial, but refused on grounds of the testimonial privilege. The Trial Judge ruled there was an exception to the privilege when spouses are jointly involved in a criminal enterprise and held the wife in contempt when she continued to refuse to testify. Reversing the contempt sanction, the Court held that because *Trammel v. United States, 445 U.S. 40, 53 (1980)* , said that "the witness may be neither compelled to testify nor foreclosed from testifying," there is no joint participant exception to the testimonial privilege.

[iv] Marital -- Adverse Testimony -- Miscellaneous Cases

Trammel v. United States, 445 U.S. 40 (1980) : The Supreme Court held that the witness-spouse, rather than the party-spouse, is the holder of the adverse testimonial privilege. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[8]*.

United States v. Yerardi, 192 F.3d 14 (1st Cir. 1999) : The defendant's husband was indicted on RICO charges that included criminal forfeiture; he was released on bail secured by an appearance bond that the defendant signed. When the government sought forfeiture of the bond for the husband's violation of his release conditions, the defendant testified without invoking the adverse spousal testimonial privilege. The husband later pleaded guilty to the RICO indictment and agreed to forfeit $916,000. In a proceeding to discover the husband's assets, the defendant refused to answer questions, asserting the adverse spousal testimony privilege. Vacating an order of contempt, the Court rejected the government argument that the privilege did not apply in criminal forfeiture proceedings because the "proceeding to achieve the forfeiture is itself 'more civil than criminal.' " Finding it unnecessary to decide whether the privilege might apply in civil cases, the Court concluded that the privilege applied in this case because it was ancillary to a criminal case, the action sought to recover a penalty under criminal rather than civil forfeiture proceedings, and it raised an appreciable risk of contributing to a future criminal prosecution of the husband. The Court noted that if the government considered the defendant's testimony essential to the forfeiture, it could overcome the adverse spousal testimony privilege by filing an affidavit promising that it would not use either directly or indirectly the compelled testimony of the wife in subsequent criminal proceedings against her husband. If no such affidavit is filed, the government would be entitled to depose the wife, but she would be entitled to invoke the privilege on a question-by-question basis.

In re Grand Jury Subpoena of Ford, 756 F.2d 249 (2d Cir. 1985) : The Court upheld a contempt citation against a husband who refused to testify before a grand jury investigating his wife. Since the government assured the husband that his testimony would not be used, directly or indirectly, against the wife, the Court found that the spousal privilege was unavailable.

In re Grand Jury Matter, 673 F.2d 688 (3d Cir. 1982) : The Court upheld a spousal immunity claim made by a wife called to testify by a grand jury investigating the activity of a third party where the testimony might have indirectly implicated her husband. Although the government promised that no indictment by the grand jury before whom the witness would testify would name her husband as a defendant or as an unindicted coconspirator, the testimony remained sufficiently adverse to the husband, since "all who are party to the action understand that the wife's testimony is sought, inter alia, in the hope that her husband will be indicted." One Judge suggested in a footnote that the Trial Court could confer "use-fruits" immunity to assure the wife that her testimony would not be used against her husband, but a concurring opinion suggested that the immunity footnote amounted to an advisory opinion. The dissenting Judge argued that there is "a qualitative difference in impact between testimony that itself causes a grand jury to indict the non-witness spouse, and testimony against a third party, who eventually may testify against the spouse before another grand jury."

United States v. Hall, 989 F.2d 711 (4th Cir. 1993) : The Court overturned a conviction for cocaine offenses, finding reversible error when the prosecutor cross-examined the defendant using a written statement obtained from his wife, who had declined to testify against her husband at trial. Not only was the statement hearsay, but its use appeared to violate the wife's privilege not to testify against her husband. In *United States v. Morris, 988 F.2d 1335 (4th Cir. 1993)* , the Court reversed a conviction for narcotics offenses because the prosecutor had been allowed to cross-examine the accused's wife about her invocation of the marital privilege before the grand jury. To permit the jury to infer that she would have testified before the grand jury if she had something exculpatory to say would, in the Court's view, destroy the privilege.

United States v. Archer, 733 F.2d 354 (5th Cir. 1984) : Convictions of a husband and wife for conspiring to embezzle bank funds were affirmed as the Court found that statements by the wife to an FBI agent were admissible despite the husband's claim of marital privilege. It held that the spousal immunity privilege, which *Trammel* held could be raised only by a witness-spouse, was unavailable to a defendant-spouse objecting to introduction of the other spouse's out-of-court statements. The Court also held that there is no privilege to object to introduction of out-of-court statements made prior to trial, since the introduction of such statements would hardly threaten marital harmony and their exclusion would be unduly costly in terms of lost evidence.

United States v. Porter, 986 F.2d 1014 (6th Cir. 1993) : The Court affirmed a conviction for offenses arising out of the defendant's exchanging explosives for cocaine and cash, holding there was no abuse of discretion in admitting testimony by the defendant's former wife relating communications from him made while they were married. As the two were divorced at the time of trial, there was no violation of the adverse spousal testimony privilege.

United States v. Espino, 317 F.3d 788 (8th Cir. 2003) : The defendant's wife was a cooperating witness, giving testimony against him in a trial for methamphetamine offenses. The Court rejected his argument that the spousal privilege statute of Nebraska, the forum state, precluded her testimony against him without his consent, since the federal rule, established in *Trammel v. United States,* is that the adverse testimony privilege belongs to the witness-spouse. In *United States v. Jackson, 939 F.2d 625 (8th Cir. 1991)* , the Court affirmed bank robbery convictions, holding that the defendant could not claim the spousal immunity privilege for communications to his wife (from whom he had been separated 16 months), because she was willing to testify for the government. In *United States v. Smith*, n109 the Court affirmed two defendants' convictions for bank robbery. One defendant's wife asserted her privilege not to testify against her husband, but she was required to testify against the second defendant, her son. The Court indicated that nothing in the testimony implicated the husband.

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) : A husband and wife involved in a drug conspiracy were tried separately for their crimes. After the wife was convicted, she was called to testify at her husband's trial, but refused on grounds of the testimonial privilege. The government then offered, under *Rule 804(b)(3)*, transcripts of the wife's testimony from her own trial. The Court found it unnecessary to decide whether admission of the transcripts was proper, but it did note that the husband could not object to them on grounds of the spousal testimonial privilege, since that privilege lies with the testifying spouse, not the party spouse. In *United States v. Tsinnijinnie*, n110 the Court held that an excited utterance of one spouse could be admitted in a criminal trial against the other spouse. After noting authorities to the contrary, the Court concluded that the threat to a marriage posed by admitting hearsay statements was at best speculative and that it was outweighed by the state's need for evidence.

United States v. Jarvison, 409 F.3d 1221 (10th Cir. 2005) : During the pretrial stages of a prosecution for child sex abuse, the government moved to compel testimony of a witness; the witness invoked the privilege to refuse to give adverse testimony against her spouse. The government argued that the marriage was not valid, and even if it were, the Judge should recognize an exception to the spousal testimonial privilege when acts of child abuse are involved. The Court affirmed denial of the motion to compel. The defendant and the witness were Navajos who lived on the reservation, and the Court held that the question of the validity of the marriage was therefore to be determined by

Navajo law, which considered the marriage valid, even though the defendant and the witness were married in an unlicensed traditional ceremony, and even though the defendant had left the witness for a long period and fathered children by another woman. The Court further refused to establish an exception to the spousal testimonial privilege for acts of child abuse, distinguishing the exception it had established in such cases for the marital communications privilege in *United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997)* , because no exception is currently recognized by any federal Court.

[v] Marital -- Adverse Testimony -- Waiver

United States v. Yerardi, 192 F.3d 14 (1st Cir. 1999) : The defendant's husband was indicted on RICO charges that included criminal forfeiture; he was released on bail secured by an appearance bond that the defendant signed. When the government sought forfeiture of the bond for the husband's violation of his release conditions, the defendant testified without invoking the adverse spousal testimonial privilege. The husband later pleaded guilty to the RICO indictment and agreed to forfeit $916,000. In a proceeding to discover the husband's assets, the defendant refused to answer questions, asserting the adverse spousal testimony privilege. The Court vacated an order of contempt. It rejected the argument that the privilege had been waived by the husband's plea agreement, since the privilege belongs to the witness-spouse, here the wife, rather than the party-spouse, here the husband. As for the argument that the defendant had waived the privilege by testifying regarding the husband's assets at the bail forfeiture hearing, the Court noted that it was possible that a pick-and-choose approach to answering questions could operate as a waiver, but the government had not provided a detailed comparison of the prior answers given and the more recent questions that the defendant refused to answer to determine whether the questions answered in the bail hearing were adverse to the husband.

United States v. Bad Wound, 203 F.3d 1072 (8th Cir. 2000) : Affirming convictions for fraud and related charges, the Court found no error in the admission of adverse testimony from the defendant's wife. The wife, represented by counsel, had entered into a plea agreement in which she agreed to provide "complete and truthful testimony before grand juries, at trial, and at other proceedings as required." She testified against her husband with "apparent reluctance." The Court found that the wife's plea agreement, although "broadly phrased," put the wife on notice that she might have to give adverse testimony, and thus was a voluntary waiver of the privilege.

[b] Marital -- Common-law Marriage, Cohabitants

United States v. Acker, 52 F.3d 509 (4th Cir. 1995) : The Court held in a bank robbery prosecution that there was no abuse of discretion in rejecting marital privilege claims. Although the defendant and the witness had lived together as man and wife for approximately 25 years, neither of the states in which they lived recognizes common-law marriages.

United States v. White, 545 F.2d 1129 (8th Cir. 1976) : Affirming a bank robbery conviction, the Court held there was no error in denying both the defendant and his alleged common-law wife the right to assert the spousal immunity privilege. Arkansas, the state in which they held themselves out to be spouses, does not recognize common-law marriage and the Federal Courts will look to state law to determine the validity of a marriage.

In re Ms. X, 562 F. Supp. 486 (N.D. Cal. 1983) : A woman called to testify before a grand jury claimed a marital privilege not to testify against a man to whom she was not formally married, but with whom she lived as husband and wife for six and one-half years. The man fathered her four children, and she held him out as her husband. The Court found "that we are rapidly approaching the era when greater recognition of the rights of parties in a non-formalized marital relationship must be acknowledged by our judicial system," but it refused to place greater weight on the policy of "promoting marital accord in non-marital settings" than on the public's right to evidence in a criminal investigation.

[c] Marital -- Confidential Communications

[i] Confidentiality

SEC v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) : The Court reversed a decision to enforce an SEC subpoena requesting disclosure of telephone communications between a securities trader and his wife. The trader was a managing director of a firm and head of its Chicago office. He decided upon his arrival in Chicago that the office should have a system for routine taping of telephone calls with its customers. He claimed in response to the SEC subpoena for the tapes that he reasonably believed that the private phone in his office was not part of the taping system. The Court held that the broker should have been permitted to engage in some discovery to seek evidence to support his claim that he did not know his conversations with his wife were being taped, observing that without discovery the broker could not be expected to offer evidence to support his claim.

United States v. Taylor, 92 F.3d 1313 (2d Cir. 1996) : The Court affirmed Hobbs Act convictions, finding that a taped conversation between a defendant and his wife, in which the defendant talked about carrying a gun and storing it in an office, was properly admitted. The Court found that the Trial Judge improperly placed the burden on the defendant to prove that third parties were not present, instead of presuming confidentiality, but also found that the government rebutted the presumption successfully.

United States v. Madoch, 149 F.3d 596 (7th Cir. 1998) : In a tax fraud prosecution, the Court held there was no error in the admission of tape-recorded conversations between the defendant and her incarcerated husband. Given the well-known need for correctional institutions to monitor inmate conversations, the defendant could not reasonably expect that her conversation with her husband, whom she knew to be in jail, would be confidential.

United States v. Strobehn, 421 F.3d 1017 (9th Cir. 2005) : On the day of the charged armed robbery, the defendant left seven pages (five sheets, with writing on both sides of two) on the kitchen table of the apartment he shared with his wife and children. The first one-and-a-third pages was a note addressed to his wife; he then drew a line across and wrote a note to his children that took up another third of the second page; there was then another line across and a note to others that carried over to the third page; and then followed other notes separated by lines across to various family members. The defendant argued that the evidence was privileged, but the Court, affirming, found that it was not a confidential marital communication because "as written the compilation was manifestly intended to be communicated to all twenty-four individuals to whom it was addressed." In *United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004)* , the Court reversed a mail fraud conviction because a letter to the defendant from his wife was erroneously admitted. The handwritten letter had been left on the kitchen counter of the couple's home and was found in their bedroom during execution of a search warrant. The Court noted that the nature of the communication was of a kind likely to be confidential. Although the letter implored the husband to communicate the substance of its concerns to a third person, there was no obvious implication that the wife "understood her request of Montgomery would be transmitted to O'Connor or that O'Connor would infer that Montgomery was acting at Mrs. Montgomery's direction." Nor did the letter's location on the kitchen counter indicate that it was not intended to be confidential. Even though the couple's children resided in the house, there was "no evidence that the children would likely have seen or read the letter or that Mrs. Montgomery acted without regard to whether the children would have seen it." The Court concluded: "We will not cast aside the presumption of confidentiality by speculating that the communication was made in the presence of, or was likely to be seen by, the couple's children."

[ii] Marital -- Confidential Communications -- Holder of Privilege

United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004) : The Court reversed a mail fraud conviction because a letter to the defendant from his wife was erroneously admitted. The Trial Judge had overruled the defendant's objection to admission of the letter on the ground that the privilege for confidential marital communications belongs only to the communicating spouse, but the Court held, following the weight of authority, that either spouse may assert the

privilege. Giving the privilege to both spouses avoids the risk of eviscerating it through attempts to prove circumstantially what one spouse said by proving what the other said.

[iii] Marital -- Confidential Communications -- Joint Participants in Crime

United States v. Bey, 188 F.3d 1 (1st Cir. 1999) : The Court affirmed a conviction for drug importation, finding no abuse of discretion in the admission of testimony by the defendant's wife as to confidential communications between them. The government sufficiently established that she was a joint participant, by evidence that she knowingly assisted him with transportation and communications related to the scheme, knowingly accepted drug proceeds, and maintained his cover story. In a trial for a cocaine distribution conspiracy, *United States v. Wood, 924 F.2d 399 (1st Cir. 1991)* , the government offered a letter the defendant wrote to his wife when both were in jail after their arrests for the crimes at issue. The Court held the letter was a confidential communication and should not have been admitted, as it was written after the conclusion of the alleged conspiracy between the spouses, but the error was harmless. In *United States v. Picciandra*, n111 the Court affirmed income tax evasion convictions, ruling that communications concerning crimes in which spouses are jointly participating do not fall within the marital communications privilege.

United States v. Estes, 793 F.2d 465 (2d Cir. 1986) : The Court reversed a conviction for testifying falsely before a grand jury, holding that the defendant's statement to his wife following a completed theft was within the marital communications privilege, since the wife could not be involved as an accessory after the fact unless she knew that a theft had taken place and the communication of that fact was a necessary prerequisite to her involvement. Thus, statements communicating the fact of the theft could not have been in furtherance of an ongoing crime. The Court also held that the wife's testimony concerning the defendant's counting and hiding of the money did not involve marital communications and was not privileged.

United States v. Hill, 967 F.2d 902 (3d Cir. 1992) : Affirming a conviction for drug and weapons offenses, the Court held there was no error in permitting the defendant's wife to testify to confidential communications between them, as she was a joint participant in the defendant's crimes, even though she later cooperated with the authorities. In a drug conspiracy case, *United States v. Ammar*, n112 the Court concluded that the marital communications privilege did not apply to communications relating to ongoing or future criminal activity.

United States v. Savage 390 F.3d 823 (4th Cir. 2004) : The Court affirmed convictions arising out of a scheme to defraud several investors, especially single, older women, by inducing them to invest in phony business ventures. It found no abuse of discretion in the admission of testimony by the defendant's ex-wife that he had dressed up as one of the women victims. The Court reasoned that, while the incident might have been distasteful to some jurors, it was probative of the defendant's fraudulent activities as to this victim. It rejected the defendant's argument that the sexual incident was a confidential marital communication, finding that when the communication was made the defendant and his wife were jointly involved in ongoing criminal activity. In a kidnapping and firearms case, *United States v. Parker*, n113 the Court held that a husband's statements to his wife came within the joint participant exception to the privilege, finding "no basis for making a distinction between marital communications that involve the initial discussion and commencement of joint criminal conduct between spouses, and marital communications made during the joint participation in that criminal conduct." In *United States v. Broome*, n114 the Court affirmed convictions arising out of a conspiracy to sell stolen cars, holding that "where marital communications have to do with the commission of a crime in which both spouses are participants, the conversation does not fall within the marital privilege."

United States v. Archer, 733 F.2d 354 (5th Cir. 1984) : After holding that neither a witness-spouse nor a defendant-spouse could successfully claim a spousal immunity privilege to exclude evidence of out-of-court statements made orally or in writing by one spouse to a government agent prior to trial, the Court recognized that the marital communications privilege might protect such statements. That privilege was unavailing in this case, however, because the communications were made in the course of the spouses' joint participation in criminal activity. See also *United States v. Harrelson* n115(in a prosecution for killing a Federal Judge, the Court found that marital communications

were in furtherance of a conspiracy, and expressed doubts that conversations concerning past crimes would fall within the privilege).

United States v. Sims, 755 F.2d 1239 (6th Cir. 1985) : The Court recognized a joint participants exception to the marital communications privilege, although it limited the exception "to permit admission of only those conversations that pertain to patently illegal activity."

United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002) : Affirming convictions arising out of a murder-for-hire scheme, the Court held it was error (but harmless) to admit the defendant's statement to his wife that he had supplied his coconspirator with the phone number of a hit-man. The wife was not a participant in the underlying crime, and the communication took place before she undertook any actions that made her an accessory-after-the-fact. The Court concluded: "The initial disclosure of a crime to one's spouse, without more, is covered by the marital communications privilege. If the spouse later joins the conspiracy, communications from that point certainly should not be protected. This distinction is consistent with the purpose of the marital communications privilege." In *United States v. Short, 4 F.3d 475 (7th Cir. 1993)* , the Court affirmed convictions for altering vehicle identification numbers and selling stolen cars with altered VINs, holding that confidential communications between a defendant and his then-wife were properly admitted because she had aided and abetted the conspiracy even though she was not indicted nor named as an unindicted coconspirator. To the extent that communications were made before she realized she was a participant, any error in admitting them was harmless. In *United States v. Keck*, n116 the Court affirmed convictions on drug charges, holding that neither marital privilege applied if spouses were joint participants in crime.

United States v. Evans, 966 F.2d 398 (8th Cir. 1992) : The Court affirmed convictions for manufacturing and distributing marijuana, holding that confidential communications between a defendant and his wife, who was not charged, were not privileged because she was also a participant in the crime. In adopting a partners in crime exception to the marital confidential communication privilege, the Court noted that the exception was limited to patently illegal activity.

United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004) : The Court reversed a mail fraud conviction because a letter to the defendant from his wife was erroneously admitted. Although the wife was charged with participating in her husband's conspiracy, the letter encouraged the husband to take action to end the fraud, and it was only after those efforts proved fruitless that the wife joined the conspiracy, so the exception to the privilege for joint participants did not apply. In a trial for tax fraud, *United States v. Marashi, 913 F.2d 724 (9th Cir. 1990)* , the government introduced testimony by the defendant's ex-wife that he had ordered her to erase entries in his appointment books and to hide a double-ledger scheme, and had also instructed her to underreport income. The Court held that the former communication was not privileged because of the presence of third parties and the latter because the communications were in furtherance of joint criminal activity, even though the ex-wife was never prosecuted for the underreporting.

[iv] Marital -- Confidential Communications -- Miscellaneous Cases

United States v. Hall, 989 F.2d 711 (4th Cir. 1993) : The Court overturned a conviction for cocaine offenses, finding reversible error when the prosecutor cross-examined the defendant using a written statement obtained from his wife, who had declined to testify against her husband at trial. Not only was the statement hearsay, but its use also appeared to violate the defendant's marital communications privilege to the extent that the statement related private communications between the spouses. In *United States v. Parker*, n117 the Court affirmed kidnapping and firearms convictions, finding that testimony by the defendant's wife did not violate the marital communications privilege. It reasoned that the privilege generally does not extend to acts and that verbal communications in the presence of a third party are not privileged. In *United States v. Burton*, n118 the Court found no privilege violation in the inclusion in a probation report of statements made by the defendant's spouse. Citing *Trammel v. United States* (see the Editorial Explanatory Comment, *§ 501.02[8]*), which dealt with spousal immunity rather than confidential communications, the Court found that the privilege applied to testimony, not to one spouse's providing information to the government outside of Court.

United States v. Koehler, 790 F.2d 1256 (5th Cir. 1986) : The Court affirmed a firearms conviction, holding that testimony by a spouse concerning violent acts did not involve marital communications.

United States v. Hook, 781 F.2d 1166 (6th Cir. 1986) : Affirming a conviction for tax evasion, the Court found that the defendant's acts of giving his wife money to pay household bills were not communicative and were not privileged. In *United States v. Klayer*, n119 the Court held that the marital communications privilege did not prevent a wife from testifying in a fraud prosecution that her husband had asked her for permission to sign her name on an insurance claim, since the request was made over the telephone while an insurance adjuster was listening, so it was not confidential. In *United States v. Robinson*, n120 the Court affirmed convictions for racketeering offenses, finding that a wife's testimony concerning her discovery of a certain unexecuted bill of sale was properly admitted. The testimony described only acts, not communications, and therefore was outside the scope of the privilege.

United States v. Lofton, 957 F.2d 476 (7th Cir. 1992) : The Court held that testimony by the defendant's wife regarding his cocaine use and a package received at their home was properly admitted, as the privilege applies only to confidential communications and does not extend to acts observed by a spouse. It was error, but harmless, to hold the privilege was waived by the wife's testimony at a suppression hearing; she had not testified about any confidential communications at the hearing.

United States v. Espino, 317 F.3d 788 (8th Cir. 2003) : Affirming a conviction for methamphetamine offenses, the Court held that the Trial Judge properly preserved the marital confidential communications privilege by prohibiting testimony about private conversations between the defendant and his wife, and made no error in denying a motion *in limine* to the extent that it would have treated as privileged testimony from the wife (a cooperating witness) regarding the defendant's conduct that was not communicative. In *United States v. McConnell, 903 F.2d 566 (8th Cir. 1990)* , the Court held, in affirming convictions of a drug distribution conspiracy, that a defendant's ex-wife was properly permitted to testify against him, as none of the testimony referred to statements outside the presence of third parties.

United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983) : The Court affirmed convictions for drug offenses, finding the defendant had no marital communications privilege to prevent his wife from testifying that she saw LSD in the trunk of his car. The privilege extends only to utterances or expressions intended to be communicative. In *United States v. McCown*, n121 the Court found that testimony by a defendant's wife that he had instructed her to write a check that was used by codefendants to purchase a firearm was not intended to be confidential. It was obvious to the codefendants that the wife had signed the check, it was a fair inference that she had done so at the defendant's request, and there was no indication that the defendant intended to keep his instruction to his wife secret. In *In re Grand Jury Investigation*, n122 the Court reversed a contempt ruling against a witness who claimed a marital communications privilege, holding that the privilege extends to both spouses and that it applies before a grand jury whether or not the nontestifying spouse is a target.

United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997) : In a prosecution for sexual abuse of an 11-year-old female relative living in the defendant's home, the Trial Judge granted a pretrial order preventing the defendant's wife from testifying that the defendant would signify his interest in initiating sexual intercourse by digital penetration of her vagina. The Court noted that acts intended to convey a message are within the privilege, but reversed the order because the exception for crimes against children applied in this case. In *New England Mut. Life Ins. Co. v. Anderson*, n123 an insurance company sued to set aside a life insurance policy as fraudulently procured by a beneficiary, who allegedly conspired to murder the insured, her first husband. The Court held it was proper to bar examination of the beneficiary's second husband regarding a newspaper reporter's interview with her because his testimony might reveal privileged communications. The witness was unable on *voir dire* to distinguish interview statements from those made to him in confidence. In *United States v. Neal*, n124 a bank robbery and homicide prosecution, the Court said that the Trial Judge had used an "abundance of caution" in excluding evidence concerning telephone conversations between the defendant and his wife that were taped by the FBI with her consent but without his knowledge. The Court's opinion discussed a

crime-fraud exception applicable to other communications because the wife was an accessory after the fact, but the two concurring Judges said most of her testimony related to conduct, which is not covered by the privilege.

[v] Marital -- Confidential Communications -- Statements in Furtherance of Crime or Fraud

United States v. Rakes, 136 F.3d 1 (1st Cir. 1998) : The government claimed that the victim of an extortion scheme lied under oath about why he sold his business; he testified that he did so voluntarily when in fact he was threatened with death unless he sold the business at below market value. The government brought perjury charges against the extortion victim. It sought to obtain privileged communications made by the victim to his spouse concerning the sale of the business and the reasons for the sale, on the theory that the communications were in furtherance of the extortion. The Court affirmed suppression of the communications, holding that under the crime-fraud exception, "it takes wrongful complicity by the privilege holder, not innocent or involuntary action, to forfeit the privilege."

United States v. Neal, 743 F.2d 1441 (10th Cir. 1984) : In a bank robbery and homicide prosecution, the Court's opinion adopted a "crime-fraud" exception to the marital communication privilege, under which the privilege would not apply to confidential communications from the defendant because the wife was an accessory after the fact. One concurring Judge would not adopt a crime-fraud exception and the other concurring Judge thought the exception inapplicable to this case, but both believed much of the wife's testimony related to conduct, which is not protected by the privilege.

United States v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988) : Affirming drug convictions and rejecting arguments concerning minimization of wiretaps, the Court observed that "[u]nder federal law, the marital privilege does not protect those conversations made in furtherance of a conspiracy."

[vi] Marital -- Confidential Communications -- Waiver

[A] Marital -- Confidential Communications -- Waiver -- Failure To Assert Privilege

Morganroth & Morganroth v. DeLorean, 123 F.3d 374 (6th Cir. 1997) : In an action against a former client for attorney's fees, the defendant's ex-wife gave deposition testimony that was introduced against him at trial. The Court held that he had waived the privilege by failing to make specific objections on that basis when the witness was deposed. The failure to object at that time deprived the plaintiffs of the opportunity to question the witness regarding the context of the conversations, which would have permitted determination of whether the privilege applied.

United States v. Vo, 413 F.3d 1010 (9th Cir. 2005) : Affirming a conviction for distributing methamphetamine, the Court held that the defendant had waived his privilege for marital confidential communications by failing to assert the privilege at a pretrial conference or to object at trial to his wife's testimony.

[B] Marital -- Confidential Communications -- Waiver -- Miscellaneous Cases

SEC v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) : A securities trader, who was a managing director of a firm and head of its Chicago office, decided upon his arrival in Chicago that the office should have a system for routine taping of telephone calls with its customers. When the SEC subpoenaed telephone communications between the trader and his wife, he asserted that he reasonably believed that the conversations on a private phone in his office were not taped. Reversing an order to enforce the subpoena, the Court held that when the couple failed to seek possession of the tapes of their conversations, they did not waive any privilege. For some time after the couple learned that their conversations had been taped, they had no reason to expect that any third party would seek to learn the contents of the conversation, but as soon as they learned that the firm had turned the tapes over to a government agency, they claimed privilege. Reasonable efforts to protect the confidentiality of privileged communications did not require that they institute formal legal proceedings to gain physical possession of the tapes. In addition, the Court held that the firm's giving the tapes to the government agency was not a waiver by the Lavins because they had not authorized the firm to deliver the tapes, nor

was there a waiver when the couple submitted transcripts to the District Court for *in camera* review when ruling on the privilege claim.

United States v. Rakes, 136 F.3d 1 (1st Cir. 1998) : The victim of an extortion scheme was charged with perjury for lying under oath about why he sold his business; he testified that he did so voluntarily when in fact he was threatened with death unless he sold the business at below market value. The government sought to obtain privileged communications made by the victim to his spouse concerning the sale of the business and the reasons for the sale, arguing that the victim had waived the privilege because he had also told a friend on a separate occasion about his reasons for selling the business. The Trial Judge suppressed the communications. Affirming, the Court rejected the waiver argument because the victim had not disclosed his communications with his spouse; disclosure of the underlying facts was not enough to constitute a waiver. Nor was the victim's disclosure of the underlying information to the friend so complete and pervasive as to undermine a claim of privilege.

United States v. Lea, 249 F.3d 632 (7th Cir. 2001) : After a business deal went sour, the defendant was charged with contaminating a rendering works and causing a massive recall of its products. The defendant argued that the contamination was the work of a third party. Affirming a conviction, the Court held there was no abuse of discretion in precluding examination of the other party's wife concerning alleged inculpatory statements he made to her. The defendant did not overcome the presumption that private communications between spouses are privileged, and the fact that the husband had made statements to the FDA dealing with a similar topic did not waive the privilege, when he did not divulge the communication he had made to his wife.

[C] Marital -- Confidential Communications -- Waiver -- Testimony

United States v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995) : In a civil forfeiture case, the wife of a drug trafficker claimed she was an innocent owner of property. The Court found no abuse of discretion in the decision below that the wife waived her marital communications privilege by testifying during her deposition about conversations with her husband prior to his arrest. The District Judge had reasoned that the wife could not selectively decide to testify concerning pre-arrest conversations and not to testify about post-arrest conversations.

[d] Marital -- Exceptions

[i] Agency Relationship

United States v. Nelson, 485 F. Supp. 941 (W.D. Mich. 1980) : A defendant charged with having his wife's signature forged on a bank loan application claimed that the indictment was invalid because his wife's privileged testimony was improperly used by the grand jury. The Court held that "testimony relating either to the existence or absence of spousal agency is not testimony about a protected communication."

United States v. Price, 577 F.2d 1356 (9th Cir. 1978) : After noting that in the Ninth Circuit, as distinguished from others, extrajudicial statements by one spouse come within the spousal immunity privilege, the Court concluded that the privilege did not apply "[w]hen one spouse is shown to be an agent of the other."

[ii] Marital -- Exceptions -- Crime Against Children

United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) : Citing proposed Rule 505(b)(1), the Court affirmed a conviction for attempted rape and decided that the spousal incapacity privilege did not apply when a crime against a child of either spouse was charged. One Judge dissented on the ground that there was no need to expand exceptions from the privilege, especially in a case where the victim is competent to testify.

United States v. White, 974 F.2d 1135 (9th Cir. 1992) : The Court affirmed the defendant's conviction for manslaughter of his stepdaughter, holding there was no error in admitting confidential marital communications, as the

privilege does not apply to statements relating to a crime in which a spouse or a spouse's child is the victim.

United States v. Jarvison, 409 F.3d 1221 (10th Cir. 2005) : During the pretrial stages of a prosecution for child sex abuse, the government moved to compel testimony of a witness; the witness invoked the privilege to refuse to give adverse testimony against her spouse. The government argued that the marriage was not valid, and even if it were, the Judge should recognize an exception to the spousal testimonial privilege when acts of child abuse are involved. Affirming denial of the motion to compel, the Court refused to establish an exception to the spousal testimonial privilege for acts of child abuse, distinguishing the exception it had established in such cases for the marital communications privilege in *United States v. Bahe, infra,* because no federal Court currently recognizes an exception to compel adverse spousal testimony in cases of child abuse. In a prosecution for sexual abuse of an 11-year-old female relative living in the defendant's home, *United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997)* , the Trial Judge granted a pretrial order preventing the defendant's wife from testifying that he would signify his interest in initiating sexual intercourse by digital penetration of her vagina. Reversing the order, the Court held that an exception to the marital communication privilege applies where a spouse has abused a minor child within the household, regardless of the child's relationship to the spouses.

[e] Marital -- Fraudulent, Dissolved, or Failing Marriage

In re Witness Before the Grand Jury, 791 F.2d 234 (2d Cir. 1986) : The Court held that the adverse testimonial privilege was inapplicable where the spouses had lived apart for eleven years at the time of a grand jury investigation and the husband had lived with and represented himself as married to another woman. The Court also held there was no marital communication privilege where the husband and wife had lived apart for four years prior to the first communication as to which the privilege was claimed and there was no possibility of reconciliation at the time of the communication.

United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) : The Court reversed a conviction for a firearms offense, noting that "[i]t is well established that an exception to the husband-wife privilege exists if the trial judge determines that the marriage is a fraud." In *United States v. Cameron*, n125 the Court focused on several factors -- e.g., the absence of cohabitation at trial and the brief period in which the spouses had cohabited, and the defendant's fathering of a child with the woman with whom he actually lived -- and concluded that "where the evidence supported a finding that the marriage was no longer viable and its members had little hope or desire for reconciliation, reason, experience and common sense indicate that the traditional policy reasons for the privilege are non-existent."

United States v. Porter, 986 F.2d 1014 (6th Cir. 1993) : The Court affirmed a conviction for offenses arising out of the defendant's exchanging explosives for cocaine and cash, holding there was no abuse of discretion in admitting testimony by the defendant's former wife relating communications from him made while they were still legally married but ten to twelve days after she had permanently "moved out." Holding the marital communication privilege inapplicable where the spouses have permanently separated, the Court noted that there should be a factual finding on permanent separation if requested. As the two were divorced at the time of trial, there was no violation of the adverse spousal testimony privilege.

United States v. Hamilton, 19 F.3d 350 (7th Cir. 1994) : The Court affirmed convictions for bank robbery, holding there was no error in admitting confidential communications a defendant made to his supposed wife. After an issue was raised at a pretrial hearing that she was not legally divorced from her first husband at the time she married the defendant, the defendant failed to prove the validity of the marriage at trial. The Court also strictly interpreted the valid marriage requirement, so it rejected the defendant's argument that he made the communications in reliance on a belief that the two were validly married. In *United States v. Byrd*, n126 the Court sustained a husband's convictions for arson

and conspiracy, rejecting his objection to the admission of marital statements. Proof that the defendant and his wife were permanently separated rendered the communications privilege "automatically inapplicable," because "society's interests in protecting the confidentiality of the relationships of permanently separated spouses is outweighed by the need to secure evidence in the search for truth that is the essence of a criminal trial."

United States v. Jackson, 939 F.2d 625 (8th Cir. 1991) : The Court affirmed bank robbery convictions, holding that the defendant could not claim the spousal immunity privilege for communications to his wife (from whom he had been separated 16 months), because she was willing to testify for the government. Neither could he claim the confidential communication privilege, because they were permanently separated without any semblance of a marital relationship at the time of the communications. In *United States v. Brown*, n127 the defendant left his wife two weeks after marrying her and had not seen her from that time until the trial; the Court found no testimonial privilege.

United States v. Murphy, 65 F.3d 758 (9th Cir. 1995) : Affirming convictions for violating environmental laws and making false statements, the Court held that the marital communications privilege "does not apply if the couple was separated and the marriage was irreconcilable at the time of the communication." Factors to be considered in determining whether a marriage is irreconcilable include the duration of the separation, the stability of the marriage at the time of the communication, whether a divorce action had been filed and the conduct of the parties since that filing, whether a property settlement had been proposed, and any statements by the parties regarding irreconcilability or the reasons for separation. Thus, a communication made after the defendant had told his wife he did not want to be married, and had filed for divorce, and after the couple had been separated for seven years, was properly found not privileged. In *United States v. Roberson*, n128 the Court affirmed a rape conviction, holding that the marital communications privilege did not apply to statements made by a husband after a dissolution action had been filed and he was no longer living with his wife when he communicated with her, even though the marriage was still valid under state law. In *In re Grand Jury Proceedings (84-5)*, n129 the Court said that "mere suspicious timing of a marriage does not support a finding of a sham marriage, especially when other evidence, such as living together or intentions of living together as husband and wife, indicates that the marriage was entered into in good faith." Thus, it reversed an order holding a wife in contempt for refusing to testify before a grand jury to matters concerning her husband. In *In re Grand Jury Investigation of Hugle*, n130 the Court held that as to confidential communication made during the marriage, the marital communications privilege can be asserted even after the marriage ends, so it "must be available to a partner in an existing, albeit disharmonious marriage."

United States v. Knox, 124 F.3d 1360 (10th Cir. 1997) : Affirming convictions for mail fraud, the Court found no error in the admission of testimony by the defendant's former wife. The Court, citing this *Manual*, held that the confidential communications privilege does not apply if the spouses were divorced at the time of the communication. In *United States v. Treff, 924 F.2d 975 (10th Cir. 1991)* , the Court affirmed the defendant's conviction for attempting to kill his former supervisor at the IRS, holding there was no error in admitting entries from a diary kept by the defendant's late wife over a marital communication privilege objection. The diary was kept on advice of the wife's counsel when the parties were having marital difficulties and the relevant entry was made just before both parties filed for divorce. See also *United States v. Apodaca* n131(denying adverse testimony privilege because defendant's marriage to key government witness three days before trial was a fraud).

United States v. Singleton, 260 F.3d 1295 (11th Cir. 2001) : Affirming a conviction for making false statements to a credit union, the Court found no abuse of discretion in rejecting a privilege claim for tapes that a husband made, at the request of the FBI, of his wife's statements. The Court reasoned that the privilege does not apply when a couple is permanently separated. The factors to be considered in determining separation are whether the couple was cohabiting, how long they had not been cohabiting, and whether either had filed for divorce; the burden is on the party claiming the privilege to prove by a preponderance of the evidence that it applies.

[6] Newsreporter

[a] Common-law Privilege for Sources

In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138 (D.C. Cir. 2006) : The Court held that the *First Amendment* does not afford journalists a constitutional right to refuse to divulge confidential sources in response to grand jury subpoenas. It found it unnecessary to decide whether such a privilege exists under federal common law, because even if such a privilege existed, it was a qualified privilege, and the reporter's interest in confidentiality was outweighed in this case by the interest of the grand jury in conducting a criminal investigation. In *Clyburn v. News World Commun., Inc., 903 F.2d 29 (D.C. Cir. 1990)* , the Court upheld summary judgment for the defendants in a defamation action, ruling that the privilege was properly applied because the plaintiff utterly failed to pursue obvious alternative sources of information.

Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) : In a civil rights suit against a city mayor for alleged interference with a political candidate's campaign, the Court held that a newsreporter had a common-law privilege to refuse to disclose the source of news stories about the plaintiff's performance. In *United States v. Cuthbertson*, n132 the Court held that the common-law, qualified newsreporter-source privilege first recognized by the Circuit in *Riley* also applied in criminal cases. The Court said that before privileged materials are ordered to be produced, even for an *in camera* review, the party seeking them must show that he is unable to acquire the information from another source that does not enjoy the protection of the privilege. Statements of witnesses must be produced for *in camera* review if they are relevant evidentiary material; they need not be "centrally relevant." In *United States v. Criden*, n133 the Court held that a journalist could not refuse to affirm or deny that she had a conversation with a particular individual who had already testified that the conversation occurred, when the evidence was relevant to a defense allegation of prosecutorial misconduct.

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) : The Court held in a libel action that the plaintiffs could compel discovery of a confidential source of the journalist defendants. The Court avoided the question of which state's privilege law to apply by finding that all concerned jurisdictions followed the same rule.

Los Angeles Mem. Coliseum Comm'n v. National Football League, 89 F.R.D. 489 (C.D. Cal. 1981) : In a football team's action against the league in connection with the team's efforts to move the franchise, state claims were joined with a federal antitrust claim. The league sought to subpoena records of two newsreporters, but the Trial Judge, relying on both federal and state law, quashed the subpoenas. The Judge recognized a qualified federal common-law privilege for journalists and found that the league had not exhausted other means of obtaining the information sought from the reporters.

[b] Newsreporter -- Constitutional Privilege for Sources

Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005) : Following press disclosures of an FBI investigation into allegations of espionage by a Department of Energy engineer, the engineer sued for violation of the Privacy Act, 5 U.S.C. § 522a. During discovery the engineer was unsuccessful in obtaining information about the source of the leaks from government officials, so he subpoenaed reporters who had published the disclosures. Affirming contempt orders issued after the reporters' motions to quash were denied, the Court reasoned that reporters have a qualified privilege under the *First Amendment* to refuse in civil cases to disclose confidential sources, but that in this case there was no abuse of discretion in ruling that the engineer had overcome application of the privilege. The information he sought went to "the heart of the matter," and he had exhausted "every reasonable alternative source of information" -- although

perhaps not every possible source -- before seeking discovery from the reporters. In *In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1138 (D.C. Cir. 2006)* , the Court held that the *First Amendment* does not afford journalists a constitutional right to refuse to divulge confidential sources in response to grand jury subpoenas. It found it unnecessary to decide whether such a privilege exists under federal common law, because even if such a privilege existed, it was a qualified privilege, and the reporter's interest in confidentiality was outweighed in this case by the interest of the grand jury in conducting a criminal investigation. In an action against Justice Department officials for leaking wiretap transcripts, *Zerilli v. Smith*, n134 the Court found that the plaintiffs had not made a sufficient showing to justify overriding a newsreporter's claim of privilege with respect to the sources of the transcripts that he published. Although a litigant's need for evidence is important in ruling on a privilege claim, the litigant's efforts to gain information from alternative sources also is of central importance. When, as here, the reporter is a source of information in a dispute among others, the case for recognizing a privilege is stronger than when the reporter is a party seeking to shield himself from liability.

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004) : A court order prohibited counsel from disclosing surveillance tapes made in a corruption investigation and furnished to defense counsel during discovery, but a local television station aired one of the videotapes. In an effort to determine whether the protective order had been violated by leaking the tapes, a special prosecutor was appointed. After interviewing approximately 14 individuals, the prosecutor subpoenaed a reporter for the station. The reporter asserted a "newsman's privilege" and refused to answer any questions regarding the identity of the person from whom he received the tape. Affirming an order of civil contempt against the reporter, the Court held that even following the Circuit's "heightened sensitivity" to *First Amendment* concerns, disclosure of confidential sources was proper in this case, where the request was for information highly relevant to a good-faith criminal investigation and reasonable efforts had been made to obtain the information elsewhere than from the reporter.

United States v. Sanders, 211 F.3d 711 (2d Cir. 2000) : In an unusual case arising out of the 1996 TWA flight 800 crash in the Atlantic, the Court affirmed the convictions of husband and wife journalists for conspiring to remove without authority parts of the aircraft. Their conduct apparently was an effort to prove the "real" cause of the crash. The prosecutor offered the couple immunity if they would identify the person or persons who violated a federal criminal statute by providing them samples from the crash. The couple refused immunity, and they were prosecuted and convicted despite their claim that "there is a journalist's privilege barring any government coercion to disclose a news source" absent a compelling governmental interest. The Court noted that its prior decisions recognizing a privilege had involved "the power of a court to supervise its own compulsory discovery processes." In contrast, the instant case involved "the power of a prosecutor to decide when and on what terms to bring charges against a defendant." The Court declined to extend the privilege to this situation. In *von Bulow v. von Bulow*, n135 a highly publicized case brought by the children of a woman whose husband was acquitted of attempting to murder her, the Court upheld a contempt citation against a third party who had refused to comply with an order to produce documents prepared as part of an effort to write a book about the criminal prosecution. The Court noted that a person claiming a *First Amendment* qualified privilege to protect news-gathering material must demonstrate "the intent to disseminate the information to the public." Here, the third party's motive at the time she commissioned reports on the prosecution was to vindicate the defendant, not to disseminate information. Finally, the Court determined that there was no showing that she assured sources that their information would be confidential.

Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000) : Reversing a civil contempt finding against a reporter who refused to divulge the sources for stories about a sealed multimillion-dollar settlement in an environmental tort action, the Court held there was no compelling interest in learning the sources in order to sanction violation of the sealing order, because the proper steps had not been followed before the settlement was sealed and thus the order was invalid. In *In re Shain, 978 F.2d 850 (4th Cir. 1992)* , four reporters refused to testify at a Hobbs Act prosecution of state

legislators regarding statements made to them in the course of newsgathering. The Court held there was no qualified privilege, as the statements were not made in confidence and there was no evidence of government harassment or bad faith in seeking the information. The Justice Department regulation concerning the compelling of testimony from journalists could not be invoked, even had its procedures been followed, because it expressly disclaims creating any legally enforceable right and is to be enforced only administratively and not by the Courts through the exclusion of evidence. One Judge concurred specially, believing that the majority's focus on the absence of governmental bad faith was insufficiently sensitive to the interest in not routinely dragging reporters into the midst of cases they cover.

In re Selcraig, 705 F.2d 789 (5th Cir. 1983) : In an action by a discharged school teacher against a school district and several officials on a claim that they had publicized false, stigmatizing charges against him, the plaintiff sought to discover the confidential sources relied upon by a reporter who made inquiries that resulted in the publication of the charges. Vacating a contempt decree against the reporter, the Court recognized a qualified *First Amendment* privilege to protect reporters' sources. It found that the plaintiff had not yet established liability and that the reporter's source was relevant only to punitive damages if there was liability, so until the plaintiff could show at least a *prima facie* case of liability, there was no demonstrated necessity for disclosure of the source. The Court declined to treat the reporter more favorably than one who was a party to a case, and it rejected a suggestion by *amicus curiae* that the qualified privilege should be subject to invasion only where there is a "compelling" need for the information or where it is "absolutely critical" to a claim or defense.

McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) : The plaintiff, being prosecuted in Ireland for terrorism, sought an order under *28 U.S.C. § 1782* directing journalists to produce tape recordings that he thought would be useful in the cross-examination of a key witness for the prosecution. The tape recordings were of interviews with the witness that the journalists had conducted in preparation for writing the witness' biography. The journalists argued that the tapes were protected from compelled disclosure by "a federal common law reporter's privilege rooted in the *First Amendment*." Explaining its refusal to stay an order to produce the tapes, the Court discussed the various lines of authority regarding a constitutional newsreporter's privilege. It noted that the principal concern of a privilege is in providing confidentiality of sources. In this case, however, not only was the source known but also he did not object to disclosure of his interviews to the plaintiff.

Continental Cablevision v. Storer Broadcasting Co., 583 F. Supp. 427 (E.D. Mo. 1984) : In an action alleging that the defendant's employees libeled a cablevision company by distributing a false statement to members of a city council, the Court recognized a *First Amendment* qualified privilege for newsreporters not to reveal confidential sources, but it refused to quash a subpoena to a reporter who had written about cable franchises. Reporters, like other witnesses, must attend a deposition and claim privilege specifically as to questions threatening the confidentiality of sources.

Price v. Time, Inc., 416 F.3d 1327 (11th Cir. 2005) : The former coach of the University of Alabama football team sued a magazine reporter and publisher for libel. The published report stated that the coach, while on a trip with the team, had taken two women to a hotel room and had sex with them. The plaintiff sought disclosure of the sources of the report and the defendants invoked the newsreporter's constitutionally-based qualified privilege against disclosure of confidential sources. The Court upheld the privilege claim, holding that the plaintiff had failed to show that he had "used reasonable means to discover the information from alternative sources." The Court stated that "[b]efore we can say that Price has exhausted all reasonable alternative means to discover the identity of the confidential source, he must depose the four women from whom he is most likely to discover that identity, especially since [under the facts] the source is almost certainly one of three."

[c] Newsreporter -- Editing Process

Herbert v. Lando, 441 U.S. 153 (1979) , rev'g 568 F.2d 974 (2d Cir. 1977) : In this libel action by a plaintiff classified as a public figure under *New York Times Co. v. Sullivan*, n136 the Court of Appeals created a privilege to protect the defendants against disclosure during discovery of a journalist's exercise of editorial control and judgment, relying on *Branzburg v. Hayes* n137 for the proposition that "without some protection for seeking out the news, freedom of the press could be eviscerated." The Supreme Court reversed, holding (6-3) that a libel action itself is a deterrent to speech and publication, that the plaintiff in a *New York Times* type of case bears a heavy burden of proving actual malice and needs the kind of evidence sought in this case, and that the privilege for the editorial process would be difficult to confine.

[d] Newsreporter -- Fiction Author

In re Madden, 151 F.3d 125 (3d Cir. 1998) : In an unfair trade action between professional wrestling promoters, the plaintiff deposed an employee of the defendant who produced tape-recorded commentaries related to professional wrestling for the defendant's 900-number hotline. The deponent, invoking a "journalist's privilege," refused to identify sources of certain allegedly false and misleading statements recorded for the hotline. The Court reversed an order that denied a motion to compel the deponent's testimony, and held that the privilege applies only to persons engaged in the process of "investigative reporting" or "news gathering" with the intent to disseminate the news to the public, not to persons like the deponent who are really just authors of entertaining fiction intending to provide advertisement and entertainment.

[e] Newsreporter -- Nonconfidential Information

Gonzales v. National Broadcasting Co., 194 F.3d 29 (2d Cir. 1999) : Both the plaintiffs and the defendant in a civil rights action subpoenaed "outtakes" from a televised report by the NBC news program "Dateline." The outtakes depicted stops of vehicles by the defendant police officer. NBC moved to quash the subpoenas, contending that there is a qualified privilege for newsreporters under federal law, to protect against disclosure of nonconfidential information. Affirming denial of the motion to quash, the Court recognized that the qualified privilege protecting press materials from disclosure applies to nonconfidential as well as confidential materials, since unrestricted discovery would burden the press with heavy costs of subpoena compliance and otherwise impair its ability to perform its duties. However, the Court held that the parties in this case had satisfied the less-demanding showing required for disclosure of nonconfidential press materials. Here, the outtakes were "of likely relevance to a significant issue in the case, and ... not reasonably obtainable from other available sources."

United States v. Smith, 135 F.3d 963 (5th Cir. 1998) : In a criminal proceeding, the Trial Judge granted a television station's motion to quash a subpoena for the unbroadcast portions of an interview with the defendant, finding that newsreporters had a qualified privilege under the Supreme Court's *Branzburg* decision, and that the government did not show a substantial need for the evidence. Reversing, the Court held that *Branzburg* did not establish a general, qualified privilege for newsreporters in criminal cases; at most it provided a privilege to refuse disclosure where the "grand jury investigation is not being conducted in good faith." In the Court's view, "*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." Here, there was no evidence of harassment -- the prosecution served a single subpoena, for nonconfidential information, after receiving clearance from the Attorney General.

[f] Newsreporter -- Other Privileges for News Gathering

United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) : The Court affirmed a pretrial ruling in a criminal case that enforced a subpoena to the National Broadcasting Company for "outtakes" of an interview of a

prospective, key witness. A small portion of the interview was previously broadcast. The Trial Judge had recognized a qualified privilege, determined that the subpoenaed outtakes involved no confidential sources, and ordered that the outtakes be submitted for *in camera* review and possible release to the defendants. The Court approved the procedure, observing that the government had agreed to advise NBC when and if the Judge decided to release any material for use during trial.

In re Application to Quash Subpoena to National Broadcasting Co., 79 F.3d 346 (2d Cir. 1996) : The defendant in a product liability action brought in the District of Massachusetts obtained a subpoena in the Southern District of New York for out-takes from an NBC broadcast. Reversing denial of a motion to quash the subpoena, the Court held that New York State's Shield Law applied, and that the defendant had failed to carry its burden under the Shield Law of making a clear and convincing showing that the out-takes were critical and necessary to its defense and that the information sought was unavailable elsewhere. The Court noted that the standard required in the New York Shield Law was identical to that it had previously applied as a matter of federal law in *United States v. Cutler, 6 F.3d 67 (2d Cir. 1993)* . In *United States v. Burke*, n138 the Court affirmed convictions for RICO and conspiracy offenses arising out of a "point-shaving" scheme in college basketball. One of the participants in the scheme, who testified at trial, had collaborated on an article in a national sports magazine, and a defendant moved to subpoena all documents and tapes in the magazine's possession relating to the article. The Court said that its prior decisions required "a clear and specific showing that the evidence sought was highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources" to overcome a claim of reporter's privilege. Here, the defendant had ample impeachment evidence and the information available from the magazine was cumulative, so the Court upheld the privilege claim.

In re Grand Jury Matter (Gronowicz), 764 F.2d 983 (3d Cir. 1985) (en banc): A divided Court affirmed a contempt citation against an author who refused to disclose information to a grand jury because he claimed that the purpose of the grand jury's investigation was to determine the truth of assertions made in his book, an inquiry prohibited by the *First Amendment*. The Court found that the grand jury properly investigated possible misrepresentations about the book, and the information sought was relevant to its inquiry.

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) : Plaintiffs in a defamation action sought testimony, notes, and tape recordings from an investigative author who had interviewed the defendant while working on a book. Vacating an order holding the author in contempt, the Court held that an investigative book author has standing to invoke the journalist's privilege, that the privilege protects information and materials obtained without a guarantee of confidentiality, and that the plaintiffs had not shown a need for the information requested sufficient to overcome the interests favoring nondisclosure. The concurring Judge would have rested the decision on the nonconstitutional ground that it was an abuse of discretion under *Fed. R. Civ. P. 26(b)(1)* to fail to require the plaintiffs to first seek information about the interviews from the defendant. The plaintiffs subsequently deposed the defendant and again demanded discovery from the author. Reversing a second contempt order, in *Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995)* , the Court held that where information sought is not confidential, a civil litigant is entitled to overcome a valid assertion of the journalist's privilege by a nonparty only upon a showing that the requested material is: unavailable despite exhaustion of all reasonable alternative sources; noncumulative; and clearly relevant (actually, not just potentially) to an important issue in the case. The Court found (2-1) that the requested information was not clearly relevant to an important issue and was cumulative of other evidence.

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) : In an action against a corporation that allegedly violated a deceased woman's rights during her lifetime, the defendant gave notice to a filmmaker that his deposition was required and simultaneously served upon him a subpoena to produce all documents and writings in connection with his investigation of the deceased's death. The Court noted that there is no absolute privilege for reporters, but it concluded

that the Supreme Court has recognized a qualified privilege and that a balancing of *First Amendment* rights against the needs of parties is required in civil litigation. The Court also concluded that a filmmaker had the same qualified privilege as a more traditional reporter.

United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) : Affirming racketeering convictions, the Court upheld a decision not to allow the defendants to compel reporters to answer interrogatories or testify about a story they wrote concerning a grand jury investigation into a bribe offered to a juror. The source of the information in the story was available to the defendants, and the defendants failed to show that the reporters' information was otherwise unavailable and that they had a compelling need for disclosure.

[7] Physician-Patient

[a] Discovery

Doe v. Eli Lilly & Co., 99 F.R.D. 126 (D.D.C. 1983) : In a suit against a drug manufacturer for a child's prenatal injuries, the District Court held that, where physical condition had been placed in issue and the plaintiffs conceded that the District of Columbia's doctor-patient privilege had been waived, the defendants were entitled to interview the plaintiffs' doctors. The Judge rejected the plaintiffs' argument that the doctors should be deposed rather than interviewed and ordered the plaintiffs to execute authorizations "to inform their physicians that no inhibitions of privilege exist with respect to the disclosure of any information they possess to defendant Eli Lilly and its agents which is relevant to the subject matter of these proceedings."

N.O. v. Callahan, 110 F.R.D. 637 (D. Mass. 1986) : In an action by inmates at a state mental health facility alleging systematic failures to provide adequate medical care, the plaintiffs sought medical records of nonparty patients. Although the District Court found that such records are privileged under state law, it held that a strong showing of need had been made and that the records could be discovered. The Judge required deletion of the names of the patients and limited disclosure of the records to counsel, clerical assistants, and experts.

United States v. University Hosp., 575 F. Supp. 607 (E.D.N.Y. 1983) , *aff'd*, *729 F.2d 144 (1984)* : The District Court denied the government's motion to compel the hospital to provide medical records of a handicapped infant whose parents refused to consent to certain surgical procedures, although it observed that federal evidence law does not recognize a doctor-patient privilege.

Oslund v. United States, 128 F.R.D. 110 (D. Minn. 1989) : The plaintiff, who brought an action under the Federal Tort Claims Act alleging he had received herpes from an occupational therapy intern employed at a VA hospital, sought discovery of the intern's medical records. The District Court held that Minnesota's medical records privilege applied, because the FTCA now provides that the United States is to be substituted for an individual party defendant and is entitled to assert any defenses otherwise available to the individual employee. The Judge concluded, however, that the intern's medical records were discoverable under a protective order.

[b] Physician-Patient -- Generally

Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) : In a civil rights action on behalf of an arrestee rendered incompetent allegedly as a result of the arrest, the Court held there was no abuse of discretion in admitting evidence of physician-patient communications, as federal law governs federal question cases with pendent state law claims. The Federal Courts do not recognize a federal physician-patient privilege; and even if state law applied, the privilege was

waived when the plaintiff voluntarily produced records of the treating physician without asserting the privilege.

Patterson v. Caterpillar, Inc., 70 F.3d 503 (7th Cir. 1995) : Affirming a judgment in an ERISA case for an employer that terminated an employee's disability benefits, the Court denied that the employee's doctor-patient privilege was violated when one of his treating physicians testified on behalf of the employer. There is no doctor-patient privilege under federal law, and any state privilege was inapplicable in an ERISA case.

United States v. Bercier, 848 F.2d 917 (8th Cir. 1988) : Affirming a conviction for involuntary manslaughter while driving intoxicated, the Court held that a physician-patient privilege is not recognized in federal criminal proceedings.

Physician-patient privilege cases involving psychotherapists are annotated in § 501.03[8].

[8] Psychotherapists

[a] Basis of Privilege

Jaffee v. Redmond, 518 U.S. 1 (1996) : The Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under *Rule 501 of the Federal Rules of Evidence*." It further held, contrary to the Court of Appeals decision, that the privilege was not qualified by the need of the adversary to obtain the privileged information. Thus, where the privilege applies, it is absolute. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[6]*.

United States v. Schwensow, 151 F.3d 650 (7th Cir. 1998) : The defendant was charged with felon firearm possession after volunteer operators at an Alcoholics Anonymous hotline office found guns in a bag he left with them after they referred him to a detoxification center. Affirming, the Court found no abuse of discretion in the decision that communications with the volunteers were not privileged. They neither possessed credentials qualifying them, nor acted or held themselves out, as counselors; their office did not contain any indicia that it provided counseling services; and the defendant did not speak with them for purposes of diagnosis or treatment, but only to obtain the address for a detoxification center, which he had already decided to enter.

[b] Employee Assistance Programs

Oleszko v. State Compensation Ins. Fund, 243 F.3d 1154 (9th Cir. 2001) : In a state employee's employment discrimination action, the Court found no error when the Fund's employee assistance program was not required to produce records or to testify about the substance of communications by other employees. The program was designed to assist employees in dealing with a range of personal issues -- health, marital, financial, substance abuse, and emotional problems. The program's staff contained no licensed psychiatrist, psychologist or social worker, but all of the staff had backgrounds in psychology or social work. The Court reasoned that "[t]he reasons for recognizing a privilege for treatment by psychiatrists or social workers apply equally to EAPs."

[c] Psychotherapists -- Exceptions

[i] Child Victim

United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994) : The Court affirmed a conviction for sexually abusing

children, holding it would not recognize a psychotherapist-patient privilege in a criminal child sexual abuse case.

[ii] Psychotherapists -- Exceptions -- Crime or Fraud

In re Grand Jury Proceedings (Violette), 183 F.3d 71 (1st Cir. 1999) : The Court held that the psychotherapist-patient privilege is subject to a crime-fraud exception, reasoning that communications that are intended to further a crime or fraud are not "allied with bona fide psychotherapy and, thus, protecting such communications will not promote mental health." The Court emphasized "that the crime-fraud exception will apply only when the patient's purpose is to promote a particular crime or fraud." In this case the government had established a *prima facie* case that the client's communications were made as part of a scheme to defraud lenders and/or disability insurers.

In re Doe, 711 F.2d 1187 (2d Cir. 1983) : The Court held that it would not recognize a psychotherapist-patient privilege claim for patient records of a sham medical clinic that operated to dispense controlled substances. An *in camera* examination of the records revealed no intensely personal communications of the sort that the privilege might be thought to foster.

[iii] Psychotherapists -- Exceptions -- Fees, Patient Identity, etc.

In re Grand Jury Subpoenas Duces Tecum Dated Jan. 30, 1986, 638 F. Supp. 794 (D. Me. 1986) : The Court denied a psychiatrist's motion to quash a grand jury subpoena directed to his solely-owned corporation. Any privilege would not extend to portions of a doctor's records "documenting the times and lengths of patient appointments, fees, patient diagnoses, treatment plans and recommendations, and somatic therapies," or to patient identities. As for other documents, the doctor had not made a particularized claim of privilege as to specific items or categories, so the motion was denied without prejudice to reconsideration.

In re Zuniga, 714 F.2d 632 (6th Cir. 1983) : The Court affirmed enforcement of subpoenas *duces tecum* issued to psychotherapists by a grand jury investigating Medicaid fraud. The Court found that the information sought -- the identity of patients, the dates on which they were treated, and the length of treatment on each date -- was not privileged. Assuming *arguendo* that patient identity might be privileged, the Court also observed that the information had been disclosed to Blue Cross/Blue Shield, so the privilege would have been waived.

[iv] Psychotherapists -- Exceptions -- Threats

United States v. Hayes, 227 F.3d 578 (6th Cir. 2000) : The defendant was charged with making threats in several psychotherapy sessions to murder his supervisor at the United States Postal Service. The Court upheld exclusion of the therapist's expected testimony, and affirmed dismissal of the indictment. Although a "dangerous patient" exception appeared to have been recognized in a footnote in *Jaffee v. Redmond,* the Court believed that the footnote "was referring to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their duty to protect the patient or identifiable third parties."

United States v. Chase, 340 F.3d 978 (9th Cir. 2003) (en banc): In the course of his treatment for bipolar disorder, the defendant gave his psychiatrist a list of persons, including two FBI agents who had investigated complaints he had made, whom he thought about injuring or killing. The psychiatrist notified the FBI about the threatening statements, and when the defendant learned that federal officers were going to execute a search warrant at his home, he told a telephone operator at the clinic where the psychiatrist worked that "there are FBI Marshals that are on their way out to get me and if that happens, people are going to die." Affirming his conviction for threatening to murder the officers executing the warrant, the *en banc* Court held that it was error (but harmless) to admit the psychiatrist's testimony regarding the threats made during treatment sessions, because they were confidential statements made for the purposes of diagnosis and treatment and thus privileged under *Jaffee v. Redmond, 518 U.S. 1 (1996)* . The threats were properly disclosed to the authorities, but the *Tarasoff* exception to confidentiality does not take a communication out of the privilege, and the

Court declined to recognize a dangerous-patient exception to the federal testimonial privilege. Three Judges, concurring in the result, would have recognized a dangerous-patient exception to the privilege, relying in part on dictum in *Jaffee*'s footnote 19, which states that "we have no doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."

United States v. Glass, 133 F.3d 1356 (10th Cir. 1998) : The defendant was voluntarily admitted to a mental health unit, and stated to the psychiatrist examining him that he wanted to "get in the history books like Hinkley [*sic*] and he wanted to shoot Bill Clinton and Hillary." In a prosecution for threatening the President, the Court held that the rationale of *Jaffee v. Redmond* applied to protect the defendant's statement, and therefore that the defendant's guilty plea (conditioned on the admissibility of the statement) had to be vacated. The Court recognized that *Jaffee* envisioned an exception to the psychotherapist-patient privilege "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." However, in this case there was no indication that the threat was serious or that the threat could only be averted by means of disclosure.

[d] Psychotherapists -- In the Course of Diagnosis or Treatment

United States v. Romo, 413 F.3d 1044 (9th Cir. 2005) : The defendant, an inmate charged with threatening the President, had sought a meeting with a licensed professional counselor who had previously provided him with mental health treatment and at the meeting had admitted sending a threatening letter. Affirming, the Court held there was no abuse of discretion when the Judge found that the meeting was not in the course of diagnosis or treatment and denied the psychotherapist privilege against the counselor's testimony. The Court reasoned that the fact that a therapist has previously provided mental health care does not itself indicate that a subsequent meeting involved therapy; special attention must be paid to the particulars of the meeting during which the allegedly privileged information was exchanged. Here, according to the majority, there was nothing to suggest that the defendant was seeking counseling and there was nothing about the meeting indicating that it involved treatment of any kind -- the defendant simply blurted out the information about the threat. The counselor's wide-ranging responsibilities as "program director" gave further evidence precluding an assumption that the meeting was a psychotherapy session. One Judge, concurring in the result, would have found the communication privileged, since the defendant had contacted the counselor to discuss a problem he was having and the communication was made in the course of discussing that problem.

[e] Psychotherapists -- Insanity Claims

Noggle v. Marshall, 706 F.2d 1408 (6th Cir. 1983) . In a habeas corpus case, the Court found no constitutional error in the government's responding to an insanity defense by calling as its witness a psychiatrist who had been retained by the defense and who had examined the defendant, but who was not called by the defense. The Court also held that a defendant retains his privilege against self-incrimination even after calling psychiatrists to testify in support of an insanity defense. If cross-examination of the defense psychiatrists elicits statements made by the defendant, a jury may use these statements only on the insanity issue, not to determine guilt or innocence. The Court concluded that a bifurcated proceeding was not constitutionally required.

[f] Psychotherapists -- Miscellaneous Cases

In re Doe, 964 F.2d 1325 (2d Cir. 1992) : Affirming a civil contempt order against a key government witness in an extortion investigation who refused to answer questions before trial about his psychiatric history, the Court recognized a psychotherapist-patient privilege but held that in the circumstances *in camera* discovery subject to a protective order against public disclosure was sufficient to safeguard the witness' privacy interests. The Court declined to rule whether the privilege could limit confrontation as to credibility at trial.

United States v. Schlette, 842 F.2d 1574 (9th Cir. 1988) , amended, 854 F.2d 359 (9th Cir. 1988) : A prosecutor's estate and a newspaper sought access to a psychiatric report and sentencing reports relating to a defendant who killed the prosecutor and committed suicide. The Court held that the reports should have been released, rejecting the government's attempt to assert a psychotherapist-patient privilege on behalf of the deceased defendant. It concluded that only the personal representative of the defendant "arguably would have standing to assert the privilege."

[g] Psychotherapists -- Privilege Not Qualified or Subject to Balancing

In re Sealed Case (Medical Records), 381 F.3d 1205 (D.C. Cir. 2004) : In an action by mentally disabled group home residents against a government agency and other defendants arising from alleged sexual assaults against residents by a mentally disabled co-resident, the agency was ordered to produce all of the co-resident's records in discovery. The Trial Judge, who did not screen the records in any way, had observed that "privileges are qualified or conditional for a number of reasons." Vacating the order, the Court responded that "[t]hat statement is incorrect with respect to the psychotherapist privilege. In *Jaffee,* the Court flatly rejected the suggestion that the privilege was subject to balancing." Thus, it was error to permit the plaintiff's counsel to see material covered by the privilege, regardless of the Judge's "assessment of the 'interests of justice.' "

[h] Psychotherapists -- Waiver

United States v. Snelenberger, 24 F.3d 799 (6th Cir. 1994) : The Court affirmed a conviction for threatening to murder an Administrative Law Judge, holding there was no abuse of discretion in admitting testimony by a psychotherapist regarding the defendant's threats. The defendant had waived the privilege by acknowledging to an FBI agent that he had expressed the threat to the psychotherapist. In *In re Zuniga*, n139 the Court affirmed enforcement of subpoenas *duces tecum* issued to psychotherapists by a grand jury investigating Medicaid fraud. The Court found that the information sought -- the identity of patients, the dates on which they were treated, and the length of treatment on each date -- was not privileged. Assuming *arguendo* that patient identity might be privileged, the Court also observed that the information had been disclosed to Blue Cross/Blue Shield, so the privilege would have been waived.

In re Pebsworth, 705 F.2d 261 (7th Cir. 1983) : The Court enforced a grand jury subpoena for a psychotherapist's records in an investigation of possible fraudulent insurance claims. The Court concluded that any privilege that might have existed was waived by the patients' explicit authorization of disclosure of the requested records to the medical insurers. A concurring Judge argued that "traditional waiver doctrines are inappropriate in the context of present-day medical insurance"; that insurance plans encourage doctor-patient relationships and reduce their costs; and that insurance plans and the privilege "go hand in hand."

Dixon v. City of Lawton, Okla., 898 F.2d 1443 (10th Cir. 1990) : In a civil rights wrongful death action, the Court held there was no error in admitting evidence of confidential communications between the decedent and psychotherapists. The Court said the plaintiff put the decedent's mental condition in issue by seeking damages for mental pain and suffering prior to death and the communications were brief, recent, and directly related to issues necessarily injected into the suit by the plaintiff. Even if the subject matter of the communication were viewed as pertaining only to the defense of the action, the Court would adopt the view that the privilege does not apply after the patient's death when any party relies on the condition as an element of a claim or defense.

[9] Required Reports

United States v. King, 73 F.R.D. 103 (E.D.N.Y. 1976) : In a prosecution for income tax evasion, the government subpoenaed New York City income tax returns filed by the defendant. After observing that proposed Rule 502 might have required granting the City's motion to quash the subpoena, the Court rejected the privilege claim under *Rule 501*. Placing greatest emphasis on the need of the trier of fact to have as much pertinent evidence as possible, the Court concluded that the local privilege did not furnish much of an incentive for honest reporting, especially because the City retained the right to share its information with other taxing authorities on a reciprocal basis.

In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976) : When a federal grand jury sought production of lawyers' contingent fee agreements that a State Court rule required to be filed and "impounded subject to inspection only by Order of the Court, by the client or by the Disciplinary Board of the Supreme Court of Pennsylvania," the Court refused to quash the subpoena. The Court recognized that proposed Rule 502 would have adopted a privilege for required records or reports, but stated that it would not assume that Congress' refusal to adopt the rule amounted to either approval or disapproval. Rather, the Court analyzed the scant precedent available and decided that the federal interest in providing full information to the grand jury outweighed the state interest in encouraging people to file reports because the state had other means available to compel compliance.

In re Medtronic, Inc., 184 F.3d 807 (8th Cir. 1999) : The Trial Judge in a product liability case entered discovery orders requiring a pacemaker manufacturer to contact 4000 patients about whom adverse event reports had been filed. The Judge refused to apply an FDA regulation making such required reports confidential, on the ground that the regulation created a privilege inconsistent with *Rule 501* because only Congress and the Supreme Court had authority to modify common-law privileges. Granting a petition for mandamus, the Court held the orders invalid. First, the governing provision in this diversity case was the second sentence of *Rule 501*, which calls for reference to state law. Second, the regulation had no adverse impact on the applicable Arkansas Rule of Evidence, which gives patients control over disclosure of medical records and confidential communications made for purposes of medical diagnosis or treatment. Finally, any conflict between state and federal law must be resolved in favor of the federal provisions, and for these purposes regulations made within congressional authorization have the same preemptive effect as federal statutes.

In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556 (N.D. Ga. 1992) : Granting motions to compel the defendants to produce government civil investigative demands and interrogatories and the answers thereto in their possession, the Court held that there was no required reports privilege where the statutory restrictions on disclosure apply only to the officers to whom the report is made and the statute does not expressly confer a privilege on the reporting party.

[10] Special Privileges

[a] Academic Research

Cusumano v. Microsoft Corp., 162 F.3d 708, 1998-2 Trade Cas. (CCH) P72373 (1st Cir. 1998) : In preparing to defend its antitrust case with the government, Microsoft sought to discover materials from two academic researchers who were bringing out a book on the "browser war," which was based in significant part on interviews with current and former Netscape Communications Corporation employees. The Court held there had been no abuse of discretion in the determination below that Microsoft's need for that particular information did not overcome the importance of preserving confidentiality for investigative materials gleaned in the course of pre-publication academic research.

In re American Tobacco Co., 880 F.2d 1520 (2d Cir. 1989) : The Court affirmed civil contempt citations against two nonparties, a medical school and the American Cancer Society, that refused to respond to subpoenas by tobacco

companies for various research data that were compiled by their medical staffs. The companies expected that plaintiffs in product liability suits against them would present expert testimony relying on seminal studies by these medical staffs and sought the underlying data to prepare for examination of the experts. The Court found that the applicable New York law recognized at most only a qualified privilege for scholarly research and that the protective order entered by the Trial Judge properly protected the confidentiality of sensitive information. In *In re Grand Jury Subpoena Dated Jan. 4, 1984*, n140 the District Court recognized a scholar's privilege and quashed a grand jury subpoena for notes that a Ph.D. candidate had made while working as a waiter. Following a suspicious fire at the restaurant, the police had learned that he had made daily notes concerning activities at the restaurant in connection with his dissertation on American restaurants. Remanding without actually deciding whether to recognize a scholar's privilege, the Court stated that application of any such privilege

> requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality.

Buchanan v. American Motors Corp., 697 F.2d 151 (6th Cir. 1983) : In a product liability suit pending in North Carolina, the defendant manufacturer attempted to subpoena an expert residing in Michigan for a deposition that would require him to spend substantial time testifying and to disclose raw data that he collected over the course of long study. The Court recognized that the witness had no privilege to refuse to testify but decided it was no abuse of discretion to quash the subpoena as unduly burdensome.

Deitchman v. E.R. Squibb & Sons, 740 F.2d 556 (7th Cir. 1984) : In a product liability action against drug manufacturers, the Court recognized a qualified privilege for protection of scientific research. It found, however, that where the plaintiffs' experts intended to rely on articles written by the founder of a project at the University of Chicago to study the disease suffered by the plaintiffs, the defendants had great need to discover information in the project's possession that might enable it to cross-examine the plaintiffs' experts. Since the subpoena seeking all the project's documents was too broad, and the project's resistance to any discovery at all was unacceptable in the face of the company's need for information, the Court remanded with a suggestion to find a common ground that would permit some discovery.

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993) : The Court affirmed a judgment of contempt against a Ph.D. student who refused to respond to grand jury questions about vandalism by animal rights activists at a university's animal research facility, holding that there was neither a *First Amendment* nor a federal common-law privilege for confidential information received in the course of scholarly research.

[b] Special Privileges -- Bank Depositor

United States v. Grand Jury Investigation, 417 F. Supp. 389 (E.D. Pa. 1976) : Denying a motion to quash a grand jury's subpoena *duces tecum*, the District Court rejected an argument that a depositor had a privilege to prevent banking information from being obtained from the depositor's bank.

United States v. Prevatt, 526 F.2d 400 (5th Cir. 1976) : The Court rejected the defendant's claim of a bank-depositor privilege in an income tax prosecution.

[c] Special Privileges -- Child Abuse and Juvenile Reports

Pearson v. Miller, 211 F.3d 57 (3d Cir. 2000) : The Court declined to recognize a privilege based on confidentiality provisions in three state statutes that protected reports of child abuse, juvenile records, and mental health records. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[4]*.

[d] Special Privileges -- Employer-Stenographer

United States v. Schoenheinz, 548 F.2d 1389 (9th Cir. 1977) : The Court held that the Oregon employer-stenographer privilege could not be asserted in a proceeding to enforce an IRS summons, because such a privilege was not recognized by federal common law.

[e] Special Privileges -- Family Members

In re Grand Jury Subpoena (Matthews), 714 F.2d 223, 1983-2 Trade Cas. (CCH) P65544 (2d Cir. 1983) : The Court affirmed a contempt ruling against a witness who refused to testify before a grand jury investigating his in-laws. Although the Court indicated that it was aware of opinions recognizing a parent-child privilege, it rejected the claim of a family privilege to protect against testimony that might be adverse to in-laws.

In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997) : In consolidated cases, two witnesses moved to quash subpoenas served by the grand jury. Both witnesses invoked a parent-child privilege; one witness was a parent subpoenaed to provide confidential information against his son, and the other witness was a daughter subpoenaed to provide evidence against her father. Upholding denial of the motions to quash, the Court refused to recognize a parent-child privilege. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[9]*.

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998) : The defendant, convicted of illegal possession of firearms and ammunition, claimed error in the admission of statements by his minor children concerning his acts of child abuse and brandishing of weapons. Affirming, the Court found it unnecessary to decide whether a parent-child privilege existed under federal common law, because "even if such a privilege were to be recognized, it would have to be narrowly defined and would have obvious limits, perhaps such as where the family fractures itself or the child waives the privilege or where ongoing criminal activity would be shielded by assertion of the privilege." The defendant could not claim any parent-child privilege, because the children's statements indicated that he had illegally possessed guns "in circumstances where he was abusing his children and placing them at risk with those guns." In *United States v. Jones*, n141 a witness who was given immunity and called to testify before a grand jury claimed a privilege not to give evidence against his father. The Court noted that there was only "sparse authority" to support the claim, but did not hold that no "family" privilege existed under federal law. Instead, it limited its holding rejecting the privilege claim to a case involving an adult child where the grand jury was not asking about communications between father and son and was not inquiring into the son's "familial association" with his parent. It emphasized that "we do not endeavor to decide to what extent the age of the child and whether or not emancipation has occurred may or may not affect the decision as to whether any familial privilege exists."

United States v. Ismail, 756 F.2d 1253 (6th Cir. 1985) : The Court affirmed heroin convictions, ruling that an emancipated adult, if subpoenaed, must testify against a parent. It declined to "address situations involving, for instance, unemancipated minors who generally require much greater parental guidance and support than do emancipated adults."

United States v. Davies, 768 F.2d 893 (7th Cir. 1985) : The Court held that there is no parent-child privilege. The defendant, charged with involvement with stolen merchandise, had complained that the F.B.I. obtained from his daughter a telephone number that he had confided in private. Aside from rejecting the privilege claim, the Court observed that the government had not sought to have the daughter testify.

In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983) : The Court recognized a parent-child privilege and held that it entitled a child to refuse to testify before a grand jury about confidential communications between him and his father and also to decline to testify adversely against his father in any criminal proceeding. The opinion contains a lengthy discussion of arguments in favor of expanding the scope of family privileges beyond spouses.

In re Grand Jury Subpoena (Santarelli), 740 F.2d 816 (11th Cir. 1984) : Affirming a contempt finding against a grand jury witness, the Court rejected a claim that a witness ought not to have to testify against his father. The Court cited *In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. 1981)* , which rejected a parent-child privilege, and stated that it was bound by that decision.

[f] Special Privileges -- Federal Statute

Baldrige v. Shapiro, 455 U.S. 345 (1982) : The Court held that because the Census Act guarantees that raw data reported by individuals as part of the census is to be held confidential and not to be disclosed, lists of addresses are not available to the public under the Freedom of Information Act or to litigants seeking pretrial discovery under *Fed. R. Civ. P. 26*. Citing *Rule 501*, the Court said "that Congress intended the confidentiality provision to constitute a 'privilege' " and that "[t]he wisdom of its classifications is not for us to decide."

Chiron Corp. v. NTSB, 198 F.3d 935 (D.C. Cir. 1999) : The petitioners sued to compel the NTSB to share information obtained during an investigation of a fire that destroyed an aircraft containing cargo owned and manufactured by them, arguing that they may face civil liability claims for the fire. In an opinion dismissing the petition for lack of standing, the Court observed that the governing statute makes the NTSB's report inadmissible in a civil action, but that factual accident reports by NTSB investigators are, by regulation, not reports of the Board and are thus admissible.

[g] Special Privileges -- Hospital Records

Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456 (3d Cir. 1996) : In a diversity action on behalf of a patient sexually assaulted by two other patients at a mental hospital, the Court held that Pennsylvania's Mental Health Procedures Act barred production of "incident reports" created as a result of the incident.

[h] Special Privileges -- Informant in Litigation

Powers v. Chicago Transit Auth., 890 F.2d 1355 (7th Cir. 1989) : The plaintiff in a civil rights action obtained a memorandum allegedly containing confidential information from the defendant's files and forwarded a copy to the media, but refused in a protective order proceeding to disclose who had provided the memorandum to him, citing a "confidential-informant-in-litigation" privilege. The Court affirmed rejection of the privilege and dismissal of the plaintiff's case for failure to comply with discovery orders, holding that the proposed privilege was overbroad and unsupported by any authority.

[i] Special Privileges -- Internal Investigations, Peer Review, and Self-Analysis

University of Pa. v. EEOC, 493 U.S. 951 (1990) : In the course of investigating a charge that the University had violated Title VII in denying tenure to a Chinese-American woman, the EEOC subpoenaed tenure files of the woman and five men alleged to have received more favorable treatment. The University's application to have the subpoena modified to exclude "confidential peer review information" was denied by the EEOC and the subpoena was ordered enforced. In a unanimous affirmance, the Supreme Court first refused to recognize a common-law privilege under *Rule 501*, noting that the balancing of conflicting interests of this type is particularly a legislative function and that Congress, while providing for some confidentiality in EEOC proceedings, had not created a privilege for peer review documents. Further, the Court noted that a peer review privilege for academic tenure decisions would be a substantial obstacle to investigating and remedying discrimination and that acceptance would lead to a wave of similar privilege claims by other employers. The Court distinguished the executive privilege recognized in *United States v. Nixon*, grounded in the separation of powers doctrine, and rejected the University's *First Amendment* claim, as the subpoena was neither an attempt to control the content of speech nor a direct infringement of academic freedom. This case is discussed in the Editorial Explanatory Comment, *§ 501.02[7]*.

First Eastern Corp. v. Mainwaring, 21 F.3d 465 (D.C. Cir. 1994) : The Court reversed an order quashing a subpoena for records related to a bank that was served on an independent management consultant that federal regulators required the bank to retain. Because the bank had not raised the qualified self-evaluative privilege below, the Court refused to entertain the claim, but it indicated it would be unlikely to recognize such a privilege that had been found only in limited cases involving areas of public health or public safety. In *FTC v. TRW, Inc.*, n142 the defendant credit reporting agency, fearing an FTC complaint about its practices, undertook a program in which in-house auditors checked branch offices for compliance with federal and state law. Auditors prepared reports and identified problems and branch managers submitted written responses to the reports. The Court said that "[w]hatever may be the status of the 'self evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a governmental agency."

Whitman v. United States, 108 F.R.D. 5 (D.N.H. 1985) : In a malpractice action brought under the Federal Tort Claims Act, the Court indicated approval of a line of cases creating a privilege protecting hospital peer review records from disclosure during discovery. It found, however, that the privilege was waived in the instant case by the deposition testimony of one of the doctors who revealed the names of the individuals present at the peer review hearing and the experts' opinion on the procedure used during an operation.

In re Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992) : In a securities class action case, the District Judge recognized a privilege of critical self-analysis, but held that it was not absolute. The Magistrate Judge found that the information in the documents sought by the plaintiffs was available elsewhere, and the District Judge concluded that the plaintiffs failed to demonstrate a need for the documents sufficient to override the privilege. In an employment discrimination action, *Hardy v. New York News, Inc.*, n143 a Magistrate ruled that the plaintiff's interest in proving discriminatory intent outweighed any interest in critical self-analysis that the defendant urged in support of a privilege to protect its efforts at self-improvement.

Virmani v. Novant Health Inc., 259 F.3d 284 (4th Cir. 2001) : In a suit by a physician who claimed that his hospital privileges were terminated because of his race and national origin, the defendant hospital claimed privilege as to peer review records. The Court rejected the privilege claim, framing the question as follows: "The issue before us is whether the interest in promoting candor in medical peer review proceedings outweighs the need for probative evidence in a discrimination case." The Court reasoned that the plaintiff's discrimination claim "arises from the peer review process itself," and relied on *University of Pa. v. EEOC, 493 U.S. 182 (1990)* , in which peer review privilege was

rejected in a tenure denial case. The opinion did not address whether such a privilege might be recognized in another kind of case.

In re Kaiser Aluminum & Chem. Co., 214 F.3d 586 (5th Cir. 2000) : The Court affirmed an order enforcing administrative subpoenas following an explosion at a bauxite processing plant. Without deciding whether a self-evaluation privilege should ever be recognized, it declined to do so for documents produced by a Kaiser committee formed in the 1970s to study the equipment at the plant and determine how procedures could be improved and liability minimized, since they were pre-accident documents sought by a government agency.

Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977) : The Court held that an executive engineer for the defendant should answer deposition questions concerning internal meetings and discussions designed to review, analyze, and evaluate operations with an eye to continued self-improvement. The Court noted other decisions granting a qualified privilege for internal meetings to facilitate self-improvement, but distinguished those cases as involving requests for production of the actual minutes or other documents concerning the matters discussed in confidential meetings.

Memorial Hosp. v. Shadur, 664 F.2d 1058, 1981-2 Trade Cas. (CCH) P64353, 1981-2 Trade Cas. (CCH) P64353 (7th Cir. 1981) : Where one doctor sued others for restraint of trade, the Court held that it would not follow a state statute making records of hospital disciplinary proceedings privileged. Although the Court did say that a privilege might be recognized as a matter of comity, it concluded that the need for disclosure was particularly substantial in the instant case.

Agster v. Maricopa County, 406 F.3d 1091 (9th Cir. 2005) : In an action arising from the death of an inmate who died while in the custody of the county's sheriff's department, the Court affirmed an order requiring the defendant to produce the mortality review conducted by Correctional Health Services (whose employees had given medical care to the decedent). Although Arizona recognizes a privilege for peer review of the professional practices within a hospital or center, the Court observed that the suit raised a federal claim so that federal law governed. The Court relied upon two considerations in denying the privilege. First, it found that Congress granted immunity to participants in a medical peer review in the Health Care Quality Improvement Act of 1986, but did not privilege the report resulting from the peer review process. Second, it found that "[w]hereas in the ordinary hospital it may be that the first object of all involved in patient care is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered." The Court concluded that "[i]n these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided." In *Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992)* , the Court reversed a judgment for the defendant in a Jones Act case, holding it was error to deny the plaintiff discovery of the ship's safety committee minutes under a privilege of "self-critical analysis." The Court held that the privilege, if it exists at all, only protects routine internal corporate reviews of matters related to safety concerns, and not voluntary routine preaccident safety reviews. In *EEOC v. General Tel. Co. of Nw., Inc.*, n144 the Court reversed a finding that the defendant had not engaged in sex discrimination, holding that evidence of the defendant's equal opportunity efforts was improperly admitted after the EEOC had been precluded from discovering relevant self-critical material.

Hoffman v. United Telecommun., Inc., 117 F.R.D. 440 (D. Kan. 1987) : In an employment discrimination suit, the Magistrate ruled that a self-evaluation privilege applied to the subjective evaluations of a witness who had performed an analysis in preparation for an affirmative action plan required by the government. The privilege did not protect objective data generated by the analysis.

Scott v. McDonald, 70 F.R.D. 568 (N.D. Ga. 1976) : In an action alleging medical malpractice by a hospital, the Court granted the defendant's motion for a protective order, holding that a Georgia statute applied, rendering inadmissible records and proceedings of any hospital medical review committee, peer review committee, or medical organizational committee, and prohibiting the introduction of testimony concerning evidence presented to such committees.

[j] Special Privileges -- Judicial Officers

In re Certain Complaints Under Investigation, 783 F.2d 1488 (11th Cir. 1986) : Although the Court recognized a qualified privilege protecting confidential communications among Judges and their staffs, it found that a Judge's secretary could be compelled to produce appointment diaries, guest sign-in sheets, and telephone logs failing a showing that they would reveal communications concerning judicial business. Moreover, the Court held that subpoenas directed at a Judge's staff members were enforceable in this case in light of an Investigating Committee's need for information.

[k] Special Privileges -- Legislative

United States v. Gillock, 445 U.S. 360 (1980) : The Court held that in a federal criminal prosecution against a state legislator there is no legislative privilege barring the introduction of the defendant's legislative acts.

Searingtown Corp. v. North Hills, 575 F. Supp. 1295 (E.D.N.Y. 1981) : In a civil rights action, the Court ruled that a village mayor and members of the village board of trustees had a privilege to refuse to disclose their motivations for and deliberations concerning various legislative acts.

In re Grand Jury, 821 F.2d 946 (3d Cir. 1987) : The Court held that a common-law speech or debate privilege is not cognizable in Federal Courts, so a grand jury subpoena duces tecum to a state legislative committee should not have been quashed. The Court left open the possibility that a more narrowly drawn privilege for confidential deliberative communications might be recognized.

[l] Special Privileges -- Mediation

, *In re Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487 (5th Cir. 1998)* : Individuals who had participated in a state mediation session under a federally funded agricultural loan program sought to quash a subpoena issued by a grand jury investigating financial irregularities in the mediation program. The individuals argued that the information was protected by a federal "mediation privilege," but the Court rejected this claim, noting that under the pertinent federal statute, federal funding is dependent on the mediation proceedings being confidential. However, " 'confidential' does not necessarily mean 'privileged,' " and the Court concluded that the confidentiality provision could not have been intended "to shield wrongdoing arising out of the state agricultural loan mediation process."

[m] Special Privileges -- Ombudsman

Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997) : The Court reversed a summary judgment for an employer in an age discrimination suit, holding it was error to rule that confidential communications made by an employee to a company ombudsman were privileged. Although the Court agreed that "fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement," it reasoned that "far more is required to justify the creation of a new evidentiary privilege." The corporate ombudsman promises strict confidentiality to employees and is bound by a code of ethics to keep that promise, but the Court observed that "when an aggrieved

employee or an employee-witness is deciding whether or not to confide in a company ombudsman, his greatest concern is not likely to be that the statement will someday be revealed in civil discovery," since it is more likely that "the employee will fear that the ombudsman is biased in favor of the company, and that the ombudsman will tell management everything that the employee says."

[n] Special Privileges -- Social Worker-Client

Jaffee v. Redmond, 116 S. Ct. 1923 (1996) : The Court held that the federal psychotherapist-patient privilege "should also extend to confidential communications made to licensed social workers in the course of psychotherapy." This case is discussed in the Editorial Explanatory Comment, *§ 501.02[6]*.

[11] State Law

[a] Diversity Actions

Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 117 F.R.D. 292 (D.D.C. 1987) : The Magistrate recognized that there is no federally recognized accountant-client privilege, but determined that state law governed the privilege question in the instant case. The Magistrate noted that the presiding Judge had determined that in the District of Columbia a local Court would apply the privilege law of the jurisdiction with the more substantial interest in the matter.

In re Application to Quash Subpoena to National Broadcasting Co., 79 F.3d 346 (2d Cir. 1996) : The defendant in a product liability action brought in the District of Massachusetts obtained a subpoena in the Southern District of New York for out-takes from an NBC broadcast. Reversing denial of a motion to quash the subpoena, the Court held that New York State's Shield Law applied, and that the defendant had failed to carry its burden under the Shield Law of making a clear and convincing showing that the out-takes were critical and necessary to its defense and that the information sought was unavailable elsewhere.

Hahnemann Univ. Hosp. v. Edgar, 74 F.3d 456 (3d Cir. 1996) : In a diversity action on behalf of a patient sexually assaulted by two other patients at a mental hospital, the Court held that Pennsylvania's Mental Health Procedures Act barred production of "incident reports" created as a result of the incident. In *Samuelson v. Susen*, n145 the Court upheld the Pennsylvania District Court's applying Ohio privilege law after finding that a Pennsylvania State Court would apply Ohio law.

Kappas v. Chestnut Lodge, Inc., 709 F.2d 878 (4th Cir. 1983) : In a diversity medical malpractice action, the Court found that a state statute making proceedings and files of medical review committees inadmissible was broad enough to cover staff conferences at a hospital, so it upheld a ruling excluding transcripts of those conferences and affirmed a judgment for the defendants.

In re: Avantel, S.A., 343 F.3d 311 (5th Cir. 2003) : In a diversity action by a Texas corporation against a Mexican corporation, when the defendant filed a petition for mandamus against an order to disclose allegedly privileged documents, it both included the documents in an appendix, without requesting that the volume be filed under seal, and sent an unredacted copy of the volume to opposing counsel. The Court held that Texas privilege law, including the Texas law rejecting waiver for inadvertent disclosures, applied and denied the plaintiff's motion to dismiss the petition for mootness, since the issue of inadvertency was for the Judge to decide. The Court also held there was no abuse of discretion when the Judge refused to apply the Mexican professional secret doctrine, as the defendant had requested. As

the party claiming privilege, the defendant had the burden of proving the substance of the Mexican privilege law to a reasonable certainty, which it failed to do.

Credit Life Ins. Co. v. Uniworld Ins. Co., 94 F.R.D. 113 (S.D. Ohio 1982) : Ruling on a motion to dismiss for lack of personal jurisdiction in a diversity action for fraud and breach of contract, the Court determined that the law of Ohio did not recognize a privilege for tax returns, so the defendants were ordered to produce their returns.

Favala v. Cumberland Eng'g Co., 17 F.3d 987 (7th Cir. 1994) : In a product liability action, the plaintiff was barred from offering testimony by the defendant's former Vice President of Product Integrity, on the ground that he had been privy to confidential information and trial strategy discussions. Vacating a judgment for the defendant, the Court held that under the governing Illinois law, which does not follow *Upjohn*, there was no sufficient showing that the witness was a member of the control group; even if he were, there was no sufficient showing that his testifying would lead to disclosure of privileged information. In a libel action, *Desai v. Hersh, 954 F.2d 1408 (7th Cir. 1992)* , the plaintiff declined to seek disclosure of the defendant reporter's sources, as was permitted by state law, and sought only to preclude reliance on or reference to any unidentified sources at trial. The Court noted that although the applicability of the reporter's privilege was determined by state law, the collateral effects of invoking the privilege were subject to the Rules and the privilege must be strictly construed to give effect to federal evidentiary requirements. In this case, allowing the reporter to assert the privilege and then vouch for the unnamed sources had the effect of treating the privilege as absolute, which the court said could violate *Rule 403*; the plaintiff failed to preserve this argument for appeal, however. In *Armour Int'l Co. v. Worldwide Cosmetics, Inc.*, n146 the Court, ruling on an interlocutory appeal in a diversity case arising out of a contract dispute, refused to apply the Illinois accountant privilege to protect documents, where all audits were performed by the accountant's employees in a foreign country and none of the employees were registered as accountants in Illinois.

In re Medtronic, Inc., 184 F.3d 807 (8th Cir. 1999) : The Trial Judge in a product liability case entered discovery orders requiring a pacemaker manufacturer to contact 4000 patients about whom adverse event reports had been filed. The Judge refused to apply an FDA regulation making such required reports confidential, on the ground that the regulation created a privilege inconsistent with *Rule 501* because only Congress and the Supreme Court had authority to modify common-law privileges. Granting a petition for mandamus, the Court held the orders invalid. First, the governing provision in this diversity case was the second sentence of *Rule 501*, which calls for reference to state law. Second, the regulation had no adverse impact on the applicable Arkansas Rule of Evidence, which gives patients control over disclosure of medical records and confidential communications made for purposes of medical diagnosis or treatment. Finally, any conflict between state and federal law must be resolved in favor of the federal provisions, and for these purposes regulations made within congressional authorization have the same preemptive effect as federal statutes. In *Pritchard-Keang Nam Corp. v. Jaworski*, n147 the Court indicated that state law on privilege governed, but it suggested that "determining whether a *prima facie* showing of fraud has been made may be a question of federal law." We believe that the suggestion should be rejected, since the conditions for any exceptions are as much a part of state privilege law as the privileges themselves.

Feldman v. Allstate Ins. Co., 322 F.3d 660 (9th Cir. 2003) : In an action for coverage under a homeowner's policy, the Court reversed summary judgment for the insurer because the Judge had considered a tape recording of a conversation between the plaintiff and his then-wife, which had been made in violation of California law. Because this was a diversity civil action, the *Erie* doctrine required the Judge to follow the state provision, which makes such recordings inadmissible in order to advance the substantive state policy of protecting privacy. The Court held that the wife's testimony regarding the conversations was properly admitted, since it was not barred by the law regarding illegal recordings and the plaintiff had waived any privilege for spousal confidential communications. The plaintiff had explicitly stated he was not asserting the privilege during the wife's deposition, and the Court found no support in state

law for a "selective waiver" rule. In *Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir. 1995)*, the plaintiff insurer settled an action against it for bad-faith refusal to settle a personal injury/wrongful death claim and then sued the law firm it had retained to represent the insureds in the underlying action for malpractice and contribution on the ground that the firm had negligently failed to convey the insurer's offer to the plaintiffs in the underlying action. The Court held that a state rule prohibiting negative inferences from a claim of privilege is part of the state law Federal Courts are required to apply when state law supplies the rule of decision. Therefore, the defendant was properly prohibited from asking questions of the plaintiff's witnesses that were designed to get the witnesses to invoke the privilege in the presence of the jury.

Somer v. Johnson, 704 F.2d 1473 (11th Cir. 1983): In a medical malpractice diversity action, the Court recognized that state law on privileges governed and held that the plaintiff's request for internal hospital reviews and personnel files of the doctors was properly denied where state law made such documents privileged.

[b] State Law -- Federal Claims

Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508 (D.C. Cir. 1993): The Court affirmed enforcement of a subpoena from the RTC to a dissolved law firm, holding that federal, rather than Missouri, privilege law applied. The law firm argued that the administrative investigation was merely a stage of subsequent litigation in State Courts. The Court concluded that the RTC's investigation was neither directed nor statutorily limited to possible state law violations.

In re Hampers, 651 F.2d 19 (1st Cir. 1981): A federal grand jury investigating an arson-fraud scheme subpoenaed tax records held by the Massachusetts Commissioner of Revenue. After finding that the State Courts would hold the records to be privileged under a scheme paralleling the provisions applicable to federal tax records, *26 U.S.C. § 6103*, the Court concluded that there was a qualified privilege under *Rule 501* that required the same showing for disclosure as would be required for disclosure of federal tax records.

United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991): The Court, upholding IRS summonses requiring attorneys to report names of clients who paid them cash fees over $10,000, held that federal, rather than New York, law applied, but that under either law the reports did not require disclosure of confidential information. In *United States v. One Parcel of Prop. Located at 31-33 York St., 930 F.2d 139 (2d Cir. 1991)*, a proceeding to forfeit property used in drug transactions, the Court held that evidence derived from erased state records regarding the owner's sons' drug arrests could be used to rebut her "innocent owner" defense. The federal interest in eradicating the drug trade prevails over any state interest in the confidentiality of arrest records.

In re Grand Jury, 535 F. Supp. 537 (D.N.J. 1982): The Court granted a motion to quash a grand jury subpoena, adopting as a matter of federal common law "a qualified privilege for the disclosure of state tax returns patterned precisely on *26 U.S.C. § 6103(i)(1)* respecting proceedings to enforce federal laws not relating to tax administration."

Willy v. Administrative Review Board, 423 F.3d 483 (5th Cir. 2005): A former in-house attorney claimed that he had been discharged from employment because of his report following an internal environmental audit, not really because of lying about contacts with a state agency, as the employer claimed. In a Department of Labor proceeding for violation of federal whistleblower statutes, the attorney sought the report in discovery, but the employer's claim of attorney-client privilege was ultimately upheld by the Administrative Review Board. Vacating that ruling, the Court first held that, regardless of the state privilege law, federal privilege law applied to this case based on federal law

claims. It then held that the client's privilege in this case was subject to the exception for communications relevant to an issue of breach of duty between client and attorney, and that this exception could be asserted both defensively (when the lawyer is charged with breaching a duty) and offensively, as here (when the lawyer is claiming the client breached a duty to him). In *Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991)* , the Court remanded a judgment for the defendants in an action by sheriff's deputies who alleged they were discharged in retaliation for exercising rights of free speech and political association, and held that the plaintiffs had been improperly denied discovery of sheriff's department personnel files. The Court noted that when considering a federal claim, federal common law rather than state law determines the existence and scope of a privilege, but Federal Courts will consider state policy supporting a privilege in weighing the government's interest in confidentiality. In a civil rights case, *American Civil Liberties Union, Inc. v. Finch*, n148 the Court held that a state statute sealing the records of a State Commission for 50 years did not require Federal Courts to recognize any evidentiary privilege that the statute might have created for State Courts.

Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004) : The District Court quashed a subpoena by the Department of Justice for redacted medical records of abortion patients of a physician challenging the constitutionality of the Partial-Birth Abortion Ban Act, on the ground that the privacy provisions and regulations of the Health Insurance Portability and Accountability Act were superseded by more stringent provisions of state law, which held that even redacted medical records are not to be disclosed in judicial proceedings. The Court held that under *Rule 501* the state medical records privilege did not apply in federal question suits and that no new federal common-law privilege for abortion records was appropriate. However, the order below was affirmed on the basis of *Fed. R. Civ. P. 45(c)(3)(A)(iv)*, since the government's minimal showing of the probative value of the records meant that the benefit of producing material sought by the subpoena was exceeded by the burden of compliance with it. In a mail fraud prosecution, *United States v. Wilson, 960 F.2d 48 (7th Cir. 1992)* , the Court held that an Illinois privilege for unemployment compensation records did not apply. The state's interest in encouraging full and accurate reporting from claimants and employers by assuring confidentiality is relatively weak and is outweighed by the strong federal interest in enforcing federal criminal statutes, especially when, as here, the defendants were charged with scheming to defraud the unemployment compensation system. In a civil rights suit alleging a conspiracy in which the Chicago police department participated, *Socialist Workers Party v. Grubisic*, n149 the plaintiffs sought transcripts of a state grand jury investigation into illegal police activities. The Court observed that the need to protect state and federal grand jury materials was the same. Although federal law determines the scope of the privilege, the Court concluded that the party desiring discovery should first seek it in the State Court that supervised the grand jury.

United States v. Simmons, 964 F.2d 763 (8th Cir. 1992) : Affirming convictions for cocaine offenses, the Court held that it was error (but harmless) to exclude, because of a state law privilege, a probation report of a confidential informant. In federal criminal cases only federal privilege law applies, and the Court has rejected any privilege for confidential communications to probation officers. In *United States v. Prouse, 945 F.2d 1017 (8th Cir. 1991)* , the Court affirmed convictions for operating a commercial airliner while intoxicated, holding that blood tests initiated by the defendant's employer were admissible in spite of a state law providing that positive tests resulting from an employer alcohol testing program may not be used as evidence in a criminal action against the employee.

In re Grand Jury Proceedings, 832 F.2d 554 (11th Cir. 1987) : The Court held there was no error in denying motions by witnesses before a state grand jury to quash a federal grand jury's subpoenas for their testimony. It found that the state secrecy statute that governed grand juries did not create a privilege and was not designed to provide protection for witnesses. By so construing the statute, the Court avoided having to decide whether as a matter of comity it would have recognized such a broad state privilege in a federal action. In *United States v. Silverman*, n150 the Court affirmed an obstruction of justice conviction of an attorney who extorted money from his client, and upheld the issuance of a subpoena for complaints made against the defendant to the state bar. It recognized that such complaints might be confidential under state law, but concluded that the government was entitled to subpoena them in a federal criminal case

in which it appeared that the defendant might testify and present character evidence.

[c] State Law -- State and Federal Claims Combined

In re Sealed Case (Medical Records), 381 F.3d 1205 (D.C. Cir. 2004) : In an action by mentally disabled group home residents against a government agency and other defendants arising from alleged sexual assaults against residents by a mentally disabled co-resident, the agency was ordered to produce all of the co-resident's records in discovery. Vacating the order, the Court observed that where a document is relevant to both federal and state claims but the federal and state privilege rules are

> inconsistent, application of an inconsistent state rule in either direction could undermine the federal evidentiary interest. ... And where the primary source of the court's jurisdiction is the federal claim, to which the state claim is merely pendent (supplemental), it seems appropriate that the federal evidentiary interest -- whether in privilege or production -- should be primary as well.

First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) : In a securities action against a securities dealer, its partners, and house counsel, the Court concluded that federal privilege law should apply with respect to pendent state claims.

Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 1982-1 Trade Cas. (CCH) P64564 (3d Cir. 1982) : The Court affirmed a ruling denying a protective order to enforce a state accountant-client privilege, observing that where state and federal questions would be tried together "[o]bviously applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable." It held that "when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." It observed, however, that it was not precluding "resort to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled."

Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) : In a civil rights action on behalf of an arrestee rendered incompetent allegedly as a result of the arrest, the Court held there was no abuse of discretion in admitting evidence of physician-patient communications, as federal law governs federal question cases with pendent state law claims and the Federal Courts do not recognize a federal physician-patient privilege.

FDIC v. Mercantile Nat'l Bank, 84 F.R.D. 345 (N.D. Ill. 1979) : In a federal securities action with a pendent state claim, the Court refused to apply a state accountant-client privilege to bar discovery.

[12] Tax Practitioner

United States v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003) : Clients of an accounting and consulting firm sought to intervene in a proceeding in which the IRS sought firm records relating to allegedly abusive tax shelters in which they participated. The IRS argued that client identities are no more protected under the tax practitioner privilege of *26 U.S.C. § 7525* than under the attorney-client privilege, but the clients argued that disclosure of their identities in connection with the tax shelters would inevitably disclose their motive for seeking tax advice from the firm and thus impermissibly disclose confidential communications. Affirming the order denying intervention, the Court held that "[d]isclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax

shelters described in its summonses. It is less than clear, however, as to what motive, or other confidential communication of tax advice, can be inferred from that information alone." More importantly, participation in potentially abusive tax shelters is information subject to full disclosure under the tax laws, so the clients could not reasonably expect their communications with the firm to be confidential. In *United States v. Frederick, 182 F.3d 496 (7th Cir. 1999)* , Frederick, a lawyer and an accountant, provided legal representation to and prepared the tax returns of taxpayers being investigated by the IRS. The Court upheld enforcement of an order directing Frederick to turn over documents created in connection with preparation of the taxpayers' returns, since he was doing accountant's rather than lawyer's work in connection with these documents. The Court also held that the privilege under *26 U.S.C. § 7525* for federally-authorized tax practitioners protects those nonlawyers only when they are doing lawyer's rather than accountant's or other preparer's work.

[13] Trade Secrets

Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) : The Court observed that

> [n]o absolute privilege protects trade secrets from disclosure through the discovery process. If the information sought is relevant and necessary, at the discovery stage of the litigation, to the preparation of the case of the applicant therefor, disclosure will be required. However, the courts are loath to order disclosure of trade secrets absent a clear showing of an immediate need for the information requested.
>
> This court finds that confidential business matters and technical information are trade secrets. That fact alone will not protect them from discovery. Once the privilege is asserted by the owner, the party *seeking* discovery must make a clear showing that the documents are relevant to the *issues involved in this litigation*. In doubtful situations, production will *not* be ordered ... . This court must determine: first, which communications are trade secrets; and second, whether the parties seeking discovery have made a clear showing that the trade secret privilege should not be honored because of the relevancy of the communications to the issues involved in this litigation.

Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) : The plaintiff brought a FOIA action to obtain aircraft plans and specifications filed with the FAA. The current corporate owner of the plans claimed an exemption from disclosure as a trade secret, but the plaintiff argued that the exemption had been waived by a predecessor owner. The Court agreed that where a submitter or owner of documents grants the government permission to loan or release them to the public, they no longer have trade secret protection, but it affirmed summary judgment for the agency because the plaintiff did not appeal the Judge's decision that it was possible for an owner to revoke the permission to disclose that had previously been given.

FOOTNOTES:

(n1)Footnote 1. *Davis v. Costa-Gavras, 580 F. Supp. 1082 (S.D.N.Y. 1984)* .

(n2)Footnote 2. *SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976)* , *appeal dismissed*, *534 F.2d 1031 (2d Cir. 1976)* .

(n3)Footnote 3. *In re Colocotronis Tanker Sec. Litig., 449 F. Supp. 828 (S.D.N.Y. 1978)* .

(n4)Footnote 4. *Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985)* .

(n5)Footnote 5. *North River Ins. Co. v. Philadelphia Reins. Corp., 797 F. Supp. 363 (D.N.J. 1992)* .

(n6)Footnote 6. *Hodges, Grant & Kaufmann v. United States Gov't, 768 F.2d 719 (5th Cir. 1985)* .

(n7)Footnote 7. *Bauman v. Jacobs Suchard, Inc., 136 F.R.D. 460 (N.D. Ill. 1990)* .

(n8)Footnote 8. *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co., 118 F.R.D. 609 (E.D. Wis. 1987)* .

(n9)Footnote 9. *United States v. Bay State Ambulance & Hosp. Rental Serv., 874 F.2d 20 (1st Cir. 1989)* .

(n10)Footnote 10. *United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)* .

(n11)Footnote 11. *United States v. Schwimmer, 738 F. Supp. 654 (E.D.N.Y. 1990)* , *aff'd*, *924 F.2d 443 (2d Cir. 1991)* .

(n12)Footnote 12. *In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381 (S.D.N.Y. 1975)* .

(n13)Footnote 13. *Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)* .

(n14)Footnote 14. *Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)* .

(n15)Footnote 15. *United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979)* .

(n16)Footnote 16. *United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985)* .

(n17)Footnote 17. *United States v. Oloyede, 982 F.2d 133 (4th Cir. 1992)* .

(n18)Footnote 18. *United States v. Jones, 696 F.2d 1069 (4th Cir. 1982)* .

(n19)Footnote 19. *In re Grand Jury Proceedings, 727 F.2d 1352 (4th Cir. 1984)* .

(n20)Footnote 20. *United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984)* .

(n21)Footnote 21. *United States v. Windfelder, 790 F.2d 576 (7th Cir. 1986)* .

(n22)Footnote 22. *United States v. Spector, 793 F.2d 932 (8th Cir. 1986)* .

(n23)Footnote 23. *United States v. Flores, 628 F.2d 521 (9th Cir. 1980)* .

(n24)Footnote 24. *United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976)* .

(n25)Footnote 25. *Cuno, Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y. 1988)* .

(n26)Footnote 26. *Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674 (S.D.N.Y. 1983)* .

(n27)Footnote 27. *Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45 (S.D.N.Y. 1982)* .

(n28)Footnote 28. *United States v. Amerada-Hess Corp., 619 F.2d 980 (3d Cir. 1980)* .

(n29)Footnote 29. *In re Sealed Case, 120 F.R.D. 66 (N.D. Ill. 1988)* .

(n30)Footnote 30. *Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1977)* (en banc).

(n31)Footnote 31. *Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486 (9th Cir. 1989)* .

(n32)Footnote 32. *Sound Video Unlimited, Inc. v. Video Shack, Inc., 661 F. Supp. 1482 (N.D. Ill. 1987)* .

(n33)Footnote 33. *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co., 118 F.R.D. 609 (E.D. Wis. 1987)* .

(n34)Footnote 34. *Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984)* .

(n35)Footnote 35. *In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995)* .

(n36)Footnote 36. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983 (Marc Rich & Co.), 731 F.2d 1032 (2d Cir. 1984)* .

(n37)Footnote 37. *In re Impounded Case (Law Firm), 879 F.2d 1211 (3d Cir. 1989)* .

(n38)Footnote 38. *United States v. Neal, 27 F.3d 1035 (5th Cir. 1994)* .

(n39)Footnote 39. *United States v. Aucoin, 964 F.2d 1492 (5th Cir. 1992)* .

(n40)Footnote 40. *United States v. Soudan, 812 F.2d 920 (5th Cir. 1986)* .

(n41)Footnote 41. *United States v. Dyer, 722 F.2d 174 (5th Cir. 1983)* .

(n42)Footnote 42. *In re Grand Jury Proceedings, 87 F.3d 377, 381-82 (9th Cir. 1996)* .

(n43)Footnote 43. *United States v. Zolin, 905 F.2d 1344 (9th Cir. 1990)* .

(n44)Footnote 44. *United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984)* .

(n45)Footnote 45. *In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987)* .

(n46)Footnote 46. *United States v. de la Jara, 973 F.2d 746 (9th Cir. 1992)* .

(n47)Footnote 47. *In re Grand Jury Investigation, 974 F.2d 1068 (9th Cir. 1992)* .

(n48)Footnote 48. *In re Friend, 411 F. Supp. 776 (S.D.N.Y. 1975)* .

(n49)Footnote 49. *United States v. Ballard, 779 F.2d 287 (5th Cir. 1986)* .

(n50)Footnote 50. *Federal Sav. & Loan Ins. Corp. v. Ferm, 909 F.2d 372 (9th Cir. 1990)* .

(n51)Footnote 51. *In re Grand Jury Proceedings (United States v. Jones), 517 F.2d 666 (5th Cir. 1975)* .

(n52)Footnote 52. *In re Grand Jury Proceeding, Cherney, 898 F.2d 565 (7th Cir. 1990)* .

(n53)Footnote 53. *In re Shargel, 742 F.2d 61 (2d Cir. 1984)* .

(n54)Footnote 54. *In re Horn, 976 F.2d 1314 (9th Cir. 1992)* .

(n55)Footnote 55. *Dole v. Milonas, 889 F.2d 885 (9th Cir. 1989)* .

(n56)Footnote 56. *Riggs National Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)* .

(n57)Footnote 57. In re Subpoenas Duces Tecum Dated March 16, 1992, *978 F.2d 1159 (9th Cir. 1992)* .

(n58)Footnote 58. *Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983)* .

(n59)Footnote 59. *Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980)* .

(n60)Footnote 60. *Town of Norfolk v. United States Army Corps of Eng's, 968 F.2d 1438 (1st Cir. 1992)* .

(n61)Footnote 61. *Mobil Oil Co. v. Department of Energy, 102 F.R.D. 1 (N.D.N.Y. 1983)* .

(n62)Footnote 62. *In re Boileau, 736 F.2d 503 (9th Cir. 1984)* .

(n63)Footnote 63. *United States v. Horvath, 731 F.2d 557 (8th Cir. 1984)* .

(n64)Footnote 64. *United States v. Bauer, 132 F.3d 504 (9th Cir. 1997)* .

(n65)Footnote 65. *United States v. Chen, 99 F.3d 1495 (9th Cir. 1996)* .

(n66)Footnote 66. *United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976)* .

(n67)Footnote 67. *United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996)* .

(n68)Footnote 68. *In re Grand Jury Proceedings, 791 F.2d 663 (8th Cir. 1986)* .

(n69)Footnote 69. *United States v. Tedder, 801 F.2d 1437 (4th Cir. 1986)* .

(n70)Footnote 70. *In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995)* .

(n71)Footnote 71. *In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984)* .

(n72)Footnote 72. *United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995)* .

(n73)Footnote 73. *Eigenheim Bank v. Halpern, 598 F. Supp. 988 (S.D.N.Y. 1984)* .

(n74)Footnote 74. *Thomas v. Pansy Ellen Prods., Inc., 672 F. Supp. 237 (W.D.N.C. 1987)* .

(n75)Footnote 75. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205 (M.D.N.C. 1986)* .

(n76)Footnote 76. *In re Recombinant DNA Tech. Patent & Contract Litig., 850 F. Supp. 769 (S.D. Ind. 1994)* .

(n77)Footnote 77. *Weil v. Investment/Indicators, Research & Mgt., Inc., 647 F.2d 18 (9th Cir. 1981)* .

(n78)Footnote 78. *United States v. Jones, 696 F.2d 1069 (4th Cir. 1982)* .

(n79)Footnote 79. *United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987)* .

(n80)Footnote 80. *Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 891 (S.D.N.Y. 1990)* .

(n81)Footnote 81. *Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674 (S.D.N.Y. 1983)* .

(n82)Footnote 82. *Town of Newton v. Rumery, 480 U.S. 386 (1987)* (holding that a voluntary release-dismissal agreement will bar a civil rights action unless public policy trumps the agreement).

(n83)Footnote 83. *Glenemede Trust Co. v. Thompson, 56 F.3d 476 (3d Cir. 1995)* .

(n84)Footnote 84. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir. 1994)* .

(n85)Footnote 85. *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992)* .

(n86)Footnote 86. *United States v. Miller, 600 F.2d 498 (5th Cir. 1979)* .

(n87)Footnote 87. *Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977)* .

(n88)Footnote 88. *Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co., 118 F.R.D. 609 (E.D. Wis. 1987)* .

(n89)Footnote 89. *Weil v. Investment/Indicators, Research & Mgt., Inc., 647 F.2d 18 (9th Cir. 1981)* .

(n90)Footnote 90. *In re Subpoena Served upon Comptroller of Currency, 967 F.2d 630 (D.C. Cir. 1992)* .

(n91)Footnote 91. *In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577 (E.D.N.Y. 1979)* .

(n92)Footnote 92. *Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997)* .

(n93)Footnote 93. *Skibo v. City of New York, 109 F.R.D. 58 (E.D.N.Y. 1985)* .

(n94)Footnote 94. *Spell v. McDaniel, 591 F. Supp. 1090 (E.D.N.C. 1984)* .

(n95)Footnote 95. *Pickel v. United States, 746 F.2d 176 (3d Cir. 1984)* .

(n96)Footnote 96. *Dole v. Local 1942, 870 F.2d 368 (7th Cir. 1989)* .

(n97)Footnote 97. *United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987)* .

(n98)Footnote 98. *United States v. Hemmer, 729 F.2d 10 (1st Cir. 1984)* .

(n99)Footnote 99. *United States v. Silva, 580 F.2d 144 (5th Cir. 1978)* .

(n100)Footnote 100. *United States v. Doe, 525 F.2d 878 (5th Cir. 1976)* .

(n101)Footnote 101. *United States v. Partyka, 544 F.2d 345 (8th Cir. 1976)* .

(n102)Footnote 102. *Mobil Oil Co. v. Department of Energy, 102 F.R.D. 1 (N.D.N.Y. 1983)* .

(n103)Footnote 103. *Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321 (D.D.C. 1977)* , *aff'd*, *433 U.S. 425 (1977)* .

(n104)Footnote 104. *In re United States, 872 F.2d 472 (D.C. Cir. 1989)* .

(n105)Footnote 105. *Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978)* .

(n106)Footnote 106. *Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985)* .

(n107)Footnote 107. *Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988)* .

(n108)Footnote 108. *United States v. Smith, 750 F.2d 1215 (4th Cir. 1984)* .

(n109)Footnote 109. *United States v. Smith, 742 F.2d 398 (8th Cir. 1984)* .

(n110)Footnote 110. *United States v. Tsinnijinnie, 601 F.2d 1035 (9th Cir. 1979)* .

(n111)Footnote 111. *United States v. Picciandra, 788 F.2d 39 (1st Cir. 1986)* .

(n112)Footnote 112. *United States v. Ammar, 714 F.2d 238 (3d Cir. 1983)* .

(n113)Footnote 113. *United States v. Parker, 834 F.2d 408 (4th Cir. 1987)* .

(n114)Footnote 114. *United States v. Broome, 732 F.2d 363 (4th Cir. 1984)* .

(n115)Footnote 115. *United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985)* .

(n116)Footnote 116. *United States v. Keck, 773 F.2d 759 (7th Cir. 1985)* .

(n117)Footnote 117. *United States v. Parker, 834 F.2d 408 (4th Cir. 1987)* .

(n118)Footnote 118. *United States v. Burton, 631 F.2d 280 (4th Cir. 1980)* .

(n119)Footnote 119. *United States v. Klayer, 707 F.2d 892 (6th Cir. 1983)* .

(n120)Footnote 120. *United States v. Robinson, 763 F.2d 778 (6th Cir. 1985)* .

(n121)Footnote 121. *United States v. McCown, 711 F.2d 1441 (9th Cir. 1983)* .

(n122)Footnote 122. *In re Grand Jury Investigation, 603 F.2d 786 (9th Cir. 1979)* .

(n123)Footnote 123. *New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989)* .

(n124)Footnote 124. *United States v. Neal, 743 F.2d 1441 (10th Cir. 1984)* .

(n125)Footnote 125. *United States v. Cameron, 556 F.2d 752 (5th Cir. 1977)* .

(n126)Footnote 126. *United States v. Byrd, 750 F.2d 585 (7th Cir. 1984)* .

(n127)Footnote 127. *United States v. Brown, 605 F.2d 389 (8th Cir. 1979)* .

(n128)Footnote 128. *United States v. Roberson, 859 F.2d 1376 (9th Cir. 1988)* .

(n129)Footnote 129. *In re Grand Jury Proceedings (84-5), 777 F.2d 508 (9th Cir. 1985)* .

(n130)Footnote 130. *In re Grand Jury Investigation of Hugle, 754 F.2d 863 (9th Cir. 1985)* .

(n131)Footnote 131. *United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975)* .

(n132)Footnote 132. *United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980)* . See also a further opinion after remand of the case, *651 F.2d 189 (3d Cir. 1981)* .

(n133)Footnote 133. *United States v. Criden, 633 F.2d 346 (3d Cir. 1980)* .

(n134)Footnote 134. *Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)* .

(n135)Footnote 135. *von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987)* .

(n136)Footnote 136. *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)* .

(n137)Footnote 137. *Branzburg v. Hayes, 408 U.S. 665 (1972)* .

(n138)Footnote 138. *United States v. Burke, 700 F.2d 70 (2d Cir. 1983)* .

(n139)Footnote 139. *In re Zuniga, 714 F.2d 632 (6th Cir. 1983)* .

(n140)Footnote 140. *In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223 (2d Cir. 1984)* .

(n141)Footnote 141. *United States v. Jones, 683 F.2d 817 (4th Cir. 1982)* .

(n142)Footnote 142. *Federal Trade Com. v. TRW, Inc., 628 F.2d 207, 1980-2 Trade Cas. (CCH) P63374 (D.C. Cir. 1980)* .

(n143)Footnote 143. *Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987)* .

(n144)Footnote 144. *EEOC v. General Tel. Co. of Nw., Inc., 885 F.2d 575 (9th Cir. 1989)* .

(n145)Footnote 145. *Samuelson v. Susen, 576 F.2d 546 (3d Cir. 1978)* .

(n146)Footnote 146. *Armour Int'l Co. v. Worldwide Cosmetics, Inc., 689 F.2d 134 (7th Cir. 1982)* .

(n147)Footnote 147. *Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277 (8th Cir. 1984)* .

(n148)Footnote 148. *American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336 (5th Cir. 1981)* .

(n149)Footnote 149. *Socialist Workers Party v. Grubisic, 619 F.2d 641 (7th Cir. 1980)* .

(n150)Footnote 150. *United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article V. Privileges
CHAPTER 501 RULE 501

2-501 Federal Rules of Evidence Manual 501.04

501.04 Legislative History

[1] Advisory Committee's Note

Deleted. **[Part Three of this *Manual* sets forth the thirteen proposed federal rules on privilege together with the Advisory Committee's Notes. Ed.]**

[2] Report of the House Committee on the Judiciary

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single *Rule, 501*, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from *Rule 26 of the Federal Rules of Criminal Procedure*, mandates the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added by the Committee to the lone term "witnesses" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after *Rule 302* and similar to language added by the Committee to *Rule 601* relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)* , a result in accord with current federal court decisions. See *Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555-556 n.2 (2d Cir. 1967)* . The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop."

[3] Report of the Senate Committee on the Judiciary

Clearly, the most far-reaching House change in the rules as promulgated, was the elimination of the Court's proposed rules on privilege contained in article V. Article V purported to define the privileges to be recognized in the Federal courts in all actions, cases, and proceedings; any alleged privilege not enumerated in article V (e.g., that of a newsreporter) was deemed not to exist and could not be given effect unless of constitutional dimension. The privileges recognized included trade secret, lawyer-client, husband-wife, doctor-patient (but applicable only to psychotherapists), identity of informer, secrets of state, and official information.

From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges, with the nub of the disagreement being whether the rule defining them was merely codifying existing law. In addition, the husband-wife privilege drew fire as a result of the conscious decision of the Court to narrow its scope from that recognized under present Federal decisions. The partial doctor-patient privilege seemed to satisfy no one, either doctors or patients; and even the privilege as drafted came in for its share of criticism because of its failure to define representative of the client, a critical issue for corporations and organizations. Much controversy also attended the failure to include a newsman's privilege. Further, there was dissatisfaction with the policy of the Court's rule not to require application of State privilege in civil actions where the underlying issues were governed by substantive State law, a result which many legal scholars deemed mandated by Erie R. Co. v. Tompkins. Finally, some commentators questioned the wisdom of promulgating rules of privilege under the rules Enabling Act, on the ground that in their view, the codification of the law of privilege should be left to the regular legislative process.

Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (*Rule 501*) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. In addition, a proviso was approved requiring Federal courts to recognize and apply state privilege law in civil cases governed by *Erie R. Co. v. Tompkins, supra*, as under present Federal case law.

The rationale underlying the proviso as passed by the House is that Federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. This reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy. Another rationale for the proviso is that the Court's proposal would have prompted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and Federal Courts. The House provision, on the other hand, under which the Federal Court is bound to apply the State's privilege law in actions founded on a State-created right, might limit the incentive to shop.

Your committee is in accord with the approach of the House with respect to Article V. Therefore, save for a technical amendment which is discussed *infra*, *Rule 501*, as passed by the House, was left undisturbed.

...

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted *supra*, the House amended Article V to eliminate all of the Court's specific rules on privileges. Through a single *Rule, 501*, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from *Rule 26 of the Federal Rules of Criminal Procedure*) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under *28 U.S.C. § 1332*). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in non-diversity, Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions ... with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. Is a claim (or defense) based on such a reference a claim or defense as to which Federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g., an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other.

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise). [While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present *rule 43(a) of the Federal Rules of Civil Procedure* which provides: In

any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under *28 U.S.C. § 1441(b)*.

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of [*sic*] the competency of witnesses.

[Except for footnote 7, which we placed in the brackets in the second to last paragraph, all footnotes are deleted. Ed.]

[4] Report of the House and Senate Conferees

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under *28 U.S.C. § 1332* or *28 U.S.C. § 1335*, or between citizens of different States and removed under *28 U.S.C. § 1441(b)* the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 1942 Trade Cas. (CCH) P56245 (1942)* .

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

> "A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state." *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942)* (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See

> C.A. Wright, Federal Courts 251-52 (2d ed. 1970); *Holmberg v. Armbrecht, 327 U.S. 392 (1946)* ; *DeSylva v. Ballentine, 351 U.S. 570, 581 (1956)* ; 9 Wright & Miller, Federal Rules and Procedure § 2408[*sic*].

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

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PART TWO: THE RULES THEMSELVES
Article V. Privileges
Supp. To CHAPTER 501 RULE 501

2-501 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 501, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE V. PRIVILEGES	**ARTICLE V. PRIVILEGES**
Rule 501. General Rule	**Rule 501. Privilege in General**
Except as otherwise	The common law -- as in-

required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witterpreted by United States courts in the light of reason and experience -- governs a claim of privilege unless any of the following provides otherwise:

ness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason

and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, per-

son, government, State, or political subdivision thereof shall be determined in accordance with State law.

- the United States Constitution;
- a federal statute; or
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Committee Note

The language of Rule 501 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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PART TWO: THE RULES THEMSELVES
Article V. Privileges
Supp. To CHAPTER 501 RULE 501

2-501 Federal Rules of Evidence Manual Supp. to § 501.03

Supp. to § 501.03 Annotated Cases

[Go To Main]

[2] Attorney-Client [Go To Main]

[b] Attorney-Client -- Common Interest

[i] Action Between Joint Clients

In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007) : In an action by former subsidiaries against the parent company, the parent produced documents that it conceded were created to provide joint advice to it and its subsidiaries, but refused to produce documents that it claimed were provided solely to it and were not part of any joint representation. The parent's attorney-client privilege claim as to the latter documents was denied, but the Court reversed the order and remanded. The Court observed that the "default rule" is that all communications made in the course of a joint representation are discoverable when former co-clients sue each other, and it rejected the parent's argument that the default rule should be flipped when the litigation involves a parent company and a former subsidiary: Although case law recognizes that a corporate client includes subsidiaries and parents so that disclosure of confidential communications within the corporate structure does not involve a waiver, the parent should not be permitted "to have it both ways" -- i.e., treating the corporate group as a single client, but permitting the parent to own the privilege in perpetuity even when interests diverge. Thus, it concluded that "absent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client." At the same time, the Court rejected the subsidiaries' argument that the parent waived the privilege in this case by agreeing to produce some documents: the parent produced documents that it believed fell within a joint representation and did not thereby impliedly waive the privilege as to other documents. It also rejected the subsidiaries' argument that they had waived the parent's privilege when they waived regarding joint client communications in Canadian insolvency proceedings: "[t]he general answer is bilateral control" -- i.e., each client may waive the privilege with respect to its own communications but not to the communications of another co-client. The Court remanded for fact finding on whether the parent and subsidiaries were joint clients. It advised the Trial Judge that the parent could reasonably expect that communications with outside counsel as to divestiture issues would be privileged and the privilege was not waived by sharing the communications with in-house counsel, even if in-house counsel jointly

represented the parent and the subsidiaries and thus were in a conflict of interest. The fact that the lawyer was in conflict could not be held to abrogate the clients' expectation of confidentiality: "If the communications were outside the scope of the joint representation, then sharing them with a conflicted joint attorney is of no moment, even if the conflicted attorney acted improperly in accepting the communications... . If the communications were within the scope, then they are discoverable."

[v. 1] Attorney-Client -- Common Interest -- Tax Cases

United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007) : In a proceeding to enforce administrative subpoenas issued by the IRS in connection with an investigation into abusive tax shelters, BDO asserted the attorney-client privilege against disclosure of a memorandum written by a lawyer-partner in the firm to an attorney at the firm's outside counsel, which subsequently came into the hands of an attorney at another law firm. Although that firm did not represent BDO, the two provided legal and accounting services, respectively, jointly to clients on the same or related matters. The recipient testified that she received the memorandum from BDO as input into an opinion letter regarding tax shelters that her firm was preparing for both BDO and their common clients. The Court affirmed a ruling holding that the memorandum was privileged under the common interest doctrine: "In essence, through the memorandum, two joint venturers, BDO and Jenkins & Gilchrist, undertook a consultation between their respective in-house counsel and BDO's outside counsel with respect to the legality of the proposed financial course of action they would recommend to their common clients." The voluntary disclosure of the memorandum did not waive BDO's claim of privilege.

[d] Attorney-Client -- Compulsory Process

Murdoch v. Castro, 609 F.3d 983 (9th Cir. 2010) (en banc): In his state murder trial, Murdoch sought to introduce a letter that an accomplice had written to his attorney containing statements to the effect that Murdoch had not been involved in the murder, but the Trial Judge upheld the accomplice's attorney's claim of attorney-client privilege regarding the communications. The accomplice then testified at trial against Murdoch, who was convicted. Murdoch sought habeas relief, arguing that the inability to use the accomplice's exculpatory statement violated his right to confront the accomplice at trial. The Court *en banc* upheld the denial of habeas relief, with a plurality holding that it has not been "clearly established" under federal law that an invocation of the attorney-client privilege can operate to deprive an accused of a constitutional right.

[e] Attorney-Client -- Confidential Communications

[ii] Attorney-Client -- Confidential Communications -- Intention that Attorney Will Disclose Information Communicated

United States v. Bauer, 551 F.3d 786 (8th Cir. 2008) : The Court affirmed convictions of a husband and wife for bankruptcy fraud and money laundering, holding that the wife waived her attorney-client privilege "by choosing to make her attorneys' performance the central element of her defense." In a footnote, the Court observed that "[a]s the government points out, it is not certain that the subject matter at issue -- information communicated from the Bauers to their attorneys for the purpose of disclosure in publicly filed bankruptcy schedules -- was even protected by the privilege."

United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009) : The defendant, CFO of Broadcom Corporation, was indicted for his involvement in a backdating scheme that resulted in Broadcom restating its earnings. Ruehle had made statements to attorneys hired by Broadcom to conduct an internal investigation. Subsequently, Broadcom disclosed all the statements to outside auditors and to various federal agencies, in an attempt to work its way through the scandal. At a hearing when the government sought disclosure of the statements, the attorneys testified that they began their meeting with Ruehle by notifying him that they were representing the corporation, not him, but Ruehle denied any recollection of such warnings, and stated that he believed that the attorneys were acting as his counsel. The District Court held that

the statements were privileged because Ruehle had a "reasonable belief" that the attorneys were acting on his behalf. Reversing on interlocutory review, the Court accepted the finding of fact that Ruehle thought he had a personal attorney-client relationship with Broadcom's lawyers, but it found that Ruehle could not have reasonably anticipated that his communications with the lawyers would remain confidential. He was the senior corporate executive with primary responsibility to Broadcom's financial affairs, and his duties encompassed "Broadcom's strict compliance with reporting and record keeping requirements imposed through the Securities and Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, among many other federal and state rules and regulations. As the head of finance, Ruehle cannot credibly claim ignorance of the general disclosure requirement imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC." Thus, his "statements to [the attorneys] were not 'made in confidence' but rather for the purpose of outside disclosure."

[iii] Attorney-Client -- Confidential Communications -- Miscellaneous Cases

United States v. DeFonte, 441 F.3d 92 (2d Cir. 2006) (per curiam): In the prosecution of a corrections officer, a former inmate who was to be called as a witness intervened to assert the attorney-client privilege with respect to a journal that had been taken from her cell, in which she had recorded attorney-client conversations and other matters. The Trial Judge denied the motion on the grounds that the documents were not protected by the privilege and the inmate had no expectation of privacy in the contents of her cell. The Court reversed, holding that incarcerated individuals retain the attorney-client privilege and the right to keep privileged documents confidential where not inconsistent with legitimate penological objectives. However, it left open on remand the question whether the inmate had treated the notes in such a careless manner as to negate her intent to keep them confidential. The Court also held that memorializations of private conversations between the inmate and her attorney were protected from disclosure. As to records of events made for the purpose of later discussions with the attorney, the Court said that "an outline of what a client wishes to discuss with counsel -- and which is subsequently discussed with one's counsel -- would seem to fit squarely within our understanding of the scope of the privilege," but "[a] rule that recognizes a privilege for any writing made with an eye toward legal representation would be too broad."

Jenkins v. Bartlett, 487 F.3d 482 (7th Cir. 2007) : Following an incident in which a police officer fatally shot a suspect, the officer was taken to police headquarters for a departmental investigation. While there preparing for his interview with Internal Affairs, he met with the president of the police officers' association and an attorney provided by the association. In a civil rights action on behalf of the suspect against the officer, the plaintiff argued that there was no privilege for communications between the officer and the attorney because of the presence of the president. Affirming a judgment for the defendants, the Court upheld the decision sustaining the officer's claim of privilege, on the ground that the president was present solely to assist the attorney as he prepared to represent the officer.

[f] Attorney-Client -- Corporate Privilege

[ii] Attorney-Client -- Corporate Privilege -- Generally

In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007) : In an action by former subsidiaries against the parent company, the parent produced documents that it conceded were created to provide joint advice to it and its subsidiaries, but refused to produce documents that it claimed were provided solely to it and were not part of any joint representation. The parent's attorney-client privilege claim as to the latter documents was denied, but the Court reversed the order and remanded. The Court observed that the "default rule" is that all communications made in the course of a joint representation are discoverable when former co-clients sue each other, and it rejected the parent's argument that the default rule should be flipped when the litigation involves a parent company and a former subsidiary: Although case law recognizes that a corporate client includes subsidiaries and parents so that disclosure of confidential communications within the corporate structure does not involve a waiver, the parent should not be permitted "to have it both ways" -- i.e., treating the corporate group as a single client, but permitting the parent to own the privilege in perpetuity even when interests diverge. Thus, it concluded that "absent some compelling reason to disregard entity separateness, in the

typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client." At the same time, the Court rejected the subsidiaries' argument that the parent waived the privilege in this case by agreeing to produce some documents: the parent produced documents that it believed fell within a joint representation and did not thereby impliedly waive the privilege as to other documents. It also rejected the subsidiaries' argument that they had waived the parent's privilege when they waived regarding joint client communications in Canadian insolvency proceedings: "[t]he general answer is bilateral control" -- i.e., each client may waive the privilege with respect to its own communications but not to the communications of another co-client. The Court remanded for fact finding on whether the parent and subsidiaries were joint clients. It advised the Trial Judge that the parent could reasonably expect that communications with outside counsel as to divestiture issues would be privileged and the privilege was not waived by sharing the communications with in-house counsel, even if in-house counsel jointly represented the parent and the subsidiaries and thus were in a conflict of interest. The fact that the lawyer was in conflict could not be held to abrogate the clients' expectation of confidentiality: "If the communications were outside the scope of the joint representation, then sharing them with a conflicted joint attorney is of no moment, even if the conflicted attorney acted improperly in accepting the communications... . If the communications were within the scope, then they are discoverable."

United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) : The defendant in an insurance fraud case was not an officer, director, or employee of the company through which the fraud was committed, although he had formed the company and was heavily involved in all its operations. Affirming, the Court held there was no error in permitting the corporation's attorneys to disclose communications with the defendant, since he was a functional employee of the corporate client and his communications with the attorneys dealt with the legal affairs of the corporation. He did not have a personal attorney-client relationship because he had not sought personal legal advice from the corporate attorneys, and his subjective belief that the attorneys represented him was insufficient because that belief was either unreasonable or not manifested to those attorneys. In *United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009)* , the defendant, CFO of Broadcom Corporation, was indicted for his involvement in a backdating scheme that resulted in Broadcom restating its earnings. Ruehle had made statements to attorneys hired by Broadcom to conduct an internal investigation. Subsequently, Broadcom disclosed all the statements to outside auditors and to various federal agencies, in an attempt to work its way through the scandal. At a hearing when the government sought disclosure of the statements, the attorneys testified that they began their meeting with Ruehle by notifying him that they were representing the corporation, not him, but Ruehle denied any recollection of such warnings, and stated that he believed that the attorneys were acting as his counsel. The District Court held that the statements were privileged because Ruehle had a "reasonable belief" that the attorneys were acting on his behalf. Reversing on interlocutory review, the Court accepted the finding of fact that Ruehle thought he had a personal attorney-client relationship with Broadcom's lawyers, but it found that Ruehle could not have reasonably anticipated that his communications with the lawyers would remain confidential. He was the senior corporate executive with primary responsibility to Broadcom's financial affairs, and his duties encompassed "Broadcom's strict compliance with reporting and record keeping requirements imposed through the Securities and Exchange Act of 1934 and the Sarbanes-Oxley Act of 2002, among many other federal and state rules and regulations. As the head of finance, Ruehle cannot credibly claim ignorance of the general disclosure requirement imposed on a publicly traded company with respect to its outside auditors or the need to truthfully report corporate information to the SEC." Thus, his "statements to [the attorneys] were not 'made in confidence' but rather for the purpose of outside disclosure."

[i] Attorney-Client -- Exceptions

[i] Crime or Fraud

[A] Civil Cases

Kilpatrick v. King, 499 F.3d 759 (8th Cir. 2007) : The plaintiff had been acquitted of child abuse, but the state Department of Health and Human Services listed him on its Central Register of Abuse and Neglect. The plaintiff then

amended his civil rights complaint charging that the initial investigation and prosecution violated due process to add a claim that the Register listing was retaliatory. When one of the individual defendants sued for retaliation refused to answer deposition questions about consultations with HHS counsel, the plaintiff moved to compel discovery, arguing that the attorney-client privilege did not apply because the consultation was to further a crime or fraud (presumably the alleged conspiracy to retaliate). Affirming summary judgment for the defendants, the Court held there was no abuse of discretion in denying the order to compel, as the plaintiff had not met his burden of presenting a factual basis to support his belief that the advice was sought in furtherance of any alleged retaliation.

[B] Attorney-Client -- Exceptions -- Crime or Fraud -- Criminal Cases

In re Grand Jury, 475 F.3d 1299 (D.C. Cir. 2007) : A corporation conducted an internal investigation into whether its past actions had violated federal campaign finance laws. The investigation was conducted by an outside law firm. John Doe, a corporate executive, retained separate counsel, and the corporation and its law firm entered into a joint defense agreement with Doe and his separate counsel. Pursuant to a DOJ demand, the corporation produced an unsigned copy of the minutes of a Board of Directors' meeting, which appeared to show that political activities proposed by Doe included illegal corporate contributions to federal political candidates. The corporation's law firm requested Doe to provide any recollections he had regarding the meeting, and Doe's personal attorney faxed to the law firm a signed copy of the minutes with Doe's "assignment recommendations" attached. The minutes seemed to indicate that there were no approved recommendations. The law firm contacted Doe and indicated that DOJ would want to know why the signed copy and the assignment recommendation were produced so late, and Doe responded that his assistant only recently had looked at his personal copy of the corporate minutes. Doe's personal counsel subsequently informed the corporation's law firm that the assignment recommendation was not a contemporaneous document and had been prepared later when Doe stated that his assistant had searched his personal files. The law firm informed DOJ that the assignment recommendations were not a contemporaneous record, and DOJ sought from corporate counsel the circumstances under which the document had been obtained and all conversations the law firm had with the persons who provided the document. The corporation originally claimed privilege, but relented when DOJ raised the crime-fraud exception. When confronted by DOJ with his conflicting statements concerning the manner in which the document had been provided to the corporation, Doe's attorney raised the attorney-client privilege. The District Court held that the assignment recommendations were not protected by the attorney-client privilege because they were simply a corporate document, and the conversations concerning the document were not protected because of the crime-fraud exception to the privilege. The Court of Appeals affirmed, noting that the government had demonstrated a *prima facie* case of crime-fraud, and the exception applied: "Corporate counsel's affidavit submitted with his motion to quash reveals that following production of that document Doe told corporate counsel on at least three occasions that his secretary had found the document and that he did not know when it was created, even though he later admitted that he created it at the time the signed minutes were found in his file."

In re Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006) : In an ongoing criminal investigation, the government became concerned that the Executive Director of an organization to whom subpoenas were issued might have been involved in the destruction of e-mails and obstruction of justice. The government sought to compel the attorney for the Director to testify regarding his discussions with the Director about her compliance with the subpoenas. The government also sought production of the attorney's notes of his conversation with the Director concerning the organization's compliance with the subpoena. The Trial Judge reviewed the government's *ex parte* affidavit *in camera* and concluded that there was sufficient evidence to satisfy the crime-fraud exception in a showing that the Director was in the process of obstruction of justice at the time of her conversation with the attorney and used the information provided by the attorney in furtherance of crime. The Court affirmed, accepting the government's argument that, while the attorney did nothing improper in advising the Director, there was evidence that the Director used the attorney's communication to determine the type of material that the government sought and used the information in furtherance of her obstruction of justice. The Court held that it did not matter that the Director did not initiate the communication with the attorney or solicit any advice, because the crime-fraud exception "is equally applicable in situations where there has been a prior attorney-client relationship and the communication at issue was made in the context of that relationship."

The Court also concluded that the Director's communications with counsel "furthered" crime or fraud, because in those conversations the Director was informed of the kinds of documents that the grand jury was seeking, and obtaining this advice could have assisted the Director in determining what kinds of documents to destroy. In *United States v. Doe, 429 F.3d 450 (3d Cir. 2005)* , the Court reversed a ruling quashing a grand jury subpoena on grounds of the attorney-client privilege. It held that the government had made a *prima facie* showing that the client's communications with the attorney were in furtherance of criminal acts, and found that the Trial Court used the wrong standard in evaluating the evidence. It "improperly relied on whether the consultation assisted or furthered the crime." Instead, the Judge should have focused on the intent of the client in communicating with the lawyer.

United States v. Lentz, 524 F.3d 501 (4th Cir. 2008) : The defendant, arrested for murder, had consulted with another inmate about hiring a hit man to murder some witnesses. In a recorded conversation with his attorney, the defendant asked questions to check on the other inmate's reliability in the scheme. Affirming, the Court found no error in denying suppression of the recorded conversation, as it fell within the crime-fraud exception to the attorney-client privilege.

United States v. Al-Shahin, 474 F.3d 941 (7th Cir. 2007) : Affirming convictions for mail fraud, the Court held that the crime-fraud exception applied to testimony by an attorney who worked with the FBI and posed as a lawyer whose mission was to find and represent clients in settling fraudulent accident claims with various insurance companies. The evidence demonstrated that the defendants who consulted with the attorney were engaged in bringing fraudulent insurance claims, and established a *prima facie* case that the attorney was being used as part of the fraudulent scheme.

[C] Attorney-Client -- Exceptions -- Crime or Fraud -- Procedures

United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007) : In a proceeding to enforce administrative subpoenas issued by the IRS in connection with an investigation into abusive tax shelters, the Court found no abuse of discretion in a ruling that a document fell within the crime-fraud exception. It rejected the view ascribed to some Circuits, "which require enough evidence of crime or fraud to support a verdict in order to invoke the crime-fraud exception." Rather, it held that "[t]o invoke the crime-fraud exception, the party seeking to abrogate the attorney-client privilege must present prima facie evidence that 'gives colour to the charge' by showing some foundation in fact. [citations] The party seeking to abrogate the privilege meets its burden by bringing forth sufficient evidence to justify the district court in requiring the proponent of the privilege to come forward with an explanation for the evidence against it." Here, the Judge had conducted an *in camera* inspection, had found *prima facie* evidence of crime or fraud, and did not find the proponents' explanation to the contrary satisfactory.

Kilpatrick v. King, 499 F.3d 759 (8th Cir. 2007) : The plaintiff had been acquitted of child abuse, but the state Department of Health and Human Services listed him on its Central Register of Abuse and Neglect. The plaintiff then amended his civil rights complaint charging that the initial investigation and prosecution violated due process to add a claim that the Register listing was retaliatory. When one of the individual defendants sued for retaliation refused to answer deposition questions about consultations with HHS counsel, the plaintiff moved to compel discovery, arguing that the attorney-client privilege did not apply because the consultation was to further a crime or fraud (presumably the alleged conspiracy to retaliate). Affirming summary judgment for the defendants, the Court held there was no abuse of discretion in denying the order to compel, as the plaintiff had not met his burden of presenting a factual basis to support his belief that the advice was sought in furtherance of any alleged retaliation, which was required before the Judge could review the allegedly privileged testimony and rule on the privilege claim. In *In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007)* , the Court affirmed an order requiring disclosure to a grand jury of attorney-client documents generated in furtherance of the client's fraud. It held that the crime or fraud needs to be "established" to overcome the privilege, but that there need only be "probable cause to believe that a crime or fraud ha[s] been perpetrated" to call for *in camera* review. It rejected the client's claim that establishing the crime or fraud calls for clear and convincing evidence. Although it had previously suggested that in a civil case the party opposing the application of the crime-fraud exception is entitled to present countervailing evidence, it did not decide whether a different rule might apply in the grand jury context.

In re Napster, Inc., Copyright Litig., 479 F.3d 1078 (9th Cir. 2007) : Music industry companies alleged that the media conglomerate Bertelsmann was vicariously liable for copyright infringement by the Napster file sharing service and its users, on the ground that a multi-million dollar loan by Bertelsmann gave it control over Napster and prolonged its infringing operations. The companies sought discovery of attorney-client communications related to the loan, arguing that they came within the crime-fraud exception because they were in pursuance of a scheme to defraud and deceive the courts regarding the true nature of the "loan" transaction. The District Court ordered disclosure of the communications, upon a finding that a *prima facie* showing had been made; it concluded that it in determining whether the exception applied, it "need only consider the evidence offered by the moving party" and that it need not "consider conflicting evidence offered by the party seeking to uphold the privilege." Reversing, the Court held that when outright disclosure (as opposed to an *in camera* review) is requested, the party seeking to preserve the privilege has the right to introduce countervailing evidence, and that the party seeking disclosure has the burden of proving by a preponderance of the evidence that the exception applies. Reviewing the evidence in this case, the Court held that the companies had not met their burden.

[k] Attorney-Client -- Fees, Client Identity and Address, etc.

[v] Attorney-Client -- Fees, Client Identity and Address, etc. -- Miscellaneous Cases

Reiserer v. United States, 479 F.3d 1160 (9th Cir. 2007) : During an investigation of an attorney and his firm for promoting abusive tax shelters, the IRS issued a summons to his bank for documents relating to accounts maintained by the firm. The attorney objected to disclosure of client identity and fee information, but the Court affirmed denial of a motion to quash the summons. The documents sought were not confidential attorney-client communications, and the client identity and fee information was not privileged because revelation of that information would not constitute acknowledgment of criminality. The summons was issued as part of an investigation of the attorney, not his clients; "[d]isclosure of the clients' identities may eventually lead them to become IRS targets, but disclosure in itself is not incriminating."

[l] Attorney-Client -- Fiduciary Litigation

In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007) : In an action by former subsidiaries against the parent company, the parent produced documents that it conceded were created to provide joint advice to it and its subsidiaries, but refused to produce documents that it claimed were provided solely to it and were not part of any joint representation. The parent's attorney-client privilege claim as to the latter documents was denied, but the Court reversed the order and remanded. The subsidiaries claimed that because the parent controlled them while they were insolvent, the parent owed fiduciary duties to the subsidiaries of which their creditors were the primary beneficiaries, and therefore that the fiduciary exception to the privilege recognized in *Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)* , should apply. The Court concluded that "[t]he key ... is insolvency," because "[i]f the Debtors [subsidiaries] were not insolvent or in that hazy 'zone of insolvency,' ... at the time of the otherwise privileged communications, then BCE [the parent] was the only beneficiary of the Debtors' success, and it could not, therefore, breach its fiduciary duty to itself." The Court ultimately concluded that the dates on which each subsidiary became insolvent were issues of fact it could not resolve and alerted the Trial Judge to the requirement under *Garner* that there be a colorable claim of breach of fiduciary duty; it noted that generally a fiduciary "does not have a duty to guarantee or bail out a corporate family member when it loses money."

In re United States, 590 F.3d 1305 (Fed. Cir. 2009) : In a suit alleging that the United States had mismanaged trust assets and other funds of a Native American tribe, the Court denied a writ of mandamus against an order compelling the United States to disclose communications that it claimed were protected by the attorney-client privilege. The Court held that the fiduciary exception to the privilege applied to communications concerning management of an Indian trust, at least where the government has not considered a specific competing interest (such as statutes governing endangered

species or natural resources) in those communications.

[o] Attorney-Client -- Legal Advice or Services

[i] Generally

In re County of Erie, 473 F.3d 413 (2d Cir. 2007) : In a class action challenging strip searches pursuant to a written policy of the County Sheriff's office, the Trial Judge ordered the discovery of e-mails between an Assistant County Attorney and County officials that discussed the propriety of the policy. The Judge determined that the e-mails were not privileged because they proposed changes to the existing policy and its implementation to make it constitutional, but that was the only "legal analysis" and "no legal advice [was] rendered apart from policy recommendations." Granting a writ of mandamus, the Court found that the Judge took too narrow a view of legal advice: "When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation -- or that advocates and promotes compliance, or oversees implementation of compliance measures -- is legal advice." It explained that "[f]undamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct," and "[t]he complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances." Although it found that the e-mails were privileged, the Court remanded for a determination whether the privilege had been waived by the distribution of e-mail communications to people in the Sheriff's Department who had not requested advice.

Regional Airport Auth. v. LFG, LLC, 460 F.3d 697 (6th Cir. 2006) : Affirming summary judgment for the defendant in a CERCLA action, the Court found no error in a ruling denying attorney-client privilege protection to communications between the plaintiff's counsel and remediation consultants for the plaintiff, as the communications were not made to obtain legal advice.

[iii] Attorney-Client -- Legal Advice or Services -- Investigations

Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612 (7th Cir. 2009) : In a civil rights action arising from sexual assaults by a teacher upon students, the plaintiffs sought discovery of interview notes related to the case that had been prepared by a law firm retained by the school district. The Court reversed an order to compel disclosure of the notes, holding that the Judge had erroneously focused on the school district's announcement that it had retained the law firm to investigate the situation and had neglected the more significant engagement letter, which had provided that the firm would both investigate the district's response to allegations about the teacher and provide legal services in connection with the representation. Furthermore, the conduct of the attorneys and the treatment of their communications was consistent with their acting to provide legal services.

[t] Attorney-Client -- Protected Communications

United States v. Jones, 600 F.3d 847 (7th Cir. 2010) : The Court vacated the conviction of one defendant charged with conspiracy to distribute narcotics, because a detective identifying the voice on a tape recording indicated that he recognized the defendant's voice based on overhearing a courtroom conversation between the defendant and his attorney. It held that the detective's testimony did not violate the attorney-client privilege, as neither the contents nor the subject matter of the alleged conversation were revealed. However, the defendant challenged whether the conversation even occurred, but under the advocate-witness rule could not use his counsel to dispute the detective's story. The Court vacated the conviction because the Judge had not addressed the conflict of interest in ruling on a mistrial motion.

[aa] Attorney-Client -- Standing To Assert the Privilege

United States v. Smith, 454 F.3d 707 (7th Cir. 2006) : During defense cross-examination of a cooperating witness in a cocaine distribution case, the government objected on the basis of attorney-client privilege when the witness was asked what his counsel told him about the terms of his plea deal. Affirming, the Court held it was error (but harmless) to sustain the objection, when the witness had not asserted the privilege himself to at least one question regarding what his lawyer had told him and appeared ready to answer the defense questions without limitation. The Court noted that "the government did not act inappropriately in bringing the privilege issue to the court's attention," but that the privilege was not a proper basis for a government objection, since the privilege belonged solely to the witness.

[ee] Attorney-Client -- Waiver

[i.1] Attorney-Client -- Waiver -- Calling Attorney To Testify

United States v. Hyles, 479 F.3d 958 (8th Cir. 2007) : In a murder-for-hire trial arising from the murder of a witness against the defendant in a state drug trial, the defendant called his former attorney from the underlying case and asked him about discussions between them. Affirming, the Court led that the defendant had waived his privilege and could not assert it to bar the government from cross-examining the attorney.

[ii] Attorney-Client -- Waiver -- Disclosure of Privileged Communication

[C.1] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Delay in Asserting Privilege

United States v. Ary, 518 F.3d 775 (10th Cir. 2008) : Affirming convictions for fraud and stolen property offenses arising from transactions involving space artifacts, the Court found no error in a ruling that the defendant waived the attorney-client privilege and work product protection as to documents seized in a government search when he waited six weeks to assert protection after a Rule 16 discovery meeting. In a footnote, the Court suggested that it was "possible" that the defendant waived the privilege at the Rule 16 meeting itself, when he failed to raise any privilege claim despite the fact that the government provided an inventory of items seized in the search, which included the "black box" containing the allegedly privileged material.

[D] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Disclosure by Agent or Attorney

In re Grand Jury (Attorney-Client Privilege), 527 F.3d 200 (D.C. Cir. 2008) : The attorney for a psychiatrist being investigated for Medicaid fraud had shown copies of his client's patient records to the government in an effort to exonerate the client. When the government later subpoenaed the originals of the records for a forensic ink analysis to determine when they were created, the attorney and client moved to quash the subpoena, claiming attorney-client privilege. Affirming denial of the motion to quash, the Court held that sharing the records with the government destroyed whatever privilege might have attached to them by having been given to the attorney for the purpose of obtaining legal advice. In *In re Grand Jury, 475 F.3d 1299 (D.C. Cir. 2007)* , a corporation conducted an internal investigation into whether its past actions had violated federal campaign finance laws. The investigation was conducted by an outside law firm. John Doe, a corporate executive, retained separate counsel, and the corporation and its law firm entered into a joint defense agreement with Doe and his separate counsel. Pursuant to a DOJ demand, the corporation produced an unsigned copy of the minutes of a Board of Directors' meeting, which appeared to show that political activities proposed by Doe included illegal corporate contributions to federal political candidates. The corporation's law firm requested Doe to provide any recollections he had regarding the meeting, and Doe's personal attorney faxed to the law firm a signed copy of the minutes with Doe's "assignment recommendations" attached. The minutes seemed to indicate that there were no approved recommendations. The law firm contacted Doe and indicated that DOJ would want to know why the signed copy and the assignment recommendation were produced so late, and Doe responded that his assistant only recently had looked at his personal copy of the corporate minutes. Doe's personal counsel subsequently informed the corporation's law firm that the assignment recommendation was not a contemporaneous document and had been prepared later when Doe stated that his assistant had searched his personal files. The law firm informed DOJ that

the assignment recommendations were not a contemporaneous record, and DOJ sought from corporate counsel the circumstances under which the document had been obtained and all conversations the law firm had with the persons who provided the document. The corporation originally claimed privilege, but relented when DOJ raised the crime-fraud exception. When confronted by DOJ with his conflicting statements concerning the manner in which the document had been provided to the corporation, Doe's attorney raised the attorney-client privilege. The Trial Judge rejected the claim of privilege, and the Court affirmed. It concluded that Doe waived any privilege, because "the disclosure of the document was more than inadvertent, its disclosure was actually the result of affirmative acts by the attorney and client now asserting the privilege."

In re Powerhouse Licensing, LLC, 441 F.3d 467 (6th Cir. 2006) : In an action over allegedly fraudulent asset transfers, the Trial Judge ordered the deposition of counsel for a judgment debtor and the production of allegedly privileged documents. Denying the debtor's petition for mandamus, the Court held that the privilege had been waived when the attorney submitted an affidavit regarding the challenged transactions that contained statements representing opinions based upon confidential attorney-client communications that went to the heart of the legal claims at issue.

[G] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Government Investigations

In re Qwest Communs. Int'l, 450 F.3d 1179 (10th Cir. 2006) : Adopting the majority position, the Court rejected the concept of "selective waiver," and held that disclosure of privileged information to a government regulator constituted a waiver for all purposes. It upheld the grant of the plaintiffs' motion to compel production of information given by the defendant to a government regulator in an attempt to cooperate with a government investigation. The Court concluded that "[t]he record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party. ... [T]he rule Qwest advocates would be a leap, not a natural, incremental next step in the common law development of privileges and protections." It made no difference that Qwest had entered into a confidentiality agreement with the regulator before turning over the documents: "the confidentiality agreements gave the agencies broad discretion to use the Waiver Documents as they saw fit, and any restrictions on their use were loose in practice."

[I] Attorney-Client -- Waiver -- Disclosure of Privileged Communications -- Inadvertent Waiver

Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371 (7th Cir. 2008) : Affirming summary judgment for the defendants in an action by a judgment creditor seeking to set aside allegedly fraudulent transfers, the Court held there was no clear error in ordering return of an attorney's memorandum that had been produced to the plaintiff. The precautions taken to avoid disclosure were adequate, the disclosure was in a production of 30-40 boxes of documents, the memorandum did not appear to contain any evidence of crime or fraud, and the defendant's counsel took steps to rectify the error within three days of learning of the disclosure.

[J] Attorney-Client -- Waiver -- Disclosure of Privileged Communication -- Intent To Waive

United States v. Seale, 600 F.3d 473 (5th Cir. 2010) : The defendant was charged with a fatal kidnapping committed in 1964 after another participant gave a statement in 2006 to the FBI implicating the defendant. Affirming, the Court found no error in precluding the defense from calling the attorney for the informant to testify that he had recanted the statement, thereby impeaching his trial testimony, since there was no sufficient proof the informant intended to waive the privilege. Despite defense arguments that the informant knew his attorney was discussing his statement with defense counsel, at a hearing on whether the privilege had been waived, the informant's attorney flatly denied that his client had ever given him permission to speak to defense counsel or that his client had ever repudiated the statement he gave to the FBI. In any event, the defense declined to recall the informant as a witness to ask whether he intended to waive the privilege.

[iii] Attorney-Client -- Waiver -- Raising a Claim or Defense

[A] Civil Cases

In re County of Erie, 546 F.3d 222 (2d Cir. 2008) : In a class action suit challenging the constitutionality of strip searches of detainees, the Trial Judge found a waiver of attorney-client privilege as to certain e-mails between County officials and the County attorney's office on the ground that the County was claiming that it had qualified immunity and the lawyer's communications to the officials would bear upon its defense that the County had not violated clearly established law. The Court granted a mandamus petition and vacated the ruling below, holding that to constitute a waiver "a party must *rely* on privileged advice from his counsel to make his claim or defense." The Court "[d]ecline[d] to specify or speculate as to what degree of reliance is required because Petitioners here do not rely upon the advice of counsel in the assertion of their defense in this action." The "[p]etitioners do not claim a good faith or state of mind defense. They maintain only that their actions were lawful or that any rights violated were not clearly established." If a defense of lawful activity were enough to constitute a waiver of attorney-client privilege, then there could be a waiver in virtually every case in which a client consulted with an attorney in advance of an action.

In re Seagate Technology, LLC, 497 F.3d 1360 (Fed. Cir. 2007) (en banc): Seagate, threatened with suit and ultimately sued for patent infringement by Convolve, retained counsel to provide opinions regarding the validity of the patents. After Seagate indicated its intent to rely on the opinion letters in defending against willful infringement, Convolve moved to compel discovery of communications with other counsel, including trial counsel. The Judge held that the attorney-client privilege and work product protection were waived, and granted the order to compel. On mandamus review *en banc,* the Court granted Seagate's petition, holding that, as a general matter, asserting the advice of counsel defense and disclosing opinions of opinion counsel in response to a charge of willful infringement does not constitute waiver of the attorney-client privilege for communications with trial counsel. It reasoned that "the significantly different functions of trial counsel and opinion counsel advise against extending waiver to trial counsel. Whereas opinion counsel serves to provide an objective assessment for making informed business decisions, trial counsel focuses on litigation strategy and evaluates the most successful manner of presenting a case to a judicial decision maker ... in an adversarial process." The Court also overruled its prior standard for willful infringement, now requiring "at least a showing of objective recklessness," so "there is no affirmative obligation to obtain opinion of counsel." In *In re Echostar Communs. Corp., 448 F.3d 1294 (Fed. Cir. 2006)* , a patent infringement action, the defendants responded to an allegation of willful infringement that they had relied on the advice of in-house counsel. After the action was filed, they obtained additional legal advice from an outside firm but elected not to rely upon it. The plaintiffs obtained an order for discovery of documents in the possession of the defendant's in-house and outside counsel, after the Judge ruled that the attorney-client privilege and work product protection had been waived by the advice of counsel defense. On petition for mandamus, the Court held that the defense waived the privilege as to all attorney-client communications relating to the same subject matter, even though the defendants based the defense only on communications from the in-house counsel and outside counsel were not consulted until later. The Court concluded, however, that work product protection would continue to protect documents by the outside counsel that were not communicated to the defendants, as they would not bear on the defendants' belief as to infringement.

[B] Attorney-Client -- Waiver -- Raising a Claim or Defense -- Criminal Cases

United States v. Bauer, 551 F.3d 786 (8th Cir. 2008) : The Court affirmed convictions of a husband and wife for bankruptcy fraud and money laundering, holding that the wife waived her attorney-client privilege "by choosing to make her attorneys' performance the central element of her defense."

[C] Attorney-Client -- Waiver -- Raising a Claim or Defense -- Habeas Corpus Cases

United States v. Pinson, 584 F.3d 972 (10th Cir. 2009) : Dismissing an appeal from denial of a prisoner's § 2255 motion, the Court held that "[w]hen a habeas petitioner claims that he received ineffective assistance of counsel, he puts communications between him and his attorney directly in issue, and thus by implication waives the attorney-client privilege with respect to those communications." In this case, the Court found the scope of the order to the petitioner's

attorney "a bit troubling," but found no abuse of discretion.

[iv] Attorney-Client -- Waiver -- Scope of Waiver

Hernandez v. Tanninen, 604 F.3d 1095 (9th Cir. 2010) : The plaintiff in an employment discrimination case added an allegation of conspiracy to cover up wrongdoing after a coworker, who had spoken with the plaintiff's attorney and agreed to provide a corroborative statement, later said that he "could not do that to" the supervisor. Realizing that he might now be a witness to the coworker's conduct, the attorney referred the case to another attorney. Subsequently, the defendants moved to compel production of the first attorney's entire file, arguing that because the plaintiff was relying on the attorney as a witness, fairness mandated that any privilege that once existed was waived entirely. The Court granted mandamus against an order compelling production of the entire file, holding that the privilege was waived only with respect to communications related to the attorney's communications with the coworker.

[3] Clergy-Penitent [Go To Main]

Varner v. Stovall, 500 F.3d 491 (6th Cir. 2007) : The Court affirmed the denial of habeas corpus relief to a state defendant convicted of assault with intent to commit murder for hiring a third party to shoot her abusive boyfriend. It held that Michigan did not violate the Religion Clauses of the *First Amendment* by limiting the clergy-penitent privilege to confidential communications with a minister in his or her professional capacity as a member of the clergy, and not extending the privilege to all religious communications. Thus, the privilege was properly denied to entries in her private journal, even if they might be construed as prayers.

[4] Government [Go To Main]

[a] Deliberative Process

[i] Federal Agencies

[B] Government -- Deliberative Process -- Federal Agencies -- Miscellaneous Cases

Loving v. Department of Defense, 550 F.3d 32 (D.C. Cir. 2008) : A soldier convicted of capital murder by a court-martial sued under the Freedom of Information Act seeking disclosure of memoranda prepared for the President in connection with his statutory review of the death sentence. Affirming summary judgment for the defendants, the Court held that the disputed documents came within FOIA Exemption 5 for documents protected by privilege. Memoranda from the Army and Defense Secretaries to the President advising him on his review fell squarely within the presidential communications privilege because they directly involved the President and their confidentiality "ensure[s] that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge." The Judge Advocate General's recommendation, which was forwarded by the Army Secretary to the President, likewise fell within the presidential communication privilege, because the President solicited and received in a manner sufficient to bring it within the privilege. The Court held that a memorandum from the Department of Defense Office of General Counsel to the Counsel for the President came within the deliberative process privilege. The plaintiff's interest did not constitute a public interest in disclosure surmounting the privilege, and there was no abuse of discretion in the Judge's decision not to conduct *in camera* review to determine whether the document contained segregable factual portions that might be disclosed. In *Judicial Watch, Inc., v. FDA, 449 F.3d 141 (D.C. Cir. 2006)* , an action seeking enforcement of an FOIA request for all documents related to the FDA's approval of the drug mifepristone, the FDA asserted the deliberative process privilege with respect to certain of the documents. The petitioner argued that undated documents could not be predecisional, but the Court stated that dates are "but one way to illustrate a chronology" and noted that some of the documents in question were clearly predecisional because they were concerned with a filing made well before the

FDA's approval of the drug. The Court noted, however, that some of the undated documents were not as clearly predecisional, and so remanded so that the FDA could provide more information about those documents. It also observed that even documents prepared after the approval of the drug might be predecisional "with respect to other nonfinal agency policies, including uses of the drug that the agency has not approved."

Stewart v. United States Dept. of Interior, 554 F.3d 1236 (10th Cir. 2009) : The Court reversed the grant of a FOIA request for documents prepared by a consultant to the Bureau of Land Management. The Judge had considered the consultant analogous to a nongovernmental consultant because his scholarly work in the field and his advocacy indicated that he had deep-seated views and thus was not a disinterested expert. The Court concluded, however, that materials prepared by a paid consultant to an agency come within the deliberative process privilege unless the consultant has a personal or economic stake in the outcome of the process.

[d] Government -- Informant's Privilege

[i] Government -- Informant's Privilege -- Civil Cases

In re United States Dep't of Homeland Sec., 459 F.3d 565 (5th Cir. 2006) : The Court dismissed the Department's petition for writ of mandamus against an order compelling disclosure of documents allegedly protected by the law enforcement privilege. The underlying action was one in which a surety company and a bonding agent sought to estop the Department from collecting bonds posted by aliens pending their removal. The Department argued that the documents contained information about "ongoing criminal investigations -- including investigative leads and identifying information relating to witnesses and law enforcement personnel." The Court first held that the Judge should have recognized the existence of the privilege because "in today's times the compelled production of government documents could impact highly sensitive matters relating to national security." It then remanded the matter for a review of the documents *in camera* and, by balancing "the government's interest in confidentiality against the litigant's need for the documents," a determination whether the documents were privileged. The Court advised that in making this determination, the Judge should consider the ten factors set out in *Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973)* : (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the requesting party's case.

[ii] Government -- Informant's Privilege -- Criminal Cases

United States v. Roberson, 439 F.3d 934 (8th Cir. 2006) : Affirming convictions for a crack cocaine distribution conspiracy, the Court found no abuse of discretion in the denial of a motion to disclose the identity of a confidential informant. The informant, who claimed to have witnessed a defendant possessing crack cocaine (but not to have witnessed a drug transaction), was a mere tipster, and disclosure would have been only marginal value to the codefendant's case.

United States v. Decoud, 456 F.3d 996 (9th Cir. 2006) : The Court affirmed convictions for a conspiracy to distribute crack cocaine, finding no abuse of discretion in the denial of a motion to disclose the identity of a confidential informant. While the informant, who was the source of information used to support a warrant application, might have testified to lack of knowledge of one defendant's involvement in the conspiracy, that fact was undisputed and could have been elicited with other information. Besides, the testimony would have been of little help to the defendant,

because it would have done little to refute the affirmative proof of her involvement. Finally, the government did not rely on the informant in any aspect of its case against the defendant, and the informant was not involved in any transaction contained in the indictment.

United States v. Flores, 572 F.3d 1254 (11th Cir. 2009) : During a RICO trial of gang killings, a cooperating witness testified he did not buy drugs for personal use when he was not monitored and the ICE agent who directed him testified he knew that to be a fact because he "had another informant within the gang that would also provide me intelligence at the same time." When the defense sought the identity of this other informant, the Judge conducted an *in camera* review of unredacted government materials and concluded that they showed no direct criminal participation by the unidentified informant, his probable testimony would not aid in establishing a defense, and the government had a legitimate interest in nondisclosure. Affirming, the Court found no abuse of discretion, since the defendant did not satisfy his burden of establishing the relationship between his defense and the probable testimony of the informant, and the government cited interests in the informant's safety and his involvement in ongoing investigations.

[e] Government -- Invocation by Head of Department

Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302 (Fed. Cir. 2006) : A partnership seeking readjustment of tax liabilities requested production of documents relied upon by the IRS in framing its regulations, but the government asserted "executive privilege" as to some of the documents, pursuant to invocation of the privilege by the IRS Assistant Chief Counsel, who had examined the voluminous documents at issue. Reversing a ruling that the invocation of privilege was procedurally flawed because it was not made by the head of the agency, the Court held that the "deliberative process" executive privilege, unlike the "military and state secrets" privilege, could be invoked by a subordinate officer to whom the authority had been properly delegated, as it was in this case. The Court noted that delegating review "undoubtedly results in a more thorough, more consistent, and timelier review." It justified the distinction between the privileges on the ground that the state secrets privilege is absolute and there is ordinarily no *in camera* judicial review possible of the highly sensitive withheld documents. One Judge dissented, arguing that limiting exercise of executive privilege to agency heads "helps ensure that the privilege is not abused or overused."

[e.1] Government -- Law Enforcement Investigation

Commonwealth of Puerto Rico v. United States, 490 F.3d 50 (1st Cir. 2007) : The Court affirmed judgments for the United States in two actions by Puerto Rico to compel disclosure of materials related to activities of employees of the FBI. The Court noted that it and other federal circuits have recognized a privilege for law enforcement materials that was similar to the exemption in the Freedom of Information Act for law enforcement materials. The Court held that the privilege it recognized in *United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987)* (see *Manual* § 501.03[4][d][ii]), for "confidential government surveillance information" would be extended to "law enforcement techniques and procedures."

In re City of New York, 607 F.3d 923 (2d Cir. 2010) : The plaintiffs, who were arrested for protesting during the Republican National Convention, brought an action for violation of their constitutional rights. Rejecting the City's invocation of the law enforcement privilege, the Judge ordered the disclosure of field reports submitted by undercover officers in advance of the convention, reasoning that the reports would be relevant to challenge the City's claim that its pre-convention investigation of violent protestors supported its policy of mass arrests of protestors during the convention, and that the City's interests could be protected by limiting access to "attorney's eyes only" or to keeping the reports "under seal." The Court granted a writ of mandamus and held that the privilege protected against any kind of disclosure of the reports. It was not at all convinced that the procedures of "under seal" or "attorney's eyes only" would be sufficiently protective, in light of the risk of leaks and the consequences of disclosure to the interests in public safety. It also held that the plaintiffs had not overcome the "strong presumption" against lifting the law enforcement privilege. Conducting its own review of the records, the Court found that the field reports were largely confirmatory of other information that the City had already produced.

[f.1] Government -- Mental Processes of Judges and Government Agents

United States v. Anderson, 560 F.3d 275 (5th Cir. 2009) : In a prosecution for sex trafficking of children, the defendant issued a subpoena to a Judge who in an unrelated case had accepted a plea on a failure-to-identify charge from one of the girls who allegedly worked for the defendant. Hoping to support his claim that he did not know the girl was a minor, the defendant sought to elicit from the subpoenaed Judge that he did not suspect she was a juvenile when accepting the plea. Affirming the conviction, the Court found no abuse of discretion when the subpoena was quashed, as the defendant sought discovery of the Judge's mental processes, which are protected from compelled testimony because disclosure " 'would be destructive of judicial responsibility.' "

[g] Government -- Presidential Communications

Loving v. Department of Defense, 550 F.3d 32 (D.C. Cir. 2008) : A soldier convicted of capital murder by a court-martial sued under the Freedom of Information Act seeking disclosure of memoranda prepared for the President in connection with his statutory review of the death sentence. Affirming summary judgment for the defendants, the Court held that the disputed documents came within FOIA Exemption 5 for documents protected by privilege. Memoranda from the Army and Defense Secretaries to the President advising him on his review fell squarely within the presidential communications privilege because they directly involved the President and their confidentiality "ensure[s] that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge." The Judge Advocate General's recommendation, which was forwarded by the Army Secretary to the President, likewise fell within the presidential communication privilege, because the President solicited and received in a manner sufficient to bring it within the privilege. The Court held that a memorandum from the Department of Defense Office of General Counsel to the Counsel for the President came within the deliberative process privilege. The plaintiff's interest did not constitute a public interest in disclosure surmounting the privilege, and there was no abuse of discretion in the Judge's decision not to conduct *in camera* review to determine whether the document contained segregable factual portions that might be disclosed.

[i] Government -- State or Military Secrets

[i] Civil Cases

In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007) : In a DEA agent's *Bivens* action against State Department and CIA officials, the United States intervened and asserted the state secrets privilege regarding two internal investigations that had been conducted by agency inspectors general. The Court affirmed a ruling sustaining the privilege claims, although it reversed dismissal of the action, finding sufficient nonprivileged information to state a claim and no deprivation of a valid defense resulting from sustaining the privilege. The Court rejected an argument against the privilege in *Bivens* actions, finding no distinction from the statutory claims in *Reynolds*. It also noted that the Federal Rules, under which the privilege has been recognized, apply unless they offend the constitutional trial rights of litigants, which was not the case here. The Court found no abuse of discretion when the privilege was sustained after the Judge had conducted an *ex parte, in camera* review of the reports at issue.

Doe v. CIA, 576 F.3d 95 (2d Cir. 2009) : The Court affirmed dismissal of claims by the wife and children of a former covert-status CIA employee related to his termination, finding no violation of the plaintiffs' constitutional right of access to the courts, where the agency properly asserted the state secrets privilege, and the District Judge properly reviewed the privilege claim *ex parte* and *in camera* and determined that the litigation could proceed no further without disclosure of the privileged information. The Court noted that the proceedings were conducted *ex parte* and *in camera* "for good and sufficient reason ... to ensure that legitimate state secrets were not lost in the process."

El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) : A suspected terrorist sued CIA officials, alleging that he had been illegally detained as part of the CIA's "extraordinary rendition" program, tortured, and subjected to other inhumane

treatment. The Court found that dismissal was required because the plaintiff's claims and the government's defenses could not fairly be litigated without disclosure of state secrets. Although the existence of the "rendition" program may be widely known, the controlling inquiry "is not whether the general subject matter of an action can be described without resort to state secrets," but "whether an action can be *litigated* without threatening the disclosure of state secrets." In this case, proof of the plaintiff's claim would require "evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations." Moreover, the defense would necessarily involve disclosure of information regarding the actual circumstances of the plaintiff's detention and treatment, by witnesses whose very identity is secret.

Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) : In an action by an Islamic foundation designated as a terrorist organization to challenge the government's terrorist surveillance program (TSP), the government's motion to dismiss on state secret privilege grounds was denied, but the Court reversed and remanded. The Court first rejected the argument that the subject matter of the lawsuit was itself a state secret, because the government had publicly disclosed information about TSP: "the government's many attempts to assuage citizens' fears that they have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege." However, the Court concluded that the privilege protected a "Top Secret" document erroneously provided to the Foundation in 2004 during a proceeding to freeze its assets. The Court agreed with the Trial Judge that the government had not waived the privilege by inadvertent disclosure. As to whether the document involved a state secret, the Court declared: "We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or justification of privilege... . That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second-guessing the Executive in this arena." The government sustained its burden with "[d]etailed statements ... that disclosure of information concerning the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." The Court concluded that without the information from the "Top Secret" document, the foundation was unable to establish standing to challenge the TSP. The Court remanded for consideration of whether the Foreign Intelligence Surveillance Act preempts the common-law state secrets privilege.

[ii] Government -- State and Military Secrets -- Criminal Cases

In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93 (2d Cir. 2008) : The Court affirmed convictions for al Qaeda terrorism in 1998, finding no violation of *Fifth* and *Sixth Amendment* rights to present a defense in Classified Information Procedures Act provisions limiting access to classified materials to persons holding a security clearance. In *United States v. Aref, 533 F.3d 72 (2d Cir. 2008)* , the Court affirmed convictions for money laundering and providing material support for a terrorist organization. It found no abuse of discretion in permitting the government to file certain material under seal and in issuing orders under seal that withheld information from the defendants. Applying the Classified Information Procedures Act, the Court found the privilege to protect classified information and other state secrets applicable in this case, even though the government failed to assert the claim of privilege through the head of the department with control over the matter; it indicated that it expected the head of the department to properly make the claim in future cases. The Court reviewed the sealed material and noted that "the Government has established a reasonable danger that disclosure would jeopardize national security" and that "the district court did not deny the defendants any helpful evidence." Although it found that the sealed documents were properly withheld from the defendants and the public, the Court cautioned that "we reinforce the requirement that district courts avoid sealing documents in their entirety unless necessary" and that "[t]ransparency is pivotal to public perception of the judiciary's legitimacy and independence." It also added that "[w]e recognize, however, that transparency must at times yield to more compelling interests."

United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008) : The Court affirmed a defendant's convictions arising from his affiliation with al-Qaeda. It discussed the Classified Information Procedures Act and the balance that a Trial Judge must

strike between nondisclosure of classified information and the defendant's right to prepare a defense. It held that, at a minimum, the Judge must provide the same version of evidence to the defendant that is provided to the jury. The Court declared that "[i]f the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the *Confrontation Clause*." In this case, the Court found error and a confrontation violation, albeit harmless, in the Judge's providing the jury with unredacted versions of classified information while the defendant was given only redacted substitute versions.

[5] Marital [Go To Main]

[a] Adverse Testimony

[iv] Marital -- Adverse Testimony -- Miscellaneous Cases

United States v. Thompson, 454 F.3d 459 (5th Cir. 2006) : Affirming convictions for bank robbery, the Court held there was no plain error in admitting at trial testimony given by a defendant's wife at a pre-trial detention hearing. Contrary to the defendant's argument, a right to have a spouse-witness affirmatively warned of the right not to testify against his or her spouse is not supported in the case law.

[b] Marital -- Common-law Marriage, Cohabitants

United States v. Rivera, 527 F.3d 891 (9th Cir. 2008) : Affirming drug conspiracy convictions, the Court rejected defense arguments that minimization procedures in conducting wiretaps had been inadequate. It noted that communications between one defendant and a woman were not covered by a marital privilege, since the only contention was that they had children together.

[c] Marital -- Confidential Communications

[i] Confidentiality

United States v. Griffin, 440 F.3d 1138 (9th Cir. 2006) : The Court held that the marital communications privilege was inapplicable to letters sent by a prisoner to his wife. The prisoner was incarcerated in California, where prison regulations indicated that mail may be read by prison authorities; therefore, there was no expectation of confidentiality.

[ii] Marital -- Confidential Communications -- Holder of Privilege

United States v. Darif, 446 F.3d 701 (7th Cir. 2006) : The Court held that both spouses may claim the marital communications privilege.

[iii] Marital -- Confidential Communications -- Joint Participants in Crime

United States v. Miller, 588 F.3d 897 (5th Cir. 2009) : The Court affirmed a conviction for tax evasion, finding no abuse of discretion in the admission of testimony from the defendant's former wife about conversations with the defendant as to whether checks received in their business should go into business or personal accounts and regarding his decision not to file tax returns because he believed that filing was not necessary and unconstitutional. The communications related to joint criminal activity, even though the witness was not charged with a crime, and were thus not protected by the confidential marital communications privilege.

United States v. King, 541 F.3d 1143 (5th Cir. 2008) , the Court affirmed a conviction for conspiracy to possess cocaine with intent to distribute, finding no abuse of discretion in admitting transcripts of tape-recorded conversations between the defendant and his wife. Because the conversations involved potential criminal activity of hiding assets, the

"joint participation" exception to the privilege for confidential spousal communications applied.

[v] Marital -- Confidential Communications -- Statements in Furtherance of Crime or Fraud

United States v. Darif, 446 F.3d 701 (7th Cir. 2006) : The defendant, charged with conspiracy to commit marriage fraud for allegedly paying an American citizen to marry him and help him obtain a visa, was also charged with witness tampering, based on a letter that he sent to his wife, while in jail pending trial, in which he urged her to contradict her grand jury testimony. Affirming, the Court upheld a ruling that the marital communications privilege did not apply because the defendant and his wife were joint participants in crime. (Thus, the Court applied a "joint participants" exception to the marital communications privilege, when in fact the proper exception -- as with the attorney-client privilege -- would have been for statements made in furtherance of crime or fraud.) In a footnote, the Court stated that "[o]ur analysis would be different if in fact the letter had no relation to the marriage fraud charges, and the letter represented the first time that Defendant suggested that Kirklin [the wife] change her testimony." In those circumstances, the communication would not have been in furtherance of a crime, but would have been a suggestion of a new crime that the wife would not yet have accepted.

[d] Marital -- Exceptions

[ii] Marital -- Exceptions -- Crime Against Children

United States v. Banks, 556 F.3d 967 (9th Cir. 2009) : The defendant was convicted for producing child pornography and related offenses in a case in which the victim was the defendant's grandson. The defendant's wife testified against him at trial, relating confidential communications that the defendant had made to her. The Judge admitted this testimony over a claim of marital communications privilege, reasoning that the exception for harm to children applied. Reversing, the Court held that the harm-to-child exception should apply only if the victim is a child or step-child of one or both of the marital partners, or a "functional equivalent of a birth or step-child." Here, the strong bond between the victim and his grandparents, infrequent overnight visits, and even regular day-care services did not satisfy the "functional equivalence" standard.

[6] Newsreporter [Go To Main]

[a] Common-law Privilege for Sources

New York Times Co. v. Gonzalez, 459 F.3d 160 (2d Cir. 2006) : The *Times* sought a declaratory judgment that phone records of its reporters in the hands of third party providers were shielded from a grand jury subpoena by reporters' privileges protecting the confidentiality of sources. The government argued that regardless of any privileges the reporters may have, they did not defeat a subpoena directed to a third party provider. The Court held that "so long as the third party plays an integral role in reporters' work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves." Because the telephone plays an integral role in a reporter's work, "any common law or *First Amendment* protection that protects the reporters also protects their third party telephone records sought by the government." After considering the government's compelling interest, whether the information was necessary and critical to the maintenance of the claim, and whether the information was obtainable from other sources, the Court concluded that any common-law privilege was overcome as a matter of law. It also held that reporters have no *First Amendment* right to shield their confidential sources from a grand jury investigation.

[b] Newsreporter -- Constitutional Privilege for Sources

New York Times Co. v. Gonzalez, 459 F.3d 160 (2d Cir. 2006) : The *Times* sought a declaratory judgment that phone records of its reporters in the hands of third party providers were shielded from a grand jury subpoena by reporters'

privileges protecting the confidentiality of sources. The government argued that regardless of any privileges the reporters may have, they did not defeat a subpoena directed to a third party provider. The Court held that "so long as the third party plays an integral role in reporters' work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves." Because the telephone plays an integral role in a reporter's work, "any common law or *First Amendment* protection that protects the reporters also protects their third party telephone records sought by the government." After considering the government's compelling interest, whether the information was necessary and critical to the maintenance of the claim, and whether the information was obtainable from other sources, the Court concluded that any common-law privilege was overcome as a matter of law. It also held that reporters have no *First Amendment* right to shield their confidential sources from a grand jury investigation.

[7] Physician-Patient [Go To Main]

[b] Physician-Patient -- Generally

United States v. Bek, 493 F.3d 790 (7th Cir. 2007) : Affirming a conviction for prescribing drugs without a proper medical purpose, the Court rejected a defense argument that patient records had been erroneously admitted in violation of the physician-patient privilege. The controlling law in this federal prosecution was federal common law, which provides no physician-patient privilege. The Court declined to adopt a physician-patient privilege in light of the Supreme Court's decision in *Jaffee v. Redmond*, finding "no circuit authority in support of a physician-patient privilege even after *Jaffee*" and seeing no reason to create such a privilege.

[8] Psychotherapists [Go To Main]

[c] Psychotherapists -- Exceptions

[iv] Psychotherapists -- Exceptions -- Threats

United States v. Auster, 517 F.3d 312 (5th Cir. 2008) : In a prosecution charging the defendant with extortion in connection with his workers' compensation claim, the government offered communications between the defendant and his therapist relating threats to harm others, arguing that they fell within the "dangerous patient" exception to the therapist-patient privilege. The Judge ruled that the exception did not apply, because by the time of the defendant's criminal trial disclosure was not necessary to protect anyone from imminent harm. On interlocutory appeal, the Court reversed, holding that the applicability of the dangerous patient exception was inapposite, because the statements to the therapist were not privileged in the first place. The defendant had been repeatedly warned that any threats to harm others that he made to his therapist would have to be reported to the authorities and to potential victims. Therefore he had no reasonable expectation of confidentiality when he made the threats.

[f] Psychotherapists -- Miscellaneous Cases

United States v. Wilk, 572 F.3d 1229 (11th Cir. 2009) : The defendant was convicted for killing a police officer assisting in execution of a search warrant during a federal investigation. Affirming, the Court held that evidence and testimony relating to the defendant's medical records were not protected by the psychotherapist-patient privilege. The Judge had granted the defendant's motion to exclude two records authored by psychologists, and other records failed to show that the defendant ever consulted any personnel about his emotional wellbeing; they were also covered by an "informed consent" form that indicated they would be released "as specifically required by law." The Court found no abuse of discretion in the decision declining to adopt Florida's physician-patient privilege as to certain HIV-related medical records; in any event, the defendant continually relied on his mental status from HIV dementia as central to his defense.

[h] Psychotherapists -- Waiver

Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007) : In an employee's ADA action against the SEC for failing to accommodate his medical conditions, the Court reversed an order denying, on grounds of waiver, the plaintiff's motion to quash a subpoena for confidential records of communications with his psychoanalyst. The plaintiff's complaint had not alleged any psychological or mental injury from the SEC's conduct, nor asserted any claim of emotional distress damages. Although he acknowledged in a deposition suffering from depression and referred in discovery to "stress" and "humiliation," "those answers do not clearly make an allegation of, much less a claim to recovery for, emotional distress." And his waiver of his privilege as to his psychopharmacologist was unrelated to his mental or emotional condition; he claimed heart problems related to a lipid disorder for which that physician administered medication and managed its effects. The Court added that the defendant could not overcome the privilege by putting the plaintiff's mental state at issue.

In re Sims, 534 F.3d 117 (2d Cir. 2008) : In a prisoner's civil rights action for excessive force, the defendants obtained an order for disclosure of the plaintiff's psychiatric records, on the grounds that he "had put his psychiatric history at issue by relying on evidence that he suffered from a pre-existing physical condition to support his claim that he was attacked," and by claiming that the attack on him was unprovoked, since his "psychiatric records might show that he had masochistic or suicidal tendencies undermining his claim." Reversing the order on mandamus review, the Court held it was an abuse of discretion to treat the plaintiff's psychotherapist privilege as being waived. Neither in his complaint nor in his deposition did he indicate he was seeking damages for mental or emotional injuries; his reference to prior psychiatric treatment was in a deposition for which he had requested and been denied assignment of counsel and where there was no indication he was even aware of his privilege; when represented by counsel he expressly disavowed any claim for unusual emotional injuries; he had not used his mental condition in an effort to support his claim; the defendants' efforts to put his mental condition in issue could not operate as a waiver; and merely seeking damages for "garden variety" pain and suffering accompanying physical injuries is not a waiver of the privilege.

Maday v. Public Libraries, 480 F.3d 815 (6th Cir. 2007) : Affirming a judgment for the defendants in an age discrimination action brought by a former employee, the Court found no error in the admission of a record from the plaintiff's meeting with a social worker-therapist, which contained the social worker's statement that the plaintiff was "unhappy with her attorney who told her he didn't want to be used as a tool for revenge." The Court held that the plaintiff waived her psychotherapist-patient privilege when she "put her emotional state at issue in the case." Therefore, the records were subject only to Rule 403 balancing. Although the record referred to a private conversation between the plaintiff and her attorney, the attorney-client privilege had been waived by the plaintiff's disclosure of the conversation to the social worker. In the Court's view, "Maday's argument that the social-worker and attorney-client privileges should be combined is unavailing in a situation where, as here, both privileges have clearly been waived."

Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006) : In a Title VII action for sexual harassment, the Court held that the plaintiff had waived her psychotherapist-patient privilege by seeking damages for emotional distress.

[10] Special Privileges [Go To Main]

[0.1] Special Privileges -- Arbitration Materials

Gotham Holdings, LP v. Health Grades, Inc., 580 F.3d 664 (7th Cir. 2009) : The defendant in a litigation contended that an arbitration award supported its view of the merits and tendered the award and some of the documents exchanged in the arbitration. When the plaintiff asked to see related documents, the defendant refused on the ground that the parties to the arbitration had pledged confidentiality. Affirming an order enforcing a subpoena directed to the other party in the arbitration, the Court held that even if the confidentiality agreement had not provided that the materials could be disclosed in response to a subpoena, the confidentiality provision would not be effective. "Contracts bind only the

parties. No one can 'agree' with someone else that a stranger[']s resort to discovery under the Federal Rules of Civil Procedure will be cut off."

[i] Special Privileges -- Internal Investigations, Peer Review, and Self-Analysis

Adkins v. Christie, 488 F.3d 1324 (11th Cir. 2007) : Reversing summary judgment for the defendants in an action by an African-American physician claiming discriminatory termination of his hospital privileges, the Court found that the Trial Judge unduly limited discovery and held that it would decline in federal discrimination cases to recognize a peer review privilege for documents relating to medical peer review proceedings. While a peer review privilege is recognized by all 50 states and the District of Columbia, the state statutes address different policy concerns in their focus on malpractice suits.

[11] State Law [Go To Main]

[a] Diversity Actions

Babasa v. Lenscrafters, Inc., 498 F.3d 972 (9th Cir. 2007) : Affirming remand of a class action because removal was untimely, the Court agreed with the Trial Judge that a letter sent by plaintiffs' counsel to defense counsel clearly indicated that the amount in controversy satisfied federal jurisdictional requirements and that the defendant waited too long to file for removal. The Court declined to decide whether California's mediation privilege applied to the letter, because, even though the case was in the diversity jurisdiction, the question of jurisdictional amount is a federal question, and under Rule 501 the federal law of privilege controls. Moreover, the defendant waived any argument that the letter fell within a federal evidentiary privilege by failing to raise a privilege claim before the Trial Judge or in appellate briefs.

[12] Tax Practitioner [Go To Main]

Valero Energy Corp. v. United States, 569 F.3d 626 (7th Cir. 2009) : The IRS issued a summons to accountants seeking documents related to tax planning for a corporate merger. Affirming an order enforcing the summons, the Court held that some of the documents were unprotected by the tax practitioner-client privilege and others came within the exception for promotion of tax shelters. The Court noted that the privilege extends to tax practitioners only to the extent they are doing lawyers' work, so it is not enough that the communications raise federal tax topics, and to the extent that documents are used for both preparing tax returns and litigation, they are not protected. As for the exception, it encompasses any plan or arrangement whose significant purpose is to avoid or evade federal taxes, regardless of whether prepackaged or individualized, and it applies to documents encouraging participation in a tax shelter, but not those merely informing about such schemes, assessing such plans in a neutral fashion, or evaluating soft spots in tax shelters that the client has used in the past. In *United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007)* , in a proceeding to enforce administrative subpoenas issued by the IRS in connection with an investigation into abusive tax shelters, the Court held that the tax practitioner privilege is subject to an exception for communications in connection with tax shelters and that the IRS has the burden of proving that a document falls within the exception.

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[12] Voir Dire

601.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 275 (1999)

[3] Report of the House Committee on the Judiciary

[4] Report of the Senate Committee on the Judiciary

[5] Report of the House and Senate Conferees

[6] Citations to Hearings and Debates

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601.01 Official Text

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

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601.02 Editorial Explanatory Comment

[1] Federal and State Law

The Rule states that where federal law controls the claim or defense, every person is considered to be competent to be a witness unless another Rule provides otherwise. n1 See, e.g., *Rules 605* and *606(b)*. The focus is no longer on the witness's competency, but rather on the witness's credibility. n2

Rule 601 looks to the states for tests of competency to apply "to an element of a claim or defense as to which State law supplies the rule of decision." Most importantly, *Rule 601* ensures that Dead Man's Statutes will govern all elements of claims and defenses for which state law provides the rule of decision. n3 States' Dead Man's Statutes do not apply to federal question cases. n4

The Advisory Committee's proposal contained no reference to state law at all. The Advisory Committee was of the view that Dead Man's Statutes should not be applicable in any federal litigation. Congress was concerned, however, that the Advisory Committee's position presented an *Erie* problem. The Senate initially approved different language for *Rule 601*, corresponding to the language it preferred for *Rule 501*, which is fully discussed in the Editorial Explanatory Comment accompanying that Rule, § 501.02[1]. The House version prevails in both Rules.

One problem that was not anticipated by *Rule 601* is whether a Federal Court should accept a state's characterization of its own rule of evidence when state law supplies the rule of decision with respect to an element of a claim or defense. Some states' Dead Man's Statutes -- e.g., California, Connecticut, and Virginia -- do not declare the surviving party to a transaction to be incompetent, but instead allow hearsay statements of decedents to be admitted or require corroboration of the survivor's testimony. If these states do not deem their Dead Man's Statutes to be competency rules, *Rule 601* is not by its own force applicable. Nor does any other Federal Rule require Federal Courts to follow the state rules on hearsay. However, the intent of *Rule 601* is to defer to state policies regarding who can testify on issues relating to state-enacted law and to permit states to establish special protections in cases involving decedents. Therefore we think that Federal Courts should defer to state Dead Man Rules (as well as other rules preventing witnesses from testifying) even if states label their rules as something other than competency rules. n5

When state and federal issues are tried together, a problem arises similar to those previously analyzed in connection

with *Rule 501*, *see* § 501.02[1]. In this context, the conflict is that the witness may be incompetent under state law to testify to state issues, but competent under federal law to testify to federal issues. The converse situation is quite unlikely to occur, given the liberal view as to competency provided by *Rule 601*.

In deciding whether enough evidence exists to go to a jury, the Trial Judge can use different competency rules for different claims. The Judge may also be able to do so in a nonjury case. But once the case is sent to the jury, it is doubtful that the jury will understand any limiting instruction that it should consider a witness to be competent as to some claims and incompetent as to others. A uniform application is thus required in these circumstances. Either the witness is incompetent as to both claims or competent as to both. As discussed in the Editorial Explanatory Comment to *Rule 501*, our view is that when a conflict arises, the federal interest in obtaining testimony usually should predominate. n6

[2] Judicial Discretion

By referring to other Rules limiting the testimony of otherwise competent witnesses, *Rule 601* leaves the Trial Court some discretion to exclude witnesses who are significantly impaired in their mental or emotional capacity. For example, the Judge retains the traditional discretion under *Rule 403* to exclude a witness where the probative value of the testimony is substantially outweighed by the risks of unfair prejudice, undue time consumption, or jury confusion that might result from the witness' impaired state. Furthermore, if the witness is clearly not rational, the Judge has the discretion to exclude the witness under *Rule 602*, which requires the witness to be testifying on the basis of "personal knowledge." See also the Editorial Explanatory Comment accompanying *Rule 603*, *§ 603.02[2]*, suggesting that a witness' inability to satisfy the oath requirement might require rejection of the witness's testimony. n7

One problem in the drafting of *Rule 601* is that it is not clear that the Trial Judge has the power to *voir dire* a witness in order to assess testimonial qualifications. Because the first sentence of *Rule 601* states that every person is competent to be a witness, such *voir dire* would seem to be unnecessary. Yet, if we are correct in our assertion that *Rule 403* allows the Trial Judge to exclude witnesses on the ground that their testimony would be substantially more prejudicial, time wasting, or confusing than probative, some form of interrogation of these witnesses may be necessary, and is certainly within the Judge's discretion. The same is true with the authority to exclude the witness under Rules 602 and 603. The Trial Judge should be able to put questions to the witness pursuant to these Rules, despite the first sentence of *Rule 601*. n8

[3] Competency of Hearsay Declarants

If it is assumed, as Courts have held, that the Trial Judge has the authority to exclude a witness on grounds of incompetency, a question arises whether the witness' hearsay statements should be excluded as well, even if they would otherwise fit a hearsay exception. This problem occurs fairly frequently in cases raising issues of child abuse, where the infant victim has made hearsay statements that would be admissible under a hearsay exception -- most commonly *Rules 803(2)*, *803(4)*, or *807* -- and yet the child is found too young to appreciate the consequences of the oath and the responsibilities of being a witness. Most Courts have held that the child's incompetency to testify as a witness has no bearing on the admissibility of the hearsay statement. The reasoning is that the grounds for admitting the hearsay statement are unrelated to the child's ability to appreciate the oath and the consequences of testifying. For example, if the hearsay statement is an excited utterance, its truthfulness is supported by the fact that the child made the statement while under the influence of a startling event. If this is so, it does not matter that the child has no appreciation of the consequences of the oath; the hearsay statement is reliable anyway. Thus, the circumstantial guarantees of trustworthiness surrounding the excited utterance substitute for the competency requirements at trial. n9 The same can be said for statements made for purposes of medical treatment or diagnosis (*Rule 803(4)*), n10 and statements reliable enough to be admitted under the residual exception (*Rule 807*). n11

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984)* :

> Under this rule, every witness is presumed to be competent. Neither feeble-mindedness nor insanity renders a witness incompetent or unqualified... The only grounds for disqualifying a party as a witness under *Rule 601* ... are that the witness does not have knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully.

See also *United States v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989)* (power to exclude testimony out of concern that the witness is impaired must be found "outside of *Rule 601*"; no abuse of discretion in admitting the testimony of a cocaine addict).

(n2)Footnote 2. See, e.g., *United States v. Allen J., 127 F.3d 1292 (10th Cir. 1997)* (Rule 601 places a "heavy burden on a party seeking to have a child declared incompetent to testify"; the fact that the 12-year-old witness suffered from fetal alcohol syndrome and had a learning disability was not enough to overcome this heavy burden; any problems with the witness' testimony "raise questions of credibility, not competence"); *United States v. Hyson, 721 F.2d 856 (1st Cir. 1983)* (there is no Rule permitting a witness's exclusion for mental incompetence; this is a credibility determination for the trier of fact).

(n3)Footnote 3. See, e.g. *Brand v. Brand, 811 F.2d 74 (2d Cir. 1987)* (under *Rule 601*, the Federal Court was required to apply the New York Dead Man's Statute in a diversity action); *Waltzer v. Transidyne Gen. Corp., 697 F.2d 130 (6th Cir. 1983)* (attorney's competency to testify as a witness in a diversity case is governed by state law). Dead Man's Statutes generally prohibit an interested witness from testifying to a transaction with a decedent when the decedent's estate is an adverse party. The rationale is to prevent unscrupulous claims against the estate. However, the consequence of the Dead Man's Rule is to confuse competency with credibility, and to preclude the enforcement of honest claims. For a thorough discussion of a typical Dead Man's Statute, see M. Martin & D. Capra, New York Evidence Handbook ch. 6 (Aspen, 2d ed. 2002).

(n4)Footnote 4. See, e.g., *Longoria v. Wilson, 730 F.2d 300 (5th Cir. 1984)* (Dead Man's Statute is inapplicable to a civil rights action brought under *42 U.S.C. § 1983*).

(n5)Footnote 5. See *Legg v. Chopra, 286 F.3d 286 (6th Cir. 2002)* (expert properly excluded from testifying in a federal diversity action because Tennessee law requires experts in a medical malpractice case to be licensed either in Tennessee or in a contiguous state; the purpose of the law is to assure that only experts familiar with local standards of care should be permitted to testify; as such this is a competency rule).

(n6)Footnote 6. See *Donohoe v. Consolidated Operating & Prod., 736 F. Supp. 845 (N.D. Ill. 1990)* (*Rule 601*, which favors reception of evidence, applies to all claims when there is a mixture of federal and state claims).

(n7)Footnote 7. See, e.g., *United States v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989)* (Trial Court can exercise control over impaired witnesses under three sources: (1) by balancing probative worth against prejudicial impact under *Rule 403*; (2) by excluding testimony of a witness who cannot "take or comprehend an oath or affirmation" under *Rule 603*; and (3) by finding the witness "impaired to the point that he would not be able to satisfy the personal knowledge requirement" of *Rule 602*). See also *United States v. Hyson, 721 F.2d 856 (1st Cir. 1983)* (Trial Court properly struck testimony on competency grounds, where the witness was incoherent due to drug use).

(n8)Footnote 8. See, e.g., *United States v. Gutman, 725 F.2d 417 (7th Cir. 1984)* ; (Trial Judge retains power, and sometimes the duty, to hold a hearing "to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion"); *United States v. Gates, 10 F.3d 765 (11th Cir. 1993)* ("Notwithstanding *Rule 601*, a court has the power to rule that a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue.").

(n9)Footnote 9. See Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial, 15 A.L.R. 4th 1043 (1987) (noting the difference between the grounds for admitting hearsay statements and the grounds for allowing witnesses to testify).

(n10)Footnote 10. See, e.g., *Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988)* ("The fact that a young child may be incompetent to testify at trial affects neither prong of the two-part test for admitting evidence under 803(4)").

(n11)Footnote 11. See, e.g., *United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986)* (the incompetency of a child as a witness is irrelevant because admissibility under the residual hearsay exception does not depend on the declarant's ability to understand the purpose of questioning or the necessity to relate accurate information).

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601.03 Annotated Cases

[Go To Supp]

[1] Attorneys As Witnesses

Complaint of Ta Chi Navigation (Panama) Corp., 677 F.2d 225 (2d Cir. 1982) : In a shipowner's action for exoneration from or limitation of liability for cargo damage claims, the Court found error where the corporation's attorney was excluded as a witness without considering the hardship to the client of having to forgo testimony that it could not have anticipated as necessary.

Ramey v. District 141, Int'l Ass'n of Machinists, 378 F.3d 269 (2d Cir. 2004) : The plaintiffs sued their union for breach of its duty of fair representation, arising from the treatment of their seniority status after a previous employer went bankrupt and a new employer took over. Affirming a judgment for the plaintiffs, the Court found no abuse of discretion when an attorney who had formerly represented the plaintiffs was permitted to testify to a central issue in the case, the union's hostility to the plaintiffs. The professional relationship between the attorney and the plaintiffs was of short duration, it had ended a decade before this case came to trial, and the attorney was not representing the plaintiffs in the trial.

Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530 (3d Cir. 1976) : The Court held there was no abuse of discretion (although it frowned on the practice) in permitting an associate in the law firm representing several defendants in a patent infringement action to testify as an expert witness. The Court commented in a footnote that "[i]t would be appropriate to consider incorporating within the body of evidentiary rules the current disciplinary norm proscribing the testimony of a lawyer for his client," although the Rules and existing precedent do not do so.

Grizzle v. Travelers Health Network, Inc., 14 F.3d 261 (5th Cir. 1994) : The Court held there was no error in precluding a paralegal employed by the plaintiff's counsel in an ADEA case from testifying as a "fact witness" as to the plaintiff's lost wages as derived from the EEOC's pay calculation computer program. Permitting testimony by an

employee of an attorney who is assisting in the preparation and prosecution of a case is tantamount to permitting testimony by the attorney.

Waltzer v. Transidyne Gen. Corp., 697 F.2d 130 (6th Cir. 1983) : A subscriber sued a corporation for breach of a subscription agreement. Since state law governed the defense of rescission, the Court looked to the Michigan version of *Rule 601* and found that an attorney for the corporation was competent to testify concerning contested issues. The Court suggested that the attorney should have withdrawn from representation when he should have foreseen that his testimony would be required.

Petrilli v. Drechsel, 94 F.3d 325 (7th Cir. 1996) : Affirming a judgment for the defendants in a former employee's action challenging denial of severance and pension benefits, the Court held there was no error in taking testimony from the employer's in-house counsel, who was only a fact witness and not acting as advocate for the defendants. In *Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993)* , the Court held there was no reversible error in permitting an attorney for the plaintiff to authenticate a chart she prepared from materials the defendant produced in an age discrimination case. Especially where the defendant unexpectedly objected to the chart on foundational grounds, the Court was not inclined to find that the attorney's testimony presented the sort of conflict in roles that underlies the attorney-witness rule. In *United States v. Ewing*, n1 the Court affirmed a cocaine possession conviction, holding there was no abuse of discretion in precluding the defendant's attorney from testifying that his name was not written in two notebooks when they were seized by the police, although it appeared in them when they were introduced at trial. Because a paralegal who had accompanied the attorney testified to the alleged tampering, the attorney's testimony, although corroborative, would have been only cumulative. In an antitrust case, *Will v. Comprehensive Accounting Corp.*, n2 the Court held that a lawyer for a franchiser was properly permitted to testify about advice he had given concerning the necessity of protecting trademarks and trade secrets, noting that a lawyer who has withdrawn from representation is not disqualified from testifying thereafter.

United States v. Watson, 952 F.2d 982 (8th Cir. 1991) : The prosecutor's opening statement in a drug trafficking case mentioned that the investigation began because of reports that one of the defendants was dealing at the location, while the investigating officer testified that the informant mentioned both defendants as sellers. The Court held there was no abuse of discretion in refusing to allow examination of the Assistant U.S. Attorney to impeach the officer's testimony, as the AUSA's stated lapse of memory was not vital evidence and the ruling actually left the defendants in the superior position of being able to argue the incongruity without having any explanation introduced in evidence.

United States v. Edwards, 154 F.3d 915 (9th Cir. 1998) : The Court reversed a cocaine possession conviction as a result of improper vouching by the prosecutor. Although a bag containing crack cocaine was found in a car driven by the defendant, the car was registered to another person, and one officer who was present when the car was searched testified that there was nothing in the bag that established the identity of the owner. The night the officer testified, the prosecutor, in the presence of two police officers, examined the bag, which had been in the custody of the police for two years, and found a bail receipt bearing the defendant's name under a piece of cardboard at the bottom. The prosecutor called the two police officers who were present, and each testified as to the discovery of the bail receipt. The prosecutor identified the receipt as close to a "smoking gun" in closing argument. Observing that "the danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise," the Court reasoned that "[a]lthough the circumstances of this case do not fit neatly under either the advocate-witness rule or the vouching rule, there can be no question that the policies underlying both rules were directly contravened by the prosecutor's continued representation of the government."

Bickford v. John E. Mitchell Co., 595 F.2d 540 (10th Cir. 1979) : In a case involving patent rights, the Court held there was no error in permitting one of the defendant's lawyers to withdraw from the case and to be called as an expert witness on the value of the patents in question.

[2] Children As Witnesses

United States v. Thai, 29 F.3d 785 (2d Cir. 1994) : Affirming RICO convictions, the Court held there was no abuse of discretion in a finding that a 61/2 -year-old was a competent witness, despite her youth.

United States v. Snyder, 189 F.3d 640 (7th Cir. 1999) : In a prosecution for producing child pornography, the defendant moved for a psychological examination of the 11-year-old complaining witness. The Court held there was no abuse of discretion in denying the motion. The fact that some of the witness' statements were unfounded did not mean he was unable to differentiate between reality and fantasy; the fact he was taking medication that could make him incompetent did not mean the medication had in fact made him incompetent; and the defendant was able to effectively call the reliability of the witness' testimony into question on cross-examination.

United States v. Allen J., 127 F.3d 1292 (10th Cir. 1997) : Affirming an adjudication of juvenile delinquency resulting from the sexual assault of a minor, the Court found no error in the Trial Judge's finding that the victim was competent to testify. The Court noted that both *Rule 601* and *18 U.S.C. § 3509(c)(2)* place a "heavy burden on a party seeking to have a child declared incompetent to testify." The fact that the 12-year-old victim suffered from fetal alcohol syndrome and had a learning disability was not enough to overcome this heavy burden. The Court concluded that "[a]ny inconsistencies in the victim's story or problems with her testimony ... raise questions of credibility, not competence."

[3] Compensated Lay Witness

United States v. Davis, 261 F.3d 1 (1st Cir. 2001) : In a suit by a hazardous waste generator for contribution under CERCLA from potentially responsible parties, the Court found no error in the admission of deposition testimony by a driver who had hauled waste. The driver, who was unemployed and very ill at the time of his testimony (he died before trial), had been paid $700-800 by the plaintiff for the time he spent preparing and testifying. Rejecting arguments that the payments disqualified the driver as a witness and that his testimony should have been disregarded because he made inconsistent statements in affidavits he signed in an earlier Superfund case, the Court noted that the payment was not contingent on the outcome of the case, and that there were no direct inconsistencies between the affidavits and the testimony.

[4] Competency of Hearsay Declarants

United States v. Fields, 871 F.2d 188 (1st Cir. 1989) : Affirming bank robbery convictions, the Court held that a declaration against interest was properly admitted, even though the declarant was using drugs.

Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) : In an action by a four-year-old child and her mother alleging child abuse on the part of the child's father and his parents, the Court reversed a judgment for the defendants, concluding that statements by the child were admissible under *Rules 803(2)* and *803(4)* even if the child was not competent to testify as a witness.

[5] Dead Man's Statute

Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996) : In an art dealer's breach of contract action against an artist's estate, the Court held that testimony by the plaintiff regarding transactions with the artist was barred by New York's Dead Man's Statute.

Longoria v. Wilson, 730 F.2d 300 (5th Cir. 1984) : In this federal civil rights action, the Court held that a state Dead Man's Statute was inapplicable.

Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033 (7th Cir. 1977) : In this securities case, the Court noted that the Illinois Dead Man's Act did not apply when federal securities law was the basis for the suit.

Hanes v. Mid-America Petroleum, Inc., 577 F. Supp. 637 (W.D. Mo. 1983) : The Court found that the Petroleum Marketing Practices Act, *15 U.S.C. § 2801 et seq.* , was enacted to establish a uniform set of rules governing the grounds for termination and nonrenewal of motor fuel marketing premises, that the Act did not displace state franchise law that would be used to fill the gaps in the Act, and that the federal approach to competency of witnesses would govern even though state law was incorporated by reference in the case. Thus, the Court held that the state Dead Man's Statute did not apply.

Equitable Life Assur. Soc'y of the U.S. v. McKay, 837 F.2d 904 (9th Cir. 1988) , after certified question answered, 861 F.2d 221 (9th Cir. 1988) : This interpleader action in the District Court for Oregon was governed by Washington law. The Trial Judge found the Dead Man's Statute substantive and applied the Washington statute. The Court of Appeals held that applicability of the Washington Dead Man's Statute depended on the choice of law rules of Oregon, and certified the question to the Oregon Supreme Court. The Oregon Supreme Court responded that the Washington Dead Man's Statute was procedural under Oregon law, so it was inapplicable in an Oregon Court.

[6] Drug Use and Intoxication

United States v. Hyson, 721 F.2d 856 (1st Cir. 1983) : The Court affirmed the convictions for a narcotics conspiracy, approving the procedure followed after it appeared that a government witness might have been under the influence of narcotics. On the first day of the witness' testimony, the Judge asked whether he had taken any drugs before testifying and accepted the witness' "no" answer. On the second day, the witness appeared to have difficulty speaking, so the Judge suggested, and the government arranged for, a medical examination of the witness. Two days later, the examining physician reported that the witness had been under the influence of phencyclidine when testifying, causing him to be in "an acute confusional state." The doctor suggested the effects of the drug would clear in 24 hours; when he repeated his examination a day later, the witness was much improved and competent to testify. The Judge recalled the jurors, explained the situation, and told them that all of the second day's testimony of the witness was stricken. He also explained the doctor's examinations and findings and then permitted the witness to be recalled.

United States v. Van Meerbeke, 548 F.2d 415 (2d Cir. 1976) : Twice while testifying, the principal government witness in a drug case ingested some of the heroin that was offered into evidence. Although the Court affirmed the appellants' convictions, it criticized the Trial Judge for remaining silent at the time he first noticed the witness' actions. "Several courses were available, if sought: suspension of testimony for the day, a medical examination to determine the witness's capacity to continue with his testimony, and a stern warning to the witness outside the jury's hearing." The Court concluded it was not error to leave the jury with the task of evaluating the witness' credibility, especially since defense counsel brought out that the witness had ingested drugs on the stand.

United States v. Snead, 447 F. Supp. 1321 (E.D. Pa. 1978) , aff'd, 577 F.2d 730 (3d Cir. 1978) : The District Court held that a prosecution witness could testify about the occurrences on the day of a bank robbery, although he had been drinking slightly on that day.

United States v. Killian, 524 F.2d 1268 (5th Cir. 1975) : Affirming convictions for narcotics violations, the Court held there was no error in refusing to strike the testimony of an admitted drug user. In *United States v. Jackson*, n3 a prosecution of a doctor for unlawfully dispensing drugs, the defendant asked the Trial Judge to order psychiatric examinations of 13 government witnesses who used drugs. Affirming denial of the order, the Court noted that "[t]he fact that a witness is a narcotics user goes not to his competency but to his credibility," and that a Judge must consider in ruling on a motion for a psychiatric examination the invasion of a witness' privacy that would result.

United States v. Ramirez, 871 F.2d 582 (6th Cir. 1989) : The Court held that a coconspirator who was addicted to cocaine at the time of the incidents leading to trial was competent to testify, and that there was no error in barring expert testimony concerning the possible effect of drug usage.

United States v. Harris, 542 F.2d 1283 (7th Cir. 1976) : One government witness at a drug conspiracy trial testified that he had used heroin for years, that two days before the trial he had had a "fix," and that the day before trial he had received Demerol and Phenergon. On several occasions during his testimony the witness was observed to be bouncing or nodding, and a defense expert testified that a person receiving the dosages that the witness had received would experience some clouding of consciousness and difficulty in pinpointing accurate thoughts while testifying. Affirming, the Court emphasized that the witness' condition was a matter of credibility for evaluation by the jury. While using an intoxicated witness causes us concern, it is encouraging that the Court implied that the Trial Judge had discretion to exclude a witness who was intoxicated at the time of trial.

United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978) , supplemented, 455 F. Supp. 524 (D. Minn. 1978) , rev'd on other grounds, 596 F.2d 759 (8th Cir. 1979) : The District Court read *Rule 601* as establishing a presumption of competence, but as allowing a witness to be excluded if "drug use negated the threshold minimal level of competency required before a witness can take the stand."

[7] Expert Witnesses

Legg v. Chopra, 286 F.3d 286 (6th Cir. 2002) : The Court affirmed summary judgment for the defendant in a diversity medical malpractice case, because the plaintiff's expert, a Texas physician, did not satisfy the Tennessee law holding only experts licensed in Tennessee or a contiguous state to be competent in medical malpractice cases. The Court held that the Tennessee statute governs "competency" within the meaning of *Rule 601*, since the law's structure reflects an intimate relationship between the standard of care and the qualification requirements of the medical expert who will establish that standard. The Court noted that *Rule 601*, as thus read, does not directly conflict with *Rule 702*, which governs the procedural issue of the reliability of an expert witness' opinions.

[8] Hypnotized Witnesses

Rock v. Arkansas, 483 U.S. 44 (1987) : The defendant, charged with manslaughter for shooting her husband, underwent hypnosis with a trained neuropsychologist to refresh her memory. When she sought to testify that her gun had misfired, the state Trial Judge limited the testimony to matters remembered and stated to the psychologist before being hypnotized, even though her refreshed memory was consistent with defense expert testimony. Remanding, the

Supreme Court held that the defendant's constitutional right to testify in her own behalf was violated by the ruling. Justice Blackmun's opinion for the Court recognized that "the right to present relevant testimony is not without limitation," but cautioned that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." The Court found that the Arkansas rule establishing a *per se* bar against posthypnosis testimony "operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced." Justice Blackmun concluded that Arkansas "has not justified the exclusion of all of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory," and that the State Courts had not considered the arguments for admitting Rock's testimony in light of the corroboration of recalled details.

Borawick v. Shay, 68 F.3d 597 (2d Cir. 1995) : The plaintiff brought a tort suit against her aunt and uncle for allegedly sexually abusing her when she was a child. Her proof consisted mainly of her hypnotically-refreshed memories. The Trial Judge excluded the hypnotically-refreshed testimony and entered summary judgment. Affirming, the Court adopted a totality-of-the-circumstances approach toward hypnotically-refreshed testimony, and set forth the following non-exclusive list of factors to be considered: (1) whether the hypnosis was used for the purpose of refreshing recollection, or whether it was conducted as part of therapy -- the latter being more reliable; (2) whether the witness was subject to suggestion; (3) whether a record of the session was kept; (4) whether the hypnotist was sufficiently qualified; (5) whether corroborating evidence exists to support the reliability of the hypnotically-refreshed memories; (6) whether the witness was highly hypnotizable and thus more prone to suggestion; and (7) expert testimony offered by the parties as to the procedures used in the case. In this case, the plaintiff's hypnotically-refreshed testimony was properly excluded because: the hypnotist was not licensed, and had not even attended college; no record of the hypnosis session was kept; and the plaintiff's assertions of abuse were "far-fetched and uncorroborated."

Mersch v. City of Dallas, 207 F.3d 732 (5th Cir. 2000) : The Court affirmed summary judgment against a plaintiff who alleged that police officers used excessive force in arresting her and rejected the plaintiff's claim that hypnotically-refreshed testimony about what happened during her arrest was sufficient to create a triable issue of fact. The Court listed as relevant factors in deciding whether to admit hypnotically enhanced testimony whether "1) the hypnosis is done by a psychologist or psychiatrist trained in its use and independent of either party; 2) the hypnosis is done in a neutral setting with only the hypnotist and the subject present; 3) an audio or video recording is made of all interrogations before, during and after hypnosis; 4) corroborating evidence exists; and 5) the pre-hypnosis and post-hypnosis statements substantially correspond." In this case, the hypnotically-enhanced evidence was *per se* inadmissible because it involved a hypnotized subject identifying for the first time a person she had reason to know was already under suspicion. The Court agreed with the approach of two cases from other Circuits, n4 which "impose on the proponent of the hypnotically-enhanced testimony the burden of proof during the proceeding and recommend that district courts conduct pretrial evidentiary hearings on the matter." In *United States v. Valdez*, n5 the Court reversed a conviction for extortion, finding that "when, as here, a hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the posthypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session." The Court noted that it was not making a rule that a hypnotized witness, or even post-hypnotic testimony, was *per se* incompetent under all circumstances. See also *United States v. Harrelson* n6(in a prosecution for killing a Federal Judge, the Court distinguished *Valdez* on the ground that two witnesses who made identifications had either identified or described a defendant prior to being hypnotized). In *United States v. Bourgeois*, n7 the Court affirmed tax fraud convictions, holding there was no error in refusing to exclude or limit, or give a cautionary instruction concerning, the testimony of a witness who had consulted a hypnotist for help in remembering a fact significant in the case. Evidence at a pretrial hearing supported a finding that the session was unsuccessful and the witness was never hypnotized, so the procedural protections of *Valdez* were not required.

United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) : The Court affirmed convictions for firearm offenses

and for damaging property, holding that the defendant was not denied a fair trial when six witnesses were hypnotized during the investigation of bombings in 1978. The jury had been instructed that it was to decide what effect the hypnosis had on the testimony. The Court rejected a "sweeping rule of inadmissibility" with respect to witnesses who have been hypnotized, but indicated that careful scrutiny of their testimony is required.

Sprynczynatyk v. General Motors Corp, 771 F.2d 1112 (8th Cir. 1985) : The Court reversed a judgment for a plaintiff who alleged product liability and negligence in the design of automobile brakes, because of error in admitting videotapes of a hypnotic session and rejecting the defendant's request for a limiting instruction explaining that the videotapes were admitted only to evaluate the opinions of an expert witness. The Court also rejected a *per se* rule barring the use of hypnosis to refresh the recollection of a witness, holding instead that hypnotically refreshed testimony may be admitted if the procedures utilized were sufficient to guarantee reliability.

[9] Mental Incompetence or Illness

United States v. Devin, 918 F.2d 280 (1st Cir. 1990) : Affirming a conviction for RICO and extortion offenses, the Court held there was no abuse of discretion in the determination that the principal prosecution witness was competent to testify although he had suffered a severe psychiatric episode 14 years earlier, as he had returned to the business world after two weeks' hospitalization and his ability to function at the time of trial was not called into serious question. The Court noted that the Trial Judge, who has broad latitude as to whether a competency hearing is even needed, had elected to hold one.

Government of Virgin Islands v. A., Leonard, 922 F.2d 1141 (3d Cir. 1991) : Affirming the defendant's conviction for raping his daughters, ages 13 and ten, the Court held there was no error in denying an order compelling them to undergo psychiatric testing before giving testimony. Even accepting the allegations that they were liars, there was no showing of a special need, such as mental illness, to justify such an examination.

United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982) : The Court reversed a conviction for assault with intent to commit murder where a defense witness was not permitted to testify on the ground that he had been found criminally insane and incompetent to stand trial and was subject to hallucinations. The Court said that *Rule 601* applies to persons considered to be insane to the same extent as to other persons and that where, as here, a treating physician indicated that the witness had a sufficient memory, understood the oath, and could communicate what he saw, he should have been permitted to testify. The Court also found that the government had no standing to claim that the witness did not understand the incriminating nature of what he might say. In *United States v. Odom*, n8 the Court held that because no objection was made to the competency of nursing home residents when they were called to testify in a prosecution arising out of a fraudulent absentee voting scheme, the defendants could not complain about a ruling that the residents were competent witnesses. The Court also indicated that the modern trend is toward finding witnesses competent, and stated that it would not reverse a finding of competency except for "clear error."

United States v. Saenz, 747 F.2d 930 (5th Cir. 1984) : Affirming convictions in a vote-buying conspiracy, the Court upheld a ruling that a witness was competent to testify, stating that "[a] witness is competent to testify if she is capable of communicating relevant material and understands she has an obligation to do so." In *United States v. Roach*, n9 the Court upheld the refusal to order a psychiatric examination of a witness, saying that "it is doubtful that mental incompetence would even be grounds for disqualification of a prospective witness." However, the Court left open the possibility that a Trial Judge might approve such an examination as necessary to assist a defendant in challenging a witness' credibility. In *United States v. McRary*, n10 the Court held that a kidnapping defendant should have been permitted a chance to show that his wife, who was found incompetent to stand trial, was capable of testifying at his trial.

United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993) : The Court affirmed drug convictions, holding there was no error in permitting two witnesses to testify even though both had psychiatric histories. The Trial Judge was not required to conduct a special examination into competency, and could have excluded testimony under *Rule 403*, *602*, or *603* without any special examination. The Court noted that "[a]s long as a witness appreciates his duty to tell the truth, and is minimally capable of observing, recalling, and communicating events, his testimony should come in for whatever it is worth."

United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997) : Appealing from racketeering convictions, the defendants argued that it was error to allow the prosecution's star witness to testify without first ordering him to undergo a psychiatric examination. The witness had led a life of crime, deceit, and perjury, and on cross-examination stated that the oath meant nothing to him. Affirming the convictions, the Court stated that "[w]hether a witness should be forced to endure a psychiatric examination before being allowed to testify is a matter best left to the discretion of the district court." There was no abuse of discretion in this case, since "even the most dastardly scoundrels, cheats and liars are generally competent to testify." In *United States v. Gutman*, n11 the Court affirmed a Hobbs Act conviction, holding there was no error in refusing to order that a key government witness undergo a psychiatric examination or to hold a pretrial hearing on his competency. The majority recognized that the Trial Judge has the power to condition admissibility of a witness' testimony on willingness to take a psychiatric examination, but it cautioned that the power should be used sparingly. The mental history of the witness did not create a sufficient doubt as to competency to compel a pretrial hearing and the witness' testimony was not so "incoherent" that it should have been stricken.

Andrews v. Neer, 253 F.3d 1052 (8th Cir. 2001) : Reversing on other grounds a judgment for the daughter of a state hospital patient who sued for damages arising from the death of her father, the Court found no abuse of discretion in allowing the plaintiff to present the testimony of an involuntarily committed schizophrenic patient. In *United States v. Skorniak, 59 F.3d 750 (8th Cir. 1995)* , the Court affirmed a conviction for drug and money laundering offenses, and held there was no abuse of discretion in refusing to order a mental examination of a government witness, as the bare assertion that the witness "was not competent to testify due to his mental state" was insufficient to overcome the presumption in *Rule 601* that all witnesses are competent to testify. The defendant was given ample opportunity on cross-examination to explore the witness' psychological problems and his history of drug and alcohol abuse. In *United States v. Peyro*, n12 the Court affirmed a conviction for cocaine offenses, finding no error in the refusal to strike the testimony of a government witness who conceded that she was "emotionally unbalanced" and did not "remember anything very well." Citing Rules 601 and 602, it found that the jury could weigh the value, if any, of the witness' testimony.

United States v. Gates, 10 F.3d 765 (11th Cir. 1993) : The defendant in a bank robbery case sought to have a psychiatric examination of a government witness who had a history of mental problems, including institutionalization approximately ten days before the first of the charged robberies. The Court noted that, notwithstanding the Rule, a Trial Court has the power to rule a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue. Because the witness was cross-examined vigorously and searchingly, his medical records were placed in evidence, and the institutionalization had occurred more than two years before trial, there was no abuse of discretion in not granting the examination or in not conducting a hearing on the issue of competency.

[10] Miscellaneous Cases

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300 (5th Cir. 1991) : The Court reversed a judgment for the defendants in a housing discrimination action, holding it was error to exclude testimony of government investigators

whose reports the Magistrate Judge excluded. The witnesses were competent, even if the Magistrate Judge considered them untrustworthy, and any problem about admitting the reports through the back door could have been avoided by *in limine* rulings. In *United States v. Villalta*, n13 the Court ruled favorably on the government's interlocutory appeal, holding that a prosecution witness was competent to testify concerning situations in which the witness depended upon his knowledge of Spanish for comprehension of the events, since the witness was available for cross-examination as to his ability to understand Spanish and the jury also could consider two tape-recorded conversations between an undercover agent and the witness as independent evidence of the witness' ability to understand Spanish.

United States v. Bedonie, 913 F.2d 782 (10th Cir. 1990) : The Court affirmed felony-murder convictions, holding that even numerous prior inconsistent statements went only to a witness' credibility, an issue for the jury, not to the witness' competency, which is an issue for the Judge alone. See also *United States v. Cook, 949 F.2d 289 (10th Cir. 1991)* (witness not incompetent either because she gave contradictory testimony or because she was a drug abuser).

[11] State Law

Kowalski v. Gagne, 914 F.2d 299 (1st Cir. 1990) : Affirming a judgment for the plaintiff in a wrongful death action brought by the widow against the man convicted of murdering her husband, the Court held that a Massachusetts competency rule barring testimony by a husband or wife as to private conversations with a spouse would have made the plaintiff's testimony regarding a conversation with her husband inadmissible, but the defendant failed to assert a specific objection on that ground.

Legg v. Chopra, 286 F.3d 286 (6th Cir. 2002) : The Court affirmed summary judgment for the defendant in a diversity medical malpractice case, because the plaintiff's expert, a Texas physician, did not satisfy the Tennessee law holding only experts licensed in Tennessee or a contiguous state to be competent in medical malpractice cases. The Court held that the Tennessee statute governs "competency" within the meaning of *Rule 601*, since the law's structure reflects an intimate relationship between the standard of care and the qualification requirements of the medical expert who will establish that standard. The Court noted that *Rule 601*, as thus read, does not directly conflict with *Rule 702*, which governs the procedural issue of the reliability of an expert witness' opinions.

Andrews v. Neer, 253 F.3d 1052 (8th Cir. 2001) : Reversing on other grounds a judgment for the daughter of a state hospital patient who sued for damages arising from the death of her father, the Court found no abuse of discretion in allowing the plaintiff to present the testimony of an involuntarily committed schizophrenic patient. The Court upheld a ruling that a Missouri statute deeming mentally ill persons incompetent to testify did not govern in a § 1983 civil rights action, even if Missouri law was used to fill gaps in the federal statutory scheme, such as determining standing to sue.

Equitable Life Assur. Soc'y of the U.S. v. McKay, 837 F.2d 904 (9th Cir. 1988) , after certified question answered, 861 F.2d 221 (9th Cir. 1988) : This interpleader action in the District Court for Oregon was governed by Washington law. The Trial Judge found the Dead Man's Statute substantive and applied the Washington statute. The Court of Appeals held that applicability of the Washington Dead Man's Statute depended on the choice of law rules of Oregon, and certified the question to the Oregon Supreme Court. The Oregon Supreme Court responded that the Washington Dead Man's Statute was procedural under Oregon law, so it was inapplicable in an Oregon Court.

[12] *Voir Dire*

United States v. Spotted War Bonnet, 882 F.2d 1360 (8th Cir. 1989) , *vacated on other grounds*, *497 U.S. 1021 (1990)* , *adhered to on remand*, *933 F.2d 1471 (8th Cir. 1991)* : In affirming the defendant's conviction for sexual abuse of his daughters, the Court held that the victims (ages six and eight at the time of trial) were properly permitted to testify without a preliminary *voir dire* on their competency. The dissenting Judge said that a *voir dire* should have been conducted, as their testimony demonstrated significant problems with memory.

FOOTNOTES:

(n1)Footnote 1. *United States v. Ewing, 979 F.2d 1234 (7th Cir. 1992)* .

(n2)Footnote 2. *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 1985-2 Trade Cas. (CCH) P66833 (7th Cir. 1985)* .

(n3)Footnote 3. *United States v. Jackson, 576 F.2d 46 (5th Cir. 1978)* .

(n4)Footnote 4. *Borawick v. Shay, 68 F.3d 597 (2d Cir. 1995)* , and *Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985)* .

(n5)Footnote 5. *United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984)* .

(n6)Footnote 6. *United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985)* .

(n7)Footnote 7. *United States v. Bourgeois, 950 F.2d 980 (5th Cir. 1992)* .

(n8)Footnote 8. *United States v. Odom, 736 F.2d 104 (4th Cir. 1984)* .

(n9)Footnote 9. *United States v. Roach, 590 F.2d 181 (5th Cir. 1979)* .

(n10)Footnote 10. *United States v. McRary, 616 F.2d 181 (5th Cir. 1980)* .

(n11)Footnote 11. *United States v. Gutman, 725 F.2d 417 (7th Cir. 1984)* .

(n12)Footnote 12. *United States v. Peyro, 786 F.2d 826 (8th Cir. 1986)* .

(n13)Footnote 13. *United States v. Villalta, 662 F.2d 1205 (5th Cir. 1981)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 601 RULE 601

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601.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501. **[This proposal by the Advisory Committee, providing that federal rules of competency applied even where state law provided the rule of decision, was subsequently rejected by Congress. Ed.]**.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, *34 Geo. Wash. L. Rev. 53 (1965)*. Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on *voir dire* examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505 [deleted by the Congress. Ed.]. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to

credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 275 (1999)

Rule 601 -- Competence

Rule 601 is a broad rule providing that every witness is presumed competent. The rule proposed by the Advisory Committee had only one sentence: "Every person is competent to be a witness except as otherwise provided by these Rules." The intent of the Advisory Committee was to wipe out all the ancient rules of incompetency--most particularly the Dead Man's statute. Dead Man's statutes generally provide that a person interested in an action brought against the estate of a dead person is incompetent to testify in his own behalf or interest as to a transaction or communication between himself and the dead person. The Advisory Committee Note to Rule 601 states that the "Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind."

The Advisory Committee thought, correctly, that Dead Man's statutes are misguided. Under the Dead Man's Rule, a person is disqualified from testifying because it is thought that he will be able to lie on the witness stand without the possibility of contradiction from someone now dead. Yet this is really a concern over credibility, that the factfinder is easily able to comprehend, and that can be addressed adequately through argument. For every piece of fraudulent testimony screened out by the Dead Man's statute, there are probably three or more meritorious claims that are dismissed because of the failure of proof. Moreover, the Dead Man's statutes are so complicated that they give rise to much wasteful litigation as to their precise meaning. For example, the New York Dead Man's statute uses over 300 words to establish a rule of incompetency. Not surprisingly, there are hundreds of reported cases attempting to divine the meaning of the New York Dead Man's statute. (For a discussion of the New York statute, see Martin, Capra & Rossi, New York Evidence Handbook, ch.6, Aspen Press 1997.)

So the Advisory Committee was undoubtedly correct to condemn Dead Man's statutes and to reject them in proposed Rule 601. The problem, however, is that many states still have a Dead Man's statute. The Advisory Committee proposal left no room for state Dead Man's statutes to apply, even in cases where state law provided the rule of decision in federal court. The Advisory Committee Note to *Rule 601* specifically declares that state Dead Man's statutes are not to have effect in diversity cases. Congress, however, was concerned that Dead Man's statutes represent state policy that should not be disregarded in diversity cases. Therefore, Congress added a second sentence to Rule 601, providing that "in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Thus, the Advisory Committee's Note is incorrect in its comment on the inapplicability of state Dead Man's statutes in diversity cases.

[3] Report of the House Committee on the Judiciary

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which the State law supplies the rule of decision. Cf. *Courtland v. Walston & Co., Inc., 340 F. Supp. 1076, 1087-92 (S.D.N.Y. 1972)* .

[4] Report of the Senate Committee on the Judiciary

The amendment to Rule 601 parallels the treatment accorded Rule 501 discussed immediately above.

[5] Report of the House and Senate Conferees

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under *28 U.S.C. § 1332* or *28 U.S.C. § 1335*, or between citizens of different States and removed under *28 U.S.C. § 1441(b)* the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

[6] Citations to Hearings and Debates

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 60-61 (1974).

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PART TWO: THE RULES THEMSELVES
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Supp. To CHAPTER 601 RULE 601

2-601 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 601, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE VI. WITNESSES	**ARTICLE VI. WITNESSES**
Rule 601. General Rule of Competency	**Rule 601. Competency to Testify in General**
Every	Every

person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which

person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the

State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 601.03 Annotated Cases

[Go To Main]

[1] Attorneys As Witnesses [Go To Main]

Macheca Transport v. Philadelphia Indem., 463 F.3d 827 (8th Cir. 2006) : In an action for breach of an insurance contract and vexatious refusal to pay, the Court held it was an abuse of discretion to disqualify the plaintiff's lawyer on the ground that the lawyer had communicated with the insurance company and so was in a position to testify to whether the insurer's failure to pay was wilful and without reasonable cause. Attorneys may not be disqualified simply because they have personal knowledge of relevant evidence. Disqualification is necessary only when there is no alternative source to prove a disputed issue at trial. The plaintiff had stated that it could prove its case without calling the lawyer; and the Trial Judge never considered whether the lawyer was the only available witness to testify in support of the plaintiff's claim.

[11] State Law [Go To Main]

Greyhound Lines, Inc. v. Wade, 485 F.3d 1032 (8th Cir. 2007) : In an action by a bus company whose bus was rear-ended by a truck, the Court found no abuse of discretion in a finding that the bus driver, who suffered from a brain impairment, was competent to testify under Nebraska law. The Trial Judge was satisfied that the bus driver would recall the events at issue and that her testimony on the whole was accurate and reliable.

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§ 602.syn Synopsis to Chapter 602: RULE 602

602.01 Official Text

602.02 Editorial Explanatory Comment

[1] General Requirement of Personal Knowledge

[2] Relationship to Hearsay Rule

[3] Relationship to Admissions

[4] Objections

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602.04 Legislative History

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 602 RULE 602

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602.01 Official Text

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 602 RULE 602

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602.02 Editorial Explanatory Comment

[1] General Requirement of Personal Knowledge

Except for experts, who are subject to the provisions of *Rule 703*, witnesses must have personal knowledge of the matters about which they testify. Testimony of ordinary lay witnesses should not be admitted without some evidence to demonstrate that the witnesses have personal knowledge of the subject matter of the testimony. n1 But personal knowledge may be proved by the witness's own testimony, including the witness's inferences and opinions, so long as these inferences and opinions are themselves based on personal knowledge. n2

As long as there is enough evidence to support a finding that the witness has personal knowledge, the Trial Judge must let the jury decide whether the witness is really knowledgeable. n3 If the jury believes that the witness has no personal knowledge, it will disregard the testimony. Thus, the personal knowledge requirement is a matter of conditional relevancy. n4 The witness need not be absolutely certain of the event related in order to satisfy the personal knowledge requirement; nor must the Judge be convinced. It is enough that a reasonable juror could find that the witness perceived the event. n5 Moreover, perfect knowledge is not required -- the witness can be vague about certain details, and still have enough knowledge to testify under *Rule 602*. n6 A problem in the witness's perception generally goes to weight and not admissibility. n7

The fact that *Rule 701* allows a lay witness to testify in opinion form does not undercut the requirement of personal knowledge; in fact, *Rule 701* effectively incorporates the personal knowledge requirement as a prerequisite to acceptance of opinions by lay persons. n8

[2] Relationship to Hearsay Rule

Sometimes the concept of personal knowledge becomes confused in the context of hearsay evidence. If, for example, police officers testify that the defendant confessed to murder, the evidence is admissible (assuming of course that the confession is voluntary) even though the officers are not personally knowledgeable about the murder. The officers are saying in effect: "We heard the defendant claim responsibility for the murder." The witnesses have personal knowledge only of what the defendant said. They cannot testify, "Defendant committed the murder," because they do not know this to be true. The officers only have personal knowledge of what they heard. n9 Of course, even if the witnesses'

statements only concern what they heard, the declarant's statement must itself comply with the hearsay rule; in the above example, the hearsay rule is satisfied because the defendant's statement is a party admission. n10

A more difficult question is whether a hearsay declarant, whose out-of-court statement would otherwise be admissible under a hearsay exception, must have had personal knowledge as to the matters related in the statement. For example, assume that a hearsay declarant excitedly states, "The blue car ran the light and hit the other car!" The statement is offered to prove that the blue car ran the light and hit the other car. In response to the hearsay objection, the statement is offered as an excited utterance. Must it be shown, as a condition of admissibility under the hearsay exception, that the declarant had personal knowledge of the event related?

The answer must be "yes" as a general rule. When a statement is introduced under a hearsay exception, the declarant is in effect testifying in Court. The statement is considered for its truth in the same manner as in-court testimony. If the declarant were actually to testify in Court, personal knowledge would be required. There is no reason for a different rule when the declarant is "testifying" by way of hearsay. In addition, if a hearsay declarant makes a statement not based on personal knowledge, a strong argument can be made that the hearsay rule itself is not satisfied. The declarant may well be relying on other out-of-court sources when making the statement. If that is so, then a multiple hearsay problem is presented. Under *Rule 805*, the mere fact that the declarant's statement would qualify under a hearsay exception is not enough. The underlying information must qualify as well.

Accordingly, the Courts generally have held that the personal knowledge requirement applies to hearsay declarants whose out-of-court statements are offered under a hearsay exception. n11 The exception to the rule is admissions, where the declarant need not have personal knowledge for the statement to be admissible. n12 The reason for this exception is discussed in *[3]*, immediately below.

It is obviously more difficult to apply the personal knowledge requirement to hearsay than it is to apply it to in-court testimony. Witnesses who are in Court can be asked directly about whether they have personal knowledge of the event related. When a witness attests to personal knowledge at trial, *Rule 602* is satisfied unless no reasonable person could believe the witness's assertion of personal knowledge (e.g., where the witness testifies that he saw Napoleon leaving the scene of a crime). With hearsay, however, the declarant is ordinarily not in a position to tell the Court directly about personal knowledge. So the Court must determine whether the declarant had personal knowledge by considering the hearsay statement and the surrounding circumstances. For example, in *United States v. Owens-El, 889 F.2d 913 (9th Cir. 1989)* , the defendant challenged the admissibility of a hearsay statement from a prison guard who was beaten with a heavy pipe. Shortly after the attack, the guard identified Owens as the perpetrator, and this statement was admitted at trial under a hearsay exception. Owens argued that the guard had no personal knowledge upon which to base his conclusion that Owens had hit him. But the Court held that a reasonable juror could have found that the guard possessed the requisite personal knowledge. Among other things, the Court noted that the guard had suffered "defensive wounds" on his face and arms, "which circumstantially indicate a frontal attack and face-to-face confrontation." Also, the description of the beating was so detailed that an inference of personal knowledge could be drawn by a reasonable factfinder. n13

[3] Relationship to Admissions

There is at least one common exception to the rule that both an in-court witness and an out-of-court declarant must have personal knowledge of the subject matter of their testimony. It is generally held that a party's admissions are admissible even though the party had no personal knowledge of the subject of the admission. n14 Apparently, the common law assumed that parties who admit things probably have some reason for doing so and thus once an admission is made, a party should not be permitted to claim absence of knowledge, since such a claim is too easily made. Parties can explain to the factfinder why they spoke without knowledge, and the factfinder can decide what weight to give the statement in light of the explanation.

Another argument for this exception is that the personal knowledge requirement is designed to provide some assurance that a statement is reliable, and admissions are brought before the trier of fact whether or not they are reliable. Admissions are a function of the adversary system. If parties or their agents make statements that are detrimental to the party's case, it is not up to the Court to protect the party from an unreliable statement. Rather, it is up to the party to try to explain the statement. n15

[4] Objections

Objections on the basis of a lack of personal knowledge should be made at the earliest possible time. Once a witness has given testimony, a motion to strike is the only available remedy. Such a motion is never a perfect remedy, and rarely is it as desirable as barring inadmissible evidence before it is offered. Although there is some reason to allow experts to state their conclusions before providing the basis for their opinions, other witnesses almost always can state the basis for their testimony before providing details. Thus, even though *Rule 701* allows lay witnesses to give opinions and *Rule 704* allows opinions on the ultimate issue, it is generally desirable to have some showing of personal knowledge before a witness goes very far in offering opinions, especially on an important issue in a case.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Hart v. O'Brien, 127 F.3d 424 (5th Cir. 1997)* (officer should not have been permitted to give his opinion about the motivation or intent of other officers during an arrest and incarceration of a suspect; the officer did not participate in the investigation or arrest, and there was nothing in the record to support a finding of personal knowledge); *Kemp v. Balboa, 23 F.3d 211 (8th Cir. 1994)* (error to allow a witness to testify to events related in medical records, where the witness had no first-hand knowledge that these events occurred); *McCrary-El v. Shaw, 992 F.2d 809 (8th Cir. 1993)* (in a case concerning alleged use of excessive force against an inmate, a fellow inmate's testimony was properly excluded, because no reasonable person could have found that the inmate was able to see anything of relevance about the incident).

(n2)Footnote 2. See, e.g., *United States v. Doe, 960 F.2d 221 (1st Cir. 1992)* (in a trial for firearm possession, the owner of a sporting goods store could properly testify that Taurus pistols are made in Brazil, even though he had never been to Brazil; under *Rule 602*, personal knowledge included "inferences and opinions, so long as they are grounded in personal observation and experience"; a reasonable juror could find that the witness "had firsthand knowledge from which he could infer that the pistol was made outside Massachusetts, indeed in Brazil, particularly since his testimony to this effect was unchallenged").

(n3)Footnote 3. See, e.g., *United States v. Hickey, 917 F.2d 901 (6th Cir. 1990)* ("Testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about"; witness's testimony was admissible despite the fact that it may have been, "in large part, unbelievable to some and in spite of the possibility that his perception was sometimes impaired").

(n4)Footnote 4. See Advisory Committee Note to *Rule 602* ("It will be observed that the rule is in fact a specialized application of the provisions of *Rule 104(b)* on conditional relevancy.").

(n5)Footnote 5. See, e.g., *M.B.A.F.B. Federal Credit Union v. Cumis Ins. Soc'y, 681 F.2d 930 (4th Cir. 1982)* :

> [*Rule 602*] does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under the rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.

See also *United States v. Peyro, 786 F.2d 826 (8th Cir. 1986)* (testimony was admissible under *Rule 602* even though

the witness admitted that she had substantial memory problems, where she also stated that "certain moments I know I remember, but nothing at all specific in any of it").

(n6)Footnote 6. See, e.g., *United States v. Powers, 75 F.3d 335 (7th Cir. 1996)* ("[t]he fact that a witness cannot recall specific dates does not require exclusion of that testimony," since inability to recall specific dates does not demonstrate an absence of personal knowledge; the opponent's remedy is not exclusion but rather cross-examination and impeachment).

(n7)Footnote 7. *United States v. Peyro, 786 F.2d 826 (8th Cir. 1986)* (witness who admitted substantial memory and emotional problems nonetheless had sufficient personal knowledge to testify; the Court noted that the witness's "recall and emotional problems were laid bare for the jury's consideration").

(n8)Footnote 8. See, e.g., *Visser v. Packer Engineering Assoc., 924 F.2d 655 (7th Cir. 1991)* (lay inferences or opinions must be "grounded in personal knowledge or experience" and cannot be "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience").

(n9)Footnote 9. See, e.g., *United States v. Stratton, 779 F.2d 820, 829 (2d Cir. 1985)* :

> When A testifies that B told him of an event, A usually has personal knowledge only of B's report. It is B who has personal knowledge of the event. Thus, the hearsay rules require that the *declarant*, B in our example, have personal knowledge of the events recounted, not that the witness have such personal knowledge.

(n10)Footnote 10. See, e.g., *Kaczmarek v. Allied Chemical Corp., 836 F.2d 1055 (7th Cir. 1987)* ("a witness cannot offer the contents of a hearsay statement as his personal knowledge"). See also *United States v. Mandel, 591 F.2d 1347, 1369 (4th Cir. 1979)* : Where a governor was tried for mail fraud and racketeering, Senators testified to their beliefs as to the governor's position on a veto override:

> While this testimony is not hearsay in form, the feeling and beliefs expressed therein were often based in whole or in part on impermissible hearsay. To the extent it was based on hearsay, this testimony is inadmissible because the witness lacked the requisite first-hand knowledge. [But where the beliefs were based on] admissible evidence, such as direct statements or acts by one of Governor Mandel's agents, [then the testimony was admissible].

(n11)Footnote 11. See, e.g., *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* (a 911 tape describing police brutality was properly excluded because the citizen caller apparently lacked personal knowledge of the events that he was reporting; the "requirement that a declarant have personal knowledge of the events described applies to the present sense impression exception," and "[s]imilarly, the excited utterance exception is only available if the declarant has firsthand knowledge of the subject matter of her statement"); *Brown v. Keane, 355 F.3d 82 (2d Cir. 2004)* (hearsay statements in 911 call could not be admitted because there was insufficient indication that the caller witnessed the events related; the hearsay exceptions for present sense impressions and excited utterances apply "only to reports of what the declarant has actually observed through the senses, not to what the declarant merely conjectures."); *United States v. Owens-El, 889 F.2d 913 (9th Cir. 1989)* ("the person who made the out-of-court statement must have had personal knowledge of the event on which he based his statement"); *United States v. Lang, 589 F.2d 92, 97 (2d Cir. 1978)* (it was reversible error to admit a statement against penal interest where the declarant lacked personal knowledge of the event described in his statement).

(n12)Footnote 12. See, e.g., *Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978)* (rejecting the contention that personal knowledge is required on the part of a declarant whose statement is otherwise admissible as an agency-admission under *Rule 801(d)(2)(D)*); *United States v. Ammar, 714 F.2d 238 (3d Cir.*

1983) (the declarant need not have personal knowledge for statements to be admissible under the hearsay exception for coconspirator statements).

(n13)Footnote 13. See also *United States v. Tocco, 135 F.3d 116 (2d Cir. 1998)* (excited utterance properly admitted; a reasonable trier of fact could have concluded that the declarant had personal knowledge that he had set a fire on the defendant's behalf; the property that was burned was the defendant's clothing store, and the evidence indicated that the declarant entered the store after hours with a key; a "trier of fact could reasonably believe that [the declarant] obtained the key from the store owner and therefore was aware that the arson was committed at the owner's direction").

(n14)Footnote 14. See the Advisory Committee Note to *Rule 801(d)(2)* (noting the freedom that admissions have enjoyed "from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge").

(n15)Footnote 15. See the Advisory Committee Note to *Rule 801(d)(2)* ("Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission.").

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602.03 Annotated Cases

[Go To Supp]

[1] Charts and Graphs

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) : The Court affirmed convictions of three individuals and a corporation for wire fraud and other offenses, holding that an FBI agent properly used four charts, which summarized the testimony of government witnesses, to explain to the jury how cash flowed through certain companies. Since the witness had knowledge of the transcripts and exhibits on which he relied to prepare the charts, *Rule 602* was satisfied.

[2] Drug Use

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) : The Court affirmed bank robbery convictions, finding no abuse of discretion in the admission of testimony by a witness who claimed he was intoxicated before the grand jury and at trial. There was no record evidence corroborating the claim of intoxication, and the threshold for admitting testimony under *Rule 602* is "low," so the Trial Judge's decision not to credit the witness' *post hoc* representations was not clear error. In a cocaine distribution prosecution, *United States v. Hickey, 917 F.2d 901 (6th Cir. 1990)* , the Court held that a reasonable juror could believe that a principal witness perceived the events to which he testified, even though his testimony may have been in large part unbelievable to some and his perception was sometimes impaired by his admitted drug addiction.

[3] Foundation Lacking

FDIC v. Houde, 90 F.3d 600 (1st Cir. 1996) : The defendants gave a note to a bank that subsequently failed and was taken over by the FDIC. When the FDIC sought to enforce the note, it presented a witness, but no documentary evidence, to show that it had transferred the note to a bridge bank and then regained the note as receiver on the bridge bank's dissolution. Affirming a judgment for the defendants rendered because the FDIC failed to show its enforceable title to the note, the Court held there was no error in striking the testimony, as the witness, who took over the file just two weeks before trial, had no personal knowledge of the events about which he testified.

Elizarraras v. Bank of El Paso, 631 F.2d 366 (5th Cir. 1980) : The drawer of a check alleged that the defendant's refusal to honor the check resulted in certain penalties being imposed by the payee bank. The Court said that the drawer had no personal knowledge concerning the penalties that were imposed and that statements by the payee bank officials concerning penalties were hearsay.

United States v. Lanci, 669 F.2d 391 (6th Cir. 1982) : Affirming convictions for conspiracy and bribery of an FBI employee, the Court upheld a ruling excluding testimony of an unavailable codefendant in an earlier state Court proceeding that he "imagined" that the defendant's fingerprints appeared on FBI documents because of the defendant's curiosity about them. Because the codefendant also said that he did not know whether the defendant "read them [the documents] or glanced through them or what," the testimony was inadmissible under *Rule 602*.

Unterreiner v. Volkswagen of Am., Inc., 8 F.3d 1206 (7th Cir. 1993) : The plaintiff in an age discrimination action, who was seeking to avoid a limitations bar by showing that the defendant failed to post a required notice, testified at his deposition that he did not remember what was posted on a bulletin board, but in an affidavit a year later said there was no notice on the board. Affirming summary judgment for the defendant, the Court held that statements founded on what the plaintiff admitted to be faulty recollection were not sufficiently probative to defeat summary judgment. The Court further noted that it was possible the factfinder would not be allowed to hear the kind of testimony in the affidavit because the plaintiff's insufficient recollection would make him incompetent under the Rule. In the view of the dissenting Judge, the Rule does not disqualify witnesses with faulty memory, only those with none at all. In *Visser v. Packer Eng'g Assoc., 924 F.2d 655 (7th Cir. 1991)* (en banc), the Court affirmed a summary judgment for the defendant in an age discrimination case, holding that affidavits by coemployees had been properly excluded; they stated no facts, and contained only conclusory inferences of impermissible motivation for the plaintiff's discharge. In *Palucki v. Sears, Roebuck & Co.*, n1 the Court affirmed summary judgment granted for the defendant in an age discrimination case brought by a discharged store manager, holding that a deponent's "gut feeling" regarding the defendant's motivation would not be admissible personal knowledge creating a genuine issue of material fact. In *Kaczmarek v. Allied Chem. Corp.*, n2 a suit by the driver of a truck who was doused with sulfuric acid while unloading it, the Court found reversible error when the company's safety director was permitted to testify about safety rules that were in effect five years before he went to work for the company. His testimony could not have been based upon personal knowledge, and no showing was made that he was an expert who did not need personal knowledge. The Court found, however, that testimony by a division head concerning meetings on safety that all drivers were required to attend did satisfy the personal knowledge rule, even if the witness could not remember specifically that the plaintiff attended the meetings. In *Gorby v. Schneider Tank Lines*, n3 the Court sustained a judgment for the wife of a motorist killed in an accident with a truck, finding no error in the exclusion of testimony by an eyewitness that the truck driver did everything that he could to avoid the accident. The witness had no personal knowledge of what the truck driver actually did in his cab and could not have known when the driver saw the other vehicle.

McCrary-El v. Shaw, 992 F.2d 809 (8th Cir. 1993) : The Court affirmed a judgment for correctional officers sued for using excessive force against an inmate, holding there was no abuse of discretion in excluding testimony by a fellow inmate on the ground that he was not able to see anything of relevance about the incident. In *Kern v. Levolor Lorentzen, Inc., 899 F.2d 772 (9th Cir. 1990)* , a wrongful termination case, the Trial Judge excluded testimony by the defendant's personnel manager as to the meaning of a disputed word in a letter sent to the plaintiff. The Court reasoned that the witness did not hold a position with the defendant until after the relevant time period and thus did not have personal knowledge concerning the proper interpretation of the letter.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004) : The Court affirmed a judgment holding that the Bankruptcy

Court had erroneously admitted bank records submitted as an attachment to a supplemental declaration of the Trustee's counsel, because the counsel had no personal knowledge as to the authenticity of the records, and there was no other proof of authenticity.

Nationalist Movement v. City of Cumming, 913 F.2d 885 (11th Cir. 1990) , *vacated & reh'g en banc granted*, *921 F.2d 1125 (1990)* , *panel opinion reinstated*, *934 F.2d 1482 (11th Cir. 1991)* , *aff'd*, *505 U.S. 123 (1992)* : The Court held there was no error in striking a witness' testimony offered to authenticate purported business records of the plaintiff, as the witness had been appointed "acting secretary" of the organization on the morning of the hearing and had no knowledge of the records, could not identify them, and had never seen them until they were presented by the plaintiff's attorney that morning.

[4] Foundation Satisfied

United States v. Doe, 960 F.2d 221 (1st Cir. 1992) : In a prosecution of a felon for criminal possession of a firearm that had moved in interstate commerce, the Court held that a reasonable trier of fact could believe that a sports shop owner had firsthand knowledge from which he could infer that a pistol was made in Brazil. Personal knowledge includes inferences and opinions, so long as they are grounded in personal observation and experience.

Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993) : The Court reversed a judgment against insureds who sued to recover the proceeds of a fire policy, holding that it was error to exclude the case notes and testimony of a social worker who was responsible for a file on the children of a couple renting the insured's house. The Court found that the evidence was based on personal knowledge and might have supported a claim that the renters rather than the insureds caused the fire. The dissenting Judge was unpersuaded that the record demonstrated personal knowledge on the part of the social worker. In *Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759 (2d Cir. 1991)* , a textile importer's copyright infringement action, the Court held that a defense witness had sufficient personal knowledge to testify even though she stated only that she "believed" the fact asserted, as she was not testifying upon conjecture or hearsay. In *United States v. McGrath*, n4 the Court suggested that circumstantial evidence would support a finding of personal knowledge by the maker of out-of-court records.

M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y, 681 F.2d 930 (4th Cir. 1982) : Affirming a plaintiff's judgment on a bond that covered loss from the failure of the plaintiff's employees to perform their duties faithfully, the Court found that a witness had sufficient personal knowledge to testify even though he was not positive about his testimony. A dissenting Judge argued that the witness made an assumption about a crucial fact and that he had not shown any basis for personal knowledge.

United States v. Cantu, 167 F.3d 198 (5th Cir. 1999) : The Court affirmed a drug conspiracy conviction, holding there was no error in finding that a witness had personal knowledge of the defendant's relationship with another person, based on the witness' testimony that she believed the defendant was the boss because she had observed the defendant giving the other person orders while they were unloading and storing marijuana at her house. In *United States v. MMR Corp. (LA), 907 F.2d 489, 1990-2 Trade Cas. (CCH) P69136 (5th Cir. 1990)* , the Court affirmed convictions for bid rigging and mail fraud, holding that a witness who had significant contact with the president of one of the bidders and was present at both meetings between the bidders concerned had sufficient personal knowledge to testify about the agreement between the bidders even though another person had negotiated the agreement and the witness testified he was unsure how he had come to know about it. In *United States v. Davis*, n5 the Court affirmed a felon firearms possession conviction. The Court observed that in determining whether a witness has shown sufficient personal knowledge,

> the trial court has some discretion in evaluating ... an initial showing, and generally does not abuse that discretion by accepting as provisionally adequate a witness' testimony that he has personal knowledge, when other evidence indicates that the witness had a personal connection to the subject matter, there is nothing to suggest that the witness likely did not have or could not have had such knowledge, and its probable absence could be easily shown, but opposing counsel, despite full opportunity to do so, wholly fails to make any such showing.

United States v. Oliver, 908 F.2d 260 (8th Cir. 1990) : The defendant, charged with aiding and abetting the forgery of a check, denied that she knew the true last name of the forger when she endorsed the check. The Court held there was no abuse of discretion in admitting testimony by a detective that he had seen the two together more than once and he had no doubt that she knew the forger's name.

Stuart v. Unum Life Ins. Co. of Am., 217 F.3d 1145 (9th Cir. 2000) : The Trial Judge remanded an insurance dispute removed from State Court on the ground that the defendants had not carried their burden of showing that the company's group plan was an ERISA plan, which would have subjected the case to federal jurisdiction. Reversing an order granting the plaintiffs costs and expenses for improper removal, the Court held that it was error to exclude the declaration of the company's vice president for corporate services regarding the particular condition required for ERISA coverage, since the record showed that he not only had reviewed the insurance policy but also had personal knowledge of the facts showing the condition was satisfied. In *United States v. Owens-El*, n6 on remand of *United States v. Owens* n7(discussed under *Rule 801(d)(1)(C)*, *§§ 801.02[3][c]*, *[3][d]*, *[5]*), the Court held that there was sufficient evidence that a witness had personal knowledge of the identity of his attacker when making an out-of-court identification, since the witness' wounds circumstantially indicated a frontal attack, the detail of the description suggested he remembered it at the time of the statement, and the witness testified at trial that the attack was vivid in his mind at the time of making the statement.

United States v. Van Dorn, 925 F.2d 1331 (11th Cir. 1991) : The Court affirmed racketeering convictions, holding that a witness' associations with a crime family were sufficient for him to testify that a defendant was a member of that crime family, even if the witness had no firsthand knowledge that would serve as the basis for his statements.

United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986) : Affirming a judgment for the United States in a restitution action against crude-oil resellers, the Court held that a witness who supervised the audit and summarized the work of 20 auditors on a project could testify concerning the audit, since he satisfied the personal knowledge requirement.

[5] Hearsay Declarants

United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) : In an arson case the defendant's alleged accomplice had run to his friend's house three hours after the defendant's business establishment had burned and people had been trapped inside. He told his friend that he had set the fire for the defendant. This statement was admitted at trial as an excited utterance. The Court rejected a challenge, made on the ground that there was no showing that the declarant had personal knowledge, to the portion of the statement implicating the defendant. Because the property that burned was the defendant's clothing store, and the evidence indicated that the declarant entered the store with a key, "[a] trier of fact could reasonably believe that [the declarant] obtained the key from the store owner and therefore was aware that the arson was committed at the owner's direction."

Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995) : Affirming a judgment for police officers alleged to have used excessive force, the Court held that a 911 tape describing the alleged event was properly excluded because the citizen caller apparently lacked personal knowledge of the events that he was reporting. The Court held that "this requirement that a declarant have personal knowledge of the events described applies to the present sense impression exception," and that "[s]imilarly, the excited utterance exception is only available if the declarant has firsthand knowledge of the subject matter of her statement." The Court also observed that the proponent of a hearsay declaration has "the burden of establishing personal perception by a preponderance of the evidence."

[6] Incomplete Personal Knowledge

Hallquist v. Local 276, 843 F.2d 18 (1st Cir. 1988) : Affirming a judgment for a plumber who successfully claimed sex discrimination by an employer, the Court held that the plaintiff was properly permitted to testify that work was available on the job site, even if she did not have knowledge of all of the circumstances that the employer encountered. The extent of her personal knowledge went to weight, not admissibility.

United States v. Powers, 75 F.3d 335 (7th Cir. 1996) : Affirming a cocaine conspiracy conviction, the Court held that "[t]he fact that a witness cannot recall specific dates does not require exclusion of that testimony," since a witness' inability to recall specific dates does not demonstrate absence of personal knowledge. The opponent's remedy is not exclusion but rather cross-examination and impeachment.

[7] Lay Versus Expert Witnesses

Hunters Int'l Mfg. Corp. v. Christiana Metals Corp., 561 F. Supp. 614 (E.D. Mich. 1982) , aff'd, 725 F.2d 683 (1983) : The District Court granted judgment n.o.v. for the defendants in a contract action, finding that an accountant, who testified as a lay person because he was not identified as an expert during discovery, testified concerning lost profits without personal knowledge of the facts on which he based his projections.

Kemp v. Balboa, 23 F.3d 211 (8th Cir. 1994) : In a prisoner's civil rights suit for wrongful deprivation of medication to control his epilepsy, a licensed practical nurse at the correctional center testified that the prisoner had failed to pick up his medication on seven occasions. The Court granted the plaintiff a new trial on damages, holding that the nurse's testimony, which was based only on review of the prisoner's medical file (not introduced into evidence), should not have been admitted, as she was testifying only as a lay witness and she had no personal knowledge of the matter.

[8] Regular Procedures

First Nat'l Bank v. Lustig, 96 F.3d 1554 (5th Cir. 1996) : In an action by a bank against sureties that had issued a blanket bond, the Court affirmed in part a judgment for the bank as to coverage and bad faith. The Court held that testimony of a bank employee as to a loan committee's practice of relying on certain bank officers was properly admitted, even though the employee was not present when certain loans were approved. The employee had personal knowledge of the practice, which was the subject matter of the testimony. In *United States v. Quezada*, n8 the Court affirmed a conviction for illegal entry by an alien after deportation, holding that an INS agent had sufficient personal knowledge concerning the normal procedure in executing a warrant of deportation, even though he personally had not physically observed the execution of a warrant.

[9] Relationship to Other Rules

Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518 (7th Cir. 1989) : The defendant in a breach of contract action sought to prove that defects in the quality of copiers it was purchasing were a ground for its termination of the contract, but the Trial Judge excluded statements by the plaintiff's expert witness and the defendant's board of directors regarding the quality of the copiers on the ground that they were based on information by customers and engineers and were therefore hearsay. The Court disagreed, holding that assessments of a product's quality by business people are inferential, not first hand, and as long as they are the sort of inferences that business people customarily draw, they count as personal knowledge, not hearsay. The same principles apply to the acquisition of knowledge by expert witnesses, as *Rule 703* recognizes.

Ostad v. Oregon Health Sciences Univ., 327 F.3d 876 (9th Cir. 2003) : Affirming a judgment for a former resident at a medical university who claimed that he was terminated in retaliation for questioning a physician's billing practices, the Court upheld the admission of testimony by one doctor that he had concerns about another doctor's billing practices. Since the testifying doctor was speaking about his own concerns, his testimony was based on personal knowledge even if the concerns arose from conversations with a third party.

[10] Testimony About Another's State of Mind

Hart v. O'Brien, 127 F.3d 424 (5th Cir. 1997) : Reviewing absolute and qualified immunity issues in a civil rights suit brought by a plaintiff who was arrested, charged with possession of marijuana, and detained in jail for two weeks, the Court found that the deposition testimony of one officer in which he speculated about the motivation or intent of other officers was inadmissible. The deposed officer did not participate in the investigation or surveillance, and was not involved in the decision to arrest the plaintiff. Thus, the Court found that there was nothing in the record to support a finding of personal knowledge on the part of the deposed officer.

FOOTNOTES:

(n1)Footnote 1. *Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989)* .

(n2)Footnote 2. *Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055 (7th Cir. 1987)* .

(n3)Footnote 3. *Gorby v. Schneider Tank Lines, 741 F.2d 1015 (7th Cir. 1984)* .

(n4)Footnote 4. *United States v. McGrath, 613 F.2d 361 (2d Cir. 1979)* .

(n5)Footnote 5. *United States v. Davis, 792 F.2d 1299 (5th Cir. 1986)* .

(n6)Footnote 6. *United States v. Owens-El, 889 F.2d 913 (9th Cir. 1989)* .

(n7)Footnote 7. *United States v. Owens, 484 U.S. 554 (1988)* .

(n8)Footnote 8. *United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 602 RULE 602

2-602 Federal Rules of Evidence Manual 602.04

602.04 Legislative History

Advisory Committee's Note

"[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself: hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of *Rule 104(b)* on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to *Rule 703* is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."

Following the 1987 amendments to *Rule 602*, the Supreme Court sent to Congress a technical amendment correcting capitalization, which took effect on November 1, 1988.]

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Supp. To CHAPTER 602 RULE 602

2-602 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 602, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 602. Lack of Personal Knowledge	**Rule 602. Need for Personal Knowledge**
A witness may not testify to a matter unless	A witness may testify to a matter only if

less evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own

witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.	testimony. This rule does not apply to a witness' s expert testimony under Rule 703.

Committee Note

The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 602.03 Annotated Cases

[Go To Main]

[3] Foundation Lacking [Go To Main]

Alpert v. United States, 481 F.3d 404 (6th Cir. 2007) : The Court affirmed summary judgment for the IRS in a taxpayer's action for a refund, holding that an affidavit by the taxpayer that certain named creditors and other unsecured creditors had written off the debt of his subchapter-S corporation in particular years was insufficient to establish a discharge of debt at that time. The statement regarding the writing off of debts by the other unsecured creditors was based upon his "belief" and did not demonstrate the required personal knowledge.

United States v. Becerril-Lopez, 541 F.3d 881, 888 (9th Cir. 2008) : In a prosecution for being a deported alien found in the United States, the Border Patrol agent operating the night scope at the time of the defendant's entry testified on direct that he had tracked several people crossing the border and then directed another agent to their hiding place. However, on cross-examination he conceded that he had no independent recollection of the facts and was relying on a report by the other agent. Affirming, the Court held it was a clear abuse of discretion (but harmless error) not to strike the agent's testimony, which lacked personal knowledge and "in the end, amounted to reading in portions of Agent Rivera's report."

Zokari v. Gates, 561 F.3d 1076 (10th Cir. 2009) : The Court affirmed a judgment for the employer in a Title VII action, finding no abuse of discretion in the exclusion of testimony by a union steward, based on review of employee evaluations, that African-Americans and minorities had "a difficult time with regard to evaluations and ratings and mentoring and on-the-job training." Although the witness knew the evaluation scores for employees, he could not know if the evaluations were discriminatory because he knew nothing regarding the work performance of any employee except himself, so his testimony was properly excluded for lack of personal knowledge.

Corwin v. Walt Disney Co., 475 F.3d 1239 (11th Cir. 2007) : The plaintiff claimed that the defendant's theme park infringed the copyright of a painting that was a rendering of a third party's idea for an international theme park in miniature. Affirming summary judgment for the defendant, the Court found that affidavits offered to prove the

defendant's access to the painting were properly disregarded because the affiants had no personal knowledge of the facts they asserted.

[4] Foundation Satisfied [Go To Main]

United States v. Famania-Roche, 537 F.3d 71 (1st Cir. 2008) : The Court affirmed drug convictions, holding that a cooperating witness had sufficient personal knowledge of the inner workings of a drug conspiracy to testify that the defendant controlled a certain drug point and to describe quantities of drugs sold at different drug points on a weekly basis. The witness operated her own drug point, was present at the place where the conspirators gathered to discuss the drugs they sold at various drug points, and had personally seen the defendant sell drugs to customers she sent to him. In *United States v. Munoz, 487 F.3d 25 (1st Cir. 2007)* , the Court affirmed convictions of former bank executives for bank fraud, finding no abuse of discretion in permitting an officer of the affected bank to testify regarding board meetings nearly 20 years previously. Statements such as, "I don't recall that it was discussed. I believe that if it was discussed I would remember and it is not reflected in the minutes," provided a sufficient showing that the witness had enough recall to testify from his personal knowledge about information given to the board.

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CHAPTER 603 RULE 603

2-603 Federal Rules of Evidence Manual 603.syn

§ 603.syn Synopsis to Chapter 603: RULE 603

603.01 Official Text

603.02 Editorial Explanatory Comment

[1] Basic Requirement

[2] Relationship to Competency

[3] Miscellaneous Proceedings

[4] Procedure

603.03 Annotated Cases

[1] Absence of Objection

[2] Admonishing Witness

[3] Child Witness

[4] Oath by Atheist

[5] Refusal To Swear or Affirm

[6] Renunciation of the Oath

[7] Translator

[8] Trial Counsel

603.04 Legislative History

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PART TWO: THE RULES THEMSELVES
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2-603 Federal Rules of Evidence Manual 603.01

603.01 Official Text

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

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2-603 Federal Rules of Evidence Manual 603.02

603.02 Editorial Explanatory Comment

[1] Basic Requirement

Along with cross-examination, the requirement of an oath is designed to ensure that every witness gives accurate and honest testimony. Although some critics have suggested that the oath is not really a substantial deterrent to false testimony, Courts have imposed the requirement on the ground that it provides some assurance that the truth will be told. n1 This, of course, is especially the case where there is a threat of a perjury conviction, which is contingent upon testimony having been made under oath. n2

Rule 603 states that a witness need not swear an oath, but may merely affirm that he or she will testify truthfully. The affirmation can be given in any form calculated to awaken the conscience of the witness and impress upon the witness the duty to tell the truth. By permitting affirmation as well as oath, the rule appears to alleviate any of difficulty faced by certain members of some religious groups with the traditional oath requirement. Witnesses may not be cross-examined about their decision to affirm rather than swear; if questioning were allowed, the right to affirm rather than swear would be meaningless. n3

Rule 603 does not mandate that the oath or affirmation be given in a specific form. n4 Flexibility might well be required, for example, to accommodate beliefs and opinions protected by the *First Amendment*. Thus, in *United States v. Ward, 989 F.2d 1015 (9th Cir. 1992)* , the defendant refused to testify because the Trial Judge did not permit him to take an altered version of the standard oath. The defendant would have taken an oath that substituted the term "fully integrated honesty" for the word "truth." The Court of Appeals held that it was error to refuse to accede to the defendant's demand. It found the defendant's objection to the standard oath to be based on "beliefs that are protected by the *First Amendment*." The Court noted that there is no rigid formula for an acceptable oath. Under *Federal Rule 603*, an oath is sufficient if it is in a form "calculated to awaken the witness' conscience and impress the witness' mind with the duty" to tell the truth. The Court stated, however, that the Trial Judge can refuse a proffered form of oath if it is nothing but "a cleverly worded oath that creates loopholes for falsehood or attempts to create a safe harbor for perjury." For example, a proffered oath that "I would not tell a lie to stay out of jail" has been properly rejected. Witnesses taking such an oath might wiggle out of a perjury charge by saying that the oath was not violated, because they lied for some purpose other than to stay out of jail, such as to protect a relative. n5 In *Ward*, the Court found that the proffered oath was not a means to evade the sanction of perjury. n6

Flexibility in the form of the oath might also be necessary for child-witnesses, who might be hard-pressed to understand the formal version. n7 Some child-witnesses may be so young as to be incapable of appreciating the importance of telling the truth in a courtroom, no matter how flexible the oath; in these limited cases, we believe that the Trial Judge must declare the child incompetent. See the discussion in *[2]*, immediately below.

[2] Relationship to Competency

The Advisory Committee's Note states that *Rule 603* "is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children." Presumably the Note refers to the requirement that the oath or affirmation be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind" with a duty to testify truthfully. As our Editorial Explanatory Comment in *§ 601.02[2]* suggests, however, it is hard to believe that the Trial Judge has no discretion under any circumstances to reject a witness on competency grounds. A Court does have discretion to exclude a witness, despite *Rule 601*, if that witness cannot understand the meaning of an oath or an equivalent. n8

[3] Miscellaneous Proceedings

If *Rule 1101* is read literally, witnesses do not have to testify under oath pursuant to *Rule 603* when testifying on preliminary questions of fact, in sentencing proceedings, in probation revocation proceedings, and in other proceedings in which witnesses have traditionally testified under oath. This is because the Federal Rules of Evidence are not applicable to such proceedings. There is no indication, however, that Congress in *Rule 1101* intended to open the door to in-court testimony without an oath. Whenever a witness is testifying in a proceeding, an oath is desirable, *Rule 1101* notwithstanding.

[4] Procedure

Trial Judges who take the view that administration of an oath to witnesses is a solemn and important part of a judicial proceeding are much more likely, in our view, to impress upon witnesses the importance of honest, careful testimony.

Counsel who know that a witness will affirm but not swear to tell the truth should ask that the clerk, or whoever administers the oath, request the witness to make an affirmation. If this is done before the witness is asked to take an oath, the witness is spared the embarrassment of having to refuse to "swear" to tell the truth, and the jury is spared confusion. n9

FOOTNOTES:

(n1)Footnote 1. See *United States v. Hawkins, 76 F.3d 545 (4th Cir. 1996)* (Trial Judge erred in a criminal contempt prosecution in permitting the prosecutor to identify the defendant as the person who had been recalcitrant and uttered obscenities when called as a witness in a criminal case: "testimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible").

(n2)Footnote 2. See, e.g., *United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997)* ("The idea behind [Rule 603] is to preserve the integrity of the judicial process by awakening the witness' conscience and making the witness amenable to perjury prosecution if he fibs.").

(n3)Footnote 3. See *United States v. Kalaydjian, 784 F.2d 53 (2d Cir. 1986)* (Trial Court did not err in refusing to permit the defendants to cross-examine witnesses about why they did not choose to swear on the Koran, as they had the opportunity to do).

(n4)Footnote 4. See, e.g., *United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993)* (Court translator had translated a recorded conversation; when she testified about the taped conversation, she was asked only to swear that she translated

the tape to the best of her ability; the Court held there was no error in failing to obtain a general oath that the translator would tell the truth; the translator's testimony related only to the accuracy and validity of the translation, and her oath specifically covered the subject matter of the testimony); *United States v. Salim, 855 F.2d 944 (2d Cir. 1988)* (admission of a deposition taken in France in the absence of an oath did not violate *Rule 603*, where the French Judge "took pains to press upon [the deponent] the need to answer truthfully, and the witness promised that she would do so").

(n5)Footnote 5. See, e.g., *United States v. Fowler, 605 F.2d 181 (5th Cir. 1979)* (Trial Court properly refused testimony from a defendant who was only willing to say that he was a truthful man and would not lie to stay out of jail; *Rule 603* does not require the Trial Court to give the witness a safe harbor for perjury).

(n6)Footnote 6. See also *Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1991)* (Trial Court erred in refusing to allow a witness to testify where she said that she would "declare" rather than "swear" or "affirm" the truth).

(n7)Footnote 7. *Spigarolo v. Meachum, 934 F.2d 19 (2d Cir. 1991)* (oath was sufficient where the child was told to raise her right hand and was asked twice whether she would tell the truth: "When children testify, the trial court may fashion an oath or affirmation that is meaningful to the witness.").

(n8)Footnote 8. See, e.g., *United States v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989)* (Trial Court can exercise control over impaired witnesses by excluding testimony of a witness who cannot "take or comprehend an oath or affirmation" under *Rule 603*). Compare *United States v. Saget, 991 F.2d 702 (11th Cir. 1993)* (witness was not incompetent to testify simply because he swore an oath to God despite being an atheist; the record reflected the witness' cognizance of his solemn duty to tell the truth, and this is sufficient under *Rule 603*).

(n9)Footnote 9. See, e.g., *United States v. Rabb, 394 F.2d 230 (3d Cir. 1968)* (questioning on preliminary points concerning the proper form of oath should take place outside the jury's hearing, especially where the witness is "a follower of a minority religion which is unpopular with many persons in the community").

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603.03 Annotated Cases

[1] Absence of Objection

United States v. Odom, 736 F.2d 104 (4th Cir. 1984) : In a prosecution for mail fraud arising out of a fraudulent absentee voting scheme, the Trial Judge refused to permit nine witnesses for the government to be sworn when they indicated on the witness stand that they could not respond to their names or they gave such contradictory responses that they appeared to lack competency. Although the defendants subsequently complained that it was error for the Judge to permit the witnesses to testify at all without administering an oath, a majority of the Court held that the failure to object to the absence of an oath at the time the witnesses took the stand waived any objection. The majority also noted that the Trial Judge had offered to recall the witnesses and to permit a re-cross examination, but the defendants indicated that they would withdraw their objection. A concurring Judge would have found a waiver of the objection in the defendants' failure to object to the closing jury instructions concerning the credibility of the unsworn witnesses.

[2] Admonishing Witness

United States v. Greer, 806 F.2d 556 (5th Cir. 1986) : Upholding convictions for racketeering, the Court held that the Trial Judge did not err in admonishing a defense character witness about the oath requirement after the witness asked the prosecutor conducting cross-examination if he wanted the truth.

[3] Child Witness

United States v. Thai, 29 F.3d 785 (2d Cir. 1994) : Affirming RICO convictions, the Court held that a 13-year-old witness had not been allowed to give "unsworn" testimony when he assured the Trial Judge that he appreciated the difference between truth and falsehood and knew it would be improper to lie, and promised to tell the truth. When children testify, the Trial Judge may fashion an oath or affirmation that is meaningful to the witness; no special verbal formulation is required.

[4] Oath by Atheist

United States v. Saget, 991 F.2d 702 (11th Cir. 1993) : Affirming narcotics convictions, the Court held that a witness was not incompetent to testify because he swore an oath to God despite being an atheist. Noting that an oath to God is not required, the Court concluded that the record reflected the witness' cognizance of his solemn duty to tell the truth.

[5] Refusal To Swear or Affirm

Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1991) (per curiam): The Tax Court dismissed a petition for lack of prosecution because the taxpayer refused on religious grounds to swear or affirm at a hearing. The Court reversed, holding that the Judge should have attempted to accommodate the taxpayer by inquiring into her objections and considering her proposed alternative. In *United States v. Fowler*, n1 the Court affirmed the Trial Judge's refusal to allow a defendant to testify after he refused to either swear or affirm that he would tell the truth or submit to cross-examination.

United States v. Ward, 989 F.2d 1015 (9th Cir. 1992) , *amended* (9th Cir. 1993): The Court reversed the defendant's conviction for tax evasion, holding it was an abuse of discretion to refuse to allow the defendant to swear on an oath that substituted "fully integrated Honesty" for the word "truth." The Trial Court's interest in administering its precise form of oath must yield to the defendant's *First Amendment* rights. A dissenting Judge believed that the majority was accommodating purely secular philosophical concerns unprotected by the Constitution, which would lead to numerous wasteful and time-consuming attacks on the oath. In *Gordon v. Idaho*, n2 the Court reversed a dismissal of a civil rights action imposed as a penalty for the plaintiff's refusal to comply with a discovery order that required him to take an oath or affirmation. It concluded that the Trial Judge "should have explored the least restrictive means of assuring that Gordon would testify truthfully at his deposition."

[6] Renunciation of the Oath

United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997) : Affirming racketeering convictions, the Court found no plain error in the failure to strike the testimony of a government witness who admitted on cross-examination that the oath meant "nothing" to him. The Court, citing *Rule 603*, reasoned as follows:

> The idea behind the rule is to preserve the integrity of the judicial process by awakening the witness' conscience and making the witness amenable to perjury prosecution if he fibs. In this case Patrick swore to tell the truth and repeatedly acknowledged the district judge's admonishments that he was under oath. Patrick was also aware of the consequences of perjury [having suffered upward departures in sentencing for previous acts of perjury]. It follows, then, that this single remark on cross-examination did not require the district judge to *sua sponte* strike his entire 3-days' worth of testimony.

[7] Translator

United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993) : In a prosecution for cocaine distribution, a Court translator had translated a recorded conversation; when she testified, she was asked only to swear that she translated the tape to the best of her ability, but she did not take a standard witness' oath. The Court held there was no error, since her testimony related only to the accuracy and validity of the translation. The dissenting Judge believed that: the failure to inform the witness of her duty to tell the truth on the stand and of the penalty for perjury denied the defendant's right to meaningful confrontation; the examination of the witness tested her credibility as well as the accuracy of her translation; and the standing oath she had taken as an interpreter was insufficient as an oath for a witness.

[8] Trial Counsel

United States v. Hawkins, 76 F.3d 545 (4th Cir. 1996) : The Court held that it was error in a criminal contempt prosecution to permit the prosecuting attorney to identify Hawkins as the person who had been recalcitrant and uttered obscenities when called as a witness in a criminal case, since "testimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible."

FOOTNOTES:
(n1)Footnote 1. *United States v. Fowler, 605 F.2d 181 (5th Cir. 1979)* .

(n2)Footnote 2. *Gordon v. Idaho, 778 F.2d 1397 (9th Cir. 1985)* .

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603.04 Legislative History

Advisory Committee's Note

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, *1 U.S.C. § 1*; judges and clerks may administer oaths and affirmations, *28 U.S.C. §§ 459*, *953*; and affirmations are acceptable in lieu of oaths under *Rule 43(d) of the Federal Rules of Civil Procedure*. Perjury by a witness is a crime, *18 U.S.C. § 1621*.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

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2-603 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 603, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 603. Oath or Affirmation	**Rule 603. Oath or Affirmation to Testify Truthfully**
Before testifying, every witness	Before testifying, a witness must

shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness' conscience.

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Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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§ 604.syn Synopsis to Chapter 604: RULE 604

604.01 Official Text

604.02 Editorial Explanatory Comment

[1] Basic Requirement

[2] Special Transcription Procedures

[3] Miscellaneous Proceedings

[4] Finding Interpreters

[5] Family Member as Interpreter

604.03 Annotated Cases

[1] Constitutional Right

[2] Court-Appointed Interpreter

[3] Failure To Object

[4] Family Member As Interpreter

[5] Oath

[6] Witness' Need for Interpreter

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604.01 Official Text

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

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604.02 Editorial Explanatory Comment

[1] Basic Requirement

The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Court Interpreters Act n1 all provide for appointment of interpreters in appropriate cases. This Rule states that an interpreter is subject to the provisions of the Evidence Rules relating to qualification as an expert. If the interpreter's skill in language is helpful to the Judge and jury, and the interpreter has expertise in translating the relevant languages, then the interpreter qualifies as an expert. An interpreter willing to take an oath or affirmation to make a true translation can assist the Court and jury in the trial process. n2

[2] Special Transcription Procedures

One interesting question not discussed anywhere in the Rules is what special transcription procedures, if any, should be required if an interpreter is employed at trial. Assuming that the average Court reporter is not multilingual, or that even a multilinguist may find a language he or she is incapable of transcribing and understanding, it is clear that total dependence on a Court reporter to transcribe proceedings will sometimes result in a record of only the English version of who said what at trial. Because interpreters may err, we suggest that during any part of a trial when an interpreter is employed for purposes of explaining a question or answer to the Court, the jury and the parties, a sound recording of the proceedings should be made.

[3] Miscellaneous Proceedings

There is a problem with this Rule that is similar to the problem identified in the Editorial Explanatory Comment accompanying *Rule 603*, *§ 603.02[3]*. When Congress adopted *Rule 1101*, it indicated its desire to have most of the technical rules of evidence rendered inapplicable in many pretrial and posttrial proceedings. Unfortunately, *Rule 1101* now provides that *Rule 604* does not apply in situations in which other Evidence Rules are inapplicable. This is most unfortunate, because *Rule 604* ought to apply whenever an interpreter is used, and an interpreter ought to be used whenever possible in order to ensure that non-English speaking people, or nonspeaking people, are treated fairly in Federal Courts. We suggest that the Court exercise its supervisory authority to appoint and regulate interpreters where necessary, even where *Rule 604* is technically inapplicable.

[4] Finding Interpreters

Appointment of an interpreter, like appointment of counsel, is probably constitutionally required if necessary to enable criminal defendants to understand the proceedings being conducted against them. n3

The difficulty of finding adequate interpreters has been reduced by the enactment of the Court Interpreters Act, *28 U.S.C. §§ 1827* and *1828*. Section 1827 requires the Director of the Administrative Office of the Federal Courts to establish a program to facilitate the use of interpreters in Federal Courts by *inter alia:* (1) prescribing, determining, and certifying the qualifications of interpreters; (2) maintaining a list of qualified interpreters; and (3) prescribing a fee schedule for interpreters. Presiding Judges are to use the most qualified available interpreter in criminal and civil actions (including habeas corpus actions) when a party or witness speaks only or primarily a language other than English or suffers from a hearing impairment (whether or not suffering also from a speech impairment). By a 1988 amendment to the section, the interpretation is to be in the simultaneous mode for any party to a criminal proceeding or other judicial proceeding instituted by the United States and in the consecutive mode for witnesses, unless the presiding judicial officer determines that simultaneous or consecutive interpretation "will aid in the efficient administration of justice." Section 1828 provides that the Director shall establish a program for special interpretative services that "shall provide a capacity for simultaneous interpretation services in multidefendant criminal actions and multidefendant civil actions."

[5] Family Member as Interpreter

In some cases, it may be necessary, or at least helpful, to appoint a family member of the witness as an interpreter. For example, in *United States v. Ball, 988 F.2d 7 (5th Cir. 1993)* , the prosecution called a witness who was deaf and whose speech was unintelligible to the Judge and jury. The Trial Judge permitted the witness' wife to serve as an interpreter. The Court held that there was no abuse of discretion in appointing the witness' wife as an interpreter. The obvious concern in such an appointment is that the interpreter will have a suspect motivation; but here, the Court noted that the wife's only connection to the case was that she was married to a witness who himself had no stake in the outcome. It was also important that the nature of the witness' disability made it necessary to appoint someone familiar with the witness. n4 Obviously, the appointment of a family member would not be justified if the witness spoke a foreign language; an unaffiliated translator can be found in such circumstances.

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. §§ 1827, 1828.*

(n2)Footnote 2. See, e.g., *United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993)* (when a translator testified, she was asked only to swear that she translated a tape to the best of her ability; this was not error, because her testimony related only to the accuracy and validity of the translation, and her oath thus encompassed the entirety of her testimony).

(n3)Footnote 3. See, e.g., *Jackson v. Garcia, 665 F.2d 395 (1st Cir. 1981)* (the right to an interpreter "is of federal constitutional dimension" if the defendant is otherwise unable to understand the proceedings).

(n4)Footnote 4. *United States v. Bell, 367 F.3d 452 (5th Cir. 2004)* (no abuse of discretion in allowing the sister of a victim (a deaf mute) to interpret the victim's testimony at trial; the Trial Judge found that the sister was the only member of the limited pool of interpreters who had no personal knowledge of the events in issue).

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604.03 Annotated Cases

[1] Constitutional Right

United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994) : The Court reversed cocaine convictions, finding, *inter alia*, that the defendant's *Fifth Amendment* right to testify in his own behalf was violated when the Judge removed an interpreter and insisted that the defendant try to proceed in English before the jury. The Court concluded that a determination that a witness requires an interpreter requires personal observation of the witness, which must initially be made outside the hearing of the jury.

[2] Court-Appointed Interpreter

United States v. Moon, 718 F.2d 1210 (2d Cir. 1983) : The Court affirmed convictions arising out of the filing of false tax returns, holding that under the Court Interpreters Act of 1978, *28 U.S.C. § 1827*, the defendant could not have his own interpreter translate his testimony if he took the stand. The defendant was permitted to use his own interpreter to translate the proceedings for him. The Court found that the requirement of a court-appointed interpreter for testimony was intended to prevent parties from using untrustworthy interpreters who might disrupt the proceedings.

[3] Failure To Object

United States v. Miller, 806 F.2d 223 (10th Cir. 1986) : Affirming a rape conviction, the Court held that a defendant could not complain that an interpreter was unqualified where the defendant consented to the trial procedure and the interpreter was used only sparingly at trial.

[4] Family Member As Interpreter

United States v. Bell, 367 F.3d 452 (5th Cir. 2004) : The Court affirmed convictions for aggravated sexual abuse, finding no abuse of discretion in allowing the sister of one victim, a deaf mute, to interpret the victim's testimony at

trial. Although a defendant complained that the sister was devoted to the victim, the Trial Judge found that she was the only member of the limited pool of available interpreters who had no personal knowledge of the events at issue. The Court noted that the defense was allowed to call another potential interpreter to challenge the sister's interpretation. In *United States v. Ball, 988 F.2d 7 (5th Cir. 1993)* , the Court affirmed a conviction for possession of a stolen Treasury check, holding there was no abuse of discretion in appointing the witness' wife as interpreter for a deaf witness whose speech was unintelligible. The Court recognized that an interpreter must have no interest in the outcome of the proceeding, but found that the wife's only connection to the defendant was that she was married to a witness. The Court also observed that the nature of the witness' disability made it necessary to appoint someone familiar with the witness.

[5] Oath

United States v. Pluta, 176 F.3d 43 (2d Cir. 1999) : The defendant was convicted of smuggling aliens. His first language, as well as that of many of the witnesses, was Polish. He contended that the Trial Judge committed error by failing to administer proper oaths to the interpreters at trial. The Judge asked the interpreters if they were going to "literally interpret" the testimony and proceedings, and each answered "yes." Affirming the convictions, the Court noted that "this colloquy may have been somewhat less than what is envisioned by the Rules' requirement of a dialogue sufficient to awaken the interpreter's conscience and impress the interpreter's mind with his or her duties." But the defendant had not shown "any shortfall that caused him prejudice" and could not point to any instance in which the interpreters failed to interpret literally or accurately.

United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993) : In a prosecution for cocaine distribution, a Court translator had translated a recorded conversation; when she testified, she was asked only to swear that she translated the tape to the best of her ability, but she did not take a standard witness' oath. The Court held there was no error, since her testimony related only to the accuracy and validity of the translation. The dissenting Judge believed that the standing oath she had taken as an interpreter was insufficient as an oath for a witness.

[6] Witness' Need for Interpreter

United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994) : The Court reversed cocaine convictions, finding, *inter alia*, that the defendant's rights were violated when the Judge removed an interpreter and insisted that the defendant try to proceed in English before the jury. The Court concluded that a determination of the need for an interpreter must be based on personal observation of the witness, which must initially be made outside the hearing of the jury.

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604.04 Legislative History

Advisory Committee's Note

The rule implements *Rule 43(f) of the Federal Rules of Civil Procedure* and *Rule 28(b) of the Federal Rules of Criminal Procedure*, both of which contain provisions for the appointment and compensation of interpreters.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

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Scope

The chart below shows the proposed style amendments for Rule 604, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 604. Interpreters	**Rule 604. Interpreter**
An interpreter is subject to the provisions of these rules	An interpreter must be qualified and must give an oath or affirm

relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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§ 605.syn Synopsis to Chapter 605: RULE 605

605.01 Official Text

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[1] Basic Rule

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[4] Summary and Comment on the Evidence

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[1] Collateral Proceedings

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[3] Judicial Employees

[4] Special Master

[5] Summary and Comment

[6] View by Judge

605.04 Legislative History

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605.01 Official Text

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

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605.02 Editorial Explanatory Comment

[1] Basic Rule

A Judge who presides at trial may not testify in that trial as a witness. This is such an important principle that no objection need be made in order to preserve a claim of error for appeal. Another reason for the "automatic objection" is to avoid putting counsel in the difficult position of asking the Trial Judge to rule on his or her own conduct.

28 U.S.C. § 455(b) already provides that a Judge must disqualify himself or herself in any case in which he or she is "likely to be a material witness in the proceeding." n1 Consequently, *Rule 605* is rarely invoked, because Trial Judges who are likely to be witnesses at the trial are also likely to have recused themselves before trial. However, the drafters of the Federal Rules of Evidence wanted to ensure that there is absolutely no possibility of the Trial Judge being both witness and Judge in the same proceeding.

The policy of the absolute exclusionary principle of *Rule 605* is eminently sound. If the Judge were to testify for one side or the other, the jury would likely be biased toward the side with whom the Judge would be identified. n2 At a minimum, the jury is bound to be confused by the Judge's having taken on two incompatible roles. It would also be unworkable to have Judges rule on objections to their own testimony, or to have Judges determine the permissible scope of their own cross-examination. Furthermore, Judges would be conflicted in ruling on directed verdict and new trial motions, because they would have to weigh their own testimony. Finally, at least one litigant would be put in the impossible position of cross-examining the Judge and objecting to the Judge's testimony.

While the Advisory Committee and the Congress do not raise the point, it is also possible that it would be unconstitutional in a criminal case for a Judge both to preside and testify. The argument that testimony aligns the Judge with a party or with an issue and thus raises the possibility of partiality, which is enough under the Due Process Clause to require disqualification, would find support in *Ward v. Village of Monroeville, 409 U.S. 57 (1972)* (finding a violation of the right to a fair trial where the Trial Judge in a traffic case was also the Mayor, who was responsible for municipal finances), and *Tumey v. Ohio, 273 U.S. 510 (1927)* (biased Judge taints the proceedings, requiring *per se* reversal for a constitutional violation).

[2] Alternatives to Testifying

The one instance in which a Judge might be tempted to testify is after seeing parties or witnesses violate a sequestration order. Often, the Judge can explore this on the record without becoming a witness by having the relevant parties or witnesses explain their conduct. If they deny doing what the Judge saw or deny saying what the Judge heard, the Judge may have to declare a mistrial in order to become available to testify in a second trial.

[3] Collateral Proceedings

Is a Trial Judge who is called to testify in a habeas corpus proceeding competent to testify as to what happened at trial? Yes, the Trial Judge is permitted to testify in a collateral proceeding. *Rule 605* only precludes testimony in the trial at which the Judge presides. There are times, in fact, where it is absolutely necessary that a Trial Judge be called as a witness. This is especially true when the attack on the conviction comes in the form of an attack on the actions or motives of the Trial Judge. n3

28 U.S.C. § 2245 provides that a state Judge may file a written explanation of what happened at a state trial in the case of a federal collateral attack. This obviates the need to call the Judge as a witness in some, but not all, cases. For a Supreme Court case in which a state Judge testified in a federal habeas corpus proceeding, see *Castaneda v. Partida, 430 U.S. 482 (1977)* (testimony concerning the exclusion of Hispanics from a grand jury).

[4] Summary and Comment on the Evidence

Nothing in *Rule 605* is intended to bar Trial Judges from exercising their traditional powers to summarize and comment upon the evidence. The Supreme Court approved a rule (*Rule 105*, in Part Three of this *Manual*) codifying the Federal Judges' traditional powers to summarize and comment, but the House Judiciary Committee deleted it, noting that it was highly controversial because those powers were not given to most state Judges. The Senate Committee acceded to the deletion "with the understanding that the present Federal practice, taken from the common law, ... is left undisturbed." n4

On the other hand, *Rule 605* does more than prohibit the Judge from the extreme conduct of leaving the bench and taking the witness stand. The intent of the Rule is to prohibit the Judge from acting as an unsworn witness as well. n5 So there is a line between commenting on the evidence, which is permissible, and acting as an unsworn fact witness in the case, which is not. n6

Illustrative of this admittedly vague dividing line is *United States v. Pritchett, 699 F.2d 317 (6th Cir. 1983)* . In a drug case, the prosecution sought on cross-examination to associate the defendant with one Lee Miles, who had been previously convicted for cocaine distribution. The defendant admitted that he knew Miles, but stated that he did not know that Miles had been convicted on a cocaine charge. As it happened, the Trial Judge in Pritchett's case was the Judge who had sentenced Miles. When defense counsel objected to this line of questioning, the Trial Judge denied the objection, and informed the jury that, indeed, Miles had been convicted of cocaine distribution.

On appeal, the Court held that the entire line of questioning concerning the defendant's connection with Miles constituted impermissible character evidence. But the Court declared that it would not reverse the conviction on this ground alone, because "Pritchett's innocent answers to the prosecutor's questions and the brevity of the exchange in the context of the lengthy trial mitigated its potentially damaging effect." The Court found it more disturbing -- and reversible error -- that the Trial Judge engaged in "what we can only characterize as improper testimony" by confirming what the prosecutor had unsuccessfully attempted to solicit from Pritchett, i.e., that Miles was a convicted cocaine dealer. The Court reasoned as follows: "By his interjection here, the judge below lent the weight of the bench to a line of inquiry we have already determined was impermissibly prejudicial. Moreover, because of the context in which his editorial occurred -- immediately following the defendant's negative answers -- his remarks created a two-fold danger. Not only was the possibility that the jury would draw the prohibited inference strengthened, but there arose

simultaneously the possibility that the jury would take the judge's confirmation as an impeachment of Pritchett's credibility. Whether or not either of the two possibilities actually come to fruition is impossible to say and, we think, irrelevant. We are persuaded that the risk is sufficiently great to justify reversal and remand for a new trial."

The Trial Judge's comment in *Pritchett* was not a permissible comment on the evidence, because there was *no* evidence presented that Miles was a convicted drug dealer. If some evidence is presented on a point, however, and the Trial Judge gives her evaluation of that evidence to the jury, this will not be a violation of *Rule 605*, unless, perhaps, the Judge's evaluation is vastly overstated. n7

FOOTNOTES:

(n1)Footnote 1. For a lengthy discussion of *28 U.S.C. § 455*, see *Liteky v. United States, 510 U.S. 540 (1994)* (recusal was not required merely because the Trial Judge showed antagonism to the defendant as a result of conduct and information elicited during the trial).

(n2)Footnote 2. See *United States v. Nickl, 427 F.3d 1286 (10th Cir. 2005)* ("Adherence to *Rule 605* also prevents prejudice which may arise from a judge's testimony because of the judge's influential position with the jury.").

(n3)Footnote 3. See, e.g., *Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994)* (finding no bar in a habeas proceeding to testimony by the Trial Judge).

(n4)Footnote 4. See, e.g., *Wilson v. Bicycle South, Inc., 915 F.2d 1503 (11th Cir. 1990)* (finding no error when the Trial Judge commented on the evidence and the testimony of the plaintiff's expert; the Judge's exercise of the "time-honored, though little used, right and duty of a federal judge" to comment did not prejudice the parties and did not result in an incorrect instruction to the jury).

(n5)Footnote 5. See, e.g., *United States v. Paiva, 892 F.2d 148 (1st Cir. 1989)* (Trial Court's explanation of how a field test for drugs was conducted was error -- it went beyond the Trial Court's power to comment on the evidence).

(n6)Footnote 6. See, e.g., *Lillie v. United States, 953 F.2d 1188 (10th Cir. 1992)* (*Rule 605* was violated where the Trial Judge in a bench trial viewed the scene where the accident allegedly happened, without notice and without providing counsel for either party the opportunity to accompany him, and then made findings of fact); *United States v. Maceo, 947 F.2d 1191 (5th Cir. 1991)* (during cross-examination concerning a plea bargain made by a government witness, the Trial Judge stated that defense counsel had "misstated" the law on plea bargains; this was within the Judge's power to comment, because the Judge did not "impermissibly testify as to any fact issue"); *United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986)* (flight instruction should not have been given; however, it was not "purported or implied testimony by the Judge," and thus there was no violation of *Rule 605*).

(n7)Footnote 7. See also *United States v. Nickl, 427 F.3d 1286 (10th Cir. 2005)* : A cooperating witness (Steward) testified at the defendant's trial for bank fraud; she gave conflicting testimony about her intent to defraud the bank, first claiming that she had no intent to injure the bank, and then admitting she had pleaded guilty to having intent to defraud. On cross-examination, defense counsel suggested that Steward pled guilty to defrauding the bank, even though not guilty, "just to get it over with." The Trial Judge, who had taken Steward's plea, then interjected that he would never have taken the plea unless he was convinced that Steward had committed the crime. The Court found that this interjection was reversible error: "Here, as in *Pritchett* ... the presiding judge's commentary about Steward's intent to defraud the bank added new evidence which the prosecution was otherwise unable to establish. Steward had given conflicting testimony as to her intent, and the judge added evidence when he told the jury he was convinced Steward intended to defraud the bank. The judge's comment did not summarize Steward's testimony, it reshaped it. It converted Steward's equivocations into a definitive answer on the question of intent and improperly addressed an ultimate factual issue to be decided by the jury. ... Accordingly, the comment constituted impermissible testimony in violation of *Rule 605*."

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[1] Collateral Proceedings

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994) : The Court held that in a habeas corpus proceeding there is no bar to the State Trial Judge giving testimony as a fact witness to supplement the State Court record.

[2] Judges As Witnesses

Robinson v. Commissioner, 70 F.3d 34 (5th Cir. 1995) : In an action to determine the portion of settlement proceeds allocable to punitive damages, the Court held that the taxpayers were not entitled to subpoena a State Court Judge to testify as to his understanding and knowledge of the settlement agreement, since that would inevitably lead to an impermissible inquiry into his mental processes in reaching a decision.

United States v. Frankenthal, 582 F.2d 1102 (7th Cir. 1978) : In an eavesdropping prosecution the government called a Federal District Judge to testify that he had been consulted by a defense witness who wanted the trial date in the case postponed because he had a business interest in the outcome of the trial. Affirming the conviction, the Court noted that Federal Judges should be called with caution, but concluded it was proper to admit the evidence with an instruction to the jury that the Judge's testimony was to be used only to assess the defense witness' credibility and not as evidence against the accused.

United States v. Nickl, 427 F.3d 1286 (10th Cir. 2005) : The defendant was convicted of aiding and abetting in the misapplication of bank funds by a bank employee who had pleaded guilty. The employee gave conflicting testimony on her intent to defraud, which was an element of the aiding and abetting crime, and when the defense asked on re-cross whether she pleaded guilty just to "get it over with," the Judge interrupted and said that he took her plea after a "specific lengthy inquiry" and he would never have accepted it unless convinced she had acted with the requisite intent to defraud. The Court reversed, holding that the Judge's commentary violated *Rule 605*, because it added new evidence

that the prosecution was otherwise unable to establish: "It converted [the witness'] equivocations into a definitive answer ... and improperly addressed an ultimate factual issue to be decided by the jury."

[3] Judicial Employees

Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593 (5th Cir. 1977) : A central issue in a personal injury action was whether the injured party slipped because of a wet spot on the floor. After the first trial ended in a mistrial because of the injured party's death, the Trial Judge's law clerk went with a friend to the accident scene out of curiosity. It was raining at the time, and they saw a puddle approximately where the original complainant had fallen. The clerk reported to the Judge what he saw, and then phoned defense counsel to inform him of his observation and remark that the information might have a bearing on a settlement. Before the retrial the Judge also disclosed the information to the plaintiff's counsel, who called the clerk and the friend to testify. Reversing a judgment for the plaintiff, the Court held that the testimony of the clerk, who was so closely associated with the Judge, distorted the proceedings. Citing *Rule 605* as persuasive authority, the Court expressed its concern that the jury might have concluded that the clerk's information had special importance and that the defendant would not be able to attack the credibility of the clerk because of his identification with the Trial Judge.

Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir. 1980) : In an action for breach of contract and warranties, the Judge had sent his law clerk to visit the plaintiff's plant to observe machinery before the bench trial. The Court remanded, observing that "[w]e believe that, where a suit is to be tried without a jury, sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a trial judge" that a hearing on the allegation was required. After the remand, *649 F.2d 416 (6th Cir. 1981)* , the Court held (2-1) that the presumption of prejudice arising from the law clerk's report of off-the-record observations had been overcome by evidence establishing that the sole purpose of the clerk's visit was to observe the machine and describe it to the Judge so that he might better understand the evidence at trial.

[4] Special Master

Gary W. v. Louisiana, 861 F.2d 1366 (5th Cir. 1988) : The Court held that a special master, who was appointed to ensure compliance with a protective order during the remedial phase of a class action case involving mentally retarded and emotionally disturbed children, was performing a quasi-judicial function when she submitted her formal recommendation. Thus, an examination into her mental processes in making the recommendation was prohibited.

[5] Summary and Comment

United States v. Paiva, 892 F.2d 148 (1st Cir. 1989) : During a trial for cocaine distribution offenses, a detective identified as cocaine a substance that he had field tested and sent to a lab. In the course of directing the jury to disregard any reference to the lab report, the Judge explained a field test. The Court held that this was an impermissible exercise of the Judge's power to explain, summarize, and comment on the facts and evidence. The error was harmless, however.

United States v. Brown, 946 F.2d 1191 (6th Cir. 1991) : Where the defendant was convicted for selling cocaine to an addict-informant, the Court held there was no error in refusing to give a special cautionary instruction regarding the informant's credibility, as the charge is discretionary and failure to give it will not constitute plain error where there is corroborating evidence. One Judge dissented, on the grounds that there was no corroboration of the critical facts and that the Trial Court's decision was erroneously based on a belief that it could not comment on the evidence.

Wilson v. Bicycle South, Inc., 915 F.2d 1503 (11th Cir. 1990) : Affirming a judgment for the defendants in a product liability action, the Court held that there was no error when the Trial Judge commented on the evidence and the testimony of the plaintiff's expert. The Judge's exercise of the "time-honored, though little used, right and duty of a federal judge" neither excited a prejudice affecting the substantial rights of the parties nor incorrectly instructed the jury.

[6] View by Judge

Lillie v. United States, 953 F.2d 1188 (10th Cir. 1992) : The Court reversed a judgment against the plaintiff in a Federal Tort Claims Act case because the Trial Judge, who was the trier of fact, had viewed the scene where the accident allegedly happened without notice and without providing counsel for either party the opportunity to accompany him.

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Advisory Committee's Note

In view of the mandate of 23 U.S.C. § 455 that a judge disqualify himself in "any case in which he ... is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, *36 A.B.A.J. 630 (1950)*; cases collected in Annot., 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; *California Evidence Code § 703*; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. *Cf.* 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot., 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

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Scope

The chart below shows the proposed style amendments for Rule 605, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 605. Competency of Judge as Witness	**Rule 605. Judge's Competency as a Witness**
The judge presiding at the trial may not testi	The presiding judge may not testify as a wit-

fy in that trial as a witness. No objection need be made in order to preserve the point.	ness at the trial. A party need not object to preserve the issue.

Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[2] Judges As Witnesses [Go To Main]

United States v. Blanchard, 542 F.3d 1133 (7th Cir. 2008) : The defendant was prosecuted for manufacturing methamphetamine and felon firearm possession after his adult son reported his criminal activity. The son gave testimony before the grand jury implicating the defendant in possession of firearms, but at a subsequent suppression hearing he claimed that the firearms were in his own exclusive possession. Confronted with his prior statements, the Judge's comments that the testimony was not credible, and threats of a perjury prosecution, he recanted and gave testimony consistent with that before the grand jury at a reopened suppression hearing and again at trial. Defense counsel sought to impeach him by getting him to admit that the government had told him that he could be charged with perjury. On redirect the prosecutor then elicited that it was the Judge (who presided at both the suppression hearing and the trial) who had first suggested the exculpatory testimony was not truthful, and quoted at length from the Judge's comments at the first suppression hearing. Overruling repeated objections, the Judge said that it was "a direct statement of the Court in a judicial proceeding... . This is reading judicial testimony." Vacating the conviction, the Court held that it was an abuse of discretion for the Judge to allow introduction of his own suppression-hearing comments on the credibility of a key government witness. Rule 605 prohibits a presiding Judge from making comments based on his personal knowledge of matters external to the trial, and that bar applies as well when the Judge's comments were read into the record by the prosecutor, especially when the Judge acknowledged them as his own. Furthermore, the danger of unfair prejudice from this "judicial testimony," which placed the weight of the Judge's authority behind the witness' government-friendly testimony, significantly outweighed its probative value, which was slight given the other evidence on the son's credibility.

United States v. Berber-Tinoco, 510 F.3d 1083 (9th Cir. 2007) : Although it affirmed a conviction for unlawful re-entry after deportation, the Court held that the Trial Judge violated Rule 605 when, in a suppression hearing, he interjected his own observations regarding the location of stop signs along a certain road near the border and the narrowness of the road, as well as when he relied on his personal knowledge that no speed limit was posted on a certain road near the border and that the speed limit was therefore 55 miles per hour. The Court noted, however, that the Judge

did not violate Rule 605 in drawing fair inferences from evidence in the record.

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[x] Rule 606(b) -- Time Pressure

[y] Rule 606(b) -- Verdict Forms

606.04 Legislative History

[1] Advisory Committee's Note

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

[4] Report of the Senate Committee on the Judiciary

[5] Report of the House and Senate Conferees

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Rule 606. Competency of Juror as Witness

(a) *At the trial*. -- A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment*. -- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

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606.02 Editorial Explanatory Comment

[1] Objections to Jurors as Witnesses

Like Trial Judges, members of trial juries are prohibited from testifying in the same trial in which they sit. This is because jurors who testify would be put in the conflicted role of having to weigh their own testimony, and one of the parties would be put in the uncomfortable role of risking enmity with the jury by cross-examining and impeaching the juror-witness. Consequently, *Rule 606* establishes a firm rule, perhaps constitutionally based. n1 Of course, the Rule seldom needs to be applied, since even the most casual *voir dire* will result in the disqualification of a juror who has enough personal knowledge about the case to testify about it.

In our view, calling a juror to testify is so obviously improper that its prohibition should not depend upon timely objection. But *Rule 606(a)* does require an objection, presumably with the normal rules of timeliness applying, although the objection can be made outside the hearing of the jury. Allowing the objection to be made outside the jury's hearing makes eminent sense, because otherwise counsel runs the risk of offending the jurors in making the objection.

[2] Post-Verdict Inquiries

While there is general agreement that the mental operations and the emotional reactions of jurors during the deliberative process should not be the subject of subsequent inquiry, there has been some disagreement as to whether a juror should be able to impeach a verdict by testifying about other matters. The Advisory Committee proposed a version of *Rule 606(b)* permitting a juror to testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. This was changed in the House of Representatives to permit juror testimony about other matters. The House drew the line between mental operations and emotional reactions on the one hand, and objective factors which could occur inside or outside the jury room, on the other hand. The latter could be the subject of inquiry. Under the House view, a quotient verdict, for example, would be subject to attack; it would not be subject to attack under the Rule promulgated by the Advisory Committee.

Opting for finality in litigation and privacy of deliberations, the Senate chose to take the Advisory Committee's approach and limit jury testimony to inquiries into whether extraneous prejudicial information was improperly brought

to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. No inquiry could be made as to any matter or statement occurring during the course of the jury's deliberation. This would limit impeachment of jury verdicts by denying any opportunity to inquire into whether a quotient verdict was employed, whether other objectionable forms of compromise were agreed to, or whether improper arguments were made by the jurors. The Senate version prevailed in conference. n2 Thus, the Advisory Committee's original proposal is reinstated in *Rule 606(b)*; the subject of post-verdict inquiry through juror testimony is strictly limited to the existence of outside influences or extraneous information upon the jury. n3

As adopted, *Rule 606(b)* furthers at least five policies. The Third Circuit has described these policies as follows:

> (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; and (5) maintaining the viability of the jury as a judicial decisionmaking body. n4

[3] Inquiry into Bias

Rule 606(b) would appear to preclude testimony concerning the effect of a juror's racial or other bias on deliberations. n5 However, assuming that *voir dire* is minimally adequate, jurors who are unwavering in their bias are likely to have lied during *voir dire;* and these lies would ordinarily be considered material misrepresentations, because prospective jurors who truthfully answer that they are unalterably biased will be struck for cause. *Rule 606(b)* applies to juror deliberations, but it does not preclude an inquiry into whether a juror lied during *voir dire*. n6 Accordingly, evidence could be presented about the juror's lies on *voir dire* in an attempt to overturn a verdict. n7 The primary focus would be on what the jurors did and how they felt before the deliberations, rather than on anything done during the deliberations. However, *Rule 606(b)* would prohibit inquiry into the effect that a biased juror might have had on other jurors; such an inquiry would intrude into the thought processes of the jurors during deliberations. See the discussion in *[6], infra* .

Despite the salutary policies behind *Rule 606(b)*, Courts in criminal cases are understandably reluctant to limit their inquiry to the *voir dire* stage when there are allegations that jurors relied on racial or other prejudices during their deliberations. As the Second Circuit has stated, Courts "have hesitated to apply the rule dogmatically" in the face of the defendant's *Sixth Amendment* right to an impartial jury. n8 While the Court must remain sensitive to the policies of finality and protection of the jury, these policies must be tempered by the criminal defendant's right to a fair trial. n9 Therefore, *Rule 606(b)* should be construed to permit juror testimony as to racial or other bias of one or more of the jurors, as well as to the effect that the bias might have had on deliberations.

[4] External Influences

The Supreme Court in *Tanner v. United States, 483 U.S. 107 (1987)* , emphasized the limited scope of the "outside influence" exception to *Rule 606(b)*. After their conviction, the defendants in *Tanner* called to the Trial Judge's attention a juror's statement that several jurors had consumed alcohol at lunch throughout the trial, causing them to sleep through the afternoon sessions. The defendants also presented an affidavit from a juror stating that several members of the jury, including the affiant, consumed alcohol during the trial and that some jurors used illegal drugs. Justice O'Connor, writing for the majority, held that *Rule 606(b)* prevented proof of these matters. According to Justice O'Connor, instances of substance abuse are not "outside" or "extraneous" influences that can impeach a jury verdict. She also rejected the argument that the failure to inquire into juror intoxication denies a defendant a fair trial before an impartial and competent jury. She reasoned that other aspects of the trial process -- including *voir dire* of jurors, observations by the Trial Judge and courtroom participants, and observations during the trial reported by other jurors -- are adequate to assure a constitutionally fair trial. Justice O'Connor emphasized that the benefits of *Rule 606(b)*, i.e., preservation of the privacy and finality of jury deliberations, outweigh the expense of suffering possibly inaccurate jury verdicts. n10

Accordingly, after *Tanner*, inquiry under *Rule 606(b)* generally must be limited to influences outside the evidence presented at trial, such as prejudicial publicity, pressure placed on jurors from outside sources, use of extrajudicial information, and the like -- again with the probable exception for evidence of racial or other bias. n11 Examples of alleged misconduct that have been held immune from inquiry under *Rule 606(b)* after *Tanner* include: intimidation of one juror by another; n12 unfair inferences drawn from the evidence; n13 assumptions that a defendant who failed to take the stand must be guilty; n14 misunderstandings about the death penalty; n15 and a vote for conviction because extended deliberation would cut into the juror's vacation. n16 The Court in *United States v. Ruggiero, 56 F.3d 647, 652 (5th Cir. 1995)* , summed it up by stating that *Rule 606(b)* bars juror testimony on "at least four topics: (1) the methods or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during deliberations."

[5] Misunderstood Instructions, Clerical Errors, and the 2006 Amendment to Rule 606(b)

After the strict construction given to *Rule 606(b)* by the Supreme Court in *Tanner*, it would appear that any post-verdict inquiry into jury deliberations on the ground of a jury's misunderstanding (or simply not following) Trial Court instructions would be doomed to defeat. n17 This generally has been borne out in the Courts, but the opinions are not uniform. An example of a proper application of *Rule 606(b)* is *Plummer v. Springfield Terminal Ry., 5 F.3d 1 (1st Cir. 1993)* , where the jury in a FELA case found the defendant 12% at fault and the plaintiff 88% at fault. The jury was then given an interrogatory on damages. The Trial Judge instructed the jury not to make any reduction from the damage amount for contributory fault, because the Trial Judge would make the necessary reduction. Then the jury returned with a damage amount that was exactly 12% of what the plaintiff had claimed, a rather coincidental amount given the jury's previous findings as to fault. The Trial Judge discharged the jury and entered a judgment for 12% of the amount in the interrogatory answer. So instead of receiving 12% of his damage demand pursuant to the Judge's instructions, the plaintiff received 12% of 12% of his damage demand. The plaintiff argued that the jury clearly misunderstood the Trial Judge's instructions, and requested a *voir dire* of the jury to "clarify" their verdict. But the Court held that the Trial Judge properly rejected this request, since it would amount to inquiring into the thought processes attendant to jury deliberations. In other words, a question such as "how did you interpret the Judge's instructions, and did you follow them?" would tread upon the subjective thoughts of the jurors, in violation of *Rule 606(b)*. n18

The Rule as currently written (and applied in *Tanner*) would not appear to permit juror proof even if the verdict is incorrectly transcribed onto the verdict form. Yet all Courts have held that *Rule 606(b)* does not prohibit inquiry into whether the jury made a "clerical error." The exception makes sense if limited to purely clerical errors; as so limited, jury testimony would only be allowed to the extent necessary to prove that the verdict rendered was mistranscribed or improperly stated, and therefore it would not intrude into the internal deliberations of the jury. n19 As so limited, a clerical error exception would not be applicable in a case like *Plummer*, because the jury's error in that case resulted from either a misunderstanding of or a complete disregard of the Trial Judge's instructions. This was not a clerical error, such as marking the wrong box in a verdict form, or misplacing a decimal point in a damages award. As the *Plummer* Court noted, "[T]he number that the jury chose is not in dispute." Rather, the dispute "went to what the jurors were thinking when they chose the number that they did and whether their thinking was sound." An inquiry into these matters should be prohibited by *Rule 606(b)*, notwithstanding an exception for clerical error. n20

Yet some courts have extended the clerical error exception to situations in which the jury simply misunderstood, misapplied, or ignored the Court's instructions. These Courts have permitted juror proof when the verdict that the jury intended is different from the one actually rendered. n21 Under this broader exception of "clerical error," juror proof would be allowed in a case like *Plummer*, because the jury in that case intended the plaintiff to receive a different award than the one that the Judge reduced in accordance with his instructions.

The Advisory Committee on Evidence Rules proposed an amendment to *Rule 606(b)* that would codify the judicially-engrafted "clerical error" exception, but would also resolve the conflict in the Courts over the breadth of the

exception. The Advisory Committee opted for a narrow view of the exception, so that it would apply only when the verdict is incorrect because it was mistranscribed on the jury form. As of this writing, the amendment to *Rule 606(b)* has been approved by the Judicial Conference and the Supreme Court, and it is scheduled to go into effect on December 1, 2006.

The amendment and the Committee Note are set forth below. Note that the Committee Note provides a justification for choosing a narrow definition of clerical error--a justification that lies in the rationale of the Rule itself. The Committee Note also points out that the problem of clerical errors can be largely avoided by polling the jury before it is excused.

2006 Amendment to Rule 606(b)

Rule 606. Competency of Juror as Witness

...

(b) Inquiry into validity of verdict or indictment. -- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewithThe material within the following brackets is overstruck in the original. [,] . The material within the following brackets is overstruck in the original. [except that] But a juror may testify The material within the following brackets is overstruck in the original. [on the question] about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) The material within the following brackets is overstruck in the original. [or] whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. The material within the following brackets is overstruck in the original. [Nor may a] A juror's affidavit or evidence of any statement by the juror The material within the following brackets is overstruck in the original. [concerning] may not be received on a matter about which the juror would be precluded from testifyingThe material within the following brackets is overstruck in the original. [be received for these purposes].

* * *

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry., 5 F.3d 1, 3 (1st Cir. 1993)* ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to *Rule 606(b)*."); *Teevee Toons, Inc., v. MP3.Com, Inc., 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001)* (noting that *Rule 606(b)* has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences

of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987)* ; *Eastridge Development Co., v. Halpert Associates, Inc., 853 F.2d 772 (10th Cir. 1988)* . The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R., 880 F.2d 68, 74 (8th Cir. 1989)* (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates *Rule 606(b)* because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp., 862 F.2d 1201, 1208 (5th Cir. 1989)* ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. *Rule 606(b)* does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978))* .

[6] Effect of Extraneous Information and Outside Influences on Juror Deliberations

While *Rule 606(b)* permits post-verdict inquiry into extraneous information and outside influences, it does *not* permit juror testimony as to the actual effect of these matters on the testifying juror or on any other juror. n22 Testimony as to the actual impact of outside intrusions would be testimony concerning the deliberative process of the jury. This is clearly prohibited by *Rule 606(b)*. n23 So in assessing whether a new trial is required as a result of extraneous information and outside influences on the jury, the Trial Judge must reason by inference as to the effect that these matters might have had on jury deliberations. n24

[7] Alternate Forms of Proof

The preceding sections highlight the reach of this Rule; it covers testimony by jurors, affidavits of jurors, and any other evidence (including writings and testimony by nonjurors, such as newspaper accounts of juror interviews) offered as a substitute for juror testimony. If jury testimony is barred by *Rule 606(b)*, all other derivative forms of proof are also barred. n25

[8] Supporting Verdicts

In our view *Rule 606(b)* clearly applies to attempts to support as well as to impeach a jury verdict. This reading is the fairest reading of the text of the Rule and finds support in the first sentence of the original Advisory Committee Note accompanying *Rule 606(b)*. Unfortunately, the Advisory Committee confined most of its Note to a discussion of impeaching jury verdicts. This has led some Courts to assume mistakenly that the Rule does not apply when a juror's

affidavit is offered to support a verdict. n26 Other Courts, however, have properly applied the Rule. For example, in *Wiedemann v. Galiano, 722 F.2d 335 (7th Cir. 1983)* , the plaintiff alleged that the defendant negligently operated a syringe in a medical procedure. The plaintiff discovered that, after the syringe was admitted into evidence and before it was sent to the jury room, the defendant and his attorney lubricated it so that it would not stick if the jury experimented with it. The plaintiff brought this to the attention of the Trial Judge in a new trial motion. But the Trial Judge, in denying the motion, relied upon affidavits of jurors stating that the mechanical condition of the syringe had not affected their deliberations. The Court of Appeals found that the affidavits could not be used under *Rule 606(b)*, even though in this case they were used to support the verdict. The alteration of the syringe was an outside influence; but juror testimony about the effect that an outside influence had on the deliberations is precluded by the Rule. On remand, the Trial Judge was instructed to assess the likely effect of the extraneous influence on a reasonable juror.

[9] Habeas Corpus Cases

An interesting question arises as to whether *Rule 606(b)* governs in a habeas corpus case in which a state conviction is challenged. We think that a Federal Court should protect state verdicts and indictments under *Rule 606(b)* to the same extent as federal verdicts and indictments. n27 As federal law governs federal habeas corpus actions, our view is in accord with *Rule 601*. It also comports with *Rule 1101(e)*. It should be noted, however, that if a state evidence rule allows broader inquiry into jury actions than the Federal Rule, and if in the process of exhausting state remedies a broader inquiry is made, we see nothing in *Rule 606(b)* that would bar the Federal Court from considering relevant information brought out in the state proceedings. In such a case no juror would be testifying before the Federal Court, so the last sentence of the Rule should not apply as the juror *would have been permitted to testify* in the State Court. However, it should be a very rare case in which the evidence would be relevant because of the limited nature of federal habeas corpus actions and the presumption that what cannot be the subject of inquiry in a federal action cannot be germane to a valid constitutional claim. Of course, an inquiry into a constitutional violation cannot be prohibited by a state evidence rule that is even more restrictive than *Rule 606(b)*. n28

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Parker v. Gladden, 385 U.S. 363 (1966)* (discussing the *Sixth Amendment* right to an impartial jury free from improper influence).

(n2)Footnote 2. See, e.g., *United States v. Ford, 840 F.2d 460, 465-66 (7th Cir. 1988)* (as finally promulgated, *Rule 606(b)* "is designed not only to protect the jurors from being pestered by lawyers after verdicts are rendered, but also to protect the judicial process from efforts to undermine verdicts by scrutinizing the jurors' thoughts and deliberations"); *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 1983-2 Trade Cas. (CCH) P65507 (5th Cir. 1983)* (*Rule 606(b)*, as ultimately promulgated, prohibits inquiry into juror deliberations, even though it appears that the jury rendered a quotient verdict; Senate version of the Rule "makes clear the drafters' intent that a jury's verdict should not be open to searching the minds and motives of the jurors, and must be affirmed if there is adequate support for the award").

(n3)Footnote 3. For some examples of outside influence and extraneous information, see § 606.03[2][i].

(n4)Footnote 4. *United States v. Stansfield, 101 F.3d 909 (3d Cir. 1996)* (holding that *Rule 606(b)* prohibits inquiry into a partial verdict rendered by a jury continuing deliberations).

(n5)Footnote 5. See, e.g., *Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981)* (evidence of "improper motives of individual jurors" is excluded under *Rule 606(b)*; such biases should be uncovered when the jury is being selected); *United States v. Duzac, 622 F.2d 911 (5th Cir. 1980)* (a verdict "may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations"; Trial Judge properly refused to conduct an inquiry into allegations that some jurors allowed their prejudices to affect their decision, since the questions that the Judge would have had to ask were precluded by *Rule 606(b)*).

(n6)Footnote 6. See, e.g., *United States v. Henley, 238 F.3d 1111 (9th Cir. 2001)* (ordering an inquiry into whether a juror used racial epithets during the trial):

> Where, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful. *Hard v. Burlington N. Railroad, 812 F.2d 482, 485 (9th Cir. 1987)* ("Statements which tend to show deceit during voir dire are not barred by *Rule 606(b)*"). If appellants can show that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause, then they are entitled to a new trial.

(n7)Footnote 7. See, e.g., *United States v. Colombo, 869 F.2d 149 (2d Cir. 1989)* (accepting an affidavit from an alternate juror, averring that another juror deliberately failed to reveal a matter on *voir dire* because she thought it would hurt her chances to sit on the case: "Courts cannot administer justice in circumstances in which a juror can commit a federal crime in order to serve as a juror in a criminal case and do so with no fear of sanction so long as a conviction results."); *Hard v. Burlington N. R.R., 812 F.2d 482 (9th Cir. 1987)* (Trial Court erred in failing to hold an evidentiary hearing to investigate an allegation that a juror had concealed the fact on *voir dire* that he and his father were former employees of the defendant).

(n8)Footnote 8. *Wright v. United States, 732 F.2d 1048 (2d Cir. 1984)* .

(n9)Footnote 9. See *Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987)* (Court properly reviewed the internal deliberative process of the jury to determine whether a racial slur during deliberations had an effect on the verdict; no denial of due process was found where only one racially derogatory comment was made during five hours of deliberations, and that comment was unrelated to any discussion of the facts; the Court concluded that *Rule 606(b)* "cannot be applied in such an unfair manner as to deny due process" and therefore a juror's racial bias and its effect on the deliberations was a proper subject of post-verdict inquiry).

(n10)Footnote 10. See also *Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987)* (*Rule 606(b)* is the result of a "policy decision that the social costs of [jury] error are outweighed by the need for finality to litigation, to protect jurors from harassment after a verdict is rendered, and to prevent the possible exploitation of disgruntled ex-jurors.").

(n11)Footnote 11. See, e.g., *United States v. Caldwell, 83 F.3d 954 (8th Cir. 1996)* (proof that a juror's husband entered the jury room during breaks in deliberation was not barred by *Rule 606(b)*, since these incidents constituted possible external influence on the jury; however, a new trial was not warranted, because the defendant offered no evidence that the juror's husband "gained improper knowledge from watching the trial and then imparted that knowledge to the jury or even that any communication between the husband and the jurors occurred"); *United States v. Ruggiero, 56 F.3d 647 (5th Cir. 1995)* (*Rule 606(b)* did not preclude proof that one juror received information from an associate that the government's witness was a "good guy" and that one of the defendants was a thief; however, a new trial was not warranted, because the extraneous information did not prejudice the jury determination); *United States v. Robinson, 645 F.2d 616 (8th Cir. 1981)* (*Rule 606(b)* does not preclude a juror from testifying about publicity, attempted tampering and similar matters). Compare *United States v. Tallman, 952 F.2d 164 (8th Cir. 1991)* (there was no error in denying a new trial based on assertions in a juror's note that other jurors were harassing and insulting; to admit proof of contentiousness and conflict to impeach a verdict would be to eviscerate *Rule 606(b)*); *United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982)* (the Trial Court properly rejected an affidavit of a juror who had remembered seeing the defendant prior to trial so that he may have had a subconscious memory of the defendant during the deliberations; noting that the juror did not lie on *voir dire*, the Court cited *Rule 606(b)* in support of its conclusion that this was not a case in which improper information was brought before a juror, but one in which the defendant improperly sought to inquire into the mental processes of a juror).

(n12)Footnote 12. *United States v. Briggs, 291 F.3d 958 (7th Cir. 2002)* (juror's complaint that she was intimidated by other jurors was not an outside influence; juror testimony on the intimidation was barred by *Rule 606(b)*); *United States v. Stansfield, 101 F.3d 909 (3d Cir. 1996)* ("intimidation or harassment of one juror by another falls squarely within the core prohibition of the Rule").

(n13)Footnote 13. *United States v. DiSalvo, 34 F.3d 1204 (3d Cir. 1994)* (Trial Court properly refused to inquire into the statement of a juror made during deliberations, that "you can't get into this situation without being guilty"; the "courts have strictly enforced this mandate and have precluded inquiries regarding alleged jury misconduct or bias absent the existence of extra-record information or extra-jury influence").

(n14)Footnote 14. *United States v. Rutherford, 371 F.3d 634 (9th Cir. 2004)* (jurors learned of defendant's failure to testify "through their personal observations during trial, not through a prohibited route or improper ex parte contact"; no error in finding that juror testimony regarding the effect of the defendant's failure to take the stand was inadmissible under *Rule 606(b)*); *United States v. Tran, 122 F.3d 670 (8th Cir. 1997)* (the defendant's failure to testify "was not extraneous prejudicial information, because it was known to the jurors as a result of their presence at trial, not as a result of something disclosed to them that had not occurred in the courtroom"); *United States v. Voigt, 877 F.2d 1465 (10th Cir. 1989)* (Trial Court properly refused to conduct inquiry after receiving juror's affidavit that the defendant was convicted because he refused to take the stand).

(n15)Footnote 15. *Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)* (juror provided a statement that he voted for the death penalty after concluding that he could not convince any other juror to vote for a life sentence; this statement reflected that the juror misunderstood the jury instruction, which stated that a single juror could block capital punishment; but this evidence is inadmissible under *Rule 606(b)* because it is proof of the juror's mental process during deliberations).

(n16)Footnote 16. *United States v. Murphy, 836 F.2d 248 (6th Cir. 1988)* (the defendant was not permitted to inquire into whether jury deliberations were affected by one juror's vacation plans).

(n17)Footnote 17. See, e.g., *United States v. Tines, 70 F.3d 891 (6th Cir. 1995)* (Trial Judge properly declined to investigate allegations from a juror that the jury misinterpreted and misapplied the Trial Judge's "deadlock" instruction: a jury's "interpretation and application of the court's instructions is a part of the deliberative process and was correctly excluded under *Rule 606(b)*"); *Wilkerson v. Amco Corp., 703 F.2d 184 (5th Cir. 1983)* (Trial Judge properly exercised discretion in refusing permission to a losing party to interview jurors in order to find whether the jury employed an improper method of breaking a deadlock; the jurors would not have been permitted to testify about whether they followed instructions from the Trial Judge after they expressed an inability to agree on a verdict, thus any information developed in the proposed inquiry would have been inadmissible); *Abatino v. United States, 750 F.2d 1442 (9th Cir. 1985)* (holding that a juror's affidavit on the effect of an instruction was not admissible under *Rule 606(b)*).

(n18)Footnote 18. See also *Morgan v. Woessner, 975 F.2d 629 (9th Cir. 1992)* (the defendants were not entitled to a new trial on the ground that jurors said afterwards that they had discussed whether damages should cover the plaintiff's attorney's fees; these "subjective thoughts and beliefs" cannot be proved under *Rule 606(b)*); *Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989)* (Trial Judge erred in refusing to enter judgment upon the first verdict that the jury returned, which was for the defendant; the Judge violated *Rule 606(b)* in eliciting testimony from the jurors that they misunderstood the Judge's instructions); *Karl v. Burlington N. R. Co., 880 F.2d 68 (8th Cir. 1989)* (where the jury responded with inconsistent answers to special interrogatories regarding apportionment of responsibility and damages, the Trial Judge attempted to "clarify" by interviewing the foreperson; this was impermissible, because the inquiry went to the jurors' understanding or intentions and was forbidden by the Rule).

(n19)Footnote 19. See, e.g., *United States v. Dotson, 817 F.2d 1127 (5th Cir. 1987) , modified, 821 F.2d 1034 (1987)* (Trial Judge properly corrected a jury verdict after the jury was discharged, to acquit the defendants on one count; there is an exception from the general prohibition of *Rule 606(b)* for situations in which a clerical error in a

verdict is corrected to reflect the intent of the jury); *Eastridge Dev. Co. v. Halpert Assocs., 853 F.2d 772 (10th Cir. 1988)* (Trial Judge properly interrogated the jury foreman about a possible clerical error in the verdict and permissibly corrected the verdict when an obvious clerical error was discovered).

(n20)Footnote 20. See also *Karl v. Burlington N. R. Co., 880 F.2d 68 (8th Cir. 1989)* (the "clerical error" exception to *Rule 606(b)* applies only when the verdict is misreported due to some oversight or mistake, such as mistakenly stating that a defendant was guilty when the jury had actually agreed that he was not guilty; but the clerical error exception does not apply where the verdict "truly stated what the jury agreed to," even though the jury may have misinterpreted the Judge's instructions).

(n21)Footnote 21. *Attridge v. Cencorp Div., 836 F.2d 113 (2d Cir. 1987)* (inquiry of jurors is permissible where the goal was to determine whether the verdict intended by the jury was different from the judgment announced); *McCullough v. Consolidated Rail Corp., 937 F.2d 1167 (6th Cir. 1991)* (no error in amending a verdict sheet after the Trial Judge determined that the jury unanimously intended the award on the verdict sheet to be a net rather than a gross award).

(n22)Footnote 22. *United States v. Lloyd, 269 F.3d 228 (3d Cir. 2001)* ("Thus, a court may inquire into the verdict if prejudicial information was improperly brought to the jury's attention or if any outside influence was improperly brought to bear upon any juror. However, the court may only inquire into the existence of extraneous information, and not into the subjective effect of such information on the particular jurors.").

(n23)Footnote 23. See, e.g., *Rinehart v. Wedge, 943 F.2d 1158 (9th Cir. 1991)* (*Rule 606(b)* permits proof of external intrusions on the deliberative process, but does not permit inquiry into the "subjective effect" of such intrusions); *United States v. Simpson, 950 F.2d 1519 (10th Cir. 1991)* (juror may testify as to "*whether* any extraneous prejudicial information was improperly brought to bear" on juror deliberations, but "a juror may not testify as to the *effect* the outside information had upon the juror").

(n24)Footnote 24. See, e.g., *United States v. Berry, 92 F.3d 597 (7th Cir. 1996)* (affirming an order for a new trial, in light of evidence that the jury was given a transcript of taped conversations never admitted as evidence: "a district court must ignore a juror's comment regarding how a particular piece of material disposed the juror toward a particular verdict, and the district court must make an independent determination of the likely effect of the extraneous material").

(n25)Footnote 25. See, e.g., *United States v. Elder, 90 F.3d 1110 (6th Cir. 1996)* (Trial Judge properly denied a defense request to examine juror notebooks; because jurors may not be questioned about thought processes, their notebooks may not be examined as an inquiry into thought processes); *Hard v. Burlington N. R. Co., 870 F.2d 1454, 1461 (10th Cir. 1989)* (*Rule 606(b)* "bars not just juror testimony but evidence of any sort as to a statement by a juror concerning jury deliberations, so long as a juror would be barred from making the same statement in the form of testimony in court"); *Ohanian v. Avis Rent A Car Sys., 779 F.2d 101 (2d Cir. 1985)* (notes by jury, made while determining damages, fall within *Rule 606(b)* and thus "may not be used to attack the verdict").

(n26)Footnote 26. See, e.g., *Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975)* (inquiry by the Court into the deliberative process of the jury in an attempt to save, not to impeach, the verdict was permitted).

(n27)Footnote 27. See, e.g., *Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998)* (in a habeas corpus proceeding, *Rule 606(b)* was applied to preclude proof of juror deliberations in the state criminal trial); *McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997)* (in a habeas corpus proceeding, *Federal Rule 606(b)*, and not the state rule of evidence, applies to determine the admissibility of a juror's testimony offered to impeach a State Court verdict).

(n28)Footnote 28. See, e.g., *Durr v. Cook, 589 F.2d 891 (5th Cir. 1979)* , holding that a state statute barring a juror from testifying to his own misconduct could not constitutionally bar an inquiry of a juror as to whether the juror brought extraneous information into the jury room.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 606 RULE 606

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606.03 Annotated Cases

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[1] Rule 606(a) -- At the Trial

United States v. Kills Enemy, 3 F.3d 1201 (8th Cir. 1993) : Although it affirmed a cocaine conviction, the Court expressed its "concern about the government's actions" in calling a member of the jury venire in the case to testify. It concluded that this was "a close case," and that "the result might well be different" in another case "with a developed record of real harm."

[2] Rule 606(b) -- Inquiry Into Validity of Verdict or Indictment

[a] Rule 606(b) -- Bench Trials and Mental Processes of Judges

Morrison v. Kimmelman, 650 F. Supp. 801 (D.N.J. 1986) : Finding that a lawyer's failure to discover and seek suppression of unconstitutionally seized evidence prejudiced a defendant, the Court held that the state Trial Judge could not be called to testify regarding his thought processes in convicting the defendant.

Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd on other grounds, 466 U.S. 668 (1984)* : Following the denial of habeas corpus relief to a petitioner sentenced to death for three murders, the Court of Appeals remanded the case, finding it was error to permit the State Judge who sentenced the petitioner to testify that his sentence would not have changed even if defense counsel had presented mitigating character evidence. Relying on *Rule 606(b)*, the Court concluded that by waiving a jury the petitioner substituted the State Trial Judge for the jury, and the same strong policy reasons for not inquiring into the mental processes of jurors applied in this case.

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) : The Court held in a habeas corpus case that a Federal Court cannot consider postdecision statements by a State Trial Judge as to his mental processes in sentencing.

[b] Rule 606(b) -- Bias of Jurors

Wright v. United States, 559 F. Supp. 1139 (E.D.N.Y. 1983) , *aff'd*, *732 F.2d 1048 (2d Cir. 1984)* : Denying a postconviction motion to vacate conspiracy and extortion convictions, the District Court observed that Federal Courts faced with the question whether a defendant was prejudiced by racial bias in the jury room "have hesitated to apply the rule [606(b)] dogmatically" in light of the *Sixth Amendment's* guarantee of a fair and impartial jury. In this case, the defendant had not made a sufficient showing of prejudice to warrant a hearing, as the only evidence indicative of prejudice was a racial epithet used in reference to the defendant by one juror to a coworker. In *Tobias v. Smith*, n1 a state prisoner sought habeas corpus relief on the ground, *inter alia*, that several members of the jury had racial prejudice against him. Citing *Rule 606(b)* and the *Sixth Amendment* fair trial right, the District Court held that juror bias or prejudice may be an extraneous influence that can be the subject of inquiry, especially if statements made during deliberations indicate that a juror lied during *voir dire*. The Court decided that it was necessary to have a hearing in this case to inquire into the claim of bias.

United States v. Duzac, 622 F.2d 911 (5th Cir. 1980) : A post-verdict inquiry was deemed inappropriate with respect to a jury note to the Trial Judge indicating there were "certain prejudices" among the jury that prevented a verdict on one count. The Judge had responded by telling the jury to decide the case on the evidence and without regard to prejudice or sympathy.

Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987) : Although recognizing that testimony concerning an alleged racial slur during jury deliberations in State Court generally could not be admitted in a habeas corpus case governed by *Rule 606(b)*, the Court observed that "[t]he rule of juror incompetency cannot be applied in such an unfair manner as to deny due process"; in this case there was no substantial probability that the alleged slur made a difference in the outcome of the trial.

Smith v. Brewer, 444 F. Supp. 482 (S.D. Iowa 1978) , *aff'd*, *577 F.2d 466 (8th Cir. 1978)* : The District Court found that under the facts of this habeas corpus case racial bias evident in the jury room was not a proper subject of inquiry under the Rule, but suggested that fundamental fairness might require such an inquiry in some cases.

[c] Rule 606(b) -- Collateral Estoppel Inquiry

United States v. Barragan-Cepeda, 29 F.3d 1378 (9th Cir. 1994) : A defendant charged as a deported alien who illegally reentered the United States defended on the ground that he had been acquitted of similar charges in 1980 on a finding that he was a citizen. The Court held it was error to exclude affidavits from two jurors in the 1980 trial, as the defendant was not seeking to impeach that verdict but to rely upon it.

[d] Rule 606(b) -- Competency of Juror

Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980) : In a habeas corpus case, the Court said that due process required a hearing into a juror's competence at trial, when one month after trial the juror complained to the prosecutor of "harassment by 'voices' " and indicated that he had heard "vibrations" throughout the trial, particularly in the jury room.

Government of Virgin Islands v. Nicholas, 759 F.2d 1073 (3d Cir. 1985) : The Court affirmed (2-1) the rejection without an evidentiary hearing of a collateral attack on murder, robbery, and other convictions based on a claim that a juror's hearing was impaired. Reasoning that post-verdict inquiries should be resisted in most instances, even when a

juror's competency is attacked, the Court found the showing of the juror's difficulty in understanding the evidence insufficient to warrant a hearing.

Weaver v. Puckett, 896 F.2d 126 (5th Cir. 1990) : The Court affirmed denial of habeas corpus relief where the petitioner alleged that a juror was so hearing-impaired as to offend *Sixth Amendment* rights. Juror competency is an "internal" matter not provable by the juror's testimony, and even if the common-law exception still applied where there is substantial if not wholly conclusive evidence of incompetency, in this case the requisite extremely strong showing from nonjuror sources that would permit a post-verdict inquiry of the juror was not made.

[e] Rule 606(b) -- Compromise Verdicts

United States v. Straach, 987 F.2d 232 (5th Cir. 1993) : The Court sustained the denial of a mistrial motion, which was made when two jurors came forward after the verdicts were returned in a firearms sale case and said that they had consistently maintained that the defendant was not guilty on all counts, but had been pressured into compromising their verdicts on two counts. The Court concluded that any "pressure" did not count as an outside influence.

[f] Rule 606(b) -- Drug and Alcohol Use

Tanner v. United States, 483 U.S. 107 (1987) : The Court held that *Rule 606(b)* prevented proof of a juror's allegations that several jurors had used drugs and alcohol during deliberations. This case is discussed in the Editorial Explanatory Comment, *§ 606.02[4]*.

[g] Rule 606(b) -- Errors in Verdicts

Plummer v. Springfield Terminal Ry., 5 F.3d 1 (1st Cir. 1993) : The jury in a FELA case found the defendant 12 percent at fault and subsequently answered an interrogatory on damages (which said not to make any deduction for the plaintiff's fault) with an amount that was exactly 12 percent of what the plaintiff had claimed. The Trial Judge discharged the jury and entered a judgment for 12 percent of the amount in the interrogatory answer. Rejecting the view taken in some Circuits, and construing the "clerical error" exception to the Rule narrowly, the Court held there was no error in refusing the plaintiff's request to conduct a *voir dire* of the jury to clarify their verdict or to obtain affidavits from jurors, as the Rule bars inquiry into the juror's thought processes and understanding of the instructions.

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989) : The Court reversed a judgment for a plaintiff in a personal injury case, holding it was error to refuse to enter judgment upon the first verdict that the jury returned, which was for the defendant. The Court concluded that the Judge violated *Rule 606(b)* in eliciting unsworn testimony from the jurors that they misunderstood the instructions and in directing the jury to resume deliberations. The Court distinguished cases in which testimony is received that the verdict announced was not that agreed to in deliberations or a clerical error is corrected. In *United States v. Dotson*, n2 the Court affirmed drug-related convictions, holding that the Trial Judge properly corrected a jury verdict after the jury was discharged to acquit the defendants on one count. The Court recognized an exception from the general prohibition of *Rule 606(b)* for situations in which a clerical error in a verdict is corrected to reflect the intent of the jury.

[h] Rule 606(b) -- Experiments

Simon v. Kuhlman, 488 F. Supp. 59 (S.D.N.Y. 1979) : In a state prisoner's habeas corpus action, the Court held that the petitioner was entitled to a hearing on his claim that jurors improperly experimented by placing a stocking over one

juror's face. Citing *Rule 606(b)* as persuasive authority for its constitutional ruling, the Court said the hearing could inquire into how any experiment came about, how many jurors were involved, whether jurors discussed the results of the experiment and, if so, at what point in the deliberations.

United States v. Castello, 526 F. Supp. 847 (W.D. Tex. 1981) : The Court granted a new trial to a defendant convicted of assault with a dangerous weapon when one juror conducted a ballistics experiment during a weekend recess and reported the results to the other jurors.

In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982) : After the verdict was returned in an action against manufacturers of aluminum wiring alleged to be responsible for a fire in a supper club that killed many people, one juror wrote an anonymous letter to a newspaper indicating that he had experimented at home with aluminum wiring. At a post-trial hearing, the Trial Judge learned that the juror communicated his information to at least six other jurors during the trial. Under these circumstances, the Court found that reversal of a judgment for the defendants was required and suggested that at a second trial the Judge and counsel should consider the possibility that jurors may become concerned with the wiring in their own homes, and the desirability of more explicit precautionary instructions concerning proper juror behavior.

[i] Rule 606(b) -- Extraneous Prejudicial Information

[i] Rule 606(b) -- Civil Cases

Wilson v. Vermont Castings, Inc., 170 F.3d 391 (3d Cir. 1999) : The plaintiff in a product liability action had been severely burned when her dress caught fire as she warmed herself by a woodburning stove on which she had left open a door. Before trial, the defendant stove manufacturer's motion *in limine* to exclude any evidence of the existence or contents of the stove owner's manual was granted, on the ground that the plaintiff had never read or seen the manual. Following a verdict for the defendant, the plaintiff moved for a new trial on the ground that a juror who owned a stove made by the same manufacturer had told the other jurors during deliberations: (a) about personal experience with the stove, (b) that the stove came with a manual, (c) the content of the manual's warnings, and (d) that even in light of what she knew from the trial and from a review of the manual she would continue to operate the stove with the door open. The Court held that the manual and its contents were "extraneous information," but the information was not prejudicial because the plaintiff had prevailed on the issue of defect, which was the only issue to which the manual was relevant in this case. The juror's statements regarding her own conduct, by contrast, were not "extraneous information" and inquiry into the effect of those statements on the jurors' thinking is barred by *Rule 606(b)*. Thus, there was no error in denying the new trial motion.

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) : The Court affirmed the grant of a new trial when, following a jury verdict for a civil rights plaintiff who claimed that deputy sheriffs used excessive force against him, it appeared that several exhibits ruled inadmissible had mistakenly been submitted to the jury.

In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982) : After the verdict was returned in an action against manufacturers of aluminum wiring alleged to be responsible for a fire in a supper club that killed many people, one juror wrote an anonymous letter to a newspaper indicating that he had experimented at home with aluminum wiring. At a post-trial hearing, the Trial Judge learned that the juror communicated his information to at least six other jurors during the trial. Under these circumstances, the Court found that reversal was required.

Hard v. Burlington N. R.R., 812 F.2d 482 (9th Cir. 1987) : The Court remanded for a determination whether a juror failed to answer honestly material questions asked during *voir dire*. Several jurors submitted affidavits stating that one juror made statements concerning the railroad's settlement practices, and the plaintiff, a railroad employee, learned that this juror and his father were former railroad employees. On *voir dire*, the juror had indicated that he had no prior contacts with the railroad. The Court concluded that the plaintiff's evidence concerned extraneous influences and was not barred by *Rule 606(b)*, but added that the plaintiff "must still establish that the error or defect in the proceedings affected the substantial rights of the parties to be entitled to a new trial."

[ii] Rule 606(b) -- Extraneous Prejudicial Information -- Criminal Cases

United States v. Boney, 68 F.3d 497 (D.C. Cir. 1995) : The defendant challenged his conviction on narcotics charges after it was discovered that the foreman of his jury had a prior felony conviction, which he did not reveal on his juror qualification form or on *voir dire*. Remanding for an evidentiary hearing to determine whether the foreman's felony status constituted "actual bias," the Court held that *Rule 606(b)* did not bar inquiry into whether the foreman had disclosed his prior felony or experiences with the criminal justice system to other jurors during deliberations: "Although it is expected that jurors will bring their various life experiences into the jury room, [the foreman's] experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of [the foreman's] felon status would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." In *United States v. Brooks*, n3 a defendant convicted of murder challenged his 13-year-old conviction by offering an affidavit from a juror, who said he remembered seeing the defendant prior to trial so that he may have had a subconscious memory of the defendant during the deliberations. Distinguishing cases in which a juror lies on *voir dire*, the Court cited *Rule 606(b)* in support of its conclusion that this was not a case in which improper information was brought before a juror, but one in which the defendant improperly sought to inquire into the mental processes of a juror.

Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975) : To support a new trial motion, defendants convicted of murder in a pre-Rules trial supplied affidavits from two jurors that cited rumors of other killings in the Virgin Islands that circulated among the jurors. Citing *Rule 606*, the Court suggested that the only extraneous information for which a verdict could be impeached would involve that relating specifically to the guilt of those on trial or something actually happening to one or more jurors that threatens impartiality.

United States v. Duncan, 598 F.2d 839 (4th Cir. 1979) : The Court concluded that it was proper for a juror to testify that she consulted a dictionary, but that neither she nor any other juror could testify to the effect of the extraneous influence on the deliberations.

United States v. Ruggiero, 56 F.3d 647 (5th Cir. 1995) : After the defendants had been convicted for securities violations, one of the jurors disclosed that she learned information during the trial concerning the principal prosecution witness and one defendant. Affirming denial of a new trial, the Court held there was no abuse of discretion in the conclusion that the government had rebutted the presumption that the extrinsic information prejudiced the jury. Although the juror's testimony that the information had no effect on her ability to be fair and impartial might have been inadmissible, there was no indication the Trial Judge considered it when making the required assessment of the content of the extrinsic material, the manner in which it came to the jury's attention, and the weight of the evidence against the defendant.

United States v. Hill, 688 F.2d 18 (6th Cir. 1982) : The Court found no prejudicial error in one juror's reading a law book in the jury room without permission, where the juror was dismissed by stipulation before deliberations began

and testified in chambers that he had not discussed what he had read with another juror.

United States v. Paneras, 222 F.3d 406 (7th Cir. 2000) : In a prosecution for fraud and related charges arising out of his shady business and personal affairs, the defendant argued that a new trial should have been granted because one of the jurors created a cartoon depicting his perception of the defendant and the events described at trial; this cartoon was shown to the jurors and the defendant contended that at least one of the jurors changed her mind after seeing the cartoon. The Court affirmed the rejection of the motion for a new trial, saying it was "not convinced that a juror's cartoon rendering of the events at trial constitutes an extraneous influence." But even if it were extraneous, *Rule 606(b)* precludes proof that a juror's decision was influenced by it. In *United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990)* , after a bailiff discovered a map that had not been admitted in evidence in the jury room during deliberations in a cocaine conspiracy prosecution, the Trial Judge brought the matter to the parties' attention, but did not examine the jurors until after the verdict was rendered. The Court held that the defendants waived any assertion of error attributable to the timing of the examination by not making a timely objection, but noted that in any event *Rule 606(b)* would permit a post-verdict inquiry regarding the map, as it was "extraneous ... information." See also *United States v. Sababu* n4(finding no abuse of discretion in refusing to conduct a *voir dire* of the jury when it was discovered during deliberations that inadmissible evidence had been sent to the jury room; *Rule 606(b)* is inapplicable to preverdict inquiries). In *United States v. Bruscino*, n5 the Court affirmed conspiracy and murder convictions, finding there was no reasonable possibility that two documents not admitted as evidence that went to the jury room prejudiced the defendants.

United States v. Brown, 108 F.3d 863 (8th Cir. 1997) : Affirming the grant of a new trial in a Medicaid/Medicare kickback case, the Court held there was no error in asking jurors on post-verdict *voir dire* whether some jurors had been told that a codefendant had pleaded guilty just before the trial. In *United States v. Caldwell, 83 F.3d 954 (8th Cir. 1996)* , the defendant sought to overturn a verdict against him on the ground that a husband of one of the jurors entered the jury room during several breaks. The Court held that proof of these incidents was not barred by *Rule 606(b)*, since these incidents constituted possible external influence on the jury. Nonetheless, relief was properly denied, since the defendant offered no evidence that the juror's husband "gained improper knowledge from watching the trial and then imparted that knowledge to the jury or even that any communication between the husband and the jurors occurred." Although the Court found in *United States v. Bassler*, n6 that a juror's taking notes in violation of the Trial Judge's instructions and taking notes on a book about jury duty that was not in evidence amounted to "an extrinsic influence," the Court concluded that the conduct was not prejudicial. In *United States v. Robinson*, n7 the Court stated that the Rule does not preclude a juror from testifying about publicity, attempted tampering, and similar matters.

United States v. Maree, 934 F.2d 196 (9th Cir. 1991) : The Court remanded a drug conviction for a new trial, holding that a juror's affidavits that she discussed the evidence with friends during the trial should have been admitted. The affidavits factually explained the outside influence and information presented to the juror; only the subjective effect of that influence is inadmissible under the Rule. In a RICO prosecution, *United States v. Bagnariol*, n8 the Court ruled that it was proper to elicit testimony from jurors concerning one juror's visit to the public library to do independent research.

United States v. Davis, 60 F.3d 1479 (10th Cir. 1995) : In a prosecution for Medicaid fraud, the Court held there was no abuse of discretion in denying the defendant's request for a hearing in connection with a new trial motion alleging that jurors had watched TV news reports of the trial with the sound muted. Once the fact of potential misconduct is brought to the attention of the Trial Judge, who is uniquely able to assess the relative severity of the allegations, an evidentiary hearing may be an exercise in futility, since further questioning of jurors as to the effect of the misconduct is precluded by the Rule.

Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1985) : In granting a state prisoner habeas corpus relief from a murder conviction, the Court considered, *inter alia*, that a juror in his case had previously sat through a trial of three others charged in the crime and heard testimony of an accomplice who had confessed and pleaded guilty. The Court referred to this fact as "historical, objective" and concluded it was not barred by *Rule 606(b)*. In *United States v. Gaffney*, n9 the Court granted a new trial in a mail fraud case because of extraneous influences upon the jury, including: several jurors were aware that the Judge had denied motions for judgment of acquittal, several jurors were aware of one defendant's criminal record, a number of jurors watched or heard news reports about the trial, and at least two jurors were contacted by a person who told them not to believe the evidence.

[j] Rule 606(b) -- Habeas Corpus Proceedings

Bibbins v. Dalsheim, 21 F.3d 13 (2d Cir. 1994) : Affirming denial of a habeas corpus petition based on alleged juror misconduct, the Court noted that *Rule 606(b)* would be applied in determining whether there was actual prejudice flowing from the jury's erroneous consideration of extrarecord evidence.

United States v. Cheek, 94 F.3d 136 (4th Cir. 1996) : A defendant convicted for conducting a continuing criminal enterprise petitioned for habeas corpus relief on the ground that his codefendant had improperly contacted a juror during the trial. Reversing denial of the petition, the Court found that the government had not rebutted the presumption of prejudice and held that it was error to ask the juror whether he had listened to and considered all the evidence and to rely on this evidence of his mental processes in ruling on the petition.

Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998) : Pyles' defense at trial for murdering a police officer was that he thought the victim was a robber, not a police officer, when the victim confronted him outside a closed convenience store. He sought habeas relief because a juror had made an unauthorized visit to the crime scene. To support his claim, he submitted affidavits of the juror, who admitted that she visited the scene; that the visit gave her a new perspective because the actual scene was "much smaller" than that painted at trial; and that as a result of her visit, she was convinced that the defendant must have been aware that the victim arrived in a police car and was a police officer. The Court held that almost all of the assertions in these affidavits were inadmissible under *Rule 606(b)*, because the vast majority of the assertions described the juror's mental impressions. The only extraneous prejudicial information contained in the affidavits was the bare fact that the juror had visited the crime scene. Because the juror's unauthorized visit itself constituted harmless error, the denial of habeas corpus relief was affirmed. In *Williams v. Collins, 16 F.3d 626 (5th Cir. 1994)* , the Court held that the Rule precluded use at the evidentiary hearing on a habeas corpus petition of testimony from trial jurors as to the effects if mitigating evidence had been presented.

Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999) : Following the trial in a state capital murder case, a juror told an investigator that he voted for the death penalty after concluding that he could not persuade any other juror to vote for lenience, and that he forgot that a single juror could block capital punishment. Affirming denial of habeas corpus, the Court noted that *Rule 606(b)* precludes admission of such evidence concerning a juror's mental processes in collateral attacks on state judgments as well as in direct attacks on federal verdicts. In *Jacobs v. Marathon County, 73 F.3d 164 (7th Cir. 1996)* , after a defendant was acquitted on five counts of murder, the state sought to try him for kidnapping and false imprisonment. The Court affirmed denial of habeas corpus relief sought on double jeopardy grounds. In the determination of the issues resolved by the first prosecution, the defendant relied upon five identical affidavits from jurors in the murder trial stating the grounds of their verdict. The Court held that the affidavits were admissible since they were not an inquiry into the validity of a verdict, but that "admissibility does not compel a finding of believability." These affidavits were lawyer-generated, they were in "quasi-legalese," and they were obtained three years after the first trial, so they were insufficient proof of the defendant's double jeopardy claim.

McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997) , *amended*, *116 F.3d 364* , *vacated in part on other grounds en banc*, *130 F.3d 833 (9th Cir. 1997)* : The Court held that in a habeas corpus proceeding, *Federal Rule 606(b)*, and not the state rule of evidence, applies to determine the admissibility of a juror's testimony offered to impeach a State Court verdict. In this case, the juror's affidavit was properly excluded. The juror stated that she and other jurors operated under two misconceptions: that if the defendant received a life sentence, he would be paroled, and that if he received the death penalty, he would not really be executed. Juror misconceptions about the consequences of a life or death sentence do not constitute extraneous influences that can be permissibly proved under *Rule 606(b)*.

Capps v. Sullivan, 921 F.2d 260 (10th Cir. 1990) : The Court held that evidence from two jurors, who indicated they would have voted differently had they been given an entrapment instruction in the petitioner's state trial, was erroneously considered in a federal habeas proceeding.

[k] Rule 606(b) -- Improper Contacts or Threats to Jury

United States v. Cheek, 94 F.3d 136 (4th Cir. 1996) : A defendant convicted for conducting a continuing criminal enterprise petitioned for habeas corpus relief on the ground that his codefendant had improperly contacted a juror during the trial. Reversing denial of the petition, the Court found that the government had not rebutted the presumption of prejudice and held that it was error to ask the juror whether he had listened to and considered all the evidence and to rely on this evidence of his mental processes in ruling on the petition.

Port Terminal & Warehousing Co. v. John S. James Co., 92 F.R.D. 100, 1982-1 Trade Cas. (CCH) P64594 (S.D. Ga. 1981) , *aff'd*, *695 F.2d 1328, 1982-83 Trade Cas. (CCH) P65147 (11th Cir. 1983)* : When the plaintiffs' counsel learned following the verdict in this antitrust action that one of the defendants may have made an improper overture to a juror during the trial, the Court ordered a hearing after instructing all counsel not to discuss the matter outside their law firms. Although the Court found that the factual showing at the hearing raised a presumption of prejudice, it concluded that the defendants were not actually hurt by anything that happened and denied a new trial request.

[l] Rule 606(b) -- Improper Exhibits in Jury Room

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) : The Court affirmed the grant of a new trial when, following a jury verdict for a civil rights plaintiff who claimed that deputy sheriffs used excessive force against him, it appeared that several exhibits ruled inadmissible had mistakenly been submitted to the jury.

United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990) : After a bailiff discovered a map that had not been admitted into evidence in the jury room during deliberations in a cocaine conspiracy prosecution, the Trial Judge brought the matter to the parties' attention, but did not examine the jurors until after the verdict was given. The Court held that the defendants waived any assertion of error attributable to the timing of the examination by not making a timely objection, but noted that in any event *Rule 606(b)* would permit a post-verdict inquiry regarding the map, as it was "extraneous ... information." In *United States v. Bruscino*, n10 the Court affirmed conspiracy and murder convictions, finding there was no reasonable possibility that two documents not admitted as evidence that went to the jury room prejudiced the defendants.

[m] Rule 606(b) -- Instructions to the Jury

United States v. Black, 843 F.2d 1456 (D.C. Cir. 1988) : Affirming a tax evasion conviction, the Court held that a juror's affidavit, offered to prove that the Trial Judge's anti-deadlock instructions were coercive, not only failed to prove

this fact, but also were inadmissible under *Rule 606(b)*.

Moores v. Navitrade S.A., 94 F.R.D. 340 (D. Me. 1982) , *aff'd*, *705 F.2d 440 (1st Cir. 1983)* : The District Court denied a motion for a new trial based on an affidavit by the plaintiff's agent offered to support the conclusion that the jury did not follow the Court's instructions. The allegation involved an inquiry into the mental processes of the jury, which would be impermissible.

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989) : The Court reversed a judgment for a plaintiff in a personal injury case, holding it was error to refuse to enter judgment upon the first verdict that the jury returned, which was for the defendant. The Trial Judge violated *Rule 606(b)* in eliciting unsworn testimony from the jurors that they misunderstood the instructions and in directing the jury to resume deliberations. The Court distinguished cases in which testimony is received that the verdict announced was not that agreed to in deliberations or a clerical error is corrected. In *Peveto v. Sears, Roebuck & Co.*, n11 the Court affirmed a judgment based upon a jury verdict finding the user of an electrical saw 96 percent at fault, holding that even if the jury was erroneously instructed on contributory negligence, this was not an extraneous influence.

United States v. Tines, 70 F.3d 891 (6th Cir. 1995) : Affirming convictions of prison guards for violating inmates' civil rights, the Court held that the Trial Judge properly declined to investigate allegations from a juror that the jury misinterpreted and misapplied a "deadlock" instruction. The Court concluded that "[a] jury's interpretation and application of the court's instructions is a part of the deliberative process and was correctly excluded under *Rule 606(b)*," and that "[h]ow the jury interprets an *Allen* charge to come to a verdict is no exception to this principle."

United States v. Bussell, 414 F.3d 1048 (9th Cir. 2005) : When the defendant's codefendant-husband died during jury deliberations in their trial for bankruptcy fraud, the jury was given a supplemental instruction that the husband's case "has been disposed of and is no longer before you" and that the jurors were not to "guess or speculate as to the reason for the disposition." The defendant attacked the guilty verdict against her, relying on interviews of four jurors indicating that the jury had speculated that the husband had entered a guilty plea. Affirming denial of the defendant's new trial motion, the Court held that the juror interviews were inadmissible under *Rule 606(b)*, rejecting the argument that the jurors' speculation was "extraneous prejudicial information." The alleged source of speculation--the supplemental instruction--was not extraneous. "It did not enter the jury room through an external, prohibited route, but rather was part of the trial." In *Abatino v. United States*, n12 the Court held that a juror's affidavit on the effect of the Judge's instructions was not admissible under *Rule 606(b)*.

[n] Rule 606(b) -- Interpreter in Jury Room

United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987) : The Court stated that when an interpreter is present in the jury room to assist a deaf juror, a Trial Judge should inquire of the interpreter and the jurors as to whether the interpreter abided by the oath and refrained from participating in deliberations. Although the Judge did not inquire of the jurors in this case, the Court found that there was no allegation that the interpreter's representation that the oath was complied with was untrue.

[o] Rule 606(b) -- Interviews with Jurors

United States v. Bailey, 834 F.2d 218 (1st Cir. 1987) : The Court held that a defendant convicted of corruptly endeavoring to influence a juror should have been permitted Court-controlled interviews with jurors who served with

the juror who the defendant was charged with contacting. Such interviews might have provided the defendant with evidence concerning the key juror's credibility and character.

United States v. Moon, 718 F.2d 1210 (2d Cir. 1983) : Affirming convictions for filing false tax returns, the Court found that the Trial Judge had made an adequate inquiry into whether the jury had been exposed to improper influences during the trial. It approved the Judge's order barring the attorneys, the defendants, and their agents from contacting jurors without prior consent of the Court.

United States v. Gravely, 840 F.2d 1156, 1988-1 Trade Cas. (CCH) P67906 (4th Cir. 1988) : Affirming antitrust and obstruction of justice convictions, the Court held that a defendant was not entitled to permission to conduct posttrial interviews with jurors absent a showing of outside influence. In *United States v. Barber*, n13 the Court affirmed a RICO conviction and upheld the Trial Judge's post-verdict refusal to permit the defendant to interview two jurors who stated after they left the courtroom that they were "gravely disturbed" by the verdict. The Court noted that "[t]he opportunities for other abuses which would greatly exceed the possibly unfortunate consequences of not pursuing belated, post-verdict claims of intimidation by fellow jurors are obvious."

United States v. Davila, 704 F.2d 749 (5th Cir. 1983) : The Court upheld convictions for sexually abusing illegal aliens, finding no error in denying the defendants' request to interview the jurors after the verdict, as they made no preliminary showing of misconduct and sought "simply to discover what happened in the jury's deliberations in the hope of uncovering an impropriety." The Court upheld a local rule barring attorneys and parties from contacting jurors without permission of the District Judge in *Big John, B.V. v. Indian Head Grain Co.* n14 In *Wilkerson v. Amco Corp.*, n15 the Court found no abuse of discretion in refusing a losing party permission to interview jurors in order to find whether the jury employed an improper method of breaking a deadlock. Absent some claim of misconduct, the Court expressed a preference for avoiding chances of jury tampering and "ransacking the jurors." The jurors would not have been permitted to testify whether they followed the Judge's instructions, and any information developed in the proposed inquiry would have been inadmissible.

United States v. Miller, 806 F.2d 223 (10th Cir. 1986) : Affirming a rape conviction, the Court held it was proper to deny a motion by the defendant to interview a juror who had contacted defense counsel to express her reservations about the verdict. Any inquiry could not result in evidence that would be admissible under *Rule 606(b)*.

[p] Rule 606(b) -- Judicial Discretion

United States v. Aimone, 715 F.2d 822 (3d Cir. 1983) : The Court affirmed RICO convictions, finding no error in the denial of a postjudgment inquiry into jury deliberations. One juror had expressed concern about separation from her husband and about the pressure of deliberations imposed by actions of the foreperson. The Trial Judge spoke with her and consulted counsel for both sides concerning the action he should take. Ultimately, he gave a supplemental charge to the jury that discussed the role of the foreperson. The Court found that since the charge was given to all jurors in open Court, there was no need for inquiry into what the one juror might have told others about her conversations with the Judge.

Resolution Trust Corp. v. Stone, 998 F.2d 1534 (10th Cir. 1993) : In a suit alleging racketeering and fraud, the Court found no violation of *Rule 606(b)* in asking the jury foreman to clarify the verdict.

United States v. Ayarza-Garcia, 819 F.2d 1043 (11th Cir. 1987) : The Court held that a Trial Judge properly decided not to conduct an investigation after a juror published an article describing jury deliberations. No extraneous influences were alleged.

[q] Rule 606(b) -- Jurors' Notebooks

United States v. Elder, 90 F.3d 1110 (6th Cir. 1996) : The Court held there was no error in prohibiting counsel from reviewing jurors' trial notebooks when an issue of exposure to prejudicial information arose, as the notebooks could contain statements barred by the Rule concerning the jurors' thought processes, comments, or calculations.

[r] Rule 606(b) -- Jury Misconduct

Tanner v. United States, 483 U.S. 107 (1987) : The Supreme Court rejected the defendants' claim that substance abuse was an "outside" or "extraneous" influence that could impeach a jury verdict. The Court also rejected the argument the failure to inquire into juror intoxication denies a defendant a fair trial before an impartial and competent jury, reasoning that other aspects of the trial process -- *voir dire* of jurors, observations by the Trial Judge and courtroom participants, and observations and reports by fellow jurors -- were adequate to assure defendants fair trials. This case is discussed in the Editorial Explanatory Comment, *§ 606.02[4]*.

United States v. Connolly, 341 F.3d 16 (1st Cir. 2003) : Affirming the conviction of a former FBI agent for racketeering and other offenses, the Court found no violation of *Rule 606(b)* when the defendant's post-trial request to inquire into whether jurors took notes into the jury room was refused. The Judge had explained to the jurors that he did not permit note-taking during the trial, but a newspaper report published after the trial revealed that jurors went home and jotted down notes, which they took into deliberations. The Court agreed that this was not a violation of the Judge's instructions. Moreover, the Court held that juror notes were not extrinsic evidence, but were intrinsic because they reflected juror impressions and recollections.

Anderson v. Miller, 346 F.3d 315 (2d Cir. 2003) : A State prisoner sought a writ of habeas corpus, presenting affidavits from two jurors indicating that they felt coerced by other jurors into finding the defendant guilty. The Court upheld the denial of the writ on the ground that while the jurors might have felt pressured, no reasonable juror would have thought herself to be facing a physical assault if she refused to vote for conviction. In the course of its opinion, the Court noted that *Rule 606(b)* could not prohibit proof that there were threats or acts of physical violence during jury deliberations. It stated if *Rule 606(b)* were construed to preclude hearing juror testimony when there are credible allegations that a juror's safety was threatened by fellow jurors, "it would raise serious constitutional concerns with respect to a defendant's right to a fair trial."

United States v. Stansfield, 101 F.3d 909 (3d Cir. 1996) : The jury in a mail fraud and witness tampering case rendered a partial verdict of guilty on certain counts and had just returned to the jury room to commence deliberations on the remaining count when three jurors abruptly left the jury room and refused to return, stating that they had been intimidated by gender-based insults. The Court held that *Rule 606(b)* bars juror testimony concerning intimidation or harassment of one juror by another.

United States v. Brito, 136 F.3d 397 (5th Cir. 1998) : In a marijuana-importation prosecution, the Court found no abuse of discretion in denial of new trial motions based on juror affidavits that the jury improperly discussed extraneous general information concerning sentencing and the defendants' rights of appeal, contrary to specific instructions not to

consider punishment, where nothing suggested that the information came to the jury's attention from an outside source. In *United States v. Martinez-Moncivais, 14 F.3d 1030 (5th Cir. 1994)* , the Court affirmed convictions for drug trafficking offenses, holding there was no abuse of discretion in denying the defendant's motion for a new trial. A juror's affidavit that two other jurors suggested that if the defendant were innocent he would have taken the stand in his own defense did not show that external influences were brought to bear on the deliberative process.

United States v. Logan, 250 F.3d 350 (6th Cir. 2001) : Affirming fraud and related convictions, the Court found no error in the Trial Judge's preclusion of post-verdict interviews with jurors regarding possibly premature deliberations. The alleged misconduct constituted a potential internal rather than external influence on the jury, and because juror testimony about internal influences is prohibited by *Rule 606(b)*, there was no point in allowing the interviews.

United States v. Briggs, 291 F.3d 958 (7th Cir. 2002) : Affirming drug convictions, the Court held that the Trial Judge did not err in refusing to conduct a hearing into a juror's complaints that she had been "intimidated" by other jurors into finding the defendant guilty. Because this complaint involved only "intrajury influences on the verdict," and there was no allegation of any extraneous prejudicial information or outside influence, the juror's allegations were not admissible under *Rule 606(b)*.

United States v. Tran, 122 F.3d 670 (8th Cir. 1997) : The defendant, convicted of conspiracy to traffic in counterfeit checks, sought a hearing on jury misconduct, proffering affidavits from jurors indicating that the defendant's failure to testify at trial was used as evidence against him in jury deliberations. The Court held that the Trial Judge properly denied the motion for a hearing, because the affidavits were inadmissible under *Rule 606(b)*. The defendant's failure to testify "was not extraneous prejudicial information, because it was known to the jurors as a result of their presence at trial, not as a result of something disclosed to them that had not occurred in the courtroom." The Court distinguished *United States v. Swinton, 75 F.3d 374 (8th Cir. 1996)* , a case in which the jurors were informed of a prior conviction of the defendant that had not been admitted at trial. See also *United States v. Rodriguez, 116 F.3d 1225 (8th Cir. 1997)* , similarly holding inadmissible a juror's statement that the jury considered the defendant's failure to testify as an admission of guilt. In *United States v. Blumeyer*, n16 the Court held (2-1) that it was error to grant defendants in a fraud case a new trial based upon juror taint. One juror, who had hesitated to affirm the verdict when the Trial Judge first polled the jurors, contacted defense counsel and indicated regret about the verdict. The Judge interviewed the juror, who stated that the jury foreman had asked an attorney friend a question of law and mentioned the contact during deliberations. Subsequently, four other jurors indicated that the foreman had mentioned the contact during deliberations. The majority concluded that the Judge erred in considering the subject matter of the deliberations at the time the foreman mentioned the contact, since *Rule 606(b)* bars inquiry into the mental processes and deliberations of the jury. The dissent argued that an inquiry into the relationship between the subject matter of the deliberations and the foreman's statement was permissible on the issue whether extraneous prejudicial information was brought to the jury's attention or outside influence was improperly brought to bear upon any juror. In *United States v. Tallman*, n17 the Court, affirming convictions for cocaine offenses, held there was no error in denying a new trial based on assertions in a juror's note during deliberations that other jurors were harassing and insulting. Total placidity is not the nature of jury deliberation, and to admit proof of contentiousness and conflict to impeach a verdict would be to eviscerate the Rule.

United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988) : The Court held that alleged harassment or intimidation of one juror by another may not be used to impeach a verdict.

[s] Rule 606(b) -- Mental Processes

[i] Rule 606(b) -- Civil Cases

Moores v. Navitrade S.A., 94 F.R.D. 340 (D. Me. 1982) , *aff'd*, *705 F.2d 440 (1st Cir. 1983)* : The Court denied a motion for a new trial based on an affidavit of the plaintiff's agent offered to support the conclusion that the jury did not follow the Court's instructions. The allegation involved an inquiry into the mental processes of the jury, which is impermissible.

Ohanian v. Avis Rent A Car Sys., 779 F.2d 101 (2d Cir. 1985) : The Court affirmed a judgment for an employee who sued for breach of contract, but denied his cross-appeal on the damage issue. It found that juror notes were not admissible to impeach the damage portion of the verdict.

McNulty v. Borden, Inc., 542 F. Supp. 655, 1982-2 Trade Cas. (CCH) P64953 (E.D. Pa. 1982) : The Court held that a juror's affidavit to the effect that he had been mistaken as to the judgment that would be entered on the basis of answers to interrogatories did not establish exposure to erroneous prejudicial information.

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989) : The Court reversed a judgment for a plaintiff in a personal injury case, holding it was error to refuse to enter judgment upon the first verdict that the jury returned, which was for the defendant. The Judge violated *Rule 606(b)* in eliciting testimony from the jurors that they misunderstood the instructions and in directing the jury to resume deliberations. In *Multiflex, Inc. v. Samuel Moore & Co.*, n18 the Court affirmed a judgment for the plaintiff as to liability in an antitrust case, but reversed as to damages. The jury had awarded different sums under two sections of the Sherman Act, and the Court found no basis for the difference. It held that the Trial Judge properly disregarded juror affidavits that suggested that the jury might have been attempting to award damages for injury to the plaintiff's reputation or to punish the defendant. These affidavits related to the jury's decision-making processes, not to external influences, and were barred by *Rule 606*. In *Carson v. Polley*, n19 the Court held that a new trial was properly refused after the jury foreman, during deliberations, sent the Trial Judge a letter stating that the plaintiff had put on almost no evidence. This letter indicated the juror's mental processes, but did not amount to extraneous information.

Wilsmann v. Upjohn Co., 572 F. Supp. 242 (W.D. Mich. 1983) : Both sides made offers of proof that related posttrial conversations with jurors, but the Court refused to receive evidence concerning how a jury reached a damage award in a securities case on the ground that its receipt would violate *Rule 606(b)*.

Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914 (7th Cir. 1991) : The Court upheld the grant of a new trial to the defendant in a personal injury action after a marshal told jurors they would be kept in custody until they reached a verdict. The Court noted that it was improper under the Rule for the Trial Judge to ask jurors whether they reached the verdict because they believed in it or because they wanted to go home. See also *Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132 (7th Cir. 1992)* (noting the impropriety of questioning jurors whether their deliberations were prejudiced by extraneous information or outside influences). The plaintiff in *Wiedemann v. Galiano*, n20 who alleged that the defendant negligently operated a syringe, had discovered that, after the syringe was admitted into evidence and before it was sent to the jury room, the defendant and his attorney lubricated it so that it would not stick if the jury experimented with it. The Court reversed denial of the plaintiff's new trial motion because the Trial Judge improperly admitted juror affidavits stating that the mechanical condition of the syringe had not affected their deliberations.

Karl v. Burlington N. R. Co., 880 F.2d 68 (8th Cir. 1989) : In an action by a motorist injured in a car-train collision, the jury gave inconsistent answers to special interrogatories regarding apportionment of responsibility and

damages, which the Trial Judge attempted to "clarify" by interviewing the foreperson. The Court reversed the judgment on the "true verdict" subsequently entered, holding that the mistake made by the jury was not merely clerical, but one that went to the validity of the verdict, so inquiry into the jurors' understanding or intentions was forbidden by the Rule. See also *Scogin v. Century Fitness, Inc.* n21(the Trial Judge properly refused to inquire whether the jury reached its verdict by a quotient method).

E.F. Hutton & Co. v. Arnebergh, 775 F.2d 1061 (9th Cir. 1985) : Expressing concern about the Trial Judge's reconvening the jury several weeks after it was discharged, interviewing it *in camera*, and asking the jury to advise him of the result it intended by its verdict, the Court observed that *Rule 606(b)* appeared to prohibit juror testimony concerning the intent of their verdict, but affirmed because both parties preferred the procedure to a new trial.

McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504 (11th Cir. 1990) : The Court affirmed a judgment for the defendant in a product liability action, holding there was no abuse of discretion in refusing to permit posttrial interviews with jurors. The plaintiff had wanted to question jurors about an incident when a juror became distraught during deliberations, but, as his allegations went only to the juror's own emotional state of mind and its possible effect on other jurors and not to any prejudicial information or outside influence brought to bear on the jury, the inquiry would not be consistent with *Rule 606(b)*.

[ii] Rule 606(b) -- Mental Processes -- Criminal Cases

United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982) : The Court affirmed convictions for giving and receiving an illegal gratuity, finding that the Trial Judge acted properly in making no further inquiry after a juror reported that she had indicated that she would go along with a unanimous vote of the other jurors, since an inquiry would have delved into the mental processes of the jurors, something not permitted by the Rule.

United States v. DiSalvo, 34 F.3d 1204 (3d Cir. 1994) : In a RICO and extortion prosecution, the Court held that the Trial Judge properly refused to inquire into a juror's statement, made during deliberations, that "[y]ou [i.e., the defendant] can't get into this situation without being guilty." Since the jury had not considered prejudicial extra-record information, *Rule 606(b)* prohibited an inquiry into the juror's statement. Upholding RICO convictions over arguments of pretrial publicity prejudicing the jury in *United States v. Gilsenan, 949 F.2d 90 (3d Cir. 1991)* , the Court held that it could consider the affidavit of a juror who was excused during the trial, as her mental state had nothing to do with the verdict. In *United States v. Friedland*, n22 the Court agreed that it was proper to deny a request, following a newspaper story that jurors in a criminal trial discussed the defendant's failure to testify, that the jurors be examined about their deliberations.

United States v. Jones, 132 F.3d 232 (5th Cir. 1998) , *aff'd*, *527 U.S. 373 (1999)* : The Court held that a defendant challenging a death sentence for murder was not permitted to undermine the verdict by juror affidavits alleging confusion caused by the instructions regarding the unanimity requirement. The reasons for not allowing jurors to impeach verdicts in trials apply with equal force to sentencing hearings.

United States v. Gonzales, 227 F.3d 520 (6th Cir. 2000) : The defendant sought to attack his guilty verdict through a juror's statement that she felt pressured to vote guilty; that the jurors thought that it was no problem to vote guilty because the defendant would only get a "slap on the wrist"; and that the foreman stated that he had seen the defendant's counsel represent another client and that counsel "always represented guilty clients." The Court held that none of this information was admissible to attack the verdict. All of it dealt with internal juror deliberations; none of it referred to

extraneous influences. In *United States v. Murphy, 836 F.2d 248 (6th Cir. 1988)* , the Court held that the Trial Judge properly precluded the defendant from inquiring whether a juror's plan to leave on vacation affected deliberations.

United States v. Berry, 92 F.3d 597 (7th Cir. 1996) : Upholding a new trial granted in a drug case after the Judge's post-verdict discussion with jurors revealed that a transcript had improperly gone into the jury room, the Court held that in finding a reasonable possibility of prejudice the Judge correctly disregarded one juror's comment that the transcript actually helped one defendant. The Court observed that "a district court must ignore a juror's comment regarding how a particular piece of material disposed the juror toward a particular verdict, and the district court must make an independent determination of the likely effect of the extraneous material." See also *United States v. Ford* n23(a juror's letter alleging extreme and excessive pressure on jurors to change votes did not allege extraneous influence).

United States v. Arpan, 887 F.2d 873 (8th Cir. 1989) (en banc): The Court said that a letter from a juror raising concerns about coercion resulting from the Trial Judge's response to questions during deliberations should be disregarded. Dissenting Judges thought that although the letter could not serve as a basis for a new trial, it could be used to corroborate the conclusion that a reasonable juror could have misunderstood the Judge's response. See also *United States v. Krall* n24(a juror's affidavit in a tax prosecution saying that she feared an IRS investigation if she voted to acquit could not be considered because it related the juror's mental processes).

United States v. Weiner, 578 F.2d 757 (9th Cir. 1978) : The Court approved a ruling that one juror's affidavit to the effect that she voted guilty "with reservation," which was supported by affidavits of two fellow jurors, could not be used to impeach a verdict. See also *United States v. Marques* n25(holding that a compromise verdict could not be impeached).

United States v. Sjeklocha, 843 F.2d 485 (11th Cir. 1988) : The Court held that a juror affidavit and statement to a newspaper concerning the effect that newly discovered evidence would have had on the verdict was inadmissible.

[t] Rule 606(b) -- Official Contacts

Peterson v. Wilson, 141 F.3d 573 (5th Cir. 1998) : In a civil rights action, the Trial Judge met with jurors after they rendered a verdict for the plaintiff, and on the basis of the jurors' comments, granted a new trial for the defendant. Relying on *Rule 606(b)*, the Court reversed and reinstated the verdict. The Court stated that a Trial Judge's post-verdict *ex parte* discussion with jurors "is highly irregular if not impermissible, and, more important, that impeachment of the jury verdict on the basis of information obtained in such a discussion constitutes abuse of discretion *per se*."

Haugh v. Jones & Laughlin Steel Corp., 949 F.2d 914 (7th Cir. 1991) : In upholding the grant of a new trial to the defendant in a personal injury action after a marshal told jurors they would be kept in custody until they reached a verdict, the Court noted that it was improper under the Rule for the Trial Judge to ask jurors whether they reached the verdict because they believed in it or because they wanted to go home.

United States v. Scisum, 32 F.3d 1479 (10th Cir. 1994) : Reversing a Mann Act conviction because of the Trial Judge's *ex parte* contact with a juror, the Court noted that *Rule 606(b)* precluded consideration of the juror's statement in her affidavit that had she not met with the Judge she would have dissented from the guilty verdict when polled. In *United States v. Greer*, n26 the Court overturned drug convictions, because at a lunch break during trial a marshal informed jurors of sentencing possibilities. The Court said that any *ex parte* contact between jurors and Court officials

about the matter being tried is presumptively prejudicial, and that *Rule 606(b)* limited the opportunities for jurors to claim not to have been affected by extraneous information.

[u] Rule 606(b) -- Partial Verdicts

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003) : The Court affirmed four defendants' drug-related convictions. Five days after the jury returned a verdict of guilty against Stover, it told the Judge that it was hung as to another defendant and that some jurors wanted to redeliberate as to Stover. The Judge ruled that no further inquiry was required and that the jury's deliberations would be terminated. The Court, relying on *United States v. Dakins, 872 F.2d 1061 (D.C. Cir. 1989)* , found no abuse of discretion, because *Rule 606(b)* "bars eliciting juror testimony here to impeach the verdict against Stover, which was unanimously rendered, as the contemporaneous polling confirmed."

United States v. Hockridge, 573 F.2d 752 (2d Cir. 1978) : The Court held that *Rule 606(b)* prevents impeachment of a partial verdict returned under *Fed. R. Crim. P. 31(b)* on the ground that some jurors pressured others to agree to the verdict. "While the freedom of jury deliberations is less threatened by impeachment of partial verdicts than by impeachment of verdicts generally, it is, nevertheless, clearly impinged."

United States v. Ortiz, 942 F.2d 903 (5th Cir. 1991) : The Court affirmed convictions for drug offenses, holding there was no error in denying a new trial based on affidavits by three jurors that they had not agreed to return guilty verdicts on several counts. The exception to the Rule that allows consideration of jurors' statements to determine whether a verdict was in fact reached is not so broad as to allow a juror to contradict four earlier statements made by that juror in open Court unequivocally expressing agreement with the verdict.

[v] Rule 606(b) -- Pre-Deliberation Statements of Jurors

United States v. Richards, 241 F.3d 335 (3d Cir. 2001) : The defendant moved for a new trial on the basis of an affidavit from an alternate juror stating that he had overheard two jurors state before deliberations that the defendant was guilty. The Trial Judge denied the motion and the Court affirmed. It stated that evaluating evidence of misconduct after the verdict was rendered "would require the District Court to interview the jurors in contravention of *Rule 606(b)*." Although the statements allegedly made by the jurors occurred prior to deliberation, "the jurors would necessarily be queried as to their thought process to determine whether or not the premature statements affected their verdict." Such questioning is prohibited by the Rule.

[w] Rule 606(b) -- Sentencing

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) : A husband and wife involved in a drug conspiracy were tried separately for their crimes. After the wife was convicted, her lawyer delivered to the Judge letters from four jurors explaining their beliefs that the wife had been severely abused by her husband. The Court found that the Judge's decision not to consider the letters in sentencing was not an abuse of discretion, since a practice of doing so could lead to harassment of jurors.

[x] Rule 606(b) -- Time Pressure

Poches v. J.J. Newberry Co., 549 F.2d 1166 (8th Cir. 1977) : Affirming a judgment for the defendant in a product liability action, the Court rejected an attempt to impeach the verdict with a showing that a juror may have rushed to judgment because of prior business commitments.

[y] Rule 606(b) -- Verdict Forms

Tanno v. S.S. President Madison Ves., 830 F.2d 991 (9th Cir. 1987) : The Court held that statements that a jury put in parentheses on a special verdict form had to be disregarded in deciding whether the verdict was inconsistent, since the statements were explanations of the mental processes of the jury that may not impeach the verdict.

FOOTNOTES:

(n1)Footnote 1. *Tobias v. Smith, 468 F. Supp. 1287 (W.D.N.Y. 1979)* .

(n2)Footnote 2. *United States v. Dotson, 817 F.2d 1127 (5th Cir. 1987)* , *modified*, *821 F.2d 1034 (1987)* .

(n3)Footnote 3. *United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982)* .

(n4)Footnote 4. *United States v. Sababu, 891 F.2d 1308 (7th Cir. 1989)* .

(n5)Footnote 5. *United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982)* (en banc).

(n6)Footnote 6. *United States v. Bassler, 651 F.2d 600 (8th Cir. 1981)* .

(n7)Footnote 7. *United States v. Robinson, 645 F.2d 616 (8th Cir. 1981)* .

(n8)Footnote 8. *United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)* .

(n9)Footnote 9. *United States v. Gaffney, 676 F. Supp. 1544 (M.D. Fla. 1987)* .

(n10)Footnote 10. *United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982)* (en banc).

(n11)Footnote 11. *Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987)* .

(n12)Footnote 12. *Abatino v. United States, 750 F.2d 1442 (9th Cir. 1985)* .

(n13)Footnote 13. *United States v. Barber, 668 F.2d 778 (4th Cir. 1982)* .

(n14)Footnote 14. *Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143 (5th Cir. 1983)* .

(n15)Footnote 15. *Wilkerson v. Amco Corp., 703 F.2d 184 (5th Cir. 1983)* .

(n16)Footnote 16. *United States v. Blumeyer, 62 F.3d 1013 (8th Cir. 1995)* .

(n17)Footnote 17. *United States v. Tallman, 952 F.2d 164 (8th Cir. 1991)* .

(n18)Footnote 18. *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 1983-2 Trade Cas. (CCH) P65507 (5th Cir. 1983)* .

(n19)Footnote 19. *Carson v. Polley, 689 F.2d 562 (5th Cir. 1982)* .

(n20)Footnote 20. *Wiedemann v. Galiano, 722 F.2d 335 (7th Cir. 1983)* .

(n21)Footnote 21. *Scogin v. Century Fitness, Inc., 780 F.2d 1316 (8th Cir. 1985)* .

(n22)Footnote 22. *United States v. Friedland, 660 F.2d 919 (3d Cir. 1981)* .

(n23)Footnote 23. *United States v. Ford, 840 F.2d 460 (7th Cir. 1988)* .

(n24)Footnote 24. *United States v. Krall, 835 F.2d 711 (8th Cir. 1987)* .

(n25)Footnote 25. *United States v. Marques, 600 F.2d 742 (9th Cir. 1979)* .

(n26)Footnote 26. *United States v. Greer, 620 F.2d 1383 (10th Cir. 1980)* .

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606.04 Legislative History

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[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however, in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 785, 59 L. Ed. 1300 (1915)* . On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964)* . The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892)* . Under the federal

decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde v. United States, 225 U.S. 347, 382 (1912)* ; a quotient verdict, *McDonald v. Pless, 238 U.S. 264 (1915)* ; speculation as to insurance coverage, *Holden v. Porter, 405 F.2d 878 (10th Cir. 1969)* and *Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967)* , *cert. denied*, *389 U.S. 1014* ; misinterpretation of instructions, *Farmers Coop. Elev. Ass'n v. Strand, supra ;* mistake in returning verdict, *United States v. Chereton, 309 F.2d 197 (6th Cir. 1962)* ; interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961)* . The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. United States, 146 U.S. 140 (1892)* . See also *Parker v. Gladden, 385 U.S. 363 (1966)* .

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6 (e) of the Federal Rules of Criminal Procedure and *18 U.S.C. § 3500*, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

As proposed, subdivision (b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family); he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury deliberations.

The 1969 and the 1971 drafts would have permitted a member of the jury to testify concerning irregularities occurring in the jury room. The Advisory Committee comment to subdivision (b) in the 1971 draft stated that "the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented in the 1971 draft that:

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room ... . The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North

Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Subcommittee approved subdivision (b) in the text of those drafts.

[3] Report of the House Committee on the Judiciary

Deleted; virtually identical to Subcommittee Note.

[4] Report of the Senate Committee on the Judiciary

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodied long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In McDonald v. Pless, the Court stated:

> let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation --to the destruction of all frankness and freedom of discussion and conference. *[238 U.S. 264, 267 (1915)* .]

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, Rule 606 should not permit any inquiry into the internal deliberations of the jurors.

[5] Report of the House and Senate Conferees

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question

whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

[6] Citations to Hearings and Debates

Letter from Ronald L. Carlson to Hon. William L. Hungate, February 27, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 389-90 (1973).

Letter from Ronald L. Carlson to Hon. William L. Hungate, April 16, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 27 (1973).

Debate in the House of Representatives, 120 Cong. Rec. H550-H551 (daily ed. February 6, 1974).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 61 (1974).

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109-11 (1974).

Debate in the House of Representatives, 120 Cong. Rec. H12259 (December 18, 1974).

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2-606 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 606, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 606. Competency of Juror as Witness		**Rule 606. Juror's Competency as a Witness**	
(a)	**At the trial.** A member of the jury may	**(a)**	**At the Trial.** A juror may not testify as a

not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object outside the jury's presence.

ject out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or

(b) During an Inquiry into the Validity of a Verdict or Indictment.

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from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brou

ght to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form

. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(1) ***Prohibited Testimony or Other Evidence.***

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of any-

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(2) ***Exceptions.*** A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was im-

properly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 606.01 Official Text

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Rule 606(b) has been amended, effective December 1, 2006. The amendment limits the scope of the "clerical error" exception that is discussed in the Main Volume at *§ 606.02[5]*. The Committee Note is set forth *infra* at § 606.04[1.1]. Following is the text of the amended Rule:

Rule 606. **Competency of Juror as Witness**

(a) At the trial. -- A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. -- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewithThe material within the following brackets is overstruck in the original. [,].The material within the following brackets is overstruck in the original. [except that] But a juror may testify The material within the following brackets is overstruck in the original. [on the question] about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) The material within the following brackets is overstruck in the original. [or] whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. The material within the following brackets is overstruck in the original. [Nor may a] A juror's affidavit or evidence of any statement by the juror The material within the following brackets is overstruck in the original. [concerning] may not be received on a matter about which the juror would be precluded from testifying The material within the following brackets is overstruck in the original. [be received for these purposes].

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[2] Rule 606(b) -- Inquiry into Validity of Verdict or Indictment [Go To Main]

[b] Rule 606(b) -- Bias of Jurors

United States v. Decoud, 456 F.3d 996 (9th Cir. 2006) : After the verdict in a crack cocaine distribution case, the defendants moved for a new trial on the ground that a juror had been improperly dismissed during deliberations. Although the dismissal had been at the juror's request on religious grounds, she allegedly stated later that she had felt pressure from fellow jurors as the only African-American in a case involving black defendants. Affirming, the Court found no abuse of discretion in the denial of a hearing on whether bias motivated the juror to request dismissal. It reasoned that its suggestion in *United States v. Henley, 238 F.3d 1111 (9th Cir. 2001)* (*see Manual § 606.02[3]* n.6), that evidence of racial prejudice might be exempt from *Rule 606(b)*'s restriction on post-trial evidence applied to racial bias against the defendant. Here, the most the defendants' affidavit presented was an allegation that the juror "implied" she felt racial pressure because she was a "hold-out." "While the dismissed juror and the appellants are African-American, this fact alone does not warrant piercing the secrecy and sanctity of jury deliberations or disrupting the finality of the process." One Judge dissented, arguing that until "an evidentiary hearing is held, ... the specter of racial prejudice hangs over the trial and undermines public confidence in the verdict."

[g] Rule 606(b) -- Errors in Verdicts

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008) : Small billboard companies alleged that the defendant, a billboard operator acting as leasing agent for railroads, had wrongfully appropriated for itself billboard sites for which the plaintiffs had applied. The jury returned verdicts for the plaintiffs, indicating on a special verdict form the identical damages for each of the three state-law claims asserted; the form did not indicate the total damages to be awarded to each plaintiff. The defendant filed a motion seeking formation of the judgment in the amount stated for one claim, arguing that because there was a single indivisible injury there should not be multiple recoveries. The plaintiffs responded with an argument, supported by juror affidavits, that the jurors were confused and intended that the damages amount noted for each separate theory of recovery should be totaled. Affirming rejection of

the plaintiffs' argument, the Court held that the Judge did not err in refusing to consider the juror affidavits, as the plaintiffs' charges of mistake or ambiguity in the verdict form could not be characterized as simply a clerical error.

[i] Rule 606(b) -- Extraneous Prejudicial Information

[ii] Rule 606(b) -- Extraneous Prejudicial Information -- Criminal Cases

United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) : In an obstruction of justice prosecution, evidence was admitted with an instruction that it was admissible only against the defendant and not against a codefendant. In post-verdict interviews with jurors, one indicated that they had used the evidence against both defendants. The codefendant argued that the evidence was extraneous as to him and prejudicial, so evidence from the juror should have been admitted in support of his new trial motion. Affirming, the Court held that the alleged impermissible influence was not the result of information the jurors learned through outside contacts or that entered the jury room through an external, prohibited route, so it could not be considered extraneous information.

Garcia v. Andrews, 488 F.3d 370 (6th Cir. 2007) : The petitioner in this habeas corpus proceeding alleged that his trial had been tainted because one juror was fearful of retaliation from the petitioner's family and had informed two other jurors of this subjective fear. Affirming denial of the writ, the Court found that Rule 606(b) barred proof of the allegations, since there was no evidence of "any outside influence on any of the jurors at any point during either the trial or jury deliberations."

United States v. Wintermute, 443 F.3d 993 (8th Cir. 2006) : Affirming a conviction for making a false statement to the Office of the Comptroller of the Currency, the Court held there was no abuse of discretion in denying an evidentiary hearing when the defendant introduced postverdict affidavits from two jurors stating that another juror had asked during deliberations "what kind of message will be sent to the [defrauded] investors if we do not convict?" The statement was not extraneous, since it referred to investor losses that were subject to extensive evidence at trial.

United States v. Benally, 546 F.3d 1230 (10th Cir. 2008) : In the prosecution of a Native American for assaulting a Bureau of Indian Affairs officer, the Trial Judge granted a new trial after a juror provided an affidavit that the foreman and other jurors had made racist statements about Native Americans during the deliberations. Reversing, the Court held that the affidavit violated Rule 606(b) and did not come within the exceptions regarding extraneous prejudicial information or outside influences, as none of the statements were "specific extra-record facts relating to the defendant," but were only "generalized statements, ostensibly based on the jurors' personal experience."

[j] Rule 606(b) -- Habeas Corpus Proceedings

Helmig v. Kemna, 461 F.3d 960 (8th Cir. 2006) : A man convicted in state court for murder argued that his conviction should be vacated because the jurors requested, obtained, and consulted a highway map that was not admitted into evidence. Affirming dismissal of the habeas corpus petition, the Court noted that in order to be able to proffer testimony from the jurors, the petitioner had to prove that the evidence was both extraneous and prejudicial. Here, the petitioner failed to prove that the map was extraneous; he provided no evidence that the map was conveyed to the jury from an outside source, and he did not attempt to refute testimony that everything given to the jury had been approved by the Trial Judge.

[r] Rule 606(b) -- Jury Misconduct

Garcia v. Andrews, 488 F.3d 370 (6th Cir. 2007) : The petitioner in this habeas corpus proceeding alleged that his trial had been tainted because one juror was fearful of retaliation from the petitioner's family and had informed two other jurors of this subjective fear. Affirming denial of the writ, the Court found that Rule 606(b) barred proof of the allegations, since there was no evidence of "any outside influence on any of the jurors at any point during either the trial or jury deliberations."

United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) : The Court affirmed convictions in a public corruption case, finding no abuse of discretion in the denial of a new trial based upon purported e-mails exchanged between jurors during trial and deliberations which were mailed anonymously to the defense. The Court noted that "[t]he district court said that it had serious reservations about the authenticity of these purported e-mails, but concluded that the law barred it from questioning the jurors about their deliberations, or about the e-mails purporting to suggest that the jurors deliberated improperly." The Court agreed and added that the fact that the jury acquitted on many of the charges supported the conclusion that the jury carefully weighed the evidence and reached a reasoned verdict free of undue influence. This is an unusual case, since it does not simply involve a claim that jurors might have prematurely deliberated or that some jurors might have had conversations with other jurors that were not heard by all members of the jury. The idea that jurors would be e-mailing one another during the trial raises questions of whether the e-mails are a form of extrinsic evidence that jurors should not be considering. In the end, however, the Trial Judge examined the e-mails and simply concluded that a new trial was not warranted, not that the e-mails were not cause for concern.

[s] Rule 606(b) -- Mental Processes

[ii] Rule 606(b) -- Mental Processes -- Criminal Cases

United States v. Lloyd, 462 F.3d 510 (6th Cir. 2006) : Affirming a bank robbery conviction, the Court found no abuse of discretion in denial of a defense motion to question a juror who had told another attorney that "he did not vote his mind as a juror." There was no need to inquire whether this was the result of any extraneous influence or pressure, since the letter to the judge from the attorney clearly stated that the pressure under which the juror buckled was "pressure from the other jurors." In *United States v. Kelley, 461 F.3d 817 (6th Cir. 2006)* , defendants convicted of extortion argued that a juror engaged in misconduct when he spoke to the *Detroit Free Press* about whether the defendants should have testified on their own behalf. The Court held that because the juror did not learn of the defendants' failure to testify "through improper channels," the exceptions for extraneous prejudicial information and outside influence were inapplicable. Thus, the juror's thoughts about the trial were inadmissible.

United States v. Honken, 541 F.3d 1146 (8th Cir. 2008) : During the penalty phase of a capital murder case, allegations were made that the boss of one juror had made improper, prejudicial comments to her. The Judge questioned the juror and the parties agreed to remove her from further deliberations. Then, each of the jurors was asked what he or she had heard about the comments, following which the Judge denied a mistrial motion, giving the defense the option of proceeding with 11 jurors or replacing the removed juror with an alternate. Following a death penalty verdict by the jury with an alternate, the Judge held a post-trial evidentiary hearing to investigated the boss's purported comments further. In that hearing, the removed juror, when asked about the effect of her boss's comments, stated that she ignored them and they had no effect on her decision in the case. Affirming, the Court held it was error (but harmless) to ask those questions, as "Rule 606(b) prohibits a juror from testifying at a post-verdict hearing as to whether extraneous information or an outside influence affected that juror's ability to be impartial."

[w] Rule 606(b) -- Sentencing

United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) : The Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no error in the rejection of an affidavit from an investigator who interviewed the jurors. The affidavit concluded that some jurors believed that if the defendant was sentenced to life imprisonment, it was still possible that he could be released. This belief was contrary to the Trial Judge's specific instruction on the point. Under Rule 606(b) the affidavit could not be received, as the rule does not permit proof that the jury misunderstood the Judge's instructions.

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[1.1] 2006 Amendment Committee Note [Go To Main]

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry., 5 F.3d 1, 3 (1st Cir. 1993)* ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to *Rule 606(b)*."); *Teevee Toons, Inc., v. MP3. Com, Inc., 148 F. Supp. 2d 276, 278 (S.D.N.Y. 2001)* (noting that *Rule 606(b)* has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987)* ; *Eastridge Development Co., v. Halpert Associates, Inc., 853 F.2d 772 (10th Cir. 1988)* . The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R., 880 F.2d 68, 74 (8th Cir. 1989)* (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates *Rule 606(b)* because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp., 862 F.2d 1201, 1208 (5th Cir. 1989)* ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the

amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id*.

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. *Rule 606(b)* does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978))* .

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607.04 Legislative History

[1] Advisory Committee's Note

[2] 1987 Amendment Advisory Committee Note

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Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

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607.02 Editorial Explanatory Comment

[1] Departure From the Common Law

At common law, a party calling a witness ordinarily could not attack the credibility of that witness. The common-law rule, commonly referred to as the "voucher rule," is abandoned in the Federal Rules. *Rule 607* specifically provides that any party, including the party who calls the witness, may attack the credibility of any witness. The rationale for the common-law rule was never very persuasive. It rested on assumptions concerning a party's presumptive support of a witness called by that party, and the need to protect the witness from harassment. The Federal Rule recognizes the practical reality that a party does not necessarily vouch for a witness; in fact, a party may have no choice but to call an adverse witness in order to prove a case. Even at common law, if the Trial Judge were willing to call a witness, both parties traditionally were given the right to cross-examine and to impeach that witness. And when a witness was viewed as hostile, or counsel made an effective claim of surprise following damaging testimony by a witness, counsel was given the right to impeach the witness. All of these considerations led the Advisory Committee and Congress to conclude that there was no sound reason for denying either side the right to impeach.

[2] Impeachment With Otherwise Inadmissible Evidence

By its terms, *Rule 607* would appear to permit some abusive practices, such as in the following hypothetical: A prosecutor calls a witness who has made a previous statement implicating the defendant in a crime; that statement would be excluded as hearsay if offered for its truth; the prosecutor knows that the witness has repudiated the statement and if called will testify in favor of the defendant; nonetheless, the prosecutor calls the witness for the ostensible purpose of "impeaching" him with the prior inconsistent statement. The reason that this practice appears abusive is that there is no legitimate forensic purpose in calling a witness solely to impeach him. If impeachment were the real purpose, the witness would never be called, since the most that could be accomplished is a net result of zero. As one Court put it: "The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer." n1 Thus, the prosecutor in the above example must have had some other purpose for calling a witness who has made a prior inconsistent statement, and that purpose is obvious: the prosecutor is trying to bring before the jury, in the guise of "impeachment," hearsay evidence that the jury could not otherwise consider. Obviously such a practice should be prohibited. As Judge Posner put it, it would be an abuse of *Rule 607* for a party "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence ... in the hope that the

jury would miss the subtle distinction between impeachment and substantive evidence -- or, if it didn't miss it, would ignore it." n2

Accordingly, despite the permissive language of *Rule 607*, the Courts have held that a party may not call a witness solely to impeach him with otherwise inadmissible evidence. n3 This limitation on the flexibility provided by *Rule 607* has most often been applied against prosecutors who call adverse witnesses, but it has also been applied against criminal defendants and civil litigants. n4

The above-stated limitation, however, applies only when the party calls the witness for the impermissible purpose of impeaching that witness with evidence not otherwise admissible. If instead the party calls the witness for a good faith purpose, then the limitation will not apply. n5 For example, if a witness is called with the expectation that he will testify favorably, and the party is then surprised by negative testimony, the party is permitted to recoup its losses by impeaching the witness. n6 Thus, the common-law doctrine of "surprise" has been revived in cases where a party calls a witness and then seeks to impeach him with otherwise inadmissible evidence. n7 Of course, the claim of surprise must be credible to permit impeachment with otherwise inadmissible evidence; it can't be a mere hope that the witness will have "seen the light" and change his stated course when he takes the stand. The Trial Judge should require counsel who seeks to offer an inconsistent statement as impeachment of a witness on direct examination to make a proffer to justify a claim of surprise, and should permit opposing counsel to *voir dire* the witness outside the presence of the jury to obtain assurance that the witness had not alerted the calling party that the testimony would be inconsistent with a previous hearsay statement.

A party also would be in good faith in impeaching a witness with otherwise inadmissible evidence if it "called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness' prior inconsistent statement." n8 If a witness is needed to corroborate parts of a case, the party should be allowed to impeach that witness where some aspects of the testimony are adverse to the party's case; the party should not be put to the poor choice of either forgoing the corroborating witness or forgoing the impeachment. n9 For similar reasons, a party must be allowed to call a witness, even when anticipating the need for impeachment with inadmissible evidence, when the failure to call the witness might lead the jury to draw a negative inference against the party. n10 The need to avoid such a negative inference is certainly a good-faith reason to call the witness.

Finally, the limitation on *Rule 607* applies only if the impeachment evidence is not otherwise admissible. So for example, if a witness has made a prior statement under oath at a trial or hearing, the witness may be called and the statement may be introduced even if counsel *knows* that the witness will repudiate the statement and testify adversely. This is because such a prior inconsistent statement is admissible for its truth under *Rule 801(d)(1)(A)*, and therefore the witness is not being called solely to be impeached with otherwise inadmissible evidence. n11 There is no abuse of the hearsay rule in these circumstances.

[3] Impeachment of Favorable Witnesses

There will be some situations in which a witness gives testimony favorable to a party and the party knows that impeachment evidence would be less damaging if it were brought out as part of the party's case, rather than by the adversary. Impeachment on direct examination may take the wind out of the sails of the expected impeachment by the adversary. A party's impeachment of its own witnesses under these circumstances is permitted by *Rule 607*. n12 The Court-imposed limitation on *Rule 607*, discussed above, is not applicable in these circumstances, because the party is not calling a witness *solely* for impeachment. Rather, the witness is called to give favorable testimony and the party makes a judgment that the inevitable impeachment is less damaging when it occurs on direct examination. The evil to be guarded against is a party's attempting to impeach a wholly unfavorable witness with evidence that is not otherwise admissible.

Nonetheless, there is a legitimate question whether a party should be able to impeach a favorable witness if the adversary would probably not choose to attack the witness on the point. For example, in *United States v. Frappier, 807 F.2d 257 (1st Cir. 1986)* , Frappier was on trial for murdering her husband. The prosecution called Frappier's daughter, who implicated her mother in the crime. For the ostensible purpose of defusing impeachment for bias, the prosecution brought out the fact that Frappier had slept with her daughter's husband. Frappier argued that this impeachment was impermissible because there was no basis for the prosecution to conclude that she would ever impeach her daughter with information that put Frappier herself in such a negative light; in fact, at trial, Frappier had stated that she would not use this information to impeach her daughter's credibility.

The Court in *Frappier* was not unsympathetic to the defendant's argument. It found it a close question whether the Trial Judge should have allowed the government to impeach its witness with an arguably prejudicial fact that appellant had explicitly stated she would not use in challenging the witness' credibility, arguably eliminating the possibility of any potential sting from disclosure of that information on cross-examination. Nevertheless, the Court found no abuse of discretion because the "appellant may have sought to challenge her daughter's credibility in other ways."

We do not see how it would have made any difference if Frappier were to attack her daughter's credibility "in other ways." That would not make the impeachment at issue in *Frappier* any more probative. For example, if the defendant were to impeach her daughter with prior convictions or inconsistent statements, the prosecution would not be taking the sting out of that expected impeachment by introducing evidence of bias. Rather, the prosecution would simply be adding fuel to the fire.

On the other hand, the prosecution may be concerned that without the evidence of bias, the jury may look draw some unfair inferences against the witness. Even without impeachment from the defendant, Frappier's daughter looks disloyal in "ratting out" her mother. The jury in such a case may speculate on improper motives that the daughter may have had. This speculation does not go away simply because the defendant fails to bring out the bias evidence on cross-examination. Alternatively, the jury may simply tune out the witness who voluntarily testifies against a parent; this risk arises even if the defendant agrees not to bring out the bias evidence. In other words, the prosecution may have a legitimate reason to impeach its own witness even when an attack from the adversary is unlikely. So while the Court's reasoning in *Frappier* (that the defendant may have attacked the daughter on other grounds) is unpersuasive, the result seems correct. n13

[4] Plea Agreements of Government Witnesses

A special subset of the problem of impeachment of favorable witnesses arises when the government in a criminal case offers evidence of the plea agreements entered into by witnesses testifying on its behalf. Undoubtedly, there are permissible purposes for such evidence, e.g., to anticipate defense impeachment and show the trier of fact that nothing is hidden on direct examination. n14 But there also is a danger in any jury trial when plea agreements are introduced by the prosecution.

Three concerns are raised when the government introduces a plea agreement on direct examination of a cooperating witness. The first, and probably least serious, is that the government is engaged in "bolstering" the credibility of its witness. The general rule is that it is unnecessary to provide information to support a witness' credibility until such time as that credibility has been attacked. If parties were permitted to bolster their witnesses, a lot of court time would be spent in introducing information that might ultimately be unnecessary. If the witness' credibility is never attacked, there is no reason to provide this supporting evidence, since the shared presumption is that witnesses are presumed credible unless there is reason to think otherwise. n15 Moreover, a good deal of otherwise inadmissible information might be introduced in the guise of supporting credibility, such as prior statements of the witness that would otherwise be hearsay. Admitting this evidence for "credibility" purposes seems a substantial cost that ought to be avoided at least until the opponent attacks that credibility. n16

The second concern with admitting plea agreements is that the government may somehow "vouch" for the credibility of the cooperating witness. It is the jury's job to assess the witness' credibility on the basis of the testimony and evidence presented. It would therefore be improper for the government to assert that it knew the witness was telling the truth, possibly on the basis of extrinsic information not admitted at trial. As applied to plea agreements, the vouching problem could arise when there is something in the agreement indicating the government's belief that the witness is telling the truth. An example is a clause in the agreement stating that the government had independently verified the truth of the witness' account. Alternatively, there might be a clause in the agreement that the government could emphasize at trial as demonstrable evidence that the witness had to be telling the truth. An example is a clause providing that the witness has agreed to submit to a polygraph examination as part of the deal.

The third and most substantial concern with introducing plea agreements of cooperating witnesses is that the jury will misuse the agreement as evidence of the defendant's guilt. At least this is so where the witness pleads guilty to committing a crime that is tied in some way to the defendant. The classic case is where the defendant is charged with conspiracy and the witness has pleaded guilty to the same conspiracy. As the Third Circuit stated in *United States v. Toner, 173 F.2d 140 (3d Cir. 1949)* :

> From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A. This is one of the cases, therefore, where evidence logically probative is to be excluded because of some countervailing policy. ... The foundation of the countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant had a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else.

The Courts have generally downplayed the three concerns set forth above, to the point where plea agreements are almost always admissible, in full, on direct examination. The three dangers from admitting plea agreements on direct examination are generally treated as follows:

1. The concern over bolstering. Courts have answered that the government has the right to anticipate that defense counsel will bring up the plea agreement in an attempt to show that the cooperating witness has a motive to falsify. The Courts conclude that the agreement therefore can be brought out on direct examination to "remove the sting" from the anticipated impeachment and to prevent the jury from thinking that the government was hiding negative evidence. n17

2. The concern over vouching. Courts have held that the government does not vouch for its witnesses simply by introducing their plea agreements. Rather, vouching is a concern only in those unusual cases in which the agreement includes implicit or explicit government assertions of veracity, e.g., that the witness has told the truth or that the witness has agreed to take a polygraph examination. n18

3. The concern over misuse of the plea agreement as evidence of the defendant's guilt. The Courts have generally held that plea agreements are admissible under *Rule 403* despite their prejudicial effect. They reason that the prejudicial effect of the plea agreement can be diminished somewhat by an instruction to the jury directing it to use the evidence only on the question of the credibility of the cooperating witness. Courts usually find that this prejudicial impact, as diminished by the instruction, does not substantially outweigh the probative value of the plea agreement for such purposes of assessing the witness' credibility. n19

Some have argued that it is inappropriate to admit a plea agreement on direct examination. It seems to us, however, that if the defendant is going to introduce the agreement on cross-examination in an attempt to show the witness is lying in

order to get a deal, it is only fair to permit the government to bring out the agreement on direct. The government should be able to blunt the impact of an anticipated attack; otherwise the impeachment evidence will look much more important than it really is. n20 More importantly, if the government cannot refer to the plea agreement on direct, it will suffer a negative consequence when the agreement is raised on cross-examination. The jury may think that the government was trying to hide the fact that a deal was made with the witness. This would be an unfair inference if the agreement was barred from direct by an evidence rule rather than by the government's own decision. Moreover, under *Rule 607*, the prosecution has the right to impeach a witness it calls. To the extent a plea agreement impeaches a witness for bias, the prosecution would much rather conduct that impeachment in a relatively gentle manner on direct examination.

Does the admissibility question change, however, if the defendant promises not to refer to the agreement on cross-examination or elsewhere in the trial? It seems that there is no need to remove the sting of anticipated impeachment if the defendant promises that the impeachment will not occur. But most Courts have not seen it that way. n21 The Third Circuit's en banc opinion in *United States v. Universal Rehabilitation Services (PA), Inc., 205 F.3d 657 (3d Cir. 2000)* , discussed in detail in the Editorial Explanatory Comment to *Rule 403*, *§ 403.02[8]*, held that a plea agreement was admissible on direct despite the defendants' concession that they would not raise any issue pertinent to the agreement on cross-examination. The Court was clearly concerned that the defendants "concession" would be hard to administer. It would raise issues such as: (1) whether the defendants "raise" the plea agreement by generally questioning the veracity of the cooperating witness, or by asking whether the witness has conferred with the government; (2) the effect if the defendants do raise the plea agreement on cross-examination after the prosecution has been precluded from raising it on direct; and (3) the effect if the defendants raise the agreement for the first time in closing argument.

But beyond these practical concerns, the *Universal* Court was convinced that a plea agreement remains probative on the cooperating witness' credibility even if the defendant never impeaches the witness. Specifically, the plea agreement remains probative (1) to prevent the jury from speculating that the defendant is a victim of selective prosecution; and (2) to explain how the witness has first-hand knowledge concerning the subject of the testimony. n22 The Court found no abuse of discretion in the Trial Court's *Rule 403* ruling admitting the agreements on direct; the plea agreements retained probative value despite the defendants' concession, and the risk of prejudice to the defendants did not substantially outweigh this probative value. The Court noted that the risk of prejudice was diminished by the fact that the jury was instructed a number of times not to use the plea agreements as substantive evidence of the defendants' guilt.

It does not follow, however, that the decision in *Universal* means that plea agreements of cooperating witnesses will be automatically admitted in all trials, no matter what the defendant does. The Court in *Universal* did not hold that Trial Courts *must* admit these agreements. It simply held that the Trial Court did not abuse its wide discretion in admitting the plea agreements. We hope that Trial Courts will use their discretion to exclude plea agreements from jury consideration when the defendants make a solid, clear commitment that they will not raise (1) the plea or plea agreement, (2) any attack on the witness' motive to falsify that might arise from an interest in cooperation or cutting a deal, or (3) any inference that the defendant was selectively prosecuted. If the Trial Court does the right thing and excludes the plea agreement when such a promise is made, it should instruct the jurors upon request that they should concern themselves only with the guilt or innocence of the defendant and not with the possibility of selective prosecution or the involvement of the witnesses in the crimes charged. In this way, the prosecution's need to admit the plea agreement to counteract jury speculation will be minimized.

It should be noted that impeachment on cross-examination is not the only way to attack the credibility of a witness. If the defendant in any way attacks a prosecution witness as having a motive to falsify -- for example, by impugning the motive of the witness in opening argument -- then the prosecution should, in fairness, be able to introduce aspects of the plea agreement that are responsive to the attack. n23 In these circumstances, the prosecution is not trying to remove the sting of anticipated impeachment which may never happen; rather, it is trying to rehabilitate a witness who has already been attacked. As one Court put it: "A defendant will not be heard to complain of its admission when he instigates such

admission, or attempts to exploit the evidence by frequent, pointed, and direct references to the coconspirator's guilty plea." n24

Finally, it must be remembered that even if the plea agreement is admissible as probative of a cooperating witness' credibility, the defendant is entitled upon request to a strong limiting instruction that the agreement is not to be used as substantive evidence of the defendant's guilt. n25

[5] Other Limitations on Impeachment

Although *Rule 607* has liberalized impeachment by generally permitting all parties to impeach all witnesses, it does not require that a Trial Judge admit all impeaching evidence offered in a case. Other Rules -- particularly *Rules 403* and *611(a)* -- provide authority for the Trial Judge to limit impeachment that is unduly harassing or that is repetitive, unhelpful, or prejudicial to one of the parties. The cases annotated in *§ 607.03* indicate that the Courts of Appeals have no hesitancy in affirming Trial Judges who limit impeachment evidence to protect a witness from unfair questioning or to speed up a trial. There may be some reason for concern, however, about a judicial tendency to view any evidence that duplicates previously admitted evidence as unhelpful. One powerful way of increasing the probative value of evidence is to corroborate it. By definition, much corroborative evidence is cumulative; often witnesses testify to exactly what other witnesses have said.

It is doubtful that any hard and fast rule can govern impeachment rulings. Counsel must be careful when impeachment evidence is excluded to make offers of proof that demonstrate not only the substance of the excluded evidence, but also why the evidence is offered. If corroboration is the purpose, it should be stated explicitly. Moreover, counsel may persuade the Trial Judge to admit additional impeachment evidence by explaining the importance of a witness in the case and the need for impeachment. In criminal cases confrontation claims may be strengthened with careful offers of proof.

It must be remembered that the hearsay rules are often inapplicable to a party's attempt to impeach a witness. This is because impeachment evidence is usually not offered for its truth, but rather for its bearing upon the witness' credibility. n26

[6] Traditional Forms of Impeachment Not Mentioned by the Rules

Under *Rule 402*, all relevant evidence is admissible. One type of relevant evidence is impeachment evidence. Although the Federal Rules of Evidence contain a number of Rules that dictate how witnesses may be impeached and restrict certain forms of impeachment (specifically evidence of the witness' character for veracity and prior inconsistent statements), there is no serious attempt in the Rules to specifically treat all traditional methods of impeaching a witness. However, any impeachment not barred by the Constitution, statutes, or other Rules that is relevant to the credibility of a witness is admissible under *Rule 402*. The Supreme Court recognized this in *United States v. Abel, 469 U.S. 45 (1984)* . In that case, the Trial Judge permitted a defense witness to be questioned by the government concerning his membership in the same secret prison gang to which a defendant also belonged, and concerning the tenets of the gang. The Court observed that bias evidence is not specifically covered by the Federal Rules of Evidence, even though it is a well-known form of impeachment. But because bias evidence is relevant to credibility, the Court reasoned that it certainly is admissible under *Rule 402*, subject to the balance of probative value and prejudicial effect set forth in *Rule 403*. n27 Other traditional forms of impeachment recognized by Courts, though not mentioned in any of the Federal Rules, include inability to recall or relate, n28 emotional or psychiatric impairment, n29 and contradiction. n30 Of course, all these forms of impeachment are subject to the balance of probative value and prejudicial effect, confusion, and delay set forth in *Rule 403*. n31 Cases applying *Rule 403* to impeachment evidence -- especially the determination of whether an effort to impeach goes to a collateral matter -- are set forth in the Annotations to *Rule 403*, *§ 403.03*.

[7] Impeachment and Constitutional Law

It can be important in criminal cases to determine whether impeachment is barred by a constitutional rule.

One important decision of the Supreme Court on the subject of impeachment is *Jenkins v. Anderson, 447 U.S. 231 (1980)* . Before *Jenkins*, the Court had held in *Doyle v. Ohio, 426 U.S. 610 (1976)* , that it is fundamentally unfair to use a defendant's silence after *Miranda* warnings as impeachment evidence when the defendant takes the stand at trial. n32 But *Jenkins* holds that it violates neither due process nor self-incrimination concepts to use silence *before* arrest as impeachment evidence once a defendant takes the stand to testify. The rule is different concerning pre-arrest silence because, at the time of the silence, the government had made no promises, as it had in *Doyle* by way of *Miranda* warnings. As long as the evidence of pre-arrest silence is relevant it may be used without violating the Constitution. After *Jenkins*, the Court decided *Fletcher v. Weir, 455 U.S. 603 (1982)* , holding that silence after arrest but before *Miranda* warnings also may be used as impeachment evidence.

These decisions raise the question whether silence before grand juries or other tribunals can be subsequently used for impeachment. Despite *Jenkins* and *Fletcher*, Courts have thus far refused to allow a person's silence at a grand jury to be used for impeachment when the person testifies at trial. Undoubtedly this is because the witnesses are ordinarily informed about the right to silence when they are called before the grand jury. Even if the warning does not come from the government, so that *Doyle* is inapplicable, being silent after being made aware that anything you say can be used against you is not very probative. Whatever probative value exists is substantially outweighed by the risk that the jury will use the silence not for impeachment purposes but as an admission of guilt. n33

Absent some warnings about the right to remain silent, *Jenkins* and *Fletcher* appear to say that the Constitution does not prohibit the use of prior silence as impeachment evidence. But it will be important for Courts to focus on whether the choice to remain silent is relevant to impeachment, and whether the probative value is substantially outweighed by the risk of jury confusion. That is, even if silence is constitutionally admissible, it may be subject to exclusion under *Rule 403*. n34

Another situation in which constitutional law bears on impeachment arises when the accused seeks to impeach a witness and the Trial Judge precludes the attack. The usual grounds for preclusion are that the attack is cumulative, a waste of time, without foundation, or simply not very probative of the witness' credibility. Constitutional issues arise here because the accused has a constitutional right to an effective defense. This right is discussed in the Editorial Explanatory Comment to *Rule 412*, *§ 412.02[3]*, which presents an analogous situation of the accused being precluded from attacking a witness and claiming that precluding the attack violates the defendant's right to an effective defense. As discussed under *Rule 412*, the Courts engage in a balancing process, considering the importance of the witness, the strength of the impeachment evidence, whether the witness has been impeached on other grounds, and the costs of admitting the impeachment evidence in terms of waste of time, prejudice, and confusion of the jury. In essence, the Court uses the same balancing approach as is employed under *Rule 403*. Constitutional error has been found when the defendant is precluded from impeaching a critical witness with evidence that would have been highly effective in attacking the witness' credibility. n35 No error will be found if the impeachment is cumulative, concerns remote matters, is without foundation, or would confuse the jury. n36

FOOTNOTES:

(n1)Footnote 1. *United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984)* .

(n2)Footnote 2. *United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984)* .

(n3)Footnote 3. See, e.g., *United States v. Ince, 21 F.3d 576 (4th Cir. 1994)* (conviction was reversed because the government's "only apparent purpose for impeaching one of its own witnesses was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence"); *United States v. Hogan, 763 F.2d 697 (5th Cir. 1985)* ("Because the government called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay

evidence, we reverse."); *United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984)* ("a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired").

(n4)Footnote 4. *United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985)* (criminal defendant cannot call a witness "for the purposes of circumventing the hearsay rule by means of *Rule 607*"); *Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979)* (plaintiff could not call a witness to the stand for the purpose of bringing out an inconsistent statement, when that statement was inadmissible for substantive purposes).

(n5)Footnote 5. See *United States v. Kane, 944 F.2d 1406, 1411 (7th Cir. 1991)* ("The test is whether the prosecution exhibited bad faith by calling a witness sure to be unhelpful to its case.").

(n6)Footnote 6. See, e.g., *United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988)* (impeachment was permissible after the prosecutor previously interviewed the witness and determined that the witness was going to give testimony favorable to the government's case; the prosecutor had not received any subsequent information that the witness had changed his mind).

(n7)Footnote 7. See, e.g., *United States v. Crouch, 731 F.2d 621 (9th Cir. 1984)* (prosecutor was not surprised by adverse testimony because the witness had already given testimony exculpatory to the defendant on *voir dire*; therefore it was impermissible for the prosecution to call the witness and impeach him with otherwise inadmissible evidence); *United States v. Kane, 944 F.2d 1406 (7th Cir. 1991)* (the prosecution had not improperly called the defendant's wife merely to introduce inconsistent hearsay statements; the prosecution had a sincere reason to call her because she had firsthand knowledge of the scheme charged, and there was no reason to believe she would be hostile or would supply an opportunity for impeachment).

(n8)Footnote 8. *United States v. Webster, 734 F.2d 1191, 1193 (7th Cir. 1984)* . See also *United States v. DeLillo, 620 F.2d 939 (2d Cir. 1980)* (the Court upheld the government's impeachment of the unfavorable portions of its own witness' testimony where the overall testimony was favorable to the government in many respects).

(n9)Footnote 9. *United States v. Eisen, 974 F.2d 246 (2d Cir. 1992)* (where the government has called a witness whose corroborating testimony is instrumental in constructing its case, it has a right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government's account of the same events; the prejudicial effect of the impeachment in this case did not substantially outweigh the probative value of the favorable portions of the testimony).

(n10)Footnote 10. See, e.g., *United States v. Gilbert, 57 F.3d 709 (9th Cir. 1995)* (the government acted properly in calling two eyewitnesses and impeaching them with prior statements, not independently admissible, concerning the defendant's possession of a gun; if the government had not called these two witnesses, "the jury would have been left to ponder why the government was reluctant to question these eye-witnesses").

(n11)Footnote 11. See, e.g., *United States v. Medley, 913 F.2d 1248 (7th Cir. 1990)* (no error in permitting the government to impeach a witness when his testimony was inconsistent with his grand jury testimony; because the prior statement was under oath and thus admissible under *Rule 801(d)(1)(A)*, the witness was not called to introduce otherwise inadmissible hearsay).

(n12)Footnote 12. See, e.g., *United States v. Rivera-Medina, 845 F.2d 12 (1st Cir. 1988)* (upholding the government's effort to elicit from its witnesses testimony that they committed 100 crimes in order to anticipate a defense attack and to reduce its impact); *United States v. Marroquin, 885 F.2d 1240 (5th Cir. 1989)* (government witness was properly permitted to testify concerning other frauds he had perpetrated, since he could have been cross-examined about them and the government is permitted to "blunt the sword" by revealing the information first).

(n13)Footnote 13. The result in *Frappier* seems especially correct in light of the Supreme Court's decision in *Old*

Chief v. United States, 519 U.S. 172 (1997) , where the Court declared that the prosecution should be permitted to proffer evidence on a point in order to guard against jury speculation in the absence of evidence, even if the defendant offers to concede the point. See the extensive discussion of *Old Chief* in the Editorial Explanatory Comment to *Rule 403, §§ 403.02[7]-[11].*

(n14)Footnote 14. See, e.g., *United States v. Darden, 70 F.3d 1507 (8th Cir. 1995)* (Trial Judge properly permitted the government, on direct examination, to elicit from a witness the fact that the witness had made a deal with the government to receive a life sentence for certain crimes, and thus avoided exposure to the death penalty: "disclosure of a guilty plea in order to blunt attacks on a witness' credibility during cross-examination is permissible and serves a legitimate purpose"); *United States v. Gambino, 926 F.2d 1355 (3d Cir. 1991)* (the government could properly elicit guilty pleas of testifying accomplices on direct examination to dampen subsequent attacks on credibility and to foreclose any suggestion that the party producing the witness was concealing evidence, so long as the jury was instructed on the limited purposes of a coconspirator's guilty plea); *United States v. Countryman, 758 F.2d 574 (5th Cir. 1985)* (it was permissible for the government to elicit on direct examination an alleged coconspirator's testimony concerning his guilty plea in order to blunt the impact of expected cross-examination, but the prosecutor may not attempt to use the plea as affirmative evidence of the defendant's guilt).

(n15)Footnote 15. See 1 McCormick on Evidence (5th ed. 1999) at 123: "[A]s a general proposition, bolstering evidence is inadmissible. As of the direct examination, it is uncertain whether the cross-examiner will attack the witness' credibility; the counsel might waive cross-examination or cross-examine solely for the purpose of eliciting new facts on the merits which support the counsel's theory of the case. If the opposing counsel does so, all the time devoted to the bolstering evidence on direct examination will have been wasted. For that reason, the witness's proponent must ordinarily hold information favorable to the witness's credibility in reserve for rehabilitation."

(n16)Footnote 16. This is why a prior consistent statement of a witness is not admissible to support credibility unless the witness' credibility has been attacked and the statement is probative in rebuttal. See generally *Tome v. United States, 513 U.S. 150 (1995)* , discussed in the Editorial Explanatory Comment to *Rule 801(d)(1)(B), § 801.02[4][c].*

(n17)Footnote 17. See, e.g., *United States v. Universal Rehabilitation Services, 205 F.3d 657 (3d Cir. 2000)* (plea agreements may be introduced to remove the sting of anticipated impeachment for bias).

(n18)Footnote 18. See, e.g., *United States v. Thornton, 197 F.3d 241 (7th Cir. 1999)* (the government should avoid "unnecessary references to truthfulness" in the agreement); *United States v. Binker, 795 F.2d 1218 (5th Cir. 1986)* (clause in agreement attesting to government's independent verification was improperly admitted because it amounted to government vouching for the credibility of the witness); *United States v. Brown, 720 F.2d 1059 (9th Cir. 1983)* (prosecutor improperly referred to the fact that as part of plea bargain agreements several government witnesses agreed to submit to polygraph tests); *United States v. Hilton, 772 F.2d 783 (11th Cir. 1985)* (it was error to permit the government to introduce plea bargain documents containing references to polygraph examinations and to argue that its witnesses were credible because they agreed to take such examinations). Clauses in the agreement under which the witness agrees to testify truthfully are, by contrast, admissible, so long as the prosecutor does not improperly rely on such a clause to specifically argue that the witness must have been telling the truth. Truthtelling clauses are considered to add nothing to the witness' already-existing obligation to tell the truth. See, e.g., *United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)* (no abuse of discretion in the admission of a cooperating witness' plea agreement that contained a promise to provide truthful information; introduction of the entire agreement permitted the jury to consider fully the witness' possible conflicting motivations, and the prosecutor did not improperly rely on the truthfulness provision in closing argument to vouch for the witness); *United States v. Trujillo, 376 F.3d 593 (6th Cir. 2004)* (no improper vouching by eliciting testimony that cooperating witnesses were required to testify truthfully under their plea agreements; "the prosecutor did not offer any personal observations or opinions as to the veracity" of the witnesses, "nor did she place the prestige of the Government behind their credibility.").

(n19)Footnote 19. See, e.g., *United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000)* ("We have held that a

prosecutor may inquire into the terms of a cooperating witness's plea agreement so long as this information is not used as evidence of the defendant's guilt and the jury understands its duty to judge witness credibility independently"); *United States v. Romer, 148 F.3d 359, 1998-1 Trade Cas. (CCH) P72197 (4th Cir. 1998)* (plea agreement properly admitted where no attempt was made to argue improper inferences about the defendant's guilt).

(n20)Footnote 20. The rule that a party may "remove the sting" of anticipated cross-examination and impeachment is not solely for the benefit of prosecutors. Defense counsel often find it advisable to refer in direct examination to the prior convictions of their witnesses. See generally *Wilson v. Williams, 182 F.3d 562 (7th Cir. 1999)* (en banc) (defendant permitted to bring out his prior convictions on direct examination, in order to remove the sting of anticipated impeachment).

(n21)Footnote 21. See, e.g., *United States v. McNeill, 728 F.2d 5 (1st Cir. 1984)* (the government properly elicited from two of its witnesses the fact that they had been immunized and compelled to testify, even though the defendant indicated that he would not ask about immunity on cross-examination: "The fact of immunity and compulsion orders aids the jury function regardless of whether defendant intended to attack the credibility of the witnesses.").

(n22)Footnote 22. *The Court in United States v. Montani, 204 F.3d 761 (7th Cir. 2000)* , found another ground of probative value for a plea agreement even after a defendant's concession not to raise it: the agreement provides an answer to possible juror speculation as to why the witness would take the stand and admit to criminal activity: "The jury could not help but wonder why Israel was testifying for the government and whether he had been charged in the crime. His credibility was impeached by his own testimony. No case in this Circuit holds that the government must wait for the defense to impeach a witness with evidence of a guilty plea before the government may answer with its own evidence of that plea."

See also *United States v. Alex Janows & Co., 2 F.3d 716, 1993-2 Trade Cas. (CCH) P70323 (7th Cir. 1993)* (guilty plea was admissible for credibility purposes even in the absence of an attack from the adversary, because the jury may question why a coconspirator would give such obviously self-damaging testimony; however, the prosecution may have "overplayed the card" by eliciting the details of the transactions to which the codefendants pleaded guilty; but there was no objection at trial, and this practice did not rise to the level of plain error).

(n23)Footnote 23. See, e.g., *United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995)* (the government properly entered its witnesses' plea agreements into evidence on direct examination, since the defendants had attacked the credibility of these witnesses in their opening statements); *United States v. Cosentino, 844 F.2d 30 (2d Cir. 1988)* (plea agreement may be introduced on direct when the defendant's opening statement challenges the credibility of the witness); *United States v. Sanders, 893 F.2d 133 (7th Cir. 1990)* (there was no abuse of discretion in admitting former codefendants' guilty pleas during the government's case-in-chief, as the defense trial strategy implying that the defendant was singled out and the former codefendant-witness went unpunished made admission of the plea evidence inevitable, and the jury was properly instructed not to consider the pleas as substantive evidence against the defendant).

(n24)Footnote 24. *United States v. Samak, 7 F.3d 1196 (5th Cir. 1993)* .

(n25)Footnote 25. See, e.g., *Government of the Virgin Islands v. Mujahid, 990 F.2d 111 (3d Cir. 1993)* (if a coconspirator's guilty plea is offered for credibility purposes, the Trial Judge must give a limiting instruction that the plea is completely inadmissible in assessing the defendant's guilt; in this case, the Judge's instruction warned the jury that it should not give undue weight to an accomplice who has pleaded guilty; this instruction was insufficient, because it made no reference to the fact that the jury could not in any way use the guilty plea as proof of the defendant's guilt; however, the defendant did not object to the instruction at trial, and the error did not rise to the level of plain error); *United States v. Ramirez, 973 F.2d 102 (2d Cir. 1992)* (reversible error to refuse to instruct the jury that it should not consider a testifying codefendant's guilty plea as evidence of the defendant's guilt).

(n26)Footnote 26. See, e.g., *United States v. Royal, 972 F.2d 643 (5th Cir. 1992)* (evidence that a defense witness'

mother tried to convince him to say that guns and drugs in the defendant's house belonged to the witness and not the defendant was admissible over a hearsay objection as relevant to the witness' bias).

(n27)Footnote 27. See also *Douglas v. Owens, 50 F.3d 1226 (3d Cir. 1995)* (reversing a judgment for a prison inmate who alleged that he was beaten by guards after a prison riot; the defendants were improperly restricted from cross-examining a witness as to bias; the witness, who had been a Muslim cleric at the prison, corroborated the plaintiff's claims that he exhibited bruises and abrasions during the relevant time period; the defendants were improperly precluded from bringing out the fact that the cleric had been fired by the Department of Corrections because of his involvement with the rioting inmates and his failure to cooperate with an investigation of the riots).

Of course, the proponent must establish a foundation that the evidence offered to prove bias is in fact probative of bias. See *United States v. Elkins, 70 F.3d 81 (10th Cir. 1995)* (reversing a defendant's firearm convictions on the ground that the Trial Judge erred in permitting a defense witness to be questioned about his gang membership and gang activity, in a purported attempt to show the witness' bias; no evidence supported the conclusion that the witness and the defendant were members of the same gang).

(n28)Footnote 28. See, e.g., *United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987)* (the defendant should have been permitted to cross-examine a witness concerning his regular use of cocaine to impeach the witness' ability to observe and remember).

(n29)Footnote 29. See, e.g., *Revels v. Vincenz, 382 F.3d 870 (8th Cir. 2004)* (no error in permitting the defendants' to question the plaintiff as to whether he heard voices in the past: "We have specifically approved the use of a witness's mental condition to challenge his credibility."); *Chnapkova v. Koh, 985 F.2d 79 (2d Cir. 1993)* (hospital records showing that the plaintiff-witness had a history of psychiatric problems should have been admitted to impeach the witness' credibility).

(n30)Footnote 30. See, e.g., *United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* (where the defendant asserted on direct examination that he had never seen and did not recognize marijuana, he could be contradicted with evidence of a seventeen-year-old conviction for marijuana possession). See generally McMunigal & Sharpe, *Reforming Extrinsic Impeachment*, *33 Conn. L. Rev. 363 (2001)*, for a thorough discussion of the rules governing contradiction.

(n31)Footnote 31. See, e.g., *Jones v. Southern Pac. R.R., 962 F.2d 447 (5th Cir. 1992)* (in a negligence action arising from a train accident, the plaintiff could not introduce the conductor's previous safety infractions to contradict his testimony that he had not been ticketed for speeding or improper braking; these prior safety infractions, nearly all of which occurred several years before the accident took place, were not directly related to the issues in the case, and thus were properly excluded under *Rule 403*).

(n32)Footnote 32. In *Wainwright v. Greenfield, 474 U.S. 284 (1986)* , the Court reaffirmed *Doyle* and held that evidence of postarrest, post-*Miranda* warnings silence could not be used to impeach a defendant's claim of insanity at the time. *Subsequently, in Brecht v. Abrahamson, 507 U.S. 619 (1993)* , the Court unanimously affirmed the constitutional vitality of the *Doyle* rule.

In *Anderson v. Charles, 447 U.S. 404 (1980)* , the Supreme Court distinguished *Doyle* and said that if a person waives his rights after receiving *Miranda* warnings and speaks to the police, he can be asked at trial why his earlier statement differs from trial testimony. *Doyle* holds that the government violates due process when it tells the defendant (via *Miranda* warnings) that he has a right to remain silent, and then uses the silence against him at trial. This principle was not implicated in *Anderson*, where the defendant was told that he could remain silent and yet gave a statement.

(n33)Footnote 33. See, e.g., *Nezowy v. United States, 723 F.2d 1120 (3d Cir. 1983)* : The Court held it was error for a prosecutor to ask a witness whether she had invoked her privilege against self-incrimination before a grand jury:

Because of the ever present danger that a jury might misunderstand the context in which such *fifth*

> *amendment* questioning occurs, and because ... we ... find it difficult to imagine any circumstance where such examination would be relevant and appropriate, we hold that questioning of a witness by the Government as to whether he had previously claimed the constitutional right to refuse to testify at a grand jury proceeding will constitute trial error.

See also *United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995)* (error, though harmless, to cross-examine the defendant about his invocation of the privilege against cross-examination before the grand jury: "The rule is well-established that a witness generally may not be cross-examined about her choice to invoke the *fifth amendment* privilege in grand jury proceedings."; the defendant did not open the door to such impeachment by testifying that he had been waiting a long time for his trial date to arrive; that statement could not be "interpreted as a complaint that he had never before had a chance to speak to the government or the grand jury.").

(n34)Footnote 34. See, e.g., *United States v. Johns, 734 F.2d 657 (11th Cir. 1984)* (stating that the Trial Judge must rule on the probative value of silence for impeachment purposes in the context of a particular case; the Trial Judge might consider "the strength of the alibi, the witness' proximity to the investigation, how soon the witness finds out about the arrest, and what steps were available to him"; the Judge should conduct such an inquiry outside the presence of the jury).

(n35)Footnote 35. See, e.g., *United States v. Sarracino, 340 F.3d 1148 (10th Cir. 2003)* (error to prohibit inquiry into bias of the government's lead investigator); *United States v. Manske, 186 F.3d 770 (7th Cir. 1999)* (reversible error to preclude cross-examination of the principal government witness about past incidents in which the witness had threatened and intimidated potential witnesses in a criminal trial in which he was the defendant); *United States v. Turner, 198 F.3d 425 (4th Cir. 1999)* (error to preclude inquiry into important details of cooperating witness' agreement with the government); *United States v. Stavroff, 149 F.3d 478 (6th Cir. 1998)* (error to preclude defense counsel from questioning a cooperating witness about the witness' hopes and expectations in pleading guilty; the defendant had a constitutional right to impeach the witness for bias).

(n36)Footnote 36. See, e.g., *United States v. Zaccaria, 240 F.3d 75 (1st Cir. 2001)* (no error in precluding inquiry into an alleged bad act of the witness, where the defendant presented no foundation that the event ever occurred); *United States v. Rahman, 189 F.3d 88 (2d Cir. 1999)* (no error in precluding evidence offered for bias, where the foundation was weak and the evidence was not very probative); *United States v. Williamson, 202 F.3d 974 (7th Cir. 2000)* (no error to preclude impeachment where the defendant had already attacked the witness on several grounds; Trial Judge has discretion to exclude cumulative evidence even though it is offered to attack an important witness); *United States v. McGuire, 200 F.3d 668 (10th Cir. 1999)* (no error to preclude impeachment with convictions remote in time, where the defendant was permitted to conduct an extensive and searching cross-examination of the witness' suspect motives and lack of credibility).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 607 RULE 607

2-607 Federal Rules of Evidence Manual 607.03

607.03 Annotated Cases

[Go To Supp]

[1] Bias

[a] Civil Cases

Brady v. Chemical Constr. Corp., 740 F.2d 195 (2d Cir. 1984) : The Court held that a letter from an insurance company to an employee covered by a fidelity bond asking him to pay the amount of loss or to notify the company that the claim was false had been properly admitted to show the bias of the employee, who testified for the company.

Douglas v. Owens, 50 F.3d 1226 (3d Cir. 1995) : The Court reversed a judgment for an inmate who alleged that he was beaten by guards after a prison riot. A Muslim cleric who had been employed at the prison corroborated the plaintiff's claims that he exhibited bruises and abrasions during the relevant time period. The jury was permitted to hear only that the cleric had been "terminated" from his position, but not that he had been fired by the Department of Corrections because of his involvement with the rioting inmates and his failure to cooperate with an investigation of the riots. The Court stated that the circumstances of the cleric's discharge were critical to showing that he was not only biased against the prison, but also biased in favor of prisoners, such as the plaintiff.

Hafner v. Brown, 983 F.2d 570 (4th Cir. 1992) : Affirming a judgment for the plaintiff in an arrestee's § 1983 action, the Court held there was no abuse of discretion in precluding cross-examination of the plaintiff's witness about her prior arrests. The defendants were permitted to ask about prior convictions and bad acts probative of the witness' credibility, as well as about her relationships with the police and directly whether she had any bias. Evidence of arrests is of dubious value on credibility and bias and the defendants did not provide persuasive arguments that the line of questioning they proposed would have gotten them further than the cross-examination that was permitted.

[b] Bias -- Criminal Defense Witnesses

United States v. Abel, 469 U.S. 45 (1984) : In Abel's armed robbery trial, a defense witness, Mills, testified that he had been in prison with Abel and a government witness, Ehle, and that Ehle had told him that Abel was not one of the robbers, but that he would implicate Abel in order to obtain a shorter sentence for himself. On cross-examination, the prosecutor asked Mills whether he and Abel were members in a secret prison organization whose members would lie to protect each other. Mills denied this, and the prosecution recalled Ehle to testify that Abel and Mills were, in fact, members of such an organization. The Court of Appeals found the impeachment was improper because it involved a "group tenet," rather than a personal tenet on the part of Mills. A unanimous Supreme Court reversed, holding that bias impeachment was permissible, although not specifically mentioned in the Rules, and that the type of organization to which members belong can be relevant in assessing the nature or extent of a witness' bias.

United States v. Spencer, 25 F.3d 1105 (D.C. Cir. 1994) : The Court held there was no error in permitting the prosecutor in a narcotics case to cross-examine a defense witness about a pending armed robbery charge against her, as other evidence indicated her antipathy toward law enforcement and the cross-examination suggested a possible source of that bias.

United States v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978) : The Court affirmed a police officer's civil rights conviction for beating and assaulting a suspect in a drug raid. After two police witnesses for the defendant testified that he did not mistreat either of the complaining parties in the case, the prosecution was permitted to show that the witnesses had themselves been suspended for the excessive use of force on unrelated occasions. Emphasizing "that there is a significant difference between introducing misconduct evidence as to the defendant and as to a witness not on trial," the Court found that the evidence was properly admitted on the question of possible bias of the witnesses.

United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996) : The Court held in a bank fraud prosecution that there was no error in cross-examining a defense witness about whether a transaction in which he and the defendant had engaged was itself the subject of an investigation. While neither a witness' prior bad acts nor the mere fact that he has been arrested or indicted is generally admissible for impeachment, where the arrest or accusation grows out of transactions at issue, or related transactions, the evidence is admissible to show the witness' potential bias. In *United States v. Royal, 972 F.2d 643 (5th Cir. 1992)* , a cocaine distribution prosecution, the Court held that evidence a defense witness' mother tried to convince him to say that guns and drugs in the defendant's house belonged to the witness and not the defendant was admissible as relevant to the witness' bias. In *United States v. Smith*, n1 the Court upheld convictions for conspiracy and misapplying government funds, noting that testimony relating a conversation between two defense witnesses that suggested one had gone over her testimony with a defendant was admissible to establish bias.

United States v. Thompson, 359 F.3d 470 (7th Cir. 2004) : The defendant was charged with possession of ammunition by a felon after bullets were found in a jacket in a car in which he and his girlfriend had been traveling. Shortly after the arrest, she told police that the jacket and the bullets belonged to the defendant, but at trial she testified for the defense that they were hers. Although an *in limine* ruling precluded mention of the defendant's prior convictions and status as a suspect in uncharged crimes, the government was permitted to ask the girlfriend on cross-examination about past threats he had made against her and past charges she had brought against him. Affirming, the Court found no abuse of discretion, since even without evidence that the witness was intimidated, the evidence of threats was probative of the witness' bias and its probative value was not substantially outweighed by the danger of unfair prejudice.

United States v. Elkins, 70 F.3d 81 (10th Cir. 1995) : The Court reversed a conviction for felon firearm possession because evidence of the defendant's and a defense witness' gang membership and gang activity was improperly admitted to impeach the witness. There was no evidence that the two were members of the same gang or that the witness'

testimony was biased because of fear of gang discipline. In *United States v. Keys, 899 F.2d 983 (10th Cir. 1990)* , a prosecution for possessing a weapon in a federal penitentiary, the defendant and two of his witnesses, also prisoners, denied they were gang members; on rebuttal, prison officers testified that the defendant had previously said he was a member of a gang with 60 members who would do him favors. The Court held that the evidence was properly admitted not to show bias due to common membership, as there was no showing the three prisoners belonged to the same gang, but to show bias due to fear, in that the witness' testimony might have been influenced by fear of the defendant and his gang. Because credibility was crucial to resolution of the case, the probative value of mentioning the prison gang was not significantly outweighed by its prejudicial effect.

United States v. Frazier, 944 F.2d 820 (11th Cir. 1991) : The Court affirmed a conviction for making false statements before a grand jury, holding there was no error in admitting evidence that the defendant's lawyer was paid by her employer, whose fraudulent conduct was the focus of the grand jury's investigation.

[c] Bias -- Inconsistent Statements

United States v. Hudson, 970 F.2d 948 (1st Cir. 1992) : After witnesses, including the defendant's brother, testified under a grant of immunity about drug transactions, the defense offered evidence that the witnesses had participated in jailhouse conversations indicating that the defendant was not involved in drugs and that the brother was upset at the defendant for beating him out of gambling money and not taking care of his family. The Court held it was error to exclude the evidence, which was inconsistent with the witnesses' testimony and indicative of bias.

United States v. Betts, 16 F.3d 748 (7th Cir. 1994) : The Trial Judge in a drug prosecution had excluded evidence that a prosecution witness had said he would testify against the defendants in exchange for a government promise to have his sentence reduced, because the principal witness had not been given an adequate opportunity to explain or deny the statement on cross-examination before the extrinsic evidence was offered. The Court held there was no error, finding the weight of authority to require that a party seeking to prove bias through extrinsic evidence of a witness' prior statement must first give the witness an opportunity to explain or deny the statement, "even though *Rule 613(b)* is not strictly applicable." We would observe that even if that Rule were applicable, it does not by its terms (see the Editorial Explanatory Comment to *Rule 613*, *§ 613.02[1]*) require the opportunity to explain or deny be given *before* the extrinsic evidence is admitted. See also *United States v. Marzano* n2(suggesting that a foundation must be laid before showing the bias of a witness by a prior inconsistent statement, the Court left open the question whether a different rule should be applied where conduct rather than a statement is involved).

[d] Bias -- Prosecution Witnesses

[i] Impeachment Denied

United States v. Watson, 409 F.3d 458 (D.C. Cir. 2005) : The defendant, an African-American, was stopped by an officer for a window-tint violation, and a search of his car uncovered drugs and firearms. At trial for weapons and drug offenses, the defendant wanted to cross-examine the officer about 30 instances in which he stopped black men for window-tint violations but eventually arrested them on drug charges. Affirming, the Court found no error in prohibiting this inquiry. It concluded that the relevance of the evidence to impeach the witness for bias "was not readily apparent given the lack of information regarding [the officer's] arrests of members of other demographic groups, and its probative value was substantially outweighed by the threat of undue delay or confusion of issues inherent in a drawn-out inquiry into the details of [the officer's] history of arrests."

United States v. Jarabek, 726 F.2d 889 (1st Cir. 1984) : The Court affirmed Hobbs Act convictions, finding it was proper to preclude cross-examination of a government witness concerning alleged improprieties in his handling of his daughter's 1980 tax return. Since the witness began cooperating with the government's investigation in 1979 and the government did not discover any possible improprieties until four days before trial in 1982, the Court reasoned that the evidence did not tend to show that the witness cooperated in order to curry favor with the government. In *United States v. Keithan*, n3 the Court sustained convictions arising out of a fraudulent scheme selling insurance policies to elderly persons. It held there was no error in preventing the defendant from cross-examining a government witness, who testified to a conversation in which a codefendant described the fraudulent scheme, about letters he had written while in prison for conduct similar to that alleged against the defendant. The letters expressed the witness' belief that the government was concentrating on drug cases rather than insurance fraud, so others like him might escape conviction, and his regret at having pleaded guilty. Although the Court reasoned that every "worthwhile citizen" would feel the way the witness did, we believe that this kind of appellate review usurps the jury's function. It seems impossible to be certain that the witness, who regretted admitting guilt, had exactly the same feelings as any other citizen and that he had no greater urge to convict others charged with similar crimes than any ordinary citizen would have.

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) : The Court upheld convictions arising from the 1993 World Trade Center bombing, finding no error when defense counsel was prevented from cross-examining a government informant about racial bias he allegedly harbored against Black Muslims while working on an investigation of Muslim defendants of Arab descent. The Court reasoned that the foundation for the cross-examination was weak and the alleged bias was not against any defendant or members of a defendant's racial group. In *United States v. Lanese*, n4 defendants convicted of extortion offenses alleged denial of confrontation rights because they were not permitted to explore on cross-examination the details of a key government witness' prior arrest. The Court affirmed, holding that the circumstances of the prior arrest were not probative of bias and that the jury was given full information as to the witness' immunity agreements, enrollment in the witness protection program, and gambling compulsion sufficient for the jury to pass on the witness' credibility. In *United States v. Glover*, n5 a drug conspiracy case, the Court held there was no abuse of discretion when the Trial Judge barred cross-examination of one of the government's primary witnesses concerning psychiatric treatment she received 12 years earlier, even though the defense claimed the treatments were prompted by various romantic setbacks and provided a motive for the witness to shade her testimony in favor of her lover (one of the conspirators). The Court emphasized the remoteness of the treatments, their tenuous connection with the witness' reliability at trial, and the fact that the witness was fully examined about her romantic involvement.

United States v. Thorn, 917 F.2d 170 (5th Cir. 1990) : The Court affirmed a fraud conviction, holding there was no error in excluding evidence of a state indictment for drug offenses pending against the government's key witness, absent a showing that the federal prosecutor had any ability to influence the disposition of the state charges and given that the evidence could have a highly prejudicial effect on the way the jury viewed the witness' testimony. In *United States v. Leslie*, n6 the Court affirmed convictions on drug charges, holding that the defendant was properly denied an opportunity to offer extrinsic evidence of bias of a government witness. It reasoned that *Rule 613* governs where a party seeks to introduce extrinsic evidence to impeach a witness' trial testimony and demonstrate bias. In this case, the defendant failed to afford the witness a chance to explain or deny the statement that the defendant wished to offer to prove bias.

United States v. Beverly, 369 F.3d 516 (6th Cir. 2004) : Affirming convictions for bank robberies and firearms offenses, the Court found no abuse of discretion in precluding defense counsel from cross-examining a government witness about the witness' alleged attempts to molest the defendant's 12-year-old daughter. The Court found the evidence "only marginally relevant and highly prejudicial," as there was no evidence that the witness had ever been accused of molestation or knew that anyone suspected him of committing the offenses.

United States v. Jakoubek, 411 F.3d 951 (8th Cir. 2005) : The Court affirmed a murder-for-hire conviction, finding no abuse of discretion when the defense was not permitted to elicit evidence of State Court charges pending against the government's key witness. In the Court's view, it was sufficient that the jury was informed of the witness' extensive criminal history and the terms of his cooperation agreement: "there was no indication that [the witness] would or could receive assistance from the government regarding his warrant on pending state charges, let alone that he altered his testimony or sought to 'entrap' Jakoubek in exchange for such assistance." In a prosecution for armed bank robbery and interstate transportation of a stolen car, *United States v. Mansaw*, n7 a defendant was precluded from eliciting testimony that a cooperating witness had charged that the defendant and two codefendants had committed another robbery and that local authorities had not charged the defendant with that crime. The Court found that this evidence failed to prove either bias or that the witness had made a false charge against the defendant. The defendant had a substantial opportunity to question the witness about her bargain with the government, so the limitation on cross-examination concerning the report of the other robbery was proper.

United States v. Monks, 774 F.2d 945 (9th Cir. 1985) : The Court found no error in precluding one defendant from cross-examining a witness about another bank robbery with a codefendant, since evidence that there was any resulting bias was purely speculative.

United States v. Taylor, 417 F.3d 1176 (11th Cir. 2005) : The Court affirmed a drug possession and firearm conviction, finding no abuse of discretion when the defendant was not permitted to introduce, as evidence of the arresting officer's bias and tendency for untruthfulness, civilian complaints charging the officer with brutality, planting evidence, and harassment. As all the complaints were unproven and there was no evidence that they had led to discipline or conviction of the officer, any probative value they might have was substantially outweighed by the risk of unfair prejudice to the prosecution. In *United States v. Oliveros, 275 F.3d 1299 (11th Cir. 2001)* , a money-laundering prosecution, the principal government witness had faced detention for an immigration violation, but the government obtained favorable treatment for him in exchange for his testimony. The Court found no error in the exclusion of testimony by an expert on immigration law that the witness had been subject to a far longer detention on the immigration charges than he had admitted in his testimony. The testimony would have shown the extent of the benefit the witness *actually* received for cooperating, but the relevant factor in determining his motive to lie was the benefit he *believed* he was receiving. In a criminal tax evasion case, *United States v. Williams*, n8 the Court found no abuse of discretion in excluding evidence that a government witness, the defendant's personal secretary, had previously had an illicit love affair with a man who was later involved in litigation with the defendant. The defendant showed no connection among the affair, the prior litigation, and the instant prosecution; besides, the defendant had been permitted to show the secretary's limited knowledge and that she had previously testified against him.

[ii] Bias -- Prosecution Witnesses -- Impeachment Permitted or Required

Delaware v. Van Arsdall, 475 U.S. 673 (1986) : Justice Rehnquist wrote for the Court as it held that a defendant was denied his confrontation right in a state murder case when he was prohibited from questioning a prosecution witness concerning the dismissal of a pending public drunkenness charge. This was evidence "that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony," "a prototypical form of bias on the part of the witness."

United States v. Akitoye, 923 F.2d 221 (1st Cir. 1991) : Affirming a conviction for drug offenses, the Court held that an objection was properly sustained when the defendant was asked on cross-examination whether a previous witness was lying, and that there was no abuse of discretion in permitting the defendant to be asked instead whether he knew of any reason why the previous witness would lie, as the latter question went to bias.

United States v. Lawson, 736 F.2d 835 (2d Cir. 1984) : The Court reversed a bank robbery conviction on another ground, but said that the defendant should have been permitted to question a government witness about acts of prostitution that she may have committed on behalf of another government witness who had been a participant in the robbery, since her answers might have proved bias on her part.

United States v. Williams, 892 F.2d 296 (3d Cir. 1989) : A government witness in a prosecution for possessing a gun as a convicted felon was also a convicted felon and was also found in possession of a gun. The Court held the witness' conviction was not admissible to impeach her under *Rule 609*, as it was more than ten years old, but it should have been admitted as relevant to show the witness' motive to ingratiate herself with the government. Although exclusion violated the *Confrontation Clause*, the error was held harmless.

United States v. Turner, 198 F.3d 425 (4th Cir. 1999) : In a prosecution for engaging in a continuing criminal enterprise, the Court held it was error (but harmless) to prohibit defense counsel from cross-examining a government witness about her fear of facing the death penalty for involvement in the murder that was the subject of the prosecution. Although the Trial Judge reasoned that questions as to what charges the witness thought she might be facing when she agreed to testify were irrelevant because sentencing was up to the Judge, the Court stated that "the crux of the inquiry is the witness's state of mind." The fact that the witness feared the death penalty was thus relevant even if the Judge might not have imposed it had she not testified. In *United States v. Dorta*, n9 the Court affirmed drug-related convictions, stating that a defendant is constitutionally entitled to explore a government witness' understanding of the benefits that will result from his testimony.

United States v. Garza, 754 F.2d 1202, 1985-1 Trade Cas. (CCH) P66440 (5th Cir. 1985) : In a prosecution of police officers for civil rights violations, the Court held it was error (but harmless) to exclude evidence of the arrest records of several government witnesses, since it was relevant to show bias on the part of the witnesses.

United States v. Stavroff, 149 F.3d 478 (6th Cir. 1998) : Affirming a tax fraud conviction, the Court found it was error (but harmless) when the Judge *sua sponte* precluded defense counsel from cross-examining a cooperating witness about the witness' hopes and expectations in pleading guilty, since the defendant has a constitutional right to impeach the witness for bias.

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : The defendants in a drug trafficking conspiracy trial sought to impeach a cooperating witness with two letters that the witness had written to the prosecutor in which he said he was "not a bad person" and was "riding with the government 100%" and that he knew enough information so that "we can make arrangements for [me] to go home." The Court noted that "the better practice would have been" for the Judge to allow each defense attorney some leeway to cross-examine the witness on the letters, as evidence of his biases and motivations for testifying, but that any error was harmless. The Court rejected the government's assertion that the letters were inadmissible hearsay, noting that they were "textbook examples of impeachment evidence." In *United States v. Manske, 186 F.3d 770 (7th Cir. 1999)* , the defendant was convicted for cocaine distribution solely on testimony from cooperating witnesses and evidence of his having met regularly with them; there was no physical evidence or admission by the defendant. The defendant likewise had no physical or documentary evidence supporting his claim that the regular meetings involved gambling activities and the cooperating witnesses were framing him. Although the case turned on the credibility of the prosecution witnesses, the defense was precluded from cross-examining a principal government witness about incidents in which he had threatened and intimidated potential witnesses against him. The defense was also precluded from inquiring into other witnesses' potential bias in favor of that witness because the Judge believed there was no link between the threat evidence and any fear one of the witnesses might have had. Reversing, the Court held that threats to other witnesses were probative of the witness' untruthfulness

under *Rule 608(b)*, and that precluding examination of the other witnesses' bias resulting from the threats violated the defendant's *Sixth Amendment* rights. The Court also held that no foundation questions were necessary before asking about facts or events logically relevant to show bias.

United States v. Williams, 194 F.3d 886 (8th Cir. 1999) : The Court held it was error (but harmless) to preclude cross-examination of a prosecution witness on misdemeanor charges because they were "wanteds" or pending charges. The Court reasoned that "[t]he presence of outstanding warrants together with [the witness'] status as a probationer may serve as a basis to contend that these circumstances influenced the witness to testify favorably for the prosecution."

United States v. Takahashi, 205 F.3d 1161 (9th Cir. 2000) : Affirming a conviction for drug possession with intent to distribute, the Court found no abuse of discretion in the admission of evidence that the defendant and a favorable witness belonged to a secretive Japanese organized crime group whose members will perjure themselves for one another. The evidence was probative of bias, and the Judge both gave a limiting instruction and induced the government not to show photographs of the gang's distinctive tattoos on the defendant. In *United States v. Harris, 185 F.3d 999 (9th Cir. 1999)* , a prosecution for embezzling from an ERISA pension plan, one of the principal government witnesses was the defendant's sister, who was also the widow of the defendant's frequent investment partner. At the time she testified, the pension trust was suing her husband's estate on a promissory note. The estate's theory was that the note was not valid, and convicting the defendant of fraud would support that theory. The widow thus would benefit from the defendant's conviction, but the Judge would not let the defense ask her anything about the other lawsuit, apparently on the ground that the examination would go too far afield from the direct examination. The Judge also limited cross-examination of former employees suing the defendant for breach of fiduciary duty to questions about the nature of their dispute but not how much they were suing him for. The Court held these rulings limiting cross-examination of the prosecution witnesses were an abuse of discretion, although harmless error. The defense has a *Confrontation Clause* right to show possible motivations that prosecution witnesses may have to falsify their testimony, and the Judge's discretion to avoid undue consumption of time and confusion of issues cannot justify so severe a limitation on cross-examination as to prevent the jury from learning information needed to judge rationally whether witnesses might be shading the truth. In *United States v. Ray*, n10 the Court overturned a conviction for cocaine offenses, finding it was an abuse of discretion to preclude the defendant from cross-examining a key government witness as to his continued trafficking in cocaine following a plea agreement, which might have biased him against the defendant. As long as the allegations by the defendant were shown to have some grounding in reality, the Court found that the danger that a defendant would falsely report criminal acts by a government witness in order to be able to examine the witness about the nonexistent acts was not great enough to deny the defendant a chance to impeach an important witness by inquiring into a real possibility of bias. See also *United States v. Jones* n11(reversing a conviction for interfering with commerce by threats of violence, because evidence that the defendant had rebuffed a homosexual advance by a government witness was erroneously excluded). Note, however, that a defendant does not always have the right to inquire into the details relating to a bias claim. See *United States v. Brutzman* n12(counsel for a mail fraud defendant was permitted to show that a government witness was involved in civil litigation with the defense counsel, but was not permitted to inquire into the details of the complaint that had been filed in the civil case).

United States v. Sarracino, 340 F.3d 1148 (10th Cir. 2003) : Affirming convictions for murder, the Court held it was error (but harmless) to limit cross-examination of the government's lead investigator, who, between the incident and the trial, had gotten in trouble with his employer and had resigned while under investigation for misuse of a government computer. Limiting defense counsel to asking whether the witness was still employed as a government investigator and precluding inquiry into the reasons for the termination of employment gave the defense insufficient opportunity to show the witness' motivation to help the government. Thus, this limitation violated defendant's confrontation rights.

United States v. Williams, 954 F.2d 668 (11th Cir. 1992) : The Court reversed convictions for conspiring to

distribute marijuana because evidence that an informant-witness was to receive 25 percent of all seized assets for his assistance had been excluded as irrelevant and unduly prejudicial. The Court noted that the jury has the right to know what may be motivating a witness and if the amount paid is felt to be too prejudicial for a jury to hear, the solution is for the government to make reasonable payments, not for the evidence to be excluded. Although the Court suggested in *United States v. Bulman* n13 that it might have been better to permit a defendant to cross-examine a DEA informant concerning prior arrests and dispositions thereof, it found no abuse of discretion in limiting the cross-examination, since questions were allowed concerning the informant's employment and compensation by the DEA.

[iii] Bias -- Prosecution Witnesses -- Limiting Examination on Guilty Plea or Immunity

United States v. Kone, 307 F.3d 430 (6th Cir. 2002) : The Court affirmed convictions involving violations of the immigration laws, finding no abuse of discretion in limiting the cross-examination of prosecution witnesses as to whether they had an expectation of favorable treatment in exchange for their testimony. As to one witness, the Court concluded that the jury possessed sufficient information--immunity and compensation were provided--to make a judgment about bias. The Court concluded that defense counsel did not make clear what impeachment was being attempted as to two other witnesses.

United States v. Arocho, 305 F.3d 627 (7th Cir. 2002) : Affirming drug-related convictions, the Court held that there was no abuse of discretion in restricting the defendants in their cross-examination of two witnesses who entered into plea agreements with the government. The defense was permitted to elicit from the witnesses that charges had been dropped and they expected to obtain a substantial benefit from cooperation, but was not permitted to question in more detail as to the specific sentences and guideline ranges they faced before entering into the plea agreements.

[e] Bias -- Racial Bias

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) : The Court upheld convictions arising from the 1993 World Trade Center bombing, finding no error when defense counsel was prevented from cross-examining a government informant about racial bias he allegedly harbored against Black Muslims while working on an investigation of Muslim defendants of Arab descent. The Court reasoned that the foundation for the cross-examination was weak and the alleged bias was not against any defendant or members of a defendant's racial group.

[f] Bias -- Rehabilitation

United States v. Sumlin, 271 F.3d 274 (D.C. Cir. 2001) : Affirming cocaine convictions, the Court found no plain error in the admission of a drug agent's testimony that a confidential informant had assisted the government in other investigations that had resulted in numerous arrests. The Court stated that it did not know for what purpose the government offered the evidence, since the defendant raised no objection to which the government would have had to respond. It noted, however, that in *United States v. Smith, 232 F.3d 236 (D.C. Cir. 2000)* , it had dismissed a relevance challenge to similar evidence because the fact that an informant has cooperated in the past bears on his motive to testify in the present. Thus, it was possible that the agent's testimony in the instant case was offered to rebut a bias attack and its admission could not be plain error.

United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980) : The Court reversed Hatch Act convictions, holding it was improper to permit "rehabilitation" of a witness impeached for bias by evidence of other acts that justified rather than explained away the witness' hostility.

[2] Bolstering the Witness

[a] Generally

United States v. Vazquez-Rivera, 407 F.3d 476 (1st Cir. 2005) : The Court affirmed a conviction for conspiring to distribute heroin, holding that the case agent did not improperly vouch for the defendant's brother as a witness when the agent explained how he obtained a statement from the brother during a "safety valve" interview. The brother had testified for the defendant and contradicted the statement he made during the interview, so rather than vouching for the brother as a witness, the agent was testifying to a prior inconsistent statement and to the circumstances in which it was made. In *United States v. Perez-Ruiz, 353 F.3d 1 (1st Cir. 2003)* , a drug conspiracy case, the Court ruled that a DEA agent's testimony purporting to express belief in an informant's testimony and stating that there were other witnesses who could also corroborate the testimony was improper bolstering. Despite its harsh criticism of the prosecutor and the DEA agent for a "flagrant breach" in offering testimony that "was improper and never should have seen the light of day," the Court found no plain error. In *United States v. Tom, 330 F.3d 83 (1st Cir. 2003)* , the Court affirmed cocaine-related convictions, holding that the prosecutor did not engage in any improper vouching by asking a DEA agent whether, in the course of his investigation, he came upon any information to indicate that a cooperating witness had not been truthful with him. The Court reasoned that the agent did not vouch for the witness's credibility, but simply stated that he had no facts that caused him to believe that the witness had deceived him. In *United States v. Rosario-Diaz*, n14 the Court held it was error (but harmless) to permit an FBI agent to bolster the testimony of a cooperating witness by opining that particular statements of the witness were "lies" and by representing that the statements not singled out as lies had been "tested" and verified through interrogation techniques. Although the agent could properly have testified to facts within his personal knowledge that supported another witness' testimony and to actions he took to corroborate the testimony, it was impermissible for him to put the prestige of his professional knowledge behind the cooperating witness' testimony. n15

United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993) : The Court held, in a cocaine conspiracy prosecution, that the prosecutor had not improperly bolstered the testimony of its witnesses when a case officer testified about the investigative techniques employed by the government. The witness did not testify as to anyone's trustworthiness, but only put evidence before the jury from which they could evaluate for themselves whether the witnesses were trustworthy.

United States v. Martinez, 253 F.3d 251 (6th Cir. 2001) : The Court held it was error (but harmless) in a drug case for the prosecutor to elicit from a narcotics deputy that information from the government's main witness in seven prior investigations had "always been credible, ... accurate and truthful." Although the Court found that the testimony did not amount to a prosecutor's placing personal prestige behind the key witness and noted that the prosecutor could properly seek to support the witness's credibility, it held that error occurred because the prosecutor failed to ask the deputy what evidence there was to confirm the witness's previous reliability and instead simply asked the deputy to assert that the witness had been accurate and truthful. That meant that the prosecutor was implying a guarantee of truthfulness based on facts outside the record, which is impermissible. In *United States v. Francis, 170 F.3d 546 (6th Cir. 1999)* , the Court reversed money laundering convictions because of prosecutorial misconduct. The misconduct included eliciting from an agent that he had corroborated information from a cooperating witness, without also eliciting the details of the corroboration. Where the defendants in a marijuana possession case, *United States v. Lochmondy*, n16 attacked the credibility of a government witness, the Court held it was proper to admit testimony thereafter that the witness had cooperated on other cases that resulted in convictions.

United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) : In a drug smuggling prosecution, the Court sustained the introduction of testimony by a government witness that he had been told by a lawyer associated with the defendants that "they know where your brother is at." The evidence was relevant to an assessment of the witness' credibility, in that it tended to demonstrate the witness' resolve in testifying. The Court declined to hold that the testimony was unduly

prejudicial.

[b] Bolstering the Witness -- Opening the Door

United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995) : The Court affirmed drug convictions, holding that the government properly entered its witnesses' plea agreements into evidence on direct examination, since the defendants had attacked the credibility of these witnesses in their opening statements. One defendant's complaint that a polygraph clause was improperly introduced was rejected because the defendant's own counsel had elicited testimony about that clause.

[c] Bolstering the Witness -- Vouching by Prosecutor

United States v. Binker, 795 F.2d 1218 (5th Cir. 1986) : The Court affirmed marijuana convictions, finding that the government properly questioned its witnesses about their plea agreements, which included promises to testify truthfully. Admission of an unredacted plea agreement stating that the government had independently verified the witness' statements was error, but was harmless in this case. The Court cautioned prosecutors against attempting to bolster a witness by vouching for credibility and implying that the government possesses extrinsic evidence not presented to the jury that supports the witness.

United States v. Trujillo, 376 F.3d 593 (6th Cir. 2004) : Affirming a conviction for conspiracy to possess marijuana with intent to distribute, the Court rejected the defendant's argument that the government improperly vouched for the testimony of two coconspirators by eliciting testimony that they had to truthfully cooperate or they would breach their plea agreements. The Court observed that "the prosecutor did not offer any personal observations or opinions as to the veracity" of either witness, "nor did she place the prestige of the Government behind their credibility." In *United States v. Francis, 170 F.3d 546 (6th Cir. 1999)* , the Court reversed money laundering convictions because of prosecutorial misconduct, which included improperly vouching for cooperating witnesses by disclosing, in addition to the terms of their plea agreements, that favorable sentencing recommendations would be made because the terms had been adhered to. It also included the prosecutor's reference to having terminated plea discussions "abruptly" because the witness "wasn't telling the truth," and subsequently offering an agreement when she had a subsequent meeting and believed him.

United States v. Edwards, 154 F.3d 915 (9th Cir. 1998) : The Court reversed a cocaine possession conviction as a result of improper vouching by the prosecutor. Although a bag containing crack cocaine was found in a car driven by the defendant, the car was registered to another person, and one officer who was present when the car was searched testified that there was nothing in the bag that established the identity of the owner. The night the officer testified, the prosecutor, in the presence of two police officers, examined the bag, which had been in the custody of the police for two years, and found a bail receipt bearing the defendant's name under a piece of cardboard at the bottom. The prosecutor called the two police officers who were present, and each testified as to the discovery of the bail receipt. The prosecutor identified the receipt as close to a "smoking gun" in closing argument. Observing that "the danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise," the Court reasoned that "[a]lthough the circumstances of this case do not fit neatly under either the advocate-witness rule or the vouching rule, there can be no question that the policies underlying both rules were directly contravened by the prosecutor's continued representation of the government." In *United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996)* , the Court, reversing a defendant's convictions for aggravated sexual assault against his stepdaughter, found that the prosecutor improperly vouched for the credibility of the stepdaughter by referring to inadmissible prior consistent statements made by the complaining witness. In *United States v. Kerr*, n17 the Court reversed drug-related convictions, finding that "an experienced United States

attorney deliberately introduced into the case his personal opinion of the witnesses' credibility."

[3] Coaching

United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986) : The Court reversed a conviction for interfering with a citizen's civil rights, finding that the defendant should have been permitted to play tape-recorded interviews of three principal government witnesses, which had been conducted by an attorney who had been instrumental in publicizing the events giving rise to the prosecution. The defendant claimed that the witnesses were coached to testify as they did. Although the Court did not refer to this as bias impeachment, the defendant's theory closely resembles an attack on the ground that a witness has been influenced to disfavor one side of a case.

United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994) : On cross-examination of the defendant, who was charged with cocaine distribution, the prosecutor asked whether he had discussed his testimony with his attorney prior to taking the stand and, after the defendant admitted he had, asked about an event the defendant had discussed during direct examination that was interrupted by a Court recess. The prosecutor used this line of questioning to expose a subtle difference in the direct testimony before and after the recess and thus to create an inference that the defendant's attorney had coached him during the recess. The Court held that there was no violation of the defendant's attorney-client privilege, as the prosecutor's questions did not reach the substance of the legal advice given and coaching is a proper subject of impeachment. We are concerned about this sort of cross-examination, since the witness' denial of having a conversation could only be corroborated by having the attorney testify, and the implication of coaching from an admission could only be rebutted by revealing privileged communications.

United States v. Plotke, 725 F.2d 1303 (11th Cir. 1984) : In a mail fraud and conspiracy case, a witness was unable to identify one of several defendants during an evidentiary hearing on the admissibility of conspirator statements. After a recess, he purported to make a positive identification. The Trial Judge held a hearing to determine whether the witness' ability to make the identification was the product of improper coaching and ultimately forbade the witness from identifying the defendant before the jury. The Judge barred two other defendants from impeaching the witness by asking questions about events that occurred during the recess, and the Court affirmed. It found that the defendants had ample latitude to attack the witness and that further impeachment on a collateral matter was not necessary to satisfy the demands of the *Confrontation Clause*.

[4] Contradiction

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995) : In a female lawyer's Title VII action against a law firm, the Court held it was error (but harmless) to admit evidence that the plaintiff had had difficulty in getting along with staff and in meeting deadlines at a firm where she had worked previously. The evidence did not properly impeach her by showing character for untruthfulness or by contradicting her explanation of why she left the prior firm.

United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978) : Reviewing a ruling that permitted other crimes evidence to be introduced in a public corruption case, the Court observed that "[o]nce a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." The Court also observed that "*Rule 607* appears to allow the continuation of federal practice in admitting extrinsic evidence to impeach specific errors or falsehoods in a witness' direct testimony, subject to *Rule 403* considerations."

United States v. Payne, 102 F.3d 289 (7th Cir. 1996) : Affirming a conviction for cocaine distribution, the Court found no error when the defendant was precluded from offering evidence to contradict a prosecution witness. The witness, a participant in the drug deal, stated that neither his family nor his girlfriend knew that he was a drug dealer. The defendant was not permitted to call the girlfriend, who would have testified that she knew that the witness was a drug dealer. The Court held that the girlfriend's testimony was properly precluded under the "collateral issue rule," since it would not have dealt at all with the defendant's guilt or innocence. In *United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994)* , the Court affirmed drug trafficking convictions, noting that presenting evidence that part or all of a witness' testimony is incorrect is a valid method of impeachment. However, the Court held there was no abuse of discretion in excluding testimony that would only contradict government witnesses on matters irrelevant to issues in the trial.

United States v. Callaway, 938 F.2d 907 (8th Cir. 1991) : Where the defendant, charged with transferring a firearm knowing it would be used to commit a crime of violence, testified on direct that he had not been involved in any robberies, there was no error in asking him about a 1972 conviction for grand larceny and a 1969 theft. The Court held that the cross-examination directly attacked the credibility of the defendant's denial of involvement in any robberies or thefts. In *United States v. LeAmous, 754 F.2d 795 (8th Cir. 1985)* , the defendant, by painting a picture of himself on direct examination as someone who protected young girls by encouraging alternatives to prostitution, opened himself up to cross-examination concerning particular instances of conduct.

[5] Cooperating Witness' Guilty Plea or Immunity

[a] Impeachment Use

[i] Instructions on Use

United States v. Ramirez, 973 F.2d 102 (2d Cir. 1992) : The Court reversed a conviction for narcotics and firearms offenses, holding it was error to refuse to instruct the jury that they should not consider a testifying codefendant's guilty plea as evidence of the defendant's guilt.

United States v. Werme, 939 F.2d 108 (3d Cir. 1991) : The Court affirmed a conviction for conspiracy to violate the Travel Act, noting that evidence of another party's guilty plea is not admissible to prove the defendant's guilt but may be admitted to show the witness' bias. The Court held it was error, but harmless, to fail to give a requested limiting instruction when a coconspirator's guilty plea was introduced.

United States v. Modena, 302 F.3d 626 (6th Cir. 2002) : The Court affirmed a conviction for conspiracy to defraud, holding it was error (but not plain error) for the Judge to fail to issue a cautionary instruction after a cooperating witness for the government acknowledged that he had been convicted in connection with the conspiracy. In *United States v. Christian*, n18 the Court affirmed drug convictions, holding there was no plain error in the failure to give a limiting instruction *sua sponte* concerning a codefendant's guilty plea. After observing that a plea by a codefendant can be especially prejudicial, the Court reasoned that the potential for prejudice is greatly reduced where the codefendant testifies regarding the specific facts underlying the crimes in issue.

United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991) : Affirming tax evasion convictions arising out of a "skimming" scheme, the Court held there was no abuse of discretion in giving, at the government's instance, an instruction to consider carefully testimony from a prosecution witness who had been given immunity. Although the instruction is ordinarily given on behalf of the defense, the witness was basically a hostile witness, and the Rule permits

any party to attack a witness' credibility.

United States v. Harris, 738 F.2d 1068 (9th Cir. 1984) : The Court said that it was unfortunate that the jury was instructed not to speculate on the reasons why two coconspirators pleaded guilty and testified for the government. The defendants attempted to use the pleas to prove that the coconspirators had a motive to testify as the government wanted, and the instruction tended to undercut the attempt at impeachment. However, the Court found that another instruction fairly informed the jury that it should carefully examine the testimony of confessing codefendants.

United States v. Baez, 703 F.2d 453 (10th Cir. 1983) : The Court found plain error in the Trial Judge's statement to the jury in a drug conspiracy case that two codefendants had pleaded guilty. The Court recognized that where codefendants testify, the government or the defense may reveal guilty pleas for the jury to consider in evaluating credibility, and it reiterated the importance of instructions to the jury on the permissible use of a guilty plea. In this case, however, one of the codefendants did not testify and the Judge gave no instruction concerning the plea by the one codefendant who did testify.

[ii] Cooperating Witness' Guilty Plea or Immunity -- Impeachment Use -- Other Proper Use

United States v. Basic Constr. Co., 711 F.2d 570, 1983-1 Trade Cas. (CCH) P65472 (4th Cir. 1983) : Affirming bid-rigging convictions, the Court held there was no error in a ruling that either side could bring out the fact that a codefendant had pleaded guilty. The Court noted, however, that it might be preferable to tell the jury only that the case against the codefendant had been disposed of. In *United States v. McEachern, 675 F.2d 618 (4th Cir. 1982)* , the Court found that where the defense made a strenuous attack on a government witness by bringing out the fact that he had pleaded guilty and made a deal, the government was entitled to show that the deal was not as good as the attack by the defense suggested.

United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989) : The Court held there was no error in admitting the guilty pleas of codefendants who testified at trial, not as evidence of the defendants' guilt, but as evidence of the witness' credibility after it had been attacked.

United States v. Roth, 736 F.2d 1222 (8th Cir. 1984) : The Court observed that admission of "evidence that a codefendant has pled guilty to the same offense is not error unless elicited as substantive proof of the defendant's guilt. Such evidence is clearly admissible to show the witness' acknowledgment of participation in the offense, or to reflect on his credibility."

United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994) : Reversing convictions for cocaine offenses on other grounds, the Court noted that it was error to sustain best evidence objections when the defendant attempted to cross-examine codefendant witnesses about their understanding of their plea agreements. The witnesses' understanding of the terms of the agreements was relevant in assessing credibility.

United States v. Dunn, 841 F.2d 1026 (10th Cir. 1988) : In a drug prosecution, the Court held that "[i]f a coconspirator testifies, the government or defense may question the witness about the plea in order for the jury to assess the credibility of the witness," but it added that the Judge should caution the jury as to the purpose for which the evidence is admitted.

United States v. Edwards, 716 F.2d 822 (11th Cir. 1983) : The Court held that the government could rehabilitate its witness, who was cross-examined in a way that implied he might have something to gain in exchange for his testimony, by showing that he had already been convicted and sentenced.

[iii] Cooperating Witness' Guilty Plea or Immunity -- Impeachment Use -- Proper Use on Direct Examination

United States v. Spriggs, 996 F.2d 320 (D.C. Cir. 1993) : Affirming drug convictions, the Court applied the rule followed in a majority of Circuits, that the government may elicit evidence of the contents of a cooperation agreement on direct examination, and observed that there is no reason to believe such evidence improperly bolsters the credibility of a witness.

United States v. Richardson, 421 F.3d 17 (1st Cir. 2005) : The defendant was convicted for perjury before a grand jury investigating Medicare/Medicaid fraud, when she lied about illegal discounts for pharmaceuticals from her employer. The prosecution introduced testimony from a former supervisor that the employer expected accurate reports from employees and gave bonuses to increase sales, and it also introduced evidence that the witness had pleaded guilty to charges of fraud against the government based on conduct while working for the employer. The defendant argued that evidence of the witness' guilty plea was prejudicial in suggesting the defendant's guilt by association, the risk of prejudice substantially outweighed the weak probative value of the substantive testimony, and the preemptive impeachment was unnecessary because the defendant offered to forgo impeachment of the witness. Affirming, the Court held there was no abuse of discretion, since the evidence was relevant, and any risk of undue prejudice was minimized by lengthy and repeated cautionary instructions to the jury. In *United States v. Martin*, n19 the Court upheld a conviction for transporting stolen autos, finding no error when the government was permitted to read its witnesses' plea agreements to the jury in their entirety. It reasoned that redaction of the agreements "would leave the jury with a slanted and false picture of what the bargain entailed." In *United States v. McNeill*, n20 the Court affirmed a mail fraud conviction, holding that the government properly elicited from two of its witnesses the fact that they had been immunized and compelled to testify, although the defendant had indicated that he would not ask about immunity on cross-examination. The Court reasoned that "[t]he fact of immunity and compulsion orders aids the jury function regardless of whether defendant intended to attack the credibility of the witnesses." Although recognizing "that evidence of a grant of immunity may ... have bolstered the witnesses' credibility," it concluded that "the very need for the immunity and compulsion orders ... undercut the credibility of these witnesses," and that it was important for the jury to draw its own inferences from the circumstances under which the witnesses testified.

United States v. Fernandez, 829 F.2d 363 (2d Cir. 1987) : The Court observed that the existence of an agreement may be adduced on direct examination to preclude any inference of concealment by the government, but that the agreement itself may be admitted on redirect examination only as a proper response to cross-examination. The Court reasoned that not every cross-examination that attempts to undermine the testimony of a government witness warrants admission of an agreement, e.g., an examination that did not challenge credibility but merely suggested some confusion on the witness' part would not justify admission of the agreement. In this case, any error in admitting the agreement was found to be harmless. The Court stated in *United States v. Cosentino* n21 that the text of a cooperation agreement may be introduced during direct examination when the defendant's opening statement challenges the credibility of the witness. See also *United States v. Borello* n22(the defendant's convictions for smuggling goods into the United States were reversed after the government improperly introduced a witness' written cooperation agreement on direct examination).

United States v. Universal Rehabilitation Servs. (PA), Inc., 205 F.3d 657 (3d Cir. 2000) (en banc): In the prosecution of a corporation and its director of operations for Medicare fraud, the Court found no abuse of discretion in

denying a defense motion *in limine* to bar the government from introducing evidence that two prosecution witnesses, former employees of the corporation, had pleaded guilty to fraud in the scheme, although defense counsel represented that they would not challenge the credibility of the two witnesses. This case is discussed in the Editorial Explanatory Comment, *§ 607.02[4]*. In *United States v. Gambino, 926 F.2d 1355 (3d Cir. 1991)* , the Court affirmed convictions for drug offenses, holding that the government could properly elicit guilty pleas of testifying accomplices on direct examination to dampen subsequent attacks on credibility and to foreclose any suggestion that the party producing the witness was concealing evidence, so long as the jury understands the limited purposes of a coconspirator's guilty plea. See also *United States v. Frankenberry* n23(the government may elicit on direct examination that a witness is in a protection program and has received substantial benefit, as long as it does not exploit any inference of threats by the defendant).

United States v. Romer, 148 F.3d 359, 1998-1 Trade Cas. (CCH) P72197 (4th Cir. 1998) : The Court found no error when the cooperating witness testified on direct that he had entered into a plea agreement with the government. The Court held that the protections that it set forth in *United States v. Henderson, 717 F.2d 135 (4th Cir. 1983)* , had been met, specifically: (1) the prosecutor's questions did not imply that the government had special knowledge of the witness' veracity; (2) the Trial Judge instructed the jury to be cautious in evaluating the witness' testimony; and (3) the prosecutor's closing argument contained no improper use of the witness' promise of truthful cooperation.

United States v. Valley, 928 F.2d 130 (5th Cir. 1991) : Affirming a conviction arising from stolen Treasury checks, the Court found no abuse of discretion in permitting the government to refer to testifying coconspirators' guilty pleas in its opening statement and on direct examination, when the defense, even though moving *in limine* to exclude mention of the pleas, had not made a timely and unequivocal commitment not to use the convictions. See also *United States v. Countryman, 758 F.2d 574 (5th Cir. 1985)* (the government may elicit a coconspirator's guilty plea on direct examination to blunt the impact of expected cross-examination, but it may not attempt to use the plea as affirmative evidence of the defendant's guilt).

United States v. Montani, 204 F.3d 761 (7th Cir. 2000) : Affirming a conviction for fraud, the Court held there was no abuse of discretion in permitting the government to introduce evidence of the cooperating witness' guilty plea on his direct examination, even though the defendant offered before trial to stipulate that he would not use the plea to impeach the witness' testimony. Admitting the guilty plea evidence on direct avoids a piecemeal presentation and supplies an answer to the jurors' natural question why the witness would testify about crimes in which he was a participant. Any prejudicial effect was cured by an instruction that the guilty plea evidence could be considered only for credibility. In *United States v. Robbins, 197 F.3d 829 (7th Cir. 1999)* , the Court affirmed convictions arising out of a large-scale marijuana operation. It noted that "[o]ur case law permits the prosecutor to elicit testimony on direct examination concerning the witness' plea agreement; indeed, he may place the entire plea agreement in evidence." Rejecting defense arguments that the introduction of proffer letters and plea agreements was improper, the Court observed that "we have cautioned the Government to avoid unnecessary repetitive references to truthfulness in its plea agreements," but it found that there was no overemphasis in this case. In *United States v. Sanders*, n24 the Court, affirming fraud convictions, found no abuse of discretion in admitting former codefendants' guilty pleas during the government's case-in-chief, as defense trial strategy implying that the defendant was singled out and the former codefendant-witness went unpunished made admission of the plea evidence inevitable, and the jury was properly instructed not to consider the pleas as evidence against the defendant. See also *United States v. McGrath* n25(the government properly elicited from a codefendant testimony that he had pleaded guilty to similar charges, since the indictment charging both the defendant and the codefendant was read to the jury); *United States v. LeFevour* n26(no error in the government's bringing out a witness' immunity agreement even if no cross-examination was expected); *United States v. Davis* n27(testimony of unindicted coconspirators who had pleaded or been found guilty was properly admitted to anticipate cross-examination and avoid any impression that the government was concealing information).

United States v. Tulk, 171 F.3d 596 (8th Cir. 1999) : The Court affirmed convictions arising out of a narcotics conspiracy, and found no error in the introduction of evidence of prosecution witness plea agreements, noting that "the prosecutor's questioning did not suggest that the government had independently verified the testimony or that acceptance of the agreement implied that the proposed testimony was accurate." In *United States v. Darden*, n28 the Court affirmed racketeering convictions involving drug trafficking, holding that the government was properly permitted to elicit from a witness on direct examination the fact that the witness had made a deal with the government to receive a life sentence for certain crimes, and thus avoided exposure to the death penalty. In *United States v. Kroh*, n29 a bank fraud conspiracy prosecution, the government introduced during its case-in-chief a witness' guilty plea to a conspiracy with the defendant to defraud the banks in question, ostensibly to show the credibility of the witness and his admitted participation in the conspiracy. The Court held there was no abuse of discretion in permitting direct examination of the witness regarding his plea agreement, as the government did not focus on the *quid pro quo* involved and did not even mention that the conspiracy to which the witness had pleaded was the one with the defendant. When the defendant, on cross-examination, asked the witness whether he had agreed with the defendant to defraud the bank, the door was opened for the government to bring out that the witness had pleaded guilty to a conspiracy with the defendant. Three Judges dissented on the ground that the government unfairly called the witness merely to introduce evidence of his guilty plea.

United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) : The Court said that a prosecutor could bring out that a witness called by the government had pleaded guilty to the crime for which the defendants are being tried.

United States v. Lord, 907 F.2d 1028 (10th Cir. 1990) : Noting that a majority of the Circuits permit the government to introduce evidence of the truthfulness provisions of a witness' plea or cooperation agreement on direct examination, before any challenge to the witness' credibility, the Court held in affirming wire fraud convictions that *Rule 608(a)(2)*'s requirement that credibility be attacked before evidence of the witness' truthful character can be introduced was not violated by bringing out plea and cooperation agreements on direct, since the evidence impeaches as well as bolsters the witness' credibility. In *United States v. Davis*, n30 the Court said that the prosecution may use evidence of guilty pleas by codefendant witnesses to bolster their claim of first-hand knowledge and to blunt defense efforts at impeachment.

United States v. Smith, 893 F.2d 1269 (11th Cir. 1990) : After the beginning of a trial of a drug conspiracy, two codefendants made a plea agreement and testified for the government. The Court held that evidence of the plea agreement was properly offered by the government to counter an anticipated contention of bias and that instructions made it clear that the evidence was not to be used as substantive evidence of guilt. See also *United States v. Melton* n31(upholding the government's eliciting from a witness his agreement to plead guilty and the bargain for dismissal of charges against his wife).

[iv] Cooperating Witness' Guilty Plea or Immunity -- Impeachment Use -- Use Improper

United States v. Dworken, 855 F.2d 12 (1st Cir. 1988) : The Court noted that a codefendant's plea may be elicited on direct to dampen the likely effects of an attack by a defendant, but cautioned that prosecutors may not use such a plea to support an inference of guilt on the part of other defendants. Although it found misconduct in the prosecutor's statements in the instant case, it determined that reversal was not required.

United States v. Runnels, 833 F.2d 1183 (1987) , vacated on other grounds, 877 F.2d 481 (6th Cir. 1989) (en

banc): The Court observed that the government's revelation that a witness had entered a guilty plea "smack[ed] of sharp practice, at the least," since the only purpose for offering the evidence was to mislead the jury into thinking that the witness had no motive to be favorable to the government.

[b] Cooperating Witness' Guilty Plea or Immunity -- Polygraph and Truthfulness Provisions

United States v. Musacchia, 900 F.2d 493 (1990) , *vacated in part on other grounds*, *955 F.2d 3 (2d Cir. 1991)* : The Court, in reviewing a tax evasion case, found error in admitting three prosecution witnesses' testimony on direct about "truth-telling" provisions in their cooperation agreements, but the error was harmless. See also *United States v. Jones* n32(truth-telling portions of cooperation agreements were properly admitted once the defendant questioned the motive of government witnesses and inquired into their immunity status); *United States v. Borello* n33(convictions for smuggling goods into the United States were reversed after the government improperly introduced a witness' written cooperation agreement on direct examination).

United States v. Porter, 821 F.2d 968 (4th Cir. 1987) : The Court held that it was error, but harmless, to introduce a plea agreement containing a requirement that a government witness take a polygraph test. See also *United States v. Herrera* n34(evidence of plea agreements that referred to a witness' possibly taking a polygraph examination was improperly admitted, since it amounted to bolstering the witness' credibility with inadmissible evidence); *United States v. Henderson* n35(finding no error in the government's bringing out a witness' plea agreement, although the defendant had not indicated whether he planned to question the witness about it, or in disclosing a truthful-testimony promise in the agreement, where the prosecutor never implied the government had special knowledge concerning the witness' truthfulness).

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000) : In a RICO prosecution of a Mafia leader, the Court found no abuse of discretion in the admission of a cooperating witness' plea agreement that contained a promise to "provide truthful and complete information." Introduction of the entire plea agreement permitted the jury to consider fully the witness' possible conflicting motivations, and the prosecutor did not improperly rely on the truthfulness provision in closing argument to vouch for the witness. In *United States v. Townsend*, n36 the Court affirmed convictions for mail fraud and altering odometers, holding that the government was properly permitted to elicit testimony showing that its witness had entered into a plea bargain and that the agreement contained a promise the witness would testify truthfully.

United States v. Collins, 223 F.3d 502 (7th Cir. 2000) : The Court affirmed a conviction for conspiracy to distribute methamphetamine, holding there was no abuse of discretion in admitting cooperation and plea agreements for ten government witnesses. Introduction of the agreements, which contained stipulations to provide "complete and truthful" information and testimony, and eliciting testimony from each witness that s/he was obligated to be truthful did not constitute impermissible "unnecessarily repetitive references to truthfulness." The Court reiterated its caution to prosecutors from *United States v. Thornton*, *infra*. In *United States v. Robbins, 197 F.3d 829 (7th Cir. 1999)* , the Court affirmed convictions arising out of a large-scale marijuana operation. It found no abuse of discretion when the defense was barred from asking witnesses, whose plea agreements and proffer letters stated that each of them was willing to submit to a polygraph examination at the request of the government, whether they had taken the polygraph tests. The Court reasoned that "even the threshold question as to whether a polygraph test had been administered would confuse and cause speculation among the jury." In a drug conspiracy prosecution, *United States v. Thornton*, n37 the government introduced plea agreements for the nine cooperating witnesses and proffer letters for most of those witnesses. Each proffer letter made three references to truthfulness, and each plea agreement made five references to truthfulness. The Court approved admission, but it repeated its warning to prosecutors to avoid "unnecessarily repetitive references to truthfulness," noted that three references in the proffer letters and five in the plea agreements came "perilously close" to the line, and observed that the proffer letters in particular seemed overkill, since they had no

distinct evidentiary purpose when a superseding plea agreement has been reached. The plea agreements also contained a sentence in which the witness agreed to submit to a polygraph examination upon the government's request (no requests were made, and none of the witnesses ever took a test); the Judge redacted this sentence from all the plea agreements. However, the proffer letters of two witnesses also contained the sentence. The Court said it was a mistake to admit the proffer letters without redacting the polygraph reference, but that any error was rendered harmless by a cautionary instruction not to pay attention to whether the witness might have taken a polygraph test. In *United States v. Mealy*, n38 a marijuana prosecution, the government was properly permitted to introduce codefendants' plea agreements; references to truthful testimony were not disproportionately emphasized and the prosecutor did not vouch for the witnesses.

United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) : Affirming convictions for conspiracy to transport a stolen vehicle, perjury, and making a false statement, the Court held there was no error in permitting the prosecutor to elicit testimony from three prosecution witnesses that they had entered into cooperation agreements that required them to tell the truth. The Court observed that "[w]e have held that a prosecutor may inquire into the terms of a cooperating witness's plea agreement so long as this information is not used as evidence of the defendant's guilt and the jury understands its duty to judge witness credibility independently." The Court noted that the prosecutor said nothing to imply that the defendant must be guilty because his friends had pleaded guilty.

United States v. Dadanian, 818 F.2d 1443 (1987) , vacated in part on other grounds, 856 F.2d 1391 (9th Cir. 1988) : The Court held that admission of a plea agreement in which a witness agreed to testify truthfully and to cooperate did not amount to improper vouching for credibility. See also *United States v. Kats* n39(a co-perpetrator's partially redacted plea agreement, which contained promises to give truthful testimony and allowed the government to rescind an immunity grant for untruthfulness, was properly admitted after the defendant attacked the witness' credibility). In *United States v. Brown*, n40 the Court reversed heroin distribution convictions because the prosecutor improperly brought to the jury's attention the fact that as part of plea bargain agreements several government witnesses agreed to submit to polygraph tests. The government may bring out that it has made a bargain with a witness, but it may not elicit every fact that might be mentioned in the agreement.

See also *United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990)* (the error, if any, in permitting an FBI agent to mention the "truthfulness" portion of witnesses' cooperation agreements during direct examination was harmless, given defense counsel's attack during cross-examination).

United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986) : The Court affirmed drug convictions, finding that the government was properly permitted to introduce the terms of a plea agreement, which included a promise to testify truthfully, once the defendant attacked a witness on cross-examination. In *United States v. Cruz*, n41 a prosecution of a large cocaine distribution conspiracy, the Court held that a prosecutor properly introduced truth-telling provisions in plea agreements of government witnesses on direct examination where the witnesses' credibility came under heavy attack from the first opening statements by the defense. In *United States v. Hilton*, n42 the Court reversed drug convictions because the government was permitted to introduce plea bargain documents containing references to polygraph examinations and to argue that its witnesses were credible because they agreed to such examinations. A dissenting Judge argued that the evidence of the offers to take examinations did not bolster credibility.

[c] Cooperating Witness' Guilty Plea or Immunity -- Potential Sentence

United States v. Cropp, 127 F.3d 354 (4th Cir. 1997) : The Court held in a crack distribution conspiracy prosecution that there was no abuse of discretion in prohibiting cross-examination of cooperating witnesses regarding the specific penalties that they would have received absent cooperation or that they hoped to receive due to their

cooperation. Defense counsel were permitted to ask the witnesses whether they faced a "severe penalty" prior to cooperating and whether they expected to receive a lesser sentence because of their cooperation. Any additional probative value from quantitative questions was outweighed by the certain prejudice to the government that would result when a sympathetic jury learns that a finding of guilt results in 10-20 years of imprisonment.

[6] Defense Witness' Guilty Plea

United States v. Chilcote, 724 F.2d 1498 (11th Cir. 1984) : The Court upheld a cocaine conviction, finding that a defense witness was properly impeached with a guilty plea as to his own involvement in the transactions that included the defendant. The Court noted that the defendant did not object to the evidence of the plea at trial and found that the government did not take unfair advantage with the evidence.

[7] Drug Use

United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987) : The Court held it was error (but harmless) to prohibit a defendant from cross-examining a witness concerning his regular use of cocaine, in order to impeach his ability to observe and remember.

Smalley v. United States, 798 F.2d 1182 (8th Cir. 1986) : In a prosecution for conspiracy to falsify firearms dealers' records, the Court found no error in the exclusion of a pharmacist's testimony concerning the effects of a drug that a witness had taken, since the offer of proof indicated that the pharmacist could not render an opinion as to whether the drug would reduce inhibitions against lying.

[8] Group Membership

United States v. Abel, 469 U.S. 45 (1984) : In Abel's armed robbery trial, a defense witness, Mills, testified that he had been in prison with Abel and a government witness, Ehle, and that Ehle had told him that Abel was not one of the robbers, but that he would implicate Abel in order to obtain a shorter sentence for himself. On cross-examination, the prosecutor asked Mills whether he and Abel were members in a secret prison organization whose members would lie to protect each other. Mills denied this, and the prosecution recalled Ehle to testify that Abel and Mills were, in fact, members of such an organization. The Court of Appeals found the impeachment was improper because it involved a "group tenet," rather than a personal tenet on the part of Mills. A unanimous Supreme Court reversed, holding that bias impeachment was permissible and that the type of organization to which members belong can be relevant to assessing the nature or extent of a witness' bias.

United States v. Elkins, 70 F.3d 81 (10th Cir. 1995) : The Court reversed a conviction for being a felon in possession of a firearm because evidence of the defendant's and a defense witness' gang membership and gang activity was improperly admitted to impeach the witness. There was no evidence that the two were members of the same gang or that the witness' testimony was biased because of fear of gang discipline.

[9] Habit Evidence

United States v. Ible, 630 F.2d 389 (5th Cir. 1980) : Reversing a conviction for possession of counterfeit currency on another ground, the Court noted that "it is well settled that impeachment of a witness by presenting testimony of a general habit of intemperance unrelated to veracity is improper."

[10] "Impeaching" an Accused Who Does Not Testify

United States v. Beeks, 224 F.3d 741 (8th Cir. 2000) : The Court reversed a conviction for conspiracy to distribute cocaine, because the prosecutor referred to the defendant's prior conviction even though he never testified. Cross-examining a defense witness who testified to the defendant's employment history, the prosecutor sought to elicit how the defendant had responded to a question regarding prior convictions on an employment form he had filled out. An objection was sustained before the witness could answer, but the Court found prosecutorial misconduct because the implication of the question was that the defendant had been convicted of a crime and had lied to his employer about it. That was an improper attempt "to obtain the effect of impeachment even though Beeks did not testify."

[11] Impeachment, and Anticipating Impeachment, on Direct Examination

[a] Hearsay Evidence

[i] Offered by Accused

United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985) : The Court found that the defendants were properly precluded from calling a witness for the purpose of offering an inconsistent statement that was not admissible as substantive evidence.

United States v. Fay, 668 F.2d 375 (8th Cir. 1981) : The Court held there was no error in refusing to permit a defendant charged with assault to call a witness for the sole purpose of subsequently offering a prior out-of-court statement not admissible as substantive evidence.

[ii] Impeachment, and Anticipating Impeachment, on Direct Examination -- Hearsay Evidence -- Offered by Prosecution

United States v. Johnson, 802 F.2d 1459 (D.C. Cir. 1986) : Although the Court affirmed a cocaine conviction, it found that the prosecution acted improperly in calling a witness for the sole purpose of bringing out the witness' postarrest statement that was not independently admissible.

United States v. Zackson, 12 F.3d 1178 (2d Cir. 1993) : The Court held it was error, but harmless, for the prosecutor to call an unwilling witness solely to get before the jury inadmissible hearsay under the guise of refreshing recollection.

United States v. Ince, 21 F.3d 576 (4th Cir. 1994) : The Court reversed a conviction for assault with a dangerous weapon, finding that "the United States' only apparent purpose for impeaching one of its own witnesses was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence of [the defendant]'s alleged confession." In *United States v. Brewer, 1 F.3d 1430 (4th Cir. 1993)* , the Court affirmed a cocaine conviction, finding that the defendant failed to preserve a claim that the government called a witness solely to elicit testimony (after she denied that the defendant was a drug dealer) that she had told federal marshals the defendant was such a dealer. A dissenting Judge believed that the error was preserved and that "the prosecution attempted to set up its own witness as a straw man whom it could impeach by the use of inadmissible hearsay."

United States v. Livingston, 816 F.2d 184 (5th Cir. 1987) : Affirming convictions involving stolen securities, the

Court observed that a prosecutor may not introduce a prior inconsistent statement under the guise of impeachment when its real purpose is to place incriminating hearsay before the jury. Here, the government called a witness to testify against the defendant and properly anticipated defense impeachment by offering the witness' prior inconsistent statement. In *United States v. Hogan*, n43 the Court reversed a marijuana conviction "[b]ecause the government called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay evidence." It reasoned that the danger is that "[t]he jury will hear the impeachment evidence, which is not otherwise admissible and is not substantive proof of guilt, but is likely to be received as such proof."

United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977) : Armed bank robbery convictions were overturned because the prosecution had been permitted "to recite to a recalcitrant government witness a litany of leading questions which incorporated the entire substance of his unsworn, oral statements inculpating the Appellants." The witness, an accomplice who had pleaded guilty, maintained at trial that he had no recollection who was with him in the bank, and the prosecutor attempted to lay a foundation for introducing prior oral statements that the witness made to FBI agents. The Court held it was error to use the prior unsworn statements, although limited impeachment of the witness using the substance of an FBI agent's memorandum would have been permissible under *Rule 613(a)*.

United States v. Medley, 913 F.2d 1248 (7th Cir. 1990) : Affirming bribery convictions, the Court held there was no error in permitting the government to impeach a previously convicted accomplice when his testimony was inconsistent with his plea colloquy and grand jury testimony. The impeachment was not used just to introduce otherwise inadmissible hearsay. In *United States v. Kane, 944 F.2d 1406 (7th Cir. 1991)* , the Court affirmed a fraud conviction, holding that the prosecution had not improperly called the defendant's wife merely to introduce inconsistent hearsay statements. The prosecution had a sincere reason to call her because she had firsthand knowledge of the scheme, and had no reason to believe she would be hostile or would supply an opportunity for impeachment. In *United States v. Webster*, n44 the Court observed that it would be an abuse of the Rule for a party to call a witness in order to put before a jury inconsistent statements not qualifying for admission under *Rule 801*. Here, however, the prosecutor asked the Trial Judge for permission to *voir dire* a witness outside the hearing of the jury because she did not know what he would say, and the Judge denied permission following an objection by defense counsel, which indicated that the prosecutor believed in good faith that the witness would be favorable, although she could not be certain what he would say. The Court also observed that statements offered by a prosecutor for impeachment might be excluded under *Rule 403*, even though the prosecutor acted in good faith.

United States v. Gilbert, 57 F.3d 709 (9th Cir. 1995) : Affirming a conviction for felon firearm possession, the Court held that the government acted properly in calling two eyewitnesses and impeaching them with prior statements, not independently admissible, concerning the defendant's possession of a gun. The Court observed that, if the government had not called these two witnesses, "the jury would have been left to ponder why the government was reluctant to question these eye-witnesses." In *United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990)* , the Court reversed a conviction for conspiracy to distribute cocaine, finding plain error when the purpose for which the government called a witness was impeaching the witness and thereby introducing otherwise inadmissible evidence, rather than using the witness' testimony, which it knew would be false. Sustaining a bank robbery conviction in *United States v. Crouch*, n45 the Court held it was error (but harmless) for the government "overzealously" to call a witness knowing that she would deny having said certain things in order to "impeach" her with prior statements that were not admissible under *Rule 801*.

United States v. Carter, 973 F.2d 1509 (10th Cir. 1992) : The Court affirmed a conviction for conspiring to distribute cocaine, holding there was no abuse of discretion in admitting a government witness' prior statement made to the police. Although the witness had said a week prior to trial that he was fearful and would not testify, that fact was not sufficient to establish that the prosecutor had an improper purpose in calling the witness to the stand and offering his

prior statement when the witness failed to testify consistently with that statement. In *United States v. Johnson, 977 F.2d 1360 (10th Cir. 1992)* , a prosecution for drug-manufacturing and firearms offenses, the Court held that there was no abuse of discretion in admitting an accomplice witness' prior statement that one of the defendants had been armed, as the government had been surprised by the witness' testimony on direct (contrary to his grand jury testimony) that the defendant did not possess a gun -- or at least that he did not recall whether the defendant possessed a gun -- at the relevant time. In *United States v. Peterman*, n46 the Court affirmed fraud convictions, finding that the government was properly permitted to introduce the prior conviction of a coperpetrator called as a government witness, after the witness' testimony took it by surprise. The Court recognized that a prosecutor may not use impeachment as a guise for putting inadmissible evidence before a trier of fact, but it concluded that the government's offer of the evidence was for a legitimate purpose.

[iii] Impeachment, and Anticipating Impeachment, on Direct Examination -- Hearsay Evidence -- Offered in Civil Case

Balogh's of Coral Gables, Inc. v. Getz, 798 F.2d 1356 (11th Cir. 1986) (en banc), *reinstating 778 F.2d 649 (11th Cir. 1985)* : In an antitrust case, the Court held that a statement, allegedly made by a former employee of a defendant company, that was handwritten by the plaintiff's counsel and initialed by the former employee was properly excluded as hearsay. The Court added that "a witness may not be called solely for the purpose of impeaching him and thereby obtaining otherwise inadmissible testimony."

[b] Impeachment, and Anticipating Impeachment, on Direct Examination -- Miscellaneous Cases

Robinson v. Watts Detective Agency, 685 F.2d 729 (1st Cir. 1982) : In a suit by a bankruptcy trustee company to recover assets allegedly misappropriated from a security company, the Court upheld the trustee's calling an adverse party and impeaching that party with evidence of a prior conviction. It noted that "[i]mpeachment under *Rule 607* is not limited to occasions where the party calling the witness is surprised or misled by the testimony."

United States v. Louis, 814 F.2d 852 (2d Cir. 1987) : The Court affirmed heroin convictions, finding no error in the prosecutor's eliciting on direct examination of a government witness that the witness had been convicted of the same crimes for which the defendant was on trial. The testimony did not impermissibly suggest that the defendant's lack of knowledge defense had been rejected, since the witness never mentioned the defense.

United States v. Livingston, 816 F.2d 184 (5th Cir. 1987) : Affirming convictions involving stolen securities, the Court found no error when a government witness was permitted to say that he had recanted his prior version of the events and to give an explanation on direct, since the defense certainly would have elicited the same information. In *United States v. Fusco, 748 F.2d 996 (5th Cir. 1984)* , the Court held that it was permissible in a marijuana importation case for the government to show that an informant-witness had been paid money for participation in investigations, to prove that payments were not for "saying the right things on the stand." The Trial Judge has authority under *Rule 611(a)* to permit the government to anticipate an attack, but the Court suggested that ordinarily anticipation of impeachment should be avoided.

United States v. Faymore, 736 F.2d 328 (6th Cir. 1984) : The Court affirmed a doctor's convictions for narcotics offenses, finding that the government properly elicited testimony from a witness who had worked with drug enforcement agents in the case that tended to impeach her credibility. The evidence related to the witness' drug dependence, the government's payment of money to her, and its promise to aid her incarcerated husband. Under the Rule a party is not required to leave impeachment for the cross-examiner.

United States v. Giles, 246 F.3d 966 (7th Cir. 2001) : In the prosecution of a Chicago Alderman for, *inter alia*, receiving bribes from a government mole (Christopher), the Court found no error in precluding the defendant from calling the mole, who was in a witness protection program, as a defense witness ostensibly to prove that the government scripted his conversations with Giles. The Court found that a party may not call a witness for the sole purpose of impeaching him, noting that "it seems clear here that the true defense reason (and we can understand the desire to do it) for wanting to put Christopher on the stand was to expose his warts to the jury and float the inference that the FBI should not play footsie with a sleazeball." Further, the defendant did not make an offer of proof as to the substance of the testimony he believed in good faith that Christopher would give. In *United States v. Holly, 167 F.3d 393 (7th Cir. 1999)* , the Court affirmed fraud convictions, finding no error when the government was permitted to bring out on direct examination that the defendant had threatened witnesses, since defense counsel indicated that he intended to use the witnesses' prior statements exculpatory of the defendant on cross-examination. In *United States v. Ienco*, n47 the Court reversed a conviction for extortion offenses because the Trial Judge had, *inter alia*, not permitted the defendant to use leading questions to impeach his own witness during a suppression hearing.

United States v. Spears, 827 F.2d 705 (11th Cir. 1987) : Reversing a judgment denying the government's motion *in limine* and dismissing an indictment that charged prison officials with excessive use of force, the Court held that the government could anticipate the impeachment of witnesses who made prior inconsistent statements and could elicit explanations that the witnesses believed they would lose their jobs if they did not make such statements.

[c] Impeachment, and Anticipating Impeachment, on Direct Examination -- Prejudicial Evidence

United States v. Rodriguez-Cardona, 924 F.2d 1148 (1st Cir. 1991) : On direct examination of an informant in a drug prosecution, the government brought out that he had come to the FBI's attention during an investigation of several murders. Noting its concern that this sort of "context" evidence could easily be misused by placing a defendant in the midst of extensive criminal activity unrelated to the offense charged, the Court nevertheless held that here the prosecution had a need to get the damaging evidence about the informant in front of the jury prior to cross-examination. As the testimony did not implicate the defendant in the murders and the Judge gave a cautionary instruction, there was no possible prejudice and admission of the testimony was not error. In *United States v. Frappier*, n48 the Court affirmed the defendant's conviction for procuring the premeditated murder of her husband. The Court upheld the government's calling the defendant's daughter to testify and eliciting the fact that the defendant had married the daughter's ex-husband, but observed that it was a close question whether the government should have been permitted to call the daughter and to impeach her with such a prejudicial fact.

United States v. Eisen, 974 F.2d 246 (2d Cir. 1992) : The Court affirmed RICO convictions for a law firm's fraudulent conducting of personal injury litigation, holding there was no abuse of discretion in allowing the government to call witnesses that it had said "have refused to give up the lie." Where the government has called a witness whose corroborating testimony is instrumental in constructing its case, it has a right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government's account of the same events. The prejudicial effect of the impeachment in this case did not substantially outweigh the probative value of the evidence.

United States v. Melia, 691 F.2d 672 (4th Cir. 1982) : The Court reversed a conviction for receipt of stolen property, finding it was improper to admit evidence that witnesses had been threatened in showing the good character and credibility of key government witnesses. The Court said that the government may use evidence that a witness is participating in a witness protection plan to counter inferences of bias or improper motivation, and that such evidence might be offered on direct examination. However, the evidence must be handled with caution, since it can be unduly

prejudicial to a defendant, as in this case.

United States v. West, 22 F.3d 586 (5th Cir. 1994) : In a bankruptcy fraud prosecution, the government called a witness who was an associate of the defendant's, and impeached the witness on direct by questioning him about his three felonies. The defendant argued that such impeachment was not necessary to take the "sting" out of expected impeachment of the witness by the defendant, because the defendant had "guaranteed" that he would not bring out the convictions on cross-examination, and that the prosecutor had introduced the convictions solely for the purpose of proving the defendant's guilt by association with the witness. The Court held that the impeachment was permissible because the witness' testimony was critical, and the jury had been instructed to use the convictions solely in judging the credibility of the witness. The Court did not directly answer, however, why the prosecution would find it necessary to take the "sting" out of an expected impeachment that the defendant had "guaranteed" would never occur.

United States v. Gorny, 732 F.2d 597 (7th Cir. 1984) : In a fraud and racketeering prosecution, the Court found that the government did not seek unfair advantage in charging the defendant with several counts involving a close friend, calling the friend as a witness, and subsequently eliciting evidence on redirect examination that impeached the witness. The defendant claimed that the government endeavored to hurt him unfairly by bringing out unrelated incidents concerning his friend that would spill over to him. The Court concluded, however, that the charges fit in with others contained in the indictment and that the government only offered its impeachment evidence after the defendant elicited testimony from the witness that his only motive in doing favors for the defendant was his personal friendship for the defendant. Although it approved the impeachment in this case, the Court observed that "[i]t is possible for a party to abuse this rule [607], and prosecutorial conduct, in particular, must be carefully scrutinized to ascertain that a witness has not been called merely for the purpose of introducing irrelevant evidence or of establishing the defendant's guilt by association with the witness." In *United States v. Boroni*, n49 the Court reversed (2-1) a conviction for cocaine offenses, finding it was error to permit the government to elicit evidence from a key witness that his immunity agreement covered an unrelated cash register skimming scheme involving him and the defendant. The unrelated crime was inadmissible under *Rule 404(b)* and was prejudicial.

[d] Impeachment, and Anticipating Impeachment, on Direct Examination -- Prior Crimes or Bad Acts

United States v. Flemmi, 402 F.3d 79 (1st Cir. 2005) : The Court affirmed the convictions of a retired Boston police officer arising from his assistance in hiding weapons and impeding an investigation of a criminal enterprise in which his brother was a controlling member. It held that the prosecution properly elicited from the key witness testimony regarding three murders committed in his presence and his involvement in the unlawful acquisition of a liquor store. The Court reasoned that the prosecution may elicit potential impeachment evidence on direct examination, and it was clear to the jury that the defendant was not involved in the crimes about which the witness testified. In an extortion case, *United States v. Rivera-Medina, 845 F.2d 12 (1st Cir. 1988)* , the Court upheld the government's effort to elicit from its witnesses testimony that they committed 100 crimes in order to anticipate a defense attack and to reduce its impact.

United States v. Marroquin, 885 F.2d 1240 (5th Cir. 1989) : The Court held that a government witness was properly permitted to testify concerning other frauds he had perpetrated, since he could have been cross-examined about them and the government is permitted to "blunt the sword" by revealing the information first.

United States v. Douglas, 403 F.3d 922 (7th Cir. 2005) : The defendant was charged with selling crack cocaine to a confidential informant, who the government chose not to call as a witness at trial, probably because of his substantial criminal history. When the defense indicated that it planned to call the informant, the Judge ruled *in limine* that the

defense could call the informant as a transactional witness and impeach him with prior inconsistent statements concerning the circumstances, but because the informant's "credibility was not at issue[,] ... his criminal history was irrelevant." Affirming, the Court found no abuse of discretion in the ruling. Because the government's case rested entirely on the testimony of the undercover officers who set up the transactions, the informant's credibility "would be irrelevant and inadmissible. ... A party is not free to impeach the credibility of a witness simply for the sake of doing so."

United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) : Affirming a larceny conviction, the Court explained that permitting defense counsel to introduce the defendant's prior criminal record "has been justified on the ground that it serves a twofold purpose: (a) to bring out the witness' 'real character,' the whole person, particularly his credibility, and (b) to draw the teeth out of [an] adversary's probable use of the same evidence on cross-examination."

[12] Impeachment of Inadmissible Testimony

United States v. Foster, 376 F.3d 577 (6th Cir. 2004) : The Court affirmed drug and firearm convictions, holding that the government was properly permitted to impeach the defendant's ex-girlfriend, who testified as a defense witness to the events surrounding the defendant's arrest. The girlfriend's direct testimony that the defendant had gone into a dumpster with her and her son to look for the defendant's cell phone was contradicted by a prior inconsistent statement she made to the police. This was standard impeachment. Then, on cross-examination the prosecution asked the witness whether she had ever seen the defendant selling PCP. The Judge permitted a *voir dire* of the witness in response to *Rule 403* and *Rule 404(b)* objections. The witness said she never saw the defendant with or selling PCP. The government was then permitted to ask the witness the same question in the presence of the jury and then to impeach her with a prior inconsistent statement. The Court affirmed, on the ground that this also was standard impeachment. In our view, that holding is suspect. When the prosecutor went beyond the scope of the direct, ordinarily the prosecutor is proceeding "as if on direct examination" pursuant to *Rule 611(b)*. Had the prosecutor called the girlfriend as a witness, he could not do so for the purpose of offering the inconsistent statement because it was not admissible for its truth under *Rule 801(d)(1)(A)*. It seems that the prosecutor essentially circumvented the rule that a witness may not be asked questions for the purpose of offering inconsistent statements not admissible for their truth. The prosecutor knew the witness would deny seeing the defendant selling PCP, and in going beyond her direct testimony to explore the issue the prosecutor appears to have wanted her prior statement in evidence.

[13] Limitations on Cross-Examination

[a] Contradiction

United States v. Kohan, 806 F.2d 18 (2d Cir. 1986) : The Court reversed a conviction for bank fraud, finding it was error to preclude the defendant from cross-examining a government witness in an effort to show that the witness, not the defendant, might have been engaged in a conspiracy to defraud the bank. The evidence in the case supported this theory of defense, and the Trial Judge, although possessing broad discretion in ruling on the scope of cross-examination, should allow wide latitude for defense cross-examination of a government witness. In *United States v. Pedroza*, n50 the Court reversed kidnapping conspiracy convictions because the defendants were not permitted to ask witnesses whether the kidnapped boy's father had voluntarily entrusted his son to them. The Court found that in its questioning of the father, the government opened the inquiry into whether he had consented to give his son to the defendants and that, even if the government had not asked such questions, there was an evidentiary basis for them.

United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) : The Court reversed a drug conviction because counsel was not permitted to cross-examine a government agent about recorded calls made to him by the defendant. Although

the calls made reference to other defendants and were inadmissible hearsay as to them, the Court said cross-examination would have revealed inconsistencies between the calls and the agent's testimony. The Court suggested that granting a severance would have been a prudent course of action.

[b] Limitations on Cross-Examination -- Cumulative Questioning

United States v. Williamson, 202 F.3d 974 (7th Cir. 2000) : Affirming a conviction for cocaine possession, the Court held that the Trial Judge provided the defendant with numerous opportunities to attack the informant who had purchased cocaine from the defendant. The Court noted that a Judge has discretion to exclude cumulative evidence even though such evidence is offered to impeach an important witness.

United States v. Beardslee, 197 F.3d 378 (9th Cir. 1999) , *amended*, *204 F.3d 983 (9th Cir. 2000)* : The Trial Judge in an arson-fraud conspiracy prosecution limited the defense cross-examination of two cooperating witnesses. The Court held that the error, if any, in barring examination of one witness regarding his being on probation was harmless, since the relevance of the evidence was "marginal, at best," and the witness was adequately examined on other issues touching his credibility and bias against the defendant, such as his failure to fully implicate her in his first ATF interview. There was also no abuse of discretion in barring examination of the other witness regarding traffic citations for which he had not paid the fine and an arrest warrant had been issued. The marginal relevance of the evidence would likely have been outweighed by the risk of confusing the jury; furthermore, the witness admitted on cross-examination that he did not "live up to" his obligation under the plea agreement to "obey all laws," and that he believed he had not been sanctioned because he was cooperating, so the failure to specify what laws he had not obeyed would have been largely irrelevant to his credibility.

United States v. McGuire, 200 F.3d 668 (10th Cir. 1999) : The Court affirmed a carjacking conviction, finding no abuse of discretion when the defendant was precluded from cross-examining a cooperating witness about juvenile convictions for misdemeanor theft and being on probation at the time of the incident. The defense had been permitted to conduct an extensive and searching cross-examination exposing the witness' credibility, motives, and biases.

[c] Limitations on Cross-Examination -- Impeachment for Bias

United States v. Lin, 101 F.3d 760 (D.C. Cir. 1996) : The Court held in a Hostage Taking Act prosecution that there was no abuse of discretion or *Confrontation Clause* violation in precluding defense counsel from asking a witness whether he was involved in a gambling business allegedly competing with the defendant's. Although the evidence might go to the witness' bias, the defense provided no basis aside from the defendant's unsworn assertions for initiating such a highly prejudicial line of questioning. In *United States v. Anderson*, n51 the Trial Judge in a cocaine trafficking case did not permit the defendants to cross-examine a key prosecution witness, who was testifying under immunity, about a prior charge of murder that had been dismissed without prejudice to reinstatement. The Court held the ruling violated the defendants' confrontation rights because even if there were no promises of leniency, the jury might reasonably have found that the government's right to reinstate the murder charge furnished the witness with a motive for favoring the prosecution in her testimony.

United States v. Twomey, 806 F.2d 1136 (1st Cir. 1986) : Affirming convictions of a former federal prosecutor for the sale of law enforcement information to a drug smuggler, the Court held there was no error in precluding cross-examination of the purchaser of the information as to allegations that he had been involved in two murders, since the unsubstantiated allegations were highly prejudicial and of little probative value. The jury was sufficiently able to assess the witness' motivations on the basis of evidence that he had entered into an arrangement whereby the

government recommended a favorable sentence in return for his cooperation in the prosecution. See also *United States v. Pitocchelli* n52(a limitation on cross-examination of a coconspirator concerning acts of retaliation against the defendant was permissible where the jury had other evidence as to the conspirator's violent nature and attitude toward the defendant); *United States v. Kepreos* n53("If the jury has sufficient evidence ... bearing on the witness' bias, the court need not permit unending excursions into each and every matter touching upon veracity."); *United States v. Barrett* n54(the Judge properly limited cross-examination as the defendant otherwise sufficiently showed the bias of a government witness).

United States v. Tindle, 808 F.2d 319 (4th Cir. 1986) : The Court held there was no abuse of discretion in restricting defense cross-examination to the offenses actually charged against a government witness and to his plea agreement, and in preventing questions about the witness' possible exposure to a life sentence for participation in a continuing criminal enterprise; the jury already had ample evidence of his incentives to please the government.

United States v. Mayer, 556 F.2d 245 (5th Cir. 1977) : The Court reversed convictions for filing of false statements with the VA, holding it was error to limit cross-examination of three prosecution witnesses to their guilty pleas and not permit evidence of the underlying bargains that could be relevant to bias.

United States v. Christian, 786 F.2d 203 (6th Cir. 1986) : Affirming drug convictions, the Court held that the defendants were not unfairly treated when they were denied an opportunity to cross-examine a witness about dismissal of her state drug charge, since they did elicit evidence that the government was paying her and that she sought to help her husband by cooperating. See also *United States v. Touchstone* n55(the jury in a drug case had ample evidence to make a credibility judgment without hearing that a government witness had been given immunity for two homicides in exchange for his cooperation, where another defendant might have been prejudiced by evidence of the homicides).

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : The defendants in a drug trafficking conspiracy trial sought to impeach a cooperating witness with two letters the witness had written to the prosecutor in which he said he was "not a bad person" and was "riding with the government 100%" and that he knew enough information so that "we can make arrangements for [me] to go home." The Court noted that "the better practice would have been" for the Judge to allow each defense attorney some leeway to cross-examine the witness on the letters, as evidence of his biases and motivations for testifying, but that any error was harmless. The Court rejected the government's assertion that the letters were inadmissible hearsay, noting that they were "textbook examples of impeachment evidence." In *United States v. Muelbl*, n56 the Court upheld restrictions placed on the cross-examination of government witnesses, where defense counsel was able to develop the apparent motives and biases of the witnesses.

United States v. Jakoubek, 411 F.3d 951 (8th Cir. 2005) : The Court affirmed a murder-for-hire conviction, finding no abuse of discretion when the defense was not permitted to elicit evidence of State Court charges pending against the government's key witness. In the Court's view, it was sufficient that the jury was informed of the witness' extensive criminal history and the terms of his cooperation agreement, since "there was no indication that [the witness] would or could receive assistance from the government regarding his warrant on pending state charges, let alone that he altered his testimony or sought to 'entrap' Jakoubek in exchange for such assistance."

United States v. Jackson, 756 F.2d 703 (9th Cir. 1985) : Where a witness was examined concerning his payment for an agreement to notify authorities of contact by the defendant, the Court held that it was not error to restrict further examination into his later paid cooperation with the FBI. It reasoned that "no violation of the *confrontation clause* occurs unless the restriction relates to an area of considerable relevancy, and the denial was prejudicial."

United States v. Sarracino, 340 F.3d 1148 (10th Cir. 2003) : Affirming convictions for murder, the Court held it was error (but harmless) to limit cross-examination of the government's lead investigator, who, between the incident and the trial, had gotten in trouble with his employer and had resigned while under investigation for misuse of a government computer. Limiting defense counsel to asking whether the witness was still employed as a government investigator and precluding inquiry into the reasons for the termination of employment gave the defense insufficient opportunity to show the witness' motivation to help the government. Thus, this limitation violated the defendant's confrontation rights. In *United States v. DeSoto, 950 F.2d 626 (10th Cir. 1991)* , the Court reversed a conviction for unlawful possession of a firearm because the defendant was not permitted to cross-examine the principal government witness to bring out that she was the girlfriend of a man from whom the defendant had been accused of embezzling $10,000. In *United States v. Young*, n57 the defendant, charged with defrauding a bank in a scheme involving a fictitious account of her physician-employer, sought to examine him on his bias toward her for confronting him about potential medical malpractice liability. The Court held there was no *Confrontation Clause* violation in barring the examination, as its probative value was substantially outweighed by the danger of unfair prejudice.

United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992) : Reversing a conviction for extortion and filing false income tax returns, the Court held that exclusion of evidence that the chief prosecution witness' sons had been arrested for selling marijuana violated the defendant's *Sixth Amendment* right. A reasonable juror could have concluded that the witness' testimony was the result of a desire to protect his sons. In *United States v. De Parias*, n58 the Court affirmed extortion convictions, holding there was either no error or harmless error when the defendant was permitted to ask a prosecution witness whether the government had promised to assist him in avoiding prosecution, but was not permitted to elicit testimony that the witness was facing a murder charge. The general contours of the plea agreement would have enabled a jury to assess the witness' motivation and any error in limiting cross-examination would not have affected the jury's verdict.

[d] Limitations on Cross-Examination -- Impeachment by Inconsistent Statement or Action

United States v. Stock, 948 F.2d 1299 (D.C. Cir. 1991) : The Court affirmed a conviction for possession of cocaine with intent to distribute, holding it was error (but harmless) to preclude cross-examination of an arresting officer regarding his testimony that the defendant said "I don't have anything," when he had not included this statement in his police report, the affidavit with the complaint, or his grand jury testimony. A jury might reasonably have found the omission unnatural and the prior statements inconsistent with the trial testimony.

United States v. Ayotte, 741 F.2d 865 (6th Cir. 1984) : The Court reversed drug convictions because defense counsel was not permitted to question a government agent concerning his omission of material from a written report and his grand jury testimony. The Court reasoned that "no other witness corroborated the testimony in question [of the agent], which we consider to be critical to Ayotte's convictions."

[e] Limitations on Cross-Examination -- Impeachment Generally

United States v. Drougas, 748 F.2d 8 (1st Cir. 1984) : The Court upheld limitations on defense impeachment and examination of government witnesses in a marijuana conspiracy case, noting that the Trial Judge may limit the scope of impeachment evidence or cross-examination "so long as his discretion is exercised with caution and solicitude for the defendant's *sixth amendment* rights."

United States v. Mourad, 729 F.2d 195 (2d Cir. 1984) : The Court affirmed drug convictions, holding that the defendants were not denied confrontation when the Trial Judge refused to strike the testimony of a government witness who failed to return to Court for completion of his cross-examination. The defendants had almost completed cross-examination and it was the government that had been hurt by the witness' disappearance, since there was no opportunity for rehabilitation of the witness who had been impeached in substantial ways.

United States v. Adams, 759 F.2d 1099 (3d Cir. 1985) : The Court found no error in the Trial Judge's limitation on cross-examination about threats leading to a witness' participation in a witness protection program, since additional testimony might have prejudiced other defendants.

United States v. Baresh, 790 F.2d 392 (5th Cir. 1986) : Affirming marijuana convictions, the Court found no improper restriction of cross-examination of government witnesses. The pertinent question is "whether the trial court imposed unreasonable limits on cross-examination such that a reasonable jury might have received a significantly different impression of a witness' credibility had defense counsel pursued his proposed line of cross-examination." See also *United States v. Carlock* n59(the Court properly limited cross-examination of a government witness concerning payments for a girlfriend's abortion and for an apartment shared with someone else after permitting questions about the witness' pocketing of money); *United States v. Kimble* n60(where a key government witness was adequately tested by questions about his prior perjury and a plea bargain, there was no error in limiting questions concerning various unrelated state crimes).

United States v. Padin, 787 F.2d 1071 (6th Cir. 1986) : The Court affirmed drug convictions, stating that cross-examination of government witnesses is a matter of right but that the Trial Judge may limit an examination when it goes beyond providing the jury with sufficient information to assess credibility.

United States v. Robinson, 832 F.2d 366 (7th Cir. 1987) : The Court held that it is not an abuse of discretion to preclude repetitive and confusing cross-examination. In a cocaine case, *United States v. Navarro*, n61 the Court found that the Trial Judge did not err in barring defense counsel from eliciting the home address and place of employment of the key government witness, where the Judge permitted cross-examination concerning the city of residence, the nature of the witness' employment, and the general location of the employer, and the Judge determined *in camera* that further disclosure would not have been helpful.

United States v. Lee, 743 F.2d 1240 (8th Cir. 1984) : The Court stated that a Trial Judge's limitation on the scope of cross-examination that represents a considered judgment that a matter was adequately explored will not be reversed except for an abuse of discretion.

United States v. Domina, 784 F.2d 1361 (9th Cir. 1986) : Upholding a bank robbery conviction, the Court approved a limitation on questions concerning a government witness' drug use. It observed that the defendant's confrontation right is "subject to the broad discretion of a trial judge to preclude harassment or unduly prejudicial interrogation," and that "the issue of narcotics use must be handled with some sensitivity because it can result in unnecessary prejudice and hostility toward a witness." See also *United States v. Whitworth* n62(sustaining an espionage conviction where the defendant had ample opportunity to cross-examine and impeach the key government witness). In *United States v. Rangel*, n63 the Court held that although questioning an informant as to his true name, home address, and phone number is presumptively proper under *Smith v. Illinois, 390 U.S. 129 (1968)* , there was no abuse of discretion in barring such questions upon a showing that the informant's life had been threatened.

United States v. Atwell, 766 F.2d 416 (10th Cir. 1985) : The Court said that "[a]s long as the defendant's basic confrontation right is protected, it is within the trial court's discretion to limit the scope of cross-examination." In *United States v. Swingler*, n64 the Court held that it was permissible to bar cross-examination as to a government witness' involvement in an alleged prior homicide, where the Judge permitted extensive cross-examination concerning various crimes and it was not clear that the death in question was a criminal homicide. See also *United States v. Morales-Quinones* n65(in a prosecution for transporting illegal aliens, there was no abuse of discretion in limiting cross-examination of a government witness concerning illegal entries into the country, where the witness was asked about entries resulting in convictions, and additional questions might have confused the jury).

United States v. Rubin, 733 F.2d 837 (11th Cir. 1984) : The Court upheld limitations on cross-examination imposed in an effort to prevent cumulative testimony. See also *United States v. Pepe* n66(finding no error to preclude cross-examination as to the home addresses of witnesses in a protection program and a witness who was in danger). In *United States v. Plotke*, n67 a mail fraud and conspiracy case, a witness was unable to identify one of several defendants during an evidentiary hearing on the admissibility of conspirator statements. After a recess, he purported to make a positive identification. The Trial Judge held a hearing to determine whether the witness' ability to make the identification was the product of improper coaching and ultimately forbade the witness from identifying the defendant before the jury. The Judge barred two other defendants from impeaching the witness by asking questions about events that occurred during the recess, and the Court affirmed. It found that the defendants had ample latitude to attack the witness and that further impeachment on a collateral matter was not necessary to satisfy the demands of the *Confrontation Clause*. See also *United States v. Perry* n68(no error in prohibiting the defendant's cross-examination about some of the details of a government witness' prior drug conviction); *United States v. Alonso* n69(finding that cross-examination about additional bad acts was not necessary).

[f] Limitations on Cross-Examination -- Jury Confusion

United States v. Mikutowicz, 365 F.3d 65 (1st Cir. 2004) : The Court affirmed convictions for tax offenses, holding that the Trial Judge properly limited the cross-examination of an IRS agent who testified as to why the IRS concluded that the defendant and his companies took unwarranted deductions. The defendant tried to cross-examine the agent regarding various judicial opinions, even though the agent was not qualified as an expert on tax law. The Court concluded: "Had the cross-examination proceeded as Mikutowicz proposed, it would have involved defense counsel reading excerpts of cases to the jury, without the jury having a context for evaluating the import of the information that it was receiving. ... The district court was well within its discretion in concluding that such an 'examination' would have exceeded the scope of the direct examination and confused the jury."

[14] Mental Condition

United States v. Butt, 955 F.2d 77 (1st Cir. 1992) : Affirming convictions of two police officers for participating in a payoff scheme involving prostitutes, the Court held there was no abuse of discretion in excluding a hospital report made following a government witness' suicide attempt, as there was no indication her mental instability at that time affected her ability to perceive or recall events or testify accurately about them. In *United States v. Peters*, n70 the Court affirmed the convictions of a corporation and its president for mail fraud and conspiracy, finding no error in a bar on cross-examination of a government witness concerning his psychiatric history, where the Trial Judge concluded that a prior anxiety ailment would not have affected the witness' ability to observe or to communicate.

Chnapkova v. Koh, 985 F.2d 79 (2d Cir. 1993) : The Court reversed a judgment for a patient who sued a plastic surgeon claiming that surgery had left her face scarred. It concluded that hospital records showing that the patient had a history of psychiatric problems, and did not complain of facial scarring after the surgery, should have been admitted.

Not only did the records impeach her credibility, but they also were relevant to the doctor's defense that any scarring was due to some other surgery, not his. In *United States v. Bari*, n71 a prison escape case, the Court held there was no abuse of discretion in precluding cross-examination of a government witness concerning hospitalization for schizophrenia for a 15-month period more than ten years before the trial.

United States v. Cecil, 836 F.2d 1431 (4th Cir. 1988) (en banc): A majority of the *en banc* Court concluded in a drug prosecution that there was no error in barring the defendant from eliciting evidence of a psychiatrist's unsworn opinion of a key government witness' inability to tell the truth. The psychiatrist had examined the witness three years earlier when the witness had indicated an intention to assert a diminished capacity and insanity defense to another charge. The Court found that the earlier diagnosis was irrelevant to the witness' competency to testify. The dissenters argued that the defense had a right to cross-examine with respect to mental impairment, especially since the defendant represented that he wished to show that the witness either was doubtful about his mental condition in the past or that the witness was prepared to misrepresent his condition to manipulate the judicial process.

United States v. Jimenez, 256 F.3d 330 (5th Cir. 2001) : The Court affirmed convictions for arson, holding there was no abuse of discretion when the defendants were not permitted to impeach a witness with evidence of his mental history. While the witness had been treated for self-destructive behavior, he was never diagnosed with a psychosis and there was "only a tenuous argument" that he suffered from an impairment affecting his ability to comprehend and tell the truth. The defendants were permitted to cross-examine him extensively regarding his drug use, criminal activity, and allegedly inconsistent statements to police.

Revels v. Vincenz, 382 F.3d 870 (8th Cir. 2004) : An involuntarily committed psychiatric patient brought a civil rights action against state hospital employees alleging *Eighth Amendment* violations. The Court affirmed judgments for the defendants, holding that there was no plain error in the defendants' questioning the plaintiff as to whether he heard voices in the past: "We have specifically approved the use of a witness's mental condition to challenge his credibility." In *United States v. Love, 329 F.3d 981 (8th Cir. 2003)* , the Court reversed a conviction for felon firearm possession, finding that restrictions on cross-examination violated the defendant's *Confrontation Clause* right. The Court held that the defense should have been permitted to cross-examine the key government witness, who testified that he saw the defendant with a rifle or shotgun and a little revolver and that the defendant offered to sell the guns, regarding a diagnosis of schizophrenia and an impairment of his short- and long-term memory. Memory loss is a condition that implicates a witness's ability to know and relate the truth, and there was evidence that the witness suffered for years from the condition. In a prosecution for food stamp violations, *United States v. Marvin*, n72 the Court held that the defendant had adequate opportunity to impeach a government witness, finding no error in the exclusion of evidence that the witness had voluntarily received treatment for drug and alcohol abuse in a mental hospital.

United States v. Antone, 981 F.2d 1059 (9th Cir. 1992) : The Court held there was no abuse of discretion in refusing the defendant in a child abuse case access to the victim's psychiatric records, as *in camera* inspection revealed nothing suggesting that the victim's story was fabricated or that she suffered from any psychosis, mental defect, or addiction, or that otherwise reflected on her credibility.

United States v. Pino, 827 F.2d 1429 (10th Cir. 1987) : Affirming assault convictions, the Court found no error in the denial of a defendant's motion for a psychiatric examination of a government witness and observed that the Trial Judge has broad discretion in deciding whether to allow such an examination for purposes of impeachment.

United States v. Thompson, 976 F.2d 666 (11th Cir. 1992) : The girlfriend of a defendant had been arrested

attempting to deliver methamphetamine for him and, after cooperating with the authorities, had been admitted to a hospital for treatment of her drug addiction. At trial, use of notes taken by her counselors in the hospital was permitted only on cross-examination to the extent they were inconsistent with her answers to questions about whether she had problems with telling the truth or with being manipulative. The Court held there was no abuse of discretion, as the records, reflecting treatment for drug addiction rather than mental disorders, were not as a whole probative of her credibility. In *United States v. Lindstrom*, n73 the Court reversed fraud and conspiracy convictions, finding that the Trial Judge improperly placed limitations on cross-examination of the chief prosecution witness concerning her prior psychiatric treatment and erroneously limited defense access to the witness' psychiatric history. The Court rejected an argument that privacy interests could justify restrictions on psychiatric evidence that was pertinent to an attack on the witness' motivation in testifying. See also *United States v. Phelps* n74(upholding a ruling that permitted cross-examination of a witness concerning his psychiatric condition for five years prior to trial, but prohibited examination as to more remote periods).

[15] Not-Guilty Plea

United States v. Norris, 910 F.2d 1246 (5th Cir. 1990) : On cross-examination, the prosecutor in an amphetamine distribution case elicited that a defendant had previously been convicted of marijuana delivery after pleading not guilty to the charge of which he knew he was guilty. The Court reversed the defendant's conviction, holding that the questioning, and argument based thereon that the defendant was dishonest, penalized him for exercising his constitutional right to plead not guilty and put the government to its proof.

[16] Opening the Door

United States v. Brown, 921 F.2d 1304 (D.C. Cir. 1990) : In a trial for PCP possession, an arresting officer testified on cross-examination that an informant had said she had previously met the defendant, but the officer had not recorded that fact in his notes. On redirect, he testified that the informant could identify the defendant from previous dealings of PCP. The Court held that mention of the PCP dealings was error, as that was hearsay not rehabilitating the officer's credibility, and defense counsel had not opened the door to otherwise inadmissible evidence, since the cross-examination question called for testimony admissible under the prior identification exception.

United States v. Gambino, 951 F.2d 498 (2d Cir. 1991) : A defendant charged with drug offenses attempted to explain his participation in a narcotics sale by saying he believed only phony drugs were being sold and that he was lying when he boasted of his drug connections. Affirming his conviction, the Court held that he had opened the door to cross-examination about his relationship with several individuals who were either narcotics traffickers or Mafia members.

United States v. Scott, 267 F.3d 729 (7th Cir. 2001) : In a drug trafficking prosecution, the Court held there was no abuse of discretion in admitting evidence that a cooperating witness had given testimony in other cases that assisted in obtaining indictments and convictions. The evidence was relevant to rebut any suggestion that the witness had falsely implicated the defendant, since it tended to show that he had less reason to deal in the particular case. The same point is made in *United States v. Curry, 187 F.3d 762 (7th Cir. 1999)* , and *United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996)* .

United States v. Zimmerman, 832 F.2d 454 (8th Cir. 1987) : The Court held that the government properly elicited from the defendant in a tax fraud case testimony concerning knowledge of the government's successful lawsuit against another member of the church to which the defendant belonged. This testimony was elicited after the defendant testified

that the church had never lost a case.

United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988) : Although the Court affirmed an espionage conviction, it held that a government witness was erroneously permitted to speculate on redirect examination about the defendant's state of mind. On cross-examination, defense counsel asked the witness whether he had suspicions about the defendant's sincerity. The answer called for the witness to speak about his own state of mind, and the Court held that the rule of "curative admissibility" or "opening the door" "does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted." The questions on redirect examination went to the defendant's state of mind, not the witness'.

McEwen v. City of Norman, Okla., 926 F.2d 1539 (10th Cir. 1991) : In a civil rights action alleging that excessive force was used during the chase and arrest of a motorcyclist after a collision with a police car, the Court held there was no plain error in allowing cross-examination of an eyewitness called by the plaintiff regarding his use of an alias, outstanding bench warrants, and his drinking habits. The plaintiff had opened the door by eliciting testimony that the witness gave a fictitious name at the scene because he was intimidated due to past experiences and fear of what the arresting officer could do to him, that the witness was arrested by the officer after giving a deposition in the case, and that the officer was "out to get" the witness.

[17] Prior Consistent Statements

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003) : The Court affirmed drug-related convictions, holding held that a witness's prior statements to the FBI were properly admitted on redirect examination after the witness was cross-examined concerning an inconsistency between the witness's trial testimony and one statement he had made to the FBI. The Court concluded that statements were not offered for their truth, but only to clarify or rebut an inconsistency raised on cross-examination, so they were not governed by *Rule 801(d)(1)(B)* or the timing rule adopted by the Supreme Court in *Tome v. United States, 513 U.S. 150 (1995)* . Although some of the statements offered were not relevant to rebut inconsistencies, any error in admitting them was harmless.

[18] Redirect Examination

United States v. Naiman, 211 F.3d 40 (2d Cir. 2000) : The defendant was convicted of misapplication of funds, bribery, and mail fraud in a scheme to use a non-profit community organization as a front to obtain and then misapply state funding. On cross-examination of two government witnesses who had been employed by the non-profit organization, one testified that she did not think she had done anything wrong when she had accepted a grant designated for student tuition in lieu of a raise, and the other testified that she did not think she had done anything wrong by helping the organization to provide state-subsidized health insurance to individuals whom the organization did not employ. The Court found no error when the government was allowed to introduce evidence on redirect examination of the witnesses that each had entered into an immunity agreement with the government, since the defendant opened the door to redirect by eliciting the testimony that the witnesses not think they had done anything wrong. The Court noted that redirect examination "may be used to rebut false impressions arising from cross-examination and the trial judge is in the best position to determine whether such a false impression was created."

[19] Reference to Prior Trial

United States v. Giovanelli, 945 F.2d 479 (2d Cir. 1991) : In a RICO prosecution based in part on offenses of which the defendant had previously been acquitted in State Court, the Court held it was error, but harmless, to preclude

defense counsel from referring to the prior trials. Although revealing the verdict of the prior trial may unfairly prejudice the government's case, it was essential for the defendants to substantiate their claims that the witnesses were deliberately or subliminally refining their testimony in light of the prior trial. The Court commented that the prudent course would have been for the District Judge simply to have explained that it is permissible for the federal government to prosecute an individual for the same offense that has previously been the subject of prosecution by the state, and then to have revealed during the trial that the jury would hear references to testimony given at prior state trials, instructed the jurors not to speculate about the outcome of the prior trials, and permitted counsel to refer to the trials but not to their outcome.

[20] Silence or Invocation of Privilege

Perez v. Jones, 935 F.2d 480 (2d Cir. 1991) : Affirming dismissal of a habeas corpus petition, the Court held there was no denial of due process when the prosecutor attempted to impeach a defense witness with repeated questions to which the witness asserted his privilege against self-incrimination, as inferences drawn from invocation of the privilege could not have been used to build the state's case-in-chief or add critical weight to the state's case.

United States v. Cummiskey, 728 F.2d 200 (3d Cir. 1984) : The Court read the Supreme Court's decision in *Doyle v. Ohio, 426 U.S. 610 (1976)* , as holding "that when the action of remaining silent occurs after the witness has received *Miranda* warnings, that action is not relevant as a prior inconsistent assertion." Since the relevance of the silence depends on the absence of warnings, the Court held "that when a testifying defendant makes an objection to the prosecutor's cross-examination with respect to postarrest silence, it is the prosecutor's burden, under *Rule 104(b)*, to establish that *Miranda* warnings were not given prior to the silence relied upon for impeachment purposes." In *Nezowy v. United States*, n75 the Court found that it was error (but harmless) for a prosecutor to ask a nonparty witness whether she had invoked her privilege against self-incrimination before a grand jury, since "a jury might misunderstand the context in which such *fifth amendment* questioning occurs, and it [is] difficult to imagine any circumstance where such examination would be relevant and appropriate."

United States v. Blankenship, 746 F.2d 233 (5th Cir. 1984) : The Court affirmed mail fraud convictions, finding that the prosecutor was properly permitted to ask questions about the defendant's prearrest contact with a postal inspector and that the prosecutor had not sought to comment on post-*Miranda* silence.

United States v. Aguwa, 123 F.3d 418 (6th Cir. 1997) : The Court held there was no abuse of discretion in a drug case when an alibi witness, the defendant's wife, was impeached with evidence that she had failed to come forward with the alibi until the eve of trial and had not spoken about this "alibi" to anyone else. The witness clearly would have been aware of the pending charges and cognizant of the significance of timely providing the defendant with an alibi. Particularly since the defendant never even attempted to provide an explanation for the delay, there was no basis for concluding that the adverse inference was confusing, misleading, or unfairly prejudicial.

United States v. Johns, 734 F.2d 657 (11th Cir. 1984) : Affirming convictions for cocaine offenses, the Court found that a prosecutor properly questioned an alibi witness concerning his reasons for not coming forward with his information long before the trial. The Court declined to adopt a *per se* rule rejecting such cross-examination; rather, the Trial Judge must rule on the probative value of the cross-examination in the context of a particular case, considering "the strength of the alibi, the witness' proximity to the investigation, how soon the witness finds out about the arrest, and what steps were available to him."

[21] Summary Judgments and Directed Verdicts

Inventive Music Ltd. v. Cohen, 617 F.2d 29 (3d Cir. 1980) : Reversing a directed verdict for the defendants in an action related to the sale of a business, the Court rejected an argument that the plaintiffs were bound by testimony of their witness: "Because *Rule 607* abandons the restriction on impeaching one's own witness, it necessarily follows that a party is not strictly bound by his own witness."

Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716 (4th Cir. 1977) : The Court reversed summary judgment granted to the plaintiff in a contract action after its first witness, the former president of one of the defendants, had given direct testimony as an adverse witness. When no cross-examination was permitted, the nonmoving party had been denied its right under *Fed. R. Civ. P. 56* to rebut the motion for summary judgment. The Court emphasized that because *Rule 607* permits any party to impeach a witness, the defendant could not be precluded from impeaching or contradicting the witness' testimony.

[22] Threats to Witnesses -- Admissible To Explain Changed Testimony

United States v. Perez-Montanez, 202 F.3d 434 (1st Cir. 2000) : Affirming carjacking and firearm convictions, the Court held that a coconspirator who testified as a government witness was properly permitted to testify about threats that he received and believed were from a defendant, since "[t]he evidence was admitted not to prove the truth of the threats or their origin but to show Serrano's [the witness's] motivation for having changed his version of events, which he did several times before trial."

FOOTNOTES:

(n1)Footnote 1. *United States v. Smith, 550 F.2d 277 (5th Cir. 1977)* .

(n2)Footnote 2. *United States v. Marzano, 537 F.2d 257 (7th Cir. 1976)* .

(n3)Footnote 3. *United States v. Keithan, 751 F.2d 9 (1st Cir. 1984)* .

(n4)Footnote 4. *United States v. Lanese, 890 F.2d 1284 (2d Cir. 1989)* .

(n5)Footnote 5. *United States v. Glover, 588 F.2d 876 (2d Cir. 1978)* .

(n6)Footnote 6. *United States v. Leslie, 759 F.2d 366 (1985)* , *rev'd on other grounds*, *783 F.2d 541 (5th Cir. 1986)* (en banc), *vacated on other grounds*, *479 U.S. 1074* , *remanded on other grounds*, *813 F.2d 658 (5th Cir. 1987)* .

(n7)Footnote 7. *United States v. Mansaw, 714 F.2d 785 (8th Cir. 1983)* .

(n8)Footnote 8. *United States v. Williams, 875 F.2d 846 (11th Cir. 1989)* .

(n9)Footnote 9. *United States v. Dorta, 783 F.2d 1179 (4th Cir. 1986)* .

(n10)Footnote 10. *United States v. Ray, 731 F.2d 1361 (9th Cir. 1984)* .

(n11)Footnote 11. *United States v. Jones, 766 F.2d 412 (9th Cir. 1985)* .

(n12)Footnote 12. *United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984)* .

(n13)Footnote 13. *United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982)* .

(n14)Footnote 14. *United States v. Rosario-Diaz, 202 F.3d 54 (1st Cir. 2000)* .

(n15)Footnote 15. See also *United States v. Torres-Galindo, 206 F.3d 136 (1st Cir. 2000)* , where the Court noted it was troubled by testimony from the same agent regarding a defendant's custodial statements.

(n16)Footnote 16. *United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989)* .

(n17)Footnote 17. *United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992)* .

(n18)Footnote 18. *United States v. Christian, 786 F.2d 203 (6th Cir. 1986)* .

(n19)Footnote 19. *United States v. Martin, 815 F.2d 818 (1st Cir. 1987)* .

(n20)Footnote 20. *United States v. McNeill, 728 F.2d 5 (1st Cir. 1984)* .

(n21)Footnote 21. *United States v. Cosentino, 844 F.2d 30 (2d Cir. 1988)* .

(n22)Footnote 22. *United States v. Borello, 766 F.2d 46 (2d Cir. 1985)* .

(n23)Footnote 23. *United States v. Frankenberry, 696 F.2d 239 (3d Cir. 1982)* .

(n24)Footnote 24. *United States v. Sanders, 893 F.2d 133 (7th Cir. 1990)* .

(n25)Footnote 25. *United States v. McGrath, 811 F.2d 1022 (7th Cir. 1987)* .

(n26)Footnote 26. *United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986)* .

(n27)Footnote 27. *United States v. Davis, 838 F.2d 909 (7th Cir. 1988)* .

(n28)Footnote 28. *United States v. Darden, 70 F.3d 1507 (8th Cir. 1995)* .

(n29)Footnote 29. *United States v. Kroh, 915 F.2d 326 (8th Cir. 1990)* (en banc).

(n30)Footnote 30. *United States v. Davis, 766 F.2d 1452 (10th Cir. 1985)* .

(n31)Footnote 31. *United States v. Melton, 739 F.2d 576 (11th Cir. 1984)* .

(n32)Footnote 32. *United States v. Jones, 763 F.2d 518 (2d Cir. 1985)* .

(n33)Footnote 33. *United States v. Borello, 766 F.2d 46 (2d Cir. 1985)* .

(n34)Footnote 34. *United States v. Herrera, 832 F.2d 833 (4th Cir. 1987)* .

(n35)Footnote 35. *United States v. Henderson, 717 F.2d 135 (4th Cir. 1983)* .

(n36)Footnote 36. *United States v. Townsend, 796 F.2d 158 (6th Cir. 1986)* .

(n37)Footnote 37. *United States v. Thornton, 197 F.3d 241 (7th Cir. 1999)* .

(n38)Footnote 38. *United States v. Mealy, 851 F.2d 890 (7th Cir. 1988)* .

(n39)Footnote 39. *United States v. Kats, 871 F.2d 105 (9th Cir. 1989)* .

(n40)Footnote 40. *United States v. Brown, 720 F.2d 1059 (9th Cir. 1983)* .

(n41)Footnote 41. *United States v. Cruz, 805 F.2d 1464 (11th Cir. 1986)* .

(n42)Footnote 42. *United States v. Hilton, 772 F.2d 783 (11th Cir. 1985)* .

(n43)Footnote 43. *United States v. Hogan, 763 F.2d 697 (5th Cir. 1985)* .

(n44)Footnote 44. *United States v. Webster, 734 F.2d 1191 (7th Cir. 1984)* .

(n45)Footnote 45. *United States v. Crouch, 731 F.2d 621 (9th Cir. 1984)* .

(n46)Footnote 46. *United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988)* .

(n47)Footnote 47. *United States v. Ienco, 92 F.3d 564 (7th Cir. 1996)* .

(n48)Footnote 48. *United States v. Frappier, 807 F.2d 257 (1st Cir. 1986)* .

(n49)Footnote 49. *United States v. Boroni, 758 F.2d 222 (7th Cir. 1985)* .

(n50)Footnote 50. *United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984)* .

(n51)Footnote 51. *United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989)* .

(n52)Footnote 52. *United States v. Pitocchelli, 830 F.2d 401 (1st Cir. 1987)* .

(n53)Footnote 53. *United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985)* .

(n54)Footnote 54. *United States v. Barrett, 766 F.2d 609 (1st Cir. 1985)* .

(n55)Footnote 55. *United States v. Touchstone, 726 F.2d 1116 (6th Cir. 1984)* .

(n56)Footnote 56. *United States v. Muebl, 739 F.2d 1175 (7th Cir. 1984)* .

(n57)Footnote 57. *United States v. Young, 952 F.2d 1252 (10th Cir. 1991)* .

(n58)Footnote 58. *United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986)* .

(n59)Footnote 59. *United States v. Carlock, 806 F.2d 535 (5th Cir. 1986)* .

(n60)Footnote 60. *United States v. Kimble, 719 F.2d 1253 (5th Cir. 1983)* .

(n61)Footnote 61. *United States v. Navarro, 737 F.2d 625 (7th Cir. 1984)* .

(n62)Footnote 62. *United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988)* .

(n63)Footnote 63. *United States v. Rangel, 534 F.2d 147 (9th Cir. 1976)* .

(n64)Footnote 64. *United States v. Swingler, 758 F.2d 477 (10th Cir. 1985)* .

(n65)Footnote 65. *United States v. Morales-Quinones, 812 F.2d 604 (10th Cir. 1987)* .

(n66)Footnote 66. *United States v. Pepe, 747 F.2d 632 (11th Cir. 1984)* .

(n67)Footnote 67. *United States v. Plotke, 725 F.2d 1303 (11th Cir. 1984)* .

(n68)Footnote 68. *United States v. Perry, 740 F.2d 854 (11th Cir. 1984)* .

(n69)Footnote 69. *United States v. Alonso, 740 F.2d 862 (11th Cir. 1984)* .

(n70)Footnote 70. *United States v. Peters, 732 F.2d 1004 (1st Cir. 1984)* .

(n71)Footnote 71. *United States v. Bari, 750 F.2d 1169 (2d Cir. 1984)* .

(n72)Footnote 72. [*United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982)* .

(n73)Footnote 73. *United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983)* .

(n74)Footnote 74. *United States v. Phelps, 733 F.2d 1464 (11th Cir. 1984)* .

(n75)Footnote 75. *Nezowy v. United States, 723 F.2d 1120 (3d Cir. 1983)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 607 RULE 607

2-607 Federal Rules of Evidence Manual 607.04

607.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). **[Editor's Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]** Ladd, Impeachment of One's Own Witness -- New Developments, *4 U. Chi. L. Rev. 69 (1936)*; McCormick § 38; 3 Wigmore §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised *Rule 32(a)(1) of the Federal Rules of Civil Procedure* allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill. Rev. Stats. 1967, c. 110, § 60; Mass. Laws Annot. 1959, c. 233 § 23; 20 *N.M. Stats. Annot. 1953, § 20-2-4*; *NYCPLR § 4514* (McKinney 1963); 12 Vt. Stats. Annot. 1959, *§§ 1641a*, *1642*. Complete judicial rejection of the old rule is found in *United States v. Freeman, 302 F.2d 347 (2d Cir. 1962)* . The same result is reached in Uniform Rule 20; *California Evidence Code § 785*; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

[2] 1987 Amendment Advisory Committee Note

1987 Amendment Advisory Committee Note

The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is the following: "The amendment is technical. No substantive change is intended."

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 607 RULE 607

2-607 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 607, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 607. Who May Impeach	**Rule 607. Who May Impeach a Witness**
The credibility of a witness may be attacked	Any party, including the party that called the

by any party, including the party calling the witness. witness, may attack the witness's credibility.

Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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2-607 Federal Rules of Evidence Manual Supp. to § 607.03

Supp. to § 607.03 Annotated Cases

[Go To Main]

[1] Bias [Go To Main]

[b] Bias -- Criminal Defense Witnesses

United States v. Allen, 540 F.3d 821 (8th Cir. 2008) : The defendant was convicted of felon firearm possession after a loaded handgun was found under the front passenger seat of a car he was attempting to enter on the passenger side when he was arrested. At trial he called the driver of the car, who testified to borrowing the car from his father without permission and denied any knowledge of the gun's presence. On cross-examination the driver admitted having a misdemeanor domestic battery and assault conviction. Affirming, the Court found no abuse of discretion in admission of the conviction evidence. The evidence was not used to cast doubt on the witness' character for truthfulness, which would have violated Rule 609. Rather, because one convicted of misdemeanor domestic battery is prohibited by federal law from possessing a firearm, the evidence tended to show the witness' bias and motivation to deny any knowledge or possession of the gun.

[d] Bias -- Prosecution Witnesses

[i] Impeachment Denied

United States v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010) : The Court affirmed drug trafficking convictions, finding no abuse of discretion when the defense was precluded from introducing evidence that a witness, who had denied having handled a gun, had shot and killed another man with a gun. The Trial Judge had properly excluded the extrinsic evidence for use in impeachment by contradiction, and the Court held that because the government was not aware of the shooting until the defense brought it up, the evidence had no tendency to impeach by showing bias.

United States v. Eagle, 498 F.3d 885 (8th Cir. 2007) : Affirming a conviction for involuntary manslaughter in Indian country, the Court held that the defendant was permitted to explore sufficiently the bias of two witnesses by eliciting testimony that one witness had previously accused the defendant's brother of sexual assault and the witness had testified against the brother, and that the defendant was not denied a fair opportunity to confront the witnesses when evidence

that the brother had been acquitted was excluded. The Court noted that the bias of the witnesses was established by their having given statements against the brother, regardless of the outcome of the brother's trial.

United States v. Al-Rekabi, 454 F.3d 1113 (10th Cir. 2006) : The defendant, charged with possession of a stolen pistol, sought to impeach a prosecution witness who had been involved in the incident with his conviction under state law for criminal mischief. The defendant argued that the conviction could be characterized as a "misdemeanor crime of domestic violence" making possession of a firearm illegal under federal law, which gave the witness a motive to lie and testify that he never took possession of the pistol, contrary to the defendant's testimony. Affirming, the Court held there was no abuse of discretion in precluding the impeachment, as the state crime of criminal mischief does not include the elements of "use or threatened use of physical force" or "threatened use of a deadly weapon" that are required for a "misdemeanor crime of domestic violence."

United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009) : The defendant was convicted for persuading his minor step-daughter to engage in sexually explicit conduct for the purpose of producing photos of the conduct. Affirming, the Court found no abuse of discretion when the defendant was barred from cross-examining law enforcement officers about the Sheriff's Office's financial interest in the forfeiture of the defendant's house. The Court observed that "the officers' interest in the case is best described as ... indirect, impersonal, and tenuous," and concluded that "[t]o suggest that the officers were biased because the Sheriff's Office that employed them may have benefitted from a forfeiture is rank speculation" and "such testimony had the potential to confuse the jury and distract it from the central issues."

[ii] Bias -- Prosecution Witnesses -- Impeachment Permitted or Required

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : In a prosecution for drug offenses, the Court held it was an abuse of discretion (but harmless error) to exclude evidence of an informant's misdemeanor conviction for assault, as the date of the conviction shortly after the witness made a drug buy in this case indicated that he had a pending charge against him at the time of the defendant's alleged transaction and therefore would be motivated to curry favor with the government.

United States v. Salem, 578 F.3d 682 (7th Cir. 2009) : In a prosecution for witness tampering, the Court vacated the denial of a motion for a new trial and remanded for an evidentiary hearing as to whether the prosecution's failure to turn over exculpatory evidence required a new trial. The Court noted that "[f]or impeachment purposes, a criminal defendant on trial is entitled to reveal to the jury not only what benefits a witness is receiving, but also what he perceives he may receive."

United States v. Watler, 461 F.3d 1005 (8th Cir. 2006) : Affirming a drug conviction, the Court held that the defendant's *Sixth Amendment* confrontation right was violated (but the error was harmless) when he was not permitted to cross-examine a coconspirator about any threats made by the witness against him. The Court explained: "A witness's desire to kill the defendant is probative of bias in a way that is distinct from a witness's acceptance of a plea agreement in exchange for testimony. While a plea deal engages a witness's self-interest, a death threat suggests personal animus toward the defendant."

[f] Bias -- Rehabilitation

United States v. White, 519 F.3d 342 (7th Cir. 2008) : The lead prosecution witness in a drug case testified on direct that he was testifying pursuant to a plea agreement in the hope that his sentence would be reduced. On cross-examination, defense counsel attacked the witness's credibility, focusing on the fact that he was relying on the government to seek to reduce what would otherwise be a mandatory minimum sentence. Affirming, the Court held there was no abuse of discretion in permitting the prosecutor to introduce evidence that information from the witness had led to a forfeiture and guilty pleas in other cases. The evidence tended to rehabilitate the witness, whose credibility had been attacked, by making the jury aware that he had "other, 'multiple bargaining chips' vis-a-vis the government,

making it less likely that he was lying in this case out of self-interest."

[4] Contradiction [Go To Main]

United States v. Ramirez, 609 F.3d 495 (2d Cir. 2010) : The defendant in a drug prosecution testified that during the time charged in the indictment he had served as a driver but did not know that he was driving people to drug transactions, and that he never saw drugs during that time. The Court held it was error (but harmless) to allow the defendant to be impeached with evidence of his involvement in a drug transaction that occurred after the end of the indicted conspiracy. Because the defendant limited his testimony to lack of knowledge during the indicted conspiracy, and never "forswore, as a universal matter, ever having seen drugs of any kind," the later drug transaction did not contradict his testimony. In contrast, testimony from another witness that the defendant was directly involved in drug transactions during the time of indictment was properly admitted for contradiction. The Court noted that "[i]t is an open question in our Court whether the government can present extrinsic evidence to impeach by contradiction a statement made by the defendant on *cross*-examination, where such evidence would otherwise be barred by the Federal Rules of Evidence."

United States v. Greenidge, 495 F.3d 85 (3d Cir. 2007) : In a bank fraud prosecution, the defendant testified that she was an honest businesswoman, and denied that she ever had any criminal problems or received any complaints about her honesty in business. The Court held there was no error in then allowing the government to cross-examine the defendant about two complaints filed against her, one for failing to return trucks she had rented and the other for refusing to release property to a customer. Using a Rule 403 analysis, the Court found that the defendant's volunteered denials opened the door to an inquiry into her business ethics; her "unqualified denial rendered the impeachment by contradiction more probative of her credibility"; and the government was not permitted to introduce the complaints into evidence, thus limiting the risk of prejudice, confusion, and delay.

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009) : Affirming convictions of a former county commissioner for fraud and other offenses, the Court stated that impeachment by contradiction is an exception to the rule prohibiting extrinsic evidence of impeachment, and that "[i]mpeachment by contradiction is permitted to prevent witnesses from engaging in perjury and then using the prohibition on collateral fact testimony to conceal the perjury." Finding no abuse of discretion when the defendant was barred from offering witnesses to contradict testimony elicited by the defendant on cross-examination, the Court reasoned that during cross-examination, "impeachment by contradiction is far less likely to achieve its intended purpose of rooting out perjury because opposing counsel may manipulate questions to trap an unwary witness into 'volunteering' statements on cross-examination." The Court noted, however, that "the general rule need not be rigidly enforced so as to exclude all impeachment by contradiction of testimony given during cross-examination."

United States v. Crockett, 435 F.3d 1305 (10th Cir. 2006) : Affirming a conviction for conspiring to defraud the IRS and aiding and assisting in the preparation of false and fraudulent tax returns, the Court found no abuse of discretion when the prosecutor was permitted to cross-examine the defendant about his failure to file his personal tax returns for the years 1992-1998. The defendant testified on direct examination that he would never advise or assist anyone in cheating on their taxes, and the Court explained that "when a defendant makes a false statement during direct testimony, the prosecution is allowed to prove, either through cross-examination or by rebuttal witnesses, that the defendant lied as to that fact." With evidence in the record showing that the defendant earned income sufficient to require filing of returns, the prosecutor was entitled to inquire into the defendant's failure to file the returns "[u]nder the doctrine of specific contradiction."

[5] Cooperating Witness' Guilty Plea or Immunity [Go To Main]

[a] Impeachment Use

[iii] Cooperating Witness' Guilty Plea or Immunity -- Impeachment Use -- Proper Use of Direct Examination

United States v. Setser, 568 F.3d 482 (5th Cir. 2009) : The Court affirmed convictions for operating a multimillion-dollar Ponzi scheme, and found no error when the prosecution was allowed to make various references to guilty pleas entered by coconspirators. The Judge gave thorough limiting instructions, most references were for the permissible purpose of rebutting anticipated impeachment and other references were quite limited, and the defense itself devoted significant attention to the plea agreement by a central witness.

United States v. Thornton, 609 F.3d 373 (6th Cir. 2010) : Affirming drug and firearms convictions, the Court found no error in allowing the government on direct examination to question a cooperating witness about the details of his plea agreement. The Court held that the prosecutor is allowed to "place the plea before the jury so as to blunt defense efforts at impeachment and dispel the suggestion that the government has something to hide." In *United States v. Carson, 560 F.3d 566 (6th Cir. 2009)* , the Court affirmed convictions of three police officers for offenses arising from the use of excessive force while making an arrest. The Court observed that, with a limiting instruction, a prosecutor may elicit evidence of a guilty plea on direct examination so that the jury may fully assess the credibility of a witness. It warned, however, that the use of such a plea may become illegitimate if a prosecutor suggests to the jury in closing argument that the jury use the plea as proof of the defendant's guilt. There was no plain error in the prosecutor's closing argument in this case.

[iv] Cooperating Witness' Guilty Plea or Immunity -- Impeachment Use -- Use Improper

United States v. Benson, 591 F.3d 491 (6th Cir. 2010) : Affirming convictions for drug conspiracy offenses, the Court observed that, "[a]lthough guilty pleas may be elicited by the prosecutor on direct examination so that the jury may assess the credibility of the witness, a legitimate introduction of a plea may rise to the level of prejudicial error if the prosecutor suggests in closing argument that the jury use the plea for a prohibited purpose." The "introduction of guilty pleas may only be used for credibility purposes and is not substantive evidence of the defendant's guilt." In this case, the prosecutor mentioned in closing argument that "a number of the co-conspirators who testified in this case have already pled guilty to this conspiracy, which would certainly further support the fact that the conspiracy existed." The Court indicated that this and other statements may have been improper, but the erroneous use of the guilty pleas was harmless.

[b] Cooperating Witness' Guilty Plea or Immunity -- Polygraph and Truthfulness Provisions

United States v. Edwards, 581 F.3d 604 (7th Cir. 2009) : The Court held that a prosecutor did not engage in improper vouching by asking a government informant on direct examination what would happen to his plea agreement if he did not testify truthfully. The question was "innocent" in that it "merely probed Beagle's understanding of the consequences of lying on the stand. The prosecutor was not implying that he had any secret information that Beagle would have been afraid to lie because of the consequences if he did." The Court noted that case law "allows the government to present evidence that plea deals are conditioned on truthful testimony."

United States v. McClellon, 578 F.3d 846 (8th Cir. 2009) : The Court affirmed a conviction for possession of cocaine base with intent to distribute, finding no abuse of discretion when the government was permitted to introduce a cooperating witness' plea agreement (including a promise to testify truthfully) on direct examination. It noted that "'while the existence of a plea agreement may support his or her interest in testifying truthfully, the plea agreement may also impeach the witness' credibility by showing his or her interest in testifying as the government wishes regardless of the truth.'" Thus, introducing the whole agreement helps the jury in fully assessing the witness' credibility.

United States v. Jones, 468 F.3d 704 (10th Cir. 2006) : Affirming a conviction for conspiracy to manufacture and

distribute cocaine base, the Court held that disclosure of a plea bargain in which the witness was to be given sentencing consideration only if he "continued to cooperate ... in an honest and truthful manner" did not constitute impermissible vouching by suggesting that the witness had already provided honest and truthful information. It was merely a representation by the witness that he had testified truthfully and would continue to do so.

[c] Cooperating Witness' Guilty Plea or Immunity -- Potential Sentence

United States v. Walley, 567 F.3d 354 (8th Cir. 2009) : The Court affirmed methamphetamine convictions, finding no abuse of discretion when the defendant was precluded from cross-examining a coconspirator about the specific maximum (40 years) and minimum (five years) sentences he was facing. The government objected that the questioning was really an attempt to educate the jury about the defendant's possible sentence because the defendant and the witness were charged with the same crime. The Judge permitted the defendant to ask the witness whether he was facing a "significant sentence." The Court agreed that the ruling was reasonable and distinguished both *United States v. Caldwell, 88 F.3d 522 (8th Cir. 1996)* , *vacated on other grounds*, *531 U.S. 1049 (2000)* (prosecution had agreed to dismiss charges), and *United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989)* (witness had already received the benefit of a reduction in charges).

United States v. Larson, 495 F.3d 1094 (9th Cir. 2007) (enbanc): In *United States v. Larson, 460 F.3d 1200 (9th Cir. 2006)* , a panel of the Court had affirmed convictions for conspiracy to distribute methamphetamine, finding no abuse of discretion when the defense was not permitted to elicit on cross-examination that a cooperating witness faced a mandatory life sentence. On rehearing, the *en banc* Court held that the District Court had abused its discretion in barring the questions, but also held that the resulting error was harmless, because defense counsel did explore the witness's "criminal past, history as a drug user and seller, and desire to obtain a lesser sentence through his testimony against his co-conspirators. We note, too, that the court instructed the jury that it should view the testimony of the cooperating witnesses with greater caution than that of other witnesses."

[7] Drug Use [Go To Main]

United States v. Vitale, 459 F.3d 190 (2d Cir. 2006) : Affirming a conviction for bank fraud, the Court found no *Sixth Amendment* confrontation violation when the defendant was denied access to a witness's substance abuse treatment records. Defense counsel had subpoenaed the records from a drug rehabilitation clinic after learning that a government witness (Trantino) was enrolled in a drug abuse treatment program there. The defendant argued that since "Trantino had admitted to the heavy use of painkillers during the bank fraud scheme and drug addiction when he was discussing the case with the FBI ... access to the records was necessary to cross-examine Trantino." The Court held that "when records do not reflect treatment for mental disorders but rather reflect treatment for drug addiction, the introduction of the complete records is not warranted because they are not, as a whole, probative of ... credibility." It also noted that "although defense counsel was not allowed to review the physical records, the trial court did not limit the scope or nature of defense counsel's cross-examination in any way." The Court implied that had Trantino testified inconsistently with the documents, their production may have been warranted.

United States v. Gallardo, 497 F.3d 727 (7th Cir. 2007) : Affirming convictions for drug distribution offenses, the Court found no error in the exclusion of testimony by a defense expert regarding the effects of the past use of drugs on the ability to remember. The Judge permitted the defendants to ask government witnesses whether they were currently addicted to drugs and whether they had been addicted at any time during the four-year period of the conspiracy and to offer extrinsic evidence of the witnesses' drug use during this period. The Court held it was a reasonable conclusion that the expert testimony would not help the jury, because there was no evidence of the witnesses' past drug use or addiction; it noted that evidence of drug use may be unduly prejudicial and may be limited where memory or mental capacity is not genuinely in issue.

United States v. Hodge, 594 F.3d 614 (8th Cir. 2010) : The Court affirmed convictions for a conspiracy to manufacture methamphetamine. Addressing a challenge to the credibility of the government's witnesses, it noted that "[p]rior drug abuse may be relevant when the witness's memory or mental abilities are legitimately before the court. [citation] Prior drug abuse or drug addiction, however, has no automatic effect on the credibility of a witness ... . [I]t is the jury's prerogative to evaluate the credibility of witnesses in light of their prior drug abuse or addiction."

United States v. Robinson, 583 F.3d 1265 (10th Cir. 2009) : The Court reversed a firearm conviction because the defendant was not permitted inquiry into the mental health history of the star witness for the government, the confidential informant who allegedly sold the defendant the gun. The witness' mental health records indicated that he: was a major user of illegal drugs (contradicting his trial testimony that he had not regularly used drugs); suffered visual and auditory hallucinations; and was taking a variety of medications upon discharge from a mental hospital. Under these circumstances, the Court found that the ruling violated the defendant's right to confrontation; if the defendant had been able to use the evidence, he could have fruitfully attacked both the witness' capacity and his character for veracity.

[9] Immigration Status [Go To Main]

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) : The Court affirmed a conviction for possession of methamphetamine with intent to distribute, holding there was no abuse of discretion when the government elicited on cross-examination of the defendant that he had been illegally in the United States for over 13 years. The evidence was relevant to rebut efforts on direct exam to portray the defendant as a nice, law-abiding person who had never committed a crime.

[11] Impeachment, and Anticipating Impeachment, on Direct Examination [Go To Main]

[a] Hearsay Evidence

[ii] Impeachment, and Anticipating Impeachment, on Direct Examination -- Hearsay Evidence -- Offered by Prosecution

United States v. Burt, 495 F.3d 733 (7th Cir. 2007) : At a trial on child pornography charges, a government witness testified about his online relationship with the defendant but denied that the defendant had ever sent him photos of naked boys. The prosecution was then permitted to prove that the witness had made statements inconsistent with that denial when he was interviewed after his arrest. Affirming, the Court found no error in permitting the prosecution to impeach a witness it had called with inconsistent statements, as there was no evidence that the government had acted in bad faith in calling the witness. When, as here, a witness who might provide evidence harmful to the government is also expected to provide helpful evidence, the prosecutor should not be put to the choice of forgoing impeachment or forgoing the helpful evidence.

[13] Limitations on Cross-Examination [Go To Main]

[c] Limitations on Cross-Examination -- Impeachment for Bias

United States v. Rodriguez-Velez, 597 F.3d 32 (1st Cir. 2010) : The Court affirmed a conviction for conspiracy to possess drugs with intent to distribute, finding no abuse of discretion in limiting cross-examination of a government informant who testified about statements made by two coconspirators who were brothers of the defendant's wife. The defense sought to ask whether the witness was aware that the defendant had been unfaithful to his wife, but whether the witness knew of the infidelity shed no light on whether the brothers-in-law knew; there was no reason to believe that the

brothers-in-law thought they were speaking with an informant and thus no reason for them to vilify the defendant even if they were aware of the infidelity; and their statements tended to glorify rather than vilify the defendant. In *United States v. Bunchan, 580 F.3d 66 (1st Cir. 2009)* , the Court affirmed a mail fraud conviction, finding no abuse of discretion when the defense was permitted to ask a government witness about pending state criminal charges for assault but was not permitted to bring out that the charges were for indecent assault and battery of a child. The Judge's ruling permitted elicitation of the witness' motive to ingratiate himself with the government but avoided unnecessary and unfair prejudice against the witness. The Court also noted that reference to the particular nature of the charges was not admissible under Rule 608(b) because it was not relevant to the witness' character for truthfulness.

[e] Limitations on Cross-Examination -- Impeachment Generally

United States v. Smith, 451 F.3d 209 (4th Cir. 2006) : In a drug case, police officers testified that the defendant had been arrested in two previous cases with drugs on his person, and that the drugs found in the previous arrests had been destroyed by the police. Defense efforts to cross-examine each witness about the circumstances of the destruction were denied on the grounds of limited relevance and waste of time. The Court found that precluding this cross-examination violated the defendant's constitutional right to an effective defense, although it was harmless error. The Court noted that "the availability of appropriate cross-examination by an accused is ... essential when the physical evidence, about which the witnesses are testifying, no longer exists," and explained that "the examination Smith sought to conduct was highly relevant to the issues in the case, in that the prosecution witnesses were testifying that the substances were contraband and had been seized from Smith. The trustworthiness and competence of these witnesses related directly to the charges in the indictment, and their credibility was crucial to the jury's assessment of the prosecution's case." In particular, an officer's testimony that drugs were destroyed when state charges were dismissed because of pending federal charges "raised obvious concerns." Where the officer testified that he was unaware of the pending federal charges when the evidence was destroyed, but the state charges were dismissed precisely because of the pending federal charges, cross-examination "would have cut to the core of [the officer's] credibility and was highly relevant to the issues before the jury. And any resulting prejudice to the prosecution from a thorough examination on the facts surrounding the evidence's destruction was plainly outweighed by Smith's right to inquire into the pertinent circumstances." The Judge's contrary conclusion -- that the relevance of such cross-examination would have been "extremely slight" -- was thus based on a "clearly erroneous assessment of the evidence" and constituted an abuse of discretion.

United States v. Street, 548 F.3d 618 (8th Cir. 2008) : In a prosecution for aiding and abetting murder in furtherance of drug trafficking, the defense had been permitted to cross-examine a government witness regarding her arrest after a high-speed chase over several hours, but had been precluded from bringing out that she had told her teenaged companion to shoot at the pursuing officers during the chase. Although the Court reversed the conviction on other grounds, it found no abuse of discretion in the limitation on the witness' cross-examination, since the defendant had adequate opportunity to impeach the witness. The Court noted that evidence of the instructions to shoot at the pursuing officers "would tend to show her willingness to engage in illegal or reckless behavior to advance her own interests and was relevant on the issue of whether she would have hesitated to falsify her testimony had she believed it would curry favor with prosecutors." Further, it was "not clear that any potential prejudice from introducing this evidence on cross examination would have outweighed its relevance." However, even if there was an abuse of discretion, the error would have been harmless.

[f] Limitations on Cross-Examination -- Jury Confusion

United States v. Franco, 484 F.3d 347 (6th Cir. 2007) : Affirming a conviction for cocaine possession, the Court found no abuse of discretion or unfairness in the limitations imposed on cross-examination of a government witness who had participated in the controlled sale of cocaine that led to the prosecution. The defendant claimed entrapment and there was evidence that in 1992 the witness had engaged in unethical conduct as an informant that led to a decision not to prosecute the target of an investigation, who had claimed entrapment. Because entrapment was the defense in both the 1992 case and the instant case and there was similar misconduct by the informant-witness in both cases, the

government's reasons for not prosecuting the 1992 were "arguably relevant to a small degree." However, questioning about the past case could have been substantially more prejudicial than probative because it would have been confusing, particularly since the defendant had been permitted to cross-examine the witness about several past bad acts.

[14] Mental Condition [Go To Main]

United States v. George, 532 F.3d 933 (D.C. Cir. 2008) : In a prosecution for bank robbery, the star prosecution witness was the defendant's sister. Affirming, the Court found no error in precluding him from impeaching his sister with her mental health history, which indicated that she suffered from bipolar disorder. The sister had already been impeached with "much more damning evidence" -- including her interest in obtaining a reward, her plea bargain, her violent acts and hatred toward her family members, and her use of PCP over a 20-year period. The Court noted that impaired mental health does not necessarily cast doubt on a witness's credibility: "The days are long past when any mental illness was presumed to undermine a witness's competence to testify. The category of mental illnesses includes a wide variety of conditions, of varying degrees of severity and substantially different effects. Simply labeling a witness as having 'mental health problems,' or alluding to her 'issues with rage, anger, and racing thoughts,' [quoting the defendant's arguments] does not provide a basis for thinking she cannot correctly perceive reality." The defendant's proffer gave no indication why bipolar disorder would cause his sister difficulty in perceiving reality or motivate her to hurt her brother.

United States v. Vitale, 459 F.3d 190 (2d Cir. 2006) : Affirming a conviction for bank fraud, the Court found no *Sixth Amendment* confrontation violation when the defendant was denied access to a witness's substance abuse treatment records. Defense counsel had subpoenaed the records from a drug rehabilitation clinic after learning that a government witness (Trantino) was enrolled in a drug abuse treatment program there. The defendant argued that since "Trantino had admitted to the heavy use of painkillers during the bank fraud scheme and drug addiction when he was discussing the case with the FBI ... access to the records was necessary to cross-examine Trantino." The Court held that "when records do not reflect treatment for mental disorders but rather reflect treatment for drug addiction, the introduction of the complete records is not warranted because they are not, as a whole, probative of ... credibility." It also noted that "although defense counsel was not allowed to review the physical records, the trial court did not limit the scope or nature of defense counsel's cross-examination in any way." The Court implied that had Trantino testified inconsistently with the documents, their production may have been warranted.

[17] Prior Consistent Statements [Go To Main]

United States v. Hoover, 543 F.3d 448 (8th Cir. 2008) : The Court affirmed convictions for using a firearm in connection with a drug trafficking offense. It held that, whether or not witnesses' prior statements were made before a motive to falsify arose, there was no abuse of discretion in admitting the statements to show that there was really no inconsistency between the prior statements and trial testimony. The jury was properly instructed that the statements could only be used to evaluate the witnesses' credibility, insofar as they might explain the alleged inconsistencies.

[20.1] State Law Regarding Credibility [Go To Main]

United States v. Bruce, 550 F.3d 668 (7th Cir. 2008) : The Court affirmed a conviction for possession of cocaine base with intent to distribute, finding no abuse of discretion in the denial of a defense request to give an instruction that state law requires custodial interrogations to be recorded and that evidence of unrecorded statements should be viewed with caution. Federal, not state, law governs the admissibility of evidence in federal criminal trials, and any relevance the

absence of a recording might have came from the choice to stop recording the interview -- a fact of which the jury was made aware -- not from the presence or absence of a state law governing recordings.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 608 RULE 608

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§ 608.syn Synopsis to Chapter 608: RULE 608

608.01 Official Text

608.02 Editorial Explanatory Comment

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[4] Relationship to Rule 403

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[9] Good-Faith Basis for Questions

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[12] Relationship to Rule 607

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[xxvii] RULE 608(b) -- Questioning Principal Witness -- Theft Offenses

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[xxix] RULE 608(b) -- Questioning Principal Witness -- Witness' Statements

[i] RULE 608(b) -- Relationship to Other Rules

[i] RULE 608(b) -- Relationship to Rule 404(b)

[ii] RULE 608(b) -- Relationship to Other Rules -- Rule 609(a)

[iii] RULE 608(b) -- Relationship to Other Rules -- Rule 611(a)

[iv] RULE 608(b) -- Relationship to Other Rules -- Rule 613(b)

[v] RULE 608(b) -- Relationship to Other Rules -- Rule 702

[j] RULE 608(b) -- Use of Documents

608.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 276 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the House and Senate Conferees

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 608 RULE 608

2-608 Federal Rules of Evidence Manual 608.01

608.01 Official Text

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct*. -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 608 RULE 608

2-608 Federal Rules of Evidence Manual 608.02

608.02 Editorial Explanatory Comment

[1] Bad Character for Truthfulness

One of the ways of impeaching a witness is to introduce evidence that the witness has a bad character for truthfulness, i.e., a propensity to tell lies. The rationale is that a witness who has a propensity to lie will act in accordance with that propensity while testifying. Such impeachment is excepted from the limitations on character evidence in *Rule 404*, and is expressly permitted by *Rule 608*, subject to certain important limitations discussed below.

Rule 608 continues the common-law limitation on the use of character evidence to bolster the credibility of the witness. Evidence of truthful character is only admissible after the character of the witness for truthfulness has been attacked in some manner.

The Courts have made clear that in order for evidence of truthful character to be admissible, the witness must have been specifically attacked on grounds of bad character. n1 As one Court put it:

> Under *Rule 608*, evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Vigorous cross examination and/or the fact that a witness is contradicted by other evidence in the case does not constitute such an attack. n2

The Rules set forth two means by which to attack a witness' character for veracity. *Rule 608(a)* provides that a party may call a qualified witness to testify about another witness' bad character for truthfulness. n3 This is not a preferred method of impeachment, however, for at least three reasons. First, the witness who is being attacked usually will have testified well before the character witness will testify, i.e., in the adversary's case-in-chief. So as a matter of timing, the character witness may serve only to highlight and refresh the jury's recollection of the first witness' testimony. Second and more important, the character witness is limited to testifying in the form of opinion or reputation. So the attack on the witness' character is relatively truncated and conclusory. Third, the character witness can be tested by being asked about specific truthful acts of the witness whose character is being attacked. This is the same form of testing by way of specific acts that is authorized in *Rule 405*, and discussed in the Editorial Explanatory Comment to that Rule, *§ 405.02[4]-[7]*. All in all, the calling of a witness to impugn the character of another witness is usually unlikely to

advance the proponent's case and may sometimes backfire.

The second and ordinarily more productive way to attack a witness' character for veracity is to inquire about specific bad acts that are pertinent to untruthfulness, while the witness is testifying. n4 Not only is this an immediate form of impeachment, but a specific act is ordinarily more potent than general testimony as to character or reputation. And finally, while witnesses are permitted to explain or deny the specific acts, they are not permitted to refer to unrelated specific good acts in rebuttal.

Rule 608(b) allows a party to refer to pertinent specific acts to impeach a witness' character for veracity. If the party wants to use prior *convictions* to show the witness' bad character for veracity, *Rule 609* applies. n5

Under *Rule 608* (and *Rule 609*), there is only one character trait that can be made the subject of an attack, and that is the character trait for untruthfulness. No other character trait is considered pertinent to the witness' propensity to lie on the stand. For example, in *United States v. Robinson, 956 F.2d 1388 (7th Cir. 1992)* , the defendants wanted to inquire into the past drug use of two prosecution witnesses. They argued that evidence of drug use would impeach the character of the witnesses. The Trial Judge prohibited the impeachment and the Court of Appeals affirmed. The Court rejected the proposition that "witnesses who have previously used narcotics are more likely to tell lies." It found that evidence of drug use would really have been offered to prove a character trait other than a character for untruthfulness, and this was not permitted by *Rule 608*. n6

Of course, evidence of drug use may be useful for a different type of attack on a witness' credibility: it may show impairment of the witness' ability to recall and relate. n7 However, in *Robinson*, the defendants did not even purport to argue that the witnesses' drug use affected their memory of relevant events or impaired their capacity to relate these events at trial. Therefore, the evidence of drug use was properly excluded. n8

[2] Reputation and Opinion Evidence

The Advisory Committee drafted *Rule 608(a)* in such a way that character evidence could be presented by either reputation or opinion evidence. At common law, only reputation testimony could be used. Whether or not opinion testimony should be permitted received much discussion in Congress. Ultimately, Congress concluded that character evidence can be based on either reputation or opinion, thus departing from common-law doctrine, as we discussed in the Editorial Explanatory Comment accompanying *Rule 405*, *§ 405.02[3]*. We shall not repeat the discussion of reputation and opinion evidence, which can be found there.

The limitation in the Rule to opinion and reputation evidence mean that a character witness cannot be used as a subterfuge for getting specific acts of untruthfulness in front of the jury. Thus, if witness *A* has based his or her "opinion" of witness *B*'s character for untruthfulness solely on the basis of a single bad act by *B*, then Witness *A* may not testify, because he or she is not really an opinion witness within the meaning of *Rule 608(a)*. n9

[3] Prior Bad Act Impeachment

Rule 608(b) provides that for the purpose of attacking a witness' character for veracity, specific instances of conduct of a witness may be inquired into when that witness is testifying. Whenever specific instances of conduct are so used to impeach a witness, they must relate to the witness' character for untruthfulness as discussed above. Prior bad act impeachment was the product of little debate and may have escaped the attention of many members of Congress who had a fixation on *Rule 609*.

[4] Relationship to Rule 403

In a sense, all bad acts of a witness are pertinent to the witness' character for untruthfulness. If the act is "bad," it

ordinarily indicates some transgression of law or ethics. If the witness was willing to disrespect the law or act unethically, that is at least somewhat probative of the proposition that the witness is also willing to disrespect the oath and lie on the stand. Yet *Rule 608* clearly does not contemplate automatic impeachment with all of a witness' bad acts. n10 As the Advisory Committee stated in its Note to *Rule 608*, the Trial Court must also apply *Rule 403* to determine whether the probative value of the bad act as to the witness' untruthful character is substantially outweighed by the risk of prejudice, confusion and delay. n11

We suggest that the following factors, among others, should be taken into account in assessing the probative value and prejudicial effect of bad acts when offered to impeach the witness' character trait for veracity:

(1) *Dishonest nature of the act*. While every bad act is somewhat probative of veracity, it is clear that acts that involve dishonesty or lying are more probative of a propensity to lie on the stand than are acts that do not. n12 *Rule 609* draws a distinction in its text between crimes of dishonesty and other crimes in the text of the Rule, and there is every reason for Courts applying Rules 608 and 403 to take account of this distinction as a matter of logic, even it is not specified in those Rules. n13

(2) *Remoteness of the act*. As originally proposed, *Rule 608(b)* prohibited the admission of "remote" acts of misconduct. In order to provide for more flexibility, Congress deleted this limitation. However, remoteness remains an important consideration, because the older the act, the less it says about the witness' *current* propensity to lie on the stand. n14 Of course, the remoteness factor cannot be applied independently. If the act occurred long ago and yet it strongly indicates dishonest character, it may still be sufficiently probative to justify consideration by the factfinder. n15

(3) *Impeachment on other grounds*. If the witness has already been impeached by other methods, then use of bad acts becomes less probative. As discussed in the Editorial Explanatory Comment to *Rule 403*, *§ 403.02[5]*, the probative value of a particular piece of evidence must be assessed in light of the other evidence that is or can be proffered to prove the point. Thus, if a witness has already been impeached with a prior inconsistent statement and evidence of bias, the Court should be more receptive to prohibiting inquiry into a bad act.

(4) *Importance of the witness' credibility*. In some cases, the credibility of a certain witness is crucial to the outcome, and in some cases it is not. The more important the witness' credibility is to the case, the more permissive the Court should be in allowing inquiry into the witness' character for truthfulness. For example, if the case comes down to a testimonial dispute between two witnesses, bad acts may well be fair game where they would not be if the witness was simply a foundation witness for an unexceptional document. n16

(5) *Inflammatory nature of the act*. While all bad acts are prejudicial simply because they are "bad," it is clear that some acts create a greater risk of an emotional response from the jury than others. The Trial Judge should be particularly sensitive to bad acts that will inflame the passions of the jurors to such a degree that a witness' probative testimony will be ignored unfairly. n17

(6) *Similarity of the bad act to the issues in the case*. The risk of prejudice is especially acute if the witness' bad act is similar or identical to the issues disputed in the case. The similarity may encourage the jury not simply to disregard the witness' testimony, but also to decide a substantive issue improperly. For example, if a criminal defendant is being tried for extortion and is impeached with prior acts of extortion, there is a great danger that the jury will use these acts for the impermissible character purposes that are otherwise prohibited under *Rule 404(b)*; as such, exclusion should be more likely than if the bad act were dissimilar to the facts being tried.

(7) *The relationship of the witness to the case*. Under *Rule 403*, the prejudice that the Court must consider is not the humiliation suffered by the witness -- although that may be a factor for the Trial Judge to consider under *Rule 611(a)* in exercising discretion to exclude bad acts evidence, and under *Rule 412* in protecting a rape victim. The prejudice to be considered under *Rule 403* is that which will be suffered by the party whose testimony the witness favors. In this regard,

the prejudice will vary depending on who the witness is. If the witness is simply an unaffiliated fact witness, the only prejudice suffered by the party is that the witness' testimony may be unfairly disregarded by the jury. But if the witness is somehow affiliated with the party -- such as a family member, friend, or business associate -- the prejudice derived from the witness' bad act is greater, because the jury may not merely disbelieve the witness; it may also unfairly conclude that "birds of a feather flock together." And, of course, if the witness *is* the party, the possible prejudice derived from a bad act will be at its highest. n18

[5] Claim-Mindedness

One difficult question that has arisen under *Rule 608* is whether a defendant in a civil case can introduce evidence of the plaintiff's litigiousness or "claim-mindedness." For example, in *Hemphill v. Washington Metro. Area Transit Auth., 982 F.2d 572 (D.C. Cir. 1993)* , Hemphill sued the Transit Authority, alleging that the negligent conduct of a bus driver caused another car to crash into Hemphill's car. Hemphill lacked memory of the collision, and relied on the testimony of the driver whose car ran into hers to prove the Transit Authority's responsibility for the accident. Hemphill did testify at trial to her injuries and their relationship to the accident. On cross-examination Hemphill was asked about eight other injuries she had suffered in the span of thirty years. These injuries stemmed from four car crashes, two slip-and-fall incidents, one criminal assault, and one instance in which she was hit on the head by a falling object. She stated on cross-examination that she had pursued legal action following most of these injuries. The defendant did not contend, however, that any of these prior claims were in any way fabricated.

Over Hemphill's objection, the Trial Judge gave a "claims-minded plaintiff" instruction, allowing the jury to consider "whether the plaintiff was merely unlucky or whether or not she is claims-minded," and stating that the jury could take into account that "it is unusual for a person not engaged in a hazardous activity to suffer negligent injuries repeatedly within a short period of time and at the hands of different persons."

The Court of Appeals held that this instruction was error and reversed the judgment for the defendant. According to the Court, a claims-minded plaintiff instruction will *always* be in error unless the defendant presents evidence to indicate that the prior claims were false or fraudulent. This is because the mere existence of prior claims, on which the instruction is based, cannot pass the probative value/prejudice balance mandated by *Rule 403*. The mere fact that the plaintiff has brought claims, no matter how many, was found by the *Hemphill* Court as not sufficiently probative of veracity, in the absence of a showing that the claims were false.

There are several possible purposes for proffering evidence of a plaintiff's prior claims, but all such purposes appear problematic under the Federal Rules. One possibility is that the defendant is attempting to impeach the plaintiff's character for veracity. If so, the defendant must satisfy Rules 608 and 403. As discussed in the preceding section, prior bad acts of a witness cannot be inquired into if the prejudicial effect of the bad acts substantially outweighs the probative value of the evidence as it bears on credibility. The Court in *Hemphill* reasoned that, in the absence of a showing that the prior claims were false, the claims say little if anything about the plaintiff's propensity to lie on the stand. Against this minimal probative value there is significant prejudicial effect because the jury may believe, through the mere volume of claims, that the plaintiff is "litigious" and prone to bringing meritless claims. As the Second Circuit has stated: "The charge of litigiousness is a serious one, likely to result in undue prejudice against the party charged, unless the previous claims made by the party are shown to have been fraudulent." n19

Another possibility is that a defendant may be trying to introduce prior claims to show that the plaintiff has a character trait for litigiousness, and was acting in accordance with this trait in bringing the instant action. Under this scenario, the evidence would have probative value whether or not the plaintiff testified. But this possibility is even less likely to succeed than an attempt to impeach the plaintiff as a witness, because evidence of character would be barred by *Rule 404*, which prohibits character evidence to prove conduct in a civil case. n20

One possibility in some cases is that the defendant may argue that prior claims are probative of the plaintiff's bias

against the defendant. This argument could not be made by the Transit Authority in *Hemphill* because the plaintiff's lawsuits were brought against various defendants and alleged injury by various methods. However, if the plaintiff has brought several cases against the same defendant, or the same type of defendant, then the prior claims may have some probative value as to bias.

A close case on bias was presented in *Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988)* , where an African-American plaintiff brought police brutality claims against the City of New York, alleging excessive force on the part of white police officers. The City brought out at trial that Outley had filed numerous claims against white police officers. On appeal from a verdict against the plaintiff, the City argued that the evidence of prior lawsuits was designed to show Outley's bias against white police officers. The City properly pointed out that impeaching a witness for bias is different from trying to prove that the witness has a general propensity to make a false statement. n21 An attack on character is an attempt to show that the witness is generally a liar. An attack for bias is an attempt to show that the witness has a specific motive to provide false testimony in a specific litigation.

The *Outley* Court concluded that an attempt to show bias is a legitimate method of impeachment and also a legitimate not-for-character purpose under *Rule 404(b)*. However, a defendant proffering prior lawsuits to prove the bias of a witness must still show that the probative value is not substantially outweighed by the prejudice that the plaintiff will suffer when the jury learns of his litigious background, together with the confusion and delay that may be caused when these various actions are introduced. In other words, the defendant must still satisfy the balancing test of *Rule 403*. The Court in *Outley* held that the prior actions proffered by the City failed to satisfy the *Rule 403* test. According to the Court, the prejudice suffered by Outley when the jury heard about the other claims was substantial. In contrast, the probative value of the claims as to bias was "too remote." The Court explained that the mere fact that the suits were brought was not very probative of whether Outley harbored a bias against white police officers.

The Court in *Outley* recognized that the probative value of the prior claims as to bias would have been much greater if there was evidence that the claims were unjustified, fraudulent, or frivolous. But this could not be established by the mere fact that the claims were brought. The *Outley* Court reasoned that in order to establish probative value, the defendant would have to provide proof as to the lack of merit of the prior claims. But this proof process would itself implicate *Rule 403* concerns, because it would "likely lead to multifariousness and a confusion of issues." Given the difficult and collateral nature of the inquiry into the merits of the plaintiff's other claims, the *Outley* Court concluded that "at least in this case, it is an area of examination better left closed." On the other hand, if there is clear and easily provable evidence that the plaintiff's prior claims were frivolous -- e.g., if the Trial Court in a prior case imposed sanctions on the plaintiff for frivolous litigation -- the result may be different.

It also bears noting that if the defendant in *Hemphill* had focused only on the plaintiff's *injuries*, as opposed to her *claims*, then these injuries could well have been relevant to the extent of damage suffered by Hemphill in the accident that was the subject of the suit. n22

[6] Specific Acts to Bolster Credibility

Can the direct examiner elicit evidence of specific acts of *truthful* conduct of the witness whose character has been attacked? The answer is ordinarily "no," because subdivision (a), which provides for positive character evidence after the witness' character for veracity has been attacked, makes clear that reputation and opinion evidence are permissible, but not specific acts.

But in two situations the direct examiner should be permitted at least to refer to specific truthful acts after the witness' character for truthfulness has been brought into question: First, if a witness admits during cross-examination to having previously committed an untruthful act, fairness requires that the witness be permitted to explain the circumstances surrounding, and perhaps mitigating, the act. So for example, witnesses who have admitted to perjury should be allowed to explain that they turned themselves in to the government and recanted their perjury or that they voluntarily attempted

to correct their actions. Without this evidence, the prior bad act is blown out of proportion. This principle of fairness allows witnesses to refer to some specific acts of truthfulness in a limited way. It does not, however, allow witnesses to bring in all the truthful acts that they might ever have done.

Second, a party calling a character witness is permitted, following "have you heard" or "do you know" cross-examination, to put the character witness' testimony in proper perspective by testing the character witness' qualifications; this permits some limited reference to specific truthful acts.

Consider the following case: Witness *X* is asked, "You have testified that a prior witness *Y* is reported to be highly credible. But have you heard that *Y* was charged in 1970 with perjury by the federal government?" *X* answers, "Yes." *X* responds to later questions by indicating that the charge did not affect *Y*'s reputation. The party sponsoring *X* should probably be able to elicit that *X* also heard that charges were dropped against *Y* for lack of evidence, that *X* learned *Y* was cleared, that *Y* offered to take a lie detector test, or that *Y* proved the truth of his sworn statements, etc. Some of this supportive evidence may involve specific acts, but will probably be allowed, because it bears on the weight of the witness' testimony.

Thus, we believe that a proper reading of the Rule produces the following conclusions: (1) both the direct examiner and the cross-examiner are free to *impeach* witnesses with specific bad act evidence; (2) except in very limited circumstances, the party seeking to *bolster* the credibility of a witness whom that party called may not use specific instances of conduct.

[7] Extrinsic Evidence

Rule 608(b) prohibits the introduction of extrinsic evidence to prove specific instances of conduct of a witness when the only purpose of introducing these acts is to impeach the witness' character for veracity. Therefore, although a witness can be questioned about a particular event -- subject to the Trial Court's balancing of probative value and prejudicial effect under *Rule 403* -- the examiner must accept the witness' affirmation or denial of the event. n23 The purpose of the ban on extrinsic evidence is "to avoid holding mini-trials on irrelevant or collateral matters." n24

The exclusionary principle of *Rule 608(b)* applies only if the sole purpose in offering the specific act is to impeach the witness' character for veracity. If the specific act is offered to impeach the witness on other grounds, then the absolute preclusion of extrinsic evidence is inapplicable. This point was made clear by the Supreme Court in *United States v. Abel, 469 U.S. 45 (1984)* . Abel was charged with bank robbery, and called Mills to testify on his behalf. The prosecution sought to impeach Mills with the fact that both he and Abel were members of the Aryan Brotherhood, a secret prison gang in which members swore to protect each other, by perjury if necessary. When Mills denied his membership in the prison gang, the Trial Court permitted the prosecution to rebut the denial with testimony from another witness. Abel objected that this violated the *Rule 608(b)* limitation on extrinsic evidence. But the Court unanimously rejected Abel's argument in the following analysis:

> It seems clear to us that the proffered testimony with respect to Mills' membership in the Aryan Brotherhood sufficed to show potential bias in favor of [Abel]; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

Thus, if Mills were simply an unaffiliated fact witness in a personal injury case, his Aryan Brotherhood membership could be the subject of inquiry (because he joined an organization sworn to perjury), but extrinsic proof would be prohibited by *Rule 608(b)* because the only purpose for the evidence would be to show that Mills had a character trait

for lying. But because Mills also had a specific motive to falsify testimony on behalf of a fellow Aryan Brother in *Abel*, the *Rule 608(b)* limitation was found inapplicable.

Abel does not hold that extrinsic impeachment evidence *must* always be admitted when it is offered for a purpose other than proving the witness' character for veracity. The Court specified that *Rule 403* may be used to exclude extrinsic evidence when it is unduly prejudicial, confusing, or time-consuming. n25

Similarly, extrinsic evidence offered for contradiction is not barred by *Rule 608(b)*, but it can be excluded if the probative value as to the witness' credibility would be substantially outweighed by the risk of prejudice, confusion, and delay. Traditionally the admissibility of extrinsic evidence offered as contradiction was governed by whether the evidence was "collateral" or not. But the Federal Rules do not follow that traditional, undeniably fuzzy, term. Rules 402 and 403 displace the common-law rules prohibiting impeachment on "collateral" matters. n26

[8] The Breadth of the Extrinsic Evidence Ban and the 2003 Amendment to Rule 608(b)

Until 2003, the text of *Rule 608(b)* was somewhat broader than the reasonable reading given to it by the Court in *Abel*. The Rule provided that extrinsic evidence was inadmissible when offered "for the purpose of attacking or supporting the witness' *credibility*." The term "credibility" is obviously broader than the term "character for truthfulness." Professor Schmertz, in *Emerging Problems Under the Federal Rules of Evidence* at 161, noted that "[r]ead literally, the first sentence of [the pre-2003] *Rule 608(b)* could bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility."

The Advisory Committee on Evidence Rules determined that a number of cases had misapplied the Rule to preclude extrinsic evidence offered to impeach on non-character grounds. The Advisory Committee was also concerned that litigators might read the Rule literally and fail to proffer extrinsic evidence even to impeach a witness on non-character grounds. So in 2001 the Committee resolved to propose an amendment to *Rule 608(b)*.

The Committee considered whether *Rule 608(b)* as originally intended is indeed the correct approach to the admissibility of extrinsic evidence offered for impeachment. That approach distinguishes a character attack (as to which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to *Rule 403*). The Committee unanimously agreed that the basic approach of the Federal Rules -- distinguishing between an attack on the witness' character and other forms of impeachment -- is correct and should not be changed. An attack on a witness' character for truthfulness can be overbroad and extraneous to the issues in the case; extrinsic proof of bad acts will almost always result in a waste of time and confusion of the jury on a collateral matter. It makes sense, therefore, to employ a categorical rule of exclusion of extrinsic evidence when offered to attack a witness' character for truthfulness. Extrinsic evidence of other forms of impeachment might well be more central to the issues in the case (e.g., contradiction of a material fact, or an inconsistency in a prior statement that is material to the witness' testimony), and so a case by case approach under *Rule 403* was appropriate.

The Advisory Committee's proposed amendment to *Rule 608(b)* became effective on December 1, 2003. It simply substituted the correct term "character for truthfulness" for the overbroad term "credibility" in *Rule 608(b)*. The Committee Note makes clear that other forms of impeachment are governed by Rules 402 and 403 and not by the absolute bar on extrinsic evidence. The Committee Note also emphasizes that the limitation on extrinsic evidence also bars reference to the consequences that a witness might have suffered from a bad act:

> It should be noted that the extrinsic evidence prohibition of *Rule 608(b)* bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, *Rule 608(b)* prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis, 183 F.3d 231, 257, n. 12 (3d Cir. 1999)* (emphasizing that in

attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under *Rule 608(b)*"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, *7 Crim. Just. 28, 31 (Winter 1993)* ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

[9] Good-Faith Basis for Questions

When the *Rule 608(b)* limitation on extrinsic evidence applies, it means that a specific act cannot be proved. However, this does not mean that the party can ask about a pertinent bad act without any proof that the witness actually committed the act. To control the risk of abuse, the Courts have held that a party must have a "plausible basis" to believe that the witness committed the bad act before it can be made the subject of inquiry. n27 The evidence supporting a plausible basis need not satisfy the admissibility requirements of the Federal Rules, but the party must be prepared to articulate a plausible factual basis to the Judge upon objection by the adversary. n28

[10] Denial of Bad Acts

Should a party be permitted to cross-examine a witness about a bad act *knowing* that the witness will deny it? This was the question in *United States v. Cudlitz, 72 F.3d 992 (1st Cir. 1996)* , an arson case. The Court held that the government was properly permitted to inquire, on cross-examination of Cudlitz, about his prior attempt to solicit arson. Cudlitz had testified on direct that, when previously faced with an unprofitable business venture, he had duly paid his debts, had never had a fire connected with any other enterprise, and had never made a claim for fire damage on any of his other properties. Cudlitz argued that it was improper to allow the government to ask about a prior arson, when the government knew that Cudlitz would deny it (based on his direct testimony), and where the government would be prohibited from proving the event through extrinsic evidence. The Court analyzed this argument as follows:

> An observer might well [ask] how it could possibly be proper for the government to ask a prejudicial question that it knows will be answered negatively, that cannot be pursued with extrinsic proof, and that serves only to suggest to the jury (contrary to the standard instruction) the fact implied by the question.
>
> The only answer is that the cross-examination of this kind is part of a system of checks and balances that the law has developed to caution a credulous jury against possible perjury. Thus, while the question may be asked, the government must on demand supply a good faith basis for the question; the witness may vigorously deny the suggestion and explain the basis for the denial; with rare exceptions, the government must accept the answer without offering extrinsic evidence; and the court will normally provide a limiting instruction. With these protections, and *Rule 403*, the defendant must be content.

The fact that the witness is certain to deny the allegation makes it less probative in assessing the witness' character. Still, the Court should have the discretion to allow the question despite the certainty of a denial -- otherwise, a witness could unilaterally preclude any reference to bad acts, by simply notifying the adversary in advance that he will deny them.

It has been argued that the limitation on extrinsic evidence leaves the witness free to lie by simply denying an act with no fear of contradiction. This is an overreaction. A witness takes an oath to tell the truth. If the witness violates that oath, the witness is subject to prosecution for perjury or a perjury-type crime. Moreover, cross-examination as to the bad act is not cut off by the witness' denial. All that *Rule 608(b)* does is to prevent the focus of a trial from turning from the merits of a dispute to the issue of whether a witness committed a particular act, the only relevance of which is that, if it was committed by the witness, that fact might affect the jury's assessment of credibility.

[11] Acquittals

Because a party needs only a plausible basis to believe that a bad act occurred before it can be used for impeachment under *Rule 608(b)*, would it make any difference if the witness has been acquitted of the bad act? In *United States v. Schwab, 886 F.2d 509 (2d Cir. 1989)* , the Court held that an acquittal barred the government from inquiring into alleged misconduct of the defendant-witness. The Court relied on *Rule 403*, and stated that an acquittal "will normally alter the balance between probative force and prejudice which is already a close matter in many cases where prior misconduct of a defendant is offered."

We agree with the reasoning in *Schwab* that an acquittal will ordinarily diminish the probative value of the underlying alleged conduct to such an extent that *Rule 403* will mandate exclusion. Indeed, there is much to be said for a bright line rule of exclusion on the ground that a case-by-case application of the *Rule 403* balancing test, where the witness has been acquitted, will ordinarily result in exclusion anyway. We recognize that conduct for which a defendant has been acquitted *can* be admitted for a not-for-character purpose, such as proof of intent, under *Rule 404(b)*. However, the difference between the Rules is that if the bad act is offered under *Rule 404(b)* it is proved at trial, so the jury can decide to its satisfaction whether the defendant really committed the act. In contrast, a bad act offered under *Rule 608(b)* cannot be proved in front of the jury. Thus there is a far greater risk that the jury, with no basis to assess whether the act occurred or not, will give the accusation more weight than it is worth, even when informed that the witness was acquitted. This is the kind of prejudicial effect that the Court must take into account under *Rule 403*. Accordingly, we suggest that Trial Courts prohibit any reference to a bad act offered to impeach a witness' character for veracity if the witness has been acquitted of charges arising from the act.

[12] Relationship to Rule 607

In our view, any examiner, whether on direct or on cross, who seeks to impeach a witness under *Rule 608(b)* can elicit evidence of prior bad acts. We read "cross-examination" as meaning "impeachment." In other words, a direct examiner who wishes to impeach a witness or who believes that a witness will be impeached on cross-examination may ask the witness about specific acts. This result is consistent with *Rule 607*.

[13] Relationship to Rule 404(b)

The basic distinction between evidence offered under *Rule 404(b)* and impeachment attempted under *Rule 608(b)* is that evidence is generally offered under the former Rule as affirmative proof of a disputed issue, while evidence may only be offered under the latter Rule to impeach a witness. See § 404.02[25] for a complete discussion of the interrelationship between these Rules.

[14] Relationship to Rule 609

Rule 609(d) provides that juvenile adjudications generally are not admissible for impeachment. One question that may arise in connection with the relationship between Rules 608 and 609 is whether a juvenile's act that resulted in a delinquency adjudication may be the subject of inquiry under *Rule 608*. Our view is that the basic policy of *Rule 609(d)* is to treat actions by juveniles as youthful indiscretions that should be forgiven and forgotten except when they have special probative value. We would extend the policy to *Rule 608* and bar inquiry into juvenile acts as not shedding sufficient light on credibility to warrant reference to them, and we would rely on *Rule 403* to support exclusion.

Both *Rule 608* and *Rule 609* come into play when a witness' conviction is based on some underlying acts that may be probative of a character for truthfulness. This interrelationship is discussed in the Editorial Explanatory Comment to *Rule 609, § 609.02[5]-[6]*.

[15] Relationship to Rule 613(b)

When the witness is impeached for having an untruthful character, the charge is that the witness generally lies and

therefore may be lying on the stand. In contrast, when the witness is impeached for having made a prior inconsistent statement, there is no charge that the witness is a liar by nature. The contention is rather that the witness has told different stories about the matters in dispute, and therefore may not be telling the truth at the trial. From the point of view of the Evidence Rules, the difference between impeachment with a prior inconsistent statement under *Rule 613(b)* and impeachment for untruthful character under *Rule 608(b)* is that extrinsic evidence cannot be admitted to prove character, but extrinsic evidence (specifically the prior statement) can be admitted to prove an inconsistency, subject to *Rule 403*. The line between these two forms of impeachment is sometimes difficult to draw, however.

An excellent primer on the differentiation between the two forms of impeachment was provided by Judge Selya in *United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999)* . Defense witness Flint testified that the defendant was not at his home at the time that a drug transaction occurred there and various parties were arrested. On cross-examination, Flint was asked whether he had told a police officer at the time of the drug bust that the officers had missed several ounces of cocaine that were buried in the yard outside the defendant's home. Flint denied making this statement. The prosecution then called the officer to whom Flint had spoken. That officer testified that Flint had indeed made the statement about the buried cocaine. The *Winchenbach* Court first rejected the defendant's argument that the extrinsic evidence should have been barred because *one* purpose for the evidence was to impeach the witness' character through evidence of prior drug use. The Court stated that the defendant's contention was "an overbroad generalization which, among its other vices, contradicts the time-honored tenet that prior inconsistent statements ordinarily may be used to impeach a witness's credibility. In the bargain, this interpretation of *Rule 608(b)* leaves no room at all for the admission of extrinsic impeachment evidence under the auspices of *Rule 613(b)*. Thus, we reject it."

The *Winchenbach* Court set forth "a principled distinction between the types of evidence covered by the two rules." Specifically:

> *Rule 613(b)* applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary -- not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question). [citations omitted] In short, comparison and contradiction are the hallmarks of *Rule 613(b)*.
>
> In contrast, *Rule 608(b)* addresses situations in which a witness's prior activity, whether exemplified by conduct or by a statement, in and of itself casts significant doubt upon his veracity. [citation omitted] Thus, *Rule 608(b)* applies to, and bars the introduction of, extrinsic evidence of specific instances of a witness's *misconduct* if offered to impugn his credibility. So viewed, *Rule 608(b)* applies to a statement, as long as the statement in and of itself stands as an independent means of impeachment without any need to compare it to contradictory trial testimony. [citations omitted]

Applying this analysis to the facts, the Court found that the officer's testimony about the defense witness' statement was covered by *Rule 613(b)* -- and therefore the extrinsic evidence was not absolutely prohibited. The witness' denial of a prior statement about the location of drugs clearly presented an inconsistency with his trial testimony. *Rule 608(b)* would apply to bar the extrinsic evidence only if the prior statement concerning the drugs, standing alone and without any reference to the witness' trial testimony, was pertinent to the witness' character for truthfulness. The Court stated that the evidence of the witness' prior statement failed that test because it was simply evidence of prior drug activity that is not pertinent to truthfulness. It concluded that "the appellant does not squarely argue that the mere assertion that the officers missed some buried jars of cocaine during their search of the premises, offered in an effort to cooperate with law enforcement, sinks to the level of an affirmative example of Flint's misconduct such as would significantly affect Flint's credibility, and such an argument, if made, would be unconvincing. It is only the comparison of the earlier statement with Flint's trial testimony that imbues the evidence with probative value for impeachment purposes."

The *Winchenbach* Court noted that extrinsic evidence of a prior inconsistent statement, while not controlled by *Rule*

608(b), was still subject to the balancing test of *Rule 403*. The Court found no abuse of discretion in admitting the extrinsic evidence. It reasoned that Flint was an important alibi witness, and that the inconsistency was clearly probative of the witness' credibility. n29

[16] Plea Agreements of Government Witnesses

The Editorial Explanatory Comments under Rules 403 and 607 discuss the important question of whether the prosecution can introduce the plea agreement of a cooperating witness on direct examination. The prosecution has several reasons to want to admit the plea agreement on direct examination, among them: (1) taking the sting out of anticipated impeachment by the defense; (2) deterring jury speculation that the defendant is being singled out for prosecution while other cohorts go free; and (3) corroborating the witness' claim of personal knowledge of the underlying events.

As discussed under Rules 403 and 607 (see §§ 403.02[8], 607.02[5]), the Courts have generally allowed the prosecution to offer plea agreements on direct examination of cooperating witnesses, even if the defendant agrees not to raise the agreement on cross-examinaton. But is such a practice permissible under *Rule 608*? In *United States v. Universal Rehabilitation Services, 205 F.3d 657 (3d Cir. 2000)* (en banc), the dissenters made a half-hearted attempt to argue that admission of the cooperating witnesses' plea agreements on direct violated *Rule 608*. Judge Roth stated: "Arguably, under *Rule 608(a)*, absent an attack on [the cooperating witnesses'] credibility, their guilty pleas are inadmissible."

This argument is not borne out by the language of *Rule 608(a)*, however. *Rule 608(a)* states that the credibility of a witness may be attacked or supported "by evidence in the form of opinion or reputation" but subject to the limitation that "evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." By its terms, *Rule 608(a)* limits only the *forms* of proof of a witness' credibility. It imposes limits on opinion or reputation evidence of credibility. But a plea agreement is neither opinion nor reputation evidence. Moreover, the Rule precludes evidence of "truthful character," and a plea agreement is not evidence of truthful character (unless the government is offering polygraph clauses or affirmations in the agreement that the witness has told the truth, which clauses are inadmissible under *Rule 403* anyway). When an agreement is introduced to deter speculation about selective prosecution, nothing is being said about the character of the witness. Nor is character raised if the agreement is offered to corroborate the witness' assertion of personal knowledge. Put another way, inveterate liars can and do sign plea agreements. For all these reasons, *Rule 608(a)* does not prevent the prosecution from introducing plea agreements on direct examination.

In *Universal*, Judge Roth argued that in admitting the plea agreements on direct examination the Trial Court acted "at odds with *Rule 608(b)*." But this argument is weak. For one thing, it is not clear that a plea agreement is "conduct" of a witness within the meaning of the Rule. For another, the Rule simply states that certain evidence pertinent to credibility may not be proved by "extrinsic evidence." The Rule itself imposes no limitation on *referring* to or testifying to evidence of credibility on direct examination. It simply provides that the information covered by the Rule cannot be proved by extrinsic evidence. Thus, at most, the Rule would prohibit introduction of the plea agreement itself into evidence; it does not prohibit the prosecutor from asking the witness about the agreement, from eliciting testimony about the terms of the agreement and the witness' understanding of it, etc.

But most importantly, *Rule 608(b)* applies only when the evidence is offered to attack or support the witness' *character for truthfulness*. The Rule does not apply to evidence offered to prove other aspects of the witness' credibility, such as bias/motive to falsify, inconsistent statements, contradiction, and capacity. The Supreme Court made this clear in *United States v. Abel, 469 U.S. 45 (1984)* , see [7], *above*. A plea agreement of a cooperating witness is not offered to prove the witness' character for truthtelling. Entering into a plea agreement is no indication of whether the witness is generally a liar. In sum, *Rule 608* provides no authority for the Trial Court to exclude the plea agreement of a cooperating witness. Whatever protection exists for defendants must come from *Rule 403*. n30

[17] Privilege Against Self-Incrimination

The last paragraph of *Rule 608(b)* provides that a witness who takes the stand does not waive the privilege against self-incrimination by being examined with respect to matters relating only to character for truthfulness. So for example, a defendant who is charged with robbery and takes the stand to deny the charge may invoke the privilege against self-incrimination if asked whether he or she committed a previous embezzlement for which no charge has been laid (assuming that such a question would relate to truthfulness and that the Judge would otherwise allow it). n31 Similarly, a government witness may take the stand and refuse to answer questions about conduct unrelated to the case at bar where a statement about that conduct could tend to incriminate the witness. n32

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Drury, 344 F.3d 1089 (11th Cir. 2003)* (no abuse of discretion in excluding evidence of the defendant's good character for truthfulness; the government did not attack the defendant's character for truthfulness by using cross-examination to point out inconsistencies in his testimony and then arguing to the jury that the defendant's story was not credible); *United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982)* (Trial Judge did not err in excluding character testimony concerning the defendant's honesty after the government pointed out inconsistencies in his testimony; this was not an attack on his character for truthfulness, so rehabilitation evidence was not called for).

(n2)Footnote 2. *United States v. Thomas, 768 F.2d 611, 618 (5th Cir. 1985)* . See also *United States v. Hedgcorth, 873 F.2d 1307 (9th Cir. 1989)* (FBI agent could not testify that he thought the defendant was a truthful person, because the government had not attacked the defendant's truthfulness as a witness: "The fact that some of the evidence may have shown that defendant conspired to cover up his crime does not mean that defendant's character for truthfulness has been attacked by opinion or reputation evidence or otherwise.").

(n3)Footnote 3. See, e.g., *United States v. Tedder, 403 F.3d 836 (7th Cir. 2005)* (no error in permitting the defendant's brothers to testify that they had low opinions of his honesty, even though they had not spoken with him in a decade; "*Rule 608(a)* does not contain a time limit," and "[t]he long break in family relations was a subject for cross-examination."); *Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993)* (abuse of discretion to exclude testimony by a journalist that one of the defense witnesses was a liar; the journalist had interviewed the witness and members of his "community" sufficiently both to give an opinion and to testify to the witness' reputation for truthfulness). Compare *United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996)* (no error where the Trial Court denied two defendants the opportunity to testify concerning the reputation of a prosecution witness; the defendants "alleged no facts to suggest that they were personally familiar with Garcia or his alleged reputation for dishonesty").

(n4)Footnote 4. See, e.g., *United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004)* (reversible error to prohibit defendant from cross-examining the key government witness about the witness having given false testimony on a prior occasion); *United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995)* (failure to report income and solicitation of bribes are probative of dishonesty and thus the government was properly permitted to refer to these acts while cross-examining the defendant).

(n5)Footnote 5. See generally *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 734)* (discussing the relationship between Rules 608 and 609 and noting that a conviction might be admissible under *Rule 609* while the acts underlying the conviction might be admissible under *Rule 608*).

(n6)Footnote 6. See also *United States v. Anderson, 139 F.3d 291 (1st Cir. 1998)* (witnesses could not be impeached with the fact that they had engaged in prostitution; commercial sexual activity is not relevant to a person's character for veracity); *United States v. Meserve, 271 F.3d 314 (1st Cir. 2001)* (error to permit the prosecution to impeach a defense witness with evidence of violent activity as that had "no bearing" on the witness' character for truthfulness); *United States v. Parker, 133 F.3d 322 (5th Cir. 1998)* (no error in precluding the defendant from asking the witness about murder charges pending against her: "Violent crimes are irrelevant to a witness' character for

truthfulness"); *United States v. McMillon, 14 F.3d 948 (4th Cir. 1994)* (an attack on a witness' sexual preference is not permissible under *Rule 608*: the witness' "sexual life is not probative of his character for truthfulness. Instead, it is exactly the type of cross-examination strategy ... that impairs the search for the truth and harasses, annoys or humiliates the witness in the process.").

(n7)Footnote 7. See, e.g., *United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987)* (defendant should have been permitted to cross-examine a witness concerning his regular use of cocaine to impeach his ability to observe and remember); *Jarrett v. United States, 822 F.2d 1438, 1445 (7th Cir. 1987)* ("A witness' use of drugs is only relevant as to the ability of the witness to perceive the underlying events and testify lucidly at trial."); *United States v. DiPaolo, 804 F.2d 225 (2d Cir. 1986)* (evidence of alcoholism "tells us nothing of the witness's testimonial incapacity unless it involves actual intoxication at the time of the event observed or at the time of testifying. Hence, because its bearing on moral character does not involve the veracity trait it will usually not be admissible" to attack the witness' character).

(n8)Footnote 8. See also *United States v. Geston, 299 F.3d 1130 (9th Cir. 2002)* (proper to exclude witness' alcoholism and acts of violence, as this was not probative of the witness' character for truthfulness).

(n9)Footnote 9. See, e.g., *United States v. Thomas, 768 F.2d 611 (5th Cir. 1985)* (polygraph expert may not testify as to his personal opinion that a witness is either a truthful or untruthful person; such testimony, based upon a single incident, is not character opinion testimony within the meaning of *Rule 608*).

(n10)Footnote 10. See, e.g., *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories, 37 F.3d 1460 (11th Cir. 1994)* (reversible error when the Trial Court permitted the defendant to impeach the plaintiff's expert witness, an accountant, by inquiring about the witness' bankruptcy and the fact that he borrowed money from his clients and failed to pay it back; "seeking discharge in bankruptcy does not show a disregard for truth that would cast doubt on a witness's veracity"; and even if the witness' borrowing from clients was unethical, "[t]o infer untruthfulness from any unethical act paves the way to the exception that swallows the rule.").

(n11)Footnote 11. See, e.g., *United States v. Dakins, 872 F.2d 1061 (D.C. Cir. 1989)* (applying *Rule 403* and holding that the Trial Court did not err in excluding specific acts offered to impeach a witness' character for veracity); *Williams v. Chevron U.S.A., Inc., 875 F.2d 501, 504 (5th Cir. 1989)* (citing to Advisory Committee Note to *Rule 608(b)*, the Court stated that "the admissibility of specific instances of conduct is circumscribed by *Rule 403*").

(n12)Footnote 12. See, e.g., *United States v. Redditt, 381 F.3d 597 (7th Cir. 2004)* (no error in permitting defendant to be cross-examined about her false denial on an employment action that she had ever been convicted of a crime); *Deary v. City of Gloucester, 9 F.3d 191 (1st Cir. 1993)* (filing a false overtime report is highly probative of witness' bad character for veracity).

(n13)Footnote 13. See, e.g., *United States v. Beros, 833 F.2d 455 (3d Cir. 1987)* (Trial Judge properly permitted the government to cross-examine the defendant concerning his false swearing on a marriage license application; such an act is highly probative of a person's propensity to lie on the witness stand). Compare *United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001)* (error to allow the prosecution to cross-examine the defendant about losing a contract because he violated his customer's policy against giving gratuities to the customer's employees; there was no showing that the defendant had acted fraudulently or dishonestly); *United States v. Flaharty, 295 F.3d 182 (2d Cir. 2002)* (no error in prohibiting defendant from cross-examining government witness about his involvement in a murder, as this is "generally not a crime of dishonesty" and so was not sufficiently probative of the witness' character for truthfulness).

(n14)Footnote 14. See, e.g., *United States v. Kennedy, 714 F.2d 968 (9th Cir. 1983)* (witness' involvement with the Hell's Angels ten years earlier was properly excluded under *Rule 608(b)* since "it detracted only minimally from his credibility").

(n15)Footnote 15. See, e.g., *United States v. Weichert, 783 F.2d 23, 26 (2d Cir. 1986)* (the government was permitted to cross-examine the defendant about his disbarment which occurred twelve years earlier: "That the

disbarment occurred twelve years before the trial decreased its probative value but did not require exclusion.").

(n16)Footnote 16. See, e.g., *Chnapkova v. Koh, 985 F.2d 79 (2d Cir. 1993)* (because the plaintiff's credibility was crucial, the Trial Judge should have permitted the defense to question her about her failure ever to file tax returns); *Varhol v. National R.R. Passenger Corp., 909 F.2d 1557 (7th Cir. 1990)* (the plaintiff was properly cross-examined about a suspension from work he had received for purchasing stolen train tickets from his boss, because the connection between such acts and honesty and integrity, and between honesty and integrity and credibility, was sufficient to allow admission when credibility was a key issue and the plaintiff was given an opportunity to minimize any adverse inference on redirect examination); *United States v. Leake, 642 F.2d 715 (4th Cir. 1981)* (discretion to limit cross-examination must focus on "the importance of the testimony [of the witness being cross-examined] to the government's case, the relevance of the conduct to the witness' truthfulness, and the danger of prejudice, confusion, or delay raised by evidence sought to be adduced"; here, it was error to prevent cross-examination about bad acts when the witness was the key witness for the government.).

(n17)Footnote 17. See, e.g., *United States v. Wolf, 787 F.2d 1094 (7th Cir. 1986)* (the prosecutor's cross-examination of the defendant concerning his contracting venereal disease on a trip to Thailand, his recommendation of an abortion for a woman, and his relationship with a 14-year-old girl was prejudicial and improper).

(n18)Footnote 18. See, e.g., *United States v. Blake, 941 F.2d 334 (5th Cir. 1991)* (error, but harmless, to permit the defendant in a drug and weapons prosecution to be asked whether he had said he had killed ten people; this inflammatory question was unrelated to the substantive issues before the jury, and its probative effect on credibility was only cumulative of other impeachment evidence).

(n19)Footnote 19. *Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988)* (error to admit prior claims by plaintiff). See also *Raysor v. Port Authority, 768 F.2d 34 (2d Cir. 1985)* (a plaintiff's litigiousness "may have some slight probative value, but that value is outweighed by the substantial danger of jury bias against the chronic litigant.").

(n20)Footnote 20. See, e.g., *Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988)* ("Litigiousness is the sort of character trait with which *Rule 404(b)* is concerned.").

(n21)Footnote 21. See *United States v. Abel, 469 U.S. 45 (1984)* (evidence that was inadmissible to impeach the witness' character for veracity was nonetheless admissible to show the witness' bias and motive to falsify).

(n22)Footnote 22. See *Hemphill, 982 F.2d at 575* (permitting cross-examination about prior claims when "relevant to the cause and extent of a claimant's injuries").

(n23)Footnote 23. See, e.g., *United States v. Brooke, 4 F.3d 1480 (9th Cir. 1993)* (the defendant in a murder trial was accused of having feigned terminal cancer; extrinsic evidence of "cancer fraud" could not be introduced if its only purpose was to attack the defendant's character for veracity: "Under this explicit rule [*Rule 608(b)*], the government was stuck with whatever response Brooke gave about her cancer; the government could attempt on further cross-examination to elicit a response contradicting her prior testimony, but it could not improperly impeach Brooke through extrinsic evidence.").

(n24)Footnote 24. *Deary v. City of Gloucester, 9 F.3d 191, 197 (1st Cir. 1993)* (calling a witness to the stand to rebut the denial by a previous witness of a bad act "was an unnecessary foray, resulting in a waste of the court's time," and was prohibited by *Rule 608(b)*).

(n25)Footnote 25. See, e.g., *United States v. Phillips, 888 F.2d 38 (6th Cir. 1989)* (Trial Court did not err in prohibiting extrinsic evidence of bias where "the only bias defendant can point to is a desire by the government witnesses to save their jobs by allegedly lying on cross-examination about a remote matter as opposed to lying about a fact material to the case."); *United States v. Soundingsides, 825 F.2d 1468 (10th Cir. 1987)* (extrinsic evidence of a prior inconsistent statement was properly excluded where the witness admitted having made the statement: "since the

substance of the statements had already been repeated before the jury and acknowledged, the overkill of testimony by the Agents again repeating the statements, with its prejudicial risk of use as substantive evidence, was error.").

(n26)Footnote 26. See, e.g., *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403, not by the common-law "collateral" rule).

(n27)Footnote 27. See, e.g., *United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004)* ("the general rule is that the questioner must be in possession of some facts which support a general belief that the witness committed the offense or the degrading act to which the question relates"); *United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990)* (the prosecutor's reference to a bad act was error as it implied a factual predicate that the prosecutor knew could not be supported by evidence).

(n28)Footnote 28. See, e.g., *United States v. Schwab, 886 F.2d 509 (2d Cir. 1989)* (finding that the government had a plausible basis for cross-examining a witness as to prior misconduct, and noting that the government brought up the bad act only after receiving approval from the Trial Court).

(n29)Footnote 29. For cases following the *Winchenbach* analysis, see *United States v. Bolzer, 367 F.3d 1032 (8th Cir. 2004)* (prior statement was raised because it showed bad character, and its inconsistency with the witness' testimony was not on a disputed issue in the case; therefore extrinsic evidence was impermissible); *United States v. McGee, 408 F.3d 966 (7th Cir. 2005)* (the force of impeachment was not based on an inconsistency with the witness' testimony, but rather on the fact that the prior statement was an elaborate lie, therefore *Rule 608(b)* applied and it was error for the Trial Court to allow extrinsic evidence).

(n30)Footnote 30. See generally Edward Imwinkelried, *The Silence Speaks Volumes: A Brief Reflection on Whether it is Necessary or Even Desirable to Fill the Seeming Gaps in Article VI of the Federal Rules of Evidence*, *1998 UNIV. ILL. L. REV. 1013*. Professor Imwinkelried concluded that for the most part misapplication of the Article VI rules has occurred because some Courts have failed to recognize that *Rule 403* operates as a default provision for impeachment questions that are not specifically treated in Article VI.

(n31)Footnote 31. See, e.g., Air et *Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985)* (in a breach of contract action, the Trial Judge did not err in sustaining one plaintiff's claim of the privilege against self-incrimination in response to questions concerning alleged nonpayment of Belgian income taxes and in refusing to permit comment on the claim).

(n32)Footnote 32. *United States v. McClurge, 311 F.3d 866 (7th Cir. 2002)* (no error in refusing to strike the testimony of a government witness who refused to answer questions about criminal activity unrelated to the charges involved in the instant case).

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Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 608 RULE 608

2-608 Federal Rules of Evidence Manual 608.03

608.03 Annotated Cases

[Go To Supp]

[1] RULE 608(a) -- OPINION AND REPUTATION EVIDENCE OF CHARACTER

[a] RULE 608(a) -- Character Evidence To Impeach

[i] RULE 608(a) -- Cumulative Evidence

United States v. Haynes, 554 F.2d 231 (5th Cir. 1977) : Affirming convictions for drug offenses, the Court held there was no abuse of discretion in refusing to allow the defendants to call more than one witness to testify that an undercover DEA agent had a bad reputation for truth and veracity. We suggest that Judges should not be too quick to declare character evidence cumulative, since the fact that more than one person is willing to come forward and testify to a witness' poor reputation may make the character evidence far more persuasive than if only one person testifies.

United States v. Melton, 739 F.2d 576 (11th Cir. 1984) : Upholding conspiracy and wire fraud convictions, the Court held there was no error in permitting the government to call five witnesses, after the defendant testified, to state that they would not believe him under oath. The Court reasoned that "if Melton was able to convince individuals to trade expensive cars for worthless gems, the trial judge could well have concluded that the government should be allowed to call five witnesses to counteract any effect Melton's obviously believable personality might have on the jury."

[ii] RULE 608(a) -- Character Evidence To Impeach -- Miscellaneous Cases

Deary v. City of Gloucester, 9 F.3d 191 (1st Cir. 1993) : In a civil rights action for use of excessive force, the commanding officer was asked on cross-examination about another officer's reputation for truthfulness, responded that he had never known the officer to be untruthful, and then denied knowing of an incident in which the other officer had been disciplined for an untruthful overtime report. The other officer was then recalled to the stand and admitted the incident ten years previously; documents regarding the incident were also admitted. The Court held that the commander

was properly asked about the credibility of the other officer, who had previously testified, and that there was no abuse of discretion in permitting cross-examination of the commander, as character witness, with the ten-year-old disciplinary incident. The Court noted, however, that the other officer should not have been recalled and the documents should not have been admitted, as that was extrinsic evidence of specific conduct for the purpose of attacking the witness' credibility; questioning about the incident should have stopped when the commander denied any knowledge. The error was harmless, however, because the other officer could have been asked about the incident when he first testified and the evidence was not likely to inflame the jury against the defense.

United States v. Basic Constr. Co., 711 F.2d 570, 1983-1 Trade Cas. (CCH) P65472 (4th Cir. 1983) : The Court affirmed bid-rigging convictions, finding (2-1) harmless the Trial Judge's error in excluding opinion evidence offered by a defendant to impeach a government witness.

United States v. Lashmett, 965 F.2d 179 (7th Cir. 1992) : Where defense witnesses testified that the principal prosecution witnesses had bad reputations for dishonesty, the Court held it was error (but harmless) to prohibit them from adding their personal opinions that the others were dishonest. In *United States v. Pacione, 950 F.2d 1348 (7th Cir. 1991)* , the Court affirmed a conviction for threatening a revenue officer, holding there was no abuse of discretion in permitting rebuttal witnesses to testify about the defendant's reputation for untruthfulness and their opinions of his untruthfulness. Although he had been convicted in connection with the business out of which their knowledge arose, it was defense counsel who brought out his prior bad acts.

United States v. Nazarenus, 983 F.2d 1480 (8th Cir. 1993) : The Court held in a prosecution for aggravated sexual abuse that it was error (but harmless) to admit evidence that the defendant frequently drove fast, because it was not connected with his character for truthfulness. In *United States v. Malady, 960 F.2d 57 (8th Cir. 1992)* , the Court affirmed a conviction for felon firearm possession, holding that an objection was properly sustained when a deputy sheriff was asked on cross-examination whether he believed another prosecution witness. Assuming the deputy had sufficient contact with the witness, he could have been asked for his general opinion of the witness' truthfulness, but not whether he believed the witness' story.

United States v. Melton, 739 F.2d 576 (11th Cir. 1984) : Upholding conspiracy and wire fraud convictions, the Court held there was no error in permitting the government to call five witnesses, after the defendant testified, to state that they would not believe him under oath. The Court reasoned that "if Melton was able to convince individuals to trade expensive cars for worthless gems, the trial judge could well have concluded that the government should be allowed to call five witnesses to counteract any effect Melton's obviously believable personality might have on the jury."

[iii] RULE 608(a) -- Character Evidence To Impeach -- Prejudicial Testimony

United States v. Herzberg, 558 F.2d 1219 (5th Cir. 1977) : The Court affirmed convictions for mail fraud after a trial at which the government impeached one of the testifying defendants with a character witness who testified that the defendant had a bad reputation in the community for truthfulness. The Court rejected the argument that the evidence should have been excluded under *Rule 403* as unduly prejudicial.

[iv] RULE 608(a) -- Character Evidence To Impeach -- Qualifications of Witness

United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) : The defendant was convicted of felon firearm

possession upon testimony provided by a single police officer. The Court reversed because the defendant was improperly restricted in asking the officer about prior bad acts under *Rule 608(b)*, but it upheld rulings regarding reputation and opinion character witnesses. None of the three witnesses was found to have a sufficient basis to testify to the officer's reputation. One, a reporter, was not personally acquainted with defendant or with his reputation in the community. Any knowledge possessed by the reporter, or by a second witness, an acquaintance of the officer, was also too remote in time. As for the third witness, a defense attorney, the Court did not resolve whether the "court community" is pertinent for a police officer's reputation, but found in any event that this testimony was inadmissible because it relied on the attorney's conversations with only a few criminal defense attorneys, a "subset" of the proposed community. The Court noted that the relevant "community" for character testimony is not limited to a particular neighborhood or locality. The Court also noted that the foundational requirement for opinion evidence regarding a witness' character for truthfulness is less stringent than that for reputation evidence, but upheld exclusion of proposed opinion testimony because it was not supported by sufficient facts and was thus unduly prejudicial under *Rule 403*.

United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) , *vacated*, *602 F.2d 653 (4th Cir. 1979)* (en banc): Overturning mail fraud and racketeering convictions on other grounds, the Court of Appeals panel cited this *Manual* and indicated that character evidence offered to impeach a witness (or to respond to impeachment evidence) could take the form of reputation or opinion based in the locality where a witness worked as well as the locality where the witness lived. An equally divided *en banc* Court reinstated the convictions, but did not comment on this point.

United States v. Dotson, 799 F.2d 189 (5th Cir. 1986) : Basing their opinions solely on their investigation of this firearms case, government agents testified that the defendant and his associates were not to be believed under oath. Reversing, the Court held that the opinions were inadmissible in the absence of some underlying basis to demonstrate that they were more than "bare assertions." Although the Court did not "hold that government agents may never testify as to the truthfulness of a defendant or defense witnesses," or that "a government agent's opinion of a witness' character may never be based exclusively on what the agent learned in an official investigation," it concluded that the basis was insufficient in this case.

United States v. Tager, 788 F.2d 349 (6th Cir. 1986) : Affirming securities fraud convictions, the Court found no error when a defense witness was prohibited from stating that a government witness' truthfulness was "very bad," based on an incident that occurred 11 years before the trial. The incident was remote and the testimony was essentially cumulative. We would also point out that the witness was not qualified to opine as to the other witness' character on the basis of a single act. Moreover, allowing such testimony would be a way of getting otherwise inadmissible specific acts in through the back door of "opinion."

United States v. Tedder, 403 F.3d 836 (7th Cir. 2005) : The Court affirmed convictions for conspiracy to defraud the United States and money laundering, finding no abuse of discretion in permitting the defendant's brothers to testify that they had low opinions of his honesty, even though they had not spoken with him in a decade. The Court reasoned that "*Rule 608(a)* does not contain a time limit," and "[t]he long break in family relations was a subject for cross-examination." In *Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993)* , a civil rights plaintiff, who had shot and killed two policemen, alleged that police had tortured him in extracting a confession. In reversing a judgment for the individual defendants, the Court noted that it had been an abuse of discretion to exclude testimony by a British journalist that one of the defense witnesses was a liar. Although there was no error in excluding evidence that a story from the witness being investigated by the journalist had turned out to be false (because that was evidence of a specific act), the journalist had interviewed the witness and members of his "community" sufficiently both to give an opinion and to testify to the witness' reputation for truthfulness.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed a conviction for aggravated sexual assault because the defense was erroneously prevented from introducing a lay witness' opinion that one of the alleged victims (who testified) "was untruthful" and "didn't always tell the truth." The witness was the foster care parent with whom the child had lived following the initial report and investigation of abuse. She saw him on a daily basis during the four to six months that he resided with her, so her opinion about his credibility was more than a "bare assertion" or "conclusory observation." In *United States v. McMurray, 20 F.3d 831 (8th Cir. 1994)* , the Court affirmed cocaine convictions, finding no abuse of discretion when the defendant was impeached by opinion testimony of a character witness who had lent the defendant a credit card in order to buy presents for his children, but had ended up having to pay large travel expenses incurred by the defendant and his wife. That experience provided a rational basis for the witness' opinion as to the defendant's truthfulness. We question whether this was not simply a ruse to get specific act evidence in through the back door of "opinion." In *United States v. Cortez*, n1 the Court held it was error (but harmless) for two law enforcement officers to testify that they believed a government witness who reported jailhouse conversations with the defendant to them. Where neither officer had participated in the investigation of the witness or of the defendant or had known the witness until he came forward with information concerning the conversations, they had insufficient knowledge on which to base an opinion as to the witness' character for truthfulness.

United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996) : Affirming cocaine-related convictions, the Court found no error where two defendants were not permitted to testify concerning the reputation of an undercover informant, Garcia. The Court observed that the defendants were permitted to cross-examine Garcia and other witnesses with respect to Garcia's credibility, and concluded that the defendants "alleged no facts to suggest that they were personally familiar with Garcia or his alleged reputation for dishonesty." In *United States v. Bedonie, 913 F.2d 782 (10th Cir. 1990)* , the Court affirmed the Navajo defendants' convictions of felony-murder in Indian country, holding that a principal for three years of a school that was the focal point for community activities was qualified to testify to the defendants' reputation for truthfulness, even though he did not speak the Navajo language and lived with white teachers in a compound set apart from the Navajos. In *Cooper v. Asplundh Tree Expert Co.*, n2 the Court affirmed a finding of age discrimination, holding that one employee, who had worked with a defense witness for 11 years and who had dealt regularly with the witness for almost two years, was qualified to testify concerning the witness' reputation for veracity.

United States v. Watson, 669 F.2d 1374 (11th Cir. 1982) : Reversing convictions for conspiracy to possess marijuana with intent to distribute, the Court held it was error to preclude defense witnesses from giving opinion and reputation testimony concerning the key government witness. Although the Court said that a reputation witness must show a reasonable foundation for his testimony, it relied on *United States v. Lollar, 606 F.2d 587 (5th Cir. 1979)* , and held that an opinion witness need not lay a foundation, but need only show personal knowledge.

[b] RULE 608(a) -- Expert Testimony

United States v. Gonzalez-Maldonado, 115 F.3d 9 (1st Cir. 1997) : The Court held in this cocaine-related money laundering case that it was error to exclude testimony by a psychiatrist who had examined a coconspirator whose conversations were tape recorded and who was found incompetent to stand trial. Although parties do not have unlimited authority to offer expert testimony on the question of credibility, there is no legal bar to expert testimony simply because it relates to credibility. The Court viewed this case as quite unusual because the jury could not observe and evaluate the incompetent witness. This made the expert testimony that the witness had a mental illness that led to verbosity, *grandeza*, and exaggeration especially important. In *United States v. Shay, 57 F.3d 126 (1st Cir. 1995)* , the government, prosecuting the defendant for attempting to blow up his father's car, relied upon incriminating statements the defendant made to the police, the media, and fellow inmates. The Court held it was reversible error to exclude testimony for the defense from a psychiatrist that the defendant suffered from a mental disorder known as Munchausen's Disease, which caused him to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention." The Court relied upon the Advisory Committee's Notes to Rules 405 and 608 to conclude that

expert testimony may be offered to establish a witness' truthful or untruthful character. In *United States v. Piva*, n3 the Court affirmed a marijuana conviction, but it expressed concern about the prosecution's use of professional government witnesses to vouch for the credibility of an informant.

Skidmore v. Precision Printing & Pkg., Inc., 188 F.3d 606 (5th Cir. 1999) : In an employee's action for sexual harassment and intentional infliction of emotional distress, the Court held that the Trial Judge did not err in admitting the testimony of a psychiatrist who examined the plaintiff. It held that his opinion that the plaintiff had not lied to him or fabricated her symptoms was not an impermissible opinion as to her credibility, but amounted to a proper opinion that her symptoms seemed genuine.

United States v. Waters, 194 F.3d 926 (8th Cir. 1999) : The Court found no abuse of discretion in admitting rebuttal testimony by a social worker that "children rarely tell you everything about an abuse the first time they are asked" and that they often leave out details of abuse because they are embarrassed. The witness never gave her opinion as to whether the victim was telling the truth, but only informed the jury of the characteristics of sexually abused children. In *United States v. Azure*, n4 the Court reversed a defendant's conviction for carnal knowledge of his common-law wife's young daughter, because a physician who was an expert on child abuse was erroneously permitted to testify that the daughter was believable. This went beyond reputation and opinion evidence and invaded the province of the jury. The Court added, however, that a social worker could testify that the daughter knew the difference between truth and lies. In a motorist's product liability action against an automobile manufacturer, *Bastow v. General Motors Corp.*, n5 the Court held it was not an abuse of discretion to exclude, under *Rule 403*, expert testimony offered by the defense to show that the "plaintiff had an antisocial behavior disorder and hence a character for untruthfulness." In *United States v. Roy*, n6 the Court affirmed a murder conviction, although it was "deeply troubled" by an FBI agent's testimony, as an expert in criminal investigations, that "amounted to an impermissible opinion that the accomplices' testimony was consistent and truthful.

United States v. Candoli, 870 F.2d 496 (9th Cir. 1989) : The Court found it was error (but harmless) to permit one expert witness to testify concerning the favorable professional reputation of another government expert in a prosecution for arson and fraud. The Court observed that reputation evidence should have been limited to truthfulness and excluded until the witness who was supported by the reputation evidence had been attacked. In *United States v. Binder*, n7 the Court reversed convictions for sexual offenses upon minor children, holding (2-1) that it was error to admit government expert testimony concerning the victims' ability to distinguish truth from falsehood and reality from fantasy. The majority reasoned that the experts went beyond aiding the jury "in understanding credibility evaluations or problems common to all children of the victim's age," and testified instead "that these particular children in this particular case could be believed." In *United States v. Awkard*, n8 the Court held that the use of hypnosis to enhance the memory of a government witness was proper, but that it was error (albeit harmless) to permit a government expert to testify about the general reliability of hypnosis before the witness whose memory was enhanced was attacked and to allow the expert to state that the enhanced memory of the government's witness was accurate. The Court expressed concern about the prejudicial impact of such evidence on the defendants and strongly stated that expert testimony on a particular witness' ability to recall is inadmissible under *Rule 608*.

United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc): Overturning its prior rule holding polygraph evidence inadmissible *per se*, the Court *en banc* vacated a conviction for knowingly making false statements to a grand jury and held that polygraph evidence was now sufficiently accepted as reliable that it could be admitted on stipulation or for impeachment or corroboration under *Rule 608* upon adequate notice and opportunity for the opponent also to conduct a polygraph examination, subject to the discretion of the Trial Judge.

[c] RULE 608(a) -- Other Proceedings Offered To Affect Credibility

United States v. Lopez, 944 F.2d 33 (1st Cir. 1991) : The Court affirmed a conviction for conspiracy to possess heroin, holding there was no abuse of discretion in precluding the defendant from asking a police officer about a prior trial in which he had given testimony and in which the Judge had granted a new trial, in part because he disbelieved the officer's testimony. There was little utility in permitting the officer to be asked whether he had given untruthful testimony at the other trial, because no extrinsic evidence could be introduced to rebut his anticipated denial; moreover, the jury's knowledge of a credibility assessment made at an unrelated trial would have created a great risk that the jury might avoid its responsibility to assess the officer's credibility at the present trial.

United States v. Cruz, 894 F.2d 41 (2d Cir. 1990) : The Court affirmed a conviction for cocaine offenses, holding that there was no abuse of discretion in refusing to allow cross-examination of a government witness with a transcript from another drug case in which the Judge had held that the witness, an informant in both cases, was not credible. The finding was only that he lacked credibility in that case, not that he was lacking in veracity generally. In a narcotics case, *United States v. Terry*, n9 the government asked a "voice expert" offered by the defendant whether his testimony in other cases had been criticized as unworthy of belief. The Court upheld this cross-examination, citing *Rules 608(b)* and *613*. Neither Rule is applicable, however. Under *Rule 608(b)*, specific acts that the witness himself admits would be proper to attack credibility, but not the opinions of the witness' critics concerning his testimony on other occasions. And criticisms by others hardly amount to an inconsistent statement by him. The cross-examination was an effort to demonstrate that some people doubted the expert in other cases, which is the kind of opinion evidence that does not go to general character for truthfulness and is inadmissible. The Court likewise improperly allowed extrinsic evidence of a third party's opinion in *United States v. Bagaric*, n10 a RICO prosecution in which the government was permitted to ask a defendant, who testified on direct examination that he had sought and been denied political asylum in the United States, whether he had testified under oath at a deportation proceeding and whether the Immigration Judge had found his testimony not to be credible.

United States v. Dowling, 855 F.2d 114 (3d Cir. 1988) , aff'd, 493 U.S. 342 (1989) : Affirming convictions arising out of a bank robbery, the Court held there was no error in barring cross-examination of an eyewitness who had sued the bank to recover money he alleged was on the counter during the robbery. The Court noted that the jury verdict against the witness was not necessarily a reflection on his credibility and that the danger of confusion may well have outweighed the probative value on the witness' veracity.

United States v. Fernandez-Roque, 703 F.2d 808 (5th Cir. 1983) : The Court held it was not error to exclude evidence that a jury acquitted the defendants in a related case in which the same government witness testified. The acquittal in the prior case established only that the jury had a reasonable doubt as to those defendants' guilt; it did not foreclose the conviction of a different defendant. We would also note that even if it were clear that the prior jury did not believe the witness, nothing in *Rule 608* permits this kind of impeachment. Opinions as to general credibility, not truthfulness on a particular occasion, are all that the Rule permits, and evidence that the prior jury did not believe the witness is opinion evidence.

United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997) : The Court affirmed racketeering convictions, and found no error in the exclusion of four statements made by government prosecutors in other cases in which they called one hearsay declarant and one witness in the instant case liars. The Court reasoned that, even if the statements satisfied the hearsay rule, the Trial Judge could properly have excluded them as confusing, since the statements addressed other matters, and as unhelpful, since whether the prosecutor believes a witness is generally irrelevant. We would add that *Rule 608(a)* is limited to opinion testimony about a witness' character for truthfulness or untruthfulness and does not permit an opinion as to whether particular testimony is true or false. In *Schultz v. Thomas*, n11 an action against police

officers who allegedly used excessive force, the Court reversed a judgment for the arrestee because the Judge in the state prosecution for disorderly conduct was erroneously permitted to testify that he had found the police officers' testimony in that action was unbelievable. The state Judge's opinions were inadmissible, since they represented his opinion as to credibility on a single occasion. In *United States v. Wright*, n12 the Court affirmed a conviction for heroin offenses, rejecting the defendant's argument that a government informant called as a witness could be impeached by evidence that he testified in two previous trials in which the defendants were acquitted. "The issue was whether [the informant] was credible in the eyes of the present jury, not whether twelve other persons believed or disbelieved him."

King v. Ahrens, 16 F.3d 265 (8th Cir. 1994) : The Court held in a medical malpractice case that there was no abuse of discretion in excluding evidence that the defendant's medical license had been suspended eight years earlier, as any probative value the evidence had on the absence of mistake in failing to note critical information on the medical chart and on the doctor's credibility was substantially outweighed by its prejudicial effect, given the remoteness in time and the dissimilarity between the incidents.

United States v. Sorondo, 845 F.2d 945 (11th Cir. 1988) : The Court reversed cocaine convictions, finding plain error in the admission of evidence that a government witness had provided assistance that led to the conviction of well over 100 defendants. This evidence posed a danger that the defendant's jury would rely upon the judgment of other juries that the witness was credible.

[d] RULE 608(a) -- Other Purposes for Evidence

United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005) : The Court upheld the convictions of a former police officer for pistol whipping an arrestee, submitting a misleading report about the incident, and making a false statement to an FBI agent. It found no abuse of discretion in permitting a detective to testify that he originally believed the defendant's version of events but then changed his mind and believed the arrestee. The detective was not purporting to testify as to the truthfulness of the arrestee, but to explain, after he was cross-examined about his reports, why he originally did not record the arrestee's complaints in his original police reports.

[e] RULE 608(a) -- Rehabilitation Evidence

[i] RULE 608(a) -- Attacks Permitting Rehabilitation

United States v. Lechoco, 542 F.2d 84 (D.C. Cir. 1976) : A defendant charged with kidnapping presented two doctors to support his insanity defense. The government emphasized on cross-examination that the doctors' testimony depended on the truth of statements made in psychiatric interviews with the defendant and attempted to point out reasons why he might be less than truthful. The defense then sought to offer testimony by a fellow worker who would have testified as to the defendant's reputation for truthfulness and honesty. The Court held it was reversible error to exclude this evidence, as the government had opened the door to the introduction of the character testimony by its cross-examination.

United States v. Angelini, 678 F.2d 380 (1st Cir. 1982) : Reversing a methaqualone possession conviction because the defendant was denied a chance to offer character testimony that he was a law-abiding person, the Court also observed that he was properly denied an opportunity to offer character evidence regarding truthfulness, as it was not pertinent to the crime charged and the cross-examination was insufficiently "slashing" to warrant rehabilitation.

Raysor v. Port Auth., 768 F.2d 34 (2d Cir. 1985) : In a civil rights action for false arrest and malicious

prosecution, the Court upheld the exclusion of evidence concerning a defendant's religion, long-term marriage, and support of her children, since the evidence was used to bolster character that had not been attacked. In *United States v. Arroyo-Angulo*, n13 the Court held that in a criminal case the government cannot rehabilitate a witness until the witness is attacked, and that this principle applies to rehabilitation attempts other than by offering reputation and character evidence. In *United States v. Medical Therapy Sciences, Inc.*, n14 the Court upheld the government's rehabilitation of its witness. Although the government properly anticipated defense impeachment by bringing out its witness' prior convictions on direct examination, this did not entitle the government to proceed to rehabilitate the witness. However, sharp cross-examination can qualify as an attack, which may permit the direct examiner to rehabilitate a witness.

Renda v. King, 347 F.3d 550 (3d Cir. 2003): The Court reversed a judgment for the plaintiff in an action against a police officer for malicious prosecution, because the defendant was not permitted to offer evidence of his good character for truthfulness after the plaintiff's opening statement argued that the defendant was corrupt in the conduct of an official investigation. The Court held that the attack on the defendant went beyond showing his bias as a witness to impugning his character, so "counterproof of good character should no doubt be admitted." In *United States v. Murray, 103 F.3d 310 (3d Cir. 1997)* , a principal witness for the government in a continuing criminal enterprise trial was subjected to extended and vigorous cross-examination regarding his various illegal and sordid activities. In response, the government presented a police officer, who testified that the witness had "made" 65 or 66 cases as a confidential informant and had been extremely reliable in the information provided. The Court held that the cross-examination constituted an attack on the witness' character for truthfulness that permitted introduction of evidence to support his credibility. However, it was reversible error to admit the testimony as to specific instances relevant to the witness' character for truthfulness.

United States v. Thomas, 768 F.2d 611 (5th Cir. 1985) : Affirming cocaine convictions, the Court held that a vigorous cross-examination or contradiction of a witness is not an attack on credibility warranting admission of character evidence to rehabilitate the witness. In *Stokes v. Delcambre*, n15 the Court affirmed a damage award for the plaintiff, who had been injured while in the custody of the defendant sheriff and his deputy. It held that the plaintiff had not attacked the deputy's character for truthfulness merely by attributing a statement to the deputy that he denied making, so it was not error to exclude rehabilitating character testimony concerning the deputy's reputation for truthfulness.

United States v. Bonner, 302 F.3d 776 (7th Cir. 2002) : In a fraud prosecution for swindling a widow out of her VA benefit payments, the Court held there was no plain error (and would not have been an abuse of discretion, had the defendant objected) when the government elicited evidence bolstering the widow's trustworthiness during its case in chief. The evidence was proper to rehabilitate her credibility after the defense opening statement, and cross-examination of the widow when she testified, both of which implied that she might have gained some advantage from cooperating with the government's case.

United States v. Santiago, 46 F.3d 885 (9th Cir. 1995) : Appealing a conviction for the murder of a fellow inmate, the defendant complained that prosecution witnesses were permitted to testify on direct examination that they feared retaliation from the Mexican Mafia, a prisoner group with which the defendant was affiliated. The defendant argued that this testimony constituted impermissible bolstering because it was offered to show that the witnesses had no incentive to lie to assist the government. The Court held, however, that the testimony was properly admitted because the defense counsel, in his opening statement, accused the witnesses of lying to receive some advantage. The witnesses were therefore properly rehabilitated on direct examination. In *United States v. Dring, 930 F.2d 687 (9th Cir. 1991)* , the Court affirmed a conviction for drug offenses, holding that because government attacks on the defendant's testimony were direct rather than circumstantial, by showing bias, presenting contradiction evidence, and cross-examining vigorously, the defendant's proffered rehabilitative character testimony was properly excluded. In *United States v.*

Hedgcorth, n16 the Court stated that the fact that some government evidence might have suggested that the defendant conspired to cover up his crime does not mean that his truthfulness has been attacked by opinion or reputation evidence or otherwise.

United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982) : Although it reversed a conviction for forcibly resisting and interfering with Coast Guardsmen on another ground, the Court said it was not error to exclude character testimony concerning the defendant's honesty. That the government pointed out inconsistencies in his testimony and argued that his version was not credible was not an attack on his character for truthfulness permitting rehabilitation evidence.

[ii] RULE 608(a) -- Rehabilitation Evidence -- Cross-Examination Insufficient to Permit Rehabilitation

United States v. Drury, 344 F.3d 1089 (11th Cir. 2003) : The Court affirmed a conviction for murder-for-hire, holding there was no abuse of discretion in excluding evidence offered by the defendant of his good character for truthfulness. The government did not an attack the defendant's character for truthfulness within the meaning of *Rule 608* by simply using cross-examination to point out inconsistencies in his testimony and arguing therefrom that the testimony was not credible.

[iii] RULE 608(a) -- Rehabilitation Evidence -- Evidence Responsive to Attack

United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989) : Where the defendants in a marijuana possession case attacked the credibility of a government witness, the Court held it was proper to admit testimony thereafter that the witness had cooperated on other cases that resulted in convictions.

[iv] RULE 608(a) -- Rehabilitation Evidence -- Evidence Not Responsive to Attack

Zinman v. Black & Decker (U.S.), Inc., 983 F.2d 431 (2d Cir. 1993) : In an action by a former podiatrist who sued a manufacturer for an allegedly defective product, the Court held that the plaintiff was not entitled to respond to evidence of his prior conviction for Medicare fraud with evidence of law-abiding and community-minded behavior following his conviction, because the evidence did not bear on his truthfulness and therefore did not serve to rebut any false impression created by the conviction.

Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979) : The Court held that reputation evidence was properly admitted following impeachment with an inconsistent statement. In our view, the Court confused the various means of impeachment and the responses appropriate to each.

United States v. Marshall, 173 F.3d 1312 (11th Cir. 1999) : An informant allegedly received crack cocaine from the defendants and turned it over to the police later that day or the next day. At trial the DEA agent supervising the operation responded in the negative when asked, "Do you believe that [the informant] acquired the crack cocaine ... from another source [than the defendants]?" Vacating the defendants' convictions, the Court held it was an abuse of discretion to admit the testimony, since the agent was a lay witness and he had no personal knowledge regarding the origin of the cocaine provided by the informant. The Court rejected the government's contention that the witness' opinion was rehabilitation evidence countering defense attacks on the informant's credibility. The question asked was primarily a question regarding a fact (the source of the crack) and only incidentally a question regarding the informant's truthfulness.

[v] RULE 608(a) -- Rehabilitation Evidence -- Polygraph

United States v. Thomas, 768 F.2d 611 (5th Cir. 1985) : Affirming cocaine convictions, the Court held that a vigorous cross-examination or contradiction of a witness is not an attack on credibility warranting admission of character evidence to rehabilitate the witness. Moreover, the Court expressed doubts that a polygraph examiner's opinion as to truthfulness was truly opinion evidence falling within *Rule 608*.

[f] RULE 608(a) -- Witness' Own Opinion

United States v. Yarns, 811 F.2d 454 (8th Cir. 1987) : Affirming a conviction for conspiracy to counterfeit, the Court held that extrinsic evidence of the defendant's boasts concerning his ability to lie were properly admitted. This is the rare case in which the party-witness' own admissions provide impeaching character evidence.

[2] RULE 608(b) -- SPECIFIC INSTANCES OF CONDUCT

[a] RULE 608(b) -- Bias

United States v. Gomes, 177 F.3d 76 (1st Cir. 1999) : Appealing from drug trafficking convictions, the defendants argued that it was error to exclude extrinsic evidence on three matters pertinent to the testimony of a cooperating government witness -- that the witness purchased cocaine for himself while cooperating with the government; that the witness had boasted of torturing another drug dealer; and that the witness had threatened a person with bodily harm -- because the evidence was relevant to show bias, and thus not barred by *Rule 608(b)*. The Court found that the evidence of the cocaine purchase might show bias, since that conduct might cause the government to tear up the cooperation agreement, thus giving the witness an even greater incentive to slant his testimony in favor of the government. However, the Court concluded that it was not an abuse of discretion "to exclude such an excursion into extrinsic evidence that would distract from the main issues and in this case would add little of practical value to the defense." As to the other matters, their connection with bias was "remote," so extrinsic evidence was properly excluded.

United States v. Hatchett, 918 F.2d 631 (6th Cir. 1990) : The Court affirmed a conviction for tax evasion, holding that the defendant's law partner, who testified for the defense about the partnership and the defendant's efforts to pay his taxes, was properly questioned on cross-examination about his own failure to file income tax returns, as the evidence demonstrated bias, which is permissible under the Rule because it goes to the witness' character for truthfulness. A better view is that failing to file income tax returns is not an act directly probative of a character trait of untruthfulness that would be admitted under *Rule 608*, but that to the extent it is probative of bias it may be admitted under Rules 401-403.

United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996) : The Court affirmed an insurance fraud conviction, holding that after the defendant suggested that a witness falsely implicated him to obtain a plea agreement, the government was properly permitted to prove that the witness cooperated against a number of people. Such evidence tended to rebut the suggestion that the witness' testimony was a lie he told in his own self-interest. The *Rule 608(b)* exclusion of extrinsic evidence was inapplicable, because the credibility issue was bias rather than character for veracity.

United States v. Collins, 90 F.3d 1420 (9th Cir. 1996) : The Court affirmed a firearm conviction, holding there was no error in barring the defendant from asking a government witness whether he transported drugs and lied to his friends about an incident involving the police, since neither of these questions suggested bias or relevance to the facts in dispute. In our view, the Court misread *Rule 608(b)*, which permits questions about any acts by a witness that might

suggest bad character for veracity. It requires neither a showing of bias nor of a relationship of the acts to the facts underlying the crime charged.

[b] RULE 608(b) -- Character Witnesses

[i] RULE 608(b) -- Impeaching

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) : In a narcotics case, an undercover police officer was the star witness for the government. The defendants called the government witness' former commanding officer, who testified that the witness was not a truthful individual and had a reputation for untruthfulness. On cross-examination, the supervisor was led to acknowledge various commendations which the government witness had received, as well as the fact that the witness had been injured in the line of duty. The Court rejected the defendants' contention that introduction of these specific instances violated *Rule 608(b)*, since the government was not simply trying to prove the good character of its witness, but was using the specific instances to test the supervisor's familiarity with the government witness' character. In *Deary v. City of Gloucester, 9 F.3d 191 (1st Cir. 1993)* , a civil rights action for use of excessive force, the commanding officer was asked on cross-examination about another officer's reputation for truthfulness, responded that he had never known the officer to be untruthful, and then denied knowing of an incident in which the other officer had been disciplined for an untruthful overtime report. The Court held that the commander was properly asked about the credibility of the other officer, who had previously testified, and that there was no abuse of discretion in permitting cross-examination of the commander, as character witness, with the ten-year-old disciplinary incident.

United States v. McNeill, 887 F.2d 448 (3d Cir. 1989) : In a prosecution for soliciting a crime of violence, the defendant called witnesses to testify to the character of the government's principal witness, but the Court held he was properly precluded from asking them about occasions when the witness had solicited them for crimes, because that was impermissible extrinsic evidence, and from asking the prosecution witness about those occasions, because the events were not probative of truthfulness. In *United States v. Coleman*, n17 the Court upheld a former IRS officer's convictions, finding that it was proper for the government to question character witnesses concerning specific instances of the defendant's conduct, although such cross-examination is subject to a *Rule 403* analysis.

United States v. Edwards, 549 F.2d 362 (5th Cir. 1977) : Affirming convictions for conspiracy to possess counterfeit money, the Court emphasized that in questioning a character witness, a cross-examiner (i.e., a party attempting to test whether the character witness is credible) can ask the character witness about events that are more than ten years old, because the ten-year limitation of *Rule 609(b)* has no application to such questioning. It must be kept in mind, however, that under *Rule 403* the Trial Judge can limit the questions asked character witnesses.

[ii] RULE 608(b) -- Character Witnesses -- Specific Instances on Redirect

United States v. McNatt, 931 F.2d 251 (4th Cir. 1991) : In a trial for cocaine possession, a state prosecutor testified to her opinion that a former police officer testifying for the government was not truthful, but on cross-examination said that when she had worked with him in State Court she believed he was truthful. The Court held there was no abuse of discretion in precluding the defendant from asking on redirect what had changed the witness' mind, as the Rule does not allow the party calling a witness to inquire into specific instances of conduct of the person about whose character the witness is testifying.

[c] RULE 608(b) -- Collateral Matter To Impeach

United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993) : Affirming a check forgery conviction, the Court held

there was no error in precluding the defendant from calling a witness to testify that a government witness did not live at the address he testified to. Drawing an analogy to *Rule 608(b)*'s ban on extrinsic evidence, the Court reasoned that "[i]t is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter." The Court concluded that the power to exclude evidence offered to impeach on a collateral matter is a particular example of the Trial Judge's authority to exclude evidence under *Rule 403*.

United States v. Bonner, 302 F.3d 776 (7th Cir. 2002) : Affirming a fraud conviction for swindling a widow out of her VA benefit payments, the Court held there was no abuse of discretion in excluding testimony of a defense witness, offered to rebut the widow's testimony that she had not spoken to the witness on the telephone. The evidence was relevant only for impeachment, so it was a collateral matter and properly excluded. In an interstate theft case, *United States v. Miller, 159 F.3d 1106 (7th Cir. 1998)* , a witness testified that he saw one of the defendants use a backhoe to dig a hole, in which some of the stolen property was later found. The defendant called another witness to testify that he, not the defendant, dug the hole. Morris was called in rebuttal and corroborated the first witness; on cross-examination by the defendant, Morris denied recently talking with another defendant, Love. The defendant was not permitted to call Love to contradict Morris' testimony, and the Court affirmed. Love's testimony would only serve to impeach; it had neither an independent purpose nor an independent ground for admission. Therefore, it was "precisely the type of collateral impeachment testimony expressly prohibited" by *Rule 608(b)*. We would note that contradiction is not covered by *Rule 608(b)* but rather by Rules 401-403.

[d] RULE 608(b) -- Explaining the Misconduct

United States v. Lawton, 366 F.3d 550 (7th Cir. 2004) : In a trial for false statements in connection with a gun purchase, the prosecution was permitted under *Rule 608(b)* to question the defendant about writing four checks on a closed bank account over a 16-day period. However, the defendant was not permitted on re-direct to explain that he subsequently paid the merchants to whom he had written the bad checks and that he had accepted responsibility for them. Affirming, the Court found no abuse of discretion in excluding the evidence: while it was consistent with the notion that the defendant wrote the checks inadvertently, it was not particularly indicative of his state of mind at the time he wrote the checks. In a drug and money laundering case, *United States v. Marzano, 160 F.3d 399 (7th Cir. 1998)* , the Court held it was error (but harmless) to preclude the defendant from explaining the nature of a prior conviction used in impeaching him. In explaining why he had not disclosed a conviction in his application for a seat on the Chicago Mercantile Exchange, the defendant testified that it was a 12-year-old misdemeanor that he had forgotten about when he filed the application, but he was not permitted to explain that the conviction "was merely the forfeiture of a $50 bond that he had posted when arrested on a charge of buying a ticket to a Cubs game from a scalper in violation of an obscure Chicago ordinance, and was realistically the equivalent of a traffic violation." The Court reasoned that had the defendant been allowed to explain the conviction, "the credibility of his testimony that he had forgotten it when he filled out the form would have been enhanced."

[e] RULE 608(b) -- Extrinsic Evidence

[i] RULE 608(b) -- Error To Admit

Deary v. City of Gloucester, 9 F.3d 191 (1st Cir. 1993) : In a civil rights action for use of excessive force, the commanding officer was asked on cross-examination about another officer's reputation for truthfulness, responded that he had never known the officer to be untruthful, and then denied knowing of an incident in which the other officer had been disciplined for an untruthful overtime report. The other officer was then recalled to the stand and admitted the incident ten years previously; documents regarding the incident were then admitted. The Court held that the commander was properly asked about the credibility of the other officer, who had previously testified, and that there was no abuse of discretion in permitting cross-examination of the commander, as character witness, with the ten-year-old disciplinary

incident. The Court noted, however, that the other officer should not have been recalled and the documents should not have been admitted, as that was extrinsic evidence of specific conduct for the purpose of attacking the witness' credibility; questioning about the incident should have stopped when the commander denied any knowledge. The error was harmless, however, because the other officer could have been asked about the incident when he first testified and the evidence was not likely to inflame the jury against the defense.

United States v. Murray, 103 F.3d 310 (3d Cir. 1997) : A principal witness for the government in a continuing criminal enterprise trial was subjected to extended and vigorous cross-examination regarding his various illegal and sordid activities. In response, the government presented a police officer, who testified that the witness had "made" 65 or 66 cases as a confidential informant and had been extremely reliable in the information provided. The Court held that the cross-examination constituted an attack on the witness' character for truthfulness that permitted introduction of evidence to support his credibility. However, it was reversible error to admit the testimony as to specific instances relevant to the witness' character for truthfulness.

United States v. Taylor, 900 F.2d 779 (4th Cir. 1990) : The Court reversed a drug possession conviction because, *inter alia*, the government bolstered the credibility of its informant witness by extrinsic evidence that he had provided reliable information and testimony that resulted in several convictions.

United States v. Cluck, 544 F.2d 195 (5th Cir. 1976) : The Court reversed a conviction on the ground that the government attacked a witness' credibility with extrinsic evidence of prior bad acts.

United States v. DeSantis, 134 F.3d 760 (6th Cir. 1998) : The defendant was convicted for mail and securities fraud in selling interests in a limited partnership, which collapsed when bars that it owned lost their liquor licenses. The government contended that the investor loss was caused by the defendant hiding excessive commissions when selling the interests; the defendant claimed that the loss occurred because his partner had sabotaged the business after they had a falling out by falsely representing to the state liquor control commission that the defendant still controlled the bars although he was required to dispose of them when convicted of another felony. On cross-examination of the defendant, he was compelled to read into evidence a State Appellate Court decision affirming administrative agency findings that he had not relinquished control over the bars. The Court reversed the conviction in this case, holding that it was improper to prove the findings by extrinsic evidence, even when read by the defendant. Two Judges, concurring in the judgment, would have excluded the evidence under *Rule 403* and not reached the *Rule 608(b)* issue.

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : In the trial of a drug trafficking conspiracy, the prosecutor, trying on cross-examination to get one defendant to admit that he often made things up and told stories, asked him whether he had phoned his employer and told him a story. When the defendant stated that he was not sure what the prosecutor was talking about, the prosecutor played a tape-recording of a phone conversation the defendant had with his employer after he was placed in custody in which he offered a false explanation of why he was absent from work. The government argued that the tape was offered to "refresh recollection," but the Court observed that if the prosecutor wanted to refresh recollection, the proper way would have been to play the tape outside the presence of the jury. In response to the government's argument that the tape was admissible as a prior inconsistent statement, the Court responded that, even though it sometimes is difficult to distinguish between *Rule 608 (b)* and *Rule 613* evidence, it was clear in this case that the prosecutor was seeking to prove that the defendant lied to his employer and thus the tape was extrinsic evidence and inadmissible. The error was harmless, however. In *Taylor v. National R.R. Passenger Corp., 920 F.2d 1372 (7th Cir. 1990)* , a jury verdict for the plaintiff in a FELA case was reversed because 14-year-old military medical records indicating complaints of back pain and a job application not mentioning back injuries had been erroneously admitted. The Court held that the records were irrelevant to the plaintiff's injury claim and were collateral

extrinsic evidence inadmissible to impeach his testimony.

Berry v. Oswalt, 143 F.3d 1127 (8th Cir. 1998) : A female prisoner was awarded damages for sexual harassment by a corrections officer. The Court found reversible error in the admission of testimony concerning prior uncharged sexual misconduct by the corrections officer. The testimony was admitted as "impeachment," but the Court concluded that it really went to the substance of the claim. Even if this could be characterized as impeachment of the defendant's testimony that he never engaged in such conduct, the Court noted, it was impermissible extrinsic evidence that should have been excluded under *Rule 608(b)*.

United States v. Brooke, 4 F.3d 1480 (9th Cir. 1993) : A conviction for offenses arising out of a pipe bombing was reversed for improper admission of evidence that the defendant had falsely claimed to friends to be suffering from terminal cancer. Extrinsic evidence was inadmissible to impeach the defendant's credibility.

United States v. Reed, 700 F.2d 638 (11th Cir. 1983) : The Court reversed a conviction for embezzlement and mail offenses because the prosecutor not only asked the defendant on cross-examination whether he recalled being in possession of a marijuana cigarette at the time of arrest and making a statement admitting marijuana use, but also offered an agent to contradict the defendant's answers. The Court observed that *Rule 608* does not permit impeachment by extrinsic evidence, and it refused to read *Rule 611(b)*, governing the scope of cross-examination, as permitting extrinsic evidence barred by *Rule 608*. In our view, the questions about marijuana use did not relate to credibility and should not have been asked; the extrinsic evidence compounded the problem of the improper questions.

[ii] RULE 608(b) -- Extrinsic Evidence -- Evidence Admissible for Other Purpose

United States v. Blum, 62 F.3d 63 (2d Cir. 1995) : In a prosecution of a pesticide plant owner for obstructing an EPA investigation by, *inter alia*, presenting a false pesticide production logbook, evidence that the principal government witness (who had been the production manager of the plant being inspected) had falsified the logbook himself in order to hide his own defalcations was excluded under *Rule 608* as extrinsic evidence. Reversing, the Court found exclusion of the evidence was error, since it was not being offered primarily to impeach the witness' credibility, but to show the motive for creation of the false logbook, which was directly relevant to the question of the defendant's guilt.

United States v. Opager, 589 F.2d 799 (5th Cir. 1979) : After a government informant testified that he had observed the defendant engage in drug transactions while the two worked together in a beauty salon, the defendant offered the salon's business records to prove that the informant never worked there. Holding that the records should not have been excluded under *Rule 608(b)*, the Court noted that they were not extrinsic evidence of prior bad acts, but "were introduced to disprove a specific fact material to Opager's defense."

United States v. Swanson, 952 F.2d 175 (8th Cir. 1991) : When an informant in a heroin distribution case indicated that her motive for arranging the buys was revenge for the defendant's reintroducing her to heroin use after a period of abstinence, the defendant offered another witness to testify that it was the informant who introduced the defendant to heroin use. The Court held it was error, but harmless, to exclude the testimony under *Rule 608(b)*, as it did not just reflect on the informant's credibility but had a material bearing on the crime at issue.

United States v. Calle, 822 F.2d 1016 (11th Cir. 1987) : The Court reversed a conviction for cocaine offenses,

holding it was error to bar a defense rebuttal witness from testifying that the prosecution's star witness was involved with large amounts of cash in drug trafficking. The excluded testimony would have contradicted the picture the government's witness painted of himself as a small-time drug user and would have supported the defendant's theory that the government witness, not the defendant, was the source of cocaine in this case.

[iii] RULE 608(b) -- Extrinsic Evidence -- Generally Inadmissible

United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996) : The Court held, in a drug conspiracy case, that the Trial Judge properly sustained an objection to defense counsel's asking a government witness whether a complaint was filed against her, after the witness denied ever making false accusations against anyone. The Court held that defense counsel was improperly attempting to introduce extrinsic evidence.

United States v. Marino, 277 F.3d 11 (1st Cir. 2002) : Affirming racketeering convictions, the Court found no error in the exclusion of evidence that would have contradicted the testimony of two government witnesses. Some of the evidence simply contradicted the witnesses as to their denial of certain acts and was barred by the no-extrinsic evidence provision in *Rule 608(b)*, and it was a proper exercise of discretion to exclude the other evidence under *Rule 403*. In *United States v. Lopez, 944 F.2d 33 (1st Cir. 1991)* , the Court affirmed a conviction for conspiracy to possess heroin, holding there was no abuse of discretion in precluding the defendant from asking a police officer about a prior trial in which he had given testimony and in which the Judge had granted a new trial, in part because he disbelieved the officer's testimony. There was little utility in permitting the officer to be asked whether he had given untruthful testimony at the other trial, because no extrinsic evidence could be introduced to rebut his anticipated denial. In *United States v. Espinal*, n18 the Court sustained a cocaine conviction, ruling it was proper to exclude extrinsic evidence offered to contradict a government witness who denied ever using another name.

United States v. Aponte, 31 F.3d 86 (2d Cir. 1994) : In a postal robbery conspiracy case, the Trial Judge excluded as hearsay evidence that a government witness had given a fabricated statement and false descriptions of "robbers." The Court held that the statements were not hearsay because they were offered to show the witness' capacity for deception, not for the truth of the matter asserted; however, the statements were properly excludable under *Rule 608(b)* as extrinsic evidence of the character and conduct of the witness. In *United States v. DiPaolo*, n19 the Court affirmed convictions for intimidating witnesses, as it found that defendants were properly barred from offering extrinsic evidence as to two acts that a government witness denied.

Nicholas v. Pennsylvania State Univ., 227 F.3d 133 (3d Cir. 2000) : In a tenured professor's action for wrongful termination, the plaintiff attempted to call a rebuttal witness to testify that the plaintiff's supervisor, who was a defendant and a witness against him, had previously submitted inaccurate information in a government grant application. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in exclusion of the rebuttal witness' testimony, since *Rule 608(b)* prohibits using extrinsic evidence of specific acts to impeach a witness' character for truthfulness. In *United States v. Davis, 183 F.3d 231 (3d Cir. 1999)* , *amended*, *197 F.3d 662 (3d Cir. 1999)* , the Court reversed the convictions of a former New York Transit police officer, but found no error when the prosecutor was permitted to cross-examine the defendant about misappropriating departmental gasoline, and about lying about taking a subway pass from a man and ripping it up. The Court, in a very careful analysis, observed that the government could only cross-examine the defendant about the events, and cautioned that it could not ask questions about whether the defendant was suspended or deemed a liar by the police department's Internal Affairs division. The Court noted that questions about and evidence of disciplinary actions and findings by others are a form of extrinsic evidence that should not be permitted, because they inject the views of a third person into the case to contradict the witness. A footnote stated that "[a] few courts have allowed cross-examination about other bad acts under *Rule 404(b)* to challenge credibility, though we think that the correct view is that such questions are allowable under *Rule 608*." In

United States v. Oxman, n20 the Court upheld the exclusion of extrinsic evidence that a government witness had committed a prior fraudulent act.

United States v. White, 972 F.2d 590 (5th Cir. 1992) : In a prosecution for cocaine distribution, the Court held there was no abuse of discretion in excluding extrinsic evidence that the government's star witness had previously offered to fabricate testimony against an individual in exchange for government leniency in charges pending against him. In *United States v. Gordon*, n21 the Court affirmed conspiracy and fraud convictions, holding that the defendant was properly barred from questioning one witness about a prior statement he had made concerning another witness. The questioning was impermissible because it amounted to introduction of extrinsic evidence concerning the other witness' acts. In *United States v. Reed*, n22 the Court affirmed extortion convictions, finding that extrinsic evidence of prior bad acts could not be admitted to impeach the victim who complained of extortion attempts.

United States v. Miller, 91 F.3d 1160 (8th Cir. 1996) : The Court affirmed methamphetamine-related convictions, holding that the defendant was properly precluded from impeaching the testimony of a government witness with extrinsic evidence that the witness had attempted to bribe police officers, apparently in matters unrelated to the trial. In *United States v. Martz, 964 F.2d 787 (8th Cir. 1992)* , the Court held there was no abuse of discretion in permitting a defendant charged with distributing LSD to cross-examine the key prosecution witness about prior guilty pleas to state drug charges but excluding the documentary evidence of the plea agreements themselves. As the agreements required no cooperation or testimony, they had no bearing on the witness' potential bias or prejudice, and the Rule otherwise bars extrinsic evidence of prior bad acts merely to show a witness' general character for untruthfulness. In *United States v. Bussey*, n23 the Court affirmed convictions for tax evasion, holding that expert testimony as to accounting procedures was properly excluded when offered to impeach the defendant's accountant's testimony that he had told the defendant to amend a return. The Rule prohibits use of extrinsic evidence of a witness' conduct to attack his credibility.

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) : A convicted murderer seeking habeas corpus relief on the ground of ineffective assistance of counsel sought to admit State Bar records of fraud complaints against his lawyer. Affirming denial of the petition, the Court held that *Rule 608(b)* prevented use of the records to impeach the lawyer's testimony. In *Lewy v. Southern Pac. Transp. Co.*, n24 the Court held that an employee in a FELA action would not have been entitled to testify in his direct examination concerning a witness' alleged embezzlement in order to attack the witness' credibility.

Wilson v. Muckala, 303 F.3d 1207 (10th Cir. 2002) : In a sexual harassment action by a nurse, the Court found no error in excluding evidence of the defendant doctor's extra-marital affairs, which was offered to impeach his deposition testimony that he never had an adulterous relationship while employed by the hospital. The Court held that evidence of the affairs was excluded by *Rule 608(b)*'s ban on extrinsic evidence. We note, however, the *Rule 608(b)* ban applies only if the extrinsic evidence is offered to prove the witness' character for untruthfulness, and here the purpose of the impeachment was not to show that the doctor had a propensity to lie, but rather to contradict the doctor's testimony. Nonetheless, we believe that the extrinsic evidence was properly excluded, but under *Rule 403*, because the probative value for contradiction on such a collateral matter was substantially outweighed by the risks of prejudice, delay, and jury confusion. In *United States v. Olivo, 80 F.3d 1466 (10th Cir. 1996)* , the Court affirmed a conviction for drug offenses, holding there was no abuse of discretion in precluding the defendant from introducing an affidavit of arrest showing that the principal government witness had made a false claim for insurance, as the affidavit was impermissible extrinsic evidence on a collateral matter. Likewise, there was no abuse of discretion in restricting rebuttal examination of the witness about the false claim, as the examination was cumulative. In *United States v. Bowie*, n25 a defendant asserted ineffective assistance of trial counsel because a government witness testified on cross-examination that he had falsified a signed statement under the counsel's supervision in an unrelated case in which the counsel had represented the defendant. The Court held that was insufficient to show counsel's conflict of interest, as the witness' admission of

prior untruthfulness was before the jury and *Rule 608(b)* in any event precluded the counsel from pursuing the matter further.

United States v. Corbin, 734 F.2d 643 (11th Cir. 1984) : The Court sustained drug conspiracy and related convictions, holding it was proper to exclude extrinsic evidence that a government witness had shot another man in a prior drug transaction unrelated to the instant case, after the witness denied the shooting on cross-examination. The evidence might have been admissible if the defendants provided any evidence that the witness had reason to believe that he might benefit in a prosecution arising from the shooting from his testimony in this case. In *United States v. Edwards*, n26 the Court upheld a ruling that witnesses could not testify to specific acts by a government witness. The defendants did not claim that the evidence was admissible for any purpose other than bad act impeachment until they claimed on appeal, when it was too late, that the evidence tended to prove that the witness was the source of a drug attributed to them.

[iv] RULE 608(b) -- Extrinsic Evidence -- Opening the Door

Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (1st Cir. 1992) : Reversing a judgment for the defendant in a product liability action arising out of a motorcycle accident, the Court held that it was error to cross-examine the plaintiff about speeding violations inadmissible under *Rule 404(b)* simply in the hope that he would deny them, thus raising a "red herring" for impeachment. See also *United States v. Ruiz-Batista, 956 F.2d 351 (1st Cir. 1992)* (strongly condemning the government procedure of asking the defendant whether he had possessed cocaine on other occasions and, after receiving a denial, seeking to show such occasions for purpose of impeachment). In *United States v. Babbitt*, n27 the Court affirmed convictions on cocaine charges, holding there was no error in admitting evidence of two remote arrests of a defendant who claimed on direct examination that he had no police record.

United States v. Beverly, 5 F.3d 633 (2d Cir. 1993) : A defendant charged with crack cocaine and firearms offenses testified that he had never possessed a gun in Albany, New York, had only very limited familiarity with guns, and was not in Albany on specified dates. Affirming, the Court held there was no abuse of discretion in permitting rebuttal evidence that he had committed two shootings on specified dates in Albany, although it noted "with distress" that the government overreached by including in its impeachment evidence the facts that the defendant had fired guns in Albany into a house, at a woman, and into the leg of a man. In *United States v. Garcia, 900 F.2d 571 (2d Cir. 1990)* , the Court affirmed a conviction for crack cocaine distribution, holding that the prosecutor was properly permitted to introduce a record of the defendant's prior arrest for drug possession after the defendant, who had testified on direct never to have been accused of selling drugs and who had denied on cross-examination ever having been involved with drugs, on redirect created the false impression that the arrest had not involved drugs.

United States v. Billups, 692 F.2d 320 (4th Cir. 1982) : When a labor official charged with various offenses took the stand and testified that he had never accepted "anything" from waterfront employers, the door was opened, according to the Court, to government rebuttal evidence showing that he had received gratuities over the course of several years.

United States v. Blake, 941 F.2d 334 (5th Cir. 1991) : In a prosecution for drug and weapons offenses, the government elicited testimony from police officers that the defendant had admitted involvement in the crimes charged and in other criminal activity, but on direct and cross-examination the defendant denied making any incriminating statements to the police officers. The Court held there was no error in admitting rebuttal evidence of the defendant's involvement in the uncharged crimes, as it corroborated the original testimony about his confession that he was involved in drug trafficking, which was clearly a material issue in the case. A dissenting Judge contended that the

government may not rebut with extrinsic evidence a contradiction elicited on cross-examination about a collateral matter. In *Carson v. Polley*, n28 the Court reversed a judgment for deputy sheriffs who allegedly used excessive force against the plaintiff, finding that a department performance evaluation report stating that one deputy "needs to learn to control his temper" should have been admitted to impeach the deputy after he testified, over objection, that he had not had problems in learning to control his temper. The Court said that this was evidence on a material issue and thus should have been admitted notwithstanding the limitation on extrinsic evidence under *Rule 608(b)*. In our view, the Court was right about *Rule 608(b)*, but wrong about the result. *Rule 608* was inapplicable because the report did not reflect on the deputy's character as a witness for veracity. However, *Rule 404* barred the question, and the contradicting report, as evidence of the deputy's character for using excessive force. In *United States v. Vaglica*, n29 the Court reversed the conviction for marijuana offenses of a defendant who offered evidence that he feigned involvement, intending to report the drug activity to law enforcement activity as he had done on a previous occasion. After defense counsel argued that the government had not offered any evidence to refute the defendant's claim that he had indeed reported criminal activity on the prior occasion, the prosecutor commented to the jury that the government offered no evidence because the "Federal Rules of Criminal Evidence" [*sic*] prohibited it from doing so. The Court observed that the prosecutor's statement of the law was erroneous, since extrinsic evidence could have been offered, not to prove a prior bad act for impeachment purposes, but to negate the very defense evidence that had been offered to show innocent intent.

United States v. Cusmano, 729 F.2d 380 (6th Cir. 1984) : Affirming a Hobbs Act conviction that grew out of coercive tactics directed at employees, the Court concluded that evidence of the defendant's conduct in his trucking firm's bankruptcy proceedings was properly admitted to respond to his claim on direct examination that he had close business relationships with his employees.

United States v. Kehm, 799 F.2d 354 (7th Cir. 1986) : The Court held that videotapes of a defendant bragging about his role in earlier smuggling ventures were admissible in a drug prosecution to rebut the defendant's claim that he had been too busy running a business to engage in the smuggling that was charged.

United States v. Jackson, 882 F.2d 1444 (9th Cir. 1989) : The Court held there was no error when the defendant, a disbarred lawyer charged with mail and tax fraud, was impeached with his signed statement that he had been disciplined for misappropriating client funds 14 years earlier. The Court found that while remoteness is a relevant factor, there is no time limit in *Rule 608(b)*, and that use of the statement in cross-examining the defendant was permissible. As long as the prosecutor used the prior statement to refresh recollection and to bring home to the defendant that any denial of misconduct might involve perjury, we believe that the Court is certainly correct, but we disagree with the additional observation that under *Rule 613(b)*, a prior statement by a witness could be used to impeach a denial of a prior act that is the subject of a *Rule 608(b)* examination. Using a prior statement after a witness denies an act is impermissibly offering extrinsic evidence, as the dissenting Judge noted.

United States v. Fleming, 19 F.3d 1325 (10th Cir. 1994) : Affirming convictions for firearms violations, the Court held that the *Rule 608(b)* ban on extrinsic evidence did not prevent a party from demonstrating that testimony elicited on direct examination (even regarding a collateral matter) was false: "A defendant may not make false statements on direct examination and rely on the government's inability to challenge his credibility as to the truth of those statements." The Court recognized, however, that *Rule 403* may support exclusion of some rebuttal testimony.

United States v. Cousins, 842 F.2d 1245 (11th Cir. 1988) : In a prosecution for conspiracy to import cocaine and tax evasion, the Court held that evidence of the defendant's prior drug use was properly admitted after the defendant claimed on direct examination that he had always been "an anti-drug person." In *United States v. Blanton*, n30 a

prosecution of a physician charged with improper dispensing of drugs, the Court held that cross-examination of the defendant concerning his wife's death, which was partially attributable to an overdose of a drug he had obtained for her, was proper where the defendant portrayed himself as meticulously careful.

[v] RULE 608(b) -- Extrinsic Evidence -- Third-Party Accusations

Young v. James Green Mgmt., Inc., 327 F.3d 616 (7th Cir. 2003) : Affirming a judgment for the defendant employer in a race discrimination action, the Court found no abuse of discretion in permitting a property manager employed by the defendant to be cross-examined as to whether a former employer had accused him of stealing documents. The Court suggested that this was permissible under *Rule 608(b)*, but we disagree. A witness may be asked whether he stole something from a former employer, because that is a question about a prior act related to honesty. But asking about the employer's accusation focuses not on what the witness did but on what the employer said, which is extrinsic evidence and also hearsay.

[vi] RULE 608(b) -- Extrinsic Evidence -- Witness Admits Bad Acts

Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980) : In an inmate's action against prison officials, the Court held that a letter from the plaintiff to another inmate suggesting how to bring a brutality suit, a "set-up," was properly admitted, in part because the plaintiff admitted writing the letter. *Rule 608(b)*'s ban on extrinsic evidence serves to keep collateral matters (i.e., whether impeaching conduct happened) from assuming prominence out of proportion to their significance, but there was no danger of a "minitrial" here. In our view, there is even less reason to allow proof through extrinsic evidence when the witness admits the bad act than if the witness denies the act. However, if the timing of the letter and its language suggested a planned fraud (something challenged in the dissent), the letter was correctly admitted as showing a plan to bring a fraudulent suit, which is not simply a prior bad act offered to impeach credibility.

United States v. Zandi, 769 F.2d 229 (4th Cir. 1985) : The Court affirmed an opium possession conviction, finding that extrinsic evidence of documents on which the defendant gave false information was properly used by the government during cross-examination, since the defendant admitted providing the false information. In our view, this was error, since if the witness admits the bad act, there is even less reason to allow proof through extrinsic evidence than if the witness denies the act. Of course, error in admitting the extrinsic evidence would almost always be harmless, since the only consequence would be to waste the Court's time.

[f] RULE 608(b) -- *In Limine* Rulings

United States v. Goldman, 41 F.3d 785 (1st Cir. 1994) : The Court held that a defendant charged with drug offenses could not appeal a ruling permitting the government to cross-examine him about prior acts of drug dealing for impeachment purposes. Since the defendant did not testify, the Court relied upon *Luce v. United States, 469 U.S. 38 (1984)* , and concluded that "[a]lthough *Luce* involved impeachment by conviction under *Rule 609*, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rules 403 and 404 objections that are advanced by Goldman in this case."

United States v. Weichert, 783 F.2d 23 (2d Cir. 1986) : The Court relied upon *Luce v. United States* to hold that defendants in a fraud case could not challenge an *in limine* ruling permitting the government to ask an attorney-witness about his disbarment if he testified, since the defendants never called him as a witness.

United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992) : In a prosecution for theft of government property, the

Trial Judge ruled that evidence of prior thefts by the defendant was not admissible on the government's direct case but would be admissible under *Rule 608(b)* to impeach the defendant if he took the stand. The Court held that the defendant was precluded from appealing that ruling because he did not testify at trial.

United States v. Daniele, 886 F.2d 1046 (8th Cir. 1989) : The Court found no error in the Trial Judge's declining to rule in advance of the defendant's taking the stand on the scope of cross-examination concerning whether he had lied to IRS investigators. It reasoned that "the trial court generally balances each question's relevance to honesty and veracity with its prejudicial impact," and found that the Judge in this case indicated that such balancing would be done.

[g] RULE 608(b) -- Privilege Against Self-Incrimination

United States v. Pelusio, 725 F.2d 161 (2d Cir. 1983) : In a prosecution for unlawful receipt of firearms, the Court found there was no error in permitting the direct examination of the arresting officer to stand, even though he invoked his privilege against self-incrimination when asked about unrelated departmental charges pending against him. In *Air et Chaleur, S.A. v. Janeway*, n31 the Court affirmed a verdict for stockholders who sued for breach of a contract to purchase their stock, finding no error in rulings sustaining one plaintiff's claim of the privilege against self-incrimination in response to questions concerning alleged nonpayment of Belgian income taxes and refusing to permit comment on the claim.

United States v. Viera, 819 F.2d 498 (1987) , adhered to on reh'g en banc, 839 F.2d 1113 (5th Cir. 1988) : In reviewing cocaine distribution convictions, a panel of the Court held there was no error in limiting the cross-examination of the alleged principal in order to protect his privilege against self-incrimination on collateral offenses. The panel observed that the defendant was able to explore the principal's potential bias and to demonstrate reasons why the jury might doubt his credibility. On rehearing *en banc*, the Court vacated the panel's reversal of the defendant's convictions, but adopted the prior opinion regarding the limitation of cross-examination.

United States v. McClurge, 311 F.3d 866 (7th Cir. 2002) : In a trial on kidnapping and related charges, the defendants attempted to impeach a prosecution witness by questioning him about criminal activity that was unrelated to the facts at issue. The witness refused to answer and invoked the *Fifth Amendment* privilege; the defendants moved to strike the witness' direct testimony, but the Trial Judge denied the motion. The Court, relying on the Advisory Committee Note to *Rule 608(b)*, found no error. It noted that the questions were "collateral" to the culpability of the defendants and therefore were aimed solely at impugning the witness' credibility, "an attempt which must cease at the threshold of [the witness'] own *Fifth Amendment* rights."

[h] RULE 608(b) -- Questioning Principal Witness

[i] RULE 608(b) -- Acquittals

United States v. Schwab, 886 F.2d 509 (2d Cir. 1989) : The Court held that it was error, but harmless, for the defendant in a bribery case to be asked on cross-examination about a 1970 tax fraud of which he was acquitted and 1965 perjury charges that had been dismissed after two mistrials.

[ii] RULE 608(b) -- Questioning Principal Witness -- Alcohol Consumption

United States v. Geston, 299 F.3d 1130 (9th Cir. 2002) : The Court affirmed a police officer's convictions for unreasonable use of force and assault with a dangerous weapon, holding that evidence that the victim was previously

involved in two violent incidents after drinking alcohol was properly excluded, since neither of the prior incidents constituted conduct that was probative of the victim's character for truthfulness or his credibility.

[iii] RULE 608(b) -- Questioning Principal Witness -- Arrests

Hafner v. Brown, 983 F.2d 570 (4th Cir. 1992) : Affirming a judgment for the plaintiff in an arrestee's § 1983 action, the Court held there was no abuse of discretion in precluding cross-examination of the plaintiff's witness about her prior arrests. The defendants were permitted to ask about prior convictions and bad acts probative of the witness' credibility, as well as about her relationships with the police and directly whether she had any bias. Evidence of arrests is of dubious value on credibility and bias and the defendants did not provide persuasive arguments that the line of questioning they proposed would have gotten them further than the cross-examination permitted.

United States v. Pettigrew, 77 F.3d 1500 (5th Cir. 1996) : The Court held in a bank fraud prosecution that there was no error in cross-examining a defense witness about whether a transaction in which he and the defendant had engaged was itself the subject of an investigation. While neither a witness' prior bad acts nor the mere fact that he has been arrested or indicted is generally admissible for impeachment, where the arrest or accusation grows out of transactions at issue, or related transactions, the evidence is admissible to show the witness' potential bias. In *United States v. Farias-Farias, 925 F.2d 805 (5th Cir. 1991)* , the Court held it was permissible for a prosecutor to ask a defendant charged with marijuana smuggling about prior arrests for drunk driving, alien smuggling, and weapons offenses. The evidence was inconsistent with his telling the customs agent when he was arrested that he had only one prior arrest, and tended to impeach his credibility. In an action for personal injuries by a contractor's employee against the owner of a drilling platform on which he was working, *Williams v. Chevron U.S.A., Inc.*, n32 the Trial Judge did not err in precluding the defendant from introducing a 1971 arrest record that showed the plaintiff's weight as much less than he testified it was at that time, since the unfair prejudice that would be produced by the evidence substantially outweighed its probative value.

[iv] RULE 608(b) -- Questioning Principal Witness -- Bad Faith Impeachment

United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990) : A defendant charged with conspiracy to distribute marijuana attempted to offer as alibi evidence a Mexican accident report, and the prosecutor asked on cross-examination whether the report had been purchased and whether the accident ever happened. The Court held the questioning was error (but not reversible), as it implied a factual predicate that the prosecutor knew could not be supported by evidence.

[v] RULE 608(b) -- Questioning Principal Witness -- Bribery

United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001) : Affirming convictions for tax fraud, the Court found it was an abuse of discretion (but harmless error) to cross-examine the defendant about losing a contract because he violated his customer's policy against giving gratuities to its employees. There was no showing of the contents of the policy or whether the alleged violation demonstrated trustworthiness.

Vichare v. AMBAC, Inc., 106 F.3d 457 (2d Cir. 1997) : After discovery in a Title VII action disclosed that the plaintiff had received kickbacks from a subcontractor, the defendants asserted a counterclaim for breach of fiduciary duty. On cross-examination of the plaintiff, he was asked about the kickbacks. The Court held there was no abuse of discretion, as the evidence was admissible to impeach under *Rule 608(b)*, and it did not run afoul of the policy expressed in *McKennon v. Nashville Banner Publ. Co., 513 U.S. 352 (1995)* , against an employer using after-acquired evidence to defeat a cause of action for employment discrimination.

[vi] RULE 608(b) -- Questioning Principal Witness -- Bribery and Forgery

United States v. Waldrip, 981 F.2d 799 (5th Cir. 1993) : The Court affirmed convictions for bank fraud offenses, holding there was no plain error in questioning the defendant about acts of forgery and bribery. Although the forgery was very similar to the conduct for which she was on trial, any error was harmless.

[vii] RULE 608(b) -- Questioning Principal Witness -- Bribery and Fraud

United States v. Rosa, 891 F.2d 1063 (3d Cir. 1989) : The Court affirmed convictions for drug offenses, holding that the defendants were properly prohibited from cross-examining a government witness regarding his alleged involvement in bribing public officials in connection with an insurance fraud, because bribery is not the kind of conduct that bears on truthfulness or untruthfulness. The defendants had properly been permitted to inquire concerning the fraudulent insurance claim itself, as well as the witness' conspiratorial oath of loyalty to his crime family to the extent it bore on truthfulness.

[viii] RULE 608(b) -- Questioning Principal Witness -- Bribery and Perjury

United States v. Hurst, 951 F.2d 1490 (6th Cir. 1991) : On direct examination of a defendant charged with gambling offenses, his previous guilty plea to attempted obstruction of justice was elicited. The Court held there was no abuse of discretion in permitting cross-examination to bring out that the conviction arose from an attempt to bribe a police officer to make false official records, as subornation of perjury could be probative of truthfulness.

United States v. Wilson, 985 F.2d 348 (7th Cir. 1993) : Affirming a conviction for conspiracy to impede the IRS, the Court held that a defendant was properly cross-examined about acts of perjury and acts of bribery.

[ix] RULE 608(b) -- Questioning Principal Witness -- Civil Complaints

United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996) : The Court held, in a drug conspiracy case, that it was not an abuse of discretion to preclude the defense from asking a witness whether a civil complaint had been filed against her, as "the mere filing of a complaint is not 'probative of truthfulness or untruthfulness,' regardless of whether the allegations in the complaint, if true, would seriously undermine the witness' credibility."

United States v. Dowling, 855 F.2d 114 (3d Cir. 1988) , aff'd, 493 U.S. 342 (1990) : Affirming convictions arising out of a bank robbery, the Court held there was no error in barring cross-examination of an eyewitness who had sued the bank to recover money he alleged was on the counter during the robbery. The Court noted that the jury verdict against the witness was not necessarily a reflection on his credibility and that the danger of confusion might well have outweighed probative value.

[x] RULE 608(b) -- Questioning Principal Witness -- Crimes Involving Force or Violence

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : Although the Court affirmed convictions for robbery and firearms offenses, it found error when the prosecution questioned the defendant's brother about whether he was a "tough guy" and had been in a lot of fights, since the evidence was completely irrelevant to his credibility as a witness, in the circumstances of this case.

United States v. Flaharty, 295 F.3d 182 (2d Cir. 2002) : Affirming convictions for drug conspiracy offenses, the Court found no abuse of discretion when the defendants were not permitted to cross-examine a key government witness, a former leader of the conspiracy, about his involvement in a murder. The Court noted that "[m]urder generally is not a crime of dishonesty, and nothing about the Evans murder suggested that it would in any way reflect on [the witness'] truthfulness."

United States v. Parker, 133 F.3d 322 (5th Cir. 1998) : The Court affirmed convictions for public bribery, finding no error when the defense was precluded from cross-examining a prosecution witness about pending state charges that she had murdered her husband, since "[v]iolent crimes are irrelevant to a witness' character for truthfulness." In *United States v. Bynum*, n33 the Court upheld a ruling that a government witness could not be cross-examined about prior bad acts of holding foster children against their will to work at his racetrack, since the acts shed little light on credibility.

United States v. Manske, 186 F.3d 770 (7th Cir. 1999) : The defendant was convicted for cocaine distribution solely on testimony from cooperating witnesses and evidence of his having met regularly with them; there was no physical evidence or admission by the defendant. The defendant likewise had no physical or documentary evidence supporting his claim that the regular meetings involved gambling activities and the cooperating witnesses were framing him. Although the case turned on the credibility of the prosecution witnesses, the defense was precluded from cross-examining a principal government witness about past incidents in which the witness had threatened and intimidated potential witnesses against him. Reversing, the Court held that threats to other witnesses were probative under *Rule 608(b)* of the likelihood that the witness would seek to gain advantage for himself by giving false testimony against the defendant.

United States v. Young, 567 F.2d 799 (8th Cir. 1977) : The Court affirmed rejection of a defendant's attempt to impeach a witness by cross-examining her concerning her alleged offer to pay $10,000 to have her former husband killed, stating that "the proposed question was not relevant to veracity and honesty and would have been highly prejudicial."

United States v. Van Dorn, 925 F.2d 1331 (11th Cir. 1991) : The Court affirmed racketeering convictions, holding there was no error in prohibiting evidence that a key prosecution witness had allegedly threatened federal judicial officers in his prior drug prosecution, as the evidence had nothing to do with truthfulness or untruthfulness and was in any event barred under the Rule because it was extrinsic.

[xi] RULE 608(b) -- Questioning Principal Witness -- Disciplinary Actions

Deary v. City of Gloucester, 9 F.3d 191 (1st Cir. 1993) : In a civil rights action for use of excessive force, the commanding officer was asked on cross-examination about another officer's reputation for truthfulness, responded that he had never known the officer to be untruthful, and then denied knowing of an incident in which the other officer had been disciplined for an untruthful overtime report. The other officer was then recalled to the stand and admitted the incident ten years previously; documents regarding the incident were then admitted. The Court held that the commander was properly asked about the credibility of the other officer, who had previously testified, and that there was no abuse of discretion in permitting cross-examination of the commander, as character witness, with the ten-year-old disciplinary incident. The Court noted, however, that the other officer should not have been recalled and the documents should not have been admitted, as that was extrinsic evidence of specific conduct for the purpose of attacking the witness' credibility; questioning about the incident should have stopped when the commander denied any knowledge. The error was harmless, however, because the other officer could have been asked about the incident when he first testified and the evidence was not likely to inflame the jury against the defense. In *Navarro de Cosme v. Hospital Pavia, 922 F.2d*

926 (1st Cir. 1991) , the Court affirmed a judgment for the defendants in an action by the parents of a stillborn fetus, holding there was no abuse of discretion in permitting cross-examination of the plaintiffs' expert witness about another case in which he had submitted an inflated invoice for fees earned as an expert witness, about the suspension of his notary's license for failure to submit required reports, and about his being a defendant in three medical malpractice cases. The matters all pertained to his credibility as a witness. In a civil rights case against police officers, *De San Miguel v. Sbert*, n34 the plaintiff was not entitled to ask a defendant officer whether he had been disciplined on unrelated matters, since this did not tend to prove untruthfulness.

United States v. Davis, 183 F.3d 231 (3d Cir. 1999) , *amended*, *197 F.3d 662 (3d Cir. 1999)* : The Court reversed the convictions of a former New York Transit police officer, but found no error when the prosecutor was permitted to cross-examine the defendant about misappropriating departmental gasoline, and about lying about taking a subway pass from a man and ripping it up. The Court, in a very careful analysis, observed that the government could only cross-examine the defendant about the events, and cautioned that it could not ask questions about whether the defendant was suspended or deemed a liar by the police department's Internal Affairs division. The Court noted that questions about and evidence of disciplinary actions and findings by others are a form of extrinsic evidence that should not be permitted, because they inject the views of a third person into the case to contradict the witness.

United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980) : The Court held that a defendant could be cross-examined about his suspension from the practice of law and the underlying facts.

United States v. Simpson, 709 F.2d 903 (5th Cir. 1983) : A defendant charged in a drug scheme claimed that he was involved in legitimate business activities and that certain conversations with others involved "role playing" where he pretended to go along with them. The Court found that it was proper for the government to cross-examine the defendant concerning a civil injunction obtained against him by the SEC. Admission of the judgment itself was an improper use of extrinsic evidence, but harmless in this case.

United States v. Stoecker, 215 F.3d 788 (7th Cir. 2000) : The Court affirmed convictions for making false statements to financial institutions and giving or receiving bribes, finding no abuse of discretion when the defendant was barred from asking a government witness about an administrative complaint against him that led to his voluntarily surrendering his real estate license. The Court observed that the complaint against the witness was over 15 years old, no assessment of guilt was ever made, and the witness was never required to pay restitution. Even had the witness been convicted of a crime, the conviction would have been barred by the ten-year rule of *Rule 609(b)*. Thus, the Trial Judge did not err in finding that the probative value for impeachment purposes was substantially outweighed by the risk of unfair prejudice. In an action by an injured railroad worker, *Varhol v. National R.R. Passenger Corp., 909 F.2d 1557 (7th Cir. 1990)* , the Court held that the plaintiff was properly cross-examined about a suspension from work he had received for purchasing stolen train tickets from his boss, because the connection between such acts and honesty and integrity, and between honesty and integrity and credibility, is sufficient to allow admission when credibility was a key issue and the plaintiff was given an opportunity to minimize any adverse inference on redirect examination.

United States v. Hastings, 577 F.2d 38 (8th Cir. 1978) : The Court held that it was proper to preclude the defendant from cross-examining a witness about events leading to his less-than-honorable discharge from the military for failure to wear his uniform, since the evidence did not relate to credibility.

Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001) : African-American plaintiffs, who had been stopped by a security guard for suspected shoplifting, brought a § 1981 action against the store. Affirming a

judgment for the plaintiffs, the Court held there was no abuse of discretion in questioning the guard about his suspension 20 years previously from the state highway patrol for falsifying a report. Although the event was remote in time, it was probative of his character for truthfulness. In *United States v. Rosario Fuentez, 231 F.3d 700 (10th Cir. 2000)* , the Court affirmed drug convictions, finding no abuse of discretion when the defendant was precluded from cross-examining the undercover officer who participated in her arrest concerning disciplinary proceedings after the officer made a false statement to his supervisor investigating an unauthorized undercover drug operation. The Trial Judge indicated that it was "not at all clear" that *Rule 608* would sanction introduction of evidence of the investigation and the officer's misrepresentations. The Court concluded that "the admission of testimony regarding the investigation would have been proper," but, finding the issue "close," it held there was no abuse of discretion in precluding the inquiry, given the Judge's concern that it would have been confusing, the fact that the defense brought out other evidence related to the officer's credibility, and the fact the officer's testimony was corroborated by other evidence.

[xii] RULE 608(b) -- Questioning Principal Witness -- Discretion To Limit

United States v. Tillem, 906 F.2d 814 (2d Cir. 1990) : The Court held there was no abuse of discretion when the Trial Judge in an extortion prosecution prevented cross-examination of a government witness about illegally engaging in structured transactions to avoid currency transaction reporting requirements. The probative value of the evidence, if any, as to truthfulness was outweighed by its prejudicial effect.

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : In a personal injury action arising from a slip-and-fall, the Trial Judge admitted evidence that one of the plaintiff's expert witnesses had pleaded guilty to embezzlement, but forbade questions regarding the amount embezzled or the facts and circumstances of the crimes. Reversing a judgment for the plaintiff on other grounds, the Court noted that the guilty pleas were properly admitted under *Rule 609(a)(2)*. The underlying misconduct, involving dishonesty, was probative of the witness' character for truthfulness, and thus admissible, at the Judge's discretion (governed by Rules 403 and 611), under *Rule 608(b)*. The Court found no abuse of discretion in excluding reference to the underlying acts, but it noted that the amount of money misappropriated and the manner in which it was done were certainly relevant to prove the witness' dishonesty. On remand, the Judge was free to balance once again whether the gain from this probative value justified the time required to ask about the details.

United States v. Leake, 642 F.2d 715 (4th Cir. 1981) : Reversing convictions for offenses involving misappropriation of federal funds, the Court held the defense was improperly restricted from inquiring into prior acts of the key government witness. While the Trial Judge has discretion to limit cross-examination, such discretion must focus on "the importance of the testimony [of the witness being cross-examined] to the government's case, the relevance of the conduct to the witness' truthfulness, and the danger of prejudice, confusion, or delay raised by evidence sought to be adduced."

United States v. Brown, 946 F.2d 1191 (6th Cir. 1991) : The Court affirmed a conviction for cocaine offenses in late 1989, holding there was no abuse of discretion when cross-examination of the government's key witness regarding his drug addiction and sale of drugs prior to that year was limited in order to avoid unnecessarily prolonging the examination. Careful scrutiny of the record revealed that defense counsel was able to cross-examine the witness effectively, to disclose that he was an addict-informant, and to explore fully his potential bias and truthfulness. Evidence of his prior drug use was inadmissible, as it did not bear on his character for untruthfulness.

United States v. Marvin, 720 F.2d 12 (8th Cir. 1983) : The Court affirmed a conviction for illegal possession of a firearm, upholding a ruling that the defense could not ask a government witness about drug use and involvement in insurance fraud after the witness indicated outside the hearing of the jury that she would deny the conduct mentioned in

the questions. The Court also sustained the exclusion under *Rule 403* of questions about the witness' complaints that the defendant had sexually harassed her.

United States v. Rosario Fuentez, 231 F.3d 700 (10th Cir. 2000) : The Court affirmed drug convictions, finding no abuse of discretion when the defendant was precluded from cross-examining the undercover officer who participated in her arrest concerning disciplinary proceedings after the officer made a false statement to his supervisor investigating an unauthorized undercover drug operation. The Trial Judge was concerned that the inquiry would lead to a "trial within a trial" because the disciplinary action was on appeal and there was some controversy as to exactly what happened in the investigation; further, it was "not at all clear" to the Judge that *Rule 608* would sanction introduction of evidence of the investigation and the officer's misrepresentations. The Court concluded that "the admission of testimony regarding the investigation would have been proper," but, finding the issue "close," it held there was no abuse of discretion in precluding the inquiry, given the Judge's concern that it would have been confusing, the fact that the defense brought out other evidence related to the officer's credibility, and the fact the officer's testimony was corroborated by other evidence.

United States v. Taylor, 417 F.3d 1176 (11th Cir. 2005) : The Court affirmed a drug possession and firearm conviction, finding no abuse of discretion when the defendant was not permitted to introduce, as evidence of the arresting officer's bias and tendency for untruthfulness, civilian complaints charging the officer with brutality, planting evidence, and harassment. As all the complaints were unproven and there was no evidence that they had led to discipline or conviction of the officer, any probative value they might have was substantially outweighed by the risk of unfair prejudice to the prosecution. In a drug prosecution, *United States v. Novaton, 271 F.3d 968 (11th Cir. 2001)* , the Court found no abuse of discretion in barring the defendants from cross-examining a police detective about his suspension from the force for a four-month period in 1987 while he was investigated and before he ultimately was reinstated, and from cross-examining an agent about a pending investigation into whether he had stolen drugs. The Court held that a Judge has discretion to exclude the questioning under *Rule 403* and that, even though a defendant has a right of confrontation and it is important for a defendant to be able to examine a "star witness," the evidence was inadmissible because there was no finding of any bad act and the evidence was substantially more prejudicial than probative.

[xiii] RULE 608(b) -- Questioning Principal Witness -- Failure To File Tax Returns

Chnapkova v. Koh, 985 F.2d 79 (2d Cir. 1993) : The Court reversed a judgment for a patient who sued a plastic surgeon claiming that surgery had left her face scarred, holding that, because the plaintiff's credibility was crucial, the defense should have been permitted to question her about her failure ever to file tax returns.

[xiv] RULE 608(b) -- Questioning Principal Witness -- Failure To Pay Debts

Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 37 F.3d 1460 (11th Cir. 1994) : In an antitrust action, the Court found reversible error in permitting the defendant to impeach the plaintiff's expert witness, an accountant, by inquiring about the witness' bankruptcy and the fact that he borrowed money from his clients and failed to pay it back. The Court held that "seeking discharge in bankruptcy does not show a disregard for truth that would cast doubt on a witness's veracity." The Court also stated that even if the witness' borrowing from clients was unethical, "[t]o infer untruthfulness from any unethical act paves the way to the exception that swallows the rule."

[xv] RULE 608(b) -- Questioning Principal Witness -- Failure To Register Gun

United States v. Miles, 207 F.3d 988 (7th Cir. 2000) : The Court affirmed convictions for attempted bank robbery and use of a firearm. The government offered evidence that a security guard fired shots at the defendant, the defendant had gunshot wounds when arrested, and the bullet recovered from the defendant's leg matched the security guard's gun. The Court held that there was no error in preventing the defendant from asking the security guard about his failure to register his gun with the City of Chicago. The security guard had purchased the gun while employed as a police officer in another city and possessed a valid state firearm owner's identification card as well as a gun registration card issued by the state. Thus, the failure to register the gun with the City did not implicate fraud, deceit, or dishonesty and would not bear on his truthfulness.

[xvi] RULE 608(b) -- Questioning Principal Witness -- False Statements

[A] RULE 608(b) -- Accused-Witness Charged with Falsification Offense

United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001) : The Court affirmed convictions for filing false tax returns, finding no abuse of discretion when the defendant was cross-examined about altering time cards, inflating bills, and removing records that he later told an investigator were unavailable because there had been a fire.

United States v. Jones, 900 F.2d 512 (2d Cir. 1990) : The Court held there was no error when the defendant, charged with making false statements before the grand jury, was impeached by asking her about false statements she made on employment, driver's license, and loan applications, and on income tax returns.

United States v. Sanders, 343 F.3d 511 (5th Cir. 2003) : The Court affirmed convictions for bank fraud and making a false statement to the SBA, finding no abuse of discretion when the prosecutor was permitted to question the defendant about reneging on an agreement with the real estate agent who sold the defendant's home. The Court reasoned that, because the defendant's conduct may have involved fraud, it addressed his character for truthfulness; thus, the Judge could find that any prejudicial effect did not substantially outweigh its probative value. In *United States v. Cole*, n35 the Court found no error in the government's asking a defendant charged with willful misapplication of funds whether he had submitted a false excuse for being absent from work to a former employer.

United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992) : A man was murdered as part of a scheme by his wife and others to defraud life insurance companies. The Court held that a defense witness was properly asked on cross-examination about an illegal handgun sale in which he offered to "create" paperwork naming a fictitious person as purchaser.

United States v. Amahia, 825 F.2d 177 (8th Cir. 1987) : The Court affirmed convictions arising from a fraudulent marriage scheme to procure immigration visas, holding it was not error to permit cross-examination of the defendant concerning specific acts of insurance fraud.

United States v. Girdner, 773 F.2d 257 (10th Cir. 1985) : The Court found no error in the cross-examination of a defendant, charged with making false statements in connection with an absentee ballot fraud prosecution, concerning prior falsehoods and deceitful acts in the ballot fraud scheme.

[B] RULE 608(b) -- Questioning Principal Witness -- False Statements -- Other Witnesses

United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) : The Court reversed a conviction for felon firearm

possession because the defendant was improperly restricted in cross-examining the key government witness, a police officer, about three instances of past misconduct: alleged false testimony before a court four years earlier, the suspension of his driver's license five years earlier and his failure to report the suspension to his supervisors, and failure to make child support payments. The Court concluded that the proposed cross-examination was "strongly probative" of the officer's character for untruthfulness, as "[n]othing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath."

United States v. Fortes, 619 F.2d 108 (1st Cir. 1980) : In a bank robbery case, the Court approved a ruling preventing the defense from asking a government witness about involvement in a sale of cocaine, since this was not probative of untruthfulness. The Court also said it was proper to permit an extensive inquiry by the defense into whether the government witness had told the truth on previous occasions, but to limit to some extent the number of questions asked. In *United States v. Nogueira*, n36 the Court upheld a ruling barring the defense in a bank robbery case from questioning a key government witness about an alleged false statement on an employment application, as it was remote in time and involved a failure to mention a juvenile adjudication, which the witness' probation officer had told him was not a criminal record for employment purposes.

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996) : In an inmate's § 1983 action against prison guards, the plaintiff was precluded from asking one of the defendants on cross-examination whether he had previously claimed a knee injury on the job which the Worker's Compensation Board had found not to be job related and whether he had previously been suspended three months without pay for giving false information to a lieutenant. The Court vacated a judgment for the defendants, and said that on remand the cross-examination questions would be proper, assuming there was a good faith basis and the Trial Judge did not determine that they should be excluded under *Rule 403*. In a RICO prosecution, *United States v. Bagaric*, n37 the Court concluded that the government was properly permitted to ask a defendant, who testified on direct examination that he had sought and been denied political asylum in the United States, whether he had testified under oath at a deportation proceeding and whether the Immigration Judge had found his testimony not to be credible. In our view, the Court's conclusion is inconsistent with *Rule 608*. The government could have asked the witness whether he lied under oath during a proceeding. A denial would have concluded the inquiry. However, the government may not suggest that some third party did not believe the witness, as this smuggles in extrinsic evidence of a third party's opinion, which is barred by the Rule.

United States v. Irizarry, 341 F.3d 273 (3d Cir. 2003) : Affirming RICO convictions, the Court held that the prosecutor properly cross-examined the defendant about why he had a driver's license in another person's name in his wallet at the time of arrest and why he had numerous blank social security cards in his apartment. The Court concluded that the questions were permissible to establish the defendant's lack of truthfulness. In *Johnson v. Elk Lake School Dist., 283 F.3d 138 (3d Cir. 2002)* , a § 1983 action arising from alleged sexual abuse of a high school student by a guidance counselor, the Court found no abuse of discretion when the plaintiff was not permitted to ask the counselor on cross-examination if he had lied about having made the dean's list in college when he first applied for a job with the school district nine years before the trial. The remoteness in time substantially diminished the probative value of the evidence, and the lying, while duplicitous and wrong, "was not so indicative of moral turpitude as to be particularly probative" of his character for untruthfulness. In *United States v. Sullivan*, n38 the Court affirmed a police commander's extortion conviction, finding that the prosecution properly cross-examined the defendant concerning the accuracy of federal income tax forms and financial disclosure forms. In *United States v. Beros*, n39 the Court held that the government was properly permitted to cross-examine the defendant concerning his false swearing on a marriage license application.

United States v. Hitchmon, 609 F.2d 1098 (5th Cir. 1979) : The Court reversed convictions for assaulting federal officers because the defendants were restricted in cross-examining the assaulted officers in an effort to show they

previously had perjured themselves in the case.

United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995) : The Court held there was no abuse of discretion in permitting a defendant charged with arson to be cross-examined about a prior investigation into two unrelated fires, where he had initially denied any knowledge of the fires and subsequently admitted that he had originally lied and that he knew who set the fires. The admitted lies were probative of his character for truthfulness or untruthfulness and the evidence was not unfairly prejudicial.

United States v. Dawson, 425 F.3d 389 (7th Cir. 2005) : Affirming convictions for a narcotics trafficking conspiracy, the Court found it was error (but harmless) to preclude cross-examination of three government agents about rulings in other cases that the Judges there had disbelieved their testimony. The defendants were not proposing to use extrinsic evidence, but only question the witnesses about specific conduct for the purpose of attacking their character for truthfulness. In a prosecution for stealing and opening mail, *United States v. Redditt, 381 F.3d 597 (7th Cir. 2004)* , the Court found no abuse of discretion when the defendant was cross-examined about her false denial on an employment application that she had ever been convicted. Furthermore, the defense waived any challenge on appeal to admission of the application form when counsel stated that he had no objections when the document was introduced. In *United States v. Holt*, n40 the Court affirmed a conviction for masterminding a bank robbery, finding that the prosecution properly questioned the defendant's wife concerning occasions on which she had someone sign her name to checks in order to make purchases and later reported the checks as stolen, since a witness' statement to an investigator provided a good faith basis for the questions. In *Simmons, Inc. v. Pinkerton's, Inc.*, n41 the Court affirmed a judgment for a warehouse owner who sought to recover damages against the defendants as a result of a fire. It found that the plaintiff was properly permitted to elicit from an employee of the defendants that he had falsely told the defendants' investigator that he had taken and passed a polygraph examination regarding the circumstances of the fire. The question was directed at the fact that the witness had lied, a bad act relating to credibility that was the proper subject of inquiry under *Rule 608(b)*; whether or not a test had been taken or its results would have otherwise been admissible was irrelevant. In *United States v. Covelli*, n42 the Court sustained convictions arising out of the robbery of a shop and the disposition of stolen goods, finding that one defendant was properly asked on cross-examination whether he had faked insanity previously when charged with burglary. See also *United States v. Howard* n43(it was permissible for the government to cross-examine the defendant concerning false statements on employment applications).

Crimm v. Missouri Pac. R.R., 750 F.2d 703 (8th Cir. 1984) : The Court affirmed an employer's judgment in an age discrimination action, finding no error in the exclusion of the employee's questions to company witnesses concerning one witness' false answer on an application form, which the witness subsequently corrected, and use of marijuana. It concluded that the Trial Judge had discretion to find that the questions would not have contributed much to an assessment of the credibility of the witnesses and would have been unduly prejudicial.

United States v. Carlin, 698 F.2d 1133 (11th Cir. 1983) : Affirming a conviction for interstate transportation of stolen and forged securities, the Court found that after the defendant testified on direct examination concerning his application for two used car dealer licenses, the government was entitled to ask him whether, on his verified application for the licenses, he answered truthfully a question concerning previous conviction of a felony.

[xvii] RULE 608(b) -- Questioning Principal Witness -- Foundation Required

United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004) : The Court reversed a conviction for felon firearm possession because the defendant was improperly restricted in cross-examining the key government witness, a police officer, about three instances of past misconduct: alleged false testimony before a court four years earlier, the

suspension of his driver's license five years earlier and his failure to report the suspension to his supervisors, and failure to make child support payments. The Judge barred the questions, concluding that the probative value was not high and there was a risk of diverting the jury's attention from the facts of the case. The Court held that the proposed cross-examination was "strongly probative" of the officer's character for truthfulness, and found that the defense had a "reasonable basis" in copies of the records for asking the questions.

[xviii] RULE 608(b) -- Questioning Principal Witness -- Fraud

United States v. Sanders, 343 F.3d 511 (5th Cir. 2003) : The Court affirmed convictions for bank fraud and making a false statement to the SBA, finding no abuse of discretion when the prosecutor was permitted to question the defendant about reneging on an agreement with the real estate agent who sold the defendant's home. The Court reasoned that, because the defendant's conduct may have involved fraud, it addressed his character for truthfulness; thus, the Judge could find that any prejudicial effect did not substantially outweigh its probative value.

United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000) : At a mail fraud trial arising from a sale-leaseback scheme, one of the defendants mentioned on direct examination another sale-leaseback investment in which he had been involved that had failed. The Court held there was no abuse of discretion in permitting inquiry on cross-examination of the defendant about a third sale-leaseback investment he had sold more than ten years earlier. The evidence was relevant to the truthfulness of the defendant's claim that he was an unwitting participant in the charged scheme, since the terms of the two schemes were similar, and the evidence was not too remote to be probative of his truthfulness.

[xix] RULE 608(b) -- Questioning Principal Witness -- Group Associations

United States v. Dickens, 775 F.2d 1056 (9th Cir. 1985) : Reversing drug convictions, the Court found error in the cross-examination of one defendant concerning his belonging to "the mob," since "[a] defendant's guilt may not be proven by associating him with unsavory characters," and "[e]vidence of association with others associated with the 'mob,' even though the others may have been engaged in criminal activity, did not bear on [his] truthfulness."

[xx] RULE 608(b) -- Questioning Principal Witness -- Immigration Violations

United States v. Thiongo, 344 F.3d 55 (1st Cir. 2003) : The Court affirmed convictions arising from a conspiracy to gain illegal admission into the United States for Kenyan nationals, holding there was no abuse of discretion in permitting the prosecutor to ask the defendant on cross-examination whether she served as a legal witness to a sham marriage (between her current husband and another woman) designed to avoid immigration laws. The Court found that willingness to do so "is fairly probative of Defendant's truthfulness."

[xxi] RULE 608(b) -- Questioning Principal Witness -- Missing Evidence or Witness

United States v. Smith, 792 F.2d 441 (4th Cir. 1986) : The Court upheld the government's cross-examination of the defendant as to his procuring the absence of a material prosecution witness.

[xxii] RULE 608(b) -- Questioning Principal Witness -- Narcotics

United States v. Atherton, 936 F.2d 728 (2d Cir. 1991) : Affirming a conviction for distributing cocaine, the Court held there was no abuse of discretion in precluding cross-examination of a prosecution witness about use of illegal drugs during the period he was acting as a government informant, as the evidence was not probative of either the

witness' bias or his credibility.

United States v. McDonald, 905 F.2d 871 (5th Cir. 1990) : The Court held it was error (but harmless) to cross-examine a defendant charged with importing marijuana about his prior use of speed and cocaine, as drug use is not probative of truthfulness.

United States v. Brown, 946 F.2d 1191 (6th Cir. 1991) : The Court affirmed a conviction for cocaine offenses in late 1989, holding there was no abuse of discretion when cross-examination of the government's key witness regarding his drug addiction and sale of drugs prior to that year was limited in order to avoid unnecessarily prolonging the examination. Careful scrutiny of the record revealed that defense counsel was able to cross-examine the witness effectively, to disclose that he was an addict-informant, and to explore fully his potential bias and truthfulness. Evidence of his prior drug use was inadmissible, as it did not bear on his character for untruthfulness.

United States v. Bentley, 706 F.2d 1498 (8th Cir. 1983) : Affirming convictions in a drug case, the Court found no error in prohibiting a defendant from asking a government witness whether he had been indicted in a prior drug investigation. The indictment did not result in a conviction and the underlying act of involvement in a drug operation was not so clearly indicative of untruthfulness that it had to be permitted.

United States v. Kizer, 569 F.2d 504 (9th Cir. 1978) : The Court held it was not error to bar cross-examination of a government witness about past drug use and hospitalization for addiction.

United States v. Wilson, 244 F.3d 1208 (10th Cir. 2001) : Although the Court affirmed cocaine-related convictions, it found that it was error (but harmless) to permit cross-examination of one defendant about his past drug-related arrests. The questioning was impermissible under *Rule 608(b)* because "the drug crimes themselves (the 'conduct' at issue) have no relation to truth or untruth." In *Bennett v. Longacre*, n44 the Court held in an automobile accident case that it was proper under *Rule 608(b)* to disallow examination of the defendant concerning prior use of alcohol and marijuana, since that would not shed light on the witness' character for truthfulness.

United States v. Clemons, 32 F.3d 1504 (11th Cir. 1994) : The Court held it was error (but harmless) for one defendant in a trial for the murder of a DEA agent to cross-examine his codefendant about prior use or sale of drugs, as the evidence was neither probative of the witness' truthfulness or his capacity to testify nor relevant to the facts of the case. Affirming convictions for violating a theft suspect's civil rights by allowing a codefendant to beat him, the Court in *United States v. Sellers, 906 F.2d 597 (11th Cir. 1990)* , held there was no abuse of discretion in excluding evidence that the complainant had a year prior to the incident checked himself into a mental hospital saying he had a problem with drug and alcohol abuse and that he previously used drugs. The story at the hospital was made up at a time he had domestic troubles, and the defendants offered no proof he suffered any mental disorder impairing his perceptions at the time of the incident; nor could they show any drug or alcohol impairment or even use during the year preceding the incident. Neither the prior drug use nor the lies to the hospital staff while he was emotionally distressed were probative of his truthfulness at trial. In *United States v. Massell*, n45 the Court found no error in a ruling that if the defendant asked a witness about her drug use, the witness would be permitted to indicate that she used drugs while married to the defendant and together with him. See also *United States v. Holman* n46(permitting the defense to ask a key government witness in a marijuana smuggling case about his drug use at approximately the time of the smuggling, but not about drug use at other times).

[xxiii] RULE 608(b) -- Questioning Principal Witness -- Not-Guilty Plea

United States v. Norris, 910 F.2d 1246 (5th Cir. 1990) : On cross-examination, the prosecutor in an amphetamine distribution case elicited that a defendant had previously been convicted of marijuana delivery after pleading not guilty to the charge, of which he knew he was guilty. The Court reversed the defendant's conviction, holding that the questioning, and argument based thereon that the defendant was dishonest, penalized the defendant for exercising his constitutional right to plead not guilty and put the government to its proof.

[xxiv] RULE 608(b) -- Questioning Principal Witness -- Opening the Door

United States v. Cusmano, 729 F.2d 380 (6th Cir. 1984) : Affirming a Hobbs Act conviction that grew out of coercive tactics directed at employees, the Court concluded that cross-examination of the defendant concerning his assault on one of his truck drivers was proper following his direct examination in which he denied ever threatening anyone, including any drivers.

Young v. James Green Mgmt., Inc., 327 F.3d 616 (7th Cir. 2003) : Affirming a judgment for the defendant employer in a racial discrimination action, the Court found no abuse of discretion when a property manager employed by the defendant was cross-examined as to whether a former employer had accused him of stealing documents. The Court noted that the witness testified on direct examination that he was accused of taking a client's documents and turning them over to opposing counsel, which he portrayed in a charitable light. This testimony opened the door to cross-examination on the theft accusation. In a prosecution for firearms offenses, *United States v. Taylor*, n47 the government's apparent theory was that the defendant might have had weapons to protect cocaine and other items. The defendant claimed he had no drugs and that the weapons were left by a friend, and on cross-examination he denied any familiarity with cocaine. The Court held there was no error in permitting the prosecutor to ask about an arrest for cocaine possession and about the discovery of cocaine at his residence a few months after the firearms were found.

United States v. Beckman, 298 F.3d 788 (9th Cir. 2002) : Affirming convictions for marijuana importation offenses, the Court held it was error (but harmless) for the prosecutor to ask the defendant about an arrest in San Diego for attempted burglary and a misdemeanor conviction in San Bernardino for trespassing. The government argued that the questions were intended to show that when he said on direct that he had "hit the road" to "see ... unexplored territory," his implication that Southern California was "unexplored territory" was false, because the arrest and conviction showed he had been there before. The Court observed that he could have been traveling through California to get to unexplored territory or exploring parts of Southern California as yet unexplored, notwithstanding his prior trips. The vague statement on direct examination hardly counted as a claim that he had never been to San Diego before the charged crime, and in no way provided cover for introducing other crimes under "the guise of impeachment." In *United States v. Palmer*, n48 the Court affirmed a conviction for obtaining cocaine by misrepresentation, holding that there was no abuse of discretion in permitting the prosecutor to cross-examine the defendant as to whether he had diverted to his personal use any of the cocaine that was ostensibly for use in his dental practice, when his direct testimony implied that he had used no cocaine personally.

United States v. Drake, 932 F.2d 861 (10th Cir. 1991) : In a prosecution for wire fraud, the prosecutor referred on cross-examination of the defendant to college records inconsistent with his description of his academic record. The Court held that preliminary testimony on direct regarding educational background opened the area to cross-examination and provided a potential target for impeachment, and that the prosecutor's examination did not include impermissible extrinsic evidence.

Shiley, Inc. v. Bentley Labs., 794 F.2d 1561 (Fed. Cir. 1986) : In a patent infringement action, the Court found that the plaintiff was properly permitted to impeach a defense witness by questioning him about an adverse judgment of willful infringement in prior litigation with a third party, after he testified that he had a policy of avoiding infringement.

[xxv] RULE 608(b) -- Questioning Principal Witness -- Prejudicial Effect

United States v. Dakins, 872 F.2d 1061 (D.C. Cir. 1989) : The Court affirmed a drug conviction, finding no error when the defendant was barred from offering evidence that the undercover officer, who the defendant claimed entrapped him, had failed to intercede when the defendant was involved in an altercation with another officer. The Court suggested that, if the evidence was relevant, it was more prejudicial than probative.

Perez v. Jones, 935 F.2d 480 (2d Cir. 1991) : Affirming dismissal of a habeas corpus petition, the Court held there was no denial of due process when the prosecutor attempted to impeach a defense witness with repeated questions to which the witness asserted his privilege against self-incrimination, since inferences drawn from invocation of the privilege could not have been used to build the state's case-in-chief or add critical weight to the state's case.

United States v. Blake, 941 F.2d 334 (5th Cir. 1991) : The Court held it was error, but harmless, to permit the defendant in a drug and weapons prosecution to be asked whether he had said he had killed ten people, as this inflammatory question was entirely unrelated to any substantive issue before the jury, and its probative effect on credibility was only cumulative of other impeachment evidence.

[xxvi] RULE 608(b) -- Questioning Principal Witness -- Sexual Conduct

United States v. Thiongo, 344 F.3d 55 (1st Cir. 2003) : Affirming convictions arising from a conspiracy to gain illegal admission into the United States for Kenyan nationals, the Court indicated that it was receptive to the defendant's claim that evidence that she bore one man's child while married to another was not probative of truthfulness, but any error was harmless. In a prosecution for transportation across state lines for purposes of illegal sexual activity, *United States v. Anderson, 139 F.3d 291 (1st Cir. 1998)* , two minors testified that the defendants transported them to New Jersey and employed them as prostitutes. Affirming, the Court found no error when the defendants were not permitted to cross-examine the minors about prostitution activities that the minors engaged in both before and after the time period charged. The Court rejected the argument that commercial sexual activity was relevant to credibility as a witness, declaring that "[s]uch a position seems to us to embody a particularly offensive form of stereotyping to which we are loath to give credence."

United States v. Crowley, 318 F.3d 401 (2d Cir. 2003) : Affirming a conviction for attempted aggravated sexual abuse, the Court found no abuse of discretion when the defense was precluded from asking the victim during cross-examination about previous cases in which she made false accusations of rape. On a *voir dire* examination, the victim denied making false claims; because *Rule 608(b)* would keep the defense from attempting to refute these denials, the only evidence before the jury would have been the accusation and the victim's denial. Allowing cross-examination before the jury "would thus have produced little of probative value" and "the prejudicial impact of engendering speculation about the subject outweighed the minimal probative value of permitting the jury to evaluate [the victim's] demeanor during the question and answer." We believe that this analysis proves too much: it would prohibit cross-examination with bad acts whenever the witness makes it clear that he will deny they occurred, giving the witness unilateral control over bad acts cross-examination. In a drug case, *United States v. Rabinowitz*, n49 the Court said that prior acts of sodomy upon young children and consequent psychiatric treatment bore no relationship to the credibility of a witness.

United States v. McMillon, 14 F.3d 948 (4th Cir. 1994) : The Court held in a drug prosecution that it was not an abuse of discretion to preclude a defendant from cross-examining a cooperating coconspirator about the witness' use of drugs to force men to engage in sexual acts with him. Testimony regarding a witness' sexual life is not probative of his character for truthfulness; rather, it impairs the search for truth and harasses, annoys, or humiliates the witness in the process.

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978) : The Court stated that the fact that a witness is a homosexual has nothing to do with his character for truthfulness.

United States v. Smith, 831 F.2d 657 (6th Cir. 1987) : The Court held that evidence that a witness dressed as a prostitute or engaged in prostitution was inadmissible, since it had little relevance to credibility. Although defense counsel sought to argue that the evidence was relevant to prove bias, the record did not indicate that a bias theory was suggested during the trial.

United States v. Wolf, 787 F.2d 1094 (7th Cir. 1986) : Reversing Mann Act convictions, the Court found that cross-examination of the defendant concerning his contracting venereal disease on a trip to Thailand, his recommendation of an abortion for a woman, and his relationship with a 14-year-old girl was prejudicial and improper.

[xxvii] RULE 608(b) -- Questioning Principal Witness -- Theft Offenses

United States v. Badger, 983 F.2d 1443 (7th Cir. 1993) : Answering a cross-examination question, a defendant on trial for drug crimes said he was against thievery; the prosecutor then brought out that he had been convicted of a misdemeanor theft offense more than ten years previously and asked whether he and another conspirator had dealt in stolen goods. The Court held the misdemeanor questions permissible, but it was improper (although not plain error) to ask about dealing in stolen goods because there was no basis for the questions and they did not serve to impeach his earlier testimony.

[xxviii] RULE 608(b) -- Questioning Principal Witness -- Threatening Witnesses

United States v. Manske, 186 F.3d 770 (7th Cir. 1999) : The defendant was convicted for cocaine distribution solely on testimony from cooperating witnesses and evidence of his having met regularly with them; there was no physical evidence or admission by the defendant. The defendant likewise had no physical or documentary evidence supporting his claim that the regular meetings involved gambling activities and the cooperating witnesses were framing him. Although the case turned on the credibility of the prosecution witnesses, the defense was precluded from cross-examining a principal government witness about past incidents in which the witness had threatened and intimidated potential witnesses against him. Reversing, the Court held that the threats to other witnesses were probative under *Rule 608(b)* of the likelihood that the witness would seek to gain advantage for himself by giving false testimony against the defendant.

[xxix] RULE 608(b) -- Questioning Principal Witness -- Witness' Statements

United States v. Bartelho, 129 F.3d 663 (1st Cir. 1997) : In an armed bank robbery case, one prosecution witness was an inmate who recounted admissions purportedly made by the defendant while he was held before trial. The defendant sought to cross-examine the witness on statements the witness had allegedly made to other inmates after

giving testimony at the defendant's first trial (which ended in a hung jury). The government objected that the witness' statements explaining his testimony were made for his own protection. While not necessarily agreeing with the Judge's ruling that the statements were not sufficiently probative of untruthfulness to be admissible, the Court found no abuse of discretion in their exclusion.

United States v. Studley, 892 F.2d 518 (7th Cir. 1989) : In affirming a conviction for knowingly disposing of farm equipment pledged to the Farmers Home Administration, the Court held that the defendant was properly asked on cross-examination about statements he made several months after the charged crime in which he purported to announce that he was no longer bound by the laws of the United States. The evidence was relevant to his credibility, as a person making such statements may well not feel bound by the oath, and to the credibility of his story, as the anger expressed in the statement may have reflected his motivations at the time of the crime.

[i] RULE 608(b) -- Relationship to Other Rules

[i] RULE 608(b) -- Relationship to Rule 404(b)

Bonilla v. Yamaha Motors Corp., 955 F.2d 150 (1st Cir. 1992) : Reversing a judgment for the defendant in a product liability action arising out of a motorcycle accident, the Court held that it was error to cross-examine the plaintiff about speeding violations inadmissible under *Rule 404(b)* simply in the hope that he would deny them, thus raising a "red herring" for impeachment. See also *United States v. Ruiz-Batista, 956 F.2d 351 (1st Cir. 1992)* (strongly condemning the government's procedure of asking the defendant whether he had possessed cocaine on other occasions and, after receiving a denial, seeking to show such occasions for purpose of impeachment).

United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 1985-1 Trade Cas. (CCH) P66573 (4th Cir. 1985) : In a prosecution for a conspiracy to rig bids, the Court upheld the introduction of one defendant's previous bidrigging to prove knowledge and intent to enter a conspiracy. It held that extrinsic evidence may be properly admitted under *Rule 404(b)* even though it could not be used under *Rule 608(b)*, but it suggested that "the better practice is for the prosecutor to introduce this type of evidence in his or her case in chief," rather than on rebuttal, in an effort "to have the last say through evidence of a defendant's prior misconduct."

United States v. Jensen, 41 F.3d 946 (5th Cir. 1994) : The Court affirmed convictions stemming from a fraudulent scheme that led to a failure of certain savings and loan institutions, holding that documents showing that the defendant had previously made false statements were properly admitted. The government offered the documents into evidence while cross-examining the defendant, and the Court recognized that this use of extrinsic evidence would be error under *Rule 608(b)*. However, the Court found that the documents were independently admissible under *Rule 404(b)* to prove intent to commit the crimes with which the defendant was charged. In *United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995)* , the Court affirmed convictions for bribery and extortion, holding that the government was not required to comply with the notice requirement of *Rule 404(b)* when it cross-examined the defendant about alleged acts of fraud, bribery, and embezzlement, as the acts were probative of his character for truthfulness and the questions were permissible under *Rule 608(b)*.

United States v. Chevalier, 1 F.3d 581 (7th Cir. 1993) : The defendant had been indicted for tax fraud committed in 1984-86 and for a bank fraud in 1989 but the charges were severed. Affirming the defendant's conviction for tax fraud, the Court held there was no error in cross-examining him about the bank fraud after he testified, as he thereby put his credibility in issue, and the evidence was probative of his truthfulness.

King v. Ahrens, 16 F.3d 265 (8th Cir. 1994) : The Court held in a medical malpractice case that there was no abuse of discretion in excluding evidence that the defendant's medical license had been suspended eight years earlier, as any probative value the evidence had on the absence of mistake in failing to note critical information on the medical chart and on the doctor's credibility was substantially outweighed by its prejudicial effect, given the remoteness in time and the dissimilarity between the incidents.

United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005) : Officers at a border checkpoint stopped a truck co-driven by the defendants and found marijuana packed in duffle bags beneath the mattress in the sleeping compartment. The defendants, charged with possession, obtained an *in limine* ruling excluding evidence that a few months before they were arrested, a truck owned by the same owner had been stopped and marijuana packed in duffle bags was found hidden in the sleeping compartment. The co-drivers in that case claimed that they had found the marijuana by the side of the road and had hidden it themselves; the owner was not charged in the case. At trial in this case the owner testified for the government that he had inspected the truck just before the defendant picked it up and had found no marijuana in it. The defendants sought to cross-examine the owner about the prior incident, as evidence that he was operating a drug ring of which they were unaware, but the Judge ruled that the cross-examination was not permissible under Rules 404(b) and 608(b). Reversing, the Court held that the cross-examinations should have been permitted as "reverse 404(b)" evidence, and that *Rule 608(b)* had no application to the case, since the cross-examination was not intended to attack the owner's character for truthfulness but rather to negate the defendants' guilt by circumstantial evidence

United States v. Cardenas, 895 F.2d 1338 (11th Cir. 1990) : The Court affirmed the defendant's drug possession and conspiracy convictions, holding that evidence of prior drug usage and dealing admitted under *Rule 404(b)* could also have been admitted under *Rule 608(b)* to contradict the defendant's testimony that he had never given cocaine to the witness, had never sold it, and had not used it for several years.

[ii] RULE 608(b) -- Relationship to Other Rules -- Rule 609(a)

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : In a personal injury action arising from a slip-and-fall, the Trial Judge admitted evidence that one of the plaintiff's expert witnesses had pleaded guilty to embezzlement, but forbade questions regarding the amount embezzled or the facts and circumstances of the crimes. Reversing a judgment for the plaintiff on other grounds, the Court noted that the guilty pleas were properly admitted under *Rule 609(a)(2)*. The underlying misconduct, involving dishonesty, was probative of the witness' character for truthfulness, and thus admissible, at the Judge's discretion (governed by Rules 403 and 611), under *Rule 608(b)*. The Court found no abuse of discretion in excluding reference to the underlying acts, but it noted that the amount of money misappropriated and the manner in which it was done were certainly relevant to prove the witness' dishonesty. On remand, the Judge was free to balance once again whether the gain from this probative value justified the time required to ask about the details.

United States v. Hurst, 951 F.2d 1490 (6th Cir. 1991) : On direct examination of a defendant charged with gambling offenses, his guilty plea to attempted obstruction of justice was elicited. The Court held there was no abuse of discretion in permitting cross-examination to bring out that the conviction arose from an attempt to bribe a police officer to make false official records, as subornation of perjury could be probative of truthfulness. Because guilty pleas often result from plea bargaining and the name of the offense is rarely informative about the nature of the offense to which guilt is acknowledged in the allocution, it is often appropriate to describe some details of the offense so that the witness' credibility can be evaluated. While this is not possible under *Rule 609*, which permits use only of the conviction itself, it is possible under *Rule 608*, subject to the Court's discretion to exclude unduly prejudicial details pursuant to *Rule 403*.

[iii] RULE 608(b) -- Relationship to Other Rules -- Rule 611(a)

United States v. McMillon, 14 F.3d 948 (4th Cir. 1994) : The Court held in a drug prosecution that it was not an abuse of discretion to preclude a defendant from cross-examining a cooperating coconspirator about the witness' use of drugs to force men to engage in sexual acts with him. Testimony regarding a witness' sexual life is not probative of his character for truthfulness; rather, it impairs the search for truth and harasses, annoys, or humiliates the witness in the process.

United States v. Drake, 932 F.2d 861 (10th Cir. 1991) : On cross-examination of a defendant charged with wire fraud, the prosecutor referred to college records inconsistent with the defendant's description of his academic record. The Court held that preliminary testimony on direct examination regarding educational background opened the area to cross-examination and provided a potential target for impeachment, and that the prosecutor's examination did not include impermissible extrinsic evidence. The Court suggested, however, that the questions were arguably improper because they assumed facts not in evidence.

[iv] RULE 608(b) -- Relationship to Other Rules -- Rule 613(b)

United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999) : Affirming a cocaine distribution conviction, the Court held that a government agent was properly permitted to testify that Flint, the defendant's alibi witness, had told him that agents who had searched the defendant's trailer had missed some cocaine. Flint had denied on cross-examination having any knowledge that the defendant was involved in drugs. The Court recognized "the time-honored tenet that prior inconsistent statements ordinarily may be used to impeach a witness's credibility," and noted that the Trial Judge had erred in relying on *Rule 608(b)*, rather than *Rule 613(b)*, to admit the statement. In this case, the officer's testimony about the defense witness' repudiation of a prior statement about the location of drugs clearly presented an inconsistency, and thus was covered by *Rule 613(b)*, so the extrinsic evidence was not absolutely prohibited. *Rule 608(b)* would apply only if the prior statement concerning the drugs, standing alone and without any reference to the witness' trial testimony, was pertinent to the witness' character for veracity.

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : In the trial of a drug trafficking conspiracy, the prosecutor, trying on cross-examination to get one defendant to admit that he often made things up and told stories, asked him whether he had phoned his employer and told him a story. When the defendant stated that he was not sure what the prosecutor was talking about, the prosecutor played a tape-recording of a phone conversation the defendant had with his employer after he was placed in custody in which he offered a false explanation of why he was absent from work. The government argued that the tape was offered to "refresh recollection," but the Court observed that if the prosecutor wanted to refresh recollection, the proper way would have been to play the tape outside the presence of the jury. In response to the government's argument that the tape was admissible as a prior inconsistent statement, the Court responded that, even though it sometimes is difficult to distinguish between *Rule 608(b)* and *Rule 613* evidence, it was clear in this case that the prosecutor was seeking to prove that the defendant lied to his employer and thus the tape was extrinsic evidence and inadmissible. The error was harmless, however.

[v] RULE 608(b) -- Relationship to Other Rules -- Rule 702

United States v. York, 933 F.2d 1343 (7th Cir. 1991) : Affirming convictions for mail fraud and arson, the Court held there was no error in permitting the government to conduct a *voir dire* in the jury's presence focusing on prior unprofessional conduct of an expert pathologist. The defendant had qualified the witness before the jury, the questions were relevant to the weight to be accorded the expert's testimony, the prosecutor had a good-faith basis for the questions, and qualification is a preliminary question to which *Rule 608(b)* does not apply.

[j] RULE 608(b) -- Use of Documents

Kasuri v. St. Elizabeth Hosp. Med. Center, 897 F.2d 845 (6th Cir. 1990) : The plaintiff in a Title VII action had said at her deposition that she had been promised acceptance into a residency program, but at trial testified only that the director of the program had been encouraging to her. The defendant impeached the witness with her deposition and then, over a *Rule 608(b)* objection, offered the director's deposition (pursuant to *Fed. R. Civ. P. 32(a)(3)*) to bolster the impeachment by demonstrating that the plaintiff changed her story after the director's deposition was taken, in order to make it consistent with his deposition. The Court held that *Rule 608(b)* was inapposite, as the deposition testimony did not present a specific act of conduct of the plaintiff.

FOOTNOTES:

(n1)Footnote 1. *United States v. Cortez, 935 F.2d 135 (8th Cir. 1991)* .

(n2)Footnote 2. *Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988)* .

(n3)Footnote 3. *United States v. Piva, 870 F.2d 753 (1st Cir. 1989)* .

(n4)Footnote 4. *United States v. Azure, 801 F.2d 336 (8th Cir. 1986)* .

(n5)Footnote 5. *Bastow v. General Motors Corp., 844 F.2d 506 (8th Cir. 1988)* .

(n6)Footnote 6. *United States v. Roy, 843 F.2d 305 (8th Cir. 1988)* .

(n7)Footnote 7. *United States v. Binder, 769 F.2d 595 (9th Cir. 1985)* .

(n8)Footnote 8. *United States v. Awkard, 597 F.2d 667 (9th Cir. 1979)* .

(n9)Footnote 9. *United States v. Terry, 702 F.2d 299 (2d Cir. 1983)* .

(n10)Footnote 10. *United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983)* .

(n11)Footnote 11. *Schultz v. Thomas, 832 F.2d 108 (7th Cir. 1987)* .

(n12)Footnote 12. *United States v. Wright, 542 F.2d 975 (7th Cir. 1976)* .

(n13)Footnote 13. *United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir. 1978)* .

(n14)Footnote 14. *United States v. Medical Therapy Sciences, Inc., 583 F.2d 36 (2d Cir. 1978)* .

(n15)Footnote 15. *Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983)* .

(n16)Footnote 16. *United States v. Hedgcorth, 873 F.2d 1307 (9th Cir. 1989)* .

(n17)Footnote 17. *United States v. Coleman, 805 F.2d 474 (3d Cir. 1986)* .

(n18)Footnote 18. *United States v. Espinal, 757 F.2d 423 (1st Cir. 1985)* .

(n19)Footnote 19. *United States v. Di Paolo, 804 F.2d 225 (2d Cir. 1986)* .

(n20)Footnote 20. *United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984)* , *vacated on other grounds*, *473 U.S. 922 (1985)* .

(n21)Footnote 21. *United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986)* .

(n22)Footnote 22. *United States v. Reed, 715 F.2d 870 (5th Cir. 1983)* .

(n23)Footnote 23. *United States v. Bussey, 942 F.2d 1241 (8th Cir. 1991)* .

(n24)Footnote 24. *Lewy v. Southern Pac. Transp. Co., 799 F.2d 1281 (9th Cir. 1986)* .

(n25)Footnote 25. *United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990)* .

(n26)Footnote 26. *United States v. Edwards, 696 F.2d 1277 (11th Cir. 1983)* .

(n27)Footnote 27. *United States v. Babbitt, 683 F.2d 21 (1st Cir. 1982)* .

(n28)Footnote 28. *Carson v. Polley, 689 F.2d 562 (5th Cir. 1982)* .

(n29)Footnote 29. *United States v. Vaglica, 720 F.2d 388 (5th Cir. 1983)* .

(n30)Footnote 30. *United States v. Blanton, 730 F.2d 1425 (11th Cir. 1984)* .

(n31)Footnote 31. *Air et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985)* .

(n32)Footnote 32. *Williams v. Chevron U.S.A., Inc., 875 F.2d 501 (5th Cir. 1989)* .

(n33)Footnote 33. *United States v. Bynum, 566 F.2d 914, 923 (5th Cir. 1978)* .

(n34)Footnote 34. *De San Miguel v. Sbert, 611 F.2d 935 (1st Cir. 1979)* .

(n35)Footnote 35. *United States v. Cole, 617 F.2d 151 (5th Cir. 1980)* .

(n36)Footnote 36. *United States v. Nogueira, 585 F.2d 23 (1st Cir. 1978)* .

(n37)Footnote 37. *United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983)* .

(n38)Footnote 38. *United States v. Sullivan, 803 F.2d 87 (3d Cir. 1986)* .

(n39)Footnote 39. *United States v. Beros, 833 F.2d 455 (3d Cir. 1987)* .

(n40)Footnote 40. *United States v. Holt, 817 F.2d 1264 (7th Cir. 1987)* .

(n41)Footnote 41. *Simmons, Inc. v. Pinkerton's, Inc., 762 F.2d 591 (7th Cir. 1985)* .

(n42)Footnote 42. *United States v. Covelli, 738 F.2d 847 (7th Cir. 1984)* .

(n43)Footnote 43. *United States v. Howard, 774 F.2d 838 (7th Cir. 1985)* .

(n44)Footnote 44. *Bennett v. Longacre, 774 F.2d 1024 (10th Cir. 1985)* .

(n45)Footnote 45. *United States v. Massell, 823 F.2d 1503 (11th Cir. 1987)* .

(n46)Footnote 46. *United States v. Holman, 680 F.2d 1340 (11th Cir. 1982)* .

(n47)Footnote 47. *United States v. Taylor, 728 F.2d 864 (7th Cir. 1984)* .

(n48)Footnote 48. *United States v. Palmer, 691 F.2d 921 (9th Cir. 1982)* .

(n49)Footnote 49. *United States v. Rabinowitz, 578 F.2d 910 (2d Cir. 1978)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 608 RULE 608

2-608 Federal Rules of Evidence Manual 608.04

608.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion, witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick § 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. *United States v. Walker, 313 F.2d 236 (6th Cir. 1963)* , and cases cited therein; McCormick § 44, pp. 94-95, n.3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick § 49, p. 105; 4 Wigmore § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCormick § 49 (Cf. 4 Wigmore §§ 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's note to Rule 405 *supra* .

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. **[Editor's Note: The Advisory Committee's proposal precluded reference to bad acts that were remote in time. This provision was deleted by Congress in favor of a case-by-case balancing of probative value and prejudicial effect.]** Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as *People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950)* , that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. *In Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)* , the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961)* ; McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."

Following the 1987 amendments to Rule 608, the Supreme Court sent to Congress a technical amendment correcting capitalization, effective November 1, 1988.]

Advisory Committee Note to 2003 Amendment to Rule 608(b)

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. See *United States v. Abel, 469 U.S. 45 (1984)* ; *United States v. Fusco, 748 F.2d 996 (5th Cir. 1984)* (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d

ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case ...").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. See, e.g., *United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999)* (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996)* (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. See *United States v. Davis, 183 F.3d 231, 257 n.12 (3d Cir. 1999)* (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). See also Stephen A. Saltzburg, Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence, *7 Crim. Just. 28, 31 (Winter 1993)* ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 276 (1999)

Rule 608 provides for impeachment of a witness's character for veracity. *Rule 608(b)* states that a witness's character can be attacked through specific instances of misconduct on the witness's part. Thus, a witness can be asked on cross-examination about his having lied to Congress. The inference is that if he lied to Congress, he has a propensity to lie, and therefore he is more likely to be lying on the witness stand. The Advisory Committee's proposed Rule 608 permitted specific instances of conduct to be brought out on cross-examination of the witness being attacked, within the discretion of the trial judge, if probative on the witness's character for veracity, "and not remote in time." The Advisory Committee Note to *Rule 608*, provides, correspondingly, as follows:

> Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time.

Congress, however, deleted the language precluding the use of acts remote in time to impeach a witness's character for

veracity. Congress was of the view that the reference to remoteness in time was confusing. Would remoteness be determined by the time between the bad act and trial, or the time between the bad act and the incident involved at trial? Congress believed that the reference to judicial discretion in the rule was sufficient to protect against impeachment with truly stale bad acts.

Counsel confronted with bad acts of a witness that have occurred years before the trial should not place much reliance on the Advisory Committee's proposed total exclusion of acts that are remote in time. Congress's reference to judicial discretion is the key to making an argument to admit or exclude bad acts that occurred long ago. Contrary to the Advisory Committee's implication, there are no ironclad rules. Cases can be found admitting acts that might well be considered "remote in time." For example, in *United States v. Jackson, 882 F.2d 1444 (9th Cir. 1989)* , the court found no error when the defendant, a disbarred lawyer charged with mail and tax fraud, was impeached with his acts of misappropriating client funds fourteen years earlier. The defendant argued that the acts could not be the subject of impeachment because they were "remote in time." The court found that while remoteness is a relevant factor, there is no time limit in *Rule 608(b)*, and that the court did not abuse its discretion in allowing inquiry into the bad acts. The acts were clearly probative of the defendant's character for veracity. On the other hand, in *United States v. Kennedy, 714 F.2d 968 (9th Cir. 1983)* , the court held that a witness's involvement with the Hell's Angels ten years earlier was properly excluded, the court remarking that the bad acts "detracted only minimally" from the witness's credibility.

Thus, remoteness, while not dispositive as it would appear to be under the Advisory Committee's Note, remains an important factor because the older the act, the less it says about the witness's current propensity to lie on the stand. Still, if the act occurred long ago and yet evidences dishonest character, it may be sufficiently probative to justify consideration by the factfinder.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

See Note to Rule 405 with respect to the change in subdivision (a).

The second sentence of subdivision (b) as proposed permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness and not remote in time. Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Subcommittee redrafted the second sentence to emphasize the discretionary role of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). The Subcommittee is of the view that explicitly referring to the discretion of the court and deleting the reference to remoteness is a more practical way to deal with the subject. As recast, the subdivision makes clear the antecedent of "his" in the original.

[4] Report of the House Committee on the Judiciary

Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony. **[Editor's Note: The Rule was subsequently changed back to permit the use of opinion testimony.]**

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time." Such cross-examination could be of the witness himself or of another witness

who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the Court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

[5] Report of the House and Senate Conferees

The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 608 RULE 608

2-608 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 608, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 608. Evidence of Character and Conduct of Witness	**Rule 608. A Witness's Character for Truthfulness or Untruthfulness**
(a) Opinion and rep	**(a) Reputation or**

utation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence	**Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testi

may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or

mony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

	reputation evidence or otherwise.	
(b) Specific instances of conduct.	Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truth	**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a wit-

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untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness of the character for truthfulness or untruthfulness of:

or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-in-

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character

crimination when examined with respect to matters that relate only to character for truthfulness.	for truthfulness.

Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

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2-608 Federal Rules of Evidence Manual Supp. to § 608.03

Supp. to § 608.03 Annotated Cases

[Go To Main]

[1] Rule 608(a) -- Opinion and Reputation Evidence of Character [Go To Main]

[a] Rule 608(a) -- Character Evidence To Impeach

[iv] Rule 608(a) -- Character Evidence To Impeach -- Qualifications of Witness

United States v. Garza, 448 F.3d 294 (5th Cir. 2006) : In a drug case, the defense proffered a witness who would have testified that in his opinion a police officer who testified for the government was an untruthful person, based on an investigation that he conducted as an investigator for the Department of Justice, after he received a report that the police officer had made representations to a United States Attorney that were not true. Affirming, the Court found no abuse of discretion in excluding the proffered character witness, because the investigation of the police officer that the witness conducted was not completely thorough, and did not result in referring any charges for prosecution.

[b.1] Rule 608(a) -- Opinion That Another Witness Lied

United States v. Robinson, 473 F.3d 387 (1st Cir. 2007) : Affirming drug and firearms convictions, the Court held it was error (but harmless) when the prosecutor asked the defendant on cross-examination whether two law enforcement witnesses had lied on the witness stand. The Court reiterated that it is improper for an attorney to ask a witness whether another witness lied, and it is unfair to force a defendant to choose between recanting and calling a law enforcement witness a liar.

United States v. Harris, 471 F.3d 507 (3d Cir. 2006) : The Court affirmed a conviction for felon firearm possession, holding it was error (but not plain error) for the prosecutor to cross-examine the defendant on whether the police witnesses against him had lied. "Such questions invade the province of the jury and force a witness to testify as to something he cannot know, i.e., whether another is intentionally seeking to mislead the tribunal. In addition, ... such questions force defendants into choosing to either undermine their own testimony or essentially accuse another witness of being a liar." The Court noted that such cross-examination might be proper if the witness opened the door by stating on direct that another witness lied, and that cross-examination focusing on the differences and similarities between the

witness' testimony and another's is often necessary and permissible, provided the witness is not asked to testify as to the other witness' veracity.

[c] Rule 608(a) -- Other Proceedings Offered To Affect Credibility

United States v. Burns, 526 F.3d 852 (5th Cir. 2008) : The Court affirmed crack cocaine convictions, but it found that the prosecution improperly attempted to vouch for a cooperating witness in the cross-examination of a defense witness who was called to testify that the cooperating witness's reputation for truthfulness was not good. The prosecutor asked whether the character witness was aware that the cooperating witness had testified in a very similar case and the jury found her to be truthful. The Trial Judge sustained an objection to the question and instructed the jury to disregard questions where an objection was sustained. The Court found that the improper vouching did not render the defendant's trial unfair.

[e] Rule 608(a) -- Rehabilitation Evidence

[iv] Rule 608(a) -- Rehabilitation Evidence -- Evidence Not Responsive to Attack

United States v. Harris, 491 F.3d 440 (D.C. Cir. 2007) : Affirming a conviction for possession with intent to distribute cocaine base, the Court found no abuse of discretion when the defendant was precluded from eliciting testimony regarding his truthful character. The defendant's truthfulness as a witness had not been attacked, so the evidence was inadmissible under Rule 608(a)), and his character trait for truthfulness was not pertinent to his propensity to commit a drug crime, so the evidence was inadmissible under Rule 404(a).

[2] Rule 608(b) -- Specific Instances of Conduct [Go To Main]

[a] Rule 608(b) -- Bias

United States v. Bishop, 453 F.3d 30 (1st Cir. 2006) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion in limiting the cross-examination of a government witness who the defendant alleged had on another occasion falsely accused him of rape. The Court reasoned that the cross-examination posed the likelihood of diversion and prejudice and the unlikelihood that the defendant would be able to counter any denial by the witness in light of *Rule 608(b)*. We question the reliance on *Rule 608(b)*, given that the defendant's apparent motive in cross-examination was to suggest that the witness was biased against him. Extrinsic evidence of specific acts tending to show bias (as opposed to untruthfulness) is not excluded by *Rule 608(b)*.

United States v. Skelton, 514 F.3d 433 (5th Cir. 2008) : Affirming an extortion conviction, the Court held that the defendant was adequately permitted to explore the potential bias of the alleged victim of the extortion. It rejected a defense argument that the fact that victim may have stolen money and lied to the IRS was "intrinsic" to the crime charged, since the extortion charge related to the defendant's conduct, not the victim's. However, the victim's conduct might provide a motive for the victim to divert attention from his own misdeeds and to curry favor with the government. The Court emphasized that Rule 608(b)'s bar on extrinsic evidence applies only where evidence is introduced to show a witness's general character for truthfulness and is no bar to extrinsic evidence of bias. Thus, the Court concluded that evidence of the victim's possible bias should have been admitted, but that Rule 403 was properly used to limit the amount of bias evidence presented. The defendant had been permitted to explore sufficiently whether the victim was lying to protect himself and whether he had received any assurances from the government that he would not be prosecuted.

[e] Rule 608(b) -- Extrinsic Evidence

[ii] Rule 608(b) -- Extrinsic Evidence -- Evidence Admissible for Other Purpose

Gaillard v. Jim's Water Serv., Inc., 535 F.3d 771 (8th Cir. 2008) : After he was injured in a motorcycle accident, the plaintiff filed supplemental tax returns claiming additional income of as much as $120,000 per year. He produced the supplemental returns in the course of discovery in his personal injury action and used them in the first trial of the action (which ended with a hung jury) to support his lost income claim. Before the retrial, he moved unsuccessfully to exclude the returns as more prejudicial than probative. Affirming a judgment for the defendants, the Court found no abuse of discretion in allowing the returns to be admitted and utilized to impeach the credibility of the plaintiff and his expert witness. The Court explained that the returns were "highly relevant to the defense of this case. First, past income as established by tax returns is highly relevant to a loss of income claim. Second, the tax returns were probative of his character for truthfulness and thus relevant to keeping any damage award to a reasonable and fair level." Although the Court cited Rule 608(b) for the latter proposition, we observe that no attention was apparently paid to the Rule's bar on extrinsic evidence. And as to the first proposition, the supplemental return in particular was not being offered in that trial to prove the loss of income, but only to affect credibility. The Court also noted that the returns "were relevant to impeach the credibility of [the plaintiff's] economic expert, who testified he typically relies upon an individual's income tax return as the most reliable source of wage verification, yet ignored," the plaintiff's, "because he could not 'trust them' and they might be 'pure fiction.' " The Court said, "It matters not that [the plaintiff's] expert did not rely on the returns. The district court properly found the tax returns were admissible as impeachment evidence under Rule 608(b)," but it did not reconcile its ruling with either the "cross examination" or the "witness's own conduct" provisions of the Rule.

[iii] Rule 608(b) -- Extrinsic Evidence -- Generally Inadmissible

United States v. Thomas, 467 F.3d 49 (1st Cir. 2006) : The Court affirmed a conviction for drug smuggling, finding no error when, after a witness denied on cross-examination that he had retained for himself part of a drug shipment in another case in which he had participated as an informant, the defendant was not permitted to call another witness to prove that the first witness was lying. Under *Rule 608(b)*, extrinsic evidence is not admissible to impeach a witness by contradiction on a collateral matter. Even if the proposed evidence were offered to show bias rather than character, it would nevertheless be inadmissible under *Rule 403*.

United States v. Seymour, 468 F.3d 378 (6th Cir. 2006) : The defendant was convicted for sexual abuse of his sister-in-law and his niece. Affirming, the Court found no abuse of discretion the exclusion of testimony by the defendant's friend that he had seen the adult victim and the defendant hugging and kissing two years after the alleged sexual assault. The testimony was not admissible as an attack on the victim's character for truthfulness through testimony about a specific act, because *Rule 608(b)* bars extrinsic evidence for that purpose.

United States v. Neighbors, 590 F.3d 485 (7th Cir. 2009) : In a prosecution for cocaine offenses, the defense asked a cooperating witness if he "ever told anyone that you have either lied in this particular case or intended to lie in this particular case?" When the witness responded negatively, the defense sought unsuccessfully to introduce letters in which the witness said, "I did lie on that Haitian N***." Affirming, the Court held that the letters were governed by Rule 608(b), not Rule 613, because their probative value came from the underlying lie, not the contradiction between testimony at trial and the content of the letters. As such, the letters were extrinsic evidence inadmissible under Rule 608(b).

[g] Rule 608(b) -- Privilege Against Self-Incrimination

United States v. Rivera-Rangel, 466 F.3d 158 (1st Cir. 2006) : The defendant, a former executive assistant to the Governor of Puerto Rico, was convicted of Hobbs Act violations largely on the testimony of two businessmen who testified that they gave money to the defendant in exchange for access to high-ranking government officials. One of the businessmen, when asked during cross-examination about payments he had received from the other businessman while the witness was himself a government official (years before the charged conduct), invoked his privilege against self-incrimination. The defendant moved for a mistrial when the privilege claim was upheld, but the Court found no

error in the denial of that motion. The defendant's explanation of why he wished to inquire into the payments raised issues collateral to the dispute; a different argument the defendant made on appeal for why the payments were central to the case was waived by not raising it at trial. Citing *Rule 608(b)*, the Court noted that impeachment through reference to a witness's prior conduct is always subject to the Trial Judge's sound discretion. It observed that the defendant had several other effective ways of attacking the witness's credibility, including eliciting testimony that the witness had pleaded guilty to related charges and was hoping for a lenient sentence.

[h] Rule 608(b) -- Questioning Principal Witness

[iv] Rule 608(b) -- Questioning Principal Witness -- Bad Faith Impeachment

United States v. Cawthorn, 429 F.3d 793 (8th Cir. 2005) , vacated on other grounds, 128 S. Ct. 1060, 169 L. Ed. 2d 801 (2008) : The Court affirmed a crack cocaine conviction, finding no abuse of discretion when the defendant was denied the opportunity to ask questions like "Do you lie to authorities?"; "Do you generally lie?"; and "Would you lie to authorities to get something for it?" There was no showing that the defendant had no plausible (i.e., good-faith) basis for the questions.

[x] Rule 608(b) -- Questioning Principal Witness -- Crimes Involving Force or Violence

United States v. Williams, 464 F.3d 443 (3d Cir. 2006) : The Court affirmed convictions for a cocaine distribution conspiracy, finding no abuse of discretion when the defense was precluded from asking the principal prosecution witness, who had claimed on direct that he had never committed a murder, about having once stabbed an individual to death. The evidence that he had in fact committed the murder was extremely weak, posing the potential for an unnecessary mini-trial, and even if it had been strong, it was not clearly relevant to the witness' truthfulness and it had a strong potential to prejudice the jury.

United States v. Haskell, 468 F.3d 1064 (8th Cir. 2006) : Affirming convictions for murdering a federal witness, the Court found no error when the defendant was precluded from cross-examining Hunter, a government witness, about the multiple assaults that Hunter committed while in prison. "Additional cross-examination into Hunter's prison behavior would not have led a reasonable jury to have a different impression of Hunter's credibility, given that the jury was informed of the nature of Hunter's cooperation with the government." The defendant also argued that he was unfairly precluded from cross-examining one of his coconspirators (Jones) about murder and misdemeanor charges against Jones, as well as Jones' recanted confession. The Court held that the murder charge "was not relevant to prove truthfulness and [therefore] an improper subject for impeachment," and that the circumstances surrounding the recanted confession were irrelevant because although "at the time of the initial statement, Jones may have had an incentive to implicate Haskell, no incentive existed at the time of Haskell's trial, because Jones had been acquitted." Similarly, since "Jones testified that he had no deal with the government and had been offered no consideration for his testimony at Haskell's trial," the "information about the pending trials charges was irrelevant and an improper subject for cross-examination."

[xii] Rule 608(b) -- Questioning Principal Witness -- Discretion To Limit

Hollins v. City of Milwaukee, 574 F.3d 822 (7th Cir. 2009) : The Court affirmed judgments for the defendants in an arrestee's § 1983 action alleging excessive force by police officers. Under a ruling *in limine*, the plaintiff was not permitted to introduce during his case-in-chief evidence concerning an investigation into an allegation that one officer had falsified police reports. On cross-examination of the officer, the plaintiff was permitted to ask whether he had been asked to leave the department because of fabrication but was not permitted follow-up questions after the officer's negative answer. Finding no abuse of discretion in the rulings, the Court noted that extrinsic evidence is inadmissible to prove specific instances of misconduct offered to attack a witness' character for truthfulness, and that because the particular allegations of misconduct in this case had never been proven or found to have any merit, further inquiry would have had little probative value.

[xii.1] Rule 608(b) -- Questioning Principal Witness -- Failure To Correct Misstatements

Rahn v. Hawkins, 464 F.3d 813 (8th Cir. 2006) : In arrestee's civil rights action, the Court held it was error (but harmless) to preclude the plaintiff from asking a defendant about statements contrary to her testimony in a commemorative booklet she received when she was awarded a commendation for her role in his arrest. The Court observed that "[i] she knew about the booklet's contents before accepting the award, but yet said nothing, the jury may infer that she has a tendency to dissemble," and while there was no evidence that she did know beforehand, the plaintiff should have been able to question her. Furthermore, if a reasonable person would have spoken up in the circumstances, the witness' silence could be treated as an adoption of the statements, which could then be used to impeach her inconsistent trial testimony.

[xvi] Rule 608(b) -- Questioning Principal Witness -- False Statements

[A] Rule 608(b) -- Accused-Witness Charged with Falsification Offense

United States v. Shinderman, 515 F.3d 5 (1st Cir. 2008) : Affirming a doctor's conviction for unauthorized use of another doctor's name and DEA registration number, the Court found no abuse of discretion in permitting the government to cross-examine the defendant about false answers in his application for a medical license. The Court reasoned that "[a]fter all, a witness's willingness to lie to the government in an application for a license is highly probative of his character for truthfulness." It added that, because the central issue in the case was the defendant's intent, "his credibility was highly relevant to the outcome of the case." In examining the defendant's claim of unfair prejudice, the Court noted that the Trial Judge permitted the defendant to explain why he thought his answers were accurate when he made them.

[B] Rule 608(b) -- Questioning Principal Witness -- False Statements -- Other Witnesses

United States v. Mejia, 597 F.3d 1329 (D.C. Cir. 2010) : The defendant, convicted for conspiring to import cocaine, argued that the government knowingly used false testimony from a key witness, who had testified in other cases arising from the same DEA-initiated Central American sting operation. In one earlier trial, the Judge concluded that the witness was "not entirely truthful." In the trial of another case, the witness was asked about that conclusion and denied any knowledge of it. In the instant case, the witness was asked whether he was aware that a Judge had made a finding that he was not entirely truthful, and the witness said he was not, but he admitted that he had been asked about it in the later trial. Affirming, the Court held that this cross-examination was proper, and that there was no evidence that the witness testified falsely. We question whether the defendant should have been permitted to ask any questions about a Judge's conclusion in another case, since that is not a prior act of the witness, but the hearsay statement of a third party. The correct question is "were you not entirely truthful in a previous case," and the party asking the question is bound by the answer of the witness.

United States v. Seymour, 472 F.3d 969 (7th Cir. 2006) : Affirming a conviction for felon firearm possession, the Court held there was no abuse of discretion in precluding the defense from cross-examining the arresting officer who found the gun about his failure to mention in a report about arresting a jaywalker that he had used force causing a concussion. Learning that he used excessive force against a minor lawbreaker was likely to prejudice the jury, but even though his omission was dishonest in the circumstances, the Court concluded that the evidence had "no probative value at all," since the defendant did not contest the officer's testimony or impugn his conduct. In *United States v. Dawson, 434 F.3d 956 (7th Cir. 2006),* government moved for rehearing in a narcotics trafficking conspiracy case because it was concerned about the *stare decisis* effect of a statement in the prior opinion, *425 F.3d 389 (7th Cir. 2005)* (see the Main Volume of the *Manual*), that it was error (but harmless in the case) to bar defendants from asking a witness whether a Judge believed him or her in a prior case. The government relied in part upon the Committee Note accompanying the 2003 amendment to *Rule 608(b)*, which quoted an article by one of the authors of this *Manual,* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, *7 Crim. Just. 28 (Winter 1993)*. Upon rehearing, the

Court indicated that it continues to believe that a cross-examiner may ask a witness, "Has any federal Judge ever found that you lied on the stand?" We respectfully observe, however, that the Court did not explain how such a question can be viewed as "specific instances of the conduct of the witness ... [that] may ... be inquired into on cross-examination." A Judge's finding is a separate act and cannot be said to be conduct of the witness. Moreover, the purpose of the limitation on extrinsic evidence is to make a witness's denial of an act final, so that the act does not become a disputed issue. If the cross-examiner can ask about a third party's opinion of a witness's conduct, presumably on re-direct the examiner would be permitted to have the witness explain why the third party's opinion is incorrect. This seems precisely the kind of dispute the "no extrinsic evidence" rule is intended to prohibit.

United States v. No Neck, 472 F.3d 1048 (8th Cir. 2007) : Affirming a conviction for sexual abuse of two children, the Court held it was an abuse of discretion (but harmless error) to preclude the defendant from cross-examining the victims' mother about previously falsely accusing her brother of a similar offense.

[xviii] Rule 608(b) -- Questioning Principal Witness -- Fraud

United States v. Beck, 557 F.3d 619 (8th Cir. 2009) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in limiting the cross-examination of the arresting officer as to his involvement in a ticket scalping scandal. The officer's testimony was merely duplicative of other testimony, and discrediting the officer's testimony would have had little impact on the government's case.

[xx] Rule 608(b) -- Questioning Principal Witness -- Immigration Violations

United States v. Almeida-Perez, 549 F.3d 1162 (8th Cir. 2008) : The Court affirmed convictions for alien possession of firearms, finding no plain error in the Magistrate Judge's questioning of witnesses at a suppression hearing. It noted that "the fact that the suppression motion was tried to a Magistrate Judge, rather than to a jury, decreases the danger or prejudice to the defendants from the Magistrate Judge's questioning." The Court also observed that the Magistrate Judge's questions as to the circumstances under which witnesses entered this country might have been relevant under Rule 608(b) to assessing credibility, but added that "[a]t the same time, we must say that the use of such evidence is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage" and "the relevance of an immigration violation to character for truthfulness is at the least debatable and would depend on the facts of the particular violation since many immigration violations do not involve a false statement."

[xxii] Rule 608(b) -- Questioning Principal Witness -- Narcotics

United States v. Holden, 557 F.3d 698 (6th Cir. 2009) : In a prosecution for false reporting to the Environmental Protection Agency, the Court found no abuse of discretion in the exclusion of evidence that the principal witness for the government had been treated for marijuana dependency, which caused short-term memory loss, more than nine years before the charged events. The defense was properly permitted to question the witness about his ability to perceive the events that were the subject of his testimony, but his prior drug use was not relevant to his character for truthfulness. That he may have misrepresented his drug use at the time of treatment or experienced memory loss at that time had little if any relevance to his ability to testify truthfully about an unrelated subject more than a decade later.

United States v. Apperson, 441 F.3d 1162 (10th Cir. 2006) : Affirming a conviction for conspiring to manufacture LSD, the Court found no error in prohibiting the defendant from cross-examining a witness concerning prior drug use. The defendant was intending to impeach the witness's character for truthfulness, but the Court noted that a witness's use of drugs "may not be used to attack his or her general credibility, but only his or her ability to perceive the underlying events and testify lucidly at the trial."

[xxiv.1] Rule 608(b) -- Questioning Principal Witness -- Polygraph Examination Results

United States v. Apperson, 441 F.3d 1162 (10th Cir. 2006) : Affirming a conviction for conspiring to manufacture LSD, the Court found no error in prohibiting the defendant from cross-examining a cooperating witness about the witness's failing a polygraph test during the investigation. The defendant was intending to impeach the witness's character for truthfulness, but the Court noted that a failed polygraph test "had the potential to be overvalued by the jury, and thus was excludable under *Rule 403*."

[xxvi] Rule 608(b) -- Questioning Principal Witness -- Sexual Conduct

United States v. Bunchan, 580 F.3d 66 (1st Cir. 2009) : The Court affirmed a mail fraud conviction, finding no abuse of discretion when the defense was permitted to ask a government witness about pending state criminal charges for assault but was not permitted to bring out that the charges were for indecent assault and battery of a child. The Judge's ruling permitted elicitation of the witness' motive to ingratiate himself with the government but avoided unnecessary and unfair prejudice against the witness. The Court also noted that reference to the particular nature of the charges was not admissible under Rule 608(b) because it was not relevant to the witness' character for truthfulness.

[i] Rule 608(b) -- Relationship to Other Rules

[ii] Rule 608(b) -- Relationship to Other Rules -- Rule 609(a)

United States v. Barnhart, 599 F.3d 737 (7th Cir. 2010) : The Court affirmed a wire fraud conviction, holding that the government was properly permitted to question the defendant under Rule 608(b) about the specific conduct underlying his prior convictions for theft and deceptive practices. It noted that while impeachment under Rule 609 is limited to the fact of the conviction, Rule 608(b) allows inquiry into bad acts underlying the conviction unless their probative value as to the witness's truthfulness is substantially outweighed by their prejudicial effect. In this case, the underlying conduct was "highly relevant to Barnhart's character for truthfulness."

United States v. Osazuwa, 564 F.3d 1169 (9th Cir. 2009) : The Court reversed an inmate's conviction for assaulting a guard because he had been cross-examined extensively about the circumstances of a bank fraud conviction introduced to impeach him. It held that impeachment evidence relating to convictions falls within the exclusive purview of Rule 609, so the details of offenses (even though they involved dishonesty) are not admissible under Rule 608(b), and the scope of the inquiry under Rule 609(a) does not include, except in exceptional circumstances, details of the crime. The Court also rejected an argument that the defendant had opened the door to the cross-examination by testifying he served only one day in jail, thus minimizing the seriousness of the offense, since the testimony was an accurate answer to the question asked and he did not attempt to explain away or otherwise minimize his conviction.

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[ix] Rule 609(a) -- Dishonesty or Crimen Falsi -- Lewd Conduct

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[o] Rule 609(a) -- Relationship to Rule 404(b)

[p] Rule 609(a) -- Uncounseled Conviction

[2] Rule 609(b) -- TIME LIMIT

[a] Rule 609(b) -- Discretion

[i] Rule 609(b) -- Accused and Defense Witnesses

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[iii] Rule 609(b) -- Discretion -- Witnesses in Civil Cases

[b] Rule 609(b) -- Dishonesty Convictions

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[h] Rule 609(b) -- Timing of Prior Convictions

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[3] Rule 609(c) -- Effect of Pardon, annulment, or Certificate of Rehabilitation

[a] Rule 609(c) -- Discretion of Trial Judge

[b] Rule 609(c) -- Finding of Rehabilitation Implied

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[d] Rule 609(c) -- Objection to Impeachment Required

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[5] Rule 609(e) -- Pendency of Appeal

[a] Rule 609(e) -- Conviction, But No Sentence or Judgment

[b] Rule 609(e) -- State Law

[c] Rule 609(e) -- Suspended Sentence

609.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 277 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the Senate Committee on the Judiciary

[6] Report of the House and Senate Conferees

[7] 1990 Amendment Advisory Committee's Note

[8] Citations to Hearings and Debates

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609.01 Official Text

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Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule*. -- For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) *Time limit*. -- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation*. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications*. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal*. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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609.02 Editorial Explanatory Comment

[1] Basic Rule

In some respects, *Rule 609* covers the same ground as *Rule 608*. Both Rules are concerned with a particular form of impeachment: proving that a witness has a character for untruthfulness. Both Rules permit, with some limitations, an inquiry into specific conduct in the witness' past, to raise the inference that such conduct has some bearing on the witness' bad character for veracity. The two Rules are different in scope and effect, however. If the misconduct was a bad act, it is covered by *Rule 608*, and inquiry into the act is dependent on balancing probative value and prejudicial effect under *Rule 403*; also, extrinsic evidence is not admissible to prove the act occurred. In contrast, if the misconduct resulted in a conviction, it is covered by *Rule 609*, and inquiry is controlled by a complex set of rules dependent in part on the type of conviction and in part on the witness being impeached; also, if inquiry is permitted, it can be proved by extrinsic evidence.

One reason for the difference in treatment is that the drafters of the Rules, and Congress, felt that the exclusion of extrinsic evidence found in *Rule 608(b)* should not apply where the impeachment was with prior convictions. This is because a conviction, unlike a bad act, can be proved easily if the witness denies it. There is no risk of a mini-trial on a collateral issue. Also, the denial of a bad act may result from simply inadvertence, but it is not so likely that the witness has simply forgotten about a conviction.

The more important reason for differential treatment is that prior convictions were thought to be more serious, and more probative of a propensity to lie on the stand than other bad acts. Whether this is true or not, it is clear that Congress believed it to be so. It is also clear that *Rule 609* received much more attention in the drafting and approval process than did *Rule 608*.

Subdivision (a) is the dominant provision in the Rule, covering convictions that Congress considered to be "recent" enough to have substantial probative value as to the witness' character for veracity. The most crucial inquiry under *Rule 609(a)* is whether the conviction that is the subject of impeachment falls under subdivision (a)(1) or subdivision (a)(2). The legislative presumption is that crimes that involve dishonesty or false statement (covered by subdivision (a)(2)) are highly probative of the witness' character for veracity, while other convictions (covered by subdivision (a)(1)) are somewhat less probative.

Rule 609(a)(2) provides that if a witness has been convicted of any crime of "dishonesty or false statement," then the conviction "shall be admitted" to impeach the witness. n1 In contrast, if the conviction did not involve dishonesty or false statement, then *Rule 609(a)(1)* provides that the conviction is admissible only if it is a felony n2 and only if it satisfies a specified balancing test. If the conviction is covered by *Rule 609(a)(1)*, the Judge must balance the conviction's probative value in proving the witness' untruthful character against the prejudice that would arise from introducing the conviction. If the witness is a criminal defendant, the conviction can be admitted under *Rule 609(a)(1)* only if the probative value of the conviction outweighs its prejudicial effect. The conviction of any other witness is admissible so long as its probative value is not substantially outweighed by its prejudicial effect; that is, the general balancing test of *Rule 403* applies if the witness is not the accused. n3

[2] Legislative Debate

Probably no single Rule provoked as much controversy in Congress as *Rule 609*. In the House of Representatives, the prevailing view was that a prior conviction should be introduced only if the crime involved dishonesty or false statement.

Under the bill originally approved by the Senate, witnesses other than the accused could also be impeached by crimes punishable by death or imprisonment in excess of one year if the Court determined that the probative value of the evidence outweighed its prejudicial effect.

The actual Rule represents a compromise of sorts. More impeachment is permissible under the Rule than under the House draft. But felony convictions not amounting to *crimen falsi* can be used to impeach any witness, *including a defendant*, which represents an abandonment of the Senate's limitation.

The Rule as originally promulgated was anomalous in several respects, however. First, it referred to proving convictions on "cross-examination," but it is clear, especially in light of *Rule 607*, that a party should be able to bring out otherwise admissible prior convictions on direct examination as well. Second, *Rule 609(a)(1)* was ambiguous as to whether the Trial Judge could exclude unduly prejudicial convictions when offered against prosecution witnesses or witnesses in civil cases; the Rule referred only to prejudice "against the defendant." n4

In 1990, the Rule was amended to delete the reference to cross-examination and to clarify that, under *Rule 609(a)(1)*, the Trial Judge must balance probative value and prejudicial effect as to all witnesses in all cases -- though the balancing test is tilted more toward exclusion when the criminal defendant is the witness.

The Rule has again been amended (with the amendment scheduled to take effect on December 1, 2006) to clarify and limit the convictions that are subject to automatic admissibility under *Rule 609(a)(2)*. That amendment is discussed below, § 609.02[5].

[3] Crimes of Dishonesty or False Statement

It is critical for the parties in both civil and criminal cases to determine whether a witness' conviction was one of "dishonesty or false statement." The offering party will always wish to characterize a conviction as one of dishonesty or false statement, because then it will be automatically admitted. The nonoffering party will always wish to characterize a conviction as not one of dishonesty or false statement, because then there will be an opportunity to have the conviction excluded pursuant to the *Rule 609(a)(1)* weighing process; and if such a conviction is not a felony, it cannot be admitted under the Rule.

If the conviction is found to be one of dishonesty or false statement, it must be admitted no matter how prejudicial it is, no matter who the witness is, and no matter how cumulative it may be as to impeachment of the witness. While the *Rule*

403 test is applied as a backstop to many other Rules (see, e.g., *Rules 404(b)*, *407*, *608* and *702*), this is not the case with *Rule 609(a)(2)*. *Rule 609(a)(2)* is cast in mandatory language. Any possible doubt was erased by the 1990 amendment, which makes clear that the *Rule 403* test is inapplicable to convictions of dishonesty or false statement. The amendment added the *Rule 403* test to govern most convictions offered under *Rule 609(a)(1)*, but pointedly did not add such a test to *Rule 609(a)(2)*. n5

[4] Categorizing Crimes

Rule 609(a)(2) does not define or list those crimes that are automatically admissible, and there has been significant disagreement among the Courts as to which crimes should qualify for mandatory admission under *Rule 609(a)(2)*. For example, is shoplifting or burglary a crime of dishonesty or false statement? What about a drug crime?

When the Rule was amended in 1990, the Advisory Committee refused to add any language clarifying which crimes must be admitted for impeachment under *Rule 609(a)(2)*. The Committee's explanation for not proposing an amendment to *Rule 609(a)(2)* is as follows:

> The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying *Rule 609*. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "by the phrase dishonesty and false statement, the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny.

There is general agreement that crimes containing a statutory element requiring proof of deceit are covered by *Rule 609(a)(2)*. Examples include perjury, fraud, falsifying government forms, and counterfeiting. Defendants cannot be convicted of these crimes unless the prosecution proves that they have lied in some way. The fact that witnesses have essentially been convicted for lying is obviously probative of whether they are lying on the stand -- so probative, in fact, that Congress mandated admission no matter how prejudicial the convictions would be. n6 As the Seventh Circuit has stated:

> The essential characteristic of these offenses [such as perjury, false statement, criminal fraud, embezzlement or false pretenses] is that the witness, acting in a calculated and deliberate manner, has committed acts of falsification for the very purpose of deceiving. It is this essential characteristic that makes these crimes probative of a witness' propensity to lie on the stand. n7

Disagreement exists with respect to theft crimes. On the one hand, it can be argued that a shoplifter or burglar acted deceitfully or at least underhandedly, and that this activity is just as probative of a propensity to lie on the stand as is the dishonesty inherent in a perjury conviction. On the other hand, deceit is not necessarily a statutory element or an obvious avenue of proof for the crime of theft, nor is false statement; so it is not as obvious that the conviction is as probative of credibility as, for example, a conviction in which the government of necessity proved beyond a reasonable doubt that the witness had acted dishonestly and made a false statement. n8 Some types of theft crimes, like bank robbery, are even more questionable as to their pertinence to the witness' credibility, because a person could rob a bank without engaging in a single act of deceit or falsification. n9

We believe that if a conviction does not on its face contain an element of deceit, there is good reason to subject it to the

balancing test of *Rule 609(a)(1)*. Exemplary of our reasoning is the Ninth Circuit's *en banc* opinion in *United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992)* . Brackeen was tried for aiding and abetting an armed bank robbery, and when he took the stand, he was impeached with his guilty pleas to two unarmed bank robberies that occurred within days of the charged crime. The Trial Judge allowed the impeachment, reasoning that the bank robberies were crimes involving dishonesty or false statement, and thus were to be automatically admitted under *Rule 609(a)(2)*. But the Court of Appeals reversed. It concluded that "Congress intended *Rule 609(a)(2)* to apply only to those crimes that factually or by definition entail some *element* of misrepresentation or deceit, and not to those crimes which, bad though they are, do not carry with them a tinge of falsification." n10

The importance of characterizing bank robbery as a crime that does not involve dishonesty or false statement is apparent in a case such as *Brackeen*. Brackeen took the stand at trial to testify that he was not a bank robber. If his previous convictions were automatically admitted under *Rule 609(a)(2)*, there would be an unacceptable risk that the jury would use the prior convictions for the impermissible inference that "once a bank robber, always a bank robber." Given that risk, there is a strong possibility that the defendant would not take the stand at all. On the other hand, if the convictions are subject to the balancing test provided by *Rule 609(a)(1)*, then there is at least a fair chance that they could be kept from the jury. A defendant is undeniably prejudiced when the jury hears about crimes similar to that with which he is charged; and a conviction of a criminal defendant-witness is not admissible under *Rule 609(a)(1)* unless its probative value outweighs its prejudicial effect. At a minimum, there is a possibility in a case like *Brackeen* that the Trial Judge would exclude one of the bank robbery convictions on the ground that it is cumulative as to the defendant's character for truthfulness. n11 Such exclusion would not be possible under the *Rule 609(a)(2)* provision for automatic admission. So at the very least, the broader view of *Rule 609(a)(1)*, and the correspondingly more limited view of *Rule 609(a)(2)*, means that the defendant receives some judicial oversight into the use of these prejudicial convictions.

Another crime the characterization of which is in dispute is the willful failure to file a tax return. For example, in *Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992)* , the plaintiff in a malpractice case called an expert pathologist, who was impeached with his prior misdemeanor conviction for willful failure to file a tax return in violation of *26 U.S.C. § 7203*. The Trial Judge held that the conviction fell under *Rule 609(a)(2)* and therefore admission was required, but the Third Circuit reversed. The Court of Appeals reasoned that *Rule 609(a)(2)* should be narrowly construed, because it is a radical provision that deprives the Trial Judge of the discretion to weigh the prejudicial effect of admitting the evidence against its probative value in proving the witness' credibility. n12 The Court noted that to obtain a conviction for willful failure to file a tax return, the government is not required to show that a defendant acted with the deceitful purpose of concealing any tax liability. Rather, all that is required is proof that the defendant acted voluntarily and with the deliberate intent to violate the law. The Court concluded therefore that a conviction under section 7203 did not "necessarily connote dishonesty or a false statement within the narrow ambit of *Rule 609(a)(2)*." n13

The result in *Cree* is in conflict with the Eleventh Circuit's opinion in *United States v. Gellman, 677 F.2d 65 (11th Cir. 1982)* , where the Court reasoned that a violation of Section 7203 was "sufficiently reprehensible to meet the exception of *Rule 609(a)(2)*." n14 The *Cree* Court, however, cogently pointed out that *Rule 609(a)(2)* does not measure the reprehensibility or the severity of a crime, but rather focuses on whether the crime is especially probative of the witness' propensity to lie. It is the deceit factor in the conviction that makes it so probative of the witness' credibility that admission is mandated. n15

It is notable that because a conviction under Section 7203 is a misdemeanor (it is not punishable by a term of imprisonment in excess of one year), the result in *Cree* means that a witness can never be impeached under *Rule 609(a)(1)* with that conviction; while *Rule 609(a)(2)* provides for mandatory admission of all convictions covered by the Rule, *Rule 609(a)(1)* does not permit admission of misdemeanors. So it was critical to the plaintiff in *Cree* to have her expert's prior conviction defined as one that did not involve dishonesty or false statement. n16

A strict construction of *Rule 609(a)(2)* is sound policy: Because almost every criminal act is in some broad sense a dishonest act in either preparation or execution, a broad construction of *Rule 609(a)(2)* would swallow up *Rule*

609(a)(1) and would lead to mandatory admission of almost all prior convictions, even though many of these convictions would have slight probative value as to the witness' character for truthfulness and would carry significant prejudicial effect. n17 Given the predominance of the *Rule 403* balancing approach throughout the Federal Rules and the general grant of discretion that the Rules provide to Trial Judges, it makes sense to limit where possible a Rule that mandates admission and thus prohibits the use of judicial discretion and balancing. As the D.C. Circuit Court of Appeals has stated:

> *Rule 609(a)(2)* is to be construed narrowly; it is not *carte blanche* for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court, *Rule 609(a)(2)* must be confined to a narrow subset of crimes -- those that bear *directly* upon the accused's propensity to testify truthfully. n18

We believe that, while it is important for the jury to get a sense of the witness' character for veracity, it is also important that the rules on impeachment not unduly discourage parties from calling witnesses -- especially criminal defendant-witnesses -- to the stand. We think that *Rule 609(a)(1)* is a good-faith attempt to strike a balance of competing interests; therefore, automatic admission under *Rule 609(a)(2)* should be the very limited exception, not the rule.

[5] Facts Underlying the Conviction, and the 2006 Amendment to Rule 609(a)(2)

What if the witness was convicted of a crime that does not itself contain an element of deceit, but the crime was committed in a *manner* that involved deceit? For example, the crime of murder contains no statutory element of deceit, but a particular defendant may have acted dishonestly in order to get the victim to a certain place where the murder would occur. Can the Court go behind the conviction itself to the supporting facts and hold that the manner of committing the crime requires admission under *Rule 609(a)(2)*? The Courts are in dispute on this question, and a pending amendment to *Rule 609(a)(2)* seeks to resolve this conflict.

Most Circuits have held that a conviction is subject to admission under *Rule 609(a)(2)*, even where dishonesty or false statement is not an essential element of the crime, if the proponent can show that the conviction rested in some way on facts indicating that the witness was actually dishonest or deceitful in committing the crime. n19

We submit that it is unwise to apply *Rule 609(a)(2)* so broadly as to permit a Trial Court to go behind the witness' crime and determine whether the crime was committed in a deceitful manner. The premise for such a broad approach is that a conviction for a crime such as drug distribution will have more or less probative value depending on how it was committed. While this may or may not be true, the fact is that if the conviction is admitted, the jury will generally hear only that the conviction was rendered and that a certain punishment was meted out. *Rule 609* does not allow the jury to hear the underlying facts of the conviction. n20 The Courts have consistently held that evidence of the conviction is limited to "the crime charged, the date, and the disposition." n21 This is part of the reasoning for dispensing with an extrinsic evidence exclusion such as that found in *Rule 608(b)* -- the conviction itself can be easily proved, without a need to delve into the facts. Consequently, whatever greater probative value there is in the manner that a crime was committed will be lost on the jury.

More importantly, an approach permitting the Trial Court to go behind the conviction in every case will make *Rule 609(a)(2)* the predominant rule, and not the exception. This is because there is probably some act of deceit in almost every crime. Thus, *Rule 609(a)(2)* will swallow up *Rule 609(a)(1)*, even though the balancing approach of the latter Rule is more consistent with the general framework of the Federal Rules.

Finally, it is to say the least an indeterminate inquiry for a Trial Court to decide retrospectively just what facts actually led to the witness' conviction. If a witness has been convicted of drug distribution, how is the Trial Judge to determine whether the jury in that prior case found beyond a reasonable doubt that the witness had acted deceitfully in committing

the crime? The general verdict of guilty is obviously an insufficient indication. Should the Trial Judge look at the indictment? At the record? Should the Trial Judge hold a hearing and essentially retry the prior case, when the only goal is to determine whether the conviction is "automatically" admitted? The process of going behind the crime to the underlying facts hardly seems "automatic."

For these reasons, some Courts have rejected the majority approach and have held that convictions such as for murder, drug distribution, etc., can never be automatically admitted even if they were allegedly committed in a deceitful manner. For example, in *Cree*, see § 609.02[4], the Third Circuit recognized that "it is certainly possible, and perhaps even likely, that in some instances individuals who willfully fail to file federal income tax returns do so with the conscious intent to conceal their tax liability." However, the Court concluded that "the manner in which a particular defendant commits a crime is irrelevant; what matters is whether dishonesty or false statement is an element of the statutory offense."

The Advisory Committee's amendment to *Rule 609(a)(2)* rejects both approaches in the cases. That is, it rejects the notion that a Court can or should always go behind a conviction to try to determine whether some of the underlying facts were dishonest or deceitful; such an approach is inefficient and indeterminative. On the other hand, the Committee was persuaded (or one might say overwhelmed) by the Justice Department's view that a pure "elements" approach to *Rule 609(a)(2)*, while easy to apply, would unduly limit impeachment. The Justice Department's major concern was with a prior conviction for obstruction of justice. Deceit or dishonesty is not an element of that crime, because it can be committed, for example, by threatening a witness or contumaciously destroying evidence. On the other hand, many convictions for obstruction will be grounded on dishonest conduct (e.g., lying to authorities), and the centrality of these acts to the conviction might well be evident without having to speculate or to retry the case. For example, the indictment might itself provide sufficient indication that proof of dishonest acts was fundamental to the conviction.

While there is much to be said, as above, for a strict elements approach to *Rule 609(a)(2)*, the Advisory Committee determined that it would not be able to get an amendment approved in the face of staunch opposition from the Department of Justice; and that a test could be proposed that would at least limit some of the problems of allowing or requiring a Court to go behind every conviction to look for deceitful or dishonest acts. The Committee Note tries to limit the damage of the Justice Department's demand that *Rule 609(a)(2)* cover crimes other than those in which deceit or dishonesty is part of a statutory element.

The amendment to *Rule 609(a)*, and the Committee Note, accordingly provide as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(Amendment effective December 1, 2006)

> **(a) General rule**.--For the purpose of attacking the The material within the following brackets is overstruck in the original. [credibility] character for truthfulness of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to *Rule 403*, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and evidence that any witness has been convicted of a crime shall be admitted, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

* * *

Committee Note

The amendment provides that *Rule 609(a)(2)* mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under *Rule 609(a)(2)*, even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, *90 J. Crim. L. & Criminology 1087 (2000)*.

Evidence of crimes in the nature of *crimina falsi* must be admitted under *Rule 609(a)(2)*, regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., *18 U.S.C. § 1001*, Material Misrepresentation to the Federal Government) or a section that does not (e.g., *18 U.S.C. § 1503*, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted.*Cf. Taylor v. United States, 495 U.S. 575, 602 (1990)* (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125. S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of *Rule 609* are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness.*See, e.g., United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* (*Rule 609* was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as

that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

[6] Facts Underlying the Conviction and the Relationship with Rule 608

The underlying facts of a conviction might be a subject of inquiry when the witness testifies, even if the conviction is not itself admissible under *Rule 609*. For example, if a drug seller misrepresents the quality of the heroin that he sells, that misrepresentation may impeach the seller as a witness even though the conviction was for the sale, not the misrepresentation. In fact, the misrepresentation may be considered even if the seller was never convicted of any crime. *United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980)* . This is because *Rule 608* permits impeachment with the witness' prior bad acts, even if the acts did not result in conviction.

It must be remembered, however, that unlike convictions covered by *Rule 609(a)(2)*, prior bad acts are not automatically admissible to impeach the witness' character for veracity. Rather, admissibility of such acts is regulated by the *Rule 403* balancing test. n22 Also, because of *Rule 608(b)*'s exclusion of extrinsic evidence, the details on which the conviction is based cannot be proved if the witness denies them.

Interestingly, if the underlying facts are not permitted to bootstrap a conviction into automatic admission under *Rule 609(a)(2)*, it may be the case, at least where the accused is the witness, that the deceitful manner in which the crime was committed may be a subject of inquiry while the conviction itself may not. This is because the deceitful acts might be more probative of credibility than the bare fact of a conviction that does not contain a statutory element requiring proof of deceit. Furthermore, the deceitful acts can be brought out unless their prejudicial effect *substantially* outweighs their probative value under *Rule 403*; whereas at least in the case of an accused-witness, the conviction itself is only admissible if its probative value outweighs its prejudicial effect. The *Rule 609(a)(1)* balancing test is far more beneficial to the criminal defendant than is the balancing test employed under *Rules 403* and *608*.

On the other hand, if the conviction is automatically admitted under *Rule 609(a)(2)*, it makes it less likely that the underlying facts will be admitted under *Rule 608*. This is because the jury has already been informed that the witness has committed a crime involving dishonesty or false statement. Adding in the details will usually be "piling on," so that the costs of delay and prejudice are likely to substantially outweigh the minimal incremental probative value of the underlying facts in proving credibility. n23

[7] Balancing Test

As mentioned above, *Rule 609(a)(1)* provides a special balancing test when the criminal defendant is the witness. The prosecution must show that the probative value of the conviction outweighs the prejudicial effect that the accused will suffer when the jury hears about the conviction. This is more protective of defendants than the *Rule 403* test, under which the prejudicial effect must substantially outweigh the probative value for the evidence to be excluded. As a practical matter this means that a defendant's convictions stand a chance of exclusion when: (1) they are similar to the crime with which the defendant is charged; (2) they are particularly inflammatory; or (3) the defendant has been impeached in other ways, such as with inconsistent statements or with convictions that are automatically admitted under *Rule 609(a)(2)*. n24

In the Editorial Explanatory Comment to *Rule 608*, *§ 608.02[4]*, we provide a nonexclusive list of factors that the Trial Court should take into account when assessing the probative value and prejudicial effect of a bad act offered to impeach a witness' character for veracity. These factors are equally applicable to the probative value-prejudice balance mandated for convictions under *Rule 609(a)(1)*. As with impeachment under *Rule 608*, it is important to note that the prejudice that the Trial Court is to take into account is not the "prejudice" that the witness may suffer in terms of humiliation (though that factor may be considered by the Trial Court exercising its powers under *Rule 611*). The Trial Court operating under *Rule 609* must consider the prejudice suffered by the party whose testimony the witness favors. It is also important to remember that the probative value of impeachment evidence increases as the witness' credibility

becomes more important in the case. n25

[8] Determination on the Record

Most Appellate Courts have urged Trial Judges to hold a hearing before making a *Rule 609* ruling, and to make findings on the record. n26 Requiring a hearing with on-the-record findings is most desirable because it assures careful consideration by the Trial Judge and expedites appellate review. If the conviction falls under *Rule 609(a)(1)*, the Trial Court should provide some statement concerning the factors it used in the balancing process.

The Advisory Committee on the Federal Rules of Evidence has considered the following language as a possible amendment to *Rule 609*, to provide some structure for Trial Courts to employ under this complex Rule:

> The court shall articulate on the record the factors considered in making its determination of admissibility of evidence offered under either subdivision (a)(1) or subdivision (b) of this rule. The court may consider such factors, among others, as (i) the degree to which a conviction of the crime is indicative of veracity; (ii) the point in time of the conviction and the witness' subsequent history; (iii) the similarity between the conviction offered for impeachment and the charged crime if the witness is either a defendant in a criminal case or a witness who would be associated with the criminal defendant; (iv) the importance of the witness' testimony; (v) the importance of credibility to the outcome of the action; (vi) other evidence offered or to be offered by the party to impeach the witness; and (vii) whether the witness testified in the case in which he or she was convicted. If a conviction is admitted at trial under this Rule, the court must, upon request, instruct the jury on the specific purpose for which the evidence can be used, and expressly advise the jury that the evidence cannot be used as proof of criminal disposition.

The Advisory Committee ultimately decided against proposing the amendment, on the ground that it simply codified what Courts were generally doing under the Rule already. But the proposed language is, we believe, a helpful guideline for Trial Judges to employ. The factors set forth in the proposed amendment are the factors that are often discussed by the Courts. n27

[9] Limiting Instructions

A limiting instruction is critical in helping the jury to understand the difference between impeachment and substantive evidence, and it is instrumental in controlling, at least to some extent, the prejudice that will be suffered by the party associated with the witness impeached with a prior conviction.

The Federal Judicial Center has suggested the following limiting instruction when the criminal defendant is impeached with a prior conviction:

> You have been told that the defendant was found guilty in [year] of [e.g., bank robbery]. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, how much you will believe of his testimony in this trial. The fact that the defendant was found guilty of another crime does not mean that he committed this crime, and you must not use his guilt for the crime of [bank robbery] as proof of the crime charged in this case. You may find him guilty of this crime only if the government has proved beyond a reasonable doubt that he committed it. n28

The FJC suggests that the following instruction be given whenever a witness other than the accused is impeached with a prior conviction:

> You have heard that the witness,_____, was convicted in [year] of [e.g., armed robbery]. This conviction has been brought to your attention only because you may wish to consider it when you decide, as with any witness, whether you believe his testimony. n29

[10] Old Convictions

Rule 609(b) provides a time limit on the rules set forth in *Rule 609(a)*. Evidence of a prior conviction is generally not admissible for purposes of impeachment if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from confinement, whichever is the later date. For example, if a witness was convicted of robbery in 1994 and was confined for two years for the offense, *Rule 609(a)* would govern impeachment with the prior conviction until 2006. After 2006, the more exclusionary balancing test of *Rule 609(b)* takes over.

The House would have precluded the use of any conviction over ten years old, while the Senate favored use of such a conviction if the Court determines in the interests of justice that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. The Senate's preference was written into the final Rule with a provision that a party must give notice of an intention to introduce a conviction falling outside the ten-year period. The Conferees anticipated that the notice would be in writing and would specify the date, nature, and place of conviction. n30 Notice provides some assurance that both sides are prepared to argue about the appropriate balance between probative value and prejudicial effect.

Besides the notice requirement, *Rule 609(b)* differs from *Rule 609(a)* in three respects:

(1) There is no distinction made between crimes that involve dishonesty or false statement and those that do not. But of course a perjury conviction, though dated, is logically more probative of the witness' current veracity than is a stale assault conviction. So crimes involving dishonesty or false statement are far more likely to survive the *Rule 609(b)* balancing test. n31

(2) There is no difference in treatment between criminal defendants and other witnesses. All old convictions of all witnesses are subject to the same balancing test.

(3) The balancing test, unlike the tests provided in *Rule 609(a)(1)*, contains a strong presumption that old convictions should be excluded. The proponent must show that the probative value of the conviction substantially outweighs the prejudicial effect. This is a "reverse 403" test.

As a practical matter, the exclusionary presumption of the *Rule 609(b)* test means that an old conviction should almost always be excluded, and this is especially so if one of the following circumstances exist: (1) the witness has already been impeached with other evidence; (2) the old conviction is highly inflammatory; or (3) the conviction is that of a party or an affiliate of a party and it bears a similarity to the subject matter of the action. n32

[11] Relationship to Contradiction

The special rules set forth in *Rule 609* are applicable only if the proponent is attempting to use prior convictions to impeach the witness' character for truthtelling. If there is another purpose for introducing the conviction, then *Rule 609* poses no bar, and the Trial Court should admit the conviction subject to the balancing test of *Rule 403*. For example, in *United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* , the defendant in a drug case testified to his innocence and implied that he had never been in contact with drugs. On cross-examination the government asked the defendant whether he had ever personally seen marijuana. He answered that he had not. The prosecution then offered in rebuttal, and the Trial Court admitted, the defendant's 15-year-old conviction for possession of marijuana. The jury was given a limiting instruction. The Court of Appeals held that the government's questioning as to the defendant's knowledge of marijuana was permissible and did not go beyond the scope of direct examination. The Court also held that *Rule 609* did not apply because that Rule has nothing to say about "the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue." The Court reasoned that the admissibility of the remote conviction should be determined under *Rule 403*, rather than under the more exclusionary balancing test of *Rule 609(b)*. It found that *Rule 403* provided valid grounds to admit Lopez's prior conviction: since the defendant had brought up his unfamiliarity with

drugs on his own, the prejudicial effect of the old conviction did not substantially outweigh the probative value. n33

[12] *In Limine* Rulings

The Supreme Court established in *Luce v. United States, 469 U.S. 38 (1984)* , that Courts of Appeals cannot review Trial Judges' *in limine* rulings that indicate the extent to which defendants (and presumably other witnesses) may be impeached if they testify, unless the defendants (or other witnesses) testify and actually are impeached. The decision is discussed in the Editorial Explanatory Comment to *Rule 103*, *§ 103.02[13]*, as are the cases that have extended *Luce* to comparable situations. In many cases, Trial Judges will want to give defendants the benefit of knowing the scope of impeachment they face if they testify. The decision to take the stand is of critical importance in most criminal cases, and if it is possible for the Trial Judge to rule on impeachment prior to a defendant's making the decision, the defendant may be able to make a more informed choice. Now that Trial Judges know that defendants cannot appeal *in limine* rulings without testifying, they can make advance rulings without worrying that defendants may have no intention of testifying and may be trying to create hypothetical issues for appellate purposes in the event of a conviction.

In limine rulings need not necessarily be made at the outset of trial. The Court might want to see how much the defense impeaches government witnesses, and how important the credibility questions are, before deciding on the scope of impeachment of the defendant and other defense witnesses. If the Court chooses not to rule prior to trial, it might be more willing to make an advance ruling at the conclusion of the government's case. The Court may request an offer of proof prior to ruling and make any ruling conditional on the accuracy of the offer.

Motions *in limine* should not only assist the defendant in making an informed decision on whether to testify, but they should also provide the government and the Court with advantages. If the government is aware prior to the defendant's testimony of the permissible scope of impeachment, it will be able to plan its cross-examination and, if some prior convictions are excluded, decide what other evidence it wishes to offer or to emphasize during cross-examination. Thus, the government may actually benefit from knowing the scope of impeachment.

The advantage to the Trial Judge of an *in limine* ruling is that there is time to consider the delicate balancing required by *Rule 609(a)(1)* or *609(b)*, where those Rules are applicable. Also, a motion *in limine* gives the Judge advance notice of the need for a ruling and time to prepare a statement of reasons for the record.

[13] Pardons and Annulments

Rule 609(c) provides that a conviction that has been the subject of a pardon, annulment, or any other equivalent procedure based on a finding that the person convicted has been rehabilitated cannot be used for impeachment as long as the witness has not been convicted of a subsequent crime that is punishable by death or imprisonment in excess of one year. The theory of this Rule is that someone who has been rehabilitated should no longer be subject to impeachment by a conviction that took place prior to the rehabilitation. Once a subsequent serious crime is committed, however, the notion of rehabilitation disappears.

If the pardon, or the other equivalent procedure, is based on a finding of innocence, the conviction may not be used for impeachment purposes irrespective of the subsequent criminal record of the witness. Conversely, a pardon or annulment that is not based on a finding of rehabilitation leaves the conviction intact for impeachment purposes.

[14] Juvenile Adjudications

At common law, evidence of juvenile adjudications is generally not admissible. *Rule 609(d)* departs from the common-law tradition slightly. It provides that evidence of juvenile adjudications is generally not admissible, but permits the Judge in a criminal case to admit evidence of a juvenile adjudication of any witness other than an accused, if the adjudication involves the kind of offense that would be admissible as a prior conviction to attack the credibility of

an adult and if the Court is satisfied that the evidence is necessary for a fair determination of the issue of guilt or innocence. n34

Rule 609(d) is based in part on a belief that several Supreme Court decisions providing juveniles with certain procedural due process protections ensure greater reliability in juvenile adjudications than previously, when these adjudications were not considered reliable enough to be used. The Rule also recognizes the policy of the juvenile Courts to do everything reasonably possible to ensure that a juvenile adjudication at an early age will not stigmatize the juvenile any more than is necessary. Weighing the relative accuracy of juvenile adjudications against the policy of juvenile law, *Rule 609(d)* provides that juvenile adjudications should be excluded unless they are necessary. It also assures that no criminal defendants will suffer because of their own juvenile adjudications.

[15] Pending Appeals

The fact that a conviction is being appealed does not prohibit its introduction into evidence. Subdivision (e) so states. The pendency of the appeal, is, however, a circumstance that may be introduced to qualify the probative value of the evidence. Presumably, the qualification value of the pendency of an appeal will be dependent on the grounds for appeal. If, for example, the appeal is based on a *Fourth Amendment* violation, it should not at all limit the impeachment power of the conviction -- the *Fourth Amendment* has nothing to do with the witness' innocence of the crime for which he was convicted. If, on the other hand, the appeal is for insufficient evidence or ineffective assistance of counsel, it would appear to have more probative value in rebutting the impeachment power of the conviction.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Kiendra, 663 F.2d 349 (1st Cir. 1981)* (convictions for crimes of dishonesty are automatically admissible because *Rule 609(a)(2)* provides that they "shall" be admitted; the Trial Judge has no discretion to exclude such convictions).

(n2)Footnote 2. See, e.g., *United States v. Wiman, 77 F.3d 981 (7th Cir. 1996)* (a misdemeanor conviction for driving under the influence of alcohol is not admissible under *Rule 609(a)(2)* because it does not involve dishonesty or false statements, and it is not admissible under *Rule 609(a)(1)* because it is not a felony).

(n3)Footnote 3. See *United States v. Tse, 375 F.3d 148 (1st Cir. 2004)* , for an extensive discussion of the different balancing tests in *Rule 609(a)(1)*.

(n4)Footnote 4. See *Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989)* (noting that the pre-amendment rule could not be applied as written, because it provided for automatic admissibility of all crimes of plaintiffs and their witnesses, but provided for possible exclusion of crimes of civil defendants and their witnesses pursuant to judicial balancing; there was no rational basis for this distinction in civil cases).

(n5)Footnote 5. See *Rule 609* Advisory Comm. Note to 1990 Amendment. See also *Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989)* (Trial Court has no discretion to exclude convictions falling within *Rule 609(a)(2)*).

(n6)Footnote 6. See, e.g., *United States v. Tracy, 36 F.3d 187 (1st Cir. 1994)* (conviction for uttering a false prescription is automatically admissible to impeach a witness under *Rule 609(a)(2)*); *United States v. Noble, 754 F.2d 1324 (7th Cir. 1985)* (counterfeiting conviction is automatically admissible under *Rule 609(a)(2)*); *United States v. Hans, 738 F.2d 88 (3d Cir. 1984)* (conviction for knowingly transporting forged securities is automatically admissible to impeach the witness).

(n7)Footnote 7. *United States v. Cameron, 814 F.2d 403, 407 (7th Cir. 1987)* .

(n8)Footnote 8. *United States v. Johnson, 388 F.3d 96 (3d Cir. 2004)* (conviction for purse snatching was improperly admitted under *Rule 609(a)(2)*).

(n9)Footnote 9. *Walker v. Horn, 385 F.3d 321 (3d Cir. 2004)* (robbery convictions improperly admitted under *Rule 609(a)(2)* as they did not involve "communicative or expressive dishonesty").

(n10)Footnote 10. (Emphasis added.) The *Brackeen* Court noted that the majority of Circuits have held that theft and robbery crimes are not per se admitted under *Rule 609(a)(2)*. See, e.g., *United States v. Foster, 227 F.3d 1096 (9th Cir. 2000)* (crime of receiving stolen property does not involved dishonesty or false statement within the meaning of *Rule 609(a)(2)* because it "can be accomplished without any misrepresention or deceit on the part of either the giver or the receiver"); *United States v. Seamster, 568 F.2d 188 (10th Cir. 1978)* (*Rule 609(a)(2)* covers only those convictions "involving some element of deceit, untruthfulness or falsification which would tend to show that a witness would be likely to testify untruthfully"); *Coursey v. Broadhurst, 888 F.2d 338 (5th Cir. 1989)* (a cattle theft conviction is not automatically admissible); *United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982)* (robbery and purse snatching are not automatically dishonesty crimes); *United States v. Ashley, 569 F.2d 975 (5th Cir. 1978)* (conviction for shoplifting does not involve dishonesty within the meaning of *Rule 609(a)(2)*); *United States v. Scisney, 885 F.2d 325 (6th Cir. 1989)* (same). But see *United States v. Brown, 603 F.2d 1022 (1st Cir. 1979)* (burglary and petit larceny are automatically admitted under *Rule 609(a)(2)*).

(n11)Footnote 11. See, e.g., *United States v. Bagley, 772 F.2d 482 (9th Cir. 1985)* (the defendant's prior bank robbery convictions could not be admitted under *Rule 609(a)(1)* in a bank robbery prosecution; the government had little need for the impeachment evidence, because it had two forgery convictions available for impeachment use); *United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975)* (the defendant's prior assault conviction was held inadmissible to impeach him in a bank robbery prosecution).

(n12)Footnote 12. See also the discussion by Judge Posner in *Altobello v. Borden Confectionary Prods., Inc., 872 F.2d 215 (7th Cir. 1989)* , in which he concludes that *Rule 609(a)(2)* must be construed narrowly to avoid swallowing *Rule 609(a)(1)* and its balancing test.

(n13)Footnote 13. See also *United States v. Cameron, 814 F.2d 403 (7th Cir. 1987)* , where the Court, construing *Rule 609(a)(2)* narrowly, held that a conviction for carrying a switchblade was not automatically admissible. The defendant, who wished to impeach a prosecution witness, argued that carrying a switchblade was a crime involving dishonesty because a switchblade is made so as not to appear to be a weapon though in fact it is. The Court rejected this argument on the ground that the only element of the crime was actual possession; thus the prosecution did not have to prove that the witness had an intent to deceive when he carried the switchblade.

(n14)Footnote 14. See also *United States v. Wilson, 985 F.2d 348 (7th Cir. 1993)* (placing questionable reliance on cases holding that prior convictions for filing *false* tax returns are automatically admissible).

(n15)Footnote 15. The Supreme Court granted certiorari in *Cree* to resolve this conflict in the federal cases, but then, almost immediately, certiorari was dismissed. See *506 U.S. 1017 (1992)* . See also *United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993)* (conviction for illegal acquisition of food stamps was not automatically admissible under *Rule 609(a)(2)*; that Rule should be narrowly construed, to apply only to those crimes "characterized by an element of deceit or deliberate interference with the truth"; the Court concluded that the crime of illegal acquisition of food stamps does not include an element of untruthfulness, though it noted that a different question may have been presented had the defendant been convicted of unlawful *negotiation* of food stamps).

(n16)Footnote 16. See also *United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991)* (misdemeanor theft conviction is not automatically admissible under *Rule 609(a)(2)*, and not admissible under the terms of *Rule 609(a)(1)*).

(n17)Footnote 17. A broad view of *Rule 609(a)(2)* would cover drug crimes, but consistently with our view, most Courts have held that drug crimes do not on their face involve dishonesty or false statement within the meaning of the Rule. See, e.g., *United States v. Begay, 144 F.3d 1336 (10th Cir. 1998)* (drug convictions evaluated under *Rule 609(a)(1)*); *Gust v. Jones, 162 F.3d 587 (10th Cir. 1998)* (conviction for drug smuggling was not admissible under *Rule*

609(a)(2) because that crime did not "per se, involve dishonesty or false statement").

(n18)Footnote 18. *United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978)* .

(n19)Footnote 19. See, e.g., *United States v. Foster, 227 F.3d 1096 (9th Cir. 2000)* (conviction for receipt of stolen property is not admitted automatically under *Rule 609(a)(2)* because the crime can be accomplished without any misrepresentation or deceit; however, the conviction can be admitted under *Rule 609(a)(2)* if the Trial Court finds that the crime "was actually committed by fraudulent or deceitful means"); *United States v. Dunson, 142 F.3d 1213 (10th Cir. 1998)* (shoplifting conviction is not the type of crime that is automatically admitted under *Rule 609(a)(2)*; however, the Trial Judge can, upon request, go behind the elements of the crime to determine whether the particular conviction rested on facts establishing dishonesty or false statement); *United States v. Yeo, 739 F.2d 385 (8th Cir. 1984)* (the proponent has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit); *United States v. Whitman, 665 F.2d 313 (10th Cir. 1981)* (larceny offense that was actually committed by fraudulent or deceitful means is automatically admitted under *Rule 609(a)(2)*).

(n20)Footnote 20. See *United States v. Albers, 93 F.3d 1469 (10th Cir. 1996)* (the Trial Judge erred in permitting the prosecutor to bring out the underlying facts of a prior conviction for grand theft: "The defendant was entitled to the protection of the rule that only the prior conviction, its general nature, and punishment of felony range were fair game for testing the defendant's credibility"); *United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989)* (the underlying factual details of a conviction cannot be inquired into on cross-examination); *Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987)* (when the witness was impeached with a rape conviction, it was error to inquire where a prior rape occurred); *United States v. Beckett, 706 F.2d 519 (5th Cir. 1983)* (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983)* (impeachment with a prior conviction is limited to the recitation of the conviction itself).

(n21)Footnote 21. *Gora v. Costa, 971 F.2d 1325, 1330 (7th Cir. 1992)* ("it is error to elicit any further information for impeachment purposes").

(n22)Footnote 22. See, e.g., *United States v. Hurst, 951 F.2d 1490 (6th Cir. 1991)* (details of a conviction to which the defendant entered a guilty plea were not admissible under *Rule 609*, but they were the proper subject of inquiry under *Rules 403* and *608* where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

It is also possible that the details underlying a conviction may be admissible to rebut the witness' attempt to explain away the conviction. See, e.g., *United States v. Valencia, 61 F.3d 616 (8th Cir. 1995)* (it was permissible to cross-examine on the details of a conviction where the defendant, on direct examination, attempted to minimize his guilt as to that conviction). The *Valencia* Court concluded that the government properly cross-examined the defendant in order to clarify the facts as to the prior conviction and thereby impeach his direct testimony. See also *United States v. Perry, 857 F.2d 1346 (9th Cir. 1988)* (the defendant opened the door to an inquiry into details of a prior misdemeanor convictions for embezzlement and false pretenses by attempting to explain them away and offering his own version of the underlying facts).

(n23)Footnote 23. See, e.g., *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)* : The plaintiff's expert witness was impeached with a prior conviction for embezzlement. The Court found no abuse of discretion in excluding evidence of the amount of money the witness embezzled and the fact that the conviction resulted from a longstanding scheme. The amount of money embezzled and the length of the scheme carry probative value independent of the conviction itself, because a "juror could rationally conclude that one who embezzles a million dollars from the Government over a long period of time has a worse character for veracity than a person who steals five dollars once." However, there was no error in excluding these details because the chief probative force of the conviction was that the witness committed crimes of dishonesty, and this evidence came out during trial: "Filling in the details surrounding these crimes would

doubtless have taken a fair bit of trial time, and would have been cumulative insofar as doing so would only result in proving the same points--i.e., that [the witness] has a character for being untruthful and his expert opinions should not be believed.."

(n24)Footnote 24. See, e.g., *United States v. Sanders, 964 F.2d 295 (4th Cir. 1992)* (error in an assault prosecution to impeach the defendant with his prior conviction for assault).

(n25)Footnote 25. See, e.g., *United States v. Causey, 9 F.3d 1341 (7th Cir. 1993)* (admitting the defendant's prior conviction for a similar offense was not error, where the defendant's credibility was critical to the jury's determination).

(n26)Footnote 26. See, e.g., *United States v. Preston, 608 F.2d 626 (5th Cir. 1979)* (remanding in the absence of an on-the-record determination); *United States v. Moore, 917 F.2d 215 (6th Cir. 1990)* (Trial Court should hold a hearing to determine the admissibility of prior convictions offered under *Rule 609(a)(1)*, and should make an explicit finding as to whether the probative value outweighs the prejudicial effect).

(n27)Footnote 27. See generally *United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983)* , and *United States v. Givens, 767 F.2d 574 (9th Cir. 1985)* , for excellent discussions of these factors. See also *United States v. Toney, 27 F.3d 1245 (7th Cir. 1994)* (considering the similarity between the prior conviction and the crime charged).

(n28)Footnote 28. Federal Judicial Center, Pattern Criminal Jury Instruction 41 (1987).

(n29)Footnote 29. Federal Judicial Center Pattern Criminal Jury Instruction 30 (1987). See also *United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993)* (error to introduce a prior conviction of the defendant's brother, who testified for the defendant, where the Trial Court failed to instruct the jury that it was to be considered only to impeach the brother).

(n30)Footnote 30. See, e.g., *United States v. Colletti, 984 F.2d 1339 (3d Cir. 1992)* (conviction more than 20 years old; Trial Court did not err in excluding it where the defendants failed to give advance notice to the prosecution). Compare *United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992)* (the pretrial notice requirement was excused where the Trial Court offered the defendant a continuance, and the defendant declined).

(n31)Footnote 31. See, e.g., *United States v. Payton, 159 F.3d 49 (2d Cir. 1998)* (no abuse of discretion in admitting 13-year-old convictions for false statement and larceny; the witness' testimony was "critical" and the impeachment value of the convictions was "substantial").

(n32)Footnote 32. See, e.g., *United States v. Privett, 68 F.3d 101 (5th Cir. 1995)* (in a felon-firearm case, the Trial Judge erred (harmlessly) in admitting evidence of four felony convictions of the defendant, each of which was more than ten years old; the defendant's prior convictions for burglary, theft, escape, and aggravated robbery did little to rebut the direct examination, and erroneously demonstrated a criminal predisposition; their probative value as to credibility did not substantially outweigh the risk of prejudice to the defendant); *United States v. Hamilton, 48 F.3d 149 (5th Cir. 1995)* (a prosecution witness' old convictions for armed robbery and theft by check were properly excluded: "[t]he general rule is inadmissibility" for convictions offered under *Rule 609(b)*).

(n33)Footnote 33. See also *United States v. Norton, 26 F.3d 240 (1st Cir. 1994)* (in a felon-firearm prosecution, the Trial Court properly allowed the government to introduce the defendant's prior firearm conviction; the defendant had testified on direct that he had never possessed a gun in his life, so the prior conviction provided proper contradiction).

(n34)Footnote 34. The evidence is admissible only in a criminal case. "The trial court has no discretion to admit such evidence in a civil proceeding." *Powell v. Levit, 640 F.2d 239 (9th Cir. 1981)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 609 RULE 609

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609.03 Annotated Cases

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[1] Rule609(a) -- General Rule

[a] Rule 609(a) -- Arrests

United States v. Wilson, 244 F.3d 1208 (10th Cir. 2001) : Although the Court affirmed cocaine-related convictions, it found that it was error (but harmless) to permit cross-examination of one defendant about his past drug-related arrests. Questions about arrests do not qualify under *Rule 609*; "*Rule 609* was enacted to curb the potentially prejudicial use of conviction evidence, and arrests receive more protection than convictions."

[b] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect

[i] Rule 609(a) -- Accused-Witness

[A] Rule 609(a) -- Error To Admit

United States v. Sanders, 964 F.2d 295 (4th Cir. 1992) : Reversing a conviction for assault with a dangerous weapon in a prison, the Court held it was error to admit evidence of the defendant's prior convictions for inmate assault and contraband possession. Even had there been an explicit balancing inquiry before admitting the evidence, it would have been inadmissible under the Rule because of the high likelihood of prejudice that accompanies the admission of such similar prior convictions.

United States v. Martinez, 555 F.2d 1273 (5th Cir. 1977) : The Court reversed a conviction for conspiracy to distribute cocaine on the ground that the defendant was improperly impeached with evidence of an aiding and abetting conviction arising out of the same narcotics transaction. The prior conviction was of little value in assessing the credibility of a defendant who had his first brush with the law in connection with the disputed transaction, and, said the Court, "we can hardly conceive of a more prejudicial prior conviction."

United States v. Bagley, 772 F.2d 482 (9th Cir. 1985) : The Court found an abuse of discretion, although it was harmless, in the admission of a defendant's prior robbery convictions in a bank robbery prosecution. The Court noted that the defendant had not sought to misrepresent his character and stated that "[t]o allow evidence of a prior conviction for the very crime for which a defendant is on trial may be devastating in its potential impact on a jury." Also, the government had little need for this particular evidence, since it had two forgery convictions available for impeachment use. In *United States v. Larsen*, n1 the Court observed that it was plain (but not reversible) error to permit the government to use two child molesting convictions to impeach a defendant charged with uttering counterfeit bills, since they were of minimal value with respect to credibility.

[B] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Factors To Be Considered

United States v. Brito, 427 F.3d 53 (1st Cir. 2005) : In a prosecution for possession of a firearm by an illegal alien, the Court found no error when the defendant was impeached with three drug-trafficking convictions. The Court noted that prior drug-trafficking crimes "are generally viewed as having some bearing on veracity." The convictions were not very prejudicial because the offenses underlying the convictions were not similar to the offense charged. And because "the jury had to decide whether to believe the appellant or the police officers[, t]he salience of the credibility issue weighs in favor of admitting the convictions."

United States v. Hawley, 554 F.2d 50 (2d Cir. 1977) : The defendant in a bank robbery trial was impeached with evidence that he had been convicted of another offense committed subsequently. Affirming, the Court said the Trial Judge had properly exercised his discretion in this bench trial. Among the factors the Court emphasized should be considered in ruling on a *Rule 609* balancing question are: the nature of the crime, the time of conviction, the similarity between the past crime and charged crime, and the importance of the testimony of the witness and the centrality of the credibility issue.

United States v. Givens, 767 F.2d 574 (9th Cir. 1985) : The Court identified the five factors that must be balanced under *Rule 609(a)(1)* as: the impeachment value of the prior crime; the point in time of the conviction and the witness' subsequent history; the similarity between the past crime and the current charge; the importance of the defendant's testimony; and the centrality of the credibility issue. It upheld the admission of prior convictions for robbery, attempted robbery, and assault with a deadly weapon on a police officer in this prosecution for armed postal robbery.

[C] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Miscellaneous Cases

United States v. Lattner, 385 F.3d 947 (6th Cir. 2004) : Affirming a cocaine conviction, the Court found no abuse of discretion when the defendant's two prior felony drug convictions were admitted to impeach him. The probative value of the convictions was high because credibility was crucial, and the prejudicial effect was minimal in light of the introduction under *Rule 404(b)* of the defendant's prior involvement in drug transactions.

United States v. Gant, 396 F.3d 906 (7th Cir. 2005) : In a felon firearm possession trial, three government witnesses testified that the defendant had a gun and used it to strike his daughter and her boyfriend. The defendant conceded striking the two but claimed that he had a lead pipe rather than a gun. The Court held that evidence that the defendant had been convicted for possession of a controlled substance with intent to distribute had been properly

admitted to impeach, reasoning that the defendant's credibility was important. We question the reasoning. Since the charge was that the defendant was a convicted felon in possession of a gun, the jury already knew that the defendant had a record. Moreover, the conviction was not very probative of the defendant's credibility, because the crime was not necessarily one in which veracity was involved. At the same time, the ruling might have prejudiced the defendant in view of the frequent connection between drugs and guns. It also must be remembered that the balancing test of *Rule 609(a)(1)* favors defendants: the probative value as to credibility must outweigh the prejudice to the defendant. In *United States v. Montgomery, 390 F.3d 1013 (7th Cir. 2004)* , the Court affirmed a conviction for felon firearm possession and upheld the admission for impeachment of the defendant's prior felony convictions for drug crimes, obstruction of justice, aggravated sexual abuse, and failure to register as a sex offender. The Trial Judge engaged in a careful balancing test, as articulated in *United States v. Mahone*, 537 F.22d 922 (7th Cir. 1976), and had properly concluded that the importance of the defendant's testimony and the centrality of his credibility were factors that turned the balancing toward admission of the evidence.

[D] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Prior Convictions in the Same Case

United States v. Joost, 133 F.3d 125 (1st Cir. 1998) : The defendant was convicted under the Hobbs Act for conspiracy to rob an armored truck and for felon firearm possession in the same incident, but the firearms conviction was reversed for failure to give an entrapment charge. His motion *in limine* to exclude evidence of the Hobbs Act conviction on retrial of the firearms charge was denied, and the objection was not renewed at trial. The Court held that error was not preserved, but in any event there was no abuse of discretion in the finding that the probative value of the conviction for impeachment purposes was not substantially outweighed by its potentially prejudicial effect.

United States v. Martinez, 555 F.2d 1273 (5th Cir. 1977) : The Court reversed a conviction for conspiracy to distribute cocaine on the ground that the defendant was improperly impeached with evidence of an aiding and abetting conviction arising out of the same narcotics transaction. The prior conviction was of little value in assessing the credibility of a defendant who had his first brush with the law in connection with the disputed transaction, and, said the Court, "we can hardly conceive of a more prejudicial prior conviction."

United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) : The defendant had been convicted on some counts of an indictment and a mistrial declared as to other counts. The Court held that it was proper for the government to use the convictions to impeach the defendant when he testified at the retrial of the latter counts.

United States v. Moore, 735 F.2d 289 (8th Cir. 1984) : In a prosecution for illegal firearms possession by a felon, the Court upheld impeachment of the defendant with convictions for drug offenses in connection with charged incident.

[E] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Procedure

United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983) (en banc): Affirming a heroin distribution conviction, the Court wrote that "(1) all convictions that meet the *Rule 609(a)(1)* threshold are at least somewhat probative of credibility; (2) the trial court has discretion to decide how much background information, if any, it needs to perform *Rule 609(a)(1)*'s balance of probativeness against prejudice to the defendant." It found no abuse of discretion in the Trial Judge's rulings that he did not need to hear background information concerning an eight-year-old robbery conviction in order to determine admissibility and that the defendant could be impeached with the conviction.

United States v. Moore, 917 F.2d 215 (6th Cir. 1990) : The Court affirmed armed robbery convictions, holding that a defendant-witness was properly impeached with a 1979 armed robbery conviction. When the government advised that it wished to use several prior convictions, the Trial Judge held a hearing outside the jury's presence and made a specific finding that the probative value on the witness' credibility of only the 1979 conviction outweighed any prejudicial effect.

[F] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Similarity Between Convictions and Crimes Charged

United States v. Tracy, 36 F.3d 187 (1st Cir. 1994) : In a prosecution for felon firearm possession, which resulted from the defendant's armed robbery of a grocery store, the Court found no abuse of discretion in the admission of convictions for assault and stolen firearms to impeach the defendant. Since the defendant pleaded not guilty by reason of insanity, a central issue was whether he could appreciate the wrongfulness of his conduct, and the prior convictions were relevant to show "that Tracy had reason to know that his conduct was improper." In *United States v. Beltran*, n2 the Court upheld marijuana convictions, finding no error in the refusal to permit one defendant to impeach other defendants with evidence of prior drug-smuggling convictions. In *United States v. George*, n3 the Court upheld the admission of a prior conviction for a similar crime that was used to impeach the defendant in a drug prosecution.

United States v. Sanders, 964 F.2d 295 (4th Cir. 1992) : Reversing a conviction for assault with a dangerous weapon in a prison, the Court held it was error to admit evidence of the defendant's prior convictions for inmate assault and contraband possession. Even had there been an explicit balancing inquiry before admitting the evidence, it would have been inadmissible under the Rule because of the high likelihood of prejudice that accompanies the admission of such similar prior convictions. Compare *United States v. Wilson* n4(a rape defendant was properly impeached with a German rape conviction).

United States v. Shaw, 701 F.2d 367 (5th Cir. 1983) : Upholding convictions for murder and other crimes, the Court found no error when the defendant was impeached with prior convictions for rape and assault with intent to rape. The Trial Judge had ruled before trial that the jury could be told that the defendant had been convicted of a crime punishable by more than a year in prison and ultimately decided that it would be less prejudicial to tell the jury the nature of the crimes than to permit speculation as to whether the prior crimes might have been murders. We question whether the prior convictions should have been used at all, since they had little to do with credibility and the heinous nature of the offenses might well have prejudiced the jury.

United States v. Hernandez, 106 F.3d 737 (7th Cir. 1997) : The Court held in a prosecution for kidnapping, which was related to a drug transaction, that there was no abuse of discretion in permitting the defendant to be impeached by a five-year-old conviction for possession of cocaine and marijuana. In *United States v. Toney, 27 F.3d 1245 (7th Cir. 1994)* , the Court held there was no abuse of discretion in permitting cross-examination of the defendant about a 1986 burglary conviction and a 1983 aggravated battery conviction in his trial for felon firearm possession. Although there was some similarity between the latter conviction and the facts surrounding the charge, there was no similarity with the burglary conviction, so the prejudice to the defendant was minimal. Furthermore, the defendant's credibility was crucial because his coercion defense to the possession charge turned on his state of mind, about which he testified.

United States v. Booker, 706 F.2d 860 (8th Cir. 1983) : The Court affirmed a conviction for felon firearm possession. The defendant offered to stipulate to a prior felony, but the Court held that the government was entitled to prove multiple felony convictions for firearms offenses as impeachment evidence under *Rule 609* when the defendant testified. Despite the Supreme Court's suggestion in *Old Chief v. United States, 519 U.S. 172 (1997)* (*see* the Editorial

Explanatory Comments, *§§ 403.02[6]-[11], 404.02[16]*), that the prosecution need not accept a stipulation unless the prior offenses are offered only to establish status, we believe that the similarity of the offenses presents a high probability that the jury would use the evidence substantively (which is impermissible under *Rule 404*) rather than just for impeachment, so it is difficult to see how the probative value of prior convictions for firearms offenses outweighs their possible prejudicial effect when the offense charged is another firearms crime. See also *United States v. Moore* n5(in a felon firearm possession case, the Court upheld impeachment of the defendant with convictions for drug offenses in connection with the charged incident). In *United States v. Levine*, n6 the Court affirmed a conviction for mail theft, finding no error in a pretrial decision to admit a 1978 conviction for possession of stolen mail and a 1975 conviction for grand larceny as impeachment evidence if the defendant chose to testify.

United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995) : The Court affirmed bank robbery convictions, holding there was no abuse of discretion in admitting evidence of a defendant's prior robbery conviction to impeach him. The Court noted that its decision in *United States v. Brackeen* n7 held only that bank robbery is not a crime of dishonesty automatically admissible to impeach under *Rule 609(a)(2)*; it did not foreclose admission of a prior robbery conviction under the balancing test of *Rule 609(a)(1)*. In this case, the balance of the five factors identified in *United States v. Givens* n8 favored admissibility, even though the similarity between the charged bank robbery and the prior residential robbery weighed in favor of exclusion. In *United States v. Wallace*, n9 the Court, after deciding to remand a heroin case on a Jencks Act issue, held that the defendant's prior heroin conviction should have been excluded. The government had evidence of a prior perjury conviction, and there was a clear risk that the heroin conviction would be misused as character evidence. In *United States v. Browne*, n10 the Court affirmed an armed bank robbery conviction, holding that the government was properly permitted to impeach the defendant with evidence of a prior bank robbery conviction. Although the similarity of the prior conviction and the crime charged "did counsel against admissibility," the Court found that "the importance of the defendant's testimony and the centrality of his credibility to the defense" justified admission of the evidence. The Court also emphasized that the timing of the two crimes (less than a year elapsed between his release from jail on the earlier conviction and the charged offense) and the defendant's testimony about his war record and character left the government with a strong need for fair impeachment.

United States v. Smith, 10 F.3d 724 (10th Cir. 1993) : The Court held there was no abuse of discretion in admitting evidence of the defendant's prior robbery and burglary convictions after he testified in a bank robbery prosecution, as the evidence was probative on the credibility of his duress defense and the jury was instructed on the limited purpose for which it was admitted. In *United States v. Short, 947 F.2d 1445 (10th Cir. 1991)* , the Trial Judge ruled *in limine* that the defendant, charged with manufacturing amphetamine, could be impeached with a prior felony conviction but that the government could not bring out that the conviction was for drug offenses. On cross-examination, the prosecutor nevertheless asked about the prior drug conviction. While not condoning the prosecutor's possible mistake in not seeking reversal or clarification of the ruling before asking the question, the Court held that refusal to grant a mistrial was harmless error in the circumstances.

United States v. Harris, 720 F.2d 1259 (11th Cir. 1983) : In a drug prosecution, the Trial Judge decided that if the defendant chose to testify, a prior conviction on drug charges would be admitted under *Rule 404(b)* to prove intent and also under *Rule 609(a)*. The Court affirmed, noting that not only would the conviction have been admissible under *Rule 404* whether or not the defendant testified, but also that the defendant vigorously used evidence of prior convictions to attack government witnesses.

[ii] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Civil Cases

[A] Rule 609(a) -- Civil Rights Cases

Abshire v. Walls, 830 F.2d 1277 (4th Cir. 1987) : Affirming a judgment for a pretrial detainee against officers who strip-searched him, the Court held evidence of the plaintiff's prior convictions was properly excluded on the ground that their probative value was substantially outweighed by the danger of unfair prejudice.

Doe v. Sullivan County, Tenn., 956 F.2d 545 (6th Cir. 1992) : In a prisoner's civil rights action, the Trial Judge admitted evidence that a defendant-witness had been convicted of a felony but precluded questioning about the number and details of the witness' convictions. Without mentioning the 1990 amendment to the Rule, the Court concluded that the plaintiff had a right to introduce the nature of the crime, the number of counts, and the date of disposition of the witness' convictions; the error was harmless, however. In *Donald v. Wilson*, n11 the Court affirmed judgments for officers sued in a civil rights case by a prisoner, holding that there was no error under *Rule 403* in admitting evidence of the plaintiff's past conviction for rape. In *Murr v. Stinson*, n12 the Court affirmed a civil rights judgment for a plaintiff who sued a sheriff, holding that the sheriff was properly impeached with cocaine convictions, since the recent convictions were more probative than prejudicial.

Gora v. Costa, 971 F.2d 1325 (7th Cir. 1992) : In a civil rights action brought against police officers, the defense brought out that one of the plaintiff-witnesses had been convicted of burglary and was currently incarcerated. The Court held that going beyond the crime charged, the date, and the disposition was ordinarily improper impeachment under the Rule, but that admitting evidence of current incarceration was not an abuse of discretion in this case because the witness and his family, in claiming damages for emotional distress, had already indicated a negative perception of the law enforcement community and this evidence was relevant to the cause of that negative perception.

Jones v. TEK Indus., Inc., 319 F.3d 355 (8th Cir. 2003) : Inmates sued for alleged religious discrimination by a private corporation that ran a manufacturing facility in the prison. Affirming a judgment for the defendant, the Court held there was no abuse of discretion when defense counsel was permitted to ask the plaintiff to state the names of the crimes of which they had been convicted. Since " 'most jurors probably do not understand the range of offense connoted by the term felony, ... [they may] need to know the specific crime in order to evaluate its effect on credibility.' " Prejudicial effect was minimized by omitting any details of the crimes and the victims and by instructions limiting use of the evidence to credibility. In an arrestee's civil rights action against police officers, *Jones v. Board of Police Comm'rs*, n13 the Court, applying *Rule 403*, found no unfair prejudice in admission of convictions for robbery, rape, and forcible sodomy in a case "in which the jury had to choose between conflicting versions of the same occurrence." In an inmate's civil rights case, *Lewis v. Sheriff's Dep't*, n14 the Court affirmed a judgment for the defendants, finding that prior convictions used to impeach the plaintiff were not unduly prejudicial. In *Jones v. Collier*, n15 the Court found that a civil rights plaintiff had waived his objection to the use of prior convictions for impeachment. It observed, however, that when prior convictions do not involve dishonesty, "the trial court must take particular care to balance the probative value of the evidence against its prejudicial effect." The Court added that when credibility is "all important, the trial court will not abuse its discretion by admitting such evidence."

[B] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Civil Cases -- Other Cases

Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) : This decision, which held there was no balancing test applicable to witnesses in civil cases (and government witnesses in criminal cases), was negated by the 1990 amendment to the Rule, which made evidence of convictions of those witnesses subject to *Rule 403*'s general balancing test (see the Editorial Explanatory Comment, *§ 609.02[2]*).

Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983) : The Court reversed a Jones Act judgment for the defendants, finding that evidence of the plaintiff's conviction for armed robbery and his prison sentence was unduly

prejudicial under *Rule 403*. The Court rejected a claim that the evidence was properly used to demonstrate inconsistencies in the plaintiff's testimony.

Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983) : In a product liability case against an airplane manufacturer, the Court held that a prior conviction was properly admitted to impeach the pilot of the aircraft in which the plaintiff passengers were riding when they were injured. Although the Judge failed to make an explicit balancing ruling, the Court found that he had examined *in limine* all relevant factors. The Court approved the manufacturer's reading to the jury a portion of the judgment of conviction, which involved several drug counts, since the pilot testified about the convictions on cross-examination in an ambiguous and incomplete manner. The Court said that admission of the judgment "near the end of Cessna's case-in-chief might not be acceptable in most cases," but it was not error in a case in which the impeached witness testified by videotape deposition and Cessna was not in a position to offer the impeachment evidence except as part of its own case.

Wilson v. Union Pac. R.R., 56 F.3d 1226 (10th Cir. 1995) : The Court held there was no error in precluding the defendant employer in a FELA case from introducing evidence of the plaintiff's prior conviction for drug possession during the liability phase of the trial, as the crime was not highly relevant to the issue of veracity and it was likely to arouse jury sentiment against the plaintiff. The Court also affirmed exclusion of the evidence during the damages phase, since admission would have resulted in a needless proliferation of collateral issues related to the cause of his termination from the job and his subsequent employability.

[iii] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Criminal Defense Witnesses

United States v. Fawley, 137 F.3d 458 (7th Cir. 1998) : The defendant was charged with perjury after he denied before a grand jury any knowledge that his employer was harboring illegal aliens. At trial the defense called the employer as a witness and elicited that he had been convicted of a felony; during cross-examination the government brought out that the employer had been convicted of harboring illegal aliens, as well as the names of the aliens (who also happened to be witnesses in the perjury trial). The Court found no abuse of discretion, since it had previously held that "when questions asked on direct examination of a witness concerning prior crimes have been perfunctory in nature, a prosecutor is entitled to amplify them," and the balancing test applicable to witnesses other than the accused calls for admission unless the probative value of the prior conviction for impeachment is substantially outweighed by the prejudicial effect. In this case, the limited amplification that was permitted and the instructions to the jury avoided substantial prejudice.

[iv] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Different Balancing Tests

United States v. Tse, 375 F.3d 148 (1st Cir. 2004) : The Court affirmed a conviction for distributing cocaine, but held it was error as a matter of law to use the same balancing test in determining the admissibility of prior convictions of the defendant and a confidential informant who was the key government witness. Both the defendant and the informant had prior convictions for assault and battery. The Court observed that the 1990 amendment to *Rule 609* created more protection for the accused than for other witnesses: "The court may exclude a prior conviction of the accused, offered for the purpose of impeachment, if the prejudicial effect of the conviction merely outweighs its probative value; the court may exclude a conviction of a government witness, offered by the accused for the purpose of impeachment, only if the danger of unfair prejudice from the conviction substantially outweighs its probative value."

[v] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Prosecution Witnesses

United States v. Gray, 410 F.3d 338 (7th Cir. 2005) : Affirming convictions for drug trafficking offenses, the Court found no abuse of discretion when the defendants were precluded from impeaching a cooperating coconspirator with evidence of a 12-year-old perjury conviction. The Court reasoned that the defendants had been permitted to impeach the witness with four serious felony convictions, and the perjury had occurred on a driver's license application rather than in testimony. Surprisingly, the Court referred to the conviction as subject to a balancing test under *Rule 609(a)*, but perjury is the classic dishonesty offense and under *Rule 609(a)(2)* is not subject to balancing. The Court also cited *Rule 609(b)*, which also has a (different) balancing test and to which dishonesty convictions are subject, but the opinion does not make clear which balancing test was being applied. In *United States v. Galati, 230 F.3d 254 (7th Cir. 2000)* , the Court found no abuse of discretion when the defendant in a bank robbery case was precluded from impeaching a witness with a drug possession conviction. The witness was a store clerk who testified she saw the defendant trying on a baseball cap identical to that worn by the perpetrator, her testimony came five years after she served her sentence of one year probation, nothing about the possession conviction actually suggested that she would be dishonest or deceitful, and the likelihood of unfair prejudice was great. In *United States v. Cavender*, n16 a prosecution for conspiring to possess and distribute cocaine base, the principal government witness testified on direct and reiterated on cross that he had not used, sold, or dealt drugs when he previously lived in Chicago. The defense was not permitted to introduce evidence that the witness had been convicted of a felony in Chicago for possession of a controlled substance. Reversing, the Court held it was error under *Rule 609(a)(1)* to exclude the evidence of the conviction. Under the applicable *Rule 403* balancing test, the evidence was highly probative in contradicting the witness' testimony and would not be cumulative or a waste of time.

United States v. Rowe, 92 F.3d 928 (9th Cir. 1996) : The Court held in a carjacking prosecution that there was no abuse of discretion in precluding the defendant from impeaching the victim with her prior conviction for theft, as the jury might improperly infer that the victim had stolen the car she was driving on the night of the carjacking. The Court had serious reservations about limiting cross-examination of the victim as to a recent drug possession conviction, but the error, if any, was harmless.

United States v. Howell, 285 F.3d 1263 (10th Cir. 2002) : The Court reversed a correctional officer's conviction for depriving inmates of civil rights, finding it was an abuse of discretion to exclude evidence of numerous prosecution witnesses' prior convictions without conducting a balancing analysis under *Rule 403*. The Judge had made a blanket ruling that only the fact and date of the witnesses' felony convictions could be admitted, but the Court noted that ordinarily evidence of the nature of a witness' felony convictions and their number should be admitted. In *United States v. Begay, 144 F.3d 1336 (10th Cir. 1998)* , the Court affirmed a conviction for robbery, finding no error when prior convictions of two prosecution witnesses were excluded. The drug conviction of one of the witnesses was not very relevant to credibility, "and is potentially prejudicial in arousing sentiment against a witness." The rape and burglary convictions of the other witness were also of minimal probative value as to credibility, especially since they were almost ten years old.

United States v. Burston, 159 F.3d 1328 (11th Cir. 1998) : The defendant in a postal and bank robbery case sought to impeach a witness with evidence of his four felony convictions -- two for theft, one for aggravated assault, and one for armed robbery. However, he was permitted to bring out only that the witness had "a felony conviction." The Court held that precluding evidence of the nature and number of the witness' convictions was an abuse of discretion, albeit harmless error. Despite the Trial Judge's apparent belief that those facts lacked probative value, the implicit assumption of *Rule 609(a)* is that prior convictions have probative value, and that probative value is likely to vary depending on the number and type of convictions. And here there was no finding, or basis for a finding, that the evidence would have created a substantial danger of prejudice, confusion, or delay.

[vi] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Statement of Reasons

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977) : Affirming a firearms conviction, the Court indicated that the Trial Judge's statement of reasons for his ruling balancing prejudicial effect and probative value aided appellate review.

United States v. Gray, 852 F.2d 136 (4th Cir. 1988) : The Court affirmed convictions for extortion and related crimes, observing that, although the Trial Judge might have offered a more detailed analysis to support the introduction of a prior conviction to impeach the defendant, the defendant did not object to the explanation given, so the Judge was not on notice that the defendant desired a more detailed finding.

United States v. Turner, 960 F.2d 461 (5th Cir. 1992) : The Court held there was no abuse of discretion when convictions for sexual abuse, burglary, and weapons possession were admitted in the defendant's trial for threatening Judges. The Trial Judge made a finding on the record concluding that the prejudice of the convictions did not outweigh their probative value and gave explicit limiting instructions restricting the convictions to impeachment and distinguishing the evidence from substantive evidence of guilt. In *United States v. Preston*, n17 the Court strongly suggested that Trial Judges give reasons for rulings under *Rule 609(a)(1)* following a hearing on the record.

United States v. Alvarez, 833 F.2d 724 (7th Cir. 1987) : The Court reiterated the utility of explicit balancing, but found no error in the admission without specific findings of evidence to impeach a defendant. In *United States v. Mahone*, n18 the Court affirmed a conviction for possession of a sawed-off shotgun, finding no error in a ruling that the defendant could be impeached with a prior conviction for robbery if he chose to testify. The Court urged Trial Judges to make explicit findings that the prejudicial effect of *Rule 609* evidence to the defendant will be outweighed by its probative value after a hearing on the record.

United States v. Walker, 817 F.2d 461 (8th Cir. 1987) : Affirming an assault conviction, the Court indicated that the Trial Judge's statement of reasons for admitting a prior conviction -- in this case for arson -- can be of great utility on appeal. It concluded, however, that if the failure to make such a statement was error, the error was harmless. In *United States v. Key*, n19 the Court affirmed a kidnapping conviction, finding no error in a ruling that the defendant's prior convictions for aiding and abetting forgery, second-degree burglary, and escape could be admitted for impeachment. The Court observed that the Trial Judge did not indicate on the record, as it preferred, that he had balanced the prejudicial effects of the convictions against their probative value, but it presumed that he must have done the balancing when he made his ruling immediately after a bench conference in which counsel for both sides argued about probative value and prejudicial effect.

United States v. Love, 746 F.2d 477 (9th Cir. 1984) : The Court affirmed an aggravated robbery conviction, finding no error in the admission of a prior robbery conviction to impeach the defendant. Although the Court noted that there was ambiguity about the reasons for admission of the conviction and that the Trial Judge made no finding in support of admission, it stated that there is no requirement of findings and found that any error was harmless. See also *United States v. McCollum* n20(the panel noted that the Court has not definitively held that Trial Judge must state reasons for admitting a conviction under *Rule 609(a)(1)*; one Judge opined that they should be required to do so); *United States v. Portillo* n21(affirming an armed bank robbery conviction after the defendant was impeached by theft and armed robbery convictions, the Court said that a simple statement that probative value outweighed prejudicial effect was not adequate to support a *Rule 609* ruling, but the error was harmless).

United States v. Rosales, 680 F.2d 1304 (10th Cir. 1981) : In a prosecution for assaulting a prison officer, the Court found no error in impeaching defense witnesses with crimes not involving dishonesty and said that no findings

were required. The Court emphasized the utility of on-the-record balancing in *United States v. Lamb*, n22 as it upheld the impeachment of a defendant with armed robbery and battery convictions.

[vii] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Title or Nature of Prior Conviction

United States v. Joost, 133 F.3d 125 (1st Cir. 1998) : The defendant, charged with felon firearm possession, stipulated to his prior conviction for interfering with civil rights. After he testified in his own defense, the government was permitted to show the nature of the prior felony on cross-examination. The Court found no abuse of discretion, both because the defendant had opened the door by describing the prior felony on direct examination and had waived the error by failing to make a contemporaneous objection, and because *Rule 609(a)* permits evidence of a prior conviction to impeach the credibility of a testifying defendant if its probative value outweighs its prejudicial effect.

United States v. Johnson, 302 F.3d 139 (3d Cir. 2002) : Affirming drug-related convictions, the Court found no abuse of discretion in permitting the government to impeach the defendant and a defense witness with evidence of prior felony convictions. The prosecutor asked the defendant only whether he had been convicted of a felony, and did not inquire as to the nature of the offense for which he was convicted. The prosecutor elicited from the defense witness that he had two felony convictions, but the Trial Judge precluded mention that they were drug offenses. The Court found that credibility of the defendant was important and that the impeachment value of the prior conviction outweighed any potential prejudice and found no plain error in the impeachment of the witness.

United States v. Smith, 131 F.3d 685 (7th Cir. 1997) : In a bank robbery case, the Court held there was no abuse of discretion in admitting the titles of the defendant's prior convictions when he was impeached with them. The convictions were similar to the crime at issue and the defendant had offered to stipulate to their number if the titles were excluded, but the convictions were within the ten-year time limit and the credibility of the defendant's testimony was a central issue. Furthermore, the jury was clearly instructed to consider the prior convictions only for impeachment purposes.

United States v. Hursh, 217 F.3d 761 (9th Cir. 2000) : The Court affirmed marijuana convictions relating to the defendant's attempt to enter the United States in a car that contained marijuana in the gas tank. It upheld a ruling that permitted the government to impeach the defendant by showing that he was previously convicted of a felony. The ruling permitted the government to elicit only the fact that there was a felony conviction, not the specific nature of the conviction (possession of heroin). In *United States v. Jimenez, 214 F.3d 1095 (9th Cir. 2000)* , a prosecution for felon firearm possession, the government sought to impeach the defendant with his prior felony convictions for burglary and for assault with a deadly weapon. The Trial Judge granted the request, but ordered that the assault conviction be referred to as a "felony involving a firearm." The Court reversed the defendant's conviction because the Judge's well-meaning attempt to mitigate the prejudice to the defendant inadvertently made it worse. Altering the nature of the assault conviction from one involving a deadly weapon to one involving a firearm increased rather than decreased the likelihood that the jury would draw an impermissible inference, since the only issue in dispute was whether the defendant in fact possessed a firearm.

United States v. Howell, 285 F.3d 1263 (10th Cir. 2002) : The Court reversed a correctional officer's conviction for depriving inmates of civil rights, finding it was an abuse of discretion to exclude evidence of numerous prosecution witnesses' prior convictions without conducting a balancing analysis under *Rule 403*. The Judge had made a blanket ruling that only the fact and date of the witnesses' felony convictions could be admitted, but the Court noted that ordinarily evidence of the nature of a witness' felony convictions and their number should be admitted.

United States v. Burston, 159 F.3d 1328 (11th Cir. 1998) : The defendant in a postal and bank robbery case sought to impeach a witness with evidence of his four felony convictions -- two for theft, one for aggravated assault, and one for armed robbery. However, he was permitted to bring out only that the witness had "a felony conviction." The Court held that precluding evidence of the nature and number of the witness' convictions was an abuse of discretion, albeit harmless error. Despite the Trial Judge's apparent belief that those facts lacked probative value, the implicit assumption of *Rule 609(a)* is that prior convictions have probative value, and that probative value is likely to vary depending on the number and type of convictions. And here there was no finding, or basis for a finding, that the evidence would have created a substantial danger of prejudice, confusion, or delay.

[c] Rule 609(a) -- Corporate Convictions

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997) : Addressing a question of first impression, the Court held that "*Rule 609* does not permit corporate convictions to be used to impeach the credibility of employee witnesses who were not directly connected to the underlying criminal act."

[d] Rule 609(a) -- Deferred Adjudications

United States v. Hamilton, 48 F.3d 149 (5th Cir. 1995) : Affirming convictions for postal theft and counterfeiting, the Court held there was no error in precluding impeachment of the principal government witness by evidence of a deferred adjudication on a state charge of felony theft by check. Although "conviction" status for the purpose of *Rule 609* is properly determined by federal law, it was not an abuse of discretion to follow the state practice of treating a deferred adjudication as not a conviction. In this case, enough information about the deferred adjudication was admitted to adequately argue the witness' possible bias to the jury.

[e] Rule 609(a) -- Details of the Conviction

United States v. Baylor, 97 F.3d 542 (D.C. Cir. 1996) : Affirming convictions for distributing cocaine base, the Court noted that it might have been proper to permit further cross-examination of a prosecution witness regarding the circumstances of a conviction offered to impeach. The witness had attempted to explain the circumstances, his substantive testimony was central to the case, the defense was attempting to cast doubt on his credibility, and there was no risk of prejudice to the defendant in inquiring about the facts underlying the witness' conviction. Any error in limiting the cross-examination was harmless, however.

United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989) : The defendant in a perjury prosecution argued that he should have been permitted to bring out the fact the victim had been a child when showing a principal prosecution witness' conviction for sexual assault. The Court held that the Rule does not require exploration of underlying factual details irrelevant to credibility, so long as the defendant was able to impeach the witness by evidence of the conviction itself.

United States v. Weisser, 417 F.3d 336 (2d Cir. 2005) : Affirming a conviction for using interstate commerce to engage in sexual acts with a minor, the Court held that the defendant had not been given inadequate assistance of counsel when no objection was made to introduction of his criminal history, including a 1986 conviction for child molestation. The defendant had opened the door by testifying that he was not sexually interested in minors, so the government could use the circumstances of the conviction on cross-examination to impeach his credibility and any objection would be futile.

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : In a personal injury action arising from a slip-and-fall, the Trial Judge admitted evidence that one of the plaintiff's expert witnesses had pleaded guilty to embezzlement, but forbade questions regarding the amount embezzled or the facts and circumstances of the crimes. Reversing a judgment for the plaintiff on other grounds, the Court noted that the guilty pleas were properly admitted under *Rule 609(a)(2)*. The underlying misconduct, involving dishonesty, was probative of the witness' character for truthfulness, and thus admissible, at the Judge's discretion (governed by *Rules 403* and *611*), under *Rule 608(b)*. The Court found no abuse of discretion in excluding reference to the underlying acts, but it noted that the amount of money misappropriated and the manner in which it was done were certainly relevant to prove the witness' dishonesty. On remand, the Judge was free to balance once again whether the gain from this probative value justified the time required to ask about the details.

United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986) : The Court affirmed conspiracy and fraud convictions, holding that the defendant was properly barred from inquiring into the particular facts of a government witness' prior convictions. In *United States v. Beckett*, n23 a prosecution for possession of an illegally made and unregistered firearm, the defendant was asked whether he told a federal agent that because he had been convicted of a felony (which he had admitted on direct examination) he could not have firearms. The Court found that this suggestion of an offense not charged was improper, reiterating that a testifying defendant is required " 'to give answers only as to whether he ha[s] been previously convicted of a felony, as to what the felony was, and as to when the conviction was had.' " The Court found that the prosecutor's improper question was harmless error, but directed the District Court to hold a hearing on whether he should be disciplined for repeated misconduct. In *United States v. Tumblin*, n24 the Court held that the prosecutor erred in cross-examining the defendant about the details of prior convictions including "such matters as the length of confinement, the interim period of freedom between a particular release date and defendant's next arrest for a crime, and defendant's unemployment between confinements."

United States v. Bender, 265 F.3d 464 (6th Cir. 2001) : One charge against a defendant in a drug distribution case was felon firearm possession. Rather than requiring the government to introduce evidence of the prior conviction, the parties agreed to stipulate that the defendant was convicted of a felony in 1987, and the defendant's cross-examination was to be limited to getting her to confirm that she agreed to the stipulation. However, after the defendant twice testified that she never sold drugs, the government was permitted to bring out on cross-examination that her prior conviction was for distribution of powder cocaine. Affirming, the Court found no abuse of discretion, since the defendant's misleading testimony opened the door to the impeachment proof and limiting instructions minimized any prejudicial effect.

United States v. Douglas, 408 F.3d 922 (7th Cir. 2005) : Before the defendant's trial for selling crack cocaine, the Judge granted his motion *in limine* to exclude one stale prior drug conviction, and denied his motion to exclude a 1993 drug conviction. The Judge indicated that the prosecution could only impeach the defendant by asking whether he had a prior conviction and could not mention the name or nature of the conviction, but warned the defendant that he might open the door to additional details about the conviction. When the defendant testified that he offered to cooperate with the police despite his innocence because he had "never been through nothing like that," the Judge permitted the government to cross-examine about both prior drug convictions. The Court found no abuse of discretion and indicated that, even if there were some error, it would be harmless. The prosecutor did not dwell on the prior convictions, but merely elicited that the defendant had twice been in situations where police interrogation was likely, and this cast doubt on the defendant's testimony without causing undue prejudice. In an action for allegedly discriminatory discharge, *Young v. James Green Mgmt., Inc., 327 F.3d 616 (7th Cir. 2003)* , the Court affirmed a judgment for the defendant employer, finding no abuse of discretion when a property manager employed by the defendant was cross-examined concerning details of his prior convictions for automobile theft and aggravated battery. The witness' direct testimony about his relationship with a particular woman and his redirect testimony regarding the theft opened the door to cross-examination and re-cross examination. In *United States v. Williams, 272 F.3d 845 (7th Cir. 2001)* , the Court

affirmed cocaine-related convictions, finding no error when the government was permitted to cross-examine a defendant about the details of his prior convictions. Ordinarily the details of a conviction are not admissible under *Rule 609*. However, here the defendant in giving direct testimony about the circumstances surrounding his convictions "revealed only selected details, tried to distance himself from responsibility, and claimed to be cooperating with the police whenever cooperation was requested of him following an arrest." In *United States v. White*, n25 the Trial Judge ruled *in limine* that the defendant, charged with bank robbery and kidnapping, could be impeached with his prior conviction for sexual abuse. On direct examination, the defendant sought to explain that he was convicted for having consensual sex with a girl under the age of 17 when he was 20. The government on cross-examination relied on the police report of the incident to assert that the girl was only 13, that the sex was not consensual, and that the girl was taken to a hospital for treatment. Although it found that the defendant had opened the door to these details by giving his own version of the events, the Court stressed that "the prosecution is limited to using only the information for which it has a good faith belief that there is supporting evidence." In this case, the police report was sufficient to support a good faith belief, even though there was a good deal of evidence that the sex was consensual, as indicated by the fact that the defendant received no jail time for the offense. Since the police report was not in evidence, the Court found that the government had committed misconduct (although the error was harmless) by emphasizing in closing argument its version of the events underlying the prior conviction. In *United States v. Robinson*, n26 a defendant charged with fraud testified on direct examination that he had been convicted as an accessory after the fact of attempted murder; on cross-examination, the prosecutor brought out that the intended victim was a woman grand jury witness. The Court held it was error (but harmless) to reveal details of the prior conviction.

United States v. Jackson, 310 F.3d 1053 (8th Cir. 2002) (per curiam): On direct examination, the defendant acknowledged that he had two years previously been convicted of attempted capital murder and then asserted that the jury had sentenced him to the statutory minimum because "[t]here's no self-defense law in Arkansas." The Court held there was no abuse of discretion when the prosecutor was permitted to elicit on cross-examination that evidence in the attempted murder trial indicated that after an argument with the victim, the defendant had followed him in his car, stopped him, shot him, and continued to shoot him after he fell to the ground. The cross-examination was properly allowed to impeach the defendant's credibility in implying that he had acted in self-defense. In *Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001)* , the Court affirmed a judgment against a correctional officer for using excessive force, and upheld the decision below to admit evidence that the plaintiff had prior felony convictions but to exclude the details (that the convictions were for rape and sodomy). Distinguishing its prior decision in *Cummings v. Malone*, (*infra*), the Court concluded that the Trial Judge here carefully balanced the relevant interests and found that "[t]he evidence in question in the present case was not similarly probative on the issue of credibility." In *United States v. Swanson*, n27 the Court affirmed a conviction for manufacturing marijuana, holding there was no abuse of discretion in permitting the defendant to be cross-examined regarding the circumstances underlying his previous conviction for felony menacing. He had testified on direct about the details in an attempt to minimize his guilt, so the government was properly permitted to bring out any relevant facts on cross-examination. In *Cummings v. Malone*, n28 the Court reversed a judgment for a prisoner who alleged use of excessive force by prison officials, holding, *inter alia*, that it was an abuse of discretion to exclude the plaintiff's "face sheet" to prove his specific prior felony convictions. Although there is discretion under *Rule 403* to limit inquiry into past convictions, in this case credibility was critical, so the jury had a need to know both the number of felony convictions and the specific crimes involved. The Court noted that "[t]he ability to introduce the specific crime is not a license to flaunt its details, however; cross-examiners are limited to eliciting the name, date and disposition of the felony committed." Distinguishing *Cummings*, the Court held in *United States v. Ford, 17 F.3d 1100 (8th Cir. 1994)* , that it was not an abuse of discretion to preclude evidence that the felony conviction of the prosecution's primary witness had been for a sex offense against a minor. Introduction of the specific felony could easily have distracted the jury without adding any real probative information.

United States v. Albers, 93 F.3d 1469 (10th Cir. 1996) : The Court held in a prosecution for conspiring to manufacture methamphetamine that it was error (but harmless) to bring out on cross-examination the facts underlying

the defendant's prior conviction for grand theft after the defense revealed the conviction on direct. The Court stated that "the defendant was entitled to the protection of the rule that only the prior conviction, its general nature, and punishment of felony range were fair game for testing the defendant's credibility."

[f] Rule 609(a) -- Dishonesty or *Crimen Falsi*

[i] Rule 609(a) -- Assault

United States v. Harvey, 588 F.2d 1201 (8th Cir. 1978) : Reversing a conviction for possession and uttering of a stolen Treasury check, the Court concluded that the prosecutor committed plain error in asking the defendant about prior misdemeanors involving assault, which does not involve dishonesty or false statement.

[ii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Counterfeiting and Forgery

United States v. Hans, 738 F.2d 88 (3d Cir. 1984) : The Court held that a conviction for knowingly transporting forged securities is a *crimen falsi* offense.

United States v. Morrow, 977 F.2d 222 (6th Cir. 1992) (en banc): The Court held in a drug prosecution that counterfeiting is a dishonesty offense.

United States v. Noble, 754 F.2d 1324 (7th Cir. 1985) : The Court held that counterfeiting is a dishonesty offense.

United States v. Jackson, 680 F.2d 561 (8th Cir. 1982) : The Court approved the use of a prior conviction for transporting forged securities in interstate commerce to impeach a defendant charged with illegal possession of a firearm, finding that this was a dishonesty offense.

United States v. Cuozzo, 962 F.2d 945 (9th Cir. 1992) : Affirming fraud convictions, the Court held that dealing in counterfeit obligations or securities is a dishonesty offense. In *United States v. Bay*, n29 a bank robbery case, the Court observed that the Trial Judge had no discretion to deny the defendant the right to impeach a government witness with a five-year-old forgery conviction. Since forgery is a dishonesty offense, the Court stated that it was automatically admissible as long as it fell within the ten-year time period specified in the Rule. In *United States v. Harris*, n30 the Court ruled that passing counterfeit money is a dishonesty offense.

[iii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Embezzlement

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : In a personal injury action arising from a slip-and-fall, the Trial Judge admitted evidence that one of the plaintiff's expert witnesses had pleaded guilty to embezzlement, but forbade questions regarding the amount embezzled or the facts and circumstances of the crimes. Reversing a judgment for the plaintiff on other grounds, the Court noted that the guilty pleas were properly admitted under *Rule 609(a)(2)*.

[iv] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- False Statements

United States v. Lester, 749 F.2d 1288 (9th Cir. 1984) : The Court found in an obstruction of justice case that exclusion of defense evidence that a government witness had been convicted of the misdemeanor of filing a false police

report was error (but harmless), since dishonesty convictions are not subject to discretionary exclusion.

[v] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Food Stamp Offenses

United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993) : Affirming drug and firearm convictions, the Court held it was error (but harmless) to permit impeachment of the defendant with a misdemeanor conviction for possessing and acquiring food stamps illegally. Neither the elements of the crime nor the specific circumstances of the case demonstrated that the defendant engaged in deceitfulness or untruthfulness.

[vi] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Fraud

United States v. Wong, 703 F.2d 65 (3d Cir. 1983) : A defendant convicted of mail fraud and racketeering was impeached with evidence of prior convictions for mail fraud and Medicare fraud. Affirming, the Court held that there is no discretion to exclude prior convictions coming within *Rule 609(a)(2)*.

United States v. Cook, 557 F.2d 1149 (5th Cir. 1977) : Although it reversed the defendant's conviction on 15 counts of fraud, the Court noted that he was properly impeached with a previous fraud conviction, because fraud falls within the automatic impeachment provision of *Rule 609(a)(2)*.

United States v. Kuecker, 740 F.2d 496 (7th Cir. 1984) : The Court upheld mail and wire fraud convictions, finding that the Trial Judge properly ruled *in limine* that a prior conviction for mail fraud could be used to impeach the defendant if he testified. The Court ruled that "the trial court had no discretion to prevent introduction, for impeachment purposes, of evidence of prior convictions for crimes involving dishonesty or false statement, subject only to the ten-year time limit embodied in rule 609(b)."

United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) : Affirming convictions for securities law and income tax violations, the Court held that a conviction for conspiracy to issue unauthorized securities and mail fraud was a crime involving dishonesty within the meaning of the Rule.

United States v. Whitman, 665 F.2d 313 (10th Cir. 1981) : Upholding a conviction for making false statements to a federally insured bank, the Court approved a ruling that the defendant could be impeached with a prior land fraud conviction if he chose to testify. The Court treated a larceny offense committed by fraudulent or deceitful means as a crime involving dishonesty or false statement.

[vii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Income Tax Offenses

Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992) : The Court reversed a judgment for the defendant physician in a medical malpractice suit, holding it was error to permit impeachment of the plaintiff's expert pathologist with his 1984 misdemeanor conviction for willful failure to file an income tax return. This case is discussed in the Editorial Explanatory Comment, *§ 609.02[4]*.

Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981) : The Court held that a civil defendant's misdemeanor conviction for willfully failing to provide information for income tax purposes was sufficiently reprehensible to be used for impeachment under *Rule 609(a)(2)*.

United States v. Wilson, 985 F.2d 348 (7th Cir. 1993) : Affirming a conviction for conspiracy to impede the IRS, the Court held that a conviction for failure to file tax returns involved dishonesty.

Dean v. Trans World Airlines, Inc., 924 F.2d 805 (9th Cir. 1991) : The Court held in a wrongful discharge action that it was error, but harmless, to exclude evidence of the plaintiff's misdemeanor conviction for failure to file a tax return. The Court noted that the conviction was based on deliberate filing of an incomplete return rather than on a complete failure to file a return, and concluded that it involved an element of misrepresentation and thus qualified as a dishonesty offense under the Rule.

United States v. Gellman, 677 F.2d 65 (11th Cir. 1982) : In a prosecution for failure to file an income tax return, the Court held that a defense witness was properly questioned about a similar conviction because the crime was a dishonesty offense.

[viii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Larceny, Robbery, and Theft Offenses

[A] Rule 609(a) -- Shoplifting

United States v. Ashley, 569 F.2d 975 (5th Cir. 1978) : The Court held that a conviction for shoplifting is not a conviction involving dishonesty or false statement within the meaning of the Rule.

McHenry v. Chadwick, 896 F.2d 184 (6th Cir. 1990) : In an inmate's civil rights action against correctional officers, the Trial Judge excluded evidence of the plaintiff's prior misdemeanor convictions for shoplifting and concealing stolen property. The Court held that shoplifting did not involve dishonesty or false statement. Although concealing stolen property was a dishonesty offense, the error was harmless because the jury already knew the plaintiff had been convicted of burglary. In *United States v. Scisney,* n31 a bank robbery prosecution, the Court held that evidence of the defendant's prior misdemeanor shoplifting conviction was improperly admitted as a conviction involving dishonesty or false statement, but the error was harmless.

United States v. Owens, 145 F.3d 923 (7th Cir. 1998) : The defendant, charged with crack cocaine distribution, was not permitted to show that the principal prosecution witness had previously pleaded guilty to misdemeanor retail theft for stealing a car stereo. Noting that petty shoplifting does not, in and of itself, qualify as a crime of dishonesty under *Rule 609(a)(2)*, the Court found no abuse of discretion in excluding the evidence in this case, since the witness had already been impeached with a felony conviction. See also *United States v. Galati, 230 F.3d 254 (7th Cir. 2000)* (evidence that principal prosecution witness was convicted 20 years ago as a college student for shoplifting a cassette tape was properly excluded). In *United States v. Amaechi*, n32 the Court affirmed a drug conviction, holding that the defendant was properly precluded from offering evidence of a government witness' prior conviction for shoplifting, as such a crime does not involve an element of misrepresentation or other indication of a propensity to lie.

United States v. Ortega, 561 F.2d 803 (9th Cir. 1977) : The Court noted that shoplifting is not a dishonesty conviction.

United States v. Dunson, 142 F.3d 1213 (10th Cir. 1998) : Appealing a cocaine conviction, the defendant complained that he was not permitted to impeach the star prosecution witness with the witness' prior misdemeanor

conviction for shoplifting. The Court found no error, and held that shoplifting is not the type of crime that is automatically admissible under *Rule 609(a)(2)*.

[B] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Larceny, Robbery, and Theft Offenses -- Other Offenses

United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978) : The Court held it was error to rule that a defendant charged with conspiracy to violate the Food Stamp Act could be impeached with a prior conviction for attempted petit larceny. Because the crime appeared to be a misdemeanor, the Court said that it could only be used if it satisfied *Rule 609(a)(2)*, which it did not, because there was no suggestion of fraud or deceit associated with the prior conviction.

United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) : Affirming bank robbery and related convictions, the Court held that purse snatchings did not qualify as dishonesty offenses, but the convictions were properly admitted under subdivision (a)(1).

United States v. Johnson, 388 F.3d 96 (3d Cir. 2004) : The Court vacated a conviction for carjacking because the defendant's prior conviction for purse snatching was improperly admitted to impeach him. In *Walker v. Horn, 385 F.3d 321 (3d Cir. 2004)* , the Court held it was error (but harmless) for the Trial Judge to admit the defendant's robbery convictions under *Rule 609(a)(2)* without balancing probative value and prejudicial effect. While robbery is a serious crime, "it does not involve communicative or expressive dishonesty." In *Government of Virgin Islands v. Toto*, n33 the Court reversed a conviction for distributing marijuana, indicating that under the Rules it was error to impeach the defendant with a prior misdemeanor conviction for petit larceny, because this was not a *crimen falsi* offense.

United States v. Newman, 849 F.2d 156 (5th Cir. 1988) : The Court held that convictions for theft-forgery and theft by deception qualified for admission as dishonesty crimes. In *United States v. Carden*, n34 the Court held that a defendant could be impeached with a petty larceny conviction, as the crime involved dishonesty.

United States v. Wiman, 77 F.3d 981 (7th Cir. 1996) : Affirming a conviction for felon firearm possession, the Court found no error in prohibiting the defendant from impeaching a prosecution witness with a misdemeanor conviction for theft of gas from a gas station. The Court concluded that the crime did not involve dishonesty or false statements. In *Altobello v. Borden Confectionary Prods., Inc.*, n35 the Court held that meter tampering is always a crime of deception, since it always involves an attempt to deceive the meter reader. In *United States v. Papia*, n36 the Court held that a conviction for theft of less than $100, which was a plea bargain reduction of a forgery charge, was a crime involving dishonesty.

United States v. Yeo, 739 F.2d 385 (8th Cir. 1984) : After deciding to reverse a conviction for extortion on another ground, the Court added that a theft conviction was improperly admitted, absent evidence that it involved fraud or deceit.

United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992) (en banc; per curiam): The Court resolved an intra-Circuit conflict of precedents, unanimously holding that bank robbery is not *per se* a crime of "dishonesty" under the Rule. The Court concluded that "Congress intended *Rule 609(a)(2)* to apply only to those crimes that factually or by definition entail some element of misrepresentation or deceit, not to 'those crimes which, bad though they are, do not carry with them a tinge of falsification.' " This case is discussed in the Editorial Explanatory Comment, *§ 609.02[4]*. In *United States v. Glenn*, n37 the Court found it was error (but harmless) to permit impeachment of a defendant charged with

drug offenses with evidence of prior burglary and grand theft convictions, since there was no showing that the crimes were committed "by fraudulent or deceitful means."

United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991) : Affirming a conviction for civil rights violations, the Court held there was no abuse of discretion in prohibiting cross-examination of the victim regarding his prior criminal record and pending theft charges, as prior misdemeanor theft convictions are usually not sufficiently probative of veracity to be admissible under *Rule 609(a)(2)*.

[ix] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Lewd Conduct

United States v. Colbert, 116 F.2d 395 (9th Cir. 1997) : The Court held that the Trial Judge properly excluded a witness' prior misdemeanor conviction for lewd conduct. Quoting *United States v. Walker, 613 F.2d 1349, 1354 (5th Cir. 1980)* , the Court stated that "a conviction for prostitution does not involve dishonesty or false statement and is not admissible under 609(a) for impeachment purposes."

[x] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Miscellaneous Offenses

United States v. Tracy, 36 F.3d 187 (1st Cir. 1994) : In a prosecution for felon firearm possession, the Court held that a conviction for uttering a false prescription was automatically admissible to impeach the defendant under *Rule 609(a)(2)*.

[xi] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Motor Vehicle Offenses

United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) : The defendant's murder conviction was reversed because he was improperly asked about a 17-year-old juvenile adjudication, a disorderly conduct conviction seven years previously, and convictions for drunken driving and public drunkenness. The Court concluded that the last two convictions were misdemeanors that did not have a bearing on truth and veracity or involve moral turpitude. In our view, the Court should not have relied on such general "moral turpitude" language, when *Rule 609(a)(2)* specifically requires "dishonesty or false statement."

United States v. Wiman, 77 F.3d 981 (7th Cir. 1996) : Affirming a conviction for felon gun possession, the Court found no error in prohibiting the defendant from impeaching a prosecution witness with a misdemeanor conviction for driving under the influence of alcohol. The Court concluded that the crime did not involve dishonesty or false statements.

United States v. Nichols, 808 F.2d 660 (8th Cir. 1987) : Affirming a conviction for distributing cocaine, the Court held that the defendant was properly precluded from asking an FBI agent about a misdemeanor conviction for driving while intoxicated, as the offense did not involve dishonesty or false statement.

[xii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Narcotics Offenses

United States v. Logan, 998 F.2d 1025 (D.C. Cir. 1993) : A defense witness in a drug prosecution was improperly impeached with misdemeanor convictions for taking property without a right and distributing marijuana and PCP, but the Court held the error was harmless because it was a witness rather than a defendant who was impeached, the prosecution did not emphasize the convictions, a proper limiting instruction was promptly given, the witness' story was

confirmed in part by another witness, and the other evidence against the defendant was strong. The dissenting Judge observed that when a defendant does not testify and presents his case through others, improper impeachment (particularly of the defendant's chief witness) is likely to be prejudicial and not harmless.

Medrano v. City of Los Angeles, 973 F.2d 1499 (9th Cir. 1992) : Reversing a judgment for the defendants in a § 1983 action, the Court held that it was error to impeach the plaintiffs' witnesses by arrest records and by misdemeanor convictions for drug use and shoplifting. In *United States v. Mehrmanesh*, n38 the Court found it error (but harmless) to rule that a defendant's prior conviction for smuggling hashish was automatically admissible should he choose to testify. According to the Court, "Convictions for such surreptitious activity, not necessarily involving misrepresentations or falsification, do not bear *directly* on the likelihood that the defendant will testify truthfully." In *United States v. Thompson*, n39 the Court found no error in prohibiting cross-examination of a government witness about a prior marijuana conviction, since the misdemeanor was not one involving dishonesty or false statement within the meaning of the Rule.

[xiii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- No Balancing

SEC v. Sargent, 229 F.3d 68 (1st Cir. 2000) : The defendants, charged with illegally trading securities on the basis of nonpublic information, had been convicted of lying to the Commission during its investigation of the incident. At trial on the civil charges, the Judge excluded evidence of the convictions on the ground that "you get all the probative value you need because the witness admitted he lied." Reversing a judgment as a matter of law entered for the defendants, the Court stated that the Commission was entitled to attack the defendants' credibility more forcefully than simply through their admission of lying, by presenting the fact that they had been convicted of knowingly and willfully making a materially false statement to a government official. There is no discretion to exclude prior convictions involving dishonesty or false statements, so the ruling below was error.

[xiv] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Receipt of Stolen Property

United States v. Foster, 227 F.3d 1096 (9th Cir. 2000) : In a narcotics case, the Court found reversible error in the admission of the defendant's prior misdemeanor conviction for receipt of stolen property. The conviction was admitted automatically under *Rule 609(a)(2)*, but the Court found that the crime of receipt of stolen property "can be accomplished without any misrepresentation or deceit on the part of either the giver or the receiver."

[xv] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Smuggling

United States v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982) : The Court found it error (but harmless) to rule that a defendant's prior conviction for smuggling hashish was automatically admissible should he choose to testify. According to the Court, "Convictions for such surreptitious activity, not necessarily involving misrepresentations or falsification, do not bear *directly* on the likelihood that the defendant will testify truthfully."

Gust v. Jones, 162 F.3d 587 (10th Cir. 1998) : In a case arising out of a highway accident, the Court held that a plaintiff's prior conviction for smuggling drugs into a penitentiary was not admissible under *Rule 609(a)(2)*, because that crime did not "per se, involve dishonesty or false statement." Nor was it an abuse of discretion to rule that the conviction was inadmissible under the balancing test set forth in *Rule 609(a)(1)*.

[xvi] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Title or Nature of Prior Conviction

United States v. Cabrera, 201 F.3d 1243 (9th Cir. 2000) : The Court found no prosecutorial misconduct in an alien-smuggling case when the defendant was asked on cross-examination whether he had any prior convictions. The Trial Judge had ruled in response to a motion *in limine* that the defendant could be asked about his convictions for misdemeanors but without referring to the underlying act of placing a false sticker on a car. The Court further held that there was no misconduct when the prosecutor's question left it to the defendant's redirect examination to bring out that the prior conviction was only for a misdemeanor.

[xvii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Weapons Convictions

United States v. Slade, 627 F.2d 293 (D.C. Cir. 1980) : The Court concluded that unlicensed possession of a pistol is not a dishonesty crime.

United States v. Cameron, 814 F.2d 403 (7th Cir. 1987) : Affirming a conviction for unlicensed firearms sales, the Court held there was no error in excluding evidence that a government witness had a misdemeanor conviction for possessing a switchblade. Whether or not the crime is a dishonesty offense under state law, the Court found that it "is not probative of his [the witness'] propensity to testify truthfully."

[xviii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Worthless Check Convictions

Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652 (3d Cir. 1989) : In affirming a judgment for the defendant in a product liability action, the Court held that the plaintiff was properly impeached under *Rule 609(a)(2)* with evidence of his prior convictions for passing bad checks and forgery.

United States v. Cunningham, 638 F.2d 696 (4th Cir. 1981) : Accepting the argument that under some circumstances a conviction for "worthless checks" might qualify for admission under *Rule 609(a)(2)*, the Court said that the party claiming that the conviction qualifies must demonstrate that it does.

United States v. Barb, 20 F.3d 694 (6th Cir. 1994) : Reversing a conviction for wire fraud, the Court held it was error to impeach the defendant with three misdemeanor convictions for writing bad checks. The Court relied upon State Court decisions that suggested that not all bad check convictions involved dishonesty. One Judge dissented on the ground that the applicable statutes required a fraudulent intent, so the crimes necessarily involved dishonesty.

United States v. Motley, 940 F.2d 1079 (7th Cir. 1991) : The Court affirmed false claims convictions, holding there was no error in precluding the defendant from impeaching a prosecution witness with a nine-year-old misdemeanor conviction for "check deception," as there was no indication that the offense actually involved fraud or dishonesty rather than simple negligence in overdrawing a checking account. See also *United States v. Kane, 944 F.2d 1406 (7th Cir. 1991)* (delivering a check knowing that it would not be paid or honored was a crime of dishonesty under applicable state law, so it was a proper crime with which to impeach).

United States v. Mucci, 630 F.2d 737 (10th Cir. 1980) : The Court concluded that a misdemeanor conviction for issuing, or causing to be issued or transferred, a check with knowledge that it could be dishonored is a dishonesty offense.

[g] Rule 609(a) -- Explaining the Conviction

United States v. Kane, 944 F.2d 1406 (7th Cir. 1991) : When the defendant in a fraud prosecution conceded that he had previously been convicted but asserted that he had entered a guilty plea in order to avoid having to go to Court, the prosecutor accused him of lying and implied that he had a dishonest character. The Court held this was error, but harmless because the defendant was able to present reasons for his plea with which the jury could sympathize, thereby blotting the effect of the prosecutor's improper accusations.

[h] Rule 609(a) -- Felony or Misdemeanor

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : Affirming convictions for robbery and firearms offenses, the Court found it was error (but harmless) to admit convictions for assault and disorderly conduct to impeach the defendant's brother as a witness. Generally, Maine law made these crimes misdemeanors, and the government, saying the burden was on the defense, offered no evidence that the assault qualified as a felony. But the Court held that the government, as the party seeking to introduce the evidence, had the burden of showing it was admissible.

[i] Rule 609(a) -- Good Faith Basis

United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996) : Affirming cocaine-related convictions, the Court found no error when the Trial Judge precluded questioning of a witness and a government agent regarding the witness' alleged prior convictions in Mexico. The Court found no evidence of a good faith basis for the questions, and noted that the defendants were given an opportunity to establish such a basis.

[j] Rule 609(a) -- "Impeaching" a Defendant Who Does Not Testify

United States v. Beeks, 224 F.3d 741 (8th Cir. 2000) : The Court reversed a conviction for conspiracy to distribute cocaine, because the prosecutor referred to the defendant's prior conviction even though he never testified. Cross-examining a defense witness who testified to the defendant's employment history, the prosecutor sought to elicit how the defendant had responded to a question regarding prior convictions on an employment form he had filled out. An objection was sustained before the witness could answer, but the Court found prosecutorial misconduct because the implication of the question was that the defendant had been convicted of a crime and had lied to his employer about it. That was an improper attempt "to obtain the effect of impeachment even though Beeks did not testify."

[k] Rule 609(a) -- *In Limine* Motions

Luce v. United States, 469 U.S. 38 (1984) . See the Editorial Explanatory Comment to *Rule 103(a), § 103.02[13].*

Ohler v. United States, 529 U.S. 753 (2000) . See the Editorial Explanatory Comment to *Rule 103(a), § 103.02[14].*

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977) : Affirming a firearms conviction, the Court encouraged Trial Judges "when feasible, [to] make reasonable efforts to accommodate a defendant by ruling in advance on the admissibility of a criminal record so that he can make an informed decision whether or not to testify," but it declined to mandate an *in limine* procedure for all cases.

United States v. Rivers, 693 F.2d 52 (8th Cir. 1982) : The Court affirmed a conviction for armed robbery of a savings and loan, finding there was no error in refusing to rule *in limine* where the Trial Judge did not know whether the

prior convictions were felonies, whether the defendant would testify if his convictions were excluded, and what the nature of his testimony would be. The Court distinguished *United States v. Burkhead*, n40 which held it was an abuse of discretion not to rule on the defendant's motion to prohibit impeachment by prior convictions, where the defendant had been previously tried on five substantive counts and sought a ruling before his conspiracy trial.

United States v. Williams, 939 F.2d 721 (9th Cir. 1991) : The Court held that, by bringing out the fact of his prior conviction during direct examination, a defendant convicted for possession of cocaine had waived the right to appeal from an adverse *in limine* ruling. By the defendant's strategic choice at trial, the Trial Judge and the government were deprived of a last chance to reverse their prestated positions. In *United States v. Browne*, n41 the Court upheld the admission of a defendant's prior bank robbery conviction to impeach his testimony in an armed bank robbery prosecution. It found no error in the decision to await the defendant's testimony before ruling on his motion to exclude the conviction.

United States v. Martinez, 76 F.3d 1145 (10th Cir. 1996) : Affirming convictions for bribery and other offenses, the Court held that the defendant waived his right to object to the use of a prior conviction for a cocaine offense when he testified to the conviction on direct examination. The Trial Judge had declined to make a pretrial ruling on the admissibility of the prior conviction for impeachment purposes, and again declined to rule on admissibility prior to the defendant's taking the stand. The Court found no error in deferring a ruling, and observed that it "cannot speculate whether the government would have cross-examined the defendant about his cocaine conviction." In *United States v. Sides, 944 F.2d 1554 (10th Cir. 1991)* , the Trial Judge deferred until trial ruling on the defendant's motion *in limine* to exclude his prior convictions; after the prosecution rested, the Judge held a hearing in which the parties were questioned about the defendant's intention to testify. The Court affirmed the murder conviction, holding that by failing to make any objection during the hearing or when the impeaching evidence was introduced, the defendant had not preserved any issue for review. In *United States v. Short*, n42 the Trial Judge ruled *in limine* that the defendant, charged with manufacturing amphetamine, could be impeached with a prior felony conviction but that the government could not bring out that the conviction was for drug offenses. On cross-examination, the prosecutor nevertheless asked about the prior drug conviction. While not condoning the prosecutor's possible mistake in not seeking reversal or clarification of the ruling before asking the question, the Court held that refusal to grant a mistrial was harmless error in the circumstances.

[l] Rule 609(a) -- *Nolo Contendere* Pleas

United States v. Sonny Mitchell Center, 934 F.2d 77 (5th Cir. 1991) (per curiam): Affirming forfeiture of interests in a shopping center used for drug trafficking, the Court found no error in impeachment of one claimant by convictions entered pursuant to pleas of *nolo contendere*. The Circuit's former rule making such convictions inadmissible for impeachment did not survive adoption of the Federal Rules.

Brewer v. City of Napa, 210 F.3d 1093 (9th Cir. 2000) : The Court held that the plaintiff in a civil rights action was properly impeached with convictions based on *nolo contendere* pleas. The Court reasoned that *Rule 410* did not preclude such impeachment, because that Rule "by its terms prohibits only evidence of *pleas*" while *Rule 609* "permits admission for impeachment purposes of evidence of *convictions*." The Court also noted that the Advisory Committee considered an exception to *Rule 609* for *nolo* convictions and ultimately rejected it.

[m] Rule 609(a) -- Opening the Door

United States v. Barrett, 766 F.2d 609 (1st Cir. 1985) : The Court held that a bank robbery defendant opened the

door to the introduction of a death certificate for a man he had killed by testifying on direct examination concerning the circumstances of the shooting for which he had been convicted.

United States v. Williams, 272 F.3d 845 (7th Cir. 2001) : The Court affirmed cocaine related convictions, finding no error when the government was permitted to cross-examine a defendant about the details of his prior convictions. Ordinarily the details of a conviction are not admissible under *Rule 609*. However, in his direct testimony about the circumstances of his convictions, the defendant "revealed only selected details, tried to distance himself from responsibility, and claimed to be cooperating with the police whenever cooperation was requested of him following an arrest." In a prosecution for attempting to possess marijuana with intent to distribute, *United States v. Rein*, n43 the Court held there was no abuse of discretion in admitting a nine-and-one-half-year-old conviction for delivery of a controlled substance to impeach a defendant who testified that he had not previously engaged in the type of activity alleged.

United States v. Valencia, 61 F.3d 616 (8th Cir. 1995) : Affirming cocaine convictions, the Court held there was no error in admitting, for impeachment purposes, evidence that the defendant had been convicted for unlawful possession for sale and purchase for sale of a controlled substance. On direct examination, the defendant had admitted that he had a prior conviction for possession of cocaine but attempted to minimize his guilt as to that conviction. The Court concluded that the government properly cross-examined him in order to clarify the facts as to the prior conviction and thereby impeach his direct testimony. In *United States v. Amahia*, n44 the Court affirmed convictions arising from a fraudulent marriage scheme to procure immigration visas, holding there was no error in permitting the prosecution to cross-examine the defendant concerning details of prior felony convictions for insurance fraud. The defendant attempted to explain away the convictions, and the Court reasoned that "the defendant may be cross-examined on any facts which are relevant to the direct examination."

United States v. Perry, 857 F.2d 1346 (9th Cir. 1988) : Affirming income tax and mail fraud convictions, the Court held that a defendant opened the door to an inquiry into details of prior misdemeanor convictions for embezzlement and false pretenses by attempting to explain them away and offering his own version of the underlying facts. In *United States v. Mehrmanesh*, n45 a defendant in a heroin distribution case indicated at a hearing on a motion to limit cross-examination should he choose to testify that he planned to raise the question whether he ever was involved with narcotics. The Court upheld a ruling that the government could ask the defendant about a prior conviction for importation of hashish.

United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977) : Affirming a conviction for mail fraud, the Court held that the government properly cross-examined the defendant about his testimony on direct examination relating to prior illegal conduct to which he pleaded guilty. The Court observed that ordinarily the government's examination should be confined "to a showing of the essential facts of convictions, the nature of the crimes, and the punishment," but that when the accused sets forth a favorable version of prior convictions to the jury, the government is entitled to cross-examine "on any facts which are relevant to the direct examination."

United States v. Vigliatura, 878 F.2d 1346 (11th Cir. 1989) : In a prosecution for theft from interstate commerce, there was no plain error in permitting extensive cross-examination of the defendant regarding a prior arrest and the factual details of his prior convictions, after he had given testimony on direct examination about some past convictions and "charges" and had denied any other charges or convictions than those about which he testified.

[n] Rule 609(a) -- Rebuttal Evidence

United States v. Carter, 953 F.2d 1449 (5th Cir. 1992) : The Court affirmed convictions for drug offenses, holding it was not error to introduce evidence that a defendant had been in prison for a crime not punishable by imprisonment of more than one year, as the evidence was not used to impeach but to contradict his testimony that he had been continuously employed during that period.

[o] Rule 609(a) -- Relationship to Rule 404(b)

United States v. Valencia, 61 F.3d 616 (8th Cir. 1995) : Affirming cocaine convictions, the Court held there was no error in admitting, for impeachment purposes, evidence that the defendant had been convicted for unlawful possession for sale and purchase for sale of a controlled substance. The Trial Judge had denied the government the use of the evidence in its case-in-chief, finding that its probative value under *Rule 404(b)* was outweighed under *Rule 403* by its prejudicial effect. After the defendant had testified and attempted to minimize his prior criminal activity, however, the conviction was admitted under *Rule 609*. The Court observed that convictions offered under *Rule 404(b)* and *609* are offered for different purposes, so the probative value-prejudicial effect balance may differ under the two Rules. "The probative character of evidence under *Rule 609* has to do with credibility of a witness, while 404(b) 'probativeness' essentially goes to the question of whether or not the accused committed the crime charged."

United States v. Cordoba, 104 F.3d 225 (9th Cir. 1997) : In the course of remanding a drug conviction on other grounds, the Court announced that it would not entertain a challenge to the admission of bad acts evidence under *Rule 404(b)* where that evidence had been properly admitted to impeach the defendant under *Rule 609*. The Court reasoned that when a conviction is properly admitted under *Rule 609*, any error in admitting the conviction under *Rule 404(b)* is automatically harmless.

[p] Rule 609(a) -- Uncounseled Conviction

United States v. Denetclaw, 96 F.3d 454 (10th Cir. 1996) : Affirming a conviction for assault and maiming, the Court concluded that evidence that the defendant had pled guilty in the Navajo Nation Tribal Court to the tribal misdemeanor offense of aggravated battery, arising out of the same events giving rise to this prosecution, was properly admitted. The Court reasoned that, even if the defendant were denied his *Sixth Amendment* right to counsel, his pleas in the Tribal Court were admissible for impeachment purposes.

[2] Rule 609(b) -- TIME LIMIT

[a] Rule 609(b) -- Discretion

[i] Rule 609(b) -- Accused and Defense Witnesses

United States v. Brown, 603 F.2d 1022 (1st Cir. 1979) : The Court held it was no abuse of discretion to admit the defendant's more than ten-year-old convictions for burglary and petit larceny to impeach him in a theft prosecution. Where the government's only eyewitness had been impeached with an extensive criminal record, and the defendant suggested that this witness actually committed the crime, the defendant's prior convictions were "highly important evidence."

United States v. Payton, 159 F.3d 49 (2d Cir. 1998) : Affirming a felon firearm possession conviction, the Court found no abuse of discretion in the admission of two 13-year-old convictions, offered to impeach the defendant's mother. One conviction was for false statement under oath to a public official and the other was for third-degree larceny; both arose out of an application for food stamps. The Trial Court was within its discretion because the witness'

testimony was "critical" to the case, and the impeachment value of the convictions was "substantial." In *United States v. Martino*, n46 the Court upheld heroin convictions, finding no abuse of discretion in the admission of an 11-year-old federal narcotics conviction to impeach the defendant.

United States v. Redditt, 381 F.3d 597 (7th Cir. 2004) : At the defendant's trial for stealing and opening mail, her 1992 conviction for stealing electricity was admitted. The defendant's credibility was a critical factor in the case "in light of the complete contradiction between the defendant's testimony and the testimony of the government's witness," so the Court held the Trial Judge's determination that the probative value of the conviction outweighed any prejudicial effect was not an abuse of discretion. In *United States v. Shapiro*, n47 the defendant's convictions for offenses related to the misapplication of bank funds were overturned because the government was erroneously permitted to impeach him with a 38-year-old bankruptcy fraud conviction and a 24-year-old income tax evasion conviction. The Court could find no "exceptional circumstances" (quoting the Senate Judiciary Committee Report) to justify admission of such dated convictions, especially because they were similar to the crimes for which the defendant was tried. One Judge dissented, emphasizing the discretion permitted Trial Judges.

United States v. Brown, 956 F.2d 782 (8th Cir. 1992) : Affirming a conviction for drug offenses, the Court held that where credibility was a critical factor because the jury essentially had to choose between the versions of events presented by the government's witnesses and by the defendant's, the defendant's 22-year-old burglary conviction was highly probative as impeachment evidence; thus, it was reasonable to find that the probative value of the conviction substantially outweighed any prejudicial effect. In *United States v. Thomas*, n48 the defendant, convicted for possession of a firearm that was found by officers executing a search warrant, sought to show the bias of the officers by calling his cousin to testify to an incident eight years earlier in which the officers had allegedly beaten the defendant and his cousin while making an arrest. The officers did not recall the arrest and denied the beating. The Court held there was no abuse of discretion in permitting impeachment of the cousin with his 17-year-old conviction of heroin possession, as the witness' credibility was a paramount issue. See also *United States v. Keene* n49(finding no abuse of discretion when a similar 1976 drug conviction was brought out only on cross-examination after the defendant's testimony implied no contact with the drug prior to 1982); *United States v. Maichle* n50(evidence of a conviction for a similar narcotics charge was admissible despite its age, where the defendant denied knowing that a package contained cocaine and his credibility was a significant factor); *United States v. Spero* n51(upholding impeachment of the defendant with a 22-year-old grand theft conviction in a trial for conspiracy to possess an unregistered destructive device where the credibility of the witness was crucial).

United States v. Bensimon, 172 F.3d 1121 (9th Cir. 1999) : The Trial Judge denied a motion *in limine* to admit evidence of the defendant's 17-year-old mail fraud conviction in his trial for cocaine possession, but reconsidered the ruling midway through cross-examination of the defendant and admitted the evidence. The Court reversed, finding that the Judge had mistakenly treated the defendant's testimony as portraying himself as always having been a law-abiding citizen, had erred in relying on the defendant's lack of memory as a reason for admitting the conviction (in fact, that in itself was useful impeachment evidence), and had improperly focused on the importance of the defendant's credibility to the government's case rather than how well the evidence would demonstrate the witness' lack of trustworthiness.

United States v. Gates, 10 F.3d 765 (11th Cir. 1993) : In a bank robbery case, the Court held there was no error in permitting cross-examination of the defendant about a drug conviction more than ten years old, as the evidence tended to establish that his answer on direct describing a single felony conviction was false. In *United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992)* , the Court affirmed a conviction for bank robbery, holding there was no abuse of discretion in allowing the defendant to be impeached by a 13-year-old burglary conviction, as his credibility was a key issue. Although the circumstantial evidence was strong, the only direct witness for the prosecution was an accomplice who had pleaded guilty to the robbery and whose criminal record was known to the jury.

[ii] Rule 609(b) -- Discretion -- Prosecution Witnesses

United States v. Orlando-Figueroa, 229 F.3d 33 (1st Cir. 2000) : The Court held, in a bribery prosecution, that there was no abuse of discretion in excluding evidence that a cooperating witness had been convicted 13 years previously for mail fraud. A defense theory was that the witness, not the defendants, was the real culprit in the scheme. While that increased the value of the conviction to the defense, it also increased the prejudicial effect of the evidence. The defense may well have wanted to use the conviction not so much to show the witness' testimony was untrue as to show from a criminal propensity that the witness was as culpable as the defendants. The defense was given ample opportunity to attack the witness' credibility with more recent and more factually similar evidence than the mail fraud conviction.

United States v. Agnew, 385 F.3d 288 (3d Cir. 2004) : The defendant, charged with distributing crack cocaine and felon firearm possession, was not permitted to impeach a prosecution witness with his 16-year-old forgery conviction. The Court held that the probative value of the evidence "was sufficiently small that the 'interests of justice' did not warrant its admission, and that any error in refusing to admit the evidence was harmless."

United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977) : The Court upheld a ruling that barred impeachment of prosecution witnesses with convictions more than ten years old, saying that "Congress intended that Trial Judges be extremely cautious in admitting evidence of remote convictions."

United States v. Lochmondy, 890 F.2d 817 (6th Cir. 1989) : The District Court did not abuse its broad discretion in a marijuana possession case when it excluded evidence that the government's principal witness had two prior drug convictions more than ten years old and a misdemeanor conviction for disorderly conduct growing out of a shoplifting incident, also more than ten years old. The Court of Appeals cautioned, however, that careful consideration should be given to admission of past convictions of a principal government witness.

United States v. Peak, 856 F.2d 825 (7th Cir. 1988) : In a drug conspiracy prosecution, the Court held there was no error in excluding evidence of a government witness' prior, stale convictions that were offered for impeachment. There was other evidence of the convictions in the record, the probative value of the convictions was not great, and defense counsel had given inadequate notice.

United States v. Reeves, 730 F.2d 1189 (8th Cir. 1984) : The Court affirmed marijuana convictions, finding no error in the exclusion of an 18-year-old breaking-and-entering conviction of a government witness. The Court observed that the defense attacked the witness' credibility through other means and that the Trial Judge did not clearly err in finding that the stale conviction was insufficiently probative.

United States v. Linn, 31 F.3d 987 (10th Cir. 1994) : Affirming an arson conviction, the Court held there was no abuse of discretion in excluding evidence that a cooperating witness had been convicted of larceny and possession of stolen property 17 years before the trial. The convictions possessed little probative value because of their age and the evidence was prejudicial to the government's case.

United States v. Pope, 132 F.3d 684 (11th Cir. 1998) : The Court found there was no abuse of discretion in refusing to allow the defendant, charged with firearms offenses, to impeach a prosecution witness with her 28-year-old

burglary conviction. In *United States v. Tisdale*, n52 the Court affirmed a bank robbery conviction, holding there was no abuse of discretion in barring the defendant from impeaching an accomplice with evidence of stale convictions. The jurors were aware that the accomplice had an extensive criminal history and that his testimony was given in exchange for a plea agreement. In *United States v. Solomon*, n53 the Court affirmed convictions for truck hijackings and interstate transportation of stolen goods. Upholding a ruling that convictions more than ten years old could not be used to impeach a government witness, the Court observed that although the Rule's major concern is prejudice to defendants, it also protects the government from the use of stale convictions. The Court also noted that the witness was impeached in several other ways.

[iii] Rule 609(b) -- Discretion -- Witnesses in Civil Cases

Wierstak v. Heffernan, 789 F.2d 968 (1st Cir. 1986) : In a civil rights action for excessive force in making an arrest, the Court found that the plaintiff's prior convictions for breaking, entering, and larceny at night and for possession of a harmful drug were properly excluded where they were more than ten years old. Although the plaintiff's credibility was critical, the jury learned of more recent convictions for possession of heroin, attempted breaking and entering, and possession of burglary tools, so the evidence of the stale convictions would have been far more prejudicial than probative.

[b] Rule 609(b) -- Dishonesty Convictions

United States v. Orlando-Figueroa, 229 F.3d 33 (1st Cir. 2000) : The Court held, in a bribery prosecution, that there was no abuse of discretion in excluding evidence that a cooperating witness had been convicted 13 years previously for mail fraud. A defense theory was that the witness, not the defendants, was the real culprit in the scheme. While that increased the value of the conviction to the defense, it also increased the prejudicial effect of the evidence. The defense may well have wanted to use the conviction not so much to show the witness' testimony was untrue as to show from a criminal propensity that the witness was as culpable as the defendants. The defense was given ample opportunity to attack the witness' credibility with more recent and more factually similar evidence than the mail fraud conviction.

Zinman v. Black & Decker (U.S.), Inc., 983 F.2d 431 (2d Cir. 1993) : In an action by a former podiatrist who sued a manufacturer for an allegedly defective product, the Court reasoned that making a false statement to a government agency is akin to perjury, and found no error in admitting a Medicaid fraud conviction more than ten years old to impeach the plaintiff. Since the plaintiff was given two opportunities to seek a mistrial due to the lack of notice concerning the conviction, his failure to do so was deemed by the Court to be a waiver as to the sufficiency of notice.

United States v. Agnew, 407 F.3d 193 (3d Cir. 2005) : The defendant, charged with distributing crack cocaine and felon firearm possession, was not permitted to impeach a prosecution witness with his 16-year-old forgery conviction. The Court held that the probative value of the evidence "was sufficiently small that the 'interests of justice' did not warrant its admission, and that any error in refusing to admit the evidence was harmless." In a prosecution for interstate transportation of stolen property, *United States v. Colletti, 984 F.2d 1339 (3d Cir. 1992)* , the Court held there was no abuse of discretion in precluding cross-examination about a prosecution witness' 1969 conviction for "disorderly person -- false pretense" because the defendants failed to provide sufficient information about the alleged conviction for a ruling on admissibility, there was insufficient advance notice, and the impeachment value of a 22-year-old conviction for what may well have been merely a summary offense akin to disorderly conduct was virtually nonexistent. In *United States v. D'Agata*, n54 the Court denied the government's motion *in limine* for admission of the defendant's 16-year-old conviction for perjury in a prosecution for conspiracy and receipt of stolen goods, as "the practical effect of allowing this impeachment" would deny the defendant "a fair opportunity to defend himself by testifying."

United States v. Cathey, 591 F.2d 268 (5th Cir. 1979) : The Court said that the fact that a conviction more than ten years old was for a crime of dishonesty is not enough to warrant admitting it; true necessity must be shown.

United States v. Sloman, 909 F.2d 176 (6th Cir. 1990) : Affirming convictions for mail fraud, the Court held there was no error in permitting a defendant to be asked about a 17-year-old conviction for a crime involving dishonesty, where the Trial Court conducted a hearing and stated its reasons for admitting the evidence, even though there were no exceptional circumstances calling for admission of the evidence.

United States v. Gray, 410 F.3d 338 (7th Cir. 2005) : Affirming convictions for drug trafficking offenses, the Court found no abuse of discretion when the defendants were precluded from impeaching a cooperating coconspirator with evidence of a 12-year-old perjury conviction. The Court reasoned that the defendants had been permitted to impeach the witness with four serious felony convictions, and the perjury had occurred on a driver's license application rather than in testimony.

United States v. Singer, 660 F.2d 1295 (8th Cir. 1981) : Although the Court upheld convictions for conspiracy and theft, it found an abuse of discretion in the admission of 12-year-old grand larceny convictions offered to impeach the defendants. The Court observed that the convictions were of low probative value because of their age, more recent convictions also were used, and the government had little need for additional impeachment; furthermore, the presumption against admission of stale convictions is not so weak that it falls simply because a conviction was for a dishonesty offense.

American Home Assur. Co. v. American President Lines, Ltd., 44 F.3d 774 (9th Cir. 1994) : In an insurer's subrogation action for freeze damage to fruit, the defendant carrier attempted to offer evidence that a surveyor who assessed the damage had a 12-year-old Hong Kong fraud conviction. The Court found no abuse of discretion in exclusion of the evidence, where the Trial Judge doubted that the conviction would be very probative of credibility, both because of its age and because of the witness' claims that the guilty plea was coerced.

[c] Rule 609(b) -- Findings on the Record

United States v. Ebner, 782 F.2d 1120 (2d Cir. 1986) : The Court affirmed a tax evasion conviction, holding that the Trial Judge's on-the-record findings were sufficient to support admission of prior federal and state convictions for securities fraud. See also *United States v. Gilbert* n55(upholding introduction in a securities law prosecution of a mail fraud conviction more than ten years old, where the Judge supported the ruling with "specific facts and circumstances"). In *United States v. Mahler*, n56 the Court affirmed convictions for securities violations, finding it was error (but harmless) when no on-the-record findings were made regarding convictions more than ten years old. Citing this *Manual*, the Court reasoned that: (1) "the language of the Rule clearly suggests such an on-the-record determination"; (2) "the legislative history of *Rule 609(b)*, over and above that specifically related to the notice requirement, militates in favor of concluding that the Rule contemplates an on-the-record determination of admissibility"; (3) "the case law, while not entirely consistent, assumes that *Rule 609(b)* requires an on-the-record finding"; (4) "from a policy standpoint an on-the-record determination is a prudent requirement."

United States v. Cavender, 578 F.2d 528 (4th Cir. 1978) : The Court reversed a conviction for illegal possession of a firearm because the Trial Judge erroneously ruled that if the defendant chose to testify he could be impeached with

three convictions that were more than ten years old. The Court indicated that an on-the-record determination, supported by "specific facts and circumstances," that the probative value of the conviction "substantially" outweighs its prejudicial effect is required by the Rule. A concurring opinion would have limited the requirement of an on-the-record statement of reasons to cases in which a request for such a determination was made by counsel. *Cavender* was followed in *United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)* .

United States v. Avants, 367 F.3d 433 (5th Cir. 2004) : Affirming a conviction for aiding and abetting a racially motivated murder, the Court upheld the admission of 1966 state preliminary hearing testimony against the defendant by an aider and abetter (Jones) who was deceased at the time of the federal trial. Avants complained that he was not permitted to impeach Jones with his prior 1935 conviction for breaking and entering and his 1938 conviction for grand larceny. The Court ruled, however, that the Judge is not required to engage in on-the-record balancing for stale convictions when they are excluded; the balancing on the record is required only when stale convictions are admitted. In a marijuana prosecution, *United States v. Acosta*, n57 the Court vacated and remanded one defendant's conviction because the Trial Judge admitted a stale prior conviction as impeachment evidence without weighing its probative value against its prejudicial effect on the record.

United States v. Sims, 588 F.2d 1145 (6th Cir. 1978) : The Court adopted the Second Circuit's reading of *Rule 609(b)* as expressed in *United States v. Mahler, supra*.

United States v. Holmes, 822 F.2d 802 (8th Cir. 1987) : Affirming an escape conviction, the Court held there was no error in permitting the defendant to be impeached with four convictions more than 12 years old. It specifically declined to require specific findings on the record under *Rule 609(b)*, as long as the record indicates that the Trial Judge carefully considered objections under the Rule; here, a prior escape conviction was excluded.

United States v. Murray, 751 F.2d 1528 (9th Cir. 1985) : The Court upheld admission of a conviction more than ten years old for receiving stolen property to impeach a defendant charged with conspiracy to conceal assets from a bankruptcy trustee, where the Trial Judge made requisite findings on the record. In *Powell v. Levit, 640 F.2d 239 (9th Cir. 1981)* , the Court found error in the admission of a stale conviction where the Trial Judge made no finding concerning the probative value and prejudicial effect of the evidence.

United States v. Davis, 787 F.2d 1501 (11th Cir. 1986) : Affirming drug conspiracy convictions, the Court found that the government was properly permitted to ask one defendant about a 1966 conviction involving conspiracy to possess illegal whiskey, after the defendant breached a stipulation that he would not present character evidence by testifying that he had never conspired to possess an illegal substance. The Trial Judge did not make on-the-record findings, and the Court found that they were not required where the conviction was admitted not to impeach the defendant by evidence of a prior conviction, but to impeach him by contradicting his denial that he had previously conspired.

[d] Rule 609(b) -- *In Limine* Motions

United States v. Johnson, 720 F.2d 519 (8th Cir. 1983) : The Court affirmed drug convictions, finding that the defendant waived his right to object to the government's use of a more than ten-year-old conviction to impeach him when his own counsel brought out the conviction during trial after he unsuccessfully attempted to have it excluded by an *in limine* motion before trial. The Court reasoned that pretrial rulings on stale convictions are "tentative," because a final ruling depends on the specific facts and circumstances of each case.

United States v. Bensimon, 172 F.3d 1121 (9th Cir. 1999) : The Trial Judge denied a motion *in limine* to admit evidence of the defendant's 17-year-old mail fraud conviction in his trial for cocaine possession, but reconsidered and reversed the ruling midway through cross-examination of the defendant and admitted the evidence. The Court reversed, finding that the Judge on reconsideration had improperly balanced the probative value and prejudicial effect of the evidence, including failing to consider any prejudice that would accrue to the defendant as a result of reversing a prior *in limine* ruling.

[e] Rule 609(b) -- Notice

United States v. Livingston, 816 F.2d 184 (5th Cir. 1987) : Affirming convictions involving stolen securities, the Court found no error in the exclusion of a government witness' stale bad check conviction, since the defendant had not given notice of an intention to offer it.

United States v. Huddleston, 811 F.2d 974 (6th Cir. 1987) , *aff'd*, *485 U.S. 681 (1988)* : The government's failure to give written notice of its intention to impeach a defense witness with a 13-year-old misdemeanor conviction for failing to file a tax return was not fatal, since the government did not know the witness would be called until a few minutes ahead of his testimony and the defendant did not object to the absence of written notice.

United States v. Vgeri, 51 F.3d 876 (9th Cir. 1995) : The Court held in a cocaine conspiracy prosecution that there was no abuse of discretion in precluding cross-examination of an informant witness with her 18-year-old theft conviction. Although the defense did not learn of the conviction until the Friday before trial, it had at least one full business day to provide the requisite written notice.

[f] Rule 609(b) -- Probation Revocation and Subsequent Incarceration

United States v. Brewer, 451 F. Supp. 50 (E.D. Tenn. 1978) : For purposes of the ten-year time period, reconfinement pursuant to a parole violation is treated the same as confinement imposed for the original conviction.

United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988) : Remanding a heroin case on a Jencks Act issue, the Court noted that the defendant's conviction in 1970 was time-barred, even though her parole was revoked in 1977 and she was recommitted to prison after she was convicted for perjury. It concluded that the perjury conviction was not substantively related to the original conviction and that the revocation did not constitute confinement for purposes of the Rule. We question this analysis, since a revocation followed by a recommitment decision suggests that the defendant is confined for two crimes and is serving the sentence concurrently. In *United States v. McClintock*, n58 a prosecution for fraudulently selling gemstones, the Court held that a defendant's prison time, which was imposed following a probation violation, was time served pursuant to the original conviction. The original conviction was for fraudulent fund raising, and the revocation resulted from violation of a probation condition barring the defendant from engaging professionally in charitable fund raising. The Court reasoned that the violation implicated the original dishonest activity and thus was confinement for that activity. It declined to rule, however, that "a district court may never look behind the circumstances of a probation violation to see if it was substantial or technical, dishonest or honest."

[g] Rule 609(b) -- Rebuttal Evidence

United States v. Norton, 26 F.3d 240 (1st Cir. 1994) : In a prosecution for felon firearm possession, the

defendant's 30-year-old conviction for unlawfully carrying a firearm was excluded *in limine* under *Rule 609(b)*. At trial the defendant, when asked whether he had a gun in his possession when arrested on the current charge, stated that "I never had a gun in my life." On cross-examination, the prosecution was allowed to impeach the defendant with evidence of the prior conviction. The Court found no error, reasoning that *Rule 609* "is not controlling in this context" because the conviction was not admitted to impeach the defendant's character for veracity but rather to contradict his assertion that he never had a gun in his life. As such, admissibility was governed by *Rule 403*. The Court found that the conviction was "highly relevant to contradict [his] specific misleading assertion."

United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992) : The Court held that the Rule did not apply to exclude evidence of the defendant's 17-year-old conviction for marijuana possession, as it was offered to contradict his testimony that he did not recognize marijuana and not to impeach his credibility.

United States v. Davis, 787 F.2d 1501 (11th Cir. 1986) : Affirming drug conspiracy convictions, the Court found that the government was properly permitted to ask one defendant about a 1966 conviction involving conspiracy to possess illegal whiskey, after the defendant breached a stipulation that he would not present character evidence by testifying that he had never conspired to possess an illegal substance. The Trial Judge did not make on-the-record findings, and the Court found that they were not required where the conviction was admitted not to impeach the defendant by evidence of a prior conviction, but to impeach him by contradicting his denial that he had previously conspired.

[h] Rule 609(b) -- Timing of Prior Convictions

Trindle v. Sonat Marine, Inc., 697 F. Supp. 879 (E.D. Pa. 1988) : The Trial Judge ruled *in limine* in a personal injury action that for purposes of determining whether a prior conviction is more than ten years old, the question is whether ten years has expired at the time the witness testifies at trial.

United States v. Daniel, 957 F.2d 162 (5th Cir. 1992) : The Court held in affirming convictions for possession of stolen goods that the date of "release from confinement" should be the end of imprisonment, not the termination of a period of probation, so evidence of a government witness' prior conviction was properly excluded.

United States v. Lorenzo, 43 F.3d 1303 (9th Cir. 1995) : Affirming a ruling that precluded impeachment of a government witness with a conviction that was more than ten years old, the Court held that the *Rule 609(b)* period is measured from the date of the witness' release from confinement or conviction, whichever is later, until the date that the defendant is indicted. The defendant argued that *Rule 609(b)* should not have applied because the government delayed his indictment for almost two years after its investigation was completed. The Court found, however, that the delay was not in bad faith, but rather was a result of the defendant's continuing criminal activity.

United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991) , *supplemented*, *931 F.2d 1396 (10th Cir. 1991)* : A defendant was arrested for the instant drug offense less than ten years following his most recent incarceration, but the trial began after ten years from his release. The Court found it unnecessary to decide whether the limitations period under the Rule had run, as admission of the particular prior conviction was not an abuse of discretion.

[i] Rule 609(b) -- Tolling the Limitations Period

United States v. Mullins, 562 F.2d 999 (5th Cir. 1977) :

> The defendant would not have had the protection of the ten-year limitation if he had not fled to avoid prosecution. By his voluntary wrongful act, he cannot gain the protection of *Rule 609(b)* ... . Refusal to toll the limitations in *Rule 609(b)* [for flight] would undercut the clear intent of Congress.

[3] Rule 609(c) -- Effect of Pardon, annulment, or Certificate of Rehabilitation

[a] Rule 609(c) -- Discretion of Trial Judge

Brown v. Frey, 889 F.2d 159 (8th Cir. 1989) : The Court held, in an inmate's civil rights action, that the Trial Judge had no discretion to allow the plaintiff to cross-examine a defendant-witness regarding his prior perjury conviction, as the witness received an amended pardon three days after the start of trial which stated that the pardon was based on rehabilitation.

[b] Rule 609(c) -- Finding of Rehabilitation Implied

United States v. Pagan, 721 F.2d 24 (2d Cir. 1983) : The Court reversed a heroin distribution conviction because the Trial Judge permitted the defendant to be impeached with a conviction that had been set aside under the Youth Corrections Act prior to expiration of the sentence. The Court reasoned that although the defendant received no certificate of rehabilitation, "a certificate setting aside a youthful offender's conviction and unconditionally discharging him from further probation prior to expiration of the maximum term of probation clearly implies a finding that no further supervision is required, i.e., that this offender has been rehabilitated."

United States v. Thorne, 547 F.2d 56 (8th Cir. 1976) : Affirming a conviction for escaping from custody, the Court upheld a ruling that a key government witness, who had been convicted of three offenses, had been rehabilitated on the basis of therapy, education, and work history. The Court concluded that no certificate of rehabilitation was necessary, emphasizing the Rule's inclusion of "other equivalent procedure based on a finding of the rehabilitation of the person convicted." See also *United States v. Ferguson* n59(finding a violation of neither *Rule 609(c)* nor the *Confrontation Clause* in the exclusion of a government witness' prior state controlled substance conviction that had been expunged by a State Court).

[c] Rule 609(c) -- No Finding of Rehabilitation

Zinman v. Black & Decker (U.S.), Inc., 983 F.2d 431 (2d Cir. 1993) : In an action by a former podiatrist who sued a manufacturer for an allegedly defective product, the Court held that a prior conviction for Medicare fraud was properly admitted to impeach the plaintiff. The fact that he had completed community service and had his podiatrist's registration renewed was not a finding of rehabilitation or innocence. In *United States v. DiNapoli*, n60 the Court affirmed a conviction for conspiring to influence the outcome of horse races, upholding a ruling that a New York "certificate of relief from disabilities" issued to a convicted felon was not a certificate based on a finding either of rehabilitation or innocence and therefore was outside the scope of *Rule 609(c)*. The Court found that although New York law allowed the issuance of a certificate when it would be an aid to rehabilitation, the state law did not require a determination that the convict already was rehabilitated.

Smith v. Tidewater Marine Towing, Inc., 927 F.2d 838 (5th Cir. 1991) : The Court affirmed a judgment for the defendant in a Jones Act suit, holding that a pardon automatically given first offenders upon completion of their sentence was not based on rehabilitation, so the plaintiff was properly impeached by his state robbery conviction. In *United States v. Wiggins*, n61 the Court, discussing *Rule 609(c)*'s applicability to the defendant's release from a "halfway house" where he had been placed as a condition of his probation on a drug conviction, observed that Congress

evinced "a desire to accord a controlling consideration to rehabilitation as opposed to executive grace or judicial invalidation." However, the defendant failed to show that he was found to be rehabilitated.

United States v. Jones, 647 F.2d 696 (6th Cir. 1981) : The Court held that a pardon granted to restore civil rights did not prove that a defendant was rehabilitated and did not make evidence of his prior conviction inadmissible.

U.S. Xpress Enter., Inc. v. J.B. Hunt Transport, Inc., 320 F.3d 809 (8th Cir. 2003) : The truck driver who allegedly caused a fatal accident had been convicted in Canada of possession of stolen property (punishable by imprisonment in excess of one year), but his conviction had been "absolved" under Canadian law. The Court held that the conviction was properly used to impeach the driver when he testified, since the absolution was not a finding of rehabilitation or innocence.

United States v. Wood, 943 F.2d 1048 (9th Cir. 1991) : The Court affirmed a conviction for tax evasion, holding that the defendant had been properly impeached by evidence of a conviction that had been dismissed under state law, as the dismissal was not based upon a finding of rehabilitation.

United States v. Moore, 556 F.2d 479 (10th Cir. 1977) : In a prosecution for attempting to damage a federal courthouse, the Court held there was no error in denying the defendant's *in limine* motion to suppress the use of a California felony conviction as impeachment evidence. Although the conviction was expunged, California law provided that it could be used in a State Court for impeachment purposes. The Court held that under *Rule 609(c)* "the extent of such expungement, must in the instant case be determined by reference to California law."

Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985) : In a civil rights action for unlawful arrest, the Court held that a plaintiff could be impeached with evidence that he had pleaded guilty to a first offense charge of battery, pursuant to a state procedure that permitted the plea without entry of judgment and that exonerated the defendant following a successful completion of probation. The Court found that the state law did not provide for rehabilitation and did not involve a finding of rehabilitation.

[d] Rule 609(c) -- Objection to Impeachment Required

United States v. Trejo-Zambrano, 582 F.2d 460 (9th Cir. 1978) : In a prosecution for marijuana offenses, the Court held that it was the defendant's burden to object to introduction of a conviction that had been automatically vacated pursuant to the Federal Youth Corrections Act. The dissenting Judge pointed out that this was a situation in which the prosecutor and defense were equally on notice that the conviction had been set aside.

[e] Rule 609(c) -- Vacated Convictions

United States v. Russell, 221 F.3d 615 (4th Cir. 2000) : The Court vacated a conviction for heroin possession on the ground of ineffective assistance of counsel because the defendant's attorney allowed him to be impeached with convictions, for armed assault with intent to kill and for arson, that had been vacated and were invalid at the time of trial.

United States v. Fisher, 106 F.3d 622 (5th Cir. 1997) : A defendant in a bank fraud prosecution was impeached with evidence of a state conviction for criminal contempt in failing to comply with a turnover order. Soon after the

defendant was convicted in this case, the contempt conviction was overturned on the ground that the defendant had not received proper notice of the subject matter of the contempt motion. Reversing denial of his motion for a new trial, the Court held that because of the constitutional infirmity arising from lack of notice, the contempt conviction was improperly admitted against the defendant and the error was not harmless.

[4] Rule 609(d) -- Juvenile Adjudications

United States v. Rogers, 918 F.2d 207 (D.C. Cir. 1990) : Affirming a conviction for possessing crack with intent to distribute, the Court held that the Rule did not bar evidence of other drug possession offenses committed while the defendant was a juvenile when the evidence was admissible under *Rule 404(b)*.

United States v. Ciro, 753 F.2d 248 (2d Cir. 1985) : The Court affirmed convictions for cocaine offenses, finding no error in the exclusion of a government witness' juvenile adjudication. The Court observed that there was ample opportunity for the defendants to cross-examine the witness, although it added that it questioned "whether the government was well advised to press the objection" since "the additional evidence could hardly have had a significant effect on the jury's assessment of [the witness'] credibility, but the exclusion of the evidence provided defendants with a serious issue for appeal."

United States v. Ashley, 569 F.2d 975 (5th Cir. 1978) : The Court held that a conviction under the Federal Youth Corrections Act is a conviction of a crime, and that a conviction under the Act does not fall under *Rule 609(d)* when offered for impeachment purposes. The Court drew a line between a conviction of a crime and a finding of delinquency, holding that *Rule 609(d)* covers only the latter. In *United States v. Decker*, n62 the Court affirmed convictions for drug offenses, holding that evidence of a juvenile adjudication offered to impeach a government witness was properly excluded. Although it was not certain whether the Trial Judge relied upon the remoteness of the adjudication or its status as a "juvenile" adjudication, the proponent of the evidence failed to demonstrate that the probative value of the adjudication outweighed its prejudicial effect. The Court also rejected a claim that the *Confrontation Clause* guaranteed the right to impeach a witness with a juvenile adjudication and distinguished *Davis v. Alaska, 415 U.S. 308 (1974)* , as a case involving bias.

United States v. Morrow, 977 F.2d 222 (6th Cir. 1992) (en banc): Affirming convictions for carrying a firearm in relation to a drug trafficking offense, the Court held that the protections of *Rule 609(d)* did not apply where the defendant was 19 years old at the time of his arrest and conviction, even though the offense was prosecuted under the Federal Youth Corrections Act.

United States v. Jones, 557 F.2d 1237 (8th Cir. 1977) : Affirming a conviction for robbery of a savings and loan association, the Court held it was not an abuse of discretion to preclude the defendant from impeaching his former girlfriend by eliciting details of her juvenile conviction, after he elicited information that she had been adjudicated as a delinquent, sent to a reformatory, and convicted of a crime equivalent to a felony.

United States v. Williams, 963 F.2d 1337 (10th Cir. 1992) : Affirming convictions for crack cocaine distribution, the Court held there was no violation of confrontation rights when the defendants were prevented from introducing evidence of government witnesses' juvenile records, as the witnesses were not under probation likely to induce bias, the jury was aware of pending charges that might have motivated lying for the government, the witnesses were not key to the prosecution, and the defendants had substantial other evidence with which to impeach the witnesses' credibility.

Samples v. City of Atlanta, 916 F.2d 1548 (11th Cir. 1990) : The Court affirmed a summary judgment for the defendants in a § 1983 action by the parents of a youth fatally shot by a police officer, holding that evidence of the decedent's juvenile court records was admissible to impeach the mother's credibility by showing she had not fully disclosed her knowledge of his glue sniffing habit.

[5] Rule 609(e) -- Pendency of Appeal

[a] Rule 609(e) -- Conviction, But No Sentence or Judgment

United States v. Vanderbosch, 610 F.2d 95 (2d Cir. 1979) : The Court affirmed drug convictions, holding there was no error in a ruling that the defendant could be impeached on the basis of a jury's guilty verdict that had not been reduced to judgment and on which sentence had not been imposed.

United States v. Mitchell, 886 F.2d 667 (4th Cir. 1989) : Affirming convictions for obstructing a grand jury investigation, the Court held that the defendant was properly impeached by evidence of a prior conviction, where sentence had not yet been imposed and the time for appeal had not yet run, but his posttrial motions had been denied.

United States v. Klein, 560 F.2d 1236 (5th Cir. 1977) : Affirming convictions on drug charges, the Court upheld a ruling that a conviction by a jury in another case in which no judgment or sentence had yet been entered could be used to impeach the defendant if he chose to testify at trial. The Court analogized to *Rule 609(e)* and concluded that the difference between a jury verdict of guilty and the entry of the judgment is inconsequential. The Court emphasized that it was not deciding whether a plea of guilty would be admissible before the entry of judgment.

[b] Rule 609(e) -- State Law

United States v. Klayer, 707 F.2d 892 (6th Cir. 1983) : The Court found that federal law permitted impeachment of a defendant with a state conviction that was still on appeal, even though the state evidence law barred the use of a conviction for impeachment purposes until the appeal is decided.

[c] Rule 609(e) -- Suspended Sentence

United States v. Collins, 552 F.2d 243 (8th Cir. 1977) : Affirming convictions for drug offenses, the Court held that one defendant was properly impeached with a prior felony conviction on which the sentence was suspended. "[T]his court fails to find a distinction between a conviction whose finality is still pending during appeal or which has been reversed on appeal and a conviction which is final but upon which a suspended sentence was imposed." We agree with the holding, but strongly urge that convictions reversed on appeal be deemed inadmissible for impeachment purposes.

FOOTNOTES:

(n1)Footnote 1. *United States v. Larsen, 596 F.2d 347 (9th Cir. 1979)* .

(n2)Footnote 2. *United States v. Beltran, 761 F.2d 1 (1st Cir. 1985)* .

(n3)Footnote 3. *United States v. George, 752 F.2d 749 (1st Cir. 1985)* .

(n4)Footnote 4. *United States v. Wilson, 556 F.2d 1177 (4th Cir. 1977)* .

(n5)Footnote 5. *United States v. Moore, 735 F.2d 289 (8th Cir. 1984)* .

(n6)Footnote 6. *United States v. Levine, 700 F.2d 1176 (8th Cir. 1983)* .

(n7)Footnote 7. *United States v. Brackeen, 969 F.2d 827 (9th Cir. 1992)* (en banc; per curiam) (*see* the Editorial Explanatory Comment, *§ 609.02[4]*).

(n8)Footnote 8. *United States v. Givens, 767 F.2d 574 (9th Cir. 1985)* .

(n9)Footnote 9. *United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988)* .

(n10)Footnote 10. *United States v. Browne, 829 F.2d 760 (9th Cir. 1987)* .

(n11)Footnote 11. *Donald v. Wilson, 847 F.2d 1191 (6th Cir. 1988)* .

(n12)Footnote 12. *Murr v. Stinson, 752 F.2d 233 (6th Cir. 1985)* .

(n13)Footnote 13. *Jones v. Board of Police Comm'rs, 844 F.2d 500 (8th Cir. 1988)* .

(n14)Footnote 14. *Lewis v. Sheriff's Dep't, 817 F.2d 465 (8th Cir. 1987)* .

(n15)Footnote 15. *Jones v. Collier, 762 F.2d 71 (8th Cir. 1985)* .

(n16)Footnote 16. *United States v. Cavender, 228 F.3d 792 (7th Cir. 2000)* .

(n17)Footnote 17. *United States v. Preston, 608 F.2d 626 (5th Cir. 1979)* .

(n18)Footnote 18. *United States v. Mahone, 537 F.2d 922 (7th Cir. 1976)* .

(n19)Footnote 19. *United States v. Key, 717 F.2d 1206 (8th Cir. 1983)* .

(n20)Footnote 20. *United States v. McCollum, 732 F.2d 1419 (9th Cir. 1984)* .

(n21)Footnote 21. *United States v. Portillo, 699 F.2d 461 (9th Cir. 1982)* .

(n22)Footnote 22. *United States v. Lamb, 575 F.2d 1310 (10th Cir. 1978)* .

(n23)Footnote 23. *United States v. Beckett, 706 F.2d 519 (5th Cir. 1983)* .

(n24)Footnote 24. *United States v. Tumblin, 551 F.2d 1001 (5th Cir. 1977)* .

(n25)Footnote 25. *United States v. White, 222 F.3d 363 (7th Cir. 2000)* .

(n26)Footnote 26. *United States v. Robinson, 8 F.3d 398 (7th Cir. 1993)* .

(n27)Footnote 27. *United States v. Swanson, 9 F.3d 1354 (8th Cir. 1993)* .

(n28)Footnote 28. *Cummings v. Malone, 995 F.2d 817 (8th Cir. 1993)* .

(n29)Footnote 29. *United States v. Bay, 762 F.2d 1314 (9th Cir. 1984)* .

(n30)Footnote 30. *United States v. Harris, 738 F.2d 1068 (9th Cir. 1984)* .

(n31)Footnote 31. *United States v. Scisney, 885 F.2d 325 (6th Cir. 1989)* .

(n32)Footnote 32. *United States v. Amaechi, 991 F.2d 374 (7th Cir. 1993)* .

(n33)Footnote 33. *Government of Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976)* .

(n34)Footnote 34. *United States v. Carden, 529 F.2d 443 (5th Cir. 1976)* .

(n35)Footnote 35. *Altobello v. Borden Confectionary Prods., Inc., 872 F.2d 215 (7th Cir. 1989)* .

(n36)Footnote 36. *United States v. Papia, 560 F.2d 827 (7th Cir. 1977)* .

(n37)Footnote 37. *United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982)* .

(n38)Footnote 38. *United States v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982)* .

(n39)Footnote 39. *United States v. Thompson, 559 F.2d 552 (9th Cir. 1977)* .

(n40)Footnote 40. *United States v. Burkhead, 646 F.2d 1283 (8th Cir. 1981)* .

(n41)Footnote 41. *United States v. Browne, 829 F.2d 760 (9th Cir. 1987)* .

(n42)Footnote 42. *United States v. Short, 947 F.2d 1445 (10th Cir. 1991)* .

(n43)Footnote 43. *United States v Rein, 848 F.2d 777 (7th Cir. 1988)* .

(n44)Footnote 44. *United States v. Amahia, 825 F.2d 177 (8th Cir. 1987)* .

(n45)Footnote 45. *United States v. Mehrmanesh, 682 F.2d 1303 (9th Cir. 1982)* .

(n46)Footnote 46. *United States v. Martino, 759 F.2d 998 (2d Cir. 1985)* .

(n47)Footnote 47. *United States v. Shapiro, 565 F.2d 479 (7th Cir. 1977)* .

(n48)Footnote 48. *United States v. Thomas, 914 F.2d 139 (8th Cir. 1990)* .

(n49)Footnote 49. *United States v. Keene, 915 F.2d 1164 (8th Cir. 1990)* .

(n50)Footnote 50. *United States v. Maichle, 861 F.2d 178 (8th Cir. 1988)* .

(n51)Footnote 51. *United States v. Spero, 625 F.2d 779 (8th Cir. 1980)* .

(n52)Footnote 52. *United States v. Tisdale, 817 F.2d 1552 (11th Cir. 1987)* .

(n53)Footnote 53. *United States v. Solomon, 686 F.2d 863 (11th Cir. 1982)* .

(n54)Footnote 54. *United States v. D'Agata, 646 F. Supp. 390 (E.D. Pa. 1986)* , *aff'd*, *826 F.2d 1057 (3d Cir. 1987)* .

(n55)Footnote 55. *United States v. Gilbert, 668 F.2d 94 (2d Cir. 1981)* .

(n56)Footnote 56. *United States v. Mahler, 579 F.2d 730 (2d Cir. 1978)* .

(n57)Footnote 57. *United States v. Acosta, 763 F.2d 671 (5th Cir. 1985)* .

(n58)Footnote 58. *United States v. McClintock, 748 F.2d 1278 (9th Cir. 1984)* .

(n59)Footnote 59. *United States v. Ferguson, 776 F.2d 217 (8th Cir. 1985)* .

(n60)Footnote 60. *United States v. DiNapoli, 557 F.2d 962 (2d Cir. 1977)* .

(n61)Footnote 61. *United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978)* .

(n62)Footnote 62. *United States v. Decker, 543 F.2d 1102 (5th Cir. 1976)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 609 RULE 609

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609.04 Legislative History

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[1] Advisory Committee's Note

Advisory Committee's Note

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi*, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of *§ 14-305 of the District of Columbia Code*, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States, 348 F.2d 763, 121 U.S. App. D.C. 151 (1965)* ; McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Editor's Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for Trial Court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act,

making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, *18 U.S.C. § 13*, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, *28 U.S.C. § 1865*. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See *28 U.S.C. § 1865*, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests -- Current Trends, *89 U. Pa. L. Rev. 166, 176*-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, § 788(5), p. 142, Cal. Law Rev. Comm'n (1965), though not adopted. See *California Evidence Code § 788*. **[Editor's Note: The Rule ultimately adopted by Congress provides for admissibility of convictions more than ten years old when the probative value substantially outweighs the prejudicial effect.]**

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in *California Evidence Code § 788*. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas v. United States, 121 F.2d 905, 74 App. D.C. 167 (1941)* ; *Cotton v. United States, 355 F.2d 480 (10th Cir. 1966)* . This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)* , no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. *387 U.S. at 25, 87 S. Ct. 1428* . See also Note, Rights and Rehabilitation in the Juvenile Courts, *67 Colum. L. Rev. 281, 289 (1967)*. In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967)* . Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 *id.* §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States v. Empire Packing Co., 174 F.2d 16 (7th Cir. 1949)* , *cert. denied*, *337 U.S. 959, 69 S. Ct. 1534, 93 L. Ed. 1758* ; *Bloch v. United States, 226 F.2d 185 (9th Cir. 1955)* , *cert. denied*, *350 U.S. 948, 76 S. Ct. 323, 100 L. Ed. 826* and *353 U.S. 959, 77 S. Ct.*

868, 1 L. Ed. 2d 910 ; and see *Newman v. United States, 331 F.2d 968* (8th Cir. 1964). Contra, *Campbell v. United States, 176 F.2d 45, 85 U.S. App. D.C. 133 (1949)* . The pendency of an appeal is, however, a qualifying circumstance properly considerable.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 277 (1999)

Rule 609 -- Impeachment With Prior Convictions

Rule 609 provides that certain prior convictions of a witness can be introduced to impeach the witness's character for veracity. As originally drafted by the Advisory

Committee and approved by the Supreme Court, Rule 609(a) provided for automatic admission of all felony convictions, unless it had been more than ten years since the conviction or the witness' confinement thereon, in which case Rule 609(b) provided that the conviction would be absolutely inadmissible. The rule further provided for admissibility of misdemeanor convictions, but only if they involved dishonesty or false statement. The Advisory Committee Note sets forth opposing views on the admissibility of prior convictions. One view, which Congress had previously adopted for the District of Columbia courts, provided for automatic admission of all felonies, and automatic admission of misdemeanors based on dishonesty or false statement. A more moderate view provided that crimes involving dishonesty should be automatically admitted, while other convictions (e.g., murder, bank robbery, etc.) should be excluded. The judgment behind this latter view was that only convictions involving dishonesty or false statement (also called "crimen falsi" convictions) were truly probative of the witness's character for truthfulness. A third view provided, in the words of the Advisory Committee, that "the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States, 348 F.2d 763, 121 U.S. App. D.C. 151 (1965)* ."

The Advisory Committee expressed no view on the merits of these conflicting proposals. It opted for the automatic admissibility view because Congress, in 1970, had taken this position in providing rules of evidence for the District of Columbia courts. See section 14-30 5 of the District of Columbia Code. Rule 609(a) was "drafted to accord with the congressional policy manifested in the 1970 legislation."

Apparently Congress had a change of heart on the matter when it reviewed the proposed Federal Rules of Evidence. As to automatic admission of felonies, the House Committee on the Judiciary report expresses concern over "the danger of unfair prejudice ... and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused" that would result from automatic admission of all felony convictions for impeachment. The House's position was that only crimen falsi crimes should be admissible. Eventually, Congress settled on a modified approach in Rule 609(a), whereby all recent crimen falsi crimes would be automatically admitted, while felony convictions not involving dishonesty or false statement would be admissible if they pass a judicial balancing of probative value and prejudicial effect; criminal defendants receive a somewhat more protective balancing test with respect to noncrimen falsi crimes, in deference to their constitutional right to testify. (The balancing process for non-crimen falsi crimes was clarified by a 1990 amendment to Federal Rule 609(a)(1).)

The end result is a complex rule. Anyone seeking to master it should not rely on the original Advisory Committee Note, however. It is completely out of sync with the rule as passed and later amended, since it describes the rule as automatically admitting all recent felony convictions, which is not the case. The Advisory Committee Comment to the 1990 amendment to Rule 609(a) is a far more accurate guide to the rule.

As to old crimes (i.e., where more than ten years have passed since conviction or confinement), Congress decided, contrary to the Advisory Committee's position, that they could have probative value in assessing the credibility of a witness. The Senate Committee on the Judiciary stated that "[A]lthough convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness." Accordingly, Rule 609(b) as adopted states that if more than ten years have passed since the date of conviction or confinement (whichever is later), the conviction can be admitted to impeach the witness, but only if the probative value of the conviction substantially outweighs the risk of prejudice. Yet the Rule 609(b) test, while exclusionary, does not exclude all old convictions. Thus a lawyer attempting to divine the meaning of Rule 609(b) should not look to the Advisory Committee Note. She would get the mistaken impression that convictions more than ten years old can never be admitted.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Advisory Committee note stated: "There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose." The Subcommittee consideration of the Rule made this clear. Sentiment was expressed that only convictions of offenses bearing on credibility should be admissible; as proposed, the Rule had no limitation. Sentiment was expressed in support of the formulation of the 1971 draft -- no conviction should be admissible if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." Concern was voiced as to whether there should be an arbitrary time limitation such as that contained in subdivision (b), and whether and under what circumstances juvenile adjudications should be admissible.

The Subcommittee draft addresses and disposes of these considerations as follows:

> (1) Subdivision (a) was amended so that convictions of crimes involving dishonesty or false statements are always admissible to attack credibility. However, for all other crimes, convictions of only those which are felonies by Federal standards will be admissible unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of the convictions.
>
> (2) Subdivision (b) was amended to read in substance as set forth in the 1971 Advisory Committee draft as constituting a fairer, more reasonable, time measure than that in the draft submitted to the Congress.
>
> (3) Subdivision (c) was amended to reflect the Subcommittee's view that, with regard to pardons, annulments, etc., based on rehabilitation, only conviction of a subsequent serious crime (not any crime as the Court draft had proposed) should be sufficient to permit reference to the pardoned conviction for impeachment purposes.
>
> (4) Subdivision (d) was amended to confer upon a judge discretion to admit evidence of juvenile adjudications in criminal cases only. This appeared to be the intention of the Court, judging from the use of the word "accused" in the second sentence of subdivision (d) as submitted to the Congress.

[Subdivision (c) was not amended in the June 28, 1973 draft. Ed.]

[4] Report of the House Committee on the Judiciary

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

> "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a

> crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment."

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair
>
> prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement."

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e.*, crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date."

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year," on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

[5] Report of the Senate Committee on the Judiciary

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a

felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of *crimen falsi* the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under Rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over ten years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over ten years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over ten years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

[6] Report of the House and Senate Conferees

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness's credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of Rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness's reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the convictions, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

[7] 1990 Amendment Advisory Committee's Note

1990 Amendment Advisory Committee's Note

[The following is the Advisory Committee Note accompanying the changes to subdivision (a) effective December 1, 1990:]

The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment. *See*, e.g., *United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977)* . The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.

The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. *See Green v. Bock Laundry Machine Co., 490 U.S. 504, 109 S. Ct. 1981] (1989)* . The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice -- *i.e.*, the danger that convictions that would be excluded under *Rule 404* will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.

The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the [criminal] defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. *See, e.g., Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984)* , *cert. denied*, *105 S. Ct. 2157 (1985)* . The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. *See, e.g., Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985)* ; *Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983)* .

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. *See, e.g., United States v. Thorne, 547 F.2d 56 (8th Cir. 1976)* ; *United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977)* , *cert. denied*, *444 U.S. 847 (1979)* . This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment

to a witness. *Rule 412* already recognizes this and excluded [*sic*] certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of *Davis v. Alaska, 415 U.S. 308 (1974)* . *Davis* involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. *See generally* Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2) thus facilitating retrieval under current computerized research programs which distinguish the two provisions. The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny. Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the conviction *for impeachment*, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

[8] Citations to Hearings and Debates

Letter from Herbert E. Hoffman to Edward W. Cleary, May 31, 1973, and Reply Letter from Edward W. Cleary to Herbert E. Hoffman, June 12, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 99-100 (1973).

Debate in the House of Representatives, 120 Cong. Rec. H551--H557 (daily ed. February 6, 1974).

Debate in the Senate, 120 Cong. Rec. S19908--S19914 (daily ed. November 22, 1974).

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109, 111 (1974).

Debate in the House of Representatives, 120 Cong. Rec. H12254, H12257--H12258 (daily ed. December 18, 1974).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 609 RULE 609

3-609 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 609, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 609. Impeachment by Evidence of Conviction of Crime	**Rule 609. Impeachment by Evidence of a Criminal Conviction**
(a) General rule. For	**(a) In General.** The fol-

the purpose of attacking the character for truthfulness of a witness, lowing rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) evidence that a witness other than an accused has been convicted of a crime shall be

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment in excess of one year, the evidence shall be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accusedonment for more than one year, the evidence:

d has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the pro-

			bative value of the evidence outweighs its prejudicial effect to that defendant; and
(2)	evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if	**(2)**	for any crime regardless of the punishment, the evidence must be admitted if the court can readily deter-

it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a

(b) Limit on Using the Evi

min e that es- tab- lish- ing the ele- men ts of the crim e re- quir ed prov ing - - or the wit- ness' s ad- mit- ting -- a dis- hon- est act or false state men t.

conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that con-

dence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the con-

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advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(1) its probative value, supported

by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the

party has a fair opportunity to contest its use.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted,

and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, an-

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or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile

(d) Juvenile Adjudications. Evidence of a juvenile

adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if convic-

adjudication is admissible under this rule only if:

tion of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of

guilt or in-no-cenc e.

(1) it is offer ed in a crim inal case;

(2) the ad-ju-dica-tion was of a wit-ness oth-er than the de-fend ant;

(3) an adul t's con-vic-tion for that of-fens e wou ld be ad-miss ible to at-tack the

adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render

(e) Pendency of an Appeal. A conviction that satisfies this rule is admiss

evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

evidence even if an appeal is pending. Evidence of the pendency is also admissible.

Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 609 RULE 609

3-609 Federal Rules of Evidence Manual Supp. to § 609.01

Supp. to § 609.01 Official Text

[Go To Main]

Rule 609 has been amended effective December 1, 2006. The issues giving rise to the amendment are discussed in the Main Volume at *§ 609.02[5]*. The Committee Note is set forth *infra* at § 609.04[7.1]. Following is the text of the amended Rule:

Rule 609 **Impeachment by Evidence of Conviction of Crime**

(a) General rule. -- For the purpose of attacking the The material within the following brackets is overstruck in the original. [credibility] character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of

the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime The material within the following brackets is overstruck in the original. [which] that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

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[1] Rule 609(a) -- General Rule [Go To Main]

[b] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect

[i] Rule 609(a) -- Accused-Witness

[A] Rule 609(a) -- Error To Admit

United States v. Kemp, 546 F.3d 759 (6th Cir. 2008) : In a prosecution for felon firearm possession, the defendant, whose stipulation to having been convicted of a felony had been read to the jury, was impeached with evidence that he had twice been convicted in 1987 of taking indecent liberties with a minor and sentenced to ten years. The Court concluded that "[o]n this record we can see little or no" impeachment value in having the jury know not only that the accused "was a felon *simpliciter* -- which they already knew -- but that he was this particular *kind* of felon." Furthermore, "the names of those convictions -- involving as they do sexual contact with minors -- were heavy with prejudice." However, because no sufficient objection was made at trial, the Court applied an "exceedingly deferential" standard of review and was unable to conclude that admission of the names of the crimes was so manifestly incorrect as to amount to plain error.

[B] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Accused-Witness -- Factors To Be Considered

United States v. Jackson, 546 F.3d 801 (7th Cir. 2008) : The Court affirmed fraud convictions arising from a scheme to submit inflated insurance claims in connection with three motor vehicles that were stolen or damaged. It found no abuse of discretion when a defendant was impeached with his almost-10-year-old conviction for receiving stolen property. The Judge weighed the age of the conviction as a factor against admission, and properly considered that the conviction reflected conduct bearing on the witness' truthfulness (although receiving stolen property is not a crime of dishonesty per se) and that the defendant's credibility would be a key factor in assessing his testimony on the central issues of his intent and state of mind. Any prejudicial effect was mitigated by the standard instruction that the evidence

was to be used only in evaluating truthfulness as a witness and for no other purpose.

United States v. Headbird, 461 F.3d 1074 (8th Cir. 2006) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion when the defendant's prior convictions (which, although not specified in the opinion, were apparently for violent felonies) were admitted for impeachment purposes. Because the case hinged on credibility, the defendant's convictions were highly probative: " '[O]ne who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath.' " The Court further held that because the defendant had denied recollection of the convictions, the government was properly allowed to ask more specific questions than those typically allowed, i.e., as to the facts and nature of the previous convictions.

[v] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Prosecution Witnesses

United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) : The Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion when the defendant was prohibited from impeaching a government witness by showing that he was a registered sex offender. The witness had been convicted in the 1980s of sexual assault, sentenced to probation, and required to register as a sex offender. The Court observed that "although the jury might have considered Richards more likely to be untruthful if it had known of his conviction, there is a significant danger that it would have instead improperly discounted his testimony because of personal revulsion for sex offenses"; and the jury already knew the witness had been convicted of other crimes, was currently incarcerated, and had a history of mental disturbance and drug abuse, and that the government would attempt to reduce his sentence in exchange for his testimony.

[vii] Rule 609(a) -- Balancing Probative Value Against Prejudicial Effect -- Title or Nature of Prior Conviction

United States v. Kemp, 546 F.3d 759 (6th Cir. 2008) : In a prosecution for felon firearm possession, the defendant, whose stipulation to having been convicted of a felony had been read to the jury, was impeached with evidence that he had twice been convicted in 1987 of taking indecent liberties with a minor and sentenced to ten years. The Court concluded that "[o]n this record we can see little or no" impeachment value in having the jury know not only that the accused "was a felon *simpliciter* -- which they already knew -- but that he was this particular *kind* of felon." Furthermore, "the names of those convictions -- involving as they do sexual contact with minors -- were heavy with prejudice." However, because no sufficient objection was made at trial, the Court applied an "exceedingly deferential" standard of review and was unable to conclude that admission of the names of the crimes was so manifestly incorrect as to amount to plain error.

[b.1] Rule 609(a) -- Conviction After Testifying

United States v. Street, 548 F.3d 618 (8th Cir. 2008) : In a prosecution for murder in furtherance of a drug transaction, the defense sought to impeach a government witness with not only his prior conviction but also the fact that the witness had testified at the trial, suggesting that the jury in that case had concluded that the witness had lied on the stand. Reversing on other grounds, the Court found no error in excluding the fact that the witness had testified at his trial. To go beyond proving the conviction after a jury trial "and to contest the truthfulness of Pospisil's individual past statements would be to relitigate his prior conviction." The Court noted that the scope of examination into prior convictions is "strictly limited" to the fact, date, and description of the crime charged, "in order to avoid the confusion resulting from the trial of collateral issues, and also to avoid unfairness to the witness."

[c] Rule 609(a) -- Corporate Convictions

Olin Corp. v. Certain Underwriters at Lloyd's London, 468 F.3d 120 (2d Cir. 2006) : In an action to recover indemnification for pollution remediation under CERCLA, the Court found no abuse of discretion in the exclusion of evidence that the corporate plaintiff and three employees had been convicted of a misdemeanor in 1979 for intentionally

polluting and for knowingly submitting false reports that understated its release of mercury. Even assuming that a corporate representative may be impeached with the corporation's convictions, the probative value of the conviction did not substantially outweigh its prejudicial impact. It dealt with a different time frame than much of the initial pollution at issue in this case, and it may have been highly prejudicial in suggesting that the contamination at issue was intentional.

[e] Rule 609(a) -- Details of the Conviction

United States v. Estrada, 430 F.3d 606 (2d Cir. 2005) : The Court held that the Trial Judge "misapplied *Rule 609(a)(1)* by limiting the scope of impeachment of the government's witnesses, as a matter of policy, to the fact and date of the felony convictions without permitting inquiry into the statutory names of the witnesses' offenses of conviction." The Court noted that *Rule 609* contemplates admitting "evidence" of a witness' conviction for impeachment purposes, and declared that the "overwhelming weight of authority" provides that, under *Rule 609(a)*, "inquiry into the essential facts of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required by the Rule." The Court observed that the nature of the conviction bore on its probative value for impeachment, and thus it was contrary to the *Rule 609(a)(1)* balancing test to consider all felonies as equal.

United States v. Barnhart, 599 F.3d 737 (7th Cir. 2010) : The Court affirmed a wire fraud conviction, holding that the government was properly permitted to question the defendant under Rule 608(b) about the specific conduct underlying his prior convictions for theft and deceptive practices. It noted that while impeachment under Rule 609 is limited to the fact of the conviction, Rule 608(b) allows inquiry into bad acts underlying the conviction unless their probative value as to the witness's truthfulness is substantially outweighed by their prejudicial effect. In this case, the underlying conduct was "highly relevant to Barnhart's character for truthfulness."

United States v. Osazuwa, 564 F.3d 1169 (9th Cir. 2009) : The Court reversed an inmate's conviction for assaulting a guard because he had been cross-examined extensively about the circumstances of a bank fraud conviction introduced to impeach him. It held that impeachment evidence relating to convictions falls within the exclusive purview of Rule 609, so the details of offenses (even though they involved dishonesty) are not admissible under Rule 608(b), and the scope of the inquiry under Rule 609(a) does not include, except in exceptional circumstances, details of the crime. The Court also rejected an argument that the defendant had opened the door to the cross-examination by testifying he served only one day in jail, thus minimizing the seriousness of the offense, since the testimony was an accurate answer to the question asked and he did not attempt to explain away or otherwise minimize his conviction.

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) : Affirming a conviction for possession of methamphetamine with intent to distribute, the Court found no abuse of discretion when the defense was precluded, without a Rule 403 balancing, from asking a cooperating witness about details underlying his conviction that would have affected the possible penalty. The cross-examiner is entitled to elicit the nature of a conviction offered to impeach, but not to inquire as to the specific underlying facts and circumstances. In *United States v. Commanche, 577 F.3d 1261 (10th Cir. 2009)* , the Court reversed a conviction for assault with intent to do bodily harm arising from a fight in which the defendant, who claimed self-defense, used a box cutter. The Court held it was error to admit evidence that the defendant had twice been convicted of aggravated battery after altercations in which he brandished sharp cutting instruments: "That Commanche was twice convicted of aggravated battery was properly admissible. That the crimes involved cutting instruments consistent with the box cutter used in the present case was not."

[f] Rule 609(a) -- Dishonesty or *Crimen Falsi*

[viii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Larceny, Robbery, and Theft Offenses

[A] Rule 609(a) -- Shoplifting

Kunz v. DeFelice, 538 F.3d 667 (7th Cir. 2008) : Affirming a judgment for an arrestee suing for excessive force, the Court found no abuse of discretion in excluding evidence that the plaintiff had recently been convicted for retail theft.

Although the state considers theft to be a crime of dishonesty for the purposes of its version of Rule 609(a)(2), that designation is not binding on the federal courts. Thus, the evidence was subject to Rule 403 balancing, according to Rule 609(a)(1), and the Judge was entitled to conclude that it was cumulative of other convictions already introduced or inadmissible propensity evidence.

[B] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- Larceny, Robbery, and Theft Offenses -- Other Offenses

United States v. Estrada, 430 F.3d 606 (2d Cir. 2005) : The Court held that a larceny conviction of a government witness was not automatically admissible under *Rule 609(a)(2)*.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : In a prosecution for drug offenses, the Court held it was an abuse of discretion (but harmless error) to exclude evidence of a prosecution witness' misdemeanor convictions for theft-by-check, as the offenses have as an element "an act of dishonesty or false statement" and the proof is not subject to Rule 403 balancing.

[xiii] Rule 609(a) -- Dishonesty or *Crimen Falsi* -- No Balancing

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : Affirming a conviction for drug offenses, the Court held it was an abuse of discretion (but harmless error) to exclude documentary evidence that a testifying confidential informant had been convicted for theft-by-check, a misdemeanor. The crime has as an element "an act of dishonesty or false statement," so the evidence is not subject to balancing, under Rule 609(a)(2), and the witness did not clearly admit to the convictions, but only indicated that he was "possibly" convicted.

United States v. Collier, 527 F.3d 695 (8th Cir. 2008) : In a prosecution for felon firearm possession, the government and the defense stipulated to the fact of the defendant's conviction for the predicate offense, but the Judge rule *in limine* that the nature of the offense, credit card fraud, would be admissible if the defendant testified. The defendant testified, the impeachment evidence was introduced, and the defendant was convicted. Affirming, the Court rejected an argument that the probative value of the evidence was substantially outweighed by its prejudicial effect, and held that because the prior conviction required proof of an act of dishonesty or false statement, it was automatically admissible under Rule 609(a)(2) and not subject to Rule 403 balancing. The Court also noted that the predicate felony would be admissible under Rule 609(a)(1), as the offense was highly probative of credibility and not highly prejudicial because "as felonies go it is not a very serious felony."

[k] Rule 609(a) -- *In Limine* Motions

United States v. Gunter, 551 F.3d 472 (6th Cir. 2009) : Affirming narcotics convictions, the Court held that the defendant failed to preserve a claim of error on the Judge's ruling that if he testified, the government could introduce his prior conviction for impeachment. The defendant did not testify at trial and, on appeal, argued that he was deprived of his constitutional right to testify. The Court noted that the "admissibility of a prior conviction is not appealable where a defendant does not testify." Additionally, there is no constitutional deprivation where a rule merely "deters" a defendant from taking the stand and does not actually "prevent" him from doing so.

United States v. El-Alamin, 574 F.3d 915 (8th Cir. 2009) : Affirming a conviction for felon firearm possession, the Court held that because the defendant had introduced his prior convictions, he waived his right to appeal the Judge's denial of his motion *in limine* to exclude evidence of the convictions.

[k.1] Rule 609(a) -- Misdemeanor Conviction To Prove Bias

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : Affirming convictions for drug offenses, the Court held it was an abuse of discretion (but harmless error) to exclude documentary evidence that a testifying confidential informant had been convicted of the misdemeanor offense of assault by bodily injury involving family violence. The witness admitted

that he had been convicted of the offense, but indicated on cross-examination that he was not certain of precisely when he had been convicted. Records showing the dates of arrest and conviction on the family violence charges could have shown that he had a pending charge against him at the time of the defendant's alleged drug transaction and therefore that he would be motivated to "curry favor with the government."

United States v. Allen, 540 F.3d 821 (8th Cir. 2008) : The defendant was convicted of felon firearm possession after a loaded handgun was found under the front passenger seat of a car he was attempting to enter on the passenger side when he was arrested. At trial he called the driver of the car, who testified to borrowing the car from his father without permission and denied any knowledge of the gun's presence. On cross-examination the driver admitted having a misdemeanor conviction for domestic battery and assault. Affirming, the Court found no abuse of discretion in admission of the conviction evidence. The evidence was not used to cast doubt on the witness' character for truthfulness, which would have violated Rule 609. Rather, because one convicted of misdemeanor domestic battery is prohibited by federal law from possessing a firearm, the evidence tended to show the witness' bias and motivation to deny any knowledge or possession of the gun.

[m] Rule 609(a) -- Opening the Door

United States v. Decoud, 456 F.3d 996 (9th Cir. 2006) : The Court affirmed convictions for a crack cocaine distribution conspiracy, holding that a defendant waived her right to challenge admission of prior convictions offered to impeach her because she testified about them on direct examination.

[m.1] Rule 609(a) -- Proving the Conviction

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : Affirming convictions for drug offenses, the Court held there was no abuse of discretion in excluding certified copies of conviction records offered to impeach a prosecution witness, as the witness had admitted the offenses on direct examination and had been cross-examined about the convictions.

[o.1] Summary Judgment

FDIC v. Jeff Miller Stables, 573 F.3d 289 (6th Cir. 2009) : The Court affirmed partial summary judgment for the FDIC in an action to recover assets transferred by a bank embezzler. The defendants argued that Rule 609 required the Judge to draw the conclusion that the embezzler, a convicted felon, lied in his affidavit when he asserted that he had embezzled the funds that he then transferred to the defendants. The Court noted, however, that the Rule contains no language *requiring* the trier to draw the inference that an impeached witness's testimony is untrue, so it found no error when the Judge declined to draw an adverse inference as to the affiant's credibility.

[2] Rule 609(b) -- Time Limit [Go To Main]

[a] Rule 609(b) -- Discretion

[ii] Rule 609(b) -- Discretion -- Prosecution Witnesses

United States v. Nguyen, 542 F.3d 275 (1st Cir. 2008) : The Court affirmed a conviction for using extortionate means to collect an extension of credit, finding no abuse of discretion in excluding the victim's slightly more than 10-year-old state court conviction for auto entry. The Court noted that the conviction was stale, it was a property crime that "does not generate much traction along the road toward probative value in connection with the question of its perpetrator's veracity," and the case was not a "he said, he said" case in which the verdict depended on the victim's unsupported testimony. The Court rejected an argument that the witness' conviction should have been admitted to "counterbalance" the defendant's conviction that was admitted to impeach him when he testified, as it rested on a "logical fallacy" that the witness' conviction somehow became more probative of the witness' credibility once the defendant was impeached.

United States v. Heath, 447 F.3d 535 (7th Cir. 2006) : The defendant in a fraud case was permitted to impeach a cooperating coconspirator with nine convictions of the witness in the preceding ten years but no older convictions. Affirming, the Court found no abuse of discretion, as the defendant, who identified the precluded convictions only as involving theft, did not satisfy the burden of showing that their probative value substantially outweighed their prejudicial effect, and there were theft convictions among those admitted, so he had a sufficient opportunity to impeach the witness.

[iii] Rule 609(b) -- Discretion -- Witnesses in Civil Cases

Schmude v. Tricam Indus., 556 F.3d 624 (7th Cir. 2009) : The plaintiff in a product liability action arising from a ladder accident had been convicted in 1995 for the sale of firearms without a federal license by a convicted felon. The Judge in the 2008 trial ruled that the probative force of the conviction evidence to impeach substantially outweighed its prejudicial effect, but limited the description of the felony on cross-examination to the sale of firearms without a federal license. Affirming a judgment for the plaintiff, the Court expressed "qualms about the judge's having rewritten history, so that the jury was given an erroneous description of the felony of which the plaintiff had been convicted." However, it concluded that the Judge made a reasonable choice to avoid having to allow the jury to hear either about two old convictions or about none.

Simpson v. Thomas, 528 F.3d 685 (9th Cir. 2008) : The Court reversed a judgment for a corrections officer sued by an inmate who alleged he was the victim of excessive force, holding it was reversible error to admit three prior convictions of the plaintiff, all of which were more than ten years old. Admitting the convictions on the ground that the prejudice did not outweigh the probative value was wrong for three reasons: "First, the language used by the district court inverts the requirement of Rule 609(b) by requiring the prejudice to outweigh the probative value. Second, the district court did not offer specific facts and circumstances to support its conclusion, as required by Rule 609(b). Third, the language of the Rule requires that the probative value *substantially* outweighs the prejudice."

[b] Rule 609(b) -- Dishonesty Convictions

Olin Corp. v. Certain Underwriters at Lloyd's London, 468 F.3d 120 (2d Cir. 2006) : In an action to recover indemnification for pollution remediation under CERCLA, the Court found no abuse of discretion in the exclusion of evidence that the corporate plaintiff and three employees had been convicted of a misdemeanor in 1979 for intentionally polluting and for knowingly submitting false reports that understated its release of mercury. Even assuming that a corporate representative may be impeached with the corporation's convictions, the probative value of the conviction did not substantially outweigh its prejudicial impact. It dealt with a different time frame than much of the initial pollution at issue in this case, and it may have been highly prejudicial in suggesting that the contamination at issue was intentional.

[g.1] Rule 609(b) -- Release from Confinement

United States v. Rogers, 542 F.3d 197 (7th Cir. 2008) : Affirming a conviction for felon firearm possession, the Court held it was error (but harmless) to impeach the defendant at his 2005 trial with his 1993 conviction for distribution of cocaine. He had been released from prison on that conviction in 1994 but had remained on probation supervision until 1999. The Court held that "confinement" in Rule 609(b) referred to imprisonment and not to periods of probation or parole. On a post-verdict new trial motion, the Judge had reached the same conclusion and had found that the evidence did not satisfy the stricter balancing test of Rule 609(b), but denied the motion because the error was harmless.

[h] Rule 609(b) -- Timing of Prior Conviction

United States v. Nguyen, 542 F.3d 275 (1st Cir. 2008) : The Court affirmed a conviction for using extortionate means to collect an extension of credit, finding no abuse of discretion in excluding the victim's slightly more than 10-year-old state court conviction for auto entry. The Court was not persuaded that the conviction should have been admitted

because it would not have been stale had his trial started a few months earlier, as did the trial of his codefendants. "[W]henever the law draws a line, some events will fall on the 'other' side," and there was no indication "that the government manipulated either the calendar or the scheduling process in order to postpone the trial and allow the clock to run on the auto entry conviction."

United States v. Watler, 461 F.3d 1005 (8th Cir. 2006) : In a trial on drug charges, the Judge admitted testimony about the defendant's previous conviction for grand theft under *Rule 609(a)*, reasoning that it was less than ten years between the defendant's release from confinement and the date on which he was indicted on the instant charges. The Court held that this ruling was error, because the "ten-year time limit should be measured from the date of the conviction or release to the date that the trial begins." Thus, the conviction was admissible if at all under *Rule 609(b)*, and as the government had not provided advance notice under that Rule, it was error to find the conviction admissible. However, the defendant had brought up the conviction on direct examination to reduce the sting, and therefore forfeited his right to appeal the error, under *Ohler v. United States, 529 U.S. 753 (2000)* .

Simpson v. Thomas, 528 F.3d 685 (9th Cir. 2008) : The Court reversed a judgment for a corrections officer sued by an inmate who alleged he was the victim of excessive force, holding it was reversible error to admit three prior convictions of the plaintiff, all of which were more than ten years old, when the Trial Judge had improperly applied Rule 609(b)'s balancing test. The Court also held that Rule 609(b) applies to a conviction more than ten years old even if has been used to enhance a sentence for a separate conviction that falls within the ten-year time limit: "[T]he plain language of 609(b) excludes evidence of a conviction if it has been more than ten years 'since the date of the conviction or the release of the witness from the confinement *imposed for that conviction*.' We see no reason to construe this language to mean anything other than exactly what it says."

[5] Rule 609(e) -- Pendency of Appeal [Go To Main]

[a.1] Rule 609(e) -- Miscellaneous Cases

United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) : The Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion when a defense witness was impeached with two convictions for capital murder. Although the Court had held, prior to the witness' testimony in the instant case, that the witness could not be convicted on two counts for the same offense, it had stayed the mandate, which did not issue until after the witness testified. The Court concluded that the witness was correctly impeached with both convictions given Rule 609(e), and commented that the defendant had the right to present information about the witness' appeal to ameliorate the impeachment.

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[7.1] 2006 Amendment Committee Note [Go To Main]

The amendment provides that *Rule 609(a)(2)* mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under *Rule 609(a)(2)*, even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, *90 J. Crim. L. & Criminology 1087 (2000)*.

Evidence of crimes in the nature of *crimina falsi* must be admitted under *Rule 609(a)(2)*, regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., *18 U.S.C. § 1001*, Material Misrepresentation to the Federal Government) or a section that does not (e.g., *18 U.S.C. § 1503*, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate

whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States, 495 U.S. 575, 602 (1990)* (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States, 125. S.Ct. 1254 (2005)* (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of *Rule 609* are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* (*Rule 609* was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

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Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

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610.02 Editorial Explanatory Comment

[1] Basic Rule

The religious beliefs or opinions of a witness cannot be the subject of inquiry for impeachment or rehabilitation purposes. In other words, a party cannot impeach witnesses by showing that their religious beliefs are of one type or another and cannot show that because of their religious beliefs their credibility is impaired or enhanced. The Rule is probably grounded in a judgment that such evidence is not highly probative, and that it is unseemly for Courts to invade unnecessarily this very personal sphere of a witness' life. As one Court put it, the purpose of the Rule is "to guard against the prejudice which may result from disclosure of a witness' faith." n1 The Rule protects against disclosure of traditional as well as non-traditional religious beliefs. n2

[2] Concern with Overbreadth

At first blush, *Rule 610* appears to be so attuned to *First Amendment* and privacy concerns that it is beyond criticism. We fear, however, that it is overbroad. For example, if a fundamental tenet of a religion is that government is a false god that should be fought and not obeyed, a member of the religious group might not be a trustworthy witness. n3 At a time when religion and politics are difficult to separate, and when non-traditional religious groups seem to be proliferating, an absolute ban on evidence of membership may result in the exclusion of evidence that is quite probative of credibility.

[3] Relationship to Bias

Some Courts have implied that *Rule 610* should not bar proof of religious affiliation when it is offered to show bias, i.e., a motive to testify falsely in the specific action. n4

An example of a case where a bias exception to *Rule 610* should have been applied is *Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993)* . *Malek* was an insurance dispute in which the plaintiffs' financial stability became a contested issue. The plaintiffs, who were Hasidic Jews, called an accountant to testify. The Trial Court permitted defense counsel on cross-examination to bring out the fact that the accountant was a member of the Hasidic community, as were the plaintiffs, and that the accountant had many clients in the Hasidic community.

On appeal, the Court found that this cross-examination was prohibited by Rule 610, and it reversed the judgment for the defendants. The Court objected to what it stated was the defendant's attempt to show that the accountant's "character for truthfulness was affected by his religious beliefs." The Court found this line of inquiry particularly troubling because "the impeached witness' religious affiliation is the same as that of the plaintiffs."

We believe, however, that the dissenting Judge in *Malek* had the better of the argument. He concluded that "the questioning represented a completely legitimate attempt to impeach [the accountant] by showing that his livelihood depended in large part on his relationship with the Hasidic community, a community of which Mr. Malek was a member." Thus, the fact that the plaintiffs and the accountant had a shared religious affiliation was more, and not less, reason to allow the inquiry. As the dissenter noted, the questions on cross-examination were directed primarily at the witness' livelihood. The accountant was not asked whether he was devout, what his particular beliefs were, or any similar questions that would have dealt with his religious belief and thus would clearly have violated Rule 610. n5 In our view, a bias exception to *Rule 610* should be applicable in a case such as *Malek*. While there may be cases requiring difficult line-drawing, *Rule 610* should not be read to totally preclude all references to the witness' religion.

FOOTNOTES:

(n1)Footnote 1. *United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980)* (*Rule 610* prohibits evidence of religious beliefs as a means of showing that "credibility is impaired as a result of those beliefs"; the Rule protects both conventional and unconventional religions).

(n2)Footnote 2. See, e.g., *United States v. Rushing, 313 F.3d 428 (8th Cir. 2002)* (inquiry into witness' conversion to Christianity was barred by Rule 610).

(n3)Footnote 3. See, e.g., *United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980)* (no error to prohibit inquiry into a witness' belief in the "Luceme religion" so long as the witness stated on *voir dire* that he had no religious beliefs that would cause him to violate his oath to testify truthfully).

(n4)Footnote 4. See, e.g., *United States v. Teicher, 987 F.2d 112 (2d Cir. 1993)* (impeachment of a Jewish witness for his belief in "Messianic thought," where the defendants were Jewish, was properly prohibited under Rule 610; that Rule does provide an exception to permit inquiry into religious beliefs to show a witness' bias; however, the witness' religious views were not probative of bias in this case, where he stated to the Trial Judge that he did not want to testify and that "one of the cardinal rules is that Jews aren't supposed to turn other Jews over").

(n5)Footnote 5. Compare *Contemporary Mission, Inc. v. Bonded Mailings, Inc., 671 F.2d 81 (2d Cir. 1984)* (Rule 610 precluded inquiry into the genuineness of a witness' religious devotion).

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Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993) : The Court reversed a judgment against Hasidic Jewish insureds who sued to recover the proceeds of a fire policy, holding that it was error to permit impeachment of the plaintiffs' accountant, called to testify as to their financial stability, with questions about the other Hasidic people he represented. The Court concluded that the questions attempted to show that the witness' character was affected by his religious beliefs. The dissenting Judge argued that the questions went to bias, not religious belief. This case is discussed in the Editorial Explanatory Comment, *§ 610.02[3]*. In *United States v. Kalaydjian*, n1 the Court held that a defendant in a drug case was not entitled to cross-examine a government witness regarding his reasons for deciding to affirm rather than to swear on the Koran. It noted that not only does every witness have the right to affirm, but also that the defense inquiry would have violated *Rule 610*.

Government of Virgin Islands v. Petersen, 553 F.2d 324 (3d Cir. 1977) : Affirming the defendant's conviction for second-degree murder, the Court noted that the religious beliefs of a witness called by the defense were inadmissible under *Rule 610* if used to enhance the witness' credibility. For any other purpose, the evidence would have been irrelevant.

Tisdale v. Federal Express Corp., 415 F.3d 516 (6th Cir. 2005) : Affirming a judgment for the plaintiff in a Title VII retaliation case, the Court held it was error (but harmless) to allow reading into the record deposition testimony from a witness regarding his religious beliefs, on the ground it was "the witness's statement as to why he thinks he's a credible witness." Such use of evidence of religious beliefs to affect credibility is expressly prohibited by *Rule 610*.

Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995) : In a declaratory judgment action to determine whether a fellow-employee exclusion in a liability policy applied to a fatal crash of a company plane, the Court held there was no abuse of discretion in excluding evidence of certain witnesses' religious beliefs, which had been offered to show they were biased. Evidence that the witnesses were members of the church of which a defendant was pastor had been properly admitted to show bias, but their particular religious beliefs were irrelevant to showing bias and inadmissible under *Rule 610* to impair credibility otherwise.

FOOTNOTES:

(n1)Footnote 1. *United States v. Kalaydjian, 784 F.2d 53 (2d Cir. 1986)* .

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610.04 Legislative History

Advisory Committee's Note

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. *Tucker v. Reil, 51 Ariz. 357, 77 P.2d 203 (1938)* . To the same effect, though less specifically worded, is *California Evidence Code § 789*. See 3 Wigmore § 936.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

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3-610 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 610, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 610. Religious Beliefs or Opinions	**Rule 610. Religious Beliefs or Opinions**
Evidence of the beliefs or opinions of a	Evidence of a witness's religious beliefs

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Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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United States v. Dohan, 508 F.3d 989 (11th Cir. 2007) (per curiam): The Court affirmed convictions arising from a Ponzi scheme, finding no violation of Rule 610 when a cooperating witness said that he was a "moral, Christian man." The unsolicited comment came on redirect, after defense counsel had cross-examined the witness on why the jury should believe him at trial when he had previously committed perjury and other bad acts. The prosecutor did not ask further questions to show that the witness' credibility was enhanced by his religious beliefs, and defense counsel did not object, but instead attempted on recross to ask his own impermissibly religious question.

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§ 611.syn Synopsis to Chapter 611: RULE 611

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[4] Questioning by Jurors

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[e] Rule 611(a) -- Documents Referenced in Testimony

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[h] Rule 611(a) -- Exhibits

[i] Rule 611(a) -- Headphones

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[k] Rule 611(a) -- Limitations on Examination

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[ii] Rule 611(a) -- Limitations on Examination -- No Abuse of Discretion

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[n] Rule 611(a) -- Overview Witness

[o] RULE 611(a) -- Pretrial Orders and Witness Lists

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[v] Rule 611(a) -- Summary Charts and Testimony

[w] Rule 611(a) -- Unruly Witness

[x] Rule 611(a) -- Videotaped Testimony

[2] Rule 611(b) -- Scope of Cross-Examination

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[e] Rule 611(b) -- Questions Bearing on Credibility

[f] Rule 611(b) -- Scope of Cross-Examination

[3] Rule 611(c) -- Leading QuestionS

[a] Rule 611(c) -- Appellate Review

[b] Rule 611(c) -- Cross-Examination Beyond Scope of Direct

[c] Rule 611(c) -- Depositions

[d] Rule 611(c) -- Examination of Adverse Party

[e] Rule 611(c) -- Expert Witness

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[g] Rule 611(c) -- Foundation Matters and Developing the Witness' Testimony

[h] Rule 611(c) -- Friendly Witnesses

[i] Rule 611(c) -- Hostile or Adverse Witnesses

[j] Rule 611(c) -- Sexual Assault Victim Witness

[k] Rule 611(c) -- Witnesses with Communication Problems

[l] Rule 611(c) -- Young or Disabled Witnesses

611.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 278 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the Senate Committee on the Judiciary

[6] Report of the House and Senate Conferees

[7] Citations to Hearings and Debates

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611.01 Official Text

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination*. -- Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions*. -- Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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611.02 Editorial Explanatory Comment

[1] Judicial Control Over Mode and Order of Proof

Rule 611(a) codifies the traditional role of the Judge, which is to exercise reasonable control over the manner in which proceedings are conducted in order to ensure that witnesses and parties are fairly treated and that the search for truth is not impaired by presentation of prejudicial, confusing, or extraneous material.

The Rule implicitly provides for balancing analogous to *Rule 403*. *Subdivision (a)* provides that the Court shall exercise control over the ways in which witnesses are interrogated and real evidence is presented in order to avoid wasting time and to protect witnesses from harassment, unnecessary embarrassment, or any other improper or abusive tactic. n1

Rule 611(a) can be invoked to supplement *Rule 403* in situations in which a witness is being harassed or humiliated. Damage to the witness' personal interests (as distinct from a party's interest) is ordinarily not considered "prejudice" within the meaning of *Rule 403*, *608*, or *609*. That is, Courts have not used *Rule 403* or *608* or *609* to prohibit cross-examination or impeachment on the ground that it is unduly prejudicial to the witness' interest independent from that of a party to the action. (See the Editorial Explanatory Comment to *Rule 608*, *§ 608.02[4]*, for a discussion on this point.) However, under *Rule 611(a)*, the Trial Court has authority to protect the interests of a witness when necessary, and presumably that means that cross-examination and impeachment could be limited if was unduly harassing or humiliating. It should also be remembered that in civil cases arising from sexual misconduct, *Rule 412* specifically requires the Trial Court to consider the prejudice suffered by the victim in determining the admissibility of the victim's sexual history.

Of course, *Rule 611(a)* cannot be employed to limit the cross-examination of a prosecution witness where to do so would violate the defendant's right to confrontation. n2

Rule 611(a) is infrequently cited. Yet, it is a Rule that is continually used during a trial. It permits the Trial Judge to allow or disallow changes in the order of proof, rebuttal evidence, surrebuttal evidence, recall of witnesses, reopening of a case once a party has rested, and many other requests that are made in the course of a trial. n3 Also, Trial Courts have sometimes exercised authority under *Rule 611(a)* to permit a witness to testify in narrative form, when that would expedite the trial or assist the search for truth. n4 *Rule 611(a)* also provides the Trial Court the necessary authority to

rule on traditional objections to questioning such as "argumentative," "compound," "asked and answered," etc.

Rule 611(a) also is significant in that it provides the authority for a Trial Judge to allow the use of summary charts and exhibits based on evidence adduced at trial. As discussed in our Editorial Explanatory Comment to *Rule 1006*, *§ 1006.02[5]*, many opinions have cited that Rule as authorizing summaries of trial evidence, even though the placement and language of *Rule 1006* indicate that it is intended to provide a substitute for presentation at trial of voluminous evidence and an escape from the Best Evidence Rule. *Rule 611(a)* is much more apt authority for summaries of evidence that has already been presented at trial. The Rule plainly gives the Trial Judge leeway to permit or to disallow various forms of summary evidence in the interests of promoting a fair trial. n5

[2] Abuse of Discretion

Appellate Courts are understandably deferential to the Trial Judge's exercise of power over the trial under *Rule 611(a)*. But there are limits; and occasionally an Appellate Court holds that a Trial Judge *should* have exercised some control and authority and did not. n6 Appellate Courts are especially sensitive to an imbalance in the presentation to the jury that might have been rectified by judicial intervention. For example, *Loinaz v. EG & G, Inc.*, 910 F.2d 1 (1st Cir. 1990) , was a fraud and breach of contract case in which the evidence basically came down to a credibility determination among witnesses. The plaintiff had two witnesses (Diego Loinaz and Mary Loinaz), and the defendant had one (Mr. Francisco). After the plaintiffs' first witness testified, the defendant asked the Trial Judge that it be allowed, under *Rule 611(a)*, to present its witness out of turn. The defendant explained that due to a personal emergency, Francisco would not be available after the close of the plaintiff's case-in-chief. The plaintiffs objected to this disruption of their order of proof, and argued that Francisco had been deposed and that the deposition could be used instead of live testimony. The Trial Judge sided with the plaintiffs and refused to change the usual order of proof, but the Court of Appeals found reversible error. The Court began its analysis by noting its discomfort at intervening in questions of trial management and presentation of witnesses:

> The defendant is asking us to rule that it was denied a fair trial because the judge refused to ... permit a witness to be presented out of turn. Such rulings by appellate courts are particularly distasteful. Decisions regarding the management of the trial calendar and the courtroom proceedings are particularly within the province of the trial judge, and her determinations will not be disturbed by us absent a finding that she abused her discretion. Appellate judges, reading sterile, written documents, cannot know all that preceded the challenged judgment, so they must be mindful that there may be factors the record does not reveal. They must also be wary of the tendency to employ hindsight that encompasses the entire case, to consider evidence and circumstances, including the ultimate outcome, that were not available to the judge at the time of her ruling.
>
> However, although the view from the appellate court is not perfect, a trial court's discretion is not unlimited. If we believe that the trial judge's discretionary decisions have resulted in undue prejudice to the appellant's case, we will reverse. [A] judge abuses her discretion when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

Despite its reservations, the Court found an abuse of discretion because of the imbalance of proof that was created when the defendant's important witness testified by way of deposition:

> Because of the [Trial Court's] decision, the defendant could not present to the jury a person who would rebut the plaintiffs' version of the facts, a person whom the jury could evaluate in the same manner they had Diego and Mary Loinaz. The plaintiffs' presentation of Diego and Mary Loinaz to the jury was very important because the case was ... about two people who claimed to be harmed by the defendant's actions. ... Their testimony as witnesses made the case real -- here were the man and the

> woman whose claims the jury must decide. The defendant could offer the jury nothing to compare with the persons of Diego and Mary Loinaz; all they had were "canned" answers read back by an employee of the court. ...
>
> If possible, it is always better if the jury can observe the witness firsthand to judge his or her demeanor. In this case, it was possible for the jury to observe Francisco firsthand, if the *Rule 611* motion had been granted.

The *Loinaz* Court rejected the plaintiffs' argument that to *grant* the *Rule 611* motion would have resulted in undue prejudice to the plaintiffs:

> The plaintiffs claim that they would have been prejudiced if the testimony of Francisco had been taken out of turn and allowed to interrupt their presentation of their case. Certainly, the general rule is that a party should be able to present his case and order that case as he sees fit. However, *Rule 611* has carved out an exception to this general rule and requires the trial judge to control the presentation of evidence in the interest of ascertaining truth. The dynamics of a party's presentation may be compromised when the testimony of an opposing witness is allowed to interrupt that presentation, but *Rule 611* recognizes that such an alteration in order may be necessary at times. ... The plaintiffs have failed to show that they would have been seriously affected by an interruption in their presentation of evidence. Certainly, their prejudice would not rise near that experienced by the defendant.
>
> Likewise, the trial judge failed to articulate any persuasive reasons that an interruption in the plaintiffs' order of proof would harm the court. The court's schedule would not have been compromised, and any confusion to the jury that the interruption might have created could have been cured by instructions from the judge. It is possible that a court's authority could be threatened by frivolous interruptions in the court's orderly administration of justice. However, this requested interruption was not frivolous, and the simplistic statement by the court that "this is not the way things are done" is inadequate. n7

We believe that the Court of Appeals in *Loinaz* failed to give the Trial Judge sufficient deference. n8 The Trial Court was presented with possible prejudice on both sides. Rejecting the *Rule 611* motion meant that the defendant could not present a live witness. But granting the *Rule 611* motion would have meant a disruption in the plaintiffs' order of proof, and undoubtedly an appeal for a *Rule 611* violation if the plaintiffs had lost. It is possible that the defendants suffered more prejudice by the absence of live testimony than the plaintiffs would have suffered by a rearrangement of the order of proof. But where the possible harm on either side of a *Rule 611* decision is even remotely equivalent, we believe that the Trial Judge must be given the benefit of the doubt. n9

[3] Completeness

Rule 611(a) can be and has been used by Trial Courts as a means of enforcing a rule of completeness with respect to testimonial evidence, i.e., a rule of "verbal completeness." The rule of completeness embodied in *Rule 106* appears on its face to apply only to documents, though it has been applied more broadly. n10 However, any doubt as to the applicability of *Rule 106* to testimony about an oral statement is mooted by the Trial Judge's authority under *Rule 611(a)* to apply the completeness principle to witness testimony. n11 A good example of the application of *Rule 611(a)* as a rule permitting verbal completeness is *United States v. Castro, 813 F.2d 571 (2d Cir. 1987)* . Castro was tried with Pozo for a drug crime. When he was arrested, he told the police officer that he knew that there were drugs at the scene, but that the drugs were Pozo's. At trial, the officer to whom the statement was made was called to testify to a redacted version of this statement. Redaction was required to protect Pozo's right to confrontation under *Bruton v. United States, 391 U.S. 123 (1968)* . But if the statement were simply redacted to cut out all reference to Pozo, the officer would testify that "Castro told me he knew there were drugs at the scene." The Trial Court therefore exercised its authority under *Rule 611(a)*, and required the witness to testify that "Castro said he knew there were drugs at the scene, but he denied that the

drugs were his." The Court of Appeals found this to be an appropriate exercise of discretion under *Rule 611(a)*. It analyzed the completeness question as follows:

> *Rule 106* governs only writings, since in practice verbal precision cannot be expected when the source of evidence as to an utterance is the memory of a witness. However, ... while verbal precision may be unnecessary, the testimony should at least represent the tenor of the utterance as a whole, and not mere fragments of it.
>
> Moreover, *Rule 611(a)* empowers and obligates the district court to take account of these considerations. ... Accordingly, whether we operate under *Rule 106*'s embodiment of the rule of completeness, or under the more general provision of *Rule 611(a)*, we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the ascertainment of truth.

The *Castro* Court found that the Trial Judge had acted appropriately in recrafting Castro's statement so that "the gist of Castro's statement was presented without unduly prejudicing the right of Pozo to avoid being implicated by a codefendant's out-of-court statement, or the right of Castro to have his conduct and statement presented in context."

[4] Questioning by Jurors

Occasionally Trial Judges have invoked *Rule 611(a)* to permit the questioning of witnesses by jurors. While Appellate Courts have not found this practice to be a *per se* abuse of discretion, it is clear that the practice is frowned upon. As the Court noted in *United States v. Bush, 47 F.3d 511 (2d Cir. 1995)* , questioning by jurors "risks turning jurors into advocates" and "creates the risk that jurors will ask prejudicial or other improper questions." The *Bush* Court observed that prejudicial lines of questioning could not easily be remedied by the Trial Judge, because "remedial measures taken by the court to control jurors' improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand." Finally, the Court expressed concern that juror questioning "will often impale attorneys on the horns of a dilemma" because an attorney, by objecting to a question from a juror, risks alienating the jury. n12 The *Bush* Court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will "almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances."

Assuming that compelling circumstances can be found which might permit the jurors to question witnesses, it is clear that the Trial Judge must maintain strict control over the procedure. The Court in *United States v. Collins, 226 F.3d 457 (6th Cir. 2000)* , set forth the following procedural safeguards that should be undertaken before jurors' questions are permitted:

> When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their question in writing without disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorney should be allowed an opportunity to present any objections. n13 The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness. n14

[5] Scope of Cross-Examination

Most common-law jurisdictions adhere to the view that the scope of cross-examination as of right does not extend beyond the scope of the subject matter testified to on direct examination. This is the position taken by *Rule 611(b)*. n15 Congress rejected the Advisory Committee's proposal that would have provided for cross-examination on any relevant subject about which the witness is knowledgeable.

The rationale of the Rule is that the party who calls the witness ordinarily should be allowed its own order of proof, and that cross-examination beyond the subject matter of direct would be an unwarranted disruption. Of course, the Rule does not mean that the witness can never be asked about the unrelated subject matter. The solution is for the adverse party to call the witness during its own case-in-chief. n16 Because the Rule is simply a timing mechanism, its application does not violate the defendant's constitutional right to develop adequately the testimony of adverse witnesses. n17

The Rule provides that the Judge has discretion to permit a broader scope of cross-examination. It appears that Judges have often exercised this discretion, especially where the witness would be substantially inconvenienced by having to testify on two separate occasions, or where expanded cross-examination might expedite the proceedings or assist in the search for truth. n18

Of course, the scope limitation of *Rule 611(b)* does not restrict impeachment of the witness' credibility. n19 A party can impeach a witness on cross-examination even if the subject matter of the witness' credibility was not addressed on direct. This is because the witness' credibility is always an underlying issue, independent of the subject matter of the direct testimony. n20

A party who goes beyond the scope of the direct examination, with the Court's permission, may not ask leading questions (unless the witness is hostile); that is, the examination must be conducted as if it were the witness' direct examination. n21

[6] Leading Questions

Rule 611(c) codifies the traditional common-law rule that leading questions should be confined to cross-examination and should not be asked on direct examination. The Rule does state that leading questions may be asked on direct examination if necessary to develop the testimony of the witness. Often leading questions are asked in order to refresh the recollection of a witness or to quicken the pace of a trial. Also, leading questions may be necessary if the witness is a young child, or is frightened or uncommunicative. n22

A hostile witness, an adverse party, or a person identified with an adverse party may be interrogated on direct examination by leading questions. n23 The final two sentences of *Rule 611(c)* leave the state of the law confused with respect to whether the party who cross-examines a witness that the Judge has identified as hostile or adverse to the adversary can ask leading questions. To the extent that the direct examination has produced favorable evidence for the party calling the witness, leading questions by the other side would appear to be warranted. If the direct examination is favorable to the cross-examiner, Courts have justifiably treated the cross-examination as delayed direct examination and have denied the cross-examiner a chance to lead an already favorable witness. n24

The rule against leading questions is obviously a flexible one. An Appellate Court will rarely, if ever, reverse on the sole ground of a violation of *Rule 611(c)*. n25 Such an error, if it exists, is extremely unlikely to be prejudicial enough to warrant a reversal. This is because counsel who continually lead friendly witnesses are probably doing the client a disservice; the factfinder wants to hear testimony from the witness, not from counsel. Moreover, the lawyer who feels the need to construct a leading question for a friendly witness runs the risk that the witness may not even understand what the question is. n26

[7] Hostile or Adverse Witnesses

Is any witness who gives unfavorable testimony to a party a hostile or adverse witness within the meaning of *Rule 611*? This is a difficult question to answer. At common law, more of a showing of hostility was needed than simply a demonstration that the witness had adverse testimony to give. The requirement of a greater showing before leading questions were allowed went hand in hand with the rule that a party could not impeach its own witness. This tandem tended to place direct examiners in an uncomfortable position in dealing with witnesses whose testimony they wished to probe, and even to pick apart, in order to prove their case. *Rule 607* provides that a party may impeach its own witness. Since one form of impeachment is asking leading questions to test the witness' credibility, one might think that the party who called a witness who gave damaging testimony against that party should be able to ask leading questions for impeachment. Such a reading of the Rules would result in prohibition of leading questions on direct examination where the witness is favorable to the calling party but would recognize that leading questions may be a form of impeachment when a witness gives unfavorable testimony. To us this reading makes good sense. But the proper relationship between impeachment and scope of examination is largely developed on a case-by-case basis.

It is clear, however, that a witness is not "hostile" to a party simply because he or she is named on the adversary's witness list. n27 *Rule 607* allows a party to call hostile witnesses, so a mere listing by a litigant is an insufficient basis upon which to consider the witness hostile to the other side.

[8] Cross-Examination of Criminal Defendants

Nothing in *Rule 611* resolves the continuing controversy over the proper scope of cross-examination of a defendant who waives the privilege against self-incrimination and testifies. We agree with the Advisory Committee that "the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination." Congress demonstrated its concern that the privilege not be unnecessarily invaded in the second paragraph of *Rule 608* as well as in *Rule 104(d)*, which states that an accused "does not, by testifying on a preliminary matter, become subject to cross-examination as to other issues in the case." A similar concern leads us to recommend that the defendant be subject to cross-examination only to the extent necessary to fairly test the statements made upon direct examination and clear inferences that might be drawn from such statements. In other words, a rule of "verbal completeness" would be an appropriate test with which to determine the scope of a waiver. This position respects the privilege, but ensures that it does not give the defendant an extra tactical weapon not contemplated by the Constitution. n28

We note that the accused who elects to testify opens the door to impeachment under *Rules 608* and *609* that can be damaging. n29 Thus, the decision to waive the privilege involves costs as well as benefits.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Sorrentino, 726 F.2d 876 (1st Cir. 1984)* (upholding a Trial Judge's limiting defense counsel's cross-examination of a government agent on the grounds that it was cumulative and harassing); *Williams v. Mensey, 785 F.2d 631 (8th Cir. 1986)* (Trial Court had authority under *Rule 611(a)* to instruct counsel not to hold inadmissible documents in hand while cross-examining witnesses); *United States v. Bennett, 702 F.2d 833, 836 (9th Cir. 1983)* ("It was justifiable for the trial judge to reprimand defense counsel for holding a document in his hand during cross-examination in a way designed to suggest that it was a report he was reading from.").

(n2)Footnote 2. See, e.g., *United States v. Foster, 982 F.2d 551 (D.C. Cir. 1993)* (reversing a conviction in a drug case because defense counsel was not permitted to cross-examine the key prosecution witness on, inter alia, his explanation for why the defendant had much less cash on him at the time of arrest than would be expected of someone who had just made two drug sales); *United States v. Jones, 982 F.2d 380 (9th Cir. 1992)* (reversing a conviction because the Trial Judge's absolute ban on recross-examination, even when new matter was brought out on redirect, violated the defendant's confrontation rights). Compare *United States v. Brown, 946 F.2d 1191 (6th Cir. 1991)*

(affirming the defendant's conviction for cocaine offenses in late 1989, holding there was no constitutional violation when cross-examination of the government's key witness regarding his drug addiction and sale of drugs prior to that year was limited in order to avoid unnecessarily prolonging the examination; careful scrutiny of the record revealed that the defense counsel was able to effectively cross-examine the witness, to disclose that the witness was an addict-informant, and to fully explore the witness' potential bias and untruthfulness; evidence of the witness' prior drug use did not bear on his character for truthfulness or untruthfulness).

(n3)Footnote 3. See, e.g., *United States v. Soto-Beniquez, 350 F.3d 131 (1st Cir. 2003)* (rebuttal evidence properly permitted where the defendant opened the door to an issue not addressed in the government's principal case); *United States v. Puckett, 147 F.3d 765 (8th Cir. 1998)* (no abuse of discretion where the Trial Court allowed the prosecution to recall law enforcement witnesses during the trial so that evidence could be presented in chronological order); *Berroyer v. Hertz, 672 F.2d 334 (3d Cir. 1982)* (no abuse of discretion under *Rule 611(a)* where the Trial Court permitted the plaintiff to call a "rebuttal" witness in her case-in-chief after the defendant obtained permission to call its expert out of turn); *United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982)* (upholding the Trial Judge's exclusion of surrebuttal evidence that was repetitive of evidence offered in the case-in-chief for the defense); *United States v. Gaertner, 705 F.2d 210 (7th Cir. 1983)* (the Trial Judge did not err in permitting the government to offer rebuttal evidence to refute specific testimony of defense witnesses and in rejecting surrebuttal testimony, which would have been a repetition of the defense testimony that the government had rebutted).

(n4)Footnote 4. See, e.g., *United States v. Young, 745 F.2d 733, 761 (2d Cir. 1984)* (a Trial Judge "has broad discretion in deciding whether or not to allow narrative testimony"; it was proper in the instant case to permit narrative testimony to explain videotape evidence).

(n5)Footnote 5. See, e.g., *United States v. Stiger, 371 F.3d 732 (10th Cir. 2004)* (charts were not admissible under *Rule 1006* because they summarized expert opinion rather than voluminous evidence not admitted at trial; but the charts were admissible under *Rule 611(a)* because they assisted the jury in putting together the testimony in a complex trial); *United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 2000)* (no abuse of discretion where the government was permitted to display throughout the trial a time-line and organizational charts; the charts were not admitted into evidence, but were simply pedagogical devices, and the jury was repeatedly instructed as to their proper purpose); *United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995)* (in a complex conspiracy case, the prosecution relied upon a detective to explain the testimony given by prior witnesses and to lay the foundation for an organizational chart that was admitted into evidence; the Trial Judge properly exercised discretion under *Rule 611(a)* to admit the chart and foundational testimony; the chart helped the jury understand the testimony, and the Trial Judge took proper precautions by assuring that the person who prepared the chart was available for cross-examination, and instructing the jury that it had to weigh the significance of the underlying testimony when looking at the chart); *United States v. Paulino, 935 F.2d 739 (6th Cir. 1991)* (no error in permitting a witness to give testimony explaining an organizational chart that showed the various players and their roles in the alleged drug conspiracy and a chart that indicated the cash generated from cocaine sales for a specified period; a proper cautionary instruction was given at the close of evidence, the defendants had full opportunity to cross-examine the witness, and the charts were not substantially inconsistent with the evidence adduced at trial).

(n6)Footnote 6. See, e.g., *United States v. Taylor, 210 F.3d 311 (5th Cir. 2000)* (reversing the defendant's drug convictions because a government chart purporting to list the players in a conspiracy did not accurately reflect the testimony at trial; it showed connections to the defendant that did not exist and gave her a more central role in the conspiracy than the evidence supported); *United States v. Noushfar, 78 F.3d 1442 (9th Cir. 1996)* (the Trial Judge committed reversible error in sending to the jury room, over the defendant's objection, 14 tapes that had not been played in the courtroom, together with a tape recorder; the Trial Judge "completely abdicated control of the presentation of the evidence," and "made no analysis of whether undue emphasis might be placed on some of the recorded conversations"). See also *Patrick v. City of Detroit, 906 F.2d 1108 (6th Cir. 1990)* (error under *Rule 611(a)* for the Trial Court to refuse to allow the defendant to recall the plaintiff during the defendant's case).

(n7)Footnote 7. See also *First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295 (8th Cir. 1991)* (the defendant did not attend the initial stage of the trial because the plaintiff never subpoenaed him, so the plaintiff read his extensive pretrial deposition into the record as an admission; when the defendant later attempted to testify as part of the defense case, the Trial Judge excluded the testimony on the ground the defendant had already testified at length through his deposition; the Court of Appeals found it an abuse of discretion and plain error not to give the defendant an opportunity to allow the jury to observe his demeanor and pass upon his credibility).

(n8)Footnote 8. For a case with facts similar to *Loinaz*, where the Court expressed concern about the Trial Court's resolution but found no reversible error, see *Traylor v. Husqvarna Motor, 988 F.2d 729 (7th Cir. 1993)* (the plaintiff's expert testified on direct on Friday, and stated that he would not be available for cross-examination on Monday; the Judge decided that the cross-examination would be videotaped on Saturday and played for the jury on Monday; the plaintiffs argued that the witness should have instead been recalled for cross-examination on Tuesday or Wednesday, when he would have been available; the Court of Appeals stated: "Although we have no objection to videotaped testimony and do not believe that the fact that this witness's direct testimony was live and his cross-examination taped was a reversible error, we do think this sort of dual media testimony is generally a bad idea"; the Court cited studies showing that live testimony is more effective than other forms of presenting evidence).

(n9)Footnote 9. See *United States v. Branham, 97 F.3d 835 (6th Cir. 1996)* (the Trial Court did not abuse its discretion in declining to require the government to play all audiotapes of conversations involving two defendants and a government informant in chronological order in its case-in-chief; the Trial Judge told the defendants that they could play the tapes in their suggested order as part of the defense case; this was sufficient to ensure that the jury would not be confused or misled).

(n10)Footnote 10. See the Editorial Explanatory Comment to *Rule 106*, *§ 106.02[2]*, for a discussion of this point.

(n11)Footnote 11. See, e.g., *United States v. Li, 55 F.3d 325 (7th Cir. 1995)* (*Rule 611(a)* gives Trial Judges the same authority regarding oral statements as *Rule 106* grants regarding written and recorded statements).

(n12)Footnote 12. See also *United States v. Collins, 226 F.3d 457 (6th Cir. 2000)* , in which the Court listed the following dangers inherent in juror questioning of witnesses: "jurors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies." Also, there is a risk "that a sense of camaraderie among jurors may lead them to attach more significance to questions propounded by fellow jurors than those posed by counsel."

(n13)Footnote 13. See also *United States v. Ricketts, 317 F.3d 540 (6th Cir. 2003)* (error for the Trial Court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

(n14)Footnote 14. See also *United States v. Douglas, 81 F.3d 324 (2d Cir. 1996)* (the Trial Judge employed proper procedure by requiring juror questions to be in writing, and by asking the questions himself, after reviewing them with counsel; however, the Judge "exceeded his allowable discretion by inviting questions both at the start of the trial and at the end of each witness' testimony"; this error was harmless, however, because the juror questions were directed at only two witnesses, neither of whom was the defendant, and the questions were "few in number and of slight significance").

(n15)Footnote 15. See, e.g., *United States v. Vasquez, 858 F.2d 1387 (9th Cir. 1988)* (in a drug prosecution, the Court held that questions concerning items in the defendant's apartment -- i.e., drugs and cash -- were within the scope of direct examination where the defendant claimed that he had left his apartment and had left alone).

(n16)Footnote 16. See, e.g., *United States v. Southers, 583 F.2d 1302 (5th Cir. 1978)* (Trial Judge properly prevented the defendant from offering his good character evidence under *Rule 404(a)* by cross-examining government

witnesses; the defendant could subsequently call these witnesses to testify for the defense).

(n17)Footnote 17. See, e.g., *United States v. McLaughlin, 957 F.2d 12 (1st Cir. 1992)* (no abuse of discretion or *Confrontation Clause* violation where the defendant was precluded from cross-examining government agents about an unrelated fraud scheme, as the evidence went beyond the scope of the direct examination; had the defendant wished to adduce new evidence in support of his defense, he could have called the agents as defense witnesses).

(n18)Footnote 18. See, e.g., *Sturm v. Clark Equip. Co., 547 F. Supp. 144 (W.D. Mo. 1982) , aff'd, 732 F.2d 161 (1984)* (in a product liability action, the District Court ruled that it was proper for the defendant to examine the plaintiff's witness with regard to his familiarity with the product and warnings to the injured person -- subject matter beyond the scope of direct examination -- where leading questions were not permitted and the procedure made it unnecessary for the witness to be recalled later in the trial).

(n19)Footnote 19. See, e.g., *United States v. Lara, 181 F.3d 183 (1st Cir. 1999)* (no violation of *Rule 611(b)* where questions asked on cross-examination were pertinent to the witness' credibility).

(n20)Footnote 20. See, e.g., *United States v. Smalley, 754 F.2d 944, 951 (11th Cir. 1985)* ("Matters affecting the credibility of the witness are always relevant on cross-examination."); *United States v. Arnott, 704 F.2d 322, 324 (6th Cir. 1983)* ("The subject matter of direct examination and issues of witness credibility are always open to cross-examination.").

(n21)Footnote 21. See, e.g., *MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274 (8th Cir. 1994)* :

> Grace should not be permitted to ask leading questions in its attempt to establish its statute of limitations defense through cross-examination of witnesses called by MDU in its case-in-chief, unless those witnesses' direct testimony bears significantly on the limitations issue, or unless Grace can sufficiently demonstrate that those witnesses are hostile.

(n22)Footnote 22. See, e.g., *United States v. Grassrope, 342 F.3d 866 (8th Cir. 2003)* (leading questions permitted in child sex abuse prosecution: "It is not uncommon that the precise physiological details of sexual assault must be elicited by focused questioning. We have repeatedly upheld the use of leading questions to develop the testimony of sexual assault victims, particularly children."); *United States v. Archdale, 229 F.3d 861 (9th Cir. 2000)* (no error in the prosecution's use of leading questions in the examination of a child allegedly the victim of sexual abuse; the witness was having a difficult time testifying about a very personal matter); *United States v. Rodriguez-Garcia, 983 F.2d 1563 (10th Cir. 1993)* (no abuse of discretion in permitting the prosecutor to ask leading questions of a witness testifying through an interpreter because he did not speak English).

(n23)Footnote 23. See, e.g., *United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995)* (the Trial Judge did not abuse his discretion in permitting the government to treat its key witness as hostile and ask that witness leading questions: "It is unclear from the record whether he was recalcitrant or merely forgetful; however he did state he was uncomfortable in the courtroom and hesitant to testify.").

(n24)Footnote 24. See, e.g., *Woods v. Lecureux, 110 F.3d 1215, 1221 (6th Cir. 1997)* ("a district court should be hesitant to authorize the use of leading questions when it is cross-examination in form only").

(n25)Footnote 25. See, e.g., *United States v. Ranney, 719 F.2d 1183 (1st Cir. 1983)* (rejecting the defendants' claim that the prosecutor's questions were impermissibly leading and stating that "[r]arely, if ever, will an appellate court interfere with the trial judge's broad discretion to control the mode and order of interrogation"); *United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983)* (rejecting the claim that the Trial Judge should not have permitted the prosecutor to lead government witnesses; the Court noted that the Rule contains "words of suggestion, not command," and indicated that reversals for improper use of leading questions will be extremely rare); *Stine v. Marathon Oil Co., 976*

F.2d 254 (5th Cir. 1992) (the Court noted its almost total unwillingness to reverse for improper use of leading questions).

(n26)Footnote 26. See, e.g., *Woods v. Lecureux, 110 F.3d 1215, 1221 (6th Cir. 1997)* ("Far from suggesting an answer to the witness, this particularly egregious line of questioning confused the witness such that he did not even know what the question was.").

(n27)Footnote 27. See, e.g., *Suarez Matos v. Ashford Presbyterian Community Hosp., 4 F.3d 47 (1st Cir. 1993)* (leading questions should not have been permitted on direct examination, where the only indication of hostility was that the witness had been named on the adversary's witness list).

(n28)Footnote 28. See, e.g., *United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977)* (where the defendant testified that she was under duress at the time of a bank robbery, she waived the privilege with respect to questions on cross-examination concerning a later period in which she acted voluntarily; the government's questions were "reasonably related" to the defendant's testimony). See also *Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991)* (a defendant who testifies at a capital sentencing hearing concerning biographical information does not waive the privilege with respect to the circumstances of the crime).

(n29)Footnote 29. See, e.g., *United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976)* (if the defendant takes the stand he may be impeached like any other witness, and the breadth of the waiver of the privilege against self-incrimination is determined by the permissible scope of direct examination).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 611 RULE 611

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611.03 Annotated Cases

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[1] Rule 611(a) -- Control by Court

[a] Rule 611(a) -- Avoiding Needless Consumption of Time

United States v. Levine, 180 F.3d 869 (7th Cir. 1999) : Affirming a mail fraud conviction, the Court found no abuse of discretion when the Judge repeatedly told counsel to desist from a line of cross-examination and move to another; counsel repeatedly ignored orders to move along, insisted on returning to subjects that had been foreclosed, and could not explain why he wanted to pursue lines of inquiry that mystified the Judge.

United States v. Cody, 114 F.3d 772 (8th Cir. 1997) : The Court affirmed a cocaine conviction, finding no error when defense counsel was prohibited from using a tape recording of suppression hearing testimony to impeach a police officer. The Trial Judge had indicated that he would permit defense counsel to impeach the witness by playing portions of the tape-recorded testimony provided that it was cued to the proper spot, but defense counsel wanted a five-minute recess to cue the tape after each allegedly inconsistent statement. The Court concluded that the Judge had wide discretion to decide that this procedure would cause unnecessary delay and waste of time.

[b] Rule 611(a) -- Completing Oral Statements

United States v. Castro, 813 F.2d 571 (2d Cir. 1987) : This case is discussed in the Editorial Explanatory Comment, *§ 611.02[3]*.

United States v. Li, 55 F.3d 325 (7th Cir. 1995) : In the trial of a kickback scheme between a union and a health care provider, the government called the union president to testify to a conversation in which the defendant admitted making payments to his codefendant. The president was not permitted to testify, however, that when he asked the defendant why he did not report the codefendant's apparent extortion earlier, the defendant replied that the codefendant

"would put an axe in my head." Reiterating its analysis in *United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993)* , that *Rule 611(a)* gives Trial Judges the same authority regarding oral statements as *Rule 106* grants regarding written and recorded statements, the Court found there was no abuse of discretion. The alleged threat was not necessary to explain or understand the defendant's admission, and it was not needed to avoid misleading the jury, since the defendant had explicitly not pursued a coercion defense.

[c] Rule 611(a) -- Cross-Examination of Friendly Witness

Argentine v. United Steel Workers of Am., 287 F.3d 476 (6th Cir. 2002) : In an action challenging imposition of a trusteeship on a local of a labor union, the plaintiffs called an auditor employed by the defendant USWA during their case in chief. Concluding that the witness was essentially a USWA witness, the Judge did not allow cross-examination of the witness after the direct examination but instead required USWA to call the witness during its case-in-chief a week later. The Court held there was no abuse of discretion in delaying USWA's examination, as it would be a cross-examination only be in form and not in fact.

[d] Rule 611(a) -- Deposition Testimony

Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992) : In partially reversing the judgment in an action on an oil lease, the Court noted its great concern regarding the Trial Judge's practice of having excerpts of depositions provided for the jury to read overnight, instead of having deposition testimony read in open Court. This "takeout evidence" was a substantial burden on the jurors, with risks of their reading the excerpts totally outside the Judge's control and of their perhaps even returning the excerpts unread, but both parties agreed to the procedure and the Court presumed that the jury followed instructions to read the material, so the procedure was not plain error.

R.B. Matthews, Inc. v. Transamerica Transp. Servs., 945 F.2d 269 (9th Cir. 1991) : The defendant in a breach of contract action refused to produce two of its employees or bring them within subpoena range, so the plaintiff read excerpts from their depositions. The Court held that an order precluding the defendant from thereafter offering their live testimony was not an abuse of discretion, as it would not skew discovery and the defendants had engaged in gamesmanship.

Gracia v. Lee, 976 F.2d 1344 (10th Cir. 1992) : The plaintiffs in a medical malpractice action took a "discovery" deposition of the defendant and later, because of his ill health, a "preservation" deposition. Affirming a judgment for the defendant, the Court held there was no abuse of discretion in excluding at trial excerpts from the first deposition, which the plaintiffs contended would have undermined the relatively stronger case the defendant was able to present through the second deposition. The Court reasoned that the plaintiffs had elected not to use the excerpts when taking the second deposition, which would have provided the defendant with an opportunity to address, on videotape for the benefit of the jury, any concerns raised by his earlier testimony.

[e] Rule 611(a) -- Documents Referenced in Testimony

United States v. Marshall, 307 F.3d 1267 (10th Cir. 2002) : In a prosecution for felon firearm possession, the defense cross-examined a police officer regarding his testimony that he saw the defendant pulling and tugging at his waistband as he fled from the police. The defense noted that the officer did not mention this in his incident report, but the officer responded that he had noted it in his arrest affidavit. Affirming, the Court upheld the admission of both the incident report and the arrest affidavit, noting that "[a]dmission of both reports allowed the jury to accurately weigh the officer's credibility without a potentially confusing series of second-hand accounts from witnesses regarding the

contents of the incident report and the arrest affidavit."

[f] Rule 611(a) -- Examination of Adverse Party

Rodriguez v. Banco Cent. Corp., 990 F.2d 7 (1st Cir. 1993) : In a civil racketeering suit, the Court affirmed a directed verdict for the defendants, holding there was no error when the plaintiffs were precluded from using leading questions to examine certain defendants. Although the Court observed that the rules generally permit leading questions to be used against an adverse party, it indicated that *Rule 611(a)* might empower a Trial Judge to disallow such questions, for example, if they would tend to distort the testimony of a witness. In any event, the plaintiffs made no showing of specific information that might have been elicited with leading questions, so any error was harmless. In an antitrust action by a physician who had been denied hospital privileges, *Elgabri v. Lekas, 964 F.2d 1255, 1992-1 Trade Cas. (CCH) P69838 (1st Cir. 1992)* , the Court held there was no abuse of discretion in limiting the plaintiff's direct examination of defendants to subject matter that could not be obtained in any other manner. There is no unfettered right to call an adverse party on direct examination as part of one's case-in-chief, and the plaintiff was able vigorously to cross-examine the defendants when they presented their own cases.

Patrick v. City of Detroit, 906 F.2d 1108 (6th Cir. 1990) : The plaintiff in a civil rights suit against police officers for using excessive force in making an arrest had been cross-examined by counsel for one of the officers regarding liability but not the extent of damages. The Court held that *Rule 611(a)* did not authorize precluding the officer from calling the plaintiff as an adverse witness after a directed verdict motion had been denied and cross-examining him regarding the extent of damages, especially when counsel had indicated his intention to do so and the Judge had not indicated disapproval.

[g] Rule 611(a) -- Exclusion of Party Testimony

First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295 (8th Cir. 1991) : The defendant did not attend the initial stage of the trial on a civil RICO claim because the plaintiff never subpoenaed him, so the plaintiff read his extensive pretrial deposition into the record as an admission. When his counsel later attempted to call the defendant to testify as part of the defense case, the Trial Judge excluded the testimony on the ground that the defendant had already testified at length through his deposition. The Court vacated a judgment for the plaintiff, holding that in the absence of some proper basis in the record it was an abuse of discretion and plain error not to give the defendant an opportunity to allow the jury to observe his demeanor and pass upon his credibility. The case was remanded for a determination whether the defendant's testimony would have any evidentiary value helpful to the defense.

[h] Rule 611(a) -- Exhibits

United States v. Hans, 738 F.2d 88 (3d Cir. 1984) : The Court reversed a bank robbery conviction on the ground that the jury was permitted to inspect two "windbreakers" during its deliberations, even though they had not been admitted as evidence, and the jury was not informed that the chief prosecution witness did not believe the windbreakers were the ones worn by the robbers. In *Hughes v. Hemingway Transp., Inc.*, n1 the Judge observed that even where state law provides the rule of decision, the determination as to whether exhibits may be taken to the jury room is left to the sound discretion of the Federal Court.

United States v. Salerno, 108 F.3d 730 (7th Cir. 1997) : Affirming a conviction for murder in a racketeering enterprise, the Court held there was no abuse of discretion in permitting the jurors to file past a scale model of the crime scene. Although the defense objected that the procedure was overly dramatic, suggesting mourners filing past a casket,

the Court noted that the Trial Judge had been concerned whether all the jurors could view the model from the jury box, and had taken precautions against the jurors having contact with government witnesses, agents, or attorneys when viewing the model. The Court also held there was no abuse of discretion in permitting the model to go into the jury room during deliberations.

United States v. Noushfar, 78 F.3d 1442 (9th Cir. 1996) : Reversing convictions for illegal importation of goods and money laundering, the Court held it was error to send to the jury room, over the defendants' objection, 14 tapes that had not been played in the courtroom, together with a tape recorder. The Court said that the Trial Judge "completely abdicated control of the presentation of the evidence," and "made no analysis of whether undue emphasis might be placed on some of the recorded conversations."

[i] Rule 611(a) -- Headphones

United States v. Talley, 194 F.3d 758 (6th Cir. 1999) : The defendant in a drug trial argued that the jurors should have listened to audiotaped evidence through one loudspeaker rather than through separate headphones, as the quality of the headsets could differ and different jurors would end up hearing different things. The Court held that in the absence of any evidence of technical or hearing difficulties, there was no abuse of discretion in using headsets, which were adopted in an attempt to ensure that the jurors properly and clearly heard the evidence.

[j] Rule 611(a) -- Jurors' Questioning of Witnesses

United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993) : In a complex wire fraud prosecution arising out of a "land flip" scheme, the Court held there was no abuse of discretion in permitting 11 juror questions, which were relatively bland in character and designed to clarify and explain testimony already given, but cautioned that the practice should be reserved for exceptional situations.

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995) : Reversing a heroin conviction, the Court held that allowing the jury to question witnesses (including the defendant) was an abuse of discretion. The Court observed that "jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts," and "juror questioning is particularly troublesome when it is directed at the defendant himself in a criminal trial." In *United States v. Bush, 47 F.3d 511 (2d Cir. 1995)* , the Court affirmed a bank robbery conviction, finding no plain error when jurors were permitted to ask limited questions clarifying confusion about certain relevant physical facts during the defendant's testimony. This case is discussed in the Editorial Explanatory Comment, *§ 611.02[4]*. In *United States v. Douglas*, n2 the Court held that the Trial Judge employed proper procedures, but "exceeded his allowable discretion by inviting questions both at the start of the trial and at the end of each witness' testimony." The error was harmless, however, because the questions were directed at only two witnesses (not the defendant) and were "few in number and of slight significance." See also *United States v. Thompson* n3(it was error, but harmless, where the Judge invited the jurors to submit questions as each witness had finished testifying on direct and cross-examination; only a minimal number of questions were actually submitted, and they were in the nature of clarification rather than argumentation).

United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999) : The Court held in a hijacking case that there was no abuse of discretion where jurors were permitted to pose questions for witnesses. As a matter of first impression in the Circuit, the Court approved the procedure used in the case: the jurors could submit handwritten questions to the Judge, who would review them and permit counsel to see them and make any objections deemed appropriate; the Judge would determine the propriety of the questions outside the jury's hearing before asking them; and the Judge, rather than the

jurors or the attorneys, would put the questions to the witness. The Court noted that "the dangers of allowing jurors to ask questions orally far outweighs any perceived benefit of allowing juror questioning of witnesses."

United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986) : In a marijuana importation case, the Court disapproved of the Trial Judge's inviting juror questioning and permitting a juror to ask questions in the hearing of other jurors. Reversal of the convictions was not required, however. In *DeBenedetto v. Goodyear Tire & Rubber Co.*, n4 the Court affirmed a judgment for a tire manufacturer in a product liability case. Although it found that the Trial Judge had discretion to permit a juror's question to be asked, it also observed that "the practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial to verdict."

United States v. Ricketts, 317 F.3d 540 (6th Cir. 2003) : Affirming convictions for various offenses involving a drug conspiracy, the Court held it was error (but harmless) for the Trial Judge to permit jurors to submit five questions to witnesses without counsel first being allowed to review those questions. In a case in which the Trial Judge invited jurors to submit written questions to witnesses, *United States v. Collins, 226 F.3d 457 (6th Cir. 2000)* , the Court held that "while allowing jurors to ask questions during criminal trials is permissible and best left to the discretion of the trial judge, the routine practice of juror questioning should be discouraged. Nonetheless, we discern no abuse of discretion in this case." This case is discussed in the Editorial Explanatory Comment, *§ 611.02[4]*.

United States v. Feinberg, 89 F.3d 333 (7th Cir. 1996) : The Court expressed serious reservations regarding the practice, but found no plain error in permitting the jurors to ask questions orally of witnesses during an extortion trial.

United States v. Johnson, 914 F.2d 136 (8th Cir. 1990) : The Court affirmed convictions for offenses connected with the defendant's operation of a "chop shop" for stolen and wrecked vehicles, finding no error in permitting the jurors to question witnesses. The questions were asked only after counsel had completed their examinations, the Trial Judge considered the questions before allowing answers to be given, counsel were allowed to re-examine the witnesses after the questions, and the record did not reveal that the jury's neutrality was affected or its judgment altered by the questions asked.

United States v. Richardson, 233 F.3d 1285 (11th Cir. 2000) : The Court held there was no abuse of discretion when jurors were permitted to pose questions for the witnesses in a complex six-week money laundering, fraud, and embezzlement trial. The Trial Judge had employed all the recommended prophylactic measures, requiring written submissions, providing counsel with the opportunity to object privately, and exercising discretion about which questions to ask, and had several times through the trial instructed the jury as to the limited purpose of the questions, the proper use of the procedure, and the danger of reaching conclusions before all the evidence had been received.

[k] Rule 611(a) -- Limitations on Examination

Other cases involving limitations on examination are annotated in *§ 607.03[13]*.

[i] Abuse of Discretion

United States v. Foster, 982 F.2d 551 (D.C. Cir. 1993) : The Court reversed a conviction for possessing crack cocaine with intent to distribute because counsel was not permitted to cross-examine the key prosecution witness on, *inter alia*, his explanation why the defendant had much less cash on him at the time of arrest than would be expected of someone who had just made two drug sales. In *Harbor Ins. Co. v. Schnabel Found. Co., 946 F.2d 930 (D.C. Cir. 1991)*

, a negligence action to determine financial responsibility arising out of damage at a construction site, the Court held it was an abuse of discretion to limit cross-examination of the defendant's principal expert witness where the purpose of the cross-examination was to show that the witness lacked personal knowledge of the sites he had described as comparable to the project at issue.

United States v. Vega Molina, 407 F.3d 511 (1st Cir. 2005) : In the trial of multiple defendants for murders following a botched robbery, the Judge significantly limited one codefendant's cross-examination of a cooperating witness in order to prevent introduction of another codefendant's prior bad acts. The Court reversed the first codefendant's conviction, holding that the restrictions violated his *Confrontation Clause* rights because he was prevented from exploiting subjects that would have cast serious doubt on the witness' trustworthiness and from presenting his main theory of defense, that the witness and the second codefendant had conspired to frame him. In a bank fraud prosecution, *United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997)* , the Court held that the defendant was denied her *Sixth Amendment* rights when she was precluded on relevancy grounds from eliciting that a cooperating witness had been introduced to her by the highest officer of the bank. That restriction kept her from presenting a theory of defense that the witness had conspired not with her but with the officer in the fraud scheme.

Nemir v. Mitsubishi Motors Corp., 381 F.3d 540 (6th Cir. 2004) : When the plaintiff in a personal injury action attempted to impeach a defense causation expert with an excerpt from a book co-authored by another expert, Spitz, who was retained by the defendant, the Judge instructed the plaintiff to save such questioning for Sptiz's testimony. Then, when the plaintiff attempted to cross-examine Spitz about the excerpt, the Judge prohibited the questioning as beyond the scope of his direct testimony. Reversing a judgment for the defendant, the Court held that the plaintiff was erroneously prevented by the Judge's rulings from introducing relevant impeachment evidence. Affirming a tax fraud conviction in *United States v. Stavroff, 149 F.3d 478 (6th Cir. 1998)* , the Court found it was error (but harmless) when the Judge precluded defense counsel from cross-examining a cooperating witness about the witness' hopes and expectations in pleading guilty, since the defendant has a constitutional right to impeach the witness for bias. Excluding a question *sua sponte* and in front of the jury unduly highlights the question for the jury and may unfairly cast defense counsel in a bad light.

United States v. Schoneberg, 396 F.3d 1036 (9th Cir. 2005) : A cooperating witness in a marijuana distribution and money laundering case had already been sentenced and had been told by doctors that he could expect to die in prison from cystic fibrosis. To counter the inference that the witness had nothing to gain by lying, the defense introduced evidence that he had a plea bargain, but it was precluded from cross-examining the witness about whether his testimony was affected by the possibility of a sentence reduction and from getting the witness to confirm that the U.S. Attorney would be the sole judge of the truthfulness of his testimony for the purpose of seeking a sentence reduction. Reversing, the Court held that the restrictions left the jury not fully informed about the witness' motivation to lie and were an abuse of discretion. In *United States v. Wilmore, 381 F.3d 868 (9th Cir. 2004)* , a prosecution witness at a trial for felon firearm possession testified to the events of the day but denied having seen the defendant with a gun. The government then introduced the witness' grand jury testimony that she saw him with a gun. When the prosecutor then asked whether she lied to the grand jury, she claimed her *Fifth Amendment* privilege. On cross-examination, the defense was limited to exploring her testimony about the events but prohibited from asking about her grand jury testimony. Reversing, the Court held it was a violation of the *Confrontation Clause* not to permit inquiry into whether the witness was testifying in return for leniency for legal troubles of her own or had lied to obscure the fact that the coat in which the gun was found was hers. The Court noted that it had established a general rule that where a government witness invokes the *Fifth Amendment* on cross-examination, the witness' direct testimony must be stricken unless the refusal to answer concerns only collateral matters. In a wire fraud case, *United States v. Adamson,* n5 the defendant had told a Hewlitt-Packard investigator that improper payments to two H-P employees had been solicited by the employees, and the defendant's brother, also present at the interview, said little more than "That's true." When the brother

subsequently testified for the government that they had been bribing the employees, the defendant sought to impeach him, arguing that his silence was an adoption of the defendant's account. The Court held it was an abuse of discretion and a violation of confrontation rights to limit impeachment of the brother to the statements he had made at the interview and to exclude the defendant's statements as hearsay more prejudicial than probative under *Rule 403*. The defendant's statements at the interview were needed to place the witness' statements and silence in context; they were not hearsay because they were not being offered for their truth; and they were "exceedingly probative and only minimally, if at all, prejudicial." In a prosecution for embezzling from an ERISA pension plan, *United States v. Harris*, n6 one of the principal government witnesses was the defendant's sister, who was also the widow of the defendant's frequent investment partner. At the time she testified, the pension trust was suing her husband's estate on a promissory note. The estate's theory was that the note was not valid, and convicting the defendant of fraud would support that theory. The widow thus would benefit from the defendant's conviction, but the Judge would not let the defense ask her anything about the other lawsuit, apparently on the ground that the examination would go too far afield from the direct examination. The Judge also limited cross-examination of former employees suing the defendant for breach of fiduciary duty to questions about the nature of their dispute but not how much they were suing him for. The Court held these rulings were an abuse of discretion, although harmless error. The defense has a *Confrontation Clause* right to show possible motivations that prosecution witnesses may have to falsify their testimony, and the Judge's discretion to avoid undue consumption of time and confusion of issues cannot justify so severe a limitation on cross-examination as to prevent the jury from learning information needed to judge rationally whether witnesses might be shading the truth. In *United States v. Jones*, n7 the Court reversed a conviction for marijuana smuggling because the Trial Judge's absolute ban on recross-examination, even when new matter was brought out on redirect, violated the defendant's confrontation rights.

[ii] Rule 611(a) -- Limitations on Examination -- No Abuse of Discretion

United States v. Callipari, 368 F.3d 22 (1st Cir. 2004) : The Court affirmed the conviction of a stock options trader for wire fraud, holding there was no abuse of discretion when the defense was limited in cross-examining representatives of the victim regarding their lack of diligence or lack of knowledge concerning the situation. The defense was given sufficient opportunity to present its theory, while the limitations on examination were reasonable to protect against repetition and confusion.

United States v. Wilkerson, 361 F.3d 717 (2d Cir. 2004) : The Court affirmed a Hobbs Act conviction arising from a fatal armed robbery, holding there was no abuse of discretion when the Judge permitted cross-examination of a prosecution witness about variances between her testimony at the prior trial of a codefendant but did not permit any reference to the outcome of that trial, as that information could be prejudicial. In *United States v. Sasso, 59 F.3d 341 (2d Cir. 1995)* , the Court affirmed convictions for firearms offenses, holding there was no abuse of discretion in precluding cross-examination of a prosecution witness regarding her psychiatric history and her ingestion of antidepressant drugs. The witness' depression was a predictable result of a specific catastrophic event, so its recency did not suggest the condition had any probative value; further, there was no evidence that the depression had put her in a delusional state or that any medications would have affected her ability to perceive or understand the events about which she testified.

United States v. Ambers, 85 F.3d 173 (4th Cir. 1996) : Affirming a drug conspiracy conviction, the Court held there was no abuse of discretion in prohibiting the defendant from cross-examining cooperating witnesses about how the Sentencing Guidelines would apply, since such examination might do more to confuse jurors than enlighten them and the defendant had an adequate opportunity to explore the witnesses' subjective motives for testifying.

United States v. Martinez, 151 F.3d 384 (5th Cir. 1998) : The Court affirmed drug trafficking convictions, holding

there was no abuse of discretion when the Trial Judge limited cross-examination of government witnesses by: permitting only one defense counsel to examine a cooperating witness concerning any benefits he would receive for his testimony; confining cross-examination to the scope of the direct; and barring repetitive questions. Defense counsel and the jurors were told at the beginning of trial about these restrictions and the jury was cautioned not to construe against a defendant the fact that his counsel did not ask the same question that had already been asked by another defense attorney; the defendants did not show that these limitations or the way they were applied were prejudicial toward them. In *United States v. Clinical Leasing Serv., 982 F.2d 900 (5th Cir. 1992)* , an action to hold corporate officers personally liable for fines imposed against their corporation, the Court held there was no abuse of discretion in terminating one officer's direct testimony. His attorney had been specifically warned not to lead the witness, after having been warned about leading questions at least seven times previously.

United States v. Brown, 946 F.2d 1191 (6th Cir. 1991) : The Court affirmed a conviction for cocaine offenses in late 1989, holding there was no abuse of discretion when cross-examination of the government's key witness regarding his drug addiction and sale of drugs prior to that year was limited in order to avoid unnecessarily prolonging the examination. Careful scrutiny of the record revealed that defense counsel was able to effectively cross-examine the witness, to disclose that he was an addict-informant, and to fully explore his potential bias and truthfulness. Evidence of his prior drug use was inadmissible, as it did not bear on his character for truthfulness or untruthfulness.

United States v. Rettenberger, 344 F.3d 702 (7th Cir. 2003) : A husband and wife were tried for fraudulently obtaining insurance payments for his faked mental disability. After the wife testified, the Judge ruled that the husband's counsel could not cross-examine her, even when counsel vowed not to use argumentative or leading questions, because the Judge viewed her as a witness favorable to the husband's position. Affirming, the Court found no confrontation violation, even though some of the wife's testimony might have been adverse to the husband's interests, because the husband was given an opportunity (of which he ultimately did not avail himself) to examine her during his case. In *United States v. Smith, 308 F.3d 726 (7th Cir. 2002)* , the defendant, charged with marijuana and tax offenses, sought to show that a cooperating witness was lying when he said his affidavit was original by cross-examining him with a police officer's affidavit, the first paragraph of which was virtually identical to a paragraph in the witness' affidavit. Holding there was no error in precluding the cross-examination, the Court noted that "[l]imitations on cross-examination rise to the level of a *Sixth Amendment* violation when they prevent exposure of a witness's bias and motivation to lie," and are thus subject to *de novo,* rather than the usual abuse of discretion, review. Here, the defendant was given ample opportunity to expose bias, including calling the officer and eliciting from him that the language the witness had claimed as his own was included in two other witnesses' statements as well as in the officer's affidavit. In *United States v. Ward*, n8 the Court affirmed convictions for a large-scale drug distribution conspiracy, finding no abuse of discretion when cross-examination of a cooperating witness was limited. The defense was permitted to bring out that federal prosecutors helped to clear a warrant against the witness for unrelated state charges as a result of the witness' cooperation. However, it was not allowed to inquire into the nature of the state charges, which were based on allegations of spousal and child abuse. The Court held that the jury had a sufficient basis to make a discriminating appraisal of the witness' motive and bias without hearing the highly inflammatory nature of the charges. In *United States v. Plescia*, n9 the Court affirmed drug conspiracy convictions, holding there was no error in limiting impeachment of the chief prosecution witness. The defense was given sufficient opportunity to bring out that the witness had previously given creative and detailed lies under oath, had lied in telling people of the murder of African-American gang members, and had lied at a departmental hearing regarding his drug use as a police officer; further inquiry into the details was unnecessary and probably prejudicial. There was also no error in precluding cross-examination of the witness regarding his use of anti-depressive and anti-anxiety medications, since the defense did not offer any expert testimony regarding the effects of the medications, and mention of the drug Prozac would likely be prejudicial.

United States v. Beardslee, 197 F.3d 378 (9th Cir. 1999) : The Trial Judge in an arson-fraud conspiracy prosecution limited the defense cross-examination of two cooperating witnesses. The Court held there was no abuse of discretion in barring examination of one witness regarding his being on probation, since the relevance of the evidence was "marginal, at best," and the witness was adequately examined on other issues touching his credibility and bias against the defendant, such as his failure to fully implicate her in his first ATF interview. There was also no abuse of discretion in barring examination of the other witness regarding traffic citations for which he had not paid the fine and an arrest warrant had been issued. The marginal relevance of the evidence would likely have been outweighed by the risk of confusing the jury; furthermore, the witness admitted on cross-examination that he did not "live up to" his obligation under the plea agreement to "obey all laws," and that he believed he had not been sanctioned because he was cooperating, so the failure to specify which laws he had not obeyed would have been largely irrelevant to his credibility. In *United States v. Miller*, n10 the Court affirmed a conviction for receiving stolen goods, and upheld a ruling that defense counsel could not read prior testimony of the victim into evidence, where the victim had been questioned extensively about prior inconsistent statements and on cross-examination the government did not raise any issue that would have justified further inquiry into the inconsistent statements.

United States v. McGuire, 200 F.3d 668 (10th Cir. 1999) : The Court affirmed a carjacking conviction, finding no abuse of discretion when the defendant was precluded from cross-examining a cooperating witness about juvenile convictions for misdemeanor theft and being on probation at the time of the incident. The defense had been permitted to conduct an extensive and searching cross-examination exposing the witness' credibility, motives, and biases and presenting the defendant's theory of the case, that the witness rather than he had been the violent aggressor.

[iii] Rule 611(a) -- Limitations on Examination -- Time Limits

Akouri v. State of Fla. Dept. of Transp., 408 F.3d 1338 (11th Cir. 2005) : The Court affirmed the judgment in a Title VII action, finding no abuse of discretion when the Judge set time limits on the plaintiff's testimony. It was clear that the restrictions imposed were flexible and the Judge made reasonable accommodations as necessary, including extending the time allowance by an hour and fifteen minutes when the plaintiff's counsel indicated that he would be unable to present his case fully in the time originally given.

[l] Rule 611(a) -- Limitations on Proof

United States v. Janati, 374 F.3d 263 (4th Cir. 2004) : The Judge presiding over a prosecution concerning a complex healthcare fraud conspiracy limited the government's case-in-chief to presentation of the 61 overt acts alleged in the indictment and ruled that charts and summary testimony regarding 1300 transactions within the scope of the conspiracy could only be presented in rebuttal if necessary. On interlocutory appeal, the Court held the ruling to be an abuse of discretion. While the Judge's concern for managing the complexity of the trial was understandable, the government has a right to present acts committed in furtherance of a charged conspiracy even though they are not specifically described in the indictment, and since the additional transactions were within the scope of the indictment, evidence regarding them would not be unduly prejudicial.

[m] Rule 611(a) -- Order of Proof

Loinaz v. EG & G, Inc., 910 F.2d 1 (1st Cir. 1990) : A judgment for the plaintiff in an employment contract dispute was reversed because the Trial Court, although not abusing its discretion in denying a continuance due to the unavailability of a key defense witness, abused its discretion in denying a motion to call that witness out of turn, as the defendant was thereby precluded from presenting any live rebuttal to the plaintiff's testimony. This case is discussed in the Editorial Explanatory Comment, *§ 611.02[2]*.

Berroyer v. Hertz, 672 F.2d 334 (3d Cir. 1982) : In a medical malpractice action the Court found no abuse of discretion when the plaintiff was permitted to call a "rebuttal" witness during her case-in-chief, after the defendant obtained permission to call its expert out of turn.

Martin v. American Petrofina, Inc., 779 F.2d 250 (5th Cir. 1985) , *modified on other grounds*, *785 F.2d 543 (5th Cir. 1986)* : In a suit by a pipe fitter against various asbestos manufacturers, the Court held there was no error in permitting the plaintiff to introduce evidence of his medical condition before evidence of the defective nature of the manufacturers' product. In *Cranberg v. Consumer Union*, n11 the Court affirmed a judgment for the defendants in a libel action brought *pro se* by a plaintiff who claimed that his product had been disparaged. It cited *Rule 611(a)* in approving the Trial Judge's request that the engineers who had tested the product testify first and that the defendants proceed first in examining the witnesses.

United States v. Branham, 97 F.3d 835 (6th Cir. 1996) : In a drug case the Court found no error when the government was not required to play all audiotapes of conversations involving two defendants and a government informant in chronological order in its case-in-chief. The Trial Judge told the defendants that they could play the tapes in their suggested order as part of the defense case, and the Court concluded that this was sufficient to ensure that the jury would not be confused or misled. In *United States v. Lash, 937 F.2d 1077 (6th Cir. 1991)* , the Court affirmed fraud conspiracy convictions, holding there was no abuse of discretion when the government was permitted to call fewer than all of the victim witnesses first. There was no showing that the order was ineffective for the ascertainment of truth or otherwise violated the Rule's requirements.

Stone v. Peacock, 968 F.2d 1163 (11th Cir. 1992) : The Court held, in an employee's civil rights action, that there was no error in requiring the plaintiff to testify first, without being cross-examined at the time, so that some chronology would be laid out at the beginning of the trial.

[n] Rule 611(a) -- Overview Witness

United States v. Casas, 425 F.3d 23 (1st Cir. 2005) : The Court affirmed drug-trafficking convictions, holding it was error (but harmless) when a government agent gave preliminary "overview" testimony regarding the existence and operation of a drug smuggling organization involving the defendants. The agent's testimony went well beyond his personal knowledge. In *United States v. Garcia-Morales, 382 F.3d 12 (1st Cir. 2004)* , although the Court affirmed a drug conspiracy conviction, it found that the testimony of the government's first witness, the Customs Service agent in charge of the investigation, was hearsay testimony based upon information provided by others. The Court reiterated its position, stated in *United States v. Casas, 356 F.3d 104 (1st Cir. 2004)* , and *United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986)* , that "overview" testimony at the outset of a case is "inherently problematic." The agent in this case provided testimony that the defendant was a member of the conspiracy before any evidence of conspiracy was presented, and also testified to an informant's conversation with a conspirator even though he was not a witness to the conversation.

United States v. Griffin, 324 F.3d 330 (5th Cir. 2003) : In a prosecution for mail fraud, conspiracy, bribery, and money laundering, the Court held it was error to permit an FBI agent to testify as the second government witness and to use a chart containing pictures of persons and symbols for the entities involved in the alleged conspiracy. Although the Court recognized that there is an established tradition permitting summaries of trial evidence to be used with proper limiting instructions, it commented that "[h]ere, of course, the evidence had not yet been presented so that the witness

was used as an overview witness." The Court "unequivocally" condemned the use of an overview witness "as a tool employed by the government to paint a picture of guilt before the evidence has been introduced." Because the chart was not admitted into evidence or sent to the jury room and the overview testimony was supported by other witnesses and exhibits, the Court found the use of the overview witness to be harmless error.

[o] RULE 611(a) -- Pretrial Orders and Witness Lists

United States v. Cox, 752 F.2d 741 (1st Cir. 1985) : Upholding cocaine convictions, the Court found there was no unfair prejudice when the government was permitted to call a witness not named on a pretrial witness list. The defense was aware of the existence of the witness and the Trial Judge allowed five days to prepare for the witness' testimony.

[p] Rule 611(a) -- Privilege Claims

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978) : The Court suggested that, although a Trial Judge should be solicitous of a witness' privilege not to incriminate himself, the Judge should not automatically assume that a witness will invoke the privilege whenever possible. Rather, the witness should be asked whether he desires to claim the privilege or to consult with counsel.

United States v. Arnott, 704 F.2d 322 (6th Cir. 1983) : The defense in a drug case represented that a witness would testify in support of an entrapment claim and requested a ruling that would limit the scope of cross-examination to the subject matter of the direct examination so that the witness would not have to claim the privilege against self-incrimination. The Trial Judge invited the defense to indicate the questions that would be put on direct examination, but the invitation was declined. The Court found no error in this procedure, since the Judge could not properly rule on the scope of cross-examination or on the witness' right to claim the privilege without knowing what would be said on direct examination and exactly what might be asked on cross-examination.

[q] Rule 611(a) -- Protecting the Witness

United States v. Sorrentino, 726 F.2d 876 (1st Cir. 1984) : In a prosecution for income tax evasion, the Court upheld a ruling limiting defense counsel's cross-examination of a government agent on the grounds that it was cumulative and harassing.

United States v. Toner, 728 F.2d 115 (2d Cir. 1984) : Convictions for firearms offenses were affirmed as the Court found that the Trial Judge, after permitting wide cross-examination of a government informant-witness, properly barred inquiry into the informant's reasons for coming to the FBI, since the inquiry apparently would have jeopardized other ongoing FBI investigations.

United States v. McMillon, 14 F.3d 948 (4th Cir. 1994) : The Court held in a drug prosecution that it was not an abuse of discretion to preclude a defendant from cross-examining a cooperating coconspirator about the witness' use of drugs to force men to engage in sexual acts with him. Testimony regarding the witness' sexual life is not probative of his character for truthfulness; rather, it impairs the search for truth and harasses, annoys, or humiliates the witness in the process.

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) : The Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms. At trial the defense was not permitted to

cross-examine one of the Treasurer's office employees, a lesbian, about her alleged hostility to the defendant because the defendant had fired the witness' lover. Reversing for this and other evidentiary errors, the Court held that, because the witness was openly lesbian and a lesbian activist, the Judge could not preclude the cross-examination on the ground of protecting the witness against anti-homosexual stigmatization. In *United States v. Ford, 21 F.3d 759 (7th Cir. 1994)* , the Court affirmed RICO convictions, holding there was no abuse of discretion when defense counsel was precluded from asking a cooperating government witness whether he had been known by another name, as the witness was in a witness protection program and needed to protect his new identity; furthermore, the question was only an attempt to catch the witness in a lie, so the evidence would only have been collateral.

[r] Rule 611(a) -- Reading from Exhibits

United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000) : Affirming securities fraud convictions, the Court upheld a ruling that admitted certain letters into evidence but did not permit the defendant to read aloud from them: "There was thus no error in the district court's discretionary ruling limiting the manner in which the evidence was presented to the jury."

[s] Rule 611(a) -- Rebuttal and Surrebuttal

United States v. Soto-Beniquez, 350 F.3d 131 (1st Cir. 2003) : Affirming convictions in a complex drug conspiracy case, the Court held that one defendant had opened the door to rebuttal evidence by arguing that the government did not have sufficient evidence to indict him for murdering a government informant, which was why it accepted a guilty plea to the charge of accessory after the fact. After the defendant made this argument, the government was properly permitted to offer rebuttal evidence to prove that the weapon used in another murder, to which the defendant had pleaded guilty, was the same one used to kill the informant. In a prosecution for embezzlement from the Department of Veterans Affairs, *United States v. Le'on- Delfis*, 203 F.3d 103 (1st Cir. 2000) , the government offered evidence that a defendant made two large bank deposits in 1996, which allegedly related to money laundering charges against him. The defendant's wife testified for the defense that their family finances in 1996 were such that the deposit could have come from personal funds. On cross-examination she was asked about money seized in a civil forfeiture proceeding related to the criminal case; she said the amount seized was the family's entire savings, and she did not think the sum exceeded $200,000. When questioned about the legitimate sources of the money seized, she could explain only $105,500. On rebuttal the government proved that the amount seized was $203,000; it argued that this evidence impeached the wife's testimony and was circumstantial evidence of the defendant's wrongdoing. The Court found no abuse of discretion when the defendant was precluded from offering evidence on surrebuttal that other individuals claimed part of the seized money. The defense could have offered the evidence during its case, following the wife's cross-examination. Further, the evidence did not impeach or explain away the proof that the government had offered on rebuttal: it did not suggest that the amount seized was less than $203,000, nor did it add anything to the wife's testimony on direct that other persons made claims to the money. In *Kines v. Butterworth*, n12 the Court, affirming dismissal of habeas corpus petitions, upheld the exclusion of surrebuttal evidence with the following comment:

> While rebuttal testimony which is offered to impeach the credibility of a key witness cannot ordinarily be viewed as collateral, *United States v. Uramoto, 638 F.2d 84 (9th Cir. 1980)* , yet when the testimony is offered at a late stage of the trial in surrebuttal, and it is repetitious of evidence presented earlier to the jury, the trial judge's exercise of discretion should not be interfered with unless the ruling is so prejudicial that it necessarily prevents a fair trial.

United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992) : Affirming a conviction for conspiring to distribute

cocaine, the Court held there was no abuse of discretion in permitting a surveillance agent to testify on the government's rebuttal that he had seen a conspirator enter a building empty-handed and return carrying a box. The testimony was not mere bolstering, but a proper rebuttal of testimony by a defense investigator to the effect that a previous government witness could not have seen the building entrance as he claimed.

United States v. Barnette, 211 F.3d 803 (4th Cir. 2000) : The Court affirmed murder convictions resulting from a hijacking, but vacated the defendant's death sentence and remanded for further proceedings. At the capital phase, the defendant called experts who testified that in their opinion the defendant would not be a future danger in prison. In rebuttal, the government called an expert in forensic psychology who testified that the defendant was a psychopath and therefore would be dangerous in prison. The Trial Judge refused to allow the defense to recall one of its experts for surrebuttal testimony to challenge the government expert's conclusions. The Court found error in the refusal to permit this surrebuttal testimony. Surrebuttal testimony is to be permitted when necessary "to respond to any new matter brought up on rebuttal," and here no mention had been made of the defendant being a psychopath until the government began its rebuttal case. In *United States v. Burgess*, n13 the Court affirmed (2-1) a conviction for conspiracy to distribute cocaine, and upheld the exclusion of surrebuttal evidence pertaining to a posttraumatic stress disorder that was repetitive of evidence offered in the case-in-chief for the defense.

Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986) : The Court reversed a judgment entered for a valve manufacturer on a plant owner's claim arising out of an accident at a chemical plant. It found that the owner should have been permitted to offer expert rebuttal testimony in response to the manufacturer's evidence, since the owner was "under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised on defense," and the rebuttal evidence was critical to the owner's case.

Toth v. Grand Trunk R.R., 306 F.3d 335 (6th Cir. 2002) : A railroad employee sued for injuries allegedly caused by a defective operating lever while he was coupling railroad cars. A defense witness testified that the railroad's inspection program would have detected the defect before the car left the yard, but the plaintiff was not permitted to introduce rebuttal evidence that not all cars were inspected. The Court held it was error (but harmless) to exclude the evidence. Although evidence of deficiencies in the inspection practices would have been relevant to prove the existence of a defect, it was not necessary for the plaintiff to pursue this theory in his case-in-chief. So the evidence was proper to rebut the theory after it was introduced by the defense. In an employment discrimination action, *EEOC v. Monarch Mach. Tool Co.*, n14 the Court remanded, finding that the District Judge erred in requesting the employer to submit certain evidence at the conclusion of the trial and in relying upon that evidence without giving the company a chance to present any rebuttal evidence.

United States v. Wilson, 134 F.3d 855 (7th Cir. 1998) : The government attempted to connect one defendant with a cocaine conspiracy by showing that a person with his name had registered at a motel in El Paso, but the record introduced had no vehicle or driver's license number. After the defendant denied in his testimony that he had ever been in El Paso, the government presented as rebuttal evidence a registration card from the motel which included the defendant's driver's license number, together with testimony from an employee that the desk clerk would not write down the number without verifying it against the actual license. The defendant was not permitted to introduce surrebuttal evidence that he did not possess a driver's license at the time in question. The Court held that excluding the surrebuttal evidence was an abuse of discretion, since it was relevant to meet evidence first presented by the government on rebuttal, but the error was harmless. In *United States v. O'Brien, 119 F.3d 523 (7th Cir. 1997)* , the Court affirmed fraud convictions, holding there was no abuse of discretion in refusing to permit the defendant to take the stand again to offer surrebuttal testimony after a witness had given rebuttal testimony of uncharged acts to impeach the defendant's testimony in her case in chief. The surrebuttal testimony would only have been cumulative of testimony the defendant had already given; and the defendant had been permitted to offer surrebuttal evidence on the impeaching witness' bad

reputation for truthfulness. In *United States v. Gaertner*, n15 the Court affirmed a conviction for cocaine possession, holding there was no error in permitting the government to offer rebuttal evidence to refute specific testimony of defense witnesses and in rejecting surrebuttal testimony, which would have been a repetition of the defense testimony that the government had rebutted: "It is well established that the admission of rebuttal evidence lies within the sound discretion of the trial court and appellate courts will not interfere with the trial court's ruling unless there is a clear abuse of discretion."

Smith v. Conley, 584 F.2d 844 (8th Cir. 1978) : The Court upheld a ruling under *Rule 611(a)* that an expert witness called by the plaintiff in this civil rights action should be excluded because the witness was available during the plaintiff's case-in-chief but was not called until rebuttal evidence was offered. In *United States v. Calvert, 523 F.2d 895 (8th Cir. 1975)* , the Court found no abuse of discretion in allowing the government to offer rebuttal evidence that was available during the government's case-in-chief.

United States v. McCollum, 732 F.2d 1419 (9th Cir. 1984) : The Court found no error in the Trial Judge's rejection of an additional expert offered as a surrebuttal witness, where the defense had bypassed the opportunity to call the expert during its case-in-chief.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005) : In an action by arrestees alleging excessive force by a police officer, the Trial Judge granted the defendants' motion *in limine* against introduction of the police department's Standard Operating Procedures on the grounds that they were irrelevant to the plaintiffs' federal constitutional claim and that even if they were relevant on the state law claims, their probative value was substantially outweighed by risks of prejudice and confusion. At trial, however, the defense asserted that the officer had acted in accordance with his training, and the plaintiffs sought to introduce the SOPs on rebuttal. The Court found no abuse of discretion in the exclusion of the evidence, noting that although "[w]hen a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible," "permissible does not mean mandatory" and "the decision whether to admit or exclude rebuttal testimony remains within the trial court's sound discretion." Here, the SOPs themselves "would have added nothing to the evidence Plaintiffs were allowed to adduce," and expert testimony related to the SOPs that the plaintiffs sought to introduce would have risked jury confusion.

United States v. Glass, 709 F.2d 669 (11th Cir. 1983) : In a drug prosecution the Court sustained the Trial Judge's refusal to permit surrebuttal testimony, saying that "[s]urrebuttal testimony should go to the essence of the rebuttal testimony" and that the testimony offered in this case did not. In *United States v. Haimowitz*, n16 the government presented two character witnesses to testify that the defendant's reputation for truthfulness was bad and that in their opinion he was not truthful. The Court found no abuse of discretion when defense counsel was denied a continuance to obtain surrebuttal witnesses to testify about credibility.

[t] Rule 611(a) -- Recalling Witnesses

United States v. Dent, 984 F.2d 1453 (7th Cir. 1993) : In a felon firearm possession case, the Court held there was no abuse of discretion in permitting the government to recall an expert witness after the Trial Judge received two notes by a juror asking several questions. Although disapproving of the practice of recalling witnesses in order to answer individual jurors' questions, the Court noted that here the Judge properly instructed the jury that it was not responding directly to the questions, the testimony concerned tangential issues in the case, and the government had not rested. In *United States v. Raineri*, n17 the Court upheld a Trial Judge who quashed a defense subpoena to recall for further impeachment a government witness who already had been impeached.

United States v. Puckett, 147 F.3d 765 (8th Cir. 1998) : The Court affirmed convictions for a crack distribution conspiracy, finding no abuse of discretion when the government was permitted to recall law enforcement witnesses during the course of the trial so the evidence could be presented in chronological order. The witnesses testified about different subject matter each time, the defendants were free to cross-examine them about any of their testimony, and there was no indication that the government recalled the witnesses to bolster their credibility. In *United States v. Jackson*, n18 the Court, affirming convictions in a complex drug conspiracy case, approved the government's trial tactics in calling an agent, who was personally involved in many of the narcotic sales at issue, numerous times rather than once. The Court stated that "the manner in which [the agent] was called to testify lent a praiseworthy degree of order to this complicated trial." Noting that after each appearance the agent was subject to cross-examination on the subject matter of that appearance as well as to his credibility, the Court found that no confrontation right of the defendant was violated.

United States v. Clark, 617 F.2d 180 (9th Cir. 1980) : The Court found no abuse of discretion in refusing to allow a bank robbery defendant to recall a psychiatric expert during rebuttal, when no offer of proof was made as to what the witness would add to the case. In *United States v. Perry*, n19 drug distribution convictions were affirmed despite the defendants' contention that a government witness who was impeached with several testimonial inconsistencies was improperly permitted to take the stand a second time to clarify the inconsistencies. "The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which the trial judge necessarily has broad discretion."

United States v. McLean-Davis, 785 F.2d 1534 (11th Cir. 1986) , *modified*, *795 F.2d 957 (11th Cir. 1986)* : Affirming marijuana convictions, the Court found that the Trial Judge properly told the defendant, at the close of his testimony, that he would have to submit to further cross-examination if he called a witness on his behalf. The ruling was within the Judge's power to control the order of proof. In a cocaine distribution case, *United States v. Butera*, n20 the Court found no error in permitting sequential testimony of the principal governmental investigating officer, where there was an opportunity for cross-examination after each appearance.

[u] Rule 611(a) -- Reopening the Evidence

Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148 (1st Cir. 1996) : In a negligence action against a hotel for failing to summon aid promptly on behalf of a guest suffering a heart attack, the Court held there was no abuse of discretion in permitting the plaintiff to reopen its case to produce witnesses on the causation issue, as there was no indication that the plaintiff withheld the proof as a strategic matter or that the defendant suffered any prejudice as a result.

Goldberg v. National Life Ins. Co., 774 F.2d 559 (2d Cir. 1985) : The Court held it was not error to exclude an additional witness for the plaintiff after the plaintiff rested, where the witness would have changed the theory of the case in a way that might have confused the jury.

United States v. Terry, 729 F.2d 1063 (6th Cir. 1984) : The Court upheld the denial of two defendants' motion to reopen their case for further impeachment of a government witness who had already been extensively impeached.

United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001) : Affirming CCE and drug convictions, the Court found no abuse of discretion in permitting one defendant to testify after the defense had rested, even though the defendant's testimony implicated himself and other defendants. The harm to the other defendants was the same as if the defendant had testified before the defense rested. There was no basis for a grant of mistrial, since the Judge allowed the other

defendants adequate opportunity to respond to the testimony.

[v] Rule 611(a) -- Summary Charts and Testimony

Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 2002-1 Trade Cas. (CCH) P73620 (1st Cir. 2002) : The Court affirmed a judgment for a professional soccer league and its investor/owners in an antitrust suit brought by soccer players, and held that the Trial Judge properly admitted a chart summarizing the testimony of two defense witnesses. The Court observed that "[i]t is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful," and "[n]othing precludes their use with respect to oral testimony." The Court further noted that "[a]lthough the court admitted the charts as 'evidence,' its instruction made clear that they were merely aids and that the testimony controlled."

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : In the prosecution of a conspiracy to bomb United States commercial airliners in southeast Asia and for crimes relating to the 1993 bombing of the World Trade Center, the Court held that it was not an abuse of discretion to admit the government's summary charts of telephone records, but this brief portion of the Court's lengthy opinion is muddled. The Court affirmed the admission of the charts under *Rule 1006*, while commenting that "any possible prejudice was cured by the District Court's limiting instruction stating that the charts were not evidence; they were only graphic demonstrations of the underlying evidence, and the jury had to determine for itself whether they fairly and accurately summarized the underlying evidence." The confusion arises because summaries under *Rule 1006* are evidence; they summarize voluminous material that cannot practically be brought to court. Summaries of trial evidence are *Rule 611(a)* summaries and may or may not be admitted as illustrative exhibits.

United States v. Janati, 374 F.3d 263 (4th Cir. 2004) : The Judge presiding over a prosecution concerning a complex healthcare fraud conspiracy limited the government's case-in-chief to presentation of the 61 overt acts alleged in the indictment and ruled that charts and summary testimony regarding 1300 transactions within the scope of the conspiracy could only be presented in rebuttal if necessary. On interlocutory appeal, the Court held that the limitation on the case-in-chief was an abuse of discretion. Although the Judge had not ruled on any specific summary chart, the Court noted that *Rule 1006* could be used to provide independent evidence of voluminous records if the chart is an accurate compilation of records otherwise admissible in evidence that have been made available to the opposing party. To the extent that the charts would summarize witness' conclusions or opinions, they would be pedagogical charts subject to regulation under *Rule 611(a)*. In *United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995)* , the Court held there was no abuse of discretion when a detective, at the end of the government's case-in-chief, offered an organizational chart based on prior witness' testimony that diagrammed drug transactions among members of the charged conspiracy. After an extended discussion of summary testimony from expert witnesses, the Court concluded that the summary chart would be helpful because of the complexity of the case. Furthermore, appropriate safeguards were utilized to minimize any potential prejudice to the defendants: the parties stipulated that the chart accurately reflected the testimony of prior witnesses; the detective was voir dired before giving testimony as to the chart, and extensively cross-examined regarding the chart's creation; the defendants were given a recess to prepare the cross-examination regarding the chart; and numerous limiting instructions were given. The Court likewise held there was no abuse of discretion in admitting summary testimony from the detective, but it cautioned that the dangers inherent in the dual roles of expert and summary witness make the practice inappropriate in the ordinary drug prosecution lacking the complexity of this case.

United States v. Fullwood, 342 F.3d 409 (5th Cir. 2003) : The Court affirmed convictions arising from a scheme to submit false crop insurance claims, finding no plain error in the government's calling as its last witness a special agent to recap a significant part of the testimony previously given. It noted that "[f]or complex cases, we have allowed

summary witnesses in a limited capacity," but concluded that "there are limits that may have been exceeded here, because, as the final rebuttal witness, the Special Agent was allowed, without justification, to simply recap substantial portions of the Government's case-in-chief." The Court added that "in light of the ... dangers and the seemingly increased use of such witnesses by the Government, we strongly caution, *once again*, against use of summary witnesses in this fashion, especially in a non-complex case." In a prosecution for misapplying federal grant payments, *United States v. Buck, 324 F.3d 786 (5th Cir. 2003)* , the Court held that it was error to admit into evidence and allow into the jury room a diagram showing connections between the defendant and the misapplied payments, but the error was harmless because the diagram accurately summarized testimony and other evidence that had been properly admitted and was thus already before the jury. Although the defendant argued the issue in terms of *Rule 1006*, the Court, quoting this *Manual,* noted that pedagogical aids such as the diagram in this case are properly analyzed under *Rule 611*. In *United States v. Hart,* n21 the defendant was convicted of making false statements in applications for farm loans by omitting debts from Farm and Home Plans (computer-generated projections of the borrower's plan of operation). At trial, an employee of the loan servicing agency was permitted to introduce, as summaries under *Rule 1006*, revised FHPs that she had prepared, which the government said illustrated what the results would have been if all the debts testified to by the prosecution witnesses had been included on the actual FHPs. Reversing, the Court held that the government had failed to adduce any evidence in support of the assumptions and conclusions that the witness drew when preparing her versions of the "proper" FHPs. While the government had shown undisclosed debts, it had not shown that the full amount of those debts belonged on a properly prepared FHP, so the "summary" impermissibly assumed what the government "was required to prove beyond a reasonable doubt as operative facts of the alleged offense." In *United States v. Taylor*, n22 the Court reversed convictions for drug trafficking offenses because a government chart purporting to list the players in the conspiracy and their positions within the hierarchy was improperly admitted into evidence; the chart did not accurately reflect the underlying testimony. In a massive drug trafficking case, *United States v. Posada-Rios*, n23 the Court found no abuse of discretion when the government was permitted to display throughout the trial a time-line and organizational charts on eight large poster boards on easels. The charts were not admitted into evidence, but were pedagogical devices, and the jury was repeatedly instructed as to their proper purpose.

United States v. Bray, 139 F.3d 1104 (6th Cir. 1998) : In a postal clerk's trial for embezzling money received from stamp purchases, the government introduced charts summarizing the forms that kept daily track of the clerk's transactions. Affirming, the Court held there was no error in refusing to give a limiting instruction that the charts were not evidence or proof of facts. Such an instruction may be appropriate when a summary is a pedagogical device, governed by *Rule 611(a)*, but the charts in this case were properly introduced under *Rule 1006* as primary evidence of records so voluminous that they could not be conveniently examined in court, and so constituted the evidence to be considered by the factfinder. In *United States v. Paulino, 935 F.2d 739 (6th Cir. 1991)* , the Court affirmed convictions for conspiring to possess and distribute cocaine, holding there was no error in permitting a witness to give testimony explaining an organizational chart that showed the various players and their roles in the conspiracy and a chart that indicated the cash generated from cocaine sales for a specified period. A proper cautionary instruction was given at the close of evidence, the defendants had a full opportunity to cross-examine the witness, and the charts were not substantially inconsistent with the evidence adduced at trial.

United States v. Pree, 384 F.3d 378 (7th Cir. 2004) : In a trial for filing false tax returns, the government introduced two summary charts prepared by a testifying IRS agent. The defendant did not challenge the accuracy of the charts, and the Judge gave a pattern instruction stating that the charts accurately summarized voluminous books, records, or documents. That instruction was problematic because the charts summarized evidence already admitted, and thus were akin to "a teaching device rather than ... substantive evidence." Although the Court recognized that the preferred practice when such charts are offered is to instruct the jury that the charts are not evidence and only purport to summarize already admitted evidence, it declined to find plain error in view of the absence of any challenge to the accuracy of the charts. Further, the Court found no plain error when the agent was permitted to testify as a summary witness, noting that a summary witness may testify as to his analysis of a transaction based upon the testimony of other

witnesses and explain the analysis based upon his special expertise. The nature of such testimony makes "the line between summary testimony and expert testimony indistinct." The Court found no problem in the "selective summary of the Government's evidence," as the defendant could cross-examine the witness and offer her own evidence. As part of its proof that the defendant had aided and abetted tampering with motor vehicle identification numbers in *United States v. Petty, 132 F.3d 373 (7th Cir. 1997)* , the government introduced certain telephone records. The computer-generated records were cumbersome, were difficult to read, and contained much irrelevant information, so an FBI technical analyst prepared charts summarizing the relevant phone calls. For "reasons unapparent to [the Court]," the Trial Judge declined to admit the charts as summary evidence under *Rule 1006*, but did permit the analyst to use them as demonstrative aids under *Rule 611(a)*. The Court found no abuse of discretion, nor would it have had the charts been admitted into evidence, since they summarized complex evidence that was admissible.

United States v. Baker, 10 F.3d 1374 (9th Cir. 1993) : In a complex narcotics manufacturing prosecution, the Court held there was no abuse of discretion in permitting an FBI agent to present a summary including a total value of the narcotics transactions and expenditures testified to during the government's case. The Court noted that the agent was presenting neither summary evidence under *Rule 1006* nor expert evidence under *Rule 702*; rather, the testimony was permissible under *Rule 611(a)* as clarifying the government's presentation for the jury. Because of the dangers of undue prejudice, such summaries should be admitted only in exceptional cases, but in this case careful precautions had been taken (e.g., a week's continuance for the defense to examine the materials, a full opportunity to cross-examine the agent, and thorough limiting instructions three times during the testimony).

United States v. Stiger, 413 F.3d 1185 (10th Cir. 2005) : In a complex narcotics conspiracy case, the Court held it was error (but harmless) to admit a chart purporting to detail the organizational structure of the conspiracy, which the officer presenting the chart had constructed from both trial testimony and interviews conducted during the investigation. In *United States v. Ray, 370 F.3d 1039 (10th Cir. 2004)* , the Court affirmed drug-conspiracy convictions, upholding the use of summary charts during the testimony of a law enforcement agent at the end of the government's case-in-chief. The summary of trial testimony was not admissible under *Rule 703* (because it did not serve as the basis of an expert opinion); nor was it admissible under *Rule 1006* (because it did not purport to summarize voluminous admissible information that was not proffered at trial). But the Court held it was admissible under *Rule 611(a)* because of the complexity of the case and the precautions taken to avoid prejudice (here, full cross-examination of the agent who prepared the charts and clear instruction to the jury on the proper use of the charts and summary testimony).

United States v. Richardson, 233 F.3d 1285 (11th Cir. 2000) : The Court held there was no abuse of discretion in a complex six-week trial for money laundering, fraud, and embezzlement when a government witness was permitted to present charts summarizing the transaction histories of the accounts of the 14 alleged embezzlement victims. The Trial Judge issued numerous limiting instructions to the jury, the expert specifically testified that the label "unauthorized transaction" on one of the columns represented his opinion, the expert was available for cross-examination, and the label was ultimately changed to "questioned transaction" before the charts went to the jury.

[w] Rule 611(a) -- Unruly Witness

Lee v. Rapid City Area School Dist. No. 51-4, 981 F.2d 316 (8th Cir. 1992) (en banc): In an age discrimination action by a teacher whose contract was not renewed, the Trial Court admitted evidence that school administrators had received complaints about the plaintiff from students and parents but it refused, on grounds that the evidence was hearsay and the witnesses repeatedly volunteered nonresponsive statements, to allow testimony about the substance of the complaints unless they had been documented. The Court of Appeals held, *inter alia*, that there had been no abuse of discretion in the Trial Court's actions to control witnesses it deemed unruly. Three Judges dissented from this point, on the basis that the key rulings were made on the mistaken hearsay ground rather than to control overly voluble witnesses.

[x] Rule 611(a) -- Videotaped Testimony

Traylor v. Husqvarna Motor, 988 F.2d 729 (7th Cir. 1993) : In an action for injuries caused by a defective maul, the defendant's expert gave direct testimony on Friday; when he said he could not appear on Monday, the Magistrate Judge permitted him to be cross-examined Saturday on videotape (which was shown to the jury on Monday), rather than having him recalled on Tuesday or Wednesday for cross-examination in person. Reversing on other grounds, the Court noted its disapproval of this procedure, which gave artificially greater salience to the direct testimony.

[2] Rule 611(b) -- Scope of Cross-Examination

[a] Rule 611(b) -- Discretion of Trial Judge

United States v. Eniola, 893 F.2d 383 (D.C. Cir. 1990) : During a codefendant's cross-examination of a defendant in a drug conspiracy case, a new issue arose that had not been covered during direct examination, so all counsel were given an opportunity to ask further questions. The Court held there was no abuse of discretion when the prosecution was permitted to recross-examine, even though the defendant did no redirect examination, as he had every opportunity to do so and there were legitimate reasons for allowing the prosecution to explore the important new evidence helpful to the prosecution's case that arose during the cross-examination.

United States v. McLaughlin, 957 F.2d 12 (1st Cir. 1992) : The Court affirmed bank fraud convictions, holding there was no abuse of discretion or *Confrontation Clause* violation where one defendant was precluded from cross-examining government agents about another fraud scheme, as the evidence went beyond the scope of the direct examination. Had the defendant wished to adduce new evidence in support of his defense, he could have called the agents as defense witnesses. In a prosecution for attempted income tax evasion, *United States v. Sorrentino*, n24 the Court upheld the exclusion of questions relating to a witness' credibility asked on re-recross examination following re-redirect examination in which credibility was not bolstered by the government.

United States v. Reindeau, 947 F.2d 32 (2d Cir. 1991) : The Court reversed convictions for possessing unregistered firearms, holding it was an abuse of discretion to curtail cross-examination of the government's expert witness concerning whether the explosive device involved was intentionally designed for use as a weapon. In *United States v. Edwardo-Franco*, n25 convictions of cocaine possession offenses were reversed in part because of an abuse of discretion when the defendants were not permitted to show on cross-examination of government expert witnesses the fees the witnesses received for testifying, or that two handwriting experts could differ in their opinions. The Court indicated that the rulings may have given the appearance the Judge was biased or vouching for the witness' credibility or expertise.

United States v. Riggi, 951 F.2d 1368 (3d Cir. 1991) : The Court reversed Hobbs Act and RICO convictions, holding that a blanket rule barring recross-examination violated the defendants' confrontation rights. When material new matters were brought out by the government on redirect, the defendants were entitled to recross. In a medical malpractice case, *Lis v. Robert Packer Hosp.*, n26 the Court found it was error (but harmless) to allow cross-examination beyond the scope of the direct. It concluded that "notwithstanding the trial court's laudable motives, its ruling effectuated neither the letter or the spirit of *Rule 611(b)*." In *United States v. Segal*, n27 the Court reversed convictions for conspiracy and bribery of a public official, observing that:

> [w]hile the Trial Court has wide discretion to prevent repetition, harassment of the witness or production of irrelevant material, the right of cross-examination is of constitutional dimension and may

> not be denied ... . Therefore, if a matter has been raised on direct examination, generally cross-examination must be permitted. Moreover, questioning of the witness which tests his perception, memory or otherwise tends to discredit him is proper ... .

Francis v. Clark Equip. Co., 993 F.2d 545 (6th Cir. 1993) : In a suit by a forklift operator against a manufacturer, the Court held that "[i]t was prejudicial to defendant for the magistrate to allow plaintiff's expert to testify from documents discussing the developing feasibility of operator restraint technology and then to forbid cross-examination on the same subject matter."

[b] Rule 611(b) -- Examination of Accused

United States v. Bartelho, 129 F.3d 663 (1st Cir. 1997) : The defendant, charged with armed bank robbery, testified that he had been supporting himself at the time by selling drugs, but he refused on cross-examination to name his supplier. The Judge granted a motion to strike his direct testimony and the Court affirmed. On plain error review, the Court observed that the sanction may have been broader than necessary to cure the defendant's refusal to answer, but concluded that the question was not collateral, since it directly targeted the credibility of the absence-of-motive defense interposed.

Hankins v. Civiletti, 614 F.2d 953 (5th Cir. 1980) : Upholding a judgment of contempt for failing to produce or explain certain business records, the Court found that when the defendant took the stand to testify at a hearing he opened himself to cross-examination "with regard to matters relevant to his direct testimony."

United States v. Brantley, 786 F.2d 1322 (7th Cir. 1986) : The Court affirmed a conviction for conspiracy to commit fraud against a federally-funded youth program. It found no plain error when the government examined the defendant concerning a codefendant's business, since his direct examination attempted to suggest that the business was legitimate and that his receipt of money from it also was legitimate.

United States v. Jones, 913 F.2d 1552 (11th Cir. 1990) : The Court affirmed convictions for a cocaine conspiracy, holding there was no error in cross-examining a defendant about his employment history when, by gratuitously informing the jury on direct examination about a promotion, he was attempting to create a certain impression, the truth or falsity of which the government was entitled to explore on cross-examination.

[c] Rule 611(b) -- Failure To Answer on Direct

United States v. Papajohn, 212 F.3d 1112 (8th Cir. 2000) : Affirming the defendant's convictions for joining with her husband to burn down their store to collect insurance, the Court held that the Trial Judge did not err in declining to permit cross-examination of a witness who refused to answer questions when called by the prosecution. It reasoned that "there was no subject matter to be cross-examined and no direct testimony to be impeached."

[d] Rule 611(b) -- Invocation of Privilege Against Self-Incrimination

United States v. Gary, 74 F.3d 304 (1st Cir. 1996) : The Court affirmed a felon firearm possession conviction, holding that the defendant was properly precluded from calling a witness who had testified at a first trial and who

indicated that he would testify for the defense on direct examination but would invoke his privilege against self-incrimination on cross-examination. The witness was testifying about the merits of the case, not about a collateral matter, so he could not properly testify for one side and avoid examination by the other. Because the witness was unavailable, his former testimony was admissible.

United States v. Gullett, 713 F.2d 1203 (6th Cir. 1983) : Although a government witness had been granted informal immunity, the Court held that he had the right to invoke the privilege against self-incrimination on cross-examination, and found that the witness' refusal to answer questions did not impair the defendants' cross-examination, since his refusal did not relate to matters to which he testified on direct examination.

United States v. Nunez, 668 F.2d 1116 (10th Cir. 1981) : Affirming a conviction for possession of counterfeit funds, the Court held there was no obligation to strike the testimony of the key prosecution witness who refused to answer a self-incriminating question, and that even without an answer the defendant had a full opportunity to explore the witness' motive in testifying.

United States v. Pilcher, 672 F.2d 875 (11th Cir. 1982) : In a prosecution for willful failure to file income tax returns, the defendant testified that he believed he had a right to file returns containing no financial information, but he refused to answer questions on cross-examination that inquired into his good faith. The Trial Judge held the defendant in civil contempt and suspended the trial. The Court affirmed, holding that a defendant witness cannot "refuse to answer questions properly within the scope of cross-examination under *Rule 611(b)*."

[e] Rule 611(b) -- Questions Bearing on Credibility

United States v. Lara, 181 F.3d 183 (1st Cir. 1999) : Appealing convictions arising out of his involvement with the Latin Kings street gang, a defendant complained that his cross-examination exceeded the scope of his direct. The defendant had testified concerning a carjacking, and was cross-examined about other crimes of which he and his codefendants were accused, including a murder and two attempted murders charged as predicate acts in the RICO conspiracy. The Court found that the questions were permissible because they were relevant to the defendant's credibility, and were also related to the carjacking testimony. The defendant had testified that the carjacking was unrelated to street gang activity, and it was therefore permissible to ask him about other crimes that he had committed "under the organization's auspices." The Court also held that even if the questions were beyond the scope of direct, the Trial Judge had discretion under the terms of *Rule 611(b)* to permit such questioning. In this case, the challenged questions "occupied only a fraction of the cross-examination and bore a close relationship to major trial issues," so there was no abuse of discretion.

[f] Rule 611(b) -- Scope of Cross-Examination

United States v. Mikutowicz, 365 F.3d 65 (1st Cir. 2004) : Affirming convictions for tax offenses, the Court held that the Trial Judge properly limited the cross-examination of an IRS agent who testified as to why the IRS concluded that the defendant and his companies took unwarranted deductions. The defendant tried to cross-examine the agent regarding various judicial opinions, even though the agent was not qualified as an expert on tax law and did not mention the opinions on direct examination. The proposed cross-examination "would have involved defense counsel reading excerpts of cases to the jury, without the jury having a context for evaluating the import of the information that it was receiving," which would have been beyond the scope of the direct examination and possibly confusing to the jury. In *Macaulay v. Anas, 321 F.3d 45 (1st Cir. 2003)* , a medical malpractice action arising from unsuccessful back surgery, the plaintiff's expert testified on direct examination (in a videotaped deposition offered at trial) that screws used in the

surgery are supposed to be placed inside the pedicles of the patient's spine and that several of the screws in the plaintiff were not so placed, characterizing them as "malpositioned" or "misplaced." When on cross-examination the expert acknowledged that their placement did not necessarily signify a deviation from the applicable standard of care, the plaintiff objected on the ground that the witness was not offered as an expert on the standard of care. Affirming a judgment for the defendant, the Court found no abuse of discretion in admission of the testimony, since regardless of the plaintiff's plan for the witness, his direct testimony supported an inference that the defendant had committed malpractice, which the defense was entitled to probe on cross-examination.

Tramonte v. Fibreboard Corp., 947 F.2d 762 (5th Cir. 1991) : Having failed to give the notice required under a local rule, the plaintiffs in an asbestosis wrongful death action were not permitted to introduce a treating physician's deposition during their case-in-chief, but they attempted to introduce its contents in cross-examining a defense expert. The Court held there was no error in sustaining defense objections, since the deposition was not introduced on direct and had no bearing on the expert's credibility because he had never read or relied on it. In *United States v. Walker*, n28 the Court approved the government's redirect examination of a witness, saying that "[c]ross-examination with respect to a part of a transaction enables the opposing party to elicit evidence on redirect examination of the whole transaction at least to the extent that it relates to the same subject."

United States v. Chance, 306 F.3d 356 (6th Cir. 2002) : During direct examination of a sheriff charged with racketeering offenses, counsel asked about four employees that he had hired or promoted and then asked whether the defendant knew them to be "competent hard-working folks." The Court held that the answer, "They were all very competent, except for [one of the four who was a cooperating witness]" expanded upon the question and implied that everyone in the department, with that one exception, was a competent employee, thereby opening the door to cross-examination about other employees who had planted evidence and sworn out false affidavits in support of search and arrest warrants.

United States v. Carter, 910 F.2d 1524 (7th Cir. 1990) : The Court affirmed robbery convictions, holding there was no error when the prosecution was permitted to exceed the scope of the direct in cross-examining a defense witness about matters it chose not to offer in its case-in-chief and that would not have been proper rebuttal, as the elicited testimony challenged some of the alibis that the defendant was presenting.

United States v. Gurolla, 333 F.3d 944 (9th Cir. 2003) : The Court held that the defendants' fair trial rights were not violated when the Trial Judge strictly limited cross-examination to rebuttal of matters raised on direct examination, since it was made clear that the defendants could recall the prosecution's witnesses as part of their cases-in-chief if they wished to question them on matters not covered by direct examination. In *United States v. Castellanos-Garcia, 270 F.3d 773 (9th Cir. 2001)* , the Court affirmed a conviction for entering the United States after being deported, holding there was no abuse of discretion in precluding cross-examination of the arresting agent concerning the location of sensors along the border. Since the agent had testified that he had not received any information from any possible sensors, their location was beyond the scope of his testimony on direct. In a complex narcotics manufacturing prosecution, *United States v. Baker*, n29 the Court held that the defendants' confrontation rights had been violated when the Trial Judge denied recross if the questions fell within an "area" or "subject matter" for which cross-examination had previously been available. The error in applying this overly narrow definition of "new matter" was harmless, however. In *United States v. Vasquez*, n30 the Court affirmed drug convictions, holding that questions concerning items in the defendants' apartment -- i.e., drugs and cash -- were within the scope of direct where a defendant claimed that he had left an apartment and was alone. In *United States v. Green*, n31 a husband and wife were convicted of conspiring to obstruct justice and of related offenses. The Court observed that witnesses may be cross-examined about matters raised on their direct examination, but said that "[a]n opening statement, however, having no evidentiary value, cannot operate to place an issue in controversy."

[3] Rule 611(c) -- Leading QuestionS

[a] Rule 611(c) -- Appellate Review

United States v. Ranney, 719 F.2d 1183 (1st Cir. 1983) : The Court sustained convictions for fraud and conspiracy arising out of a scheme to sell investment contracts in home heating oil. It found that the Trial Judge properly permitted investors to answer a series of hypothetical questions that established they would not have invested but for the representations that were made. In a footnote, the Court rejected the defendants' claim that the questions were impermissibly leading and stated that "[r]arely, if ever, will an appellate court interfere with the trial judge's broad discretion to control the mode and order of interrogation."

Sanders v. New York City Human Resources Admin., 361 F.3d 749 (2d Cir. 2004) : Affirming a judgment for the defendant in a Title VII action, the Court held that the fact the Judge had allowed defense counsel to lead non-hostile witnesses on different occasions did not entitle the plaintiff to a new trial. The language of *Rule 611(c)*, which expresses a preference for non-leading questions, is only precatory, and Trial Judges are afforded a large of discretion in overseeing the examination of witnesses. That discretion was not abused in this case. In a tax fraud prosecution, *United States v. DeFiore*, n32 the Court held there was no error in permitting the prosecutor to lead government witnesses. The Court noted that the Rule contains "words of suggestion, not command," and indicated that reversals for improper use of leading questions will be extremely rare.

Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993) : In a suit for fraud in connection with a resort development project, the Court held there was no abuse of discretion in permitting the plaintiffs to examine the defendants' former sales agent with leading questions. Although the witness had been discharged by the defendants, the Judge determined he was still associated with them, based on his behavior in the first trial. The Court stated that this is precisely the sort of ruling that a Trial Judge is in the best position to make, and reversal is warranted only if leading questions cause denial of a fair trial.

Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992) : The Court, partially reversing the judgment in an action on an oil lease, noted its almost total unwillingness to reverse for infractions of the leading question rule and concluded there had been no abuse of discretion amounting to plain error, but urged the Trial Judge on remand to restrict the use of leading questions on direct to noncontroversial or background areas.

United States v. Meza-Urtado, 351 F.3d 301 (7th Cir. 2003) : Affirming a drug conviction, the Court held that there was no plain error in the government's use of leading questions in the direct examination of two witnesses. The leading questions clarified one witness' testimony and were used to deal with a second witness who was "conveniently 'forgetful.' " The Court further noted that an error in permitting leading questions is critically dependent on the opponent making a proper objection at trial: "[A]n objection to a question as 'leading' is only an objection to the 'form' of the question. If an objection is offered and sustained, the examiner simply rephrases the question and draws the desired information from the witness. Any reasonably good lawyer worth his salt can accomplish this little trick. Without a sustained objection, an examiner would never have a chance to rephrase his question. For this reason, we think error, plain or otherwise, could never be identified in a case where only the form of a question to which no objection is made is challenged on appeal."

United States v. Templeman, 965 F.2d 617 (8th Cir. 1992) : Rejecting an argument that the prosecutor's use of leading questions warranted a new trial in a drug case, the Court noted that rulings on such objections are entrusted to

the Trial Judge's discretion and held there was no error in the numerous objections overruled. As for the questions to which objections had been sustained, they were neither so numerous nor so suggestive that they crossed the fine line between stimulating an accurate memory and implanting a false one, and they did not interfere with the jury's ability to weigh testimony and credibility.

United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001) : Affirming a conviction for violating the Clean Air Act, the Court held that the Trial Judge did not err in sustaining numerous objections to leading questions put to the defendant on direct examination. The Court reviewed the rulings "for abuse of discretion" and indicated that it would reverse only if the sustained objections amounted to or contributed to the denial of a fair trial, which it did not find in this case. In *Miller v. Fairchild Indus.*, n33 although it was not entirely clear to the Court that leading questions were needed to develop the direct testimony of a defense witness in this Title VII case, the Trial Judge's action in overruling the plaintiffs' objections did not amount to or contribute to denial of a fair trial, because the testimony elicited did not substantially expand or alter earlier testimony responding to proper, nonleading questions, so reversal was not warranted.

United States v. Hewes, 729 F.2d 1302 (11th Cir. 1984) : The Court held that the Trial Judge's toleration of leading questions in direct examination of government and defense witnesses was within permissible limits of discretion.

[b] Rule 611(c) -- Cross-Examination Beyond Scope of Direct

MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274 (8th Cir. 1994) : Reversing a judgment for the defendant in an action by a building owner for expenses in removing asbestos fireproofing, the Court noted that when cross-examination goes beyond the scope of direct, as it did here to establish a statute of limitations affirmative defense, the examiner must be required to ask questions of nonhostile witnesses as if on direct, i.e., without leading.

[c] Rule 611(c) -- Depositions

Oberlin v. Marlin Am. Corp., 596 F.2d 1322 (7th Cir. 1979) : In a case arising out of a franchise agreement, the defendant had taken a deposition of the plaintiff during which the plaintiff's counsel asked leading questions. The failure to object to leading questions during a deposition generally waives any objection at trial, since any error might be cured during the deposition if a timely objection is made, but the Court sustained a ruling under *Rule 611(a)* that some of the leading questions and answers from the deposition would not be admitted in evidence, since they might well have carried undue weight before the jury. In our view, *Rule 403* was the proper authority for exclusion.

[d] Rule 611(c) -- Examination of Adverse Party

Rodriguez v. Banco Cent. Corp., 990 F.2d 7 (1st Cir. 1993) : In a civil racketeering suit, the Court affirmed a judgment for the defendants, holding there was no error when the plaintiffs were precluded from using leading questions to examine certain defendants. The Court observed that the Rules generally permit leading questions to be used against an adverse party, but such questions might properly be disallowed, for example, if they would tend to distort the testimony of a witness. In any event, the plaintiffs in this case made no showing of specific information that might have been elicited with leading questions.

[e] Rule 611(c) -- Expert Witness

Suarez Matos v. Ashford Presbyterian Community Hosp., 4 F.3d 47 (1st Cir. 1993) : In a medical malpractice action, the plaintiff called, and cross-examined as a hostile witness, a physician whom the defendants had named before trial as their proposed expert witness. The Court vacated a judgment for the plaintiff, holding that the obligation to name witnesses is intended to give an opportunity to prepare, not to afford procedural advantages, and that allowing the practice followed in this trial would make expert witnesses who are reluctant to appear in the first place even more reluctant if they are to start with rigorous cross-examination before they have even made their statement.

[f] Rule 611(c) -- Following Non-Leading Questions

United States v. Carboni, 204 F.3d 39 (2d Cir. 2000) : The prosecutor asked a number of leading questions during the direct examination of a government witness. The Court found no error because the leading questions were asked only after the prosecutor had "repeatedly attempted to elicit the same information through non-leading questions."

[g] Rule 611(c) -- Foundation Matters and Developing the Witness' Testimony

United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997) : The Court held in a bank fraud prosecution that there was no abuse of discretion in permitting the prosecutor to use leading questions to lay a foundation for a line of questioning or to assist in developing coherent testimony from a witness who was at times unresponsive or showed a lack of understanding.

[h] Rule 611(c) -- Friendly Witnesses

United States v. Clinical Leasing Serv., 982 F.2d 900 (5th Cir. 1992) : In an action to hold corporate officers personally liable for fines imposed against their corporation, the Court held there was no abuse of discretion in terminating one officer's direct testimony. His attorney had been specifically warned not to lead the witness, after having been warned about leading questions at least seven times previously. Affirming a Jones Act judgment for an employer in *Adroin v. J. Ray McDermott & Co.*, n34 the Court found no abuse of discretion when the employer was permitted to ask leading questions during cross-examination of witnesses who were its employees and who might have been considered friendly witnesses.

Morvant v. Construction Aggregates Corp., 570 F.2d 626, 635 (6th Cir. 1978) : The Court noted that the use of leading questions on cross-examination of a friendly witness who was called as an adverse witness is within the Trial Judge's discretion: "If the witness is friendly to the examiner, there is the same danger of suggestiveness as on direct; and consequently the court may, in its discretion, forbid the use of leading questions."

United States v. Hansen, 583 F.2d 325 (7th Cir. 1978) : The Court affirmed a ruling that one codefendant (a father) could examine another codefendant (his son) only with nonleading questions.

[i] Rule 611(c) -- Hostile or Adverse Witnesses

United States v. Hicks, 748 F.2d 854 (4th Cir. 1984) : The Court found that a bank robbery defendant's girlfriend was identified with the defendant and could be asked leading questions by the government on direct examination.

Perkins v. Volkswagen of Am., 596 F.2d 681 (5th Cir. 1979) : In this product liability case, the Court found that it was error (but harmless) to rule that the plaintiff could not call an employee of the defendant and ask leading questions.

Ellis v. City of Chicago, 667 F.2d 606 (7th Cir. 1981) : In a dog owner's unsuccessful suit against the City and a police officer who killed his dog, the Court held it was error (but harmless) to deny the plaintiff an opportunity to ask leading questions of police officers whom he called to testify, when those officers were employees of the City and were present at part of the incident giving rise to the litigation.

United States v. Mora-Higuera, 269 F.3d 905 (8th Cir. 2001) : In a methamphetamine distribution case, the prosecution was permitted to use leading questions on direct after a witness became evasive and unclear about the types of drugs involved in the conspiracy. The Court found no plain error, since the witness was a relative of the defendant, testifying as part of a plea agreement, and the government asked at most 11 leading questions, most of them foundational.

United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995) , *supplemented*, *80 F.3d 1466 (10th Cir. 1996)* : Affirming drug-related convictions, the Court held it was not an abuse of discretion to permit the government to treat its key witness as hostile. The Court observed that "[i]t is unclear from the record whether he was recalcitrant or merely forgetful; however, he did state he was uncomfortable in the courtroom and hesitant to testify." In the circumstance, the witness could have been found hostile, reluctant, or unwilling to testify, or having difficulty understanding English; any of these grounds would justify permitting a direct examiner to ask leading questions.

Haney v. Mizell Mem. Hosp., 744 F.2d 1467 (11th Cir. 1984) : Although the Court affirmed a judgment for the defendants in a medical malpractice case, it found error when the plaintiff was not permitted to ask leading questions to a nurse employed by the hospital. The Court pointed out that "*Rule 611(c)* ... significantly enlarged the class of witnesses presumed hostile," and concluded that "an employee of one of the defendants present when the alleged malpractice may have occurred certainly was identified with a party adverse to Haney."

[j] Rule 611(c) -- Sexual Assault Victim Witness

United States v. Grassrope, 342 F.3d 866 (8th Cir. 2003) : Affirming a conviction for aggravated sexual assault upon a 17-year-old babysitter, the Court found no abuse of discretion when the prosecutor was permitted to elicit by leading questions that the defendant had vaginally and anally penetrated the victim. The Court noted that "[i]t is not uncommon that the precise physiological details of sexual assault must be elicited by focused questioning. We have repeatedly upheld the use of leading questions to develop the testimony of sexual assault victims, particularly children." In this case, the victim had already testified to the penetration at the defendant's first trial (which ended in a mistrial), and the defendant contested only consent, not penetration.

[k] Rule 611(c) -- Witnesses with Communication Problems

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995) : Affirming a conviction for possession of heroin with intent to distribute, the Court held there was neither a *Confrontation Clause* violation nor a clear abuse of discretion when the Trial Judge permitted the principal prosecution witness, who spoke little English and testified primarily in Urdu through a translator, to be examined largely by leading questions.

United States v. Rodriguez-Garcia, 983 F.2d 1563 (10th Cir. 1993) : The Court held in a drug trafficking prosecution that there was no abuse of discretion in permitting the prosecutor to ask leading questions of a witness who testified through an interpreter because he did not speak English.

[l] Rule 611(c) -- Young or Disabled Witnesses

Jordan v. Hurley, 397 F.3d 360 (6th Cir. 2005) : Affirming denial of habeas corpus relief to a state prisoner convicted of rape, the Court found no *Confrontation Clause* violation when the victim, who had Down syndrome and had difficulty responding to the prosecutor's questions, was examined by leading questions.

United States v. Wright, 119 F.3d 630 (8th Cir. 1997) : The Court held there was no abuse of discretion in a prosecution for sexual abuse of a four-year-old girl to permit use of leading questions in the direct examination of the victim, even absent a specific showing of necessity or reluctance to testify. In *United States v. Butler, 56 F.3d 941 (8th Cir. 1995)* , the Court held there was no abuse of discretion in permitting the prosecutor to ask the nine-year-old complaining witness after he described a sexual assault, "Do you remember any lotion or anything like that around this time period?" The government was eliciting very sensitive testimony from a child witness, and there was no indication it was attempting to shape the witness' evidence. See also *United States v. Rossbach* n35(finding no error in the use of leading questions in examining 15 and 17-year-old victims of sexual assaults who were hesitant to answer questions regarding the assaults); *United States v. Littlewind* n36(use of leading questions was necessary under the circumstances and not excessive where rape victims were young girls understandably reluctant to talk about what happened). In *United States v. Nabors*, n37 the Court held that the prosecutor did not improperly lead a 12-year-old witness in a bank robbery trial when he sought to elicit an answer containing a "naughty" word that the witness was reluctant to use.

United States v. Archdale, 229 F.3d 861 (9th Cir. 2000) : Affirming a conviction for child sexual abuse, the Court found no error in the prosecution's use of leading questions in the direct examination of the alleged victim, since the witness was having difficulty testifying about a very personal matter. The Court also found it permissible for the prosecution to use an anatomical diagram to help the witness describe what happened to her; this helped the witness to testify fully. In *United States v. Jordan, 964 F.2d 944 (9th Cir. 1992)* , the Court held that the defendant, convicted of sexual abuse, was not denied his right to confrontation when the prosecutor was permitted to ask leading questions of the eight-year-old victim, who was so reluctant to testify initially that a recess was ordered during her testimony.

FOOTNOTES:

(n1)Footnote 1. *Hughes v. Hemingway Transp., Inc., 539 F. Supp. 130 (E.D. Pa. 1982)* .

(n2)Footnote 2. *United States v. Douglas, 81 F.3d 324 (2d Cir. 1996)* .

(n3)Footnote 3. *United States v. Thompson, 76 F.3d 442 (2d Cir. 1996)* .

(n4)Footnote 4. *DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (4th Cir. 1985)* .

(n5)Footnote 5. *United States v. Adamson, 291 F.3d 606 (9th Cir. 2002)* .

(n6)Footnote 6. *United States v. Harris, 185 F.3d 999 (9th Cir. 1999)* .

(n7)Footnote 7. *United States v. Jones, 982 F.2d 380 (9th Cir. 1992)* , *amended* (9th Cir. 1993).

(n8)Footnote 8. *United States v. Ward, 211 F.3d 356 (7th Cir. 2000)* .

(n9)Footnote 9. *United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995)* .

(n10)Footnote 10. *United States v. Miller, 688 F.2d 652 (9th Cir. 1982)* .

(n11)Footnote 11. *Cranberg v. Consumer Union, 756 F.2d 382 (5th Cir. 1985)* .

(n12)Footnote 12. *Kines v. Butterworth, 669 F.2d 6 (1st Cir. 1981)* .

(n13)Footnote 13. *United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982)* .

(n14)Footnote 14. *EEOC v. Monarch Mach. Tool. Co., 737 F.2d 1444 (6th Cir. 1980)* .

(n15)Footnote 15. *United States v. Gaertner, 705 F.2d 210 (7th Cir. 1983)* .

(n16)Footnote 16. *United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983)* .

(n17)Footnote 17. *United States v. Raineri, 670 F.2d 702 (7th Cir. 1982)* .

(n18)Footnote 18. *United States v. Jackson, 549 F.2d 517 (8th Cir. 1977)* .

(n19)Footnote 19. *United States v. Perry, 550 F.2d 524 (9th Cir. 1977)* .

(n20)Footnote 20. *United States v. Butera, 677 F.2d 1376 (11th Cir. 1982)* .

(n21)Footnote 21. *United States v. Hart, 295 F.3d 451 (5th Cir. 2002)* .

(n22)Footnote 22. *United States v. Taylor, 210 F.3d 311 (5th Cir. 2000)* .

(n23)Footnote 23. *United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998)* .

(n24)Footnote 24. *United States v. Sorrentino, 726 F.2d 876 (1st Cir. 1984)* .

(n25)Footnote 25. *United States v. Edwardo-Franco, 885 F.2d 1002 (2d Cir. 1989)* .

(n26)Footnote 26. *Lis v. Robert Packer Hosp., 579 F.2d 819 (3d Cir. 1978)* .

(n27)Footnote 27. *United States v. Segal, 534 F.2d 578 (3d Cir. 1976)* .

(n28)Footnote 28. *United States v. Walker, 613 F.2d 1349 (5th Cir. 1980)* .

(n29)Footnote 29. *United States v. Baker, 10 F.3d 1374 (9th Cir. 1993)* .

(n30)Footnote 30. *United States v. Vasquez, 858 F.2d 1387 (9th Cir. 1988)* .

(n31)Footnote 31. *United States v. Green, 648 F.2d 587 (9th Cir. 1981)* .

(n32)Footnote 32. *United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983)* .

(n33)Footnote 33. *Miller v. Fairchild Indus., 885 F.2d 498 (9th Cir. 1989)* .

(n34)Footnote 34. *Ardoin v. J. Ray McDermott & Co., 684 F.2d 335 (5th Cir. 1982)* .

(n35)Footnote 35. *United States v. Rossbach, 701 F.2d 713 (8th Cir. 1983)* .

(n36)Footnote 36. *United States v. Littlewind, 551 F.2d 244 (8th Cir. 1977)* ; accord *United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989)* .

(n37)Footnote 37. *United States v. Nabors, 762 F.2d 642 (8th Cir. 1985)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 611 RULE 611

3-611 Federal Rules of Evidence Manual 611.04

611.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b). **[Editor's Note: The reference is to Rule 403; there is no subdivision (b).]**

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford v. United States, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624 (1931)* , the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)* , serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

Subdivision (b). [Editor's Note: The Advisory Committee version of Rule 611(b) called for wide open cross-examination on any relevant issue. Congress rejected this proposal and adopted a rule limiting the scope of cross-examination to the subject matter of the direct, with the Trial Court having discretion to broaden the scope. The Advisory Committee Note makes the case for the Committee's proposal.]

The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904)* , quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. *Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929)* . While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See, for example, *Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3d Cir. 1942)* ; *Butler v. New York Cent. R. R., 253 F.2d 281 (7th Cir. 1958)* ; *United States v. Johnson, 285 F.2d 35 (9th Cir. 1960)* ; *Union Automobile Indem. Ass'n v. Capitol Indem. Ins. Co., 310 F.2d 318 (7th Cir. 1962)* . In evaluating these considerations, McCormick says:

> The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many courtrooms, of continual bickering over the choice of the numerous variations of the "scope of the direct" criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisons were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:
>
> "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.
>
> "We recommend that the rule allowing questions upon any part of the issue known to the witness ... be adopted... ."
>
> McCormick, § 27, p. 51. See also 5 Moore's Federal Practice P 43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the

trial. Under *Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)*, no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d) *supra*. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker v. United States, 5 F.2d 818 (8th Cir. 1925)*, is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson v. United States, 318 U.S. 189, 195, 63 S. Ct. 549, 87 L. Ed. 704 (1943)*. See also *Brown v. United States, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)*. The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under *Rule 14 of the Federal Rules of Criminal Procedure*. *Cross v. United States, 335 F.2d 987, 118 U.S. App. D.C. 324 (1964)*. Cf. *United States v. Baker, 262 F. Supp. 657, 686 (D.D.C. 1966)*. In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. *Rule 43(b) of the Federal Rules of Civil Procedure* has included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, *Maryland Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955)*, and *Degelos v. Fidelity & Cas. Co., 313 F.2d 809 (5th Cir. 1963)*, holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable. **[Editor's Note: Congress revised the last sentence of Rule 611(c) by expanding it to criminal cases (allowing the defendant, for example, to use leading questions on the direct examination of a witness associated with the government), and by permitting the use of leading questions in the direct examination of any hostile witness.]**

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 278 (1999)

Rule 611(b) -- Scope of Cross-Examination

There are basically two views concerning the proper scope of cross-examination of a witness. The "English Rule" states that the cross-examiner should be free to inquire about any information relevant to the case; in contrast, the traditional "American Rule" is that the cross-examiner may only ask questions that concern the subject matter of the direct examination (with the exception, of course, of questions pertaining to the witness's credibility). An illustration of the

difference is instructive. Assume a wrongful death case in which the plaintiff is suing for the death of his wife. The plaintiff calls the next door neighbor who testifies that he saw the decedent walking across the street in front of her house when she was run down by the defendant's bakery truck. On cross-examination, defense counsel wants to inquire into the neighbor's knowledge of any extramarital affairs that the plaintiff had during the course of the plaintiff's marriage to the decedent. Under the English Rule, this would be perfectly permissible; the information is relevant to the damages that the plaintiff has suffered from the loss of his wife. Under the American Rule, the information is, of course, equally relevant, but it cannot be brought up on cross-examination. The subject matter of direct dealt with the accident, which is a question of liability. The subject matter of the proposed cross-examination goes to damages.

The rationale for the American Rule is that a party generally should be free to follow its own order of proof without distraction from the adversary. The American Rule does not, of course, prevent the adversary from ever inquiring into a subject matter beyond the scope of a witness's direct examination. It operates simply as a timing device. The solution for the adversary is to call the witness to testify again during its own case.

The Advisory Committee opted for the wide-open cross-examination model in its proposed Rule 611(b), with the proviso that the trial judge would have discretion, in the interests of justice, to "limit cross-examination with respect to matters not testified to on direct examination." Quoting McCormick, the note states: "The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only."

Despite this cogent argument, Congress rejected the Advisory Committee's proposal. In essence, Congress reversed the presumption in the Advisory Committee's proposed rule. As promulgated, Rule 611(b) limits cross-examination to the subject matter of direct and to questions of credibility, but grants the trial judge discretion to expand the scope of cross-examination in a particular case. Congress' position, as expressed by the House Committee on the Judiciary, was that the traditional American Rule "facilitates orderly presentation by each party at trial." The safety valve of judicial discretion was included to limit the hair-splitting arguments as to the proper "scope of direct" at trial and on appeal that would otherwise surely occur under the American Rule. The result is that a lawyer seeking to determine the proper scope of cross-examination should not refer to the Advisory Committee Note.

Rule 611(c) -- Leading Questions

Federal Rule 611(c) provides that leading questions are generally impermissible on direct examination, and generally permissible on cross-examination. The proviso is that when a party calls "a hostile witness, an adverse party, or a witness identified with an adverse party," the party may use leading questions on direct. The reason for restricting leading questions is that testimony of the witness is preferred over testimony of the lawyer. If the witness is sympathetic to the lawyer's cause (as is ordinarily the case when the witness is called on direct) the risk is that he will be too easily led to simply affirm the closed-ended statements of the lawyer. On the other hand, if the witness is unsympathetic to the lawyer's cause (as is ordinarily the case on cross-examination), there is a possibility that open-ended, nonleading questions could be evaded or exploited by the witness; therefore leading questions should generally be permitted on cross-examination.

The Advisory Committee's proposal for Rule 611(c) was somewhat more restrictive in permitting leading questions than the rule ultimately adopted by Congress. The Advisory Committee would have permitted leading questions on cross-examination in civil cases only. The Advisory Committee gave no explanation for this limitation. The proviso for leading questions on direct was limited to situations in which the witness was either an adverse party or a person identified with an adverse party.

Congress believed that the permission for leading questions on cross-examination should be applicable to criminal as well as civil cases, "to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses

identified with the government, in which event the ... defendant should be permitted to inquire with leading questions." (Statement of House Committee on the Judiciary). Moreover, Congress was of the view that leading questions should be permissible with respect to all hostile witnesses, not merely those witnesses who were adverse parties or identified with them. Consequently, the Advisory Committee Note to the rule gives an inaccurate impression-it describes the rule as more narrow in permitting leading questions than it actually is.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Subcommittee amended subdivision (b) to return to the rule which prevails in the Federal courts and 39 State jurisdictions. As amended, the Rule is in the text of the 1969 draft; it limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more. This more traditional rule facilitates orderly presentations and progress at trial. Further, in the light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The change in subdivision (c) from "In civil cases" to "When" is designed to reflect the possibility that in criminal cases the defendant may be entitled to call a witness identified with the government, in which event the Subcommittee felt the defendant should be permitted to inquire using leading questions.

[Not included in June 28, 1973 draft. Ed.]

[4] Report of the House Committee on the Judiciary

As submitted by the Court, Rule 611(b) provided: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination."

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The third sentence of Rule 611(c) as submitted by the Court provided that: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

[5] Report of the Senate Committee on the Judiciary

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of

direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from prospectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discreation [*sic*] is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination.

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

As submitted by the Supreme Court, the rule [611(c)] provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness" -- that is a witness who is hostile in fact -- could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

[6] Report of the House and Senate Conferees

No reference.

[7] Citations to Hearings and Debates

Letter from Ronald L. Carlson to Hon. William L. Hungate, February 27, 1973, and accompanying material, in Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 390-92 (1973).

Excerpt from Testimony, March 15, 1973, [Participants: Representatives Smith and Hungate of the Subcommittee;

Albert E. Jenner, Jr., Chairman of the Advisory Committee on the Rules of Evidence; Edward W. Cleary, Reporter, Advisory Committee; United States Circuit Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States], Hearings on Proposed Rules of Evidence Before the House Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 526-27 (1973).

Letter from Ronald L. Carlson to Hon. William L. Hungate, April 16, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 27-28 (1973).

Letter from Hon. William H. Becker to Hon. William L. Hungate, July 30, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 250-53 (1973).

Letter from Leroy Jeffers to Hon. John Tower, May 15, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 375-76 (1974).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 62-63 (1974).

Letter from Hon. Irving R. Kaufman to Hon. James O. Eastland, June 11, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 378-79 (1974).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 611 RULE 611

3-611 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 611, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 611. Mode and Order of Interrogation and Presentation	**Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
(a) Co	**(a) Co**

ntrol by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and pres	**ntrol by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

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effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b)	**Scope of cross-examination.** Cross-examination	**(b)**	**Scope of Cross-Examination.** Cross-examination

shou ld be lim- ited to the sub- ject mat- ter of the dir- ect ex- ami na- tion and mat- ters af- fect- ing the credi bil- ity of the wit- ness. The cour t may, in the ex- er- cise of dis- cre- tion, per- mit in- quir y in-

shou ld not go bey- ond the sub- ject mat- ter of the dir- ect ex- ami na- tion and mat- ters af- fect- ing the wit- ness' s credi bil- ity. The cour t may al- low in- quir y in- to ad- di- tion- al mat- ters as if on

	to additional matters as if on direct examination.	direct examination.
(c)	**Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to de-	**(c) Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness' s

velop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with testimony. Ordinarily, the court should allow leading questions:

an adverse party, interrogation may be by leading questions.

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified

with an adverse party.

Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
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3-611 Federal Rules of Evidence Manual Supp. to § 611.03

Supp. to § 611.03 Annotated Cases

[Go To Main]

[1] Rule 611(a) -- Control by Court [Go To Main]

[a.1] Rule 611(a) -- Closed Circuit Testimony

Parkhurst v. Belt, 567 F.3d 995 (8th Cir. 2009) : In a civil case for damages resulting from the alleged sexual abuse of a child, the Court found no error when the child was permitted to testify by closed circuit television. The Trial Judge has significant discretion over the mode of interrogating witnesses, and here the Judge interviewed the child and, having watched her break down over the prospect of testifying against the defendant, found that it would be too traumatic to have her testify in the courtroom. The Court concluded that "[t]he need to protect the welfare of an abused child qualifies as a compelling circumstance" under *Fed. R. Civ. P. 43(a)*, which requires testimony to be taken in open court except in compelling circumstances.

[f.1] Excluding Admitted Evidence During Deliberations

In re Hanford Nuclear Reservation Litig., 534 F.3d 986 (9th Cir. 2008) , *amending 497 F.3d 1005 (9th Cir. 2007)* : Reversing in part judgments from a trial in which bellwether plaintiffs representing a class of residents near a nuclear facility that helped make an atomic bomb during World War II claimed that radioiodine (I-131) emissions caused cancers and life threatening diseases, the Court found it was an abuse of discretion when the Trial Judge told the jury, in response to its inquiry, that it could not consider expert testimony pertaining to subject matter that was not contained in the expert's report. The defendants had not objected to the testimony during the trial. The Court stated that "[i]t is a rare circumstance when the court may exclude evidence after the close of the parties' cases," and explained that "[i]f the parties have already rested, they no longer have a chance to provide a curative response to the excluded evidence."

[j] Rule 611(a) -- Jurors' Questioning of Witnesses

SEC v. Koenig, 557 F.3d 736 (7th Cir. 2009) : In a civil enforcement action for violation of securities laws, the Court found no abuse of discretion when questions from jurors were asked of witnesses. The jurors submitted the questions to the Judge, who asked some, reformulated and asked others, and did not ask others thought to be inappropriate or

repetitive. Although prior decisions had expressed skepticism about juror questioning, the Court concluded that "[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice."

United States v. Smith, 569 F.3d 1209 (10th Cir. 2009) : The Court affirmed convictions for tax evasion, finding no abuse of discretion when the Judge twice asked witnesses questions submitted by jurors. Although juror questioning has risks, the questions here were clarifying and factual, not one-sided, hostile, or frivolous, and they pointed to areas where the attorneys might need to explain concepts further to jurors. Further, the Judge did not allow or invite a steady stream of juror participation.

[k] Rule 611(a) -- Limitations on Examination

[i] Abuse of Discretion

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008) : Reviewing a multi-drug trafficking case, the Court held that it was an abuse of discretion (but harmless error) to bar one defendant from cross-examining an agent about alleged family ties and hostile relations that existed between the officer and the defendant. Although the officer's testimony was partially corroborated by the testimony of another officer, that "did not provide an adequate basis for the court's preclusion of the cross-examination sought by [the defendant]." The Trial Judge excluded the cross-examination primarily on the ground that it was a collateral matter, but the Court found that it clearly was designed to elicit evidence of the officer's motive and bias for providing inculpatory testimony.

[ii] Rule 611(a) -- Limitations on Examination -- No Abuse of Discretion

United States v. Hatch, 514 F.3d 145 (1st Cir. 2008) : The defendant was convicted for filing false tax returns, having not reported income received as the first winner of the "reality-TV" show "Survivor." On appeal, he complained of not being permitted to introduce evidence that the producers had changed the rules of the show, leading him to think that they would pay the taxes on any winnings, thus negating the willfulness element of the charges that he had not reported the income. Affirming, the Court found no abuse of discretion, as the Trial Judge had repeatedly ruled that evidence of anything the producers did or said to induce the defendant's belief they were assuming the tax liability would be admissible, but that evidence simply of changing the rules of the show was irrelevant to the charges and would be inadmissible. The Court also found no abuse of discretion in limitations imposed on cross-examination of prosecution witnesses, as "[t]he relatively few exclusions were largely of questions that could reasonably be thought to be repetitive, improper, incoherent, or confusing to the jury, or else dealt with matters of seemingly scant relevance to the charges upon which Hatch was being tried."

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008) : The defendants were convicted of fraud in a scheme that involved check-kiting with the cooperation of a bank officer. Affirming, the Court found no abuse of discretion when the Trial Judge limited cross-examination of a bank compliance officer called by the government as a records custodian. The defendants argued that the bank had a motive to cooperate in the instant case because it was being investigated in a totally unrelated matter. However, the unrelated investigation occurred years after the investigation of the actions at issue here with which the bank had cooperated, and the witness had little knowledge of the other investigation, so the "marginal relevance and the risk of delay and confusion created by a mini-trial to explain the evidence support the district court's decision to limit the cross-examination."

United States v. Hitt, 473 F.3d 146 (5th Cir. 2006) : In a Mann Act prosecution arising from sexual abuse of a teenage boy, one defendant (Hitt) recalled a doctor who had testified for the government and conducted cross-examination. The codefendant (Causey) declined to examine the doctor on direct, the government cross-examined, and Hitt engaged in a short re-direct. Causey then sought to conduct a "re-direct" but was not permitted to do so. Affirming, the Court found no *Confrontation Clause* violation -- because the doctor was not called to testify against Causey at this stage of the trial -- or abuse of discretion.

United States v. Payne, 437 F.3d 540 (6th Cir. 2006) : The Court affirmed a conviction for passing counterfeit obligations, finding no abuse of discretion when the re-cross examination of an important government witness was limited. The Court noted that "[w]e have permitted district courts to curtail or even to deny recross-examination if the government elicits no new matters on redirect examination." Here, the government had elicited no new information on redirect examination.

United States v. Oaks, 606 F.3d 530 (8th Cir. 2010) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in denying the defendant's request for additional cross-examination of a police officer. The officer testified on direct examination that he could not see what the defendant threw in a lake because shadows from tall shrubs or trees prevented him from seeing clearly; he was cross-examined about not mentioning shrubbery in an earlier description of the event; and on redirect he reviewed a written statement made near the incident that indicated that the defendant threw an item in the direction of "weeds" and "vegetation." The Court observed that the defendant failed to explain what additional questions on re-cross would have significantly impacted the officer's credibility. In *United States v. Parish, 606 F.3d 480 (8th Cir. 2010)* , a prosecution for drug offenses, the defense indicated before trial that it would ask police about an alleged beating when the defendant was arrested, and the government moved *in limine* to preclude such questions before the defendant had testified to his having been beaten and raised those allegations as part of his defense. To forestall an argument to the jury based on the content of cross-examination questions, the Judge ruled that there should be some foundation established before the officers were cross-examined on the alleged beating. The Judge further stated that "as things go along, and if foundation can be established for the admission of this stuff, that's a whole other issue. For right now, I'm not going to get into it, especially during voir dire or opening statements." The alleged beating was never raised during the government's case-in-chief, although officers testified about the circumstances of the arrest. On appeal, the defendant claimed that he had been erroneously limited in questioning the police during the government's case-in-chief. Affirming, the Court held that the *in limine* ruling had been "'definitive' only in the sense that it applied to voir dire and opening statements and not to the offer of testimony or evidence during the trial." Because the question of later admission of the evidence as the trial record developed was left open, there was no abuse of discretion in the ruling, and the defendant had been provided the opportunity to present to the jury all the evidence supporting his story. In *United States v. Bentley, 561 F.3d 803 (8th Cir. 2009)* , the Court affirmed convictions for sexual exploitation of children and possession of child pornography, finding no confrontation violation when the defense was precluded from asking witnesses testifying about certain photographs whether they had heard that the defendant might not have taken the pictures. The proposed examination was not designed to illuminate flaws in memory and it would have introduced speculative hearsay.

[iii] Rule 611(a) -- Limitations on Examination -- Time Limits

United States v. Midgett, 488 F.3d 288 (4th Cir. 2007) : Affirming convictions for several offenses, including damaging a vehicle by fire and bank robbery, the Court found no abuse of discretion when time limits were imposed on the cross-examination of the defendant's former girlfriend/coconspirator and on the direct examination of the defendant, after defense counsel had engaged in lengthy interrogation that elicited each witness's central evidence. The cross-examination of the girlfriend was allowed to continue long after the Judge instructed defense counsel to conclude it within five minutes, defense counsel was permitted to ask all his questions on re-cross, and defense counsel concluded his direct examination of the defendant before the time limit imposed by the Judge had expired.

Cedar Hill Hardware & Constr. Supply v. Ins. Corp. of Hannover, 563 F.3d 329 (8th Cir. 2009) : The Court affirmed a judgment for the insurer in an insurance coverage dispute. The Judge had set the trial for two stages, the first of which lasted 29 trial days. Frustrated with the attorneys' conduct and concerned about losing jurors, the Judge imposed time limits of eight hours for each side in the second stage of the case. The Court found no abuse of discretion, writing that "we cannot view the time limits and the proposed witnesses in isolation," and "we must assess the district court's trial management decisions in context, against the backdrop of a twenty-nine day, first-phase trial and against the pattern of cumulative witnesses already called by the parties." After noting that the appellant's offer of proof did not "describe

with specificity how additional testimony would have been more than cumulative," the Court added that "[w]hile we have looked with suspicion upon, and recommended caution regarding, strict time limits, we have not addressed a situation similar to the present case." In *Harris v. Chand, 506 F.3d 1135 (8th Cir. 2007)* , the Court affirmed a judgment for the employer in a Title VII race discrimination action, finding no abuse of discretion in the Trial Judge's placing time limits on the presentation of the plaintiff's case and no plain error when the plaintiff was not able to call witnesses due to the time limit. The plaintiff made neither an objection when the Judge said her time was up nor an offer of proof as to the testimony that she was unable to present. The Court observed that time limits imposed before trial must be sufficiently flexible to accommodate adjustments if it appears during trial that the limits were too restrictive, and when there is an objection to the exclusion of evidence as a result of time limits the Judge must explain the exclusion. A dissenting Judge argued that the Trial Judge "placed an impermissibly rigid time constraint on the plaintiff's case" and that the plaintiff had attempted to make offers of proof but was not permitted to do so.

[l] Rule 611(a) -- Limitations on Proof

United States v. Ingram, 501 F.3d 963 (8th Cir. 2007) , vacated for reconsideration of sentencing, 173 L. Ed. 2d 284 : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion when video clips of witnesses interviewed by the government the day after the defendant's arrest were excluded. Although the defendant claimed that the clips should have been admitted to impeach the witnesses, the Court observed that the defendant had been given wide latitude to examine the investigator about the videotaped interviews and the defendant could not identify any evidence on the clips that he was not able to put before the jury through his examination of the investigator or cross-examination of the witnesses who were interviewed.

[m] Rule 611(a) -- Order of Proof

Santos v. Posadas de Puerto Rico Assoc., Inc., 452 F.3d 59 (1st Cir. 2006) : In a slip and fall case, the plaintiff's damages expert was not available to testify during the plaintiff's case-in-chief. The Trial Judge altered the order of proof so that the defendant's case would start after the plaintiff's case on liability. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in this reordering. Although the defense contended that it had only one hour from the Judge's order to gather and prepare its witnesses, the Court found no substantial prejudice. It noted that "[m]inor scheduling changes of this sort occur on a daily basis in the course of trial practice, and counsel must be ready to deal with them. In the absence of special circumstances -- and none are present here -- such tweakings in the order of proof do not work unfair prejudice."

United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) : The Court affirmed convictions for carjacking and firearms offenses, holding it was no abuse of discretion to call a recess before defense counsel finished cross-examining a witness and to permit the prosecution to call two witnesses to give brief testimony before the day ended. The Judge had made sure that the defense was at an appropriate transition point before calling the recess, and there were valid reasons why the two witnesses had to testify immediately (e.g., one witness was about to give birth).

[q.1] Rule 611(a) -- Readback of Trial Testimony

United States v. Richard, 504 F.3d 1109 (9th Cir. 2007) : The Court reversed a conviction for felon firearm possession, because the jury was permitted to hear a readback of only a portion of the testimony of the prosecution's star witness (who was the only witness directly connecting the defendant with the gun). The Court noted that readbacks present "an inherent risk of undue emphasis" of the testimony that is read or played to the jury, and therefore that "certain precautions must generally be taken to avoid that risk." These safeguards include: (1) the replay should be conducted in open court with all parties present; (2) "the jury should ordinarily be provided with the witness's *entire* testimony -- i.e., direct *and* cross-examination;" and (3) the jury "should be admonished to weigh all the evidence and not focus on any portion of the trial." The Court found that a cautionary instruction was especially important where, as here, "the jury has exhibited an obvious intent to emphasize a specific portion of the testimony." Finally, in deciding

whether to allow testimony to be replayed, a Judge "should consider the quantum of evidence against the defendant and the importance of the testimony to be replayed in relation to other evidence." In this case, the Judge replayed only the portion of the witness' testimony that was most directly inculpatory of the defendant (although the jury had initially requested all the witness' testimony) and took none of the precautions necessary to ensure that the jury did not unduly emphasize the testimony. See *United States v. Medina Casteneda, 511 F.3d 1246 (9th Cir. 2008)* (no abuse of discretion to deny jury's request to read back a witness' testimony, particularly given "the tendency of the jury to focus on one particular piece of evidence at the expense of other evidence").

[s] Rule 611(a) -- Rebuttal and Surrebuttal

United States v. Groves, 470 F.3d 311 (7th Cir. 2006) : In a trial for felon firearm possession, defense counsel's cross-examination of a government witness (Foster) went beyond the scope of the direct. When the prosecutor objected, defense counsel offered to bring Foster back to the stand during the defendant's case-in-chief. However, the Judge allowed the defendant to continue to question Foster beyond the scope of direct, and then allowed the government to offer rebuttal witnesses to Foster's testimony. On appeal, the defendant argued that the rebuttal evidence should not have been allowed because Foster was not the defendant's witness. The Court held that because defense counsel was allowed to question Foster out of order rather than call her back to the stand later, "this part of her testimony was part of the defendant's case-in-chief." Therefore the government was properly allowed to rebut matters raised on Foster's cross-examination. The Court noted, however, that one rebuttal witness testified on matters within the scope of Foster's direct examination; while this was error, it was harmless.

Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006) : Affirming judgments for a packing plant owner sued by a residential property owner who claimed she was injured by hydrogen sulfide gas emitted from the plant's wastewater treatment lagoons, the Court found no error when an expert the plaintiff listed as a rebuttal witness was not permitted to testify during the plaintiff's case-in-chief. "The district court reasonably construed the progression order as dictating both the timing and substantive nature of expert witness testimony, and it was well within its discretion to rule that witnesses disclosed as rebuttal witnesses under the progression order would testify as rebuttal witnesses at trial." The Court found that the defendant would have suffered significant prejudice if the expert who was listed as a rebuttal witness was allowed to testify as a primary expert witness, as the defendant selected its experts and developed motion and trial strategies in reliance on the plaintiff's designation of primary experts.

[u] Rule 611(a) -- Reopening the Evidence

United States v. Crawford, 533 F.3d 133 (2d Cir. 2008) : The Court reversed a firearms conviction because the Trial Judge reopened the case during jury deliberations so that the government could admit evidence of a trace report. The Judge reopened the case *sua sponte* after the jury inquired why the gun was never traced to the original owner. The Court set forth the following standards for determining whether a Judge can reopen a case once a jury has retired for deliberations:

> The court must consider the timeliness of the motion, the character of the testimony, and the effect of granting the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not imbue the evidence with distorted importance, prejudice the opposing party's case, *or preclude an adversary from having an adequate opportunity to meet the additional evidence offered*.

(Emphasis in original.) In this case the Court found that the government had no excuse for failing to enter the trace report during its case-in-chief; "the belated introduction of the trace report probably imbued the evidence with distorted importance" especially because the reopening was in response to a question from the jury; the defense was prejudiced

because its strategy -- may have been different if the government had introduced the trace report in its case-in-chief; and even more prejudice was suffered because the testimony on reopening indicated that the defense counsel was aware of the existence of the trace report -- thus undermining the defense's credibility after the defense had already presented its case.

[v] Rule 611(a) -- Summary Charts and Testimony

United States v. McElroy, 587 F.3d 73 (1st Cir. 2009) : Affirming tax fraud convictions, the Court found no error in admitting testimony and exhibits that summarized the government's case. The summary witnesses "did no more than analyze facts already introduced into evidence and spell out the tax consequences that necessarily flow from those facts." In *United States v. Milkiewicz, 470 F.3d 390 (1st Cir. 2006)* , toward the end of a fraud and tax fraud case in which several thousand pages of financial records were offered by the government to prove transactions in the scheme, the prosecutor called an IRS agent to testify about a series of charts that summarized the information contained in those financial records. The defense initially objected only to admission of the charts as independent evidence, but later argued that they should not have been given to the jury because one set contained errors and significant omissions rendering it unreliable and the other was improperly admitted through the agent, who was not qualified as a witness. Affirming, the Court took the occasion to clarify its approach to the treatment of summaries under the Rules, noting that "[i] a case where voluminous underlying records are involved, the key difference between [the] various approaches appears to be the purpose for which the summaries are offered":

> Charts admitted under *Rule 1006* are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently they must fairly represent the underlying documents and be " 'accurate and non-prejudicial.' " [citations omitted]
>
> By contrast, a pedagogical aid that is allowed under *Rule 611(a)* to illustrate or clarify a party's position, or allowed under *Rule 703* to assist expert testimony, may be less neutral in its presentation. Record support is necessary because such devices tend to be "more akin to argument than to evidence," and "may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent." In some cases, however, such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of *Rule 1006*.

The Court held that although most, if not all, of the charts would have been admissible into evidence under *Rule 1006*, there certainly was no abuse of discretion in allowing the jury to consider them under *Rules 611(a)* and *703*. Deficiencies in the underlying records were explored on examination of the witnesses, "and gaps or other imperfections in the underlying data do not necessarily undermine the value of the summary charts as pedagogical aids under *Rule 611(a)*." As for the tax charts, the summarization of documents "took patience but not expertise," and an IRS agent was well qualified to make the computations, "particularly where, as here, the computation required no subjective judgment."

United States v. Ollison, 555 F.3d 152 (5th Cir. 2009) : The defendant was convicted for theft from an agency receiving federal funds, after she charged personal expenses on a card issued by her employer. Affirming, the Court found no abuse of discretion when an FBI agent was permitted to use charts categorizing the defendant's expenses to illustrate testimony regarding his review of the charges. The charts reflected evidence presented to the jury, and the jury was instructed that they were to be used as demonstrative aids only. The evidence presented in the case was voluminous and presented an appreciable degree of complexity, and the Court concluded that the agent's summary testimony was supported by the evidence and did not "implicate[] the concerns we have previously expressed about the improper use of summary testimony." In *United States v. Ogba, 526 F.3d 214 (5th Cir. 2008)* , the Court affirmed in part convictions for Medicare fraud, finding no abuse of discretion when the government was permitted to use a summary chart showing

a conspiracy between a prosecution witness and a defendant. The chart reflected admitted evidence and both cross-examination of the introducing agent's summary testimony and the jury instructions tested the chart's accuracy and made it clear that the chart was a summary, not evidence. In *United States v. Nguyen, 504 F.3d 561 (5th Cir. 2007)* , the court affirmed convictions arising from a fraudulent home buying scheme, finding that some of the testimony given by an FBI financial analyst "was inappropriate," but the error was harmless. The Court observed that it has allowed the use of summary witnesses in limited situations, but that it "has repeatedly warned of its dangers" and that "[s]ummary witnesses may not be used as a substitute for, or a supplement to, closing argument," or for "inappropriate means." Here, the analyst referred to one defendant as a coconspirator and thereby offered an opinion on mental state that is prohibited by Rule 704(b). Moreover, the analyst provided a summary of her investigation and authenticated a summary chart that relied in part on out-of-court statements that unspecified witnesses made to FBI agents during their investigation, which was "error because the supporting evidence must have been *presented previously* to the jury to establish any assumptions reflected in the summary." In *United States v. Harms, 442 F.3d 367 (5th Cir. 2006)* , the court affirmed convictions for mail fraud and perjury in connection with the receipt of worker's compensation benefits, finding no error when the government was permitted to use a time-line chart comparing the dates of payments the defendant received to the dates of the forms he filed and his activities while receiving benefits. The chart was used only as a pedagogical device; it was not admitted into evidence or allowed into the jury room. As such, its use was governed by *Rule 611(a)*, not *Rule 1006*. The Court held that charts used as pedagogical devices are permissible, within the Trial Court's discretion, so long as they assist the jury and are consistent with the evidence presented. In this case, the evidence "presented an appreciable risk of complexity" and the chart was "not inconsistent with the other evidence presented."

United States v. Sanchez, 586 F.3d 918 (11th Cir. 2009) : The Court affirmed convictions for conspiracy to possess marijuana with the intent to distribute, finding no abuse of discretion in admitting call records for cell phones used by the conspirators, a summary of those records prepared by the prosecution, and a map showing the general location of the subject cell phones in relation to specific cell phone call towers at the times the phones were used. The Court concluded that the information that was stored was recorded contemporaneously with the transaction it depicted and constituted business records, and that given the fact that the records were admissible, it was not an abuse of discretion to permit the government to offer summaries and maps based upon the records.

[2] Rule 611(b) -- Scope of Cross-Examination [Go To Main]

[a] Rule 611(b) -- Discretion of Trial Judge

United States v. Whitten, 610 F.3d 168 (2d Cir. 2010) : In a trial arising from the murder of undercover police detectives, a prosecution witness testified on direct that the defendant had told fellow gang members shortly after the incident that he had "popped" the victims. On cross-examination he was asked whether he had a clear memory of that declaration, and on redirect he was rehabilitated by inquiry into what he understood the statement to mean and whether he had any doubt whether that was what was said. Affirming the conviction, the Court held there was no abuse of discretion when the defense was precluded from conducting recross-examination about other statements the defendant had made at the time, since none of the prior examination had addressed any except the "popped" statement. Although the Judge had discretion to permit questioning beyond the scope of the direct and redirect, the defense did not provide any indication of its good faith basis for the precluded question or any explanation of the significance of the potential answers.

United States v. Groves, 470 F.3d 311 (7th Cir. 2006) : In a trial for felon firearm possession, defense counsel's cross-examination of a government witness (Foster) went beyond the scope of the direct. When the prosecutor objected, defense counsel offered to bring Foster back to the stand during the defendant's case-in-chief. However, the Judge allowed the defendant to continue to question Foster beyond the scope of direct, and then allowed the government to offer rebuttal witnesses to Foster's testimony. On appeal, the defendant argued that the rebuttal evidence should not

have been allowed because Foster was not the defendant's witness. The Court held that because defense counsel was allowed to question Foster out of order rather than call her back to the stand later, "this part of her testimony was part of the defendant's case-in-chief." Therefore the government was properly allowed to rebut matters raised on Foster's cross-examination. The Court noted, however, that one rebuttal witness testified on matters within the scope of Foster's direct examination; while this was error, it was harmless.

[f] Rule 611(b) -- Scope of Cross-Examination

United States v. Brockenborrugh, 575 F.3d 726 (D.C. Cir. 2009) : In a prosecution for wire fraud arising from a scheme to file a fraudulent deed to obtain a property, the defendant explained on direct examination that his relationship with the other conspirator was that she did taxes for half of the court security officers (of which he was one) and was his property manager. Affirming, the Court found no abuse of discretion when the government was permitted to cross-examine the defendant about his extramarital sexual relationship with the conspirator. The cross-examination was reasonable given the suggestion on direct examination that the conspirators had only a business relationship. Thus, the cross-examination went to matters of credibility and was on a subject matter related to the direct. The Court identified the only possible prejudicial effect as the possible inference that a person who "cheats" on his wife cannot be trusted, and concluded that "[a]ny such effect was mitigated by the district court's instruction to the jury to disregard the relationship as evidence of bad character."

United States v. Maxwell, 579 F.3d 1282 (11th Cir. 2009) : Affirming convictions arising from a fraudulent scheme to obtain construction contracts set aside for socially and economically disadvantaged companies, the Court found no abuse of discretion when the Judge restricted the defendant's cross-examination of a witness to the six contracts discussed in the witness's direct examination and told the defendant that if he wanted to discuss other contracts he had to recall the witness in the defense case.

[g] Rule 611(b) -- Scope of Recross-Examination

United States v. Whitten, 610 F.3d 168 (2d Cir. 2010) : In a trial arising from the murder of undercover police detectives, a prosecution witness testified on direct that the defendant had told fellow gang members shortly after the incident that he had "popped" the victims. On cross-examination he was asked whether he had a clear memory of that declaration, and on redirect his was rehabilitated by inquiry into what he understood the statement to mean and whether he had any doubt whether that was what was said. Affirming the conviction, the Court held there was no abuse of discretion when the defense was precluded from conducting recross-examination about other statements the defendant had made at the time, since none of the prior examination had addressed any except the "popped" statement. Although the Judge had discretion to permit questioning beyond the scope of the direct and redirect, the defense did not provide any indication of its good faith basis for the precluded question or any explanation of the significance of the potential answers.

United States v. Ball, 499 F.3d 890 (8th Cir. 2007) , vacated on other grounds, 129 S. Ct. 2049 (2009) : The Court affirmed a conviction for offenses arising from a methamphetamine distribution conspiracy, finding no abuse of discretion when the Judge barred recross-examination on a matter that had been covered in the witness' direct and cross-examination but not in the government's redirect.

[h] Rule 611(b) -- Witness Demonstration

United States v. Williams, 461 F.3d 441 (4th Cir. 2006) : The defendant was charged with felon firearm possession after officers became suspicious about a fanny pack he was wearing and found a handgun. At trial, the defendant, without taking the stand to testify, offered to demonstrate to the jury that he could not have been wearing the fanny pack because its belt was too short to close around his waist. The Judge accepted the government's argument that the demonstration would amount to testimony and would require the defendant to undergo cross-examination. The

defendant proceeded to try on the fanny pack and was then subjected to cross-examination. The Court held the Judge's ruling error (but harmless). Analogizing from *Fifth Amendment* doctrine that demonstrations of clothing and the like are not considered "testimonial," the Court concluded that a demonstration such as that proposed by the defendant is not testimonial, and so "does not subject its proponent to cross-examination under *Rule 611(b)*."

[3] Rule 611(c) -- Leading Questions [Go To Main]

[g] Rule 611(c) -- Foundation Matters and Developing the Witness' Testimony

United States v. Kuehne, 547 F.3d 667 (6th Cir. 2008) : The Court affirmed a conviction for firearm offenses, finding that the prosecutor did not improperly use leading questions when they were used to direct a witness' testimony to a particular date or individual, or to clarify testimony.

[h] Rule 611(c) -- Friendly Witnesses

United States v. Hansen, 434 F.3d 92 (1st Cir. 2006) : The Court affirmed a conviction for crimes arising from a robbery and murder, finding no plain error in the prosecution's use of leading questions in the direct examination of a cooperating coconspirator. The Court noted that the Trial Judge is best situated to strike a practical and fair balance as to the use of leading questions and has extensive discretion as to the phrasing of questions. Here, the prosecutor's questions did not "cross the fine line between stimulating an accurate memory and implanting a false one"; they were used "primarily to develop coherent testimony" from the witness and to avoid eliciting from the witness prejudicial information concerning his previous criminal history with the defendant.

[i] Rule 611(c) -- Hostile or Adverse Witness

McCabe v. Parker, 608 F.3d 1068 (8th Cir. 2010) : In a civil rights action arising from arrests and searches following a political demonstration, the Court held that the Judge's *sua sponte* instructions to avoid leading adverse witnesses on direct examination had a minuscule impact and did not affect the plaintiffs' substantial rights.

[j] Rule 611(c) -- Sexual Assault Victim Witness

United States v. Wright, 540 F.3d 833 (8th Cir. 2008) : In an aggravated child sexual abuse case, the prosecutor asked leading questions of a victim regarding the details of the abuse. Although the witness was an adult at the time of trial and had not indicated a reluctance to testify, the Court found no abuse of discretion in overruling defense objections to the questions, as they were necessary to clarify the testimony and establish the requisite "precise physiological details of sexual assault."

[l] Rule 611(c) -- Young or Disabled Witness

United States v. Carey, 589 F.3d 187 (5th Cir. 2009) : Affirming convictions for aggravated sexual abuse of a minor under the age of 12, the Court rejected the defendant's contention that the prosecutor improperly led the victim during direct examination, observing that "a victim-witness's youth and nervousness can satisfy Rule 611's necessity requirement." It concluded that in this case "the indictment concerned a sex crime, the witness was twelve, and the record reveals several times where DJ appeared nervous."

United States v. Johnson, 519 F.3d 816 (8th Cir. 2008) : Affirming a conviction for aggravated sexual abuse of a child, the Court found no abuse of discretion in permitting the prosecution to use leading questions in examining the child victim. The child was young and reluctant to testify, and the subject matter was traumatic. In *United States v. Rojas, 520 F.3d 876 (8th Cir. 2008)* , a prosecution for aggravated sexual abuse of a child, the Court found no abuse of discretion when the AUSA asked several leading questions (some of which demanded yes or no answers and some of

which required or elicited further response or explanation) of the ten-year-old alleged victim, who was distraught during her testimony.

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[10] Relationship to Other Rules

[a] Discovery Rules

[b] Relationship to Other Rules -- Jencks Act

[c] Relationship to Other Rules -- Rule 803(5)

[11] Unethically Obtained Evidence

[12] Use of Notes While Testifying

[13] Work Product Protection

612.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 280 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

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612.01 Official Text

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by *section 3500 of title 18, United States Code*, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

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PART TWO: THE RULES THEMSELVES
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612.02 Editorial Explanatory Comment

[1] Refreshing Recollection While Testifying

When a witness has difficulty recalling some of the facts within personal knowledge, it is standard practice to refresh the witness' recollection. This is often done by showing the witness a prior statement or other writing that stimulates memory. *Rule 612* provides that if a witness is shown a writing to refresh memory while testifying, the adverse party is entitled to have the writing produced for inspection and to cross-examine the witness with respect to it. Moreover, an adverse party may introduce into evidence those portions of the writing that relate to the testimony of the witness. The right to inspect and use a writing is unqualified if the witness uses it to refresh recollection *while testifying*. But if the witness uses a writing to refresh recollection *before* taking the stand, the opportunity to inspect and use the writing is dependent upon the Court's finding that disclosure is necessary in the interests of justice. n1

Of course a document cannot be used to refresh recollection if the witness' recollection needs no refreshment. So for example in *United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004)* , the Court found no error when the Trial Court prohibited the defendant from using a document to refresh the recollection of a government witness. The witness did not claim his memory was impaired, and the Court declared that it is "hornbook law that a party may not use a document to refresh a witness's recollection unless the witness exhibits a failure of memory."

[2] Documents That May Be Used

The Judge need not limit documents used to refresh recollection to those resembling past recollection recorded. Almost anything should be usable for the purpose of refreshing the memory of the witness; it does not have to be admissible because it is not being admitted as evidence. n2 As long as a document does refresh memory, its origin is not important. In fact, the Rule has been read to apply to any material used to refresh recollection, whether or not in the form of a writing. n3

[3] Risk of the Document Being Used as Testimony

It is important to recognize that there is a difference between refreshing memory with a document and introducing a document as substantive proof, most commonly under the past recollection recorded exception to the hearsay rule:

> The primary difference between the two classifications is the ability of the witness to testify from present knowledge: where the witness' memory is revived, and he presently recollects the facts and swears to them, he is obviously in a different position from the witness who cannot directly state the facts from present memory and who must ask the court to accept a writing for the truth of its contents because he is willing to swear, for one reason or another, that its contents are true. n4

A document used to refresh recollection is not admitted on behalf of the proponent of the evidence, whereas a document satisfying the hearsay exception is admitted for its truth. This distinction could give rise to possible abuse when a party either fails or refuses to qualify a record as past recollection recorded and chooses instead to "refresh" the witness' recollection. n5 There is a possibility that the witness' recollection might not actually be refreshed (and maybe does not even need to be refreshed), and the document is essentially being used as hearsay evidence of an event. Trial Judges have the discretion and the obligation to prevent a witness from relying on inadmissible evidence to "refresh" recollection when this is simply a ruse for getting the otherwise inadmissible evidence before the jury. n6

[4] Excision of Irrelevant Material

To the extent that the writing contains matters not related to the subject matter of the testimony of the witness, or that were not used to refresh the recollection of the witness, the Court may excise any such portions and then deliver the writing to the opposing party for inspection. n7 Similarly, the writing may be redacted before it is introduced into evidence.

[5] Refreshing Recollection Before Trial

This Rule provides that the Court may in its discretion order a writing produced if a witness utilized the writing to refresh memory for the purpose of testifying prior to taking the stand at trial. There is an exception, however, for statements covered by the Jencks Act, *18 U.S.C. § 3500*, which provides in essence that pretrial statements of government witnesses in a criminal trial need not be disclosed to the defense until after the witness' direct examination at trial. Thus, even though prosecution witnesses use their prior statements to refresh recollection prior to testifying, the Judge has no discretion to order production of the statement until after the witness finishes testifying on direct, at which time the Jencks Act governs. n8 Once the witness testifies, statements covered by the statute must be revealed to the defense upon request.

While the Jencks Act postpones required disclosure until after direct examination, in practice a prosecutor will often voluntarily disclose Jencks Act material before that point. The reason is that disclosure after direct examination will often result in a delay of the trial to allow the defense some time to review the material. n9 It must also be remembered that the Jencks Act covers only statements previously made by the government witness. It does not apply to some other document or statement that the witness might have used before or at trial to refresh recollection. n10 Disclosure of material other than statements of testifying witnesses is governed by *Rule 612* (and judicial discretion thereunder) whenever it is used to refresh a witness' recollection. n11

The expansion in the Rule of the right to review documents used to refresh recollection prior to trial, if the Judge so orders, goes beyond traditional common-law doctrine, yet it does not go as far as the Advisory Committee wished. The Advisory Committee wanted to provide that statements used to refresh recollection before trial would be treated in the same manner as statements used to refresh recollection at trial. But Congress thought that this would be an invitation to a fishing expedition by counsel.

In light of the concerns expressed by Congress, it is likely that the Judge will ordinarily exercise discretion to prevent discovery of statements used before trial to refresh recollection in order to ensure that lawyers are not inhibited in carefully preparing clients and other witnesses for their appearance on the witness stand. n12

[6] Effect of Privilege and Work Product Doctrine Where Recollection Is Refreshed Before Trial

Must a privilege or a work product claim give way when, prior to trial, a witness has reviewed documents to refresh recollection in preparation for testifying? Courts have usually ruled in favor of disclosure in these circumstances, on grounds of waiver. But we would not hold that every time a witness looks at any privileged or work product material in preparation for trial, that document should be disclosed to the other side. n13 To determine under *Rule 612* whether disclosure of material consulted by a witness before trial would be "necessary in the interests of justice," the Trial Judge may have to determine, among other things: (1) the extent to which the witness actually relied upon documents to refresh recollection; n14(2) the extent to which those documents related facts similar to those testified to by the witness; and (3) the extent to which the privileged or work product material would be revealed by disclosure of the document. n15 By using *Rule 403*, and to some extent *Rule 611*, the Trial Judge should be able to make an appropriate ruling on a case-by-case basis. n16

[7] Effect of Privilege and Work Product Doctrine Where Recollection Is Refreshed at Trial

Counsel for a client who actually uses a privileged document on the stand to refresh a witness' memory will generally be held to have waived (or, more precisely, forfeited) the privilege. n17 This situation is distinguishable from preparation of a witness *before* trial, discussed in the immediately preceding section. A finding of waiver is much less obvious when the privileged material has simply been used before trial, perhaps as one of many means attempted to refresh a witness' recollection. For one thing, it is not as apparent, as it would be on the stand, that the witness actually relied on the specific privileged material to prepare his testimony.

As discussed in the Editorial Explanatory Comment to *Rule 501*, *§ 501.02[5][k][i]*, the privilege is forfeited when the client or counsel engages in conduct that would make it unfair to continue to shield the information. And it would indeed be unfair to allow the witness to use privileged material on the witness stand, and yet to deny access to the adversary on cross-examination. The distinction between the use of privileged materials before and during trial is borne out by the distinction in *Rule 612* itself, which requires production if the material is used while the witness is testifying, but leaves it to the Trial Judge to determine whether disclosure is necessary when the witness used the material before testifying.

Similarly, where a witness uses work product to refresh recollection during in-court testimony or during a deposition, such conduct should operate as a waiver of the immunity. Any other rule would be unfair to the adversary. n18 Again, this is distinguishable from the use of work product before the witness testifies; disclosure of work product used by the witness in preparing for testimony should be subject to the case-by-case approach discussed in the preceding section.

[8] "Adverse Party" Under the Rule

Rule 612 provides a right to cross-examine a witness who uses a writing to refresh recollection. The Rule uses the term "adverse party" in connection with the right to cross-examine. What the Rule intends, we think, is that any time a witness is shown a writing to refresh recollection while testifying, and in limited circumstances before testifying, the party opposing whoever showed the memorandum to the witness should be able to see it and to examine the witness concerning it. If the witness produces a writing *sua sponte*, either side should be able to see it, although the direct examiner should not be permitted to offer the writing as a substitute for evidence. If the witness is not assisted by the writing or repudiates it, obviously the need to protect the party opposing whoever showed the writing to the witness is minimized. In fact, no protection may be needed.

[9] Use of Document and Jury Instructions

When a document is subject to *Rule 612* because it has been used to refresh recollection, the jury should be told that the document is introduced only on the issue of credibility. n19 Of course, if the document is otherwise admissible, no

limiting instruction is necessary.

[10] Additional Problem Areas

Three further problems can be found with this Rule.

First, there is some difficulty in ascertaining why the words "at the hearing" were used rather than the words "at the trial." To us, "at the hearing" signifies any proceeding in which the Rules apply under *Rule 1101*. Most of the decisions equate depositions with hearings and trials for purposes of the Rule. Thus, "at the hearing" means the occasion on which the witness with refreshed recollection will testify, whether that is a deposition, a hearing on a motion, or the trial.

Second, there is a question whether, if the government intentionally refuses to turn over evidence used to refresh the recollection of its witnesses and forces a mistrial, the *Double Jeopardy Clause* would bar reprosecution. Since *Rule 612* would appear to place the government on notice concerning a possible responsibility to turn over such evidence, the Supreme Court's double jeopardy jurisprudence suggests that retrial might be barred. n20 This is one reason why a mistrial is unlikely to be declared except as a last resort.

Third, nothing in *Rule 612* appears to bar the use of contempt procedures to punish noncompliance or to coerce compliance with Court orders. Of course, a valid claim of privilege would amount to a defense in such proceedings.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Sai Keung Wong, 886 F.2d 252 (9th Cir. 1989)* (after government witness reviewed a foreign police report, it was returned to the foreign consulate, making it unavailable to the defense; it was not error to allow the witness to testify on the basis of refreshed recollection; the report had been reviewed by the witness before trial and there is no absolute right to disclosure under these circumstances; the Trial Court did not abuse its discretion in finding that disclosure was not required in the interests of justice).

(n2)Footnote 2. See, e.g., *United States v. Scott, 701 F.2d 1340 (11th Cir. 1983)* (upholding the use of documents to refresh the recollection of government witnesses, although these documents had been ruled inadmissible: "When there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witness' memory is inadmissible.").

(n3)Footnote 3. See, e.g., *20th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81 (2d Cir. 1984)* (the Court stated that "in fairness and under the spirit of the Rules the better practice is to permit opposing counsel to examine a tape," where the tape was used to refresh the recollection of a witness).

(n4)Footnote 4. *United States v. Riccardi, 174 F.2d 883, 886 (3d Cir. 1949)* .

(n5)Footnote 5. See, e.g., *Rush v. Illinois Cent. R.R. Co., 399 F.3d 705 (6th Cir. 2005)* (it was error to allow counsel to ask whether certain transcript statements were correct rather than asking whether the transcript refreshed recollection; the Court "reach[ed] the inescapable conclusion that defense counsel impermissibly utilized the 'guise of refreshing recollect,' ...to place before the jury [the witness'] prior, out-of-court statements regarding the manner in which Rush fell from the CN-IC train").

(n6)Footnote 6. See, e.g., *United States v. Weller, 238 F.3d 1215 (10th Cir. 2001)* ("the court has the discretion to withhold any writing from a witness where the judge believes that the document will be a source of direct testimony rather than the key to refreshing the witness' independent recollection"; no error to prevent the defendant from relying on a detailed document during testimony; the defendant's recollection did not seem impaired); 20th *Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81 (2d Cir. 1984)* (Trial Court must ensure "that the witness actually has a present recollection and that otherwise inadmissible evidence does not slip in inadvertently for its truth"); *Hall v. American Bakeries Co., 873 F.2d 1133, 1136 (8th Cir. 1989)* (error to allow the witness to testify "from prepared notes under the

guise of refreshing recollection"). Compare *United States v. Rinke, 778 F.2d 581 (10th Cir. 1985)* (government witness was properly allowed to consult a memorandum while he was giving testimony, since the memorandum was not a substitute for testimony but was merely used to refresh recollection; such a practice was not abusive given the defendant's right under *Rule 612* to inspect and use the memorandum for cross-examination).

(n7)Footnote 7. See, e.g., *United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986)* (no error for the Trial Judge to require the government to turn over only those portions of grand jury testimony actually used by the witness to prepare for trial); *United States v. Howton, 688 F.2d 272 (5th Cir. 1982)* (where the Trial Judge reviewed a report inspected by a witness before he testified, and found that the report was not germane to the witness' direct examination, disclosure to the defense was unnecessary); *United States v. Darden, 70 F.3d 1507 (8th Cir. 1995)* (after a government witness refreshed his recollection by referring to DEA reports summarizing debriefing sessions with the witness, the Trial Judge properly limited cross-examination to those portions of the reports that the witness was able to recall).

(n8)Footnote 8. Under *Fed. R. Crim. P. 26.2*, both the government and the defense have an obligation to turn over witness statements. But the reference to the Jencks Act is still significant because it postpones the timing of prosecutorial production until after government witnesses actually testify.

(n9)Footnote 9. See, e.g., *United States v. Algie, 667 F.2d 569 (6th Cir. 1982)* (noting the U.S. Attorney's "policy in many cases of advanced disclosure of Jencks Act materials to defendants," and also noting that the timing provisions of the Jencks Act needlessly slow down the trial process).

(n10)Footnote 10. See, e.g., *United States v. Nathan, 816 F.2d 230 (6th Cir. 1987)* (informal notes are not "statements" within the meaning of the Jencks Act).

(n11)Footnote 11. See, e.g., *United States v. Blas, 947 F.2d 1320 (7th Cir. 1991)* (no abuse of discretion in denying production of reports made by other officers and investigators that a DEA agent said he had reviewed prior to testifying at a sentencing hearing; the reports were not statements "made by said witness" discoverable under the Jencks Act; and where recollection is refreshed prior to the hearing, disclosure under *Rule 612* is within the discretion of the Trial Judge; this discretion was not abused here, where the defendant had "other avenues" with which to test the witness' testimony).

(n12)Footnote 12. See, e.g., *Cosden Oil v. Karl O. Helm A.G., 736 F.2d 1064 (5th Cir. 1984)* (no abuse of discretion in refusing to require production of a document used by a witness to refresh his recollection prior to testifying).

(n13)Footnote 13. See, e.g., *Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674 (S.D.N.Y. 1983)* (*Rule 612* permits, but does not require, disclosure of material used to refresh recollection before testifying; the Court declined to order disclosure where the witness did not in fact rely upon the document, stating that "[t]he mere fact that a witness looked at a document protected by the attorney-client privilege in preparation for a deposition is an inadequate reason to conclude that the privilege was destroyed.").

(n14)Footnote 14. See, e.g., *Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985)* (turnover of work product was not required where "the trial court did not properly condition its application of *Rule 612* on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony"; the Court expressed concern that *Rule 612* might become a pretext for wholesale exploration of an opposing party's files).

(n15)Footnote 15. See generally E. Epstein & M. Martin, The Attorney-Client Privilege And the Work-Product Doctrine 158-63 (2d ed. 1989).

(n16)Footnote 16. See *James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 1982-1 Trade Cas. (CCH) P64599 (D. Del. 1982)* (where the plaintiff's counsel assembled a binder that was reviewed by witnesses before their depositions were taken, the Court discussed *Rule 612* and its impact on privilege rules and concluded "that Congress left the task of

striking a balance between the competing interests of full disclosure and the maintenance of confidentiality for case by case determination"; the Court concluded that the contents of the binder should be disclosed in connection with the depositions, even though work product would be revealed).

(n17)Footnote 17. See, e.g., *Marshall v. Postal Serv., 88 F.R.D. 348 (D.D.C. 1980)* (use of a document to refresh memory during testimony operates as a waiver of the attorney-client privilege as to that document).

(n18)Footnote 18. See generally *Westinghouse v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991)* (selective disclosure to the adversary constitutes waiver of work product).

(n19)Footnote 19. See, e.g., *United States v. Harris, 908 F.2d 728 (11th Cir. 1990)* (where reports were used to refresh recollection and then used on cross-examination pursuant to *Rule 612*, it was proper to instruct the jury that the reports were not admissible as evidence).

(n20)Footnote 20. See, e.g., *Oregon v. Kennedy, 456 U.S. 667 (1982)* (where mistrial is declared due to conduct of the prosecutor that is intended to create a mistrial, then *Double Jeopardy Clause* bars a subsequent prosecution).

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PART TWO: THE RULES THEMSELVES
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612.03 Annotated Cases

[Go To Supp]

[1] Depositions

James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 1982-1 Trade Cas. (CCH) P64599 (D. Del. 1982) : In an action alleging antitrust and labor violations in which the plaintiff's counsel assembled a binder that was reviewed by witnesses before their depositions were taken, the Court discussed *Rule 612* and its impact on privilege rules and concluded "that Congress left the task of striking a balance between the competing interests of full disclosure and the maintenance of confidentiality for case by case determination." Although it recognized that revealing the choice of documents for the binder would reveal work product, the Court concluded that the contents of the binders should be disclosed in connection with the depositions.

[2] Failure of Memory Required

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004) : Affirming convictions for conspiracy to grow marijuana plants, the Court found no error when the defense was precluded from using a downward departure motion to "refresh" an agent's memory on cross-examination, since "[i]t is hornbook law that a party may not use a document to refresh a witness's recollection unless the witness exhibits a failure of memory," and the agent did not claim that his memory on the point was impaired.

[3] Government Witnesses -- Criminal Cases

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975) : In a prosecution for a taxicab robbery, a police officer's report containing the cab driver's complaint and a transcript of that report as broadcast to the police department were inconsistent with the driver's testimony. When the defense sought to introduce the report and transcript, the Trial Judge ruled that they were inadmissible as hearsay, but the Court held that because the officer used them to refresh his recollection before testifying as a prosecution witness, the defendant, as opposing party, should have been permitted to introduce the writings.

United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980) : The Court warned a prosecutor to establish that a witness needed to refresh recollection before showing him a statement.

United States v. Muhammad, 120 F.3d 688 (7th Cir. 1997) : Affirming a conviction for bribery and obstruction of justice, the Court held there was no error in permitting an FBI agent who had interviewed the defendant to testify and in refusing to order disclosure of the agent's interview notes. Before trial the agent had used a written "summary" of the interview, which was prepared by the other interviewing agent, to refresh her recollection, as is permitted by *Rule 612*. The Court found that her testimony stemmed from her personal knowledge and not from the summary. The defendant had access to the summary and used it extensively in cross-examining the agent regarding preparation of her testimony. The Trial Judge reviewed the interview notes *in camera* and found no inconsistencies between them and the summary, so the Court found no error in denying the defendant disclosure of the notes. In *United States v. Blas, 947 F.2d 1320 (7th Cir. 1991)* , the Court held there was no abuse of discretion in denying production of reports made by other officers and investigators that a DEA agent said he had reviewed prior to testifying at a sentencing hearing. The reports were not statements "made by said witness" discoverable under the Jencks Act, and, even if *Rule 612* were applicable in sentencing hearings, the defendant had made no showing why production was necessary in the interest of justice or that the Trial Judge was mistaken in assessing the burden involved in reviewing the documents *in camera*.

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) : After a government witness refreshed his recollection by referring to DEA reports summarizing debriefing sessions with the witness, the Trial Judge limited cross-examination to those portions of the reports that the witness was able to recall. The Court found no error, and affirmed racketeering convictions for drug trafficking. *United States v. Cheyenne* n1 involved an FBI agent who, three days after eliciting a confession in a murder case, had dictated his notes to a secretary who incorporated them into a "302" report; the agent compared the report with the notes and then destroyed them. At a suppression hearing the agent indicated that he had no recollection of the confession and needed to refresh his memory by looking at the report. At trial the report was not used, but the Court noted that "it is clear that Agent Hafner's testimony relating to Cheyenne's confession was striking [*sic*] similar, in both content and sequence, to the '302' report." The government argued that the "302" report was admissible under *Rule 803(5)* and that any reference to it would have been proper, but the Court refused to reach the argument because the report was never offered in evidence. In rejecting the defendant's argument that the agent's testimony should have been stricken because he had no present recollection of the confession, the Court cited *Rule 612* for the proposition that refreshing the recollection of a witness is entirely proper and that the credibility of the agent was a question for the jury. Of course, any time that an officer's memory is refreshed with a document, the defense can have the document admitted under the Rule.

United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986) : The Court affirmed a perjury conviction, finding no error in the Trial Judge's ruling requiring the government to turn over only the portions of grand jury testimony used by a witness to prepare for trial.

United States v. Williams, 875 F.2d 846 (11th Cir. 1989) : The Court declined to find that a Trial Judge had abused his discretion in refusing to order an agent to turn over a record that he had examined in preparing to testify.

[4] Habeas Corpus Cases

Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982) : In a habeas corpus case, the Court said that a petitioner was entitled to inspect and use during cross-examination of his former counsel any portion of the file that counsel used while

testifying.

[5] Inadmissible Documents

Rush v. Illinois Cent. R.R., 399 F.3d 705 (6th Cir. 2005) : The plaintiff child fell from a railcar on which he and other children had been playing. Within several hours of the accident, a risk manager/railroad police officer interviewed three of the children. The plaintiff called two of the interviewed children as witnesses. The defense used a transcript of one child's interview to refresh recollection when the child could not recall the interview; the Court held that this was proper. With respect to another child, the defense asked leading questions ostensibly to refresh recollection. Because defense counsel asked the child whether certain transcript statements were correct rather than asking whether the transcript refreshed recollection, the Court held that the out-of-court statements were impermissibly placed before the jury to prove how the plaintiff fell. The statements were admissible as prior inconsistent statements under *Rule 613*, however.

United States v. Scott, 701 F.2d 1340 (11th Cir. 1983) : Affirming convictions for making false statements to banks and misuse of the mails, the Court upheld the use of documents to refresh the recollection of government witnesses, although these documents had been ruled inadmissible because the government had failed to supply them to the defense in discovery. The Court noted that "[w]hen there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witness' memory is inadmissible."

[6] *In Camera* Review

United States v. Howton, 688 F.2d 272 (5th Cir. 1982) : The Court affirmed convictions arising out of an interstate confidence scheme and approved the Trial Judge's granting a defense request for *in camera* review under *Rule 612* of a report reviewed by a witness. Since the Trial Judge found that the report was not germane to the witness' direct examination, disclosure to the defense was unnecessary.

[7] Pretrial Refreshing of Recollection

Cosden Oil & Chem. Co. v. Karl O. Helm A.G., 736 F.2d 1064 (5th Cir. 1984) : In a contract dispute, the Court found that the Trial Judge did not err in declining to order a witness to turn over to counsel for an opposing party the notes that he admitted using to refresh his recollection prior to trial. Although the Trial Judge had authority to order the notes turned over, the Judge determined that such an order was not required, especially where the witness never referred to the notes while testifying.

[8] Privileged Documents

Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co., 118 F.R.D. 609 (E.D. Wis. 1987) : The District Court ruled that a company "cannot allow their witnesses to review such [privileged] documents to refresh their recollections for the purpose of testifying, without allowing Minco [an adversary] to inspect the documents prior to trial."

United States v. Sai Keung Wong, 886 F.2d 252 (9th Cir. 1989) : The Court affirmed convictions for heroin importation offenses, rejecting the defendants' claim that they were entitled to examine Malaysian police reports used by a government witness before testifying. The reports included much information about a confidential informant, whose identity the Court held the defendants were not entitled to discover, and turning over the reports would have

violated Malaysian law, so disclosure was not "necessary in the interests of justice."

[9] Proper Manner of Refreshing Recollection

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : In the trial of a drug trafficking conspiracy, the prosecutor, trying on cross-examination to get one defendant to admit that he often made things up and told stories, asked him whether he had phoned his employer and told him a story. When the defendant stated that he was not sure what the prosecutor was talking about, the prosecutor played a tape-recording of a phone conversation the defendant had with his employer after he was placed in custody in which he offered a false explanation of why he was absent from work. The government argued that the tape was offered to "refresh recollection," but the Court observed that if the prosecutor wanted to refresh recollection, the proper way would have been to play the tape outside the presence of the jury.

[10] Relationship to Other Rules

[a] Discovery Rules

G.J.B. & Assoc. v. Singleton, 913 F.2d 824 (10th Cir. 1990) : On appeal of sanctions imposed against an attorney for failing to make available before trial written notes that a witness proposed to use to refresh recollection during testimony, the Court held that a standing pretrial order requiring exchange of exhibits to be used during direct examination applied to the notes and that the Rule did not excuse the failure to comply with the order.

[b] Relationship to Other Rules -- Jencks Act

United States v. Blas, 947 F.2d 1320 (7th Cir. 1991) : The Court held there was no abuse of discretion in denying production of reports made by other officers and investigators that a DEA agent said he had reviewed prior to testifying at a sentencing hearing. The reports were not statements "made by said witness" discoverable under the Jencks Act, and, even if *Rule 612* were applicable in sentencing hearings, the defendant had made no showing why production was necessary in the interest of justice or that the Trial Judge was mistaken in assessing the burden involved in reviewing the documents *in camera*.

United States v. Soto, 711 F.2d 1558 (11th Cir. 1983) : The Court reversed a decision to strike the testimony of two government agents who had destroyed handwritten drafts and notes after their reports were reduced to typed copies. The Court cited *Rule 612* as authority for the view that a witness' memoranda or notes do not become statements for purposes of the Jencks Act simply because the witness uses them for purposes of refreshing recollection prior to taking the stand. The Rule does not automatically require production of material viewed by a witness prior to trial, and the Court reasoned that the Jencks Act was not intended to require production of everything a witness might consult prior to trial.

[c] Relationship to Other Rules -- Rule 803(5)

United States v. Massachusetts Maritime Academy, 762 F.2d 142 (1st Cir. 1985) : The Court affirmed an order for injunctive relief prohibiting further sex discrimination by the defendant, finding no error in the admission of testimony of a witness who had no present recollection of facts, but whose memory was refreshed with an affidavit she had given four years earlier. The Court cited *Rule 612(2)* as authority for refreshing the recollection of a witness prior to trial. In our view, the correctness of the decision depends on whether the affidavit truly refreshed memory, or whether the witness simply intended to say that the affidavit was accurate when made. If memory was refreshed, the procedure was proper and the decision was correct. If, however, the witness merely affirmed that the affidavit was truthful, it should

have been tested under the past recollection recorded exception to the hearsay rule, which is provided in *Rule 803(5)*.

[11] Unethically Obtained Evidence

20th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81 (2d Cir. 1984) : In an opinion remanding for further proceedings a trademark-unfair competition case, the Court stated that "the use of unethically obtained evidence merely to refresh recollection is not prohibited by the Federal Rules of Evidence." It added that "[t]he court must ensure, however, that the witness actually has a present recollection and that otherwise inadmissible evidence does not slip in inadvertently for its truth." The Court also stated that where a tape recording has been unethically obtained and it is used to refresh recollection, opposing counsel should be permitted to examine all parts of the tape, even those not used to refresh recollection.

[12] Use of Notes While Testifying

Hall v. American Bakeries Co., 873 F.2d 1133 (8th Cir. 1989) : The Court found that the Trial Judge erred in permitting a witness to use notes while testifying where no foundation was laid as to the witness' need to refresh his memory and as to the usefulness of the notes. The error was harmless, however.

United States v. Weller, 238 F.3d 1215 (10th Cir. 2001) : After the government showed that the financial situation of a bank manager, charged with embezzlement, suddenly and substantially improved following the disappearance of funds from the vault, the defendant sought to show that she had sold a large number of personal and household goods. She first tried to introduce an appraisal of the items she claimed to have sold, and after that was rejected as hearsay, she testified about the items on direct examination. When her counsel sought to use the appraisal to refresh her recollection about details, a government objection was sustained. The Court affirmed, holding that the Trial Judge has discretion to withhold any writing from a witness when the Judge believes that the document will be used as a source of direct testimony rather than to refresh the witness' independent recollection. In *Strickland Tower Maintenance v. AT&T Commun., Inc., 128 F.3d 1422 (10th Cir. 1997)* , a breach of contract action, the Court held there was no abuse of discretion in precluding an expert witness from using a particular document to refresh his memory. Because the witness was only vaguely familiar with the document, there was a risk he would simply read its contents into evidence. In *United States v. Rinke*, n2 a prosecution for marijuana-related offenses, the Court held that it was permissible for a government witness to use notes while testifying in order to refresh his memory. It observed that the defendants had the right to cross-examine the witness about the notes and to introduce them into evidence.

[13] Work Product Protection

Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977) , rev'd on other grounds, 603 F.2d 263 (2d Cir. 1979) : The Magistrate supervising discovery had ordered that, in connection with depositions of expert witnesses, all material given to the expert during his preparation be produced for opposing counsel pursuant to *Rule 612*. Kodak refused to turn over notebooks that had been shown to its economic experts as "background" during their preparation for the case. The Judge examined the materials and found that they involved "work product" in an essential sense of the term. Although he recognized the possibility of a waiver of the work product privilege by using documents to prepare the witnesses for trial, the Judge found that there was no indication of a calculated plan to exploit the work product in the instant case and that the materials actually made available for cross-examination covered all the concrete and specifically identifiable points on which the experts were instructed or advised for their testimony. See also *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, n3 where the District Court said that

> [w]hile the use of writings to refresh deponents' recollection may create dangers of selective

memory, under the circumstances of this case, where many of the documents C-W's attorneys have shown deponents to refresh their recollection fall within the work product doctrine, it would not be appropriate to order C-W to turn over the documents it has used to refresh their witness' recollection.

Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985) : The Court granted a writ of mandamus overturning discovery rulings by a Trial Judge in a securities fraud class action suit. One ruling had required the defendants to turn over documents used to prepare a witness for a deposition. The Court reasoned that "the trial court did not properly condition its application of *Rule 612* on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony." The Court was concerned that *Rule 612* might become a pretext for wholesale exploration of an opposing party's files and that an attorney's theories that inform the way documents are assembled, which ought to be considered work product, would be disclosed.

FOOTNOTES:

(n1)Footnote 1. *United States v. Cheyenne, 558 F.2d 902 (8th Cir. 1977)* .

(n2)Footnote 2. *United States v. Rinke, 778 F.2d 581 (10th Cir. 1985)* .

(n3)Footnote 3. *Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45 (S.D.N.Y. 1982)* .

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612.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. *Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942)* ; *Needelman v. United States, 261 F.2d 802 (5th Cir. 1958)* , *cert. dismissed*, *362 U.S. 600, 80 S. Ct. 960, 4 L. Ed. 2d 980* , *reh. denied*, *363 U.S. 858, 80 S. Ct. 1606, 4 L. Ed. 2d 1739* , Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, *People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963)* ; *State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957)* ; *State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958)* ; *State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917)* , and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17. **[Editor's Note: The Advisory Committee proposal to require disclosure of documents relied on by witnesses before trial was rejected, in favor of a provision allowing disclosure only if the court, in its discretion, finds that it is necessary in the interests of justice.]**

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the *Jencks* statute, *18 U.S.C. § 3500*: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Items falling within the purview of the statute are producible only as provided by its terms, *Palermo v. United States, 360 U.S. 343, 351 (1959)* , and

disclosure under the rule is limited similarly by the statutory conditions. With this limitation in mind, some differences of application may be noted. The *Jencks* statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the *Jencks* statute, striking the testimony or in exceptional cases a mistrial. *18 U.S.C. § 3500(d)*. In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16 (g) of the Federal Rules of Criminal Procedure and *Rule 37(b) of the Federal Rules of Civil Procedure* for appropriate sanctions.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 280 (1999)

Federal Rule 612 addresses the problem of a witness using a writing to refresh memory. The rule provides that in certain circumstances the adversary has the right to have the writing produced, to cross-examine the witness thereon, and to introduce into evidence the portions of the writing that relate to the testimony. This right is granted whenever the witness uses a document to refresh recollection while testifying. If the writing was used to refresh recollection before trial, inspection and use by the adversary is only granted if the trial court finds it necessary in the interests of justice.

The Advisory Committee's proposed Rule 612 was significantly broader in dealing with recollection refreshed before trial. The Advisory Committee noted that the bulk of the case law to that point had "denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter." The Advisory Committee Note criticizes this position, stating that the "risk of imposition and the need of safeguard" is just as great when the witness refreshes recollection pre-trial as it is when recollection is refreshed at trial. The risk in either case is that it is the writing, and not the witness, that is really testifying.

But Congress thought that the Advisory Committee's position would create a risk of abuse on the other side, i.e., by the party demanding disclosure. As the House Committee on the Judiciary put it, "permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." In light of the concerns expressed by Congress, it appears that most trial judges have exercised discretion to prevent discovery of statements used before trial to refresh recollection, in order to prevent harassment and to ensure that lawyers are not inhibited in carefully preparing witnesses for their trial testimony. *See, e.g., Cosden Oil v. Karl 0.Helm A.G., 736 F.2d 1064 (5th Cir. 1984)* (no abuse of discretion in refusing to require production of document used by witness to refresh his recollection prior to testifying). Yet a lawyer looking at the Advisory Committee Note to the rule would think that there is an absolute right to demand production of a document if it was used to refresh recollection before trial.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

Permitting an adverse party to require the production of writings used *before* testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial. The Subcommittee recast the first sentence of the Rule to permit access to any such writings only if the court determines access is in the interests of justice.

[4] Report of the House Committee on the Judiciary

As submitted to Congress, Rule 612 provided that except as set forth in *18 U.S.C. 3500*, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman v. United States, 316 U.S. 129 (1942)* . The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

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3-612 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 612, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 612. Writing Used To Refresh Memory	**Rule 612. Writing Used to Refresh a Witness's Memory**
Except as otherwise prov	**(a) Scope.** This rule gives an ad-

ided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either --

versee party certain options when a witness uses a writing to refresh memory.

(1) while testifying, or

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to in-

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.

spec t it, to cros s-ex- ami ne the wit- ness there on, and to in- tro- duce in evid ence thos e por- tions whic h re- late to the testi mon y of the wit- ness. If it is clai med that the writ- ing con- tains mat- ters not re- C. § 350 0 prov ides oth- er- wise in a crim inal case, an ad- vers e part y is en- title d to have the writ- ing pro- duce d at the heari ng, to in- spec t it, to cros s- ex- ami ne the wit- ness abou t it, and to in- tro-

lated to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitle duce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera,

d there to. Any portion with held over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or,

if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not de-

liver ed as orde red, the cour t may is- sue any ap- pro- pri- ate or- der. But if the pro- secu tion does not com ply in a crim inal case, the cour t must strik e the wit- ness' s testi mon y or -- if justi ce so re- quir

es -- de- clare a mis- trial.

Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[12] Use of Notes While Testifying [Go To Main]

United States v. Carey, 589 F.3d 187 (5th Cir. 2009) : Affirming convictions for aggravated sexual abuse of a minor under the age of 12, the Court rejected the defendant's contention that the prosecutor misused a police report during the victim's testimony. The Court observed that any writing may be used to refresh recollection regardless of whether the witness being refreshed authored the writing; the Circuit has rejected the requirement that a witness must explicitly declare that a writing actually refreshed recollection; and the record failed to demonstrate that the victim read from the police report rather than used it to refresh recollection. The Judge must ensure that a witness uses a document to refresh recollection and that the document does not simply put words in the witness's mouth; the Court would defer to the Judge's decision that no impropriety occurred in this case. The Court noted that the defendant exercised his right to question the victim about her reliance on the report and to argue to the jury that the reliance rendered her testimony not credible.

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[c] Rule 613(b) -- Determination of Inconsistency

[d] Rule 613(b) -- Inconsistency With Tax Returns

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[f] Rule 613(b) -- No Inconsistency -- Witness Testified To Making Statement

[g] Rule 613(b) -- Omission As Inconsistent Statement

[h] Rule 613(b) -- Opportunity To Explain or Deny

[i] Rule 613(b) -- Prior to Extrinsic Evidence

[ii] Rule 613(b) -- Opportunity To Explain or Deny -- Requirement in General

[i] Rule 613(b) -- Prejudicial Material in Statement

[j] Rule 613(b) -- Relationship to Other Rules

[i] Rule 613(b) -- Hearsay Rules

[ii] Rule 613(b) -- Relationship to Other Rules -- Rule 403

[iii] Rule 613(b) -- Relationship to Other Rules -- Rule 608(b)

[k] Rule 613(b) -- Scope of Witness' Explanation

[l] Rule 613(b) -- Silence As Inconsistent Statement

[m] Rule 613(b) -- Summary Judgment

[n] Rule 613(b) -- Third Person's Notes of Prior Statement

613.04 Legislative History

[1] Advisory Committee's Note

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613.01 Official Text

Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement*. -- In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness*. -- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

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613.02 Editorial Explanatory Comment

[1] Showing a Statement to the Witness

One of the traditional ways of impeaching a witness is by introducing evidence of a prior inconsistent statement. Under common law, the examining party was required to lay an adequate foundation for the statement at the time the witness testified. This was referred to as "the rule in Queen Caroline's case." n1 That rule required the cross-examining party to confront the witness directly on cross-examination with the inconsistent statement. At that point, the witness would have an opportunity to admit, explain, repudiate, or deny the statement. If the witness denied making the statement, then the Trial Court could in its discretion permit the cross-examining party to prove through extrinsic evidence that the statement was made.

Rule 613, on its face, changes the common-law foundation requirements. The Rule provides that when a witness is examined concerning a prior statement, this statement need not be shown to the witness at the time of the examination. However, extrinsic evidence of the statement may not be introduced unless the witness is given some opportunity, at some point in the trial, to explain, repudiate, or deny the statement. n2 If the witness denies the statement, extrinsic evidence of the statement is admissible subject to *Rule 403*.

[2] Disclosing the Contents to Opposing Counsel

Under *Rule 613*, witnesses need not be shown the statement or told of its contents at the time they are asked about it. Nevertheless, on request opposing counsel must be shown the statement, or its contents must be disclosed to counsel. This provision protects the opposing party against unwarranted insinuations that a statement has been made. n3 The language of *Rule 613(a)* providing that "on request the same [prior statement] shall be shown or disclosed to opposing counsel" has the potential to cause confusion. Apparently, a written statement is to be shown to counsel and an oral one is to be disclosed. Although the Rule is not crystal clear, it appears that a statement is to be turned over or disclosed in the form in which the questioner has secured the statement. The time for the showing or disclosure is when the witness is examined about the prior statement, assuming that a proper request is made. In some Courts, the Rule may advance the timing of disclosure, which otherwise might not come until the end of cross-examination.

[3] Opportunity for Witness to Explain or Deny the Statement

Rule 613(b) provides that the witness must be afforded an opportunity to explain or to deny the statement but removes the common-law requirement that the foundation be made prior to the introduction of the prior inconsistent statement.

One rationale for this important change in *Rule 613* is that it permits several collusive witnesses to be examined before disclosure of a joint prior inconsistent statement. A second reason for the change is that the old common-law rule was sometimes applied inflexibly; a party who inadvertently neglected to lay a foundation was barred from introducing relevant prior inconsistent statements.

In most cases involving the application of *Rule 613* the foundation will be developed in the same manner as it is in the traditional common-law jurisdiction. Laying the foundation while the witness is on the stand testifying will usually prove to be the most efficient way of proceeding. For one thing, a presentation of the statement to the witness may be needed to satisfy authentication or best evidence concerns. And, if no other reason applies, it may be risky to dispense with a prior foundation, because the witness may become unavailable before the statement is proffered. If that occurs, the admissibility of the extrinsic evidence is subject to the discretion of the Court; and that discretion is rarely exercised in favor of a party who had a chance to confront the witness with the statement and did not do so. n4

The Eleventh Circuit noted the prudence of adhering to the common-law procedure as a practical matter in *Wammock v. Celotex Corp., 793 F.2d 1518, 1522 (11th Cir. 1986)* :

> *Rule 613(b)* does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction as the *preferred* method of proceeding. In fact, where the proponent of the testimony fails to do so, and the witness subsequently becomes unavailable, the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement. For this reason, most courts consider the touchstone of admissibility under rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements.

[4] Reasons for Relaxing the Foundation Requirement

Professor Edward Cleary, the Reporter for the original Advisory Committee, explained the modification of the common-law foundation requirement as follows: n5

> The objectives of the [common-law] procedure are: (1) to save time, since the witness may admit having made the statement and thus make the extrinsic proof unnecessary; (2) to avoid unfair surprise to the opposite party by affording him an opportunity to draw a denial or explanation from the witness; and (3) to give the witness himself, in fairness, a chance to deny or to explain the apparent discrepancy. These are desirable objectives. The second and third can, however, be achieved by affording an opportunity to explain at any time during the trial, and no particular time sequence is required. Only the first of the objectives named above, saving time, points in the direction of the traditional foundation requirement on cross-examination, and even here countervailing factors are present: the time saved is not great; the laying of the foundation may inadvertently have been overlooked; the impeaching statement may not have been discovered until later; and premature disclosure may on occasion frustrate the effective impeachment of collusive witnesses. The argument may be made that the recalling of a witness for further cross-examination will afford an adequate solution for these difficulties and hence the traditional procedure should be retained. The argument is not a sound one. In the first place, recall for cross-examination has traditionally been very much within the discretion of the judge and seems likely to continue so. And secondly, the admissibility of prior inconsistent statements ought not to be enmeshed in the technicalities of cross-examination when all that is being sought is the presentation of an opportunity to deny or explain.
>
> In view of these considerations, the Advisory Committee concluded that the objectives could better

> be achieved by allowing the opportunity to deny or explain to occur at any time during the trial, rather than limiting it to cross-examination.
>
> Moreover, occasionally situations may arise where the interests of justice will warrant dispensing entirely with the opportunity to explain or deny. Thus if a witness becomes unavailable through absence or death, the judge ought to have discretion to allow the impeaching statement.
>
> In my view, the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of trial. The rule ought, however, to remain as drawn, leaving the practical approach to the good sense of the practitioner.

[5] Criticism of Relaxing the Foundation Requirement

We believe that the common-law rule has much to recommend it, at least if not applied in a draconian fashion. We wonder about the wisdom of the modification. Even Professor Cleary recognized that time is wasted in introducing extrinsic evidence where the witness if confronted would have readily admitted making the statement. This is not a de minimis consideration. We also fear that prior statements that a witness would readily acknowledge will be given more impact than they might warrant, because the statements will not be followed immediately by an explanation. The jury may, understandably but inappropriately, think the explanation to have been concocted after the fact.

We recognize that the change wrought by *Rule 613* is directed to legitimate problems. The common-law rule was in some cases a trap for the unwary: (1) statements were sometimes lost due to an inadvertent failure to lay a foundation; (2) problems were presented when inconsistent statements were discovered after the witness testified; and (3) most importantly, there was the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

However, these problems could be better handled by adding to the standard common-law foundation requirement a sentence allowing the Trial Court the discretion to dispense with the foundation requirement when that is necessary in the interests of justice. This would be a solution similar to that provided in *Rule 611(b)*, which recognizes the merits of the common-law rule of scope limitations on cross-examination, but which nonetheless permits the Trial Court in its discretion to dispense with the rule in appropriate circumstances. A sound proposal would also include specific language authorizing the Trial Judge to dispense with a prior foundation requirement where the party's failure to lay the foundation was inadvertent, or was otherwise the result of good cause.

Judge Selya, concurring in *United States v. Hudson, 970 F.2d 948, 959 (1st Cir. 1992)* , has expressed a view similar to our own:

> [The common-law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

[6] Federal Courts' Reversion to Common-Law Rule

Despite the language of the Rule and the apparent intent of the drafters, many Federal Courts have held that *Rule 613(b) does not* abolish the traditional common-law requirement of laying a foundation with the witness prior to the introduction of a prior inconsistent statement. n6 Even those Courts that read the Rule to dispense with a prior foundation requirement nonetheless recognize that a Trial Court has the power to control the order of proof under *Rule 611(a)*, and that this power can be exercised on a case-by-case basis to require a prior foundation before admitting

extrinsic evidence of an inconsistent statement. As the First Circuit stated in *United States v. Hudson, 970 F.2d 948, 956 n.2 (1st Cir. 1992)* : "*Rule 611(a)* allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit." The *Hudson* Court concluded that *Rule 613* "was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness." n7

We suggest that the judicial reluctance to apply the Rule is a good indication that the Rule itself is unsound.

[7] The Need to Confront the Witness with Minor Inconsistencies

Even if the Rule is read to change the common-law prior foundation requirement, it seems clear that there are still situations in which the cross-examiner must confront the witness with her inconsistent statement or lose all chance of bringing it up. One example is when the inconsistent statement involves only a minor inconsistency, unrelated to the facts in dispute. Extrinsic evidence of a minor inconsistency ordinarily would not be permitted under *Rule 403*; therefore the witness must be asked about it or the inconsistency will never be brought before the jury. n8 As one Court has put it: "Even if a proponent is not always required to lay a prior foundation under *Rule 613(b)*, a trial court is free to use its informed discretion to exclude extrinsic evidence of prior inconsistent statements on grounds of unwarranted prejudice, confusion, waste of time, or the like." n9

Thus, if a witness states she had just come from the movie "Paycheck" when she saw the defendant kill the plaintiff, her prior statement that she had just come from the movie "Reindeer Games" when she witnessed the event would have some bearing on her credibility; the fact that she got her Ben Affleck movies mixed up may say something about whether her account is credible, so the inconsistency is a proper subject of limited inquiry. But unless the examiner confronts the witness with her earlier inconsistent statement, the jury will never learn of it. The inconsistency goes to a minor matter because it is not central to her account of the facts in dispute. If the examiner offered extrinsic evidence of the inconsistent statement, it would be rejected under *Rule 403*. n10 Thus, the only way for the jury to hear about the inconsistency is to confront the witness with it. If the witness denies making the statement, it could not be proved through extrinsic evidence, however. n11 But at least the jury would have heard about the prior statement.

[8] Extrinsic Proof Not Required

The Rule permits extrinsic evidence of a prior inconsistent statement under certain circumstances, though it does not require a party to prove through extrinsic evidence that the statement was made. n12 But the lack of an extrinsic proof *requirement* could lead to abuse. Counsel might ask about a prior inconsistent statement without any basis to believe that such a statement ever was made. In order to protect against this possibility, Trial Courts have imposed safeguards by using their authority under *Rules 611* and *403*. The Court may, upon request, demand that examiners articulate a basis for concluding in good faith that the prior inconsistent statement was in fact made. n13 In this regard, the review by the Court is similar to that exercised when a party seeks to cross-examine a character witness by asking the witness about the defendant's prior bad acts, or cross-examines a witness about prior bad acts under *Rule 608*. See the discussion in the Editorial Explanatory Comment to *Rules 405* (*§ 405.02[5]*) and *608* (*§ 608.02[9]*). Also, the Trial Court should instruct the jury that "statements by counsel, including assertions of fact, are not to be considered as evidence." n14

[9] Statement Must Have Been Made By the Witness

Under *Rule 613* the examiner must show not only that the statement proffered was made, but also that it was made by the witness who is being impeached. For example, in *United States v. Chavez, 979 F.2d 1350 (9th Cir. 1992)* , Officer Benedetti testified that he saw Chavez hand a coconspirator a small yellow packet containing heroin. Chavez sought to offer into evidence a diagram that he contended was drawn by another officer, Ramirez, during a meeting with defense counsel prior to trial. The diagram drawn by Ramirez indicated a different place for the heroin transaction from that testified to by Benedetti. Ramirez drew the diagram based on the description given to him by Benedetti prior to trial.

However, at trial, Officer Benedetti testified that he had never seen the diagram before it was shown to him during cross-examination. Chavez presented no evidence to contradict Benedetti's denial of authorship. Under these circumstances, the Court found no error in the exclusion of the diagram. The Court concluded that *Rule 613* was not violated "because the diagram did not contain admissible evidence that tended to prove that Officer Benedetti had made a prior inconsistent statement." n15

[10] Relationship to Other Rules

See the Editorial Explanatory Comment to *Rule 608*, *§ 608.02[15]*, for a discussion of the distinction between impeachment with a prior inconsistent statement and impeachment of a witness whose statement is offered to show a bad character for veracity. The distinction is important because if the impeachment is under *Rule 608(b)*, extrinsic evidence of the statement is not permitted -- the party must accept the witness' denial. In contrast, if the impeachment is under *Rule 613*, and that Rule's foundation requirements are met, extrinsic evidence of the statement can be introduced -- subject to a balance of probative value against the risk of prejudice, confusion, and delay under *Rule 403*.

Rule 801(d)(1)(A) provides for substantive use of prior inconsistent statements only if made under oath at a formal proceeding; inconsistent statements not falling under that Rule (or any other exception to or exemption from the hearsay rule), can be used for a limited purpose only. The Courts have expressed concern that lawyers may attempt to call witnesses and impeach them with inconsistent statements in the hope that the jury will consider the inconsistent statements as substantive evidence. This matter is discussed in the Editorial Explanatory Comment to *Rule 607*, *§ 607.02[2]*.

Impeachment of a hearsay declarant by means of a prior inconsistent statement is covered in *Rule 806*. *Rule 806* provides that a hearsay declarant may be impeached with an inconsistent statement even though the declarant never had an opportunity to explain or deny the statement. It obviously makes no sense to impose a prior foundation requirement for statements of hearsay declarants. Thus, *Rule 613* is inapplicable to the use of inconsistent statements to impeach a hearsay declarant.

Rule 613 expressly states that a party may offer an admission by a party-opponent without ever giving the opponent an opportunity to explain or deny the admission. n16 This is because party-opponents will have plenty of opportunity to explain or deny their statements, either in their own cases or on rebuttal.

[11] Prior Inconsistent Conduct, Silence, and Omissions

The final paragraph of the Advisory Committee's Note indicates that the Rule is not intended to apply to impeachment by evidence of prior inconsistent conduct. While extrinsic proof of inconsistent conduct may be admissible under some other Rule, there is no authority for admission under *Rule 613*. n17 However, *Rule 613* is a double-edged sword in that it authorizes the use of extrinsic evidence, but it also imposes a foundational requirement that the witness have some opportunity to explain the inconsistency at some point in the trial. So, if evidence of inconsistent conduct is otherwise admissible, *Rule 613* is inapplicable, and it would seem that the conduct could be admitted without any opportunity given for the witness to explain it.

A witness's prior silence may be inconsistent with his testimony at trial. Suppose a witness testifies at trial and identifies Larry, Moe, and Curly as the bank robbers, while his previous statement to police officers implicated only Larry and Moe. His prior omission as to Curly is inconsistent with his later testimony; it would have been natural to mention Curly in the original statement, and the failure to mention Curly is, in these circumstances, equivalent to saying that "Curly was not there." Courts have treated this type of omission as a "statement" covered by *Rule 613*, rather than as conduct outside the scope of the Rule. We believe this is the correct approach, because the failure to mention a matter when it would be natural to do so, as in the above hypothetical, is really a "statement" that the matter never happened. n18

In the above hypothetical, the witness made a statement that did not include a material fact later mentioned at trial. But the principle -- of inconsistency and of applicability of *Rule 613* -- can apply even where the witness made no affirmative statement at all. That is, complete silence can be treated as a "statement" inconsistent with trial testimony, if at the time of the silence a reasonable person would have then made a statement similar to that later made at trial. n19

FOOTNOTES:

(n1)Footnote 1. See Queen Caroline's Case, 2 Brod. & Bing. 284, *129 Eng. Rep. 976 (1820)* . For a discussion of the case and the rule, see Stern & Grosh, *A Visit with Queen Caroline: Her Trial and Its Rule*, 6 Cap. U. L. Rev. 165 (1976).

(n2)Footnote 2. See, e.g., *United States v. McCall, 85 F.3d 1193 (6th Cir. 1996)* (no error when the government in rebuttal introduced extrinsic evidence of a defense witness' prior inconsistent statement; while the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government's impeachment attempt was a failure); *United States v. Hudson, 970 F.2d 948 (1st Cir. 1992)* (foundation for admitting extrinsic evidence of a prior inconsistent statement does not require that the witness have an opportunity to explain or deny the statement before it is introduced; all that is required is that the witness at least be available for recall during the course of the trial; a Trial Court can exercise its discretion to require a prior confrontation, but here the Court labored under a misapprehension of law that a prior confrontation was required by law; therefore it was reversible error to exclude a prior inconsistent statement of a government witness on the ground that the witness was not confronted with the statement before it was proffered).

(n3)Footnote 3. See, e.g., *United States v. Lawson, 683 F.2d 688 (2d Cir. 1982)* (*Rule 613(a)* gives opposing counsel a right to see written statements used to impeach a witness; there is no judicial discretion to deny inspection).

(n4)Footnote 4. See, e.g., *United States v. Schnapp, 322 F.3d 564 (8th Cir. 2003)* (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness; counsel had not asked the witness about the statement either on cross-examination or when recalled by the defense, and it was well within the Judge's discretion not to permit deviation from the traditional procedure of providing a witness an opportunity to explain or deny the statement); *In re Nautilus Motor Tanker Co., 862 F. Supp. 1251 (D.N.J. 1994)* (inconsistent statements are not admissible where the plaintiff did not try to offer them until the end of the trial, and at that point there was no opportunity to recall the witnesses; the Court chose not to exercise its discretion to dispense with the witness' explanation or denial).

(n5)Footnote 5. Letter from Edward W. Cleary to Hon. William L. Hungate, May 8, 1973, in Supplement to Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 74-75 (1973).

(n6)Footnote 6. The following cases are among those that retain the common-law rule: *United States v. DiNapoli, 557 F.2d 962 (2d Cir. 1977)* ; *United States v. Devine, 934 F.2d 1325 (5th Cir. 1991)* ; *United States v. Sutton, 41 F.3d 1257 (8th Cir. 1994)* (the Trial Judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Cutler, 676 F.2d 1245 (9th Cir. 1982)* ; *United States v. Bonnett, 877 F.2d 1450 (10th Cir. 1989)* .

The following cases are among those holding that *Rule 613(b)* dispenses with a general prior foundation requirement: *United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984)* ; *United States v. Young, 86 F.3d 944 (9th Cir. 1996)* (rejecting the argument that an inconsistent statement was inadmissible because no foundation was laid on cross-examination; all that is required is that the witness have an opportunity to explain or deny the statement at some point, and such an opportunity can be provided by recalling the witness); *Wammock v. Celotex Corp., 793 F.2d 1518 (11th Cir. 1986)* (noting, however, that prior foundation is the preferred method).

(n7)Footnote 7. See also *United States v. Marks, 816 F.2d 1207, 1211 (7th Cir. 1987)* (Trial Judge is entitled despite *Rule 613* "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors").

(n8)Footnote 8. See, e.g., *United States v. Grooms, 978 F.2d 425 (8th Cir. 1992)* (witness's prior inconsistent statement could not be proved by way of extrinsic evidence because the inconsistency went to a minor matter and therefore such proof was inadmissible under *Rule 403*); *Taylor v. National R.R. Passenger Corp., 920 F.2d 1372 (7th Cir. 1990)* (fourteen-year-old military medical records indicating complaints of back pain and a job application not mentioning back injuries were erroneously admitted; the records were irrelevant to the plaintiff's injury claim and under *Rule 403* extrinsic evidence was inadmissible to impeach his testimony).

(n9)Footnote 9. *United States v. Hudson, 970 F.2d 948, 956 n.2 (1st Cir. 1992)* .

(n10)Footnote 10. See, e.g., *Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988)* (Trial Court has discretion under *Rule 403* to exclude evidence not excluded by *Rule 613(b)*).

(n11)Footnote 11. See, e.g., *United States v. Grooms, 978 F.2d 425 (8th Cir. 1992)* (no abuse of discretion in excluding extrinsic evidence of an alleged prior inconsistent statement offered to impeach a government witness, as the disputed statement related only to a minor matter not affecting the substantive issues of the case); *United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987)* (en banc) (*Rule 613(b)* "does not state that extrinsic evidence must be admitted in all cases where a witness has had an opportunity to confront and explain it").

(n12)Footnote 12. See, e.g., *United States v. Gholston, 10 F.3d 384, 388 (6th Cir. 1993)* ("There is no requirement under *Rule 613* that a party who seeks to impeach a witness through alleged prior inconsistent statements must present extrinsic evidence to support the impeachment attempt.").

(n13)Footnote 13. See, e.g., *United States v. Silverstein, 737 F.2d 864 (10th Cir. 1984)* (the prosecutor erred in cross-examining the defendant about a statement he allegedly made; the prosecutor knew that the inmate to whom the statement allegedly was made was unavailable, and he had no proof of the statement; the Court found that the prosecutor improperly had tried to "use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.").

(n14)Footnote 14. *United States v. Gholston, 10 F.3d 384, 389 (6th Cir. 1993)* .

(n15)Footnote 15. See also *United States v. Almonte, 956 F.2d 27 (2d Cir. 1992)* (the defendant sought to prove that a witness had made a prior inconsistent statement by offering the notes of the statement prepared by a third party; the Court held that a third party's characterization of a prior statement of a witness cannot be admitted unless it is subscribed to by the witness being impeached, or else constitutes a verbatim transcription of that witness' own words; in the absence of endorsement by the witness, the proponent bears the burden of authenticating the transcription, which presents questions of conditional relevancy; in this case, the Court found that there was insufficient evidence to support a jury finding that the notes were an exact transcription; rather, the notes looked and sounded like a quickly jotted summary; such a shorthand characterization by someone other than the witness cannot be admitted as the witness' prior inconsistent statement).

(n16)Footnote 16. See, e.g., *Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364 (11th Cir. 1988)* (foundation requirement of *Rule 613* is not applicable when the statement is introduced as the admission of an agent of a party-opponent under *Rule 801(d)(2)(D)*).

(n17)Footnote 17. See, e.g., *United States v. Smith, 605 F.2d 839 (5th Cir. 1979)* (*Rule 613* provides no authority to admit extrinsic evidence that a witness acted in a manner contrary to his trial testimony).

(n18)Footnote 18. See, e.g., *United States v. Strother, 49 F.3d 869 (2d Cir. 1995)* (finding it was reversible error

to exclude a memorandum that was silent about a matter to which a bank official later testified at trial; it would have been "natural" for the bank official to include the fact in that memorandum, and therefore the failure to include it was inconsistent with her later testimony); *United States v. Sheffield, 992 F.2d 1164 (11th Cir. 1993)* (failure to assert a fact when it would have been natural to do so is tantamount to assertion of the nonexistence of that fact; this is admissible for impeachment purposes as a prior inconsistent statement).

(n19)Footnote 19. See, e.g., *United States v. Mercado, 412 F.3d 243 (1st Cir. 2005)* (no error in permitting the prosecution to cross-examine the defendant's ex-girlfriend about why she waited nine months to come forward if her exculpatory evidence were true; this was prior inconsistent silence that was relevant to impeach the witness).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 613 RULE 613

3-613 Federal Rules of Evidence Manual 613.03

613.03 Annotated Cases

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[1] Rule 613(a) -- Examining Witness Concerning Prior Statement

[a] Rule 613(a) -- Agent's Statement To Impeach

Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir. 1986) : The Court reversed a judgment for a plaintiff who claimed that he was injured when exposed to chemicals while working for a contractor at the defendant's plant. It found error in the Trial Judge's ruling prohibiting the defendant from cross-examining the plaintiff about a prior suit in which he attributed the same injuries to an explosion. The Court stated that "[a]n opening statement made by an attorney is admissible in a later lawsuit against his client," and that statements made in a pleading in a prior case are admissible for impeachment under *Rule 613* and as substantive evidence under *Rule 801(d)(2)*.

[b] Rule 613(a) -- Counsel's Right To Inspect

United States v. Lawson, 683 F.2d 688 (2d Cir. 1982) : After reversing a bank robbery conviction on another ground, the Court observed that *Rule 613(a)* gives opposing counsel a right to see written statements used to impeach a witness, and that there was no judicial discretion to deny inspection.

[c] Rule 613(a) -- Good-Faith Basis for Questions

United States v. Harris, 542 F.2d 1283 (7th Cir. 1976) : Affirming drug conspiracy convictions, the Court stated that it is reversible error to fail to produce the person to whom a prior statement was made if the statement was used to impeach a witness who denied making it.

United States v. Silverstein, 737 F.2d 864 (10th Cir. 1984) : The Court reversed an inmate's conviction for killing a fellow inmate. It found that the prosecutor erred in cross-examining the defendant about a statement he allegedly made

to another inmate that was used as circumstantial evidence of his guilt. Since the prosecutor knew that the inmate to whom the statement allegedly was made was unavailable and he had no proof of the statement, the Court found that he improperly had tried to "use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable."

[d] Rule 613(a) -- Showing Statement to Witness

United States v. Marks, 816 F.2d 1207 (7th Cir. 1987) : The Court affirmed convictions for conspiring to distribute marijuana, holding there was no error in requiring defense counsel to show an FBI report to a witness while cross-examining the witness concerning statements it contained. Although the Court recognized that *Rule 613(a)* abolished the requirement that a witness must be shown a written statement before being asked about it, the Court concluded that a Trial Judge "is entitled to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors."

Sloman v. Tadlock, 21 F.3d 1462 (9th Cir. 1994) : In a civil rights case, the Court held there was no abuse of discretion when counsel was required to impeach a witness with prior inconsistent statements "in an appropriate manner," by first letting her read the statements to herself and then to ask questions about the seeming inconsistency with her statements at trial. In *NLRB v. Bakers of Paris, Inc., 929 F.2d 1427 (9th Cir. 1991)* , the Court enforced a bargaining order issued to an employer, holding that it was error (but harmless) for the Administrative Law Judge to exclude evidence of employees' prior statements because the non-English-speaking-and-reading witnesses were unable to authenticate the statements before they were used as a topic of cross-examination. The Rule was drafted expressly to abolish the requirement that a prior inconsistent statement be presented to a witness, let alone be authenticated, before it was so used.

[e] Rule 613(a) -- Unofficial Transcript

United States v. Cody, 114 F.3d 772 (8th Cir. 1997) : The Court affirmed a cocaine conviction, finding no error when defense counsel was prohibited from using an unofficial transcript to cross-examine a police officer. The Trial Judge was reasonably concerned that the unofficial transcript of suppression hearing testimony "could contain inaccurate or incomplete information and that the witness's refusal to acknowledge the accuracy of statements read from that transcript would mislead the jury." The Judge had indicated that he would permit defense counsel to impeach the witness by playing portions of the tape-recorded testimony provided that it was cued to the proper spot.

[f] Rule 613(a) -- Unsigned or Unadopted Prior Statement

Jenkins v. TDC Mgt. Corp., 21 F.3d 436 (D.C. Cir. 1994) : In an action for breach of an employment contract, the defendant attempted to cross-examine the plaintiff's accountant about a statement allegedly made to an investigator, but was precluded because the memorandum being used by defense counsel was the investigator's summary, "not something [the accountant] acknowledged and accepted." Reversing, the Court noted that the Rule clearly contemplates the use of oral statements and gives no indication that an oral statement that happens to have been recorded in writing be adopted before being used for impeachment. If the problem was that the jury might have been deceived into believing the accountant had written the words on the notes being read by counsel, there was no obstacle to simply instructing the jury regarding the source of the memorandum.

[2] Rule 613(b) -- Extrinsic Evidence of Prior Inconsistent Statement of Witness

[a] Rule 613(b) -- Bias

United States v. Betts, 16 F.3d 748 (7th Cir. 1994) : The Trial Judge in a drug prosecution excluded testimony that a prosecution witness had said he would testify against the defendants in exchange for a government promise to have his sentence reduced, because the principal witness had not been given an adequate opportunity to explain or deny the statement on cross-examination before the extrinsic evidence was offered. The Court held there was no error, finding the weight of authority to require that a party seeking to prove bias through extrinsic evidence of a witness' prior statement must first give the witness an opportunity to explain or deny the statement, "even though *Rule 613(b)* is not strictly applicable." We would observe that even if the Rule were applicable, it does not require that the opportunity to explain or deny must be given *before* the extrinsic evidence is admitted.

[b] Rule 613(b) -- Collateral Matter

Taylor v. National R.R. Passenger Corp., 920 F.2d 1372 (7th Cir. 1990) : A jury verdict for the plaintiff in a FELA case was reversed because 14-year-old military medical records indicating complaints of back pain and a job application not mentioning back injuries had been erroneously admitted. The Court held that the records were irrelevant to the plaintiff's injury claim and were collateral extrinsic evidence inadmissible to impeach his testimony.

United States v. Grooms, 978 F.2d 425 (8th Cir. 1992) : The Court affirmed the defendant's conviction for abusive sexual contact, holding there was no abuse of discretion in excluding extrinsic evidence of an alleged prior inconsistent statement offered to impeach a government witness, as the disputed statement related only to a collateral matter not affecting the substantive issues of the case.

United States v. Higa, 55 F.3d 448 (9th Cir. 1995) : A principal government witness in a drug importation case had told investigators about and had testified before the grand jury regarding his and the defendant's participation in the conspiracy, but at trial he was evasive on direct and on cross-examination he testified that the investigators told him to lie and that he told the same story before the grand jury to avoid prosecution for perjury. The Court held there was no abuse of discretion in permitting witnesses to testify to the witness' prior statements and to admit grand jury testimony contradicting the trial testimony. Use of the previous testimony was not impeachment by past conduct but rather was impeachment by past statements, so the bar in *Rule 608(b)* on extrinsic evidence did not apply. Moreover, the evidence was not collateral, since the inconsistencies went not just to credibility but to matters at issue in the trial.

[c] Rule 613(b) -- Determination of Inconsistency

United States v. Martin, 694 F.2d 885 (1st Cir. 1982) : Affirming a conviction for mail fraud, the Court found that the exclusion of a prior statement by a victim who testified for the government was not improper, because defense counsel failed to show that the statement was inconsistent with her testimony. In *United States v. Tracey*, n1 the Court found no inconsistency between a witness' testimony that he was unaware that a lawsuit had been filed against him and documents evidencing the fact that a summons in the suit had been served by mail addressed to the witness' old address.

United States v. Trzaska, 111 F.3d 1019 (2d Cir. 1997) : The defendant had twice previously been convicted of firearms offenses. At this trial for firearms offenses, the defendant's son testified for the defense that in 1992 the defendant had said the son should take the guns then being stored at a friend's apartment because he "didn't want nothing to do with them anymore." To impeach the 1992 statement, the prosecution then offered the defendant's statement during the course of an illegal search leading to the instant charges that "I'm a drug addict with this [i.e., guns]. It's a sickness." Reversing, the Court held that this impeachment was erroneous. There is no necessary inconsistency between indicating a desire to dispose of specific guns and admitting an obsession with guns in general; further, the year's time lapse between the statements clouds whatever inconsistency might have existed. The argument

that there was an inconsistency between the defendant's admission that he possessed the guns found at the time of his arrest and the implicit denial that he possessed the guns in the friend's apartment was likewise unavailing, since the two statements referred to different guns. In *United States v. Agajanian*, n2 the Court held that a transcript of a taped conversation was sufficiently inconsistent to be admitted for impeachment, and that a diametric inconsistency is not required. In *United States v. Hall*, n3 a prosecution of a former customs inspector for converting property, the Court held the government properly introduced a complaint letter by the victim after the defense suggested that the letter was inconsistent with the victim's testimony. Whether or not a charge of recent fabrication had been made, the Court said that the jury should have been permitted to make a judgment as to whether the letter was inconsistent as the defense claimed.

United States v. Barile, 286 F.3d 749 (4th Cir. 2002) : In his trial for making materially false statements to the Food and Drug Administration, the defendant sought to impeach a government witness with documents created by the FDA's Office of Criminal Investigation during its investigation of a submission by the defendant's company to the FDA concerning a product enhancement. The Judge precluded the examination on the ground that statements in the documents attributed to a witness were not specifically inconsistent with her testimony, but the Court sharply disagreed, noting that the inconsistency was plain. Because statements of a third party that are not adopted by a witness cannot be used for prior inconsistent statement impeachment, the Court noted that on retrial the Judge must determine whether the statements were reasonably attributable to the witness.

United States v. Misher, 99 F.3d 664 (5th Cir. 1996) : In a drug trafficking prosecution, a defendant attempted to impeach a testifying officer by introducing an affidavit the officer had given in support of a search warrant, which listed the persons the officer believed to be members of the conspiracy but did not include the defendant's name. Affirming, the Court found no abuse of discretion, since the officer had had over a year to change his opinion of the scope of the conspiracy, and nothing in the affidavit directly contradicted the officer's testimony. In *United States v. Devine*, n4 a prosecution witness in a drug case testified on cross-examination that he did not remember a prior conversation. The Court held there was no error in excluding extrinsic evidence of the conversation. The claim of faulty memory did not constitute an inconsistent statement, so the extrinsic evidence would be inadmissible hearsay.

Vaughn v. Willis, 853 F.2d 1372 (7th Cir. 1988) : Affirming a judgment for a prisoner who was raped by other inmates, the Court held that the Trial Judge properly excluded a letter that the defendant-guard offered to impeach an inmate, who had testified at a deposition and subsequently stated that he would not testify at trial because of fear for his family. The Trial Judge found that the letter was not plainly inconsistent and that it would be unfair to admit it without admitting evidence that the witness feared for his safety, and the defendant objected to admission of evidence of the witness' fear.

Weyers v. Lear Operations Corp., 359 F.3d 1049 (8th Cir. 2004) : The Court reversed a judgment for a terminated employee in an age discrimination action, holding it was an abuse of discretion to preclude the employer from introducing for impeachment purposes the plaintiff's prior statement to the EEOC, which indicated that the plaintiff had not been subject to age-related comments until a few months into her appointment. In contrast, at trial the plaintiff testified that she was harassed about her age from the very beginning of her employment. In a drug case, *United States v. McCrady*, n5 a government witness initially stated that she could not remember whether the defendant told her that the prosecution was a frame-up, but admitted that such a statement had been made when confronted with her own pretrial statement. When the defendant denied making the statement, an Assistant U.S. Attorney was permitted to testify that the government witness had said that the defendant had made the statement. The Court found that the attorney's testimony was unwarranted, since it did not impeach the defendant, and it was not inconsistent with the government witness' testimony.

United States v. Billue, 994 F.2d 1562 (11th Cir. 1993) : At his trial for felon firearm possession, the defendant asserted he had lent his identification to a person who sold a rifle at a pawnshop. After the pawnshop operator said he could not recall seeing anyone other than the defendant, nor could he recall telling an ATF agent the defendant was alone, the agent testified to the prior statement. The Court held this was proper, as "[t]he law is clear that if a witness had denied making a statement or has failed to remember it, the making of the statement may be proved by another witness," and the government had not acted in bad faith in calling the pawnshop operator.

[d] Rule 613(b) -- Inconsistency With Tax Returns

Kassim v. City of Schenectady, 415 F.3d 246 (2d Cir. 2005) : The operator of a variety store sued for violation of § 1983 after the City closed his business without notice when it foreclosed on his lessor for delinquent property taxes. To prove his losses, the plaintiff offered his business records, which indicated higher profits than his recent tax returns, but the Judge excluded the records, apparently either because the tax returns were more reliable or because of a notion that a taxpayer is estopped from inconsistently claiming higher earnings in a civil suit against a private party. The Court held that neither explanation would justify the ruling, since "[w]here a party has made a prior statement inconsistent with the one the party seeks to advance at trial, a question of credibility arises, which is for the jury, not the judge, to assess," and there is no rule of estoppel regarding earnings reported on tax returns, but "[t]he credibility of plaintiff's evidence of his business profits, in light of its inconsistency with his tax return, was for the jury to assess." The error was harmless, however, because the business records were not sufficiently authenticated.

[e] Rule 613(b) -- Need for Extrinsic Evidence

United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991) : In a sexual assault and robbery prosecution, the defendant's father testified that the defendant was left-handed, contrary to the complainants' testimony. Reversing the conviction on other grounds, the Court noted that the government was properly permitted to ask the witness about prior statements to a pretrial services officer indicating almost no contact with the defendant and, when he did not recall the conversation, to call the officer as a witness.

United States v. Greer, 806 F.2d 556 (5th Cir. 1986) : Upholding convictions for racketeering, the Court held it was not error to exclude a tape-recorded statement of a government witness, since the witness admitted on cross-examination that he made the inconsistent statement.

United States v. Lashmett, 965 F.2d 179 (7th Cir. 1992) : As part of a scheme to defraud an insurer, the defendant's accomplices (and principal prosecution witnesses) filed a complaint and affidavits in a civil suit. At the fraud trial they testified that statements in the papers were false; finding no impeachment value once the lies were admitted, the Trial Judge excluded the papers. The Court held that extrinsic proof should be admitted even if the witness admits making a prior inconsistent statement because it will emphasize the contradiction to the jury and best inform them of the document's impeaching weight and significance; the error was harmless, however. See also *United States v. Holt* n6(the fact that a witness seeks to explain away prior inconsistent statements does not deprive the government of the right to offer the statements as impeaching evidence).

United States v. Soundingsides, 820 F.2d 1232 (10th Cir. 1987) : The Court held it was error to admit testimony by two FBI agents concerning a prior inconsistent statement of a witness who denied seeing a murder defendant beat the victim. Since the witness admitted that he had made a prior statement, the testimony was unnecessary and brought hearsay before the jury.

United States v. Jackson, 748 F.2d 1535 (11th Cir. 1984) : Affirming a defendant's Hobbs Act conviction, the Court found that "[t]he prosecution does not lose its right to introduce a contradictory statement because the defendant in direct examination attempts to explain away the contradiction by describing his uncommunicated state of mind in making one of the statements."

[f] Rule 613(b) -- No Inconsistency -- Witness Testified To Making Statement

United States v. Arena, 180 F.3d 380 (2d Cir. 1999) : In a Hobbs Act prosecution arising from butyric acid attacks on abortion providers, the Court held there was no abuse of discretion when the defendant was prohibited from impeaching the principal prosecution witness with statements to a probation officer indicating that the defendant was not involved in the incidents. Because the witness herself testified to making the statements to the probation officer, the excluded statements did not satisfy the requirement that statements offered for impeachment be inconsistent with trial testimony.

Rush v. Illinois Cent. R.R., 399 F.3d 705 (6th Cir. 2005) : The child plaintiff was injured in a fall from a railcar on which he and other children were playing. Within several hours of the accident, a risk manager/railroad police officer interviewed three of the children. The plaintiff called two of the interviewed children as witnesses. The Court held that it was error (but harmless) to admit an audio recording to impeach one of the children after he admitted making inconsistent statements.

[g] Rule 613(b) -- Omission As Inconsistent Statement

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : The Court affirmed convictions for robbery and firearms offenses, finding no error in the exclusion of evidence that a prosecution witness's grand jury testimony had not included certain details that she had testified to at trial. The witness had not been asked about the details during her grand jury testimony, and thus there was no inconsistency when she was asked about those details and testified to them at trial.

United States v. Strother, 49 F.3d 869 (2d Cir. 1995) : In a prosecution for obtaining funds from a financial institution by means of false pretenses, the disputed question was whether the defendant asked a bank official to honor a check for $82,000 drawn on insufficient funds, on the promise that he would wire in money to cover it, or had asked the official to hold the check rather than to pay it and she mistakenly paid it. The Court held it was error to exclude memoranda in which the bank official described the transaction but did not explicitly mention that the defendant had asked her to pay the check, because they were inconsistent with the official's testimony at trial that the defendant specifically asked her to pay the check, and it would have been "natural" for the bank official to include the defendant's request to pay the check in her memoranda.

United States v. Leach, 613 F.2d 1295 (5th Cir. 1980) : A witness may be impeached by showing that he omitted a matter when making a prior statement, although the Trial Judge has discretion to rule on whether an omission is actually inconsistent with trial testimony. In *Busbee v. Sule*, n7 the Court held that the District Judge did not err in admitting as impeachment evidence a copy of an investigating officer's accident report, which revealed that no charges were brought against a defendant.

Lampkins v. Thompson, 337 F.3d 1009 (8th Cir. 2003) : The plaintiff in a civil rights action alleged that federal agents had unconstitutionally detained him at an airport. When the agents testified that they had seen the plaintiff's

ticket before the stop and that it had another passenger's name on it, the plaintiff sought unsuccessfully to introduce the agents' prior sworn statement, which said nothing about seeing the name on the ticket until after the stop. Affirming a judgment for the defendants, the Court found no abuse of discretion in exclusion of the evidence, since the omission was not probative to impeach in the absence of a statement that the affidavits contained all the facts the declarant knew about the incident, and since the affidavits were likely to mislead or confuse the jury.

United States v. Sheffield, 992 F.2d 1164 (11th Cir. 1993) : The defendant's conviction for embezzling government property was reversed because he was not permitted to introduce testimony by his supervisor that his subordinate, the principal prosecution witness, had said nothing about being authorized to act by the defendant when confronted with evidence of wrongdoing. That silence was inconsistent with the subordinate's trial identification of the defendant as the architect of the scheme.

[h] Rule 613(b) -- Opportunity To Explain or Deny

[i] Rule 613(b) -- Prior to Extrinsic Evidence

United States v. Hudson, 970 F.2d 948 (1st Cir. 1992) : After witnesses, including the defendant's brother, testified under a grant of immunity about drug transactions, the defense offered evidence that the witnesses had participated in jailhouse conversations indicating that the defendant was not involved in drugs and that the brother was upset at the defendant for beating him out of gambling money and not taking care of his family. The Court held that although a witness had not been confronted with his prior inconsistent statements while on the witness stand, he was available to be recalled to explain it, so exclusion was error. One Judge, concurring, believed that the Circuit should reconsider its precedents and join most of the other Circuits in requiring that a proper foundation be laid before introduction of extrinsic impeachment evidence.

United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979) : The Court noted that error in barring the introduction of a prior inconsistent "statement" (the failure of a witness to identify a defendant at the first trial) until the witness was given a chance to explain was harmless, in part because the witness could have been recalled by the defense and had been cross-examined for two and one-half days without being asked about the nonidentification. In *United States v. King*, n8 the Court noted that under *Rule 613* counsel is not required to confront a witness with a prior inconsistent statement before offering it, but observed that in some instances failure to elicit information from a witness about a prior inconsistent statement might lead to later exclusion of the evidence on the ground that it would take more time to present the evidence than would be warranted in the circumstances.

United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977) : The Court affirmed convictions for holding persons to involuntary servitude, and relied on *Rule 613(b)* as persuasive authority for the Trial Judge's treatment of an inconsistent statement made *after* a witness testified at trial. The Judge admitted extrinsic evidence of the statement before the witness was recalled and afforded any opportunity to explain or deny the statement.

United States v. McCall, 85 F.3d 1193 (6th Cir. 1996) : Affirming a conviction for bank robbery, the Court found no abuse of discretion where the government, in its rebuttal, introduced extrinsic evidence of a defense witness' prior inconsistent statement. While the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government's impeachment attempt was a failure. In a prosecution involving false entries in bank records, *United States v. McGuire*, n9 the government offered evidence of an inconsistent statement by a defense witness made after the witness testified and was excused. The Court expressed disapproval of the government's failure to inform the defendants of its intention to offer the statement, but it

found that the defendants could have arranged for the witness to be returned as a rebuttal witness if they believed that an opportunity to examine the witness about the statement was important.

United States v. Valencia, 913 F.2d 378 (7th Cir. 1990) : The defendant in a drug conspiracy case was not permitted to ask a DEA agent about statements given him by a witness who had previously testified, because the defendant had not confronted the witness with the statements during his cross-examination. The Court held that any error in the ruling, given the possibility that the witness could have been recalled during rebuttal to explain or deny the prior statements, was harmless.

United States v. Schnapp, 322 F.3d 564 (8th Cir. 2003) : Affirming a conviction for arson, the Court found no abuse of discretion when the defendant was precluded from testifying to an investigator's statement, regarding the cause of the fire, that was inconsistent with testimony the investigator gave during the government's case-in-chief. The investigator had not been asked about his inconsistent statement, either on cross-examination or on being recalled by the defense before the defendant testified, and it was well within the Judge's discretion not to permit deviation from the normal course of providing a witness with the opportunity to explain or deny an inconsistent statement before admitting extrinsic evidence of it. In *United States v. Sutton, 41 F.3d 1257 (8th Cir. 1994)* , the Court affirmed bank robbery and firearm convictions, holding that it was proper to exclude testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand. We note that under the language of *Rule 613(b)* a party should be able to offer inconsistent statements to impeach a witness who has already testified, provided that the witness can be recalled and given an opportunity to explain or deny the statements. However, as discussed in the Editorial Explanatory Comment, *§ 613.02[6]*, many Courts have reverted to a general requirement of a prior foundation before extrinsic evidence of a prior inconsistent statement may be admitted. In a drug-possession case, *United States v. Hechavarria*, n10 the Court held there was no prejudicial error in refusing to admit a prior statement of a government witness because the defendant did not question the witness regarding the statement while the witness was on the stand. In *United States v. Lynch*, n11 the Court affirmed murder and related convictions, holding there was no error in barring extrinsic evidence of government witnesses' inconsistent statements. The defendants had not laid a foundation for the statements during cross-examination of the witnesses, and the Court observed that there were logistical difficulties in arranging for the recall of inmate witnesses. In *Jones v. Collier*, n12 the Court affirmed judgments for the defendants in a civil rights case, holding that the Trial Judge did not err by refusing to recall a witness who was 300 miles away or to halt the trial so that a transcript of his prior testimony could be prepared. The Court stated that the attorney for the plaintiff knew that the witness had given inconsistent testimony and that "[w]hen inconsistent testimony is presented, it is elementary to lay a foundation for rebuttal if rebuttal is to be presented."

United States v. Young, 86 F.3d 944 (9th Cir. 1996) : During the government's case, cooperating witnesses, including one John Drake, testified that the defendants used Drake as a middleman to distribute kilogram quantities of cocaine. The defendant then called a witness to testify to hearing Drake say he was "falsely accusing somebody as being [his] supplier," but the witness asserted his self-incrimination privilege. Reversing the conviction on other grounds, the Court noted that the testimony would have been admissible even though Drake had not been asked specifically about the statement, since the government would have been free to recall Drake as a witness and give him an additional opportunity to explain or deny the statement attributed to him.

Wilmington Trust Co. v. Manufacturers Life Ins. Co., 749 F.2d 694 (11th Cir. 1985) : The Court held, in affirming judgments for beneficiaries suing to recover on a life insurance policy, that the plaintiff properly impeached a defense witness by proving an inconsistent statement during rebuttal testimony, even though the witness had not been asked about the statement on cross-examination. The defendant could have requested an opportunity during surrebuttal for the witness to explain the statement; the opportunity to explain under *Rule 613* need not precede the admission of extrinsic

evidence.

[ii] Rule 613(b) -- Opportunity To Explain or Deny -- Requirement in General

United States v. Greer, 806 F.2d 556 (5th Cir. 1986) : Upholding convictions for racketeering, the Court held there was no error in excluding extrinsic evidence of a witness' out-of-court statement where the witness was never given a chance to explain or deny the statement. In *In re Corrugated Container Antitrust Litig.*, n13 the Court affirmed a judgment for the defendants in an antitrust case, holding that the Trial Judge properly rejected the plaintiffs' attempt to introduce, as substantive or impeachment evidence, an interview conducted by government attorneys with a witness pursuant to an immunity grant. The plaintiffs deposed the witness and used his deposition as evidence, but at a second deposition the witness invoked his privilege against self-incrimination. The Court reasoned that the interview statements could not be used under *Rule 613*, since the opposing party had no opportunity to interrogate the witness concerning his interview in light of his privilege claim.

Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) : Affirming a judgment for the defendant in a medical malpractice suit, the Court held there was no abuse of discretion in excluding a postoccurrence letter from the patient's family physician offered to impeach cross-examination testimony by the physician at his videotaped deposition. On redirect examination at the deposition, counsel had only asked the physician whether he wrote the letter and had neglected to ask the witness any questions about the contents of the letter or to give the witness a chance to explain the circumstances in which he wrote the letter. In an airplane crash case, *Nachtsheim v. Beech Aircraft Corp.*, n14 the Court held that the Trial Judge properly excluded a document written to the National Transportation Safety Board by one of the defendant's officers that was offered at trial to impeach the testimony of a defense witness. Analogizing the situation to *Rule 613(b)*, the Court agreed it could be unfair to impeach a witness with a document that was not shown to him before he was excused and which he had no opportunity to explain.

United States v. Moore, 149 F.3d 773 (8th Cir. 1998) : A conspirator in a continuing criminal enterprise gave a tape-recorded statement, in which he identified the defendant as the ringleader, to federal agents after his arrest. When he named another as leader during testimony at trial, the government was permitted to introduce the entire tape-recorded statement during its rebuttal case. Affirming, the Court held that although the government during cross-examination did not confront the witness with every statement on the tape, he was given a substantial opportunity to explain his prior statements before the tape was admitted. In *United States v. Wright, 119 F.3d 630 (8th Cir. 1997)* , a prosecution for sexual abuse of a four-year-old girl, the Court found no error when the defense was precluded from offering statements the victim had given to a government psychologist as prior inconsistent statements. When the victim had earlier testified, she had not been given an opportunity to explain or deny the statements, and the Court found no interests of justice that called for excusing compliance with that requirement. In *United States v. Miller*, n15 the Court affirmed methamphetamine-related convictions, but it held that the Trial Judge erred in refusing to allow the defendant to impeach the testimony of a government witness by calling a jailer to testify about an inconsistent statement by the witness that was material to the case. The witness was cross-examined about the prior statements, and denied them. This was all the foundation necessary.

United States v. Mitchell, 113 F.3d 1528 (10th Cir. 1997) : On cross-examination in a bank robbery case, a prosecution witness denied that she had had trouble with memory and forgetfulness. The defense was not permitted to introduce a psychological record in which she had said she had some problems with forgetfulness since the robbery, because she testified that she could not remember making the statement to her psychologist. The Court held that exclusion of the record was error (but harmless), since the witness had been given an opportunity to explain or deny the statement, which was inconsistent with her trial testimony.

Wammock v. Celotex Corp., 793 F.2d 1518 (11th Cir. 1986) : In an asbestosis action, the Court upheld a judgment for the plaintiff, finding no error in the exclusion of prior deposition testimony offered by the company to impeach the plaintiff's expert, who testified that he had corresponded with the company in the 1950s. The expert had been excused and was unavailable, so he could neither explain nor deny the prior statements. Although the company claimed surprise and denied knowing of the inconsistent statements while the expert testified, the Court found that the company had a great deal of information concerning the expert and should have brought any problem in producing the inconsistent statements to the Trial Judge's attention before the expert was excused.

[i] Rule 613(b) -- Prejudicial Material in Statement

White v. Cohen, 635 F.2d 761 (9th Cir. 1981) : In a suit arising out of an accident at a motel, the plaintiff impeached the motel manager with a tape-recorded inconsistent statement obtained by the plaintiff's investigator. The Court reversed the judgment in part because the statement contained repeated references to an alleged criminal act by the defendant motel owner. The Court said that the Trial Judge should have screened the tape as the defense requested and excised the references to criminal acts.

[j] Rule 613(b) -- Relationship to Other Rules

[i] Rule 613(b) -- Hearsay Rules

Goodman v. Pennsylvania Turnpike Comm'n, 293 F.3d 655 (3d Cir. 2002) : The Court affirmed a judgment for a public employee who alleged that his employer failed to promote him because of his political affiliation. The Court held that testimony as to statements made by two defense witnesses was properly admitted as prior inconsistent statements. It noted that the fact that the witnesses made inconsistent statements was relevant impeachment, and that there was no effort by the plaintiff to improperly use the inconsistent statements as substantive evidence.

Rush v. Illinois Cent. R.R., 399 F.3d 705 (6th Cir. 2005) : The plaintiff child fell from a railcar on which he and other children had been playing. Within several hours of the accident, a risk manager/railroad police officer interviewed three of the children. On cross-examination of one of the interviewed children, the defense asked leading questions ostensibly to refresh recollection. Because defense counsel asked the child whether certain transcript statements were correct rather than asking whether the transcript refreshed recollection, the Court held that the out-of-court statements were impermissibly placed before the jury to prove how the plaintiff fell. The statements were admissible as prior inconsistent statements under *Rule 613*, however.

United States v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993) : The Court held it was error (but harmless) to admit as past recollection recorded a statement by a witness to a prison assault, where the witness had refused to sign the statement when the FBI agent who took it showed it to him and had disavowed its accuracy on the stand. The Court observed that the statement would also not have been admissible as a prior inconsistent statement because it was not the witness' statement.

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004) : In a prosecution for bank fraud, the defendant denied on cross-examination that she had been in financial difficulties and the prosecution introduced her bankruptcy petition indicating debts well over $100,000. Affirming, the Court held that the petition was admissible under *Rule 613* as a prior inconsistent statement, under *Rule 801(d)(1)(A)* as a prior inconsistent statement given under oath subject to a penalty of perjury, and under *Rule 801(d)(2)* as an admission by a party opponent.

United States v. Saget, 991 F.2d 702 (11th Cir. 1993) : The Court held there was no error in precluding defense counsel from reading from an FBI agent's summary of a witness' statements during cross-examination in a narcotics trial, as "a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." The Court noted that defense counsel was permitted to question the FBI agent about the witness' statements and to recall the witness for cross-examination about them. In our view, the problem arose because defense counsel purported, by reading the statement, to tell the jury the contents of an FBI report, which was hearsay. It would have been permissible for defense counsel to lay the typical foundation by asking the witness whether he had made certain statements to an FBI agent, and if the witness denied doing so, to call the agent to contradict the witness. In *Lexington Ins. Co. v. Cooke's Seafood*, n16 the Court observed that the foundation requirement for inconsistent statements does not apply when a statement is admissible under *Rule 801(d)(2)*, even if the statement is an agent's admission rather than a personal admission of a party.

[ii] Rule 613(b) -- Relationship to Other Rules -- Rule 403

United States v. Young, 248 F.3d 260 (4th Cir. 2001) : In a prosecution of charges related to a kidnapping, the Court found no error in the exclusion of a prior statement made by a government witness in a conversation with the defendant that the defendant surreptitiously taped. The statement could have been construed as an admission that the witness committed the crime instead of the defendant. Although the defendant had established a foundation for admitting the statement as inconsistent under *Rule 613(b)*, the Trial Judge still had discretion to exclude it under *Rule 403*. In this case, the witness did not make an unequivocal statement that was inconsistent with his trial testimony, but instead replied affirmatively to leading questions posed by the defendant, in a tape replete with the defendant's self-serving hearsay.

[iii] Rule 613(b) -- Relationship to Other Rules -- Rule 608(b)

United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999) : Affirming a cocaine distribution conviction, the Court held that a government agent was properly permitted to testify that Flint, the defendant's alibi witness, had told him that agents who had searched the defendant's trailer had missed some cocaine. Flint had denied on cross-examination having any knowledge that the defendant was involved in drugs. The Court recognized "the time-honored tenet that prior inconsistent statements ordinarily may be used to impeach a witness's credibility," and noted that the Trial Judge had erred in relying on *Rule 608(b)*, rather than *Rule 613(b)*, to admit the statement. In this case, the officer's testimony about the defense witness' repudiation of a prior statement about the location of drugs clearly presented an inconsistency, and thus was covered by *Rule 613(b)*, so the extrinsic evidence was not absolutely prohibited. *Rule 608(b)* would apply only if the prior statement concerning the drugs, standing alone and without any reference to the witness' trial testimony, was pertinent to the witness' character for veracity. The Court noted that extrinsic evidence of a prior inconsistent statement, while not controlled by *Rule 608(b)*, was still subject to the balancing test of *Rule 403*.

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : In the trial of a drug trafficking conspiracy, the prosecutor, trying on cross-examination to get one defendant to admit that he often made things up and told stories, asked him whether he had phoned his employer and told him a story. When the defendant stated that he was not sure what the prosecutor was talking about, the prosecutor played a tape-recording of a phone conversation the defendant had with his employer after he was placed in custody in which he offered a false explanation of why he was absent from work. In response to the argument that the tape was admissible as a prior inconsistent statement, the Court stated that, even though it sometimes is difficult to distinguish between *Rule 608(b)* and *Rule 613* evidence, it was clear in this case that the prosecutor was seeking to prove that the defendant lied to his employer and thus the tape was extrinsic evidence and inadmissible. The error was harmless, however.

[k] Rule 613(b) -- Scope of Witness' Explanation

Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986) : The Court upheld a judgment for the plaintiff in an employment discrimination action, finding that the plaintiff's lawyer properly elicited testimony from him concerning the circumstances of his deposition, after the plaintiff was impeached with statements made during the deposition.

[l] Rule 613(b) -- Silence As Inconsistent Statement

United States v. Mercado, 412 F.3d 243 (1st Cir. 2005) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion in permitting the prosecution to cross-examine the defendant's ex-girlfriend about why she waited nine months to come forward if her exculpatory evidence were true. In the course of the cross-examination, the prosecution established that the witness knew the defendant was facing proceedings in State Court arising from the same gun possession giving rise to the federal prosecution and failed to come forward to assist the defendant in the state case. The Court held that the Judge properly instructed the jury that the state proceedings were only relevant to "action or inaction" by the witness. In *United States v. Zaccaria, 240 F.3d 75 (1st Cir. 2001)* , during the investigation of a counterfeiting scheme, a principal prosecution witness at the defendant's trial had elected to remain silent after receiving *Miranda* warnings. The Court held there was no abuse of discretion when the defendant was precluded from introducing evidence of this prior silence to impeach the witness. In the Court's view: (1) "[s]ilence per se generally has little or no probative value for impeachment purposes"; (2) "evidence of the invocation of the right to remain silent is inherently prejudicial"; and (3) there were no "special trappings that might imbue [the witness'] silence with unaccustomed probative force" or other special circumstances that called for making an exception to the usual rule.

[m] Rule 613(b) -- Summary Judgment

Santos v. Murdock, 243 F.3d 681 (2d Cir. 2001) : Affirming summary judgment for an arrestee who claimed that the defendants submitted an arrest warrant containing false statements and arrested the defendant without probable cause, the Court held that a sworn statement given to the plaintiff's lawyer by a witness who had been twice deposed was not sufficient to defeat summary judgment. Since the statement, which was inconsistent with the deposition testimony, was not made in a "proceeding," it would be admissible at trial only for impeachment purposes and not as substantive evidence. There is reason to be cautious about the scope of the holding. If the sworn statement was a representation that the witness would testify at trial in contradiction of the depositions, the plaintiff may well have demonstrated that a dispute existed as to a material fact. No affidavit considered by a Court in ruling on summary judgment is admissible at trial; the issue is whether the facts set forth in an affidavit are sufficient to warrant a trial. However, in the instant case, the fact that there was no indication the affiant was prepared to testify in a manner consistent with the affidavit meant there was no substantive evidence presenting a dispute as to a material fact.

[n] Rule 613(b) -- Third Person's Notes of Prior Statement

United States v. Almonte, 956 F.2d 27 (2d Cir. 1992) : The Court affirmed the defendant's conviction for distributing heroin, holding that an Assistant U.S. Attorney's shorthand summary made after debriefing a witness was not shown to reflect what the witness said sufficiently to be used as a prior inconsistent statement impeaching the witness. To be admissible for impeachment, the notes must reflect the witness' own words rather than the note-taker's interpretation.

United States v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993) : The Court held it was error (but harmless) to admit as

past recollection recorded a statement by a witness to a prison assault, where the witness had refused to sign the statement when the FBI agent who took it showed it to him and had disavowed its accuracy on the stand. The Court observed that the statement would also not have been admissible as a prior inconsistent statement because it was not the witness' statement.

United States v. Chavez, 979 F.2d 1350 (9th Cir. 1992) : The Court affirmed a conviction for heroin possession, holding there was no abuse of discretion in excluding a diagram drawn by one officer during a meeting with defense counsel to impeach another officer's testimony about seeing the transaction at issue. The drawing was not the witness' prior statement but only a record of the officers' memory of others' hearsay declarations.

United States v. Saget, 991 F.2d 702 (11th Cir. 1993) : The Court held there was no error in precluding defense counsel from reading from an FBI agent's summary of a witness' statements during cross-examination in a narcotics trial, as "a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." The Court noted that defense counsel was permitted to question the FBI agent about the witness' statements and to recall the witness for cross-examination about them. In our view, the problem arose because defense counsel purported, by reading the statement, to tell the jury the contents of an FBI report, which was hearsay. It would have been permissible for defense counsel to lay the typical foundation by asking the witness whether he had made certain statements to an FBI agent, and if the witness denied doing so, to call the agent to contradict the witness.

FOOTNOTES:

(n1)Footnote 1. *United States v. Tracey, 675 F.2d 433 (1st Cir. 1982)* .

(n2)Footnote 2. *United States v. Agajanian, 852 F.2d 56 (2d Cir. 1988)* .

(n3)Footnote 3. *United States v. Hall, 739 F.2d 96 (2d Cir. 1984)* .

(n4)Footnote 4. *United States v. Devine, 934 F.2d 1325 (5th Cir. 1991)* .

(n5)Footnote 5. *United States v. McCrady, 774 F.2d 868 (8th Cir. 1985)* .

(n6)Footnote 6. *United States v. Holt, 817 F.2d 1264 (7th Cir. 1987)* .

(n7)Footnote 7. *Busbee v. Sule, 603 F.2d 1197 (5th Cir. 1979)* .

(n8)Footnote 8. *United States v. King, 560 F.2d 122 (2d Cir. 1977)* .

(n9)Footnote 9. *United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984)* .

(n10)Footnote 10. *United States v. Hechavarria, 960 F.2d 736 (8th Cir. 1992)* (per curiam).

(n11)Footnote 11. *United States v. Lynch, 800 F.2d 765 (8th Cir. 1986)* .

(n12)Footnote 12. *Jones v. Collier, 762 F.2d 71 (8th Cir. 1985)* .

(n13)Footnote 13. *In re Corrugated Container Antitrust Litig., 756 F.2d 411, 1985-1 Trade Cas. (CCH) P66525 (5th Cir. 1985)* .

(n14)Footnote 14. *Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988)* .

(n15)Footnote 15. *United States v. Miller, 91 F.3d 1160 (8th Cir. 1996)* .

(n16)Footnote 16. *Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364 (11th Cir. 1988)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 613 RULE 613

3-613 Federal Rules of Evidence Manual 613.04

613.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). The Queen's Case, 2 Br. & B. 284, *129 Eng. Rep. 976 (1820)* , laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, *52 Cornell L.Q. 239, 246-47 (1967)*; McCormick § 28; 4 Wigmore §§ 1259-1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, *52 Cornell L.Q. 239, 247 (1967)*. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to *California Evidence Code § 770*. Also, dangers of oversight are reduced. See McCormick § 37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in *California Evidence Code § 770*

and New Jersey Evidence Rule 22(b).

Under principles of *expressio unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[Following the 1987 amendments to Rule 608, the Supreme Court sent to Congress a technical amendment correcting capitalization, effective November 1, 1988.]

[2] Citations to Hearings and Debates

See Letter from Edward W. Cleary to Hon. William L. Hungate, quoted in Section B.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 613 RULE 613

3-613 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 613, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 613. Prior Statements of Witnesses	**Rule 613. Witness's Prior Statement**
(a) Examining witness concerning prior state	**(a) Showing or Disclosing the Statement Dur**

ment. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on

ing Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or

	request the same shall be shown or disclosed to opposing counsel.		disclose its contents to an adverse party's attorney.
(b)	**Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a	**(b)**	**Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness' prior inconsistent statemen

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witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ce so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic

only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 613 RULE 613

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Supp. to § 613.03 Annotated Cases

[Go To Main]

[1] Rule 613(a) -- Examining Witness Concerning Prior Statement [Go To Main]

[c.1] Party's Statement To Impeach Witness

Jones v. National Am. Univ., 608 F.3d 1039 (8th Cir. 2010) : The defendant in an age discrimination employment case had responded to the plaintiff's EEOC charge by asserting that she was not promoted because of deficient performance. Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion when that response was introduced to impeach testimony by members of the hiring committee that the plaintiff had not been promoted because of lack of relevant experience.

[d.1] Rule 613(a) -- Silence As Inconsistent Statement

Rahn v. Hawkins, 464 F.3d 813 (8th Cir. 2006) : In arrestee's civil rights action, the Court held it was error (but harmless) to preclude the plaintiff from asking a defendant about statements contrary to her testimony that were recorded in a commemorative booklet she received when she was awarded a commendation for her role in his arrest. The Court observed that "[i] she knew about the booklet's contents before accepting the award, but yet said nothing, the jury may infer that she has a tendency to dissemble," and while there was no evidence that she did know beforehand, the plaintiff should have been able to question her. Furthermore, if a reasonable person would have spoken up in the circumstances, the witness' silence could be treated as an adoption of the statements, which could then be used to impeach her inconsistent trial testimony.

[2] Rule 613(b) -- Extrinsic Evidence of Prior Inconsistent Statement of Witness [Go To Main]

[b] Rule 613(b) -- Collateral Matter

United States v. Catalan-Roman, 585 F.3d 453 (1st Cir. 2009) : Affirming convictions arising from a conspiracy to rob armored vehicles that resulted in the shooting death of an armored vehicle guard, the Court held it was an abuse of

discretion (but harmless error) when prior inconsistent statements about the robberies by the government's key eyewitness were excluded on the ground that they would constitute extrinsic evidence on a collateral matter. The Court noted that "the rule restricting impeachment to non-collateral matters is analogous to Rule 403's relevancy balancing test." In this case, the prior statements should have been admitted because some of the details the defendant sought to impeach as inconsistent plainly helped the government prove the premeditation that was an element of one of the counts. Other details were relevant to the jury's consideration of the death penalty. Moreover, many of the details to be impeached were brought out on direct examination by the government, and the government's own belief that the details were important "supports the non-collateral nature of the inconsistencies identified by Catalan."

United States v. Allen, 540 F.3d 821 (8th Cir. 2008) : The defendant was convicted of felon firearm possession after a loaded handgun was found under the front passenger seat of a car he was attempting to enter on the passenger side when he was arrested. At trial he called the driver of the car, who testified to borrowing the car from his father without permission and denied any knowledge of the gun's presence, and the driver's father, who testified that he had helped the defendant's girlfriend purchase the gun, had cleaned it, and had put it in the car "a few weeks" after the purchase. Affirming, the Court found no abuse of discretion when, after the defendant denied on cross-examination telling a detective that he had cleaned and wrapped the unloaded gun under the car seat four or five days after the purchase, the detective was permitted to testify regarding the defendant's statement to him. "[T]he evidence was material as it bore directly on the question of how the gun came to be in the car when Allen was arrested," the witness was provided an opportunity to explain or deny the earlier statement, and the defendant had an opportunity (which he did not take) to examine the witness thereon.

[c] Rule 613(b) -- Determination of Inconsistency

United States v. Richardson, 515 F.3d 74 (1st Cir. 2008) : The Court affirmed cocaine and firearm convictions, finding no abuse of discretion in the admission of a suppressed tape recording and a transcript of a telephone conversation with a paid government informant. The Court noted that "[t]he government generally may use otherwise inadmissible evidence in order to impeach a testifying criminal defendant," "[s]tatements ... need not be directly inconsistent in order to be deemed inconsistent," and "[i]t lies within the sound discretion of the district court to determine whether an inconsistency exists." Here, the Court found that the statements at issue were sufficiently at odds with trial testimony to be deemed inconsistent. In *United States v. DeSimone, 488 F.3d 561 (1st Cir. 2007)* , the Court affirmed a tax fraud conviction, finding no abuse of discretion in the exclusion of hearsay statements about an alleged conversation offered to impeach a witness' testimony. The witness never denied that the conversation took place, but rather stated that he did not recall it, which was not implausible given the five-year lapse between the conversation and the trial testimony.

[c.1] Extrinsic Evidence of Inconsistent Statement

United States v. Watkins, 591 F.3d 780 (5th Cir. 2009) : The Court affirmed drug convictions, holding that a rental application in which the defendant listed a present member of the conspiracy as his landlord was properly admitted to impeach his trial testimony denying that an alleged member of the conspiracy was his landlord. "It is well established that after a witness denies making a statement during cross-examination, evidence may be introduced to prove the statement was made."

[e] Rule 613(b) -- Need for Extrinsic Evidence

United States v. La Vallee, 439 F.3d 670 (10th Cir. 2006) : Affirming convictions of former prison guards for deprivation of inmates' rights, the Court held that when a witness admitted during her testimony that she had made an inconsistent statement, it was no abuse of discretion to preclude a third party from testifying to the same inconsistent statement.

[g] Rule 613(b) -- Omission As Inconsistent Statement

United States v. Catalan-Roman, 585 F.3d 453 (1st Cir. 2009) : Affirming convictions arising from a conspiracy to rob armored vehicles that resulted in the shooting death of an armored vehicle guard, the Court held it was an abuse of discretion when the defendant was prevented from impeaching the key government eyewitness with the fact that when he was interviewed by the FBI he failed to mention details about the shooting of the guard about which he testified at trial. The Judge had reasoned that the failure to mention the details could be explained by the facts that the eyewitness was injured and in the hospital when interviewed, he had taken pain medication, the interview was short, and it was unclear what type of questions the FBI asked. The Court held that the details of the trial testimony were important. For example, although the witness testified that the victim had cried out for his life, he had not mentioned that in the initial interview. The Court concluded that the jury rather than the Judge should have determined whether omissions in the FBI interview were inconsistent with the trial testimony.

[h] Rule 613(b) -- Opportunity To Explain or Deny

[ii] Rule 613(b) -- Opportunity To Explain or Deny -- Requirement in General

United States v. Allen, 540 F.3d 821 (8th Cir. 2008) : The defendant was convicted of felon firearm possession after a loaded handgun was found under the front passenger seat of a car he was attempting to enter on the passenger side when he was arrested. At trial he called the driver of the car, who testified to borrowing the car from his father without permission and denied any knowledge of the gun's presence, and the driver's father, who testified that he had helped the defendant's girlfriend purchase the gun, had cleaned it, and had put it in the car "a few weeks" after the purchase. Affirming, the Court found no abuse of discretion when, after the defendant denied on cross-examination telling a detective that he had cleaned and wrapped the unloaded gun under the car seat four or five days after the purchase, the detective was permitted to testify regarding the defendant's statement to him. "[T]he evidence was material as it bore directly on the question of how the gun came to be in the car when Allen was arrested," the witness was provided an opportunity to explain or deny the earlier statement, and the defendant had an opportunity (which he did not take) to examine the witness thereon. In *United States v. Hyles, 479 F.3d 958 (8th Cir. 2007)* , the Court affirmed a murder-for-hire conviction, finding no abuse of discretion when the defense was not permitted to introduce prior statements to impeach a witness. The witness was no longer in the courtroom when the prior statements were offered; while she was still under subpoena, the Trial Court stated that it would deny a request to bring her back because the evidence would be cumulative, given that she "had already proven herself untrustworthy."

[j] Rule 613(b) -- Relationship to Other Rules

[i] Rule 613(b) -- Hearsay Rules

United States v. Eagle, 498 F.3d 885 (8th Cir. 2007) : Affirming a conviction for involuntary manslaughter in Indian country, the Court held it was error (but harmless) to exclude as hearsay extrinsic evidence of prior inconsistent statements that two government witnesses denied making. The evidence was not hearsay because it was offered only to show an inconsistency, not to establish the truth of the statements.

[ii] Rule 613(b) -- Relationship to Other Rules -- Rule 403

United States v. Eagle, 498 F.3d 885 (8th Cir. 2007) : Affirming a conviction for involuntary manslaughter in Indian country, the Court held it was error (but harmless) to exclude as hearsay extrinsic evidence of prior inconsistent statements that two government witnesses denied making. The Court found that a proper foundation had been laid, and there was no basis for concluding that the probative value of the impeachment evidence was substantially outweighed by the danger of unfair prejudice.

[iii] Rule 613(b) -- Relationship to Other Rules -- Rule 608(b)

United States v. Neighbors, 590 F.3d 485 (7th Cir. 2009) : In a prosecution for cocaine offenses, the defense asked a

cooperating witness if he "ever told anyone that you have either lied in this particular case or intended to lie in this particular case?" When the witness responded negatively, the defense sought unsuccessfully to introduce letters in which the witness said, "I did lie on that Haitian N***." Affirming, the Court held that the letters were governed by Rule 608(b), not Rule 613, because their probative value came from the underlying lie, not the contradiction between testimony at trial and the content of the letters. As such, the letters were extrinsic evidence inadmissible under Rule 608(b).

[l] Rule 613(b) -- Silence as Inconsistent Statement

United States v. Useni, 516 F.3d 634 (7th Cir. 2008) : Affirming convictions for gambling and racketeering offenses, the Court found somewhat "problematic" the exclusion of testimony by an FBI agent called to contradict a government witness who claimed that he mentioned to the agent during an interview the defendant's demand for a cash payment. The exclusion of the agent left the witness's testimony "unrebutted on the record," but any error was harmless. The Court also found no abuse of discretion in the exclusion of testimony by another FBI agent called to testify that a government witness did not mention a demand for cash payment by the defendant when interviewed by the agent. The Court found that the witness admitted that the demand was not mentioned in the interview, so that the agent would not contradict the witness, and that the agent's proposed testimony actually tended to explain why it would not have been natural for the subject of the demand to have come up during the interview. In short, the agent would not have contributed to the defendant's attempt to impeach the witness by showing an omission in the FBI interview.

[n] Rule 613(b) -- Third Person's Notes of Prior Statement

United States v. De La Cruz Suarez, 601 F.3d 1202 (11th Cir. 2010) : The Court affirmed convictions for conspiracy to commit alien smuggling, finding no abuse of discretion in the exclusion of a statement offered by a defendant as a prior inconsistent statement of a government witness. An FBI agent recorded in a summary of her interview with the witness that he said the captains of the boat he was on noticed the boat was sitting low in the water and were concerned but no one wanted to exit the boat. The witness on cross-examination testified that he did not know anything about overcrowding on the boat. The Court observed that the report was a summary of the agent's version of the interview and was not an inconsistent statement of the witness.

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[3] Rule 614(c) -- Objections

614.04 Legislative History

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614.01 Official Text

Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by court*. -- The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court*. -- The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections*. -- Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

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614.02 Editorial Explanatory Comment

[1] Basic Rule

This Rule concerns the Trial Court's authority to call and examine witnesses. It provides that the Judge may call witnesses *sua sponte* or at the suggestion of any party. It also provides that if the Judge does call a witness, all parties are entitled to cross-examine the witness. Subdivision (b) makes clear that the Judge is authorized to interrogate any witness, regardless of whether the witness is called by the Judge or by a party. n1

It may be wondered why a Judge would ever have to call a witness. We think that there are some limited situations in which such a practice could be appropriate. For example, a witness may have relevant information, and yet neither side might want to be viewed as having sponsored the witness. n2 This could be true even though there is no longer a voucher rule, because despite *Rule 607* a party may be concerned that the jury will associate witnesses with the calling party. A party may need testimony from a certain witness and yet may want to keep some distance from that witness. We think that judicial intervention might be appropriate in these limited circumstances because it would further the search for truth and protect the parties from prejudice. Ordinarily, however, the Judge would not act *sua sponte* in this situation, but only at the request of one of the parties. n3

Another possibility, though remote, is that the Trial Judge might determine that the parties have not fashioned the case in a way that reaches the truth and avoids jury confusion. *Rule 614* can be used by the Judge *sua sponte* to avoid being confined within the case as made by the parties. n4 Of course, respect to counsel and the adversary system counsels that the Judge almost always defer to the parties' presentation of the case. The *Rule 614* power to call witnesses *sua sponte* should therefore be rarely invoked and, we would add, only after consulting with counsel and providing them an opportunity to call the witness and to prepare for the witness' testimony.

The Trial Judge has a separate authority under *Rule 706* to call expert witnesses. See § 706.02 for further discussion of that Rule.

[2] Objections

Subdivision (c) of *Rule 614* provides an exception to the normal requirement that objections must be made at the

earliest possible time. An objecting party is given an option. Counsel either may object immediately to the calling of witnesses by the Court or to the manner in which the Judge interrogates any witness, or counsel may object at the next available opportunity when the jury is not present. n5 This option exists so that counsel will not refrain from objecting for fear that the jury will interpret an objection to the Judge's action as posing a conflict between the attorney and the Judge. This is similar to the policy discussed with respect to testimony by jurors in the Editorial Explanatory Comment accompanying *Rule 606, § 606.02[1].*

However, it is clear that a timely objection, as defined in the Rule, is required to preserve any claim of error for appeal. n6 The failure to object in the time prescribed by the Rule deprives the Judge of an opportunity to attempt to rectify any error through an appropriate limiting instruction. n7

[3] Jury Instructions

Just as the Judge is not permitted to become an advocate in summing up the evidence and commenting to the jury, the Judge is not permitted to become an advocate with respect to calling and interrogating witnesses. This line between developing the truth and advocacy is a fine one indeed.

To avoid the possibility that a witness will be considered by the jury to be the Judge's witness and that the weight of the witnesses' testimony will be unduly enhanced, the Trial Judge should instruct the jury that by calling a witness the Court suggests nothing about credibility, and that the Court's witness is to be assessed by the jury like all other witnesses. The Advisory Committee commented upon "[t]he tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching... ." An identical tendency may exist when the Court calls a witness. The suggested instruction is mildly burdensome, but provides at least some insurance against prejudice. n8

It is also necessary to instruct the jury properly when the Judge questions witnesses called by one of the parties. The risk here is not that the witness will be associated with the Judge, but rather that the questions asked may indicate that the Judge favors one side over the other. n9 A "model charge" to the jury after judicial intervention with witnesses was crafted by the Court in *Moore v. United States, 598 F.2d 439, 443 n.2 (5th Cir. 1979)* :

> You are the sole judges of the facts in the case, the weight of the evidence and the credibility of the witnesses. If the Court should express or you even think has intimated any opinion with respect to the facts in this case, you are not bound by it. I particularly point out to you that by questioning witnesses to bring out facts not brought out by the lawyers, the Court is endeavoring only to see that all of the facts are brought out for your consideration so that you can perform what is your sole task of deciding the facts. By asking questions the Court does not in any way intimate any opinion with respect to the facts in the case. n10

[4] Dangers of Judicial Involvement With Witnesses

The power to interrogate witnesses is widely recognized and plainly provided for in *Rule 614*. The exercise of this power is sometimes appropriate, especially in complex cases where judicial intervention may be necessary to protect against jury confusion. n11 Also, a question from the Trial Judge may be necessary to clarify the witness's testimony. n12 Finally, the Trial Judge understandably should have somewhat more latitude to question witnesses in a bench trial--so long as there is no indication from this questioning that the Judge has predetermined the case. n13

We would caution, however, that the Trial Judge who becomes too active at a jury trial may threaten the impartiality of the jury and undermine the legitimate efforts of counsel working in an adversary system. n14 At a minimum, the Trial Judge must avoid bolstering or attacking the credibility of witnesses, n15 and must refrain from interjecting information without support in the evidence. n16 As the Court stated in *United States v. Bland, 697 F.2d 262 (8th Cir. 1983)* , a case in which the Court reversed convictions because the Trial Judge's questioning was not neutral:

> A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury. A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. n17

There are alternatives to the Court's calling witnesses and interrogating them. One obvious alternative is to confer with counsel in advance and to suggest some questions that could be asked and some witnesses that could be called. These and other solutions are explored at length in Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, *64 Va. L. Rev. 1 (1978*).

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Gonzalez-Torres, 980 F.2d 788 (1st Cir. 1992)* (no plain error in direct, specific questions by the Trial Judge to clarify the defendant's testimony, where the Judge's impartiality remained intact throughout); *United States v. Seeright, 978 F.2d 842 (4th Cir. 1992)* (no abuse of discretion where the Trial Judge questioned the defendant; the questioning was neither hostile nor disbelieving and was consistent with the questioning of other witnesses; the defendant was not interrupted nor badgered; and the jury was properly advised to draw no inferences therefrom and that only it could determine credibility).

(n2)Footnote 2. See, e.g., *United States v. Leslie, 542 F.2d 285 (5th Cir. 1976)* ("Given the asserted likelihood that [the witnesses] would testify adversely to the government, leading to the inevitable government attempt to impeach, the court could properly protect the prosecution from whatever tendency the jury might have had to associate the witnesses with the calling party.").

(n3)Footnote 3. Moreover, the Judge must remain aware of the possibility that the witness's testimony may be given unwarranted weight by the jury because the witness was called by the Court rather than by the parties. A jury instruction should be given to prevent this possibility. See the discussion in § 614.02[3].

(n4)Footnote 4. See, e.g., *Cunningham v. Housing Auth., 764 F.2d 1097 (5th Cir. 1985)* (no error to order parties to depose a witness, where the Trial Judge justifiably determined that the parties had not properly fashioned the case).

(n5)Footnote 5. See, e.g., *United States v. Evans, 994 F.2d 317 (7th Cir. 1993)* (the defendant properly preserved error as to the Trial Judge's prejudicially interrogating the defendant in a skeptical tone, by making the objection the next day as the first order of business after completion of the defendant's testimony).

(n6)Footnote 6. See, e.g., *United States v. Kwiat, 817 F.2d 440 (7th Cir. 1987)* (*Rule 614* allows objections to be postponed until the jury is not present, but it does not excuse the failure to object at all). See also *United States v. Billups, 692 F.2d 320 (4th Cir. 1982)* (a claim of error was not preserved where counsel waited until the end of several days of the witness' testimony before objecting to the Trial Judge's questions).

(n7)Footnote 7. See, e.g., *United States v. Vega, 589 F.2d 1147 (2d Cir. 1978)* (the right to complain on appeal about the Trial Judge's questions was waived by counsel's failure to object either immediately or at the first opportunity outside the jury's presence; the Court rejected the argument that counsel should be entirely excused from objecting because of "timidity or fear of antagonizing the judge" and relied upon the explicit language of *Rule 614(c)*).

(n8)Footnote 8. See, e.g., *United States v. Karnes, 531 F.2d 214 (4th Cir. 1976)* (impartiality was destroyed when the Judge called witnesses essential to the prosecution's case without explanation or instruction to the jury).

(n9)Footnote 9. See, e.g., *United States v. Tilghman, 134 F.3d 414 (D.C. Cir. 1998)* (conviction reversed because the Judge's repeated questions to the defendant-witness could have indicated to the jury that he disbelieved the defendant); *United States v. Saenz, 134 F.3d 697 (5th Cir. 1998)* (conviction reversed because the Judge's questioning of the chief prosecution witness and of the defendant could have led the jury to believe that the Judge favored the government's case).

(n10)Footnote 10. See also *United States v. Green, 293 F.3d 886 (5th Cir. 2002)* (judicial questioning was not error where the Trial Court properly instructed the jury to give no special weight to questioning by the Court); *Van Leirsburg v. Sioux Valley Hospital, 831 F.2d 169 (8th Cir. 1987)* (Trial Judge properly instructed the jury not to consider the Court's comments as evidence or as any indication of the Court's view of the facts).

(n11)Footnote 11. See, e.g., *United States v. Green, 544 F.2d 138 (3d Cir. 1976)* (in a complex case the Judge may question witnesses to a greater extent than in a simple case); *United States v. Parodi, 703 F.2d 768 (4th Cir. 1983)* (the Court rejected complaints that the Trial Judge had impermissibly interjected himself into the examination of witnesses; the Court reasoned that in complicated cases with many defendants the Judge may make a special effort to see that evidence is understood by the jury, but also cautioned that Trial Judges should take care never to indicate to the jury an opinion that the defendant is guilty). See also *United States v. Castner, 50 F.3d 1267 (4th Cir. 1995)* (it was permissible for the Court to question witnesses where the evidence was "highly complex, involving the intricacies of accounting principles, business management, and government contracting"; the Trial Court's intervention "clarified the testimony and focused the jury's attention on the critical issues in a highly complicated case").

(n12)Footnote 12. See, e.g., *United States v. Henry, 136 F.3d 12 (1st Cir. 1998)* (Trial Judge's limited questioning was a proper effort to clarify the testimony in a complex case); *United States v. Dreamer, 88 F.3d 655 (8th Cir. 1996)* (in an arson case, there was no error in the Trial Court's questioning of a witness, where the witness had made several conflicting statements about whether she had seen the defendant outside the house on the night of the fire; a Trial Judge is permitted to clarify the testimony of a witness in order to avoid any misunderstanding of the testimony by the jury; in this case, the Trial Judge simply attempted to determine which of the witness' contradictory statements was the truth); *United States v. Orr, 68 F.3d 1247 (10th Cir. 1995)* (in a trial for bank fraud arising out of a check kiting scheme, there was no plain error in the Trial Court's brief questioning of three prosecution witnesses; the questions were permissible attempts "to clarify the somewhat complicated testimony about how the bank transactions were structured"); *United States v. Seeright, 978 F.2d 842 (4th Cir. 1992)* (questions were permissible where they "helped the jury focus" and where the Judge did not assume the role of an advocate); *Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992)* (the Trial Judge "need not sit on the bench like a mummy when his intervention would serve to clarify an issue").

(n13)Footnote 13. See, e.g., *Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382 (5th Cir. 1985)* (noting that the Judge has greater latitude to participate in a bench trial than a jury trial, and also noting that "[w]hen a pro se litigant ... goes to trial against a party represented by a member of the bar, the responsibility of the trial judge may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel").

(n14)Footnote 14. See *United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004)* (Trial Court erred in questioning witnesses where the question went beyond clarifying the evidence and was "inappropriately extensive and suggestive of the court's own conclusion about [the defendant's] credibility."

(n15)Footnote 15. See, e.g., *Rivas v. Brattesani, 94 F.3d 802 (2d Cir. 1996)* (a judgment for the plaintiff in an excessive force case was reversed, where questions by the Trial Judge to two defense witnesses "conveyed to the jury the impression that [the Judge] held a fixed and unfavorable opinion of defendants, their counsel, and their position"; one question implied that the defendants' expert witness, a medical examiner, conducted autopsies without ever examining the body; another question implied that the memo book of one of the defendant police officers was a fraud that he made up at the end of every day; the cumulative impact of these prejudicial comments could not be cured by a limiting instruction, especially as the case rested largely on a credibility determination between the plaintiff's account and that of the defendants). See also *United States v. Victoria, 837 F.2d 50 (2d Cir. 1988)* (finding reversible error where the Trial Judge asked questions of the defendants "in the nature of cross-examination" that challenged their credibility: "it seems to be clear error for a trial judge to ask questions bearing on the credibility of a defendant-witness prior to the completion of the direct examination").

(n16)Footnote 16. See, e.g., *United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994)* (the Trial Judge probably

overstepped the bounds of proper judicial interrogation when he asked the defendant's witness whether he had ever been convicted of a felony, without any evidence in the record to support a good faith belief that this was so; but the defendant made no objection at any point and this did not rise to the level of plain error). When a Judge in questioning witnesses refers to inadmissible evidence, there is a strong argument that *Rule 605* is violated as well as *Rule 614*.

(n17)Footnote 17. See also *United States v. Beaty, 722 F.2d 1090 (3d Cir. 1983)* (finding reversible error where the Trial Judge's "vigorous participation" conveyed his skepticism about the defendant's alibi and where his questioning of the defendant's key witness was not an attempt to clarify her testimony but was rather "a frontal attack on her credibility").

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614.03 Annotated Cases

[Go To Supp]

[1] Rule 614(a) -- Calling by Court

[a] Rule 614(a) -- Duty To Call Witnesses

McNeil v. Lowney, 831 F.2d 1368 (7th Cir. 1987) : In an action by an inmate who claimed that he was denied adequate medical care, the Court held that the Trial Judge did not err in failing to call witnesses on his own motion, since the plaintiff had adequate access to information from various sources.

[b] Rule 614(a) -- Error To Call Witnesses

United States v. Karnes, 531 F.2d 214 (4th Cir. 1976) : Reversing a conviction for knowingly concealing a stolen motor vehicle, the Court cited *Rule 614* (which was not in effect at the time of trial) for the general proposition that the Trial Judge may call and question witnesses, but held that the required impartiality was destroyed when the Judge called witnesses essential to the prosecution's case without explanation or instruction to the jury. One Judge labeled the error a violation of due process, another called it an error of federal criminal procedure, and the third dissented, emphasizing the Judge's responsibility to society and the public to reach the truth.

[c] Rule 614(a) -- Judicially Ordered Depositions

Cunningham v. Housing Authority, 764 F.2d 1097 (5th Cir. 1985) : The Court affirmed a judgment for the housing authority in a suit alleging sex discrimination in employment. It found that *Rule 614* authorized the Trial Judge to order the parties to take the deposition of a witness after the case had been taken under submission.

[d] Rule 614(a) -- Permissible To Call Witnesses

United States v. Agajanian, 852 F.2d 56 (2d Cir. 1988) : The Court held that a Trial Judge may call a witness and permit the parties to cross-examine without the Judge's first having conducted a direct examination.

United States v. Leslie, 542 F.2d 285 (5th Cir. 1976) : When the defendant and three accomplices were arrested for transporting and dealing in stolen cars, the statements of the others implicated the defendant as the "ring leader." Believing that at least one of the three would change his version of the events at trial, the government asked the Trial Judge to call the witnesses. The Court upheld the procedure, stating that "given the asserted likelihood that [the three] would testify adversely to the government, leading to the inevitable government attempt to impeach, the court could properly protect the prosecution from whatever tendency the jury might have had to associate the witnesses with the calling party."

[e] Rule 614(a) -- Relationship to Rule 706

Holland v. Commissioner, 835 F.2d 675 (6th Cir. 1987) : The Court found no error in a Tax Court Judge's suggesting at trial that the government produce an expert to testify to the authenticity of signatures on documents. Although the taxpayer complained that the Judge had not complied with *Rule 706*, the Court held that there was substantial compliance with *Rule 614*.

[2] Rule 614(b) -- Interrogation by Court

[a] Rule 614(b) -- Bench Trials

Crandell v. United States, 703 F.2d 74 (4th Cir. 1983) : The Court reversed a judgment for the United States in a medical malpractice action tried to the bench. It found that the Trial Judge erred in preventing effective cross-examination of government witnesses, made comments concerning the plaintiffs' failure to settle the case that were not in the tradition of a fair, impartial presiding Judge, and even more clearly erred by interfering with the plaintiffs' expert witness.

[b] Rule 614(b) -- Clarifying Questions

Stevenson v. District of Columbia Metro. Police Dep't, 248 F.3d 1187 (D.C. Cir. 2001) : Affirming a judgment for the defendants in an arrestee's § 1983 action, the Court found no error when the Trial Judge asked a hypothetical question of a defense expert witness. The Judge gave the plaintiff's requested instruction that the jury was not to treat the Judge's assumed facts either as the Judge's opinion of the facts or as the facts of the case, and also provided the plaintiff with the opportunity (which he did not use) to ask the expert a hypothetical using his version of the facts.

United States v. Rosario-Peralta, 199 F.3d 552 (1st Cir. 1999) : In a narcotics case involving interdiction of a vessel on the high seas, the Court found no error in the Trial Judge's interruptive questioning of a defense expert. The expert's testimony was confusing in that it included numerous maritime calculations, and the Judge's questions helped to clarify this testimony. The Court noted that the Judge asked "short, even-handed clarifying questions, albeit frequent ones," and also asked questions of government witnesses who testified on the same subject matter. In *United States v. Henry, 136 F.3d 12 (1st Cir. 1998)* , the Court affirmed convictions for dumping hazardous waste, mail fraud, and wire fraud, finding no error in the Trial Judge's questioning of a regulatory inspector who testified as a government witness. The case involved complex questions concerning toxicity and reporting requirements, and the Trial Judge's limited questioning was a proper effort to clarify the testimony that fell "squarely within the scope of the district judge's right and responsibility to manage the progress of the trial."

United States v. Messina, 131 F.3d 36 (2d Cir. 1997) : Affirming a conviction for extortion, the Court found no plain error in the Trial Judge's questioning of the defendant on three separate occasions at trial. The first set of questions amounted to nothing more than a clarification of an apparent inconsistency in the defendant's testimony. The second set of questions challenged one of the defendant's assertions of fact, but the Judge subsequently explained to the jury that he and not the defendant had been incorrect on the facts. The third set of questions was more troubling, since the Judge questioned the motivation of the defendant in destroying documents. However, the Court found no plain error, given the fact that the questioning lasted only a few minutes in a five-week trial; moreover, there was nothing in the record to indicate that the Trial Judge "displayed any antipathy toward Messina's testimony that went beyond judicial skepticism."

United States v. Reyes, 227 F.3d 263 (5th Cir. 2000) : Affirming convictions for possession of marijuana with intent to distribute, the Court noted that the Trial Judge's questioning had gone beyond mere clarification into the realm of advancing a theory of the case compatible with the prosecution, but held that the prejudicial effect was not so pervasive as to deprive the defendants, who had not made timely objections, of their constitutional rights. In *United States v. Mizell, 88 F.3d 288 (5th Cir. 1996)* , the defendant contended that the Trial Judge's interrogation of her expert witness in a robbery trial amounted to a comment on the weight of the evidence and violated her due process rights. The defendant did not object at trial, however -- either at the time or at the next available opportunity when the jury was not present, as provided by *Rule 614* -- so the Court reviewed for plain error. There was no plain error, because the Judge's questions were in the nature of clarification -- for example, clarifying that the expert had no personal knowledge about certain matters but was relying exclusively on what the defendant had told him.

United States v. Dreamer, 88 F.3d 655 (8th Cir. 1996) : Affirming a conviction for setting fire to a house, the Court found no error in the Trial Judge's questioning of a witness. The witness had made several conflicting statements about whether she had seen the defendant outside the house on the night of the fire. The Court concluded that a Trial Judge is permitted to clarify the testimony of a witness, in order to avoid any misunderstanding of the testimony by the jury. In this case, the Judge simply attempted to determine which of the witness' contradictory statements was the truth.

[c] Rule 614(b) -- Complex Cases

United States v. Green, 544 F.2d 138 (3d Cir. 1976) : Affirming a conviction for air piracy, the Court upheld the Trial Judge's conduct in interrogating witnesses. It stated that in a complex case the Judge may question to a greater extent than in a simple case.

United States v. Castner, 50 F.3d 1267 (4th Cir. 1995) : Affirming convictions for defrauding the government, the Court found no abuse of discretion in the Trial Judge's questioning of a defendant and defense witnesses. The Court noted that the evidence was "highly complex, involving the intricacies of accounting principles, business management, and government contracting." The Court also observed that the Judge interrupted and interrogated both government and defense witnesses. It concluded that the Judge's intervention "clarified the testimony and focused the jury's attention on the critical issues in a highly complicated case." In *United States v. Parodi*, n1 a narcotics conspiracy case, the Court rejected complaints that the Trial Judge had impermissibly interjected himself into the examination of witnesses. The Court reasoned that in complicated cases with many defendants the Judge may make a special effort to see that evidence is understood by the jury, but also cautioned that Trial Judges should take care never to indicate to the jury an opinion that the defendant is guilty. The Court concluded that two questions by the Trial Judge to a witness concerning an immunity grant and the impact on State Court proceedings of the witness' testimony in the instant case would have been better asked by the government, but it also concluded that the questioning by the Judge did not deny a fair trial.

United States v. Orr, 68 F.3d 1247 (10th Cir. 1995) : Affirming a conviction for bank fraud arising out of a check kiting scheme, the Court found no plain error in the Trial Judge's brief questioning of three prosecution witnesses. While the responses to the questions may have negatively affected the defense, the questions were permissible attempts "to clarify the somewhat complicated testimony about how the bank transactions were structured."

[d] Rule 614(b) -- Discretion of Trial Judge

[i] Rule 614(b) -- Civil Cases

Rivera-Torres v. Ortiz Velez, 341 F.3d 86 (1st Cir. 2003) : In an action alleging employment discrimination motivated by political animus, the Court affirmed a judgment for the plaintiff, finding no reversible error in the Judge's questioning of a witness, which "[o]n the cold record before us," suggested some skepticism about the witness' testimony. Although ideally the Judge should have avoided this suggestion, the Court concluded that, given the brevity of the exchange and the mild nature of the questioning, the Judge's interjections did not result in "serious prejudice," especially because a careful cautionary instruction was given.

Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990) : The Court affirmed a judgment for the plaintiff in a product liability action, noting that the Judge properly asked questions of the plaintiff, described as a man of few words, to aid the understanding of the jury.

Mosco v. Baltimore & Ohio R.R., 817 F.2d 1088 (4th Cir. 1987) : The Court affirmed a judgment for the railroad in a FELA case, finding that the Trial Judge did not err in asking questions to clarify testimony.

Van Leirsburg v. Sioux Valley Hosp., 831 F.2d 169 (8th Cir. 1987) : The Court held that a Trial Judge's questioning of a witness in a medical malpractice case was permissible to clarify testimony and was not excessive judicial intervention. See also *Hale v. Firestone Tire & Rubber Co.* n2(questioning of an expert witness to clarify testimony was permissible).

Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525 (9th Cir. 1986) : In an opinion reversing convictions for "churning" stock accounts on another ground, the Court held that the Trial Judge did not improperly question witnesses or criticize counsel. It observed that many of the Judge's questions clarified either questions or answers and that criticism of counsel's preparedness did not impugn his integrity or the merit of the case.

Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144 (10th Cir. 1978) : Affirming a judgment for the defendants in a quiet title and ejectment action involving lode-mining claims, the Court stated: "A trial judge is allowed to participate in a trial and ask questions, including leading questions, of a witness in order to ascertain the facts in the search for the truth." However, in *Lane v. Wallace*, n3 a physician malpractice action, the Court cautioned that "[e]ver increasing litigation places intolerable burdens on federal judges with resulting irritation and impatience. Heavy as they are the judiciary must bear these burdens... . [A] judge should not talk too much."

[ii] Rule 614(b) -- Discretion of Trial Judge -- Criminal Cases

United States v. Gonzalez-Torres, 980 F.2d 788 (1st Cir. 1992) : The Court affirmed cocaine importation convictions, holding there was no plain error in direct, specific questions by the Trial Judge to clarify the defendant's testimony, where the Judge's impartiality remained intact throughout.

United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987) : The Court affirmed drug trafficking and money laundering convictions, holding that the Trial Judge did not err in asking questions in order to clarify testimony.

United States v. Seeright, 978 F.2d 842 (4th Cir. 1992) : The Court held there was no abuse of discretion in the Trial Judge's questioning of the defendant, where it was neither hostile nor disbelieving and was consistent with the questioning of other witnesses, the defendant was not interrupted nor badgered, and the jury was properly advised to draw no inferences therefrom and that only it could determine credibility. In *United States v. Norris*, n4 the Court indicated that it is permissible for the Trial Judge to clarify testimony by asking questions.

United States v. Sanchez, 325 F.3d 600 (5th Cir. 2003) : Affirming a conviction for making false statements in connection with a Small Business Administration loan, the Court found no plain error in the Trial Judge's comments and questions to witnesses. While the Judge's comments and questions during cross-examination of government witnesses might on occasion "have been inadvisable," they did not impair cross-examination by the defense. Although the information elicited "clearly helped the government," "[w]hen viewed in totality, the court's questioning of witnesses, comments on the evidence, and evidentiary rulings do not amount to a quantitatively and qualitatively substantial intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor." In *United States v. Green, 293 F.3d 886 (5th Cir. 2002)* , a cocaine trafficking prosecution, one defense witness testified that he was the manager of a band in which the defendant played, and given his closeness to the defendant, it was impossible for the defendant to have traded drugs without the witness knowing. Before the witness left the stand, the Judge asked him a series of questions which elicited the fact that he did not report cash payments to the band as income. Although the Court noted that a Trial Judge "must be careful not to express a bias or to confuse the roles of the judge and prosecutor," it found no plain error, since the Judge properly instructed the jury regarding judicial questions and the questioning "was negligible, with no cumulative effect." In *Moore v. United States*, n5 the Court upheld a conviction for possession of nontax-paid whiskey, rejecting the defendant's argument that the Trial Judge acted improperly in putting 105 questions to him, after he answered 41 questions on direct examination and 66 questions on cross-examination. The Court indicated that the Trial Judge's questions were fair and were within his common-law prerogatives. In *United States v. Adkins*, n6 the Court concluded that a Trial Judge's questioning of witnesses and interruption of counsel did not evince bias, although it found some comments by the Trial Judge to have been improper.

United States v. Smith, 831 F.2d 657 (6th Cir. 1987) : The Court held that a Trial Judge may question witnesses in order to clarify their testimony. In *United States v. Slone*, n7 the Court affirmed marijuana-related convictions, finding that the Trial Judge's questions were attempts to clarify testimony and did not cast the Judge in an improper role. In *United States v. Tilton*, n8 the Court affirmed an armed robbery conviction, although it expressed concern that the Trial Judge's "questioning of the witnesses went beyond that generally expected of one who is to take on the role of a neutral arbitrator." It declined to reverse the conviction, however, as the conduct appeared to affect both the government and the defendant.

United States v. Simpson, 337 F.3d 905 (7th Cir. 2003) : The Court affirmed drug distribution conspiracy convictions, finding an abuse of discretion, but harmless error, in the Trial Judge's interrupting defense counsel 12 times during the trial. None of the Judge's remarks when interrupting a witness' testimony, admonishing counsel not to ask questions that had already been asked and answered, and requesting a sidebar "[gave] rise to any suggestion of bias but rather were clearly designed to 'make the interrogation and presentation effective for the ascertainment of truth [and to] avoid a needless consumption of time.' *Rule 611(a)*." In a bank robbery case, *United States v. Martin, 189 F.3d 547 (7th Cir. 1999)* , the defendant asserted that he was financially secure and had no motive to rob. On cross-examination about the apparent contradiction between that assertion and his claim of indigence when applying for a CJA attorney,

the defendant's answers were somewhat ambiguous and contradictory. The Trial Judge questioned him further on some of the points raised in the cross-examination, and the defendant moved for a mistrial. The Court held there was no abuse of discretion in denying the mistrial motion. Although the Judge's stated purpose for questioning the defendant--to assure that he was truly indigent and the CJA program was being run efficiently--was not a concern of the jury, so that part of the questioning should have been out of their presence, the interrogation also helped to clarify the defendant's financial condition for the jury. The Judge's questioning did not convey his thoughts about the defendant's honesty or dishonesty. In *United States v. Evans*, n9 the Court affirmed a conviction for felon firearm possession, holding that the defendant properly preserved a claim of error as to the Trial Judge's prejudicially interrogating the defendant in a skeptical tone, by making the objection the next day as the first order of business after completion of the defendant's testimony. There was no error in denying the defendant's motion for a mistrial, as the Judge limited his intrusion by asking questions only after both parties had completed their examinations, and had instructed the jury not to assume from his questions that he held any opinion and to disregard all his comments in making their findings of fact. In *United States v. Gill*, n10 the Court held that the Trial Judge's questioning of witnesses in a wire fraud case was not improper where the questions were quite limited and were aimed solely at prosecution witnesses, and neither the questions nor the Judge's limited intervention implied a bias against the defendant. In *United States v. Kwiat*, n11 a bank fraud prosecution, the Court held that the Trial Judge did not deny a fair trial in asking 60 questions during eight days of trial or in showing asperity in front of the jury no more than five times. The Court suggested that counsel who believe that the Trial Judge is acting unfairly should so indicate during the trial, stating that it "will not presume that district judges are so thin-skinned and vindictive that counsel should be allowed to bypass the most immediate way of dealing with their grievances about the conduct of the trial--requests to the presiding officer."

United States v. Jerde, 841 F.2d 818 (8th Cir. 1988) : The Court held that a Trial Judge's questioning of a witness in a tax prosecution was permissible to clarify testimony and was not excessive judicial intervention. In *United States v. Cooper*, n12 the Court held that the Trial Judge acted properly in asking questions at trial to clarify the testimony of the defendant, saying that it is the Trial Judge's duty to clarify the testimony of a witness in order to avoid any misunderstanding of the testimony by the jury.

United States v. Parker, 241 F.3d 1114 (9th Cir. 2001) : Affirming convictions arising from an armed bank robbery conspiracy, the Court held that despite the Trial Judge's substantial participation in the proceedings, the defendant was not deprived of a fair trial. There was no indication that the Judge was actually biased or projected the appearance of advocacy or partiality, and the jury members were instructed that they were the judges of the facts and should not infer any opinion from the Judge's questioning. "The mere fact that a judge's participation in a trial is substantial or even 'extreme' does not *ipso facto* deprive a defendant of a fair trial." In *United States v. Bradshaw*, n13 the Court found, in the course of affirming a kidnapping conviction, that the Trial Judge had not acted improperly in questioning a government witness. "Although a trial judge may question witnesses to clarify and develop facts, he must never prejudice the defendant by assuming a partisan stance." The Judge's questions had been fair and he properly instructed the jury that nothing he said was meant to suggest what verdict it should return.

United States v. Block, 755 F.2d 770 (11th Cir. 1985) : The Court affirmed convictions arising out of a fraudulent loan scheme, finding that the Trial Judge had not improperly interjected himself into the case. The Court observed, however, that "a trial judge improperly interjects himself into the trial by questioning witnesses when the attorneys are competently conducting their cases."

[e] Rule 614(b) -- Improper Questioning

United States v. Tilghman, 134 F.3d 414 (D.C. Cir. 1998) : The Court reversed a conviction for making false statements on a government form because the Judge's repeated questions to the defendant could have telegraphed to the

jury that he disbelieved the defendant, in a case where the defense rested heavily on the defendant's personal credibility.

Rivas v. Brattesani, 94 F.3d 802 (2d Cir. 1996) : The Court reversed a judgment for the plaintiff in an excessive force case, finding that questions by the Trial Judge to two defense witnesses "conveyed to the jury the impression that [the Judge] held a fixed and unfavorable opinion of defendants, their counsel, and their position." One question implied that the defendants' expert witness, a medical examiner, conducted autopsies without ever examining the body. Another question implied that the memo book of one of the defendant police officers was a fraud that he made up at the end of every day. The Court found that the cumulative impact of these prejudicial comments could not be cured by a limiting instruction, especially since the case rested largely on a credibility determination between the plaintiff's account and that of the defendants. In *United States v. Filani, 74 F.3d 378 (2d Cir. 1996)* , the Court reversed a conviction for importing heroin because numerous instances of the Trial Judge's intrusive questioning unfairly prejudiced the defendant. In *United States v. Manko*, n14 the Court expressed great concern that questioning by the Trial Judge explicitly and repeatedly endorsing the government's view of a witness' role in a tax fraud scheme was a breach of impartiality, but held that the Judge's conduct did not deprive the defendants of a fair trial. In *United States v. Victoria*, n15 the Court reversed convictions on cocaine charges, finding that the Trial Judge asked questions of the defendants "in the nature of cross-examination" that challenged their credibility. The Court wrote that "it seems to be clear error for a trial judge to ask questions bearing on the credibility of a defendant-witness prior to the completion of the direct examination." It added that when the Judge interrogates a defendant for the purpose of challenging credibility and conveys the Judge's opinion that the witness is not worthy of belief, the defendant is deprived of a fair trial if credibility is a key issue.

United States v. Wilensky, 757 F.2d 594 (3d Cir. 1985) : When the defendant, charged with obstruction of justice, presented a psychiatrist in support of his insanity defense, the Judge "interrupted both the direct and cross examination ... with his questions delving deeply into the basis for the opinion and the extent of Wilensky's involvement with the usage of drugs, and '[a]t various points the trial judge assumed the entire examination of the witness, posing numerous questions ... in succession'." The Court concluded that the Judge "did overstep the bounds of prudent judicial conduct," and erred in so doing, but it found that the error was "not so egregious as to justify reversal of the convictions." In *United States v. Beaty*, n16 the Court reversed a defendant's drug convictions on the ground that the Trial Judge denied him a fair trial by "cross-examining" three of his four witnesses in a way that must certainly have communicated to the jury skepticism about the defendant's alibi. The Court found that the Judge's overzealous examination was reversible error despite his instructions to the jury that it was the sole trier of fact and that he was not a partisan.

Rodriguez v. Riddell Sports, Inc., 242 F.3d 567 (5th Cir. 2001) : Reversing judgments for the plaintiffs in an action for injuries from an allegedly defective football helmet, the Court noted that it was troubled by the Trial Judge's questioning of a defense expert who testified that the speed at which the football player hit the ground was half the speed estimated by the plaintiffs' expert. The Judge suggested that he thought defendants should be arguing that the speed was higher," which "at best ... violated the stricture that a court should not comment on trial strategy." In a prosecution for marijuana offenses where the outcome depended largely on the credibility of the defendant and of the chief prosecution witness, *United States v. Saenz, 134 F.3d 697 (5th Cir. 1998)* (per curiam), the Court reversed a conviction because the Judge's questioning of the chief prosecution witness and of the defendant could have led the jury to believe that the Judge favored the prosecutor's case, despite instructions to disregard any opinion that might be revealed. In *United States v. Candelaria-Gonzalez*, n17 the Court reversed narcotics convictions partly because the Trial Judge erred in interrupting counsel and criticizing counsel in the presence of the jury. "In a case of this nature, where determination of guilt or innocence rests largely on whether the jury credits the testimony of the chief government witness or that of the defendants, avoidance of the appearance of bias by the trial judge takes on added importance."

United States v. Van Dyke, 14 F.3d 415 (8th Cir. 1994) : The Court reversed a conviction for bank fraud because, *inter alia*, the Trial Judge excessively involved himself in trying the case, perceptibly as an advocate for the

prosecution. In *United States v. Singer*, n18 a panel of the Court held that it was not unfair to the defense when the Trial Judge questioned a number of prosecution witnesses himself, suggested objections to government counsel, and made comments that could have created jury sympathy for government counsel. The panel opined that "experience in this circuit teaches that jurors are not always reluctant to disregard even very strong comments." The *en banc* Court reversed, finding that the jury could well have inferred that "the judge was siding with the government." In *United States v. Bland*, n19 the Court reversed convictions for firearms offenses because the Trial Judge's questioning was not neutral. The Court observed: "A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury. A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony."

United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004) : After the government concluded its cross-examination of the defendant in a bank fraud trial, the Judge questioned the defendant at some length (without objection) concerning a transaction involved in the case. The Court concluded that the questioning went beyond clarifying the evidence and was "inappropriately extensive and suggestive of the court's own conclusion about [the defendant]'s credibility." However, it did not warrant reversal for plain error, particularly because appropriate curative instructions were given. In *United States v. Moorehead, 57 F.3d 875 (9th Cir. 1995)* , the Court reversed a conviction for felon firearm possession because the Trial Judge questioned a defense witness, one of the defendant's closest friends, in an effort to establish that both the witness and the defendant were drug dealers who spent most of their time selling narcotics in the park. Noting that there was no evidence that the defendant used any gun while dealing drugs, the Court concluded that the questioning violated *Rule 404(b)*, the evidence was substantially more prejudicial than probative, and "[t]he fact that it was the judge--and not the prosecution--that asked the questions could only exacerbate the damage done Mr. Moorehead's cause."

[f] Rule 614(b) -- Neutral Questions

Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion Familiar, 345 F.3d 15 (1st Cir. 2003) : The Court affirmed a judgment for an abortion clinic patient in a malpractice action against a doctor and the clinic. It found no error in the Trial Judge's questions to witnesses, noting that the questions "were phrased in a neutral manner."

[g] Rule 614(b) -- *Pro Se* Litigants

Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382 (5th Cir. 1985) : The Court affirmed a judgment for the defendants in a libel action brought *pro se* by a plaintiff who claimed that his product had been disparaged. Although the plaintiff complained that the Judge's participation in the trial was excessive, comprising 23 percent of the transcript, the Court observed that the Judge has greater latitude to participate in a bench trial than a jury trial. It also observed that

> [w]hen a *pro se* litigant, even one as skillful as Cranberg, goes to trial against a party represented by a member of the bar, the responsibility of the trial judge may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel.

[3] Rule 614(c) -- Objections

United States v. Vega, 589 F.2d 1147 (2d Cir. 1978) : The Court held that a client's right to complain on appeal about the Trial Judge's questions was waived by his lawyer's failure to object either immediately or at the first opportunity outside the jury's presence. It rejected the argument that counsel should be excused from objecting because of "timidity or fear of antagonizing the judge," and relied upon the explicit language of *Rule 614(c)*.

United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994) : The Court held that the defendant's failure to object at trial to the Trial Judge's questioning of a defense witness precluded review on appeal. Although the Judge's asking whether the witness had ever been convicted of a felony was inappropriate and improvident in the absence of any particularized good-faith basis, it was not so prejudicial as to deny the defendant a fair and impartial trial. In *United States v. Billups*, n20 the Court affirmed several convictions of a labor official, rejecting a claim that the Trial Judge's questions and comments were so improper as to require a new trial. Defense counsel waited too long to object and thus the objection was waived under the terms of *Rule 614(c)*.

United States v. Evans, 994 F.2d 317 (7th Cir. 1993) : Affirming a conviction for felon firearm possession, the Court held that the defendant properly preserved a claim of error as to the Trial Judge's prejudicially interrogating the defendant in a skeptical tone, by making the objection the next day as the first order of business after completion of the defendant's testimony.

FOOTNOTES:

(n1)Footnote 1. *United States v. Parodi, 703 F.2d 768 (4th Cir. 1983)* .

(n2)Footnote 2. *Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985)* .

(n3)Footnote 3. *Lane v. Wallace, 579 F.2d 1200 (10th Cir. 1978)* .

(n4)Footnote 4. *United States v. Norris, 749 F.2d 1116 (4th Cir. 1984)* .

(n5)Footnote 5. *Moore v. United States, 598 F.2d 439 (5th Cir. 1979)* .

(n6)Footnote 6. *United States v. Adkins, 741 F.2d 744 (5th Cir. 1984)* .

(n7)Footnote 7. *United States v. Slone, 833 F.2d 595 (6th Cir. 1987)* .

(n8)Footnote 8. *United States v. Tilton, 714 F.2d 642 (6th Cir. 1983)* .

(n9)Footnote 9. *United States v. Evans, 994 F.2d 317 (7th Cir. 1993)* .

(n10)Footnote 10. *United States v. Gill, 909 F.2d 274 (7th Cir. 1990)* .

(n11)Footnote 11. *United States v. Kwiat, 817 F.2d 440 (7th Cir. 1987)* .

(n12)Footnote 12. *United States v. Cooper, 596 F.2d 327 (8th Cir. 1979)* .

(n13)Footnote 13. *United States v. Bradshaw, 690 F.2d 704 (9th Cir. 1982)* .

(n14)Footnote 14. *United States v. Manko, 979 F.2d 900 (2d Cir. 1992)* .

(n15)Footnote 15. *United States v. Victoria, 837 F.2d 50 (2d Cir. 1988)* .

(n16)Footnote 16. *United States v. Beaty, 722 F.2d 1090 (3d Cir. 1983)* .

(n17)Footnote 17. *United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977)* .

(n18)Footnote 18. *United States v. Singer, 710 F.2d 431 (1983)* (en banc), rev'g *687 F.2d 1135 (8th Cir. 1982)* .

(n19)Footnote 19. *United States v. Bland, 697 F.2d 262 (8th Cir. 1983)* .

(n20)Footnote 20. *United States v. Billups, 692 F.2d 320 (4th Cir. 1982)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 614 RULE 614

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614.04 Legislative History

Advisory Committee's Note

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick § 8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303-304 (5th ed. 1965); 9 Wigmore § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607 *supra* . Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick § 8, pp. 12-13; Maguire, Weinstein, et al., Cases on Evidence 737-39 (5th ed. 1965); 3 Wigmore § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 614 RULE 614

3-614 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 614, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 614. Calling and Interrogation of Witnesses by Court	**Rule 614. Court's Calling or Examining a Witness**
(a) Calling by court. The	**(a) Calling.** The court may

	court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.		call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b)	**Interrogation by court.** The court may	**(b)**	**Examining.** The court may examine a

	interrogate witnesses, whether called by itself or by a party.		witness regardless of who calls the witness.
(c)	**Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at	**(c)**	**Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity

the next available op-por-tun-ity whe n the jury is not pres ent.	whe n the jury is not pres ent.

Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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PART TWO: THE RULES THEMSELVES
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Supp. to § 614.03 Annotated Cases

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[2] Rule 614(b) -- Interrogation by Court [Go To Main]

[a] Rule 614(b) -- Bench Trials

United States v. Almeida-Perez, 549 F.3d 1162 (8th Cir. 2008) : The Court affirmed convictions for aliens in possession of firearms, finding no plain error in the Magistrate Judge's questioning of witnesses at a suppression hearing. It noted that "the fact that the suppression motion was tried to a Magistrate Judge, rather than to a jury, decreases the danger or prejudice to the defendants from the Magistrate Judge's questioning."

[b] Rule 614(b) -- Clarifying Questions

United States v. Angulo-Hernandez, 565 F.3d 2 (1st Cir. 2009) : The Court affirmed drug convictions, finding no unfair prejudice to the defendants in the Trial Judge's questioning of witnesses. The questions "were, on the whole, efforts by the district court to clarify testimony, respond to defense counsels' objections, determine the qualifications of expert witnesses, and expedite the trial, all legitimate purposes."

United States v. Roach, 502 F.3d 425 (6th Cir. 2007) : Affirming convictions of police officers for depriving two Hispanic men of their civil rights, the Court held that the Trial Judge did not render the trial unfair by asking questions of witnesses. The Judge asked questions of the police chief after he testified about the shift-log for the day on which the men were deprived of their rights, and the Court found that the questions were brief and direct, revealed no bias for either side, and addressed a matter that might have confused the jury.

[c] Rule 614(b) -- Complex Cases

United States v. Smith, 452 F.3d 323 (4th Cir. 2006) : Affirming convictions for drug conspiracy and murder, the Court found no plain error in the Trial Judge's extensive questioning of several witnesses. The Judge's conduct "revealed no bias and crossed no line. It represented the judge's permissible attempt to cabin and control a two-week trial that featured numerous witnesses, extensive amounts of evidence, and, even on appeal, an eight-volume joint

appendix totaling over 2600 pages." The Court noted that the Judge spoke up when defense counsel posed questions "that were difficult to understand, that had already been asked and answered, or that were otherwise irrelevant." Moreover, the Judge properly instructed the jury that the judicial participation during testimony was not to be interpreted as commentary on the evidence. The Court noted that "[t]he inability of cold transcripts to replicate the human dynamics of a trial suggests caution in the review of judicial interference claims. It should thus come as no surprise that we apply a measure of deference to the judgments of those to whom, after all, the conduct of trial has been textually entrusted. See *Fed.R.Evid. 611(a)*; *614(a)-(b)*."

[d] Rule 614(b) -- Discretion of Trial Judge

[i] Rule 614(b) -- Civil Cases

Chainey v. Street, 523 F.3d 200 (3d Cir. 2008) : In an action arising from a city's decision to halt repairs on houses rebuilt after a police bombing, the Court found no abuse of discretion when the Trial Judge questioned the mayor, "expressing surprise" that the mayor could not recall key occurrences and suggesting that he should have "been more solicitous of the welfare of his citizens." The Court noted that interrogating witnesses "has been an important and longstanding practice on the part of trial judges and should not be discouraged," and that "the abuse of discretion standard is a deferential one and in order to meet the standard the conduct of a trial judge must be 'inimical and partisan, clearly evident and prejudicial.' "

[e] Rule 614(b) -- Improper Questioning

United States v. Melendez-Rivas, 566 F.3d 41 (1st Cir. 2009) : The Court vacated a conviction for carjacking because the Trial Judge's questioning in a case involving several credibility contests not only elicited hearsay but also brought out that an FBI agent thought that the defendant (who claimed he had no criminal record or associations) was involved in crimes that could lead to the death penalty. A follow-up question whether the witness believed the FBI and the instructions given were inadequate to offset the prejudice.

United States v. Barnhart, 599 F.3d 737 (7th Cir. 2010) : Affirming a wire fraud conviction, the Court found that the Trial Judge's "questioning of the witnesses during this trial went too far," but the defendant had failed to object and could not demonstrate plain error. The Judge's leading questions of one witness "read like a cross-examination"; his questioning of the defendant gave the impression that he was skeptical of the testimony; and his "questioning of the witnesses went beyond mere clarification and instead gave the impression that the judge disbelieved Barnhart's defense." In sum, "the quantity and quality of the judge's questions in this case conveyed an improper skepticism about Barnhart's defense." In *United States v. McCray, 437 F.3d 639 (7th Cir. 2006)* , in a drug prosecution, the Court found no prejudice in the Trial Judge's interruption of defense counsel's cross-examination with extensive questioning of a prosecution witness, as well as extensive questioning of a police officer during the government's direct examination. This questioning was coupled with the Trial Judge's standing practice of not permitting sidebar discussion. While affirming the conviction, the Court expressed

> some concern over the judge's decision to proceed with extensive questioning. When coupled with the trial court's practice of not permitting sidebars, the judge's questions in this case arguably placed the defendant's lawyer in an awkward position. Defense counsel was faced with either passively accepting what he perceived to be an unwarranted examination or potentially exacerbating the situation by challenging the judge's impartiality in front of the jury. To avoid the risk of unforeseen prejudice, we encourage district judges to remain vigilant to the potential impact of their questions during a jury trial.

[3] Rule 614(c) -- Objections [Go To Main]

United States v. Smith, 452 F.3d 323 (4th Cir. 2006) : The Court held that defense motions *in limine* and post-trial objection to judicial intervention in the questioning of witnesses were not sufficient to preserve claims of error arising from judicial questioning of witnesses at trial, as "the former was premature and the latter dilatory." The motion *in limine* was a general request that the Judge "refrain from any actions which may be interpreted by the jury as favoring the government over the defense especially regarding the court questioning or rehabilitating witnesses." This motion necessarily was too general, as it "failed to alert the trial judge to any improper questioning with the required specificity," and it "sought in effect to charge the district judge with bias before the trial had even so much as started." On the other hand, the post-trial motion gave the Judge no opportunity to address the defendants' concerns. Litigants "may not attempt to blindside district courts by pointing out errors long after the opportunity to take immediate curative action has passed."

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
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615.04 Legislative History

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[2] 1998 Amendment Committee Note

[3] Report of the Senate Committee on the Judiciary

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 615 RULE 615

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615.01 Official Text

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 615 RULE 615

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615.02 Editorial Explanatory Comment

[1] Right to Sequestration

Sequestration of prospective witnesses is a common method of discouraging or preventing collusion and exposing inaccuracies in testimony. n1 This Rule provides that at the request of a party, or on its own motion, the Court shall order witnesses excluded so they cannot hear the testimony of other witnesses. A party who requests sequestration of witnesses has a right to it under this Rule, subject to the exceptions contained in the Rule. n2

When a victim of a crime is a witness in the criminal case, the sequestration power set forth in *Rule 615* has been substantially circumscribed by statute. See the discussion in § 615.02[9].

[2] Exceptions

The exceptions set forth in the Rule will be discussed in turn, with the complex treatment of crime victims left for the end of this Editorial Explanatory Comment (see § 615.02[9]).

(1) *Parties*. A party to the action cannot be sequestered. It is generally viewed as improper to prohibit a party from being present during the trial of his or her own cause. In a criminal case the *Sixth* and *Fourteenth Amendments* entitle a defendant to be present, although the defendant may "waive" that right in several ways. n3 In civil cases it would appear to be inconsistent with due process to deny parties the opportunity to fully participate in their case, simply on the ground that they may tailor their testimony to what witnesses have already said. n4

(2) *Designated representative*. If an individual party has the right to be present, an organizational party should have the same right to be present at all times to ensure that the organization's interests are adequately protected. The Rule therefore provides an exception for a designated representative of a party who is not a natural person. n5

In a criminal case, it is generally held that the police officer in charge of the investigation is within the "officer or employee" exception provided in *Rule 615*. n6

There is some dispute about whether the "officer or employee" exception authorizes more than one person to remain in

the courtroom during the entire trial. Some Courts have held that a party may designate only one representative for this *Rule 615* exception. n7 Others have left it to the discretion of the Trial Judge, recognizing, of course, that at some point there must be a limit, or else corporate and government representatives would be flooding the courtroom. n8

(3) *Person whose presence is essential to the party's presentation*. There are cases in which a party needs a prospective witness to be in the courtroom, in order to properly prepare and present the case. In such instances, the Trial Judge must balance the need of the party for the assistance of the prospective witness against the wisdom of sequestration. Although no such balance is explicitly provided for in *Rule 615*, it is probably inherent in the use of the word "essential" in subdivision (c). n9 Thus, it has been held that a Trial Court can exercise discretion to permit experts to remain in the courtroom, especially during the testimony of an expert for the opposing party, where that presence is essential to the expert's own testimony. n10 Discretion is necessary given the fine lines between experts who are necessary to manage a case and those who are not, and between those who are experts and those who are combination expert and fact witness. n11 Generally speaking, where a witness is both a fact and expert witness, sequestration should be ordered, or at the very least the witness' access should be limited to that testimony crucial to the witness' own expert opinion. n12

The Second Circuit in *United States v. Jackson, 60 F.3d 128, 134 (2d Cir. 1995)* , set forth a helpful list of considerations for Trial Courts to employ in determining whether a witness should be exempted from a sequestration under the exception for witnesses essential to preparation of the case:

> In making a *Rule 615* ruling, a district court must exercise discretion, and among the factors that might usefully inform the exercise of such discretion are: 1) how critical the testimony in question is, that is, whether it will involve controverted and material facts; 2) whether the information is ordinarily subject to tailoring, such that cross-examination or other evidence could bring to light any deficiencies; 3) to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses; 4) the order in which the witnesses will testify; 5) any potential for bias that might motivate the witness to tailor his testimony; and 6) ... whether the witness's presence is "essential" rather than simply desirable.

[3] Alternatives Short of Complete Sequestration

When a witness falls into one of the exceptions to *Rule 615*, it does not mean that the policy that drives the Rule is inapplicable. Therefore, the Trial Judge may want to consider alternatives other than sequestration for witnesses who fall into the exceptions. For example, the Trial Court could use its authority under *Rule 611(a)* to require the nonsequestered witness to testify early, if not first, in the case. n13 Also, if the witness' presence is "essential" only with respect to the testimony of certain other witnesses -- as is most typically the case with experts, who might need to hear the testimony of an adverse expert -- the witness should be permitted to be present only for the testimony of those witnesses.

[4] Scope of Sequestration

Rule 615 provides only for exclusion of witnesses from the courtroom. The Rule says nothing about witnesses talking with each other outside the courtroom, nor does it concern itself with witnesses who obtain access to information about the trial through means other than presence in the courtroom. However, the Rule does not affect the Trial Court's inherent power to fashion a more far-reaching sequestration order appropriate to the circumstances of the case. The relationship between *Rule 615* and the Trial Court's broader inherent sequestration authority was analyzed by Judge Selya in *United States v. Sepulveda, 15 F.3d 1161, 1175-77 (1st Cir. 1993)* , a case in which the defendant objected to the fact that three prosecution witnesses were placed in the same jail cell throughout the trial. Judge Selya analyzed *Rule 615* and the broader sequestration power as follows:

> [*Rule 615*] more or less codifies common-law sequestration powers, but it is at once less discretionary and less stringent than its forebears. On one hand, the rule cabins the judge's discretion by

> affording all parties a right to close the courtroom to prospective witnesses. On the other hand, while the common law supported sequestration beyond the courtroom, *Rule 615* contemplates a smaller reserve; by its terms, courts must "order witnesses excluded" only from the courtroom proper. In sum, the rule demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires.
>
> Outside of the heartland, the district court may make whatever provisions it deems necessary to manage trials in the interests of justice, including the sequestration of witnesses before, during, and after their testimony, and compelling the parties to present witnesses in a prescribed sequence. *Rule 615* neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion. See *United States v. Arias-Santana, 964 F.2d 1262, 1266 (1st Cir. 1992)* (explaining that a federal trial court may enter non-discussion orders at its discretion).
>
> This is not to say, however, that sequestration orders which affect witnesses outside the courtroom are a rarity. As a practical matter, district courts routinely exercise their discretion to augment *Rule 615* by instructing witnesses, without making fine spatial distinctions, that they are not to discuss their testimony. Indeed, such non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare, serving to fortify the protections offered by *Rule 615*.

Judge Selya, in *Sepulveda*, made clear that if a party wants a sequestration order that goes further than that mandated by *Rule 615*, then it is up to the party to ask for it with specificity:

> Here, appellants moved in advance of trial for sequestration without indicating to the court what level of restraint they thought appropriate. The court granted the motion in its simplest aspect, directing counsel "to monitor sequestration" and ordering "that witnesses who are subject to [the court's] order are not to be present in the courtroom at any time prior to their appearance to render testimony." At trial, the district court expanded its earlier order beyond the *Rule 615* minimum, instructing each witness at the close of his or her testimony not to discuss that testimony with any other witness. Appellants accepted the conditions of sequestration described by the court without demurrer. What is more, they did not request any further instructions, say, that witnesses be directed at the end of each day, or before each recess, not to discuss their testimony. Thus, every witness was placed under an order prohibiting discussion of the case with other witnesses only upon the completion of his or her testimony. On these facts, the district court's denial of relief must be upheld. The court's basic sequestration order, which ploughed a straight furrow in line with *Rule 615* itself, did not extend beyond the courtroom. There has been no intimation that the witnesses transgressed this order. Moreover, because the district court did not promulgate a non-discussion order applicable to any witness until the conclusion of that witness's testimony, [the cohabiting witnesses] were under no obligation, prior to that moment, to refrain from discussing their recollections with each other.

Counsel who believe that sequestration of witnesses will work to the advantage of their clients should make all reasonable efforts to ensure that a sequestration order is fully protective. For example, it is not sufficient for counsel simply to ask the Trial Judge to have the witnesses removed from the courtroom when they are not testifying. Counsel should also ask that the Trial Judge instruct the witnesses that they are not to discuss the case with one another.

As seen in *Sepulveda*, it is the Court's order that determines the scope of sequestration and whether there will be a remedy when a witness obtains access to trial evidence in advance of testifying. Reliance on agreement between the parties will not be enough. Illustrative is *United States v. Williams, 136 F.3d 1166 (7th Cir. 1998)* , where the Court found no violation of *Rule 615* when one prosecution witness spoke to another. The defendant moved for a mistrial on the ground that the sequestration order had been violated. The Court noted, however, that there was "one teensy, weensy

problem with this argument -- no sequestration order was ever entered." Before opening statements, the prosecutor informed the Judge that counsel had "talked about it, and both our sets of witnesses will be sequestered." The Judge replied "very good." There was no formal request for a sequestration order under *Rule 615*, nor did the Judge enter such an order *sua sponte*. The Court declared that "[i]t is not at all uncommon for trial attorneys to treat sequestration orders under *Rule 615* in a nonchalant manner, but a cavalier approach is not advisable." It held that "attorneys should specifically note the rule and ask the trial judge to formally invoke it. Without taking these minimal steps, it will be the rare case indeed where we could conclude that a 'sequestration order' has been violated."

[5] Application to Defense Counsel

Does a criminal defense counsel violate *Rule 615* by disclosing trial testimony to prospective witnesses? In *United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)* (en banc), a defense witness was excluded because defense counsel in preparing that witness for trial disclosed to him the trial testimony of a prosecution witness. The Trial Court found the exclusion of the witness an appropriate sanction for a violation of the sequestration order it had entered under *Rule 615*, and for a later extension of that order stating that "the witnesses shall not discuss one with the other their testimony." But the Court of Appeals reversed the conviction.

The Court relied on the following arguments: (1) "[i]t is clear from the unambiguous language of *Rule 615* that lawyers are simply not subject to the Rule" because the Rule relates only to witnesses and "serves only to exclude witnesses from the courtroom"; (2) the Trial Judge's extension precluding witnesses from discussing their testimony with other witnesses did not address the conduct of lawyers in any way; and (3) most importantly, any attempt to prevent defense counsel from disclosing trial testimony in preparing witnesses would probably violate the defendant's constitutional right to effective assistance of counsel. On this last point, the Court concluded that "where an attorney seeks to perform his constitutionally mandated duty to effectively represent a criminal defendant, he must be free to interview defense witnesses and to discuss with them all appropriate matters, without being subject to an overbroad sequestration order."

[6] Remedies for Violations

Great care should be taken in formulating a sequestration order. Once an order has been violated, appropriate remedies are difficult to develop. Although the Trial Judge has discretion to exclude the testimony of a witness who has violated a sequestration order, n14 this drastic remedy appears to be disfavored for understandable reasons. n15 Holding the witness in contempt for violating an order serves a punishment purpose and may have an impact on future witnesses, but cannot remedy the harm done by improper witness contact with other witnesses. And allowing a comment by opposing counsel on a witness' noncompliance with a sequestration order, although certainly a proper remedy, is of dubious value. n16 While a mistrial is a possibility, it can hardly be considered a preferred remedy. n17

Even the most careful sequestration instruction will be to no avail if a witness refuses to follow judicial instructions. But if it can be assumed, and we think it can, that many witnesses would not knowingly violate an explicit command of the Court, the more explicit the Court can be the better the trial system will work. n18

[7] Depositions

The risk that a prospective witness will tailor his or her testimony if allowed to hear another witness testify can be as much a problem at depositions as at trial. *Rule 615* does not explicitly apply to deposition testimony, and until 1993 Courts divided on whether the Judge had the power to bar witnesses not yet deposed from hearing someone else's deposition.

The question was decided by an amendment to *Fed. R. Civ. P. 30(c)*, effective December 1, 1993, which provides that Evidence *Rule 615* does not apply to the examination of witnesses at depositions. Thus, other deponents are not automatically excluded simply by the request of a party; however, they may be excluded, when appropriate, pursuant to

a protective order under *Civil Rule 26(c)(5)*.

[8] Suppression Hearings

The Federal Rules of Evidence are generally held inapplicable to suppression hearings. For example, in proving that probable cause existed to support a challenged search, the government can rely on hearsay. See the Editorial Explanatory Comment to *Rule 1101*, *§ 1101.02[4]*. Yet despite the general inapplicability of the Rules, there is a good argument for requiring sequestration of witnesses at suppression hearings. The importance of the sequestration power at suppression hearings is emphasized by the Court in *United States v. Brewer, 947 F.2d 404 (9th Cir. 1991)* , where the defendant moved to sequester a police officer who was scheduled to testify after another police officer at a suppression hearing. The Trial Court denied the motion on the ground that *Rule 615* was not applicable to suppression hearings. The two police officers testified virtually identically. The Court of Appeals reversed and remanded the order denying suppression. The Court addressed the government's argument that *Rule 1101(d)(1)* (exempting preliminary determinations from the Evidence Rules) covered suppression hearings. The Court noted that *Rule 1101(d)(1)* essentially restates *Rule 104*, and elaborated as follows:

> The commentary that follows *Rule 104* makes it clear that this section is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied. The examples of foundational facts that may be proved without complying with the exclusionary Rules of Evidence include the qualifications of an expert, the unavailability of a witness whose former testimony is being offered, the presence of a third person during a conversation between an attorney and client, proof of the interest of the declarant in determining whether the out-of-court statement threatens that interest, the competency of a child to testify as a witness.

The *Brewer* Court found that *Rule 615* was a procedural rule designed to guarantee a fair proceeding, as opposed to a rule dealing with the admissibility of evidence. Therefore it applied to suppression hearings. The Court held that *Rule 1101* "does not support the notion that procedural rules designed to protect the integrity of the fact finding process are inapplicable in a suppression hearing."

The *Brewer* Court's reading of *Rule 1101* makes a good deal of sense. But even if the Court is wrong about the applicability of *Rule 615*, the Judge at a suppression hearing surely has common-law authority to sequester witnesses to protect the integrity of *any* judicial proceeding. The need for the exercise of this power is apparent in the context of a suppression hearing, where all too often police officers testify identically about a contested set of facts. The advantage of a holding that *Rule 615* is applicable is that the defendant has a *right* under the Rule to exclude police officers from the courtroom. But even if the Rule does not apply, it is hoped that the Trial Court will freely exercise its common-law sequestration power to protect against collusion of witnesses.

[9] Victims of Crime

Federal *Rule 615* could obviously have an impact on a victim of a crime in the context of a criminal trial. The victim will often be a witness, and will often have an emotional and psychological interest in attending all trial proceedings. Victims would seem, however, to be subject to sequestration under the terms of *Rule 615* and would not seem to fall within the first three exceptions to that Rule. A victim is not a party to a criminal action, and it would be difficult to make the case that a victim's presence is essential to the presentation of the case.

In 1990, Congress enacted the "Victim of Crime *Bill of Rights*," *42 U.S.C. § 10606*, which provides several protections for victims of crime, among them the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." This legislation was supplemented by enactment of another Crime Victims Act codified at *18 U.S.C. § 3771*. The new Crime Victim's Act gives victims the right "not to be excluded from any ... public court proceeding, unless the

court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." Thus the new Act extends the right to attend to all public court proceedings, not just trials, and requires the Court to find by "clear and convincing evidence" that exclusion of the victim is necessary.

It is clear that Congress intended in these two pieces of victims' rights legislation to create an exception to *Rule 615* for crime victims. The exception permitting exclusion, which is narrowly tailored to take account of the interests of crime victims and is more recently enacted than the Rule, takes precedence over *Rule 615*. Accordingly, in 1998 *Rule 615* was amended to provide that witnesses could not be excluded if their presence is "authorized by statute." The Advisory Committee Note to the Rule makes specific reference to victims' rights legislation.

Under the legislation, a Trial Judge must determine whether the testimony of the victim will be "materially affected" by hearing other testimony. The use of the word "materially" imposes a difficult task on a Trial Judge, especially in light of the ordinary discovery that is mandated in criminal cases. *Fed. R. Crim. P. 16* does not require the government to reveal names of witnesses or to disclose the expected nature of their testimony. Nor does it require the government to produce statements of witnesses. The Jencks Act, *18 U.S.C. § 3500*, does not require the government to turn over statements of testifying witnesses until they have given direct examination. Thus, a Trial Judge called upon to determine the effect of other testimony on a victim often will be largely in the dark. As the evidentiary standard for exclusion is clear and convincing evidence that the victim's testimony will be tainted, it is unlikely, given the difficulties of proof, that this standard will be met in the ordinary course. That is particularly true in high profile cases, where sequestration will do little to shield the victim, or anyone else, from the substance of trial court testimony.

Even if a crime victim is subject to sequestration, this does not mean that the victim should be sequestered for any substantial part of a criminal trial. Any conscientious prosecutor dealing with a victim who wishes to be present at public Court proceedings related to that victim's harm should make his or her best effort to call the victim first and then argue that the victim has a right to remain in the courtroom during the rest of the trial. The argument is that, once the victim's testimony is completed, there no longer is a reason for exclusion.

Should a prosecutor fail to seek to have the victim testify first, the Judge should exercise the power conferred by *Rule 611(a)* to control the order of proof, and require the victim to be the first witness if the victim has expressed a desire to attend the trial. The result is that in all but the most unusual cases the victim should be able to be present during virtually the entire trial, if not the entire trial. This result is consistent with Congress' goals in enacting the victims' rights legislation.

In the Oklahoma City bombing trial, *United States v. McVeigh*, the defendant sought to exclude victims on the ground that they planned to testify at the *sentencing hearing*. The defense argued that the victims' presence at the trial would materially affect their testimony at the later proceeding. The Trial Judge agreed with the defendant and entered an order excluding from the trial any victims who planned to give victim impact statements at the sentencing hearing. This left the victims in a quandary: to attend the trial, they would essentially have to waive their right to give a victim impact statement at the sentencing hearing.

Congress responded with legislation entitled "The Victim Rights Clarification Act of 1997." The law adds section *3510 to Title 18*, and provides that notwithstanding any other law or Rule (including of course *Rule 615*), a Court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence." The Advisory Committee Note to the 1998 amendment to *Rule 615* specifically refers to the Victim Rights Clarification Act as a statutory exception to the sequestration power set forth in the Rule. After the Victim Rights Clarification Act, the Trial Court has no authority to exclude victims from trial on the ground that their presence at trial might taint their testimony at a sentencing proceeding.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)* (sequestration is "designed to discourage and expose fabrication, inaccuracy and collusion"); *United States v. Shurn, 849 F.2d 1090 (8th Cir. 1988)* (noting that the purpose of a sequestration order is to prevent witnesses "from tailoring their testimony to that which has already been presented").

(n2)Footnote 2. See, e.g., *Government of the Virgin Islands v. Edinborough, 625 F.2d 472, 474 (3d Cir. 1980)* ("The mandatory language of the rule shows that it was intended to change the prior practice under which the trial court had discretion to determine whether a witness should be excluded."); *Hollman v. Dale Electronic, Inc., 752 F.2d 311 (8th Cir. 1985)* (it was error for the Trial Judge to refuse to honor the plaintiff's demand for sequestration of witnesses; sequestration is required when requested by a party).

(n3)Footnote 3. See, e.g., *Illinois v. Allen, 397 U.S. 337 (1970)* (the constitutional right to be present at trial was not violated where the defendant was excluded for engaging in obstreperous and disruptive conduct in the courtroom). For a further discussion of the criminal defendant's constitutional right to be present at trial, see S. Saltzburg & D. Capra, American Criminal Procedure 1290-1300 (7th ed. 2004).

Note that the Supreme Court has held that when the accused testifies, it is permissible for the prosecutor to argue to the jury that it can draw a negative inference from the fact that the accused, unlike other witnesses, could not be sequestered. *Portuondo v. Agard, 529 U.S. 61 (2000)* . The Court in *Agard* declared as follows:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate -- and indeed, given the inability to sequester the defendant, sometimes essential -- to the central function of the trial, which is to discover the truth.

(n4)Footnote 4. See, e.g., *Helminski v. Ayerst Labs., 766 F.2d 208, 216 (6th Cir. 1985)* ("Consistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver.").

(n5)Footnote 5. See, e.g., *Queen v. Washington Metro. Area Transit Auth., 842 F.2d 476 (D.C. Cir. 1988)* (the defendant bus company had the right to designate the bus driver, rather than an officer or other company official, as its designated representative who would not be sequestered; *Roberts ex rel. Johnson v. Galen of Va.., Inc., 325 F.3d 776 (6th Cir. 2003)* (former corporate official of now-defunct corporation could be designated as a representative not subject to sequestration).

(n6)Footnote 6. See, e.g., *United States v. Payan, 992 F.2d 1387 (5th Cir. 1993)* (the defendant had no right to have the officer in charge of the investigation excluded from the courtroom).

(n7)Footnote 7. See, e.g., *United States v. Hickman, 151 F.3d 446 (5th Cir. 1998)* (error to allow two case agents to sit in the courtroom before they testified); *United States v. Pulley, 922 F.2d 1283 (6th Cir. 1991)* (the officer or employee exception does not permit two investigating officers to sit through the trial); *United States v. Farnham, 791 F.2d 331 (4th Cir. 1986)* (reversible error where two agents were permitted to remain in the courtroom; because the Rule favors sequestration, exceptions should be narrowly construed, and requiring a party to show prejudice from violation of the Rule would be unduly harsh and self-defeating).

(n8)Footnote 8. See, e.g., *United States v. Green, 293 F.3d 886 (5th Cir. 2002)* (no abuse of discretion in allowing three police officials to be present throughout the trial; the case was complex and each official oversaw a different part of the investigation).

(n9)Footnote 9. See, e.g., *United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993)* (there was no error in permitting a DEA agent to sit in the courtroom as an "essential" witness in addition to an FBI special agent who served as the government's representative; the Court noted that each agent was excluded from the courtroom when the other was testifying).

(n10)Footnote 10. See, e.g., *United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002)* (error to sequester defense expert because expert was necessary to evaluate the prosecution's evidence); *Hill v. Porter Memorial Hosp., 90 F.3d 220 (7th Cir. 1996)* (finding no error in permitting experts to have access to the testimony of other experts; each side's expert witnesses were permitted to consult the other's trial testimony, and the jury was instructed that it could consider that a witness had reviewed trial testimony in evaluating that witness' testimony); *Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993)* (it was an abuse of discretion to sequester the plaintiff's expert, where the defendant's expert's testimony differed from his prior reports, and therefore the plaintiff's expert's "presence in the courtroom was important to the presentation of the Maleks' case").

(n11)Footnote 11. *Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993)* (McLaughlin, J., dissenting) (arguing that the Trial Court did not abuse its discretion in sequestering the plaintiff's expert, because the expert "testified extensively to facts arising from his personal examination"); *United States v. Agnes, 581 F. Supp. 462 (E.D. Pa. 1984)* (the defendant had not demonstrated that his girlfriend had such special expertise or knowledge as warranted exempting her from a sequestration order).

(n12)Footnote 12. See, e.g., *Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625 (4th Cir. 1996)* (a general contractor hired by the defendant was properly excluded from the courtroom while evidence was presented; the contractor was both a fact witness and an expert witness, and the defendant claimed he was "a critical witness"; because the contractor was a fact witness in part, "[i]t is in precisely this circumstance that adherence to the sequestration rule is most important"; moreover, the Court found that the defendant failed to establish that the contractor needed to hear other witnesses in order to render an expert opinion).

(n13)Footnote 13. See, e.g., *United States v. Mitchell, 733 F.2d 327 (4th Cir. 1984)* (reiterating that "better practice suggests that if the agent [exempted from sequestration] is to testify, he should testify as the Government's first witness, unless ... there were good reasons otherwise"); *In re United States, 584 F.2d 666 (5th Cir. 1978)* (concluding that a government agent could be the government's "representative under (2) of the Rule," and adding that under *Rule 611(a)* the Judge might order the government to use the agent as a witness early in its case -- or not at all -- to avoid any unfairness in having the agent present to hear other witnesses).

(n14)Footnote 14. See, e.g., *Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981)* (exclusion was an appropriate sanction where counsel instigated the violation of a sequestration order). Compare *United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)* (reversible error for excluding a witness for violation of a sequestration order; this severe sanction was disproportionate to the violation; the witness' testimony was critical, and the violation if any was inadvertent because it was unclear whether the sequestration order applied to these circumstances).

(n15)Footnote 15. See, e.g., *Jerry Parks Equip. Co. v. Southeast Equip. Co., 817 F.2d 340 (5th Cir. 1987)* (holding that the Trial Judge did not abuse his discretion in striking the testimony of a witness who violated a sequestration order, but stating that "lesser sanctions would appear more in order"). See also *United States v. Hobbs, 31 F.3d 918 (9th Cir. 1994)* (it was plain error to exclude the testimony of a defense witness who violated a sequestration order, where there was no showing that the defense knew about the violation).

(n16)Footnote 16. See, e.g., *United States v. Friedman, 854 F.2d 535 (2d Cir. 1988)* (defense counsel was permitted to tell the jury that prosecution witnesses read trial transcripts in violation of a sequestration order).

(n17)Footnote 17. See, e.g., *United States v. Magana, 127 F.3d 1 (1st Cir. 1997)* (declaring a mistrial "is a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure

to the evidence is likely to prove beyond realistic hope of repair"); *United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993)* (discussing the possibility of a mistrial as a last resort).

(n18)Footnote 18. See, e.g., *United States v. Sepulveda, 15 F.3d at 1177* ("We assume that witnesses, like all other persons subject to court orders, will follow the instructions they receive."); see discussion of *Sepulveda*, *§ 615.02[4]*.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 615 RULE 615

3-615 Federal Rules of Evidence Manual 615.03

615.03 Annotated Cases

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[1] Designated Representative

[a] Civil Cases

Queen v. Washington Metro. Area Transit Auth., 842 F.2d 476 (D.C. Cir. 1988) : Affirming a judgment for the defendant in an action by a pedestrian who was struck by a bus, the Court held that the bus company had the right to designate the bus driver, rather than an officer or other company official, as its designated representative.

Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 699 F.2d 240 (5th Cir. 1983) : The Court affirmed a judgment for the owner of a pipeline damaged when it was struck by a drilling rig, finding it was proper to exclude a witness whom one party wanted in the courtroom, as the party did not claim that the witness was an employee entitled to be a designated representative.

Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986) : Affirming a judgment for an employer in a sex discrimination case, the Court declined to decide whether a corporation may designate more than one representative. Instead, it found that any error in permitting one person to be so designated during pretrial depositions and another at trial was not prejudicial.

[b] Designated Representative -- Criminal Cases

[i] Designated Case Agent

United States v. Hensel, 699 F.2d 18 (1st Cir. 1983) : A government agent, who sat at counsel table throughout a marijuana conspiracy prosecution, testified that certain behavior "such as making lists and buying boats" was typical of drug smugglers. Although it recognized the risk of prejudice, the Court held it was not an abuse of discretion to admit

the testimony. See also *United States v. Machor* n1(finding no abuse of discretion in permitting a federal agent who posed as a prospective buyer during a drug transaction, and who was designated by the government as its representative, to remain in the courtroom while an informant testified, nor in denying the defendants' request that the agent testify before the informant).

United States v. Gonzalez, 918 F.2d 1129 (3d Cir. 1990) : Affirming convictions for drug offenses, the Court held there was no abuse of discretion in denying a motion to sequester the government's case agent even though the agent later testified against the defendants. The Court noted that the possibility agents could coordinate their testimony did not pose a likelihood of prejudice since they had ample time before trial to do that were they so inclined.

United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) : In a narcotics conspiracy case, the Court found no error in a ruling permitting a DEA agent to remain in the courtroom as the government's designated agent during testimony and subsequently to testify. The Court observed that the Judge could have compelled the agent to testify first, but that it was not an abuse of discretion to decline to do so. See also *United States v. Mitchell* n2(reiterating that "better practice suggests that if the agent [exempted from sequestration] is to testify, he should testify as the Government's first witness, unless ... there were good reasons otherwise," and finding that deferring the testimony made sense in order to avoid confusion).

In re United States, 584 F.2d 666 (5th Cir. 1978) : The Court granted mandamus, holding it was error to refuse to except a government agent from a sequestration order. The Court concluded that a government agent could be the government's "representative under (2) of the Rule," and added that under *Rule 611(a)* the Judge might order the government to use the agent as a witness early in its case (or not at all) to avoid any unfairness in having the agent present to hear other witnesses.

United States v. Martin, 920 F.2d 393 (6th Cir. 1990) : Affirming a conviction for distributing cocaine, the Court held there was no error in refusing to order that the case agent be sequestered or testify first for the government.

United States v. Crabtree, 979 F.2d 1261 (7th Cir. 1992) : The Court held there was no abuse of discretion in allowing an FBI agent, who had observed most of a bank fraud trial ostensibly as an expert witness on a check kiting charge, to testify regarding other charges as well. The agent could have qualified as a designated representative of the government and under *Rule 703* it was proper for him to base his expert testimony on facts learned at trial. In *United States v. Adamo*, n3 the Court rejected the defendant's argument that allowing an undercover agent to sit at the prosecutor's table during the trial was an improper tacit endorsement of the agent, holding that the Rule's legislative history and decisions in other Circuits make it clear that an agent may be designated to sit at the government counsel table even though he is also a witness.

United States v. Sykes, 977 F.2d 1242 (8th Cir. 1992) : Affirming a conviction for drug trafficking offenses, the Court noted that the decision whether to allow the government's designated case agent to testify even though he sits at the counsel table during the trial is left to the Trial Judge's discretion and the Rule does not differentiate between expert and nonexpert witnesses. There was no abuse of discretion in this case, as the agent's expert testimony was distinct from the other witness' occurrence testimony. In *United States v. Jones*, n4 the Court upheld the government's designation of a local police officer as the case agent so that he was immune from sequestration under the Rule.

United States v. Butera, 677 F.2d 1376 (11th Cir. 1982) : The Court found no error in the Trial Judge's exempting

from sequestration the principal investigating officer in the case.

[ii] Designated Representative -- Criminal Cases -- Multiple Representatives

United States v. Jackson, 60 F.3d 128 (2d Cir. 1995) : The Court held that in rare cases more than one witness might be exempted under a subdivision of *Rule 615*. In *United States v. Rivera, 971 F.2d 876 (2d Cir. 1992)* , the Court, affirming convictions for a heroin distribution conspiracy, held that there was no error in permitting two testifying case agents to be present in the courtroom, as one was designated as a representative of the government and no objection was made to the presence of the other.

United States v. Farnham, 791 F.2d 331 (4th Cir. 1986) : The Court reversed a conviction for making false statements to a grand jury because two agents were erroneously permitted to remain in the courtroom; the Court interpreted *Rule 615(2)* to permit only one designated agent to remain in the courtroom. Because the Rule reflects an *a priori* judgment in favor of sequestration, exceptions should be narrowly construed, and requiring a party to show prejudice from violation of the Rule would be unduly harsh and self-defeating.

United States v. Green, 293 F.3d 886 (5th Cir. 2002) : Affirming drug trafficking convictions, the Court found no abuse of discretion when three officers, representing the FBI, State Police, and parish sheriff's office, were permitted to sit at counsel table throughout the trial. The case was complex; the investigation was lengthy and broad geographically, and involved numerous witnesses; each agency performed independent investigations; and the defendants failed to show that the investigators' presence prejudiced their testimony. In a prosecution for a series of bank robberies, *United States v. Hickman, 151 F.3d 446 (5th Cir. 1998) , aff'd by equally divided en banc court, 179 F.3d 230 (5th Cir. 1999)* , a local police officer was permitted to sit at counsel's table along with the FBI case agent. Affirming the convictions, the Court noted that it had never directly decided whether the government can designate more than one individual as its representative under *Rule 615(2)*, although it had approved the use of two agents under the essential-presence exception of *Rule 615(3)*. The string of simple armed robberies in this case did not fall within the ambit of *Rule 615(3)*'s complexity exception and no other reason was provided for overruling the *Rule 615* objection, so it was an abuse of discretion to permit the presence of both agents during the trial. The error was harmless, however, since the witnesses generally testified about different subject matter and in two instances one directly contradicted on cross-examination testimony given by the other. At the trial of a marijuana distribution conspiracy, in *United States v. Ramirez*, n5 two government agents were permitted to remain in the courtroom as representatives of the government while other witnesses were testifying. Assuming *arguendo* that it was error to allow designation of more than one witness as a "representative," the Court held there was no prejudice to the defendant because one agent was sequestered whenever the other was testifying, thus minimizing their opportunities to tailor their testimony, and there was no showing of prejudice from having an extra agent in the room when others testified. In *United States v. Alvarado*, n6 the Court affirmed a marijuana conviction, holding there was no error in permitting two DEA agents to be present during trial. The Court said that "the decision as to how many will be excused from sequestration is just as discretionary with the trial judge as who will be excused."

United States v. Pulley, 922 F.2d 1283 (6th Cir. 1991) : The Court held the error in permitting two government agents to remain in the courtroom was harmless, as one was the first prosecution witness and therefore could not have tailored his testimony and the second could well have been designated the government's sole representative. In any event, their testimony did not overlap significantly, so their joint presence during the trial could not have undermined the integrity of the factfinding process.

United States v. Faul, 748 F.2d 1204 (8th Cir. 1984) : In a prosecution for the murder of U.S. Marshals, the Trial

Judge apparently recognized two government representatives under *Rule 615(2)*. The Court found any error to be harmless and declined to decide whether an exception for two designated representatives is permissible under the Rule.

United States v. Spina, 654 F. Supp. 94 (S.D. Fla. 1987) , aff'd, 881 F.2d 1086 (11th Cir. 1989) : The District Court denied an appeal from a Magistrate's ruling that permitted two United States attorneys and an FBI agent to remain in the courtroom during a hearing on motions alleging prosecutorial misconduct. The Court stated: "The Government has an absolute right to name a representative under *Rule 615(2)* and the Court must permit this even though the moving party (defendant) objects to the Government's designation." It added that "[t]he Court has the discretion to permit the Government to name more than one exempted representative."

[2] Expert Witnesses

United States v. Lussier, 929 F.2d 25 (1st Cir. 1991) (per curiam): The Court held there was no abuse of discretion in a tax evasion case in permitting an IRS agent, who testified at the end of the government's case to his calculation of the taxes due, to remain in the courtroom during the giving of testimony. As his testimony was based on, summarized, and was consistent with the evidence presented at trial, there would have been little if any reason to sequester him and the defendant was not prejudiced by allowing him to remain.

Malek v. Federal Ins. Co., 994 F.2d 49 (2d Cir. 1993) : The Court reversed a judgment against insureds who sued to recover the proceeds of a fire policy, holding it was error to exclude the plaintiffs' expert witness from the courtroom during the time when the insurer's expert testified. The insurer's expert testified that the fire was "intense," but he did not so find in his report, and the insured's expert could have assisted the insureds in cross-examining the insurer's expert. Moreover, the insureds' rebuttal testimony was important to the case, and the insureds had only a ten-minute recess between the testimony of the experts to confer with counsel. The dissenting Judge argued that the excluded expert was a "fact witness" who testified to his examination of the fire scene and was not the kind of witness whose testimony would be unaffected by being present during the other witness' testimony.

United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982) : The Court found no error in permitting psychiatric experts for both sides on the defense of posttraumatic stress disorder to remain in Court throughout the proceedings, where written reports from the experts were delayed to the point that they were forthcoming from the defense only two days before trial and from the government on the second (and last) day of trial.

Polythane Sys. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201 (5th Cir. 1993) : Affirming a judgment for the manufacturer of a flotation foam in an action seeking a declaration of nonliability for problems with a dock, the Court observed that an engineer had properly been excluded from the courtroom. Recognizing that "[e]xpert witnesses clearly fall within *Rule 615(3)*'s exception," the Court noted that the engineer was not listed as a *Rule 702* expert and was tendered as a *Rule 701* lay witness, and held there was no abuse of discretion in finding that the witness was not a person whose presence was essential. In *Mayo v. Tri-Bell Indus.*, n7 the Court affirmed a judgment for the defendant in a wrongful death case, finding that the Trial Judge properly exempted experts from sequestration, since they are permitted to testify on the basis of facts or data obtained at or before the hearing and may testify on the basis of facts or data provided by other witnesses in the case. In *Miller v. Universal City Studios, Inc.*, n8 the Court approved a ruling excluding an expert witness who was provided with daily copy of testimony in violation of a sequestration order. The Court observed that "[w]hether or not it would be reasonable for a trial court to exempt an expert witness from a sequestration order, there is no required exemption under *Rule 615*."

United States v. Mohney, 949 F.2d 1397 (6th Cir. 1991) : In a tax evasion prosecution involving individual and corporate returns, the Court held there was no abuse of discretion in refusing to sequester an IRS agent who would testify about the individual returns during summary testimony addressed to the corporate returns, as the calculations on the individual returns depended on those on the corporate returns. In *Morvant v. Construction Aggregates Corp.*, n9 the Court said:

> We ... hold that where a party seeks to except an expert witness from exclusion under *Rule 615* on the basis that he needs to hear firsthand the testimony of the witnesses, the decision whether to permit him to remain is within the discretion of the trial judge and should not normally be disturbed on appeal ... . On the other hand, where a fair showing has been made that the expert witness is in fact required for the management of the case, and this is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel.

Hill v. Porter Memorial Hosp., 90 F.3d 220 (7th Cir. 1996) : Affirming a judgment for a hospital in a medical malpractice action, the Court concluded that a Magistrate Judge did not err in permitting two experts to testify, even though they had been provided with a transcript of one of the plaintiff's expert's testimony notwithstanding that a sequestration order was in place. The Magistrate Judge carefully examined the defense experts' testimony and found that it was not tailored to the testimony that had been transcribed. The Magistrate Judge took the extra steps of allowing each side's expert witnesses to consult the other's trial testimony, and instructing the jury that it could consider that a witness had reviewed trial testimony in evaluating that witness' testimony. In *United States v. Crabtree, 979 F.2d 1261 (7th Cir. 1992)* , the Court held there was no abuse of discretion in allowing an FBI agent, who had observed most of a bank fraud trial ostensibly as an expert witness on a check kiting charge, to testify regarding other charges as well. The agent could have qualified as a designated representative of the government and under *Rule 703* it was proper for him to base his expert testimony on facts learned at trial.

United States v. Conners, 894 F.2d 987 (8th Cir. 1990) : The Court held, in affirming the defendant's bank fraud convictions, that there was no abuse of discretion in permitting an FDIC examiner, who was to be an expert witness for the government, to sit at counsel's table during the trial, as his presence was essential to his ability to testify effectively regarding exhibits before the jury and the nature of his testimony was not susceptible of being tainted by what he heard in the courtroom.

United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002) : The defendant, charged in connection with an incident involving four shootings, called an expert criminologist to testify about scenarios leading to accidental discharges. Although the government had no objection to the expert's presence in the courtroom during the victims' testimony, the Trial Judge ordered him excluded shortly after the trial commenced. The Court found the sequestration was an abuse of discretion (but harmless error), since the defense made a "fair showing" that the expert's presence was "essential," especially because at the time of the order the Judge had not yet precluded the witness from applying his opinions to the facts of the case. The Judge's concern that the expert's presence would create a false impression that his testimony had "some added substance" is not a reason for which *Rule 615* authorizes exclusion.

[3] Expert and Fact Witness

Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625 (4th Cir. 1996) : The Court affirmed a judgment for a renovator against an apartment complex, holding that a general contractor hired by the defendant was properly excluded from the courtroom while evidence was presented. The contractor was both a fact witness and an expert witness, and the

defendant claimed he was "a critical witness." The defendant failed to establish that the contractor needed to hear other witnesses in order to render an expert opinion, and because the contractor was a fact witness in part, the Court concluded that "[i]t is in precisely this circumstance that adherence to the sequestration rule is most important."

[4] Natural Persons

Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) : Appealing a judgment for the plaintiff in a personal injury action against a corporation and its employee, the defendants complained that the principal officer of the corporation had been improperly sequestered. The Court held there was no error as to the principal officer and owner, because this person was described at trial as "a former owner," a description that did not identify with sufficient clarity his position with the corporation. Moreover, there was no showing that his presence was essential to the corporation's defense.

[5] Parties

Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977) : Appealing a judgment for the plaintiff in a personal injury action against a corporation and its employee, the defendants complained that the employee had been improperly sequestered. The Court held it was error to exclude the employee, who had been named only as a "John Doe" defendant until the complaint was formally amended after the trial started.

Roberts ex rel. Johnson v. Galen of Va., Inc., 325 F.3d 776 (6th Cir. 2003) : In an action alleging injuries resulting from a transfer of a patient from a hospital to a nursing facility, the Court affirmed a judgment for the hospital, finding no error in the refusal to sequester a defense witness before her testimony. The witness had been an official of the defendant at the time of the plaintiff's transfer, but by the time of trial the defendant no longer operated the hospital and in fact had no employees and had ceased operations entirely. The Court held that, even as a former employee, the witness was within the exception of *Rule 615(2)*. The purpose of that exception is "to give corporations the right to have a representative present throughout a trial." If corporations without any employees were not entitled to any representative at trial at all, it "would be unfair given that natural parties," such as the plaintiff in this case, have the right to avoid sequestration.

Medite of N.M., Inc. v. NLRB, 72 F.3d 780 (10th Cir. 1995) : The Court held it was error (but harmless) for the Administrative Law Judge in an unfair labor practices case brought on behalf of dismissed strikers to refuse to exclude charging parties when each testified about common events.

Hull v. Merck & Co., 758 F.2d 1474 (11th Cir. 1985) : The Court held that a plaintiff, who was improperly sequestered, waived any error when he stated at the time the issue was first raised that he was willing to proceed.

[6] Party's Attorney

United States v. Reeder, 614 F.2d 1179 (8th Cir. 1980) : Affirming gambling convictions, the Court said that if this really were the odd case in which the defendant needed to call a codefendant's lawyer as a witness, he could have done so, and the lawyer would have been allowed to remain present in the courtroom.

Milicevic v. Fletcher Jones Imports, Ltd., 402 F.3d 912, 2005-1 Trade Cas. (CCH) P74736 (9th Cir. 2005) : At trial in a case brought under the Magnuson-Morrison Warranty Act, the defendant moved to sequester the plaintiff's

counsel, on the ground that counsel had first-hand knowledge of the underlying facts and was likely to be a witness in the case. The Judge denied the motion, but prohibited the attorney from examining witnesses on issues about which he had first-hand knowledge. Finding no error in the refusal to sequester counsel, the Court stated that counsel fell under the exception in *Rule 615* for a person whose presence was essential to the presentation of the case.

[7] Person Whose Presence Is Essential

Bruneau ex rel. Schofield v. South Kortright Cent. School Dist., 163 F.3d 749 (2d Cir. 1998) : The Court held, in a sixth-grader's Title IX and § 1983 action for sexual harassment by fellow students, that there was no abuse of discretion in exempting two defense witnesses from a sequestration order. The Court observed that "[s]ix factors serve as guides to inform a district court's exercise of its discretion: (1) how critical is the sought-to-be-excluded witness's testimony; (2) whether that testimony is ordinarily subject to tailoring; (3) whether the testimony is likely to cover the same issues as other witnesses; (4) in what order will the witnesses be called; (5) whether any potential for bias exists that could incline a person to tailor his testimony; and (6) whether the witness's presence is essential or simply desirable." In this case, the Court concluded that the witnesses were most knowledgeable about school policy and underlying events and that their testimony was "not subject to tailoring" because they had been previously examined at length before trial and were present during the pretrial depositions of the plaintiff and most of her witnesses.

United States v. Agnes, 753 F.2d 293 (3d Cir. 1985) : The Court affirmed a Hobbs Act conviction, finding no abuse of discretion in the Trial Judge's refusal to exempt the defendant's girl friend from a sequestration order. There was no showing that the witness had "such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness or the witness would be unable to present essential testimony without hearing the trial testimony of other witnesses." In *Government of Virgin Islands v. Edinborough*, n10 during the defendant's trial for raping the 13-year-old daughter of his former wife, the mother was permitted to be present while her daughter testified. The Court recognized that *Rule 615* provides parties with a right to sequestration of witnesses, but it found no prejudice arising from the ruling, as the statements made by the mother and daughter at the time of the offense did not differ from their trial testimony and the mother's presence might have been viewed as essential to the presentation of the government's case.

United States v. Green, 324 F.3d 375 (5th Cir. 2003) : Affirming drug, firearm, and money laundering convictions, the Court noted that it has never decided whether the government can designate more than one individual as its case agent, but that it had permitted exemption of more than one case agent when the presence of multiple agents was shown to be essential to the presentation of the case. The Court was not persuaded that the two agents were essential in this case, but there was no reversible error, because the defendant could identify no prejudice from the dual exemption.

United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993) : The Court affirmed drug convictions, holding there was no error in permitting a DEA agent to sit in the courtroom as an "essential" witness in addition to an FBI special agent who served as the government's representative. The Court noted that each agent was excluded from the courtroom when the other was testifying.

[8] Rebuttal Witnesses

United States v. Hargrove, 929 F.2d 316 (7th Cir. 1991) : Affirming a conviction for conspiracy to distribute cocaine, the Court held that there was no violation of a sequestration order when a witness was permitted to give testimony rebutting another witness whose testimony she had heard. The government did not intend to call her until the

other witness testified, her testimony did not contravene the purpose of the sequestration order because it rebutted rather than confirmed the other witness', and it was limited to a narrow issue of police coercion in identification and did not reach the substance of the other witness' account regarding the defendant. In *United States v. Bramlet*, n11 the Court affirmed a bank robbery conviction, holding it was not error to strike the testimony of an expert witness who violated a sequestration order by reading transcripts of the defense witnesses' testimony in preparing to rebut an insanity defense. The defendant had opposed a mistrial, and had only asked that the testimony be stricken. Moreover, the Court concluded that "application of the court's general exclusionary order to the government's rebuttal witnesses was unnecessary" since "the very function of a rebuttal witness is directed toward challenging the prior testimony of opposing witnesses."

United States v. Shurn, 849 F.2d 1090 (8th Cir. 1988) : The Court held that, after a government witness surprised the prosecution with his testimony, a police officer who had been present during the witness' testimony was properly permitted to relate a prior statement by the witness. The Court reasoned that the Trial Judge has broad discretion in implementing *Rule 615*, and that the purpose of a sequestration order is to prevent witnesses "from tailoring their testimony to that which has already been presented, not to prevent impeachment of witnesses."

United States v. Ell, 718 F.2d 291 (9th Cir. 1983) : The Court reversed a conviction for uttering an altered government check. It held that rebuttal witnesses who have testified during the government's case-in-chief are covered by a sequestration order and that when the Judge erroneously fails to enforce the sequestration rule against a witness, prejudice is presumed, and the burden is on the party who relied on the witness to demonstrate that the violation was harmless.

[9] Remedies for Violations

United States v. Magana, 127 F.3d 1 (1st Cir. 1997) : Affirming a conviction for entering into a sham marriage in violation of the immigration laws, the Court held there was no abuse of discretion in denying a motion for mistrial after it was learned that the prosecution had prepared a witness in violation of the Trial Judge's sequestration order. The Court stated that upon discovery of a violation of a sequestration order, the "recommended" remedy is to "strike the offending evidence and promptly instruct the jury to disregard it." The Judge took "exactly these steps" and "the circumstances did not call for more extreme action." The Court noted that declaring a mistrial for a violation of a sequestration order "is a last resort, only to be implemented if the taint is ineradicable, that is, only if the trial judge believes that the jury's exposure to the evidence is likely to prove beyond realistic hope of repair." In *United States v. Cox*, n12 the Court stated that remedies for sequestration violations generally are left to the discretion of the Trial Judge.

Pickel v. United States, 746 F.2d 176 (3d Cir. 1984) : The Court reversed an order quashing summonses issued by the Internal Revenue Service. Although there was a violation by government witnesses of a sequestration order that governed a hearing on enforcement of the summonses, the Court found an abuse of discretion in the decision to quash the subpoenas rather than to utilize a lesser sanction, especially in the absence of a showing of prejudice.

United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (en banc): The Judge in a six-defendant narcotics trial granted "the usual sequestration rule ... that the witnesses shall not discuss one with the other their testimony." The Court reversed an order to strike the testimony of the sole witness for one defendant, who had indicated that defense counsel had disclosed to him the testimony of a prosecution witness. This case is discussed in the Editorial Explanatory Comment, *§ 615.02[5]*. In *United States v. Cropp, 127 F.3d 354 (4th Cir. 1997)* , a crack distribution conspiracy prosecution, the Trial Judge struck the testimony of a witness after it became apparent that he had spoken with a

defendant in plain violation of a sequestration order. The Court found no abuse of discretion, although it thought the Judge would have been well advised to employ a lesser sanction, in order to preserve both the purpose of the sequestration rule and the defendant's right to present a defense. It also concluded that the witness should have been more closely examined in *voir dire* before excluding him, to determine the extent of the taint of his testimony and the causes of that taint. In *United States v. McMahon*, n13 the Court affirmed (2-1) the conviction for criminal contempt of a defense witness subject to a sequestration order who paid his secretary to take extensive notes of the trial and who reviewed the daily transcript before testifying.

United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998) : The Court held that there was no error in refusing to strike the testimony of witnesses who violated a sequestration order in a massive drug trafficking trial. The defendants were allowed a full opportunity to cross-examine the second witness, and the testimony elicited did not indicate that the witness' testimony was influenced by his improper conversations. The Trial Court did not abuse its discretion in refusing defense counsel permission to question the witnesses outside the jury's presence about the nature and extent of their conversations. In *Jerry Parks Equip. Co. v. Southeast Equip. Co.*, n14 the Court found no abuse of discretion in striking the testimony of a witness who violated a sequestration order, although it observed that "lesser sanctions would appear more in order." In *United States v. Ortega-Chavez*, n15 where government rebuttal witnesses in a prosecution involving smuggling illegal aliens into the country violated a sequestration order, the Court found no abuse of discretion in the Trial Judge's decision to let them testify. In *United States v. Warren*, n16 the Court said that a party must show prejudice before a Court will reverse a case in which witnesses, who should have been sequestered, have been permitted to testify.

United States v. Gibson, 675 F.2d 825 (6th Cir. 1982) : The Court noted that violation of a sequestration order does not automatically require that a witness' testimony be rejected, but it approved the Trial Judge's decision to exclude a defense witness who remained in Court with the defendant's knowledge and consent after a sequestration request by the government was granted.

United States v. Tedder, 403 F.3d 836 (7th Cir. 2005) : The Court affirmed convictions for conspiracy to defraud the United States and money laundering, finding no abuse of discretion when a defense reputation witness was barred from testifying on rebuttal. The witness was in the courtroom during other testimony, after the Judge had entered an order forbidding testimony by anyone who had listened to other witnesses. The Court concluded that the defendant should have kept the witness out of the courtroom if he wanted the witness to testify or should have called another witness.

United States v. Covington, 133 F.3d 639 (8th Cir. 1998) : Affirming convictions for crack distribution, the Court found no abuse of discretion in the refusal to grant a mistrial after two of the witnesses spoke with each other when being transported from the courthouse to the jailhouse before one gave testimony. The two conversations were brief, a Marshal promptly instructed the witnesses not to talk about the case, and there was no showing that the contact resulted in less than candid testimony. In *United States v. Wilson, 103 F.3d 1402 (8th Cir. 1997)* , the Court, affirming drug and assault convictions, found no abuse of discretion when a defense witness was not permitted to testify after he had been present in the courtroom during several days of testimony despite a sequestration order.

United States v. Hobbs, 31 F.3d 918 (9th Cir. 1994) : At a hearing to suppress evidence in a drug possession case, the Trial Judge precluded two defense witnesses from testifying, after they entered the courtroom and observed the proceedings in violation of a sequestration order. The Court noted that exclusion of a witness is a strongly disfavored sanction and held the ruling below plain error in the absence of any evidence that the defendant or his counsel knew or consented to the witnesses' presence in the courtroom or that the witnesses were aware of the sequestration order. In

United States v. Avila-Macias, n17 the Court held there was no abuse of discretion in excluding a surrebuttal witness who violated a sequestration order. The Court indicated, however, that disqualification of a witness is not a preferred remedy and emphasized the limited importance of the witness and the fault of defense counsel with respect to the sequestration violation.

United States v. Benally, 756 F.2d 773 (10th Cir. 1985) : Although the Court reversed a conviction for vehicular homicide, it held there was no error in refusing to permit a defense investigator to testify when he had sat at counsel table throughout the trial despite the Trial Judge's order sequestering witnesses.

United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991) : During the trial of a drug smuggling conspiracy, several government witnesses allegedly discussed their testimony in violation of a sequestration order. Noting that such a violation may be treated by citing the guilty party for contempt, allowing cross-examination as to the nature of the violation, or striking testimony already given or disallowing further testimony, the Court held that there was no abuse of discretion in denying a mistrial, given the curative cross-examination of the witnesses. In *United States v. Monaco*, n18 a government witness refused in the second trial of a drug conspiracy case to testify to matters about which he did not testify in the first trial. The Trial Judge held the witness in contempt and admitted the testimony from the first trial, despite the defendants' claim that they were denied an adequate opportunity to cross-examine the witness at the first trial. They claimed that the witness had violated a sequestration order and that the violation had been discovered after the first trial ended. The Court examined the order in which the witnesses testified at the first trial, the timing of the alleged violation, and the nature of the cross-examination by five different attorneys for the defense before concluding that the sequestration violation was collateral and did not affect the testimony at the first trial.

[10] Right To Sequestration

Hollman v. Dale Electronic, Inc., 752 F.2d 311 (8th Cir. 1985) : Although the Court affirmed a judgment for an employer and compensation carrier in a suit by a former employee, it found error in the Trial Judge's refusal to honor the plaintiff's request for sequestration of witnesses. The Court observed that sequestration is required when requested by a party unless one of the exceptions to the Rule applies.

[11] Scope of Sequestration

United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993) : The Court noted, in reviewing drug trafficking conspiracy convictions, that the Rule's mandatory provisions extend only to preventing witnesses from hearing other witnesses testify and that limitations on witnesses discussing testimony with each other are subject to the Trial Judge's discretion. The Court held that housing three prosecution witnesses in the same cell block during the trial was not a violation of the Judge's order prohibiting witnesses from discussing the case after giving testimony and there was no other reason to suspect transgression of the sequestration order. This case is discussed in the Editorial Explanatory Comment, *§ 615.02[4]*. In *United States v. Arruda*, n19 the Court found that where two witnesses who had been sequestered met together during trial to discuss their testimony, the conduct "had the same potential effect as a violation of a sequestration order." It found, however, that the Trial Judge did not err in permitting them to testify and allowing evidence of the meetings to be revealed to the jury.

United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) : The Court affirmed racketeering convictions, holding that the Trial Judge did not err in permitting witnesses who had read portions of the trial transcript to testify. Although it recognized that the witnesses might have violated the Rule, the Court observed that the government did not cause them to do so and their exposure to the transcript was fully explored during their testimony.

United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (en banc): The Judge in a six-defendant narcotics trial granted "the usual sequestration rule ... that the witnesses shall not discuss one with the other their testimony." When the sole witness for one defendant indicated that defense counsel had disclosed to him the testimony of a prosecution witness, the Judge granted the government's motion to strike the testimony and to exclude the witness from further testimony. Reversing, a plurality of the Court held that the Judge's reference to "the usual sequestration rule" was to *Rule 615*; *Rule 615* serves only to exclude witnesses from the courtroom and did not prohibit defense counsel from discussing a prior witness' testimony; and the supplemental admonition that "the witnesses shall not discuss one with the other their testimony" was likewise no restraint on counsel. The plurality also held that the purpose and spirit of *Rule 615* are not implicated by counsel's preparing a witness, and in any event must yield to counsel's constitutional and ethical duties. The Court held that even if there were a violation of the order in this case, exclusion of the witness' testimony in its entirety was unduly severe, since the proffered testimony covered other witnesses than the one counsel had discussed in the preparation and other topics that were crucial to the defendant's defense, and the fault, if any, was the lawyer's, not the defendant's. Three Judges, concurring in the judgment, believed it was an abuse of discretion not to determine exactly what counsel told the witness before imposing the sanction and it was therefore unnecessary for the Court to determine whether the counsel actually violated the sequestration order. One Judge, concurring in the judgment, believed that the counsel plainly did not violate the order, and thus it was unnecessary to decide the proper interpretation of *Rule 615*. Two Judges dissented on the grounds that Trial Judge had not abused his discretion in applying *Rule 615*, finding that counsel had violated the order, and imposing the sanction.

United States v. Rugiero, 20 F.3d 1387 (6th Cir. 1994) : The Court stated that it was not satisfied with the government's explanation that it had brought together two witnesses, after one had testified, in order to demonstrate to one reluctant witness that the other could implicate him. The Court concluded that "[b]ringing witnesses together in this fashion, especially without the court's consent, comes very close to a per se violation of this ancient and important rule of sequestration," but found no prejudicial error. The dissenting Judge would have reversed the defendant's conviction for "such an obvious and notorious violation."

United States v. Vallie, 284 F.3d 917 (8th Cir. 2002) : Affirming convictions for sexual abuse offenses, the Court found no abuse of discretion in permitting courtroom spectators to communicate with sequestered witnesses, since "[t]here is no evidence that any conversations between trial observers and sequestered witnesses resulted in tailored testimony or otherwise prejudiced Vallie in any way." The Court added that it did not endorse the Judge's use of the term "asinine" in referring to sequestration, but noted that the remark was made outside the jury's hearing. In *United States v. Calderin-Rodriguez, 244 F.3d 977 (8th Cir. 2001)* , the Court affirmed drug convictions, finding no error in the refusal to strike the testimony of a government witness after the witness discussed his testimony with the prosecutor during a recess midway through his direct testimony. Noting that *Rule 615* "does not by its terms forbid an attorney from conferring with witnesses," the Court held that the prosecutor violated neither *Rule 615* nor the sequestration order in the case. The Trial Judge has the inherent authority to go beyond *Rule 615* and prohibit such contacts in order to preserve the status quo between breaks and to prevent the coaching of witnesses, but in this case the Judge's order explicitly assumed that the attorneys would talk to witnesses.

United States v. Buchanan, 787 F.2d 477 (10th Cir. 1986) : The Court affirmed convictions for possessing an unregistered firearm and conspiracy, although it found that the Trial Judge erred in ruling that a witness did not violate a sequestration order when she talked to other witnesses about their testimony. In *United States v. Greschner*, n20 the Court stated that *Rule 615* requires not only that prospective witnesses be excluded from the courtroom, but also that they be prohibited from discussing the case with other witnesses. In our view, *Rule 615* by its terms applies only to the exclusion of witnesses from the courtroom. However, Trial Courts can and should go further, and exercise their inherent power to ensure that witnesses do not discuss the case with other witnesses.

United States v. Jimenez, 780 F.2d 975 (11th Cir. 1986) : The Court affirmed marijuana convictions, although it rejected the government's argument that an agent did not violate a sequestration order when he read another agent's testimony at a prior trial that ended in a mistrial. The Court stated that "there is no difference between reading and hearing testimony for purposes of *Rule 615*," but it upheld the Trial Judge's decision not to grant a mistrial and to permit instead full cross-examination of the agent concerning the violation. In *United States v. Alvarez*, n21 the Court held that there was no error in a prosecution for drug offenses and the murder of a federal agent where the Trial Judge permitted government agents who testified to remain in the courtroom to hear the case after they were excused as witnesses.

[12] Sequestration Order Never Entered

United States v. Williams, 136 F.3d 1166 (7th Cir. 1998) : Affirming drug convictions, the Court found no violation of *Rule 615* when one prosecution witness spoke to another. The defendant had never requested a sequestration order, so such an order was never entered. While the parties had stipulated that the witnesses would be sequestered, a violation of this stipulation did not implicate *Rule 615*. This case is discussed in the Editorial Explanatory Comment, *§ 615.02[4]*.

[13] Suppression Hearing

United States v. Brewer, 947 F.2d 404 (9th Cir. 1991) : The Court reversed a conviction for possession of cocaine, holding that a witness should have been excluded from a suppression hearing on the defendant's motion. Under *Rule 1101(d)(1)* the traditional exclusionary rules do not apply, but the procedural rules regulating the process of admission and exclusion remain applicable. Because *Rule 615* is a procedural rule directed at the fairness of the proceedings, and not a rule affecting the type of evidence that can be considered, it applies in suppression hearings. This case is discussed in the Editorial Explanatory Comment, *§ 615.02[8]*.

[14] Unexpected Need for Testimony

United States v. Green, 305 F.3d 422 (6th Cir. 2002) : In a trial for narcotics trafficking and failure to appear at sentencing, the key prosecution witness identified the defendant (Willie Green) as the "Kenny Green" who was his supplier. On cross-examination, defense counsel produced a letter from the witness to his wife stating that a "Willie Green" got picked up in Florida and asking who he was. The government then called the witness' attorney to testify about how the witness learned the defendant's identity. The attorney testified over objection, since the attorney had been present in court for some of his client's testimony. The Court found no violation of the Trial Judge's sequestration order, since the government had no way to know that the attorney might have to testify and thus should be excluded while his client testified.

FOOTNOTES:

(n1)Footnote 1. *United States v. Machor, 879 F.2d 945 (1st Cir. 1989)* .

(n2)Footnote 2. *United States v. Mitchell, 733 F.2d 327 (4th Cir. 1984)* .

(n3)Footnote 3. *United States v. Adamo, 882 F.2d 1218 (7th Cir. 1989)* .

(n4)Footnote 4. *United States v. Jones, 687 F.2d 1265 (8th Cir. 1982)* .

(n5)Footnote 5. *United States v. Ramirez, 963 F.2d 693 (5th Cir. 1992)* .

(n6)Footnote 6. *United States v. Alvarado, 647 F.2d 537 (5th Cir. 1981)* .

(n7)Footnote 7. *Mayo v. Tri-Bell Indus., 787 F.2d 1007 (5th Cir. 1986)* .

(n8)Footnote 8. *Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981)* .

(n9)Footnote 9. *Morvant v. Construction Aggregates Corp., 570 F.2d 626, 630 (6th Cir. 1978)* .

(n10)Footnote 10. *Government of Virgin Islands v. Edinborough, 625 F.2d 472 (3d Cir. 1980)* .

(n11)Footnote 11. *United States v. Bramlet, 820 F.2d 851 (7th Cir. 1987)* .

(n12)Footnote 12. *United States v. Cox, 752 F.2d 741 (1st Cir. 1985)* .

(n13)Footnote 13. *United States v. McMahon, 104 F.3d 638 (4th Cir. 1997)* .

(n14)Footnote 14. *Jerry Parks Equip. Co. v. Southeast Equip. Co., 817 F.2d 340 (5th Cir. 1987)* .

(n15)Footnote 15. *United States v. Ortega-Chavez, 682 F.2d 1086 (5th Cir. 1982)* .

(n16)Footnote 16. *United States v. Warren, 578 F.2d 1058 (5th Cir. 1978)* (en banc).

(n17)Footnote 17. *United States v. Avila-Macias, 577 F.2d 1384 (9th Cir. 1978)* .

(n18)Footnote 18. *United States v. Monaco, 702 F.2d 860 (11th Cir. 1983)* .

(n19)Footnote 19. *United States v. Arruda, 715 F.2d 671 (1st Cir. 1983)* .

(n20)Footnote 20. *United States v. Greschner, 802 F.2d 373 (10th Cir. 1986)* .

(n21)Footnote 21. *United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985)* .

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
CHAPTER 615 RULE 615

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615.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956)* ; *Portomene v. United States, 221 F.2d 582 (5th Cir. 1955)* ; *Powell v. United States, 208 F.2d 618 (6th Cir. 1953)* ; *Jones v. United States, 252 F. Supp. 781 (W.D. Okla. 1966)* . Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See *California Evidence Code § 777*. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841 n.4.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

[Following the 1987 amendments to Rule 615, Congress adopted a technical amendment inserting a missing word, effective November 18, 1988. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7075(a), 102 Stat. 4181 (1988).]

[2] 1998 Amendment Committee Note

1998 Amendment Committee Note

The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, *42 U.S.C. § 10606*, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (*18 U.S.C. § 3510*).

[3] Report of the Senate Committee on the Judiciary

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in -- he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under Rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear the investigative agents are within the group specified under the second exception made in the Rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the Rule.

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PART TWO: THE RULES THEMSELVES
Article VI. Witnesses
Supp. To CHAPTER 615 RULE 615

3-615 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 615, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 615. Exclusion of Witnesses	**Rule 615. Excluding Witnesses**
At the request of a party the court shall order	At a party's request, the court must order wit-

witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natwitnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

ural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to

be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a

natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defens

e; or

(d) a person authorized by statute to be present.

Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 615.03 Annotated Cases

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[1] Designated Representative [Go To Main]

[b] Designated Representative -- Criminal Cases

[i] Designated Case Agent

United States v. Charles, 456 F.3d 249 (1st Cir. 2006) : The Court affirmed a conviction for assault upon a federal officer, finding no abuse of discretion when a case agent was permitted to sit at the counsel table. There is no requirement under *Rule 615(2)* that the designated representative be essential to the party's case, and the concerns addressed by *Rule 615* were sufficiently accommodated by having the agent testify first before joining the prosecutor at the counsel table.

United States v. Avalos, 506 F.3d 972 (10th Cir. 2007) , vacated for reconsideration of sentencing, 129 S. Ct. 993 (2009) : Appealing a conviction for distribution of methamphetamine, the defendant argued that it was error to allow the government's case agent to be present during witness testimony, as he was later called by the defendant as a rebuttal witness. The Court noted that "the government may designate a case agent responsible for an investigation as its representative under Rule 615(2)," but it found error in the fact that the government had not formally designated the witness as its Rule 615(2) representative on the record at the time the defendant moved for sequestration. The error was harmless, however.

[2] Expert Witnesses

United States v. Olofson, 563 F.3d 652 (7th Cir. 2009) : The Court affirmed a conviction for illegally transferring a machine gun, finding no abuse of discretion when the defendant's firearm expert was excluded from the courtroom during the testimony of the government's expert. The Court rejected the argument that merely because Rule 703 contemplates that an expert may render an opinion based on facts or data made known at trial necessarily means that an expert is exempt from a Rule 615 sequestration order.

[9] Remedies for Violations [Go To Main]

United States v. Smith, 441 F.3d 254 (4th Cir. 2006) : In the prosecution of a cocaine distribution conspiracy, a defendant's daughter was called by the defense to testify regarding the defendant's relationship with his son, the son's various periods of incarceration, and the defendant's employment. On motion of the government, the Trial Judge limited the witness' testimony to the defendant's character, and excluded testimony about any substantive issues, because the witness had violated an order sequestering witnesses by being present during testimony on two different days. Noting that exclusion of a witness' testimony is "an extreme remedy" to be employed sparingly, the Court held that the order was an abuse of discretion (but harmless error) because the primary purpose of the witness' testimony was to impeach the son's testimony, and she was not present even in the courthouse when he testified, so it was not possible that she could have tailored her testimony to his in any way.

United States v. Franklin, 561 F.3d 398 (5th Cir. 2009) : In a prosecution for drug and firearms offenses, the government had intended to call three coconspirators who had pleaded guilty to testify. The first testified for a morning and gave damaging testimony before a lunch recess, during which he discussed the case with the other two. The prosecution had failed to inform the testifying witness of the sequestration rule. The Trial Judge limited the testifying witness' further testimony to a brief cross-examination and precluded the other two coconspirators from testifying at all. Affirming, the Court found no abuse of discretion in the remedy chosen for the sequestration violation. The Court rejected the defendants' argument that the Judge should have stricken the direct testimony in its entirety and permitted the witness to be examined regarding his violation of the rule, observing that any examination about the rule violation might have led to the jury hearing hearsay concerning some of the defendants' guilt.

[11] Scope of Sequestration [Go To Main]

United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) : The Court held that Rule 615 was not violated when the prosecutor spoke with the victim-witness during a recess in the middle of the witness' cross-examination. Rule 615 orders prevent witnesses from speaking with other witnesses, not with counsel. Here the Judge, while permitting the prosecutor to talk with the witness, also stated that the prosecutor could not coach the witness.

United States v. Camacho, 555 F.3d 695 (8th Cir. 2009) : Affirming convictions in a drug conspiracy case, the Court found no abuse of discretion in a ruling that a husband and wife did not violate a sequestration order by discussing their testimony with each other. The Judge had informed the parties and their counsel that it had taken the defense request for sequestration to be simply a motion for exclusion of witnesses so that they could not hear one another while testifying.

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[2] Helpfulness to the Factfinder

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[11] Expert Witness Distinguished

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[12] Handwriting

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[29] Speed of Vehicle

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[31] Trademarks

[32] Value of Property

[33] Voice Identification

[34] Wealth or Income

701.04 Legislative History

[1] Advisory Committee's Note

[2] 2000 Amendment Committee Note

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701.01 Official Text

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

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701.02 Editorial Explanatory Comment

[1] The Vague Distinction Between Opinion and Fact

Rule 701 marks a departure from the common law. The Rule provides that a witness may testify in the form of opinion if the opinion is rationally based on the perception of the witness and helpful in understanding the testimony or in determining a fact in issue. Judge Learned Hand succinctly criticized the common-law rule, which generally prohibited lay witnesses from testifying in the form of an opinion: n1

> The truth is ... that the exclusion of opinion evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and also depends solely upon practical considerations, as, for example, the saving of time and the mentality of the witness. ... It is a good rule as nearly as one can, to reproduce the scene as it was, and so to correct the personal equations of the witnesses. But one must be careful not to miss the forest for the trees, as generally happens, unless much latitude is allowed.

Judge Hand's view carries the day in *Rule 701*. Lay witness opinion is admissible so long as it would be helpful to the factfinder and it is rationally based on personal perception. n2 If, on the other hand, the opinion is too abstract and it would be more helpful for the witness to testify to raw data, then the Trial Court can exercise its discretion to exclude the opinion. n3 And if the witness' opinion is speculative or is not based on personal knowledge, it must be excluded. n4

[2] Helpfulness to the Factfinder

Rule 701 properly recognizes that a lay witness' opinion can be helpful to the factfinder, indeed more helpful at times than the raw data on which the opinion is based. An opinion is often a convenient shorthand device. For example, testimony that a person was "excited" or "angry" is more evocative and understandable than a long, physical description of the person's outward manifestations. n5 There is little danger that *Rule 701* will open the door to unfounded and conclusory lay opinions. If the opinion is unfounded, or if the opinion is in the form of a legal conclusion (e.g., "he is guilty"), it will be readily excluded as unhelpful. n6

The Ninth Circuit case of *United States v. Yazzie, 976 F.2d 1252, 1254-56 (9th Cir. 1992)* , provides an extensive

discussion and valuable application of *Rule 701*. Yazzie was charged with statutory rape. The federal statute, unlike that of many states, permits a defense of reasonable mistake as to the age of the minor. Yazzie claimed that he reasonably believed that the minor was over 16 years old at the time of the incident; in fact, she was fifteen-and-a-half. To establish the reasonableness of his belief, Yazzie called several witnesses who offered to testify that as of the date of the alleged sexual abuse, their observations caused them to believe the minor to be between 16 and 20 years old. The Trial Judge excluded this testimony as impermissible opinion. The witnesses were permitted to testify to "facts," such as that the minor smoked cigarettes, wore make-up, and drove a car. But they were not permitted to give their opinion as to how old they thought she was.

The Court of Appeals found the Trial Judge's limitation on opinion testimony to be reversible error. It analyzed the question as follows:

> We understand *Rule 701* to mean that opinions of non-experts may be admitted where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable the jury to form an opinion or reach an intelligent conclusion. If it is impossible or difficult to reproduce the data observed by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based upon what he observed. It is a means of conveying to the jury what the witness has seen or heard.

The *Yazzie* Court explained how the witnesses' opinions as to the minor's age would be helpful to the jury:

> The testimony helps in the understanding of the witnesses' descriptive testimony and in determining a critical fact at issue -- whether it was reasonable for Yazzie to believe that the minor was 16 or older. In the case before us, the jurors could not themselves assess how old the minor looked at the time of the incident: by the time of the trial, the minor was almost 17 years old, and her appearance was undoubtedly substantially different than it had been on the night in question, a year and a half earlier. Thus, the jurors were wholly dependent on the testimony of witnesses. Yet the witnesses were permitted to testify only to the minor's describable features and behavior. Their testimony was no substitute for a clear and unequivocal statement of their opinions. It did not tell the jury that these witnesses believed the minor to be at least 16 years old at the time of the incident.

The Court also noted that *Rule 701* is particularly helpful when the so-called "facts" to which the witness would otherwise have to testify are essentially indescribable:

> Our finding that the trial judge erred in not admitting the opinions of Yazzie's witnesses as to the minor's age is supported by all of the considerations that underlie *Rule 701*'s authorization of the use of lay opinion testimony. First, it is difficult to distinguish a fifteen-and-a-half-year-old from a 16-year-old, and it is still more difficult to put into words why one believes that a person is one age and not the other. There is a certain intangible element involved in one's conclusions on such a question. We form an opinion of a person's age from a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appear to us. Mannerisms and facial features are notoriously difficult to describe accurately, and one's reasons for concluding that a person is a particular age are both too complex and too indefinable to set out fully. In addition, a witness may not know, let alone be able to report precisely, what factors induced his or her conclusion. In such a case, the fact that the witness reached the conclusion is the important part of the testimony, not the largely undeterminable or inexplicable reasons that prompted the conclusion.
>
> Furthermore, age is a matter on which everyone has an opinion. Knowingly or unknowingly, we all form conclusions about people's ages every day. It is therefore particularly appropriate for a lay witness to express an opinion on the subject.

The *Yazzie* Court concluded that the limitation on opinion testimony "deprived the jury of the most direct evidence available as to the age that the minor reasonably appeared to be on the night of the incident. Thus, the Judge's ruling constituted a clear abuse of discretion." n7

The age of a person is thus a proper subject of lay testimony because the conclusion is more helpful to the jury than the indescribable raw data on which the conclusion is based. Similar reasoning applies to lay testimony as to the speed of an object, such as a car. Testimony by eyewitnesses as to the approximate speed of a vehicle is routinely admitted as helpful to the jury under *Rule 701*. n8

[3] Personal Knowledge Required

Rule 701 requires that the lay opinion must be based on personal knowledge; the Rule does not permit lay witnesses to speculate about events that they have not perceived. n9 Nor is the Rule designed to permit completely hypothetical testimony. The Rule implies that the Judge may exclude opinion evidence if it is confusing; or if it is not helpful in clarifying the testimony of the witness and in understanding the facts of the case; or if it goes well beyond the facts presented. n10

It is to be expected that most direct examinations will elicit the underlying facts giving rise to an opinion or inference as well as the opinion or inference itself. If the jury is aware of the basis of the opinion, it is likely to give it more weight than an opinion unsupported by facts. n11 Should the direct-examiner fail to elicit the basic facts, the cross-examiner must weigh the potential advantages of proving the basic facts on cross-examination in an attempt to discredit or weaken the opinion against the potential disadvantage of making a witness look highly credible by permitting him to provide detailed facts or answers to the cross-examiner's questions. The risk may be worth it where there is an indication that the witness' basis is shaky, or where cross-examination as to basis would uncover other negative information about the witness. n12

[4] Inferences Drawn By Lay Witnesses

Lay witnesses are permitted to draw reasonable inferences from their personal perceptions. Indeed, it can hardly be otherwise. A witness who sees a driver with an unruly look on his face shaking a middle finger and yelling out the window at another driver is permitted to draw the inference that the driver was angry. *Yazzie* is obviously a case where the witnesses should have been permitted to draw an inference about the complainant's age on the basis of their personal knowledge. However, where the lay witness draws a conclusion that is simply not reasonably supported by what they know, their opinion is unhelpful to the factfinder and should be excluded under *Rule 701*. Illustrative is *United States v. Santos, 201 F.3d 953 (7th Cir. 2000)* . The defendant was a public official, the Treasurer for the City of Chicago, charged with extorting campaign contributions. Crucial to the case was evidence that certain contractors with the defendant's office were terminated for refusing to pay up. The actual terminations were ordered by an assistant in the office, John Henry, but employees in the office were permitted to testify that they had "no doubt" or a "personal feeling" that Santos, the head of the office, ordered Henry to order the terminations. These witnesses drew an inference from their knowledge of Santos' management style, which they described as dictatorial and intrusive. Judge Posner declared that the witnesses were properly permitted to testify to Santos' management style, but they should not have been permitted to draw the inference that Santos ordered Henry to terminate the contractors. He explained as follows:

> The way in which Santos managed the Treasurer's office, a small office, was a matter within the range of these witnesses' personal observation. Had they stopped with their testimony about Santos' management style, the prosecutor could have asked the jury to infer that it was likely that Henry would not have ordered the cutoffs himself, that he was just her messenger boy. But instead the witnesses were permitted to draw the inference themselves, and in doing so they stepped outside the boundaries of their personal knowledge and invaded the province of the jury.

> It is true that *Rule 701* does not interdict all inference drawing by lay witnesses. That would be absurd, since almost all testimony, even testimony as to what one has seen, is inferential in the sense that a reasoning process, however rudimentary, is being applied to the raw sense data. But the inferences must be tethered to perception, to what the witness saw or heard. What the witnesses here saw and heard was how Santos managed the office, but it was an impermissible leap to infer the existence of an express order by Santos on a particular matter. Not because the witnesses were not expert witnesses, who are permitted to testify to matters of which they lack personal knowledge, but because the inferences that they tried to draw were too speculative to count as evidence. n13

The Trial Judge must make a judgment call in assessing whether the lay witness' inference is reasonably based on personal knowledge or a speculative leap of faith. This will not be easy, but obviously the inference will be more sustainable if it is based on substantial personal knowledge and results from an unremarkable application of logic and experience to a certain set of facts -- such as the question of age in *Yazzie*. n14 We believe that *Santos* is a closer case than Judge Posner would have it. If the witnesses knew that Santos was a dictator and a control freak, it would seem reasonable to for them to infer that a major matter such as a public contract would be within her control. It would be another thing if the witnesses were to infer that the Mayor of Chicago must have ordered the terminations because, after all, the Mayor is the top public official. That inference would be unreasonable and speculative; the inference that the witnesses drew in *Santos* is significantly more reasonable.

[5] Order of Presentation

In the course of carrying out its responsibilities under *Rule 611* to control the flow of evidence at trial, the Trial Court at times may find it desirable to require a witness to begin with a statement of the data, observations, or material relied upon to support an opinion before the witness is allowed to actually state the opinion. One advantage of such a procedure is that, if an objection to the opinion is likely, the Trial Judge is on notice as to the witness' basis before the jury is made aware of the opinion. If the Trial Judge ultimately concludes that the opinion either is not rationally based on the perceptions of the witness or is not helpful to the jury, the Judge can strike testimony concerning the material used to formulate the opinion and need not fear that the jury will be influenced by the opinion itself, which the jury will not have heard.

[6] Legal Conclusions of Lay Witnesses

Because the opinion of a lay witness must be helpful to be admissible, it follows that a lay witness cannot be permitted to draw conclusions of law on the stand. A witness who testifies that he or she thought the defendant was "guilty" or had acted "with malice aforethought" is not helping the jury. Rather, the witness is usurping the role of the jury. n15

It does not follow, however, that every opinion that uses law-related terms is automatically inadmissible. Many law-based terms have an accepted lay meaning, and testimony employing such terms could be helpful to a jury in a particular case. Thus, if a witness testifies that two people had "a contract," this is not necessarily inadmissible, unless the very question in the case is whether the two people had a legally enforceable contract. n16 Testimony that two people had a contract may well operate as a convenient shorthand device that will assist the jury and expedite the trial, though the jury should be instructed as to the difference between lay and legal definitions.

United States v. Koon, 34 F.3d 1416 (9th Cir. 1994) , provides a good example of lay opinion that is helpful, rather than a legal conclusion. Two police officers appealed their convictions for the deprivation of the rights of an arrestee, Rodney King, who was severely beaten after a high speed chase. The federal convictions were obtained after a state trial on the same matter resulted in a mistrial on one state count and an acquittal on all other state counts. The Court held that testimony in the state trial, by an officer who was at the scene of the beating (and who was actually acquitted as a defendant in both trials), was properly admitted against the two convicted defendants in the federal trial. The defendants objected to the officer's testimony that one of the defendants was "out of control" during the beating. In their view, this

was just another way of saying that excessive force was employed -- and the use of excessive force was the very question that the jury would have to decide. The Court responded that "the ultimate issue was not whether the defendants were out of control, but whether they willfully used unreasonable force." The Court concluded that the officer's observation was helpful to the jury (it was a meaningful shorthand device to describe a person's conduct) and was rationally based on the officer's personal perception of the beating. If the witness had used the legal buzzwords, "excessive force," it might well have been excluded -- but colloquial terminology short of that conclusion can be helpful to the jury.

[7] The Distinction Between Lay and Expert Witnesses and the 2000 Amendment to Rule 701

What is the difference between an expert and a lay witness? The Ninth Circuit addressed this question in *United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997)* , and many other Courts have struggled with that same question. Decisions such as *Figueroa-Lopez* spurred the Advisory Committee on Evidence Rules to propose an amendment to *Rule 701* that would provide a more bright-line delineation between expert and lay witnesses. That amendment became effective December 1, 2000. The result in *Figueroa-Lopez* is essentially codified by the amendment, and relied upon in the Committee Note, so it is useful to consider the facts and background of that case. Lopez was charged and convicted of possession of cocaine with intent to distribute. He asserted error in the Trial Court's permission of testimony from law enforcement agents. In his view, the law enforcement agents were presented as expert witnesses, and yet they were neither disclosed as such before trial, nor qualified as such at trial. The government argued that the officers' testimony was permissible lay witness testimony under *Rule 701*. Lopez argued that the testimony from the agents could only be admitted under *Rule 702*.

An overview of the facts in *Figueroa-Lopez* illustrates the difficulty that the Court had before it. An undercover agent named Storm approached Lopez about a drug transaction. For about a month, Lopez spoke by telephone several times with Storm about the impending cocaine deal. These conversations were recorded. On May 25, 1995, Storm called Lopez and arranged to meet later that day in a parking lot to complete the cocaine transaction. Before meeting with Storm, Lopez drove in circles around the parking lot in a Monte Carlo. Storm and Lopez then met in the parking lot. Lopez drove away from Storm and parked next to a silver Nissan Sentra. Lopez entered the Nissan, bent down for several minutes, and then returned to the Monte Carlo. Lopez returned to Storm's location and showed Storm a kilogram package of cocaine. Storm gave the arrest signal, and agents arrested Lopez. In the Monte Carlo, the agents found the keys to the Nissan and one kilogram of cocaine on the floor below the front seat. In the Nissan, the agents found nine kilograms of cocaine concealed in the car's door panels.

Lopez interposed an entrapment defense, claiming that Storm had pressured him into selling drugs in order to pay off a debt, and that he had no prior experience with drug dealing. Throughout the trial, the Government presented opinion testimony by law enforcement witnesses as to how Lopez's conduct, as observed by the agents, conformed to the methods and techniques of experienced drug dealers. Lopez objected to this testimony, claiming that it was improper expert testimony because the Government had not qualified the witnesses as experts, and had not given prior notice of expert witness testimony as required by *Fed. R. Crim. P. 16(a)(1)(E)*. That Rule states that "the government shall disclose to the defendant a written summary of testimony the government intends to use under" *Rule 702*, and that the summary "must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications." (A similar disclosure requirement applies in civil cases under *Fed. R. Civ. P. 26(a)(2)*, though it is limited to experts who are specially retained to give testimony).

The Trial Judge overruled all of Lopez's objections and admitted the testimony as proper lay opinion. The testimony regarding the way Lopez was driving, from which the agent inferred that Lopez was behaving as an "experienced narcotics trafficker," was found admissible because the officer was a "percipient witness." The Trial Judge also permitted the agents to testify that: (1) Lopez's actions were "countersurveillance" and "a common practice for narcotics dealers"; (2) Lopez's use of a rental car during the transaction was "indicative of an experienced narcotics trafficker"; (3) certain terms used by Lopez and Storm were code words for a drug deal, a common practice of narcotics dealers; (4)

the manner of hiding the cocaine was consistent with the practices of experienced drug traffickers; and (5) the large quantity and high purity of the cocaine indicated that Lopez was close to the source of the cocaine. Agents repeatedly referred to Lopez's actions as consistent with an "experienced narcotics trafficker." The prosecution, during examination of the agents and in closing argument, continually emphasized the experience of the officers as supporting their ability to make such assessments.

The Court of Appeals found that it was error to permit all this testimony in the guise of lay witness testimony. The testimony would have been admitted as expert testimony, because it clearly assisted the trier of fact in understanding matters beyond the understanding of ordinary jurors, i.e., the *modus operandi* of drug dealers. The Court noted, as an example, that one of the agents "began his testimony with a recitation of his extensive training and experience with the DEA" and that "had the Government opted to do so, Larsen could have been formally qualified as an expert witness on the dispositive issue of whether Lopez's behavior suggested that he was an 'experienced' -- as contrasted with a fledgling -- drug trafficker." However, this routine process did not occur in *Figueroa-Lopez*. The Government conceded that it made no effort properly to qualify the witnesses as having the knowledge, experience, training, or education to render their testimony admissible under *Rule 702*.

The government argued that it was unnecessary to qualify the witnesses as experts, contending that *Rules 701* and *702* are not mutually exclusive. In the government's view, where the expert's testimony is on a specialized (as opposed to a scientific) subject, a witness with the requisite experience in the subject matter can testify either as an expert or as a lay witness.

The *Figueroa-Lopez* Court rejected the government's position, stating that the overlap between *Rules 702* and *701* is not nearly as broad as the government would have it. Where testimony requires extensive experience beyond matters of common knowledge, it must be treated as, and regulated as, expert testimony. The Court emphasized the fact that the government *treated* its law enforcement witnesses as experts, continually emphasizing their "specialized" training and experience. It would not do for the government to trumpet its witnesses as experts and yet avoid the obligations of disclosure and qualification that are applicable to expert witnesses.

The *Figueroa-Lopez* Court noted the dangers of the government's blurring the line between expert and lay witnesses:

> The Government's argument simply blurs the distinction between *Federal Rules of Evidence 701* and *702*. Lay witness testimony is governed by *Rule 701*, which limits opinions to those "rationally based on the perception of the witness." *Rule 702*, on the other hand, governs admission of expert opinion testimony concerning "specialized knowledge." The testimony in this case is precisely the type of "specialized knowledge" governed by *Rule 702*. A holding to the contrary would encourage the Government to offer all kinds of specialized opinions without pausing first properly to establish the required qualifications of their witnesses. The mere percipience of a witness to the facts on which he wishes to tender an opinion does not trump *Rule 702*. Otherwise, a layperson witnessing the removal of a bullet from a heart during an autopsy could opine as to the cause of the decedent's death. Surely a civilian bystander, or for that matter a raw DEA recruit would not be allowed to interpret for the jury Lopez's behavior in the parking lot on May 25, 1995 as that of an "experienced" trafficker merely because that person was an eyewitness to the same.
>
> In addition, the Government's argument subverts the requirements of *Federal Rule of Criminal Procedure 16(a)(1)(E)*. Rule 16 requires the Government to "disclose to the defendant a written summary of [expert] testimony the government intends to use ... during its case in chief." The Rule "is intended to minimize surprise that often results from unexpected testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Rule [Crim. P.] 16(a)(1)(E) (advisory committee's note).

So, what is the exact delineation between testimony of a lay witness and that of an expert? The *Figueroa-Lopez* Court offered this distinction. When one officer testified that Lopez's driving the car several times around the parking lot before the transaction was "suspicious," this was permissible lay witness testimony because it related to matters "common enough" to be within the purview of any witness with any kind of life experience. It is common knowledge that a person is acting out of the ordinary when he makes a point of driving a car multiple times around a parking lot for no apparent purpose. However, where the officers testified that the defendant's activity was consistent with that of an experienced narcotics trafficker, some specialized experience was required. People don't get that kind of experience in the ordinary walks of life.

Admittedly, the distinction put forth in *Figueroa-Lopez* -- between an opinion that movement of a car was suspicious (within the province of a lay witness), and an opinion that a driver was engaged in "countersurveillance activity" (within the exclusive province of an expert) -- is a fine one. However, some line must be drawn, or else the disclosure requirements of the Civil and Criminal Rules, and the qualification requirements of *Evidence Rule 702*, would be too easily evaded.

Courts have struggled with the distinctions between lay and expert opinion in civil cases as well. Sometimes the reason for the dispute between the parties on this matter is because the proponent hopes to evade the requirements for expert testimony laid down by *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)* . The Court in *Daubert* anointed Trial Judges as "gatekeepers," and required Trial Courts to independently assess the reliability of expert testimony. Under *Daubert*, the Trial Court must assure itself that the expert testimony proceeds from sufficient "scientific, technical or specialized knowledge" as required by *Rule 702*. The *Daubert* Court held that a Trial Judge must independently evaluate proffered expert testimony to assure that it is at least minimally reliable.

In the leading case of *Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190 (3rd Cir. 1995)* , Judge Becker reviewed the testimony of a purported lay witness who testified that an accident was caused because a mechanical lift had been defectively designed. The witness based his testimony on his extensive experience with maintaining and operating machinery such as that used in the accident. Judge Becker relied on the "spirit" of *Daubert,* and declared that "under *Rule 701* the trial judge must play some gatekeeping role so as to ensure that the rationally derived and helpfulness requirements of the rule are met." In other words, if the witness is testifying to technical or highly specialized subject matter, the gatekeeping requirements of *Daubert* cannot be evaded simply by labeling the witness as a lay rather than expert witness.

One reading the *Asplundh* opinion is struck by Judge Becker's own dissatisfaction with the method he had to employ to prevent a party from avoiding the reliability requirements of *Rule 702*. He would clearly have liked to hold, as the Court did in *Figueroa-Lopez,* that testimony on specialized subject matter must be admissible under *Rule 702* or not at all. However, he could not find such a result in the broad wording of *Rule 701* as it was written at the time. Judge Becker's view was that if the witness' testimony is "rationally based on personal perception" and would assist the trier of fact, then it is admissible under the terms of *Rule 701* regardless of whether it deals with technical or specialized subject matter.

Judge Becker did not seem too happy with the absence of subject matter delineation in *Rule 701*. In his view, the Rule as then written provided an unhealthy overlap with *Rule 702*. Judge Becker suggested that subject matter distinctions in *Rule 701* "can and might well be made by the drafters of the Federal Rules," and that "a better formulation of the lay opinion rule would perhaps eliminate these matters [i.e., testimony on scientific, technical or specialized subject matter] from the ambit of *Rule 701*." Judge Becker took "the liberty of commending this issue to the attention of the Judicial Conference Advisory Committee on Rules of Evidence, which monitors developments in evidence jurisprudence."

The Advisory Committee on the Federal Rules of Evidence, which one of the authors of this Treatise serves as Reporter, took Judge Becker up on his invitation. The Rule now provides that testimony cannot be admitted under *Rule 701* if it is based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*. The Committee

Note to the *Rule 701* amendment states that the intent is "to eliminate the risk that the reliability requirements set forth in *Rule 702* will be evaded through the simple expedient of proffering an expert in lay witness clothing" and also to ensure "that a party will not evade the expert witness disclosure requirements set forth in *Fed.R.Civ.P. 26* and *Fed.R.Crim.P. 16* by simply calling an expert witness in the guise of a layperson." The Advisory Committee's position was that the amendment was not a sea change in existing law, because Courts such as *Figueroa-Lopez* and *Asplundh* had already barred attempts to evade *Rule 702* by calling an expert in the guise of a lay witness.

The Department of Justice [DOJ] adamantly opposed the amendment to *Rule 701*. DOJ officials argued that the amendment would require the government to qualify many witnesses as experts who have traditionally been considered lay witnesses. As an example, DOJ postulated a case where a senior citizen who lived in a neighborhood for a long time would be called to testify that she saw the defendant engaged in drug activity on the street corner. DOJ argued that this would be testimony based on "specialized knowledge" and therefore the witness would have to be qualified as an expert under the amendment. Moreover, she would have to be disclosed as an expert in advance of trial under *Fed. R. Crim. P. 16*. And this could mean that her safety would be put in jeopardy.

The Advisory Committee took the position that DOJ's concerns were overstated. As to the senior citizen hypothetical, whether the testimony would be treated under amended *Rule 701* or under *Rule 702* would depend on the exact nature of the testimony. If the witness were to testify that the defendant was acting as a steerer in a drug transaction, or that the defendant was engaged in a coded conversation, this would indeed be expert testimony. Moreover, the Advisory Committee had no problem with requiring such a witness to be qualified as an expert, disclosed in advance, and subject to a *Daubert/Kumho* inquiry. If advance disclosure could risk the safety of the witness, then nothing would prevent the government from getting a protective order that would limit or excuse such disclosure. In contrast, if the witness were to testify that she saw the defendant drop a packet of drugs on the street, this would not be expert testimony. You don't need specialized knowledge to know that white powder in certain circumstances is drugs. That is common knowledge, not specialized knowledge.

Another example given by DOJ was a game warden who would testify that an eagle flew over his head at a certain location. Is that expert testimony? The Advisory Committee took the position that drawing an inference that a bird is an eagle is within the common experience of most people, so the testimony would be that of a lay witness. However, if the witness were to testify that based on the eagle's height it must have come from a nesting grounds, or it had an irregular heartbeat, or it was a particular type of eagle outside its normal environment, then this would be testimony on the basis of specialized knowledge, and would have to be qualified under *Rule 702*. The Advisory Committee noted that if the witness were called to give such specialized testimony, counsel would clearly have to establish a foundation that the witness had substantial experience in the field of eagles. That kind of foundation looks a lot like -- indeed it is exactly like -- what counsel would have to do to qualify the witness as an expert. The Advisory Committee's position was essentially that if it looks like an expert and talks like an expert and a foundation is established in the manner required for an expert, then it's an expert and should be subject to the reliability requirements of *Rule 702* and the disclosure requirements of the Civil and Criminal Rules.

The Advisory Committee recognized that the line between specialized knowledge and common knowledge would not always be easy to draw. But the Committee believed that the cost of such a delineation was worth it. Otherwise, parties could routinely evade the strictures of *Daubert*, and the disclosure requirements of the Civil and Criminal Rules, by presenting expert testimony and yet calling it lay testimony. The last paragraph of the Committee Note is an attempt to provide some guidance to Judges and practitioners in distinguishing specialized knowledge testimony from common knowledge testimony. The Note observes that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The example given is that a lay witness with experience could testify that a substance appeared to be blood, but a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. The former opinion is based on fairly common if not necessarily universal experience, while the latter is based on fairly narrow experience that is not part of

the everyday life of most persons.

It must be remembered that a single witness can be both an expert and a lay witness. As the Committee Note states, the Rule focuses on *testimony*, not *witnesses*. A typical example is a treating physician. When the physician testifies that the plaintiff was coughing and running a fever, this is lay witness testimony governed by *Rule 701*. However, if the physician also testifies that he diagnosed the patient as having Reactive Airways Dysfunction Syndrome caused by exposure to a toxic chemical, then this is testimony based on scientific, technical, or other specialized knowledge and must be qualified under *Rule 702*.

Even as amended, *Rule 701* permits a witness with personal knowledge to testify to issues such as the amount of lost profits or the value of property. See the Committee Note to the 2000 amendment. This is because the assessment of value can be derived from ordinary experience and does not require specialized training or knowledge. For example, the owner of a business knows what it is worth simply by knowing the business. On the other hand, if the assessment of value or estimate of lost profit is not based on personal knowledge, it cannot be admitted under the terms of *Rule 701*. n17

The Rule as amended also permits law enforcement agents to provide, as lay witnesses, identification testimony of such matters as handwriting and that it is the defendant in a photograph. These processes of identification are not necessarily based on special expertise within the meaning of *Rule 702*. But in order to qualify as helpful lay testimony, the witness must be testifying on the basis of personal knowledge-- not, for example, generalized knowledge of "how criminals write" or "how facial characteristics change." n18 Moreover, the testimony must be helpful to the jury. If the jury is in the same position as a lay witness to evaluate a photograph or handwriting, the lay witness' identification testimony will not be helpful. n19 The Court in *United States v. Beck, 418 F.3d 1008 (9th Cir. 2005)* , provided a good summary of the foundation requirements for admissible identification testimony by a lay witness under the amended *Rule 701*. The defendant was convicted of bank robbery. He challenged the testimony of his probation officer, who identified the defendant as the person in the bank surveillance photograph. The Court found no error, concluding that the witness had "sufficient contact with the defendant to achieve a level of familiarity" that rendered his lay opinion helpful. The officer met with the defendant four times in a two-month period, for a total of more than seventy minutes. Reviewing the case law of other Circuits, the Court set forth the following standards for determining the admissibility of lay witness identification testimony:

> In accord with the decisions of our sister circuits, we hold that whether a lay opinion is helpful depends on a totality of circumstances including the witness's familiarity with the defendant's appearance at the time the crime was committed, the witness's familiarity with the witness's customary manner of dress, insofar as such information related to the clothing of the person depicted in the surveillance photograph, whether the defendant disguised his or her appearance during the offense or altered his or her appearance before trial, and whether the witness knew the defendant over time and in a variety of circumstances, such that the witness's lay identification testimony offered to the jury a perspective it could not acquire in its limited exposure to the defendant. The absence of any single factor will not render testimony inadmissible because cross-examination exists to highlight potential weaknesses in lay opinion testimony.

FOOTNOTES:

(n1)Footnote 1. *Central R.R. v. Monahan, 11 F.2d 212, 213-14 (2d Cir. 1926)* .

(n2)Footnote 2. See, e.g., *Scheerer v. Hardee's Food Sys., 148 F.3d 1036 (8th Cir. 1998)* (in a slip-and-fall case, it was not error to admit lay opinion that the accident had been caused by the plaintiff's wearing slippery shoes; the statement was rationally based on the witness' personal perception of the accident, and could have aided the jury in its determinations); *Haun v. Ideal Indus., 81 F.3d 541 (5th Cir. 1996)* (in an ADEA case, testimony from a supervisor that the employer was phasing out older workers was properly admitted as a lay opinion; the testimony was based on the

supervisor's own perception, and it helped the jury determine whether the employer discriminated); *Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991)* (in an action arising from a collision with a parked tractor trailer during rainy weather, the Trial Court properly permitted an eyewitness to testify that the emergency flashers on the tractor-trailer did not provide "an adequate warning under the conditions of the weather at that time"); *Robinson v. Bump, 894 F.2d 758 (5th Cir. 1990)* (in an action arising from a collision with a truck, it was proper to permit an eyewitness to testify that the driver was "in total control" of the truck until it was struck by one of the vehicles; the witness personally observed the truck's movement, and the testimony was helpful in assessing whether the driver was negligent).

(n3)Footnote 3. See, e.g., *United States v. Hauert, 40 F.3d 197 (7th Cir. 1994)* (the Trial Judge properly excluded lay witness testimony concerning the defendant's sincerely held beliefs that he was exempt from taxation; this testimony was too abstract to assist the jury).

(n4)Footnote 4. As to lack of personal knowledge, see, e.g., *Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995)* (testimony by a 30-year heroin addict was inadmissible as lay opinion concerning the mental condition of the plaintiff, who was a heroin addict; the affiant had no personal knowledge about the plaintiff). As to speculative opinions, see, e.g., *Alexis v. McDonald's Restaurants of Mass., 67 F.3d 341 (1st Cir. 1995)* (the plaintiff claimed that she was ejected from a restaurant as a result of race discrimination; testimony of witnesses that the plaintiff would not have been excluded had she been white was inadmissible lay opinion; while the witnesses based their conclusions on their personal perception that the manager was hostile and uncooperative, there was "no foundation" for the conclusions of racial animus, because there was no probative evidence that the manager's hostility was "something other than a race-neutral reaction to the stressful encounter" with the plaintiff).

(n5)Footnote 5. See, e.g., *Government of Virgin Islands v. Knight, 989 F.2d 619 (3d Cir. 1993)* (the Court held it was error, but harmless, to exclude testimony of an eyewitness whose opinion was that the defendant's firing of his gun was an accident; under *Rule 701*, "*[i]*f circumstances can be presented with greater clarity by stating an opinion, then that opinion is helpful to the trier of fact," and that is the case with an eyewitness to a shooting).

(n6)Footnote 6. See, e.g., *United States v. Crawford, 239 F.3d 1086 (9th Cir. 2001)* (lay witness, an employee of a state university, was improperly permitted to testify that the university was prohibited by law from abandoning property; "abandon" is a legal term and a legal conclusion from this lay witness was not helpful to the jury).

(n7)Footnote 7. See also *United States v. Stanley, 896 F.2d 450 (10th Cir. 1990)* (in a prosecution for receiving child pornography through the mails, there was no abuse of discretion in permitting a postal inspector to testify that the children depicted engaging in sexual conduct in the photographs he observed while testifying were under age eighteen, as the testimony was helpful in determining the subjects' ages and was an appropriate subject for lay opinion testimony).

(n8)Footnote 8. See, e.g., *Gust v. Jones, 162 F.3d 587 (10th Cir. 1998)* ("persons of reasonable intelligence and ordinary experience are uniformly permitted to express opinions as to matters such as the speed of an automobile under their observation").

(n9)Footnote 9. See, e.g., *United States v. Glenn, 312 F.3d 58 (2d Cir. 2002)* (testimony by a drug dealer that the defendant must have been carrying a gun in his waistband was erroneously admitted under *Rule 701* as the witness lacked first-hand knowledge or observation of the defendant); *Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990)* (in a product liability action, the Trial Court improperly permitted a nonexpert eyewitness to give an opinion on the crucial issue of whether the wheel on the plaintiff's car separated before the rollover began or after it was already in progress; the witness admitted he never saw the wheel leave the vehicle and could not recall whether it was still on the vehicle when he saw the car flipping over).

(n10)Footnote 10. See, e.g., *Washington v. Department of Transp., 8 F.3d 296 (5th Cir. 1993)* ("speculative opinion testimony by lay witnesses -- i.e., testimony not based upon the witness' perception -- is generally considered

inadmissible"). See also *United States v. Sanchez-Sotelo, 8 F.3d 202 (5th Cir. 1993)* (error, though harmless, to permit an officer to "translate" taped conversations between the defendants, where the officer's opinion as to what was meant went well beyond the plain meaning of the tape; "*Rule 701* should be applied in a manner that allows the jury to draw its own conclusions.").

(n11)Footnote 11. See, e.g., *Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993)* (it was proper to allow witnesses to testify about what one of the defendants knew and about what he intended to do, where the testimony was simply "inferences that could have been rationally drawn from facts of which the witnesses had personal knowledge"; the Court notes that the jury "had before it ample contextual evidence from which to evaluate the opinion").

(n12)Footnote 12. See, e.g., *United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991)* (where a witness testified that the defendant was left-handed -- contrary to the complainants' testimony -- the government was properly permitted to probe the basis for that opinion by cross-examining the witness about his relationship with and knowledge of the defendant; cross-examination led to effective impeachment of the witness).

(n13)Footnote 13. See also *Hester v. BIC Corp., 225 F.3d 178 (2d Cir. 2000)* (reversible error to permit lay witnesses to testify that supervisor's coldness and hostility was due to racial bias; this was "speculative lay opinion" that "merely tells the jury what result to reach").

(n14)Footnote 14. For a case in which an inference was found permissible, see *United States v. Vega-Figueroa, 234 F.3d 744 (1st Cir. 2000)* (no error when the sister of a woman killed by a conspiracy was permitted to give her opinion that her sister was killed because she was selling more drugs at a certain location than the conspirators; the witness was heavily involved with drug activity at that location, she was present at a meeting when conspirators mentioned the drug competition, she had first-hand knowledge of how drug organizations work, and she witnessed her sister's murder).

(n15)Footnote 15. See e.g., *United States v. Griffin, 324 F.3d 330 (5th Cir. 2003)* (error in permitting lay witness to testify to her understanding of the law in a mail fraud prosecution); *Torres v. City of Oakland, 758 F.2d 147 (6th Cir. 1985)* (it was error, but harmless, for a witness who had taken part in the selection of a person for a new supervisory position to give an opinion as to whether the plaintiff had been discriminated against because of national origin; such testimony called for a legal conclusion and would not be helpful to the jury; the Court suggested that "a more carefully phrased question could have elicited similar information and avoided the problem of testimony containing a legal conclusion").

(n16)Footnote 16. See, e.g., *United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1992-1 Trade Cas. (CCH) P69879 (8th Cir. 1992)* (in a Sherman Act case, it was not error to permit lay witnesses to give testimony that "agreements" to fix prices and allocate the market had been reached; the word has a well-established lay meaning and does not demand a conclusion as to the legal implications of conduct).

(n17)Footnote 17. See, e.g., *Dijo, Inc. v. Hilton Hotels Corp., 351 F.3d 679 (5th Cir. 2003)* : Finding that it was error to admit testimony on lost profits from a lay witness who had no personal knowledge of the business:

> We have previously recognized that the [2000] amendment did not place any restrictions on the preamendment practice of allowing business owners or officers to testify based on particularized knowledge derived from their position. Nevertheless, it has always been the rule that lay opinion testimony may be elicited only if it is based on the witness's first-hand knowledge or observations. This foundational requirement helps to eliminate the risk that a party will circumvent the reliability requirements set forth in *Federal Rule of Evidence 702* by adducing expert testimony in lay clothing.

(n18)Footnote 18. See *Hall v. United Ins. Co. of America, 367 F.3d 1255 (11th Cir. 2004)* (in order to give helpful testimony identifying handwriting, a lay witness must provide "detailed information regarding any correspondence,

documents or the like, relied upon to establish familiarity"; moreover, the lay witness "must provide detailed information regarding his or her relationship with the signatory-- whether it be familial, professional, or otherwise personal").

(n19)Footnote 19. See *United States v. Dixon, 413 F.3d 540 (6th Cir. 2005)* (photographic identification by lay witnesses was not helpful where the defendant had not altered his appearance and "our review of the surveillance photograph indicates that it is not of particularly poor or grainy quality, and it fully depicts the suspect's body from the waist up.").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 701 RULE 701

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701.03 Annotated Cases

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[1] Accident Conditions

Lauria v. AMTRAK, 145 F.3d 593 (3d Cir. 1998) : The Court reversed judgment as a matter of law entered for the defendant in a railroad worker's FELA action because the plaintiff had not been permitted to introduce testimony from a coworker regarding the condition the following morning of the tracks on which the plaintiff slipped. His testimony would have been helpful because it would have shown a piece of wood in the exact location where the plaintiff fell, which could have helped in determining whether the wood posed an unreasonable danger to employees crossing the tracks in poor lighting conditions.

Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) : In an action arising out of a collision between a car and a parked tractor-trailer during rainy weather, the Court noted there was no abuse of discretion in permitting an eyewitness to testify that the emergency flashers on the tractor-trailer did not provide "an adequate warning under the conditions of the weather at that time."

Robinson v. Bump, 894 F.2d 758 (5th Cir. 1990) : Affirming a judgment for the driver of a truck involved in a fatal multivehicle collision, the Court held there was no abuse of discretion in permitting an eyewitness to testify that the driver was "in total control" of the truck until it was struck by one of the vehicles, since the witness was able to observe the truck's movement, the movement is rationally related to the driver's control, and the testimony was helpful in assessing whether the driver was negligent. The Court reversed a judgment for the defendants in a wrongful death action, *Young v. Illinois Cent. G. R.R., 618 F.2d 332 (5th Cir. 1980)* , in part because lay testimony concerning the condition of a railroad crossing at the time of an accident was erroneously excluded.

Scheerer v. Hardee's Food Sys., 148 F.3d 1036 (8th Cir. 1998) : In a slip-and-fall case, the Court found no error when defense counsel was permitted to elicit from the plaintiff's friend that the friend had said, at the time of the accident, that the accident had been caused by the plaintiff's wearing slippery shoes. Because the friend's

contemporaneous statement was rationally based on her own first-hand perceptions and reasonably would have aided the jury's understanding of a fact in issue, it was not inadmissible under *Rule 701*. In *Meder v. Everest & Jennings, Inc.*, n1 a suit arising out of the plaintiff's falling from a wheelchair manufactured by the defendant, the Court held that an opinion of a police officer who investigated the accident could not be admitted, since the opinion was not based on anything he observed and he was not an expert on wheelchairs.

[2] Age

United States v. Yazzie, 976 F.2d 1252 (9th Cir. 1992) : The defendant's conviction for statutory rape was reversed because he was not permitted to ask lay witnesses what age they believed the victim was, although they were permitted to testify that they had seen her smoke cigarettes, drive a car, use makeup, and drink beer. The witnesses' opinions on the matter, which were extremely difficult to break down into factual components, were relevant to the reasonableness of the defendant's claim that he thought she was at least 16.

United States v. Stanley, 896 F.2d 450 (10th Cir. 1990) : In a prosecution for receiving child pornography through the mails, there was no abuse of discretion in permitting a postal inspector to testify that children depicted engaging in sexual conduct in photographs shown to him while testifying were under age 18, as the testimony was helpful in determining the subjects' ages and as an explanation of why he had seized the package.

[3] Causation

Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995) : In an action for contribution arising from a fatal accident involving an aerial lift, the plaintiffs offered deposition testimony by the fleet maintenance supervisor responsible for the lift that he had inspected the disassembled lift shortly after the accident, that he had observed a metal fracture where a hole had been drilled through a metal rod, that the accident was attributable to the way the rod was drilled through, and that he questioned the appropriateness of the design. The Court reversed a judgment for the plaintiffs because the Trial Judge failed to examine with sufficient rigor whether the supervisor's testimony admitted under *Rule 701* was informed by sufficient experience or specialized knowledge. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*.

Wactor v. Spartan Transp. Corp., 27 F.3d 347 (8th Cir. 1994) : In a Jones Act action for personal injuries suffered by a deckhand when a line on a river tow broke during locking maneuvers, the Court held there was no abuse of discretion in permitting the lockmen who had been assisting in the maneuvers to testify that the plaintiff had not followed the correct procedure in securing the line, which caused the line to break. Their opinion was based on their observations as well as their years of experience assisting tows through the locks.

Agro Air Assocs. v. Houston Cas. Co., 128 F.3d 1452 (11th Cir. 1997) : The plaintiff sued its insurer for fraud after the insurer canceled certain insurance policies. At trial the plaintiff's president and insurance brokers gave lay testimony regarding their opinions why the insurer had terminated its relationship and why the plaintiff's insurance rates and premiums increased after the termination. The Court held there was no abuse of discretion in admitting the testimony, since it was based on facts they had observed personally and through substantial experience in their respective businesses.

[4] Credibility

United States v. Gaines, 170 F.3d 72 (1st Cir. 1999) : Affirming drug convictions, the Court found no error when

the prosecutor asked the defendant to comment on the credibility of other witnesses whose testimony contradicted his own. While "it is improper for an attorney to ask a witness whether another witness lied on the stand" because "credibility judgments are for the jury, not witnesses, to make," in this case the prosecutor did not ask the defendant whether he believed the other witnesses had lied, but only asked whether the other witnesses were "wrong." Thus, the defendant was "not required to choose between conceding the point or branding another witness as a liar."

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) : In a cocaine prosecution, a government witness testified that she had told the DEA agent about two men involved in the drug scheme, including the defendant, and that she had identified the defendant's photograph for the agent. The agent's reports made no mention of these matters, and the agent recalled no identification. Nonetheless, the agent testified in response to the prosecutor's questions that he found nothing inconsistent between the witness' testimony and what she had told him. Reversing, the Court stated that the agent's testimony, which was simply an opinion of the witness' credibility, could not assist the jury.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed a conviction for aggravated sexual assault because the defense was erroneously prevented from introducing a lay witness' opinion that one of the alleged victims (who testified) "was untruthful" and "didn't always tell the truth." The witness was the foster care parent with whom the child had lived following the initial report and investigation of abuse. She saw him on a daily basis during the four to six months that he resided with her, so her opinion about his credibility was more than a "bare assertion" or "conclusory observation." In *United States v. Cournoyer, 118 F.3d 1279 (8th Cir. 1997)* , the Court affirmed a conviction for aggravated sexual abuse, holding there was no abuse of discretion in excluding defense testimony, after evidence that the complainant had several times attempted suicide was introduced, that the complainant's rape charge was "another attempt to get attention." In the Court's view, the history of suicide attempts did not provide a rational basis for inferring that the rape accusation was false, so the testimony would not have helped the jury determine facts at issue.

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998) : The defendant, an illegal alien, was charged with assault on a Border Patrol officer after being apprehended in an attempt to cross into the United States. The defendant claimed self-defense. The Court found reversible error when a Border Patrol agent was permitted to testify that he believed that the agent who had allegedly been assaulted was telling the truth. While a witness' character for truthfulness may be bolstered once it has been impeached, it may not be bolstered by inadmissible evidence; opinion testimony as to the credibility of a witness' account is inadmissible because it does not assist the jury.

[5] Custom or Practice

Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) : Reversing a summary judgment for the defendants in a civil rights action, the Court held that the opinion of a witness, who had worked in a police department for a long time, that the department had the policy or practice of encouraging brutality was admissible to prove the City's responsibility for damages to which the plaintiff might be entitled.

[6] Damages

Walton v. Nalco Chem. Co., 272 F.3d 13 (1st Cir. 2001) : An employer, sued by a former salesman for age discrimination, counterclaimed for breach of a noncompete agreement; to prove its damages it offered testimony by its district sales manager. The Court found no abuse of discretion in exclusion of the testimony, since the witness' opinion was based solely on his lay review of corporate reports reflecting gross profits and he had no personal knowledge how those data were compiled. Furthermore, the corporate reports did not contain any data relating to the period at issue.

Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995) : Affirming a judgment for a manufacturer of locks who alleged that a competitor engaged in racketeering and deceptive trade practices, the Court held that the president of the plaintiff company properly testified as to lost profits and that he "was fully capable of examining the company's sales over a period of years, noting a slow-down, and testifying to the estimated losses attributable to the defamatory and fraudulent activities of appellants."

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) : In a fraud, tortious interference, and RICO action by a quick lube franchiser against its oil supplier, the Court held there was no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of his business and generally based on valid assumptions. In *Sowell v. Butcher & Singer, Inc., 926 F.2d 289 (3d Cir. 1991)* , the Court affirmed a directed verdict granted for the defendants in a securities fraud class action, holding there was no error in excluding damages testimony by the plaintiff regarding securities transactions, as the opinions and inferences he drew from transfer records were based on not only his own perceptions but also on assistance from his attorneys and other experts. In an action by the buyer for a defective supermarket refrigeration system, *In re Merritt Logan, Inc.,* n2 the Court held that the buyer's principal shareholder and a witness who had prepared a survey of the supermarket site as a store location were both sufficiently qualified by their personal knowledge to give opinions regarding the store's lost profits. In *Joy Mfg. Co. v. Sola Basic Indus.*, n3 the Court reversed a judgment for the plaintiff on a claim that two heat-treating furnaces failed to work, but held it was error to exclude testimony in which the plaintiff's production supervisor estimated the losses suffered because of furnace failures. Where the witness had personal knowledge of the problems of his company, testified in detail about the work done at the company's plant, participated in the purchase of the furnaces, and witnessed their operation on a day-to-day basis, his inability to say precisely why a furnace was inoperable at a particular time was a subject for cross-examination, not a reason to strike the testimony.

DIJO, Inc. v. Hilton Hotels Corp., 351 F.3d 679 (5th Cir. 2003) : In an action for breach of a lease and tortious interference, the Court vacated the damages award for the plaintiff because the plaintiff's witness "had little significant actual knowledge about [the plaintiff] and its operations," so he could not offer lay opinion testimony, and the plaintiff made no attempt to qualify him as an expert. In *Mississippi Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359 (5th Cir. 2002)* , a breach of warranty action by the purchaser of a gas compressor train for use in ammonia production, the Court upheld the admission of testimony by the plaintiff's director of risk management and property taxation concerning the amount of lost profits caused by the defective train. The Court noted that "[o]ther circuits that have addressed this question have allowed lost profit testimony by a layperson witness if the witness has direct knowledge of the business accounts underlying the profit calculation." The Court found that the witness had personal knowledge of the plaintiff's books and had done lost profit calculations for insurance purposes. In *Morel v. Sabine Towing & Transp. Co.*, n4 the Court affirmed a seaman's judgment in a personal injury action, holding that it was permissible for the plaintiff to testify as a lay person to the amount needed to sustain a mending seaman in the locality where he resided.

Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701, 2004-2 Trade Cas. (CCH) P74476 (8th Cir. 2004) : The Court affirmed a judgment for the plaintiff in a price discrimination case, finding no abuse of discretion when one of the plaintiff's co-owners was permitted to testify about the plaintiff's lost profits and business value. A proper foundation was laid to show the witness' knowledge as a business owner of the business' value and its lost profits. His use of a multiplier in calculating the value of the franchise was supported by his knowledge that they were often used, and he selected one based on his knowledge of current practices; differences between the multiplier he used and those suggested by the defendant were for the jury to resolve. In *Allied Sys., Ltd. v. Teamsters Local 604, 304 F.3d 785 (8th Cir. 2002)* , an action alleging that the union breached a collective bargaining agreement, the Court found no abuse of discretion when the plaintiff's vice president of internal audit was permitted to testify as to damages, despite

not having been disclosed as an expert before trial. Although the witness may have used accounting principles and methods, his testimony was limited to his firsthand knowledge, obtained as bookkeeper and record-keeper and from a field audit he conducted during the dispute. In *In re Air Crash at Little Rock, Ark., on June 1, 1999, 291 F.3d 503 (8th Cir. 2002)* , the Court affirmed in part an airline passenger's personal injury action, holding that one of the plaintiff's college professors was qualified to give either expert or lay opinion regarding the plaintiff's chances of having a successful student teaching experience and becoming a music teacher following the accident, which was likely to be useful to the trier of fact in assessing the plaintiff's damages.

Lifewise Master Funding v. Telebank, 374 F.3d 917 (10th Cir. 2004) : In an action by a lending company against its loan financer for breach of contract, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the exclusion of testimony by the plaintiff's CEO as to its lost profits. The proposed testimony was based on a financial model for which the witness lacked qualifications to testify. The plaintiff passed up an opportunity to have the witness testify solely as a businessperson based on his personal knowledge and his experience as president of the company, giving a straightforward opinion as to lost profits using conventional methods based on the plaintiff's actual operating history. In a civil rights action, *Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996)* , the plaintiff alleged that injuries from the defendant's use of excessive force caused him to lose profits from his business of purchasing, rehabilitating, and selling houses. The Court held that the plaintiff had sufficient expertise and personal knowledge to render an opinion as to the value of his properties and lost future profits of his own real estate ventures.

[7] Defective Product

Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995) : In an action for contribution arising from a fatal accident involving an aerial lift, the plaintiffs offered deposition testimony by the fleet maintenance supervisor responsible for the lift that he had inspected the disassembled lift shortly after the accident, that he had observed a metal fracture where a hole had been drilled through a metal rod, that the accident was attributable to the way the rod was drilled through, and that he questioned the appropriateness of the design. The Court reversed a judgment for the plaintiffs because the Trial Judge failed to examine with sufficient rigor whether the supervisor's testimony admitted under *Rule 701* was informed by sufficient experience or specialized knowledge. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*.

Gardner v. Chrysler Corp., 89 F.3d 729 (10th Cir. 1996) : In a product liability action for injuries suffered when the seat occupied by the plaintiff gave way when a minivan was rear-ended, the Court affirmed a judgment for the defendant, holding there was no abuse of discretion in excluding a witness offered by the plaintiff. Although a member of the defendant's Minivan Safety Leadership Team subsequent to the plaintiff's accident, the witness had no previous involvement with minivans or seat design, he had no knowledge of the recliner mechanism at issue or of seat designing and testing, and in a deposition he specifically handed off seat design questions to the engineering department because the MSLT was concerned with marketing.

[8] Discriminatory Motivation

Hester v. BIC Corp., 225 F.3d 178 (2d Cir. 2000) : The Court reversed a judgment for the plaintiff, who sued for racial discrimination in employment, because co-workers had been improperly permitted to testify that a supervisor's hostile treatment of the plaintiff had been based on race. The testimony was not helpful because none of the witnesses was involved in the employer's decision-making processes or had personal knowledge of it, and none had any basis for knowing whether the employee was adequately performing her duties; the testimony was not focused on objective facts but instead consisted of subjective impressions.

[9] Drugs and Controlled Substances

United States v. Santana, 342 F.3d 60 (1st Cir. 2003) : Affirming cocaine convictions, the Court found no error in the admission of testimony by a DEA agent that he smelled marijuana during the search of a witness' home. The Court found that the agent had personal knowledge of what he smelled and had sufficient experience to be able to identify the smell of marijuana. In *United States v. Paiva, 892 F.2d 148 (1st Cir. 1989)* , the Court affirmed cocaine distribution convictions, holding that it was not an abuse of discretion to permit a lay witness, having past experience with cocaine, to testify on the basis of her observation and tasting of it that a substance found in the defendant's shoe was cocaine.

United States v. Garcia, 291 F.3d 127 (2d Cir. 2002) : The Court reversed convictions for cocaine distribution offenses because a witness was permitted to testify that the defendant understood a conversation to be a coded discussion of a drug transaction. The principal prosecution witness was an informant who had been arrested for heroin offenses and, while cooperating with the government, had begun working in the asbestos industry, where he sought to involve a coworker in drugs. The informant testified that the coworker connected him with the defendant, and that a transcript of a conversation between the accomplice and the defendant in which they discussed a potential asbestos project involved the use of code words to arrange a drug trade. The Court held that the government did not lay a proper foundation for the informant's opinion of the defendant's knowledge. The witness explained his own participation, why he spoke in code, and what he meant by the code he used, but he did not offer any explanation for how the defendant could know they were speaking in code.

United States v. Sweeney, 688 F.2d 1131 (7th Cir. 1982) : The Court said that even if lay witnesses were improperly permitted to identify substances as drugs, any error was harmless where the essence of the charges was a conspiracy and it was not necessary to prove what the substances actually were. The Court also held that a witness is qualified to testify to the identity of a drug based on prior use and knowledge of the drug and a sampling of the substance identified.

United States v. Espino, 317 F.3d 788 (8th Cir. 2003) : Affirming a conviction for methamphetamine offenses, the Court found no abuse of discretion in permitting lay witnesses with extensive experience in the drug trade to testify to the amounts and weights of drugs they had handled or observed. In a prosecution for offenses involving amphetamine, *United States v. Westbrook, 896 F.2d 330 (8th Cir. 1990)* , the Court held that witnesses having other experience with the drug could identify the substance sold or manufactured on the charged occasions as being amphetamine; any error in allowing one witness without such experience to express her opinion as to the drug's identity was harmless in light of substantial other evidence of the identity of the substance.

[10] Emotions

United States v. Meling, 47 F.3d 1546 (9th Cir. 1995) : Affirming a conviction for product tampering that arose from the defendant's scheme to murder his wife for insurance benefits, the Court held there was no error in permitting a 911 operator and a paramedic to testify that the defendant had feigned agitation and grief. They had ample time to assess his behavior and were better able than the jury to assess whether it was abnormal for the circumstances.

[11] Expert Witness Distinguished

[a] Civil Cases

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) : The Court reversed a judgment for municipal

employees who claimed that their discharges had been politically motivated, holding that it was an abuse of discretion to preclude testimony by a Commonwealth labor department deputy secretary for legal affairs with whom the defendant mayor had consulted before discharging the plaintiffs. The Judge had excluded the witness on the grounds that he was an expert for whom the requirements of *Fed. R. Civ. P. 26* had not been met and that any factual testimony he would give would be "inextricably conjoined to expert opinion and testimony" regarding the applicable law. The Court held that because the mayor claimed qualified immunity based on reliance on advice of counsel, the witness was a percipient fact witness not subject to the provisions for expert witnesses. Furthermore, legal opinions referred to in his testimony did not justify its wholesale exclusion, because they were relevant to his state of mind.

Bank of China, N.Y. Branch v. NBM LLC, 359 F.3d 171 (2d Cir. 2004) : Reversing a judgment for the plaintiff in a civil RICO action, the Court held it was error to permit a witness for the plaintiff to testify that certain transactions did not comport with the business community's understanding of normal trade transactions and that it is fraud when an importer presents a trust receipt to a bank to obtain a loan knowing there are no real goods involved. To the extent that the witness' testimony was not a product of his investigation but rather reflected specialized knowledge he had because of his extensive experience in international banking, he was testifying as an expert rather than a lay witness. Because he was not disclosed as an expert witness and the reliability requirements set forth in *Rule 702* had not been satisfied, it was error to admit his testimony. In *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98 (2d Cir. 2002)* , an action for infringement of copyrights in computer programs, the Court found no abuse of discretion when a supervisor was permitted to give testimony about the significance of a programmer's involvement in work on the programs at issue and on the meaning of the term "program." The witness' opinions were rationally based on his perceptions as supervisor and as a person who worked on the program; they were helpful to the jury's understanding of a central issue of fact, authorship, and of the meaning of the term "program" as used in the copyright registrations; and it was not based on scientific, technical, or other specialized knowledge, but on the witness' everyday experience as a programmer.

Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995) : In an action for contribution arising from a fatal accident involving an aerial lift, the plaintiffs offered deposition testimony by the fleet maintenance supervisor responsible for the lift that he had inspected the disassembled lift shortly after the accident, that he had observed a metal fracture where a hole had been drilled through a metal rod, that the accident was attributable to the way the rod was drilled through, and that he questioned the appropriateness of the design. The Court reversed a judgment for the plaintiffs because the Trial Judge failed to examine with sufficient rigor whether the supervisor's testimony admitted under *Rule 701* was informed by sufficient experience or specialized knowledge. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*.

Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200 (4th Cir. 2000) : In an action by an insured yacht owner for a declaratory judgment seeking insurance coverage under a hull policy, the Court reversed a judgment rendered for the insurer after a bench trial because the Trial Judge erroneously admitted expert testimony, along with the witness' investigative report, from a marine surveyor/investigator who was not listed as an expert witness and who had not provided a report during discovery. Although the Judge indicated that he would limit the witness to lay testimony, the Court held that the Judge actually permitted the witness to offer testimony that only an expert could give, such as the effectiveness of dropping anchor, the location of the vessel, and the time interval between the thump and the grounding.

Stahl v. Novartis Pharms. Corp., 283 F.3d 254 (5th Cir. 2002) : Affirming summary judgment for the defendant in an action alleging inadequate warnings on a prescription drug, the Court held there was no error in accepting testimony from a dermatologist concerning whether the package insert made him aware of risks of liver disease. The testimony involved the physician's own understanding and perception of the warning label as the plaintiff's treating physician and did not constitute an expert assessment, so no *Daubert* hearing was required. In an action alleging

personal injuries from toxic chemicals emanating from a well, *Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996)* , the Court affirmed summary judgment for the defendant, finding no error in the exclusion of testimony from a witness the plaintiffs characterized as both a lay and expert witness. The Trial Judge found the witness qualified to testify about corrosion in oil and gas wells, but excluded testimony, allegedly based on the witness' personal knowledge, about toxic chemicals being used at the well. The Court agreed that, as the witness lacked any expertise in chemistry or toxicology, it was doubtful he had personal knowledge about the toxicity of the chemicals (such as benzene) at the well.

TY Inc. v. Softbelly's Inc., 353 F.3d 528 (7th Cir. 2003) : In a trademark infringement action against the manufacturer of a computer-screen cleaner, the Court reversed a judgment for the plaintiff because a defense witness who was a competitor of the plaintiff was erroneously precluded from testifying. The witness would have testified that as early as 1988, before the plaintiff began selling "Beanie Babies," the word "beanie" was being used in the trade names of other manufacturers of "plush beanbag animals" and the word "beanie" was generic. The Court reasoned that "experienced businessmen know a great deal about what consumers think; that is personal knowledge" and not hearsay, so that the witness need not be designated or qualified as an expert. In *Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914 (7th Cir. 2002)* , the Court affirmed a judgment for a French research services business and several of its subsidiaries in a suit by an American company in a dispute in which the plaintiff alleged misappropriation of trade secrets, fraud, and breach of contract. The Court found no abuse of discretion in permitting an executive at one of the defendant subsidiaries to testify that the plaintiff's product was not unique, although he was not included on a pretrial expert witness list. The witness testified on the basis of seeing similar products during his 20 years in the business, so he could be properly considered a lay witness.

In re Air Crash at Little Rock, Ark., on June 1, 1999, 291 F.3d 503 (8th Cir. 2002) : The Court affirmed in part an airline passenger's personal injury action, holding that one of the plaintiff's college professors was qualified to give either expert or lay opinion regarding the plaintiff's chances of having a successful student teaching experience and becoming a music teacher following the accident. The Court reasoned that "[t]his is more in the nature of lay opinion testimony than expert testimony," and that "[b]ecause of [the professor's] personal knowledge of Lloyd and his experience as the supervising instructor of music student teachers at a smaller university in Oklahoma, he was qualified to give an opinion about Lloyd's chances of successfully completing her student teaching requirements." The Court added that "his perceptions and analysis of Lloyd's school experiences following the accident were likely useful to the trier of fact in determining Lloyd's damages."

Lifewise Master Funding v. Telebank, 374 F.3d 917 (10th Cir. 2004) : In an action by a lending company against its loan financer for breach of contract, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the exclusion of testimony by the plaintiff's CEO as to its lost profits. The proposed testimony was based on a financial model for which the witness lacked qualifications to testify. The plaintiff passed up an opportunity to have the witness testify solely as a businessperson based on his personal knowledge and his experience as president of the company, giving a straightforward opinion as to lost profits using conventional methods based on the plaintiff's actual operating history.

Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213 (11th Cir. 2003) : In an action by a ship repairer to recover payment for repairs made to an ocean-going bulk carrier, the Court held there was no abuse of discretion in permitting officers and employees of the plaintiff to testify as lay witnesses that the charges for the work by it and its subcontractors were reasonable and in line with those of similar operations providing similar services. The witnesses were not testifying to specialized knowledge within the realm of an expert, but to particularized knowledge that they had by virtue of their position in the business.

[b] Expert Witness Distinguished -- Criminal Cases

United States v. Soto-Beniquez, 356 F.3d 1 (1st Cir. 2003) : Affirming convictions in a complex drug conspiracy prosecution, the Court held that eight forensic examiners were not used as "experts" (which would have entitled the defense to notice of their testimony), since each testified to personal observations at a crime scene. Although the witnesses may have had some expertise, each testified as a lay witness.

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) : During the defendant's trial for a cocaine distribution conspiracy, a case agent was permitted to testify, "based on your investigation" or "[a]s far as our investigation determined," regarding the roles of certain participants, including the defendant. The Court held that admission of the testimony was error, but harmless. It was not admissible lay opinion testimony because it was not based on the agent's personal perceptions, but rather drew on the total information developed by all the officials who participated in the investigation, and it was not helpful to the jury within the meaning of *Rule 701* in that it went beyond telling the jurors what was in the evidence to telling them what inferences to draw from it. Further, the witness' opinion was based on specialized knowledge, so it was inadmissible under *Rule 701(c)*, and the government had made no effort to satisfy the expert testimony requirements of reliability under *Rule 702* and pretrial disclosure under *Fed. R. Crim. P. 16*. In *United States v. Grinage, 390 F.3d 746 (2d Cir. 2004)* , the Court reversed convictions for PCP distribution because testimony by a DEA agent who had supervised the wiretap of the defendant's cellular telephone was erroneously admitted. The agent, testifying as a lay witness, stated that he had listened to all 2000 calls, described his understanding of the calls based upon his investigation, and also interpreted calls played to the jury. The Court found that the agent's testimony was an improper substitute for the calls themselves. Whether or not the agent might have been able to testify as an expert, the Court concluded that "the risk that he was testifying based upon information not before the jury, including hearsay, or at the least, that the jury would think he had knowledge beyond what was before them, is clear." In *United States v. Glenn, 312 F.3d 58 (2d Cir. 2002)* , the Court reversed a murder conviction partly because a cooperating witness, a drug dealer like the defendant, was improperly permitted to testify about the manner in which drug dealers carry handguns and then to opine that, based on his experience, the bulge he observed, from a distance of five or six house-widths, at the defendant's waist was caused by a gun and could not have been caused by a pager or any other item. The Court held that the witness "clearly lacked sufficient 'first-hand knowledge or observation' to enable him to reach this conclusion," and that to the extent the opinion was based on specialized knowledge, the witness was not qualified as an expert using reliable principles and methods.

United States v. Miranda, 248 F.3d 434 (5th Cir. 2001) : An FBI agent in a drug case testified that he had been involved in the investigation of the conspiracy and in translating intercepted phone calls from Spanish to English, and he identified various code words that callers had used and the English drug terms to which the words referred. The Court found no error in the admission of the testimony under *Rule 701*, stating that the agent's "extensive participation in the investigation of this conspiracy, including surveillance, undercover purchases of drugs, debriefings of cooperating witnesses familiar with the drug negotiations of the defendants, and the monitoring and translating of intercepted telephone conversations, allowed him to form opinions concerning the meaning of certain code words used in this drug ring based on his personal perceptions." We note that the Court was not referring to *Rule 701* as it was amended after the trial. Under the amended *Rule 701*, it would appear that the agent was testifying on the basis of specialized knowledge within the scope of *Rule 702*, and therefore his testimony would have to be admitted under *Rule 702* or not at all. In *United States v. Riddle, 103 F.3d 423 (5th Cir. 1997)* , the Court reversed a conviction for bank fraud because a bank examiner, who the prosecution had agreed would not be offering expert testimony, did not merely draw straightforward conclusions from observations informed by his own experience in examining the bank, but also provided an overview of banking regulations and practices and authoritatively condemned the defendant's actions.

United States v. Conn, 297 F.3d 548 (7th Cir. 2002) : Affirming a conviction for willfully dealing in firearms without a license, the Court upheld the admission of testimony by a BATF agent that, based on his training and

experience, the defendant's firearms were not collector's items. The Court noted that the Trial Judge did not indicate whether the testimony was admitted under *Rule 701* or *702*, but concluded that the 2000 amendment to *Rule 701* required a conclusion that the testimony was expert testimony because it was not based only on the agent's observations, but on his accumulated expertise obtained through experience and training.

United States v. Martinez-Figueroa, 363 F.3d 679 (8th Cir. 2004) : The defendant was convicted of conspiracy to distribute marijuana. after he was found with a commercial truck full of marijuana and claimed that he was a trucker who thought he was carrying cheese from California to Indiana. The arresting officer testified that he seized the logbook, which indicated that the defendant had been traveling erratically, rather than directly to Indiana. The officer was allowed to testify about how logbooks are used by truckers and the purpose of a logbook. The Court found no abuse of discretion in permitting the officer to testify as a lay witness about the use and purpose of logbooks in the trucking industry, since he was using his knowledge of that "not particularly technical" subject to explain to the jury how he was able to use the logbook in interrogating the defendant and verifying or refuting his description of his travels. In *United States v. Peoples, 250 F.3d 630 (8th Cir. 2001)* , the agent in charge of investigating a government witness' murder testified to her interpretation of surreptitiously recorded conversations between the defendants, including not only coded language but also plain English words and phrases. She included her opinions about what the defendants were thinking during their conversation, and repeated throughout her testimony that the defendants were responsible for the murder of the government witness. Reversing, the Court held that the agent was improperly "allowed to offer a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant." The testimony was neither permissible lay opinion testimony nor qualified expert testimony.

United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) : The Court held it was error (but harmless) to admit, as lay opinion, testimony by law enforcement officers that the defendant's conduct conformed to the methods and techniques of experienced drug dealers. Such testimony requires that the witness be qualified as having the knowledge, experience, training, or education to render the testimony admissible under *Rule 702*. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*.

United States v. Caballero, 277 F.3d 1235 (10th Cir. 2002) : The defendants were convicted of defrauding immigrants seeking permanent legal residence by falsely promising that they would assist them in obtaining papers from the Immigration and Naturalization Service. At trial, several INS officials testified as lay witnesses to INS procedures and operations pertinent to obtaining visas and similar documents. Rejecting the argument that the witnesses were experts whose opinions could not be admitted under *Rule 701* as amended in 2000, the Court found that they were not testifying to any opinions at all; rather they were testifying to "readily-understandable INS procedures or operations." Because their testimony was fact and not opinion, it could not violate *Rule 701*. In *United States v. Gauvin, 173 F.3d 798 (10th Cir. 1999)* , the defendant was convicted of assault, after he collided with a police officer during a high-speed car chase. In support of his defense was that he did not cause the collision, his accident reconstruction experts testified that the police officer ran into the defendant's car. To challenge the veracity of police reports contradicting his experts, the defendant proffered the testimony of an instructor at the New Mexico police academy, who would have testified that police officers are trained that they should never change their reports. The Court held that the instructor's testimony was properly excluded for failure to satisfy the notice requirement of *Fed. R. Crim. P. 16(b)(1)(C)*. The Court rejected the argument that the disclosure provision did not apply because the instructor was a lay witness rather than an expert, since the instructor would have been testifying on the basis of "specialized knowledge" within the meaning of *Rule 702*.

United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005) : The Court upheld the convictions of a former police officer for pistol whipping an arrestee, submitting a misleading report about the incident, and making a false statement to an FBI agent. It found no abuse of discretion in permitting the arrestee's treating physician (who could not testify as

an expert because the government failed to provide proper notice) to testify as to what she observed when she examined the arrestee after the arrest. However, it was error (but harmless) to admit the doctor's opinion on the cause of the injuries under *Rule 701*, since that testimony was a "hypothesis," and answering hypothetical questions is typically the domain of an expert. In *United States v. Cano, 289 F.3d 1354 (11th Cir. 2002)* , the Court affirmed drug trafficking convictions, and found no abuse of discretion in permitting an investigating officer to testify how he deciphered a hieroglyphic code for numbers in a book seized from a coconspirator. The officer was not testifying as an expert, but was simply matching the hieroglyphs next to names in the book to phone numbers he had for the people named, which decrypted the code. In *United States v. Trujillo,* n5 the Court found no error in the admission of testimony by an agent who had returned to the warehouse where he had arrested the defendant Fuentes. The agent testified that he had inspected the warehouse door, and was unable to see anything through the door when it was closed. This testimony contradicted that of Fuentes, who had testified that he had looked through cracks in the door on the date of his arrest to determine that he was in danger. Although the agent had never been qualified as an expert to conduct the "experiment" at the warehouse, the agent's observation of the door "did not require the skill of an expert, as it was not beyond the understanding and experience of an average citizen."

[12] Handwriting

Hall v. United Ins. Co. of Am., 367 F.3d 1255 (11th Cir. 2004) : The Court affirmed summary judgment for the insurer in an action to obtain benefits under a policy that the insurer had terminated. The plaintiff had filed an affidavit stating that based on her familiarity with the insured's handwriting, he had not signed the letter of termination. The Court held that such an opinion requires detailed information regarding documents relied upon to establish familiarity, including identification of the documents with particularity, and detailed information regarding the witness' relationship with the signatory -- whether it be familial, professional, or otherwise personal. In *United States v. Barker*, n6 the Court affirmed a bank employee's conviction for misapplying and converting traveler's checks, holding that testimony of two fellow employees, who identified the defendant's handwriting on checks, was properly admitted.

[13] Hearsay Declarants

United States v. LeRoy, 944 F.2d 787 (10th Cir. 1991) : A defendant charged with conspiring to distribute cocaine base attempted to impeach a prosecution witness by evidence that the witness' probation file included a handwritten notation, "mentally unbalanced." The Court held the record was properly excluded because there was no showing of the basis for the opinion, which would be required if the declarant had testified.

[14] Helpfulness

Lynch v. City of Boston, 180 F.3d 1 (1st Cir. 1999) : The plaintiff claimed that her contract to manage a City welfare program was not renewed because of her activities as a whistleblower. To prove that she was qualified for renewal, she called a person who worked extensively with her in the City program, who testified concerning his personal observation of the plaintiff's excellent organizational skills, her proficiency at long-term planning, her ability to recruit participants, and her motivational and communications skills. Under these circumstances, the Court found no error in the exclusion of the witness' opinion that the plaintiff was responsible for the success of the program. That conclusion was not helpful to the jury given all the personal observations that the witness had already provided.

Head v. Glacier N.W., Inc., 413 F.3d 1053 (9th Cir. 2005) : An employee was terminated after he got a loader he was operating stuck in the mud, which the employer claimed was violation of its equipment abuse policy. The employee claimed the termination was disability discrimination. In his ADA suit, the Court held there was no abuse of discretion when a lay witness with personal knowledge was not permitted to answer whether the situation "caused you to believe

that he violated the equipment abuse policy." It was not apparent how the opinion would have been helpful, since "[t]he jury was fully capable of comparing the incident involving the loader with the standards in the equipment abuse policy and drawing its own conclusions."

[15] Hypothetical Questions

United States v. Ranney, 719 F.2d 1183 (1st Cir. 1983) : The Court sustained convictions for fraud and conspiracy arising out of a scheme to sell investment contracts in home heating oil, finding that investors were properly permitted to answer hypothetical questions establishing that they would not have invested but for the representations made. The Court observed that the investors were essentially being asked for information within their personal knowledge and were not being asked to render "expert" opinions.

[16] Identifications

[a] Generally

United States v. Jackman, 48 F.3d 1 (1st Cir. 1995) : The Court held in a bank robbery case that there was no abuse of discretion in permitting the defendant's ex-wife and two people who knew him relatively well to testify that he was the man pictured in blurred and grainy surveillance camera photographs of the robbery. Each had seen him numerous times wearing a baseball cap, as the robber was, and each was familiar with his carriage and posture.

United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991) : Reversing a sexual assault and robbery conviction on other grounds, the Court noted that the defendant's father testified that the defendant was left-handed (contrary to the complainants' testimony) and that the government was properly permitted to probe the basis for that opinion by cross-examining the witness about his relationship with and knowledge of the defendant.

United States v. Ellis, 121 F.3d 908 (4th Cir. 1997) : Affirming convictions arising out of a bank robbery, the Court held there was no abuse of discretion in permitting an accomplice to identify the defendant in a bank surveillance photograph "by the shape of his body." A lay witness is permitted to give an opinion concerning the identity of a person pictured in a surveillance photograph if there is a basis for concluding that the witness is more likely to correctly identify the person than the jury is. In a bank robbery case, *United States v. Robinson, 804 F.2d 280 (4th Cir. 1986)* , the Court upheld the admission of testimony by the defendant's brother identifying the defendant in surveillance photos, noting that lay identification witnesses may testify if there is a basis for concluding that they are more likely than a jury to correctly make an identification from a photograph.

United States v. Dixon, 413 F.3d 540 (6th Cir. 2005) : On interlocutory appeal in a prosecution for attempted bank extortion, the Court found no abuse of discretion in an *in limine* order excluding testimony by the defendant's son and former wives that, in their respective opinions, the person depicted in a bank surveillance photograph was the defendant. Although two of the witnesses were indisputably familiar with the defendant's general appearance, the evidence failed to establish that either was familiar with his appearance at the specific time of the offense. Furthermore, it was not clear that the testimony would be helpful, since the evidence indicated the defendant had not altered his appearance prior to trial, and the photograph fully depicted the suspect from the waist up and was not of particularly poor or grainy quality. One Judge concurred, noting the deference accorded evidentiary rulings and observing that someone who has lived with a person and seen him in myriad contexts is presumptively better able to identify him in a photo than a juror comparing the photo with a one-time live view.

United States v. Towns, 913 F.2d 434 (7th Cir. 1990) : In a bank robbery case, the Court upheld permitting a defendant's former girlfriend to identify him as one of the men pictured in surveillance camera photographs, as his appearance had changed at the time of trial and her close association with him, including observing his appearance on the day of the robbery, would be helpful to the jury's determination of whether he was in the photographs. In another bank robbery case, *United States v. Jackson*, n7 the government called two tellers and a third witness to identify the defendant in a bank surveillance film. The third witness had only met the defendant once, a few months before the robbery. Noting that the defendant's appearance may have changed between the robbery and trial, a majority of the Court upheld the use of this witness, saying that "[t]he amount of time that the witness had to observe the defendant goes to the weight to be accorded to the testimony by the jury rather than to its admissibility." A dissenting Judge argued that the jury was as well equipped as this witness to compare the bank film with the defendant.

United States v. Lucas, 898 F.2d 606 (8th Cir. 1990) : The Court affirmed a bank robbery conviction, holding that there was no abuse of discretion in permitting the defendant's girlfriend to identify him from surveillance photographs, as she was more familiar with his appearance at the time of the robbery and he had facial hair in the photographs but not at the time of trial, so her testimony could be helpful to the jury.

United States v. Holmes, 229 F.3d 782 (9th Cir. 2000) : The Court found no abuse of discretion when a lay witness was permitted to identify him as the robber depicted in the bank surveillance photographs. The witness had a sufficient foundation for her opinion because she had met the defendant on at least six occasions, lasting more than 30 minutes each. Moreover, the opinion testimony assisted the jury, since the surveillance photographs were fuzzy and none of the photographs showed a full frontal view of the defendant's face. In a bank robbery case, *United States v. Barrett*, n8 the Court found no abuse of discretion in admitting testimony by the defendant's girlfriend identifying him in a surveillance photograph. The defendant had changed his appearance before the trial and the testimony of someone who knew him well when he had a beard and mustache was helpful to the jury. In *United States v. Goodheim*, n9 the Court affirmed a conviction for firearms violations, holding that redirect examination of a government witness, which established that he previously had identified the defendant's photo as a picture of the person who had purchased three weapons, was permissible as long as proper safeguards and procedures were followed when the photos were shown to the witness.

United States v. Ingram, 600 F.2d 260 (10th Cir. 1979) : The Court upheld the use of lay opinion identification by friends of a defendant. See also *United States v. Borrelli* n10(the defendant's stepfather was properly allowed to identify him in bank surveillance film).

United States v. Pierce, 136 F.3d 770 (11th Cir. 1998) : The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in permitting the defendant's supervisor in the six months before his arrest to give his opinion that the defendant was the person depicted in surveillance photographs. Although the defendant's appearance had not changed between the robbery and trial, and the subject was not obscured from view in the photograph, the witness' greater familiarity with the defendant's appearance meant that his testimony could be of assistance to the jury.

[b] Identifications -- By Law Enforcement Agents

United States v. Kornegay, 410 F.3d 89 (1st Cir. 2005) : To rebut the defendant's claim that the charged drug sale had been committed by his identical twin brother, the government called as an identification witness a police officer, who testified that over a six-month period near the charged sale he had on several occasions encountered the brothers and had learned to distinguish them. Affirming, the Court found no abuse of discretion in admitting the evidence, since the officer's opinion was based on sufficient experience and would be helpful to the jury. Although the officer's

knowledge was derived from a criminal investigation, the probative value of his testimony was not substantially outweighed by any prejudicial effect.

United States v. Robinson, 544 F.2d 110 (2d Cir. 1976) : Reversing a bank robbery conviction, the Court held it was error to preclude a correctional officer from testifying that the film of the bank robbery showed that the participant was one Turner, not the defendant. Although it is generally not improper to exclude lay witness testimony as to whether the individual in a bank photograph is the defendant, in this case the testimony would have been helpful (because Turner was unavailable) in determining the identity of the participant.

United States v. Allen, 787 F.2d 933 (4th Cir. 1986) , *vacated on other grounds*, *479 U.S. 1077 (1987)* : Affirming bank robbery convictions, the Court upheld the admission of testimony by a police officer and a parole officer identifying two defendants from bank surveillance films. It concluded that "testimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to the defendants." The jury was not informed that the witnesses were law enforcement officers, but the defendants complained that they could not realistically cross-examine the witnesses concerning occupation and bias without eliciting testimony concerning the defendants' criminal activities. The Court found that "[n]othing in the Rules of Evidence or any other source is intended to relieve criminal defendants from difficult strategic choices," and praised the Trial Judge for carefully considering how the two witnesses should be examined.

United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976) : The Court reversed a conviction for armed bank robbery after the government offered testimony by the defendant's parole officer to prove that he was the person shown in photographs of the robbery. Although the government contended that the defendant's appearance had changed between the robbery and the trial, the Court held that the probation officer should not have been permitted to testify, even without revealing his relationship to the defendant, because the defendant could not effectively examine his relationship with the witness without risking undue prejudice.

United States v. Stormer, 938 F.2d 759 (7th Cir. 1991) : In the prosecution of a former police officer for bank robbery, the Court held there was no abuse of discretion in permitting other police officers to give opinion testimony as to the identity of the robber in the bank surveillance photographs. The testimony was helpful because the person pictured had made efforts to alter his appearance; this probative value was not outweighed by the risk that rumors of the defendant's alleged impropriety while he was on the force would be exposed in the course of examining the witnesses as to their possible bias and prejudice.

United States v. Cruz, 285 F.3d 692 (8th Cir. 2002) : Reversing convictions for drug and firearms offenses, the Court noted that it was error when a police officer identified the defendant as the subject of a black and white photocopy of an expired photo identification card issued in Mexico. The Court observed such testimony is admissible only if there is some basis to believe that the witness is more likely to correctly identify the defendant from the photograph than is the jury, and that "[d]ue to the constraints placed on cross-examination, we have discouraged the use of lay opinion identification by police officers to identify defendants." In this case the officer had no dealings with the defendant prior to his arrest. In *United States v. Wright, 904 F.2d 403 (8th Cir. 1990)* , the Court held there was no abuse of discretion in admitting testimony from witnesses familiar with the defendant from his previous involvement in the criminal justice system, where that connection was not disclosed and the witnesses' contacts were extensive enough to be helpful in identifying the person depicted in surveillance films of bank robbery. In *United States v. Farnsworth*, n11 the Court affirmed a bank robbery conviction, holding it was no abuse of discretion to admit testimony by parole officers who identified the defendant in surveillance films. The parole officers' status was not revealed nor was the defendant's prior record.

United States v. Beck, 418 F.3d 1008 (9th Cir. 2005) : The Court affirmed a bank robbery conviction, finding no abuse of discretion when a probation officer was permitted to testify that the defendant was the person depicted in a bank surveillance photo. The Judge limited the witness to disclosing that he had a "professional relationship" with the defendant so that no mention was made that the witness was a law enforcement officer. The Court held that "a lay witness may give an opinion regarding the identity of a person depicted in a photograph if that witness has had sufficient contact with the defendant to achieve a familiarity that renders the lay opinion helpful." That standard was satisfied by the fact that the witness had met with the defendant four times in a two-month period for a total of more than 70 minutes. In *United States v. Henderson, 241 F.3d 638 (9th Cir. 2000)* , the Court affirmed convictions for bank robbery, finding no error in the admission of testimony from a detective that the defendant was the robber pictured in surveillance photographs. The detective had known the defendant for more than four years and had seen him more than 100 times. The identification was particularly helpful because none of the eyewitnesses to the robbery could identify the defendant. See also *United States v. Henderson* n12(police officer could identify the defendant in surveillance photographs from having seen the defendant on a daily, weekly, or biweekly basis throughout a 15-year period and having seen him wear a heavy overcoat like that worn by the robber in the surveillance photos). In *United States v. LaPierre*, n13 the Court vacated a conviction for bank robbery and firearms offenses, holding that it was an abuse of discretion to permit an investigating officer to give an opinion that the individual pictured in the bank surveillance photographs was the defendant. The testimony was unnecessary because the defendant's appearance had not changed, and it ran the risk of invading the province of the jury and prejudicing the defendant, especially because the officer had never seen the defendant in person.

United States v. Pierce, 136 F.3d 770 (11th Cir. 1998) : The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in permitting the defendant's probation officer to give her opinion that the defendant was the person depicted in surveillance photographs. Although the defendant's appearance had not changed between the robbery and trial, and the subject was not obscured from view in the photograph, the witness' greater familiarity with the defendant's appearance meant that her testimony could be of assistance to the jury. The probation officer testified that she knew the defendant in that capacity, but her testimony was neither the sole nor even the primary source of evidence about the defendant's criminal history.

[17] Improper Speculation

Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003) : In a sexual harassment lawsuit, the Court ruled that there was no plain error in the admission of testimony by a female police officer, who also experienced harassment, as to her opinion about the plaintiff's claims. Although the Court noted in passing that the witness was relying on hearsay, its main criticism of the testimony was that the witness had no personal knowledge of what happened to the plaintiff and had no qualifications as an expert to offer helpful opinion. The witness essentially presented "jury argument offered from the witness stand." In *Alexis v. McDonald's Restaurants of Mass., Inc., 67 F.3d 341 (1st Cir. 1995)* , the plaintiff was ejected from a McDonald's restaurant and arrested, after complaining that she did not receive the food that she ordered. She sued under *42 U.S.C. § 1981*, asserting that her ejection was the result of race-based animus on the part of the restaurant manager. Affirming summary judgment for the defendants, the Court upheld exclusion of affidavits by several of the plaintiff's companions, who had opined that the plaintiff would not have been ejected had she been white, based on the fact that the manager was hostile and uncooperative. The Court agreed, on the ground that there was "no foundation" for the conclusions of racial animus, because there was no probative evidence that the manager's hostility was "something other than a race-neutral reaction to the stressful encounter" with the plaintiff. In a product liability action, *Swajian v. General Motors Corp.*, n14 the plaintiff alleged that his decedent was killed in a rollover accident caused by a defective axle in the vehicle she was driving. The Court reversed a judgment for the plaintiff, holding it was error to permit a nonexpert eyewitness to give an opinion on the crucial issue of whether the wheel separated before the rollover began or after it was already in progress, since the witness admitted he never saw the wheel leave the vehicle

and could not recall whether it was still on the vehicle when he saw the car flipping over.

United States v. Glenn, 312 F.3d 58 (2d Cir. 2002) : The Court reversed a murder conviction partly because a cooperating witness, a drug dealer like the defendant, was improperly permitted to testify about the manner in which drug dealers carry handguns and then to opine that, based on his experience, the bulge he observed, from a distance of five or six house-widths, at the defendant's waist was caused by a gun and could not have been caused by a pager or any other item. The Court held that the witness "clearly lacked sufficient 'first-hand knowledge or observation' to enable him to reach this conclusion," and that to the extent the opinion was based on specialized knowledge, the witness was not qualified as an expert using reliable principles and methods.

Washington v. Department of Transp., 8 F.3d 296 (5th Cir. 1993) : A worker injured when a spark from a vacuum cleaner ignited acetone vapors was not permitted to testify as to what he would have done had the warning label on the vacuum been more conspicuous. The Court held the ruling was no abuse of discretion, as the testimony would not have been based on the plaintiff's perception but upon his self-serving speculation. In *United States v. Carlock*, n15 the Court affirmed a union business agent's racketeering, extortion, and other convictions, holding that secretaries in the defendant's office could testify that union referrals were not given out fairly. However, it was error (albeit harmless) to admit one secretary's testimony, based on an invoice and her inferences from other information, that a defendant owned heavy equipment, since it could have been no more than an educated guess.

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) : The Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms; those who refused to contribute were allegedly denied contracts with the Treasurer's office. The actual cutoffs of recalcitrant contractors were ordered by the Treasurer's deputy, but employees of the office were permitted to testify that they had "no doubt" or a "personal feeling" that the Treasurer had ordered the deputy to order the cutoffs. Reversing for this and other evidentiary errors, the Court found that the witnesses had gone beyond their personal knowledge -- of the way in which the defendant managed her office -- to draw an impermissible speculative inference that the Treasurer had given an express order. In *Stagman v. Ryan, 176 F.3d 986 (7th Cir. 1999)* , an accountant who was employed by the Illinois Attorney General's office brought a § 1983 action, alleging that his *First Amendment* rights had been violated by terminating his employment for engaging in union-related activities. The plaintiff's principal evidence in opposing motions for summary judgment was an affidavit by a personnel officer in the AG's office stating that the plaintiff's supervisor would not have dismissed him without the Attorney General's "express approval" because he was a "close relative of an influential member of the General Assembly." The Court found no abuse of discretion in exclusion of this statement; it was not admissible lay witness opinion because there was no showing that the affiant had personal knowledge of the facts asserted in his statement. In *Visser v. Packer Eng'g Assoc.*, n16 the Court affirmed a summary judgment for the defendant in an age discrimination case, holding that affidavits by co-employees had been properly excluded, as they stated no facts but only conclusory inferences of impermissible motivation for the plaintiff's discharge.

[18] Interpretation of Contracts

Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203 (5th Cir. 1998) : When the defendant, a noted actress, was sued for breach of an appearance contract, she defended on the ground that she had exercised a provision in the contract that permitted her to cancel if a "significant acting opportunity in a film comes up." Affirming a judgment for the plaintiff, the Court held there was no abuse of discretion in permitting the plaintiff's president to testify that the film on which the defendant worked was not a "significant acting opportunity." The witness had extensive experience in public relations and in television production, as well as in negotiating with actors, and he had himself drafted the language at issue, so his testimony was helpful to a clear understanding of the situation.

[19] Interpretation of Statement or Tape Recording

United States v. Grinage, 390 F.3d 746 (2d Cir. 2004) : The Court reversed convictions for PCP distribution because testimony by a DEA agent who had supervised the wiretap of the defendant's cellular telephone was erroneously admitted. The agent, testifying as a lay witness, stated that he had listened to all 2000 calls, described his understanding of the calls based upon his investigation, and agent also interpreted calls played to the jury. The Court found that the agent's testimony was an improper substitute for the calls themselves. Whether or not the agent might have been able to testify as an expert, the Court concluded that "the risk that he was testifying based upon information not before the jury, including hearsay, or at the least, that the jury would think he had knowledge beyond what was before them, is clear." In *United States v. Garcia, 291 F.3d 127 (2d Cir. 2002)* , the Court reversed convictions for cocaine distribution offenses because a witness was permitted to testify that the defendant understood a conversation to be a coded discussion of a drug transaction. The principal prosecution witness was an informant who had been arrested for heroin offenses and, while cooperating with the government, had begun working in the asbestos industry, where he sought to involve a coworker in drugs. The informant testified that the coworker connected him with the defendant, and that a transcript of a conversation between the accomplice and the defendant in which they discussed a potential asbestos project involved the use of code words to arrange a drug trade. The Court held that the government did not lay a proper foundation for the informant's opinion of the defendant's knowledge. The witness explained his own participation, why he spoke in code, and what he meant by the code he used, but he did not offer any explanation for how the defendant could know they were speaking in code. In a narcotics prosecution, *United States v. Rivera*, n17 a former member of the conspiracy testified to the meaning of certain narcotics records. Affirming, the Court distinguished its prior cases, such as *United States v. Boissoneault*, n18 which had held that a law enforcement agent cannot give expert testimony as to how jargon is commonly used in the drug trade unless the agent has first-hand knowledge of the actual usage by the defendants in the case. Those decisions were inapplicable here because the witness testified not as an expert but rather as a lay witness, with "first hand knowledge of the organization's record-keeping methods and of the terminology it used in making those records," so the testimony was "helpful to the jury's understanding of the operations of the organization." Affirming a conviction for embezzlement in *United States v. Urlacher*, n19 the Court held there was no error in permitting a coconspirator who participated in recorded conversations to explain statements or words that would be ambiguous or unclear to someone who had not been a participant, as the testimony was helpful to the jury's understanding of the often confusing and disjointed discussions on the tapes.

United States v. De Peri, 778 F.2d 963 (3d Cir. 1985) : In a prosecution of police officers for extortion, the Court upheld the admission of a witness' testimony as to his understanding of a tape-recorded conversation. It found that to the uninitiated listener the statements sounded like code, and that the testimony was based on the witness' perceptions at the time of the conversation. In *United States v. Dicker*, n20 the Court reversed a conviction for conspiracy to violate export restrictions. Distinguishing *De Peri*, the Court concluded that the statements in the instant case were clear, so it would not be helpful to the jury for a lay witness to testify to what he meant by his words in a transcribed conversation and what he understood the defendant to be saying.

United States v. Parsee, 178 F.3d 374 (5th Cir. 1999) : The Court affirmed narcotics convictions, finding no abuse of discretion when a participant in the conspiracy was permitted to testify that a reference to "pants" in a telephone conversation was a coded reference to the drugs. The witness was a participant in the conversations and her testimony was rationally based on her perceptions.

United States v. Graham, 856 F.2d 756 (6th Cir. 1988) : In a bribery case, the Court held that "[a] government agent may, like any other witness, testify in the form of an opinion as to his understanding of a defendant's statement."

United States v. Estrada, 39 F.3d 772 (7th Cir. 1994) : The Court affirmed convictions for cocaine distribution, finding no error when an undercover informant, who negotiated a drug transaction with one of the defendants, testified as to his understanding of tape recorded conversations he had with the defendant and interpreted the coded language in the conversations for the jury. The informant had sufficient personal knowledge because he was a participant in the conversations, and his translation of code words was helpful to the jury.

United States v. Simas, 937 F.2d 459 (9th Cir. 1991) : The Court affirmed convictions for bribery and mail fraud, holding there was no error in permitting FBI agents to give lay opinion testimony concerning their understanding of what the defendant meant to convey by vague and ambiguous statements during the course of the alleged crimes. The agents' opinions were based on their perceptions, and their understanding of the words and innuendo was helpful to the jury in understanding the defendant's meaning.

United States v. Awan, 966 F.2d 1415 (11th Cir. 1992) : The Court affirmed convictions for money laundering, holding there was no error in permitting an undercover agent to state his understanding of conversations with the defendants, where the conversations were abbreviated, composed with unfinished sentences, and included numerous references to complicated international finance and money laundering transactions with which the jury would likely to have been unfamiliar. In *United States v. Davis*, n21 the Court affirmed drug conspiracy convictions, holding there was no error in permitting a witness to tell the jury what he thought a defendant meant by a certain statement.

[20] Investigative Results

Brady v. Chemical Constr. Corp., 740 F.2d 195 (2d Cir. 1984) : Affirming a judgment holding insurance companies liable to a corporation on fidelity bonds covering employee dishonesty, the Court held that an investigator could testify about the results of his investigation into the employee's dishonesty. His opinion testimony was based on his personal investigation and was helpful to the jury.

Rabon v. Great Southwest Fire Ins. Co., 818 F.2d 306 (4th Cir. 1987) : The Court reversed a judgment for an insured who sued his insurer to recover on a fire insurance policy, holding it was error to admit evidence that an arson charge that had been brought against the insured was dismissed. The Court stated that "such evidence goes directly to the principal issue before the jury and is highly prejudicial," and evidence of nonprosecution or acquittal is inadmissible for several reasons, including the difference in burdens of persuasion in civil and criminal cases. The Court observed that a prosecutor's opinion whether the insured started a fire is inadmissible opinion, not based on personal knowledge.

[21] Knowledge or Intent

[a] Civil Cases

Winant v. Bostic, 5 F.3d 767 (4th Cir. 1993) : In a suit for fraud in connection with a resort development project, the Court held there was no error when an environmental agency officer was permitted to testify that a defendant knew or should have known that a particular development permit was required. The inference was properly based on previous dealings between them in which the defendant had been issued nine notices of violations of land development laws and the office had informed him of the permits required. The Court also upheld testimony by the defendant's sales agent that the defendant never intended to do what he promised, as the agent had had numerous conversations with the defendant that permitted him rationally to draw this conclusion.

Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir. 1989) : Finding sufficient evidence to support

a jury verdict of age discrimination, the Court held that a co-worker's experience in the corporation was a sufficient basis to allow him to testify that the plaintiff was discharged and not rehired because of his age, although the witness had no first-hand knowledge of the events surrounding the termination.

Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985) : The Court held it was error (but harmless) for a witness, who had taken part in the selection of a person for a new supervisory position, to give an opinion as to whether the plaintiff had been discriminated against because of national origin, since this called for a legal conclusion. It rejected an argument that an opinion concerning the intention of the person who ultimately made the decision not to promote the plaintiff was inadmissible under *Rule 701* and concluded that it is not "beyond the ken of an ordinary person to infer from another's outward actions what his inward feelings are regarding a third person's national origin."

Bohannon v. Pegelow, 652 F.2d 729 (7th Cir. 1981) : In a civil rights action alleging wrongful arrest by a police officer, the Court held that a witness who observed the arrest could testify that it was racially motivated.

Cassino v. Reichhold Chem., 817 F.2d 1338 (9th Cir. 1987) : The Court affirmed a finding that an employer engaged in age discrimination in terminating an employee, although it indicated that even the plaintiff agreed that it was error to permit two lay witnesses to testify that the employer had terminated the plaintiff and other employees because of age.

[b] Knowledge or Intent -- Criminal Cases

United States v. Vega-Figueroa, 234 F.3d 744 (1st Cir. 2000) : Affirming drug trafficking convictions, the Court found no abuse of discretion when the sister of a woman allegedly killed by the conspiracy was permitted to give her opinion that her sister was killed because she was selling more drugs at a particular location than the defendant and his coconspirators. The witness was heavily involved with the competing drug point, she had participated in a meeting in which the defendant mentioned the benefits of joining his organization, she had first-hand knowledge of how drug-trafficking organizations worked, she witnessed her sister's murder, and her testimony was helpful in understanding the motive behind the murder and how the act furthered the conspiracy.

United States v. Rea, 958 F.2d 1206 (2d Cir. 1992) : The Court held, in a prosecution for willful evasion of gasoline excise taxes, that it was error (but harmless) to admit testimony by a lay witness who perceived transactions at issue that a defendant "had to" know that the purpose of the scheme for invoicing sales was to permit tax evasion. The opinion was not helpful to the jury, who not only knew what the witness had described but also knew more of the defendant's industry experience and of the contents of the defendant's records than the witness.

United States v. Polishan, 336 F.3d 234 (3d Cir. 2003) : The Court affirmed the securities fraud convictions of an executive, finding no plain error in the admission of testimony by co-workers of the defendant that described his role in the company and the type of information to which he had access. Although it acknowledged that "[t]here is a fine line between statements that permissibly offer a witness's testimony about his or her own perceptions while supporting inferences about knowledge, and statements that constitute opinions on a witness's knowledge," it found that the testimony in this case left to the jury the ultimate conclusion as to whether the defendant knew about accounting irregularities. Affirming convictions for conspiracy and wire fraud in *United States v. Anderskow, 88 F.3d 245 (3d Cir. 1996)* , the Court held it was proper to admit testimony by a cooperating coconspirator that implied that one defendant knew that information in letters signed by this defendant was false. The witness properly provided reasons supporting an unstated conclusion that the defendant had guilty knowledge. However, the Court also held that the witness

impermissibly testified that he had a subjective belief that a second defendant "must have known" that fraud was occurring. This opinion essentially turned the witness "into a thirteenth juror" and was not helpful to a trier of fact called upon to evaluate the same evidence that the witness had available. The error was harmless, however. In *Government of Virgin Islands v. Knight*, n22 the Court affirmed convictions for manslaughter and firearms offenses, holding it was error (but harmless) to exclude testimony of an eyewitness whose opinion was that the defendant's firing of his gun was an accident. Under *Rule 701*, "*[i]*f circumstances can be presented with greater clarity by stating an opinion, then that opinion is helpful to the trier of fact," which is the case with an eyewitness to a shooting.

United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) : In a prosecution of a government contractor's employee for conversion of classified information, the Court held that Defense Department officials were properly permitted to opine that a person with the defendant's experience in the Department would know the rules about classified budget documents and that they were unavailable to contractors. Although only one witness knew the defendant, each was familiar with the documents, the reasons for their secret classification, the nature of the defendant's work in the Department, and the knowledge of people with his experience regarding the rules; the opinions were helpful in determining the defendant's knowledge and the state of mind with which he acted.

United States v. Ruppel, 666 F.2d 261 (5th Cir. 1982) : The Court said in a drug conspiracy case that "[t]he admission of opinion testimony about a defendant's state of mind is highly prejudicial and should be avoided." However, it found in this case that the prosecutor was clarifying a witness' answer, not asking the witness to state that the defendant had a criminal intent.

United States v. Bogan, 267 F.3d 614 (7th Cir. 2001) : At the defendant's trial for assaulting a federal officer in a prison, the government introduced the tape recording of a telephone conversation in which a fellow inmate who was observing the events exclaimed that the defendant was "trying to kill" the officer. The Court found no abuse of discretion, since the statement was rationally based on the witness' observation of the incident and was helpful to the jury. Affirming convictions for tax evasion in *United States v. Hauert, 40 F.3d 197 (7th Cir. 1994)* , the Court held that it was proper to exclude lay witness testimony concerning the defendant's sincerely held beliefs that he was exempt from taxation. The defendant's beliefs "are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here"; in a footnote the Court suggested that a Trial Judge may consider excluding even helpful and relevant lay opinion under *Rule 403*. In *United States v. Giovannetti*, n23 a prosecution for knowing participation in gambling offenses, one witness testified that a defendant had told him he had rented a house to an acquaintance of a man known to the witness as a gambler, and that shortly thereafter the witness had been told by the gambler's organization that the phone number for calling in bets was changed to one for the area in which the house was located. On the basis of the conversation and the phone number, the witness testified that it was possible bets were being taken out of the defendant's house. The Court held there was no error in admitting the testimony, as the witness was not being asked to draw an inference for the jury's benefit, but to show that, when the facts were known equally or better by the defendant, it could be assumed the defendant probably had drawn the same inference and thus had the requisite knowledge.

United States v. Oliver, 908 F.2d 260 (8th Cir. 1990) : The defendant, charged with aiding and abetting the forgery of a check, denied that she knew the true last name of the forger when she endorsed the check. The Court held there was no abuse of discretion in admitting testimony by a detective that he had seen the two together more than once and he had no doubt that she knew the forger's name.

United States v. Henke, 222 F.3d 633 (9th Cir. 2000) : Two corporate officials were charged with securities fraud and related offenses, the government alleging that the defendants "cooked the books" to present the corporation as a

more favorable investment opportunity than it actually was. At trial, the person who took over the job of one of the defendants testified that the defendants "must have known" about the revenue reporting scheme. Reversing on other grounds, the Court found that admitting this testimony was error, because "the jury was in the best position to determine whether the defendants knew about the revenue scheme," so the witness' lay testimony did not assist the jury. In *United States v. Koon, 34 F.3d 1416 (9th Cir. 1994)* , *aff'd in part on other grounds*, *518 U.S. 81 (1996)* , the Court affirmed the convictions of two police officers for the deprivation of the rights of an arrestee, Rodney King, who was severely beaten after a high-speed chase. This federal conviction was obtained after a state trial on the same matter resulted in a mistrial on one count and an acquittal on all other counts. The Court found no error in the admission of testimony given in the state trial by an officer who was at the scene of the beating (and who was actually acquitted as a defendant in both trials) that one of the defendants was "out of control," as it was helpful to the jury and was rationally based on the officer's personal perception of the beating. In *United States v. Skeet*, n24 the Court held there was no error in rejecting the opinion testimony of two witnesses in an assault case that a shooting was accidental.

United States v. Hoffner, 777 F.2d 1423 (10th Cir. 1985) : In a prosecution of a doctor for illegally dispensing drugs, the Court held that lay witnesses were properly barred from testifying that in their opinion the drugs were dispensed for a proper purpose. Because none of the witnesses was present in the examining room when the patients who received prescriptions were examined, the opinions could not be based on facts perceived by the witnesses.

[22] Law Enforcement Agents

[a] Drug Cases

United States v. Pinillos-Prieto, 419 F.3d 61 (1st Cir. 2005) : The Court affirmed cocaine convictions, holding that a law enforcement officer was properly permitted to testify as a lay witness that drug organizations were dangerous and that they protected their drugs with firearms, and that the moment when drugs and money were handed over was the most dangerous part of the work of an undercover agent. Those matters were well founded on the officer's personal knowledge and were susceptible to cross-examination. In *United States v. Ayala-Pizarro, 407 F.3d 25 (1st Cir. 2005)* , the Court affirmed drug and firearms convictions, finding no error in the admission of a police officer's testimony concerning the nature of drug distribution points and their operation, and no plain error in the admission of the officer's testimony as to how heroin is normally packaged for distribution. The Court reasoned that neither type of testimony was expert testimony, since the officer based his testimony on his personal experience in the neighborhood about which he testified. In *United States v. Santana, 342 F.3d 60 (1st Cir. 2003)* , the Court affirmed cocaine convictions, finding no error in the admission of testimony by a DEA agent that he smelled marijuana during the search of a witness' home. The Court found that the agent had personal knowledge of what he smelled and had sufficient experience to be able to identify the smell of marijuana. In *United States v. DiMarzo*, n25 the Court affirmed convictions for a cocaine distribution conspiracy in which two defendants asserted they had not known a third was planning to conduct a drug deal, holding there was no abuse of discretion in permitting an undercover agent in the case to testify on redirect that in his experience innocent observers were not invited to accompany criminals engaged in completing a drug deal. The testimony did not implicate the opinion rules, since it was simply the witness' personal experience relating to a subject bearing directly upon the appropriateness of a jury inference, nor did it encroach on the jury's factfinding function regarding the ultimate issue of guilt.

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) : During the defendant's trial for a cocaine distribution conspiracy, a case agent was permitted to testify, "based on your investigation" or "[a]s far as our investigation determined," regarding the roles of certain participants, including the defendant. The Court held that admission of the testimony was error, but harmless. Although opinion testimony is not inadmissible simply because it embraces an ultimate issue, the agent's opinion that the defendant was a partner with another in receiving cocaine "was essentially telling the jury that he had concluded that Garcia was guilty of the crimes charged," and opinion testimony merely

telling the jury what result to reach is inadmissible. The testimony was not admissible lay opinion because it was not based on the agent's personal perceptions, but rather drew on the total information developed by all the officials who participated in the investigation, and it was not helpful to the jury within the meaning of *Rule 701* in that it went beyond telling the jurors what was in the evidence to telling them what inferences to draw from it. To the extent the witness' opinion was based on specialized knowledge, it was inadmissible under *Rule 701(c)*, and the government had made no effort to satisfy the expert testimony requirements of reliability under *Rule 702* and pretrial disclosure under *Fed. R. Crim. P. 16*. In a cocaine prosecution, *United States v. Forrester, 60 F.3d 52 (2d Cir. 1995)* , a government witness testified that she had told the DEA agent about two men involved in the drug scheme, including the defendant, and that she had identified the defendant's photograph for the agent. The agent's reports made no mention of these matters, and the agent recalled no identification. Nonetheless, the agent testified in response to the prosecutor's questions that he found nothing inconsistent between the witness' testimony and what she had told him. Reversing, the Court stated that the agent's testimony, which was simply an opinion of the witness' credibility, could not assist the jury.

United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) : The Court held it was error (but harmless) to admit, as lay opinion, testimony by law enforcement officers that the defendant's conduct conformed to the methods and techniques of experienced drug dealers. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*.

United States v. Marshall, 173 F.3d 1312 (11th Cir. 1999) : An informant allegedly received crack cocaine from the defendants and turned it over to the police later that day or the next day. At trial the DEA agent supervising the operation was permitted to testify that he did not believe the crack received by the police had come from a source other than the defendants. Vacating the defendants' convictions, the Court held it was an abuse of discretion to admit the testimony, since the agent was a lay witness and he had no personal knowledge regarding the origin of the cocaine provided by the informant. In *United States v. Valdez*, n26 a marijuana possession conspiracy prosecution, a Customs investigator was properly permitted to opine that the defendant and another had entered a semi-trailer under surveillance, after testifying that he saw the men's legs and feet through the underside of the trailer and then saw the legs and feet disappear without subsequently reappearing around either side of the trailer.

[b] Law Enforcement Agents -- Other Cases

United States v. Palmieri, 21 F.3d 1265 (3d Cir. 1994) , *vacated on other grounds*, *513 U.S. 957 (1994)* : The Court affirmed a conviction for unlicensed dealing in firearms, holding there was no error in admitting testimony by experienced FBI agents that weapons were machine guns, even though the witnesses were not qualified as experts. In *United States v. Allen, 10 F.3d 405 (7th Cir. 1993)* , the Court affirmed a conviction for aiding and abetting the conduct of an illegal gambling business, holding there was no abuse of discretion in admitting a statement by an undercover officer who operated the sting that she "assumed" the defendant would continue to do favors because he was anticipating they could do him a favor. The "assumption" was an inference based on the witness' own perceptions, nothing in the defendant's trial objection specifically referenced the Rule's helpfulness requirement, and the defense had ample opportunity to clarify and pick apart the witness' testimony on cross-examination.

United States v. Begay, 42 F.3d 486 (9th Cir. 1994) : The Court affirmed convictions for various offenses arising out of a civil disturbance on a Navajo reservation, holding there was no abuse of discretion in permitting an officer to narrate a videotape that was a half-speed version, with color-coded circles and arrows added, of an original videotape of the incident. Although the officer had not been present at the disturbance, he had reviewed the original over 100 times, aided by a magnifying glass, so his testimony was based on his own perceptions, and it and the enhanced tape were helpful to the jury in evaluating the original. In *United States v. Simas, 937 F.2d 459 (9th Cir. 1991)* , the Court affirmed convictions for bribery and mail fraud, holding there was no error in permitting FBI agents to give lay opinion testimony concerning their understanding of what the defendant meant to convey by vague and ambiguous statements

during the course of the alleged crimes. The agents' opinions were based on their perceptions, and their understanding of the words and innuendo was helpful to the jury in understanding the defendant's meaning. In a bank robbery prosecution, *United States v. Burnette*, n27 the Court found no error in permitting a police officer to state his opinion that one of the defendants was "removing" a license plate from a car, as the testimony was based on his observations and was helpful to the jury. The Court did observe, however, that "it would have been better had the District Court limited [the officer] to statement of the underlying facts."

United States v. Stanley, 896 F.2d 450 (10th Cir. 1990) : In a prosecution for receiving child pornography through the mails, there was no abuse of discretion in permitting a postal inspector to testify that the children depicted engaging in sexual conduct in photographs he observed while testifying were under age 18, as the testimony was helpful in determining the subjects' ages and as an explanation of why he had seized the package.

United States v. Awan, 966 F.2d 1415 (11th Cir. 1992) : The Court affirmed convictions for money laundering, holding there was no error in permitting an undercover agent to state his understanding of conversations with defendants, where the conversations were abbreviated, composed with unfinished sentences, and included numerous references to complicated international finance and money laundering transactions with which the jury would likely be unfamiliar.

[23] Legal Conclusions

United States v. Griffin, 324 F.3d 330 (5th Cir. 2003) : In a prosecution for mail fraud, the Court found that the former director of the Texas Department of Housing and Community Affairs was properly permitted to testify as to her understanding of state ethics rules and what the Department's employees were instructed about those rules. The Court also found that the witness, who testified as a lay witness, was improperly permitted to testify as to her interpretation of the law. The error was harmless, however.

United States v. Sheffey, 57 F.3d 1419 (6th Cir. 1995) : The defendant was charged with murder and assault after an automobile collision in which he was driving impaired with prescription drugs and alcohol. At trial eyewitnesses were asked whether the defendant had driven "recklessly, in extreme disregard of human life." The Court held that although the question embraced the terms of the jury instruction on malice aforethought, the terms have a separate, distinct, and specialized meaning in the law different from that in the vernacular, so the witnesses were not being called on to provide unhelpful legal conclusions. One Judge dissented on the ground that "extreme disregard for human life" is a form of words that, while used in ordinary speech, also has a specialized legal meaning. In *Torres v. County of Oakland*, n28 the Court held it was error (but harmless) for a witness, who had taken part in the selection of a person for a new supervisory position, to give an opinion as to whether the plaintiff had been discriminated against because of national origin, since this called for a legal conclusion. The Court suggested that "a more carefully phrased question could have elicited similar information and avoided the problem of testimony containing a legal conclusion."

United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1992-1 Trade Cas. (CCH) P69879 (8th Cir. 1992) : The Court affirmed convictions for conspiracy to suppress competition in violation of the Sherman Act, holding there was no abuse of discretion in permitting lay witnesses to give testimony that "agreements" to fix prices and allocate the market had been reached. The word has a well-established lay meaning and does not demand a conclusion as to the legal implications of conduct.

United States v. Crawford, 239 F.3d 1086 (9th Cir. 2001) : The defendant was a professor at UCLA who was

charged with fraudulently having arranged for the sale of a valuable painting that hung on the wall of her office at UCLA. To rebut the defense that UCLA had abandoned the painting, the government called a University official who testified that UCLA is a public institution that is not permitted to abandon property. The Court held that admitting this testimony was error (though harmless) because the lay witness was essentially giving a legal conclusion: " 'Abandon' is a legal term, and the jury could have read [the official's] statement to mean that UCLA cannot, as a matter of law, be found to have 'abandoned' property." In *United States v. Koon, 34 F.3d 1416 (9th Cir. 1994)* , *aff'd in part on other grounds*, *518 U. S. 81 (1996)* , the Court affirmed the convictions of two police officers for the deprivation of the rights of an arrestee, Rodney King, who was severely beaten after a high-speed chase. This federal conviction was obtained after a state trial on the same matter resulted in a mistrial on one count and an acquittal on all other counts. The Court found no error in the admission of testimony given in the state trial by an officer who was at the scene of the beating (and who was actually acquitted as a defendant in both trials) to the effect that after the beating he went to the police station intending to report a use of excessive force. Declining "to adopt a rule barring testimony about actions which are motivated by opinions," the Court rejected the argument that the officer's testimony was an impermissible lay opinion that excessive force had been used.

[24] Mental or Physical Condition

Singletary v. Secretary of HEW, 623 F.2d 217 (2d Cir. 1980) : In the course of reversing a denial of disability benefits, the Court said that the claimant's son should have been permitted to testify about the claimant's alcoholism and inability to work, even though he was not a doctor.

Bushman v. Halm, 798 F.2d 651 (3d Cir. 1986) : The Court reversed a summary judgment for a defendant in a Federal Tort Claims Act case arising out of an automobile accident. The plaintiff's affidavit stated that his legs were pain-free prior to the accident, but that he experienced recurrent pain in his knees and surrounding soft tissues after they contacted the dashboard in the accident. The Court found that the affidavit was based upon first-hand knowledge, and set forth facts relevant to the material issue of causation.

Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995) : One issue in a suit by a prisoner who claimed that he was denied medical treatment for heroin withdrawal was whether the statute of limitations was tolled because of the plaintiff's mental condition. Affirming summary judgment for the defendants, the Court held that an affidavit by a 30-year heroin addict was inadmissible as lay opinion concerning the plaintiff's mental condition, because the affiant had no personal knowledge about the plaintiff.

United States v. Lawson, 653 F.2d 299 (7th Cir. 1981) : Lay testimony that the defendant was sane at time of offenses was permitted. In *United States v. Jackson*, n29 the Court held that an inmate's wife, who observed the incident, could not properly testify as to why her husband was depressed at the time he assaulted a correctional officer, because she could not perceive the cause of his depression.

United States v. LeRoy, 944 F.2d 787 (10th Cir. 1991) : A defendant charged with conspiring to distribute cocaine base attempted to impeach a prosecution witness by evidence that the witness' probation file included a handwritten notation, "mentally unbalanced." The Court held the record was properly excluded because there was no showing of the basis for the opinion, which would be required if the declarant had testified.

Dallis v. Aetna Life Ins. Co., 768 F.2d 1303 (11th Cir. 1985) : Affirming a widower's judgment in an action to recover the costs of his wife's cancer treatment at a Bahamian clinic, the Court held that lay witnesses who had been

treated at the clinic were properly permitted to testify that they were feeling in good health, as the evidence related to the question whether the wife's treatment was necessary.

[25] Noise

Rushing v. Kansas City S. Ry., 185 F.3d 496 (5th Cir. 1999) : The Court reversed a partial summary judgment for the defendant in a nuisance action by homeowners complaining of noise and vibrations from the defendant's property, finding that the plaintiffs' affidavits, which claimed that the noise measurement obtained by the defendant's expert did not reflect the typical noise that they heard, raised a genuine issue of material fact. The Court indicated that it was unsure whether the Trial Judge excluded the affidavits, but concluded that exclusion would have been an abuse of discretion, since the plaintiffs satisfied *Rule 701*. There was no way to state that the sound was quieter than usual on the night of measurement "except by the conclusory inference" and that the plaintiffs' conclusions "would be helpful to the jury in assessing KCS's compliance" with noise regulations.

[26] Participation in Crime

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) : The Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms; those who refused to contribute were allegedly denied contracts with the Treasurer's office. The actual cutoffs of recalcitrant contractors were ordered by the Treasurer's deputy, but employees of the office were permitted to testify that they had "no doubt" or a "personal feeling" that the Treasurer had ordered the deputy to order the cutoffs. Reversing for this and other evidentiary errors, the Court found that the witnesses had gone beyond their personal knowledge -- of the way in which the defendant managed her office -- to draw an impermissible speculative inference that the Treasurer had given an express order.

United States v. Thompson, 708 F.2d 1294 (8th Cir. 1983) : The Court affirmed convictions for interstate transportation of stolen equipment, finding no error in the admission of opinion testimony by three government witnesses that the defendant was involved in the criminal activity. A majority found that the witnesses each described specific facts known to him and that the opinion of each was a "shorthand rendition" of the facts. A dissenting Judge found that the opinions impermissibly went beyond the facts that the witnesses had observed and that they were not the kind of opinions that would have been helpful to a jury.

[27] Personal Knowledge

United States v. Olender, 338 F.3d 629 (6th Cir. 2003) : Affirming a conviction for being a felon in possession of ammunition, the Court found no error in the exclusion of a defense witness who would have criticized the police investigation in the case. The witness was basing his opinion on a review of documents and taped interviews with people who knew about the investigation. The Court noted that firsthand knowledge was an essential requirement for lay witnesses, and this witness did not meet that requirement.

[28] Reasonableness of Charges

Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213 (11th Cir. 2003) : In an action by a ship repairer to recover payment for repairs made to an ocean-going bulk carrier, the Court held there was no abuse of discretion in permitting officers and employees of the plaintiff to testify as lay witnesses that the charges for the work by it and its subcontractors were reasonable and in line with those of similar operations providing similar services. The witnesses were not testifying to specialized knowledge within the realm of an expert, but to particularized knowledge that they had by virtue of their position in the business.

[29] Speed of Vehicle

Gust v. Jones, 162 F.3d 587 (10th Cir. 1998) : Appealing verdicts for plaintiffs in an action arising out of a highway accident, the defendants claimed it was a violation of *Rule 701* to permit an eyewitness to provide an opinion on the speed of one of the vehicles at the time of the accident. The Court held that this testimony was properly admitted because "persons of reasonable intelligence and ordinary experience are uniformly permitted to express opinions as to matters such as the speed of an automobile under their observation." The Court noted that the witness had followed the vehicle for a number of miles prior to the accident.

[30] Technical Matters

Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995) : In an action for contribution arising from a fatal accident involving an aerial lift, the plaintiffs offered deposition testimony by the fleet maintenance supervisor responsible for the lift that he had inspected the disassembled lift shortly after the accident, that he had observed a metal fracture where a hole had been drilled through a metal rod, that the accident was attributable to the way the rod was drilled through, and that he questioned the appropriateness of the design. The Court reversed a judgment for the plaintiffs because the Trial Judge failed to examine with sufficient rigor whether the supervisor's testimony admitted under *Rule 701* was informed by sufficient experience or specialized knowledge. This case is discussed in the Editorial Explanatory Comment, *§ 701.02[7]*

Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996) : In an action alleging personal injuries from toxic chemicals emanating from a well, the Trial Judge had determined that a witness, who was characterized by the plaintiffs as both lay and expert, was qualified to testify about corrosion in oil and gas wells, but had excluded testimony, allegedly based on the witness' personal knowledge, about toxic chemicals being used at the well. Affirming summary judgment for the defendant, the Court found no error, reasoning that the witness lacked any expertise in chemistry or toxicology, and declared: "It is rather doubtful that, in the absence of any specialized training or experience in these areas, he -- or any other ordinary person -- could have personal knowledge about the toxicity of chemicals (such as benzene) at the well or elsewhere."

[31] Trademarks

Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1982-83 Trade Cas. (CCH) P65051 (9th Cir. 1982) : Affirming judgments in favor of Coca-Cola against a defendant charged with trademark infringement and unfair competition, the Court said that employees of the defendant's bar and restaurant were not qualified to testify as to what their customers were thinking when they ordered "Coke."

[32] Value of Property

Robinson v. Watts Detective Agency, 685 F.2d 729 (1st Cir. 1982) : In a suit by the trustee in bankruptcy of a security corporation alleging misappropriation of assets, the Court held that the owner of a business is competent to give an opinion as to the value of corporate employees, customers, and goodwill.

United States v. 68. 94 Acres of Land, 918 F.2d 389 (3d Cir. 1990) : The Court vacated and remanded a judgment for landowners in an eminent domain case because expert testimony by the landowners' expert was improperly excluded. The Court held, however, that it was no abuse of discretion to strike testimony by a landowner regarding the property's value, which was based only on the opinion of another expert whose testimony was excluded pursuant to a

proper discovery sanction.

King v. Ames, 179 F.3d 370 (5th Cir. 1999) : The plaintiff brought an action on behalf of her father, a deceased musician, against a record producer for, *inter alia*, misappropriation of the father's name and likeness. She testified that she had ten years' experience informally conducting business for the estate and that she was familiar with the commercial value of his name and likeness because of involvement in negotiations to market T-shirts; based on that experience she determined the defendant's misappropriation amounted to $25,000 in damages. The Trial Judge granted the defendant's motion for judgment as a matter of law after the jury awarded $27,000 damages on the claim, but the Court reversed, holding that the plaintiff's testimony was sufficient evidence of the value of the intangible property interest. In *South Cent. Livestock Dealers, Inc. v. Security State Bank*, n30 a corporation's financial officer was treated as so clearly akin to the owner of a business that he was qualified to give an opinion regarding the value of the business.

United States v. Johnson, 805 F.2d 753 (7th Cir. 1986) : Affirming bank fraud convictions, the Court held that a lay person could testify to the value of collateral where his opinion was based on his own perceptions.

Eckelkamp v. Beste, 315 F.3d 863 (8th Cir. 2002) : The Court affirmed judgments for the defendants in an action alleging breach of ERISA fiduciary duties, and found no abuse of discretion in the admission of affidavits by the company's accountant and another who conducted the company's annual appraisals that included statements about executive compensation at other companies and an explanation of why a particular valuation method was used. The statements were offered to show the basis of advice given the fiduciaries and contained particularized knowledge that the witnesses had by virtue of their positions, so they were not excludable as expert opinion.

Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996) : The plaintiff in a civil rights action alleged that injuries from the defendants' use of excessive force caused him to lose profits from his business of purchasing, rehabilitating, and selling houses. The Court held that the plaintiff had sufficient expertise and personal knowledge to render an opinion as to the value of his properties and lost future profits of his own real estate ventures.

J & H Auto Trim Co. v. Bellefonte Ins. Co., 677 F.2d 1365 (11th Cir. 1982) : In a fire insurance dispute, the Court held that the Trial Judge unduly restricted evidence of the destroyed property's value, saying that "an owner of property is competent to testify regarding its value," and that the weight of the testimony is for the jury to decide. Accord *La Combe v. A-T-O, Inc., 679 F.2d 431 (5th Cir. 1982)* .

[33] Voice Identification

United States v. Bush, 405 F.3d 909 (10th Cir. 2005) : The defendant, convicted of cocaine distribution, argued that it was error to allow the undercover officer to testify as a lay witness that it was the defendant's voice in an incriminating conversation that was surreptitiously recorded and played at trial. The Court affirmed, finding no error in admitting the voice identification testimony under *Rule 701*. The witness had sufficient familiarity with the defendant's voice from speaking to him in person and numerous times over the phone. Moreover, the testimony was helpful to the jury, since the defendant exercised his right not to testify and the jury never heard his voice.

[34] Wealth or Income

United States v. Flaharty, 295 F.3d 182 (2d Cir. 2002) : Affirming convictions for drug conspiracy offenses, the Court found no plain error when a key government witness, a former leader of the conspiracy, testified to estimates of

the income received by participants. The witness had personal knowledge of the drugs sold and the money grossed from the sales, and thus was in a position to offer an estimate.

FOOTNOTES:

(n1)Footnote 1. *Meder v. Everest & Jennings, Inc., 637 F.2d 1182 (8th Cir. 1981)* .

(n2)Footnote 2. *In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990)* .

(n3)Footnote 3. *Joy Mfg. Co. v. Sola Basic Indus., 697 F.2d 104 (3d Cir. 1982)* .

(n4)Footnote 4. *Morel v. Sabine Towing & Transp. Co, 669 F.2d 345 (5th Cir. 1982)* .

(n5)Footnote 5. *United States v. Trujillo, 146 F.3d 838 (11th Cir. 1998)* .

(n6)Footnote 6. *United States v. Barker, 735 F.2d 1280 (11th Cir. 1984)* .

(n7)Footnote 7. *United States v. Jackson, 688 F.2d 1121 (7th Cir. 1982)* .

(n8)Footnote 8. *United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983)* .

(n9)Footnote 9. *United States v. Goodheim, 686 F.2d 776 (9th Cir. 1982)* .

(n10)Footnote 10. *United States v. Borrelli, 621 F.2d 1092 (10th Cir. 1980)* .

(n11)Footnote 11. *United States v. Farnsworth, 729 F.2d 1158 (8th Cir. 1984)* .

(n12)Footnote 12. *United States v. Henderson, 68 F.3d 323 (9th Cir. 1995)* .

(n13)Footnote 13. *United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993)* .

(n14)Footnote 14. *Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990)* .

(n15)Footnote 15. *United States v. Carlock, 806 F.2d 535 (5th Cir. 1986)* .

(n16)Footnote 16. *Visser v. Packer Eng'g Assoc., 924 F.2d 655 (7th Cir. 1991)* (en banc).

(n17)Footnote 17. *United States v. Rivera, 22 F.3d 430 (2d Cir. 1994)* .

(n18)Footnote 18. *United States v. Boissoneault, 926 F.2d 230 (2d Cir. 1991)* .

(n19)Footnote 19. *United States v. Urlacher, 979 F.2d 935 (2d Cir. 1992)* .

(n20)Footnote 20. *United States v. Dicker, 853 F.2d 1103 (3d Cir. 1988)* .

(n21)Footnote 21. *United States v. Davis, 787 F.2d 1501 (11th Cir. 1986)* .

(n22)Footnote 22. *Government of Virgin Islands v. Knight, 989 F.2d 619 (3d Cir. 1993)* .

(n23)Footnote 23. *United States v. Giovannetti, 919 F.2d 1223 (7th Cir. 1990)* .

(n24)Footnote 24. *United States v. Skeet, 665 F.2d 983 (9th Cir. 1982)* .

(n25)Footnote 25. *United States v. DiMarzo, 80 F.3d 656 (1st Cir. 1996)* .

(n26)Footnote 26. *United States v. Valdez, 880 F.2d 1230 (11th Cir. 1989)* .

(n27)Footnote 27. *United States v. Burnette, 698 F.2d 1038 (9th Cir. 1983)* .

(n28)Footnote 28. *Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985)* .

(n29)Footnote 29. *United States v. Jackson, 569 F.2d 1003 (7th Cir. 1978)* .

(n30)Footnote 30. *South Cent. Livestock Dealers, Inc. v. Security State Bank, 614 F.2d 1056 (5th Cir. 1980)* .

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 701 RULE 701

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701.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, *5 Vand. L. Rev. 414, 415-17 (1952)*. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are *California Evidence Code § 800*; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] 2000 Amendment Committee Note

2000 Amendment Committee Note

Committee Note

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995)* . By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in *Fed.R.Civ.P. 26* and *Fed.R.Crim.P.16* by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996)* (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997)* (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of *Federal Rule of Criminal Procedure 16(a)(1)(E)*").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997)* (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995)* .

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993)* (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook, 896 F.2d 330 (8th Cir. 1990)* (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown, 836 S.W.2d 530, 549 (1992)* , a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown,* the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
Supp. To CHAPTER 701 RULE 701

3-701 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 701, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY	**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**
Rule 701. Opinion Test	**Rule 701. Opinion Test**

imony by Lay Witnesses	**imony by Lay Witnesses**
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences whic	If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

h are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientif

ic, technical, or other specialized knowledge within the scope of Rule 702.

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to

determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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Supp. to § 701.03 Annotated Cases

[Go To Main]

[2] Age [Go To Main]

United States v. Kain, 589 F.3d 945 (8th Cir. 2009) : The Court affirmed drug and child pornography convictions, finding no plain error in the admission of a Texas Ranger's testimony that he met the girl depicted in one of the images on the defendant's computer and she was approximately five years old.

[4] Credibility [Go To Main]

Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010) : In a false arrest and malicious prosecution action against police officers who arrested the plaintiffs, the defendants introduced evidence that the prosecutors who prepared the charging documents following the arrests considered the police officers' complaints credible. Vacating a judgment for the defendants, the Court held that the evidence was inadmissible because the prosecutors' belief in the officers' credibility was irrelevant to whether they had probable cause to make the arrests and because it is improper for one witness to vouch for the credibility of another.

[5] Custom or Practice [Go To Main]

United States v. Munoz, 487 F.3d 25 (1st Cir. 2007) : Affirming convictions of former bank executives for bank fraud, the Court found no abuse of discretion when an officer of the affected bank testified to his opinion that certain loan transactions were improperly classified. The officer's testimony was based on his knowledge of the bank's loan classification system and the practice applying it.

[Go To Main]

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008) : Small billboard companies alleged that the defendant, a billboard operator acting as leasing agent for railroads, had wrongfully appropriated for itself billboard sites for which the plaintiffs had applied. Affirming in part a judgment for the plaintiffs, the Court held there was no abuse of discretion in permitting two railroad employees to testify that the defendant's process of reviewing site applications internally was outside the industry norm and contrary to their expectations as representatives of the railroads and that it was not fair for the defendant to surreptitiously review applications and appropriate sites. The witnesses spoke from their experience in railroad real estate management and billboard site review and approval, and their testimony was helpful to the jury in refuting testimony by the defendant's witnesses that its process was permissible under the terms of its contracts with the railroads.

[6] Damages [Go To Main]

Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73 (3d Cir. 2009) : The Court affirmed the finding of liability for the plaintiff in an employment discrimination suit but vacated the damages determination. Finding an abuse of discretion in permitting the plaintiff to testify about her estimated lost earnings and pension benefits, the Court noted that "we have consistently required that lay testimony requiring future projections of a business or operation come from someone who has intimate and thorough knowledge of the business gathered from either a lengthy tenure or a position of authority." In this case, the plaintiff was only a temporary employee for less than a year "and did not develop in-depth knowledge of the company's salary structure, advancement opportunities, pay raises, or employment patterns." Much of her testimony "required forward-looking speculation for which she lacked training," so it "crossed the line into subject areas that demand expert testimony."

Meaux Surface Protection, Inc. v. Fogleman, 607 F.3d 161 (5th Cir. 2010) : In a suit involving damages to a business, the Court found no abuse of discretion when the chief financial officer of the plaintiff was permitted to testify concerning lost profits. The Court observed that a corporate officer who provides projections or opinions about changes in profits is not an expert but a lay witness, so that the heightened disclosure requirements for an expert witness were not implicated. Because the CFO was intimately familiar with the plaintiff's financial performance, "[i]t would defy reason to say that the district court abused its discretion in allowing him to testify about such matters" as lost profits and financial damages.

Von der Ruhr v. Immtech Int'l, Inc., 570 F.3d 858 (7th Cir. 2009) : In an action by the assignee of a patent license and its president for breach of contract and tortious interference with contract, the Court affirmed judgment for the plaintiffs. However, it found no abuse of discretion in excluding the president's lay opinion testimony as to millions of dollars of lost profits. The patent licence related to a brand new drug that was not approved by the FDA and that still needed a corporate partner, and as to which no competitive market analysis had been done. The president "had no personal experience with obtaining a corporate licensing agreement for a pharmaceutical or treatment of any kind, had never brought a pharmaceutical to market, and had never made a profit from a pharmaceutical." In addition, he had no experience in finding a corporate partner for a new pharmaceutical, so he "did not have any personal knowledge or experience to contribute." In *Emerald Invs. L.P. v. Allmerica Fin. Life Ins. & Ann. Co., 516 F.3d 612 (7th Cir. 2008)* , in a breach of contract action by an investor whose "market timing" arbitrage scheme had been terminated when the defendant unilaterally amended account transfer rules, the Court held it was error to admit damages testimony by the plaintiff's principal. "With the benefit of hindsight, he picked days on which he said he would have traded during the damages period ... had it not been for the breach of contract, which prevented him from doing so. His testimony was as worthless as [if a bettor] had picked the horse to bet on after the race had been run."

US Salt, Inc. v. Broken Arrow, Inc., 563 F.3d 687 (8th Cir. 2009) : In a breach of contract action involving supplies of

salt, the Court held there was no error when testimony on lost profits by the president of the plaintiff corporation was excluded. The opinion amounted to "speculation and conjecture" because the president "failed to perform any analysis of a viable market for the solar salt he expected to receive from Broken Arrow and he lacked relevant and recent activity in the solar salt market." Further, he "could not identify any customer interested in buying from U.S. Salt a specific amount of solar salt at a specific price" and the company had not been active in the solar salt market since the late 1980s.

[9] Drugs and Controlled Substances [Go To Main]

In *United States v. Durham, 464 F.3d 976 (9th Cir. 2006)* , the Court affirmed the defendant's conviction for allowing her 18-month-old daughter to inhale from a lit marijuana pipe, finding no abuse of discretion in allowing a witness with a lengthy history of smoking marijuana to testify that the substance in the pipe contained marijuana. The witness was present at the time and smoked from the same pipe, so her opinion was based on her personal knowledge obtained by seeing, smelling, tasting, and experiencing the effects of the pipe's contents. Since the opinion was based upon personal knowledge of the characteristics of marijuana and of the substance at issue, it was not based on specialized knowledge within the scope of *Rule 702*.

[11] Expert Witness Distinguished [Go To Main]

[a] Civil Cases

Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73 (3d Cir. 2009) : The Court affirmed a judgment for the plaintiff in an employment discrimination suit but remanded for a re-trial on damages, finding an abuse of discretion in permitting the plaintiff to testify about her estimated lost earnings and pension benefits. It noted that "we have consistently required that lay testimony requiring future projections of a business or operation come from someone who has intimate and thorough knowledge of the business gathered from either a lengthy tenure or a position of authority." In this case, the plaintiff was only a temporary employee for less than a year "and did not develop in-depth knowledge of the company's salary structure, advancement opportunities, pay raises, or employment patterns." Much of her testimony "required forward-looking speculation for which she lacked training," so it "crossed the line into subject areas that demand expert testimony." In *Eichorn v. AT&T Corp., 484 F.3d 644 (3d Cir. 2007)* , the Court affirmed summary judgment for the plaintiffs in an action alleging improper termination of pension benefits under ERISA. It found no abuse of discretion in the exclusion of spreadsheets prepared by the son of the plaintiffs. The son, who was not an expert, made various assumptions about future events, such as when the plaintiffs would have retired, how their salaries would have increased, what choices the plaintiffs would have made with respect to pension benefits, and life expectancy of the plaintiffs. Although the plaintiffs claimed that the spreadsheets were admissible under Rule 1006, the Court concluded that "[t]he calculations went beyond the data they summarized and included several assumptions, inferences, and projections about future events, which represent Mr. Crowley's opinion, rather than the underlying information." The evidence was thus subject to the rules governing opinion testimony, and was properly held inadmissible, given there was no abuse of discretion in finding that the son was not qualified to render an opinion as a lay witness.

Compania Administradora de Recuperacion v. Titan Int'l Inc., 533 F.3d 555 (7th Cir. 2008) : Affirming summary judgment granted to a creditor who sued for breach of a guaranty contract, the Court held that a witness's testimony as to the value of collateral was properly characterized as expert, not lay, testimony. The witness's only connection with the items in question was the fact that he had been an officer of a company that held a controlling interest in another company that at one time owned the collateral; his valuations were based on his extensive experience purchasing and selling the type of items being valued, rather than on personal knowledge. The Court relied on the Advisory Committee Note to the 2000 amendment to Rule 701 for the proposition that "a business owner or officer is allowed to testify [to the value of business property] without being qualified as an expert only because that testimony is tied to his or her

personal knowledge." Because the witness was not timely designated as an expert, the Trial Court was within its discretion to exclude the witness' testimony due to the discovery violation. In *Farfaras v. Citizens Bank & Trust, 433 F.3d 558 (7th Cir. 2006)* , in an action for sexual harassment, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when a lay witness was permitted to describe the plaintiff's mental condition as "depressed." Although the term has a medical definition, "a reasonable jury can be expected to understand the difference between lay use of an adjective and an expert's use of the same word to describe a specific psychological condition."

Jerden v. Amstutz, 430 F.3d 1231 (9th Cir. 2005) : The Court reversed a judgment for the defendant in a medical malpractice action, finding it was an abuse of discretion to permit the neurosurgical nurse practitioner who assisted the defendant during an operation on the plaintiff to testify that an MRI report used in connection with the operation indicated a brain tumor. It was error to admit the testimony as that of a fact witness who did not state any opinions, since the witness made detailed and scientific observations about the report and rendered opinions and inferences that he drew from his observations and that, as he admitted, he was not competent to provide.

[b] Expert Witness Distinguished -- Criminal Cases

United States v. Wilson, 605 F.3d 985 (D.C. Cir. 2010) : Affirming drug convictions, the Court found no abuse of discretion in excluding a former drug dealer who was called as a lay witness to interpret various taped phone calls. The Court reasoned that "[a] witness with firsthand experience of a particular drug operation may testify under Rule 701," but in the absence of firsthand experience, a witness must be qualified as an expert.

United States v. Hatch, 514 F.3d 145 (1st Cir. 2008) : The defendant was convicted for filing false tax returns, having not reported income received as the first winner of the "reality-TV" show "Survivor." On appeal, he complained that two accountants, who were never formally designated as experts by the government, were improperly permitted to give expert testimony. Affirming, the Court held that the accountants, who had prepared tax returns for the defendant, were called as and gave testimony as fact witnesses, and to the extent their unobjected-to testimony might be said to have included expert opinion, it "could in no way be considered to be plain error."

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008) : The Court affirmed a conviction for racketeering conspiracy, finding no abuse of discretion when a government witness who was a member of the same crime family as the defendant was permitted to give his opinion as to the meaning of intercepted phone conversations. It concluded "where a witness derives his opinion solely from insider perceptions of a conspiracy of which he was a member, he may share his perspective as to aspects of the scheme about which he has gained knowledge as a lay witness subject to Rule 701, not as an expert subject to Rule 702." In a prosecution for marijuana distribution, *United States v. Hamilton, 538 F.3d 162 (2d Cir. 2008)* , a police officer was permitted to give testimony regarding narcotics trafficking. Affirming, the Court held that any error in admitting the testimony as lay opinion was harmless, since the government firmly established the officer's relevant experience, his qualifications, and the reliability of his evidence. In *United States v. Rigas, 490 F.3d 208 (2d Cir. 2007)* , the court affirmed convictions for securities fraud involving Adelphia Communications Company. It found no abuse of discretion in permitting a company employee to testify as a lay witness to the effects of the company's reclassifying debt, when the testimony was based upon his 20 months' employment with the company and his familiarity with company records. The witness testified not on the basis of general knowledge about recordkeeping but rather upon his observations made during employment at Adelphia. Moreover, the witness did not testify to whether the reclassifications were proper (which would have been the province of an expert) but rather to the effect of the reclassifications.

United States v. Roe, 606 F.3d 180 (4th Cir. 2010) : The Court affirmed a conviction for impersonating a federal police officer, finding no abuse of discretion in permitting a police officer to give lay testimony as to the qualifications and authority related to the handgun carry permit and security guard and private detective certifications found in the defendant's wallet. The officer was in charge of the unit that issues the permits and certifications, so his testimony was rationally based on his perceptions regarding a matter that the Court said "was not 'specialized knowledge' in the Rule

702 sense." In *United States v. Perkins, 470 F.3d 150 (4th Cir. 2006)* , in the trial of a police officer for using excessive force in making an arrest, officers who were at the scene were permitted to testify that unnecessary blows were struck, as were three officers without personal knowledge of the event. None of these witnesses were designated as experts, and the defendant argued that it was error to permit them to testify as lay witnesses. Affirming, the Court found that the testimony of officers at the scene "was framed in terms of their eyewitness observations and particularized experience as police officers" and thus was admissible under *Rule 701*. It held, however, that the opinion testimony of the three other officers "crossed the line between *Rules 701 and 702*." Their opinions "were elicited in response to hypothetical questions based on second-hand accounts, making their testimony similar, if not indistinguishable from" expert testimony. The error in admitting that testimony as lay opinion was harmless, however.

United States v. McMillan, 600 F.3d 434 (5th Cir. 2010) : The Court affirmed a fraud conviction, finding no abuse of discretion when a CPA and a former insurance regulator, who had been employed by the defendant, were permitted to testify regarding the booking of assets on the books of the defendant's company. Both "properly testified as fact witnesses about their observations and perceptions in the case in response to specific solicitations from [the defendant]." The Court also found that testimony by an auditor for the state department of insurance who conducted a targeted review of the company's financial statements was largely factual, and that to the extent it may have implicated specialized accounting knowledge, any error would be harmless. In *United States v. Valencia, 600 F.3d 389 (5th Cir. 2010)* , the Court affirmed fraud convictions arising from a scheme to give false information regarding natural gas trades to industry publications in order to manipulate natural gas markets. It found no abuse of discretion when a former risk manager at one of the involved companies was permitted to testify as a lay witness to the effects of the false reporting. The testimony related to his former job duties, and he recreated much of the analysis he regularly performed when evaluating risk tolerances. Although much of the data had been provided to him after he left the company, his knowledge and analysis were derived from duties he held there, so his testimony was based on personal knowledge and experience gained whiled employed by the company. In *United States v. York, 600 F.3d 347 (5th Cir. 2010)* , a prosecution for arson offenses, the Court found no abuse of discretion in precluding testimony from the defendant's father regarding the circumstances of the defendant's birth, which led the witness to suspect organic brain damage, as the testimony went to a matter requiring specialized knowledge and an expert witness. In *United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009)* , the Court affirmed a conviction for possession and receipt of child pornography, finding no plain error in permitting a government witness to testify about how an individual downloads, installs, and uses a program found on the defendant's computer. The witness testified that it is not possible for someone to send a video file that the user has not searched for, and on cross-examination was unable to answer whether there was "a warning system to tell the user that LimeWire [the program] was being overtaken by a trojan." The Court observed that "[t]he case law is not completely clear on where to draw the line between expert and lay testimony," found that "[t]he testimony elicited by the defense is closer to expert testimony than is the testimony of which it complains," and concluded that "[w]ith the prevalence of computer technology, it is not unreasonable to argue this type of information would fall within knowledge of the average lay person." In *United States v. Jackson, 549 F.3d 963 (5th Cir. 2008)* , the Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion in the admission of testimony by a special investigator at the prison that inmates typically remove their shirts before fist fights, but typically pad their clothes in knife fights. The Court concluded that the testimony was background information about prison fights that could assist the jury in determining the defendant's and the victim's states of mind, given evidence showing that the victim had taken his shirt off before the fight while the defendant had not. The Court also found no plain error in the admission of the testimony as lay opinion. The witness testified on the basis of his "past experiences based on personal observation as an investigative agent," while expert testimony involves "more than common sense or the officer's past experiences formed from first hand observation." In *United States v. Yanez Sosa, 513 F.3d 194 (5th Cir. 2008)* , a prosecution for possession of firearms in furtherance of drug trafficking, the Trial Judge permitted law enforcement officers to provide lay testimony on the use of chemicals in drug manufacturing, modifications to firearms, and the reason why drug dealers carry guns. Affirming, the Court noted that "[f]or much of the disputed testimony, we doubt that the district court abused its discretion in determining that the particular testimony at issue fell within the bounds of permissible lay opinion testimony and thus did not impinge the territory of specialized knowledge," since "[i]t is not clear that the testimony that went beyond description, into the realm of opinion, was based

on 'specialized knowledge' as opposed simply to common sense or the officer's past experience formed from first-hand observation." Some of the testimony, specifically testimony regarding the use of chemicals found in the defendant's apartment, may have crossed the line, but the Court concluded, without deciding that there was error, that any error was harmless.

United States v. White, 492 F.3d 380 (6th Cir. 2007) : The Court affirmed convictions arising from a scheme to defraud Medicare, but held it was an abuse of discretion to permit four Medicare auditors (fiscal intermediary witnesses) to testify as lay witnesses. The line separating lay and expert testimony "is far from clear in cases where, as here, a witness with specialized or technical knowledge was also personally involved in the factual underpinnings of the case." Because the Rules "distinguish between lay and expert *testimony*, not *witnesses*," "[o]ne witness may properly offer lay testimony and, at the same time, may be precluded from putting forth expert testimony." The Court found that "[t]he Medicare program operates within a complex and intricate regulatory scheme," so that it could not "say that the average lay person, including any Medicare beneficiary, commands a working knowledge of Medicate reimbursement procedures." The error was harmless, since the bulk of the witnesses' testimony constituted lay testimony as to their personal observation of facts while auditing Medicare cost reports. In *United States v. Ganier, 468 F.3d 920 (6th Cir. 2006)* , a prosecution for obstruction of justice arising from deletion of computer files subpoenaed by a grand jury, testimony from Drueck, a forensic computer specialist who would have testified regarding manipulation of the defendant's computer files, was excluded as a discovery sanction on the ground that the defense had not been provided with a written summary of the testimony as required by *Fed. R. Crim. P. 16(a)(1)(G)*. On interlocutory appeal the government argued that Drueck's testimony was not expert testimony, because it was not scientific or technical, and therefore no advance disclosure was required. However, the Court held that the proposed testimony was based on specialized knowledge and therefore was admissible if at all under *Rule 702*. It explained that "[t]he average layperson today may be able to interpret the outputs of popular software programs as easily as he or she interprets everyday vernacular, but the interpretation Drueck needed to apply to make sense of the software reports is more similar to the specialized knowledge police officers use to interpret slang and code words used by drug dealers." Although in the past witnesses had been permitted to apply specialized knowledge while giving lay testimony, "the 2000 amendment to *Federal Rule of Evidence 701* clarified that lay opinions or inferences cannot be based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*." Thus, the government had violated its discovery obligations under *Rule 16*, but the Court held that the order precluding the witness was excessive under the circumstances, so it vacated the decision below and remanded for reconsideration.

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008) : In a prosecution of a drug conspiracy, a law enforcement agent was permitted to testify to his interpretation of what were apparently coded conversations between the conspirators. The Court found that the agent was properly permitted to testify as a lay witness, since he was not testifying to terms commonly used by drug conspiracies, but rather to unusual and idiosyncratic code used by this particular conspiracy. The agent's understanding "came only as a result of the particular things he perceived from monitoring intercepted calls, observing drug transactions of these conspirators, and talking with the cooperating conspirators about this drug operation." In *United States v. Oriedo, 498 F.3d 593 (7th Cir. 2007)* , the Court affirmed a conviction involving crack cocaine, but held it was error (albeit harmless) to admit as lay opinion an agent's testimony as to the way in which drug dealers package crack cocaine for resale. Although the testimony was couched as a matter of the agent's observation, he "brought the wealth of his experience as a narcotics officer to bear on those observations and made connections for the jury based on that specialized knowledge."

United States v. Garrido, 596 F.3d 613 (9th Cir. 2010) : The Court affirmed a conviction for Hobbs Act robbery, finding there was no abuse of discretion when lay witnesses testified that the defendant use a gun during the robbery, where the testimony was predicated on concrete facts within their own observation. "They did not have to be experts or have training in weapons identification to testify about what they saw." *United States v. Durham, 464 F.3d 976 (9th Cir. 2006)* , the Court affirmed the defendant's conviction for allowing her 18-month-old daughter to inhale from a lit marijuana pipe, finding no abuse of discretion in allowing a witness with a lengthy history of smoking marijuana to testify that the substance in the pipe contained marijuana. The witness was present at the time and smoked from the

same pipe, so her opinion was based on her personal knowledge obtained by seeing, smelling, tasting, and experiencing the effects of the pipe's contents. Since the opinion was based upon personal knowledge of the characteristics of marijuana and of the substance at issue, it was not based on specialized knowledge within the scope of *Rule 702*.

United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009) : In the defendant's trial for persuading his minor step-daughter to engage in sexually explicit conduct for the purpose of producing photos of the conduct, an officer was permitted to testify that it is not unusual for a 13-year-old child to fail to remember the exact times and dates of an offense. Affirming, the Court "agree[d] with Sarras that the government did not seek to qualify Officer Ortiz as an expert but offered her opinion testimony on this issue as a lay witness" and "her opinion testimony does seem more like that of an expert with specialized knowledge," but it found any error in admitting her testimony to be harmless. In *United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006)* , the Court affirmed bank fraud convictions, finding no abuse of discretion in permitting the government's principal trial witness, a trained financial analyst with 23 years' experience, to testify as a lay witness. The witness did not testify to an expert opinion; rather, he reviewed and summarized voluminous financial documents and matched certain records against other records. This enabled the witness to testify to the results of the comparisons -- i.e., that the records showed that the company sent invoices to a bank for work done by employees whose time sheets showed that the work was not done for the bank. Although the witness conceded that his use of computer software might have made him more efficient at reviewing the records, the Court held that "his review itself was within the capacity of any reasonable lay person." In *United States v. Dulcio, 441 F.3d 1269 (11th Cir. 2006)* , a drug distribution case, a law enforcement agent testified to the *modus operandi* of people involved in the drug business and tied each codefendant's role to that typically seen in a narcotics importing business. The Court held it was error (but harmless) to permit such testimony as lay witness testimony, because it was based on "specialized knowledge" within the meaning of *Rule 702*. In *United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006)* , the Court affirmed a conviction for aggravated carjacking, finding no abuse of discretion in the admission of testimony by a state bureau of investigation crime scene specialist that a blood stain the back of a shirt found in the car driven by the defendant appeared to have been made by someone wiping a bloody knife on the shirt. Although the witness could have qualified for expert witness status, his testimony was properly admitted as lay opinion because it reflected personal observations about the shirt and knife.

[12] Handwriting [Go To Main]

United States v. Samet, 466 F.3d 251 (2d Cir. 2006) : In a racketeering trial, a postal inspector, who had been working on the investigation for three years and spent 80% of her time on the investigation, was permitted to identify the handwriting of one of the defendants. Affirming, the Court found no abuse of discretion in admitting the handwriting opinion. Lay opinion testimony offered to authenticate handwriting must comport with both *Rules 701* and *901(b)(2)*. Here, the witness did not acquire her handwriting knowledge for purposes of litigation, and her opinion was admissible under both Rules. The Court reasoned that during the investigation -- before there was litigation -- the inspector's opportunity to observe the defendant's handwriting "was no less (and little different) than if she had been his accountant, employee or family member."

United States v. Garth, 540 F.3d 766 (8th Cir. 2008) , overruled in part on other grounds, 562 F.3d 892 (8th Cir. 2009) : The Court affirmed a tax preparer's convictions for fraud and aiding and abetting the making of false claims, finding no abuse of discretion in the admission of an investigator's testimony that certain signatures on tax returns appeared to be in similar handwriting. Although the witness was not qualified as an expert, the opinion of similarity did not involve application of specialized knowledge, was based on the witness' observation of the signatures, and was helpful to the trier. Furthermore, each document was admitted into evidence and available for the jury to consider in conjunction with the testimony.

[14] Helpfulness [Go To Main]

Hirst v. Inverness Hotel Corp., 544 F.3d 221 (3d Cir. 2008) : The Court vacated a judgment for the defendant in a negligence action by a hotel guest who was raped by an intruder, holding that error was committed when the president of the company providing security services at the hotel testified that "there was no way that this alleged incident would have been prevented by us or by anyone." The witness' opinion was not based on his own perception, as he had never been to the hotel and everything he knew about the incident had been told him by an attorney or employee; his opinion was not helpful because it was "little more than a self-serving, conclusory opinion as to what result [the jury] should ultimately reach" on the causation issue; and a proper opinion on the issue would have required specialized knowledge and qualification as an expert witness.

La Resolana Architects, PA v. Reno, Inc., 555 F.3d 1171 (10th Cir. 2009) : In an action for copyright infringement of an architect's plans, the plaintiff offered a witness to testify, as an "ordinary observer," that the defendant's plans were substantially similar to the copyrighted plans. Affirming a judgment for the defendant, the Court found no abuse of discretion in exclusion of the witness' testimony. She was a lay witness with no personal knowledge of the facts of the case, and her testimony was not helpful, since the "ordinary observer" is a legal fiction providing the measure by which the trier of fact judges the similarity of two works.

[16] Identifications [Go To Main]

[a] Generally

United States v. Shabazz, 564 F.3d 280 (3d Cir. 2009) : The Court affirmed Hobbs Act and firearm convictions, finding no abuse of discretion when an accomplice was permitted to identify the defendant as the man depicted in a surveillance video of a robbery and a still photo taken from the video. The witness' narration of the video was limited to those incidents in which he was an actual eyewitness and he was excluded from discussing what was happening on the film when his back was turned.

[b] Identifications -- By Law Enforcement Agents

United States v. Garcia-Ortiz, 528 F.3d 74 (1st Cir. 2008) : Affirming convictions for robbery and murder, the Court held it was an abuse of discretion (but harmless error) to permit a police officer to testify that the defendant resembled a photograph of another person whom the robbery victim identified as the perpetrator. The officer testified to a subject on which he could not provide assistance to the jury; he was simply a lay witness and so was in the same position as the jury in identifying the person in the photo.

United States v. Avila, 557 F.3d 809 (7th Cir. 2009) : The Court affirmed a conviction for conspiracy to distribute numerous controlled substances, finding no plain error when several government witnesses were asked to identify the defendant and state whether he was the one who participated in the "drug trafficking conspiracy," "enterprise," or "organization." Although the form of the question "[left] much to be desired," the prosecutor's purpose was simply to get to the ultimate issue of the defendant's identity and rebut defense suggestions that another person of the same name had been involved in the conspiracy.

United States v. Contreras, 536 F.3d 1167 (10th Cir. 2008) : The Court affirmed a conviction for bank robbery, finding no abuse of discretion in the admission of testimony by a probation officer familiar with the defendant, who identified the defendant as the perpetrator of the robbery from surveillance video footage. Although there was no indication that the defendant had changed his appearance in the time between the robbery and the trial, the officer's prior familiarity with the defendant made her testimony helpful. She had met with the defendant on multiple occasions, which gave her "the opportunity to develop a more sophisticated mental picture of Contreras's appearance outside the sterile, one-dimensional atmosphere of the courtroom." In *United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007)* , the

Court affirmed a drug distribution conspiracy conviction, finding no abuse of discretion when a surveillance videotape was admitted based on an agent's opinion that it was the defendant's image on the tape. Although the jury was able to see the defendant throughout the trial, the agent's testimony was helpful because he had looked at the video "many times" and the jury had not.

[17] Improper Speculation [Go To Main]

Hirst v. Inverness Hotel Corp., 544 F.3d 221 (3d Cir. 2008) : The Court reversed a judgment for the defendant in a negligence action by a hotel guest who was raped by an intruder, holding that error was committed when the president of the company providing security services at the hotel testified that "there was no way that this alleged incident would have been prevented by us or by anyone." The witness' opinion was not based on his own perception, as he had never been to the hotel and everything he knew about the incident had been told him by an attorney or employee; his opinion was not helpful because it was "little more than a self-serving, conclusory opinion as to what result [the jury] should ultimately reach" on the causation issue; and a proper opinion on the issue would have required specialized knowledge and qualification as an expert witness.

Keri v. Board of Trustees of Purdue Univ., 458 F.3d 620 (7th Cir. 2006) : A black assistant professor who was not reappointed sued under Title VII. Affirming summary judgment for the defendant, the Court upheld exclusion of statements about the racial climate at the university made by other professors. The Court concluded that the statements were "not proper *Rule 701* opinion" because the witnesses were "offering not their sensory but mental observations, dispersed with hearsay."

[21] Knowledge or Intent [Go To Main]

[b] Knowledge or Intent -- Criminal Cases

United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) : The Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion in the admission of testimony by a special investigator at the prison that inmates typically remove their shirts before fist fights, but typically pad their clothes in knife fights. The Court concluded that the testimony was background information about prison fights that could assist the jury in determining the defendant's and the victim's states of mind, given evidence showing that the victim had taken his shirt off before the fight while the defendant had not. The Court also found no plain error in the admission of the testimony as lay opinion. The witness testified on the basis of his "past experiences based on personal observation as an investigative agent," while expert testimony involves "more than common sense or the officer's past experiences formed from first hand observation."

United States v. Wantuch, 525 F.3d 505 (7th Cir. 2008) : Affirming convictions for fraud and related offenses, the Court held it was an abuse of discretion (but harmless error) to permit a lay witness involved in the defendant's scheme to opine that the defendant "knew all the time that everything he was doing was illegal." The Court noted that "[w]e have held that lay opinion testimony regarding mental states is admissible under Rule 701," but added that "there are limits to its admissibility." Although the lay witness had a sufficient foundation based on his involvement in the defendant's scheme, the Court noted that the "jury was just as capable as [the witness] of inferring that Wantuch knew he was committing a crime."

[22] Law Enforcement Agents [Go To Main]

[a] Drug Cases

United States v. Flores-de-Jesus, 569 F.3d 8 (1st Cir. 2009) : Although the Court affirmed drug convictions, it reiterated concerns about the "use of a law enforcement officer as the first witness in a multi-defendant drug prosecution to provide an 'overview' of the prosecution's case" that it expressed in *United States v. Casas, 356 F.3d 104 (1st Cir. 2004)* (*Manual* § 702.03[54][j]). The Court recognized that "[t]here may be value in having a case agent describe the course of his investigation in order to set the stage for the testimony to come about the nature of the conspiracy and the defendants involved." However, absent a basis of personal knowledge, "the overview witness may not offer substantive testimony about the nature of the conspiracy or the involvement of particular defendants"; such overview testimony may raise *Confrontation Clause* questions. In this case, the prosecution improperly used an overview witness who was "essentially endorsing the testimony of other witnesses in what can only be viewed as an attempt by the government to bolster the credibility of those later witnesses." The Court warned that "[h]enceforth, there can be no justification in this circuit for the government's repetition of the errors that we have identified here in the use of overview testimony in criminal cases." In *United States v. Santiago, 560 F.3d 62 (1st Cir. 2009)* , the Court affirmed drug distribution convictions, finding no abuse of discretion in permitting an undercover agent to testify to the meaning of code words or phrases used by the defendants even though he had not been qualified as an expert. The agent had been involved in the investigation, listened to over 90 percent of the intercepts, learned voices and patterns, and heard and used the coded language in his undercover buys relating to the investigation; so his testimony qualified as lay testimony because it was rationally based on his perception and helpful to the determination of facts in issue, and was not based on specialized knowledge within the scope of Rule 702. In *United States v. Page, 521 F.3d 101 (1st Cir. 2008)* , the court affirmed cocaine distribution convictions, finding no error in permitting a government agent to testify as a lay witness that, based on his experience as a drug enforcement officer, dealers typically have burly individuals like the defendants accompany them during drug transactions to provide protective counter-surveillance against police drug stings.

United States v. Yanez Sosa, 513 F.3d 194 (5th Cir. 2008) : In a prosecution for possession of firearms in furtherance of drug trafficking, the Trial Judge permitted law enforcement officers to provide lay testimony on the use of chemicals in drug manufacturing, modifications to firearms, and the reason why drug dealers carry guns. Affirming, the Court noted that "[f]or much of the disputed testimony, we doubt that the district court abused its discretion in determining that the particular testimony at issue fell within the bounds of permissible lay opinion testimony and thus did not impinge the territory of specialized knowledge," since "[i]t is not clear that the testimony that went beyond description, into the realm of opinion, was based on 'specialized knowledge' as opposed simply to common sense or the officer's past experience formed from first-hand observation." Some of the testimony, specifically testimony regarding the use of chemicals found in the defendant's apartment, may have crossed the line, but the Court concluded, without deciding that there was error, that any error was harmless.

United States v. Farmer, 543 F.3d 363 (7th Cir. 2008) : The Court affirmed drug-related convictions, finding no abuse of discretion when a DEA agent was permitted to testify as to the meaning of coded language contained in tape-recorded conversations. The Court noted that the potential for prejudice when a witness testifies as both a lay witness and an expert may be addressed by appropriate cautionary instructions and by examination of the witness in such a way as to make clear when the witness is testifying to fact and when the witness is offering an expert opinion.

United States v. Freeman, 498 F.3d 893 (9th Cir. 2007) : Affirming a cocaine conviction, the Court held that a police detective's lay opinion testimony interpreting ambiguous recorded telephone conversations was properly admitted based upon his personal knowledge of the investigation and testimony as to other terms of which the witness had no personal knowledge was properly admitted because the agent had attained specialized knowledge of drug trafficking and had been qualified as an expert. The Court rejected a claim that it was error for the detective to testify as both lay and expert witness, although it agreed with *United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003)* (*see* Main Volume § 702.03[54][d]), that there are dangers when a law enforcement agent gives testimony in dual roles. The Court concluded that it was error (but harmless) to admit some portions of the detective's testimony, particularly opinions that relied on or conveyed hearsay evidence, and interpretation of clear statements that the jury would understand on its own.

[b] Law Enforcement Agents -- Other Cases

United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006) : The Court affirmed a conviction for aggravated carjacking, finding no abuse of discretion in the admission of testimony by a state bureau of investigation crime scene specialist that a blood stain the back of a shirt found in the car driven by the defendant appeared to have been made by someone wiping a bloody knife on the shirt. Although the witness could have qualified for expert witness status, his testimony was properly admitted as lay opinion because it reflected personal observations about the shirt and knife.

[23] Legal Conclusions [Go To Main]

United States v. Hoffecker, 530 F.3d 137 (3d Cir. 2008) : The Court affirmed mail and wire fraud convictions, finding no abuse of discretion when a cooperating witness was allowed to testify that the scheme being promoted by the defendant was a "scam." The conclusion was based on the witness' interactions with the defendant; it was helpful to the jury because the witness' perception that the program was a scam "explained why he was a Government cooperator"; use of the term was not based on the language of the statute; and the witness' testimony involved what he thought at the time, not at the time of trial.

United States v. Ahmed, 472 F.3d 427 (6th Cir. 2006) : Affirming the defendant's conviction for making false statements concerning his employment history when he was interviewed for a position as a baggage screener, the Court found no abuse of discretion in permitting an assistant director in the personnel security division at the Transportation Security Administration to testify as a lay witness that information the defendant provided in a particular section of a questionnaire had not been honest and that this influenced TSA's decision concerning employment suitability. The Court found that the testimony was based on personal knowledge and was relevant to establishing the materiality of the false statements. Although the defendant complained that the testimony amounted to a legal conclusion, the Court concluded that the testimony that the answers were "false" was nothing more than a non-technical expression of the witness's opinion. As such, the terms used by the witness did not carry a "separate, distinct and specialized meaning in the law different from that present in the vernacular."

United States v. Noel, 581 F.3d 490 (7th Cir. 2009) : Although it affirmed convictions for producing and possessing child pornography, the Court held it was an abuse of discretion to permit an Indiana detective who conducted the forensic examination of the computer media seized from the defendant's residence to testify that photos on the computer met the federal definition of child pornography. The Court noted that the witness gave no explanation for her opinion, so it amounted to "nothing more than a statement that the photos were illegal." "Given proper instructions, the jury was capable of making this determination on its own." The Court reiterated that "lay testimony offering a legal conclusion is inadmissible because it is not helpful to the jury, as required by Rule 701(b)." In *United States v. Avila, 557 F.3d 809 (7th Cir. 2009)* , the Court affirmed a conviction for conspiracy to distribute numerous controlled substances, finding no plain error when several government witnesses were asked to identify the defendant and state whether he was the one who participated in the "drug trafficking conspiracy," "enterprise," or "organization." Although the form of the question "[left] much to be desired," the prosecutor's purpose was simply to get to the ultimate issue of the defendant's identity and rebut defense suggestions that another person of the same name had been involved in the conspiracy.

United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) : Affirming a fraud conviction, the Court held that testimony by an attorney for a health insurance company that he told the defendant, a consultant to the company, that marketing certain health insurance plans would be a criminal offense because the plans did not comply with federal and state laws was not improper lay opinion testimony. The witness not offered as a legal expert but was instead offered to prove that the defendant was on notice that his conduct was illegal.

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) : In an action challenging a city's

refusal to grant a permit to a church to operate a day care facility, the Court found that a bishop of the church was high enough in the church structure to qualify as a speaking agent so that a letter undercutting the church's position was admissible as an admission of a party-opponent. However, it was error (albeit harmless) to admit the bishop's opinions in the letter regarding what constitutes a compelling state interest under the Religious Land Use and Institutionalized Persons Act, as he had no legal training or expertise and was "entirely unqualified to pontificate on legal questions."

[24] Mental or Physical Condition [Go To Main]

United States v. York, 600 F.3d 347 (5th Cir. 2010) : In a prosecution for arson offenses, the Court found no abuse of discretion in precluding testimony from the defendant's father regarding the circumstances of the defendant's birth, which led the witness to suspect organic brain damage, as the testimony went to a matter requiring specialized knowledge and an expert witness.

Farfaras v. Citizens Bank & Trust, 433 F.3d 558 (7th Cir. 2006) : In an action for sexual harassment, the Court affirmed a judgment for the plaintiff, finding no abuse of discretion when a lay witness was permitted to describe the plaintiff's mental condition as "depressed." Although the term has a medical definition, "a reasonable jury can be expected to understand the difference between lay use of an adjective and an expert's use of the same word to describe a specific psychological condition."

In re Mosley, 494 F.3d 1320 (11th Cir. 2007) : Mosley sought termination of his student loan obligations on grounds of undue hardship. The Bankruptcy Court granted him relief, finding that Mosley was in a cycle of illness and homelessness that prevented him from working. Affirming, the Court found no error in allowing Mosley to testify to his own physical condition, even though he was not a medical expert, since he "did not purport to give an opinion on his medical prognosis, but rather testified from personal knowledge about how his struggles with depression, back pain, and the side effects of his medication have made it difficult for him to obtain work."

[25] Noise [Go To Main]

Tufariello v. Long Island R.R., 458 F.3d 80 (2d Cir. 2006) : In an action by a railroad employee who alleged that he suffered hearing damage from loud horns, the Court vacated summary judgment for the defendant. Rather than offering objective evidence of the horns' loudness, the plaintiff offered his own testimony that the horns caused him physical pain. The Court noted that a lay witness may testify to pain he has experienced, and held that the testimony, together with expert testimony relating pain-inducing noise to hearing loss, was sufficient to make a showing on the issue of causation.

[27] Personal Knowledge [Go To Main]

United States v. Tsekhanovich, 507 F.3d 127 (2d Cir. 2007) : Affirming health care fraud convictions arising from submission of false or inflated insurance claims on behalf of auto accident victims, the Court found no abuse of discretion in permitting a cooperating witness, who had known the defendant for a few years before the conversations in question, to testify concerning his understanding of why the defendant would send him cars for repair and of the meaning of certain words. In *United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007)* , the court reversed a conviction arising from participation in an insurance fraud scheme, finding an abuse of discretion in permitting a cooperating witness to testify as to the defendant's knowledge of the fraud. When the witness was asked to articulate the basis for his opinion, he testified, "I based it on the only thing I could base it on which is my experience there, what people said

about [Kaplan], my conversation with [Kaplan], everything that I [had] been involved in. That's what my opinion could be based on." The Court described this as "extremely vague" and concluded that the "testimony failed to show that his opinion as to Kaplan's knowledge was rationally based on facts he had observed."

United States v. Mock, 523 F.3d 1299 (11th Cir. 2008) : The Court affirmed convictions for arson, holding that a defense witness was properly precluded from testifying that she "believed" that someone else committed two of the fires, because the lay witness's testimony was not based on first-hand knowledge.

[32] Value of Property [Go To Main]

Christopher Phelps & Assoc., LLC v. Galloway, 492 F.3d 532 (4th Cir. 2007) : In an architectural firm's action for copyright infringement against a homeowner who used its plans to construct his house, the Court held that the defendant's testimony was properly admitted as evidence of the value of his property.

Versai Mgmt. Corp. v. Clarendon Am. Ins. Co., 597 F.3d 729 (5th Cir. 2010) : The Court held that "the owner of a business may properly testify to the value of that business" without being qualified as an expert on valuation.

Compania Administradora de Recuperacion v. Titan Int'l Inc., 533 F.3d 555 (7th Cir. 2008) : Affirming summary judgment granted to a creditor who sued for breach of a guaranty contract, the Court held that a witness' testimony as to the value of collateral was properly characterized as expert, not lay, testimony. The witness' only connection with the items in question was the fact that he had been an officer of a company that held a controlling interest in another company that at one time owned the collateral; his valuations were based on his extensive experience purchasing and selling the type of items being valued, rather than on personal knowledge. The Court relied on the Advisory Committee Note to the 2000 amendment to Rule 701 for the proposition that "a business owner or officer is allowed to testify [to the value of business property] without being qualified as an expert only because that testimony is tied to his or her personal knowledge." Because the witness was not timely designated as an expert, the Trial Court was within its discretion to exclude the witness' testimony due to the discovery violation.

[33] Voice Identification [Go To Main]

United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007) : The Court affirmed a drug distribution conspiracy conviction, finding no abuse of discretion when audiotapes of six recorded telephone calls were admitted based on an agent's opinion that it was the defendant's voice on the tapes. The bases for the agent's opinion were a comparison between the defendant's voice on one call in which he self-identified with the voices on the other calls and the agent's having heard the defendant speak in court a few days before the trial began. Although the jury could make its own comparison from the audio recordings, the officer's testimony was helpful because at the time it was given the jury had not heard the defendant's voice.

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Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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702.02 Editorial Explanatory Comment

[1] Basic Rule

This is the basic rule governing the testimony of expert witnesses. In essence, an expert witness may testify if the expert has scientific, technical, or some other kind of specialized knowledge that would be helpful in deciding the case correctly, and if the expert's testimony is sufficiently reliable to assist the factfinder. The intent of the Rule is to liberalize the admissibility standards for expert testimony. n1

Rule 702 does require, however, that the expert possess some specialized knowledge, skill, or education that is not in the possession of the jurors. If the witness is testifying on the basis of knowledge that is commonly held by most people -- e.g., that red liquid coming from a body is blood -- then the opinion of the witness must be evaluated under *Rule 701*. The specialized knowledge necessary for expert testimony may be derived from experience as well as from education or training. n2

[2] Proper Subject Matter for Expert Testimony

The Rule is clearly not limited to scientific expert testimony. It refers as well to technical or other specialized knowledge; all that is required is that expert testimony on the subject matter will assist the factfinder. Consequently, any information that is not common knowledge can be an appropriate subject of expert testimony. n3 On the other hand, if jurors without assistance are as capable of answering a question as an expert, then the expert's testimony on that point would not be helpful and should be excluded under *Rule 702*. In such a case, the expert is adding nothing that could not be supplied by attorneys in the way of argument. n4

The opinion in *Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986)* , provides a valuable application of the subject matter to which an expert can permissibly testify. *Scott* was a slip-and-fall case. The plaintiff was walking on the sidewalk outside the defendant's store. She was wearing high heels. In her path was a sidewalk grate, and to the side of the grate was the curb, freshly painted yellow. She avoided the grate and placed her foot on the curb. But a small chunk of concrete was missing from the curb, and the plaintiff stepped into the hole. She contended that the defendant was negligent for painting over the curb and thus concealing the danger. At trial, the plaintiff called a human factors expert, who testified to two matters: (1) that women wearing high heels tend to avoid sidewalk grates; and (2) that the

color yellow prompts the human eye to fill in discontinuities, i.e., to turn three-dimensional things into two-dimensional things.

The Court of Appeals in *Scott* held that the Trial Court erred in permitting the expert to testify about the reaction of women in high heels to sidewalk grates. This was not helpful because "the witness was merely repeating what is common knowledge and common sense." The Court did, however, find that the human factors expert properly testified that the yellow color of the curb might prompt the human eye to fill in discontinuities. According to the Court, that subject "was not a matter within the common knowledge of jurors." n5

The question remaining in *Scott* was whether the error was prejudicial. The Court held that "the admission of such testimony, though technical error, will almost invariably be harmless." This was because the basis of the error was that the expert told the jury something that it already knew.

There will be some rare instances, however, where expert testimony about obvious matters could constitute prejudicial error. For example, where the expert does nothing more than bolster the credibility of a fact witness by merely restating that testimony in expert garb, the error may well be prejudicial in a case that hinges on credibility. In such a case, the witness is simply acting as a "credibility expert" and this is, for obvious reasons, not a proper subject matter for expert testimony; and yet the testimony can be harmful because the jury may defer to the expert on credibility even though the determination of credibility is their sole province. Thus, in *United States v. Cruz, 981 F.2d 659 (2d Cir. 1992)* , an undercover narcotics agent testified to the function of a "broker" in a drug transaction. This general testimony corroborated the testimony of the prosecution's principal fact witness, who had testified that the defendant had acted as an intermediary in the sale of drugs purchased by the witness. The defendant, in direct contradiction, testified that he was not present at the drug transactions, and that his meetings with the prosecution's witness concerned car repairs. The Court found that the expert's *modus operandi* testimony was improperly admitted because it was not helpful to the jury. It reasoned: "That drug traffickers may seek to conceal their identities by using intermediaries would seem evident to the average juror from movies, television crime dramas, and news stories." n6 More importantly, the Court in *Cruz* found that the improper admission of the expert testimony was reversible error, because it was used to bolster the testimony of the prosecution's central fact-witness. This was prejudicial because "it strongly suggests to the jury that a law enforcement specialist ... believes the government's witness to be credible and the defendant to be guilty." n7

The Annotated Cases, *§ 702.03*, contain a large sampling of cases concerning the appropriate subject matter of expert testimony.

[3] Qualification Standards

A witness may qualify as an expert on the basis of knowledge, skill, training, education, or experience. These bases for qualification are disjunctive. n8 Whether a witness is qualified as an expert can only be determined by the nature of the opinion offered. Thus, experience may be a crucial component for one type of expert opinion, whereas academic training may be essential for another. n9 For yet other types, no particular basis is required, so long as one of the bases in the Rule is established.

Generally speaking, the Courts have been reluctant to exclude an expert on the ground that he or she is unqualified. This is understandable given the generally permissive tone of *Rule 702*, and the possibility in some situations that exclusion of an expert could be tantamount to dismissal of the case. Consequently, Courts have not required a party to show that the witness is an outstanding expert, or to show that the witness is well-known or respected in the field; these are generally questions of weight. n10 Also, the expert need not have encyclopedic knowledge about the field in question. n11 Nor is it necessary, at least on the question of qualifications, for an expert to have published or researched on the matter to which she testifies. n12

Of course, an expert cannot be considered unqualified merely because he or she is being compensated. n13 Indeed, it

has been held that a party to the litigation can be qualified to serve as his own expert witness. n14 Any question of bias that arises from a financial arrangement can be tested on cross-examination and assessed by the factfinder. n15

All this is not to say that any self-described "expert" will automatically be allowed to testify. The requirements of *Rule 702*, though minimal, have occasionally been breached, and Courts are not hesitant to exclude the "expert" who is utterly lacking in qualifications. n16 An egregious example was presented in *Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 1989-1 Trade Cas. (CCH) P68650 (4th Cir. 1989)* . The plaintiff called an "expert" who would testify that a certain credit practice was tantamount to price discrimination. But the witness was not an economist, she had no experience in making credit decisions, and she had done no research or writing in the subject matter of her testimony. Indeed, her only stated qualification was that she was employed by a company who hired out experts to testify in sophisticated financial litigation. The Court of Appeals understandably concluded that this was not enough. It declared that "[a]lthough the spirit of the Rules of Evidence is to eschew excessive restrictions on the admissibility of testimony, the plain language of the Rules maintains some limitations on expressions of opinion." It further stated that while it could not conclude that the witness' status as a professional expert alone required exclusion of her testimony, "it would be absurd to conclude that one can become an expert simply by accumulating experience in testifying." n17

Similarly, even minimal standards for qualification will not be met if the expert's training or experience is obviously deficient and the expert demonstrates little or no familiarity with the subject matter. For example, in *United States v. Bahena, 223 F.3d 797 (8th Cir. 2000)* , the defendant's expert witness on voice spectrography was excluded as unqualified. The Court found no error, because the witness had no formal training whatsoever in the field; he could not say for certain when he first began in the field; he was not a member of any professional organization in the field; he was not familiar with any industry standards; and he could not answer several fundamental questions about the technology of voice spectrography. Essentially, the witness was a lay witness masquerading as an expert in a field requiring technical or specialized knowledge. n18

Courts are also concerned about experts who testify in specialized areas outside their ordinary expertise. Designation as an "expert" is not a license to unconstrained testimony on all scientific, technical, and other specialized matters. n19 Courts have shown an increasing interest in keeping an expert's testimony within the witness' designated area of expertise. n20 An example is *Ancho v. Pentek Corp., 157 F.3d 512 (7th Cir. 1998)* , where the plaintiff proffered a mechanical engineer to testify that an injury at a factory could have been avoided if the plant had been redesigned. The Court found no error in excluding the expert, reasoning as follows:

> Just as a qualified and board certified heart surgeon does not possess sufficient knowledge of orthopaedic medicine to render an expert opinion on spine surgery, likewise we agree with the trial court's ruling that a mechanical engineer ... lacks qualifications to give expert testimony about plant configuration. Ancho should have retained a qualified plant engineer to testify at trial and his failure to do so was a mistake in judgment for which he has no one to blame but himself.

While a Court must be attuned to a qualifications problem when an expert appears to be opining outside a "specialty," a Court should also be concerned about requiring "superspecialized" experts in all cases. There is a danger that a requirement of specialization can be applied so stringently as to exclude most objective experts. Such a danger is discussed in *Stagl v. Delta Air Lines, Inc., 117 F.3d 76 (2d Cir. 1997)* . Stagl was a senior citizen who was injured near a baggage carousel, during a typical mob scene in which passengers were retrieving their baggage. Stagl proffered a mechanical engineer to testify that the baggage delivery system was unsafe for older people, given the crowds around the baggage carousel and the heavy luggage flying about. The Trial Judge ruled that the witness was not qualified because he had no specialized expertise in airline terminal or baggage claim area design. But the Court of Appeals found this to be error. The Court observed:

> In determining whether an expert is sufficiently knowledgeable to be admitted to testify, one of the factors that the district court ought to consider is whether other experts exist who are more specifically

> qualified and who are nonetheless not in the employ of the company or industry whose practices are being challenged. If the only experts permitted to testify inevitably represent the same side of a civil case, those who possess these experts can, for all practical purposes, set their own standards. And allowing an industry to do this is improper because it is very similar to what has been long since held inappropriate, namely, letting the custom of an industry or trade define what is reasonable in that trade.

Addressing the Trial Judge's concern over the witness's lack of expertise with respect to airports, the Court noted that "[i]t is hard to imagine an expert in airport terminal design or baggage claim systems who developed that expertise in any way other than by working for the airline industry," and that "to require the degree of specificity the court imposed came close to letting that industry indirectly set its own standards." The Court observed that the plaintiff's expert had a master's degree in mechanical engineering from Columbia University and had worked as a licensed engineer for twenty years. It concluded, therefore, that the witness was qualified to testify about the interaction of machines and people based on his education and experience even though he had no expertise in airline terminal or baggage claim design. *Stagl* provides the valuable insight that while a Court should not lightly permit testimony from an expert outside his or her "specialty," a Court must also guard against requiring an expertise so specialized as to disqualify anyone who is not a captive of the specialized industry.

[4] Hypothetical Questions

The Rule provides that an expert may testify in the form of an opinion or otherwise. Much of the criticism concerning expert testimony under common law was directed at the use of the hypothetical question. The language in this last sentence about the form of the expert's testimony means that the expert need not answer in the form of an opinion responding to a hypothetical question. In fact, the Advisory Committee suggests that the expert may be called to the stand to give a dissertation or exposition of scientific or other principles relative to the case. This point is accentuated in the Committee Note to the 2000 amendment (§ *702.04[2]*), which states that it will often be important for an expert "to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case." This would leave the trier of fact to apply the principles to the facts as they develop.

Rule 702, when read in conjunction with *Rules 703* and *705*, might make the hypothetical question a more useful and less technical tool than it has been in the past. Before the adoption of the Federal Rules, most Courts insisted upon a formulation of a hypothetical question that included all relevant facts and that did not include any facts that were not supported by evidence before the trier of fact. This led lawyers to frame questions that were so long that jurors had difficulty recalling the contents of the question. It also led opposing counsel to object that facts in the question had not been proved, in an effort to strike the answer.

Now that experts may rely on facts or data not actually introduced, as long as reasonable experts in the field rely on such facts or data (*Rule 703*), and experts are not required on direct examination to reveal all of their facts or data (*Rule 705*), hypothetical questions may be asked that do not include every fact arguably relevant to a case and that include facts or data not actually in evidence. The combination of *Rules 702*, *703*, and *705* enables counsel to use the hypothetical question to assist in the presentation of understandable testimony and to emphasize and highlight such testimony. As a result, the hypothetical question becomes a more useful lawyering device, as an optional tool, than it ever was when Courts mandated its use and imposed strict requirements on the manner in which it was used. Of course, the hypothetical question, to be proper, must still have some basis in the evidence; if the hypothetical is based on a distortion of the facts, then the Trial Judge certainly has the discretion to exclude the testimony as unhelpful and confusing. n21

[5] The Gatekeeper Function -- *Daubert*

In the well-known case of *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)* , the Court indicated that before scientific evidence could be admitted it had to gain general acceptance in the particular field to which it belonged. Until

1993, there was considerable controversy as to whether *Rule 702* incorporated or rejected the *Frye* "general acceptance" test. Then, in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* , the Supreme Court unanimously rejected the *Frye* test as a basis for assessing the admissibility of scientific expert testimony under *Rule 702*.

Beyond rejecting *Frye* as a controlling principle, seven members of the Court, in an opinion written by Justice Blackmun, went further and established general, flexible guidelines, for determining the admissibility of scientific expert testimony. According to Justice Blackmun, *Rule 702* of the Federal Rules requires the Trial Judge to act as a "gatekeeper" for such testimony, to assure that it truly proceeds from "scientific ... knowledge" as required by the Rule. Essentially, this means that a Trial Judge must evaluate the proffered testimony to assure that it is at least minimally reliable; concerns about expert testimony cannot be simply referred to the jury as a question of weight.

The majority in *Daubert* set forth a five-factor, nondispositive, nonexclusive, "flexible" test to be employed by the Trial Court under *Rule 702* in determining the "validity" of scientific evidence. These factors are:

(1) whether the technique or theory can be or has been tested;

(2) whether the theory or technique has been subject to peer review and publication;

(3) the known or potential rate of error;

(4) the existence and maintenance of standards and controls; and

(5) the degree to which the theory or technique has been generally accepted in the scientific community.

While the *Daubert* Court set forth a few factors for judicial gatekeepers to take into account, it did not purport to provide a comprehensive analysis. It did, however, make the important point that the admissibility of expert testimony is governed by *Rule 104(a)*, not *Rule 104(b)*. Thus, the Judge must find it more likely than not that the expert's methods are reliable and that they are reliably applied to the facts at hand.

The *Daubert* Court remanded the case because the Lower Courts had excluded the testimony of the plaintiffs' scientific experts solely on the basis that their methodology was not generally accepted in the scientific community and was not peer-reviewed. Under the new, flexible standards set by the Court, the general acceptance test relied upon by the Lower Courts in *Daubert* is relevant to but not dispositive of admissibility. That is to say, expert testimony can be admitted as reliable even though the expert's methodology is not generally accepted in her field.

The *Daubert* Court's rejection of the *Frye* test certainly makes sense as a matter of statutory construction. *Rule 702* does not mention *Frye*, and the plain meaning of the Rule, which refers to *assisting* the jury through scientific and other knowledge, does not readily lend itself to a relatively exclusive "general acceptance" test. As the Court in *Daubert* pointed out, the *Frye* test is conservative, because it excludes otherwise reliable scientific testimony merely because it has not undergone the time-consuming process of general acceptance in the scientific community. n22 In contrast, *Federal Rules 702* and *403* are written in terms of a presumption of admissibility.

As a matter of policy, however, the Court's rejection of *Frye* is far less compelling. It is true that the majority of commentators have criticized *Frye* as being unduly restrictive and unduly vague at the same time. n23 There is much to be said, though, for a conservative approach when faced with new "scientific" technology and theories that have not been generally accepted by the relevant scientific community -- especially where the so-called expert is testifying against the defendant in a criminal case. *Frye* leaves the question of reliability to the community of scientists; *Daubert* leaves that question to Trial Judges who are often ill-equipped to determine the validity of challenged scientific testimony.

Daubert rejects "general acceptance" as an exclusive test for assessing scientific expert evidence, and clearly states that Trial Courts have a front-line role in screening out questionable or unreliable expert testimony. n24 But the impact of *Daubert* is open to question, because the Court specifically relied upon general acceptance and peer review (which is just a variant of general acceptance) as important factors in determining admissibility. As Judge Becker stated in *United States v. Downing, 753 F.2d 1224 (3d Cir. 1985)* , a case relied upon heavily by the *Daubert* Court:

> In many cases ... the acceptance factor may well be decisive, or nearly so. Thus, we expect that a technique that satisfies the *Frye* test usually will be found to be reliable as well. On the other hand, a known technique which has been able to attract only minimal support within the community is likely to be found unreliable.

What *Frye* recognized and what Courts using the *Daubert* reliability analysis should recognize is that a trier of fact must be in a position to evaluate the weight of evidence. A novel scientific test, especially one devised by one or two people, poses problems because there may be few experts available to examine the test from the opposite viewpoint of the party relying upon it. Such testimony cannot really be weighed if the expert is simply making a conclusion on a "take it or leave it" basis that is not susceptible to attack by objective standards. n25 Results that would not stand rigorous analysis might be accepted because such analysis is not possible at the time of trial. The ultimate question for the Trial Judge under any test is whether both sides will have a fair opportunity to test the validity of scientific results; if not, those results should not be admissible. In deciding the ultimate questions, Trial Judges must consider the degree to which the accuracy of scientific information has been established. The less certain the scientific community is about information, the less willing Courts should be to receive it. Whether a Trial Judge excludes evidence as likely to confuse the jury or as being more prejudicial (meaning more likely to be misused than used correctly) than probative, on the one hand, or as lacking sufficient acceptance in the scientific community, on the other hand, is not likely to be crucial in the long run. n26 Under any approach, Trial Judges and Appellate Courts have reason to be concerned about scientific evidence manufactured for litigation.

[6] Major Post-*Daubert* Cases on Scientific Expert Testimony

The *Daubert* opinion was open-ended and vague. The Court clearly switched the focus from the scientific community -- which determined reliability under *Frye* -- to the Trial Judge, who now must determine reliability by taking into account not only the views of the scientific community, but also other factors, to determine whether proffered expert testimony is in fact reliable.

In the later case of *General Electric Co. v. Joiner, 522 U.S. 136 (1997)* , the Court did provide some indication of how the gatekeeper function might work in evaluating scientific evidence. In *Joiner*, the plaintiff proffered experts to testify that his exposure to PCBs caused him to contract cancer. The Supreme Court found no error in the Trial Court's exclusion of these experts as unreliable. The experts relied on several studies, but the Court found this reliance to be flawed and unscientific. One study relied upon was a study in which infant mice were exposed to PCBs and contracted cancer. The problem was that the mice contracted a different kind of cancer than that suffered by the plaintiff; moreover, the studies could not be replicated in adult mice nor in any other species. The experts' reliance on four epidemiological studies was likewise flawed. Two of the studies found no statistically significant connection between PCBs and cancer; one study did not mention PCBs; and the fourth study, which found a statistically significant connection, involved subjects who were exposed to a variety of other carcinogens. The Court concluded that there was an "analytical gap" between the experts' conclusion on causation and the studies on which they relied for their conclusion. The experts made no attempt to bridge this analytical gap by relying on any other objective or verifiable standards. The *Joiner* Court concluded that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Importantly, the *Joiner* Court held that a District Court's *Daubert* rulings are reviewable only for abuse of discretion. *Joiner* establishes that an expert's testimony must have a sufficient basis and that the expert must not leap to an unfounded conclusion. It also establishes that a Trial Judge's *Daubert* rulings will rarely be reversed.

There are several Lower Court opinions that try to put some more meat on the *Daubert* bones. Two of the most important are Judge Kozinski's opinion in *Daubert* on remand, and Judge Becker's opinion in the *Paoli* case.

On remand of the *Daubert* case from the Supreme Court, the Ninth Circuit held that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under *Rule 702*. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)* . The Ninth Circuit thoroughly analyzed and applied the Supreme Court's opinion, making the following important points:

(1) *Daubert* requires a two-part analysis as applied to scientific expert testimony. First, the Court must determine whether the expert testimony is based upon the scientific method. Second, the Court must determine whether there is a "fit" between the expert's testimony and a disputed issue in the case.

(2) The first, "reliability" prong of *Daubert* is not satisfied by "an expert's self-serving assertion that his conclusions were derived by the scientific method." Rather, "the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."

(3) An important determinant of reliability "is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." This is because -- with the important exception of scientific forensic testimony in a criminal case -- "a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office." Thus, if an expert testifies on the basis of research he has conducted independent of the litigation, this "provides important, objective proof that the research comports with the dictates of good science." The Court reasoned that "independent research carries its own indicia of reliability, as it is conducted, so to speak, in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support." n27

(4) If the expert's testimony is not based on independent research, "the party proffering it must come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles."

(5) One means of showing scientific validity, even if the research was prepared in anticipation of litigation, is that "the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication." The Court reasoned that publication and peer review provide "a significant indication that [the research] is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science."

(6) Where the expert's testimony does not grow out of pre-litigation research and has not been subject to peer review, "the experts must explain precisely how they went about reaching their conclusions and point to some objective source -- a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like -- to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field."

Applying these principles to the testimony of the plaintiffs' experts, the *Daubert on remand* Court found that the *Daubert* standards had not been met. The experts' research was prepared solely for purposes of Bendectin litigation. It had not been peer reviewed, nor had it even been deemed worthy of comment by the scientific community. Finally, the experts had not explained their methodology or verified it by reference to objective sources. The Court concluded that it had been presented "with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The Court also found that the testimony of most of the plaintiffs' experts failed the "fit" requirement of *Daubert*. This was because the substantive law required proof that Bendectin more likely than not caused the plaintiffs' limb reduction.

Yet most of the plaintiffs' experts testified only that Bendectin *increased the risk* of limb reduction. This testimony actually tended to disprove the plaintiffs' contention that Bendectin was more likely than not the cause of their limb reduction.

In *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)* , Judge Becker reviewed, in light of *Daubert*, a grant of summary judgment in a case alleging damages from exposure to PCB's. The Court engaged in an extensive and incisive analysis of *Daubert*'s effect on scientific expert testimony. The Court made the following important points about the gatekeeping function after *Daubert*:

(1) Because a Judge at an *in limine* hearing must make findings of fact on complex scientific issues, and because the *in limine* ruling will often decide the case, "it is important that each side have an opportunity to depose the other side's experts in order to develop strong critiques and defenses of their expert's methodologies."

(2) Because the question of reliability is an admissibility requirement governed by *Rule 104(a)*, a proponent must do more than simply make a *prima facie* case on reliability. While the proponent does not have to prove to the Judge that the proffered expert testimony is *correct*, he or she must prove to the Judge by a preponderance of the evidence that the testimony is *reliable*. The *Paoli* Court stated that the "evidentiary requirement of reliability is lower than the merits standard of correctness."

(3) After *Daubert* any distinction between an expert's methods and the application is no longer viable. It is no longer the case that if the methodology is sound, the possible misapplication in a specific case becomes a question for the jury. *Daubert* provides that "*any* step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." n28 The *Daubert* Court stated that the Trial Judge must review the reliability of an expert's methodology, as distinct from the expert's conclusion. But Judge Becker pointed out that this passage in *Daubert* does not generally hold water. When a Judge disagrees with an expert's conclusion, "it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." The only situation in which the methodology/conclusion distinction might make a difference is where expert testimony is challenged on the *sole* ground that the conclusion is different from that of other experts. In that case, the Trial Judge must inquire beyond the conclusion before excluding the testimony. But in the ordinary case, if the conclusion is controversial, it is ordinarily excluded under *Daubert*, because there is either something wrong with the methodology that was used, or the methodology was improperly applied, so as to reach such an odd conclusion. n29

(4) The qualifications of the expert are relevant not only to the qualifications prong of *Rule 702*, but also to the reliability prong. Thus, the Trial Judge should be especially reluctant to exclude a disputed methodology where the expert is eminently qualified. Despite *Daubert* putting the spotlight on Trial Judges, it stands to reason that there should be some judicial deference to an outstanding expert. As one post-*Daubert* Court put it, an expert's outstanding qualifications provide "circumstantial evidence" that the expert has employed a sound methodology. n30 In contrast, an expert's marginal qualifications should cut in favor of excluding testimony as unreliable. n31

(5) Because the *Daubert* Court held that *Rule 702* was the "primary locus of a court's gatekeeping role," the use of *Rule 403* to exclude expert testimony should be left for the rare case. Thus, "there must be something *particularly* confusing about the scientific evidence at issue -- something other than the general complexity of scientific evidence."

Applying these factors to the case at hand, the *Paoli* Court held that the District Court abused its discretion when it excluded expert testimony that PCBs are harmful to humans. The testimony was based on animal studies, and such studies are sufficiently reliable when they are not contradicted by epidemiological studies. n32 The Court also held, contrary to the District Court's ruling, that it was not necessary for a doctor to examine patients before he could reliably testify that they faced a future risk of illness from prior exposure to PCB's. The doctor's opinion was reliable because he based it on a residential history of each plaintiff, and on fat and blood tests performed on the plaintiffs.

[7] Other Factors Relevant to the Reliability of Scientific Expert Testimony Under *Daubert*

After *Daubert*, the Courts have focused on several factors in addition to those listed in the *Daubert* opinion that have been found to bear on the reliability of a scientific expert's testimony. None of these factors is dispositive, but each has been considered in the cases. A short discussion of these factors follows.

Extrapolation and the "analytical gap." Some experts have fallen into the trap of leaping from an accepted scientific fact or premise to an unsupported conclusion. These experts have sometimes relied on logical analysis to go from premise to conclusion. Some have simply made a leap of faith. If the process from premise to conclusion is not itself consistent with the scientific method or other well-accepted principles, then Courts have a tendency to exclude the testimony as based on unreliable and improper extrapolation.

One example of improper extrapolation is an expert's use of structure analysis. This problem arose in *Daubert on remand*, as well as in other toxic tort cases. Structure analysis is sometimes proffered by an expert where there is no demonstrated connection between a certain chemical substance and a certain injury, but there is a demonstrated connection between a *similar* chemical substance and that injury. For example, there is no scientifically demonstrable connection between Bendectin and birth defects; but there is scientific evidence that substances with a chemical structure similar to that of Bendectin cause birth defects. Thus, the expert employing structure analysis reasons that substances with similar chemical structures cause similar injuries. But this reasoning is not consistent with the scientific method; it is improper extrapolation. As scholars have noted, "Even minor changes in molecular structure can alter a substance's effect. The metabolic process stands as an unknown intervening variable between the original chemical structure and the adverse effect." n33 Thus, it is improper, after *Daubert*, to leap to a conclusion about one chemical substance on the basis of the effects caused by another, in the absence of other scientific support. n34

It is also improper extrapolation to conclude, without any supporting research, that a substance that causes one harm also causes a different harm. For example, in *Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996)*, the question was whether the plaintiff's birth defect, hemifacial microsomia, was caused by his mother's use of Clomid. The expert based his conclusion to that effect on epidemiological studies that showed a link between Clomid and other types of birth defects. He concluded that since Clomid is capable of causing other birth defects, it also caused hemifacial microsomia. The Court held that this reasoning was not scientific. The doctor's testimony "was influenced by litigation-driven financial incentive," and the doctor's premise -- that a positive association between a drug and some birth defects indicates an association with other birth defects -- was not recognized by even a minority of scientists. n35

Similarly, in *Joiner, supra*, the Supreme Court pointed out that the experts' conclusion that PCB's caused the plaintiff's cancer was the product of improper extrapolation. The experts relied on epidemiological studies, but those studies did not support the conclusions reached. n36

Red flags are also raised when a scientific expert purports to testify on the basis of a methodology that is transposed from one area to a completely different area of inquiry -- at least if there is no independent research supporting the transposition. Thus, in *Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996)*, the plaintiff sought to prove that the decedent's mesothelioma was caused by smoking cigarettes with a filter made with crocidolite asbestos. The decedent's lung tissue was tested for asbestos fibers, using the standard methodologies of "bleach digestion" and "low temperature plasma ashing." No crocidolite fibers were found. The plaintiffs then retained an expert who tested for asbestos in *building materials* to conduct tests on the decedent's lung tissue. This expert was unaware of the methodologies ordinarily employed in testing human tissue. He used the same test that he used on building materials, known as high temperature ashing, and found crocidolite fibers in the tissue. The expert stated that high temperature ashing was as usable on tissue as on bricks, though he had never conducted such a test on tissue before this litigation. He also admitted that the high temperature could alter the chemistry of the sample, in which case it would be impossible to tell whether asbestos fibers were crocidolite or some other kind. But he asserted that his method was far more likely to produce a false negative than a false positive.

The Court held that the expert's testimony was properly excluded as unscientific under *Daubert*. It made the following points:

> Nowhere in *Daubert* did the Court suggest that failure to adhere to the customary methods for conducting a particular kind of scientific inquiry is irrelevant to the admissibility of a scientist's testimony. On the contrary, the Court made clear that it is relevant. A judge or jury is not equipped to evaluate scientific innovations. If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry. To forsake the accepted methods without even inquiring why they are the accepted methods -- in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method -- and without even knowing what the accepted methods are, strikes us ... as irresponsible.
>
> ...
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> Modern science is highly specialized. An expert in the detection of asbestos in building materials cannot be assumed to be an expert in the detection of asbestos in human tissues even though, as the plaintiff reminds us, many building materials, most obviously wood, are, like human and animal tissues, organic rather than inorganic substances. The fact that the plaintiffs' lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

All this is not to say that learning from one subject matter can never be used to form a conclusion as to a different subject matter, or that premises established in one context are completely irrelevant in another. The question is how big a leap the expert is taking. In *Braun*, the Court reasoned, correctly we think, that the leap from testing bricks to testing human tissue was too great in the absence of some objective support. In contrast, in *Newport Ltd. v. Sears, Roebuck & Co.*, 1995 U.S. Dist. LEXIS 7652, 1995 WL 328158 (E.D. La. 1995) , an economist was permitted to testify to the amount of lost profits suffered by the plaintiff as a result of a breach of a real estate contract concerning industrial park property. The economist used a methodology known as multiple regression analysis. The defendant complained that this methodology had never been used to determine the value of industrial park real estate, but admitted that the methodology was widely accepted as a reliable way to determine the value of commercial real estate. The Court found that the difference between commercial real estate and industrial park property was not so profound as to render the economist's testimony unreliable. It was not like the leap from bricks to lung tissue in *Braun*.

Thus, some analytical leaps are permissible when justified by scientific support or reasoning. Another example of a permissible analytical leap by a scientific expert arose in *Kennedy v. Collagen Corporation, 161 F.3d 1226 (9th Cir. 1998)* . The plaintiff claimed that her use of the facial product Zyderm caused her to contract lupus, an autoimmune disorder. The plaintiff's expert rheumatologist testified to causation on the basis of peer-reviewed articles, clinical trials and product studies, an investigation conducted by the Texas Department of Health, a physical examination of the plaintiff, laboratory tests, and the temporal proximity between the plaintiff's use of Zyderm and the existence of her autoimmune disorder. None of the studies indicated that Zyderm caused lupus; rather, the studies established a connection between Zyderm and autoimmune disorders that were similar to lupus. Ordinarily an analytical gap would arise if the expert were to conclude that Zyderm causes lupus simply because it causes disorders that are similar to lupus. However, the expert filled that analytical gap by relying on the finding, established in both peer-reviewed publications and clinical studies, that Zyderm induces the body to produce the *same autoimmune antibodies* that are the

hallmark of lupus. So the expert was not relying solely on causation of similar diseases, but also on the fact that the manner of causation, the operation of the substance, was the same. The Court concluded that "Dr. Spindler set forth the steps he took in arriving at his conclusion in his deposition. Dr. Spindler's analogical reasoning was based on objective, verifiable evidence and scientific methodology of the kind traditionally used by rheumatologists. That is precisely what *Daubert* requires."

Reliance on anecdotal evidence. An expert who bases a scientific opinion solely on one or a few case studies is generally held to have an insufficient basis for reliable testimony after *Daubert*. There are two problems with relying on such anecdotal data, at least exclusively. First, anecdotal evidence is usually derived from insufficient sampling. Second, there is a strong possibility that anecdotal cases are not comparable to the facts of the case at bar -- for example, if a number of people contract lung cancer through an alleged exposure to a toxic substance, a proper statistical study will exclude the possibility of other sources for the injury (referred to as confounding factors), such as cigarette smoking. But a single case study, or other anecdotal evidence, is unlikely to be screened for confounding factors.

For example, in *Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995)* , *aff'd in pertinent part*, *100 F.3d 1150 (4th Cir. 1996)* , the plaintiff alleged that she suffered respiratory illness as a result of exposure to aviation jet fuel vapors that were released from an overflow at the defendant's storage terminal. The plaintiff's expert toxicologist was prohibited from testifying at trial after a *Daubert* hearing, and the Court consequently granted summary judgment for the defendant. The toxicologist relied on case studies in which people who were exposed to the organic compounds in jet fuel suffered respiratory illnesses (though most illnesses were temporary). The Court held that reliance on these studies to form a conclusion was inconsistent with the scientific method. The Court reasoned that "case reports are not reliable scientific evidence of causation, because they simply describe reported phenomena without comparison to the rate at which the phenomena occur in the general population or in a defined control group; do not isolate and exclude potentially alternative causes; and do not investigate or explain the mechanism of causation." n37 Importantly, the Court noted that the toxicologist did not purport to follow the methodology ordinarily followed by toxicologists. Rather, he formed his opinion "and then tried to conform it to the methodology."

This is not to say that case studies are completely irrelevant to an analysis consistent with the scientific method. The problem in *Cavallo* was that the case studies were, essentially, the *only* source upon which the expert based his opinion. In contrast, scientists often use case studies to spur further research, or to confirm conclusions already arrived at in more methodical studies. Thus, in *Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993)* , the plaintiffs claimed that their exposure to asbestos in the workplace created a legitimate fear that they would develop laryngeal cancer in the future. The plaintiffs' expert testified that asbestos created a risk of laryngeal cancer, basing his conclusion on epidemiological evidence reported in the medical literature, and on the inordinately high incidence of persons at the plaintiffs' workplace whom the expert had personally diagnosed as having laryngeal cancer. The defendants objected to the expert's testimony under *Daubert* insofar as it was based on anecdotal evidence, because the expert had personally evaluated only 150 patients, and found four to have laryngeal cancer. They argued that this was not a sufficient number of cases from which to draw a proper statistical conclusion of cause and effect. Moreover, the expert made no analysis of possible confounding factors. The Court nonetheless held that the expert testimony was properly admitted, stating: "Nothing in *Rules 702* and *703* or in *Daubert* prohibits an expert from testifying to confirmatory data, gained through his own clinical experience, on the origin of a disease or the consequences of exposure to certain conditions." The Court noted that the expert was cross-examined and freely acknowledged that his anecdotal evidence was not dispositive; rather, it was relevant information which, taken together with the epidemiological studies, justified a conclusion on causation. Undoubtedly the result in *Cantrell* would have been different if the expert had relied *solely* on personal anecdotal evidence for his conclusion.

Reliance on temporal proximity. There are a number of cases after *Daubert* in which a healthy plaintiff has been exposed to a product and becomes ill shortly thereafter. For example, in *Porter v. Whitehall Lab., 9 F.3d 607 (7th Cir. 1993)* , Porter came to the hospital to be treated for a fractured toe. He had no other health problems. He was given ibuprofen, took about thirty tablets over a month-long period, and at the end of that month he was diagnosed with renal

failure from which he would not recover. Porter's experts testified that ibuprofen caused his renal failure, even though no published data or study supported this conclusion. The experts essentially based their opinions on Porter's prior good health and the temporal proximity between the ingestion of ibuprofen and renal failure. The Court concluded, however, that forming a conclusion on the basis of temporal proximity, in the absence of some established scientific connection between substance and illness, is inconsistent with the scientific method. By relying solely on temporal proximity, the expert fails to consider other possible explanations -- not to mention the unexplainable -- that a scientist would want to look into before drawing a conclusion. n38

Again, this is not to say that the temporal proximity between exposure and injury is completely irrelevant to the scientific method. The result in *Porter* might well have been different if published controlled studies and/or epidemiological evidence established some connection between ibuprofen and renal failure. Then the temporal proximity between exposure and injury can be used as confirmatory data. This was the case in *Kennedy v. Collagen Corp., supra*, where the expert's opinion on causation was based in part on the plaintiff's having contracted lupus shortly after receiving collagen injections. The expert could properly rely on this factor in light of the studies indicating a substantial connection between collagen and autoimmune disorders. As one Court put it, "[A] temporal connection is entitled to greater weight when there is an established scientific connection between exposure and illness or other circumstantial evidence supporting the causal link." n39

Moreover, in certain unusual circumstances, the short time between exposure and injury may itself be enough for a scientist to draw a conclusion about causation. As the Court put it in *Cavallo, supra*: "There may be instances where the temporal connection between exposure to a given chemical and subsequent injury is so compelling as to dispense with the need for reliance on standard methods of toxicology." In *Cavallo*, the plaintiff was exposed to a fairly small amount of jet fuel vapor, and developed a respiratory disease immediately thereafter. While the Court excluded expert testimony based solely on that temporal connection, it recognized that the case would be different if a previously healthy plaintiff were exposed to jet fuel in an extremely large dose (e.g., a barrel of it was poured on the plaintiff's head), and developed a respiratory disease shortly thereafter. Also, the Court recognized that a scientifically-based conclusion of causation can be drawn where a large number of people are all exposed to a substance and all develop similar symptoms right away. For example, if everyone in Cavallo's neighborhood developed the same respiratory disease right after a jet fuel spill, a scientist might properly conclude that the jet fuel caused the injuries. n40

The weight that a temporal connection can be given in a reliable scientific enquiry will depend on the circumstances. For example, a temporal connection between exposure and injury will be stronger and entitled to more weight if the symptoms abate after exposure is terminated. Thus, in *Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999)*, the plaintiff alleged that his sinus condition was severely aggravated by his exposure to talc at his workplace. He relied on the testimony of his treating doctor to prove his case. The doctor conducted a differential diagnosis, ruling out causes other than talc, and he also relied on the temporal connection between exposure and injury. The Court found that the Trial Court did not abuse its discretion in finding the treating physician's testimony reliable under *Daubert*. The Court noted that while a temporal connection between exposure and injury is not enough in itself to support a reliable conclusion of cause and effect, "depending on the circumstances, a temporal connection between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation." This was particularly true in this case where the plaintiff's sinus condition improved when he was out of work, and worsened when he went back to work. In contrast, temporal connection will be of little relevance if the plaintiff's condition pre-existed exposure.

Insufficient connection between the expert's opinion and the facts of the case. Some experts after *Daubert* have fallen into the trap of relying on a proper methodology, but failing to connect it with the facts of the case. Thus, in *Chikovsky v. Ortho Pharmaceutical Corp., 832 F. Supp. 341 (S.D. Fla. 1993)*, the Court granted summary judgment after holding inadmissible the plaintiff's expert's testimony that Retin-A caused the plaintiff's birth defects. The plaintiff's mother had used Retin-A topically for skin blemishes during her pregnancy. Some studies tended to show a connection between a product similar to Retin-A and birth defects, but only when the product was taken orally and in large doses. But the

plaintiff's expert did not know how much Retin-A the plaintiff's mother had applied to her skin during pregnancy, and it was clear that the amount could not have approached the dosages in the studies relied upon by the expert.

Another example of a failure to connect reliable expert testimony with the facts arose in *Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472 (1st Cir. 1997)* . The plaintiff was run over by her car after putting it in park and exiting the vehicle. She sought to have an engineer testify about the phenomenon of "false park detent" -- where the driver feels as if he or she has put the car in park, without looking at the gear shift, but the car is not actually in park. The Court held that this testimony was properly excluded under *Daubert*, because it rested on a factual premise -- that the plaintiff did not look at the console shift before turning off the car -- that was at odds with the plaintiff's own testimony: "The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect."

An expert's lack of knowledge about the case has also been regulated through the *Daubert* "fit" requirement. n41 The Court in *Daubert* stated that a scientific principle may be valid for one purpose but not for another. The principle relied upon by the expert, though valid, might not "fit" the facts of the case at bar. A valid study finding a connection between a substance and an injury will fail the "fit" requirement if the plaintiff's exposure to the substance is materially different from the exposures considered in the study. Thus, in *Sorenson v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994)* , the plaintiffs alleged that their mental retardation was caused by their parents' use, before childbirth, of alfalfa tablets that had been coated with ethylene oxide (EtO). The Court held that the Trial Judge properly rejected the plaintiffs' experts' conclusion that EtO could cause mental retardation in children if taken by parents before childbirth. The testimony failed the *Daubert* "fit" requirement because the experts did not know whether, and the plaintiffs produced no evidence that, the alfalfa tablets taken by their parents contained any EtO residue.

Ruling out other possible causes. Before a conclusion on causation can be reliably drawn, the expert must make some reasonable attempt to eliminate some of the most obvious causes other than the one chosen. In medical terms, this is called conducting a differential diagnosis -- e.g., excluding other causes, such as genetics or other toxins, for a certain disease. In epidemiological terms, this is called controlling for confounding factors. n42

Unfortunately, some experts have sought to testify to the specific cause of an injury without having attempted to screen out other obvious causes. Thus, in *Claar v. Burlington N. R.R., 29 F.3d 499 (9th Cir. 1994)* , the plaintiffs brought an action under FELA alleging that they were injured by exposure to toxic chemicals. Affirming an order of summary judgment for the defendant, the Court held that the proffered testimony of the plaintiffs' experts was inadmissible. The experts concluded that the plaintiffs' injuries were caused by exposure to toxic chemicals, but they neglected to investigate any other possible causes of the plaintiffs' injuries. For example, an expert concluded that the chemicals caused one plaintiff to suffer from "dyscalculia" (bad at arithmetic) and "spelling dispraxia" (bad at spelling). But the expert never reviewed the plaintiff's school records. These records indicated that the plaintiff had these problems when he was a child. Basically, the experts appeared to have first concluded that the plaintiffs were injured due to exposure to chemicals, and then consulted the relevant literature in the field to support their opinions. The *Claar* Court concluded:

> Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method. Certainly, scientists may form initial tentative hypotheses. However, scientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed by the district court as lacking the objectivity that is the hallmark of the scientific method. n43

Similarly, statisticians who fail to root out the most obvious alternative causes for a statistical disparity are likely to be excluded after *Daubert*. n44

This is not to say that an expert, in order to testify on causation, must be able to categorically exclude each and every possible alternative cause. As the Federal Judicial Center Reference Manual on Scientific Evidence cogently points out,

it is "never possible to rule out every alternative explanation." n45 For example, in *Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)* , the plaintiff proffered experts who testified that the drug Depo-Provera caused the plaintiff's birth defects. The experts could not categorically rule out all possible sources of the plaintiff's birth defects. For example, they had not conducted state-of-the-art chromosomal studies, though they did look at the relevant medical records of mother, grandmother, etc. But to require the experts to categorically rule out all other possible causes for an injury would mean that few experts would ever be able to testify -- or that the cost of litigation for plaintiffs would be prohibitively expensive. The Court held that the possibility of some uneliminated causes presented a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert. n46

On the other hand, a proper differential diagnosis -- i.e., considering the basic causes for a symptom and excluding all but one -- has been held a reliable basis for an expert's conclusion on causation under *Daubert*. A description of the process and its scientific validity is found in *Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir. 1999)* :

> Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. *See Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252-53 (1st Cir. 1998)* . A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely. *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997)* (explaining that "[d]ifferential diagnosis is defined for physicians as 'the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings' ") (quoting *Stedman's Medical Dictionary* 428 (25th ed.1990)); *see McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)* (describing differential etiology as an analysis "which requires listing possible causes, then eliminating all causes but one"); *Glaser v. Thompson Med. Co., 32 F.3d 969, 978 (6th Cir. 1994)* (recognizing that differential diagnosis is "a standard diagnostic tool used by medical professionals to diagnose the most likely cause or causes of illness, injury and disease"). This technique "has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results." *Brown v. Southeastern Penn. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 758 (3d Cir. 1994)* ; *see Heller v. Shaw Indus., Inc., 167 F.3d 146, 154-55 (3d Cir. 1999)* (noting "that differential diagnosis consists of a testable hypothesis, has been peer reviewed, contains standards for controlling its operation, is generally accepted, and is used outside of the judicial context"). We previously have upheld the admission of an expert opinion on causation based upon a differential diagnosis. *See Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383-85 (4th Cir. 1995)* (holding that expert testimony by treating physician concerning cause of plaintiff's liver failure -- acetaminophen combined with alcohol -- was admissible despite the lack of epidemiological data). And, the overwhelming majority of the courts of appeals that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the *Rule 702* inquiry. *Compare Heller, 167 F.3d at 154* , 156-57 (concluding that a proper differential diagnosis is adequate to support expert medical opinion on causation), *Kennedy v. Collagen Corp., 161 F.3d 1226, 1228-30 (9th Cir. 1998)* (holding district court abused its discretion in excluding an expert opinion on causation based upon a reliable differential diagnosis), *Baker, 156 F.3d at 252-53* (determining that a differential diagnosis rendered expert opinion on causation sufficiently reliable for admission), *Zuchowicz v. United States, 140 F.3d 381, 385-87 (2d Cir. 1998)* (upholding determination that expert opinion was reliable in part based on differential diagnosis), *and Ambrosini v. Labarraque, 101 F.3d 129, 140-41 (D.C. Cir. 1996)* (holding that because expert opinion was based on differential diagnosis, district court abused its discretion in refusing to admit it), *with Moore v. Ashland Chem., Inc., 151 F.3d 269, 277-79 (5th Cir. 1998)* (en banc) (concluding that district court did not abuse its discretion in rejecting expert opinion on

> causation without discussing why differential diagnosis was insufficient to support admission of opinion into evidence). Thus, we hold that a reliable differential diagnosis provides a valid foundation for an expert opinion. n47

The underlying premise of differential diagnosis is that there is an established connection between certain possible causes and a condition or symptom -- then all of the established causes are ruled out but one. That is to say, a substance or condition must be "ruled in" as a potential cause before it can be part of a differential diagnosis. An example of a flawed differential diagnosis is found in *Black v. Food Lion, 171 F.3d 308 (5th Cir. 1999)* . The Trial Court permitted a treating physician to testify that the plaintiff suffered from fibromyalgia syndrome that was caused by the trauma from a slip-and-fall at the defendant's store. The Court found reversible error, concluding that this testimony was unreliable under *Daubert*. The Trial Court had permitted the testimony on the ground that the expert had followed a proper protocol by eliminating other possible causes of fibromyalgia. But the Court rejected this analysis, because the causes of fibromyalgia have not been established:

> This analysis amounts to saying that because Dr. Reyna thought she had eliminated other possible causes of fibromyalgia, even though she does not know the real "cause," it had to be the fall at Food Lion. This is not an exercise in scientific logic but in the fallacy of post-hoc propter-hoc reasoning, which is as unacceptable in science as in law. By the same "logic," Dr. Reyna could have concluded that if Black had gone on a trip to Disney World and been jostled in a ride, that event could have contributed to the onset of fibromyalgia. The court's task was to determine whether Dr. Reyna's methodology tied the fall at Food Lion by some specific train of medical evidence to Black's development of fibromyalgia. No one doubts the utility of medical histories in general or the process by which doctors rule out some known causes of disease in order to finalize a diagnosis. But such general rules must, under *Daubert* ... be applied fact-specifically in each case. The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur. Based on such predicate knowledge, it may then be possible to fasten legal liability for a person's disease or injury. n48

Insufficient foundation for the expert's opinion. Under *Daubert*, the District Court as gatekeeper must reject expert testimony that is seriously under-researched. The expert's research need not be absolutely exhaustive. But if the expert has failed even to consult obviously pertinent studies, or has failed even to test the thesis, then the testimony should be excluded under *Daubert*. n49 As discussed below, this principle of sufficient basis/adequate foundation has been codified in the 2000 amendment to *Rule 701*. See *Rule 702(1)*.

The problem of lack of testing often arises in product liability cases, where the plaintiff calls an expert who would testify that the defendant should have designed the product differently. If the alternative design has never been made and tested, either by the expert or anyone else, Courts are likely to prohibit the expert from testifying after *Daubert*. As the Seventh Circuit noted in *Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996)* , a number of factors must go into a reliable conclusion that an alternative design should have been employed, e.g., the compatibility of the design with existing systems, relative efficiency, maintenance costs, ease of servicing, and the effects of price. As the *Cummins* Court put it: "Many of these considerations are product-and-manufacturer-specific, and most cannot be determined reliably without testing."

We believe, however, that testing should not be an absolute requirement to the admissibility of expert testimony on design safety. The expense of litigation must be taken into account. If a design engineer testifies that a car could have been designed more safely, the Court should not exclude the testimony simply because the expert has not himself built a car employing the alternative design.

A fine example of the proper approach to testing after *Daubert* is found in Judge Vance's opinion in *Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241 (M.D. La. 1996)* . Tassin was injured while operating a power saw, and proffered an

engineer who concluded that alternative designs were safer, and that the defendant failed to provide adequate warnings. Judge Vance analyzed the admissibility of this testimony in light of *Daubert* as follows:

> It may well be that an engineer is able to demonstrate the reliability of an alternative design without conducting scientific tests, for example, if he can point to another type of investigation or analysis that substantiates his conclusions. For example, an expert might rely upon a review of experimental, statistical, or other technical industry data, or on relevant safety studies, products, surveys, or applicable industry standards. He could also combine any one or more of these methods with his own evaluation and inspection of the product based on experience and training in working with the type of product at issue. The expert's opinion must, however, rest on more than speculation, he must use the types of information, analyses and methods relied on by experts in his field, and the information that he gathers and the methodology that he uses must reasonably support his conclusions. If the expert's opinions are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches, then [testing of an alternative design is not absolutely required].

Applying these standards to the facts, the *Tassin* Court excluded the expert's testimony on certain alternative designs based on parts that he had never tested or even seen, and the safety of which was not supported by the tests of others nor by any relevant literature. However, the Court held testimony as to another alternative design admissible, where the expert had actually conducted some testing, and where the safety of the product received support from the relevant literature. The expert could have tested more systematically and extensively, but this presented a question of weight. Finally, the Court held the expert's conclusion as to inadequate warnings to be admissible. The alternative warnings suggested by the expert had not been scientifically tested. But the Court found that testing as to warnings (as opposed to testing alternative designs) was not critical where the expert had substantial experience in both product design and in preparing product manuals and warnings. n50

Subjectivity. The Court in *Daubert* emphasized that the scientific method is an objective one. It instructed a Trial Court to assure itself that the expert's hypothesis could be tested by objective standards. This is the essence of what the Court referred to as scientific validity, also known as "falsifiability." It follows that if an expert's methodology cannot be explained in objective terms, and is not subject to be proven incorrect by objective standards, then the methodology is presumptively unreliable.

An example of this proposition arose in *O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)* . The plaintiff claimed that her cataracts were caused by exposure to nuclear radiation. She called an ophthalmologist who testified to that effect. He based his conclusion on a visual inspection of the plaintiff's eyes. The expert testified that he could identify radiation-induced cataracts by simple visual observation; however, there was no scientific support for this premise. The Court noted that the defendant's experts had shown that a proper methodology for detecting radiation-induced cataracts included a medical work-up, a work-up of the patient's history, and an examination of occupation dosimetry charts. The testimony failed under *Daubert* because the expert employed a completely subjective approach that was rejected by other scientists, and which could not be proved false. The testimony was basically an *ipse dixit* from the expert, and after *Daubert*, that is not enough. n51

[8] Good Scientific Testimony After *Daubert*

There are a growing number of cases in which a scientific expert has been found to pass the "good science" threshold established by *Daubert*. n52 A good example of testimony satisfying *Daubert* is found in *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995)* . The plaintiff claimed that he suffered severe liver damage as a result of combining Extra-Strength Tylenol and alcohol. Eventually the plaintiff had to have a liver transplant. To prove general causation (i.e., that there is a link between substance and injury), the plaintiff called two liver disease specialists, who both testified that a warning of the possible danger of combining alcohol and acetaminophen should have been placed on the

Tylenol label. These experts described how the alcohol-acetaminophen mixture can become a toxin in the liver. They cited numerous treatises and articles published in medical journals that described the increased risk of liver injury when acetaminophen is combined with alcohol. To prove specific causation (i.e., that the substance actually caused the plaintiff's injury), the plaintiff called two treating physicians, who had examined his liver and found evidence of acetaminophen toxicity. The treating physicians investigated the possibility of other causes, such as viral failure, by comparing the plaintiff's liver to liver samples damaged by viruses. They concluded that the plaintiff's liver showed negative for viral damage.

What makes for sound methodology? The *Benedi* Court stressed the following:

> Benedi's treating physicians based their conclusions on the microscopic appearance of his liver, the Tylenol found in his blood upon his admission to the hospital, the history of several days of Tylenol use after regular alcohol consumption, and the lack of evidence of a viral or any other cause of the liver failure. Benedi's [liver disease experts] relied upon a similar methodology: history, examination, lab and pathology data, and study of the peer-reviewed literature.

The Court concluded that it would "not declare such methodologies invalid and unreliable in light of the medical community's daily use of the same methodologies in diagnosing patients."

Evaluating the result in *Benedi* and similar cases after *Daubert* leads to the following conclusion: a scientific expert's testimony will be admissible if the expert employs the same methodology in reaching the conclusion as he or she would employ if working as a scientist in the real world. If the methodology is good enough for the real world, it is good enough for a trial. On the other hand, if the methodology is altered for the purposes of litigation, there is every reason to exclude it after *Daubert*. As Judge Posner has put it, the object of *Daubert* is to assure that "experts adhere to the same standards of intellectual rigor that are demanded in their professional work." n53

It must be stressed that while *Daubert* assigns Trial Judges the role of gatekeepers, it does not authorize Trial Judges to act as "super-experts," or to scrutinize experts in such a way as to exclude all but the perfect expert testimony. This lesson was learned by the Trial Judge who was reversed in *United States v. 14. 38 Acres of Land Situated in Leflore County, Miss., 80 F.3d 1074 (5th Cir. 1996)* . This was an eminent domain action, in which the landowner proffered an engineering expert and a real estate appraisal expert. The engineering expert stated that a new levee left the subject property unprotected from flooding, and in a worse position than before the levee was built. The real estate appraisal expert stated that any prospective buyer would determine that the property was subject to flooding, and that the fair market value of the property had been reduced. The Trial Court excluded the experts' testimony as speculative and without foundation, relying specifically on the experts' apparent uncertainty about the extent of flooding on the property in the event of heavy rainfall. But the Court of Appeals found an abuse of discretion, because the Trial Judge "applied too stringent a reliability test." The Court stated that *Daubert* had not worked a "seachange over federal evidence law" and that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." The engineer's opinion was properly based on his review of maps, photographs, and other relevant data, as well as his experience as an engineer. The appraisal expert's opinion was based on his experience, his personal inspection of the property, comparable sales, and discussions with local brokers. Under these circumstances, any vagueness or tentativeness in the testimony were "matters properly to be tested in the crucible of adversary proceedings; they are not the basis for truncating that process." n54

Thus, it is not up to Trial Judges to pick apart an expert's testimony and exclude it if there is any flaw, no matter how minute. The task of the gatekeeper after *Daubert* is to ensure that the expert reached the opinion by the same avenues that the expert uses in his or her day-to-day work. Perhaps Judge McLaughlin put it best in *McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995)* . The plaintiff in *McCullock* alleged that she contracted a respiratory ailment, including throat polyps, from exposure to an unventilated glue pot at her place of employment. Fuller aggressively challenged two experts under *Daubert* -- a consulting engineer, who testified that the plaintiff was in the "breathing

zone" of the glue fumes, and an ear, nose, and throat doctor, who testified that the glue fumes caused the plaintiff's ailments. The engineer based his opinion on his extensive practical experience, examination of safety literature and the warnings provided by the defendant, interviews with the plaintiff concerning her exposure, and background industrial experience with ventilation. The doctor based his testimony on his treatment of the plaintiff, her medical history, pathological studies, use of a differential diagnosis, and scientific and medical treatises. Under these circumstances, the Court found that any dispute as to the experts' lack of specialization, flaws in methodology, or lack of textual authority went to weight and not admissibility. The Court concluded that the defendant's point-by-point, strict scrutiny attack on the experts' qualifications and methodology constituted an unwarranted extension of *Daubert*:

> Trial judges must exercise sound discretion as gatekeepers of expert testimony under *Daubert*. Fuller, however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul -- separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

Similarly, *Daubert* does not authorize a Trial Court to exclude an expert's testimony simply because the expert relies upon methods that are disputed by others in the field. It will often be the case that experts in a particular field employ different methods -- psychiatry and medicine are obvious examples. *Daubert* does not give the Trial Judge the right simply to choose one competing methodology over another. The question is whether the methodology employed by the expert is reliable; dispute in the field is a relevant consideration, but it is not dispositive. For example, in *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77 (1st Cir. 1998)* , a wrongful death accident arising from a traffic accident, the defendant proffered an expert pharmacologist who concluded that the decedent had "snorted" at least 200 mg of cocaine thirty to sixty minutes prior to the accident. To reach this conclusion on dosage, the expert relied on a mathematical formula said to be supported by several published studies supporting a "half-life technique" of assessing dosages. The Trial Court excluded this testimony on the ground that other pharmacologists used a different technique for determining dosage. But the Court found an abuse of discretion. The Court recognized that the scientific literature relied upon by the expert "does not make an open-and-shut case" because the studies indicate that the half-life of cocaine varies among individuals due to many factors. But the Court stated that the Trial Judge "set the bar too high" in excluding the expert's testimony on the basis of these possible variables. The Court noted that "no single factor disposes of a reliability inquiry" and that "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion." In this case, the expert's opinion was "premised on an accepted technique, embodied a methodology that has significant support in the relevant universe of scientific literature, and was expressed to a reasonable degree of scientific certainty."

[9] Applying the *Daubert* Gatekeeping Standards to "Non-scientific" Expert Testimony

One of the questions left open by *Daubert* was whether its standards apply to expert testimony that does not purport to be scientifically-based. The starting point in analyzing this question is that *Rule 702* does not limit expert testimony to that which is scientifically grounded. It refers as well to technical or other specialized knowledge. Because the Rule permits admission of expert testimony whenever it will assist the factfinder, any information that is not common knowledge may be an appropriate subject of expert testimony, whether scientifically grounded or not. Given the breadth of permissible topics for expert testimony, then, can the *Daubert* Court's focus on the Trial Judge's gatekeeper role be applicable to experts other than the epidemiologist- and toxicologist-types considered in *Daubert*?

The Supreme Court answered this question in *Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)* . The Court in *Kumho* held that the *Daubert* gatekeeper function applies to the testimony of experts who do not purport to testify on the basis of scientific principles -- the Trial Judge has an obligation to assure that such testimony is reliable. *Kumho* involved a tire failure expert who would have testified that a tire exploded because it was defective. His mode of analysis was to investigate whether the failure might have been caused for any reason other than defect. He employed

his own four-factor test to rule out other causes such as overinflation or underinflation. He found that some of his self-selected factors indicating improper inflation of the tire were indicated, but not sufficiently so to identify improper inflation as the cause of the tire exploding. The Trial Judge excluded the expert's testimony for, among other reasons, failure to satisfy the *Daubert* standards. The Judge found that the expert's methodology was subjective; it had not been peer reviewed; there was no indication of the rate of error; and there was no general acceptance of the expert's four-factor test for determining alternative causation.

The Supreme Court, in a decision written by Justice Breyer, declared that *Rule 702* requires all experts to testify on the basis of "knowledge," and that in *Daubert*, "the Court specified that it is the Rule's word 'knowledge,' not the words (like 'scientific') that modify that word, that 'establishes a standard of evidentiary reliability.' " The Court also noted that "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides the one from the others." The Court therefore saw no reason under the Rule to apply the gatekeeping function to scientific experts only.

The Court then moved to whether a Trial Judge could properly assess non-scientific expert testimony by means of the specific factors that *Daubert* had listed as relevant to assessing the reliability of scientific expert testimony -- specifically, objective standards, peer review, rate of error, standards and controls, and general acceptance. The Court held that any or all of these factors might permissibly be used to evaluate non-scientific expert testimony, but that ultimately the factors that a Trial Judge relies upon to determine reliability must be dependent upon the particular area of expertise that is being evaluated. The Court explained as follows:

> We agree with the Solicitor General that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.
>
> *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.
>
> At the same time, and contrary to the Court of Appeals' view, some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Justice Breyer gave the bottom line standard for employing the gatekeeping requirement in evaluating non-scientific expert testimony:

> The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal

> experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Not surprisingly, this "same intellectual rigor" standard is the same as that being employed by the Courts to evaluate scientific testimony. Whether the specific *Daubert* factors are appropriate in determining whether this standard has been met will depend on the circumstances. The *Kumho* Court declared that "a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony."

Importantly, the *Kumho* Court held that the Trial Judge's decision on the factors to be employed in assessing an expert's reliability is reviewable only for abuse of discretion. Otherwise, the Judge "would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." This language contemplates that a challenge to expert testimony should not be routine, but should be saved for the unusual case where it is apparent that the expert has under-researched the issues, seriously misapplied a methodology, or has acted clearly inconsistently with professional standards. It should not be the case that every accountant, every electrician, and every plumber becomes the subject of a *Daubert* hearing.

Turning to the expert's proffered testimony in *Kumho*, the Court found no abuse of discretion in either the Trial Judge's use of the specific *Daubert* factors or in the ultimate decision that the testimony was not reliable enough to be admissible. The expert's assumption -- that alternative causes could be ruled out by looking at a number of specific factors identified solely by the expert -- was essentially subjective and unsupported by any other tire failure expert. Moreover, the expert discounted evidence that under his own test indicated that the tire had been improperly inflated. Justice Breyer concluded as follows:

> Indeed, no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here. Of course, Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."

Thus, the expert was properly rejected because he could not show that he used the same intellectual rigor in reaching his conclusion as would be expected of him in his professional life outside the courtroom.

Even though the gatekeeper function applies to non-scientific expert testimony, it stands to reason (as the Court in *Kumho* recognized) that the specific *Daubert* factors will often have to be rejected or modified when reviewing soft science or non-scientific expert testimony. A Court should not exclude an expert on automobile repair on the ground that he has not published his research in a peer-reviewed journal. A Court should not reject the testimony of a sociologist who cannot be definitive about a possible rate of error in his findings. An example of this necessary flexibility is found in *Tyus v. Urban Search Mgt., 102 F.3d 256 (7th Cir. 1996)* . The plaintiffs in *Tyus* appealed a judgment rendered for the defendants in a suit alleging that advertising for a rental building targeted only whites, in violation of the Fair Housing Act. The plaintiffs proffered a social science expert who would have testified to how an all-white advertising campaign affects African-Americans. The Trial Court, without conducting a *Daubert* analysis, excluded the expert on the ground that his testimony was too general to be helpful. The Court found that the Trial Court erred in failing to scrutinize the expert's testimony under the *Daubert* "framework," and reversed the judgment. The Court declared that the central teaching of *Daubert* -- that expert testimony "must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work" -- was fully applicable to the testimony of experts in the social sciences. However, recognizing the need for a flexible application of *Daubert*, the Court noted the following caveat:

> It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree ... that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

The *Tyus* Court found that the Trial Court erred in excluding the expert, because his testimony "would have given the jury a view of the evidence well beyond their everyday experience." Moreover, the expert's research was based on peer-reviewed articles, and his "focus group" method was a well-accepted methodology in the field of social science. In other words, the expert brought basically the same intellectual rigor to his courtroom testimony as he employed in his life as a social scientist. n55

Where expert testimony is not adaptable to being put through the wringer of falsifiability, publication, and peer review, the Trial Judge still has the obligation to determine whether the testimony is properly grounded, well-reasoned, and not speculative. If there is a well-accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable. The more subjective and controversial the expert's inquiry, the more likely the testimony is to be excluded as unreliable. So, for example, in *Gier v. Educational Serv. Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994)*, *aff'd*, *66 F.3d 940 (8th Cir. 1995)*, an action brought against a school on behalf of mentally retarded students for alleged sexual, physical, and emotional abuse, the Magistrate Judge held a *Daubert* hearing with respect to experts who had interviewed the children who were allegedly abused. The Magistrate Judge ruled *in limine* that the experts would not be permitted to testify that any of the plaintiffs were abused in any manner, nor to any opinion based on such a conclusion. The Court expressed concern about the subjective nature of the investigation of specific instances of child abuse, and about the vagueness of the standard protocol, which "leaves a gaping hole in the direction it provides the master's level clinician to conduct the interview." In other words, the experts had not relied on any well-accepted, objective methodology in reaching their conclusions. n56

A particular problem after *Kumho* involves the non-scientific expert who testifies on the basis of experience. The example from *Kumho* is the perfume-tester who sniffs a substance and identifies its brand and provenance. When asked how he knows that, he just says, "I know it when I smell it and I smell it a lot." Can he be permitted to testify solely on this conclusory experience-based analysis? Put another way, must the Trial Court take the expert's word for it? The Court in *Kumho* implies that it is inconsistent with the gatekeeper function to simply let an experience-based expert testify without any explication of how they come to their conclusion and why they believe they are correct. This implication -- that experience-based experts must justify their conclusions as reliable -- has been codified in the 2000 amendment to *Rule 702*, discussed immediately below.

[10] The 2000 Amendment to Rule 702

On December 1, 2000, *Rule 702* was amended in an attempt to codify and structure the Supreme Court trilogy of *Daubert, Joiner* and *Kumho*. The amendment sets forth three standards that must be met before a challenged expert's testimony can be admitted. The Trial Court must find that:

(1) *the expert is basing the opinion on sufficient facts or data*. If an expert has engaged in insufficient research, or has ignored obvious factors, the opinion must be excluded under this prong of the test. In other words, the expert must have a sufficient *foundation* for the testimony. Judge Becker has stated that the foundation requirement, while "well developed in the case law and in the experience of trial lawyers and judges" has not been expressly grounded in one of the Federal Rules. n57 The Advisory Committee realized that there was a gap in the Rules, and also that the Court in *Daubert* implicitly required a foundation requirement for expert testimony. The Advisory Committee decided to avoid any ambiguity and to make the foundation requirement a specific part of *Rule 702*. The Courts appear to be applying the "sufficient basis" requirement without controversy. n58 A good example is *United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004)*, in which the defendant was charged with impersonation and tax evasion. The evidence indicated that the impersonator spoke Cantonese with a Mandarin accent. The defendant proffered a linguistics expert who would

have testified that the defendant, whose native dialect was Cantonese, could not have faked a Mandarin accent when speaking Cantonese. The Court held that this testimony was properly excluded because the expert lacked a sufficient basis for his conclusion. The expert relied on a conversation in which the defendant spoke for only 15 seconds, in preparation for a trial in which the defendant had a strong incentive to minimize his linguistic abilities.

(2) *the testimony is the product of reliable principles and methods*. This is the heart of *Daubert* -- a requirement that the expert's methods are reliable.

(3) *the witness has applied the principles and methods reliably to the facts of the case*. This is a recognition, implicit in *Daubert* and *Joiner*, that the use of a reliable method is not enough to guarantee reliable testimony. The proponent must also show that the methods have been applied reliably in the specific case.

At the time this amendment was first considered, the Lower Courts were in disagreement about whether the *Daubert* gatekeeping function applied to nonscientific expert testimony. The Advisory Committee believed that *Daubert* should apply to nonscientific experts, and the amendment clearly extends the *Daubert* gatekeeping function to all expert testimony. Toward the end of the rulemaking process, after the public comment period had ended, the Supreme Court decided *Kumho*. As discussed above, the Court in *Kumho* extended the *Daubert* gatekeeping function to nonscientific experts. The question for the Committee at that point was whether to continue with the amendment. The Committee decided, after much deliberation, that an amendment to *Rule 702* would be extremely valuable to the bench and bar even after *Kumho*.

The Reporter's memorandum to the Committee set forth the following arguments for continuing with the amendment even after the Court's decision in *Kumho*:

> 1. In its "expert trilogy" (*Daubert/Joiner/Kumho*) the Court has a lot to say about the reliability requirements for expert testimony, but nowhere in any of those opinions does the Court lay out the specific steps and criteria that a Trial Court must undertake in assessing the reliability of all kinds of expert testimony. The amendment synthesizes the Supreme Court cases and lays out three requirements that all expert testimony must meet. This clarification and synthesis will be of great assistance to the bench and bar.
>
> 2. The courts before the amendment remained in dispute about some important matters of gatekeeping. For example, some courts were focusing only on whether the expert has employed a reliable method, and were not considering whether the expert actually applied that method reliably to the facts of the case. Other courts were focusing on both methods and application. The amendment makes clear that reliable *application* of a method is every bit as important as whether the method itself is reliable.
>
> 3. The courts before the amendment remained in dispute about the applicable standard of proof for *Daubert* determinations. The Committee Note to the amendment makes clear that the proponent has the burden of showing, by a preponderance of the evidence, that expert testimony is reliable.
>
> 4. The Supreme Court cited the Committee Note to the proposed amendment with approval in *Kumho*, providing at least some indication that the Committee was on the right track. And indeed, the Note itself, independent of the text, will provide helpful guidance to courts and litigants on how to approach *Daubert* problems. The Note provides an extensive survey of the factors that the Courts have found relevant to assessing the reliability of expert testimony under *Daubert*, and this survey can help Courts and litigants in this difficult area.
>
> 5. Before the amendment, even without any obvious conflicts on the specifics, the Courts divided over how to even approach a *Daubert* question. Some Courts seemed to approach *Daubert* as a rigorous

exercise requiring the Trial Court to scrutinize, in detail, the expert's basis, methods, and application. Other Courts seemed to think that all *Daubert* requires is that the Trial Court assure itself that the expert's opinion is something more than mere unfounded speculation -- all other possible defects go to the jury. Adoption of the amendment, and the Committee Note, was considered likely to provide uniformity in the *approach* to *Daubert* questions. The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some Courts had been employing.

6. Finally, if the Rule were not amended, there was a legitimate cause for concern that Congress would act to amend *Rule 702*. Senator Hatch and Congressman Coble each proposed legislation that purported to codify *Daubert*. These codification efforts were shelved, in part, because of assurances that the Rules Committee was already considering a change to *Rule 702*. If the Committee would not act, there is a possibility that these congressional efforts will be renewed. And congressional tinkering with the Evidence Rules has in the past resulted in significant problems of interpretation (e.g., *Rules 413-415* and *Rule 704(b)*).

The public comment on the proposed amendment to *Rule 702* was quite polarized. Generally speaking, plaintiffs' groups opposed the amendment and defendants' groups favored it. What follows is a discussion of the major concerns brought up by plaintiffs' groups and other members of the public, and the response to these concerns by the Advisory Committee:

1. *The amendment will result in a proliferation of Daubert motions:* The argument was that the amendment virtually invites defendants to challenge every expert proffered by a plaintiff. But the Committee's position was that an increase in challenges to experts, if any, would not be caused by the amendment, but rather by the Supreme Court's opinions in *Daubert* and *Kumho*. The amendment simply seeks to codify those cases. Moreover, the admittedly limited empirical research indicates that challenges to experts have not gone up dramatically after *Daubert*. The Committee nonetheless added a paragraph to the Committee Note indicating that the amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and provided a citation to the passage in *Kumho* indicating that expert testimony in the ordinary case will not be subject to a *Daubert* challenge.

2. *Limitation on the right to jury trial*. The oft-expressed concern of plaintiffs' groups was that the amendment will give the Trial Judge authority to simply exclude expert testimony that the judge disagrees with or does not believe -- thus infringing on the jury's role. The Committee's view was, again, that the amendment was simply codifying the Supreme Court's cases. Nonetheless, the Committee added a paragraph to the Note, indicating that *Daubert* was not intended to take credibility issues away from the jury, and that cross-examination is the remedy for shaky but not completely unreliable expert testimony.

3. *Allowing the Judge to pick among competing methodologies*. Some public comments expressed the concern that the amendment fails to recognize that there might be two or more competing methodologies in the same field. The implication of these comments is that the amendment would require a Trial Judge to choose the more established or more accepted methodology in the field -- which could lead to a kind of rigid orthodoxy. The Committee's response was that this concern was not justified by the text of the amendment. The amendment simply provides that the expert must be using reliable principles and methods. It does not say that the methods must be those used by a majority of professionals in the particular field. Nor does it say that competing methodologies in a single field cannot all be reliable. Nor does it say that a method is unreliable until it is embraced by a majority of professionals in the field. To take an example, nothing in the text of the amendment would prevent two psychiatrists from different "schools" from testifying as to the mental condition of a patient -- a Freudian and a Skinnerian could both testify, and come to different conclusions, so long as they were acting as they would in their respective professional lives. Nor would the Court be forced to exclude one of two economists where the witnesses are from different schools of economic thought. Nor would an expert necessarily be excluded if he relied on one method of DNA identification (e.g., PCS) rather than another more commonly used method (e.g., RFLP). Nonetheless, the Committee decided to allay any concerns by

adding a paragraph to the Committee Note. The paragraph provides that when a Trial Court applying the amendment rules that an expert's testimony is reliable, this would not necessarily mean that contradictory expert testimony is automatically unreliable. The Note now emphasizes that the amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise, so long as the chosen principles and methods are reliable.

4. *The problem of experience-based experts:* Some public commentators took the rather extreme position that the amendment would exclude the testimony of any expert relying on experience as opposed to scientific or technical knowledge. These comments were generally conclusory, but they appeared to be based on an assumption that the amendment's emphasis on "reliable principles and methods" is somehow inconsistent with an expert's reliance on experience. How can experience be a method? The Committee had three responses to this critique. First, the term "reliable principles and methods" does not in any way prevent reliance on experience. Use of experience can certainly be a reliable "method" for coming to certain conclusions; *Kumho* makes this clear. Second, the text of *Rule 702* has always referred to experts qualified by experience, and that is not changed by the amendment. Third, the Committee Note emphasizes that the testimony of experience-based experts can be admissible if it is reliable. Nonetheless, to allay any concerns, the Committee added even more language to the Committee Note, emphasizing that nothing in the amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a reliable foundation for expert testimony.

Cases under the amendment to Rule 702: Some commentators have contended that the amendment to *Rule 702* does much more than codify *Daubert* and its progeny. They assert that the intent of the amendment is to cast the Trial Judge in the role of a super-expert, excluding all expert testimony that he or she does not personally find credible. They contend that the amendment instructs trial judges to exclude all proffered expert testimony unless they find it so sound as to be immune from attack. In the elegant words of one critical lawyer, Bert Black, anyone who thinks that the amendment merely codifies *Daubert* "is smoking something funny."

However, the amendment does nothing more than apply the *Daubert* gatekeeping function to all expert testimony, as the Supreme Court emphasized in *Kumho*. The three general standards set forth in the amended Rule can clearly be found in *Daubert* and its progeny, though those cases do not set forth these standards as clearly or as helpfully as does the amendment. The amended Rule crystallizes the central tenets of *Daubert* and provides the courts with a straightforward checklist that can be applied, with considerable flexibility, to all kinds of expert testimony. n59

The cases decided under the amended *Rule 702* belie the paranoid contention that the amendment works a seachange in the regulation of expert testimony. The Courts have so far held that the amendment simply codifies *Daubert* by extracting the three general requirements from the Supreme Court's basic premises about the Trial Court's gatekeeping function. n60

Three exemplary cases illustrate the proper approach to expert testimony under *Daubert* and the amendment to *Rule 702*. In *Blevins v. New Holland North America, 128 F. Supp. 2d 952 (W.D. Va. 2001)* , the plaintiff was injured by a hay baler. The plaintiff disembarked from the hay baler to lift up the tail gate and dislodge some hay that was stuck in the baler. He did not turn the baler off. His arm got caught in the machinery. The plaintiff proffered an expert to testify that the baler could have been designed with an emergency stop system that would enable somebody caught in the machinery to turn it off and avoid further injury. The defendant argued that this testimony should be excluded under *Rule 702* for three reasons: (1) the expert failed to perform any "scientific testing"; (2) his views had not been "peer reviewed"; and (3) an emergency stop system has not been installed on any hay balers manufactured in the United States.

The *Blevins* Court turned to the amended *Rule 702*. It stated that the Rule as amended "has adopted the *Daubert* principles." It referred to the Advisory Committee Note to the amendment, which sets forth the specific *Daubert* standards (testing, peer review, general acceptance, etc.) and noted that the amendment does not codify these specific

standards, because *Daubert* itself says that these specific requirements are not exclusive or dispositive. The Court then applied the flexible three-step test of the amendment and determined that the expert's testimony was sufficiently reliable to be admissible. The Court concluded as follows:

> Sevart [the expert] is an experienced professional engineer, with academic as well as practical credentials. He has carefully studied the issue and written about it under the official auspices of a recognized professional organization. He himself has designed and built at least ten emergency stop systems for various types of hay balers and corn pickers and after examining the hay baler in question is of the opinion that it would be feasible to install such a system on that model. While he may be wrong, the value and weight of this opinion are proper matters for the jury to determine.

The Court's analysis of the expert testimony in *Blevins* is an excellent application of the amended Rule and of *Daubert* itself. The expert had a sufficient basis -- designing emergency stop systems on other hay balers and personally investigating the model in question. The expert used a reliable method -- extensive experience, training, and reasoning consistent with other professionals in his field. And he properly applied this experience to the facts of the case by determining whether there was any material difference between the machine at issue and those machines on which the expert had successfully installed emergency stop systems. The Court properly noted that an expert's testimony need not be perfect to be admissible; minimal inconsistencies and gaps in the expert's analysis can be addressed on cross-examination.

The second exemplary case under the amended *Rule 702* is *Lennon v. Norfolk and Western Ry. Co., 123 F. Supp. 2d 1143 (N.D. Ind. 2000)* . The plaintiff proffered an expert to testify that his multiple sclerosis resulted from having taken a nasty fall while on the job. The Court observed that *Rule 702* had been amended "in response to *Daubert*" and held that under the amended Rule, as under *Daubert*, the expert's testimony was not reliable enough to be admissible. The expert's proposition, that MS could be caused by a fall, was unsupported by most of the medical literature. The expert's reliance on a few case studies was an insufficient basis for his conclusion. The expert responded that he had performed a differential diagnosis on the plaintiff -- ruling out all causes for his MS other than trauma, and therefore concluding that trauma must have caused the MS. But the Court noted that a differential diagnosis is only reliable if it rules out all *known causes* of an injury but one, and only if the one cause left is in fact a *known cause* of the injury. In this case, the expert's assumption that trauma causes MS was just that -- an unsupported assumption. The analysis under *Lennon* is perfectly correct under *Daubert* and the amended *Rule 702*. It is also consistent with the pre-amendment cases decided under *Daubert*. n61

The gatekeeper function means that the Trial Court must exclude expert testimony that is nothing but hypothesis and speculation. If the expert in *Lennon* had been the plaintiff's doctor, it is extremely unlikely that he would have relied on a theory of "trauma causes MS" if that theory were material to treating the patient. And yet he was willing to testify to that theory at trial. As the Committee Note to the amended *Rule 702* states, the Court's gatekeeping duty under the amendment, as under *Daubert*, is to make certain that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." If the method is good enough for an expert in his professional life, it is good enough for a courtroom; but if an expert is willing to testify in court to a theory he would not use in his professional life, then that testimony should be excluded. It is to be hoped that the Courts will continue to apply the amended *Rule 702* with this helpful rule of thumb in mind. *Daubert* and *Kumho* are very much alive in the amended *Rule 702*.

The final exemplary case illustrates the proper treatment of experience-based experts under *Daubert* and the amended *Rule 702*. The defendant in *United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004)* (en banc), was charged with kidnaping. The victim was sexually assaulted. Forensic evidence failed to show any traces of the defendant's hair or bodily fluids on the victim. The defendant proffered a forensic expert who would have testified, on the basis of his experience in the field, that he would have expected to find some transfer of hairs or seminal fluid if a sexual assault had occurred. The Trial Court excluded the expert on the ground that he gave no explanation for his expectation, other than

a reference to his extensive experience in the field of forensic testing. The Court found no error in excluding the expert. It relied heavily on the Committee Note to the 2000 amendment to *Rule 702*, which indicates that the gatekeeping function requires scrutiny of experience-based experts. The Court noted first that experts can give helpful testimony on the basis of their experience -- a point recognized in the Committee Note to the 2000 amendment. The Court then proceeded as follows:

> Of course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express. ... Indeed, the Committee Note to the 2000 Amendments of *Rule 702* expressly says that, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.' " If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong. ... Exactly how reliability is evaluated may vary from case to case, but what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial. See *Fed.R.Evid. 702* advisory committee's note (2000 amends.) ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.").

In this case, the expert provided nothing other than an assertion based on his experience. Thus the testimony could not be admitted under *Daubert* and the amended *Rule 702*. The *Frazier* Court explained as follows:

> Tressel offered precious little in the way of a reliable foundation or basis for his opinion. After the government moved to exclude Tressel's expert testimony, the district court was obliged to exercise its gatekeeping role by determining whether Tressel provided a reliable foundation or basis for his opinion. When questioned specifically about the basis for his opinion, Tressel said his opinion was based on his experience, and on various texts in forensic investigation. However, even after repeated prompting, Tressel never explained just how his own experience, or the texts he mentioned, supported his "expectancy" opinion. Indeed, Tressel identified only a single investigation he had worked on in which hair evidence was recovered during the investigation of a serial rapist, and could suggest no study that had ever examined the rate of transfer of hair in sexual assault cases.
>
> ... Without knowing how frequently hair or seminal fluid is transferred during sexual conduct in similar cases -- whether derived from reliable studies or based on some quantification derived from his own experience -- it would be very difficult indeed for the district court (or for that matter the jury) to make even an informed assessment, let alone to verify that the recovery of hair or fluid evidence in this case "would be expected." Nor could the district court tell from Tressel's testimony whether his opinions had been subjected to peer review or, even, the percentage of cases in which his opinion had been erroneous. Simply put, Tressel did not offer any hard information concerning the rates of transfer of hair or fluids during sexual conduct.
>
> Since Tressel was relying solely or primarily on his experience, it remained the burden of the proponent of this testimony to explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case. Again, "[t]he court's gatekeeping function requires more than simply 'taking the expert's word for it.' " *Fed.R.Evid. 702* advisory committee's note (2000 amends.).
>
> Our review of this record leads us to the conclusion that the district court did not abuse its discretion in finding the absence of a sufficiently verifiable, quantitative basis for Tressel's opinion. As we have noted, the application of an abuse-of-discretion standard recognizes a range of possible conclusions that

> the trial judge may reach. In this case, we are satisfied that the district judge acted well within that range in finding an insufficient nexus between the experience proffered by the expert and the essential opinion propounded.

The three illustrative cases above can be used as a blueprint for assessing most if not all of the challenged expert testimony under the amended *Rule 702*.

[11] Expert Credibility and the Gatekeeper Function

Can a Trial Judge applying *Daubert* and the amended *Rule 702* exclude an expert on the ground that the judge finds the expert not *credible?* At first glance, it would seem impermissible for a Trial Judge to make a credibility assessment because it would encroach on the jury's role. An argument can be made that the Trial Judge should admit expert testimony whenever the expert's submission, if believed by the jury, proves by a preponderance that the expert had a sufficient foundation and reliably employed reliable methods. But the question is somewhat complicated because if the expert is untrustworthy, it may be that the expert did not in fact employ reliable methods, even though he or she says the method is reliable. This would mean that the jury would hear unreliable expert testimony, contrary to the principle of *Daubert*.

Judge Becker considered the complex relationship between expert credibility and reliability in *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)* . The Trial Judge in *Elcock* held a *Daubert* hearing and determined that one of the plaintiff's experts did not pass the reliability threshold. The Judge relied in part on the fact that the expert had engaged in criminal acts involving fraud; this fraudulent activity was not in any way related to the expert's professional life. Judge Becker found the Trial Court's reliance on these bad acts to be error, and stated that on remand "the District Court should not consider Copemann's likely credibility as a witness when assessing the reliability of his methods." Judge Becker added, however, the following important elaboration:

> We do not hold ... that a district court can never consider an expert witness's credibility in assessing the reliability of that expert's methodology under *Rule 702*. Such a general prohibition would be foreclosed by the language of *Rule 104(a)*, which delineates the district court's fact-finding responsibilities in the context of an *in limine* hearing on the *Daubert* reliability issue. Indeed, consider a case in which an expert witness, during a *Daubert* hearing, claims to have looked at the key data that informed his proffered methodology, while the opponent offers testimony suggesting that the expert had not in fact conducted such an examination. Under such a scenario, a district court would necessarily have to address and resolve the credibility issue raised by the conflicting testimony in order to arrive at a conclusion regarding the reliability of the methodology at issue. We therefore recognize that, under certain circumstances, a district court, in order to discharge its fact-finding responsibility under *Rule 104(a)*, may need to evaluate an expert's general credibility as part of the *Rule 702* reliability inquiry.
>
> On the other hand, we believe that a district court's fact-finding role under *Rule 104(a)* is circumscribed in the *Daubert* reliability context. Although *Daubert* assigns to the district court a preliminary gatekeeping function -- requiring the court to act as a specialized fact-finder in determining whether the methodology relied upon by an expert witness is reliable -- it does not necessarily follow that the court should be given free rein to employ its assessment of an expert witness's general credibility in making the *Rule 702* reliability determination. To conclude otherwise would be to permit the district court, acting in its capacity as a *Daubert* gatekeeper, to improperly impinge on the province of the ultimate fact-finder, to whom issues concerning the general credibility of witnesses are ordinarily reserved.

Judge Becker noted that the relationship between evidence bearing on an expert witness's credibility and a court's reliability analysis under *Daubert* "is subtle and nuanced, and does not readily admit to the drawing of bright lines."

However, as Judge Becker notes in *Elcock*, a distinction can be drawn between credibility evidence that bears directly on the expert's methods, and evidence of credibility that is more general. Judge Becker posited the following example:

> For instance, in situations involving an attempt to attack an expert witness's credibility on the basis of prior bad acts or convictions, at least one prominent evidence commentator has noted that an expert's prior dishonesty or misconduct should not qualify as an appropriate factor in assessing methodological reliability when the acts are wholly unrelated to the expert's use of a particular methodology, but that a court should take such dishonesty or misconduct into account when the nexus between the acts and the expert's methodology is more direct, e.g., when the prior dishonest acts involve fraud committed in connection with the earlier phases of a research project that serves as the foundation for the expert's proffered opinion. *See* Edward J. Imwinkelreid, *Trial Judges -- Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony*, *84 Marq. L. Rev. 1, 39 (2000)*. Under this approach, for instance, the fact that an expert witness falsely reported his salary on an income tax return has little if any bearing on the reliability of a diagnostic test he frequently employs, but the fact that the expert lied about whether his methodology had been subjected to peer review, or intentionally understated the test's known rates of error, is a different matter entirely.

Thus, if the attack on credibility has nothing to do with the expert's methods, the issue of credibility should be left to the jury -- the opponent can bring impeachment evidence before the jury by way of cross-examination as with any witness, but it has no part in the *Daubert* hearing. As applied to the facts of *Elcock*, the credibility evidence should not have been used by the Trial Court, because it related to acts of dishonesty and fraud completely outside the expert's professional life. On the other hand, if the expert in *Elcock* had previously falsified results in his professional life, this would have been proper information for the Trial Court to consider at the *Daubert* hearing.

[12] ***Daubert*** Analysis and Summary Judgment

Should the gatekeeper standards of *Daubert* apply in the same way on summary judgment as they apply at trial? The best discussion of this question is found in *Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997)* , in which the Court addressed the plaintiff's argument that a *Daubert* analysis is improper in the context of summary judgment:

> The plaintiff posits that *Daubert* is strictly a time-of-trial phenomenon. She is wrong. The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert*'s threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment. See *Cavallo v. Star Enter., 100 F.3d 1150, 1159 (4th Cir. 1996)* ; *Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297-99 (8th Cir. 1996)* ; *Claar v. Burlington N. R.R., 29 F.3d 499, 502-05 (9th Cir. 1994)* ; *Porter v. Whitehall Lab., Inc., 9 F.3d 607, 612, 616-17 (7th Cir. 1993)* .

However, the Court cautioned against applying the gatekeeper function too rigorously when deciding a summary judgment motion. The Court explained as follows:

> The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. Voir dire is an extremely helpful device in evaluating proffered expert testimony, and this device is not readily available in the course of summary judgment proceedings. Moreover, given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the

summary judgment stage.

> We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious -- except when defects are obvious on the face of a proffer -- not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

As the *Cortes-Irizarry* Court notes, the record on summary judgment is ordinarily insufficient for a conscientious *Daubert* determination. It is only where the expert's affidavit is purely conclusory and speculative that the Trial Court would have enough confidence to reject the expert testimony as insufficiently reliable at such an early stage of the proceedings.

Of course it is possible for the Trial Court to speed up the *Daubert* determination by essentially requiring a full presentation of the expert testimony, and rebuttal, at the summary judgment stage. Courts have displayed considerable ingenuity in devising ways in which an adequate record can be developed so as to permit *Daubert* rulings to be made in conjunction with motions for summary judgment. See, e.g., *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994)* (discussing the use of *in limine* hearings); *Claar v. Burlington N. R.R., 29 F.3d 499, 502-05 (9th Cir. 1994)* (discussing the District Court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions). The problem with these methods is that they may result in a trial before the trial. As the *Cortes-Irizarry* Court put it: "We do not in any way disparage such practices; we merely warn that the game sometimes will not be worth the candle."

[13] Pre-*Daubert* Cases

Before the Supreme Court in *Daubert* established its flexible test for determining the reliability of expert testimony, several federal circuits had already rejected *Frye* in favor of a more permissive and flexible approach to admissibility. The *Daubert* Court relied on many of these cases, especially from the Third Circuit. Thus, the cases that had rejected the *Frye* test before *Daubert* are still good authority after *Daubert;* indeed, they represent helpful, concrete applications of the flexible reliability-based approach to scientific expert testimony. n62 Of course they remain good law under the amended *Rule 702*, because that amendment simply clarifies and codifies the *Daubert* standard.

The Annotations to this Rule continue to include pre-*Daubert* cases that applied a flexible, reliability-based approach to scientific expert testimony. However, we have deleted the cases that relied solely on "general acceptance," as they have now been repudiated by *Daubert*. We have also deleted the cases that held that the *Daubert* gatekeeping function is inapplicable to non-scientific expert testimony. Those cases have been repudiated by the Supreme Court in *Kumho, supra* , and by the amendment to *Rule 702*.

[14] Peer Review

It is interesting to note that several of the amici in *Daubert* argued that peer review was not a very effective means of determining the reliability of scientific expert testimony. The amici reasoned that peer review is only as good as the reviewer, and that professional experts are now creating their own peer-reviewed journals to benefit from the deference given by Courts to peer review and publication. n63 The *Daubert* Court, however, rejected these concerns. It stated that "submission to the scrutiny of the scientific community is a component of 'good science' " and is highly relevant, though not dispositive to reliability. Of course, even the amici who criticized peer review did not reject it entirely as a legal standard -- to do so would remove an incentive for an expert to publish his or her opinions before trial.

However, it must be remembered that peer review is not an absolute requirement for admissibility after *Daubert*. For one thing, the expert's research may be too particularized to be publishable. If an expert researches the water flow in a particular aquifer in Kansas, it is unlikely that there is much of a market for publication. n64 Also, the expert's research

may concern a historical event that is no longer of much interest to the publication world. Thus, in *Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)* , an expert testified on the basis of his research that the drug Depo-Provera caused birth defects. The research had not been peer reviewed, but the Court found that this was of no moment, because Depo-Provera had been taken off the market several years earlier, and thus there would be "no reason in the world" to publish those findings.

One thing is clear -- peer review means review by fellow experts. In *Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996)* , the expert made the novel argument that his research had been peer reviewed because he had already testified about it in several Court actions. The Court understandably rejected the argument that review of an expert's methodology by other Courts could constitute "peer review" within the meaning of *Daubert*.

[15] Judge and Jury Functions

In the past, cries have been heard that experts usurp the function of the jury. Under *Rule 702* the expert may be used as an advisor to the jury, much like a consultant might advise a business so that the jury can benefit far more from the special knowledge or training of the expert than it has in the past where the expert was simply asked to give one conclusory opinion to one extended hypothetical question. Of course, if the expert does intrude on areas left for the jury -- such as the credibility of a witness -- the Trial Judge should exclude the testimony as unhelpful. n65 Conversely, if the expert is called simply to give an opinion on the applicable law, he should be excluded as intruding on the *Judge's* role. n66

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* (noting that cross-examination, rather than exclusion, is the correct means of dealing with "shaky" expert testimony); *Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990)* ("doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility.").

(n2)Footnote 2. See, e.g., *Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995)* (finding no error in permitting a former Miami police chief to testify that motorcycle crash guards -- which were lacking on the motorcycle used by the plaintiff -- are effective in reducing injuries; while the witness had no scientific or engineering expertise in motorcycle design, he had been on the police motor squad for nine years and had investigated hundreds of motorcycle accidents).

(n3)Footnote 3. See, e.g., *United States v. Romero, 57 F.3d 565 (7th Cir. 1995)* (expert testimony of a narcotics agent concerning the amount and value of cocaine, the significance of its packaging, and the use of code words, was properly permitted: "our society has not progressed (or rather, descended) to the point where the tools of the drug trade are familiar to all"); *United States v. Saulter, 60 F.3d 270 (7th Cir. 1995)* (it was proper for a law enforcement agent to testify to the process of manufacturing crack; this subject matter was "likely beyond the ken of the average juror"); *United States v. Onumonu, 967 F.2d 782 (2d Cir. 1992)* (expert testimony about the profits that could be made by diamond smuggling through the use of internal carriers was erroneously excluded as unhelpful, because the topic was certainly esoteric and counterintuitive enough to be beyond the ordinary understanding of some jurors; therefore, it met the minimal standards of helpfulness set forth in *Rule 702*).

(n4)Footnote 4. See, e.g., *United States v. Fuentes-Cariaga, 209 F.3d 1140 (9th Cir. 2000)* (no error to preclude expert testimony from a law enforcement officer that a driver's nervousness at a border crossing is not indicative of guilt; the nervousness of drivers stopped at the border is within the ordinary understanding of jurors); *Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995)* (expert testimony was not necessary to establish a standard of care for forklift operation: "[t]he operation of a forklift involves simple principles of balance well within the common knowledge of lay jurors"); *Green v. Kinney Shoe Corp., 715 F. Supp. 1122 (D.D.C. 1989)* (it should be clear to any person that a subjective promoting process could be used to hide discriminatory intent; accordingly, expert testimony to that effect would not be helpful: "Indeed, this kind of argument may be made, based on the evidence, by lawyers in

closing argument.").

(n5)Footnote 5. *Judge Becker, in United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999)* , draws a similar line between helpful expert testimony and testimony that tells the jurors something they can figure out for themselves. In *Gibbs*, a law enforcement expert testified to the meaning of conversations between members of a drug conspiracy. The expert testified that "jawn" meant cocaine, that to "hit" someone meant to page them on their beeper, and that a "quarter" meant $2500. Judge Becker found this testimony permissible because these terms were not within the ordinary understanding of jurors, and the expert's translation was therefore helpful. However, the expert also testified that "tonight is the night" was a reference to the fact that two coconspirators were going to take part in a particular mission that night. Judge Becker found that this testimony was erroneously (though harmlessly) admitted, because " 'tonight is the night' contains no intrinsic code that a jury would be unable to understand." See also *Peters v. Five Star Marine Serv., 898 F.2d 448 (5th Cir. 1990)* (a maritime expert was properly prohibited from testifying that it was unreasonable for an employer to instruct his employee to manually move heavy equipment on the deck of a boat during rough seas, and that spilled diesel fuel had made the deck slippery: "The trial judge correctly decided that the jury could adeptly assess this situation using only their common experience and knowledge. Expert testimony was unnecessary, and thus the decision to exclude the testimony was within the discretion of the trial judge."). Compare *Carroll v. Otis Elev. Co., 896 F.2d 210 (7th Cir. 1990)* , where expert testimony that the color red attracts children, that a covered stop button is less accessible to children than an uncovered one, and that the more difficult a button is to push, the less readily it is activated by a small child, was held properly admitted by the Trial Court:

> While it is true that one needn't be B.F. Skinner to know that brightly colored objects are attractive to small children and that covered buttons or those with significant resistance are more difficult to actuate by little hands, given our liberal federal standard, the trial court was not manifestly erroneous in admitting this testimony.

(n6)Footnote 6. See also *United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991)* (testimony that drug dealers force prospective buyers to use drugs at gunpoint was found not helpful since most New York jurors would figure this to be the case).

(n7)Footnote 7. See also *Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005)* (expert testimony that police officer must have been telling the truth about the incident in which he shot an arrestee was erroneously admitted; the Court noted that it had "consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under *Rule 702*"; the expert's statements "essentially instructed the jury as to an ultimate determination that was exclusively within its province."). Compare *United States v. Saulter, 60 F.3d 270 (7th Cir. 1995)* (finding no error when a law enforcement agent testified to the process of manufacturing crack; however, the government was warned not to call law enforcement agents as experts simply to bolster the credibility of a government fact-witness; in this case the expert was not called "solely to corroborate" the testimony of the star government witness).

(n8)Footnote 8. See, e.g., *Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998)* (error to exclude expert witness on vocational rehabilitation as insufficiently qualified; the witness had no academic training in the field, but he had significant practical experience through his employment with disabled individuals and was familiar with the literature in the field; the Court stated that "ordinarily an otherwise qualified witness is not disqualified merely because of a lack of academic training" and that the witness had "substantially more knowledge than an average lay person regarding employment opportunities for disabled individuals"); *Friendship Heights Assoc. v. Vlastimil Koubek, 785 F.2d 1154 (4th Cir. 1986)* (an expert was not unqualified to render an opinion on the cause of paint delamination merely because she lacked practical experience, where she was a materials scientist and thus qualified on the basis of her education).

(n9)Footnote 9. See, e.g., *Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994)* (an expert could testify to principles on the basis of training with no experience, but testimony as to the effect of applying those principles requires

a basis in experience). See also *Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984)* (a police officer who arrived at an accident scene was qualified to give an opinion concerning the cause of the accident, since he had investigated 600 accidents); *Havens Steel Co. v. Randolph Eng'g Co., 613 F. Supp. 514 (W.D. Mo. 1985)* (a professional engineer who had never engaged in studies nor had any experience in determining decreased worker efficiency as a result of overtime was not qualified to render an opinion on this matter).

(n10)Footnote 10. See G. Joseph & S. Saltzburg, Evidence in America § 51.3 (Courts have made it clear that "trial judges are not to demand that the proffered expert possess the highest possible credentials or skills, or be the most qualified of all conceivable experts.").

(n11)Footnote 11. See, e.g., *Ellis v. K-Lan Co., 695 F.2d 157 (5th Cir. 1983)* (an expert's lack of familiarity with a statutory standard affects the weight and not the admissibility of his testimony); *Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990)* (testimony by a mechanical engineer that an eyeguard would protect eyes from injury was properly admitted even though the expert had no medical expertise: "Bell's self-acknowledged lack of medical expertise went to the weight rather than to the admissibility of his opinion."); *Knight v. Otis Elev., 596 F.2d 84 (3d Cir. 1979)* (consulting chemist and engineer was qualified to render an opinion concerning the design and manufacture of elevators; inexperience in these areas goes to weight, not admissibility).

(n12)Footnote 12. See, e.g., *United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983)* (doctor of osteopathy is qualified to testify respecting the defendant's competence to stand trial, where he had received one year training in psychiatry, even though he had never published or researched on such matters).

(n13)Footnote 13. See, e.g., *In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1267, 1279 (E.D.N.Y. 1985)* : A doctor's opening remark at his deposition, wondering who was going to take care of his fees in the case, does not render him unqualified:

> The Federal Rules of Evidence assume that rigorous cross-examination will alleviate concern about expert testimony that is contradictory or overly influenced by the prospect of monetary gain. The jury, not the judge, decides whether these considerations have so tainted an expert's opinion as to make it unworthy of belief.

See also *Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988)* (witness is not to be disqualified merely because he is a "professional expert," especially since this fact can be brought out on cross-examination).

(n14)Footnote 14. See, e.g., *Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996)* (the plaintiff was qualified to project lost future profits in light of 15 years' experience); *Rodriguez v. Pacificare of Tex., Inc., 980 F.2d 1014 (5th Cir. 1993)* (no abuse of discretion in accepting the party-physician's affidavit as an expert in his own case, where the relevant qualifying criteria were satisfied); *Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988)* (the plaintiff was properly permitted to testify as an expert concerning his economic losses).

(n15)Footnote 15. See, e.g., *Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996)* (the Trial Judge properly permitted the Chief Executive Officer of the cigarette manufacturer, who held a Ph.D. in organic chemistry and had published a number of scientific articles, to testify as to whether a micronite filter was likely to have released asbestos fibers in the course of smoking; a witness need not be a "disinterested" expert witness in order to testify; the jury was able to weigh the witness' interest as CEO in assessing his testimony).

(n16)Footnote 16. See, e.g., *Lifewise Master Funding v. Telebank, 374 F.3d 917 (10th Cir. 2004)* (no error in excluding proffered expert testimony on damages; the witness had no familiarity, knowledge or experience with damages analysis and could not explain how his damages model worked).

(n17)Footnote 17. See also *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d 1169 (1st Cir. 1992)* (no

error in excluding testimony concerning mechanical defects in a crane; the witness was a civil, rather than mechanical, engineer with no experience or training regarding the design and manufacture of cranes, and he had a "hired gun" background as an instant expert in an astonishing number of other areas that suggested he would not possess the professional safeguards ensuring objectivity); *Andrews v. Metro N. Commuter R.R., 882 F.2d 705 (2d Cir. 1989)* (the testimony of a self-described "forensic engineer" in a railroad accident case should have been excluded where the engineer had no experience in railroading, and was nothing more than "an inexperienced layman posing as a railroad expert").

(n18)Footnote 18. See also *Wilson v. Woods, 163 F.3d 935 (5th Cir. 1999)* (no error to exclude expert witness on automobile accident reconstruction; the witness was a college teacher, but he had never taught a course concerning accident reconstruction; he had no degree or certification in the field; he had never conducted any studies or experiments in the field; he did not take any measurements or collect any data in this case, having relied only on publicly accessible data published by the government; and he was unable to demonstrate how his training as an engineer qualified him to testify to principles of accident reconstruction); *United States v. Williams, 212 F.3d 1305 (D.C. Cir. 2000)* (error to permit police officer to testify as an expert that it is common for people who use drugs to carry a gun for protection; the officer's experience was limited to fewer than a dozen arrests involving firearms, and this was "not sufficient grounding" to qualify him as an expert). Compare *United States v. Robertson, 387 F.3d 702 (8th Cir. 2004)* (law enforcement agent was sufficiently qualified to testify that the amount of drugs possessed by the defendant was a "distribution amount"; the officer was a ten-year veteran, he had attended a course sponsored by the DEA, and he gathered intelligence on the local narcotics trade as part of his daily routine).

(n19)Footnote 19. See, e.g., *Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358 (5th Cir. 2000)* (in an action for infringement and misappropriation of trade secrets regarding offshore marine cranes, there was no error in excluding expert testimony regarding the defendant's profits from infringing activity; the expert had substantial experience in the marine crane industry, but he had no experience or training as an accountant, and he did not conduct any independent examination into the defendant's sales figures); *Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998)* (ceramics expert testified that a grinding wheel was defectively manufactured and also that the product warnings were inadequate; while the expert was qualified to testify about a manufacturing defect, this did not qualify him to testify about the adequacy of warnings).

(n20)Footnote 20. See, e.g., *Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997)* (an electromechanical engineer was not qualified to testify that a pavement profiler was defective because its back-up alarm was not loud enough to alert crew workers, due to the human factors phenomenon of "habituation" to repetitive sounds in the workplace); *Hardin v. Ski Venture, Inc., 50 F.3d 1291 (4th Cir. 1995)* (expert on ski accidents was not qualified to testify about the principles of snowmaking). See also *Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994)* (testimony that a police department failed to provide sufficient training to officers concerning domestic violence cases was properly excluded; the witness's doctorate in sociology was "a credential that does not in itself describe any specific body of scientific or technical expertise pertinent to this case").

(n21)Footnote 21. See, e.g., *United States v. Wilson, 798 F.2d 509 (1st Cir. 1986)* (the Trial Court properly prohibited an expert from testifying, where the expert was expected to answer hypothetical questions unsupported by facts); *Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986)* (hypothetical questions posed to an expert without personal knowledge must assume a fair, undistorted collection of facts).

(n22)Footnote 22. See Lacey, *Scientific Evidence*, *24 Jurimetrics J. 254 (1984)* (*Frye* jurisdictions will always lag behind advances in science).

(n23)Footnote 23. See generally *United States v. Downing, 753 F.2d 1224 (3d Cir. 1985)* (rejecting *Frye* on policy grounds and collecting authorities).

(n24)Footnote 24. See, e.g., *Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993)* (an expert

testified to the value of properties by using a "discounted cash flow analysis"; he relied solely on historical cash flows, rather than potential cash flows; after *Daubert*, this testimony was improperly admitted, because the expert "conceded that he did not employ the methodology that experts in valuation find essential"; the Trial Judge erred in failing to conduct a "preliminary assessment" of methodology before allowing the expert to testify).

(n25)Footnote 25. See, e.g., *Cabrera v. Cordis Corp., 134 F.3d 1418 (9th Cir. 1998)* (expert testimony properly excluded where expert relied on a testing procedure that could not be replicated, even by the expert, and where the expert could not document how his testing procedure was developed).

(n26)Footnote 26. The Court in *Daubert* specifically stated that expert testimony should be more strictly scrutinized under *Rule 403* than other forms of testimony. See the discussion on this point in the Editorial Explanatory Comment to *Rule 403*, *§ 403.02[13]*.

(n27)Footnote 27. In casting doubt on research conducted in anticipation of litigation, the *Daubert on remand* Court is referring to research on issues of general, as opposed to specific, causation. In a toxic tort case, the plaintiff must show both that the toxic substance causes the harm suffered by the plaintiff (the issue of general causation), and that the toxic substance actually did cause the plaintiff's harm (the issue of specific causation). Thus, even if it can be proved that Bendectin causes limb reduction, a plaintiff loses if his mother did not take Bendectin, or took some other substance that caused the limb reduction, or if a genetic defect caused the limb reduction. *Daubert on remand* puts a red flag on research into general causation that is conducted in anticipation of litigation. But an expert cannot be expected to conduct research on the cause of a particular plaintiff's injury outside the realm of litigation. It is only when the plaintiff discovers the injury that research into causation would begin, and it is also at that very point that litigation is anticipated. Indeed, every treating doctor who testifies to the plaintiff's injuries can be said to conduct her research in anticipation of litigation.

(n28)Footnote 28. The Court in *Daubert* did state that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." *509 U.S. at 595* . Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)* . If an expert relies on trusted methods and yet comes to a conclusion clearly at odds with logic or reality, the Trial Judge can exclude the testimony under the assumption that the conclusion was reached by a faulty application of the methods. See, e.g., *In re TMI Litig., 193 F.3d 613 (3d Cir. 1999)* , *amended 199 F.3d 158 (3d Cir. 2000)* (an expert who estimated radiation exposure at Three Mile Island employed reliable methods; however, the expert's testimony was properly excluded because his conclusion was that the level of radiation was substantial enough to kill a large number of people, when in fact no fatalities occurred; while the *Daubert* focus is on methodology, not conclusions, expert testimony can be excluded if the conclusion is so out of line with reality that the methodology must have been improperly applied).

(n29)Footnote 29. See also *Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996)* ("When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied.").

(n30)Footnote 30. *Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)* (expert testimony that drug caused birth defects held admissible, in part on the basis of the expert's outstanding qualifications).

(n31)Footnote 31. See, e.g., *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)* (Trial Court erred in not holding a *Daubert* hearing, where damages expert relied on dubious methodology, and expert's qualifications were minimal: where qualifications are a "close call," this factor weighs in favor of excluding the testimony as unreliable).

(n32)Footnote 32. See also *Metabolife Int'l v. Wornick, 264 F.3d 832 (9th Cir. 2001)* ("animal studies are not per se inadmissible and should be subjected to substantive analysis, just like other scientific evidence"; however, "bridging the species gap may require sophisticated scientific technique and analysis (i.e., more than 'straight extrapolation') to

produce reliable and relevant results").

(n33)Footnote 33. Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After Daubert*, 78 Minn. L. Rev. 1387, 1409 (1994).

(n34)Footnote 34. See also *Schudel v. General Electric Co., 120 F.3d 991 (9th Cir. 1997)* (expert testimony on causation excluded where the expert based his opinion on studies involving organic solvents other than those involved in the case; moreover, the studies examined long-term exposure at low concentration, and short-term exposure at high concentration, rather than the short-term, moderate exposure suffered by the plaintiff; "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable.").

(n35)Footnote 35. See also *Mitchell v. Gencorp., 165 F.3d 778 (10th Cir. 1999)* (experts could not testify that the plaintiff's exposure to chemicals similar to benzene would affect the body in the same way as benzene; without "scientific data supporting their conclusions that chemicals similar to benzene cause the same problems as benzene, the analytical gap in the experts' testimony is simply too wide for the opinions to establish causation.").

(n36)Footnote 36. See also *Fuesting v. Zimmer, 421 F.3d 528 (7th Cir. 2005)* (expert in polymer science should not have been allowed to testify that a prosthetic knee failed because it was improperly sterilized; expert did not "bridge the analytical gap" between his principles of basic polymer science and "his complex conclusions").

(n37)Footnote 37. See also *Casey v. Ohio Med. Prods., 877 F. Supp. 1380 (N.D. Cal. 1995)* (granting summary judgment for the defendant in a case in which the plaintiff alleged that he contracted hepatitis shortly after his exposure to halothane; the expert relied solely on anecdotal evidence, and this was not sufficient scientific support for the expert's conclusion on causation).

(n38)Footnote 38. See also *Schmaltz v. Norfolk & W. Ry., 878 F. Supp. 1119 (N.D. Ill. 1995)* ("It is well-settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method.").

(n39)Footnote 39. *Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999)* (abuse of discretion to exclude the testimony of a doctor who concluded that the plaintiffs' health problems were caused by exposure to benzene; the expert relied not only on the "strong temporal connection between the refinery workers' exposure to benzene and the onset of their symptoms" but also on extensive scientific literature establishing a connection between benzene and the symptoms suffered by the plaintiffs).

(n40)Footnote 40. See also *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)* ("If 50 people who eat at a restaurant one evening come down with food poisoning during the night, we can infer that the restaurant's food probably contained something unwholesome, even if none of the dishes is available for analysis.").

(n41)Footnote 41. See, e.g., *Cippolone v. Yale Indus. Prods., Inc., 202 F.3d 376 (1st Cir. 2000)* (suit alleging that the plaintiff injured his hand while working on a loading dock; expert testimony comparing the size of a person's hand while grasping an object, and the gap between a docklift and a catwalk where the injury occurred, was properly excluded; because the plaintiff was not grasping anything at the time of the accident, this testimony did not "fit" the facts of the case).

(n42)Footnote 42. See, e.g., *Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002)* (in an employment discrimination case, the plaintiff's statistician sufficiently controlled for confounding factors for expert testimony to be admissible; the expert's regression analysis "accounted for experience and seniority within the company" and "by tracking the employees over time, [the expert] "was able to control outside factors that may have contributed to women originally being placed in lower management positions).

(n43)Footnote 43. See also *Turner v. Iowa Fire Equipment Co., 229 F.3d 1202, 2000-2 Trade Cas. (CCH) P15900 (8th Cir. 2000)* (treating physician's testimony on causation was properly excluded where the doctor "did not

systematically rule out all other possible causes"; the doctor was "clearly more concerned with identifying and treating Delores' condition than he was with identifying the specific substances that caused her condition"; his conclusion on causation was simply an "afterthought" rather than the result of a proper differential diagnosis); *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)* (District Court erred in excluding the testimony of one doctor insofar as that testimony was based on the doctor's personal examination and review of the medical history of certain plaintiffs, knowledge of PCB exposure in the area at issue, and some consideration of possible alternative causes; however, where the doctor was unable to explain away any alternative causes, the District Court properly excluded the doctor's testimony).

(n44)Footnote 44. See, e.g., *People Who Care v. Rockford Board of Education, 111 F.3d 528, 537 (7th Cir. 1997)* (holding that expert testimony finding discrimination to be the cause of underperformance of minority students was unreliable under *Daubert;* the expert made no attempt to exclude other obvious alternative causes: "A statistical study is not inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest. But a statistical study that fails to correct for salient explanatory variables, or even to make the most elementary comparisons, has no value as causal explanation and is therefore inadmissible in a federal court.").

(n45)Footnote 45. Reference Manual on Scientific Evidence 163 (Fed. Jud. Ctr. 1994).

(n46)Footnote 46. See also *Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999)* :

> A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation. See *In re Paoli R.R. Yard PCB Litig., 35 F.3d at 758-61* . However, "[a] medical expert's causation conclusion should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness." *Heller, 167 F.3d at 156* . The alternative causes suggested by a defendant "affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony," *id. at 157* , unless the expert can offer "*no* explanation for why she has concluded [an alternative cause offered by the opposing party] was not the sole cause," *id. at 156* . See also *Kannankeril, 128 F.3d at 808* (explaining that "[i]n attacking the differential diagnosis performed by the plaintiff's expert, the defendant may point to a plausible cause of the plaintiff's illness other than the defendant's actions" and "[i]t then becomes necessary for the plaintiff's experts to offer a good explanation as to why his or her conclusion remains reliable"); *In re Paoli R.R. Yard PCB Litig., 35 F.3d at 764-65* (recognizing that failure to account for all possible causes does not render expert opinion based on differential diagnosis inadmissible; only if expert utterly fails to consider alternative causes or fails to explain why the opinion remains sound in light of alternative causes suggested by the opposing party is expert's opinion unreliable for failure to account for all potential causes).

(n47)Footnote 47. See also *Hardyman v. Norfolk & Western Ry. Co., 243 F.3d 255 (6th Cir. 2001)* (Trial Judge erred in excluding expert testimony based solely on a differential diagnosis)

(n48)Footnote 48. See also *Meister v. Medical Engineering Corp., 267 F.3d 1123 (D.C. Cir. 2001)* (expert's opinion based on differential diagnosis in a breast implant case was unreliable under *Daubert*: "That methodology rests on the assumption that whatever factors remain after other alternative causes have been eliminated is at least capable of causing the disease in question" and here there was no scientific basis for "ruling in" silicone as a possible cause of the plaintiff's injuries).

(n49)Footnote 49. See, e.g., *Brooks v. Outboard Marine Corp., 234 F.3d 89 (2d Cir. 2000)* (the plaintiff's hand was amputated when it was caught in the propeller of an outboard motor; there was no error in the exclusion of the expert's testimony on product design; the expert had never seen the actual boat or motor, had never spoken to the people involved in the accident, was unaware of the dimensions of the boat or the placement of the seats near the motor, and

had never attempted to reconstruct the accident or test his theory); *Clark v. Takata Corp., 192 F.3d 750 (7th Cir. 1999)* (expert's testimony that the plaintiff's injuries were caused by a seat belt failure was properly excluded; the expert's testimony was based only on a visual inspection of the vehicle and the expert's experience; the expert conducted no tests, relied on no studies, and proffered no explanation of his methodology or of how his experienced led to his conclusion: "Where the expert offers nothing more than a 'bottom line' conclusion, he does not assist the trier of fact."); *Kirstein v. Parks Corp., 159 F.3d 1065 (7th Cir. 1998)* (the plaintiff claimed that a combination of two household products caused him to suffer severe burns when he used them to remove linoleum; the Trial Court properly excluded the plaintiff's expert in industrial and product safety, because the expert "did no testing on these products, either alone or in combination. Neither did he provide studies which employed such testing. In short, Dr. Nelson offered only speculation.").

(n50)Footnote 50. See also *Bitler v. A.O. Smith Corp., 400 F.3d 1227 (10th Cir. 2004)* (expert opinion as to cause of explosion was properly permitted; the fact that the expert did not test his theory was not dispositive because the reliability of the expert's methods were not in dispute; the Court distinguished this case from one in which "an expert proposes a theory that modifies otherwise well-established knowledge about regularly occurring phenomena, such as the normal ignition temperature of wood," and found in such a case "the importance of testing as a factor in determining reliability to be at its highest."). Compare *United States v. Gabaldon, 389 F.3d 1090 (10th Cir. 2004)* (in a murder case, it was no error to exclude the testimony of an accident reconstructionist, who concluded that the internal geometry of a car would have made it difficult for the defendant to reach the victim with enough power to inflict the blows that contributed to her death: the expert conceded that his theory could have been tested by placing defendant in the car and taking measurements, but no such testing was done).

(n51)Footnote 51. See also *In re TMI Litig., 199 F.3d 158 (3d Cir. 1999)* (no abuse of discretion in excluding an expert who based his opinion on radiation exposure on his own model; the expert's hydraulic model was unreliable because the expert rejected, without explanation, generally accepted computer models that track radiation dispersion, and the expert's own model was untested and subjective).

(n52)Footnote 52. See, e.g., *Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996)* (testimony from defense experts that radiation caused the plaintiff's mesothelioma was properly admitted; one expert was a pathologist and the other was a specialist in occupational lung disease; both relied on medical literature, their knowledge of mesothelioma and its causes, animal studies, and the plaintiff's medical history: "As required by *Daubert*, their procedures for examining the facts presented to them and their own research methodologies were based on the methods of science and did not reveal opinion based merely on their own subjective beliefs."); *Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir. 1995)* (the plaintiff claimed that he contracted manganese encephalopathy while at the defendant's worksite; the plaintiff's doctor conducted a "PET" scan of the plaintiff's brain, and used this to exclude alternative sources of the plaintiff's condition, such as Alzheimer's disease; he concluded that the PET scan result was consistent with manganese encephalopathy; this testimony was properly admitted under *Daubert:* "In determining the cause of a person's injuries, it is relevant that other possible sources of his injuries, argued for by the defense counsel, have been ruled out by his treating physicians. Indeed, ruling out alternative explanations for injuries is a valid medical method."). Importantly, the Court in *Hose* noted that "the fact that Hose's treating physician ordered the PET scan prior to the initiation of litigation is another important indication that this technique is scientifically valid."

(n53)Footnote 53. *Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996)* (holding expert testimony properly excluded where the expert offered "neither a theoretical reason to believe that wearing a nicotine patch for three days ... could precipitate a heart attack, or any experimental, statistical or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on such a theory"). See also *Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998)* (expert's conclusions on school segregation should have been rejected because the expert conceded that he had not brought the same scientific methodology and intellectual rigor to his analysis as he would in his out-of-court-research); *McMahon v. Bunn-O-Matic, Corp., 150 F.3d 651 (7th Cir. 1998)* (expert's unsupported conclusion was properly excluded: "No engineer would put such an unsupported conclusion in a scholarly article. [The expert] would not accept it in a submission to the Journal of Biomechanical Engineering, which he edits;

we doubt that he would accept it from a student in a term paper. Why, then, should courts pay it any heed?").

(n54)Footnote 54. See also *Jahn v. Equine Services, PSC, 233 F.3d 382 (6th Cir. 2000)* (testimony could not be excluded under *Daubert* simply because the expert was not absolutely certain of his results: "*Daubert* and *Rule 702* require only that the expert testimony be derived from inferences based on a scientific method and that those inferences be derived from the facts of the case at hand, not that they know answers to all the questions a case presents -- even to the most fundamental questions.").

(n55)Footnote 55. See also *Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)* ("Whether the expert would opine on economic valuation, advertising psychology, or engineering, application of the *Daubert* factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers.").

(n56)Footnote 56. In this regard, the opinion in *Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993)* , is instructive. In this action for securities fraud, the plaintiff's expert, an accountant, was allowed to testify that a Peat Marwick audit had improperly certified that property interests had a certain value when in fact they were worth much less. To reach this conclusion, the accountant used a discounted cash flow analysis, by which he assessed value solely on the basis of net, rather than potential, cash flow. Reversing a judgment for the plaintiff, the Court held that the Trial Court abused its discretion in admitting the expert's valuation, because the expert's methodology was faulty: by failing to consider potential cash flow, the expert's methodology would lead to the conclusion that "raw land is worthless and that a large office building in the final stages of construction also has no value even though it is fully leased out and could be sold for a hundred million dollars." The Seventh Circuit held that the expert's testimony lacked validity under *Daubert*. It was patently inconsistent with well-accepted accounting principles, and it was illogical to boot. The accountant would not have lasted long in his profession if he employed such a goofy methodology for clients outside the courtroom.

(n57)Footnote 57. *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)* .

(n58)Footnote 58. See, e.g., *United States v. Mamah, 332 F.3d 475 (7th Cir. 2003)* (expert testimony that the defendant likely gave a false confession was properly excluded because the experts did not have a sufficient basis to form a conclusion; experts relied on cultural practices that provided no link to their conclusion).

(n59)Footnote 59. See generally Brixen & Meis, *Codifying the "Daubert Trilogy": The Amendment to Federal Rule of Evidence 702* , 40 Jurimetrics 527 (2000) ("The amendment to *Rule 702* codifies existing case law interpreting the existing rule.").

(n60)Footnote 60. See, e.g., *Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001)* (the language added by the amendment "is consistent with the gatekeeping function articulated in *Daubert*. The Advisory Committee Notes explain that no specific factors were articulated in the new rule because the factors mentioned in *Daubert* are neither exclusive, nor dispositive, and do not apply to every type of expert testimony. We are satisfied that the amendment to *Fed.R.Evid. 702* does not alter the standard for evaluating the admissibility of expert opinions in this case."); *Pappas v. Sony Electronics, Inc., 136 F. Supp. 2d 413 (W.D. Pa. 2000)* ("amended *Rule 702* does not effect a change in the application of *Daubert* in the Third Circuit").

(n61)Footnote 61. See, e.g., *Black v. Food Lion, 171 F.3d 308 (5th Cir. 1999)* (doctor's testimony that fibromyalgia syndrome was caused by a fall was inadmissible under *Daubert* and *Kumho*; the exact process that results in fibromyalgia or the factors that trigger the process remain unknown, so "no scientifically reliable conclusion on causation can be drawn" and no differential diagnosis can be conducted).

(n62)Footnote 62. See, e.g., *United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992)* (applying a reliability test and concluding that DNA identification testing is sufficiently reliable to be admissible under *Rule 702*; some of the specific factors to determine the reliability of a scientific technique are: potential rate of error; existence and maintenance of

standards; whether the method is employed carefully or whether it is subject to abuse; the existence of analogies to other types of scientific inquiries; and the risk of false positives as opposed to false negatives).

(n63)Footnote 63. See Brief of Amici Curiae Daryl E. Chubin, Ph.D., et al.; Brief of Carnegie Commission on Science, Technology and Government as Amicus Curiae in Support of Neither Party.

(n64)Footnote 64. See, e.g., *St. Martin v. Mobil Exploration & Production, 224 F.3d 402 (5th Cir. 2000)* (expert was properly permitted to testify that the defendant's activity had resulted in erosion to marshlands; the expert's failure to submit a peer reviewed publication was not dispositive because each marsh "will have different forces acting upon it, depending upon its specific surroundings" and therefore "a court could not rationally expect that a marshland expert would have published a peer-reviewed paper on each possible permutation of factors or each damaged area of marsh").

(n65)Footnote 65. See, e.g., *Westcott v. Crinklaw, 68 F.3d 1073 (8th Cir. 1995)* (in an excessive force case, the police officer called an expert witness who testified that the officer was suffering from post-traumatic stress syndrome when he made the statements, and that this syndrome may cause a person to make inaccurate and unreliable statements; admission of the expert's testimony was an abuse of discretion, because it directly addressed the credibility of the officer as a witness, and usurped the function of the jury; since the case turned on the accuracy of the officer's testimony, this improper bolstering was reversible error); *United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996)* (finding no error in excluding a defense psychiatric expert who would have testified that a former cult member -- and prosecution witness -- was a psychopath with no conception of the truth: "[e]xpert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility assessments"). Compare *United States v. Tsinnijinnie, 91 F.3d 1285 (9th Cir. 1996)* (in a child sex prosecution, there was no error when an expert on child sex abuse was permitted to testify about the timing of reports of sexual abuse by children: "The expert did not bolster the credibility of the victim. The expert testimony was offered only to explain why children may be intimidated by physical abuse and deterred from complaining against the abuser, sometimes for long periods of time. The testimony was not offered to prove that the defendant had physically abused the child, but to explain how, if such conduct occurs, it may affect children.").

(n66)Footnote 66. See, e.g., *CMI-Trading, Inc., v. Quantum Air, Inc., 98 F.3d 887 (6th Cir. 1996)* (in a commercial dispute on a promissory note, the question was whether the transaction between the parties was a loan transaction or a joint venture; expert testimony from a financial consultant, who would have concluded both that the parties intended to enter a joint venture, and that they had actually created a joint venture was properly excluded, because "the intent of the parties is an issue within the competence of the jury and expert opinion testimony will not assist the jury" and "the legal concepts of 'loan' and 'joint venture' are issues of law and are within the sole competence of the court; experts may not testify as to the legal effect of a contract.")

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 702 RULE 702

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702.03 Annotated Cases

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[1] Accident Reconstruction

Habecker v. Clark Equip. Co., 36 F.3d 278 (3d Cir. 1994) : The Court remanded a product liability action for wrongful death that was brought after the decedent was crushed by a forklift which fell from a ramp, but held there was no abuse of discretion in excluding testimony from the plaintiff's expert, who had attempted to simulate the accident. The expert's testimony did not "fit" with the facts of the case, as is required by *Daubert*, because the conditions of the simulation were far different from those existing at the time of the accident. Specifically, there was no attempt to replicate the velocity or the rearward movement of the forklift, the height of the fork was disregarded, and there was no operator in the forklift nor cargo on the fork during the purported simulation.

Guillory v. Domtar Indus. Inc., 95 F.3d 1320 (5th Cir. 1996) : The plaintiff was severely injured when a fork fell off a forklift and hit him on the head. The Court found no error in exclusion under *Daubert* of the defendant's expert, a mechanical engineer and specialist in accident reconstruction, because the expert would have testified on the basis of forklift models and exhibits that were not sufficiently similar to the forklift that caused the accident. The Trial Judge's gatekeeping role is to avoid "pure speculation": "Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all." See also *Barnes v. General Motors Corp., 547 F.2d 275 (5th Cir. 1977)* (holding it was error to allow the plaintiff's expert to testify about an experiment he conducted on another automobile under significantly different circumstances from those admittedly existing at the time of the accident at issue).

Clay v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000) : The Court affirmed a judgment for the estates of passengers in a Ford Bronco II who were killed in a rollover accident. The plaintiffs' expert had taught for 20 years in the fields of mechanical engineering, machine design, dynamics, engineering mechanics, and stress analysis; his consulting work involved accident reconstruction. Although he had never worked in the automobile industry, never previously tested a Bronco II, and had never published an article on vehicle handling and stability, the Court held that the expert's experience in analyzing "dynamics" was sufficient to support his opinion that the accident was caused by

design defects in the Bronco II. The Court noted that the expert had reviewed the police accident report, some depositions, and statements and photographs, and that the defendant's expert had reviewed similar material. Although it was not disqualifying that the plaintiff's expert did not visit the accident site until the day before he testified or that the expert had not tested his theories, this was "a close case," within the Trial Judge's discretion. The dissenting Judge disagreed that the case was even close and concluded that the Trial Judge had abdicated his gatekeeping function. In *Greenwell v. Boatwright, 184 F.3d 492 (6th Cir. 1999)* , a personal injury action arising from a collision between two trucks, the defendant's accident reconstruction expert testified that, on the basis of his analysis, eyewitness testimony about the accident was inaccurate. The Court held that the testimony regarding the credibility of eyewitness testimony was improper because it was beyond the scope of the witness' expertise, but its admission was harmless error. The Court found no error when the expert was permitted to express an opinion based on the physical evidence even though the factual basis was contradicted by some of the eyewitness testimony. The expert proffered a legitimate explanation for disregarding the eyewitness testimony, and because the factual underpinnings of his testimony were sound, his opinions were admissible. One Judge dissented. Although it reversed a plaintiffs' judgment in *Bauman v. Volkswagenwerk A.G.* n1 on another ground, the Court approved the introduction of expert testimony based on simulated reproductions of an accident and observed that in some cases expert testimony may be the only way to establish the defectiveness of a product.

Smith v. BMW No. Am., Inc., 308 F.3d 913 (8th Cir. 2002) : In an action alleging that failure of her car's air bag properly to deploy caused her severe injuries in an accident, the plaintiff proffered an accident reconstructionist to testify that the car's velocity was great enough that a properly functioning air bag would have deployed upon impact. The Trial Judge excluded the testimony on the ground that information that the witness put into a crash analysis program was fundamentally flawed, particularly his estimates of the principal direction of force and his displacement measurements, so the results were inherently unreliable. The Court found that the witness' estimate of the principal direction of force was based on all information obtainable and there was no basis for concluding that the estimate was unreliable. The Court concurred that the expert's failure to account for "free space" or "air gaps" in his frontal displacement measurements rendered his estimate unreliable, justifying exclusion of his conclusions. However, corrections provided by the defendant's accident reconstructionist meant that there was evidence before the Judge creating a genuine issue of material fact, so it was error to grant the defendant's summary judgment motion. In *Miles v. General Motors Corp., 262 F.3d 720 (8th Cir. 2001)* , the Court affirmed a judgment for a truck manufacturer sued by a motorcyclist who was injured in a collision with a truck, and upheld the admission of testimony by an engineer specializing in biomechanics and accident reconstruction. Although the plaintiff complained that, at the time of his deposition, the expert had not examined the x-rays of the plaintiff's leg, the motorcycle, the truck, or the accident scene, the Court noted that the expert had examined the police report, photographs of the scene, the plaintiff's medical records including reports that interpreted his x-rays, witness statements and depositions, and medical literature. Thus, the plaintiff's criticisms were a proper subject for cross-examination rather than a reason to exclude the testimony.

United States v. Gabaldon, 389 F.3d 1090 (10th Cir. 2004) : In the defendant's trial for murder and related offenses, the government contended that the defendant was sitting in the front passenger seat of his car, the victim was sitting behind the driver, and the defendant hit the victim with such force as to break bones in her face. The defendant proffered an accident reconstructionist, who would have testified that the internal geometry of the car would have made it difficult for the defendant to reach the victim with enough power to inflict the blows that contributed to her death. Affirming, the Court found no abuse of discretion in excluding the expert's testimony, as it lacked reliability under *Daubert*. The expert's opinion about the defendant's effective reach and ability to land forceful blows while holding on to the front seat back was "entirely conclusory and unsupported by any scientific evidence or reasoning." In *Robinson v. Missouri Pac. R.R., 16 F.3d 1083 (10th Cir. 1994)* , the Court affirmed a judgment for the plaintiffs in a wrongful death action arising out of a train's collision with a car, holding it was a close question, but no abuse of discretion, to admit a video animation illustrating the plaintiff's expert's theory about how the collision had occurred. The Court was bothered that the video showed the car angling toward the approach of the train and rotating at impact and spinning off

the tracks, since it was also possible that the train impaled the car on its front. The Court noted that although the physical phenomena of crash movements may be explained on scientific principles, "an argument can be made that it is outside scientific knowledge to opine in cases such as this one that a car struck at an angle will necessarily leave the railroad tracks on impact." In *Jackson v. Fletcher*, n2 the Court reversed a defendant's judgment in a case arising out of an auto-truck collision on the ground it was error to admit testimony based upon experiments conducted by the defendants' experts when the circumstances of the experiments were different from those of the accident.

[2] Accountants

Fund of Funds, Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314 (S.D.N.Y. 1982) : Ruling on posttrial motions in a securities fraud case brought by mutual funds against an accounting firm, the Court upheld the admission of expert testimony concerning standard accounting practices. The experts were experienced senior accounting partners who were able to tell the jury about industry-wide procedural guidelines.

Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993) : The Court reversed a judgment for investors who sued an accounting firm, holding, *inter alia*, that it was error to permit an accountant, who admitted that he did not employ the methodology that experts in the field find essential, to testify that the defendant violated various accounting standards.

Club Car, Inc. v. Club Car (Quebec) Import, Inc., 362 F.3d 775 (11th Cir. 2004) : Affirming a judgment for a manufacturer who sued a distributor for payments owed for goods delivered prior to the manufacturer's terminating the distribution arrangement, the Court upheld a ruling striking the testimony of the defendant's accounting expert who testified in support of counterclaims as to the defendant's damages. The expert relied upon gross sales and profit figures and failed to consider expenses normally incurred in generating income and profits. The Court found that the Judge reasonably concluded that the lost profit calculation was based on flawed methodology that was not accepted in the accounting community. In an antitrust action against five chemical companies alleging that the defendants engaged in a conspiracy to fix prices for repackaged chlorine, *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 1998-2 Trade Cas. (CCH) P72307 (11th Cir. 1998)* , the Court held it was an abuse of discretion to exclude testimony of an accountant proffered by the plaintiffs. The accountant properly calculated, compiled, and explained the costs borne and profits obtained by the defendants during the period of the alleged conspiracy; this information would assist the trier of fact to determine whether the defendants acted in a consciously parallel fashion. The accountant properly considered all pertinent costs, including material costs, labor costs, and insurance costs. While the accountant was not qualified to render opinions based on economic theory, the witness never did so in this case.

[3] Age

United States v. Katz, 178 F.3d 368 (5th Cir. 1999) : The defendant, charged with receiving child pornography, filed a motion to exclude all expert witness testimony purporting to determine the age of persons portrayed in the videotapes and computer files at issue on the basis of applying the "Tanner Scale" (which is a recognized scientific test for determining the age of postpubescent Caucasian females according to pubic hair and breast development). On interlocutory appeal, the Court held there was no abuse of discretion in excluding several of the computer images at issue, where the government witness' expertise was linked to the Tanner Scale method and he testified that the method was not scientifically useful in determining the age of the models depicted because the range of ages for each stage was too broad and extended beyond the critical age of 18.

[4] Animal Studies

Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001) : Metabolife, a manufacturer of herbal diet pills, brought a defamation action against a television station and a news reporter in response to the defendants' broadcast report that Metabolife was unsafe. The Trial Judge excluded opinions, which relied on animal studies conducted in Asia, by a Metabolife expert that the product was safe, on the grounds that animal studies are always inadmissible "due to the uncertainties in extrapolating from effects on mice and rats to humans," and the studies "took place outside the United States government's regulatory supervision." The Court reversed dismissal of the plaintiff's claims, holding that the Judge's reasons for rejecting the expert testimony were insufficient under *Daubert*. The Court held that "animal studies are not per se inadmissible and should be subjected to substantive analysis, just like other scientific evidence" and that in some circumstances animal studies can "provide useful data about human health." A remand was required for a more particularized gatekeeper assessment of the expert's testimony based on animal studies.

[5] Antitrust Violations

SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 1999-2 Trade Cas. (CCH) P72617 (1st Cir. 1999) : The Court affirmed summary judgment for the defendant in an antitrust action based on alleged monopolization of the market for computer maintenance and repair. A report by the plaintiff's expert that concluded DEC had a much greater share of the market than it should enjoy given low customer satisfaction did not provide evidence of DEC's monopoly power, since the opinions were based on highly suspect data and methodology. The expert had no customer satisfaction survey or cited sources to support his conclusions about DEC's customer satisfaction ratings, and there was no indication or consideration in his report of the validity of internal DEC documents, the interpretation of which provided the basis of his opinion.

Rossi v. Standard Roofing, Inc., 156 F.3d 452, 1998-2 Trade Cas. (CCH) P72274 (3d Cir. 1998) : In an antitrust action involving an alleged group boycott, the Court, reversing a summary judgment for some defendants and affirming as to others, held that an expert report was not too speculative to be admitted. Although the expert relied upon sales figures that the plaintiff achieved while working for a major national chain, the Court found that the plaintiff had a long track record and evidence that customers would patronize him regardless of his employer and that the industry had a strong "local accent." The expert made certain assumptions regarding sales and costs based upon the plaintiff's experience which the Court found were not too speculative or unreasonable to support an opinion, relying in part on the relaxed standard for proving damages of *Bigelow v. RKO Radio Pictures*. n3 In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1993-1 Trade Cas. (CCH) P70293 (3d Cir. 1993)* , the Court reversed a summary judgment in an antitrust case brought by a supermarket against rendering companies for restraint of trade. The plaintiffs offered economic testimony by experts who examined the pricing pattern of the defendants and concluded that there was no logical reason to support the disparities found, but the testimony was excluded at trial under *Rule 403*. The Court reasoned that the multiple regression analysis the experts used was reliable, their qualifications were unchallenged, and "if expert testimony survives the rigors of *Rules 702 and 703*, then *Rule 403* becomes an unlikely basis for exclusion, especially in the pretrial setting." Cross-examination would tend to ensure that jurors would not be misled by the expert testimony.

TFWS, Inc. v. Schaefer, 325 F.3d 234, 2003-1 Trade Cas. (CCH) P73991 (4th Cir. 2003) : A liquor retailer, pursuing an antitrust challenge to Maryland's statutory pricing scheme, argued that expert testimony suggesting that alcohol prices in the state are generally higher than in other states should not have been admitted. Although it vacated summary judgment for the defendant, the Court concluded that the argument really did not go to the reliability of the expert's work, which involved American Chamber of Commerce pricing data for metropolitan areas, a calculation of average prices, and cost of living adjustments. Rather, the argument went to the weight to be given the evidence, and there was no abuse of discretion in its admission.

In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 1999-2 Trade Cas. (CCH) P72576 (7th Cir. 1999) : The Court found it was error (but harmless) to exclude testimony from an economist on the ground that he had not studied the prescription drug industry in depth and had formulated his opinion after working on the case for only 40 hours. In the Court's view, the opinion that there is price discrimination in the prescription drug industry is one that such a distinguished economist should have been able to reach in even less time. In *Khan v. State Oil Co., 93 F.3d 1358, 1996-2 Trade Cas. (CCH) P71546 (7th Cir. 1996)* , the Court reversed summary judgment for the defendant in an antitrust case alleging vertical maximum price-fixing, holding it was error to exclude testimony from an economist for the plaintiff, where the expert's study satisfied professional norms for economists.

Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004) : The Court reversed a damage award in a Sherman Act suit by a limousine manufacturer against competitors and a vehicle manufacturer. It held that the defendants' conduct was not *per se* unreasonable and that the plaintiff's expert should have considered factors other than the defendants' conduct in a rule of reason analysis, rather than assuming the plaintiff's lost growth was a result of the defendants' conspiracy. The Court noted in a footnote that it did not foreclose the possibility that the plaintiff's expert could testify in a new trial if he formulated "a new opinion using the proper standard under a rule of reason analysis." In *Concord Board Corp. v. Brunswick Corp., 207 F.3d 1039, 2000-1 Trade Cas. (CCH) P72836 (8th Cir. 2000)* , the Court reversed a judgment for boat builders who brought an antitrust action against a stern drive engine manufacturer. The plaintiffs relied primarily on a Stanford University economics professor, who testified that the defendant had monopoly power in the stern drive market that enabled it to use its market share discount program to impose a "tax" on boat builders and dealers who chose to buy their engines from other manufacturers. The Court held it was error to admit the testimony, because it did not adequately "fit" the facts of the case. The expert's economic model "was not grounded in the economic reality" of the market and it "also failed to account for market events that both sides agreed were not related to any anticompetitive conduct." In *Bolt v. Halifax Hosp. Med. Center*, n4 the Court, reversing a judgment against a doctor who alleged that the revocation of his medical staff privileges was a violation of the antitrust laws, found it was error to exclude expert testimony by a physician who had examined two incidents upon which the hospitals relied in revoking the privileges. The expert had concluded that no reasonable medical practitioner would have reached the conclusions reached by the investigators and that the hospitals that relied upon their findings. The Court reasoned that evidence that common grounds for revocation were pretextual and that other grounds were baseless might be probative of a conspiracy. It would also have been an abuse of discretion to exclude the expert testimony under *Rule 403*, since the testimony was probative and no other evidence was reasonably available to the plaintiff.

Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1998-1 Trade Cas. (CCH) P72187 (9th Cir. 1998) : Gasoline retailers alleged that the defendant oil company had engaged in predatory pricing. Affirming summary judgment for the defendant, the Court held there was no inconsistency between a ruling that admitted testimony by the plaintiffs' expert witness and the summary judgment. The finding under *Daubert* that the expert's methodology was sound did not mean that his conclusions were correct and legally sufficient to create a question of material fact.

Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 2002-2 Trade Cas. (CCH) P73807 (10th Cir. 2002) : Affirming judgment as a matter of law granted for the defendant in an antitrust action between two software companies, the Court held there was no abuse of discretion when testimony by the plaintiffs' expert regarding the relevant market was excluded because he used unreliable data, did not understand computers or the computer market, did not use surveys revealing consumer preferences although he testified that the relevant market was determined by consumer purchasing patterns, did not calculate the cross-elasticity of demand to determine which products were substitutes, and did not address changes in the computer market.

Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 2003-2 Trade Cas. (CCH) P74158 (11th Cir. 2003) : Affirming summary judgment for the defendant cigarette manufacturers in an antitrust action by wholesalers, the Court

found no abuse of discretion in the exclusion of opinions by the plaintiffs' expert witness that the defendants engaged in an illegal price fixing conspiracy. The expert's opinions were of no assistance because he included conscious parallelism within his definition of collusion, and thus did not differentiate between legal and illegal pricing behavior. In an antitrust action against five chemical companies alleging that the defendants engaged in a conspiracy to fix prices for repackaged chlorine, *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 1998-2 Trade Cas. (CCH) P72307 (11th Cir. 1998)* , the Court held it was an abuse of discretion to exclude testimony of an accountant proffered by the plaintiffs. The accountant properly calculated, compiled, and explained the costs borne and profits obtained by the defendants during the period of the alleged conspiracy, and properly considered all pertinent costs; this information would assist the trier of fact to determine whether the defendants acted in a consciously parallel fashion. While the accountant was not qualified to render opinions based on economic theory, he never did so in this case. The Court also found an abuse of discretion when the Judge excluded the entire testimony of the statistician proffered by the plaintiffs because it failed to show a successful conspiracy. That was a "conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs' evidence"; the expert was not required to prove the plaintiffs' case by himself. The Court found that the expert utilized well-established and reliable methodologies in the preparation of most of his statistics. However, there was no error in excluding the statistician's testimony insofar as he characterized certain bids as "signals" to coconspirators, and insofar as he testified about applicable legal standards; testimony on these subjects was outside the witness' expertise.

[6] Appellate Review

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) : In a suit alleging that the plaintiff contracted cancer from exposure to PCBs, the Trial Judge excluded the plaintiff's expert's causation testimony under *Daubert*, and granted summary judgment to the defendants because, in the absence of expert testimony, the plaintiff presented no triable issue of fact. The Court of Appeals reversed, n5 holding that the expert's testimony was sufficiently reliable under *Daubert*. That Court applied a "hard look" standard of review to the District Court's *Daubert* rulings -- a standard somewhere between abuse of discretion and de novo review. The Supreme Court reversed and reinstated the grant of summary judgment. It held that a Trial Judge's rulings under *Daubert* are to be reviewed pursuant to the abuse of discretion standard traditionally applied to evidentiary rulings. The Court rejected any distinction between rulings admitting and excluding expert evidence, and likewise rejected a more searching standard of review for evidentiary rulings that are "outcome-determinative."

United States v. Brown, 415 F.3d 1257 (11th Cir. 2005) : The principal issue in the bench trial of the defendants for distribution of a controlled substance analogue was whether the 1,4-butanediol they possessed had a chemical structure "substantially similar" to gamma hydroxybutyric acid (GHB), a controlled substance. The government offered testimony from a DEA forensic drug chemist and a biochemist with the National Institute of Environmental Health Sciences; their testimony was admitted. The defense offered a freelance consultant in the field of chemistry who held a Ph.D. in plant pathology; the Judge heard this witness' testimony without ruling on his qualifications, but did not consider the testimony as reliable expert opinion in making findings of fact. Affirming, the Court first provided an extensive explanation of the extremely deferential review ("the heavy thumb -- really a thumb and a finger or two -- that is put on the district court's side of the scale") given to *Daubert* rulings. It then concluded there was no abuse of discretion in the finding that the opinion testimony of the prosecution experts satisfied the reliability standards. The Court also found no abuse of discretion when the Judge declined to qualify the defendants' witness as an expert, given his academic work and professional experience related more to plant pathology and botany than to chemistry. Even if the witness were qualified, the Judge's conclusion that his method was unreliable and unreliably applied was not error. In any event, the Judge considered the witness' testimony as lay opinion, but decided to give it little weight -- a decision entitled to even greater deference on appeal.

[7] Application of Principles and Methods to the Facts of the Case

Masters v. Hesston Corp., 291 F.3d 985 (7th Cir. 2002) : In a suit by a farmer injured by an allegedly defective hay baler, the Court affirmed the exclusion of the plaintiff's expert testimony and the grant of summary judgment to the manufacturer. The Court found no problem with the expert's statement of the relevant standards of care, which were found in guidelines promulgated by the American Society of Agricultural Engineers and were grounded in basic principles of engineering. However, the expert, who explained that the applicable standard was to eliminate feed rolls "where possible" and "without unduly restricting the function of the machine," stated that it was a violation of basic engineering principles not to have eliminated the feed rolls on the baler at issue. That was an improper application of the standard, since he gave no indication how eliminating the feed rolls would not have unduly restricted the baler's function.

[8] Attorneys as Witnesses

Universal Athletic Sales Co. v. American Gym, Rec. & Athletic Equip. Corp., 546 F.2d 530 (3d Cir. 1976) : The Court held there was no abuse of discretion -- although it frowned on the practice and found error in giving controlling weight to the testimony -- when an associate in the law firm representing several defendants was permitted to testify as an expert witness in this patent infringement action. The Court commented that "[i]t would be appropriate to consider incorporating with the body of evidentiary rules the current disciplinary norm proscribing the testimony of a lawyer for his client."

Primrose Oper. Co. v. National Am. Ins. Co., 382 F.3d 546 (5th Cir. 2004) : In an action by oil and gas operators who sued their commercial liability insurer for breach of its duty to defend in a landowner's action for pollution, the Court upheld the admission of testimony by a Texas attorney, who had been involved in the pollution suit, as to the reasonableness of the attorneys' fees charged the plaintiffs by two law firms. The witness was certified by the Texas Board of Legal Specialization in the oil and gas industry; he reviewed complete copies of all of the bills of the firms; and he was aware of the hourly rates and the total hours. The fact that the witness did not compare the bills with that of a third law firm went to the weight, not the admissibility, of the witness' testimony.

First Union Nat'l Bank v. Benham, 423 F.3d 855 (8th Cir. 2005) : In a legal malpractice action against a mergers and acquisitions attorney and his firm for failing to assert a timely claim for valuation of stock acquired in a merger, the Judge excluded expert testimony on the standard of practice of an Arkansas attorney in such matters, on the ground that the witness' conclusions were based on his own experience and not that of other lawyers. Reversing a judgment for the defendant, the Court found that exclusion was an abuse of discretion, given that the witness had been licensed as an attorney in Arkansas for over 36 years and had practiced extensively in the M&A area; it noted that *Rule 702* permits opinion testimony based on specialized knowledge gained by "experience."

[9] Availiability of Rebuttal Expert

United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979) : The Court upheld the government's calling a counterintelligence officer to testify on Soviet intelligence recruiting practices, even though the defendant could not obtain a rebuttal expert.

[10] Ballistics Evidence

United States v. Hicks, 389 F.3d 514 (5th Cir. 2004) : At the defendant's trial for a firearms violation, the government introduced evidence that an officer was shot to death in a high speed chase, the defendant was arrested for this crime, a search of his house turned up a.30-.30 rifle, and casings from such a rifle were found at the scene of the

shooting. Affirming, the Court found no abuse of discretion when a ballistics expert was permitted to testify that the casings found at the scene were fired from the rifle found at the defendant's house. The Court noted that: the matching of shell casings to the weapons that fired them has been a recognized method for decades; standards for firearms comparison testing exist and the expert followed them in this case; there is authoritative literature about firearms comparison testing that the expert relied on; and the expert testified that the error rate of firearms comparison testing is zero or near zero.

[11] Bias of Expert Witness

Marshall v. Perez Arzuaga, 828 F.2d 845 (1st Cir. 1987) : Affirming a judgment for a plaintiff who sued a rental car company and the driver of its car, the Court held that an expert was not disqualified as a "partisan witness." It reasoned that "[e]ven assuming, without deciding, that partiality might disqualify an expert witness," the fact that the expert repeatedly spoke to the plaintiff's counsel about the case and discussed various theories of causation was "part of the normal communications that must take place between a lawyer and the expert he has hired to explain the technical aspects of the case."

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) : In an action by a plaintiff who sued after contracting asbestosis, the Court sustained judgments against some, but not all asbestos manufacturers, finding that a medical witness was properly permitted to testify even though he had seen more than 600 asbestosis patients, almost all of whom had been referred by the plaintiff's lawyers.

United States v. Chang, 207 F.3d 1169 (9th Cir. 2000) : Affirming convictions for uttering and possessing a counterfeit foreign obligation, a Japanese certificate, the Court found it was error (but harmless) to exclude the testimony of an assistant professor of clinical marketing, who would have testified that the certificate was genuine, on the ground that he "was not picked as an initially neutral party," since he had assisted the defendant in his efforts to authenticate the certificate prior to trial. The Trial Judge had essentially reasoned that the expert was biased, but an expert's bias goes to only weight, not to admissibility.

[12] Business Custom; Industry Practice

Linkstrom v. Golden T. Farms, 883 F.2d 269 (3d Cir. 1989) : In this wrongful death action for a young migrant worker killed in a farm accident, the Trial Court abused its discretion in excluding testimony by the plaintiff's farm safety expert regarding safety practices a reasonable farmer would follow. The testimony would have helped jurors without farm experience establish the standard of reasonable care for persons in the defendant's position.

United States v. Tucker, 345 F.3d 320 (5th Cir. 2003) : In a securities and mail fraud case, the Court held it was an abuse of discretion (but harmless error) to refuse to permit defense expert testimony regarding the meaning of the term "invest in automobile loans" in private placement memoranda. The testimony would have refuted the government's contention that an investment meant only the purchase of the principal amount of the loans. The expert should have been permitted "to provide the jury with the usage of the word 'invest' within the securities industry."

First Tennessee Bank N.A. v. Barreto, 268 F.3d 319 (6th Cir. 2001) : Following a bench trial, the Trial Judge entered judgment for the Small Business Administration in a suit by a lender to compel the SBA to fulfill its alleged contractual obligation to purchase a defaulted loan. The Court found no error in the admission of a banking expert to testify as to whether the lender bank had followed prudent banking practices with respect to servicing the loans. The

expert began his banking career in 1950 and had substantial experience supervising letter of credit departments. The Court noted that the testimony was both relevant and sufficiently reliable, and that "to the extent that Iorlano [the expert] may have lacked familiarity with some aspects of banking relationships, the district court correctly reasoned that such unfamiliarity merely affected the weight and credibility of his testimony, not its admissibility." Rejecting the lender's argument that the testimony should have been excluded because it did not satisfy the *Daubert* factors, the Court noted that "the four specific factors utilized in *Daubert* may be of limited utility in the context of non-scientific expert testimony." In *McGowan v. Cooper Indus.*, n6 the Court reversed a judgment for the manufacturer of an air compressor that exploded and injured the plaintiffs, holding it was error to bar an expert witness from testifying as to industry custom with respect to a manufacturer's factory representatives.

First Union Nat'l Bank v. Benham, 423 F.3d 855 (8th Cir. 2005) : In a legal malpractice action against a mergers and acquisitions attorney and his firm for failing to assert a timely claim for valuation of stock acquired in a merger, the Judge excluded expert testimony on the standard of practice of an Arkansas attorney in such matters, on the ground that the witness' conclusions were based on his own experience and not that of other lawyers. Reversing a judgment for the defendant, the Court found that exclusion was an abuse of discretion, given that the witness had been licensed as an attorney in Arkansas for over 36 years and had practiced extensively in the M&A area; it noted that *Rule 702* permits opinion testimony based on specialized knowledge gained by "experience." In *FDIC v. First Interstate Bank of Des Moines, N.A.*, n7 the Court affirmed a judgment for the plaintiff that the defendant bank aided and abetted a stockbroker in defrauding another bank. It held that the plaintiff's expert witness was properly permitted to testify as to the way in which experienced bank personnel would view the stockbroker's transactions. The defendant argued that the testimony was impermissible opinion regarding the significance of events to a party charged with knowledge, but the Court concluded it would assist the jurors' understanding of a bank's investment officers' function.

Jinro America Inc. v. Secure Investments, Inc., 266 F.3d 993 (9th Cir. 2001) : In a breach of contract and fraud action by a South Korean company, the Court reversed summary judgment granted for the defendants after a jury, in the first stage of a bifurcated trial, found for the defendants on their claim that the contract at issue was a sham contract designed to cover up a high-risk investments scheme that circumvented South Korea's currency regulations. The Court held that the trial "was prejudicially infected by ethnically biased, 'xenophobic' expert testimony." The defendants' expert was a former Air Force investigator, who was a private investigator at the time of trial. He had no formal education in business or as a cultural expert, but he claimed to have familiarized himself with Korean business practices as part of his job duties. Although he had not investigated the plaintiff company, he testified about the *modus operandi* of Korean businessmen to seek to circumvent laws that restrict their money-making ability and to use the United States and California as a safe haven for schemes to evade currency requirements. On cross-examination, he stated that "the prevalence of corruption and fraud in the Korean business community is very great and very extensive." The Court found that the testimony was unreliable given the qualifications and knowledge of the expert and the lack of empirical evidence to support his opinions, and that "it was so tinged with ethnic bias and stereotyping that it should have been excluded under *Rule 403*'s balancing test."

United States v. Fredette, 315 F.3d 1235 (10th Cir. 2003) : The Court affirmed a conviction for mail fraud arising out of a rebate scheme, and held there was no abuse of discretion in the exclusion of evidence from the defendant's marketing expert that would have compared the "breakage rules and requirements" of the defendant's program to other programs. The expert admitted at the *Daubert* hearing that the defendant's program was unusual and he had never seen a similar one, so applying an industry standard did not work. Thus, the witness' expertise gave him no special insight into the operations of the defendant's program.

[13] Business Judgments

United States v. Kelley, 615 F.2d 378 (5th Cir. 1980) : The Court held that it was proper under either *Rule 701* or *702* for bank officers to state that, based on their experience, a loan application could have influenced the decision to grant the loan.

[14] Cause of Accident

[a] Generally

Almonte v. National Union Fire Ins. Co., 787 F.2d 763 (1st Cir. 1986) : Affirming a judgment for an insurer that refused to pay losses from a fire that it claimed was arson, the Court found it was error (waived or harmless) not to have conducted a more extensive preliminary inquiry before admitting testimony by an investigating officer, since the officer was not only an arson expert but also the officer charged with determining who started the fire. "It was, therefore, important for the trial judge to ensure that [the officer] did not stray from explaining why he thought the fire was incendiary in origin to explaining who he thought might have caused the fire." See also *Apostol v. United States* n8(finding no error in excluding deposition testimony of the plaintiff's air traffic expert, since there was no testimony in the deposition qualifying the witness as an expert).

In re Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994) : In this action by relatives of passengers killed in an aircraft bombing, the Court affirmed the jury's finding of liability against the airline for willful disregard of safety standards respecting security checks of baggage. The Court (2-1) found no error in excluding the testimony of the airline's experts on terrorism. The experts, who would have explained alternative ways in which the bombing might have occurred, did not base their opinions on record evidence and their testimony was impermissibly speculative. The dissenting Judge argued that the airline should have been permitted to call its own experts in order to attack the plaintiffs' expert evidence. In *Martell v. Boardwalk Enters.*, n9 a personal injury case arising out of a boating accident, the Court found no error in the admission of expert testimony concerning problems with the vessel that the plaintiff was using, despite the defendant's claim that the problems did not relate to what the plaintiff was doing at the time of the accident.

Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69 (3d Cir. 1996) : The Court affirmed summary judgment for the defendant in a passenger's suit for injuries suffered when she slipped in a cruise ship's bath tub. The plaintiff's expert's opinion that inadequate stripping caused her fall was not based on any direct or circumstantial evidence of where in the tub she was standing when she fell, and it was also speculative to infer that she was standing between the strips at the time of the accident. Because the expert's opinion was based on speculation or conjecture, it was properly disregarded.

O'Neill v. Windshire-Copeland Assocs., 372 F.3d 281 (4th Cir. 2004) : Affirming a judgment for defendants in an action to recover for serious personal injuries suffered when the plaintiff fell from a second-story balcony at an apartment complex, the Court found no abuse of discretion in the exclusion of proposed expert testimony by a biomechanics professor that it was much more likely that the plaintiff fell because of a wind gust than because she accidentally leaned over too far and lost her balance. The Court concluded that "[t]his opinion appears to be based more on supposition than science, especially since Dr. Thompson admitted that the cause of O'Neill's fall was 'not clear.' " In an FELA action, *Persinger v. Norfolk & W. Ry., 920 F.2d 1185 (4th Cir. 1990)* , the Court affirmed the grant of a new trial, agreeing there had been error in admitting testimony by a human factors analyst regarding whether the weight the plaintiff had to lift to perform his job was unreasonable, as that is a matter within the common sense and everyday knowledge of the jurors. In *Scott v. Sears, Roebuck & Co.*, n10 the Court found error in the admission of expert testimony as to ergonomics or "human factors" in a slip and fall case, because the expert testified to matters that the jury could have understood without any help. However, the admission of testimony within the common knowledge of jurors

"will almost invariably be harmless," so judgment for the plaintiff was affirmed.

Cook v. American S.S. Co., 53 F.3d 733 (6th Cir. 1995) : In a seaman's action for injuries suffered when the line supporting him in a bosun's chair parted, the Court vacated a judgment for the plaintiff because a witness, who was qualified as an expert in materials testing, had done no testing on the line in question, and his opinion that a localized heat source had caused the line to part was not based on any scientific, technical, or other specialized knowledge.

Roback v. V.I.P. Transp. Inc., 90 F.3d 1207 (7th Cir. 1996) : In an action for injuries sustained when a truck rear-ended a car, the defendants offered an engineer who had taken the truck for a 90-mile test drive after the accident and used a computerized data acquisition system that he had developed to gather data on the performance of various systems in the truck, in order to support the defendants' contention that the truck had been malfunctioning at the time of the accident. Reversing a judgment for punitive damages, the Court held it was error to exclude the witness' testimony on the ground it was not sufficiently "scientific" to satisfy *Rule 702* and *Daubert*, since he was merely offering enhanced eyewitness observations, using a device assembled from standard components about which he could have been interrogated and which produced data subject to examination and independent verification. The Court found no error in excluding testimony from a consultant on issues of visual perception of automobile drivers, as any juror who drives would readily understand without expert assistance that a driver who is distracted may not realize until too late the need to slow down for vehicles ahead; the witness' further opinion on how long the truck driver's eyes were likely diverted bordered on speculation. In *Kelsay v. Consolidated Rail Corp.*, n11 a judgment for a railroad in a train-car crash was sustained, as the Court held (2-1) that it was proper for a police officer, who investigated the accident, to opine that it resulted from driver inattention.

Zimmer v. Miller Trucking Co., 743 F.2d 601 (8th Cir. 1984) : The Court found no error in the exclusion of a police officer's opinion as to the cause of an auto accident, where the Trial Judge found that the jurors were as able as the officer to understand whether it was reasonable for a truck to park on the side of the road.

Guidroz-Brualt v. Missouri Pac. R.R., 254 F.3d 825 (9th Cir. 2001) : Plaintiffs injured in a train wreck alleged that the crew was negligent in not stopping the train before it reached a loosened rail that caused the derailment. Affirming summary judgment for the defendants, the Court found no abuse of discretion in the exclusion of affidavits from three experts offered by the plaintiffs, which indicated that the track separation should have been visible in time for the crew to avoid the accident. However, there was no factual basis for any assumption that the separation was visible, and there was substantial evidence that the rail had been loosened by saboteurs who had taken significant efforts to hide their work.

Hynes v. Energy West, Inc., 211 F.3d 1193 (10th Cir. 2000) : Affirming a judgment for tenants who sued a gas company for injuries suffered in a gas explosion resulting from a leaking pipeline, the Court upheld a ruling permitting the plaintiff's expert to testify that the defendant had not properly odorified its gas so that a leak would be detectable. The Court emphasized that the expert "has extensive scientific credentials and he was able to articulate a scientific process by which neutralization and oxidation occurs," and "evidence of adherence to a practice within an industry implies a significant degree of reliability." In *Robinson v. Missouri Pac. R.R., 16 F.3d 1083 (10th Cir. 1994)* , the Court, affirming a judgment for the plaintiffs in a wrongful death action arising out of a train's collision with a car, held it was a close question, but no abuse of discretion, to admit a video animation illustrating the plaintiff's expert's theory about how the collision had occurred. The Court was bothered that the tape showed the car angling toward the approach of the train and rotating at impact and spinning off the tracks, since it was also possible that the train impaled the car on its front.

[b] Cause of Accident -- Product Injuries

Coleman v. Parkline Corp., 844 F.2d 863 (D.C. Cir. 1988) : The Court upheld a judgment for the plaintiff in a suit against a manufacturer whose elevator ceiling collapsed. It approved the admission of testimony of a safety engineer who testified to the dangers involved in the manner in which the defendant tied its ceilings for shipping, the need for warnings, and the feasible alternatives to secure the ceilings. It was unnecessary that the expert have particular experience in loading elevator ceilings.

Brooks v. Outboard Marine Corp., 234 F.3d 89 (2d Cir. 2000) : Affirming a summary judgment for the manufacturer of a motor used on a boat, in an action by the parent of a minor whose hand was amputated by the motor's propeller, the Court upheld the exclusion of the plaintiff's expert testimony. The expert had never seen the actual boat or motor, had never spoken to the boys involved in the accident, was unaware of the dimensions of the boat or the placement of the seats near the motor, and had never attempted to reconstruct the accident or to test his theory. The Court rejected the argument that the defendant was required to present its own expert in rebuttal in order to mount a *Daubert* challenge.

Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408 (3d Cir. 2002) : The plaintiffs, suing for wrongful death in a helicopter crash, alleged that a shaft seal was installed backwards and leaked flammable fluid, which was ingested by an engine as the craft was attempting to land. To prove that the flammable fluid had another source, an expert for the defendant manufacturer testified that it was hydraulic fluid. The plaintiffs objected that the testimony lacked an adequate factual basis because there was insufficient evidence of the presence of hydraulic fluid inside the engine. Affirming a judgment for the defendant, the Court found a sufficient factual foundation in evidence that hydraulic fluid was found in places where it should not have been, including outside the engine and near the engine. Once the defendant met the foundational requirements for admissibility, it was up to the plaintiffs to highlight the weaknesses in the expert's opinion through cross-examination. In *Roe v. Deere & Co.*, n12 the Court held that expert testimony should have been admitted to prove that a driver's injuries would have been lessened when a tractor rolled over if it had been equipped with a safety device. In *Breidor v. Sears, Roebuck & Co.*, n13 the Court reversed a judgment for the defendant in a product liability action, holding it was an abuse of discretion to prohibit the plaintiffs' expert from giving an opinion as to the cause of a refrigerator fire. The expert had made a thorough investigation of the refrigerator and had eliminated all possible causes except for a malfunction in the thermometer.

Brown v. Parker-Hannifin Corp., 919 F.2d 308 (5th Cir. 1990) : The Court affirmed a directed verdict for the defendant in a product liability action, holding that testimony by the plaintiff's expert was properly excluded because the theories he offered were no better to explain the accident than others equally likely. Without some basis to establish that one of his theories identified the most likely cause of the failure on this occasion, his testimony amounted only to speculation and was of no assistance to the jury. In *Shipp v. General Motors Corp.*, n14 the Court affirmed a judgment against the defendant in an action by the owner-driver who claimed that her injuries in a rollover accident were caused by a defectively designed roof on her car. It held that the plaintiff's biomedical engineering expert was properly permitted to testify that the plaintiff's injuries were caused by the roof's intrusion into her occupant's space. It also held that another expert was properly allowed to give his opinion that the design of the roof on the car was inadequate and to suggest how it might have been improved.

Clark v. Chrysler Corp., 310 F.3d 461 (6th Cir. 2002) : Affirming a judgment against the manufacturer of the pickup that the plaintiff's decedent was driving, the Court found no abuse of discretion in admitting the testimony of a latch expert and a B-pillar and accident reconstruction expert. The latch expert had substantial experience with how vehicles hold up in accidents and had special expertise, and had done extensive testing, on door latch failures. The Court

concluded that the fact that the expert did not do testing in this case went to the weight of the testimony rather than admissibility. The Court also found that the B-pillar-accident reconstruction expert was properly permitted to testify despite the fact that he did no testing. The expert's opinion was based on his background in automobile safety testing, and on examination of the accident scene, the police report, the photographs of the accident, and the depositions, as well as an in-depth inspection of the truck at his own facility. In *Pride v. BIC Corp., 218 F.3d 566 (6th Cir. 2000)* , the Court affirmed summary judgment for the defendant manufacturer of a lighter that allegedly caused the death of the plaintiff's decedent, finding no abuse of discretion in excluding expert testimony proffered to explain how the lighter exploded. The methodologies employed by the experts were too unreliable, since they failed timely to conduct replicable laboratory experiments demonstrating that the explosion and residual damage that occurred were consistent with an incident caused by a manufacturing defect, and they did not validate their hypotheses by reference to generally accepted scientific principles as applied to the facts of the case.

Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000) : A plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to testify that the plaintiff's injury could not have been caused by a plastic wingnut discharged from a lawnmower and that he did not believe the plaintiff when he testified that the was in the operator's zone behind the mower when he was injured. The witness, a mechanical engineer with no medical training, was not qualified to give expert testimony on medical questions, including the cause of an eye injury, and the witness' opinion about the plaintiff's credibility was merely based on speculation and not the proper subject of expert testimony. In *Kirstein v. Parks Corp., 159 F.3d 1065 (7th Cir. 1998)* , the plaintiff, while removing linoleum in his house, had used a chemical adhesive remover, followed by lacquer thinner to remove the adhesive residue. He was severely burned when the remover and thinner exploded and caught fire. In an action against the manufacturers of the two products, the Court affirmed the grant of summary judgment for the defendants, finding no abuse of discretion in exclusion of testimony by the plaintiff's expert. Although the expert had impressive credentials as a safety engineer, he was not a chemist, whose expertise would be helpful if not essential as a basis for the suggestion in his deposition that the combination of the two substances increased the danger posed by either one alone. Furthermore, he had done no testing on the products, nor did he provide studies that employed such testing. Thus, the expert "offered only speculation." In *Barron v. Ford Motor Co. of Can. Ltd.*, n15 a product liability action after the plaintiff had been ejected from a car in an accident, the Court held it was error (but harmless) not to permit a state trooper to testify that the plaintiff must have exited the car through the sunroof, as she claimed, because the sunroof was shattered, the plaintiff was found on the side of the road, and rescue workers had broken the front window. Although the trooper's testimony may have seemed simplistic to the sophisticated, it was based on his perceptions and expertise and would have been helpful to the trier.

Smith v. BMW No. Am., Inc., 308 F.3d 913 (8th Cir. 2002) : In a personal injury action alleging that a car's air bag failed to deploy properly, the Trial Judge excluded testimony from an accident reconstructionist, on the ground that the witness put fundamentally flawed information into a crash analysis program, particularly his estimates of the principal direction of force and his displacement measurements, so the results were inherently unreliable. The Court found that the witness' estimate of the principal direction of force was based on all information obtainable and there was no basis for concluding that the estimate was unreliable. The Court concurred that the expert's failure to account for "free space" or "air gaps" in his frontal displacement measurements rendered his estimate unreliable, justifying exclusion of his conclusions. However, corrections provided by the defendant's accident reconstructionist meant that there was evidence before the Judge creating a genuine issue of material fact, so it was error to grant the defendant's summary judgment motion.

Bitler v. A.O. Smith Corp., 400 F.3d 1227 (10th Cir. 2004) : The Court affirmed a judgment for the plaintiffs in an action arising from a propane explosion, finding no abuse of discretion in the admission of the plaintiffs' experts'

testimony as to the cause of the explosion. The fire investigator followed generally acceptable practice for fire investigators analyzing the cause of fire accidents. The expert who testified to the defective condition of a valve was not required to test his theory regarding how the gas leaked; testing is essential only for "controversial or novel explanations concerning regularly occurring natural phenomena," and the plaintiffs here needed only to establish by a preponderance of the evidence the causation of a one-time occurrence. Both experts properly used a method of "reasoning to the best inference," similar to the "differential diagnosis" method employed in the medical context. In *Truck Ins. Exchange v. MagneTek, Inc., 360 F.3d 1206 (10th Cir. 2004)* , an action against the manufacturer of a fluorescent light ballast, the plaintiff offered an expert's opinion that long-term, low-temperature heat from a defective ballast ignited wood, causing a building to be destroyed. The Court held there was no abuse of discretion in excluding the opinion as unreliable: the testimony was not supported by scientific testing; three publications offered in support of the theory were vague and inconclusive, and they cast doubt on the general scientific acceptance, the methodology, and the adequacy of the experimentation underlying the theory at this time; and the expert's testimony underscored the scientific uncertainty about the theory. The Court also held that a fire investigator's conclusion blaming the ballast was properly excluded. Because the investigator did not have any evidence that the ballast could generate enough heat to ignite combustibles, his conclusion was based on speculation rather than on reliable principles and method. Further, his opinion did not meet the standards of fire investigation he professed to be following. In *Orth v. Emerson Elec. Co.*, n16 the Court affirmed a judgment for the plaintiffs in a product liability action arising out of a gas heater explosion, holding that testimony by the plaintiffs' expert tended to connect up the direct evidence by providing a plausible explanation, and his knowledge of propane gas in such a scenario assisted them in understanding the evidence presented. In *Werth v. Makita Elec. Works, Ltd.*, n17 the Court reversed a judgment for the defendant manufacturer in an action arising out of a circular-saw accident, holding it was error to exclude testimony on causation by an expert for the plaintiffs just because he had not conducted independent tests of his thesis. In *Ponder v. Warren Tool Corp.*, n18 the Court reversed a judgment for a manufacturer who was sued by an automobile repairer who was injured when a tire that he was mounting exploded. It concluded that the plaintiff's assistant manager and sales manager at the tire shop should have been permitted to testify to the cause of the accident. He based his opinion on first-hand observation and upon his examination of the implements that were used by the plaintiff.

Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988) : The Court held that an expert with 30 years of experience as an elevator engineer could give an opinion as to the cause of an accident, even though his opinion was based on two elevator inspections that occurred more than two years after the accident.

[15] Cause of Disease or Injury

[a] Abuse Cases

United States v. Velarde, 214 F.3d 1204 (10th Cir. 2000) : The Court reversed a conviction for aggravated sexual abuse of a child because the Trial Judge did not make reliability determinations before admitting testimony from a pediatrician and a clinic psychologist. The witnesses had testified regarding the characteristics of alleged child sexual abuse victims, had opined that the child's condition was consistent with sexual abuse, and had indicated that they believed abuse had occurred because the victim had alleged that it occurred. Without itself determining whether the testimony was reliable, the Court held that the failure to make a reliability determination below was an abuse of discretion and not harmless error in this case. In *United States v. Charley, 189 F.3d 1251 (10th Cir. 1999)* , the Court held it was error, but harmless, when a pediatrician specializing in child sexual abuse gave an unconditional opinion that the victims in the case had in fact been sexually abused. If the opinion was based on the girls' medical history, there was no showing that the expert's opinion ruling out all other causes for the girls' physical complaints was reliable. On the other hand, if the opinion was largely based on crediting the girls' accounts, the witness was essentially vouching for their truthfulness, which is impermissible.

[b] Cause of Disease or Injury -- Drugs, Toxic Exposure, etc.

See annotations under "Scientific Evidence -- Causation of Disease or Injury," *§ 702.03[84][c]*

[c] Cause of Disease or Injury -- Medical Testimony

[i] Cause of Disease or Injury -- Medical Testimony -- Differential Diagnosis

Ruggiero v. Warner-Lambert Co., 424 F.3d 249 (2d Cir. 2005) : The Court found no abuse of discretion in the exclusion of the plaintiff's expert testimony in an action claiming that the plaintiff's decedent's cirrhosis and death were caused by Rezulin. There were no studies that suggested that cirrhosis could be caused or exacerbated by the drug, and while the Court recognized that a differential diagnosis could be used to identify the most likely cause of a set of signs and symptoms, it concluded that this diagnosis does not necessarily support an opinion on general causation because it assumes that the final, suspected cause must be capable of causing the injury.

Heller v. Shaw Indus., 167 F.3d 146 (3d Cir. 1999) : The plaintiffs alleged in a product liability action against the maker of a carpet installed in their house that volatile organic compounds (VOCs) emitted by the carpet caused the wife's respiratory illnesses. The Trial Judge excluded an opinion by an allergy-immunology specialist because no research supported his contention that the level of VOCs detected could cause the illness experienced, his differential diagnosis did not rule out *all* alternative possible causes, and the evidence showing a temporal relationship between installation of the carpet and the plaintiff's symptoms was weak. The Court noted that an expert's opinion need not be based on published studies so long as the methodology is scientifically valid, and that a differential diagnosis need not rule out all alternative causes so long as the diagnostic techniques employed provide good grounds for the conclusion. However, the Court affirmed summary judgment for the defendant because the expert had heavily relied on the temporal relationship, which was unreliable in this case because the plaintiff was ill both before the carpet was installed and after it was removed.

Cooper v. Smith & Nephew, Inc., 259 F.3d 194 (4th Cir. 2001) : The Trial Judge excluded the plaintiff's medical expert and granted summary judgment for the defendants in an action alleging that a defective spinal fusion device caused the plaintiff's failed back surgeries and resulting complications. Affirming, the Court found that the expert's opinion was based upon subjective beliefs rather than upon a valid scientific method. Although the expert had conducted a differential diagnosis, it was not reliable: he assumed that if the surgery was not a success, it could only be because the device was defective, and he failed to take account of any other potential causes, even though the medical literature cited other possible causes (such as smoking) for the failure of spinal fusion surgery. Finally, by failing to conduct a physical examination of the plaintiff (even though he admitted insisting upon a physical examination of his own patients), he did not employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. The Court also noted that the 2000 amendment to *Rule 702* does not alter *Daubert*'s standard for evaluating the admissibility of experts' opinions. In *Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999)* , an employee of a window manufacturer alleged that talcum powder used as a lubricant on gaskets for the windows caused him severe sinus problems. Affirming a judgment for the plaintiff in a product liability action against the gasket manufacturer, the Court held there was no abuse of discretion in admitting opinion testimony from the plaintiff's treating physician that the plaintiff's sinus problems were caused by inhalation of airborne talc in the workplace. Although the expert's opinion was based only on a differential diagnosis, the Court held that a reliable differential diagnosis provides a valid foundation for an expert opinion and that the expert's diagnosis was sufficiently reliable in this case.

Hardyman v. Norfolk & W. Ry., 243 F.3d 255 (6th Cir. 2001) : In a railroad brakeman's FELA suit alleging carpal

tunnel syndrome and related injuries. the Trial Judge excluded causation testimony from the plaintiff's experts, a specialist in occupational and environmental medicine and a certified ergonomist, on the ground that they had not established a "dose/response relationship" between the plaintiff's activities and CTS as a basis for their causation opinions. Reversing summary judgment for the defendant, the Court held it was an abuse of discretion to reject the experts' opinions based on differential diagnosis, which is also a reliable and acceptable methodology for determining causation.

Mattis v. Carlon Elec. Prods., 295 F.3d 856 (8th Cir. 2002) : The Court affirmed a judgment for an electrician who claimed that vapors from polyvinyl chloride cement caused his reactive airways dysfunction syndrome. The Court found that the plaintiff's treating physician was properly permitted to give a causation opinion based on a differential diagnosis. The witness ruled out other possible causes of the plaintiff's illness, such as smoking, asthma, or ammonia; she also relied on published studies linking RADS to organic solvents like those in the defendant's cement.

Glastetter v. Novartis Pharmaceuticals Corp., 252 F.3d 986 (8th Cir. 2001) : The Court affirmed a judgment for the drug manufacturer, finding no abuse of discretion in the exclusion of the plaintiff's medical expert testimony that the drug caused the plaintiff's stroke. The major premise supporting the expert's differential diagnosis, that the drug administered to the plaintiff caused vasoconstriction, was insufficiently supported by reliable data. Although finding the opinions based on differential diagnosis inadmissible in this case, the Court noted that "a plaintiff need not introduce epidemiological evidence of causation in order to satisfy *Daubert*'s threshold for admission of expert medical testimony." In *Turner v. Iowa Fire Equip. Co.*, n19 the plaintiff began suffering respiratory disease after fire extinguishing equipment at her workplace accidentally discharged. In her suit against the manufacturer and maintainer of the equipment, differential diagnosis testimony from her treating physician that her condition was caused by the baking soda discharged from the equipment was excluded on the ground that it did not satisfy *Daubert*'s standards of scientific reliability. Affirming summary judgment to the defendants, the Court held that *Daubert* applies to treating physicians testifying as experts just as much as to physicians hired solely for purposes of litigation.

Norris v. Baxter Healthcare Corp., 397 F.3d 878 (10th Cir. 2005) : In an action by the recipient of silicone gel breast implants alleging systemic autoimmune disease, the Court found no error in the exclusion of the plaintiff's causation experts. Their testimony did not satisfy *Daubert*'s requirement that the underlying reasoning or methodology be scientifically valid, because they "completely ignored or discounted without explanation the many epidemiological studies which found no medically reliable link between silicone breast implants and systemic disease." Their reliance on differential diagnosis and case studies was misplaced, since under accepted scientific methodology those techniques are valid only when general causation has been proven.

[ii] Cause of Disease or Injury -- Medical Testimony -- Miscellaneous Cases

Vargas v. Lee, 317 F.3d 498 (5th Cir. 2003) : In a motorist's personal injury action, the Court vacated a judgment for the plaintiff and remanded for recalculation of damages because an expert was improperly permitted to testify that the accident caused the plaintiff to develop symptoms of fibromyalgia syndrome. The Court held that scientific understanding of the syndrome had not progressed sufficiently to change its conclusion in *Black v. Food Lion, Inc.*, *infra*, that expert testimony regarding the causation of the syndrome by traumatic injury did not satisfy the *Daubert* factors or any other standard of reliability. In *Pipitone v. Biomatrix, Inc., 288 F.3d 239 (5th Cir. 2002)* , an action alleging that the defendant's Synvisc fluid caused a salmonella infection when injected into a patient's knee, the Trial Judge excluded the testimony of the plaintiffs' two experts and granted summary judgment. Reversing, the Court held it was an abuse of discretion to exclude one expert for failing to do an epidemiological study, and for relying, when concluding there was no connection between salmonella infection and injectable knee products, on a literature search that excluded Synvisc. An epidemiological study is not appropriate when only a single person is infected, and "if

Pipitone's salmonella infection in this case was caused by unsterile injection technique or some other cause unrelated to Synvisc, one would reasonably expect to find other occurrences of salmonella infections arising from injections of any product into the knee." Finally, although the expert failed to eliminate "many viable alternative sources" for the infection, the Court found he not only personally examined the injured plaintiff in the hospital but had also specifically looked for and found no symptoms that a physician would expect to find if salmonella had been introduced into the body by a means other than injection. In *Tanner v. Westbrook*, n20 the plaintiffs alleged that their daughter suffered cerebral palsy because the defendants failed to properly treat her birth asphyxia. Reversing a judgment for the plaintiffs, the Court held that their experts on medical causation should not have been permitted to testify because they failed to meet the *Daubert* standards. The experts' testimony that birth asphyxia is a cause of cerebral palsy was contrary to the medical literature indicating that "birth asphyxia is rarely a cause of cerebral palsy and that a large proportion of cases of cerebral palsy remains unexplained." Furthermore, the literature indicates that there is usually major organ damage when birth asphyxia is serious enough to cause cerebral palsy, but the plaintiff did not suffer organ damage. In a slip and fall case, *Black v. Food Lion*, n21 a treating physician was permitted to testify that the plaintiff suffered from fibromyalgia syndrome, and that this condition was caused by the trauma from the slip and fall. Reversing, the Court found that the expert's theory failed under the *Daubert* factors, and that the Trial Judge "fatally erred" by applying the *Daubert* criteria "at a standard of meaninglessly high generality rather than boring in on the precise state of scientific knowledge in this case." This case is discussed in the Editorial Explanatory Comment, *§ 702.02[7]*. In *Carroll v. Morgan*, n22 a medical malpractice wrongful death case, the Court held there was no abuse of discretion in permitting the defendant's expert to testify regarding the cause of death, despite his reluctance to accept as authoritative in their entirety certain medical textbooks and journals mentioned by the plaintiff and to accept one particular source as the exclusive authority on endocarditis. There was no showing that the witness relied on a particularly objectionable or unconventional scientific theory or methodology; his testimony was based on 30 years as a practicing, board-certified cardiologist, on his review of appropriate records, and on a broad spectrum of published materials, so it was not mere "unsupported speculation."

Jahn v. Equine Services, PSC, 233 F.3d 382 (6th Cir. 2000) : The Court reversed a summary judgment for veterinarians sued by the owner of a champion pony that died after surgery. It held that the fact that one of the owner's experts had never performed the surgery at issue did not preclude the expert's opinion as to the cause of the pony's death, since he was not criticizing the surgery and did not base his opinion on any knowledge of the procedure performed. Rather, he was relying on the medical records presented to him by the defendants and his own clinical/professional experience in giving testimony regarding pre-operative testing and post-operative monitoring. Moreover, the plaintiffs' experts were not required to specify precisely what killed the pony; it was sufficient that they identified what they believed to be the probable cause, using inferences based on a scientific method and derived from the facts at hand, which were less than optimal because of the defendants' inadequate record keeping.

Pearson v. Ramos, 237 F.3d 881 (7th Cir. 2001) : The plaintiff, a federal prisoner, was denied access to the prison yard for a year. He claimed that this sanction was cruel and unusual punishment, and sought damages. At trial, he testified that his teeth fell out as a consequence of lack of out-of-cell exercise. The Court found that this testimony violated *Rule 702*. "Wholly lacking in medical knowledge as he was, the plaintiff was incompetent to testify on the causal relation if any between exercise and healthy gums." In *Jones v. Lincoln Elec. Co., 188 F.3d 709 (7th Cir. 1999)* , the Court affirmed a judgment for manufacturers and distributors of welding rods in a suit by a welder who claimed neurological injuries from being exposed to manganese in fumes emitted from the rods. The central issue in the case was whether the plaintiff suffered from manganism or from idiopathic Parkinson's disease. The Court indicated that the Trial Judge may have erred in permitting a professor of materials science to testify for the defense concerning the ability of the body to absorb manganese, since his research experience was not sufficient to permit him to testify about medical conclusions, but any error was harmless.

In re Air Crash at Little Rock, Ark., on June 1, 1999, 291 F.3d 503 (8th Cir. 2002) : In an airline passenger's personal injury action under the Warsaw Convention, the Court held that a psychiatrist's opinion that the plaintiff had a physical injury to her brain resulting from chronic Post Traumatic Stress Disorder caused by the accident should have been excluded, as none of the available tests had been performed to show that she actually suffered from physical changes to her brain. The Court also found that the Trial Judge did not engage in a proper *Daubert* inquiry when the airline objected that the theory that PTSD results in physical changes to the brain is not a recognized psychiatric concept. In *Penney v. Praxair, Inc.*, n23 the plaintiff offered testimony from a doctor who conducted a Position Emission Tomography scan of the plaintiff's brain, to prove the existence of brain injury after a car accident. The Court held that the testimony concerning the results of the PET scan was properly excluded under *Daubert*. A PET scan measures brain functions, and the results of the scan are compared to a control group to detect abnormalities. In this case, the control group was dissimilar from the plaintiff in terms of age and medication levels, both of which can affect the scans. In *Watkins v. Schriver*, n24 an arrestee's civil rights action, the Court held that there was no abuse of discretion in precluding the plaintiff's expert neurologist from testifying that the plaintiff's injuries were more consistent with being thrown into a wall than a slip and fall. There was no showing how the witness' expertise enabled him to reach that conclusion, so the proffered testimony was merely an attempt to tell the jury what the witness believed the verdict should be. In *United States v. Whitted*, n25 the Court reversed a defendant's conviction for aggravated sexual abuse and incest, finding it was plain error for a physician to offer an opinion that the victim had suffered repeated child sexual abuse. The physical evidence was inconclusive, and the doctor examined the victim years after the alleged abuse and after the victim had become sexually active, so the conclusion had to be based simply on the doctor's belief that the victim's claims of abuse were true. In *Williams v. Wal-Mart Stores, Inc.*, n26 the Court reversed a judgment for the defendant in a personal injury action brought by a store customer who allegedly suffered back injuries when a shelf display collapsed on him. It was plain error to refuse to allow the plaintiff to ask his medical experts whether he experienced a trauma to his back, as the question was not tantamount to asking whether in their opinion the alleged incident actually occurred.

Sullivan v. United States Dep't of the Navy, 365 F.3d 827 (9th Cir. 2004) : In a medical malpractice case, the Trial Court excluded testimony from the plaintiff's expert, who noted that four standard medical texts stated that the length of an operation was "an influencing factor for infection" and opined that the excessive length of the plaintiff's surgery increased the risk of infection by a factor of six, because it believed that the defendant's version of the facts was correct and the plaintiff's version incorrect. Reversing summary judgment for the government, the Court concluded that because of its "resolution of the disputes over material facts, the district court did not see the relevance of the medical literature relating to the risk of infection of the surgical wound that was part of the operation," and, in any event, "it applied an inappropriately rigid *Daubert* standard to medical expert testimony." In *Domingo v. T.K., 289 F.3d 600 (9th Cir. 2002)* , the plaintiff suffered severe brain damage from fat particles released into his blood during hip surgery. This is a recognized risk of such surgery, but the plaintiff attributed the injury in his case to the extraordinarily long time it took to fit the prosthesis into his femur. Affirming summary judgment for the defendant, the Court held there was no abuse of discretion in excluding the causation testimony of the plaintiff's expert, since it did not satisfy the *Daubert* criteria.

Mitchell v. Gencorp., 165 F.3d 778 (10th Cir. 1999) : The plaintiff claimed that exposure to benzene in the company's "flammable room" caused him to contract chronic myelogenous leukemia. The Court found no error in the exclusion of testimony by four doctors, who relied on published works indicating a link between exposure to benzene and certain types of leukemia other than that suffered by the plaintiff, offered by the plaintiff to prove causation. There was no evidence that the plaintiff had actually been exposed to benzene, and the doctors did not have scientific data supporting their conclusion that the plaintiff's admitted exposure to chemicals similar to benzene would affect the body in the same way as benzene.

Toole v. Baxter Healthcare Corp., 235 F.3d 1307 (11th Cir. 2000) : In a silicone breast implant case, the plaintiff

presented witnesses who testified that her breast implants caused her disease or who testified to the disease process when the human body reacts with silicone or silica. The Court affirmed a judgment for the plaintiff, finding no abuse of discretion when the Trial Judge determined that the experts' testimony was sufficiently reliable, since they had conducted research, published in peer-reviewed journals, and treated hundreds of patients with silicone gel implants. In *Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999)* , a product liability action alleging injuries from silicone breast implants, the plaintiff submitted proposed testimony by a board certified immunologist, a board certified pathologist, and a treating board certified rheumatologist. Affirming summary judgment for the defendants, the Court found no abuse of discretion in findings that: certain studies were not sufficiently reliable, especially when contrasted with more than 20 epidemiological studies that found no statistical correlation between silicone breast implants and systemic disease; the pathologist's theories were based more on personal opinion than scientific knowledge; the treating rheumatologist did not satisfy Georgia's standard of reasonable probability; and the rheumatologist's opinions were based upon unreliable methodology.

Terran v. Secretary of Health & Human Servs., 195 F.3d 1302 (Fed. Cir. 1999) : The Court affirmed a decision denying compensation under the National Child Vaccine Injury Act of 1986 to a child who began suffering seizures after receiving DPT vaccine. The Special Master had applied the factors set forth in *Daubert* and had determined that the plaintiff's expert's theory regarding the causal link between the pertussis toxin and the plaintiff's condition did not meet the standards for scientific reliability. The Court noted that *Kumho Tire* had resolved the applicability of *Daubert* to "general medical issues," and concluded that the Special Master had properly used the *Daubert* factors as a framework for analysis but not as four tests that each had to be satisfied.

[iii] Cause of Disease or Injury -- Medical Testimony -- Plaintiff's Statements As Basis for Opinion

Cooper v. Carl A. Nelson & Co., 211 F.3d 1008 (7th Cir. 2000) : A worker was injured when he fell while traversing a drainage ditch at a construction site. Reversing a judgment for the employer, the Court found it was error to exclude the testimony of the plaintiff's medical witnesses that his fall caused him to suffer chronic pain syndrome (CPS). The Trial Judge excluded the testimony because the experts relied solely upon the plaintiff's statements about his past medical history and about the fall in forming their diagnosis. Rejecting the "overly demanding gatekeeping role" suggested by the defendant, the Court noted that the experts' theory was generally recognized, and held that the contention that other conditions might have caused the plaintiff's CPS went to the weight of the medical testimony, not its admissibility.

[16] Cause of Economic Injury

Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 2003-2 Trade Cas. (CCH) P74152 (8th Cir. 2003) : Health maintenance organizations sued to recover for tobacco-related health care costs allegedly caused by the defendant tobacco companies conspiring to conceal the risks of smoking and to avoid developing safer tobacco products. The Judge excluded testimony by the plaintiffs' expert, a physician and economics professor, regarding the damage caused by the "disinformation effect" (how accurate disclosures would have affected smoking start and quit rates) and the "retardation-of-innovation effect" (how R&D spending equivalent to the chemical and drug industries would have reduced average tar yields). The testimony was seen as unduly speculative regarding the relations between advertising and initiation or quit rates and between spending and innovation, and as internally inconsistent because it failed to account for the relationship between innovation and information in the counterfactual situations he was positing. Affirming in part summary judgment for the defendants, the Court found that although the issue was close, there was no clear error in excluding the testimony. Several of the witness' predictions of the situation in the absence of the defendants' conspiracy were "inspired guesses at best." Moreover, the expert had taken lower tar as a measure of improvement, which was inconsistent with the plaintiffs' contention that the defendants had fraudulently marketed "low tar" and "light" cigarettes as healthier despite their knowledge that smokers would find way to compensate for the

reductions, so the expert's opinions did not properly "fit" the plaintiffs' case.

[17] Certainty of Opinion

DaSilva v. American Brands, Inc., 845 F.2d 356 (1st Cir. 1988) : The Court held, in a wrongful death action against the manufacturer of an industrial mixing machine, that a doctor was properly permitted to give an opinion as to the cause of death. Even though the doctor sometimes spoke of "his belief" or what "could have" been the cause, the Court found that his testimony was based on a reasonable degree of medical certainty and that he was not required to explain with certainty every injury suffered by the victim.

United States v. Mornan, 413 F.3d 372 (3d Cir. 2005) : The Court affirmed mail and wire fraud convictions arising from a telemarketing scheme, finding no plain error in the admission of testimony from a government handwriting expert despite her responding "I think they are" to the question whether her opinions were rendered to a "reasonable degree of scientific certainty." The Court noted that *Rule 702* does not require "reasonable scientific certainty" and that the witness had testified that rendering "less-than-certain" opinions is an accepted practice in her field. In an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, *Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996)* , the Court reversed a judgment for the defendants, holding it was error to preclude the plaintiff from asking a defense expert whether he could state "with reasonable medical certainty" that radiation exposure caused the decedent's mesothelioma. Although the talismanic phrase is not required, it is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony and that also assists a reviewing Court in determining whether the jury has been given the appropriate standard by which to judge the opinion. In an asbestos product liability action, *Schulz v. Celotex Corp.*, n27 a directed verdict was granted for the defendants because the attending physician did not couch his diagnosis of causation in terms of reasonable medical certainty. The Court reversed, holding that under either federal or the governing state law the testimony carried with it the requisite degree of certainty needed for admissibility.

Rohrbough v. Wyeth Labs., 916 F.2d 970 (4th Cir. 1990) : Affirming summary judgment for the defendant manufacturer in an action for personal injuries allegedly caused by defective vaccine, the Court held that an expert's opinion as to proximate cause must be stated in terms of reasonable probability. Although declining to base its decision on the presence or absence of any particular language, the Court found that none of the plaintiff's experts fairly established that it was reasonably probable the vaccine caused the injuries.

Pipitone v. Biomatrix, Inc., 288 F.3d 239 (5th Cir. 2002) : In an action alleging that the defendant's Synvisc fluid caused a salmonella infection when injected into a patient's knee, the Trial Judge excluded the testimony of the plaintiffs' two experts and granted summary judgment. Although the Court reversed for an abuse of discretion in excluding the testimony of one expert, it found no error in the exclusion of testimony by the orthopedic surgeon who injected the fluid that it was as likely as not that the Synvisc syringe contained the salmonella bacteria that infected Pipitone's knee and that he had no "scientific evidence" to support the conclusion that it was more likely than not that the infection occurred in this way. Concluding that the testimony was not helpful to the factfinder, the Court noted that "[a] perfectly equivocal opinion does not make any fact more or less probable and is irrelevant under the Federal Rules of Evidence."

Mayhew v. Bell S.S. Co., 917 F.2d 961 (6th Cir. 1990) : The Court affirmed the damages awarded a seaman in a Jones Act case, holding that deposition testimony by the plaintiff's expert was properly excluded because it did not articulate more than a mere possibility of a causal relationship between the defendant's negligence and the injury for which the plaintiff sought damages.

United States v. Cyphers, 553 F.2d 1064 (7th Cir. 1977) : Affirming convictions for armed bank robbery, the Court held that it was proper to admit the testimony of a government witness that hairs recovered from articles used by the robbers were "microscopically like" hair samples taken from the defendants. The Court emphasized that there is no requirement that an expert opinion be expressed in terms of a reasonable scientific certainty, and that the lack of certainty goes to the weight of the evidence, not its admissibility.

People of Terr. of Guam v. Reyes, 879 F.2d 646 (9th Cir. 1989) : Affirming a manslaughter conviction, the Court held that it was unnecessary to decide whether the medical examiner's opinion that "it [was] safe to assume" a bruise "probably" happened at the same time or prior to the shooting was improper because it was not stated in terms of a "reasonable degree of medical certainty," as the record clearly showed he based his testimony on the substantive equivalent of such certainty.

[18] Chemists

United States v. Vitek Supply Corp., 144 F.3d 476 (7th Cir. 1998) : Affirming convictions for a conspiracy to defraud Customs and the FDA by smuggling misbranded animal drugs, the Court held there was no abuse of discretion in admitting testimony by a government expert to prove that the defendant's products contained illegal substances. Although the Trial Judge had not specifically found that the chemical tests used were generally accepted for the purpose of determining the content of the particular products, the Court held that was not necessary where the testing procedures were widely used and did not involve out-of-the-ordinary applications or abstract or novel scientific theories.

United States v. Ruiz, 412 F.3d 871 (8th Cir. 2005) : The Court affirmed convictions for drug distribution, finding no abuse of discretion in the admission of testimony from a chemist that methamphetamine found in a garbage can at an apartment and during an arrest in a parking lot could have originated from the same process based on a comparison of their purity, a common cutting agent, and the presence of pseudoephedrine. In *United States v. $141,700 in U.S. Currency, 157 F.3d 600 (8th Cir. 1998)* , to prove in a forfeiture proceeding that a large sum of money found in baggies in the ceiling of a camper was the proceeds of drug transactions, the government offered testimony that a drug-detecting dog positively alerted to the presence of drugs after sniffing one of the packages of money in a controlled testing procedure. Affirming the forfeiture, the Court held that testimony by a chemist that 99% of United States currency is contaminated with drug residue was properly excluded under *Daubert* because the expert's methodology was unreliable and it bore none of the indicia of reliability articulated in *Daubert*.

United States v. Brown, 415 F.3d 1257 (11th Cir. 2005) : The principal issue in the bench trial of the defendants for distribution of a controlled substance analogue was whether the 1,4-butanediol they possessed had a chemical structure "substantially similar" to gamma hydroxybutyric acid (GHB), a controlled substance. The government offered testimony from a DEA forensic drug chemist and a biochemist with the National Institute of Environmental Health Sciences; their testimony was admitted. The defense offered a freelance consultant in the field of chemistry who held a Ph.D. in plant pathology; the Judge heard this witness' testimony without ruling on his qualifications, but did not consider the testimony as reliable expert opinion in making findings of fact. Affirming, the Court concluded there was no abuse of discretion in the finding that the opinion testimony of the prosecution experts satisfied the reliability standards. Even though the method those experts used satisfied only the general acceptance factor of the four noted in *Daubert*, accepting credible evidence of a generally accepted method applied reliably was not clearly erroneous, particularly in the bench trial situation, where there is less need for the gatekeeper to keep the gate. The Court also found no abuse of discretion when the Judge declined to qualify the defendants' witness as an expert, given his academic work and professional experience related more to plant pathology and botany than to chemistry. Even if the

witness were qualified, the Judge's conclusion that his method was unreliable and unreliably applied was not error.

[19] Chiropractors

Kudabeck v. Kroger Co., 338 F.3d 856 (8th Cir. 2003) : In a slip and fall case, the plaintiff called a chiropractor as an expert witness, who testified that the plaintiff's fall caused her to suffer from advanced degenerative disc disease and osteoarthritis in her back. Rejecting arguments that the expert's testimony should have been excluded under *Daubert* and *Rule 702*, because the expert's differential diagnosis was not "thorough" and he failed to rely on any published studies linking a fall to the damages suffered by the plaintiff, the Court found no abuse of discretion. The expert did in fact conduct a differential diagnosis, looking at such alternative causes, and the argument that the differential diagnosis was not completely thorough raised a question of weight rather than admissibility. Nor was it dispositive that the expert failed to rely on any published studies, where there was no showing that the witness exceeded the boundaries of the general practice and methodology of chiropractors.

[20] Civil Rights Cases

Kopf v. Skyrm, 993 F.2d 374 (4th Cir. 1993) : Reversing a judgment in favor of defendants sued for using excessive force in making an arrest, the Court held that it was error to deny the plaintiff an opportunity to call two expert witnesses to testify concerning the proper use of police dogs and slapjacks. Rejecting any "blanket rule" with respect to expert testimony in excessive force cases, the Court held that the proper training of a police dog is not common knowledge, and that an expert should be permitted to testify as to the prevailing standard of conduct with respect to a slapjack.

Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998) : The plaintiff claimed that his civil rights were violated by an officer who allegedly arrested him without probable cause for carrying a concealed knife. Affirming a judgment for the officer, the Court held there was no abuse of discretion in admitting testimony by other officers that they had trained the defendant in approaching knives in varying contexts. Although none of the testimony regarding the dangerousness of knives and how they are used by criminals was earth-shattering and much of it probably overlapped with the jurors' own experiences, it was at least helpful in putting the defendant's actions -- such as waiting after he heard that the plaintiff had a concealed knife in a bar until the plaintiff left the bar to approach him -- in context.

Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) : In a civil rights action by Hmong refugees against a state employee for allegedly raping them, the Court held there was no error in permitting an anthropologist to describe the Hmong culture and explain the behavior of the plaintiffs within that cultural context, where the expert was precluded from testifying regarding the specifics of the case, such as whether there was a rape or why these particular plaintiffs did not report the rape. The Court also held that a social psychologist and a clinical social worker who interviewed the plaintiffs were properly permitted to testify as to what each plaintiff explained had happened and the resulting problems in each plaintiff's life, the witness' opinions regarding their psychological conditions, and her general understanding of the reactions of women to various life events including rape. The expert testimony assisted the trier of fact in assessing damages, and although the plaintiffs' stories were recounted, no expert was permitted to testify that the plaintiffs were telling the truth.

[21] Computers

Roback v. V.I.P. Transp. Inc., 90 F.3d 1207 (7th Cir. 1996) : A truck driver who rammed a car claimed that he was distracted by the erratic operation of a faulty cruise control system. An engineer, who used a computerized data

acquisition system called the DATAQ to gather data on the performance of various systems within an automobile or truck, took the truck on a 90-mile drive and used the DATAQ to document how the vehicle performed. The engineer concluded that the cruise control, when engaged, caused the engine to rev and the speedometer to fluctuate dramatically, even though the truck would not exceed the set speed limit. The Court held that although the DATAQ system had not been subject to peer review, the testimony was sufficiently scientific to satisfy *Daubert*: the methodology of gathering and compiling data during a test run was hardly novel, and although the expert was the only one who had used the DATAQ, he had "used standard components to assemble the DATAQ, and he certainly could have been interrogated about the way in which his software worked. His data were subject to examination and independent verification."

United States v. Larry Reed & Sons Partnership, 280 F.3d 1212 (8th Cir. 2002) : The defendants filed an insurance claim for loss of their cotton crop in 1993, but the government contended that no cotton was planted on that land during that season. Affirming a judgment against the defendants in a False Claims Act suit, the Court found no abuse of discretion in the admission of testimony by an agricultural expert that a computer analysis of satellite images supported the government's contention. The expert satisfied the *Daubert* standards for reliable expert testimony by referring to "hundreds and hundreds" of academic journals about the computer analysis process and its use in, e.g., assessing crop hail damage. He also "clearly explained his method of analysis, presented the satellite data, and illustrated how he applied the method to the facts before him."

[22] Credibility Testimony

[a] Abuse Cases

Doe v. Johnson, 52 F.3d 1448 (7th Cir. 1995) : A child and her adoptive parents sued her foster parents, alleging they sexually abused her. Affirming a verdict for the defendants, the Court held there was no error in permitting a defense expert to testify, on the basis of a review of pertinent records, that the child made allegations of sexual abuse to receive rewards from her adoptive parents, and that her allegations were the product of suggestion. The Court concluded that the expert's testimony "did not invade the province of the jury as to the question of credibility and merely dealt with [the expert's] opinion that Doe's allegations probably were fabricated and were the product of parental and therapeutic suggestion."

United States v. Kirkie, 261 F.3d 761 (8th Cir. 2001) : Physicians who had examined the victim in a sexual abuse case six and 18 months after the alleged assaults testified that their physical examination was normal, but that she had reported herself to have been sexually abused, and that it was not uncommon for child victims not to report specific details, or to delay reporting, of sexual assaults. The Court held there was no abuse of discretion in admitting the testimony, where the physicians did not opine as to whether the alleged abuse actually occurred or whether the victim was telling the truth. In *United States v. Waters, 194 F.3d 926 (8th Cir. 1999)* , the Court found no abuse of discretion in admitting rebuttal testimony by a social worker that "children rarely tell you everything about an abuse the first time they are asked" and that they often leave out details of abuse because they are embarrassed. The witness never gave her opinion as to whether the victim was telling the truth, but only informed the jury of the characteristics of sexually abused children. See also *United States v. Running Horse* n28(no error in permitting clinical psychologist who examined victim to testify to characteristics of sexually abused children and characteristics that victim exhibited, since he never gave his opinion whether victim was telling the truth). In *United States v. Whitted*, n29 the Court reversed a conviction for aggravated sexual abuse and incest, finding plain error when a physician was permitted to offer an opinion that the victim had suffered repeated child sexual abuse. The physical evidence was inconclusive, and the doctor examined the victim years after the alleged abuse and after the victim had become sexually active, so the conclusion had to be based simply on the doctor's belief that the victim's claims of abuse were true. See also *United States v. Plenty Arrows* n30(no abuse of discretion when defense expert, who testified on direct that the victim denied during an interview that he had been sexually abused, testified on cross-examination that the victim's behavior was

consistent with that of a sexually abused child); *United States v. Johns* n31(a psychologist testified about the dynamics of long-term familial sexual abuse, properly making no comment on the victim's credibility nor identifying her as a victim of sexual abuse).

United States v. Tsinnijinnie, 91 F.3d 1285 (9th Cir. 1996) : In a child sex abuse prosecution, the Court found no error when an expert on child sex abuse was permitted to testify about the timing of reports of sexual abuse by children, where the expert did not bolster the credibility of the victim but only explained why abused children may not complain. In a rape prosecution in which the defendant claimed consent, *United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995)* , the Court found no plain error when the prosecution's expert was permitted to testify that, in her opinion, the victim did not fake the rape. The Court noted that this comment was elicited during redirect examination after the defense counsel had suggested that the victim had "fooled" the expert into making an incorrect diagnosis; the defendant had thereby opened the door to testimony as to the victim's credibility which would not otherwise have been admissible. In *United States v. Antone*, n32 the Court held there was no abuse of discretion in admitting expert testimony regarding the general behavioral characteristics exhibited by victims of child sexual abuse, where the expert did not testify that the victim in this case could be believed.

Wilson v. Muckala, 303 F.3d 1207 (10th Cir. 2002) : In a nurse's action for sexual harassment, the Court found no error in the exclusion of testimony from the plaintiff's treating psychiatrist that the plaintiff was telling the truth when she said she was a victim of sexual harassment. The Court noted that "[e]xpert testimony on the psychological and emotional traits of abuse victims is typically admissible, so long as the witness makes no comment on the alleged victim's credibility, or identify the alleged victim as a victim of abuse ... . The credibility of witness testimony is a matter left to the jury and generally is not an appropriate subject for expert testimony." In *United States v. Velarde, 214 F.3d 1204 (10th Cir. 2000)* , the Court reversed a conviction for aggravated sexual abuse of a child because the Trial Judge did not make reliability determinations before admitting testimony from a pediatrician and a clinic psychologist, who had testified regarding the characteristics of alleged child sexual abuse victims, had opined that the child's condition was consistent with sexual abuse, and had indicated that they believed abuse had occurred because the victim had alleged that it occurred. In *United States v. Charley*, n33 the Court held it was error, but harmless, when a pediatrician specializing in child sexual abuse gave an unconditional opinion that the victims in the case had in fact been sexually abused. If the opinion was based on the girls' medical history, there was no showing that the expert's opinion ruling out all other causes for the girls' physical complaints was reliable. On the other hand, if the opinion was largely based on crediting the girls' accounts, the expert was essentially vouching for their truthfulness, which is impermissible.

Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998) : The Court reversed the denial of habeas corpus to a petitioner convicted for child abuse. Where the case was based almost entirely upon stories told by three young-children witnesses, the petitioner was denied a fundamentally fair trial when an expert for the prosecution testified that "99.5% of children tell the truth" and that in his own experience interviewing 1,000 children about sexual abuse he "had not personally encountered an instance where a child had invented a lie about abuse."

[b] Credibility -- Other Cases

United States v. Torres-Galindo, 206 F.3d 136 (1st Cir. 2000) : Although the Court affirmed carjacking and firearms convictions, it noted that it was troubled by the testimony of an FBI special agent whose "vouching" the Court had criticized in *United States v. Rosario-Diaz* (*infra*). The agent testified regarding custodial statements made by one defendant that "it is difficult for me to remember a time when a defendant or a suspect in a case has immediately told me the truth" and that "[m]ost of the time they always start with a lie." While the agent did not explicitly state that he believed the defendant's confessions rather than his denial, nor did he indicate that he was aware of facts not before the

jury that confirmed the truth of the confession, the pattern that he purported to describe "is essentially the stuff of expert testimony and even if [he] were regarded as an expert, we doubt whether this is testimony that could properly be regarded as helpful to a jury, ... which out of its own experience may know that persons accused of wrongdoing often deny their guilt before confessing." Any error in admitting the testimony was harmless, however. In *United States v. Rosario-Diaz, 202 F.3d 54 (1st Cir. 2000)* , the Court held it was error (but harmless) to permit an FBI agent to bolster the testimony of a cooperating witness by opining that particular statements of the witness were "lies" and representing that the statements not singled out as lies had been "tested" and verified through interrogation techniques. Although the agent could properly have testified to facts within his personal knowledge that supported another witness' testimony and to actions he took to corroborate the testimony, it was impermissible for him to put the prestige of his professional knowledge behind the cooperating witness' testimony.

Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005) : In a civil rights case alleging excessive force, the disputed question was whether the plaintiff was shot in the back -- as indicated by the medical evidence -- or shot while turning toward the officer with a gun in hand, as testified to by the officer. The defendant's expert, a forensic pathologist, offered an innocent explanation for the inconsistency between the medical evidence and the officer's testimony, and indicated that he had ruled out the possibility that the officer was simply lying, because of the difficulties in getting away with a lie about discharging a weapon. The Court found that the pathologist gave expert testimony that the officer was telling the truth, which it had consistently held inadmissible under *Rule 702*. In ruling that guilt-assuming hypothetical questions of lay character witnesses are improper in *United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990)* , the Court left open the possibility that they might be asked on cross-examination of expert character witnesses. One Judge, concurring only in the judgment, said that expert character testimony is one of those ideas whose time has not yet come, and with common sense and a modicum of luck never will. In *United States v. Scop*, n34 the Court reversed stock fraud convictions, concluding that the chief investigator of an SEC regional office improperly based his opinion on the "positive assessment of the trustworthiness and accuracy of the testimony of the government's witnesses." The Court reasoned that the witness' expertise "did not encompass the evaluation of testimony" and that "even expert witnesses possessed of medical knowledge and skills that relate directly to credibility may not state an opinion as to whether another witness is credible."

United States v. Thomas, 74 F.3d 676 (6th Cir. 1996) : The Court held in a drug case that there was no abuse of discretion in precluding the defendant from calling "an experienced federal criminal practitioner" to testify about the incentive a cooperating witness would have to give false testimony as a result of a plea agreement containing a promise of a reduced sentence in exchange for cooperation with the government, since the jury could understand the witness' incentive on the basis of cross-examination without expert help.

Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000) : A plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to testify that he did not believe the plaintiff when he testified that he was in the operator's zone behind the mower when he was injured. The witness' opinion about the plaintiff's credibility was merely based on speculation and not the proper subject of expert testimony.

Westcott v. Crinklaw, 68 F.3d 1073 (8th Cir. 1995) : The Court reversed a judgment for a police officer in a civil rights action brought by the wife of a burglar shot and killed by the officer. After the shooting, the officer had made statements inconsistent with his later trial testimony. To explain these inconsistencies, the officer called an expert witness who testified that the officer was suffering from post-traumatic stress syndrome when he made the statements, and that this syndrome may cause a person to make inaccurate and unreliable statements. The Court held that the admission of the expert's testimony was an abuse of discretion, because it directly addressed the credibility of the officer

as a witness, and usurped the function of the jury. In *United States v. French, 12 F.3d 114 (8th Cir. 1993)* , the Court held there was no abuse of discretion in a marijuana conspiracy case when the defendant was precluded from offering testimony by an attorney regularly representing criminal defendants that witnesses who testify after signing plea agreements containing substantial-assistance provisions are more likely to incriminate the defendant falsely in order to receive the reduction. This conclusion is within the realm of common sense and expert testimony is not necessary to draw it.

United States v. Adams, 271 F.3d 1236 (10th Cir. 2001) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the exclusion of a psychologist's report suggesting that the defendant might not have been telling the truth in confessing to police. The report was "little more than a professionally-trained witness testifying that, based upon his history, 'Mr. Adams is the type of person who would have lied about his involvement to the police,' " the confession was clearly voluntary, and the reason given in his recantation for lying -- to protect his girlfriend -- is the sort that a jury is capable of resolving without expert testimony. In *United States v. Toledo, 985 F.2d 1462 (10th Cir. 1993)* , the Court held it was a close question, but not plain error, to admit a psychiatrist's testimony as to whether the victim's story might be delusional in a prosecution for kidnapping a 14-year-old mentally retarded and mentally ill girl.

Griffin v. City of Opa-Locka, 261 F.3d 1295 (11th Cir. 2001) : A former City employee brought a civil rights action after the City manager sexually harassed and raped her. The Court found no abuse of discretion in admitting testimony from an expert for the plaintiff about common responses by victims of rape or harassment. The expert did not comment on the plaintiff's credibility, veracity, or capacity for truthful testimony, nor on whether the events she described had in fact transpired. In *United States v. Beasley, 72 F.3d 1518 (11th Cir. 1996)* , the Court affirmed convictions arising from murders and other crimes committed by a religious cult, and found no error in excluding a defense psychiatric expert who would have testified that a former cult member (a prosecution witness) was a psychopath with no conception of the truth. "Expert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility assessments."

[23] Credibility of Expert Witness

Deputy v. Lehman Bros., Inc., 345 F.3d 494 (7th Cir. 2003) : In an action alleging securities fraud by a broker, the Court held that the Trial Judge erroneously excluded expert testimony that the plaintiff had not signed a "Client Agreement" providing for arbitration. The Judge focused on seven reasons, most of which concerned issues of credibility and persuasiveness, for excluding the testimony; e.g., the Judge found that the expert was less than candid in describing her testimony in a previous case. The Court found that "such considerations are relevant only in valuing the testimony, not in determining its admissibility."

United States v. Vesey, 338 F.3d 913 (8th Cir. 2003) : Affirming drug trafficking convictions, the Court found it was error (but harmless) to exclude a defense witness called as an expert to testify to how drug operations are normally conducted and to counter the testimony of the government's expert witness. The witness had been excluded on the ground that he gave contradictory and evasive responses, which erroneously shifted the focus to the witness' credibility rather to his qualification on the basis of experience. The Court found that he had extensive knowledge, which he used to formulate general rules of drug trafficking behavior, and that he applied the rules to explain the behavior of the actors in this case.

[24] Cultural Experts

United States v. Sebaggala, 256 F.3d 59 (1st Cir. 2001) : A Ugandan national, charged with making false declarations to Customs regarding monetary instruments he was carrying, proffered an expert to testify on the linguistic and cultural traits of the tribe to which the defendant belonged, to aid in assessing his ability to understand the forms he signed and thus his culpability. The Court found no abuse of discretion in excluding the testimony, which was grounded primarily on anecdotal experience and, because it focused on customs like affability and on tribal forms of nonverbal communication, would not materially assist in assessing the defendant's ability to comprehend Customs forms.

United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999) : The defendant, a Laotian immigrant charged with mail fraud in selling insurance without a license, sought to call an expert on Laotian culture to testify to the importance of the burial rite, the history in Laos and the U.S. of pooling money to pay burial expenses, the difficulty of learning English and concepts such as insurance, and the lack of education and sophistication of Laotians in general. Even though the expert would not testify in any way about the defendant's mental state or intent, the Court found no abuse of discretion in the exclusion of the testimony on the ground that it would not have been helpful to the jury in determining the defendant's guilt. In *Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991)* , a civil rights action by Hmong refugees against a state employee for allegedly raping them, the Court held there was no error in permitting an anthropologist to describe the Hmong culture and explain the behavior of the plaintiffs within that cultural context, where the expert was precluded from testifying regarding the specifics of the case, such as whether there was a rape or why these particular plaintiffs did not report the rape.

[25] Damages

[a] Antitrust

Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F.3d 1267, 1995-2 Trade Cas. (CCH) P71103 (3d Cir. 1995) : In a Robinson-Patman Act case, the Court held there was no error in admitting the plaintiff's expert testimony, but the testimony did not provide sufficient evidence to support a finding of antitrust injury, because the expert did not sufficiently link the plaintiff's fall in sales to price discrimination. The expert failed to take into account the fact that the sales may have been lost for reasons apart from the price discrimination and failed to identify a single lost customer.

International Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 1984-2 Trade Cas. (CCH) P66193 (D.S.C. 1984) , *aff'd*, *792 F.2d 416, 1986-1 Trade Cas. (CCH) P67138 (4th Cir. 1986)* : The Court found that the evidence sustained a jury's verdict in an antitrust case and that the plaintiff's economist projected damages on the basis of reasonable data and assumptions.

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 1986-1 Trade Cas. (CCH) P67189 (7th Cir. 1986) : The Court reversed a judgment for the plaintiff in an antitrust case, stating that "[t]he projection of lost profits that Olympia's expert witness made to the jury bore no relation to Olympia's internal business planning or to economic reality." The Court recognized that "[s]peculation has its place in estimating damages, and doubts should be resolved against the wrongdoer," but it concluded that the assumptions made by the expert in this case were unreasonable.

[b] Damages -- Civil Rights and Employment Discrimination

Cummings v. Standard Register Co., 265 F.3d 56 (1st Cir. 2001) : In an age discrimination case, the Court found no abuse of discretion in the admission of testimony by the plaintiff's expert regarding front pay damages. The expert had used data from the Bureau of Labor Statistics and one year's salary as a base, rather than company-specific data and

a mean of salaries. However, during cross-examination he offered sufficient explanations for his methodology, and the defendant failed to show that the information he did use was incorrect or to dispute that his assumptions are ones that economists make with some frequency. A computational error that the expert had made was exposed in his testimony, but it was duly corrected while he was on the stand, so that the jury could consider the correction in assessing his conclusions.

Doran v. Eckold, 362 F.3d 1047 (8th Cir. 2004) : In a § 1983 action arising from the no-knock execution of a search warrant, the Court found no error in the admission of damages testimony from an experienced accountant. The witness had used the plaintiff's own estimation of his reduction of work capacity and the clients he lost, and had calculated the dollar amount of the loss from prior tax returns and client invoices. The Court held that the witness' calculations were derived using standard accounting procedures and based on estimations, not simply "guesses"; questions about the factual basis went to the credibility, not the admissibility, of the testimony.

Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) : In a civil rights action by Hmong refugees against a state employee for allegedly raping them, the Court held there was no error in permitting a social psychologist and a clinical social worker who interviewed the plaintiffs to testify as to what each plaintiff explained had happened and the resulting problems in each plaintiff's life. Each witness was also properly permitted to give her opinion regarding the victims' psychological conditions, and her general understanding of the reactions of women to various life events including rape. The expert testimony assisted the trier of fact in assessing damages, and although the plaintiffs' stories were recounted, no expert opinions were permitted that the plaintiffs were telling the truth. In *Cassino v. Reichhold Chems., Inc.*, n35 the Court affirmed a finding that an employer engaged in age discrimination in terminating an employee, but reversed the damage award because of error in excluding the employer's expert testimony concerning the reasonableness of the plaintiff's mitigation efforts and the availability of jobs.

[c] Damages -- Contracts

International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc., 851 F.2d 540 (1st Cir. 1988) : The Court affirmed a damage award in a suit by a purchaser of a boiler who alleged that a breach of warranty resulted in business interruptions. It held that an accounting expert was properly permitted to derive damage estimates by reviewing the plaintiff's financial records, and that the somewhat abbreviated and conclusory description of the underlying documentation that he provided went to weight rather than admissibility.

Advent Systems v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) : Remanding a contract action between computer software and hardware manufacturers, the Court noted, with respect to the plaintiff's damages expert, that there had been no factual inquiry and finding as to what data experts in the field find reliable, and that it had serious reservations about the validity of expert testimony based on prior predictions of sales for a given period when actual performance data for that same time span are available.

Genmoora Corp. v. Moore Bus. Forms, Inc., 939 F.2d 1149 (5th Cir. 1991) : The Court held in a breach of contract action related to the sale of a business that the defendant had not preserved its objections to expert testimony by the plaintiff's chief financial officer regarding proposed adjustments in a disputed audit, but held that the testimony was insufficient to support the plaintiff's claimed adjustments. Although auditors frequently extrapolate from samples, a sampling from inventory like that made by the witness would not support an adjustment to receivables.

Children's Broadcasting Corp. v. Walt Disney Co., 357 F.3d 860 (8th Cir. 2004) : In an action for breach of

contract and misappropriation of trade secrets arising from efforts to develop a broadcast network for children, the Court held there was no abuse of discretion in admitting testimony from the plaintiff's expert on damages, since the defendants failed to show that the expert's opinion was so unsupported that his testimony could offer no assistance to the jury. In its earlier decision in the case, *Children's Broadcasting Corp. v. Walt Disney Co., 245 F.3d 1008 (8th Cir. 2001)* , the Court affirmed a conditional grant of a new trial on damages, finding no abuse of discretion in the Trial Court's conclusion that it should have excluded the testimony of the plaintiff's expert witness on damages. The expert had failed to consider the effect of competition on Children's, his theory of causation was questionable, and his testimony was based on a report prepared before Children's' claims were narrowed for trial. In *School Dist. No. 11 v. Sverdrup & Parcel & Assocs.*, n36 the Court upheld a decision in favor of a school district that sued for damages resulting from the failure of reroofing on three buildings. It found that the expert testimony on damages, including testimony concerning a contingency expense, was permissible, observing that "[t]he difficulty of proving a precise amount will not preclude recovery as long as there is a reasonable basis to approximate the amount." In *Cashman v. Allied Prods. Corp.*, n37 the Court held that an accountant and business consultant to a seller and another witness with extensive experience in the same business were properly permitted to testify as experts with respect to lost profits.

Humetrix, Inc. v. Gemplus S.C.A., 268 F.3d 910 (9th Cir. 2001) : Affirming a judgment for an entrepreneur against the manufacturer of Smart Card technology in a case alleging breach of contract and breach of fiduciary duty, the Court found no abuse of discretion in admitting expert testimony as to the entrepreneur's lost profits. The experts based their testimony on contracts that the entrepreneur had closed, pilot projects for which it had received commitments, contracts in negotiation, market forecasts (including the defendant's own), contacts with government officials, and the plaintiff's cooperative effort with the defendant, so there was substantial evidence to support the lost profit testimony. In *In re James E. O'Connell Co.*, n38 the Court affirmed a judgment for a would-be purchaser of a plant against a bankruptcy trustee for breach of contract and conversion, finding that an expert could give an opinion on lost profits on the basis of the purchaser's financial statements, comparable data pertaining to similar businesses, and more general information such as forecasts and reports on markets for dried vegetable products.

Lifewise Master Funding v. Telebank, 374 F.3d 917 (10th Cir. 2004) : In an action by a lending company against its loan financer for breach of contract, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the exclusion of the damages model proffered by the plaintiff, since the proposed expert was not qualified in the methodology and the methodology was "unique to this case and not based on any recognized standard"; further, the methodology was "not in regular usage for predicting future profits, was not peer reviewed, has no uniform usage in any known industry, and is capable of manipulation to achieve virtually any desired result." In *Firestone Tire & Rubber Co. v. Pearson*, n39 the Court held that an accountant was properly permitted to testify to damages suffered by a business as result of the breach of an agreement, where the jury was made aware of any speculation resulting from incomplete data. See also *State Office Sys. v. Olivetti Corp.* n40(the president and treasurer of a company was qualified to give an opinion as to lost profits based upon his knowledge of its operations, sales, and profits).

[d] Damages -- Distributorships, Franchises, and Other Business Relationships

Irvine v. Murad Skin Research Labs., Inc., 194 F.3d 313 (1st Cir. 1999) : The Court awarded a new trial on damages in a distributor's action against its supplier because the plaintiff's expert testimony was unreliable. Specifically, the accountant utilized incorrect sales data and relied on incorrect assumptions regarding the plaintiff's business in determining the losses attributable to the defendant's actions. In *Newell P.R., Ltd. v. Rubbermaid Inc., 20 F.3d 15 (1st Cir. 1994)* , the Court affirmed a judgment against the supplier for termination of an exclusive distribution agreement, and held there was no error in admitting testimony by the plaintiff's damages expert, despite contentions of surprise, confusion, and failure to supplement discovery responses. The expert was concededly qualified and the supplier was able to cross-examine the expert and a Court-appointed expert and to present its own expert. In *Knightsbridge Mktg. Servs. v. Promociones y Proyectos*, n41 an action by a United States company claiming breach of its contract to act as a

sales representative and registration agent for a Dominican Republic company's hotel, the Court held that the plaintiff's expert properly relied upon his knowledge and experience in the hotel-booking business, information obtained from the defendant's hotel, and authoritative sources in the Dominican Republic in offering an opinion as to lost profits. See also *Computer Sys. Eng'g, Inc. v. Qantel Corp.* n42(sustaining a damage award in an action arising out of a computer products distribution agreement, and finding that the plaintiff's CPA-auditor was properly permitted to forecast lost profits; damages need not be proved with mathematical certainty).

Tuf Racing Prods., Inc. v. American Suzuki Motor Corp., 223 F.3d 585 (7th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a suit for wrongful termination of a franchise agreement, holding there was no error when the plaintiff's accountant, a CPA, presented its theory of damages. Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to the trier may qualify as an expert witness, and there is no requirement that a damages witness in a case like this have a degree in economics, statistics, mathematics, or some other "academic" field that might bear on the calculation of damages. In *Target Market Publishing Inc. v. ADVO, Inc., 136 F.3d 1139 (7th Cir. 1998)* , a diversity action for breach of contract and fiduciary duty arising from a joint venture to market a direct mail advertising publication, the Court affirmed summary judgment for the defendant on the ground that the plaintiff could not recover the requisite jurisdictional amount. There was no abuse of discretion in excluding a report from an expert accountant and business appraiser who concluded that had the defendant performed its contractual obligations, the joint venture would have earned $1.4 million during the contract period, where the report was based on the speculative assumption that the joint venture would have successfully entered 49 marketing zones, when at the time of the breach it had only operated in two marketing zones and was unsuccessful in both. In *Bright v. Land O'Lakes, Inc.*, n43 the Court upheld a damage award in favor of a distributor who sued a manufacturer for breach of contract and violation of a state law governing dealerships. It held that testimony by the distributor's damages expert, who calculated projected earnings by determining gross revenue per capita in the original distribution area and assumed the same earnings in an expanded territory, was properly admitted notwithstanding the manufacturer's claim that there was no competition in the original area and substantial competition in the expanded area, since the manufacturer had ample opportunity to cross-examine the expert and to offer its own expert.

Storage Technology Corp. v. Cisco Sys., Inc., 395 F.3d 921 (8th Cir. 2005) : The Court affirmed summary judgment for the defendant in an action alleging that the plaintiff's former employees had been tortiously induced to breach their employment contracts. The plaintiff's expert asserted that the damages were the value of the company that the employees joined, which was shortly thereafter acquired by the defendant. The Court held that the expert's opinion was fundamentally unsupported and speculative, and that there was no abuse of discretion in excluding it. In *Wash Solutions, Inc. v. PDQ Mfg., Inc., 395 F.3d 888 (8th Cir. 2004)* , an action for early termination of a car wash distributor franchise, the Court affirmed in part a judgment for the plaintiff and found no abuse of discretion in the admission of testimony from the plaintiff's damages expert. Although the witness failed to address the plaintiff's historical sales performance and lacked knowledge of the car wash industry, the plaintiff was not attempting to project future sales to unknown customers but was only claiming net profit to be made on sales projected at the time the franchise was terminated, so the witness' qualifications as an expert in accounting and financial reporting were sufficient to make those calculations. In *Meterlogic, Inc. v. KLT, Inc., 368 F.3d 1017 (8th Cir. 2004)* , summary judgment was granted for the defendant in an action alleging misrepresentations in negotiating an agreement to sell remote monitoring and metering technology and services for business machines. Affirming, the Court found no abuse of discretion in excluding testimony by the plaintiff's damages expert that predicted financial results 10 years into the future despite the fact that the parties' agreement was for only two years and allowed termination at any time. Moreover, the expert made assumptions that lacked foundation regarding the contract and the parties' market share and annual growth. In *Ventura v. Titan Sports, Inc.*, n44 the Court affirmed a quantum meruit claim brought by a professional wrestler who contended that he was entitled to some of the profits from sales of videotapes on which he served as a commentator. The Court held that the expert's methodology in arriving at the royalty percentages was reliable, since he based his opinion upon a survey of thousands of licensing agreements in the field of entertainment and sports, and it is "common practice to

prove the value of an article (e.g., a videotape license) by introducing transactions involving substantially similar articles (i.e., other licenses)." Remanding for further consideration of the amount of punitive damages in *Robertson Oil Co. v. Phillips Petroleum Co.*, n45 an action for interference with a business relationship, the Court held there had been no abuse of discretion in permitting an expert to testify as to what size punitive award against a company with the defendant's net worth would be comparable to a $2, $100, or $1000 award against a "common worker," as an explanation of what the figures in the defendant's financial statements meant.

Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003) , *aff'd*, *125 S. Ct. 2611 (2005)* : In a class action by gasoline dealers against their supplier for breaching a sales agreement by the manner in which the supplier set wholesale prices, the defendant argued it was error to admit testimony of the dealers' expert because he had no specialized knowledge of pricing systems in the petroleum industry and because his methodology was flawed. Affirming, the Court held that given the extensive six-day *Daubert* hearing to determine whether the methodology was reliable, it was not an abuse of discretion to allow the expert to testify at trial, where the defendant was able to cross-examine him fully and refute his testimony through its own expert witness. In a breach of contract suit arising from a distributor's refusal to pay a manufacturer for telephones, *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.*, n46 the Court held that an expert witness' testimony as to damages was not unduly speculative and that a past history of profits is not absolutely required to support economic projections of lost future profits.

[e] Damages -- Civil RICO

Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987) : The Court affirmed a judgment against the defendants in a civil racketeering case, holding that the plaintiff's comptroller was properly qualified as an expert on the fair market value of gas cylinders of which the plaintiff was deprived by a fraud scheme, even though he did not explain the procedures used to determine market value, where the comptroller was responsible for determining the value of cylinders to be acquired.

Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001) : In a civil RICO action to recover funds that the defendants fraudulently diverted in connection with real estate investments, the Court found no abuse of discretion in the admission of expert testimony by the plaintiffs' damages witness, an experienced economist. The witness was qualified, his theories and methodology were sufficiently reliable, and there was an adequate foundation for his assumptions.

[f] Damages -- Personal Injuries and Property Damage

Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549 (D.C. Cir. 1993) : In a suit by estates of helicopter crash victims against the manufacturer of an engine, the Court held that expert testimony as to the income and investment profits one deceased would have earned should have been excluded as totally speculative. The expert "simply made up new lines of work" for the deceased and made projections regarding appreciation of a single piece of property without ascertaining the experience of investors in the market.

Marcano Rivera v. Turabo Medical Center Partnership, 415 F.3d 162 (1st Cir. 2005) : In a medical malpractice action arising from a delivery in which the infant suffered severe neurological damage, the plaintiffs offered testimony from a life-care planner regarding the projected cost of the infant's future care. Although noting that the expert's report "might have benefitted from a review of the projections" regarding the infant's future needs, the Court found there was no abuse of discretion in the determination that the expert's methodology was sufficiently reliable. The expert based his testimony on a review of records from the agency providing skilled nursing care, a letter from the infant's physician, and an interview of her family and caregiver.

Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18 (2d Cir. 1996) : The Court vacated a damages award for a plaintiff in a personal injury action, because the plaintiff's expert's calculation of the plaintiff's lost earnings was not accompanied by a sufficient factual foundation. The expert's assumptions that the plaintiff would work 40 hours per week, 52 weeks per year, with fringe benefits and regular pay increases for the rest of his career, represented a "complete break" with the plaintiff's work history of seasonal and intermittent employment. The expert also relied on unsupported assumptions concerning fringe benefits, without any evidence that the plaintiff received benefits of any kind from his employment. In a wrongful death action, *Shatkin v. McDonnell Douglas Corp.*, n47 the Court found no error in the refusal to permit an economist to testify as to the pecuniary damage attributable to the plaintiff's loss of her son when the economist made unsupportable assumptions concerning the amount of income the son would have given the mother, cast his testimony in a way that might have resulted in jury confusion and misunderstanding, used price rather than wage inflation in projecting the son's future earnings, ignored the impact of state taxation on the son's earnings, made unwarranted assumptions about the effect of federal taxation on the earnings, and chose a discount rate that could not be supported. In *Shu-Tao Lin v. McDonnell Douglas Corp.*, n48 the Trial Judge granted a new trial on damages subject to remittitur in an action for the wrongful death of an airline passenger, concluding that the plaintiff's economist lacked sufficient factual bases, so the opinion that he gave was not reasonably reliable. The Court agreed that the plaintiff's economist was improperly permitted to give "lengthy, extravagant and non-probative" projections of lost future income.

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : Reversing a judgment for the plaintiff in a slip and fall case, the Court held it was an abuse of discretion to admit testimony from an economist whose assumptions about the plaintiff's injuries, her earning capacity before and after the accident, and her work expectancy were wholly lacking foundation in the record. In *Toombs v. Manning*, n49 a suit by a passenger injured by a subway train, the Court held that lost future earnings were a proper element of damages where the passenger testified as to his prior employment history and his experts testified to his preaccident potential and his now-limited economic horizons. In *Salas v. Wang*, n50 a medical malpractice case brought on behalf of a child who suffered severe brain damage, the Court concluded that it was not reversible error to permit a plaintiff's expert to testify as to aggregate damages, since the expert might have been able to assist the jury in performing calculations, such as a reduction of a lump sum award to present value. Ruling on evidentiary questions to provide guidance upon retrial in *Gumbs v. International Harvester, Inc.*, n51 the Court held that the plaintiff's economic expert should not have been permitted to speculate about lost fringe benefits or lost income absent a showing of a factual basis for his projections.

Murphy v. National R.R. Passenger Corp., 547 F.2d 816 (4th Cir. 1977) : Remanding a FELA case because the Trial Judge refused to admit testimony about the qualifications of the plaintiff's experts after the defendant conceded that they were well qualified, the Court stated that expert testimony or actuarial tables on the present value of future lost earnings may be admitted and said that on retrial the Trial Judge should, on request, "explain a method of calculating present value at a rate of interest to be determined by the jury in light of prevailing economic conditions."

In re Air Crash Disaster, 795 F.2d 1230 (5th Cir. 1986) : In a suit by three children whose parents were killed in an airplane accident, the Court found that an economist's assumptions concerning the deceased father's likely annual salary increase, likely tax rate, projected savings, and national figures on consumption by families were "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating how much of [the father's] income would have found its way into assets or savings to be inherited by his children." Thus, it found the damage award to have been based on testimony that was too speculative.

Drayton v. Jiffee Chem. Corp., 591 F.2d 352 (6th Cir. 1978) : In a personal injury action the Court noted that an

expert could testify about inflation rates, the value of the dollar, worker productivity, and investment rates, and could consider the possibilities that such variables would continue into the future.

Mercado v. Ahmed, 974 F.2d 863 (7th Cir. 1992) : In an action for personal injuries arising out of a taxicab accident, the Court held there was no abuse of discretion in precluding an economist with an M.B.A. from testifying as to the plaintiff's "lost pleasures of living." Despite the expert's training, extensive research, and countless calculations, it was not an abuse of discretion to rule that his testimony would not aid the jury; this conclusion may be less a reflection of the flaws in his methodology than on the impossibility of any person achieving unique knowledge of the value of life. In *Nemmers v. United States*, n52 the Judge ruled that the testimony of an economic expert in a medical malpractice case concerning future movement of wages must be based upon competent evidence of future economic trends (i.e., known economic facts and accepted economic theory), not the personal experience of an actuary.

Dorn v. Burlington No. Santa Fe, 397 F.3d 1183 (9th Cir. 2005) : In a wrongful death action brought after a train crash, the Trial Judge allowed the plaintiff's expert to testify to the amount of hedonic damages suffered by the victim, but refused to allow the defendant's expert to discredit the opinions of the plaintiff's expert. The Court found that this was error, declaring that the methodology employed by the plaintiff's expert was "shaky," which made it all the more necessary to allow the defendant to proffer its own expert. In *Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996)* , the Court affirmed a judgment awarding only nominal damages for the plaintiff, the daughter of a man killed by the Los Angeles police during a robbery. Because there was no evidence of W-2 forms, no pay stubs, no tax returns, no canceled checks, and no employer testimony, the Court held there was no error in excluding expert testimony projecting the amount of money the deceased would have earned and paid as child support. In a civil rights action by Hmong refugees against a state employee for allegedly raping them, *Dang Vang v. Vang Xiong X. Toyed*, n53 the Court held there was no error in permitting a social psychologist and a clinical social worker who interviewed the plaintiffs to testify as to what each plaintiff explained had happened and the resulting problems in each plaintiff's life. Each witness was also properly permitted to give her opinion regarding the victims' psychological conditions, and her general understanding of the reactions of women to various life events including rape. The expert testimony assisted the trier of fact in assessing damages.

Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a product liability action against the manufacturer of a machine for removing road pavement, holding there was no abuse of discretion in admitting testimony from a forensic economist regarding hedonic damages. There was a sufficient finding that the expert's testimony explaining the concept of hedonic damages was relevant and reliable, and the expert did not apply the facts of this case to the criteria he proffered or give his opinion of the hedonic damages appropriate in this case. In a civil rights action, *Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996)* , the plaintiff alleged that injuries from the defendants' use of excessive force caused him to lose profits from his business of purchasing, rehabilitating, and selling houses. The Court held that the plaintiff had sufficient expertise and personal knowledge to render an opinion as to lost future profits of his own real estate ventures. In an automobile accident case, *Quinones v. Pennsylvania Gen. Ins. Co.,* n54 the Court held that testimony of an economist was properly excluded, since the economist based his testimony concerning the plaintiff's lost earning capacity on Department of Labor statistics for production workers in jewelry manufacturing, and those figures were not relevant to computing the income of the plaintiff, a self-employed watch repairman.

McDermott v. Middle East Carpet Co., 811 F.2d 1422 (11th Cir. 1987) : The Court held that an expert could properly rely upon financial statements from a company's fourth year of operations, which was the first full year following the rebuilding of a plant destroyed by fire, to give an opinion concerning lost profits due to a delay in starting operations.

[g] Damages -- Property Interests and Transactions

Piney Woods Country Life School v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984) : Remanding a class action involving the interpretation of royalty clauses in oil and gas leases, the Court observed that proving market value at the well often may be difficult and that completely comparable sales are not likely to be found. It suggested that the Trial Judge not reject out of hand sales with some different characteristics and that the plaintiffs "should not be faced with the impossible task of establishing market value with absolute certainty or perfection."

Ellis v. Gallatin Steel Co., 390 F.3d 461 (6th Cir. 2004) : Affirming in part a judgment for the plaintiffs in a nuisance action arising from industrial pollution, the Court found no abuse of discretion in the admission of testimony from the plaintiffs' damages expert. The Trial Judge's failure to mention the *Daubert* factors was not error when they were not pertinent -- here, "an accurate assessment of a local real-estate market does not require peer review or extensive scholarly writing." The expert's failure to consider other possible sources of pollution did not render his testimony unreliable, and he applied the correct legal standard for damages (diminution in value of use of the property) at trial, although he initially erred in applying the diminution in market value standard.

American Nat'l Bank v. K-Mart Corp., 717 F.2d 394 (7th Cir. 1983) : In a suit by a tenant against a landlord for breach of a duty to keep premises in repair, the Court held it was error to exclude the testimony of a real estate appraiser who had estimated the difference in the rental value of the premises in and out of repair. Although the tenant had not actually tried to sublet the property, the bases for the expert opinion were not too speculative to support an opinion.

Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997) : In an action to recover damages from the use of lands jointly by the Navajo Nation and the Hopi Tribe, the Court held there was no abuse of discretion in admitting testimony by an economist regarding the fair value of Navajo grazing. Although the witness was not a real estate appraiser, he was a professor who had taught and written about "rangeland appraisal" and "range economic analysis" for 25 years, and his testimony derived from a relatively straightforward application of range economics rather than a novel scientific theory.

Atlantic Richfield Co. v. Farm Credit Bank, 226 F.3d 1138 (10th Cir. 2000) : In an action related to oil and gas leases in which one of the issues was the value of carbon dioxide gas used to extract oil, the defendants' expert economist proposed to testify based not on actual sales prices but on a hypothetical construct because, in his view, there was neither a competitive market nor "reliable actual sales" of the gas in the area. The Court found no abuse of discretion in exclusion of the expert's testimony, since his opinions were formed specifically for the litigation, he had not employed his theory previously, his opinions had not been published or subjected to peer review, and his analysis disregarded or failed to account for the prices actually received by certain suppliers in the market and in comparable markets. In *Ramsey v. Culpepper*, n55 the Court affirmed a judgment for a lessor who alleged negligence and fraud on the part of a realtor, and held that an economist-mathematician was properly permitted to testify on the question of damages where the case involved complicated mathematical principles, and that the expert could rely upon the real estate transactions to which a real estate appraiser had testified during the trial.

[h] Damages -- Other Cases

Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 2002-2 Trade Cas. (CCH) P73909 (2d Cir. 2002) : The plaintiff alleged that a competitor engaged in product disparagement and other conduct that led to lost business and the eventual closing of its store. Affirming a judgment for the defendants, the Court found no abuse of discretion in the exclusion of expert testimony regarding the plaintiff's damages. The witness assumed that a "campaign

of disparagement" caused sales to decline; however, that was never proved. Furthermore, his generalized findings about the value of the business did not comply with the requirement under the governing state law that damages for named customers be itemized.

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456 (5th Cir. 1986) : The Court reversed a judgment in favor of a trust that sued an employer and its principal shareholder alleging breach of fiduciary duty. It concluded that an expert's failure to consider relevant factors or to explain his reasons for disregarding them rendered his testimony unworthy of credit. Thus, it could not be used as a basis for determining the fair market value of the trust's stock for purposes of calculating damages.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985) : The Court reversed an actress' judgment against a magazine for invasion of privacy, finding that an economist's calculation of lost earnings was erroneous because he failed to consider the "extreme riskiness" of the plaintiff's earnings stream. The Court reasoned that an adjustment was required "to reflect the preference of a risk-averse individual for a smaller amount, received with certainty, to a larger expected amount that is subject to great uncertainty." It also found that the expert erred in failing to consider the plaintiff's opportunities in other markets outside of Chicago where she had been making commercials.

Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 2003-2 Trade Cas. (CCH) P74152 (8th Cir. 2003) : Health maintenance organizations sued to recover for tobacco-related health care costs allegedly caused by the defendant tobacco companies conspiring to conceal the risks of smoking and to avoid developing safer tobacco products. The Judge excluded testimony by the plaintiffs' expert, a physician and economics professor, regarding the damage caused by the "disinformation effect" (how accurate disclosures would have affected smoking start and quit rates) and the "retardation-of-innovation effect" (how R&D spending equivalent to the chemical and drug industries would have reduced average tar yields). The testimony was seen as unduly speculative regarding the relations between advertising and initiation or quit rates and between spending and innovation, and as internally inconsistent because it failed to account for the relationship between innovation and information in the counterfactual situations he was positing. Affirming in part summary judgment for the defendants, the Court found that although the issue was close, there was no clear error in excluding the testimony. Several of the witness' predictions of the situation in the absence of the defendants' conspiracy were "inspired guesses at best." Moreover, the expert had taken lower tar as a measure of improvement, which was inconsistent with the plaintiffs' contention that the defendants had fraudulently marketed "low tar" and "light" cigarettes as healthier despite their knowledge that smokers would find way to compensate for the reductions, so the expert's opinions did not properly "fit" the plaintiffs' case. In an action for wrongful discharge, *Norton v. Caremark, Inc., 20 F.3d 330 (8th Cir. 1994)* , the Court held that there was no abuse of discretion in admitting testimony by the plaintiff's damages expert, as his calculations and assumptions were the subject of rigorous cross-examination and even if they were flawed, they were not so fundamentally unsupported as to be of no assistance to the jury.

Micro Chem., Inc. v. Lextron, Inc., 317 F.3d 1387 (Fed. Cir. 2003) : Affirming a judgment for the patent holder in an infringement action, the Court found no abuse of discretion in the admission of expert testimony regarding reasonable royalties. The expert's testimony was based on a reliable methodology -- using the conceptual framework of a hypothetical negotiation between patentee and infringer -- and the fact it was based on the plaintiff's version of the contested facts did not affect admissibility, since the defendants had ample opportunity through cross-examination and their own expert to present their competing version.

[26] ***Daubert*** Hearings

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : Affirming convictions for a conspiracy to bomb United States commercial airliners in southeast Asia and for crimes relating to the 1993 bombing of the World Trade Center, the Court found that the defendants were not prejudiced by a ruling barring presentation at trial of any defense expert witnesses who did not testify at a *Daubert* hearing, as the defendants failed to show that the ruling prevented them from calling any additional experts. Moreover, the Trial Judge was within his discretion in refusing to postpone the *Daubert* hearing, given the facts that jury selection was underway when the hearing occurred, and that holding the hearing thereafter would have interrupted the trial and wasted the time of the jury.

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : To establish the extent of her disability and lost earning capacity resulting from a slip and fall, the plaintiff offered opinion testimony from a witness that was based on her psychological condition, the extent of her physical injuries, employment factors, and tests performed on the plaintiff. The Court reversed a judgment for the plaintiff, holding that significant reliability questions regarding the expert's methodology made it error to deny a *Daubert* hearing, which would have permitted a fuller assessment of his analytical processes and was therefore a necessary predicate to a proper determination as to the reliability of his methods. In *Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000)* , the Court affirmed a summary judgment for the manufacturer of a truck and a chassis in a suit by a truck driver who was injured when his truck struck a guardrail and a bridge abutment pierced the floor of his cab. The Court found no error in excluding evidence from the plaintiff's engineering experts without a full-fledged *Daubert* hearing. It distinguished its decision in *Padillas v. Stork-Gamco, Inc.* (*infra*), which had emphasized the importance of an *in limine* hearing on *Daubert* challenges even in the absence of a request for such a hearing when admissibility turns on factual issues, on the ground that in this case the Trial Judge had sufficient evidence -- a preliminary report, an amended report, an affidavit challenging the witness, and two depositions -- to make a decision without a hearing. In *Padillas v. Stork-Gamco, Inc.*, n56 the Trial Judge granted summary judgment to the defendant manufacturer in a product liability action after excluding a report prepared by the plaintiff's expert mechanical engineer. Reversing, the Court held it was an abuse of discretion to exclude the report without holding a *Daubert* hearing. That the plaintiff did not request a hearing was immaterial, first, because of the Judge's independent responsibility to properly manage complex litigation, and, second, because the plaintiff could not have known the direction the Judge's opinion might take and thus needed an opportunity to be heard on the critical issues before his case was dismissed. In *Holbrook v. Lykes Bros. S.S. Co.*, n57 the Court found no error in admitting the defendant's expert testimony without having held a *Daubert* hearing. The Court noted that the Judge had scheduled a *Daubert* hearing, but that plaintiff's counsel was unprepared. At that point, it was sufficient for the Judge to entertain a motion to strike at trial.

Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001) : Affirming summary judgment for the defendant in an action for injuries allegedly caused by PCB contamination from pipeline leaks, the Court held there was no abuse of discretion when the Magistrate Judge excluded proffered testimony from the plaintiffs' witnesses without holding a *Daubert* hearing. The plaintiffs had not requested such a hearing, the admissibility of the experts' testimony was fully briefed by the parties, and it was clear from the record and opinion that there was an adequate basis from which to determine the reliability and validity of the experts' opinions. In *Clay v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000)* , the Court affirmed a judgment for the estates of passengers in a Ford Bronco II who were killed in a rollover accident. The defendant had requested a hearing on a motion *in limine* to exclude the plaintiff's accident reconstruction expert, but the Trial Judge denied the request because it was made only one week before trial. The majority concluded that, although the record did not explicitly state that the expert's testimony was relevant and reliable, it was clear that the Judge had so found from the rulings on motions made by the defendant during trial. The dissenting Judge was troubled that the Trial Judge did not make an initial assessment of the expert's testimony and never made an express assessment at any time.

Gruca v. Alpha Therapeutic Corp., 51 F.3d 638 (7th Cir. 1995) : The Court reversed judgments for the defendant

blood plasma manufacturers in a wrongful death action arising from a hemophiliac's death from AIDS, holding, *inter alia*, that it was error for the Trial Judge to decline to determine the admissibility under *Daubert* of the plaintiffs' proffered expert testimony concerning antigenic stimulation.

United States v. Robertson, 387 F.3d 702 (8th Cir. 2004) : Affirming drug and firearm convictions, the Court found no abuse of discretion in the admission of testimony by detectives that the amount of drugs possessed by the defendant was a "distribution amount." The detectives had adequate training and experience and the Judge performed the proper gatekeeping function in screening the testimony, even though the Judge did not hold a *Daubert* hearing. In *In re Air Crash at Little Rock, Ark., on June 1, 1999, 291 F.3d 503 (8th Cir. 2002)* , an airline passenger's personal injury action under the Warsaw Convention, the Court found that the Trial Judge did not engage in a proper *Daubert* inquiry when the airline objected that the theory that PTSD results in physical changes to the brain is not a recognized psychiatric concept, but that the airline requested a *Daubert* hearing too late: "We agree with the district court that when reasonably possible, Daubert issues should be raised prior to trial and that ideally the Daubert 'hearing' should not be conducted following a fifteen-minute morning recess shortly before the expert is scheduled to testify." In *United States v. Evans, 272 F.3d 1069 (8th Cir. 2001)* , the Court affirmed convictions for violations of the Mann Act, finding no abuse of discretion in the admission of expert testimony from a law enforcement agent concerning the operation of a prostitution ring. The defendant complained that the Trial Judge erred in refusing to conduct a *Daubert* hearing, but the Court held that there is no requirement that a *Daubert* hearing always be held.

United States v. Mendoza-Paz, 286 F.3d 1104 (9th Cir. 2002) : In a drug smuggling prosecution, the Trial Judge conducted a *Daubert* hearing in the jury's presence and admitted a government expert's opinion on the value of drugs found hidden in the defendant's car. Affirming, the Court found no error in holding the *Daubert* hearing in the presence of the jury, and noted that although the Supreme Court, in its *Daubert* trilogy, had stated that "the inquiry is a 'preliminary' one, to be made 'at the outset,' this does not mean that it must be made in a separate, pretrial hearing, outside the presence of the jury." In *In re Hanford Nuclear Reservation Litig., 292 F.3d 1124 (9th Cir. 2002)* , the Court, although reversing summary judgment, stated that it was not necessarily an abuse of discretion to fail to hold a *Daubert* hearing before excluding the expert testimony of plaintiffs' radiation experts. The Trial Court had before it the experts' reports, some deposition testimony, and the experts' affidavits; it therefore could have determined that it had an adequate record before it to make a ruling on the reliability of the experts' testimony. In a prosecution for importing marijuana, *United States v. Alatorre*, n58 the Court held that there was no abuse of discretion in refusing to hold a pretrial *Daubert* hearing before admitting testimony from a Customs agent regarding issues of value, distributable quantity, and structure and organization. *Kumho* makes clear that no particular procedure is required, and counsel's *voir dire* of the witness at trial in this case was sufficient for the discharge of the gatekeeping function.

Dodge v. Cotter Corp., 328 F.3d 1212 (10th Cir. 2003) : The Court reversed a judgment for plaintiffs in a pollution action by nearby residents against a uranium mill because the Trial Court "did not perform its gatekeeper function" with respect to three of the plaintiffs' experts. Even if the Judge's findings had not lacked sufficient specificity to allow review, it was an abuse of discretion to limit the length of any *Daubert* brief and appendix to 20 pages, to insist on the exclusive use of argument and proffers at the *Daubert* hearing instead of live witness testimony, to conduct a *Daubert* hearing that allowed for "little more than a cursory review of the contested issues," to reserve ruling on admissibility until trial, to decline proffers of experts' reports, and to place greater emphasis in the experts' *voir dire* on keeping it brief than on reviewing their reasoning and methodology. The Court concluded that "[a]though each of the court's decisions taken by itself might well be within its discretion, taken together, these decisions placed an unreasonable limitation on the information available to the court and in our view exceeded the bounds of permissible choice in the circumstances." In one of the prosecutions for bombing the Federal Building in Oklahoma City, *United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999)* , the government introduced testimony by a forensic explosives expert, who gave opinions about the type and size of the bomb that was used. The Court found no abuse of discretion in

the refusal to hold a *Daubert* hearing, where the defendant did not challenge the expert's methodology, but only whether the test results were undercut by flaws in the application, e.g., the care and maintenance of equipment used. It was within the Trial Judge's discretion to decide that questions of misapplication of a scientific procedure go to weight as well as to admissibility, and that it would therefore conserve judicial resources to have foundation evidence presented at trial rather than at a hearing outside the jury's presence, so long as a ruling on admissibility was made at some time.

[27] Designation As "Expert"

United States v. Williams, 81 F.3d 1434 (7th Cir. 1996) : The Trial Judge in a drug conspiracy trial designated a prosecution witness who translated the conspiracy's code for the jury as an "expert witness." The Court noted that one did not need to be impartial or a member of a learned profession to be an expert witness under the Rules, and held that the witness in question need not be designated an expert because he was testifying from personal knowledge about the meaning of the terms. Any risk that the unnecessary designation in this case puffed the witness up too much was waived by the defendants' failure to request an instruction that an " 'expert witness' is not necessarily a person of learning and probity."

[28] Differential Diagnosis

Clausen v. M/V New Carissa, 339 F.3d 1049 (9th Cir. 2003) : In an action by owners of an oyster farm claiming that an oil spill caused all the oysters to die, the Court found no abuse of discretion in the admission of causation testimony from the plaintiffs' expert. The expert properly applied a differential diagnosis based on a detailed history of the oyster site, evidence of the oil spill's extent, testing of oysters for oil, and the geographical and temporal proximity of the oyster deaths to the oil spill. The fact that there was no established minimum threshold for oyster death from oil, nor published studies on the toxic effects of oil on shellfish, did not make the expert's evaluation mere guesswork. Finally, the Court found the expert had "provided specific reasons" for ruling out low salinity as the cause, including the fact that the oysters did not exhibit the characteristics of low salinity mortality.

Goebel v. Denver & R.G.W. R.R., 346 F.3d 987 (10th Cir. 2003) : Affirming a judgment for an employee claiming that he sustained acute high altitude cerebral edema (HACE) as a result of exposure to diesel fumes in a high-altitude railroad tunnel, the Court found no abuse of discretion in a determination that the plaintiff's expert's differential diagnosis was reliable. The diagnosis followed a standard and accepted methodology, the expert adequately explained why the plaintiff might not have exhibited every symptom of the diagnosed condition, and the expert adequately considered and ruled out most of the alternative explanations for HACE. The Court concluded that there were reasons why the expert did not diagnose other causes as the specific cause of the plaintiff's injuries and that "any weaknesses should have been diligently pursued and exposed on cross examination."

[29] Drug Traffickers as Expert Witnesses

United States v. Vesey, 338 F.3d 913 (8th Cir. 2003) : Affirming drug trafficking convictions, the Court found it was error (but harmless) to exclude a defense witness called as an expert to testify to how drug operations are normally conducted and to counter the testimony of the government's expert witness. The witness had been excluded on the ground that he gave contradictory and evasive responses, which erroneously shifted the focus to the witness' credibility rather to his qualification on the basis of experience. The Court found that he had extensive knowledge, which he used to formulate general rules of drug trafficking behavior, and that he applied the rules to explain the behavior of the actors in this case.

[30] Economists

Mathis v. Exxon Corp., 302 F.3d 448 (5th Cir. 2002) : In a breach of contract action by gasoline station franchisees complaining that the defendant set prices to drive them out of business, the Court found no abuse of discretion in the admission of testimony from an economist offered by the plaintiff to show that the defendant's gas price was higher that what could be considered "commercially reasonable." The expert was qualified and was reliable, since he drew on general business and economic principles that satisfy the *Daubert* factors. Given the focus of his testimony on the defendant's pricing, there was no need for him to isolate the precise impact on each station, and its reliability was not affected by any error in defining the competitive market for each station.

[31] Employment Discrimination Cases

[a] Expert Testimony Admissible or Admission Required

Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987) , rev'd on other grounds, 490 U.S. 228 (1989) : The Court of Appeals affirmed a finding that stereotypical attitudes impermissibly affected partnership selection in the defendant's firm. It approved the Judge's reliance on a social psychologist's testimony that the plaintiff was the victim of stereotyping. The expert relied upon written reactions to the plaintiff and male candidates for partnership and on other factors ordinarily considered by stereotyping experts.

Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) : The Court affirmed an employee's judgment in an age discrimination suit, finding that expert statistical evidence was properly admitted. The expert's decision to focus on all terminations, whether listed as voluntary or involuntary, was not unusual and reflected the reality that the circumstances surrounding terminations were disputed.

Tyler v. Union Oil Co., 304 F.3d 379 (5th Cir. 2002) : In an age discrimination case, the Court found no abuse of discretion in the admission of expert testimony for the plaintiffs by a statistician. Although the class protected by the ADEA is employees over 40, the Court held that statistical groupings comparing employees over 50 with those under 50 were permissible, since an ADEA plaintiff may establish a prima facie case by showing replacement by someone younger, even if the replacement was within the protected class. Objections that the expert had created his own database, to the omission of variables, and to the use of age as a continuous variable in the analysis went to weight rather than admissibility.

McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073 (6th Cir. 1989) : Affirming a judgment for employees in an age discrimination case, the Court found no abuse of discretion in the admission of expert testimony concerning a statistical comparison of new hirees and employees transferred from other divisions with those terminated. The employer had a full chance to cross-examine the expert and to present its own expert and to explore its claim that the ages in the applicant pool would control the ages of new hirees.

Bell v. Environmental Protection Agency, 232 F.3d 546 (7th Cir. 2000) : EPA employees who had been denied promotions brought Title VII claims based on race and national origin discrimination. Reversing summary judgment for the defendant, the Court held it was error not to have considered expert evidence that there were statistically significant differences between native and foreign born applicants in receiving promotions and that there were differences, although not statistically significant, regarding promotion of African-Americans. Although statistics cannot be used as the primary means of establishing discrimination in disparate treatment situations, they can be used in conjunction with other evidence of disparate treatment to show whether the alleged disparity is the result of discrimination. The Court

also held that the plaintiffs' analysis of all promotions in the upper Midwest region of the EPA, rather than just the 16 eligible applicants for the position used by the Judge, encompassed the appropriate labor market. In *Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000)* , an age discrimination action by employees terminated or demoted during a downsizing program, summary judgment was granted for the defendants after evidence from a statistician that showed correlations between the ages of employees and the companies' decisions to terminate was excluded. Reversing, the Court observed that statistical evidence can be very useful to prove discrimination when the theory is disparate treatment or discriminatory pattern and practice, although it will likely not be sufficient in itself. The Court concluded that the expert's studies were prepared in a reliable and statistically sound way, containing relevant evidence that a trier of fact would have been entitled to consider. In *Bryant v. City of Chicago*, n59 minorities challenged an examination for promotion to police lieutenant under Title VII). The Court held that there was no error in admitting testimony by the City's expert witness, who prepared the examination, that the skills tested were related to the testee's effectiveness as a police lieutenant. The expert based his opinion on a detailed job analysis, and on his own extensive, peer-reviewed publications on the subject of employee selection and promotion. In *Webb v. City of Chester*, n60 the Court affirmed a judgment for a plaintiff who claimed that she was discharged from her position as a police officer because of her sex, and upheld the admission of expert testimony concerning the appropriateness of her behavior in incidents relied upon by the defendants as the basis for the discharge.

Hartley v. Dillard's, Inc., 310 F.3d 1054 (8th Cir. 2002) : The defendant in an age discrimination case asserted that it had terminated the plaintiff as a store manager for failure to meet sales and profit goals. The plaintiff offered an economist to testify that the financial problems of the store were consistent with what was happening to department stores in malls around the country, suggesting that the defendant's explanation was pretextual. The Court, finding no abuse of discretion in admitting the testimony, rejected the defendant's contention that the testimony was not based on sufficient facts or data because some of the materials relied on did not squarely support the testimony. Unless the expert's opinion is " 'so fundamentally unsupported that it can offer no assistance to the jury,' " the strength of the factual basis goes only to weight and is a matter for cross-examination. In *Wilmington v. J.I. Case Co.*, n61 the Court upheld a judgment for a plaintiff who sued his employer for race discrimination, finding no error in the admission of expert testimony that the relationship between the number of blacks employed by the defendant and the percentage of discharged workers who were black was statistically significant. Although there were only 27 discharges, the Court found that the statistical base was not too small to support the testimony.

Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996) : The Court held it was an abuse of discretion to preclude an expert in educational and value testing from testifying on behalf of the plaintiff in an employment discrimination case that the employer had improperly used screening tests to confirm his preexisting notions about the plaintiff. The Court observed that "[t]his kind of value/aptitude testing is science, and it is the paradigmatic role of experts to help juries understand the application of science."

Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) : The Court reversed in part a judgment against a discharged black employee of a city police department, and held that the plaintiff's expert witness should have been permitted to introduce testimony and a graph summarizing and explaining raw data introduced at trial in support of the plaintiff's claim of racial discrimination; without the witness' testimony there was no way for the jury to discern the meaning of the data accurately. The witness, a psychological counselor, should also have been permitted to give testimony on the psychological impact of the termination, as it was directly relevant to the issue of damages.

[b] Employment Discrimination Cases -- Expert Testimony Excludable or Exclusion Required

Nance v. Librarian of Congress, 661 F. Supp. 794 (D.D.C. 1987) : The Trial Judge concluded that expert testimony offered by the plaintiff in a Title VII suit alleging racial discrimination had no probative value, where the

expert's credentials were marginal, he made inaccurate assumptions concerning the qualities that a job entailed, he was unable to provide specific numerical ratings for job candidates, and the rating system he used was not part of the selection process of the employer.

Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986) , *vacated in part on other grounds*, *491 U.S. 164 (1989)* : The Court affirmed a judgment against a plaintiff who alleged racial discrimination in employment, finding no error in the exclusion of testimony by an expert in personnel administration that the plaintiff was better qualified than a person who was promoted. The Trial Judge could well have found that the testimony would not have been helpful to the jury in assessing the relative qualifications of the two people.

Mu noz v. Orr, 200 F.3d 291 (5th Cir. 2000) : The Court affirmed summary judgment for the defendants in a Title VII class action by Hispanic males challenging promotion practices at an Air Force base. It found no abuse of discretion in the exclusion of evidence from the plaintiffs' statistical expert, since his reports were unreliable in both particular miscalculations and their general approach to the analysis. The analysis failed to meet the standards for admission of scientific evidence, as the methods were not in accord with those of experts in the field. In *Mercado v. Austin Police Dep't*, n62 the Court found no error in the exclusion of an expert's opinion that discrimination was an element of a personnel decision on the ground that it would not be helpful in an employment discrimination case.

Bennett v. Roberts, 295 F.3d 687 (7th Cir. 2002) : Affirming summary judgment granted against an African-American applicant who alleged racial discrimination in a school district's hiring practices, the Court found no error in the exclusion of evidence from the plaintiff's statistical expert, since the expert had not properly identified the relevant labor market in his analysis. The expert had not considered the degree to which potential applicants in the metropolitan statistical area would be interested in working in the district, the effects of commuting patterns on the relevant pool, or the extent to which the district would hire applicants from within the state. In *Lang v. Kohl's Food Stores, Inc., 217 F.3d 919 (7th Cir. 2000)* , the Court affirmed judgments for the employer on claims by women bakery and deli clerks that they were discriminated against relative to male produce clerks, finding no abuse of discretion in the exclusion of testimony by plaintiffs' expert that the three departments' positions were "virtually identical in terms of their basic function and ... substantially equal in terms of skill, effort, responsibility and working conditions." The conclusion was unsupported except for a list of the clerks' duties without any indication of the actual tasks performed, and a supplemental report based on discussions with a "focus group" of eight bakery or deli workers "did little more than parrot" the plaintiffs' belief that their duties required as much skill as produce duties. In *Huey v. United Parcel Serv.*, n63 the Court affirmed summary judgment for the defendant in a race discrimination and retaliation action brought by a former employee, holding there was no abuse of discretion in excluding testimony from a "forensic vocational expert" with a Ph.D. in human resource development. The expert's opinion was based only on speaking with the plaintiff and reading documents supplied by the plaintiff's counsel; there was no showing how his specialized knowledge had been employed to analyze the plaintiff's situation; and the conclusion was simply that the plaintiff was the victim of a retaliatory discharge for racially motivated reasons. In *Sheehan v. Daily Racing Form, Inc.*, n64 the plaintiff, suing sued for age discrimination when he was terminated in a corporate downsizing, opposed the employer's motion for summary judgment with the affidavit of a statistician, who compared the age of those dismissed and those retained, and concluded that the probability that retention of office personnel was uncorrelated with age was less than five percent. Affirming the grant of summary judgment to the employer, the Court held that the affidavit failed to meet the *Daubert* standard: the statistician's methodology was defective, and his failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age indicated a failure to exercise the degree of care that a statistician would use in his scientific work, outside the context of litigation.

Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996) : In an employment discrimination case, the Court found no abuse of discretion when a psychologist was precluded from explaining what the employer's notations

of age and reliance on second-hand reports indicated about his decision-making process in hiring, as the jury had other testimony about those practices.

Hill v. Seaboard Coast Line R.R., 767 F.2d 771 (11th Cir. 1985) : The Court found no abuse of discretion in the rejection of an employer's expert testimony that those promoted were more qualified than the plaintiffs in a discrimination case, since the expert used an assessment method that differed from the employer's.

[32] Engineers

[a] Expert Testimony Admissible or Admission Required

Babcock v. General Motors Corp., 299 F.3d 60 (1st Cir. 2002) : The plaintiff's decedent was thrown from a pickup truck in a collision, allegedly because of a defect in the locking mechanism of his seatbelt that permitted it to become unbuckled as soon as pressure was exerted upon it. Affirming a judgment for the plaintiff, the Court found no error in the admission of testimony by a mechanical engineer that, *inter alia,* the decedent's seatbelt had disengaged during impact and the disengagement was caused by a design defect, since the testimony rested on a reliable foundation and was relevant to the issues in the case. In *Correa v. Cruisers Div., 298 F.3d 13 (1st Cir. 2002)* , a breach of warranty action arising from the sale of a motorboat, the Court found no abuse of discretion in admitting the testimony by the plaintiffs' mechanical engineer that the engines' fuel management system was defective. The Court noted that the expert's 20 years of experience repairing marine engines was sufficient to qualify him, and his visual inspection and removal of a spark plug was adequate to support an opinion.

Tormenia v. First Investors Realty Co., 251 F.3d 128 (3d Cir. 2001) : The Court found no abuse of discretion when the plaintiff in an action resulting from a revolving door accident offered causation testimony from a civil engineer with a master's degree who had taught engineering for 32 years. Although the expert's opinion was not based on a direct inspection of the door, his use of the plaintiff's account of the accident, the defendants' interrogatory responses concerning the maintenance schedule, and his experience with similar mechanical devices was not so unreliable that his testimony, which was based on general principles of physical science and his own experience with similar mechanisms, should have been found inadmissible.

Maryland Cas. Co. v. Therm-O-Disc., Inc., 137 F.3d 780 (4th Cir. 1998) : In a subrogation action arising from a fire, the Court found no abuse of discretion in the admission of testimony by the plaintiff's engineering expert that the fire was caused by a malfunction in a thermostat manufactured by the defendant. The witness was an electrical engineer with extensive experience, who through his testimony "established that his opinion was based on his examination of the conditions inside the disputed switch and the application of principles of electrical engineering to those conditions." He also cited numerous works of technical literature in support of his methodology.

Smith v. Ford Motor Co., 215 F.3d 713 (7th Cir. 2000) : The Trial Judge granted the defendant's motion to exclude the plaintiff's experts and then dismissed a suit by the driver of a car injured when he fell asleep and his car ran off the road. One of the experts was a metallurgical engineer with 40 years of experience in the field; another had a degree in mechanical engineering and over ten years' experience in automobile accident reconstruction and automobile mechanical failure analysis. Although the Court agreed that the two experts were not qualified as automotive engineers, it noted that they were qualified to testify to how the relevant parts were manufactured and why they might have failed. The Court also disagreed with the Judge's exclusive reliance on the fact that neither expert had had his work published in a peer-reviewed journal in ruling that the experts' testimony was unreliable under *Daubert*. It was also error to conclude that the testimony would not be helpful because the experts could not conclusively determine whether a design

or manufacturing defect caused the failure in the steering gear; the testimony was relevant and there is no requirement that an expert testify to the ultimate issue in the case. In an FELA action by an employee suing for injuries allegedly sustained when lightning struck a railroad tower, *Walker v. Soo Line R.R., 208 F.3d 581 (7th Cir. 2000)* , an electrical engineering professor gave deposition testimony about different ways that lightning could have penetrated the tower, starting from assumptions about lightning hits in different places in the railroad yard. The Judge admitted only those portions of the testimony that addressed the dangers if the tower had been struck directly, and only in rebuttal to contradict testimony from the defendant's expert. Reversing a judgment for the defendant, the Court held it was an abuse of discretion to limit the plaintiff's expert's testimony, since the testimony could have been helpful in determining whether lightning injured the plaintiff, even though the expert could not say with any certainty where exactly lightning hit the rail yard, if it hit the yard at all. The Court also held there was no abuse of discretion in admitting testimony regarding the safety of the tower from an electrical engineer proffered by the defendant. The expert was qualified by experience, and inadequacies in the inspection on which his opinions were based went only to credibility. In a product liability case, *DePaepe v. General Motors Corp.*, n65 the plaintiff's engineering expert testified that the sun visor on a car was defective because it did not comply with federal regulations. Reversing a judgment for the plaintiff on other grounds, the Court found that the defendant's *Daubert* attack on this testimony was properly rejected. The defendant "lampooned" the tests used by the plaintiff's expert, but failed to indicate how the methodology employed by the expert was any different from that generally employed by other professionals in the field. The Court did, however, find error when the plaintiff's expert was permitted to testify that the defendant had changed the design of its sun visors "to save money." The Trial Judge had stated that "as an expert, he can speculate," but the Court responded that "the whole point of *Daubert* is that experts can't 'speculate.' They need adequately sound bases for their opinion." Since the expert knew nothing about how or why the defendant reached its conclusion to change the sun visors, he could not testify as to the defendant's motive.

Miles v. General Motors Corp., 262 F.3d 720 (8th Cir. 2001) : Affirming a judgment for a truck manufacturer sued by a motorcyclist who was injured in a collision with a truck, the Court upheld the admission of testimony by a mechanical engineer and an engineer specializing in biomechanics and accident reconstruction. The Court found that the mechanical engineer provided highly useful testimony regarding the general purpose of bumpers, how they are tested, and the design of the truck's bumper. Although the plaintiff complained that the accident reconstructionist had not examined the x-rays of the plaintiff's leg, the motorcycle, the truck, or the accident scene, the Court noted that the expert had examined the police report, photographs of the scene, the plaintiff's medical records including reports that interpreted his x-rays, witness statements and depositions, and medical literature. Thus, the plaintiff's criticisms were a proper subject for cross-examination rather than a reason to exclude the testimony.

Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003) : Affirming a judgment for the defendant manufacturer of a thrust reverser that the plaintiff company wanted to employ in a jet engine, the Court upheld the admission of expert testimony for the defendant based upon a "CFD study," which "is a relatively new scientific discipline that uses computer models to measure fluid dynamics, e.g., the flow of air around and through a jet engine." The plaintiff also had used CFD studies in the course of trying to improve the performance of engine parts. The expert had worked with CFD for 20 years and had performed more than 40 CFD studies and assisted in 80 additional studies. The Court noted that identifying flaws in the application of generally reliable scientific evidence, such as CFD analysis "is precisely the role of cross-examination."

[b] Engineers -- Expert Testimony Excludable or Exclusion Required

Koken v. Black & Veatch Const., Inc., 426 F.3d 39 (1st Cir. 2005) : In an action involving injury to property after a fire blanket failed to control a welding fire, the Court found no error in the exclusion of testimony from an engineer that there should have been a warning on the fire blanket "that it was inappropriate for cutting operations." The expert "completely failed to articulate any methodology for determining the appropriateness of a fire blanket for particular

operations."

Zaremba v. General Motors Corp., 360 F.3d 355 (2d Cir. 2004) : The Court affirmed summary judgment for the defendants in a product liability action arising from a rollover accident, finding no abuse of discretion in exclusion of the plaintiffs' expert's opinion that an alternative design for the car would have made it more crashworthy. The witness had not performed tests on his alternative design, had not subjected it to peer review or publication, and had not shown general acceptance of his design or his methodology. Further, he could not rely on tests conducted by the defendant, since neither those tests nor models, calculations, or drawings from the witness showed that the witness' hypothetical alternative design would have resulted in greater safety in the accident at issue. The Court noted that the witness had been given "the benefit of a substantial doubt" when he was found a qualified expert, since he had only a bachelor's degree in engineering and his only practical experience was in designing parts for automobile air bags; all his remaining employment had been consulting for purposes of litigation, primarily as an accident reconstructionist.

Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000) : The Court affirmed a summary judgment for the defendants in a suit by a truck driver who was injured when his truck struck a guardrail and a bridge abutment pierced the floor of his cab. Upholding exclusion of testimony by an engineer who opined that the truck was defectively designed, the Court found that the witness failed to test either of the two hypotheses he offered to support his opinion; he claimed he had studied bread trucks but could not say if they were the same kind as the plaintiff drove or were manufactured by the same manufacturer; he failed completely to consider that the design of the guardrail might have been the cause of the accident; his opinion was inconsistent with the laws of physics; he did not attempt to calculate the force inflicted by the truck on the guardrail or the strength of the guardrail; and he had no way of knowing if his suggested modifications of design would have been an improvement.

American & Foreign Ins. Co. v. General Elec. Co., 45 F.3d 135 (6th Cir. 1995) : In an action arising from a fire in a school building, the Trial Judge excluded testimony from the plaintiff's expert, an electrical engineer, that the fire was caused by a defectively designed and manufactured circuit breaker. While the ruling was made before *Daubert*, the Court held that the Judge's reasoning was equally sound after *Daubert*. The expert's testimony had been properly excluded because: his theories about circuit breakers were not accepted by experts in the field; he did not follow protocol when conducting his tests on the circuit breaker in question; the raw data of the expert's test was not preserved; and his instruments were not calibrated.

Chapman v. Maytag Corp., 297 F.3d 682 (7th Cir. 2002) : The Court reversed a judgment for a plaintiff whose husband was electrocuted when he touched a metal surface energized by a current emanating from a kitchen range, because testimony from the plaintiff's expert, who had an undergraduate degree in mechanical engineering, did not qualify under *Daubert*. The expert had not tested his thesis and shown it to be reliable; he had not conducted any scientific tests or experiments in order to arrive at his conclusions; and he never produced any studies, tests or experiments to justify or verify his conclusions. Thus, he was not utilizing a scientific methodology, which is "*Daubert*'s most significant guidepost." The witness also failed to satisfy other *Daubert* guideposts for reliability: there was no proof his theory was generally accepted in the field, or even that it was supported in the scientific literature, and he had not published anything concerning his theory. In *Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000)* , a plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to testify that the plaintiff's injury could not have been caused by a plastic wingnut discharged from a lawnmower and that he did not believe the plaintiff when he testified that he was in the operator's zone behind the mower when he was injured. The witness, a mechanical engineer with no medical training, was not qualified to give expert testimony on medical questions, including the cause of an eye injury, and the witness' opinion about the plaintiff's credibility was merely based on speculation and not the proper subject of expert

testimony. In *Clark v. Takata Corp.*, n66 a mechanical engineer was prepared to testify for the plaintiff, who was seriously injured in a rollover accident, that the lap belt disengaged during the rollover sequence and that a properly functioning lap belt would have prevented the plaintiff from striking the roof. Affirming summary judgment for the defendant, the Court held that the expert's testimony was properly excluded. It was apparent from the expert's deposition that he had simply assumed that the lap belt had disengaged, and had formulated no independent opinion on the matter. As to whether a properly functioning lap belt would have prevented injury, the Court noted that the expert's testimony was based only on a visual inspection of the vehicle and on his experience; he conducted no tests, relied on no studies, and proffered no explanation of his methodology or of how his experience led to his conclusion. In a product liability action, *Ancho v. Pentek Corp.*, n67 the Court upheld summary judgment for the defendant in an action by an employee who had been injured by an automatic car that transported cardboard in a factory. A mechanical engineer would have testified for the plaintiff that the entire plant should have been redesigned to provide a safer system of transporting materials. But the expert had never seen the automatic car in operation, had never visited the accident scene, and had no experience in plant design, so his testimony was properly excluded under *Daubert*. In *Navarro v. Fuji Heavy Indus., Ltd.*, n68 the Court affirmed summary judgment for the defendant in a personal injury case, holding that an engineering expert's affidavit was properly excluded under *Daubert*. The expert's assertion that the defendant car manufacturer should have known about the risk of internal rusting was "nakedly conclusional." The Court rejected the argument that the gaps in the expert's testimony would have been filled in if the defendant, before moving for summary judgment, had deposed the expert, since "there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit." Affirming a judgment for the defendant in a product liability case, *Cummins v. Lyle Indus.*, n69 the Court held that the testimony of the plaintiff's design engineer, to the effect that the defendant should have used a different design to make its product safer, was properly excluded under *Daubert*. The expert's testimony was unscientific, because the expert had never tested his proposed alternative design. Many of the factors that must go into the conclusion that an alternative design should have been employed "are product-and-manufacturer-specific, and most cannot be determined reliably without testing."

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996) : The Court affirmed a summary judgment for the manufacturer of a tire changer sued by a mechanic who was injured while using the changer when a tire exploded. It held that an engineering expert's testimony was properly excluded where the expert had not designed or tested any of the proposed safety devices he claimed were missing from the tire changer, and the expert had never designed or tested a platform for a tire changer. The Court also rejected the argument that review of an expert's methodology by other Courts could constitute "peer review" within the meaning of *Daubert*.

Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329 (11th Cir. 2003) : Affirming summary judgment for a maintenance contractor sued by two helicopter pilots who had been injured in a crash, the Court found no abuse of discretion in excluding expert testimony offered by the plaintiffs that cracks on the helicopter would have been visible to the naked eye. One expert who operated an electron microscope to take pictures of cracks failed to demonstrate any expertise in determining when a crack appeared and when it was visible, and another failed to account for cracks that were discovered on other helicopters in the fleet that were not visible to the naked eye. In *McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253 (11th Cir. 2002)* , the Court affirmed summary judgment for the defendant in a product liability action arising from the eruption and fragmentation of a catheter inside the plaintiff's bladder, finding no error in the exclusion of the affidavit offered by the plaintiff's engineering expert. The expert's methodology was not scientifically reliable and his causation opinion was based wholly on speculation, because he "did not test alternative designs for the catheter; did not talk to medical personnel; was unable to cite scientific literature in support of his theories; and did not consider or test possibilities for failure that could have come from sources outside the product."

[33] Environmental Experts

St. Martin v. Mobil Exploration & Production, 224 F.3d 402 (5th Cir. 2000) : In an action to recover for damages

to marshland, the Court found no abuse of discretion when the plaintiffs' expert, a marshland ecologist, was permitted to testify that the defendants' failure to maintain spoil banks caused specific damage, including erosion of the grass mats in the marsh. The Court held that the lack of peer review was not dispositive because each marsh "will have different forces acting upon it, depending upon its specific location and its surroundings" and therefore "a court could not rationally expect that a marshland expert would have published a peer-reviewed paper on each possible permutation of factors or each damaged area of marsh." It was enough that the expert relied on an understanding of the applicable principles, combined with personal observation of the marsh in question.

Nutrasweet Co. v. X-L Engineering Co., 227 F.3d 776 (7th Cir. 2000) : In an action for reimbursement for cleanup costs under CERCLA, the Court found no error when the plaintiff's expert was permitted to testify that liquid compounds from the defendant's factory had run off into the plaintiff's property. The expert relied on a sequence of aerial photos to determine the flow of the liquid, and this methodology was an accepted tool in the field of hydrology and environmental engineering. The Court rejected the defendant's arguments that the testimony was unreliable because the expert had no "direct" evidence and had visited the site only once, where his opinion was based on verifiable data gathered by others. In *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc., 135 F.3d 526 (7th Cir. 1998)* , an action between adjoining landowners, the Court held that there was no abuse of discretion in excluding as unreliable testimony from an environmental consultant regarding indications of diesel fuel on one party's land that had allegedly run off from the other party's. The consultant's opinion was based on sampling at a single location; the District Judge suggested that more sampling was not done because the consultant "didn't want to run the risk of getting a result that he wouldn't like and wouldn't fit the conclusion he wanted to draw."

United States v. Dico, Inc., 266 F.3d 864 (8th Cir. 2001) : In a CERCLA action brought to recover response costs for contaminated groundwater, the Court found no error in the admission of testimony by the government's hydrogeologist. The computer model used by the expert was sanctioned by the EPA and is considered a standard model that is commonly used by hydrogeologists. The Court rejected Dico's claim of insufficient factual data, declaring that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." In our view, this latter statement is incorrect under the 2000 amendment to *Rule 702*, which provides that an expert's testimony is admissible only if "(1) the testimony is based on sufficient facts or data ... ."

United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999) : The defendant was convicted for knowingly transporting and disposing of hazardous waste. The Court found there was no abuse of discretion in excluding testimony from the defendant's expert, who had a degree in chemistry, that the material at issue was not hazardous. The witness' opinion was not "scientifically valid" because he based it on an unproven testing method, he was unfamiliar with the relevant regulations, and he disagreed with the EPA's regulatory determination that barium is a hazardous waste.

[34] Ethics Expert

Dibella v. Hopkins, 403 F.3d 102 (2d Cir. 2005) : The Court affirmed judgments in a libel action, holding there was no abuse of discretion in the exclusion of testimony by a defense expert on business ethics. In the expert's report, he improperly expressed an opinion on the veracity of a lay witness' testimony and inappropriately drew a legal conclusion that the plaintiff's actions amounted to extortion. Furthermore, his opinions on whether the plaintiff had acted ethically could have confused the jury, when the real issue in the case was what had actually transpired between the parties.

United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000) : The defendant, an attorney with a civil practice, was charged with obstruction of justice after he conveyed instructions to remove or destroy property from a client who had

been arrested as a fugitive. Although both sides were permitted to call experts to testify regarding lawyers' ethical standards, the jury was told that the evidence was simply "background" and counsel were not permitted to make ethics arguments in closing. Affirming an order granting the defendant a new trial, the Court held that the expert should have been permitted to assist the jury in understanding the special obligations of the attorney-client relationship and the defendant's likely state of mind with respect to those obligations.

Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988) : The Court held that testimony of a legal expert as to the Code of Professional Responsibility was admissible in a legal malpractice action, since the Code established an ethical standard rather than a legal standard of professional negligence.

[35] Exhibits

Crane v. Crest Tankers, Inc., 47 F.3d 292 (8th Cir. 1995) : The Court reversed a judgment for the plaintiff in a seaman's Jones Act case because a "Future Damage Calculator" was improperly admitted into evidence. The exhibit was a slide-rule type device with life and work expectancy and present value tables. The jury was given the device with no instruction about which damages were to be reduced to present value, how the rate of interest was to be determined, or how the device was to be used, and the defendant was given no opportunity to challenge the expertise or methods of calculation of the device's author. There was no showing that the device was generally used and relied upon, although the name of the publisher ("Lawyers and Judges Publishing Co.") suggested that the judiciary had vouched for it.

[36] Experiments, Reconstructions, and Demonstrations

Wolf v. Procter & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982) : The Court ruled *in limine* in an action against the manufacturer and distributor of a tampon to recover for toxic shock syndrome that an in-court experiment by an expert, demonstrating how a chemical in the tampon might have broken down when exposed to an enzyme found in the vagina, was helpful and would not confuse the jury.

United States v. Norris, 217 F.3d 262 (5th Cir. 2000) : The Court upheld the convictions of a lawyer for false declarations in a bankruptcy proceeding in which he testified that he had burned almost a half million dollars in cash in order to spite his former partners; the government contended that he had in fact kept the money. The Trial Judge admitted into evidence a videotape in which an ATF agent reenacted the steps that the defendant allegedly took when he burned the cash. The reenactment showed that most of the bills would not have burned. Although the Judge held that *Daubert* did not apply to the videotape, the Court disagreed on the ground that the ATF agent was rendering expert testimony. However, because the Judge had actually engaged in a reliability analysis, the Court held that the gatekeeping function of *Daubert* had occurred under a different label. In *Young v. Illinois Cent. G. R.R.*, n70 the Court reversed a judgment for the defendant in a wrongful death action, in part because the Trial Judge erroneously excluded a motion picture experiment and expert testimony offered to show how dangerous a railroad crossing was. See also *Barnes v. General Motors Corp.* n71(holding it was error to allow the plaintiff's expert to testify about an experiment he conducted on another automobile under significantly different circumstances from those admittedly existing at the time of the accident at issue).

Bauman v. Volkswagenwerk A.G., 621 F.2d 230 (6th Cir. 1980) : Although it reversed a plaintiffs' judgment in a product liability action on another ground, the Court approved the introduction of expert testimony based on simulated reproductions of an accident and observed that in some cases expert testimony may be the only way to establish the defectiveness of a product.

Pullman v. Land O'Lakes, Inc., 262 F.3d 759 (8th Cir. 2001) : Affirming a judgment for dairy farmers against a dairy consultant whose employee negligently prepared feed that sickened and killed dairy cows, the Court upheld the admission of an experimental test conducted at a college which sought to recreate the situation that occurred at the plaintiffs' farms when the cows became sick and died. The Court held that it was not necessary to apply *Daubert* to the test evidence because the experimenters offered no conclusions or opinions. In *Kehm v. Procter & Gamble Mfg. Co.*, n72 the Court affirmed a judgment for survivors of a consumer who died from toxic shock syndrome, and ruled that it was proper to permit one of the plaintiffs' experts to perform an in-court demonstration of how a component in the manufacturer's tampons could interact with an enzyme found in the vagina to create hospitable conditions for the growth of bacteria that produce TSS toxin. Emphasizing the Trial Judge's discretion in ruling on experiments, the Court found that the similarity between the experiment and the actual phenomena it purported to represent was sufficient to warrant allowing the experiment and relying on cross-examination to point out any deficiencies.

Robinson v. Missouri Pac. R.R., 16 F.3d 1083 (10th Cir. 1994) : Affirming a judgment for the plaintiffs in a wrongful death action arising out of a train's collision with a car, the Court held it was a close question, but no abuse of discretion, to admit a video animation illustrating the plaintiff's expert's theory about how the collision had occurred. The Court was bothered that the video showed the car angling toward the approach of the train and rotating at impact and spinning off the tracks, since it was also possible that the train impaled the car on its front. It suggested that as future issues arise "the district court [should] carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions and films or animations illustrative of such opinions." In a wrongful death action arising out of a helicopter crash, *Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992)* , the Court held there was no abuse of discretion in excluding videotape evidence of an experiment conducted by the defendant's expert, as there were substantial dissimilarities from the situation at issue. An experiment used simply to demonstrate the principles used in forming expert opinion need not strictly adhere to the facts, but this experiment was also used to demonstrate what the defendant believed occurred in the helicopter's engine. In *Jackson v. Fletcher*, n73 the Court reversed a defendant's judgment in a case arising out of an auto-truck collision on the ground that it was error to admit testimony based upon experiments conducted by the defendants' experts when the circumstances of the experiments were different from those of the accident.

[37] Expert Witness Originally Retained by Adverse Party

Peterson v. Willie, 81 F.3d 1033 (11th Cir. 1996) : In an action brought by a pretrial detainee for deliberate indifference to his medical needs, the defendants called an expert whom the plaintiff had retained and designated as an expert witness expected to testify, but who had subsequently been discharged by the plaintiff's counsel. The expert was permitted to testify for the defendants, and also to state that he had been previously retained by the plaintiff. Various approaches have been taken when an expert originally retained by one side is called by the other: some Courts permit such experts to be called, but prohibit mentioning the fact that they were originally retained by the adversary; others do not allow such experts to testify absent a showing of need. The Court concluded that the issue of whether such experts may testify is committed to the discretion of the Trial Judge, but cautioned that leave should not ordinarily be granted if other experts are readily available. As to whether the expert may refer to the previous retention, the Court concluded that "the unfair prejudice resulting from disclosing this fact usually outweighs any probative value"; however, a reference would be warranted if the adversary were to attack the qualifications of the expert. Since the plaintiff made no such attack in this case, the Court found it was error (but harmless) to permit mention of the prior retention.

[38] Eyewitness Identification

United States v. Stokes, 388 F.3d 21 (1st Cir. 2004) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the exclusion of expert testimony regarding eyewitness identification. The defense had not provided the Trial Judge "any information regarding the reliability and helpfulness of the proposed

expert testimony ... [or] any indication of the existence of a special circumstance" indicating that the testimony would "assist the trier of fact to understand the evidence." In *United States v. Brien, 59 F.3d 274 (1st Cir. 1995)* , the Court affirmed an armed bank robbery conviction, holding there was no abuse of discretion in excluding testimony by a defense expert on eyewitness identification, where the Trial Judge made clear his need for some proffer of data or literature underlying the expert's assumptions and conclusions but the defense offered little, despite repeated opportunities to do so. Judicial notice of the expert literature casting doubt on eyewitness evidence would not be sufficient in this case, since the helpfulness and reliability of the expert's assertions depended on the specifics underlying them. In *United States v. Fosher*, n74 the Trial Judge, denying a bank robbery defendant the opportunity to call a psychologist to testify about the dangers of eyewitness identification, expressed concern about the "aura of special reliability and trustworthiness" that the evidence would have and emphasized that properly instructed jurors, aided by cross-examination and professional argument, "can make an informed evaluation of eyewitness testimony without the assistance of a psychologist." The Court found no abuse of discretion, as the defendant's offer of proof supported conclusions that the testimony would have little if any relevance and its science lacked reliability that would enable it to add to the jury's common- sense evaluation.

United States v. Lumpkin, 192 F.3d 280 (2d Cir. 1999) : Affirming a narcotics conviction, the Court found no error in the exclusion of expert testimony concerning eyewitness identification. The expert would have testified that a witness' confidence in his identification is not a good predictor of accuracy, which the Court held would have usurped the role of the jurors in assessing the credibility of the identification witnesses.

United States v. Mathis, 264 F.3d 321 (3d Cir. 2001) : Affirming convictions for bank robbery and conspiracy, the Court found it was error (but harmless) to exclude some expert testimony by a clinical psychologist regarding eyewitness identification. Relying heavily on its decision in *United States v. Stevens*, *infra*, the Court found that expert testimony regarding "double identification" or "post-event information" and about the relationship between accuracy of identification and confidence of a witness fit the facts of the case and should have been admitted. Testimony about "weapons focus" was relevant and should have been admitted, even though the witness who saw the defendant was a police officer. The Court declined to affirm exclusion of the evidence under *Rule 403* because the "District Court explained its ruling with little more than a series of conclusions" about an "aura of reliability that's attached to an expert witness" and a danger of usurping the jury's function. The Court upheld the exclusion of expert testimony that more accurate memories are produced by objects that are viewed for longer periods of time and that once a witness makes an identification he or she will tend to stick to it. Relying on *Stevens,* the Court found that these topics did not require the help of an expert. In *United States v. Downing*, n75 the Court, vacating a fraud conviction, provided one of the most thorough discussions of the admissibility of expert testimony concerning eyewitness identification, and established a framework for evaluating scientific expert testimony that was ultimately adopted by the Supreme Court in *Daubert* (see the Editorial Explanatory Comment, *§ 702.02[5]*). On remand, n76 the Trial Judge reinstated the conviction, based on concerns about the reliability, "fit," and undue impact of the expert testimony. In *United States v. Stevens*, n77 a robbery and sexual assault prosecution, the Trial Judge permitted an expert psychologist to testify to the effects on identification of cross-racial identification, weapon focus, and stress, but excluded testimony on the suggestiveness of a wanted board used in the investigation, relation back in subsequent identifications, and the lack of correlation between confidence and accuracy in eyewitness identifications. Reversing, the Court held there was no abuse of discretion in excluding the testimony about suggestiveness and relation back, but that excluding the lack of correlation testimony was error, because the expert's opinion was counterintuitive. In *United States v. Dowling*, n78 the Court affirmed bank robbery convictions, holding there was no error in excluding expert testimony on eyewitness identification on the ground that the data upon which the expert purported to rely were not tied to the facts of the case. Moreover, the defendants gave only five days' notice of their proffered expert testimony, and many of the expert's observations were of the type that did not require special expertise.

United States v. Harris, 995 F.2d 532 (4th Cir. 1993) : Affirming an armed bank robbery conviction, the Court held there was no abuse of discretion in excluding proffered expert testimony concerning the psychological limitations on eyewitness identification. The Court noted a trend in recent years to admit such testimony in narrow circumstances, but, emphasizing the Trial Judge's discretion, found nothing in the facts of the case to suggest that jurors using common sense could not assess the eyewitness identifications.

United States v. Moore, 786 F.2d 1308 (5th Cir. 1986) : Affirming extortion convictions, the Court observed that expert testimony on eyewitness identification is admissible in the sound exercise of the Trial Judge's discretion, but it found no error in the exclusion of such evidence in this case. It emphasized that "in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged."

United States v. Langan, 263 F.3d 613 (6th Cir. 2001) : In a bank robbery prosecution, the Court found no abuse of discretion in the exclusion of testimony from a psychologist regarding the weakness of an eyewitness identification due to "unconscious transference," even though 14 months had passed between the robbery and identification of the defendant in a photo spread and the witness had seen the defendant's capture on TV news. The expert's own article noted that the literature provided "mixed and somewhat weak support" for the transference theory and that the empirical evidence for the theory was "rather meager." While the Court was hesitant to adopt all the Trial Judge's other criticisms under the "scientific knowledge" prong, it agreed that the testimony failed the "fit" requirement because it was not based on any personal knowledge of the eyewitness but only on general knowledge of the type of circumstances, and thus would not add to the ordinary knowledge of most jurors, especially when the defense had ample opportunity to cross-examine the eyewitness at trial. In *United States v. Smithers, 212 F.3d 306 (6th Cir. 2000)* , the Court reversed a conviction for bank robbery because the Trial Judge excluded an experienced psychologist from testifying about weaknesses in eyewitness identifications on behalf of the defense without conducting a *Daubert* hearing. Even apart from the Judge's comment that he was "interested in seeing what a jury will do absent that expert testimony," he abused his discretion. The particular expert's science and methodology had already been accredited by the Court; the proffered testimony could have been applied to the facts at issue; and it would have been helpful to the trier, because jurors tend to be unduly receptive to eyewitness testimony. One Judge dissented. In an armed robbery prosecution, *United States v. Smith*, n79 the Trial Judge rejected the defendant's proffer of a psychologist to testify about eyewitness identification on the ground that the testimony would not assist the jury in deciding the case. The Court distinguished the First Circuit's decision in *Fosher, supra* , on the ground that the expert in this case established the relationship between the scientific evidence and the facts, but it declined to actually find error and concluded that any error was harmless.

United States v. Carter, 410 F.3d 942 (7th Cir. 2005) : Affirming a bank robbery conviction, the Court found no error in the denial of the defendant's motion for appointment of an expert to testify on the unreliability of identifications. The Court stated that "jurors understand that memory can be less than perfect" and that "the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury -- determining the credibility of witnesses." The Court recognized that expert testimony on the unreliability of identifications might be helpful to the jury in certain cases, but found no abuse of discretion in the conclusion below that the case "did not present an unusual or compelling situation in which the aid of an expert witness is required." In *Newsome v. McCabe, 319 F.3d 301 (7th Cir. 2003)* , the plaintiff, who had served 15 years of a murder sentence and was then pardoned on the ground of innocence because evidence strongly implied that another person had committed the crime, brought a § 1983 claim alleging that police officers induced three witnesses to identify him as the killer. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in the admission of testimony by a psychology professor specializing in eyewitness identifications that experiments he conducted indicated that the probability all three of the eyewitnesses, assuming they had seen the suspected killer, would have independently picked the plaintiff out of a lineup by chance error was substantially less than one in 1,000. The witness was an expert on the

subject of identification, his testimony was based on sufficient data, his methods were reliable by the standards of the field, and he applied those methods reliably to the facts of the plaintiff's case. Any problems with his testimony could be sufficiently explored at trial. In *United States v. Crotteau*, n80 the Court affirmed a bank robbery conviction, finding no error in the exclusion of the defense expert's testimony on the unreliability of eyewitness identification. The Court reasoned that this is not a proper subject matter for experts, because of its influence on the jury's credibility determinations, and also noted that it was "not necessary" because defense counsel thoroughly cross-examined the witness and there was corroborative evidence that the defendant was the robber. The Court affirmed a conviction for kidnapping and illegally transporting a teenage girl in *United States v. Hall*, n81 and found no abuse of discretion in the exclusion of expert testimony by a psychologist concerning the scientific bases for eyewitness identification and the factors that give rise to suggestiveness. The Trial Judge ruled that such testimony would not assist the jury, and the Court concluded that the *Daubert* factors were properly examined. In *United States v. Curry*, n82 the Court held there was no abuse of discretion in precluding testimony by an expert on eyewitness identification. Although the testimony might not have been totally unhelpful, the identification issue was minor in the context of a four-week trial, vigorous cross-examination exposed the weakness of the identifications, and the defendants gave the government only four days' notice of their intent to call the expert. See also *United States v. Larkin* n83(no abuse of discretion to deny request to appoint an expert witness to testify about the undependability of eyewitness identification under stressful circumstances, as the issue is well within the ken of most lay jurors and counsel was afforded ample opportunity at trial to discuss it and cast doubt on the witness' identifications of his client).

United States v. Martin, 391 F.3d 949 (8th Cir. 2004) : The Court affirmed a conviction for interference with interstate commerce by threats or violence, finding no abuse of discretion when expert testimony about the general reliability of eyewitness identifications was excluded, since that is a matter of common understanding. In fact, the jury was instructed to weigh the strength of the identifications in the case by considering various reliability-related factors, and the identifications were fully corroborated by an accomplice's testimony. In *United States v. Kime, 99 F.3d 870 (8th Cir. 1996)* , the Court affirmed drug conspiracy convictions, finding no abuse of discretion in the exclusion of expert testimony on eyewitness identification proffered by a defendant. There was an insufficient basis for finding that the proposed testimony qualified as "scientific knowledge" under *Daubert*; the testimony intruded into the jury's domain when it opined that the in-court identification in the case was "inherently untrustworthy"; and there was a "very real danger that the proffered expert testimony could either confuse the jury or cause it to substitute the expert's credibility assessment for its own." In *United States v. Blade*, n84 the Court, affirming a firearm conviction, held that there was no error in the exclusion of expert testimony concerning eyewitness identification, even though similar testimony had been admitted in a first trial that ended in a hung jury. Although such testimony should not be automatically excluded, Trial Judges have discretion to exclude it as more prejudicial than probative. The Court concluded that "we would be especially hesitant to find an abuse of discretion unless the government's case ... rested exclusively on uncorroborated eyewitness testimony."

United States v. Ginn, 87 F.3d 367 (9th Cir. 1996) : Affirming a bank robbery conviction after a bench trial, the Court found no abuse of discretion in the exclusion of the defendant's expert on the unreliability of eyewitness identification. The Trial Judge was in the best position to determine whether the expert's testimony would be of any assistance, and the Judge "could reasonably find that the most efficient method of attacking the credibility of the eyewitness testimony would be through cross-examination of the eyewitnesses." In *United States v. Rincon, 28 F.3d 921 (9th Cir. 1994)* , the Court held there was no abuse of discretion in excluding expert eyewitness identification testimony, as the determination that the defendant had not shown the proposed testimony related to a scientific subject was supported by the record, and comprehensive instructions given in the case equally well assisted the jury. In *United States v. Amador-Galvan*, n85 the Court reversed convictions for cocaine possession, remanding for a determination whether expert testimony proffered by the defendants on the unreliability of eyewitness identifications was trustworthy and scientifically valid.

United States v. Smith, 156 F.3d 1046 (10th Cir. 1998) : In a prosecution for theft from a firearms dealer, an ATF agent interviewed witnesses to the theft, and the defendant claimed that the agent's use of photographs led to impermissibly suggestive identifications. The Court found no abuse of discretion in the exclusion of testimony by a defense expert on eyewitness identification. The Trial Judge found after a lengthy hearing that testimony about lighting and the effects of stress touched upon areas of common knowledge and would not have been helpful to the jury.

United States v. Smith, 122 F.3d 1355 (11th Cir. 1997) (per curiam): The Court affirmed a bank robbery conviction, holding there was no abuse of discretion in excluding expert testimony offered by the defendant regarding the reliability of eyewitness identifications. Circuit precedent disfavoring such evidence has not been disturbed by *Daubert*, since the testimony, although scientific knowledge, does not assist the trier of fact because the jury is able to determine the reliability of eyewitness identification with the tools of cross-examination. Furthermore, the defendant was sufficiently protected by instructions highlighting such problems as cross-racial identification, potential bias from earlier identifications, delay between the event and the identification, and stress.

[39] Fingerprint Identification

United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004) : Affirming convictions for Hobbs Act robbery in an extensive opinion examining numerous sources, the Court held that fingerprint evidence was sufficiently reliable to be admitted. It also found no error in a ruling prohibiting the defendant's experts from testifying that fingerprint identification was not a science, reasoning that the Supreme Court's extension of *Daubert* to all expert testimony made irrelevant the question whether fingerprint identification was a science.

United States v. Crisp, 324 F.3d 261 (4th Cir. 2003) : Affirming convictions for offenses arising out of an armed bank robbery, the Court found no abuse of discretion in admitting expert testimony regarding handwriting and fingerprints. The Court wrote that "[w]hile the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community, but in the courts as well." There was evidence of professional standards controlling the technique's operation, which provided adequate assurance of consistency among fingerprint analyses, and it was no abuse of discretion to credit testimony that fingerprint identification has an exceedingly low rate of error.

United States v. George, 363 F.3d 666 (7th Cir. 2004) : The Court affirmed convictions for counterfeiting offenses, bank fraud, and money laundering, finding no abuse of discretion in the admission of expert testimony by an FBI fingerprint examiner who relied upon partial prints in finding that they were the defendant's. The Court found that fingerprint identification was reliable under *Daubert*. In *United States v. Havvard, 260 F.3d 597 (7th Cir. 2001)* , the Court affirmed a conviction for felon firearm possession, finding that the Trial Judge had properly considered the *Daubert* factors in ruling on the defendant's motion to exclude fingerprint identification evidence and concluding "that fingerprinting techniques have been tested in the adversarial system, that individual results are routinely subjected to peer review for verification, and that the probability for error is exceptionally low."

United States v. Janis, 387 F.3d 682 (8th Cir. 2004) : Affirming a conviction for felon firearm possession, the Court found no error in the admission of expert testimony on fingerprint identification. The Court quoted the Fourth Circuit in *United States v. Crisp, supra* , on the general acceptance of fingerprint identification testimony.

United States v. Burdeau, 168 F.3d 352 (9th Cir. 1999) : The Court affirmed a conviction for using a firearm in a robbery, finding no abuse of discretion in permitting an FBI agent to testify that identifiable fingerprints are almost

never found on guns and only rarely found on other objects submitted for testing; he explained that this may be due to the surface, the dryness of the skin, or fingers being moved in a manner that smudges the prints. The Court held that this testimony was proper rebuttal to cross-examination of the agent that emphasized the lack of fingerprint evidence in the case. In *United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996)* , the Court affirmed kidnapping convictions, finding that testimony from the prosecution's fingerprint identification expert was properly admitted despite the failure to conduct a *Daubert* analysis. The defendant admitted that the expert's identification technique was generally accepted and that fingerprint comparison has been subjected to peer review and publication, so the *Daubert* reliability requirement was satisfied. And since the testimony would assist the jury in determining the identity of the kidnappers, it also satisfied the "fit" requirement.

United States v. Lauder, 409 F.3d 1254 (10th Cir. 2005) : Affirming cocaine convictions, the Court found no error in the admission of testimony from a government expert that a fingerprint obtained from the defendant using the "live skin" method matched the print on a bag of cocaine found in a search. The Court held that *Daubert* was inapplicable because it did not "regulate the underlying facts or data that an expert relies on when forming her opinion," and "[a]bsent some specific objection to the technology" relied upon by an expert, a Trial Judge is not required to take testimony as to how the technology works. In our opinion, the Court's analysis is incomplete. *Rule 702* specifically requires that the expert's opinion must be based on sufficient facts or data, and *Rule 703* limits the facts on which the expert can rely to those that are found reasonably reliable by experts in the field. Moreover, the defendant challenged the reliability of the equipment used to record his print, and *Rule 702* specifically states that the Trial Judge must assure that the expert's methodology is reliably applied. All this does not necessarily mean that the ruling below was error, but it does mean that the expert's testimony did not receive sufficient scrutiny in this case.

United States v. Abreu, 406 F.3d 1304 (11th Cir. 2005) : The Court affirmed a conviction for possession of marijuana with intent to distribute, finding no abuse of discretion in the admission of fingerprint identification evidence. The Court noted that it agreed with other Circuits that have held that such evidence is sufficiently reliable to satisfy *Rule 702*, and it added that, since Trial Judges are given broad discretion to decide how to determine reliability, there was no error in giving greater weight to the general acceptance factor than to other factors.

[40] Fire Investigations

United States v. Diaz, 300 F.3d 66 (1st Cir. 2002) : Affirming an arson conviction, the Court found no plain error in the admission of two experts' cause and origin testimony, since the experts examined first-hand the basement where the fire took place, compiled numerous details supporting their theories, and refuted alternative explanations for the fire. In *Almonte v. National Union Fire Ins. Co.*, n86 the Court affirmed a judgment for an insurer that refused to pay losses from a fire that it claimed was arson, but found it was error (waived or harmless) not to have conducted a more extensive preliminary inquiry before admitting testimony by an investigating officer, since the officer was not only an arson expert but also the officer charged with determining who started the fire. "It was, therefore, important for the trial judge to ensure that [the officer] did not stray from explaining why he thought the fire was incendiary in origin to explaining who he thought might have caused the fire."

United States v. Gardner, 211 F.3d 1049 (7th Cir. 2000) : Affirming a defendant's convictions arising out of the arson of her business, the Court found no error when a government expert on causation of fires was permitted to testify that faulty electrical wiring was not the ignition source and that the burn pattern was consistent with the use of an accelerant. The expert had reviewed 120 photos and three reports from investigators of the fire scene and interviewed people who were at the scene. In *United States v. Lundy*, n87 the Court affirmed a conviction for arson and mail fraud, finding that a detective, who was a member of the Chicago police department bomb squad, was properly permitted to testify as to the cause and origin of a fire.

Weisgram v. Marley Co., 169 F.3d 514 (8th Cir. 1999) , *aff'd on other grounds*, *528 U.S. 440 (2000)* : In a product liability action against the manufacturer of an electrical baseboard heater for fatal injuries allegedly caused by the heater igniting flooring, carpeting, and a sofa, the Court vacated a judgment for the plaintiffs because the testimony from their expert witnesses was unreliable and should have been excluded. One witness, the captain of the first fire truck on the scene, based his opinion on an assumption that the heater malfunctioned, which he was not qualified to assume, and then speculated about the course of the fire. Although his opinion was that the fire radiated from the heater through a rug and flooring to the sofa, he had no basis for his assumption about the location of the rug and he had no knowledge regarding the composition of the flooring. A second expert, a master electrician who had experience consulting on electrical fires, never visited the scene of the fire and based his conclusions on the fire captain's observations, including his assumption that the fire started from the electrical heater. He did not test the heater itself, but only speculated about how it could have failed. A third witness, a metallurgist who examined the thermostat contacts of the heater, concluded that the contacts had welded without knowing the wattage or amperage of the heater and without testing whether his theory was possible.

Michigan Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915 (11th Cir. 1998) : In a declaratory judgment action brought by an insurer who denied coverage on a homeowner's policy, the insurer's expert concluded that a fire in the home was intentionally set. After a *Daubert* hearing, the Trial Judge excluded the expert's testimony, and the Court found no error. The expert performed no tests and took no samples; he was unable to identify the source of ignition of the fire; and he was unable to rationally explain how he came to his conclusion.

[41] "Fit" Between Expert Testimony and the Facts

Cipollone v. Yale Indus. Prods., Inc., 202 F.3d 376 (1st Cir. 2000) : Affirming a summary judgment for defendants in a suit by a worker who injured his hand while working on a loading dock manufactured by one defendant and installed by another, the Court upheld the Trial Judge's ruling that expert testimony was inadmissible. The testimony related to the relative size of a person's hand grasping an object and a gap between a docklift and a catwalk. Since the plaintiff was not grasping anything at the time of the accident, the Court found that the testimony did not "fit" the facts of the case. In *Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997)* , the plaintiff was run over by her car after putting it in "park" and exiting the vehicle. The Court found no error in the exclusion of testimony from an engineer about the phenomenon of "false park detent" -- where the car feels as if it is in "park" but is not. The expert's testimony rested on a factual premise -- that the plaintiff did not look at the console shift before turning off the car -- that was at odds with the plaintiff's own testimony.

Habecker v. Clark Equip. Co., 36 F.3d 278 (3d Cir. 1994) : In a product liability action for wrongful death that was brought after the decedent was crushed by a forklift that fell from a ramp, the Court vacated a judgment for the defendant, but held there was no abuse of discretion in excluding testimony from the plaintiff's expert, who had conducted an investigation and attempted to simulate the accident. The expert's testimony did not "fit" with the facts of the case, as is required by *Daubert*, because the conditions of the simulation were far different from those existing at the time of the accident. Specifically, there was no attempt to replicate the velocity or the rearward movement of the forklift, the height of the fork was disregarded, and there was no operator in the forklift nor cargo on the fork during the purported simulation.

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) : Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that the Trial Judge properly excluded the results of a "penile plethysmograph" test offered to prove that the defendant did not exhibit the characteristics of a "fixated pedophile." The expert testimony

violated the "fit" requirement of *Daubert*, because Powers was charged with statutory rape of his daughter, not with being a "fixated pedophile," and he had offered no supporting evidence "showing that those who are not fixated pedophiles are less likely to commit incest abuse."

Leverette v. Louisville Ladder Co., 183 F.3d 339 (5th Cir. 1999) : Suing the manufacturer of a ladder from which he fell, the plaintiff proffered testimony from a professor of chemistry and polymer sciences, who opined that the ladder had a manufacturing defect because there was no adhesion between the fiberglass and the polymer matrix making up the ladder. The Court found no error when the testimony was excluded and summary judgment was entered for the defendant. The expert's testimony did not fit the facts of the case, because under the applicable state law, a defendant is not liable for a manufacturing defect unless the product deviated in a material way from the industry's manufacturing specifications, and here the expert never considered the industry standards and failed to assess whether the ladder met those standards.

United States v. Welch, 368 F.3d 970 (7th Cir. 2004) : The defendant was charged in 2002 with the robbery of a credit union in 1997. Although he was not identified in a lineup, three individuals who knew him testified that they believed he was the man depicted in bank surveillance photographs. Affirming, the Court found no error when a defense expert was precluded from testifying regarding the propensity of witnesses to identify a person based on familiarity with clothing, the tendency of witnesses to misidentify a person based upon factors of which the witness is unaware, and the deterioration of memory over time. The testimony would not assist the jury, and there was no "fit" between the expert's testimony and the circumstances of the identifications, as the witnesses knew the defendant very well prior to the crime and had as much time as they needed to view the surveillance films in a stress-free atmosphere. In *Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341 (7th Cir. 1995)* , the Court affirmed a judgment for the defendant manufacturer in a product liability action brought after a hypo-hyperthermia machine fell over onto a nurse moving it in a hospital, holding there was no error in excluding testimony by the plaintiff's expert regarding a defect in the machine's cord wrap. The witness proffered unverified statements unsupported by any scientific method and, because he did not have the requisite experience to assess the unit's suitability for its intended purpose within its environment or its adherence to the prevailing standards for similar machines, there was no "fit" with the facts of the case. In *United States v. Lilly*, n88 a prosecution of a minister and his wife for income tax evasion, the defendant wife sought to call an expert witness to testify about the general duties of Baptist ministers' wives. The Court held that the testimony was properly excluded for lack of "fit," because the witness' expertise "on the general duties of ministers' wives, without specific reference to whether those duties would render a minister's wife incapable of willingly evading tax, could not have aided a jury in determining the issue of Mrs. Lilly's intent."

United States v. White Horse, 316 F.3d 769 (8th Cir. 2003) : In the prosecution of a Native American for sexual abuse of his six-year-old son, the defense was not permitted to introduce testimony by a psychologist who had conducted an "Abel Assessment" of the defendant and concluded that he did not have a sexual interest in underage boys. The Abel Assessment measures the amount of time that a subject views slides of clothed and partially clothed people, and is premised on a correlation between sexual response and the length of time spent viewing sexual stimuli; it also includes consideration of a questionnaire regarding the subject's sexual behavior and willingness to admit to experiencing common social problems (as a kind of "lie scale"). The Court found no error in a finding of lack of "fit" between the facts of the case and the Abel Assessment, since there was no indication that it had been tested with a statistically significant sample of Native Americans, and none of the slides contained pictures of Native American children. Moreover, incest cases like this had been excluded from testing in the Abel Assessment because incest offenders often act for reasons other than sexual interest. In *Concord Board Corp. v. Brunswick Corp., 207 F.3d 1039, 2000-1 Trade Cas. (CCH) P72836 (8th Cir. 2000)* , an antitrust action by boat builders against a stern drive engine manufacturer, the Court held it was error to admit expert testimony by an economics professor because it did not adequately "fit" the facts of the case. The expert used an economic model "to construct a hypothetical market which was

not grounded in the economic reality of the stern drive engine market, for it ignored inconvenient evidence"; "[t]he model also failed to account for market events that both sides agreed were not related to any anticompetitive conduct." In *United States v. J.H.H.*, n89 a prosecution arising from racially-based crimes, the Court found it was error (but harmless) when a government expert testified regarding the skinhead movement and skinhead activities, as well as the activities of other white supremacist groups. Because the government had introduced no evidence demonstrating that the defendants were in fact members of a skinhead group or were skinhead sympathizers, the expert testimony did not properly "fit" with the facts of the case.

United States v. Scholl, 166 F.3d 964 (9th Cir. 1999) : Affirming the defendant's conviction for filing false tax returns and structuring currency transactions in connection with his extensive gambling activities, the Court found no error in excluding expert testimony that pathological gamblers have distortion in their thinking, and denial, which impact their ability and wherewithal to keep records of their wins and losses. The testimony failed the *Daubert* "fit" requirement, since it would not tend to show that the defendant actually believed his tax return to be correct in reporting winnings and losses, nor would it show that he did not intend to falsely report his wins and losses. On remand from the Supreme Court, the Court of Appeals held in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)* , that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under *Rule 702*. The Court found that the testimony of most of the plaintiffs' experts failed the *Daubert* "fit" requirement, because state tort law required the plaintiffs to prove that Bendectin was more likely than not the cause of their injuries, and these experts did not make such a conclusion. Rather, they could only testify that Bendectin increased the risk of limb reduction, which in fact tended to disprove the plaintiffs' argument as to legal causation, because "it shows that Bendectin does not double the likelihood of birth defects."

McDowell v. Brown, 391 F.3d 1283 (11th Cir. 2004) : In a § 1983 action by a former inmate alleging medical malpractice, the Court found no abuse of discretion in the exclusion of testimony by the plaintiff's experts. Although the Trial Judge erred in ruling that the physicians were unqualified to testify to the standard of care for nurses in a jail, the only scientifically reliable parts of their theories dealt with treatment delays 2-12 times as long as involved in this case.

[42] Forensic Experts

United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990) : Affirming convictions of former Customs officers for robbery-related offenses in connection with the murder of a money courier, the Court held that there was no abuse of discretion in allowing a forensic pathologist called to give an opinion on the date and time of death to take into account not only the condition of the body but also ordinary nonexpert circumstantial evidence pointing to a particular time of death, as the evidence was helpful and would not have misled the jury.

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995) : The Court held in a bank robbery prosecution that there was no abuse of discretion in excluding testimony about bank surveillance photographs from forensic anthropologists, as there was no showing the method had been tested, subjected to peer review, or widely accepted in the relevant scientific community, and the known rate of error was very high. Furthermore, there was no indication that the witnesses were better able than the jury to compare photographs.

United States v. Allen, 390 F.3d 944 (7th Cir. 2004) : Affirming a conviction for aiding and abetting a bank burglary, the Court held there was no abuse of discretion when a police forensic examiner was permitted to testify that, although there was no definitive match, the tennis shoes the defendant was wearing at the time of his arrest could have made the impression the police found in the cement dust in the bank. The government had established that the

methodology was peer reviewed and generally accepted in the forensic community, and there is no requirement that an expert have an opinion on the ultimate issue for testimony to be relevant and helpful.

United States v. Conroy, 424 F.3d 833 (8th Cir. 2005) : Affirming convictions for sexual assault, the Court found no abuse of discretion in the admission of expert testimony to explain why the laboratory results found no semen on a rug allegedly used by the defendant to wipe semen from himself after a rape of one of the victims. The Court saw "little difference between a forensic expert testifying as to the reasons for not finding bodily fluid evidence on a rug, and the common situation of a fingerprint expert testifying as to the reasons for not finding a defendant's fingerprints on an object in question." In *United States v. Rushing, 388 F.3d 1153 (8th Cir. 2004)* (per curiam), a prosecution for illegally bringing two Chinese women into the United States so that one defendant could engage in sexual relations with them, one of the women testified that she had sexual intercourse with the defendant approximately once a week for a year, and the defense sought to discredit the testimony through an expert witness who would have testified that the defendant more likely than not would have contracted Hepatitis B from the witness had the relationship been as described. Affirming, the Court found no abuse of discretion in excluding the expert testimony, since it was not based upon sufficient facts or data, it was not the product of reliable methods, and the expert applied his criteria using assumptions contrary to the established facts of the case. In particular, the expert in forming his opinion failed to take into account the witness' level of infectiousness, that the disease progresses differently in women than in men, and that it is less likely for a man to contract the disease from a woman than vice versa, and he assumed that they had sex two to three times a week rather than once a week as the witness testified.

United States v. Cavely, 318 F.3d 987 (10th Cir. 2003) : Affirming convictions for manufacturing methamphetamine, the Court found no error in admitting the testimony of a forensic scientist who provided an estimate of the amount of methamphetamine that was or could have been produced by the four meth labs found by the police in this case. The expert made the estimate by examining police records showing the amount of precursor ingredients found at each lab, and then applying a "conversion percentage" applicable to the form of production that was used. The Court noted that the expert's method was commonly used by forensic chemists and "was based on published articles, seminars and courses on clandestine laboratories, DEA literature, and [the expert's] own experience as a forensic scientist." While the expert's estimates were based on certain factual assumptions about the quantity of precursor chemicals, the defendant was able to cross-examine the expert about these assumptions.

United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004) (en banc): In a prosecution for kidnapping and sexual assault, the defendant proffered testimony from a former chief investigator in a medical examiner's office that the absence of either the defendant's hair or bodily fluids on the victim's person or in the car where the assaults took place cast doubt on the assault claim. Affirming, the *en banc* Court held there was no abuse of discretion in excluding the evidence, since the witness never explained how his experience or the texts he referred to supported his opinion that the recovery of inculpatory hair or seminal fluid "would be expected" if a rape had in fact occurred. Furthermore, the opinion would not assist the jury, since they had no way of knowing whether finding hair or seminal fluid was a virtual certainty, a strong probability, barely more likely than not, or just a possibility. In *Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001)* , a civil RICO action to recover funds that the defendants fraudulently diverted in connection with real estate investments, the Court found no abuse of discretion in the admission of testimony by the plaintiffs' liability expert, a forensic accounting expert with experience in detecting and tracing the misappropriation of funds in complex financial transactions. The witness did not exceed the scope of his expertise when stating reasonable assumptions regarding the requirements of the applicable contracts in order to put his opinions in context.

[43] "Gatekeeping"

[a] Bench Trials

Gibbs v. Gibbs, 210 F.3d 491 (5th Cir. 2000) : An insurance company refused to pay life insurance proceeds to the spouse of a deceased murder victim, contending that she was involved in the murder. The spouse took a polygraph test, which showed that she made deceptive answers about her involvement. In an interpleader action over the insurance proceeds, the Trial Judge held that there was not enough evidence to indicate that the spouse was involved in the murder, but relied in part on the polygraph results in holding that the insurance company was entitled to attorney fees from the insurance proceeds, because its actions were in good faith. Noting that "[m]ost of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as a trier of fact," the Court held it was sufficient that an expert testified in detail regarding the factors and analysis involved in the polygraph examination process, and the Judge found the process scientifically valid.

Deal v. Hamilton County Board of Educ., 392 F.3d 840 (6th Cir. 2004) : The parents of an autistic child were successful in an administrative proceeding seeking reimbursement for various educational costs, but the Trial Judge rejected the determination after a bench trial at which additional evidence was presented. On appeal, the Court noted that the "gatekeeper" doctrine of *Daubert* "was designed to protect juries and is largely irrelevant in the context of a bench trial."

United States v. Brown, 415 F.3d 1257 (11th Cir. 2005) : The principal issue in the bench trial of the defendants for distribution of a controlled substance analogue was whether the 1,4-butanediol they possessed had a chemical structure "substantially similar" to gamma hydroxybutyric acid (GHB), a controlled substance. The government offered testimony from a DEA forensic drug chemist and a biochemist with the National Institute of Environmental Health Sciences; their testimony was admitted. The defense offered a freelance consultant in the field of chemistry who held a Ph.D. in plant pathology; the Judge heard this witness' testimony without ruling on his qualifications, but did not consider the testimony as reliable expert opinion in making findings of fact. Affirming, the Court first provided an extensive explanation of the extremely deferential review ("the heavy thumb -- really a thumb and a finger or two -- that is put on the district court's side of the scale") given to *Daubert* rulings. It then concluded there was no abuse of discretion in the finding that the opinion testimony of the prosecution experts satisfied the reliability standards. Even though the method those experts used satisfied only the general acceptance factor of the four noted in *Daubert,* accepting credible evidence of a generally accepted method applied reliably was not clearly erroneous, particularly in the bench trial situation, where there is less need for the gatekeeper to keep the gate. The Court also found no abuse of discretion when the Judge declined to qualify the defendants' witness as an expert and concluded that, even if he were qualified, his method was unreliable and unreliably applied.

Seaboard Lumber Co. v. United States, 308 F.3d 1283 (Fed. Cir. 2002) : Timber contractors who had not performed on harvesting contracts sued for declarations of nonliability, but the government successfully counterclaimed for damages. Finding no abuse of discretion in the admission of expert damages testimony and affirming a judgment rendered after a bench trial, the Court noted that "[w]hile these concerns are of less import in a bench trial, where no screening of the factfinder can take place, the *Daubert* standards of relevance and reliability must nevertheless be met."

[b] "Gatekeeping" -- Findings Required

Proctor & Gamble Co. v. Haugen, 427 F.3d 727, 2005-2 Trade Cas. (CCH) P74976 (10th Cir. 2005) : Reversing dismissal of a Lanham Act case, the Court found that the Trial Judge had failed to comply with the *Daubert* "gatekeeping" function in excluding testimony from an expert for the plaintiff. The Judge had given no warning before dismissing the case that there would be a ruling on the expert's testimony, and had failed to create a sufficiently developed record to allow a determination of whether the relevant law was properly applied, which suggested that the ruling was simply "an off-the-cuff decision to exclude the expert testimony." In *Goebel v. Denver & R.G.W. R.R., 215 F.3d 1083 (10th Cir. 2000)* , the Court reversed a judgment for a locomotive engineer in an FELA action alleging that

he sustained brain damage when exposed to diesel exhaust in a high altitude train tunnel. Although the Trial Judge admitted testimony of a doctor who concluded that the plaintiff's exposure in the tunnel caused injury to the brain, the Court found that "[t]here is not a single explicit statement on the record to indicate that the district court ever conducted any form of *Daubert* analysis whatsoever," and opined that "[a] review of this case convinces us of the absolute necessity of district court findings on the record." The *Daubert* gatekeeping inquiry is a "flexible determination," but "a district court, when faced with a party's objection, must adequately demonstrate by specific findings in the record that it has performed its duty as a gatekeeper." In *United States v. Velarde*, n90 the Court reversed a conviction for aggravated sexual abuse of a child, finding an abuse of discretion in the Trial Judge's admission of expert testimony, over the defendant's objection, without conducting a *Daubert* analysis.

[c] "Gatekeeping" -- Product Liability Cases

Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) : The Court (2-1) reversed summary judgment for the defendants in an action alleging that birth defects were caused by the drug Depo-Provera. The Court held that in rejecting the testimony of an epidemiologist and a teratologist, the Trial Judge had misconceived "the limited gatekeeper role envisioned in *Daubert*." Both of the plaintiff's experts had relied on standard methodologies and published studies; they were highly qualified; one had testified about his conclusions before the FDA before the instant litigation arose; and they had sufficiently ruled out other possible causes.

Pestel v. Vermeer Mfg. Co., 64 F.3d 382 (8th Cir. 1995) : The Court affirmed a directed verdict for a manufacturer, and held that the Trial Court properly performed its gatekeeping function under *Daubert* when it excluded the testimony of an expert who claimed to have designed a protective guard for the "stump cutter" that injured the plaintiff. The Judge found that the proposed guard had not been tested, the design was not reliable, there was no peer review of the guard, and the expert made no showing that such guards were generally used on stump cutters.

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233 (11th Cir. 2005) : In an action by plaintiffs claiming that a herbal weight-loss supplement containing ephedrine and caffeine caused them strokes and heart attacks, the defendant manufacturer moved to exclude causation testimony from a pharmacologist and a neurologist, but after a *Daubert* hearing the Judge ruled that he "lacked sufficient knowledge on the scientific subject matter to exclude the testimony presented and that Defendant had not presented competing testimony for [him] to determine that, as a matter of law, testimony from Plaintiffs' experts was inadmissible." Reversing a judgment for the plaintiffs, the Court held that it was an abuse of discretion when the Judge abdicated his gatekeeping role by disavowing ability to handle the *Daubert* issues.

[d] "Gatekeeping" -- Requirement of Gatekeeping Analysis

Elsayed Mukhtar v. California State Univ., Hayward, 299 F.3d 1053 (9th Cir. 2002) : Vacating a judgment in favor of a professor who sued his university alleging racial discrimination in the decision to deny him tenure, the Court held that the Trial Judge failed to perform the required gatekeeping function under *Daubert*. In rejecting an *in limine* challenge to the plaintiff's expert and deciding to admit the expert's testimony, the Judge did not discuss its reliability but instead seemed focused on assuring that the expert not offer an opinion on an "ultimate issue" that was for the jury.

[44] General Acceptance

United States v. Fullwood, 342 F.3d 409 (5th Cir. 2003) : The Court affirmed convictions arising from a scheme to submit false crop insurance claims, finding no abuse of discretion in the admission of a government expert's

testimony, based on analysis of satellite imagery, that the defendant did not plant crops for which he submitted insurance claims. The government submitted a list of 16 articles published in peer-reviewed journals that demonstrated the general acceptance of the expert's techniques in the scientific community.

[45] Handwriting Experts

United States v. Mooney, 315 F.3d 54 (1st Cir. 2002) : Affirming conspiracy and firearm convictions, the Court held there was no abuse of discretion in admitting expert handwriting testimony that the defendant was the author of incriminating letters. The Trial Judge held a *Daubert* hearing and found that all the *Daubert* factors were satisfied. The fact that another Judge, in *United States v. Hines, 55 F. Supp. 2d 62 (D. Mass. 1999)* , excluded the handwriting testimony of a different expert did not require the Judge in this case to exclude evidence. Under the abuse of discretion standard applicable to *Daubert* rulings, different Trial Judges may permissibly reach different conclusions on similar expert testimony.

United States v. Mornan, 413 F.3d 372 (3d Cir. 2005) : The Court affirmed mail and wire fraud convictions arising from a telemarketing scheme, finding no plain error in the admission of testimony from a government handwriting expert despite her responding "I think they are" to the question whether her opinions were rendered to a "reasonable degree of scientific certainty." The Court noted that *Rule 702* does not require "reasonable scientific certainty" and that the witness had testified that rendering "less-than-certain" opinions is an accepted practice in her field. In *United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995)* , the prosecution offered an expert to opine that the defendant's girlfriend and one of his accomplices had written a mailing label that had been used to ship drugs. The Trial Judge rejected defense arguments that handwriting analysis did not constitute a valid field of expertise and, after the government expert testified, refused to permit a professor called by the defense to testify as a critic of the field of handwriting analysis. Vacating the conviction, the Court held that the defense evidence properly went to the weight of the government testimony, and that under *Daubert* the professor had sufficient specialized knowledge to be considered an expert, his proposed testimony was sufficiently reliable (having been subjected to peer review), and it fit the facts of the case.

United States v. Crisp, 324 F.3d 261 (4th Cir. 2003) : Affirming armed bank robbery convictions, the Court found no abuse of discretion in admitting expert testimony regarding handwriting and fingerprints. The Court noted that "handwriting comparison testimony has a long history of admissibility in the courts of this country," which "gives us the assurance of reliability that *Daubert* requires." It observed that the handwriting expert's principal role is "to draw the jury's attention to similarities between a known exemplar and a contested sample," leaving it to the jury to examine the evidence and "decide for itself whether it agreed with the expert. To the extent that a given handwriting analysis is flawed or flimsy, an able defense lawyer will bring that fact to the jury's attention, both through skillful cross-examination and by presenting expert testimony of his own." In *United States v. Herrera*, n91 the Court held that expert opinion regarding handwriting need not be based on absolute certainty and upheld the introduction of testimony based on a "high degree of belief."

Deputy v. Lehman Bros., Inc., 345 F.3d 494 (7th Cir. 2003) : In an action alleging securities fraud by a broker, the Court held it was error to exclude expert testimony that the plaintiff had not signed a "Client Agreement" providing for arbitration. The Judge had focused on seven reasons, most of which concerned issues of credibility and persuasiveness, but the Court found that "such considerations are relevant only in valuing the testimony, not in determining its admissibility." Remanding for a *Daubert* hearing on "whether testimony concerning the genuineness of a signature is properly the subject of expert opinion," the Court noted that every Circuit that has considered the issue has permitted expert testimony, but several District Courts have rejected handwriting analysis as unreliable.

United States v. Kehoe, 310 F.3d 579 (8th Cir. 2002) : Affirming racketeering convictions, the Court found no error in the admission of expert testimony on handwriting, as the expert had been examining documents for ten years, belonged to a professional organization in his field, and lectured on the topic of questioned documents. The Court also emphasized that the expert adequately explained his methods and process of analysis. In a prosecution for uttering forged government checks, *United States v. Hardrich*, n92 the Court found no error in the admission of a government handwriting expert's testimony that the defendant did sign, might have signed, did not sign, and "probably signed" certain endorsements and signatures.

United States v. Prime, 363 F.3d 1028 (9th Cir. 2004) : The Court affirmed convictions related to selling non-existent items on eBay, purchasing items using counterfeit money orders, pirating computer software, and stealing credit card numbers to assist in laundering money. It found no error in the denial of a motion *in limine* to exclude the testimony of a handwriting expert who opined that the defendant's handwriting appeared on the counterfeit money orders and other incriminating documents, as the Judge carefully considered all the *Daubert* factors in finding the testimony sufficiently reliable, and the Judge's conclusion was consistent with the Circuit decisions holding that handwriting testimony can satisfy the *Daubert* reliability threshold. In a drug-related case, *United States v. Fleishman*, n93 the Court found no error in the admission of testimony by a handwriting expert offered to prove that a defendant made certain notations, even though the expert indicated that he could not be certain as to his conclusion. The Court said that "[a]bsolute certainty of result is not required for admissibility," and that any uncertainty went only to weight.

United States v. Paul, 175 F.3d 906 (11th Cir. 1999) : The Court affirmed a conviction for extortion, finding no abuse of discretion in permitting an expert document examiner to present handwriting analysis evidence that identified the defendant as the author of a note. The defendant's argument that handwriting analysis does not qualify as "reliable scientific evidence" was found "without merit" because "[c]ourts have long received handwriting analysis testimony as admissible evidence." The Court also held there was no abuse of discretion in precluding rebuttal testimony for the defendant from a law professor who had coauthored a 1989 law review article, based on a review of the literature, that was critical of forensic document examiners' ability to reach the correct conclusion in questioned document examinations: "His skill, experience, training and education as a lawyer did not make him any more qualified to testify as an expert on handwriting analysis than a lay person who read the same articles."

[46] HLA Blood Grouping

United States v. Kandiel, 865 F.2d 967 (8th Cir. 1989) : The Court affirmed convictions for firearms and other violations, holding it was proper to admit a physician's testimony that, based upon a comparison of HLA genetic markers when applied to population frequencies of blood group typings, a defendant was 17 times more likely than a person selected at random to be the brother of a particular person.

[47] Human Factors Analysis

Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997) : A construction worker whose foot was run over by a pavement profiler sought in his product liability action against the manufacturer to introduce testimony from a "human factors" expert that it was necessary in designing construction machinery to take account of the phenomenon of "habituation," where workers tend to "tune out" constantly repeated warning signals. The Court held there was no error in excluding the testimony, as the witness' training was in electrical engineering, not psychology, and his experience was in making machines "user friendly" rather than in considering the safety implications of a device.

Persinger v. Norfolk & W. Ry., 920 F.2d 1185 (4th Cir. 1990) : In an FELA action, the Court affirmed the grant of a new trial, agreeing there had been error in admitting testimony by a human factors analyst regarding whether the weight the plaintiff had to lift to perform his job was unreasonable, as that is a matter within the common sense and everyday knowledge of the jurors. In *Scott v. Sears, Roebuck & Co.*, n94 the Court found error in the admission of expert testimony as to ergonomics or "human factors" in a slip and fall case, because the expert testified to matters that the jury could have understood without any help. However, the admission of testimony within the common knowledge of jurors "will almost invariably be harmless," so judgment for the plaintiff was affirmed.

Mihailovich v. Laatsch, 359 F.3d 892 (7th Cir. 2004) : In a legal malpractice case in which the former client claimed that, but for the attorney's failure to adequately investigate a negligence case, the former client would have prevailed, the Trial Judge excluded expert testimony offered by the plaintiff without giving reasons for finding it insufficiently reliable. Vacating a judgment for the attorney, the Court indicated that the admissibility of expert testimony should be addressed on remand. Although the Court expressed no opinion as to the correct result on remand, it noted that the expert's human factors analysis was not novel but a recognized approach that may yield legitimate insights as to the hazards that particular situations (including roadways) may pose, and that the expert's hypothesis appeared to be consistent with the facts.

Jaurequi v. Carter Mfg. Co., 173 F.3d 1076 (8th Cir. 1999) : The Court held in a product liability case that there was no abuse of discretion in excluding testimony for the plaintiff by a mechanical engineer and a human factors engineer that the farm machinery at issue was unreasonably dangerous because the warnings on it were deficient in placement, design, orientation, and content. The evidence failed the reliability prong of *Daubert* because the witnesses had not created or designed, much less tested, warnings they would have considered more appropriate, and they had not pointed to such warnings being used in practice by any other manufacturer.

[48] Impeachment of Experts

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : Reversing a judgment for the plaintiff in a slip and fall case because the Trial Judge had not conducted a *Daubert* hearing into the reliability of the methodology used by the plaintiff's vocational rehabilitationist, the Court noted that the fact the witness had pleaded guilty to embezzlement and knowing conversion of federal property was not an appropriate *Daubert* factor to weigh in assessing the reliability of his methods. The evidence could only be used by the jury to assess the witness' credibility.

Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) : In a product liability case, the Court said that "cross-examination of an expert about fees earned in prior cases is not improper," since such evidence might tend to establish a bias.

Nemir v. Mitsubishi Motors Corp., 381 F.3d 540 (6th Cir. 2004) : The plaintiff was seriously injured when his seatbelt latch allegedly gave way in an automobile accident. When the plaintiff attempted to impeach a defense causation expert with an excerpt from a book co-authored by another expert, Spitz, retained by the defendant, the Judge instructed the plaintiff to save such questioning for Sptiz's testimony. Then, when the plaintiff attempted to cross-examine Spitz about the excerpt, the Judge prohibited the questioning as beyond the scope of his direct testimony. Reversing a judgment for the defendant, the Court held that the plaintiff was erroneously prevented by the Judge's rulings from introducing relevant impeachment evidence.

United States v. York, 933 F.2d 1343 (7th Cir. 1991) : Affirming convictions for mail fraud and arson, the Court

held there was no error in permitting the government to conduct a *voir dire* in the jury's presence focusing on prior unprofessional conduct of an expert pathologist. The defendant had qualified the witness before the jury, the questions were relevant to the weight to be accorded the expert's testimony, the prosecutor had a good faith basis for the questions, and qualification is a preliminary question to which *Rule 608(b)* does not apply.

United States v. 10.48 Acres of Land, 621 F.2d 338 (9th Cir. 1980) : In a condemnation action, the Court upheld a ruling disallowing cross-examination of a government expert concerning the price paid by the government for a similar easement. It noted that such sales generally are treated as payments in the nature of compromise and are not admissible to prove fair market value, and that the expert had not relied on the sale in reaching an opinion.

[49] Insanity Defense

United States v. McRary, 616 F.2d 181 (5th Cir. 1980) : The Court held that a defense expert should have been permitted to testify about a "folie a deux," a condition in which two people share the same fantasy, since "all evidence relevant or pertinent to the issue of insanity should be admitted." In *United States v. Lopez*, n95 the Court affirmed convictions for assault of a federal penitentiary employee and held there was no abuse of discretion in excluding the testimony of a professor who claimed to be an expert on sensory deprivation.

[50] Intellectual Property Cases

Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110 (3d Cir. 2004) : In a bank's action for a declaratory judgment that it was not infringing a competitor's trademarks, the Court found no abuse of discretion in the exclusion of a customer-confusion survey conducted for the defendant. Because in a "reverse confusion" case the relevant base is the senior user's customers, the defendant's survey of customers in the junior user's market meant the methodology of the survey was fundamentally flawed. Because the flaw went beyond mere technical unreliability, it went to the admissibility, not merely the weight of the evidence. In a copyright infringement case involving a computer program, *Whelan Assocs. v. Jaslow Dental Lab.*, n96 the Court held that the ordinary approach in an infringement case -- receiving expert testimony with respect to the similarity of two works and having a lay judgment as to whether any copying was an unlawful appropriation -- was not useful. Rather, when the subjects of the copyright are particularly complex, "a single substantial similarity inquiry according to which both lay and expert testimony would be admissible" is preferred.

Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc., 35 F.3d 1226 (8th Cir. 1994) : In an action for alleged trade secret misappropriation of the genetic makeup of certain seed corn, the Court held that scientific evidence from electrophoresis, liquid chromatography, and growout testing was properly admitted, as the techniques were widely used in the industry, conducted by qualified experts, and considered helpful enough to be relied upon by both parties in the suit.

Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004) : In an action for alleged infringement of a copyrighted song, the Court held that testimony from the plaintiff's expert musicologist had been improperly rejected on the ground that the methodology was flawed. Although the methodology was "selective," in that it discounted notes that the expert characterized as "ornamental," the expert sufficiently explained that notes falling on the beat will be more prominent to the ear than notes falling off the beat and some artists will ornament their notes in ways that other do not. This methodology of removing notes perceived as performance-related was consistent with infringement law, which permits consideration of only the appropriation of a song's compositional elements and not of elements unique to the plaintiff's performance.

Autoskill, Inc. v. National Educational Support Sys., 994 F.2d 1476 (10th Cir. 1993) : The Court affirmed an injunction for a copyright holder against a competitor, and held that the Trial Judge had discretion to consider an expert's views as to the protectable and unprotectable portions of a computer program. "As the judge noted, the experts' opinions may be helpful, but their legal conclusions on these points are not binding."

Cytologix Corp. v. Ventana Medical Sys., Inc., 424 F.3d 1168 (Fed. Cir. 2005) : In a patent infringement action, the Court noted that it was improper to have expert witnesses testify before the jury regarding claim construction. The risk of confusing the jury is high even when, as here, the jury is instructed that the Judge's claim constructions control. In *Data Line Corp. v. Micro Technologies, Inc.*, n97 the Court affirmed a permanent injunction against patent infringement by the defendant, holding that expert testimony was admissible to establish infringement, despite the fact that the plaintiff's expert witnesses did not physically inspect the infringing device and were unable to identify certain of its schematic drawings, read its source code, and describe details of its test phase. The plaintiff presented evidence that physical inspection would have been useless and that the drawings and source code were not the best evidence of the operation of the device. In *McGill, Inc. v. John Zink Co.*, n98 the Court noted that expert testimony may be used in a patent infringement case to construe claims -- i.e., as evidence of how the claims would be construed by those skilled in the art.

[51] Interpretation of Contracts or Written Instruments

Buford v. Wilmington Trust Co., 841 F.2d 51 (3d Cir. 1988) : In a breach of contract action by a former owner of a business against a bank that acquired the business, the Court held that an expert witness was properly permitted to testify that in his opinion certain expenditures by the bank were not what could commonly be understood to be "advertising expenditures to promote the discount brokerage business acquired." In *First Nat'l State Bank v. Reliance Elec. Co., 668 F.2d 725 (3d Cir. 1981)* , the Court said that the Trial Judge ruled properly in permitting "an outstanding scholar and a foremost expert on the Uniform Commercial Code" to testify as to trade usage in a dispute over a lease.

United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991) : Affirming convictions for making false statements to defraud in connection with government insured mortgages, the Court held that the defendants' expert was properly precluded from testifying as to the meaning of government regulations affecting certifications signed by the defendants, but should have been permitted to testify to ambiguities in the language of the certifications. The error was harmless, however. In *Forrest Creek Assocs. v. McLean Sav. & Loan Ass'n*, n99 the Court affirmed the dismissal of claims and counterclaims in a contract action, finding that expert testimony proffered by a borrower was inadmissible. The testimony concerning the interpretation of a loan contract involved a question of law that was reserved to the Court.

Phillips Oil Co. v. OKC Corp., 812 F.2d 265 (5th Cir. 1987) : In a diversity action, the Court held that expert testimony was properly admitted to interpret the term "cost" as used in a "farmout" agreement between oil companies. The net profits accounting provisions in the agreement had a specialized usage and meaning within the oil and gas accounting field so that the expert testimony was helpful in understanding the provisions.

North Am. Specialty Ins. Co. v. Myers, 111 F.3d 1273 (6th Cir. 1997) : Affirming summary judgment against the insureds in a declaratory judgment action over insurance coverage, the Court held there was no error in refusing to consider the report of an asserted expert in the interpretation of insurance contracts, since the issues in the case were simply legal questions and did not require interpreting any ambiguous provisions or confusing technical terms. In an action on a promissory note, *CMI-Trading, Inc. v. Quantum Air, Inc., 98 F.3d 887 (6th Cir. 1996)* , the defendants

asserted that the contracts involved constituted a joint venture agreement rather than a loan agreement. The Court held there was no error in prohibiting the defendant's expert, a financial consultant specializing in private equity transactions, from expressing an opinion based on the documents as to the sort of relationship the parties intended. The legal concepts of "loan" and "joint venture" are issues of law beyond the competence of an expert. In *Apponi v. Sunshine Biscuits, Inc.*, n100 an action by former employees of a company to recover early retirement benefits, the Court held there was no error in excluding the testimony of a labor relations expert that the pension plan provided early retirement benefits under one condition only, so it was unlikely that the company would have entered into an oral agreement with a labor union that would not have been integrated into the written agreement. The expert opinion would not have helped the jury decide whether certain representations had been made by the company to the union. The Court indicated, however, that on remand the excluded testimony might be relevant in determining whether any representations were made by persons with authority to bind the company and whether they were intended to be acted upon by the plaintiffs.

Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357 (7th Cir. 1990) : In an action by an insurer for a declaration of nonliability on a policy of directors' and officers' liability insurance, the Court held there had been reversible error in permitting the plaintiff's lawyer to testify to the meaning of a crucial term in the defendant's charter. Because the charter was ambiguous, expert testimony was a permissible aid to interpretation; however, the lawyer who testified based his opinion on use of the word in judicial opinions rather than in charters, which allowed the jury to infer that it could look to the witness for legal guidance, and thus impermissibly tilted the balance between the parties toward the insurers.

Nucor Corp. v. Nebraska Pub. Power Dist., 891 F.2d 1343 (8th Cir. 1989) : In an action for breach of a utility contract implementing a statute requiring rates to be fair, reasonable, and nondiscriminatory, the Court held that there was no error in admitting expert evidence construing those terms. Expert testimony defining terms of a technical nature and indicating whether they have acquired a well-recognized meaning in the industry has frequently been recognized as valuable. In *United States v. Garvin*, n101 the defendant's mail fraud convictions, based on false answers on insurance policy applications, were reversed in part because expert testimony concerning the meaning of the language of insurance contracts was improperly excluded. The Court concluded that the jury could have been aided by the evidence.

United States v. Ortland, 109 F.3d 539 (9th Cir. 1997) : Affirming a conviction for a fraud involving a partnership agreement drafted by an attorney for the defendant and his wife, the Court upheld the exclusion of expert testimony concerning the terms and effect of the partnership agreement, since the issue was not what the expert thought but what the defendant thought and said about the agreement. In *Maffei v. Northern Ins. Co., 12 F.3d 892 (9th Cir. 1993)* , the plaintiff sued its insurers for refusing to pay on policies covering "hostile fires" after an incident in which substantial heat and whitish-yellow smoke was released from chemical drums. The Trial Judge granted summary judgment for the defendants, rejecting declarations from the plaintiff's experts that there had been a "fire" because heat, light, and a flame were released and that release of the vapor cloud constituted a "hostile fire" as defined in the policy. The Court reversed, holding that common sense was not sufficient to determine whether a fire had occurred in these circumstances, but that there was no error in excluding the declaration regarding "hostile fire" because the term is not ambiguous and the witness did not specifically testify as to custom and usage regarding use of the term. In an action by workers asserting a contract based on promissory estoppel, *Aguilar v. International Longshoremen's Union, 966 F.2d 443 (9th Cir. 1992)* , the Court held that an avowed expert in employment application interpretation was properly precluded from testifying that a promise had been made and the workers were reasonable in relying on it, as the reasonableness and foreseeability of the workers' reliance were matters of law for the Court's determination. In *Energy Oils, Inc. v. Montana Power Co.*, n102 the Court concluded that an expert witness should not have been permitted to testify as to the legal effect of written agreements. The construction of agreements belongs to the Courts.

[52] Jones Act Cases

Wills v. Amerada Hess Corp., 379 F.3d 32 (2d Cir. 2004) : A deceased seaman's wife brought a Jones Act action alleging that her decedent contracted squamous cell carcinoma from his exposure to benzene on the defendant's ships. The Court affirmed summary judgment for the defendant, finding no abuse of discretion in excluding the plaintiff's proffered expert's testimony as unreliable under *Daubert*. The Court rejected the argument that because Jones Act claimants carry a lighter burden of proof as to causation than their counterparts on land, the strict standards of *Daubert* are inapplicable: even where the plaintiff faces a relaxed burden of proof, "the district court's admission of expert testimony is nonetheless governed by the strictures of *Daubert* and *Rule 702*."

[53] Knowledge, Intent, Good Faith, Motivation, etc.

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) : Upholding convictions related to the 1993 World Trade Center bombing, the Court found no error in the exclusion of expert testimony concerning the intentions of the lead defendant, a Muslim cleric, with respect to "jihad" (i.e., combating of oppression, or holy war). The expert was not competent to tell the jury of the defendant's intentions without having the defendant speak. The Court also held that testimony of an international security expert that terrorist activity against the United States was against the cleric's interest similarly was speculation by someone who was not competent to testify to a defendant's intentions. In *United States v. DiDomenico, 985 F.2d 1159 (2d Cir. 1993)* , the Court affirmed convictions for wire fraud and interstate transportation of stolen computer equipment, and held there was no abuse of discretion in excluding evidence that the defendant had a "dependent personality disorder." The imprimatur of a clinical label was neither necessary nor helpful for the jury in assessing the defendant's state of mind and would complicate the jury's task. One Judge dissented on the ground that the diagnosis, being neither commonplace nor beyond the boundaries of current psychiatric knowledge, could be helpful, and the jury could be relied on to evaluate the evidence with a critical eye and look beyond the clinical label in deciding whether the defendant's mental state included guilty knowledge.

Dunn v. HOVIC, 1 F.3d 1362 (3d Cir. 1993) , *modified on other grounds*, *13 F.3d 58 (3d Cir. 1993)* : Affirming a judgment for a plaintiff claiming an asbestos-related injury, the Court held that there was no error in allowing the plaintiff's expert to testify, on the basis of his review of the asbestos manufacturer's corporate records, that the manufacturer knew of the risks of asbestos.

Singer v. City of Waco, 324 F.3d 813 (5th Cir. 2003) : Affirming a judgment for firefighters in a Fair Labor Standards Act case, the Court upheld the exclusion of expert testimony by a former Department of Labor official that the City "likely did not know that its pay practices violated the FLSA." Since the expert was not an employee of the City and was not a party to any of the events leading up to the litigation, there was no showing of a reasonable basis for expert testimony as to willfulness. In *United States v. Chavis*, n103 the Court affirmed mail fraud convictions, finding that the defendant's cross-examination of a government expert opened the door to redirect examination in which the expert opined that, if certain facts were assumed, a person who made representations would not have acted in good faith. The Court observed, however, that "in the ordinary circumstance testimony concerning a defendant's state of mind must be avoided."

United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993) : The Court reversed the defendant's conviction for involuntary manslaughter of his infant daughter, holding that it was an abuse of discretion to exclude expert testimony on the general lack of public awareness of the dangers of shaking an infant. Where the dispositive issue in the case was whether the defendant intended to revive the infant or to injure her, the evidence would be probative of his knowledge and intent, helpful to the trier, and not cumulative. In *United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992)* , the Court reversed a conviction for extortion and filing false income tax returns, holding that it was error to exclude testimony by a defense expert on the reasonableness of the defendant's conclusion that a $1,500 check he received was a gift rather than taxable income. A subjective good-faith misunderstanding of the law or a good-faith belief that one is

not violating the law can negate the statutory wilfulness requirement of criminal tax offenses, so any evidence of the reasonableness of the defendant's belief was relevant to the determination of whether his violation of the tax laws was wilful.

[54] Law Enforcement Agents

[a] Check-kiting

United States v. Yoon, 128 F.3d 515 (7th Cir. 1997) : The Court held that testimony from a law enforcement agent concerning a check-kiting scheme was properly admitted under *Daubert*. The agent testified on the basis of extensive experience, describing how check-kiting schemes operate and explaining how and why he reached the opinion that check-kiting occurred in this case.

United States v. Whitehead, 176 F.3d 1030 (8th Cir. 1999) : The Court held in a bank fraud prosecution that there was no abuse of discretion in permitting an FBI agent to explain check-kiting and discuss some of its common characteristics. The Trial Judge had found that the testimony was reliable and would aid the trier of fact in understanding the evidence.

[b] Law Enforcement Agents -- Child Abuse

United States v. Romero, 189 F.3d 576 (7th Cir. 1999) : The defendant was charged with kidnapping a minor with intent to engage in criminal sexual activity after developing a relationship with a 12-year-old boy over the Internet. The Court found no abuse of discretion in admitting testimony regarding the characteristics of "preferential" child molesters from an FBI expert on child molesters. The testimony was helpful in dispelling the stereotype of a molester as "a dirty old man in a wrinkled raincoat" who snatches children off the street as they wait for the school bus and in understanding the sophisticated psychological techniques modern molesters use to seduce their victims.

[c] Law Enforcement Agents -- Drug Cases

[i] Defense Evidence

United States v. Montague, 958 F.2d 1094 (D.C. Cir. 1992) : In a drug prosecution, the Court held there was no abuse of discretion in precluding the defense from cross-examining a government expert on narcotics distribution about the effects of crack cocaine on the user's memory and perception.

United States v. Roldan-Zapata, 916 F.2d 795 (2d Cir. 1990) : The Court held there was no error in preventing a defense expert witness in a drug case from testifying as to police and DEA agents' surveillance and recordkeeping procedures. Although he was qualified to opine whether notes and ledgers taken from the defendants were narcotics records, he had been retired from government service for eight years and there was no showing he had current knowledge of "normal" procedures.

[ii] Law Enforcement Agents -- Drug Cases -- Drug Prices, Effects, Growing, Manufacture, etc.

United States v. Montague, 958 F.2d 1094 (D.C. Cir. 1992) : In a drug prosecution, the Court held there was no abuse of discretion in precluding the defense from cross-examining a government expert on narcotics distribution about the effects of crack cocaine on the user's memory and perception.

United States v. Rivera Rodriguez, 808 F.2d 886 (1st Cir. 1986) : In a prosecution for importing and possessing cocaine with intent to distribute, the Court held that an expert was properly permitted to testify that a certain instrument found in the defendant's car could be used to adulterate cocaine, as the testimony would have helped the jury.

United States v. Saulter, 60 F.3d 270 (7th Cir. 1995) : The Court found no error when a law enforcement agent testified to the process of manufacturing crack. This subject matter was "likely beyond the ken of the average juror." The Court noted that in this case the government's main fact-witness had been heavily impeached, but that the expert was not called "solely to corroborate" the testimony of that witness.

United States v. Hughes, 15 F.3d 798 (8th Cir. 1994) : An expert testified that the purity level of crack cocaine found in the defendant's pocket was the same as the purity level of crack found in his trunk and that it is unusual to find two batches with the same purity level. Distinguishing *United States v. Arenal*, n104 the Court held that here the jury was allowed to draw its own conclusion whether the two exhibits of crack were from the same source or batch. In *United States v. Agyen*, n105 the Court held that a DEA agent could testify as to the street value of pure heroin contained in a mixture, even though the agent had never analyzed the value of heroin prior to this case.

United States v. Mendoza-Paz, 286 F.3d 1104 (9th Cir. 2002) : The defendant, caught crossing a port of entry with drugs hidden in her car, challenged the testimony of the government's drug valuation expert, arguing that it was not subject to empirical testing, could not be reviewed for error rates, and contained estimates that had not been accepted in any expert community. Finding no error in admission of the testimony, the Court noted that the *Daubert* inquiry for non-scientific experts was a flexible one, and that factors such as peer review and potential error rate "simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." In *United States v. Lennick, 18 F.3d 814 (9th Cir. 1994)* , the Court held there was no abuse of discretion in permitting an officer to testify about the length of time it takes to grow a marijuana plant, the amount of marijuana it takes to make a cigarette, and the amount of marijuana one could obtain from a single plant, as such matters may be outside the common knowledge of a jury determining whether the defendant, who allegedly grew almost 50 plants, was growing more than he could consume himself.

[iii] Law Enforcement Agents -- Drug Cases -- Interpreting Statements, Code, etc.

United States v. Rivera-Rosario, 300 F.3d 1 (1st Cir. 2002) : Reviewing drug trafficking convictions, the Court found no plain error in the admission of testimony by a federal agent as to the meaning of coded conversations. The FBI had trained the agent on how to conduct drug investigations and to decipher coded references, and the agent's experience in 25 drug investigations, many of which intercepted conversations in English and Spanish and involved heavily coded references to drugs and narcotics dealing, provided a sufficient basis for the testimony. In a cocaine-related money laundering case, *United States v. Gonzalez-Maldonado, 115 F.3d 9 (1st Cir. 1997)* , the Court held that it was error to permit an FBI agent to interpret words in recorded conversations that were not code words and that were clear statements that the jury could interpret for itself. See also *United States v. Hoffman* n106(government agent was properly permitted to interpret coded drug negotiations).

United States v. Cruz, 363 F.3d 187 (2d Cir. 2004) : Reversing a conviction for aiding and abetting narcotics trafficking, the Court held that while government agents could assist in deciphering drug jargon, it was improper to permit them to testify about the meaning of a phrase like "to watch someone's back" that is neither "coded nor esoteric," and that the dangers of admitting such testimony are particularly acute when, as in this case, the law enforcement agent

is also testifying as a fact witness.

United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999) : In a cocaine distribution conspiracy case the Court held it was an abuse of discretion (but harmless error) to permit an agent to interpret phrases such as "tonight's the night," "we're going to be on that tonight," and "got to do it tonight." In contrast to terms like "jawn," "on post," and "quarter," which the agent properly translated from the drug trade argot, the former phrases were ones for which the jury needed no aid or illumination. Thus, the agent's testimony was not helpful and served only to bolster allegations that the defendant was an enforcer.

United States v. Phillips, 593 F.2d 553 (4th Cir. 1978) : The Court found no error in admitting testimony by a government agent in a narcotics case interpreting code language in intercepted telephone conversations.

United States v. Krout, 66 F.3d 1420 (5th Cir. 1995) : The Court held it was error (but harmless) for a detective to testify that references in recorded conversations to "the people" and the "driver of the truck" indicated that a defendant was acting with others to bring heroin into the area. There was no assertion by the government that the conversations were in code, and the jury was in as good a position as the "expert" to interpret ordinary words.

United States v. Lawson, 780 F.2d 535 (6th Cir. 1985) : The Court affirmed convictions involving transportation of stolen property. It upheld the admission of police officers' testimony concerning the meaning of certain terms used in drug trafficking, finding that the officers were experts and that there was evidence that stolen property would be exchanged for drugs.

United States v. Ceballos, 302 F.3d 679 (7th Cir. 2002) : The Court affirmed drug conspiracy and money laundering convictions, holding there was no abuse of discretion in permitting two experienced DEA agents to interpret code language used in recorded phone conversations. Although the conversations were in Spanish and neither agent spoke fluent Spanish, the Court found no authority prohibiting experts from interpreting drug code language in English translations of Spanish conversations. The Court also held that the agents could offer opinions on the meaning of pronouns such as "it" and "them" because the pronouns were used in an ambiguous manner. In *United States v. Ramirez*, n107 the Court affirmed cocaine convictions, finding no error in the admission of testimony by a government agent who interpreted tape-recorded conversations based upon his experience in narcotics cases. Interestingly, the Trial Judge did not use the word "expert" in instructing the jury, since its use might have unduly emphasized the testimony.

United States v. Sparks, 949 F.2d 1023 (8th Cir. 1991) : The Court held that an experienced detective's testimony could be helpful in a drug conspiracy case to understand the meaning of graffiti and hand signs depicted in pictures as well as the potential significance of an admitted gang member moving from Los Angeles to a city in the Midwest.

[iv] Law Enforcement Agents -- Drug Cases -- Opinions About Conduct or Other Circumstances in Case

United States v. Hall, 969 F.2d 1102 (D.C. Cir. 1992) : The Court held there was no abuse of discretion in allowing an expert on use and distribution of narcotics to testify on the question of whether the defendant had the requisite intent in a prosecution for possession with intent to distribute. Even though the Judge conducting the bench trial was experienced with narcotics trafficking cases, the expert testimony could be helpful; furthermore, the Judge's expertise made it highly unlikely the Judge would be swayed by the "aura" of the expert's testimony.

United States v. Agudelo, 988 F.2d 285 (1st Cir. 1993) : The Court held it was error (but harmless) to admit a drug enforcement agent's testimony that cash in the defendant's possession was the proceeds of a drug transaction when the agent had no special grounds for his opinion.

United States v. Young, 745 F.2d 733 (2d Cir. 1984) : In a prosecution involving heroin trafficking, the Court found that government agents were properly permitted to testify that in their opinion an incident involving a defendant was a narcotics transaction, since the agents were experts whose testimony might have aided the jury in understanding unusual events. The Court approved the use of another expert to narrate a videotape in order to opine for the jury what the tape revealed, and it also upheld the admission of testimony concerning the general background of heroin distribution, which was used to explain to the jury the paraphernalia that was found in a search. One Judge concurred, but questioned "whether an expert's opinion that the events he observes constitute a drug transaction provides very much, if any, assistance to a jury, beyond whatever inference is available to be drawn by the jury from all the evidence." He suggested that Trial Judges should carefully screen this kind of expert opinion under *Rules 403* and *702* and "should not routinely admit opinions of the sort at issue here."

United States v. Davis, 397 F.3d 173 (3d Cir. 2005) : The Court affirmed drug trafficking and firearms convictions, holding there was no abuse of discretion in admitting expert testimony from an experienced police officer. When asked a hypothetical question based on the evidence whether the facts were consistent with drug trafficking or with simple possession, he answered that it "would be possession with intent to deliver the narcotics." His testimony concerning the methods of operation for drug traffickers in the South Philadelphia area would assist the jury because the topic was not within the common knowledge of the average juror. Affirming marijuana convictions in *United States v. Wright-Barker*, n108 the Court sustained the admission of testimony by a Coast Guard expert that a ship's course and condition were consistent with drug smuggling.

United States v. Hopkins, 310 F.3d 145 (4th Cir. 2002) : Affirming a conviction for possessing cocaine with intent to distribute, the Court held there was no abuse of discretion when an experienced police officer was permitted to testify how the materials found in the defendant's car at the time of arrest led him to believe, based on his experience and training, that the defendant was involved in drug distribution. The testimony was properly based on the witness' observations of the evidence in the case and assisted the jury in determining the defendant's guilt. In *United States v. Cooper*, n109 the Court upheld the admission of testimony by a drug agent as to the defendant's place of residence, since the agent's opinion was based upon seeing the defendant at the residence many times.

United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003) : In a truck driver's trial for marijuana possession, a DEA agent testified about how drug traffickers recruit smugglers. He suggested that the recruits knew they were transporting drugs, and he mentioned specifically facts closely paralleling the case. Affirming, the Court found that admission of the agent's testimony was an abuse of discretion (but harmless error). The testimony was closely akin to drug courier profile evidence, which is inadmissible because it is inherently prejudicial and violates *Rule 704(b)*'s bar on expert testimony to prove a mental element: in these cases, the courier's knowledge that he was transporting drugs. Further, it was questionable whether the agent's testimony about what the driver would have known involved any expertise. In a drug conspiracy case, *United States v. Buchanan, 70 F.3d 818 (5th Cir. 1995)* , the Court held there was no abuse of discretion in admitting testimony by experienced officers that a defendant's actions indicated he was guarding a car that was later found to contain weapons and crack cocaine. The officer's specialized knowledge could be helpful to aid the jury in determining whether the defendant's presence with the drugs was innocent or not.

United States v. Swafford, 385 F.3d 1026 (6th Cir. 2004) : Affirming methamphetamine and firearms convictions, the Court found no abuse of discretion when a police officer was permitted to testify that methamphetamine found in a

garage outside the defendant's house was possessed with intent to distribute and that firearms play a role in drug trafficking activity. The Court stated that "[p]olice officers are routinely allowed to testify that circumstances are consistent with distribution of drugs rather than personal use," and opined that courts have taken a very tolerant view of testimony tying firearms to drug trafficking.

United States v. Brown, 7 F.3d 648 (7th Cir. 1993) : The Court affirmed a conviction for possessing cocaine base with intent to distribute, holding there was no error in permitting a DEA agent to testify, based on the circumstances, that the crack seized "was intended for distribution." Viewed as a whole, the testimony merely suggested that this crack probably would be distributed rather than used by the defendant; it was not an opinion on guilt or innocence nor on the defendant's mental state. In *United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992)* , the Court held that it was error (but harmless) for a correctional officer to give an opinion that balloons smuggled into the prison contained drugs, as there was no foundation offered that he had training or personal knowledge regarding how drugs were smuggled into prisons. In *United States v. Foster*, n110 the Court affirmed a conviction for possession of cocaine and PCP with intent to distribute, holding that a DEA agent involved in the arrest could be helpful to the jury in pointing out, based on his long experience in narcotics investigations, the criminal *modus operandi* involved in apparently innocent behavior.

United States v. Brown, 110 F.3d 605 (8th Cir. 1997) : A law enforcement agent testified as an expert in this narcotics case, expressing the opinion that a certain house was used as a stash house and that the defendant's activity was consistent with one engaging in a drug delivery and countersurveillance activity. Affirming the conviction, the Court held that the agent's testimony assisted the jury in determining the significance of the defendant's activity. In *United States v. Cotton, 22 F.3d 182 (8th Cir. 1994)* , the Court held that an experienced detective could testify that the amount of crack cocaine seized was indicative of distribution.

United States v. Espinosa, 827 F.2d 604 (9th Cir. 1987) : The Court held that a narcotics detective was properly permitted to testify that an apartment was being used as a "stash pad" for narcotics and money. See also *United States v. Andersson* n111(upholding the admission of testimony by a paid government informant concerning techniques used by drug peddlers and testimony by an officer that the defendants engaged in "counter-surveillance techniques" to ascertain whether they were being followed).

[v] Law Enforcement Agents -- Drug Cases -- Practices of Drug Trade

United States v. Moore, 104 F.3d 377 (D.C. Cir. 1997) : Hidden in the car in which the defendant was arrested were drugs, weapons, and a roll of duct tape. Affirming a conviction for drug trafficking offenses, the Court held there was no abuse of discretion in permitting a detective knowledgeable about narcotics to testify that duct tape was often used in the drug trade to bind people being robbed or who were otherwise restrained. The evidence was helpful to the jury in determining the defendant's intent to distribute the drugs found in his possession, and its probative value was not substantially outweighed by its tendency to suggest he was a violent person who binds people with duct tape. In *United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990)* , an African-American and two Jamaicans were jointly charged with drug offenses. The Court reversed their convictions, in part because a detective was permitted to testify to the *modus operandi* of Jamaican drug dealers and how the market "has been taken over basically by Jamaicans." The Court cautioned that although jurors may not be familiar with the methods of drug dealers, expert testimony may create undue prejudice because of its aura of special reliability and trustworthiness.

United States v. Lopez-Lopez, 282 F.3d 1 (1st Cir. 2002) : Affirming cocaine-related convictions, the Court held that a Customs Service expert was properly allowed to testify as to the *modus operandi* of individuals importing drugs into Puerto Rico. The expert's explanations of how drug importation schemes use global positioning satellites to

facilitate air drops and boat transfers and how cellular phones are used to enable boat-to-ground communications could have helped the jury understand matters outside its ordinary knowledge and experience. The Court held that the government made a sufficient showing to satisfy the "flexible" test for reliability of non-scientific expert testimony established in *Kumho Tire*. In *United States v. DiMarzo, 80 F.3d 656 (1st Cir. 1996)* , the Court affirmed convictions for a cocaine distribution conspiracy in which two defendants asserted they had not known a third was planning to conduct a drug deal, holding there was no abuse of discretion in permitting an undercover agent in the case to testify on redirect that in his experience innocent observers were not invited to accompany criminals engaged in completing a drug deal. The testimony did not implicate the opinion rules, since it was simply the witness' personal experience relating to a subject bearing directly upon the appropriateness of a jury inference, nor did it encroach on the jury's factfinding function regarding the ultimate issue of guilt. In *United States v. Montas*, n112 the Court affirmed a cocaine possession conviction, although it raised questions about the admissibility of a drug agent's testimony that drug traffickers often travel under assumed names to avoid being caught. The Court found that "this evidence was on the very margin of -- and probably beyond -- what is acceptable," but declined to find plain error.

United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) : Reversing convictions for drug offenses because a detective was improperly permitted to testify to operating methods of drug dealers, the Court said that a New York jury hardly needs expert assistance to inform them of the functions of a scale or index card in a drug deal or that dealers, in order to flush out undercover police officers, threaten customers with guns to make them snort cocaine. In *United States v. Cruz, 981 F.2d 659 (2d Cir. 1992)* , the Court reversed a drug conviction for the erroneous admission of expert testimony concerning the behavior of drug dealers from a certain area and the *modus operandi* of dealers in the area. The government's key witness asserted that the defendant had acted as a "broker" between one drug dealer and suppliers, but the defendant denied he was present at the transactions. The Trial Judge admitted testimony of a special agent to bolster the key witness' testimony by showing that the events described by the witness were typical of drug deals in the area. The Court cited *Castillo* and reasoned that the government may not bolster a witness' testimony in this way and that "guilt may not be inferred from the conduct of unrelated persons." See also *United States v. Cruz* n113(a government agent was properly permitted to testify regarding the food stamp program and the use of food stamps in narcotics sales, where food stamps had been found on one defendant following surveillance of a suspected narcotics exchange area).

United States v. Perez, 280 F.3d 318 (3d Cir. 2002) : The Court found no abuse of discretion in a methamphetamine prosecution when a detective lieutenant was permitted to testify how drug traffickers use cellular telephones to frustrate police investigations. The Court observed that "[i]t is not common knowledge among lay persons serving as jurors that police are unable simultaneously to wire-tap cellular phone calls and keep under surveillance those who make them, or that numeric pagers are used by drug traffickers to transmit coded messages."

United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994) : In a drug trafficking case, the Court held there was no error in admitting testimony from a police officer about the methods of drug dealers. In *United States v. Monu*, n114 the Court upheld the admission of expert testimony by investigative agents concerning the purity of heroin generally distributed and the identification of a scale as a tool of heroin trade. The agents had many years of experience in investigating heroin distribution.

United States v. Garcia, 86 F.3d 394 (5th Cir. 1996) : The Court held there was no abuse of discretion in permitting a DEA agent to testify about the methods of large cocaine trafficking organizations and that such an organization controlled the cocaine seized in the case, since the average juror might not be aware that the presence of 166.9 kilos of cocaine is indicative of such an organization or that they commonly use "car swaps," "stash houses," and "heat runs" as testified to in this case.

United States v. Harris, 192 F.3d 580 (6th Cir. 1999) : In a prosecution for drug distribution, the defendant claimed that the six grams of crack found on his person was for personal use. The Court found that the *Daubert* and *Kumho* standards of relevance and reliability were met when a law enforcement agent was permitted to testify as an expert on the methods and operations of street level drug dealers.

United States v. Brumley, 217 F.3d 905 (7th Cir. 2000) : In a prosecution for possession of methamphetamine with intent to distribute, the Court found no abuse of discretion when a DEA agent was permitted to testify that amounts of methamphetamine in excess of one ounce were distribution as opposed to personal use amounts. The testimony was not subjective or speculative, but based on the agent's experience in approximately 100 methamphetamine investigations, and did not purport to be based on some special knowledge of the defendant's mental state. In *United States v. Sanchez-Galvez, 33 F.3d 829 (7th Cir. 1994)* , the Trial Judge permitted an experienced DEA agent to testify that the presence of several persons, in addition to the buyer and seller, is common in drug transactions; that the presence of children at drug deals is increasing in frequency; and that parking lots are common venues for drug transactions. The Court held that this testimony was properly admitted because it helped the jury "to apply to the evidence alternative theories of which they ordinarily would not have been aware." See also *United States v. Gonzalez* n115(a DEA agent was permitted to testify that narcotic-related phone calls "are short").

United States v. Battle, 859 F.2d 56 (8th Cir. 1988) : The Court held that an agent was properly permitted to testify that two scales were common to drug operations.

United States v. Pineda-Torres, 287 F.3d 860 (9th Cir. 2002) : The Court reversed convictions for importation and possession of marijuana, finding that it was an abuse of discretion to admit expert testimony regarding the structure of drug trafficking organizations (including the futility of collecting fingerprints because of the organizations' compartmentalized nature) in a simple, non-conspiracy importation case. Citing *United States v. Vallejo* (see § 403.03[29][c][ii]), the Court concluded that it had rejected the notion that evidence of the structure of drug organizations could prove that a particular defendant had knowledge that drugs were in his car. The Court also held that the defendant had not opened the door to the evidence by cross-examining a Customs agent about the failure to lift fingerprints. In *United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002)* , a prosecution for drug importation and possession with intent to distribute, the defendant denied knowing that he was carrying the drugs and a Customs agent was permitted to testify about the methods and techniques used by narcotics smugglers, including that a smuggler would not risk using an unknowing courier to transport drugs. The Court held that admission of the expert's testimony was reversible error, since it prejudicially portrayed the defendant as a member of an international drug trafficking organization even though he was indicted only as an individual and there was no charge that he was acting in a conspiracy. In *United States v. Murillo,* n116 the defendant was arrested driving a rental car in which over one million dollars worth of drugs were found hidden. The Court found no abuse of discretion in admitting testimony from a DEA agent about the *modus operandi* of drug traffickers, including the typical travel itineraries of drug couriers, why couriers use rental cars, and how traffickers do not entrust large quantities of drugs to people who are unaware that they are transporting them. The testimony was helpful to determining whether the defendant was simply an unknowing courier. At the same time, the agent did not go beyond his experience with drug traffickers and impermissibly provide an explicit opinion as to the defendant's knowledge or state of mind. In *United States v. Figueroa-Lopez*, n117 the Court held it was error (but harmless) to admit, as lay opinion, testimony by law enforcement officers that the defendant's conduct conformed to the methods and techniques of experienced drug dealers. Such testimony requires that the witness be qualified as having the knowledge, experience, training, or education to render the testimony admissible under *Rule 702*. In *United States v. Cordoba*, n118 the Court remanded a drug conviction on other grounds, but found no error in the admission of a law enforcement agent's expert testimony that sophisticated narcotics traffickers do not entrust 300 kilograms of cocaine to someone who is unaware of what he is transporting. The testimony was helpful in a complex criminal case to explain the *modus operandi* of drug dealers. In *United States v. Taren-Palma*, n119 the Court affirmed

convictions for cocaine distribution and weapons offenses, holding there was no error in permitting one of the undercover agents to testify that guns are often used in drug transactions to protect either the drugs or the money at the time of the exchange. One Judge dissented in part, on the ground that the testimony was unnecessary and prejudicial in this close case. In *United States v. Jaramillo-Suarez*, n120 the Court affirmed convictions for a cocaine distribution conspiracy, holding that an expert agent properly testified about the nature of pay/owe sheets, as that is specialized information not readily known to jurors.

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999) : The Court found no abuse of discretion when a Customs agent was permitted to testify regarding the general techniques of drug smugglers and about certain modifications made in a defendant's plane to make it more suitable for drug smuggling, as the evidence was relevant to establishing the existence of the charged conspiracy to smuggle marijuana from Jamaica by using an airplane.

[vi] Law Enforcement Agents -- Drug Cases -- Role in Enterprise

United States v. Boney, 977 F.2d 624 (D.C. Cir. 1992) : In a thorough opinion affirming convictions for cocaine distribution, the Court held that an officer's testimony, which at most matched particular defendants with paradigm roles in an illegal enterprise, did not amount to an impermissible direct opinion on the defendants' guilt. The inherent danger of such expert opinion is a factor to be considered under *Rule 403*, which the defendant in this case did not raise; on the facts, there was clearly no plain error and there probably would have been no abuse of discretion in finding the balance favored admissibility.

United States v. Garcia-Morales, 382 F.3d 12 (1st Cir. 2004) : Affirming a drug conspiracy conviction, the Court held that testimony by the Customs Service agent in charge of the investigation was admissible to explain the structure and operation of a typical drug conspiracy. It reasoned that most jurors are likely unfamiliar with the drug trade, so the testimony provided helpful context for explaining the defendant's participation.

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) : During the defendant's trial for a cocaine distribution conspiracy, a case agent was permitted to testify, "based on your investigation" or "[a]s far as our investigation determined," regarding the roles of certain participants, including the defendant. The Court held that admission of the testimony was error, but harmless. Although opinion testimony is not inadmissible simply because it embraces an ultimate issue, the agent's opinion that the defendant was a partner with another in receiving cocaine "was essentially telling the jury that he had concluded that Garcia was guilty of the crimes charged," and opinion testimony merely telling the jury what result to reach is inadmissible. Furthermore, the testimony did not satisfy the requirements for either lay or expert opinions.

United States v. Galvan, 407 F.3d 954 (8th Cir. 2005) : In a prosecution for possessing pseudophedrine knowing it would be sued to manufacture methamphetamine, the Court held it was not an abuse of discretion to allow the government to call an expert even though an arresting officer, who testified only as a lay witness, possessed enough narcotics expertise to testify to the roles of pseudophedrine and purchasers of the drug in the production of methamphetamine.

[vii] Law Enforcement Agents -- Drug Cases -- Use of Cash

United States v. Gaines, 170 F.3d 72 (1st Cir. 1999) : At a trial on drug charges, an IRS investigator was permitted to describe some of the defendant's cash purchases, and then to conclude that the defendant's use of cash was

"consistent with drug dealing" and "very difficult to trace." The Court considered that whether cash is used in drug dealing is a dubious subject for expert opinion testimony, but found no plain error.

[d] Law Enforcement Agents -- Dual Roles

United States v. Barrow, 400 F.3d 109 (2d Cir. 2005) : The Court affirmed a conviction for distribution of cocaine, finding no abuse of discretion when a detective was permitted to give both fact and expert testimony. The Court reasoned that the witness' expert testimony was brief and related only to undisputed general practices of street-level drug dealers, and her fact testimony was likewise brief and easily separable from the expert testimony. In *United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003)* , the Court affirmed convictions arising from a drug conspiracy, but it expressed concerns about using a case agent as an expert to testify about the meaning of code words in wiretapped conversations. First, a fact witness may benefit from an "aura of special reliability and trustworthiness" when testifying as an expert. Second, a defendant may decline to cross-examine the dual-role case agent because "a failed effort to impeach the witness as expert may effectively enhance his credibility as a fact witness." Third, there is a risk that the expert testimony will stray into making sweeping conclusion about the defendant's activities, as here, where the agent testified about the meaning of conversations in general, beyond the interpretation of code words, and interpreted ambiguous slang terms, with no evidence that they were drug code with fixed meaning either within the narcotics world or within this particular conspiracy. The error in exceeding the bounds of *Rule 702* was harmless, however. In *United States v. Rivera, 971 F.2d 876 (2d Cir. 1992)* , the Court held that an undercover agent was properly permitted to testify as both fact witness and expert witness on heroin production, distribution, and use.

United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995) : The Court held there was no abuse of discretion when a detective, at the end of the government's case-in-chief, offered summary testimony and an organizational chart based on prior witnesses' testimony that diagrammed drug transactions among members of the charged conspiracy. Although the detective's summary testimony did not relate to his specialized knowledge, the Court concluded that the summary chart would be helpful because of the complexity of the case. The Court cautioned that the dangers inherent in the dual roles of expert and summary witness make the practice inappropriate in the ordinary drug prosecution lacking the complexity of this case.

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000) : In the RICO prosecution of a Mafia leader, the Court found no abuse of discretion in permitting an FBI agent to testify both as a fact witness and as an expert on the Mafia's organization, rules, and structure. The agent's dual roles were emphasized to the jury by the fact that he testified early in the trial as a fact witness and at its conclusion as an expert, and the jury was instructed to consider his dual roles in determining the weight to be given his testimony. In *United States v. Thomas, 74 F.3d 676 (6th Cir. 1996)* , the Court affirmed a crack cocaine conviction, holding that a detective was properly permitted to testify as a fact witness and as an expert witness assisting the jury in understanding the drug trade. The Court declined to adopt a *per se* prohibition on the use of a witness as both a fact witness and an expert, but did "note that both the district court and the prosecutor should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony."

United States v. Parra, 402 F.3d 752 (7th Cir. 2005) : In a drug prosecution, a law enforcement agent testified as an expert on counter-surveillance tactics used in narcotics transaction, and he also testified as an eyewitness to the transaction at issue. Affirming, the Court found that the Judge had been careful to avoid the pitfalls of dual-role witnesses, i.e., that the jury will be confused and that the jury will misunderstand its function in evaluating the evidence. In *United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002)* , the Court affirmed drug trafficking convictions, holding there was no abuse of discretion when a police officer involved in the investigation was also permitted to give expert testimony concerning the history, leadership, and drug-selling operations of a street gang with which various defendants

were associated. While providing the jury with useful background concerning the gang and its narcotics activities, the expert's testimony did not invite the jury to conclude that membership in the gang equated with participation in the charged conspiracy. Furthermore, the potential for prejudice from the officer's dual role as expert and fact witness was avoided by structuring his direct examination so as to separate his opinions as an expert from his factual observations as an occurrence witness. In *United States v. Foster*, n121 the Court affirmed a conviction for possession of cocaine and PCP with intent to distribute, holding that a DEA agent involved in the arrest could be helpful to the jury in pointing out, based on his long experience in narcotics investigations, the criminal *modus operandi* involved in apparently innocent behavior. The Trial Judge and the prosecutor were sensitive to the need to prevent any jury confusion that might be engendered by the witness' dual role.

[e] Law Enforcement Agents -- Firearms

United States v. Corey, 207 F.3d 84 (1st Cir. 2000) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in permitting an ATF agent to testify that the shotgun at issue had traveled across state lines. The agent had experience in providing technical information about firearms identification, testing and evaluating firearms submitted as evidence, and maintaining the ATF reference collection of firearms. One Judge dissented on the ground that people of common understanding can easily comprehend from corporate records and without expert assistance where a weapon was manufactured.

United States v. Wallace, 889 F.2d 580 (5th Cir. 1989) : The Court affirmed a felon firearm possession conviction, holding that an ATF agent with lengthy research, training, and experience was properly permitted to opine that markings on a gun established it had been manufactured by an out-of-state company.

United States v. Conn, 297 F.3d 548 (7th Cir. 2002) : Affirming a conviction for willfully dealing in firearms without a license, the Court upheld the admission of testimony by a BATF agent that, based on his training and experience, the defendant's firearms were not collector's items. The Court concluded that the record showed that the testimony was based on sufficient facts and was the product of reliable principles and methods, and that the witness had applied the principles and methods reliably to the facts of the case. In *United States v. Ware, 914 F.2d 997 (7th Cir. 1990)* , the Court held an expert ATF agent's testimony was helpful in determining whether a shotgun had traveled interstate.

United States v. Strobehn, 421 F.3d 1017 (9th Cir. 2005) : The Court affirmed an armed bank robbery conviction, finding no abuse of discretion when an FBI agent was permitted to testify that the gun carried by the robber pictured in bank photographs was the same type of gun that the defendant owned. Unlike situations in which the jury is able without expert assistance to look at surveillance photographs of the robber and determine whether the defendant is the same person, the Court concluded that "[i]t is unlikely that anyone not experienced in handling and using firearms would know what features to look at, or how to compare them," in identifying firearms. In *United States v. Webb, 115 F.3d 711 (9th Cir. 1997)* , the Court affirmed a conviction for possession of ammunition by a felon, finding no error in the admission of police expert testimony regarding the reasons criminals conceal weapons in the engine compartments of their cars. In *United States v. Gutierrez*, n122 the Court affirmed a firearms conviction, holding there was no abuse of discretion in permitting an officer to testify that the defendant's behavior was "furtive."

[f] Law Enforcement Agents -- Fraud

Pelster v. Ray, 987 F.2d 514 (8th Cir. 1993) : In an action by purchasers of a used car with a rolled-back odometer against a dealer and an auto auction through which the car was sold, the plaintiffs offered a state revenue investigator to

testify that the odometers of 300 of 350 cars sold through the auction that he checked had been rolled back and that the dealer had been responsible for 204 of those 300 cars. The Court reversed a judgment for the buyers, holding that the investigator's testimony was inadmissible hearsay, since it rested upon out-of-court statements that a particular vehicle had a certain number of miles on the odometer on a given date and another out-of-court statement or document purporting to show a smaller number of miles at a later date. No showing was made that the investigator was an expert or that experts in any field rely upon the sources of information he relied upon. Moreover, the Court found that a lay person did not need expert help to compare odometer readings on two titles or statements. The Court observed that on retrial the investigator may have helpful expert testimony to offer with respect to the form of odometer statements, how titles are prepared or altered, and how auto auctions are run, but the expert cannot bring inadmissible hearsay before the jury under the guise of an expert opinion.

United States v. Alonso, 48 F.3d 1536 (9th Cir. 1995) : Affirming convictions for a fake credit card scheme, the Court held there was no error in permitting the undercover agents conducting the sting to characterize a defendant's counter-surveillance behavior as consistent with someone being involved in a criminal activity. The agents did not express an opinion that the defendant was guilty of the crimes charged, but only helped the jury understand how otherwise innocent conduct, such as looking into parked cars, might indicate criminal behavior. In *United States v. Johnson*, n123 the Court affirmed mail and securities fraud convictions and upheld the admission of a government expert's testimony concerning fraudulent schemes. The Court observed that expert testimony could help the jury understand complex criminal activities and alert it "to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." See also *United States v. McCollum* n124(upholding the admission of expert testimony regarding the typical structure of mail fraud schemes).

[g] Law Enforcement Agents -- Gambling, Loansharking, Organized Crime, Racketeering, etc.

United States v. Weiner, 3 F.3d 17 (1st Cir. 1993) : In affirming RICO convictions, the Court held it was error (but harmless) to permit an FBI agent to testify that different references next to the same telephone number in various records all referred to the same person. This opinion reflected no special expertise but was a routine inference that the jury could draw on its own. In *United States v. Lamattina*, n125 the Court held that an FBI agent's testimony as to the meaning of loansharking terms was helpful to the jury in determining the significance of recorded conversations.

United States v. Long, 917 F.2d 691 (2d Cir. 1990) : The Court reversed RICO convictions, holding that an FBI agent had been improperly permitted to testify about organized crime families, as the extensive descriptions had a highly prejudicial effect and only marginal relevance when the enterprise alleged was not a crime family and had only a single connection with organized crime. See also *United States v. Daly* n126(a law enforcement officer was properly permitted to explain the nature and structure of organized crime families).

United States v. Vastola, 899 F.2d 211 (3d Cir. 1990) , *vacated on other grounds*, *497 U.S. 1001 (1990)* : Affirming convictions for extortion offenses, the Court held that a police officer with extensive experience investigating loansharking was properly permitted to testify regarding loansharking terms used in a taped conversation. In *United States v. Riccobene*, n127 the Court found no error in the admission of testimony by a government agent defining terms like "La Cosa Nostra," "capi," and "consigliere," where the jury was instructed that the testimony was offered only for its definitional value.

United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) : The Court approved a ruling that admitted expert testimony by a special government agent who testified about the nature of gambling operations, gambling terminology, and his opinion of the defendant's role in a bookmaking scheme. The testimony apparently was based on an interpretation of

conversations obtained through government wiretaps.

Spatafore v. United States, 752 F.2d 415 (9th Cir. 1985) : An FBI agent was permitted to testify concerning the significance of intercepted telephone conversations that related to point spreads on which wagers were based.

United States v. Pinelli, 890 F.2d 1461 (10th Cir. 1989) : Convictions for gambling offenses were affirmed, the Court holding that an FBI agent was properly permitted to state opinions regarding the roles played by various defendants in the gambling operation. The testimony would assist the jury, since the case was complex; there was a large volume of tape recordings and documentary exhibits; and the average person is unfamiliar with the professional gambling business.

[h] Law Enforcement Agents -- Gang Experts

United States v. Padilla, 387 F.3d 1087 (9th Cir. 2004) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion when a detective having extensive experience with local gangs was permitted to testify regarding gang punishment for junior members who fail to support senior members. The testimony was admitted for the limited purpose of impeaching exculpatory testimony offered by a passenger in the defendant's car, who testified that both he and the defendant were gang members and that the gun found in the car was his rather than the defendant's. The probative value of the expert's testimony on the witness' truthfulness was not substantially outweighed by any prejudicial effect. In *United States v. Hankey, 203 F.3d 1160 (9th Cir. 2000)* , Hankey's codefendant in a drug trial testified that Hankey was not involved. An officer who was an expert on gang activity gave testimony in rebuttal that gang members who testify against one of their own are typically beaten or killed by other members of their gang. Affirming, the Court found that the Trial Judge had conducted a searching inquiry of the expert's experience and his reasoning from that experience, and the expert had demonstrated that the information upon which he relied was of the type normally obtained in his day-to-day police activity, so the testimony was properly admitted.

[i] Law Enforcement Agents -- Miscellaneous Testimony

United States v. Rosario-Diaz, 202 F.3d 54 (1st Cir. 2000) : The Court held it was error (but harmless) to permit an FBI agent to bolster the testimony of a cooperating witness by opining that particular statements of the witness were "lies" and by representing that the statements not singled out as lies had been "tested" and verified through interrogation techniques. Although the agent could properly have testified to facts within his personal knowledge that supported another witness' testimony and to actions he took to corroborate the testimony, it was impermissible for him to put the prestige of his professional knowledge behind the cooperating witness' testimony.

United States v. Oreira, 29 F.3d 185 (5th Cir. 1994) : Reversing convictions for structuring currency transactions, the Court held that it was proper for an IRS agent to give testimony as to how giro houses in Houston operated, but that the expert provided no foundation for testimony that a giro house is engaging in illegal structuring when most of the money is wired to one country. The Court noted that the government rightly disclaimed any argument that the particular destination country, Colombia, could be the basis for an inference of illegality. Although "not recommend[ing] the present case as a model for eliciting expert testimony," the Court in *United States v. Willey, 57 F.3d 1374 (5th Cir. 1995)* , found no abuse of discretion when an IRS agent was permitted to give her opinion in a money laundering case that certain transactions concealed the true source, nature, ownership, or control of the funds. The agent had not testified that the transactions were designed to conceal the source of the funds, which was the ultimate issue in the case.

United States v. McCullah, 745 F.2d 350 (6th Cir. 1984) : Affirming convictions involving transportation and sale of stolen vehicles, the Court upheld admission of a government agent's testimony that a stolen tractor was "hidden" under some trees.

Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998) : The plaintiff claimed that his civil rights were violated by an officer who allegedly arrested him without probable cause for carrying a concealed knife. Affirming a judgment for the officer, the Court held there was no abuse of discretion in admitting testimony by other officers that they had trained the defendant in approaching persons carrying knives in varying contexts. Although none of the testimony regarding the dangerousness of knives and how they are used by criminals was earth-shattering and much of it probably overlapped with the jurors' own experiences, it was at least helpful in putting the defendant's actions -- such as waiting after he heard that the plaintiff had a concealed knife in a bar until the plaintiff left the bar to approach him -- in context. In *United States v. Moore, 936 F.2d 1508 (7th Cir. 1991)* , the Court affirmed a ruling *in limine* precluding the defendant in a postal armed robbery case from calling a police officer as an expert witness to testify that the police had released the defendant from custody without charging him with a crime. A law enforcement officer's opinion concerning whether a defendant should be charged with a crime at a very early stage of the investigation is relevant only to the questions of the terms of bail and of whether there was probable cause to charge at that particular early phase, but is of no relevance to the question of whether the facts fully developed during the course of a continuing investigation and presented at trial established a defendant's guilt of the crime. In *United States v. Lundy*, n128 the Court affirmed convictions for arson and mail fraud, finding that a detective, who was a member of the Chicago police department bomb squad, was properly permitted to testify as to the cause and origin of a fire. The Court cautioned, however, that "[d]istrict courts must ensure that expert testimony is in fact expert testimony, not merely opinion given by an expert."

Sphere Drake Ins. PLC v. Trisko, 226 F.3d 951 (8th Cir. 2000) : Insurers sought to disclaim coverage after their insured, a maker and designer of jewelry, found that jewelry he had placed in the trunk of a rental car following a show was missing when he got to the airport to drop off the car. At trial the insured offered testimony and exhibits from a detective with the local police department regarding crime in the area, to help the jury understand the jewelry's disappearance. The Court found no abuse of discretion in the admission of the testimony, since the detective had specialized knowledge of jewel thieves and their methods of operation and his investigation of the incident at issue afforded him knowledge of the case that was outside the jury's experience. In *United States v. Rose*, n129 the Court upheld an armed bank robbery conviction, finding no abuse of discretion in the admission of testimony by a police officer as to the results of a shoe-print comparison. Although the expert had worked as a firearms and tool mark examiner and had attended seminars relating to these examinations, his only expertise with shoe-prints came from "on-the-job training" over a six-year period. There was no evidence discrediting the methodology used by the expert, and Court said that "[a]n expert witness need not be an outstanding practitioner in the field nor have certificates of training in the particular subject." In a prosecution for passing counterfeit bills, *United States v. Thompson*, n130 the Court found that a Secret Service agent was qualified to testify that bills were counterfeit.

United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002) : The Court reversed a conviction for threatening the President because Secret Service and police officers were permitted to testify that they considered documents the defendant had sent to be threatening. Since the legal standard was whether a reasonable person would foresee that the statements would be interpreted as a threat "by those to whom the maker communicates," and the defendant did not send his documents to law enforcement officers, their reactions had little bearing on the issue. The jury could well decide how a reasonable person would interpret the documents, and the law enforcement officers were "particularly unqualified," since by their professional experience they would see potential dangers that others might not notice or would consider innocuous. In *United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001)* , the Court found no abuse of discretion when a DEA agent was permitted to testify as an expert to the transcription and translation of tape recordings of Spanish-language conversations, one of which included him as a participant. The agent was qualified by

virtue of being a native Spanish speaker with considerable experience translating between Spanish and English, and the defense had a sufficient opportunity to expose the agent's biases, including presenting its own expert, who testified that it was inadvisable to have a participant to a conversation transcribe and translate that conversation. In *United States v. Christophe*, n131 the Court held that an experienced agent was properly permitted to testify why no fingerprints were found in a bank robbery case.

United States v. Cross, 928 F.2d 1030 (11th Cir. 1991) : Affirming convictions for mailing obscene material and for conspiring to produce child pornography, the Court held that an FBI agent was properly permitted to testify that particular pictures would be of sexual interest to pedophiles and to offer his expert opinion that the pictures were obscene, as the contested materials were directed at such a bizarre deviant group that the experience of the trier of fact would be inadequate to judge whether they appealed to the prurient interest.

[j] Law Enforcement Agents -- "Overview" Testimony

United States v. Casas, 356 F.3d 104 (1st Cir. 2004) : The Court held in a drug trafficking case that it was error for the first witness called by the government, a DEA agent, to testify about his investigation and then give his conclusions about the "organization," its members, and its activities, when the basis of his conclusions went beyond his personal knowledge and even beyond the evidence presented at trial. It was likely that these conclusions were based, at least in part, on statements by the purported leader of the conspiracy, who cooperated with the government and provided information but did not testify at trial. The Court considered it a "troubling development" that both it and the Fifth Circuit have had to address the government's use of initial witness "overview testimony," which is "inherently problematic ... [because] it raises the very real specter that the jury verdict could be influenced by statements of fact or credibility assessments in the overview but not in evidence ... [and] especially problematic because juries may place greater weight on evidence perceived to have the imprimatur of the government." Although expert witnesses have leeway under *Rule 703* to rely on underlying facts or data that are not themselves admissible, the DEA agent was never qualified as an expert witness and his conclusions that particular persons were members of the conspiracy were not an appropriate subject for expert testimony. See also *United States v. Casas, 425 F.3d 23 (1st Cir. 2005)* (finding "overview" testimony harmless error in related case).

[k] Law Enforcement Agents -- Summary Testimony

United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995) : The Court held there was no abuse of discretion when a detective, at the end of the government's case-in-chief, offered summary testimony and an organizational chart based on prior witnesses' testimony that diagrammed drug transactions among members of the charged conspiracy. Although the detective's summary testimony did not relate to his specialized knowledge, the Court concluded, after an extended discussion of summary testimony from expert witnesses, that the summary chart would be helpful because of the complexity of the case. The Court likewise held there was no abuse of discretion in admitting summary testimony from the detective, but it cautioned that the dangers inherent in the dual roles of expert and summary witness make the practice inappropriate in the ordinary drug prosecution lacking the complexity of this case.

United States v. Castillo, 77 F.3d 1480 (5th Cir. 1996) : The Court held in a marijuana distribution prosecution that a DEA agent, who properly presented summary charts relating to numerous wiretaps, had improperly been permitted to testify to matters that had nothing to do with summarizing any documents or records, were not anything observed or personally known by him, and were not the basis of any expert opinion expressed by him. The error was harmless, however, since the agent did not misstate the testimony he repeated or paraphrased, the testimony was uncontradicted, and it was plain that he was always referring to what another witness had testified to, and not to any other source of information.

United States v. Pree, 384 F.3d 378 (7th Cir. 2004) : The Court affirmed a conviction for filing false tax returns, finding no plain error in the admission of an IRS agent's testimony as a summary witness. The Court noted that a summary witness may testify as to his analysis of a transaction based upon the testimony of other witnesses and explain the analysis based upon his special expertise. The nature of such testimony makes "the line between summary testimony and expert testimony indistinct." The Court found no problem in the "selective summary of the Government's evidence," noting that the defendant could cross-examine the witness and offer her own evidence.

United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984) : In a prosecution for subscribing false corporate income tax returns, a government agent called as a "summary witness" was properly permitted to testify, where he had experience as an auditor and had performed a substantial review of another agent's work.

[l] Law Enforcement Agents -- Taxes

United States v. Duncan, 42 F.3d 97 (2d Cir. 1994) : Affirming a conviction for conspiracy, bank fraud, and corrupt payments, the Court held there was no error in admitting testimony by an IRS agent that falsified IRS filings "obstruct[] and defeat[] [the] entire process," as the expert's testimony did not repeatedly use legally specialized terms and it was based on his personal knowledge.

United States v. Moore, 997 F.2d 55 (5th Cir. 1993) : In a tax evasion prosecution, the prosecution relied upon an IRS agent to testify, *inter alia*, as a summary witness with respect to general income tax matters, the IRS' criminal investigation of the defendants, and the trial proceedings. The Court found that the agent had not directly addressed the question of the defendants' intent, and the Trial Judge had discretion to admit the testimony.

United States v. Tarwater, 308 F.3d 494 (6th Cir. 2002) : The Court affirmed a conviction for filing false tax returns, holding there was no abuse of discretion when an IRS agent was permitted to testify that the defendant under-reported his income. The Court agreed that the *Daubert* factors were of limited value in this case, but found that the Trial Judge had carefully considered whether the testimony was reliable and relevant. The testimony was the product of "well-established principles of bookkeeping and accounting as those areas of expertise are applied to the Internal Revenue Code," and based on the defendant's bank and business records.

United States v. Benson, 941 F.2d 598 (7th Cir. 1991) , amended, 957 F.2d 301 (7th Cir. 1992) : The Court reversed tax evasion convictions, holding it was an abuse of discretion to permit an IRS agent to recapitulate the government's evidence (much of which was disputed) and opine as to the character of certain monies received by the taxpayer defendant. Much of the agent's testimony consisted of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw and expressing impermissible opinions on the credibility of other witnesses' testimony.

United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984) : In a prosecution for subscribing false corporate income tax returns, a government agent called as a "summary witness" was properly permitted to testify, where he had experience as an auditor and had performed a substantial review of another agent's work.

[55] Lay Witness Distinguished

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) : Reversing a judgment for municipal employees who claimed that their discharges had been politically motivated, the Court held it was an abuse of discretion to preclude testimony by a Commonwealth labor department deputy secretary for legal affairs whom the defendant mayor had consulted before discharging the plaintiffs. Because the mayor claimed qualified immunity based on reliance on advice of counsel, the legal opinions about which the witness would testify would be relevant facts from a percipient witness rather than opinions from an expert witness.

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) : During a trial of a cocaine distribution conspiracy, a case agent was permitted to testify, "based on your investigation" or "[a]s far as our investigation determined," regarding the roles of certain participants, including the defendant. The Court held that admission of the testimony was error, but harmless. The testimony was not admissible lay opinion testimony because it was not based on only the agent's personal perceptions, and it was not helpful to the jury within the meaning of *Rule 701* in that it went beyond telling the jurors what was in the evidence to telling them what inferences to draw from it. Furthermore, the witness' opinion was based on specialized knowledge, so it was inadmissible under *Rule 701(c)*, and the government had made no effort to satisfy the expert testimony requirements of reliability under *Rule 702* and pretrial disclosure under *Fed. R. Crim. P. 16*. In a civil RICO action, *Bank of China, N.Y. Branch v. NBM LLC, 359 F.3d 171 (2d Cir. 2004)* , a witness for the plaintiff testified that certain transactions did not comport with the business community's understanding of normal trade transactions and that it is fraud when an importer presents a trust receipt to a bank to obtain a loan knowing that there are no real goods involved. Reversing a judgment for the plaintiff, the Court held that to the extent that the witness' testimony was not a product of his investigation but rather reflected specialized knowledge based on his extensive experience in international banking, he was testifying as an expert rather than a lay witness. Because he was not disclosed as an expert witness and the reliability requirements set forth in *Rule 702* had not been satisfied, it was error to admit his testimony.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997) : The Court reversed a conviction for bank fraud because a bank examiner, who the prosecution had agreed would not be offering expert testimony, did not merely draw straightforward conclusions from observations informed by his own experience in examining the bank, but also purported to describe sound banking practices in the abstract. His testimony went beyond what a lay person would have been able to offer after conducting the examinations, to providing an overview of banking regulations and practices and authoritatively condemning the defendant's actions. Having been presented as a fact witness at trial, he could not be certified as an expert on appeal.

TY Inc. v. Softbelly's Inc., 353 F.3d 528 (7th Cir. 2003) : Reversing a judgment for a plaintiff who sued the manufacturer of a computer screen cleaner for trademark infringement, the Court held it was error to exclude a defense witness (a competitor of the plaintiff) who would have testified that as early as 1988, before the plaintiff began selling "Beanie Babies," the word "beanie" was being used in the trade names of other manufacturers of "plush beanbag animals" and the word "beanie" was generic. The Court reasoned that "experienced businessmen know a great deal about what consumers think; that is personal knowledge" and not hearsay, so that the witness need not be designated or qualified as an expert.

United States v. Galvan, 407 F.3d 954 (8th Cir. 2005) : In a prosecution for possessing pseudophedrine knowing it would be sued to manufacture methamphetamine, the Court held it was not an abuse of discretion to allow the government to call an expert even though an arresting officer, who testified only as a lay witness, possessed enough narcotics expertise to testify to the roles of pseudophedrine and purchasers of the drug in the production of methamphetamine. The defendant cited no authority requiring a fact witness to testify also as an expert when the fact witness is so qualified, and the expert's testimony was not redundant to the officer's.

United States v. Ramirez, 348 F.3d 1175 (10th Cir. 2003) : Affirming methamphetamine and cocaine convictions, the Court found no plain error when an undercover police officer was permitted to testify as an expert regarding the contents of wiretapped phone calls, since the officer had personal knowledge of the matters discussed in the calls and of the participants in the calls. In *United States v. Gauvin, 173 F.3d 798 (10th Cir. 1999)* , the defendant was convicted of assault, after he collided with a police officer during a high-speed car chase. In support of his defense was that he did not cause the collision, his accident reconstruction experts testified that the police officer ran into the defendant's car. To challenge the veracity of police reports contradicting his experts, the defendant proffered the testimony of an instructor at the state police academy, to the effect that police officers are trained that they should never change their reports. The instructor's testimony was excluded for failure to comply with the disclosure requirements of *Fed. R. Crim. P. 16(b)(1)(C)*. The defendant argued that he was proffering the instructor as a lay witness rather than an expert. The Court upheld the ruling below, because the instructor would have been testifying on the basis of "specialized knowledge" within the meaning of *Rule 702*.

United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005) : The Court upheld the convictions of a former police officer for pistol whipping an arrestee, submitting a misleading report about the incident, and making a false statement to an FBI agent. It found no abuse of discretion in permitting the arrestee's treating physician (who could not testify as an expert because the government failed to provide proper notice) to testify as to what she observed when she examined the arrestee after the arrest. The Court assumed, however, that it was error (but harmless) to admit the doctor's opinion on the cause of the injuries under *Rule 701*. That testimony was a "hypothesis," and answering hypothetical questions is typically the domain of an expert.

[56] Lighting Expert

United States v. Triplett, 195 F.3d 990 (8th Cir. 1999) : In support of his misidentification defense in a drug case, the defendant offered a "lighting expert" to testify about the nighttime visibility in the area of the transaction. The Court found no abuse of discretion in exclusion of the testimony after a *Daubert* hearing, where the expert conceded that his efforts could not measure what people could see, his opinions did not refer to his test but were based on what he could see by his own experience, and the lighting was similar to that encountered many places in the City of St. Louis.

[57] Linguistic Analysis

United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004) : Witnesses in an immigration fraud case testified that the suspect spoke with a Mandarin Chinese accent. To support his claim of misidentification, the defendant offered testimony from an expert that it would be "extremely difficult" for him to fake a Mandarin accent. The Court found no abuse of discretion in exclusion of the testimony, since the expert's 15-second Mandarin dialogue with the defendant in the midst of a 25-minute conversation in Cantonese provided an insufficient basis for her opinion and the linguistics literature she referred to had only an attenuated and indirect relation to her proffered testimony.

Durkin v. Equifax Check Servs., Inc., 406 F.3d 410 (7th Cir. 2005) : In support of their claim that bad check collection letters violated the Fair Debt Collection Practices Act because they were confusing to unsophisticated consumers, the plaintiffs offered expert testimony from an English professor regarding the readability of the letters. The Court affirmed summary judgment for the defendant, finding no abuse of discretion in exclusion of the expert's testimony on the grounds of irrelevance -- because he analyzed the readability of the entire letters rather than the specific language the plaintiffs singled out as increasing their confusion -- and of unreliability -- because he did not sufficiently articulate the manner and method by which he determined the challenged language was confusing but simply recited and endorsed the plaintiffs' claims of confusion.

United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985) : The Court affirmed convictions arising out of a casino skimming conspiracy. It upheld the exclusion, as confusing, of testimony by a linguistics expert concerning the structure of a taped conversation.

[58] Litigation Outcome Opinion

Dairy Farmers of Am., Inc. v. Travelers Ins. Co., 391 F.3d 936 (8th Cir. 2004) : The plaintiff sued its insurer, claiming that failure to appoint separate counsel to represent it and its trucker in an underlying personal injury suit was a breach of fiduciary duty. The plaintiff offered testimony from a law professor that the "likely outcome" if separate counsel had been appointed would have been a settlement not requiring the plaintiff to pay its $250,000 deductible. Affirming a judgment for the insurer, the Court held there was no abuse of discretion in excluding the expert's opinion, as "lacked foundation and was purely speculative"; besides, it had not been disclosed pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*.

[59] Memory Expert

United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985) : In a prosecution for securities and bankruptcy fraud, the Court found no error in the exclusion of expert testimony from a "memory expert," since "[t]he average person is able to understand that people forget."

[60] Methodology and Conclusions

Rebel Oil Co. v. Atlantic Richfield Co., 146 F.3d 1088, 1998-1 Trade Cas. (CCH) P72187 (9th Cir. 1998) : Gasoline retailers alleged that the defendant oil company had engaged in predatory pricing. Affirming summary judgment for the defendant, the Court held there was no inconsistency between a ruling that admitted testimony by the plaintiffs' expert witness and the summary judgment. The finding under *Daubert* that the expert's methodology was sound did not mean that his conclusions were legally sufficient to create a question of material fact.

[61] "Non-scientific" Opinions and *Daubert*

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) : The Court held that the Trial Judge's gatekeeping function under *Daubert* applies to all experts, not just those providing scientific evidence. The case is discussed in the Editorial Explanatory Comment to *Rule 702*, *§ 702.02[9]*.

[62] Nuclear Radiation

In re TMI Litig., 193 F.3d 613 (3d Cir. 1999) , amended, 199 F.3d 158 (3d Cir. 2000) : An action was brought by area residents of the Three Mile Island nuclear power plant for injuries allegedly caused by a nuclear accident that released radioactive materials. As part of a case management order, a group of "typical" plaintiffs was selected for trial on the issue of whether the release of radioactive materials was substantial enough to have caused any injury. Affirming all but one of the rulings that most of the plaintiffs' expert testimony regarding radiation exposure was inadmissible under *Daubert* and *Rule 703*, the Court held that: (1) one expert's "plume" model of radiation dispersion was unreliable because the expert rejected, without any explanation, generally accepted computer models that track plume dispersion, and the expert's own model was untested and subjective; (2) a conclusion that high levels of radiation were released from TMI on the basis of studies indicating high radiation levels in southern Maine was unreliable because the expert had nothing, other than conjecture, to support his conclusion that the radiation in Maine came from TMI; (3) testimony from experts on soil samples was properly excluded because the experts disregarded laboratory results indicating that

most of the radiation found in the soil "was the result of naturally occurring background radionuclides" such as radon; (4) experts who estimated dose exposure by investigating trees at the site used proper methodology, but their testimony was properly excluded, because the conclusion was that the trees had been exposed to a level of radiation that was substantial enough to kill humans, which indicated that the methodology must have been misapplied to the facts of the case; (5) an expert who performed a cytogenic analysis on blood samples on a group of area residents was properly precluded from testifying, because the testing was conducted 15 years after the accident, and the expert admitted that the reliability of her study was dependent on an analysis within three years of exposure; (6) an expert who conducted a dendometric analysis of trees was properly excluded for failing to rule out other possible causes for the condition of the trees he examined; (7) a dose exposure report from a microbiologist was properly excluded because the expert used a complex, but completely subjective and unexplained, weighting process to determine whether area residents suffered cancer as a result of radiation exposure; (8) a cancer research expert's opinion was properly excluded because it was based on the unreliable conclusions of the other experts; (9) an epidemiologist's conclusions were properly rejected because the expert simply took the participants that were given him by consultants to the plaintiffs, so there was no assurance their selection did not bias the study; (10) a mortality study was properly excluded for lack of "fit," because the expert made no attempt to analyze any possible association between mortality and exposure to radiation; (11) an expert who essentially testified as a summary expert was properly excluded, because his opinion was like "the last domino in the line" that must fall when all the other dominoes are toppled. The Court did find that it was an abuse of discretion to exclude an expert's cancer incidence study on the ground that the expert had relied on a shorter latency period than the defendants' expert claimed was appropriate. Under *Daubert* a Trial Judge is not permitted to exclude an expert simply because she believes the experts on the other side. Nonetheless, the admission of the cancer incidence study would not have created a triable issue of fact, so summary judgment for the defendants was affirmed.

In re Hanford Nuclear Reservation Litig., 292 F.3d 1124 (9th Cir. 2002) : In a suit by individuals exposed to radioactive emissions against operators of the Hanford federal nuclear facility, the Court reversed summary judgments entered for defendants, because the Trial Judge had improperly excluded testimony from plaintiffs' experts who would testify only that the radiation emitted from Hanford was capable of causing the plaintiffs' injuries but not that it more likely than not caused their injuries. The Judge's own discovery orders had limited discovery at this phase of the case to questions of generic causation, so it was improper to impose the "doubling of the risk" standard of individual causation.

[63] Obscenity

United States v. Pryba, 900 F.2d 748 (4th Cir. 1990) : In affirming convictions for selling obscene materials, the Court held there was no error in rejecting the defendant's proffer of a telephone survey conducted by a social sciences and psychology professor regarding community attitudes, toleration, and standards with respect to sexually explicit materials, as the questions did not fully and accurately describe the challenged materials, which were seen by the jury.

United States v. Arvin, 900 F.2d 1385 (9th Cir. 1990) : The Court found it was not error to exclude testimony by the defendant's expert in a prosecution for mailing lascivious photographs. Because the standard is "commonsensical" and because an exhibition may be lascivious without being obscene, issues on which an expert could be helpful, such as community standards, are irrelevant.

United States v. Cross, 928 F.2d 1030 (11th Cir. 1991) : Affirming convictions for mailing obscene material and for conspiring to produce child pornography, the Court held that an FBI agent was properly permitted to testify that particular pictures would be of sexual interest to pedophiles and to offer his expert opinion that the pictures were obscene, as the contested materials were directed at such a bizarre deviant group that the experience of the trier of fact would be inadequate to judge whether they appealed to the prurient interest.

[64] Opinion on Law

[a] Generally

F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987) : The Court affirmed a damage award in a breach of contract action by a furnisher of administrative services against a union pension fund. It held that proposed expert testimony that service contracts were unenforceable for lack of essential terms was properly excluded on the ground that it amounted to testimony on the law that governed the case, which is the province of the Trial Judge.

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : The Court affirmed the civil rights conviction of a deputy sheriff for shooting an unarmed arrestee in the back. The chief of police of a nearby town, the chief deputy sheriff, and another sheriff, all of whom were involved in the apprehension of the victim, testified that the shooting was not reasonable. The Court held that the testimony did not violate *Rule 704(b)* because the witnesses did not testify as to the defendant's mental state, but it violated *Rule 704(a)* because "[r]easonableness under the *Fourth Amendment* or Due Process Clause is a legal conclusion." The error was harmless, however. In *Askanase v. Fatjo, 130 F.3d 657 (5th Cir. 1997)* , the Court affirmed summary judgment against a bankruptcy trustee asserting claims against the debtor's directors and others, holding there was no abuse of discretion in precluding a lawyer from testifying that defendants had breached their fiduciary duties. Although a lawyer may testify as to legal matters involving questions of fact, the opinions excluded in this case went to issues for the trier of fact to decide. In a bankruptcy fraud prosecution, *United States v. West*, n132 the defendant argued that he relied in good faith on advice of his counsel and his accountant in structuring his transactions. The Court found no error in precluding him from calling two bankruptcy law experts to prove that it was reasonable to follow the advice given to him, reasoning that "the typical juror is qualified to determine intelligently and to the best degree possible both the reasonableness of a client relying upon the advice of an attorney and accountant retained to render such advice and whether the client did so in good faith after making full disclosure."

United States v. Montgomery, 980 F.2d 388 (6th Cir. 1992) : The Court held, in a prosecution for mail fraud and kiting checks, that there was no abuse of discretion in permitting expert witnesses to testify as to their opinions about what check kiting is and how it works, where the Trial Judge made it clear that the witnesses were not giving legal opinions and that the legal definition would be included in the jury instructions, as it was. The Court also said that the Bankruptcy Judge should not have been permitted to testify as to the meaning of an order that he had entered: "An order entered by a judge should speak for itself and not be varied by parol testimony as to what was meant by its provisions."

FTC v. Amy Travel Service, 875 F.2d 564, 1989-1 Trade Cas. (CCH) P68549 (7th Cir. 1989) : The Court held there was no error in excluding expert testimony as to whether the defendant's practices with respect to bargain vacation vouchers were deceptive or misleading, since the expert was being asked for a legal opinion.

Peterson v. City of Plymouth, 60 F.3d 469 (8th Cir. 1995) : In a civil rights action arising from an arrest allegedly made without probable cause, the defendants were permitted to call an expert in police practices, who testified that the officers' conduct comported with the "standards under the *Fourth Amendment*." Reversing a judgment for the defendants, the Court held that admission of this testimony was an abuse of discretion, because it was simply a legal conclusion that could not assist the jury in its factfinding role.

United States v. Unruh, 855 F.2d 1363 (9th Cir. 1987) : In a prosecution for misapplication of bank funds, the Court held that the Trial Judge properly permitted a bank examiner to explain a regulation to the jury, since the testimony assisted the jury in understanding other evidence presented by the prosecution.

United States v. Lewis, 240 F.3d 866 (10th Cir. 2001) : Affirming a conviction for violating the Lacey Act, which makes it illegal to sell wildlife taken in violation of State law, the Court held there was no abuse of discretion in permitting the assistant chief of law enforcement for the Oklahoma Department of Wildlife to describe the requirements for acquiring a commercial area hunting license, since the expert testified only as to the general requirements and not whether the defendant's specific conduct violated those requirements. In *Autoskill, Inc. v. National Educational Support Sys., 994 F.2d 1476 (10th Cir. 1993)* , the Court affirmed an injunction for a copyright holder against a competitor, and held that the Trial Judge had discretion to consider an expert's views as to the protectable and unprotectable portions of a computer program. "As the judge noted, the experts' opinions may be helpful, but their legal conclusions on these points are not binding." In a coal miner's suit against his employer's parent company, *Smith v. Atlantic Richfield Co.*, n133 the Court held it was proper to exclude testimony by an expert witness as to whether acts or omissions of the parent company were "prudent mine practices," since any opinion would have called for a legal conclusion based upon an assumption that the parent was the mine operator. In *Miami Int'l Realty Co. v. Paynter*, n134 the Court held that testimony of a legal expert as to the Code of Professional Responsibility was admissible in a legal malpractice action, since the Code established an ethical standard rather than a legal standard of professional negligence.

United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996) : In a mail fraud prosecution, the defendants argued that it was error to exclude their expert, a former Judge, who would have testified about the enactment of the mail fraud statute and how it changed the law, because the expert would have helped to explain their ignorance of the law. Affirming the convictions, the Court recognized that experts on the law have been permitted to testify in tax cases, but noted that "ignorance of the law is not a defense in this mail fraud case," so the expert's testimony would have been confusing and irrelevant.

[b] Opinion on Law -- Employment and Labor

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207 (D.C. Cir. 1997) : A deaf person alleged that a transit police officer, who investigated an altercation the plaintiff had with a bus driver, had violated the Americans with Disabilities Act. The Court held it was error to accept from the plaintiff's expert testimony that the officer's means of communications with the plaintiff were not "as effective" as the officer's means of communication with others. The expert grossly misstated the law as to what constitutes "as effective" communication, and the quoted phrase (from the regulations) is a term of art with a meaning separate and distinct from the vernacular. For the same reason, the expert's testimony that the officer was not "trained to proficiency" was impermissible.

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) : Reversing a judgment for municipal employees who claimed that their discharges had been politically motivated, the Court held it was an abuse of discretion to preclude testimony by a Commonwealth labor department deputy secretary for legal affairs whom the defendant mayor had consulted before discharging the plaintiffs. Because the mayor claimed qualified immunity based on reliance on advice of counsel, the legal opinions about which the witness would testify would be relevant facts from a percipient witness rather than opinions from an expert witness. In a civil rights action by municipal employees allegedly terminated because of their political affiliations, *Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92 (1st Cir. 1997)* , the Court held it was error (but harmless) to permit an expert witness to testify as to what the law required and that her examination of the plaintiffs' personnel records led to the conclusion that they had been improperly hired or renewed in the first place. The witness' testimony was not of factual conclusions that could aid the jury but of questions of law, on which the Judge is to instruct and the jury to decide.

Hogan v. American Tel. & Tel. Co., 812 F.2d 409 (8th Cir. 1987) : Although testimony by an employer's

witnesses that they had not intended to discriminate involved a legal conclusion, which could have been excluded, the Court found that any error in overruling objections to the testimony was harmless, since the Judge on one occasion defined the term "discriminate" to mean "people are treated differently on the basis of their race."

[c] Opinion on Law -- Foreign Law

A/S Kreditt-Finans v. CIA Venetico De Navegacion S.A., 560 F. Supp. 705 (E.D. Pa. 1983) , *aff'd*, *729 F.2d 1446 (3d Cir. 1984)* : The Court found that a bank officer was competent to testify to the validity of a Norwegian mortgage, even though he was not a lawyer. Under *Fed. R. Civ. P. 44.1*, a Court may consider any relevant material or source, whether or not admissible under the rules of evidence, in determining an issue under foreign law.

McDonnell Douglas Corp. v. Islamic Republic of Iran, 591 F. Supp. 293 (E.D. Mo. 1983) , *aff'd*, *758 F.2d 341 (8th Cir. 1985)* : The Court declined to follow a forum selection clause in a contract concerning military aircraft parts. It found, on the basis of an affidavit by an attorney who lived in Iran and who was actively involved in the legal community there, that the Iranian legal system was not prepared to fairly adjudicate the parties' contractual claims.

[d] Opinion on Law -- Immigration

United States v. Oliveros, 275 F.3d 1299 (11th Cir. 2001) : In a money laundering case, the principal government witness had faced detention for immigration violations, but the government obtained favorable treatment for him in exchange for his testimony. Affirming, the Court held there was no error in excluding an expert on immigration law who would have testified that the witness was subject to longer detention on the immigration charges than he had admitted at trial. The Court noted that the defendant should have presented the immigration law question (including pertinent expert opinions) to the Judge and asked the Judge to instruct the jury on the law.

[e] Opinion on Law -- Securities

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) : Affirming a conviction for securities offenses, the Court held there was no abuse of discretion in permitting a government expert to supply general background as to securities law filing requirements and to clarify ambiguities in specified instructions on the relevant blank form. There was also no abuse of discretion in excluding evidence by the defendant's expert as to the general understanding of a relevant phrase, as it related directly to the issue of whether the defendant's actual disclosures complied with the legal requirements. One Judge thought that much of the government witness' testimony consisted of legal opinions that should have been explored solely in the Court's instructions, and that the defense expert was prevented from answering questions that were in principle indistinguishable from those answered by the government expert. In *Marx & Co. v. Diners' Club, Inc.*, n135 the plaintiffs sued for breach of a contract to sell the assets of their company to Diners' Club in exchange for unregistered stock in the purchaser's company. Reversing a judgment for the plaintiffs, the Court held that "the District Court erred in permitting ... an expert witness called by plaintiffs, to give his opinion as to the legal obligations of the parties under the contract." The Court distinguished the permissible use of expert testimony to explain the practices of the securities business from the improper use of expert testimony to instruct the jury as to applicable principles of law.

Molecular Tech. Corp. v. Valentine, 925 F.2d 910 (6th Cir. 1991) : The Court reversed a judgment for the plaintiffs in a securities fraud action, in part because the plaintiffs' expert was repeatedly allowed to testify as to the requirements of federal securities disclosure laws.

[f] Opinion on Law -- Taxes

United States v. Burton, 737 F.2d 439 (5th Cir. 1984) : Although it reversed an income tax conviction on another ground, the Court found no error in the exclusion of expert testimony that the defendant's claim of ignorance that wages are taxable income was not implausible. The Court suggested that better evidence might have been offered in the form of surveys, which would reduce "potential for confusion and protracted side trips." The Court distinguished a prior decision in *United States v. Garber* n136 on the ground that the expert testimony there was offered in the context of law that was so unsettled that it bordered on "legal vagueness." In *United States v. Daly*, n137 the Court affirmed convictions for tax avoidance by using churches and held it was proper to exclude expert testimony, offered to negate willfulness, that the state of the law was confused. There was no showing that the defendants had relied on the expert in planning their conduct, other evidence of the defendants' state of mind was admitted, and the Trial Judge found that the jury would be confused by the testimony.

United States v. Hatchett, 918 F.2d 631 (6th Cir. 1990) : The Court affirmed a conviction for tax evasion, holding there was no error in precluding the defendant's attorney from explaining the legal authority for the advice given the defendant. The attorney was permitted to testify that he based his advice on research and was confident it was a sound position; to permit testimony about the specific results of the research could have confused the jury if the law presented by the witness conflicted with that as instructed by the Trial Judge.

United States v. Jungles, 903 F.2d 468 (7th Cir. 1990) : In the defendant's trial for evading taxes by a scheme in which he changed his status to "independent contractor," his expert was precluded from stating the legal principles surrounding the "independent contractor" relationship and from giving an opinion whether in a hypothetical set of circumstances a person in the defendant's position would be so considered. The Court held that exclusion of testimony regarding the principles was proper, but the opinion should not have been excluded. The error was harmless, however. In *United States v. Windfelder*, n138 the Court affirmed a defendant's conviction for understating his income in his federal tax return and for understating the estate of his aunt on an estate tax return. It found that testimony of expert witnesses with respect to whether the aunt authorized transfers of assets to the defendant for her expenses, whether the transfers were gifts to the defendant, or whether they were utilized by the defendant without authorization was proper opinion evidence as to the tax consequences of a transaction. The experts "utilized their expertise in accounting and tax matters in making their determinations, not their knowledge of the workings of the human mind."

United States v. Hawley, 768 F.2d 249 (8th Cir. 1985) : In a prosecution for failing to file tax returns, the Court upheld the exclusion of expert testimony that the defendant's failure to file was a reasonable construction of the law. The expert was not familiar with the defendant's beliefs; his opinion was based upon a review of statutes and decisions. The Judge rejected the testimony because it did not relate to the defendant's willfulness and represented a legal conclusion to which an expert may not testify. In our view, this is a close case: Testimony by an expert that a person in the taxpayer's position reasonably could have concluded the way the taxpayer did does not tell the jury what the law is; it tells the jury only that a person might reasonably have thought, albeit incorrectly, that filing a return was not required.

United States v. Scholl, 166 F.3d 964 (9th Cir. 1999) : Affirming convictions for filing false tax returns and currency structuring, the Court found no error in the exclusion of testimony by defense experts on tax and accounting law as to the confusing state of tax and accounting law. The experts were testifying to legal conclusions that were for the Trial Judge's determination. Moreover, the question for the jury was not whether the laws were confusing, but rather whether the defendant himself was confused -- "and on this issue Scholl's proffered experts had nothing to say."

United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992) : Reversing a conviction for extortion and filing false

income tax returns, the Court held that it was error to exclude testimony by a defense expert on the reasonableness of the defendant's conclusion that a $1,500 check he received was a gift rather than taxable income, as a subjective good-faith misunderstanding of the law or a good-faith belief that one is not violating the law can negate the statutory willfulness requirement of criminal tax offenses, so any evidence of the reasonableness of the defendant's belief was relevant to the determination of whether his violation of the tax laws was willful.

[65] Party or Interested Person As Expert Witness

[a] Generally

Rodriguez v. Pacificare of Tex., Inc., 980 F.2d 1014 (5th Cir. 1993) : Affirming a summary judgment for the defendants in an action against a physician and a health maintenance organization for failing to provide adequate medical care and coverage, the Court held there was no abuse of discretion in accepting the physician's affidavit as an expert in his own case, where the relevant qualifying criteria were satisfied.

Greyhound Computer Corp. v. International Bus. Machs. Corp., 559 F.2d 488, 1977-2 Trade Cas. (CCH) P61603 (9th Cir. 1977) : "An interested witness may testify as to the amount of damage so long as the record reflects his competency and the factual basis for his conclusions."

Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996) : Affirming a judgment for the defendant in a product liability action alleging that a smoker had died from cancer caused by asbestos contained in cigarette filters, the Court held there was no abuse of discretion in permitting the chief executive officer of the defendant cigarette manufacturer to testify as an expert witness, as he was qualified by training and experience and he was not disqualified by reason of his interest in the litigation.

[b] Party or Interested Person As Expert Witness -- Employee of Party

Dunn v. Sears, Roebuck & Co., 639 F.2d 11711 (5th Cir. 1981) , modified on other grounds, 645 F.2d 511 (5th Cir. 1981) : "That a witness is an employee of a party does not preclude his qualification as an expert ... . His potential bias may be explored on cross-examination and argued to the jury."

Hingson v. Pacific Sw. Airlines, 743 F.2d 1408 (9th Cir. 1984) : Reversing part of a judgment for an airline sued by a blind passenger who was required to sit in the front row of the passenger section, the Court held it was error to exclude testimony by the airline's director of planning and control for flight operations, who was a qualified expert. The fact that the expert worked for the defendant airline did not disqualify him from testifying for the plaintiff.

[66] Personal Knowledge Not Required

Sementilli v. Trinidad Corp., 155 F.3d 1130 (9th Cir. 1998) : Sementilli was injured while working as a seaman. The shipping company settled with Sementilli and then brought an indemnity action against the doctor who certified Sementilli as fit to be a seaman. Reversing summary judgment for the doctor, the Court held it was error to exclude the testimony of the medical expert proffered by the company that Sementilli was unfit for sea duty; that the doctor had previously declared him permanently disabled; and that given his psychological and physical condition, Sementilli was an "accident waiting to happen." The Trial Judge excluded the expert's testimony on the ground that he had not personally examined Sementilli and was not there when the accident occurred, but the Court noted that an expert need not have personal knowledge, and that the expert relied on medical records, which was permissible under *Rule 703*.

[67] Pharmacology Evidence

Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77 (1st Cir. 1998) : Reversing a judgment for the plaintiff in a diversity action arising from a fatal traffic accident, the Court held it was an abuse of discretion to exclude testimony from the defendant's expert pharmacologist, on the basis of an autopsy report and the half-life values of the substances involved, that the decedent had "snorted" at least 200 mg of cocaine 30-60 minutes prior to the accident. The expert had relied on a mathematical formula said to be supported by several published studies supporting a "half-life technique" of assessing dosages. Recognizing that the scientific literature relied upon by the expert did not make "an open-and-shut case" because the studies indicate that the half-life of cocaine varies among individuals due to many factors, the Court stated that, nevertheless, the Trial Judge "set the bar too high" in excluding the expert's testimony on the basis of these possible variables.

Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581 (5th Cir. 2003) : The Court reversed a judgment for the defendants in a wrongful death action arising when the plaintiff's decedent, standing on the median strip after his vehicle was involved in an accident, was struck by an industrial sweeper truck. The plaintiff's expert toxicologist had not been permitted to testify that the sweeper driver's conceded marijuana use within 12 hours before the accident had impaired his perception and reaction time. The scientific findings underlying the expert's conclusions were widely accepted in the field of toxicology and the expert reliably applied those principles to the facts of the case.

[68] Photogrammetry

United States v. Everett, 825 F.2d 658 (2d Cir. 1987) : The Court affirmed bank robbery convictions and held that an FBI agent was properly permitted to testify as an expert in photogrammetry to the height of a person shown in a surveillance photo.

United States v. Quinn, 18 F.3d 1461 (9th Cir. 1994) : The Court upheld convictions arising from a bank robbery, finding no error in permitting expert use of "photogrammetry" to estimate the height of a robber from surveillance pictures. The Trial Judge properly found that the technique was nothing more than a series of computer-assisted calculations that did not involve any "novel or questionable scientific technique."

[69] Photographic Identification

United States v. Brewer, 783 F.2d 841 (9th Cir. 1986) : The Court affirmed an armed bank robbery conviction, concluding there was no error in excluding testimony by the defense's forensic anthropologist, where the witness could not state conclusively that fthe defendant was not the robber pictured in surveillance photos. It held that the Trial Judge could have found that the testimony would not have helped the jury. See also *United States v. Barrett* n139(there was no abuse of discretion in the admission of testimony by a photographic expert who testified concerning similarities between clothing seized from the defendant and clothing shown in surveillance photos). In *United States v. Collins*, n140 the Court affirmed a conviction for armed bank robbery, upholding the government's use of an FBI expert who testified that shoes and a briefcase found in a search of the defendant's premises were the same as depicted in bank surveillance photographs. Because the witness was "an expert in the field of questioned documents and photographic comparison," the Court held that his testimony was technical and specialized and clearly helpful to the jury.

[70] Polygraph and Similar Evidence

United States v. Scheffer, 523 U.S. 303 (1998) : In a military prosecution, the Supreme Court held that Military

Rule of Evidence 707, a *per se* rule excluding polygraph evidence, did not violate a defendant's constitutional right to an effective defense when it excluded exculpatory polygraph test results. The right to an effective defense is tempered by the government's right to exclude unreliable evidence from a criminal trial, and "there is simply no consensus that polygraph evidence is reliable," so the Rule is "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." The decision was on constitutional grounds and the Court did not consider whether and under what conditions polygraph evidence might be admissible under the Federal Rules of Evidence.

United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003) : In a prosecution for visa fraud, the Court found no error when the defendant was not permitted to present evidence of a favorable polygraph examination. The Court reasoned that the Circuit's *per se* rule could be changed only by the *en banc* Court, although the panel "might otherwise be inclined to hold that *Daubert* requires a more nuanced evaluation of polygraph evidence." One Judge dissented, on the ground that the Circuit's post-*Daubert* cases had "not addressed, let alone answered, the question of whether our *per se* rule" was consistent with the principles set forth in *Daubert*.

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) : Concluding that the Circuit's *per se* rule against admission of polygraph testimony could not survive *Daubert*, the Court reversed drug convictions because defense polygraph evidence, offered to corroborate the defendants' testimony at a suppression hearing, had been excluded, and remanded the case for further proceedings. The Court emphasized that it was not holding that polygraph examinations are scientifically valid or that they always will assist the trier of fact; furthermore, it observed that *Rule 403* might appropriately be invoked in some cases, even though polygraph evidence was no longer inadmissible *per se*. On remand in *Posado*, the polygraph results were held to be inadmissible after a *Daubert* hearing. *United States v. Ramirez, 1995 WL 918083 (S.D. Tex. 1995)* .

United States v. Taylor, 154 F.3d 675 (7th Cir. 1998) : Affirming convictions for narcotics and firearms offenses, the Court found no error in the exclusion of evidence from a polygraph examination of the defendant's girlfriend. While polygraph testing can be reliable when the examiner employs the probable lie control question technique, the expert's application of that technique was not reliable here because he used "stock" questions rather than questions tailored to the circumstances of the case. The expert also used a subjective visual scoring technique in calculating the results, rather than the more reliable objective numerical scoring system. The expert testified that he was not familiar with any social science studies of the last few years regarding the validation of polygraph technique.

United States v. Benavidez-Benavidez, 217 F.3d 720 (9th Cir. 2000) : The Court found no error in the exclusion of unstipulated polygraph evidence that purported to show that the defendant was truthful in denying knowledge of the marijuana in his van. The Trial Judge had held a *Daubert* hearing and found that the polygraph evidence satisfied all the *Daubert* factors except general acceptance, and then excluded the evidence under both *Rule 702* and *Rule 403* with passing mention of *Rule 704(b)*. The Court affirmed under *Rule 403* without deciding whether exclusion was also proper under the other two Rules, observing that Trial Judges have wide discretion to refuse to admit polygraph evidence and noting that "district courts are free to reject the admission of polygraph evidence on the basis of any applicable rule of evidence without analyzing all other potential bases for exclusion." In *United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999)* , a cocaine distribution prosecution, the Court held there was no abuse of discretion in the exclusion, after a *Daubert* hearing, of an unstipulated polygraph examination, where the Trial Judge found no reliable real-life error rate, no general acceptance in the scientific community for courtroom fact-determinative use, and no reliable and accepted controlling standards. Even if polygraph evidence in general meets the requirements of *Rule 702*, the examination in this case was defective in several significant respects, and the risks of unfair prejudice associated with admitting evidence of a flawed exam substantially outweigh its probative value, so there was no abuse of discretion in excluding it under *Rule 403*. On an earlier appeal of *Cordoba*, n141 the Court had held that after the "flexible inquiry" mandated by the Supreme Court's decision in *Daubert*, its prior *per se* rule of exclusion was no longer

tenable, but cautioned that its opinion was not to be taken as indicating any kind of enthusiasm for unstipulated polygraph evidence.

United States v. Call, 129 F.3d 1402 (10th Cir. 1997) : The defendant in a drug case offered expert testimony regarding a polygraph test he had taken. Noting that after *Daubert* the Circuit's rule of *per se* inadmissibility of unilaterally taken polygraph tests was no longer tenable -- although this did not suggest "a newfound enthusiasm for polygraph evidence" -- the Court found it unnecessary to determine whether the evidence satisfied the *Daubert* standards, and instead upheld exclusion under *Rule 403*. The evidence was proffered to bolster the defendant's credibility, and expert testimony in support of a witness' credibility "is often excluded because it usurps a critical function of the jury."

United States v. Henderson, 409 F.3d 1293 (11th Cir. 2005) : The Court upheld the convictions of a former police officer for pistol whipping an arrestee, submitting a misleading report about the incident, and making a false statement to an FBI agent. The majority held there was no abuse of discretion when evidence of two polygraph tests taken by the defendant was excluded under *Daubert*. The dissenting Judge argued that excluding evidence on this ground was foreclosed by *United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989)* (en banc), which, in permitting use of polygraph evidence when the parties stipulate to admissibility or when parties seek to impeach or corroborate the testimony of a trial witness, indicated that polygraphy had progressed to a level of acceptance sufficient to allow its use unless there were problems with the examiner's qualifications or administration of the test. In *United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998)* , the defendant, charged with Medicare and Medicaid fraud, submitted to a polygraph examination that indicated he was not being deceptive when he denied commission of the fraud. Affirming, the Court found no abuse of discretion in exclusion of the results under *Rule 702*, because of the paucity of tests and published studies addressing the validity of the polygraph technique used, and the defendant's failure to show that the technique had gained general acceptance within the relevant scientific community. Even if the evidence had met the *Rule 702* threshold, it was not an abuse of discretion to exclude it under *Rule 403*.

[71] Product Design

Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997) : The Court affirmed a judgment for the defendant in a product liability action brought by a motorist who had parked an automobile and then suffered injuries when it rolled back, allegedly because of a defect in the gear selection lever. There was no abuse of discretion in excluding testimony by the plaintiff's proffered expert that a defect in the shift lever's design led to the accident, since it did not rest upon a reliable factual and methodological foundation.

Zaremba v. General Motors Corp., 360 F.3d 355 (2d Cir. 2004) : The Court affirmed summary judgment for the defendants in a product liability action arising from a rollover accident, finding no abuse of discretion in exclusion of the plaintiffs' expert's opinion that an alternative design for the car would have made it more crashworthy. The witness had not performed tests on his alternative design, had not subjected it to peer review or publication, and had not shown general acceptance of his design or his methodology. Further, he could not rely on tests conducted by the defendant, since neither those tests nor models, calculations, or drawings from the witness showed that the witness' hypothetical alternative design would have resulted in greater safety in the accident at issue.

Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316 (3d Cir. 2003) : Affirming a judgment for the defendant in a product liability action arising from the death of a 12-year-old riding a jet ski, the Court found no abuse of discretion when expert witnesses were precluded from testifying that the jet ski was defectively designed because riders would accidentally activate the "squeeze finger" throttle by clenching their hands as a "stress reaction." There was no literature

or demonstrable tests confirming this theory, so any opinion based on it was speculative and unreliable. In *Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000)* , the Court affirmed summary judgment for the manufacturer in a suit by a truck driver who was injured when his truck struck a guardrail and a bridge abutment pierced the floor of his cab. It upheld exclusion of an engineer who opined that the truck was defectively designed. The witness failed to test either of the two hypotheses he offered to support his opinion; he claimed he had studied bread trucks but could not say if they were the same kind as the plaintiff drove or were manufactured by the same manufacturer; he failed completely to consider that the design of the guardrail might have been the cause of the accident; his opinion was inconsistent with the laws of physics; he did not attempt to calculate the force inflicted by the truck on the guardrail or the strength of the guardrail; and he had no way of knowing if his suggested modifications of design would have been an improvement.

Oglesby v. General Motors Corp., 190 F.3d 244 (4th Cir. 1999) : The Court affirmed summary judgment for the defendant in a product liability case, finding no error in the exclusion of a mechanical engineer's opinion that a plastic engine part was defective. The engineer did not know how or from what material the part was manufactured, he did not know any specifications prescribed for the part, and he did not perform any tests or calculations to determine its strength or the stresses to which it was subjected, yet he offered an opinion that there was apparently a manufacturing defect, most likely caused "in the formulation or handling of the thermosetting plastic" (although the part was made from a "nylon composite, glass filled" with "thermoplastic" characteristics). Because the expert lacked a sufficient knowledge base, he could not eliminate other equally plausible causes for the particular accident.

Guy v. Crown Equip. Corp., 394 F.3d 320 (5th Cir. 2004) : In a product liability action by a forklift operator injured when she lost her balance and her left leg came out through the operator-compartment opening and was crushed against a railing, the Court affirmed judgment as a matter of law for the manufacturer. It found no abuse of discretion in the exclusion of testimony by the plaintiff's expert regarding a feasible design alternative: his opinions were untested; he offered only conceptual suggestions and never presented a specific design before trial in time for the defendants to prepare a reply; and his analysis of the defendant's tests of its designs considered only "tip-over" and "off-the-dock" scenarios, not "left-leg-injury" scenarios such as were involved in this case. In a product liability action arising from an accident with a conveyor, *Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997)* , the Court held there was no abuse of discretion in excluding testimony by the plaintiff's proposed expert witness regarding alternative designs. The plaintiff's expert did not utilize the proper methodology for proposing alternative designs, since he only conceptualized possibilities but did not test any of the proposed alternatives; his testimony lacked empirical support concerning other available conveyors; if he made any drawings or calculations, he did not consider them important enough to keep; and he never examined the conveyor in question.

Nemir v. Mitsubishi Motors Corp., 381 F.3d 540 (6th Cir. 2004) : The plaintiff, who was seriously injured when his seatbelt latch allegedly gave way in an automobile accident, offered testimony by an expert that when he tested the latch 20 times using purposeful manipulation, twice it did not perform properly. The Judge excluded the evidence on the ground that "[n]o reasonable driver purposefully manipulates the buckle at different speeds and different angles to achieve a state of partial lapse." Reversing a judgment for the defendant, the Court held it was error to exclude the expert's testimony, since "the point of the purposeful manipulation was to show that partial latching could occur under certain circumstances."

Fuesting v. Zimmer, Inc., 421 F.3d 528 (7th Cir. 2005) : In a product liability action arising from the failure of a prosthetic knee joint, the plaintiff's expert testified that sterilization by gamma irradiation in air had caused the implant's polyethylene to oxidate and ultimately to delaminate and prematurely fail. The Court held that the expert's testimony had not been subject to an adequate *Daubert* analysis. Furthermore, in testifying that superior alternatives existed, the expert had failed to perform a reliable comparison, had neglected to consider other factors that may have counseled use of the chosen method, and had disregarded the facts that the manufacturer followed the virtually universal industry

practice in sterilizing knee implants and that no manufacturer at the time used any of the expert's proffered methods. In *Masters v. Hesston Corp., 291 F.3d 985 (7th Cir. 2002)* , a suit by a farmer injured by an allegedly defective hay baler, the Court affirmed the exclusion of the plaintiff's expert testimony and the grant of summary judgment to the manufacturer. The Court found no problem with the expert's statement of the relevant standards of care, but it found the standards were not properly applied to the facts of the case. In a product liability action arising from a forklift accident, *Dhillon v. Crown Controls Corp.,* n142 the Court affirmed summary judgment for the defendant, finding no abuse of discretion in the rejection of evidence from experts offered by the plaintiff who proposed an alternative design. The experts had not taken any steps that would show professional rigor in the assessment of alternative designs; there was no evidence that their alternative had been favorably subject to peer review or generally accepted by manufacturers or standards organizations; and their conclusion that their alternative would have avoided the accident was obvious to a lay jury, so their evidence would only be helpful if they could show that the alternative was economically feasible or safe. In an action arising out of forklift accidents, In *Bourelle v. Crown Equip. Corp.*, n143 the Court affirmed summary judgment for the defendant, holding there was no abuse of discretion in finding the plaintiffs' expert witness' opinions that the forklift was defectively designed insufficiently reliable. The expert never saw or inspected the vehicle itself and never observed it operating in the warehouse where the accidents occurred; he never tested his alternative design theories; no lab or organization had tested them; no other manufacturer had incorporated his proposed design; and he had not seen any industry studies regarding accident experience with the particular forklift. In *McMahon v. Bunn-O-Matic Corp.*, n144 the plaintiff had received third-degree burns when coffee prepared in a coffee maker manufactured by the defendant was placed in a styrofoam cup, and the cup collapsed. Responding to a motion for summary judgment, the plaintiff submitted an affidavit from a mechanical engineer, which stated in its entirety that "at the temperatures at which this coffee was brewed and maintained the structural integrity of the styrofoam cup into which the coffee was poured would be compromised making it more flexible and likely to give way or collapse when its rigid lid is removed." The Court affirmed the Magistrate Judge's grant of summary judgment for the defendant, holding that the expert's affidavit was properly excluded under *Daubert*. The expert provided no reasoning, explanation, or empirical support, only a bare conclusion. Affirming a judgment for the defendant in a product liability case, *Cummins v. Lyle Indus.*, n145 the Court held that the testimony of the plaintiff's design engineer, to the effect that the defendant should have used a different design to make its product safer, was properly excluded under *Daubert*. The expert's testimony was unscientific, because the expert had never tested his proposed alternative design. Many of the factors that must go into the conclusion that an alternative design should have been employed "are product-and-manufacturer-specific, and most cannot be determined reliably without testing."

Lauzon v. Senco Products, Inc., 270 F.3d 681 (8th Cir. 2001) : In a design defect case involving a pneumatic nailer, the Court found it was an abuse of discretion to exclude the testimony of the plaintiff's expert. In a lengthy opinion on *Daubert* principles, the Court concluded that the witness had sufficiently examined the nailer and the circumstances surrounding the accident; he relied on peer reviewed studies indicating that the type of nailer in question was dangerous and that an alternative design was safer; he relied on generally accepted methods; and he ruled out other obvious causes for the accident. In *Giles v. Miners, Inc., 242 F.3d 810 (8th Cir. 2001)* , an action was brought against the manufacturer of a grocery store freezer after a young girl received a frostbite injury when her hand stuck to the interior of the freezer. The Court found no abuse of discretion in excluding the plaintiff's expert, who would have testified that the freezer was unreasonably dangerous without a mesh safety guard that would attach with duct tape to the freezer wall. There was no indication that the expert had analyzed how the proposed safety guard would interact with the freezer's proper functioning. Moreover, the expert's mesh insertion design alternative would violate government and industry design standards. In *Jaurequi v. Carter Mfg. Co.*, n146 the Court held that there was no abuse of discretion in excluding testimony for the plaintiff by a mechanical engineer that the farm machinery at issue was unreasonably dangerous because it lacked awareness barriers. The evidence failed the reliability prong of *Daubert* because the witness had not attempted to construct or draw such a device, much less test its utility, and he had not pointed to such a device being used in practice by any manufacturer. In *Dancy v. Hyster Co.*, n147 the Court affirmed summary judgment for the defendant in a product liability action arising from a lift truck accident, and found no abuse of discretion in the exclusion of testimony by the plaintiff's expert witness regarding a safer alternative design for the lift truck. The witness

specialized in thermal science and had never designed a lift truck or similar machine, had never tested his theory for a safer design, had never seen the type of device he proposed on a similar machine, and had not even designed the device he suggested would have prevented the plaintiff's injury. In *Peitzmeier v. Hennessy Indus., Inc.*, n148 a mechanic was injured while using a tire changer when a tire exploded. The Court affirmed a summary judgment for the manufacturer of the tire changer, holding that an engineering expert's testimony was properly excluded. The expert had not designed or tested any of the proposed safety devices he claimed were missing from the tire changer, and he had never designed or tested a platform for a tire changer. The Court also rejected the argument that review of an expert's methodology by other Courts could constitute "peer review" within the meaning of *Daubert*.

Diviero v. Uniroyal Goodrich Tire Co., 114 F.3d 851 (9th Cir. 1997) : Affirming summary judgment for the defendant in a personal injury case based on an allegedly defectively designed tire, the Court held that the testimony of the plaintiff's expert was properly excluded. The expert's conclusion that an adhesion defect caused the steel belts of the tire to separate was found "unsubstantiated and subjective": the expert could not dismiss other possible causes, he knew nothing about adhesion failures generally, and he could not explain the reasoning behind his opinion.

Kinser v. Gehl Co., 184 F.3d 1259 (10th Cir. 1999) : Although the Court affirmed a judgment awarding damages to the estate and survivor of a farmer who was killed while operating a baler manufactured by the defendant, it found error (harmless) in the admission of expert testimony on behalf of the plaintiffs by two engineers who concluded that the baler was defectively designed. The experts had no practical experience in mechanical design and had not tested the feasibility or safety of any of their proposals.

[72] Product Warnings

Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316 (3d Cir. 2003) : Affirming a judgment for the defendant in a product liability action arising from the death of a 12-year-old riding a jet ski, the Court found no abuse of discretion when expert witnesses were precluded from testifying that the warnings on the jet ski should have limited users to at least age 16. There was no support in the literature or otherwise for such a restriction, so any opinion to that effect was speculative and unreliable.

Bourelle v. Crown Equip. Corp., 220 F.3d 532 (7th Cir. 2000) : The Court affirmed summary judgment for the defendant in an action arising out of forklift accidents, holding there was no abuse of discretion in finding the plaintiffs' expert witness' opinions that warnings on the forklift were defective insufficiently reliable. The expert failed to test or even to draft a proposed alternative warning, which was akin to "talking off the cuff" and not acceptable methodology.

Jaurequi v. Carter Mfg. Co., 173 F.3d 1076 (8th Cir. 1999) : The Court held in a product liability case that there was no abuse of discretion in excluding testimony for the plaintiff by a mechanical engineer and a human factors engineer that the farm machinery at issue was unreasonably dangerous because the warnings on it were deficient in placement, design, orientation, and content. The evidence failed the reliability prong of *Daubert* because the witnesses had not created or designed, much less tested, warnings they would have considered more appropriate, and they had not pointed to such warnings being used in practice by any other manufacturer.

Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965 (10th Cir. 2001) : The plaintiff brought a product liability action alleging that inadequate warnings accompanied a surgical nail implanted in her broken femur. Affirming summary judgment granted for the manufacturer, the Court found no abuse of discretion in disregarding an opinion from the plaintiff's treating physician regarding the adequacy of the warnings. Although the witness was a board

certified orthopaedic surgeon, she had done no research on intramedullary nailing and she had no experience drafting a surgical technique or warning for a product of any kind.

[73] "Profile" Evidence

United States v. White, 890 F.2d 1012 (8th Cir. 1989) : The Court affirmed convictions for drug-related crimes, holding that there was no clear abuse of discretion when law enforcement officials were permitted to use drug-courier profiles to explain the *modus operandi* of crimes the defendants were charged with, as the activities were not something with which most jurors are familiar. The Court cautioned that the evidence is prejudicial by nature and that it did not favor admission in all cases. See also *United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989)* (holding it was error, but harmless, to admit testimony regarding a drug-courier profile when it was used as proof that the defendant committed the crime).

[74] Proper Subjects of Expert Testimony

United States v. Kayne, 90 F.3d 7 (1st Cir. 1996) : In a prosecution for fraudulently selling rare coins at an inflated value, the Trial Judge admitted testimony from eight coin dealers that the coins sold by the defendant were of substantially lower quality and value than represented in the accompanying documentation. The defendant argued that this was not a proper subject matter for expert testimony, but the Court found no error. It concluded that "[o]pinions of value are a traditional subject of expert testimony" and that "[o]ne could hardly expect a lay jury to form conclusions about such an esoteric subject as the value of rare coins without the help of an expert."

United States v. Mulder, 273 F.3d 91 (2d Cir. 2001) : In an extortion prosecution alleging that members of labor coalitions forced contractors to hire members of their coalition, the government called two government officials as experts to testify to the operations and structure of a labor coalition. Rejecting the defendants' argument that the testimony involved matters of common knowledge or common sense, the Court stated: "We have upheld expert testimony on the structure and tactics of the *Mafia, United States v. Locascio, 6 F.3d 924 (2d Cir. 1993)* , and, by virtue of television, best selling novels, and the movies, the Mafia is far better known to the general public than are labor coalitions." In *United States v. Diallo*, n149 the Court reversed a conviction for importing and possessing heroin, finding an abuse of discretion when a commodities analyst was not permitted to testify as an expert regarding the market price of gold in the United States and the profit to be made by smuggling gold out of Africa. The testimony supported the defendant's claim that he thought he was smuggling gold, not drugs. In *United States v. Onumonu*, n150 the defendant, charged with knowingly smuggling heroin from Nigeria in his alimentary canal, asserted he thought he was smuggling diamonds and offered an expert to testify to the feasibility and prevalence of smuggling diamonds in the same manner from Nigeria. The Court held it was error to exclude the testimony, as it was relevant to the defendant's subjective belief, did not fall under any of the *Rule 403* exceptions to admissibility, and would have been helpful to a New York jury unlikely to be familiar with diamond smuggling out of Nigeria and even less so with the feasibility of smuggling diamonds by swallowing condoms.

United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) : In a prosecution of an outside counsel, a broker, and another attorney for conspiracy to defraud insurance regulators by inflating an insurance company's assets and related offenses, the Court reversed the convictions of the outside counsel, finding error in the exclusion of testimony by a veteran commercial lawyer regarding the ethical constraints under which attorneys operate in the regulatory area and the complex considerations facing a lawyer whose client is using or has used his services to accomplish a fraud. The Court noted that "[e]xpert testimony may be particularly appropriate when specialized areas of law, such as the insurance and financial matters relevant herein, are at issue."

Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999) : In a civil rights suit, the plaintiffs claimed that a police officer used excessive force when he shot and killed the decedent after the decedent, who was "acting crazy," approached the officer with a large chunk of concrete. Affirming a judgment for the defendants, the Court found no error in the exclusion of testimony by a criminologist and former police officer that the officer acted unreasonably in shooting and killing the decedent under the circumstances. The Court noted that the decedent's behavior was "unambiguously dangerous." The only question was whether the danger was sufficiently lethal and imminent to justify the use of deadly force, and that question was "within lay competence."

United States v. Fuentes-Cariaga, 209 F.3d 1140 (9th Cir. 2000) : The Court affirmed a conviction for importing marijuana, finding no abuse of discretion when a non-percipient INS inspector was prohibited from testifying that she would not personally infer consciousness of guilt from a driver's nervousness at a border crossing. The nervousness of drivers stopped at the border is within the ordinary experience of jurors, the reasons therefor can be argued to the jury, and it is within the ordinary province of jurors to draw inferences from such a fact.

[75] Psychiatric and Psychological Evidence

[a] Civil Cases

Spencer v. General Elec. Co., 688 F. Supp. 1072 (E.D. Va. 1988) : In a sexual harassment case, the Judge held that the plaintiff could not introduce expert testimony that she suffered from post-traumatic stress disorder to prove that a rape occurred. He concluded that evidence of the disorder is not a reliable way of determining whether a rape occurred and that the prejudicial effect of the evidence outweighed its probative value.

Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606 (5th Cir. 1999) : Reversing a judgment for a former employee who alleged sexual harassment and intentional infliction of emotional distress, the Court found no abuse of discretion in the admission of testimony by a psychiatrist who examined the plaintiff and concluded that she suffered post-traumatic stress disorder. When the doctor testified to his experience, the criteria he used to make his diagnosis, and the standard methods of diagnosis in his field, he satisfied the *Daubert-Kumho* standard of assuring that he was employing in the courtroom "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." The Court also held that the doctor's opinion that the plaintiff had not lied to him or fabricated her symptoms was not an opinion as to her credibility, but amounted to a proper opinion that her symptoms seemed genuine. In an action by parents of a passenger killed in a plane crash, *Haley v. Pan Am. World Airways*, n151 the Court held that, where state law recognized a cause of action for preimpact fear, it was proper for a psychiatrist, who had treated survivors of aircraft accidents, to testify to "the five levels of anxiety that culminate in panic."

Walker v. Soo Line R.R., 208 F.3d 581 (7th Cir. 2000) : In an FELA action by an employee suing for injuries allegedly sustained when lightning struck a railroad tower, a psychologist who examined the plaintiff to determine his functional capacity was permitted to testify about the results of tests he had administered. However, the Judge excluded the psychologist's opinions regarding the plaintiff's IQ before and after the incident, because the psychologist had not evaluated the plaintiff before the incident and had relied on an erroneous account of his educational history. Reversing a judgment for the defendant, the Court held that the psychologist had used an acceptable methodology, relying for his opinions on medical, educational, and professional histories reported by the plaintiff and the plaintiff's girlfriend, as well as on a test specifically designed to estimate a person's IQ before that person suffered a trauma, so inaccuracies in the history should go to the weight, not the admissibility, of the opinions. Further, the expert's testimony could assist the jury in determining whether any electrical trauma caused a decline in the plaintiff's IQ, even if the expert did not express an opinion on that ultimate question and could not state the causal relationship with complete certainty. The Judge had also excluded testimony by the physician who had headed the clinical team that examined and evaluated the

plaintiff, on the grounds that the witness was not qualified to testify about post-traumatic stress disorder because she was not a psychiatrist or psychologist and because she relied primarily on the work of the psychologist first mentioned above, who had concluded that the plaintiff did not have PTSD. The Court found that exclusion of the physician's testimony was an abuse of discretion because (a) she was qualified to testify about the effect of electrical trauma on the body; (b) as the leader of a clinical medical team, she was not required to be qualified in every individual discipline encompassed by the team in order to testify to the team's conclusions; (c) reliance on the work of an expert who reaches an opposite conclusion using the same or similar data does not mean that one's opinion is *per se* unreliable under *Daubert;* and (d) the physician had relied on information from other professionals, in addition to the psychologist. In a civil rights action for excessive force used by police in enforcing a commitment petition, *Wallace v. Mulholland, 957 F.2d 333 (7th Cir. 1992)* , the Court held there was no error in excluding evidence of the committed person's psychiatric history. Where the issue in the case was his actual behavior and how the officers responded to it, evidence about the general nature of his condition and the likelihood that someone with that condition would act aggressively was probably irrelevant and certainly prejudicial. In a personal injury action brought for injuries suffered when a child allegedly pushed the stop button on an escalator, *Carroll v. Otis Elevator Co.*, n152 the Court held that an experimental psychologist specializing in visual perception was qualified to testify that the design of the stop button was unreasonably attractive to and operable by children.

Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) : In the damages phase of a Title VII action arising from sexual harassment in the workplace, the Special Master relied on *Daubert* to exclude all of the plaintiffs' testimony from psychological experts, reasoning that the experts had not "advanced a validated theory which furnishes a scientific basis for distinguishing between the causal effect of multiple psychological stresses or trauma, or for assigning relative impact or degree of impact to different trauma or stresses." The testimony of the expert psychologists was "thorough and meticulously presented" and the experts' methodology "was laid out clearly by each witness." The Court, in remanding for reconsideration of damages, emphasized "the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress."

S.M. v. J.K., 262 F.3d 914 (9th Cir. 2001) : Affirming a judgment for a housekeeper who charged her former employer with attempted sexual assault, the Court upheld the admission of the testimony byof a psychiatrist who diagnosed the plaintiff as suffering from Post Traumatic Stress Disorder. Although DSM-III required a "distressing event ... outside the range of usual human experience" to trigger the disorder and such an event arguably was not present in this case, the Court noted that "mental health professionals in everyday practice may disagree more than half the time on major diagnostic categories." Therefore "a variance from the DSM's diagnostic criteria will not automatically result in an unreliable diagnosis" under *Daubert*. Furthermore, the requirement was omitted from DSM-IV, suggesting that the expert's diagnostic criteria "apparently now enjoy general acceptance."

Christiansen v. City of Tulsa, 332 F.3d 1270 (10th Cir. 2003) : A mother brought an action against the City and several police officers after her son killed himself during a standoff with police. Affirming summary judgment for the defendants, the Court found no abuse of discretion in the exclusion of an affidavit from the decedent's psychiatrist averring that the officers discouraged him from contacting the decedent during the standoff, and that if he had been allowed to make such contact, the decedent would probably have not committed suicide. The Court noted that "Dr. Crass' statements regarding what might have happened had he been allowed to intervene are pure speculation," and also that the psychiatrist's averment that the officers had acted "recklessly" was properly excluded as a legal conclusion. In *Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498 (10th Cir. 1996)* , the Court held it was an abuse of discretion to preclude an expert in educational and value testing from testifying on behalf of the plaintiff in an employment discrimination case that the employer had improperly used screening tests to confirm his preexisting notions about the plaintiff. The Court observed that "[t]his kind of value/aptitude testing is science, and it is the paradigmatic role of experts to help juries understand the application of science." However, there was no abuse of discretion in precluding a

psychologist from explaining what the employer's notations of age and reliance on second-hand reports indicated about his decision-making process in hiring, as the jury had other testimony about those practices.

[b] Psychiatric and Psychological Evidence -- Condition of Accused

[i] *Mens Rea* Evidence

United States v. Schneider, 111 F.3d 197 (1st Cir. 1997) : Affirming a fraud conviction, the Court held there was no error in excluding testimony from two doctors that the defendant's capacity and judgment were significantly impaired by misprescription and overprescription of medical drugs. The Court disagreed with the conclusion below that the excluded evidence was irrelevant because of the Insanity Defense Reform Act, *18 U.S.C. § 17*, but agreed that the evidence might have been misleading to a jury, and concluded that the Trial Judge would exclude the evidence under *Rule 403* if called upon to revisit the question.

United States v. DiDomenico, 985 F.2d 1159 (2d Cir. 1993) : Affirming a conviction for wire fraud and interstate transportation of stolen computer equipment, the Court held there was no abuse of discretion in excluding evidence that the defendant had a "dependent personality disorder," as the imprimatur of a clinical label was neither necessary nor helpful for the jury to make an assessment of the defendant's state of mind and would complicate the jury's task. One Judge dissented on the ground that the diagnosis, being neither commonplace nor beyond the boundaries of current psychiatric knowledge, could be helpful, and the jury could be relied on to evaluate the evidence with a critical eye and look beyond the clinical label in deciding whether the defendant's mental state included guilty knowledge. In *United States v. McBride*, n153 the Court reversed a conviction for offenses growing out of a scheme to deposit stolen treasury checks in a bank account and withdraw the cash obtained, where a psychiatrist had not been permitted to testify that the defendant was vulnerable to suggestion at the time of the crimes, thus negating specific intent. Although it recognized the Trial Judge's leeway in admitting or excluding expert testimony, the Court rejected his conclusion that the expert could be excluded because psychiatry was in its infancy and conflicting testimony might confuse the jury.

United States v. Lamarre, 248 F.3d 642 (7th Cir. 2001) : The defendant, charged with defrauding a federal bank, claimed that his wife was responsible and that he was incapable of reading or understanding the loan documents that he signed and therefore lacked the specific intent to defraud. The defendant's expert clinical psychologist, who would have testified that the defendant lacked the capacity to understand the nature of the financial transactions that gave rise to the charges, was precluded on the ground that his testimony would "evade the common sense inquiry of jurors." The Court, finding the exclusion of the expert to be error (but harmless), remarked that Trial Judge's mistake began by failing to hold a *Daubert* hearing, which might have helped the Judge understand that the expert could assist the jury by showing through scientifically valid social science that their commonly held beliefs are incorrect. In *United States v. Shlater, 85 F.3d 1251 (7th Cir. 1996)* , a defendant who claimed insanity in an extortion prosecution offered testimony from a psychiatrist that he suffered from a "mild to moderate delusional disorder." The Court found no abuse of discretion in the exclusion of the evidence. The fact in issue was whether the defendant, at the time of the extortion incident, "suffered from a *severe* disorder that affected his ability to distinguish right from wrong," and the psychiatrist's testimony "would have served to confuse the jury as to the requisite mental state of severe mental disorder required under the federal statute for criminal insanity."

United States v. Diggs, 82 F.3d 195 (8th Cir. 1996) : The Court held in a prosecution for felon firearm possession that there was no abuse of discretion in excluding testimony from a psychologist specializing in the psychosocial development of the black male and a criminologist specializing in urban violence. The jury was able without expert assistance to determine whether the defendant was justified in possessing a gun when confronted by gang members who were holding his son. In *United States v. Nunn, 940 F.2d 1148 (8th Cir. 1991)* , the Court affirmed drug-related

convictions, holding there was no abuse of discretion in excluding psychiatric evidence that the defendant was unable to say "no" to his drug-dealing father, as the evidence did not show he was especially vulnerable to inducement by government agents and therefore would not have helped the jury understand his entrapment defense. In *United States v. Felak*, n154 the Court affirmed a tax evasion conviction, holding that psychiatric testimony that the defendant was "obsessed with his beliefs" was properly excluded as not helpful. See also *United States v. Ellsworth* n155(in a prosecution for willful failure to file tax returns, the Court upheld exclusion of psychiatric testimony that the defendant had a good faith belief that the income tax was optional).

United States v. Finley, 301 F.3d 1000 (9th Cir. 2002) : Reversing convictions arising from the defendant's attempts to use certain documents, prepared by the leader of "the Montana Freemen," as financial instruments, the Court held it was an abuse of discretion to exclude testimony by a licensed clinical psychologist that the defendant suffered from a delusional disorder, and that a person with a delusional disorder can be dissuaded from the delusion "only with tremendous, tremendous difficulty." Rejecting the argument that the witness' opinion was unreliable because it was based on his belief in the defendant's assertions, the Court noted that the diagnosis was based on "a variety of factors, including the statements made by the defendant to the psychologist in the course of his examination." The testimony did not usurp the jury's function, since they could accept the diagnosis and still find that the defendant knew the instruments were fraudulent. The testimony was helpful in offering an explanation why "an otherwise normal man could believe that these financial instruments were valid and reject all evidence to the contrary." In *United States v. Rahm, 993 F.2d 1405 (9th Cir. 1993)* , the Court reversed (2-1) counterfeiting convictions because of the improper exclusion of a psychologist's expert testimony offered to support the defendant's claim that she did not know the bills she possessed and passed were counterfeit. The psychologist had given the defendant two standardized tests and had concluded that her performance suggested difficulty with visual perception and that her personality style might be marked by lack of insight. The Court concluded that the Trial Judge relied upon two erroneous legal premises: that admission of psychological testimony requires that the defendant suffer from a mental disorder, and that an expert must be able to state conclusively that a defendant lacked *mens rea*. In *United States v. Hoac*, n156 the Court affirmed drug convictions, holding there was no error in excluding testimony by a clinical forensic psychologist as unhelpful to the jury. The witness, called to testify as to the defendant's intellect and general naivet'e and about how Chinese cultural factors might have led the defendant to travel long distances for legitimate business reasons, had performed no formal tests on the defendant and had only spoken with him twice, an hour each time. In *United States v. Byers*, n157 the Court affirmed convictions for willfully failing to file tax returns, upholding the exclusion of psychiatric evidence offered to prove that the defendant lacked the capacity to form an intention of not filing the returns. It reasoned that the testimony was ambiguous and that it was not at all clear that the testimony would have helped the jury.

[ii] Psychiatric and Psychological Evidence -- Condition of Accused -- Other Evidence

Barefoot v. Estelle, 463 U.S. 880 (1983) : Affirming the denial of habeas corpus relief to a state prisoner challenging his death sentence, the Supreme Court rejected a claim that psychiatric predictions of future dangerousness were insufficiently reliable to be considered in capital sentencing proceedings. A majority of the Court reasoned that a defendant could challenge the reliability of government experts by cross-examination and by presenting defense experts to testify to the limits of psychiatric expertise. The majority found no constitutional infirmity in an expert's making his prediction on the basis of a hypothetical question without examining the defendant. Three Justices dissented, arguing that a jury may be unduly swayed by claims of professional expertise.

United States v. Shay, 57 F.3d 126 (1st Cir. 1995) : The Court reversed a defendant's convictions for conspiracy and aiding and abetting an attempt to blow up his father's car. The government relied upon incriminating statements made by the defendant to the police, the media, and fellow inmates. In response, the defense attempted to call a psychiatrist to testify that the defendant suffered from Munchausen's Syndrome, a mental disorder that caused him to "spin out webs of lies which are ordinarily self-aggrandizing and serve to place him in the center of attention." The

Court held that it was error to exclude the testimony under *Rule 702* as unhelpful, since the testimony would have rebutted the common sense assumption that people do not make statements damaging to themselves unless they are true.

United States v. Barnette, 211 F.3d 803 (4th Cir. 2000) : The Court vacated the defendant's death sentence in a murder and hijacking case because the defense was not permitted to call a psychologist on surrebuttal in the capital sentencing phase to respond to expert testimony that the defendant was a "psychopath." However, the Court found no error in admitting the government witness' testimony, which was based on a Psychopathy Checklist. The Court declined to address whether *Daubert* applied at capital sentencing proceedings under federal law because, in any event, the Checklist was a reliable diagnostic tool. Relying on two articles written by his own expert, the defendant objected that the Checklist had not been standardized as to African-Americans or the post-middle-age population. The Court responded: "Absent evidence indicating more than such a disagreement between professionals, we do not believe the district court needed to go further to evaluate reliability."

United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) : The Court vacated a kidnapping conviction because the defendant had not been permitted to introduce testimony from a psychologist and a psychiatrist that would have shown his susceptibility to giving a false confession. The testimony had been precluded only on the ground that it would not properly assist the jury, but the Trial Judge erred in failing to apply the *Daubert* framework to this testimony. The Court recognized that "[b]ecause the fields of psychology and psychiatry deal with human behavior and mental disorders, it may be more difficult at times to distinguish between testimony that reflects genuine expertise -- a reliable body of specialized knowledge -- and something that is nothing more than fancy phrases for common sense." In the instant case, the prosecution did not challenge the scientific basis of the proffered testimony, so the Court assumed that it was valid. The Court concluded that "[i]t was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision."

United States v. Cortez, 935 F.2d 135 (8th Cir. 1991) : To help the jury understand the events surrounding the defendant's arrest and interrogation and his in-court testimony, the defense offered a psychologist to testify that the defendant had mental and emotional disorders manifested in an "inability to recall certain facts" and a withdrawn demeanor. The Court held there was no abuse of discretion in excluding the evidence, as it would not be helpful to the jury because those aspects of the defendant's personality would be readily apparent when he testified.

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989) : The Court held it was proper to exclude a psychologist's testimony concerning the effect on the defendant of his being told that he failed a polygraph test. It found that the jury was as equipped as the expert to make this evaluation.

United States v. Roark, 753 F.2d 991 (11th Cir. 1985) : The Court reversed convictions for bank robbery and conspiracy because the Trial Judge erroneously excluded the testimony of an expert psychological witness who would have testified to the defendant's susceptibility to suggestions, which was relevant to the weight to be given a confession obtained from the defendant.

[c] Psychiatric and Psychological Evidence -- Other Criminal Cases

United States v. Rouse, 111 F.3d 561 (8th Cir. 1997) : Affirming convictions for sexual abuse of children, the Court held, first, that an expert psychologist was properly precluded from expressing any opinion that a victim's accusations of sexual abuse were not credible. The Court divided on a second question, whether the expert was properly

precluded from offering testimony, after explaining the dangers of implanted memory and suggestive practices when interviewing child witnesses, that in the government interviews with the victims "there's been a practice of suggestibility employed in these techniques." One Judge seemed to say that if there were any error in exclusion of the testimony, it was harmless; one said that it was harmless error; and one Judge dissented, restating views in a vacated majority opinion n158 that the expert's testimony satisfied the *Daubert* reliability test and that its exclusion was reversible error. In *United States v. Plenty Arrows, 946 F.2d 62 (8th Cir. 1991)* , a prosecution for sexual abuse of a child, a defense expert testified on direct that during an interview the victim denied that he had been sexually abused, and the expert testified on cross-examination that the victim's behavior was consistent with that of a sexually abused child. The Court held that the cross-examination was not an abuse of discretion, as the expert did not put her stamp of believability on the victim's entire story but merely helped the jurors by stating whether the evidence was consistent with the victim's claims. In *Arcoren v. United States*, n159 the Court, reviewing convictions for sexual abuse, held that there was no abuse of discretion when expert testimony regarding battered woman syndrome was admitted after a victim had recanted her grand jury testimony. The expert testimony, which included no opinion whether the witness suffered from the syndrome, provided the jury with a basis on which to understand and evaluate the changes in the witness' testimony. See also *United States v. DeNoyer* n160(finding no error in excluding testimony of a "school psychologist" who had not examined the child victim of sodomy, but who had formed an opinion based upon listening to the victim's testimony and that of a clinical psychologist who had examined the victim); *United States v. St. Pierre* n161(upholding admission of a clinical psychologist's testimony as to traits and characteristics of sexually abused children in a prosecution of a father for abusing his stepdaughter).

United States v. Vallejo, 237 F.3d 1009 (9th Cir. 2001) : Marijuana was found when the defendant's car was searched at a Mexican border checkpoint. In support of his interpretation of what was said and meant when he was interrogated, the defendant proffered his high school's psychologist and director of special education as an expert witness, to testify about the defendant's language disorder and the difficulties he experienced understanding and expressing English. Reversing a conviction for marijuana importation, the Court held it was error to exclude the expert, since the proposed testimony "addressed an issue beyond the common knowledge of the average layperson" and would have explained how the defendant and the officer "could have very different perceptions of what occurred during the interrogation, yet both could be correct from a communications standpoint." In *United States v. Marsh, 26 F.3d 1496 (9th Cir. 1994)* , the defendant was convicted for attempted extortion of a victim with whom he had a 24-year homosexual relationship. Affirming, the Court held there was no abuse of discretion in excluding testimony by a psychologist that the victim suffered from a "dependent personality disorder" which would explain the relationship that led to giving the defendant money. In the Court's view, the victim's state of mind is irrelevant to the crime of attempted extortion; besides, the nature of the relationship was fully set out for the jury. The dissenting Judge believed that evidence of the "co-dependent" relationship was relevant to the defendant's state of mind and that the expert's specialized knowledge would have been helpful in evaluating the defendant's state of mind. In a prosecution for kidnapping and transporting two women for immoral purposes, *United States v. Winters*, n162 the Court held that expert psychiatric testimony that the women had suffered from post-traumatic stress disorder was properly admitted. The evidence assisted the jury in understanding the women's conduct and dispelled any suggestion that they acted voluntarily.

[76] Qualifications of Experts

[a] Antitrust Cases

Spray-Rite Serv. Corp. v. Monsanto Corp., 684 F.2d 1226 (7th Cir. 1982) , *aff'd*, *465 U.S. 752 (1984)* : In an antitrust case alleging price fixing, the Court held that a marketing expert was properly permitted to testify on the question of damages, even though he was not an expert in all the fields of study on which he relied in testifying.

[b] Qualifications of Experts -- Civil Rights Cases

Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994) : Affirming a judgment against a victim of domestic violence who sued a police department and police officers for failing to protect her from her spouse, the Court held that testimony from the plaintiff's proffered expert was properly excluded. The expert would have testified that the police department failed to provide sufficient training and supervision for its officers when it changed from a policy of mediation to arrest in cases of domestic violence. The expert's purported qualification was that he had a doctorate in sociology, "a credential that does not in itself describe any specific body of scientific or technical expertise pertinent to this case." Thus, it was not an abuse of discretion to rule that the plaintiff had failed to establish the witness' expertise in either criminology or domestic violence.

Hayter v. City of Mount Vernon, 154 F.3d 269 (5th Cir. 1998) : Affirming denial of summary judgment in a civil rights action for wrongful arrest, the Court found no abuse of discretion in a finding that the plaintiff's expert on law enforcement practices was qualified to testify that no reasonable officer would have arrested the plaintiff under the circumstances presented. The expert had basic, intermediate, and advanced law enforcement certifications from the State of Texas, and an associate degree in law enforcement from a community college, and was also trained in the requirements for a lawful arrest.

[c] Qualifications of Experts -- Counterfeit Securities

United States v. Chang, 207 F.3d 1169 (9th Cir. 2000) : Affirming convictions for uttering and possessing a counterfeit Japanese certificate, the Court held there was no abuse of discretion in excluding the testimony of a defense expert, an assistant professor of clinical marketing, who would have testified that the certificate was genuine. Although the expert had knowledge of the history and purpose for the issuance of such certificates, he admitted that he had no formal training in the identification of foreign certificates and did not claim any special training in detecting counterfeit securities. Thus, the witness' "practical experience in international finance did not amount to practical experience determining whether a particular security is counterfeit, the fact at issue in this case."

[d] Qualifications of Experts -- Damages Experts

Murphy v. National R.R. Passenger Corp., 547 F.2d 816 (4th Cir. 1977) : The Court remanded this FELA case because the Trial Judge refused to admit testimony about the qualifications of the plaintiff's experts after the defendant conceded that they were well qualified. The error was compounded by a jury instruction to the effect that the testimony of the experts should be disregarded if the jury determined that it was not based on sufficient education and experience.

Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358 (5th Cir. 2000) : In an action for trademark infringement and misappropriation of trade secrets regarding offshore marine cranes, the Court held there was no abuse of discretion in excluding testimony from the plaintiff's expert regarding the defendant's profits from its infringing activity. Although the witness had 15 years of experience in the marine crane industry, he had no formal or professional training in accounting and he did not conduct any independent examination of the defendant's gross sales figures, which were provided to him by the plaintiff's attorneys.

Tuf Racing Prods., Inc. v. American Suzuki Motor Corp., 223 F.3d 585 (7th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a suit for wrongful termination of a franchise agreement, holding there was no error when the plaintiff's accountant, a CPA, presented its theory of damages. Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to the trier may qualify as an expert witness, and there is no requirement that a

damages witness in a case like this have a degree in economics, statistics, mathematics, or some other "academic" field that might bear on the calculation of damages.

Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977) : Affirming a judgment for a railroad against a manufacturer of railroad cars, the Court approved the admission of expert testimony to interpret "complex technical construction specifications contained in the [parties'] agreement," and to prove the diminution in value of railroad cars resulting from their structural collapse. The former testimony was supplied by a mechanical engineer, the latter by an executive vice president of the railroad. With respect to the latter, the Court said that Rule "702 is not limited to experts in the strictest sense of the word but also encompasses a large group called 'skilled' witnesses, such as owners, bankers, and landowners testifying on the value of property."

Greyhound Computer Corp. v. International Bus. Machs. Corp., 559 F.2d 488 (9th Cir. 1977) : "An interested witness may testify as to the amount of damage so long as the record reflects his competency and the factual basis for his conclusions."

Lifewise Master Funding v. Telebank, 374 F.3d 917 (10th Cir. 2004) : In an action by a lending company against its loan financer for breach of contract, the Court affirmed a judgment for the defendant, finding no abuse of discretion in the exclusion of the plaintiff's proposed expert witness concerning damages. The witness had no familiarity, knowledge, or experience with damages analysis and was not qualified to explain how the damages model used worked or to opine on the statistical validity or interpretation of the results.

[e] Qualifications of Experts -- Discrimination Cases

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207 (D.C. Cir. 1997) : A deaf person alleged that a transit police officer, who investigated an altercation between the plaintiff and a bus driver, had violated the Americans with Disabilities Act. The Court concluded that a 24-year veteran of the Metropolitan Police Department, who had served as an instructor in police training and procedures, was improperly permitted to testify as to whether the Authority violated the ADA, but it upheld the decision below finding the officer qualified to testify as to police practices, procedures, and training.

Mullins v. Crowell, 228 F.3d 1305 (11th Cir. 2000) : In support of his Rehabilitation Act claim that he was disabled from performing craft work, a plaintiff offered testimony from a general foreman with 11 years' experience supervising craftworkers of all types for the plaintiff's employer. The Court noted that the foreman's experience would qualify him to give expert testimony, although he was not a "medical, labor, or vocational expert."

[f] Qualifications of Experts -- Drug Cases

United States v. Carswell, 922 F.2d 876 (D.C. Cir. 1991) : Affirming a conviction for cocaine possession with intent to distribute, the Court held there was no abuse of discretion in excluding testimony by a witness regarding customary packaging of cocaine for personal use, when the witness did not recognize either of the street terms for the quantities in which cocaine was sold in the District.

United States v. Paiva, 892 F.2d 148 (1st Cir. 1989) : In affirming a conviction for cocaine distribution offenses, the Court held that a detective with 15 years' experience, who was working on the narcotics unit and who had encountered cocaine before, was qualified to express an opinion that a substance he had field-tested was cocaine.

United States v. Carson, 702 F.2d 351 (2d Cir. 1983) : The Court affirmed convictions in a heroin conspiracy case, finding that government agents were properly permitted to testify that a defendant's furtive activities on a street corner appeared to be narcotics sales. The agents' conclusions were based on years of experience in investigating narcotics cases. In *United States v. Pugliese*, n163 the Court affirmed heroin-related convictions, finding that testimony of a government agent regarding typical characteristics of heroin addicts was properly admitted. The agent was qualified because of his ten years' experience in drug investigations. It did not matter that he lacked knowledge concerning local conditions in the South Florida heroin market absent some showing that those conditions might be different from the conditions existing in New York.

Cooper v. Laboratory Corp. of Am. Holdings, 150 F.3d 376 (4th Cir. 1998) : The plaintiff was fired for testing positive for alcohol in a urine sample. She sued the drug testing laboratory for failing to account for the fact that she was a diabetic, and for failing to consider whether the positive result may have been caused by fermentation or refrigeration. Affirming a grant of summary judgment for the defendant, the Court found that there was no abuse of discretion in excluding the plaintiff's expert as unqualified. The witness, who would have testified that the laboratory's procedures were inadequate, had a general knowledge of chemistry, but he had no training, experience, or skill in the field of urine alcohol testing; his knowledge of the specific subject matter was based on one course in toxicology, taken 30 years before the start of this case.

United States v. Griffith, 118 F.3d 318 (5th Cir. 1997) : Affirming a conviction for possession of marijuana with intent to distribute, the Court held there was no abuse of discretion in permitting a DEA agent to interpret cryptic recorded conversations as drug transactions. The witness had over eight years' experience as an agent, in which she participated in 50 investigations, often undercover, so she had ample opportunity to listen to drug dealers converse and to decipher the nuances of their conversations. In *United States v. Johnson*, n164 the Court upheld a ruling that a government witness could testify as an expert on the origins of marijuana that the government claimed was illegally brought into the country. The witness' qualifications involved "the experience of being around a great deal [of marijuana] and smoking it," but no special training or education. A professor called by the defense testified that there was no way to determine the origin of a particular sample of marijuana.

United States v. Lightfoot, 224 F.3d 586 (7th Cir. 2000) : In a trial for possession with intent to distribute narcotics, a law enforcement officer testified that the amount of cocaine retrieved was so great that it had to be destined for resale. Rejecting a contention that the officer was not qualified to render this opinion because he admitted that he was unfamiliar with the odor of cocaine during the cooking process, because it had no bearing on his general familiarity with the cocaine business, the Court found that the expert was sufficiently qualified by eight years of experience in investigating narcotics, as well as special training in narcotics enforcement. In *United States v. Griffin, 194 F.3d 808 (7th Cir. 1999)* , a prosecution for possession of cocaine base with intent to distribute, the Court found no abuse of discretion in admitting testimony by two crack dealers that the defendant's acts indicated an intent to distribute the crack he possessed and that the contents of certain baggies appeared to be crack, as the witnesses had sufficient experience to offer those opinions.

United States v. Robertson, 387 F.3d 702 (8th Cir. 2004) : Affirming drug and firearm convictions, the Court found no abuse of discretion in the admission of testimony by detectives that the amount of drugs possessed by the defendant was a "distribution amount." The Court noted that one detective was a ten-year veteran, he had attended a course sponsored by the DEA, and he gathered intelligence on the local narcotics trade as part of his daily routine. The other detective was a 13-year veteran of the force, had attended a DEA course, and had focused primarily on drug interdiction for the previous three years. In *United States v. Santana, 150 F.3d 860 (8th Cir. 1998)* , the Court affirmed

cocaine convictions, finding no error in the admission of expert testimony from a law enforcement agent regarding the frequency with which fingerprints are recovered from plastic bags. The witness was sufficiently qualified by 26 years of experience in law enforcement, including extensive experience in drug-related investigations. In *United States v. Johnson*, n165 the Court held there was no error in a crack distribution conspiracy trial when an unindicted coconspirator was permitted to provide expert testimony on drug trafficking, as his six years' experience in setting up various drug distribution centers in different cities gave him specialized knowledge that would be helpful to the jury.

United States v. Golden, 532 F.2d 1244 (9th Cir. 1976) : Affirming convictions for unlawful importation of heroin, the Court approved the introduction of testimony by a DEA special agent as to the market price of the amount of heroin discovered in the defendants' bags when they arrived in San Francisco on a flight from Tokyo. The agent was qualified as an expert because: he had purchased heroin more than 400 times in the United States, Europe, and Asia; he had purchased heroin in Bangkok in 1967 and had recently obtained information as to prices in Thailand from another agent (the defendants were coming from Thailand); in the months prior to trial he had made purchases in the United States; and on 13 other occasions, he had testified as an expert witness on the market value of heroin.

United States v. Brown, 415 F.3d 1257 (11th Cir. 2005) : The principal issue in the bench trial of the defendants for distribution of a controlled substance analogue was whether the 1,4-butanediol they possessed had a chemical structure "substantially similar" to gamma hydroxybutyric acid (GHB), a controlled substance. The government offered testimony from a DEA forensic drug chemist and a biochemist with the National Institute of Environmental Health Sciences; their testimony was admitted. The defense offered a freelance consultant in the field of chemistry who held a Ph.D. in plant pathology; the Judge heard this witness' testimony without ruling on his qualifications, but did not consider the testimony as reliable expert opinion in making findings of fact. Affirming, the Court found no abuse of discretion when the Judge declined to qualify the defendants' witness as an expert, since his academic work and professional experience related more to plant pathology and botany than to chemistry.

[g] Qualifications of Experts -- Engineers

DaSilva v. American Brands, Inc., 845 F.2d 356 (1st Cir. 1988) : In a wrongful death action against a manufacturer of an industrial mixing machine, the Court held that a mechanical engineer was qualified on the basis of experience as an engineer in evaluating and recommending safety devices for machines to give an opinion concerning the mixing machine. It rejected the defendant's argument that only an expert who had experience with the specific machine in question should be permitted to give an opinion on its design.

Stagl v. Delta Air Lines, Inc., 117 F.3d 76 (2d Cir. 1997) : The Court reversed a judgment as a matter of law granted for the defendant in a personal injury action alleging negligent failure to control the crowd at a baggage carousel or to provide a means by which elderly and disabled passengers like the plaintiff could retrieve their luggage safely. It was error to exclude testimony by a mechanical engineer with experience in human-machine interactions on the ground that he had no experience in airline terminal or baggage claim area design. Because such experience could only be gained by working for the airline industry, requiring it would come close to letting the industry set its own standards.

Martin v. Fleissner GMBH, 741 F.2d 61 (4th Cir. 1984) : The Court held that experts in engineering design who were familiar with the processes used by a piece of equipment could testify concerning a design defect even though they were not experts on the equipment. In *Garrett v. Desa Indus., 705 F.2d 721 (4th Cir. 1983)* , the Court reversed a judgment for a defendant in an action seeking damages for injuries suffered when the plaintiff, a carpenter, was injured by the discharge of a stud driver manufactured by the defendant. It was an abuse of discretion to preclude a mechanical engineer from testifying about the negligent design of the stud driver simply because he had no prior experience with

such a tool. The witness had tested stud drivers prior to trial and had experience with similar mechanisms.

Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990) : The Court affirmed a judgment for the defendant manufacturer of an eyeguard worn by the plaintiff when he was hit by a racquetball and sustained eye injuries, holding that the self-acknowledged lack of medical expertise of the defendant's expert in mechanical engineering and accident reconstruction went to the weight rather than the admissibility of his opinion.

Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) : In a product liability action arising out of a roll-over accident, the Court held there was no abuse of discretion in permitting the plaintiff's expert, an aerospace and mechanical engineer with 22 years of experience in automotive engineering, to testify regarding safe design of car roofs, even though he lacked experience designing car roofs or supporting structures. In *Wheeler v. John Deere Co., 935 F.2d 1090 (10th Cir. 1991)* , the Court held there was no abuse of discretion in permitting a mechanical engineer with special expertise in the safe design of farm equipment to testify to the dangers anticipated by ordinary consumers regarding a combine.

Polston v. Boomershine Pontiac-GMC Truck, Inc., 952 F.2d 1304 (11th Cir. 1992) : In a product liability action alleging enhanced injuries because the involved automobile was not crashworthy, the Court held that a mechanical engineer with substantial experience as an automobile accident investigator was properly permitted to opine that a lack of crashworthiness contributed to the plaintiff's injuries and was properly precluded from testifying which injuries were caused or enhanced by the allegedly defective condition. With his qualifications, he could testify to a reasonable degree of engineering certainty but not to a reasonable degree of medical certainty.

[h] Qualifications of Experts -- Environmental Cases

United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999) : The defendant was convicted for knowingly transporting and disposing of hazardous waste. He sought to show that he had a good faith belief that the compound involved was not hazardous waste by asking the manager of the waste management section of the state EPA hazardous materials division whether the chromium contained in the listed hazardous waste was different from the type of chromium contained in the compound at issue. The Court found no abuse of discretion in excluding the testimony, as the witness was not a toxicologist and had no knowledge of the chemical composition of the compound at issue.

[i] Qualifications of Experts -- Financial Analysts

United States v. Majors, 196 F.3d 1206 (11th Cir. 1999) : The defendants were convicted of conspiracy to defraud investors by selling worthless securities, bogus licenses, and phony distributorships. Affirming, the Court held that although the government's proffered financial expert was not a certified accountant and had no experience in small business management or in the preparation of consolidated financial statements, there was no error in admitting his testimony, since the witness had worked as a financial analyst for the FBI for more than eight years and had performed financial analyses in more than 50 cases.

[j] Qualifications of Experts -- Firearms

United States v. Bowman, 353 F.3d 546 (7th Cir. 2003) : Affirming a conviction for felon firearm possession, the Court held that a government fingerprint expert was properly permitted to answer whether the location of a thumbprint was consistent with someone making the gun "safe." The defendant argued that this testimony was outside the witness' expertise, as he was qualified as a fingerprint expert and not an expert on gun-handling. However, the Court found that

the witness had 37 years' experience in handling guns, having examined thousands of prints on guns, and he knew the gun type at issue and how one would normally hold it. Thus, the witness was "well within his expertise when concluding that, based on his undisputed discovery of a left thumbprint from the right side of the gun slide, the print was deposited in the process of someone making the gun safe."

[k] Qualifications of Experts -- Forensic Experts

Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72 (1st Cir. 2004) : The Court affirmed a judgment for a lender who sued a borrower and its principal for fraud and breach of contract arising out of a line of credit extended by the lender. It held that an ex-IRS agent with 33 years experience was qualified to analyze the flow of funds lent by the lender to the defendant into a "lock-box account" and to opine that the way in which the transactions were structured was fraudulent. Although the expert had no previous experience with lock-box accounts, the Court noted that he "did not deal with the esoterica of lock-box accounts, but, rather, with the tracking of funds into and out of the" accounts, which "fell within the heartland" of the expert's expertise.

Andrews v. Metro N. Commuter R.R., 882 F.2d 705 (2d Cir. 1989) : In an action by a pedestrian injured by a train, the Court held that it was error to allow a "forensic engineer" with no railroad experience to testify that it was "reasonable" for plaintiff, who had allegedly fallen from the station platform, to walk 3000 feet to the point of impact and that it was "negligent" of the train operator, on seeing the plaintiff on the track, to slow down and blow the horn rather than immediately put the train into emergency.

United States v. Barker, 553 F.2d 1013 (6th Cir. 1977) : Reversing bank robbery convictions, the Court held it was error to refuse to recognize a defense witness as a fingerprint expert, noting that the expert need not be "an outstanding practitioner," but must be a person who can help the jury.

United States v. Kladouris, 964 F.2d 658 (7th Cir. 1992) : The Court affirmed a conviction for arson, holding there was no error in excluding testimony about the presence of petrochemicals by an expert with no training in chemistry. In *United States v. Welch, 945 F.2d 1378 (7th Cir. 1991)* , the Court affirmed a conviction for cocaine offenses, holding there was no abuse of discretion in excluding testimony by the defendant's witness regarding the accuracy of the government transcript of a tape-recorded conversation. The witness lacked training and experience in forensic tape analysis, was unfamiliar with the use of technological instruments to detect alterations, and was basing his opinion on a third-generation copy, when the FBI standards require that an opinion dealing with tape alteration be based on an analysis of the original recording.

United States v. Collins, 559 F.2d 561 (9th Cir. 1977) : Affirming a conviction for armed bank robbery, the Court upheld the government's use of an FBI expert who testified that shoes and a briefcase found in a search of the defendant's premises were the same as depicted in bank surveillance photographs. Because the witness was "an expert in the field of questioned documents and photographic comparison," the Court held that his testimony was technical and specialized and clearly helpful to the jury.

[l] Qualifications of Experts -- Gambling Cases

United States v. Lanzotti, 205 F.3d 951 (7th Cir. 2000) : Affirming convictions for participating in an illegal gambling business, the Court upheld the Trial Judge's refusal to permit the defendants' proffered expert to testify whether certain gambling machines were illegal, since the witness was not qualified as an expert in the area of

gambling. He worked for the Illinois Liquor Commission, which regulates liquor, not gambling, and no other showing of qualification was made.

[m] Qualifications of Experts -- Handwriting Experts

United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) : In a drug trial the prosecution offered an expert to opine that the defendant's girlfriend and one of his accomplices had written a mailing label that had been used to ship drugs. The Trial Judge refused to permit a professor called by the defense to testify as a critic of the field of handwriting analysis. Vacating the conviction, the Court held that under *Daubert* the professor had sufficient specialized knowledge to be considered an expert, his proposed testimony was sufficiently reliable (having been subjected to peer review), and it fit the facts of the case.

United States v. Bourgeois, 950 F.2d 980 (5th Cir. 1992) : Affirming convictions for tax fraud, the Court held there was no clear error in refusing to qualify as an expert on handwriting a person who was not a member of the American Board of Forensic Document Examiners, but who said that he practiced forensic document examination and graphotherapy (alteration of personality by handwriting modification), had qualified for a masters in graphoanalysis (personality analysis through handwriting), and held a correspondence doctorate in metaphysics and religion.

United States v. Paul, 175 F.3d 906 (11th Cir. 1999) : The Court affirmed a conviction for extortion, finding no abuse of discretion in permitting an expert document examiner to present handwriting analysis evidence that identified the defendant as the author of a note. The Court also held there was no abuse of discretion in precluding rebuttal testimony for the defendant from a law professor who had coauthored a 1989 law review article, based on a review of the literature, that was critical of forensic document examiners' ability to reach the correct conclusion in questioned document examinations: "His skill, experience, training and education as a lawyer did not make him any more qualified to testify as an expert on handwriting analysis than a lay person who read the same articles."

[n] Qualifications of Experts -- Industry Practice

Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736 (2d Cir. 1998) : Affirming summary judgment for the defendants in an action between bottlers of spring water, the Court held there was no error in excluding testimony of the plaintiff's "contracting practices" expert because his only experience was as a marketer in the beverage industry and he was never directly involved in negotiating co-packing agreements like those involved in this case. In an action for snow and ice damages to the plaintiff's airplane while taxiing at the defendant's airport, *Pan American World Airways, Inc. v. Port Auth., 995 F.2d 5 (2d Cir. 1993)* , the Court held there was no error in excluding the plaintiff's proposed expert witness, who had never completed local air traffic control training, had little experience in large airports, and was entirely unfamiliar with ground procedures at the airport involved, even though he had served as an expert witness on behalf of the federal government and private parties in various federal trials. In *Andrews v. Metro N. Commuter R.R.*, n166 an action by a pedestrian injured by a train, the Court held that it was error to allow a "forensic engineer" with no railroad experience to testify that it was "reasonable" for plaintiff, who had allegedly fallen from the station platform, to walk 3000 feet to the point of impact and that it was "negligent" of the train operator, on seeing the plaintiff on the track, to slow down and blow the horn rather than immediately put the train into emergency.

Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791 (4th Cir. 1989) : The plaintiff in this breach of contract and price discrimination case offered testimony by a single expert witness that the defendant's change in credit practices was an unjustified credit and price discrimination. The Court held it was an abuse of discretion to permit the witness to give the opinion because there was no showing that her general business education included any training in the area of

antitrust or credit or that she had any experience in such matters.

Huval v. Offshore Pipelines, Inc., 86 F.3d 454 (5th Cir. 1996) : In a contractor's suit against its insurance consultants for failure to procure insurance coverage, the Court held there was no abuse of discretion in permitting a witness with 32 years' experience as an underwriter, accounts manager, and underwriting manager for various insurance companies to give expert testimony for the plaintiff, even though he had no experience acting as an agent where an insurance consultant was involved or in working directly with a London broker as the defendant had. In *United States v. Heath, 970 F.2d 1397 (5th Cir. 1992)* , a loan fraud prosecution, the defendants were precluded from offering a real estate lawyer who would have testified about using nonrecourse loans in real estate deals, because he would be testifying from his own experience, leaving the government no means to question his accuracy, and because there were no studies or statistics giving rise to reliable inferences. The Court held that exclusion of the testimony was error (but harmless), as the witness had specialized knowledge that could be helpful to the jury and the absence of scientific data went only to the weight of his opinions. In a FELA action, *Lowery v. Illinois Cent. G. R.R.*, n167 the Court held that a witness with more than ten years' experience as a train master, operating rules examiner, and inspector of railroad equipment was qualified as an expert on hand brake operations, even though he had not been involved in the railroad business since 1973. In a Jones Act suit by a drilling rig worker injured during a "mud transfer" operation, *Boyle v. Pool Offshore Co.*, n168 the Court held there was no abuse of discretion in admitting opinion testimony by the plaintiff's expert, who had not only received formal training in rigging techniques and served as a safety director for an offshore drilling contractor, but also had seen the mud hose transfer operation many times and had been responsible for the safety of such operations.

Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004) : The Court affirmed a judgment for an arrestee who sued police officers for using excessive force, holding there was no abuse of discretion in permitting an expert to testify "about a discrete aspect of police practices, namely use of excessive force, based upon his particularized knowledge about the area," where the witness "had considerable experience in the field of criminology" and was testifying about "police practices about which he had specialized knowledge." It distinguished its opinion in *Berry v. City of Detroit*, *infra,* because "the concept of such a field as presented by [the witness in *Berry*] was far too broad." In a careful opinion applying *Daubert* principles, *Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994)* , the Court reversed a judgment against the City in a civil rights case, holding there was insufficient evidence of experience or study that would qualify the plaintiff's expert in "police policies and practices" to opine regarding the effect that claimed disciplinary shortcomings would have on the future conduct of 5000 individual City police officers.

First Union Nat'l Bank v. Benham, 423 F.3d 855 (8th Cir. 2005) : The Court reversed a judgment for the defendant in a legal malpractice action against a mergers and acquisitions attorney and his firm for failing to assert a timely claim for valuation of stock acquired in a merger. The Judge had excluded expert testimony on the standard of practice of an Arkansas attorney on such matters, on the ground that the witness' conclusions were based on his own experience and on not that of other lawyers. The Court found that exclusion was an abuse of discretion, given that the witness was licensed as an attorney in Arkansas for over 36 years and had practiced extensively in the M&A area; it noted that *Rule 702* permits opinion testimony based on specialized knowledge gained by "experience." In an action against an accounting firm for malpractice, *Garnac Grain Co. v. Blackley, 932 F.2d 1563 (8th Cir. 1991)* , the Court held there was no abuse of discretion in excluding expert testimony by witnesses who had business degrees and basic accounting courses but who had no experience or training in auditing or generally accepted accounting standards. It was error, however, to exclude testimony by a retired business professor who had taught auditing for 40 years, even though his only auditing experience was in the 1940s and his CPA license had expired in 1981. In *Circle J Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, n169 the Court affirmed a judgment for a dairy farm owner against the manufacturer and the distributor of a system for feeding livestock, holding that a part owner of a soil and feed testing service was properly permitted to testify as an expert on the physical condition of the herd and its permanent damage. It stated that *Rule 702*

"does not rank academic training over demonstrated practical experience."

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004) : The Court affirmed a damage award for a chiropractor who sued his disability insurer for breach of contract, breach of the covenant of good faith and fair dealing, and intentional misrepresentation. It held that the plaintiff's expert -- who testified that the defendants' letter terminating the plaintiff's benefits was misleading, deceptive, and fell below industry standards -- was qualified to offer the opinion. He had 25 years experience working for insurance companies and as an independent consultant. He had actually worked for the defendants when many disability policies like the plaintiff's were sold and had received training on how insurance companies in general and the defendants in particular adjust claims. The Court also found that another witness was qualified to offer an opinion on the industry standard. This witness was a board-certified specialist in insurance medicine, worked as one defendant's vice-president and director of its medical department, and was educated on insurance policy law and disability policy language. In *LuMetta v. United States Robotics, Inc.*, n170 the Court affirmed a judgment for a plaintiff claiming breach of an implied contract. It found no error in the exclusion of three expert witnesses offered by the defendant to show the reasonableness of a commission or a "finder's fee." None of the witnesses was sufficiently acquainted with the industry practice to have helped the jury.

Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183 (10th Cir. 1992) : In an action by a securities clearing firm against a corporation for refusing to transfer and register a stock certificate, the Court held there was no abuse of discretion in precluding expert testimony on the securities business by a witness for the defendant, as he had only the general experience of an attorney who represented clients in the area of securities law and had no actual experience in representing a large brokerage house, transfer agent, or clearing house. In *Jicarilla Apache Tribe v. Andrus*, n171 a suit by the Tribe challenging oil and gas leases on a reservation, the Court upheld the admission of testimony by the Tribe's geologist. He had qualifications as a geologist, had experience with different oil companies, had been an officer of a company that had bid on Indian lands, and had prepared reserve studies on the basin involved in the case. This qualified him to testify concerning what he would have recommended as a bid on the rights.

Cronin v. Washington Nat'l Ins. Co., 980 F.2d 663 (11th Cir. 1993) : In an action for negligence and breach of contract arising out of the defendants' failure to procure a renewed health insurance policy, the Court held there was no abuse of discretion in excluding testimony by a witness with no underwriting experience that other insurance was available to the plaintiff.

[o] Qualifications of Experts -- Law Enforcement Agents

United States v. Williams, 212 F.3d 1305 (D.C. Cir. 2000) : The defendant was convicted for possession of a firearm and ammunition by a felon. The government contended that the defendant threw a gun over a bridge as he was being pursued by a police officer after fleeing from a traffic stop. The defendant contended that he was a drug user and threw his drugs, not a gun, over the bridge. A search below the bridge turned up a gun but no drugs. The Court affirmed the conviction, but found it was error to permit the officer who chased the defendant to testify on redirect examination that it was common for people who use drugs to carry a gun for protection. The officer's expertise was based on fewer than a dozen arrests involving firearms. The Court said that the inquiry whether drug *dealers* carry weapons "raises no eyebrows," but held that "[f]ewer than one dozen arrests involving possession of a firearm is not sufficient grounding to qualify him as an expert under *Rule 702 of the Federal Rules of Evidence (FRE)*, particularly without evidence establishing that any of those arrests involved a drug *user*." The Court held, 2-1, that the error was harmless.

United States v. Ceballos, 302 F.3d 679 (7th Cir. 2002) : The Court affirmed drug conspiracy and money laundering convictions, holding there was no abuse of discretion in permitting two experienced DEA agents to interpret

code language used in recorded phone conversations. Although the conversations were in Spanish and neither agent spoke fluent Spanish, the Court found no authority prohibiting experts from interpreting drug code language in English translations of Spanish conversations. In *United States v. Conn, 297 F.3d 548 (7th Cir. 2002)* , the Court affirmed a conviction for willfully dealing in firearms without a license and upheld the admission of testimony by a BATF agent that, based on his training and experience, the defendant's firearms were not collector's items. The Court cautioned that this was not "a paradigmatic example of how such an issue ought to be developed at trial," since the government never actually sought to have the agent certified as an expert, and his description of his training and experience was "somewhat less than specific." Neither infirmity was fatal, however, because he was required to state the basis of his expertise and the defense was given ample opportunity to examine him about his background.

[p] Qualifications of Experts -- Medical Testimony

[i] Accident Cases

Edmonds v. Illinois Cent. G. R.R., 910 F.2d 1284 (5th Cir. 1990) : The Court remanded a FELA case for a new trial on damages, holding that the plaintiff's expert, a clinical psychologist, was not qualified to give an opinion on a causative link between stress caused by a job-related accident and the worsening of the plaintiff's preexisting heart condition. In *Myers v. Griffin-Alexander Drilling Co., 910 F.2d 1252 (5th Cir. 1990)* , an action by a drilling vessel employee who was injured after exposure to nitrogen gas, the Court held that there was no error in permitting an expert on hyperbaric medicine, most of whose work involved effects of gases underwater, to testify about effects of nitrogen on individuals at sea level.

Wooten v. United States, 574 F. Supp. 200 (W.D. Tenn. 1982) , *aff'd*, *722 F.2d 743 (6th Cir. 1983)* : The Court granted damages to a Tort Claims Act plaintiff, finding that a registered nurse could testify as an expert concerning the safety precautions that were necessary to protect a patient under certain circumstances.

Smith v. BMW No. Am., Inc., 308 F.3d 913 (8th Cir. 2002) : The Court vacated summary judgment against the plaintiff, who alleged that failure of her car's air bag properly to deploy caused her severe injuries in an accident. The plaintiff proffered a forensic pathologist to testify that her neck was broken at the initial impact of the vehicle rather than in the subsequent rollover (thus tending to show that the defective air bag was causal) and that the air bag would have prevented or reduced her neck injuries had it deployed. The Trial Judge excluded the testimony essentially because the witness was not an expert in biomechanics, physics, or engineering and thus could not know how much force was exerted on the plaintiff in the accident or how much force her neck could withstand. However, the Court noted that the witness was not called to give testimony on those issues, but only on issues within his field: the injuries she sustained (to her neck) and the injuries she had not sustained (to her head). His testimony that the air bag would have reduced or prevented the plaintiff's injures was based on his knowledge of the basic operation of air bags and of how injuries of the type sustained by the plaintiff occur and can be prevented.

[ii] Qualifications of Experts -- Medical Testimony -- Criminal Cases

United States v. Montague, 958 F.2d 1094 (D.C. Cir. 1992) : In a drug prosecution, the Court held there was no abuse of discretion in precluding the defense from cross-examining a government expert on narcotics distribution about the effects of crack cocaine on the user's memory and perception. The expert was not qualified to testify about a medical topic.

United States v. Crosby, 713 F.2d 1066 (5th Cir. 1983) : The Court affirmed kidnapping convictions, finding no

error in the refusal to qualify a counselor at a Veterans' Center as an expert witness on posttraumatic stress syndrome. The Trial Judge reasonably insisted that an expert witness on the subject have medical training.

United States v. Withorn, 204 F.3d 790 (8th Cir. 2000) : In a prosecution for forcible rape of a 12-year-old, the Court found there was no abuse of discretion in permitting a nurse-midwife to testify, based on an examination of the victim on the morning of the incident, that her injuries were consistent with her description of a violent sexual assault and that they were probably caused by "blunt trauma." The witness had received special training in conducting examinations of rape victims, she had provided emergency coverage for obstetrics and gynecology in the past, and a significant part of her practice consisted of treating young teenage girls. In *Davis v. United States*, n172 the Court held that a public health inspector, who had investigated and managed cases involving sexually transmitted diseases for eight years, was qualified to give an opinion on the probability of transmission of gonorrhea from a female victim of a rape to the defendant in a collateral attack proceeding.

United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983) : The Court upheld a conviction for threatening the life of the President. It found no error in the admission of the testimony of an osteopathic physician who testified concerning the defendant's sanity.

[iii] Qualifications of Experts -- Medical Testimony -- Medical Malpractice Cases

Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion Familiar, 345 F.3d 15 (1st Cir. 2003) : Affirming a judgment for an abortion clinic patient in a malpractice action against a doctor and the clinic, the Court held that a general practitioner could qualify as an expert and testify as to ectopic pregnancies, even though he was not a doctor of obstetrics or gynecology. In a wrongful death medical malpractice action, *Mitchell v. United States, 141 F.3d 8 (1st Cir. 1998)* , the Court affirmed a judgment for the plaintiff, finding no error the admission of testimony from an internist with specialties in hematology and oncology, who had substantial experience with Coumadin, a drug that the deceased was taking until six days before a colonoscopy, and had performed some colonoscopies earlier in his career. The Court concluded that the witness was qualified to testify as to the risk of stroke as compared to the risk of bleeding from a colonoscopy even though he was not a gastroenterologist; he testified that cardiologists and hematologists are very much aware of the relative benefits and risks of drugs like Coumadin and the effects of their discontinuation.

Schneider v. Fried, 320 F.3d 396 (3d Cir. 2003) : The Court reversed dismissal of a medical malpractice case because the plaintiff's medical experts had been improperly precluded from testifying. One expert had been precluded partly because he no longer practiced in the subspecialty area at issue in the case, but the Court held he was qualified because of his extensive experience working closely with physicians in that subspecialty area.

Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., P.C., 388 F.3d 976 (6th Cir. 2004) : In a medical malpractice action against a cardiology practice and a pulmonologist for brain damage allegedly caused by premature removal of the plaintiff's ventilation tube following cardiac surgery, the plaintiff's expert was precluded from testifying concerning the standard of care regarding removal of a ventilation tube because he was a cardiac thoracic surgeon and was not trained in pulmonology, had never written any articles on the subject, and "could not identify any articles about pulmonology which he has read." Reversing summary judgment for the defendants, the Court held that the witness was qualified by virtue of almost 40 years' experience performing thousands of heart-related operations and managing the postoperative care of patients on a ventilator, including "[m]aybe two hundred" in the preceding three years. In *Sommer v. Davis, 317 F.3d 686 (6th Cir. 2003)* , the Court affirmed summary judgment for the defendants in a medical malpractice case, and held there was no abuse of discretion when the Trial Judge found that the plaintiff's expert, a St. Louis physician, had insufficient personal knowledge of the standard of care in Nashville or a similar community, as is

required under the applicable Tennessee law.

Cooper v. Eagle River Memorial Hospital, 270 F.3d 456 (7th Cir. 2001) : Affirming a judgment for a hospital sued on behalf of an infant who died eight months following his mother's treatment at the hospital, the Court found no abuse of discretion in the admission of testimony by a family physician regarding the standard of care for nurse practitioners. Although the physician had only limited experience with nurse practitioners, he was the director of a large multi-specialty clinic that employed two nurse practitioners and several other physician's assistants.

Mattke v. Deschamps, 374 F.3d 667 (8th Cir. 2004) : Affirming a judgment for the defendants in a medical malpractice case based on an alleged error in the pathology lab, the Court found no abuse of discretion in excluding testimony from the plaintiffs' only expert witness. He was not a pathologist; his primary areas of practice were sleep disorders and pulmonology; and while he had contacts with pathologists and pathology labs in the course of his practice, he was unfamiliar with the particular pathology phenomenon at issue in this case.

McDowell v. Brown, 391 F.3d 1283 (11th Cir. 2004) : In a § 1983 action by a former inmate alleging medical malpractice, the Court found no abuse of discretion in the exclusion of testimony by the plaintiff's experts. Although the Trial Judge erred in ruling that the physicians were unqualified to testify to the standard of care for nurses in a jail, the only scientifically reliable parts of their theories dealt with treatment delays 2-12 times as long as involved in this case.

[iv] Qualifications of Experts -- Medical Testimony -- Product Liability and Toxic Exposure Cases

Payton v. Abbott Labs., 780 F.2d 147 (1st Cir. 1985) : The Court reversed a judgment for a woman who claimed injuries attributable to her mother's ingestion while pregnant of a drug manufactured by the defendant, but it found that two experts were properly permitted to testify for the plaintiff. The Court stated that "[d]efendant is correct that ... an expert must possess some specialized knowledge of the field in which he purports to be an expert, but defendant is incorrect insofar as it challenges the experts here for not having specialized knowledge as to the specific question at issue."

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : The Court reversed a judgment for the defendants in an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, holding it was error to exclude testimony by the treating physician and an expert for the plaintiff because they lacked specialization enabling them to diagnose mesothelioma and determine its causes. The Trial Judge's restricted approach conflicted with the Court's liberal standard governing the qualifications of proffered expert witnesses and its acceptance of more general qualifications. Reversing a summary judgment for the defendants in consolidated suits by people working in or living near a railyard for damages resulting from PCB exposure, the Court held in *In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990)* , that testimony by the plaintiffs' experts was erroneously excluded because of insistence on a certain kind of degree or background. Reviewing a second summary judgment granted on remand, n173 the Court noted that, although it had eschewed imposing overly rigorous requirements of expertise and had been satisfied with more generalized qualifications, the level of expertise may indeed affect the reliability of the expert's opinion.

Jones v. Lincoln Elec. Co., 188 F.3d 709 (7th Cir. 1999) : The Court affirmed a judgment for manufacturers and distributors of welding rods in a suit by a welder who claimed neurological injuries from being exposed to manganese present in fumes emitted from the rods. The central issue in the case was whether the plaintiff suffered from manganism or idiopathic Parkinson's disease. The Court indicated that the Trial Judge may have erred in permitting a professor of materials science to testify for the defense concerning the ability of the body to absorb manganese, since his research

experience was not sufficient to permit him to testify about medical conclusions, but any error was harmless.

Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990) : The Court affirmed a judgment for the defendant manufacturer of an eyeguard worn by the plaintiff when he was hit by a racquetball and sustained eye injuries, holding that the self-acknowledged lack of medical expertise of the defendant's expert in mechanical engineering and accident reconstruction went to the weight rather than the admissibility of his opinion.

Doe v. Cutter Biological, Inc., 971 F.2d 375 (9th Cir. 1992) : Reversing summary judgment for the defendants in a suit for injuries from an HIV-contaminated blood clotting factor, the Court held it was an abuse of discretion to strike affidavits by the plaintiffs' experts. Although the experts were not licensed hematologists, they were opining within their area of expertise.

Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965 (10th Cir. 2001) : The plaintiff brought a product liability action alleging that inadequate warnings accompanied a surgical nail implanted in her broken femur. Affirming summary judgment granted for the manufacturer, the Court found no abuse of discretion in disregarding an opinion from the plaintiff's treating physician regarding the adequacy of the warnings. Although the witness was a board certified orthopaedic surgeon, she had done no research on intramedullary nailing and she had no experience drafting a surgical technique or warning for a product of any kind. In *Summers v. Missouri Pac. R.R. Sys., 132 F.3d 599 (10th Cir. 1997)* , two railroad employees sued their employer under the FELA for injuries allegedly caused by exposure to diesel exhaust fumes. The Court held there was no abuse of discretion in an *in limine* order excluding the testimony of an expert witness, to whom one plaintiff had been referred for neuropsychological testing, which concluded that the plaintiff "was experiencing a probable dementia that was consistent with toxic exposure." The witness was a psychologist and not an expert in the field of medicine or toxicology, and her opinion was based in part on testing that was still in the research stage and had not been validated. In a suit for personal injuries allegedly caused by DPT vaccine, *Graham v. Wyeth Labs.,* n174 the Court reversed a judgment for the plaintiffs and held it was error to exclude testimony by a pediatric ophthalmologist, who had treated the infant plaintiff, that the plaintiff had suffered a stroke before receiving the vaccination. Contrary to the Trial Judge's ruling, there is no requirement that an expert testifying that a vaccine did not cause injury be knowledgeable about the workings, nature, and medical literature concerning endotoxins.

Polston v. Boomershine Pontiac-GMC Truck, Inc., 952 F.2d 1304 (11th Cir. 1992) : In a product liability action alleging enhanced injuries because the involved automobile was not crashworthy, the Court held that a mechanical engineer with substantial experience as an automobile accident investigator was properly permitted to opine that a lack of crashworthiness contributed to the plaintiff's injuries and was properly precluded from testifying which injuries were caused or enhanced by the allegedly defective condition. With his qualifications, he could testify to a reasonable degree of engineering certainty but not to a reasonable degree of medical certainty.

[v] Qualifications of Experts -- Medical Testimony -- Miscellaneous Cases

Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982) : The Court affirmed a judgment for the FAA in a pilot's suit for negligent denial of airman medical certificates, finding no prejudicial error in the exclusion of a witness offered by the plaintiff to testify as an expert on aviation medicine. Observing that an expert's lack of board certification or failure to author articles in his field does not disqualify him as an expert, the Court concluded that some of the testimony that was excluded involved neurological expertise rather than aviation medicine, that some of it covered subjects on which expert testimony was not needed, and that some of the witness' testimony actually was admitted and considered by the Court.

Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995) : The Court affirmed summary judgment for the defendants in a suit by a prisoner who claimed that he was denied medical treatment for heroin withdrawal. One issue was whether the statute of limitations was tolled because of the plaintiff's mental condition. The Court held that an affidavit from a 30-year heroin addict was not admissible to prove that the plaintiff was mentally impaired due to heroin withdrawals. The affiant's personal experience with heroin addiction did not qualify him as an expert on withdrawals involving other people.

Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994) : A former U.S. Marshal bringing a Rehabilitation Act claim attempted to prove that his hepatitis-B was not disqualifying by calling a program manager for the Office of Personnel Management to testify to that effect on the basis of a letter from the treating physician and knowledge of Marshals Service standards. The Court held there was no error in excluding the testimony, as the witness lacked the superior knowledge, skill, experience, and education necessary to render a medical opinion. In *Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993)* , the plaintiff, who had shot and killed two policemen, sued alleging that police had tortured him in extracting a confession. In reversing and remanding a judgment for the individual defendants, the Court noted that there was no abuse of discretion in excluding testimony by a witness for the plaintiff that the plaintiff's description of alleged electroshock treatment was consistent with the scientific understanding of its effects and thus unlikely to have been fabricated. The witness was a pathologist who studied torture on the side, but he failed to show he had the requisite medical or scientific knowledge to establish the effects of electroshock treatments.

Larson v. Kempker, 414 F.3d 936 (8th Cir. 2005) : The plaintiff, a death-row inmate, brought an action alleging that he was not adequately protected from second-hand smoke. The Court held it was error (but harmless) to exclude the testimony of the plaintiff's expert on the effects of second-hand smoke, on the ground that the witness lacked the necessary education and training in any pertinent field despite having read the pertinent literature. Among other things, the expert had over 23 years' experience in researching the effects of second-hand smoke; he had a Ph.D. in physical chemistry; he authored an EPA report on second-hand smoke; and he advised government agencies in both the United States and Canada on possible responses to the health effects of second-hand smoke. In *Smith v. Rasmussen, 249 F.3d 755 (8th Cir. 2001)* , the plaintiff sued under § 1983 after the state Department of Human Services denied Medicaid benefits for sex reassignment surgery. The Court found no abuse of discretion when the Department's expert psychiatrist was not permitted to testify regarding the effectiveness and necessity of sex reassignment surgery in general or for the plaintiff. Although the expert was a board-certified general psychiatrist who had treated several patients with sexual disorders, he had examined only one patient with gender identity disorder, that had been eight years previous, and his contact with the patient was limited. His opinion concerning the plaintiff was based on a literature review, a review of the plaintiff's file, and two interviews with the plaintiff, but his opinion disagreed with sources he acknowledged to be authoritative. In *Bradley v. Pizzaco of Neb., Inc.*, n175 the plaintiff brought a disparate impact case claiming that his discharge for failure to comply with the defendant's no-beard policy violated Title VII because the policy discriminates against black males. The Court held it was error to reject an opinion by the EEOC's dermatologist that 25 percent of black males cannot shave, as the record and the dermatologist's resume showed he had extensive experience in the field and had conducted studies, written articles, and lectured on the topic.

Sweet v. United States, 687 F.2d 246 (8th Cir. 1982) : A former serviceman brought suit against the United States, claiming that the Army failed to inform him that he had ingested LSD as part of an experiment. The Court affirmed a judgment for the defendant, holding that an expert could testify that LSD could not have caused the plaintiff's problems, even in the absence of a personal examination of the plaintiff. The expert was one of the foremost experts in the field of LSD research.

Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984) : The Court affirmed a plaintiffs' judgment in a wrongful death action against doctors responsible for the release of a patient who shot and killed his mother and brother after he had contemplated murdering his grandparents and was found mentally ill by a probate Judge. It found that a clinical psychologist was properly permitted to testify concerning the standard of care expected of the defendants, even though the witness was not a psychiatrist. The Court noted that a clinical psychologist had been part of the team of doctors who made the decision to release the patient.

[q] Qualifications of Experts -- Navigation

United States v. Members of Estate of Boothby, 16 F.3d 19 (1st Cir. 1994) : The Court affirmed an order evicting houseboats from a protected bay, holding there was no abuse of discretion in admitting expert testimony from a Corps of Engineers official familiar with the Corps' regulations regarding navigability and the vessels at issue. The witness was sufficiently qualified to testify to the applicability of the regulations to those vessels, even though she was not a naval architect.

[r] Qualifications of Experts -- Patent Cases

N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 590 F.2d 415 (2d Cir. 1978) : The Court found error in the Trial Judge's exclusion of testimony by a patent agent, who was an expert because of his experience rather than his training.

Crom Corp. v. Crom, 677 F.2d 48 (9th Cir. 1982) : In a dispute over patent rights, the Court held that the District Judge did not err in permitting an engineer with long experience in patent law to testify concerning the interpretation and application of patent claims even if he had no specific experience with the construction of water tanks, which were involved in the dispute.

Manufacturing Research Corp. v. Graybar Elec. Co., 679 F.2d 1355 (11th Cir. 1982) : In a patent infringement action, the Court said that the District Court did not abuse its discretion in permitting a patent applicant to testify as an expert witness despite his interest in the outcome of the case. The interest went to the weight of the testimony, not its admissibility.

Air Turbine Technology, Inc. v. Atlas Copco AB, 410 F.3d 701, 2005-1 Trade Cas. (CCH) P74839 (Fed. Cir. 2005) : The Court affirmed judgment for the defendant in an action for breach of contract, unfair competition, and infringement of a patent for a pneumatic industrial grinding tool. It upheld exclusion of testimony by a co-inventor of the allegedly infringed invention regarding the structure and workings of the device alleged to infringe, since having particularized knowledge as to the former does not necessarily mean he also has particularized knowledge as to the latter. In *Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193 (Fed. Cir. 2002)* , the Court held that a witness who had owned and managed two patent licensing companies following his work in manufacturing displays in the early 1990s was competent and qualified to testify to damages in an infringement action related to LED displays. In *Slip Track Sys., Inc. v. Metal-Lite, Inc., 304 F.3d 1256 (Fed. Cir. 2002)* , an action between owners of patents for a building construction assembly to prevent drywall from cracking during earthquakes, the Court held that a witness with 40 years' experience in the construction industry who had taught about wall construction and another with six years' experience of wall building were qualified to testify that a contested prototype was a sufficient reduction to practice, even though they were not engineers skilled in the art of withstanding seismic forces. In *Shelcore, Inc. v. Durham Indus.*, n176 the Court found that, although an expert was not a toy designer, his expertise in plastics manufacturing was sufficient to justify his testifying in a patent infringement case.

[s] Qualifications of Experts -- Physical Injuries

Robert v. Conti Carriers & Terminals, 692 F.2d 22 (5th Cir. 1982) : Affirming a judgment for an injured deckhand who brought a negligence action against a vessel owner, the Court found that a physical therapist was qualified to testify concerning the physical limitations of the plaintiff following his injury.

[t] Qualifications of Experts -- Prescription Drug and Toxic Exposure Cases

Payton v. Abbott Labs., 780 F.2d 147 (1st Cir. 1985) : The Court reversed a judgment for a woman who claimed injuries attributable to her mother's ingestion while pregnant of a drug manufactured by the defendant, but it found that two experts were properly permitted to testify for the plaintiff. The Court stated that "[d]efendant is correct that ... an expert must possess some specialized knowledge of the field in which he purports to be an expert, but defendant is incorrect insofar as it challenges the experts here for not having specialized knowledge as to the specific question at issue."

McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995) : In a worker's product liability action alleging injury suffered as a result of exposure to hot-melt glue fumes, the Court held there was no abuse of discretion in permitting a consulting engineer who had practical experience and academic training regarding workplace fumes and vapors to testify whether the plaintiff was within the breathing zone of the fumes. Likewise, the Court held there was no abuse of discretion in permitting an experienced otolaryngologist to testify that the plaintiff's vocal-cord polyps resulted from the fumes. On a prior appeal, in *McCullock v. H.B. Fuller Co., 981 F.2d 656 (2d Cir. 1992)* , the Court reversed a judgment as a matter of law for the defendant, but it found no error in the exclusion of expert testimony as to the adequacy of warning labels. The Court reasoned that the witness, an electrical and industrial engineer, lacked training in chemical engineering, toxicology, environmental engineering or the design of warning labels. Thus, while the witness might have been qualified to testify concerning the need for a ventilation system, he was not qualified to testify as to the adequacy of warning labels.

Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996) : Affirming a judgment for the defendant in a product liability action alleging that a smoker had died from cancer caused by asbestos contained in cigarette filters, the Court held there was no abuse of discretion in excluding testimony by an expert for the plaintiff that he had found asbestos fibers in the smoker's lungs. The basis for the opinion was a spectrographic analysis of the residue when a section of the smoker's lung tissue was subjected to "high temperature ashing." Although the witness was an acknowledged expert in testing building materials for asbestos, he had never before conducted a test on human or animal tissue, nor had such a process been used by anyone else to test for asbestos fibers in tissue. The expert also had no knowledge of the methodologies that were or should be used in testing for asbestos in tissue.

Kennedy v. Baxter Healthcare Corp., 348 F.3d 1073 (8th Cir. 2003) (per curiam): Affirming a judgment for the manufacturer of latex gloves sued by a nurse who alleged that she developed a life-threatening allergy to the glove's proteins, the Court held there was no abuse of discretion in excluding testimony from the plaintiff's expert, who was not a doctor or a toxicologist, but who would have opined on what makes a rubber glove unsafe for allergy purposes.

Doe v. Cutter Biological, Inc., 971 F.2d 375 (9th Cir. 1992) : Reversing summary judgment for the defendants in a suit for injuries from an HIV-contaminated blood clotting factor, the Court held it was an abuse of discretion to strike affidavits by the plaintiffs' experts. Although the experts were not licensed hematologists, they were opining within their area of expertise.

Quinton v. Farmland Indus., 928 F.2d 335 (10th Cir. 1991) : The Court held that a doctor of veterinary medicine was qualified to testify regarding the toxic effects on dairy cows of excessive cockleburs in their feed, even though he was not a specialist in toxicology. In *Graham v. Wyeth Labs., 906 F.2d 1399 (10th Cir. 1990)* , the Court reversed a judgment for the plaintiffs in a suit for personal injuries allegedly caused by DPT vaccine, holding it was error to exclude testimony by a pediatric ophthalmologist who had treated the infant plaintiff that she had suffered a stroke before receiving the vaccination. Contrary to the Trial Judge's ruling, there is no requirement that an expert testifying that a vaccine did not cause injury be knowledgeable about the workings, nature, and medical literature concerning endotoxins.

[u] Qualifications of Experts -- Product Liability Cases

[i] Machinery and Tools

Exum v. General Elec. Co., 819 F.2d 1158 (D.C. Cir. 1987) : In a product liability suit by an employee injured while using a french fryer, the Court held that it was error to exclude the testimony of an engineer who had worked at OSHA and had considerable experience with industrial safety and product design issues. The fact that the witness had no specific expertise in kitchen design and had not examined a fast food kitchen did not disqualify him from rendering an opinion concerning the design of a french fryer used in a fast food operation.

DaSilva v. American Brands, Inc., 845 F.2d 356 (1st Cir. 1988) : In a wrongful death action against a manufacturer of an industrial mixing machine, the Court held that a mechanical engineer was qualified on the basis of experience as an engineer and in evaluating and recommending safety devices for machines to give an opinion concerning the mixing machine. It rejected the defendant's argument that only an expert who had experience with the specific machine in question should be permitted to give an opinion on its design.

Martin v. Fleissner GMBH, 741 F.2d 61 (4th Cir. 1984) : The Court held that experts in engineering design who were familiar with the processes used by a piece of equipment could testify concerning a design defect even though they were not experts on the equipment. *Garrett v. Desa Indus.* n177 was an action seeking damages for injuries suffered when the plaintiff, a carpenter, was injured by the discharge of a stud driver manufactured by the defendant. Reversing a judgment for a defendant, the Court found it was an abuse of discretion to prevent a mechanical engineer from testifying about the negligent design of the stud driver simply because he had no prior experience with such a tool. The witness had tested stud drivers prior to trial and had experience with similar mechanisms.

London v. MAC Corp. of Am., 44 F.3d 316 (5th Cir. 1995) : In a product liability action brought against the manufacturer of a shredder that the plaintiff was attempting to clean while standing on top of a gearbox cover ten feet off the ground, the Court held there was no error in excluding testimony offered for the plaintiff by a safety consultant. Not being an engineer, the witness lacked the expertise to address the design of the shredder, how it operates, or the function and use of its parts. The one matter he could testify to -- that it was unsafe to work in that position -- was common knowledge. The principal issue in *Sullivan v. Rowan Cos., 952 F.2d 141 (5th Cir. 1992)* , a seaman's injury case, was whether a tool was defective. The employer, cross-claiming against the tool manufacturer, tendered as an expert in metallurgical failure analysis an employee of a private laboratory that performed material failure analyses using electron microscopes. The Court held that, although a contrary decision would not necessarily have required reversal, there was no abuse of discretion in excluding the expert, whose education and training was in earth science, because he lacked academic or other training or experience in the metallurgical field. In *Lavespere v. Niagara Mach. & Tool Works, Inc.*, n178 a product liability action by an injured worker against the manufacturer of a press brake, the

Court held that a deposition by the plaintiff's expert was properly considered on a motion for summary judgment, even though the expert was an academic with no hands-on experience in designing safeguards for that particular device.

Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341 (7th Cir. 1995) : The Court affirmed a judgment for the defendant manufacturer in a product liability action brought after a hypo-hyperthermia machine fell over onto a nurse moving it in a hospital. There was no error in excluding testimony by the plaintiff's expert regarding a defect in the machine's cord wrap, where the witness proffered unverified statements unsupported by any scientific method and, because he did not have the requisite experience to assess the unit's suitability for its intended purpose within its environment or its adherence to the prevailing standards for similar machines, there was no "fit" with the facts of the case.

Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998) : The plaintiff was injured when a grinding wheel exploded. At trial he called a ceramics expert, who testified not only that the grinding wheel was defectively manufactured, but also that the defendant's product warnings were "completely inadequate." The Court found reversible error in admitting the testimony as to the product warnings because, *inter alia*, the witness was not qualified to give an opinion. He had never designed a warning for a ceramic product, and his knowledge of ceramics would not provide the expertise on "questions of display, syntax, and emphasis," relevant to warnings.

[ii] Qualifications of Experts -- Product Liability Cases -- Miscellaneous Products

Wilson v. Bradlees of New Eng., Inc., 250 F.3d 10 (1st Cir. 2001) : The plaintiff sued the manufacturer and retailers of a shirt that caught fire when she leaned across a burner on a stove. Affirming a judgment for the defendants, the Court found no error when the plaintiff's expert in chemistry was permitted to testify to matters involving chemistry and the flammable properties of substances used in the shirt, but not to usages and practices in the silk-screening industry or to the commercial feasibility of printing shirt logos with flame-retardant ink. The expert admitted that he had no expertise on those subjects. In *McDonald v. Federal Labs.*, n179 the Court upheld a judgment for a police officer who sued the manufacturer of a Mace cannister that had accidentally discharged. It found that the Trial Judge properly restricted the defendant's expert to testifying about the chemical aspects of the cannister and not to permit testimony about its design aspects. The expert "had no education in and expressed no familiarity with the engineering principles involved in the design" of the canister.

Knight v. Otis Elevator Co., 596 F.2d 84 (3d Cir. 1979) : The Court found an abuse of discretion when the plaintiff's expert, who had training in engineering and chemistry and who had experience with machine guarding, but who never examined the elevator in question in the case or designed an elevator, was not permitted to testify whether unguarded elevator control buttons constituted a design defect. The Court said that the expert's inexperience in the areas of design and manufacturing should go to the weight, and not to the admissibility, of his opinion.

Hardin v. Ski Venture, Inc., 50 F.3d 1291 (4th Cir. 1995) : In an action for personal injuries arising out of a ski accident, the plaintiff claimed that he lost control when he was blinded by artificial snow coming from a snowmaker. Affirming a verdict for the defendant, the Court found no abuse of discretion when the plaintiff's expert was precluded from testifying about the principles of snowmaking. The expert's experience in snowmaking was limited to design work on one small sledding hill; the fact that the witness had testified as an expert in other ski accident cases did not qualify him as an expert on snowmaking.

Ellis v. K-Lan Co., 695 F.2d 157 (5th Cir. 1983) : In an action by a father to recover damages for injuries

sustained by his child when the child opened the cap on a container of acid-based drain unclogger, the Court held that an expert was properly permitted to testify concerning a defect in a safety cap, even though he was unfamiliar with the definition of "special packaging" under a federal statute. The Court noted that the federal statute was not conclusive on the question of a proper standard of care and reasoned that the expert's ignorance of the statutory definition went to the weight to be accorded his testimony.

Goodwin v. MTD Prods., Inc., 232 F.3d 600 (7th Cir. 2000) : A plaintiff alleged that he suffered an eye injury when struck by a plastic wingnut that had vibrated loose from the lawnmower he was using. The Court affirmed a judgment against the manufacturer, finding no abuse of discretion when the defendant's expert witness was not permitted to testify that the plaintiff's injury could not have been caused by a plastic wingnut discharged from a lawnmower and that he did not believe the plaintiff when he testified that the was in the operator's zone behind the mower when he was injured. The witness, a mechanical engineer with no medical training, was not qualified to give expert testimony on medical questions, including the cause of an eye injury, and the witness' opinion about the plaintiff's credibility was merely based on speculation and not the proper subject of expert testimony. In *Kirstein v. Parks Corp., 159 F.3d 1065 (7th Cir. 1998)* , the plaintiff, while removing linoleum in his house, used a chemical adhesive remover, followed by lacquer thinner to remove the adhesive residue. He was severely burned when the remover and thinner exploded and caught fire. Affirming summary judgment for the manufacturers of the two products, the Court found no abuse of discretion when the plaintiff's expert was not permitted to testify. Although the witness had impressive credentials as a safety engineer, he was not a chemist, whose expertise would be helpful if not essential as a basis for the suggestion in his deposition that the combination of the two substances increased the danger posed by either one alone. Because he had done no testing on the products, alone or in combination, and provided no studies that employed such testing, he "offered only speculation," and his testimony was properly excluded despite his impressive credentials. In a personal injury action brought for injuries suffered when a child allegedly pushed the stop button on an escalator, *Carroll v. Otis Elevator Co.*, n180 the Court held that an experimental psychologist specializing in visual perception was qualified to testify that the design of the stop button was unreasonably attractive to and operable by children.

Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990) : The Court affirmed a judgment for the defendant manufacturer of an eyeguard worn by the plaintiff when he was hit by a racquetball and sustained eye injuries, holding that the self-acknowledged lack of medical expertise of the defendant's expert in mechanical engineering and accident reconstruction went to the weight rather than the admissibility of his opinion.

Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965 (10th Cir. 2001) : The plaintiff brought a product liability action alleging that inadequate warnings accompanied a surgical nail implanted in her broken femur. Affirming summary judgment granted for the manufacturer, the Court found no abuse of discretion in disregarding an opinion from the plaintiff's treating physician regarding the adequacy of the warnings. Although the witness was a board certified orthopaedic surgeon, she had done no research on intramedullary nailing and she had no experience drafting a surgical technique or warning for a product of any kind.

[iii] Qualifications of Experts -- Product Liability Cases -- Vehicles and Equipment

[A] Consumer Accidents

Bogosian v. Mercedes-Benz of N. Am., Inc., 104 F.3d 472 (1st Cir. 1997) : The Court affirmed a judgment for the defendant in a product liability action brought by a motorist who had parked an automobile and then suffered injuries when it rolled back, allegedly because of a defect in the gear selection lever. There was no error in excluding testimony by the plaintiff's proffered expert regarding transmission design, as he had at most an extensive background in

automotive repair, but no experience or training in automotive design and no engineering degree or expertise.

Zaremba v. General Motors Corp., 360 F.3d 355 (2d Cir. 2004) : The Court affirmed summary judgment for the defendants in a product liability action arising from a rollover accident, finding no abuse of discretion in exclusion of the plaintiffs' expert's opinion that an alternative design for the car would have made it more crashworthy. The Court noted that the witness had been given "the benefit of a substantial doubt" when he was found a qualified expert, since he had only a bachelor's degree in engineering and his only practical experience was in designing parts for automobile air bags; all has remaining employment had been consulting for purposes of litigation, primarily as an accident reconstructionist.

Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995) : Affirming an award of actual damages in favor of a rider who lost his leg in a collision between his motorcycle and an automobile, the Court found no error in permitting a former Miami police chief to testify that motorcycle crash guards (which were lacking on the motorcycle used by the plaintiff) are effective in reducing injuries. While the witness had no scientific or engineering expertise in motorcycle design, he had been on the police motor squad for nine years and had investigated hundreds of motorcycle accidents.

Morales v. American Honda Motor Co., 151 F.3d 500 (6th Cir. 1998) : In a product liability action for injuries to a nine-year-old riding a small motorbike, the Court held there was no abuse of discretion in permitting a witness shown to have qualifications and experience in consumer product safety to testify regarding the design of the motorbike, as well as regarding accident reconstruction, motorbike engineering, and child psychology.

Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) : In a product liability action arising out of a roll-over accident, the Court held there was no abuse of discretion in permitting the plaintiff's expert, an aerospace and mechanical engineer with 22 years of experience in automotive engineering, to testify regarding safe design of car roofs, even though he lacked experience designing car roofs or supporting structures. In *Taylor v. Cooper Tire & Rubber Co., 130 F.3d 1395 (10th Cir. 1997)* , an exploding tire case, the Court found that an expert on materials failure was properly held unqualified to testify that a tire failure was the result of a manufacturing defect, since he conducted no tests and had no expertise in the manufacturing of tires. In *Kloepfer v. Honda Motor Co., 898 F.2d 1452 (10th Cir. 1990)* , a product liability action arising out of the death of a child riding as a passenger on an all-terrain vehicle, the Court held that there was no abuse of discretion in excluding testimony by a "children's accident preventionist," because the case involved operation of the ATV by an adult.

Polston v. Boomershine Pontiac-GMC Truck, Inc., 952 F.2d 1304 (11th Cir. 1992) : In a product liability action alleging enhanced injuries because the involved automobile was not crashworthy, the Court held that a mechanical engineer with substantial experience as an automobile accident investigator was properly permitted to opine that a lack of crashworthiness contributed to the plaintiff's injuries and was properly precluded from testifying which injuries were caused or enhanced by the allegedly defective condition. With his qualifications, he could testify to a reasonable degree of engineering certainty but not to a reasonable degree of medical certainty.

[B] Qualifications of Experts -- Product Liability Cases -- Vehicles and Equipment -- Workplace Accidents

Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d 1169 (1st Cir. 1992) : In an action arising out of damage to a giant video screen when a crane installing it tipped over, the Court held that there was no abuse of discretion in excluding testimony by the plaintiff's expert as to alleged defects in the crane. The witness was a civil, rather than mechanical, engineer with no experience or training regarding the design and manufacture of cranes, and he

had a "hired gun" background as an instant expert in an astonishing number of other areas that suggested he would not possess the professional safeguards ensuring objectivity.

Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997) : A construction worker whose foot was run over by a pavement profiler sought in his product liability action against the manufacturer to introduce testimony from a "human factors" expert that it was necessary in designing construction machinery to take account of the phenomenon of "habituation," where workers tend to "tune out" constantly repeated warning signals. The Court held there was no error in excluding the testimony, as the witness' training was in electrical engineering, not psychology, and his experience was in making machines "user friendly" rather than in considering the safety implications of a device. In *Habecker v. Copperloy Corp., 893 F.2d 49 (3d Cir. 1990)* , the Court reversed a judgment for the defendants in a product liability action arising out of a forklift accident, holding that the plaintiff's proposed expert, who had a master's degree in safety education, a doctorate in human factors and product safety design, taught at Purdue, was active in product safety groups and societies, and had been employed as a safety specialist, should have been permitted to testify regarding the causal relationship between the lack of operator restraints and operator injury. In *Aloe Coal Co. v. Clark Equip. Co.*, n181 an action by a purchaser of a tractor shovel for damages to the shovel from a fire, the Court overturned a judgment against the manufacturer, finding it was error to permit a sales representative of another company to testify for the plaintiffs as to the cause of the fire. The witness was not an engineer, had no experience in designing construction machinery or determining the cause of equipment fires, and had never operated construction machinery. His sole claim of expertise, that he prepared damage estimates used to determine the costs of repairing and replacing equipment, was not sufficient to qualify him to assist the jury. In *Hammond v. International Harvester Co.*, n182 the Court affirmed a judgment for a widow who brought a product liability action claiming a design defect in the tractor that her husband had driven. It found that a witness who had worked selling automotive and mechanical equipment and who had taught automobile repair and maintenance in a high school was qualified to testify as to a design defect in a tractor.

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) : The Court overturned a judgment n.o.v. for the manufacturer of a "crawler tractor" in a suit for damages occurring when a pine sapling entered the cab of the tractor. The Court found it was error to hold that, because he lacked the necessary information and experience, the plaintiff's expert was not qualified to express an opinion as to the design and safety standard of the tractor. Since the expert had the requisite skill and had examined the design of the tractor, it was error to disregard his testimony when setting aside a jury verdict for the plaintiff.

Ancho v. Pentek Corp., 157 F.3d 512 (7th Cir. 1998) : The plaintiff had been injured by an automatic car that transported cardboard in a factory. Affirming summary judgment for the defendant, the Court found no error when the plaintiff's expert was not permitted to testify that the entire plant should have been redesigned to provide a safer system of transporting materials. The expert was a mechanical engineer, without any experience in the field of plant design, and thus lacked qualifications to give expert testimony about plant configuration.

Anderson v. Raymond Corp., 340 F.3d 520 (8th Cir. 2003) : In a product liability action for injuries the plaintiff suffered when she was thrown from a stand-up lift truck, the Court affirmed summary judgment for the defendant granted after the plaintiff's expert was found not qualified to state his opinion that the lift truck should have had a protective guard. The expert admitted that he was not an expert in the design or engineering of stand-up lift trucks; he had never designed or consulted on a design of a stand-up lift truck; he had never designed a component part or a warning of a stand-up lift truck; and he had never operated or even seen a stand-up lift truck until retained to testify in this case.

Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir. 2001) : Affirming a judgment entered as a matter of law after the testimony of the plaintiff's expert was stricken in a product liability action against the manufacturer of an asphalt paver, the Court agreed that a portion of the testimony was properly stricken. The expert's opinion as to the failure of the paver to comply with the Society of Automotive Engineers standards should not have been stricken, since he had nine years experience in failure analysis and evaluation of industrial accidents. As for the remainder of the opinion, the Court noted that the expert admitted that factual issues concerned "a field of expertise known as human factors," that he was not a specialist in the field of human factors, and that his knowledge of the field was gained during a trip to the library a week prior to trial and after he had arrived at his opinion, so the Trial Judge could reasonably have concluded that the expert lacked relevant "specialized knowledge." In *Wheeler v. John Deere Co., 935 F.2d 1090 (10th Cir. 1991)* , the Court held there was no abuse of discretion in permitting a mechanical engineer with special expertise in the safe design of farm equipment to testify to the dangers anticipated by ordinary consumers regarding a combine.

[v] Qualifications of Experts -- Railroad Accident Cases

Lauria v. AMTRAK, 145 F.3d 593 (3d Cir. 1998) : The Court reversed judgment as a matter of law entered for the defendant in a railroad worker's FELA action because the plaintiff had not been permitted to introduce testimony from a witness with 20 years' experience as trackman and supervisor of railroad tracks. The witness' experience sufficiently qualified him to assist the jury by applying his specialized knowledge regarding the defendant's responsibility to inspect and maintain in a safe condition the track on which the plaintiff had slipped. In an FELA action, *Eckert v. Aliquippa & S. R.R.*, n183 the Court stated that an injured railroad brakeman with 30 years' experience was qualified to testify as an expert concerning whether injuries would have occurred if cars had properly coupled during a collision with a parked locomotive.

Lindsey v. Louisville & N. R.R., 775 F.2d 1322 (5th Cir. 1985) : A witness who had worked as railroad switchman was permitted to testify regarding the safety of a loading-unloading operation notwithstanding that he had no experience with piggy-back cars.

[w] Qualifications of Experts -- Reconstruction of Accidents

Wilson v. Woods, 163 F.3d 935 (5th Cir. 1999) : In a personal injury action arising from a truck-car collision, the Court held there was no abuse of discretion in excluding testimony by the plaintiff's accident reconstruction expert. The witness had mechanical engineering degrees, had taught mechanical and industrial engineering, and had 25 years' experience in fire reconstruction and investigation. However, he had only recently shifted his professional emphasis to automobile accident reconstruction, he had no degree or certificate in the subject, he had never conducted any studies or experiments in the field, and he was unable to show that his training or experience as a mechanical engineer gave him expertise in accident reconstruction distinguishable from training received by other mechanical engineers. In a § 1983 action arising out of a high speed chase and a roadblock, *Rosado v. Deters, 5 F.3d 119 (5th Cir. 1993)* , the Court held that there was no abuse of discretion in excluding testimony by the plaintiffs' proposed expert in accident reconstruction. The expert had been last qualified as an accident reconstructionist over 20 years earlier, had not taken any refresher courses, and was unable to provide the physical and mathematical bases for his opinion. In an action by surviving family members of an employee killed in a flash fire at an ammunitions plant against the manufacturer and supplier of a safety suit, *Koonce v. Quaker Safety Prods. & Mfg. Co.*, n184 the Court found that an engineer who specialized in safety engineering and accident reconstruction was qualified.

Fox v. Dannenberg, 906 F.2d 1253 (8th Cir. 1990) : Holding that evidence from the plaintiff's expert engineers had been improperly excluded, the Court reversed a judgment for the defendant in a wrongful death case in which a principal issue was whether the decedent or the defendant was driving at the time of the accident. The Trial Judge had

ruled the witnesses were not qualified because neither had medical training or education. The Court held, however, that determining who was driving from the victims' location after the accident, their injuries, and the damage to the car's interior involved physical rather than medical science and both engineers had significant training and experience in that area. In *Williams v. Pro-Tec, Inc., 908 F.2d 345 (8th Cir. 1990)* , the Court affirmed a judgment for the defendant manufacturer of an eyeguard worn by the plaintiff when he was hit by a racquetball and sustained eye injuries, holding that the self-acknowledged lack of medical expertise of the defendant's expert in mechanical engineering and accident reconstruction went to the weight rather than the admissibility of his opinion.

[x] Qualifications of Experts -- Statistics and Economics

IMPACT v. Firestone, 893 F.2d 1189 (11th Cir. 1990) : The Court reversed a judgment for the defendants in a civil rights employment action, but held that there was no abuse of discretion in rejecting opinion testimony by a political scientist regarding statistical disparities in employment decisions because the witness did not have expertise as a statistician or economist.

[y] Qualifications of Experts -- Tax Cases

American Tech. Resources v. United States, 893 F.2d 651 (3d Cir. 1990) : In an action contesting penalties for promoting abusive tax shelters, the Court held that the government's expert, with academic training and practical experience in valuing businesses, was properly permitted to give evidence on the value of a business.

United States v. Marabelles, 724 F.2d 1374 (9th Cir. 1984) : Affirming a self-employed painter's conviction for tax evasion, the Court found no error in the exclusion of a defense expert, a bank loan officer, who would have testified to a reference manual's figures for the costs of producing income in the painting business. The Trial Judge could have found that the witness was not an expert in taxation or in the painting business, that the manual had only marginal application to the facts of the case, and that the witness lacked sufficient expertise to convert the data on which he relied to the defendant's case.

[z] Qualifications of Experts -- Value of Property

Shane v. Shane, 891 F.2d 976 (1st Cir. 1989) : In a fraud suit between former owners of a closely held corporation, the Court held that the plaintiff was qualified by knowledge and experience to testify as an expert regarding the value of his shares and that his lack of knowledge of the corporation's financial condition during a particular period went only to the weight, not the admissibility, of his opinion.

Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985) : The Court held that an expert who had experience in valuing publicly held stock could testify as to the value of closely held shares.

Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036 (5th Cir. 1998) : In a claim by the owner of an apartment complex for damages arising from a building inspector's "utility holds" on the complex for building code violations, the Court held there was no abuse of discretion in excluding testimony by a witness for the plaintiff that the holds had lowered the complex's market value below what it would have been without the holds. Although the witness had visited the city about once a month to buy and sell property for his employer, and part of his job was to evaluate various properties in order to advise his employer, he was not a licensed appraiser in any state, was not a licensed real estate broker, had no formal schooling in the methods of appraisal, and was unable to respond fully to questions regarding standard appraisal theory.

United States v. Tomasian, 784 F.2d 782 (7th Cir. 1986) : Affirming convictions for involvement with stolen goods, the Court upheld the exclusion of a proffered defense expert who wanted to testify as to the value of ivory tusks. The witness had no experience in appraising ivory and had simply contacted outside sources to learn the price per pound of ivory and multiplied the price by the number of pounds of tusks.

In re Tamen, 22 F.3d 199 (9th Cir. 1994) : The Court held in an action for breach of agreements to sell and develop real property that there was no abuse of discretion in permitting the plaintiff to testify as an expert regarding damages, even though he had little experience in property development and his only previous venture was unsuccessful. In *United States v. 99. 66 Acres of Land, 970 F.2d 651 (9th Cir. 1992)* , the Court affirmed the judgment in an eminent domain action, holding there was no error in excluding expert testimony by the landowner's accountant, who lacked training or practice as an appraiser and who was unfamiliar with data used in his cash flow analysis.

[aa] Qualifications of Experts -- Vocational Rehabilitation

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : To establish the extent of her disability and lost earning capacity resulting from a slip and fall, the plaintiff offered opinion testimony from a witness that was based on her psychological condition, the extent of her physical injuries, employment factors, and tests performed on the plaintiff. The expert had no formal training in vocational rehabilitation, but he had a degree in a field tangentially related to that about which he testified, he had reviewed the vocational rehabilitation literature, and he had attended conferences on the subject. Finding that the witness' qualifications fell within the outer bounds of the *Waldorf* standard, *infra*, the Court held there was no abuse of discretion in a ruling that the witness was qualified. However, the marginal nature of the qualifications was a factor in the decision to reverse a judgment for the plaintiff because no *Daubert* hearing had been conducted. In *Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998)* , the plaintiff suffered injuries in a car accident that rendered him a quadriplegic; he appealed from the denial of a motion for a new trial on damages, claiming, among other things, that the defendant's expert witness on vocational rehabilitation was not sufficiently qualified. The Court affirmed and found no abuse of discretion in permitting the witness to testify as an expert. The witness had no academic training in the field of vocational rehabilitation, but he had significant practical experience through his employment at a developmental disabilities council in attempting to provide jobs for disabled individuals; in that capacity he also became familiar with the relevant literature in the field. The Court concluded that "ordinarily an otherwise qualified witness is not disqualified merely because of a lack of academic training," and that the witness had "substantially more knowledge than an average lay person regarding employment opportunities for disabled individuals."

[bb] Qualifications of Experts -- Voice Spectrography

United States v. Bahena, 223 F.3d 797 (8th Cir. 2000) : In a trial on drug charges, the government proffered a tape recording with incriminating statements, and claimed that it was the defendant's voice on the tape. To disprove this contention, the defendant proffered an expert in voice spectrography, who would testify that the voice on the tape was not the defendant's. Affirming the convictions, the Court found no abuse of discretion in the exclusion of the expert on the ground that he was not sufficiently qualified. The witness had no formal training in voice spectrography, he could not say for certain when he first began in the field, his answers to technical questions were vague, he was not a member of any professional organization in the field, and he was not familiar with published industry standards.

[cc] Qualifications of Experts -- Other Cases

United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995) : In a prosecution for holding a household servant in

involuntary servitude, the government called a "victimologist" to rebut defense evidence that the servant often ventured outside the defendant's unlocked apartment without fleeing. The Court held there was no abuse of discretion in admitting the expert's testimony, even though her principal training and experience related to victims of sexual abuse. She had extensively researched comparable clinical behavior manifested by victims of physical abuse of a non-sexual nature, so she was qualified to testify that the servant's response was consistent with the behavior of abuse victims generally.

Friendship Heights Assocs. v. Vlastimil Koubek, A.I.A. 785 F.2d 1154 (4th Cir. 1986) : The Court reversed a judgment for an architect and a paint manufacturer in an action by a building owner who claimed damages after paint peeled from a building soon after it was painted. It found error in the exclusion of an expert witness who had a master's degree in chemical and ceramic engineering and a doctorate in silicate sciences as well as experience heading a laboratory that performed tests to determine the properties of building materials and concrete. Although the Trial Judge was concerned that the witness lacked practical experience, the Court found that she was a qualified expert.

United States v. Swanquist, 161 F.3d 1064 (7th Cir. 1998) : Affirming the conviction of a banker for making false statements in loan applications, the Court held there was no abuse of discretion in preventing an accountant called by the defendant from testifying about "off balance sheet financing." As an accountant with no banking experience, the witness was not qualified to tell the jury that a practice of omitting certain assets and liabilities was acceptable within the banking community.

Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706 (8th Cir. 2001) : The plaintiff sued for damages to its steel kept in the defendant's warehouse when the Mississippi River flooded. Reversing a judgment for the defendant, the Court held, *inter alia*, that it was an abuse of discretion to permit the defendant's witness, a hydrologist specializing in flood risk management, to give testimony regarding safe warehousing practices. Though qualified to testify that the defendant was diligent and reasonable in assessing available river data in historical context and in making judgments about reasonably foreseeable river levels and the risks they posed to the warehouse in light of the available information, the witness was not qualified to give expert opinions about the specific efforts and specific levels of protection consistent with good warehousing practices.

United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) : A defendant, charged with willfully making false entries in a union ledger, was not permitted to introduce expert testimony from a CPA regarding the defendant's knowledge and understanding of bookkeeping principles. Reversing the conviction, the Court held, *inter alia*, that the expert's experience judging bookkeepers' reliability and competence enabled her to offer an informed and helpful opinion on the defendant's level of bookkeeping knowledge. In *United States v. Barker, 967 F.2d 1275 (9th Cir. 1991)* , the Court affirmed a government contractor's convictions for presenting false claims, holding it was not an abuse of discretion to permit a civil engineer who had worked for the government seven years analyzing claims and reviewing contractors' documents to testify regarding overcharges and doublebilling.

[77] Relationship to Other Rules

United States v. Campos, 217 F.3d 707 (9th Cir. 2000) : The defendant was convicted for importation and possession of marijuana with intent to distribute, after she crossed from Tijuana in a van that had a false compartment full of marijuana. The Court held that the Trial Judge properly excluded polygraph evidence that purported to show that the defendant was truthful in saying she did not know she had drugs in her van when she crossed the border. Under *United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)* (en banc), the polygraph expert's opinion would be an inadmissible opinion as to mental state of the defendant and would be barred by *Rule 704(b)*, notwithstanding *Rule 702*.

Therefore, no *Daubert* hearing was required; if evidence is inadmissible under one rule, "there is no need for a court to determine whether it satisfies predicate evidentiary standards pertaining to another rule." In *Rogers v. Raymark Indus., 922 F.2d 1426 (9th Cir. 1991)* , a product liability wrongful death case arising out of World War II shipyard asbestos exposure, the Trial Judge excluded testimony by one of the plaintiff's experts, finding it to be minimally probative, confusing, and cumulative under *Rule 403*. The Court found no abuse of discretion, rejecting the plaintiff's argument that she needed the testimony because it would be more articulate, eloquent, and clear than that from coworkers who had forgotten the details or were too unsophisticated to describe their working conditions accurately.

[78] Reliance on Other Experts

Dura Automotive Sys. v. CTS Corp., 285 F.3d 609 (7th Cir. 2002) : In this action to determine responsibility for a CERCLA cleanup of a well field, the Court found there was no abuse of discretion in excluding testimony from a hydrogeologist on the grounds that he was essentially being used as the "mouthpiece" for groundwater-flow modelers on whose mathematical models he relied and that there had not been timely disclosure allowing determination of the reliability of the models. One Judge dissented, contending that the majority had created a new rule that would require cautious parties "to engage in something like an infinite regression of the naming of experts," and that the line between experts who exercise significant discretion (who must be produced) and experts whose work is ministerial (who do not) was unworkable.

[79] Requirement of Expert Testimony

Wills v. Amerada Hess Corp., 379 F.3d 32 (2d Cir. 2004) : A deceased seaman's wife brought a Jones Act action alleging that her decedent contracted squamous cell carcinoma from his exposure to benzene on the defendant's ships. Affirming summary judgment for the defendant, the Court found no abuse of discretion in excluding the plaintiff's proffered expert's testimony as unreliable under *Daubert*, and rejected the plaintiff's argument that expert testimony was not necessary to prove causation. Although expert testimony is not necessary in cases where jurors "are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training," here "the causal link between exposure to toxins and other behavior and squamous cell carcinoma is sufficiently beyond the knowledge of the lay juror that expert testimony is required to establish causation."

Wilburn v. Maritrans GP Inc., 139 F.3d 350 (3d Cir. 1998) : The plaintiff was injured when he was swept off the deck of a tugboat. The jury found that the defendant was negligent and the tugboat was unseaworthy. The Trial Judge granted the defendant's motions for judgment as a matter of law and for a new trial on the ground that the evidence was insufficient because the plaintiff failed to present expert testimony. The Court reversed the orders on the ground that expert testimony was not necessary, because the barge captain could have testified to the cause of the accident as a lay witness.

Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995) : The plaintiff broke his leg when heavy material slipped off a forklift operated by an employee of the defendant. Affirming a judgment for the plaintiff, the Court found that expert testimony was not necessary to establish a standard of care for forklift operation: "The operation of a forklift involves simple principles of balance well within the common knowledge of lay jurors." In *Carlsen v. Javurek*, n185 the Court reversed judgments for defendants in an action for the wrongful death of a hospital patient because the jury had been instructed that it could only find negligence on the basis of expert opinion; the lack of care alleged in the instant case was comprehensible to lay jurors.

United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003) : The defendant, convicted of receiving and distributing

images of child pornography over the Internet, argued that, under the Supreme Court's decision in *Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)* , the government was required to present expert testimony that the images were of real children rather than computer-generated, "virtual" children. Affirming, the Court concluded that "*Free Speech Coalition* did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful image is of a real child. Juries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the district court."

[80] Rescue Operations

Beck v. Haik, 377 F.3d 624 (6th Cir. 2004) : In a civil rights action on behalf of a drowning victim, which alleged that the county prevented a private water rescue organization from rescuing the victim, part of the dispute was whether the county provided a "meaningful alternative" to private rescue. A diving rescue expert who would have testified that county officials failed to use proper rescue techniques after the victim fell into the water was excluded on the ground that the dispute was not about whether the county engaged in a perfect rescue operation. Holding that exclusion of the evidence was error, the Court noted that the testimony suggested that the county was engaged in a body recovery operation rather than a rescue, which "would obviously fall short of being a meaningful alternative to rescue." However, there was no error in excluding the expert's conclusion that the victim would have survived if private rescuers would have been permitted to enter the water, since this was a medical judgment for which the expert lacked the necessary medical training.

[81] Rhetorician

United States v. Ingle, 157 F.3d 1147 (8th Cir. 1998) : The Court affirmed a conviction for aiding and abetting a murder, finding no abuse of discretion in denying the defendant's request for authorization to hire a rhetorician to serve as an expert witness on the issue of the voluntariness of his tape-recorded admissions to fellow inmates. The issue of voluntariness is for the Judge, not the jury, and it is "inherently implausible" to suggest the rhetorician would have been helpful in persuading the jury that the admissions were unreliable.

[82] Risk Assessment

Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001) : A manufacturer of herbal diet pills sued for defamation after the defendants reported that the pills were unsafe. Reversing summary judgment for the defendants, the Court found that the Judge's reasons for rejecting expert testimony that the product was safe were insufficient under *Daubert*. The Judge had excluded testimony using the methodology of risk assessment, which consists of "reviewing incident reports and the literature on a particular topic and then forming an opinion based on the information reviewed," because the experts had simply listed the articles they relied upon and had not explained how the literature supported their opinions. The Court rejected the argument that the testimony was reliable simply because the experts were relying on peer-reviewed articles, but it found that when the experts pointed to objective sources for their opinion, they had at least minimally complied with *Daubert*'s reliability standards. As a gatekeeper under *Daubert*, the Judge was free to probe the relationship between the literature and the experts' opinions on remand.

[83] Safety Experts

Saldana v. Kmart Corp., 260 F.3d 228 (3d Cir. 2001) : The Court affirmed a summary judgment granted against the plaintiff in a slip and fall case, finding no abuse of discretion in the exclusion of testimony from a safety expert. The expert's conclusion that the defendant was negligent because it failed to follow OSHA regulations applied an incorrect

legal standard and was therefore irrelevant. Her conclusion (offered on the issue of constructive notice) regarding the time it would take a bottle of wax to empty and cause a puddle like that in the case was based on tests of questionable accuracy and provided no assistance on the essential question when the spill commenced or concluded.

Jenkins v. Arkansas Power & Light Co., 140 F.3d 1161 (8th Cir. 1998) : The plaintiff, suing for injuries incurred when he dove into a reservoir and collided with an unmarked submerged island, offered testimony by an officer responsible for major Corps of Engineers reservoirs regarding proper reservoir management as it relates to the safety of recreational users. The Court found no abuse of discretion in exclusion of the testimony. Testimony regarding the private defendant's federal duties and responsibilities was an issue of law for the Trial Judge. Testimony as to what actually happened (in regard to what might have prevented the accident) was unnecessary because there was an eyewitness, the facts were not complex, and the plaintiff's expert had no experience in investigating diving accidents. Testimony regarding the plaintiff's actions and whether they were negligent related to an issue for the jury as to which the expert had no helpful specialized knowledge, since he admitted that his opinion was based on swimming with his brothers when growing up. In *Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306 (8th Cir. 1997)* , the Court affirmed a judgment for a truck driver injured when a train struck his truck on the defendant's property, and held that it was proper to admit expert testimony from a highway safety specialist who had 16 years' experience directing the office of traffic and safety which oversees all of the state's public railway crossings.

Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119 (10th Cir. 1995) : The Court affirmed a judgment for the defendant in a slip and fall case, holding that testimony by the plaintiff's safety expert was properly excluded. The expert would have testified that the floor of the defendant's store was maintained in an unsafe condition, but the Court held that "the normal life experiences and qualifications of the jury would permit it to draw its own conclusions concerning the safety of the floor, based upon the lay testimony of eyewitnesses."

[84] Scientific Evidence

[a] Admissibility Principles

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) : This case is discussed more fully in the Editorial Explanatory Comment, *§ 702.02[5]*. The Court rejected the *Frye* general acceptance test for scientific evidence and concluded that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." On remand from the Supreme Court, the Court of Appeals held that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under *Rule 702*. *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)* .

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) (see the Editorial Explanatory Comment, *§ 702.02[6]*): Reversing in part a second summary judgment for the defendants in consolidated suits by people working in or living near a railyard for damages resulting from PCB exposure, the Court observed, *inter alia*, that: *Daubert* confirmed the Circuit's basic holding that an expert's testimony is admissible so long as the process or technique used in formulating the opinion is reliable; a Trial Judge should take into account all the factors listed by either *Daubert* or *Downing* (*infra*), as well as any others that are relevant, in determining the reliability of a scientific technique or method; the notion of "fit" means that the requirement of reliability, or "good grounds," extends to each step in an expert's analysis all the way through the step that connects the work of the expert to the particular case; and the evidentiary standard of reliability, while higher than a *prima facie* showing, is lower than the merits standard of correctness -- it is "good grounds," not perfect grounds, nor the best conclusion. In *United States v. Downing*, n186 the Court exhaustively analyzed the propriety of admitting expert testimony on eyewitness identification, suggesting the

approach to be followed by a Trial Judge asked to rule upon the admission of scientific evidence. The Court indicated that the Judge should

> conduct a preliminary inquiry focusing on (1) the soundness and reliability of the technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research and test result to be presented, and particular disputed factual issues in the case.

The Court's analysis in *Downing* was heavily relied upon by the Supreme Court in *Daubert*.

[b] Scientific Evidence -- Ammunition Identification

United States v. Davis, 103 F.3d 660 (8th Cir. 1996) : Affirming a bank robbery conviction, the Court held that the District Court had fully executed its gatekeeping function and had not abused its discretion in admitting expert testimony, based on Inductively Coupled Plasma-Atomic Emission Spectrometry analysis, that bullets expended at the scene came from a cartridge box found in the defendant's car.

[c] Scientific Evidence -- Causation of Disease or Injury

[i] Drugs and Medical Devices

Meister v. Medical Eng'g Corp., 267 F.3d 1123 (D.C. Cir. 2001) : Affirming a judgment for the defendants in an action by a plaintiff alleging that she contracted sclerodoma (a tissue disease) as a result of breast implants, the Court upheld the exclusion of causation experts who testified on the basis of individual case reports, a temporal connection, and a differential diagnosis. The differential diagnosis was not reliable because there was no evidence that breast implants could cause sclerodoma. Inferring causation simply from temporal proximity, from "the mere simultaneous existence" of exposure and injury "clearly is not an appropriate methodology." And the case studies were of limited value because they were "not controlled studies," and the causation conclusions flew in the face of an "overwhelming body of contradictory epidemiological evidence." In a Bendectin case, *Raynor v. Merrell Dow Pharmaceuticals, Inc., 104 F.3d 1371 (D.C. Cir. 1997)* , the plaintiffs' experts testified to causation on the basis of chemical studies, *in vitro* studies, and animal studies. The Court, affirming a JNOV for the defendant, concluded that this methodology was unscientific because it came to a conclusion contrary to every existing epidemiological study. The Court distinguished its opinion in *Ambrosini v. Labarraque* (see *infra*), where the same type of testimony was held admissible, on the ground that the drug at issue in *Ambrosini* had not been the subject of significant epidemiological study. In this case, the plaintiffs' experts' methodology and conclusion had not been peer reviewed; their testimony suffered from "testing" problems since there was no way to verify that animal and chemical studies are accurate as applied to humans; the error rate is likely to be quite high when sound epidemiological studies produce opposite results from nonepidemiological ones; and reliance on chemical and animal studies in the face of contradicting epidemiological evidence is not a generally accepted methodology. By contrast, in *Ambrosini v. Labarraque*, n187 an action alleging that birth defects were caused by the drug Depo-Provera, the Court held that in rejecting the testimony of an epidemiologist and a teratologist, the Trial Judge had misconceived "the limited gatekeeper role envisioned in *Daubert*." Both experts had relied on standard methodologies and published studies. Both were highly qualified, which is "circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." The fact that one expert had not published his conclusions was understandable, because the drug Depo-Provera is no longer prescribed during pregnancy. It was also relevant that the teratologist had testified to his conclusions about Depo-Provera at an FDA hearing, before the instant litigation arose. Both experts sufficiently ruled out some other possible causes for the

plaintiff's birth defect, and the fact that other possible causes might have remained "uneliminated" went only to weight and not admissibility. Finally, the fact that the epidemiologist could not state categorically that Depo-Provera causes birth defects did not render his testimony inadmissible under the "fit" prong of *Daubert*, which requires only that the testimony be relevant -- it need not be sufficient to prove the point.

Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248 (1st Cir. 1998) : The plaintiff alleged that she suffered pelvic inflammatory disease from using the Dalkon Shield intrauterine device in 1973-1974. The plaintiff showed symptoms of PID in 1974 and required surgery in 1979. In 1996 the plaintiff's blood tested positive for chlamydia, indicating that at some prior time she had been infected by chlamydia. The Trial Judge excluded the Trust's expert witnesses, whose opinion was that the PID probably was caused by the chlamydia infection, and limited the Trust's examination of the plaintiff's expert. Reversing a judgment for the plaintiff, the Court found that the Trust experts' opinions had an adequate basis, including the fact that the plaintiff suffered a sexually transmitted disease in 1972 and one such disease tends to be correlated with others. The Court also rejected an argument that the experts were properly excluded under *Rule 403*, since the probative value of the expert opinion was clear as was its importance to the defense, and the jury could have been instructed on the widespread nature of chlamydia in order to reduce its possible prejudice.

Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995) : In a consumer's product liability action for severe liver damage caused by the combination of alcohol and acetaminophen, the Court held there was no abuse of discretion in the determination that the plaintiff's experts employed reliable methodology when basing their causation opinions on patient history, examination, lab and pathology data, and study of the peer-reviewed literature, since the medical community daily uses the same methodologies in diagnosing patients.

Glaser v. Thompson Med. Co., 32 F.3d 969 (6th Cir. 1994) : Reversing a summary judgment for the manufacturer of a diet pill that allegedly caused intracranial bleeding and personal injuries, the Court held that the scientific validity of the reasoning underlying the plaintiff's expert's opinion of causation was sufficiently established. The dissenting Judge disputed the applicability of the cited scientific studies and concluded that the expert's opinion was based on *post hoc, ergo propter hoc* reasoning, not scientific reasoning. In *Novak v. United States*, n188 the Court held that judgment should be entered for the United States in a suit by a widow who claimed her husband died as a result of a swine flu vaccination. It concluded that expert evidence relating to causation of a disease by swine flu vaccine was not admissible in view of the fact that the specific cause of the disease was unknown and conjectural at best.

Fuesting v. Zimmer, Inc., 421 F.3d 528 (7th Cir. 2005) : The Court reversed a judgment for the plaintiff in a product liability action arising from the failure of a prosthetic knee joint. The plaintiff's expert had testified that sterilization by gamma irradiation in air had caused the implant's polyethylene to oxidate and ultimately to delaminate and prematurely fail. The Court held that the expert's testimony had not been subject to an adequate *Daubert* analysis: his theory had not been subjected to any scientific tests or experiments; it had not been published or subjected to peer review, nor had it received scientific acceptance; the expert did not bridge the analytical gap between basic principles and the complex conclusions he reached; and his opinion had been developed expressly for the litigation. In an action by a smoker who alleged that a nicotine patch caused a heart attack, *Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996)* , the Court affirmed a summary judgment for the defendant, holding that the plaintiff's expert's deposition lacked scientific rigor, as it offered neither a theoretical reason nor any experimental, statistical, or other scientific data from which a causal relation might be inferred. In a wrongful death action arising from a hemophiliac's death from AIDS, *Gruca v. Alpha Therapeutic Corp.*, n189 the Court reversed judgments for the defendant blood plasma manufacturers, holding that it was error for the Trial Judge to decline to determine the admissibility under *Daubert* of the plaintiffs' proffered expert testimony concerning antigenic stimulation. In *Porter v. Whitehall Labs.*, n190 the Court affirmed a summary judgment for the defendants in a product liability action alleging that ibuprofen had caused acute kidney failure, holding that none of the plaintiff's experts' opinions was well grounded in the scientific method and thus they

did not meet *Daubert*'s standards.

Sorensen v. Shaklee Corp., 31 F.3d 638 (8th Cir. 1994) : The Court affirmed summary judgment for the defendants in a product liability action seeking recovery for mental retardation of children allegedly caused by their parents' pre-conception ingestion of alfalfa tablets. The plaintiffs' proposed expert testimony was not relevant because it assumed the presence of a chemical that there was no proof the tablets contained, and it had none of the *Daubert* factors indicating scientific validity.

Kennedy v. Collagen Corp., 161 F.3d 1226 (9th Cir. 1998) : Relying on peer-reviewed articles, clinical trials and product studies conducted by the defendant, an investigation by the Texas Department of Health, examination of the plaintiff and review of her medical history, medical laboratory tests, and medical reports, the plaintiff's expert offered an opinion that the defendant's collagen product caused the plaintiff's autoimmune disorder. The Trial Judge rejected the testimony because there was no specific study connecting the product with the disease and there was no consensus in the medical community on the point. Reversing summary judgment for the defendant, the Court held that it was an abuse of discretion to ignore scientific studies establishing the validity of the methodology relied upon by the expert; his reasoning was based on objective, verifiable evidence and scientific methodology of the kind traditionally used by experts in his field. On remand from the Supreme Court, the Court of Appeals held in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995)* , that summary judgment was properly granted against the plaintiffs because the testimony of their experts, which was offered to prove that Bendectin caused the plaintiffs' limb reduction, was inadmissible under *Rule 702*. None of the plaintiffs' experts had conducted research that pre-existed or was independent of the litigation; none of the research and analysis had been "subjected to normal scientific scrutiny through peer review and publication"; the experts failed to explain with particularity the methodology they followed; and they could not point to any objective external source to validate their methodology. In an action for a birth defect allegedly caused by a fertility drug, *Lust v. Merrell Dow Pharmaceuticals, Inc.*, n191 the Court affirmed summary judgment for the defendant, holding that expert testimony offered by the plaintiff on causation was properly excluded. The expert's research had not been subjected to peer review and although it had been developed before the present litigation, he was already a professional plaintiffs' witness at the time. Furthermore, he presented no evidence that his method and premises were accepted by or espoused by a recognized minority of teratologists. In *Hopkins v. Dow Corning Corp.*, n192 an action for damages suffered from defective silicone breast implants, the Court affirmed a judgment for the plaintiff, holding that testimony from the plaintiff's experts was properly admitted as proof of causation. Relying on *Daubert*, the Court concluded that the experts "based their opinions on the types of scientific data and utilized the types of scientific techniques relied upon by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data to review."

Norris v. Baxter Healthcare Corp., 397 F.3d 878 (10th Cir. 2005) : In an action by the recipient of silicone gel breast implants alleging systemic autoimmune disease, the Court found no error in the exclusion of the plaintiff's causation experts. Their testimony did not satisfy *Daubert*'s requirement that the underlying reasoning or methodology be scientifically valid, because they "completely ignored or discounted without explanation the many epidemiological studies which found no medically reliable link between silicone breast implants and systemic disease." Their reliance on differential diagnosis and case studies was misplaced, since under accepted scientific methodology those techniques are valid only when general causation has been established. In *Hollander v. Sandoz Pharms. Corp., 289 F.3d 1193 (10th Cir. 2002)* , an action alleging that the defendant's drug Parlodel, given to stop lactation in new mothers, caused the plaintiff to suffer a postpartum hemorrhagic stroke, the Court found no abuse of discretion when testimony by the plaintiffs' expert testimony was excluded because: (1) the experts were unable to explain the physiological mechanism by which Parlodel caused strokes; (2) the kinds of case reports on which the plaintiffs relied have been repeatedly rejected as a scientific basis for establishing causation; (3) the fact that the drug belongs to a class of compounds that have been shown to cause hypertension did not constitute reliable evidence that it caused strokes; and (4) the animal

studies on which the experts relied were too dissimilar from the facts of the case.

Rider v. Sandoz Pharm. Corp., 295 F.3d 1194 (11th Cir. 2002) : The Court affirmed exclusion of expert testimony and a resultant summary judgment in an action alleging that the defendant's drug Parlodel, given to stop lactation in new mothers, caused the plaintiffs to suffer postpartum hemorrhagic strokes. The Court found that case reports on which the plaintiffs' expert principally relied, even if quite detailed (and many were not), are not reliable enough to demonstrate a causal link because they report a single patient's symptoms in an uncontrolled context. Other supporting evidence -- "dechallenge/rechallenge" tests, animal studies, and chemical similarity -- did not supply sufficient assurances of reliability. In a silicone breast implant case, *Toole v. Baxter Healthcare Corp., 235 F.3d 1307 (11th Cir. 2000)* , the plaintiff presented witnesses who testified that her implants caused her disease or who testified to the disease process when the human body reacts with silicone or silica. The Court affirmed a judgment for the plaintiff, finding no abuse of discretion when the experts' testimony was determined sufficiently reliable, since they had conducted research, published in peer-reviewed journals, and treated hundreds of patients with silicone gel implants. In *Allison v. McGhan Medical Corp.*, n193 the Court affirmed a summary judgment for breast implant manufacturers. The plaintiff had submitted proposed testimony by a board certified immunologist, a board certified pathologist, and a treating board certified rheumatologist. The Court found no abuse of discretion in determinations that: certain studies were not sufficiently reliable, especially when contrasted with more than 20 epidemiological studies that found no statistical correlation between silicone breast implants and systemic disease; the pathologist's theories were based more on personal opinion than scientific knowledge; the treating rheumatologist did not satisfy Georgia's standard of reasonable probability; and the rheumatologist's opinions were based upon unreliable methodology.

Terran v. Secretary of Health & Human Servs., 195 F.3d 1302 (Fed. Cir. 1999) : The Court affirmed a decision denying compensation under the National Child Vaccine Injury Act of 1986 to a child who began suffering seizures after receiving DPT vaccine. The Special Master had applied the factors set forth in *Daubert* and had determined that the plaintiff's expert's theory regarding the causal link between the pertussis toxin and the plaintiff's condition did not meet the standards for scientific reliability. The Court concluded that the Special Master had properly used the *Daubert* factors as a framework for analysis but not as four tests that each had to be satisfied.

[ii] Scientific Evidence -- Causation of Disease or Injury -- Other Cases

Vargas v. Lee, 317 F.3d 498 (5th Cir. 2003) : In a motorist's personal injury action, the Court vacated a judgment for the plaintiff and remanded for recalculation of damages because an expert was improperly permitted to testify that the accident caused the plaintiff to develop symptoms of fibromyalgia syndrome. The Court held that scientific understanding of the syndrome had not progressed sufficiently to change its conclusion in *Black v. Food Lion, Inc.*, *infra*, that expert testimony regarding the causation of the syndrome by traumatic injury did not satisfy the *Daubert* factors or any other standard of reliability. In a slip and fall case, *Black v. Food Lion, 171 F.3d 308 (5th Cir. 1999)* , a treating physician was permitted to testify that the plaintiff suffered from fibromyalgia syndrome, and that this condition was caused by the trauma from the slip and fall. Reversing, the Court found that the expert's theory -- that the fall caused trauma that caused hormonal damage leading to fibromyalgia -- failed under the *Daubert* factors. Her theory had not been verified by testing and had not been peer-reviewed. The expert herself recognized that fibromyalgia has no known etiology. Moreover, the expert's conjecture did not satisfy the standard for general acceptance and had no known potential rate of error. The Trial Judge had permitted the testimony on the ground that the expert had followed a proper protocol by eliminating other possible causes of fibromyalgia. That, however, was "not an exercise in scientific logic but in the fallacy of post-hoc propter-hoc reasoning, which is as unacceptable in science as in law."

Quinton v. Farmland Indus., 928 F.2d 335 (10th Cir. 1991) : Affirming judgments against the defendant in an action for damages to dairy cattle injured by feed containing excessive cockleburs, the Court held that limitations

regarding the extant research on cockleburs did not render inadmissible the plaintiff's expert's extrapolations from the debilitating toxic effects of the plant reported in the literature to the sick animals he examined.

[iii] Scientific Evidence -- Causation of Disease or Injury -- Toxic Exposure

[A] Consumer Injuries

Campbell v. Metropolitan Property & Cas. Ins. Co., 239 F.3d 179 (2d Cir. 2001) : In a declaratory judgment action against a liability insurer for lead-paint poisoning injuries, it was necessary for the plaintiffs to prove that there was injury within the first eight months of exposure to the paint. Affirming in part a judgment for the plaintiffs, the Court found no abuse of discretion in admission of testimony from an expert conceded by the defendants to be "preeminent in his field" that injury to blood cells could occur within ten days of exposure. Reliability under *Daubert* was supported by: experience at the hospital center he led, where treating approximately 3,000 active cases meant that his theories were being tested daily in practice, and there was no evidence of any rate of error; numerous peer-reviewed articles directly related to the opinions to which he was testifying; and wide acceptance of his theories.

Heller v. Shaw Indus., Inc., 167 F.3d 146 (3d Cir. 1999) : The plaintiffs alleged in a product liability action against the maker of a carpet installed in their house that volatile organic compounds (VOCs) emitted by the carpet caused the wife's respiratory illnesses. The Trial Judge excluded an opinion by an allergy-immunology specialist because no research supported his contention that the level of VOCs detected could cause the illness experienced, his differential diagnosis did not rule out *all* alternative possible causes, and the evidence showing a temporal relationship between installation of the carpet and the plaintiff's symptoms was weak. The Court noted that an expert's opinion need not be based on published studies so long as the methodology is scientifically valid, and that a differential diagnosis need not rule out all alternative causes so long as the diagnostic techniques employed provide good grounds for the conclusion. However, the Court affirmed summary judgment for the defendant because the expert had heavily relied on the temporal relationship, which was unreliable in this case because the plaintiff was ill both before the carpet was installed and after it was removed. The Court also found no abuse of discretion in excluding testimony by an industrial hygienist who sampled the air in the plaintiffs' house at various times, measured the concentrations of VOCs, and concluded that the symptoms were caused by prolonged exposure to VOCs from the carpet. While the witness' methodology for measuring VOC concentrations might have been proper, his methodology for determining the concentrations at earlier times was unreliable, and the levels that he did find were far below those found to cause human illness. In *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802 (3d Cir. 1997)* , the Court reversed summary judgment for the defendant, an exterminator sued for injuries suffered by homeowners allegedly as a result of pesticide application, because the plaintiffs' expert testimony on causation was improperly excluded. The expert's opinion was sufficiently reliable under *Daubert*, where it had a substantial factual basis in his review of relevant medical records and the defendant's application records, and the supporting scientific theory is widely accepted.

Ruffin v. Shaw Indus., 149 F.3d 294 (4th Cir. 1998) (per curiam): The plaintiffs sued the manufacturer and the retailer of a carpet for breach of implied warranty, alleging that they had suffered toxic injuries from chemicals in the carpet. Affirming summary judgment for the defendants, the Court held there was no error in excluding evidence by the plaintiffs' experts, who had tested a sample of the carpet and found it caused biological responses in mice. The experts' methodology had not been validated by independent replication, peer reviewers had been uniformly critical, it was not generally accepted, and it did not (despite the experts' contention) follow the standard protocol for similar testing. In *Cavallo v. Star Enter., 100 F.3d 1150 (4th Cir. 1996)* , an action to recover for a respiratory disease from exposure to a jet fuel spill, the Trial Court granted summary judgment for the defendant, reasoning that the plaintiff's toxicological experts could not satisfy the *Daubert* standards: the experts' methodology had not been validated and was not supported by scientific literature; the literature relied upon by the experts concerned much higher exposures than that suffered by the plaintiff; and the experts' reliance on the temporal proximity between exposure and injury was inconsistent with the

scientific method. Noting that the Judge's "interpretation is restrictive in this case, but it is not inconsistent with *Daubert*," the Court found no abuse of discretion in the determination that the methodology and reasoning used by the witness did not "have a significant place in the discourse of experts in the field," as required by *Daubert*.

Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996) : In an action alleging that a smoker died from cancer caused by asbestos contained in cigarette filters, the Court affirmed a judgment for the defendant and held there was no abuse of discretion in excluding testimony by an expert for the plaintiff that he had found asbestos fibers in the smoker's lungs. The basis for the opinion was a spectrographic analysis of the residue when a section of the smoker's lung tissue was subjected to "high temperature ashing." Although the witness was an acknowledged expert in testing building materials for asbestos, he had never before conducted a test on human or animal tissue, nor had such a process been used by anyone else to test for asbestos fibers in tissue, and the expert had no knowledge of the methodologies that were or should be used in testing for asbestos in tissue.

Wright v. Willamette Indus., Inc., 91 F.3d 1105 (8th Cir. 1996) : In an action alleging personal injuries due to exposure to formaldehyde emanating from a nearby fiberboard plant, the Court reversed a judgment for the plaintiffs and held that the testimony of the plaintiff's expert on causation should not have been admitted. The expert testified that the injuries were more probably than not related to exposure to formaldehyde, "but that opinion was not based on any knowledge about what amounts of wood fibers impregnated with formaldehyde involve an appreciable risk of harm to human beings who breathe them." Therefore, the expert's testimony was speculative and unscientific under *Daubert*.

McClain v. Metabolife Int'l, Inc., 401 F.3d 1233 (11th Cir. 2005) : In an action claiming that a herbal weight-loss supplement containing ephedrine and caffeine caused the plaintiffs' strokes and heart attacks, the Judge denied, after a *Daubert* hearing, a motion to exclude causation testimony from a pharmacologist and a neurologist. Reversing a judgment for the plaintiffs, the Court held that when the Judge disavowed ability to handle the *Daubert* issues it was an abuse of discretion to abdicate the gatekeeping role. In any event, it was an abuse of discretion to admit the experts' testimony, as it lacked reliability. The pharmacologist used questionable principles and neglected established scientific ones, and made unjustifiable use of studies, reports, and consumer complaints. The opinions of the neurologist, a clinician, were subject to similar infirmities and were not saved by reliance on a differential diagnosis method (which cannot provide proof of specific causation in the absence of reliable evidence of general causation), anecdotal case reports (which cannot ordinarily provide proof of causation by themselves), or a challenge/de-challenge/re-challenge methodology lacking sufficient controls. In *Rink v. Cheminova, Inc., 400 F.3d 1286 (11th Cir. 2005)* , the Court affirmed a summary judgment for the manufacturer of a pesticide, in a class action alleging that the plaintiffs became ill as a result of their exposure to the pesticide after it was kept at unsafe temperatures. The Trial Judge found that testimony by an expert who purported to reconstruct the storage temperatures was unreliable in light of the expert's inexperience with the key substance in the pesticide, his failure to visit the storage sites and to consider the testimony of workers at the sites, and his continued use of data in subsequent reports even though the data was previously found to be unreliable. The Court agreed that the expert could not simply take data from one storage site and assume that it was applicable to other sites, and that the expert's assumptions about the sites were unsupported by sufficient factual information. The Court further found that the testimony of the plaintiff's toxicology experts was properly excluded, because these experts simply relied on the other expert's findings, which were properly found unreliable.

[B] Scientific Evidence -- Causation of Disease or Injury -- Toxic Exposure -- Workplace Injuries

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) : In a suit alleging that the plaintiff's cancer was caused by exposure to PCBs, the Supreme Court found that the Trial Court did not abuse its discretion in excluding the plaintiff's expert testimony on causation. The experts' reliance on studies involving infant mice was unscientific, because the mice contracted a different kind of cancer than that suffered by the plaintiff; moreover, the studies could not be replicated in

adult mice nor in any other species. The experts' reliance on four epidemiological studies was likewise flawed. Two of the studies found no statistically significant connection between PCBs and cancer; one study did not mention PCBs; and the fourth study, which found a statistically significant connection, involved subjects who were exposed to a variety of other carcinogens.

Amorgianos v. AMTRAK, 303 F.3d 256 (2d Cir. 2002) : The Court affirmed summary judgment for the defendant in a painter's action claiming that exposure to xylene in paint vapors caused neurological injuries. Testimony by an industrial hygienist regarding the xylene concentration at the work site was properly rejected because the expert failed to apply his own methodology reliably, neglecting to include in his calculations certain variables that he said were relevant and that were available to him. The Court found no abuse of discretion in rejecting general causation opinions that the Trial Judge, after a rigorous analysis of the experts' methods, found were unreliable because the analytical gap between the studies on which they were based and the conclusions was simply too great.

Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) : An employee of a window manufacturer alleged that talcum powder used as a lubricant on gaskets for the windows caused him severe sinus problems. Affirming a judgment for the plaintiff in a product liability action against the gasket manufacturer, the Court held there was no abuse of discretion in admitting opinion testimony from the plaintiff's treating physician that the plaintiff's sinus problems were caused by inhalation of airborne talc in the workplace. Although the expert's opinion was based only on a differential diagnosis, the Court held that a reliable differential diagnosis provides a valid foundation for an expert opinion and that the expert's diagnosis was sufficiently reliable in this case.

Burleson v. Texas Dept. of Criminal Justice, 393 F.3d 577 (5th Cir. 2004) : In an action by an inmate who claimed that prison officials were deliberately indifferent to his health when they allowed him to weld with tungsten electrodes, the plaintiff offered the expert testimony of a "well-credentialed toxicologist and expert in occupational medicine" that he inhaled thorium dust, that the dust lodged in his airways, and that it damaged surrounding cells. However, the expert conceded he had never calculated an individual's radiation exposure to thoriated tungsten welding electrodes, and he lacked any special training or medical certificates in any radiation-related disciplines or medical physics. Affirming summary judgment for the defendants, the Court upheld exclusion of the testimony, which the Magistrate Judge had concluded "was based on speculation, guesswork, and conjecture to support his theory" and was unsupported by any studies linking the prisoner's type of cancer to the 2% thoriated tungsten welding electrodes. In *Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999)* , the Court held that it was an abuse of discretion to exclude the testimony of a doctor who concluded that the plaintiff-workers suffered numerous health problems as a result of overexposure to benzene. The expert relied on extensive scientific literature establishing a connection between benzene and the symptoms experienced by the plaintiffs. He also properly relied on the "strong temporal connection" between benzine exposure and the onset of symptoms. A temporal connection alone is entitled to little weight in determining causation; it is entitled to greater weight when there is "an established scientific connection between exposure and illness or other circumstantial evidence supporting the causal link." Although the expert could not be sure of the exact extent of the plaintiffs' exposure, he reliably determined, based on conditions at the plant and the symptoms suffered by the plaintiffs, that they were exposed to benzene at levels several hundred times the permissible level, so it was not necessary for the plaintiffs to show the precise level of exposure. In *Moore v. Ashland Chem. Inc., 151 F.3d 269 (5th Cir. 1998)* (en banc), a truck driver, a long-time smoker with a history of asthma, sued for an asthmatic-type condition (RADS) allegedly caused when he was exposed to toluene while cleaning up a chemical spill. The plaintiff proffered a board-certified internist with training and experience in pulmonary disease, allergy, and environmental medicine, who concluded that the plaintiff's condition was caused by the exposure. In *Daubert* proceedings the expert admitted that he had never before treated a RADS patient exposed to toluene and that his other RADS patients had been exposed to chemicals stronger and more irritating than toluene; he did not explain how any of the other chemicals he believed caused RADS had properties similar to the toluene. The District Court excluded the expert's causation opinion,

although it allowed him to testify about his examination of the plaintiff, the tests he conducted, and the RADS diagnosis. Affirming a judgment for the defendant, the *en banc* Court found no abuse of discretion. The expert had not given any reasons why his examination and tests were important to his conclusion and he offered no scientific support for his general theory that toluene exposure at any level would cause RADS. One Judge concurred in the result and one Judge concurred specially to state that neither exclusion nor admission of this expert's testimony would be an abuse of discretion. Three Judges dissented, arguing that a clinical physician may express a causation opinion based on generally accepted clinical methodology without hard scientific corroboration under *Daubert*, and that the temporal connection between exposure and onset is an important consideration in determining causation. In a wrongful death action, *Allen v. Pennsylvania Eng'g Corp.*, n194 the Court affirmed summary judgment for the defendant, holding that expert testimony concluding that the decedent's brain cancer was caused by exposure to ethylene oxide had been properly excluded. The Court found the testimony insufficiently reliable, where no epidemiological study had found a statistically significant link between EtO exposure and human brain cancer; the results of animal studies were inconclusive at best; and there was no evidence of the level of the plaintiff's occupational exposure to EtO. Rejecting the experts' "weight of the evidence" methodology in concluding that EtO caused brain cancer, the Court noted that although government agencies use the methodology to establish prophylactic rules governing human exposure to possible carcinogens, this preventive perspective is based on a threshold of proof that is "reasonably lower than that appropriate in tort law."

Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993) : Affirming judgments for employees exposed to asbestos during the course of their employment, the Court held that a doctor was properly permitted to testify that exposure to asbestos and smoking together caused one plaintiff's laryngeal cancer and to base his opinion both on epidemiological evidence reported in medical literature and on his examination of the plaintiff and two other employees with laryngeal cancer. The Court stated that "[n]othing in *Rules 702* or *703* or in *Daubert* prohibits an expert witness from testifying to confirmatory data, gained through his own clinical experience, on the origins of a disease or the consequences of exposure to certain conditions."

Wintz v. Northrop Corp., 110 F.3d 508 (7th Cir. 1997) : To defeat a summary judgment motion, the plaintiffs proffered the testimony of a toxicologist who concluded that the plaintiff-infant's birth defects were caused by exposure to bromide in utero. Affirming summary judgment for the defendant, the Court held there was no error in finding this testimony insufficiently reliable under *Daubert*. At the time he formed his opinion, the witness knew only that the infant's mother had worked with a chemical containing bromide, and that the infant's symptoms were consistent with bromide exposure. He did not know the amount or extent of exposure or the specifics of the work environment, nor did he attempt to correlate any specific dose the mother received with the infant's symptoms. In an action by workers who allegedly became ill due to pesticide exposure, *Bradley v. Brown, 42 F.3d 434 (7th Cir. 1994)* , the plaintiffs offered clinical ecologists' opinions that "multiple chemical sensitivity" was a proximate cause of their injuries. The Court held there was no error in rejecting the evidence, where the experts' methodology was merely anecdotal and their opinion would be entirely too subjective and speculative, and peer review of clinical ecology pointed to the conclusion that the "science" of MCS's etiology had not progressed from the hypothetical to knowledge capable of assisting a factfinder. In *O'Conner v. Commonwealth Edison Co.*, n195 a personal injury action by a nuclear power plant worker against a public utility and a contractor, the Court held there was no error in excluding testimony by the plaintiff's causation expert that he could determine whether cataracts were radiation-induced simply by observation. The articles referenced by the expert established that his methodology had no basis in scientific fact.

Bonner v. ISP Technologies, Inc., 259 F.3d 924 (8th Cir. 2001) : An assembly line worker sued for psychological problems and other symptoms allegedly caused by exposure to an organic solvent. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in admission of expert causation testimony. One expert was permitted to give his opinion that exposure to the solvent caused the plaintiff's acute symptoms but not his opinion that it caused her permanent symptoms; while he relied on essentially the same scientific bases for both opinions, the Court noted that

the temporal connection made the former opinion reliable enough to pass *Rule 702* muster. The Court rejected arguments that another expert's opinion should have been excluded because his theory was developed for litigation, was not subjected to peer review, had not appeared in scientific literature, and was not supported by epidemiological studies. The defendant had not cited any scientific theory or studies contradicting the expert's theory, and the Trial Judge had "conducted an exacting review of the science involved and correctly concluded that, because Dr. Singer's methodology was scientifically valid, the scientific questions were best addressed by allowing each side to present its experts and then submitting their opinions to the jury." In a product liability action for respiratory disease, *Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 2000-2 Trade Cas. (CCH) P15900 (8th Cir. 2000)* , the plaintiff offered testimony from her treating physician that her condition was caused by baking soda accidentally discharged from fire extinguishing equipment at her workplace. Affirming summary judgment for the defendants, the Court held that: *Daubert* applies to treating physicians testifying as experts just as much as to physicians hired solely for purposes of litigation; the witness' differential diagnosis was performed for the purpose of identifying the plaintiff's condition, not its cause; his causation opinion was not based on a methodology that had been tested, subjected to peer review, and generally accepted in the medical community, since he did not systematically rule out all other possible causes; and his opinion did not gain reliability simply because a few publications indicated that the condition could have been caused as alleged, when he had not relied on those items in formulating his opinion and he did not scientifically eliminate other possible causes. In *National Bank of Commerce v. Associated Milk Producers, Inc.*, n196 a cheese plant employee sued a milk supplier alleging that his laryngeal cancer was caused by five exposures to aerosolized milk containing aflatoxin M-1 (AFM). The Court found no abuse of discretion in the exclusion of the plaintiff's expert testimony because: the experts had no scientific knowledge of the level of AFM exposure that would subject a person in the plaintiff's circumstances to an appreciable risk of laryngeal cancer; there were no scientific studies or medical literature correlating AFM and laryngeal cancer; the studies on which the experts relied did not support a finding that the levels of AFM in this case could cause laryngeal cancer; and none of the experts based their opinions on pre-litigation research on AFM, none were oncologists, none examined or treated the plaintiff, and the treating physician was not called as a witness. In *Hose v. Chicago N.W. Transp. Co.*, n197 a railroad employee sued under the FELA, alleging that he suffered manganese encephalopathy arising from his work as a welder. The Court affirmed a judgment for the plaintiff, holding that the plaintiff's medical testimony regarding causation was admissible although the experts did not demonstrate that the plaintiff suffered clinically verifiable signs of Parkinson's disease. The Court noted that such signs are usual or typical in cases involving manganese encephalopathy, but concluded that the employer did not demonstrate that manganese encephalopathy *must* be accompanied by signs of Parkinson's disease.

Schudel v. General Elec. Co., 120 F.3d 991 (9th Cir. 1997) : In a toxic exposure case arising at an industrial plant, the Court held it was an abuse of discretion to admit testimony from a toxicologist that a plaintiff suffered from encephalopathy which was caused by exposure to certain solvents. The testimony lacked reliability because it was based on studies involving other organic solvents, and there was no showing that it was scientifically acceptable to draw general conclusions about the neurotoxicity of the solvents from studies of other chemicals, especially when testimony indicated that small differences in molecular structure often have significant consequences. Furthermore, the plaintiff's exposure was neither long enough nor intense enough to fall within the ranges described in the studies, and there was no showing that extrapolation outside those ranges was scientifically acceptable. In a FELA case for alleged chemical exposure, *Claar v. Burlington N. R.R., 29 F.3d 499 (9th Cir. 1994)* , the Trial Judge reviewed the plaintiffs' experts' reasoning and methodology and concluded that they lacked the foundation and reliability necessary to support expert testimony. Affirming summary judgment for the defense, the Court held there was no abuse of discretion in excluding the opinions under *Rule 702*, as the experts had failed to explain their conclusions, had failed to follow what they conceded to be standard procedures in making a diagnosis, and had formed their opinions before reading the relevant literature.

Goebel v. Denver & R.G.W. R.R., 346 F.3d 987 (10th Cir. 2003) : The Court affirmed a judgment for an employee alleging that he sustained acute high altitude cerebral edema (HACE) as a result of exposure to diesel fumes and

pollutants in a high-altitude railroad tunnel. Finding no abuse of discretion in admitting testimony from the plaintiff's causation expert, the Court concluded that the Judge's review of the scientific literature supported a finding of an adequate link between the existing data and the expert's conclusions regarding general and specific causation. There was no abuse of discretion in the finding that the plaintiff's expert's differential diagnosis was reliable, since it followed a standard and accepted methodology, the expert adequately explained why the plaintiff might not have exhibited every symptom of the diagnosed condition, and the expert adequately considered and ruled out most of the alternative explanations for HACE. In *Mitchell v. Gencorp., 165 F.3d 778 (10th Cir. 1999)* , the plaintiff claimed that exposure to benzene in the company's "flammable room" caused him to contract chronic myelogenous leukemia. To establish the level of his exposure to toxic chemicals, he proffered the testimony of an industrial hygienist, who relied on the plaintiff's statements, a review of safety data sheets, and pictures showing some chemical spills in the "flammable room." The Court found no error in exclusion of the testimony, for "[i]t makes little sense to argue that a scientist can look at pictures and a list of chemicals contained in a room and arrive at a level of exposure." To establish causation, the plaintiff proffered the testimony of four doctors, who relied on published works indicating a link between exposure to benzene and certain types of leukemia other than that suffered by the plaintiff. Again, there was no error in exclusion, since there was no evidence that the plaintiff had actually been exposed to benzene, and the doctors did not have scientific data supporting their conclusion that the plaintiff's admitted exposure to chemicals similar to benzene would affect the body in the same way as benzene. Moreover, even if the plaintiff were exposed to benzene, the studies on which the doctors relied indicated that benzene caused a type of leukemia different than that contracted by the plaintiff.

[d] Scientific Evidence -- DNA Identification

United States v. Shea, 211 F.3d 658 (1st Cir. 2000) : The Court affirmed racketeering, carjacking, and other convictions, finding no error when a government expert was permitted to testify that DNA in blood samples of two defendants matched DNA found at different crime scenes. The Trial Judge conducted a lengthy *Daubert* hearing, and the Court concluded that any flaws in the expert's application of an otherwise reliable methodology went to weight and credibility and not to admissibility.

United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992) : Affirming a kidnapping conviction, the Court held there was no abuse of discretion in admitting DNA profiling evidence. In determining that the helpfulness standard had been met, the Trial Judge had carefully considered the general acceptance of the theory and the specific techniques used to apply it, as well as the reliability of the particular data being offered. The Court stated that in future cases, judicial notice could be taken of the theory and techniques of DNA profiling and admissibility should require only a preliminary showing of the reliability of the particular data.

United States v. Trala, 386 F.3d 536 (3d Cir. 2004) : The prosecution in a bank robbery case elicited expert testimony connecting the defendant with a cap worn by the robber through DNA identification by the PCR/STR method. Although the defendant objected that the method was not reliable when applied to samples containing mixed DNA, the Court found there was no abuse of discretion in admitting the evidence and noted that the Trial Judge's "painstaking opinion provides a thorough and compelling analysis of the court's rejection of Trala's challenges to the DNA evidence."

United States v. Beverly, 369 F.3d 516 (6th Cir. 2004) : Affirming convictions for bank robberies and firearms offenses, the Court rejected claims that it was an abuse of discretion to admit testimony concerning mtDNA evidence (mitochondrial DNA). The Court noted that "mtDNA is not as precise an identifier as nuclear DNA," and "[b]ecause it is not possible to achieve the extremely high level of certainty of identity provided by DNA, mtDNA typing has been said to be a test of exclusion, rather than one of identification." However, the Trial Judge conducted careful and extensive hearings, the scientific basis for the use of mtDNA evidence was well established, the testing methods were

sufficiently reliable to be admissible, and any questions relating to the specific tests in question were fully developed and subject to cross-examination. In *United States v. Bonds, 12 F.3d 540 (6th Cir. 1993)* , the Court affirmed conspiracy and firearms convictions, holding that DNA evidence presented by the government that was admitted under the *Frye* general acceptance test would have met the *Daubert* test. Issues such as the reliability of the particular application of the methodology and the possibility of ethnic substructure affecting frequency estimates go to the weight, not the admissibility, of the evidence.

United States v. Boswell, 270 F.3d 1200 (8th Cir. 2001) : A veterinarian was convicted for making false statements to the government in a swine disease eradication program by adulterating or substituting blood samples taken from hogs. To prove that certain samples did not come from the same sources, the government offered PCR test results of the swine DNA. The Court found no abuse of discretion in admitting the evidence, as the PCR process is approximately ten years old, has undergone extensive testing, has been recognized as reliable for matching human DNA, and was shown to be an acceptable and recognized test on swine DNA in the DNA testing community. Finally, the defendant failed to prove that there were any significant deficiencies in the protocol and procedures used by the laboratory conducting the tests in this case. In *United States v. Beasley, 102 F.3d 1440 (8th Cir. 1996)* , the Court held that DNA testing by the polymerase chain reaction method was reliable under *Daubert*, and that Courts could take judicial notice of its reliability in the future. The Court found that any potential for contamination of samples was a question of weight rather than admissibility, but it noted that in any particular case, "the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the proper protocols, and the like." In *United States v. Black Cloud*, n198 the Court held there was no abuse of discretion when a DNA expert was permitted to testify in an incest case that the defendant's genes matched the paternal genes of his niece's child at all three of the examined locations and that only one in 2237 Native Americans have all three of the genes and could possibly be the child's father. The Trial Judge conducted a hearing and found that the expert's scientific techniques were reliable before admitting the testimony.

United States v. Hicks, 103 F.3d 837 (9th Cir. 1996) : Affirming a conviction for carjacking, the Court held there was no abuse of discretion in admitting expert testimony, based on the polymerase chain reaction method of DNA testing, that none of the three perpetrators of the crime could be excluded as a contributor to the DNA sample on a vaginal swab taken from a victim.

United States v. Davis, 40 F.3d 1069 (10th Cir. 1994) : Affirming convictions arising from an attempted armed robbery, the Court held that expert testimony of DNA identification had fulfilled the *Daubert* requirements. The government had called an FBI agent trained in DNA profiling, who testified as to how FBI technicians prepared samples, how the samples were tested, and how the protocol of DNA identification was followed in the specific case. The Court rejected the argument that evidence of statistical probability of a random match should not have been admitted, since "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed."

[e] Scientific Evidence -- Drug Identification

United States v. Ortiz, 610 F.2d 280 (5th Cir. 1980) : The Court rejected the defendant's attack on expert testimony that the substance he possessed was cocaine, since the expert's test was based upon accepted scientific theory and knowledge.

[f] Scientific Evidence -- Hair Identification

United States v. Cyphers, 553 F.2d 1064 (7th Cir. 1977) : Affirming convictions for armed bank robbery, the Court held that the Trial Judge properly admitted the testimony of a government witness that hairs recovered from articles used by the robbers were "microscopically like" hair samples taken from the defendants. The Court emphasized that there is no requirement that an expert opinion be expressed in terms of a reasonable scientific certainty. Rather, the lack of certainty is something that goes to the weight to be given the evidence, not to its admissibility.

[g] Scientific Evidence -- Oil Matching

United States v. Distler, 671 F.2d 954 (6th Cir. 1981) : Upholding a water pollution conviction, the Court found that "oil matching" by a gas chromatograph analysis was "a generally accepted method of matching oil samples," that the method was "highly reliable," and that it had "a significant degree of national and international recognition." Thus, expert testimony based on the method was held properly received, as it would be after *Daubert*.

[h] Scientific Evidence -- Other Cases

United States v. Sinskey, 119 F.3d 712 (8th Cir. 1997) : In a prosecution for Clean Water Act violations by manipulating test results when releasing waste water from a meat packing plant, the government introduced another employee's "secret logs" that recorded the actual level of ammonia nitrogen in the discharges. The Court held there was no abuse of discretion in admitting the logs, since the means of testing used in preparing the logs was sufficiently accurate and reliable, and the deviations in this case from the standard protocol for doing the testing were shown not to affect the reliability of the results. In *Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc., 35 F.3d 1226 (8th Cir. 1994)* , an action for alleged trade secret misappropriation of the genetic makeup of certain seed corn, the Court held that scientific evidence from electrophoresis, liquid chromatography, and growout testing was properly admitted, as the techniques were widely used in the industry, conducted by qualified experts, and considered helpful enough to be relied upon by both parties in the suit.

[i] Scientific Evidence -- Quantitative Electroencephalograms

Nadell v. Las Vegas Metro. Police Dep't, 268 F.3d 924 (9th Cir. 2001) : The plaintiff claimed physical injuries resulting from police officers' excessive force. The Trial Judge excluded the plaintiff's expert, who had performed a quantitative electroenchephalogram (QEEG) on the plaintiff and concluded that the plaintiff suffered physical injuries during her arrest. The QEEG technique involves the mathematical processing, analysis, and display of digitally recorded EEG data. The Court found no error in the exclusion of the expert testimony. The QEEG technique was "error prone" and inadequately subjected to peer review. Moreover, the plaintiff had suffered serious head injuries as a child, and the QEEG technique could not distinguish between those previous injuries and any injuries that might have occurred during the arrest.

[j] Scientific Evidence -- Sexual Abuse Cases

United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) : Affirming a defendant's conviction for sexual abuse of his minor daughter, the Court held that the Trial Judge properly excluded the results of a "penile plethysmograph" test offered to prove that the defendant did not exhibit the characteristics of a "fixated pedophile." The Court found that the test is not a valid diagnostic tool and that it lacked accepted standards, although it might be useful in the treatment of offenders.

United States v. Black Cloud, 101 F.3d 1258 (8th Cir. 1996) : The Court held there was no abuse of discretion when a DNA expert was permitted to testify in an incest case that the defendant's genes matched the paternal genes of

his niece's child at all three of the examined locations and that only one in 2237 Native Americans have all three of the genes and could possibly be the child's father. The Trial Judge conducted a hearing and found that the expert's scientific techniques were reliable before admitting the testimony. In *Gier v. Educational Serv. Unit No. 16, 66 F.3d 940 (8th Cir. 1995)* , an action brought on behalf of handicapped children, alleging that they were physically and sexually abused while attending a state school, the Court found no error in the exclusion of experts who employed an evaluation methodology based on interviews with parents and clinical interviews with the children, including role playing with anatomically correct dolls. This case is discussed in the Editorial Explanatory Comment, *§ 702.02[9]*.

[k] Scientific Evidence -- Voice Identification

United States v. Salimonu, 182 F.3d 63 (1st Cir. 1999) : The prosecution in a drug case introduced tape recordings of incriminating conversations and, for purposes of comparison, a voice exemplar that contained a recording of the defendant's voice. The defendant sought to introduce the testimony of two experts to establish that the voice on the taped conversation and the defendant's voice on the exemplar were different. The Trial Judge admitted testimony from the developer of a spectrogram computer program but would not permit a linguist to testify based on his listening to the tapes that the two voices were different. Affirming, the Court found no abuse of discretion in the assessment below that the linguist's analysis was not reliable, given the absence of an error rate, testimony that voices could be disguised, and the lack of other indicia of reliability.

United States v. Jones, 24 F.3d 1177 (9th Cir. 1994) : Affirming a conviction for distributing cocaine base, the Court held there was no abuse of discretion in excluding proffered expert testimony on voice identification by a defense witness, where the witness had no specialized training, had himself developed the aural subjective comparison technique, did not employ a voice spectrograph, and could cite no studies or research supporting his theory or other experts who used his technique.

[85] Social Science Evidence

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) : To show that teachers had low expectations of minority students, which was alleged to be an attitudinal remnant of the segregation era justifying continued minority set-asides in school admissions, the defendants in a Boston discrimination case offered testimony by a sociologist who based his conclusions on an analogy from a "climate survey" he had done of the Kansas City school system and on anecdotal evidence about teacher attitudes in the Boston system. Reversing a judgment for the defendants, the Court held that the expert's conclusions should not have been credited, since he had conceded that he had not brought the same scientific methodology and intellectual rigor to the analysis as he would in his out-of-court research.

United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (en banc): The defendant was convicted for activities supporting Hizballah, a designated foreign terrorist organization. The Court found no abuse of discretion in the admission of expert testimony from a former FBI agent currently employed by a think tank, who specialized in Middle Eastern terrorist groups. His methodology was one generally applied in the social sciences, collecting as much information as possible and balancing new information against the body of information previously built, and his findings were subject to continual peer review. The witness applied his methodology to his conclusions regarding this case and his conclusions regarding Hizbollah's structure, the significance of the defendant's contacts with the leaders of Hizbollah, and the relation of Hizbollah's funding activities to the defendant's activities were helpful to the jury in understanding the issues in the case.

Tyus v. Urban Search Mgt., 102 F.3d 256 (7th Cir. 1996) : In the trial of a Fair Housing Act suit alleging that

advertising for a rental building targeted only whites, the plaintiffs proffered two social science experts, one to testify how an all-white advertising campaign affects African-Americans and the other about the history of racial discrimination in the local market. Both were precluded on the ground that their testimony was too general to be helpful, but the Court, reversing a judgment for the defendants, held it was error not to scrutinize the testimony under the *Daubert* "framework," to ensure "that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work." The Court added that "the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, ... genuine expertise may be based on experience or training."

[86] Specialized Knowledge Lacking

City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576 (10th Cir. 1998) : In the City's suit against insurer for bad faith in defense of an action arising from a police shooting, the City proffered an expert who would have testified, on the basis of 30 years' experience in claims handling, that the insurer had handled the claim improperly. The Judge excluded the expert because, while generally knowledgeable about insurance claims handling, he lacked "specialized knowledge about handling of bad faith cases in New Mexico involving third party insurance disputes." The Court found no abuse of discretion, noting that "[alt]hough a proffered expert possesses knowledge as to a general field, the expert who lacks specific knowledge does not necessarily assist the jury."

[87] Standards of Conduct

[a] Medical Malpractice

Schneider v. Fried, 320 F.3d 396 (3d Cir. 2003) : Reversing the dismissal of a medical malpractice case because the plaintiff's medical experts had been improperly precluded from testifying, the Court held it was an abuse of discretion to exclude an expert's testimony because he has said at one point that he was commenting on his own practice, not that of other physicians. Despite that comment, he had testified extensively about the general standard of care, which was the proper subject of his testimony.

Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., P.C., 388 F.3d 976 (6th Cir. 2004) : In a medical malpractice action against a cardiology practice and a pulmonologist for brain damage allegedly caused by premature removal of the plaintiff's ventilation tube following cardiac surgery, the Trial Judge did not permit the plaintiff's expert to testify concerning the standard of care regarding removal of a ventilation tube because he was a cardiac thoracic surgeon and was not trained in pulmonology, had never written any articles on the subject, and "could not identify any articles about pulmonology which he has read." Affirming summary judgment for the cardiology practice, the Court found that the witness had no basis for his opinion that the cardiac surgeon is responsible for the pulmonologist's decision of when to extubate a patient, and there was contrary evidence from the affidavits of five local physicians regarding the local practice as to responsibility for patient management.

[b] Standards of Conduct -- Miscellaneous Cases

Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984) : The Court found no abuse of discretion in permitting a civil engineer to testify to the state's requirements for signs on roads.

Sherbert v. Alcan Aluminum Corp., 66 F.3d 965 (8th Cir. 1995) : The plaintiff broke his leg when heavy material slipped off a forklift operated by an employee of the defendant. Affirming a judgment for the plaintiff, the Court found that expert testimony was not necessary to establish a standard of care for forklift operation. The Court declared that

"[t]he operation of a forklift involves simple principles of balance well within the common knowledge of lay jurors." In *Carlsen v. Javurek*, n199 the Court reversed judgments for defendants in an action for the wrongful death of a hospital patient because the jury had been instructed that it could only find negligence on the basis of expert opinion; the lack of care alleged in the instant case was comprehensible to lay jurors.

McKenzie v. Benton, 388 F.3d 1342 (10th Cir. 2004) : A former deputy sheriff with a history of psychological problems sued the county sheriff alleging that his refusal to rehire her violated the Americans with Disabilities Act. Affirming a judgment for the defendant, the Court found no error in the admission of testimony by a Chicago police supervisor that it would be "totally improper" to rehire the plaintiff because she had engaged in dangerous behavior and her medical/mental health history made it unreasonable to rehire her. The supervisor's long experience would have assisted the jury in determining whether the plaintiff was qualified for the position, whether it was "objectively reasonable" for the sheriff not to rehire her, and whether the plaintiff was a direct threat to herself or others. The Court also found no plain error when a psychologist who was an expert in law enforcement qualification standards testified that the sheriff's department acted in a reasonable manner in not pursuing the plaintiff's re-employment application.

[88] State Law

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) : The Court held that Pennsylvania's requirement that an expert giving a causation opinion testify "to a reasonable degree of medical certainty" was an element of the plaintiff's burden of proof, not just a standard of admissibility. Therefore, the requirement applied in a diversity case, even though federal evidence law imposes no such requirement. In *Salas v. Wang*, n200 the Court held that, whether or not state law would permit an expert to so testify, it was not reversible error to permit a plaintiff's expert to testify as to aggregate damages in a medical malpractice case brought on behalf of a child who suffered severe brain damage. The Court concluded that the expert might have been able to assist the jury in performing calculations, such as a reduction of a lump sum award to present value, and that the federal approach to expert testimony was at least arguably procedural, so federal law applied.

El-Meswari v. Washington Gas Light Co., 785 F.2d 483 (4th Cir. 1986) : In a wrongful death action, the Court found no error in the exclusion of expert testimony concerning a mother's physical injuries allegedly resulting from the loss of her son. The governing Virginia law recognizes damages for emotional anguish but not indirect physical injuries, and the Court concluded that the jury was capable of ascertaining whether the mother suffered emotional distress without hearing lengthy expert testimony concerning noncompensable injuries that was offered as corroboration of the distress.

Zachery v. Wheeler, 511 F. Supp. 591 (E.D. Tenn. 1981) : In this diversity case arising from an auto accident, the Court rejected the testimony of an accidentologist, but first decided that the ruling would not create such a conflict with Tennessee decisions as to encourage forum shopping.

Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) : Affirming a judgment for the plaintiffs in an automobile accident case, the Court held that the Federal Rules on experts apply in diversity cases and that expert testimony that the accident could have aggravated a medical condition was admissible, even though State Courts would have required that the doctor testify to a reasonable degree of medical certainty.

McGowne v. Challenge-Cook Bros., 672 F.2d 652 (8th Cir. 1982) : In a product liability diversity action the Court looked to state law to determine admissibility of expert opinion regarding the effect of inflation on the lost earning

capacity of a deceased. It also observed, however, that under *Rule 702* the District Judge has great discretion in ruling on the scope of expert testimony.

[89] Statistical Evidence

[a] Employment Cases

Currier v. United Tech. Corp., 393 F.3d 246 (1st Cir. 2004) : The Court affirmed a judgment for the plaintiff in an age discrimination case, finding no abuse of discretion in the admission of statistical evidence that a reduction in the work force had a disproportionate effect on older employees. Although the expert's "analysis skittered near the line of inadmissibility," the Court found that the defendant cross-examined the expert and showed the flaws in his analysis, and that the defendant also challenged the probative value of the statistics before the jury, which was situated to assess their significance.

Raskin v. Wyatt Co., 125 F.3d 55 (2d Cir. 1997) : In an ADEA action, the plaintiff's expert statistician had found that the defendant's employees retired earlier than comparable employees in the workforce generally, and concluded that this was attributable to the defendant's discrimination against older workers. Affirming summary judgment for the defendant, the Court found that this testimony was properly excluded as unreliable under *Daubert*. First, the expert did not account for the presence in the comparison group of those without pension plans and those who were self-employed -- "categories of people who tend to work longer and to an older age than people who work for companies that have pension plans." Thus, the expert artificially inflated the retirement age in the comparison group. Second, the expert failed to account for other possible causes of differentiation between the defendant's employees and the population at large.

Anderson v. Westinghouse Savannah R. Co., 406 F.3d 248 (4th Cir. 2005) : The Court affirmed summary judgment for the defendants in an action by black employees alleging disparate impact of their employers' Ranked Performance Pay Process (RP3). The Court found no abuse of discretion in the exclusion of testimony by the plaintiff's expert statistician regarding racial differences in the rankings under RP3, since the expert analyzed by job groupings across the Savannah River site, rather than by individual jobs within each division as the employers' policy called for using the RP3 ranking process. As a result the expert's studies failed to compare similarly situated workers and were thus not relevant.

Tyler v. Union Oil Co., 304 F.3d 379 (5th Cir. 2002) : In an age discrimination case, the Court found no abuse of discretion in the admission of expert testimony for the plaintiffs by a statistician. Although the class protected by the ADEA is employees over 40, the Court held that statistical groupings comparing employees over 50 with those under 50 were permissible, since an ADEA plaintiff may establish a *prima facie* case by showing replacement by someone younger, even if the replacement was within the protected class. The defendant's objection that the expert created his own database went to probative weight rather than to admissibility, since there was no suggestion that the compilation itself was unreliable and the argument that the underlying data, which had been provided by the defendant in discovery, was unreliable was raised in cross-examination. Objections to the omission of variables and to the use of age as a continuous variable in the analysis also went to weight rather than admissibility. In *Mu noz v. Orr, 200 F.3d 291 (5th Cir. 2000)* , the Court affirmed summary judgment for the defendants in a Title VII class action by Hispanic males challenging promotion practices at an Air Force base. It found no abuse of discretion in the exclusion of evidence from the plaintiffs' statistical expert. In particular, his analysis began with an assumption that there was discrimination, an indicator of lack of objectivity; his report stated that discrimination was the "cause" of disparities, when statistics can show only correlation, not causation; the analysis failed to consider other variables, such as education and experience, as explanations for observed discrepancies, and it did not include a multiple regression analysis; and the expert relied

only on the plaintiffs' compilations of data, giving rise to "common-sense skepticism" regarding the evaluation.

Bennett v. Roberts, 295 F.3d 687 (7th Cir. 2002) : Affirming summary judgment against an African-American applicant who alleged racial discrimination in a school district's hiring practices, the Court found no error in the exclusion of evidence from the plaintiff's statistical expert, since the expert had not properly identified the relevant labor market in his analysis. The expert had not considered the degree to which potential applicants in the metropolitan statistical area would be interested in working in the district, the effects of commuting patterns on the relevant pool, or the extent to which the district would hire applicants from within the state. In *Bell v. Environmental Protection Agency, 232 F.3d 546 (7th Cir. 2000)* , EPA employees who had been denied promotions brought Title VII claims based on race and national origin discrimination. Reversing summary judgment for the defendant, the Court held it was error not to have considered expert evidence that there were statistically significant differences between native and foreign born applicants in receiving promotions and that there were differences, although not statistically significant, regarding promotion of African-Americans. Although statistics cannot be used as the primary means of establishing discrimination in disparate treatment situations, they can be used in conjunction with other evidence of disparate treatment to show whether the alleged disparity is the result of discrimination. The Court also held that the plaintiffs' analysis of all promotions in the upper Midwest region of the EPA, rather than just the 16 eligible applicants for the position used by the Judge, encompassed the appropriate labor market. In *Adams v. Ameritech Servs., Inc.*, n201 an age discrimination action by employees terminated or demoted during a downsizing program, summary judgment was granted for the defendants after evidence from a statistician that showed correlations between the ages of employees and the companies' decisions to terminate was excluded. Reversing, the Court observed that statistical evidence can be very useful to prove discrimination when the theory is disparate treatment or discriminatory pattern and practice, although it will likely not be sufficient in itself. The Court concluded that the expert's studies were prepared in a reliable and statistically sound way, containing relevant evidence that a trier of fact would have been entitled to consider. In *Sheehan v. Daily Racing Form, Inc.*, n202 the plaintiff sued for age discrimination when he was terminated in a corporate downsizing. The plaintiff opposed the employer's motion for summary judgment with the affidavit of a statistician, who compared the age of those dismissed and those retained, and concluded that the probability that retention of office personnel was uncorrelated with age was less than five percent. Affirming the grant of summary judgment to the employer, the Court held that the affidavit failed to meet the *Daubert* standard: the statistician's methodology was defective because he arbitrarily excluded certain personnel from the sample tested, and he failed to correct for any potential explanatory variations other than age. The expert's failure to make any adjustment for variables bearing on the decision whether to discharge or retain a person on the list other than age indicated a failure to exercise the degree of care that a statistician would use in his scientific work, outside the context of litigation. In *Tagatz v. Marquette Univ.*, n203 a case in which the plaintiff served as his own expert witness, the Court rejected the argument "that if the plaintiff in a Title VII case presents evidence that passes standard tests of statistical significance, the defendant must present a statistically significant rebuttal or lose." It reasoned that when data show a real, not a spurious, difference between the means of two samples, they do not necessarily demonstrate that the difference is due to a particular attribute such as religious or age discrimination.

Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986) : The Court upheld a judgment for a plaintiff who sued his employer for subjecting him to discriminatory terms and conditions of employment because of his race. It found no error in the admission of expert testimony that the relationship between the number of blacks employed by the defendant and the percentage of discharged workers who were black was statistically significant. Although there were only 27 discharges, the Court found that the statistical base was not too small to support the testimony.

Hemmings v. Tidyman's Inc., 285 F.3d 1174 (9th Cir. 2002) : Affirming a judgment for two women who sued their employer for gender discrimination, the Court upheld the plaintiffs' statistical expert's decision to compare gender disparities in promotions and wages by using a data set composed entirely of the company's management employees.

The Court rejected arguments that the data set did not include the "qualified individuals" for promotion or that it should have used only corporate management and not the management employees of local stores.

[b] Statistical Evidence -- Other Cases

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) : In an action by a plaintiff who sued after contracting asbestosis, the Court sustained judgments against some, but not all asbestos manufacturers, and upheld the introduction of testimony by a biostatistician-epidemiologist specializing in the cause of disease, who testified concerning the risk of cancer and reduced life expectancy associated with asbestosis.

United States v. August, 745 F.2d 400 (6th Cir. 1984) : An attorney and a Bankruptcy Court intake clerk were convicted for a scheme to circumvent the blind draw case assignment system so that few of the lawyer's cases would be assigned to a particular Bankruptcy Judge. The Court affirmed, finding that the Trial Judge properly permitted an expert statistician to testify concerning the low mathematical probability that, absent manipulation of the blind draw system, the Judge whom the attorney avoided would have received so few of the attorney's cases. The expert's testimony was "highly probative and appropriate to assist the jury in interpreting the statistical significance of the distribution."

People Who Care v. Rockford Bd. of Educ., 111 F.3d 528 (7th Cir. 1997) : The Court held that expert testimony attributing discrimination as the cause for minority students underperforming was unreliable under *Daubert*; the expert made no attempt to exclude causes other than poverty, and used an unreliable indicator of poverty levels.

Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 401 F.3d 901 (8th Cir. 2005) : The manufacturer of wooden windows sued the manufacturer of a wood preservative, alleging that the preservative allowed premature rot in the windows, which caused the plaintiff to lose profits and goodwill. Affirming in part a judgment for the plaintiff, the Court held there was no abuse of discretion in the admission of testimony by a statistician who evaluated wood-rot data collected by the plaintiff. The defendant argued that the data had been collected by the plaintiff's legal department and that the sample was too small and not representative, but the Court concluded that this challenge went primarily to the factual basis for the expert's analysis rather than to its evidentiary reliability, and thus to the credibility, not the admissibility, of the evidence. In *United States v. Sdoulam, 398 F.3d 981 (8th Cir. 2005)* , the defendant, an operator of convenience stores, was charged with conspiring to distribute pseudophedrine with reason to believe it would be used to manufacture methamphetamine. The prosecution offered testimony from a statistician who, using local and national census and marketing data, compared the pseudophedrine sales at the defendant's stores with the estimated monthly average at convenience stores nationwide and opined that the difference was so great that the possibility of its occurring by chance was infinitesimal. Affirming, the Court found no abuse of discretion, since the expert laid an adequate foundational support for his conclusions and made no statement regarding the mathematical probability that the defendant was guilty of the crimes charged.

United States v. Artero, 121 F.3d 1256 (9th Cir. 1997) : The Court rejected the defendant's challenge to the ethnic composition of the grand jury, which was based on testimony from a statistician that the percentage of Hispanics on the jury wheel was substantially less than the percentage of Hispanics in the local population. This conclusion of underrepresentation was unreliable, because the expert used the percentage of Hispanics in the general population, whereas "[t]he right question is whether Hispanics eligible to serve on federal juries were unreasonably represented because of systematic exclusion," and many Hispanics in Southern California have recently arrived in this country and as such are ineligible for jury service. In *United States v. Gwaltney*, n204 the Court affirmed a conviction of a police officer for violating civil rights, finding that expert statistical evidence concerning the percentage of the male population whose semen would contain a certain blood antigen and enzyme and the percentage of males with antisperm antibodies

could be helpful to the trier of fact. In *United States v. Rogers*, n205 the Court sustained a defendant's convictions for five armed bank robberies, holding that an FBI agent properly testified as an expert that out of 1,800 bank robberies in the Los Angeles area, only two involved a person wearing a bandanna when exiting a vault. It rejected the argument that the statistical evidence would be given undue weight by a jury.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 1998-2 Trade Cas. (CCH) P72307 (11th Cir. 1998) : In an antitrust action against five chemical companies alleging that the defendants engaged in a conspiracy to fix prices for repackaged chlorine, the Court held it was an abuse of discretion when the entire testimony of the statistician proffered by the plaintiffs was excluded. The Judge's exclusion of the testimony because it failed to show a successful conspiracy was a "conflation of admissibility issues with issues regarding the sufficiency of the plaintiffs' evidence." The expert was not required to prove the plaintiffs' case by himself. The Court found that the expert utilized well-established and reliable methodologies in the preparation of most of his statistics. However, there was no error in excluding the statistician's testimony insofar as he characterized certain bids as "signals" to coconspirators, and insofar as he testified about applicable legal standards; testimony on these subjects was outside the witness' expertise.

[90] Sufficiency of Expert Testimony

B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) , clarified, 112 F.3d 88 (2d Cir. 1997) : The Court reversed summary judgments for defendants in a CERCLA case, because the Trial Court had disregarded, as "lacking 'probative merit,' " a 141-page affidavit by the plaintiffs' expert. The "carefully researched, detailed, and directly relevant" affidavit was based on summaries of admissible evidence and on reports of the sort ordinarily relied on by experts in forming opinions in their field of expertise, even though not all the reports were attached to the affidavit and not all the underlying facts and data were detailed. Furthermore, the expert's opinion relied on the methodology and data typically used and accepted in these sorts of cases, and was not "junk science." In *In re Joint E. & S. Dist. Asbestos Litig.*, n206 on remand from a decision n207 holding the plaintiff's expert's evidence that asbestos caused colon cancer sufficient to defeat summary judgment, the jury rendered a verdict for the plaintiff. The Trial Court, however, granted judgment as a matter of law for the defendants, on the ground that *Daubert* imposed an obligation on the Judge to scrutinize strictly expert testimony for its sufficiency as well as its admissibility. Reversing and reinstating the verdict, the Court of Appeals held that *Daubert* did not change the standard for assessing the sufficiency of evidence or for granting judgment as a matter of law. While the Trial Judge has an expanded role in assessing the admissibility of scientific expert testimony, this does not allow the Judge to usurp the jury's function by acting as a gatekeeper as to sufficiency.

Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) : The Court affirmed the grant of injunctive relief against a logging company in an action by an environmental group to protect a nesting habitat. It held that, because the company failed to request a ruling at trial on its *Daubert* objections to expert testimony, it could not make a sufficiency of the evidence argument on appeal that seemed to be based on a *Daubert* analysis.

[91] Sufficient Facts or Data as Basis

Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408 (3d Cir. 2002) : The plaintiffs, suing for wrongful death in a helicopter crash, alleged that a shaft seal was installed backwards and leaked flammable fluid, which was ingested by an engine as the craft was attempting to land. To prove that the flammable fluid had another source, an expert for the defendant manufacturer testified that it was hydraulic fluid. The plaintiffs objected that the testimony lacked an adequate factual basis because there was insufficient evidence of the presence of hydraulic fluid inside the engine. Affirming a judgment for the defendant, the Court found a sufficient factual foundation in evidence that hydraulic fluid was found in places where it should not have been, including outside the engine and near the engine. Once the

defendant met the foundational requirements for admissibility, it was up to the plaintiffs to highlight the weaknesses in the expert's opinion through cross-examination. One Judge dissented, finding the expert's factual foundation insufficient.

[92] Summary Judgment

Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997) : Vacating an order for summary judgment in a medical malpractice case, the Court held that *Daubert* review of expert testimony on summary judgment should proceed with caution:

> Given the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.

First United Fin. Corp. v. United States Fid. & Guar. Co., 96 F.3d 135 (5th Cir. 1996) : Opposing a motion for summary judgment in a suit to recover on a fidelity bond for losses resulting from employee dishonesty, the plaintiff proffered affidavits from two financial experts who reviewed pertinent bank files and records and concluded that certain employees acted dishonestly. Affirming the grant of summary judgment for the defendant, the Court held that this testimony was properly rejected, since an expert "may only assist and not replace the fact finder." The Court concluded that "the admissibility of expert testimony is governed by the same rules, whether at trial or on summary judgment."

Navarro v. Fuji Heavy Indus., Ltd., 117 F.3d 1027 (7th Cir. 1997) : Affirming a summary judgment for the defendant in a personal injury case, the Court held that the Trial Judge properly excluded an engineering expert's affidavit under *Daubert*. The expert asserted that the defendant, a car manufacturer, should have known about the risk of internal rusting, but the expert had not conducted a study of the matter and thus his assertions were "nakedly conclusional." Rejecting the plaintiff's argument that the gaps in the expert's testimony would have been filled in if the defendant, before moving for summary judgment, had deposed the expert, the Court declared that "there is no duty to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit. An expert's affidavit must be sufficiently complete to satisfy the *Daubert* decision, and one of those criteria ... is that the expert show how his conclusion ... is grounded in -- follows from -- an expert study of the problem."

[93] Testing in Accordance with Legal Requirements

Rushing v. Kansas City S. Ry., 185 F.3d 496 (5th Cir. 1999) : Although the Court reversed a partial summary judgment for the defendant in a nuisance action by homeowners complaining of noise and vibrations from the defendant's property, it found no plain error in the admission of an expert affidavit submitted by the defendant. The expert used the test that is required by the federal Noise Control Act, and "[w]hen applicable law mandates the use of a particular test, the proponent of the test's results should not have to establish its reliability," and "its reliability irrebuttably should be presumed."

[94] Toxicology Tests

O'Neill v. Windshire-Copeland Assocs., 372 F.3d 281 (4th Cir. 2004) : Affirming a judgment for defendants in an

action to recover for serious personal injuries suffered when the plaintiff fell from a second-story balcony at an apartment complex, the Court found no abuse of discretion when the results of a toxicology test taken while the plaintiff was being treated in the hospital were admitted. The test showed that the plaintiff had a blood alcohol content of.18 an hour after her fall. The Court rejected the argument that the use of an alcohol swab to sterilize her arm tainted the test. The fact that the test result was printed on a form that said "these results should not be used for any legal purpose" did not disqualify the test, given that doctors rely upon the test and reliable procedures are used in conducting it.

[95] Trial Court's Discretion

[a] Expert Testimony Confusing or Cumulative

El-Meswari v. Washington Gas Light Co., 785 F.2d 483 (4th Cir. 1986) : In a wrongful death action, the Court found no error in the exclusion of expert testimony concerning a mother's physical injuries allegedly resulting from the loss of her son. The governing Virginia law recognizes damages for emotional anguish but not indirect physical injuries, and the Court concluded that the jury was capable of ascertaining whether the mother suffered emotional distress without hearing lengthy expert testimony concerning noncompensable injuries that was offered as corroboration of the distress.

United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) : The Court held, in the prosecution of a financial institution officer for taking kickbacks, that there was no abuse of discretion in excluding expert testimony as to the illegality of certain contractual relationships. Although the evidence might have tended to show a motive for bias in some of the witnesses, it was likely to distract or confuse the jury, and the defendant could raise an inference of bias in other ways. The Court rejected the defendant's argument that *Daubert* changed the way that probative value is balanced for expert testimony. In *Spesco, Inc. v. General Elec. Co.*, n208 the Court affirmed a judgment holding the defendant liable for a fire. It found no error in the admission of testimony by one of the plaintiff's experts that allegedly departed from the theory of the other experts that had been disclosed during discovery. The expert's testimony was cumulative of that of other experts, so there was no error in denying the defendant a six-week continuance to conduct additional experiments in order to counter the expert's opinion.

Justice v. Carter, 972 F.2d 951 (8th Cir. 1992) : The Court affirmed a judgment for the defendant in a legal malpractice action, holding there was clearly no abuse of discretion in precluding the plaintiffs from introducing "comparable" Court cases in support of their expert's opinion that their bankruptcy plan was feasible. Such evidence is not helpful to the jury and presents the dangers of having a malpractice decision turn on what a particular Judge would likely have done rather than on what a reasonable Judge would have decided.

Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525 (9th Cir. 1986) : The Court reversed convictions for "churning" stock accounts, finding it was error to exclude expert opinion on whether the accounts in question were churned. The Trial Judge excluded the testimony because it would have extended a four-day trial to 11 days, but "[c]hurning consists of the conjunction of three complex factors," and that expert testimony was necessary to help the jury understand these factors. In *United States v. Gonzales*, n209 the Court held there was no error in excluding expert testimony that a police officer did not communicate well in Spanish, offered to prove that the officer could not be sure that the defendant understood his rights, where the expert did not propose to test the officer's conversational ability and the evidence was cumulative. In *United States v. Marabelles*, n210 the Court affirmed a self-employed painter's convictions for tax evasion, finding no error in the exclusion of a defense expert, a bank loan officer, who would have testified to a reference manual's figures for the costs of producing income in the painting business. The testimony was, *inter alia*, cumulative of testimony by another witness.

Balogh's of Coral Gables, Inc. v. Getz, 798 F.2d 1356, 1986-2 Trade Cas. (CCH) P67271 (11th Cir. 1986) (en banc), *reinstating 778 F.2d 649, 1985-2 Trade Cas. (CCH) P66889 (1985)* : The Court affirmed a judgment for the defendants in an antitrust case, finding no error in the exclusion of expert testimony that might have complicated, rather than clarified, the one simple factual issue in the case. In *United States v. Rouco*, n211 the Court affirmed a conviction for murdering an undercover officer, ruling that the Trial Judge properly excluded expert testimony concerning arrest procedures offered by the defendant to support a claim that he believed the deceased was a "Mafia hit-man" who was trying to kill him. The Judge was warranted in concluding that the testimony would not help the jury assess the defendant's belief at the time of the killing and that any probative value was outweighed by the danger of confusion.

[b] Trial Court's Discretion -- Expert Testimony Prejudicial

Spencer v. General Elec. Co., 688 F. Supp. 1072 (E.D. Va. 1988) : In a sexual harassment case, the Judge held that the plaintiff could not introduce expert testimony that she suffered from posttraumatic stress disorder to prove that a rape occurred. He concluded that evidence of the disorder is not a reliable way of determining whether a rape occurred and that the prejudicial effect of the evidence outweighed its probative value.

United States v. Green, 548 F.2d 1261 (6th Cir. 1977) : At a trial for conspiracy to manufacture a controlled substance, government experts testified concerning the drug that the defendants were charged with conspiring to manufacture. Citing *Rule 702*, the Court stated that it was a clear abuse of discretion to allow the government to introduce extensive expert testimony of both dubious relevance and cumulative prejudicial impact, including the physiological effects of the drug being manufactured, its quantity, and its market price. "We view this invocation of the 'dope peddler' image as a highly inflammatory trial tactic which innately prejudiced Appellants' rights to a fair trial."

[c] Trial Court's Discretion -- Test for Reliabiliity

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) : This case is discussed more fully in the Editorial Explanatory Comment, *§ 702.02[5]*. The Court rejected the *Frye* general acceptance test for scientific evidence and concluded that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

[96] Unhelpful Evidence -- Within Ordinary Understanding

McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987) : The Court found no abuse of discretion in the exclusion of expert testimony in a libel action as to the meaning of the word "scam" as used in a newspaper story, on the ground that the testimony would not have helped the trier of fact.

United States v. Portsmouth Paving Corp., 694 F.2d 312, 1982-83 Trade Cas. (CCH) P65034 (4th Cir. 1982) : In the course of affirming convictions for conspiracy on the part of defendants to rig bids and fix prices in connection with highway construction, the Court found that the exclusion of expert testimony offered to suggest an innocent explanation for bidding patterns was permissible where "the proffered testimony of the appellants' expert did little more than correlate higher contracting costs with longer hauling distances," which added nothing to what other witnesses had said.

Peters v. Five Star Marine Serv., 898 F.2d 448 (5th Cir. 1990) : In an action for injuries suffered on a drilling platform, the Court found no abuse of discretion in excluding testimony by a maritime operations expert regarding the hazards of off-loading a vessel in heavy seas and the defendant's obligation to keep the deck clean and cargo properly stowed. Expert testimony would be unhelpful and unnecessary, as the jury could adeptly assess the situation using only

their common experience and knowledge.

Stromback v. New Line Cinema, 384 F.3d 283 (6th Cir. 2004) : Affirming summary judgment for a movie distributor sued by the author of a poem and screenplay for copyright infringement, the Court held that no remand was needed to consider expert testimony: "[W]here, as here, the subject matter is not complex or technical, such as a computer program or a functional object, ... but instead involves a literary work aimed at a general audience, expert testimony will seldom be *necessary* to determine substantial similarity."

United States v. Welch, 368 F.3d 970 (7th Cir. 2004) : The defendant was charged in 2002 with the robbery of a credit union in 1997. Although he was not identified in a lineup, three individuals who knew him testified that they believed he was the man depicted in bank surveillance photographs. Affirming, the Court found no error when a defense expert was precluded from testifying regarding the propensity of witnesses to identify a person based on familiarity with clothing, the tendency of witnesses to misidentify a person based upon factors of which the witness is unaware, and the deterioration of memory over time. The testimony would not assist the jury, and there was no "fit" between the expert's testimony and the circumstances of the identifications, as the witnesses knew the defendant very well prior to the crime and had as much time as they needed to view the surveillance films in a stress-free atmosphere. In *Hoffman v. Caterpillar, Inc., 368 F.3d 709 (7th Cir. 2004)* , a plaintiff with only one arm brought an ADA action on the ground that her employer refused to train her to operate a high-speed document scanner. A pretrial *in limine* ruling precluded an expert for the plaintiff from testifying about her ability to operate the scanner at mandated production levels, on the ground that the expert had not observed the plaintiff operating the machine; however, the expert was permitted to testify generally about whether a one-handed person could operate the machine. After the *in limine* order and before the beginning of the trial, the plaintiff received instruction on the machine, and a videotape was made of her operating it. The Judge denied a request to change the *in limine* order, and the Court affirmed a judgment for the defendant, finding no abuse of discretion in the ruling. Although the videotape would provide a sufficient basis for the expert's opinion, the jury could determine for themselves from the videotape the plaintiff's ability, so the expert testimony would be of no help. Affirming summary judgment for the defendant in a slip and fall case, *Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996)* , the Court upheld the exclusion of an expert's affidavit which merely stated the obvious: "[I]mproperly displayed merchandise can fall to the floor where someone might step on it and fall." The affidavit offered nothing to assist the trier of fact on the question of causation, because the plaintiff presented no evidence of the presence of any object on which she might have slipped.

United States v. Romo, 413 F.3d 1044 (9th Cir. 2005) : In a prosecution for threatening the President, the Court held it was error (but harmless) for the Director of Presidential Correspondence to testify that her office would have deemed the defendant's letter a direct threat to the President. The Court reasoned that "[n]o expert testimony was necessary on that point because the average juror requires no assistance assessing what a reasonable person would foresee," which is the statutory standard for threatening communications. Besides the witness' position "makes her highly sensitive to threats and far from an accurate bellwether of what a reasonable person would foresee." In *United States v. Castaneda, 94 F.3d 592 (9th Cir. 1996)* , the Court affirmed a narcotics convictions, holding that the Trial Judge properly excluded the testimony of a witness familiar with migrant farmworkers as to why an illegal alien might fear government officials. The Court concluded that the subject of the testimony was not one that needed illumination from an expert.

Ahrens v. Ford Motor Co., 340 F.3d 1142 (10th Cir. 2003) : The plaintiff's decedent was killed when the tractor he was driving ran over him as a result of a collision with a car. The plaintiff sued the tractor's manufacturer, alleging a defect because the tractor was not equipped with a rollover bar and a seat belt to protect the operator from rollover accidents and being thrown from the tractor. Affirming summary judgment for the defendant, the Court held that the relevant factual issue was the degree to which the ordinary consumer would contemplate the danger of not having a seat

belt in the event of a collision. To the extent that the plaintiff's expert addressed the risks of operating a tractor without a seat belt, the testimony was inadmissible because that risk could be understood by ordinary jurors. In a prosecution for securities and bankruptcy fraud, *United States v. Affleck*, n212 the Court found no error in the exclusion of expert testimony from a "memory expert," since "[t]he average person is able to understand that people forget."

Cook ex rel. Tessier v. Sheriff of Monroe County, 402 F.3d 1092 (11th Cir. 2005) : In an action brought after an inmate hanged himself, the plaintiff offered the testimony of an expert on suicide prevention in correctional facilities, who was prepared to testify that the detention center was deliberately indifferent to the risks of suicide in this case. The Court found no error in the exclusion of this testimony, as most of it covered obvious conclusions that the jury could make, and the rest was unsupported by a sufficient factual foundation.

[97] Value of Property

Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252 (1st Cir. 1997) : The Court affirmed judgment as a matter of law for the defendant in a sales agent's action to recover commissions, holding there was no error in excluding a CPA's testimony proffered by the plaintiff. Although the expert was giving an opinion on the value of a security interest in a company, he omitted certain liabilities, had no independent knowledge of the company's indebtedness, and used unreliable methodology in calculating significant items. In *United States v. Kayne, 90 F.3d 7 (1st Cir. 1996)* , the defendant was convicted of fraudulently selling rare coins at an inflated value. Affirming, the Court found no error in the admission of testimony from eight coin dealers that the coins sold by the defendant were of substantially lower quality and value than represented in the accompanying documentation. "Opinions of value are a traditional subject of expert testimony," and "[o]ne could hardly expect a lay jury to form conclusions about such an esoteric subject as the value of rare coins without the help of an expert."

FDIC v. Suna Assocs., 80 F.3d 681 (2d Cir. 1996) : In a proceeding for a deficiency judgment, the FDIC offered the testimony of an expert, who valued the real estate on the basis of a sale of all of the property to a single purchaser and testified that he used a valuation methodology that was a blend of two approaches to valuation: direct sales comparison and income capitalization. The defendant objected that the testimony was based on "a developmental analysis unknown to appraisal literature, unique to [the expert] and on factual assumptions which were without any reasonable foundation." But the Court, citing *Daubert* as establishing a flexible and permissive approach, found the expert's "hybrid of two widely-recognized methods" of valuation to be sufficiently reliable, and dismissed the internal contradictions in the expert's testimony as presenting a question of weight.

United States v. 68.94 Acres of Land, 918 F.2d 389 (3d Cir. 1990) : The Court vacated and remanded a judgment for landowners in an eminent domain case, holding it was an abuse of discretion to exclude expert testimony based in part on economic analysis, which is not considered in traditional appraisals. There was no abuse of discretion in striking testimony by a landowner regarding the property's value, which was based only on the opinion of another expert whose testimony was excluded pursuant to a proper discovery sanction.

United States v. 14.38 Acres of Land, 80 F.3d 1074 (5th Cir. 1996) (per curiam): In an eminent domain action, the District Court granted the government's motion *in limine* to exclude expert testimony regarding damages suffered as a result of moving a levee, on the ground that the testimony would be speculative because the experts were tentative about the possibility of flooding on the property. Vacating and remanding, the Court held that too stringent a reliability test had been applied and the experts' inability to predict the extent of flooding did not render their testimony entirely speculative; indeed, the government would not likely have erected a flood-control levee were the possibility mere speculation and conjecture.

Eckelkamp v. Beste, 315 F.3d 863 (8th Cir. 2002) : The Court affirmed judgments for the defendants in an action alleging breach of ERISA fiduciary duties, and found no abuse of discretion in the exclusion of testimony by the plaintiffs' expert that the defendant fiduciaries were overcompensated and that they had undervalued company stock. In the compensation analysis, the expert failed to take into account that all the employees were paid considerably above market rates, he premised his analysis on comparisons to companies that in many ways were not comparable, and he did not ensure that the jobs of executives he was comparing were comparable. In the appraisal he used a "control premium" when there was no evidence the company appeared likely to be sold, and he "double counted" certain dividends that had already been paid. In *United States v. 75.13 Acres of Land*, n213 the Court held in a condemnation action that qualified experts are permitted to testify that in their judgment certain other sales are comparable to the property in question.

Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997) : In a dispute between Indian tribes over the value of grazing land, the Navajo tribe challenged the Hopi tribe's expert's testimony under *Daubert*. The Court held that the expert, an economist with a specialty in range economics and with dozens of peer-reviewed articles to his credit, was properly qualified to testify to the value of the property. "The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory."

United States v. McPhilomy, 270 F.3d 1302 (10th Cir. 2001) : Affirming convictions for stealing stone from property owned by the Bureau of Land Management, the Court found no abuse of discretion in the admission of expert testimony on the quality, quantity, and value of the stone. The expert was a geologist who had worked for the BLM for 11 years evaluating minerals. His conclusion as to the quality of the stone was based on personal inspection and his expertise. While his "opinion would have been more reliable had he employed more costly and extensive tests," it was sufficiently reliable, given his considerable expertise and his use of the same methodology he used as a certified mineral examiner for the BLM. His opinion as to value was reached by the same method he used in his job, using retail prices for comparable stone from nearby stone yards as determined by examining the comparable stone and asking the retailers about prices. In a civil rights action, *Malloy v. Monahan, 73 F.3d 1012 (10th Cir. 1996)* , the plaintiff alleged that injuries from the defendants' use of excessive force caused him to lose profits from his business of purchasing, rehabilitating, and selling houses. The Court held that the plaintiff had sufficient expertise and personal knowledge to render an opinion as to the value of his properties and lost future profits of his own real estate ventures.

United States v. 0.161 Acres of Land, 837 F.2d 1036 (11th Cir. 1988) : The Court reversed a judgment in an eminent domain action, finding that testimony by the property owners' expert as to his opinion of fair market value should have been admitted, even though the expert was not familiar with the particulars of certain sales of property that he considered in reaching his opinion. His lack of knowledge went to weight, not admissibility.

[98] Vehicle Identification Expert

United States v. Glover, 265 F.3d 337 (6th Cir. 2001) : The Court affirmed convictions for carjacking, finding no abuse of discretion in permitting an agent of the National Insurance Crime Bureau (a link between the insurance industry and law enforcement in the investigation of vehicle fraud and theft) to testify that the vehicle identification number of the victim's car indicated that it had been manufactured in Japan and thus had necessarily traveled in foreign commerce. The witness' expertise in interpreting the VIN numbers assisted the jury in determining the place of manufacture, and cautionary instructions reduced any possible prejudice.

[99] Veterinarians

Jahn v. Equine Services, PSC, 233 F.3d 382 (6th Cir. 2000) : The Court reversed a summary judgment for veterinarians sued by the owner of a champion pony that died after surgery. The owner's experts' opinions were within their expertise, were based on a scientific method, and were derived from the facts at hand, which were less than optimal because of the defendants' inadequate record keeping. The Court also criticized the Trial Judge for rejecting the experts' testimony because it was inconsistent with the factual conclusion of the pathologist, as that was an issue for the trier of fact.

[100] Vocational Rehabilitation

Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000) : To establish the extent of her disability and lost earning capacity resulting from a slip and fall, the plaintiff offered opinion testimony from a witness that was based on her psychological condition, the extent of her physical injuries, employment factors, and tests performed on the plaintiff. The Court reversed a judgment for the plaintiff, holding that questions regarding the reliability of the expert's methodology made it error not to conduct a *Daubert* hearing.

Ammons v. Aramark Uniform Servs., Inc., 368 F.3d 809 (7th Cir. 2004) : In conjunction with a worker's compensation claim, the plaintiff in an ADA action met with a vocational rehabilitation counselor, who concluded that the plaintiff was subject to a "sedentary restriction" and was not capable of returning to his past work. After suit was filed and the plaintiff retained the counselor as an expert witness, the counselor made a three-hour visit to the facility and concluded that the plaintiff's restrictions "did not preclude him from performing the majority of the work duties." Affirming summary judgment for the employer, the Court found no abuse of discretion in exclusion of the expert's opinion. Since the expert had not observed all the equipment and machinery involved in the plaintiff's duties, had not reviewed the depositions of a manager and a co-worker knowledgeable about the facility, and had not re-interviewed the plaintiff, her opinion was speculative and unreliable.

[101] Voice Identification

United States v. Salimonu, 182 F.3d 63 (1st Cir. 1999) : The prosecution in a drug case introduced tape recordings of incriminating conversations and, for purposes of comparison, a voice exemplar that contained a recording of the defendant's voice. The defendant sought to introduce the testimony of two experts to establish that the voice on the taped conversation and the defendant's voice on the exemplar were different. The Trial Judge admitted testimony from the developer of a spectogram computer program but would not permit a linguist to testify based on his listening to the tapes that the two voices were different. Affirming, the Court found no abuse of discretion in the assessment below that the linguist's analysis was not reliable, given the absence of an error rate, testimony that voices could be disguised, and the lack of other indicia of reliability. Furthermore, the linguist's testimony that a layperson could distinguish the differences that he found by listening carefully to the tapes meant that the testimony would not assist the trier of fact, as is required by *Rule 702*.

United States v. Jones, 24 F.3d 1177 (9th Cir. 1994) : Affirming a conviction for distributing cocaine base, the Court held there was no abuse of discretion in excluding proffered expert testimony on voice identification by a defense witness, where the witness had no specialized training, had himself developed the aural subjective comparison technique, did not employ a voice spectrograph, and could cite no studies or research supporting his theory or other experts who used his technique.

[102] Waiver of *Daubert* Challenge

Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir. 2001) : The Court stated that "counsel should not 'sandbag' *Daubert* concerns until the close of an opponent's case, thereby placing opposing counsel and the trial court at a severe disadvantage." The Court indicated that a Trial Judge may disallow *Daubert* motions raised late in the trial process.

FOOTNOTES:

(n1)Footnote 1. *Bauman v. Volkswagenwerk A.G., 621 F.2d 230 (6th Cir. 1980)* .

(n2)Footnote 2. *Jackson v. Fletcher, 647 F.2d 1020 (10th Cir. 1981)* .

(n3)Footnote 3. *Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)* .

(n4)Footnote 4. *Bolt v. Halifax Hosp. Med. Center, 851 F.2d 1273, 1988-2 Trade Cas. (CCH) P68174 (11th Cir. 1988)* , *panel opn. reinstated in pertinent part, 874 F.2d 755, 1989-1 Trade Cas. (CCH) P68587 (11th Cir. 1989)* (en banc).

(n5)Footnote 5. *Joiner v. General Elec. Co., 78 F.3d 524 (11th Cir. 1996)* .

(n6)Footnote 6. *McGowan v. Cooper Indus., 863 F.2d 1266 (6th Cir. 1988)* .

(n7)Footnote 7. *FDIC v. First Interstate Bank of Des Moines, N.A., 885 F.2d 423 (8th Cir. 1989)* .

(n8)Footnote 8. *Apostol v. United States, 838 F.2d 595 (1st Cir. 1988)* .

(n9)Footnote 9. *Martell v. Boardwalk Enters., 748 F.2d 740 (2d Cir. 1984)* .

(n10)Footnote 10. *Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986)* .

(n11)Footnote 11. *Kelsay v. Consolidated Rail Corp., 749 F.2d 437 (7th Cir. 1984)* .

(n12)Footnote 12. *Roe v. Deere & Co., 855 F.2d 151 (3d Cir. 1988)* .

(n13)Footnote 13. *Breidor v. Sears, Roebuck & Co., 722 F.2d 1134 (3d Cir. 1983)* .

(n14)Footnote 14. *Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985)* .

(n15)Footnote 15. *Barron v. Ford Motor Co. of Can. Ltd., 965 F.2d 195 (7th Cir. 1992)* .

(n16)Footnote 16. *Orth v. Emerson Elec. Co., 980 F.2d 632 (10th Cir. 1992)* .

(n17)Footnote 17. *Werth v. Makita Elec. Works, Ltd., 950 F.2d 643 (10th Cir. 1991)* .

(n18)Footnote 18. *Ponder v. Warren Tool Corp., 834 F.2d 1553 (10th Cir. 1987)* .

(n19)Footnote 19. *Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 2000-2 Trade Cas. (CCH) P15900 (8th Cir. 2000)* .

(n20)Footnote 20. *Tanner v. Westbrook, 174 F.3d 542 (5th Cir. 1999)* .

(n21)Footnote 21. *Black v. Food Lion, 171 F.3d 308 (5th Cir. 1999)* .

(n22)Footnote 22. *Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994)* .

(n23)Footnote 23. *Penney v. Praxair, Inc., 116 F.3d 330 (8th Cir. 1997)* .

(n24)Footnote 24. *Watkins v. Schriver, 52 F.3d 769 (8th Cir. 1995)* .

(n25)Footnote 25. *United States v. Whitted, 11 F.3d 782 (8th Cir. 1993)* .

(n26)Footnote 26. *Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357 (8th Cir. 1990)* .

(n27)Footnote 27. *Schulz v. Celotex Corp., 942 F.2d 204 (3d Cir. 1991)* .

(n28)Footnote 28. *United States v. Running Horse, 175 F.3d 635 (8th Cir. 1999)* .

(n29)Footnote 29. *United States v. Whitted, 11 F.3d 782 (8th Cir. 1993)* .

(n30)Footnote 30. *United States v. Plenty Arrows, 946 F.2d 62 (8th Cir. 1991)* .

(n31)Footnote 31. *United States v. Johns, 15 F.3d 740 (8th Cir. 1994)* .

(n32)Footnote 32. *United States v. Antone, 981 F.2d 1059 (9th Cir. 1992)* .

(n33)Footnote 33. *United States v. Charley, 189 F.3d 1251 (10th Cir. 1999)* .

(n34)Footnote 34. *United States v. Scop, 846 F.2d 135 (2d Cir. 1988)* .

(n35)Footnote 35. *Cassino v. Reichhold Chems., Inc., 817 F.2d 1338 (9th Cir. 1987)* .

(n36)Footnote 36. *School Dist. No. 11 v. Sverdrup & Parcel & Assocs., 797 F.2d 651 (8th Cir. 1986)* .

(n37)Footnote 37. *Cashman v. Allied Prods. Corp., 761 F.2d 1250 (8th Cir. 1985)* .

(n38)Footnote 38. *In re James E. O'Connell Co., 799 F.2d 1258 (9th Cir. 1986)* .

(n39)Footnote 39. *Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471 (10th Cir. 1985)* .

(n40)Footnote 40. *State Office Sys. v. Olivetti Corp., 762 F.2d 843 (10th Cir. 1985)* .

(n41)Footnote 41. *Knightsbridge Mktg. Servs. v. Promociones y Proyectos, 728 F.2d 572 (1st Cir. 1984)* .

(n42)Footnote 42. *Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59 (1st Cir. 1984)* .

(n43)Footnote 43. *Bright v. Land O'Lakes, Inc., 844 F.2d 436 (7th Cir. 1988)* .

(n44)Footnote 44. *Ventura v. Titan Sports, Inc., 65 F.3d 725 (8th Cir. 1995)* .

(n45)Footnote 45. *Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991)* .

(n46)Footnote 46. *Novatel Communications, Inc. v. Cellular Tel. Supply, Inc., 856 F.2d 151 (11th Cir. 1988)* .

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Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 702 RULE 702

3-702 Federal Rules of Evidence Manual 702.04

702.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, *5 Vand. L. Rev. 414, 418 (1952)*. When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training, or education." Thus within the scope of the rule are included not only experts in the strictest sense of the word, e.g., physicians, physicists and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

[2] 2000 Amendment Committee Note

2000 Amendment Committee Note

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)*, and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)*. In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho, 119 S.Ct. at 1178* (citing the Committee Note to the proposed amendment to *Rule 702*, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of *Rule 104(a)*. Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States, 483 U.S. 171 (1987)*.

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." *119 S.Ct. at 1175*.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho, 119 S.Ct. at 1175*, *see Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)* (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997)* (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)*.
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)* (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N. R.R., 29 F.3d 499 (9th Cir. 1994)* (testimony excluded where the expert failed to consider

other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)* (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)* . *See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 1176 (1999)* (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael, 119 S.Ct.1167, 1175 (1999)* (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.") *Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998)* (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)* (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho, 119 S.Ct. 1167, 1176* ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999)* ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5 (9th Cir. 1995)* (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996)* . As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *509 U.S. at 595* . Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael, 119 S.Ct.1167, 1176 (1999)* (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 160 (3d Cir. 1999)* (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994)* , proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable... . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318 (9th Cir.*

1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)* ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." *509 U.S. at 595* . Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997)* . Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598 (9th Cir. 1996)* . The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)* , "*any* step that renders the analysis unreliable ... renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, *Rule 702* simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1171 (1999)* ("We conclude that *Daubert's* general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)* ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994)* ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized

knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone -- or experience in conjunction with other knowledge, skill, training or education -- may not provide a sufficient foundation for expert testimony. To the contrary, the text of *Rule 702* expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997)* (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996)* (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael, 119 S.Ct.1167, 1178 (1999)* (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995)* ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)* (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999)* ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of *Rule 702* calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to *Rule 703*. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between *Rules 702 and 703*. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under *Rule 702*. *Rule 702* sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of *Rule 703* is a relatively narrow inquiry. When an expert relies on inadmissible information, *Rule 703* requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information--whether admissible information or not--is governed by the requirements of *Rule 702*.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle, 38 Ga.L.Rev. 699, 766 (1998)* ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely

give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g.*, *Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997)* (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994)* (discussing the use of *in limine* hearings); *Claar v. Burlington N. R.R., 29 F.3d 499, 502-05 (9th Cir. 1994)* (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 559 (1994)* (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
Supp. To CHAPTER 702 RULE 702

3-702 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 702, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 702. Testimony by Experts	**Rule 702. Testimony by Expert Witnesses**
If scientific, technical, or other spe-	A witness who is qualified as an expert

cialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

catio n, may testi fy there to in the form of an opin ion or oth- er- wise , if (1) the testi mon y is base d upo n suf- ficie nt facts or data, (2) the testi mon y is the prod uct of reli- able prin- ciple s and met hods

, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to un-

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Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
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3-702 Federal Rules of Evidence Manual Supp. to § 702.03

Supp. to § 702.03 Annotated Cases

[Go To Main]

[1] Accident Reconstruction [Go To Main]

Sigler v. American Honda Motor Co., 532 F.3d 469 (6th Cir. 2008) : The plaintiff in a product liability action allegedly suffered head injuries when her vehicle, traveling 70 miles per hour, left the road and collided with a small tree after going down an embankment and the airbag did not deploy. Reversing summary judgment for the defendant, the Court held there was no abuse of discretion in excluding testimony by an expert for the plaintiff regarding the speed at which the vehicle likely struck the tree and the possible cause for the airbag's failure to deploy. The expert was an experienced auto mechanic, but the speed of the collision was a matter of accident reconstruction, an area in which he lacked expertise; analyzing an automobile after an accident was an area in which he possessed expertise, but his method involved physically examining the vehicle, which did not occur in this case.

[5] Antitrust Violations [Go To Main]

Major League Baseball Properties. Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008) : The Court affirmed a summary judgment for Major League Baseball's exclusive licensing agent on a counterclaim by a company that alleged antitrust and other claims challenging the lawfulness of the exclusive arrangement. It held that the defendant's expert witness offered only a conclusory opinion unaccompanied by any evidentiary citation or any elaboration and thus failed to contradict the opinion of the plaintiff's expert that the exclusive arrangement had procompetitive effects.

Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908 (6th Cir. 2009) : The Court affirmed summary judgment for the defendants in an action alleging antitrust violations in sanctioning auto races. It found no abuse of discretion in the exclusion of evidence from the plaintiff's experts, as they had improperly defined the relevant market and had applied a version of a standard test that was idiosyncratic, was produced solely for this litigation, and did not satisfy *Daubert* criteria.

Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006) : The parties in an antitrust action participated in an "upstream" market and a "downstream" market for aluminum. The plaintiff's economic expert opined regarding the upstream market, but his testimony was based entirely on evidence from the downstream market. Affirming in part summary judgment for the defendants, the Court found no abuse of discretion in the exclusion of the expert's testimony, since only the plaintiff's attorney, and not the expert, proffered an explanation as to why the experience in one market was relevant to the situation in the other.

[10] Ballistics Evidence [Go To Main]

United States v. Williams, 506 F.3d 151 (2d Cir. 2007) : In a prosecution for racketeering, drug trafficking, and murder, the Court found no abuse of discretion when ballistics evidence was held admissible. The Trial Judge had noted that a similar attack on the reliability of ballistics evidence had been rejected by another District Judge; and before the expert's testimony was submitted to the jury, the government provided an exhaustive foundation for the witness's expertise and a detailed description of the process she used to come to her conclusions. Noting that it was not holding "that any proffered ballistic expert should be routinely admitted," the Court observed that "expert testimony long presumed reliable before Rule 702 must nonetheless be subject to the careful examination that *Daubert* and *Kumho Tire* require."

United States v. Mikos, 539 F.3d 706 (7th Cir. 2008) : Affirming a murder conviction, the Court found no error in admitting the testimony of a ballistics expert that the defendant's revolver was one of the models that could have been the murder weapon; he disclosed that at least 15 other models could have fired the bullets. The Court noted that the expert did not testify that bullets with such-and-such rifling must have come from a particular model of gun, let alone from a specific weapon, which would have overstated what could be learned from the database on which he relied. Rather, he reliably applied the data for the purpose of saying that the rifling on the bullets did not rule out the defendant's make and model of gun.

[10.1] Banking and Financial Instruments [Go To Main]

United States v. Pansier, 576 F.3d 726 (7th Cir. 2009) : The Court affirmed the conviction of a tax protester who had submitted purported sight drafts issued by the Treasury as payment for state and federal taxes. It found no abuse of discretion in permitting a bank examiner with the Office of the Comptroller of the Currency to testify that the sight drafts were worthless financial instruments. The witness qualified as an expert in legitimate and fictitious financial instruments and banking; he provided sufficient evidence about his methods for ensuring the reliability of his analyses; his testimony touching on the Uniform Commercial Code and Treasury accounts was given within the context of his analysis of the financial instruments; and his testimony regarding the ultimate issue of the falsity of the instruments did not impermissibly refer to the defendant's state of mind or intent to defraud.

[12] Business Custom; Industry Practice [Go To Main]

United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008) : The defendant was convicted of obstructing justice and making false statements by denying that a lobbyist with whom he had a relationship was "doing business" with the government agency headed by the defendant. Reversing, the Court held it was an abuse of discretion to exclude expert testimony on whether government-contracting professionals viewed inquiries about possible contracts, as opposed to actually having a contract, with the agency as "doing business." Although the term was defined in some statutes, the

issue in this case was what the defendant intended in answering questions and making statements, so the "expert's testimony would have supplied crucial context and support for Safavian's proposed meaning."

Pelletier v. Main St. Textiles, LP, 470 F.3d 48 (1st Cir. 2006) : The plaintiff, who was injured while operating a forklift, claimed that the owner of the premises was negligent in maintaining the location and in ensuring the safety of the workers. The Court found no abuse of discretion in the exclusion of the plaintiff's expert, who would have testified to the customs and practices of the industry. Although expert testimony on the customs and practice of an industry is proper, there is no entitlement to offer such expert testimony. Here, the expert never inspected the facilities and equipment at issue, so the Judge was warranted in finding that the expert lacked sufficient facts or data upon which to base an opinion on the industry practices as applied to the premises at issue. The Judge gave the plaintiff several opportunities to clarify the customs and practices about which the expert would testify and the plaintiff offered several "shifting explanations," which provided some reason for the Judge to think that the expert was merely attempting to opine on the applicability of OSHA regulations to the defendants' conduct, which was a matter on which the Judge would instruct the jury.

SR Int'l Bus. Ins. Co. v. World Trade Center Properties, LLC, 467 F.3d 107 (2d Cir. 2006) : In litigation over whether destruction of the World Trade Center towers constituted one or two "occurrences" for purposes of insurance coverage, the Court held there was no abuse of discretion in permitting a witness with over 30 years of experience in the insurance industry and familiar with the practices related to "per occurrence" property provisions to testify as to custom and usage in the industry.

United States v. Fallon, 470 F.3d 542 (3d Cir. 2006) : The defendant was charged with fraud after providing a forged FDA letter certifying a medical device that was the subject of a vendor agreement he was establishing with a leasing firm. To prove that the forgery was material, the president of the leasing firm testified that it had a policy, which he had brought with him from his prior employer, of requiring FDA clearances from medical device manufacturers. The defense countered with the testimony of a witness that he had never in 15 years in the medical leasing business requested or even seen an FDA clearance letter, but it was not permitted to introduce testimony by a former COO at a medical leasing company (the prior employer of the prosecution witness) as to the customs and practices of the medical leasing industry. Affirming, the Court held that exclusion of the industry practice evidence was error (but harmless); contrary to the Trial Judge's understanding, "a witness need not represent an entire industry in order to have sufficient knowledge of that industry's customs and practices so as to render substantial assistance to the jury." In *Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195 (3d Cir. 2006)* , a breach of contract action related to securities, a lawyer offered an affidavit stating that, on assumed facts, it would have been reasonable for Berckeley to have believed that it was entitled to a certain securities law exemption. Upholding admission of the affidavit, the Court concluded that the lawyer's opinion could be helpful to the jury in understanding the customs and business practices in the securities industry; the lawyer was an experienced former counsel for the SEC with expertise in offshore securities transactions. "The customs and business practices in the securities industry at the time the parties entered into the Agreement provides an important context which will aid the jury in determining whether Berckeley had the requisite scienter at the time to evade the registration requirements." The Court emphasized that the Trial Court, in exercising its discretion, "must ensure that an expert does not testify as to the governing law of the case." Thus, the lawyer was not permitted to "testify as to whether Berckeley complied with legal duties that arose under the federal securities laws."

United States v. Anderson, 560 F.3d 275 (5th Cir. 2009) : Affirming a conviction for sex trafficking of children, the Court found no abuse of discretion in the admission of testimony from the director of a center specializing in serving victims of sexual exploitation regarding the typical characteristics of adolescent prostitutes and the behavior of pimps. The testimony was helpful in shedding light on whether the defendant was a pimp or merely someone with a flashy lifestyle and a penchant for travel and whether the government's young witnesses traveled with him quite independently or as part of a pimp-prostitute relationship.

Naeem v. McKesson Drug Co., 444 F.3d 593 (7th Cir. 2006) : A discharged female employee claimed that she had

been subjected to gender discrimination and intentional infliction of emotional distress. An *in limine* ruling precluded the plaintiff's human resources expert from opining whether the defendant followed accepted human resource policies but allowed testimony regarding whether the defendant followed its own policies. Affirming a judgment for the plaintiff on the IIED claims, the Court held that the Judge's simple conclusion that the witness had sufficient expertise to assist the jury was insufficient to show that an adequate *Daubert* analysis had been performed, so admission of the testimony would not be given the normal deferential review. The Court concluded that it was an error (but harmless) to admit the testimony, because it did not meet the requisite level of reliability: While the expert had examined the defendant's personnel policy manual and depositions by its employees, his opinions were not tied to specific portions of the manual and appeared to be general observations regarding what is normal or usual business practice.

PFS Distrib. Co. v. Raduechel, 574 F.3d 580 (8th Cir. 2009) : The plaintiff sued former employees who established a competing business for breach of fiduciary duties and sued the accountants and bankers who advised them for civil conspiracy. Affirming judgments for the accountants and bankers, the Court found no abuse of discretion when an accounting expert and a banking expert testified to the respective professional standards, as their testimony was relevant to the knowledge and state of mind of the advisers when serving the former employees. In *Cedar Hill Hardware & Constr. Supply v. Insurance Corp. of Hannover, 563 F.3d 329 (8th Cir. 2009)* , the Court affirmed a judgment for the insurer in an insurance coverage dispute, finding no abuse of discretion in the admission of testimony by an expert with exhaustive experience in the insurance industry. His testimony regarding underwriting standards in the industry was relevant to whether the omitted information was material, and his testimony concerning industry practice regarding suspected arson was relevant to whether the insurer had vexatiously delayed and resisted paying the claim.

[14] Cause of Accident [Go To Main]

[a] Generally

Santos v. Posadas de Puerto Rico Assoc., Inc., 452 F.3d 59 (1st Cir. 2006) : An expert witness for the plaintiff, who slipped and fell while entering a hotel swimming pool, testified that there was a dangerous condition arising from a combination of factors: variable friction between the pool steps and their edges, the use of an unsuitable type of tile at the edges, the peculiar configuration of the stairs, and the absence of a handrail. Rejecting an argument that the expert's testimony was unreliable, the Court found no abuse of discretion in admitting it, and affirmed a judgment for the plaintiff. The expert had interviewed the plaintiff, visited the pool, measured the steps, examined photographs of the area, reviewed applicable codes and standards, made needed calculations, and drawn upon his extensive friction-testing of various tiles that were similar to those used to edge the pool steps. The Trial Judge "knew that any doubts as to either the accuracy of Galdos's opinion or the weight to be given to it would be thoroughly explored by means of defense counsel's cross-examination, the Hotel's presentation of contrary expert testimony, and the jury instructions."

St. Paul Mercury Ins. Co. v. The Viking Corp., 539 F.3d 623 (7th Cir. 2008) : The Court affirmed a summary judgment for a sprinkler manufacturer sued by an insurer on a claim that a defective sprinkler resulted in a fire that damaged the building of an insured. It held there was no abuse of discretion in admitting testimony by the manufacturer's expert, who had extensive experience in microscopy, that the wear and tear on the sprinkler suggested the possibility of tampering, and that he used the process of elimination to reach his conclusion. The Court noted that "an expert's testimony need not eliminate all other possible causes of the injury. The fact that several possible causes might remain 'uneliminated' only goes to the accuracy of the conclusion, not to the soundness of the methodology."

Pro Service Automotive, L.L.C. v. Lenan Corp., 469 F.3d 1210 (8th Cir. 2006) : Affirming a summary judgment for the manufacturer of a waste oil heater sued by plaintiffs alleging that the heater caused their building to burn down, the Court found no abuse of discretion in excluding the plaintiff's expert testimony on accident causation. The expert did not engage in testing or other engineering analysis to support his opinion. He provided no mathematical analysis to support his hypothesis and failed to explain how the heater would cause a fire under his theory, when it had operated for

months in the condition that the expert claimed caused the fire.

[b] Cause of Accident -- Product Injuries

Bryte v. American Household, Inc., 429 F.3d 469 (4th Cir. 2005) : The Court affirmed a summary judgment for the manufacturer of an electric throw in a wrongful death action. It found no abuse of discretion when a state fire investigator's expert testimony that the electric throw caused the fire was excluded because the investigator failed to exclude all or most of the other possible sources of the fire. Other possibilities, such as the presence of a lighted candle, were not excluded by the expert "in any methodical or reliable fashion. And we are not obliged to credit [the expert's] say-so supporting his own reliability by way of excluding other causes."

Sigler v. American Honda Motor Co., 532 F.3d 469 (6th Cir. 2008) : The plaintiff in a product liability action allegedly suffered head injuries when her vehicle, traveling 70 miles per hour, left the road and collided with a small tree after going down an embankment and the airbag did not deploy. Reversing summary judgment for the defendant, the Court held there was no abuse of discretion in excluding testimony by an expert for the plaintiff regarding the speed at which the vehicle likely struck the tree and the possible cause for the airbag's failure to deploy. The expert was an experienced auto mechanic, but the speed of the collision was a matter of accident reconstruction, an area in which he lacked expertise; analyzing an automobile after an accident was an area in which he possessed expertise, but his method involved physically examining the vehicle, which did not occur in this case.

Menz v. New Holland N. Am., Inc., 507 F.3d 1107 (8th Cir. 2007) : Affirming summary judgments for the manufacturers of a tractor and a front-end loader in a suit by a tractor driver injured in a rollover accident, the Court found no abuse of discretion in excluding the plaintiff's expert testimony that a defect in the tractor caused the accident. The expert's conclusion was "mere speculation and conjecture," since he "did not believe it was necessary to reconstruct the events preceding the accident; rather, he repeatedly testified the only way to make the tractor safe was by installing a [rollover protection system]," and he "failed to offer any theory, supported by or based on sufficient facts or data, regarding how to design out the tractor's alleged inherent instability."

[15] Cause of Disease or Injury [Go To Main]

[b] Cause of Disease or Injury -- Drugs, Toxic Exposure, etc.

Wells v. SmithKline Beecham Corp., 601 F.23d 375 (5th Cir. 2010): The Court granted summary judgment for a pharmaceutical manufacturer sued by a patient who lost $10 million gambling while taking a dopamine agonist to alleviate Parkinson's symptoms. It found no abuse of discretion in excluding testimony by the plaintiff's three experts, who based their general causation conclusion on literature which they claimed showed an association between the drug and problem gambling. The literature for the most part contained only anecdotal evidence and not statistically significant epidemiology, and the one study that reached statistical significance focused on a "class finding" and did not purport to do a controlled test on the specific drug at issue, which functions differently from other dopamine agonists. In *Knight v. Kirby Inland Marine Inc., 482 F.3d 347 (5th Cir. 2007)* , in a toxic tort action alleging that on-the-job exposure to benzene caused the plaintiffs' cancer, the Court found no abuse of discretion in excluding the plaintiffs' toxicology expert and affirmed summary judgment for the defendants. The plaintiffs' expert relied on more than 50 case-control studies to reach his conclusion on general causation, i.e., that exposure to benzene can cause cancer. While case-control studies "are not per se inadmissible evidence on general causation," there was an analytical gap between all 50 studies and any relevant conclusion of general causation in this case. For example, one study involved workers in a variety of occupations, subject to greater and lengthier exposures than the plaintiffs; another study involved "a wide range of chemicals to which appellants were never exposed"; a third study concluded only that there was a "suggestion" of a causative connection between benzene and cancer.

Barrett v. Rhodia, Inc., 606 F.3d 975 (8th Cir. 2010) : In an action for injuries allegedly caused when a cloud of toxic

gas escaped from a chemical drum used in a hazardous waste facility, the plaintiff, who had been 12-14 feet away, sought to introduce testimony establishing that he had been exposed to a sufficient concentration of the gas to cause his injuries from a board-certified allergist certified in toxicology, his treating physician, a clinical psychologist practicing in neuropsychotherapy, and a safety engineer with a degree in petroleum and natural gas engineering. Affirming summary judgment for the defendants, the Court held there was no abuse of discretion in holding, with limited exceptions, that the proffered experts lacked the experience and scientific foundation to provide the causation testimony necessary for the plaintiff's case. In *In re Prempro Products Liability Litig., 514 F.3d 825 (8th Cir. 2008)* , the Court affirmed a judgment for the defendant in an action claiming that estrogen products for symptoms related to menopause caused the plaintiff's breast cancer. It held there was no abuse of discretion in permitting a defense expert to testify, based on his opinion that it takes a minimum of 12 years from toxic exposure to detection of breast cancer, that the plaintiff's cancer was present before the ten-year period during which she used hormone replacement therapy. The witness' conclusion was "an exercise in basic math using simple deductive reasoning." The Court also held there was no abuse of discretion in excluding testimony by an expert for the plaintiff that contradicted testimony the expert gave in his deposition. In *Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006)* , the Court affirmed judgments for a packing plant owner sued by a residential property owner who claimed she was injured by hydrogen sulfide gas emitted from the plant's wastewater treatment lagoons. The Court found no abuse of discretion in limiting the plaintiff's toxicology expert to testifying that the plaintiff's injuries were consistent with hydrogen sulfide exposure and barring an opinion on causation. The Court noted that it had previously held that a toxicologist may testify that exposure to a substance caused a person's symptoms and injuries, but there was no "blanket rule that toxicologists are qualified to render an opinion on causation." In this case, the toxicologist interviewed the plaintiff but did not examine her and did not inquire about other toxic exposures, did not exclude confounding factors, and used a causation standard that was not subject to expression in terms of a potential rate of error and was a much lower standard than medical causation.

Millenkamp v. Davisco Foods Int'l, Inc., 562 F.3d 971 (9th Cir. 2009) : Buyers of milk permeate for cattle food won a judgment on breach of warranty claims against the seller of the product in an action alleging that calves died as a result of ingesting the product. The Court found no abuse of discretion in the admission of expert testimony that the milk permeate caused the calves' illness. The expert "arrived at his conclusions using scientific methods and procedures," and his "conclusions were not mere subjective beliefs or unsupported speculation." The expert provided foundation testimony as to his background in calf nutrition and knowledge of acidosis, relied upon peer-reviewed publication, and analyzed the buyers' feed mixture with a peer-reviewed computer program. In *In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1013-1014 (9th Cir. 2008)* , the Court reviewed the trial of claims by bellwether plaintiffs alleging that radioiodine emissions by plutonium producers at a nuclear facility caused cancers and other life-threatening diseases. It found no abuse of discretion in precluding the plaintiffs' expert epidemiologist from testifying that scientific extrapolation supports a finding that radiation below 40 rads could cause hypothyroidism or autoimmune thyroiditis. Because the data used to reach the conclusions were not reliable, the expert was properly precluded from "speculating that such extrapolation would likely produce results showing causation below 40 rads, and, second, stating that current epidemiological data do not contradict or prevent such a finding."

Attorney Gen'l of Okla. v. Tyson Foods, Inc., 565 F.3d 769 (10th Cir. 2009) : The Court affirmed denial of a preliminary injunction to the State in an environmental action seeking to enjoin poultry processors from applying poultry waste to any land within a river watershed. There was no abuse of discretion when the State's expert testimony on the connection between bacterial contamination in the river watershed and farmers' use of poultry litter as fertilizer was found unreliable. The expert used a novel and untested methodology, and made discretionary decisions about which data to use in making calculations that had not been published or peer-reviewed.

[c] Cause of Disease or Injury -- Medical Testimony

[i] Cause of Disease or Injury -- Medical Testimony -- Differential Diagnosis

Granfield v. CSX Transp., Inc., 597 F.3d 474 (1st Cir. 2010) : The Court affirmed a judgment for a railroad carrier

employee who claimed that he was required to operate locomotives with malfunctioning equipment and that this caused him to suffer lateral epicondylitis. There was no abuse of discretion in permitting a board-certified orthopedic surgeon, who treated over 100 patients a year with the same injury, to testify as to medical causation. The Court observed that "[w]e have previously agreed that a differential diagnosis is a proper scientific technique for medical doctor expert testimony," and found it relevant that the expert's opinion "was formed before litigation was contemplated." The Court recognized that the expert did not rely on peer-reviewed studies but noted that such reliance is only one element under the *Daubert* analysis.

Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171 (6th Cir. 2009) : In a personal injury action claiming loss of smell caused by exposure to a swimming pool chemical spilled in a store, the Judge excluded causation testimony from the plaintiff's treating otolaryngologist, on the ground that his opinion involved improper extrapolation, reliance on anecdotal evidence and temporal proximity, insufficient information about the case, failure to consider other possible causes, and subjectivity. Reversing summary judgment for the defendant, the Court held that the plaintiff had provided a sufficient foundation for the expert's opinion based on a differential diagnosis, as the doctor had objectively ascertained the nature of the patient's injury, used a valid methodology to "rule in" exposure to the pool chemical as a cause of the injury, and engaged in standard techniques to "rule out" alternative causes to reach a conclusion as to which cause was most likely.

Gayton v. McCoy, 593 F.3d 610 (7th Cir. 2010) : In an action alleging that an inmate died from a heart attack because she did not receive proper medical care, the Court found an abuse of discretion in the exclusion of testimony by the plaintiff's medical expert that the inmate's vomiting could have exacerbated her heart attack and hastened her death. It noted that the expert had conducted a "differential diagnosis based on [the inmate's] medical history and the facts surrounding her incarceration" and therefore provided "a sufficient scientific basis" for his opinion. In *Ervin v. Johnson & Johnson, Inc., 492 F.3d 901 (7th Cir. 2007)* , the Court affirmed summary judgment for the defendant in an action alleging that its prescription medication caused a blood clot that required partial amputation of the plaintiff's leg. The plaintiff's causation expert purported to apply a differential diagnosis, but "ruled in" the defendant's medication solely on the basis of temporal proximity and an Internet Google search indicating one case report of a similar clot. The witness did not rely on any published work indicating a causal relation, nor did he consider the plaintiff's pre-existing conditions, which published studies indicated can cause clots. Therefore, there was no abuse of discretion in excluding the expert's testimony.

In re Prempro Products Liability Litig., 586 F.3d 547 (8th Cir. 2009) : In an action alleging that the plaintiff's breast cancer was caused by hormone replacement therapy, the Court found no abuse of discretion in the admission of testimony by the plaintiff's expert on specific causation. Given proof from the plaintiff's oncologist that the plaintiff suffered from hormone-dependent breast cancer, it was not necessary in conducting a differential diagnosis to consider breast cancer risk factors and a family history of breast cancer but rather to focus on ruling out the two possible sources of the hormones feeding the plaintiff's cancer, the plaintiff's own or the hormone replacement therapy. In *Bland v. Verizon Wireless, (VAW) L.L.C., 538 F.3d 893 (8th Cir. 2008)* , the Court affirmed summary judgment for the defendants in an action alleging that freon, sprayed by a store employee into a customer's water bottle, had caused the plaintiff to suffer exercise-induced asthma when she drank from the bottle. The Court held that causation testimony based on a differential diagnosis was properly excluded, since the cause of exercise-induced asthma is unknown in the majority of cases, and the expert did not rule out other possible causes. Furthermore, the expert was unaware of either the toxicity or the exposure levels for freon.

Hendrix v. Evenflo Co., Inc. 609 F.3d 1183 (11th Cir. 2010) : The plaintiffs alleged that a baby's head trauma, suffered when a child restraint system malfunctioned during a minor accident, caused autism spectrum disorder (ASD) that was diagnosed several years later. The Court found no abuse of discretion in the rejection of testimony by two experts who purported to conclude, on the basis of differential diagnosis, that head trauma could and did cause ASD in this case. The experts failed to "rule in" head trauma as a cause of ASD, since the medical textbooks and epidemiological studies relied upon by the experts to rule in head trauma did not in fact support that premise. In *Guinn v. AstraZeneca Pharm.*

LP, 602 F.3d 1245 (11th Cir. 2010) (per curiam), the Court affirmed summary judgment for the defendant in an action alleging that a prescription antipsychotic drug caused the plaintiff to develop diabetes. It found no abuse of discretion in the exclusion of testimony from the plaintiff's causation expert, as she had not, in applying a differential diagnosis methodology, adequately considered and excluded possible alternative causes of the plaintiff's weight gain and diabetes while taking the drug, but had relied principally only on temporal proximity. Furthermore, she had deviated from the standard diagnostic techniques, especially interviewing the patient, that she normally used to rule out potential alternative causes.

[ii] Cause of Disease or Injury -- Medical Testimony -- Miscellaneous Cases

Wackman v. Rubsamen, 602 F.3d 391 (5th Cir. 2010) : The Court affirmed in part a judgment for the survivors of a deceased hospice patient in a wrongful death action against the patient's caregivers, finding no abuse of discretion in the admission of expert testimony that the patient had died from a morphine overdose. A study showing that morphine could be detected in livers preserved in formalin was properly admitted although the patient's body had been embalmed with a different type of fluid. Furthermore, the expert's opinion was based on more than just the morphine detected; he had ruled out other causes of death. In *United States v. Seale, 600 F.3d 473 (5th Cir. 2010)* , the Court affirmed a conviction for a fatal kidnapping committed in 1964, finding no abuse of discretion in the admission of a forensic pathologist's conclusion that the victims' deaths were caused by fresh-water drowning. The sources for the conclusion properly included autopsy reports, video footage of the recovery of a body from a river, interviews with divers conducting the recovery effort, FBI reports, and photographs of physical evidence, as well as the testimony of a coconspirator. The defense was given every opportunity to challenge the opinion with evidence that the decayed condition in which the bodies were found and the lack of soft tissue available for analysis precluded a definitive conclusion.

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) : The Court affirmed convictions of an anesthesiologist on drug and fraud charges, finding no abuse of discretion in the admission of testimony by an addiction specialist that drugs prescribed by the defendant caused the deaths of two patients. The expert's opinion was based upon toxicology reports and the patient's files, and the expert conceded on cross-examination that he could not say beyond a reasonable doubt that the defendant's prescription caused one death. In *Sigler v. American Honda Motor Co., 532 F.3d 469 (6th Cir. 2008)* , a product liability action, the plaintiff allegedly suffered head injuries when her vehicle, traveling 70 miles per hour, left the road and collided with a small tree after going down an embankment and the airbag did not deploy. Assuming that the vehicle was traveling at least 20 miles per hour at the time it struck the tree and that the plaintiff's head struck the interior of the vehicle during the collision, the plaintiff's medical expert opined that the trauma likely aggravated or exacerbated her preexisting seizure disorder. The expert's opinion was excluded as "irrelevant and unreliable," on the ground that there was no evidence supporting his assumptions, but the Court found evidence in the record from which inferences supporting the assumptions could be drawn. Thus, the Court held it was an abuse of discretion to exclude the testimony, and reversed summary judgment for the defendant.

Happel v. Walmart Stores, Inc., 602 F.3d 820 (7th Cir. 2010) : In an action alleging that negligence by a pharmacy in filling a prescription for a nonsteroidal anti-inflammatory drug for a patient allergic to NSAIDs caused an anaphylactic reaction that exacerbated the patient's multiple sclerosis, the Court reversed the judgment for errors in awarding damages, but found no abuse of discretion in excluding causation testimony from the plaintiff's expert. The witness was not qualified to testify about the plaintiff's MS because he had very limited (and unrelated) experience with MS patients, his opinion was not supported by relevant medical literature, and he offered no experimental, statistical, or other scientific data to support his theory. In *Cunningham v. Masterwear Corp., 569 F.3d 673 (7th Cir. 2009)* , in a nuisance action by plaintiffs claiming that improper storage of perchloro-ethylene by a neighboring dry cleaner had caused respiratory injuries and loss of property value, the Court found no abuse of discretion when the plaintiffs' expert medical witness was disqualified. The witness was a physician specializing in treatment of respiratory diseases, but he had never treated a respiratory illness caused or aggravated by exposure to PCE, and he was not a toxicologist. Furthermore, he did not present, directly or by citation to scientific literature, a theory that would link the level and duration of the

plaintiffs' exposure to PCE to their symptoms. In *Lewis v. CITGO Petroleum Corp., 561 F.3d 698 (7th Cir. 2009)* , the Court affirmed summary judgment for the defendant in a negligence action for injuries allegedly sustained from exposure to hydrogen sulfide, finding no abuse of discretion in the exclusion of expert causation testimony for the plaintiff. One expert, testifying regarding emotional injuries, had not examined the plaintiffs until two-and-a-half years after the incident; had concluded that one plaintiff did not have post-traumatic stress disorder at the time of his evaluation, but "likely met criteria" for PTSD at some point following the accident, based only on his interview with the plaintiff and not on review of her prior medical records; and had failed to relate the disorders he observed to other potential causes, including underlying conditions he found. As the plaintiffs failed to show the experts' opinions were based on anything other than speculation, the testimony was properly disregarded.

United States v. Two Elk, 536 F.3d 890 (8th Cir. 2008) : The Court affirmed a conviction for aggravated sexual abuse of a child, finding no abuse of discretion in the admission of medical testimony as to how acute the injuries to the victim were. The Court rejected the argument that the doctor had to testify as to "a reasonable medical certainty" and held that the testimony must be reliable, as the Judge found the testimony to be in this case. In *Polski v. Quigley Corp., 538 F.3d 836 (8th Cir. 2008)* , the Court affirmed summary judgment against plaintiffs claiming that a nasal spray had caused loss of smell and taste, finding no abuse of discretion in excluding testimony from an otolaryngologist that the spray's active ingredient damaged the "smell tissue" high inside the human nose. The premise of the testimony was that the spray bottle could expel some quantity of the medication the full distance through the nasal passages, but neither the expert nor anyone else had tested that theory.

Neiberger v. FedEx Ground Package Sys., 566 F.3d 1184 (10th Cir. 2009) : The Court affirmed a judgment for the defendant in a personal injury action arising from an auto-van accident, finding no abuse of discretion in the admission of testimony by an expert for the defendants that nonunion of the plaintiff's spine was probably caused by smoking following spinal surgery rather than by the accident. The proposition that smoking greatly increased the risk of nonunions was supported by several peer-reviewed articles in medical journals, a position statement of the American Academy of Orthopedic Surgeons, and the plaintiff's own expert, and it was applied by the defendant's witness in a manner generally accepted in the medical community, including eliminating the possibility that the accident could have been the cause of the injury.

[16] Cause of Economic Injury [Go To Main]

In re Williams Secs. Litig. - WCG Subclass, 558 F.3d 1130 (10th Cir. 2009) : In a securities fraud class action, the Court affirmed summary judgment for the defendants, finding no abuse of discretion in the exclusion of the plaintiffs' expert testimony on loss causation. The expert failed to demonstrate that it was the revelation of the fraud, and not other factors, that led to the decline in the company's share price.

[20] Civil Rights Cases [Go To Main]

Hathaway v. Bazany, 507 F.3d 312 (5th Cir. 2007) : In a civil rights action brought against a police officer who shot and killed a teenage driver at a traffic stop when the vehicle suddenly accelerated toward the officer, the plaintiffs offered testimony by a law enforcement officer with special expertise in firearms training (who happened to be the decedent's father and a plaintiff) that the defendant officer was behind the car and out of danger when he fired the shot. Affirming summary judgment for the defendant, the Court found no abuse of discretion in excluding the proffered testimony, as it lacked both a reliable methodology and sufficient factual support for the reliability of the initial assumptions.

United States v. Farrell, 563 F.3d 364 (8th Cir. 2009) : Affirming convictions for peonage, the Court held it was error

(but not plain error) for an expert witness to opine on the strength of the government's case and the credibility of its witnesses through references to the "incredible" and "strong" nature of the evidence against the defendants. Likewise, the expert invaded the fact-finding function of the jury by testifying that the workers "were not controlling their money" and were "forced to pay [the debt]," which was not simply a factual conclusion but an attempt to express an opinion as to the defendants' guilt and state that the worker witnesses were telling the truth.

[20.1] Class Certification [Go To Main]

American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010) : Vacating certification of a class action by motorcycle buyers seeking repairs to an alleged problem with the steering assembly, the Court held that the Judge should have conclusively ruled on a *Dabuert* challenge to the theory used by the plaintiffs' engineering expert, since the admissibility of his opinion was essential to the determination whether common issues predominated. The Court indicated its belief that the opinion was unreliable.

Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc): Reviewing class certification granted for female employees of Wal-Mart in a Title VII class action, the Court found no abuse of discretion when the Trial Judge accepted testimony by a sociologist who used a "social framework analysis" to examine the distinctive features of Wal-Mart's policies and practices. Wal-Mart did not challenge the methodology or contend that the expert's findings lacked relevance, but challenged only certain inferences drawn by the expert, and it was for the jury to decide whether or not the opinions were persuasive. The Court also found no abuse of discretion when the Judge relied upon a statistical expert for the plaintiffs who did a separate regression analysis for each of the 41 regions containing Wal-Mart stores. The Court emphasized that it was deciding only whether it was an abuse of discretion to find, based on all the evidence presented, that there existed common questions of fact sufficient to justify class certification, and that it was not "re-examining the relative strength or persuasiveness of the commonality evidence ourselves."

[22] Credibility Testimony [Go To Main]

[a] Abuse Cases

United States v. Simmons, 470 F.3d 1115 (5th Cir. 2006) : At a trial for sexual assault under color of law, a government expert witness testified that the defendant's behavior following the alleged incident and her in-court testimony were consistent with that of a rape victim. Affirming, the Court held that the expert had not usurped the jury's role. "Mental health experts are permitted to testify that symptoms and recollections appear genuine and that the expert believes she or he has not been duped by a fabricated account." The Court noted that the expert emphasized in his testimony that he never gives testimony "as to whether a rape did or did not occur."

United States v. Benally, 541 F.3d 990 (10th Cir. 2008) : In a trial for abusive sexual contact with a child, the defendant's confession to police officers was admitted, and he sought to challenge that confession by calling an expert who would have testified to the frequency of false confessions and the interrogation techniques known to cause them. Affirming, the Court found no abuse of discretion in the exclusion of the expert's testimony, as it would have "encroached upon the jury's vital and exclusive function to make credibility determinations." Although the expert would not have given an explicit opinion that the defendant had confessed falsely, "with or without the opinion, the import of her expert testimony would be the same: disregard the confession and credit the defendant's testimony that his confession was a lie." The Court distinguished cases establishing that psychiatric experts may testify that a defendant has a mental condition that would make it unlikely for him to have truthfully confessed.

[b] Credibility -- Other Cases

United States v. Farrell, 563 F.3d 364 (8th Cir. 2009) : Affirming convictions for peonage, the Court held it was error (but not plain error) for an expert witness to opine on the strength of the government's case and the credibility of its witnesses through references to the "incredible" and "strong" nature of the evidence against the defendants. Likewise, the expert invaded the fact-finding function of the jury by testifying that the workers "were not controlling their money" and were "forced to pay [the debt]," which was not simply a factual conclusion but an attempt to express an opinion as to the defendants' guilt and state that the worker witnesses were telling the truth.

[25] Damages [Go To Main]

[a] Antitrust

In re Scrap Metal Antitrust Litig., 527 F.3d 517 (6th Cir. 2008) : The Court affirmed a judgment for the plaintiffs in a case alleging that the defendants fixed prices in purchasing unprocessed scrap metal. It found no abuse of discretion in admitting damages testimony by the plaintiffs' expert economist. He was qualified, his testimony was relevant, and his methodology was generally accepted as reliable, so the "substantial room for debate" about his data set and the "substantial bases upon which to criticize" certain of his assumptions were matters of credibility going to the weight, not the admissibility, of the evidence.

[c] Damages -- Contracts

First Marblehead Corp. v. House, 541 F.3d 36 (1st Cir. 2008) : Five years after he resigned from the company, House attempted to exercise stock options and was told that they had expired three months after his resignation. The jury found that House had reasonably relied on negligent misrepresentations that the options would be viable for ten years, but it accepted testimony from an expert for the company that it would not have made financial sense for House to have exercised the options timely had he known of the three-month restriction. The Court found no abuse of discretion in admission of the expert's testimony, as he was an economist with nearly two decades of experience as a consultant in economics, finance, and strategy consulting, including providing investment advice to accredited investors. His testimony about how stock options function and how an investor would think about exercising those options involved topics not ordinarily within the knowledge of the jury. And the testimony provided the jury with information helpful in evaluating House's assertions as to what he would have done, without giving the expert's opinion about House's credibility or what he believed House would have done.

Wasson v. Peabody Coal Co., 542 F.3d 1172 (7th Cir. 2008) : The Court affirmed a judgment unfavorable to a lessor seeking to recover allegedly underpaid coal mining royalties. It found no abuse of discretion in allowing damages testimony offered by the lessor's accountant as an expert, which asserted that the coal price used to calculate royalties was too low, based on the difference between the price used by the lessee when calculating royalties for a particular month and the fuel cost data for that month reported by one of the lessee's customers to the Federal Energy Regulatory Commission. The opinion was unreliable because it included only a single customer, the figures for a single month were extrapolated for 20 years of alleged underpayment, and the witness admitted that he had never worked with a FERC report, did not know what items were included or excluded in the fuel cost data in such reports, and was unaware of FERC data having been used to test the accuracy of a royalty payment. In *Emerald Invs. L.P. v. Allmerica Fin. Life Ins. & Ann. Co., 516 F.3d 612 (7th Cir. 2008)* , a breach of contract action by an investor whose "market timing" arbitrage scheme had been terminated when the defendant unilaterally amended account transfer rules, the Court held there was no abuse of discretion in excluding testimony by the plaintiff's damages expert. The expert's initial report, which proposed that the plaintiff would have earned an annual rate of return on its investment of 34% for 20 years, was "preposterous," since "[t]he essence of an arbitrage opportunity is that it is transient. It is the exploitation of an economic anomaly, and the process of exploiting the anomaly eliminates it." Here, the choice of a 34% return was a blind extrapolation from the plaintiff's history that ignored changed circumstances that had already led the rate to decline to 14% in the year of the breach. The expert's first report "was so irresponsible as to justify the judge's decision to exclude the second report summarily. [He] had demonstrated a willingness to abandon the norms of his profession in

the interest of his client. Such a person cannot be trusted to continue as an expert witness in the case in which he has demonstrated that willingness, and perhaps not in other cases either."

US Salt, Inc. v. Broken Arrow, Inc., 563 F.3d 687 (8th Cir. 2009) : In a breach of contract action involving supplies of salt, the Court found no error when expert testimony on lost profits was excluded. The expert relied almost exclusively on the plaintiff's speculative estimates without any independent verification; he conducted little if any investigation or analysis of market conditions; and he revised his opinion on damages dramatically, from $1,800,000 to a range of $600,000 to $1,060,000. In *Margolies v. McCleary, Inc., 447 F.3d 1115 (8th Cir. 2006)* , the Court affirmed a damages award in a breach of contract action brought by a manufacturer of potato chips against a distributor. The distributor argued that the manufacturer's damages expert mistakenly made certain factual assumptions about future levels of market share and costs of reentering the market. Finding no error, the Court stated that "the factual basis of an expert's opinion generally relates to the weight a jury ought to accord that opinion" and "unless the factual or methodological basis for the testimony is fundamentally unreliable, its admission is not an abuse of discretion." In this case, the expert made assumptions "in areas where it was impossible to gather more concrete data due to McCleary's non-performance." The expert's assumptions "were not the product of mere conjecture with no factual basis; they were estimates generated through consideration of [the product's] past performance and potential for future performance, given current accepted market conditions."

[d] Damages -- Distributorships, Franchises, and Other Business Relationships

Cole v. Homier Distrib. Co., 599 F.3d 856 (8th Cir. 2010) : In Cole's action for breach of an oral agreement to distribute Homier tractors, the Court found no abuse of discretion in excluding Cole's damages expert because his report relied on incorrect factual premises and contained speculative calculations. For example, the expert erred in assuming that when the distributorship agreement was terminated, Cole lost its ability to sell Homier products, and the lost profits analysis was skewed by that incorrect assumption. The Court also faulted the expert for using a 25-year lost profit calculation when the distributorship agreement permitted termination for cause by giving 90 days' notice.

[g] Damages -- Property Interests and Transactions

Synergetics, Inc. v. Hurst, 477 F.3d 949 (8th Cir. 2007) : The Court affirmed a judgment for the manufacturer of ophthalmic equipment against former employees for trade secret misappropriation, finding no error in allowing the plaintiff's expert on damages to testify, although his opinion was based on the assumption that the relevant market involved only two suppliers, when in fact there were other possible sources of competition. The Court stated that an expert's opinion should be excluded only if it was so "fundamentally unsupported that it could offer no assistance to the jury" and that while other methods for calculating damages were available, "so long as the methods employed are scientifically valid, Appellants' mere disagreement with the assumptions and methodology used does not warrant exclusion of expert testimony."

United States v. 87.98 Acres, 530 F.3d 899 (9th Cir. 2008) : Affirming the judgment in an eminent domain proceeding to secure an easement for high-voltage electrical transmission lines, the Court found no abuse of discretion when an environmental planner with extensive experience advising developers regarding the impact of electromagnetic frequencies from power transmission lines on the use and development of property was permitted to testify to public perceptions on the effects of EMFs among residential homeowners and home buyers, but was not permitted to testify to the extent and level of EMFs from the transmission line at issue. While the existence of EMFs was relevant to public perceptions and property values, there was no evidence that EMF measurements affect public perceptions, so a jury could only speculate concerning the effect of a particular measurement on public perception.

i4i Ltd. Partnership v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010) : The Court affirmed a judgment for the plaintiff in a action for infringement of a software patent, finding no abuse of discretion in the admission of expert testimony for the plaintiff regarding damages. The witness used a model based on a hypothetical negotiation between

the parties at the time the infringement began, calculating a royalty rate and then multiplying that rate by the number of infringing products. The witness established that the hypothetical negotiation model is accepted among damage experts and economists, and the calculations were based on sufficient facts or data, although other data could have been used. In *Monsanto Co. v. McFarling, 488 F.3d 973 (Fed. Cir. 2007)* , the Court affirmed a judgment for the holder of patents on herbicide-resistant soybeans in an action against a seed-buying farmer for breach of the license agreement and infringement of the patents. It held there was no abuse of discretion in permitting a certified valuation expert to give an opinion on the amount of a reasonable royalty for use of the invention. That the witness was neither a farmer nor an agronomist went to the weight rather than the admissibility of the opinions. In *DSU Medical Corp. v. JMS Co., 471 F.3d 1293 (Fed. Cir. 2006)* , a patent infringement action, the Court held there was no abuse of discretion in excluding damages testimony from an expert who did not consider the effects of the availability of a noninfringing competing product and who "relied too heavily on hypothesized contracts in hypothesized markets that lacked sound economic grounding." In *MicroStrategy Inc. v. Business Objects, S.A., 429 F.3d 1344 (Fed. Cir. 2005)* , the Court, affirming in part judgments against the plaintiff in a patent infringement and business tort case, held there was no abuse of discretion in excluding damages testimony from an expert witness who attributed all the plaintiff's post-2000 losses solely to the defendant, despite the fact that the plaintiff had continuing financial struggles arising from the burst of the "dot com" bubble of the late 1990s. "While an expert need not consider *every* possible factor to render a 'reliable' opinion, the expert still must consider *enough* factors to make his or her opinion sufficiently reliable in the eyes of the court."

[26] *Daubert* Hearings [Go To Main]

United States v. Williams, 506 F.3d 151 (2d Cir. 2007) : The Court held there was no abuse of discretion when the Trial Judge refused to hold a *Daubert* hearing on the reliability of the testimony by the government's ballistics expert. "While the gatekeeping function requires the district court to ascertain the reliability of Kuehner's methodology, it does not necessarily require that a separate hearing be held in order to do so" -- particularly if, at the time the expert testimony is presented to the jury, a sufficient basis for allowing the testimony is on the record. In this case, the Judge had noted that a similar attack on the reliability of ballistics evidence had been rejected by another District Judge; and, before the expert's testimony was submitted to the jury, the government provided an exhaustive foundation for the witness's expertise and a detailed description of the process she used to come to her conclusions.

United States v. Ozuna, 561 F.3d 728 (7th Cir. 2009) : The Court affirmed a conviction for possession of cocaine with intent to distribute, finding no abuse of discretion when the Judge accepted expert testimony comparing handwriting in a suppression hearing without conducting a *Daubert* hearing. The Court held that the primary rationale behind a *Daubert* hearing -- the Judge's gatekeeping so that unreliable expert testimony does not carry too much weight with the jury -- is inapplicable in a suppression hearing. Thus, there was no requirement that a hearing be held.

United States v. Kenyon, 481 F.3d 1054 (8th Cir. 2007) : The Court affirmed a child-sex-abuse conviction, finding no abuse of discretion when the Judge, without conducting a *Daubert* hearing, permitted an expert to testify regarding various characteristics of sexually abused children. The Court noted that when "a district court is satisfied with an expert's education, training, and experience, and the expert's testimony is reasonably based on that education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary hearing." In *Miller v. Baker Implement Co., 439 F.3d 407 (8th Cir. 2006)* , the Court affirmed a summary judgment for the defendants in a subrogee's action for loss of a cotton picker that was destroyed in a fire. It found no abuse of discretion in excluding the plaintiff's expert testimony without a hearing based on affidavits submitted by the plaintiff, a detailed explanation of the proposed expert testimony, and a legal memorandum addressing the expert evidence issues. While *Daubert* hearings "may be necessary in some cases, the basic requirement under the law is that parties have an opportunity to be heard before the district court makes its decisions."

Millenkamp v. Davisco Foods Int'l, Inc., 562 F.3d 971 (9th Cir. 2009) : Buyers of milk permeate for cattle food won a

judgment on breach of warranty claims against the seller of the product in an action alleging that calves died as a result of ingesting the product. The Court found no abuse of discretion in the Judge's decision to admit expert causation testimony without first holding a *Daubert* hearing. "The parties provided the district court with briefing on his scientific expertise and proposed testimony prior to trial. The district court could properly determine that this information comprised an adequate record from which the court could make its ruling." In *United States v. Lopez-Martinez, 543 F.3d 509 (9th Cir. 2008)* , the Court affirmed a conviction for smuggling aliens into the United States, finding no abuse of discretion in permitting a Border Parol agent to testify as to methods and patterns of human trafficking without holding a *Daubert* hearing, since a Judge has the same latitude in the gatekeeping process as in the ultimate determination of reliability.

United States v. Allen, 603 F.3d 1202 (10th Cir. 2010) : The Court affirmed a drug conviction and held there was no error in a ruling that no *Daubert* hearing was necessary before admitting the testimony of the government's expert. The Judge gave the defense an opportunity to support the request for a hearing and the defense elected not to do so. In *United States v. Nacchio, 555 F.3d 1234 (10th Cir. 2009)* (en banc), *vacating in part 519 F.3d 1140 (10th Cir. 2008)* , the Court affirmed a conviction for insider trading, holding there was no abuse of discretion in excluding the defendant's expert economic witness when he was called to testify. Although no *Daubert* hearing was held (no motion for such a hearing was made until after the Judge's ruling), and defense counsel asserted that he expected to provide the foundation upon voir dire, the Court found that the defense was on notice that the Rule 702 requirements were in issue and had ample opportunity to provide evidence of the expert's reasoning and methodology before he was placed on the stand, so it was in the Judge's discretion to conclude that the expert should not testify because of a failure to establish that his testimony would be a product of reliable principles reliably applied.

[27] Designation As "Expert" [Go To Main]

United States v. Johnson, 488 F.3d 690 (6th Cir. 2007) : Although the defendant in a drug trafficking case had made no objection, the Court expressed its disapproval of the Trial Judge's having declared before the jury that a testifying officer was to be considered an expert. "When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness's stature and detracts from the court's neutrality and detachment."

[28.1] Drug Identification [Go To Main]

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) : Affirming a conviction for possession of cocaine base with intent to distribute, the Court found no abuse of discretion in admitting testimony by a West Virginia State Police forensic expert that the substances obtained from the defendant were cocaine base. Although the expert could not identify what type of chemical reaction was taking place in her tests or the chemical structure of all of the chemicals used in the tests, and did not know the error rate for the tests, she testified that the lab followed the protocols for testing that were accepted in the scientific community, the machine she used was calibrated on a daily basis, and reviews of her work had consistently demonstrated it to be error-free. The Court reasoned that a Trial Judge "need not determine that the proffered expert testimony is irrefutable or certainly correct." It concluded that although the witness "had significant gaps in her knowledge, these gaps were relevant to the weight of her testimony, not its admissibility."

[30] Economists [Go To Main]

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) : In a False Claims Act case arising from a bid-rigging conspiracy, the Court held there was no abuse of discretion in admitting expert

testimony from an economist regarding how bid-rigging cartels work, as the testimony was reliable and could be helpful to the jury.

First Marblehead Corp. v. House, 541 F.3d 36 (1st Cir. 2008) : Five years after he resigned from the company, House attempted to exercise stock options and was told that they had expired three months after his resignation. The jury found that House had reasonably relied on negligent misrepresentations that the options would be viable for ten years, but it accepted testimony from an expert for the company that it would not have made financial sense for House to have exercised the options timely had he known of the three-month restriction. The Court found no abuse of discretion in admission of the expert's testimony, as he was an economist with nearly two decades of experience as a consultant in economics, finance, and strategy consulting, including providing investment advice to accredited investors. His testimony about how stock options function and how an investor would think about exercising those options involved topics not ordinarily within the knowledge of the jury. And the testimony provided the jury with information helpful in evaluating House's assertions as to what he would have done, without giving the expert's opinion about House's credibility or what he believed House would have done.

Boca Raton Community Hosp., Inc. v. Tenet Health Care Corp., 582 F.3d 1227 (11th Cir. 2009) : The Court affirmed summary judgment for the defendant in a RICO action related to Medicare reimbursements, finding no abuse of discretion in the exclusion of evidence from the plaintiff's expert. The expert's opinion on injury and damages treated as unlawful some charges that the plaintiff's liability theory treated as lawful.

[30.1] Electronic Evidence [Go To Main]

Wendler & Ezra, P.C. v. American Int'l Group, Inc., 521 F.3d 790 (7th Cir. 2008) : A law firm specializing in representing truck drivers in tort suits brought a defamation action against a competitor alleging that the competitor posted on a bulletin board frequented by truck drivers an e-mail message that purported to be from an unhappy client of the plaintiff firm. To show that the e-mail came from the competitor, the plaintiff offered an affidavit by the webmaster at teamster.net, who stated that software told him that the posting originated from an IP address registered to the competitor. The Court held the affidavit was properly excluded, because it failed to say "what software had been employed, how it worked, what data had been provided to the program, and what if anything had been done to find out whether the poster had spoofed one of AIG's addresses." The Court added that "[p]roof that the message originated from AIG's address would not necessarily establish that AIG was complicit; it would be necessary to track the message from an originating computer and learn who had access to that machine before it would be possible to hold AIG vicariously liable." The Court reiterated that "[w]e have said over and over that an expert's *ipse dixit* is inadmissible."

[31] Employment Discrimination Cases [Go To Main]

[b] Employment Discrimination Cases -- Expert Testimony Excludable or Exclusion Required

Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009) : In an action by an employee who alleged that the failure to promote her was the result of sex discrimination, the Court affirmed a judgment for the plaintiff but held there was no abuse of discretion when the plaintiff's expert testimony was excluded. The proposed expert was a sociologist with expertise in employment discrimination and sex-based stereotypes in the workplace, who would opine on the prevalence and taxonomy of sex-stereotype employment discrimination and on how comments and behaviors of the supervisors working for the defendant were consistent with larger societal patterns and were likely based on sex-based stereotypes. However, the expert's lack of familiarity with the details of the case rendered her testimony unhelpful.

Naeem v. McKesson Drug Co., 444 F.3d 593 (7th Cir. 2006) : A discharged female employee claimed that she had been subjected to gender discrimination and intentional infliction of emotional distress. An *in limine* ruling precluded

the plaintiff's human resources expert from opining whether the defendant followed accepted human resource policies but allowed testimony regarding whether the defendant followed its own policies. Affirming a judgment for the plaintiff on the IIED claims, the Court held that the Judge's simple conclusion that the witness had sufficient expertise to assist the jury was insufficient to show that an adequate *Daubert* analysis had been performed, so admission of the testimony would not be given the normal deferential review. The Court concluded that it was an error (but harmless) to admit the testimony, because it did not meet the requisite level of reliability: While the expert had examined the defendant's personnel policy manual and depositions by its employees, his opinions were not tied to specific portions of the manual and appeared to be general observations regarding what is normal or usual business practice.

[32] Engineers [Go To Main]

[a] Expert Testimony Admissible or Admission Required

Hodges v. Mack Trucks, Inc., 474 F.3d 188 (5th Cir. 2006) : The injured driver of a truck sued the manufacturer of the truck and the manufacturer of the seatbelt, alleging design defects in the seatbelt and in the passenger-side door latch that caused him to be ejected in the accident. The Court found no abuse of discretion in admitting testimony by the driver's expert that the door latch failed and that there was a safer design available that would have substantially reduced the likelihood of the driver's injuries. It noted that the expert was an engineer with many years working in, and testifying against, the insurance industry.

Surles v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007) : The plaintiff, suing for personal injuries incurred when a deranged passenger attacked the driver of an interstate bus and caused a serious accident, argued that the defendant was negligent in failing to provide secure enclosures for its bus drivers. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in permitting a witness to testify that an entry-resistant barrier could have prevented the attack in this case and that such a barrier is feasible. The witness was an engineer whose work experience included time in the transportation sector focusing specifically on buses. In fact, he had designed a barrier such as he testified about. The Trial Judge conducted a hearing to ensure the reliability and relevancy of the testimony, precluded opinions on the issue of foreseeability as they would not have been helpful, and had a sufficient basis for concluding that the expert's conclusions were based on reliable application of his experience to a sufficient factual basis.

[b] Engineers -- Expert Testimony Excludable or Exclusion Required

Beaudette v. Louisville Ladder, Inc., 462 F.3d 22 (1st Cir. 2006) : In a product liability action arising from the collapse of a fiberglass ladder, the plaintiff's expert, an engineer, offered testimony that there was a manufacturing defect in the ladder because there were "resin-rich" areas in the fiberglass, in violation of the ANSI standard for manufacturing fiberglass ladders. Affirming summary judgment for the defendant granted after the expert's testimony was excluded, the Court found no abuse of discretion. The expert's opinion was not supported by any testing or any technical literature, and the ANSI standard was qualified by the phrase "in accordance with good commercial practice," about which he had no information, as he was not familiar with the ladder manufacturing business and was not an expert in the process by which the ladder was manufactured.

[33] Environmental Experts [Go To Main]

Olin Corp. v. Certain Underwriters at Lloyd's London, 468 F.3d 120 (2d Cir. 2006) : In an action to recover indemnification for pollution remediation under CERCLA, the Court found no abuse of discretion in the admission of expert testimony for the plaintiff by the head of an environmental civil engineering firm. Although some of the expert's opinions were not particularly well supported, there was some evidence in the record to support all of his conclusions except possibly one, and "[r]ather than selectively excluding the portions of [the expert]'s testimony that the court

thought were not well supported, the judge considered the testimony as a whole. This was not error[,]" since the weaknesses in the opinion would be pointed out to the jury by cross-examination and the defendant's experts.

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) : The Court affirmed summary judgment for the government in a proceeding to enforce a Corps of Engineers' order for restoration of wetlands on which a landowner had built a road without a permit. The Court found no abuse of discretion in the admission of expert testimony that the site was a wetland, although one of the indicators used by the expert might lead to false positives; even so, there was a sufficient showing that the evidence was reliable.

[37] Expert Witness Originally Retained by Adverse Party [Go To Main]

Jasty v. Wright Medical Technology, Inc., 528 F.3d 28 (1st Cir. 2008) : The Court affirmed a summary judgment against an orthopedic surgeon who sued a manufacturer of orthopedic implant devices for breach of contract. The surgeon complained he was not permitted to call the manufacturer's expert as a witness, but the Court held that "a trial court has discretion to decide whether to require a witness to testify for an opposing party," and that in the absence of any showing of need for the surgeon to call the witness it could not say that the Trial Judge failed to exercise discretion in excluding the testimony.

[38] Eyewitness Identification [Go To Main]

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The Court affirmed the defendant's conviction for the fatal carjacking of his ex-wife, finding no error in the exclusion of expert testimony on eyewitness identification after one witness testified that she had seen the defendant in the victim's car striking her shortly before the victim's disappearance and another witness testified to seeing a man and a woman in the car and hearing "loud voices." The Court concluded that the Judge had properly examined the factors that it had set forth as relevant to the admissibility of eyewitness experts, reasonably found that the eyewitness testimony was not the sole evidence upon which the government relied, and had a reasonable basis to conclude that the jury was capable of considering the effects of lighting, lack of attention, and post-event information in assessing the eyewitness testimony.

United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006) : Reversing convictions arising from a carjacking, the Court found error in the exclusion of testimony from the defendant's expert on eyewitness identification. The expert would have testified that people who make an identification can have a misplaced confidence in their accuracy. The Court noted that the case was primarily about the accuracy and reliability of identifications; that the expert used a reliable methodology; and that the exclusion of the expert's testimony on confidence of accuracy "significantly undermined Brownlee's ability to challenge effectively the witnesses' certainty and confidence in their identifications -- a point the Government used to its benefit both in presenting testimony and arguing to the jury it its closing at trial." Given that "witnesses ofttimes profess considerable confidence in erroneous identifications" and that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable," it followed that "expert testimony was the only method of imparting the knowledge concerning confidence-accuracy correlation to the jury." The Court also stated that "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research."

United States v. Rodriguez-Felix, 450 F.3d 1117 (10th Cir. 2006) : The Court affirmed drug trafficking convictions, finding no error in the exclusion of testimony from a defense expert on the unreliability of eyewitness identifications. It noted that such expert testimony could not be excluded automatically; admissibility depends on the reliability of the methods used by the particular expert, and whether the identification problems reviewed by the expert are sufficiently difficult to evaluate that the jury might need assistance. Here, the expert's methodology was unreliable:

> The description of Dr. Clark's research is wholly inadequate -- it fails to indicate whether it has been subjected to peer review, whether it has been published, and whether it has been accepted by other psychologists in the field. Indeed, Dr. Clark states that he is currently in the process of testing his theory. Additionally, other than generalized assertions regarding the factors which can affect an eyewitness identification, the report fails to sufficiently reference specific and recognized scientific research, which underlies Dr. Clark's conclusions, such that the court could determine if this foundational research had been subjected to peer review, and, if so, whether it had been accepted in the community. The requirements of *Daubert* are not satisfied by casual mention of a few scientific studies, which fail to demonstrate that an expert's conclusions are grounded in established research, recognized in the scientific community, or otherwise accepted as scientific knowledge.

The Court also noted that the testimony would not have assisted the jury, because "cross-examination amply exposed the common-sense deficiencies in the prosecution's identification case."

[39] Fingerprint Identification [Go To Main]

United States v. Pena, 586 F.3d 105 (1st Cir. 2009) : In a prosecution for drug and firearm offenses, the Judge expressed doubts about the reliability of fingerprint identification evidence where the governing protocol used no specific minimum number of points to confirm a match, but noted that "the case law is overwhelmingly in favor of admitting fingerprint experts under virtually any circumstance," and reasoned that the only reason to exclude the testimony or give a limiting instruction would be "if there had been data, real evidence presented about the limitations of fingerprinting." Here, the defendant's motion to exclude relied on a single law review article. Affirming, the Court found no abuse of discretion in admitting the evidence, given the widespread acceptance in spite of the relative subjectivity of certain protocols.

United States v. John, 597 F.3d 263 (5th Cir. 2010) : The Court affirmed a fraud conviction, finding no abuse of discretion in the admission of expert testimony that the defendant's fingerprints were found on certain documents. The Court noted that "there is no universally accepted number of matching points that is required for proper identification, as this varies depending on the quality of the print," and it relied on opinions from other Circuits that this "sliding-scale" analysis was "testable, generally accepted, and sufficiently reliable and that its known error rate is essentially zero." The Court also rejected the argument that the evidence was unreliable because the test had not been subjected to "blind verification" by a second expert, since no case law holds that blind verification is required.

United States v. Calderon-Segura, 512 F.3d 1104 (9th Cir. 2008) : The Court affirmed a conviction for illegal re-entry into the United States, finding no abuse of discretion in the denial of a "full *Daubert* hearing" on, and the admission of, expert testimony that an inked thumb-print exemplar taken from the defendant matched the inked thumb-print appearing on his 1999 warrant of removal. The defendant's motion "was based almost exclusively on evidence demonstrating the unreliability of *latent* fingerprint identification, whereas this case involved only the examination of two *inked* fingerprints, the reliability and admissibility of which is long-established." The defendant also "failed to show that the exemplars at issue in this case lacked clarity, were fragmented, or contained any other defects or artifactual interference that might call into question the accuracy or reliability of their identification."

United States v. Baines, 573 F.3d 979 (10th Cir. 2009) : In an extensive opinion, the Court found no abuse of discretion in the admission of expert testimony that a latent fingerprint matched the fingerprint of the defendant that was taken when he was arrested. The Court recognized that there are "multiple questions regarding whether fingerprint analysis can be considered truly scientific in an intellectual, abstract sense" but declared that "nothing in the controlling legal authority we are bound to apply demands such an extremely high degree of intellectual purity." Applying the

Daubert/Kumho factors, the Court recognized the concerns that fingerprint analysis was subjective, and that there was really no peer review of the process. As to rate of error, the Court concluded that whatever the flaws in the studies conducted on false positives, "the known error rate remains impressively low." And, as to the factor of general acceptance, the Court concluded that while acceptance by a community of unbiased experts "would carry greater weight, we believe that acceptance by other experts in the field [i.e., law enforcement and fingerprint analysts] should also be considered. And when we consider that factor with respect to fingerprint analysis, what we observe is overwhelming acceptance."

United States v. Douglas, 489 F.3d 1117 (11th Cir. 2007) : Affirming convictions for kidnapping, robbery, and carjacking, the Court found no abuse of discretion in the admission of testimony by a fingerprint expert regarding the age of a fingerprint on a vehicle and the manner in which the print was made. There was sufficient evidence that the methodology by which the expert reached his opinions was reliable and reasoned.

[40] Fire Investigations [Go To Main]

Presley v. Lakewood Eng'g & Mfg. Co., 553 F.3d 638 (8th Cir. 2009) : The Court affirmed summary judgment for a manufacturer in a personal injury action brought by a homeowner after a fire allegedly caused by a defective space heater. There was no abuse of discretion in the exclusion of testimony by the plaintiff's expert on the cause of the fire, as he failed to conduct relevant tests, relied on a theory that was not supported by any scientific study, and engaged in "vague theorizing based upon general principles."

103 Investors I, L.P. v. Square D Co., 470 F.3d 985 (10th Cir. 2006) : The Court affirmed summary judgment for the manufacturer of an electrical distribution system that was the source of a building fire, finding no abuse of discretion in the exclusion of testimony by the plaintiff's expert witness. Although the witness was a qualified fire investigator, he had no experience or knowledge related to the manufacture of electrical distribution systems, so his opinion that the fire was caused by contaminants that originated during the manufacturing process lacked reliability.

[41] "Fit" Between Expert Testimony and the Facts [Go To Main]

Muskat v. United States, 554 F.3d 183 (1st Cir. 2009) : The Court affirmed a judgment for the government in a tax refund case, finding no abuse of discretion in the exclusion of testimony from the taxpayer's expert that a large slice of a family business's goodwill was attributable to the taxpayer. It held that the expert's testimony was directed to the goodwill of the *company* whereas the principal issue at trial was whether a non-compete agreement represented compensation for the transfer of *personal* goodwill. Because all of the company's goodwill was sold under the agreement, the expert's testimony would not have shed light on the meaning of the non-compete agreement.

United States v. Schiff, 602 F.3d 152 (3d Cir. 2010) : In a stock fraud action, the prosecution sought to prove the materiality of alleged misstatements and omissions by introducing evidence of the drop in the company's stock price upon disclosure of correcting information. On interlocutory review of an order excluding testimony from the government's expert witness because he considered only exogenous factors that might have affected the stock price and did not consider that potential negative effects of other unrelated events disclosed in the announcement, the Court held that the lack of fit between the facts and the expert's opinion justified exclusion of the expert's testimony.

[42] Forensic Experts [Go To Main]

United States v. Mahone, 453 F.3d 68 (1st Cir. 2006) : Affirming a conviction for attempted armed robbery, the Court found no abuse of discretion when a government witness was permitted to testify as an expert with respect to footwear impression identification, even though she was not qualified through the International Association for Identification. The Court also found that there was an appropriate hearing into the "ACE-V" method for assessing footwear impressions, and sufficient evidence of the reliability of the method and its application in this case.

United States v. Ford, 481 F.3d 215 (3d Cir. 2007) : Affirming a bank robbery conviction, the Court found no abuse of discretion in the admission of testimony by a government expert that three partial shoeprints lifted from the counter in the bank were similar to the type of imprints that would be made by the shoes worn by the defendant when he was apprehended. The expert was qualified, his testimony would aid the jury, and it was based on a method accepted as reliable both in federal Courts and the forensic community. The Court noted a distinction between forensic identification sciences, whose reliability "rests upon the experience and observational powers of their practitioners," and the type of science typically at issue in *Daubert* cases: "While a strict application of the *Daubert* factors to forensic identification sciences might be a fruitless exercise, due to the inherently experiential nature of this type of expertise, the District Court will be in the best position to make this determination."

United States v. Rodriguez, 581 F.3d 775 (8th Cir. 2009) : The Court affirmed a conviction for kidnapping resulting in death, finding no abuse of discretion in permitting a government pathologist to testify about the results of acid-phosphate tests conducted on the victim's body, indicating the presence of semen in her vagina and cervix. The Court noted that the pathologist "did not invent acid-phosphate testing; he testified to attending national medical conferences and reviewing scientific literature on the topic. The test results are based on scientific data, and assist the jury in its fact-finding." Although the expert testified that his conclusion was based on acid-phosphate measurements in living people and there could be uncertainty about the factual basis of the timing of the chemical process in a corpse, this went to weight and not admissibility.

[43] "Gatekeeping" [Go To Main]

[a] Bench Trials

Trustees of Chi. Painters v. Royal Int'l Drywall, 493 F.3d 782 (7th Cir. 2007) : In an action to collect union benefit contributions from an employer, the Judge, as fact finder, relied on two experts to determine the number of hours the employees worked. These witnesses offered their opinions on how long it would have taken the employees to tape a drywall. The Court found no error, noting that the experts properly testified on the basis of extensive experience. It stated that in a bench trial the *Daubert* requirements may be less rigidly applied, because "in the context of a bench trial, the judge would be able to consider any shortcomings of their expertise drawn out through cross-examination" and "if the gatekeeper and the factfinder are one and the same ... the need to make such decisions prior to hearing the testimony is lessened." Reviewing a bankruptcy case, *In re Salem, 465 F.3d 767 (7th Cir. 2006)* , the Court noted that in bench trials the Judge may hear the evidence and make reliability determinations during, rather than in advance of, trial, but that the reliability standard of *Rule 702* is not lessened.

[b] "Gatekeeping" -- Findings Required

Nunez v. Allstate Ins. Co., 604 F.3d 840 (5th Cir. 2010) : The Court affirmed summary judgment for an insurer sued for additional payments on Hurricane Katrina damage claims. It found no abuse of discretion in excluding testimony by an insurance adjuster retained by the plaintiffs; even without the benefit of the Judge's explanation of the ruling, rulings from other Judges in the district and facts propounded by the defendant demonstrated that the witness was unqualified and his opinions were unreliable.

United States v. Jawara, 474 F.3d 565 (9th Cir. 2007) : The Judge in an immigration fraud case ruled on the admissibility of expert testimony after reviewing briefs and other materials relating to the *in limine* motion and hearing

lengthy oral argument, stating only: "The testimony will be allowed, and the Court finds that a *Daubert* hearing is unnecessary." Affirming, the Court noted that "[a] lthough the district court's ruling suggests an implicit finding of reliability, the failure to make an explicit reliability finding was error." The error was harmless, however.

United States v. Roach, 582 F.3d 1192 (10th Cir. 2009) : In a prosecution for drug and firearms possession by an alleged gang member, the Judge chose not to conduct a *Daubert* hearing before trial on testimony by a prosecution gang expert. When an objection was made to the witness' testimony at trial, the Judge responded by explaining Rule 702 to the jury and then stating that "I've determined that the jury may consider [the witness] as an expert and give [his expert testimony] such consideration as they deem appropriate. Affirming, the Court held that it was error (but harmless) to admit the testimony on such a conclusory statement, without making any factual findings. In *Burlington No. & S.F. Ry. v. Grant, 505 F.3d 1013 (10th Cir. 2007)* , the Court reversed judgments for the defendant in an action to recover pollution remediation costs, holding that, since the Trial Judge failed to make any findings on the record when excluding testimony by the plaintiff's expert, it could not infer proper performance of the gatekeeping function based on the Judge's few statements and questions during the *Daubert* hearing. Thus, it reversed the ruling excluding the testimony and remanded for further proceedings.

[d] "Gatekeeping" -- Requirement of Gatekeeping Analysis

Naeem v. McKesson Drug Co., 444 F.3d 593 (7th Cir. 2006) : A discharged female employee claimed that she had been subjected to gender discrimination and intentional infliction of emotional distress. An *in limine* ruling precluded the plaintiff's human resources expert from opining whether the defendant followed accepted human resource policies, but allowed testimony regarding whether the defendant followed its own policies. Affirming a judgment for the plaintiff on the IIED claims, the Court held that the Judge's simple conclusion that the witness had sufficient expertise to assist the jury was insufficient to show that an adequate *Daubert* analysis had been performed, so admission of the testimony would not be given the normal deferential review. The Court concluded that it was an error (but harmless) to admit the testimony, because it did not meet the requisite level of reliability: While the expert had examined the defendant's personnel policy manual and depositions by its employees, his opinions were not tied to specific portions of the manual and appeared to be general observations regarding what is normal or usual business practice.

[45] Handwriting Experts [Go To Main]

United States v. Garza, 448 F.3d 294 (5th Cir. 2006) : Affirming drug convictions, the Court found no abuse of discretion in the exclusion of testimony by the defendant's handwriting expert that signatures on the defendant's confession and consent to search form were forged. Although her opinion was based on examination of photocopied documents, the expert stated that she did not know how many times the documents had been photocopied and admitted that the best practice is to look at original signatures, not photocopies.

United States v. Prime, 431 F.3d 1147 (9th Cir. 2005) : This opinion supersedes the one annotated in the Main Volume of the *Manual*.

[48] Impeachment of Experts [Go To Main]

In re Hanford Nuclear Reservation Litig., 534 F.3d 986 (9th Cir. 2008) , *amending 497 F.3d 1005 (9th Cir. 2007)* : Reversing in part judgments from a trial in which bellwether plaintiffs representing a class of residents near a nuclear facility that helped make an atomic bomb during World War II claimed that radioiodine (I-131) emissions caused cancers and life threatening diseases, the Court found it was error to allow the defendants to cross-examine the plaintiffs' expert endocrinologist, Dr. Davies, by asking him about the deposition testimony of another expert whose

testimony the defendants had persuaded the Judge to exclude as unduly speculative. Dr. Davies had neither read nor relied upon the other expert's deposition, and the Court concluded that the deposition was inadmissible hearsay.

[50] Intellectual Property Cases [Go To Main]

Mike's Train House, Inc. v. Lionel, LLC, 472 F.3d 398 (6th Cir. 2006) : In an action claiming that Lionel misappropriated the plaintiff's trade secrets for producing model trains, the plaintiff's expert (Stein), a mechanical engineer, was permitted to testify to his opinion that Lionel's design drawings had been copied from drawings of the plaintiff's former employee who also worked for Lionel. That conclusion was based upon 21 self-selected criteria, including factors such as the drawing's title and part number. Stein also relied heavily on a report prepared by Lee, another expert retained by the plaintiff. The Court held that it was error to allow Stein to testify. First, the Trial Court "abandoned its gate-keeping function by failing to make any findings regarding the reliability of Stein's testimony." Second, admitting Stein's testimony was an abuse of discretion because it was unreliable. Stein "created the criteria with which he compared the design drawings" and "there is no evidence that his methodology had ever been tested, subjected to peer review, or enjoyed general acceptance." Moreover, Stein admitted that he "arbitrarily determined how much significance each of the twenty-one criteria would have on his assessment of whether there was evidence of copying." Finally, "Stein not only created his report for the purposes of litigation, but ... created the precise methodology for that purpose as well." The Court noted its suspicion "of methodologies created for the purpose of litigation, because expert witnesses are not necessarily always unbiased scientists."

Corwin v. Walt Disney Co., 475 F.3d 1239 (11th Cir. 2007) : The plaintiff claimed that the defendant's theme park infringed the copyright of a painting that was a rendering of a third party's idea for an international theme park in miniature. Affirming summary judgment for the defendant, the Court found that four experts' reports were properly excluded. Although the experts were qualified, their opinions focused on the concepts and ideas behind the painting and the theme park, rather than on the expression of those concepts and ideas, which is the only proper subject of copyright.

[53] Knowledge, Intent, Good Faith, Motivation, etc. [Go To Main]

Simpson v. Socialist People's Libyan Arab Jamahiriya, 470 F.3d 356 (D.C. Cir. 2006) : The Court affirmed denial of a motion to dismiss a suit by a passenger who claimed damages after she and her late husband had been removed from a ship by Libyan authorities, finding that the terrorism exception to the Foreign Sovereign Immunities Act was satisfied by the plaintiff. Her expert witness explained "likely scenarios" as to Libya's intended purpose, which was to exact a quid pro quo by means of the detention; he was well qualified and his opinions were based on reliable materials.

[54] Law Enforcement Agents [Go To Main]

[c] Law Enforcement Agents -- Drug Cases

[iii] Law Enforcement Agents -- Drug Cases -- Interpreting Statements, Code, etc.

United States v. Johnson, 587 F.3d 625 (4th Cir. 2009) : The Court affirmed convictions for drug crimes, finding no abuse of discretion in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. It rejected an argument that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations, which violated confrontation rights under *Crawford v. Washington* because the experts were relying on testimonial hearsay. The Court noted that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts, and that the

experts never made reference to their interviews, so the jury heard no testimonial hearsay. In *United States v. Wilson, 484 F.3d 267 (4th Cir. 2007)* , the Court affirmed convictions of a cocaine distribution conspiracy, finding no abuse of discretion in admitting testimony by one of the investigating officers interpreting recorded conversations among the conspirators. The officer fully explained the methodology he used in interpreting coded phrases. Although he occasionally did not apply his methodology reliably, adding language rather than interpreting the language used, the errors were harmless.

United States v. York, 572 F.3d 415 (7th Cir. 2009) : The Court affirmed a cocaine distribution conviction, finding no abuse of discretion when an FBI agent who handled the investigation and helped execute a "sting" was permitted to interpret drug jargon in taped conversations between the defendant and the informant used in the sting. Although the Judge did not formally anoint the agent as an expert, the Court found that any error was harmless, as the defense did not object to the testimony until well after the agent began to interpret words and had a full opportunity to cross-examine the agent. In *United States v. Farmer, 543 F.3d 363 (7th Cir. 2008)* , the Court affirmed drug-related convictions, finding no abuse of discretion when a DEA agent was permitted to testify as to the meaning of coded language contained in tape-recorded conversations. The Court noted that the potential for prejudice when a witness testifies as both a lay witness and an expert may be addressed by appropriate cautionary instructions and by examination of the witness in such a way as to make clear when the witness is testifying to fact and when the witness is offering an expert opinion.

United States v. Reed, 575 F.3d 900 (9th Cir. 2009) : The Court affirmed drug convictions, finding no abuse of discretion in permitting a law enforcement officer to testify about the meaning of coded language used in wiretapped recordings. The Court agent's testimony "was based on his experience investigating PCP traffickers and on his specific experience investigating the present case. His testimony was not inherently unreliable and it was helpful in defining ambiguous terms used in the wiretap recordings. The terms related to PCP manufacturing and were outside the knowledge of the lay juror." In *United States v. Decoud, 456 F.3d 996 (9th Cir. 2006)* , the Court affirmed convictions for a crack cocaine distribution conspiracy, finding no abuse of discretion when a government drug expert was permitted to testify that certain words recorded on tape were code for drug deals and drug use. The expert explained the methodology he used to interpret each word and indicated that for words he had not heard before he relied upon his training and experience, the context of each word in a specific call, and each call in the context of other calls that he understood.

United States v. Emmanuel, 565 F.3d 1324 (11th Cir. 2009) : Affirming a conviction for narcotics trafficking offenses, the Court held that most of a police expert's testimony was properly specific and closely related to his interpretation of drug codes and jargon, and that when he, at times, went beyond interpreting code words to interpreting conversations as a whole, the error was harmless.

[iv] Law Enforcement Agents -- Drug Cases -- Opinions About Conduct or Other Circumstances in Case

United States v. Lopez, 547 F.3d 364 (2d Cir. 2008) : The Court affirmed drug and firearm convictions, finding no abuse of discretion when an investigator from the United States Attorney's office, who had two decades of experience investigating drug crimes, was permitted to testify that drug paraphernalia seized from the defendant's car was evidence of distribution.

[v] Law Enforcement Agents -- Drug Cases -- Practices of Drug Trade

United States v. Martinez, 476 F.3d 961 (D.C. Cir. 2007) : The Court affirmed a conviction for conspiracy to import cocaine, finding no error in the admission of expert testimony by a former DEA agent that the United States was the most likely destination of Colombian cocaine transported through Central America. That evidence regarding general trafficking routes was not duplicative of factual testimony that the defendant's particular conspiracy imported cocaine into the United States.

United States v. Sanchez-Hernandez, 507 F.3d 826 (5th Cir. 2007) : Affirming a marijuana possession conviction, the Court found no abuse of discretion in admitting testimony by law enforcement agents that explained, based on their experience, how drug smuggling operations were conducted in crossing the Rio Grande. The agents testified that the lead person in a smuggling outfit would often wear camouflage so that he could hide if trouble were encountered, and that drugs were often carried in duffle bags like the one the defendant was carrying. Noting that prior decisions hold that drug courier profile testimony is inadmissible to prove substantive guilt based on similarities between a defendant and a profile, the Court stated that "[a]lthough the agents' testimony came close to crossing the line into drug profiling evidence because of its tendency to imply the defendant's knowledge of the drug activity," the agents had testified on the basis of their specialized knowledge, on a subject matter that would assist the jury.

United States v. Avila, 557 F.3d 809 (7th Cir. 2009) : The Court affirmed a conviction for conspiracy to distribute numerous controlled substances, finding no plain error when an expert displayed photographs of hidden compartments he had discovered in cars involved in other cases he had investigated and explained how "drug cartels" used this method to transport drugs. Following testimony by cooperating witnesses that the defendant or his agents transported large amounts of drugs using hidden compartments, the expert's testimony helped the jury understand the evidence, and nothing about the expert's testimony would cause the jury to decide the case on an improper basis.

United States v. Jeanetta, 533 F.3d 651 (8th Cir. 2008) : The Court affirmed drug and firearm convictions, finding no abuse of discretion in permitting a police officer to explain the significance of various items -- including ZipLoc bags, radios, scanners, and night vision goggles -- seized during a search of the defendant's home. The Court found that the significance of these seemingly innocuous items was highly relevant to rebut the defendant's claim that he was merely a drug user and not a trafficker. "Because the importance of the items would not necessarily be apparent to a lay observer, the expert testimony was necessary to explain the significance of the items as they related to the world of drug dealing." In *United States v. Gill, 513 F.3d 836 (8th Cir. 2008)* , the Court found no abuse of discretion in admitting expert testimony by a law enforcement agent on the link between firearms and drug-trafficking. That the agent's experience did not include interactions with individuals who were both trafficking drugs and licensed to carry firearms went to the weight and not the admissibility of the testimony. In *United States v. Urbina, 431 F.3d 305 (8th Cir. 2005)* , the defendant was convicted for possession with intent to distribute cocaine after his truck was stopped on the highway and six bundles of cocaine were found hidden in an auxiliary gas tank. Affirming, the Court found no abuse of discretion in permitting a DEA agent to testify that he had never seen a drug dealer entrust as large a quantity of drugs to a courier who was not aware of what he was transporting. The evidence was relevant to rebut a defense that the defendant did not know the cocaine was present in the tank; it was helpful to a jury unfamiliar with the practices of the drug trade; and the prosecution did not elicit an opinion on the ultimate issue of the defendant's knowledge, which would be impermissible.

United States v. Garcia, 447 F.3d 1327 (11th Cir. 2006) : Affirming drug convictions, the Court found no error in admitting expert testimony from an experienced DEA agent, who explained how drug trafficking organizations compartmentalize operations and roles; that drug traffickers typically stash drug proceeds in houses of people they trust; that drug traffickers use scales to weigh and package drugs; that drug traffickers often possess weapons for protection; and that drug traffickers use coded language. The Court found that this testimony could assist the jury in understanding the operations of drug conspiracies.

[vii] Law Enforcement Agents -- Drug Cases -- Use of Cash

United States v. Millbrook, 553 F.3d 1057 (7th Cir. 2009) : The Court affirmed a conviction for possession of cocaine with intent to distribute, finding no abuse of discretion when a law enforcement agent was permitted to give expert testimony that the number of small bills the defendant was carrying in the $1039 bundle found at his arrest was consistent with drug distribution.

[d] Law Enforcement Agents -- Dual Roles

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) : The Court vacated convictions for conspiracy to commit assaults in aid of racketeering activity. The prosecution arose after members of one gang shot members of other gangs. To prove the shootings arose in the course of racketeering activity, a state police officer who had been investigating gangs in the area was permitted to testify about the operations of the defendants' nationwide gang, as well as of the gang's local activities, including that its members had committed "between 18 and 22, 23" murders in the area in the five years prior to the trial. According to the officer, his testimony was based on custodial interviews with gang members, reports from other law enforcement personnel, and published sources. The Court held that much of the expert's testimony concerned material well within the grasp of the average juror. The testimony also substituted the expert's conclusion on an essential fact (that the gang committed murders in a pattern of racketeering activity) for competent evidence of that fact: "The Government cannot take a shortcut around its obligation to prove murder beyond a reasonable doubt just by having an expert pronounce that unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of [the gang]." The Court also noted that the witness "was acting as a de facto 'case agent' in providing this summary information to the jury," a practice it had admonished against because case agents testifying as experts gain unmerited credibility when testifying about factual matters from first-hand knowledge. Furthermore, while law enforcement officers routinely and reasonably rely on hearsay in reaching their conclusions, an expert witness must not simply repeat hearsay evidence but must apply expertise to the inadmissible materials -- and in too many instances the expert in this case did not do so. This was particularly a problem with statements made in custodial interrogations, which were testimonial hearsay violating the defendants' *Confrontation Clause* rights.

United States v. Baptiste, 596 F.3d 214 (4th Cir. 2010) : In a cocaine distribution prosecution a police officer was permitted to testify simultaneously as an expert on the manner and means of drug trafficking and as a fact witness. Affirming, the Court concluded that "the district court could have done more to ensure that [the officer]'s lay and expert testimony were demarcated more clearly in order to prevent juror confusion and to prevent jurors from giving undue weight to [his] lay testimony," but found no plain error.

United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006) : Vacating a conviction for conspiracy to distribute cocaine, the Court found that testimony by law enforcement officers, who had 23 years of combined experience and training in narcotics-related crimes, concerning counter-surveillance techniques was reliable and would assist the jury. However, regarding the officers' dual roles as fact and expert witnesses, the Court found error "[b]ecause there was no cautionary jury instruction regarding the agents' dual witness roles nor clear demarcation between their fact testimony and expert opinion testimony."

United States v. Goodwin, 496 F.3d 636 (7th Cir. 2007) : The Court affirmed drug trafficking convictions, finding no abuse of discretion when a case agent was permitted to give testimony both as a fact witness and as an expert interpreting drug code language. A pattern jury instruction was given to avoid jury confusion and prejudice; counsel were permitted to cross-examine the witness extensively; the witness' testimony was limited to providing a foundation for the wiretaps and to expertly interpreting the code language; and the government structured its questioning to prevent the two subject matters from overlapping.

United States v. Anchrum, 590 F.3d 795 (9th Cir. 2009) : The Court affirmed convictions for drug and firearms offenses, finding no abuse of discretion in permitting a DEA agent who had participated in the incident leading to the defendant's arrest to also testify as an expert regarding the various reasons a hypothetical drug dealer would possess a firearm. The Judge avoided problems with an agent testifying in dual roles by separating the testimony into "phases." In *United States v. Freeman, 498 F.3d 893 (9th Cir. 2007)* , the Court, affirming a cocaine conviction, held that a police detective's lay opinion testimony interpreting ambiguous recorded telephone conversations was properly admitted based upon his personal knowledge of the investigation, and testimony as to other terms of which the witness had no personal knowledge was properly admitted because the agent had attained specialized knowledge of drug trafficking and had been qualified as an expert. The Court rejected a claim that it was error for the detective to testify as both lay and expert witness, although it agreed with *United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003)* (*see* Main Volume §

702.03[54][d]), that there are dangers when a law enforcement agent gives testimony in dual roles. The Court concluded that it was error (but harmless) to admit some portions of the detective's testimony, particularly opinions that relied on or conveyed hearsay evidence, and interpretation of clear statements that the jury would understand on its own. In *United States v. Freeman, 488 F.3d 1217 (9th Cir. 2007)* , a cocaine prosecution, a detective testified to the meaning of encoded drug jargon and gave his interpretations of ambiguous recorded telephone conversations. The Court affirmed, finding that the witness was qualified by experience to offer expert testimony about drug jargon and that he used a sufficiently reliable methodology. It also found that the detective's lay opinion testimony interpreting the telephone conversations was admissible given his role in the investigation, but it expressed concern that the blurred distinction between lay and expert testimony may have permitted the detective to rely upon and convey inadmissible hearsay evidence. It also expressed concern that the "dual roles created a risk that there was an imprimatur of scientific or technical validity to the entirety of his testimony," but it found no plain error in the Judge's failure to give a cautionary instruction *sua sponte*.

[e] Law Enforcement Agents -- Firearms

United States v. Cormier, 468 F.3d 63 (1st Cir. 2006) : The Court affirmed convictions related to drug trafficking, finding no abuse of discretion when an experienced ATF agent was permitted to testify regarding the "interstate nexus" of firearms used in one of the charged offenses. The agent relied on publicly available records, conversations with manufacturers, research texts, and inspection of one of the weapons.

United States v. Mullins, 446 F.3d 750 (8th Cir. 2006) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in permitting an ATF officer to testify that the defendant's starter pistol could easily be converted to expel a projectile. The testimony was based upon an independent visual examination of the starter gun and the defendant's expert agreed that this was a proper method to determine whether it could readily be converted to a firearm.

[h] Law Enforcement Agents -- Gang Experts

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) : The Court vacated convictions for conspiracy to commit assaults in aid of racketeering activity. The prosecution arose after members of one gang shot members of other gangs. To prove the shootings arose in the course of racketeering activity, a state police officer who had been investigating gangs in the area was permitted to testify about the operations of the defendants' nationwide gang, as well as of the gang's local activities, including that its members had committed "between 18 and 22, 23" murders in the area in the five years prior to the trial. According to the officer, his testimony was based on custodial interviews with gang members, reports from other law enforcement personnel, and published sources. The Court held that much of the expert's testimony concerned material well within the grasp of the average juror. The testimony also substituted the expert's conclusion on an essential fact (that the gang committed murders in a pattern of racketeering activity) for competent evidence of that fact: "The Government cannot take a shortcut around its obligation to prove murder beyond a reasonable doubt just by having an expert pronounce that unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of [the gang]." The Court also noted that the witness "was acting as a de facto 'case agent' in providing this summary information to the jury," a practice it had admonished against because case agents testifying as experts gain unmerited credibility when testifying about factual matters from first-hand knowledge. Furthermore, while law enforcement officers routinely and reasonably rely on hearsay in reaching their conclusions, an expert witness must not simply repeat hearsay evidence but must apply expertise to the inadmissible materials -- and in too many instances the expert in this case did not do so. This was particularly a problem with statements made in custodial interrogations, which were testimonial hearsay violating the defendants' *Confrontation Clause* rights.

United States v. Street, 548 F.3d 618 (8th Cir. 2008) : The Court reversed a conviction for aiding and abetting murder in furtherance of drug trafficking, holding it was error to admit testimony from a police expert about outlaw motorcycle gangs, including their violence toward women and "snitches." The defendant was not, however, a member of the gang

on which the testimony focused, nor had he ever set foot in the gang's headquarters. The evidence indicated that two gang members had occasionally worked on motorcycles with the defendant, supplied him with precursor chemicals, and purchased and used the final product, but there was no factual grounding for the prosecutor's claim in his closing argument that the gang's lifestyle had "started to rub off on [the defendant]." All in all, the expert's gang testimony "was excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses."

[i] Law Enforcement Agents -- Miscellaneous Testimony

United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010) : The Court affirmed convictions for child sex trafficking and for interstate transportation of a minor for prostitution, finding no abuse of discretion in the admission of an experienced detective's expert testimony regarding the business of prostitution and the relationships between pimps and prostitutes. The issues are not the subject of common knowledge, and the testimony helped place other witnesses' testimony into context and provided the jury a means to assess their credibility. In *United States v. Mejia-Luna, 562 F.3d 1215 (9th Cir. 2009)* , the Court affirmed a conviction for alien smuggling, finding no abuse of discretion when an Immigration and Customs Enforcement agent was permitted to testify as an expert witness regarding the structure and methods of alien smuggling operations. The testimony assisted the jury in understanding the evidence and the defendant's particular role in the operation.

[j] Law Enforcement Agents -- "Overview" Testimony

United States v. Flores-de-Jesus, 569 F.3d 8 (1st Cir. 2009) : Although the Court affirmed drug convictions, it reiterated concerns about the "use of a law enforcement officer as the first witness in a multi-defendant drug prosecution to provide an 'overview' of the prosecution's case" that it expressed in *United States v. Casas, 356 F.3d 104 (1st Cir. 2004)* (*Manual* § 702.03[54][j]). The Court recognized that "[t]here may be value in having a case agent describe the course of his investigation in order to set the stage for the testimony to come about the nature of the conspiracy and the defendants involved." However, absent a basis of personal knowledge, "the overview witness may not offer substantive testimony about the nature of the conspiracy or the involvement of particular defendants"; such overview testimony may raise *Confrontation Clause* questions. The Court added that "[d]elineating the boundaries of acceptable overview testimony becomes even more complicated when the 'overview' witness is also qualified as an expert." In this case, the prosecution improperly used an overview witness who was "essentially endorsing the testimony of other witnesses in what can only be viewed as an attempt by the government to bolster the credibility of those later witnesses." The Court warned that "[h]enceforth, there can be no justification in this circuit for the government's repetition of the errors that we have identified here in the use of overview testimony in criminal cases."

[k] Law Enforcement Agents -- Summary Testimony

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) : The Court vacated convictions for conspiracy to commit assaults in aid of racketeering activity. The prosecution arose after members of one gang shot members of other gangs. To prove the shootings arose in the course of racketeering activity, a state police officer who had been investigating gangs in the area was permitted to testify about the operations of the defendants' nationwide gang, as well as of the gang's local activities, including that its members had committed "between 18 and 22, 23" murders in the area in the five years prior to the trial. According to the officer, his testimony was based on custodial interviews with gang members, reports from other law enforcement personnel, and published sources. The Court held that much of the expert's testimony concerned material well within the grasp of the average juror. The testimony also substituted the expert's conclusion on an essential fact (that the gang committed murders in a pattern of racketeering activity) for competent evidence of that fact: "The Government cannot take a shortcut around its obligation to prove murder beyond a reasonable doubt just by having an expert pronounce that unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of [the gang]." The Court also noted that the witness "was acting as a de facto 'case agent' in providing this summary information to the jury," a practice it had admonished against because case agents testifying as experts gain unmerited credibility when testifying about factual matters from first-hand knowledge. Furthermore, while law

enforcement officers routinely and reasonably rely on hearsay in reaching their conclusions, an expert witness must not simply repeat hearsay evidence but must apply expertise to the inadmissible materials -- and in too many instances the expert in this case did not do so. This was particularly a problem with statements made in custodial interrogations, which were testimonial hearsay violating the defendants' *Confrontation Clause* rights.

United States v. Smith, 601 F.3d 530 (6th Cir. 2010) : Affirming drug convictions, the Court found no error in the admission of summary testimony from a law enforcement agent as to the structure of the organization and the role played by the defendant within that organization. The summary testimony aided the jury in "organizing proof" that was otherwise "plausibly confusing to the jury." However, the Judge should have given cautionary instructions regarding the agent's dual roles as both a lay and expert witness, and informing the jury of the summary's purpose "and that it does not constitute evidence." Because the defendant did not ask for either instruction at trial, review was for plain error and there was none.

[55] Lay Witness Distinguished [Go To Main]

United States v. Wilson, 605 F.3d 985 (D.C. Cir. 2010) : Affirming drug convictions, the Court found no abuse of discretion in excluding a former drug dealer who was called as a lay witness to interpret various taped phone calls. The Court reasoned that "[a] witness with firsthand experience of a particular drug operation may testify under Rule 701," but in the absence of firsthand experience, a witness must be qualified as an expert.

United States v. Hatch, 514 F.3d 145 (1st Cir. 2008) : The defendant was convicted for filing false tax returns, having not reported income received as the first winner of the "reality-TV" show "Survivor." On appeal, he complained that two accountants, who were never formally designated as experts by the government, were improperly permitted to give expert testimony. Affirming, the Court held that the accountants, who had prepared tax returns for the defendant, were called as and gave testimony as fact witnesses, and to the extent their unobjected-to testimony might be said to have included expert opinion, it "could in no way be considered to be plain error."

United States v. Perkins, 470 F.3d 150 (4th Cir. 2006) : In the trial of a police officer for using excessive force in making an arrest, officers who were at the scene were permitted to testify that unnecessary blows were struck, as were three officers without personal knowledge of the event. None of these witnesses were designated as experts, and the defendant argued that it was error to permit them to testify as lay witnesses. Affirming, the Court found that the testimony of officers at the scene "was framed in terms of their eyewitness observations and particularized experience as police officers" and thus was admissible under *Rule 701*. It held, however, that the opinion testimony of the three other officers "crossed the line between *Rules 701 and 702*." Their opinions "were elicited in response to hypothetical questions based on second-hand accounts, making their testimony similar, if not indistinguishable from" expert testimony. The error in admitting that testimony as lay opinion was harmless, however.

United States v. McMillan, 600 F.3d 434 (5th Cir. 2010) : The Court affirmed a fraud conviction, finding no abuse of discretion when a CPA and a former insurance regulator, who had been employed by the defendant, were permitted to testify regarding the recording of assets on the books of the defendant's company. Both "properly testified as fact witnesses about their observations and perceptions in the case in response to specific solicitations from [the defendant]." The Court also found that testimony by an auditor for the state department of insurance who conducted a targeted review of the company's financial statements was largely factual, and that to the extent it may have implicated specialized accounting knowledge, any error would be harmless. In *United States v. Valencia, 600 F.3d 389 (5th Cir. 2010)* , the Court affirmed fraud convictions arising from a scheme to give false information regarding natural gas trades to industry publications in order to manipulate natural gas markets. It found no abuse of discretion when a former risk manager at one of the involved companies was permitted to testify as a lay witness to the effects of the false reporting. The testimony related to his former job duties, and he recreated much of the analysis he regularly performed

when evaluating risk tolerances. Although much of the data had been provided to him after he left the company, his knowledge and analysis were derived from duties he held there, so his testimony was based on personal knowledge and experience gained whiled employed by the company. In *United States v. Jackson, 549 F.3d 963 (5th Cir. 2008)*, the Court affirmed the conviction and death sentence of a federal prisoner charged with killing a fellow inmate, finding no abuse of discretion in the admission of testimony by a special investigator at the prison that inmates typically remove their shirts before fist fights, but typically pad their clothes in knife fights. The Court concluded that the testimony was background information about prison fights that could assist the jury in determining the defendant's and the victim's states of mind, given evidence showing that the victim had taken his shirt off before the fight while the defendant had not. The Court also found no plain error in the admission of the testimony as lay opinion. The witness testified on the basis of his "past experiences based on personal observation as an investigative agent," while expert testimony involves "more than common sense or the officer's past experiences formed from first hand observation."

United States v. Ganier, 468 F.3d 920 (6th Cir. 2006): In a prosecution for obstruction of justice arising from the deletion of computer files subpoenaed by a grand jury, testimony from Drueck, a forensic computer specialist who would have testified regarding manipulation of the defendant's computer files, was excluded as a discovery sanction on the ground that the defense had not been provided with a written summary of the testimony as required by *Fed. R. Crim. P. 16(a)(1)(G)*. On interlocutory appeal the government argued that Drueck's testimony was not expert testimony, because it was not scientific or technical, and therefore no advance disclosure was required. However, the Court held that the proposed testimony was based on specialized knowledge and therefore was admissible if at all under *Rule 702*. It explained that "[t]he average layperson today may be able to interpret the outputs of popular software programs as easily as he or she interprets everyday vernacular, but the interpretation Drueck needed to apply to make sense of the software reports is more similar to the specialized knowledge police officers use to interpret slang and code words used by drug dealers." Although in the past witnesses had been permitted to apply specialized knowledge while giving lay testimony, "the 2000 amendment to *Federal Rule of Evidence 701* clarified that lay opinions or inferences cannot be based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*." Thus, the government had violated its discovery obligations under *Rule 16*, but the Court held that the order precluding the witness was excessive under the circumstances, so it vacated the decision below and remanded for reconsideration.

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008): In a prosecution of a drug conspiracy, a law enforcement agent was permitted to testify to his interpretation of what were apparently coded conversations between the conspirators. The Court found that the agent was properly permitted to testify as a lay witness, since he was not testifying to terms commonly used by drug conspiracies, but rather to unusual and idiosyncratic code used by this particular conspiracy. The agent's understanding "came only as a result of the particular things he perceived from monitoring intercepted calls, observing drug transactions of these conspirators, and talking with the cooperating conspirators about this drug operation." In *Compania Administradora de Recuperacion v. Titan Int'l Inc., 533 F.3d 555 (7th Cir. 2008)*, the Court affirmed summary judgment granted to a creditor who sued for breach of a guaranty contract, holding that a witness' testimony as to the value of collateral was properly characterized as expert, not lay, testimony. The witness' only connection with the items in question was the fact that he had been an officer of a company that held a controlling interest in another company that at one time owned the collateral; his valuations were based on his extensive experience purchasing and selling the type of items being valued, rather than on personal knowledge. The Court relied on the Advisory Committee Note to the 2000 amendment to Rule 701 for the proposition that "a business owner or officer is allowed to testify [to the value of business property] without being qualified as an expert only because that testimony is tied to his or her personal knowledge." Because the witness was not timely designated as an expert, the Trial Court was within its discretion to exclude the witness' testimony due to the discovery violation. In *United States v. Oriedo, 498 F.3d 593 (7th Cir. 2007)*, the court affirmed a conviction involving crack cocaine, holding it was error (but harmless) to admit as lay opinion an agent's testimony as to the way in which drug dealers package crack cocaine for resale. Although the testimony was couched as a matter of the agent's observation, he "brought the wealth of his experience as a narcotics officer to bear on those observations and made connections for the jury based on that specialized knowledge."

Jerden v. Amstutz, 430 F.3d 1231 (9th Cir. 2005) : The Court reversed a judgment for the defendant in a medical malpractice action, finding it was an abuse of discretion to permit the neurosurgical nurse practitioner who assisted the defendant during an operation on the plaintiff to testify that an MRI report used in connection with the operation indicated a brain tumor. It was error to admit the testimony as that of a fact witness who did not state any opinions as an expert, since the witness made detailed and scientific observations about the report and rendered opinions and inferences that he drew from his observations and that, as he admitted, he was not competent to provide.

United States v. Hamaker, 455 F.3d 1316 (11th Cir. 2006) : The Court affirmed bank fraud convictions, finding no abuse of discretion in permitting the government's principal trial witness, a trained financial analyst with 23 years' experience, to testify as a lay witness. The witness did not testify to an expert opinion; rather, he reviewed and summarized voluminous financial documents and matched certain records against other records. This enabled the witness to testify to the results of the comparisons -- i.e., that the records showed that the company sent invoices to a bank for work done by employees whose time sheets showed that the work was not done for the bank. Although the witness conceded that his use of computer software might have made him more efficient at reviewing the records, the Court held that "his review itself was within the capacity of any reasonable lay person." In *United States v. Dulcio, 441 F.3d 1269 (11th Cir. 2006)* , a drug distribution case, a law enforcement agent testified to the *modus operandi* of people involved in the drug business and tied each codefendant's role to that typically seen in a narcotics importing business. The Court held it was error (but harmless) to permit such testimony as lay witness testimony, because it was based on "specialized knowledge" within the meaning of *Rule 702*.

[58.1] Materiality [Go To Main]

United States v. Wintermute, 443 F.3d 993 (8th Cir. 2006) : Affirming a conviction for making a false statement to the Office of the Comptroller of the Currency, the Court held there was no abuse of discretion in precluding a former chief counsel for the OCC from giving defense testimony that the defendant's alleged misrepresentations were not material because the OCC did not take certain actions when it learned the true facts. The test of materiality is whether the false statements were capable of influencing the agency's decision, not whether they actually succeeded in doing so, so the testimony would have served to confuse rather than assist the jury.

[58.2] Medical Conditions [Go To Main]

Hill v. Principi, 439 F.3d 18 (1st Cir. 2006) : The Court affirmed a judgment for the Department of Veterans Affairs in an action by a psychiatrist who resigned her employment after being assigned additional duties, which she claimed violated the Rehabilitation Act. It found no error in permitting a defense expert, who had examined the plaintiff four times and reviewed her medical records, to testify as to his opinion of her medical condition. Reasoning that the expert "was called upon only to offer a routine diagnosis, on a patient he had examined, pertaining to a common condition well within his particular experience," the Court noted that the "mere fact that two experts disagree is not grounds for excluding one's testimony."

[60.1] ***Modus Operandi*** [Go To Main]

United States v. Hitt, 473 F.3d 146 (5th Cir. 2006) : Affirming a Mann Act conviction arising from sexual abuse of a teenage boy, the Court found no abuse of discretion in the admission of expert testimony that persons who sexually abuse children engage in a "grooming process" designed to reduce resistance to the sexual advances. The evidence was helpful to explain the behavior of persons accused of sexual offenses.

United States v. Batton, 602 F.3d 1191 (10th Cir. 2010) : The Court affirmed a conviction for interstate transportation of a minor for unlawful sexual relations, finding no abuse of discretion in the admission of testimony from an expert about "grooming" of victims by sex offenders and that offenders are often trusted family members or friends rather than strangers. The evidence could be helpful to understand the defendant's conduct and to dispel jurors' misconceptions. The witness was not permitted to give opinions about how his testimony might relate to the facts of the case or about the credibility of witnesses.

[64] Opinion on Law [Go To Main]

[a] Generally

United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008) : The defendant was convicted of obstructing justice and making false statements by denying that a lobbyist with whom he had a relationship was "doing business" with the government agency headed by the defendant. Reversing, the Court held it was an abuse of discretion to exclude expert testimony on whether government-contracting professionals viewed inquiries about possible contracts, as opposed to actually having a contract, with the agency as "doing business." Although the term was defined in some statutes, the issue in this case was what the defendant intended in answering questions and making statements, so the "expert's testimony would have supplied crucial context and support for Safavian's proposed meaning."

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) : An attorney was convicted for a bribery scheme in which he arranged, guaranteed, and paid off loans for state judges, in order to corruptly influence the outcome of cases he had filed in their courts. Affirming, the Court found no abuse of discretion in the exclusion of "expert" testimony that one of the cases was correctly decided, since the Judge was justified in concluding that the testimony would not assist the jury and was founded on unreliable methodology. In *United States v. Wofford, 560 F.3d 341 (5th Cir. 2009)* , the Court affirmed a conviction for theft or embezzlement from an employee benefit plan, finding no abuse of discretion when an expert for the defendant was not permitted to testify that the plan was not qualified under Internal Revenue Code provisions permitting corporate deductibility and employee tax deferment for contributions. As the only requirement under the charged statute was that the plan be subject to "any provision of title I" of the ERISA statute, evidence that the plan was not "tax-qualified" was irrelevant.

United States v. Noel, 581 F.3d 490 (7th Cir. 2009) : The Court affirmed convictions for producing and possessing child pornography, but it found an abuse of discretion in permitting an Indiana detective who conducted the forensic examination of the computer media seized from the defendant's residence to testify that photos on the computer met the federal definition of child pornography. Although the witness was presented as an expert, she gave no explanation for her opinion, so it amounted to "nothing more than a statement that the photos were illegal," which would not assist the jury. In *United States v. Chube, 538 F.3d 693 (7th Cir. 2008)* , the Court affirmed convictions for unlawful distribution of controlled substances and health care fraud involving illegitimate prescriptions of OxyContin, finding no abuse of discretion in the admission of expert testimony by a doctor specializing in internal and addiction medicine and by a pharmacology expert. Both testified that the prescriptions written for 98 patients were not for a "legitimate medical purpose." The Court noted that the jury was told that the "standard of care" was an issue distinct from the question of "legality." The Court concluded that the experts did not improperly opine on the law, but indicated that the medical doctor had "come close to a statement about the Doctors' mental state." In *United States v. Caputo, 517 F.3d 935 (7th Cir. 2008)* , the Court affirmed convictions for selling unauthorized medical devices, finding no abuse of discretion in excluding proposed expert testimony, as the witness "would have testified about the meaning of the [FDA] statute and regulations. That's a subject for the court, not for testimonial experts." In *RLJCS Enters. v. Professional Benefit Trust, 487 F.3d 494 (7th Cir. 2007)* , the Court affirmed summary judgment for a multi-employer welfare benefit plan in an action by participants to recover stock of insurers whose policies were purchased by the trust and which had changed from mutual ownership. The Court found no abuse of discretion in excluding expert testimony regarding the

demutualization process and the effects of a prior IRS private letter ruling, as the evidence was "about the meaning of trust indentures, contracts, and mutual-to-stock conversions [which] belongs in briefs, not in 'experts' reports." In *United States v. Davis, 471 F.3d 783 (7th Cir. 2006)* , the Court affirmed a conviction for Medicaid fraud, finding no abuse of discretion when a witness was permitted to testify how the state Medicaid agency interpreted the requirements of the program. The Court noted that "[e]xperts are permitted to testify regarding how their government agency applies rules as long as the testimony does not incorrectly state the law or opine on certain ultimate legal issues in the case," and that "experts are allowed to testify about how they enforce regulations, whether transactions comply with regulations, and how they ensure that the public knows about regulations."

In re Prempro Products Liability Litig., 586 F.3d 547 (8th Cir. 2009) : In an action alleging that the plaintiff's breast cancer was caused by hormone replacement therapy, the Court found no abuse of discretion when testimony from the plaintiff's expert in support of punitive damages was struck as inadmissible. The witness was supposed to provide evidence regarding FDA regulations and the defendants' lack of compliance therewith. However, her testimony only began with a brief overview of some federal regulations; what followed was almost entirely a reading of the contents of specific exhibits without any analysis relating them to FDA guidelines.

Nationwide Transport Finance v. Cass Information Systems, Inc., 523 F.3d 1051 (9th Cir. 2008) : A finance company engaged in account receivable financing known as factoring sued a freight invoice payment service alleging intentional interference with contractual relationship and other contract and tort claims. Affirming a judgment for the defendant, the Court found no abuse of discretion in granting a motion to strike one of the defendant's expert reports and to limit another defense expert's testimony. The defense expert whose report was stricken was permitted to discuss industry conditions, standards and practices, but the report was excluded because it contained numerous legal conclusions. The Court also found that, whether the other expert was regarded as offering lay or expert opinion, it was not an abuse of discretion to exclude legal conclusions, since "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge."

United States Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131 (10th Cir. 2009) : Reversing and remanding judgment for the plaintiffs in a product liability action arising from an accident when an aircraft's engine shut down, the Court held it was an abuse of discretion to permit an expert for the plaintiffs to give testimony that simply restated an FAA regulation that was "written in straightforward language and quoted verbatim" in a jury instruction.

Mola Dev. Corp. v. United States, 516 F.3d 1370 (Fed. Cir. 2008) : The Court affirmed a summary judgment for the government in a suit by a thrift holding company claiming that enactment of FIRREA breached its supervisory merger contract and constituted a taking. It held that an affidavit of a former official of the Federal Home Loan Bank of San Francisco, interpreting federal regulations, was entitled to no weight, because "the proper interpretation of these regulations is an issue of law" as to which expert testimony should neither be received nor considered.

[b] Opinion on Law -- Employment and Labor

Pelletier v. Main St. Textiles, LP, 470 F.3d 48 (1st Cir. 2006) : The plaintiff, who was injured while operating a forklift, claimed that the owner of the premises was negligent in maintaining the location and in ensuring the safety of the workers. The Court found no abuse of discretion in refusing to let the plaintiff's expert opine on whether OSHA regulations applied to the defendant's conduct, since "the general rule is that it is the judge's role, not a witness's, to instruct the jury on the law."

[c] Opinion on Law -- Foreign Law

Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) : The Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It held that

because the Trial Judge properly declined to grant comity to the Salvadoran Amnesty Law, there was no abuse of discretion in excluding the defendant's expert testimony on the purpose of the Law. The opinion was not relevant and was also an opinion on the law, and "[a]n expert opinion on a question of law is inadmissible."

Sunstar, Inc. v. Alberto-Culver Co., 586 F.3d 487 (7th Cir. 2009) : In a trademark licensing suit involving foreign law issues, the Court noted that the content of foreign law may be, and most often is, proved by testimony or affidavits of experts, but that articles, treatises, and judicial opinions "are superior sources." The lawyers who testify to the meaning of foreign law "are paid for their testimony and selected on the basis for the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client"; "[t]hose are banes of expert testimony." In the Court's view, because Judges are experts on law, it is not unreasonable to expect a Judge to resolve an issue of foreign law without the aid of expert testimony.

[e] Opinion on Law -- Securities

United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) : Affirming convictions of Martha Stewart and her stockbroker for obstruction of justice in connection with an insider trading investigation, the Court found no error when a securities law expert was precluded from testifying about the legality of the stock trade at issue. The proffered testimony regarding the legal principles underlying insider trading and their application to Stewart's trade trespassed on the Judge's exclusive power to explain the law, and had the potential to confuse the jury with irrelevant facts, because the defendants were not charged with insider trading.

Berckeley Investment Group, Ltd. v. Colkitt, 455 F.3d 195 (3d Cir. 2006) : In a breach of contract action related to securities, a lawyer offered an affidavit stating that, on assumed facts, it would have been reasonable for Berckeley to have believed that it was entitled to a certain securities law exemption. Upholding admission of the affidavit, the Court emphasized that the Trial Court, in exercising its discretion, "must ensure that an expert does not testify as to the governing law of the case." Thus, the lawyer was not permitted to "testify as to whether Berckeley complied with legal duties that arose under the federal securities laws."

United States v. Setser, 568 F.3d 482 (5th Cir. 2009) : Affirming convictions for operating a multimillion-dollar Ponzi scheme, the Court held it was error (but harmless) for the receiver of the defendants' enterprises to testify that they constituted a "security fraud" and a "Ponzi scheme."

[f] Opinion on Law -- Taxes

Stobie Creek Inv. LLC v. United States, 608 F.3d 1366 (Fed. Cir. 2010) : The Court affirmed a judgment denying a taxpayer's refund claim, finding no abuse of discretion when an expert for the plaintiff was precluded from testifying about the tax laws "as they existed in 2000" and whether a tax opinion letter complied with standards set out in a Treasury Circular. Because the proffered opinion concerned a question of law, not of fact, it would not "assist" the factfinder.

[67] Pharmacology Evidence [Go To Main]

Kunz v. DeFelice, 538 F.3d 667 (7th Cir. 2008) : Affirming a judgment for an arrestee suing for excessive force, the Court found no abuse of discretion in excluding testimony from a defense witness, whose "credentials were weak, at best," that the plaintiff's ability to recall and narrate events on the night in question was impaired, given his admission to having used a small amount of heroin earlier in the evening. The witness knew neither a baseline against which to judge whether the plaintiff was impaired nor the plaintiff's habituation level (which might affect the impairing effects of the drug), and even if the witness' testimony were taken at face value, the impairing effect of the heroin should have worn off at least 90 minutes before the incident in question.

[69] Photographic Identification [Go To Main]

United States v. Sarras, 575 F.3d 1191 (11th Cir. 2009) : Affirming the defendant's conviction for inducing his minor step-daughter to engage in sexually explicit conduct for the purpose of producing photos of it and for possession of child pornography, the Court found no abuse of discretion in the exclusion of expert testimony for the defense that the defendant's penis was not the one shown in computer photos, since the expert's vein-comparison methodology was not shown to be reliable. The Court also held that the Judge, who permitted a defense expert to testify as to how certain photos of the defendant's penis were taken, did not abuse discretion in permitting a government expert to testify in rebuttal that the defendant manipulated his penis during the photographs and to identify where a mole was actually located on the penis.

[70] Polygraph and Similar Evidence [Go To Main]

Munoz v. State Farm Lloyds of Texas, 522 F.3d 568 (5th Cir. 2008) : In an action on a fire insurance policy, the insurer defended on the ground that the plaintiffs had intentionally set the fire. Reversing a judgment for the plaintiffs, the Court held it was reversible error to admit evidence that a grand jury did not indict the husband for arson, as such evidence is highly prejudicial. Although the plaintiffs argued that the insurer had opened the door to the evidence by introducing evidence that the husband had failed a polygraph examination, which they said was per se inadmissible, the Court noted that *Daubert* governs the admissibility of polygraph examination results, that neither party alleged that the results in this case were improperly admitted under *Daubert*, and that the plaintiffs had not objected to the introduction of the results at trial. Therefore, there was no support for the contention that the polygraph evidence was inadmissible and the door was not opened to the evidence of non-indictment. In *United States v. Allard, 464 F.3d 529 (5th Cir. 2006)* , the defendant had confessed to making a false claim of consumer product tampering after she was informed that she had failed a polygraph test, but at trial she claimed the confession was coerced. In response, the government introduced statements made during the examination and called the agent who administered it to explain the process and recount the events. The jury was instructed that it could consider the statements surrounding the test to determine the witness' credibility but that the results of the test were not admissible. Affirming, the Court found no abuse of discretion. The requirements of *Rule 702* did not apply because no technical, scientific, or expert testimony was being offered, and the probative value of the evidence to rebut the defendant's claim of a coerced confession was not substantially outweighed by any risk of prejudice to the defendant.

[70.1] Product Defect [Go To Main]

DG & G, Inc. v. Flexsol Packaging Corp., 576 F.3d 820 (8th Cir. 2009) : In an action by a cotton marketing association against a cotton gin operator alleging that the operator damaged cotton in the ginning process, the operator filed a cross-claim against the manufacturer of the bags used to bag the cotton, alleging that the bags were defective in retaining moisture added during the ginning process. The Court affirmed summary judgment for the manufacturer, finding no abuse of discretion when the operator's expert's report was excluded. The expert failed to follow the requirements of the method he employed to demonstrate that the product was defective, in that the method required that four specimens be tested and he tested only three (and he did not know how additional tests would affect his results), and he failed to use a dummy specimen as required; furthermore, he failed to test any of the bags used in this case.

Primiano v. Cook, 598F.3d 558 (9th Cir. 2010): In a product liability action by a patient whose elbow replacement failed after eight months, the Trial Judge granted summary judgment for the defendant after excluding the plaintiff's expert witness on the grounds that his opinion would not help the jury because he could not say why a part of the

artificial elbow failed, he never saw or talked with the plaintiff, and there was no publication supporting his opinion that the device failed extraordinarily early. Reversing, the Court held that there was no requirement of explaining the cause of the failure, where the governing law required showing only that the product failed to perform in the manner reasonably to be expected; that seeing the patient was unnecessary when the expert saw the x-rays and the implant after it was removed; and that publication is not essential, especially when the phenomenon is so extraordinary that the specialists who publish articles do not see it in their practices.

[71] Product Design [Go To Main]

Hodges v. Mack Trucks, Inc., 474 F.3d 188 (5th Cir. 2006) : The injured driver of a truck sued the manufacturer of the truck and the manufacturer of the seatbelt, alleging design defects in the seatbelt and in the passenger-side door latch that caused him to be ejected in the accident. The Court found no abuse of discretion in admitting testimony by the driver's expert that the door latch failed and that there was a safer design available that would have substantially reduced the likelihood of the driver's injuries. It noted that the expert was an engineer with many years working in, and testifying against, the insurance industry.

Johnson v. Manitowoc Boom Trucks, Inc., 484 F.3d 426 (6th Cir. 2007) : In a product liability action for injuries incurred when a truck-mounted crane tipped over, the plaintiff's expert opined that the crane was defective without an electronic interlock system that would prevent its operating unless the outriggers were in place. Affirming summary judgment for the defendant, the Court found no abuse of discretion in exclusion of the expert's testimony. The expert had not tested the proposed system and did not have significant expertise in the design and application of such devices to cranes; interlocking outriggers were not generally accepted in the crane industry at the time the crane at issue was put into the marketplace, although they are, or are on their way to being, now; and the expert's opinion was prepared solely for litigation, which calls for application of the *Daubert* factors with greater rigor.

Winters v. Fru-Con Inc., 498 F.3d 734 (7th Cir. 2007) : The Court affirmed the exclusion of expert testimony and a judgment for the defendant in a suit by a worker whose hand was severed at the wrist while working at a food processing plant. The injury occurred when a computer that controlled the plant equipment was mistakenly switched from manual to automatic, causing a valve to close on the plaintiff's hand. There was no abuse of discretion in excluding testimony by a "human factors" expert who would have opined that the computer processing system was not designed properly, as well as testimony by a forensic engineer that the valve control system was defective, because neither expert had tested his alternative designs or used another method of research to compensate for the lack of testing.

Shuck v. CNH America, LLC, 498 F.3d 868 (8th Cir. 2007) , the Court affirmed a judgment against the manufacturer of a combine in a product liability action brought after a fire in the combine's engine compartment caused extensive damage to the combine and to corn that was on board, finding no abuse of discretion in admitting the testimony of the buyers' fire causation and mechanical experts. Although the experts did not test and study the damaged and burned combine parts, the Court found that it was reasonable to credit testimony that the components could not be tested due to the destruction and alteration of the components in the fire or the arrangement of the components in the damaged engine. The Court concluded that the experts "observed the relevant evidence, applied their specialized knowledge, and systematically included and excluded possible theories of causation." *See also Sappington v. Skyjack, Inc., 512 F.3d 440 (8th Cir. 2008)* (error to exclude design expert's testimony, where expert took account of relevant standards, reviewed relevant literature and current industry practices, and the feasability and risk utility of implementing a safer design). In *Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007)* , the plaintiff's decedent was killed when he attempted to stop a Dodge Ram from rolling down a driveway after his two-year-old grandson, who had been left alone in the truck with the key in the ignition and the engine running, apparently shifted the gear out of park. In an action against the manufacturer, the plaintiff alleged that the truck was defective because it did not have a brake-shift interlock device requiring the brake pedal to be depressed in order to shift out of park. Affirming a judgment for the defendant,

the Court found no abuse of discretion in the exclusion of testimony by a former Chrysler employee that the Ram was unreasonably dangerous because it lacked a BSI device. The plaintiff's proffer did not indicate that the witness employed any methodology, reliable or otherwise. In *Smith v. Cangieter, 462 F.3d 920 (8th Cir. 2006)* , a product liability action arising from an accident in which a vehicle with part-time four-wheel drive swerved out of control, the plaintiffs offered the report of an engineer, who opined that the vehicle was defective because the four-wheel drive system caused stability problems while driving on dry asphalt at highway speeds. Affirming summary judgment for the defendants, the Court found no abuse of discretion in the exclusion of the expert's report. While peer-reviewed articles established that loss of traction can occur with part-time four-wheel drive, the expert had no testing or research about the stage at which the vehicle becomes dangerous to operate or about the effect of a loss of traction on handling and safety, and so had no acceptable basis for his conclusion that the system was unsafe at highway speeds.

Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187 (9th Cir. 2007) : In a product liability action brought after two nails inserted to stabilize the plaintiff's leg fracture failed, the plaintiff's expert metallurgist opined how the nails could have been designed or manufactured to reduce the risk of metal fatigue. The Trial Judge excluded the opinion on the ground that it would not be helpful on the issue whether the nails served the biomechanical purpose for which they were designed and granted summary judgment for the defendant. The Court held that the Judge had erroneously required the expert's testimony "to establish not only the presence of an alleged defect but also causation." The Judge "explain[ed] in great detail why Kumar's testimony fell short of guaranteeing Stilwell would prevail, [but] failed to demonstrate that a metallurgist's testimony that the metal device was both poorly manufactured and could have been designed to last longer than it did is not relevant to this products liability case." However, summary judgment was affirmed because the plaintiff presented no proof of a defect in the product causing her injuries.

[74] Proper Subjects of Expert Testimony [Go To Main]

United States v. Glover, 479 F.3d 511 (7th Cir. 2007) : In a prosecution for drug distribution offenses, the government proffered a police department technician as an expert to explain why the defendant's fingerprints were not found on a gun that the government alleged had been possessed by him. The expert testified that fingerprints are rarely obtained from guns due to various factors like sweating and the weather. Affirming, the Court rejected an argument that admitting the expert testimony was error because, *inter alia,* the jury needed no assistance on this point: it noted that "the average person might expect a gun to bear fingerprints if it was handled without gloves."

United States v. Jeanetta, 533 F.3d 651 (8th Cir. 2008) : The Court affirmed drug and firearm convictions, finding no abuse of discretion in permitting a police officer to explain the significance of various items -- including ZipLoc bags, radios, scanners, and night vision goggles -- seized during a search of the defendant's home. The Court found that the significance of these seemingly innocuous items was highly relevant to rebut the defendant's claim that he was merely a drug user and not a trafficker. "Because the importance of the items would not necessarily be apparent to a lay observer, the expert testimony was necessary to explain the significance of the items as they related to the world of drug dealing."

[75] Psychiatric and Psychological Evidence [Go To Main]

[a] Civil Cases

Goodman v. Harris County, 571 F.3d 388 (5th Cir. 2009) : The Court affirmed a judgment for the plaintiff in an excessive force civil rights action arising from the killing of a bicyclist by a deputy constable. The Court found no abuse of discretion in admitting the testimony of a psychiatrist who had examined the deputy constable, opined that the deputy constable showed cognitive weaknesses and short-term memory problems, and gave a medical opinion on the psychological underpinnings of events described to him by the deputy constable. The testimony was helpful to the jury in understanding how the deputy constable viewed the bicyclist on the night of the shooting; although the expert

testified that he observed inconsistencies in the deputy constable's description of events, the expert never opined that the deputy constable was lying.

Boyd v. City & County of San Francisco, 576 F.3d 938 (9th Cir. 2009) : In a § 1983 excessive force action arising from an incident in which the plaintiff's decedent was fatally shot at the end of a high-speed chase when he reached into his vehicle rather than obeying an instruction to get down on the ground, the defendants argued that the victim had been attempting to commit "suicide by cop." Affirming a judgment for the defendants, the Court found no abuse of discretion when a psychiatrist was permitted to testify for the defense that her study of the circumstances surrounding the suspect's death led her to conclude that he had been attempting to commit "suicide by cop."

[b] Psychiatric and Psychological Evidence -- Condition of Accused

[i] *Mens Rea* Evidence

United States v. Day, 524 F.3d 1361(D.C. Cir. 2008) : The Court affirmed convictions for mail and wire fraud and embezzlement from an employee benefit plan, finding no abuse of discretion in excluding testimony by a neuroscientist that defendant lacked the requisite *mens rea* to form the intent to defraud. The expert's opinion was based on the premise that the defendant suffered from major depression, but the defendant's medical records and other experts' opinions did not support the premise. As the neuroscientist was not qualified to diagnose depression, his opinion lacked foundation and was not reliable.

United States v. Hofus, 598 F.3d 1171 (9th Cir. 2010) : The Court affirmed a conviction for attempting to coerce and entice a minor to engage in sexual intercourse, finding no abuse of discretion when a psychologist was precluded from testifying that the defendant was engaged in texting as "fantasy alone" and was unlikely to act on the intentions (to engage in sex) expressed in his texts. It held that the likelihood the defendant would engage in sex with a minor was irrelevant to whether he would commit the charged crime of attempting to induce or entice a minor to engage in sexual activity, and that an opinion that the defendant texted "in fantasy alone" was the equivalent of saying he lacked the requisite *mens rea*, which would run afoul of Rule 704(b). One Judge dissented, arguing that the evidence was relevant, since "[i]f the defendant did not intend to have intercourse with the minor, he was unlikely to be attempting to persuade her to have intercourse," and that denying the "fantasy" evidence violated the right to present a defense. In *United States v. Cohen, 510 F.3d 1114 (9th Cir. 2007)* , the Court reversed the conviction of a defendant charged with aiding and assisting the filing of a false tax return, because the defendant's expert psychiatrist was erroneously precluded from testifying that a narcissistic personality disorder like the defendant's can cause a person to continue to believe something to be true despite overwhelming evidence of its patent absurdity. The Court held that the expert's testimony would have assisted the jury in determining whether the defendant had a good-faith belief that he was complying with the law, thereby negating the *mens rea* element of the *26 U.S.C. § 7206(2)*, which requires that a defendant "wilfully" assist in the filing of a false tax return. Without the expert testimony, the defendant had no way to explain the effect that his mental disorder may have had on his ability to form the requisite *mens rea*. In *United States v. Sandoval-Mendoza, 472 F.3d 645 (9th Cir. 2006)* , the Court reversed a conviction for conspiracy to sell methamphetamine because of an error in excluding the defendant's expert testimony. Two defense experts, a neuropsychologist and a neurologist, would have testified about the defendant's brain tumors and their effect on his cognitive performance. The Court found that the testimony was supportive of the defendant's entrapment defense, and stated that "[a]lthough the abuse of discretion standard of review is liberal, ... [w]hen credible, qualified experts disagree, a criminal defendant is entitled to have the jury, not the judge, decide whether the government has proved its case." Here, the Judge "applied an inappropriately rigid *Daubert* standard to medical expert testimony by not accepting what a good physician would in determining what is reliable knowledge in the medical profession." The Court added that "[a] trial court should admit medical expert testimony if physicians would accept it as useful and reliable," and concluded that the Judge should not have excluded the testimony merely because "it did not conclusively prove Sandoval-Mendoza's brain tumor caused susceptibility to inducement or lack of predisposition."

[ii] Psychiatric and Psychological Evidence -- Condition of Accused -- Other Evidence

United States v. Curtin, 588 F.3d 993 (9th Cir. 2009) : The Court affirmed a conviction for interstate travel to engage in sexual acts with a minor, finding no abuse of discretion when a licensed marriage and family therapist called by the defense was permitted to testify about "Internet role playing fantasy," but was not permitted to offer opinions regarding the defendant's activities and intent. Much of the excluded testimony was based on a "survey" by the witness and her associates, which had not been published, peer reviewed, or presented for analysis of methodology. Furthermore, the survey was not correlated in time or location with the charged crimes, and the witness' opinion seemed not to be based on the behavior exhibited by the defendant.

[c] Psychiatric and Psychological Evidence -- Other Criminal Cases

United States v. Joseph, 542 F.3d 13 (2d Cir. 2008) : In a prosecution for using the Internet to entice an underage girl to engage in unlawful sexual activity, the defense was precluded from calling an expert to testify about role-playing in the context of sexually explicit conversations on the Internet, including the realities and motivations of online role-playing via chatrooms and e-mail. Reversing the conviction on other grounds, the Court urged "a more thorough consideration to the defendant's claim to present" the testimony if it is offered at retrial. In the Court's view, the expert's field of study and experience qualified him to offer relevant testimony and the expert's opinions "appear to be highly likely to assist the jury 'to understand the evidence.' " One Judge, dissenting, believed that exclusion of the expert testimony was justified under Rule 403, as "[e]vidence that some people engage in role-playing on the Internet sheds little light on whether *Joseph* did so in this particular case," and even without the testimony the defense had ample opportunity to present its role-playing theory from the defendant's own testimony.

United States v. Simmons, 470 F.3d 1115 (5th Cir. 2006) : Affirming a conviction for sexual assault under color of law, the Court found no abuse of discretion in permitting a psychologist to testify that the victim's behavior and testimony were consistent with that of sexual assault victims. Although it recognized that a diagnosis of rape trauma syndrome is made for therapeutic and not forensic purposes, and assumes that a claimant is truthful, the Court held that testimony drawing on a diagnosis of rape trauma syndrome is not proscribed by *Daubert*. The Court reasoned that expert testimony need not satisfy every *Daubert* factor and noted that the reliability inquiry as applied to social scientists requires some flexibility.

United States v. Betcher, 534 F.3d 820 (8th Cir. 2008) : The defendant, charged with taking pornographic pictures of his minor granddaughters and distributing them, claimed that the girls took the pictures themselves. The Court found no error in permitting an expert to testify to the behavioral characteristics of sexually abused children in general. "Dr. Levitt's testimony as to delayed disclosure helped the jury understand why the girls did not reveal they had been photographed until they were confronted with the images. ... Dr. Levitt's testimony was relevant because it educated the jury on issues necessary to their determination of who manufactured the photographs."

[76] Qualifications of Experts [Go To Main]

[b] Qualifications of Experts -- Civil Rights Cases

Schmidt v. Magyari, 557 F.3d 564 (8th Cir. 2009) : The Court affirmed summary judgment for the City in an action by an arrestee who claimed that photographing her tattoo violated her rights. The Trial Judge properly excluded expert testimony offered by a police lieutenant on behalf of the plaintiff as to strip-search procedures, an officer's motivations, and the psychological impact of searches on arrestees. Rejecting the plaintiff's contention that the witness was sufficiently qualified by experience, the Court noted that "for an expert to be qualified based on experience, that experience must bear a close relationship to the expert's opinion." In this case there was "not a close fit": the expert had experience working as a traffic patrolman, a watch commander, and a security operator at public events. None of this experience had anything to do with strip searches or psychology.

[d] Qualifications of Experts -- Damages Experts

First Marblehead Corp. v. House, 541 F.3d 36 (1st Cir. 2008) : Five years after he resigned from the company, House attempted to exercise stock options and was told that they had expired three months after his resignation. The jury found that House had reasonably relied on negligent misrepresentations that the options would be viable for ten years, but it accepted testimony from an expert for the company that it would not have made financial sense for House to have exercised the options timely had he known of the three-month restriction. The Court found no abuse of discretion in admission of the expert's testimony, as he was an economist with nearly two decades of experience as a consultant in economics, finance, and strategy consulting, including providing investment advice to accredited investors. His testimony about how stock options function and how an investor would think about exercising those options involved topics not ordinarily within the knowledge of the jury. And the testimony provided the jury with information helpful in evaluating House's assertions as to what he would have done, without giving the expert's opinion about House's credibility or what he believed House would have done.

[k] Qualifications of Experts -- Forensic Experts

United States v. Mahone, 453 F.3d 68 (1st Cir. 2006) : Affirming a conviction for attempted armed robbery, the Court found no abuse of discretion when a government witness was permitted to testify as an expert with respect to footwear impression identification, even though she was not qualified through the International Association for Identification. The witness had a master's degree in forensic science, testified that she had made more than 11,000 footwear comparisons, worked two years as a state police "latent impressions" specialist, testified twice as an expert on footwear impressions, and attended a 40-hour FBI course in footwear and tire impression evidence. The Court also found that there was an appropriate hearing into the "ACE-V" method for assessing footwear impressions, and sufficient evidence of the reliability of the method and its application in this case.

[k.1] Qualifications of Experts -- Fraud Cases

United States v. Cooks, 589 F.3d 173 (5th Cir. 2009) : The Court affirmed fraud and money laundering convictions, although it found an abuse of discretion (but harmless error) in permitting an agent of the FDIC to testify as an expert on mortgage fraud. The witness had sparse experience working on mortgage fraud cases, had never been qualified as an expert on mortgage fraud, had no specialized training or classes in mortgage fraud, and was seemingly unaware of basic statutes and literature that govern the field.

[n] Qualifications of Experts -- Industry Practice

Levin v. Dalva Bros. Inc., 459 F.3d 68 (1st Cir. 2006) : The Court affirmed in part and reversed in part summary judgment granted in an action between buyers and sellers of antiques. It found no error in allowing the defendant's expert to testify that sheets used by an antique dealer to describe furniture comported with industry standards, as "[e]xpert testimony on industry standards is common fare in civil litigation."

United States v. Fallon, 470 F.3d 542 (3d Cir. 2006) : The defendant was charged with fraud after providing a forged FDA letter certifying a medical device that was the subject of a vendor agreement he was establishing with a leasing firm. To prove that the forgery was material, the president of the leasing firm testified that it had a policy, which he had brought with him from his prior employer, of requiring FDA clearances from medical device manufacturers. The defense countered with the testimony of a witness that he had never in 15 years in the medical leasing business requested or even seen an FDA clearance letter, but it was not permitted to introduce testimony by a former COO at a medical leasing company (the prior employer of the prosecution witness) as to the customs and practices of the medical leasing industry. Affirming, the Court held that exclusion of the industry practice evidence was error (but harmless); contrary to the Trial Judge's understanding, "a witness need not represent an entire industry in order to have sufficient knowledge of that industry's customs and practices so as to render substantial assistance to the jury."

United States v. Smith, 573 F.3d 639 (8th Cir. 2009) : The operator of an online pharmacy business was convicted for distributing controlled substances without an effective prescription and related offenses. Affirming, the Court found no abuse of discretion when a pharmacist was permitted to testify that the information provided by alleged patients to the physician employed by the defendant was insufficient for a physician to have issued valid prescriptions. As executive director for 20 years of the National Association of Boards of Pharmacy and a frequent witness before legislatures on Internet pharmacies and the relevant laws, the witness was familiar with the legal standards for issuing prescriptions and qualified to testify about compliance with the applicable standards. The Court noted that the witness was not qualified to interpret the text of the statutes and regulations in court, but any error was harmless.

Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC, 555 F.3d 1331 (11th Cir. 2009) : In a declaratory judgment and interpleader action by a life insurance company alleging that the insured materially misstated his assets, the Court affirmed summary judgment for the insurer, finding no abuse of discretion when a witness was permitted to give expert testimony regarding "general insurance industry financial underwriting standards and risk management issues," including that no insurer would issue a $7,000,000 policy for estate planning purposes to a man whose net worth was less than $200,000. The witness was qualified by his education (e.g., a doctoral degree in risk management) and experience (e.g., coauthoring a leading textbook on life insurance and serving as a paid consultant to various companies regarding the issuance of multi-million-dollar life insurance policies) to provide the information and opinions he did.

[o] Qualifications of Experts -- Law Enforcement Agents

United States v. Mejia, 597 F.3d 1329 (D.C. Cir. 2010) : In a prosecution for conspiring to import cocaine, that arose from a DEA-initiated Central American sting operation, the Court found no abuse of discretion in permitting a Guatemalan police officer with 14 years' experience to testify as to drug trafficking and transportation activities as they relate to Guatemala. The witness had not participated in cases that were prosecuted in the United States, but this did not affect his qualifications to testify about drug trafficking in Guatemala.

United States v. Garcia, 452 F.3d 36 (1st Cir. 2006) : In an illegal reentry case, the Court found no abuse of discretion when a law enforcement agent was permitted to testify as an expert in fingerprint comparison, although he had "a mere two days of training." It noted that the agent had received a certification in fingerprint comparison after taking a 16-hour course, he conducted more than 80 comparisons over a period of two years, his comparisons were often verified by other FBI officials, and he had testified as a fingerprint expert in federal court on several occasions. The Court noted that "some experts are more qualified than others" and that the agent "may have not had the same expertise as someone whose sole occupation is to compare latent prints." However, his training and experience were sufficient to permit him to testify as an expert; "[i]t was up to the jury to weigh that testimony, given what the jurors heard on direct and cross-examination about Plumb's training and experience."

United States v. Bynum, 604 F.3d 161 (4th Cir. 2010) : The Court affirmed a conviction for transporting and possessing child pornography, finding no abuse of discretion in permitting an FBI analyst with 13 years of experience in examining questioned photographic evidence to authenticate the images in the charged pornography as those of real people and to testify that they were not computer-generated.

United States v. Lee, 502 F.3d 691 (7th Cir. 2007) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the exclusion of testimony by a law enforcement officer on how gunshot residue can transfer from one surface to another, since the officer had no training in testing for the presence of gunshot residue. The Judge also properly excluded his testimony that a partial fingerprint was unsuitable for comparison, since he also had no training in the analysis of fingerprints.

Schmidt v. Magyari, 557 F.3d 564 (8th Cir. 2009) : The Court affirmed summary judgment for the City in an action by an arrestee who claimed that photographing her tattoo violated her rights. The Trial Judge properly excluded expert

testimony offered by a police lieutenant on behalf of the plaintiff as to strip-search procedures, an officer's motivations, and the psychological impact of searches on arrestees. Rejecting the plaintiff's contention that the witness was sufficiently qualified by experience, the Court noted that "for an expert to be qualified based on experience, that experience must bear a close relationship to the expert's opinion." In this case there was "not a close fit": the expert had experience working as a traffic patrolman, a watch commander, and a security operator at public events. None of this experience had anything to do with strip searches or psychology.

[p] Qualifications of Experts -- Medical Testimony

[i] Accident Cases

Robinson v. Geico Gen'l Ins. Co., 447 F.3d 1096 (8th Cir. 2006) : Affirming a judgment for an insurer that refused to pay for injuries allegedly caused by an automobile accident, the Court found no abuse of discretion in admitting the testimony of a neurologist who testified that the injury to the plaintiff's shoulder could not have been caused by the relatively light impact she suffered in the accident. Rejecting an argument that the witness' testimony was really about orthopedics, not neurology, the Court noted that " *Rule 702* does not require a defense medical expert to be of the identical medical specialty as the plaintiff's expert." Here, the expert's testimony

> pertained to the cause of the shoulder problems that made Robinson's surgery necessary. His testimony regarding the usual onset of shoulder pain was within his realm of expertise as a neurologist. As a physician, he could testify regarding the likely type of injury one would sustain by the impact of the arm into the shoulder joint. Also, Dr. Horenstein's study of the subject qualified him to testify regarding the direction one would be forced in a rear-impact collision.

[iii] Qualifications of Experts -- Medical Testimony -- Medical Malpractice Cases

Pages-Ramirez v. Ramirez-Gonzalez, 605 F.3d 109 (1st Cir. 2010) : The Court reversed a judgment as a matter of law for an obstetrician sued by parents who alleged that medical malpractice during their son's delivery caused catastrophic injury, finding that it was an abuse of discretion to exclude the plaintiffs' expert on the ground that she was not board-certified in obstetrics and gynecology and had no privileges to administer the drug used during the mother's delivery or to perform a cesarean section. The expert was board-certified and practiced in perinatal and neonatal medicine, had published book chapters that deal with the drug that was administered, and served as a consultant during high-risk deliveries and recommended that C-sections be performed. Because the expert's credentials "easily meet, and, indeed, surpass the standard for admissibility of expert testimony," the expert should have been permitted to testify during the plaintiffs' case-in-chief on the standard of care and on medical causation.

Huss v. Gayden, 571 F.3d 442 (5th Cir. 2009) : The Court reversed a judgment for a patient who alleged that the defendants' negligence in administering a drug during her pregnancy caused cardiac injuries. The defendants offered a witness, who was board-certified in internal medicine with 15 years' practice as an internist and who had treated pregnant patients with cardiac conditions, to testify that the plaintiff's condition was idiopathic (of unknown origin), that there was no established evidence that the drug administered could cause the plaintiff's condition, and that the articles relied upon by the plaintiff's causation expert were insufficient to support the causative relationship he found and were contradicted by statistically reliable research. The Magistrate Judge trying the case excluded the witness on the ground that he had virtually no experience in OB/GYN and no experience at all with the drug in question, and there was "simply nothing in [his] background" that entitled him to express an opinion about causation of the plaintiff's condition. The Court held that exclusion of the expert's opinion was an abuse of discretion, since his "training and experience as a medical professional qualify him to tell the jury why the literature does not establish a causal link," and he did not need to be board-certified in cardiology or toxicology to explain the literature.

Gayton v. McCoy, 593 F.3d 610 (7th Cir. 2010) : In an action alleging that an inmate died from a heart attack because she did not receive proper medical care, the Court found no error in the exclusion of testimony by the plaintiff's medical

expert that the inmate would not have died if prison officials had given her her cardiac medications. The doctor was not a cardiologist, and did not have any knowledge of "how these drugs function, whether they are efficacious in the short term as well as the long term, or how they prevent CHF [congestive heart failure] from reaching a critical stage." Moreover, the witness could not state "what effect, if any, these medications would have had given that the record reveals that [the inmate] had not been taking them consistently nor as instructed by her prescribing physician." Thus, the witness did not have the specialized cardiological or pharmacological knowledge necessary to make a conclusion that would help the jury. In contrast, the Court found that the witness was qualified to testify that the inmate's vomiting combined with her diuretic medications may have contributed to her tachycardia and subsequent death, since "[t]he effects of vomiting on potassium and electrolyte levels in the body is not specialized knowledge held only by cardiologists, and ... it is knowledge that any competent physician would typically possess."

Allen v. Brown Clinic, P.L.L.P., 531 F.3d 568 (8th Cir. 2008) : The Court affirmed a judgment for defendants in a medical malpractice case. The jury found that a defendant doctor was negligent in repairing a hiatal hernia through an "open surgery," but that the negligence was not the proximate cause of a patient's perforated esophagus. The Court found no abuse of discretion in permitting a board-certified general surgeon with extensive academic and professional experience to testify, even though the expert performed more laparoscopic surgeries than open surgeries and no longer did open surgeries now that the less invasive alternative was available. The Court noted that "any differences in his relative experience could be explored on cross-examination."

[iv] Qualifications of Experts -- Medical Testimony -- Product Liability and Toxic Exposure Cases

Gass v. Marriott Hotel Servs., 558 F.3d 419 (6th Cir. 2009) : In an action by hotel guests alleging that exposure to pesticides in their room caused subsequent illness, the Court found no abuse of discretion in rulings that permitted the plaintiffs' treating physicians to testify to their "symptoms, tests, diagnosis, and treatment," but not to the causation of the plaintiffs' illness. The physicians' professional experience qualified them regarding the former, but nothing in their medical expertise would allow them to testify regarding the specific pesticide that caused the plaintiffs' symptoms or when their exposure to the pesticide occurred. In *Meridia Products Liability Litig. v. Abbott Labs., 447 F.3d 861 (6th Cir. 2006)* , the court affirmed summary judgment for the defendant in an action by persons allegedly injured from taking the drug Meridia for weight loss. It found no error in excluding testimony from the plaintiffs' expert pharmacologist that Meridia elevates blood pressure, and that the increase in blood pressure is a risk to heart health that outweighed any corresponding benefit of weight loss. The Court noted that the witness was a pharmacologist, not a cardiologist, and so was "not an expert on the effects of high blood pressure on the human body."

Cunningham v. Masterwear Corp., 569 F.3d 673 (7th Cir. 2009) : In a nuisance action by plaintiffs claiming that improper storage of perchloro-ethylene by a neighboring dry cleaner had caused respiratory injuries and loss of property value, the Court found no abuse of discretion when the plaintiffs' expert medical witness was disqualified. The witness was a physician specializing in treatment of respiratory diseases, but he had never treated a respiratory illness caused or aggravated by exposure to PCE, and he was not a toxicologist. Furthermore, he did not present, directly or by citation to scientific literature, a theory that would link the level and duration of the plaintiffs' exposure to PCE to their symptoms. In *Lewis v. CITGO Petroleum Corp., 561 F.3d 698 (7th Cir. 2009)* , the Court affirmed summary judgment for the defendant in a negligence action for injuries allegedly sustained from exposure to hydrogen sulfide, finding no abuse of discretion in the exclusion of expert causation testimony for the plaintiff. One of the witnesses was an allergist with no training or experience in toxicology or epidemiology, who had treated one patient 12 years earlier after hydrogen sulfide exposure and who in preparing his diagnosis in this case had spent only 30 minutes researching a medical database for relevant information about hydrogen sulfide exposure.

In re Hanford Nuclear Reservation Litig., 534 F.3d 986 (9th Cir. 2008) : In the trial of claims by bellwether plaintiffs alleging that radioiodine emissions by plutonium producers at a nuclear facility caused cancers and other life-threatening diseases, the Trial Judge barred the plaintiffs' expert endocrinologist from testifying about any pre-litigation articles he had written on iodine-131's effect on thyroid cells because none of his articles concluded that

doses at less than 100 rads could cause disease, and there was no evidence that any of the plaintiffs had been exposed to radiation at that level. The Court held that the Judge's ruling was an abuse of discretion, since it deprived the jury of knowledge about the extent of the witness' pre-litigation expertise, which included extensive research and scholarship on the capacity of I-131 emissions to kill thyroid cells.

[v] Qualifications of Experts -- Medical Testimony -- Miscellaneous Cases

Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502 (6th Cir. 2006) (en banc): Affirming in part a preliminary injunction granted for abortion providers challenging the constitutionality of a state statute prohibiting "off-label" use of an abortion-inducing drug, the Court noted that it was improper to exclude testimony on medical and surgical abortion by the State's expert on the ground that she did not perform elective abortion procedures. "As with any other procedure or topic, an individual can acquire expertise regarding elective procedures through a variety of means other than actually performing the precise procedure at issue."

Happel v. Walmart Stores, Inc., 602 F.3d 820 (7th Cir. 2010) : In an action alleging that negligence by a pharmacy in filling a prescription for a nonsteroidal anti-inflammatory drug for a patient allergic to NSAIDs caused an anaphylactic reaction that exacerbated the patient's multiple sclerosis, the Court reversed the judgment for errors in awarding damages, but found no abuse of discretion in excluding causation testimony from the plaintiff's expert. The witness was not qualified to testify about the plaintiff's MS because he had very limited (and unrelated) experience with MS patients, his opinion was not supported by relevant medical literature, and he offered no experimental, statistical, or other scientific data to support his theory.

[q] Qualifications of Experts -- Navigation

Stolt Achievement, Ltd. v. Dredge B.E. Lindholm, 447 F.3d 360 (5th Cir. 2006) : The Court affirmed the judgment in a maritime collision case, finding no abuse of discretion when an experienced Master Mariner was permitted to testify about the effects of one ship's bow wave. Although the witness was not qualified to testify as to specific hydrodynamic effects, he did not testify to technical matters or calculations regarding the forces generated, but limited his conclusions to those based on his experience as a Master Mariner and his observations of the accident locale.

[r] Qualifications of Experts -- Patent Cases

SEB S.A. v. Montgomery Ward & Co., 594 F.3d 1360 (Fed. Cir. 2010) : In an action alleging infringement of a patented feature of a deep fryer, the Court held there was no abuse of discretion in permitting a defense expert to testify as to infringement. Although he lacked expertise in the art of designing deep fryers, he was qualified with respect to designing thermal bridges, which was an element of the patent claim. In *Sundance, Inc. v. Demonte Fabricating, Ltd., 550 F.3d 1356 (Fed. Cir. 2008)* , the Court reversed a judgment against the plaintiff in a patent infringement action, finding that it was an abuse of discretion to permit a patent attorney to offer expert opinion testimony on the issue of obviousness and other issues of infringement or validity, since he offered "testimony on several issues which are exclusively determined from the perspective of ordinary skill in the art" despite the fact that he had "no skill in the pertinent art." The Court added that being a person of ordinary skill in the art does not automatically entitle a witness to testify as an expert on these matters, nor does Rule 702 require a witness to possess something more than ordinary skill in the art to testify as an expert. In *Proveris Scientific Corp. v. Innovasystems, Inc., 536 F.3d 1256 (Fed. Cir. 2009)* , the Court affirmed a finding of infringement regarding a patent related to aerosol sprays commonly used in drug delivery devices. It found no abuse of discretion in a ruling that a mechanical engineer whose technical experience was limited to satellite design was not qualified to testify about laboratory equipment used in the development of drug delivery devices.

[s] Qualifications of Experts -- Physical Injuries

Lash v. Hollis, 525 F.3d 636 (8th Cir. 2008) : An arrestee claimed that an officer used excessive force against him by

shocking him six times with a Taser. The Court held there was no abuse of discretion in excluding the arrestee's expert testimony that the Taser was the cause of his kidney failure, as the expert had no experience with Tasers, Taser injuries, or the specific Taser at issue in the case.

[t] Qualifications of Experts -- Prescription Drug and Toxic Exposure Cases

Barrett v. Rhodia, Inc., 606 F.3d 975 (8th Cir. 2010) : In an action for injuries allegedly caused when a cloud of toxic gas escaped from a chemical drum used in a hazardous waste facility, the plaintiff, who had been 12-14 feet away, sought to introduce testimony establishing that he had been exposed to a sufficient concentration of the gas to cause his injuries from a board-certified allergist certified in toxicology, his treating physician, a clinical psychologist practicing in neuropsychotherapy, and a safety engineer with a degree in petroleum and natural gas engineering. Affirming summary judgment for the defendants, the Court held there was no abuse of discretion in holding, with limited exceptions, that the proffered experts lacked the experience and scientific foundation to provide the causation testimony necessary for the plaintiff's case.

[u] Qualifications of Experts -- Product Liability Cases

[iii] Qualifications of Experts -- Product Liability Cases -- Vehicles and Equipment

[A] Consumer Accidents

Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224 (5th Cir. 2007) : Affirming summary judgment for the manufacturer in a suit by a motorist who was injured when tread separated from a seven-year-old tire he had purchased as a spare, the Court found no abuse of discretion in excluding testimony by a polymer scientist who had concluded that the tire was defective in the absence of a nylon cap overlay. The witness had never designed a tire, nor conducted or reviewed any research into tire structure, and his only familiarity with tires came from riding on them. The Court observed that "[a]t most, Moore is qualified to testify that the tire's wire bonding could have been stronger with a nylon cap overlay." In response to the plaintiff's argument that "[a] tire is simply an application of the fundamental issues of polymer science," the Court stated: "That is true in some sense, just as it is true that asbestos, heart valves, and cupcakes can all be broken down into their basic atomic particles; but that does not mean an atomic physicist is qualified to testify regarding any asbestosis, medical malpractice, or confectionary issue. It's the science's application to tires that concerns us here, and Moore has absolutely no experience applying polymer science to tires."

[B] Qualifications of Experts -- Product Liability Cases -- Vehicles and Equipment -- Workplace Accidents

Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008) : A car mechanic brought a product liability action after the back window of an SUV shattered when he was working on the rear door lift. The plaintiff's expert would have testified that a step-by-step procedure was required in order to reduce the likelihood that the rear liftgate glass would fail when repairing the door lift, and that such a procedure should have been embodied in an instruction manual, but was not. Reversing summary judgment for the defendant granted after the expert was excluded on the ground that he was not qualified to testify about the adequacy of warnings, the Court noted that the expert had degrees in engineering and spent considerable time studying fracture mechanics and modeling materials such as glass. The expert "did not purport to opine on how the warning should be worded or how it should appear in order to effectively convey its message to an automobile technician. He only testified that neglecting to follow the steps of an instruction when replacing the 2002 Explorer's liftgate brackets and hinges might result in failure of the liftgate glass, and that a warning was necessary to alert a technician to the potential problem. [The expert] was substantively qualified to testify on this point because a proper warning is also a solution to an engineering problem."

[y.1] Qualifications of Experts -- Translation and Interpretation

United States v. Cui Qin Zhang, 458 F.3d 1126 (10th Cir. 2006) : In drug-possession trial, the prosecution introduced a

tape recording of admissions made by the Mandarin-speaking defendant in a telephone call from jail after her arrest. Affirming, the Court held that the required *Daubert* gatekeeping had been performed with respect to the English translation of the tape, based on the Judge's statement overruling objections to the interpreter's qualifications: "This is a native Mandarin Chinese Speaker who has been speaking English since he was 10 years old. And I take it ... he's probably over 30 since he's been a police officer for 14 years."

[cc] Qualifications of Experts -- Other Cases

Levin v. Dalva Bros. Inc., 459 F.3d 68 (1st Cir. 2006) : In an action between buyers and sellers of antiques, the plaintiff's expert (Fallwell), testified as to the appraisal value and his visual observations of the antiques at issue, but was not permitted to opine as to whether the clock originated from a certain historical period, because he had "insufficient experience with Regence-era furniture to authenticate the clock based on his visual examination." The plaintiff argued that although Fallwell did not have experience identifying Regence-era furniture, such specialization is not required under *Rule 702*. Affirming, the Court held that "[b] excluding Fallwell's opinion on authenticity but allowing him to testify to appraisal value and his visual observations of the clock, the court reasonably limited Fallwell to offering opinions only in those areas in which he was qualified." The plaintiff also argued that another defense expert was unqualified to testify about the attributes of the clock because he had not authenticated its period of origin. The Court noted that although the expert had only assumed the clock's period of origin, experts are allowed to give opinions that are based upon assumptions not contrary to evidence introduced at trial. In *Santos v. Posadas de Puerto Rico Assoc., Inc., 452 F.3d 59 (1st Cir. 2006)* , an expert witness for the plaintiff, who slipped and fell while entering a hotel swimming pool, testified that there was a dangerous condition arising from a combination of factors: variable friction between the pool steps and their edges, the use of an unsuitable type of tile at the edges, the peculiar configuration of the stairs, and the absence of a handrail. Although the witness had no experience in the construction or design of swimming pools, the Court found he was sufficiently qualified, and affirmed a judgment for the plaintiff. It explained that "experts come in various shapes and sizes; there is no mechanical checklist for measuring whether an expert is qualified to offer opinion evidence in a particular field." Here, the expert held a doctorate in mechanical engineering, was certified by the National Academy of Safety as a tribologist (someone who deals with friction and its effect on how people walk), and had analyzed more than 2,000 slip and fall accidents.

United States v. Winkle, 477 F.3d 407 (6th Cir. 2007) : The Court affirmed a conviction for bank fraud, finding no abuse of discretion when an employee of an accounting firm that was conducting an investigation of the affected banks was permitted to testify as an expert regarding the defendant's check kiting scheme. Although the witness was not a certified public accountant, he had a bachelor's degree in business, had worked five years as a bank examiner, and had worked twelve years with the accounting firm conducting due diligence and compliance reviews for government agencies. He had been taught how to spot check kiting activity, and part of his job was to ensure that the banks he examined had controls in place to monitor for check kiting.

Cincinnati Ins. Co. v. Bluewood, Inc., 560 F.3d 798 (8th Cir. 2009) : In an action by an apartment complex manager against a commercial property insurer alleging breach of contract and unreasonable refusal to pay in connection with water damage to apartments, the Court affirmed a judgment that awarded the manager no additional damages beyond those already paid by the insurer. The Court found no abuse of discretion in admitting the testimony of the insurer's expert on mold. Although the manager focused on the expert's lack of a college education, the Court noted that the expert had participated in between 1500 and 2000 water remediation jobs over 15 years and regularly performed experimental testing relating to mold growth and prevention.

Milne v. USA Cycling, Inc., 575 F.3d 1120 (10th Cir. 2009) : The Court affirmed a summary judgment for the defendants in an action by injured participants in a mountain bike race against race organizers and a truck driver who collided with the plaintiffs. It found no abuse of discretion in excluding the testimony by the plaintiffs' expert regarding the applicable standards of care for mountain bike racing. Although the expert had experience organizing and supervising paved road bike races, he had no experience in organizing, supervising, or studying mountain bike races and

was not an experienced mountain bike rider. The record demonstrated that the rules and practices that prevail at mountain bike races are different from those that prevail at traditional road races, so the expert was not sufficiently qualified.

[dd] Qualifications of Experts -- Witness' Professed Lack of Qualification

Watson v. United States, 485 F.3d 1100 (10th Cir. 2007) : Affirming a judgment for the government in a prisoner's suit for medical injuries, the Court found no abuse of discretion in a finding that the government's expert on the standard of care was qualified. In his deposition, the witness said that he did not consider himself an expert, although he also said that he was "talking about meeting the standard of care in the community." The Court rejected the argument that the witness' professed lack of expertise rendered him unqualified, noting that "[w]hile overly modest expert witnesses may not be exactly an everyday sort of problem in our legal system, neither can we ignore the prospect of mistakenly excluding a witness who really is expert but simply too demure to trumpet his or her qualities under cross-examination; it would hardly benefit the legal system to exclude from the stand self-deprecating individuals who rarely testify but have the expertise to do so in favor of those who are more extravagant and savvy to the legal system or who may make their living testifying in our courts." Here, the witness was qualified by being a medical doctor, board certified, with advanced training in several specialized areas, and by having served as an emergency room director and medical director of the Federal Transfer Center.

[78] Reliance on Other Experts [Go To Main]

Crowe v. Marchand, 506 F.3d 13 (1st Cir. 2007) : Affirming a judgment for the defendant physician in a medical malpractice case, the Court found no abuse of discretion in the admission of expert testimony by an orthopedic surgeon who did not review the patient's x-ray or MRI studies. The expert testified that he based his opinions on what other physicians' reports of those studies showed. The Court found that the information he relied upon provided a sufficient foundation for his opinion, since "[d]octors routinely rely on observations reported by other doctors," and "it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony in a personal injury case, to have performed every test, procedure, and examination himself."

[79] Requirement of Expert Testimony [Go To Main]

Menz v. New Holland N. Am., Inc., 507 F.3d 1107 (8th Cir. 2007) : The Court affirmed summary judgments for the manufacturers of a tractor and a front-end loader in a suit by a tractor driver injured in a rollover accident, finding no abuse of discretion in the exclusion of the plaintiff's expert testimony. The Court rejected the plaintiff's argument that this exclusion should not have resulted in summary judgment because expert testimony was not required, concluding that "the products at issue in this case are fairly technical and complex, and are not the type of machinery commonly utilized by the typical lay juror."

[82] Risk Assessment [Go To Main]

Surles v. Greyhound Lines, Inc., 474 F.3d 288 (6th Cir. 2007) : The plaintiff, suing for personal injuries incurred when a deranged passenger attacked the driver of an interstate bus and caused a serious accident, argued that the defendant was negligent in failing to provide secure enclosures for its bus drivers. Affirming a judgment for the plaintiff, the Court found no abuse of discretion in permitting a witness to assess prior incident reports and evaluate the sufficiency of the defendant's driver training. Although he had no experience specific to the bus industry, the witness had 28 years as a

police officer, including founding a unit that dealt with "managing violently inclined situations of the mentally ill," and subsequent experience with a consulting firm working with clients in the transportation industry on threat assessment issues and on training employees on "interpersonal human aggression and managing violently inclined employees." The Trial Judge conducted a hearing to ensure the reliability and relevancy of the testimony, precluded opinions on the issue of foreseeability as they would not have been helpful, and had a sufficient basis for concluding that the expert's conclusions were based on reliable application of his experience to a sufficient factual basis.

[83] Safety Experts [Go To Main]

Minix v. Canarecci, 597 F.3d 824 (7th Cir. 2010) : The Court affirmed summary judgments for defendants in an action alleging deliberate indifference when a jail inmate committed suicide. It found no abuse of discretion in the exclusion of testimony by the plaintiff's expert that the jail's nursing staff did not have the training required to competently assess an inmate's risk of suicide, as the expert cited no medical standards or principles in support of his conclusion and failed to explain his methodology.

Milne v. USA Cycling, Inc., 575 F.3d 1120 (10th Cir. 2009) : The Court affirmed a summary judgment for the defendants in an action by injured participants in a mountain bike race against race organizers and a truck driver who collided with the plaintiffs. It found no abuse of discretion in excluding the testimony by the plaintiffs' expert regarding the applicable standards of care for mountain bike racing. Although the expert had experience organizing and supervising paved road bike races, he had no experience in organizing, supervising, or studying mountain bike races and was not an experienced mountain bike rider. The record demonstrated that the rules and practices that prevail at mountain bike races are different from those that prevail at traditional road races, so the expert was not sufficiently qualified. The Court noted that even if the expert were qualified, his testimony on safety standards was unreliable because he relied almost exclusively on his own experience, which was inapplicable in the context of mountain bike racing. Therefore, his testimony about the safety precautions that should have been taken were "mere speculation."

[84] Scientific Evidence [Go To Main]

[c] Scientific Evidence -- Causation of Disease or Injury

[i] Drugs and Medical Devices

Riegel v. Medtronic, Inc., 451 F.3d 104 (2d Cir. 2006) , aff'd on other grounds, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) : The plaintiff sued the manufacturer of a balloon catheter that exploded during his heart surgery. Because the catheter was inflated beyond its specifications and it was used even though the plaintiff had heavily calcified arteries and the product specification indicated that the catheter should not be used under such circumstances, it was the plaintiff's burden to show that a manufacturing defect, rather than overinflation or calcification, caused the catheter to explode. The plaintiff's engineer offered the view that based on the nature of the plaintiff's injury, the catheter must have burst not longitudinally, but radially, which, in his view, signified a manufacturing defect. Affirming summary judgment for the defendant, the Court found that the Judge, who rejected the expert's opinion, had properly identified "serious flaws" in the expert's opinion. The expert did not explain the basis of his conclusion that the plaintiff's injury was more indicative of a radial failure than a longitudinal failure. More importantly, the expert did not explain why a radial failure led to a conclusion of manufacturing defect, and why a radial failure could not have been caused by overinflation or calcification.

[iii] Scientific Evidence -- Causation of Disease or Injury -- Toxic Exposure

[A] Consumer Injuries

In re Hanford Nuclear Reservation Litig., 534 F.3d 986 (9th Cir. 2008) , *amending 497 F.3d 1005 (9th Cir. 2007)* : Reversing in part judgments from a trial in which bellwether plaintiffs representing a class of residents near a nuclear facility that helped make an atomic bomb during World War II claimed that radioiodine (I-131) emissions caused cancers and life threatening diseases, the Court found it was an abuse of discretion to bar the plaintiffs' endocrinologist expert from testifying as to pre-litigation articles he authored on I-131's impact on thyroid cells. The Judge relied on the fact that no article concluded that doses less than 100 rads can cause autoimmune disease. "This ruling was an abuse of discretion because it deprived the jury of testimony from Dr. Davies about the extent of his pre-litigation expertise regarding causes of thyroid illness."

[e.1] Scientific Evidence -- EDTA Testing

Cooper v. Brown, 510 F.3d 870 (9th Cir. 2007) : The Court affirmed the denial of habeas corpus relief to a state defendant convicted of multiple murders and sentenced to death. This was the third habeas petition filed by the defendant, and it followed a remand in *Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004)* , in which the Court ordered the District Judge to order two scientific tests to be performed. One of the tests, for the preservative agent ethylene-diamine tetra-acetic acid (EDTA), was conducted on a bloody T-shirt in an effort to determine whether blood had been taken from a vial and planted on the shirt. Although the defendant complained that the testing protocol was flawed, the Court found no abuse of discretion in the conclusion that the EDTA testing lacked sufficient indicia of reliability to be admissible. It noted that "EDTA testing has not been subjected to peer review and there has been no discussion of forensic EDTA testing in scientific literature since a 1997 article that headlines the need for a better analytical method." Further, the error rate of EDTA testing cannot be determined, as "the widespread presence of EDTA in the environment can never be ruled out as the source of any EDTA detected in the specimen."

[h] Scientific Evidence -- Other Cases

United States v. W.R. Grace, 504 F.3d 745 (9th Cir. 2007) : In a prosecution related to the alleged release of asbestos-contaminated vermiculite from a mine, the Trial Judge ruled that government experts could not offer opinion testimony as to the amount of a release of asbestos-contaminated vermiculite based upon the defendants' historic product testing records, but that the experts could testify regarding the fact and extent of historic testing in order to show the defendants' knowledge of the dangerousness of the contaminated vermiculite. Reversing on interlocutory appeal, the Court held that the Judge erred in examining the experts' reliance on particular data, and stated that the Judge on remand should conduct a Rule 702 analysis in light of the experts' reasoning and methodology as a whole. The Court also found an abuse of discretion in the Judge's failure to consider whether the experts could testify as to the hazardous characteristics of historic releases as opposed to estimating the fiber concentrations in the charged releases. The Court held that because the expert testimony was admitted on the notice issue, the Judge implicitly found the historic testing data reliable, and thus should also have admitted the data to prove the propensity of the defendants' vermiculite to release asbestos.

[j] Scientific Evidence -- Sexual Abuse Cases

United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) : Affirming convictions for aggravated sexual abuse, the Court held there was no abuse of discretion in admitting the testimony of an expert regarding the victim's encopresis. The expert did not offer an opinion as to whether sexual abuse occurred or that the encopresis was caused by sexual abuse. Rather, the expert explained that encopresis is a nonspecific historical finding of abuse, which means that there are other reasons it may occur. The expert "provided testimony regarding characteristics of sexually abused children in general and how they compared with the characteristics exhibited by J.J. This is allowed under our precedent."

[85] Social Science Evidence [Go To Main]

United States v. Simmons, 470 F.3d 1115 (5th Cir. 2006) : Affirming a conviction for sexual assault under color of law, the Court found no abuse of discretion in permitting a psychologist to testify that the victim's behavior and testimony were consistent with that of sexual assault victims. Although it recognized that a diagnosis of rape trauma syndrome is made for therapeutic and not forensic purposes, and assumes that a claimant is truthful, the Court held that testimony drawing on a diagnosis of rape trauma syndrome is not proscribed by *Daubert*. The Court reasoned that expert testimony need not satisfy every *Daubert* factor and noted that the reliability inquiry as applied to social scientists requires some flexibility.

[87] Standards of Conduct [Go To Main]

[b] Standards of Conduct -- Miscellaneous Cases

Parker v. Gerrish, 547 F.3d 1 (1st Cir. 2008) : In a civil rights action by an arrestee alleging excessive force, the Court found no abuse of discretion in the admission of testimony by a retired police officer with experience in police training that the defendant officer's use of a Taser "was inconsistent with generally established police practices."

United States v. Wexler, 522 F.3d 194 (2d Cir. 2008) : Affirming convictions of a dermatologist for illegal distribution of controlled substances and health care fraud, the Court found no abuse of discretion in admitting expert testimony regarding the standard of care expected of dermatologists. The defendant complained that the testimony was irrelevant because a physician is not confined to one area of practice and may treat patients for conditions outside the area of specialty, but the Court held that "[w]hile failure to comply with the standard of care applicable to a medical specialty does not alone provide a basis for concluding that a physician's activities fall outside the usual course of professional practice, it surely is relevant to that determination."

North Am. Speciality Ins. Co. v. Britt Paulk Ins. Agency, 579 F.3d 1106 (10th Cir. 2009) : In an insurance action, the Court found no error in excluding proffered expert testimony regarding standard insurance industry practice. Because the jury could determine from the evidence whether the insurance company's actions comported with industry standards, an expert would not have assisted the jury.

[89] Statistical Evidence [Go To Main]

[b] Statistical Evidence -- Other Cases

United States v. Giambro, 544 F.3d 26 (1st Cir. 2008) : The Court affirmed a conviction for possession of an unregistered firearm, finding no abuse of discretion in the exclusion of testimony by a defense witness regarding the accuracy and completeness in the National Firearms Registration and Transfer Record. Although the witness had supposedly based his conclusions on a statistical analysis of filings with ATF, the Judge had properly found that "suppositions ... and conjecture abound[ed]" in the testimony, and that the witness had relied on "underlying data [that was] purely anecdotal and without scientific basis."

Lyondell Chem. Co. v. Occidental Chem. Corp., 608 F.3d 284 (5th Cir. 2010) : In a CERCLA apportionment and contribution action, it was necessary to calculate disposal volumes for each liable company based on uncertain input data, so minimum, intermediate, and maximum input values were established and a statistical expert calculated the required volumes. The Court held there was no abuse of discretion when the expert used the Monte Carlo statistical methodology, as it was shown to be sufficiently reliable for this specific application. In *United States v. Valencia, 600 F.3d 389 (5th Cir. 2010)* , the Court affirmed fraud convictions arising from a scheme to give false information regarding natural gas trades to industry publications in order to manipulate natural gas markets. It found no abuse of discretion when a witness retained by the government was permitted to express an opinion, based on analyses he

conducted, regarding the likelihood that the defendants' false reporting affected the markets. Although the unprecedented nature of the expert's work made it highly impractical to subject his methods to peer review and publication, and there would be no general acceptance of the theory in the scientific or expert community, the arithmetic underpinnings of the analysis permitted testing the theories and determining the rate of error. Although the fit between the data and the theory was approximate, that could be highlighted on cross-examination.

[91] Sufficient Facts or Data as Basis [Go To Main]

Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1 (1st Cir. 2010) : The Court affirmed summary judgments for an obstetrician and a hospital in a medical malpractice action alleging that the delayed performance of a Cesarean section led to improper diagnoses and resulting injuries to an infant. It held that the plaintiffs' obstetrical expert made it clear that there was no way that the defendant obstetrician could have known about an occult cord prolapse prior to undertaking the C-section, so the plaintiffs' neurological expert had no basis for concluding that the defendant obstetrician should have realized the condition earlier. In *Pelletier v. Main St. Textiles, LP, 470 F.3d 48 (1st Cir. 2006)* , the plaintiff, who was injured while operating a forklift, claimed that the owner of the premises was negligent in maintaining the location and in ensuring the safety of the work that was being done. The Court found no abuse of discretion in the exclusion of the plaintiff's expert, who would have testified to the customs and practices of the industry. Although expert testimony on the customs and practice of an industry is proper, there is no entitlement to offer such expert testimony. Here, the expert never inspected the facilities and equipment at issue, so the Judge was warranted in finding that the expert lacked sufficient facts or data upon which to base an opinion on the industry practices as applied to the premises at issue.

James v. Harris County, 577 F.3d 612 (5th Cir. 2009) : Affirming judgment as a matter of law for the County in an action by the family of a motorist shot and killed by a deputy sheriff during a traffic stop, the Court found no abuse of discretion when a criminologist was barred from testifying for the plaintiffs that the sheriff's department deputies "would have known that the use of deadly force was not thoroughly investigated and disciplined and, consistent with his theory, would have broken rules governing the use of force." Although the witness was permitted to testify that generally line workers will break rules if they are not enforced, he "offered no empirical evidence to connect his general theory to the Harris County Sheriff's Department; he never interviewed the department's deputies nor otherwise sought to collect evidence that might reveal whether informal networks of communication operated within the department." Finally, his testimony was not grounded in facts, as there was no evidence that it was common knowledge in the department that investigations of shootings were lax.

United States v. Brown, 461 F.3d 1062 (8th Cir. 2006) : Appealing from convictions arising from a scheme to divert pseudoephedrine to individuals who used it to manufacture methamphetamine, the defendants argued it was error to admit expert testimony that the expected sales of pseudoephedrine by an average convenience store were significantly less than the amount sold by the defendants' businesses. Affirming, the Court found that the expert had sufficient facts or data to reach a conclusion about what an average store could expect to sell, as the expert relied upon "data obtained from a national economic census regarding estimated national pseudoephedrine sales figures." It was therefore not critical that the expert did not visit any of the defendants' stores and had no information about their size, location, condition, or operations.

[94] Toxicology Tests [Go To Main]

Olson v. Ford Motor Co., 481 F.3d 619 (8th Cir. 2007) : The plaintiff, whose decedent was killed when he lost control of his Ford Explorer, sued the manufacturer alleging that a defect in the cruise control caused a sudden acceleration that the driver could not overcome even with hard braking. Affirming a judgment for the manufacturer, the Court held there

was no abuse of discretion in the admission of evidence regarding the level of alcohol in the decedent's vitreous humor and relating that to the decedent's likely blood-alcohol level at the time of the accident. The defendant's expert was a pharmacologist qualified by education and experience to testify about how alcohol affects human beings, and although he had not previously calculated a blood-alcohol level from a vitreous-humor-alcohol level, the actual conversion was a matter of simple arithmetic. Any suggestion that the sample of vitreous humor was faulty went only to the credibility of the testimony, not its admissibility, and was fully explored on examination and cross-examination. And there was evidence (albeit contradicted by witnesses for the plaintiff) that the method used by the defendant's expert for converting alcohol levels was reliable. In *United States v. Cawthorn, 429 F.3d 793 (8th Cir. 2005) , vacated on other grounds, 128 S. Ct. 1060, 169 L. Ed. 2d 801 (2008)* , the court affirmed a crack cocaine conviction, finding no abuse of discretion in the admission of expert testimony on the unlikelihood that the defendant would get cocaine residue on his hands from casual contact with contaminated money. The expert had tested a money-counter and the hands of bank tellers over the course of a Saturday morning. The Court held, however, that it was an abuse of discretion (but harmless error) to permit the same expert witness to testify that it was unlikely that one would get cocaine contamination from contact with steering wheels. There was no showing that the expert tested cars that had come into contact with cocaine or that were impounded for cocaine-related offenses.

[94.1] Translators [Go To Main]

United States v. Verdin-Garcia, 516 F.3d 884 (10th Cir. 2008) : Affirming drug trafficking convictions, the Court held there was no error in admitting without a *Daubert* hearing translations of intercepted Spanish-language telephone calls, which included slang terms. The translator in the case was familiar with the defendants' region of origin in Mexico and with its slang, and she had interpreted numerous conversations involving natives of the region.

[96] Unhelpful Evidence -- Within Ordinary Understanding [Go To Main]

Thompson v. City of Chicago, 472 F.3d 444 (7th Cir. 2006) : Affirming a judgment for police officers sued by survivors of a suspect who died following his arrest, the Court found no abuse of discretion in excluding the plaintiff's expert testimony on the question whether the defendant officer used excessive force. "The jury, after having heard all of the evidence presented, was in as good a position as the experts to judge whether the force used by the officers to subdue Thompson was objectively reasonable given the circumstances in this case."

Cavataio v. City of Bella Villa, 570 F.3d 1015 (8th Cir. 2009) : The Court affirmed judgments for a police chief and the City in an action by an arrestee and his wife alleging excessive force during an arrest and illegal touching of the wife's breast. It found no abuse of discretion in the exclusion of expert testimony offered to prove that a policeman should not squeeze an elderly woman's breast, as expert testimony was not required for a jury to understand this proposition, so the testimony was not helpful.

United States v. Cruz-Escoto, 476 F.3d 1081 (9th Cir. 2007) : The Court affirmed a conviction for being a deported alien found in the United States, finding no abuse of discretion when the defense was not permitted to introduce testimony from an expert on surveillance, which tended to impeach testimony by the arresting agent that he was continually looking west although his vehicle was facing south (which was relevant to whether the agent had observed the defendant cross the border and was therefore under "official restraint" because continuously under surveillance). There was no violation of *Fifth* or *Sixth Amendment* rights, as the evidence was irrelevant because it was within the understanding of a lay juror.

[97] Value of Property [Go To Main]

United States v. 33. 92356 Acres of Land, 585 F.3d 1 (1st Cir. 2009) : The Court affirmed a decision to exclude the landowner's expert testimony as to the highest and best use of the land in a condemnation case. The expert's testimony was premised on the use of the land based on residential development and sand extraction, but those uses would have required rezoning or a variance and the expert had no support for the assumption that the Planning Board would approve a rezoning or a variance.

Cunningham v. Masterwear Corp., 569 F.3d 673 (7th Cir. 2009) : In a nuisance action by plaintiffs claiming that improper storage of perchloro-ethylene by a neighboring dry cleaner had caused respiratory injuries and loss of property value, the Court found no abuse of discretion in the exclusion of testimony by a plaintiff that the value of the property had fallen $20,000 as a result of its contamination by PCE. The witness based this opinion on advice from a real estate agent when they were unable to sell at the initial listing price. The witness's opinion was not his own valuation, which is permissible, but simply hearsay of what the real estate agent said. And, more importantly, the opinion was not simply one of valuation but of causation, for which he had no basis.

[102] Waiver of *Daubert* Challenge [Go To Main]

Hill v. Principi, 439 F.3d 18 (1st Cir. 2006) : The Court affirmed a judgment for the Department of Veterans Affairs in an action by a psychiatrist who resigned her employment after being assigned additional duties that she claimed violated the Rehabilitation Act. It held that the plaintiff failed to object in a timely fashion to the defense expert testimony, where she waited to object until moments before the witness was to testify despite having received the witness' report five months earlier. The Court noted that "because *Daubert* generally contemplates a 'gatekeeping' function, not a 'gotcha' function, untimely *Daubert* motions should be considered only in rare circumstances."

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[1] Advisory Committee's Note

[2] 2000 Amendment Committee Note

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
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703.01 Official Text

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 703 RULE 703

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703.02 Editorial Explanatory Comment

[1] Common-law Rule on Expert Reliance on Inadmissible Information

At common law, an expert could testify only on the basis of information that was either personally known to the witness or was part of the record. For instance, a physician who examined a patient could testify as to what the physician's observations revealed. Also, an expert could testify in the form of an opinion in response to a hypothetical question. For example, an attorney could assume a theory of the case that was both reasonably supported by the evidence and favorable to the attorney's client and ask the expert whether, on the basis of the assumed facts, a given conclusion could conceivably follow. Finally, the expert could be present at the trial and asked to assume the truth of the testimony elicited and to give an opinion on the basis of that testimony. In some jurisdictions this last method was either not permitted or was confined to cases in which the facts were not disputed. All of the above are now permissible bases for an expert opinion under *Rule 703*. Also, *Rule 703*, in conjunction with *Rule 705*, would seem to permit the third technique even when facts are in dispute. Most importantly, the Rule provides for an additional permissible basis, beyond that sanctioned by the common law: the expert can rely on information not admitted or admissible at trial, so long as it is the kind of information reasonably relied upon by experts in the field.

[2] Rule 703: Departure from the Common Law

The common-law rule was problematic because it ignored the fact that the expert, when acting outside the courtroom, may often rely on information that would not be admissible at a trial. For instance, to diagnose and treat a patient, a psychiatrist may rely in part upon interviews conducted with the patient's friends and relatives. If the psychiatrist is willing to rely on such sources of information to diagnose and treat the patient in real life, it makes no sense at trial to exclude an opinion based on the same sources.

Rule 703 departs from the common law in permitting an expert to form an opinion based on facts or data that are not admissible in evidence. n1 The original Advisory Committee's Note states that the Rule is intended to broaden the basis for expert opinions and to bring the judicial practice into line with the practice of the experts themselves when not in court. In other words, an expert should be allowed to use the same information in Court that he or she would use in real life. n2

The Rule provides that if the facts or data are of a type reasonably relied upon by experts in the particular field of expertise, then the expert is permitted to use this information as a basis for her opinion. n3 An example offered by the Advisory Committee is that of a physician who forms a diagnosis based on (1) information from numerous sources, including statements by patients and relatives, and (2) reports and opinions from nurses, technicians, and other doctors. n4

It is also clear under the Federal Rule that a doctor will be able to rely upon medical journals and treatises. A psychiatrist may find the Rule especially useful, since modern psychiatric techniques seem to require consideration of information coming from numerous sources. Even if this information is not admissible, it may provide a proper basis for an expert psychiatric opinion. n5

[3] Judicial Function in Assessing Reasonable Reliance on Inadmissible Information

Under *Rule 703*, the Trial Judge must determine the reasonable reliance question: whether the expert relies on information that, though inadmissible, is the type of information that other experts in the field reasonably rely upon. n6 If the expert takes into account inadmissible information that other experts would not rely upon, the opinion is subject to exclusion under the Rule. n7

How does the Judge determine whether otherwise inadmissible facts or data are of a type reasonably relied upon by experts in a particular field? Just as a witness's own testimony may establish personal knowledge of an event about which the witness is testifying, it appears that an expert witness should be able to lay a foundation that establishes the reasonableness of relying on the inadmissible evidence. For example, if a psychiatrist is called to testify as to a person's mental condition, and if the psychiatrist indicates that the opinion is based in part on reports by school officials, the psychiatrist should be able also to testify at an admissibility hearing that such reports are ordinarily used and relied upon by other psychiatrists in making psychiatric diagnoses in nonlitigation contexts. Of course, it should be permissible for opposing counsel to introduce evidence to the contrary. The question is, however, whether the testimony from the experts should be dispositive on the issue of reasonable reliance. Does the Judge look solely to the testimony of the experts, or is a broader analysis required?

In *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1980)* , *rev'd*, *723 F.2d 238 (3d Cir. 1983)* , *rev'd on other grounds*, *475 U.S. 574 (1986)* , the District Court, in its third evidence opinion in a massive antitrust case, discussed at length the appropriate use by expert witnesses of the material that the Judge had ruled inadmissible in prior pretrial orders. After tracing the background of the language now found in *Rule 703*, the Court concluded that the following six factors should be considered in ruling on the reasonable reliance question: n8

(1) The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;

(2) The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;

(3) The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;

(4) The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;

(5) The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicating that he has taken that factor into consideration in forming his opinion;

(6) The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

The Court offered an example:

> We add that if, for example, an inadmissible document were one of a myriad of sources consulted by an expert, and if it were clear that the expert was cognizant of and took into consideration the questionability of that lone source, the opinion would likely be admissible. If, on the other hand, the expert's opinion is so dominated or pervaded by his reliance on materials which have been excluded for reasons which bear on their reliability, or is rife with similarly unreliable unsupported conclusions, having no support in the record, that opinion must also be excluded. In short, it is a balancing process. n9

The Court of Appeals reversed most of the summary judgment entered by the District Court. The Court disagreed with the Trial Judge's approach to expert witnesses. It reasoned that the proper inquiry is not what the Court deems reliable, but what experts in the relevant discipline deem it to be, and a majority found that the Trial Judge's standard was wrong as a matter of law.

We believe that the Trial Judge in *Japanese Electronics* recognized something that the Court of Appeals missed, i.e., experts may rely on data for some purposes without making any claim that the data are very accurate. Experts may have no choice in some instances but to rely on the best information that they can get. Yet, they might also concede that the information should be relied on for some purposes and not for others. The questions the Trial Judge asked were designed to discover whether the data upon which the experts wanted to rely in this particular case were data that the experts would rely upon in other settings in which they might be called upon to make important decisions outside of the courtroom venue. If the experts would not rely on the data in these other settings, then we question whether a Court should allow the expert to testify in reliance on such data. After all, the Rule says that the information must be that which is *reasonably* relied upon by experts in the field, and reasonableness depends on the circumstances.

We note that the interventionist view of the Trial Judge in *Japanese Electronics* receives substantial support from the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* (see the discussion *§ 702.02[5]*). The Court in *Daubert* emphasized the Trial Judge's essential role as a gatekeeper whose duty it is to assure that expert testimony is reliable. Because the basis of the expert's testimony is an essential component of its reliability, it follows that the Trial Judge cannot simply assess reasonable reliance on inadmissible information under *Rule 703* by deferring completely to experts. *Daubert* gives the Trial Judge an independent role that cannot be delegated. Consequently, the Third Circuit has held after *Daubert* that the holding in *Japanese Products* to the effect that the principal arbiters of the reasonableness of reliance upon inadmissible evidence are the experts and not the Trial Judge does not survive *Daubert*. The Court explained as follows:

> *Daubert* makes clear for the first time at the Supreme Court level that courts have to play a gatekeeping role with regard to experts. In stating that *Rule 702* is the primary locus of the gatekeeping role, the Court implies that there are at least some secondary loci in other Rules. By requiring the judge to look to the views of other experts rather than allowing the judge to exercise independent judgment, current Third Circuit case law eviscerates the judge's gatekeeping role with respect to an expert's data and instead gives that role to other experts. ... We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under *Rule 104(a)* that an expert is basing his or her opinion on a type of data reasonably relied upon by experts, the judge must conduct an independent evaluation into reasonableness. The judge can of course take into account the particular expert's opinion that experts reasonably rely on that type of data, as well as the opinions of other experts as to its reliability, but the judge can also take into account other factors he or she deems relevant. n10

[4] Backdoor Hearsay and the 2000 Amendment to Rule 703

Rule 703 permits an expert to rely on inadmissible information, such as hearsay, if it is the type of information on which other experts in the field would reasonably rely. *Rule 703* is not a hearsay exception, however. Simply because an expert reasonably relies on hearsay does not make it admissible for its truth. n11 The expert's opinion is distinguishable from the information upon which the expert relied. Yet if an expert reasonably relies on the hearsay, the information is admissible in a certain sense -- it is admissible to assist the factfinder in weighing the expert's testimony. That is, the hearsay is admissible for credibility purposes.

A danger arises when a proponent calls an expert who relies on hearsay, and introduces the hearsay "solely for the purpose of assisting the jury in evaluating the expert's testimony." The danger is obviously that the credibility tail will wag the hearsay dog. A proponent might even call an expert solely to admit the hearsay information on which the expert "relied." Thus, there is a danger that *Rule 703* could be used as a backdoor hearsay exception.

The 2000 amendment to *Rule 703* is intended to prevent a party from abusing the hearsay rule and other exclusionary rules by using an expert as a conduit for inadmissible evidence. (One member of the Standing Committee on Rule of Practice and Procedure lamented that the Advisory Committee was "trying to take all the fun out of practicing law.") The Rule provides that if the information is admissible only to illustrate the basis for an expert's opinion, then the jury can hear it only if its probative value substantially outweighs the risk of prejudice. This is an exclusionary balancing test that is the reverse of the standard *Rule 403* balancing test. The probative value to be assessed is the degree to which the otherwise inadmissible information will assist the jury in assessing the weight of the expert's opinion; of course, this probative value will rise or fall depending on how important the expert's opinion is in the case. The prejudicial effect to be considered is the risk that the jury will consider the otherwise inadmissible information for its truth, even though instructed not to do so.

The amendment comes with a cost, because in certain cases the jury might have some difficulty assessing the weight of the expert's testimony because the expert will not be permitted to mention with specificity all of the information he relied upon. The Advisory Committee determined that such a hindrance of the jury's function will be rare. If the information is critical to assessing the expert's opinion, and if the expert's opinion is sufficiently important to the case, the information will ordinarily survive even the strict balancing test set forth in the amendment. Moreover, the Trial Court has discretion under the balancing test to employ compromise measures. For example, the Trial Court might permit the expert to make a general reference to the underlying information relied upon, while prohibiting a detailed disclosure. An illustration is a medical report that is not admissible; a medical expert might be permitted to state that he relied on a medical report, without being permitted to state in detail all of the assertions in that report. In this way, the jury can fairly assess the expert's opinion without the risk that the medical report will be considered for its truth.

What happens if the witness is not permitted to refer to the inadmissible information on direct examination, and then the adversary attacks the expert's basis on cross-examination? Can the expert then disclose his reliance on the inadmissible information if he could not have done so on direct? The answer depends on the circumstances. The balancing test set forth in the amendment is certainly flexible enough to accommodate this situation. And clearly the balancing test would be tilted more toward allowing disclosure of the inadmissible information if it was necessary to respond to an attack on the expert's basis. Similarly, if the adversary makes a closing argument about the insufficiency of the expert's basis, the proponent should ordinarily be permitted to respond by disclosing the inadmissible information relied upon by the expert.

It is critical to note that the amendment does not in any way affect the admissibility of the expert opinion itself. It does not provide new limits on the kind of information that the expert may rely upon. It simply regulates whether the information (assuming it is admissible only to illustrate the expert's opinion) can be disclosed to the jury. It is also important to emphasize that the amendment does not impose a balancing requirement on information relied upon by an expert that is *admissible at trial but not yet admitted*. For example, a summary expert could testify in an early part of the

case and disclose the information relied upon that will be admitted later at trial. Such a practice is not an abuse -- the expert is not being called to provide a conduit to admit evidence that would otherwise be inadmissible. Thus, the balancing test applies only to information that will never be admitted for its truth at the trial.

A number of public commentators saw negative consequences from the application of the balancing test set forth in the amendment to *Evidence Rule 703*. The scenario of asserted negative consequences proceeds as follows: (1) The expert will be unable to disclose his basis and will thus be forced to limit his testimony to a bare conclusion, an *ipse dixit*, as the comments put it. (2) The opponent will be permitted to attack the expert's basis as inadequate, creating an unfair presentation of the evidence. (3) The proponent will then be permitted, in rebuttal, to disclose the basis that was not allowed to be disclosed on direct. The complaint is that this procedure gets you right back where you started from -- the jury hearing about inadmissible evidence -- but with the proponent having suffered a negative inference from not having disclosed the information on direct (i.e., the jury could think that the proponent was hiding something).

The Advisory Committee believed that these criticisms overstated the impact of the amendment. The amendment does not *preclude* the proponent from disclosing, on direct examination, inadmissible information relied upon by the expert. It simply sets forth a balancing test. Sometimes the probative value of the underlying information, in helping the jury to weigh the expert's opinion, will substantially outweigh the prejudice resulting from disclosure, especially when a limiting instruction is given to reduce the risk of prejudice. Sometimes the expert may be permitted to disclose some pieces of inadmissible information and not others. Sometimes, as recognized in the Committee Note, the expert will be permitted to refer generally to inadmissible information, but will not be able to disclose it in detail. Thus, the chance that an expert will be left with an *ipse dixit* -- no basis disclosed at all -- is remote. The chance of a Court applying a balancing test to preclude the disclosure of every part of the basis of an expert's testimony, but then letting the expert testify, seems very slim. Indeed, if an expert is left with a bare conclusion, that would be a good indication that the expert should not be testifying in the first place. Such an expert would have to be relying exclusively on inadmissible information, not reliable enough to be admitted under a hearsay exception. It is hard to see how any expert in those circumstances could expect to satisfy the reliability test imposed by *Daubert*.

As to the ability of the opponent to attack the expert's basis even though the proponent was not permitted to introduce the basis, this seeming disparity is in fact consistent with the structure of most of the exclusionary rules in the Federal Rules of Evidence. It is often the case that opponents make arguments that might take advantage of some exclusionary rule. Defendants in product liability cases are permitted to argue that a product was not defectively designed, by taking protection from the rules on subsequent remedial measures. Criminal defendants are allowed to bring in character evidence, whereas the prosecution cannot do so in its direct case. These exclusionary rules are based on the premise that the proponent could prejudice the trial by bringing in such evidence. There are two safeguards against exploitation of these Evidence Rules by opponents. First, if the opponent takes advantage of the exclusionary rule, the door is opened to rebuttal evidence that could not have been brought out on direct. Thus, if a product liability defendant claims that a design change was not feasible, a subsequent design change could be brought up in rebuttal. And a criminal defendant who testifies that he never did drugs could be impeached by a drug conviction that was initially excluded. Second, proponents can be permitted in certain circumstances and in the discretion of the Trial Court to bring out otherwise excluded evidence on direct, in order to respond in advance to an anticipated attack. For example, the prosecution can ordinarily bring out on direct examination that a witness has cut a deal. See the discussion in the Editorial Explanatory Comment to *Rule 403*, *§ 403.02[8]*.

All of these standard considerations are encompassed within the balancing test set forth in the amendment to *Rule 703*. For example, a Trial Judge could rule in some cases that inadmissible information relied upon by an expert could be disclosed on direct when it is apparent that the opponent will attack the witness's basis on cross-examination; under these circumstances, the probative value of disclosure could substantially outweigh the prejudicial effect remaining after a limiting instruction. It would depend on the circumstances. But even if the Trial Court does not permit the mention of the inadmissible information on direct, the opponent will have to be careful in attacking the expert's basis on cross-examination, because of the possibility of rebuttal. Often, the opponent may consider that the risks of an attack are

too great (i.e., the inadmissible information will be disclosed in rebuttal), and in these cases the risk of a skewed presentation of the evidence is accordingly diminished -- that risk is diminished by the opponent's concern that the rebuttal will lose the proponent more points than the attack will gain.

It is true that the balancing test in the amendment is tilted toward prevention of disclosure of inadmissible information. Thus, the chances of a bare-bones conclusion on direct, an attack on cross-examination, and disclosure of inadmissible information in rebuttal are greater than they are under the *Rule 403* balancing test. But that greater chance was considered acceptable, given the real risk that the proponent might simply be using the expert as a vehicle for obtaining backdoor admission of inadmissible evidence. Where that risk is high in the particular circumstances, the amendment essentially shifts some of the control over the disclosure from the proponent to the opponent. That shift was considered fair because it is the proponent who is creating the risk of using *Rule 703* as a backdoor.

There are not many reported cases on the effect of the amendment to *Rule 703*. But the cases that are reported indicate that the amendment is working as intended -- it is preventing experts from being used as conduits for inadmissible hearsay. n12

[5] Relationship to Rule 702

The reasonable reliance requirement of *Rule 703* is a relatively narrow inquiry -- much narrower, for example, than is the inquiry into whether the expert's opinion is helpful and reliable under *Rule 702*. While an opinion unreasonably based on inadmissible information is also unhelpful, we believe that it avoids confusion to consider the two Rules separately. *Rule 703* regulates the expert's use of inadmissible information, while *Rule 702* regulates the methodology, reliability, adequacy of basis, and helpfulness of the opinion, as well as the qualification of the expert witness.

In our view, the proper delineation between the two Rules was set forth in *DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990)* . *DeLuca* was a Bendectin case in which the plaintiff proffered expert testimony that Bendectin caused limb reduction in fetuses. The Trial Judge rejected the proffered testimony of the plaintiff's expert on the ground that the expert's recalculation of epidemiological studies was not accepted as reliable by experts in the field. The Judge relied on *Rule 703*. But the Third Circuit reversed and remanded, noting that *Rule 703* has a narrow function; it seeks to delimit the type of information that an expert can rely upon. The Court concluded that *Rule 703* would be satisfied if the epidemiological studies used as a basis for the expert's opinions were the same as those used by all other experts in the field, including the defendant's experts. The defendant's objection that the expert's reanalysis of those studies was unreliable could not be considered under *Rule 703*:

> *Rule 703* is satisfied once there is a showing that an expert's testimony is based on the type of data a reasonable expert in the field would use. ... It does not address the reliability or general acceptance of an expert's methodology. When a statistician refers to a study as not statistically significant, he is not making a statement about the reliability of the data used, rather he is making a statement about the propriety of drawing a particular inference from that data.

This did not necessarily mean that the plaintiff's expert's reanalysis of epidemiological data was admissible. The *DeLuca* Court noted that if an expert's methodology is itself unreliable, the testimony can be excluded under *Rule 702*, even if the basis of the expert's opinion satisfied the reasonable reliance standard of *Rule 703*. The Court explained that the helpfulness standard of *Rule 702* prevents an expert from using accepted data in an unreliable manner.

The distinction between *Rule 703*, which regulates the expert's use of inadmissible information, and *Rule 702*, which more broadly regulates the helpfulness, adequacy of basis, and reliability of the expert opinion, was also made by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* . The Court held that the reliability of scientific expert testimony was governed by a flexible test under *Rule 702*. The Court further stated that

> a judge assessing a proffer of expert scientific testimony under *Rule 702* should also be mindful of other applicable rules. *Rule 703* provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

The distinction between *Rule 703*'s regulation of inadmissible information and *Rule 702*'s regulation of adequacy of basis and reliability is further clarified in the 2000 amendment to *Rule 702*. The amendment specifically states that under *Rule 702*, the Trial Court must find that the expert is relying on "sufficient facts or data." Thus, the question of adequacy of basis -- what lawyers and Courts call the "foundation requirement" -- is now specifically located in *Rule 702*. *Rule 703* is left to regulate the *quality* of information relied upon by the expert.

The Advisory Committee Note to *Rule 702* drives this point home. It states as follows:

> There has been some confusion over the relationship between *Rules 702 and 703*. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under *Rule 702*. *Rule 702* sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of *Rule 703* is a relatively narrow inquiry. When an expert relies on inadmissible information, *Rule 703* requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information -- whether admissible information or not -- is governed by the requirements of *Rule 702*.

We recognize that the result will often be the same no matter what Rule the Court employs. n13 But we believe that a Trial Judge's review of expert testimony will be clarified if the questions of use of inadmissible information (*Rule 703*) and methodology, adequacy of basis, and reliability (*Rule 702*) are kept separate, at least initially. As the Third Circuit recognized in *In re Paoli R.R. Yard Litig., 35 F.3d 717 (3d Cir. 1994)* , *Rules 702 and 703* are not redundant. For example:

> There will be times when an expert's methodology is generally reliable but some of the underlying data is not of a type reasonably relied on by experts. In those cases, the expert can testify so long as he or she does not significantly rely on the unreliable data, and so long as his or her testimony survives *Rule 702* without any reliance on the excluded data. Moreover, if the judge thinks that the expert would reach a different conclusion if he was not able to rely on this data, a conclusion that would no longer help the plaintiff (or defendant) to prove his or her case, the district court can exclude his opinion as irrelevant.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999)* (appraiser permitted to rely on hearsay statements concerning the value of comparable property, because experts in the field reasonably rely on such statements); *South Cent. Petr., Inc. v. Long Bros. Oil Co., 974 F.2d 1015 (8th Cir. 1992)* (finding no abuse of discretion when an expert in a mineral rights case was permitted to make revenue projections based on multiple hearsay about the oil well in question, as the underlying information was reasonably relied on by experts in the field and only the expert's opinion, not the underlying information, was admitted into evidence).

(n2)Footnote 2. See Carlson, *Getting a Grip on Experts*, 16 Litig. 36 (1990) (under *Rule 703* experts testifying in Court may offer opinions that are based upon information they typically use in their daily work).

(n3)Footnote 3. See, e.g., *Ratliff v. Schiber Truck Co., 150 F.3d 949 (8th Cir. 1998)* (accidentologist could rely on trooper's report on an accident, as this was a "document of the type reasonably relied upon by accident reconstructionists in forming their opinions"); *United States v. Maddix, 96 F.3d 311 (8th Cir. 1996)* (in a felon-firearm prosecution, an ATF agent testified as an expert that the revolver found on the defendant had been manufactured in

California, then shipped to dealers in Arkansas, and eventually sold in Missouri; while the opinion was based on hearsay, the witness testified that firearms experts customarily rely upon tracking reports to determine whether firearms have been transported across state lines; thus, the report was properly considered as part of the basis of the expert's opinion); *United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989)* (an expert can base testimony respecting coded language in a narcotics conspiracy on transcripts not admitted into evidence; such transcripts would be relied upon by other experts in the field, and *Rule 703* expands the permissible bases of expert opinion from traditional practice).

(n4)Footnote 4. See also *United States v. Posey, 647 F.2d 1048 (10th Cir. 1981)* (in a drug prosecution, it was permissible for one chemist to rely upon tests run by another in testifying that the tested substance was cocaine: "It is quite reasonable for a chemist to review another chemist's analysis when forming an opinion as to the veracity of the latter's test results.").

(n5)Footnote 5. See, e.g., *United States v. Bramlet, 820 F.2d 851 (7th Cir. 1987)* (a psychiatrist can base testimony on recorded observations of hospital staff members; though inadmissible hearsay, it was the type of information that other psychiatrists would rely upon).

(n6)Footnote 6. See, e.g., *Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990)* (it was a violation of *Rule 703* where the experts relied on sloppily compiled workplace questionnaires prepared in anticipation of litigation, as experts in the field would not reasonably rely on this information); *Lynch v. Merrell-National Labs., 830 F.2d 1190 (1st Cir. 1987)* (expert testimony inadmissible where it is based on animal studies that would not be considered by other experts in the field); *In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985)* (expert opinion cannot be based upon patient checklists made in anticipation of litigation, because reputable physicians do not rely on such checklists to treat patients).

(n7)Footnote 7. See, e.g., *Redman v. John D. Brush & Co., 111 F.3d 1174 (4th Cir. 1997)* (a metallurgic engineer's testimony that a safe was not burglar-deterrent was properly excluded; the expert relied solely on hearsay information from store personnel to identify a standard of burglar protection capacity; experts would not rely on this hearsay as an indication of industry safety standards); *Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990)* (a doctor cannot reasonably rely upon a letter written by a nontreating physician that the plaintiff was suffering from an ulcer caused by a certain drug; the letter was written for purpose of obtaining benefits, and itself gave no basis for its conclusions; such a letter would not be relied upon by other experts).

(n8)Footnote 8. See also *Shatkin v. McDonnell Douglas Corp., 565 F. Supp. 93 (S.D.N.Y. 1983)* (The Court also has a duty to inquire into the trustworthiness of the underlying data and can exclude testimony where an expert has not reasonably based his opinion on trustworthy underpinnings.).

(n9)Footnote 9. See also *Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992)* (the Trial Judge is required by *Rule 104(a)* to make a preliminary determination regarding the trustworthiness of the factual basis on which an expert witness relies).

(n10)Footnote 10. *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)* . Ironically, Judge Becker, who was the District Court Judge in *Japanese Electronics*, wrote the opinion for the Court of Appeals in *Paoli*.

(n11)Footnote 11. See, e.g., *Peabody Coal Co. v. Director, Office of Workers' Compensation Programs, 165 F.3d 1126 (7th Cir. 1999)* (hearsay information stated in an expert report is not admissible simply because an expert reasonably relied upon it).

(n12)Footnote 12. See, e.g., *Turner v. Burlington N.S.F. R.R., 338 F.3d 1058 (9th Cir. 2003)* (fire investigator could not disclose the details of the lab report on which he based his opinion; the lab report was not otherwise admissible, and the expert's opinion was simply a restatement of the conclusions and factual data set forth in the lab report).

(n13)Footnote 13. For example, on remand in *DeLuca, 791 F. Supp. 1042 (D.N.J. 1992)* , the Trial Judge found that the plaintiff's expert's reanalysis of epidemiological data was inadmissible under *both Rule 702 and 703*. It was inadmissible under *Rule 702* because the expert's methodology was different from other scientific disciplines and produced inaccurate and unreliable results. It was inadmissible under *Rule 703* because the expert relied on his own data that could not be replicated by any other expert in the field. The Trial Judge stated that "[t]his is where *Rules 702 and 703* intersect," and quoted the *DeLuca* Court to the effect that "[i]f a study's method of data collection is faulty, it may be that no expert would rely upon the data generated as a basis for drawing any inference about the studied subject."

In *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)* , the Court recognized that there will be times when both *Rule 702* and *Rule 703* apply, and elaborated as follows:

> For example, expert testimony that uses animal studies must, to be admissible for the purpose of drawing conclusions about humans, meet *Rule 702*'s requirement of fit. This requires the court to assess whether there are good grounds for concluding that the animal studies demonstrate causation in humans. But for an expert to rely on animal studies (if their admissibility in evidence is not independently established), these studies must also meet the requirements of *Rule 703*: the conclusions of these studies must be data which must be of a type reasonably relied upon by experts to analyze causation in humans. If the expert's reliance on animal studies to draw conclusions about people constitutes a methodological flaw, it is a methodological flaw consisting of relying on data not of a type reasonably relied upon by experts. It would be problematic to conclude that this testimony was reliable enough to meet *Rule 702* but not *Rule 703* or vice versa. Testimony that is admissible as reliable under one Rule should not be inadmissible under another when the policy considerations underlying the two rules are the same.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 703 RULE 703

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703.03 Annotated Cases

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[1] Accountants' Opinions and Conclusions

Bauman v. Centex Corp., 611 F.2d 1115 (5th Cir. 1980) : In a federal securities action with pendent state claims, the Court upheld a decision to admit expert testimony that was based on a review of corporate documents and library research into the background of a company. This was the kind of information that certified public accountants rely upon in evaluating the operation of corporations.

AU Rustproofing Center, Inc. v. Gulf Oil Corp., 755 F.2d 1231 (6th Cir. 1985) : In a dealer's action charging Gulf with breach of contract and fraud, the Court held that an accountant's testimony that the dealer would have survived except for Gulf's breach was properly based on profit margin comparisons between the dealer and two service stations in neighboring towns. It observed that Gulf did not offer evidence to suggest that the comparisons were not the type relied upon by the accounting profession; in fact, Gulf's accounting expert based his opinion on a sample of profit margins for service stations in another set of cities.

Garnac Grain Co. v. Blackley, 932 F.2d 1563 (8th Cir. 1991) : In an action against an accounting firm for malpractice, the Trial Judge excluded an opinion by an expert as unreliable, because it was based only on the more extensive and somewhat contradicting report of an independent accountant brought in to investigate the matter. The Court held that the expert should have been permitted to testify, since the opinion, being based on facts supplied by an independent investigator, crossed the threshold of admissibility and in any event was reaffirmed by a subsequent opinion based on review of underlying work papers.

Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984) : In a suit by trustees of several employee trust funds against affiliated companies for breach of a collective bargaining agreement, the Court reversed and remanded a judgment for the companies because compliance audit reports that were made by an independent accounting firm and offered by the plaintiffs to show the defendants' contribution deficiencies were erroneously excluded. The reports were

not business records of the accounting firm because they were not part of a regularly conducted activity and they were inadmissible under *Rule 1006* because they relied upon inadmissible hearsay. However, because accountants ordinarily rely on audit reports in reaching opinions, *Rule 703* permitted the accountant to base an opinion upon the reports.

[2] Balancing for Otherwise Inadmissible Data

Turner v. Burlington N.S.F. R.R., 338 F.3d 1058 (9th Cir. 2003) : The plaintiffs sued for property damage after a fire beginning on the railroad's right-of-way spread across their land. The defendant's fire investigator took debris samples at the scene and sent them to a lab, which reported that they contained petroleum distillate consistent with gasoline. The investigator was not permitted to give his opinion at trial that the fire resulted from arson, because it was based on the lab report, which was not admitted into evidence. The Court affirmed a judgment for the plaintiffs, holding that the witness was not using the report as data on which he reasonably relied in forming an opinion, but rather as the sole substantive evidence for his conclusion that the fire was caused by pouring gasoline on the debris. The Court interpreted the 2000 amendment to *Rule 703* to create a presumption against use of underlying data that was otherwise inadmissible, and held that "[t]he prejudice that would result from admission of this evidence was substantial, whereas its probative value was minimal," so there was no abuse of discretion in refusing to admit the investigator's testimony.

[3] Chemical Tests

United States v. Smith, 964 F.2d 1221 (D.C. Cir. 1992) : The Court affirmed a conviction for drug trafficking, holding that a supervisor was properly permitted to testify that the results set out in the report of the DEA chemist who analyzed the drugs were correct, i.e., consistent with the supporting documentation, regardless of whether the analyzing chemist's report was itself admissible.

United States v. Jones, 687 F.2d 1265 (8th Cir. 1982) : In a prosecution for possession with intent to distribute heroin and cocaine, an expert was permitted to testify that a substance was cocaine by comparing it to a comparison sample that had been furnished by a drug manufacturer. The Court found that the expert could rely on the manufacturer's representation that its substance was cocaine.

United States v. Posey, 647 F.2d 1048 (10th Cir. 1981) : In a drug case, one chemist relied upon tests run by another in testifying that the tests supported the conclusion that the substance analyzed was cocaine. The Court approved, saying that "[i]t is quite reasonable for a chemist to review another chemist's analysis when forming an opinion as to the veracity of the latter's test results."

[4] Constitutional Concerns

Howard v. Walker, 406 F.3d 114 (2d Cir. 2005) : In the state trial of three men for burglary and felony murder, the Judge ruled that if the petitioner attacked through cross-examination the basis for the opinion of an expert testifying to the cause of the victim's death, the prosecution would be permitted to present to the jury all the evidence considered by the expert, including a custodial statement made by a non-testifying coconspirator. As a result of the ruling, the petitioner conducted only a cursory cross-examination of the expert and was convicted of having caused the victim's death. Reversing the denial of habeas corpus, the Court held that permitting the expert to rely on a statement inherently unreliable, and inadmissible under *Bruton,* was a violation of the petitioner's confrontation rights.

United States v. Abbas, 74 F.3d 506 (4th Cir. 1996) : The Court held there was no confrontation violation where a DEA chemist's results, which relied on "standards" determined by other chemists, were admitted without giving the

defendant an opportunity to cross-examine the other chemists. The standards used were generally accepted in the field of qualitative chemical analysis and admissible under *Rule 703*, and the defendant had an opportunity to counter the standards evidence by proffering his own expert and by vigorously cross-examining the DEA chemist.

United States v. Mares, 940 F.2d 455 (9th Cir. 1991) : A defendant convicted for possessing heroin argued that his right to confront witnesses was violated by expert testimony by an agent that relied in part on statements made by nontestifying codefendants. He argued that because the statements were inadmissible under the *Bruton* rule, he was unable to cross-examine the agent as to the basis for his testimony out of a fear that the harmful statements would then be put before the jury. The Court noted that *Rule 703* permits expert witnesses to rely on inadmissible evidence in forming an opinion in some circumstances, and commented that the confrontation issue raised was troubling, but held that the defendant had not preserved the issue by assuring an adequate record for review.

[5] Data Made Inadmissible by Statute

Robertson v. Union Pacific R.R., 954 F.2d 1433 (8th Cir. 1992) : Affirming a judgment for the defendant railroad in a personal injury action arising out of an automobile-train collision, the Court held there was no abuse of discretion in instructing the plaintiffs' expert witness to disregard information compiled by the state highway department in formulating his opinion regarding the dangerousness of the crossing, as the federal law under which the information was compiled makes it inadmissible in Court and provides that it shall not be considered in any action for damages (see *23 U.S.C. § 409*).

[6] Disclosure of Facts to Jury

Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991) : On redirect examination an expert witness for the defendant in a medical malpractice case identified three letters as written by prominent physicians, gave his own opinion as to the plaintiff's prognosis without citing the letters as a part of the basis, and then said his opinion was consistent with that of the three doctors. The Court reversed a judgment for the defendant, holding that the tactic simultaneously conveyed hearsay to the jury and improperly bolstered the witness' credibility.

Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1985) : The Court vacated a judgment for a manufacturer in a product liability suit arising out of the explosion of a propane cylinder, finding an abuse of discretion in permitting an engineer, who examined a safety release valve on the cylinder and the vessel on which the explosion occurred, to be cross-examined concerning the cause of the explosion, since his opinion was improperly based on a report that had been withdrawn and the cross-examination brought the withdrawn report before the jury.

United States v. Mest, 789 F.2d 1069 (4th Cir. 1986) : The Court affirmed a murder conviction, finding that a videotaped hypnotic session that a psychiatrist conducted with the defendant had been properly excluded. Without deciding whether information obtained in such sessions could be relied upon, the Court held that it was not error to exclude such evidence as an attempt to offer the defendant's version of the events without subjecting him to cross-examination.

Boone v. Moore, 980 F.2d 539 (8th Cir. 1992) : Affirming a judgment for the defendants in a civil rights action by an inmate who alleged deprivation of medical treatment, the Court held that a report by an audiologist upon which a testifying doctor relied should not have been admitted into evidence. The error was harmless, however, since the doctor had properly relied upon the report under *Rule 703*, and no objection was made when he read it to the jury.

United States v. McCollum, 732 F.2d 1419 (9th Cir. 1984) : The Court upheld a conviction for attempted bank robbery, finding it was a proper exercise of discretion to permit a forensic hypnotist to testify as to his opinion that the defendant was acting under the influence of hypnosis when he committed the crime and to show a portion of videotapes of his interviews with the defendant; likewise, there was no abuse of discretion in barring the expert from showing segments of the videotapes in which the defendant purported to have an enhanced memory following hypnosis. The Court reasoned that the defendant essentially tried to put testimony before the jury without being subject to cross-examination and that the Trial Judge reasonably prevented this while letting the expert explain his opinion to the jury.

[7] Economic Data

Advent Systems v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) : Remanding a contract action between computer software and hardware manufacturers, the Court noted, with respect to the plaintiff's damages expert, that there had been no factual inquiry and finding as to what data experts in the field find reliable, and that it had serious reservations about the validity of expert testimony based on prior predictions of sales for a given period when actual performance data for that same time span are available.

Simpson v. James, 903 F.2d 372 (5th Cir. 1990) : In affirming a judgment for the plaintiff in a diversity legal malpractice action, the Court held that the plaintiff's expert accountant properly relied on an exhibit based on corporate records, even though under state law an expert's opinion may not be admitted if based solely on hearsay of a type on which experts in the field customarily rely.

In re Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999) : Affirming summary judgment for a manufacturer charged with conspiring with competitors to fix prices and market shares, the Court held that facts stated in an expert report are not admissible simply because the expert relied upon them. The Court quoted from *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993)* : "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."

American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569 (11th Cir. 1985) : The Court affirmed a summary judgment for the defendants in an antitrust case, finding that an economist's affidavit was insufficient to create a material dispute. The economist relied on information supplied by lay witnesses that the expert did not "verify."

[8] Firearms

United States v. Corey, 207 F.3d 84 (1st Cir. 2000) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in permitting an ATF agent to testify that the shotgun at issue had traveled across state lines. Although the agent had relied on conversations with employees of the shotgun's maker in reaching his opinion as to the site of manufacture, he also relied on technical reference manuals commonly consulted by firearms experts, his own knowledge and expertise as a firearms specialist, and the markings on the shotgun.

[9] Fire Investigations

United States v. Gardner, 211 F.3d 1049 (7th Cir. 2000) : Affirming a defendant's convictions arising out of the arson of her business, the Court found no error in permitting a government expert on causation of fires to testify that

faulty wiring was not the ignition source and that the burn pattern was consistent with the use of an accelerant. The expert had reviewed 120 photos and three reports from investigators of the fire scene and interviewed people who were at the scene. The Court found that the evidence satisfied *Daubert,* and that the experts testified that photographs and reports "are the type of materials usually relied on in arson investigations to form an opinion about the cause of the fire," and so were an appropriate basis for the expert opinion.

[10] Government Data

Trull v. Volkswagen of Am., Inc., 187 F.3d 88 (1st Cir. 1999) : In a diversity product liability action arising out of a crash that occurred when the plaintiffs' vehicle slid on ice and collided with another car, the Court found no error when the defendants' experts were permitted to testify about an article concerning the effectiveness of rear seat belt restraints. The study described in the article was based upon data compiled by the National Highway Traffic Safety Administration through the Fatal Accident Reporting System. The Court reasoned that the FARS data are reported by a public agency and cited *Rule 803(8)*; it also suggested that the experts could rely upon such data under *Rule 703*.

[11] Hearsay

United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003) : Much of the government's evidence in a drug conspiracy case consisted of wiretap interceptions in which conversations "were disguised and ambiguous," so it offered the testimony of a DEA agent to testify about the meaning of various "code words." After holding that parts of the expert's testimony exceeded the limits of *Rule 702*, the Court concluded it was error for the witness to repeat hearsay in his testimony. Although in *United States v. Locascio, 6 F.3d 924 (2d Cir. 1993)* , the Court had permitted an expert on the structure of organized crime families to rely upon hearsay statements, in *Dukagjini* the witness was simply repeating the statements without applying any expertise. The errors were harmless, however. In *United States v. Mulder, 273 F.3d 91 (2d Cir. 2001)* , the Court affirmed extortion convictions based on charges that members of labor coalitions forced contractors to hire members of their coalition. The government called two government officials as experts to testify to the operations and structure of a labor coalition. The Court found no error in the admission of this testimony, rejecting the defendants' argument that the testimony was impermissibly based on hearsay. One expert relied on statements of detectives he supervised, contractors who had been victimized, and informants to form his opinions; each of these sources normally would be relied upon by other experts. Another expert relied on published reports on the construction industry, which was "a normal source of information for an expert."

United States v. Avants, 367 F.3d 433 (5th Cir. 2004) : Affirming a conviction for aiding and abetting a racially motivated murder, the Court found no plain error or abuse of discretion in admitting a pathologist's testimony regarding the type of instrumentality that caused the death of the victim. In reaching his opinion, the pathologist had considered preliminary hearing testimony by a participant in the murder, and a statement made by the defendant. The Court reasoned that "[e]xpert witnesses are permitted, of course, to draw on a wide range of sources in forming their opinions." In an action by a bank against sureties that had issued a blanket bond, *First Nat'l Bank v. Lustig, 96 F.3d 1554 (5th Cir. 1996)* , the Court affirmed in part a judgment for the bank as to coverage and bad faith. The testimony of an investigator concerning the practices of the bank's loan committee was properly admitted, even though the investigator obtained his knowledge in part by talking with bank officials, since "[e]xperts may rely on hearsay evidence in forming their opinions."

Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996) : The Court affirmed a judgment for a manufacturer in a design defect case. It upheld the exclusion of expert testimony regarding the useful life of a "limit switch" used in the defendant's machine, since it was unreasonable to rely on hearsay statements by representatives of the manufacturer, given that the expert could recall neither their names nor the dates of the conversations. In *United States v. Lundy*, n1

the Court affirmed a conviction for arson and mail fraud, finding that a detective on the Chicago police department bomb squad was properly permitted to testify as to the cause and origin of a fire. Cautioning that "[a]n arson expert cannot testify that he heard from an informant that the defendant torched the building and that thus in his expert opinion the defendant probably set the fire," and that "[d]istrict courts must ensure that expert testimony is in fact expert testimony, not merely opinion given by an expert," the Court found that interviews with witnesses to a fire are a standard investigatory technique and could be used to supplement the detective's own investigation. In *United States v. Lawson*, n2 the Court stated that "[a]n expert's testimony that was based entirely on hearsay reports, while it might satisfy *Rule 703*, would nevertheless violate a defendant's constitutional right to confront adverse witnesses"; it upheld the use of a government psychiatric expert who had some contact with the defendant but also relied upon the work of other doctors.

Sphere Drake Ins. PLC v. Trisko, 226 F.3d 951 (8th Cir. 2000) : Insurers sought to disclaim coverage after their insured, a maker and designer of jewelry, found that jewelry he had placed in the trunk of a rental car following a show was missing when he got to the airport to drop off the car. At trial the insured offered testimony from a detective with the local police department, who recounted that two informants had told him that two individuals had been paid $20,000 each to steal the jewelry. The Court noted that the informants' statements would have been hearsay had they been admitted for their truth, but there was no abuse of discretion in admitting the statements as part of the basis for the detective's opinion that the jewelry had been stolen, since he regularly relied on the statements of informants as an investigating officer. In a felon firearm prosecution, *United States v. Maddix*, n3 an ATF special agent testified as an expert that the revolver found on the defendant had been manufactured in California, then shipped to dealers in Arkansas, and eventually sold in Missouri. The defendant argued that this evidence of interstate transportation was hearsay, because the agent obtained the information from a tracking report. The Court found no error and affirmed the conviction. The agent testified that firearms experts customarily rely upon tracking reports to determine whether firearms have been transported across state lines, so the report was properly considered as part of the basis of the expert's opinion. In *Pelster v. Ray*, n4 an action by purchasers of a used car with a rolled-back odometer against a dealer and an auto auction through which the car was sold, the plaintiffs offered a state revenue investigator to testify that the odometers of 300 of 350 cars sold through the auction that he checked had been rolled back and that the dealer had been responsible for 204 of those 300 cars. The Court reversed a judgment for the buyers, holding that the investigator's testimony was inadmissible hearsay, since it rested upon out-of-court statements that a particular vehicle had a certain number of miles on the odometer on a given date and another out-of-court statement or document purporting to show a smaller number of miles at a later date. No showing was made that the investigator was an expert or that experts in any field rely upon the sources of information he relied upon.

Turner v. Burlington N.S.F. R.R., 338 F.3d 1058 (9th Cir. 2003) : The plaintiffs sued for property damage after a fire beginning on the railroad's right-of-way spread across their land. The defendant's fire investigator took debris samples at the scene and sent them to a lab, which reported that they contained petroleum distillate consistent with gasoline. The investigator was not permitted to give his opinion at trial that the fire resulted from arson, because it was based on the lab report, which was not admitted into evidence. The Court affirmed a judgment for the plaintiffs, holding that the witness was not using the report as data on which he reasonably relied in forming an opinion, but rather as the sole substantive evidence for his conclusion that the fire was caused by pouring gasoline on the debris. In a dispute between Indian tribes over the value of land, *Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997)* , the Navajo tribe challenged the Hopi tribe's expert's testimony as to the value of corn grown on the property. The expert formulated his opinion from what others told him about corn prices. The Court found no error in this reliance, noting that "no statements from third parties were admitted for their truth," and "experts in the field, i.e., appraisers, regularly go to third parties for sales figures, as the Hopi expert did here."

[12] IRS Audits

United States v. Genser, 582 F.2d 292 (3d Cir. 1978) : In an income tax case, the Court approved allowing expert testimony from an IRS special agent concerning the results of IRS audits even though the opinion was partially based upon hearsay, since the agent relied upon audit papers prepared by other IRS agents. This information was of a type reasonably relied upon by experts in the field and the defendants had a full opportunity to confront the opinions of the testifying witness and to examine them.

United States v. Brown, 548 F.2d 1194 (5th Cir. 1977) : In a prosecution for advising in the preparation and presentation of 12 fraudulent income tax returns, the Court held it was plain error for an IRS agent to testify that of 160 returns prepared by the defendant, the IRS found overstated itemized deductions in 90-95% of them. The information that the agent testified about was received from taxpayers and from a study of taxpayer records. The Court held that the out-of-court statements made by the 160 taxpayers to the agent were inadmissible hearsay and not admissible under *Rule 703* because the agent affirmed as a fact what was not sufficiently known to her personal knowledge.

[13] Judicial Evaluation of Expert's Basis

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) (see the Editorial Explanatory Comment, *§ 703.02[3]*): The Court held that the Trial Judge's gatekeeping role under *Daubert* means that it is the Judge (rather than other experts, as under prior Circuit law) who determines under *Rule 703* what data is reasonably relied upon by expert witnesses. Expert opinions as to reasonable reliance may be considered, but the Judge may also take into account other appropriate factors. In *Advent Systems v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991)* , the Court remanded a contract action between computer software and hardware manufacturers, noting, with respect to the plaintiff's damages expert, that it had serious reservations about the validity of expert testimony based on prior predictions of sales for a given period when actual performance data for that same time span are available.

Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985) : Affirming a summary judgment for the defendant in an antitrust case, the Court indicated that when an expert's opinion is based on inadmissible facts, the Trial Judge should make a threshold factual inquiry to determine whether the facts are reasonably relied upon by experts in the field. It stated that "deference ought to be accorded to the expert's view that experts in his field reasonably rely on such sources of information."

Casillas v. United States Navy, 735 F.2d 338 (9th Cir. 1984) : The Court affirmed a finding that the Navy had not discriminated against the plaintiff in failing to promote him. It concluded that the Trial Judge did not err in discounting the testimony of the plaintiff's statistical expert, where the Navy showed that the expert failed to focus on the appropriate labor pool.

[14] Law Enforcement Information

United States v. Morrison, 531 F.2d 1089 (1st Cir. 1976) : In a prosecution for conducting an illegal gambling business, the Court upheld allowing an FBI gambling expert to testify concerning the results of an analysis of betting slips and records seized from the gambling operation. Although the expert did not perform the calculations himself, he did ascertain the validity of the computations and he did not go beyond the reasonable reliance on the reports of others permitted an expert who customarily relies on such reports.

United States v. Locascio, 6 F.3d 924 (2d Cir. 1993) : The Court affirmed RICO convictions, holding there was no abuse of discretion in admitting testimony by experienced FBI agents that relied on hearsay as to such matters as the

structure and operating rules of organized crime families and the identification of specific voices heard on tape, as law enforcement agents routinely and reasonably rely upon such hearsay in the course of their duties. The Trial Judge need not make an explicit finding that such underlying sources of information used by the expert are trustworthy.

United States v. Lundy, 809 F.2d 392 (7th Cir. 1987) : The Court affirmed a conviction for arson and mail fraud, finding that a detective on the Chicago police department bomb squad was properly permitted to testify as to the cause and origin of a fire. Cautioning that "[a]n arson expert cannot testify that he heard from an informant that the defendant torched the building and that thus in his expert opinion the defendant probably set the fire," and that "[d]istrict courts must ensure that expert testimony is in fact expert testimony, not merely opinion given by an expert," the Court found that interviews with witnesses to a fire are a standard investigatory technique and could be used to supplement the detective's own investigation.

Ratliff v. Schiber Truck Co., 150 F.3d 949 (8th Cir. 1998) : In a wrongful death action brought after a fatal highway accident, the Trial Judge permitted defense counsel to cross-examine the plaintiff's accidentologist with an accident report prepared by a State Highway Patrol trooper. The trooper's report indicated that the accident could have been avoided if the decedent had not been speeding. The Court found no error and affirmed. Because the trooper's report was a "document of the type reasonably relied upon by accident reconstructionists in forming their opinion," it did not matter whether the trooper himself was an expert. In a felon firearm prosecution, *United States v. Maddix*, n5 an ATF special agent testified as an expert that the revolver found on the defendant had been manufactured in California, then shipped to dealers in Arkansas, and eventually sold in Missouri. The defendant argued that this evidence of interstate transportation was hearsay, because the agent obtained the information from a tracking report. The Court found no error and affirmed the conviction. The agent testified that firearms experts customarily rely upon tracking reports to determine whether firearms have been transported across state lines, so the report was properly considered as part of the basis of the expert's opinion. In *Pelster v. Ray*, n6 an action by purchasers of a used car with a rolled-back odometer against a dealer and an auto auction through which the car was sold, the plaintiffs offered a state revenue investigator to testify that the odometers of 300 of 350 cars sold through the auction that he checked had been rolled back and that the dealer had been responsible for 204 of those 300 cars. The Court reversed a judgment for the buyers, holding that the investigator's testimony was inadmissible hearsay, since it rested upon out-of-court statements that a particular vehicle had a certain number of miles on the odometer on a given date and another out-of-court statement or document purporting to show a smaller number of miles at a later date. No showing was made that the investigator was an expert or that experts in any field rely upon the sources of information he relied upon.

United States v. Golden, 532 F.2d 1244 (9th Cir. 1976) : The Court held that a DEA agent's testimony as to the value of heroin was not inadmissible on the ground that it was based in part on information obtained from other narcotics agents familiar with the markets involved; such information was of a type reasonably relied upon by experts determining prevailing prices in clandestine markets.

United States v. Brown, 299 F.3d 1252 (11th Cir. 2002) : The Court affirmed the cocaine-related convictions, finding no plain error in the admission of testimony by a DEA agent as to drug valuation. The agent had substantial experience investigating narcotics smuggling. Although he had not been assigned to Bermuda, where the defendant was traveling, he relied upon information provided by a DEA agent in another office who had conferred with Bermuda authorities to arrive at an estimated value. The agent testified that he typically relied upon such information in valuing narcotics. Thus, even though it was hearsay, the Court found that the data upon which the agent relied was reasonably relied upon.

[15] Medical Evidence

[a] Malpractice Cases

Ramirez v. Debs-Elias, 407 F.3d 444 (1st Cir. 2005) : Affirming a judgment for the surgeon in a patient's medical malpractice action, the Court held that the defendant's expert properly referred to the published findings of a medical researcher in describing, on the basis of his own expertise, the current state of medical research that supported his testimony. The Court said that the expert could rely upon scholarly literature in the field, because "scholarly literature is information reasonably relied upon by medical experts." In a medical malpractice case, *Ricciardi v. Children's Hosp. Med. Center*, n7 the Court affirmed a directed verdict for the defendants in a medical malpractice case, upholding a ruling that a doctor's handwritten note stating that aortic cannula had accidentally come out of the patient during an operation could not serve as the basis for an expert opinion. The doctor had no personal knowledge of the event described and could not recall the source of the information, and there was no evidence that doctors in the field would reasonably rely on unattributed material. In *Forrestal v. Magendantz*, n8 a medical malpractice case, the Court concluded that one standard method of laying the foundation for expert testimony was to show that the testifying doctor based his opinions on review of hospital records, reports of other doctors, and depositions of other doctors

Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991) : On redirect examination an expert witness for the defendant in a medical malpractice case identified three letters as written by prominent physicians, gave his own opinion as to the plaintiff's prognosis without citing the letters as a part of the basis, and then said his opinion was consistent with that of the three doctors. The Court reversed a judgment for the defendant, holding that the tactic simultaneously conveyed hearsay to the jury and improperly bolstered the witness' credibility.

Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) : The Court affirmed a judgment for the defendant in a medical malpractice suit, holding that a letter from the patient's physician to a doctor at the medical department of his employer was properly excluded as a basis for the plaintiff's expert's opinion because it was not the type of information reasonably relied on by experts. The letter contained conclusory statements by a doctor who was not the treating physician at the time of the illness in question, the likely source of the information was the plaintiff, and there was no indication the physician had any personal knowledge of the circumstances relating to the condition.

[b] Medical Evidence -- Other Cases

Coleman v. De Minico, 730 F.2d 42 (1st Cir. 1984) : The Court affirmed a judgment for police officers sued by a plaintiff claiming excessive use of force. It held that an oral surgeon who treated the plaintiff the day after his confrontation with the defendants was properly permitted to offer an opinion as to the cause of the plaintiff's injuries, even though the opinion was somewhat speculative and assumed certain facts not in evidence.

Walker v. Soo Line R.R., 208 F.3d 581 (7th Cir. 2000) : In an FELA action by an employee suing for injuries allegedly sustained when lightning struck a railroad tower, the Trial Judge excluded testimony by the physician who had headed the clinical team that examined and evaluated the plaintiff, on the grounds that the witness was not qualified to testify about post-traumatic stress disorder because she was not a psychiatrist or psychologist and because she relied primarily on the work of a psychologist who had concluded that the plaintiff did not have PTSD. Reversing a judgment for the defendant, the Court found that exclusion of the physician's testimony was an abuse of discretion because she was qualified to testify about the effect of electrical trauma on the body and she had reasonably relied on information from other professionals, in addition to the psychologist. In *United States v. Bramlet*, n9 the Court affirmed a bank robbery conviction, holding that a government expert could rely upon observations of hospital staff members in concluding that the defendant was a malingerer attempting to create a false insanity defense. In *United States v. Lawson*, n10 the Court stated that "[a]n expert's testimony that was based entirely on hearsay reports, while it might satisfy *Rule*

703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses"; it upheld the use of a government psychiatric expert who had some contact with the defendant but also relied upon the work of other doctors.

Boone v. Moore, 980 F.2d 539 (8th Cir. 1992) : Affirming a judgment for the defendants in a civil rights action by an inmate who alleged deprivation of medical treatment, the Court held that a report by an audiologist upon which a testifying doctor relied should not have been admitted into evidence. The error was harmless, however, since the doctor had properly relied upon the report under *Rule 703*, and no objection was made when he read it to the jury.

State Farm Fire & Cas. Co. v. Estate of Jenner, 856 F.2d 1359 (1988) , *vacated on other grounds*, *874 F.2d 604 (9th Cir. 1989)* : The Court reversed a summary judgment for an insurer that claimed it had no duty to defend or indemnify an insured for damages allegedly caused by his sexual molestation of a child. It held that declarations of two doctors, who had examined the insured's medical records and who had relied upon a consultation with the insured's former therapist, satisfied the reasonable reliance standard.

United States v. Baca, 687 F.2d 1356 (10th Cir. 1982) : The Court, upholding drug convictions, held that a doctor who had not personally examined a defendant could testify as to his competency on the basis of summaries of other doctors' evaluations.

[c] Medical Evidence -- Product Liability and Toxic Tort Cases

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : The Court reversed a judgment for the defendants in an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, holding it was error to exclude testimony by the treating physician because he had relied on pathology reports to confirm his diagnosis. It would run counter to the Rules' liberal policy of admissibility to permit an outside expert hired solely for litigation purposes to rely on and testify about a pathology report, but to exclude testimony by the treating physician who ordered the report and relied on it for life-and-death decisions about the patient's treatment.

Mauldin v. Upjohn Co., 697 F.2d 644 (5th Cir. 1983) : The Court found that a pathologist testifying for the plaintiff in a product liability case properly relied on paraffin blocks containing tissue prepared by another pathologist, where the numbers on the pathology reports were identical to the numbers on the paraffin blocks. Even though the witness could not attest "with absolute certainty" that the tissues were taken from the plaintiff, he could offer sufficient evidence for the trier of fact to find that they were.

Hose v. Chicago N.W. Transp. Co., 70 F.3d 968 (8th Cir. 1995) : A railroad employee sued under the FELA, alleging that he suffered manganese encephalopathy arising from his work as a welder. The Court affirmed a judgment for the plaintiff, holding there was no abuse of discretion in permitting an expert to give a diagnosis based on statements from the plaintiff and his wife regarding his physical symptoms. The opinion clearly had a sufficient factual basis, since in addition to patient history, the doctor relied on laboratory studies of the plaintiff's body and his work clothes, her own clinical examinations of the plaintiff, a series of MRIs, and reports from other doctors.

Schudel v. General Elec. Co., 120 F.3d 991 (9th Cir. 1997) : In a toxic exposure case arising at an industrial plant, the Court reversed a plaintiffs' judgment on *Daubert* grounds, but ruled that toxicological experts could rely upon interview data collected by the plaintiffs. The interviewer contacted many of the workers at the plant and discovered that some of them, including the plaintiffs, suffered from various medical symptoms. Two experts stated that

toxicologists consider such interviews reliable, and the Court agreed that the Trial Judge properly exercised discretion to permit the experts to rely on the data.

Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992) : The Court affirmed a summary judgment for the defendants in an action alleging injuries from a contaminated water supply, holding that a single water sample taken from a wastewater pond two years after the plaintiffs had last received water from the water supply was an insufficient basis for an expert opinion on causation.

[d] Medical Evidence -- Scientific Basis

Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) : A plaintiff's judgment in a product liability action seeking recovery for a child's birth defects allegedly caused by the mother's use of a drug (Bendectin) during pregnancy was reversed because the plaintiff's principal expert had been erroneously permitted to give an opinion regarding causation, even though none of the wealth of epidemiological data available concluded that the drug causes birth defects. The Court said this was not a question of novel causation theory but rather a lack of an adequate foundation. In *Ambrosini v. Labarraque*, n11 a suit for birth defects allegedly caused by Depo-Provera, the Court reversed a summary judgment granted to the defendants on the ground that the plaintiffs' experts had failed to provide an adequate scientific basis for their causation opinions. The Court found that no effort had been made to determine whether the basis of the opinions stated in the experts' affidavits was acceptable under *Rule 703*, and distinguished *Ealy* on the ground that the expert there had acknowledged that the data underlying his opinion was not of a type reasonably relied on by experts in the field. In *Mendes-Silva v. United States*, n12 the Court relied upon *Ambrosini* to reverse a summary judgment for the U.S. Public Health Service in a suit alleging that administration of a vaccine caused the plaintiff's encephalomyelitis. It reasoned that "[w]hen the underlying basis or methods of an expert's opinion are of a type reasonably relied upon by the experts in the field, the court must allow the opinion to be assessed by the factfinder -- even if the opinion reaches a novel conclusion."

Lynch v. Merrell-Nat'l Labs., 830 F.2d 1190 (1st Cir. 1987) : Affirming a manufacturer's summary judgment in a suit alleging that a drug caused birth defects, the Court held scientific studies of the drug that focused on animals and "analogous" chemicals did not provide a sufficient basis for an expert opinion that the drug caused birth defects in human beings, in the absence of any confirmatory epidemiological data.

In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987) , aff'g 611 F. Supp. 1223 (E.D.N.Y. 1985) : The Court affirmed a summary judgment for manufacturers of a herbicide in a suit by Vietnam veterans and members of their families, reasoning that the plaintiffs had failed to offer evidence that the defendants knew that Agent Orange posed a hazard of which the government was unaware. The Court stated that the existence of a "hazard must be based on a substantial body of scientific evidence" and that "[t]he hazard cannot be established by mere speculation or idiosyncratic opinion, even if that opinion is held by one who qualifies as an expert under *Rule 702*." The Trial Judge had held that expert opinions concerning a causal relationship between the herbicide and the plaintiffs' injuries would be inadmissible because they were not based upon facts or data upon which experts in the field ordinarily rely.

DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) : The Trial Judge granted a summary judgment for the defendant in an action for birth defects allegedly caused by Bendectin on the ground that all relevant epidemiological studies had found no statistically significant link between the drug and birth defects. Reversing, the Court held that an affidavit by an expert in pediatric pharmacology reanalyzing the data for the plaintiff should not have been excluded under *Rule 703*, which refers only to whether the data would be relied on, not to whether others would reach the same conclusions based on the data. On remand, the Trial Judge granted summary judgment for the

defendants, having excluded the expert's testimony because of its novel and unreliable methodology and its potential for confusing and misleading a jury. n13

Lima v. United States,708 F.2d 502 (10th Cir. 1983) : The Court affirmed dismissal of a swine flu vaccination case, finding no error in allowing the plaintiff's expert in epidemiology to testify and then subsequently striking his testimony on the grounds that the data relied on was inadmissible hearsay and not the kind reasonably relied upon by similar experts. In *Marsee v. United States Tobacco Co.*, n14 a product liability suit on behalf of a user of snuff who contracted cancer, the Court held that epidemiological studies conducted among populations in Asia that were directed toward discovering any link between chewing of smokeless tobacco and cancer would be admitted in connection with an expert's opinion. The studies examined the chewing or dipping of substances that contained smokeless tobacco, and any differences were taken into account in conclusions reached in the studies.

[16] Other Expert's Opinion

Dura Automotive Sys. v. CTS Corp., 285 F.3d 609 (7th Cir. 2002) : In this action to determine responsibility for a CERCLA cleanup of a well field, the Court found there was no abuse of discretion in excluding testimony from a hydrogeologist on the grounds that he was essentially being used as the "mouthpiece" for groundwater-flow modelers on whose mathematical models he relied and that there had not been timely disclosure allowing determination of the reliability of the models. One Judge dissented, contending that the majority had created a new rule that would require cautious parties "to engage in something like an infinite regression of the naming of experts," and that the line between experts who exercise significant discretion (who must be produced) and experts whose work is ministerial (who do not) was unworkable. In *In re James Wilson Assoc., 965 F.2d 160 (7th Cir. 1992)* , a creditor attempted to show the condition of a building involved in a bankruptcy proceeding through its expert witness, an architect, recounting statements of a consulting engineer retained by the architect. The Court held the evidence was properly excluded, as the architect would only be the engineer's spokesman, not offering an opinion within his own domain of expertise.

Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc., 125 F.3d 1176 (8th Cir. 1997) : In a property insurers' subrogation action arising out of a propane explosion, the Court held there was no abuse of discretion in admitting an expert's opinion based in part on a report by an expert consultant who had investigated the accident but who had died before trial. The report was of a type reasonably relied upon by experts in the field; in any event, the testifying expert had also relied on his own extensive experience and his own investigation of the physical evidence.

United States v. Floyd, 281 F.3d 1346 (11th Cir. 2002) : Affirming a conviction for being a felon in possession of ammunition, the Court found no error in permitting a government expert to testify to the interstate nexus of the ammunition. The expert relied in part on advice given by a technical advisor for the Association of Firearm and Tool Mark Examiners, which he testified was advice of the type reasonably relied upon by experts in the field. The Court noted that the advice was only part of his basis, since he examined the ammunition, consulted a catalog prepared by the maker of the ammunition and then, to verify the information he had obtained, he contacted the technical advisor.

[17] Personal Knowledge Not Required

Sementilli v. Trinidad Corp., 155 F.3d 1130 (9th Cir. 1998) : Sementilli was injured while working as a seaman. The shipping company settled with Sementilli and then brought an indemnity action against the doctor who certified Sementilli as fit to be a seaman. Reversing summary judgment for the doctor, the Court held it was error to exclude the testimony of the medical expert proffered by the company that Sementilli was unfit for sea duty on the ground that he had not personally examined Sementilli and was not there when the accident occurred. The Court noted that an expert

need not have personal knowledge, and that the expert relied on medical records, which was permissible under *Rule 703*.

[18] Psychiatric and Psychological Evidence

United States v. Johnson, 956 F.2d 894 (9th Cir. 1992) , *supplemented*, *969 F.2d 849 (9th Cir. 1992)* : A defendant convicted for drug offenses committed while in a ring run by a violent drug lord argued on appeal that she should have been permitted to cross-examine or call as her own witness a psychologist who gave testimony on battered women's syndrome in support of a codefendant's duress defense. The Court held there was no right to cross-examine, as the witness did not testify against the defendant, and there was no foundation for the expert to give testimony on behalf of the defendant, having only observed her testify at trial and not having conducted any interviews that are essential for a diagnosis.

[19] Reasonable Reliance on Data

[a] Civil Cases

American Universal Ins. Co. v. Falzone, 644 F.2d 65 (1st Cir. 1981) : The Court said: "[I]t is reasonable for one state fire marshal to rely on the contemporaneous and on-the-scene opinions of other investigators on his team as to the portion of the investigation that they carried out within their competence."

Stevens v. Cessna Aircraft Co., 634 F. Supp. 137 (E.D. Pa. 1986) , *aff'd mem.*, *806 F.2d 254 (3d Cir. 1986)* : Denying posttrial motions by a wife who unsuccessfully sued an airplane manufacturer for the death of her husband in a plane crash, the District Court reaffirmed its ruling that an expert in aeronautical medicine was properly permitted to testify concerning the stress the husband was under. His reliance on statements by the husband's friends, coworkers, and professors was typical of experts in his field.

Westfield Ins. Co. v. Harris, 134 F.3d 608 (4th Cir. 1998) : After the defendant's home was destroyed by a suspicious fire, his insurer hired an independent investigation firm to determine the fire's cause and origin. The investigator concluded that the fire had been deliberately set. At the trial of the insurer's declaratory judgment action to disclaim coverage, the insurer presented testimony of a state deputy fire marshal, who gave his opinion that the fire was incendiary. The witness' testimony was struck after he said that his opinion was based roughly 90 percent on what the investigator had discovered. Reversing a judgment for the insured, the Court held it was an abuse of discretion to exclude the fire marshal's testimony, since the record amply established that the reports and data from the investigator were the type of materials ordinarily relied on by fire marshals in investigating fires, and the fact that both reached the same conclusion was not a legal reason to exclude the opinion. In *Wilder Enters. v. Allied Artists Pictures Corp.*, n15 the Court, reversing an antitrust case on other grounds, said that an expert witness called by the plaintiff should have been permitted to testify concerning contracts covering the usual "splits" received by exhibitors and distributors of films despite absence of knowledge of the local market, since there was no evidence that splits changed according to location. However, the Court approved the exclusion of another expert who would have testified concerning the diminution in value of the plaintiff's real estate when there was no showing that he based his opinion on facts reasonably relied upon by other experts.

Primrose Oper. Co. v. National Am. Ins. Co., 382 F.3d 546 (5th Cir. 2004) : In an action by oil and gas operators who sued their commercial liability insurer for breach of its duty to defend in a landowner's action for pollution, the Court upheld the admission of testimony by a Texas attorney, who had been involved in the pollution suit, as to the

reasonableness of the attorneys' fees charged the plaintiffs by two law firms. The Court noted that "[b]ecause trial courts are considered experts as to the reasonableness of attorneys' fees, the district court was properly qualified to conclude that the information upon which Boyer relied was of a type 'reasonably relied on' by such expert witnesses." In an antitrust case, *Greenwood Utils. Comm'n v. Mississippi Power Co.*, n16 the Court affirmed a summary judgment for the defendant, and indicated that when an expert's opinion is based on inadmissible facts, the Trial Judge should make a threshold factual inquiry to determine whether the facts are reasonably relied upon by experts in the field. It stated that "deference ought to be accorded to the expert's view that experts in his field reasonably rely on such sources of information."

Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999) : To prove the value of a rare wood carving allegedly damaged by the express company's negligence, the plaintiff sought to introduce evidence of a telephone conversation with another collector, who said that she had been offered $2 million and later $2.5 million for her similar carving, and that she would be willing to sell for $3 million if she were offered that much. The Court held that the statements were proffered to prove the collector's belief in the carving's value, not as an offer to sell her carving, and were thus inadmissible hearsay. However, because experts in the field of appraising art such as that involved here frequently rely on evidence of comparable sales, regardless of how the evidence comes to them, the Court held it was an abuse of discretion to exclude mention of the collector's statements in the reports of the plaintiff's experts regarding the carving. One Judge dissented in part, on the ground that the collector's statement was not a comparable sale but only an offer and thus was inherently untrustworthy and an unreliable basis for an expert's opinion. In *Cravens v. County of Wood*, n17 the Court affirmed a judgment against the mother of a motorcyclist who claimed that the County had not placed adequate warning signs near a bridge renovation. It held that expert testimony of a highway patrol officer was admissible on the question of the deceased's speed at the time of the accident, even though the officer had not inspected the accident site or the motorcycle. The officer was entitled to rely upon official accident reports and accompanying photographs. In *Mannino v. International Mfg. Co.*, n18 a design defect suit against the manufacturer of an infant seat, the Trial Judge excluded the testimony of the plaintiff's expert, a bio-medical engineer, largely because he did not believe that the expert could reasonably rely on the data he purported to use in formulating an opinion. The Court reversed, holding that when the expert explained his reliance on the data and there was nothing in the record to show that it was not reasonable, he should have been permitted to testify.

Hurst v. United States, 882 F.2d 306 (8th Cir. 1989) : The plaintiffs alleged that two jetties negligently constructed in a river channel under supervision of the Corps of Engineers had caused severe flooding of their property. The Court held that although a Corps river hydraulics expert who testified as to the cause of the flood had visited the site only once, two years after the flood, his opinion was sufficiently based on review of documents in evidence and hearing testimony of other witnesses, and any weaknesses in the factual underpinnings, which were fully developed in cross-examination, went to weight and not admissibility. In *United States v. 1,014.16 Acres*, n19 the District Court found that the testimony of a real estate appraiser, a hydrologist, and a forester was properly admitted in a condemnation case despite claims that some experts relied upon the opinions of others. The Judge noted that an expert cannot be expert in every field and that *Rule 703* permits reasonable reliance on other expert opinions.

In re Aircrash, 684 F.2d 1301 (9th Cir. 1982) : In a suit by survivors of passengers killed in an airplane crash, the Court found that an expert should have been permitted to rely on the airline's training records concerning its pilot to support his opinion that the pilot was incompetent to fly. The Court emphasized that as long as the training records were of a type reasonably relied upon by aviation experts, it did not matter whether they would have been admitted were no expert present and relying on them.

Kinser v. Gehl Co., 184 F.3d 1259 (10th Cir. 1999) : Affirming a judgment awarding damages to the estate and survivor of a farmer who was killed while operating a baler manufactured by the defendant, the Court held that the Trial

Judge properly permitted the plaintiffs' expert witnesses to rely upon various documents purportedly issued by a manufacturing institute of which the defendant was a member. The Court declared that minutes of meetings and correspondence between members concerning accidents like the one involved in the instant case were "easily characterized as proper bases upon which an expert witness may rely for opinions regarding a manufacturer's knowledge of possible hazards and/or design defects." In a suit alleging that a drug caused birth defects, *Wilson v. Merrell Dow Pharmaceuticals, Inc., 893 F.2d 1149 (10th Cir. 1990)* , the defendant manufacturer offered evidence that the rate of those sorts of defects had remained constant while sales and new therapy starts of the drug had risen and then declined to zero. The Court held there was no abuse of discretion in admitting the evidence, reasoning that charts of drug sales and new therapy starts, derived from FDA reports and reports of pharmaceutical companies to independent marketing research firms, and of birth defects reported to the Centers for Disease Control, although hearsay, were reasonably relied upon by birth defect experts. The fact that the charts did not take into account when the drug was actually consumed went to their weight, not their admissibility. In *Mullan v. Quickie Aircraft Corp.*, n20 the Court reversed a judgment for the purchaser of an aircraft kit against the manufacturer and remanded for further proceedings, but it upheld the admission of expert testimony for the plaintiff, which was based in part on the factual portions of National Transportation Safety Board reports. The Court indicated that only the portions of the reports that contain conclusions are inadmissible under 49 U.S.C. § 1441(e), and that there is no reason why an expert cannot reach the same conclusions as those found in a report.

[b] Reasonable Reliance on Data -- Criminal Cases

United States v. Morrison, 531 F.2d 1089 (1st Cir. 1976) : In a prosecution for conducting an illegal gambling business, the Court upheld allowing an FBI gambling expert to testify concerning the results of an analysis of betting slips and records seized from the gambling operation. Although the expert did not perform the calculations himself, he did ascertain the validity of the computations and he did not go beyond the reasonable reliance on the reports of others permitted an expert who customarily relies on such reports.

United States v. Locascio, 6 F.3d 924 (2d Cir. 1993) : The Court affirmed RICO convictions, holding there was no abuse of discretion in admitting testimony by experienced FBI agents that relied on hearsay as to such matters as the structure and operating rules of organized crime families and the identification of specific voices heard on tape, as law enforcement agents routinely and reasonably rely upon such hearsay in the course of their duties. The Trial Judge need not make an explicit finding that such underlying sources of information used by the expert are trustworthy.

United States v. Gresham, 118 F.3d 258 (5th Cir. 1997) : The defendant was convicted for possession of an unregistered pipe bomb. Affirming, the Court found no abuse of discretion in the admission of testimony by two ATF agents, based on discussions with the manufacturers and corporate literature and materials maintained by the ATF, that components of the bomb had traveled in interstate commerce. The opinions were based on data reasonably relied upon by experts in the field, even if the sources were not admissible evidence. In *United States v. Harper*, n21 the Court held that an agent was properly permitted to testify as to the origin of a firearm based on markings on the gun, trade publications, and company catalogs.

United States v. Ware, 914 F.2d 997 (7th Cir. 1990) : In a prosecution for felon firearm possession, the Court held that an expert ATF agent's testimony that a shotgun had been manufactured in another state was properly based on his examination of markings on the gun and his personal research in various publications, trade books, and magazines. In *United States v. Bramlet*, n22 the Court affirmed a bank robbery conviction, holding that a government expert could rely upon observations of hospital staff members in concluding that the defendant was a malingerer attempting to create a false insanity defense.

United States v. Kail, 804 F.2d 441 (8th Cir. 1986) : In a prosecution for mail fraud involving the sale of coins, the Court held that government experts properly relied upon American Numismatic Society grading standards, once they testified that the standards had industry-wide acceptance and were the chief guide to the current price of rare coins.

United States v. Unruh, 855 F.2d 1363 (9th Cir. 1987) : In a prosecution for misapplication of bank funds, the Court held that a bank examiner was properly permitted to rely, in preparing to testify, upon his notes and a report that he prepared, even though the report itself was not admissible under *Rule 803(8)(C)*. In *United States v. Golden*, n23 the Court held that a DEA agent's testimony as to the value of heroin was not inadmissible on the ground that it was based in part on information obtained from other narcotics agents familiar with the markets involved; such information was of a type reasonably relied upon by experts determining prevailing prices in clandestine markets.

United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985) : In a prosecution for securities and bankruptcy fraud, the Court upheld the introduction of testimony by an accountant concerning conversations that he had with the defendant's former accountants and employees. This testimony was used to corroborate and supplement the conclusions that the accountant had reached.

United States v. Ramos, 725 F.2d 1322 (11th Cir. 1984) : The Court affirmed a conviction for making a false statement in connection with a passport application, finding that the government's expert was properly permitted to rely upon information she obtained from New York officials in forming an opinion as to the authenticity of a birth certificate.

[20] Relationship to Other Rules

In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987) , aff'g 611 F. Supp. 1223 (E.D.N.Y. 1985) : The Court affirmed a summary judgment for manufacturers of a herbicide in a suit by Vietnam veterans and members of their families, reasoning that the plaintiffs had failed to offer evidence that the defendants knew that Agent Orange posed a hazard of which the government was unaware. The Court stated that the existence of a "hazard must be based on a substantial body of scientific evidence" and that "[t]he hazard cannot be established by mere speculation or idiosyncratic opinion, even if that opinion is held by one who qualifies as an expert under *Rule 702*." The District Court had held that expert opinions concerning a causal relationship between the herbicide and the plaintiffs' injuries would be inadmissible because they were not based upon facts or data on which experts in the field ordinarily rely. The Judge also relied upon *Rule 403*. In reaching its decision, the District Court ruled that various epidemiological studies by federal, state, and Australian governments would be admissible under *Rule 803(8)(C)* and those studies conclusively demonstrated that the herbicide did not cause the plaintiffs' injuries.

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : The Court reversed a judgment for the defendants in an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, holding it was error to exclude testimony by the treating physician because he had relied on pathology reports to confirm his diagnosis. Such reliance does not reflect negatively on the expert's qualifications under *Rule 702* or on an expert's ability to diagnose.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) : The Court affirmed a judgment for a manufacturer in an airplane crash case, holding there was no error in excluding expert testimony based in part on another accident, which the Trial Judge had ruled was not similar enough to be proved. Although an expert may rely upon some facts that are not admissible, the Court declined to hold that evidence excluded by another Rule (e.g., 403) always may be used as the basis for expert testimony.

Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1996) , *amended* (9th Cir. 1997): Reversing in part an antitrust judgment, the Court found error under *Rule 1006* in the admission of two summary exhibits. One was a summary of California and Thai rice prices that had been adjusted by the defendants' expert, and the other was a graph prepared by the expert. The defendants had not made available to the plaintiffs all the materials that went into the summary exhibit, including certain raw data. The error was not prejudicial, however, because under *Rule 703* the experts could have discussed the information contained in the exhibits even though the exhibits themselves were not admissible. In *Claar v. Burlington N. R.R., 29 F.3d 499 (9th Cir. 1994)* , an FELA case for alleged chemical exposure, the Trial Judge reviewed the plaintiffs' experts' reasoning and methodology and concluded that they lacked the foundation and reliability necessary to support expert testimony. Affirming summary judgment for the defense, the Court noted that it was error for the Judge to rely on *Rule 703* in excluding the experts' opinions, because *Rule 703* only permits experts to testify regarding facts of which they have no personal knowledge; it does not deal with the Judge's authority to scrutinize the expert's methodology or reasoning. However, there was no abuse of discretion in excluding the opinions under *Rule 702*.

Renaud v. Martin Marietta Corp., 972 F.2d 304 (10th Cir. 1992) : The Court affirmed a summary judgment for the defendants in an action alleging injuries from a contaminated water supply, holding the Trial Judge was required by *Rule 104(a)* to make a preliminary determination regarding the trustworthiness of the factual basis on which an expert witness relies. This duty was properly fulfilled by excluding as unsound a causation opinion based on a single water sample taken from a wastewater pond two years after the plaintiffs had last received water from the water supply.

[21] Reliance on Treatises

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* (discussed in the Editorial Explanatory Comment, *§ 703.02[3]*): In a massive antitrust case, in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered by the District Court. The Court observed that an expert might rely upon a treatise, such as a foreign language publication, that might not be admissible under the hearsay exception. The expert might adopt portions of the treatise as part of his own testimony.

[22] State Law

Simpson v. James, 903 F.2d 372 (5th Cir. 1990) : In affirming a judgment for the plaintiff in a diversity legal malpractice action, the Court held that the plaintiff's expert accountant properly relied on an exhibit based on corporate records, even though under state law an expert's opinion may not be admitted if based solely on hearsay of a type on which experts in the field customarily rely.

[23] Statistics Prepared for Litigation

Soden v. Freightliner Corp., 714 F.2d 498 (5th Cir. 1983) : Affirming a product liability judgment against the manufacturer of a truck with an unreasonably dangerous fuel system, the Court upheld the exclusion of statistics and charts that were offered in connection with an expert witness' testimony. The statistics were prepared in anticipation of litigation from information supplied by a sister company; they were not part of a published study; they were not made available to the plaintiffs before trial; there was little to indicate exactly how the statistics were derived; and there was a question as to whether the statistics even covered accidents in which postcrash fires resulted, as opposed to accidents caused by fire. Thus, the statistics were insufficiently trustworthy to be relied upon by an expert and the charts that

summarized the statistics were also properly excluded.

[24] Summary Judgment Motions

Ambrosini v. Labarraque, 966 F.2d 1464 (D.C. Cir. 1992) : In a product liability action for birth defects allegedly caused by Depo-Provera, the defendant drug manufacturer had been granted summary judgment on the ground that the plaintiffs' experts' affidavits did not identify the publications, studies, or methodology used in forming causation opinions. The Court reversed, holding that under *Rule 705* an expert's affidavit, no matter what the basis, cannot be excluded solely because it fails to disclose the facts or data underlying the opinion, and that a determination of the affidavits' admissibility under *Rule 703* required that the experts first be required to disclose the basis of their opinions. In *Mendes-Silva v. United States, 980 F.2d 1482 (D.C. Cir. 1993)* , the Court relied upon *Ambrosini* to reverse a summary judgment for the U.S. Public Health Service in a suit alleging that administration of a vaccine caused the plaintiff's encephalomyelitis. It reasoned that "[w]hen the underlying basis or methods of an expert's opinion are of a type reasonably relied upon by the experts in the field, the court must allow the opinion to be assessed by the factfinder even if the opinion reaches a novel conclusion." In *Merit Motors, Inc. v. Chrysler Corp.*, n24 the Court stated that *Rule 703* "was intended to broaden the acceptable basis of expert opinion, but it was not intended ... to make summary judgment impossible whenever a party has produced an expert to support its position." The Trial Judge must decide whether an expert's reliance on extrajudicial data is sufficiently reasonable to warrant reliance on the data; if it is not, the expert's opinion cannot stand in the way of summary judgment.

B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) , clarified, 112 F.3d 88 (2d Cir. 1997) : In a CERCLA action to recover costs incurred in the cleanup of hazardous substances in landfills, the Court held it was error to grant summary judgment against the plaintiffs after excluding the affidavit of an expert who had written more than 150 scholarly articles and a book dealing with disposal and treatment of hazardous waste. The Court stated that "where the reports used by Dr. Brown are of the sort ordinarily relied on by experts in forming opinions within their field of expertise, the reports need not be admissible at trial ... and need not actually be attached to the affidavit to satisfy *Fed. R. Civ. P. 56(e)*."

In re Paoli R.R. Yard PCB Litig., 916 F.2d 829 (3d Cir. 1990) : In reversing a summary judgment for the defendants in consolidated suits by people working in or living near a railyard for damages resulting from PCB exposure, the Court noted that the plaintiffs were unable to contest the reasonableness of the data and techniques relied on by the defendants' experts because the Trial Judge failed to conduct an *in limine* hearing and denied oral argument on the evidentiary issues and the related summary judgment motion.

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990) : The Court affirmed a partial summary judgment for the defendants in an asbestos product liability action, holding that affidavits from the plaintiffs' expert witnesses were properly disregarded, as the reports on which they were based were so sloppily compiled and had so many obvious errors as to be of no value to the trier of fact. Furthermore, the reports, although referenced in the affidavits as exhibits, were never entered as summary judgment evidence. In *Washington v. Armstrong World Indus.*, n25 the Court affirmed summary judgment for manufacturers in a suit by a colon cancer victim's spouse against asbestos manufacturers. It found that the Trial Judge could properly have excluded (and therefore disregarded with respect to the motion) expert testimony that amounted to an opinion that asbestos exposure caused the victim's cancer. The expert had not examined the victim, and he based his entire opinion on reports of examinations of other experts who had examined the victim and reached different conclusions.

Monks v. General Elec. Co., 919 F.2d 1189 (6th Cir. 1990) : Affirming a summary judgment for the defendant in

a product liability action, the Court held there was error (but harmless) when an affidavit in opposition by the plaintiff's expert was struck on the ground it did not reveal the bases of his opinion. Although it did not go into extensive detail, the affidavit was more than a bare conclusory allegation and it was by an expert who had familiarized himself with the record.

In re Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999) : Affirming summary judgment for a manufacturer charged with conspiring with competitors to fix prices and market shares, the Court held that facts stated in an expert report are not admissible simply because the expert relied upon them. The Court quoted from *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993)* : "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."

[25] Surveys and Opinion Polls

[a] Intellectual Property Cases

Piper Aircraft Corp. v. Wag-Aero, 741 F.2d 925 (7th Cir. 1984) : The Court affirmed a judgment granting an airplane manufacturer a permanent injunction against infringement of the plaintiff's trademark. The Court found that a survey of owners of private planes was properly admitted to show that consumers were likely to assume incorrectly that certain parts and kits were manufactured by the plaintiff. Each owner was shown a copy of the defendant's catalogue and asked what company he believed had manufactured these parts and kits. The Court observed that "[p]laintiff followed the 'commendable procedure' of submitting the survey questions, along with the results of a preliminary survey, to the district court for a ruling in limine on the question of admissibility," and concluded that the survey was properly used even though it was not conducted until three days before trial, after the close of discovery. In rejecting hearsay attacks on the survey, the Court relied upon *Rule 803(3)* and *Rule 703*.

Prudential Ins. Co. v. Gibraltar Financial Corp., 694 F.2d 1150 (9th Cir. 1982) : The Court held it was error in a trademark infringement action to exclude a survey offered to prove that 14-31 percent of the public confused the plaintiff's and the defendant's corporate symbols. The Court said that neither reliability nor hearsay objections are sufficient to support rejection of survey evidence. In our view, this statement is overbroad. In trademark infringement cases, properly conducted surveys are likely to produce either nonhearsay responses or statements of belief admissible under *Rule 803(3)*. But in other surveys, respondents may be providing the surveyor with hearsay responses that are inadmissible. Also, the very idea of a properly conducted survey, i.e., one that uses accepted techniques, requires that the data be reasonably relied upon by an expert, so reliability is a concern for the Trial Judge.

Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533 (10th Cir. 1996) : The Court held in an action for infringement of a copyrighted fabric design that there was no abuse of discretion in admitting a survey conducted by the plaintiff's expert to support damages claims, as it covered an adequate universe of respondents and was conducted according to generally accepted survey principles.

[b] Surveys and Opinion Polls -- Miscellaneous Cases

Gartenberg v. Merrill Lynch Asset Mgt., Inc., 573 F. Supp. 1293 (S.D.N.Y. 1983) , *aff'd*, *740 F.2d 190 (2d Cir. 1984)* : The Court dismissed suits by money market fund shareholders who challenged management and advisory fees. It chose not to rely on a survey of investors conducted by an accounting firm, finding that the survey asked investors to engage in unhelpful speculation and that the survey provided only part of the information needed to support an expert opinion.

Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980) : In a suit for damages to a home resulting from defendant's blasting operations, the Court held that an expert geologist was properly permitted to testify for the plaintiffs and to base his opinion on statistics gathered by a questionnaire directed to 169 residents living within a six-mile radius from defendant's mine. Although the Court said that the poll was not admissible because it was not reliable enough, it concluded that the expert could reasonably rely on the survey as a basis for an opinion.

Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) : Affirming a plaintiff's victory in a suit challenging the dislocations of individuals expected from freeway construction, the Court held that a survey, used by experts in formulating opinions regarding discrimination in relocation decisions, was properly admitted by the Trial Judge. It rejected arguments that the universe surveyed was too narrow and observed that the plaintiffs demonstrated that the survey complied with accepted social science techniques.

United States v. Esle, 743 F.2d 1465 (11th Cir. 1984) : Defendants charged with drug offenses claimed that Hispanics were underrepresented on the grand jury. The Court found that the Trial Judge properly gave no weight to an expert's testimony that rested in part on a survey conducted by radio stations that broadcast in Spanish or had a sizeable Latin audience. It reasoned that such stations had an incentive to present their listening pool in a light attractive to advertising and that the survey did not consider whether the listeners spoke English or were citizens and thus were eligible for jury service.

[26] Trial Evidence, Hypothetical Questions, and Testimony of Other Witnesses as a Basis

United States v. Scop, 846 F.2d 135 (2d Cir. 1988) , *modified*, *856 F.2d 5 (2d Cir. 1988)* : The Court reversed fraud, conspiracy, and perjury convictions relating to stock transactions, concluding that the chief investigator of an SEC regional office improperly based his opinion on the "positive assessment of the trustworthiness and accuracy of the testimony of the government's witnesses." An expert may assume the credibility of witnesses in stating an opinion, but need not make -- and certainly should not state to the jury -- an assessment of witness credibility when offering an opinion based on trial testimony.

United States v. Mann, 712 F.2d 941 (4th Cir. 1983) : Upholding a firearms conviction, the Court found that an expert was properly permitted to testify that a gun was Hungarian-made, even though he never saw the gun. The expert was asked to rely on the testimony of one of the defendant's acquaintances who had seen the gun. This case is a reminder that the hypothetical question, while not required when experts are called, may be a useful, and sometimes a necessary, way of offering expert opinion -- i.e., the expert assumes the facts testified to by other witnesses.

Carter v. Massey-Ferguson, Inc., 716 F.2d 344 (5th Cir. 1983) : The Court upheld a judgment for a woodcutter who sued the manufacturer of a skidder that backed into and injured him. It found that an expert was properly permitted to give an opinion as to the importance of the skidder's failure to have a back-up alarm and to base his opinion on the plaintiff's testimony regarding the accident.

United States v. Crabtree, 979 F.2d 1261 (7th Cir. 1992) : The Court held there was no abuse of discretion in allowing an FBI agent, who had observed most of a bank fraud trial ostensibly as an expert witness on a check kiting charge, to testify regarding other charges as well. The agent could have qualified as a designated representative of the government, and under *Rule 703* it was proper for him to base his expert testimony on facts learned at trial. In *Estate of*

Carey v. Hy-Temp Mfg., Inc., 929 F.2d 1229 (7th Cir. 1991) , the Court, remanding a product liability action for a new trial, noted that an expert witness may be competent to give an opinion based upon hypothetical facts even though a foundation that the expert has personal knowledge of those facts has not been laid. In *Bass v. Wallenstein*, n26 an action by a prisoner's estate for wrongful death, the Court held that an expert had a proper basis for his opinion that the deceased would have had an excellent chance of being resuscitated if properly treated, since there was testimony supporting the assumption made by the expert.

Samples v. City of Atlanta, 916 F.2d 1548 (11th Cir. 1990) : In a § 1983 action brought by parents of a youth fatally shot by a police officer, the Court held there was no error in permitting an expert on use of force to testify on the basis of facts outside the hypothetical situation about which he was asked to give his opinion. The testimony was technically objectionable, but because it assumed facts already in evidence it did not prejudice a substantial right of the plaintiffs.

[27] Underlying Data

University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200 (1st Cir. 1993) : Affirming a judgment for the defendant in an action by the University to recover the cost of correcting corrosion on one of its vessels that had been treated with the defendant manufacturer's product, the Court held there was no abuse of discretion in excluding testimony by the university's controller concerning the amount of damages. The factual bases for his opinion included inadmissible hearsay for which there was no showing that it was of a type reasonably relied on by experts in damages assessment. Furthermore, the University came to trial with no supporting documentation to substantiate the witness' assessment of damages and, instead of attempting to assuage the Trial Court's legitimate concerns, chose to rely on a perceived "right" to have the testimony admitted under *Rule 703*.

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994) : Affirming a defendant's judgment in a product liability case, the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under *Rules 702 and 703* simply because the experts testified. *Rule 702* permits admission of expert opinion *testimony*, and *Rule 703* permits an expert to base an opinion on inadmissible evidence but not to introduce that evidence for its truth. However, where the plaintiff extensively cross-examined the witnesses regarding the reports, the door was opened to their admission under *Rule 106*. In *McMahon v. Libbey-Owens-Ford Co.*, n27 the Court affirmed a judgment for employees in an age discrimination case, finding no abuse of discretion in the admission of expert testimony concerning a statistical comparison of new hirees and employees transferred from other divisions with those terminated. The employer had a full chance to cross-examine the expert on the basis of his conclusions and to present its own expert and to explore its claim that the ages in the applicant pool would control the ages of new hirees.

Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) : The Court affirmed a judgment for the defendant in a medical malpractice suit, holding that a letter from the patient's physician to a doctor at the medical department of his employer was properly excluded as a basis for the plaintiff's expert's opinion because it was not the type of information reasonably relied on by experts. The letter contained conclusory statements by a doctor who was not the treating physician at the time of the illness in question, the likely source of the information was the plaintiff, and there was no indication the physician had any personal knowledge of the circumstances relating to the condition.

South Cent. Petr., Inc. v. Long Bros. Oil Co., 974 F.2d 1015 (8th Cir. 1992) : The Court held there was no abuse of discretion when an expert in a mineral rights case was permitted to make revenue projections based on multiple hearsay about the oil well in question, as the underlying information was reasonably relied on by experts in the field and

only the expert's opinion, not the underlying information, was admitted into evidence.

[28] Unreasonable Reliance

[a] Civil Cases

Montgomery County v. Microvote Corp., 320 F.3d 440 (3d Cir. 2003) : In a breach of warranty action against the seller of voting machines, the Court found no abuse of discretion in the exclusion of testimony by an experienced witness that the machines met Federal Election Commission standards. The witness had relied, for performance data regarding the machines, on a document prepared by an employee of the defendant who had made a "reverse" "guestimate" about the amount of time the machines were down. He had also relied on other documents whose source or basis he could not identify, as well as a sampling of audit trail tapes selected by a defense attorney. The witness had not consulted data regarding actual election use that was apparently available. In *In re TMI Litig., 193 F.3d 613 (3d Cir. 1999)* , *amended, 199 F.3d 158 (3d Cir. 2000)* , an action was brought by area residents of the Three Mile Island nuclear power plant for injuries allegedly caused by a nuclear accident that released radioactive materials. As part of a case management order, a group of "typical" plaintiffs was selected for trial on the issue of whether the release of radioactive materials was substantial enough to have caused any injury. Affirming summary judgment for the defendants, the Court upheld the exclusion of testimony by two experts on *Rule 703* grounds. In preparing their studies, the experts had improperly relied on medical summaries of individuals allegedly affected by the TMI radiation that had been prepared by consultants to and associates of plaintiffs' counsel. In *Benjamin v. Peter's Farm Condo. Owners Ass'n*, n28 the Court reversed the damages portion of a judgment for the plaintiff in a slip and fall case, because an economic expert's testimony about the plaintiff's post-injury earning capacity was improperly based upon the plaintiff's personal belief as to how much money he could earn. Although "mathematical exactness is not required," the Court noted that testimony must be based upon a factual foundation and that the plaintiff's belief was purely speculative.

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990) : The Court affirmed a partial summary judgment for the defendants in an asbestos product liability action, holding that affidavits from the plaintiffs' expert witnesses were properly disregarded, as the reports on which they were based were so sloppily compiled and had so many obvious errors as to be of no value to the trier of fact.

Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984) : The Court sustained a judgment n.o.v. for a motorcycle manufacturer in a wrongful death action. It found that expert opinion offered by the plaintiff was premised upon the fact that the motorcycle's brakes were wet at the time of the accident, a fact that had not been proved. Thus, the opinions could not support a judgment for the plaintiff. In *Dallas & Mavis Forwarding Co. v. Stegall*, n29 the plaintiff in an auto-truck collision offered the testimony of a trooper who had investigated the accident to establish the exact point of impact. Since the only data the trooper had came from statements of the parties and witnesses, the Court concluded that the Trial Judge properly excluded the opinion as not based on reliable data. The officer's report was excluded under *Rule 803(8)(C)* for the same reason.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) : The Court affirmed a judgment for a manufacturer in an airplane crash case, holding there was no error in excluding expert testimony based in part on another accident, which the Trial Judge had ruled was not similar enough to be proved. Although an expert may rely upon some facts that are not admissible, the Court declined to hold that evidence excluded by another Rule (e.g., 403) always may be used as the basis for expert testimony.

Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986) : The Court reversed a judgment against a

motorcycle rider who sued the manufacturers of his cycle and of a truck with which the cycle collided, finding that a police officer could not reasonably rely on the testimony of eyewitnesses to an accident to give an opinion as to what happened.

Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998) : A picture of the plaintiff was erroneously misidentified in a magazine article as being that of a person involved in the Pan Am 103 bombing. Reversing a judgment for the defendant on other grounds, the Court held there no abuse of discretion in excluding a memorandum prepared by the defendant's public affairs director that addressed a number of charges that the sources for the article were unreliable. The memorandum was not admissible under *Rule 703* as a basis for expert testimony that the defendants should have delayed or forgone publication of the story, since it was not shown to be the sort of document on which an expert typically relies. In an action to dissolve a consent decree that implemented an affirmative action plan for hiring City firefighters, *United States v. City of Miami, Fla., 115 F.3d 870 (11th Cir. 1997)* , the Court held it was error to continue the decree on the basis of expert testimony that underrepresentation was a vestige of past discrimination. The expert had relied on general census data rather than on the numbers of qualified applicants, he had done no research to support his opinion that the number of women in the department reflected the City's "reputation for unfairness," and he had erroneously determined the relevant labor market on the incorrect assumption that the City consistently enforced a residency requirement.

[b] Unreasonable Reliance -- Criminal Cases

United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994) : The Court reversed a doctor's conviction for illegal distribution of controlled substances, holding it was error to permit a government expert to bolster his opinion by relying on conclusions of another expert who had prepared a report on some of the defendant's patients. The Court stated that reports "specifically prepared for purposes of litigation are not, by definition," reasonably relied upon by experts. In *United States v. Swaim*, n30 the Court reversed a conviction for filing false accounts with the Postal Service. The majority found that a postal inspector was improperly permitted to relate conversations with people who had access to the money in question and to refer to exhibits summarizing what the inspector learned in his investigation, whereas the dissent argued that the inspector qualified as an expert and his testimony was based on matters reasonably relied upon by similar experts.

United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981) : The Court found that an astronomer testifying as a government expert impermissibly relied on a chart of "unknown origin and unknown accuracy." The qualification of the witness as an expert did not necessarily qualify the data on which he wished to rely.

United States v. Scrima, 819 F.2d 996 (11th Cir. 1987) : The Court affirmed a conviction for income tax evasion, finding no error in the rejection of proffered expert testimony that was based upon the defendant's out-of-court statement concerning his possession of a large amount of money, as there was no showing that accountants reasonably rely on such statements. In *United States v. Cox*, n31 the Court affirmed convictions arising out of the purchase and importation of firearms. An expert witness was proffered by the defendant to testify that the CIA had taken scrap pieces of guns originally made in Russia and remanufactured them. The testimony was offered to impeach government witnesses who testified that the guns the defendant indicated were manufactured in Guatemala were actually manufactured in Russia. The Court said that the defense expert's knowledge was primarily historical and was based on hearsay, and that it could not be reasonably relied upon to support an expert opinion.

[29] Valuation of Property

Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999) : To prove the value of a rare wood carving allegedly damaged by the express company's negligence, the plaintiff sought to introduce evidence of a telephone conversation with another collector, who said that she had been offered $2 million and later $2.5 million for her similar carving, and that she would be willing to sell for $3 million if she were offered that much. The Court held that the statements were proffered to prove the collector's belief in the carving's value, not as an offer to sell her carving, and were thus inadmissible hearsay. However, because experts in the field of appraising art such as that involved here frequently rely on evidence of comparable sales, regardless of how the evidence comes to them, the Court held it was an abuse of discretion to exclude mention of the collector's statements in the reports of the plaintiff's experts regarding the carving.

United States v. McPhilomy, 270 F.3d 1302 (10th Cir. 2001) : Affirming convictions for stealing stone from property owned by the Bureau of Land Management, the Court found no abuse of discretion in the admission of expert testimony on the quality, quantity, and value of the stone. The expert was a geologist who had worked for the BLM for eleven years evaluating minerals. His opinion as to value was reached by the same method he used in his job, using retail prices for comparable stone from nearby stone yards as determined by examining the comparable stone and asking the retailers about prices. Although the value figure was based in part on hearsay, the hearsay was the sort of evidence reasonably relied upon by experts in the field.

FOOTNOTES:

(n1)Footnote 1. *United States v. Lundy, 809 F.2d 392 (7th Cir. 1987)* .

(n2)Footnote 2. *United States v. Lawson, 653 F.2d 299 (7th Cir. 1981)* .

(n3)Footnote 3. *United States v. Maddix, 96 F.3d 311 (8th Cir. 1996)* .

(n4)Footnote 4. *Pelster v. Ray, 987 F.2d 514 (8th Cir. 1993)* .

(n5)Footnote 5. *United States v. Maddix, 96 F.3d 311 (8th Cir. 1996)* .

(n6)Footnote 6. *Pelster v. Ray, 987 F.2d 514 (8th Cir. 1993)* .

(n7)Footnote 7. *Ricciardi v. Children's Hosp. Med. Center, 811 F.2d 18 (1st Cir. 1987)* .

(n8)Footnote 8. *Forrestal v. Magendantz, 848 F.2d 303 (1st Cir. 1988)* .

(n9)Footnote 9. *United States v. Bramlet, 820 F.2d 851 (7th Cir. 1987)* .

(n10)Footnote 10. *United States v. Lawson, 653 F.2d 299 (7th Cir. 1981)* .

(n11)Footnote 11. *Ambrosini v. Labarraque, 966 F.2d 1464 (D.C. Cir. 1992)* .

(n12)Footnote 12. *Mendes-Silva v. United States, 980 F.2d 1482 (D.C. Cir. 1993)* .

(n13)Footnote 13. *DeLuca v. Merrell Dow Pharmaceuticals, Inc., 791 F. Supp. 1042 (D.N.J. 1992)* , *aff'd mem.*, *6 F.3d 778 (3d Cir. 1993)* .

(n14)Footnote 14. *Marsee v. United States Tobacco Co., 639 F. Supp. 466 (W.D. Okla. 1986)* , *aff'd*, *866 F.2d 319 (10th Cir. 1989)* .

(n15)Footnote 15. *Wilder Enters. v. Allied Artists Pictures Corp., 632 F.2d 1135 (4th Cir. 1980)* .

(n16)Footnote 16. *Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985)* .

(n17)Footnote 17. *Cravens v. County of Wood, 856 F.2d 753 (6th Cir. 1988)* .

(n18)Footnote 18. *Mannino v. International Mfg. Co., 650 F.2d 846 (6th Cir. 1981)* .

(n19)Footnote 19. *United States v. 1,014.16 Acres, 558 F. Supp. 1238 (W.D. Mo. 1983)* , *aff'd*, *739 F.2d 1371 (8th Cir. 1984)* .

(n20)Footnote 20. *Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986)* .

(n21)Footnote 21. *United States v. Harper, 802 F.2d 115 (5th Cir. 1986)* .

(n22)Footnote 22. *United States v. Bramlet, 820 F.2d 851 (7th Cir. 1987)* .

(n23)Footnote 23. *United States v. Golden, 532 F.2d 1244 (9th Cir. 1976)* .

(n24)Footnote 24. *Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977)* .

(n25)Footnote 25. *Washington v. Armstrong World Indus., 839 F.2d 1121 (5th Cir. 1988)* .

(n26)Footnote 26. *Bass v. Wallenstein, 769 F.2d 1173 (7th Cir. 1985)* .

(n27)Footnote 27. *McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073 (6th Cir. 1989)* .

(n28)Footnote 28. *Benjamin v. Peter's Farm Condo. Owners Ass'n, 820 F.2d 640 (3d Cir. 1987)* .

(n29)Footnote 29. *Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721 (6th Cir. 1981)* .

(n30)Footnote 30. *United States v. Swaim, 642 F.2d 726 (4th Cir. 1981)* .

(n31)Footnote 31. *United States v. Cox, 696 F.2d 1294 (11th Cir. 1983)* .

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PART TWO: THE RULES THEMSELVES
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CHAPTER 703 RULE 703

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703.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, *15 Vand. L. Rev. 473, 480 (1962)*. Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect, the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus, a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. *Rheingold, supra, at 531*; McCormick 15. A similar provision is *California Evidence Code 801(b)*.

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963)* . See also Blum et al., The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, *24 U. Chi. L. Rev. 1 (1956)*; Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, *48 A.B.A.J. 329 (1962)*; Zeisel, The Uniqueness of Survey Evidence, *45 Cornell L.Q. 322 (1960)*; *Annot., 76 A.L.R.2d 919* .

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice

should be taken that the rule requires that the facts or data be of a type reasonably relied upon by experts in the particular field. The language would not warrant admitting into evidence the opinion of an accidentologist as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal. Law Rev. Comm'n, Recommendation Proposing an Evidence Code 148-50 (1965).

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: The amendments are technical. No substantive change is intended.]

[2] 2000 Amendment Committee Note

2000 Amendment Committee Note

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), *with United States v. 0.59 Acres of Land, 109 F.3d 1493 (9th Cir. 1997)* (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986)* (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson, 40 Vand.L.Rev. 583 (1987)* (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

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Scope

The chart below shows the proposed style amendments for Rule 703, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 703. Bases of Opinion Testimony by Experts	**Rule 703. Bases of an Expert's Opinion Testimony**
The facts or data in the particular	An expert may base an opinion on

case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference upon the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in the case that the expert has been made aware of or personally observed, they must be admissible even though not admissible for any other purpose. When the underlying facts or data are admissible, the expert may state an opinion or inference without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 703 was amended in 2000 to add the last sentence, which was added to guard against the risk that the proponent will disguise hearsay as expert opinion testimony. Under the amendment, the trial judge must determine whether the probative value of the facts or data used by the expert in forming an opinion substantially outweighs their prejudicial effect. The amendment was proposed by the Judicial Conference Advisory Committee on Evidence Rules in response to a concern that experts were frequently disclosing to the jury the inadmissible hearsay upon which they based their opinions, thereby circumventing the rules prohibiting hearsay. The amendment was intended to limit the admissibility of facts or data that are relied upon by experts, but that are not themselves admissible and are not subject to any hearsay exception. The amendment was not intended to affect the admissibility of facts or data that are admissible for any purpose other than as substantive evidence. Thus, if the facts or data are admissible for impeachment only, the amendment provides that the trial judge must determine whether the probative value of the facts or data for impeachment purposes substantially outweighs their prejudicial effect. The amendment was not intended to affect the admissibility of facts or data that are admissible for their truth under a hearsay exception. Thus, if the facts or data are admissible under a hearsay exception, the amendment does not require any balancing of probative value against prejudicial effect.

Rule 703 was amended in 2023 to add the last sentence, which was added to guard against the risk that the proponent will disguise hearsay as expert opinion testimony. Under the amendment, the trial judge must determine whether the probative value of the facts or data used by the expert in forming an opinion substantially outweighs their prejudicial effect. The amendment was proposed by the Judicial Conference Advisory Committee on Evidence Rules in response to a concern that experts were frequently disclosing to the jury the inadmissible hearsay upon which they based their opinions, thereby circumventing the rules prohibiting hearsay. The amendment was intended to limit the admissibility of facts or data that are relied upon by experts, but that are not themselves admissible and are not subject to any hearsay exception. The amendment was not intended to affect the admissibility of facts or data that are admissible for any purpose other than as substantive evidence. Thus, if the facts or data are admissible for impeachment only, the amendment provides that the trial judge must determine whether the probative value of the facts or data for impeachment purposes substantially outweighs their prejudicial effect. The amendment was not intended to affect the admissibility of facts or data that are admissible for their truth under a hearsay exception. Thus, if the facts or data are admissible under a hearsay exception, the amendment does not require any balancing of probative value against prejudicial effect.

in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose the

data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the m to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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Supp. to § 703.03 Annotated Cases

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[4] Constitutional Concerns [Go To Main]

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010) : The Court affirmed convictions for offenses arising out of participation in a violent street gang, finding no abuse of discretion in admitting testimony by expert witnesses on the gang's organization and violent nature, relying in part on interviews with gang members. Although acknowledging that the experts' testimony was proper under Rule 703, because the gang members' statements were of a type reasonably relied on by experts in the field, the defendants argued that this reliance violated their right to confrontation because the gang members' statements were testimonial. The Court stated that *Crawford* "does not prevent expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence" and that "the question when applying *Crawford* to expert testimony is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay." In this case, the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury." In *United States v. Johnson, 587 F.3d 625 (4th Cir. 2009)* , the Court affirmed convictions for drug crimes, finding no abuse of discretion in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. It rejected an argument that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations, which violated confrontation rights under *Crawford v. Washington* because the experts were relying on testimonial hearsay. The Court noted that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts, and that the experts never made reference to their interviews, so the jury heard no testimonial hearsay.

United States v. Turner, 591 F.3d 928 (7th Cir. 2010) : At a drug trial, the defendant objected that a government chemist, who testified that tests conducted on the substance seized from the defendant indicated that it was cocaine, did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford v. Washington*. The Court found no error, holding that "the government's expert witness was properly allowed to rely on the information gathered and produced by a lab employee who did not testify at trial." The Court emphasized that no statements of the official who actually tested the substance was admitted at trial, and that the witness unequivocally

established that his opinions about the test reports were his own. The Court rejected the argument that the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts,129 S. Ct. 2527 (2009)* , requires that any official involved in forensic testimony must be produced for cross-examination. It read the case as only prohibiting the introduction of *certificates* of forensic testimony without any supporting testimony, and it observed that " *Melendez-Diaz* did not do away with *Federal Rule of Evidence 703*." In *United States v. Moon, 512 F.3d 359 (7th Cir. 2008)* , the Court held that an expert's testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate the defendant's right to confrontation under *Crawford* because "data is not 'statements' in any useful sense. Nor is a machine a 'witness against' anyone." Moreover, the expert's reliance on another expert's lab notes did not violate *Crawford* because an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The Court noted that the defendant could "insist that the data underlying an expert's testimony be admitted, see *Fed.R.Evid. 705*, but by offering the evidence themselves defendants would waive any objection under the *Confrontation Clause*." The Court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and should not have been independently admitted, but it found no plain error in the admission of these notes.

[6] Disclosure of Facts to Jury [Go To Main]

United States v. Milkiewicz, 470 F.3d 390 (1st Cir. 2006) : Toward the end of a fraud and tax fraud case in which several thousand pages of financial records were offered by the government to prove transactions in the scheme, the prosecutor called an IRS agent to testify about a series of charts that summarized the information contained in those financial records. The defense initially objected only to admission of the charts as independent evidence, but later argued that they should not have been given to the jury because one set contained errors and significant omissions rendering it unreliable and the other was improperly admitted through the agent, who was not qualified as a witness. Affirming, the Court took the occasion to clarify its approach to the treatment of summaries under the Rules, noting that "[i]n a case where voluminous underlying records are involved, the key difference between [the] various approaches appears to be the purpose for which the summaries are offered":

> Charts admitted under *Rule 1006* are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently they must fairly represent the underlying documents and be " 'accurate and non-prejudicial.' " [citations omitted]
>
> By contrast, a pedagogical aid that is allowed under *Rule 611(a)* to illustrate or clarify a party's position, or allowed under *Rule 703* to assist expert testimony, may be less neutral in its presentation. Record support is necessary because such devices tend to be "more akin to argument than to evidence," and "may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent." In some cases, however, such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of *Rule 1006*.

The Court held that although most, if not all, of the charts would have been admissible into evidence under *Rule 1006*, there certainly was not abuse of discretion in allowing the jury to consider them under *Rules 611(a)* and *703*. Deficiencies in the underlying records were explored on examination of the witnesses, "and gaps or other imperfections in the underlying data do not necessarily undermine the value of the summary charts as pedagogical aids under *Rule 611(a)*." As for the tax charts, the summarization of documents "took patience but not expertise," and an IRS agent was well qualified to make the computations, "particularly where, as here, the computation required no subjective judgment."

United States v. Leeson, 453 F.3d 631 (4th Cir. 2006) : In a felon firearm prosecution, the prosecution countered an insanity defense with a psychiatrist who opined that the defendant did not suffer from a severe mental illness. He based his opinion in part on statements by two different inmates that the defendant had approached them to recruit them in assisting him in "looking crazy." Rejecting an argument that it was error to allow the expert to disclose these statements to the jury, as part of the basis for his opinion, because they were hearsay, the Court noted that the information that the expert relied upon "was highly and directly relevant to the jury's task of evaluating that opinion." Thus, the Trial Judge "properly determined that the probative value of the inmates' out-of-court statements outweighed their prejudicial effect." We note that the Court misstated the balancing test to be applied under *Rule 703*: the probative value of the hearsay (in illuminating the basis of the expert opinion) must *substantially* outweigh the prejudicial effect.

Mike's Train House, Inc. v. Lionel, LLC, 472 F.3d 398 (6th Cir. 2006) : In an action claiming that Lionel misappropriated the plaintiff's trade secrets for producing model trains, the plaintiff's expert (Stein), a mechanical engineer, was permitted to testify to his opinion that Lionel's design drawings had been copied from drawings of the plaintiff's former employee who also worked for Lionel. Stein relied heavily on a report prepared by Lee, another expert retained by the plaintiff. He testified that he did a regression analysis on Lee's research and came to the same conclusion as Lee, i.e., that Lionel had copied the plaintiff's designs. Lee did not testify at trial and his report was not entered into evidence as it was hearsay. The Court held that it was error to allow Stein to testify to the degree of similarity between Lee's conclusions and his own, as the case law has "squarely rejected any argument that *Rule 703* extends so far as to allow an expert to testify about the conclusions of other experts."

[7] Economic Data [Go To Main]

Structural Polymer Group, Ltd. v. Zoltek Corp., 543 F.3d 987 (8th Cir. 2008) : The Court affirmed a judgment for a buyer who sued a seller for breach of a requirements contract for the sale of carbon fiber. It held that the buyer offered sufficient evidence to support the damages awarded. Although the seller complained that the buyer's expert relied on information provided by the buyer, the Court reasoned that "[a]s a rule, questions regarding the factual underpinnings of the expert's opinion affect the weight and credibility of her testimony, not its admissibility."

[11] Hearsay [Go To Main]

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) : The Court vacated convictions for conspiracy to commit assaults in aid of racketeering activity. The prosecution arose after members of one gang shot members of other gangs. To prove the shootings arose in the course of racketeering activity, a state police officer who had been investigating gangs in the area was permitted to testify about the operations of the defendants' nationwide gang, as well as of the gang's local activities, including that its members had committed "between 18 and 22, 23" murders in the area in the five years prior to the trial. According to the officer, his testimony was based on custodial interviews with gang members, reports from other law enforcement personnel, and published sources. The Court held that much of the expert's testimony concerned material well within the grasp of the average juror. The testimony also substituted the expert's conclusion on an essential fact (that the gang committed murders in a pattern of racketeering activity) for competent evidence of that fact: "The Government cannot take a shortcut around its obligation to prove murder beyond a reasonable doubt just by having an expert pronounce that unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of [the gang]." The Court also noted that the witness "was acting as a de facto 'case agent' in providing this summary information to the jury," a practice it had admonished against because case agents testifying as experts gain unmerited credibility when testifying about factual matters from first-hand knowledge. Furthermore, while law enforcement officers routinely and reasonably rely on hearsay in reaching their conclusions, an expert witness must not simply repeat hearsay evidence but must apply expertise to the inadmissible materials -- and in too many instances the expert in this case did not do so. This was particularly a problem with statements made in custodial interrogations,

which were testimonial hearsay violating the defendants' *Confrontation Clause* rights. In *United States v. Lombardozzi, 491 F.3d 61 (2d Cir. 2007)* , a loansharking prosecution, a criminal investigator testified that the defendant was affiliated with organized crime, basing his opinion on conversations with cooperating witnesses and confidential informants, as well as on personal observation. The defendant did not object to admission of the testimony on *Confrontation Clause* grounds at trial. On appeal, the Court concluded that because the opinion in effect conveyed to the jury out-of-court testimonial statements that the defendant never had an opportunity to cross-examine, admission "may have constituted error," but it "did not rise to the level of reversible plain error."

United States v. Jennings, 599 F.3d 1241 (11th Cir. 2010) : In the prosecution of a scheme to sell fraudulent workers' compensation insurance, the Court found no abuse of discretion in permitting an expert to testify to information generally known by administrators in the field, to the extent it was based on conversations with workers' compensation professionals. The Court rejected a hearsay objection, explaining that testimony regarding the regulations known by third-party administrators was not an effort to prove what the regulations were from the statements of others; rather, it was testimony by the witness about her work and her familiarity with the regulatory environment, which was evidence in support of her competence to express an opinion regarding the awareness of certain industry requirements.

[14] Law Enforcement Information [Go To Main]

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) : The Court vacated convictions for conspiracy to commit assaults in aid of racketeering activity. The prosecution arose after members of one gang shot members of other gangs. To prove the shootings arose in the course of racketeering activity, a state police officer who had been investigating gangs in the area was permitted to testify about the operations of the defendants' nationwide gang, as well as of the gang's local activities, including that its members had committed "between 18 and 22, 23" murders in the area in the five years prior to the trial. According to the officer, his testimony was based on custodial interviews with gang members, reports from other law enforcement personnel, and published sources. The Court held that much of the expert's testimony concerned material well within the grasp of the average juror. The testimony also substituted the expert's conclusion on an essential fact (that the gang committed murders in a pattern of racketeering activity) for competent evidence of that fact: "The Government cannot take a shortcut around its obligation to prove murder beyond a reasonable doubt just by having an expert pronounce that unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of [the gang]." The Court also noted that the witness "was acting as a de facto 'case agent' in providing this summary information to the jury," a practice it had admonished against because case agents testifying as experts gain unmerited credibility when testifying about factual matters from first-hand knowledge. Furthermore, while law enforcement officers routinely and reasonably rely on hearsay in reaching their conclusions, an expert witness must not simply repeat hearsay evidence but must apply expertise to the inadmissible materials -- and in too many instances the expert in this case did not do so. This was particularly a problem with statements made in custodial interrogations, which were testimonial hearsay violating the defendants' *Confrontation Clause* rights.

United States v. Steed, 548 F.3d 961 (11th Cir. 2008) : The Court affirmed a truck driver's conviction for possession of marijuana with intent to distribute, finding no abuse of discretion in the admission of testimony by the arresting officer (who was a qualified expert) regarding drug trafficking on the roadways, which was based in part on conversations with other officers and on literature published by organizations such as the National Drug Intelligence Center. The background information utilized by the witness was of the sort reasonably relied upon by experts in the law enforcement field.

[15] Medical Evidence [Go To Main]

[a] Malpractice Cases

Crowe v. Marchand, 506 F.3d 13 (1st Cir. 2007) : Affirming a judgment for the defendant physician in a medical malpractice case, the Court found no abuse of discretion in the admission of expert testimony by an orthopedic surgeon who did not review the patient's X-ray or MRI studies. The expert testified that he based his opinions on what other physicians' reports of those studies showed. The Court found that the information he relied upon provided a sufficient foundation for his opinion, since "[d]octors routinely rely on observations reported by other doctors," and "it is unrealistic to expect a physician, as a condition precedent to offering opinion testimony in a personal injury case, to have performed every test, procedure, and examination himself."

[b] Medical Evidence -- Other Cases

United States v. Seale, 600 F.3d 473 (5th Cir. 2010) : The Court affirmed a conviction for a fatal kidnapping committed in 1964, finding no abuse of discretion in the admission of a forensic pathologist's conclusion that the victims' deaths were caused by fresh-water drowning. The sources for the conclusion properly included autopsy reports, video footage of the recovery of a body from a river, interviews with divers conducting the recovery effort, FBI reports, and photographs of physical evidence, as well as the testimony of a coconspirator.

[16] Other Expert's Opinion [Go To Main]

Mike's Train House, Inc. v. Lionel, LLC, 472 F.3d 398 (6th Cir. 2006) : In an action claiming that Lionel misappropriated the plaintiff's trade secrets for producing model trains, the plaintiff's expert (Stein), a mechanical engineer, was permitted to testify to his opinion that Lionel's design drawings had been copied from drawings of the plaintiff's former employee who also worked for Lionel. Stein relied heavily on a report prepared by Lee, another expert retained by the plaintiff. He testified that he did a regression analysis on Lee's research and came to the same conclusion as Lee, i.e., that Lionel had copied the plaintiff's designs. Lee did not testify at trial and his report was not entered into evidence as it was hearsay. The Court held that it was error to allow Stein to testify to the degree of similarity between Lee's conclusions and his own, as the case law has "squarely rejected any argument that *Rule 703* extends so far as to allow an expert to testify about the conclusions of other experts."

[19] Reasonable Reliance on Data [Go To Main]

[a] Civil Cases

Ward v. Dixie Life Ins. Co., 595 F.3d 164 (4th Cir. 2010) : The Court affirmed a summary judgment and damage award for insureds who sued their insurers for breach of contract relating to supplemental cancer insurance policies. It found no abuse of discretion when the Trial Judge relied on six spreadsheets, in conjunction with the expert testimony of the plaintiffs' damages expert, to calculate damages. Five of the spreadsheets were created by the defendants and the sixth was compiled by plaintiffs' counsel from explanation-of- benefits statements provided by the insurers to the insureds. It was reasonable for the expert to rely upon the information provided by the insurers as to the actual costs of medical care and it was unnecessary to obtain the bills from the healthcare providers.

Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) : The Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It found no abuse of discretion in the admission of testimony by an expert regarding military procedures and command responsibilities. To form her opinions, the expert relied upon interviews, commission reports, documentary research, and field research, as well as her expertise in the politics of Latin America. This was the kind of information on which other experts in the field reasonably rely.

Monsanto Co. v. David, 516 F.3d 1009 (Fed. Cir. 2008) : In an action alleging infringement of a gene-sequence patent,

the plaintiff offered expert testimony that the defendant's fields had been planted exclusively with the infringing seeds. The defendant objected that the expert's opinion was based on scientific field tests conducted by the defendant's scientific team but not by the expert personally. The Court held that the tests were of the sort reasonably relied on by experts and thus a proper basis for the expert's testimony.

[b] Reasonable Reliance on Data -- Criminal Cases

United States v. Leeson, 453 F.3d 631 (4th Cir. 2006) : In a felon firearm prosecution, the prosecution countered an insanity defense with a psychiatrist who opined that the defendant did not suffer from a severe mental illness. He based his opinion in part on statements by two different inmates that the defendant had approached them to recruit them in assisting him in "looking crazy." Rejecting an argument that it was error to allow the expert to rely on these statements, the Court noted that the expert "sufficiently established that inmates in a federal mental health facility, in general, are reasonably relied upon by experts in his field."

United States v. Garcia, 447 F.3d 1327 (11th Cir. 2006) : Affirming drug convictions, the Court found no abuse of discretion in permitting a law enforcement agent to testify as an expert witness to translate coded drug conversations. Although the officer's translation was based in part on information received from a cooperating witness who was a member of the drug conspiracy, the Court upheld the conclusion that "the debriefing of suspected drug traffickers is 'the type of evidence' that is 'reasonably relied upon' by seasoned drug enforcement officers 'in forming opinions or inferences' about the use of coded language of drug traffickers." The expert was, by virtue of his professional knowledge and ability, "competent to judge for himself the reliability of statements made by an admitted drug trafficker in post-arrest debriefings in forming an expert opinion about the drug traffickers' use of coded language."

[20] Relationship to Other Rules [Go To Main]

United States v. Smith, 566 F.3d 410 (4th Cir. 2009) : The Court affirmed convictions for firearms offenses and drug trafficking, finding no error when an ATF agent was permitted to testify as an expert regarding the place of manufacture of four firearms seized from the defendant's apartment. The agent consulted various references, including one reference book and an ATF database, in arriving at his opinion. The defendant objected that the testimony violated the best evidence rule, but the Court held that the agent was not attempting to prove the contents of any book or record, but was, instead, relying on materials reasonably relied upon by experts to form an opinion.

United States v. W.R. Grace, 504 F.3d 745 (9th Cir. 2007) : On an interlocutory appeal by the government in a prosecution related to the alleged release of asbestos-contaminated vermiculite from a mine, the Court found an abuse of discretion in the exclusion of certain parts of the government's expert testimony. The Court affirmed a Rule 403 decision to exclude a report by the Agency for Toxic Substances and Disease Registry on pleural abnormalities of residents in the town where the defendants mined, but held it was an abuse of discretion to hold that experts could not rely upon the report to show that there were some associations or correlations between exposure to vermiculite in the town and pleural abnormalities. The Court reasoned that the fact that the study was associational, rather than an epidemiological study intended to show causation, did not bar the study from being used to inform an expert's opinion about the dangers of asbestos releases, provided that experts in the field reasonably rely on such studies. The Trial Judge had failed to conduct a Rule 703 analysis and instead "improperly replaced 703 balancing with 403 balancing."

[23.1] Subsequent Remedial Measures [Go To Main]

Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008) : A car mechanic brought a product liability action after the back window of an SUV shattered when he was working on the rear door lift. The plaintiff's expert would have testified

that a step-by-step procedure was required in order to reduce the likelihood that the rear liftgate glass would fail when repairing the door lift, and that such a procedure should have been embodied in an instruction manual, but was not. The expert was excluded because, in opining on the need for a warning in an instruction manual, he relied on the fact that Ford included such warnings in an instruction model for a later model, which the Judge believed meant that his testimony was barred by Rule 407. Reversing summary judgment for the defendant, the Court held that excluding the expert was error; in its view, Rule 407 could not bar the testimony because the plaintiff was not trying to admit the subsequent remedial measure. Rather, the measure was being used only as the basis of the expert's opinion, which permits expert reliance on data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The Court found that it was reasonable for an engineer to rely upon a warning and alternative safety instruction subsequently issued by a manufacturer in forming an opinion that an earlier service manual fails to provide adequate instructions and warnings to automobile technicians.

[25] Surveys and Opinion Polls [Go To Main]

[a] Intellectual Property Cases

i4i Ltd. Partnership v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010) : The Court affirmed a judgment for the plaintiff in a action for infringement of a software patent, finding no abuse of discretion in the admission of expert testimony for the plaintiff regarding damages. The expert relied in part on a survey designed to estimate the amount of infringing use. The expert who designed the survey explained that it was compiled using acceptable survey methods, and both of the patent owner's experts testified that the survey drastically understated the amount of infringing use because it was limited to business use, did not cover individual customers, and assumed that any company that did not respond was not infringing.

[27] Underlying Data [Go To Main]

Boim v. Holy Land Found. for Relief & Devel., 549 F.3d 685 (7th Cir. 2008) (en banc): The Court affirmed a judgment for parents of a teenager killed in Israel by Hamas terrorists against an organization accused of having provided financial support for Hamas in violation of American law. It found no abuse of discretion in the admission of testimony by an Israeli security expert regarding Hamas' responsibility in the matter, which was based in part on information from websites that he attributed to Hamas. The Court held that there was sufficient evidence that the websites of Islamic movements and Islamic terrorist organizations have long been accepted by security experts as valid, important, and indispensable sources of information. A dissenting opinion argued that the expert's opinion

> is based exclusively on what these websites and documents say; he has no personal knowledge of who killed David Boim. So if these sources are not genuine or say something other than what he has represented, then his opinion is worthless. No expert worth his salt would base his opinion on internet and documentary sources without assuring himself that they are reliable ... . But Paz's affidavit does not describe any such efforts that he made, and there is no other evidence in the record that establishes the authenticity and reliability of the websites and documents whose contents he recounts.

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[ii] Rule 704(b) -- Specific Intent -- Fraud and Tax Evasion

[iii] Rule 704(b) -- Specific Intent -- Miscellaneous Cases

[l] Rule 704(b) -- Unhelpful Opinions

704.04 Legislative History

[1] Advisory Committee's Note

[2] Senate Report No. 98-225 (adding subdivision (b) in 1984)

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 281 (1999)

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
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704.01 Official Text

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

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PART TWO: THE RULES THEMSELVES
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704.02 Editorial Explanatory Comment

[1] General Rule on Ultimate Issue Testimony

In many jurisdictions evidence in the form of opinion is excluded if it purports to resolve the ultimate issue to be decided by the trier of fact. Prior to the enactment of the Rules, there had been a trend, particularly with expert witnesses, to allow opinion testimony on the ultimate issues, where such an opinion would be helpful to the trier of fact. This trend was especially noticeable in cases involving complex or technical issues.

The reasoning behind *Rule 704(a)* is that if a witness (especially an expert) provides a solid foundation and explanation on an issue for which the factfinder needs assistance, the factfinder might be left hanging if the witness cannot cap off the testimony with a conclusion about the ultimate issue to which the expert is testifying. Testimony is a narrative, and jurors can be upset and confused if a witness leaves them with testimony that is less than a full narrative -- it is like the joke without the punchline, the mystery without the last page. Particularly with respect to experts, a conclusion on the ultimate issue often ties the witness' testimony together into a coherent whole, and as such it will be more helpful to state the conclusion along with the rest of the opinion. The Rule also recognizes that a distinction between ultimate and other issues is elusive, and that common-law decisions attempting to draw such a distinction were often arbitrary and unpredictable.

Rule 704(a) permits ultimate issue testimony, but only if it will be helpful in accordance with *Rule 701* or *702*. The testimony will not be helpful if the witness simply gives a conclusion on an ultimate issue without disclosing his or her reasoning process or any predicate facts. But it might be helpful if the witness, especially in the course of explaining difficult matters, lends context to detailed testimony by then drawing a conclusion on an ultimate issue. n1

Experts and lay witnesses are technically treated alike under *Rule 704*. As a practical matter, however, an expert's opinion on an ultimate issue is more likely to be helpful, and hence admissible, n2 than the ultimate conclusion of a lay witness, because the ultimate conclusion of a lay witness is really no better than what the jury can do on its own. n3

[2] Jury Instructions

When a witness testifies to an ultimate issue, the Trial Judge may well be concerned that the jury may be confused as to

its responsibility. This concern can be alleviated to some extent by an instruction to the jury that it is the sole judge of credibility, the sole finder of fact, and the sole judge of the proper inferences to be drawn from the credible facts. The Judge may want to note that jurors may find a witness to be credible and believe the basic facts to which the witness' testimony relates without sharing the conclusions drawn by the witness.

[3] Opinions on the Law

In the course of examining an expert, counsel should be sure that the witness does not go beyond the expert's proper role and intrude upon an important function of the Trial Judge, which is to instruct the jury as to the requirements of law that apply to the particular facts of the case. n4

For example, in *United States v. Scop, 846 F.2d 135 (2d Cir. 1988)* , the defendants were charged with violation of a statute prohibiting fraudulent and manipulative securities practices, by creating artificial price levels to lure unsuspecting investors. The expert, Stanley Whitten, a chief investigator for the SEC, declared throughout his testimony that the defendants had engaged in a "fraudulent and manipulative" scheme. The Court found that the expert consciously used the same formulation throughout his testimony, and concluded that this was impermissible under *Rule 704(a)*:

> It is true that *Rule 704* states that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. However, *Rule 704* was not intended to allow experts to offer opinions embodying legal conclusions.
>
> Had Whitten merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made. Instead, however, Whitten made no attempt to couch the opinion testimony in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations concerning manipulation and fraud. In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to invade the province of the court to determine the applicable law and to instruct the jury as to that law, they could not have been helpful to the jury in carrying out its legitimate functions.

The *Scop* Court distinguished between ultimate legal conclusions and ultimate factual conclusions, by using examples from previously decided drug cases in which expert opinion testimony had been permitted:

> In *United States v. Carson, 702 F.2d 351 (2d Cir. 1983)* , two Drug Enforcement Agency agents were allowed to testify concerning their opinion that conduct they observed involved a narcotics transaction. ... In *United States v. Young, 745 F.2d 733 (2d Cir. 1984)* , a police detective was allowed to testify, based on his observations, that he believed a narcotics transaction had taken place. In the same case, a DEA agent testifying as an expert witness was permitted to describe a typical chain of heroin distribution, including the characteristics and operating methods of a heroin mill. The district judge instructed the jury that this general description was unrelated to the facts or circumstances of the particular case. The agent then was allowed to testify that what he found in defendant's apartment was precisely what he would have expected to find in a heroin mill. In *United States v. Brown, 776 F.2d 397 (2d Cir. 1985)* , a police officer testifying as an expert was permitted to describe a typical drug buy in Harlem, including the role of the steerer. He was then permitted to testify over objection that the defendant acted as a steerer in a transaction the officer had observed.
>
> None of our prior cases, however, has allowed testimony similar to Whitten's repeated use of statutory and regulatory language indicating guilt. For example, telling the jury that a defendant acted as a steerer or participated in a narcotics transaction differs from opining that the defendant "possessed narcotics, to wit, heroin, with intent to sell," or "aided and abetted the possession of heroin with intent to

> sell," the functional equivalent of Whitten's testimony in a drug case. It is precisely this distinction, between ultimate factual conclusions that are dispositive of particular issues if believed, e.g., medical causation, and inadequately explored legal criteria, that is drawn by the Advisory Committee's Note [to *Rule 704*].

Despite the *Scop* Court's effort to distinguish ultimate factual conclusions from ultimate legal conclusions, the distinction is blurry at best in many cases. When the jury hears from an expert that the defendant acted as a steerer in a drug transaction, the testimony comes perilously close to an instruction on guilt. In our view, ultimate factual conclusions must also be closely regulated, and only permitted where they would truly assist the jury in a technical or specialized area. Regulating only legal conclusions is insufficient, because the ultimate factual conclusion can be just as unhelpful as a bald legal conclusion. We believe that the result in *Scop* is sound, but that the examples the Court sought to distinguish were not really distinguishable; the expert's testimony should have been excluded in each of those prior cases as well.

[4] Rule 704(b): Mental State or Condition in Criminal Cases

In 1984 Congress amended *Rule 704* as part of its response to the insanity verdict rendered in John Hinckley's trial for the attempted assassination of President Reagan. See *18 U.S.C. §§ 4241-4247*. The effect is to bar experts -- at least psychiatrists and psychologists n5-- from testifying that a criminal defendant either had or did not have the requisite mental state for committing the crime charged. The limitation imposed by subsection (b) applies only in criminal cases and only to expert testimony offered on the accused's mental state.

The final sentence of subdivision (b) captures the spirit of the amendment: the Judge or jury is to decide the mental state question, not the expert. Presumably, the drafters of the amendment hoped that it would prevent the expert from invading the province of the trier of fact, and that it would clarify the roles of experts and triers. In our view, however, there is no need for the amendment, and the Rule does more harm than good.

Rule 704(a) permits only helpful ultimate issue testimony. *Rule 704(b)* by definition prohibits helpful testimony that would otherwise be admissible under *Rule 704(a)*. It follows that *Rule 704(b)* must by definition exclude helpful expert testimony. Otherwise it has no reason for being. Unhelpful ultimate issue testimony is already excluded under *Rule 702*. For example, the Court in *United States v. Scop*, which is discussed in § 704.02[3], held that the expert's ultimate issue testimony on the defendants' guilt was conclusory and unhelpful and therefore should have been excluded under *Rule 702*. The Court did not need, and did not rely on, *Rule 704(b)* to exclude the evidence. Thus, the only situation in which *Rule 704(b)* can have any effect is when it is invoked to exclude helpful expert testimony. But why on earth should we exclude helpful expert testimony?

In using *Rule 702* prior to the amendment of *Rule 704*, Trial Judges did not have to concern themselves with the question whether an opinion was ultimate, mediate, or something else. They had only to decide whether it would assist the trier of fact in reaching a fair decision in the case. The advent of *Rule 704(b)* has led to sporadic enforcement and difficult problems in drawing lines, as is discussed below.

[5] Problems in Applying Rule 704(b)

Rule 704(b) does not totally prohibit experts from testifying in criminal cases involving disputes over *mens rea* or insanity. Nor does it bar experts from giving opinions in cases in which mental state or condition is an element of a crime or defense. Rather, the language prevents an expert from giving an opinion as to whether the defendant did or did not have the requisite mental state or condition. As one Court put it: "Congress did not enact *Rule 704(b)* so as to limit the flow of diagnostic and clinical information. Rather, the Rule changes the style of question and answer that can be used to establish both the offense and the defense thereto." n6

Dr. Park Elliott Dietz, who led the team that evaluated John Hinckley for the United States Attorney's office, has written that barring expert opinions on the ultimate issue creates line-drawing problems, for the attorney calling a favorable witness will seek to elicit testimony that approaches the ultimate issue as nearly as the Court will permit and the witness will provide. (*Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, Annals of The American Academy of Political Science, January, 1985). We would add that the line-drawing, while necessary under the Rule, serves only to separate the helpful testimony that can be admitted from the helpful testimony that cannot.

The Seventh Circuit's decision in *United States v. West, 962 F.2d 1243 (7th Cir. 1992)* , provides an interesting example of the line-drawing that must be done between conclusions on the defendant's mental state and otherwise permissible expert testimony. It also shows how *Rule 704(b)* can subvert the search for truth. West was charged with bank robbery and his defense was insanity. The Trial Judge appointed a psychiatrist to examine West. The psychiatrist concluded that West was suffering from schizoaffective disorder, a severe mental disease. But he also concluded that West understood the wrongfulness of his actions when he robbed the bank. The government moved to exclude the psychiatrist's testimony, and the Trial Court agreed, reasoning that it would be outrageous to allow a defendant to call an expert to testify to a mental disorder, when that very expert has concluded that there was no causal relationship between the illness and the crime charged.

The Court of Appeals reversed in *West*. It reasoned that the psychiatrist's ultimate conclusion that West knew right from wrong was inadmissible under *Rule 704(b)*. But *Rule 704(b)* did not operate to exclude the psychiatrist's conclusion that the defendant was suffering from a mental disease. The *West* Court, like the Trial Judge, was clearly concerned that the expert's testimony, bereft of its ultimate conclusion, would be misrepresentative. However, the Court believed that it was obligated to follow the rules Congress has made, and not rewrite or avoid them, however unwise they may be. Thus, while *Rule 704(b)* was intended to prevent distortion of the factfinding process, the decision in *West* illustrates that the Rule can actually lead to distortions of the factfinding process.

Nor is the negative impact of *Rule 704(b)* limited to the prosecution's presentation. Defendants have also suffered from *Rule 704(b)*. For example, in *United States v. Bennett, 161 F.3d 171 (3d Cir. 1998)* , the defendant was charged with fraud, check-kiting, money-laundering, and filing false statements and tax returns. In a pretrial ruling, the Judge precluded the defendant's psychiatric expert from testifying that the defendant's mental disorders made it "unlikely that he could form the intent to defraud" and "affected his ability to knowingly and wilfully submit false statements to the I.R.S." So the jury was left with general testimony about the defendant's mental disorders without a sufficient explanation of how these disorders might have affected his culpability for the charged crimes.

Rule 704(b) has also been invoked to preclude defendants from introducing exculpatory polygraph evidence, on the ground that the expert's testimony that the defendant was truthful constitutes testimony as to the defendant's mental state. n7 *Rule 704(b)* has further been applied to preclude testimony as to the defendant's physiological responses to a polygraph, the Courts finding "no principled distinction" between such testimony and a conclusion that the defendant was telling the truth. n8 So the costs of *Rule 704(b)* are spread widely across criminal trials.

[6] Hypothetical Questions

Under *Rule 704(b)* the expert can testify concerning mental diseases, but is prohibited by *Rule 704(b)* from testifying to a causal relationship between the disease and the defendant's actions. The parties might understandably try to get around this limitation by asking the expert a hypothetical question, such as: Does this mental disease characteristically include an inability to understand the wrongfulness of one's acts?

Judge Manion, concurring in *West*, discussed in § 704.02[5], concluded that such a hypothetical question could not be asked because it would be an impermissible evasion of the restrictions of *Rule 704(b)*. Some Courts have agreed with this conclusion. For example, in *United States v. Manley, 893 F.2d 1221 (11th Cir. 1990)* , defense counsel wanted to ask the expert whether a hypothetical person with the described mental disease would be able to appreciate the nature

and quality of his or her actions. The Court of Appeals upheld the Trial Judge's decision to preclude an answer to that hypothetical, on the ground that it would be an impermissible end-run around *Rule 704(b)*.

Most Courts, however have been more permissive in allowing an expert to testify about a hypothetical person's mental state. For example, in *United States v. Brown, 32 F.3d 236 (7th Cir. 1994)* , the defendant was charged with bank robbery and interposed an insanity defense. The prosecution's psychiatrist testified that Brown suffered from a major depressive disorder, and may have suffered some depressive episodes with psychotic features. Following the description of this diagnosis, the prosecutor asked the witness whether a person suffering from the disorder described was, by that reason alone, unable to understand the wrongfulness of his acts The witness answered in that such a person could still appreciate the wrongfulness of his acts. Brown objected that this was ultimate issue testimony as to his legal sanity, barred by *Rule 704(b)*. But the Trial Judge denied the objection and the Seventh Circuit affirmed.

The Court of Appeals in *Brown* concluded that despite the prohibitory language of *Rule 704(b)*, testimony may be adduced exploring the particular characteristics of the mental disease and whether those characteristics render one afflicted with the disease able to appreciate the wrongfulness or the nature and quality of his behavior. Relying on the finest of distinctions, the Court noted that the prosecution's expert never testified to Brown's particular mental state. Instead the expert merely described the mental disorder from which Brown suffered and explained that such an affliction does not preclude a person from appreciating the nature or quality of his acts. Because the expert testimony was not specific to Brown's mental state but rather concerned the characteristics of his mental disorder, it was permitted by *Rule 704(b)*. The expert never said "Brown had the requisite mental state to commit the crime." n9 It is clear that the Court in *Brown* was struggling with the Rule, and indeed it was critical of the Rule. The Court declared that the Rule had the misguided purpose of requiring jurors to decide the issue of sanity without being told what conclusion an expert would draw. Such a result is counterproductive because it denies juries the specialized knowledge of experts in just the type of complex case in which it is most useful.

Another example of fine line-drawing arose in *United States v. Thigpen, 4 F.3d 1573 (11th Cir. 1993)* (en banc), where the Court found no error in allowing the prosecutor to ask a series of questions to elicit an opinion as to whether schizophrenia by necessity implies that a person would be unable to appreciate the nature and quality of his acts. The Court stated that these questions were permissible because the prosecutor never asked the witness to opine whether Thigpen was able to appreciate the wrongfulness of his actions. The Court concluded as follows:

> While a thinly veiled hypothetical may not be used to circumvent *Rule 704(b)*, the rule does not bar an explanation of the disease and its typical effect on a person's mental state.

The line drawn by the Court in *Thigpen* is between a hypothetical that includes virtually all of the characteristics of the defendant (i.e., a thinly veiled hypothetical), and a more general hypothetical about the nature of the disease and its effect on human conduct.

But this is hardly a bright line; and it is often meaningless to distinguish between general hypotheticals and thinly veiled hypotheticals. n10 For example, in *United States v. Kristiansen, 901 F.2d 1463 (8th Cir. 1990)* , the defendant was charged with escape from a halfway house. He claimed that he lacked willful intent due to insanity. Kristiansen's expert psychiatrist testified that Kristiansen had been under the influence of cocaine and suffered from psychosis. On cross-examination, the prosecutor asked: "Would this severe mental disease affect the individual's ability to appreciate the nature and quality of the wrongfulness of his acts?" The Trial Judge sustained an objection, and the Court of Appeals affirmed, reasoning that this was a hypothetical question designed to elicit testimony on the ultimate issue of intent.

On the other hand, the Court in *Kristiansen* held that the defendant should have been permitted to ask: "Could the severe mental disease affect the ability of an individual to appreciate the nature of the quality or the wrongfulness of his acts?" The Court of Appeals reasoned as follows:

> [T]he defense should have been permitted to ask this question because it relates to the symptoms and qualities of the disease itself and does not call for an answer that describes Kristiansen's culpability at the time of the crime. *Rule 704(b)* was not meant to prohibit testimony that describes the qualities of a mental disease.

There is obviously little difference between the two questions put to the expert in *Kristiansen*, yet the Court specifically held that one was permissible under *Rule 704(b)* and one was not. Thus, it is clear that the Rule as applied by the Courts calls for some fine line-drawing. Counsel would do well to craft their questions with care and to make certain that the question calls for a description of the mental disease rather than a conclusion about the defendant's mental state at the time of the crime. Thus, counsel is not permitted to ask, "Would a person suffering from the defendant's condition be able to appreciate the nature and quality of his actions?" But counsel is apparently permitted to ask, "Would the defendant's condition affect the ability of a person suffering from that condition to appreciate the nature and quality of his actions?" n11 So long as counsel is asking about the condition and not the defendant, the hypothetical can be loaded up with details that mirror the facts of the case.

[7] Law Enforcement Experts and Criminal Intent

It might appear that the amendment makes it more difficult for the prosecutor to use expert testimony even in cases where the technical defense of insanity is not raised. The prosecution often calls law enforcement agents as experts, and this testimony often has a bearing on the defendant's mental state. For example, the agent might be called to explain coded language on a surveillance tape, or to explain the *modus operandi* of drug dealers, or to explain that possession of a certain quantity of drugs is inconsistent with personal use. All of this testimony says something about the defendant's intent.

It could be argued that any testimony from an expert that bears upon the defendant's mental state should be excluded under *Rule 704(b)*. But the Courts have not read the Rule that way. So long as the expert does not testify that the defendant acted with criminal intent, Courts have generally found the *Rule 704(b)* proscription inapplicable. n12

A typical case is *United States v. Williams, 980 F.2d 1463 (D.C. Cir. 1992)* . The prosecution's expert in a drug case testified that the more than 100 ziplock bags containing small amounts of drugs, which were found in a police raid on a premises, were meant to be distributed at street level. The defendant argued that this testimony impermissibly referred to his intent to distribute drugs. But the Court found that the expert's opinion did not violate the *Rule 704(b)* prohibition. It reasoned that the expert did not explicitly testify that *the defendant* had the mental state necessary to commit the crime charged. Rather, this testimony addressed the intentions of a hypothetical individual, not Williams in particular. Of course there was no hypothetical individual in front of the jury, only Williams, so it is apparent that the limitations imposed by the Court on mens rea testimony are ephemeral at best. n13

Some Courts have suggested that *Rule 704(b)* is applicable only to psychiatric and medical expert testimony. For example, *United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994)* , involved typical expert testimony from drug enforcement agents, to the effect that the seized drugs were for street level distribution. The Court began by noting that Courts applying *Rule 704(b)* would typically find this testimony admissible, because the expert did not say that the particular defendant had an intent to distribute drugs. The Court found, however, that this distinction was relatively useless when applied to the testimony of law enforcement agent-experts:

> In the first place, though officers did not in fact say "intent" or "intended," they may as well have, for the effect would have been exactly the same. If the drugs found on Lipscomb were for street sale distribution, as each of the officers testified, then Lipscomb possessed them for that purpose; he intended to distribute them. Further, it would seem to make little difference that the officers' opinions were based on an analysis of the external circumstances of the arrest, for the officers still would have stated an opinion or inference as to whether the defendant did or did not have the mental state or condition

> constituting an element of the crime charged, and this is what *Rule 704(b)* forbids.

Rather than admit outright that the Courts have simply ignored *Rule 704(b)*, or that the Rule as promulgated makes no sense, the *Lipscomb* Court entertained the proposition that *Rule 704(b)* was never intended to apply to the testimony of law enforcement agent-experts:

> All this assumes, however, that *Rule 704(b)* does in fact apply to the officers' testimony, an assumption worth questioning in view of the courts' apparent reluctance to rigorously enforce the rule in similar cases. Indeed, there is reason to think that the rule states only a very limited exception to the general rule, set forth in *Rule 704(a)*, that witnesses *may* give opinions on ultimate issues. ... [I]t is evident that *Rule 704(b)* was designed to avoid the confusion and illogic of translating the medical concepts relied upon by psychiatrists and other mental health experts into legal conclusions.

The Court concluded that the most sensible way to read the Rule, in light of its terms and purposes, is to apply it only to testimony based on a psychiatric or medical analysis of the defendant's mental processes. n14

The *Lipscomb* Court was ultimately unprepared, however, to conclude that *Rule 704(b)* was completely inapplicable to law enforcement agent-expert testimony. It came to the following conclusion:

> Notwithstanding these alternatives, we simply cannot ignore the fact that this court and others have routinely assumed that *Rule 704(b)* imposes an additional limitation, however slight, on the expert testimony of law enforcement officials. To reconcile that fact with our impression that the rule is of more limited scope, we conclude that when a law enforcement official states an opinion about the criminal nature of a defendant's activities, such testimony should not be excluded under *Rule 704(b)* as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes. Relevant in this regard, though not determinative, is the degree to which the expert refers specifically to the intent of the defendant, for this may indeed suggest, improperly, that the opinion is based on some special knowledge of the defendant's mental processes. n15

Most important was the *Lipscomb* Court's reminder that even if the law enforcement expert's testimony is not prohibited by *Rule 704(b)*, it must still be helpful to the jury under *Rule 702*; and it cannot be unduly prejudicial or confusing, or else it is subject to exclusion under *Rule 403*.

Other Courts have rejected the argument that *Rule 704(b)* applies only to psychiatric and psychological testimony. As the Court stated in *United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997)* : "The language of *Rule 704(b)* is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses."

Any differences among the Circuits on this matter, however, are of little practical effect. Assuming the Rule reaches all experts, in most Circuits the limitation imposed by the Rule is so minimal that for the Rule to be violated, an expert would probably have to say, point blank, that the defendant intended (or did not intend) to commit the crime. n16 If the witness has to go that far to violate *Rule 704(b)*, he also violates *Rule 702*, because his testimony is clearly of no assistance to the jury.

We share the *Lipscomb* Court's concern over the dangers inherent when law enforcement agents essentially instruct the jury to find the defendant guilty. We agree, however, that *Rule 704(b)* is unnecessary to rectify these dangers. Rather, the Court should require that the proffered testimony actually adds something important to the jury's understanding of the facts, otherwise the testimony should be excluded under *Rule 702*. Moreover, in some cases, even if the testimony is somewhat helpful, it might be unduly prejudicial and so subject to exclusion under *Rule 403*. Finally, if ultimate

conclusions are allowed to be drawn, it is important to provide a limiting instruction that the expert has no special insight into the defendant's mental state and that the jury is the final arbiter of whether the prosecution has proved the elements of the crime.

There are occasional cases in which a Court has said enough is enough, and has found error when an expert's conclusion on a mental state is couched in a hypothetical that mirrors the facts of the case. For example, in *United States v. Smart, 98 F.3d 1379 (D.C. Cir. 1996)* , a narcotics case, a law enforcement agent was permitted to testify, on the basis of hypothetical facts identical to those in the case, that the facts met the "elements of drug distribution." The Court recognized that the witness never referred directly to the defendant's intent. However, he might as well have done so, given the explicit reference to the "elements" of drug trafficking, the crime with which the defendant was charged. The Court concluded that the use of the word "elements" carries "legal connotations that could have misled the jury into thinking that Detective Thomas was speculating on the ultimate legal issue of whether Smart had the requisite intent to distribute drugs." The Court noted that a *Rule 704(b)* violation could have been avoided if the Trial Court had instructed the jury that the expert was not qualified to testify on the ultimate issue of intent. But the Trial Court gave no such instruction. n17

[8] Constitutional Challenges

Rule 704(b) has been challenged by some defendants on the ground that its exclusion of ultimate issue testimony violates the defendant's constitutional right to an effective defense. These challenges have been rejected. For example, in *United States v. Austin, 981 F.2d 1163 (10th Cir. 1992)* , the Court held that the Rule served legitimate state interests and thus withstood constitutional attack:

> *Rule 704(b)* promotes fairness by eliminating confusing and often conflicting expert testimony concerning the ultimate legal issue to be found by the trier of fact. ... The rule prevents a confusing battle of the experts and preserves the decision on the ultimate issue of state of mind for the jury, rather than leaving it in the hands of retained experts. n18

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Fiataruolo v. United States, 8 F.3d 930 (2d Cir. 1993)* (in an action for refund of tax penalties assessed against responsible persons for a contractor's unpaid withholding taxes, the Court held there was no error in permitting an expert to opine that the plaintiff was not a responsible person under the statute, as the opinion was not a simple bald assertion of law but based on a detailed explanation of the factual situation); *United States v. Buchanan, 787 F.2d 477 (10th Cir. 1986)* (in a firearms case, a government witness was properly permitted to testify that a device was required to be registered; the testimony went to an ultimate fact but could have helped the jury; the witness explained in detail the basis of his opinion and the manner in which he came to his conclusion).

(n2)Footnote 2. See, e.g., *United States v. Two Eagle, 318 F.3d 785 (8th Cir. 2003)* (in a trial for assault involving "extreme physical pain" and "protracted and obvious disfigurement", it was not error to allow medical experts to testify that the injuries to the victims included disfigurement and extreme physical pain; the Court noted that the expert's testimony on an ultimate question was helpful to the jury and that exclusion of these opinions would "render a medical expert's testimony generally inadmissible if the medical expert used common descriptive terms that also appear in the statute"); *Phillips v. Calhoun, 956 F.2d 949 (10th Cir. 1992)* (city personnel directors with experience in municipal personnel matters were properly permitted to give affidavits concerning the customary meaning and usage of critical terms in the city's charter and other personnel documents; the affiants were not stating legal conclusions, but only offering informed opinion concerning the real-world signification of the terms).

(n3)Footnote 3. See, e.g., *Slayton v. Ohio Dept. of Youth Services, 206 F.3d 669 (6th Cir. 2000)* (if lay witnesses had testified that the plaintiff had suffered illegal discrimination, this would have been impermissible, because "it seldom will be the case that a lay opinion on an ultimate issue will meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness' and the witness turns into little more than an oath helper"; however, in this

case the witnesses only used the term "sexual harassment", in a colloquial and not a legal sense); *Mitroff v. Xomox Corp., 797 F.2d 271 (6th Cir. 1986)* (the plaintiff should not have been permitted to testify and have another lay witness testify that an assistant personnel manager working for the defendant stated that the defendant engaged in a pattern of age discrimination; testimony by a lay witness on an ultimate issue will rarely if ever be helpful to the trier of fact).

(n4)Footnote 4. See, e.g., *Snap-Drape, Inc. v. Commissioner, 98 F.3d 194 (5th Cir. 1996)* (in a tax case, expert witness reports supporting the taxpayer's construction of the law were properly excluded; the taxpayer's reliance on *Rule 704(a)* was misplaced, because that Rule does not allow an expert to render conclusions of law); *United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993)* ("[t]he court's admission of expert testimony on contested issues of law in lieu of instructing the jury was manifestly erroneous under *Rule 704*"); *Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986)* (in a securities action, testimony of legal counsel to a partnership as to the meaning and applicability of securities laws to transactions at issue was not admissible; *Rule 704(a)* abolishes the proscription on ultimate issue opinions, but it does not permit the expert witness to usurp the province of the judge.).

(n5)Footnote 5. The applicability of *Rule 704(b)* to experts other than psychiatrists and psychologists is discussed in § 704.02[7].

(n6)Footnote 6. *United States v. Edwards, 819 F.2d 262, 265 (11th Cir. 1987)* .

(n7)Footnote 7. *United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)* .

(n8)Footnote 8. *United States v. Campos, 217 F.3d 707 (9th Cir. 2000)* .

(n9)Footnote 9. See also *United States v. Dixon, 185 F.3d 393 (5th Cir. 1999)* (no error in permitting an expert to testify that a person suffering from the defendant's mental disease "could still be able to appreciate the nature and quality or the wrongfulness of his acts"; the expert "merely stated that the presence of a mental illness does not answer, or contain a necessary inference that would answer, the ultimate issue"); *United States v. Salamanca, 990 F.2d 629 (D.C. Cir. 1993)* (an expert was permitted to testify that a person who drank as much as the defendant would have a diminished capacity to seek and plan).

(n10)Footnote 10. See, e.g., *United States v. Levine, 80 F.3d 129 (5th Cir. 1996)* (finding no error where a psychologist was asked to assume facts that mirrored the events of the bank robbery, and gave an opinion that the facts were inconsistent with behavior that would be expected from someone suffering from bipolar disorder, the mental condition claimed by the defendant; hypothetical questions mirroring the fact pattern of the evidence are violative of *Rule 704(b)* only when the answering testimony contains a necessary inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto; the expert did not offer an opinion as to whether the defendant did or did not have the mental state or condition constituting an element of the offenses charged; rather, the expert's testimony focused on whether facts similar to those in evidence were consistent with the conduct of a hypothetical person suffering a severe manic episode).

(n11)Footnote 11. See, e.g., *United States v. Davis, 835 F.2d 274 (11th Cir. 1988)* (it was permissible to ask whether a person diagnosed with multiple personalities could be capable of appreciating what he or she was doing; this question sought an explanation of the disease and its typical effect on a person's mental state; it did not ask the expert to draw a conclusion as to whether the defendant actually had the requisite mental state).

(n12)Footnote 12. See, e.g., *United States v. Plunk, 153 F.3d 1011 (9th Cir. 1998)* (law enforcement expert's translation of a coded conversation did not violate *Rule 704(b)*; the officer simply interpreted the conversations, "allowing the jurors to determine for themselves the legal significance of the conversations as interpreted"). Compare *United States v. Wood, 207 F.3d 1222 (10th Cir. 2000)* (doctor charged with murder and lesser included offenses arising from treatment of a patient; it was error to admit expert testimony that the defendant's treatment was "reckless" and constituted a "homicide"; such testimony "necessarily dictates the final conclusion that Dr. Wood possessed the requisite mens rea for involuntary manslaughter").

(n13)Footnote 13. See also *United States v. Younger, 398 F.3d 1179 (9th Cir. 2005)* (no error in permitting an agent to testify that in his experience he had never known a person in the defendant's circumstances to be only a user and not a dealer; the agent did not testify about the defendant specifically and denied having any particular knowledge about the defendant or what his intent may have been); *United States v. Brumley, 217 F.3d 905 (7th Cir. 2000)* (no error in permitting expert to testify that amounts of metamphetamine in excess of one ounce were for distribution rather than personal use; the expert did not purport to base the testimony on some special knowledge of the defendant's mental state); *United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999)* (no error in the admission of expert testimony that someone possessing the "equivalent of 700 bags of crack cocaine is in the business of making money selling drugs"; *Rule 704(b)* proscribes only responses suggesting some special knowledge of the defendant's mental state, not general testimony regarding the modus operandi of drug dealers); *United States v. Valle, 72 F.3d 210 (1st Cir. 1995)* (a narcotics detective was properly permitted to testify that the quantity of crack cocaine found at a search site was consistent with distribution as opposed to personal use; the witness offered no opinion as to the defendant's intent, but instead permitted the jury to draw its own conclusions).

(n14)Footnote 14. See also *United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994)* (stating that *Rule 704(b)* does not apply to testimony of a law enforcement agent); *United States v. Richard, 969 F.2d 849 (10th Cir. 1992)* (suggesting, without deciding, that *Rule 704(b)* is limited to psychiatric and medical testimony).

(n15)Footnote 15. See also *United States v. Willis, 61 F.3d 526 (7th Cir. 1995)* (finding no error when a law enforcement agent was permitted to testify that he had never had a drug case where the courier didn't know what he was carrying; the Court reiterated its position that *Rule 704(b)* does not limit law enforcement opinion testimony, so long as it is made clear that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes).

(n16)Footnote 16. Some Courts are more serious than others about policing law enforcement testimony that mirrors the facts of the case. See, e.g., *United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003)* (agent's testimony that couriers have knowledge that they are carrying drugs and often bring their wives and children with them while transporting drugs; these characteristics mirrored the facts of the case and the testimony was barred by *Rule 704(b)* even though the witness did not say "the magic words" that the defendant was knowingly transporting the drugs).

For a further discussion on testimony by law enforcement agents bearing on the defendant's criminal intent, and the limits of *Rule 704(b)*, see Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence, 55 U. Miami L. Rev. 691* (2001).

(n17)Footnote 17. See also *United States v. Boyd, 55 F.3d 667 (D.C. Cir. 1995)* (the defendant was convicted of possession with intent to distribute cocaine, after a law enforcement officer was allowed to testify that, in his opinion, the hypothetical facts posed by the prosecutor showed possession with intent to distribute; the hypothetical facts exactly mirrored the facts leading up to the defendant's arrest; this was reversible error; the Court stated that it had never held that the Government may simply recite a list of hypothetical facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics).

(n18)Footnote 18. See also *United States v. Salamanca, 990 F.2d 629 (D.C. Cir. 1993)* (finding no violation of compulsory process rights in excluding a psychologist's testimony as to whether the defendant had the mental state necessary to commit the crime; the Judge permitted the expert to opine about the capacities of a person of the purported mental condition of the defendant who had consumed the quantity of beer the defendant had on the night of the assault); *United States v. Blumberg, 961 F.2d 787 (8th Cir. 1992)* (*Rule 704(b)* does not violate the defendant's due process right to present relevant expert opinion evidence in support of his insanity defense; the Rule allows admission of every fact about the defendant's mental condition, including the expert's diagnosis, the characteristics of the condition, and the expert's opinion about the defendant's mental state and motivation at the time of the crime; it only forbids experts from telling the jury what its finding should be on the ultimate issue in the case; the Court also rejected an equal protection challenge, finding a rational basis for the distinction between criminal defendants -- to whom the Rule applies -- and

other litigants dealing with insanity issues).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 704 RULE 704

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704.03 Annotated Cases

[Go To Supp]

[1] Rule 704(a)

[a] Rule 704(a) -- Cause of Accident

Miksis v. Howard, 106 F.3d 754 (7th Cir. 1997) : Affirming a plaintiff's judgment in a personal injury action, the Court held there was no abuse of discretion in permitting a sleep deprivation expert to testify that the defendant driver was fatigued and that sleep deprivation was a primary cause of the accident. There were factual disputes on those issues for which the expert's testimony could be helpful.

Scheerer v. Hardee's Food Sys., 148 F.3d 1036 (8th Cir. 1998) : In a slip and fall case, the Court found no error when defense counsel was permitted to elicit from the plaintiff's friend that the friend had said, at the time of the accident, that the accident had been caused by the plaintiff's wearing slippery shoes. Because the friend's contemporaneous statement was rationally based on her own first-hand perceptions and reasonably would have aided the jury's understanding of a fact in issue, it was admissible under *Rule 701*. The Court concluded that "because Mrs. Fann's contemporaneous statement of opinion was 'otherwise admissible,' it was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact."

[b] Rule 704(a) -- Cause of Disease or Injury

Williams v. Wal-Mart Stores, Inc., 922 F.2d 1357 (8th Cir. 1990) : The Court reversed a judgment for the defendant in a personal injury action brought by a store customer who allegedly suffered back injuries when a shelf display collapsed on him. It was plain error to refuse to allow the plaintiff to ask his medical experts whether he experienced a trauma to his back. The question was not tantamount to asking whether in their opinion the alleged incident actually occurred.

[c] Rule 704(a) -- Civil Rights Cases

Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) : In a civil rights action by an arrestee who alleged that excessive force was used, the plaintiff's expert testified that the arresting officer had used "deadly physical force" that was "totally improper" and for which there was no "real legitimate reason" in the circumstances. The Court held that the expert's definition of physical force was an impermissible legal conclusion not substantially different from the statutory formulation charged to the jury and that the opinions that the plaintiff's conduct was not justified or warranted should have been excluded (but the error was harmless).

Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984) : Affirming a judgment for an inmate against prison guards in a civil rights suit, the Court found no error in the admission of expert testimony concerning the punitive nature of North Carolina's practice of using water hoses on inmates.

Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992) : In denying summary judgment to a sheriff sued for the alleged deprivation of a hostage's civil rights in his handling of negotiations with a gunman at the courthouse, the Trial Judge excluded the sheriff's affidavit regarding his objectives on the occasion as containing ultimate facts and admitted an affidavit by the plaintiff's expert on hostage negotiations that stated that the sheriff acted with deliberate indifference and conscious disregard. Reversing, the Court held that the sheriff's statement of his intent was not opinion testimony, but factual evidence of his mental state, and that the expert's opinions of the sheriff's state of mind would not be helpful to a jury.

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994) : The Court reversed a judgment against the City in a civil rights case, holding it was error for the plaintiff's expert in "police policies and practices" to testify that the lax discipline policies of the police department indicated that the City was "deliberately indifferent" to the welfare of its citizens, as that is a legal term for the ultimate question of liability to be decided by the jury. In *Heflin v. Stewart County, Tenn., 958 F.2d 709 (6th Cir. 1992)* , *reh'g granted on other grounds*, *968 F.2d 1 (6th Cir. 1992)* , the Court held that an expert who characterized the conduct of sheriff's personnel who found a detainee hanging in his cell as demonstrating deliberate indifference was merely emphasizing his view of the seriousness of the defendants' failures and not offering a legal conclusion. In *Shahid v. City of Detroit*, n1 a civil rights action brought for alleged failure to provide medical care to a jail inmate prior to his death, the Court held there was no error in excluding testimony by the plaintiff's expert that the defendant officers had been negligent, because the expert assumed a fact to be determined by the jury and because the expert's opinion amounted to an impermissible "legal conclusion."

Phillips v. Calhoun, 956 F.2d 949 (10th Cir. 1992) : Affirming a summary judgment for the defendant in a civil rights action by an attorney discharged by a city, the Court held that city personnel directors with experience in municipal personnel matters were properly permitted to give affidavits concerning the customary meaning and usage of critical terms in the city's charter and other personnel documents. The affiants were not stating legal conclusions, but only offering informed opinion concerning the real-world significance of the terms. See also *Zuchel v. City & County of Denver, Colo., 997 F.2d 730 (10th Cir. 1993)* (an expert in a § 1983 action against a municipality was properly permitted to testify that an officer's use of deadly force was inappropriate, where he did not give an opinion that the officer's conduct was unconstitutional). In *McEwen v. City of Norman, Okla.*, n2 a civil rights action alleging that excessive force was used during the chase and arrest of a motorcyclist after a collision with a police car, the Court noted that the defendant's expert witness on police procedures had rendered opinions that indicated to the jury the precise result they should reach on certain matters, such as the officers' intention in positioning their cars and whether they used excessive force as testified by others. At most, however, the testimony was not helpful, and the jury was not likely to be misled because of complete and explicit cautionary instructions, so there was no plain error in its admission.

[d] Rule 704(a) -- Criminal Cases

United States v. Glover, 265 F.3d 337 (6th Cir. 2001) : To prove that the defendant in a carjacking case took a motor vehicle that had been transported, shipped, or received in interstate or foreign commerce, an agent of the National Insurance Crime Bureau, who had expertise in interpreting vehicle identification numbers, testified, on the basis of the VIN, that the car had been manufactured abroad and transported to a local dealer who sold the vehicle. Affirming, the Court held that this testimony did not usurp the role of the jury, and was permissible to help the jury interpret the VIN to determine the place of manufacture of the victim's vehicle.

United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002) : The defendant, charged in connection with an incident involving four shootings, claimed that each occurred accidentally when people were struggling over a gun. The Trial Judge permitted a criminologist to describe several scenarios that can lead to an accidental discharge, but did not allow him either to give an opinion whether the shootings in this case were accidental or to identify facts in the witnesses' testimony that were consistent with accidental discharge. The Court found no abuse of discretion in the Judge's conclusions that the jury could determine, as a matter of "common sense," whether the shootings as described by the witnesses were accidental according to the expert's theories, and that the jury would not be assisted in that determination by any specialized knowledge.

[e] Rule 704(a) -- Damages

Salas v. Wang, 846 F.2d 897 (3d Cir. 1988) : In a medical malpractice case brought on behalf of a child who suffered severe brain damage, the Court concluded that it was not reversible error to permit a plaintiff's expert to testify as to aggregate damages, since the expert might have been able to assist the jury in performing calculations, such as a reduction of a lump sum award to present value. The Court rejected the argument that the expert's opinion might have an undue influence on the jury, concluding that the argument "is at odds with both the letter and the spirit of the federal rules, which encourage the use of expert testimony to render trials more rational and efficient."

Smith v. Ingersoll-Rand Co., 214 F.3d 1235 (10th Cir. 2000) : The Court affirmed a judgment for the plaintiff in a product liability action against the manufacturer of a machine for removing road pavement, holding there was no abuse of discretion in admitting testimony from a forensic economist regarding hedonic damages. There was a sufficient finding that the expert's testimony explaining the concept of hedonic damages was relevant and reliable, and the expert did not apply the facts of this case to the criteria he proffered or give his opinion of the hedonic damages appropriate in this case.

[f] Rule 704(a) -- Employment Discrimination Cases

Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669 (6th Cir. 2000) : Affirming a judgment for the plaintiff in her Title VII action for a hostile work environment, the Court found no error in admitting testimony by two agency officials who concluded that if the plaintiff's assertions of fact were true, then the plaintiff had been subjected to "sexual harassment" within the meaning of the internal policy of the employing agency. The Court noted that while lay testimony embracing an ultimate issue is specifically allowed by *Rule 704(a)*, it will seldom be helpful to the trier of fact. In this case, however, the witnesses were not giving testimony on an ultimate issue, as they did not refer to Title VII liability, but expressly addressed only the internal agency policy. The Judge's instructions were sufficient to cure any confusion between statutory and agency standards of "sexual harassment." In an age discrimination case, *Mitroff v. Xomox Corp.*, n3 the Court reversed a judgment for the plaintiff because witnesses testified that an assistant personnel manager for the defendant had stated that the corporation engaged in a pattern of age discrimination. The declarant was

not qualified as an expert on the subject, and as a lay witness, his opinion on the ultimate issue was, as usual, not helpful to the trier of fact. Furthermore, the evidence was highly prejudicial. In an age discrimination case, *Davis v. Combustion Eng'g, Inc.*, n4 the Court upheld the admission of expert testimony for the plaintiff by a witness who concluded that age was the reason for the termination of the plaintiff's employment. The Court indicated that the expert's conclusion that the discrimination was unlawful might have been objectionable because the expert used a legal criterion not clearly articulated, but it found that the expert's unfamiliarity with the governing federal statute had been plainly pointed out to the jury so that any error was harmless. In *Torres v. County of Oakland*, n5 the Court held that it was error (but harmless) for a witness, who had taken part in the selection of a person for a new supervisory position, to give an opinion as to whether the plaintiff had been discriminated against because of national origin. This called for an impermissible legal conclusion.

[g] Rule 704(a) -- Government Agents

United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) : The Court held it was error (but harmless) when a case agent was permitted to testify, "based on [our] investigation" or "[a]s far as our investigation determined," regarding the roles of certain participants, including the defendant, in a drug conspiracy. Although opinion testimony is not inadmissible simply because it embraces an ultimate issue, the agent's opinion that the defendant was a partner with another in receiving cocaine "was essentially telling the jury that he had concluded that Garcia was guilty of the crimes charged," and opinion testimony merely telling the jury what result to reach is inadmissible.

United States v. Mohney, 949 F.2d 1397 (6th Cir. 1991) : In a tax evasion prosecution, the Court held there was no abuse of discretion in permitting an IRS agent to opine that currency obtained in a business had not been reported as part of the gross receipts, as the opinion did not usurp the jury's function of determining guilt but was helpful to the jury in understanding the transactions and the agent's opinion that tax was due and owing.

United States v. Hughes, 15 F.3d 798 (8th Cir. 1994) : An expert testified that the purity level of crack cocaine found in the defendant's pocket was the same as the purity level of crack found in his trunk and that it is unusual to find two batches with the same purity level. Distinguishing *United States v. Arenal*, *infra*, the Court held that in this case, the jury was allowed to draw its own conclusion whether the two exhibits of crack were from the same source or batch. In *United States v. Arenal*, n6 the Court reversed a conviction for conspiracy to distribute cocaine, concluding that a police officer should not have been permitted to testify that cocaine would seem to have come from a common source because it was "cut" in the same way. The Court indicated that the officer could have properly testified that Inositol is used to cut cocaine, but that at the street level it was common to find various cutting agents used, and that the conclusion offered by the officer added nothing that would have helped the jury.

United States v. Kinsey, 843 F.2d 383 (9th Cir. 1988) : The Court affirmed cocaine convictions, holding that a detective was properly permitted to testify to an opinion that a defendant was involved in distributing drugs based upon the amount of cocaine that he had and its street value.

United States v. Nixon, 918 F.2d 895 (11th Cir. 1990) : The Court affirmed drug distribution conspiracy convictions, holding there was no error in denying a motion for mistrial after a detective used the term "conspiracy" in his testimony, as it was clear he was using the term as a factual, not a legal, conclusion and did not track unduly the statutory definition of the offense. In *United States v. Burchfield*, n7 the Court upheld convictions for counterfeiting offenses, finding that it was proper for a government agent to testify to the *modus operandi* of counterfeiters -- i.e., that it was common for conspirators to divide functions so that one carries a "bag" containing large sums of counterfeit money while another actually passes the counterfeit money.

[h] Rule 704(a) -- Identifications

United States v. Bice-Bey, 701 F.2d 1086 (4th Cir. 1983) : Upholding a conviction for credit card fraud involving a telephone order for electronic equipment, the Court found that an FBI agent was properly permitted to identify the voice on a tape as appellant's, even though one principal issue in the case was who made the fraudulent call. In *United States v. Sellers*, n8 the Court reversed a bank robbery conviction because the defendant's photo expert was not permitted to testify that the defendant was not the person shown in bank surveillance pictures, although the government's expert was allowed to testify that identification of the bandit by these particular pictures was impossible. The Court, citing *Rule 704*, assumed both opinions were admissible.

[i] Rule 704(a) -- Knowledge or Intent

United States v. Rea, 958 F.2d 1206 (2d Cir. 1992) : The Court held, in a prosecution for willful evasion of gasoline excise taxes, that it was error (but harmless) to admit testimony by a lay witness to the transactions at issue that a defendant "had to" know that the purpose of the scheme for invoicing sales was to permit tax evasion. Even though the showing of a rational basis for the opinion was inadequate at the time it was offered, that foundation was eventually supplied; however, the opinion was not helpful to the jury, who not only knew what the witness had described but also knew more of the defendant's industry experience and of the contents of the defendant's records than the witness.

Bauman v. Centex Corp., 611 F.2d 1115 (5th Cir. 1980) : The Court found that an expert's opinion referring to the intent or knowledge of corporate management would have been helpful to the jury.

[j] Rule 704(a) -- Medical Witnesses

United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980) : In a prosecution for assault resulting in serious bodily injury, the Court upheld the introduction of a doctor's testimony that the victim suffered serious bodily injury, where the doctor made it clear which facts he relied upon and the defendant was free to cross-examine the doctor.

[k] Rule 704(a) -- Negligence and Recklessness

Hermitage Indus. v. Schwerman Trucking Co., 814 F. Supp. 484 (D.S.C. 1993) : The Court granted the plaintiff's *in limine* motion to preclude the defendant's expert in a negligence case from testifying that the plaintiff was "negligent" and that the plaintiff's conduct was a "direct, proximate and efficient cause" of the explosion. The Judge held that "testimony by a witness in the form of a legal conclusion is clearly inadmissible."

Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983) : The Court affirmed a judgment in favor of a bulldozer operator who sued a gas pipeline operator claiming that the operator's negligence in placing the pipeline resulted in its being struck by the bulldozer. The Court upheld the exclusion of an expert opinion, based on all the evidence and the exhibits, as to the cause of the accident. Although *Rule 704* removed restrictions on testimony as to ultimate issues, it did not open the door to "questions which would merely allow the witness to tell the jury what result to reach." Moreover, the Court expressed concern that when the expert was permitted to testify as to whether the plaintiff was following proper practices in handling the bulldozer, the expert was being asked to give an opinion as to the legal, rather than factual, cause of the accident. See also *Matthews v. Ashland Chem., Inc.* n9(the Trial Judge did not err in excluding, as a legal conclusion, expert testimony that the user's premises were "ultrahazardous or unreasonably dangerous").

United States v. Sheffey, 57 F.3d 1419 (6th Cir. 1995) : The defendant was charged with murder and assault after an automobile collision in which he was driving impaired with prescription drugs and alcohol. At trial eyewitnesses were asked whether the defendant had driven "recklessly, in extreme disregard of human life." The Court held that although the question embraced the terms of the jury instruction on malice aforethought, these terms do not have a separate, distinct, and specialized meaning in the law different from that present in the vernacular, so the witnesses were not being called on to provide unhelpful legal conclusions. In *McGowan v. Cooper Indus.*, n10 the Court reversed a judgment for the manufacturer of an air compressor that exploded and injured the plaintiffs, holding that an expert witness was properly barred from testifying that the manufacturer's representative was negligent. The expert should have been permitted to testify to industry standards, but the jury could understand those standards and needed no help to decide whether the representative in this case owed a duty and breached it.

Parker v. Williams, 855 F.2d 763 (11th Cir. 1988) , *vacated on other grounds*, *862 F.2d 1471 (11th Cir. 1989)* : In a suit by a former prisoner who alleged that a jailer sexually assaulted her, the Court held that it was not reversible error to permit the plaintiff's expert to testify that the sheriff was grossly negligent in hiring the jailer. The Court stated that "[t]his is a close question," but it noted that the Trial Judge has wide discretion in admitting expert testimony and in instructing the jury on the proper weight to be given such testimony and on the meaning of legal terms. The Court found that the Judge's instruction made it difficult to conclude that the expert was testifying in terms of inadequately explored legal criteria. The Court added that gross negligence "is not exclusively a legal conclusion; it also encompasses a finding of ultimate fact." In *Haney v. Mizell Mem. Hosp.*, n11 the Court affirmed a judgment for defendants in a diversity medical malpractice action, holding there was no error in preventing one of the plaintiff's experts from giving an opinion as to whether "the doctor who made the diagnosis that you've read in this case ... was negligent or not." One possible ground for exclusion was the absence of evidence that the witness was familiar with the state standards of care and the question to the expert failed to demonstrate clearly what legal criteria he was purporting to use.

[l] Rule 704(a) -- Opinions as to Reasonableness, Necessity, etc.

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : In the prosecution of a deputy sheriff for shooting an unarmed, apprehended suspect in the back, the chief of police of a nearby town, the chief deputy sheriff, and another sheriff, all of whom were involved in the apprehension of the suspect, testified that the shooting was not reasonable. The Court held that the testimony did not violate *Rule 704(b)* because the witnesses did not testify as to the defendant's mental state, but it did violate *Rule 704(a)* because "[r]easonableness under the *Fourth Amendment* or Due Process Clause is a legal conclusion." The error was harmless, however. In an action for refund of penalties assessed for late payment of estate tax liabilities, *Estate of Sowell v. United States, 198 F.3d 169 (5th Cir. 1999)* , the plaintiff claimed a statutory excuse, that it was not liable because its delinquency was "due to reasonable cause and not due to willful neglect." At trial the Estate sought to ask its expert witness several hypothetical questions concerning what a reasonable fiduciary would do when confronted with facts identical to those in the case. The Court held there was no abuse of discretion in precluding the questions, since they called for responses constituting a legal opinion "telling the trier of fact what to decide." *Salas v. Carpenter* n12 was a suit against a sheriff for the alleged deprivation of a hostage's civil rights in his handling of negotiations with a gunman at the courthouse. In denying summary judgment to the sheriff, the Trial Judge excluded the sheriff's affidavit regarding his objectives on the occasion as containing ultimate facts and admitted an affidavit by the plaintiff's expert on hostage negotiations which stated that the sheriff acted with deliberate indifference and conscious disregard. Reversing, the Court held that the sheriff's statement of his intent was not opinion testimony, but factual evidence of his mental state, and that the expert's opinions of the sheriff's state of mind would not be helpful to a jury.

Simon v. St. Louis Co., 735 F.2d 1082 (8th Cir. 1984) : The Court affirmed a judgment against a former police officer who alleged that the County violated the Rehabilitation Act in failing to reinstate him. The plaintiff was a paraplegic as a result of a gunshot wound sustained in the line of duty. The Court found no error in allowing three

police department experts to testify on the "reasonableness, necessity and legitimacy" of two challenged department policies.

United States v. Castro, 887 F.2d 988 (9th Cir. 1989) : The Court found no error in the admission of expert testimony in a prosecution for misapplication of bank funds to the effect that loans should not have been granted. It concluded that such evidence did not purport to speak to the defendant's mental state, but focused on the creditworthiness of the borrowers.

Samples v. City of Atlanta, 916 F.2d 1548 (11th Cir. 1990) : The Court held there was no error in permitting an expert on use of force to testify in a § 1983 action brought by parents of a youth fatally shot by a police officer whether it was reasonable for the officer to discharge his firearm when the victim charged him with a knife. Although the literal wording of the question tended to call for an answer invading the province of the jury, the questions leading up to the testimony and the manner in which the expert answered the question properly informed the jury that the expert was testifying regarding prevailing standards in the field of law enforcement. In a wrongful death action, *Hanson v. Waller*, n13 the Court held that an officer who reconstructed the accident was properly permitted to testify that neither participant did anything wrong or anything that contributed to the accident. In *United States v. Gold*, n14 the Court held that testimony by a person experienced in the eyewear business that the volume of cataract eyewear sales at a particular place was "excessive" was properly admitted.

[m] Rule 704(a) -- Opinions on Legal Matters

[i] Rule 704(a) -- Civil Cases

Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207 (D.C. Cir. 1997) : A deaf person alleged that a transit police officer, who investigated an altercation the plaintiff had with a bus driver, had violated the Americans with Disabilities Act. The Court held it was error to accept from the plaintiff's expert testimony that the officer's means of communications with the plaintiff were not "as effective" as the officer's means of communication with others. The expert grossly misstated the law as to what constitutes "as effective" communication, and the quoted phrase as used in the regulations is a term of art with a meaning separate and distinct from the vernacular. For the same reason, the expert's testimony that the officer was not "trained to proficiency" was impermissible.

Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92 (1st Cir. 1997) : In a civil rights action by municipal employees allegedly terminated because of their political affiliations, the Court held it was error (but harmless) to permit an expert witness to testify as to what the law required and that her examination of the plaintiffs' personnel records led to the conclusion that they had been improperly hired or renewed in the first place. The witness' testimony was not of factual conclusions that could aid the jury but of questions of law.

Fiataruolo v. United States, 8 F.3d 930 (2d Cir. 1993) : In an action for refund of tax penalties assessed against "responsible persons" for a contractor's unpaid withholding taxes, the Court held there was no error in permitting an expert to opine that the plaintiff was not a responsible person under the statute, as the opinion was not a simple bald assertion of law but based on a detailed explanation of the factual situation. In *Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992)* , a civil rights action by an arrestee who alleged that excessive force was used, the plaintiff's expert testified that the arresting officer had used "deadly physical force" that was "totally improper" and for which there was no "real legitimate reason" in the circumstances. The Court held that the expert's definition of physical force was an impermissible legal conclusion not substantially different from the statutory formulation charged to the jury and that the opinions that the plaintiff's conduct was not justified or warranted should have been excluded (but the error was

harmless).

Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986) : In a securities action, the Court held that testimony of legal counsel to a partnership as to the meaning and applicability of securities laws to transactions at issue was not admissible. It reasoned that *Rule 704(a)* abolishes the proscription on ultimate issue opinions, "but it should not, and does not, permit the expert witness to usurp the province of the judge."

Askanase v. Fatjo, 130 F.3d 657 (5th Cir. 1997) : Affirming summary judgment against a bankruptcy trustee asserting claims against the debtor's directors and others, the Court held there was no abuse of discretion in precluding a lawyer from testifying that the defendants had breached their fiduciary duties. Although a lawyer may testify as to legal matters involving questions of fact, the opinions excluded in this case went to issues for the trier of fact to decide. In a tax case, *Snap-Drape, Inc. v. Commissioner, 98 F.3d 194 (5th Cir. 1996)* , the taxpayer sought to admit two expert witness reports supporting the taxpayer's construction of the law. The Court held that the Tax Court properly excluded these reports. The taxpayer's reliance on *Rule 704(a)* was misplaced, because that Rule "does not allow an expert to render conclusions of law."

Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557 (7th Cir. 2003) : The City shut off the water supply to a group home for developmentally disabled adults, claiming that the owners had failed to fulfill an agreement to extend the water and sewage lines to the far border of the property. In an action under federal discrimination acts, the plaintiffs offered testimony from a law professor who worked in urban planning that, *inter alia,* the City's action violated the Fair Housing Amendments Act and the owner had no duty to extend the water and sewage lines. The Court found no abuse of discretion in exclusion of the testimony, since "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible," and the testimony about the owner's duty was also irrelevant to the question whether the City's motivation was discriminatory against disabled people.

Alumbaugh v. Union Pac. R.R., 322 F.3d 520 (8th Cir. 2003) : In an action for personal injuries caused when a motorcycle overturned on a railroad grade crossing, testimony by the plaintiff's expert, who was knowledgeable about the repair of grade crossings of this particular type, "to the effect that, before the accident, the crossing had been in a state of disrepair for a substantial period of time, so that Union Pacific should have known of the condition and taken remedial action," was held inadmissible because it would have "invade[d] the province of the jury." The Court reversed a judgment for the defendant, holding that the jury was entitled to hear the expert's opinion about the crossing's condition, as "the jury could have reasonably inferred, from the state of deterioration, that the condition had been present long enough to be noticed by a reasonable landowner." In *Estes v. Moore, 993 F.2d 161 (8th Cir. 1993)* , the Court affirmed a judgment for an arresting officer alleged by the plaintiff to have used excessive force, holding that testimony by an expert as to whether probable cause existed for the arrest was no more than a legal conclusion. In *Police Ret. Sys. v. Midwest Invest. Advisory Serv.*, n15 the Court affirmed in part the judgment in a fraud action brought by a retirement system in connection with investment of its contributions, holding that the plaintiff's expert went too far in giving testimony as to the meaning of the Securities Act anti-fraud provision. Although the error allowed the expert to usurp the Judge's place in explaining the law, the error was harmless, because the defendant's experts also testified regarding the provision and there were documents in evidence from the SEC interpreting and explaining the provision. In *Harris v. Pacific Floor Mach. Mfg. Co.*, n16 a suit against the manufacturer of a floor buffer, the Court held that an injured minor's expert was properly precluded from giving an opinion on the ultimate question of the adequacy of warnings on a floor buffer that the minor was operating at the time of an accident. The expert was permitted to explain the criteria he would use in forming an opinion, and the jury was left to apply the criteria to the facts of the case.

Phillips v. Calhoun, 956 F.2d 949 (10th Cir. 1992) : The Court affirmed a summary judgment for the defendant in

a civil rights action by an attorney discharged by a city, holding that city personnel directors with experience in municipal personnel matters were properly permitted to give affidavits concerning the customary meaning and usage of critical terms in the city's charter and other personnel documents. The affiants were not stating legal conclusions but only offering informed opinion concerning the real-world signification of the terms. In *A.E. v. Independent School Dist. No. 25, 936 F.2d 472 (10th Cir. 1991)* , an action under the Education for All Handicapped Children Act, the Court held that any error in admitting testimony by the plaintiff's expert that the child's problems were not of such magnitude as to meet the federal definition of "seriously emotionally disturbed" was harmless. In a civil rights suit, *Specht v. Jensen*, n17 the Court reversed a judgment for the plaintiffs, who alleged that the defendants unlawfully searched their home and office. Expert testimony by an attorney that a search took place, that there was no consent, and that the search was illegal *per se* usurped the province of the Judge. The dissenting Judges observed that the jury was instructed that it was bound by the Judge's instructions on the law, and that the expert testimony was not necessarily improper, because it applied the law to the facts of the case and might have assisted the jury in understanding the issues.

Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537 (11th Cir. 1990) : In an action for breach of a fiduciary responsibility insurance contract, the plaintiff offered expert testimony about the interpretation of the policy and the scope of the insurer's duty to defend. The Court reversed a judgment for the plaintiff, holding that the expert's testimony was an impermissible legal conclusion. In *Parker v. Williams*, n18 a suit by a former prisoner who alleged that a jailer sexually assaulted her, the Court held that it was not reversible error to permit the plaintiff's expert to testify that the sheriff was grossly negligent in hiring the jailer. The Court stated that "[t]his is a close question," but it noted that the Trial Judge has wide discretion in admitting expert testimony and in instructing the jury on the proper weight to be given such testimony and on the meaning of legal terms. The Judge's instruction made it difficult to conclude that the expert was testifying in terms of inadequately explored legal criteria. The Court added that gross negligence "is not exclusively a legal conclusion; it also encompasses a finding of ultimate fact." In *Haney v. Mizell Mem. Hosp.*, n19 the Court affirmed a judgment for defendants in a diversity medical malpractice action, holding there was no error in preventing one of the plaintiff's experts from giving an opinion as to whether "the doctor who made the diagnosis that you've read in this case ... was negligent or not." One possible ground for exclusion was the absence of evidence that the witness was familiar with the state standards of care and the question to the expert failed to demonstrate clearly what legal criteria he was purporting to use.

[ii] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases

[A] Rule 704(a) -- Firearms

United States v. Just, 74 F.3d 902 (8th Cir. 1996) : In a prosecution for possession of an unregistered machinegun, the Court held there was no abuse of discretion in permitting the government's expert witness to testify that the firearm in question was a "machinegun" as that term is used in the statute. The jury heard evidence about the firearm's characteristics and conflicting expert opinions on whether it was a machinegun. The testimony from the government expert was helpful, in part because the defendant's expert admitted that he was not familiar with the statutory definition of the term.

United States v. Buchanan, 787 F.2d 477 (10th Cir. 1986) : The Court affirmed convictions for possessing an unregistered firearm and conspiracy, finding that a government witness was properly permitted to testify that a device was required to be registered. The testimony went to an ultimate fact but could have helped the jury.

[B] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Fraud

United States v. Scop, 846 F.2d 135 (2d Cir. 1988) : The Court reversed stock fraud convictions, concluding that

the government went beyond the proper bounds of expert testimony when an expert was permitted to testify that in his opinion individuals manipulated stock, engaged in a manipulative and fraudulent scheme, and were material participants. Such opinions, the Court concluded, "were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading," and "they could not have been helpful to the jury in carrying out its legitimate functions."

United States v. Izydore, 167 F.3d 213 (5th Cir. 1999) : The Court affirmed fraud convictions against defendants who conspired to loot a company in bankruptcy, finding no reversible error in allowing the bankruptcy trustee to testify, regarding money owed by the defendants to the company, that it "was taken, and it was not legally taken in my opinion." The statement was not so much an opinion whether the defendants were guilty of the charged crimes as an opinion that the money properly belonged to the company; in any event, the single remark was at most harmless error.

United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984) : The Court reversed a conviction for fraudulently appropriating money belonging to an estate for which he was receiver. It found error in the admission of a Bankruptcy Judge's testimony as to whether bankruptcy law in effect at the time of the alleged misappropriation allowed an interim payment to a receiver, since "[a] jury listening to a Bankruptcy Judge testify as to a question of bankruptcy law would be expected to give special credence to such testimony."

United States v. Van Dyke, 14 F.3d 415 (8th Cir. 1994) : The Court reversed a conviction for bank fraud because the Trial Judge precluded a qualified defense witness from explaining or clarifying the significance of FDIC regulations, although a prosecution witness had been permitted to testify how the regulation can be violated and offer his opinion that the defendant had committed violations.

United States v. Simpson, 7 F.3d 186 (10th Cir. 1993) : In a prosecution for misapplication of bank funds, the Court held it was a close question whether it was proper to preclude the defendant's expert on banking practices from expressing an opinion as to whether the charged transactions constituted misapplication or concealment of funds. Particularly because the defense was given considerable latitude in asking whether the transactions conformed with standard banking practices, the ruling below was not an abuse of discretion.

United States v. Gold, 743 F.2d 800 (11th Cir. 1984) : The Court affirmed Medicare fraud convictions, as it found that testimony by Medicare officials concerning whether particular claims were eligible for reimbursement was properly admitted.

[C] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Miscellaneous Cases

United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000) : In a racketeering prosecution, the Court found no abuse of discretion in permitting an agent to express an opinion that the defendant's organization had been involved in narcotics trafficking. The opinion was reasonably based on the agent's perceptions and expertise, and was not phrased in statutory terms such as "enterprise" or "racketeering activity." Affirming a conviction for conspiracy, bank fraud, and corrupt payments in *United States v. Duncan, 42 F.3d 97 (2d Cir. 1994)* , the Court held there was no error in admitting testimony by an IRS agent to the effect that falsified IRS filings "obstruct[] and defeat[] [the] entire process," as the expert's testimony did not repeatedly use legally specialized terms and it was based on his personal knowledge.

United States v. Barile, 286 F.3d 749 (4th Cir. 2002) : In his trial for making materially false statements to the

Food and Drug Administration, the defendant sought to impeach a government witness with documents created by the FDA's Office of Criminal Investigation during its investigation of a submission by the defendant's company to the FDA concerning a product enhancement, which made reference to matters the reviewer considered significant. Reversing, the Court held it was error to exclude the evidence on the ground that it amounted to an opinion on a jury issue, since nothing in the FDA documents gave the reviewer's opinion on what constitutes a violation of the false statements statute, or even what is legally required for the company's original submission, and the statements would greatly assist the jury in determining whether any false statements were material. The Court also held that testimony by the defendant's expert, who concluded that the data submitted by the defendant to the FDA was "not unreasonable," was not a legal conclusion and did not invade the province of the jury.

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : In a civil rights prosecution of a deputy sheriff for shooting an unarmed, apprehended suspect in the back, the chief of police of a nearby town, the chief deputy sheriff, and another sheriff who were involved in the apprehension of the suspect all testified that the shooting was not reasonable. The Court held that the testimony did not violate *Rule 704(b)* because the witnesses did not testify as to the defendant's mental state, but it did violate *Rule 704(a)* because "[r]easonableness under the *Fourth Amendment* or Due Process Clause is a legal conclusion." The error was harmless, however.

United States v. Two Eagle, 318 F.3d 785 (8th Cir. 2003) : The defendant was convicted of assault involving serious bodily injury, which requires "extreme physical pain" or "protracted and obvious disfigurement." The Court found no abuse of discretion in permitting the victims' doctors to testify that the injuries to the victims included disfigurement and extreme physical pain, noting that "an expert, as distinguished from a lay witness, may express his opinion on the ultimate jury question." It also reasoned that to exclude such testimony "would be to render a medical expert's testimony generally inadmissible if the medical expert used common descriptive terms that also appear in the statute." The Court noted that medical and legal terms "often overlap, and a medical expert cannot be expected to use different words merely to avoid this problem." In *United States v. Bednar*, n20 the Court affirmed a former stockbroker's convictions for various offenses, including failure to make and keep a required record. Citing *Rule 704*, the Court held that it was permissible for an expert from the SEC to testify that an account card for a margin account was one of the records a broker was required to keep.

United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1994) : The Court held that it was error (but harmless) in a Clean Water Act prosecution to permit experts for both sides to testify regarding how a permit should be construed and to allow the jury to decide which construction was correct.

[D] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Taxes

United States v. Fogg, 652 F.2d 551 (5th Cir. 1981) : The Court held there was no error for an IRS agent to testify about the correct tax treatment of certain transactions, where the opinion was based on facts in evidence and the Trial Judge instructed the jury on the weight to be given expert testimony.

United States v. Jungles, 903 F.2d 468 (7th Cir. 1990) : In the defendant's trial for evading taxes by a scheme in which he changed his status to "independent contractor," his expert was precluded from stating the legal principles surrounding the "independent contractor" relationship and from giving an opinion whether in a hypothetical set of circumstances a person in the defendant's position would be so considered. The Court held that exclusion of testimony regarding the principles was proper, but the opinion should not have been excluded. The error was harmless, however.

United States v. Clardy, 612 F.2d 1139 (9th Cir. 1980) : An IRS agent was allowed to testify that interest was not deductible in this tax case.

[n] Rule 704(a) -- Patent Cases

Symbol Techs., Inc. v. Opticon, Inc., 935 F.2d 1569 (Fed. Cir. 1991) : Affirming a judgment of infringement of a patent for laser bar-code scanners, the Court held there was no error in permitting the plaintiff's expert to testify that there was infringement without a foundation showing how each element of the device was infringed. Although claim interpretation is a question of law, an expert may give an opinion on the ultimate question of infringement. Challenging the factual underpinnings of the expert's testimony was the defendant's responsibility during cross-examination.

[o] Rule 704(a) -- Product Liability Cases

Garrett v. Desa Indus., 705 F.2d 721 (4th Cir. 1983) : The Court reversed a judgment for the defendant manufacturer in an action seeking damages for injuries suffered when a carpenter was injured by the discharge of a stud driver. The Court found it was an abuse of discretion to preclude a mechanical engineer from testifying that the driver was negligently designed and manufactured.

Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988) : In a suit against the manufacturer of a floor buffer, the Court held that an injured minor's expert was properly precluded from giving an opinion on the ultimate question of the adequacy of warnings on a floor buffer that the minor was operating at the time of an accident. The expert was permitted to explain the criteria he would use in forming an opinion, and the jury was left to apply the criteria to the facts of the case. In *Strong v. E.I. DuPont de Nemours Co.*, n21 the Court affirmed judgments for defendants in a product liability case, approving a ruling that prevented an expert from testifying that various warnings concerning the defendants' products were so inadequate as to make the products unreasonably dangerous. The Judge had properly relied upon the Advisory Committee's Note to *Rule 704* in reasoning that the form of the questions was bad and that the questions were too simplistically phrased to be helpful to the jury.

Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987) : The Court affirmed a judgment against a manufacturer of a machine in a product liability action, finding no error in permitting the plaintiff's expert to testify that the machine was "unreasonably dangerous beyond the expectation of the average user," and that the defendant "acted recklessly" in producing and distributing it. Although it recognized that this particular testimony was not helpful, the Court observed that the facts were technical and the expert explained the bases for his opinions in sufficient detail to permit the jury to independently evaluate his conclusions.

[p] Rule 704(a) -- Unhelpful Opinions

Kostelecky v. NL Acme Tool/NL Indus., 837 F.2d 828 (8th Cir. 1988) : Although the Court affirmed a judgment for a tool company in an action by a worker who was injured in an accident on an oil rig on which the company was performing work, it found that an accident report by a coworker was erroneously admitted. The report stated that the accident was the plaintiff's own fault, and as such was "evidence that merely tells the jury what result to reach." In *United States v. Valverde*, n22 a prosecution for conspiracy to escape from federal custody, the Court held that the Trial Judge properly barred the defendant's corrections expert from testifying that tape-recorded statements were consistent with nonserious conversations between guards and inmates. It concluded that the defendant "essentially wanted to ask the expert to tell the jury whether his conversations with the guards were in fact bribery attempts," and "[t]his was precisely the issue before the jury."

United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002) : The defendant, charged in connection with an incident involving four shootings, claimed that each occurred accidentally when people were struggling over a gun. The Trial Judge permitted a criminologist to describe several scenarios that can lead to an accidental discharge, but did not allow him either to give an opinion whether the shootings in this case were accidental or to identify facts in the witnesses' testimony that were consistent with accidental discharge. The Court found no abuse of discretion in the Judge's conclusions that the jury could determine, as a matter of "common sense," whether the shootings as described by the witnesses were accidental according to the expert's theories, and that the jury would not be assisted in that determination by any specialized knowledge. In *Little Oil Co. v. Atlantic Richfield Co.*, n23 the Court affirmed a judgment for a franchiser sued by a franchisee, holding that the Trial Judge properly barred an expert, whose testimony totaled 400 pages, from presenting conclusions regarding three ultimate facts. It reasoned that the expert had provided all the information that the jury needed to draw its own conclusions.

Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987) : The Court affirmed a judgment against a manufacturer of a machine in a product liability action, finding no error in permitting the plaintiff's expert to testify that the machine was "unreasonably dangerous beyond the expectation of the average user," and that the defendant "acted recklessly" in producing and distributing it. Although it recognized that this particular testimony was not helpful, the Court observed that the facts were technical and the expert explained the bases for his opinions in sufficient detail to permit the jury to independently evaluate his conclusions.

[2] Rule 704(b)

[a] Rule 704(b) -- Constitutional Challenges

United States v. Salamanca, 990 F.2d 629 (D.C. Cir. 1993) : The Court affirmed a conviction for assaulting a federal officer, holding there was no violation of compulsory process rights in excluding a psychologist's testimony as to whether the defendant had the mental state necessary to commit the crime. The Court noted that the Judge permitted the expert to opine about the capacities of a person of the purported mental condition of the defendant who had consumed the quantity of beer the defendant had on the night of the assault.

United States v. Blumberg, 961 F.2d 787 (8th Cir. 1992) : Affirming convictions for transporting and possessing stolen property, the Court held that the Rule did not violate the due process right to present relevant expert opinion evidence in support of an insanity defense. The Rule allows admission of every fact about the defendant's mental condition, including the expert's diagnosis, the characteristics of the condition, and the expert's opinion about the defendant's mental state and motivation at the time of the crime; it only forbids experts from telling the jury what its finding should be on the ultimate issue in the case. The Court also rejected an equal protection challenge, finding a rational basis for the distinction between criminal defendants and other litigants dealing with insanity issues.

United States v. Austin, 981 F.2d 1163 (10th Cir. 1992) : Affirming a conviction for assaulting a correctional officer in a case in which sanity was disputed, the Court held that a government expert was properly permitted to testify to a current diagnosis of the defendant's mental condition, and it rejected a constitutional challenge to the Rule's limitations on expert testimony.

United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986) : Affirming a bank robbery conviction, the Court found that *Rule 704(b)* did not unduly restrict the defendant in the preparation of his defense in violation of the *Fifth*

Amendment. In *United States v. Alexander*, n24 the Court found that the *Rule 704(b)* restriction on expert testimony was rational, but advised that as long as expert testimony is not impermissible opinion as to legal sanity or insanity, Courts should be liberal in admitting testimony.

[b] Rule 704(b) -- Cross-Examination

United States v. Cox, 826 F.2d 1518 (6th Cir. 1987) : Affirming a conviction for armed robbery, the Court held that the government did not improperly examine a defense expert who testified to the defendant's capacity to conform his conduct to the requirements of law.

United States v. Porter, 842 F.2d 1021 (8th Cir. 1988) : Affirming a conviction for concealing a mortgaged tractor with intent to defraud, the Court concluded that the government did not violate the Rule by asking a defense expert, who testified in support of an insanity defense that the defendant's mental disorders could impair an ability to know right from wrong, whether she agreed with a government psychologist's conclusion that the defendant could distinguish right from wrong. The Court reasoned that the government could respond to the testimony elicited on direct examination and that, even if the cross-examination exceeded the bounds permitted by *Rule 704(b)*, the error was harmless.

[c] Rule 704(b) -- Hypotheticals Mirroring the Evidence

[i] Mental Conditions

United States v. Levine, 80 F.3d 129 (5th Cir. 1996) : Affirming bank robbery and firearm convictions, the Court found that the government properly elicited opinion testimony from its expert psychologist. The prosecutor asked the expert to assume facts that mirrored the events of the bank robbery, and elicited the expert's opinion that the facts were inconsistent with behavior that would be expected from someone suffering from bipolar disorder, the mental condition claimed by the defendant. The Court stated that hypothetical questions mirroring the fact pattern of the evidence are violative of *Rule 704(b)* only "when the answering testimony contains a necessary inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." In this case, the expert did not offer such an opinion; rather, "the expert's testimony focused on whether facts similar to those in evidence were consistent with the conduct of a hypothetical person suffering a severe manic episode."

United States v. Manley, 893 F.2d 1221 (11th Cir. 1990) : The defendant in a bank robbery case attempted to support his insanity plea by asking as a hypothetical question whether a person suffering from manic depression would be able to appreciate the nature and quality or wrongfulness of their actions; after an objection to the hypothetical question was sustained, he offered evidence that he was suffering from the disorder. The Court held that objection to the thinly-veiled hypothetical question was properly sustained because it not only assumed facts that identified the defendant but also directly tracked the language of the insanity statute.

[ii] Rule 704(b) -- Hypotheticals Mirroring the Evidence -- Mental Elements

United States v. Smart, 98 F.3d 1379 (D.C. Cir. 1996) : The Court found error (albeit harmless) where a law enforcement agent was permitted to testify in a narcotics case, on the basis of "hypothetical" facts identical to those in the case, that the facts "met the elements" of drug distribution. The Court recognized that the witness never referred directly to the defendant's "intent," but he "might as well" have done so given the reference to the "elements" of drug trafficking. In a drug trafficking case, *United States v. Toms, 136 F.3d 176 (D.C. Cir. 1998)* , the prosecutor presented an expert law enforcement officer with a hypothetical tracking the facts of the defendant's arrest and asked about the respective roles of the defendant as driver and his companion, who was sitting on top of a gun, in a car containing drugs

and cash. The Court repeated its disapproval of this method of questioning, but found no abuse of discretion in permitting the expert to testify that the driver in such a case was the supplier and the other man the enforcer, since the answer was responsive to the question without purporting to describe the defendant's "intent" to distribute drugs. In *United States v. Boyd, 55 F.3d 667 (D.C. Cir. 1995)* , the Court reversed a conviction for possession with intent to distribute cocaine, after a law enforcement officer was allowed to testify that, in his opinion, the hypothetical facts posed by the prosecutor showed "possession with intent to distribute." The hypothetical facts exactly mirrored the facts leading up to the defendant's arrest. While law enforcement agents are permitted to testify to the *modus operandi* of drug dealers, the Court stated that it had never held "that the Government may simply recite a list of 'hypothetical' facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics."

United States v. Mancillas, 183 F.3d 682 (7th Cir. 1999) : At a trial for marijuana distribution, the DEA expert, given a hypothetical that mirrored the facts of the case and asked whether the marijuana in such a hypothetical was being held for distribution or for personal consumption, answered that "it's for distribution." The Court found no error, concluding that the expert's opinion "was based on his knowledge of criminal practices generally, and not on some special knowledge of Mancillas' mental process."

[d] Rule 704(b) -- Knowledge

United States v. Willis, 61 F.3d 526 (7th Cir. 1995) : Affirming a conviction for unlawful possession with intent to distribute marijuana, the Court found no error when a law enforcement agent was permitted to testify that he had never had a case "where the courier didn't know what he was carrying." The Court reiterated the Circuit's position that *Rule 704(b)* does not limit law enforcement opinion testimony, so long as it is made clear that the opinion "is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes."

United States v. Vasquez, 213 F.3d 425 (8th Cir. 2000) : Officers made a controlled delivery to the defendant of a package as to which a drug-sniffing dog had alerted in a FedEx parcel sorting station. At trial the defendant claimed he did not know the package contained drugs. A government expert testified that drug traffickers do not typically use couriers who are unaware they are transporting drugs. Affirming, the Court found no abuse of discretion in admission of the testimony, since it included no improper opinion concerning the defendant's personal knowledge.

United States v. Campos, 217 F.3d 707 (9th Cir. 2000) : The defendant was convicted for importation and possession of marijuana with intent to distribute, after she crossed over from Tijuana in a van that had a false compartment full of marijuana. The Court held that there was no plain error in permitting a Customs agent to testify that in his opinion an organization trafficking in marijuana would not entrust 151 pounds of the drug to a courier who did not know what she was transporting. The majority noted that it had not approved of such evidence in a noncomplicated case in which a proper objection was made. A dissenting Judge argued that such testimony it clearly amounted to an opinion on the mental state of the defendant and the error was plain.

[e] Rule 704(b) -- Law Enforcement Agents

See also annotations in *§ 704.03[2][c]*, "Hypotheticals Mirroring the Evidence," *§ 704.03[2][d]*, "Knowledge," and *§ 704.03[2][k]*, "Specific Intent."

[i] Drug Cases

United States v. Bailey, 319 F.3d 514 (D.C. Cir. 2003) : In a narcotics prosecution, a detective testifying as an expert stated that "no one would want to tag along [on a large-scale drug transaction] who was an innocent person." The Court found no plain error under *Rule 704(b)* in admitting this evidence, since the expert mostly testified to general information about narcotics operations and made clear that his testimony was not based on any knowledge of the defendant's conduct, but rather on his prior experience in narcotics interdiction. Thus, the jury was made aware "that the expert was not qualified to testify to the ultimate issue of intent." In *United States v. Watson, 171 F.3d 695 (D.C. Cir. 1999)* , although it reversed a conviction for drug possession with intent to distribute on other grounds, the Court found no error in the admission of testimony by an expert on drug trafficking that the 100 grams of cocaine base attributed to the defendant would contain 700 "dosage units" and that someone possessing the "equivalent of 700 bags of crack cocaine is in the business of making money selling drugs." *Rule 704(b)* proscribes only responses suggesting some special knowledge of the defendant's mental processes, not general testimony regarding the *modus operandi* of drug dealers. In *United States v. White*, n25 the Court affirmed convictions arising out of a drug conspiracy, and found no error in admitting the testimony of a law enforcement agent concerning the *modus operandi* of individuals involved in drug trafficking. The prosecutor carefully avoided any of the "mirroring hypotheticals" that had concerned the Court in other cases, and the testimony constituted general background testimony on the structure and function of a drug conspiracy. In *United States v. Conyers*, n26 the Court held that *Rule 704(b)* was not violated where the law enforcement agent testified that the sort of packaging used by the defendant was "consistent with drug distribution in the District of Columbia" and that the gun found on the defendant was the weapon of choice among local drug dealers. The testimony did not "speak directly to the guilt or innocence of the accused." In *In re Sealed Case*, n27 the Court affirmed drug-related convictions, holding there was no error in permitting the prosecution to ask a detective whether he had an opinion as to whether possession of a certain quantity of drugs was consistent with personal use or with intent to distribute. This was proper testimony about *modus operandi*; but it was error (albeit harmless) to permit the prosecution to ask a detective his opinion as to the purpose for which the defendant had drugs in his house, since this called for an impermissible opinion as to the defendant's intent.

United States v. DiMarzo, 80 F.3d 656 (1st Cir. 1996) : The Court affirmed convictions for a cocaine distribution conspiracy in which two defendants asserted they had not known a third was planning to conduct a drug deal, holding there was no abuse of discretion in permitting an undercover agent in the case to testify on redirect that in his experience innocent observers were not invited to accompany criminals engaged in completing a drug deal. The testimony did not implicate the opinion rules, since it was simply the witness' personal experience relating to a subject bearing directly upon the appropriateness of a jury inference, nor did it encroach on the jury's factfinding function regarding the ultimate issue of guilt. In *United States v. Valle, 72 F.3d 210 (1st Cir. 1995)* , a prosecution for possession of crack cocaine with intent to distribute, a narcotics detective testified that the quantity of crack found at the search site was consistent with distribution, as opposed to personal use. The Court noted that *Rule 704(b)* prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness' field of expertise, where intent is an element of the crime charged. However, there was no error in admitting the testimony, since the Rule does not prohibit experts from testifying, as here, to predicate facts from which a jury might infer such intent.

United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994) : The Court held that the error, if any, in permitting an officer to opine that drugs were possessed with intent to distribute was not plain error.

United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003) : In a truck driver's trial for possession of marijuana, a DEA agent testified about how drug traffickers recruit smugglers, suggesting that such smugglers knew they were transporting drugs, and mentioning specifically facts closely paralleling the case, including the amount of drugs given to new recruits and the presence of wives and children to mask the trafficking offense. Affirming, the Court found that admission of the agent's testimony was an abuse of discretion (but harmless error). The testimony was closely akin to drug courier profile evidence, which is inadmissible because it is inherently prejudicial and violates *Rule*

704(b)'s bar on expert testimony to prove a mental element, here, the courier's knowledge that he was transporting drugs. In *United States v. Ramirez-Velasquez, 322 F.3d 868 (5th Cir. 2003)* , the Court, affirming marijuana-related convictions, found it was error (but harmless) to admit testimony from a DEA agent that drivers of vehicles with marijuana are paid by drug conspiracy organizations on the basis of past performance and that these organizations tend to seek trustworthy drivers because their cargo is valuable and uninsurable. The Court relied on its admonition in *United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir. 2002)* , that "[t]he government goes too far in soliciting the functional equivalent of an opinion whether the defendant knew he was carrying drugs."

United States v. Love, 336 F.3d 643 (7th Cir. 2003) : The Court affirmed drug and firearm convictions, finding no plain error in permitting a DEA expert to testify that it was unusual for persons involved in a drug conspiracy to bring people to a drug deal if they do not know what is going on. The Court reasoned that the expert did not refer to the intent of the defendant, but limited himself to testimony about the common practices of drug dealers. In a prosecution for possession of methamphetamine with intent to distribute, *United States v. Brumley, 217 F.3d 905 (7th Cir. 2000)* , the Court found no abuse of discretion when a DEA agent was permitted to testify that amounts of methamphetamine in excess of one ounce were distribution as opposed to personal use amounts. The testimony was not subjective or speculative, but based on the agent's experience in approximately 100 methamphetamine investigations, and did not purport to be based on some special knowledge of the defendant's mental state. Affirming a conviction for unlawful possession with intent to distribute marijuana in *United States v. Willis*, n28 the Court found no error when a law enforcement agent was permitted to testify that he had never had a case "where the courier didn't know what he was carrying." The Court reiterated the Circuit's position that *Rule 704(b)* does not limit law enforcement opinion testimony, so long as it is made clear that the opinion "is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes." See also *United States v. Lipscomb* n29(the Rule does not preclude law enforcement experts from offering opinions that seized narcotics were possessed with intent to distribute; the Rule was mainly designed to avoid the confusion and illogic of translating medical concepts relied on by mental health experts into legal conclusions).

United States v. Younger, 398 F.3d 1179 (9th Cir. 2005) : The Court held there was no abuse of discretion when a police officer was permitted to testify that never in his 26 years' experience had a person in circumstances mirroring the defendant's been only a crack user and not also a dealer. The expert did not testify about the defendant and expressly denied having any particular knowledge about the defendant or what his intent may have been. In *United States v. Gonzales, 307 F.3d 906 (9th Cir. 2002)* , the Court affirmed drug and firearms convictions, and upheld the admission of testimony by a DEA agent that the weight of the drugs seized from the defendant would be used for distribution as opposed to personal use. The Court found no violation of *Rule 704(b)*, because the agent never stated directly that the defendant had the intent to distribute and a jury could have found that the defendant was not the typical person described by the agent. In *United States v. Murillo*, n30 the defendant was arrested driving a rental car in which over one million dollars worth of drugs were found hidden. The Court found no abuse of discretion in admitting testimony from a DEA agent about the *modus operandi* of drug traffickers, including the typical travel itineraries of drug couriers, why couriers use rental cars, and how traffickers do not entrust large quantities of drugs to people who are unaware that they are transporting them. The testimony was helpful to determining whether the defendant was simply an unknowing courier. At the same time, the agent did not go beyond his experience with drug traffickers and impermissibly provide an explicit opinion as to the defendant's knowledge or state of mind. In *United States v. Plunk*, n31 the defendant, convicted for offenses arising out of a drug distribution conspiracy, claimed that a law enforcement agent who interpreted for the jury various alleged coded conversations was giving impermissible testimony about his mental state. The Court found no error, stating that the expert "offered the opinion about the meaning of drug jargon in encrypted exchanges between the conspirators, allowing the jurors to determine for themselves the legal significance of the conversations as interpreted." In *United States v. Gomez-Norena*, n32 the Court held there was no plain error when an agent testified that the defendant's actions and possession of a large amount of cocaine were consistent with an intent to distribute it and at no time gave an opinion as to what the defendant actually thought.

United States v. Mendez-Zamora, 296 F.3d 1013 (10th Cir. 2002) : The Court affirmed conspiracy convictions relating to methamphetamine, finding no error in the admission of a police officer's testimony that one defendant was a broker and occasionally a distributor and that another assisted the brokers. In *United States v. Richard, 969 F.2d 849 (10th Cir. 1992)* , the Court affirmed convictions arising out of a marijuana possession and distribution conspiracy, holding there was no violation of the Rule when an agent identified the roles of each participant and offered his opinion that those roles were typically performed in similar drug transactions, but did not expressly draw the inference that they were in fact aware of the nature of the transaction.

[ii] Rule 704(b) -- Law Enforcement Agents -- Other Cases

United States v. Schneiderhan, 404 F.3d 73 (1st Cir. 2005) : The defendant was charged with obstruction of justice by telling a Boston mobster about a wiretap. At trial, two law enforcement witnesses testified that someone experienced in dealing with organized crime would know that revealing the existence of electronic surveillance to a target would compromise the investigation. Finding it was error (but harmless) under *Rule 704(b)* to admit the testimony, the Court rejected the government's "ingenious" argument that the witnesses spoke of knowledge whereas the crime was a specific intent crime, so that an opinion as to knowledge was not an opinion as to *mens rea*. Here, the witness' testimony approached a carbon copy of the defendant's circumstances. In *United States v. Mikutowicz, 365 F.3d 65 (1st Cir. 2004)* , the Court affirmed convictions for tax offenses, and upheld the admission of testimony by an IRS agent explaining why the IRS concluded that the deductions claimed by the defendant and his companies were improper. The Court found no violation of *Rule 704(b)*: the agent explained why the IRS reached its conclusion and did not purport to testify as to the defendant's state of mind.

United States v. Barber, 80 F.3d 964 (4th Cir. 1996) (en banc): The Court affirmed money laundering convictions, holding there was no abuse of discretion in permitting an IRS special agent to explain how the defendants' activities constituted concealment for purposes of money laundering, as he did not give any opinion regarding subjective intent in pursuing a particular activity.

United States v. Williams, 343 F.3d 423 (5th Cir. 2003) : In a civil rights prosecution of a deputy sheriff for shooting an unarmed arrestee in the back, the chief of police of a nearby town, the chief deputy sheriff, and another sheriff, all of whom were involved in the apprehension of the suspect, testified that the shooting was not reasonable. The Court held that the testimony did not violate *Rule 704(b)* because the witnesses did not testify as to the defendant's mental state, but it did violate *Rule 704(a)* because "[r]easonableness under the *Fourth Amendment* or Due Process Clause is a legal conclusion." The error was harmless, however. In *United States v. Willey, 57 F.3d 1374 (5th Cir. 1995)* , the Court, although "not recommend[ing] the present case as a model for eliciting expert testimony," found no abuse of discretion when an IRS agent was permitted to give her opinion in a money laundering case that certain transactions concealed the true source, nature, ownership, or control of the funds. The Court noted that the agent had not testified that the transactions were designed to conceal the source of the funds, which was the ultimate issue in the case.

United States v. Romero, 189 F.3d 576 (7th Cir. 1999) : The defendant was charged with kidnapping and transporting a minor with intent to engage in criminal sexual activity after developing a relationship with a 12-year-old boy over the Internet. The Court found no abuse of discretion in admitting testimony regarding the characteristics of "preferential" child molesters from an FBI expert on child molesters. The agent's testimony focused primarily on the actions typically taken by child molesters, and on redirect he explained what types of actions might distinguish the actual molester from the mere collector of child pornography, but he did not in any sense state his belief about what was going through the defendant's mind when he met the victim.

United States v. Webb, 115 F.3d 711 (9th Cir. 1997) : The Court affirmed a conviction for possession of ammunition by a felon, finding no error in the admission of police expert testimony regarding the reasons criminals conceal weapons in the engine compartments of their cars. Rejecting the argument that the testimony violated *Rule 704(b)*, the Court observed that the expert described a typical case and offered no opinion as to Webb's state of mind.

[f] Rule 704(b) -- Lay Witnesses

United States v. Polishan, 336 F.3d 234 (3d Cir. 2003) : The Court affirmed the securities fraud and related convictions of an executive, finding no plain error in the admission of testimony by co-workers of the defendant that described his role in the company and the type of information to which he had access. Although it acknowledged that "[t]here is a fine line between statements that permissibly offer a witness's testimony about his or her own perceptions while supporting inferences about knowledge, and statements that constitute opinions on a witness's knowledge," it found that the testimony in this case left to the jury the ultimate conclusion as to whether the defendant knew about accounting irregularities. Moreover, the Court held that none of the witnesses was an expert, so that none of their testimony could have violated *Rule 704(b)*. While that reasoning is technically accurate (as the *Rule 704(b)* exclusion applies only to expert testimony), it fails to note that if a lay witness is testifying that the defendant had the mental state necessary to commit the crime charged, the opinion is very likely to be of no assistance to the jury, and thus would be inadmissible under *Rule 701*.

[g] Rule 704(b) -- Medical Opinions

United States v. Gold, 661 F. Supp. 1127 (D.D.C. 1987) : Denying an *in limine* motion by the government to exclude all evidence of the defendant's mental condition and the effect of that condition on his capacity to have specific intent, the Trial Judge ruled that an expert could testify as to the facts of a defendant's mental state or condition. The expert was barred, however, from offering any opinion as to whether the defendant lacked the capacity to distinguish right from wrong or to conform his behavior to legal requirements.

United States v. DiDomenico, 985 F.2d 1159 (2d Cir. 1993) : Affirming a conviction for wire fraud and interstate transportation of stolen computer equipment, the Court held there was no abuse of discretion in excluding evidence that the defendant had a "dependent personality disorder." The majority read the "proffered testimony as stating the bottom-line inference" (that the defendant did not know the equipment was stolen because of her dependence on her boyfriend, from whom she received it), "and leaving it to the jury merely to murmur, 'Amen.' " One Judge dissented, on the ground that the expert was only presenting a *psychiatric/medical* diagnosis from which a jury might then draw inferences concerning whether the defendant possessed the mental state required for a *legal* finding of guilt.

United States v. Dixon, 185 F.3d 393 (5th Cir. 1999) : The defendant asserted an insanity defense to robbery, assault, and kidnapping charges, but the Trial Judge refused to give an insanity instruction, in part because a psychiatrist testified for the government that (1) the defendant was not suffering from a severe mental disease at the time of the crimes, and (2) a person suffering from the diseases indicated in his medical records could appreciate the wrongfulness of his acts. Although it reversed the conviction for failure to give the insanity instruction, the Court held that the expert's testimony was properly considered. On the first point, an expert is free to testify as to whether the defendant was suffering from a severe mental illness at the time of the crime, just not whether the condition prevents the defendant from appreciating the wrongfulness of his actions. As to the second point, the testimony did not violate the rule against using hypothetical questions that mirror the facts of the case, since the expert testified only to the possibility that a person suffering from Dixon's disease "*could* still be able to appreciate the nature and quality or the wrongfulness of his

acts," which "does not answer, or contain a necessary inference that would answer, the ultimate issue."

United States v. Brown, 32 F.3d 236 (7th Cir. 1994) : In the defendant's bank robbery trial, where he raised an insanity defense, the government's psychiatric expert testified that the defendant suffered from a major depressive disorder. The prosecution was permitted to ask psychiatric experts for both sides whether such a major depressive disorder indicates "that a person is unable to understand the wrongfulness of his acts"; the prosecution's expert answered in the negative. The Court found no violation of *Rule 704(b)*, reasoning that the prosecution's expert never testified "as to Brown's peculiar mental state; he merely described Brown's mental disorder and that such an affliction does not preclude one from appreciating the nature or quality of his acts." While finding that the Rule was not violated, the Court criticized the Rule as denying juries "the specialized knowledge of experts in just the type of complex case in which it is most useful." In *United States v. West, 962 F.2d 1243 (7th Cir. 1992)* , the Trial Judge, hearing the opinion of the defense psychiatrist in a bank robbery case that the defendant's mental condition was not so severe as to keep him from knowing what he was doing or that it was wrong, granted the government's motion to exclude the expert from testifying. The Court reversed on the ground that the defendant had been precluded totally from offering his insanity defense, contrary to the congressional intention only to bar the ultimate issue opinion. This case is discussed in the Editorial Explanatory Comment, *§ 704.02[5]*.

United States v. Kristiansen, 901 F.2d 1463 (8th Cir. 1990) : The Court held that the defendant, charged with escape from a halfway house facility, had properly been prohibited from asking his psychiatric witness whether he was able to appreciate the nature and quality of his actions but that harmless error was committed in barring a question whether mental disease or defect of the type the defendant allegedly had would affect a person's ability to appreciate the nature and quality of his actions, because the question related to the symptoms and qualities of the disease itself and did not call for an answer describing the defendant's culpability at the time of the crime. In *United States v. Dubray*, n33 the Court affirmed a rape conviction, holding that the prosecution's expert properly testified that the defendant was not psychotic at the time he committed the rape. This testimony did not purport to establish his sanity at the time, and was proper diagnostic testimony offered to rebut the defendant's claim that he had experienced a transient psychiatric episode. In *United States v. Gipson*, n34 the Court held that an expert was properly permitted to testify that the defendant did not suffer from a mental disease or defect when he attempted to escape. The expert did not purport to address the legal issue whether the defendant had the requisite specific intent.

United States v. Cook, 53 F.3d 1029 (9th Cir. 1995) : After the defendant in a bank robbery case presented an insanity defense, a psychiatrist called by the government testified to the defendant's mental disorders and then answered a hypothetical question based on the facts of the case with the opinion that such behavior was consistent with delusional behavior. Although the Court found no plain error, it expressed the view that the government engaged in overkill, since it was clear from the expert's other testimony that he did not believe the defendant had a mental defect that prevented him from committing the crime, and the question objected to on appeal went very close to calling for an opinion whether the defendant had a required mental state, which is prohibited by *Rule 704(b)*.

United States v. Wood, 207 F.3d 1222 (10th Cir. 2000) : A doctor was charged with murder and lesser included offenses after he injected a patient with a large amount of potassium chloride in an attempt to treat the patient, and the patient died as a result. The Court held that testimony by a medical expert that the defendant's treatment was "reckless" and constituted a "homicide" was error which, together with other errors, required a reversal of the defendant's conviction for involuntary manslaughter. The Court reasoned that the expert's testimony "necessarily dictates the final conclusion that Dr. Wood possessed the requisite mens rea for involuntary manslaughter" and that this "intrusion into the province of the jury is precisely the sort of testimony *Rule 704(b)* is designed to prevent." In *United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993)* , the defendant, charged with kidnapping, asserted an insanity defense based on a multiple personality disorder. In reversing the Trial Judge's rejection of the defense, the Court noted that an

expert witness' testimony that the defendant's illness was "serious and severe" was not violative of the Rule. In *United States v. Austin*, n35 the Court affirmed a conviction for assaulting a correctional officer, holding that, in a case in which sanity was disputed, a government expert was properly permitted to testify to a current diagnosis of the defendant's mental condition.

United States v. Manley, 893 F.2d 1221 (11th Cir. 1990) : The defendant in a bank robbery case attempted to support his insanity plea by asking as a hypothetical question whether a person suffering from manic depression would be able to appreciate the nature and quality or wrongfulness of their actions; after an objection to the hypothetical question was sustained, he offered evidence that he was suffering from the disorder. The Court held that objection to the thinly-veiled hypothetical question was properly sustained because it not only assumed facts that identified the defendant but also directly tracked the language of the insanity statute. In *United States v. Davis*, n36 the Court upheld a conviction for bank robbery, concluding that a clinical psychologist was properly permitted to testify for the government that a person suffering from multiple personalities, as the defendant claimed he was, is able to understand what he is doing. It also held that testimony by a government expert that the defendant was not suffering multiple personalities, but exhibited an antisocial personality that was consistent with his behavior, was not excluded by *Rule 704*. See also *United States v. Thigpen* n37(finding no error in permitting an expert to opine whether schizophrenia by necessity implies that a person would be unable to appreciate the nature and quality of his acts, where no question was asked about whether the defendant would be able to appreciate his actions). In *United States v. Edwards*, n38 the Court upheld permitting a psychiatrist to testify for the prosecution in response to the defendant's insanity defense to a bank robbery charge, saying that "Congress did not enact *Rule 704(b)* so as to limit the flow of diagnostic and clinical information," and "[e]very actual fact concerning the defendant's mental condition is still as admissible after the enactment of *Rule 704(b)* as it was before." In *United States v. Alexander*, n39 the Court upheld a conviction for possessing stolen mail matter. It found that the restriction on expert testimony was rational, but advised that as long as expert testimony is not impermissible opinion as to legal sanity or insanity, Courts should be liberal in admitting testimony.

[h] Rule 704(b) -- *Mens Rea* Evidence

United States v. Finley, 301 F.3d 1000 (9th Cir. 2002) : Reversing various convictions arising from the defendant's attempts to use certain documents, prepared by the leader of "the Montana Freemen," as financial instruments, the Court held it was an abuse of discretion to exclude testimony by a licensed clinical psychologist that the defendant suffered from a delusional disorder, and that a person with a delusional disorder can be dissuaded from the delusion "only with tremendous, tremendous difficulty." The testimony did not usurp the jury's function, since they could accept the diagnosis and still find that the defendant knew the instruments were fraudulent. The testimony was helpful in offering an explanation why "an otherwise normal man could believe that these financial instruments were valid and reject all evidence to the contrary." In *United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)* , a defendant, charged with wilfully making false entries in a union ledger, was not permitted to introduce expert testimony from a CPA regarding the defendant's knowledge and understanding of bookkeeping principles. Reversing her conviction, the Court held that *Rule 704(b)* applies to all expert witnesses -- not just mental health experts -- who are asked to state an opinion as to the defendant's mental state or condition. However, the only testimony prohibited under the Rule is that from which, if it is credited, it necessarily follows that the defendant did or did not possess the requisite *mens rea*. Because the conclusion sought by the defendant, that her errors were due to ignorant but innocent mistakes, was by no means compelled even if the jury believed the expert, it was an abuse of discretion to exclude the testimony.

[i] Rule 704(b) -- Polygraph Evidence

United States v. Campos, 217 F.3d 707 (9th Cir. 2000) : The defendant was convicted for importation and possession of marijuana with intent to distribute, after she crossed from Tijuana in a van that had a false compartment

full of marijuana. The Court held that the Trial Judge properly excluded polygraph evidence which purported to show that the defendant was truthful in saying she did not know she had drugs in her van when she crossed the border. The Court reasoned that under the principle of *United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)* (en banc), the polygraph expert's opinion would be an inadmissible opinion on the mental state of the defendant and would be barred by *Rule 704(b)*.

[j] Rule 704(b) -- Profile Evidence

United States v. Hayward, 359 F.3d 631 (3d Cir. 2004) : Affirming a conviction for transporting a minor with the intent to engage in criminal sexual activity, the Court found no violation of *Rule 704(b)* in the admission of testimony from a behavioral scientist concerning the general profile of an acquaintance molester. The Court cited prior cases admitting expert testimony that supports the inference or conclusion that the defendant either did or did not have the requisite *mens rea,* provided that (1) the expert does not draw the ultimate inference or conclusion for the jury, and (2) that inference or conclusion does not necessarily follow from the testimony.

[k] Rule 704(b) -- Specific Intent

[i] Rule 704(b) -- Drugs

United States v. Valle, 72 F.3d 210 (1st Cir. 1995) : In a trial for possession of crack cocaine with intent to distribute, a narcotics detective testified that the quantity of crack found at the search site was consistent with distribution, as opposed to personal use. The Court noted that *Rule 704(b)* prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness' field of expertise, where intent is an element of the crime charged. However, there was no error in admitting the testimony, since the Rule does not prohibit experts from testifying, as here, to predicate facts from which a jury might infer such intent.

United States v. Watson, 260 F.3d 301 (3d Cir. 2001) : The defendant was charged with possession of crack cocaine with intent to distribute after he was arrested on an intercity bus carrying a bag with approximately 100 baggies of the drug. At trial arresting officers were asked their opinions whether the drugs were possessed "with the intent to distribute, transfer or deliver or the intent to personally use" them, as well as whether the bus trip "was taken for the purpose of distribution, transfer and delivery of drugs, as opposed to procurement of drugs for personal use." Reversing, the Court held that the officers' testimony went beyond testifying to common practices and impermissibly went directly to the defendant's intent. By contrast, in *United States v. Davis, 397 F.3d 173 (3d Cir. 2005)* , the Court found no abuse of discretion when an experienced police officer was permitted to opine regarding facts in a hypothetical question resembling the facts of the case that it "would be possession with intent to deliver the narcotics." Unlike in *Watson,* the testimony was given in response to hypothetical rather than specific questions regarding the intent of the defendants on trial and the prosecutor did not refer to the individual's state of mind when questioning the expert. Furthermore, there was no evidence that the witness had any prior relationship with the defendants and therefore no risk that the jury would conclude he had any special insights into their thoughts or intent.

United States v. Speer, 30 F.3d 605 (5th Cir. 1994) : In a prosecution for drug-trafficking offenses, the Court held there was no abuse of discretion in permitting a DEA agent to testify that the amount of drugs possessed by the defendants was more than would be purchased for personal use and was consistent with trafficking. The agent never testified explicitly as to the defendants' intent or state of mind, but merely analyzed the evidence in light of his expertise. In *United States v. Roberts*, n40 the Court held it was error (but harmless) to exclude testimony by a psychologist that the personality of a defendant charged with cocaine offenses was consistent with his claimed activity as a self-appointed vigilante. The Court reasoned that just as expert testimony might be used to demonstrate that a

defendant was incapable of forming the specific state of mind required for an offense, a defendant may offer evidence in support of a "reverse-sting" defense that his mental condition rendered him incapable of forming the requisite intent.

[ii] Rule 704(b) -- Specific Intent -- Fraud and Tax Evasion

United States v. Bennett, 161 F.3d 171 (3d Cir. 1998) : Pleading *nolo contendere* to charges of fraud, check-kiting, money-laundering, and filing false statements and tax returns, the defendant reserved the right to appeal a pre-trial ruling precluding certain expert psychiatric testimony. The Court affirmed, holding that the Trial Judge properly excluded answers to questions asking whether the defendant's mental disorders: (1) "precluded him from forming the intent to defraud"; (2) made it "unlikely that he could form the intent to defraud"; (3) made it "unlikely that he would have engaged in conduct designed to defraud"; (4) precluded him "from forming the specific intent to defraud individuals"; (5) made it "unlikely that he could defraud the individuals and entities"; (6) "affected his ability to knowingly and willfully submit false statements to the I.R.S."; and (7) made it "unlikely that he would knowingly and willfully submit false statements to the I.R.S." The Court declared that these questions went "beyond merely assisting the jury, explaining the nature of Bennett's mental disease, or describing the typical effect of Bennett's mental disorders on his mental state. Instead, they required the expert witness to state expressly whether Bennett possessed the requisite intent to commit the crimes charged in the indictment."

United States v. Dotson, 817 F.2d 1127 (5th Cir. 1987) , *vacated in part on other grounds*, *821 F.2d 1034 (5th Cir. 1987)* : The Court affirmed drug-related convictions, holding that a government expert properly testified to facts that indicated an intent on the part of a defendant to evade taxes. The Court noted that it was doubtful that the defendant raised a sufficiently specific objection during the trial, and concluded that, except for a small portion of the testimony, the expert focused on facts and did not attempt to offer a conclusion on the defendant's state of mind.

United States v. Frost, 125 F.3d 346 (6th Cir. 1997) : The defendant was charged in a complex case with fraudulently billing the government. A government expert, who never testified, was of the opinion that the defendant had not billed certain entries in a deceptive manner, and that small businesses such as the defendant's "often bill costs to the government in ways that they think are correct, but are technically disallowable," but this information was never turned over to the defendant. The Trial Judge refused to grant a *Brady* hearing, reasoning that the expert's opinion was not exculpatory because it could not have been admitted at trial under *Rule 704(b)*. The Court found the denial of a hearing to be error and remanded, reasoning that while the expert could not have testified that the defendant lacked an intent to defraud, he could have testified, consistently with *Rule 704(b)*, that the defendant did not bill the government in a deceptive manner. Moreover, the testimony of how small businesses operate was not direct testimony of the defendant's intent; the expert could have testified that the defendant "engaged in the same common practices of those who clearly lack the requisite criminal intent."

United States v. Turner, 400 F.3d 491 (7th Cir. 2005) : The Court affirmed a money laundering conviction, finding no abuse of discretion when an IRS agent was permitted to testify about a "typical money laundering conspiracy" and that certain transactions seemed to be structured to avoid IRS reporting requirements. The agent did not refer to the intent of the defendant and only stated that "the transactions were of the type that looked like structuring, not that they actually were structuring." In *United States v. Owens, 301 F.3d 521 (7th Cir. 2002)* , the Court affirmed fraud convictions against a real estate appraiser, holding that expert opinions characterizing the defendant's appraisals as "misleading and fraudulent" did not violate *Rule 704(b)* because the expert did not comment directly on the defendant's mental state. In *United States v. Vest*, n41 a doctor was charged with fraudulently subjecting his patients to unnecessary medical tests. At trial, one of the Government's experts, a medical doctor, testified that the only reason the defendant ordered certain medical tests was for money. The defendant argued that this testimony violated *Rule 704(b)*, but the Court found no error, noting that the expert "was not billed as a psychiatrist and did not testify based on any psychiatric

analysis of Vest's mental processes." The Court concluded that "*Rule 704(b)* is a narrow exception to the general rule that experts may state opinions on ultimate issues." In *United States v. Windfelder*, n42 the Court affirmed a defendant's conviction for understating his income in his federal tax return and for understating the estate of his aunt on an estate tax return. It found that testimony of expert witnesses with respect to whether the aunt authorized transfers of assets to the defendant for her expenses, whether the transfers were gifts to the defendant, or whether they were utilized by the defendant without authorization was proper opinion evidence as to the tax consequences of a transaction. The Court found no violation of *Rule 704(b)* for two reasons: The experts "utilized their expertise in accounting and tax matters in making their determinations, not their knowledge of the workings of the human mind," and their testimony related to the intent of the aunt, not the defendant. It found error (albeit harmless), however, in the admission of testimony by an IRS agent that the defendant intentionally understated his income, since this opinion as to knowledge or wilfulness addressed an element of the crime charged.

United States v. Felak, 831 F.2d 794 (8th Cir. 1987) : Affirming a conviction for tax evasion, the Court upheld the exclusion of defense psychiatric evidence that the defendant did not possess the mental state to satisfy the definition of "wilful," "evasion," or "fraud" as alleged in the indictment.

United States v. Gomez-Osorio, 957 F.2d 636 (9th Cir. 1992) : The Court held it was error, but not plain error, for an expert to testify that the defendant, who was charged with illegal monetary transactions, had structured the transactions in order to evade the reporting requirements. Although the evidence instructed the jury that the statute's intent element had been satisfied, the witness' primary thrust was explaining the defendant's role in the scheme and the government did not refer to the testimony in its closing arguments.

United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992) : Reversing a conviction for extortion and filing false income tax returns, the Court held that it was error to exclude testimony by a defense expert on the reasonableness of the defendant's conclusion that a $1500 check he received was a gift rather than taxable income, as a subjective good-faith misunderstanding of the law or a good-faith belief that one is not violating the law can negate the statutory wilfulness requirement of criminal tax offenses, so any evidence of the reasonableness of the defendant's belief was relevant to the determination of whether his violation of the tax laws was willful. The dissenting Judge believed that the witness had no helpful knowledge on the defendant's subjective awareness of his legal duty at the time of the transaction and, to the extent the expert was opining on the defendant's wilfulness, his testimony violated *Rule 704(b)*.

[iii] Rule 704(b) -- Specific Intent -- Miscellaneous Cases

United States v. Hillsberg, 812 F.2d 328 (7th Cir. 1987) : The Court affirmed a murder conviction, finding that psychiatric evidence that a defendant lacked the capacity to form specific intent to kill was properly excluded under *Rule 704(b)*. Because the psychiatrist had found no mental disease or defect impairing the defendant and sought to testify on the effects of alcohol on mental state, the Court reasoned that lay jurors are capable of assessing the probable effects of alcohol and that "permitting an expert to describe the ordinary occurrence of intoxication in such orphic terms creates the danger of misleading the jury."

United States v. Wang, 49 F.3d 502 (9th Cir. 1995) : In a prosecution for conspiring to smuggle aliens unlawfully, a government expert was permitted to opine that the defendants "were involved in an organization to smuggle aliens." Treating this as an opinion that the defendant had the mental state constituting an element of the crime charged, the Court observed that the better practice would be for the prosecutor not to ask such questions arguably bearing on intent and for a Trial Judge not to find such answers admissible. Any error was harmless, however, and the convictions were affirmed.

United States v. Dennison, 937 F.2d 559 (10th Cir. 1991) : Affirming convictions for assault and sexual abuse, the Court held there was no error in excluding testimony by the defendant's expert that an individual suffering from borderline personality disorder does not have the capacity to form specific intent while under the influence of drugs and alcohol. Although the testimony was premised on a hypothetical person and couched in terms of the characteristics of the illness itself, the necessary inference was that the instant defendant did not have the capacity to form specific intent at the time of his crimes. In *United States v. Esch*, n43 the Court upheld convictions for sexual exploitation of children, holding that a psychologist's testimony that a defendant had a "dependent personality" and was duped into acting was properly excluded. To the extent that the expert was attempting to provide an opinion on the defendant's mental state, the testimony was inadmissible under *Rule 704(b)*. To the extent that the expert was attempting to opine on the defendant's personality characteristics, the testimony related to matters as to which the jury needed no special help.

[l] Rule 704(b) -- Unhelpful Opinions

United States v. Masat, 896 F.2d 88 (5th Cir. 1990) : The defendant in a tax evasion prosecution attempted to offer testimony by psychologists indicating that his beliefs when hiding assets were strong and sincerely held. The Court held that the evidence was not barred by *Rule 704(b)*, as it was not a direct statement on the issue of intent, but since it concerned an issue within the ability of an ordinary juror to decide and did not appear to address how the defendant's mental afflictions affected his reasoning or actions, there was no abuse of discretion in excluding it.

FOOTNOTES:

(n1)Footnote 1. *Shahid v. City of Detroit, 889 F.2d 1543 (6th Cir. 1989)* .

(n2)Footnote 2. *McEwen v. City of Norman, Okla., 926 F.2d 1539 (10th Cir. 1991)* .

(n3)Footnote 3. *Mitroff v. Xomox Corp., 797 F.2d 271 (6th Cir. 1986)* .

(n4)Footnote 4. *Davis v. Combustion Eng'g, Inc., 742 F.2d 916 (6th Cir. 1984)* .

(n5)Footnote 5. *Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985)* .

(n6)Footnote 6. *United States v. Arenal, 768 F.2d 263 (8th Cir. 1985)* .

(n7)Footnote 7. *United States v. Burchfield, 719 F.2d 356 (11th Cir. 1983)* .

(n8)Footnote 8. *United States v. Sellers, 566 F.2d 884 (4th Cir. 1977)* .

(n9)Footnote 9. *Matthews v. Ashland Chem., Inc., 770 F.2d 1303 (5th Cir. 1985)* .

(n10)Footnote 10. *McGowan v. Cooper Indus., 863 F.2d 1266 (6th Cir. 1988)* .

(n11)Footnote 11. *Haney v. Mizell Mem. Hosp., 744 F.2d 1467 (11th Cir. 1984)* .

(n12)Footnote 12. *Salas v. Carpenter, 980 F.2d 299 (5th Cir. 1992)* .

(n13)Footnote 13. *Hanson v. Waller, 888 F.2d 806 (11th Cir. 1989)* .

(n14)Footnote 14. *United States v. Gold, 743 F.2d 800 (11th Cir. 1984)* .

(n15)Footnote 15. *Police Ret. Sys. v. Midwest Invest. Advisory Serv., 940 F.2d 351 (8th Cir. 1991)* .

(n16)Footnote 16. *Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988)* .

(n17)Footnote 17. *Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988)* (en banc).

(n18)Footnote 18. *Parker v. Williams, 855 F.2d 763 (11th Cir. 1988)* , *vacated on other grounds*, *862 F.2d 1471 (11th Cir. 1989)* .

(n19)Footnote 19. *Haney v. Mizell Mem. Hosp., 744 F.2d 1467 (11th Cir. 1984)* .

(n20)Footnote 20. *United States v. Bednar, 728 F.2d 1043 (8th Cir. 1984)* .

(n21)Footnote 21. *Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682 (8th Cir. 1981)* .

(n22)Footnote 22. *United States v. Valverde, 846 F.2d 513 (8th Cir. 1988)* .

(n23)Footnote 23. *Little Oil Co. v. Atlantic Richfield Co., 852 F.2d 441 (9th Cir. 1988)* .

(n24)Footnote 24. *United States v. Alexander, 805 F.2d 1458 (11th Cir. 1986)* .

(n25)Footnote 25. *United States v. White, 116 F.3d 903 (D.C. Cir. 1997)* .

(n26)Footnote 26. *United States v. Conyers, 118 F.3d 755 (D.C. Cir. 1997)* .

(n27)Footnote 27. *In re Sealed Case, 99 F.3d 1175 (D.C. Cir. 1996)* .

(n28)Footnote 28. *United States v. Willis, 61 F.3d 526 (7th Cir. 1995)* .

(n29)Footnote 29. *United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994)* (*see* the Editorial Explanatory Comment, *§ 704.02[7]*).

(n30)Footnote 30. *United States v. Murillo, 255 F.3d 1169 (9th Cir. 2001)* .

(n31)Footnote 31. *United States v. Plunk, 153 F.3d 1011 (9th Cir. 1998)* .

(n32)Footnote 32. *United States v. Gomez-Norena, 908 F.2d 497 (9th Cir. 1990)* .

(n33)Footnote 33. *United States v. Dubray, 854 F.2d 1099 (8th Cir. 1988)* .

(n34)Footnote 34. *United States v. Gipson, 862 F.2d 714 (8th Cir. 1988)* .

(n35)Footnote 35. *United States v. Austin, 981 F.2d 1163 (10th Cir. 1992)* .

(n36)Footnote 36. *United States v. Davis, 835 F.2d 274 (11th Cir. 1988)* .

(n37)Footnote 37. *United States v. Thigpen, 4 F.3d 1573 (11th Cir. 1993)* (en banc).

(n38)Footnote 38. *United States v. Edwards, 819 F.2d 262 (11th Cir. 1987)* .

(n39)Footnote 39. *United States v. Alexander, 805 F.2d 1458 (11th Cir. 1986)* .

(n40)Footnote 40. *United States v. Roberts, 887 F.2d 534 (5th Cir. 1989)* .

(n41)Footnote 41. *United States v. Vest, 116 F.3d 1179 (7th Cir. 1997)* .

(n42)Footnote 42. *United States v. Windfelder, 790 F.2d 576 (7th Cir. 1986)* .

(n43)Footnote 43. *United States v. Esch, 832 F.2d 531 (10th Cir. 1987)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 704 RULE 704

3-704 Federal Rules of Evidence Manual 704.04

704.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called ultimate issue rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore 1920, 1921; McCormick 12. The basis usually assigned for the rule, to prevent the witness from usurping the province of the jury, is aptly characterized as empty rhetoric. 7 Wigmore 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of might or could, rather than did, though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944)* , whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 166 N.E.2d 582 (1960)* , medical causation; *Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941)* , proper method of shoring ditch; *Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951)* , cause of landslide. In each instance the opinion was allowed. **[Editor's Note: The inference in this Note, that Rule 704 imposes no limitations on ultimate issue testimony, must be qualified in light of the later addition of Rule 704(b) by Congress. Rule 704(b) prevents an expert from drawing a conclusion that a criminal defendant had or did not have the requisite mental state to commit the crime charged.]**

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, Did T have capacity to make a will would be excluded, while the question, Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution would be allowed. McCormick 12.

For similar provisions see Uniform Rule 56(4); *California Evidence Code 805*; Kansas Code of Civil Procedure 60-456(d); New Jersey Evidence Rule 56(3).

[2] Senate Report No. 98-225 (adding subdivision (b) in 1984)

With respect to limitations on the scope of expert testimony by psychiatrists and other mental health experts, section 406 of title IV of the bill amends *Rule 704 of the Federal Rules of Evidence* to provide:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been. The basis for this limitation on expert testimony in insanity cases is ably stated by the American Psychiatric Association:

> [I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to do psychiatry, i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, ultimate issue questions are formulated by the law and put to the expert witness who must then say yea or nay, then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. [Footnote omitted.] Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either sane or insane or that they do or do not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the time of the act.

Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts. [American Psychiatric Association Statement on the Insanity Defense at 18-19. See also Hearings, Limiting the Insanity Defense at 256-258 (statement of Dr. Loren Roth, University of Pittsburgh) and 272-273 (statement of Dr. Seymour L. Halleck, University of North Carolina.]

Moreover, the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to

any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven. The Committee has fashioned its Rule 704 provision to reach all such ultimate issues, e.g., premeditation in a homicide case, or lack of predisposition in entrapment.

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 281 (1999)

Rule 704 -- Opinion on Ultimate Issue

Rule 704 presents a different problem from the ones previously discussed, in that Congress did not reject the Advisory Committee's proposal at the time that the Federal Rules of Evidence were initially adopted. Rather, in 1984, Congress added a subdivision to Rule 704 that renders the original Advisory Committee Note misleading. As originally proposed by the Advisory Committee and adopted without change by Congress, Rule 704 provided that "[T]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided,. by the trier of fact." The reasoning behind the rule is sound: assuming that an expert provides a solid foundation and explanation on an issue for which the fact finder needs assistance, the expert should not be precluded from providing a logical and helpful conclusion to his testimony. The fact finder is simply left hanging if the expert is not permitted to cap off the testimony by stating a conclusion on the ultimate issue to which the expert is testifying. Sometimes, a conclusion on an ultimate issue ties the expert's testimony into a coherent whole, and as such it helps the jury to understand the issues in dispute. ...

The Advisory Committee Note to Rule 704 states that the "ultimate issue" rule is abolished. It criticizes any per se limitation on ultimate issue testimony as "unduly restrictive, difficult of application, and generally serv[ing] only to deprive the trier of fact of useful information." The Advisory Committee Note asserts that that the ultimate issue rule can lead to "odd verbal circumlocutions". For example, "a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard."

The Committee Note provides a powerful argument for rejecting the ultimate issue rule. But Congress passed the Insanity Defense Reform Act of 1984, one provision of which added a subdivision (b) to Rule 704. *See 18 U.S.C.* H 4241-4247. This amendment was promulgated outside the rulemaking process, and so there is no Advisory Committee Note that can be referred to. Rule 704(b) provides that an expert in a criminal case is not permitted to testify that a criminal defendant did or did not have the requisite mental state to commit the charged crime.

It is obvious that there is a conflict between the original Advisory Committee Note to Rule 704 and the subsequent amendment. Rule 704(b) plainly revives the ultimate issue rule in criminal cases. It raises the very anomaly referred to in the Advisory Committee Note-that an expert witness could say something about the mental state of the defendant, but simply cannot say the buzzword "intent" or "incapable of understanding the wrongfulness of his actions." The fact remains, however, that Congress has amended Rule 704, and as a result, the original Advisory Committee Note to the rule is misleading, at least as to ultimate issue testimony in criminal cases.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
Supp. To CHAPTER 704 RULE 704

3-704 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 704, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 704. Opinion on Ultimate Issue	**Rule 704. Opinion on an Ultimate Issue**
(a) Except as provided in subdivision (b), testimon	**(a) In General -- Not Automatically Objection**

	y in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.		**able.** An opinion is not objectionable just because it embraces an ultimate issue.
(b)	No expert witness testifying	**(b)**	**Exception.** In a criminal case, an

with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense. Those

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Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
Supp. To CHAPTER 704 RULE 704

3-704 Federal Rules of Evidence Manual Supp. to § 704.03

Supp. to § 704.03 Annotated Cases

[Go To Main]

[1] Rule 704(a) [Go To Main]

[c] Rule 704(a) -- Civil Rights Cases

United States v. Farrell, 563 F.3d 364 (8th Cir. 2009) : Affirming convictions for peonage, the Court held it was error (but not plain error) for an expert witness to opine on the strength of the government's case and the credibility of its witnesses through references to the "incredible" and "strong" nature of the evidence against the defendants. Likewise, the expert invaded the fact-finding function of the jury by testifying that the workers "were not controlling their money" and were "forced to pay [the debt]," which was not simply a factual conclusion but an attempt to express an opinion as to the defendants' guilt and state that the worker witnesses were telling the truth.

[d] Rule 704(a) -- Criminal Cases

United States v. McIver, 740 F.3d 550 (4th Cir. 2006) : The Court affirmed a physician's conviction for unlawful distribution of controlled substances, finding no error in the admission of testimony from an anesthesiologist qualified as an expert in pain management that the defendant's prescribing and treatment practices were "outside the course of legitimate medical practice." The terms used by the expert, although similar to those used by courts to express the underlying issue, were not "sufficiently specialized to render his testimony inadmissible" but rather fell "within the limited vernacular that is available to express whether a doctor acted outside the bounds of his professional practice."

[g.1] Rule 704(a) -- Hypothetical Questions

United States v. Jennings, 487 F.3d 564 (8th Cir. 2007) : In a mail fraud case against a former state legislator, a former state official was asked whether he would have approved a transaction had he known of a legislator's financial interest in it. Affirming, the Court held that the question was not a prejudicial "guilt-assuming hypothetical," but a proper way of showing that the undisclosed financial interest was a material fact in making the government agency decision; the government's question did not allude to the specific interest in this case or assume wrongdoing on the defendant's part, but was a general inquiry.

[j] Rule 704(a) -- Medical Witnesses

United States v. McIver, 740 F.3d 550 (4th Cir. 2006) : The Court affirmed a physician's conviction for unlawful distribution of controlled substances, finding no error in the admission of testimony from an anesthesiologist qualified as an expert in pain management that the defendant's prescribing and treatment practices were "outside the course of legitimate medical practice." The terms used by the expert, although similar to those used by courts to express the underlying issue, were not "sufficiently specialized to render his testimony inadmissible" but rather fell "within the limited vernacular that is available to express whether a doctor acted outside the bounds of his professional practice."

[l] Rule 704(a) -- Opinions as to Reasonableness, Necessity, etc.

United States v. Perkins, 470 F.3d 150 (4th Cir. 2006) : In the civil rights prosecution of a police officer for using excessive force, police officers were permitted to give both lay and expert testimony that there was no "law enforcement reason" or no "legitimate reason" for the blows that were struck. Affirming, the Court rejected the defense argument that the officers' testimony amounted to inadmissible legal conclusions, noting that opinion testimony is helpful, as opposed to stating a legal conclusion, when it offers an opinion that does not simply echo a term that has a specialized, distinct meaning in the law. In this case, the officers were asked whether they saw any legitimate reason for the defendant to kick the victim or whether there was any legitimate reason for the officer to inflict the kicks. The Court concluded that the admissibility of the testimony presented a close question, but "the Government's questions were phrased in such a manner so as to avoid the baseline legal conclusion of reasonableness... . The officers' responses that they personally saw no reason for Perkins's kicks provided the jury with concrete examples against which to consider the more abstract question of whether an 'objectively reasonable officer' would have employed the same force."

Schmidt v. Magyari, 557 F.3d 564 (8th Cir. 2009) : The Court affirmed summary judgment for the City in an action by an arrestee who claimed that photographing her tattoo violated her rights. Expert testimony by a police lieutenant on behalf of the plaintiff was properly excluded to the extent that it offered legal conclusions regarding the reasonableness of conduct in light of *Fourth Amendment* standards.

[m] Rule 704(a) -- Opinions on Legal Matters

[i] Rule 704(a) -- Civil Cases

Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) : The Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It held that because the Trial Judge properly declined to grant comity to the Salvadoran Amnesty Law, there was no abuse of discretion in excluding the defendant's expert testimony on the purpose of the Law. The opinion was not relevant and was also an opinion on the law, and "[a]n expert opinion on a question of law is inadmissible."

Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007) : The plaintiff sued for violations of her privacy rights after a videotape, allegedly showing her estranged husband raping her while she was unconscious, was broadcast without her consent and contrary to her wishes. Affirming summary judgment for the media defendants, the Court held that no issue of a material fact was created by the declaration by an expert witness for the plaintiff that the videotape was not "newsworthy" or an issue of "public concern." This determination, based on the undisputed facts in the record, was the ultimate question of law before the Court, and expert testimony on "ultimate questions of law, i.e., legal opinions or conclusions, is not favored."

[ii] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases

[B] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Fraud

United States v. Setser, 568 F.3d 482 (5th Cir. 2009) : Affirming convictions for operating a multimillion-dollar Ponzi

scheme, the Court held it was error (but harmless) for the receiver of the defendants' enterprises to testify that they constituted a "security fraud" and a "Ponzi scheme."

United States v. Winkle, 477 F.3d 407 (6th Cir. 2007) : The Court affirmed a bank fraud conviction, finding no abuse of discretion when a prosecution expert testified to his conclusion that a check kite had occurred. The expert was qualified, and his testimony was "otherwise admissible" because it was helpful to a jury that might not have understood the scheme because of its complexity and it did not impermissibly refer to the defendant's state of mind.

United States v. Davis, 471 F.3d 783 (7th Cir. 2006) : Affirming a conviction for Medicaid fraud, the Court found no abuse of discretion when a witness was permitted to testify how the state Medicaid agency interpreted the requirements of the program. The Court noted that "[e]xperts are permitted to testify regarding how their government agency applies rules as long as the testimony does not incorrectly state the law or opine on certain ultimate legal issues in the case," and that "experts are allowed to testify about how they enforce regulations, whether transactions comply with regulations, and how they ensure that the public knows about regulations."

[C] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Miscellaneous Cases

United States v. Noel, 581 F.3d 490 (7th Cir. 2009) : Although the Court affirmed convictions for producing and possessing child pornography, it found an abuse of discretion in permitting an Indiana detective who conducted the forensic examination of the computer media seized from the defendant's residence to testify that photos on the computer met the federal definition of child pornography. Although the witness was presented as an expert, she gave no explanation for her opinion, so it amounted to "nothing more than a statement that the photos were illegal," which would not assist the jury.

[D] Rule 704(a) -- Opinions on Legal Matters -- Criminal Cases -- Taxes

United States v. Moran, 493 F.3d 1002 (9th Cir. 2007) : In a prosecution for tax fraud and wire and mail fraud, the Court found no abuse of discretion in permitting a government witness to give an opinion that a program offered by the defendants was a "sham." Even if the transactions were a sham, the jury would still have to draw its own inference from that predicate testimony to answer the ultimate factual question of whether "the return was false as to something that was necessary to a determination of whether income tax was owed."

United States v. Bedford, 536 F.3d 1148 (10th Cir. 2008) : The Court affirmed a conviction for conspiracy to assist taxpayers in filing fraudulent tax returns, holding that an IRS agent was properly permitted to testify as to the proper tax consequences of a transaction. The expert did not seek to offer an opinion on whether the defendant did in fact intend to evade taxes.

[q] Rule 704(a) -- Use of Vernacular That May Have a Legal Connotation

United States v. Perkins, 470 F.3d 150 (4th Cir. 2006) : In the civil rights prosecution of a police officer for using excessive force, police officers were permitted to give both lay and expert testimony that there was no "law enforcement reason" or no "legitimate reason" for the blows that were struck. Affirming, the Court rejected the defense argument that the officers' testimony amounted to inadmissible legal conclusions, noting that opinion testimony is helpful, as opposed to stating a legal conclusion, when it offers an opinion that does not simply echo a term that has a specialized, distinct meaning in the law. The Court noted that "[o]n the one hand, conclusory testimony that a company engaged in 'discrimination,' that landlord was 'negligent,' or that investment house engaged in a 'fraudulent and manipulative scheme' involves the use of terms with considerable legal baggage; such testimony nearly always invades the province of the jury... . On the other hand, the legal meaning of some terms is not so distinctive from the colloquial meaning, if a distinction exists at all, making it difficult to gauge the helpfulness, and thus admissibility, of the testimony under *Rule 704*." The distinction between the statutory meaning of "unreasonable" use of force, and the colloquial meaning was

found "not as clear as with other more technical terms like 'negligence' or 'fraud,' *i.e.*, terms that had their common vernacular stem from their legalistic roots." In this case, the officers were asked whether they saw any legitimate reason for the defendant to kick the victim or whether there was any legitimate reason for the officer to inflict the kicks. The Court concluded that the admissibility of the testimony presented a close question, but "the Government's questions were phrased in such a manner so as to avoid the baseline legal conclusion of reasonableness... . The officers' responses that they personally saw no reason for Perkins's kicks provided the jury with concrete examples against which to consider the more abstract question of whether an 'objectively reasonable officer' would have employed the same force."

United States v. Ahmed, 472 F.3d 427 (6th Cir. 2006) : Affirming the defendant's conviction for making false statements concerning his employment history when he was interviewed for a position as a baggage screener, the Court found no abuse of discretion in permitting an assistant director in the personnel security division at the Transportation Security Administration to testify as a lay witness that information the defendant provided in a particular section of a questionnaire had not been honest and that this influenced TSA's decision concerning employment suitability. The Court found that the testimony was based on personal knowledge and was relevant to establishing the materiality of the false statements. Although the defendant complained that the testimony amounted to a legal conclusion, the Court concluded that the testimony that the answers were "false" was nothing more than a non-technical expression of the witness's opinion. As such, the terms used by the witness did not carry a "separate, distinct and specialized meaning in the law different from that present in the vernacular."

[2] Rule 704(b) [Go To Main]

[b.1] Defendant's Own Statements

United States v. Diekhoff, 535 F.3d 611 (7th Cir. 2008) : The defendant was convicted of kidnapping and related offenses after he pleaded insanity. Affirming, the Court found no error in allowing the prosecution's expert psychologist to testify that when she interviewed him, he admitted that he knew that what he did was wrong. The defendant contended that this testimony amounted to an expert opinion on his sanity, barred by Rule 704(b), but the Court concluded that the expert simply related the defendant's statement and did not state any opinion at all. "Although this observation was probative of the ultimate issue, it did not result from Dr. Stribling's expertise or the application of her technical knowledge to the fact of the case." While one could infer from the statement that it was made by a sane person, "such an inference stems from a general understanding about how the world works" and not from any expert opinion.

[d] Rule 704(b) -- Knowledge

United States v. Shaffer, 472 F.3d 1219 (10th Cir. 2007) : The defendant was convicted for possessing and distributing child pornography when he obtained pornography on the Internet and made it available to other users through a file-sharing application. Affirming, the Court found no abuse of discretion when a computer expert was precluded from opining that, based on the file structure of the defendant's hard drive, he was on a "porn fishing expedition with no particular calculation toward any particular type of material, other than generally sexually explicit material." The Court reasoned that the expert "sought to suggest to the jury, at the very least by inference, that Mr. Shaffer did not *knowingly* possess or distribute unlawful child pornography as opposed to simple adult pornography. Yet it was precisely this issue that was hotly contested in, and an essential element of, the crimes with which he was charged." Thus, the testimony came within the bar of *Rule 704(b)*.

[e] Rule 704(b) -- Law Enforcement Agents

[i] Drug Cases

United States v. Martinez, 476 F.3d 961 (D.C. Cir. 2007) : The Court affirmed a conviction for conspiracy to import

cocaine, finding no error in the admission of expert testimony by a former DEA agent that the United States was the most likely destination of Colombian cocaine transported through Central America. The testimony did not improperly refer to the defendant's particular mental state, but was only about drug organizations in general.

United States v. Lopez, 547 F.3d 364 (2d Cir. 2008) : The Court affirmed drug distribution and firearm convictions, finding no abuse of discretion in permitting an investigator from the United States Attorney's office to testify that drug paraphernalia and drugs seized from the defendant's car were more consistent with distribution than with personal use, where the expert did not testify to the defendant's intent.

United States v. Price, 458 F.3d 202 (3d Cir. 2006) : The Court affirmed a conviction for drug and weapon offenses, finding no plain error in the admission of testimony by a police expert that drug dealers are very likely to carry guns and drug buyers almost never do. The testimony said not a word about the defendant's mental state and was proper testimony about the common practices of drug dealers.

United States v. Ibarra, 493 F.3d 526 (5th Cir. 2007) : The Court reversed a conviction for possession with intent to distribute over five kilograms of cocaine because a law enforcement agent had been permitted to testify that he had never seen a courier entrusted with an amount of cocaine that size without the courier knowing that he was carrying something illegal. The expert's testimony "went directly to the ultimate issue to be determined by the jury."

United States v. Are, 590 F.3d 499 (7th Cir. 2009) : The Court affirmed convictions for drug conspiracy, finding that testimony by law enforcement agents regarding the meaning of coded language in intercepted communications did not impermissibly constitute an opinion on the defendant's mental state. The defendants argued that once the jury credited the testimony, no inference was necessary to find that the defendants possessed the requisite intent to knowingly use the phone to conduct drug transactions, but the Court noted that "the jury would still have to evaluate the coded terms in the context of the entire conversation to determine whether, as a whole, the conversation was intended to further a drug transaction." In *United States v. Morris, 576 F.3d 661 (7th Cir. 2009)* , the Court affirmed convictions for drug and firearm offenses, finding no abuse of discretion in admitting testimony by a police sergeant as to the common practices of street-level narcotics sales, including what quantities of drugs are generally possessed for purposes of distribution, and to opine that 23.7 grams of heroin "would be consistent with distribution quantity." The sergeant never expressed any opinion about the defendant's actual state of mind and, although the sergeant was involved in the raid that found the drugs, there was no likelihood that the jury would conclude that he was offering an opinion about the defendant's intent. The Court emphasized that "[t]he government's decision not to use [the sergeant] as a fact witness was an important step in avoiding potential juror confusion or crossing the line into improper opinion." In *United States v. Blount, 502 F.3d 674 (7th Cir. 2007)* , the Court affirmed a conviction for possessing a firearm in furtherance of a drug trafficking crime, holding that an officer's expert opinion that the defendant's gun was used in furtherance of drug crimes was based on the way the drugs and gun were discovered rather than on what he knew about the defendant. Thus, the testimony assisted the jury to infer the defendant's motives from a general trend linking drugs and guns. The Court also rejected the argument that the officer's "testimony was a mere legal conclusion and as such was unhelpful to the jury"; it reasoned that "[t]he average juror does not know how a drug business is run," "Boerm did not couch his testimony in legal terms," and "[t]here is a difference between stating a legal conclusion and providing concrete information against which to measure abstract legal concepts." In *United States v. Glover, 479 F.3d 511 (7th Cir. 2007)* , the court affirmed a conviction for drug distribution offenses, finding no error when a law enforcement agent was permitted to testify that street level drug dealers typically sell very small quantities; that they often maintain small stashes of drugs nearby for resupply, rather than carrying all their drugs with them; and that firearms are common tools of the trade for drug dealers. The Court noted that the officer made no direct reference to the defendant's intent to distribute drugs, "and the structure of his examination made clear that he was speaking generally about the practices of street level drug dealers, not specifically about Glover."

United States v. Urbina, 431 F.3d 305 (8th Cir. 2005) : The defendant was convicted for possession with intent to distribute cocaine after his truck was stopped on the highway and six bundles of cocaine were found hidden in an

auxiliary gas tank. Affirming, the Court found no abuse of discretion in permitting a DEA agent to testify that he had never seen a drug dealer entrust as large a quantity of drugs to a courier who was not aware of what he was transporting. The evidence was relevant to rebut a defense that the defendant did not know the cocaine was present in the tank; it was helpful to a jury not familiar with the practices of the drug trade; and the prosecution did not elicit an opinion on the ultimate issue of the defendant's knowledge, which would be impermissible.

United States v. Anchrum, 590 F.3d 795 (9th Cir. 2009) : The Court affirmed convictions for drug and firearms offenses, finding no abuse of discretion in permitting a DEA agent who had participated in the incident leading to the defendant's arrest to also testify as an expert regarding the various reasons a hypothetical drug dealer would possess a firearm. The Judge avoided problems with an agent testifying in dual roles by separating the testimony into "phases." Furthermore, the officer's expert testimony avoided opinions about the defendant's mental state by talking of a hypothetical drug dealer and describing the reasons in the second person point of view.

United States v. Steed, 548 F.3d 961 (11th Cir. 2008) : The Court affirmed a truck driver's conviction for possession of marijuana with intent to distribute, finding no abuse of discretion in the admission of testimony by the arresting officer that the defendant's hands were shaking, he had sweat on his forehead even though the air conditioner had been on, and that he avoided making eye contact. Although this testimony likely gave rise to an inference that the defendant knew he was transporting contraband, the experienced officer did not expressly state the inference and let the jury draw its own conclusions.

[g] Rule 704(b) -- Medical Opinions

United States v. Eff, 524 F.3d 712 (5th Cir. 2008) : A Forest Service firefighter, charged with arson, offered testimony by medical witnesses that he suffered from a genetic disorder that causes brain, behavioral, and neurocognitive deficiencies; the experts concluded that as a result of his condition the defendant was unable to appreciate the nature and quality or wrongfulness of his acts. Affirming, the Court held that the conclusion was inadmissible under Rule 704(b), because that was the ultimate issue in the defendant's insanity defense.

United States v. Chube, 538 F.3d 693 (7th Cir. 2008) : Affirming convictions for unlawful distribution of controlled substances and health care fraud involving illegitimate prescriptions of OxyContin, the Court found no abuse of discretion in the admission of expert testimony by a doctor specializing in internal and addiction medicine and by a pharmacology expert. Both testified that the prescriptions written for 98 patients were not for a "legitimate medical purpose." The Court noted that the jury was told that the "standard of care" was an issue distinct from the question of "legality." The Court concluded that the experts did not improperly opine on the law, but indicated that the medical doctor had "come close to a statement about the Doctors' mental state." In *United States v. Gladish, 536 F.3d 646 (7th Cir. 2008)* , the Court reserved a conviction for attempted sexual activity with a minor arising from an Internet chat room solicitation of an undercover agent impersonating a 14-year-old, holding it was an abuse of discretion to preclude a defense psychologist from testifying that the defendant suffered from a "character pathology" leading to "the emotional and physical distance he prefers in his adult interpersonal relationships due to pronounced fear of ridicule and rejection." "The psychologist could not have been permitted to testify that the defendant did not intend to have sex with 'Abagail,' but he could have testified that it was unlikely, given the defendant's psychology, that he would act on his intent."

[h] Rule 704(b) -- *Mens Rea* Evidence

United States v. Hofus, 598 F.3d 1171 (9th Cir. 2010) : The Court affirmed a conviction for attempting to coerce and entice a minor to engage in sexual intercourse, finding no abuse of discretion when a psychologist was precluded from testifying that the defendant was engaged in texting as "fantasy alone" and was unlikely to act on the intentions (to engage in sex) expressed in his texts. It held that the likelihood the defendant would engage in sex with a minor was irrelevant to whether he would commit the charged crime of attempting to induce or entice a minor to engage in sexual

activity, and that an opinion that the defendant texted "in fantasy alone" was the equivalent of saying he lacked the requisite *mens rea*, which would run afoul of Rule 704(b). One Judge dissented, arguing that the evidence was relevant, since "[i]f the defendant did not intend to have intercourse with the minor, he was unlikely to be attempting to persuade her to have intercourse," and that denying the "fantasy" evidence violated the right to present a defense. In *United States v. Cohen, 510 F.3d 1114 (9th Cir. 2007)* , the Court reversed the conviction of a defendant charged with aiding and assisting the filing of a false tax return, because the defendant's expert psychiatrist was erroneously precluded from testifying that a narcissistic personality disorder like the defendant's can cause a person to continue to believe something to be true despite overwhelming evidence of its patent absurdity. The Court held that the expert's testimony would have assisted the jury in determining whether the defendant had a good-faith belief that he was complying with the law, thereby negating the *mens rea* element of the *26 U.S.C. § 7206(2)*, which requires that a defendant "wilfully" assist in the filing of a false tax return. Without the expert testimony, the defendant had no way to explain the effect that his mental disorder may have had on his ability to form the requisite *mens rea*. The Court noted that to the extent the Trial Judge was concerned that some of the expert's testimony would violate Rule 704(b), the "best way for the district court to have insured the exclusion of the potentially inadmissible aspects of Dr. Roitman's testimony was not to bar him from testifying altogether, but to sustain the government's objections to particular questions likely to elicit inadmissible evidence under the rule." If the Judge had followed this procedure, then the expert testimony "would have gone to a predicate matter -- whether Cohen suffered from a Narcissistic Personality Disorder. Even if the jury had accepted this diagnosis, the jury would still have been required to determine what impact, if any, that condition might have on Cohen's ability to form the requisite *mens rea* -- the intent to evade the tax laws."

[j] Rule 704(b) -- Profile Evidence

United States v. Cuellar, 478 F.3d 282 (5th Cir. 2007) (en banc), reversed on other grounds, 128 S. Ct. 1994, 170 L. Ed. 2d 942 (2008) : The defendant, a suspected drug courier, was convicted of international money laundering after a bundle of cash was found hidden in a car he was driving to Mexico. A law enforcement expert was permitted to testify that "[t]he people who are driving money or who are driving dope know they are transporting either dope or money, something of value." The Court found that this testimony violated Rule 704(b), as it was essentially profile evidence and an opinion on the defendant's mental state. The defendant did not make a specific objection at trial, however, and the Court found no plain error.

[k] Rule 704(b) -- Specific Intent

[i] Rule 704(b) -- Drugs

United States v. Are, 590 F.3d 499 (7th Cir. 2009) : The Court affirmed convictions for drug conspiracy, finding that testimony by law enforcement agents regarding the meaning of coded language in intercepted communications did not impermissibly constitute an opinion on the defendant's mental state. The defendants argued that once the jury credited the testimony, no inference was necessary to find that the defendants possessed the requisite intent to knowingly use the phone to conduct drug transactions, but the Court noted that "the jury would still have to evaluate the coded terms in the context of the entire conversation to determine whether, as a whole, the conversation was intended to further a drug transaction."

[ii] Rule 704(b) -- Specific Intent -- Fraud and Tax Evasion

United States v. Cohen, 510 F.3d 1114 (9th Cir. 2007) : The Court reversed the conviction of a defendant charged with aiding and assisting the filing of a false tax return, because the defendant's expert psychiatrist was erroneously precluded from testifying that a narcissistic personality disorder like the defendant's can cause a person to continue to believe something to be true despite overwhelming evidence of its patent absurdity. The Court held that the expert's testimony would have assisted the jury in determining whether the defendant had a good-faith belief that he was complying with the law, thereby negating the *mens rea* element of the *26 U.S.C. § 7206(2)*, which requires that a defendant "wilfully" assist in the filing of a false tax return. Without the expert testimony, the defendant had no way to

explain the effect that his mental disorder may have had on his ability to form the requisite *mens rea*. The Court noted that to the extent the Trial Judge was concerned that some of the expert's testimony would violate Rule 704(b), the "best way for the district court to have insured the exclusion of the potentially inadmissible aspects of Dr. Roitman's testimony was not to bar him from testifying altogether, but to sustain the government's objections to particular questions likely to elicit inadmissible evidence under the rule." If the Judge had followed this procedure, then the expert testimony "would have gone to a predicate matter -- whether Cohen suffered from a Narcissistic Personality Disorder. Even if the jury had accepted this diagnosis, the jury would still have been required to determine what impact, if any, that condition might have on Cohen's ability to form the requisite *mens rea* -- the intent to evade the tax laws."

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705.01 Official Text

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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705.02 Editorial Explanatory Comment

[1] Basic Rule

Before the Federal Rules were adopted, Federal Courts disagreed on whether the data used by experts in formulating their opinions had to be brought out at trial by the party calling the expert as a condition precedent to admission of the expert's opinion. Some Courts required that the expert disclose on direct examination the sources used, while others assumed the credibility of the opinion without requiring such disclosure and left exploration of the sources for cross-examination.

Rule 705 by its terms puts the burden on the adverse party to expose any weaknesses in the basis of the expert's opinion, including the expert's reliance on out-of-court sources. Description of the basis is not a condition precedent to the admissibility of expert testimony. n1

[2] Flexibility of the Rule

Now that *Rule 703* permits experts to rely on certain inadmissible data, the direct examiner may wish to bring out all the data on which the expert relied in order to bolster the testimony. *Rule 705* permits the examiner to do this, assuming the Court believes that bringing out the data not independently admissible is acceptable, an issue that is discussed in the Editorial Explanatory Comment to *Rule 703*, *§ 703.02[3], [4]*. However, the Rule does not *require* that the basis be explicated during direct examination. Apparently the Rule's drafters recognized that the data on which an expert bases an opinion might sometimes confuse the trier of fact and that the examiner should be permitted to forgo testimony as to basis when confusion or undue consumption of time might be avoided by offering the opinion without many supporting details.

Rule 705 does not require the Court to admit expert testimony that lacks a sufficient basis in facts or data. The Rule must be read in tandem with *Rule 702(1)*, which requires that an expert's opinion must be based on "sufficient facts or data." *Rule 705* simply deals with the procedure and timing for presenting the underlying facts or data to the jury. n2

It should be noted that while *Rule 705* provides flexibility, in practice counsel will ordinarily present a significant amount of supporting data on direct examination of the expert. Such disclosure may be necessary to make the opinion

understandable and to allow the expert to appear well-qualified to the jury. Disclosure of the basis on direct also allows counsel to bring out and explain any weakness in the expert's basis, before it is brought out by the adversary on cross-examination.

The Rule provides that the cross-examiner "may" inquire into the underlying facts. Our view is that it is very important for the cross-examiner to be able to probe the basis for an expert opinion and that great leeway should be given to the cross-examiner to test the opinion by asking about its data base. In most cases the word "may" should be read to mean that the cross-examiner has a right to inquire into the details of an expert's opinion. This right should be subject to limitation under *Rules 403* and *611(a)*, however.

[3] Discovery of the Basis of an Expert Opinion

Because experts are not required to state the basis of their opinions on direct examination, it is extremely important that opposing counsel fully utilize opportunities to discover before trial the basis for expert opinions. *Federal Rule of Criminal Procedure 16(a)(1)(E)* provides that upon request, the government shall disclose to the defendant a written summary of expert testimony that it intends to use. The summary must describe the witness's opinions, the bases and the reasons therefor, and the witness' qualifications. *Federal Rule of Civil Procedure 26(a)(2)(B)* requires the preparation and disclosure of a report signed by the expert containing a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; and a description of the expert's qualifications, compensation, and a listing of other cases in which the expert has testified within the previous four years. n3 The Civil Rule requirement applies only to an expert "who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." It does not apply, for example, to corporate agents who are used as experts on a one-time basis.

[4] Control by the Court

The Rule does not require counsel to lay out an expert's basis on direct examination. However, the Advisory Committee Note to a 1993 Amendment to the Rule states that disclosure of the expert's basis may be required in advance if a serious question is raised under *Rule 702* or *703* as to the admissibility of the expert's testimony. That is, the Court will ordinarily require disclosure of the basis of the expert's opinion before ruling on an objection under *Rule 702* or *703*. The last clause of the first sentence of *Rule 705* specifically authorizes the Trial Judge to require testimony as to the basis in advance. It is easier to avoid an objectionable opinion than to strike one from the memory of jurors who have heard it.

[5] Risks of Not Bringing Out Basis on Direct

There are risks involved in calling an expert to testify without eliciting the basis of the opinion on direct examination. The upside possibility is that the cross-examiner will actually strengthen the expert's testimony by unwittingly exposing a solid basis for the expert's opinion. The downside risk is that the adversary will sense that a trap is laid -- especially in light of the expanded discovery provided by the Federal Rules -- and forgo cross-examination of the expert, choosing instead to call his or her own expert. That would leave counsel who called the first expert with no option other than to attempt to bring out that expert's basis on redirect or rebuttal. But this option requires an act of mercy from the Trial Judge under *Rule 611*. Counsel cannot count on a second chance to do what the Judge might think should have been done earlier.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc., 851 F.2d 540, 544 (1st Cir. 1988)* :

> If in arriving at his opinion the expert has reasonably relied on facts or data before trial, the basis for

> the opinion need not be disclosed as a condition to admitting the testimony. The burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion.

See also *United States v. Havvard, 260 F.3d 597 (7th Cir. 2001)* (no error in admitting expert testimony where the expert's basis was not described in detail on direct examination; uncovering the basis for the opinion is a matter for cross-examination under *Rule 705*); *Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980)* (the effect of *Rule 705* is to place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination.).

(n2)Footnote 2. See, e.g., *Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990)* (*Rule 705* does not provide for admissibility of an expert's bare conclusion derived from erroneous data).

(n3)Footnote 3. For an excellent discussion of the impact of the Rule 26 amendments on expert testimony, see Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97 (1996)* .

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705.03 Annotated Cases

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[1] Cross-Examination

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986) : In a kidnapping case, the Court held that one defendant's confrontation rights were not violated when a codefendant's psychiatrist was erroneously permitted to testify during cross-examination about a statement made by the codefendant concerning the offense. The government had the right to examine the basis of the doctor's opinion and the doctor's reference to what was said to him was not offered for its truth, but to explain his opinion.

United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991) : The principal government witness in a prosecution for false claims fraud had taken polygraph tests in which the government examiner concluded he was "not truthful." A government motion *in limine* to exclude polygraph evidence was granted, and at trial the defense was not permitted to inquire about the tests while cross-examining a government expert whose report (entered in evidence) concluded that the key witness was competent. The Court reversed, holding that as a panel it could not overturn the Circuit's rule excluding polygraph evidence offered to prove the examinee's truthfulness, but that under *Rule 705* the expert could be examined on the polygraph report he had considered in reaching his opinion on competency. In *United States v. Gillis*, n1 the Court affirmed convictions for involvement with stolen property and held that the government properly cross-examined a psychiatrist who had examined the defendant and testified on his behalf in a 1980 prosecution for transportation of a stolen motor vehicle and kidnapping. When the defendant elicited from the doctor his 1980 diagnosis, the government was permitted to examine him concerning the facts supporting it. The Court found that the government avoided mentioning the outcome of the prior trial and had a need to explore the basis of the expert opinion.

Polythane Sys. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201 (5th Cir. 1993) : Although the Court affirmed a judgment for the manufacturer of a flotation foam in an action seeking a declaration of nonliability for problems with a dock, it found there was error in permitting the manufacturer to introduce a report prepared by its expert (who did not

testify) simply because the manufacturer elicited on cross-examination of the marina's expert that the witness had relied on the report. The Court noted that an expert may be permitted to disclose the data relied upon, but "such disclosure does not facilitate the admission of otherwise inadmissible evidence." See also *Bryan v. John Bean Div., 566 F.2d 541 (5th Cir. 1978)* (finding error in the cross-examination of one expert about opinions of two other experts, where the testifying expert had not relied on those conclusions).

United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992) : Affirming a conviction for murder, the Court held it was proper to cross-examine defense experts about the underlying facts or data upon which they had based their opinions. In *Hale v. Firestone Tire & Rubber Co.*, n2 an action involving a wheel rim explosion, the Court held that the plaintiffs properly cross-examined a defense expert about dissimilar accidents after the expert testified that the wheel rim was a safe design and that he had no problems with it. In *Fluckey v. Chicago & N.W. Transp. Co.*, n3 the Court affirmed a judgment for a railroad in a wrongful death case, finding that cross-examination of the railroad's expert was not improperly restricted. The hypothetical question asked of the expert was not supported by the evidence.

United States v. Barton, 731 F.2d 669 (10th Cir. 1984) : The Court concluded that the government was properly permitted to ask an expert, who was called by the defense to testify that a primer residue test on the defendant was inconclusive, whether barium residue had been found on the defendant's hand. Since the expert did not testify that the test results were negative or unreliable, the Court reasoned that the government could ask the expert to explain what the test actually showed and why it was deemed inconclusive.

Studiengesellschaft Kohle, m.b.H. v. Dart Indus., 862 F.2d 1564 (Fed. Cir. 1988) : The Court held that an expert on patent royalties did not have to testify affirmatively as to his mental processes and calculations in arriving at a royalty floor, where an infringer did not cross-examine on the issue and the special master appointed to determine damages did not require such testimony.

[2] Discovery for Cross-Examination

United States v. Hensel, 699 F.2d 18 (1st Cir. 1983) : In a marijuana conspiracy prosecution, the Court upheld a ruling that the government did not have to turn over Drug Enforcement Agency documents, reports, etc., to assist the defense in cross-examination of an agent who testified, when the agent had not relied on the material in arriving at his opinion.

[3] Failure To Produce Supporting Materials

United States v. Jones, 72 F.3d 1324 (7th Cir. 1995) : In a counterfeiting case involving fingerprint evidence, the prosecution expert was unable at trial to identify the points of identity he had discerned between the known prints of one of the defendants and the prints found on counterfeit currency. The expert explained that he had prepared photographic enlargements, but had not brought them to Court, and that he could not identify any points of similarity in the prints on the witness stand without either a magnifying glass or the photographic enlargements. Affirming the convictions, the Court held there was no error in refusing to strike the expert's testimony, since the defendants would have been entitled to a continuance so that the prosecution could have produced supporting materials, but they had not requested a continuance. The defendants' decision to forgo a continuance and instead highlight on cross-examination the absence of supporting materials for the expert's opinion "must be viewed as a tactical decision by the defense."

[4] Hypothetical Questions

[a] Generally

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) : The Court affirmed income tax convictions, finding that an expert, who was expected to answer hypothetical questions unsupported by facts proved by the defense, was properly excluded from testifying.

United States v. Garcia Abrego, 141 F.3d 142 (5th Cir. 1998) : In a drug, money laundering, and CCE case, a doctor who had examined the defendant upon his arrival in the United States testified to the effects of several medications that Mexican authorities had administered to the defendant. The prosecutor asked the doctor about the effects of a 20-milligram dose of Valium on a person who has used the drug for many years. The Court held that "[a]n expert may testify in response to a hypothetical question containing facts that have evidentiary support in the trial record," and observed that two coconspirators testified to the defendant's Valium use. In *Theriot v. Bay Drilling Corp.*, n4 an action arising out of a worker's injuries on a drilling barge, the Court held that hypothetical questions posed to an expert without personal knowledge must assume a fair, undistorted collection of facts.

Taylor v. Burlington N. R.R., 787 F.2d 1309 (9th Cir. 1986) : In an opinion reversing a judgment for a former railroad employee in a FELA case on another ground, the Court observed that hypothetical questions are not abolished by the Rules, even though *Rule 705* largely removes the need for them, and that such questions "must not require the expert to assume facts that are not in evidence."

[b] Hypothetical Questions -- Omission of Fact from Hypothetical Question

Piotrowski v. Southworth Prods. Corp., 15 F.3d 748 (8th Cir. 1994) : The Court affirmed a judgment for the plaintiff in a product liability action, holding there was no abuse of discretion when the plaintiff's treating physician was asked a hypothetical question that omitted reference to the plaintiff's visits to a chiropractor four years prior to the accident. The omission was not material in the circumstances, and the hypothetical taken as a whole fairly and accurately presented the plaintiff's condition.

[5] Motions To Strike

Benjamin v. Peter's Farm Condo. Owners Ass'n, 820 F.2d 640 (3d Cir. 1987) : Reversing a judgment for a plaintiff who alleged injuries from a slip and fall, the Court held that a motion to strike an economic expert's testimony was timely where the defendant did not know until cross-examination of the speculative basis for the expert opinion.

[6] Obligations of Direct Examiner

United States v. Mangan, 575 F.2d 32 (2d Cir. 1978) : Although it affirmed convictions for defrauding the IRS, the Court said that it did "not much like the way in which this matter [presentation of a government fingerprint expert] was handled." Citing *Rule 705*, the Court emphasized that the government had a "serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony." It added that the government should have told its expert to be prepared in Court to respond to defense requests for information about the basis of the expert's opinion.

[7] Relationship to Other Rules

University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200 (1st Cir. 1993) : Affirming a judgment for the defendant in an action by the University to recover the cost of correcting corrosion on one of its vessels that had been

treated with the defendant manufacturer's product, the Court held there was no abuse of discretion in excluding testimony by the University's controller concerning the amount of damages. The University came to trial with no supporting documentation to substantiate the witness' assessment of damages and, instead of attempting to assuage the Trial Judge's legitimate concerns, chose to rely on a perceived "right" to have the testimony admitted under *Rule 703*.

Melville v. American Home Assurance Co., 443 F. Supp. 1064 (E.D. Pa. 1977) , *rev'd on other grounds*, *584 F.2d 1306 (3d Cir. 1978)* : The District Court indicated that *Rule 705* does not give a right to cross-examine opinions contained in public records admitted under *Rule 803(8)(C)*, but it observed that where the foundation of an opinion would be discredited under *Rule 705* cross-examination, the presumptive trustworthiness of the opinion might well be sufficiently impugned to disqualify the report under the proviso to *Rule 803(8)(C)*.

[8] Summary Judgment

Boyd v. State Farm Ins. Cos., 158 F.3d 326 (5th Cir. 1998) : Affirming a grant of summary judgment in favor of an employer in a Title VII action, the Court held that the Trial Judge properly rejected a conclusory affidavit of the plaintiff's medical expert. The Court held that *Rule 705* does not operate on summary judgment to permit experts to give opinions without any disclosure of the underlying facts and data.

[9] Unsupported Opinion

United States v. Havvard, 260 F.3d 597 (7th Cir. 2001) : In a trial for felon firearm possession, the government's fingerprint expert related his extensive background, described the general scientific basis for fingerprint analysis and the particular comparison techniques he uses to match fingerprints, and then stated that a latent print found on a pistol recovered at the time of the defendant's arrest matched an exemplar print of the defendant's left index finger. The Court found there was no error in admitting the witness' conclusion without more elaboration, since uncovering the basis for the opinion was a matter for cross-examination under *Rule 705*.

FOOTNOTES:

(n1)Footnote 1. *United States v. Gillis, 773 F.2d 549 (4th Cir. 1985)* .

(n2)Footnote 2. *Hale v. Firestone Tire & Rubber Co., 820 F.2d 928 (8th Cir. 1987)* .

(n3)Footnote 3. *Fluckey v. Chicago & N.W. Transp. Co., 838 F.2d 302 (8th Cir. 1988)* .

(n4)Footnote 4. *Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986)* .

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705.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, *5 Vand. L. Rev. 414, 426-27 (1952)*. While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him secondhand or observed by him firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, NYCPLR (McKinney 1963), provides:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data... .

See also *California Evidence Code 802*; Kansas Code of Civil Procedure 60-456, 60-457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, *14 Stan. L. Rev. 455 (1962)*.

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

[The entire Advisory Committee Note accompanying the gender neutralizing changes effective October 1, 1987 is as follows:

The amendment is technical. No substantive change is intended.]

[2] 1993 Amendment Committee Note

1993 Amendment Committee Note

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised *Rules 26(a)(2)(B)* and *26(e)(1) of the Federal Rules of Civil Procedure* or with revised *Rule 16 of the Federal Rules of Criminal Procedure*, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person would be allowed to testify. This rule does not preclude such an inquiry.

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Scope

The chart below shows the proposed style amendments for Rule 705, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion	**Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion**
The expert	Unless the

may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose those

court orders otherwise, an expert may state an opinion -- and give the reasons for it -- without first testifying to the underlying facts or data. But the expert may be required to disclose those

required to disclose the underlying facts or data on cross-examination.	facts or data on cross-examination.

Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

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Supp. to § 705.03 Annotated Cases

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[1] Cross-Examination [Go To Main]

United States v. Lee, 502 F.3d 691 (7th Cir. 2007) : Affirming a defendant's conviction for being a felon in possession of a firearm found in a car in which he was a passenger, the Court found no abuse of discretion in admitting government expert fingerprint testimony concerning a partial print found on the gun. The expert testified that the print did not belong to the driver of the car and that she could not exclude or identify the defendant as the source of the print. The Court reasoned that the fact that the testimony excluded the driver rendered the testimony relevant. The defendant attempted to cross-examine the expert as to whether she had asked six other scientists at her laboratory to review the partial fingerprint and whether one scientist indicated that the partial print was not suitable for comparison. The government argued that the cross-examination was proper only if the expert relied on the consultation in rendering an opinion. The Trial Judge conducted voir dire of the expert, who indicated that she asked six other analysts to review the print and considered their opinions in reaching her conclusion that the print was suitable for comparison. The Judge barred the defendant from cross-examining on the opinions the expert received, on the ground that the expert did not base her conclusion on the other experts' opinions, but only confirmed her conclusions. The Court stated that "[a]lthough the call is close, we find that the district court did not abuse its discretion in barring Lee from cross-examining Bodine [the expert] regarding the opinions of the six analysts," and "[a]t any rate any harm from denying cross-examination on this point was limited and does not warrant reversal." We respectfully suggest that the cross-examination the defendant sought to undertake is precisely that contemplated by Rule 705.

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§ 706.syn Synopsis to Chapter 706: RULE 706

706.01 Official Text

706.02 Editorial Explanatory Comment

[1] Need for Court-Appointed Expert

[2] Special Master, Court-Appointed Expert, Technical Assistant

[3] Analyzing the Rule

[a] Generally

[b] Analyzing the Rule -- Choosing the Expert

[c] Analyzing the Rule -- Compensation for Experts

[d] Analyzing the Rule -- Ex parte Communications

[4] Reluctant Experts

[5] Notification of Experts

[6] Rights of Parties

[7] Instructing the Jury

[8] Experts to Assist the Criminal Defendant

706.03 Annotated Cases

[1] Antitrust Cases

[2] Copyright Cases

[3] Cross-Examination of Expert

[4] Desirability of Appointment

[5] Discretion To Appoint

[6] Expert Witnesses Called to Testify by Parties

[7] Habeas Corpus Proceeding

[8] Law Enforcement Officers

[9] Patent Cases

[10] Payment of Expert

[11] Procedure for Appointment

[12] Revealing Appointment to Jury

[13] Scope of Rule

[14] Technical Advisors

[15] Timing of Appointment

706.04 Legislative History

[1] Advisory Committee's Note

[2] Citations to Hearings and Debates

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706.01 Official Text

Rule 706. Court Appointed Experts

(a) *Appointment*. -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) *Compensation*. -- Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the *fifth amendment*. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment*. -- In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection*. -- Nothing in this rule limits the parties in calling expert witnesses of their own

selection.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 706 RULE 706

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706.02 Editorial Explanatory Comment

[1] Need for Court-Appointed Expert

Generally speaking the Trial Court can rely on the parties, working through the adversary system, to reach the truth fairly by calling their own experts. However, it may occasionally occur that the experts are in such wild disagreement that the Trial Court might find it helpful and in furtherance of the search for truth to appoint an impartial expert. n1 Other instances may arise, again infrequently, where the Court might require technical assistance to sift through highly complex issues and unwieldy material, and where it might be useful to have that witness testify. n2 However, because of the justifiable concern that the appointment of an expert witness by the Court will be outcome-determinative, Judges have generally been reluctant to invoke this Rule. n3 The Rule gives the Court the *authority* to appoint an expert, but it does not *require* the Court to do so. n4

[2] Special Master, Court-Appointed Expert, Technical Assistant

Rule 706 is applicable only when an expert is appointed by the Court to testify as a witness. The Rule does not purport to circumscribe the Trial Judge's authority to appoint a non-testifying technical consultant to assist the Judge in understanding highly complex issues. Of course, the inherent power of the Court to appoint a technical consultant, while outside the Rule, does raise process questions that caution against such an appointment in most cases. n5

There is some overlap between the roles filled by a Court-appointed expert witness, a technical adviser, and a special master appointed under *Fed. R. Civ. P. 53*. n6 The expectations for each appointee will be very case-dependent. Flexibility is required to match the appointee's role with the needs of the case. The failure of either the Rules of Evidence or the Rules of Procedure to carefully delineate and distinguish among the various roles is actually a good thing, in that it gives the Court and the appointee maximum flexibility. It may be appropriate, depending on the case, for the appointee to switch from role to role at various times throughout the case, as long as the parties are kept in the loop.

[3] Analyzing the Rule

[a] Generally

Rule 706 is best broken down into three separate parts for purposes of analysis. First, there is the relationship of counsel and the Judge with respect to appointment and compensation of expert witnesses. Second, there is the relationship between the expert witness and the Court. Third, there is the relationship between the expert witness and the parties.

[b] Analyzing the Rule -- Choosing the Expert

Rule 706 provides that the Court shall inform the parties if it desires to appoint an expert witness on its own motion. Notice comes in the form of an order to show cause why an expert witness should not be appointed. n7 Similarly, if one party wishes the Court to appoint an expert, an order will be issued to any other parties to show cause why the expert witness should not be appointed. The Court may appoint any expert witness agreed upon by the parties; the Court also may appoint any expert witness of its own selection.

Officials of the Federal Judicial Center conducted empirical research on Court-appointed experts, and found that in a large minority of the appointments (29 of 66), the Judge used pre-existing personal or professional contacts to identify an expert. n8 This practice is criticized because it may reflect a narrow spectrum of professional opinion that was suited to the interests of the Judges' former clients and colleagues and that the parties may perceive such an expert as biased. The risk of a sweetheart appointment has led one commentator to suggest that *Rule 706* be amended to require the parties to submit a list of proposed experts to be appointed for each area of disputed testimony. n9

ABA Litigation Section Civil Trial Practice Standard 11(a) sets forth the following suggested limitations on the process of selecting a Court-appointed expert:

> a. Selection.
>
> i. The court should invite the parties to recommend jointly an expert to be appointed by the court.
>
> ii. If the parties cannot agree, the court should invite them to submit names of a specified number of experts with a summary of their qualifications and an explanation of the manner in which those qualifications fit the issues in the case.
>
> iii. The court may choose one or more experts recommended by any of the parties; or it may reject the experts recommended by the parties and select an expert unilaterally.
>
> iv. Before selecting an expert unilaterally, the court should
>
> A. Consider seeking recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and
>
> B. Afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.

These standards provide helpful guidance, and give a proper warning that a Judge should not appoint an expert simply because of a pre-existing relationship.

It should be noted that there has always been some resistance on the part of many members of the bar to the concept of Court-appointed expert witnesses. Fears that such experts will appear more impartial than their backgrounds permit them to be and that they are likely to have too much impact are not unreasonable. The Advisory Committee Note notwithstanding, the decision to appoint the Court's expert may be a troublesome one; it is surely more than one of detail, and certainly it is an oddity in an adversary system. Because many members of the bar distrust the impartial

expert, it seems advantageous for the Court to choose an expert agreed upon by opposing parties unless some strong reason appears in a particular case for ignoring the parties' wishes. n10 If the parties can agree on an expert, it is highly probable that the expert will appear neutral in the eyes of the litigants. Nothing of importance is lost, and the parties would not then be distrustful that a Judge-selected expert will represent one of several competing schools of thought. n11

[c] Analyzing the Rule -- Compensation for Experts

Reasonable compensation for a Court-appointed expert may be payable from funds that are allocated by law for criminal cases and certain civil actions. In all other civil actions and proceedings, the Rule provides that compensation shall be paid by the parties as allocated by the Court, and is recoverable as part of costs.

One problem that can arise in civil cases is that a party may be unable or unwilling to pay for the expert. A party might understandably be reluctant to pay an expert if the party suspects that the witness will testify adversely to the party's case. The Rule provides a good deal of flexibility and discretion in allocating, and enforcing payment of, the expert's expenses. This includes allocating the costs disproportionately among the parties, or even allocating all of the costs to one party. *Ledford v. Sullivan, 105 F.3d 354, 360-361 (7th Cir. 1997)* provides a good discussion of the power to allocate all of the costs of an expert to one side:

> A number of circuits have recognized that *Rule 706(b)* grants a district court the discretion to apportion all the costs of an expert to one side. *See, e.g., Steele v. Shah, 87 F.3d 1266, 1271 (11th Cir. 1996)* (remanding the case because the lower court failed to exercise its discretion to appoint and compensate an expert if the plaintiff was in fact indigent); *McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1991)* (finding that the phrase "such proportion as the court directs," *in an appropriate case,* permits the district court to apportion all costs to one side); *Webster v. Sowders, 846 F.2d 1032, 1038-39 (6th Cir. 1988)* (stating that "[a] District Court has authority to apportion costs under this rule [706(b)], including excusing impecunious parties from their share"); *United States Marshals Serv. v. Means, 741 F.2d 1053, 1059 (8th Cir. 1984)* (stating that discretionary power to advance fees of expert witnesses should be exercised *only under compelling circumstances*).
>
> In this case, when the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion to apportion all the costs to one side. We caution against reading *Rule 706(b)* in such a narrow fashion that the rule would allow for court-appointed experts only when *both* sides are able to pay their respective shares. Read in such a restrictive way, *Rule 706(b)* would hinder a district court from appointing an expert witness whenever one of the parties is indigent, even when that expert's testimony would substantially aid the court.

[d] Analyzing the Rule -- *Ex parte* Communications

Rule 706 does not address whether either the Judge or the parties can communicate *ex parte* with the Court-appointed expert witnesses. As to Judge-expert communications, there is a general recognition that while *ex parte* communications are problematic and should generally be discouraged, they may be essential, especially during the appointment process. n12 However, safeguards have been suggested to allay concerns of the parties as to the *ex parte* nature of these communications.

The ABA Litigation Section has promulgated Civil Trial Practice Standards to cover the problem of *ex parte* communications between a Judge and an appointed expert witness. Standard 11(b) provides as follows:

> b. Communications between Court and Expert. The court shall assure that the parties are aware of all communications between the court and a court-appointed expert by:

i. Permitting the parties to be present when the court meets or speaks with the expert;

ii. Providing that all communications between court and expert will be in writing with copies to the parties; or

iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties. n13

As to *ex parte* communications between counsel and the Court-appointed expert, their permissibility should be dependent on the expert's role in the case. If, for example, the expert must conduct a medical examination of the plaintiff, or if the expert must obtain specimens from one of the parties, then *ex parte* communications are not only warranted but essential. On the other hand, the obvious due process concerns arising from *ex parte* communications indicate that they should not be permitted in the ordinary case, and that even where such communications are necessary, the Court should provide for the safeguard of post-communication disclosure.

ABA Litigation Section Civil Trial Practice Standard 11(c) provides the following guidelines as to *ex parte* communications between the Court-appointed expert witness and the parties:

c. Communications between Parties and Expert. The court shall assure that every party is aware of all communications between any party and a court-appointed expert by:

i. Permitting all parties to be present when any party meets or speaks with the expert, or

ii. Providing that all communications between any party and the expert will be in writing, or if oral, shall be tape recorded, with copies to all parties.

[The Task Force that promulgated this standard comments that it is operative only if the Court has not prohibited such contact, which the Court has the inherent authority to do.]

[4] Reluctant Experts

The purpose of the Rule is to get the best help available, and accordingly the Rule provides that a reluctant witness is to be avoided. An expert witness may not be appointed by the Court unless the expert consents to act. *Rule 706* does not address the question of when the parties, or the Trial Judge under *Rule 614*, are permitted to call a knowledgeable but unwilling expert who will be asked questions within his or her expertise with no additional preparation required. n14 *Rule 706* is confined to appointment of experts who will prepare specially for trial. One of the reasons that experts might be reluctant to testify is that they fear being set upon by the parties for endless depositions and the like. Courts have rightly begun to protect Court-appointed expert witnesses from unnecessary harassment. For example, in the Breast Implant Litigation proceedings in Alabama, Judge Pointer appointed counsel to protect the interests of the Court-appointed experts. Other Courts have imposed limits on the multiple deposition of Court-appointed expert witnesses. n15

[5] Notification of Experts

Once the expert consents to be a witness and is formally appointed, the witness must be notified by the Court of his or her duties. Notification can take one of two forms. Either the Court can notify the expert in writing and file a copy of the writing with the clerk, or the expert can be notified at a conference in which the parties have an opportunity to participate.

[6] Rights of Parties

A Court-appointed expert witness must advise the parties of any proposed findings. Parties are entitled to take the expert's deposition and the expert may be called to testify by the Court or by any party. The expert is subject to cross-examination by all parties, including a party calling him as a witness. n16 The fact that the Court appoints an expert, either on its own motion or in response to a request by a party, does not limit the right of parties to call their own expert witnesses.

[7] Instructing the Jury

Should the Judge inform the jury that an expert has been appointed by the Court? The Rule leaves the matter to the Judge's discretion. There is of course a risk that the appointment of an expert will be outcome-determinative, and some commentators have proposed that because of this risk *Rule 706* should be amended to prohibit judicial comment on the Court appointment. n17 Others have suggested that the Rule be amended to require the Judge to instruct the jury against excessive reliance on the appointed expert's testimony. n18 Of course, even without an amendment to the Rule, such a limiting instruction is prudent as a matter of course. An effective instruction will probably avoid any possible claim that the jury felt somehow bound by the testimony of a witness aligned with the Court.

Section 11(d) of the ABA Litigation Section Civil Trial Practice Standards provides helpful guidance on the question of informing jurors about the expert's Court-appointed status:

> d. Jury Instructions. If an expert witness retained by the court testifies at trial,
>
> i. No Identification as Court Appointee. The court ordinarily should not identify the witness as one appointed by the court.
>
> ii. If Identified as Court Appointee. If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:
>
> A. It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;
>
> B. The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and
>
> C. The jury should carefully assess the nature of, and basis for, each witness's opinion.
>
> iii. Questioning. The witness should be examined by counsel, in an order determined by the court.

[8] Experts to Assist the Criminal Defendant

In *Ake v. Oklahoma, 470 U.S. 68 (1985)* , the Supreme Court held that when sanity is likely to be a significant factor at trial, an indigent criminal defendant is entitled to the assistance of a Court-appointed psychiatrist for the preparation and presentation of a defense. This right was derived from the principle that the Due Process Clause requires that indigents must be provided with the raw materials integral to building an effective defense. The Court held that the defendant in *Ake* made an adequate showing that insanity was likely to be a significant factor at the trial. This finding was based on several factors, including the filing of the insanity plea, the Trial Court's decision to have the defendant evaluated for competency to stand trial, the finding by the prosecution's expert that the defendant was competent only when given large doses of medication, and the expert's opinion that the defendant's severe mental impairment after the crime could have existed earlier.

Under the analysis in *Ake*, the defendant may be constitutionally entitled to the assistance of nonpsychiatric experts as well, e.g., forensic experts. The indigent defendant will have to show that an expert's assistance is necessary to the presentation of a critical issue for the defense. n19

Generally speaking, the Lower Courts have construed *Ake* narrowly. n20 However, there are some Lower Court cases that have reversed convictions for failure to provide expert assistance deemed necessary under the circumstances. n21

If the defense in a criminal case needs expert help to prepare for trial, we suggest that the Court make the appointment pursuant to the 1964 Federal Criminal Justice Act, as amended, *18 U.S.C. § 3006(e)* (permitting appointment of experts), rather than under *Rule 706*. We make this suggestion because *Rule 706* permits all parties to depose an expert, and we think that an expert who helps the criminal defendant with trial preparation ought not to be deposed. *Rule 706* should be reserved for those cases in which the Court knows that one or more parties will offer expert evidence and believes that an impartial expert will assist the trier of fact in fairly evaluating the facts.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065 (9th Cir. 1999)* (Trial Court was within its discretion to appoint a medical expert where the expert testimony of the parties was confusing and conflicted); *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002)* (remanding a price-fixing case, the Court suggested that the Trial Judge appoint an expert witness under *Rule 706*, "rather than leave himself and the jury completely at the mercy of the parties' warring experts" concerning the inferences to be drawn from the massive technical statistical evidence in the case)..

(n2)Footnote 2. See, e.g., *In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992)* , *modified on other grounds*, *993 F.2d 7 (2d Cir. 1993)* (both the District Court and the Bankruptcy Court have the power to appoint experts under *Rule 706* to assist them on the difficult matter of estimating future claims in asbestos litigation).

(n3)Footnote 3. See, e.g., *Hiern v. Sarpy, 161 F.R.D. 332 (E.D. La. 1995)* (declaring that Courts should appoint experts only in extreme circumstances, and the mere fact that the parties' retained experts have expressed divergent opinions does not require the Court appoint an expert to aid in resolving the conflict; concluding that the Court's appointment of an expert "would just add an additional witness, who may testify in favor of one side or the other ... giving one side an inappropriate numerical advantage.").

(n4)Footnote 4. See, e.g., *Quiet Technology DC-8, Inc., v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003)* ("we are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert").

(n5)Footnote 5. See, e.g., *Reilly v. United States, 863 F.2d 149 (1st Cir. 1988)* (*Rule 706* was not intended to subsume the judiciary's power to appoint technical advisors; the Court, however, expressed its strongly-held view that the appointment of a technical advisor must arise out of some cognizable judicial need for specialized skills, and that "[a]ppropriate instances, we suspect, will be hen's-teeth rare.").

In *FTC v. Enforma Natural Prods., 362 F.3d 1204 (9th Cir. 2004)* , the Court endorsed a list of procedural safeguards for Trial Courts to follow when appointing a technical advisor. The Trial Court should

> (1) utilize a fair and open procedure for appointing a neutral technical advisor; (2) address any allegations of bias, partiality, or lack of qualifications; (3) clearly define and limit the technical advisor's duties; (4) make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information; and (5) make explicit, either through an expert's report or a record of ex parte communications, the nature an content of the technical advisor's advice.

(n6)Footnote 6. Commentators have expressed the opinion that the problems of dealing with Court-appointed experts are ordinarily problems of case management and pre-trial practice that are more properly addressed in the Federal Rules of Civil Procedure than in the Federal Rules of Evidence. See, e.g., Joseph Cecil & Thomas Willging,

Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, *43 Emory L.J. 995 (1994)*.

(n7)Footnote 7. See, e.g., *Philadelphia Mtg. Trust v. Touche Ross & Co., 930 F.2d 306 (3d Cir. 1991)* (the mechanism for appointing an expert is a show cause order, which permits the Court to appoint an expert on whom the parties agree or for the Court to select its own; the Court may not select an expert proposed by one party without giving all parties a chance to respond).

(n8)Footnote 8. Cecil & Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, *43 Emory L.J. 995 (1994)*.

(n9)Footnote 9. See Johnson, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 High TecH. L.J. 249 (1988).

(n10)Footnote 10. See *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002)* (remanding a price-fixing case and suggesting that the Trial Judge direct the party-designated experts to agree upon a neutral expert who could then be appointed under *Rule 706*).

(n11)Footnote 11. For an article suggesting that, despite *Rule 706*, the Trial Judge should be reluctant to appoint independent experts when the parties object, see Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, *64 Va. L. Rev. 1* (1978). The article also suggests that the Trial Judge should refrain from calling expert witnesses, even those appointed by the Court, as the Court's witnesses.

(n12)Footnote 12. See the discussion in Cecil & Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, *43 Emory L.J. 995, 1029-33 (1994)*. See also *United States v. Craven, 239 F.3d 91 (1st Cir. 2001)* ("most ex parte contacts between a trial judge and another participant in the proceedings risk harm, and ex parte communications with key witnesses (such as court-appointed experts) are no exception. To the contrary, such ex parte contacts can create situations pregnant with problematic possibilities.").

(n13)Footnote 13. See *Reilly v. United States, 863 F.2d 149 (1st Cir. 1988)* (noting this procedure with approval).

(n14)Footnote 14. See, e.g., *Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982)* (permission of a witness with expertise was not required because he was not a Court-appointed expert; however, the party who called the witness would have to pay him a professional fee).

(n15)Footnote 15. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig., 151 F.R.D. 540 (S.D.N.Y. 1993)* (denying a motion to depose Court-appointed experts; in light of *Daubert* and the gatekeeping function that it imposes, it is more efficient for a Court to hold a pre-trial *Daubert* hearing at which the Court-appointed expert could be questioned by all parties in the presence of the Trial Judge).

(n16)Footnote 16. *Nemir v. Mitsubishi Motors Corp., 381 F.3d 540 (6th Cir. 2004)* (error to prohibit parties from calling and questioning a Court-appointed expert).

(n17)Footnote 17. See, e.g., Bua, *Experts Some Comments Relating to Discovery and Testimony Under New Rules of Evidence*, 21 Trial Law. Guide 1 (1977).

(n18)Footnote 18. See, e.g., Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence* , *6 Yale Law and Policy Review 480 (1988)*.

(n19)Footnote 19. See, e.g., *Caldwell v. Mississippi, 472 U.S. 320 (1985)* , where the Court held that undeveloped assertions that an expert will be beneficial are insufficient to entitle a defendant to appointment of an expert under *Ake*.

(n20)Footnote 20. See generally Harris, Ake *Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the*

Indigent, *68 N.C. L. Rev 763 (1990)*.

(n21)Footnote 21. See, e.g., *Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992)* (holding that denial of funds to retain a psychiatric expert to explain the nature of battered spouse syndrome precluded the defendant from presenting an effective defense in a prosecution for aiding and abetting felony-murder; specific intent was an essential element of aiding and abetting, and a psychiatric expert could have aided the defense by supporting the defendant's assertion that her presence at the scene of the crime was the result of repeated battering and not the result of an intent to assist in criminal conduct).

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
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706.03 Annotated Cases

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[1] Antitrust Cases

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for the defendants in a price-fixing case, the Court recommended that if the case went to trial, the Judge should "use the power that *Rule 706* ... expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts" regarding the inferences to be drawn from the considerable technical statistical evidence in the case. The Court suggested that the Judge direct the party-designated experts to agree upon a neutral expert who could then be appointed under *Rule 706*.

[2] Copyright Cases

Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) : In a copyright and trade secret case, the Court reasoned that, even though "[t]he well-established general rule in this circuit has been to limit the use of expert opinion in determining whether works are substantially similar," "[s]ince the test for illicit copying is based upon the response of ordinary lay observers," "in deciding the limits to which expert opinion may be employed in ascertaining the substantial similarity of computer programs, we cannot disregard the highly complicated and technical subject matter at the heart of these claims." Thus, the Court recognized "the reality that computer programs are likely to be somewhat impenetrable by lay observers," and upheld the use of a Court-appointed expert to assist the Trial Judge.

[3] Cross-Examination of Expert

Gilbane Bldg. Co. v. Federal Reserve Bank, 80 F.3d 895 (4th Cir. 1996) : The Court held in a construction contract dispute that a plaintiff was not improperly denied the right to cross-examine an expert consulted by a special master trying the case. The plaintiff had agreed to the informal procedures used in the special master proceedings and never requested an opportunity to review the expert's findings and to cross-examine him before the special master's report was filed.

[4] Desirability of Appointment

Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) : In a breach of contract action, the Court suggested that the Trial Judge should consider the desirability of appointing a neutral expert to assist the jury in dealing with "the extreme variation between the estimates provided by the parties' experts" if the case was retried following reversal of the District Court judgment.

[5] Discretion To Appoint

Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988) : In a suit by an inmate claiming that the State was exposing prisoners to dangerous levels of asbestos, the Court concluded that the Trial Court "was potentially within its authority" to reappoint an expert, who had previously been appointed to oversee asbestos removal, to provide an independent view as to whether federal regulations were being satisfied. However, findings of fact were required to justify the continued employment of the expert and to assess the costs against the State.

Oklahoma Natural Gas Co., Div. of Oneok, Inc. v. Mahan & Rowsey, Inc., 786 F.2d 1004 (10th Cir. 1986) : Affirming a judgment in an action by a gas company to recover damages and to prevent a Chapter 11 debtor from producing natural gas from the company's underground storage reservoir, the Court held that the District Judge was not required to appoint an expert under *Rule 706* simply because the parties' experts had divergent opinions.

Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333 (11th Cir. 2003) : Affirming a judgment for the defendant in an action against the manufacturer of a thrust reverser that the plaintiff company wanted to employ in a jet engine, the Court upheld the admission of expert testimony for the defendant based upon a "CFD study," which "is a relatively new scientific discipline that uses computer models to measure fluid dynamics, e.g., the flow of air around and through a jet engine." It also found no abuse of discretion when the Trial Judge declined to appoint an independent expert to help it assess the admissibility of the defendant's expert testimony. The Court reasoned that "we are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert... . [A]s long as the district court thoroughly considers a request for the appointment of such an expert and reasonably explains its ultimate decision thereon, that decision is vested in the sound discretion of the trial court." In *Steele v. Shah, 87 F.3d 1266 (11th Cir. 1996)* , a prisoner's civil rights action against a physician for discontinuing psychotropic medication, the Trial Judge denied without explanation the plaintiff's motion under *Rule 706* for appointment of an expert witness. Reversing summary judgment for the defendant, the Court noted that the plaintiff was entitled to a reasoned ruling upon his motion.

[6] Expert Witnesses Called to Testify by Parties

Nemir v. Mitsubishi Motors Corp., 381 F.3d 540 (6th Cir. 2004) : The plaintiff was seriously injured when his seatbelt latch allegedly gave way in an automobile accident. After an earlier remand of the case, the Judge appointed two expert witnesses under *Rule 706* to help determine "whether the seatbelt buckle presented an inherent unreasonable risk of danger to the plaintiff." When one of the experts concluded that the defect was unreasonably dangerous, the Judge disregarded his testimony and refused to instruct on the plaintiff's theory of strict liability. Further, the Judge prohibited the plaintiff from introducing the favorable witness' testimony. Reversing a judgment for the defendant, the Court held it was error to prohibit the plaintiff from calling the expert, since *Rule 706* provides that any party "may" call the witness to testify and does not condition a party's doing so on the Judge's approval. In *Buchanan v. American Motors Corp.*, n1 a product liability suit pending in North Carolina, the defendant manufacturer attempted to subpoena an expert residing in Michigan for a deposition that would require him to spend substantial time testifying and

disclosing raw data that he collected over the course of long study. The Court recognized that the witness had no privilege not to testify, but decided it was not an abuse of discretion to quash the subpoena as unduly burdensome.

[7] Habeas Corpus Proceeding

Smith v. Armontrout, 604 F. Supp. 840 (W.D. Mo. 1984) : Determining that the brother of a death row inmate had raised sufficient question as to the inmate's competency to waive a federal habeas corpus proceeding, the District Court decided to appoint its own expert to examine the inmate.

[8] Law Enforcement Officers

United States v. Walls, 70 F.3d 1323 (D.C. Cir. 1995) : Affirming convictions in a narcotics case, the Court found no error in the Trial Judge's designation of two undercover agents as experts to translate the jargon in taped conversations between the defendants and the agents. The Court stated that "[j]urors as well as judges often need help in deciphering the jargon of the drug trade."

[9] Patent Cases

Syntex Ophthalmics, Inc. v. Tsuetaki, 701 F.2d 677 (7th Cir. 1983) : Following the Trial Judge's initial decision to grant an injunction in a trade secret case, the defendants moved for a stay and filed various motions to permit use of certain processes. To aid it in the resolution of the motions, the Judge appointed a patent lawyer as the Court's expert. The lawyer filed a report and was examined in open Court by all parties. The Judge adopted the report and denied the motions. The Court found that the expert was qualified and that the Judge did not err in barring the defendants from presenting their own "partisan" experts, since the additional experts were unnecessary in light of a "complete" record. If, however, their testimony would have differed from that provided by the expert, we believe they should have been heard. While the Judge ultimately might have rejected their testimony, it is also possible that the experts might have persuaded him that they were more qualified than the lawyer he appointed.

Green v. Rich Iron Co., 944 F.2d 852 (Fed. Cir. 1991) : The Court held in an infringement action that an order compelling the patentee to seek reissue of the patent from the Patent and Trademark Office because of the PTO's "special expertise" could not be made under the Rule, because PTO examiners cannot be compelled to testify about their mental processes in reaching a decision on an application.

[10] Payment of Expert

Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304 (S.D.N.Y. 1981) : This patent infringement case discusses the mechanics of appointing and compensating a Court-appointed expert.

United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313 (D.N.J. 1976) : The Court rejected the United States' argument that the fees and expenses of an expert witness appointed by the Court were not properly chargeable to the United States under *Rule 706* with the comment that "[a]ll who come before the court are equals in the eyes of the law. The United States, as plaintiff, has no special or different status than any other party. In fact, in its role as plaintiff, it carries the burden of persuasion."

United States ex rel. TVA v. 109 Acres of Land, 404 F. Supp. 1392 (E.D. Tenn. 1975) : The District Court held that

the fee of a Court-appointed expert witness in an eminent domain proceeding on behalf of the Tennessee Valley Authority was to be paid by the Administrative Office of the United States Courts.

United States Marshals Serv. v. Means, 741 F.2d 1053 (8th Cir. 1984) (en banc): In an action by the United States to evict Native Americans and others allegedly illegally occupying federal lands, the Court held that *Rules 614(a)* and *706(b)*, read in light of *28 U.S.C. §§ 1920* and *2412* and *Fed. R. Civ. P. 54(d)*, permit a Trial Judge under "compelling circumstances" to advance the fees and expenses of lay and expert witnesses called by the Court in aid of indigent civil litigants. Such fees and expenses are subsequently to be taxed as costs.

McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991) , *vacated*, *502 U.S. 903 (1991)* , *reinstated on remand*, *959 F.2d 853 (1992)* , *aff'd*, *509 U.S. 25 (1993)* : The Court reversed in part a directed verdict for prison officials in an action by an inmate alleging that exposure to secondary cigarette smoke was an *Eighth Amendment* violation. The Court held that, in refusing appointment of an expert witness because no funds have been provided by law for compensation of an expert witness in civil rights cases and the plaintiff was proceeding *in forma pauperis*, the Magistrate Judge read the Rule too restrictively. The Court recommended that on remand appointment of an expert be considered, recognizing that all the costs may be apportioned to one side under the Rule.

[11] Procedure for Appointment

In re Philadelphia Mtg. Trust, 930 F.2d 306 (3d Cir. 1991) : Reversing an order taxing as costs the fees paid expert witnesses employed by a trustee with approval of the Bankruptcy Court, the Court noted that appointment of expert witnesses under *Rule 706*, which does permit the taxation of fees as costs, has procedural safeguards and serves different purposes compared to approval of experts under the Bankruptcy Code.

[12] Revealing Appointment to Jury

Grothusen v. National R.R. Passenger Corp., 603 F. Supp. 486 (E.D. Pa. 1984) : The Court denied posttrial motions by the losing plaintiff in a FELA case, holding that it was proper to disclose to the jury the fact that the Court had appointed an independent expert.

[13] Scope of Rule

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992) , *modified on other grounds*, *993 F.2d 7 (2d Cir. 1993)* : Reversing approval by the District and Bankruptcy Courts of a settlement restructuring the mechanism for distributing compensation to thousands of persons claiming asbestos-related injuries, the Court held that both the District Court and the Bankruptcy Court have the power to appoint experts under *Rule 706* to assist them on the difficult matter of estimating future claims.

[14] Technical Advisors

Reilly v. United States, 863 F.2d 149 (1st Cir. 1988) : In a medical malpractice case arising from birth injuries, the Trial Judge appointed a technical expert to assist in the calculation of damages. Rejecting the defendant's argument that the appointment did not comply with *Rule 706*, the Court observed that the Rule "was not intended to subsume the judiciary's power to appoint technical advisors." It added, however, its "strongly-held view that the appointment of a technical advisor must arise out of some cognizable judicial need for specialized skills," and that "[a]ppropriate instances, we suspect, will be hen's-teeth rare."

Association of Mexican-American Educators v. State of California, 231 F.3d 572 (9th Cir. 2000) (en banc): In a civil rights action challenging tests used in credentialling public school teachers, the Court held there was no error when the Trial Judge employed a specialist in psychometrics as a technical advisor. The Judge invited the parties to object to the specialist's appointment (they did not do so) and advised them that he expected to put the specialist on the stand toward the end of the trial, ask him his views, and permit cross-examination. However, the specialist was never called as a witness and there was no indication that the Judge relied on his opinions as a source of evidence. Therefore, the Court held that the specialist remained within the role of technical advisor (similar to the role of a specialized law clerk) rather than expert witness, so *Rule 706* did not apply and there was no requirement that the advisor submit to cross-examination or furnish an expert's report. Reviewing an ERISA claim for wrongful termination of long-term disability benefits, in *Walker v. American Home Shield Long Term Disability Plan, 180 F.3d 1065 (9th Cir. 1999)* , the Court held there was no abuse of discretion when the Judge appointed an independent medical expert to help evaluate medical evidence. The fact that evidence concerning the plaintiff's fibromyalgia, "an elusive disease of unknown cause," was confusing and conflicting presented an appropriate occasion to appoint an independent expert to assist the Judge.

[15] Timing of Appointment

Students of Cal. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984) , *vacated on other grounds*, *471 U.S. 148 (1985)* : The Court affirmed entry of an injunction requiring additional tests to determine the safety of a school. It approved the Judge's reopening of the case after the conclusion of the parties' testimony and the appointment of a neutral expert to evaluate the adequacy of seismic safety at the school site. It observed that "[a]ppointments under *Rule 706* are reviewable only for abuse of discretion," and found no abuse in this case, where the parties were permitted to thoroughly examine the Court-appointed expert.

United States v. Weathers, 618 F.2d 663 (10th Cir. 1980) : Although it affirmed a defendant's conviction, the Court suggested that the Trial Judge may have violated *Rule 706* in ordering *sua sponte* a further psychiatric examination of a defendant following a bench trial and submission of the case.

FOOTNOTES:
(n1)Footnote 1. *Buchanan v. American Motors Corp., 697 F.2d 151 (6th Cir. 1983)* .

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
CHAPTER 706 RULE 706

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706.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, Levy, Impartial Medical Testimony Revisited, *34 Temple L.Q. 416 (1961)*, the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., 298 F.2d 928 (2d Cir. 1962)* ; *Danville Tobacco Ass'n v. Bryant-Buckner Assocs., 333 F.2d 202 (4th Cir. 1964)* ; Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, *29 S. Cal. L. Rev. 195 (1956)*; 2 Wigmore 563, 9 id. 2484; Annot., 95 A.L.R.2d 383 . Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York; Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A. Rep. 184-85 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in *Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498 (1963)* ; Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, *34 Ins. Counsel J. 115 (1967)*; and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include *California Evidence Code 730-*733; Illinois Supreme Court Rule 215(d), Ill. Rev. Stat. 1969, c. 110A, 215(d); Burns Indiana Stats. 1956, 9-1702; Wisconsin Stats. Annot. 1958, 57.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of *Rule 28 of the Federal Rules of Criminal Procedure* in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in the civil cases, but only with respect to whether they should be compensated from

public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a). Is based on *Rule 28 of the Federal Rules of Criminal Procedure*, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b). Combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also *California Evidence Code 730*-731. The special provision for *Fifth Amendment* compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(l) of the Rules of Civil Procedure.

Subdivision (c). Seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d). Is in essence the last sentence of *Rule 28(a) of the Federal Rules of Criminal Procedure*.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: The amendments are technical. No substantive change is intended.]

[2] Citations to Hearings and Debates

Letter from James F. Schaeffer to Hon. William L. Hungate, June 26, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 138, 141-44 (1973).

Letter from W. Vincent Rakestraw to Hon. James O. Eastland, June 14, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 121, 125-26 (1974).

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PART TWO: THE RULES THEMSELVES
Article VII. Opinions and Expert Testimony
Supp. To CHAPTER 706 RULE 706

3-706 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 706, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 706. Court Appointed Experts		**Rule 706. Court-Appointed Expert Witnesses**	
(a)	**Appointment.** The court may on its	**(a)**	**Appointment Process.** On a party's mo-

own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any

tion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any

may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act.

sent s to act. A wit- ness so ap- poin ted shall be in- form ed of the wit- ness' du- ties by the cour t in writ- ing, a copy of whic h shall be filed with the clerk , or at a con- fer- ence in whic h the parti es shall have

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fy by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Expert's Role. The court must inform the expert

of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, includ

ing the party that called the expert.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable as follows:

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

able from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings

the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(1) in a criminal case or in a civil case involving

just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs -- and the

compensation is then charged like other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

pointed the expert witness.

(d) Parties' expert s of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 706.03 Annotated Cases

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[5.1] Expert for Benefit of Party [Go To Main]

Hannah v. United States, 523 F.3d 597 (5th Cir. 2008) : A prisoner, who brought a Federal Tort Claims action alleging that he received negligent treatment for a sinus condition, petitioned the Trial Court to appoint an expert for him under Rule 706. The Court found no error in the rejection of the petition, reasoning that "Rule 706 contemplates the appointment of an expert to aid the court. Hannah seeks an expert for his own benefit." While some courts have invoked Rule 706 to appoint an expert for an indigent party and to have the fees for that expert entirely borne by the adversary, the case law does not suggest that a Judge "can be compelled to act under Rule 706 or that the district court in this case abused its discretion in denying an expert."

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 801 RULE 801

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§ 801.syn Synopsis to Chapter 801: RULE 801

801.01 Official Text

801.02 Editorial Explanatory Comment

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[g] Definition of Hearsay -- Evidence of Association

[h] Definition of Hearsay -- State of Mind

[i] Definition of Hearsay -- Implied and Indirect Assertions

[j] Definition of Hearsay -- Statements Admitted for the Fact That They Are Made

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[b] Statements That Are Defined as Not Hearsay -- Rationale for Categorization as Not Hearsay

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[c] Admissions -- Personal Admissions

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[e] Admissions -- Authorized Admissions

[f] Admissions -- Agents' Admissions

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[ii] Admissions -- Agents' Admissions -- Personal Knowledge

[iii] Admissions -- Agents' Admissions -- Coemployee Statements

[iv] Admissions -- Agents' Admissions -- Proof of Agency

[v] Admissions -- Agents' Admissions -- Statements by Translators

[vi] Admissions -- Agents' Admissions -- Statements by Attorneys as Agent's Admissions

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[C] Conspirator Statements -- Foundation Requirements -- Independent Evidence

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[iii] Conspirator Statements -- Breadth of Rule 801(d)(2)(E)

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[k] Rule 801(d)(1)(B) -- Response to Inconsistent Statement

[l] Rule 801(d)(1)(B) -- Scope of Rehabilitation

[m] Rule 801(d)(1)(B) -- Subject to Cross-Examination

[n] Rule 801(d)(1)(B) -- Suggestion of Fabrication

[i] Rule 801(d)(1)(B) -- Civil Cases

[ii] Rule 801(d)(1)(B) -- Suggestion of Fabrication -- Criminal Cases

[o] Rule 801(d)(1)(B) -- Timing of Prior Consistent Statement

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[n] Rule 801(d)(2)(A) -- Non-inculpatory Statements

[o] Rule 801(d)(2)(A) -- Omissions

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[q] Rule 801(d)(2)(A) -- Representative Capacity

[r] Rule 801(d)(2)(A) -- Statements Made While Cooperating with the Authorities

[s] Rule 801(d)(2)(A) -- Statements Offered in the Declarant's Favor

[t] Rule 801(d)(2)(A) -- Summary Judgment Use

[u] Rule 801(d)(2)(A) -- Trustworthiness Problems

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[c] Rule 801(d)(2)(B) -- Adoption by Implication

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[x] Rule 801(d)(2)(E) -- Unidentified Declarants

[y] Rule 801(d)(2)(E) -- Use by Accused

[z] Rule 801(d)(2)(E) -- Written Statements

801.04 Legislative History

[1] Advisory Committee's Note

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 282 (1999)

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

[5] Report of the Senate Committee on the Judiciary

[6] Report of the House and Senate Conferees

[7] 1997 Amendment Committee Note

[8] Citations to Hearings and Debates

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 801 RULE 801

4-801 Federal Rules of Evidence Manual 801.01

801.01 Official Text

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

(1) Prior statement by witness. -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 801 RULE 801

4-801 Federal Rules of Evidence Manual 801.02

801.02 Editorial Explanatory Comment

[1] Definition of Hearsay

[a] Importance of the Hearsay Rule

Rule 801 defines hearsay as a statement other than one made by a witness testifying at a trial or hearing that is offered in evidence to prove the truth of the information set forth in the statement. The hearsay rule is designed to exclude a certain type of unreliable evidence. Hearsay is presumptively unreliable because when an out-of-court statement is offered for its truth, it is only probative if the person who made the statement -- the declarant -- was telling the truth. But the truthfulness of an out-of-court declarant cannot be assessed by the ordinary methods with which we determine the truth of testimonial evidence -- oath, cross-examination, and the factfinder's scrutiny of the witness' demeanor. Therefore, hearsay is presumptively unreliable.

[b] Definition of Hearsay -- Relationship to Rule 403

Rule 403 provides an important protection when an out-of-court statement is offered as nonhearsay for its effect on the listener. The conduct of the listener in response to the statement must be of some importance in the case, and the statement must be probative to explain the listener's response or state of mind. And even if probative for its effect on the listener, the out-of-court statement must be excluded if the probative value is substantially outweighed by the risk that the jury will use the statement as proof of the matter asserted. For example, if a declarant makes a statement to a police officer accusing the defendant of committing a crime, the government will often try to admit the statement for the nonhearsay purpose of explaining the officer's conduct. This is also referred to as "background" use of nonhearsay evidence. Yet, in many cases these statements are subject to exclusion under *Rule 403*. This is because when the question is whether the defendant is guilty, there is often only minimal probative value in explaining why an officer acted in a certain way; and in contrast, there is a substantial risk of prejudice because the jury could impermissibly use the statement for its truth. n1 It is important for the nonoffering party in these circumstances to make a specific objection on *Rule 403* grounds. n2 A hearsay objection is insufficient because the statement is, at least technically, not being offered for its truth.

If the probative value of the statement for its effect on the listener is not substantially outweighed by the risk that the

jury will use the statement for its truth, the nonoffering party is at any rate entitled to a limiting instruction upon request. See the Editorial Explanatory Comment to *Rule 403*, *§ 403.02[21]*, for a further discussion of these matters.

[c] Definition of Hearsay -- Definition of a "Statement" -- Assertive versus Nonassertive Conduct

If proffered evidence is not a "statement" within the meaning of *Rule 801(a)*, then it cannot be hearsay, and so cannot be excluded under the Rule. *Rule 801(a)* defines a statement as an oral or written assertion, or nonverbal conduct of a person intended as an assertion. Common-law jurisdictions divide on whether nonverbal conduct that is not intended as an assertion is hearsay if it is introduced to show the truth of the actor's underlying beliefs. The classic case is *Wright v. Doe d. Tatham*, 7 A. & E. 313, 112 Eng. Rep. 488 (Ex. 1837), *aff'd*, 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H.L. 1838) . The parties were fighting over the sanity of one Marsden, since his sanity was crucial in this testamentary contest. The House of Lords asked the Judges whether certain letters addressed to Marsden were admissible. The letters were written by Marsden's nephew and described the nephew's travels in America and other mundane matters. There was no explicit assertion in the letters that the nephew believed Marsden to be sane (e.g., "Uncle Marsden, you are sane."). The theory of admitting the letters was that the nephew must have thought that Marsden was sane and competent or they would not have been written, making the letters circumstantial evidence of sanity. That is, the nephew had an underlying belief that Marsden was sane, and the letters were offered for the truth of that belief. The assertion of competence was implicit rather than explicit. The Court held that the letters must be excluded as hearsay. It saw no distinction between implicit and explicit assertions.

One of the famous hypotheticals used in *Wright* was that of the ship captain who sails off on a ship with his family. Can this conduct be offered to prove that the ship was seaworthy? The *Wright* Court answered in the negative, reasoning that the ship captain was essentially a declarant, and that in order for the conduct to be probative of seaworthiness, it would have to be presumed, in the absence of cross-examination, that the declarant believed the vessel was seaworthy and that this belief was reasonable. The reasoning is that if the ship captain had been asked about the vessel and declared it seaworthy, this declaration would obviously have been hearsay to prove the condition of the boat. The *Wright* Court essentially found the ship captain's activity to be equivalent to an oral statement.

The result of the ship captain hypothetical changes under *Rule 801*. Conduct is not hearsay merely because it is offered to prove the truth of the belief that generated the conduct. Rather, under *Rule 801*, conduct can only be hearsay if the declarant *intended* by the conduct to communicate information. The Trial Judge has to determine whether conduct was intended to assert something or not. The Advisory Committee's Note states that "[t]he rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility." An obvious example in which conduct could be hearsay is where the declarant points to something, or shakes his head yes or no. n3 An obvious example in which conduct would not be hearsay is proof that a person was walking under an umbrella, offered to show it was raining. n4

The reasons for excluding non-assertive conduct from the hearsay rule are persuasive. A principal reason for excluding hearsay is that the veracity of the declarant cannot be tested by cross-examination. In the case of non-assertive acts, the actor by definition does not intend to make an assertion, meaning that the risk of insincerity is substantially diminished. The actor is at least not trying to lie. Moreover, non-assertive conduct is usually more reliable than the ordinary out-of-court statement, because by conduct the declarant has risked action on the correctness of his belief -- he has put his money where his mouth is. As applied to the ship captain example, it is one thing to say "this boat is seaworthy"; it is quite another to travel in the boat with your family.

Subdivision (b) of *Rule 801* defines a declarant as a person who makes a statement. Because of the interrelationship of sections (a) and (b) of the Rule, it is apparent that a declarant includes an actor whose conduct is intended as an assertion. The logic of this is as follows: A declarant is a person who makes a statement, and a statement is defined to include nonverbal conduct if that conduct is intended as an assertion; thus, a person who intentionally makes a nonverbal assertion is a declarant.

[d] Definition of Hearsay -- Statement Made Other Than While Testifying at the Trial or Hearing

Usually it is not difficult to determine whether a statement was made at some time other than during the trial or hearing. Out-of-court statements obviously are made outside of a hearing or trial. There are two points that must be considered, however, in deciding whether a statement is hearsay. First, the definition of hearsay offered in subdivision (c) would include any statement made in a different hearing or proceeding. Thus, a statement in a former trial or in a preliminary hearing is hearsay if offered for its truth in a subsequent proceeding. Of course, it might be admitted under an exception or exemption from the hearsay rule. Second, statements that are recounted on the witness stand by the declarant who made them, i.e., prior statements of testifying witnesses, are also within the definition of hearsay. n5

Subdivision (d)(1), which will be discussed shortly, recognizes that some prior statements by a declarant present in Court for cross-examination should be admitted even if offered for their truth. That subdivision states that qualifying statements are not hearsay, notwithstanding the definition found in (c).

With respect to testifying witnesses who made prior statements, a hearsay problem can ordinarily be avoided simply by asking the witness about the underlying fact related in the statement rather than about the prior statement itself. For example, "I told my husband that I saw the white car go through the red light" is hearsay if offered to prove that the white car went through the red light. However, if the witness simply testifies that she *saw* the white car go through the red light, there is no hearsay problem. n6 This is not a complete answer to the hearsay problem, however, because a party might well wish to introduce the prior statement together with a current statement of fact, either to bolster the witness' in-court testimony or because the prior statement has some independent evidentiary significance. If this is the case the party must deal with the hearsay rule, and its exceptions.

In light of the detail of *Rule 801*, there usually is little debate over whether a statement was made at a time other than during the trial or hearing. Thus, the threshold question for the Trial Judge when a hearsay statement is made usually is whether the statement is offered for its truth.

[e] Definition of Hearsay -- Statement Offered to Prove the Truth of the Matter Asserted

Often lawyers have difficulty understanding exactly what is meant by the expression "to offer a statement for some other purpose than its truth." The following illustration might help to clarify the difference between a statement offered for its truth, hence hearsay, and a statement offered for some other purpose.

Consider the classic case suggested by Justice Holmes of the man who shouts fire falsely in a crowded theater. He is prosecuted for the offense, and various witnesses are called who testify that the man did indeed shout the word "fire," but objection is made by the defendant that such testimony is hearsay, i.e., it is testimony about an out-of-court statement introduced for the truth of the matter stated. Would you sustain the objection? The answer should be "no." The statement is not introduced to prove that there was a fire in the theater. In fact, it is introduced as part of the prosecution's case designed to prove the opposite, namely, that there was no fire. This kind of case is representative of statements that are known as "operative legal facts," or cases that involve statements that have "independent legal significance." n7 In other words, because a man can be prosecuted for falsely shouting "fire" in a crowded theater, the mere fact that the word is spoken has legal significance. If it should appear that there really was a fire, then, of course, the defendant would go free. But, to disable the prosecution from showing that the word was spoken would mean that there could be no prosecution.

Contrast this with a case in which witness *A* takes the stand and testifies for the prosecution that witness *B* told witness *A* that the defendant had shouted "fire" falsely in a crowded theater. Witness *A* was not present in the theater at the time, but later heard witness *B* describe the event in full detail. This is our classic hearsay case. The prosecution is introducing the testimony, i.e., witness *B*'s story, to prove that the story is true. In other words, through witness *A*, the prosecution is intending to prove that witness *B* spoke the truth. This is not allowed, unless some exception to the hearsay rule can be

found. On the other hand, if witness *A* were a grand juror testifying in a perjury trial in which *B* was charged with lying to the grand jury concerning the fire, *A*'s statement would be admitted to prove the fact that *B* made the statement to the grand jury. Thus, the hearsay rule depends on the purpose for which the statement is offered; the same statement will be hearsay if offered for one purpose (i.e., the truth of an assertion) and non-hearsay if offered for any other. n8

There are a number of situations in which statements are not hearsay because they are not being offered for their truth. For example, a statement such as a law or regulation or an order is neither true nor false. It may be a good or bad statement in terms of its efficacy, but statements that do not assert, even implicitly, that things are true will not be hearsay.

Another example of non-hearsay is a statement that is offered as part of a claim that the statement was false or misleading -- e.g., mail fraud, wire fraud, and obstruction cases. It is offered because the proponent believes that it was false, so it cannot be hearsay as defined in subdivision (c). n9

This is not to say that it is always easy to delineate the line between statements offered for their truth and those that are not. Indeed, Courts have sometimes erred in this task. An example is *United States v. Sadler, 234 F.3d 368 (8th Cir. 2000)* . Sadler was charged with bank robbery. An officer testified that Sadler confessed his guilt to him without even being asked to do so. Sadler contended that the officer was lying. Sadler proffered the testimony of the attorney who was representing him at the time of the alleged confession. The attorney would have testified that moments before allegedly confessing to the deputy, Sadler spoke to the attorney and unequivocally asserted his innocence. In response to a hearsay objection, the defendant argued that his statement to his former attorney was admissible for the nonhearsay purpose of impeaching the credibility of the officer who testified that the defendant confessed to him. The Trial Court excluded Sadler's statement as hearsay and the Court found no error. The Court stated that "the proffered testimony would only have its desired effect if in fact the statements [to the attorney] were true." In our view, this analysis is misguided. Sadler's protestation of innocence was relevant regardless of its truth. The police officer testified that Sadler went out of his way to volunteer a confession. Even if Sadler was not telling his attorney the truth, his declaration of innocence impeaches the police officer's testimony because it makes the officer's account less plausible. It seems unlikely that Sadler would be protesting innocence to his lawyer and then, a short time later, loudly volunteering his guilt to a police officer. n10

[f] Definition of Hearsay -- Notice and Effect on the Listener

Statements are not hearsay if offered to prove that because they were made, listeners had notice or knowledge of the information related in the statements. If a statement is offered for its effect on the listener, in order to explain the listener's conduct, it does not matter whether the declarant was telling the truth. For example, warnings about defects in equipment may be used to prove notice, although the same statements that give notice would be hearsay if offered to prove the fact that there were defects. n11

The Fifth Circuit case of *United States v. Cantu, 876 F.2d 1134 (5th Cir. 1989)* , provides a good example of the nonhearsay use of an out-of-court statement for its effect on the listener. Cantu was charged with a drug crime and offered a defense of entrapment. At trial he was not permitted to testify to the statements that were made to him by Santander, an undercover government agent, that reflected a persistent effort on Santander's part to get Cantu to secure drug customers. Santander's statements were excluded as hearsay, but the Court of Appeals found that this was error. The Court reasoned that the statements "were offered as evidence of Cantu's state of mind, bearing directly on his entrapment defense," and that the actual truth of the statements was therefore irrelevant. n12

The Judge in *Cantu* had expressed concern that Cantu might have been lying on the witness stand about whether Santander actually made these statements. But the Court of Appeals rightly rejected this concern as misplaced. As the Court explained: "Cantu's credibility, like the testimony of any witness, was subject to the crucible of cross-examination and was within the exclusive province of the jury. The veracity of a claim that certain statements were made was subject

to evaluation like any other testimony presented at trial." The hearsay rule is concerned about the credibility of out-of-court declarants; the credibility of in-court witnesses is left to the jury.

[g] Definition of Hearsay -- Evidence of Association

Another example of a well-accepted nonhearsay use of out-of-court statements occurs when a statement is offered to prove an association between two or more persons. For example, if correspondence is sent back and forth between two persons, it tends to prove that they have some association, independent of the truth of the correspondence. The hearsay rule does not apply because the letters tend to prove association no matter what they say. This scenario is often employed by the government in conspiracy cases. n13 Of course, if the probative value of the evidence as proof of association is substantially outweighed by the risk that the jury will use the statements for their truth, the statements should be excluded under *Rule 403*.

[h] Definition of Hearsay -- State of Mind

One problem type of case has spurred much commentary, but it is a problem in theory more than in practice. An example is when one spouse makes a statement such as "I hate you" to the other spouse in the presence of third parties. If this statement were offered in a case to prove that the declarant was no longer in love with the other spouse, it would appear to be hearsay. It could be argued, however, that the fact that such a statement was made in the presence of other people itself is evidence of an absence of love so that the making of the statement in these circumstances is circumstantial evidence of state of mind, not hearsay. This kind of case may produce differences of opinion as to the proper classification, but the existence of a state of mind exception to the hearsay rule in *Rule 803(3)* indicates that such statements will be admissible and that the theoretical debate has little practical significance. n14 See the Editorial Explanatory Comment to *Rule 803*, *§ 803.02[4]*, for a discussion of the state of mind exception.

[i] Definition of Hearsay -- Implied and Indirect Assertions

An out-of-court statement is hearsay only if the statement is offered to prove the truth of the "matter asserted." Does this mean that the hearsay rule excludes only statements offered for the truth of matters *expressly* asserted? If a statement is offered for the truth of a matter that is implied rather than expressed, does the utterance escape the hearsay prohibition? Professor Milich, in *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness, 39 U. Kan. L. Rev. 893 (1991)*, considers the following hypothetical illustration of the problem of implied assertions:

> Assume, in a murder case, that the prosecution wants to prove that Joe is a sharpshooter. If a declarant makes a statement that "Joe is a sharpshooter," this is an express assertion of fact and is excluded as hearsay. But there are a number of equivalent statements that make the same point without making an express assertion. Among them: (1) "Joe can shoot a tick off a running jaguar at 200 yards"; (2) "You ought to go hunting with Joe"; and (3) "Have you ever seen anyone shoot a rifle like Joe?"

If the hearsay rule excludes only out-of-court statements offered for the truth of matters *expressly* asserted, then none of these three statements are hearsay. The government is not offering the statement to show that Joe can actually shoot a tick off a jaguar at 200 yards; nor that anyone ought to go hunting with Joe; nor that anyone has seen anyone else shoot a rifle like Joe.

A strong argument can be made, however, that there should be no difference between express and implied assertions, at least where the declarant is trying to make the same point by implication that he could otherwise make expressly. Given the subtlety of language, there is no reason to rest the hearsay rule on purely semantic distinctions. Certainly the hearsay dangers of an implied assertion are on a par with those attendant to an express assertion: The factfinder will be relying on the credibility of an uncross-examined declarant who may be lying or mistaken. n15 As Professor Milich states, a literalist approach to hearsay "guts the hearsay rule." In the above hypothetical, it would lead to the bizarre result that a wild exaggeration (shooting the tick off a jaguar) could be heard by the jury, whereas a more careful attempt to

approximate the truth (he is a good shot) could not. A literalist approach would also mean that the use of irony, aphorism, or metaphor could never be excluded as hearsay, even though everyone would know what the declarant intended to assert. Finally, Professor Milich makes the important point that "making the hearsay issue turn on the mere form of the out-of-court statement may tempt witnesses to 'recall' the statements in a nondeclarative form to circumvent the rule." n16

The Advisory Committee Note to *Rule 801* states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is "excluded from the definition of hearsay by the language of subdivision (c)." We think that the Advisory Committee's reading is not self-evident. The language "truth of the matter asserted" is flexible enough to cover "matters" that are implied as well as express. n17

Most Courts have been reluctant to adopt the implication of the Advisory Committee that the hearsay rule is inapplicable to implied verbal assertions. One well-known example is *United States v. Reynolds, 715 F.2d 99 (3d Cir. 1983)* . Parran and a codefendant, Reynolds, were charged with conspiring to possess and cash a social security check belonging to someone else. Reynolds was arrested after he attempted to cash the check. Parran was across the street observing the proceedings. Parran crossed the street and casually walked by Parran and the officers. As Parran walked by, Reynolds called out to Parran, "I didn't tell them anything about you." The Court analyzed the admissibility of that statement as follows:

> As the government uses it, the statement's probative value depends on the truth of an assumed fact it implies. Unless the trier assumes that the statement implies that Reynolds did not tell the postal inspectors that Parran was involved in the conspiracy to defraud, even though Parran was in fact involved, the statement carries no probative weight for the government's case. ... Consequently, we believe that, as the government uses it, the statement's relevance goes well beyond the fact that it was uttered. ... [T]he government offers it to prove the truth of the assumed fact of defendant's guilt implied by its conduct. Accordingly, we reject the government's suggestion in this case that only a statement's express assertion should be considered in deciding whether it constitutes hearsay. n18

The problems of a literalist approach to the hearsay rule, excluding only express assertions, are well illustrated by the case of *United States v. Ybarra, 70 F.3d 362 (5th Cir. 1995)* . To prove that the defendant lived in a house where a firearm was found, the government offered this statement from the defendant's wife to police officers: "[T]here is no way [Ybarra] is coming home as long as you police are here." The Court held that the statement was not hearsay because it was offered to prove something other than the fact that Ybarra would not come home. Rather, it was offered to prove that Ybarra lived in the house. This ignores the fact that the government did offer the statement for the truth of the assertion that was *implied* by the wife's statement -- i.e., that Ybarra lived there. The Court's decision that the statement was not offered for the truth of the matter asserted rests on a constricted and highly semantic view of "the matter asserted," and creates problems if the statement is changed in any slight degree. If the wife had said, "Yeah, he lives here and he won't be coming back while police are here," the statement would undeniably be hearsay. There is no substantial distinction between that hypothetical statement and the statement actually made by the wife in *Ybarra*. Moreover, what would the Court have done if the wife had said, "This is Ybarra's castle," or more obliquely, "Don't you cops have any respect? A man's home is his castle." Would these statements not be hearsay because the government would not be offering them to prove that the place was Ybarra's castle? The "express assertion" view of the hearsay rule leads to absurd results.

We believe that a statement should be treated as hearsay whenever it is offered to prove the truth of either an express or implied assertion, so long as the Trial Judge finds that the declarant intended to communicate that assertion when he made the statement. We note that most Federal Courts are in agreement with the view that implied assertions are hearsay if they are intentionally communicated by the speaker--and not hearsay if there is no intent to communicate the implication. An example is *United States v. Summers, 414 F.3d 1287 (10th Cir. 2005)* , where the defendant's accomplice in a bank robbery was arrested and said to the officer, "How did you guys find us so fast?" The Court held

that an implied assertion is hearsay if the speaker intended to communicate the implication that is sought to be used at trial. It also noted that the burden is on the opponent to show that the speaker had the intent to assert the implication in the statement. Applying this intent-based test to the facts, the Court held that the defendant satisfied his burden of demonstrating that by positing the question, "How did you guys find us so fast?", the declarant intended to make an assertion. It explained as follows:

> It begs credulity to assume that in positing the question Mohammed was exclusively interested in modern methods of law enforcement, including surveillance, communication, and coordination. Rather, fairly construed the statement intimated both guilt and wonderment at the ability of the police to apprehend the perpetrators of the crime so quickly.

An intent-based approach to implied assertions has several virtues. First, at least where statements intentionally asserting one thing are being used to prove something else that the declarant was not trying to say, the hearsay risks are reduced. This is because the declarant is unlikely to have intended to mislead on matters that he had no intent to communicate in the first place. One of the major dangers of hearsay -- the risk of insincerity -- is thus minimized, and an intent-based test would allow such unintentional statements to be admitted.

Second, an intent-based approach provides a unitary test for non-assertive conduct and verbal communications. As discussed above, conduct is hearsay only if the actor intends to communicate by his action and the conduct is offered for the truth of that communication. An intent-based approach applies the same rule for verbal communications.

Third, an intent-based approach toward implied assertions is favored by most modern commentators. n19

Fourth, an intent-based test allows the hearsay rule to apply and exclude statements that are exaggerations (such as "Joe can shoot a tick off a jaguar"), or metaphor or sarcasm. All such statements are basically the equivalent of an express assertion. If offered to prove the truth of the implied *and intended* meaning, the evidence is hearsay under an intent-based approach. This is clearly the appropriate result, even though the statement is not being offered to prove the literal truth of the matter *expressly* asserted; reserving the hearsay rule to express assertions only will deprive the rule of almost all practical effect.

There are many examples of implied but intentional assertions that should be treated as hearsay. A declarant's statement that "the sky is on fire" is hearsay when offered to show that the speaker witnessed a sunset. n20 A declarant's statement, "Well, at least I never forged a will!" is hearsay when offered to prove the implication that the person to whom the statement was made is a forger. n21 A declarant's statement, "The automobile was going faster than a speeding bullet," is hearsay when offered to prove that the car was exceeding the speed limit. These statements are hearsay because the "matter asserted" includes what the declarant reasonably intended to assert. Given the subtlety of language, there is no reason to rest the hearsay rule on purely semantic distinctions between express and implied assertions.

This is not to say that an intent-based approach to implied assertions is free from difficulty. There is some indeterminacy in the application of any intent-based test. As Professor Milich puts it, "[T]he quest for the declarant's intent in cases of verbal conduct involves a search for what the declarant truly had 'in mind.' " But any problem, we think, can be adequately handled by an objective, rather than subjective, test of intent. The question should be whether a reasonable person making a statement such as the declarant made would have intended to communicate the implied assertion that the proponent is offering for its truth. As with conduct, the burden should be placed on the nonoffering party to show that the declarant had the intent to communicate the implied assertion.

A good example of the intent-based approach to implied assertions is *United States v. Weeks, 919 F.2d 248 (5th Cir. 1990)* . Weeks was charged with kidnapping. The victims testified that their abductors used the names "Jimmy" and "Gato" in addressing each other. To establish that Weeks was "Gato," the government called a witness who testified that

he had heard others refer to Weeks as "Gato" when they addressed him, e.g., "How ya doin' Gato?" The Court held that the out-of-court statements addressed to "Gato" were properly admitted. It found that Weeks had not satisfied his burden of showing that declarants who referred to him as "Gato" were intending to communicate an implied assertion, i.e., "Weeks is nicknamed 'Gato.' " Rather, it was more likely that they were trying to communicate other ideas, and were simply using the term "Gato" as they would any other name: as a means of introduction or reference. As the declarants probably had other things in mind than simply to advertise their belief about Weeks' nickname, the statements were not hearsay. n22

In contrast, in *United States v. Berrios, 132 F.3d 834 (1st Cir. 1998)* , the government had proof that a man named "Pablo" was a drug dealer, and sought to prove that the defendant went by the nickname "Pablo." The defendant called a witness who would have testified that she was present at a drug deal with her husband, and her husband introduced her to the seller, saying "This is Pablo." The witness would have testified that the person introduced as "Pablo" was not the defendant. The Court held that the out-of-court statement of the witness' husband, "This is Pablo," was properly excluded as hearsay. That is the correct result under an intent-based test. The intent of the husband was to assert to his wife that the person before her went by the name "Pablo." If the husband had said to his wife privately, "Watch out for Pablo, he is dangerous," this would not be an intentional assertion that the person identified went by the name Pablo. Rather, the intent of the speaker would be to warn his wife to stay away from the identified person.

[j] Definition of Hearsay -- Statements Admitted for the Fact That They Are Made

If an out-of-court statement is probative simply because it has been made, without regard to its truth, then the hearsay rule is satisfied. An example of a statement properly admitted for the fact it was made is what has been called a "verbal act" -- meaning that the making of the statement itself is enough to trigger certain rights or liabilities, without regard to its truth, such as an offer to sell or a guaranty of a loan. n23 But the Court must carefully determine whether there is any legitimate purpose in admitting the statement for "the fact that it was made." Often the "fact that it was made" argument is simply an attempt to obscure legitimate hearsay concerns.

An example of the proper approach is *United States v. Harwood, 998 F.2d 91 (2d Cir. 1993)* . Harwood and McKee were arrested in a van in which LSD was found, and both were charged with possession with intent to distribute. Harwood's defense was that he was simply a passenger with no knowledge that LSD was in the van. He wanted to introduce McKee's out-of-court statement that Harwood had simply been "in the wrong place at the wrong time" and "the same would have happened to any person driving a vehicle in which [McKee] was a passenger." But the Trial Court held that the statement was inadmissible hearsay. On appeal, Harwood argued that the Trial Court erred, because he was merely offering McKee's statement "for the fact that it was made." But the Court of Appeals saw through the argument by applying accepted standards of relevance. McKee's statement had no relevance merely because it was made. That the statement was made would prove that McKee could speak; that he could speak English; that he had a thought process; that he was calm and rational. But none of these matters was in dispute. As Judge McLaughlin put it: "What would be relevant is that Harwood was in truth in the wrong place at the wrong time -- not that McKee thought so. Hence, the statement is irrelevant unless it was true, in which case it would be hearsay."

For similar reasons, the Court rejected Harwood's argument that McKee's statement was properly offered to prove McKee's "pattern of verbal behavior." McKee's pattern of verbal behavior was simply irrelevant to whether Harwood was involved in a drug transaction. Judge McLaughlin concluded that this ready list of not-for-truth purposes could not be "invoked like a mantra to circumvent a hearsay objection."

[2] Statements That Are Defined as Not Hearsay

[a] Departure from Common Law

Subdivision (d) of *Rule 801* marks a departure from preexisting law. Every one of the statements discussed in

subdivision (d) of the Rule comes within the hearsay rule as defined in subdivision (c) -- yet subdivision (d) explicitly states that these statements are not hearsay. In this respect, the departure from common law is more analytical than practical. However, it is useful to consider section (d) in its two parts, because subsection (1) involves statements that are not traditional hearsay exceptions in a majority of jurisdictions. In changing the law with respect to these statements, the Federal Rule has considerable practical impact. Subsection (2), on the other hand, involves statements that all fall within traditional hearsay exceptions, although the definitions provided under the Federal Rule may modify the common law. With respect to this subsection, the impact of the redefinition, from "not hearsay" to "hearsay subject to an exception" is negligible.

[b] Statements That Are Defined as Not Hearsay -- Rationale for Categorization as Not Hearsay

Subdivision (d) technically provides an exemption from, rather than an exception to, the hearsay rule. The statements covered by subdivision (d) are categorized as "not hearsay" rather than as "hearsay subject to an exception" because the basis for admitting these statements is different from that supporting the other standard hearsay exceptions, such as excited utterances and dying declarations, which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc. For example, excited utterances are made while the declarant is under the influence of a startling event and for that reason is less likely to be able to lie.

In contrast, prior statements of testifying witnesses (subdivision (d)(1)) are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And admissions (subdivision (d)(2)) are allowed not because they are reliable, but because the adversary or his agents made them -- if a party happens to make an unreliable statement, it is not up to the Judge to protect him from use of the statement by the adversary; it is up to the party to try to explain the statement or to diminish its importance.

The drafters of the Federal Rules thought that it would be confusing to lump prior statements of testifying witnesses and admissions together with reliability-based exceptions under a single label of "hearsay exceptions." In fact, however, the Federal Rules regime is more confusing in the end because statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, "not hearsay."

There is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g. *Rule 403*).

[3] Prior Inconsistent Statements That Are Not Hearsay

[a] Admissible for Their Truth

Subdivision (d)(1) of the Rule is divided into three parts. The first deals with prior inconsistent statements. In common-law jurisdictions, such statements are not admissible for the truth of the matters stated. They are admissible only to test the credibility of a witness. Subdivision (d)(1)(A) of the Rule departs from the common-law model by providing that when a witness testifies and is subject to cross-examination concerning a prior inconsistent statement, the prior statement may be admitted for its truth if the witness made it while testifying under oath in a previous proceeding (including grand jury) or in a deposition. n24 A hypothetical case may help to illustrate the difference between the common law and the Federal Rules approach.

If the prosecution in a criminal case calls an eyewitness to testify that the witness saw the defendant commit a bank robbery, and if the witness takes the stand and denies having seen the defendant commit the robbery, the prosecution may wish to introduce into evidence a previous contradictory statement by the witness. In common-law jurisdictions,

such a statement could be introduced to test the credibility of the witness (assuming that a valid claim of surprise or hostility permitted the party offering the witness to impeach his own witness), but the prior statement could not be introduced for its truth. Under the Federal Rule, the statement can come in for its truth, but only if the statement was made under oath in a proceeding. Otherwise it cannot be used to prove the truth of the matter stated unless it falls under some other exemption or exception from the hearsay ban. (We have deliberately chosen a hypothetical that raises questions about the possible overlap between parts (d)(1)(A) and (d)(1)(C).)

Many commentators have urged that as long as a witness is present at trial for cross-examination, there are adequate guarantees of trustworthiness, and that any statement, whether or not it has previously been tested by cross-examination or subjected to the oath requirement, should be admissible.

The Advisory Committee sided with these commentators, recommending that as long as a witness is available and testifying subject to cross-examination, all prior inconsistent statements could be adequately tested and should be admitted. The House originally wanted to restrict prior inconsistent statements introduced for their truth to statements made previously under oath *and subject to cross-examination*. The Senate initially favored the Advisory Committee's approach. *Rule 801(d)(1)(A)* emerges as a compromise. Prior cross-examination is not required (distinguishing this exception from the prior testimony exception of *Rule 804(b)(1)*) but the prior statement must have been given under oath at a formal proceeding.

Because *Rule 801(d)(1)(A)* limits the admissibility of prior inconsistent statements for substantive purposes to only those statements made under oath at a proceeding, inconsistent statements not meeting the requirements of the Rule may be used only for impeachment purposes. n25 There is a legitimate concern that clever lawyers may attempt to call witnesses solely to "impeach" them with inconsistent statements in the hope that the jury will consider the inconsistent statements as substantive evidence. The Courts have generally not permitted this to happen, however. The Editorial Explanatory Comment to *Rule 607*, *§ 607.02[2]*, discusses this problem in detail.

Where a prior inconsistent statement does not qualify for substantive use under *Rule 801(d)(1)(A)*, the nonoffering party is entitled to a limiting instruction that the statement is to be used only for impeachment purposes. n26

[b] Prior Inconsistent Statements That Are Not Hearsay -- Hearing or Other Proceeding

One of the more extreme cases decided under *Rule 801(d)(1)(A)* is *United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976)* , holding that a statement obtained by a Border Patrol agent who administered an oath to the declarant is admissible for its truth if the declarant is present at trial for cross-examination. We believe that the Court read the words "other proceeding" too broadly. In our view, "other proceedings" should be routine and formal proceedings conducted by a legal officer or under her supervision, and of a type that would lead a declarant to believe that the duty to tell the truth was the same, or nearly the same, as at a trial. Most Courts have held, contrary to *Castro-Ayon*, that investigative questioning by law enforcement officers, does not constitute an "other proceeding" within the meaning of the Rule, even if a statement is made to the officer under oath. n27

[c] Prior Inconsistent Statements That Are Not Hearsay -- Subject to Cross-Examination

The Supreme Court has given a broad interpretation to the term "subject to cross-examination concerning the statement." In *United States v. Owens, 484 U.S. 554 (1988)* , the Court said that a statement of prior identification was admissible from a witness who said he remembered making the statement, but had no memory of the event in question or of any circumstances surrounding the making of the statement. The Court held that the Rule's requirement of being subject to cross-examination is ordinarily satisfied when the witness is placed on the stand, under oath, and responds willingly to questions. Thus, the witness is subject to cross-examination within the meaning of the rule, even if his only answers are "I can't remember." In reference to prior inconsistent statements, Justice Scalia declared: "It would seem strange ... to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with

his trial testimony, see *Rule 801(d)(1)(A)*, by simply asserting lack of memory of the facts to which the prior testimony related."

The situation is different if the witness who made the prior statement refuses to testify. A witness who refuses to testify cannot be found "subject to cross-examination" within the meaning of *Rule 801(d)(1)*. Thus, in *United States v. Torrez-Ortega, 184 F.3d 1128 (10th Cir. 1999)* , the Court found reversible error when a prosecution witness refused to testify and the government introduced his prior grand jury statement under *Rule 801(d)(1)(A)*. The Court distinguished *Owens* as a case in which the witness who made the prior statement answered all questions on cross-examination; obtaining a concession of lack of memory might well be effective cross-examination, whereas no cross-examination is possible if the witness simply refuses to answer all questions.

[d] Prior Inconsistent Statements That Are Not Hearsay -- Inconsistency and Lack of Memory

In *Owens*, the witness who made the prior statement identifying Owens as the perpetrator lacked all memory of the underlying event. The Court held that the witness was subject to cross-examination within the meaning of *Rule 801(d)(1)*, but the witness' prior statement was neither offered nor admitted as a prior inconsistent statement. Rather, it was admitted as a statement of identification under *Rule 801(d)(1)(C)*. It seems clear that the witness' prior statement in *Owens* could not have been admitted under *Rule 801(d)(1)(A)* -- not because the witness wasn't subject to cross-examination, but rather because the prior statement was not inconsistent with his in-court testimony. His in-court testimony was "I don't remember." This is not necessarily inconsistent with the earlier statement "Owens hit me." On the other hand, some statements asserting lack of memory may indeed be inconsistent with a previous statement. Specifically, this would arise if the witness is simply feigning memory loss in an attempt to avoid an encounter with the truth of the prior statement. Thus, the distinction generally applied by the Courts is between: (1) feigned memory loss, which permits the use of prior inconsistent statements on the ground that the witness is in essence repudiating the prior statement by taking refuge in a lack of memory; and (2) bona fide memory loss, which precludes the use of a prior statement on the ground that it is not inconsistent with a subsequent loss of memory. n28 Thus, in a case like *Owens*, where the witness' memory loss was clearly bona fide (he had been hit over the head with a lead pipe), a prior statement of the witness would not be admissible under *Rule 801(d)(1)(A)*. However, if the previous statement was a prior identification, as was the case in *Owens*, it would be admissible under *Rule 801(d)(1)(C)*, because that Rule contains no requirement that the prior statement be inconsistent with the subsequent testimony; and even the forgetful witness would be "subject to cross-examination" within the meaning of the Rule, for reasons already discussed.

[4] Prior Consistent Statements That Are Not Hearsay

[a] Development of Rule

Subdivision (d)(1)(B) of *Rule 801* covers the substantive use of prior consistent statements. Such statements are admissible at common law only for credibility purposes, and only when probative to rebut an express or implied charge of recent fabrication on the part of a witness. It is interesting to note that under the House version of the Rule, a prior consistent statement could be introduced for its truth whether or not it was given under oath, although in common-law jurisdictions, prior consistent statements and prior inconsistent statements receive similar treatment in that both are excluded when offered for their truth. The Senate version tracked the common law.

Why did the House want to differentiate? The answer lies in practical aspects of testimony. Once a witness testifies and an attack is made on the witness' credibility, if the cross-examiner manages to impeach the witness or to break down the witness' story, it is likely that any prior consistent statement will fall with it. If the trial testimony is rejected as unbelievable by the trier of fact, an identical out-of-court statement also will be rejected.

Contrast this with the situation when a prior inconsistent statement is introduced. The party offering the prior statement hopes that the trial testimony will be disbelieved and that the inconsistent statement will be accepted as true. Here, it is

only when trial testimony fails that the inconsistent statement will be used as substantive evidence. Because the party offering an inconsistent statement as substantive evidence wants the trier of fact to accept it as true, and in preference to trial testimony, arguably greater circumstantial guarantees of trustworthiness should be required than in the case of consistent statements.

The Conference compromise rejects common-law uniformity, which would have been provided by the Senate version, and apparently accepts the arguments for differentiation. Thus, prior consistent statements are, in one respect, more readily admissible than inconsistent statements. Consistent statements need not have been made under oath or in a proceeding. On the other hand, the distinction between substantive use and impeachment use is much less significant for prior consistent statements than it is for prior inconsistent statements. With prior consistent statements, the substance of the statement is already before the factfinder by way of the witness' in-court testimony. Consequently, an error in either admitting or excluding a statement for its truth under *Rule 801(d)(1)(B)* is more likely, though not certain, to be harmless. n29

[b] Prior Consistent Statements That Are Not Hearsay -- Limitation on Use

Rule 801(d)(1)(B) limits substantive admissibility of consistent statements to cases in which some suggestion is made that the witness has fabricated testimony or has been the subject of undue influence. The reason for this restriction is that consistent statements are easily manufactured prior to trial and thus are often not very reliable or probative of truthfulness. A witness could lie or distort facts on several occasions as easily as on one. However, once the suggestion is made that the witness has a motive to fabricate trial testimony or that the witness has been unduly influenced, consistent statements made prior to the time when there was a motive for the witness to lie or the influence was likely are especially probative and are admissible under *Rule 801*. n30

Prior consistent statements might also be useful for purposes other than to rebut a charge of fabrication or bad motive. For example, if the witness is charged with a bad memory, a statement by the witness made near to the event and consistent with the in-court testimony tends to rebut the charge. *Rule 801(d)(1)(B)*, however, provides for substantive admissibility *only* when the prior consistent statement rebuts a charge of fabrication or bad motive. If the prior consistent statement is used for any other rehabilitative purpose, it may be admitted only as proof of the witness' credibility, and not as substantive evidence. n31 Persuasive arguments have been made that *Rule 801(d)(1)(B)* should be amended to provide that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate the credibility of the witness. n32 This would certainly make the Rule more straightforward and simpler to apply in practice. But that is not the current rule.

[c] Prior Consistent Statements That Are Not Hearsay -- Timing and Use for Rehabilitation, Not for Truth

At one time there was dispute among the Courts about whether a statement can be admissible for its truth under *Rule 801(d)(1)(B)* when the witness is attacked for having a motive to falsify and the prior consistent statement was made *after* the motive to falsify arose. The Supreme Court resolved this dispute in *Tome v. United States, 513 U.S. 150 (1995)* . The defendant in *Tome* was tried for sexual abuse of his young daughter. At trial the daughter implicated the defendant, basically by answering yes or no to a series of leading questions. On cross-examination defense counsel asked 348 questions, many of which were background questions, some of which concerned her allegations of abuse, and some of which were designed to show that the daughter preferred living with her mother to living with her father. The daughter refused to answer many of the questions. The prosecution then called six witnesses, each of whom testified that the daughter had made statements to them accusing the defendant of sexual abuse. The Tenth Circuit held that all of these statements were properly admitted for their truth under *Rule 801(d)(1)(B)*. n33

It should be noted that the Court of Appeals in *Tome* had rejected the defendant's argument that there was no charge of recent fabrication or improper motive that would trigger the necessity of introducing prior consistent statements. The Court stated that "the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations

of abuse out of a desire to live with her mother." By getting her to express her opinion about where she would rather live, defense counsel "attacked more than her general credibility or memory." The Court of Appeals was clearly correct in its assertion that a charge of fabrication or improper motive can be made implicitly as well as explicitly. Of course, not every attack on credibility opens the door for rehabilitation with prior consistent statements; for example, if the witness is attacked for having an untruthful character, or as simply lying, he cannot be rehabilitated with prior consistent statements because such statements do not respond to the attack that the witness is generally a liar or is lying on the stand. n34 But if there is an implicit attack on the witness' motivation, the party who sponsors the witness should be permitted a response. n35 The Supreme Court did not grant certiorari as to this aspect of the decision in *Tome*.

The Tenth Circuit had also rejected Tome's argument that the girl's consistent statements should not have been admitted because they were made at a time when she had the desire to live with her mother, i.e., they were made subject to the same motive to falsify as existed at the time the witness testified. The Court was of the opinion that *Rule 801(d)(1)(B)* does not require that a statement predate the charged motive to fabricate before it can be admitted as a prior consistent staement. It reasoned that a "pre-motive" limitation on the Rule would be too broad because "it is simply not true that an individual with a motive to lie will always do so." The Court of Appeals opted for a case-by-case approach that would consider whether, "in light of the potentially powerful motive to fabricate, the prior consistent statement has significant probative force bearing on credibility apart from mere repetition." Here the Court found that the charged motive was "not particularly strong" and that the child's prior statements were "spontaneous" and not coached. Hence they were, in the Court's view, properly admitted for their truth under *Rule 801(d)(1)(B)*.

It is this ruling in *Tome* on which the Supreme Court granted review. In an opinion by Justice Kennedy for five Justices, the Court held that a prior consistent statement is not admissible for its truth under *Rule 801(d)(1)(B)* unless the statement was made *before* the charged fabrication or improper influence or motive arose. Because of this temporal limitation, the daughter's consistent statements in *Tome* could not be admitted as proof that the defendant abused her.

Justice Kennedy relied heavily on the common-law rule, under which prior consistent statements were not admissible to rebut a charge of recent fabrication or improper motive unless they were made before the fabrication or motive to falsify arose. According to Justice Kennedy, the drafters of the Federal Rules intended to preserve the common-law "pre-motive" timing requirement. He based this conclusion on several factors: (1) the "somewhat peculiar language" of *Rule 801(d)(1)(B)* tracked the language concerning prior consistent statements in common-law cases, thus implying an intent to carry over the common-law timing rule; (2) the Notes by the Advisory Committee "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary" and there is no indication in the Notes of an intent to abrogate the common-law pre-motive requirement with respect to prior consistent statements; (3) the common-law Courts uniformly adhered to the pre-motive requirement, and "with this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]"; (4) imposing a pre-motive requirement on prior consistent statements was consistent with the Advisory Committee's generally cautious approach to prior consistent statements, or, as the Court put it, the Committee's "stated unwillingness to countenance the general use of prior prepared statements as substantive evidence."

It is odd that the *Tome* Court relied so heavily on the common law in finding a pre-motive requirement in *Rule 801(d)(1)(B)*. The common-law rule concerned admissibility of prior consistent statements solely to rehabilitate the credibility of a witness. The common law did not provide that such statements could be admitted for their truth. So it is clear that the Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way. This certainly diminishes the strength of the majority's argument that the Advisory Committee was wedded to the common-law pre-motive requirement.

While the Court's reliance on the common law provides a weak basis for its decision, this does not mean that the Court was wrong to impose a pre-motive requirement for prior consistent statements offered as substantive evidence. Justice Kennedy was clearly correct in his assertion that a pre-motive requirement was implicit in *Rule 801(d)(1)(B)*. Such a

construction is required in order to make sense out of the categories of prior consistent statements that could qualify for substantive admissibility under the Rule. The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively -- i.e., for the truth of the statement as opposed to use for rehabilitation of a witness' credibility. But many prior consistent statements could be offered for other kinds of rebuttal. If the drafters of the Federal Rules did not intend to impose a pre-motive requirement, then there would have been no need to carve out those statements offered to rebut a charge of fabrication, motive, or influence for special substantive treatment. It is only the pre-motive requirement that distinguishes prior consistent statements offered to rebut a charge of fabrication, motive, or influence from all other consistent statements. As Justice Scalia put it in his concurring opinion: "Only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

The strongest support for the *Tome* Court's adoption of the pre-motive requirement is a policy argument: it is best when considering prior consistent statements to have a bright-line rule that tends to limit their admissibility. If Trial Judges are allowed to admit prior consistent statements whenever they are merely relevant to rebut an express or implied charge of fabrication, improper motive, or influence, then the opponent of the evidence -- often a criminal defendant as in *Tome* -- will be subject to all manner of bolstering statements of adverse witnesses. The case will often be decided on the basis of the witness' hearsay rather than on the witness' in-court testimony. As Justice Kennedy put it: "[T]he whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

Tome itself was a case in point. In response to what the Lower Courts found to be a "weak" charge of improper motive -- that the child fabricated her testimony so that she could remain with her mother because she preferred where her mother lived -- the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount the girl's detailed out-of-court statements to them. Because these statements were made at a time when the witness had the same motive to fabricate that she allegedly had at trial, they were not very relevant to rebut the charge of fabrication -- assuming they were relevant at all. Notably, at closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive. The "rehabilitation" was really a smokescreen for bringing hearsay in front of the jury. And the hearsay involved direct and detailed accusations by the victim accusing the defendant of sexual abuse.

The risk of an unbridled use of *Rule 801(d)(1)(B)* is therefore that the Trial Court may play fast and loose with principles of relevance, shifting the trial from a focus on in-court witnesses to out-of-court statements. This danger is reflected in Justice Breyer's dissenting opinion, in which he argued for a flexible, relevance-based approach to the admissibility of prior consistent statements, rather than a rigid pre-motive requirement. And yet, when assessing whether the statements offered against *Tome* at trial were even relevant to rebut the weak charge of fabrication, Justice Breyer punted. He found "no reason to reevaluate this factbound conclusion" of the Trial Court. The majority, aware of the fact that prior consistent statements that post-date a motive are almost always irrelevant as rebuttal evidence at any rate, and unwilling to leave the question of relevance to possible Trial Court abuse, chose the proper result -- a bright-line, pre-motive requirement for admissibility.

It is important to remember that the Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. Prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on credibility. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary. n36 If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the context, and this explanation may include the introduction of statements consistent with his testimony. *Rule 801* is not needed to justify such an explanation. The evidence is relevant under *Rule 401* and admissible under *Rule 402* to rehabilitate the witness' credibility. n37 As the Court stated in *United States v. Harris, 761 F.2d 394 (7th Cir. 1985)* , the general principle set forth in *Rule 801(d)(1)(B)* -- i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" -- "need not be met to admit into

evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut a charge of recent fabrication or improper influence or motive and must have been made before the motive to fabricate arose. n38 Where a consistent statement is admissible for other rehabilitation purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under *Rule 801(d)(1)(B)*, the adversary is entitled to a limiting instruction as to the appropriate use of the evidence. n39

Perhaps the distinction just made -- between consistent statements offered solely for rehabilitation and those offered under the Rule as substantive evidence to rebut a charge of recent fabrication or improper influence or motive -- is an insubstantial one. Since consistent statements are identical to trial testimony, an instruction that some of them should not be considered for their truth is, as stated above, unlikely to be understood by a jury. A line between substantive and rehabilitative use of these statements may well be of little use. Yet this is the line drawn by the Rule, which carves out only certain prior consistent statements for substantive use: those that rebut a charge of recent fabrication or improper influence or motive. And most importantly, the *Tome* pre-motive requirement assures that many prior consistent statements -- those made to rebut a charge of fabrication or motive and yet which post-date the motive -- will not be admissible *at all*, either substantively or for impeachment purposes. This will help to ensure that the jury decides the case on the basis of testimony at the trial rather than on prior statements of witnesses. n40

[5] Identifications

As proposed by the Advisory Committee and approved by the House, *Rule 801(d)(1)(C)* established that an identification of a person made after perceiving him n41 is not hearsay if the person making the identification is produced at the trial or hearing and is subject to cross-examination. While such identifications are certainly hearsay, there was a belief that they are more reliable than in-court identifications. The Senate objected to the proposed Rule, and it was deleted. But in 1975, an amendment restored the provision. Interestingly, the Senate concluded upon further reflection that its initial concern that prior identifications are too weak to support a conviction "appears misdirected," because the language does not cover the "weight" to be given the evidence and "all hearsay exceptions" (technically this is an exemption rather than an exception) allow into evidence statements that may not have been made under oath (except prior inconsistent statements and former testimony). Moreover, the identifying witness must be available for cross-examination. Finally, the Senate noted that the earlier in time the identification takes place, the more likely it is that memory problems will be avoided.

Although we support the amendment, we believe that the prospect that prior identifications will be admissible as substantive evidence should lead the Supreme Court to reconsider *Kirby v. Illinois, 406 U.S. 682 (1972)* , *United States v. Ash, 413 U.S. 300 (1973)* , and *Manson v. Brathwaite, 432 U.S. 98 (1977)* , and to require greater care in the conduct of identification procedures. Unfortunately, there is no evidence of a judicial inclination toward requiring better procedures. n42 In fact, in *United States v. Owens*, discussed in § 801.02[3][c], the Court referred with apparent approval to the Advisory Committee's belief that use of out-of-court identifications was to be fostered rather than discouraged, and held that a witness who had no memory of his identification was nonetheless subject to cross-examination about it within the meaning of the Rule.

In our discussion of *Rule 801(d)(1)(A)*, *§ 801.02[3][a]*, we offered a hypothetical bank robbery case. It is helpful to return to it again here. If an eyewitness, who told the police after the robbery that "Frank Smith robbed me," testifies at trial that "Frank Smith was not present at the time of the robbery," is the prior statement admissible under (C) if it is not made under oath in a proceeding, as required under (A)? Certainly, if the witness picked out Frank Smith's picture as that of the robber and later denied at trial, under oath, that Smith was the culprit, the identification would fit under the Rule, because the witness would be available and subject to cross-examination. n43 However, if the prior statement was not made in the course of an actual photographic or corporeal identification (for example, if the witness simply goes to

the police and says, "Jim did it"), we think that the Rule should not be read to admit the statement. An application of the Rule that would cover any statement in which any declarant identified a person as a perpetrator would be overbroad. It would undermine the requirement of *Rule 801(d)(1)(A)* that prior inconsistent statements must be under oath. It would also undermine the requirement of *Rule 801(d)(1)(B)* that prior consistent statements are admissible for their truth only when they rebut a charge of recent fabrication or improper influence or motive.

As implied in the above paragraph, a prior identification need not have been made under oath, it need not have been made in a proceeding, and it is not limited to rehabilitating a witness who is attacked for recent fabrication or improper influence or motive. This is why the Rule must be limited to statements made during the course of an actual identification procedure. If not, the limitations in the other provisions of *Rule 801(d)(1)* can be too easily disregarded.

An identification can be proved under *Rule 801(d)(1)(C)* by a witness other than the declarant, so long as the declarant (i.e., the person who made the pretrial identification) is subject to cross-examination at the trial or hearing. It follows that the pretrial identification is not inadmissible simply because the declarant is unable to identify the defendant in Court; the declarant is still subject to cross-examination. n44 Nor would it matter if the declarant repudiates his identification on the stand; such a witness is still subject to cross-examination within the meaning of the Rule after *Owens*. n45 However, the person who made the identification must be subject to cross-examination; if that witness is unavailable, the Rule is inapplicable. n46

[6] Admissions

[a] Relationship to Common-Law Rule

Subsection (d)(2) of *Rule 801* is composed of the family of statements generally comprising the admissions exception to the hearsay rule. As indicated above, because an exception is applicable to these statements, they are admitted for their truth in common-law jurisdictions. The Federal Rule provides for exemptions rather than exceptions. As discussed above, the fact that the Federal Rules choose the redefinition approach, rather than the approach of creating exceptions, is of no great moment.

The admissions exception to the hearsay rule is one that does not fit neatly within any of the justifications for other exceptions (e.g., reliability, cross-examination of the declarant). It is, rather, a function of the adversary system; the best justification is that a party can hardly complain that statements he may have made, sometimes through others, were not under oath and subject to cross-examination. The risk of hearsay is that the adversary may be hiding an untrustworthy declarant, whose statement would be impervious to cross-examination; thus, the protection of the hearsay rule is needed to assure that the adversary system is fair. n47 But there is no risk of adversarial unfairness when the possibly untrustworthy declarant is the very party against whom the statement is offered. As such, no showing of trustworthiness is required for a hearsay statement to be admissible as an admission. n48

[b] Admissions -- Multiple Parties

Rule 801(d)(2) admits statements offered "against a party." This term presents no problems in a two-party case, but there is a problem of interpretation when there are multiple parties on one side of the litigation. For example in *United States v. Harwood, 998 F.2d 91 (2d Cir. 1993)* , Harwood and McKee were arrested in a van in which LSD was found, and both were charged with possession with intent to distribute. Harwood's defense was that he was simply a passenger with no knowledge that LSD was in the van. He wanted to introduce McKee's out-of-court statement that Harwood had simply been "in the wrong place at the wrong time," and "the same would have happened to any person driving a vehicle in which he [McKee] was a passenger." Harwood argued that the statement was admissible as a party-admission by McKee. But the Court held that the exemption requires that the statement must be offered "against the party" who made it. As the Rule puts it in its caption, the statement must be made by or attributable to a "party-opponent." Consequently, McKee's statement could not be used by Harwood, because McKee was not a "party-opponent" of

Harwood. Rather, they were codefendants; the government was the party-opponent of both of them. n49

We think that the *Harwood* Court's construction of the admissions exemption is questionable. It smacks of technicality. Harwood and McKee were codefendants, but they were not presenting a united defense against the government. Rather, each accused the other of placing the LSD in a hidden part of the van. In a very real sense, the defendants were party-opponents, even though they were placed on the same side of the "v." in the styling of the case. Under the circumstances, Harwood's acquittal was dependent on "convicting" McKee. As the government could have used McKee's statements to help convict him, there is no reason why Harwood should have been prohibited from doing so.

Nor is the use of admissions among codefendants outside the plain meaning of *Rule 801(d)(2)*. The Rule requires that the admission be "offered against a party." Again, Harwood was offering McKee's statement "against" McKee as a functional matter.

We also note that the *Harwood* reading of the Rule ends up treating civil and criminal defendants unequally. Civil defendants can become party-opponents by cross-claiming, thereby permitting the use of party admissions against each other. Criminal defendants, however, cannot file cross-claims, and are therefore totally dependent on the government's decision whether to admit the statement of one of the codefendants.

[c] Admissions -- Personal Admissions

Rule 801(d)(2)(A) is the exception for a statement made by a party in an individual or representative capacity. This is the simplest example of an admission. All that is required to satisfy *Rule 801(d)(2)(A)* is that the statement was made by the party and that it is offered at trial by a party-opponent.

As discussed more fully in the Editorial Explanatory Comment to *Rule 602*, *§ 602.02[3]*, a party-admission is admissible even if the party made the statement in the absence of personal knowledge. n50

It is important to note that a party-admission need not have been made with a disserving motivation. Indeed, the party may have thought at the time that the statement was beneficial to his interests, e.g., an exculpatory story that later turns out to have been false. The touchstone of admissibility is that the statement is beneficial to, and offered by, the party-opponent at the time of trial. n51 It follows that a party can never admit a statement *in her favor* under this Rule; the statement must be offered by a party-opponent. n52 As the Court noted in *United States v. McDaniel, 398 F.3d 540 (6th Cir. 2005)* , *Rule 801(d)(2)* "does not extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses" because if it did, "parties could effectuate an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to first-hand scrutiny by the jury."

[d] Admissions -- Adoptive Admissions

Rule 801(d)(2)(B) codifies what the common law calls an adoptive admission. An adoptive admission occurs when a party expressly or implicitly adopts or acquiesces in the statement of another; this can be by way of implication, by conduct, or even by silence. n53

The fact that a statement is made in the presence of a party is not by itself enough to warrant admitting the statement into evidence. There must be some circumstances indicating acquiescence. n54 But this does not mean that an adoptive admission can never be found through the party's silence. If, under the circumstances, a reasonable person would have denied the statement, silence can be deemed an adoption. n55

An interesting case showing the boundaries of "adoption" is *United States v. Hove, 52 F.3d 233 (9th Cir. 1995)* . Hove was a lawyer charged with currency structuring. The government sought to admit two instances of allegedly adoptive

admissions. In the first, an officer who was investigating one of Hove's clients asked Hove to explain the circumstances of two suspicious bank deposits; Hove said he would have to investigate and get back to the officer. The Court held that this response could not be considered an adoptive admission because the officer's questioning "did not constitute an accusation that Hove himself had committed the crime of structuring." Moreover, it could be said that even if the officer had accused Hove directly, Hove's response ("I'll have to check it out and get back to you") was far from an adoption of any accusation.

In the second instance, an officer invited Hove to tell his side of the story to the grand jury, and Hove declined. The Court held that "declining an invitation to testify in front of the grand jury simply does not constitute an admission by silence." The Court was properly concerned that an overbroad application of the adoptive admissions doctrine would impinge on the defendant's constitutional right to remain silent.

Of course, an adoptive admission is dependent upon a showing that the party heard the statement and understood it. This is a question of conditional relevance governed by *Rule 104(b)*. Thus, "before admitting a statement as an adoptive admission, the trial court must determine whether a jury could find that the defendant comprehended and acquiesced in the statement." n56 In contrast, the party's adoption of a statement once heard is an admissibility requirement and accordingly is governed by the preponderance standard of *Rule 104(a)*; the Trial Judge must find it more likely than not that the party manifested an adoption or belief in the truth of the statement. n57

[e] Admissions -- Authorized Admissions

Rule 801(d)(2)(C) covers statements by any person authorized by a party to make statements concerning some subject matter. One issue that the Advisory Committee faced in drafting this particular subsection was whether a person who is authorized to make statements only to the principal should be able to "bind" the principal if the statements are revealed to outsiders. The Rule takes the position that once someone is entrusted with a duty or responsibility to make statements, it does not matter whether or not the principal is to be the sole recipient of the statements. Thus, under this Rule, a party's books or records are usable against him, even though they are prepared by another person and they were prepared by this person with an intent only to disclose them to the principal.

Rule 801(d)(2)(C) obviously has a significant overlap with *Rule 801(d)(2)(D)*, though the former provision clearly covers fewer statements by agents than the latter. Where an agent is authorized to speak on behalf of the principal, *and* the statement is about a matter within the scope of the agent's employment, a Court will often invoke both subdivisions to justify the admissibility of the statement. n58

[f] Admissions -- Agents' Admissions

[i] Expansion of Common-Law Rule

In most common-law jurisdictions, a statement by an agent or servant can only be used against the principal if the agent or servant is employed for the purpose of making such statements. Under the Federal Rules, those statements are admissible under *Rule 801(d)(2)(C)*, discussed in the preceding section. *Federal Rule 801(d)(2)(D)* goes much further than the common law by providing that an agent's statement is admissible against the principal if it concerns a matter within the agent's scope of authority. A classic case is where a driver of a truck owned by his employer runs a red light and causes an accident; the driver apologizes to the other party involved in the accident and comments that he is sorry that he ran the red light. Clearly, this is a personal admission if the driver is sued, as our discussion of *Rule 801(d)(2)(A)* above indicates. In most common-law jurisdictions, such a statement cannot be used against the employer-owner of the vehicle unless that person authorized the driver to make such statements; simply authorizing the driver to drive the truck is not enough. *Rule 801(d)(2)(D)* permits the statement to be used against the employer-owner as well as against the driver, because if the speaker is authorized to drive the truck, then his admission about his driving covers a matter within the scope of his authority. n59 If the statement concerns a matter outside the agent's scope of authority, then it is

not admissible under this exemption. n60

[ii] Admissions -- Agents' Admissions -- Personal Knowledge

Can an agent's statement be admissible against the principal if the agent had no personal knowledge to support the statement? The concern over such statements is that the principal will be bound by statements of dubious reliability -- e.g., employee gossip. But the Courts have mostly held that such a concern is misconceived when it comes to admissions, because admissions are not based on reliability; rather, they are based on adversarial principles. The Courts, with some exceptions, reason that a party is not entitled to protection against the adversary's use of a possibly unreliable or uninformed statement of the party or the party's agent. n61 Some protection is provided, however, by the requirement that the matter spoken of must be within the agent's scope of employment. *Rule 801(d)(2)(D)* does not cover every statement made by gossips at the water cooler.

[iii] Admissions -- Agents' Admissions -- Coemployee Statements

One question that has presented some difficulty is whether a statement by one employee can ever be admissible against another employee under *Rule 801(d)(2)(D)*. The Courts have held that such a statement can qualify as an agent's admission under *Rule 801(d)(2)(D)*, but admissibility depends on whether there is a de facto agency relationship between the declarant and the party-employee. For example, in *Zaken v. Boerer, 964 F.2d 1319 (2d Cir. 1992)* , the plaintiff brought an action against the CEO of the company who fired her, alleging that she was fired for pregnancy. At trial, she offered the hearsay statement of the company's vice president of sales to the effect that the plaintiff's predecessor had also been fired for pregnancy. The Court held that this statement was admissible against the CEO in his individual capacity. The declarant was answerable to the defendant within the corporate structure; the defendant was the company's principal owner, who directed its day-to-day operations and made all final decisions. The Court concluded: "When the factors proving an agency relationship are present, the testimony should not be excluded simply because it is offered against a corporate employee rather than the corporation itself." n62 The Court also held that the statement was within the scope of the Vice President's employment, because he had some responsibility for hiring and firing decisions.

Obviously, there can be harder cases than *Boerer*, such as where an employee in one division makes a statement sought to be used against the head of another division, or where the employees share the same job description but the declarant reports daily to the party, or vice-versa, or where the party's control over an entity is subject to dispute. n63 In resolving these difficult questions of agency, most Courts require that the party-opponent must "control the daily tasks of the declarant" in order for *Rule 801(d)(2)(D)* to apply, though some more permissive Courts find more generalized control by the principal to be sufficient. n64

[iv] Admissions -- Agents' Admissions -- Proof of Agency

In order for a statement to be admissible as an agency admission, the proponent must establish that the declarant was the agent of the party-opponent at the time the statement was made. n65 The proponent must also establish the scope of the agency. n66 Often this is not difficult because existence and scope of agency are obvious. But in some cases the proponent must resort to circumstantial evidence to prove the existence and scope of the agency. An interesting example of this proposition is *Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992)* . The plaintiff brought a personal injury suit for injuries he suffered when he slipped and fell on an icy walkway leading to his condominium. After he fell, his friend phoned the defendant, the condominium's management company, to complain about the icy condition of the walkway. Shortly thereafter, a man appeared with a shovel and a bucket to clear away the ice. He made statements indicating that the management company had a poor record of maintenance of the sidewalk. The Trial Court refused to admit these statements on the ground that the plaintiff did not adequately show that the declarant was an agent speaking about a matter over which he had been granted authority by the defendant.

The Court of Appeals reversed. It held that to provide a sufficient foundation for vicarious admissions, a party need

only establish:

> (1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency. The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate.

The Court accepted the generally held notion that the proffered hearsay statement does not itself suffice to establish the agency relationship -- a notion that was subsequently codified by the 1997 amendment to *Rule 801(d)(2)*. That is, it would not have been enough for the man with the shovel to simply say, "the condominium management sent me to clean up the ice." But the plaintiff did not rely only on the declarant's own statement of his agency. Here, circumstantial evidence existed to demonstrate that the declarant was an agent and that the agency relationship extended to maintaining the walkway. The declarant responded immediately after the plaintiff's complaint to the employer, and came prepared with materials to repair the icy conditions; his statements were indicative of an employment relationship with the defendant. It was unlikely under the circumstances that he was a passing bystander, or that he was an employee acting beyond the scope of the employment relationship. Considering the circumstantial evidence together with the declarant's own statements, the Court held that the plaintiff had established the existence and scope of the agency. n67

[v] Admissions -- Agents' Admissions -- Statements by Translators

When a party-opponent does not speak English, questions arise as to whether an out-of-court statement by the party related by a translator can be admitted as an agency admission. For example, in *United States v. Da Silva, 725 F.2d 828 (2d Cir. 1983)* , the defendant gave a false exculpatory statement to a DEA agent when a search of his luggage at Customs uncovered cocaine. At trial the government, through the testimony of the DEA agent, sought to introduce the false exculpatory statement as proof of Da Silva's consciousness of guilt. But an evidentiary problem was created because Da Silva could not speak English and the DEA agent could not speak Spanish. The DEA agent had sought to bridge the communication gap by enlisting the services of a bilingual Customs Inspectional Aide. When the Aide entered the room, Da Silva, speaking in Spanish, asked the Aide whether he spoke Spanish. The Aide responded affirmatively, and Da Silva said "Thank God," in Spanish. Then Da Silva proceeded to give his false exculpatory story, which the Aide translated to the DEA agent.

The Court held that the statements of the translator were admissible as statements of an agent under either *Rule 801(d)(2)(C)* or *Rule 801(d)(2)(D)*. The Court concluded that Da Silva authorized the Aide to act as his translator, in light of his clear relief at having the Aide available, and by his "conscious reliance" on the Aide's translation. Under these circumstances, the Court was not troubled by the fact that the Aide was an employee of the government. In his role as translator, the Aide could legitimately serve as an agent of both Da Silva and the government. n68

The Court in *Da Silva* cautioned, however, that an inference of agency cannot be drawn if the translator has a motive to falsify, or if the translator is demonstrably incompetent. So for example, if two people are arrested at Customs, and one translates for the other to the effect that the translator had nothing to do with the smuggling and that it was all the other person's fault, the Court should refuse to admit the statement as an agent's admission. n69

[vi] Admissions -- Agents' Admissions -- Statements by Attorneys as Agent's Admissions

A statement of an attorney is, subject to certain conditions, admissible against the client under *Federal Rule 801(d)(2)*(C) or (D). The leading case on this subject is *United States v. McKeon, 738 F.2d 26 (2d Cir. 1984)* , where the defendant was charged with conspiracy to export firearms. A crucial piece of evidence against him was a copy of a document that the government argued was made from a copier in McKeon's wife's office. In his opening argument, defense counsel stated that a defense expert would show that the copy was not, in fact, made on the copier in Mrs. McKeon's office. The case was subsequently terminated by mistrial. Before the retrial, defense counsel was informed

that the prosecution would call an expert to testify that the copy was made on the copier in Mrs. McKeon's office, and that the expert to be called was the teacher of the expert retained by the defense. Given his now-dim prospects in a battle of the experts, defense counsel at the new trial argued that McKeon had been duped into having the crucial documents copied on the copying machine at his wife's office. The government moved to introduce defense counsel's opening statement at the prior trial as an admission by an agent, to prove McKeon's consciousness of guilt.

The Court in *McKeon* recognized that statements by an attorney are generally admissible as agency admissions against the client. It observed, however, that caution should be exercised before admitting statement made by counsel in prior criminal cases. The Court noted five concerns, some of them in the nature of those considered under *Rule 403*:

(1) Free use of prior jury argument might consume substantial time to explore marginal matters, because the probative value of a change in strategy may only be evident after an in-depth consideration of such matters as whether new evidence has been found.

(2) The jury might draw unfair inferences from a prior jury argument. The defendant has the right to choose the weak spots in the government's case, and choosing a different weak spot in the second trial does not necessarily mean that the defendant admits the strength of other aspects of the prosecution's case.

(3) The free admissibility of prior jury argument may deter counsel from vigorous advocacy. Unless the truth-seeking process demands it, counsel should not have to pull her punches at one trial due to apprehension about arguments to be made at a second trial.

(4) In order to explain the inconsistency between the two arguments of counsel, the defendant may have to testify, thus risking impeachment and the waiver of the attorney-client privilege.

(5) Introduction of the attorney's statement may mean that the attorney would become one who "ought to be called as a witness" by the defendant. Where that is the case, admission of the prior jury argument will result in disqualification of the defense counsel.

For all these reasons, the *McKeon* Court imposed three limitations before an argument of counsel in a prior trial could be offered against a criminal defendant: n70

First, there must be a true inconsistency between the arguments. Speculations of counsel, arguments about the credibility of witnesses, and general attacks on the prosecution's case should not be admitted against the defendant at a different trial, because these arguments are too ambiguous to be inconsistent with a later factual assertion.

Second, the Court must determine that the statements of counsel "were such as to be the equivalent of testimonial statements by the defendant"; in other words, the Trial Court must find that the defendant authorized the attorney to make the statements. The mere fact of an attorney-client relationship is insufficient proof on this point, because "considerable delegation is normally involved and such delegation tends to drain the evidentiary value" from the attorney's statement. Therefore, there must be evidence of the client's participatory role, either directly or inferentially. An example of a sufficient showing is where the attorney's statement must have been derived from factual input supplied by the client.

Third, the Court should, after a hearing, determine by a preponderance of the evidence that the prosecution seeks to draw a fair inference from the inconsistency and that an innocent explanation does not exist.

On the facts, the *McKeon* Court found that the attorney's prior opening statement was admissible. The Court reasoned that the opening argument in the later trial was facially inconsistent with the previous one: either the copy was made on the copier at Mrs. McKeon's office or it was not. Also, there was every reason to believe, given the points argued by

counsel, that McKeon participated in forming the strategy at both trials. Moreover, McKeon "did not stand mute and put the government to its proof at the last trial." Rather, he took a completely inconsistent stance. Finally, McKeon could give no innocent explanation for the inconsistency, even though the Trial Judge offered to consider such an explanation *in camera* to prevent disclosure of privileged communications or work product.

It therefore appears, on the basis of *McKeon* and like cases, n71 that statements by counsel will be admitted as agency admissions, so long as there is some evidence to indicate that the attorney was authorized to make the statements. This means that it behooves counsel to get his or her story straight at the outset. While some may argue that the free use of attorney's statements as admissions will chill counsel from vigorous advocacy, it can be argued with equal force that such free admissibility will encourage counsel "to be more careful in verifying the accuracy of information offered by the client." n72

While *McKeon* concerns statements made by criminal defense counsel, the principles of agency-admission are applicable to statements by other counsel as well. For example, in *United States v. Salerno, 937 F.2d 797 (2d Cir. 1991)* , *rev'd on other grounds*, *505 U.S. 317 (1992)* , the government in one megatrial sought to show that Auletta was an extortion victim -- a "puppet on a string" as the government put it. In a different megatrial involving similar as well as overlapping facts, the government indicted Auletta and sought to prove at trial that he was a voluntary bid-rigger, a major player. Auletta sought to introduce the indictment from the previous megatrial that referred to him as a victim of extortion. The Court held that statements made by government counsel at the prior megatrial concerning Auletta's minimal role were admissible under *Rules 801(d)(2)*(C) and (D). As the Court put it, "[T]he government has taken the same evidentiary clay that they used in the [first] case and, for purposes of this trial, resculpted Auletta from a 'puppet on a string' to a bid-rigger." The Court recognized that the government was free to characterize the actors in the prior trial as it wished, but concluded that the jury "is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims." n73

Similarly, attorney-as-agent admissions are often found in civil cases where pleadings are superseded, or inconsistent positions are taken in separate litigations. n74 A typical case is *Andrews v. Metro North Commuter R. Co., 882 F.2d 705 (2d Cir. 1989)* , where the plaintiff's initial complaint alleged that he was struck by a train while walking along the tracks in a train yard. There was substantial evidence that the plaintiff was highly intoxicated at the time. The plaintiff's counsel filed an amended pleading that purported to explain how the plaintiff found himself walking in a train yard: He was waiting on a commuter platform and slipped and fell because of a defective condition consisting of ice and snow; unable to get back on the platform, he wandered along the track bed in a daze until he was struck by the train. The Court of Appeals held that the Trial Court had abused its discretion in refusing to allow the jury to consider the superseded complaint as an admission. The Court relied on *McKeon* for the proposition that "a party cannot advance one version of the facts in his pleadings, conclude that his interests would be better served by a different version, and amend his pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." n75

[g] Conspirator Statements

[i] Relationship to Common-Law Rule

Rule 801(d)(2)(E) codifies the traditional coconspirator Rule, which admits into evidence statements of one coconspirator against another as long as those statements were made during the course of and in furtherance of the conspiracy. As stated in the Advisory Committee Note, coconspirator statements are admitted not because they are reliable, but because their admission is consistent with the substantive law of conspiracy and the adversarial nature of litigation. As such, like other admissions, a coconspirator statement can be admitted even if the declarant was speaking without personal knowledge. n76

Rule 801(d)(2)(E) need only be used when statements of one conspirator are offered for their truth against another.

> [M]any declarations of co-conspirators have been held admissible as "acts" of the conspiracy. The mere fact that such statements were uttered is the important input to the jury, and the introduction of the statement for that purpose is made sufficiently reliable by the defendant's opportunity to cross-examine the witness who testifies to having heard the statement being made.

Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, *85 Harv. L. Rev. 1378, 1398 (1972)*. The statements referred to by Professor Davenport (an example being a verbal agreement to enter into a conspiracy) are independently admissible because they are not covered by the definition of hearsay in *Rule 801(c)*. Thus, the remainder of the discussion of conspirators' statements will concern those that are admissible if at all only under *Rule 801(d)(2)(E)*.

[ii] Conspirator Statements -- Foundation Requirements for Admission of Conspirator Statements

[A] Elements of Foundation

The coconspirator hearsay exemption has three separate foundation requirements that the proponent must meet:

(1) The declarant and the opponent must be members of the same conspiracy; it is not enough that the declarant and the opponent are both members of some conspiracy -- they must be members of the same conspiracy. n77

(2) The statement must be made by the declarant during the course of the conspiracy. That is, the conspiracy must be in operation at the time the statement was made. A statement is not made during the course of the conspiracy if the conspiracy has terminated. Generally speaking, a conspiracy is terminated when its central criminal goal has been achieved or abandoned. n78 For monetary crimes, the central criminal goal is achieved when the money is divided up among the coconspirators. n79 Courts have held that actions designed to evade detection, after money has been divided up, are not in the course of the original conspiracy. n80 Statements made to evade detection might well be part of a subsequent conspiracy, however.

(3) The statement must be made with the intent to further the conspiracy. If the statement was simply idle chatter by a conspirator, or simply serves to blame or "finger" people as conspirators, it will not be admissible under this exemption. n81 However, statements that on their face seem only to inculpate members of the conspiracy may in fact further the conspiracy by keeping other members apprised of conspiratorial developments, by providing reassurance, or by encouraging others to join, assist, or deal with the conspiracy. n82

The first foundation requirement for admission of conspirator statements -- existence of a conspiracy between the declarant and the party-opponent -- has posed difficulties regarding two questions: (1) How much evidence is required regarding the foundation facts, and (2) can the statement itself be considered by the Trial Judge in making the preliminary determination? Subsidiary questions exist as to when and how the Trial Judge is to make the necessary finding that the party-opponent (usually a criminal defendant) and the declarant were coconspirators.

[B] Conspirator Statements -- Foundation Requirements -- Preponderance of the Evidence

In *Bourjaily v. United States, 483 U.S. 171 (1987)* , the Court held that coconspirator statements may be admitted only upon a showing by a preponderance of the evidence that a conspiracy existed and that the declarant and the defendant were participants in it.

The Supreme Court's rulings in *Bourjaily*, that the foundation facts are to be determined by the Trial Judge, and that the prosecution must prove the foundation facts by a preponderance of the evidence, were based on *Rule 104(a)*. Although that Rule does not explicitly provide the standard of proof to be applied by the Judge, the *Bourjaily* Court observed that the traditional requirement is that admissibility requirements must be established by a preponderance of proof. The

Court reasoned that the preponderance standard ensures that before admitting evidence, the Trial Judge will have found it more likely than not that the technical issues and policy concerns addressed by the Rules will have been afforded due consideration. No higher standard of proof was required to protect against the risk of error, because all that was at stake was the technical policies behind the Rules of Evidence.

The preponderance standard can provide the criminal defendant with some meaningful protection because it requires the Judge to find facts. To determine admissibility, the Judge must assess the credibility of witnesses and make a finding based on a fair assessment of the evidence, rather than on an assumption that the evidence should be taken in the light most favorable to the government. See Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, *27 Stan. L. Rev. 271, 302-04 (1975)*.

[C] Conspirator Statements -- Foundation Requirements -- Independent Evidence

In *Bourjaily*, the Court decided that the Trial Judge could consider the proffered statement itself in determining its admissibility. That decision was contrary to the rule previously followed in the Federal Courts that the preliminary facts must be established by evidence independent of the statement being offered. *Glasser v. United States, 315 U.S. 60, 74-75 (1942)* . According to the Court, the *Glasser* "no-bootstrapping rule" had been changed by *Federal Rules 104(a)* and *1101(d)(1)*, which provide that Trial Judges are not bound by the Rules of Evidence (except with respect to privileges) in making preliminary determinations. Thus, a hearsay objection would not be proper at a hearing in which the Judge is to determine whether a coconspirator statement is admissible under the hearsay exception. Most of the Circuits had taken the position that the Rules permitted consideration of hearsay and other inadmissible evidence *other than the subject statement itself*, but that Congress had given no indication it wanted to change the *Glasser* rule to permit consideration of the challenged statement as proof of its own admissibility requirements. The *Bourjaily* Court saw the matter differently: "It would be extraordinary to require legislative history to *confirm* the plain meaning of *Rule 104*."

A 1997 amendment to *Rule 801(d)(2)* codifies the *Bourjaily* rule and extends it to proof of authorization under subdivision (2)(C), and to proof of agency under subdivision (2)(D). In determining any of these preliminary questions, the Trial Court *must* consider the hearsay statement itself as part of the proof.

The *Bourjaily* decision regarding independent evidence, now codified in *Rule 801(d)(2)*, is founded on assumptions about the reliability of conspirators' statements. The Court in *Bourjaily* reasoned that out-of-court statements of purported coconspirators are only *presumed* unreliable, with the presumption rebuttable by appropriate corroborative proof. It reasoned further that individual pieces of evidence may be insufficient by themselves to prove a point but may in cumulation prove it. Taken together, these principles indicate that a piece of evidence, unreliable in isolation, may be quite probative when corroborated by other evidence. Thus, Trial Judges must be permitted to evaluate conspirators' statements for their evidentiary worth as revealed by the particular circumstances of the case.

For example, assume that the declarant sells drugs to street dealers. One day, a street dealer comes to the declarant, who has no drugs, but states to the street dealer, "My supplier Mark is sending me a shipment today, don't worry." This statement is presumptively unreliable as proof that Mark is in a drug conspiracy with the declarant. However, other evidence of suspicious association between the parties, such as large financial transactions, trips to drug source cities together, and Mark's unexplained wealth, might point to a conspiracy between them, lending corroboration to the declarant's assertion. What initially seemed unreliable now seems consistent with the known facts.

Before *Bourjaily*, the admissible evidence had to rise to the level of proof by a preponderance of the evidence that the declarant and the defendant were coconspirators before the hearsay statement could be considered by the jury. This is no longer required; the independent evidence need not rise to any particular standard of proof, so long as the entire submission, including the challenged hearsay statement itself, proves conspiracy between the declarant and the defendant by a preponderance of the evidence.

Bourjaily has its greatest impact in cases where the government's independent evidence of conspiracy is too weak to stand on its own, but strong enough to be corroborative of an inculpatory statement of a professed coconspirator. The impact can truly be deemed major in those cases in which an application of a pre-*Bourjaily* independent evidence requirement would result in exclusion of the proffered hearsay and a consequent inability even to get the case to the jury.

In *Bourjaily*, the Court found it unnecessary to decide whether a Trial Judge could rely solely on the proffered statement itself to conclude that a conspiracy existed. But the analysis in *Bourjaily* really foreclosed that possibility. The Court declared that a coconspirator hearsay statement was presumptively unreliable, but that the presumption could be overcome by corroborative independent evidence. Following that line of reasoning, it would not seem possible that the presumption of unreliability can be overcome in the complete absence of corroborative evidence. Predictably, Lower Courts after *Bourjaily* held as a matter of law that the proffered hearsay statement cannot itself satisfy the preponderance standard of admissibility. n83 The 1997 amendment to the Rule has codified these quite reasonable Lower Court rulings. The amendment provides that the contents of the hearsay statement must be considered as part of the foundation, but that the hearsay statements are not alone sufficient to establish the necessary connection between the defendant and the declarant.

While *Rule 801(d)(2)* requires consideration of the proffered statement in determining its admissibility, it does not follow that the Judge is always required to give the hearsay substantial weight in making the determination. As hearsay, it may well be "idle chatter" or malicious gossip made under circumstances providing no assurance of trustworthiness. If that is a significant possibility, the Trial Judge's focus will have to be on the strength of the independent evidence.

Courts after *Bourjaily* have held that the independent evidence must be at least "fairly incriminating" on its own before that evidence together with the hearsay statement can satisfy the *Bourjaily* preponderance requirement. As the Ninth Circuit put it in *United States v. Silverman, 861 F.2d 571, 578 (9th Cir. 1988)* :

> Evidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative of the co-conspirator's statement to constitute proof, by a preponderance of the evidence, that the defendant knew of and participated in the conspiracy. Evidence of innocent conduct does little, if anything, to enhance the reliability of the co-conspirator's statement. A co-conspirator's statement, which is presumptively unreliable hence inadmissible standing alone, is no more reliable when coupled with evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy.

In *Silverman*, the Court held that statements of the defendant's sister identifying the defendant as her drug supplier were inadmissible under the coconspirator exception. The only independent evidence of a conspiratorial connection put forth by the government was that the sister would travel to the town where the defendant lived; that the defendant would pick her up at the airport; that when the sister returned to her home, she would have drugs; and that the defendant subsequently concealed his identity from a DEA agent. The Court held that the brother-sister association was "too innocent" to connect the defendant to any conspiracy, and that the subsequent concealment of identity was not sufficiently related to the brother-sister connection to render it sufficiently probative of a conspiracy between them. The Court concluded that the independent evidence proffered by the government "was so marginally corroborative that it failed to overcome the presumptive unreliability" of the sister's hearsay statements.

We agree with the *Silverman* Court that the independent evidence must at least establish a reasonable suspicion of conspiracy before the jury can be permitted to consider the declarant's statement. Otherwise there is an unacceptable risk that the defendant will be convicted solely from the mouths of self-appointed coconspirators who are not produced for trial. n84 We suggest that the Courts, in evaluating the independent evidence presented, use a standard analogous to the reasonable suspicion test that is used to determine the legality of a *Terry* stop under the *Fourth Amendment*. That test, as applied to coconspirator hearsay, would be: whether the independent evidence, standing alone, presents a fair

possibility that the defendant and the declarant are coconspirators. n85 The government need not overcome every possible innocent explanation of the facts presented. n86 But, on the other hand, independent evidence that is not at all suggestive of criminal association (such as the brother-sister evidence in *Silverman*) should not suffice. n87

We believe that if the independent evidence is reasonably suspicious, and if that evidence combined with the hearsay statement itself establishes a conspiracy by a preponderance of the evidence, then the defendant will be sufficiently protected from unfair conviction out of the mouths of self-appointed coconspirators.

[D] Conspirator Statements -- Foundation Requirements -- Order of Proof

Trial Judges have several procedural options when deciding whether the prosecution has satisfied the foundation requirements of *Rule 801(d)(2)(E)*. One option is to hold a pretrial hearing and make a ruling on admissibility following the hearing, as the Judge does with an ordinary evidence problem. Appellate Courts have expressed a preference for this procedure, but they also recognize that in many complex conspiracy cases, this would be tantamount to trying a case twice -- the prosecution would introduce evidence of conspiracy to establish the foundation requirements for the admissibility of the hearsay, and then proffer the same evidence again at trial. So Trial Judges also have the option to allow coconspirator hearsay to be admitted at trial, subject to a condition -- i.e., the government must satisfy the preponderance of the evidence standard as the case progresses. n88

If the admissibility question is deferred, there are further permutations. The Trial Judge could make the preponderance of the evidence ruling at the close of all the evidence; or the ruling could come at the close of the government's case. In fact, there is no great difference between these two approaches. At the close of the government's case, Trial Judges must decide whether the requisite facts have been proved by a preponderance of the evidence. If not, the conspirators' statements should not be admitted under *Rule 801(d)(2)(E)*. If the government has satisfied the preponderance standard at this point, it still must be remembered that the defendant will not yet have presented evidence. In any hearing on an ordinary evidence issue, both sides have a chance to be heard. The same is true of the *Rule 801(d)(2)(E)* issue. Thus, the Trial Judge will have to consider the preponderance of the evidence question again, when all the evidence is in. This would either be the time that the Judge makes the formal ruling to admit evidence, or when she reconsiders the ruling made at the close of the government's case. The difference in approach should not be important.

If the Trial Judge defers the admissibility question and subsequently finds that the government has not met its burden of establishing the *Rule 801(d)(2)(E)* requirements, then a mistrial should be declared unless it is clear that a limiting instruction will suffice to protect the defendant from the obvious prejudice arising from the jury's having already heard the inadmissible hearsay. n89

We suggest that if the Trial Judge is thinking about deferring the question of admissibility of coconspirator hearsay until trial, the government should be required to provide a summary of its foundation evidence. If the summary indicates that the government will have trouble providing a foundation, then the Judge should either require a hearing on the admissibility of the hearsay, or else structure the order of proof at trial so that a ruling can be made before the hearsay is admitted. By these methods, a subsequent mistrial can perhaps be avoided. n90

While the Trial Judge has discretion as to when and how to make a ruling on coconspirator hearsay, it is clear that the Judge must make a finding on admissibility at some point. The failure to make a finding is not necessarily reversible error, however. For example, if the Trial Judge fails to make an explicit ruling on the admissibility of coconspirator hearsay, and yet denies a motion for directed verdict or a motion for acquittal, this might constitute an implicit finding that the government has established the foundation requirements of the hearsay exception; at least this is so when the conspiracy that spawned the hearsay statement is the same conspiracy charged in the case. The failure to make an explicit finding on admissibility might in these circumstances be harmless error. n91

If no determination on admissibility is made even implicitly, the impact of the evidentiary error must be assessed. An

efficient procedure has been set out by the Tenth Circuit in *United States v. Perez, 989 F.2d 1574 (10th Cir. 1993)* (en banc): The Appellate Court must assume that the challenged statements were inadmissible, and then assess whether the introduction of the statements at trial was harmless error. If the Appellate Court finds the presumptively erroneous admission to be harmless, then the conviction is affirmed. If the presumed error was not harmless, the case must be remanded for the Trial Judge to conduct the inquiry and make the findings that should have been made in the first place. If the Trial Judge on remand finds by a preponderance of the evidence that the declarant and the defendant were coconspirators and that the statements were made in the course and in furtherance of the conspiracy, then the conviction stands and the Court of Appeals retains jurisdiction to review the Trial Court's determination of the coconspiracy exemption question. If, on the other hand, the Trial Judge determines on remand that *Rule 801(d)(2)(E)* was not satisfied, then the conviction must be set aside, because the Appellate Court has already concluded that the error was not harmless.

Courts have uniformly held that the jury should not be informed that a Trial Judge has made a finding that there is sufficient evidence of conspiracy to satisfy *Rule 801(d)(2)(E)*. This would tend to confuse the jury and lend unwarranted weight to the hearsay statement and the evidence of conspiracy. n92

[iii] Conspirator Statements -- Breadth of Rule 801(d)(2)(E)

The hearsay exemption for coconspirator statements does not require that a conspiracy be charged in the case, only that the proponent show that the defendant and the declarant are members of the same conspiracy and that the statement was made during the course of and in furtherance of the conspiracy. n93 The Rule can apply in a wide variety of cases. Even statements by an acquitted conspirator may be used, due to the different standards of proof governing admissibility and guilt. n94 Statements by unindicted conspirators may also be used. n95 Indeed, the coconspirator hearsay exemption applies even in civil cases. n96

[7] Confrontation Concerns

Assume that an out-of-court statement is admissible either as not hearsay under *Rule 801(c)*, or as fitting within a hearsay exemption under *Rule 801(d)*. If the statement is offered against a criminal defendant, a further question arises: Is the statement admissible under the *Confrontation Clause*? Before the Court's decision in *Crawford v. Washington, 541 U.S. 36 (2004)* , the answer to that question was an unqualified "yes." But the Court's analysis in *Crawford* complicates that answer somewhat. What follows is a short discussion of *Crawford*, and then a discussion of how statements admitted under *Rule 801* interact with the rights of an accused under the *Confrontation Clause*.

Crawford:

The Court in *Crawford* held that the defendant's right to confrontation was violated because uncross-examined "testimonial" hearsay was admitted against him at trial under a state hearsay exception for declarations against interest. *Crawford* involved a statement made by the defendant's wife to police officers that implicated the defendant and herself. Under the jurisprudence established in *Ohio v. Roberts, 448 U.S. 56 (1980)* , a hearsay statement satisfies the *Confrontation Clause* if (1) it fits a "firmly-rooted" hearsay exception, or (2) the statement carries "particularized guarantees of trustworthiness" that assure its reliability. The State Courts found that Mrs. Crawford's statement to police officers satisfied the "particularized guarantees of trustworthiness" prong of *Roberts*, reasoning that Mrs. Crawford was not trying to shift blame, and that she was relating relatively recent events to a "neutral" police officer.

The Supreme Court, in an opinion by Justice Scalia, rejected the *Roberts* structure for determining whether a hearsay statement satisfies the *Confrontation Clause*, at least if the hearsay is "testimonial." Justice Scalia engaged in an extensive historical analysis and determined that the original intent of the *Confrontation Clause* was not to exclude unreliable evidence *per se*, but rather to exclude "testimonial" evidence that had not been cross-examined by the accused.

The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded even if it is clearly reliable and even if it fits into a standard hearsay exception. An example of a statement that would qualify under *Crawford* is testimony from a prior trial in which the defendant was subject to the same charges, and the witness is unavailable for the subsequent trial.

On the other hand, if the hearsay statement is not "testimonial," the Courts after *Crawford* have uniformly held that the *Roberts* test continues to regulate the admissibility of the hearsay. While the Court in *Crawford* at least implied that there would be no constitutional regulation for non-testimonial hearsay, and was no fan of the *Roberts* reliability requirement, the Lower Courts after *Crawford* has reasoned that *Roberts* applies to non-testimonial hearsay until the Supreme Court specifically rules otherwise; and it did not so rule in *Crawford*, which involved only "testimonial" hearsay. n97

So a critical question after *Crawford* is whether a hearsay statement is "testimonial" or not. Surprisingly, the Court did not try to define the term "testimonial." The closest the Court came to a definition is set forth in the following passage:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois, 502 U.S. 346, 365 (1992)* (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.
>
> ...
>
> Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.

In another part of the opinion, the Court indicated that statements taken at guilty plea allocutions are testimonial:

> Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar, 295 F.3d 1018, 1021-1023 (CA9 2002)* (plea allocution showing existence of a conspiracy); *United States v. Centracchio, 265 F.3d 518, 527-530 (CA7 2001)* (same); *United States v. Dolah, 245 F.3d 98, 104-105 (CA2 2001)* (same); *United States v. Petrillo, 237 F.3d 119, 122-123 (CA2 2000)* (same).

While the precise definition of "testimonial" is not clear, n98 what is clear is that *Crawford* provides some limitation on the use of hearsay by the prosecution in federal criminal trials.

Statements Admitted Under Rule 801 and the Confrontation Clause:

(1) *Not hearsay (Rule 801(c))*. In *Tennessee v. Street, 471 U.S. 409 (1985)* , the Court held that the nonhearsay use of an out-of-court statement raised no confrontation concerns. The Court's rationale was that the essential guarantee of the

Confrontation Clause is to provide the defendant with a right to cross-examine the witnesses against him. If a statement is not offered for the truth of the matter asserted, cross-examination of the declarant would serve no purpose because the declarant would have no relevant testimony to give. For example, assume that the prosecution wanted to prove that the victim was alive while he was being beaten by the defendant. To prove this point, the prosecution calls a witness who saw the beating and will testify that the victim cried out "Don't hit me anymore, I'm still alive!" The victim's statement is not hearsay because its truth is irrelevant; it is enough that the victim could speak -- that proves he was alive. Nor is the *Confrontation Clause* violated by introducing this testimony. Under *Crawford* the primary purpose of the *Confrontation Clause* is to guarantee cross-examination. But in this case cross-examination of the victim, even if he were alive, would do no good. The only question that could be asked is whether the victim actually said anything at the time of the beating--but this fact has already been shown by the in-court testimony of the witness who heard it. In sum, if an out-of-court statement is offered for a purpose other than proving the truth of the information related therein, its admission will not violate the *Confrontation Clause*. The Court in *Crawford* specifically reaffirmed its holding in *Street* that if a statement is non-hearsay, its admission does not violate the *Confrontation Clause*.

(2) *Prior statements of testifying witnesses (Rule 801(d)(1))*. The Court has indicated that when a witness is present at trial and subject to cross-examination, the prior statements of that witness can be admitted for their truth and the *Confrontation Clause* will not be violated. The ability to cross-examine the witness about the prior statement is sufficient to satisfy any concerns about confrontation. As applied to the Federal Rules of Evidence, this means that statements admissible under *Rule 801(d)(1)* will never violate the *Confrontation Clause* because the basic condition to admissibility under this Rule is that the declarant is testifying at the trial and subject to cross-examination. In *United States v. Owens, 484 U.S. 554 (1988)* , the Court specifically held that a prior identification of a testifying witness, who lacked memory of the event, was admissible under *Rule 801(d)(1)(C)*, and also that admission of the hearsay statement did not violate the *Confrontation Clause*. The Court stated that "the *confrontation clause* guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." n99 Courts after *Crawford* have held that *Owens* remains good law. n100

(3) *Admissions (Rule 801(d)(2))*. First, it is clear that if the admission is by the defendant himself, or is adopted by him, then it is the defendant's own hearsay statement that is being admitted. Clearly, a person has no constitutional right to confront himself. n101 *Crawford* does not change this rule, because even if the accused's statement is testimonial, there is no right to cross-examine yourself. Applying *Crawford* literally would mean that a defendant who made a voluntary confession pursuant to police interrogation would have a right to exclude this "testimonial" statement under the *Confrontation Clause*. Clearly *Crawford* did not contemplate such a result.

As to agency admissions, their admissibility will depend in the first instance on whether they are "testimonial" under *Crawford*. It is likely that most statements made by the agent of an accused will not be testimonial because they will not be made with an eye toward a criminal prosecution. But some such statements might be testimonial; for example, if a corporate agent admits to an interrogating police officer that in the course of his employment he followed directions from his superiors and violated a criminal law, that statement is likely to be found testimonial. If an agent's statement is not testimonial, then its admissibility remains governed by *Roberts*, and under that test a hearsay statement is admissible if it fits a firmly-rooted hearsay exception. Agency statements have been found to fit a firmly-rooted exception. n102

As to coconspirator statements, they are only admissible if they are made during the course and in furtherance of the conspiracy. It seems unlikely that a coconspirator would make a qualifying statement that would result in "testimony" under *Crawford*. For example, if the coconspirator is confessing to police officers, or making a plea allocution, those statements are not in furtherance of the conspiracy and so not admissible under the exception. The Court in *Crawford* held that coconspirator statements are "by their nature" not testimonial. And Lower Courts after *Crawford* have uniformly held that statements admissible under *Rule 801(d)(2)(E)* are by definition not testimonial. n103 While nontestimonial hearsay remains governed by the *Roberts* test, the Court in *Bourjaily* held that *Rule 801(d)(2)(E)* is a firmly rooted hearsay exception; as such, statements fitting within that exception automatically satisfy the *Roberts* test.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Williams, 133 F.3d 1048 (7th Cir. 1998)* (informant's accusation that the defendant robbed a bank could not be admitted for the non-hearsay purpose of proving the "background" of the police investigation, because the risk that the jury would use the accusation as proof of the defendant's guilt substantially outweighed its probative value for background purposes); *United States v. Cass, 127 F.3d 1218 (10th Cir. 1997)* (out-of-court accusations were improperly admitted as "background": "Hearsay evidence that directly goes to guilt is particularly difficult to limit to background purposes."); *United States v. Reyes, 18 F.3d 65 (2d Cir. 1994)* (reversing a conviction due to error in admitting statements made to a Customs agent which implicated the defendant in a conspiracy; even though the jury was instructed that the statements were admitted only as background, and even though the statements were relevant to explain the background of the investigation, the likelihood was high that the jury would have considered the statements for their truth anyway: "contrary to the government's contention, the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice"). Compare *United States v. Davis, 154 F.3d 772 (8th Cir. 1998)* (testimony by law enforcement officer concerning accusations he heard about the defendant was properly admitted to explain the reasons for his investigation, after defense counsel attacked the motives of the investigators); *United States v. Gilliam, 994 F.2d 97 (2d Cir. 1993)* (911 call concerning the location of a gun was admissible as nonhearsay, where it was offered to explain why a police officer returned to the scene of the defendant's arrest and arrested the defendant's friend; the statement was offered in rebuttal after the defendant argued that the officers were merely harassing the defendant and his friend).

(n2)Footnote 2. See, e.g., *United States v. Cruz, 993 F.2d 164 (8th Cir. 1993)* (detective's testimony concerning information he had received from unnamed sources was not hearsay, because it was offered to explain the officer's motivation for investigating the defendant; in the absence of an objection, the Court did not consider whether the evidence should have been excluded under *Rule 403*).

(n3)Footnote 3. See, e.g., *United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983)* (testimony by a government witness that he visited his friend who had been burned in a fire, and that the friend, heavily bandaged and unable to speak, nodded his head affirmatively when asked whether he had been paid to start the fire, was hearsay, but was admissible under the exception for statements against penal interest; the Court found that the government plainly used the nod for the truth of an assertion and, therefore, it was hearsay).

(n4)Footnote 4. See Milich, *Re-Examining Hearsay under the Federal Rules: Some Method for the Madness*, *39 U. Kan. L. Rev. 893, 903 (1991)*:

> For example, to prove that it was raining at the time, witnesses testify that they saw Mary opening her umbrella as she was walking out the door. Under the *Wright v. Tatham* approach, this evidence is hearsay because Mary's conduct implied that she believed it was raining and her belief implies that it was, in fact, raining. But the language of *Rule 801(a)(2)* points to a result at odds with the *Wright v. Tatham* approach: "Nonverbal conduct of a person" qualifies as a potential hearsay statement only "if it is intended by the person as an assertion." Opening an umbrella normally is not intended to be an assertion about anything, and, thus, such nonverbal conduct does not fall within the federal definition of hearsay.

(n5)Footnote 5. Thus, subdivision (c) focuses on whether there is an opportunity to test the statement when it is made, rather than on whether the reliability of a statement turns on the credibility of a witness who is in Court where he or she may be tested.

(n6)Footnote 6. See, e.g., *Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 490 (9th Cir. 1984)* (prior statements of a testifying witness were properly excluded as hearsay: "In each case the witness could have been asked what Landsberg had done, not what the witness said he had said Landsberg had done.").

(n7)Footnote 7. See, e.g., *United States v. Bellucci, 995 F.2d 157 (9th Cir. 1993)* (in a bank fraud case, the defendant claimed that error occurred at trial when the government proved the federally insured status of the bank by introducing the bank's FDIC certificate of insurance; this claim was meritless because the FDIC certificate "affects the legal rights of the parties" independent of the truth of any assertion in the certificate; the certificate is like a written contract that memorializes the fact of an agreement; statements which themselves give rise to substantive rights and liabilities are not hearsay); *United States v. Moss, 9 F.3d 543 (6th Cir. 1993)* (statement soliciting a bribe is not hearsay because it is a verbal act establishing that the solicitation was made; the act of solicitation itself gives rise to legal consequences).

(n8)Footnote 8. See also *Barnes v. Prudential Ins. Co., 76 F.3d 889 (8th Cir. 1996)* (a survivor of an insured claimed that the company's agent negligently failed to provide forms to the insured so that he could change the policy to make the plaintiff his beneficiary; testimony by an insurance agent that the insured told him four times that he wanted to make the plaintiff his beneficiary was improperly excluded as hearsay, because the insured's statements were relevant to prove the agent's knowledge of the insured's wishes, and were not offered for their truth; however, statements by the insured to others, to the effect that that he had told the insurance agent to change the beneficiary, were inadmissible hearsay).

(n9)Footnote 9. See, e.g., *United States v. Trala, 386 F.3d 536 (3d Cir. 2004)* (statements to a police officer by an accomplice, which misrepresented her identity and the source of the money in the defendant's car, were not hearsay because they were not admitted for their truth; the relevance of the statements was dependent on their being false; under these circumstances, cross-examination of the accomplice would serve no purpose), *vacated on other grounds, 126 S. Ct. 1078 (2006)* ; *United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)* (statement by an accomplice covering up a crime was not hearsay because it was not offered for its truth; rather, the government offered the testimony "to establish its falsity through independent evidence"); *United States v. Hathaway, 798 F.2d 902, 905 (6th Cir. 1986)* :

> When statements are offered to prove the falsity of the matter asserted, there is no need to assess the credibility of the declarant. Since there is no need to assess the credibility of the declarant of a false statement, we know of no purpose which would be served by extending the definition of hearsay to cover statements offered for the falsity of the matter asserted. We therefore join those courts which have concluded that statements offered to prove the falsity of the matter asserted are not hearsay.

(n10)Footnote 10. See also *Ostad v. Oregon Health Sciences Univ., 327 F.3d 876 (9th Cir. 2003)* (prior inconsistent statement was not hearsay because it was offered to impeach the witness' credibility and not for its truth).

(n11)Footnote 11. See, e.g., *Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990)* (in a civil rights action by an employee alleging racial discrimination, sexual harassment, and retaliatory discharge, affidavits and reports were properly admitted for the nonhearsay purpose of showing the steps taken to investigate an assault alleged by the defendant as a legitimate, nondiscriminatory reason for the plaintiff's discharge). See also *Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998)* (statements that consumer charges of product defect were without merit were erroneously excluded as hearsay; the statements were not offered to prove that the consumer charges were inaccurate, "but rather to prove that the defendant was not on notice of the alleged design defect").

(n12)Footnote 12. See also *United States v. Branham, 97 F.3d 835 (6th Cir. 1996)* (in a drug case, one defendant's testimony concerning a paid government informant's attempts to involve the defendant in a number of illegal activities was erroneously excluded as hearsay, because the statements were offered to show their effect on the defendant rather than for their truth); *United States v. Hanson, 994 F.2d 403 (7th Cir. 1993)* (statement made to the defendant that he did not have to file a certain form was not offered for its truth but rather for its impact on the defendant's state of mind; exclusion on hearsay grounds was therefore error).

(n13)Footnote 13. See, e.g., *United States v. Anello, 765 F.2d 253, 261 (1st Cir. 1985)* ("There is considerable

case authority for the proposition that notations of names, addresses, phone numbers and the like written on slips of paper or entered into address books are not hearsay when offered to connect the bearer or owner to the person indicated."); *United States v. Thorne, 997 F.2d 1504 (D.C. Cir. 1993)* (no error to admit drug records to show that the names listed were connected with each other and were also connected with amounts of money and beeper extensions; testimony did not indicate the amounts of money or the actual numbers listed); *United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993)* (various receipts were admissible not for truth but "only to link various of the defendants together by the circumstance that documents bearing the names of certain defendants of the location of certain drug transactions" were found in the possession of one of the conspirators).

(n14)Footnote 14. See, e.g., *Fun-damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993 (2d Cir. 1997)* (evidence that retail customers complained about product confusion was admissible, either as non-hearsay under *Rule 801*, or under the *Rule 803(3)* exception for statements of the declarant's state of mind).

(n15)Footnote 15. See Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, *24 Duq. L. Rev. 741 (1986)* (arguing that hearsay rule should not rest on a semantic distinction between express and implied assertions).

(n16)Footnote 16. See also *Park v. Huff, 493 F.2d 923 (5th Cir. 1974)* (noting that if the hearsay rule covered only express assertions of fact, the rule "could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions"), *aff'd on reh'g en banc*, *506 F.2d 849 (5th Cir. 1975)* .

(n17)Footnote 17. See Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, *24 Duq. L. Rev. 741* (1986) (arguing that the Advisory Committee's reading of *Rule 801(c)* is unpersuasive and not controlling).

(n18)Footnote 18. See also *Lyle v. Koehler, 720 F.2d 426 (6th Cir. 1983)* (concluding that letters are hearsay because "the inferences they necessarily invite form an integral part of the letters"; reference to "matter asserted" in *Rule 801(c)* covers both express and implied assertions).

(n19)Footnote 19. See, e.g., *Milich, supra, at 907* ("[I]ntent to communicate is the key to distinguishing between hearsay and non-hearsay under the federal definition."); Callen, *Hearsay and Informal Reasoning*, *47 Vand. L. Rev. 43, 113 (1994)*:

> When deciding whether a statement is hearsay for a particular purpose, courts should recognize that propositions the speaker generally intends the hearer to understand from the communication should be part of an assertion for purposes of the hearsay rule. Classifying assertions implied from communicative conduct as hearsay facilitates factfinders' use of their experience in informal reasoning at trial.

(n20)Footnote 20. See Park, "*I Didn't Tell Them Anything About You": Implied Assertions As Hearsay Under the Federal Rules of Evidence* , *74 Minn. L. Rev. 783* (1990) (listing and discussing the examples); Edmund Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, *62 Harv. L. Rev. 177, 189 (1948)*.

(n21)Footnote 21. *Comment, Hearsay: The Threshold Question*, 9 U.C. Davis L. Rev. 14 n.48 (1976).

(n22)Footnote 22. See also *United States v. Jackson, 88 F.3d 845 (10th Cir. 1996)* : The defendant, whose name was Kenny, was charged with narcotics violations. The police officer who arrested him testified that he seized the defendant's pager and called the telephone number displayed on the pager; the person who answered said "Is this Kenny?" This testimony was held properly admitted as non-hearsay. The Court stated that "the important question is whether the assertion is intended" and found it "hard to believe that the declarant intended to assert that Mr. Jackson was in possession of the pager and that he was responding to her call."

(n23)Footnote 23. See, e.g., *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board, 298 F.3d 201 (3d Cir. 2002)* ("a statement offered to sell a product at a particular price is a 'verbal act,' not hearsay, because the statement itself has legal effect").

(n24)Footnote 24. See, e.g., *United States v. Ricketts, 317 F.3d 540 (6th Cir. 2003)* (the defendant's request for an instruction that prior inconsistent statements could only be used for impeachment was properly rejected; the statements at issue were made at a guilty plea hearing and a grand jury hearing, and therefore were admissible as substantive evidence); *United States v. Bomski, 125 F.3d 1115 (7th Cir. 1997)* (Trial Judge should not have instructed the jury that a witness' grand jury statement that was inconsistent with his trial testimony could only be considered for credibility; because the statement was under oath, it was admissible for its truth under *Rule 801(d)(1)(A)*).

(n25)Footnote 25. *United States v. Williams, 272 F.3d 845 (7th Cir. 2001)* (prior inconsistent statements made to authorities were admissible only for impeachment because they were not made at a "proceeding").

(n26)Footnote 26. See, e.g., *United States v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990)* (finding harmful error where the Trial Court refused to give an instruction that a prior inconsistent statement not made under oath could be used only for impeachment purposes).

(n27)Footnote 27. See, e.g., *United States v. Day, 789 F.2d 1217 (6th Cir. 1986)* (pretrial interview with IRS agent does not constitute an "other proceeding"; Congress wished to limit the use of *Rule 801(d)(1)(A)* to highly reliable statements); *United States v. Dietrich, 854 F.2d 1056 (7th Cir. 1988)* (stationhouse interrogation does not constitute an "other proceeding"). See also *United States v. Perez, 870 F.2d 1222 (7th Cir. 1989)* (pretrial interview with an adverse witness under oath does not qualify as a statement made at a deposition or other proceeding).

(n28)Footnote 28. See, e.g., *United States v. Keeter, 130 F.3d 297 (7th Cir. 1997)* (witness who feigns lack of memory is subject to cross-examination within the meaning of *Rule 801(d)(1)(A)* and a prior statement is inconsistent with an untruthful statement of lack of memory); *United States v. Bigham, 812 F.2d 943 (5th Cir. 1987)* (feigned memory loss is inconsistent with a prior statement); *United States v. DiCaro, 772 F.2d 1314, 1321 (2d Cir. 1985)* ("[P]articularly in a case of manifest reluctance to testify, if a witness has testified to certain facts before a grand jury and forgets them at trial, his grand jury testimony falls squarely within *Rule 801(d)(1)(A)*."); *United States v. Balliviero, 708 F.2d 934 (5th Cir. 1983)* (faulty memory is not inconsistent with a previous statement).

(n29)Footnote 29. See, e.g., *United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993)* (erroneous exclusion of the defendant's prior consistent staement was harmless, because the defendant had testified at trial to his version of the events); *United States v. White, 11 F.3d 1446 (8th Cir. 1993)* (prior consistent statement was improperly admitted for its truth because it preceded the witness' motive to fabricate; but the error was harmless because the statement was "duplicative" of the witness' in-court testimony). Compare *United States v. Lozada-Rivera, 177 F.3d 98 (1st Cir. 1999)* (error in admitting law enforcement officer's report as a prior consistent statement was not harmless; the report contained damaging admissions of the defendant, and also provided the jury "with an authoritative condensation of the government's whole case against the defendant").

(n30)Footnote 30. See, e.g., *United States v. Barrett, 937 F.2d 1346 (8th Cir. 1991)* (consistent statement of the complainant, made before any motive to falsify arose, was held properly admitted for its truth under *Rule 801(d)(1)(B)*); *United States v. Payne, 944 F.2d 1458 (9th Cir. 1991)* (prior consistent statements were properly admitted for their truth, to show that the complainant's alleged motive to fabricate was largely speculative).

(n31)Footnote 31. See, e.g., *United States v. Keltner, 147 F.3d 662 (8th Cir. 1998)* (prior consistent statement properly admitted for rehabilitation purposes when the defendant had cross-examined the prosecution witness with prior statements but omitted portions; the government was entitled to admit those portions without regard to *Rule 801(d)(1)(B)*); *United States v. Gluzman, 154 F.3d 49 (2d Cir. 1999)* (prior consistent statement of an accomplice was properly admitted for rehabilitation outside *Rule 801(d)(1)(B)*).

(n32)Footnote 32. See Hon. Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla. State L. Rev. 509 (1997) (noting that distinctions between substantive and nonsubstantive use of prior consistent statements "are normally distinctions without practical meaning" and advocating that "the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence.").

(n33)Footnote 33. *United States v. Tome, 3 F.3d 342 (10th Cir. 1993)* .

(n34)Footnote 34. See, e.g., *United States v. Bishop, 264 F.3d 535 (5th Cir. 2001)* (prior consistent statements of a prosecution witness were not admissible where defense lawyers implied that the witness was lying or mistaken, but made no allegation that the witness had an improper motive).

(n35)Footnote 35. See, e.g., *United States v. Lozada-Rivera, 177 F.3d 98 (1st Cir. 1999)* ("Generally speaking, a charge of improper motive or recent fabrication need not be expressly made or buttressed by concrete evidence. But the proponent of the evidence must point to specific questions during his adversary's examination that suggest recent fabrication or bias. Merely appealing to credibility as a live issue will not do the trick."); *Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993)* (a charge of fabrication is not made merely because counsel points out inconsistencies in the witness' testimony; but where counsel argues that an officer made up a charge after the fact, this amounted to an allegation of fabrication that could be rebutted by a consistent statement).

(n36)Footnote 36. See, e.g., *United States v. Stover, 329 F.3d 859 (D..C. Cir. 2003)* (*Tome* not applicable where consistent statements were offered to clarify or rebut an inconsistency); *United States v. Brennan, 798 F.2d 581 (2d Cir. 1986)* (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under *Rule 801(d)(1)(B)*").

(n37)Footnote 37. See, e.g., *United States v. Pierre, 781 F.2d 329 (2d Cir. 1986)* :

> When the prior statement tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony, its use for rehabilitation purposes is within the sound discretion of the trial judge. Such use is also permissible when the consistent statement will amplify or clarify the allegedly inconsistent statement.

(n38)Footnote 38. See, e.g., *United States v. Awon, 135 F.3d 96 (1st Cir. 1998)* (error to admit statements under *Rule 801(d)(1)(B)*; prosecution witnesses were attacked on the ground that they were seeking leniency, and the prior statements were made only after the witnesses were informed that the police knew they were involved in criminal activity and could benefit themselves by cooperating; therefore the consistent statements were not made before the motive to falsify arose).

(n39)Footnote 39. See, e.g., *United States v. Castillo, 14 F.3d 802 (2d Cir. 1994)* (a prior consistent statement can be offered to rehabilitate the witness' credibility even though it is not admissible under *Rule 801(d)(1)(B)*; however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments); *United States v. White, 11 F.3d 1446 (8th Cir. 1993)* (although rehabilitative statements "were admissible when accompanied by a limiting instruction," they were not admissible for their truth under *Rule 801(d)(1)(B)* because they did not precede the witness' motive to fabricate; the Trial Court therefore erred in admitting the statements without a limiting instruction; but the error was harmless since the prior consistent statements were "duplicative" of the witness' testimony at trial).

(n40)Footnote 40. See, e.g., *United States v. Forrester, 60 F.3d 52 (2d Cir. 1995)* (reversing a defendant's cocaine convictions, in part because a prior statement of a government witness was erroneously introduced; defense counsel asserted that a cooperating witness was making up her story; a consistent statement made by the witness after her arrest

was not admissible because the witness' motive to fabricate arose as soon as she was arrested, thus the consistent statement post-dated the motive to falsify).

(n41)Footnote 41. The language "after perceiving him" is superfluous and probably is the result of having been included in other drafts that contained slightly different language from that found in the Rule.

(n42)Footnote 42. For a discussion of the constitutional limitations on pretrial identification evidence, see S. Saltzburg & D. Capra, American Criminal Procedure, ch. 4 (7th ed. 2004). 2004).

(n43)Footnote 43. See, e.g., *United States v. Lopez, 271 F.3d 472 (3d Cir. 2001)* (identification by witness who denied making it was admissible under *Rule 801(d)(1)(C)*).

(n44)Footnote 44. See, e.g., *United States v. Salameh, 152 F.3d 88 (2d Cir. 1998)* (prior identification by a witness was admissible even though the witness incorrectly pointed to two jurors as the perpetrators when testifying at trial; the witness was subject to cross-examination, and a prior identification is admissible "regardless of whether the witness confirms the identification in court"); *Adail v. Wyrick, 711 F.2d 99, 102 (8th Cir. 1983)* (Federal Courts admit "pretrial identifications made after the crime without corroborating in-court identifications under *Rule 801(d)(1)(C)*").

(n45)Footnote 45. See, e.g., *United States v. O'Malley, 796 F.2d 891, 899 (7th Cir. 1986)* ("Nothing in this rule prohibits the introduction of out-of-court statements identifying the defendant made by the declarant who at trial admitted that he made the prior identification but now denies that the defendant was the same involved in the crime.").

(n46)Footnote 46. See, e.g., *United States v. Brewer, 36 F.3d 266 (2d Cir. 1994)* (because the identifying witnesses were not called to testify, the testimony of the officer who saw the identifications could not be admitted under *Rule 801(d)(1)(C)*).

(n47)Footnote 47. See generally Mirjan Damaska, Evidence Law Adrift at 122-25 (1997).

(n48)Footnote 48. See, e.g., *Jewell v. CSX Transp., 135 F.3d 361 (6th Cir. 1998)* , where the Court found that a party-admission was properly admitted even though the declarant suffered from brain damage:

> Trustworthiness is not a separate requirement for admission under *Rule 801(d)(2)(A)*. The admissibility of statements of a party-opponent is grounded not in the presumed trustworthiness of the statements, but on a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements. As noted in the advisory committee notes to *Rule 801(d)(2)(A)*, admissions by a party-opponent are excluded from the category of hearsay 'on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.' "

(n49)Footnote 49. Accord *United States v. Gossett, 877 F.2d 901 (11th Cir. 1989)* .

(n50)Footnote 50. See, e.g., *Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978)* (the defendant's statement that a wolf in his custody bit a child was properly admitted against the defendant, even though he did not see the wolf bite the child).

(n51)Footnote 51. See, e.g., *United States v. McGee, 189 F.3d 626 (7th Cir. 1999)* (defendant's false exculpatory statements were properly admitted; to be admissible under *Rule 801(d)(2)(A)*, the statement need only be made by the party against whom it is offered; there is no requirement that the statement be inculpatory when made); *United States v. Turner, 995 F.2d 1357 (6th Cir. 1993)* (the defendant's false exculpatory statement, made to government officials, was properly admitted against him under *Rule 801(d)(2)(A)*; the Rule does not limit an admission to a statement against interest; all that is required is that the statement was made by the party, and that it is relevant and offered against him at

trial).

(n52)Footnote 52. *United States v. Bond, 87 F.3d 695 (5th Cir. 1996)* (Magistrate Judge properly excluded a tape made by the defendant; the defendant offered the tape to benefit himself, not as evidence of a statement made by a party used against that party).

(n53)Footnote 53. See, e.g., *United States v. Ward, 377 F.3d 671 (7th Cir. 2004)* (defendant's silence in the face of his sister's accusation of bank robbery was properly admitted as an adoptive admission; foundation was established that the defendant heard the statement, and the accusation was "the type of statement that a party normally would respond to if innocent"); *United States v. Pulido-Jacobo, 377 F.3d 1124 (10th Cir. 2004)* (defendant's possession of a receipt for speakers, over a two-month period, constituted an adoptive admission that the speakers were his).

(n54)Footnote 54. See, e.g., *Weigand v. United States, 760 F.2d 1072 (10th Cir. 1985)* ("By reprinting the newspaper articles and distributing them to persons with whom defendants were doing business, defendants unequivocally manifested their adoption of the inflated statements made in the newspaper articles."). Compare *United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002)* (accusations made against defendant were not admissible as adoptive admissions because the evidence established a significant language barrier, indicating that the defendant may not have understood what was said to him).

(n55)Footnote 55. See, e.g., *United States v. Hoosier, 542 F.2d 687 (6th Cir. 1976)* (defendant was silent when his girlfriend mentioned his criminal activity to a mutual friend: "Under the total circumstances, we believe that probable human behavior would have been for appellant promptly to deny his girl friend's statement if it had not been true -- particularly when it was said to a person to whom he had previously related a plan to rob a bank. While we agree with appellant's counsel that more is needed to justify admission of this statement than the mere presence and silence of the appellant, we observe that there was more in this record.").

(n56)Footnote 56. *United States v. Joshi, 896 F.2d 1303, 1312 (11th Cir. 1990)* (sufficient foundation was laid where the defendant responded with comprehension to other inquiries at the same time).

(n57)Footnote 57. *United States v. Harrison, 296 F.3d 994 (10th Cir. 2002)* (whether the defendant adopted a statement "is a preliminary question of fact to be decided by the court"; and "the Court determines the question under a preponderance of the evidence standard").

(n58)Footnote 58. See, e.g., *United States v. McKeon, 738 F.2d 26 (2d Cir. 1984)* (a statement made by an attorney on behalf of the client was admissible under subdivisions (d)(2)(C) and (d)(2)(D)).

(n59)Footnote 59. See, e.g., *Woodman v. Haemonetics Corp., 51 F.3d 1087 (1st Cir. 1995)* (a statement from a line supervisor attributing age animus to her supervisors should have been admitted; the line supervisor was acting within the scope of her employment because part of her job was to be involved in employment and personnel decisions, and she was communicating her opinion about information she received at a meeting concerning employment matters); *Corley v. Burger King Corp., 56 F.3d 709 (5th Cir. 1995)* (statements by a restaurant manager, that he was delivering something to the restaurant at the time of the accident and that he had looked away prior to the accident should have been admitted; the statement concerned "a matter within the scope of the agency or employment").

(n60)Footnote 60. See, e.g., *Barner v. Pilkington North America, Inc., 399 F.3d 745 (6th Cir. 2005)* (in an employment discrimination case, there was no error in the Trial Court's ruling that hearsay statements made by co-workers concerning past acts of discrimination were not admissible under *Rule 801(d)(2)(D)*, because they did not concern a matter within the scope of the co-workers' employment: "the scope of their employment did not include work assignments"); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921 (6th Cir. 1999)* (statement by the plaintiff's former supervisor indicating that she was being discharged because she was a woman properly excluded; the plaintiff provided no evidence that the supervisor had responsibilities over employment decisions).

(n61)Footnote 61. See, e.g., *United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003)* ("we have not required personal knowledge for statements by a party's agent"); *Society of Roman Catholic Church v. Interstate Fire & Cas., 126 F.3d 727 (5th Cir. 1997)* (statements by a sales manager of the defendant were properly admitted under *Rule 801(d)(2)(D)*; the fact that the agent had no personal knowledge of the matters asserted was "irrelevant" because personal knowledge is not required for admissions); *Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978)* (agent's statement, made without personal knowledge, held properly admitted against the principal); *Union Mut. Life Ins. Co. v. Chrysler Corp., 793 F.2d 1 (1st Cir. 1986)* (noting the split of authority on the question and holding that an agent's admission made without personal knowledge was properly admitted).

(n62)Footnote 62. See also *United States v. Agne, 214 F.3d 47 (1st Cir. 2000)* (statements by an employee of a company affiliated with the company controlled by the defendant were properly admitted under *Rule 801(d)(2)(D)*; the statements of a corporate employee may be admitted against an officer when "the factors which normally make up an agency relationship are present"; in this case, the employee was specifically designated by the defendant to handle and report on the business matter at issue in the case, and was directly responsible to the defendant on those matters).

(n63)Footnote 63. See, e.g., *United States v. Wiedyk, 71 F.3d 602 (6th Cir. 1995)* (charges against an officer of an employee welfare fund; testimony by a government witness as to statements made by his deceased partner was improperly admitted against the defendant; the declarant worked for an entity hired by the defendant's fund, but there was no showing that the defendant controlled the fund to an extent sufficient to warrant admission of statements by the declarant as statements by an agent of the defendant). The Court in *Wiedyk* recognized that an individual could in other contexts have such extensive control over an entity that statements by the entity's agent would be imputed to the individual.

(n64)Footnote 64. See, e.g., *Boren v. Sable, 887 F.2d 1032 (10th Cir. 1989)* (statement of a shop foreman was not admissible against "an absentee owner" where the shop foreman was not answerable to the owner on a daily basis); *Lippay v. Christos, 996 F.2d 1490 (3d Cir. 1993)* (agency is determined by whether the declarant is continually supervised by the party-opponent; a government informant's statements were not admissible as vicarious admissions against a government official, where the informant operated more as a "partner" than as a subordinate). For a more permissive test of agency, see *United States v. Rioux, 97 F.3d 648 (2d Cir. 1996)* (Sheriff charged with extortion and related crimes; testimony of deputies and special deputies of the Sheriff as to statements made by their supervisors was properly admitted; to qualify the supervisors as his agents, it was not necessary to show that the Sheriff controlled the declarants' daily tasks; it was sufficient that the Sheriff hand-picked the declarants, they served at his pleasure, and they were answerable to the Sheriff).

(n65)Footnote 65. Several courts have held that *Rule 801(d)(2)(D)* covers statements by independent contractors as well as agents. See, e.g., *Beck v. Haik, 377 F.3d 624 (6th Cir. 2004)* (statement of a consultant, about a matter within the scope of his employment, was admissible against the principal under *Rule 801(d)(2)(D)*; though there is little precedent, "courts confronting similar fact situations have tended to hold contractors and advisors to fall within the 'agency' relationship contemplated by *Rule 801(d)(2)(D)*").

(n66)Footnote 66. See, e.g., *Wilkinson v. Carnival Cruise Lines, 920 F.2d 1560 (11th Cir. 1991)* (in an action brought for injuries suffered when an automatic sliding glass door ran over the plaintiff's foot, hearsay statements by a cabin steward regarding the defendant's notice of previous problems with the door were erroneously admitted; the steward had no responsibilities in the cruise ship's engineering department or in the swimming pool area where the door was located); *NLRB v. Sherwood Trucking Co., 775 F.2d 744 (6th Cir. 1985)* (statement to former employees by their former supervisor was not an agent's admission because there was insufficient evidence to demonstrate that the declarant was a supervisor with authority to hire and fire when the statement was made).

(n67)Footnote 67. See also *United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982)* (circumstantial evidence that an unidentified person answering the phone was a secretary authorized to relay the message of her employer sufficiently established the scope of agency).

(n68)Footnote 68. See also *United States v. Beltran, 761 F.2d 1 (1st Cir. 1985)* (statement was admissible as an agency admission where the translator was a DEA agent).

(n69)Footnote 69. Compare *United States v. Lopez, 937 F.2d 716 (2d Cir. 1991)* (translator's statements to an undercover agent, relating conversation in Spanish between coconspirators, was held admissible because the coconspirators also spoke English and "it stands to reason that if [the translator] had distorted their conversation, they would have noticed it and corrected her").

(n70)Footnote 70. Compare *United States v. Amato, 356 F.3d 216 (2d Cir. 2004)* (statements of attorney made outside of court were properly admitted against the defendant as agent's admissions; the concerns expressed in *McKeon* are largely inapplicable to statements made by counsel out of court).

(n71)Footnote 71. See also *United States v. Brothers Constr. Co. of Ohio, Inc., 219 F.3d 300 (4th Cir. 2000)* (statement of general counsel admitted against the corporation under *Rule 801(d)(2)(D)*); *United States v. Harris, 914 F.2d 927 (7th Cir. 1990)* (statements made by defense counsel to an eyewitness concerning the possibility of mistaken identification, were held admissible as agency admissions where the mistaken identity defense was abandoned at trial); *Purgess v. Sharrock, 33 F.3d 134 (2d Cir. 1994)* (a footnote in a brief filed on the defendant's behalf by counsel in a related case was admissible as an agency admission).

(n72)Footnote 72. *United States v. Valencia, 826 F.2d 169, 175 (2d Cir. 1987)* (Meskill, J., dissenting). The Court in *Valencia* refused to find an agency admission where defense counsel allegedly made a statement to the prosecutor at an informal bail conference. The Court was concerned that proving that the attorney even made the statement would result in mutual disqualification of prosecutor and defense counsel, a process that would not be worth the benefit of admitting the evidence. There was no such concern in *McKeon*, where the defense attorney made the statement in open court.

(n73)Footnote 73. See also *United States v. Kattar, 840 F.2d 118 (1st Cir. 1988)* (government argument in one case that an organization violated the law was admissible against the government in a different case where it argued that the organization was law-abiding).

(n74)Footnote 74. See, e.g., *Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir. 1986)* (pleadings in one suit, which alleged that the defendant was solely responsible for the plaintiff's injury, were admissible in a subsequent suit against a different defendant).

(n75)Footnote 75. See also *Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245 (8th Cir. 1987)* ("A pleading abandoned or superseded through amendment no longer serves any function in the case, but may be introduced into evidence as the admission of a party.").

Note that statements of a party's expert witness have not been considered agency admissions, at least if the expert is not otherwise an employee of the party. An expert retained for litigation is considered by necessity to be independent from the parties to a litigation. See, e.g., *Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995)* (testimony of an expert called by the defendant in an unrelated asbestos case could not be used in the instant case against the defendant as an admission by an authorized agent; the expert was not one of the defendant's employees, and an agency could not be found simply because the expert testified at the previous trial on the defendant's behalf: "Because an expert witness is charged with the duty of giving his or her expert opinion regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party.").

(n76)Footnote 76. See, e.g., *United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996)* (a foundation of personal knowledge need not be established for coconspirator statements: "every court that has addressed the issue has held that coconspirator statements are not subject to the requirements of *Rule 602*").

(n77)Footnote 77. See, e.g., *United States v. Gigante, 166 F.3d 75 (2d Cir. 1999)* (hearsay statements could not be admitted solely on the finding of a "general overriding conspiracy among all of these alleged Mafia groups"; there must be a conspiracy with some specific criminal goal, and the defendant and the declarant must both be members of this conspiracy). Compare *United States v. Russo, 302 F.3d 37 (2d Cir. 2002)* (distinguishing *Gigante* and finding that the defendant and the declarant were involved in a conspiracy to maintain an organized crime syndicate, and criminal acts discussed were an objective of that conspiracy).

(n78)Footnote 78. See, e.g., *United States v. Tse, 135 F.3d 200 (1st Cir. 1998)* (gang members' statements made eight months after attempted murders were not made in the course of the conspiracy, because at that time it was clear that the murder plans had been abandoned).

(n79)Footnote 79. *United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001)* (statement was made during the course of a drug conspiracy as the conspirators had not yet received payment for the drugs).

(n80)Footnote 80. See, e.g., *United States v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000)* (no error to admit hearsay statement made by a conspirator shortly after a bank robbery occurred: "there is a distinction, for purposes of the conspirator statement exception to the hearsay rule, between an initial conspiracy to commit a crime and later actions to conceal a crime"; however, in this case the statement was made during the course of the bank robbery conspiracy because the proceeds had not yet been divided). Compare *United States v. Magluta, 418 F.3d 1166 (11th Cir. 2005)* (statement from juror who received a bribe from defendant should not have been admitted under the coconspirator exemption; the statement was made two years after the juror was paid; the Court relied on *Grunewald v. United States, 353 U.S. 391 (1957)* , and declared that the "central purpose of the bribery conspiracy" was to secure an acquittal in return for cash, so that once the verdict was rendered, that central purpose was completed: "In light of *Grunewald*, we cannot infer that a subsidiary conspiracy to conceal the bribe existed for almost two-and-a-half years after the bribery agreement had been made and carried out.").

(n81)Footnote 81. See, e.g., *United States v. Desena, 260 F.3d 150 (2d Cir. 2001)* ("casual storytelling in a bar, more than two years after the event" was not in furtherance of the conspiracy but instead was "mere idle chatter"); *United States v. LiCausi, 167 F.3d 36 (1st Cir. 1999)* (statements made by one conspirator to his girlfriend should not have been admitted under the coconspirator hearsay exemption; the declarant was simply venting his anxiety and blowing off steam in reaction to developments in the conspiracy); *United States v. Cornett, 195 F.3d 776 (5th Cir. 1999)* (statements by coconspirator did not further the conspiracy, when they were made by the declarant to her former boyfriend as a "casual aside").

(n82)Footnote 82. See, e.g., *United States v. Tom, 330 F.3d 83 (1st Cir. 2003)* (coconspirator's statement to a drug buyer that he had dealt with the defendant for a year was a statement of reassurance and so in furtherance of the conspiracy); *United States v. Jefferson, 215 F.3d 820 (8th Cir. 2000)* (statements made by one conspirator to another were in furtherance of the conspiracy where the declarant was reporting a botched murder attempt to keep the other conspirators apprised of developments: "Statements that describe past events are in furtherance of the conspiracy if they are made simply to keep coconspirators abreast of current developments and problems facing the group."); *United States v. Bowman, 215 F.3d 951 (9th Cir. 2000)* (narrations of past events are sometimes inadmissible as coconspirator statements, but in this case the coconspirator's statements to his girlfriend were in furtherance of the conspiracy because the declarant was seeking his girlfriend's assistance in criminal acts).

(n83)Footnote 83. See, e.g., *United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993)* (some independent evidence was required before coconspirator evidence could satisfy the hearsay exemption); *United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988)* (for coconspirator hearsay statements to be admissible, "there must be some evidence, aside from the proffered statements, of the existence of the conspiracy and the defendant's involvement").

(n84)Footnote 84. See *United States v. Capelton, 350 F.3d 231 (1st Cir. 2003)* (finding sufficient independent evidence of the existence of a conspiracy to support admissibility of coconspirator hearsay).

(n85)Footnote 85. For a discussion of the reasonable suspicion standard, with examples, see S. Saltzburg & D. Capra, American Criminal Procedure ch. 2 (7th ed. 2004).

(n86)Footnote 86. See, e.g., *United States v. Peveto, 881 F.2d 844 (10th Cir. 1989)* (evidence that the defendant and the declarant lived in the same apartment complex in one city and moved to the same complex in another city and evidence of narcotics paraphernalia found in the defendant's apartment established, in connection with facts in the statement -- that ownership of drug houses could be concealed by a lawyer, whom the declarant understood to be the defendant -- by a preponderance of evidence that the defendant was a member of the conspiracy).

(n87)Footnote 87. See, e.g., *United States v. Clark, 18 F.3d 1337 (6th Cir. 1994)* (finding sufficient independent evidence to support introduction of coconspirator statements; the Court stated that "'[s]ome' independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay"); *United States v. Neal, 78 F.3d 901 (4th Cir. 1996)* (the Court found three pieces of evidence that, together with the hearsay statements themselves, established a drug conspiracy by a preponderance of the evidence; the independent evidence was: corroboration that the coconspirators had become aware of police surveillance; the defendant's own statement to an undercover agent that the declarant would not be able to sell him any drugs; and a sheet of paper found in the defendant's apartment with the declarant's name and telephone number on it).

(n88)Footnote 88. See, e.g., *United States v. Hasner, 340 F.3d 1261 (11th Cir. 2003)* (no error when coconspirator statements were provisionally admitted subject to the government connecting them up with sufficient foundation evidence); *United States v. McCarthy, 961 F.2d 972 (1st Cir. 1992)* (there was no error in admitting coconspirator statements conditionally, where previous trials of other alleged coconspirators indicated it was likely that the foundation would be established; at the close of evidence, the Trial Judge reviewed only the evidence adduced at the defendant's trial and found that the prosecution had met its burden of showing the existence of the conspiracy and the participation of the declarant and the defendant therein); *United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990)* (admitting coconspirator hearsay statements subject to connection is not a routine but, rather, an exceptional procedure, appropriate only when the evidence on the question of conspiracy is extensive; most of the time it is better, especially because of double jeopardy problems, to make a preliminary determination rather than to decide the admissibility question on a mistrial motion).

(n89)Footnote 89. See, e.g., *United States v. Wood, 851 F.2d 185 (8th Cir. 1988)* (the Trial Judge may admit coconspirator hearsay subject to connection, but the government is on notice that at the conclusion of all the evidence, the Court will make an explicit determination on the record of whether, in its view, the government has proved a conspiracy by a preponderance of the evidence; if the Trial Judge determines that the government has failed to carry its burden, the Court will declare a mistrial unless an instruction to the jury to disregard the evidence would suffice to cure any prejudice). Compare *United States v. Freeman, 208 F.3d 332 (1st Cir. 2000)* (coconspirator hearsay was admitted subject to establishing a conspiratorial connection between the defendant and the declarant; when the government failed to make that connection at trial, the Trial Judge struck the statement and issued a curative instruction; this was held a sufficient remedy, the Court noting that the hearsay statement was only a small part of the evidence in a seven-day trial and had little relevance to the only charge on which the defendant was convicted).

(n90)Footnote 90. See, e.g., *United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990)* (even in complex cases, the Trial Judge should require parties to state what they believe the evidence will establish, and then decide whether that will suffice); *United States v. Shoffner, 826 F.2d 619 (7th Cir. 1987)* (the Court upheld the Trial Judge's finding that statements were in furtherance of conspiracy, but it observed that it might have been preferable for the Trial Judge to preview the government's evidence that would support its *Rule 801(d)(2)(E)* ruling rather than admit statements upon a representation that the government would prove at trial they were made in furtherance of conspiracy).

(n91)Footnote 91. See, e.g., *United States v. Fragoso, 978 F.2d 896 (5th Cir. 1992)* (for a statement to be admitted under *Rule 801(d)(2)(E)*, the Court must find by a preponderance of the evidence that the declarant and the defendant are members of the same conspiracy; this finding need not be made before the hearsay statement is heard by

the jury; however, the finding of fact must be made at some point; here, the Trial Court never made a finding that the defendant and the declarant were coconspirators, but the error was harmless, because by denying the defendant's motion for acquittal at the close of the trial, "the court implicitly found the evidence sufficient to establish a conspiracy"). See also *United States v. Jensen, 41 F.3d 946 (5th Cir. 1994)* (coconspirator hearsay statements were properly admitted even though the Trial Court never made explicit findings concerning their admissibility; the failure to make findings was harmless, because the Trial Court had denied the defendant's motion for a directed verdict, and this was an implicit finding of evidence of conspiracy sufficient to meet the requirement of *Rule 801(d)(2)(E)*).

(n92)Footnote 92. See, e.g., *United States v. Hartley, 678 F.2d 961 (11th Cir. 1982)* (it would be improper for a Trial Judge to tell a jury that he made a preliminary determination that a conspiracy existed; once the Trial Judge decides that the statements are admissible, they should be admitted like other evidence, without special instructions); *United States v. Elam, 678 F.2d 1234 (5th Cir. 1982)* (where the Trial Judge determines that the requisite foundation has been established for the introduction of conspirator statements, no jury instruction is necessary and none should be given).

(n93)Footnote 93. See, e.g., *United States v. Vega, 285 F.3d 256 (3d Cir. 2002)* (statements properly admitted if in furtherance of an uncharged conspiracy); *United States v. DeVillio, 983 F.2d 1185 (2d Cir. 1993)* (the prosecution must show by a preponderance of evidence that the defendant and the declarant are members of the same conspiracy, but there is no requirement that the defendant actually be charged with conspiracy).

(n94)Footnote 94. See, e.g., *United States v. Barksdale-Contreras, 972 F.2d 111 (5th Cir. 1992)* (statements of coconspirators were admissible even though a defendant was acquitted of conspiracy, given the different standards applicable to admissibility and guilt determinations); *United States v. Peralta, 941 F.2d 1003 (9th Cir. 1991)* (the difference between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference in the burden of proof, means that preclusion doctrines do not automatically bar the use of statements by a person who has been acquitted of conspiracy charges).

(n95)Footnote 95. See, e.g., *United States v. Smith, 550 F.2d 277 (5th Cir. 1977)* .

(n96)Footnote 96. See, e.g., *Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984)* (in a civil rights action against a sheriff and others, statements by the sheriff were properly admitted against other defendants once the plaintiff proved that there was a conspiracy and that the statements were made in furtherance thereof while the conspiracy was ongoing); *Miltland Raleigh-Durham v. Myers, 807 F. Supp. 1025 (S.D.N.Y. 1992)* (in an action by limited partners against a general partner alleging, *inter alia*, fraud, the plaintiffs demonstrated sufficient evidence of conspiracy to warrant admission of statements under *Rule 801(d)(2)(E)*).

(n97)Footnote 97. See, e.g., *Horton v. Allen, 370 F.3d 75 (1st Cir. 2004)* (non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation); *United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)* (with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."); *United States v. Franklin, 415 F.3d 537 (6th Cir. 2005)* ("the Supreme Court did not explicitly overrule its prior *Confrontation Clause* jurisprudence with its holding in *Crawford*" insofar as it applied to nontestimonial hearsay; "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.").

(n98)Footnote 98. The Court may provide a further indication of what it means by "testimonial" in the 2005-6 term, as it has granted certiorari in two state cases involving the admissibility of 911 calls and reports to police officers after *Crawford*.

(n99)Footnote 99. See, e.g., *United States v. Milton, 8 F.3d 39 (D.C. Cir. 1993)* (after *Owens*, if the declarant testifies, there is no *Confrontation Clause* violation so long as the witness answers questions: "When a witness has forgotten the basis for and the giving of testimony under oath in an earlier proceeding, and that testimony is then

introduced into evidence, defense questioning, though impaired, is not futile for the reasons given in *Owens*.").

(n100)Footnote 100. See, e.g., *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005)* (holding that admission of testimonial hearsay did not violate the *Confrontation Clause* because the declarant was subject to cross-examination within the meaning of *Owens)*.

(n101)Footnote 101. See, e.g., *United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* ("Where, as here, a party manifests an intent to adopt another person's statements as his or her own, the need to cross-examine the absent informant is not present and the *confrontation clause* is not violated.").

(n102)Footnote 102. See, e.g., *United States v. Saks, 964 F.2d 1514 (5th Cir. 1992)* (hearsay exemption for agency admissions, *Rule 801(d)(2)(D)*, is "firmly rooted" and therefore a statement admissible under that exemption automatically satisfies the *Confrontation Clause*).

(n103)Footnote 103. *United States v. Sanchez-Berrios, 424 F.3d 65 (1st Cir. 2005)* (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial"); *United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005)* (even under the broadest definition of "testimonial" discussed in *Crawford* -- reasonable anticipation of use in a criminal trial or investigation -- hearsay statements were not testimonial, as they were informal statements among coconspirators).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 801 RULE 801

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801.03 Annotated Cases

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[1] Rule 801(a) -- Statement

[a] Rule 801(a) -- Assertive Conduct

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) : The Court affirmed convictions for conspiracy to commit mail fraud and mail fraud growing out of arson of a diner. It found that testimony by a government witness that he visited his friend, who had been burned in the arson, in the hospital and that the friend, heavily bandaged and unable to speak, nodded his head affirmatively when asked whether he had been paid to burn the diner was admissible as a statement against penal interest. The Court found that the government plainly used the nod for the truth of an assertion, and therefore it was hearsay.

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999) : As evidence of a conspiracy in an antitrust case, the plaintiffs introduced testimony from a witness that when he expressed antitrust concerns to the CEO of one defendant, the CEO responded that "there was no need to worry because someone would have to prove" he spoke to the principal shareholder of the other defendant and the CEO then "leaned forward, smiled, and said 'of course we didn't.' " The Court found that the oral utterances and the act of leaning forward and smiling, when considered together as the CEO obviously intended, were a statement that the CEO *had* "talked" to his counterpart but that no one would be able to prove it. This statement was admissible against the CEO's employer under *Rule 801(d)(2)(D)*.

[b] Rule 801(a) -- Implied Assertions

United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990) : The Court held, in a cocaine distribution prosecution, that evidence a caller to the defendant's apartment at the time of his arrest asked the officer who answered whether the defendant "still had stuff" was not objectionable as hearsay because the caller's question was not intended to convey an assertion.

United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997) : A defendant in a kidnapping and cocaine conspiracy case argued that his greeting, "Nice to meet you," tended to rebut a contention that he had previously attended a meeting with the person greeted. The Court held there was no error in excluding the statement as hearsay because it was offered for its implied assertion that the defendant had never previously met the person. In *United States v. Reynolds*, n1 the Court held that the hearsay rule was applicable to a statement that was offered for the truth of an implied assertion. This case is discussed in the Editorial Explanatory Comment, *§ 801.02[1][i]*.

United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990) : The defendants in a drug trafficking case objected to testimony by an officer that when a beeper seized from the defendants went off, he called the number, identified himself as one of them, and the person at the other end asked, "Did you get the stuff?" The Court held that although implicit in the question may be an assertion that the defendants were expecting to receive some "stuff," the question was not a positive declaration and therefore not an assertion within the meaning of the Rule.

United States v. Singer, 687 F.2d 1135 (8th Cir. 1982) , aff'd in part & rev'd in part, 710 F.2d 431 (8th Cir. 1983) (en banc): In a drug prosecution, a panel of the Court held that an envelope addressed to two defendants containing a notice to terminate their tenancy was not hearsay when offered to show that the two lived together, since the landlord who addressed it was not asserting that the two lived together. The *en banc* Court reversed on other grounds, but adopted and reaffirmed this part of the panel opinion.

[c] Rule 801(a) -- Statements of Identification and Names

United States v. Allen, 960 F.2d 1055 (D.C. Cir. 1992) (per curiam): Affirming convictions for drug charges, the Court held that if there was any error in admitting evidence of a defendant's alias to connect him with certain drugs, it was undoubtedly harmless. The Court noted that evidence of names is commonly regarded as either not hearsay because it is not an assertion or so imbued with reliability because of its common usage as to make any objection frivolous.

United States v. Weeks, 919 F.2d 248 (5th Cir. 1990) : In affirming a conviction for kidnapping offenses, the Court held there was no error in admitting a warden's testimony as to the defendant's prison nickname, since the matter was nonassertive oral conduct and therefore was not hearsay.

United States v. May, 622 F.2d 1000 (9th Cir. 1980) : In a prosecution for unlawfully reentering a naval installation, the Court held that photographs on apprehension data cards were not hearsay, because they were not assertions. The Court also said that declarations by people of their names were properly admitted, because a name is not really testimonial and thus not hearsay.

United States v. Jackson, 88 F.3d 845 (10th Cir. 1996) : The defendant, whose name was Kenny, was charged with narcotics violations. The police officer who arrested him testified that he seized the defendant's pager and called the telephone number displayed on the pager; the person who answered said, "Is this Kenny?" Holding the testimony properly admitted as non-hearsay, the Court stated that "the important question is whether the assertion is intended" and found it "hard to believe that the declarant intended to assert that Mr. Jackson was in possession of the pager and that he was responding to her call."

[2] Rule 801(c) -- Hearsay

[a] Rule 801(c) -- Circumstantial Evidence

Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755 (1st Cir. 1994) : The Court vacated a judgment for the plaintiff in an age discrimination case because the defendant had not been permitted to elicit that the supervisor whose conduct was at issue had made comments that she herself was "too old for this job." The statements were not offered to prove the truth of the matter asserted; rather, the fact that they were made may have indicated that the supervisor's alleged comments that the plaintiff was too old for the job were not reflective of age animus but of frustration with a difficult job in a difficult economic environment. In *United States v. Alosa, 14 F.3d 693 (1st Cir. 1994)* , the Court affirmed drug trafficking convictions, holding that drug ledgers found in the defendant's home were not hearsay, but rather were circumstantial evidence of the character and use of the place where they were found and of the authors' participation in the conspiracy. In *United States v. Hensel*, n2 a marijuana conspiracy prosecution, the Court found that certain lists in the possession of one defendant at the time of his arrest were properly admitted, not for their truth, but as circumstantial evidence that this defendant had a relationship with those named on the lists. The defendant's possession of the lists was not an assertion and thus not hearsay.

Headley v. Tilghman, 53 F.3d 472 (2d Cir. 1995) : In an opinion reversing habeas corpus relief granted to a state prisoner, the Court noted that questions by an unidentified caller to an alleged drug distribution location, "Are you up? Can I come by? Are you ready?," were not admitted for their truth, but as circumstantial evidence that the petitioner used his beeper to receive requests for drugs. Although the questions imply assertions, admissibility is won by emphasizing the performance aspects of the statement, which means that the hearsay risks are not as intensively implicated as when an idea is directly enunciated in a statement. In a prosecution for receiving stolen property, *United States v. Rosa, 17 F.3d 1531 (2d Cir. 1994)* , the Court held that lists showing the estimated market value of watches and jewelry for which the defendant was asking prices 80-90 percent lower were properly admitted over hearsay objections. The lists were not offered for the truth of the stated values, but to show that the disparity between value and price was so great as to imply that the defendants surely believed they were dealing with stolen goods. In *United States v. Detrich*, n3 the defendant, charged with importing heroin in a suit found in his luggage, claimed that a friend had given him the suit to deliver to the friend's brother for the brother's wedding. A statement by the brother to a DEA agent that he was getting married was excluded on hearsay grounds, but the Court reversed. The statement, regardless of its truth, provided circumstantial evidence of what the defendant had been told and thus of his state of mind.

United States v. Lis, 120 F.3d 28 (4th Cir. 1997) : In a prosecution for embezzlement, the defendant sought to rebut evidence that her expenses exceeded her income by testifying that after her husband died, she had found a briefcase full of money in their house, which she said he had received as kickbacks from his customers. To prove that the money in the briefcase was her husband's, the defendant proffered paper strips found in the briefcase, containing summed columns of numbers in her husband's handwriting, which generally corresponded to the amount of money allegedly found in the suitcase. The Court held it was error to exclude the columns of numbers as hearsay, noting that the probative value of the evidence did not depend on the accuracy of the addition, but was only evidence of a link between the husband and the money in the briefcase.

United States v. Webster, 750 F.2d 307 (5th Cir. 1984) : The Court held that a defendant's out-of-court statements relating that an airplane was stored on his property were not hearsay when offered to prove that the fact he made the statements suggested that he had nothing to hide with respect to the plane.

United States v. Dandy, 998 F.2d 1344 (6th Cir. 1993) : Affirming a conviction for tax fraud, the Court held there was no abuse of discretion in admitting evidence that the clergyman who was allegedly used by the defendant for diverting income had told his secretary, "[T]ell him to get off my back and get himself another patsy." The statement was not an assertion capable of being true or false and it was being used only as evidence of the clergyman's state of mind indicating a breakdown in his relationship with the defendant.

United States v. Blandina, 895 F.2d 293 (7th Cir. 1989) : The defendant in a net-worth tax evasion case had stated that he obtained cash by selling coins from a collection he had received from his late father. The Court held that an IRS agent was properly permitted to testify to having interviewed 61 coin dealers and attended two coin shows and having found no one who had bought coins from the defendant; the testimony was not offered to prove the truth of the coin dealers' statements, but only to establish that the agent had conducted a thorough investigation and the results thereof.

United States v. Wilson, 532 F.2d 641 (8th Cir. 1976) : Affirming convictions for conspiracy to distribute heroin, the Court held there was no error in admitting two notebooks found in a house from which the defendants allegedly carried on their illegal business. The Court held that the notebooks were not hearsay, because they were not offered for their truth, but only as circumstantial proof that the apartment was used for drug trafficking.

United States v. Lopez-Alvarez, 970 F.2d 583 (9th Cir. 1992) : After a prosecution witness testified that the defendant had several times during their joint incarceration spoken of the charged kidnapping and murder, the defense attempted to ask whether other persons in the jail had also made statements about the incident. The Court held that precluding the cross-examination on hearsay grounds was error (but harmless), as the examination was not intended to develop an alternate version of the incident but merely to demonstrate that details of the crimes had been discussed in his presence, which could account for his knowing the details he related to DEA agents without having been a participant. In *United States v. Jaramillo-Suarez, 950 F.2d 1378 (9th Cir. 1991)* , the Court affirmed convictions for a cocaine distribution conspiracy, holding that a pay-owe sheet found at an apartment used by the defendant was not hearsay when offered only as circumstantial evidence to show the character and use of the place where it was found. See also *United States v. Enriquez-Estrada* n4(authenticated drug ledgers were admissible to show the character and use of the house in which they were found). Compare *United States v. Lai*, n5 where the District Court had admitted similar records merely because they were indicia of criminal activity, but the government used them to prove particular transactions in the charged drug conspiracy. Although the government argued on appeal that the records were admissible as business records or coconspirator statements, the Court remanded for a determination whether there was a proper basis for admitting the records and, if not, whether a new trial was required. In *United States v. Snow*, n6 the government offered, as proof that Bill Snow knowingly possessed an unregistered firearm, the briefcase in which the gun was found. Affixed to the briefcase was a red tape with the lettering "Tri. Tron. Electronics" and "Bill Snow." The Court held that the tape was not being offered for the truth of the words contained upon it; rather, the tape, when connected with its possession by the appellant, was circumstantial evidence of guilt.

United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993) : The Court affirmed a defendant's drug convictions, holding that testimony by police officers concerning the names and locations of apartment rental, credit card, and rental car receipts was properly admitted as circumstantial evidence rather than for the truth of any matter stated in the documents.

[b] Rule 801(c) -- Confrontation Clause Inapplicable to Nonhearsay

United States v. Trala, 386 F.3d 536 (3d Cir. 2004) , *vacated on other grounds, 126 S. Ct. 1078 (2006)* : At the time the defendant in a robbery case was arrested, his companion made conflicting false statements regarding her identity and the source of money in their car. Affirming, the Court rejected a *Confrontation Clause* challenge to the statements. Although the statements were found testimonial because they were taken by a police officer in the course of interrogation, the Court held that *Crawford v. Washington* applies only when the statement is offered for its truth, which was not the case here because the statements were offered only to establish the defendant's consciousness of guilt. The Trial Judge had not expressly cautioned the jury against considering the statements for their truth, but there was "absolutely no risk that the jury would mistakenly assume the truth" of the statements, since they were admitted because they were so obviously false.

[c] Rule 801(c) -- Conspiratorial Acts

United States v. Boyd, 566 F.2d 929 (5th Cir. 1978) : The Court held that taped conversations of a gambling business were "verbal acts" of the charged conspiracy. In *United States v. Scallion*, n7 the defendants were convicted of wire fraud in a scheme involving obtaining credit from Las Vegas casinos with false credit information from a Louisiana bank. The Court held that certain casino records, including the credit applications by the conspirators were not hearsay; the statements were acts of the conspiracy, and thus had independent legal significance.

United States v. Wolfson, 634 F.2d 1217 (9th Cir. 1980) : The Court found the words of agreement in a conspiracy to be nonhearsay.

[d] Rule 801(c) -- Examples of Hearsay

[i] Rule 801(c) -- Civil Cases

Rotolo v. Digital Equip. Corp., 150 F.3d 223 (2d Cir. 1998) : In a suit brought by a keyboard operator against a computer manufacturer for repetitive stress injuries, the Court found reversible error in the admission of a videotape of executives and experts from the Apple Computer Corporation, a rival of the defendant. In the tape, the participants emphasized the existence of a possible causal relation between computer keyboard use and repetitive stress injuries and discussed Apple's efforts to remedy the problem. The tape was not admissible to show notice, because it was never publicly released and therefore the defendant could not have been put on notice about it. "Simply put, the Apple videotape was inadmissible hearsay."

Guy v. Crown Equip. Corp., 394 F.3d 320 (5th Cir. 2004) : In a product liability action by a forklift operator injured when she lost her balance and her left leg came out through the operator-compartment opening and was crushed against a railing, the Court affirmed judgment as a matter of law for the manufacturer. There was no abuse of discretion when the plaintiff was not permitted to ask the defendant's expert about responses by K-Mart employees concerning the past use of operator-compartment doors on forklifts, as the plaintiff made no effort to show that the testimony fell with an exception to the hearsay rule. In *Prather v. Prather*, n8 the Court reversed an employee's judgment in a breach of contract case because of the erroneous admission of the employee's statements to two witnesses relating the terms of the alleged agreement; his state of mind was irrelevant, only the truth of the statements mattered.

Field v. Trigg County Hosp., Inc., 386 F.3d 729 (6th Cir. 2004) : In a medical malpractice action the defendant physician testified that he had consulted unnamed doctors at a major medical center and that they told him he was following appropriate treatment for the plaintiff. The Court held that admitting the testimony was error and vacated a judgment for the defendant. By testifying not only to the fact that a consultation took place but also to the substance of the other doctors' responses, the defendant was offering the evidence for its truth. The hearsay was not admissible under the exception for statements for purpose of medical diagnosis or treatment because the statements were not made by or on behalf of the person seeking care. In *Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999)* , to prove the value of a rare wood carving allegedly damaged by the express company's negligence, the plaintiff sought to introduce evidence of a telephone conversation with another collector, who said that she had been offered $2 million and later $2.5 million for her similar carving, and that she would be willing to sell for $3 million if she were offered that much. The Court held that the statements were proffered to prove the collector's belief in the carving's value, not as an offer to sell her carving, and were thus inadmissible hearsay.

Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank N.A., 374 F.3d 521 (7th Cir. 2004) : In an action to recover for wrongful payment of a fraudulent check, the Court held that affidavits from employers of the depositor, which stated that the check was not authorized, were hearsay and inadmissible. In *Martin v. Shawano-Gresham School Dist., 295 F.3d 701 (7th Cir. 2002)* , the Court affirmed summary judgment for the defendants in an action by parents of a seventh-grade student who committed suicide after being suspended for possessing a cigarette. The Court held that the deposition testimony by the father of the student that he understood from his wife that the student was suspended from three volleyball games was inadmissible hearsay. The Court also held that a classmate's testimony that the student told her that she felt that it was unfair that her penalty was a more severe one than imposed on a friend the same day for the same offense also was hearsay if offered to prove that there was a disparity of treatment. In an employment discrimination case, *Friedel v. City of Madison*, n9 the Court affirmed summary judgment for the defendants, holding that statements of police officers that concerned what they had heard about officers exchanging answers and passing academy training without meeting a requirement was inadmissible hearsay. Thus, it was properly disregarded when the Trial Judge ruled on the summary judgment motion.

Qualley v. Clo-Tex Int'l., Inc., 212 F.3d 1123 (8th Cir. 2000) : In a RICO fraud suit involving a purchase of Nigerian crude oil that was never delivered, the Court vacated a judgment for the plaintiff, holding it was error to admit deposition testimony in which the deponent said that he called a bank and spoke to an employee who told the deponent what names were on an account, because the bank employee's statement was inadmissible hearsay. In a wrongful death action, *Maddox v. Patterson, 905 F.2d 1178 (8th Cir. 1990)* , the Court held that testimony by a nurse, who visited the decedent only to catheterize her, to the effect that an unidentified person had said that the decedent had been semi-comatose for six days was properly excluded as hearsay. In a patent infringement case, *Square Liner 360 degrees, Inc. v. Chisum*, n10 the Court found that a letter to the party claiming infringement from a company that had been consulted for marketing assistance, in which the marketing company said that the invention was "most original and practical," was hearsay and could not qualify as a business record.

Mahone v. Lehman, 347 F.3d 1170 (9th Cir. 2003) : In a prisoner's § 1983 action after he was placed in solitary confinement in a cold, bare strip cell without clothing or running water, the Court reversed a judgment for the defendants because the plaintiff was improperly asked what he had "been diagnosed as" after the incident. The psychiatrist's diagnosis was hearsay because it was relevant only if the jury believed the therapist's opinion. In *Flores v. United States*, n11 a bail bondsman sued to recover money seized from him by the IRS. The Court reversed a finding that the money belonged to a person with outstanding tax liabilities to the United States, holding that a letter from a Mexican bank delivered to a border station, which stated that the money belonged to the person owing taxes, was inadmissible hearsay.

Sanjuan v. IBP, Inc., 160 F.3d 1291 (10th Cir. 1998) : In an action by a former employee who alleged that he had been discharged in retaliation for making a worker's compensation claim, the plaintiff introduced testimony by the defendant's supervisors that they had heard complaints from injured employees to the effect that they were harassed following injuries or medical benefits claims. The Court held that the evidence was inadmissible hearsay because it repeated out-of-court statements by the other employees to prove that the defendant did in fact have a practice of mistreating injured employees. In a product liability wrongful death action involving a pipelayer, *Huffman v. Caterpillar Tractor Co., 908 F.2d 1470 (10th Cir. 1990)* , the Court held that testimony relating expressions of concern by co-workers that the decedent may not have been competent to operate the machine were properly excluded as hearsay. In *New England Mut. Life Ins. Co. v. Anderson*, n12 an insurance company sued to set aside a life insurance policy as fraudulently procured by a beneficiary, who allegedly conspired to murder the insured, her first husband. The Court held that a newspaper account of the affair was hearsay, inadmissible as an adoptive admission or under the residual exception.

Nettles v. Electrolux Motor AB, 784 F.2d 1574 (11th Cir. 1986) : Although the Court affirmed a judgment for a wood cutter in a product liability action against a chain saw manufacturer, it found that testimony of a claims adjuster for a workers' compensation fund, that 49 of the 50 chainsaw claims the adjuster had "seen" in her office involved the defendant's saws, should not have been admitted. The testimony was hearsay evidence, but the error was harmless. In *ADP-Fin. Computer Servs., Inc. v. First Nat'l Bank*, n13 the Court affirmed a judgment for a computer services company against a bank for the bank's failure to pay for services rendered, finding that a customer survey conducted by the plaintiff was hearsay and not admissible for the defendant. The customer comments were not business records and were not statements by a party.

Superior Fireplace Co. v. Majestic Prods. Co., 270 F.3d 1358 (Fed. Cir. 2001) : The owner of a patent in an infringement action sought to prove that a certificate of correction had been properly issued by introducing a declaration by its patent attorney that the patent examiner had said the certificate was granted because the error sought to be corrected was a typographical error on his part. The Court held there was no abuse of discretion in excluding the declaration as hearsay, since it was offered to prove the truth of the matter asserted and there was no showing that the examiner's statement was contrary to his pecuniary or proprietary interest or tended to subject him to civil or criminal liability.

[ii] Rule 801(c) -- Examples of Hearsay -- Criminal Cases

[A] Rule 801(c) -- Defense Evidence

United States v. Sesay, 313 F.3d 591 (D.C. Cir. 2002) : The Court affirmed a conviction for drug and firearm offenses, holding that a statement in a police report that unidentified witnesses saw a person other than the defendant with the gun was properly excluded as hearsay. It was not relevant for anything other than the truth of the statement. The Court added that, if the evidence had any relevance as "background," the probative value was substantially outweighed by the prejudicial effect.

United States v. Berrios, 132 F.3d 834 (1st Cir. 1998) : In a drug case, the government introduced evidence indicating that a man named "Pablo" was the drug dealer, and introduced other evidence indicating that the defendant Mario Mendez was known as "Pablo." The Court found no error in the exclusion of testimony from a witness that she was present at a drug deal in which her husband introduced the seller as "Pablo," and that "Pablo" was not Mendez. The evidence was hearsay, because for the witness' testimony to be "tenable the statement made by her husband must have been true."

United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997) : A defendant in a kidnapping and cocaine conspiracy case argued that his greeting, "Nice to meet you," tended to rebut a contention that he had previously attended a meeting with the person greeted. The Court held there was no error in excluding the statement as hearsay because it was offered for its implied assertion that the defendant had never previously met the person.

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) : The Court affirmed a conviction for tax evasion offenses, finding no error in the exclusion of testimony from the defendant's tax lawyer that Bishop's former bookkeeper said she knew Bishop received a $400,000 fee in 1994, that it was her fault it was omitted from the books used to prepare his tax returns, and that she did not know why she failed to record the fee. The Court reasoned that Bishop offered the statements in order to prove the truth of their content, "that is, to show it was not his fault that all or a portion of the $400,000 fee was not reported to the IRS."

United States v. Hatchett, 918 F.2d 631 (6th Cir. 1990) : The Court affirmed a conviction for tax evasion, holding that testimony by the defendant's attorney as to statements the defendant made to the attorney about his then-pending tax situation were properly excluded as hearsay because they were only relevant to an advice-of-counsel defense if the jury considered them truthful. The dissenting Judge said that the majority had conflated two issues: whether the defendant disclosed his tax situation to his attorney, on which the defendant's statements were relevant regardless of their truth; and whether the contents of the disclosure were true, for which the testimony was hearsay. All agreed that a videotape of a television news show focusing on practices at the local IRS office was properly excluded as hearsay.

United States v. Arroyo, 406 F.3d 881 (7th Cir. 2005) : The Court affirmed heroin-related convictions, rejecting the defendant's argument that a memorandum prepared by an IRS agent relating a statement by a confidential informant was admissible to prove the state of mind of the investigating officers. The Court found that the defendant actually offered the memo to prove the truth of the informant's statement, which was inadmissible hearsay. In *United States v. Rettenberger, 344 F.3d 702 (7th Cir. 2003)* , a defendant, charged with fraudulently obtaining disability insurance payments by faking mental impairment, attempted to introduce a tape recording of an interview he had with an agent posing as a Social Security worker. The defendant argued that his mention of working on a project was belated notice to the agency about a fact missing from his disability application. That particular use was not hearsay, but the remainder of the tape was full of the defendant's descriptions of his limited abilities, which could have been relevant only for the truth of his narration, and thus hearsay. When the prosecutor made a hearsay objection to the tape, defense counsel did not propose to redact it, so the Court held there was no error in excluding the tape.

United States v. Sadler, 234 F.3d 368 (8th Cir. 2000) : Affirming convictions for armed bank robbery and firearm possession, the Court held that testimony from an attorney who had represented the defendant in state court that the defendant protested his innocence moments before confessing to a deputy was inadmissible hearsay. This case is discussed in the Editorial Explanatory Comment, *§ 801.02[1][e]*.

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994) : The defendant, charged with hiring someone to murder his wife, sought to introduce as exculpatory evidence his statement shortly after a telephone conversation that "they are going to kill [my wife]" and another statement made four days later that he had to go to San Francisco and that his life was in danger by going but in even more danger if he didn't go. The Court held there was no error in excluding the statements, as they were hearsay offered to prove the facts asserted and they did not fall within any of the exceptions.

[B] Rule 801(c) -- Examples of Hearsay -- Criminal Cases -- Official and Confidential Informants

United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004) : The Court remanded the defendant's case for a hearing on whether his counsel's performance was constitutionally ineffective, after counsel made no objection to testimony from the arresting officers that they had pursued the defendant after receiving complaints from nontestifying witnesses that they had been victims of armed robberies. To the extent that the testimony was relevant to a fact of consequence in the trial for felon firearm possession, it was hearsay because it was relevant only for the truth of the assertion that the defendant possessed a weapon. To the extent that the testimony was offered as "background" information, it was inadmissible because its considerable prejudicial effect substantially outweighed its minimal value as background. In *United States v. Evans, 216 F.3d 80 (D.C. Cir. 2000)* , an FBI agent was permitted to testify in a drug prosecution that he had received information from a federal inmate that the defendant was involved in drug trafficking. The testimony was ostensibly admitted not for its truth, but only as "background," to explain the agent's conduct in arresting the defendant. The Court found it was error (but harmless) to admit the statement, since its probative value for the nonhearsay purpose of background evidence was substantially outweighed by the risk that the jury would use the information for its truth, "and hence as evidence of his propensity to commit the crimes with which he was charged."

United States v. Garcia-Morales, 382 F.3d 12 (1st Cir. 2004) : The Court held it was error (but harmless) in a drug conspiracy case when the government's first witness, the Customs Service agent in charge of the investigation, testified, before any evidence of conspiracy was presented, that the defendant was a member of the conspiracy, and also testified to an informant's conversation with a conspirator even though he was not a participant in the conversation. The Court found the testimony was hearsay based upon information provided by others. In *United States v. Mazza*, n14 the Court affirmed cocaine convictions, but it criticized the Trial Judge's permitting two government agents to testify as to what an informant told them the defendants had done and said in various conversations. The Judge instructed the jury that the testimony was offered not for its truth, but to explain why the agents acted as they did. The Court found that this evidence had almost no probative value, even though the defendants raised an entrapment defense. It reasoned that the agents could have testified that they debriefed the informant after his conversations with the defendants and left the informant to testify as to what the defendants said. The error was harmless, however.

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) : After a 17-year-old female telephoned police to alert them to drug-related activities at a motel, officers found the caller, another female, and the defendant in a motel room, but found no drugs or drug paraphernalia. At the defendant's trial on cocaine charges, the government asked its first witness, the police sergeant who took the telephone call, whether he had been involved in a "narcotics-related incident" at the motel. He answered affirmatively and was cross-examined as to the scene that he found at the motel. Thereafter, the government elicited from the sergeant hearsay testimony as to what the 17-year-old caller had told him. The government argued that the call was admissible to explain why the officer came to the scene and arrested the defendants. Reversing because the hearsay testimony was improperly admitted, the Court held that the government's proffered not-for-truth purpose had no relevance in the case. The defense was based upon a claim that prostitution, not drug use, was occurring at the motel, and this defense did not suggest any impropriety on the part of the police. Thus, there was no basis to introduce hearsay to explain the sergeant's conduct. In *United States v. Reyes, 18 F.3d 65 (2d Cir. 1994)* , the Court reversed a conviction for conspiring to import narcotics, holding it was error to admit as nonhearsay a Customs agent's testimony regarding statements by two persons who implicated the defendant in the conspiracy, even though the declarants' exact words were not repeated. Although the jury was instructed that the statements were not admitted for their truth, the likelihood was sufficiently high that the jury would have treated the evidence for its truth anyway. The Court also rejected the argument that the evidence was properly admitted as "background" and observed that "contrary to the government's contention, the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." In *United States v. Ocampo*, n15 a defendant in a drug case won reversal of his conviction on the ground that a witness was permitted to testify that an unidentified informant told him that the defendant was known by another name. The Court found this to be inadmissible hearsay. In *United States v. Check*, n16 the Court reversed a drug conviction because the government improperly utilized its undercover agent as a trial witness. The agent testified about several conversations he had with an informant. Although the agent purported to relate only his own out-of-court statements, in effect he introduced the informant's statements as well.

United States v. Lopez, 340 F.3d 169 (3d Cir. 2003) : A federal inmate, charged with possession of heroin, argued that the heroin, which was found in a laundry bag, was possessed by someone else. The Court reversed the conviction because inadmissible hearsay was admitted against the defendant. Two officers, when asked why they searched the defendant's cell, testified that they had "received information" that Lopez had drugs on his person or in his cell. The government argued that this testimony was proper, as it established "background" in that it explained why the officers decided to search the defendant's cell. But the Court held that the real use of the informant's statements was to prove that the defendant in fact possessed drugs. In a prosecution for felon firearm possession, *United States v. Sallins, 993 F.2d 344 (3d Cir. 1993)* , the arresting officer testified that, in response to a radio call, he had been looking for a black male wearing all black clothing who was carrying a gun. The Court held it was reversible error to introduce the contents of the radio call, which was hearsay going far beyond any background necessary to explain why the officers acted as they did.

United States v. Johnston, 127 F.3d 380 (5th Cir. 1997) : The Court held that prosecutors engaged in misconduct in a massive drug trafficking prosecution when they repeatedly asked law enforcement agents what steps they took during their investigation and why they took those steps. They were thereby able to indirectly introduce damaging hearsay testimony of informants and other law enforcement agents. The Court said that "[t]he questions were clearly improper and highly prejudicial to the defendants," but concluded that the errors were harmless in the circumstances. In a prosecution for felon firearm possession, *United States v. Evans, 950 F.2d 187 (5th Cir. 1991)* , a BATF agent who searched the defendant's apartment in St. Louis testified that a woman at the apartment told him that the defendant owned a gun, showed him where it was usually kept (it was not there), and described the gun. The evidence was admitted ostensibly to give "background" on the surveillance in El Paso that led to the defendant's arrest with a similar gun secreted in his car. Reversing the conviction, the Court held that the woman's statement was used for its truth and was the only direct evidence showing that the defendant would have known the gun was in the car. In *United States v. Escobar*, n17 the Court reversed a conviction for marijuana offenses because a police officer explained how his attention focused on the defendant by relating computer information that stated the defendant was a suspected marijuana smuggler. The evidence was hearsay, clearly prejudicial, and was not offered for any proper limited purpose. In *United States v. Hernandez*, n18 the Court reversed a defendant's cocaine convictions, because of error in permitting a government witness to testify that U.S. Customs had identified the defendant as a drug smuggler. The testimony was hearsay and could not be used to prove the state of mind of the witness, a DEA agent, since his state of mind was irrelevant. Compare *United States v. Garza*, n19 a civil rights prosecution against police officers charging them with illegal arrests. The Court found it was error (but harmless) to exclude testimony about what the officers were told about the arrestees. The statements were not offered for their truth, but to explain the arrests.

United States v. Silva, 380 F.3d 1018 (7th Cir. 2004) : In a prosecution for methamphetamine crimes, a DEA agent testified to conversations between a non-testifying DEA informant and an alleged supplier that mentioned the defendant as the person making a delivery. The prosecution argued that the evidence was offered to explain the actions taken by the witness in response to the hearsay. Reversing, the Court noted that "[t]here are no doubt times when the testimony regarding a tip from an informant is relevant," but found that the broad argument made by the government "would eviscerate the constitutional rights to confront and cross-examine one's accusers." In a bank robbery case where identity was the disputed issue, *United States v. Williams, 133 F.3d 1048 (7th Cir. 1998)* , a government agent was permitted to testify that a confidential informant told him that the defendants committed the robbery. This testimony was ostensibly offered not for its truth, but rather "to establish the course of the police investigation." The Court held that the testimony was hearsay and its admission was reversible error. The Court noted that "[c]ontext and background can be established, and are properly established, without the admission of the confidential informant's hearsay declaration." Even if the informant's statement were probative of "context," the risk of prejudicial use of the statement as hearsay substantially outweighed its probative value. In *United States v. Lovelace*, n20 the defendant was arrested driving a rental car with its trunk full of cocaine and drug paraphernalia after police received an informant's tip that the defendant was to be at a particular location with cocaine for sale. Reversing, the Court held that the prejudicial effect of testimony about the tip in connecting the defendant to the drugs substantially exceeded any probative value in giving context to the officers' conduct. The Court noted that "it is the court's direction that distinguishes a tip from hearsay for the jury," but that "[a] jury is unlikely to follow an instruction given where the admission of the tip adds little to the context of the investigation or where the substance of the tip is overwhelmingly incriminating," as here. In a cocaine distribution prosecution, *United States v. Dominguez*, n21 the Court held it was error (but harmless) to admit an agent's testimony that she had learned from Guatemalan police that tests of the delivered packages had revealed cocaine.

United States v. Blake, 107 F.3d 651 (8th Cir. 1997) : Reversing convictions for felon firearm possession and methamphetamine possession, the Court held it was error to admit a statement by an unidentified confidential informant identifying the defendant as a methamphetamine dealer. Although the statement might explain why a police

investigation was undertaken, there was no showing in this case that the propriety of the investigation was in issue or that the evidence was otherwise relevant to an issue at trial.

United States v. Dean, 980 F.2d 1286 (9th Cir. 1992) : The Court reversed a conviction for felon firearm possession because the arresting deputy sheriff had been permitted to testify that he went to the defendant's home after another person had told him that the defendant had extorted money by discharging a gun near his ear. The deputy's reasons for going to the home or conducting the search that uncovered the weapon were not relevant because the defendant consented to the search; the statements were relevant to prove the possession, but only inadmissible hearsay when used for that purpose.

United States v. Becker, 230 F.3d 1224 (10th Cir. 2000) : The Court held it was error (but harmless) in a drug and weapons trial to admit a hearsay statement by a confidential informant accusing the defendant of manufacturing and selling methamphetamine. The Court noted that the government at several points in the trial invoked the informant's statements for the truth of the matter asserted, but it found the error harmless because the Judge had instructed the jury to consider the statement only as supporting the search warrant that was obtained and the officer testified that the informant never observed Becker manufacturing drugs. At a trial for making a false statement to a federal agent, in *United States v. Cass, 127 F.3d 1218 (10th Cir. 1997)* , the prosecution attempted to prove that the defendant's report that she had been kidnapped and raped was concocted by calling an FBI agent, who testified extensively to statements from others indicating that the defendant had staged her own kidnapping. Rejecting arguments that the statements were nonhearsay background offered after the defense "opened the door" by asserting in its opening statement that the FBI had failed to conduct a proper kidnapping investigation, the Court noted that "[h]earsay evidence that directly goes to guilt is particularly difficult to limit to background purposes," and that the prosecution in fact used the out-of-court statements in jury argument as if they were true. The error was harmless, however.

[C] Rule 801(c) -- Examples of Hearsay -- Criminal Cases -- Other Cases

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003) : Affirming drug-related convictions, the Court held it was error (but harmless) to admit video and audio tape recordings of transactions between one defendant (Lama) and the undercover agent. There was insufficient proof that Lama was acting in furtherance of the conspiracy to admit the tapes as coconspirator's statements, and they were not admissible as " 'verbal acts' to the extent they demonstrated that Lama was a drug dealer and provided context to the other conversations in which Lama and his co-conspirators used clothing terminology to refer to drugs," as they were not statements with independent legal significance.

United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983) : The Court held that a customer record book of drug transactions that included a reference that a certain person was engaged in transactions with the book's author was hearsay if offered to prove the truth of the transactions.

United States v. McGlory, 968 F.2d 309 (3d Cir. 1992) : The Court affirmed convictions related to a major heroin distribution conspiracy, rejecting the government's contention that "owe sheets" referring to drug transactions were only circumstantial evidence and not hearsay, but held that most of the sheets introduced were sufficiently shown to be coconspirator statements.

United States v. Williams, 41 F.3d 192 (4th Cir. 1994) : In a prosecution for possession of cocaine found in a suitcase at an airport, the government introduced evidence that a caller inquiring about the suitcase had said his name was "Wilson" and he was staying in room 412 in the Crystal City Holiday Inn. The Court held it was error (but

harmless) to introduce a detective's testimony that he called the Crystal City Holiday Inn and was told "there was no Mr. Wilson in room 412," as the statement was made by an out-of-court declarant and offered to prove the truth of the matter asserted.

United States v. Marshall, 762 F.2d 419 (5th Cir. 1985) : The Court reversed a conviction for theft of a lawn mower because the government improperly elicited testimony from an investigator that she had examined records of an Air Force post exchange and had found three lawn mowers missing. Since the records were not produced or authenticated, the testimony was hearsay elicited from a lay witness.

United States v. Hamilton, 128 F.3d 996 (6th Cir. 1997) : The defendant was convicted of tax evasion after the Judge excluded proffered receipts in reliance on a sealed pleading by a former defense counsel, which stated that she had reason to believe the defendant intended to commit perjury when testifying at trial. The Court held that it was improper to rely on the pleading, which was inadmissible hearsay, in determining the admissibility of the receipts, but the error was harmless. In *United States v. Johnson, 71 F.3d 539 (6th Cir. 1995)* , the Court affirmed a physician's conviction for illegal distribution of drugs and mail fraud, holding it was error to admit testimony by a clinic employee that when she told the defendant's partner that pharmacies had called about prescriptions written by the defendant, the partner became upset and said she would speak to the defendant about that. However, the error was harmless, because the witness later heard the partner tell the defendant over the telephone to "stop writing prescriptions like that," which was evidence that the defendant knew he was prescribing medication without a legitimate medical purpose.

United States v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990) : The declarant told agents at the time of her arrest that the defendant had given her heroin in Mexico to deliver, but at trial she said the statement was a lie. The Trial Judge refused to instruct that the prior statement could be used only for impeachment, apparently persuaded that *United States v. Owens* n22(see the Editorial Explanatory Comment, *§ 801.02[3][c]*), allowed its substantive use. The Court reversed, holding that the statement came within no hearsay exception, it was not admissible under *Rule 801(d)(1)(A)* because it was not given under oath at a proceeding or deposition, the limiting instruction should have been given, and admission without the instruction was not harmless. In *United States v. Bordallo*, n23 a prosecution for extortion and bribery, the Court held that a written "perspective" by the defendant's campaign manager, which reflected his involvement in a payoff and his view of political attitudes in Guam, was hearsay, since it was offered to prove the truth of its contents -- i.e., that payoffs were common. Its erroneous admission was harmless, however.

United States v. Hanzlicek, 187 F.3d 1228 (10th Cir. 1999) : The defendant was charged with fraud in connection with a counterfeit check scheme he learned from the leader of the Montana Freemen, LeRoy Schweitzer. During the trial, an FBI agent was permitted to testify that banks had paid out $1.8 million on Schweitzer's fraudulent checks; the testimony was permitted to show "the effectiveness of the scheme." The Court held that admission of the evidence was error (but harmless), since it was hearsay to prove the checks were actually cashed, which was the fact necessary to establish the effectiveness of the scheme. In *United States v. Glass, 128 F.3d 1398 (10th Cir. 1997)* , when the defendant was arrested at an airport, he said he was going to visit "his grandmother, Ruthy Maye Simmons." Reversing the defendant's conviction for aiding and abetting his codefendant's possession of cocaine with intent to distribute, the Court held it was error to admit evidence that the nontestifying codefendant had said Ms. Simmons was not only *her* grandmother but also was deceased. The statement was inadmissible hearsay, offered for its truth to controvert the defendant's assertion of his travel plans. In *United States v. Jefferson*, n24 the Court held that a bill for purchase of a pager was inadmissible hearsay to prove that a defendant had purchased the pager. Admission of the evidence in a prosecution for possessing drugs with intent to distribute was harmless error, however.

United States v. Hunerlach, 197 F.3d 1059 (11th Cir. 1999) : Affirming convictions for tax evasion and filing a

false statement, the Court held it was error (but harmless) to admit the testimony of an IRS agent that two alleged officers of the defendant's companies said that they were not real directors. The only relevance of the statements was to show that they were true and that the corporations were not bona fide companies.

[iii] Rule 801(c) -- Examples of Hearsay -- Indirect Hearsay

Ryan v. Miller, 303 F.3d 231 (2d Cir. 2002) : The Court granted a writ of habeas corpus for a petitioner convicted of murder in New York. Ryan's conviction in his first trial had been set aside because a codefendant's confession implicating him was erroneously admitted. A second trial ended in a mistrial after a prosecution witness testified that he had reviewed the illegal confession in preparation for his testimony. At the third trial, which led to the conviction being reviewed, the Judge allowed officers connected with the interrogation of Ryan to testify what they did as the interrogation of the codefendant progressed, but without testifying to what the codefendant had said. Thus, for example, the officer coordinating the interrogations testified that at some point he received a call from the detective questioning the codefendant and as a result he directed the detective questioning Ryan to advise Ryan of his rights on a murder charge. The Court held that this sort of testimony implicitly relayed the codefendant's accusation of Ryan, and since that was inadmissible hearsay, Ryan's confrontation rights had been violated.

[e] Rule 801(c) -- Examples of Nonhearsay

[i] Rule 801(c) -- Background or Context

[A] Rule 801(c) -- Civil Cases

Foster-Miller, Inc. v. Babcock & Wilcox Can., 210 F.3d 1 (1st Cir. 2000) : The Court affirmed a judgment for the plaintiff manufacturer, who claimed that the defendant, a competitor, had violated a confidentiality agreement and misappropriated trade secrets regarding a hose used for cleaning nuclear-powered steam generators. In arguing that its hose was not an obvious extension of existing technology, the plaintiff used notes in which an unavailable declarant reported canvassing hose makers, who had indicated that developing such a hose posed insuperable technical problems. The Court held there was no abuse of discretion in admitting the notes, since they were offered not to prove the facts asserted, but to provide context for a witness who testified that he had made a subsequent search for suppliers who would make that type of hose.

[B] Rule 801(c) -- Examples of Nonhearsay -- Background or Context -- Criminal Cases

United States v. Vazquez-Rivera, 407 F.3d 476 (1st Cir. 2005) : The Court affirmed a conviction for conspiring to distribute heroin, holding that the case agent did not offer hearsay when he testified that he "already knew" the defendant was involved in drug trafficking. The statement was offered to explain why he did not include certain information in a report, not for its truth. In *United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990)* , the Court affirmed convictions for drug trafficking, holding that statements in a recorded conversation by a conspirator who had been arrested were admissible to put the defendant's statements into perspective and make them intelligible to the jury and recognizable as admissions.

United States v. Slaughter, 386 F.3d 401 (2d Cir. 2004) (per curiam): The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of testimony that a civilian had pointed out the discarded weapon, allowing a policeman to recover it. The testimony was proffered for the legitimate purpose of explaining how the officer came to find the weapon and its probative value was not outweighed by any danger of unfair prejudice.

United States v. Wills, 346 F.3d 476 (4th Cir. 2003) : In the defendant's trial for kidnapping a person who was going to testify against him, the government evidence included taped conversations between the defendant and his brother in which the defendant revealed his scheme to kidnap and kill the witness. The defendant argued that his brother's end of the conversation was inadmissible hearsay. Affirming, the Court reasoned that the defendant's own statements were admissible as party admissions under *Rule 801(d)(2)(A)*, and the brother's statements were not hearsay because they were offered only to give the defendant's statements context and make them understandable. Defendants appealing convictions arising out of a bid-rigging conspiracy in *United States v. Romer*, n25 claimed error in the admission of a newspaper article that described an unrelated bid-rigging conviction. The Court found that the article was offered "to place in its proper context the conspirators' taped discussion about the article," and concluded that "[i]n light of the independent relevance of the article and the district court's careful instruction to the jury regarding the limits of its use, we are confident that the article was admissible."

United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998) : On cross-examination of a cooperating witness in a massive drug trafficking case, counsel elicited testimony indicating that one defendant had not been aware of other defendants' illegal activities. Later in the trial, the counsel asked a DEA agent on cross-examination whether he had participated in the debriefing of the cooperating witness "where he said my client wasn't in the drug business." In rebuttal the agent testified that the cooperating witness had said that the defendant knew two codefendants were engaging in drug trafficking and money laundering. The Court found no abuse of discretion, since the defense cross-examinations made the agent's recounting of the hearsay statements relevant to refute an implication that the government had acted in bad faith by prosecuting someone the government knew to be innocent, and the jury was properly instructed to use the statements only for their effect in forming the bases for the agents' subsequent conduct. In *United States v. Cheramie, 51 F.3d 538 (5th Cir. 1995)* , the Court held there was no confrontation violation when a tape recording of a conversation between the defendant and a confidential informant who was unavailable to testify at trial was admitted, as the informant's statements were admitted only for the limited purpose of providing a context for the defendant's statements and the jury was so instructed. In *United States v. Vizcarra-Porras*, n26 the Court found no error in a drug possession case when the arresting officer, in explaining how he came to arrest the defendant, recounted conversations in which it was asserted that the defendant had heroin, wanted to sell it, and would be coming across the border. The government consistently asserted (and limiting instructions were given) that the only reason for offering the testimony was to explain the origin of the investigation, not for the hearsay purpose of proving the defendant was predisposed to smuggle heroin, contrary to his entrapment defense.

United States v. Aguwa, 123 F.3d 418 (6th Cir. 1997) : The defendant was arrested after the suspect from whom DEA agents were attempting to make a controlled buy never appeared, but the informant recognized another man nearby who offered to help secure heroin for the informant. The other man placed several phone calls and shortly thereafter the defendant arrived and supplied the informant with heroin. Affirming a conviction for distributing heroin, the Court held there was no error when the DEA agents recounted statements by the informant that she recognized the other man and that he was calling individuals who might supply the heroin. Those statements were not offered for their truth, but only to explain how and why the agents came to be involved with this particular defendant, and none of the statements directly implicated the defendant in criminal activity. In *United States v. Pulley, 922 F.2d 1283 (6th Cir. 1991)* , the Court held there was no error in admitting a Customs officer's testimony in a cocaine prosecution that a little boy in the defendant's house had told him of a suspicious occurrence involving the defendant. As the testimony helped explain why the officer had continued a search for drugs after a trained "drug dog" had not detected anything, it was not inadmissible hearsay. In *United States v. Martin*, n27 a government investigator "set the scene" of an investigation into illicit trafficking in food stamps by recounting a general statement by an unnamed declarant that the defendant had been involved. The Court held the evidence was not "hearsay *per se*" because it was offered for the limited purpose of explaining how and why the investigation began and was not being used to supply otherwise unavailable evidence on the substantive charges.

United States v. Inglese, 282 F.3d 528 (7th Cir. 2002) : Employees of a federally licensed gun shop were charged with knowingly selling guns to straw purchasers, who would in turn give the guns to felons. The defendants made a hearsay objection when one of the straw purchasers testified that her boyfriend told her that he had been in jail, was a member of a street gang, and could not legally purchase a gun. The Court found no error in admitting this testimony. It was not hearsay, because it was offered "for the effect it had on the listener"--to explain why the witness had gone to the gun shop to purchase guns for her boyfriend. In *United States v. Linwood, 142 F.3d 418 (7th Cir. 1998)* , when officers entered the defendant's house to arrest her for selling cocaine base, the defendant was not there but her 12-year-old daughter was. When the defendant returned to the house minutes later and was told that her daughter had told the officers that her mother had been selling crack, the defendant began to pound her fists and yell at her daughter that she was not a cocaine dealer and to insist that the drugs belonged to her live-in boyfriend. The daughter also told the officers where the "dope money" was kept. The Court held there was no abuse of discretion in admitting the daughter's statements, since they were offered only to establish why the defendant reacted as she did upon hearing the first statement and to show why an officer found the money where it was hidden. Any prejudicial effect from the jury's using the statements for their truth was minimized by repeated and careful instructions as to the proper non-hearsay purposes for which the statements could be used. Furthermore, the daughter testified at trial and could be cross-examined about the facts asserted in her statements. In *United States v. Zizzo*, n28 the Court affirmed racketeering convictions, finding no error in the introduction of taped conversations between an undercover informant and unindicted coconspirators. The statements of the coconspirators were admissible under *Rule 801(d)(2)(E)*, and the responsive statements of the informant were not hearsay, because they were offered only to "give *context* to the conspirators' ends of the conversations." In *United States v. Levine*, n29 the Court affirmed murder convictions and held there was no error in admitting evidence that the victims had accused the defendant of embezzlement, as the accusations, when the defendant learned of them, affected his state of mind and provided his motive for murder. In *United States v. Lazcano*, n30 a prosecution for distributing heroin, the Court held there was no error in permitting an informant to testify that the defendant was introduced to him as a member of a Mexican crime family, since the statement was offered not to prove the defendant was indeed a member of the crime family, but to set the context in which the DEA investigation originated, and the jury was carefully instructed to use it only for that purpose.

United States v. Looking Cloud, 419 F.3d 781 (8th Cir. 2005) : Affirming a murder conviction, the Court held that testimony that people within the American Indian Movement, of which the defendant was a member, had accused the victim of being an informant and that the victim stated she feared for her life were properly admitted to show the defendant's motive for killing her. In *United States v. Malik, 345 F.3d 999 (8th Cir. 2003)* , the Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission of evidence that an informant had reported to police that the defendant said he had a gun and was willing to use it against the police. The Court said that the "propriety of a police investigation" was in issue because "[t]he testimony of Malik's witness, that she did not see or feel a gun on Malik nor did she see him drop or throw a weapon, placed the officers' credibility in issue, suggesting that the officers planted or lied about the weapon dropped by Malik." In our view, the correct approach was taken by the concurring Judge, who concluded that:

> this is the type of hearsay that is clearly excluded by the hearsay rule. An out of court statement (the unidentified male statement that he saw Malik with a gun) is used to prove the truth of the matter asserted (that Malik possessed a firearm). The fact that Malik challenged the credibility of the officers' testimony does not make the statement admissible. Under the majority's holding, the police officers would be allowed to testify about a statement made by any third party, even weeks after the incident, who claim to have seen Malik with a gun.

In a prosecution for sexual abuse, *United States v. Running Horse*, n31 the Court held that there was no error in admitting testimony of the band teacher to whom the victim reported the abuse. The evidence was admitted as

background information to assist the jury in understanding the origin of the investigation of the defendant, and the jury was instructed that it was not offered to prove that the matters reported had happened. In *United States v. Davis*, n32 the Court affirmed convictions for drug and firearm offenses. It found that testimony by a state law enforcement officer as to information he acquired during his investigation was properly admitted to explain the reasons for his investigation after defense counsel attacked the motivations for the investigation. In *United States v. Alonzo*, n33 the Court reversed convictions for conspiring to possess cocaine because a coconspirator's statement made while cooperating with the police after his arrest had been admitted against the defendants. The Court noted that on remand the Trial Judge could consider whether the statements were not hearsay if offered only to explain why the agents did what they did, but should keep in mind the prejudicial effect of such evidence and the need to avoid hearsay statements whenever possible in presenting background evidence.

United States v. Beckman, 298 F.3d 788 (9th Cir. 2002) : The Court affirmed marijuana convictions, holding that a Customs agent's testimony that a codefendant told him that the codefendant was jailed with two of his drug couriers, including the defendant, was not admitted for its truth. The testimony was offered to show that the codefendant brought up his relationship to the defendant on his own, not at the prodding of the government or to escape punishment. In *United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000)* , a mail fraud trial arising from a Ponzi scheme, an attorney for the scheme's corporate vehicle testified that at one point he sent a letter to all the corporation's salesmen requesting that they suspend selling the investment. He was permitted on direct examination also to discuss a conversation he had with one of the corporation's organizers regarding a state investigation into the scheme then being conducted. The Court held that the testimony was not hearsay because it was not offered to prove the truth of the allegations made in the investigation, but only to explain why the attorney had written the letters to the salesmen, who included the defendants. In *United States v. Payne*, n34 the Court affirmed the defendant's conviction for carnal knowledge of a female under age 16, holding there was no error in admitting out-of-court statements indicating the victim had been abused, as they were introduced only to explain a sequence of events.

United States v. Wilson, 107 F.3d 774 (10th Cir. 1997) : Affirming convictions for felon firearm possession and cocaine possession, the Court held there was no error in admitting evidence of reports by a confidential informant regarding drug sales, as the evidence explained why the government began its investigation focusing on the defendant. In our view, the evidence served only to put before the jury out-of-court assertions that the defendant was selling drugs, since the propriety of or reason for the investigation was not at issue.

United States v. Smith, 918 F.2d 1551 (11th Cir. 1990) : Affirming convictions for importing cocaine, the Court held that recorded conversations between a coconspirator and a government informant were properly admitted as in furtherance of the conspiracy when there was evidence of the informant's participation in the conspiracy before he became an informant. The Court noted that the informant's statements in the recorded conversations were alternatively admissible not for the truth of the matter asserted, but to place the coconspirator's comments in context for the jury.

[ii] Rule 801(c) -- Examples of Nonhearsay -- Consumer Confusion

Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993 (2d Cir. 1997) : The Court held in a trademark infringement case that evidence of dealer complaints that the infringing product was being sold at a lower price to other retailers was not hearsay. The evidence indicated the dealers' state of mind and was being offered to prove the existence of customer confusion, not differential sale prices.

Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001) : The owner of the intellectual property rights to the children's television character "Barney" sued a costume rental company for infringement.

Reversing in part a judgment for the defendants, the Court held it was improper to dismiss as "unreliable hearsay" evidence that children at a school rally confused the defendants' costume with Barney and that newspaper reporters erroneously described the costumed character as Barney. The evidence was nonhearsay, because it was offered to show the beliefs of the children and the reporters rather than the truth of their assertions, and it was highly probative of actual confusion.

[iii] Rule 801(c) -- Examples of Nonhearsay -- Contracts

Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527 (5th Cir. 1994) : The Court held, in a copyright licensing case, that the defendant's objection to admission of a licensing agreement on the ground of hearsay was inapt, as a contract is a verbal act with a legal reality independent of the truth of any statement contained in it.

Mueller v. Abdnor, 972 F.2d 931 (8th Cir. 1992) : In an action for breach of a real estate sales agreement in which the defendant counterclaimed for slander of title, the Court held that a contract with a third party that fell through and the defendant's contract with its eventual purchaser were admissible, on the issue of damages, as verbal acts and not as proof of the facts asserted therein.

West Coast Truck Lines v. Arcata Community Recycling Ctr., Inc., 846 F.2d 1239 (9th Cir. 1988) : The Court held that evidence of an oral agreement was not hearsay, since the evidence of statements was admitted to show that they were made, rather than for the truth of facts asserted. In *NLRB v. H. Koch & Sons, 578 F.2d 1287 (9th Cir. 1978)* , the Court approved the introduction of testimony that a union accepted an offer concerning severance pay, because the testimony was not being offered to show that the people who assented to the contract were telling the truth; the only important thing was whether they uttered words of assent.

[iv] Rule 801(c) -- Examples of Nonhearsay -- Credibility

United States v. Norman T., 129 F.3d 1099 (10th Cir. 1997) : In a nonjury trial of a juvenile delinquency proceeding for aggravated sexual abuse, the Judge admitted evidence of the questions and answers given when the five-year-old victim's mother and grandmother asked her about her complaints of vaginal pain before taking her to the hospital for an examination. The Court held there was no abuse of discretion in admitting the evidence for the nonhearsay purpose of rebutting any contention that the questioning had been suggestive.

[v] Rule 801(c) -- Examples of Nonhearsay -- Directions, Instructions, Recommendations

United States v. Balthazard, 360 F.3d 309 (1st Cir. 2004) : The defendants were convicted of a conspiracy to grow marijuana plants after officers raided a warehouse containing a massive marijuana-growing operation. Affirming, the Court found no error in the admission of notes found at the warehouse. The notes were simply instructions from one conspirator to another concerning the care and feeding of marijuana plants and did not contain any hearsay statements, since they were "relevant regardless of whether the instructions they contain[ed] were ever followed." In a prosecution for extortion arising from a scheme involving falsified warrant applications, *United States v. Murphy, 193 F.3d 1 (1st Cir. 1999)* , the Court observed that instructions to a conspirator to falsify information in warrant applications and to not report moneys seized in raids conducted pursuant to the warrants were not hearsay, since they were not offered for the truth of the matters asserted but only to show that such instructions were given. In *United States v. Hicks*, n35 the Court held that a conversation was not hearsay when it was offered to prove that a defendant enlisted another in an attempt to make good on a threat. In *Curreri v. International Bhd. of Teamsters*, n36 the Court reversed a judgment against a union in an action for injuries that the plaintiff received when he crossed a picket line, finding error in the exclusion of

testimony by the union's business agent concerning directions he gave to workers on the first day of the strike. The instructions were not hearsay; they were conduct probative of whether the union instigated violence or attempted to prevent it. See also *Gutierrez-Rodriguez v. Cartagena* n37(evidence of prior complaints against a defendant police officer were not hearsay in a civil rights action, since they were offered to show that the supervisory response was inadequate rather than for their truth).

United States v. Bellomo, 176 F.3d 580 (2d Cir. 1999) : On appeal of RICO convictions, defendants argued that hearsay had been admitted as coconspirator statements without the required finding of a specific conspiracy beyond the general existence of the Mafia. The Court found that many of the instances objected to were not instances of hearsay, since the statements fell into the category of commands as to which the witness was a percipient hearer. Thus, gestures by a mob boss conveying "no making of members" or "no killing of people" without the boss's okay were unobjectionable. According to the Court, "Statements offered as evidence of commands, threats, or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay."

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) : In a prosecution for illegal ocean dumping and making false statements to a grand jury, the Court held that the contents of certain radiotelegrams were not hearsay, as the messages consisted largely of instructions, which are not declarations of fact capable of being true or false.

Butters v. Vance Int'l Inc., 225 F.3d 462 (4th Cir. 2000) : The plaintiff, a security agent for a United States security services corporation, sued for gender discrimination because she was not permitted to serve a full rotation guarding a Saudi Arabian princess in California. The defendants were granted summary judgment on the basis of immunity under the Foreign Sovereign Immunities Act. Affirming, the Court held there was no error in admitting evidence that a Saudi military officer in charge of the princess had said the plaintiff could not serve the full rotation. The statements were not hearsay but were relevant solely for the fact they were made, because they showed that the Saudis, not the defendants, were responsible for the plaintiff's assignment.

Business Elec. Corp. v. Sharp Elec. Corp., 780 F.2d 1212 (5th Cir. 1986) , *aff'd, 485 U.S. 717 (1988)* : Reversing an antitrust judgment against Sharp, the Court noted that it was error to exclude a document indicating a policy of replacing dealers who did not meet a sales quota. The document was not hearsay, the Court reasoned, since it stated company policy. Similarly, another document stating that the plaintiff had fallen short of its quota was nonhearsay if offered to prove the belief of the defendant. See also *Muncie Aviation Corp. v. Party Doll Fleet, Inc.* n38(tried pre-Rules) (two advisory circulars promulgated by the FAA containing recommendations for landing procedures were relevant on the standard of care in this aircraft collision case; *Rule 801(c)* was invoked to show that the evidence probably was not hearsay but was circumstantial evidence not offered for its truth).

Crawford v. Garnier, 719 F.2d 1317 (7th Cir. 1983) : Affirming an employee's judgment in an action alleging that his termination from a federal emergency employment program violated his *First Amendment* rights, the Court upheld the admission of the plaintiff's testimony that an employment analyst who worked for the defendant had told him to fill out an application in a certain way. The testimony was not hearsay, since it merely related instructions that were not offered for their truth.

United States v. Morales-Macias, 855 F.2d 693 (10th Cir. 1988) : The Court affirmed a defendant's conviction for transporting illegal aliens, finding that directions given to aliens seeking transportation were not hearsay and were offered to explain how the aliens came upon the defendant. In *United States v. Shepherd*, n39 the Court held that instructions by one person to another were not hearsay where they were offered to show they were given, not that they

were true.

United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996) : The Court affirmed convictions arising from a cocaine distribution ring that engaged in murder, kidnapping, torture, and money laundering. It concluded that evidence that one defendant's murdered wife had turned over documents to another person, and directed that the documents be turned over to the police if anything happened to her, did not constitute hearsay. A direction given by the wife was not a statement of fact offered for its truth.

[vi] Rule 801(c) -- Examples of Nonhearsay -- Employment Discrimination Cases

Staniewicz v. Beecham, Inc., 687 F.2d 526 (1st Cir. 1982) : In an age discrimination suit, the Court held that the results of a telephone audit of an employee's customers by a supervisor were not hearsay when they were offered not for their truth, but only to show why a meeting was called that ultimately led to the employee's resignation.

Cameron v. Community Aid for Retarded Children, Inc., 335 F.3d 60 (2d Cir. 2003) : The plaintiff's supervisor discharged her when his investigation revealed that she had been abusive and intimidating, she was not trusted by her staff, and she had urged the staff to join her in a bid to unseat her supervisor. Affirming summary judgment for the defendant in the plaintiff's ADA action, the Court held that the statements from the staff were not hearsay because they were offered for their effect on the supervisor's mind in making the discharge decision, and were not used to prove the truth of the matters asserted. In a § 1983 action, *Barrett v. Orange County Human Rights Comm'n, 194 F.3d 341 (2d Cir. 1999)* , the Commission's former executive director alleged that he was dismissed for exercising *First Amendment* rights. The Court found no error in the admission of testimony by commissioners that they had been told by other commissioners of the plaintiff's arrogant, difficult, and obstructionist conduct and statements. The evidence was not hearsay because it was not admitted to show that the third parties' statements were true, but rather that the witnesses were motivated by the plaintiff's behavior and not by his comments on politically sensitive issues. In *Mazzella v. RCA Global Commun., Inc.*, n40 the Court held that evidence of complaints about an employee's performance was admissible to show why superiors acted, not for their truth.

Rinehimer v. Cemcolift, Inc., 292 F.3d 375 (3d Cir. 2002) : An employee, who suffered from asthma, was discharged after he developed pneumonia. Affirming a judgment for the defendant in a disability discrimination action, the Court held there was no abuse of discretion in admitting testimony that the employer was told by its doctor that the plaintiff could not wear a respirator. The evidence was not offered for its truth but to explain why the manager did not allow the employee to return to his job as a working foreman and wear a respirator.

Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002) : Affirming a judgment for a former employee who claimed sexual harassment and retaliation by a university, the Court held that the plaintiff was properly permitted to offer evidence of three other complaints made against the supervisor who allegedly harassed her. The evidence was admitted to show that the university was on notice that the supervisor might have been engaged in harassment, not for its truth. In *Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996)* , the Court affirmed a judgment against an assistant basketball coach who claimed discrimination when he was not rehired, holding that specific instances cited in the head coach's affidavit of the plaintiff's refusing to follow directions and questioning the head coach's judgment were not hearsay even though not based on personal knowledge, as those incidents were not offered for their truth but only as proof of the motive for failing to renew the contract. In an age discrimination action, *Stendebach v. CPC Int'l, Inc.*, n41 the Court held that documents offered to show the methodology used by the employer's committee to rate employees were properly not offered for their truth, but to show that they existed.

Smith v. Great Am. Restaurants, Inc., 969 F.2d 430 (7th Cir. 1992) : The Court held in an age discrimination case that there was no abuse of discretion in allowing witnesses to recount statements by the plaintiff that repeated discriminatory statements by the defendant's supervisor, as the testimony showed both that the plaintiff's version of events was consistent and that certain other employees resigned for purposes other than to join the plaintiff in a new business.

Wolff v. Brown, 128 F.3d 682 (8th Cir. 1997) : Affirming a judgment for an employer in a wrongful discharge case, the Court held that internal documents prepared by employees describing instances of the plaintiff's job misconduct were properly admitted. The reports were not hearsay, because they were offered to explain why the employer discharged the plaintiff. See also *Crimm v. Missouri P. R. Co.* n42(a managing agent's handwritten notes and report are not hearsay in an age discrimination case if offered to show that the company had a basis for making an employment decision).

Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991) : Reviewing a Title VII sex discrimination action, the Court held there was no abuse of discretion in admitting testimony by the plaintiff that she did not take an examination because she was told she would not be promoted. The evidence was admissible to show the plaintiff's state of mind in deciding whether to take the examination. In a suit by an employee who alleged breach of contract by an employer, *Henein v. Saudi Arabian Parsons Ltd.*, n43 the Court held that statements by the Saudi Arabian government concerning the employee were admissible as nonhearsay evidence of why the employer discharged the employee.

Moore v. Sears, Roebuck & Co., 683 F.2d 1321 (11th Cir. 1982) : In an age discrimination case, Sears introduced memoranda prepared by the plaintiff's supervisor to show why it fired the plaintiff. The Court held that the evidence was not hearsay. It was not offered for its truth, but to show that Sears had a nondiscriminatory reason for the discharge.

[vii] Rule 801(c) -- Examples of Nonhearsay -- Existence of Information

Harvey Barnett, Inc. v. Shidler, 338 F.3d 1125 (10th Cir. 2003) : Reviewing summary judgment for the defendant in a trade secret case, the Court held there was no error when the Judge relied on library books and information downloaded from the Internet in determining that variations of the plaintiff's methods "are known both inside and outside the children's aquatic business," and that a variation of the plaintiff's methods "could be created through a perusal of commercially available ... books." The materials considered were not admitted for the truth of the matter asserted therein, but for the very fact that publicly-available information existed.

[viii] Rule 801(c) -- Examples of Nonhearsay -- False Statements

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) : In a racketeering case involving procurement of Postal Service contracts, the Court held that a "script" prepared by one defendant for another person, in an effort to influence what he would say about the scheme, was nonhearsay. The government offered the script to prove that the information contained therein was false, rather than true.

United States v. Munson, 819 F.2d 337 (1st Cir. 1987) : The Court held that false statements by conspirators to conceal their actions were not hearsay.

United States v. Aponte, 31 F.3d 86 (2d Cir. 1994) : In a postal robbery conspiracy case, the Trial Judge excluded as hearsay evidence that a government witness had given a fabricated statement and false descriptions of the "robbers."

The Court held that the statements were not hearsay because they were offered to show the witness' capacity for deception, not for the truth of the matter asserted; however, they were properly excluded under *Rule 608(b)* as extrinsic evidence of the character and conduct of the witness.

United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997) : During a kidnapping and drug distribution conspiracy, a detective came to the door of a house in which conspirators were staying. A defendant and the wife of another answered the door; the latter gave a false name for the former. The Court held that the woman's statement was not hearsay because it was not offered for its truth. Rather, the false statement tended to show the defendant's consciousness of guilt because he did not correct it, and the jury could reasonably have inferred that he welcomed the misidentification.

United States v. Moore, 748 F.2d 246 (5th Cir. 1984) : The Court held that a letter written by the defendant was not hearsay where it was not offered for its truth but to establish mail fraud. See also *United States v. Adkins, 741 F.2d 744 (5th Cir. 1984)* (statements offered to prove falsity, not truth, are not hearsay).

United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986) : Affirming a fraud conviction, the Court concluded that business records were admissible as nonhearsay when they were offered to show that they existed, something denied by the defendant as an excuse for not returning funds to customers. The Court also noted that statements offered to prove the falsity of the matters asserted were not hearsay.

United States v. Feldman, 825 F.2d 124 (7th Cir. 1987) : Affirming convictions for fraud, the Court held that testimony concerning representations by salesmen was nonhearsay evidence offered to prove that the statements were false. Thus, it was not necessary to decide whether the statements were agents' admissions. See also *United States v. Hoag, 823 F.2d 1123 (7th Cir. 1987)* (letters claimed to be false were not hearsay).

United States v. Knigge, 832 F.2d 1100 (9th Cir. 1987) , *amended*, *846 F.2d 591 (9th Cir. 1988)* : The Court held that the hearsay rule does not bar evidence of statements offered for purposes of showing that they were false. In *United States v. Gibson*, n44 the Court held that testimony by investors as to what salesmen said to get them to invest was not hearsay; it was offered to prove a scheme. See also *United States v. Wellington* n45(false representations alleged as mail fraud are not hearsay).

United States v. Costa, 31 F.3d 1073 (11th Cir. 1994) : The Court held that a custodial statement in which the declarant sought to exculpate himself was not hearsay, where the government sought to create an inference of his guilt by showing, through the introduction of other evidence, that the declarant had lied to his interrogators.

[ix] Rule 801(c) -- Examples of Nonhearsay -- Impeachment

Conte v. General Housewares Corp., 215 F.3d 628 (6th Cir. 2000) : Affirming a judgment for a painter who was severely injured when an extension pole he used to paint a water tank came into contact with energized power lines, the Court found it was error (but harmless) to exclude on hearsay grounds a statement by another painter that he knew the power lines were hot. The statement was offered to impeach the witness' contrary trial testimony, and not for its truth.

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) : The defendants in a drug trafficking conspiracy trial sought to impeach a cooperating witness with two letters the witness had written to the prosecutor in which he said he

was "not a bad person" and was "riding with the government 100%" and that he knew enough information so that "we can make arrangements for [me] to go home." The Court noted that "the better practice would have been" for the Judge to allow each defense attorney some leeway to cross-examine the witness on the letters, as evidence of his biases and motivations for testifying, but that any error was harmless. The Court rejected the government's assertion that the letters were inadmissible hearsay, noting that they were "textbook examples of impeachment evidence."

United States v. Sadler, 234 F.3d 368 (8th Cir. 2000) : In a trial for armed bank robbery and firearm possession, the defendant offered testimony from an attorney who had represented him in state court that the defendant protested his innocence moments before confessing to a deputy. Affirming, the Court rejected a defense argument that the evidence was admissible for the nonhearsay purpose of impeaching the credibility of the officer, who testified that the defendant confessed to him, saying that "the proffered testimony would only have its desired effect if in fact the statements [to the attorney] were true." This case is discussed in the Editorial Explanatory Comment, *§ 801.02[1][e]*. In a product liability action for automobile injuries allegedly caused by a defective gearshift, *Foster v. General Motors Corp., 20 F.3d 838 (8th Cir. 1994)* (per curiam), the defendant introduced the original police report prepared by the investigating officer, together with a copy of the report received from the plaintiffs' attorney that contained alterations in a different handwriting that blamed the accident on the car's gearshift. The Court held the second report was not hearsay lacking trustworthiness for admission under the public records exception; rather, it was offered only to impeach a plaintiff's direct testimony that he did not alter the report before giving it to his attorney and thereby to rebut the claim that the gearshift caused the accident.

Ostad v. Oregon Health Sciences Univ., 327 F.3d 876 (9th Cir. 2003) : Affirming a judgment for a former resident at a medical university who claimed that he was terminated in retaliation for questioning a physician's billing practices, the Court upheld the admission of prior inconsistent statements of a defense witness, noting that they were offered for impeachment rather than for their truth.

[x] Rule 801(c) -- Examples of Nonhearsay -- Information Automatically Generated

United States v. Khorozian, 333 F.3d 498 (3d Cir. 2003) : In a bank fraud prosecution the Court held that it was error (but harmless) to exclude a fax offered by the defense because the header, which included the transmission date, was hearsay. The header was not hearsay because "[u]nder *FRE 801(a)*, a statement is something uttered by 'a person,' so nothing 'said' by a machine ... is hearsay."

United States v. Hamilton, 413 F.3d 1138 (10th Cir. 2005) : In a prosecution for transporting child pornography, the Court held there was no error in admitting header information on computer images over a hearsay objection. The header, which was automatically generated by the hosting computer whenever an image was uploaded, included the screen name of the poster, the subject of the posting, the date, and the person's IP address. Because the header was generated without the assistance or input of a person, "there was neither a 'statement' nor a 'declarant' involved here within the meaning of *Rule 801*," so the information was not hearsay.

[xi] Rule 801(c) -- Examples of Nonhearsay -- Knowledge and Notice

[A] Rule 801(c) -- Civil Cases

Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998) : In a product liability action for injuries from a milling machine, the plaintiff offered evidence that the same model of milling machine had killed a worker in Canada a year earlier. The defendant responded with testimony from a coroner's inquest into the Canadian incident, which

indicated that those investigating the incident concluded that the accident was caused by the victim's own carelessness. The Court held it was error (but harmless) to exclude the testimony from the coroner's inquest as hearsay, since the testimony was not offered for its truth, "but rather to prove that the defendant was not on notice of the alleged design defect."

Coyne v. Taber Partners I, 53 F.3d 454 (1st Cir. 1995) : Reversing a summary judgment for the defendant hotel in a negligence suit by a guest injured during a labor dispute, the Court held that a newspaper article describing the tense circumstances and potential for violence was not hearsay because it was not offered for its truth but rather to establish that the hotel knew or should have known of the violent nature of the protest.

Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002) : Affirming a judgment for a former employee who claimed sexual harassment and retaliation by a university, the Court held that the plaintiff was properly permitted to offer evidence of three other complaints made against the supervisor who allegedly harassed her. The evidence was admitted to show that the university was on notice that the supervisor might have been engaged in harassment, not for its truth. In a wrongful death action arising from an accident on a conveyor, *Alexander v. Conveyors & Dumpers, Inc.*, n46 the Court affirmed a judgment for the manufacturer, holding that testimony by the deceased co-worker concerning a conversation he had had with the deceased concerning the conveyor was not hearsay, since it was admitted to show knowledge of danger and assumption of the risk, not the truth of statements made in the conversation.

Cook v. Navistar Int'l Transp. Corp., 940 F.2d 207 (7th Cir. 1991) : Affirming a judgment for the defendant in a product liability action brought by a truck driver who was injured while attempting to climb the rear of the cab, the Court held it was error, but harmless, to exclude industry publications that would have shown the defendant had notice of prevailing design standards and that it did not, in fact, produce the best system it could have, given this knowledge. In an action for willful violations of an automatic stay, *Price v. Rochford, 947 F.2d 829 (7th Cir. 1991)* , the Court noted that newspaper articles reporting that the plaintiff was in bankruptcy raised no hearsay problem because they were offered only for the notice they gave readers.

Barnes v. Prudential Ins. Co., 76 F.3d 889 (8th Cir. 1996) : The Court reversed a judgment for an insurer in an action by an insured's surviving sibling, who claimed that the company's agent negligently failed to provide forms to the insured so that he could change the policy to make the plaintiff his beneficiary. It held that testimony by an insurance agent that the insured told him four times that he wanted to make the plaintiff his beneficiary was improperly excluded as hearsay. The insured's statements were relevant to prove the agent's knowledge of the insured's wishes, and were not offered for their truth. However, statements by the insured to others, to the effect that he had told the insurance agent to change the beneficiary, were inadmissible hearsay.

CalMat Co. v. United States Dep't of Labor, 364 F.3d 1117 (9th Cir. 2004) : Upholding a decision finding that whistleblower protection provisions had been violated, the Court held that testimony about racially offensive name-calling and reporting the incident to the employee's supervisor was not hearsay. The name-calling evidence was not offered for the truth of the statements but merely to show the statements were made, and the reports to the supervisor reflected first-hand perceptions of the witness and were relevant not for the truth of the statements but to show notice to the employer. In *Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002)* , the plaintiff news organization videotaped the notorious beating of Reginald Denny and obtained copyrights for four segments of its tape. In a copyright infringement action, the Court reversed in part summary judgment for the defendants, holding that a statement by the husband of the woman who shot the tape that he requested a videotape from a television station's archivist was not hearsay, because it was offered to show that the request led the station to send

him the tape.

Benford v. Richards Med. Co., 792 F.2d 1537 (11th Cir. 1986) : In an action by a patient against a manufacturer of a hip prosthesis, the Court held that testimony by an employee of a company, hired by the defendant to make metallurgical evaluations of metals being considered for use in a prosthesis, that he heard a former president of his company advise the defendant's representative on the telephone not to use stainless steel in a hip prosthesis was nonhearsay when used to show notice of potential problems with the use of the metal.

[B] Rule 801(c) -- Examples of Nonhearsay -- Knowledge and Notice -- Criminal Cases

United States v. Baird, 29 F.3d 647 (D.C. Cir. 1994) : In a prosecution for conflict of interest violations, the government showed that a legal officer had advised the defendant against his conduct, and the defendant attempted to introduce evidence that other legal and contracting officers had given other advice, which was relayed to the defendant by another officer. Reversing, the Court held it was error to exclude the evidence as hearsay, since it was offered only for its effect on the defendant's knowledge and intent, not for the truth of the matters asserted.

United States v. Oguns, 921 F.2d 442 (2d Cir. 1990) : The Court affirmed a conviction for heroin offenses, holding there was no error in admitting testimony that in a phone conversation during a search of the defendant's apartment, an unidentified caller asked, "Have the apples arrived there?" The statement was not hearsay because an inquiry is not an assertion, and the fact the caller's identity was not known did not matter when the phone call was offered as circumstantial evidence of the defendant's knowledge and intent regarding the importation and distribution charges. In *United States v. Puzzo, 928 F.2d 1356 (2d Cir. 1991)* , the Court held, in the prosecution of a conspiracy to import and distribute heroin, that it was error (but harmless) to exclude as hearsay a defendant's testimony concerning conversations with a coconspirator tending to prove that the defendant had been duped into believing he would be carrying jewelry, not drugs, from Italy.

United States v. Parry, 649 F.2d 292 (5th Cir. 1981) : The Court held that the defendant's statement to his mother that he was working for a narcotics agent was not hearsay because it was not offered for its truth, but to show his knowledge of the agent's identity.

United States v. Johnson, 71 F.3d 539 (6th Cir. 1995) : Affirming a physician's conviction for illegal distribution of drugs and mail fraud, the Court held it was error to admit testimony by a clinic employee that when she told the defendant's partner that pharmacies had called about prescriptions written by the defendant, the partner became upset and said she would speak to the defendant about that. However, the error was harmless, because the witness later heard the partner tell the defendant over the telephone to "stop writing prescriptions like that," which was evidence that the defendant knew he was prescribing medication without a legitimate medical purpose. In *United States v. Mays, 69 F.3d 116 (6th Cir. 1995)* , a prosecution for selling allegedly pure orange juice adulterated with sugar, the Court held that testimony that purchasers had reported the results of scientific tests was not hearsay, since it was not offered to prove the existence of sugar in the juice, but rather was used to prove the intent element of the fraud charge by creating an inference that the defendants knew of the adulteration.

United States v. Moore, 845 F.2d 683 (7th Cir. 1988) : The Court held that an inmate's letters to the defendant asking her to obtain drugs for him to sell so that he could fund his legal appeals were admissible to show that the defendant was aware of the inmate's interest in obtaining money, even illegally.

United States v. Kurkowski, 281 F.3d 699 (8th Cir. 2002) : The defendant, charged with drug dealing, claimed entrapment and argued that the government targeted him without reason. The Court held that evidence of the reasons behind the government's interest in the defendant thus became relevant, so an officer's testimony recounting an unnamed informant's story of the defendant's earlier drug sales was admissible nonhearsay.

United States v. Rogers, 321 F.3d 1226 (9th Cir. 2003) : The defendant was convicted of money laundering for serving as a referral agent for a Ponzi scheme. The Court held there was no error in admitting evidence of the criminal complaint filed against the scheme's organizer, to show that once the defendant received a copy of the complaint he was aware that the scheme might be fraudulent. That was a proper purpose, for which the evidence was not hearsay. In a money laundering prosecution, *United States v. Artega, 117 F.3d 388 (9th Cir. 1997)* , the government introduced Western Union "to-send" money order forms found in a defendant's apartment that contained as the recipient's name an alias proved to have been used by another conspirator. The government acceded to an instruction that the forms were not admissible for the truth of any matter asserted, so the Court held that the convictions would be reviewed using the evidence only for proper purposes remaining after that limitation. The Court held that because it was unlikely that anyone not involved in the conspiracy would have had knowledge or reason to use the alias, it provided strong circumstantial evidence that the defendant had knowledge necessary to commit the charged acts. In a prosecution of a kickback scheme, *United States v. Kenney*, n47 the Court held that testimony by an Assistant U.S. Attorney that he had told a witness' attorney that immunity was unacceptable and the witness would be prosecuted for his involvement in the scheme was not hearsay, as it was offered to show the witness knew he would not be given immunity and, therefore, had no motive to lie to gain points with the prosecutor. In *United States v. Castro*, n48 the Court held credit reports were admissible in a prosecution for misapplication of bank funds to prove information available to a loan official, not for their truth.

United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995) , *amended* (11th Cir. 1996): The defendant was convicted for obtaining bank loans by falsely representing that he was the beneficiary of a trust fund and that his father would give him financial assistance. At trial, the government introduced letters from the defendant's father, written to the defendant, indicating that the trust fund was depleted and that the defendant would no longer receive financial assistance. The Court reasoned that the letters were potentially admissible to prove two points: that the defendant's statements to the banks were false because he had no trust fund or financial assistance, and that the defendant (in light of the letters) knew the statements were false. While the letters were hearsay if offered for the former purpose, they were nonhearsay if offered for the latter. Since the letters were probative for a nonhearsay purpose, and since the jury was instructed to consider the letters only as proof of the defendant's state of mind, the Court found no error in their admission.

[xii] Rule 801(c) -- Examples of Nonhearsay -- Nonassertive Conduct

United States v. Zenni, 492 F. Supp. 464 (E.D. Ky. 1980) : In a prosecution for illegal bookmaking activities, the Court held that telephone conversations overheard by government agents executing a search warrant in which unknown callers attempted to place bets on sporting events were not hearsay, but involved "implied assertions" that properly are classified as nonassertive verbal conduct.

United States v. Cassano, 372 F.3d 868 (7th Cir. 2004) : At trial of a fraud scheme involving currency transaction structuring, a cooperating witness was permitted to testify that he asked two unidentified individuals, who declined to join the conspiracy, before the defendant agreed to join. The Court held that the witness' testimony that the individuals would not join was not hearsay because it contained nothing that could reasonably be characterized as an assertion of fact by the individuals. Even if some assertion were made, the evidence was not offered to prove its truth but only to describe its effect on the witness and how it was he came to seek the defendant's help.

[xiii] Rule 801(c) -- Examples of Nonhearsay -- Personal Knowledge Distinguished

United States v. Soto-Beniquez, 356 F.3d 1 (1st Cir. 2003) : Affirming convictions in a complex drug conspiracy and continuing criminal enterprise prosecution, the Court held that an officer's testimony that he observed a field test of narcotics was not hearsay, since he testified only to his observations and not to statements by those conducting the tests.

[xiv] Rule 801(c) -- Examples of Nonhearsay -- Prior Statement Adopted by Witness

Amarin Plastics, Inc. v. Maryland Cup Corp., 946 F.2d 147 (1st Cir. 1991) : The Court held in a breach of contract action that exhibits to an admissible deposition were not hearsay because the deponent had testified that the exhibits were his own statements and that they were true, so they became his present testimony.

[xv] Rule 801(c) -- Examples of Nonhearsay -- Receipts, Registration Cards, Invoices

United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004) : The Court vacated a conviction arising from an immigration fraud scheme because credit card receipts offered by the defendant to prove an alibi were improperly excluded. The receipts "[did] not trigger the traditional reliability concerns of hearsay -- defects in memory, perception, narration, or sincerity." Once a foundation of authenticity was established, they were circumstantial evidence that someone using the defendant's name made the purchases, from which the jury could infer that the purchases were made by the defendant himself, which tended to support his alibi.

United States v. Pulido-Jacobo, 377 F.3d 1124 (10th Cir. 2004) : The defendants, arrested in a car in which narcotics had been secreted, contested the link between them and the contraband that was required to establish constructive possession. They objected on hearsay grounds to the admission of a two-year-old receipt, found in one defendant's wallet, for repairs to a truck engine, which matched a copy found in the car's console. Affirming, the Court found no abuse of discretion in the admission of the engine receipts, since they were not offered to prove the truth of the matter asserted but only as circumstantial evidence that the defendant had sufficient control of the car to store an old receipt in it.

[xvi] Rule 801(c) -- Examples of Nonhearsay -- Questions

Lexington Ins. Co. v. Western Pa. Hospital, 423 F.3d 318 (3d Cir. 2005) : Affirming summary judgment for the insurer in a coverage dispute, the Court suggested that an internal business form containing handwritten notations was not hearsay because the document was an inquiry into whether the data processing department could find information, "[n]otwithstanding the fact that this inquiry could reveal assumptions the declarant might have made" about the matter. In the Court's view, "the declarant was not making an assertion, but rather was asking a question, which does not constitute hearsay under Rule 801(a)(1) and (c)." The Court added in a footnote that even if the document constituted an assertion, it would likely be admissible as an admission by a party-opponent under *Rule 801(d)(2)(D)*.

United States v. Wright, 343 F.3d 849 (6th Cir. 2003) : In the defendant's trial for offenses that included a murder arising out of a cocaine distribution scheme, the Judge admitted testimony from the victim's wife that she had received a telephone call from the defendant's girlfriend before the murder, and the girlfriend asked where the defendant was. The defendant objected that the girlfriend's statement was hearsay. But the Court found no error, since a question "merely seeks answers and usually has no factual content."

[xvii] Rule 801(c) -- Examples of Nonhearsay -- Statements Affecting Legal Rights

Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Board, 298 F.3d 201 (3d Cir. 2002) : The Court reversed much of a summary judgment for Board members in a case challenging the Board's enforcement of minimum wholesale and retail milk prices, In the course of its opinion, the Court noted that "a statement offering to sell a product at a particular price is a 'verbal act,' not hearsay, because the statement itself has legal effect."

United States v. Boulware, 384 F.3d 794 (9th Cir. 2004) : The Court reversed a conviction on tax charges, finding an abuse of discretion in the exclusion of evidence of a State Court judgment entered in a suit by the defendant against a former girlfriend. The government alleged that the defendant diverted funds from a company by giving the funds to his girlfriend and wife without reporting any of the money on his income tax returns. The state judgment established that money given to the girlfriend was not a gift and was to be held in constructive trust for the company. The Court reasoned that the judgment was relevant to prove that the money was held in trust, which established the legal effect of the transaction and thus the judgment was not hearsay. In *Stuart v. Unum Life Ins. Co. of Am., 217 F.3d 1145 (9th Cir. 2000)* , the Trial Judge remanded an insurance dispute removed from State Court on the ground that the defendants had not carried their burden of showing that the plan was an ERISA plan, which would have subjected the case to federal jurisdiction. Reversing an order granting the plaintiffs costs and expenses for improper removal, the Court held that it was error to treat the group insurance policy as inadmissible hearsay, since it was a legally operative document that defined the rights and liabilities of the parties in the case, including the rights and liabilities bearing on whether it was an ERISA plan. In *United States v. Alexander*, n49 the Court affirmed a bank robbery conviction, holding there was no error in admitting an FDIC certificate of insurance to prove the bank's insured status. Although the certificate had been admitted at trial under the residual exception, because it was a written statement affecting legal rights, it fell outside the definition of hearsay.

[xviii] Rule 801(c) -- Examples of Nonhearsay -- Statements Relied Upon

[A] Rule 801(c) -- Civil Cases

Ramirez Rodriguez v. Boehringer Ingelheim, 425 F.3d 67 (1st Cir. 2005) : In an age discrimination action by a drug salesman who had been terminated, the Court held there was no error in considering out-of-court statements by physicians who asserted that the plaintiff had dealt with drug samples improperly. The statements were not offered for their truth but to show the basis on which the employer decided to terminate him. In *Pace v. Insurance Co. of N. Am.*, n50 the Court held that letters containing the results of interviews with a vessel's owner and captain were admissible to prove why an insurer refused to pay and to demonstrate good faith, not for the truth of the statements. See also *Kassel v. Gannett Co.* n51(portions of a Veterans' Administration investigative report offered in a libel action were not hearsay, since they were admitted as state of mind evidence on the contested issue of why the VA took action, rather than as proof of the matters asserted).

Rinehimer v. Cemcolift, Inc., 292 F.3d 375 (3d Cir. 2002) : An employee, who suffered from asthma, was discharged after he developed pneumonia. Affirming a judgment for the defendant in a disability discrimination action, the Court held there was no abuse of discretion in admitting testimony that the employer was told by its doctor that the plaintiff could not wear a respirator. The evidence was not offered for its truth but to explain why the manager did not allow the employee to return to his job as a working foreman and wear a respirator.

Cebollero v. Commissioner, 967 F.2d 986 (4th Cir. 1992) : In an income tax deficiency suit against owners of a liquor store, a revenue agent testified that in reconstructing the store's income, she had called the county liquor board for an accurate list of prices paid for the goods sold. The Court held that the call was properly admitted for the limited

purpose of showing the reasonableness of the agent's method, not to prove the actual prices paid, as the issue before the Tax Court was not the amount owed but the reasonableness of the government's deficiency determination.

Martin Texas Energy Co. v. Washington Gas Light Co., 890 F.2d 784 (5th Cir. 1989) : In a suit by the seller of natural gas against the buyer for breach of contract and against a pipeline for tortious interference, a pipeline employee testified that he had been told by an employee of the seller not to disclose to the buyer the source of the gas to be transported. The seller objected that the statement was hearsay, but the Court held it was offered only to show that an improper request had been made that would justify the pipeline in refusing to transmit the gas, not that the seller actually wished to engage in improper conduct.

Woods v. City of Chicago, 234 F.3d 979 (7th Cir. 2000) : Affirming summary judgments for the defendants in a civil rights suit arising from a warrantless arrest, the Court held there was no error in considering an arrest report and a verified criminal complaint made by the alleged victim. While the documents would not be admissible as business records to prove the truth of included statements made by persons who were not part of the business, in this case they were offered only for their effect on the defendants, to provide a basis for concluding that a reasonable person in the officer's position would have probable cause to believe that an offense had been committed.

Orsini v. O/S Seabrooke O.N., 247 F.3d 953 (9th Cir. 2001) : The defendants in a Jones Act case claimed that the injured seaman had given a release; the seaman claimed it was coerced. Reversing summary judgement for the defendants, the Court held that fellow crew members' statements recounted in an affidavit were not hearsay because they were offered for the effects those statements had on his state of mind and not for the truth of the matters asserted.

FDIC v. Marina, 892 F.2d 1522 (11th Cir. 1990) (per curiam): In a proceeding by the FDIC to collect debts due a closed bank, the borrowers attempted to prove that the bank released certain guaranties prior to its closing by virtue of an accord and satisfaction. The Trial Judge excluded as hearsay testimony by the bank's former president that the accord and satisfaction had been entered into because the parties were informed that Small Business Administration regulations made a guaranty unenforceable. The Court reversed, holding that the evidence was not offered to prove that the guaranty was, in fact, unenforceable, but only as evidence of a basis for the parties' belief.

American Airlines v. United States, 204 F.3d 1103 (Fed. Cir. 2000) : In a refund action to recover withholding and other taxes that had not been collected on per diem payments to employees, the Court held it was error to exclude studies of business travel costs on hearsay grounds. The studies were offered not to prove that the per diem rates were at or below the employees' actual expenses, but to show the reasonableness of the taxpayer's belief that its per diem rates fairly represented its employees' actual expenses.

[B] Rule 801(c) -- Examples of Nonhearsay -- Statements Relied Upon -- Criminal Cases

United States v. Legarda, 17 F.3d 496 (1st Cir. 1994) : In a prosecution for drug possession, the Court held it was error (but harmless) to exclude testimony by the defendant recounting innocuous reasons offered by various declarants that would prompt him to perform the acts that eventually led to his arrest. In *United States v. Yefsky, 994 F.2d 885 (1st Cir. 1993)* , the Court held it was error (but harmless) in a fraud and conspiracy prosecution to exclude testimony by the defendant's wife, who served as his bookkeeper, about a conversation in which a codefendant said she would not have to file forms for him. The evidence was not hearsay, as it demonstrated the wife's reliance on the statement and the defendant's lack of intent to help the codefendant evade taxes.

United States v. Kohan, 806 F.2d 18 (2d Cir. 1986) : The Court reversed a conviction for bank fraud, finding that testimony that described conversations between a defendant and a codefendant in which the codefendant made certain statements concerning the sale of property should have been admitted as nonhearsay to show the understanding of the defendant and the background against which he acted.

United States v. Jackson, 621 F.2d 216 (5th Cir. 1980) : A conviction for making false bank entries was reversed in part because the defendant was not permitted to testify to a conversation that, he claimed, would have shown that he did not know his entry was false. It was improper to exclude the evidence as hearsay, since it was not offered for its truth, but only to show what the defendant was told and relied upon.

United States v. Branham, 97 F.3d 835 (6th Cir. 1996) : A defendant in a marijuana conspiracy trial sought to support his entrapment defense by introducing a government informant's statements attempting to involve the defendant in a number of illegal activities, but the statements were excluded at trial as hearsay. The Court held that the statements were not hearsay because they were offered for their effect on the defendant's state of mind, not as proof of the matters asserted. The error was harmless, however. In *United States v. Horton*, n52 the Court held that evidence of statements made was not hearsay when it was offered to show the victim's reaction to the statements. In *United States v. Gibson*, n53 the Court found error, albeit harmless, in the exclusion on hearsay grounds of a statement made by one union official that was offered to explain the defendant's subsequent conduct. The Court observed that where a statement is relevant because it was made, not because it is asserted to be true, there is no hearsay problem with the statement.

United States v. Hanson, 994 F.2d 403 (7th Cir. 1993) : The Court held that it was error (but harmless) in a tax prosecution to exclude evidence of a conversation that a defendant claimed to have had with his employer's vice president, which was offered to prove that the defendant was told that he did not have to reveal certain information on a conflict-of-interest form. The statement was offered to explain its effect on the defendant's conduct, not for its truth. In *United States v. Harris*, n54 a prosecution of two young women for failure to pay income tax on money received from a wealthy widower, letters from the transferor stating that he enjoyed giving things to the transferee were excluded as hearsay. The Court reversed, holding that the letters were not hearsay, because they were offered to prove the recipient's lack of willfulness, not the truth of the matters asserted. In *United States v. Norwood*, n55 the Court affirmed a conviction for knowing possession of stolen mail matter, but it found error (albeit harmless) in the exclusion as hearsay of testimony as to what a declarant said in giving the defendant a credit card. Use of the testimony to prove the defendant's state of mind was not hearsay.

United States v. Roberts, 676 F.2d 1185 (8th Cir. 1982) : The Court found it was error (but harmless) to exclude statements made by a government witness that were offered not for their truth, but to show why the defendant went to a certain location following a conversation with the witness.

United States v. Bishop, 291 F.3d 1100 (9th Cir. 2002) : The defendants in a tax fraud case claimed that they relied upon the advice of their accountant (*L*), since deceased, in treating certain money received as loans rather than as income. The defendants, who called a corporate accountant (*G*) to testify as to his conversations with the defendants about the tax advice they received from *L*, argued that *G*'s testimony was admissible as nonhearsay to prove good faith reliance on advice. Affirming, the Court held that *G* was properly prevented from testifying to what defendants told him that *L* had said; that testimony was offered to prove the truth of the matter asserted. The Court also held, however, that it was error (but harmless) to exclude one defendant's testimony as to what *L* advised him, because the defendant "had the right to tell the court his own version of the tax advice on which he claimed to have relied." In *United States v. Saavedra*, n56 the Court affirmed wire fraud and conspiracy convictions, and found that testimony of victims concerning calls that they had received was not hearsay where it was not offered for its truth, but to show how credit

card numbers had been fraudulently obtained. See also *United States v. Kirk* n57(testimony that employees made fraudulent statements was admissible not for its truth, but to show the effect on the listeners).

[xix] Rule 801(c) -- Examples of Nonhearsay -- State of Mind

United States v. Hayes, 369 F.3d 564 (D.C. Cir. 2004) : The prosecution in a trial for conspiracy to submit false overtime claims to the government introduced the tape recording of a telephone conversation in which the conspirators' supervisor told a cooperating conspirator to "get [the defendant]." The tape was admitted, although it "may not add anything," in an effort to connect the defendant to covering up the conspiracy. Responding to the suggestion that he participated in the cover-up, the defendant sought to introduce the tape of a second conversation, about an hour later, in which he told the cooperating conspirator to "tell the truth." The second tape was excluded as "self-serving hearsay," but the Court held it was nonhearsay admissible to prove the defendant's state of mind: telling his coconspirator to "tell the truth" indicated that he did not think he did anything wrong, making it less likely that he had the specific intent to sustain the charges. The error was harmless, however. In *United States v. Thompson, 279 F.3d 1043 (D.C. Cir. 2002)* , the defendant was charged with crack distribution after he gave an undercover officer a large drink cup with a lid on it, was handed a bundle of money, asked "What's this?," was told $1,500, asked "Are you straight?," was told "I'm straight," and exited the car where the transaction took place. The defendant denied knowing cocaine was in the cup and testified that earlier a codefendant had asked him to deliver the cup, saying it contained $2,600, which the defendant assumed was to pay a gambling debt. The government's hearsay objection to the codefendant's statement was properly overruled, because the statement was offered for the nonhearsay purpose of proving the defendant's state of mind. The defendant also tried to recount what the codefendant said after he returned with the $1,500, but a hearsay objection was sustained as to any post-transaction statements. The Court held that although it was possible that post-transaction statements might also be nonhearsay relevant to the defendant's state of mind, any error had not been preserved.

Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241 (6th Cir. 1995) : In reversing a summary judgment for the defendant in a Title VII race discrimination action, the Court held that disparaging racist comments made by persons controlling the defendant were improperly excluded from consideration on hearsay grounds. The statements were not offered to prove their truth but to demonstrate the speakers' racial attitudes.

United States v. Price, 418 F.3d 771 (7th Cir. 2005) : In a drug prosecution, the Court found no error in the admission of a copy of a police alert seized from the home of one of the coconspirators. The alert was prepared by the local police department and listed many of the defendants as members of the drug conspiracy. The Court found that the alert was not offered for the truth of its assertions but rather to prove that members of the conspiracy were aware of the alert and were engaging in counter-surveillance of police activity. The Court also held that because the alert was not offered for its truth, its admission did not violate the defendants' right to confrontation under *Crawford v. Washington*. In a defamation and antitrust action between competing travel agencies, *Israel Travel Advisory Serv. v. Israel Identity Tours, 61 F.3d 1250 (7th Cir. 1995)* , the Court held that it was error (but harmless) to exclude evidence of telephone calls made by customers comparing the agencies. The statements were not offered for their truth but to show that customers were confused.

[xx] Rule 801(c) -- Examples of Nonhearsay -- Support for Administrative Decision

Moore v. Plaster, 313 F.3d 442 (8th Cir. 2002) : A state prisoner brought a § 1983 action alleging that he had been subjected to retaliatory discipline. Affirming summary judgment for the defendants, the Court held that a confidential file and investigation report, a transcribed interview, and other materials considered as part of the summary judgment record were not inadmissible hearsay. They were not considered to determine the truth of the matters asserted, but rather to determine whether the prison officials, who may rely on hearsay in disciplinary proceedings, had "some

evidence" to support the contested disciplinary actions.

[xxi] Rule 801(c) -- Examples of Nonhearsay -- Threats

United States v. Herrera, 600 F.2d 502 (5th Cir. 1979) : The Court overturned a conviction for illegal transportation of aliens, holding that the defendant should have been permitted to testify to the contents of threatening telephone calls that she claimed to have received. The evidence was not hearsay, since the important thing when the defense was duress was that the threats were made, not whether they would have been carried out.

United States v. Williams, 952 F.2d 1504 (6th Cir. 1991) : Affirming a conviction for extortion, the Court held that statements to the victim indicating the defendant's power to block a rezoning were not hearsay, but rather evidence bearing on the reasonableness of the victim's fear of economic harm.

United States v. Swanson, 9 F.3d 1354 (8th Cir. 1993) : In a prosecution for manufacturing marijuana, the defendant offered testimony regarding threats made by a cooperating witness against another person to support a coercion defense, but it was excluded as hearsay. The Court held that because the threat was not offered to prove the truth of matters asserted, it was not hearsay, but the evidence was nevertheless properly excluded because it was impermissible character evidence and extrinsic evidence offered to attack credibility.

[xxii] Rule 801(c) -- Examples of Nonhearsay -- Tools of the Trade

United States v. Gonzales, 307 F.3d 906 (9th Cir. 2002) : Affirming drug and firearms convictions, the Court upheld the admission of testimony by a DEA agent that three sheets of paper found in a notebook in the defendant's backpack were "pay/owe" sheets commonly used by drug dealers to keep track of drug sales. The Trial Judge had found that the sheets were hearsay but instructed the jury that they were admitted to explain the agent's testimony. Disagreeing that they were hearsay, and concluding that they were "tools of the trade," the Court emphasized that the sheets were not offered for the specific information conveyed on them, but for their significance as objects closely associated with the drug trade.

[xxiii] Rule 801(c) -- Examples of Nonhearsay -- Trade Inscriptions and Identifying Marks

Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002) : The plaintiff news organization videotaped the notorious beating of Reginald Denny and obtained copyrights for four segments of its tape. In a copyright infringement action, the Court reversed in part summary judgment for the defendants, holding that the identifying slate that appears on the opening frames of the tape supplied by the station "is most appropriately characterized as circumstantial evidence of origin, rather than as an 'assertion' within the meaning of the hearsay rule," since "[t]he slate is more akin to a postmark or a time stamp." In a prosecution for criminal possession of a firearm that had moved in interstate commerce, *United States v. Alvarez, 972 F.2d 1000 (9th Cir. 1992)* (per curiam), the Court held that the inscription "Garnika, Spain" on the gun was a "mechanical trace" not excludable under the hearsay rule and not requiring extrinsic evidence of authenticity.

United States v. Thody, 978 F.2d 625 (10th Cir. 1992) : Affirming a conviction for criminal possession of a weapon that had traveled in interstate commerce, the Court noted that the manufacturer's imprint "Made in Spain" is technically not an assertion as contemplated by the Rule and therefore not hearsay.

[xxiv] Rule 801(c) -- Examples of Nonhearsay -- Verbal Acts

United States v. Southard, 700 F.2d 1 (1st Cir. 1983) : In a gambling prosecution, the Court found that records and telephone conversations were verbal acts used to prove that bets had been recorded and that betting conversations had taken place and were not hearsay.

Giove v. Stanko, 977 F.2d 413 (8th Cir. 1992) : In an action to set aside certain transfers of property as fraudulent conveyances, the Court held there was no error in admitting an affidavit filed in State Court by one of the debtors that he was a pauper, as it was a verbal act reflecting his state of mind and relevant, regardless of its truth, to whether the transfers were made with fraudulent intent. In a breach of contract action, *Modern Leasing, Inc. v. Falcon Mfg. of Cal., Inc.*, n58 the Court held that testimony about conversations concerning a lessee's manager's position was not hearsay, because it was offered only to prove the lessor's reasonable inquiry rather than the truth of the facts asserted.

United States v. Pang, 362 F.3d 1187 (9th Cir. 2004) : The prosecution introduced invoices from the defendant and checks from a customer paying those invoices at a trial for structuring currency transactions and income tax evasion. The Court held that the checks were not hearsay because they were legally operative verbal conduct, and the invoices were party admissions admissible against the defendant.

United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996) : Affirming convictions arising out of a public corruption scheme, the Court held there was no abuse of discretion in admitting tape recordings of breakfast/bribery meetings between a conspirator cooperating with the government and two other councilmembers, in which the cooperating witness made several references to the defendant. Admission of the tapes was upheld because, *inter alia*, the contemporaneous words characterizing non-verbal conduct, like the transfer of money, were not hearsay.

Knorr v. Pearson, 671 F.2d 1368 (C.C.P.A. 1982) : In a patent interference proceeding, testimony by a third party as to what one inventor said to another on the telephone was a nonhearsay "verbal act," whereas testimony as to what that inventor told the witness the other inventor said was inadmissible hearsay.

[f] Rule 801(c) -- Judgment of Acquittal

United States v. De La Rosa, 171 F.3d 215 (5th Cir. 1999) : The defendant was charged with three counts in a conspiracy to influence a jury; the jury acquitted on the first count and deadlocked on the remaining two charges. At a second trial on the remaining charges, the Trial Judge prohibited any reference to the prior trial or to the acquittal. Relying on a "vast body of authority" that a judgment of acquittal is hearsay, not otherwise exempt from the operation of the hearsay rule, the Court found no error and affirmed.

[g] Rule 801(c) -- Relevance Requirement

United States v. Meserve, 271 F.3d 314 (1st Cir. 2001) : Affirming convictions for robbery and firearms offenses, the Court held it was error (but harmless) to permit a detective to testify that he drove by the defendant's house on the night of the robbery because the defendant met the description of the robber given by eyewitnesses. The prosecution claimed that the testimony was not hearsay because it was offered to prove why the detective drove by the house, but the Court found that the detective's motivation was irrelevant to any fact in dispute. In *United States v. Mazza*, n59 the Court affirmed cocaine convictions, but it criticized the Trial Judge's permitting two government agents to testify as to what an informant told them the defendants had done and said in various conversations, purportedly to explain why the agents acted as they did. The Court found that this evidence had almost no probative value, even though the defendants

raised an entrapment defense. It reasoned that the agents could have testified that they debriefed the informant after his conversations with the defendants and left the informant to testify as to what the defendants said.

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) : After a 17-year-old female telephoned police to alert them to activities at a motel, officers found the caller, another female, and the defendant in a motel room, but found no drugs or drug paraphernalia. At the defendant's trial on cocaine charges, the government asked its first witness, the police sergeant who took the telephone call, whether he had been involved in a "narcotics-related incident" at the motel. He answered affirmatively and was cross-examined as to the scene that he found at the motel. Thereafter, the government elicited from the sergeant hearsay testimony as to what the 17-year-old caller had told him. The government argued that the call was admissible to explain why the officer came to the scene and arrested the defendants. Reversing because the hearsay testimony was improperly admitted, the Court held that the government's proffered not-for-truth purpose had no relevance in the case. The defense was based upon a claim that prostitution, not drug use, was occurring at the motel, and this defense did not suggest any impropriety on the part of the police. Thus, there was no basis to introduce hearsay to explain the sergeant's conduct.

United States v. Fountain, 2 F.3d 656 (6th Cir. 1993) : The Court found that it was error (but harmless) to admit testimony by an agent about what he had been told prior to executing a warrant. Although the statements were offered to explain the agent's actions, not for their truth, the Court observed that the reason for his action was not in issue, and "[o]therwise inadmissible hearsay evidence is not made admissible simply because it is claimed to be probative of a fact that is not in issue in the case."

United States v. Silva, 380 F.3d 1018 (7th Cir. 2004) : In a prosecution for methamphetamine offenses, a DEA agent testified to conversations between a non-testifying DEA informant and an alleged supplier that mentioned the defendant as the person making a delivery. The prosecution argued that the evidence was offered to explain the actions taken by the witness in response to the hearsay. Reversing, the Court noted that "[t]here are no doubt times when the testimony regarding a tip from an informant is relevant," but found that the broad argument made by the government "would eviscerate the constitutional rights to confront and cross-examine one's accusers."

[3] Rule 801(d)(1)(A) -- Statements Which Are Not Hearsay -- Prior Statement By Witness -- Inconsistent

[a] Rule 801(d)(1)(A) -- Defendant's Use of the Rule

United States v. Lashmett, 965 F.2d 179 (7th Cir. 1992) : As part of a scheme to defraud an insurer, the defendant's accomplices filed a complaint and affidavits in a civil suit. At the fraud trial, the accomplices testified that statements in the papers were false; the defendant wanted to introduce the papers for their truth, i.e., to show that the witnesses were lying about having made false statements. The Court held that the statements should have been admitted for their truth, as they were given under oath at a prior legal proceeding, but the error was harmless.

United States v. Smith, 776 F.2d 892 (10th Cir. 1985) : The Court affirmed a conviction for voluntary manslaughter arising out of a traffic accident, but found that testimony by a traffic accident reconstruction specialist at the defendant's first trial should have been admissible as substantive evidence when the specialist was called by the defense and his testimony at the second trial was inconsistent with his original testimony. The error was harmless, however. In a prosecution for receiving stolen silver bars, *United States v. Plum*, n60 the Court held it was error (but harmless) to restrict use of a cooperating witness' preliminary hearing testimony inconsistent with his trial testimony to impeachment.

[b] Rule 801(d)(1)(A) -- Grand Jury Testimony

United States v. Smith, 419 F.3d 521 (6th Cir. 2005) : When a witness gave different testimony at the defendant's drug-trafficking trial, the government was permitted to impeach the witness and offer his grand jury testimony as substantive evidence. The defendant did not object to the testimony being read, but did object to the jury's getting a transcript of the grand jury testimony. Affirming, the Court noted that under *Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994)* , prior statements in a document are ordinarily admitted by being read and the document should be admitted only when necessary and with a limiting instruction to guard against the dangers of undue emphasis and being taken out of context. In this case, the Judge made no finding of necessity and gave no limiting instruction; this was an abuse of discretion, but harmless error. At the trial of a cocaine distribution conspiracy in *United States v. Odom, 13 F.3d 949 (6th Cir. 1994)* , the government called an accomplice and asked about his grand jury testimony, which he said was perjured; on cross-examination, the defense elicited testimony inconsistent with the grand jury testimony; and at the conclusion of the witness' trial testimony, transcripts of his grand jury testimony and a recantation hearing were admitted as substantive evidence. The Court held there was no error, as it is immaterial whether the prosecution or the defense elicits the foundation for prior inconsistent statements; furthermore, a sufficient inconsistency is shown when the witness labels prior testimony as false. One Judge dissented, on the grounds that the witness had made no statements at trial with which the grand jury testimony was inconsistent before it was elicited and that labeling a prior statement as false is not a proper substitute for a true response from the witness contradicting his prior testimony.

[c] Rule 801(d)(1)(A) -- Inconsistency Required

United States v. Odom, 13 F.3d 949 (6th Cir. 1994) : This case is discussed in § 801.03[3][b], "Grand Jury Testimony."

United States v. Jacoby, 955 F.2d 1527 (11th Cir. 1992) : The Court affirmed convictions for fraud involving an insolvent savings and loan, holding there was no abuse of discretion in excluding a witness' grand jury testimony that only gave greater detail and did not contradict the witness' trial testimony.

[d] Rule 801(d)(1)(A) -- Leading Questions

United States v. Morgan, 555 F.2d 238 (9th Cir. 1977) : Affirming a conviction for aiding an officer of a savings and loan company in receipt of an illegal kickback, the Court upheld the introduction of grand jury testimony as substantive evidence when the government impeached its own witnesses. The grand jury testimony involved extremely leading questions of a type "not to be applauded." The Court implied that "unduly suggestive or conclusory" questions might produce evidence that would not be admissible under *Rule 801(d)(1)(A)* and perhaps not under *Rule 607*. The Court also pointed out the need for a flexible approach to deciding when an inconsistency occurs. In *United States v. Champion Int'l Corp.*, n61 the Court held that prior inconsistent testimony by a witness before a grand jury is admissible under the Rule if the same witness testifies at trial, even though some of the grand jury testimony was elicited by means of leading questions.

[e] Rule 801(d)(1)(A) -- Memory Problems; Vague Testimony

United States v. Owens, 484 U.S. 554 (1988) : The Court indicated that a witness who asserts lack of memory of the facts to which prior testimony relates is nonetheless "subject to cross-examination" within the meaning of *Rule 801(d)(1)*.

United States v. Milton, 8 F.3d 39 (D.C. Cir. 1993) : The Court affirmed convictions for stealing money of the United States, holding there was no error in admitting grand jury testimony of a prosecution witness who said at trial that she could remember almost nothing of the facts in issue or what she told the grand jury. The witness was "subject to cross-examination," and defense counsel elicited testimony that tended to discredit her grand jury testimony.

United States v. Hemmer, 729 F.2d 10 (1st Cir. 1984) : Affirming bank robbery convictions, the Court found that the Trial Judge properly admitted grand jury testimony of a girlfriend of one of the defendants when she experienced memory lapses and made statements inconsistent with her grand jury testimony.

United States v. Palumbo, 639 F.2d 123 (3d Cir. 1981) : The Court indicated that a prior statement of a government witness who suffered a memory failure at trial was not admissible under *Rule 801(d)(1)(A)*, since lack of memory was not necessarily inconsistent with her statement to the police concerning the source of her drugs.

United States v. Murphy, 696 F.2d 282 (4th Cir. 1982) : In a bank robbery trial, when a key grand jury witness took the stand and denied the truthfulness of his grand jury testimony, the government offered that testimony for its truth under *Rule 801(d)(1)(A)*. Affirming, the Court found that the testimony was properly admitted, despite some vagueness on the part of the witness about what he said before the grand jury.

United States v. Bigham, 812 F.2d 943 (5th Cir. 1987) : The Court affirmed convictions for violating the civil rights of two inmates, as it held that prior grand jury testimony by a prison official that he had seen beatings of prisoners was properly admitted when the official claimed no recollection of the events at trial. In this case, the Court found that the Trial Judge could have found that the loss of memory was feigned, and it left open the question whether a prior statement could be admitted absent such a finding.

United States v. Distler, 671 F.2d 954 (6th Cir. 1981) : Affirming a conviction for violating a federal water pollution law, the Court approved the admission of grand jury testimony for its truth, holding that "partial or vague recollection is inconsistent with total or definite recall." The Court also noted that much of the testimony was identification testimony, which need not be inconsistent to be admitted.

United States v. Keeter, 130 F.3d 297 (7th Cir. 1997) : The defendant complained that grand jury testimony of a government witness was improperly admitted into his trial for smuggling drugs into prison because at the trial the witness feigned a lack of memory. The Court affirmed, holding that a witness who feigns lack of memory is "subject to cross-examination" within the meaning of *Rule 801(d)(1)(A)*, and that a prior statement is inconsistent with an untruthful statement of lack of memory. In a prosecution alleging a scheme to bribe a U.S. Senator at the expense of a Teamsters' pension fund, *United States v. Williams*, n62 the Court found no error in the admission of grand jury testimony given by a government witness whose testimony at the trial was "limited, vague, and not inculpatory." It emphasized that the word "inconsistent" is not limited to "statements diametrically opposed or logically incompatible."

United States v. Russell, 712 F.2d 1256 (8th Cir. 1983) : The Court affirmed convictions for aiding and abetting the passing and uttering of forged postal money orders. It upheld the introduction of grand jury testimony by a key government witness who claimed at trial he could not remember contact with the defendant. The Court rejected the argument that the grand jury testimony was not inconsistent with the absence of memory at trial, observing that

inconsistency is not limited to diametrically opposed answers and may extend to evasive answers and inability to recall. In *United States v. Thompson*, n63 the Court held that the Trial Judge had considerable discretion to find that evasive answers were inconsistent with earlier testimony and to admit the testimony as substantive evidence under *Rule 801*. It also held that no limiting instruction had to be given since the statements were admissible as substantive evidence.

United States v. Knox, 124 F.3d 1360 (10th Cir. 1997) : Affirming convictions for mail fraud, the Court found that prior statements of two testifying witnesses, implicating the defendant in the fraud scheme, were admissible under *Rule 801(d)(1)(A)*. The statements were made by the witnesses at their change of plea hearings, while under oath. The statements were inconsistent with the witnesses' trial testimony, in which they stated that they could not recall whether the defendant was involved in the scheme. The Trial Judge found that the asserted memory loss of the witnesses was feigned. The Court stated that "[a] well-settled body of case law holds that where a declarant's memory loss is contrived it will be taken as inconsistent with a prior statement for purposes of applying *Rule 801(d)(1)(A)*."

[f] Rule 801(d)(1)(A) -- Opportunity for Cross-examination

United States v. Vargas, 933 F.2d 701 (9th Cir. 1991) : When the prosecutor indicated that a principal government witness (an informant) in a drug case would invoke the *Fifth Amendment*, the Trial Judge *sua sponte* established a procedure by which the witness was examined outside the jury's presence and an edited transcript was prepared. When the witness was then examined in front of the jury, counsel were permitted to ask only questions from the transcript, and if the Judge deemed an answer inconsistent with that in the transcript, he read the earlier answer to the jury. The Court reversed, holding that the procedure violated the Rules and the *Confrontation Clause*. Because the witness was available, the transcript read to the jury was not admissible as former testimony, and because the Judge would not permit cross-examination questions before the jury if they were not included in the transcript, the transcript was not admissible as prior inconsistent statements by a witness subject to cross-examination.

United States v. Torrez-Ortega, 184 F.3d 1128 (10th Cir. 1999) : The Court held that a witness who asserts an illegitimate claim of privilege and essentially refuses to answer questions at trial is not subject to cross-examination within the meaning of *Rule 801(d)(1)(A)* and the *Confrontation Clause*. Therefore it was error for the Trial Judge to admit grand jury testimony of a witness who was read excerpts of the testimony and declared his *Fifth Amendment* privilege when asked if the testimony was his; he also invoked the privilege and refused to answer questions on cross-examination. The Court distinguished *United States v. Owens*, n64 which held that a witness was subject to cross-examination despite loss of memory concerning the events at issue, because the witness in *Owens* willingly answered questions on cross-examination while the witness in the instant case refused to testify at all.

[g] Rule 801(d)(1)(A) -- Other Proceedings

Santos v. Murdock, 243 F.3d 681 (2d Cir. 2001) : Affirming summary judgment for an arrestee who claimed the defendants submitted an arrest warrant containing false statements and arrested the defendant without probable cause, the Court held that a sworn statement given to the plaintiff's lawyer by a witness who had been twice deposed was not sufficient to defeat summary judgment. Since the statement, which was inconsistent with the deposition testimony, was not made in a "proceeding," it would only be admissible at trial for impeachment purposes and not as substantive evidence.

United States v. Ricketts, 317 F.3d 540 (6th Cir. 2003) : Affirming convictions for various offenses involving a drug conspiracy, the Court upheld denial of the defendant's proposed instruction that prior inconsistent statements could be used only for impeachment. Because sworn statements made at a guilty plea hearing and at a grand jury hearing,

which were admissible as substantive evidence under *Rule 801(d)(1)(A)*, had been introduced, the proposed instruction did not accurately reflect the applicable law, so there was no abuse of discretion in denying it. In *United States v. Day*, n65 the Court reversed convictions in a tax evasion case because the government introduced "highly prejudicial and incriminating excerpts" from a testifying codefendant's pretrial interview with an IRS agent. The Court observed that the record was devoid of any evidence that the agent had the legal authority to administer an oath that would subject the declarant to the penalty of perjury. Moreover, the Court reasoned that Congress was concerned with limiting the use of *Rule 801(d)(1)(A)* to highly reliable statements, and the statement did not qualify for substantive use "because the circumstances surrounding the recording of the statement militate against reliability and truthfulness."

United States v. Williams, 272 F.3d 845 (7th Cir. 2001) : The Court affirmed cocaine related convictions, finding no error in the exclusion as substantive evidence of a letter and affidavit by a coconspirator saying that he never saw one defendant with drugs and never saw another coconspirator talk about drug deals with the defendant. These statements were inconsistent with the coconspirator's trial testimony, but were not admissible under *Rule 801(d)(1)(A)*, because neither the affidavit nor the letter was made in "a proceeding." In *United States v. Lashmett, 965 F.2d 179 (7th Cir. 1992)* , as part of a scheme to defraud an insurer, the defendant's accomplices filed a complaint and affidavits in a civil suit. At the fraud trial, the accomplices testified that statements in the papers were false; finding no impeachment value once the lies were admitted, the Trial Judge excluded the papers. The Court held that the statements should have been admitted for their truth, as they were given under oath at a prior legal proceeding, but the error was harmless. In *United States v. Dietrich*, n66 the Court affirmed a conviction for dealing in counterfeit notes, but it held that a witness' statement -- unrecorded, obtained without any indicia of legal formality, and given to agents who had authority to arrest her -- was no different from a typical police station interrogation, and failed to qualify as an "other proceeding." In *United States v. Micke*, n67 the Court held that an affidavit of a government witness was not admissible as substantive evidence to the extent it was inconsistent with trial testimony, since it was obtained by an IRS agent in an investigation rather than in a "proceeding." In *United States v. Perez*, n68 the Court affirmed drug and weapons convictions, holding that a pretrial interview with an adverse witness, which was taken by a Court reporter, was not admissible, since it did not comply with the requirements of a deposition under *Fed. R. Crim. P. 15*.

United States v. Armijo, 5 F.3d 1229 (9th Cir. 1993) : The Court held it was plain error in a drug prosecution to admit a prior inconsistent statement to FBI agents without a limiting instruction. In *United States v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990)* , the declarant told agents at the time of her arrest that in Mexico the defendant had given her heroin to deliver, but at trial she said the statement was a lie. The Trial Judge refused to instruct that the prior statement could be used only for impeachment, apparently persuaded that *United States v. Owens* n69 allowed its substantive use. The Court reversed, holding that the statement came within no hearsay exception, it was not admissible under *Rule 801(d)(1)(A)* because it was not given under oath at a proceeding or deposition, the limiting instruction should have been given, and admission without the instruction was not harmless.

[h] Rule 801(d)(1)(A) -- Presence of Declarant

United States v. Silverstein, 737 F.2d 864 (10th Cir. 1984) : The Court held it was error in a prosecution of an inmate for killing another inmate to admit under *Rule 801(d)(1)(A)* a prior statement of a codefendant whose trial had been severed. Although the severance was obtained so that the defendant could call the codefendant to testify, the defendant chose not to, and the Court stated that "[a] defendant has no duty to call any witness."

[i] Rule 801(d)(1)(A) -- Relationship to Impeachment

United States v. Bomski, 125 F.3d 1115 (7th Cir. 1997) : After an accomplice gave exculpatory testimony in a bank robbery case, the prosecution introduced the witness' grand jury testimony implicating the defendants. At the end

of the trial, the Judge gave a pattern instruction limiting consideration of prior inconsistent statements to the credibility of a witness and not to establish the truth of the matters asserted. The Court held that the instruction should not have been given, because the grand jury testimony fit the hearsay exception, but concluded that the error was harmless.

[j] Rule 801(d)(1)(A) -- Timing of Introduction

Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221 (5th Cir. 1984) : The Court affirmed a judgment for the manufacturer in a wrongful death action arising from an accident on a conveyor, holding that it was permissible for the defendant to ask a defense witness about deposition testimony that was inconsistent with her trial testimony without actually offering the deposition statements as evidence until later in the case. It reasoned that the Rule does not control the timing of formal submission of prior statements so long as the declarant who made them testifies and is subject to cross-examination about them.

United States v. Odom, 13 F.3d 949 (6th Cir. 1994) : At the trial of a cocaine distribution conspiracy, the government called an accomplice and asked about his grand jury testimony, which he said was perjured; on cross-examination, the defense elicited testimony inconsistent with the grand jury testimony; and at the conclusion of the witness' trial testimony, transcripts of his grand jury testimony and a recantation hearing were admitted as substantive evidence. The Court held there was no error, as it is immaterial whether the prosecution or the defense elicits the foundation for prior inconsistent statements; furthermore, a sufficient inconsistency is shown when the witness labels prior testimony as false. One Judge dissented, on the grounds that the witness had made no statements at trial with which the grand jury testimony was inconsistent before it was elicited and that labeling a prior statement as false is not a proper substitute for a true response from the witness contradicting his prior testimony.

[4] Rule 801(d)(1)(B) -- Statements Which Are Not Hearsay -- Prior Statement By WitnesS -- ConsistenT

[a] Rule 801(d)(1)(B) -- Anticipating Impeachment

Ross v. Saint Augustine's College, 103 F.3d 338 (4th Cir. 1996) : After the plaintiff gave testimony against the defendant in a reverse-discrimination suit, her fortunes as a student changed radically, causing psychological injury necessitating psychiatric treatment. In her subsequent action against the college for reckless infliction of emotional distress, the plaintiff missed most of the trial on advice of her psychiatrist. Before she testified, several other witnesses were permitted to provide, as "corroborating" evidence, hearsay testimony as to what she had said. The statements were confirmed by documentary evidence or by her subsequent testimony, and all were subjected to impeachment efforts during the defendant's thorough cross-examination of the plaintiff. The Court held that although there was a violation of the sequence required by *Rule 801(d)(1)(B)*, the risks it had identified in *United States v. Bolick*, *infra*, were not present and the violation did not affect any substantial right of a party, so any error was harmless. In *United States v. Bolick, 917 F.2d 135 (4th Cir. 1990)* , the Court reversed a conviction for selling cocaine because a government agent had testified to prior consistent statements by informant witnesses before those highly impeachable witnesses had given testimony or had their credibility called into question. The dissenting Judge believed that admission of the evidence was within the Trial Court's discretion regarding the proper order of proof, as the statements provided background helpful to a complete understanding of the agent's testimony.

United States v. Beaulieu, 194 F.3d 918 (8th Cir. 1999) : In a child sexual abuse prosecution, the prosecution was allowed to introduce testimony, by the victim's mother and a friend, that the victim had told them of abuse by the defendant. The Trial Judge admitted the evidence "conditionally" in response to the government's argument that it was being introduced as a preemptive rebuttal to an improper motive charge that it believed the defense would make later. However, defense counsel never asserted the victim had an improper motive or fabricated her account, except in closing

argument, where counsel simply argued that the victim had made up the story from the start. Reversing, the Court held that the statements were inadmissible under *Rule 801(d)(1)(B)* because the defense made no charge of improper motive or recent fabrication. In *United States v. Azure*, n70 the Court indicated that statements should not be admitted under this Rule until a witness has been cross-examined.

[b] Rule 801(d)(1)(B) -- Completion Use Only

United States v. Keltner, 147 F.3d 662 (8th Cir. 1998) : The Court affirmed racketeering convictions, finding no error when the government was permitted to question a witness on redirect examination about prior consistent statements even though they were made after the witness' motive to lie or fabricate had arisen. The Court reasoned that the defendants had cross-examined the witness about prior statements but had omitted portions, which the government was entitled to elicit under the role of completeness rather than under *Rule 801(d)(1)(B)*.

[c] Rule 801(d)(1)(B) -- Corroborating Accused's Testimony

United States v. Lewis, 987 F.2d 1349 (8th Cir. 1993) : The defendant in a cocaine conspiracy prosecution testified he had made a trip to Florida to turn others in to the DEA. The Court held that his girlfriend should have been allowed to corroborate his testimony that he had told her the purpose of the trip before going, but the error was harmless.

[d] Rule 801(d)(1)(B) -- Corroborating Witness' Testimony

United States v. Acker, 52 F.3d 509 (4th Cir. 1995) : The Court reversed a bank robbery conviction because an officer was permitted to recount a statement given by the principal prosecution witness after he had been arrested and indicted for participation in the robbery. The evidence was erroneously admitted only to corroborate the witness' testimony and not to rebut a charge of fabrication; in any event, it would have been difficult to satisfy the foundation requirement that the statement was made before the witness had a motive to fabricate.

United States v. Ruiz, 249 F.3d 643 (7th Cir. 2001) : Two undercover officers, one at the front and one at the back, maintained surveillance of a house suspected as a drug trafficking location. The defendant was arrested after an apparent drug transfer at the back of the house was interrupted by one of the officers. After that officer testified, his partner recounted what he had been told by radio about the incident as it was happening. The Court held the testimony was admissible as a prior consistent statement, since the proof was elicited after the declarant testified and defense counsel raised the implication that parts of his testimony were fictional, e.g., by showing that they were omitted from his post-incident report. The fact that the statements were made while events were still unfolding meant they were made before the declarant's credibility was put into question.

[e] Rule 801(d)(1)(B) -- Hearsay Within Hearsay

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988) : The Court reversed a conviction for marijuana offenses, finding that a Coast Guard officer's handwritten report of events on the night of a chase of a small boat from which marijuana was thrown was improperly admitted. Even if the officer had been sufficiently attacked to justify rehabilitation, the report contained hearsay within hearsay and therefore was more than a prior statement of the officer.

[f] Rule 801(d)(1)(B) -- Nontestifying Declarant

United States v. Sadler, 234 F.3d 368 (8th Cir. 2000) : Affirming convictions for armed bank robbery and firearm possession, the Court held that testimony from an attorney who had represented the defendant in State Court that the defendant protested his innocence moments before confessing to a deputy was inadmissible hearsay. The Court held that the testimony could not be admitted under *Rule 801(d)(1)(b)* as consistent with the defendant's not guilty plea, because the defendant did not testify.

[g] Rule 801(d)(1)(B) -- Opportunity for Cross-Examination

United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994) : The defendant in a cocaine importation case failed to appear for his scheduled trial, which proceeded against his codefendants in his absence. When he was finally apprehended and tried, the government introduced deposition testimony by a cooperating witness who was unavailable to testify. The government also introduced that witness' testimony at the codefendant's trial, under the prior consistent statement, former testimony, and residual exceptions. The Court affirmed, but held that the former testimony was not admissible under *Rule 801(d)(1)(B)* because the witness was not "subject to cross-examination concerning the statement" at the deposition, as the defendant was not notified until later that the government intended to offer it.

[h] Rule 801(d)(1)(B) -- Opportunity for Examination

United States v. Piva, 870 F.2d 753 (1st Cir. 1989) : Affirming a marijuana conviction, the Court held that an officer's testimony regarding an informant's prior consistent statement was properly admitted even before the defendant had an opportunity to examine the informant about the statement. No showing was made that the defense was unable to recall the informant and to examine him.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996) : Affirming the Trial Judge's refusal to permit a defendant to withdraw his guilty plea, the Court held that a Magistrate Judge properly excluded a tape made by the defendant while he was a fugitive, since the defendant did not testify and could not therefore offer evidence of a prior consistent statement.

[i] Rule 801(d)(1)(B) -- Prior Statement of Cooperating Witness

United States v. Wilson, 355 F.3d 358 (5th Cir. 2003) : In a narcotics prosecution, a cooperating witness, Osborne, testified that he had sold drugs for Odom. On cross-examination, defense counsel focused on the benefits that Osborne derived from his plea bargain with the government. On redirect, the government introduced a letter that Osborne wrote to another coconspirator, McDade, three years prior to entering into the plea agreement. In the letter, Osborne referred to cocaine that McDade handled for Odom and threatened to tell Odom that McDade had been cheating him if McDade did not provide Osborne with money to pay for an attorney to defend an unrelated charge. The Court found no error in admitting the letter as a prior consistent statement:

> Even though Osborne may have also had a motive to fabricate when he wrote the letter, considering Osborne wrote his letter three years earlier, while in prison on an unrelated charge, to a person who could not directly help Osborne avoid prison time, the district court did not abuse its discretion in concluding that the motive to write the letter was different than the motive to fabricate arising from his plea bargains charged at trial. A prior consistent statement need not rebut all motives to fabricate, but only the specific motive alleged at trial.

United States v. Anderson, 303 F.3d 847 (7th Cir. 2002) : The Court affirmed a conviction for conspiracy to distribute cocaine base, holding that there was no plain error in admitting evidence of post-arrest statements by drug dealers identifying the defendant as their supplier. The Court found that defense counsel had insinuated through cross-examination of the dealers that they had communicated with each other after their arrests while they were incarcerated near each other, and that they decided to frame Anderson to reduce their own sentences. The post-arrest statements, taken before the witnesses had any opportunity to consult, were thus admissible to rebut the claim that they decided later to frame Anderson. In *United States v. Stoecker, 215 F.3d 788 (7th Cir. 2000)* , the Court affirmed convictions for making false statements to financial institutions and giving or receiving bribes, finding no abuse of discretion in the admission of statements, consistent with his trial testimony, made by a government witness several years before he entered into a plea agreement with the government. The Court found that, between the questions asked by the defense on cross-examination and *voir dire*, the Trial Judge could have found that the defendant sought to imply that the witness fabricated his testimony because of his deal with the government. The consistent statements rebutted the charge of fabrication because they pre-dated the plea agreement by approximately five years.

[j] Rule 801(d)(1)(B) -- Rehabilitation Use Only

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003) : The Court affirmed drug-related convictions, finding no error in the admission of a witness' prior statements to the FBI on redirect examination after the witness was cross-examined concerning an inconsistency between his trial testimony and one statement he made to the FBI. The Court concluded that neither *Rule 801(d)(1)(B)* nor *Tome v. United States, 513 U.S. 150 (1995)* , governs statements offered only to clarify or rebut an inconsistency raised on cross-examination. Although some of the statements offered were not relevant to rebut inconsistencies, the error in admitting the irrelevant statements was harmless.

United States v. Mercado Irizarry, 404 F.3d 497 (1st Cir. 2005) : Affirming cocaine-related convictions, the Court held that a police officer's testimony about a prior statement by a cooperating witness was properly admitted as a prior consistent statement, on the ground that the witness' consistent sworn statement about the events had already been introduced into evidence by the defense in an attempt to impeach his direct testimony. In a tax fraud case, *United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001)* , a principal prosecution witness was the defendant's accountant, who testified under immunity. On cross-examination, the accountant admitted making inconsistent statements, and committing perjury, in his initial grand jury appearance, when making a subsequent proffer, and at a second grand jury appearance. On redirect the witness was permitted to read testimony he had given to the grand jury that was consistent with his trial testimony; this prior testimony covered both specific points raised in the cross-examination and other points within the scope of the overall cross-exam. The Court held that some of the prior consistent statements were properly admitted, where they provided a larger context in which trial testimony could be understood as not really inconsistent with prior statements. However, it was error (but harmless) to admit grand jury statements that were not relevant to understand or rehabilitate trial testimony, but simply to bolster it by presenting again the evidence presented on direct, through the testimony about statements to the grand jury.

United States v. Gluzman, 154 F.3d 49 (2d Cir. 1998) : The defendant argued that a prior consistent statement of her accomplice, who testified as a prosecution witness at her trial for interstate domestic violence, was not admissible under *Tome v. United States*, because it was made after the defendant was arrested. Affirming, the Court found that the statement was offered for rehabilitation outside *Rule 801(d)(1)(B)*, and therefore the *Tome* pre-motive requirement was inapplicable. In *United States v. Castillo, 14 F.3d 802 (2d Cir. 1994)* , defense counsel, seeking to discredit an undercover officer's testimony by arguing that he lied about the presence of a gun to justify his snorting cocaine during a drug purchase, contrasted the officer's testimony that he told his superior immediately after the buy that he had been forced to ingest cocaine "at gunpoint" with his testimony that the gun was displayed but never removed from an accomplice's waistband. The Court held it was not an abuse of discretion to admit testimony from the superior repeating what the officer had said to him, as the evidence was offered only to rehabilitate credibility rather than for its truth, and

thus it did not matter if the officer had a motive to fabricate when he was debriefed by his superior. In *United States v. Pierre*, n71 the Court affirmed a heroin conviction, finding that the Trial Judge properly admitted evidence that an agent's formal report stated that the defendant refused to make a controlled delivery, after the defense elicited testimony from the agent that his notes of his interview with the defendant contained no reference to the refusal. The Court reasoned that "a prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition," without implicating *Rule 801(d)(1)(B)*. In *United States v. Brennan*, n72 the Court, affirming a former State Judge's bribery and corruption convictions, followed *Pierre* and held that the Trial Judge properly admitted grand jury testimony to rehabilitate a witness who had been attacked on cross-examination with suggestions that he had made inconsistent statements to the grand jury.

United States v. Casoni, 950 F.2d 893 (3d Cir. 1991) : When the defendant sought on cross-examination to impeach the principal witness in a trial of racketeering offenses by suggesting he fabricated his testimony to gain immunity, the government called the witness' attorney to testify to what the witness had told him at their first meeting, before the attorney advised him to seek immunity by offering testimony that incriminated others in the scheme. The Court held there was no abuse of discretion in finding the statements were made before the motive to fabricate arose, even though there was evidence that the witness knew he was in trouble before he consulted the attorney. When, as here, the statements are offered only to rehabilitate, the possibility that a motive to fabricate existed when the statements were made is a matter of relevance, not a condition barring admissibility.

United States v. Ellis, 121 F.3d 908 (4th Cir. 1997) : Affirming convictions arising out of a bank robbery, the Court held there was no abuse of discretion in admitting summaries of FBI interviews with a cooperating witness as prior consistent statements, since they were offered only for the limited purpose of rehabilitating the witness' credibility. In such a situation, the only requirement is that the prior statement have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony; the restrictions of *Rule 801(d)(1)(B)* and the "pre-motive rule" of *Tome v. United States* do not apply.

United States v. Denton, 246 F.3d 784 (6th Cir. 2001) : Affirming kidnapping convictions, the Court found no error in the admission of prior consistent statements by a government witness. Defense counsel impeached the witness by having her read selected questions and answers from her written statements to the police, which appeared to be inconsistent with her trial testimony. In order to rebut the contention that the statements were inconsistent, the government was entitled to have the witness read her statements into the record in their entirety. Because the consistent statements were offered to rehabilitate the witness and not for their truth, there was no need to comply with the requirements of *Rule 801(d)(1)(B)*. Affirming a defendant's judgment in a product liability case, *Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994)* , the Court held that reports containing opinions of defense expert witnesses as well as prejudicial hearsay should not have been admitted under Rules 702 and 703 simply because the experts testified. However, because the plaintiffs relied on the reports in impeaching the experts, the reports were properly admitted for rehabilitation rather than for their truth. The Court added in a footnote that a Judge may be obliged to limit rehabilitation to testimony about documents rather than to admission of the documents themselves.

United States v. Harris, 761 F.2d 394 (7th Cir. 1985) : This case is discussed in the Editorial Explanatory Comment, *§ 801.02[4][c]*.

United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005) : The Court reversed convictions for child sex abuse, holding that prior consistent statements made by the victim to a physician's assistant were erroneously admitted under *Rule 801(d)(2)(B)*. The statements were not admissible to rebut an attack of recent fabrication, because the defendant made only a general attack, including allegations of bias, on the victim's credibility. Although the consistent statements

might have been admissible to rehabilitate the victim's credibility, the Court refused to affirm on this ground, because the consistent statements were "neither offered nor admitted on that basis, and the jury was never instructed that the evidence was received for a limited purpose." In *United States v. Andrade*, n73 the Court affirmed fraud convictions, holding there was no error in admitting evidence of an agent's notes concerning an interview with a defendant. The defendant questioned two other witnesses concerning the notes and left the impression of inaccuracies in the notes and the suggestion that there might have been collaboration between government witnesses.

United States v. Beltran, 165 F.3d 1266 (9th Cir. 1999) : When the government in a drug prosecution offered extrinsic evidence of a witness' prior consistent statements, the Judge overruled a hearsay objecection and gave a clear limiting instruction that the prior statements could be used only in considering the witness' credibility. The Court noted that the Judge's instruction was incorrect on the law, but even if the statements had been improperly admitted, it must be assumed that the jury did not use the statements as substantive evidence, so any error was harmless. A concurring Judge argued that it was error to rule that prior consistent statements could be offered simply because defense counsel asked the child witness whether he had prepared his testimony with the prosecutor and his mother prior to trial; to hold that such a question invites use of prior statements would render the limitations in the rule "a nullity and open the floodgates to the admission of practically any prior consistent statement." This Judge disagreed that the instruction reduced the impact of the error, since "[t]he credibility/substance distinction is illusory in this context," but would have affirmed solely because the statements were cumulative of other defense evidence. In *United States v. Collicott, 92 F.3d 973 (9th Cir. 1996)* , defense counsel, cross-examining a prosecution witness in a drug case, asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under *Rule 801(d)(1)(B)* because the statements were not made before the existence of a motive to fabricate. Neither could the remainder come in on the ground that the defendant had "opened the door" by introducing the officer's testimony, which was inconsistent with the witness' stated failure of memory, since they did not clarify or provide context for the inconsistent statements, but merely augmented the inconsistency and further impeached the witness by contrasting her detailed conversation with her testimony denying memory of the conversation. In *United States v. Payne*, n74 the Court affirmed a conviction for carnal knowledge of a female under age 16, holding that prior consistent statements could be admitted, even though made after the motive to fabricate arose, when they came from the same investigative reports from which impeaching inconsistent statements had been drawn, as they demonstrated that the inconsistencies were a minor part of an otherwise consistent account.

United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996) : Affirming convictions arising out of a public corruption scheme, the Court held there was no abuse of discretion in admitting tape recordings of breakfast/bribery meetings between a conspirator cooperating with the government and two other councilmembers, in which the cooperating witness made several references to the defendant. Because the tapes were made after the witness began working for the government, it was error to admit them under *Rule 801(d)(1)(B)*. However, admission of the tapes was upheld because, *inter alia*, the conversations were innocuous and they tended to rehabilitate the witness' testimony that the people involved had a familiar relationship and had regular breakfast meetings.

[k] Rule 801(d)(1)(B) -- Response to Inconsistent Statement

United States v. Coleman, 631 F.2d 908 (D.C. Cir. 1980) : The Court said that "[e]ven where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference."

United States v. Zuniga-Lara, 570 F.2d 1286 (5th Cir. 1978) : The Court upheld the introduction of a prior consistent statement to rehabilitate a government witness who was impeached on cross-examination on the basis of his failure to include information in a written report.

United States v. Allen, 579 F.2d 531 (9th Cir. 1978) : The Court approved the admission of evidence that a cooperating witness in this armed bank robbery case made consistent statements, after the defense emphasized an inconsistent statement and "contended that her testimony on direct examination was the result of an attempt to avoid criminal prosecution."

Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (1987) , reinstating en banc 784 F.2d 1523 (11th Cir. 1986) , aff'd in part and rev'd in part, 488 U.S. 153 (1988) : The Court reversed a judgment for the defendants in an action by spouses of two people killed in a Navy aircraft. It found error when the defendant was permitted to cross-examine one plaintiff about portions of a letter he had written to a Navy officer investigating the crash, but the plaintiff was denied the opportunity assured by *Rule 106* to place the evidence in perspective by bringing out other portions of the letter. The Court added that since the defendant used the portions of the letter as a prior inconsistent statement, the plaintiff should have been permitted to introduce other portions as prior consistent statements under *Rule 801(d)(1)(B)*. The Supreme Court affirmed the *Rule 106* decision, so it did not address the *Rule 801(d)(1)(B)* point.

[l] Rule 801(d)(1)(B) -- Scope of Rehabilitation

United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984) : The Court criticized the admission of hearsay statements pursuant to the government's representation that the declarants would subsequently testify. This procedure permitted the government to benefit from statements that would not have been admitted under *Rule 801(d)(1)(B)*, since the declarants had not been attacked and rehabilitation was neither necessary nor permissible.

United States v. Brantley, 733 F.2d 1429 (11th Cir. 1984) : One codefendant in a marijuana importation case prepared, with his counsel, a 31-page statement in the hopes of obtaining a good plea bargain. He subsequently pleaded guilty and testified for the government. On cross-examination, he was asked whether his statement disclosed all the facts to which he testified. In response to the implication that the witness might have fabricated facts, the government introduced the entire statement. The Court upheld its admission, finding that no request had been made to eliminate any specific portions. This is a troubling case. Surely, the government should have been permitted to show that its witness was consistent after the witness was attacked. But the showing of consistency could have been narrowly confined to the facts at which the cross-examination was directed. The probative value for rehabilitation of admitting 31 pages might have been substantially outweighed by the danger that the jury would unduly rely on the written statement, which amounted to a summary of this witness' complete testimony on direct examination.

[m] Rule 801(d)(1)(B) -- Subject to Cross-Examination

United States v. Hebeka, 25 F.3d 287 (6th Cir. 1994) : In a food stamp fraud prosecution, defense counsel attacked the credibility of the government's star witness, Dennis Alfred, by implying that he fabricated his testimony to avoid prosecution. The Court found no error when a rehabilitating prior consistent statement was introduced through another witness rather than through Alfred himself. The Court noted that Alfred was in court and subject to cross-examination, and could easily have been recalled after the third party's testimony.

United States v. Green, 258 F.3d 683 (7th Cir. 2001) : In a trial for a crack cocaine distribution conspiracy, an

investigator was permitted to read his notes of an interview with a cooperating witness. The Court held that the notes were properly admitted as past recollection recorded, and the included statements of the cooperating witness were admissible without being adopted by the declarant because they were independently admissible as prior consistent statements. The Court overruled its unique reading of *Rule 801(d)(1)(B)* in *United States v. West, 670 F.2d 675 (7th Cir. 1982)* , which interpreted the requirement of cross-examination to mean that the out-of-court statement must be elicited through the declarant rather than through a third party to whom the declaration was made. Although in *Green* cross-examination of the declarant had been completed when his prior consistent statements were introduced, he was still available for cross-examination on the statements, so *Rule 801(d)(1)(B)*'s requirement was satisfied.

[n] Rule 801(d)(1)(B) -- Suggestion of Fabrication

[i] Rule 801(d)(1)(B) -- Civil Cases

Gaines v. Walker, 986 F.2d 1438 (D.C. Cir. 1993) : Reversing an arrestee's judgment against a police officer alleged to have inflicted unnecessary force, the Court held that the defendant should have been permitted to offer his police report as a prior consistent statement. In response to the defense that the officer merely responded to the plaintiff's attempt to knife him, the plaintiff cross-examined the officer as to the difference between the offenses of carrying a deadly weapon and possession of a prohibited weapon. The officer responded that the possession crime implies an intent to use the weapon; the plaintiff then elicited that the document prepared by the U.S. Attorney's office regarding the incident, which likely would have been based upon the officer's report, charged the plaintiff only with carrying, and not with possession. Although the Court recognized that not every attempt to impeach a witness by showing inconsistencies between trial testimony and pretrial statements amounts to a charge of recent fabrication, it concluded that the only reasonable interpretation of the questions put to the officer was to suggest that he had fabricated his account of the plaintiff's use of the knife.

Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994) : Affirming a judgment assessing penalties against corporate officers for wilfully failing to pay withheld employment taxes to the government, the Court held that a prior consistent statement of one of the officers (Thomas) was properly excluded. Thomas testified that he left the corporation because he thought it was headed toward financial ruin. On cross-examination, the government implied that Thomas quit in part because he was afraid of incurring liability for the corporation's unpaid employment taxes. An IRS form prepared by Thomas after he left the corporation was consistent with his testimony as to his reasons for leaving, but the Court held that the document was properly excluded because the government had not charged Thomas with fabricating his testimony. Stating that "[o]ne may impeach for lack of credibility without going so far as to charge recent fabrication," the Court concluded that the "line of questioning was intended to show that Thomas was not telling the whole story, that an *additional* reason for his leaving was his fear that he would be liable for the unpaid taxes."

Mayoza v. Heinold Commodities, Inc., 871 F.2d 672 (7th Cir. 1989) : The Court affirmed a judgment for brokers who were sued by a commodities investor, holding that the plaintiff's wife was properly barred from testifying to a statement made during a telephone conversation with his principal broker, as no effort had been made to prove that the husband had recently fabricated testimony. In *Christmas v. Sanders*, n75 the Court affirmed a judgment for the plaintiff in a civil rights action against a police officer, upholding the exclusion of two police reports offered as consistent statements. It found that there was no charge made of recent fabrication and that the reports might have been rejected in any event because of their extensive references to the testimony of other witnesses.

Breneman v. Kennecott Corp., 799 F.2d 470 (9th Cir. 1986) : Affirming a judgment for an employer in a sex discrimination case, the Court upheld exclusion of handwritten notes apparently made by a supervisor concerning a conversation he had with the plaintiff where it was unclear when the notes were made and the defendant did not imply

fabrication on the part of the plaintiff.

Garcia v. Watkins, 604 F.2d 1297 (10th Cir. 1979) : The Court held it was error to exclude evidence of a statement made following an auto accident by a plaintiff who, the defendants implied, was fabricating her testimony.

[ii] Rule 801(d)(1)(B) -- Suggestion of Fabrication -- Criminal Cases

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986) : In a kidnapping case, the Court found that evidence that a defendant allegedly attempted to send a note to the victim prior to his arrest was not admissible as a prior consistent statement until such time as the government attempted to suggest that the defendant's trial testimony was fabricated.

United States v. Lozada-Rivera, 177 F.3d 98 (1st Cir. 1999) : The defendant, charged with taking part in a drug conspiracy, contended that he was an innocent businessman. The government called a DEA agent who testified that the defendant made incriminating statements on the day of his arrest, which the defendant denied. On cross-examination of the agent, defense counsel asked whether he had ever had a "problem" with the defendant's family, and brought out the fact that the agent had gone to school with the defendant's children 20 years earlier. The agent denied having any problem. The Court held it was error to admit in rebuttal a formal report prepared by the agent, in which he recounted, consistently with his testimony, his version of the interview with the defendant on the day of his arrest. The report was not admissible either for rehabilitation or for its truth. Defense counsel's mild cross-examination of the agent did not qualify as an implicit charge of improper motive. In *United States v. Alzanki, 54 F.3d 994 (1st Cir. 1995)* , the Court affirmed a conviction for holding a household servant in involuntary servitude, and held there was no error in admitting the servant's prior consistent statements to nurses, a therapist, and a police officer. The defense had impugned her motives by cross-examination suggesting that she had recently met with a Hollywood producer interested in purchasing film rights to her story and that she had been interviewed by Boston papers to drum up publicity for her story. In *United States v. Arias-Santana*, n76 the Court affirmed convictions for cocaine distribution, holding that a police report identifying the defendant at a drug buy, which would normally be inadmissible under *Rule 803(8)(B)*, was admissible under *Rule 801(d)(1)(B)* after the report was used on cross-examination and the officer was impliedly charged with recent fabrication. In *United States v. Vest*, n77 the Court held that responses of a witness during a phone conversation were admissible, since the witness' credibility was questioned on cross-examination and the witness had no motive to fabricate at the time of the conversation.

United States v. Wilkerson, 361 F.3d 717 (2d Cir. 2004) : The Court affirmed a Hobbs Act conviction arising out of a fatal robbery, holding that a prior consistent statement of a prosecution witness was properly offered for its truth. The statement was introduced to rebut an implication by defense counsel that the witness' testimony had changed in light of recent government assistance in securing public housing, and it had been made at least three years before the development of this alleged motive to fabricate.

United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980) : Even though the Trial Judge did not actually find that certain out-of-court statements were in furtherance of a conspiracy, the Court concluded that they were admissible anyway, since they were consistent with the declarant's trial testimony and tended to rebut the implicit defense claim that the declarant's testimony was a fabrication used to buy his way out of prison.

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) : The Court affirmed a conviction for income tax offenses, but it found that the Trial Judge should not have admitted IRS agents' notes regarding meetings they had with the defendant. Although defense attorneys implied that one agent made mistakes or lied while testifying, "it does not appear

that his supposed fabrications were recent or made with an improper motive." The cross-examination of another agent was an attempt to refresh her recollection rather than an effort to imply that her earlier testimony was false. "*Rule 801(d)(1)(B)* cannot be construed to allow the admission of what would otherwise be hearsay every time a law enforcement officer's credibility or memory is challenged; otherwise, cross-examination would always transform hearsay notes into admissible evidence." In *United States v. Henderson, 19 F.3d 917 (5th Cir. 1994)* , the Court affirmed a conviction for fraudulent banking activities, holding that cross-examination of a government witness about an FBI investigation raised questions about the witness' motives and possible collusion between the witness and the government, which provided a foundation for admission of prior statements by the witness consistent with his trial testimony. After the defendant in *United States v. Pe na* n78 insinuated that a testifying DEA agent may have inserted facts he learned subsequently into his final report on his interview with the defendant, the agent's handwritten notes on the interview were admitted. The Court held that the defendant had opened the door to the notes made the day of the interview by challenging the final report made 17 days after the interview.

United States v. Smith, 746 F.2d 1183 (6th Cir. 1984) : The Court reversed a conviction arising from the robbery of a postal employee because the defendant's brother's confession was admitted at trial before the brother actually testified. The Court found that the confession was not admissible as a consistent statement, since no charge of improper motive had been made when the statement was offered.

United States v. Williams, 128 F.3d 1128 (7th Cir. 1997) : Affirming a conviction for felon firearm possession, the Court held there was no abuse of discretion in excluding testimony that the defendant's companion had told others in phone calls from jail shortly after the incident that the guns were hers and the defendant had admitted ownership only to protect her. Cross-examination as to whether she had told the U.S. Attorney, BATF, or the police the guns were hers was not an implied charge of recent fabrication but only an impeachment of her credibility, since it showed only that she did not tell her story to everyone, not that she was telling a new and different story at trial. In *United States v. Cherry, 938 F.2d 748 (7th Cir. 1991)* , the Court held that the defendant's extensive cross-examination challenging the core of the victim's testimony in a sexual abuse case could constitute an implied charge of recent fabrication justifying admissibility of prior consistent statements.

United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005) : The Court reversed convictions for child sex abuse, holding that prior consistent statements made by the victim to a physician's assistant were erroneously admitted under *Rule 801(d)(1)(B)*. The statements were not admissible to rebut an attack of recent fabrication, because the defendant made no such attack on the victim. The defense "mounted a general attack on A.L.'s credibility, including allegations of bias against Kenyon, with no evidence to imply that A.L. had recently fabricated the matters previously recounted" to the physician's assistant. In *United States v. Webb, 214 F.3d 962 (8th Cir. 2000)* , the defendant sheriff was convicted for violating the victim's civil rights by assaults on two occasions when she requested help in enforcing a restraining order against her husband. The initial indictment charged only the second assault, and the government indicated to the defense that the first took place on June 23. A superseding indictment charged both and gave the date of the first assault as June 18. At trial the defense attacked the victim's recollection of the date of her first visit to the sheriff's office, questioning whether it had taken place at all and suggesting that she had changed her mind about the date once she learned he had an alibi for June 23. Affirming, the Court found no abuse of discretion in the admission of testimony from staff at a family violence prevention shelter that she had visited after the first assault, since it tended to rebut the implication that the victim had fabricated the first visit, even if the witnesses could not testify to the exact date of the sexual assault of which the victim had complained. In a child sexual abuse case, *United States v. Beaulieu*, n79 the prosecution was allowed to introduce testimony by the victim's mother and a friend that the victim had told them of abuse by the defendant. The Trial Judge admitted the evidence "conditionally" in response to the government's argument that it was being introduced as a preemptive rebuttal to an improper motive charge that it believed the defense would make later. However, defense counsel never asserted the victim had an improper motive or fabricated her

account, except in closing argument, where counsel simply argued that the victim had made up the story from the start. Reversing, the Court held that the statements were inadmissible under *Rule 801(d)(1)(B)* because the defense made no charge of improper motive or recent fabrication. In *United States v. Barrett*, n80 a sexual abuse prosecution in which the defendant argued that the victim changed her story about the attack from first saying she was awake before penetration to later saying she was awake only after penetration had occurred, the Court held that an FBI agent was properly permitted to testify that shortly after the assault, the victim had told him that she was not aware of the defendant until after he had penetrated her. In *United States v. Red Feather*, n81 the Court affirmed sexual assault convictions of a father who abused his daughter, and held that the daughter's diary entries were properly admitted to rehabilitate her after a cross-examination that suggested she had been coached by social service counselors. In *United States v. Nelson*, n82 the Court sustained a conviction for failing to file income tax returns and held it was not error to exclude the defendant's offer of a prior statement that was consistent with his trial testimony. Since the government's cross-examination indicated only that the defendant's explanation had differed on a prior occasion, not that he had fabricated testimony, the Court declined to disturb the ruling below that the prior statement was unnecessary for rehabilitation.

United States v. Bao, 189 F.3d 860 (9th Cir. 1999) : When police came with a search warrant to investigate illegal printing of computer manuals at the defendant's shop, several officers remained at the scene while others went to interview the person identified as having placed the order. In the meantime, the defendant, who had not been placed under arrest, was interviewed by a newsreporter and stated that he did not know he was doing anything illegal. When he was subsequently interrogated by police he admitted the printing was illegal, and the government introduced that statement in its case-in-chief. The Trial Judge excluded the exculpatory statement to the newsreporter, and the Court affirmed. The government had made no suggestion of improper motive or fabrication by admitting the defendant's admission during its case-in-chief, since the defendant had not yet testified at that point (and in fact did not take the stand until after the exculpatory statement was excluded), and the admission had been introduced as substantive evidence rather than to impeach.

United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984) : In a prosecution for obstruction of justice and conspiracy, the Court upheld the admission of testimony by a government witness' wife as to her husband's statements concerning the defendant's telephone instructions to destroy records. Since the defendant had cross-examined the witness in a way that suggested the fabrication of his testimony concerning the telephone conversations, the wife's testimony was admissible to rehabilitate the witness.

United States v. Ettinger, 344 F.3d 1149 (11th Cir. 2003) : A witness testified in a trial for assaulting a federal officer that the defendant had said shortly after the incident that he had told the victim, "I told you I was going to get you." The witness had not included the remark in his own report made after the attack, but the government was permitted to introduce an FBI report made one week after the attack that recounted the witness' statement including the remark. Affirming, the Court found no abuse of discretion, as the defense implied during cross-examination of the witness that he had fabricated hearing the defendant's statement. Affirming a conviction for violating civil rights in *United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991)* , the Court held there was no error in admitting a prior consistent statement where the implication that testimony had been fabricated fairly arose from the line of questioning pursued.

[o] Rule 801(d)(1)(B) -- Timing of Prior Consistent Statement

Tome v. United States, 513 U.S. 150 (1995) : In reversing and remanding a conviction for child sex abuse, the Court held that *Rule 801(d)(1)(B)* permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged fabrication, influence, or motive arose. Accordingly, the child's out-of-court statements implicating her father were

erroneously admitted for their truth under the Rule, because the statements were made at a time when the child had a motive to fabricate (i.e., a desire to live with her mother rather than her father).

United States v. Awon, 135 F.3d 96 (1st Cir. 1998) : Affirming arson and related convictions, the Court held that the Trial Judge erred, albeit harmlessly, in admitting prior consistent statements of two prosecution witnesses. The defense attacked the witnesses on the ground that they were seeking leniency, and the prior statements were made only after the witnesses were informed that the police knew they were involved in the arson and were promised leniency if they cooperated. Since the statements did not predate the witnesses' motivation to obtain leniency, they could not be admitted under *Rule 801(d)(1)(B)*.

United States v. Forrester, 60 F.3d 52 (2d Cir. 1995) : A witness who had been arrested as a member of the conspiracy gave testimony in a cocaine trial that implicated the defendant. On cross-examination defense counsel asserted that the witness was making up her story. In response, the prosecutor had marked for identification, and used to refresh the recollection of the witness, a handwritten statement that the witness had prepared for the government three weeks after her arrest; the statement was consistent with her trial testimony. The Court held it was error to permit use of the document as a prior consistent statement. Because the witness' motive to fabricate arose as soon as she was arrested, the consistent statement post-dated the motive to falsify. The Court concluded that "the *Tome* rationale applies to a document marked for identification where the government has admitted that its purpose in using the statements contained in the document was to rebut the inference that the witness was making up [her] story." See also *United States v. Quinto*, n83 which anticipated *Tome* in reversing a conviction for tax evasion when the government was improperly permitted to introduce a detailed IRS memorandum as a prior consistent statement after a witness was subjected to vigorous cross-examination. The Court concluded that the IRS memorandum was not made prior to the time that the motive to falsify arose, since the defendant contended that, from the beginning, government agents were ruthlessly seeking a conviction, regardless of actual guilt.

United States v. Henderson, 717 F.2d 135 (4th Cir. 1983) : The Court upheld a bank robbery conviction, finding no error in permitting the prosecution to bring out a prior consistent statement of an important government witness. The statement was made after arrest, but before a plea bargain was struck. Thus, the Court concluded, it was made prior to the time that a motive to falsify existed.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997) : Reversing a bank chairman's conviction for fraud in connection with loans in which he was interested, the Court noted that it was no longer permissible to admit a prior consistent statement made after the declarant had an improper motive to fabricate testimony. Thus, it was error to admit a proffer made in the course of plea bargaining by another participant in the scheme.

United States v. Trujillo, 376 F.3d 593 (6th Cir. 2004) : Two witnesses testified at a trial for marijuana trafficking that they had carried marijuana for the defendant. On cross-examination, the defense attempted to impeach them with inconsistent statements they had given to DEA agents in post-arrest interviews. The prosecution then called the agents in order to rehabilitate the witnesses with statements made during the post-arrest interviews that were consistent with their trial testimony. The Court held it was error (but harmless) to admit the prior consistent statements, as "[i]t is simply not believable to suggest that, a day or two after [the witnesses] were stopped with more than fifty kilograms of marijuana in their car, they did not have a motive to lie, regarding the source of the marijuana, in order to get lenient treatment." In a prosecution for mail fraud, *United States v. Toney, 161 F.3d 404 (6th Cir. 1998)* , the defendant called Armstrong (the mastermind of the scheme), who had already entered a guilty plea, to testify that the defendant was an unwitting participant. The government then impeached Armstrong with a statement made when she was arrested, in which she had referred to the defendant as a full-fledged accomplice. Defense counsel then sought to introduce an

affidavit Armstrong made after the government filed a criminal complaint against both Armstrong and Toney, in which she stated that Toney was an unwitting participant. The Trial Judge held that the statement was made after Armstrong's motive to falsify arose -- although the Judge did not know "what the motive might be here" -- and the Court found no clear error.

United States v. Williams, 128 F.3d 1128 (7th Cir. 1997) : Affirming a conviction for felon firearm possession, the Court held there was no abuse of discretion in excluding testimony that the defendant's companion had told others in phone calls from jail shortly after the incident that the guns were hers and the defendant had admitted ownership only to protect her. It was not indisputably clear that the statement was made before she had a motive to fabricate, since she could well have thought that the defendant should not be carrying a gun with his criminal record. In *United States v. Fulford, 980 F.2d 1110 (7th Cir. 1992)* , the Court affirmed convictions for methamphetamine distribution offenses, holding there was no abuse of discretion in admitting postarrest consistent statements of a cooperating witness for rehabilitation after it was suggested his testimony was a recent fabrication. The defense implied the witness' motive to fabricate arose from his cooperation agreement, so statements prior to that agreement were relevant to rehabilitate. In *United States v. Davis*, n84 the Court held that there had been no abuse of discretion in excluding the tape of a television interview offered by the defendant in a political corruption prosecution to rebut a charge he had fabricated his defense, because the interview was conducted seven days after FBI agents had indicated to him he was the subject of an investigation. In *United States v. Feldman*, n85 the Court affirmed convictions for fraud in a scheme to use false bank guarantee letters to fulfill the collateral requirements for trading in stock options. After defense counsel emphasized in his opening statement and on cross-examination of a codefendant that he had made a deal with the government, the prosecutor was properly permitted to introduce a statement that the codefendant had made to the FBI prior to entering into a plea agreement. The Court found that no motive to help the government at the expense of the defendant existed when the statement was made.

United States v. Esparza, 291 F.3d 1052 (8th Cir. 2002) : Affirming a cocaine conviction, the Court held that the defendant's statement, made at the time of his arrest, that he did not know that drugs were in his trailer, was not admissible as a prior consistent statement because he had the same motive to lie at the time of arrest as at trial. In a prosecution for sexual abuse, *United States v. White*, n86 the Court held that statements of the child victim to a social worker regarding the abuse were not admissible as substantive evidence consistent with the victim's testimony because they were made after the motive to fabricate implied by the defendant's questioning and evidence came into existence. The error was harmless, however.

Arizona v. Johnson, 351 F.3d 988 (9th Cir. 2003) : In the trial of a Border Patrol agent for sexually assaulting an alien in his custody, the government introduced statements denying consent made by the victim to another agent after she was picked up at a border crossing where the defendant had left her following the incident. Affirming, the Court found no abuse of discretion, as the statements were consistent with the victim's testimony, offered to rebut a contention that she fabricated her story because she wanted to stay in the United States for the duration of the investigation and trial, and made before any motive to falsify arose, because there was no evidence that at the time the statements were made the victim had been offered any special treatment or had been told that she could stay in the United States for a sustained period. In *United States v. Bao, 189 F.3d 860 (9th Cir. 1999)* , when police came with a search warrant to investigate illegal printing of computer manuals at the defendant's shop, several officers remained at the scene while others went to interview the person identified as having placed the order. In the meantime, the defendant, who had not been placed under arrest, was interviewed by a newsreporter and stated that he did not know he was doing anything illegal. When he was subsequently interrogated by police he admitted the printing was illegal, and the government introduced that statement in its case-in-chief. The Trial Judge excluded the exculpatory statement to the newsreporter, and the Court affirmed. Even though the defendant was not in custody at the time he spoke to the reporter, he clearly knew that he was a suspect in a criminal investigation and he had a motive to misrepresent to the reporter the

knowledge of the crime he had committed. In *United States v. Collicott*, n87 defense counsel, cross-examining a prosecution witness in a drug case, asked her what time of day she had told an arresting officer that a drug dealer had come to the hotel room she was sharing with the defendant, but she said she did not remember. Defense counsel then called the officer to recount what the witness said about the time the dealer arrived. On cross-examination of the officer, the government elicited other statements the witness had made to the officer during that conversation about the defendant's connection with the dealer. Reversing the conviction, the Court held that the remainder of the conversation was not admissible under *Rule 801(d)(1)(B)* because the witness' motive to falsify was exactly the same when the arrest took place as at trial. See also *United States v. Rohrer* n88(affirming cocaine convictions, but holding that a diagram made by a witness shortly before signing a cooperation agreement was improperly used to rehabilitate the witness).

United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996) : The Court found it was error (but harmless) to admit a cooperating witness' prior consistent statement, which was made after the witness was arrested but before he entered into a plea agreement. The statement was not made before the motive to falsify arose, because the witness "had an incentive to concoct a story" implicating the defendant as soon as he was arrested. In a prosecution for conspiring to manufacture methamphetamine, *United States v. Albers, 93 F.3d 1469 (10th Cir. 1996)* , the Court held that it was error (but harmless) to introduce prior consistent statements made, in one case, after the declarant had been arrested on unrelated charges, and in the other, after the declarant's guilty pleas had been accepted but while he was still seeking to appeal his sentence.

United States v. Drury, 396 F.3d 1303 (11th Cir. 2005) : The Court affirmed a murder-for-hire conviction, holding there was no abuse of discretion in excluding a prior consistent statement offered by the defendant. While being held in the arresting officer's vehicle following his arrest, the defendant told his son that the purported scheme was part of a "role-playing exercise" arranged by the ATF instructor who was living with the defendant. The defendant had never previously mentioned the exercise and the instructor denied ever discussing or engaging in such a thing. The Court held that although there could be no *per se* exclusion of a prior consistent statement made after the declarant's arrest, there was ample support in the record for the determination below that the defendant had adequate motive and opportunity to fabricate the story that he told his son. In *United States v. Prieto, 232 F.3d 816 (11th Cir. 2000)* , the Court affirmed robbery convictions, holding there was no abuse of discretion when statements made by an accomplice after his arrest were admitted under *Rule 801(d)(1)(B)*. Refusing to adopt a bright-line rule that a motive to fabricate necessarily attaches upon arrest, the Court found that the witness had spoken after hearing his *Miranda* rights and with no suggestion that he expected, or his interrogators offered, benefits in exchange for his cooperation.

[5] Rule 801(d)(1)(C) -- Statements Which Are Not Hearsay -- Prior Statement By Witness -- Identification

[a] Rule 801(d)(1)(C) -- Drawings

United States v. Moskowitz, 581 F.2d 14 (2d Cir. 1978) : In an armed bank robbery prosecution the government offered a drawing made by an artist from information supplied by witnesses, and two witnesses testified that the drawing looked like the robber. Affirming, the Court unanimously agreed that the two witnesses' statements were admissible under *Rule 801(d)(1)(C)*. The majority believed that the sketch itself was not hearsay; the concurring Judge thought it would be a more straightforward analysis to regard the sketch as an integral part of the prior identification evidence. Under either approach, the evidence was properly admitted.

[b] Rule 801(d)(1)(C) -- Failure To Identify at Trial

United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) : In the trial arising from the 1993 bombing of the World Trade Center, a prosecution witness identified two jurors, rather than two defendants, as perpetrators. The government

responded with evidence that the witness had previously identified the two defendants in a photo array. Affirming, the Court found no error in admitting the evidence of the prior identification, noting that a prior identification "is admissible under *Fed.R.Evid. 801(d)(1)(C)*, regardless of whether the witness confirms the identification in court." Since the witness was subject to cross-examination about the prior identification, the Rule was satisfied. In *United States v. Simmons, 923 F.2d 934 (2d Cir. 1991)* , the Court affirmed RICO convictions arising out of a massive heroin distribution conspiracy, holding there was no error in admitting evidence that a witness had positively identified a defendant from a 13-photograph array. Even though she did not identify him at trial and even though the government did not record the events surrounding an earlier procedure where she did not identify him, there was no indication the identification was impermissibly suggestive. In *United States v. DiTommaso*, n89 the Court affirmed convictions for participation in drug trafficking and money laundering, holding that a witness' prior photographic identifications of a defendant were properly elicited, even though the witness was unable to make an in-court identification.

United States v. Blackman, 66 F.3d 1572 (11th Cir. 1995) : The Court held there was no error in permitting an FBI agent to testify that a bank teller had identified a defendant from a photospread as being one of the participants in the charged bank robbery, although the teller could not identify the defendant at trial.

[c] Rule 801(d)(1)(C) -- Memory Problem

United States v. Owens, 484 U.S. 554 (1988) : A correctional counselor at a federal prison was attacked and severely beaten, leaving him with severely impaired memory. At the defendant's trial for assault with intent to murder, the victim had no present memory of his attacker's identity and admitted on cross-examination that he could not remember seeing his assailant, but said he remembered identifying the defendant to an FBI agent who visited him in the hospital. He could not remember any of his other hospital visitors or whether they had suggested who the attacker was. The Court of Appeals reversed the defendant's conviction on hearsay and confrontation grounds, but the Supreme Court held that neither *Rule 801(d)(1)(C)* nor the *Confrontation Clause* was violated by admitting evidence of the identification to the FBI agent.

[d] Rule 801(d)(1)(C) -- Photo Identification

United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) : In the trial arising from the 1993 bombing of the World Trade Center, a prosecution witness identified two jurors, rather than two defendants, as perpetrators. The government responded with evidence that the witness had previously identified the two defendants in a photo array. Affirming, the Court found no error in admitting the evidence of the prior identification. Since the witness was subject to cross-examination about the prior identification, the Rule was satisfied. In *United States v. Simmons, 923 F.2d 934 (2d Cir. 1991)* , the Court affirmed RICO convictions arising out of a massive heroin distribution conspiracy, holding there was no error in admitting evidence that a witness had positively identified a defendant from a 13-photograph array. Even though she did not identify him at trial and even though the government did not record the events surrounding an earlier procedure where she did not identify him, there was no indication the identification was impermissibly suggestive. In *United States v. DiTommaso*, n90 the Court affirmed convictions for participation in drug trafficking and money laundering, holding that a witness' prior photographic identifications of a defendant were properly elicited.

United States v. Hudson, 564 F.2d 1377 (9th Cir. 1977) : Although it reversed a conviction for armed post office robbery on other grounds, the Court approved the introduction as substantive evidence of prior photographic identifications. "Though a prior identification may be equivocal, the jury is entitled to give it such weight as it will after hearing the testimony under direct and cross examination."

United States v. Blackman, 66 F.3d 1572 (11th Cir. 1995) : The Court held there was no error in permitting an FBI agent to testify that a bank teller had identified a defendant from a photospread as being one of the participants in the charged bank robbery. In *United States v. Hines, 955 F.2d 1449 (11th Cir. 1992)* , the Court reversed convictions for aggravated sexual assault, holding it was an abuse of discretion to admit photospreads from which the complainant had identified the defendants as her assailants, as there was no demonstrable need to introduce the photographs, the photos implied the defendants had prior criminal records, and the agent's testimony highlighted that the photos were of known criminals.

[e] Rule 801(d)(1)(C) -- Police Reports

United States v. Davis, 181 F.3d 147 (D.C. Cir. 1999) : In a drug prosecution, a police officer's redacted "buy report," which identified the defendant as the seller, was held properly admitted. The officer testified at trial, and therefore the identification in the "buy report" was admissible under *Rule 801(d)(1)(C)*.

[f] Rule 801(d)(1)(C) -- Recanting Witness

United States v. Lopez, 271 F.3d 472 (3d Cir. 2001) : In prosecution for robbery and murder, the government subpoenaed a witness to testify that he told the police on the day of a crime that he had seen three of the defendants in the area of the crime, but at trial the witness denied making any such statement. Affirming, the Court found no abuse of discretion when a police lieutenant was then permitted to testify that the witness had identified the three defendants, as *Rule 801(d)(1)(C)* applies to identifications like the one made in this case.

United States v. O'Malley, 796 F.2d 891 (7th Cir. 1986) : The Court affirmed racketeering and extortion convictions, as it held that a recanting witness' prior identification was admissible under the Rule. The witness was present for cross-examination, and the identification was therefore admissible as substantive evidence.

United States v. Shryock, 342 F.3d 948 (9th Cir. 2003) : In a prosecution for gang-related murder and racketeering, one of the alleged victims testified that he had been shot but that he could not identify his assailant or pick him from a photo lineup. He also testified that at a defendant's parole revocation hearing he had testified the defendant did not shoot him. The government later called a police detective to testify that the victim identified the defendant as his assailant during a hospital interview and when shown a photo lineup at his home. The Court held that the detective's testimony was admissible under *Rule 801(d)(1)(C)*, because the victim was present at trial and available for cross-examination.

[g] Rule 801(d)(1)(C) -- Scope of the Rule

United States v. Marchand, 564 F.2d 983 (2d Cir. 1977) : A conviction for possession and distribution of marijuana was affirmed on appeal, as the Court rejected a contention that *Rule 801(d)(1)(C)*'s language "identification ... made after perceiving him" should be limited to statements made after a corporeal identification. The Court held that the Rule covers all identifications of a suspect after a crime is committed as long as proper procedures are used.

[h] Rule 801(d)(1)(C) -- Testimony by Government Agent

United States v. Paredes-Rodriguez, 160 F.3d 49 (1st Cir. 1998) : Appealing from drug and firearms convictions, the defendant argued that a police officer should not have been permitted to testify to a witness' out-of-court identification, because the witness' own identification testimony at trial had been "shaky," so the officer's testimony

served only to bolster the witness' identification. Finding no error because the witness testified at trial and was subject to cross-examination, the Court noted that the witness' less-emphatic trial identification would "merely confirm the validity of the premise underlying *Rule 801(d)(1)(C)*."

United States v. Brewer, 36 F.3d 266 (2d Cir. 1994) : In a prosecution arising from a bank robbery, the defendant sought to prove that eyewitnesses to the robbery failed to identify him in a photo array. The defendant called the police officer who conducted the array, and argued that the officer could testify, under the present sense impression exception, to the witness' failure to identify the defendant. However, the Court held that the statements by the identifying witnesses were not made immediately after the event within the meaning of *Rule 803(1)* -- the relevant event being the robbery itself and not the failure to identify the defendant. The Court concluded that the admissibility of a failure to make an identification was covered by *Rule 801(d)(1)(C)* and not by *Rule 803(1)*. Since the witnesses were not called to testify, the testimony of the officer could not be admitted under *Rule 801(d)(1)(C)*.

United States v. Brink, 39 F.3d 419 (3d Cir. 1994) : In a trial for bank robbery, the bank teller identified the defendant, but stated that she was unable to recall the bank robber's eye color. An FBI agent then testified that the day after the robbery, the teller told him that the robber had dark-colored eyes. The defendant, who had light-colored eyes, sought to use the teller's prior statement as substantive proof of innocence, but the Trial Judge would only give an instruction limiting use of the teller's prior statement to assessing her credibility. The Court reversed, holding that the ruling was error because exculpatory identifications fall within the Rule, and the Rule permits a third party (e.g., the FBI agent) to testify to the witness' prior identification, so long as the identifying witness is subject to cross-examination at trial.

United States v. Cueto, 611 F.2d 1056 (5th Cir. 1980) : A law enforcement officer was allowed to testify about a witness' out-of-court identification to corroborate the witness' testimony that such an identification was made. Because the witness was present and subject to cross-examination, *Rule 801(d)(1)(C)* was satisfied.

United States v. Jarrad, 754 F.2d 1451 (9th Cir. 1985) : The Court sustained convictions for bank robbery. It found that *Rule 801(d)(1)(C)* was satisfied where a witness testified for the government that she had been shown photos by an FBI agent but had not identified the defendant, and an FBI agent testified that the witness had stated that the defendant's picture was "similar to or reminded her of" the person she had seen. Both the witness and the agent were available for cross-examination.

[6] Rule 801(d)(2)(A) -- Statements Which Are Not Hearsay -- Admission By Party-Opponent -- Party's Own Statement

[a] Rule 801(d)(2)(A) -- "Admissions Against Interest"

United States v. Dimitroff, 541 F.2d 629 (6th Cir. 1976) : A defendant convicted of possessing controlled substances with intent to distribute contended on appeal that an affidavit he signed stating that he had picked up certain drugs from a doctor without the knowledge of the supplier of the drugs was improperly admitted against him because it was hearsay. The Court properly concluded that the statement was an admission, although it made the mistake of referring to the statement as "an admission against interest." Surprisingly, the Court apparently took seriously the contention that the statement might have been rendered inadmissible if not accompanied by independent evidence showing its trustworthiness. There is no such requirement in the Federal Rule. Perhaps the Court confused admissions and declarations against interest.

[b] Rule 801(d)(2)(A) -- Charts and Diagrams

Trull v. Volkswagen of Am., Inc., 187 F.3d 88 (1st Cir. 1999) : In a product liability action arising from an automobile collision, the Court found no abuse of discretion when the defendants were permitted to cross-examine a police officer who investigated the accident about a diagram that the plaintiffs used in a prior State Court suit against the state. The diagram suggested that the vehicles collided at a right angle during the accident, while the officer testified that the accident was a side impact collision. The evidence tended to show that the plaintiffs took a contradictory position in earlier litigation.

S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014 (S.D.N.Y. 1984) , aff'd mem., 762 F.2d 990 (2d Cir. 1985) : In a successful breach of contract action by a subcontractor against a general contractor, the District Court held that two "bar charts" prepared by the defendant for use in construction could be admitted on behalf of the plaintiff as party admissions.

[c] Rule 801(d)(2)(A) -- Consent Decree

United States v. Cohen, 946 F.2d 430 (6th Cir. 1991) : In a prosecution for making and selling pirated video tapes, the Court held there was no error in admitting a consent judgment from the companion civil copyright infringement suit. The judgment was the defendant's personal admission agreeing to be enjoined permanently from infringing the plaintiffs' copyrights. The dissenting Judge noted that the consent judgment did not contain an admission of liability or wrongdoing and would have characterized it as a settlement agreement offered only to prove liability and therefore inadmissible under *Rule 408*.

[d] Rule 801(d)(2)(A) -- Constitutional Problems

Gray v. Maryland, 523 U.S. 185 (1998) : The defendant argued that his right to confrontation was violated when his codefendant's confession was admitted at their joint trial. The defendant relied on *Bruton v. United States*, n91 where the Court held that a codefendant's confession cannot be admitted in a joint trial if the confession directly implicates the nonconfessing codefendant. In these circumstances, a limiting instruction is insufficient to protect the defendant's right to confrontation. The government relied on *Richardson v. Marsh*, *infra*, which held that the *Bruton* rule was not violated where the codefendant's confession was redacted to delete any reference to the nonconfessing codefendant. In *Gray* the confession was redacted by substituting for the defendant's name in the confession a blank space or the word "deleted." The Court relied on *Bruton*, and held that this limited redaction was insufficient to protect the defendant's right to confrontation. The Court stated that "[r]edactions that simply replace a name with an obvious blank space or a word such as deleted ... leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result." The Court reasoned that the jury would all too easily link up the redaction to the nonconfessing codefendant, and that "the obvious deletion may well call the jurors' attention specially to the removed name." The Court distinguished *Richardson* as a case in which the confession was redacted to refer only to the actions of the confessing codefendant and another person who was not a defendant at the trial. Four Justices dissented, *per* Justice Scalia, arguing that since the redacted confession did not specifically refer to the non-confessing codefendant, the result was controlled by *Richardson*.

Cruz v. New York, 481 U.S. 186 (1987) : The Court rejected the "interlocking confession" rule whereby one nontestifying codefendant's confession could be admitted against another defendant pursuant to a limiting instruction as long as the other defendant had made a confession that interlocked with the codefendant's confession. Writing for the Court, Justice Scalia reasoned that an interlocking confession "bears a positively inverse relationship to devastation,"

because it tends to confirm the defendant's own confession which, in the real world, the defendant is seeking to avoid by claiming that it was inaccurately reported or untrue when made. Thus, the Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, ... the *Confrontation Clause* bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." Four Justices dissented.

Richardson v. Marsh, 481 U.S. 200 (1987) : On the same day that it decided *Cruz, supra* , the Court held that "the *Confrontation Clause* is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." In a murder case, one codefendant's confession to the crime described a conversation that he had in a car on the way to the victims' home in which the killings were discussed. Although the other defendant was not mentioned, there was testimony that suggested this defendant had arrived in the car. The Trial Judge instructed the jury that the nontestifying codefendant's confession could not be used against the other defendant. Justice Scalia's opinion for the Court found no *Confrontation Clause* violation and distinguished *Bruton v. United States, supra* , on the ground that the nonconfessing defendant was directly implicated by the confession in *Bruton*. Justice Scalia discussed the practical need for joint trials in criminal cases and reasoned that the possibility that a jury would find a logical link between evidence properly admitted against a defendant and a confession that the jury may not use against the defendant was not substantial enough to require a rule forbidding the introduction of the confession. Three Justices dissented.

United States v. Lewis, 537 F. Supp. 151 (D.D.C. 1982) , aff'd, 716 F.2d 16 (D.C. Cir. 1983) : Two defendants moved to have their trial severed from a third who had made "strongly incriminatory declarations" that were admissible only against him. Recognizing the problem that any jury would have in confining the statements to a single defendant, the Trial Judge decided to impanel two juries, the first to hear the case against the defendants who had moved for severance and the second to hear the case against the other defendant. Proceeding in this manner, the Judge enabled the government to avoid two wholly separate trials while he protected the defendants from any unfair use of a single defendant's admissions.

United States v. Vega Molina, 407 F.3d 511 (1st Cir. 2005) : In the trial of multiple defendants for murders following a botched robbery, the prosecution introduced the confession of one nontestifying defendant in which the names of other participants were replaced with neutral phrases like "another person." The Court held that admission of the confession did not violate the codefendants' rights under *Bruton*, but that the failure to give a cautionary instruction was reversible plain error as to one codefendant because the evidence against him was "noticeably thinner" than against the other codefendant and the prosecutor in closing argument relied heavily on the confession to implicate him.

United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) : A coal mining company and two of its superintendents were convicted for violating mine safety regulations. Affirming, the Court rejected a *Sixth Amendment* objection to testimony by a government witness that one of the superintendents had told him that the other had said that the company was operating equipment in an illegal manner. The hearsay was not "testimonial" under *Crawford*, and it was trustworthy, since it was not made to curry favor or shift blame to other participants.

United States v. Sutton, 337 F.3d 792 (7th Cir. 2003) : Affirming convictions for bank robberies, the Court held there was no *Bruton* violation when one codefendant's confession was introduced with the names of the conspirators replaced with terms like "another individual," "the individual," "third individual," "that person," and "the guy." This kind of editing is not a blank space deletion of the sort held improper in *Gray v. Maryland*, nor was there an easily identified one-to-one correspondence between the replacement words and the defendants.

United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998) : In an arson prosecution, a principal source of evidence against the defendants was their repeated boasts over the years of being involved with starting the fires, as well as a tape-recorded statement made by one of them to investigators. None of the defendants testified at the trial, and each claimed on appeal that testimony regarding the others' admissions violated his or her *Confrontation Clause* rights. Affirming, the Court held that the defendants' rights had been sufficiently protected under *Richardson v. Marsh, supra* , by repeated instructions to the jury to use each admission only against the declarant and by redaction of the statements to eliminate specific identification of the declarant's codefendants. Unlike the situation in *Gray v. Maryland, supra* , in this case codefendants' names were replaced with a pronoun or similarly neutral word in a way that did not draw attention to the redaction and would not be incriminating unless linked to a codefendant by other trial evidence.

United States v. Sarracino, 340 F.3d 1148 (10th Cir. 2003) : Affirming murder convictions, the Court held it was a *Bruton* error (but harmless) to admit a nontestifying codefendant's statement that the victim had "gurgled" as he was put into a car and the defendant and the codefendant drove off to the place where the body was found.

United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999) : The Court reversed convictions for distribution of cocaine because a defendant's confession was redacted in such a way that it still implicated the precise number of the confessor's codefendants. Furthermore, it was a *Bruton* error (but harmless) to leave a physical description of one of the codefendants in the redacted confession. In *United States v. Beale, 921 F.2d 1412 (11th Cir. 1991)* , the Court reversed one defendant's RICO conviction for armored truck robberies because a nontestifying codefendant's postarrest statement that he knew the defendant by a particular street name was the only evidence connecting the defendant to the alias by which another witness had identified one of the conspirators.

[e] Rule 801(d)(2)(A) -- Depositions and Prior Testimony

Meriwether v. Coughlin, 879 F.2d 1037 (2d Cir. 1989) : In this civil rights action brought by prisoners who alleged they had been unconstitutionally transferred between institutions and beaten by corrections officers, the Court held that there was no error admitting testimony by the defendant commissioner of corrections at another proceeding where he admitted knowing of the corrections officers' "code of silence," as it was inconsistent with the defendants' position at trial that the commissioner relied on his subordinates during the events in question.

United States v. Ballard, 779 F.2d 287 (5th Cir. 1986) : The Court affirmed a conviction for making false statements in a bankruptcy petition. It found that statements by the defendant in a deposition in a civil case were admissible, despite his attempt to blame an adverse party in that case for improperly eliciting the statements.

[f] Rule 801(d)(2)(A) -- Foundation -- Standard of Proof

United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997) : Affirming a conviction for cultivating marijuana, the Court held that handwritten notes concerning the marijuana operation were sufficiently authenticated as the defendant's. In the course of its discussion, the Court suggested that a preponderance standard applies to foundation questions under *Rule 801*, compared to the *prima facie* showing required to authenticate evidence under *Rule 901*. It was unnecessary to decide the issue, however, since the government had provided enough evidence to show it more likely than not that the notes were the defendant's.

United States v. Gil, 58 F.3d 1414 (9th Cir. 1995) : Affirming drug convictions, the Court held that a drug ledger

was properly admitted for its truth. The government provided an adequate foundation under *Rule 104(b)* to support a finding that the defendant prepared the ledger. The government's handwriting expert testified that the ledger was probably written by the defendant, and there was also circumstantial evidence that the defendant wrote the ledger entries. Accordingly, the ledger was admissible as a party admission, and it was for the jury to decide whether the defendant actually prepared the ledger. In our view, the question of whether a proffered statement is that of the party is governed by the preponderance standard of *Rule 104(a)*, rather than the prima facie evidence standard of *Rule 104(b)*. We believe this result is mandated by *Bourjaily v. United States, 483 U.S. 171 (1987)* .

[g] Rule 801(d)(2)(A) -- Guilty Pleas

Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) : In a civil rights action on behalf of an arrestee rendered incompetent, allegedly as a result of the arrest, the Court held that the arrestee's guilty plea to misdemeanor assault and battery charges arising out of the incident was admissible as a party admission. Even though he was not physically able to rebut the plea at trial, he had ample opportunity to contest it prior to trial.

United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993) : The Court affirmed a conviction for felon firearm possession, holding that the defendant's prior State Court guilty plea regarding the same firearm was properly admitted as an admission, regardless of whether it met the constitutional standard for a guilty plea.

United States v. Holmes, 794 F.2d 345 (8th Cir. 1986) : Upholding a conviction for making false and fraudulent statements to a government agency, the Court found that a guilty plea to a state charge of theft by receipt of stolen property was properly admitted as an admission to prove knowledge by the defendant of the falsity of his statement. In *United States v. Riley*, n92 the Court upheld the introduction in a Mann Act prosecution of the defendant's guilty plea in State Court to a pimping charge.

[h] Rule 801(d)(2)(A) -- Interpretation of Statements

United States v. Pelletier, 845 F.2d 1126 (1st Cir. 1988) : The Court affirmed a conviction for cocaine trafficking, finding that the Trial Judge properly admitted statements made by the defendant following his arrest. It observed that "the statement about his clients could reasonably be interpreted as a reference to the crimes for which he was charged."

United States v. Pizarro, 756 F.2d 579 (7th Cir. 1985) : The Court upheld a conviction for distribution of heroin, finding no error in the admission of evidence that during a first trial of the case the defendant approached a special agent while the jury was deliberating and said: "Hey man, can I have my dope back?" Although the defendant argued that the question was a joke, the Court concluded that the jury could evaluate its significance.

People of Terr. of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985) : The Court held that a burglary defendant's offer to pay damages to the victim if charges were dropped was admissible, since "statements need not be incriminating to be admissions." It found the offer to be relevant to show consciousness of guilt.

[i] Rule 801(d)(2)(A) -- Interrelated Statements

United States v. Guzman, 754 F.2d 482 (2d Cir. 1985) : The Court affirmed a conviction for possession of cocaine, finding that statements made to the defendant by a detective were admissible to render intelligible the answers made by the defendant to the statements.

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) : Affirming convictions arising out of narcotics transactions, the Court found no error in the admission of tape recorded conversations between a defendant and a government informant. The defendant's statements were admissible as party-admissions, and the informant's statements were reciprocal and integrated utterances that were admissible to put the defendant's statements in context. In *United States v. Gutierrez-Chavez*, n93 the Court found that a codefendant's portions of a postarrest telephone conversation with the defendant were admissible as reciprocal and integrated utterances between two parties for the limited extent of putting the defendant's responses into context.

United States v. Davis, 890 F.2d 1373 (7th Cir. 1989) : Tape recordings of conversations between an informant and a defendant charged with political corruption offenses in which the defendant solicited and subsequently accepted money for political favors were properly admitted as evidence of the defendant's admissions; the informant's responses were held properly admitted for the limited purpose of placing the defendant's statements in context.

[j] Rule 801(d)(2)(A) -- Judicial Admissions

188 LLC v. Trinity Indus., Inc., 300 F.3d 730 (7th Cir. 2002) : In a commercial dispute, the defendant argued that the plaintiff was "bound" by an admission made in a pleading that the plaintiff had subsequently amended. The Court held that this argument was properly rejected: "Under some circumstances, a party may offer earlier versions of its opponent's pleadings as evidence of the facts therein, but they are not judicial admissions, and the amending party may offer evidence to rebut its superseded allegations." In *Cooper v. Carl A. Nelson & Co., 211 F.3d 1008 (7th Cir. 2000)* , a worker was injured when he fell while traversing a drainage ditch at a construction site. It was unclear whether he slipped on planks that were across the ditch or on a muddy incline leading to the planks. The Trial Judge granted summary judgment against the original complaint, which alleged a fall on the planks, and the plaintiff filed an amended complaint on the theory left open by the Judge's ruling, that he fell on the incline. The Judge granted the defendant's motion *in limine* to preclude any mention that the plaintiff fell on the planks, on the ground that the amended complaint was a judicial admission binding the plaintiff at trial. Reversing a judgment for the defendant, the Court held that the summary judgment ruling had been based on a misapprehension of the ruling, and that therefore the amended complaint filed in response to the ruling should not have bound the plaintiff at trial. Thus, evidence that the plaintiff slipped on the planks should have been admissible.

[k] Rule 801(d)(2)(A) -- Legal Briefs

Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989) : In ordering a retrial on the damages issue in this defamation action by a Veterans' Administration psychologist who alleged that defendant's libelous newspaper story led to the VA's reassigning him to a position where he had nothing to do, the Court held that a brief filed *pro se* by the plaintiff in a labor grievance proceeding protesting the reassignment should not have been excluded because his statements there that he had been transferred in reprisal for union activities and prior successful grievances were highly probative admissions directly contrary to his position at trial. The Court noted its reluctance to treat appellate briefs in one action as evidentiary admissions in another, but considered the instant circumstances as favoring admissibility, because the brief had been written by the plaintiff himself rather than by an attorney, on an issue common to both cases, and it did not purport to be other than his view of what the "real world facts are."

[l] Rule 801(d)(2)(A) -- Letters to the Trial Judge

United States v. Barrington, 806 F.2d 529 (5th Cir. 1986) : In a prosecution for interstate travel with intent to

promote prostitution, the Court upheld the introduction of a letter written by the defendant to the Trial Judge asking for mercy on the ground that she had been rehabilitated as a result of serving time on a state charge, the truth of which she did not deny. The Court found that the defendant's decision to make an admission to the Trial Judge enhanced the reliability of her statements.

[m] Rule 801(d)(2)(A) -- Multiple Parties

FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990) : In an action against an attorney for an insolvent savings and loan association, the Court held that regulatory agency examination reports admissible as public records satisfied *Rule 805* as to included hearsay because the statements were party-admissions made by a person who, at the time they were introduced, was another defendant in the instant action.

Stalbosky v. Belew, 205 F.3d 890 (6th Cir. 2000) : The estate of a decedent sued a truck driver, who raped and murdered the decedent, for wrongful death and the truck driver's employer for negligent hiring and retention. Affirming summary judgment for the employer, the Court held that a statement in which the truck driver told an investigator for the plaintiff that the employer was aware of the driver's criminal history was inadmissible. The statement was not being offered against the party making it, as required by the Rule, but against another party, the employer. In *Jewell v. CSX Transp., 135 F.3d 361 (6th Cir. 1998)* , the plaintiff's decedent was killed, and his wife and his six-year-old daughter were injured, in a grade-crossing collision between their pickup and the defendant's train. At trial of their action against the railroad, the defendant introduced testimony from six witnesses that the daughter had told them after the accident that the other two were arguing immediately before the accident and that when she told them a train was coming, she was told to be quiet. Affirming a judgment for the defendant, the Court held that the girl's statements were party admissions under *Rule 801(d)(2)(A)*; however, it did not mention that the little girl's statements were admitted not only against her, but also against the other plaintiffs.

United States v. Hay, 122 F.3d 1233 (9th Cir. 1997) : Reversing a mail fraud conviction arising from an insurance scheme, the Court held it was error to admit against the defendant an admission made by his codefendant.

Robinson v. Audi NSU Auto Union A.G., 739 F.2d 1481 (10th Cir. 1984) : In a suit against the manufacturer, the importer, the distributor, and the retailer of a car involved in a rear-end collision, the Court held that statements made by Volkswagen of America were personal admissions that could be used to show knowledge of problems with the design of a gas tank. These statements were not admissible against the manufacturer, however, since they were made prior to the time that VOA became the manufacturer's agent. Although VOA argued that the statements were made on behalf of a German company for which VOA acted as agent, the Court held that absent a clear indication by VOA that it was making the statements as an agent only, the statements were admissible as its own admissions.

[n] Rule 801(d)(2)(A) -- Non-inculpatory Statements

United States v. McGee, 189 F.3d 626 (7th Cir. 1999) : At a bank robbery trial the prosecution introduced three statements the defendant had given to an investigating detective. In each statement the defendant had denied any knowledge of or involvement in the robbery, but the three statements gave three different versions of the day's events. The defendant argued that the statements were not admissible under *Rule 801(d)(2)(A)* because they were not inculpatory. Affirming the conviction, the Court held that by the terms of the Rule an admission need only be made by the party against whom it is offered and need not be inculpatory.

[o] Rule 801(d)(2)(A) -- Omissions

Moylan v. Meadow Club, Inc., 979 F.2d 1246 (7th Cir. 1992) : In an action for overtime pay under the Fair Labor Standards Act, the Court held there was no error in admitting a letter and conversations by the plaintiff, at a time when he was trying to settle up accounts with his employer, that made no mention of overtime wages. The evidence was a party admission and the omission impeached his claim by contradiction.

[p] Rule 801(d)(2)(A) -- Real Party in Interest

Donovan v. Crisostomo, 689 F.2d 869 (9th Cir. 1982) : In a suit by the Secretary of Labor seeking injunctive relief and back pay, the Court held that statements of some employees that they did not in fact work overtime were not admissions, since the Secretary was the real party in interest and the statements were not his.

[q] Rule 801(d)(2)(A) -- Representative Capacity

Estate of Shafer v. Commissioner, 749 F.2d 1216 (6th Cir. 1984) : The Court sustained a determination upholding the IRS notice of deficiency against an estate. The Court held that an executor of an estate had traditionally been treated as a party in litigation involving the estate. It found that *Rule 801(d)(2)(A)* continued this treatment and that statements by an executor were admissible when offered by the government as party admissions.

[r] Rule 801(d)(2)(A) -- Statements Made While Cooperating with the Authorities

United States v. Billingsley, 160 F.3d 502 (8th Cir. 1998) : At a trial on drug charges, the Judge permitted an agent to testify to the contents of a taped conversation between the defendant and his drug supplier. The conversation occurred after the defendant had been arrested and had agreed to cooperate with the government. The defendant argued that his statements could not have been admitted as party-admissions, because he was only saying what the police told him to say. But the Court found no error, reasoning that the defendant's argument was "nothing more than a voluntariness argument." Since the defendant's statements were made voluntarily, they were properly admitted as party-admissions.

[s] Rule 801(d)(2)(A) -- Statements Offered in the Declarant's Favor

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : Affirming convictions for a conspiracy to bomb United States commercial airliners in southeast Asia and for crimes relating to the 1993 bombing of the World Trade Center, the Court held there was no error in precluding one defendant from offering his own prior statement to prove that a codefendant duped him. The Court reasoned that the defendant was free to testify that he had been duped, but his out-of-court statement was inadmissible hearsay because it was offered for its truth *by* the declarant.

United States v. Bond, 87 F.3d 695 (5th Cir. 1996) : Affirming the Trial Judge's refusal to permit a defendant to withdraw his guilty plea, the Court held that a Magistrate Judge properly excluded a tape made by a defendant while a fugitive. The defendant offered the tape to benefit himself, not as evidence of a statement made by a party to be used against that party.

United States v. McDaniel, 398 F.3d 540 (6th Cir. 2005) : Affirming mail and bank fraud convictions, the Court found no error in excluding statements made by one defendant to a Postal Inspector that contained both inculpatory and exculpatory information. The defendant offered them as admissions, but the Court stated that *Rule 801(d)(2)* "does not extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses."

[t] Rule 801(d)(2)(A) -- Summary Judgment Use

Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001) : In a § 1983 action arising from sexual assaults by an employee of a juvenile detention facility upon residents, the Court reversed summary judgment granted for one of the defendants, a co-worker of the perpetrator. Her statement that she "kind of knew" that the perpetrator was "messing" with students was an admission permitting an inference that she was aware that a substantial risk of harm existed.

[u] Rule 801(d)(2)(A) -- Trustworthiness Problems

Savarese v. Agriss, 883 F.2d 1194 (3d Cir. 1989) : In a civil rights action alleging that the plaintiffs had been fired from the county transportation authority based on their political beliefs, the Court held that statements by the authority's chairman, a party to the action in his official capacity, were properly admitted even though he was deceased at the time of trial, because no guarantee of trustworthiness is required for admissions.

Jewell v. CSX Transp., 135 F.3d 361 (6th Cir. 1998) : The plaintiff's decedent was killed, and his wife and his six-year-old daughter were injured, in a grade-crossing collision between their pickup and the defendant's train. At trial of their action against the railroad, the defendant introduced testimony from six witnesses that the daughter had told them after the accident that the other two were arguing immediately before the accident and that when she told them a train was coming, she was told to be quiet. The plaintiffs offered evidence that the little girl had suffered brain damage and retrograde amnesia from the accident, and they argued on appeal that because she had no "independent" recollection of the accident, her statements were not made in her "individual ... capacity." Affirming a judgment for the defendant, the Court observed that the plaintiffs had confused the terms "independent" and "individual"; the girl had made the statements in her individual capacity. The Court noted that *Rule 801(d)(2)(A)* does not have a trustworthiness requirement, and that whether the statements were the product of independent recollection or suggested by others went to their weight, not their admissibility.

United States v. Pinalto, 771 F.2d 457 (10th Cir. 1985) : In this mail fraud case, the Court reversed a pretrial ruling that had suppressed tapes on the ground that the defendant's statements were unreliable because the informer conversing with the defendant had a motive to lie in order to gather evidence to escape liability.

[7] Rule 801(d)(2)(B) -- Statements Which Are Not Hearsay -- Admission By Party-Opponent -- Adoption Or Belief In Truth

[a] Rule 801(d)(2)(B) -- Admissions in Interrogatories

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , rev'd on other grounds, 475 U.S. 574 (1986) : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants. The Trial Judge had held that answers to interrogatories that cross-referenced documents were not admissions unless expressed as admissions. But the Court concluded that under *Fed. R. Civ. P. 33* a cross-reference to documents adopts the contents of the documents as answers to the interrogatory, and the answering party is estopped from claiming otherwise.

[b] Rule 801(d)(2)(B) -- Adoption by Assent

United States v. Negron-Narvaez, 403 F.3d 33 (1st Cir. 2005) : The defendant, who pleaded guilty to drug

trafficking offenses, challenged his conviction on the ground that there was an inadequate factual basis for his plea. Affirming, the Court held that defense counsel's statements, which were verified in open court by the defendant, constituted adoptive admissions attributable to, and usable against, the defendant.

United States v. Allen, 10 F.3d 405 (7th Cir. 1993) : The Court affirmed a conviction for aiding and abetting the conduct of an illegal gambling business, holding there was no abuse of discretion in admitting audio and videotaped conversations between the defendant and an informant. From the entire context of each conversation, including nonverbal cues the jury could see on the tapes and the defendant's failure to contest any incriminating statements, the jury could find that the defendant had adopted the informant's statements. In *United States v. Rollins*, n94 the Court affirmed cocaine convictions, and held that tape-recorded conversations were admissible as adoptive admissions to the extent that the defendant adopted an informant's half of the conversation by agreeing to statements and by following through on stated arrangements. In *United States v. Young*, n95 the Court affirmed a defendant's bank robbery conviction, finding that the defendant had adopted a statement by another robber, which essentially became background for the defendant's own statement.

United States v. King, 351 F.3d 859 (8th Cir. 2003) : The Court affirmed a conviction for violating the Foreign Corrupt Practices Act, finding no abuse of discretion in the admission of certain tape-recorded conversations between the defendant and coconspirators, since the defendant had adopted his coconspirators' incriminating statements in the conversations.

[c] Rule 801(d)(2)(B) -- Adoption by Implication

United States v. Beckham, 968 F.2d 47 (D.C. Cir. 1992) : When an undercover officer purchased some crack cocaine, the seller said, "I only had one, but you can get another from my buddy"; the defendant immediately got up from his chair, walked over to a stash of crack packaged for distribution, and began to open it. Affirming, the Court held that the quoted statement was erroneously admitted under the coconspirator exception because there was no independent evidence of a conspiracy, but that the error was harmless because the statement would have been admissible under *Rule 801(d)(2)(B)* because the defendant indicated his endorsement of it.

Vazquez v. Lopez-Rosario, 134 F.3d 28 (1st Cir. 1998) : The plaintiff alleged that he was fired from a public job because of a political difference with a supervisor. Appealing from a grant of summary judgment, the plaintiff argued that evidence that he accused the defendant-supervisor of making statements about him, and that the supervisor had agreed in response that he had made "some remarks," should have been admitted as an adoptive admission. Affirming, the Court found that the supervisor's statement was insufficient to establish an adoptive admission that he was responsible for the plaintiff's dismissal. The plaintiff had not explicitly accused the supervisor of retaliating against him, and so it "would hardly be unnatural to fail to respond to an accusation that Vazquez does not claim to have made."

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) : The Court affirmed convictions for murder and related offenses, holding there was no error in admitting a tape-recorded telephone conversation as an adopted admission. The conversation was between the defendant and a former jailhouse friend, who read aloud an article reporting the conviction of an accomplice who claimed that he shot the victims because of fear of the defendant. The Court held that the recording indicated that the defendant heard and understood the allegations and commented on them to some extent. It found no indication that the defendant was silent because he knew or thought he was being recorded. The Court also upheld the instruction to the jury that it could consider the defendant's silence an admission of the truth if it found "in accordance with your common sense and experience, that the defendant would have denied the statements had they been untrue." The Judge also cautioned the jury that "you should bear in mind that some people will remain silent even

if they are innocent."

United States v. Henke, 222 F.3d 633 (9th Cir. 2000) : At a press conference held by the defendant, who was charged with securities fraud, a reporter had asked a question that amounted to an accusation that the defendant was "cooking the books" of a corporation. The defendant responded "next question, please." Reversing on other grounds, the Court found that the Trial Judge did not err in reasoning that "the natural response to such an accusation would be to deny it," and admitting the defendant's response.

United States v. Harrison, 296 F.3d 994 (10th Cir. 2002) : Affirming convictions for sexual abuse of a child, the Court upheld the admission of a statement by the victim to a tribal police officer, where during the making of the statement the defendant had looked at the victim and said words to the effect, "I told you I was sorry and it wouldn't happen again." Although the Trial Judge had admitted the statement under *Rule 807*, the Court concluded that it was admissible under *Rule 801(d)(2)(B)*, and that the Judge had made the necessary finding that the defendant "manifested an adoption or belief in [the] truth" of the victim's statement. In *Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264 (10th Cir. 1998)* , the Court reversed a summary judgment for the City as to a claim that the plaintiff's supervisor created a racially hostile work environment. The plaintiff had contacted a representative of the personnel department about the incidents she claimed were discriminatory. The representative interviewed two other supervisors who attributed the plaintiff's deteriorating performance to her supervisor's inappropriate comments and also interviewed 13 past or present employees who confirmed the plaintiffs' allegations. The representative wrote a two-page report for the City Manager, who subsequently met with the plaintiff's supervisor and told him he would be fired if he did not resign. The Court held that the report and accompanying interview notes were adopted by the City Manager, since he would not have sought the supervisor's resignation had he not believed the report.

United States v. Champion, 813 F.2d 1154 (11th Cir. 1987) : Affirming marijuana-related convictions, the Court found that one defendant adopted another's statement when, after the statement was made, he nudged the other defendant in the ribs and told him that he did not want him to speak about the incident any more.

[d] Rule 801(d)(2)(B) -- Adoption by Publication

Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996 (3d Cir. 1994) : Reviewing a summary judgment for wallpaper manufacturers in an antitrust case, the Court held that articles published in a trade association journal were adopted by the trade association when they were published.

[e] Rule 801(d)(2)(B) -- Adoption by Silence

Weston-Smith v. Cooley Dickinson Hospital, Inc., 282 F.3d 60 (1st Cir. 2002) : Affirming summary judgment for a hospital in a suit by an employee who claimed she was laid off because she had taken maternity leave, the Court found no error in the exclusion of the plaintiff's testimony that she had confronted her supervisor with an accusation that she was being fired for taking maternity leave, and the supervisor remained silent on the matter and changed the subject. The Court noted that the confrontation occurred during a social occasion and that "in context" there were a great many reasons why the supervisor might have chosen not to respond. In *United States v. Fortes*, n96 the Court observed:

> [W]e have no difficulty in concluding that an inquiry of two persons [by an acquaintance who testified at trial] as to whether they had "done a bank robbery," followed by an affirmative response by one of them describing his participation with the other in the crime, is the type of exchange to which the

silence of the unresponsive accomplice, assuming he is present and conscious of the conversation, "gives consent."

United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) : At a trial for arson and related crimes, a witness testified that he told the defendant's brother (who was a codefendant) that he had heard that the brother and another person had set the defendant's clothes store on fire, and that the brother simply nodded his head in response. The Court held that the testimony was admissible as an adoptive admission by the brother. This was the type of statement that the brother, under the circumstances, could have been expected to deny if it were untrue. Any ambiguity in the meaning of the responsive nod "was ultimately a question for the jury to assess" under *Rule 104(b)*. Affirming a conviction for aiding and abetting bribery in *United States v. Shulman*, n97 the Court observed that an adoptive admission does not require that the adopted statement incriminate the person adopting it. The nature of the statement is relevant, the Court noted, in deciding whether a reasonable person would remain silent after hearing it. See also *United States v. Williams* n98(the defendant's failure to deny a coconspirator's statement, which plainly suggested the defendant was guilty of wrongdoing, was an adoptive admission and thus admissible whether or not the conspiracy had ended at the time the statement was made); *United States v. King* n99("[t]he general rule is to look at the circumstances to see whether it was more reasonably probable that a man would answer the charge made against him than that he would not").

United States v. Robinson, 275 F.3d 371 (4th Cir. 2001) : A witness testified to hearing the two defendants describing a murder. Although she could not see them and could not identify which defendant made any given statement, she could discern two separate voices. The Court held that all the statements were admissible against both defendants, as party admissions by the speaker and as adoptive admissions by the other, since the witness testified that neither defendant contradicted the other, and in the circumstances a defendant disagreeing with statements made by the other would have made his disagreement known. In *United States v. Basic Constr. Co.*, n100 the Court affirmed a bid-rigging conviction, finding that evidence of silence on the part of a corporate officer at a meeting in which a statement was made, "I'll see if we can get anything for this work," was properly admitted as a tacit admission where a witness who also heard the statement testified that he believed it referred to bid-rigging. In *United States v. Kilbourne*, n101 the Court affirmed a murder conviction and upheld admission of the testimony by a friend of the defendant to the effect that when confronted with the fact that the defendant had called this friend and told him about the victim's death before the defendant allegedly learned of the death from a telephone call from another friend, the defendant turned silent.

United States v. Central Gulf Lines, 974 F.2d 621 (5th Cir. 1992) : In action on cargo damage claims, the Court held there was no error in admitting survey reports made by independent surveyors, as the defendant's representative had met several times with a representative of the surveyor and had never objected to the survey reports. In *Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991)* , the Court affirmed summary judgment for the defendants in a negligence suit for injuries allegedly suffered by an employee of an offshore catering service, holding that accident reports made by the defendants' employees were not admissions; the reports simply documented the plaintiff's account of the alleged accidents and nothing indicated adoption of that version of the facts.

United States v. Hoosier, 542 F.2d 687 (6th Cir. 1976) : A defendant convicted for armed bank robbery contended on appeal that his girlfriend's statement that he had lots of money, made in the presence of the defendant to a witness to whom he had earlier related a plan to rob a bank, was admitted against him improperly because it was hearsay. The Court held that because there was more here than the defendant's mere presence and his silence, the statement was properly admitted as an adoptive admission.

United States v. Ward, 377 F.3d 671 (7th Cir. 2004) : After committing a bank robbery, the defendant and his sister went to the house of a friend who was storing a bag for the defendant. When the friend did not produce the bag, the sister, the friend, and the defendant engaged in a heated discussion, during the course of which the sister said that the bag contained "the money [that the defendant and his wife] got when they robbed the bank." The defendant did not respond to this assertion. Affirming, the Court found that the sister's statement concerning the bank robbery was properly admitted against the defendant as an adoptive admission. The statement was made during a conversation in which the defendant was an active participant, so a sufficient foundation was established that the defendant heard the statement. Further, the defendant's silence qualified as an admission "because his sister's accusation is the type of statement that a party normally would respond to if innocent."

United States v. Kehoe, 310 F.3d 579 (8th Cir. 2002) : The Court affirmed convictions for racketeering offenses, holding that a statement by an accomplice regarding a murder made to the defendant's mother was an adoptive admission. The defendant actively participated in the conversation and did not deny the statements. There was nothing to suggest that he did not understand the statement. The Court also found no violation of the *Confrontation Clause*, because the defendant "effectively was a witness against himself" by adopting the statement of another. In a voting fraud case, *United States v. Townsley*, n102 the Court held that tape recordings of conversations in the presence of the defendants were admissible as adoptive admissions. In *United States v. Ojala*, n103 the Court affirmed a conviction for willfully and knowingly failing to make timely income tax filings, upholding the introduction of statements made in the defendant's presence by his attorney concerning the defendant's intention with respect to the filing of his returns. According to the Court, the statements, which the defendant did not contradict or object to, qualified as adoptive admissions or possibly as authorized or agent's admissions.

United States v. Hove, 52 F.3d 233 (9th Cir. 1995) : The Court reversed a lawyer's conviction for currency structuring, holding that two responses from the defendant to investigating officers were improperly admitted as adoptive admissions by silence. This case is discussed in the Editorial Explanatory Comment, *§ 801.02[6][d]*. In *United States v. Schaff, 948 F.2d 501 (9th Cir. 1991)* , when officers searching the home of a defendant charged with drug offenses asked him who made entries in a notebook they found, he claimed he did not know, but when his sister later told them in his presence that she made them at his direction, he said nothing. The Court held that the defendant's silence could be treated as an adoptive admission, as he was not in custody at the time his sister spoke. In *United States v. Monks*, n104 the Court affirmed convictions for bank robbery, holding that a statement by one defendant was admissible as an adoptive admission of the other where the Trial Judge found that the evidence was sufficient for a jury to conclude that the other defendant heard, understood, and acquiesced in the statement.

United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988) : In a prosecution of a husband and wife for the murder of their child, the Court held that the wife's failure to deny child abuse accusations was admissible as an adoptive admission.

[f] Rule 801(d)(2)(B) -- Adoption of Documents and Records

Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59 (1st Cir. 1984) : The Court found that a page from a profit-and-loss statement, which reflected the expected performance of one of the defendant's distributors, and which was given to the plaintiff by the defendant's vice president, was an adoptive admission.

Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335 (7th Cir. 1983) : In a construction contract dispute, the Court upheld a judgment holding the owner liable for breach of various duties to the general contractor, even though it found that a document prepared by the owner was improperly admitted. The

document failed to indicate fault with the contractor's work, and the contractor argued that this was an implicit expression of satisfaction with it. The Court reasoned that a witness should have been called to establish that there was a duty or practice to include complaints about the contractor in such a document before it was admitted.

United States v. Gil, 58 F.3d 1414 (9th Cir. 1995) : In a drug prosecution, the Court held that a drug ledger was properly admitted for its truth. The government established an adequate foundation under *Rule 104(b)* to support a finding that the defendant either made or adopted the ledger. The ledger was found on the defendant's coffee table; the transactions described in the ledger corresponded with the defendant's activities that were observed by the police; and the entries corresponded with a separate ledger that was prepared by the defendant. In our view, the question of whether a proffered statement is that of the party is governed by the preponderance standard of *Rule 104(a)*, rather than the *prima facie* evidence standard of *Rule 104(b)*. We believe this result is mandated by *Bourjaily v. United States., 483 U.S. 171 (1987)* .

Wagstaff v. Protective Apparel Corp., 760 F.2d 1074 (10th Cir. 1985) : The Court held it was error to exclude as hearsay newspaper articles that the defendants distributed to persons with whom they did business. The plaintiff's decedent, as well as others, received the articles, which contained statements concerning the defendants' financial condition, and the distribution amounted to an adoption of the contents of the articles.

[g] Rule 801(d)(2)(B) -- Documents Offered in Court or Arbitration

United States v. Warren, 42 F.3d 647 (D.C. Cir. 1994) : Although it affirmed convictions for narcotics and firearms offenses, the Court held that it was error to exclude a police officer's statement, contained in the criminal complaint against the defendant, which indicated that a person other than the defendant leased the apartment in which the drugs were found. As part of a sworn statement of facts submitted by the government to a Federal Magistrate Judge, the statement was admissible as an adoptive admission against the government. In *United States v. Morgan*, n105 the Court reversed a conviction for possession of narcotics with intent to distribute on the ground that statements by the government in a search warrant application, which indicated that the narcotics might have been the property of someone other than the defendant, were improperly excluded.

United States v. Kattar, 840 F.2d 118 (1st Cir. 1988) : Affirming a conviction for extortion, the Court held it was error (but harmless) to exclude statements made in legal memoranda and briefs filed by the Department of Justice that were offered by the defendant.

United States v. Woo, 917 F.2d 96 (2d Cir. 1990) : Affirming a conviction for drug offenses, the Court noted that erroneous descriptions of the defendant's conduct at the time of arrest included in the case agent's affidavit supporting the complaint and in his grand jury testimony, not being based on personal knowledge but on information gained from law enforcement sources, might well be adoptive admissions by the government. There was no abuse of discretion in excluding the evidence, however, as the statements may well have caused the jury to confuse the issues and draw unsubstantiated inferences concerning the conduct of government agents. In *Brownko Int'l, Inc. v. Ogden Steel Co.*, n106 a construction litigation, the Court held that a company did not adopt another company's minutes by offering them as evidence in an arbitration, since the use made of the evidence did not include adopting the factual assertion found in the minutes.

[h] Rule 801(d)(2)(B) -- Findings by Court

United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990) : The Trial Judge admitted an adoptive admission without making a preliminary finding that the defendant comprehended and acquiesced in the statement, saying that if there were insufficient evidence through the trial, relief would be under *Fed. R. Crim. P. 29*. The Court said that the Judge's approach was improper because it needlessly risked the possibility of reversal for erroneous admission, but held that in this case there was sufficient evidence of the foundation requirements that admission was not a clear abuse of discretion. In *United States v. Jenkins*, n107 the Court affirmed convictions for cocaine offenses, holding that a statement by one defendant to another was admissible as a tacit admission where it concerned getting money for cocaine and no response was forthcoming. The Court stated that an adoptive admission involves two steps: the Trial Judge makes a preliminary determination whether the requirements of the Rule have been satisfied, and the jury makes the ultimate determination. The Court did not decide whether it is necessary to instruct the jury as to its role with respect to such admissions, since an instruction was given in this case. In *United States v. Carter*, n108 the Court affirmed marijuana convictions, finding that statements made by one defendant concerning smuggling activities in a car in which other defendants were riding were adoptive admissions and were properly admitted, despite the Trial Judge's failure to make findings in support of admissibility.

[i] Rule 801(d)(2)(B) -- Insufficient Showing of Adoption

United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002) : The defendant was convicted of marriage fraud and making a false statement on an immigration document, after entering an allegedly sham marriage. Crucial evidence included a "Record of Sworn Statement," made when the defendant applied for a green card. The INS agent who conducted the interview did not testify at trial; instead testimony was given by another INS agent, who was present to translate questions and answers but was not present for the entire interview. The exhibit contained notations by the nontestifying INS agent, including opinions about whether some of the defendant's factual assertions were true. There was no direct evidence on whether the answers attributed to the defendant were verbatim statements or formulations by the INS agents. Reversing, the Court observed that, even though the defendant signed the form, it was not admissible as an adoptive admission because "[t]he evidence established a considerable language barrier, and did not support an inference that the form was read to Orellana-Blanco with the answers, or that he read it, or that he could read it."

[j] Rule 801(d)(2)(B) -- Letters and Correspondence

Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982) : In an action to recover on a debt, the Court held it was improper to admit a letter written by the plaintiff's counsel to one defendant purporting to state what that defendant had previously said to him concerning the actions of the defendants. "[T]he mere failure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions."

[k] Rule 801(d)(2)(B) -- Police Interrogations

United States v. Jinadu, 98 F.3d 239 (6th Cir. 1996) : Affirming drug convictions, the Court found that accusations made by a police officer while he was interrogating the defendant were admissible as adoptive admissions. The defendant responded in the affirmative to the accusations, and the government established a foundation that the defendant understood English and heard all of the accusations.

[l] Rule 801(d)(2)(B) -- Possession

United States v. Paulino, 13 F.3d 20 (1st Cir. 1994) : To prove the defendant's connection with the drug business in an apartment in which he was arrested, the government offered a postal money order receipt found in the apartment

that bore his name, the address of the apartment, and a notation that it was used for a rent payment. The Court held there was no abuse of discretion in admitting the receipt as an adoptive admission, evidenced by the defendant's possession plus other circumstances connecting him to the receipt and the apartment.

United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994) : The Court held that a purported profit statement found in the defendant's pocket when he was arrested on drug charges was properly admitted as an adoptive admission, where he had been negotiating sale prices and quantities for cocaine that were consistent with the figures on the slip of paper.

United States v. Pulido-Jacobo, 377 F.3d 1124 (10th Cir. 2004) : The defendants, arrested in a car in which narcotics had been secreted, contested the link between them and the contraband that was required to establish constructive possession. They objected on hearsay grounds to the admission of a two-month-old receipt found in one defendant's wallet that described speakers matching speakers found in the trunk of the car. Affirming, the Court found no abuse of discretion: the defendant's possession of the speaker receipt, plus his having kept it for two months after the purchase and the presence of the matching speakers, constituted his adoptive admission that the speakers were his, which was circumstantial evidence of the extent of his control over the vehicle.

[m] Rule 801(d)(2)(B) -- Prior Conversations

United States v. Faymore, 736 F.2d 328 (6th Cir. 1984) : Affirming a doctor's convictions for narcotics offenses, the Court found that the defendant had adopted a prior conversation between a person purporting to act as his agent and an undercover agent when he indicated in a subsequent meeting with the agent that he was the doctor mentioned in the conversation.

[n] Rule 801(d)(2)(B) -- Surveys and Opinion Polls

Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) : The plaintiff and defendants, manufacturers of competing antihistamines, had entered a settlement agreement in which the defendants had agreed not to advertise their product as "nonsedating" or "low sedating." Seeking an injunction against violations of the agreement and the Lanham Act, the plaintiff offered five surveys in which physicians were asked to relate their memories of communications made by the defendants' sales representatives. The Judge excluded the surveys and denied the injunction. Reversing, the Court held that one survey that a defendant had commissioned and in which the defendant's employee had manifested a belief in its trustworthiness should have been admitted as a party admission. The employee's report regarding the survey's results drew inferences from the underlying hearsay statements in the survey and thus adopted them for their truth.

[8] Rule 801(d)(2)(C) -- Statements Which Are Not Hearsay -- Admission By Party-Opponent -- Authorized Statement

[a] Rule 801(d)(2)(C) -- Agents' Statements

Michaels v. Michaels, 767 F.2d 1185 (7th Cir. 1985) : The Court held in a securities fraud action against a closely held corporation's owners that telexes sent by a broker to a potential buyer of the corporation were admissible as an agent's statements.

[b] Rule 801(d)(2)(C) -- Employees' Statements

B-W Acceptance Corp. v. Porter, 568 F.2d 1179 (5th Cir. 1978) : In an action by a lender to recover against

guarantors of corporate notes, the Court held that testimony by the lender's branch manager at a previous trial was admissible because the lender authorized the manager to testify to what he knew. In *Kingsley v. Baker/Beech-Nut Corp.*, n109 a suit by a former employee claiming severance compensation under his former employer's personnel policy, the Court held that testimony by an employee of the defendant that the plaintiff's superior said on the telephone that he would make the plaintiff quit was admissible under *Rule 801(d)(2)(C)*. Although the proof did not conclusively establish to whom the superior was speaking during the telephone conversation, the Court held that statements made to any third party fell within the Rule.

[c] Rule 801(d)(2)(C) -- Experts

Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995) : The Court reversed a plaintiff's verdict in an asbestos case on non-evidentiary grounds, noting that on retrial the testimony of an expert called by the defendant in an unrelated asbestos case could not be used in the instant case against the defendant as an admission by an authorized agent. The expert witness was not one of the defendant's employees, and an agency could not be found simply because the expert testified at the previous trial on the defendant's behalf. "Because an expert witness is charged with the duty of giving his or her expert opinion regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party." It is important, we think, to note that the Court did not address whether a party's reliance on previous expert opinion might amount to an adoptive admission.

Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) : In a product liability action arising out of a bus collision with a tractor-trailer, the Court affirmed a judgment for the bus manufacturer, but it concluded that a deposition of an expert employed by the defendant should have been admitted under *Rule 801(d)(2)(C)*, since the expert was hired to investigate and to report his conclusions, and "[i]n giving his deposition he was performing the function that Wayne [the defendant] had employed him to perform."

[d] Rule 801(d)(2)(C) -- Internal Memoranda

Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) : Affirming a judgment against a truck manufacturer in a product liability wrongful death action, the Court held there was no error in allowing interoffice memoranda of one of the defendant's engineers, which discussed design problems with certain tractor springs, to be admitted into evidence.

[e] Rule 801(d)(2)(C) -- Interpreters

United States v. Beltran, 761 F.2d 1 (1st Cir. 1985) : The Court upheld marijuana convictions, finding that testimony by a drug agent as to what an interpreter told him that various defendants said was properly admitted under *Rule 801(d)(2)(C)*.

United States v. Da Silva, 725 F.2d 828 (2d Cir. 1983) : This case is discussed in the Editorial Explanatory Comment, *§ 801.02[6][f][v]*.

United States v. Cordero, 18 F.3d 1248 (5th Cir. 1994) (per curiam): Affirming convictions for a marijuana distribution conspiracy, the Court held there was no plain error in admitting testimony as to a third party's translation of a defendant's Spanish statement. There were no unusual circumstances calling for an exception to the principle that an interpreter is no more than a language conduit, so his translation does not create an additional level of hearsay.

DCS Sanitation Mgt., Inc. v. Occupational Safety & Health Review Comm'n, 82 F.3d 812 (8th Cir. 1996) : The Court affirmed the Commission's decision upholding three OSHA citations for wilful violation of federal safety regulations. The findings against the employer were based in part on hearsay statements from employees that had been translated from Spanish by an interpreter retained by OSHA. The Federal Rules of Evidence are applicable in Review Commission hearings (OSHRC R.P. 2200.71 (1992)). The Court rejected the argument that the translations constituted an impermissible level of hearsay beyond the agency statements. It noted that the employer raised no questions about the ability or bias of the interpreter, and the mere fact that the interpreter was paid by OSHA "was hardly sufficient by itself to require a judge not to attribute the statements directly to the declarant."

United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991) : Affirming a conviction for drug offenses, the Court found no plain error in admitting testimony by a DEA agent as to statements of the defendant made through an interpreter retained by the agent. Rather than rigidly adopting a "language conduit" or an "agency" (see *United States v. Felix-Jerez, 667 F.2d 1297 (9th Cir. 1982))* approach to treatment of extrajudicial statements through interpreters, the Court stated that the better approach is to consider on a case-by-case basis whether the translated statements should be considered the statements of the speaker. Here, there was no specific evidence of the interpreter's bias or inaccurate translations, and there was subsequent conduct corroborating the accuracy of the transactions.

United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985) : In a prosecution for drug offenses and the murder of a federal agent, the Court held that statements made in Spanish by a defendant and translated by one undercover agent for the benefit of another agent were admissible.

[f] Rule 801(d)(2)(C) -- Parent and Subsidiary Entities

Donovan v. Local 738, 575 F. Supp. 52 (D. Md. 1983) : In an action by the Secretary of Labor to set aside a union election, the Court found that a report prepared by an administrative assistant to an international union was not admissible as an authorized admission by a local union.

Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983) : The Court affirmed a plaintiff's judgment in an antitrust action, finding that a survey prepared by an employee of a parent corporation of one of the defendant companies was admissible as an authorized admission where the person making the report had access to all the defendant's books and records, he was accompanied by the defendant's employees on visits to logging camps, and the report was circulated to the defendant.

[g] Rule 801(d)(2)(C) -- Personal Knowledge

Grace United Methodist Church v. Cheyenne, 427 F.3d 775 (10th Cir. 2005) : In an action challenging a city's refusal to grant a permit to a church to operate a day care facility, the Court found no error in the admission of a letter from a Bishop of the church that undercut the church's position. The Court held that the Bishop was high enough in the church structure to qualify as a speaking agent under *Rule 801(d)(2)(C)*, and although the Bishop lacked personal knowledge of the information related in the letter, Court said that personal knowledge is not required for party admissions because "no guarantee of trustworthiness is required in the case of an admission."

[h] Rule 801(d)(2)(C) -- Statements by Counsel

Vincent v. Louis Marx & Co., 874 F.2d 36 (1st Cir. 1989) : The Court held that a District Court has discretion to balance probative value against prejudicial effect under *Rule 403* before permitting a prior pleading filed on behalf of a

party to be admitted under *Rule 801(d)(2)(C)*. It remanded the case so that the balancing test could be applied.

Purgess v. Sharrock, 33 F.3d 134 (2d Cir. 1994) : The Court found no error in the admission against the defendant of a footnote in a brief filed on the defendant's behalf by counsel in a related case. Disqualification of the defendant's counsel was not required in light of the instruction to the jury that "the lawyer representing the defendant who made that statement now states that the statement is incorrect." That instruction obviated the need for the defendant's counsel to testify as a witness. In *United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991)* , the Court reversed convictions in the third trial of a stock fraud case, holding that the defendants should have been permitted to introduce the original bill of particulars to support their theory that the government's original version of the events had been discredited at the second trial and that it had therefore deliberately adopted fundamental changes in its version of the facts in order to enhance its chances of success. *United States v. McKeon, 738 F.2d 26 (2d Cir. 1984)* , and *Andrews v. Metro N. Commuter R.R., 882 F.2d 705 (2d Cir. 1989)* , both of which held that an attorney's statement was properly admitted against the client, are discussed in the Editorial Explanatory Comment, *§ 801.02[6][f][vi]*.

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) : In a fraud, tortious interference, and RICO action by a quick lube franchisor against its oil supplier, the Court held it was error to admit extrajudicial statements by the defendant's attorneys in connection with the filing of a counterclaim (later dismissed) as evidence of the defendant's malice, as there was no evidence that the statements were related to the management of the litigation or that the defendant otherwise authorized its attorneys to make the statements.

United States v. Blood, 806 F.2d 1218 (4th Cir. 1986) : Affirming a conviction for embezzlement from an employee benefit welfare fund, the Court reasoned that "[g]enerally, statements by an attorney concerning a matter within his employment may be admissible against the retaining client." It added that "a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon a party." Although the Court apparently held prosecutors and defense counsel to the same standard, it held that the government did not make a clear and unambiguous admission, so there was no error in refusing to treat statements by government counsel and references in *voir dire* requests as admissions. In *United States v. Martin*, n110 the Court affirmed a conviction for tax evasion, holding that statements made by the defendant's attorney to the IRS were agent's admissions. It observed that "an attorney's admission of criminal liability might not be admissible against the client," but found that the statements in the instant case did not rise to this level, since the lawyer told the IRS that his client did not know that certain sums were reportable as income.

Dartez v. Owens-Illinois, Inc., 910 F.2d 1291 (5th Cir. 1990) : Reversing a judgment for the plaintiffs in an asbestos case, the Court held it was error to admit as party admissions statements in posttrial briefs filed by the defendants in a separate action, as such briefs are restricted to the facts developed in the record. In *Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242 (5th Cir. 1990)* , the Court affirmed a judgment for the plaintiffs in a product liability action against manufacturers of a defective artillery shell, holding that the plaintiffs had not abandoned their claims against one defendant when counsel stated in closing argument that another defendant was 100 percent at fault. The statement was no more than an opinion on the application of the law to the facts, and the Court was unwilling to bind the plaintiffs to an innocent statement of their attorney made during the heat of closing argument. In *Universal Am. Barge Corp. v. J-Chem, Inc.*, n111 an action for indemnification arising out of the fire loss of a barge cargo, the Court held that admissions of the plaintiff's counsel in an arbitration would be admissible over a hearsay objection, but were not conclusive and binding in a case separate from the one in which the admissions were made.

Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815 (6th Cir. 2000) : Two plaintiffs each sued more than a dozen manufacturers and distributors of asbestos products for the wrongful deaths of their decedents. Trial went forward

against only one defendant, all the others having settled with the plaintiffs or had their cases dismissed. At trial the defendant was permitted to introduce the complaints filed by each plaintiff and to read the names of all the original defendants to the jury. Although judgment was rendered for the plaintiffs, they appealed because the defendant's responsibility was apportioned at only 5% in one case and 2% in the other. The Court held there was no error in reading the complaints, since they were admissions in which the plaintiffs admitted the existence of potential claims against the named defendants, which might be relevant to causation.

United States v. Parsons, 646 F.2d 1275 (8th Cir. 1981) : The Court held that a bankruptcy petition prepared by an attorney could be admitted against the client as an admission.

United States v. Bentson, 947 F.2d 1353 (9th Cir. 1991) : The Court held that a statement by defense counsel in closing argument that the defendant had not filed valid tax returns was a judicial admission binding before both the Trial and the Appellate Courts.

Dugan v. EMS Helicopters, Inc., 915 F.2d 1428 (10th Cir. 1990) : The Court reversed a judgment for the plaintiffs in a wrongful death action against the owner and operator of a helicopter because a complaint filed by the plaintiffs in a separate action against the helicopter's manufacturers was erroneously excluded. The complaint, which alleged the crash was proximately caused by the manufacturing defendants, was factually inconsistent with the position taken in the present action. See also *LWT, Inc. v. Childers, 19 F.3d 539 (10th Cir. 1994)* (finding an abuse of discretion in a breach of warranty action to exclude the buyer's pleading in a state suit that contained inconsistent allegations). In *State Farm Mut. Auto. Ins. Co. v. Dyer*, n112 a declaratory judgment action by an Illinois insurer to disclaim coverage in a state wrongful death suit, the Court held that a finding of diversity between the insurer and a defendant driver whose whereabouts were unknown was not clearly erroneous, noting that another defendant had asserted Wyoming citizenship for the driver in her complaint filed in the state wrongful death suit, which belied her implicit assertion in this action that the driver might have Illinois citizenship.

United States v. DeLoach, 34 F.3d 1001 (11th Cir. 1994) : Affirming a conviction for making false statements to obtain loans, the Court held there was no abuse of discretion in precluding the defense from offering comments made by the prosecutor in the closing argument in an earlier trial of codefendants. The comments, which referred to the credibility of witnesses and invited the jury to draw certain inferences, were neither statements of fact nor inconsistent with the government's position in the present case. In *Hanson v. Waller*, n113 a wrongful death action, the Court held that a letter from the plaintiff's to the defendant's counsel was properly admitted as an admission. The Court noted that although an attorney does not have authority to make admissions for his client in all instances, he does have authority to make admissions directly related to management of the litigation.

[i] Rule 801(d)(2)(C) -- Trial or Deposition Testimony

Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980) : In a product liability action arising out of a bus collision with a tractor-trailer, the Court affirmed a judgment for the bus manufacturer, but it concluded that a deposition of an expert employed by the defendant should have been admitted under *Rule 801(d)(2)(C)*, since the expert was hired to investigate and to report his conclusions and "[i]n giving his deposition he was performing the function that Wayne [the defendant] had employed him to perform." The error was found to be harmless. In *B-W Acceptance Corp. v. Porter*, n114 an action by a lender to recover against guarantors of corporate notes, the Court held that testimony of the lender's branch manager at a previous trial was admissible because the lender authorized the manager to testify to what he knew.

[9] Rule 801(d)(2)(D) -- Statements Which Are Not Hearsay -- Admission By Party-Opponent -- Agency

Relationship

[a] Rule 801(d)(2)(D) -- Admission Against Fellow Employee

United States v. Paxson, 861 F.2d 730 (D.C. Cir. 1988) : The Court sustained a conviction for making false declarations to a grand jury and held that extrajudicial statements by the vice-president of a company to the effect that certain bids were rigged were properly admitted as agent's statements. Although the declarant was not an agent of the defendant, he was an employee of the corporation in which the defendant was president and in which the defendant owned the bulk of the stock. The Court concluded that it would be "a hypertechnical construction of the rule" to hold that the statement could not be used against a corporate superior.

Zaken v. Boerer, 964 F.2d 1319 (2d Cir. 1992) : This case is discussed in the Editorial Explanatory Comment, *§ 801.02[6][f][iii]*.

Lippay v. Christos, 996 F.2d 1490 (3d Cir. 1993) : Reversing a judgment for Lippay in his malicious prosecution action, the Court held that it was error to permit Lippay's mother to testify that an informant working with Christos told her that he told Christos all along that he could not identify Lippay as the source of drugs. Because the suit was brought against Christos personally, not against the state, the majority concluded it would "not impute the statements of a declarant to a party-opponent who is merely the declarant's co-employee." To have an agency relationship, a supervisor must direct the declarant's work "on a continuing basis." Concurring, Judge Becker argued that "the correct rule is that an out-of-court statement may be admissible under *Rule 801(d)(2)(D)* when a sufficient supervisory relationship exists between two individuals who share a unity of interest regarding the subject matter of the testimony in question."

United States v. Wiedyk, 71 F.3d 602 (6th Cir. 1995) : In the prosecution of a union benefits fund officer for taking kickbacks, the Court held it was error (but harmless) to admit testimony by an employee of an organization hired by the fund that another employee of the organization had told him not to bother seeking out more cost-effective providers because the defendant was steering the fund's business. Although the defendant and arguably the declarant were employees of the fund, the defendant did not have such control over the fund or over the declarant that the declarant was an employee or agent of the defendant.

Boren v. Sable, 887 F.2d 1032 (10th Cir. 1989) : The plaintiff, who had been injured in an industrial accident, sued the plant manager for negligence. The Court held that hearsay statements of co-workers were not admissible against the manager as admissions by the manager's agents. In *United States v. Young*, n115 the Court reversed a conviction for mail fraud and false statement on other grounds, but it found that statements of a corporate accountant were properly admitted under *Rule 801(d)(2)(D)* against the defendant, who was a corporate vice president. The Court observed that when statements by one employee are offered against another, their admissibility "will necessarily depend on the nature of the relationship between the declarant and the defendant."

[b] Rule 801(d)(2)(D) -- Confrontation Concerns

United States v. King, 134 F.3d 1173 (2d Cir. 1998) : The government charged the boxing promoter Don King with wire fraud, and a mistrial was declared when the jury deadlocked. The government then charged both King and his corporation, of which King was the sole shareholder, with wire fraud based on the same transactions at issue in the first trial. At a pretrial hearing, the Trial Judge held that King's testimony at the initial trial could not be admitted against the corporation, on the ground that admitting testimony in which King sought to shift blame to the corporation would

violate the corporation's right to confrontation. On interlocutory appeal, the Court reversed, holding that a *Confrontation Clause* objection is not available when a corporation, owned entirely by one person, seeks to preclude the use against it of that person's testimony from a prior trial. When the corporation is the alter ego of its sole shareholder, it "has no valid complaint that it lacked the opportunity to conduct its own cross-examination of the witness with respect to testimony that was subject to explanation or clarification by the shareholder-witness upon questioning by his counsel at the first trial." The Court further concluded that "[t]he same considerations that render the *Confrontation Clause* inapplicable also refute [the corporation's] contention that King's testimony is not admissible against his corporation under *Rule 801(d)(2)(D)*."

United States v. Photogrammetric Data Services, Inc., 259 F.3d 229 (4th Cir. 2001) : Affirming the fraud convictions of a company and one of its managers, the Court found no error in the admission of incriminating hearsay statements made by the manager to law enforcement agents as well as other statements made by the manager to an informant (a co-employee). The statements concerned matters within the scope of the manager's employment and were made during the existence of the employment relationship, and thus were admissible against the company under *Rule 801(d)(2)(D)*. Although the Court found no confrontation violation under the then-applicable *Ohio v. Roberts* analysis, we note that the statements to law enforcement agents could well be considered "testimonial," and thus inadmissible, under *Crawford v. Washington*.

[c] Rule 801(d)(2)(D) -- Depositions

Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) : In a suit by a worker against various manufacturers alleging injury as a result of exposure to asbestos, the Court held that a deposition of a witness in an earlier asbestos suit was improperly admitted in this case. The witness' company had been dismissed as a defendant, so the deposition testimony was not admissible as an agent's statement, and no effort was made to show that the witness was unavailable.

Daniel v. Ben E. Keith Co., 97 F.3d 1329 (10th Cir. 1996) : In a product liability action alleging defective labels on bleach, the defendant seller produced for a deposition, as the most knowledgeable person available to testify about the label, an employee of the company that labeled and packaged the defendant's bleach. The Court held there was no error in disallowing the deponent's testimony as an admission of a party-opponent, even though state product liability law might impose liability on his employer for its role in the chain of distribution, since the plaintiffs neither pleaded nor proved an agency relationship between the defendant and the deponent's employer.

[d] Rule 801(d)(2)(D) -- During the Relationship

Blanchard v. Peoples Bank, 844 F.2d 264 (5th Cir. 1988) : The Court held that an attorney's affidavits as to recollections of a former bank employee were inadmissible, since the recollections were reported after the agency relationship ended.

Calhoun v. Baylor, 646 F.2d 1158 (6th Cir. 1981) : Affirming a judgment for a bankruptcy trustee suing to recover royalties and fees paid by the bankrupt company, the Court held that statements of former agents of the company were not admissible against the trustee, since *Rule 801(d)(2)* "does not include statements by predecessors in interest among the types of statements the rule makes admissible."

Young v. James Green Mgmt., Inc., 327 F.3d 616 (7th Cir. 2003) : Two former employees sued their employer alleging that they were terminated as a result of racial discrimination. Affirming a judgment for the defendant, the Court

held there was no abuse of discretion in excluding a resignation letter sent to the employer by a manager, stating that he was resigning as a result of being asked to participate in illegal discrimination. The statements in the letter were made after the manager resigned and thus was no longer an agent of the employer. In *Walsh v. McCain Foods Ltd., 81 F.3d 722 (7th Cir. 1996)* , three individual plaintiffs, who were the sole shareholders of a corporation, brought a breach of contract action alleging that the defendant bought the corporation but failed to pay on promissory notes pursuant to the sales agreement. The defendant sought to introduce an admission by one of the plaintiffs that the plaintiffs had concealed material information. The admitting plaintiff had settled prior to trial, however, and the Trial Judge held that his admission could not be used against the other two. The Court rejected the argument that the statement was an agency admission, since the admission was made four years after the corporation was sold, and any agency relationship that had existed among the plaintiffs was terminated upon the sale of the corporation.

Kinser v. Gehl Co., 184 F.3d 1259 (10th Cir. 1999) : The Court affirmed a judgment awarding damages to the estate and survivor of a farmer who was killed while operating a baler manufactured by the defendant, finding no error when the plaintiffs were permitted to read into evidence deposition excerpts of a retired employee who was deposed in three previous lawsuits involving the defendant's balers. The Court noted that the employee continued to consult for the defendant on projects he had overseen while working for the company, and that the deposition excerpts all concerned events and policies occurring during his tenure.

[e] Rule 801(d)(2)(D) -- Employee of Related Employer

United States v. Agne, 214 F.3d 47 (1st Cir. 2000) : Affirming convictions for bank fraud and making a false statement on a loan application, the Court found no error in the admission of hearsay statements from an employee of a company affiliated with the company controlled by the defendant. The Court held that the statements of a corporate employee may be admitted against a corporate officer when "the factors which normally make up an agency relationship are present." Here, there was an agency relationship, since the employee was specifically designated by the defendant to handle and report on the business matter at issue in the case, and was directly responsible to the defendant on these matters.

Yates v. Rexton, Inc., 267 F.3d 793 (8th Cir. 2001) : The Court reversed summary judgment granted for the defendant in an age discrimination case because statements by executives in the defendant's corporate parent were improperly disregarded as hearsay. Although the executives were not the decision-makers with respect to the plaintiff's termination, the parent corporation exercised control over the defendant, and the executives were intimately involved in the process of shaping the defendant's workforce. Thus, their statements were those of an agent of a party-opponent.

In re Sunset Bay Assoc., 944 F.2d 1503 (9th Cir. 1991) : Reversing a summary judgment for the lender and its chief lending officer in fraud claims relating to a construction loan default, the Court held that statements by a loan officer were admissible against both defendants, although the officer was an employee only of the lender. When an employee's superior has instructed the employee to act in furtherance of a fraudulent scheme, statements made by the employee relating to that scheme are admissible under the Rule.

Daniel v. Ben E. Keith Co., 97 F.3d 1329 (10th Cir. 1996) : In a product liability action alleging defective labels on bleach, the defendant seller produced for a deposition, as the most knowledgeable person available to testify about the label, an employee of the company that labeled and packaged the defendant's bleach. The Court held there was no error in disallowing the deponent's testimony as an admission of a party-opponent, even though state product liability law might impose liability on his employer for its role in the chain of distribution, since the plaintiffs neither pleaded nor proved an agency relationship between the defendant and the deponent's employer.

[f] Rule 801(d)(2)(D) -- Examples of Agents' Admissions

[i] Rule 801(d)(2)(D) -- Employment Discrimination Cases

Woodman v. Haemonetics Corp., 51 F.3d 1087 (1st Cir. 1995) : Vacating an order granting summary judgment for the defendant in an age discrimination case, the Court held that the Trial Judge should have admitted, under *Rule 801(d)(2)(D)*, a statement from a line supervisor attributing age animus to her supervisors. The line supervisor was acting within the scope of her employment because part of her job was to be involved in employment and personnel decisions; and she was communicating her opinion about information she received at a meeting concerning employment matters.

Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995) : Reversing summary judgment against an employee alleging she had been discharged because of her gender, the Court held there was no error in admitting the plaintiff's testimony that her immediate supervisor and the supervisor who dismissed her had said her firing was because the General Manager wanted a man in the job, as all were making statements concerning a matter within the scope of their employment.

Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995) : Affirming a judgment for the plaintiff in an age discrimination case, the Court held that a statement by a supervisor that the defendant company "frowned on older people" was properly admitted under *Rule 801(d)(2)(D)*. The Court stated that where a supervisor is authorized to speak with subordinates about the employer's employment practices, a statement of the supervisor's "understanding regarding the criteria utilized by management in making decisions on hiring, firing, compensation and the like is admissible against the employer." The Court rejected the argument that the agent's statement constituted double hearsay; rather, the statement was simply an opinion by the agent.

EEOC v. Watergate at Landmark Condominium, 24 F.3d 635 (4th Cir. 1994) : To prove that a condominium association had discharged an employee on the basis of her age, the plaintiff introduced statements by residents serving as volunteers on various association committees. The Court held that the residents were "agents" of the defendant association for purposes of the Rule, although they were neither officials nor employees and the committees were technically only advisory to the Board of Directors; agency was found because the committees were critical to the decisional process of the association.

Wilkerson v. Columbus Separate School Dist., 985 F.2d 815 (5th Cir. 1993) : In an employment discrimination action by a white football coach claiming his contract was not renewed after a black teacher had been fired, the coach offered deposition testimony that the school board president had said a black board member told him, "You got the black, now you are going to get the white." The Court held the statements were double hearsay but were admissible against the school district because both declarants were its agents.

Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073 (6th Cir. 1999) : The Court affirmed a judgment for the plaintiff in a Title VII race discrimination case, holding there was no error in admitting testimony by a co-employee of the plaintiff that the witness' brother-in-law, who worked for the same employer, told him at a social occasion that the plaintiff's supervisor had told the brother-in-law that "some bad stuff's going to happen" in the plaintiff's area and that the witness should stay out of it unless he wanted to be fired. The supervisor was the employer's agent with respect to personnel issues, and he used the brother-in-law as an agent of the company for purposes of communicating the warning to the witness. In any event, the supervisor was a witness subject to examination in court, so the defendants "had an

opportunity to put before the jury their version of the event in question." Reversing a summary judgment for the defendant in an age discrimination case, *Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 227 (6th Cir. 1990)* , the Court held that an affidavit alleging that the plaintiff's department manager had praised her work and requested five years' notice if she ever planned to leave the company was improperly discounted. The alleged statements would clearly be admissible at trial as vicarious admissions; the fact they were made in a social setting would go to their weight, not to their admissibility.

Allen v. Chicago Transit Auth., 317 F.3d 696 (7th Cir. 2003) : The Court reversed summary judgment for the Authority in an employment discrimination action because the Trial Judge failed to give any weight to a finding by the Authority's own investigator that a supervisor's explanation for promoting a white man over the African-American female plaintiffs was not credible. The finding was admissible both as an admission made by an employee of a party opponent within the scope of his employment and as an investigative report of a public agency. In *Bell v. Environmental Protection Agency, 232 F.3d 546 (7th Cir. 2000)* , EPA employees who had been denied promotions brought Title VII claims based on race and national origin discrimination. In granting summary judgment to the defendant, the Trial Judge excluded as hearsay a memorandum written by a member of the EPA promotion selection panel which stated that the EPA did not promote the best candidates. The Court found that the memorandum was admissible as an agent's admission to rebut the agency's assertion in litigation that it honestly believed it was promoting the more qualified candidates. In a former employee's age discrimination action, *Hybert v. Hearst Corp.*, n116 the Court held there was no abuse of discretion in admitting as vicarious admissions his supervisor's statements about the attitudes and intentions of management higher-ups regarding older employees. See also *Crawford v. Garnier* n117(noting that instructions from an employment analyst about how to fill out an application would have been admitted as agents' admissions whether or not the analyst had been authorized to say what he did); *Nekolny v. Painter* n118(upholding the introduction of testimony by an agent concerning her superior's state of mind with respect to one plaintiff).

Eliserio v. United Steelworkers Local 310, 398 F.3d 1071 (8th Cir. 2005) : In an employee's action claiming racial harassment by the union, the Court held that statements made by local union officials about a matter of union concern and within the scope of their duties as union officials were admissions of a party opponent. In an employment discrimination action arising from the firing of a black personnel manager in a hotel, *EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998)* , the Court held there was no error in admitting statements by other managers that indicated the CEO of the hotel's corporate parent had a policy of excluding blacks from significant managerial positions and otherwise discriminated against blacks in the hotel. The other managers were speaking within the scope of their authority, which extended to management and employment decisions. Thus, the double hearsay -- statements by these agents as to what the CEO had said -- was admissible because both levels qualified as agents' statements. The Court also upheld testimony that an agent had said that "the corporate office" did not want a black person to be assistant personnel director, reasoning that the attribution was sufficient where the original speaker's identity could be inferred from the context. In a diversity action charging discrimination under state law, *Russell v. United Parcel Serv., Inc.*, n119 the Court held that the Trial Judge should have admitted statements by two of the defendant's supervisors to the effect that a manager was treating her badly because she had filed claims against the company. Citing both Rules 701 and 801(d), the Court said that the statements were admissible as admissions even though they were cast in the form of opinions.

O'Donnell v. Georgia Osteopathic Hosp., 748 F.2d 1543 (11th Cir. 1984) : The Court affirmed a jury's finding that the defendant hospital discriminated against the plaintiff because of her age, and upheld the admission of testimony by the person who replaced the plaintiff, which described discussions a staff doctor reported he had with the executive director of the hospital concerning the plaintiff's treatment. The Court found that the extrajudicial statements represented two-step agents' admissions.

[ii] Rule 801(d)(2)(D) -- Examples of Agents' Admissions -- Other Cases

Astra Pharmaceutical Prods., Inc. v. Occupational Safety & Health Review Comm'n, 681 F.2d 69 (1st Cir. 1982) : On review of an OSHA decision, the Court approved reliance on statements by a company's employees even though it recognized that the statements were not "free from ambiguity."

Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987) : The Court held that a credit union employee's statement to the assistant manager that she had obtained the credit information at issue at the request of the credit union's manager was admissible as an agent's statement in a suit against the credit union under the Fair Credit Reporting Act. In *Bostick Oil Co. v. Michelin Tire Corp.*, n120 an antitrust case brought by a distributor after a tire manufacturer terminated his contract as distributor, the Court said that a memorandum prepared by the manufacturer's district manager concerning the distributor's sales activities was admissible when offered by the distributor as long as the manager was authorized to make the memorandum or it concerned a subject within the scope of his agency.

Scofi v. McKeon Constr. Co., 666 F.2d 170 (5th Cir. 1982) : The Court held in a wrongful death action that the statements by an independent contractor's foreman relating his safety responsibilities were admissible against the contractor.

Stalbosky v. Belew, 205 F.3d 890 (6th Cir. 2000) : The estate of a decedent sued a truck driver, who raped and murdered the decedent, for wrongful death and the truck driver's employer for negligent hiring and retention. Although it affirmed summary judgment for the employer, the Court held that a statement by the "semi-retired" chairman of the board of the employer should have been considered against it. In an antitrust case, *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999)* , the plaintiffs introduced as evidence of a conspiracy testimony from a witness that when he expressed antitrust concerns to the CEO of one defendant, the CEO responded that "there was no need to worry because someone would have to prove" he spoke to the principal shareholder of the other defendant and the CEO then "leaned forward, smiled, and said 'of course we didn't.' " The Court found that the oral utterances and the act of leaning forward and smiling, when considered together as the CEO obviously intended, were a statement that the CEO *had* "talked" to his counterpart but that no one would be able to prove it. Reversing summary judgment for the defendants, the Court held that this statement was admissible against the CEO's employer under *Rule 801(d)(2)(D)*, since it was made concerning a matter within the scope of the CEO's employment during the existence of the relationship. In *Robert R. Jones Assoc., Inc. v. Nino Homes*, n121 the Court held that a custom house builder was entitled to profits that it would have earned but for an infringer's unauthorized duplication and use of drawings, and that testimony concerning a statement by an architect hired by the infringer was properly admitted as an agent's admission. The architect had said the president of the infringing firm had given him a photocopy of the plaintiff's floor plans and instructed him to copy them.

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for the defendants in a price-fixing case, the Court held it was error for the Judge to disregard a statement by plant manager for one of the defendants, "We have an understanding within the industry not to undercut each other's prices." His statement was admissible as an admission by a party because he was commenting on a matter within the scope of his employment. In a prosecution for willful copyright infringement, *United States v. Cross, 816 F.2d 297 (7th Cir. 1987)* , the Court found that statements by an employee of two co-owners of a business were properly admitted as an agent's statements and that it was not necessary for the government to satisfy the exemption for conspirator statements.

Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982) : In an action by owners of a motor home against a co-op whose employee overfilled the home's propane tank, the Court held that a statement by the employee, tape-recorded by an insurance adjuster, was an agent's admission. See also *Pillsbury Co. v. Cleaver-Brooks Div.* n122(upholding

admission of agent's statements that were adopted by another agent).

Harris v. Itzhaki, 183 F.3d 1043 (9th Cir. 1999) : Reversing summary judgment for the defendant in a Fair Housing Act case, the Court held there was a jury question whether the woman who kept spare keys, collected rent checks, and showed vacant units to prospective tenants was an agent of the defendants, and thus whether her statement that the defendants did not want to rent to blacks was admissible as a vicarious admission. The Court noted that whether an agency relationship exists for purposes of the Fair Housing Act is determined under federal, not state, law. In *Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996)* , the Court affirmed a judgment for the plaintiffs in a class action against the former Philippine president for human-rights abuses, and held there was no abuse of discretion in admitting statements made by members of the Philippine military or paramilitary forces to the plaintiffs or witnesses in this case. There was sufficient evidence from the statements themselves and from expert testimony about the structure of the forces to determine an agency relationship existed. In *In re Aircrash in Bali, Indonesia*, n123 the Court held that an airline's report on its safety record and problems was admissible as an admission by employees. In *Abatti v. Commissioner*, n124 the Court reversed the Tax Court, ruling that papers compiled by the taxpayers' accountant in the course of an audit were admissible against the taxpayers under *Rule 801(d)(2)(D)*.

Rainbow Travel Serv. v. Hilton Hotels Corp., 896 F.2d 1233 (10th Cir. 1990) : The Court held, in a breach of contract action by a travel service whose clients were bumped from reservations, that in proving the defendant hotel's overbooking policy, a witness was properly permitted to testify to statements by a shuttle bus driver employed by the defendant that his job was to transport guests who had been bumped and to try to keep them happy. In *United States v. Shunk*, n125 the Court affirmed a conviction for felon firearm possession, holding that the defendant's statements to undercover officers that his brother had sold a pistol to them ratified the brother's prior statements that he was the defendant's agent and made the brother's statements admissible as agent's admissions. In *Whiteley v. OKC Corp.*, n126 the Court affirmed a judgment for a plaintiff who claimed that the defendant had breached express and implied warranties as to propane that was delivered to the plaintiff. It noted that testimony by a third party as to what his own employee told him about an accident at the defendant's yard was hearsay that was properly excluded, and it found that testimony by the third party as to statements made by the defendant's employee was properly admitted as an agent's admission.

Kenney v. Lewis Revels Rare Coins, Inc., 741 F.2d 378 (11th Cir. 1984) : The Court affirmed judgments for the plaintiffs, who were injured when a truck driven by the defendant's employees collided with the plaintiffs' van, and upheld the admission of a trooper's testimony concerning statements made at the scene by the employees and a diagram based on the statements. The statements were agents' admissions.

[g] Rule 801(d)(2)(D) -- Government Agents and Employees

United States v. American Tel. & Tel. Co., 498 F. Supp. 353 (D.D.C. 1980) : In this large civil antitrust action, the Court determined that the plaintiff was the United States, not the Department of Justice, and that statements by agents of the United States could qualify as admissions.

Corrigan v. United States, 609 F. Supp. 720 (E.D. Va. 1985) , rev'd on other grounds, 815 F.2d 954 (4th Cir. 1987) : The guardian of a former soldier who had been incapacitated following an automobile crash that occurred after the soldier had been drinking at a non-commissioned officers' club sued the government for damages. The Court held that a bartender's statements concerning the intoxicated state of the soldier were admissible as agent's admissions.

Murrey v. United States, 73 F.3d 1448 (7th Cir. 1996) : The Court reversed a judgment for the United States in an FTCA suit by a patient's estate alleging medical malpractice by a government hospital. The Judge had excluded evidence that the Secretary of Veterans' Affairs publicly announced that poor care had contributed to the death of the patient, and evidence that the department's lawyers informed the patient's widow that his death had been "caused by a medical misadventure" and invited her to file a tort claim. Rejecting an argument that admission of the evidence would violate the statutory limit of $25,000 on an agency's authority to settle a claim under the FTCA, the Court stated that this "would have some merit if all admissions made by an agency were treated as judicial admissions, for then by making admissions an agency could effectively bypass the $25,000 limitation," but when the admissions are used only as evidence, "the fact that an agency makes a case more difficult to defend by the Department of Justice because the head of the agency or one of its officers makes damaging admissions is a peril of litigation, not an unauthorized settlement offer."

Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) : Affirming a judgment for the plaintiffs in a class action against the former Philippine president for human rights abuses, the Court held there was no abuse of discretion in admitting statements made by members of the Philippine military or paramilitary forces to the plaintiffs or witnesses in this case. There was sufficient evidence from the statements themselves and from expert testimony about the structure of the forces to determine an agency relationship existed.

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) : In an action against the United States to recover for the alleged taking of unpatented mining claims, the Court vacated a summary judgment for the United States, holding that the Trial Judge erred in refusing to consider a letter from a Forest Service supervisor stating that the plaintiffs' lessee had made a valid discovery of minerals on the claim. The statement was admissible as an agent's admission.

[h] Rule 801(d)(2)(D) -- Government Attorneys

United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997) : Affirming racketeering convictions, the Court found no error in the exclusion of four statements made by government prosecutors in other cases in which they called one hearsay declarant and one witness in the instant case liars. The Court stated that "[b]ased on the common law principle that no individual should be able to bind the sovereign, we generally decline to apply *Rule 801(d)(2)* to statements made by government employees in criminal cases," but recognized that "a number of courts have rejected that approach when dealing with statements made by government attorneys." (Citing *United States v. Kattar, 840 F.2d 118 (1st Cir. 1988)* .)

[i] Rule 801(d)(2)(D) -- Government Informants

United States v. Yildiz, 355 F.3d 80 (2d Cir. 2004) : Affirming a Hobbs Act conviction, the Court adhered to "the common law rule that a government agent's out-of-court statements are not admissible for their truth in a criminal prosecution as admissions by a party opponent." Maintaining that the common law rule retained its viability even though *Rule 801(d)(2)(D)* makes no mention of a limitation for government agents, the Court reasoned that the government's "many agents and actors are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign."

United States v. Summers, 598 F.2d 450 (5th Cir. 1979) : The Court affirmed a Hobbs Act conviction, finding that telephone conversations recorded on tape were properly admitted to show that the defendant was to receive certain money, since the person whose statements implicated the defendant was an agent making statements within the scope of employment. The Court did find error in the introduction of statements by the agent after the agent began working with

the government, but said it was harmless.

United States v. Branham, 97 F.3d 835 (6th Cir. 1996) : A defendant in a marijuana conspiracy trial sought to support his entrapment defense by introducing a government informant's statements attempting to involve the defendant in a number of illegal activities, but the statements were excluded by the Trial Judge as hearsay. The Court noted that the statements were made by the agent of a party-opponent within the scope of his agency, but held that they were not hearsay because they were offered for their effect on the defendant's state of mind, not as proof of the matters asserted. Error in excluding the evidence was harmless, however.

United States v. Arroyo, 406 F.3d 881 (7th Cir. 2005) : The Court affirmed heroin-related convictions, rejecting the argument that a memorandum prepared by an IRS agent relating a statement by a confidential informant was admissible as an agent's admission. The Court noted that it had previously held that government agents are not party-opponents; it could also have noted that even if the memo were an agent's admission, it is not clear that the confidential informant would also have qualified as an agent. The memo quoted the informant, and thus there was double hearsay -- the memo itself and the informant's statement. In *United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994)* , the Court affirmed convictions for explosives and firearms violations arising from a bombing-burglary scheme, holding there was no abuse of discretion in excluding postarrest statements by a conspirator who was cooperating with the government as agent's admissions. It declined to disturb its longstanding rule that no individual's statement could bind the sovereign.

[j] Rule 801(d)(2)(D) -- Government Publications

United States v. Van Griffin, 874 F.2d 634 (9th Cir. 1989) : In a prosecution for driving under the influence of alcohol, the Court found error (harmless, however) in the exclusion of a government manual that set forth certain procedures that are necessary for reliable testing. The Court declined to say that every U.S. publication is admissible as a party admission, but found that the manual offered by the defendant was prepared by the department charged with developing rules for highway safety and was relevant to the charge brought against the defendant.

[k] Rule 801(d)(2)(D) -- Independent Contractors

Sabel v. Mead Johnson & Co., 737 F. Supp. 135 (D. Mass. 1990) : The Court held, in a product liability action against a drug manufacturer, that statements by outside experts at a meeting convened and financed by the defendant between the experts and its employees were not admissible as agents' admissions because the defendant did not control the manner or means of discussion employed by the participants at the meeting, and there was no evidence the consultants were empowered to speak on its behalf.

Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142 (5th Cir. 1991) : Reviewing consolidated asbestos injury cases, the Court held that a report made by the partner of a testifying expert for the defendants in asbestos cases was inadmissible under the Rule, as a person must be subject to the principal's control in order to be deemed an agent, and it is highly doubtful that a physician would be subject to the control of nine asbestos manufacturers. Furthermore, the plaintiffs offered no evidence to satisfy their burden of showing an agency relationship between the defendants and the doctor.

Beck v. Haik, 377 F.3d 624 (6th Cir. 2004) : The Court held that the statement of a consultant, made about a matter within the scope of his employment, was admissible against a principal under *Rule 801(d)(2)(D)*. The Court

noted that though there is little precedent, "courts confronting similar fact situations have tended to hold contractors and advisors to fall within the 'agency' relationship contemplated by *Rule 801(d)(2)(D)*."

Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990) : The Court affirmed judgments for the defendant insurance company in an age discrimination case, holding that statements by two of the defendant's insurance agents and one of its district managers about what had happened at a Christmas party were properly excluded because the plaintiff did not establish that the declarants were agents as opposed to independent contractors or that their statements concerned a matter within the scope of their agency.

[l] Rule 801(d)(2)(D) -- Invocation of Privilege by Agent

RAD Servs. v. Aetna Cas. & Sur. Co., 808 F.2d 271 (3d Cir. 1986) : Affirming a judgment for an insurer in an action by a company to recover costs incurred in disposing of hazardous waste, the Court held that a jury was properly permitted to infer from the fact that agents of the company invoked their privilege against self-incrimination during depositions with respect to critical facts that their answers would have been adverse to the company.

[m] Rule 801(d)(2)(D) -- Joint Parties

Movie 1 & 2 v. United Artists Commun., Inc., 909 F.2d 1245 (9th Cir. 1990) : The Trial Judge granted summary judgment for the defendants in an antitrust action against film exhibitors and distributors after excluding from evidence statements by an employee of a defendant distributor. The Court reversed, holding that the statements were admissible at least against the distributor and the exhibitor with which the statements indicated the distributor was conspiring. In *Fenner v. Dependable Trucking Co.*, n127 the Court reversed a judgment for a plaintiff motorist against the employer of another motorist and the operator of the premises where the accident occurred. To prove the speed of the other vehicle, the plaintiff was permitted to produce the testimony of a witness who had heard an employee of the premises state that the other vehicle was moving too fast. The Court observed that this statement was an agent's admission of the operator of the premises, not of the employer of the other motorist. Thus, it could not be used to prove that the other motorist was speeding.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998) : In an antitrust action against five chemical companies for a conspiracy to fix prices for repackaged chlorine, the Court reversed a grant of summary judgment for one of the defendants. The CEO of that defendant had stated to friends that he was engaged in fixing chlorine prices; this was clearly a statement about a matter within the scope of the CEO's authority, and thus should have been admitted against his corporate employer under *Rule 801(d)(2)(D)*. It was not admissible against the other companies, however.

[n] Rule 801(d)(2)(D) -- Judicial Admissions

Sanders v. New York City Human Resources Admin., 361 F.3d 749 (2d Cir. 2004) : Affirming a judgment for the City in a Title VII action alleging race and gender discrimination and retaliation, the Court held that findings by various agency employees who had investigated the plaintiff's complaints that concluded her supervisor had retaliated against her were admissible as agents' admissions under the hearsay rule. However, they were simply the employees' opinions, based on circumstantial evidence, and not judicial admissions usable against the defendant to establish a matter conclusively.

[o] Rule 801(d)(2)(D) -- Multiple Agents

Sea-Land Service, Inc. v. Lozen Int'l, LLC, 285 F.3d 808 (9th Cir. 2002) : Reversing summary judgment for a carrier on a claim by a shipper seeking damages for the carrier's failure to deliver a shipment in a timely manner, the Court held that e-mails created by an employee of the carrier that were forwarded to the shipper by another employee were admissible as agency admissions. The employee who wrote the first e-mail acted within the scope of his authority and the e-mail was adopted by the other employee within the scope of her authority. The Court appeared to recognize that one employee cannot adopt a statement by another on behalf of any employer unless the adoption was within the scope of employment.

[p] Rule 801(d)(2)(D) -- Partners

United States v. Saks, 964 F.2d 1514 (5th Cir. 1992) : Affirming convictions for fraud, the Court held that a deposition given by a nontestifying codefendant in a civil suit was properly admitted, as the defendants were partners and thus agents for each other, the deposition testimony related to matters within the scope of the deponent's agency as a general partner, and it was made during the winding up of the partnership and thus during the existence of the agency relationship.

[q] Rule 801(d)(2)(D) -- Personal Knowledge

Brookover v. Mary Hitchcock Mem. Hosp., 893 F.2d 411 (1st Cir. 1990) : The plaintiff in a medical malpractice action introduced evidence that after the patient's fall, the nurses in the defendant hospital said that he should have been restrained. The Court held that the evidence should not have been admitted as an agent's admission because there was no proof that the nurses were employees of the hospital, but that the defendant had waived the objection by asserting only the declarants' lack of personal knowledge of the circumstances. The Court went on to hold that, at least under the facts of the case, personal knowledge was not required for the agent's admissions. In an action by a lender against Chrysler, the lessee of computer equipment, and Chrysler's sublessee, CSA, *Union Mut. Life Ins. Co. v. Chrysler Corp.*, n128 the Court held that a letter written by a CSA accountant was properly admitted against CSA where the accountant responded to an inquiry as part of his duties. It did not decide whether an agent's admission requires that the agent have personal knowledge of the facts underlying a statement, since the accountant based his letter on a sublease that he examined. The Court noted that CSA did not object on the ground that the accountant did not have sufficient information to give an opinion, and suggested that had the objection been made, the letter still might have been admitted, given CSA's ability to explain its significance to the jury.

United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003) : The Court affirmed a conviction for health care fraud, holding that the testimony by the defendant's patient that she told the defendant's nurse that her patient file was much thinner than on a previous visit and the nurse replied that the defendant's office "had a tip, therefore, they destroyed the files before the government agency came in to confiscate" them was admissible as an agent's admission. The Court reasoned that "it was surely within the scope of the nurse's employment to assure a patient that a file being examined was the patient's and to provide an explanation to allay the patient's justifiable doubts." In response to the defendant's claim that there was no showing that the nurse had personal knowledge, the Court responded that personal knowledge was readily inferable from her statement "we destroyed your file," and added that "[i]n any event, we have not required personal knowledge for statements by a party's agent."

Society of Roman Catholic Church v. Interstate Fire & Cas., 126 F.3d 727 (5th Cir. 1997) : In a dispute over whether the plaintiff was properly informed of the coverage of an insurance policy, the Court held that statements by a sales manager of the insurer were properly admitted as agency admissions. The fact that the agent had no personal knowledge of the matters asserted was "irrelevant," because personal knowledge is not required for admissions.

MCI Commun. Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983) : In this massive antitrust case, the Court upheld the admission of an internal AT&T study that reflected statements by managers within the scope of their duties: "The fact that the report is based on hearsay or reflects opinion goes to its weight and credibility, not its admissibility."

Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978) : In a personal injury action on behalf of a child attacked by a wolf, the Court found that statements by an agent of the defendant corporation were admissible under subdivision (d)(2)(D). The Court held that there is no implied requirement in the Rule "that the declarant have personal knowledge of the facts underlying his statement."

[r] Rule 801(d)(2)(D) -- Proving Agency

Belton v. Washington Metro. Area Transit Auth., 20 F.3d 1197 (D.C. Cir. 1994) : Reversing a judgment for a pedestrian injured in a bus accident on another ground, the Court noted that a statement regarding the accident that was included with other statements from bystanders in the investigating officer's report should not be allowed as an admission against the defendant unless the officer could actually trace it to the bus driver.

Gomez v. Rivera Rodriguez, 344 F.3d 103 (1st Cir. 2003) : Reversing a judgment for municipal employees who claimed that their discharges had been politically motivated, the Court held it was an abuse of discretion to admit testimony regarding statements by the defendant mayor's wife that tended to show political animus by the mayor. The Court found no independent evidence to support the contention that the wife was an agent for the mayor or for the municipality in connection with the plaintiffs' employment. In *Vazquez v. Lopez-Rosario, 134 F.3d 28 (1st Cir. 1998)* , the Court affirmed summary judgment against the plaintiff, who alleged that he was fired from a public job because of a political difference with a supervisor. The Court held that many statements made to the plaintiff by government officials about his employment situation were properly excluded and that error in excluding others was harmless. Many of the statements were nothing more than "hallway gossip," where the original declarant is unknown and therefore "it is impossible to determine whether the original declarant also fits within the party-opponent definition." In a medical malpractice action, *Brookover v. Mary Hitchcock Mem. Hosp.*, n129 the plaintiff introduced evidence that after the patient's fall, the nurses in the defendant hospital said that he should have been restrained. The Court held that the evidence should not have been admitted as an agent's admission because there was no proof that the nurses were employees of the hospital, but that the defendant had waived the objection by asserting only the declarants' lack of personal knowledge of the circumstances.

United States v. Rioux, 97 F.3d 648 (2d Cir. 1996) : Affirming a Sheriff's convictions for extortion and related crimes, the Court held that testimony of deputies and special deputies of the Sheriff as to statements made by their supervisors was properly admitted. The Court rejected the Sheriff's argument that, to qualify the supervisors as his agents, the government had to show that the Sheriff controlled the declarants' daily tasks. The Court found it sufficient that the Sheriff hand-picked the declarants, they served at his pleasure, and they were answerable to the Sheriff. *Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534 (2d Cir. 1992)* , which held that agency can be proved by circumstantial evidence, is discussed in the Editorial Explanatory Comment, *§ 801.02[6][f][iv]*.

Davis v. Mobil Oil Exploration & Producing Southeast, Inc., 864 F.2d 1171 (5th Cir. 1989) : The Court affirmed the liability portion of a drilling rig employee's negligence action against the operator and rig owner. It held that two of the plaintiff's co-workers were properly permitted to testify to an unsafe directive issued by a Mobil company man at a safety meeting on the day of the plaintiff's accident. Although the plaintiff could not demonstrate by name the identity of the man who issued the directive, the Court found sufficient evidence that the man was an agent of the defendant to

warrant admission of the evidence.

American Eagle Ins. Co. v. Thompson, 85 F.3d 327 (8th Cir. 1996) : In an insurer's declaratory action to disclaim coverage for the pilot in an air crash, the Court held that statements by an insurance agent after the accident that assured coverage were improperly admitted against the insurer. The declarant had negotiated policies on behalf of the pilot's alleged employer, but there was no showing that he was an agent of the insurer.

Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) : Affirming a judgment for the plaintiffs in a class action against the former Philippine president for human rights abuses, the Court held there was no abuse of discretion in admitting statements made by members of the Philippine military or paramilitary forces to the plaintiffs or witnesses in this case. There was sufficient evidence from the statements themselves and from expert testimony about the structure of the forces to determine an agency relationship existed. In *City of Long Beach v. Standard Oil Co., 46 F.3d 929 (9th Cir. 1995)* , the Court affirmed a judgment for an oil company in an antitrust case, finding no error in the exclusion of handwritten notes offered against the defendant as an agency admission. The Court concluded that the plaintiffs had failed to show that the author made the notes as an agent of the defendant company. In *Merrick v. Farmers Ins. Group*, n130 the Court affirmed judgments for the defendant insurance company in an age discrimination case, holding that statements by two of the defendant's insurance agents and one of its district managers about what had happened at a Christmas party were properly excluded because the plaintiff did not establish that the declarants were agents, as opposed to independent contractors, or that their statements concerned a matter within the scope of their agency.

[s] Rule 801(d)(2)(D) -- Relationship to Other Rules

Aliotta v. AMTRAK, 315 F.3d 756 (7th Cir. 2003) : The plaintiff's decedent, who had been standing on a railroad platform, was somehow struck and killed by a high-speed train passing through the station. The plaintiff offered deposition testimony by the risk manager of one of the defendant railroads that a large, high-speed train creates a vacuum that will pull a person standing too close towards the train. The Trial Judge granted the defendants' motion *in limine* on the grounds that the witness' statements were not admissions under *Rule 801(d)(2)(D)* and that the witness was not qualified to give expert testimony under *Rule 702*. The Court held that the statements were an admission because the witness was speaking about knowledge he had acquired during the course of his job, which was to investigate accidents and speak to other railroad employees about the causes and potential causes of train accidents. However, the Court also held that admissions, although not subject to the personal knowledge requirement of *Rule 602* and lay opinion limitations of *Rule 701*, are subject to the provisions governing expert testimony in Rules 701(c) and 702. Because the witness' scientific statements were unreliable under *Daubert*, they were properly excluded as offered for the truth of the existence of a dangerous "vacuum effect." If offered only to prove that the railroad was aware of a risk, they would only duplicate other evidence that the railroad knew narrow platforms to be a safety risk, so they might have been properly excluded under *Rule 403*. The Court concluded that there was no error in exclusion of the deposition statements.

[t] Rule 801(d)(2)(D) -- Scope of Agent's Employment

[i] Rule 801(d)(2)(D) -- Employment Cases

Larch v. Mansfield Mun. Elec. Dep't, 272 F.3d 63 (1st Cir. 2001) : The plaintiff sued under a state whistleblower statute after he was dismissed from his position as manager of the Department allegedly because he refused to obey a Commissioner's order to hire a friend as a meter reader. The Court found no abuse of discretion in the admission of another Commissioner's statement that "he would kick [the plaintiff's] ass out of town and ... make life miserable for the department," since the Commissioner's job description encompassed, and the statements were related to, oversight of

the Department.

Blackburn v. United Parcel Serv., Inc., 179 F.3d 81 (3d Cir. 1999) : The plaintiff alleged that he had been discharged from UPS in violation of a state whistleblower statute; the defendant countered that he had violated the company's anti-nepotism policy. In support of his contention that the defense was pretextual, the plaintiff offered testimony that other UPS employees had informed him that certain named employees were related. Affirming summary judgment for the defendant, the Court found there was insufficient showing that the declarants were speaking about matters within the scope of their employment, and therefore the statements were inadmissible as vicarious admissions. In an age discrimination case, *Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994)* , the Court reversed a summary judgment for the defendant, but held that an alleged statement that the employer could not afford to keep employees over 50 years of age was properly disregarded because the declarant was not a decisionmaker and the original source of the comment could not be identified as a person with authority in the matter.

Staheli v. University of Miss., 854 F.2d 121 (5th Cir. 1988) : The Court affirmed a judgment for a university sued by a professor who was denied tenure, holding that there was no error in excluding evidence that an accounting professor had told the plaintiff that the university chancellor was upset about an incident involving the plaintiff. The accounting professor had nothing to do with the tenure decision, and the statement did not fall within the scope of his agency even though the professor served on the faculty senate and the university's planning council.

Schweitzer v. Teamsters Local 100, 413 F.3d 533 (6th Cir. 2005) : Although the Court affirmed summary judgment against a plaintiff who alleged he was terminated to avoid payment of his benefits in violation of ERISA, it found an abuse of discretion in the exclusion of testimony that the defendant's Secretary-Treasurer had told the witness that the plaintiff had been let go because the defendant did not want to pay his benefits. The plaintiff presented no evidence regarding the scope of the declarant's authority, but the Court concluded that "it is reasonable to surmise" that a matter regarding a decision to terminate an employee falls within the scope of the position of union Secretary-Treasurer, especially when the defendant's attorney had represented that the decision was made by the President, "in consultation with [the] Secretary-Treasurer." In *Barner v. Pilkington N. Am., Inc., 399 F.3d 745 (6th Cir. 2005)* , the Court affirmed a jury verdict for the defendant employers in a racial discrimination case, finding no error in the exclusion of hearsay statements made by co-workers concerning past acts of discrimination that the co-workers claimed they had suffered in work assignments. The Court held that these statements could not be admitted under *Rule 801(d)(2)(D)*, because the scope of the co-workers' employment did not include work assignments. In *Carter v. University of Toledo, 349 F.3d 269 (6th Cir. 2003)* , the plaintiff sued for race discrimination after her visiting appointment was not renewed by the University's College of Education. The Court found that a statement by the University's Vice Provost, which tended to show that the defendant's cited reasons for nonrenewal were pretextual, was properly admitted as an agent's admission. Although the Vice Provost did not have direct authority to decide on the plaintiff's renewal, his responsibility for the University's affirmative action process made his statements about the racial composition of the faculty within the ambit of his authority. In an employment discrimination action for constructive discharge, *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, n131 the plaintiff offered evidence that a former supervisor had told her that her divisional manager "did not want any 'skirts' working for him." The Court affirmed summary judgment for the defendant, holding there was no error in excluding the former supervisor's statement, since there was no evidence he had responsibilities regarding the plaintiff's employment at the time he allegedly made the statement. The Court also upheld exclusion of similar statements by the divisional manager that the plaintiff said had been recounted to her by her supervisor at the relevant time. Although the declarant was her supervisor, he was not involved in the actions that the plaintiff claimed led to her constructive discharge, so his recounting of the divisional manager's statements did not concern matters within the scope of his agency or employment. In *NLRB v. Sherwood Trucking Co.*, n132 the Court denied enforcement of a Labor Board order requiring the company to offer 12 truckers back pay and reinstatement and to recognize and bargain with the union. It found that a crucial statement to former

employees by their former supervisor was not an agent's admission because there was insufficient evidence to demonstrate that the declarant was a supervisor with authority to hire and fire when the statement was made. In *Hill v. Spiegel, Inc.*, n133 the Court reversed a plaintiff's judgment in an age discrimination suit, finding that testimony by a former employee of the defendant company relating statements made by other employees concerning the plaintiff's discharge were improperly admitted. There was no evidence to warrant a finding that the discharge of the plaintiff was within the scope of these employees' duties.

Haywood v. Lucent Tech., Inc., 323 F.3d 524 (7th Cir. 2003) : Affirming summary judgment against a former employee who alleged racial discrimination, retaliation, and defamation, the Court noted that the plaintiff's only evidence of a defamatory statement was her own testimony that another employee told her about information received from the employee's superiors in corporate security. Although statements by the superiors might have been *Rule 801(d)(2)(D)* admissions, there was no evidence that the employee who related those statements spoke within the scope of employment, so there was a level of hearsay that was not overcome. In an employment discrimination case, *Krause v. City of La Crosse, 246 F.3d 995 (7th Cir. 2001)* , the Court affirmed summary judgment for the defendant City, finding no error in the exclusion of transcripts of an interview in which a former Assistant Police Chief for the City told the plaintiff's investigator that the plaintiff had been reassigned as a punishment for complaining about discrimination. The statement was inadmissible hearsay, since an assistant police chief was not acting within his scope of employment when he discussed the alleged motivations of members of the City's finance department in transferring the plaintiff to another office. In an ADEA case brought by a Court Commissioner (a judicial officer), *Halloway v. Milwaukee County*, n134 the Court held that statements by a Corporation Counsel office member and a former Clerk of Court recounting alleged statements by the plaintiff's supervising Judge were properly excluded. There was no showing that either declarant was involved in the decision-making process or was acting within the scope of his duties, even as "liaison" to the supervising Judge, when relating the conversation. In *Stagman v. Ryan*, n135 an accountant who was employed by the Illinois Attorney General's office brought a § 1983 action, alleging that his *First Amendment* rights had been violated by terminating his employment for engaging in union-related activities. The plaintiff's principal evidence in opposing the defendants' motions for summary judgment was an affidavit by a personnel officer in the AG's office that, *inter alia*, recounted statements by the plaintiff's supervisor to the effect that the Attorney General would be advised before the plaintiff was fired. Although the evidence was not sufficient to overcome summary judgment for the Attorney General, the Court held that the statements were admissible under *Rule 801(d)(2)(D)* because the supervisor was shown to have been a participant in the decision to discharge the plaintiff. However, the Court found that a statement made by a bureau chief in the AG's office, after the supervisor requested the chief to discuss removing the plaintiff from a collective bargaining team with union officials, was properly excluded. There was no showing that the chief was an employee of the supervisor or that her responsibilities included persuading the union which members to put on its bargaining team.

Watson v. O'Neill, 365 F.3d 609 (8th Cir. 2004) : The Court affirmed a judgment for the Secretary of the Treasury in a suit alleging racial discrimination in promotions, finding no abuse of discretion in the exclusion of a racially insulting remark attributed to one of the employer's managers. Although the Court observed that the plaintiff "correctly notes that inflammatory racial remarks are admissible to establish an on-going pattern of racial harassment and discriminatory animus," it noted that the Trial Judge found little, if any, evidence that the manager was the actual decisionmaker, and that the statement occurred four years before the promotion decision. In *Yates v. Rexton, Inc., 267 F.3d 793 (8th Cir. 2001)* , the Court reversed summary judgment granted for the defendant in an age discrimination case because statements by executives in the defendant's corporate parent were improperly disregarded as hearsay. Although the executives were not the decision-makers with respect to the plaintiff's termination, the parent corporation exercised control over the defendant, and the executives were intimately involved in the process of shaping the defendant's workforce. Thus, their statements were those of an agent of a party-opponent.

Skillsky v. Lucky Stores, Inc., 893 F.2d 1088 (9th Cir. 1990) : In a wrongful termination action, the Court held that statements recounting what the defendant's "big wheels" had allegedly said, which were attributed by the witness' supervisor to employees of the defendant, were properly held inadmissible because there was no showing the declarants were speaking about matters within the scope of their employment. See also *Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990)* (in an age discrimination case, statements by the defendant insurance company's insurance agents and a district manager about what happened at a Christmas party were properly excluded because the plaintiff did not establish that the declarants were agents as opposed to independent contractors or that their statements concerned a matter within the scope of their agency); *Breneman v. Kennecott Corp.* n136(the plaintiff did not show that statements were within the scope of authority where one employee testified to what a second employee had stated that a third employee said).

Jaramillo v. Colorado Judicial Dep't, 427 F.3d 1303 (10th Cir. 2005) : The Court affirmed summary judgment for the employer in an age discrimination case, finding no error in the refusal to consider testimony about the situation from the plaintiff's co-employees, as none were involved in the decisionmaking process or claimed to have received their information from employees involved in the decisionmaking process affecting the employment action at issue. In a Title VII and ADEA action by an employee who had been demoted, *Abuan v. Level 3 Communications, Inc., 353 F.3d 1158 (10th Cir. 2003)* , the plaintiff introduced a statement made by his supervisor at a going-away party for the supervisor, in which the supervisor said that a substantial reason for his resignation was the company's unethical treatment of the plaintiff. Affirming a judgment for the plaintiff, the Court found no abuse of discretion. The supervisor was a high corporate officer, the remarks were within the scope of his own employment while discussing the treatment of his subordinate, and they were made while he was still an agent or employee of the company. In a suit alleging sexual harassment, *Purrington v. University of Utah*, n137 the Court affirmed a judgment for an employer, concluding that testimony from two University professors about conversations they had with other University personnel about the plaintiff was properly excluded because the plaintiff failed to demonstrate that the statements by University personnel concerned matters within the scope of their employment. In a gender discrimination suit, *Sorensen v. City of Aurora*, n138 the Court held that the plaintiff failed to show that a statement by a deputy fire chief was within the scope of his agency.

Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985) : In an employment discrimination action, the Court found it was error to exclude a derogatory statement concerning African-American women made by an assistant superintendent of hiring for the company. Since he was involved in hiring decisions, the assistant's statement was admissible as an agent's admission.

[ii] Rule 801(d)(2)(D) -- Scope of Agent's Employment -- Other Cases

Marcic v. Reinauer Transp. Cos., 397 F.3d 120 (2d Cir. 2005) : The plaintiff in a Jones Act case proffered the statement of a deck hand at the scene that the paint on which the plaintiff slipped had no sand in it. Although the plaintiff speculated that the deck hand was probably one of the persons who painted the rail, so that his statement would "relate to a matter" within the scope of his employment, the plaintiff did not offer any evidence that this was the case, so the Court found no error in exclusion of the statement. In *United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003)* , the Court affirmed a conviction for health care fraud, holding that the testimony by the defendant's patient that she told the defendant's nurse that her patient file was much thinner than on a previous visit and the nurse replied that the defendant's office "had a tip, therefore, they destroyed the files before the government agency came in to confiscate" them was admissible as an agent's admission. The Court reasoned that "it was surely within the scope of the nurse's employment to assure a patient that a file being examined was the patient's and to provide an explanation to allay the patient's justifiable doubts." In *United States v. Rioux*, n139 the Court affirmed a sheriff's convictions for extortion and related crimes, holding that testimony by deputies and special deputies of the sheriff as to statements made by their supervisors was properly admitted as statements of agents. The Court found that there was evidence that the supervisors

discussed suspension decisions regarding deputies with the sheriff and that they enforced the sheriff's instruction to the deputies that they had to pay dues as a condition of employment. It was not necessary that the supervisors be final decisionmakers for their statements to be within the scope of their employment.

Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991) : The Court affirmed a judgment for the defendants in an antitrust action, holding there was no abuse of discretion in excluding statements made by the defendants' employees. In one situation, there was no evidence that the employee had actual or apparent authority regarding the matter about which he spoke; in another, it was possible there was such authority, but because the statements and the circumstances in which they were made were confusing and the declarant testified and was fully cross-examined, the ruling below was not an abuse of discretion.

Corley v. Burger King Corp., 56 F.3d 709 (5th Cir. 1995) (per curiam): In a personal injury action arising out of a collision with a car driven by a Burger King store manager, summary judgment was granted for the defendant on the ground that there was no showing the manager was acting in the course and scope of his employment at the time of the accident. The Court reversed, holding that the manager's statement at the scene that he was taking some carbon dioxide to the store was an admissible statement concerning a matter within the scope of his employment as manager. In *United States v. Summers*, n140 the Court affirmed a Hobbs Act conviction, finding that telephone conversations recorded on tape were properly admitted to show that the defendant was to receive certain money, since the person whose statements implicated the defendant was an agent making statements within the scope of employment. The Court did find error in the introduction of statements by the agent after the agent began working with the government, but said it was harmless.

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) : In a suit between the airline and the aircraft manufacturer for contribution and reimbursement for settlements arising from an air crash, the Court held it was error (but harmless) for an expert retained by the manufacturer to testify that he had heard from airline employees that the Vice President for Flight Operations had called the airline's crew members "SOBs" after looking in the cockpit at the crash site. Although the Vice President's statements would have been admissible against the airline, the hearsay exception for agents' admissions did not apply to the other employees' recounting of his statements, since it was not part of their job to investigate accident scenes or communicate the results of investigations.

Aliotta v. AMTRAK, 315 F.3d 756 (7th Cir. 2003) : The plaintiff's decedent, who had been standing on a railroad platform, was somehow struck and killed by a high-speed train passing through the station. The plaintiff offered deposition testimony by the risk manager of one of the defendant railroads that a large, high-speed train creates a vacuum that will pull a person standing too close towards the train. The Trial Judge granted the defendants' motion *in limine* on the grounds that the witness' statements were not admissions under *Rule 801(d)(2)(D)* and that the witness was not qualified to give expert testimony under *Rule 702*. Affirming exclusion of the statements, the Court held that they were an admission because the witness was speaking about knowledge he had acquired during the course of his job, which was to investigate accidents and speak to other railroad employees about the causes and potential causes of train accidents. However, the statements were properly excluded as unreliable scientific evidence. In *United States v. Draiman*, n141 the Court affirmed a mail fraud conviction arising from the defendant's filing fraudulent insurance claims following a burglary. It upheld the admission of evidence concerning an exhibit prepared by an accountant for the defendant's company in the ordinary course of business as both an agent's admission and a business record.

Gulbranson v. Duluth, M. & I.R. Ry., 921 F.2d 139 (8th Cir. 1990) : The Court reversed a judgment for the plaintiff in a FELA action, holding that minutes of the defendant's car department safety committee had been admitted erroneously, as there was no showing who the speakers were or that they were the defendant's agents speaking about matters within the scope of their employment. In *Tallarico v. Trans World Airlines, Inc.*, n142 an action by a

handicapped minor for violation of the Air Carriers Access Act when she was not permitted to board a flight unaccompanied, the Trial Judge excluded the plaintiff's evidence that two of defendant's employees later made derogatory remarks about the plaintiff and the incident in issue. The Court upheld the exclusion, as the persons who made the statements were nonmanagement employees and were not involved in the defendant's decision not to allow the plaintiff to board the flight.

Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002) : The plaintiff news organization videotaped the notorious beating of Reginald Denny and obtained copyrights for four segments of its tape. In a copyright infringement action, the Court affirmed in part summary judgment for the defendants, finding no error in the exclusion of testimony by the husband of the woman who shot the tape that he had spoken to an editor at a station and to a Westinghouse lawyer and they had said that the station and Westinghouse had copied and used the tape. The Court noted that the party claiming that a statement is an agent's admission must demonstrate that the declaration was within the scope of the agency. In an antitrust conspiracy case, *In re Coordinated Pretrial Proceedings, 906 F.2d 432 (9th Cir. 1990)* , the Court reversed a summary judgment for the defendants, holding that statements by a defendant's marketing director that the defendant would support certain pricing policies were admissible against the defendant even though the declarant had testified that he did not have authority on his own to raise prices. His testimony that he gathered market intelligence and acted as liaison between top management and the field on pricing, as well as other circumstances, indicated the statements were within the scope of his employment. See also *Oki America, Inc. v. Microtech Int'l, Inc.* n143(Microtech failed to demonstrate that a statement by an Oki sales manager was within the scope of his employment, especially given the manager's testimony that he knew nothing about Microtech as a customer). In *Hoptowit v. Ray*, n144 a suit against state officials by inmates challenging prison conditions, the Court found no error in admitting an investigative report prepared by employees of the state Attorney General's office for the state Department of Social and Health Services. It is not necessary to show that a statement is within the scope of the agency; it is sufficient to show that the statement related to a matter within the scope of the agency.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005) : The plaintiff sued police officers and the City for using excessive force when intervening to prevent him from committing suicide, after he was shot with a "less lethal" projectile that struck his head and caused brain injuries. Affirming summary judgment for the City, the Court found no abuse of discretion when the plaintiff's sister was precluded from testifying that a City police officer (not involved in the incident) told her that Orlando trains its officers to "shoot people in the head." not the body. There was no evidence aside from the statement establishing the declarant's employment relationship and its scope. In *Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991)* , the Court reversed a judgment for the plaintiff in an action brought for injuries suffered when an automatic sliding glass door ran over her foot. Hearsay statements by a cabin steward regarding the defendant's notice of previous problems with the door were erroneously admitted, since the steward had no responsibilities in the cruise ship's engineering department or in the swimming pool area where the door was located. In *Lloyd v. Professional Realty Servs., Inc.*, n145 the Court upheld exclusion of statements, stating that the plaintiffs were unable to show that the declarant's statements related to any authority that had been conferred upon him by the defendants.

[u] Rule 801(d)(2)(D) -- Statements by Counsel

United States v. Amato, 356 F.3d 216 (2d Cir. 2004) (per curiam): Affirming a conviction for attempted tampering with a cooperating witness, the Court held that statements by the defendant's attorney which were inconsistent with other testimony about the defendant's efforts to contact the cooperating witness were admissible as agent's admissions. The Court noted that the concerns expressed in *United States v. McKeon*, *infra*, regarding use of counsel's jury arguments against the client are largely inapplicable to out-of-court statements made by counsel. In *United States v. Valencia*, n146 the Court affirmed (2-1) a pretrial ruling that statements made by a defense lawyer during informal conversations with the prosecutor could not be admitted as agent's admissions to prove the defendant's consciousness of

guilt. The Court found that admission of such statements "would pose some threat to chilling the prospects for plea negotiations," even though no such negotiations were in progress in the instant case. It distinguished its opinion in *United States v. McKeon* n147(*see* the Editorial Explanatory Comment, *§ 801.02[6][f][vi]*), on several grounds: A statement made in Court is transcribed so that a dispute about what was said is unlikely; the attorney's opening statement at a trial in *McKeon* did not pose a threat to plea bargaining; and the *McKeon* statement was directly inconsistent with the defense at the prior trial. In *Litton Sys., Inc. v. American Tel. & Tel. Co.*, n148 the Court affirmed a large antitrust judgment for the plaintiffs, upholding the exclusion of notes made by an attorney for the plaintiff indicating that various employees told him about wrongdoing on the part of other employees. The Court said that "what some Litton employees said about other employees in the course of his investigation does not bring the events he [the attorney] summarized within the scope of his agency or employment."

United States v. Brothers Constr. Co. of Ohio, Inc., 219 F.3d 300 (4th Cir. 2000) : Two corporations were charged with fraudulently receiving public funds in a scheme involving a public construction project that was supposed to be conducted by a "disadvantaged business enterprise." Brothers Company, the DBE, operated as a straw man, while the actual work was done by Bunn Construction, the other defendant, and Brothers received a kickback for lending its name to the project. The general counsel for Bunn testified before a grand jury that he knew that the actual work on the project was done by Bunn employees and not by Brothers. When the attorney claimed his self-incrimination privilege at trial, the grand jury testimony was admitted under the residual exception as proof that the defendants had falsely represented to the government that Brothers had worked on the project. The Court found that the grand jury testimony should not have been admitted as residual hearsay, but affirmed nonetheless, on the ground that the testimony could have been admitted against Bunn as an agency admission. At the time of the grand jury testimony, the general counsel was an employee of the corporation, and he was speaking about a matter within the scope of his authority. The testimony could not be admitted against Brothers, since the counsel was employed by Bunn and not Brothers, but any error in admitting the testimony against Brothers was harmless.

Hardy v. Johns-Manville Sales Corp., 851 F.2d 742 (5th Cir. 1988) : Reversing a judgment for plaintiffs who sued asbestos manufacturers for damages resulting from exposure to asbestos, the Court held that excerpts from two appellate briefs in other cases were improperly admitted. The issues in the other cases were different because they involved insurance coverage, and the Court reasoned that the appellate briefs differed from Trial Court pleadings in making statements about what the Trial Court record shows rather than about "the facts as they unfolded in the real world."

Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir. 1986) : Reversing a judgment for a plaintiff who claimed that he was injured when exposed to chemicals while working for a contractor at the defendant's plant, the Court held it was error to prohibit the defendant from cross-examining the plaintiff about a prior suit in which he attributed the same injuries to an explosion. It stated that "[a]n opening statement made by an attorney is admissible in a later lawsuit against his client," and that statements made in pleading in a prior case are admissible. Although the prior statements were made by the plaintiff's attorney, the plaintiff could be questioned about them.

United States v. Brandon, 50 F.3d 464 (7th Cir. 1995) : The Court held in a wire fraud prosecution that a response made to a grand jury subpoena by the defendant's prior attorney was properly admitted. Because the attorney did not represent the defendant in the criminal matter and there was no suggestion he would have done so, none of the policies weighing against admissibility of statements made by an attorney acting as agent for his client was infringed. In *United States v. Harris, 914 F.2d 927 (7th Cir. 1990)* , the Court affirmed an armed bank robbery conviction, holding there was no abuse of discretion in admitting statements by the defendant's former counsel, who had been investigating a mistaken identity theory, as vicarious admissions. Under the circumstances, the Court reasoned that there was no impairment of the privilege against self-incrimination or the rights to counsel of one's choice and effective assistance of counsel, nor

would admission deter vigorous and legitimate advocacy. In a case involving similar facts, *United States v. Sanders*, n149 the Court affirmed a drug conviction, finding that the Trial Judge properly admitted testimony concerning a visit (made five months before the defendant was indicted) by the defendant's attorney to two alleged coconspirators who were then incarcerated. The attorney told the coconspirators that he represented the defendant and asked whether they had made statements to the police. The Court reasoned that the defendant waived any attorney-client privilege claim by objecting at trial only on hearsay grounds, and concluded that the hearsay objection was unavailing under *Rule 801(d)(2)(D)*.

Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245 (8th Cir. 1987) : The Court affirmed a judgment in a breach of contract action and held that "[a] pleading abandoned or superseded through amendment no longer serves any function in the case, but may be introduced into evidence as the admission of a party."

United States v. Flores, 679 F.2d 173 (9th Cir. 1982) : The Court affirmed a conviction for felon firearm possession, holding that a letter in which the defendant's attorney admitted the defendant's ownership of the gun was properly introduced.

[v] Rule 801(d)(2)(D) -- Statements for Internal Use

Theriot v. J. Ray McDermott & Co., 742 F.2d 877 (5th Cir. 1984) : The Court upheld in a Jones Act suit the admission of a report prepared for the defendant by a foreman whose job was to investigate injuries to workers. That the report was made for the company did not render it inadmissible on behalf of the injured seaman.

MCI Commun. Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983) : In this important antitrust case, the Court upheld the admission of an internal AT&T study which reflected statements by managers within the scope of their duties: "The fact that the report is based on hearsay or reflects opinion goes to its weight and credibility, not its admissibility."

[10] Rule 801(d)(2)(E) -- Statements Which Are Not Hearsay -- Admission By Party-Opponent -- Coconspirators

[a] Rule 801(d)(2)(E) -- Acquittal of Conspiracy

United States v. Carroll, 860 F.2d 500 (1st Cir. 1988) : The Court held that a ruling admitting conspirator statements is not invalidated by a subsequent acquittal of the conspirator-declarant. In *United States v. Dworken*, n150 the Court affirmed a marijuana conviction, holding that conspirator statements were properly admitted, even though the jury acquitted all defendants of the single charged conspiracy.

United States v. Barksdale-Contreras, 972 F.2d 111 (5th Cir. 1992) : The Court affirmed convictions arising out of a kidnapping plot, holding that statements of coconspirators were admissible even though a defendant was acquitted of conspiracy, given the different standards applicable to admissibility and guilt determinations.

United States v. Todd, 920 F.2d 399 (6th Cir. 1990) : The Court held, in a prosecution of a drug distribution conspiracy, that statements by a declarant who had been tried previously and acquitted of the charge of conspiracy could be admitted under the Rule, as the burden of proof necessary to convict is higher than the preponderance burden required for admission of evidence. See also *United States v. Ayotte* n151(conspirator statements could properly be

used to convict a defendant of substantive offenses, even though the jury returned a not guilty verdict on the conspiracy charge).

United States v. Peralta, 941 F.2d 1003 (9th Cir. 1991) : Affirming a conviction for hostage taking and extortion, the Court held there was no error in admitting extrajudicial statements of a person in furtherance and during the course of a conspiracy, even though the declarant had been acquitted of conspiracy charges. The difference between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference in the burden of proof, mean that preclusion doctrines do not automatically bar the use of statements by a person who has been acquitted of the crime of conspiracy.

[b] Rule 801(d)(2)(E) -- Appellate Review

United States v. Machor, 879 F.2d 945 (1st Cir. 1989) : In this narcotics prosecution the Court held that the failure to make a finding of admissibility when counsel properly objects to the evidence but does not request a final determination is not subject either to automatic reversal or to reversal only for plain error. Rather, there will be no reversible error if the Appellate Court's examination of the record reveals that the Trial Judge acknowledged that a *Rule 801(d)(2)(E)* problem existed and the government met its burden of proof; otherwise, the case may be remanded with instructions to make the determination.

United States v. Rahme, 813 F.2d 31 (2d Cir. 1987) : Affirming a defendant's heroin convictions, the Court stated that a finding that statements are in furtherance of conspiracy will not be overturned unless it is clearly erroneous.

United States v. Bolla, 685 F.2d 929 (5th Cir. 1982) : Affirming marijuana-related convictions, the Court said that it would not overturn a Trial Judge's decision to admit conspirator statements unless the decision was clearly erroneous. See also *United States v. Acosta* n152(a Trial Court's finding that the Rule is satisfied is judged on appeal by the clearly erroneous standard).

United States v. Gessa, 971 F.2d 1257 (6th Cir. 1992) (en banc): The Court said that it would apply a clearly-erroneous, rather than an abuse-of-discretion, standard of review to the factual determinations required by the Rule, and held that coconspirator statements were properly admitted in this case.

United States v. Rodriguez, 975 F.2d 404 (7th Cir. 1992) : The Court reversed an *in limine* order excluding coconspirator statements, holding that all *Rule 801(d)(2)(E)* rulings, whether based on pretrial proffers or after an evidentiary hearing or at trial, are reviewed for clear error. The Court rejected the government's argument that pretrial proffers be subjected to *de novo* review, considering it perverse to apply more searching review to the one method of making such rulings the Court has expressly approved of as efficient.

United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988) : The Court observed that "[w]e have held that the issue of whether the government has established a prima facie case of conspiracy in its offer of proof is a legal question to be reviewed de novo," but that the Supreme Court's *Bourjaily* opinion stated that the Court did not find the Trial Judge's factfinding to be clearly erroneous. Declining to decide whether *Bourjaily* actually mandates a clearly erroneous standard, the Court found that under any standard, conspirator statements were properly admitted. See also *United States v. Zavala-Serra* n153(noting that *Bourjaily* indicates the clearly erroneous standard applies, but finding both *de novo* and clearly erroneous standards satisfied).

United States v. Ayarza-Garcia, 819 F.2d 1043 (11th Cir. 1987) : The Court held that admission of statements under the Rule was not clearly erroneous. After holding that the Trial Judge's findings on the admissibility of conspirator statements would be reviewed under the "clearly erroneous" standard in *United States v. Caldwell*, n154 the Court upheld the Judge's finding that there was insufficient evidence to support the introduction of a hearsay statement as to one defendant and reversed a similar ruling as to another defendant.

[c] Rule 801(d)(2)(E) -- Availability of Declarant

United States v. Inadi, 475 U.S. 387 (1986) : The Supreme Court rejected the defendant's *Confrontation Clause* argument and held that a showing of unavailability was not required before conspirator statements are offered by the government.

[d] Rule 801(d)(2)(E) -- Bench Trials

United States v. Alfonso, 738 F.2d 369 (10th Cir. 1984) : Affirming a conviction for distributing cocaine, the Court held that in a bench trial the Judge must follow the same standard of admissibility for conspirator statements as in a jury trial, but the Judge need not expressly state for the record in a bench trial that the government has met its burden of establishing admissibility.

[e] Rule 801(d)(2)(E) -- Cautionary Instructions

United States v. Drougas, 748 F.2d 8 (1st Cir. 1984) : Affirming convictions involving importation and possession of marijuana, the Court indicated that the Trial Judge properly refused to give a cautionary instruction concerning conspirator statements that were conditionally admitted. Such an instruction may be prejudicial to a defendant if the Judge ultimately rules that the statements are admissible and instructs the jury that the foundation facts have been found.

United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993) : In the prosecution of two leaders of a large drug trafficking conspiracy, the Trial Judge told the jury that statements proffered as coconspirator statements were admitted on a conditional basis and later told them that the government had proved the existence of a conspiracy to his satisfaction, so that the statements were admissible against both defendants. The Court held that the instructions were inappropriate because, while it might be proper to alert the jury that there may be a later ruling to disregard conditionally admitted evidence, the jury should not be told what facts the Judge believes have been established when making a determination of admissibility. The error was harmless, however. In *United States v. Mastropieri*, n155 the Court said it expected that "trial judges in this circuit not only will shoulder the responsibility of making the determination of admissibility, ... but will hereafter refrain from giving the jury a 'second bite' " through a jury instruction.

United States v. Ascarrunz, 838 F.2d 759 (5th Cir. 1988) : The Court held in a drug prosecution that a Trial Judge need not instruct the jury that it must find a defendant to have been a member of a conspiracy on the basis of evidence other than a coconspirator's statement before using the statement against the defendant. In *United States v. Elam*, n156 the Court affirmed convictions for conspiracy to import and distribute marijuana, saying that it was "plain that only when the trial judge has determined, at the close of the evidence, that the prosecution has not demonstrated the defendant's participation in a conspiracy by a preponderance of independent evidence, that an instruction to the jury should be considered." Where the Trial Judge determines that the requisite foundation has been established for the introduction of conspirator statements, no jury instruction is necessary and none should be given.

United States v. August, 745 F.2d 400 (6th Cir. 1984) : The Court noted that it was error, but harmless in this case, for the Trial Judge to tell the jury about the finding that he made concerning a conspiracy.

United States v. Brown, 940 F.2d 1090 (7th Cir. 1991) : The Court affirmed a conviction for participating in a conspiracy to distribute cocaine, holding that the defendant's activities on the night of his arrest and the manner of his surrender, together with the coconspirator's statements themselves, were sufficient for a determination that the defendant was a member of the conspiracy. Although an instruction that the jury consider only the defendant's acts and statements in determining whether he became a member of the conspiracy was erroneous, it acted to the defendant's advantage by preventing the jury from considering incriminating evidence of his involvement in the conspiracy. In *United States v. Peters*, n157 the Court found that a Trial Judge's explanation of his ruling admitting conspirator statements was not prejudicial, but clearly stated that Judges should not explain rulings admitting such evidence and should, at most, merely caution jurors that conspirator statements have not been subjected to cross-examination. In *United States v. Tuchow*, n158 the Court made an unfortunate error when it requested Trial Judges to instruct the jury that statements not offered for their truth, but which indicate the nature and scope of a conspiracy, are admissible for a limited purpose and are not independent evidence of the defendant's participation in the conspiracy. Since the sufficiency of the evidence offered as a basis for admitting conspirator statements is a question for the Court alone, the jury should not be instructed on the matter.

United States v. Hartley, 678 F.2d 961 (11th Cir. 1982) : Affirming conspiracy, RICO, and other convictions, the Court observed that where the Judge determines that conspirator statements are admissible, there is no reason to give a cautionary instruction to the jury. The Court also noted that it would be improper for a Trial Judge to tell a jury that he made a preliminary determination that a conspiracy existed. Once the Judge decides that the statements are admissible, they should be admitted like other evidence without special instructions.

[f] Rule 801(d)(2)(E) -- Civil Cases

Earle v. Benoit, 850 F.2d 836 (1st Cir. 1988) : In a civil rights action alleging a conspiracy to harass the plaintiff, the Court held that it was proper to strike the plaintiff's testimony concerning statements made by town police officers, since the plaintiff had failed to prove by a preponderance of the evidence a conspiracy between the officers and the defendant state troopers. The Court also held it was proper to rule that the statements were inadmissible prior to the close of evidence, since the plaintiff had an opportunity to point to evidence that would satisfy *Rule 801* and was unable to do so.

State of N.Y. v. Hendrikson Bros., 840 F.2d 1065 (2d Cir. 1988) : The Court used the *Bourjaily* test for conspirator statements in this civil antitrust action and concluded that the plaintiff had established by a preponderance of the evidence the requisite elements for reliance on the conspirator's rule.

Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998) : In an antitrust action involving an alleged group boycott, the Court reversed a summary judgment for some defendants and affirmed as to others. It concluded that the plaintiff had demonstrated by a preponderance of the evidence that a statement by one defendant was admissible against others as a coconspirator statement. In an antitrust action by an unsuccessful applicant for a franchise, *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358 (3d Cir. 1992)* , the Court vacated in part a summary judgment for the defendants, and held there was sufficient evidence of a conspiracy shown to admit statements of alleged coconspirators.

Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991) : The Court affirmed a judgment for the defendants in an antitrust action, holding there was no error in excluding statements offered under *Rule 801(d)(2)(E)* because the preliminary showing of a conspiracy was insufficient. In making that determination, the Trial Judge acted properly in weighing the credibility and reliability of evidence, including hearsay statements.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111 (5th Cir. 1980) : In a securities action, the Court said that the same approach to conspirators' statements utilized in criminal cases also should be used in civil cases, although "the district court's discretion in controlling the order of proof may be broader ... in a civil action." The Court also implied that a corporate agent's statements made during and in furtherance of a conspiracy involving the corporation could be used against other conspirators.

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999) : As evidence of a conspiracy in an antitrust case, the plaintiffs introduced testimony from a witness that when he expressed antitrust concerns to the CEO of one defendant, the CEO responded that "there was no need to worry because someone would have to prove" he spoke to the principal shareholder of the other defendant and the CEO then "leaned forward, smiled, and said 'of course we didn't.' " The Court found that the oral utterances and the act of leaning forward and smiling, when considered together as the CEO obviously intended, were a statement that the CEO *had* "talked" to his counterpart but that no one would be able to prove it. Although the Court reversed summary judgment that had been granted for the defendants, it found no clear error in the ruling below that the statement was not admissible against the second defendant under *Rule 801(d)(2)(E)* because it did not further the conspiracy.

Qualley v. Clo-Tex Int'l., Inc., 212 F.3d 1123 (8th Cir. 2000) : Vacating a judgment for a plaintiff in a RICO fraud action involving a purchase of Nigerian crude oil that was never delivered, the Court held it was error to admit deposition testimony in which other people's statements quoted by the deponent were offered for their truth. Admission of the statements under the coconspirator exception was clearly erroneous, since there was no evidence aside from the contents of the statements themselves that tended to connect the speakers with the defendants, and the only document linking the various individuals was insufficient to establish a conspiracy by a preponderance of the evidence. Affirming a summary judgment for the defendant in a price-fixing case, *Pink Supply Corp. v. Hiebert, Inc.*, n159 the Court held that evidence of alleged conspirator statements could be disregarded when there was no independent evidence of conspiracy.

In re Coordinated Pretrial Proceedings, 906 F.2d 432 (9th Cir. 1990) : Reversing a summary judgment for the defendants in an antitrust conspiracy case, the Court held that there was sufficient independent evidence of the conspiracy to make statements by various of the defendants' agents admissible against all the defendants. In *Filco v. Amana Refrigerator, Inc.*, n160 the Court affirmed a summary judgment for retailers and a manufacturer in a price fixing antitrust case. It found that there was no independent evidence of conspiracy, so certain conspirator statements would not have been admissible.

[g] Rule 801(d)(2)(E) -- Confrontation Concerns

Bourjaily v. United States, 483 U.S. 171 (1987) : The Supreme Court held that the *Confrontation Clause* is satisfied when a statement is properly admitted under the coconspirator rule. In *United States v. Inadi, 475 U.S. 387 (1986)* , the Supreme Court held that a showing of unavailability was not required before conspirator statements are offered by the government. We note that under *Crawford v. Washington, 541 U.S. 36 (2004)* , coconspirator statements are unlikely to be "testimonial," so confrontation concerns will rarely if ever be at issue. *Crawford* is discussed in the

Editorial Explanatory Comment, *§ 801.02[7]*.

United States v. Sanchez-Berrios, 424 F.3d 65 (1st Cir. 2005) : The Court held that a statement made in the course and furtherance of a conspiracy was by its nature not testimonial within the meaning of *Crawford v. Washington*. As non-testimonial hearsay, the statement's admissibility under the *Confrontation Clause* was dependent on compliance with *Ohio v. Roberts*, and the admission of the hearsay satisfied *Roberts* because the coconspirator exemption is a firmly rooted hearsay exception. Moreover, admission of the coconspirator hearsay did not violate the defendant's constitutional rights under *Bruton v. United States*, because "there is no *Bruton* problem" when the nontestifying codefendant's statement is admissible under a firmly-rooted hearsay exception.

United States v. Holmes, 406 F.3d 337 (5th Cir. 2005) : To avoid a statute of limitations bar in a medical malpractice case, the defendant lawyer conspired with a court clerk to have filings back-dated. During discovery on the limitations issue in the malpractice case, the clerk gave a deposition in which she falsely explained how apparent discrepancies might have occurred. In the defendant's subsequent trial for mail fraud and conspiracy, the prosecution introduced the clerk's deposition. Although the defendant repeatedly referenced the deposition as exculpatory, on appeal he claimed that introduction of the deposition against him was a confrontation violation. The Court held that the clerk's deposition testimony constituted statements in furtherance of the conspiracy. Without deciding whether coconspirator statements in a deposition are "testimonial" under *Crawford*, the Court held that in this case there was no *Sixth Amendment* problem because the statements were not offered for their truth. In *United States v. Robinson, 367 F.3d 278 (5th Cir. 2004)* , the Court affirmed a drug trafficker's murder convictions and death sentence, holding that coconspirator statements are not "testimonial" under the Supreme Court's *Crawford v. Washington, 541 U.S. 36 (2004)* , *Confrontation Clause* analysis.

United States v. Lee, 374 F.3d 637 (8th Cir. 2004) : The defendant was convicted of murder in aid of racketeering after killing a gun dealer and his family. Affirming, the Court found no error in the admission of inculpatory statements made by a coconspirator to his brother. The defendant argued that the statements were testimonial under *Crawford v. Washington* because they were "detailed, confessional, and made after the events to a cooperating individual." The Court held they were not testimonial because the statements were made to a coconspirator and they were admissible as coconspirator statements because they were made in furtherance of a conspiracy involving the brother to sell the stolen guns. In *United States v. Reyes, 362 F.3d 536 (8th Cir. 2004)* , the Court affirmed drug-related convictions, holding that the defendants' right to confrontation was not violated by the admission of coconspirator statements under *Rule 801(d)(2)(E)*, because coconspirator statements are not "testimonial" under *Crawford v. Washington, 541 U.S. 36 (2004)* .

United States v. Allen, 425 F.3d 1231 (9th Cir. 2005) : The Court held that coconspirator statements admitted against the defendant were not "testimonial" under *Crawford v. Washington* and their admission did not violate the defendant's right to confrontation. In contrast, a statement made to a police officer by a former coconspirator after he was arrested, which identified the defendant as a person recruited for the conspiracy, was testimonial. There was no constitutional error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

[h] Rule 801(d)(2)(E) -- Conspiracy Not Charged

United States v. Grossman, 843 F.2d 78 (2d Cir. 1988) : The Court noted that the government need not charge a conspiracy to take advantage of the conspirator's rule.

United States v. Horton, 847 F.2d 313 (6th Cir. 1988) : The Court found the foundation sufficient to admit a coconspirator's statement, even though no conspiracy was charged.

[i] Rule 801(d)(2)(E) -- Declarant's Participation in Conspiracy

United States v. Candelaria-Silva, 166 F.3d 19 (1st Cir. 1999) : Affirming drug trafficking convictions, the Court held there was no error in admitting a letter written by an alleged member of the charged conspiracy. Seizure of the letter at the home of a conspirator, contents referring to the subject matter of the conspiracy, and testimony regarding the roles of the writer and persons named in the letter constituted strong evidence that the letter was prepared by a coconspirator during and in furtherance of the conspiracy.

United States v. Monteleone, 257 F.3d 210 (2d Cir. 2001) : Affirming convictions for racketeering, murder and other offenses, the Court found no error in the admission of coconspirator statements by a conspirator who was cooperating with the government. It reasoned that "[m]embership in a criminal conspiracy and rendering services to the government as an informant are not necessarily mutually exclusive roles. The status as a co-conspirator of one who is passing information to the government turns on whether his efforts as an agent of the government supplant his efforts as an agent of his co-conspirators. We draw a distinction between a co-conspirator who exchanges information with the government while still pursuing the conspiracy's criminal objectives, and one whose conduct as a 'co-conspirator' is shaped and directed by the desires of the government. Scarpa falls squarely into the former category."

United States v. Dakota, 188 F.3d 663 (6th Cir. 1999) : Although the Court affirmed a convictions for paying kickbacks to an agent of an Indian tribal organization, it found error in the admission of documents seized from the defendant's son's home. A federal agent who was present when the documents were seized sought to lay a foundation, but the Court held that the lack of evidence as to the role of the son in the kickback operation precluded admission of the records as coconspirator statements. Affirming convictions for extortion and false statement in an official corruption case, *United States v. Rogers, 118 F.3d 466 (6th Cir. 1997)* , the Court held it was probably error (but harmless, in any event) to admit under the coconspirator exemption statements by a declarant whose only proved link to the conspirators was a government informant. In *United States v. Todd*, n161 a prosecution of a drug distribution conspiracy, the Court held that statements by a declarant who had been tried previously and acquitted of the charge of conspiracy could be admitted under the Rule, as the burden of proof necessary to convict is higher than the preponderance burden required for admission of evidence.

United States v. Peralta, 941 F.2d 1003 (9th Cir. 1991) : Affirming a conviction for hostage taking and extortion, the Court held there was no error in admitting extrajudicial statements of a person in furtherance and during the course of a conspiracy, even though the declarant had been acquitted of conspiracy charges. The difference between what must be proved to invoke the hearsay exception and what must be proved in order to convict a person of the crime of conspiracy, as well as the difference in the burden of proof, mean that preclusion doctrines do not automatically bar the use of statements by a person who has been acquitted of the crime of conspiracy.

[j] Rule 801(d)(2)(E) -- Defendant's Participation in Conspiracy

United States v. Geronimo, 330 F.3d 67 (1st Cir. 2003) : The defendant was acquitted on a charge of conspiracy to import the drug Ecstasy, but convicted of aiding and abetting the importation. On appeal, he argued that it was error to admit hearsay statements of the conspirators under *Rule 801(d)(2)(E)* because, while he conceded that a conspiracy existed, the evidence was insufficient that he was a member of that conspiracy. The Court found no plain error, given evidence of the defendant's numerous calls to the conspirators, his arranging a meeting of the conspirators before the

drugs were to be imported, and his attempt to accept delivery of the drug.

United States v. Rivera, 22 F.3d 430 (2d Cir. 1994) : In a narcotics prosecution, the Court held it was error (but harmless) to admit a statement made by Rivera's coconspirator, Aponte-Vega, to the effect that Rivera was Aponte-Vega's partner in a drug conspiracy and that Rivera had a stash house where heroin was kept. The statement was made by Aponte-Vega pursuant to a plan (unrelated to the drug conspiracy) to rob various people; the statement identified Rivera as a possible person who could be robbed. The Court concluded that Aponte-Vega's statement could not be considered in furtherance of the conspiracy of which Rivera was a member, because Rivera was in fact an intended target of the robbery proposal.

United States v. Barksdale-Contreras, 972 F.2d 111 (5th Cir. 1992) : The Court affirmed convictions arising out of a kidnapping plot, holding that statements of coconspirators were admissible even though a defendant was acquitted of conspiracy, given the different standards applicable to admissibility and guilt determinations.

United States v. Brown, 940 F.2d 1090 (7th Cir. 1991) : The Court affirmed a conviction for participating in a conspiracy to distribute cocaine, holding that the defendant's activities on the night of his arrest and the manner of his surrender, together with the coconspirator's statements themselves, were sufficient for a determination that the defendant was a member of the conspiracy. Although an instruction that the jury consider only the defendant's acts and statements in determining whether he became a member of the conspiracy was erroneous, it acted to the defendant's advantage by preventing the jury from considering incriminating evidence of his involvement in the conspiracy. In *United States v. Arvanitis, 902 F.2d 489 (7th Cir. 1990)* , the Court affirmed a conviction for conspiracy to commit arson by hiring a RICO enterprise, but held that a statement by one of the RICO conspirators was improperly admitted against the defendant because proof that he was a purchaser of the RICO conspiracy's services was insufficient to establish his participation in that conspiracy.

United States v. Roach, 28 F.3d 729 (8th Cir. 1994) : Affirming convictions for possession of ephedrine with intent to manufacture methamphetamine, the Court held there was sufficient evidence of a defendant's participation in a conspiracy to admit her codefendant's out-of-court statement implicating her.

United States v. Castaneda, 16 F.3d 1504 (9th Cir. 1994) : The Court reversed two defendants' convictions for money laundering because coconspirator statements had been admitted without sufficient independent evidence that the defendants were members of the conspiracy.

United States v. Peveto, 881 F.2d 844 (10th Cir. 1989) : One defendant in this narcotics conspiracy prosecution objected to introduction of another defendant's statement identifying him as a fellow conspirator. The Court held that evidence that the two lived in the same apartment complex in one city and moved to the same complex in another city and evidence of narcotics paraphernalia found in the defendant's apartment could be considered in connection with facts in the statement -- that ownership of dope houses could be concealed by a lawyer, whom the declarant understood to be the defendant -- in deciding by a preponderance of evidence that the defendant was a member of the conspiracy.

[k] Rule 801(d)(2)(E) -- During the Conspiracy

[i] Rule 801(d)(2)(E) -- Miscellaneous Cases

United States v. Walls, 70 F.3d 1323 (D.C. Cir. 1995) : Affirming drug convictions, the Court held that statements

by the defendants' coconspirator identifying several members of the conspiracy were properly admitted. The defendants argued that the declarant had withdrawn from the conspiracy before she made the statements. The Court recognized that there was mutual distrust between the declarant and the other conspirators, and that consideration had been given to expelling the declarant. Nonetheless, the declarant was still a member of the conspiracy at the time of the statements, because "she remained loyal to the conspiracy and made no affirmative attempt to withdraw."

United States v. Tse, 135 F.3d 200 (1st Cir. 1998) : The defendant was charged as leader of a Boston gang having ties to Hong Kong with attempted murder in aid of a racketeering enterprise. The Court held that gang members' statements occurring eight months after the attempted murders and after the defendant was in Hong Kong with no intention of returning to Boston were not made during the conspiracy, but their admission was harmless error.

United States v. Tracy, 12 F.3d 1186 (2d Cir. 1993) : In the prosecution of two leaders of a large drug trafficking conspiracy, the government introduced a copy of the complaint in the case that was annotated by one of the defendants with death threats against informant and agent sources of the allegations. The annotations had apparently been made after all the other conspirators had been arrested. The document was admitted against the conspirator making the annotations as evidence that he had sufficient familiarity with the operation to identify the unnamed informants; the Trial Judge instructed that it was not binding on the other defendant on trial, but that acts and statements of coconspirators could be considered against any defendant in determining whether the government had proved the charges. The Court held that the annotated complaint should not have been admitted against the codefendant who did not make it, because the statements were not made during and in furtherance of the conspiracy, and that the instruction was insufficient to protect the codefendant from its use against him, but the error was harmless.

United States v. Walker, 796 F.2d 43 (4th Cir. 1986) : The Court affirmed an espionage conviction, holding that conspirator statements were properly admitted, since a conspiracy is presumed to continue and the defendant did not prove withdrawal. In *United States v. Truslow*, n162 convictions for a conspiracy to obstruct justice were reversed because the Trial Judge erroneously accepted the government's argument that statements made during the life of the *conspirator* (declarant) were admissible. The italicized word should have been *conspiracy*, since it is the life of the combination, not its members, that is important.

United States v. Koopmans, 757 F.2d 901 (7th Cir. 1985) : In a prosecution for introducing marijuana into prison, the Court found error, albeit harmless, in the admission of a conspirator's statement, where another conspiracy between them had ended before the statement was made and they were no longer conspiring together.

United States v. Lewis, 759 F.2d 1316 (8th Cir. 1985) : The Court stated that a conspiracy is presumed to exist until it is actually terminated. See also *United States v. Johnson, 767 F.2d 1259 (8th Cir. 1985)* (tape-recorded statements were inadmissible when made prior to the conspiracy, but error was harmless).

[ii] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements After Declarant's Arrest

United States v. Howard, 115 F.3d 1151 (4th Cir. 1997) : Affirming cocaine conspiracy convictions, the Court held that statements made by one coconspirator with his nephew about another defendant's role in the conspiracy were properly admitted, even though the statements were made while the declarant was in jail. The Court declined to hold that statements made during incarceration automatically fall outside the scope of the coconspirator exception, stating that "[u]nfortunately, a conspiracy's activities do not always end when some of its members go to jail." The discussions related to the continued mechanics and operations of the conspiracy. In *United States v. Blackshire*, n163 the Court

reversed a conviction for conspiring to distribute and distributing heroin, holding that it was error to admit against the defendant a codefendant's statement to a police officer after her arrest. The Court stated that a conspirator's statement made after arrest is not admissible against coconspirators because it is not made in furtherance of the conspiracy, nor during its continuance.

United States v. Arce, 997 F.2d 1123 (5th Cir. 1993) : Affirming convictions for a cocaine distribution conspiracy, the Court held it was error (but harmless) to admit testimony about a jailhouse conversation between conspirators after their arrest, where there was no evidence that the conspiracy was continuing. In *United States v. Pineda-Ortuno, 952 F.2d 98 (5th Cir. 1992)* , the Court held it was error (but harmless) to admit a coconspirator's statement dictated to agents after the declarant was arrested. In *United States v. Triplett*, n164 the Court affirmed an arson conviction, holding that a coconspirator's threats to a witness, made in jail after the declarant's arrest, were in furtherance of avoiding punishment.

United States v. Williams, 87 F.3d 249 (8th Cir. 1996) : The Court affirmed a conviction for various offenses arising out of a scheme to profit from stolen Treasury checks. It approved the admission of statements by another coconspirator to investigators after the declarant's arrest, reasoning that statements made during the concealment phase of a conspiracy may fall within the coconspirator rule if made "in furtherance of the conspiracy," and that, even though "[p]ost-arrest confessions or statements incriminating others by one coconspirator are not made in furtherance of a conspiracy," the statements admitted in this case were not confessions implicating the defendant but were made to enable the other coconspirators to continue to pursue their common objectives. In *United States v. Alonzo, 991 F.2d 1422 (8th Cir. 1993)* , the Court reversed convictions for conspiring to possess cocaine because a coconspirator's statement made while cooperating with the police after his arrest had been admitted against the defendants. In *United States v. Carper*, n165 the Court, reviewing drug convictions, held that admitting an alleged coconspirator's statement to police after his arrest was error, but harmless. In *United States v. Smith*, n166 the Court ruled that tape recordings of conversations between a conspirator who had been arrested and agreed to cooperate and other conspirators were admissible under the hearsay exemption because the conspiracy to distribute heroin was a continuing one and was still in existence at the time the conversations were taped. All three members of the panel agreed that the conspirator who agreed to cooperate with the state could not make statements on the tape that would qualify for admission under the hearsay exemption, but they differed on the impact on the jury of the admission of such statements in the instant case.

United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986) : Affirming convictions arising out of a conspiracy to sell stolen corporate bonds, the Court observed that although statements made by a coconspirator after his arrest cannot be used against fellow conspirators, statements by unarrested conspirators who are still operating in furtherance of the conspiracy may be admitted.

United States v. Perez-Garcia, 904 F.2d 1534 (11th Cir. 1990) : The Court held that it was error to admit under the Rule a statement made after the declarant and his coconspirators had been arrested, as by that time the conspiracy had terminated. In *United States v. Jones, 913 F.2d 1552 (11th Cir. 1990)* , the Court held there was no error in admitting a tape-recorded telephone conversation between two coconspirators, one of whom had already been arrested, as the other's statements were made in furtherance of a conspiracy in which he and the defendant were still participating.

[iii] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements After Defendant's Arrest

United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989) : The Court affirmed convictions for cocaine trafficking offenses, holding that statements by one coconspirator to another who was secretly cooperating with the government, made after the defendant was arrested, were in the course and in furtherance of the conspiracy that was still

continuing.

United States v. Robinson, 390 F.3d 853 (6th Cir. 2004) : Affirming drug and firearm convictions, the Court held that coconspirator statements made after the defendant was in jail and no longer an active participant were properly admitted against him, since "he is nonetheless presumed to be a continuing member, and is chargeable for the subsequent acts of co-conspirators, so long [as] the conspiracy was ongoing and Robinson did not establish his affirmative withdrawal from the conspiracy."

United States v. Hubbard, 22 F.3d 1410 (7th Cir. 1994) : The Court affirmed convictions for a conspiracy to manufacture PCP, holding that statements made by a codefendant after the defendant was arrested and had begun cooperating were properly admitted as coconspirator statements. The defendant had not informed the codefendant of his withdrawal from the conspiracy, and his continued association with known targets of the investigation and his attempts to warn them of police involvement indicated that he had not made the required "clean breast to the authorities" even though he had started to assist the government. In *United States v. Patel*, n167 the Court affirmed convictions in connection with a hashish importing conspiracy, holding that recorded statements by a coconspirator were properly admitted, even though the defendant was at that time cooperating with the authorities and had agreed to make the phone call recorded, as the defendant had not communicated his abandonment to any of his coconspirators, nor had he made a clean breast to the authorities.

[iv] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements After Objectives Attained or Failed

United States v. Serrano, 870 F.2d 1 (1st Cir. 1989) : The Court reversed a conviction for fraud, finding that conspirator statements had been made long after the objectives of the alleged conspiracy had either failed or been achieved. The Court reasoned that "when the acts of concealment are done after the central objectives are attained, for the purpose only of covering up after the crime, they are inadmissible."

United States v. Floyd, 555 F.2d 45 (2d Cir. 1977) : Affirming armed bank robbery convictions, the Court held it was error (but harmless) to admit a statement by one defendant to a third person on the day after the robbery in which he admitted robbing the bank, implicated his codefendant, and arranged with the third person to burn the getaway car. The Court noted that the established Federal rule "is that once 'the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.' " (Quoting *Grunewald v. United States, 353 U.S. 391, 401-02 (1957)* .) Accord *United States v. DeVaugn* n168(reversing a conviction for heroin distribution because a telephone conversation between an undercover agent and a coconspirator following delivery of the heroin was admitted although the conspiracy ended with delivery).

United States v. Moses, 148 F.3d 277 (3d Cir. 1998) : The defendant in a tax fraud case argued that statements made by his coconspirators to a grand jury investigating the defendant's suspected willful failure to pay taxes were improperly admitted, since by the time the grand jury convened, the defendant had already failed to pay taxes, so the conspiracy was over. Affirming the conviction, the Court noted that the indictment alleged a continuing conspiracy to evade taxes that included overt acts of concealment after the taxes were due. Since the grand jury testimony occurred while the taxes were still collectible, it was not outside the term of the conspiracy, and was properly admitted under *Rule 801(d)(2)(E)*.

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for

the defendants in a price-fixing case, the Court noted that assertions of the privilege against self-incrimination by officers of one of the defendants could be used to show that the charged conspiracy involved their employer, but could not be used against the other defendants under *Rule 801(d)(2)(E)* because when the officers refused to speak the conspiracy was long over, so their "statements" were not during and in furtherance of the conspiracy.

United States v. Sollars, 979 F.2d 1294 (8th Cir. 1992) : Affirming denial of a severance motion in an arson trial, the Court held that statements by the arsonist recounting how his codefendant planned the fire, made to a coconspirator who agreed after the fire to provide the arsonist with an alibi, were made during the concealment phase of the conspiracy and in furtherance of it and would have been admissible in separate trials.

United States v. Silverstein, 737 F.2d 864 (10th Cir. 1984) : Reversing a defendant's conviction for killing a fellow prison inmate, the Court found that a statement one witness attributed to a codefendant was made after any conspiracy to commit murder ended and during a stage in which the defendants attempted to conceal guilt, so it could not have properly been admitted as a conspirator statement.

United States v. Magluta, 418 F.3d 1166 (11th Cir. 2005) : The defendant had been acquitted of criminal charges, but more than two years later an undercover investigator was sent to talk to a juror who was suspected of having received a bribe from the defendant. The investigator posed as an associate of the defendant who was instructing the juror to keep quiet about the money he had received at the time of the acquittal. The juror admitted receiving the bribe and promised to keep quiet about it. At the defendant's trial for obstruction of justice by juror bribery, the juror's statement was admitted under the coconspirator exemption, but the Court held this was error and reversed the conviction. The statement was not made during the course of the conspiracy because any conspiracy between the defendant and the juror ended when the juror was paid and the defendant was acquitted. In *United States v. Carter*, n169 the Court affirmed RICO conspiracy and other drug-related convictions, finding that statements were made during a conspiracy where the conspiracy included as an objective the obstruction of justice.

[v] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements Before Defendant Joined

United States v. Flemmi, 402 F.3d 79 (1st Cir. 2005) : The Court affirmed the convictions of a retired Boston police officer arising from his assistance in hiding weapons and impeding an investigation of a criminal enterprise in which his brother was a controlling member. It held that coconspirator statements were properly admitted against the defendant even if they were made before he became a conspirator. In *United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995)* , the Court affirmed convictions arising out of laundering of drug money, holding that a defendant, who joined a conspiracy after statements were made, had "effectively adopted" those statements. See also *United States v. Goldberg, 105 F.3d 770 (1st Cir. 1997)* (questioning the policy, but indicating the panel was neither free nor inclined to depart from *Saccoccia*, which follows most Circuits). In *United States v. Masse*, n170 the Court affirmed a cocaine distribution conviction, holding that a statement made by a coconspirator was admissible against a defendant-conspirator even if the statement was made before the defendant joined the conspiracy.

United States v. Badalamenti, 794 F.2d 821 (2d Cir. 1986) : The Court held that statements of a defendant's coconspirators were admissible even if made before he joined the conspiracy, where the defendant was aware of what his conspirators had been doing and saying on behalf of the enterprise.

United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985) : The Court held that statements made during and in furtherance of the conspiracy are admissible against a defendant even though he joins the conspiracy after they are

made.

United States v. Rocha, 916 F.2d 219 (5th Cir. 1990) : The Court affirmed convictions for kidnapping, extortion, and conspiracy, holding that statements made before a defendant joined the conspiracy were properly admitted, as there was evidence of his subsequent knowledge and willingness to participate in the conspiracy.

United States v. Robinson, 390 F.3d 853 (6th Cir. 2004) : Affirming drug and firearm convictions, the Court held that coconspirator statements made before the defendant entered the conspiracy were properly admitted against him, and reiterated its statement in *United States v. Gravier, 706 F.2d 174 (6th Cir. 1983)* , that "[i]t has long been established that a conspirator may join a conspiracy already in progress and be held responsible for actions done in furtherance of the conspiracy before he joined."

United States v. Handlin, 366 F.3d 584 (7th Cir. 2004) : The Court held in an arson conspiracy prosecution that it was irrelevant whether coconspirator statements were made before the defendant joined the conspiracy, "so long as he joined it at some point." Since there was no argument that the defendant was not part of the conspiracy at some point and the Court found there was a single overarching conspiracy rather than multiple conspiracies, the statements were admissible under the coconspirator exception. In *United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990)* , the Court held that a statement about a defendant made in furtherance of a conspiracy he only later joined was properly admitted against him. See also *United States v. Liefer* n171(the "defendant and the declarant need not both be members of the conspiracy at the time of the statement, for a defendant who joins a conspiracy after its inception adopts all prior acts and declarations in furtherance of the conspiracy by his fellow co-conspirators").

United States v. Jiminez-Perez, 238 F.3d 970 (8th Cir. 2001) : Affirming drug trafficking convictions, the Court held there was no abuse of discretion in the admission of statements made by a coconspirator shortly before he was arrested. Even if the defendants did not join the conspiracy until after the declarant was arrested, there was a conspiracy involving the declarant in existence when he made the statements, it did not fold with his arrest, and that same overall conspiracy was the one joined by the defendants. In *United States v. Leroux*, n172 the Court affirmed a mail fraud conviction, holding that "statements made by co-conspirators before a defendant joins the conspiracy are admissible as long as the conspiracy or scheme existed at the time the statements were made."

United States v. Segura-Gallegos, 41 F.3d 1266 (9th Cir. 1994) : Affirming narcotics convictions, the Court held that statements by the defendant's coconspirators were properly admitted against him, even if the statements were made before the defendant joined the conspiracy. It noted that statements made prior to the defendant's joining the conspiracy would not be admissible to show his *participation*, but in this case the statements did not refer to the defendant and were offered to show the preparations that were taken before a narcotics transaction. In *United States v. Mkhsian, 5 F.3d 1306 (9th Cir. 1993)* , the Court affirmed convictions for a cocaine distribution conspiracy, holding there was no error in admitting statements by codefendants before one defendant entered the conspiracy, as one who joins an ongoing conspiracy is deemed to have adopted the prior acts and declarations of conspirators after the formation and in furtherance of the conspiracy.

United States v. Brown, 943 F.2d 1246 (10th Cir. 1991) : Adopting the "prevailing view among the Circuits," the Court held in a bankruptcy fraud prosecution that previous statements made by coconspirators were admissible against the defendant who subsequently joined the conspiracy.

United States v. Tombrello, 666 F.2d 485 (11th Cir. 1982) : The Court held that statements by one conspirator made during and in furtherance of a conspiracy may be admitted against members of the conspiracy who joined after the statements were made.

[vi] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements Before Proceeds Divided

United States v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000) : Reviewing bank robbery convictions, the Court found no error in the admission of hearsay statements by one of the conspirators made shortly after the robbery occurred but before the money had been divided up. It rejected the argument that the statements were made after the conspiracy ended, noting that "[t]here is a distinction, for purposes of the co-conspirator statement exception to the hearsay rule, between an initial conspiracy to commit a crime and later actions to conceal the crime." Under First Circuit precedent, a bank robbery conspiracy includes the division and the hiding of the money. In *United States v. Ibern-Maldonado*, n173 the Court held that a statement made at the time a pilot was being paid for transporting marijuana was admissible, since the conspiracy continued until the proceeds were divided.

United States v. Knuckles, 581 F.2d 305 (2d Cir. 1978) : The Court, affirming narcotics convictions, said that "it is fair to say that where a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants."

United States v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001) : Affirming a conviction for conspiring to import heroin, the Court upheld the admission of a tape-recorded conversation between a former coconspirator who was cooperating with the government and the defendant's brother, who was also a coconspirator. Although the former coconspirator was cooperating, the Court reasoned that the conspiracy continued until the former coconspirator's suppliers received full payment for the heroin. In *United States v. Howard*, n174 the Court affirmed convictions arising out of an arson-insurance mail fraud scheme, concluding that conspirator statements uttered before the conspirators had collected the insurance proceeds and aimed at avoiding detection of the conspiracy were made during the life of the conspiracy.

United States v. Xheka, 704 F.2d 974 (7th Cir. 1983) : The Court found that conspirator statements were properly admitted, since the conspiracy was to burn down a building in order to collect insurance, and at the time the statements were made, the insurance had not yet been paid. Accord *United States v. Zabic, 745 F.2d 464 (7th Cir. 1984)* ; see also *United States v. Doyle* n175(an arson conspiracy involved not only bombing of a building but also payment to the arsonist; statements made prior to the payment were admissible).

[vii] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements Outside Charged Period

United States v. Piper, 298 F.3d 47 (1st Cir. 2002) : The Court affirmed cocaine-related convictions, holding that a coconspirator's statements made two days after the last of three drug sales occurred were properly admitted. The Court observed that mere cessation of activity does not constitute withdrawal from a conspiracy, and that when a conspiracy "contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated." Here, the charged conspiracy included three separate drug sales spanning a 13-day period. In *United States v. Munson*, n176 the Court held that testimony that an admitted coconspirator said, while selling cocaine to the witness, that the defendant was his supplier was admissible under the coconspirator rule even though the sale took place outside the period of the conspiracy charged in the indictment. As long as another conspiracy existed, any statement in furtherance thereof satisfied the Rule and was admissible.

United States v. Castleberry, 116 F.3d 1384 (11th Cir. 1997) : The Court affirmed Hobbs Act convictions for conspiring with a prosecutor to fix DUI cases. It held that entries from the prosecutor's pocket calendar were properly admitted as conspirator's statements even though they were made in mid-1987 and the indictment charged that the conspiracy began on a date unknown but which was before the first day of 1988. The Court concluded that the entries were reasonably close to the dates alleged in the indictment and satisfied the "during the course" requirement.

[l] Rule 801(d)(2)(E) -- Existence of Conspiracy

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) : In a RICO prosecution of the boss of a Mafia family, the Judge admitted some conspirator statements solely on the finding of a "general overriding conspiracy among all of these alleged Mafia groups." The Court held this was error, as there must be a conspiracy with some specific criminal goal, but the error was harmless because some of the statements were made in furtherance of specific conspiratorial goals, some would have been properly admissible as declarations against interest or under the state of mind exception, and the remainder were not prejudicial in the circumstances.

United States v. Cruz, 910 F.2d 1072 (3d Cir. 1990) : The Court affirmed convictions of a cocaine distribution conspiracy, holding that actions of defendants sufficiently established the existence of a conspiracy as to admit statements by an unidentified coconspirator.

United States v. Neal, 78 F.3d 901 (4th Cir. 1996) : In a drug prosecution, the government introduced an alleged coconspirator's statements to an undercover buyer that the defendant had ordered a moratorium on drug sales due to police surveillance. The Court found three pieces of evidence that, together with the hearsay statements themselves, established a conspiracy by a preponderance of the evidence: corroboration that the coconspirators had become aware of police surveillance; the defendant's own statement to the undercover agent that the declarant would not be able to sell him any drugs; and a sheet of paper found in the defendant's apartment with the declarant's name and telephone number on it.

United States v. Mahkimetas, 991 F.2d 379 (7th Cir. 1993) : The Court affirmed a conviction for cocaine distribution, finding error (but harmless) in the admission of a statement by the defendant's mother to an undercover officer, since no conspiracy existed at the time the mother made the statement to the undercover officer. Once the defendant agreed to participate, a conspiracy existed and additional statements by the mother qualified as coconspirator statements. The Court observed that a conspiracy may not be formed solely between a criminally-motivated person and a government agent or informer, although the fact that one party to a conversation is a government agent does not preclude admission if the declarant is shown to be a member of a conspiracy with others.

United States v. Whalen, 844 F.2d 529 (8th Cir. 1988) : The Court held it was error (but harmless) to admit a statement by a murder defendant's mother that she wiped a knife clean. The fact that the mother might have told the defendant not to speak to police was insufficient to establish a conspiracy between mother and son.

United States v. LaHue, 254 F.3d 900 (10th Cir. 2001) : The Court affirmed convictions for violating the Medicare Antikickback Act, holding there was no abuse of discretion in admitting numerous statements as coconspirator admissions. The Court noted that there is no requirement that the common plan required as part of the foundation be for an unlawful purpose. In *United States v. Mobile Materials, Inc.*, n177 the prosecution of a highway construction bid-rigging conspiracy, the Court held that evidence of bid-rigging on projects other than those charged in the indictment could be introduced to show the existence of a conspiracy involving the defendant and the declarant in

which admissible coconspirator's statements were made. In *United States v. Bucaro*, n178 the Court held that the government need not prove that a combination between the defendant and others was for unlawful purposes, since evidence that there was a conspiracy to accomplish any goal sufficed.

[m] Rule 801(d)(2)(E) -- Foundation

See also annotations in *§ 801.03[10][r]*, "Order of Presentation."

[i] Rule 801(d)(2)(E) -- Conditional Admission of Statement

United States v. Freeman, 208 F.3d 332 (1st Cir. 2000) : The first witness in the trial of a police officer on charges of witness tampering and conspiring to take bribes from the owner of a striptease club testified that her employer, the club owner, had told her that he provided free drinks to police officers to avoid "beefs" with them and that he was to call city, not state, police in the event of a licensing violation committed on the premises. The testimony was admitted provisionally under the coconspirator exemption. Subsequently, the owner testified that he provided benefits to the defendant because of fear, not any willing agreement between the two. Toward the end of the government's case-in-chief, the Judge concluded there was insufficient evidence of a conspiracy to admit the coconspirator statements, the evidence was stricken, and the jury were instructed to disregard it. Affirming the defendant's conviction of witness tampering (the jury acquitted him of the conspiracy charge), the Court held that striking the evidence and issuing the curative instruction were sufficient to avoid any prejudice caused by provisional admission of the hearsay, especially since it was only a brief part of a seven-day trial and had scant relevance on the charges of which the defendant was convicted.

United States v. McDougal, 137 F.3d 547 (8th Cir. 1998) : In a trial for fraud in connection with a Small Business Administration loan, coconspirator statements were admitted conditionally during the government's case-in-chief, but the conspiracy count was dismissed at the end of the government's evidence. The Court held there was no abuse of discretion in denying a mistrial motion, since the testimony was not prejudicial to the defendant. Furthermore, there was no error in failing to give cautionary instructions regarding the statements, since the general instruction tendered by the defense was too vague and counsel did not identify specific testimony as to which cautionary instructions were requested.

United States v. Hasner, 340 F.3d 1261 (11th Cir. 2003) (per curiam): The Court affirmed mail fraud convictions, finding no error when coconspirator statements were provisionally admitted subject to the government connecting them up with sufficient foundation evidence. The Court noted that, contrary to the defendants' assertions, the 1997 amendment to *Rule 801(d)(2)(E)* did not change the practice permitting admission subject to connection, but only codified three issues relating to foundation evidence that were raised by *Bourjaily v. United States, 483 U.S. 171 (1987)* .

[ii] Rule 801(d)(2)(E) -- Foundation -- Hearings

United States v. Medina, 761 F.2d 12 (1st Cir. 1985) : The Court declined to require a pretrial hearing to resolve objections to conspirator statements.

United States v. Williams, 264 F.3d 561 (5th Cir. 2001) : Affirming the conviction of a former city councilman for conspiracy to commit extortion and solicitation of bribes, the Court rejected the defendant's claim that the Trial Judge erred in failing to conduct a hearing and failing to make a finding on the record regarding coconspirator statements.

Since this was a retrial before the same Judge on the same charges, the Trial Court was well within its discretion in finding without a hearing that the requirements of *Rule 801(d)(2)(E)* were satisfied. In *United States v. Nichols*, n179 the Court affirmed convictions for mail fraud and conspiracy, finding no error in the Trial Judge's having a "proffer hearing" rather than an evidentiary hearing in order to make a preliminary decision on the admissibility of statements. Most importantly, the Court said that if the defendant wanted the Judge to reconsider his ruling after hearing defense evidence, he must ask the Judge to do so.

United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001) : Affirming CCE and drug convictions, the Court held that the Trial Judge properly admitted coconspirator statements, even though the Judge failed to hold an evidentiary hearing. Although a hearing is one way to go about the task of determining the foundation, it is not the only or even the best way in all cases; a Judge may act on the basis of a pretrial evidentiary proffer or evidence introduced in the early stages of trial. In *United States v. Vargas, 16 F.3d 155 (7th Cir. 1994)* , the Court held that although preliminary proof on the admissibility of a coconspirator statement is desirable, there was no abuse of discretion in adducing such proof in the form of a written proffer rather than a full-blown pretrial hearing.

United States v. Owens, 70 F.3d 1118 (10th Cir. 1995) : Without broadly and unequivocally endorsing the summary procedures used in this drug conspiracy case, the Court held there was no abuse of discretion in admitting coconspirator statements after a hearing at which only an FBI agent testified to information coconspirators provided after entering into plea agreements. In *United States v. Roberts, 14 F.3d 502 (10th Cir. 1993)* , the Court indicated it was reluctant to approve substitution of a written proffer for a pretrial hearing on admissibility or provisional admission subject to being connected up, because the hearing or provisional admission provides the Judge with more options, e.g., judging the conversation in context and identifying the speaker. Nevertheless, there was no abuse of discretion in ordering a written proffer in a complex drug case, where a hearing was potentially unwieldy and the Judge invited the parties to press continuing objections and made contemporaneous rulings and gave limiting instructions during trial. See also *United States v. McMurry* n180(finding no error in failing to hold a pretrial hearing, where the Judge made the requisite factual determinations before admitting the statements).

United States v. Allison, 908 F.2d 1531 (11th Cir. 1990) : The Court affirmed convictions of a cocaine distribution conspiracy, holding that a defendant was not entitled to a hearing on admissibility before a coconspirator's statement was admitted, where the government made its offer of proof and the Trial Judge made a preliminary determination to admit the statements based on the offer, subject to the government's ability to prove the defendant's participation in the conspiracy. In *United States v. Roe*, n181 the Court affirmed convictions arising out of a fraudulent investment scheme, stating that a hearing on the admissibility of conspirator statements is significantly preferable to admission of statements subject to establishing a foundation by the end of trial. It held, however, that the Judge is not required to make an express declaration that such a hearing is impractical before conditionally admitting conspirator statements. In *United States v. Hewes*, n182 the Court emphasized that a pretrial hearing is not always the best way to deal with conspirator statements, approving the conditional admission of statements followed by a proper ruling under the preponderance standard. The Court noted that the Trial Judge had required the government to submit a summary of its nonhearsay evidence in connection with its ruling.

[iii] Rule 801(d)(2)(E) -- Foundation -- Miscellaneous Cases

United States v. McCarthy, 961 F.2d 972 (1st Cir. 1992) : The Court affirmed convictions for drug offenses, holding there was no clear error in admitting coconspirator statements conditionally, where previous trials of alleged coconspirators indicated it was likely that the foundation would be established. At the close of evidence, the Trial Judge reviewed only the evidence adduced at the defendant's trial and found that the prosecution had met its burden of showing the existence of the conspiracy and the participation of the declarant and the defendant therein. In a mail fraud

case, *United States v. Silvano*, n183 the Court found sufficient evidence of conspiracy to warrant introduction of conspirator statements. It reasoned that a Trial Judge may consider evidence relating to events subsequent to a declaration in deciding whether sufficient evidence of conspiracy exists.

Precision Piping & Instruments, Inc. v. E.I. Du Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991) : The Court affirmed a judgment on a directed verdict for the defendants in an antitrust action, holding there was no error in excluding statements offered under *Rule 801(d)(2)(E)* because the preliminary showing of a conspiracy was insufficient. In making that determination, the Trial Judge acted properly in weighing the credibility and reliability of evidence, including hearsay statements.

United States v. Wood, 851 F.2d 185 (8th Cir. 1988) : The Court reaffirmed the basic approach to conspirator statements that it had adopted in *United States v. Bell, 573 F.2d 1040 (8th Cir. 1978)* , and held that a pretrial hearing on the admissibility of statements is not required. The Trial Judge may admit the statements subject to connection, but the government is on notice that at the conclusion of all the evidence the Court will make an explicit determination on the record of whether in its view the government has proved a conspiracy by a preponderance of the evidence. If the Trial Judge determines that the government has failed to carry its burden, the Court will declare a mistrial unless an instruction to the jury to disregard the evidence would suffice to cure any prejudice.

United States v. Smith, 893 F.2d 1573 (9th Cir. 1990) : The Court held that a calendar/drug ledger kept by a deceased conspirator was properly admitted in the trial of a drug conspiracy where the government provided independent evidence of the deceased conspirator's financial and cocaine transactions with other conspirators, proof that the ledger recorded many of those transactions, and proof that the ledger was kept and the entries made while the conspirator was engaged in the purchase and distribution of cocaine. Thus, there was sufficient evidence that the ledger was authored by the deceased conspirator to be admissible against other conspirators.

[iv] Rule 801(d)(2)(E) -- Foundation -- Requirement of Record

United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979) : The Court stated that Judges have discretion to admit the coconspirator hearsay statements "subject to later connection," provided they do so with care. It also said that the Trial Court should make an explicit statement (not to the jury, but for the record) that it has found a conspiracy to exist by a preponderance of the independent evidence. However, in *United States v. Ammar, 714 F.2d 238 (3d Cir. 1983)* , the Court declined to reverse where no explicit statement was made.

United States v. Jensen, 41 F.3d 946 (5th Cir. 1994) : The Court affirmed convictions stemming from a fraudulent scheme which led to a failure of certain savings and loan institutions, holding that coconspirator hearsay statements were properly admitted even though the Trial Judge never made explicit findings concerning their admissibility. The Court held that the failure to make findings was harmless, because the Judge had denied the defendant's motion for a directed verdict, and this was an implicit finding of evidence of conspiracy sufficient to meet the requirement of *Rule 801(d)(2)(E)*. In *United States v. Fragoso, 978 F.2d 896 (5th Cir. 1992)* , although no findings as to the predicate facts were ever made when coconspirator statements were admitted in a cocaine conspiracy trial, the Court held the error was harmless. Under *Bourjaily* there is a procedural duty upon appropriate motion to make the findings at some time; whether express findings should precede admission of the statements is committed to the Trial Court's broad discretion.

United States v. Smith, 320 F.3d 647 (6th Cir. 2003) : The Court affirmed convictions for offenses arising from an extortion scheme against banks, and held that there was no abuse of discretion in the admission of coconspirator

statements. The Trial Judge made only a conclusory statement that "the government has put in sufficient facts from which a reasonable juror could determine that the alleged conspiracy did in fact exist," but the Court found sufficient evidence in the record supporting admission. In *United States v. Kone, 307 F.3d 430 (6th Cir. 2002)* , the Court affirmed convictions involving violations of the immigration laws. Regarding the admission of many statements offered under *Rule 801(d)(2)(E)*, it observed that "[r]egrettably, the district court did not make specific findings to support how, in its view, the government had met is burden as to each of the *Rule 801(d)(2)(E)* elements with respect to each of the contested statements," and opined that "[i]n fact, most, if not all of the challenged statements are made by non-conspiratorial declarants and are, consequently, clearly inadmissible under 801(d)(2)(E)." However, the abuse of discretion in admitting the statements was harmless error. In *United States v. Curro*, n184 the Court concluded that a Trial Judge is not obligated to state reasons supporting a finding that the conspirator exemption is satisfied, but added that "[o]n more complex rulings, some explanation undoubtedly would be helpful even if not required." It also cautioned that "a mere conclusory statement will not always suffice."

United States v. Perez, 989 F.2d 1574 (10th Cir. 1993) (en banc): This case, in which the Court required Trial Judges to make record findings for statements offered under *Rule 801(d)(2)(E)*, is discussed in the Editorial Explanatory Comment, *§ 801.02[6][g][ii][D]*. See also *United States v. Rascon, 8 F.3d 1537 (10th Cir. 1993)* (reversing and remanding because an abuse of discretion was not harmless when statements were admitted without the requisite findings on the record that they were in furtherance and that the declarant was a member); *United States v. Powell, 973 F.2d 885 (10th Cir. 1992)* (in bench trials, explicit findings are required only when the defendant makes a specific request). In *United States v. Gary, 999 F.2d 474 (10th Cir. 1993)* , the Court held it was error (but harmless) to admit coconspirator statements in a cocaine distribution case without making the required findings on the record, where the declarant testified at trial and was subject to cross-examination.

United States v. Fernandez, 797 F.2d 943 (11th Cir. 1986) : The Court observed that a Trial Judge's failure to make a specific determination that the foundation for conspirator statements was satisfied may be harmless error where the record demonstrates the propriety of the admission of evidence.

[v] Rule 801(d)(2)(E) -- Foundation -- Rulings

United States v. Murphy, 193 F.3d 1 (1st Cir. 1999) : In a prosecution for extortion arising from a scheme involving falsified warrant applications, the Trial Judge told counsel prior to jury deliberations that the findings on admissibility of coconspirator statements would be made after the verdict. Although noting that it "is surely the better practice (absent very unusual circumstances)" to make the explicit findings before the case goes to the jury, the Court found no error in postponing the ruling, since counsel in any doubt as to the evidence properly subject to closing argument and jury consideration should ask for a ruling. In a prosecution for conspiring to sell stolen property, *United States v. Richardson, 14 F.3d 666 (1st Cir. 1994)* , the Trial Judge admitted coconspirator statements conditionally, with a final determination to be made at the end of the government's case. Affirming, the Court noted that the Circuit rule requires the determination to be made at the close of all the evidence, but that the defendant had waived the error by failing to object. In *United States v. Cranston*, n185 the Court found that although the Trial Judge erred in ruling on the admissibility of conspirator statements on the second day of trial rather than at the end of the case, there was sufficient evidence to support the ruling.

United States v. DeRoche, 726 F.2d 1025 (5th Cir. 1984) : Prior to trial on charges of possession and sale of stolen property and conspiracy, the defendant asked the Trial Judge to hold a hearing on the admissibility of conspirator statements. No hearing was held, and twice during the trial the government asked the Judge to rule that sufficient evidence of conspiracy had been adduced to satisfy the Rule. On both occasions, the Judge indicated that he did not believe that the government had met its burden and told the jury to consider the statement only against the person who

made it. But, at the close of evidence, the Judge submitted the case to the jury without any limiting instruction. The Court observed that defense counsel should have asked the Judge to rule on admissibility at the close of the evidence, but found that, in light of the Judge's statements in response to the government requests for a ruling, it was impossible to tell whether the Judge had found the conspirator statements to be admissible after all the evidence was in. It reversed the conviction and remanded the case for a new trial.

United States v. Castro, 908 F.2d 85 (6th Cir. 1990) : The Court affirmed convictions for narcotics offenses but ordered a limited remand, holding it was error for the Trial Judge, having admitted coconspirators' statements subject to a later demonstration of their admissibility, to neglect to make the required foundation findings at the end of the trial. In a prosecution for making and presenting false tax refund checks, *United States v. Holloway*, n186 the Court observed that when conspirator statements are offered, a Trial Judge has several options: hold a mini-hearing for purposes of making a finding on the admissibility question; require the government to produce its independent evidence before ruling on the admissibility of the challenged statements; or admit the statements subject to a later finding under the preponderance standard. If the third option is followed, "the court should stress to counsel that the statements are admitted subject to defendant's continuing objection" and that the prosecutor will have to show the foundation facts by a preponderance of the evidence. "At the conclusion of the government's case-in-chief, the court should rule on the defendant's hearsay objection." Since the Judge failed to make a ruling on the admissibility question, the Court remanded for a finding.

United States v. Roulette, 75 F.3d 418 (8th Cir. 1996) : Affirming cocaine-related convictions, the Court held that, although the Trial Judge failed to make a finding on the elements of the coconspirator exception after conditionally admitting coconspirator hearsay statements, the defendant was not prejudiced.

[n] Rule 801(d)(2)(E) -- Independent Evidence of Foundation

Bourjaily v. United States, 483 U.S. 171 (1987) : The Supreme Court held that the preponderance of the evidence standard governs preliminary factfinding under *Rule 801(d)(2)(E)*. It also held that *Rules 104(a)* and *1101(d)(1)* demonstrate a plain congressional intent to permit Courts to consider the contents of challenged conspirator statements in making preliminary factual determinations. It left undecided, however, whether a Court may rely solely on conspirator statements to find that *Rule 801(d)(2)(E)* is satisfied. The 1997 amendment to the Rule makes clear that some independent evidence is required.

United States v. Beckham, 968 F.2d 47 (D.C. Cir. 1992) : When an undercover officer purchased some crack cocaine, the seller said, "I only had one, but you can get another from my buddy"; the defendant immediately got up from his chair, walked over to a stash of crack packaged for distribution, and began to open it. The Court held that the quoted statement was erroneously admitted under the coconspirator exception because there was no independent evidence of a conspiracy, but that the error was harmless because the statement would have been admissible under *Rule 801(d)(2)(B)* because the defendant indicated his endorsement of it.

United States v. Capelton, 350 F.3d 231 (1st Cir. 2003) : The Court affirmed cocaine convictions, finding sufficient independent evidence of the existence of a conspiracy to admit statements under the coconspirator exception. In *United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993)* , the Court, reviewing drug trafficking conspiracy convictions, held that admission of two coconspirator's statements without independent evidence was harmless error. In *United States v. Tarvers*, n187 the Court found sufficient independent evidence of conspiracy, in addition to conspirator statements, to satisfy the *Bourjaily* standard.

United States v. Padilla, 203 F.3d 156 (2d Cir. 2000) : The Court held there was no clear error in a RICO prosecution when a note from one defendant to a bribed witness was admitted against the other defendant as tending to prove his consciousness of guilt. A reference to the second defendant in the note demonstrated a relationship between the defendants not existing in a vacuum but in the context of what the jury could find was a conspiracy to suborn perjury, and thus was independent evidence sufficient to corroborate the substantial hearsay evidence that the second defendant was a member of the conspiracy to obstruct justice. In *United States v. Tellier, 83 F.3d 578 (2d Cir. 1996)* , the Court reversed a RICO conviction because the sole evidence for one of the predicate acts (conspiracy to distribute marijuana) was a hearsay statement from the defendant's alleged coconspirator. Though the defendant did not object to the admission of the hearsay at trial, the Court found plain error, because the government proffered no independent evidence of the conspiracy, in violation of the clear rule that some independent evidence is required. See also *United States v. Jaramillo-Montoya* n188(concluding that the offered statements, considered with independent evidence, were sufficient to establish a conspiracy for purposes of the evidence rule).

United States v. Gambino, 926 F.2d 1355 (3d Cir. 1991) : Affirming convictions for drug offenses, the Court held there was sufficient independent evidence for admission of coconspirator statements.

United States v. McConnell, 988 F.2d 530 (5th Cir. 1993) : Reversing convictions for conspiracy to commit and commission of mail fraud, the Court held that the government had failed to proffer independent evidence providing a proper foundation for alleged conspirator statements. In *United States v. Hagmann, 950 F.2d 175 (5th Cir. 1991)* , the Court held that a pattern jury instruction, which stated that only the acts and statements of the defendant could be considered in determining whether that defendant had become a member of the conspiracy, no longer accurately stated the law after *Bourjaily*. See also *United States v. Chase* n189(the offered statements plus independent evidence laid a proper foundation).

United States v. Clark, 18 F.3d 1337 (6th Cir. 1994) : The Court affirmed bank robbery convictions, finding sufficient independent evidence to support introduction of coconspirator statements. The Court stated that " '[s]ome' independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay."

United States v. Petty, 132 F.3d 373 (7th Cir. 1997) : The Court upheld admission of coconspirator statements in a prosecution for aiding and abetting tampering with motor vehicle identification numbers. The defendant correctly asserted that hearsay statements of the conspirators alone cannot establish the existence of the conspiracy, but in this case the hearsay was adequately corroborated by other evidence. In *United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)* (en banc), the Court relied on *Bourjaily's* holding that hearsay (including the statement) may be considered in determining the admissibility of coconspirator statements, and on the generally accepted principle that the jury does not reexamine the sufficiency of the foundation for such statements once admitted by the Trial Judge, in holding that a pattern jury instruction, which stated that only the acts and statements of the particular defendant may be considered when determining whether that defendant became a member of the conspiracy, was confusing and unnecessary. Three Judges concurred in affirming the conviction, but dissented on the ground that proof of membership in a conspiracy, just as proof of agency, should not be made only by the acts or declarations of agents; some acknowledging act or declaration by the principal (conspirator) must be shown, a point made by the challenged instruction. In *United States v. Potts*, n190 the Court applied *Bourjaily* and found sufficient evidence to support the introduction of conspirator statements in a prosecution for conspiracy to transport and present altered postal money orders. Although most of the statements were made with respect to smuggling drugs into a prison, and the defendant was not charged with this offense, the Court found that the conspiracy charged and the drug conspiracy were coextensive.

United States v. Clay, 16 F.3d 892 (8th Cir. 1994) : The Court held that the defendant's own admissions provided the independent evidence in this case. In *United States v. Campbell*, n191 the Court found that *Bourjaily* was satisfied.

United States v. Castaneda, 16 F.3d 1504 (9th Cir. 1994) : The Court reversed convictions for money laundering because coconspirator statements had been admitted without sufficient independent evidence that the defendants were members of the conspiracy. In *United States v. Torres, 908 F.2d 1417 (9th Cir. 1990)* , the Court affirmed drug conspiracy convictions, noting that a coconspirator's statements may not alone establish the existence of the conspiracy; relevant areas of inquiry on that issue include the nature of the scheme, the identity of the participants, the quality, frequency, and duration of each conspirator's transactions, and the commonality of times and goals. In *United States v. Silverman* n192(discussed in the Editorial Explanatory Comment, *§ 801.02[6][g][ii][C]*), the Court held (2-1) that there was insufficient foundational evidence to satisfy *Bourjaily*.

United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th Cir. 1996) : The Court held that taped conversations of a coconspirator and a putative buyer were properly admitted against the defendant in a drug prosecution. The Trial Court did not rely solely on the coconspirator hearsay itself to determine that the defendant and the declarant were coconspirators; it also relied on a card found in the coconspirator's possession that connected him to the defendant as a drug source, and on taped conversations between the defendant and the declarant. In *United States v. Owens, 70 F.3d 1118 (10th Cir. 1995)* , a drug conspiracy case, the Court held there was no abuse of discretion in admitting coconspirator statements after a hearing at which only an FBI agent testified to information coconspirators provided after entering into plea agreements. The argument that the government was required to corroborate the information with independent evidence was rejected; admissibility requires only information independent of the statements being offered, not independent of the conspirators. In *United States v. Smith*, n193 the Court held that the admission of tape recordings was proper, since the tapes, when considered together with independent evidence, satisfied the foundation requirement.

United States v. Chestang, 849 F.2d 528 (11th Cir. 1988) : Affirming convictions for conspiracy to possess and to distribute cocaine, the Court held there was sufficient independent evidence, in addition to the statements, to support the finding by a preponderance.

[o] Rule 801(d)(2)(E) -- In Furtherance Of

[i] Rule 801(d)(2)(E) -- Informants' Statements

United States v. Rogers, 118 F.3d 466 (6th Cir. 1997) : Reviewing convictions for extortion and false statement in an official corruption case, the Court held that statements by a former conspirator who was cooperating with the government were not admissible under *Rule 801(d)(2)(E)*, but could be heard by the jury to put another conspirator's statements into context.

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) : On appeal of racketeering convictions for drug trafficking, the Court concluded that statements by a government informant could not qualify as coconspirator statements when they were made after the informant agreed to cooperate with the government. Such statements were neither made nor intended to be made to further conspiratorial goals. Admission of the statements was harmless error, however.

[ii] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required

[A] Rule 801(d)(2)(E) -- Efforts To Conceal

United States v. Fahey, 769 F.2d 829 (1st Cir. 1985) : The Court held that a statement by a conspirator that was made to mislead an FBI agent was in furtherance of the conspiracy.

United States v. Mendoza-Medina, 346 F.3d 121 (5th Cir. 2003) : The defendant truck driver, charged with possession of marijuana with intent to distribute, claimed that it was his first time smuggling drugs for his employer, Ramirez, who had a history of narcotics trafficking. At trial, a DEA agent testified that agents seized $368,000 in cash from Ramirez after a trip hauling freight that he and the defendant had made two months before the charged incident. The agent opined that the money was drug related and reported Ramirez's statements to him that, when they arrived at the end of the trip, he got out of the cab to open the gate while defendant parked the truck and unhitched the trailer. Ramirez claimed that he found the money in boxes by the road, that he took the boxes and left in his car, and that defendant was not aware that he had found the cash. The agent also opined that Remirez had lied about finding the cash. The Court found no abuse of discretion in admitting this testimony, since there was sufficient evidence that the defendant and Ramirez were engaged in a conspiracy, and that the statements to the agent were made in furtherance of the conspiracy, since they were likely made to conceal the source of the cash and ensure that the conspiracy could continue. In *United States v. Phillips, 219 F.3d 404 (5th Cir. 2000)* , the defendant was a tax assessor who was charged with putting people on the public payroll even though they did no work. The daughter of one of these "ghost" employees testified at trial that her mother told her all about the scam after the daughter expressed her suspicions. Upholding admission of the mother's statements under the coconspirator exemption, the Court found they were in furtherance of the conspiracy. It reasoned that the mother confessed to her daughter "in an effort to exact sympathy so that the scheme could remain a secret." In the course of affirming drug trafficking convictions in *United States v. Broussard*, n194 the Court held that conversations in which one conspirator told another to use a safe phone indicated a desire to have the conspiracy concealed from DEA agents, and that such statements are in furtherance of conspiracy. In *United States v. Triplett*, n195 the Court affirmed an arson conviction, holding that a coconspirator's threats to a witness, made in jail after the declarant's arrest, were in furtherance of avoiding punishment.

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) : The Court affirmed bank robbery convictions, finding no abuse of discretion in the admission of statements by one defendant to a witness that implicated another defendant. It concluded that the statements were made in furtherance of the conspiracy, because "[s]tatements that are designed to facilitate the concealment of a conspiracy's criminal accomplishments are admissible under *Rule 801(d)(2)(E)*."

United States v. Skidmore, 254 F.3d 635 (7th Cir. 2001) : The defendant's wife explained to a gun shop secretary, with whom they had become friendly, that she rather than her husband always completed the paperwork when purchasing firearms at the shop because he was a convicted felon. Affirming his conviction for felon firearm possession, the Court held there was no abuse of discretion in admitting the secretary's testimony regarding this explanation, as it was a coconspirator statement under *Rule 801(d)(2)(E)*. The fact that the wife was never observed paying in connection with these gun purchases tended to show that she was conspiring with her husband to act as a straw purchaser, and her decision to reveal the actual reason she repeatedly designated herself as purchaser "can be characterized as an expression of trust as well as an attempt to secure the confidence of her friend, thereby preventing further detection of what she and her husband were doing." In *United States v. DiDomenico*, n196 The Court affirmed convictions for RICO and predicate acts of murder, extortion, etc., and held there was no error in admitting statements by a conspirator regarding a murder five years earlier, since the conspiracy was still going on when the declarant, in an effort to prevent its unraveling, made his reassuring statements. In *United States v. Troop*, n197 the Court held that a coconspirator's statement expressing concern that a participating informant was in law enforcement was in furtherance of the conspiracy because avoiding detection by law enforcement officials furthers the aims of the conspiracy.

United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) : Affirming a conviction for an arson conspiracy, the Court found no abuse of discretion in the admission of testimony by the brother of a conspirator that when the conspirator

received telephone calls from the defendant, he would take the phone to another room and refuse to divulge the contents of the conversation despite the witness' suspicions. The Court held that "[a] statement of a conspirator which conceals the conspiracy without revealing any of the conspirators' illegal objectives from one who appears suspicious is in furtherance of the conspiracy." In *United States v. Alcantar, 271 F.3d 731 (8th Cir. 2001)* , the Court affirmed convictions for conspiring to distribute methamphetamine, holding that a secret tape recording of a conversation between two conspirators while seated in the back seat of a patrol car, in which they expressed concern that police might find drugs in their pickup and agreed to "stick to" their concocted story, was admissible under *Rule 801(d)(2)(E)*, as it was in furtherance of the conspiracy. In *United States v. Mayberry*, n198 the Court affirmed a conviction for maliciously damaging a building, holding that a coconspirator's statement to a person outside the conspiracy could be in furtherance of the conspiracy because it could be construed as seeking assistance or cooperation in avoiding detection by law enforcement authorities. In *United States v. Garcia*, n199 the Court affirmed a conviction of conspiracy to import counterfeit money, holding that a coconspirator's statements were properly admitted in furtherance of the conspiracy when made, in one case, to delay or prevent the arrest of a conspirator and, in another, to enlist a family member's assistance by revealing to him the conspiracy.

[B] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Information to Conspirators

United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988) : Affirming drug conspiracy convictions, the Court held that statements by one conspirator to another that provided key information to enable the other conspirator to carry out his duties were in furtherance of the conspiracy, and were not mere narrations of past acts.

United States v. Martinez-Medina, 279 F.3d 105 (1st Cir. 2002) : Affirming narcotics convictions, the Court rejected arguments that some statements among conspirators were improperly admitted because they were not in furtherance of the conspiracy. The statements conveyed information to fellow conspirators about the operations of the drug conspiracy or discussed strategies for dealing with the threat posed by rivals to the drug conspiracy.

United States v. Russo, 302 F.3d 37 (2d Cir. 2002) : The Court upheld obstruction of justice convictions that arose from efforts by the defendants, after the trial of an organized crime case in which Russo's son was a defendant, to contact a juror in violation of a court order and to hide a witness subpoenaed by a grand jury. The Court held that declarations by nondefendant members of the Colombo crime family were admissible as coconspirator statements. Distinguishing *United States v. Gigante, 166 F.3d 75 (2d Cir. 1999)* , the Court explained that it held in *Gigante* that statements of individuals made in furtherance of a plan to kill a particular person should not have been admitted against a defendant who was not part of that plan because the murder plan was not an objective of the conspiracy which the defendant joined. Here, by contrast, the defendant and the declarant were in a conspiracy to maintain an organized crime syndicate and the declarant's statements furthered maintenance of the syndicate by giving associated persons information about its membership. In a RICO prosecution, *United States v. Diaz, 176 F.3d 52 (2d Cir. 1999)* , the defendant argued that statements about a double murder made by one of the defendant's coconspirators to another were not "in furtherance" of the RICO conspiracy, but were merely "idle chatter," since the murder had been completed and the conspirator was simply relating historical facts. The Court found no error in admission of the statements, because they "clearly promoted the goals" of the conspiracy, by apprising another member of its progress, assisting the declarant in getting away, and "foster[ing] the cohesiveness of the conspiracy." See also *United States v. Paone* n200(the "in furtherance" requirement is met when a conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance).

United States v. Patton, 594 F.2d 444 (5th Cir. 1979) : The Court said, affirming a drug conspiracy conviction, that "although the phrase 'in furtherance of the conspiracy' has a talismanic ring to it, the phrase must not be applied too

strictly or the purpose of the exception would be defeated." It approved the introduction of statements "made by one conspirator to a fellow conspirator identifying yet another conspirator [the defendant] as the ultimate purchaser of the marijuana."

United States v. Salgado, 250 F.3d 438 (6th Cir. 2001) : In the prosecution of a drug conspiracy, the Court found no error in the admission a hearsay statement between two conspirators, indicating that one of the defendants was driving cocaine up from Florida. The conversation identifying one of the defendants as the transporter of drugs was more than mere "idle chatter"; it was designed to inform coconspirators that a substitute driver had been found for the person who ordinarily transported the drugs, and that a new supply of drugs would soon be delivered. Affirming convictions for conspiring to possess more than 1,000 pounds of marijuana with intent to distribute in *United States v. Hitow*, n201 the Court held that one conspirator's statement to a second that the defendant had obtained 1,800 pounds of marijuana was properly admitted as in furtherance of the conspiracy because it told the second conspirator, who was high up in the distribution chain, who was purchasing marijuana and in what quantities, thus informing him of the activity and status of the conspiracy.

United States v. Johnson, 200 F.3d 529 (7th Cir. 2000) : Affirming a conviction for conspiring to distribute cocaine, the Court found no error in the admission of one coconspirator's statement to another that the defendant had been allocated a particular territory for distribution, since it furthered the conspiracy by conveying to the hearer the breadth of the conspiracy, its geographical divisions, and his role with respect to those divisions, thereby precluding internecine competition and allowing the conspiracy to allocate its resources more efficiently and minimize waste. In *United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990)* , the Court held that statements keeping the recipient abreast of and knowledgeable about the conspiracy were properly admitted in the trial of a cocaine conspiracy prosecution.

United States v. Jordan, 260 F.3d 930 (8th Cir. 2001) : The Court affirmed a conviction for conspiracy to distribute methamphetamine, holding that statements made to criminal participants to keep them abreast of events were in furtherance of conspiracy. In *United States v. Jefferson, 215 F.3d 820 (8th Cir. 2000)* , the Court affirmed gang-related convictions involving murder and drug trafficking, holding that statements made by one conspirator to another were in furtherance of conspiracy where the declarant was reporting a botched murder attempt to keep the other conspirators abreast of developments.

United States v. Bowman, 215 F.3d 951 (9th Cir. 2000) : The Court affirmed bank robbery convictions, finding no error in the admission of statements the defendant's partner made to the partner's girlfriend, which explained that the partner had sent a key to a storage locker to another conspirator and that the locker contained incriminating evidence. These statements were in furtherance of the conspiracy, since they were made to keep the conspiring girlfriend "up to speed" about the conspirators' efforts. In *United States v. Zavala-Serra*, n202 the Court noted that in deciding whether a statement was in furtherance of conspiracy, the Court looks to the intent of the declarant, not to the actual effects of the statement. Thus, statements intending to apprise another conspirator of ongoing developments are in furtherance of the conspiracy.

United States v. Harris, 908 F.2d 728 (11th Cir. 1990) : The Court affirmed cocaine importation conspiracy convictions, holding that "reminiscence" or "retrospective" statements that provided information keeping coconspirators abreast of the conspiracy's current status were properly admitted as in furtherance of the conspiracy.

[C] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Miscellaneous Cases

United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987) : The Court held that hearsay statements could be admitted as having been made in furtherance of a conspiracy even if the defendant was unaware of some of the acts related in the statements.

United States v. Cruz, 797 F.2d 90 (2d Cir. 1986) : The Court found that statements by one narcotics seller to an undercover officer were in furtherance of a conspiracy even though another defendant had given an instruction that no narcotics should be sold to the officer. See also *United States v. Persico* n203(conspirator statements that informed witnesses of the status of the conspiracy were in furtherance thereof).

United States v. Pecora, 798 F.2d 614 (3d Cir. 1986) : The Court affirmed racketeering convictions, finding that statements about past acts of the conspiracy made in a conversation with an informant were properly admitted, since the discussion of past events was an integral part of an ongoing business. In *United States v. Jannotti*, n204 the Court affirmed RICO and Hobbs Act convictions, finding that many conspirator statements were properly admitted, but also finding that portions of videotapes of two meetings contained discussions that were not in furtherance of the conspiracies charged.

United States v. Johnson, 872 F.2d 612 (5th Cir. 1989) : The Court took a broad view of the "in furtherance" language and held that boasts by one conspirator may be in furtherance of the conspiracy.

United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982) : In the course of affirming convictions for conspiracy to deal in explosives, the Court upheld the admission of conspirator statements. It emphasized that the statements need not actually have furthered the conspiracy; it is sufficient that they were intended to promote the conspiratorial activities.

United States v. Godinez, 110 F.3d 448 (7th Cir. 1997) : Affirming drug convictions, the Court upheld the admission of a statement from one of the coconspirators to a prospective member of the conspiracy that described the structure of the conspiracy and named the defendant as a member. The Court noted that "[s]tatements that further the conspiracy can take many forms, including statements made to recruit potential coconspirators." Here, the declarant's statements "showed a level of trust" in the prospective member that might have helped recruit him into the conspiracy. In *United States v. Powers, 75 F.3d 335 (7th Cir. 1996)* , the Court affirmed a cocaine conspiracy conviction, holding that a statement may be in furtherance of a conspiracy even if it was not made exclusively, or even primarily, to further the conspiracy. It concluded that a statement by two coconspirators that portions of money seized by the government belonged to them was in furtherance of conspiracy since it was made as part of an effort to learn about the seizure. In *United States v. Van Daal Wyk*, n205 the Court held that a conspirator's statements amounted to measures taken to control damage to an ongoing conspiracy and were in furtherance of the conspiracy. In a marijuana prosecution, *United States v. Mealy*, n206 the Court held that statements could be in furtherance of a conspiracy even if made to a person who was actually a government informant.

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) : The Court affirmed racketeering convictions involving drug trafficking, holding that certain coconspirator statements were admissible because "statements that describe past events are in furtherance of the conspiracy if they are made to plan future activities." In *United States v. Meeks*, n207 the Court held that statements by one conspirator that a cocaine dealer was going to have someone killed and statements as to sources of drugs were in furtherance of conspiracy. See also *United States v. Lewis* n208(the "in furtherance of" requirement "is construed broadly").

United States v. Williams, 989 F.2d 1061 (9th Cir. 1993) : The Court affirmed drug convictions and approved the admission of five coconspirator statements, finding all to have been in furtherance of conspiracy. Although one statement was not made to a conspirator, it was an effort to set a drug sale in motion and was integral to the conspiracy. Another statement, in which a conspirator expressed frustration to a girlfriend, was not in furtherance of conspiracy, but was deemed admissible as a declaration against interest. In *United States v. Moody*, n209 the Court upheld a finding that statements made in the planning stage of a drug conspiracy concerning the travel required to obtain the drugs were in furtherance of the conspiracy. See also *United States v. Paris* n210(a statement by a drug dealer to a customer identifying the dealer's source was admissible as in furtherance of a cocaine conspiracy); *United States v. Crespo de Llano* n211(a statement by a conspirator concerning the site of cocaine sale negotiations was made to keep a proposed buyer abreast of activities and was in furtherance of the conspiracy); *United States v. Tille* n212("When a purpose of the conspiracy is to formulate future strategies of concealment, narrations of past events may be in furtherance of the continuing conspiracy."). In *United States v. Dowling*, n213 the Court found that a statement by a codefendant was properly admitted as a conspirator statement where it was made to induce a third party to supply materials that would be used in the conspiracy. See also *United States v. O'Connor* n214(a conspirator's statement that two other defendants were partners with another person was in furtherance of the conspiracy as it assured undercover agents that two defendants had authority to resolve a dispute; a conspirator's statement that enlarged the size of the debt an informant had to repay by giving drugs to the defendants was also in furtherance of the conspiracy).

United States v. Reyes, 798 F.2d 380 (10th Cir. 1986) : Affirming a cocaine conviction, the Court stated that it had no "talismanic formula for determining when a conspirator's statements are in furtherance of the conspiracy" and that it rejected "the defendant's proposition that the statements must actually further the conspiracy to be admissible." It is sufficient, the Court reasoned, that the statements are intended to promote conspiratorial objectives.

United States v. Hernando Ospina, 798 F.2d 1570 (11th Cir. 1986) : The Court held that a statement by one defendant that, although he only handled money transactions, he knew a codefendant was in the narcotics business was in furtherance of conspiracy.

[D] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Obtaining Assistance

United States v. Mangan, 575 F.2d 32 (2d Cir. 1978) : The Court noted that a statement made to induce another to join the conspiracy can be "in furtherance."

United States v. Shores, 33 F.3d 438 (4th Cir. 1994) : In a murder-for-hire prosecution, a coconspirator told a jailhouse informant that he and the defendant had been involved in a murder-for-hire plot; the coconspirator gave details of the plot, as well as future plans to kill witnesses and suborn perjury. The Court held that all of these statements were properly admitted as in furtherance of a conspiracy between the defendant and the coconspirator. While the question was "close," the statements in context could reasonably be construed as being designed, at least in part, to induce the jailhouse informant "to join or provide assistance to the conspiracy, by providing him with necessary background and familiarizing him with the members of the conspiracy."

United States v. Dorn, 561 F.2d 1252 (7th Cir. 1977) : The Court said, when approving the admission of statements made by a husband to a wife in an effort to enlist the wife's support for a criminal enterprise, that "conversations made by conspirators to prospective co-conspirators for membership purposes are acts in furtherance of the conspiracy."

United States v. Garcia, 893 F.2d 188 (8th Cir. 1990) : The Court affirmed a conviction of conspiracy to import counterfeit money, holding that a coconspirator's statements were properly admitted in furtherance of the conspiracy when made, in one case, to delay or prevent the arrest of a conspirator and, in another, to enlist a family member's assistance by revealing to him the conspiracy.

United States v. Bowman, 215 F.3d 951 (9th Cir. 2000) : Affirming bank robbery convictions, the Court recognized that narrations of past events are sometimes inadmissible as coconspirator statements, but found that the defendant's partner's statements to his girlfriend admitting that he was a bank robber were admissible because the partner was seeking her assistance in criminal acts.

[E] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Reassurance, Encouragement, etc.

United States v. Tom, 330 F.3d 83 (1st Cir. 2003) : The Court affirmed cocaine-related convictions, holding that a coconspirator's statement to a drug buyer that he had dealt with the defendant for a year was a statement of reassurance and thus admissible as in furtherance of the conspiracy. In *United States v. Newton, 326 F.3d 253 (1st Cir. 2003)* , a drug trafficking prosecution, the defendant argued that a coconspirator's statement describing a murder was not in furtherance of the objective of eliminating individuals because by that time they were already dead. Affirming, the Court held that the defendant construed the relevant objective of the conspiracy too narrowly; the statements furthered the broad objectives of the drug trafficking conspiracy by reassuring a major supplier that the organization was effectively addressing external threats to its security and profitability.

United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990) : The Court affirmed convictions for bank robbery offenses committed by members of a Puerto Rican independence group, holding there was no error in admitting as a coconspirator statement a communique that bore the group's logo and recited that plans for the robbery had taken over a year to complete. The communique furthered the conspiracy by providing reassurance as to the group's status and solvency, new information about its membership, and encouragement for future activities. In *United States v. Rahme*, n215 the Court affirmed heroin convictions, holding that one conspirator's statements that the defendant's people were the source of the heroin were properly admitted. They were in furtherance of the conspiracy because they were efforts to reassure another conspirator of the ability to produce heroin.

United States v. Ammar, 714 F.2d 238 (3d Cir. 1983) : In a drug conspiracy case, the Court concluded that "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy and are admissible" if they otherwise qualify under the Rule. See also *United States v. De Peri* n216(statements providing reassurance to coconspirators were properly admitted).

United States v. Lindell, 881 F.2d 1313 (5th Cir. 1989) : In a prosecution for various narcotics offenses, one defendant objected to testimony that another conspirator had told a third that the defendant was a "smuggler pilot" on the ground the statement was not in furtherance since he was accused of being the bagman in the operation, not the pilot. The Court, saying that the requirement must not be applied too strictly or the purpose of the exception would be defeated, held that the statement was properly admitted, as it allowed the hearer to infer that the defendant was someone who could be trusted in a drug smuggling operation.

United States v. Rios, 842 F.2d 868 (6th Cir. 1988) : The Court indicated that assuring coconspirators that one had

an outlet for goods was in furtherance of a conspiracy.

United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990) : The Court held that one drug dealer's introduction of the defendant to another dealer as "my million dollar marijuana customer" was in furtherance of a cocaine conspiracy, as it provided assurance the defendant could be trusted.

United States v. Flynn, 852 F.2d 1045 (8th Cir. 1988) : In a racketeering case, the Court held that conspirator statements that discussed past events were made to "pull the troops together" and to "provide renewed fervor among the members of the conspiracy." They therefore satisfied the in furtherance requirement.

United States v. Smith, 833 F.2d 213 (10th Cir. 1987) : The Court stated that statements that provide reassurances are in furtherance of a conspiracy.

United States v. Santiago, 837 F.2d 1545 (11th Cir. 1988) : The Court indicated that boasts and other conversations that allay suspicions of coconspirators may be in furtherance of a conspiracy.

[F] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Statements to Undercover Agents or Informants

United States v. Piper, 298 F.3d 47 (1st Cir. 2002) : Affirming cocaine-related convictions, the Court held that statements by a coconspirator to a government informant are admissible under *Rule 801(d)(2)(E)*, provided that the statements were in furtherance of the conspiracy and made while the conspiracy was ongoing.

[G] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Threats to Witnesses

United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002) : Affirming a conviction of murder-for-hire in connection with drug trafficking, the Court held there was no abuse of discretion in admitting testimony by the wife of a participant in the drug scheme that her husband told her that he had helped the defendant bury the body of an individual who owed the defendant money and who had "talk[ed] too much," which she regarded as a personal threat. There was sufficient evidence that the husband was a member of the conspiracy, and the statements could be found in furtherance of the conspiracy because, in making them, the husband intended to preserve the conspiracy by frightening his wife in order to dissuade her from informing the authorities about the drug scheme.

[iii] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Excludable or Exclusion Required

[A] Rule 801(d)(2)(E) -- Civil Cases

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999) : As evidence of a conspiracy in an antitrust case, the plaintiffs introduced testimony from a witness that when he expressed antitrust concerns to the CEO of one defendant, the CEO responded that "there was no need to worry because someone would have to prove" he spoke to the principal shareholder of the other defendant and the CEO then "leaned forward, smiled, and said 'of course we didn't.' " The Court found that the oral utterances and the act of leaning forward and smiling, when considered together as the CEO obviously intended, were a statement that the CEO *had* "talked" to his counterpart but that no one would be able to prove it. Although the Court reversed summary judgment that had been granted for the defendants, it found no clear

error in the ruling below that the statement was not admissible against the second defendant under *Rule 801(d)(2)(E)* because it did not further the conspiracy.

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) : Reversing summary judgment for the defendants in a price-fixing case, the Court noted that assertions of the privilege against self-incrimination by officers of one of the defendants could be used to show that the charged conspiracy involved their employer, but could not be used against the other defendants under *Rule 801(d)(2)(E)* because when the officers refused to speak the conspiracy was long over, so their "statements" were not during and in furtherance of the conspiracy.

Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982) : In an antitrust case, the Court found that statements by a defendant distributor to his office staff to the effect that he intended to force a common supplier to stop supplying the plaintiff distributor were not in furtherance of a conspiracy and thus were admissible only as personal admissions against the one defendant.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998) : In an antitrust action against five chemical companies for a conspiracy to fix prices for repackaged chlorine, the Court found no error in the exclusion of hearsay statements by the CEO of one of the defendants, when offered against the other defendants. The CEO had stated to friends that he was engaged in fixing chlorine prices. While this statement was admissible against the CEO's corporate employer under *Rule 801(d)(2)(D)*, it was not admissible against the other corporations because it did not satisfy the requirements of *Rule 801(d)(2)(E)*. Specifically, it was not made in furtherance of the conspiracy, as it was made to friends over drinks at the golf course. A statement that merely "spills the beans, with no intention of recruiting the auditor into the conspiracy does not further the conspiracy."

[B] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Excludable or Exclusion Required -- Criminal Cases

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003) : Affirming drug-related convictions, the Court held it was error (but harmless) to admit statements by defendant Lama to an undercover agent during a recorded drug deal as coconspirator's statements. It rejected the government's argument that "because the indictment alleged that Lama distributed heroin to 'Henry and other coconspirators,' any heroin that Lama distributed during the life of the conspiracy was in furtherance of the conspiracy." The only evidence purporting to show the recorded deal was part of the conspiracy was evidence that Lama also engaged in drug deals with another conspirator, which provided "no basis to draw the further inference" that the deals were part of the same conspiracy.

United States v. Piper, 298 F.3d 47 (1st Cir. 2002) : Although it affirmed cocaine-related convictions, the Court held that statements made by a coconspirator to a drug buyer expressing the coconspirator's dissatisfaction with the defendant and the possibility of using an alternative supplier were not in furtherance of the conspiracy. As an attempt to persuade the buyer to purchase drugs from a source other than the defendant, they were "antithetic to the central object of the charged conspiracy," and thus inadmissible. In *United States v. LiCausi, 167 F.3d 36 (1st Cir. 1999)* , the Court affirmed convictions for a robbery conspiracy, holding it was error (but harmless) to admit statements made by one conspirator to his girlfriend in which he recounted details of several of the robberies and attempts. Having been made after the crimes described took place, they did not yield significant enough information to constitute reports to a conspirator (assuming the girlfriend was such); rather they appeared to be instances of blowing off steam or venting anxiety.

United States v. Desena, 260 F.3d 150 (2d Cir. 2001) : In a prosecution for crimes arising from motorcycle gang activity, the Court held it was error to admit statements by a gang leader recounting an arson attempt in which the defendant was involved, because they were made in the course of "casual storytelling in a bar, more than two years after the event," and thus were "mere idle chatter" and not made in furtherance of the conspiracy. The error was harmless, however, because the statements were admissible under *Rule 804(b)(3)*. In *United States v. Lieberman*, n217 the Court found that statements of one conspirator did not qualify for admission under *Rule 801*, since they occurred in a "casual conversation," which made it "difficult to envision how it [the conversation] would have furthered the conspiracy." However, the statements were declarations against penal interest and thus admissible under *Rule 804*. In *United States v. Lang*, n218 the Court found that a statement could not have been in furtherance of a conspiracy when one alleged conspirator made statements to an undercover agent three days after the defendant's arrest. The Court said that the "in furtherance of" language was to be read as "protective of defendants."

United States v. Jannotti, 729 F.2d 213 (3d Cir. 1984) : The Court affirmed RICO and Hobbs Act convictions, finding that many conspirator statements were properly admitted, but also finding that portions of videotapes of two meetings contained discussions that were not in furtherance of the conspiracies charged.

United States v. Heater, 63 F.3d 311 (4th Cir. 1995) : In a prosecution for various marijuana-related offenses, the Court observed that a statement by one defendant that she and another defendant owned a marijuana field was not made in furtherance of a conspiracy, but was simply an observation made to a person who was not a member of the conspiracy. The statement did not qualify as "in furtherance of" a conspiracy simply because the defendant-declarant sometimes delivered marijuana to the witness, absent a showing that the statement was made in the context of a larger discourse about the drug conspiracy. However, the statement was a personal admission, properly admitted against the defendant-declarant. In *United States v. Urbanik*, n219 the Court reversed marijuana convictions, holding that statements made during a casual conversation were not in furtherance of a conspiracy and were "idle conversation."

United States v. Cornett, 195 F.3d 776 (5th Cir. 1999) : The Court reversed a defendant's conviction for a drug conspiracy because a statement allegedly tying her to the conspiracy was improperly admitted under *Rule 801(d)(2)(E)*. The statement was made in the context of a long conversation about relationships and trust in relationships -- the defendant was a girlfriend who had replaced the declarant in the lead conspirator's affections -- and could not reasonably be construed as referring to the conspiracy's business; rather, it was "a mere casual aside" in a conversation about "the spurned lover" and "the other woman." In *United States v. El-Zoubi, 993 F.2d 442 (5th Cir. 1993)* , the Court affirmed the defendant's conviction for offenses in connection with arson of his business, holding it was error (but harmless) to admit the arsonist's statement to a neighboring store owner that he was going to burn the building, as there was no indication the declarant thought the conspiracy was more likely to succeed if the other owner knew of his intent. In *United States v. Means*, n220 a mail fraud case involving the use of improper influence by a bank comptroller, the Court concluded that a statement by the president of a bank to a witness to the effect that he was going to talk to some people who could get a charter and that it would cost $25,000 should not have been admitted as a conspirator's statement. The statement was "mere idle conversation" and was not in furtherance of the conspiracy. The error was harmless, however. See also *United States v. Phillips* n221("casual, retrospective comments made in conversations about past events" are not in furtherance of a conspiracy).

United States v. Darwich, 337 F.3d 645 (6th Cir. 2003) : The Court vacated the defendant's sentence for a marijuana distribution conviction because the Judge had used inadmissible hearsay in determining the amount of marijuana that had been sold, including statements by a government witness that his nephews sometimes told him how many pounds of marijuana they bagged a night. The Court held these were not statements made in furtherance of the conspiracy, but were "casual conversation about past events."

United States v. Williams, 272 F.3d 845 (7th Cir. 2001) : Affirming cocaine related convictions, the Court held it was error (but harmless) to admit a statement by a coconspirator to a detective that cash found strapped to his body was drug money obtained from a particular person. A confession to a police officer generally cannot be in furtherance of a conspiracy. In *United States v. Santos, 20 F.3d 280 (7th Cir. 1994)* , the Court affirmed money laundering convictions, holding it was error (but harmless) to admit a codefendant's statements to an IRS agent, as the agent was not part of any conspiracy and the codefendant was merely commenting on his past activities and did not intend his remarks to further any objectives of the scheme. In *United States v. Pallais*, n222 the Court affirmed convictions related to a large drug trafficking ring, noting that while talk about a conspiracy among or by the conspirators should not be presumed to be unrelated to accomplishment of its goals, idle chatter, mere chitchat, casual admissions of culpability, and other noise and static in the information stream are not admissible, nominally because they are not in furtherance, but really because they are insufficiently reliable to be considered by the jury. In *United States v. Johnson*, n223 the Court held it was error, but harmless, to admit in a mail fraud prosecution evidence of a coconspirator's statement to a third person that nothing would happen to that person if he were caught attempting a similar scheme, as the statement did nothing to further the conspiracy. Affirming convictions for prostitution offenses and tax evasion in *United States v. Doerr*, n224 the Court held it was error (but harmless) to admit a statement made to a frequent patron explaining the presence of a red curtain at one of the clubs involved, because it was only a narrative of a past event; it was also harmless error to admit a statement that "I can't believe you don't know what's going on" made between coconspirators, because it was only mocking the hearer's ignorance and it was not a part of the normal information flow between conspirators.

United States v. Gjerde, 110 F.3d 595 (8th Cir. 1997) : The Court affirmed a defendant's conviction for conspiring to defraud HUD by obtaining a loan for his coconspirators. However, it was error to admit under *Rule 801(d)(2)(E)* testimony by an FBI agent that a coconspirator told him that a company was set up as a straw company simply to facilitate the fraudulent loan. The Court found that the government could not meet its burden of establishing that the statement was in furtherance of the conspiracy, since the statement was made three and a half years after the loan was obtained and was not made to conceal the conspiracy. The error was harmless because the statement was admissible as a declaration against interest. In *United States v. Mitchell, 31 F.3d 628 (8th Cir. 1994)* , the Court affirmed a conviction for structuring currency transactions, holding it was an abuse of discretion (but harmless) to admit a coconspirator's statements that simply informed the listener of the declarant's criminal activities and did not further the objectives of the conspiracy. In *United States v. Wood*, n225 the Court held that a statement by a cooperating witness to his wife was not in furtherance of a conspiracy, but its admission was harmless error. See also *United States v. Snider* n226(finding one conspirator's statements were casual comments concerning other members of the marijuana operation, not in furtherance of the conspiracy).

United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991) : Affirming a conviction for drug offenses, the Court held that a coconspirator's statements that he would not sell heroin because the defendant had never paid for a prior heroin transaction were purely historical, with no connection or purpose to the conspiracy in question, and thus not in furtherance. See also *United States v. Bibbero* n227(it was reversible error to admit a statement by one conspirator to a government witness, that marijuana belonged to the defendant, because the statement "was idle conversation" and did not further the conspiracy); *United States v. O'Connor* n228(a conspirator's statements seeking to induce an undercover agent to have future dealings after completion of the conspiracy was not in furtherance of the conspiracy).

United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988) : In a prosecution of a husband and wife for the murder of their child, the Court held that a statement by the wife that the husband had hit the child was a mere narrative and did not further the conspiracy.

United States v. Blakey, 960 F.2d 996 (11th Cir. 1992) : The Court reversed a conviction for bank fraud and counterfeiting, holding that a coconspirator's statement to an investigator for the bank implicating the defendant was

erroneously admitted, as it was a simple attempt to shift the blame, not a statement made to mislead the investigation or otherwise advance any objective of the conspiracy. In *United States v. Posner*, n229 the Judge ruled *in limine* in a criminal tax prosecution that a letter written by a real estate appraiser to a college, stating that the appraisal he had made of the defendant's land gift was unrealistic, was inadmissible against the defendant. There was no evidence that the letter was written to allay suspicions; in fact, the letter would have raised suspicions. Thus, the letter was not in furtherance of a conspiracy.

[p] Rule 801(d)(2)(E) -- Multiple Conspiracies

[i] Rule 801(d)(2)(E) -- Statement Admissible

United States v. Marino, 277 F.3d 11 (1st Cir. 2002) : Affirming racketeering convictions, the Court held that statements made by members of one rival faction of an organized crime family were properly admitted in a prosecution of members of another faction. The Court rejected the argument that statements by rivals could not be in furtherance of a conspiracy, since here there was an overarching organized crime family conspiracy, in the course of and in furtherance of which the statements were made. In *United States v. Hurley, 63 F.3d 1 (1st Cir. 1995)* , the Court affirmed RICO and money laundering convictions, holding there was no error in admitting statements by regional managers of rival drug cartels under *Rule 801(d)(2)(E)*, since the Trial Judge found that the regional managers were, more probably than not, both members of the charged money-laundering conspiracy. In *United States v. Dunn*, n230 the Court upheld the admission of a tape recording as a conspirator's statement in an extortion case. It indicated that statements made during and in furtherance of one conspiracy may be used to prove another conspiracy, although there is a relevance hurdle that first must be overcome.

United States v. Vega, 285 F.3d 256 (3d Cir. 2002) : Affirming a conviction for heroin distribution offenses, the Court held that testimony of a witness regarding the defendant's participation in another conspiracy, and notebook pages containing references to the defendant with regard to the other conspiracy, were properly admitted over hearsay and character evidence objections. The notebooks were admissible as coconspirator statements, since they were made in furtherance of the uncharged conspiracy by a member of that conspiracy during the conspiracy, and there was sufficient evidence that the defendant was a member of that conspiracy. The Court implicitly concluded that as long as coconspirator statements are relevant to the crime charged, they may be admitted despite the fact that they were in furtherance of an uncharged conspiracy. In a prosecution for drug and money laundering offenses, *United States v. Ellis, 156 F.3d 493 (3d Cir. 1998)* , the defendant complained that statements made by a money laundering coconspirator were made during a time when the laundering had not extended to drug offenses. Although the Court agreed that there might have been two conspiracies, it held that out-of-court statements may be admitted even though the defendant is not charged with any conspiracy in the indictment.

United States v. Delgado, 401 F.3d 290 (5th Cir. 2005) : Affirming racketeering convictions, the Court held that coconspirator statements were properly admitted and reiterated its statement in *United States v. Arce, 997 F.2d 1123 (5th Cir. 1993)* , that "[t]he conspiracy that forms the basis for admitting the coconspirators' statements need not be the same conspiracy for which the defendant is indicted."

United States v. Maliszewski, 161 F.3d 992 (6th Cir. 1998) : The Court affirmed marijuana convictions, finding that most conspirator statements were properly admitted. Although some of the statements referred to cutting a middleman supplier out of the conspiracy, the Court reasoned that "there is no rule that says if some members of a conspiracy talk about getting rid of another member, that conversation is not in furtherance of the first conspiracy, but is instead directed at an entirely new conspiracy," and that "even if that *were* the case, ... the statements would nonetheless be admissible since they would certainly be in furtherance of the new conspiracy." In *United States v. Bibby*, n231 the

Court held that the Trial Judge erred in finding a single conspiracy, but it found that the error was harmless, since all statements were properly admitted in the light of the multiple conspiracies that were proved.

United States v. Frazier, 213 F.3d 409 (7th Cir. 2000) : The Court affirmed narcotics conspiracy convictions, finding no abuse of discretion in the admission of statements that had been made by members of a criminal organization, since there was sufficient evidence that that particular organization was linked to the defendants' organization and was part of a single conspiracy. In *United States v. Potts*, n232 the Court found sufficient evidence to support the introduction of conspirator statements in a prosecution for conspiracy to transport and present altered postal money orders. Although most of the statements were made with respect to smuggling drugs into a prison, and the defendant was not charged with this offense, the Court found that the conspiracy charged and the drug conspiracy were coextensive.

United States v. Townsley, 843 F.2d 1070 (8th Cir. 1988) , modified on other grounds en banc , 856 F.2d 1189 (8th Cir. 1988) : In a voting fraud case, the Court held that conversations were in furtherance of a 1983 conspiracy to conceal a 1980 vote fraud conspiracy and were therefore admissible as substantive evidence. Moreover, the Court reasoned that the existence of the 1983 conspiracy tended to prove the earlier one. In *United States v. Snider*, n233 three defendants were charged with a marijuana conspiracy. Although the Court found that the government proved two conspiracies, not the single one charged, and reversed on the conspiracy count, it reasoned that the evidence that the defendants were conspirators was strong enough to satisfy the preponderance of the evidence standard.

United States v. Layton, 855 F.2d 1388 (9th Cir. 1988) : The Court affirmed the defendant's conviction for conspiring to kill a Congressman, holding that speeches made by a cult leader were admissible as conspirator statements. In an earlier opinion, n234 the Court had held that the speeches were in furtherance of a conspiracy. On this appeal, the Court held that the conspirator exemption "applies to statements made during the course and in furtherance of any enterprise, whether legal or illegal, in which the declarant and the defendant jointly participated."

United States v. Matthews, 411 F.3d 1210 (11th Cir. 2005) : The defendant in a major cocaine conspiracy case argued that a conversation between coconspirators was erroneously admitted because the conversation focused on a sale of Ecstasy and he was not charged with distributing that drug. The Court held, however, that because the conversation also included reference to a cocaine transaction there was no error in its admission: "[W]e see no reason to think that the ... conversation could not have been 'during the course and in furtherance of' two different conspiracies."

[ii] Rule 801(d)(2)(E) -- Multiple Conspiracies -- Statement Inadmissible

United States v. Murphy, 193 F.3d 1 (1st Cir. 1999) : An attorney was charged with extortion in connection with a scheme involving falsified warrant applications. The Court held that in admitting coconspirator statements the Trial Judge may not sufficiently have distinguished between the charged extortion conspiracy and the broader false warrant conspiracy, of which the defendant was not shown to have been a member, but that any error was harmless. In *United States v. Morrow*, n235 the Court affirmed mail fraud convictions in a case involving multiple overlapping conspiracies, holding it was error (but harmless) to admit statements under the coconspirator rule when the defendant was not at some point a member of the same conspiracy that generated the statement.

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) : In a RICO prosecution of the boss of a Mafia family, the Judge admitted some conspirator statements solely on the finding of a "general overriding conspiracy among all of these alleged Mafia groups." The Court held this was error, as there must be a conspiracy with some specific criminal goal,

but the error was harmless because some of the statements were made in furtherance of specific conspiratorial goals, some would have been properly admissible as declarations against interest or under the state of mind exception, and the remainder were not prejudicial in the circumstances.

United States v. Garcia, 13 F.3d 1464 (11th Cir. 1994) : The Court held, in a prosecution for thefts from interstate commerce, that it was error (but harmless) to admit statements made in the course of one conspiracy that predated another conspiracy with which he was charged. Where there are multiple conspiracies, it is error to admit a statement merely advancing some other conspiracy not involving the defendant against whom it is admitted.

[q] Rule 801(d)(2)(E) -- Notes As Coconspirator Statements

United States v. SKW Metals & Alloys, Inc., 195 F.3d 83 (2d Cir. 1999) : Affirming the convictions of a company and its executive vice president for conspiring to fix prices, the Court held that notes that the president of one supplier took of conversations with the convicted vice president and other coconspirators were admissible as coconspirator statements. The Court reasoned that the notes were summaries of understandings and future commitments and thus were "statements" and were intended by the president to act as a record and a guide to future conduct.

[r] Rule 801(d)(2)(E) -- Order of Presentation

See also annotations in *§ 801.03[10][m]*, "Foundation."

Bourjaily v. United States, 483 U.S. 171 (1987) : In footnote 1 of its opinion holding that the preponderance of the evidence standard governs preliminary factfinding and that challenged statements may be considered as part of the factfinding, the Court stated that "we do not express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial." This case is discussed in the Editorial Explanatory Comment, *§ 801.02[6][g][ii][B]*.

United States v. Gantt, 617 F.2d 831 (D.C. Cir. 1980) : The Court indicated that a Trial Judge may conditionally admit conspirators' statements subject to a later finding of conspiracy by the Judge, and that a motion to strike or a mistrial would have to be granted if the government failed to offer sufficient independent evidence.

United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980) : The Court said that a Trial Judge "should determine that there is enough merit in the prosecution's case to risk the admission of hearsay that might later prove inadmissible." The evidence presented at the hearing in this case was inadequate to justify a "threshold" ruling admitting conspirators' statements, and the trial evidence had not removed doubts about the statements' admissibility, so the error in the initial decision to admit them was not harmless.

United States v. Cox, 923 F.2d 519 (7th Cir. 1991) : In ruling on the admissibility of a coconspirator's statements, the Trial Judge followed the permissible procedure of having a pretrial proffer, conditional ruling, and ultimate ruling at the end of the government's case, but required as a matter of policy that the preliminary proffer be *ex parte*, thus withholding the evidence from the defendant's counsel through oral argument on appeal. Although it expressed concern and bewilderment over this policy when there was no reasonable justification for sealing, the Court nevertheless held there was no reversible error. In *United States v. Ferra, 900 F.2d 1057 (7th Cir. 1990)* , the Court reversed a conviction for selling guns and cocaine, noting that admitting coconspirators' statements subject to connection is not a routine but

an exceptional procedure, appropriate only when the evidence on the question of conspiracy is extensive. Most of the time, it is better to make a preliminary determination rather than to decide the admissibility question on a mistrial motion; even in complex cases, the Trial Judge should require parties to state what they believe the evidence will establish and then decide whether that will suffice.

United States v. Legato, 682 F.2d 180 (8th Cir. 1982) : Affirming a conviction of drug distribution and conspiracy, the Court found no error in the Trial Judge's making his ruling admitting conspirator statements before the close of all the evidence where the proof was so great that the timing did not matter. Although the Judge erred in telling the jury in connection with admitting the statements that he had found a conspiracy by a preponderance of the evidence, the Court found that error was not prejudicial where the Judge also told the jury that they could believe that the declarant was lying. See also *Llach v. United States* n236(upholding conditional admission of conspirator statements subject to a later ruling, with two Judges emphasizing that it is preferable for independent proof to be presented first). In *United States v. Reda*, n237 the Court warned Trial Judges that admission of conspirator statements subject to "connecting up" always poses the risk that mistrial may be required if the foundation for the statements ultimately fails. It reiterated prior suggestions that the government's independent evidence should be introduced so that the Judge may rule on the admissibility of conspirator statements before the jury hears them.

United States v. Arbelaez, 719 F.2d 1453 (9th Cir. 1983) : The Court upheld the conditional admission of conspirator statements.

United States v. Urena, 27 F.3d 1487 (10th Cir. 1994) : Affirming a conviction for drug-related offenses, the Court held that the strongly preferred order of proof is first to hold a hearing outside the presence of the jury to determine by a preponderance of the evidence the existence of a predicate conspiracy, but that it was not an abuse of discretion to omit the hearing where a significant amount of evidence suggesting a predicate conspiracy had been permitted before the coconspirator statement was offered. See also *United States v. Pinto* n238(statements may be admitted subject to being connected up); *United States v. Monaco* n239(recognizing that the Judge need not rule before trial begins on the admissibility of statements).

United States v. Monaco, 702 F.2d 860 (11th Cir. 1983) : The Court stated that a Trial Judge need not reconsider a ruling admitting conspirator statements at the end of trial unless a request for reconsideration is made.

[s] Rule 801(d)(2)(E) -- Personal Knowledge

United States v. Ammar, 714 F.2d 238 (3d Cir. 1983) : In a drug conspiracy case, the Court concluded that statements by one conspirator may be used against others, if they qualify under the Rule, even though there is no showing that the declarant conspirator had personal knowledge of the facts about which he spoke.

United States v. Goins, 11 F.3d 441 (4th Cir. 1993) : Affirming a conviction for cocaine offenses, the Court held that declarants of coconspirator statements need not be shown to have personal knowledge of matters asserted.

United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996) : The Court affirmed a conviction for wire fraud in a scheme arising out of a conspiracy to kill horses and collect on insurance. It held that a foundation of personal knowledge need not be established for coconspirator statements, and observed that "every court that has addressed the issue has held that coconspirator statements are not subject to the requirements of *Rule 602*."

[t] Rule 801(d)(2)(E) -- Relationship to Other Rules

United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980) : The Court found that statements of one conspirator did not qualify for admission under *Rule 801*, since they occurred in a "casual conversation," which made it "difficult to envision how it [the conversation] would have furthered the conspiracy." However, the Court found the statements to be declarations against penal interest and thus admissible under *Rule 804*.

United States v. Heater, 63 F.3d 311 (4th Cir. 1995) : In a prosecution for various marijuana-related offenses, the Court observed that a statement by one defendant that she and another defendant owned a marijuana field was not made in furtherance of a conspiracy. The statement was simply an observation made to a person who was not a member of the conspiracy. The statement did not qualify as "in furtherance of" a conspiracy simply because the declarant-defendant sometimes delivered marijuana to the witness, absent a showing that the statement was made in the context of a larger discourse about the drug conspiracy. The Court held, however, that the statement was a personal admission, properly admitted against the declarant-defendant.

United States v. Maliszewski, 161 F.3d 992 (6th Cir. 1998) : The Court affirmed marijuana convictions, finding that most conspirator statements were properly admitted. A conversation between a husband and wife was held not to have been in furtherance of the conspiracy even though both were coconspirators, because it furthered their own individual objectives or was just idle chatter between spouses. There was no error in the admission of the conversation, however, since it qualified as a declaration against interest because the conversation inculpated both spouses in criminal activity.

United States v. Brown, 31 F.3d 484 (7th Cir. 1994) : In the prosecution of a scheme to defraud banks by third-party processing of telemarketing charges, testimony regarding three persons' statements that they had furthered the scheme was admitted over a hearsay objection on the government's assurance that it would show they were unindicted coconspirators. When the government failed to make this showing, however, the Trial Judge let the testimony stand, on the ground it was "other bad acts" evidence admissible to show the defendants' knowledge and intent. The Court held that this was error (but harmless), as the government's *Rule 404(b)* argument was a concession that there was no showing a conspiracy existed, as required for *Rule 801(d)(2)(E)*, and even "other acts" evidence is inadmissible if it is also hearsay.

United States v. Gjerde, 110 F.3d 595 (8th Cir. 1997) : The Court affirmed a defendant's conviction for conspiring to defraud HUD by obtaining a loan for his coconspirators. However, it was error to admit under *Rule 801(d)(2)(E)* testimony by an FBI agent that a coconspirator told him that a company was set up as a straw company simply to facilitate the fraudulent loan. The Court found that the government could not meet its burden of establishing that the statement was in furtherance of the conspiracy, since the statement was made three and a half years after the loan was obtained and was not made to conceal the conspiracy. The error was harmless because the statement was admissible as a declaration against interest. In *Battle v. Lubrizol Corp.*, n240 an antitrust case, the Court found that statements by a defendant distributor to his office staff to the effect that he intended to force a common supplier to stop supplying the plaintiff distributor were not in furtherance of conspiracy and thus were admissible only as personal admissions against the one defendant.

United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991) : The Court affirmed a conviction for drug offenses, holding that a coconspirator's statements that he would not sell heroin because the defendant had never paid for a prior heroin transaction were purely historical, with no connection or purpose to the conspiracy in question, and thus not in

furtherance. However, the statements were also against the unavailable declarant's penal interest and admissible under *Rule 804(b)(3)*.

[u] Rule 801(d)(2)(E) -- Resubmitting Foundation Questions to Jury

United States v. Mastropieri, 685 F.2d 776 (2d Cir. 1982) : In the course of affirming income tax convictions, the Court said that it expected "that trial judges in this circuit not only will shoulder the responsibility of making the determination of admissibility, ... but will hereafter refrain from giving the jury a 'second bite' " through a jury instruction.

United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985) : The Court stated that the admissibility question is for the Court, not the jury.

United States v. Ascarrunz, 838 F.2d 759 (5th Cir. 1988) : The Court held in a drug prosecution that a Trial Judge need not instruct the jury that it must find a defendant to have been a member of a conspiracy on the basis of evidence other than a coconspirator's statement before using the statement against the defendant. In *United States v. Elam*, n241 the Court affirmed convictions for conspiracy to import and distribute marijuana, saying that it was "plain that only when the trial judge has determined, at the close of the evidence, that the prosecution has not demonstrated the defendant's participation in a conspiracy by a preponderance of independent evidence, that an instruction to the jury should be considered." Where the Trial Judge determines that the requisite foundation has been established for the introduction of conspirator statements, no jury instruction is necessary and none should be given.

United States v. Swidan, 888 F.2d 1076 (6th Cir. 1989) : The Court disapproved instructing the jury concerning the standard it should apply before considering coconspirator statements.

United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990) (en banc): The Court noted that every Circuit considering the question had held that the jury may not reexamine the question whether there is "enough" evidence of the defendant's participation to allow coconspirator statements to be used; the Judge's decision to admit is conclusive. In *United States v. Tuchow*, n242 the Court made an unfortunate error when it requested Trial Judges to instruct the jury that statements not offered for their truth, but which indicate the nature and scope of a conspiracy, are admissible for a limited purpose and are not independent evidence of the defendant's participation in the conspiracy. Since the sufficiency of the evidence offered as a basis for admitting conspirator statements is a question for the Court alone, the jury should not be instructed on the matter.

[v] Rule 801(d)(2)(E) -- Statements Made to Cooperating Witnesses

United States v. Wright, 343 F.3d 849 (6th Cir. 2003) : The Court affirmed convictions for offenses that included a murder arising out of a cocaine distribution scheme, holding that tape-recorded statements between a conspirator cooperating with the government and two other conspirators were properly admitted against the defendant. The Court held that statements of coconspirators gained from a cooperating coconspirator are admissible so long as they were made during the course and in furtherance of the conspiracy.

United States v. King, 351 F.3d 859 (8th Cir. 2003) : The Court affirmed a conviction for violating the Foreign Corrupt Practices Act, finding no abuse of discretion in the admission of certain tape-recorded conversations between the defendant and coconspirators even though one of the coconspirators, Kingsley, was acting under the direction and

surveillance of government agents to obtain evidence against the others. "[T]he fact that Kingsley allied himself with the government 'has no effect on the continuing conspiratorial efforts of his associates who remain at large,' and does not bar admission of his statements under *Rule 801(d)(2)(E)*."

[w] Rule 801(d)(2)(E) -- Statements Made to Non-Conspirators

United States v. Castellini, 392 F.3d 35 (1st Cir. 2005) : In a money laundering case, the defendant's alleged coconspirator had made statements to an undercover agent, attempting to enlist him in the conspiracy, and these statements were offered against the defendant under the coconspirator hearsay exemption. The Court noted that as a matter of law there could be no conspiracy with an undercover agent. But statements made by the coconspirator to the agent to enlist him in a conspiracy already underway could be admissible against members of the conspiracy if the statements were in furtherance of a conspiracy. Although it was a close question here whether there was a conspiracy underway at the time the statements were made, some of the statements were admissible to prove background, not for their truth, and any error in admitting other statements was harmless.

United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001) : Affirming CCE and drug convictions, the Court held that coconspirator statements that involved threats made to a witness were properly admitted. It did not matter whether the witness was a coconspirator; what mattered was that the declarant and the defendants against whom the statements were admitted were members of the conspiracy, and that the threats were made in furtherance of that conspiracy.

United States v. Frazier, 280 F.3d 835 (8th Cir. 2002) : The Court affirmed convictions arising from a heroin distribution operation, finding no error in the admission of testimony by a government informant as to what the defendants told him about the location of drug distribution points and when sales would be made. The Court observed that the Rule does not require that a statement be made by a coconspirator to a coconspirator, but merely requires that it be made by a declarant who was a coconspirator and admitted against a defendant who was a coconspirator, as long as the statement was made during and in furtherance of the conspiracy.

United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995) : The Court held that statements made by one of the conspirators to a person who transacted business with the conspiracy, and who ultimately acted as an undercover informant, were properly admitted in a drug conspiracy trial, even though the Trial Judge had erroneously found that the undercover informant was a member of the conspiracy. The error made no difference, because under the Rule "the appropriate focus is on whether the statements were 'made by' a member of the conspiracy, and not on whether the statements were 'made to' a member of the conspiracy."

[x] Rule 801(d)(2)(E) -- Unidentified Declarants

United States v. McGlory, 968 F.2d 309 (3d Cir. 1992) : Affirming convictions related to a major heroin distribution conspiracy, the Court rejected the government's contention that "owe sheets" referring to drug transactions were not hearsay, but held that most of the sheets introduced were sufficiently shown by circumstantial evidence to be admissible statements by unidentified coconspirators. In *United States v. Cruz, 910 F.2d 1072 (3d Cir. 1990)* , the Court affirmed convictions of a cocaine distribution conspiracy, holding that actions of defendants sufficiently established the existence of a conspiracy as to admit statements by an unidentified coconspirator.

United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000) : The Court affirmed convictions for espionage, holding that records of the former East German spy agency were properly admitted under the coconspirator exception. There

was ample evidence that the defendants had conspired with personnel of the agency, that the statements were made during the course of the conspiracy, and that the agency was acting in furtherance of the conspiracy in compiling the defendants' real and code names, the object of their assignments, etc. While the identity of the declarants of unsigned documents could not be known, the information included in them, which was corroborated in many respects, compelled the conclusion that the documents were made by or at the direction of agents with knowledge of and involvement in the conspiracy with the defendants.

United States v. Greer, 939 F.2d 1076 (1991) , *reinstated in part, 968 F.2d 433 (5th Cir. 1992)* (en banc): The Court affirmed convictions for conspiring to oppress black, Hispanic, and Jewish citizens in the exercise of their constitutional rights, holding it was error, but harmless, to admit a statement by an unidentified declarant in a group of 12-15 white males during the investigation of a racial assault. While the government could demonstrate that the conspiracy existed at the time and the statement was made during the course and in furtherance to the conspiracy, it failed to show that the declarant and the defendants were members of the conspiracy, because only five defendants were convicted of the conspiracy out of a possible 15 who were present when the statement was made and there was a good possibility that the person who made the statement was not a member of the conspiracy.

United States v. Breitkreutz, 977 F.2d 214 (6th Cir. 1992) : The Court held that although the author was not precisely identified, the statements in a drug ledger and the circumstances of its seizure allowed a reasonable conclusion that the statements were made during the course of and in furtherance of a drug conspiracy of which the defendant was a part. In a prosecution of two defendants and a medical clinic for conspiring to distribute controlled substances, *United States v. Mahar*, n243 the Court found error in the admission of 12 pages of handwritten notes found in the clinic, where a handwriting expert identified five pages as being in the writing of the clinic's doctor and three in the handwriting of the father of the clinic's president. Although the Trial Judge found that a conspiracy existed and that the defendants were members, no finding was made as to whether the authors of the notes were members of the conspiracy, or whether the notes were made by either or both in the course of and in furtherance of a conspiracy.

United States v. Smith, 223 F.3d 554 (7th Cir. 2000) : In the prosecution of a massive street gang drug conspiracy, the government offered "The List," a document describing the territorial and hierarchical organization of the entire operation, which had been found in the files of an organization owned by the gang leader's female partner. Affirming, the Court found no abuse of discretion in admitting "The List" as a coconspirator statement, since the details it contained were such that it could only have been written by a member of the gang or someone sufficiently involved with the operation to be intimately familiar with it, and thus a coconspirator.

United States v. Gonzales, 90 F.3d 1363 (8th Cir. 1996) : Affirming convictions for money laundering, the Court found there was sufficient evidence to treat Western Union money transfer applications as admissions by coconspirators, even though some of the declarants were not identified. The government need only show by a preponderance that the unknown declarant was a coconspirator. "Where the statement itself and the surrounding circumstances provide sufficient evidence of reliability, unidentifiability will not be particularly important."

United States v. Christopher, 923 F.2d 1545 (11th Cir. 1991) : The Court held it was error (but harmless) to admit a statement under the Rule where it was unclear who made the statement and there was no specific finding that the declarant (whoever it was) was a coconspirator with the defendant and that the statement was made during the course of and in furtherance of the conspiracy.

[y] Rule 801(d)(2)(E) -- Use by Accused

United States v. Milstein, 401 F.3d 53 (2d Cir. 2005) : The Court affirmed convictions for illegal distribution of prescription drugs, holding that tape-recorded conversations between two individuals identified by the defendant as coconspirators were properly excluded, since the statement was offered by a coconspirator, rather than against one as required by the Rule.

United States v. Kapp, 781 F.2d 1008 (3d Cir. 1986) : Affirming a conviction for conspiracy to transport stolen motor vehicles, the Court upheld the exclusion of a tape-recorded conversation between a government informant and a coconspirator offered against the government. The statement was not a party admission by the government.

[z] Rule 801(d)(2)(E) -- Written Statements

United States v. Candelaria-Silva, 166 F.3d 19 (1st Cir. 1999) : Affirming drug trafficking convictions, the Court held there was no error in admitting a letter written by an alleged member of the charged conspiracy. Seizure of the letter at the home of a conspirator, contents referring to the subject matter of the conspiracy, and testimony regarding the roles of the writer and persons named in the letter constituted strong evidence that the letter was prepared by a coconspirator during and in furtherance of the conspiracy.

FOOTNOTES:

(n1)Footnote 1. *United States v. Reynolds, 715 F.2d 99 (3d Cir. 1983)* .

(n2)Footnote 2. *United States v. Hensel, 699 F.2d 18 (1st Cir. 1983)* .

(n3)Footnote 3. *United States v. Detrich, 865 F.2d 17 (2d Cir. 1988)* .

(n4)Footnote 4. *United States v. Enriquez-Estrada, 999 F.2d 1355 (9th Cir. 1993)* .

(n5)Footnote 5. *United States v. Lai, 944 F.2d 1434 (9th Cir. 1991)* .

(n6)Footnote 6. *United States v. Snow, 517 F.2d 441 (9th Cir. 1975)* .

(n7)Footnote 7. *United States v. Scallion, 533 F.2d 903 (5th Cir. 1976)* .

(n8)Footnote 8. *Prather v. Prather, 650 F.2d 88 (5th Cir. 1981)* .

(n9)Footnote 9. *Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987)* .

(n10)Footnote 10. *Square Liner 360 degrees Inc. v. Chisum, 691 F.2d 362 (8th Cir. 1982)* .

(n11)Footnote 11. *Flores v. United States, 551 F.2d 1169 (9th Cir. 1977)* .

(n12)Footnote 12. *New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989)* .

(n13)Footnote 13. *ADP-Fin. Computer Servs., Inc. v. First Nat'l Bank, 703 F.2d 1261 (11th Cir. 1983)* .

(n14)Footnote 14. *United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986)* .

(n15)Footnote 15. *United States v. Ocampo, 650 F.2d 421 (2d Cir. 1981)* .

(n16)Footnote 16. *United States v. Check, 582 F.2d 668 (2d Cir. 1978)* .

(n17)Footnote 17. *United States v. Escobar, 674 F.2d 469 (5th Cir. 1982)* .

(n18)Footnote 18. *United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985)* .

(n19)Footnote 19. *United States v. Garza, 754 F.2d 1202 (5th Cir. 1985)* .

(n20)Footnote 20. *United States v. Lovelace, 123 F.3d 650 (7th Cir. 1997)* .

(n21)Footnote 21. *United States v. Dominguez, 992 F.2d 678 (7th Cir. 1993)* .

(n22)Footnote 22. *United States v. Owens, 484 U.S. 554 (1988)* .

(n23)Footnote 23. *United States v. Bordallo, 857 F.2d 519 (1988)* , *modified on other grounds*, *872 F.2d 334 (9th Cir. 1989)* (en banc).

(n24)Footnote 24. *United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991)* , *supplemented*, *931 F.2d 1396 (10th Cir. 1991)* .

(n25)Footnote 25. *United States v. Romer, 148 F.3d 359 (4th Cir. 1998)* .

(n26)Footnote 26. *United States v. Vizcarra-Porras, 889 F.2d 1435 (5th Cir. 1989)* .

(n27)Footnote 27. *United States v. Martin, 897 F.2d 1368 (6th Cir. 1990)* .

(n28)Footnote 28. *United States v. Zizzo, 120 F.3d 1338 (7th Cir. 1997)* .

(n29)Footnote 29. *United States v. Levine, 5 F.3d 1100 (7th Cir. 1993)* .

(n30)Footnote 30. *United States v. Lazcano, 881 F.2d 402 (7th Cir. 1989)* .

(n31)Footnote 31. *United States v. Running Horse, 175 F.3d 635 (8th Cir. 1999)* .

(n32)Footnote 32. *United States v. Davis, 154 F.3d 772 (8th Cir. 1998)* .

(n33)Footnote 33. *United States v. Alonzo, 991 F.2d 1422 (8th Cir. 1993)* .

(n34)Footnote 34. *United States v. Payne, 944 F.2d 1458 (9th Cir. 1991)* .

(n35)Footnote 35. *United States v. Hicks, 848 F.2d 1 (1st Cir. 1988)* .

(n36)Footnote 36. *Curreri v. International Bhd. of Teamsters, 722 F.2d 6 (1st Cir. 1983)* .

(n37)Footnote 37. *Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989)* .

(n38)Footnote 38. *Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975)* .

(n39)Footnote 39. *United States v. Shepherd, 739 F.2d 510 (10th Cir. 1984)* .

(n40)Footnote 40. *Mazzella v. RCA Global Commun., Inc., 642 F. Supp. 1531 (S.D.N.Y. 1986)* , *aff'd*, *814 F.2d 653 (2d Cir. 1987)* .

(n41)Footnote 41. *Stendebach v. CPC Int'l, Inc., 691 F.2d 735 (5th Cir. 1982)* .

(n42)Footnote 42. *Crimm v. Missouri P. R. Co., 750 F.2d 703 (8th Cir. 1984)* .

(n43)Footnote 43. *Henein v. Saudi Arabian Parsons Ltd., 818 F.2d 1508 (9th Cir. 1987)* .

(n44)Footnote 44. *United States v. Gibson, 690 F.2d 697 (9th Cir. 1982)* .

(n45)Footnote 45. *United States v. Wellington, 754 F.2d 1457 (9th Cir. 1985)* .

(n46)Footnote 46. *Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221 (5th Cir. 1984)* .

(n47)Footnote 47. *United States v. Kenney, 911 F.2d 315 (9th Cir. 1990)* .

(n48)Footnote 48. *United States v. Castro, 887 F.2d 988 (9th Cir. 1989)* .

(n49)Footnote 49. *United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995)* .

(n50)Footnote 50. *Pace v. Insurance Co. of N. Am., 838 F.2d 572 (1st Cir. 1988)* .

(n51)Footnote 51. *Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989)* .

(n52)Footnote 52. *United States v. Horton, 847 F.2d 313 (6th Cir. 1988)* .

(n53)Footnote 53. *United States v. Gibson, 675 F.2d 825 (6th Cir. 1982)* .

(n54)Footnote 54. *United States v. Harris, 942 F.2d 1125 (7th Cir. 1991)* .

(n55)Footnote 55. *United States v. Norwood, 798 F.2d 1094 (7th Cir. 1986)* .

(n56)Footnote 56. *United States v. Saavedra, 684 F.2d 1293 (9th Cir. 1982)* .

(n57)Footnote 57. *United States v. Kirk, 844 F.2d 660 (9th Cir. 1988)* .

(n58)Footnote 58. *Modern Leasing, Inc. v. Falcon Mfg. of Cal., Inc., 888 F.2d 59 (8th Cir. 1989)* .

(n59)Footnote 59. *United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986)* .

(n60)Footnote 60. *United States v. Plum, 558 F.2d 568 (10th Cir. 1977)* .

(n61)Footnote 61. *United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977)* .

(n62)Footnote 62. *United States v. Williams, 737 F.2d 594 (7th Cir. 1984)* .

(n63)Footnote 63. *United States v. Thompson, 708 F.2d 1294 (8th Cir. 1983)* .

(n64)Footnote 64. *United States v. Owens, 484 U.S. 554 (1988)* .

(n65)Footnote 65. *United States v. Day, 789 F.2d 1217 (6th Cir. 1986)* .

(n66)Footnote 66. *United States v. Dietrich, 854 F.2d 1056 (7th Cir. 1988)* .

(n67)Footnote 67. *United States v. Micke, 859 F.2d 473 (7th Cir. 1988)* .

(n68)Footnote 68. *United States v. Perez, 870 F.2d 1222 (7th Cir. 1989)* .

(n69)Footnote 69. *United States v. Owens, 484 U.S. 554 (1988)* .

(n70)Footnote 70. *United States v. Azure, 801 F.2d 336 (8th Cir. 1986)* .

(n71)Footnote 71. *United States v. Pierre, 781 F.2d 329 (2d Cir. 1986)* .

(n72)Footnote 72. *United States v. Brennan, 798 F.2d 581 (2d Cir. 1986)* .

(n73)Footnote 73. *United States v. Andrade, 788 F.2d 521 (8th Cir. 1986)* .

(n74)Footnote 74. *United States v. Payne, 944 F.2d 1458 (9th Cir. 1991)* .

(n75)Footnote 75. *Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985)* .

(n76)Footnote 76. *United States v. Arias-Santana, 964 F.2d 1262 (1st Cir. 1992)* .

(n77)Footnote 77. *United States v. Vest, 842 F.2d 1319 (1st Cir. 1988)* .

(n78)Footnote 78. United States v. Pe na, *949 F.2d 751 (5th Cir. 1991)* .

(n79)Footnote 79. *United States v. Beaulieu, 194 F.3d 918 (8th Cir. 1999)* .

(n80)Footnote 80. *United States v. Barrett, 937 F.2d 1346 (8th Cir. 1991)* .

(n81)Footnote 81. *United States v. Red Feather, 865 F.2d 169 (8th Cir. 1989)* .

(n82)Footnote 82. *United States v. Nelson, 735 F.2d 1070 (8th Cir. 1984)* .

(n83)Footnote 83. *United States v. Quinto, 582 F.2d 224 (2d Cir. 1978)* .

(n84)Footnote 84. *United States v. Davis, 890 F.2d 1373 (7th Cir. 1989)* .

(n85)Footnote 85. *United States v. Feldman, 711 F.2d 758 (7th Cir. 1983)* .

(n86)Footnote 86. *United States v. White, 11 F.3d 1446 (8th Cir. 1993)* .

(n87)Footnote 87. *United States v. Collicott, 92 F.3d 973 (9th Cir. 1996)* .

(n88)Footnote 88. *United States v. Rohrer, 708 F.2d 429 (9th Cir. 1983)* .

(n89)Footnote 89. *United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987)* .

(n90)Footnote 90. *United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987)* .

(n91)Footnote 91. *Bruton v. United States, 391 U.S. 123 (1968)* .

(n92)Footnote 92. *United States v. Riley, 684 F.2d 542 (8th Cir. 1982)* .

(n93)Footnote 93. *United States v. Gutierrez-Chavez, 842 F.2d 77 (5th Cir. 1988)* .

(n94)Footnote 94. *United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* .

(n95)Footnote 95. *United States v. Young, 814 F.2d 392 (7th Cir. 1987)* .

(n96)Footnote 96. *United States v. Fortes, 619 F.2d 108 (1st Cir. 1980)* .

(n97)Footnote 97. *United States v. Shulman, 624 F.2d 384 (2d Cir. 1980)* .

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Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 801 RULE 801

4-801 Federal Rules of Evidence Manual 801.04

801.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Special Introductory Note: The Hearsay Problem

In General

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, *62 Harv. L. Rev. 177 (1948)*; Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination -- A Judge's Viewpoint, *3 Record 12 (1948)*; Strahorn, A Reconsideration of the Hearsay Rule and Admissions, *85 U. Pa. L. Rev. 484, 485 (1937)*, Selected Writings, *supra*, 756, 757; Weinstein, Probative Force of Hearsay, *46 Iowa L. Rev. 331 (1961)*. Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. *Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 495-96, 71 S. Ct. 456, 95 L. Ed. 456 (1951)* ; Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, *47 A.B.A.J. 580 (1961)*, quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that

testimony be taken orally in open court. The *Sixth Amendment* right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 Wigmore § 1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of declarations of available declarants in Rule 801(d)(1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no *quid pro quo* in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass. Gen. L. 1932, c. 233 § 65, and in the English act of 1938, St. 1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the *Sixth Amendment* requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, *46 Iowa L. Rev. 331 (1961)*. Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, *18 Minn. L. Rev. 506 (1934)*. Procedural

safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary... ." Chadbourn, Bentham and the Hearsay Rule -- A Benthamic View of Rule 63 (4)(c) of the Uniform Rules of Evidence, *75 Harv. L. Rev. 932, 947 (1962)*.

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness." Rules 803(24) and 804(b)(6). **[Editor's Note: The latter exception was enacted as (b)(5), and both exceptions have been transferred to a single Rule 807 by a 1997 amendment.]** This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

Confrontation And Due Process

Until very recently, decisions invoking the *confrontation clause of the Sixth Amendment* were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. *Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895)* ; *Motes v. United States, 178 U.S. 458, 20 S. Ct. 993, 44 L. Ed. 1150 (1900)* ; *Delaney v. United States, 263 U.S. 586, 44 S. Ct. 206, 68 L. Ed. 462 (1924)* . Beginning with *Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)* , the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of *Snyder* was that of an elastic concept of hearsay. The deportation case of *Bridges v. Wixon, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945)* , may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. *In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948)* , ruled that cross-examination was essential to due process in a state contempt proceeding, but in *United States v. Nugent, 346 U.S. 1, 73 S. Ct. 991, 97 L. Ed. 1417 (1953)* , the court held that it was not an essential aspect of a "hearing" for a conscientious objector under the *Selective Service Act. Stein v. New York, 346 U.S. 156, 196, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953)* , disclaimed any purpose to read the hearsay rule into the Fourteenth

Amendment but in *Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959)* , revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in *Willner v. Committee on Character, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963)* . Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965, the *confrontation clause* was held applicable to the states. *Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)* . Prosecution use of former testimony given at a preliminary hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional

hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of *Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)* , however, the result reached by applying the *confrontation clause* is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the *confrontation clause* was the means selected to achieve this end. Comparable facts and a like result appeared in *Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)* .

The pattern suggested in *Douglas* was developed further and more distinctly in a pair of cases at the end of the 1966 term. *United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)* , and *Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)* , hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for "a meaningful confrontation at trial." *United States v. Wade, supra, 388 U.S. at 236, 87 S. Ct. at 1937* . *Wade* involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In *Gilbert*, witnesses did testify to an earlier identification, readily classifiable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. *388 U.S. 263, 272 n.3, 87 S. Ct. 1951* . See also *Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)* , holding that the right of confrontation was violated when the bailiff made prejudicial statements to jurors, and Note, *75 Yale L.J. 1434 (1966)*.

Under the earlier cases, the *confrontation clause* may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions, but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the *confrontation clause* and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and *California Evidence Code §§ 1200-1340*.

Rule 801

General Provisions

Subdivision (a). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his

belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, *62 Harv. L. Rev. 177, 214, 217 (1948)*, and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, *14 Stan. L. Rev. 682 (1962)*. Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, *33 Rocky Mt. L. Rev. 133 (1961)*. Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, *14 Vand. L. Rev. 741, 765*-67 (1961).

For similar approaches, see Uniform Rule 62 (1); *California Evidence Code §§ 225*, *1200*; Kansas Code of Civil Procedure § 60-450(a); New Jersey Evidence Rule 62 (1).

Subdivision (b). No Advisory Committee Note.

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *id*. § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950)* , *rev'd on other grounds*, *340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534* , letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) Prior statement by witness. Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor

observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945)* , the fact is that, of the many common-law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrated quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State v. Saporen, 205 Minn. 358, 285 N.W. 808 (1939)* ; *Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967)* ; *People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968)* . In respect to demeanor, as Judge Learned Hand observed in *Di Carlo v. United States, 6 F.2d 364 (2d Cir. 1925)* , when the jury decide that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63 (1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. *Compare* Uniform Rule 63 (1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. **[Editor's Note: Modified by the Congress to provide for substantive admissibility only if the prior statement was made under oath at a formal proceeding.]** As has been said by the California Law Revision Commission with respect to a similar provision:

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

Comment, *California Evidence Code § 1235*. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in *People v. Johnson, 68 Cal. 2d 646, 68 Cal. Rptr. 599, 441 P.2d 111 (1968)* . The constitutionality of the Advisory Committee's view was upheld in *California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)* . Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its

admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of ... identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are *People v. Gould, 54 Cal. 2d 621, 7 Cal. Rptr. 273, 354 P.2d 865 (1960)* ; *Judy v. State, 218 Md. 168, 146 A.2d 29 (1958)* ; *State v. Simmons, 63 Wash. 2d 17, 385 P.2d 389 (1963)* ; *California Evidence Code § 1238*; New Jersey Evidence Rule 63 (1)(c); N.Y. Code of Criminal Procedure § 393b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in *Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)* . Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

> There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See *71 A.L.R.2d 449* . It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement.

The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 A.L.R.2d Later Case Service 1225-1228 ... *388 U.S. at 272, n. 3, 87 S.Ct. at 1956* .

[Editor's Note: This part was deleted by the Congress, but it was subsequently restored.]

(2) Admissions. Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, *85 U. Pa. L. Rev. 484, 564 (1937)*; Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs. To the same effect is *California Evidence Code § 1220*. Compare Uniform Rule 63 (7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "*X* is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a

fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159-61. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and *California Evidence Code § 1222* which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, *14 Vand. L. Rev. 855, 860*-61 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958)* ; *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller, 292 F.2d 775, 784, 110 U.S. App. D.C. 282 (1961)* ; *Martin v. Savage Truck Lines, Inc., 121 F. Supp. 417 (D.D.C. 1954)* , and numerous state court decisions collected in 4 Wigmore, 1964 Supp., pp. 66-73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view, see *Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965)* and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure § 60-460 (i)(1), and New Jersey Evidence Rule 63(9)(a).

(E) The limitation upon the admissibility of statements of coconspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of coconspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, *52 Mich. L. Rev. 1159 (1954)*; Comment, *25 U. Chi. L. Rev. 530 (1958)*. The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949)* ; *Wong Sun v. United States, 371 U.S. 471, 490, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)* . For similarly limited provisions, see *California Evidence Code § 1223* and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 282 (1999)

Prior Inconsistent Statements -- Rule 801(d)(1)(A)

Under common law, a statement of a witness that was inconsistent with his in-court testimony could be admitted to impeach the witness's credibility, but there was no special hearsay exception to allow such a statement to be admissible for its truth. The Advisory Committee thought that the common-law rule, distinguishing between impeachment and

substantive use of prior inconsistent statements, was nonsensical. It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, "[t]he declarant is in court and may be examined and crossexamined in regard to his statements and their subject matter." Moreover, "[t]he trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Finally, "the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation." For all these reasons, the Advisory Committee's proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee's Note to the proposal makes this clear: "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence."

Congress, however, cut back on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" are admissible as substantive evidence. The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, "there can be no dispute as to whether the prior statement was made"; and 2) the requirements of oath and formality of proceeding "provide firm additional assurances of the reliability of the prior statement."

The requirements imposed by Congress in Rule 801(d)(1)(A) have little to do with the concerns that are at the heart of the hearsay rule. First, while the requirement of a formal proceeding tends to alleviate concern over whether the prior inconsistent statement was ever made, that concern has nothing to do with the hearsay rule. The making of the statement (as distinguished from its truth) is a question addressed by in-court testimony: the in-court witness testifies that the statement was or was not made, and this becomes a jury question. Second, the requirements of oath and formality do little to guarantee the reliability of the prior out-of-court statement. The whole basis for reliability of these statements is that the declarant is the same person as the witness who is testifying under oath at the time of trial, and can therefore be cross-examined about the prior statement. That reliability guarantee is not dependent on the circumstances under which the out-of-court statement was made. Thus, the limitations imposed by Congress do not seem to mesh very well with the concerns expressed.

However, while the Advisory Committee's proposal has a stronger basis in the theory of the hearsay rule, the fact remains that it is not the law. Therefore, the Advisory Committee's categorical assertion that prior inconsistent statements "are substantive evidence" is misleading.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

Present Federal law generally permits the use of prior inconsistent statements of a witness for impeachment only. Subdivision (d)(1) as proposed by the Court would permit such statements to be admissible as substantive evidence. Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation, the Subcommittee decided to adopt a compromise version of the Rule patterned after the position of the Second Circuit. See *United States v. De Sisto, 329 F.2d 929 (2d Cir. 1964)* , *cert. denied*, *377 U.S. 979* ; *United States v. Cunningham, 446 F.2d 194* . The Rule as approved draws a distinction between types of prior inconsistent statements and allows only those made before a grand jury, or at a trial or hearing, or in a deposition, to be admissible for their truth. The rationale for the Subcommittee's decision was that (1) unlike in other situations, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding and an oath provided firm additional assurances of the reliability of the statement. The Subcommittee intends that nothing in the Rule should be deemed to impair the secrecy of grand jury investigations.

[4] Report of the House Committee on the Judiciary

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California v. Green, 399 U.S. 149 (1970)* . Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States v. Anderson, 406 F.2d 719, 720 (4th Cir.)* , *cert. denied*, *395 U.S. 967 (1969))* and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. Compare *United States v. DeSisto, 329 F.2d 929 (2d Cir.)* , *cert. denied*, *377 U.S. 979 (1964)* ; *United States v. Cunningham, 446 F.2d 194 (2d Cir. 1971)* (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provided firm additional assurances of the reliability of the prior statement.

[The following excerpt is from House Report, No. 94-355, 94th Cong., 1st Sess. (1975), relating to the amendment adding subdivision 801(d)(1)(C) to the Federal Rule. -- Ed.]

The Committee on the Judiciary, to whom was referred the bill (S. 1549) to amend the Federal Rules of Evidence, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Purpose

The purpose of this legislation is to amend *Rule 801(d)(1) of the Federal Rules of Evidence*.

Background

The Federal Rules of Evidence govern proceedings in federal courts and before United States magistrates. Article VIII of those Rules deals with hearsay evidence, and Rule 801 provides general definitions for Article VIII. Subdivision (d)(1) of Rule 801 defines certain statements not to be hearsay and therefore not inadmissible under Rule 802, which makes hearsay statements generally inadmissible.

When the Federal Rules of Evidence bill (H.R. 5463) passed the House on February 6, 1974, by a vote of 377 to 13, it contained the following provision:

A statement is not hearsay if ... the defendant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... *(C) one of identification of a person made after perceiving him*. [Emphasis added.]

The Senate-passed version of H.R. 5463 omitted the italicized language.

The House-Senate Conference Committee on H.R. 5463 met in December 1974 to iron out the differences between the House and Senate versions of the bill. The Senate strenuously insisted upon its version of Rule 801(d)(1); in fact, it was indicated that any compromise that included the House version of the rule would face extended discussion during the Senate debate. In the face of this, the House Conferees agreed to the Senate version of Rule 801(d)(1).

S. 1549, which is cosponsored in the Senate by Senators Philip A. Hart, John L. McClellan and Roman Hruska, seeks to put back into Rule 801(d)(1) the language that was struck at Conference. In other words, the Senate is now acceding to the House version of Rule 801(d)(1).

Analysis of the Bill

Rule 801(d)(1)(C), as it is proposed to read, has a precondition to the use of the out-of-court statement of identification. The person who made the statement (the "declarant") must testify at the trial or hearing and must be subject to cross-examination concerning the statement. Even if this precondition is met, the out-of-court statement of identification must still meet constitutional standards. If the precondition is satisfied and the constitutional standards are met, then the out-of-court statement of identification is admissible.

A. Constitutional Standards

Out-of-court statements of identification can be made in different contexts. They can be made at a preindictment or a postindictment lineup. They can be made at a one-person showup that takes place shortly after the crime. They can also be made after being shown a series of photographs.

When there is a postindictment lineup, the Constitution requires that the defendant's counsel be present. *United States v. Wade, 388 U.S. 218 (1967)* . When there is a preindictment lineup, there is no requirement that defendant's counsel be present. *Kirby v. Illinois, 406 U.S. 682 (1972)* . Likewise, when a group of photographs is shown to someone, there is no requirement that the defendant's lawyer be present. *Simmons v. United States, 390 U.S. 377 (1968)* .

Out-of-court identification procedures -- including lineups, showups and displays of photographs -- must meet the due process standard of the *Fifth* and *Fourteenth Amendments to the United States Constitution*. *Kirby v. Illinois, 406 U.S. 682 (1972)* (preindictment lineup); *Foster v. California, 394 U.S. 440 (1969)* (preindictment lineup followed by face-to-face showup); *Stovall v. Denno, 388 U.S. 293 (1967)* (one-person showup); *Simmons v. United States, 390 U.S. 377 (1968)* (display of photographs). The due process standard requires looking at the totality of the circumstances to determine whether the identification procedure was "unnecessarily suggestive and conducive to irreparably mistaken identification." *Kirby v. Illinois, 406 U.S. 682, 691 (1972)* .

If the identification procedure does not measure up to the Constitutional standard, then the witness' out-of-court statement is not admissible. Furthermore, the witness cannot make an in-court identification unless there is clear and convincing evidence that there is an independent basis for the in-court identification. *United States v. Wade, 388 U.S. 218 (1967)* ; *Gilbert v. California, 388 U.S. 263 (1967)* .

B. Case Law

There was a split among the authorities as to whether out-of-court statements of identification are admissible. See Annot., 71 A.L.R.2d 449 .

The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial.

Gilbert v. California, 388 U.S. 263, 272 n.3 (1967) .

Federal courts admit out-of-court statements of identification. See, e.g., *United States v. Miller, 381 F.2d 529 (2d Cir. 1967)* (photographic display); *United States v. Shannon, 424 F.2d 475 (3d Cir. 1970)* , *cert. denied*, *400 U.S. 844* (photographic display followed by one-person showup); *Bolling v. United*

States, 18 F.2d 863 (4th Cir. 1927) (on-the-scene identification); *United States v. Fabio, 394 F.2d 132 (4th Cir. 1968)* (preindictment lineup); *United States v. Cooper, 472 F.2d 64 (5th Cir. 1973)* , *cert. denied*, *414 U.S. 840* (photographic display); *United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974)* (photographic display); *Eidson v. United States, 272 F.2d 684 (10th Cir. 1959)* (preindictment lineup); *Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968)* (cellblock confrontation).

Thus, Rule 801(d)(1)(C) as proposed in S. 1549 is fully consistent with current Federal case law. Federal case law treats such statements as exceptions to the hearsay rule; Rule 801(d)(1)(C) defines them not to be hearsay. The result is the same in either instance -- the statement is admissible if the person who made it testifies and is subject to cross-examination.

C. Rationale

Courtroom identifications can be very suggestive. The defendant is known to be present and generally sits in a certain location. Out-of-court identifications are generally more reliable. They take place relatively soon after the offense, while the incident is still reasonably fresh in the witness' mind. Out-of-court identifications are particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial. As time goes by, a witness' memory will fade and his identification will become less reliable. An early, out-of-court identification provides fairness to defendants by ensuring accuracy of the identification. At the same time, it aids the government by making sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime.

The justification for not admitting out-of-court statements of identification was stated in the Senate Report on the Federal Rules of Evidence bill (H.R. 5463) to be a "concern that a person could be convicted solely upon evidence admitted under this [exception]." Senate Report No. 93-1277, at 16. However, Rule 801(d)(1) is not addressed to the issue of the sufficiency of evidence but to the issue of its admissibility. This was pointed out in Senate Report on the Federal Rules of Evidence in reference to subdivision (A) of Rule 801(d)(1).

It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely to its admissibility.

Senate Report No. 93--1277, at 16 n.20.

Conclusion

S. 1549 will put into the Federal Rules of Evidence the prevailing Federal practice and will reinstate language that the House overwhelmingly approved last Congress. It will simply provide that out-of-court identifications are admissible if they meet constitutional requirements. The Committee recommends passage of S. 1549.

...

[5] Report of the Senate Committee on the Judiciary

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand.

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated. [It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate.]

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(C) of Rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

The House approved the long-accepted rule that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a co-conspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a co-conspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi, 393 F.2d 97, 99 (2d Cir.)* , *cert. denied*, *393 U.S. 913 (1968)* ; *United States v. Spencer, 415 F.2d 1301, 1304 (7th Cir., 1969)* . [Except for footnote 21 which is included in brackets in the second to the last paragraph, all footnotes are deleted. -- Ed.]

[Editor's Note: The following excerpt is from Senate Report, No. 94-199, 94th Cong., 1st Sess. (1975), relating to the amendment adding subdivision 801 (d)(1)(C) to the Federal Rule.]

> The Committee on the Judiciary, to which was referred the bill (S. 1549) to amend the Federal Rules of Evidence for certain courts and proceedings, having considered the same, reports favorably thereon and recommends that the bill do pass.
>
> **Purpose**

The purpose of this legislation is to amend the Federal Rules of Evidence to make clear that nonsuggestive lineup, photographic and other identifications, made in compliance with the Constitution, are admissible in evidence.

Statement

The Federal Rules of Evidence, as submitted by the Supreme Court and passed by the House of Representatives, included the following provision in Rule 801(d)(1)(C):

A statement is not hearsay if ... the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... *one of identification of a person made after perceiving him*. [Emphasis supplied.]

A similar provision was contained in the Preliminary Draft of the Proposed Rules (March 1969), the Revised Draft (March 1971), the Judicial Conference Proposed Draft, and the Supreme Court Draft (November 1972).

Senator Philip A. Hart (for himself and Senators Hruska and McClellan) introduced S. 1549 on April 29, 1975, to add a new subparagraph (d)(1) to Rule 801, Definitions, of Article VIII (Hearsay).

The purpose of the provision was to make clear, in line with the recent law in the area, that nonsuggestive lineup, photographic and other identifications are not hearsay and therefore are admissible. In the lineup case of *Gilbert v. California, 388 U.S. 263, 272 n. 3 (1967)* , the Supreme Court, noting the split of authority in admitting prior out-of-court identifications, stated, "The recent trend, however, is to admit the prior identification under the exception [to the hearsay rule] that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial." And the Federal Courts of Appeals have generally admitted these identifications. See, e.g., *Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968)* (*en banc*), *cert. denied*, *394 U.S. 964 (1969)* ; *United States v. Miller, 381 F.2d 529, 538 (2d Cir. 1967)* (Friendly, J.); *Eidson v. United States, 272 F.2d 684, 686 (10th Cir. 1959)* . See also 4 Wigmore, Evidence, § 1130 (Chadbourn rev. 1972) which strongly supports admissibility of prior identifications. Additional authority is collected in Rothstein, Understanding the New Federal Rules of Evidence, pp. 385-86, 390, and 669-70 (1975 Supplement).

In the course of processing the Rules of Evidence in the final weeks of the 93rd Congress, the provision excluding such statements of identification from the hearsay category was deleted. Although there was no suggestion in the committee report that prior identifications are not probative, concern was there expressed that a conviction could be based upon such unsworn, out-of-court testimony. Upon further reflection, that concern appears misdirected. First, this exception is addressed to the "admissibility" of evidence and not to the "sufficiency" of evidence to prove guilt. Secondly, except for the former testimony exception to the hearsay exclusion, all hearsay exceptions allow into evidence statements which may not have been made under oath. Moreover, under this rule, unlike a significant majority of the hearsay exceptions, the prior identification is admissible only when the person who made it testifies at trial and is subject to cross-examination. This assures that if any discrepancy occurs between the witness' in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed.

Upon reflection, then, it appears the rule is desirable. Since these identifications take place reasonably soon after an offense has been committed, the witness' observations are still fresh in his mind. The identification occurs before his recollection has been dimmed by the passage of time. Equally as important, it also takes place before the defendant or some other party has had the opportunity, through

bribe or threat, to influence the witness to change his mind.

Both experience and psychological studies suggest that identifications consisting of nonsuggestive lineups, photographic spreads, or similar identifications, made reasonably soon after the offense, are most [*sic*] reliable than in-court identifications. Admitting these prior identifications therefore provides greater fairness to both the prosecution and defense in a criminal trial. See McCormick, Evidence, 602 (2d ed. 1972). Their exclusion would thus be detrimental to the fair administration of justice.

That the trier of fact, whether it be judge or jury, cannot properly perform its function if highly probative and constitutional identification evidence is kept from it has been recognized by the Court of Appeals for the District of Columbia Circuit in an *en banc* decision in *Clemons v. United States, 408 F.2d at 1243* :

The rationale behind the exclusion of hearsay evidence has little force in the case of witnesses ... who are available for cross-examination. We also think that juries in criminal cases, before being called upon to decide the awesome question of guilt or innocence, are entitled to know more of the circumstances which culminate in a courtroom identification -- an event which, standing alone, often means very little to a conscientious and intelligent juror, who routinely expects the witnesses to identify the defendant in court and who may not attach great weight to such an identification in the absence of corroboration.

For these reasons, evidence of an earlier identification made by a person who is now testifying at the trial should not be treated as inadmissible hearsay.

Again, it should be emphasized that though the rule makes prior identifications admissible, they *still* must meet constitutional muster. In *Gilbert v. California, 388 U.S. 218 (1967)* , the Supreme Court held that the *Sixth Amendment* right to assistance of counsel applied to lineup identifications. Even though the Court held that the right to counsel applied only to post-indictment lineups, *Kirby v. Illinois, 406 U.S. 682 (1972)* , other cases make clear that the Due Process Clause is applicable to *all* pretrial lineups and that it forbids a lineup that is unnecessarily suggestive and conducive to mistaken identification. *Stovall v. Denno, 388 U.S. 293 (1967)* ; *Foster v. California, 394 U.S. 440 (1969)* . Having the identifying witness on the stand (which is required by the first clause of Rule 801(d)(1)), coupled with these constitutional safeguards, provide adequate assurances of trustworthiness to warrant the admissibility of such prior identifications.

Finally, the committee notes that several States which have adopted Evidence Codes in the last few years have included a rule which provides for the admissibility of prior identifications. *Cal. Evid. Code § 1238* (West 1966); Kan. Civ. Pro. Stat. Ann. § 60-460(a) (Vernon 1964); *Nev. Rev. Stat. § 51.035(2)(c)* (1973); New Jersey Evidence Rule § 63(1)(c); N.M. Stat. Ann. § 20-4-801(d)(1)(C) (1973); N.Y. Crim. Pro. § 60.25 (McKinney Supp. 1971); Utah Rules of Evidence § 63(1) (1971); *Wis. Stat. Ann. § 908.01(4)(a)* (Spec. Pamphlet 1974); Proposed Maine Rules of Evidence § 801(d)(1)(C) (Tent. Draft. Dec. 1974).

Conclusion

For these reasons, the committee recommends that the bill do pass.

[6] Report of the House and Senate Conferees

Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment. **[This was changed by subsequent amendment as noted above. -- Ed.]**

[7] 1997 Amendment Committee Note

1997 Amendment Committee Note

Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States, 483 U.S. 171 (1987)* . First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., *United States v. Beckham, 968 F.2d 47, 51 (D.C. Cir. 1992)* ; *United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993)* , *cert. denied*, *114 S. Ct. 2714 (1994)* ; *United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.)* , *cert. denied*, *488 U.S. 821 (1988)* ; *United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.)* , *cert. denied*, *115 S. Ct. 152 (1994)* ; *United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988)* ; *United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988)* ; *United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988)* ; *United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987)* , *cert. denied*, *485 U.S. 1013 (1988)* ; *United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990)* .

Third, the amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundation facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and the scope thereof under subdivision (D).

[8] Citations to Hearings and Debates

Letter from Hon. John L. McClellan to Hon. Albert B. Maris, August 12, 1971, in Supplement to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 47, 57-59 (1973), [Exhibit I to Letter from Hon. John L. McClellan to Hon. William L. Hungate, May 2, 1973].

Letter from Hon. Albert B. Maris to Herbert E. Hoffman, May 30, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 98 (1973).

Letter from Edward W. Cleary to Herbert E. Hoffman, May 31, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 98-99 (1973).

Letter from James F. Schaeffer to Hon. William L. Hungate, June 22, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 122, 125-29 (1973).

Debate in the House of Representatives, 120 Cong. Rec. H560--H563 (daily ed. February 6, 1974).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 64-66 (1974).

Testimony of Edward W. Cleary, June 4, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 50-52 (1974).

Testimony of J. Francis Paschal, June 4, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 90 (1974).

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109, 111-12 (1974).

Testimony and Statement of Herbert Semmel, June 5, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 299, 301-04, 307-18 (1974).

[The following citations relate to the amendment adding subdivision 801(d)(1)(C) to the Rule.]

Debate in the Senate, 121 Cong. Rec. S7128--S7129 (daily ed. April 30, 1975); 121 Cong. Rec. S11098--S11099 (daily ed. June 18, 1975); 121 Cong. Rec. S17713 (daily ed. Oct. 7, 1975).

Debate in the House of Representatives, 121 Cong. Rec. H9653--H9655 (daily ed. Oct. 6, 1975).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
Supp. To CHAPTER 801 RULE 801

4-801 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 801, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE VIII. HEARSAY	**ARTICLE VIII. HEARSAY**
Rule 801. Definitions	**Rule 801. Definitions That Apply to This**

Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an asser-

tion.

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. A "declarant" is a person who

(b) Declarant. "Declarant" means the person

	makes a statement.		who made the statement.
(c)	**Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter as-	**(c)**	**Hearsay.** "Hearsay" means a statement that:

	serted.		
	(1) the declarant does not make while testifying at the current trial or hearing; and		
	(2) a party offers in evidence to prove the truth of the matter asserted in the statement.		
(d)	**Statements**	**(d)**	**Statements**

nts which are not hearsay. A statement is not hearsay if --	**nts That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:		
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cros		**(1)**	***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-ex-

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or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication

or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(A) is inconsistent with the declarant's testimony and was given under

penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the de-

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vant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and

in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or

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ment is offered under subdivision (E).

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by

a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the

existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Committee Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense -- a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

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PART TWO: THE RULES THEMSELVES
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Supp. To CHAPTER 801 RULE 801

4-801 Federal Rules of Evidence Manual Supp. to § 801.03

Supp. to § 801.03 Annotated Cases

[Go To Main]

[1] Rule 801(a) -- Statement [Go To Main]

[a] Rule 801(a) -- Assertive Conduct

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) : In a prosecution for health care fraud, the government offered, to prove that the defendant's manner of giving pain injections was improper, a video it had commissioned in which a physician demonstrated the proper manner for giving the injections. The Court held it was error (but harmless) to admit the video. All portions of the video were "statements": not only the oral and written verbal parts, but also the depictions of the physician's conduct, which was nonverbal conduct intended as an assertion of the proper way to do the procedure. The statements were offered for the truth of the assertion that that was the way to give the injection. And no hearsay exception applied. In particular, this video did not come within the learned treatise exception of Rule 803(18) because it was prepared for litigation purposes, not subject to peer review or public scrutiny, and not prepared primarily for professionals with the reputation of the author at stake.

[2] Rule 801(c) -- Hearsay [Go To Main]

[b] Rule 801(c) -- Confrontation Clause Inapplicable to Nonhearsay

United States v. Hansen, 434 F.3d 92 (1st Cir. 2006) : The Court held that the admission of an undercover informant's statements, made in a conversation with the defendant, did not violate the *Confrontation Clause*, because they were not offered for their truth but rather to provide context for the defendant's own statements.

United States v. Paulino, 445 F.3d 211 (2d Cir. 2006) : The Court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's *Sixth Amendment* rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

United States v. Warman, 578 F.3d 320 (6th Cir. 2009) : The Court affirmed drug conspiracy convictions, finding no

error in admitting an agent's testimony regarding the roles of various members of a motorcycle gang in selling drugs, based on "information he had developed" from various cooperators and informants. The Court said that "although the ... statements ... may be testimonial in nature, they were not offered for the truth of the matter asserted, but rather, merely to provide background about the FBI's investigation of the [gang] and [the defendant]. Because they do not go to the heart of the government's case against [the defendant], they do not violate the *Confrontation Clause*." In *United States v. Powers, 500 F.3d 500 (6th Cir. 2007)* , in a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. Affirming, the Court held it was both evidentiary and constitutional error (but harmless) to admit the informant's statements. It rejected the government's argument that even though the informant's statements were testimonial (because made to a police officer in anticipation of litigation), they were not hearsay, because they were not offered for their truth but rather "to show why the police conducted a sting operation" against the defendant, and accordingly did not violate *Crawford*. The Court reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation."

[d] Rule 801(c) -- Examples of Hearsay

[i] Rule 801(c) -- Civil Cases

Alpert v. United States, 481 F.3d 404 (6th Cir. 2007) : The Court affirmed summary judgment for the IRS in a taxpayer's action for a refund, holding that an affidavit by the taxpayer that certain named creditors and other unsecured creditors had written off the debt of his subchapter-S corporation in particular years was insufficient to establish a discharge of debt at that time. The statement regarding the writing off of debts by the named creditors was apparently based solely on information that the taxpayer received from elsewhere and was thus inadmissible hearsay.

Gunville v. Walker, 583 F.3d 979 (7th Cir. 2009) : Affirming summary judgment for state officials sued by former employees who alleged that their termination violated their *First* and *Fourteenth Amendment* rights, the Court held that testimony by an assistant to a state personnel manager that the manager told her that voter records were "pulled" for certain personnel decisions was hearsay because it was offered to prove that the records were in fact pulled. In *Schindler v. Seiler, 474 F.3d 1008 (7th Cir. 2007)* , the Court affirmed summary judgment for the defendant in a defamation action by a neurosurgeon who alleged that the defendant accused him of paralyzing patients. It held that testimony by the defendant, that another doctor told him that the plaintiff had said the defendant was a bad doctor who had paralyzed four patients, was inadmissible hearsay. Although statements that constitute slander are not hearsay, the doctor's out-of-court assertion that the plaintiff made the statement was hearsay.

Mason v. Corr. Med. Servs., Inc., 559 F.3d 880 (8th Cir. 2009) : In an inmate's action for alleged indifference to his medical needs, the plaintiff attempted to prove that the prison's medical director was aware of his situation by offering testimony of another inmate that he heard a prison physician confer on the telephone with a person addressed as the medical director. Affirming summary judgment for the medical director, the Court held the testimony was hearsay, as it was an out-of-court statement by the physician offered to prove that the medical director was the person on the other end of the phone. In *Moore v. Indehar, 514 F.3d 756 (8th Cir. 2008)* , a § 1983 action, an arrestee suing for excessive force offered a police report by a colleague of the arresting officer and the colleague's recommendation that the officer receive a Medal of Honor, to prove the officer's intent to target the arrestee. The Court held that the Trial Judge properly disregarded the documents when ruling on the defendant' summary judgment motion, as they were hearsay and thus inadmissible.

McInnis v. Fairfield Communities, Inc., 458 F.3d 1129 (10th Cir. 2006) : The Court affirmed a judgment for the plaintiff in a Title VII gender discrimination action, finding no abuse of discretion in the exclusion of emails written by a supervisor. The statements were not admissible as nonhearsay to prove the employer's state of mind in making an employment decision, because neither the declarant nor the addressees made the termination decision at issue in the case.

[ii] Rule 801(c) -- Examples of Hearsay -- Criminal Cases

[A] Rule 801(c) -- Defense Evidence

United States v. Davis, 596 F.3d 852 (D.C. Cir. 2010) : The national treasurer of a fraternity was charged with writing checks to cash and depositing them into his personal bank account. In support of his claim that he had used funds derived from those checks to pay fraternity expenses, he offered testimony from his wife that she had seen him making payments for fraternity expenses. The Court held there was no abuse of discretion in precluding the wife's testimony, as her only knowledge that the expenses were the fraternity's came from hearsay statements by the defendant or on bills that she saw.

United States v. Guzman, 603 F.3d 99 (1st Cir. 2010) : The Court affirmed an arson conviction, finding no abuse of discretion in limiting the defendant's cross-examination of a former cellmate as to what the defendant told the cellmate that the defendant's lawyers had said to him. The defense was permitted to try to establish that the cellmate's testimony may have been influenced by what he learned about the details of the arson from discovery documents in the cell, but was not permitted to try to prove through the cellmate the truth of statements made by the defendant himself.

United States v. Hoffecker, 530 F.3d 137 (3d Cir. 2008) : Affirming convictions for mail and wire fraud arising from a commodities-sales scheme, the Court found no error when the defense was not permitted to play the entirety of a tape recording, portions of which the government had offered as admissions by a party-opponent. The recording was of a presentation made by the defendant to a government undercover operation he was seeking to recruit as a boiler-room. The defendant argued that it was evidence of his state of mind -- that the program was always to be operated in a legitimate manner -- but the Court found that the statements were simply exculpatory, made to people he had every reason to sign on to sell aggressively for his own gain. Furthermore, they were not necessary to explain or place in context the portions admitted or any other evidence or testimony.

[B] Rule 801(c) -- Examples of Hearsay -- Criminal Cases -- Official and Confidential Informants

United States v. Cabrera-Rivera, 583 F.3d 26 (1st Cir. 2009) : In a robbery prosecution, the government offered statements that accomplices made to police officers, arguing that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. The Court rejected the argument, since the government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence, and the government did not contend that one of the accomplice's confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford*. In *United States v. Benitez-Avila, 570 F.3d 364 (1st Cir. 2009)* , a prosecution of an armed robbery that took place outside a gas station owned by the victim's husband, a federal agent testified that the husband told him that the husband had received a tip from an informant who said that one of the assailants was known as "Gemelo," which means twin in Spanish, and that the agent had established that the defendant was a twin by examining mugshots of the defendant and his deceased twin brother. The Court found that the testimony about the husband's statement was double hearsay. It was not admissible for the not-for-truth purpose of showing the basis for the agent's focusing his investigation, because that "was not a relevant issue in the trial." Although "prosecutors, in an effort to make the evidence of defendants' guilt more lively and to captivate the jurors with the drama of the hunt for the solution to the crime, will often organize the presentation of the evidence of guilt in the form or a narrative of the investigation," "[t]he issue in a criminal trial, upon which the government bears the burden of proof, is whether the evidence proves the defendant's guilt beyond a reasonable doubt," and "[w]hether government agents had a reasonable, good faith basis for investigating the defendant is a completely different question, which is not in issue unless the defendant puts it in issue." The Court concluded that a prosecutor "cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence, or by asserting that it has a nonhearsay relevance to an issue that is itself not relevant." Admission of the hearsay evidence was harmless error, however. In *United States v. Maher, 454 F.3d 13 (1st Cir. 2006)* , at the defendant's drug trial, several accusatory statements from an informant

(Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The Court found that these statements were testimonial under *Crawford v. Washington*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs... . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." Rejecting the argument that there was no *Confrontation Clause* violation because the statements were not admitted for their truth, the Court explained:

> The government's articulated justification -- that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* -- is impossibly overbroad ... [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule... . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The ... officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

However, the Court found no plain error, noting, *inter alia,* that the testimony was followed immediately by a *sua sponte* instruction not to use Johnson's statements for their truth.

United States v. Warman, 578 F.3d 320 (6th Cir. 2009) : Affirming drug conspiracy convictions, the Court held it was plain error (but harmless) to admit an agent's testimony that an informant had identified the defendant as a supplier of narcotics to the conspiracy. The statement was hearsay and testimonial, so its admission violated the *Confrontation Clause*. In *United States v. Powers, 500 F.3d 500 (6th Cir. 2007)* , in a drug prosecution, a law enforcement officer testified that he had received information about the defendant's prior criminal activity from a confidential informant. Affirming, the Court held it was both evidentiary and constitutional error (but harmless) to admit the informant's statements. It rejected the government's argument that even though the informant's statements were testimonial (because made to a police officer in anticipation of litigation), they were not hearsay, because they were not offered for their truth but rather "to show why the police conducted a sting operation" against the defendant, and accordingly did not violate *Crawford*. The Court reasoned that "details about Defendant's alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation." In *United States v. Caver, 470 F.3d 220 (6th Cir. 2006)* , the court affirmed convictions for cocaine offenses, holding it was error (but harmless) to admit testimony by a police officer that a sergeant briefed other officers and said that Caver was responsible for dealing a lot of drugs in a certain area. Although the government argued that the testimony provided background information explaining how law enforcement became involved with Caver, the Court found that Caver was arrested when a drug deal was spotted, at a time when the background information had nothing to do with the arrest. Thus, the only purpose for offering the testimony was for the truth of the sergeant's accusations, and the sergeant's statements were therefore hearsay.

United States v. Anderson, 450 F.3d 294 (7th Cir. 2006) : Affirming convictions for crack cocaine distribution, the Court held it was plain (but harmless) *Confrontation Clause* error for the investigating agent to testify about what a nontestifying informant had told him about the defendants.

United States v. Singh, 494 F.3d 653 (8th Cir. 2007) : Affirming convictions for methamphetamine distribution, the Court held it was error (but harmless) to admit testimony by a detective recounting statements by a confidential informant regarding interactions with a defendant. The statements were hearsay and the declarant was not speaking as a coconspirator in furtherance of the conspiracy but as a cooperating informer.

United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009) : In a drug case, the Court held it was error (but harmless) to admit, as explaining the "background" of the police investigation, out-of-court statements to police officers that implicated the defendant in drug activity. It found that the accusations were not necessary to prove the context of the police investigation because the government had already offered admissible evidence to prove how the police focused their investigation on the defendant, and it noted that "a prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence." It also observed that when evidence is introduced that bears on the ultimate issue in the case but is not necessary to explain the background of an investigation, "the only reasonable conclusion we can reach is that the evidence was offered, not as background, but as support for the government's case against the defendant ... . That purpose is impermissible, and this evidence should not have been admitted. Nor should this evidence have been offered by the prosecution."

United States v. Arbolaez, 450 F.3d 1283 (11th Cir. 2006) : In a marijuana prosecution, the government introduced statements made by one of the defendant's accomplices to law enforcement officers during a search, not for truth but to explain the officers' reactions to the statements. Finding admission of the statements error (but harmless), the Court noted that it had held that "testimony as to the details of statements received by a government agent ... even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." It also found that the accomplice's statements were "testimonial" under *Crawford v. Washington,* because they were made in response to questions from police officers. In *United States v. Baker, 432 F.3d 1189 (11th Cir. 2005)* , the Court, reviewing convictions for a cocaine distribution conspiracy, held that it was an abuse of discretion to admit hearsay statements made to various police officers to "explain" the officers' investigation. The Court concluded that the statements were used to prove the truth of the matters asserted.

[C] Rule 801(c) -- Examples of Hearsay -- Criminal Cases -- Other Cases

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) : The Court reversed convictions for conspiring to provide material support to designated terrorist organizations (Hamas and Al-Qaeda). The Court found an abuse of discretion in the admission of a mujahidin form during the government's rebuttal case that purported to show that one of the defendants had sponsored a fighter to attend a training camp, since there was no finding about the existence of a conspiracy in which the defendant against whom the form was offered participated. The Court also ruled that the form was not admissible to rebut the "false impression that no evidence corroborated" the testimony of an informant-witness, as hearsay evidence is not admissible for its truth to rebut a false impression created during the defendant's case-in-chief.

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) : In a prosecution for health care fraud, the government offered, to prove that the defendant's manner of giving pain injections was improper, a video it had commissioned in which a physician demonstrated the proper manner for giving the injections. The Court held it was error (but harmless) to admit the video. All portions of the video were "statements": not only the oral and written verbal parts, but also the depictions of the physician's conduct, which was nonverbal conduct intended as an assertion of the proper way to do the procedure. The statements were offered for the truth of the assertion that that was the way to give the injection. And no hearsay exception applied. In particular, this video did not come within the learned treatise exception of Rule 803(18) because it was prepared for litigation purposes, not subject to peer review or public scrutiny, and not prepared primarily for professionals with the reputation of the author at stake.

United States v. DeMarce, 564 F.3d 989 (8th Cir. 2009) : The defendant was convicted for attempted aggravated sexual abuse of his 11-year-old niece after he attempted to rape her in his car. When he dropped her off at home following the incident, she first lied about the source of her injuries, but a few minutes later told the true story, which her mother related at trial. Affirming, the Court held that admission of most of the testimony was error, but harmless. It rejected the government's argument that the testimony was admissible to explain why the mother contacted the police, because the testimony was not restricted at trial to this purpose and was admitted for its truth. It held that the daughter's

statement was inadmissible as an excited utterance because the fact that she first fabricated a statement before correcting it demonstrated a level of reflection inconsistent with an excited utterance. The Court held that the daughter's statement was admissible under Rule 803(3) to the extent that she described her physical state at the time of the statement, but not to the extent she described the events leading up to her physical state, as that was an inadmissible statement of memory. In *United States v. Wright, 540 F.3d 833 (8th Cir. 2008)* , in a prosecution for aggravated child sexual abuse, one witness testified that based on what a victim had told her, she had reported the conversation to the sheriff, including identifying the defendant. Affirming, the Court noted that the testimony would be admissible to provide "background information as to why the police began their investigation," but that it was "not wholly convinced the witnesses' detailed testimony was necessary for background ... , [and] was instead likely offered for the truth of the matter asserted." Any error was harmless, however. Although the Court affirmed a conviction for aggravated sexual abuse of a child in *United States v. Two Elk, 536 F.3d 890 (8th Cir. 2008)* , it found an abuse of discretion in the admission of testimony by an FBI agent that another individual told the agent that he was not involved in any abuse. The other individual was a prime suspect and his denial of culpability was hearsay because it was offered to prove that he did not commit the crime.

United States v. Sine, 493 F.3d 1021 (9th Cir. 2007) : In a mail fraud prosecution, the Court held it was error, but not reversible plain error, to permit the government to ask witnesses on cross-examination questions that incorporated adverse findings by a Judge in related civil litigation. Factual determinations by a Judge in a civil action are inadmissible hearsay not coming within any hearsay exception, and a Judge's findings can unduly affect a jury, which is likely to defer to credibility determinations made by an authoritative, professional factfinder rather than determine those issues for themselves.

United States v. Caraway, 534 F.3d 1290 (10th Cir. 2008) : The defendant was convicted of mailing an explosive to a man who was dating his ex-wife. At trial the government, on direct examination of the defendant's daughter, asked her about a prior statement in which she admitted driving the defendant's son to the post office to mail the explosive. The daughter admitted making the statement but repudiated it. The Court found that it was error (but harmless) to admit the evidence of the daughter's prior statement. It could not at that point have been admitted for impeachment purposes, "because she had not yet testified to the contrary. And it could not be used substantively because for that purpose it would be inadmissible hearsay." The Court also noted that even if the statement were introduced after the daughter testified that she was not involved, it was error for the government to argue its substantive effect to the jury in closing.

[e] Rule 801(c) -- Examples of Nonhearsay

[0.1] Rule 801(c) -- Examples of Nonhearsay -- Absence of Statements

Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147 (9th Cir. 2009) : In an action by a credit card holder against the issuer for violations of the Fair Credit Reporting Act and related claims, the Court, reversing in part, held that the holder's declaration that he had reviewed many of his personal credit reports and none of them included a notice that he disputed delinquent charges was not hearsay. The reports were not being offered for their truth, but to prove that no statement noticing the dispute was contained in them.

[i] Rule 801(c) -- Background or Context

[A] Rule 801(c) -- Civil Cases

Garner v. Missouri Dep't of Mental Health, 439 F.3d 958 (8th Cir. 2006) : Affirming a judgment in a Title VII action against a plaintiff who claimed to have been wrongfully discharged, the Court held there was no abuse of discretion in admitting testimony about unsubstantiated allegations against the plaintiff. The allegations were not admitted for their truth but to explain why the supervisor had suspended the plaintiff and started an investigation that ultimately led to the plaintiff's termination on unrelated charges.

[B] Rule 801(c) -- Background or Context -- Criminal Cases

United States v. Hicks, 575 F.3d 130 (1st Cir. 2009) : The Court affirmed cocaine-related convictions, finding no error in the admission of a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. It held that admission of the girlfriend's statements in the telephone call did not violate the defendant's right to confrontation, because they were admissible not for their truth but to provide the context for understanding the defendant's own incriminating statements. In *United States v. Cruz-Diaz, 550 F.3d 169 (1st Cir. 2008)* , in a joint trial for bank robbery, one defendant's counsel asked a police officer on cross-examination about the failure of police to pursue various investigatory options after it detained the two defendants. The officer responded by quoting statements by the codefendant that incriminated both. Affirming, the Court held that the statements were not hearsay (and not in violation of *Crawford* or *Bruton*) because they were not offered for their truth but only to explain the police actions and respond to a defense picture of police and FBI ineptitude. In *United States v. Page, 521 F.3d 101 (1st Cir. 2008)* , the Court affirmed convictions for cocaine distribution, finding no abuse of discretion in admitting an audiotape of a conversation in which a drug dealer was giving instructions to an associate to give one defendant a share of drug proceeds and the defendant could be heard in the background on the associate's end of the line. The tape was not offered to prove the drug transaction but to prove the trust relationship between the dealer and the defendant. In *United States v. Colon-Diaz, 521 F.3d 29 (1st Cir. 2008)* , the Court affirmed a conviction for drug distribution, finding no plain error in the admission of testimony by an informant that federal agents asked her to go purchase drugs from the defendant's "yellow point" location. The evidence was admitted for the purpose of demonstrating why the informant went to that location, and not to prove that the defendant owned the location. The Court noted that the defense had approved a limiting instruction that the jury "may not take that answer for its veracity, that it was the defendant's yellow point." The Court also pointed out that other testimony by task force members offered to show why they went to the defendant's location or focused on the defendant was admitted to explain their actions, not for its truth, and was accompanied by appropriate limiting instructions.

United States v. Johnson, 529 F.3d 493 (2d Cir. 2008) : The government case agent in a drug conspiracy prosecution testified extensively to the course of the investigation, and in doing so related out-of court statements from various individuals about the defendant's alleged drug activities. The government argued that these accusations were admissible to prove "background," but the Court found error (albeit harmless). In its extensive analysis of such "background" evidence, the Court observed that

> the government may be tempted to make its presentation to the jury more compelling, dramatic, and seductive by telling the exciting story of the investigation and how it progressed from suspicion to certitude, and how traps were set which resulted in the defendant's capture, red handed. But the issue to be tried is not how the investigation was conducted, but whether the evidence proves the defendant's guilt beyond a reasonable doubt. The agent's state of mind as the investigation progressed is ordinarily of little or no relevance to the question of the defendant [sic] guilt. A prosecutor's tactical desire to tell the jury an exciting, captivating story does not justify expanding the scope of admissible evidence to include improper matter, which, although offered as pertinent to the agent's state of mind, may be used by the jury prejudicially as evidence confirming the defendant's guilt. When the evidence is proper with respect to an unimportant issue but improper and prejudicial on a crucially important issue, it is unlikely to pass the balancing test of Rule 403.

In *United States v. Dupre, 462 F.3d 131 (2d Cir. 2006)* , defendants were convicted for wire fraud in a scheme promising 1000-to-1 returns for funds invested purportedly to unfreeze assets once held by the family of Philippines president Marcos. The Court affirmed, finding no error in the admission of messages from a group of investors, which speculated that the scheme was a fraud. The statements were not hearsay because they were not offered to prove the facts asserted but to provide context for the defendants' responding messages; furthermore, they served to rebut the defendants' argument that they had no reason to know the scheme was fraudulent.

United States v. Price, 458 F.3d 202 (3d Cir. 2006) : The defendant was arrested by backup officers after a surveillance officer observing drug activity saw him remove a gun from his waistband and place it in a car trunk. At trial, the surveillance officer testified to what he had seen, and then the backup officers testified that they moved in after receiving a radio call from the surveillance officer reporting the defendant's possession of a gun. Affirming a conviction for drug and weapon offenses, the Court found no error in permitting the backups to mention the gun as nonhearsay background, as the testimony explained why the surveillance operation had been terminated without amassing any concrete evidence of drug transactions.

United States v. Dunigan, 555 F.3d 501 (5th Cir. 2009) : Affirming a bank robbery conviction, the Court held that an officer's testimony as to out-of-court statements offered solely to explain how police investigated a crime were not hearsay. "Testimony describing an investigation's background should not be needlessly objected to on hearsay grounds where it goes only to how police investigated a crime rather than to the truth of the matter asserted." The Court rejected an argument that the officer's testimony should have been excluded under Rule 403, concluding that the statements were highly probative, because they "explained the investigation's time line and how the defendant was eventually located." In contrast, the prejudice to the defendant was limited because the out-of-court statements "did not implicate his specific car in the robbery but merely eliminated another class of cars."

United States v. Deitz, 577 F.3d 672 (6th Cir. 2009) : Affirming drug convictions, the Court found no plain error in allowing an FBI agent to testify that agents tailed the defendant to what turned out to be a drug transaction because a confidential informant had reported to them about Deitz's drug activity. The informant's statement was testimonial under *Crawford v. Washington*, because it was an accusation made to a police officer. However, it was not hearsay, because "it provided mere background information, not facts going to the very heart of the prosecutor's case," so its admission did not violate Deitz's right to confrontation. In *United States v. Davis, 577 F.3d 660 (6th Cir. 2009)* , the Court affirmed a conviction for felon firearm possession. It held that the contents of a woman's statement to police that she had recently seen the defendant with a gun in a car she described along with the license plate was not hearsay, because it was not offered to prove the truth of the contents but was used to explain the police investigation that led to the defendant and the defendant's conduct when he learned the police were looking for him. In *United States v. Gibbs, 506 F.3d 479 (6th Cir. 2007)* , the Court affirmed a conviction for felon firearm possession, holding that testimony by an agent that a parolee told the agent that the defendant had some long guns hidden in his basement bedroom was not offered for its truth, but was offered to explain why the bedroom was searched.

United States v. Taylor, 569 F.3d 742 (7th Cir. 2009) : The Court affirmed a conviction for felon firearm possession, finding no error in the admission of numerous references to statements by a nontestifying eyewitness that "[the defendant] just took a gun across the street." The statement was offered for the nonhearsay purpose of explaining the officers' action, for example, why they looked across the street, why they questioned a person there, and why they handcuffed the defendant when he approached. This was not a situation where the police were "testifying to statements harvested from an ongoing relationship with an informant," but rather the explanation of the police response to a developing potentially dangerous situation." In *United States v. Bermea-Boone, 563 F.3d 621 (7th Cir. 2009)* , the Court affirmed cocaine convictions, holding that transcripts of two recorded conversations between coconspirators and the defendant were not hearsay, because they were used to provide context for the defendant's admissions rather than for their truth. Thus, there was no violation of the *Confrontation Clause*, because the coconspirators did not function as witnesses against the defendant. In *United States v. Burt, 495 F.3d 733 (7th Cir. 2007)* , the Court affirmed a conviction on child pornography charges, finding no error in the admission of a properly authenticated Yahoo! chat log of a conversation between the defendant and a government witness. The defendant's statements in the chat were properly admitted as party admissions, and the witness' half of the conversation, being necessary to provide context for the defendant's comments, was not hearsay because it was not offered for the truth of the matter asserted. In *United States v. James, 487 F.3d 518 (7th Cir. 2007)* , a case arising from a drug transaction between the defendant and an informant, the defense theory was that the defendant was an innocent person who had been set up by the informant, a career criminal looking to save himself from prison and from other drug dealers. After this theory was pursued on the

cross-examination of one agent by questions regarding the informant's background, the prosecution was permitted on examination of another agent to ask about the informant's background as a cooperating informant and the informant's experience with the defendant, in order to provide context for the investigation and explain why the government had chosen to work with the defendant. Affirming, the Court found no error in admitting statements recounting the informant's experience with the defendant over a hearsay objection, as statements offered to provide background and context and to bear on credibility, should it become an issue, are not offered to prove the truth of the matters asserted, and the jury was so instructed.

United States v. DeMarce, 564 F.3d 989 (8th Cir. 2009) : The defendant was convicted for attempted aggravated sexual abuse of his 11-year-old niece after he attempted to rape her in his car. When he dropped her off at home following the incident, she first lied about the source of her injuries, but a few minutes later told the true story, which her mother related at trial. Affirming, the Court held that admission of most of the testimony was error, but harmless. It rejected the government's argument that the testimony was admissible to explain why the mother contacted the police, because the testimony was not restricted at trial to this purpose and was admitted for its truth. In *United States v. Brown, 560 F.3d 754 (8th Cir. 2009)* , a drug conspiracy case, a shooting victim gave a statement to a police officer that accused a person named "Clean" who was accompanied by a man named Charmar. The officer who took this statement testified that he entered "Charmar" into a database to help identify "Clean" and the database search led him to the defendant. The Court found no error in admitting the victim's statement, stating that "it is not hearsay when offered to explain why an officer conducted an investigation in a certain way." The defendant argued that the purported nonhearsay purpose for admitting the evidence "was only a subterfuge to get Williams' statement about Brown before the jury," but the Court responded that the defendant had not argued at trial that the prejudicial effect of the evidence outweighed its nonhearsay value. Further, the Judge twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, because the statement was not offered for its truth, "it does not implicate the *confrontation clause*."

United States v. Cesareo-Ayala, 576 F.3d 1120 (10th Cir. 2009) : Soon after the defendant's coconspirator was arrested and agreed to cooperate, he received a call from the defendant setting up another cocaine transaction. Statements by the coconspirator in that conversation that implied the defendant was dealing were admitted under Rule 801(d)(2)(E). Affirming a conviction for cocaine trafficking, the Court held there was no error in admitting the statements, as they were not hearsay but only provided the context for the defendant's statements in the conversation that strongly suggested he had been involved in another transaction. The concurring Judge thought that the coconspirator's statements were inadmissible under Rule 801(d)(2)(E) because his statements were not in furtherance of the conspiracy after his arrest, and thought that the contents of the statements and the manner in which they were admitted supported an argument that they were admitted for their truth and thus hearsay, but that any errors were harmless. In *United States v. Ledford, 443 F.3d 702 (10th Cir. 2005)* , in a felon firearm prosecution, the Court found no error in admitting a statement made by the defendant's wife to an officer responding to a domestic violence call. The wife stated that she was afraid that the defendant might kill her for calling the police -- then she led the officer to a bedroom and gave him a handgun from a dresser drawer. The Court found that the wife's statement was not hearsay, because it was not offered to prove that the defendant actually threatened his wife. Rather, it was offered to explain why the wife led the officer to the bedroom and retrieved the gun.

United States v. Jiminez, 564 F.3d 1280 (11th Cir. 2009) : The defendant was convicted for participating in a marijuana-growing operation with his brother. Affirming, the Court found no error in the admission of an agent's testimony that the brother had told him the defendant was involved. The statement was not hearsay because it was offered on redirect only to explain why the agent had re-interviewed the defendant, after cross-examination of the agent had suggested that there was something improper about the repeated interviews of the defendant. A concurring Judge suggested that the better practice would have been to give an instruction about the limited purpose for which the brother's statement was being admitted.

[vi] Rule 801(c) -- Examples of Nonhearsay -- Employment Discrimination Cases

Vazquez-Valentin v. Santiago-Diaz, 459 F.3d 144 (1st Cir. 2006) : In an employment discrimination case, the defendants, members of the municipal administration employing the plaintiff, sought to justify her demotion on the ground that she had been illegally promoted by a previous administration. The Judge excluded, on hearsay grounds, an audit that the Comptroller of Puerto Rico had completed during the last months of the previous administration, which indicated improprieties in employment practices. The Court held that the documents, which warned "that the Mayor and his administration would be liable under the Commonwealth's ethics laws if they did not take measures to remedy the hiring abuses" that were found, did not constitute hearsay because they were "offered as an explanation for the personnel actions undertaken by the defendants rather than for the truth of the personnel irregularities described in the documents."

Blair v. Henry Filters, Inc., 505 F.3d 517 (6th Cir. 2007) : Reversing summary judgment for the employer in an age discrimination case, the Court held that a supervisor's statement that the plaintiff was "too old" was not hearsay because it was offered for the fact that it was said, not to prove that the plaintiff was actually too old for the work. Likewise, testimony that the supervisor stated that "he needed to set up a younger sales force" was not hearsay, because the statement was not offered for the truth of the matter asserted.

[viii] Rule 801(c) -- Examples of Nonhearsay -- False Statements

United States v. Tann, 532 F.3d 868 (D.C. Cir. 2008) : Affirming fraud convictions arising from embezzlement, the Court held that the checks that the defendant forged as part of the embezzlement were not offered "for their truth," but only to prove that they were created by the defendant.

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008) : Affirming conviction for bank fraud and mortgage fraud, the Court held that tax abstracts and tax records from the IRS were not hearsay because they were offered not to prove the taxpayer's actual income but only to prove that tax return copies submitted with loan applications were fabricated because they differed from the tax returns actually filed with the IRS.

United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) : The Court affirmed a conviction for kidnapping resulting in death, finding no error in the admission of a statement by the victim that she and her son were going to Disneyland, when in fact they planned to go to Mexico with the defendant to import drugs. Although the statement was admitted under Rule 803(3) as evidence of the victim's state of mind, the Court held that because it was a false statement and not offered to prove the victim's intent to go to Disneyland, it was properly admitted because it was nonhearsay.

[ix] Rule 801(c) -- Examples of Nonhearsay -- Impeachment

United States v. Burt, 495 F.3d 733 (7th Cir. 2007) : At a trial on child pornography charges, a government witness testified about his online relationship with the defendant but denied that the defendant had ever sent him photos of naked boys. The prosecution was then permitted to prove that the witness had made statements inconsistent with that denial when he was interviewed after his arrest. Affirming, the Court held that the prior inconsistent statements were not inadmissible hearsay because they were offered only to impeach the witness' testimony and the jury was given careful limiting instructions to that effect.

Garner v. Missouri Dep't of Mental Health, 439 F.3d 958 (8th Cir. 2006) : Affirming a judgment in a Title VII action against a plaintiff who claimed to have been wrongfully discharged, the Court held there was no abuse of discretion in admitting testimony about unsubstantiated allegations against the plaintiff. The allegations were not admitted for their truth but to explain why the supervisor had suspended the plaintiff and started an investigation that ultimately led to the plaintiff's termination on unrelated charges.

[x] Rule 801(c) -- Examples of Nonhearsay -- Information Automatically Generated

United States v. Lamons, 532 F.3d 1251 (11th Cir. 2008) : Affirming the convictions of a former flight attendant for making a threatening telephone call regarding a bomb and setting fire to the lavatory of a plane, the Court held there was no error in admitting over hearsay and confrontation objections a compact disc of data made from telephone calls to the defendant's airline and a call report created from the disc. Neither piece of evidence was a "statement" under Rule 801(a), since "the statements in question are the statements of machines, not statements of persons." The Court observed that "the best way to advance the truth-seeking process with respect to [machine-generated] statements is not through cross-examination of the machine operator but through the process of authentication as provided for in *Federal Rule of Evidence 901(b)(9)*."

[xi] Rule 801(c) -- Examples of Nonhearsay -- Knowledge and Notice

[A] Rule 801(c) -- Civil Cases

Biegas v. Quickway Carriers, Inc., 573 F.3d 365 (6th Cir. 2009) : The plaintiff's decedent was killed when a tractor-trailer sideswiped his truck while he had stopped it on the shoulder and was inspecting the load. The Court reversed partial summary judgment granted for the defendant on comparative negligence, but found no abuse of discretion in admitting evidence that the passenger accompanying the decedent had within minutes following the accident told other witnesses who had stopped that he had told the decedent prior to the accident to "get out of the road, he was going to get hit." In the Court's view, what the declarant told the decedent was not hearsay because it "was not offered to prove that [the decedent] was in fact standing in the travel lane at the time of the accident, but rather to prove that [he] had been put on notice that he was in imminent danger and should have been aware of the risk he faced." When the declarant recounted this warning to the other witnesses, his statement was admissible as an excited utterance, since he had just witnessed a terrible accident that dismembered and killed his friend and employer and his statement was made before there was an opportunity to fabricate or misrepresent and while he was still under the stress of the excitement.

Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 518 F.3d 459 (7th Cir. 2008) : The Court affirmed judgments in consolidated appeals arising from the collapse of a wall of a canal. It held that a letter from a power company to a canal company was not hearsay, because it was offered only to show notice and thus indicate when the clock began to run on the statute of limitations.

[B] Rule 801(c) -- Examples of Nonhearsay -- Knowledge and Notice -- Criminal Cases

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) : Two pharmacists were convicted of conspiring with physicians to distribute large quantities of pain medications under cover of false prescriptions written by the physicians. Affirming, the Court found no abuse of discretion in the admission of extensive testimony recounting the *Texas Pharmacy Laws and Regulations*, which every Texas pharmacy is required to maintain and which discusses diversion of prescription drugs to illegal uses. The *TPLR* was probative of the defendants' states of mind, speaking to their claims that nothing about the circumstances aroused their suspicions as to the illegitimate prescriptions.

United States v. Harper, 463 F.3d 663 (7th Cir. 2006) : Affirming mail fraud convictions, the Court found no error in the admission of a letter sent by the government to the defendant's previous attorney reporting that the defendant had deposited unexplained cash into his accounts. The Court held that the letter was properly admitted to prove "its effect on [the defendant] -- that its receipt spurred him to cover his tracks -- and was strong circumstantial evidence of guilt."

[xii.1] Rule 801(c) -- Examples of Nonhearsay -- Opening the Door

United States v. Eagle, 515 F.3d 794 (8th Cir. 2008) : Affirming convictions for aggravated sexual abuse in Indian country, the Court held there was no plain error in the admission of evidence of a statement made by the victim to his mother, and of another statement made to a special agent who repeated it to the forensic investigator who testified. The

defendant had opened the door to both statements through the cross-examination of the mother and the investigator.

[xv] Rule 801(c) -- Examples of Nonhearsay -- Receipts, Registration Cards, Invoices

United States v. Serrano, 434 F.3d 1003 (7th Cir. 2006) : Affirming a conviction for aiding and abetting distribution of cocaine, the Court found no abuse of discretion in admitting automobile insurance cards, insurance declarations, and related correspondence found in, or in trash from, the house in which the defendant was arrested. The documents were not offered as proof of their contents but as circumstantial evidence that the defendant was more than a casual visitor to the house, which was a center for the drug scheme.

[xviii] Rule 801(c) -- Examples of Nonhearsay -- Statements Relied Upon

[A] Rule 801(c) -- Civil Cases

Royall v. National Ass'n of Letter Carriers, 548 F.3d 137 (D.C. Cir. 2008) : The Court affirmed summary judgment for the defendant in an employment discrimination case, finding no error in consideration of depositions recounting complaints regarding the plaintiff's performance. The evidence was not hearsay offered to prove that the complaints were valid; rather, it was nonhearsay offered to illuminate the employer's motives and actions.

McIntosh v. Partridge, 540 F.3d 315 (5th Cir. 2008) : The Court affirmed summary judgment for a former supervisor sued by a dentist who had worked in a state-operated residential facility for disabled persons but was terminated upon his return from active military service. It held that evidence of an outside expert's report on an investigation into the dentist's alleged misconduct and an internal e-mail reporting the poor condition of residents' teeth in the facility were properly admitted to demonstrate the basis for the supervisor's termination.

Maday v. Public Libraries, 480 F.3d 815 (6th Cir. 2007) : Affirming a judgment for the defendants in a former employee's age discrimination suit, the Court found no error when a supervisor was permitted to testify to accounts she had heard from others about the plaintiff's poor work performance and erratic behavior. The accounts were not hearsay when offered as the basis for the supervisor's taking disciplinary action against the plaintiff.

Jewett v. Anders, 521 F.3d 818 (7th Cir. 2008) : In a civil rights action for false arrest, the Court held that it was error to exclude testimony from the defendant that he had been advised by headquarters to proceed to a Wal-Mart and arrest a person of a particular description. He then went to the Wal-Mart and arrested the plaintiff, who met the description but who was not the person suspected of committing a crime. The report from headquarters to the officer was not hearsay: "The statement is offered to demonstrate the effect of this information on Officer Anders as he encountered Mr. Jewett and to explain the Officer's actions in detaining Mr. Jewett, not to prove the truth of the matter asserted. All that matters is that the statement was made and Officer Anders heard it." In *Talmage v. Harris, 486 F.3d 968 (7th Cir. 2007)* , an action against an insurer for bad faith failure to fully reimburse an insured for damages caused by a fire, the Court held that reports by appraisers, which estimated the amount of loss caused by the fire, were not hearsay. They were offered not to prove the actual amount of damages, but rather their effect on the insurer's state of mind; the disputed issue in the case was whether the insurer had knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

[B] Rule 801(c) -- Examples of Nonhearsay -- Statements Relied Upon -- Criminal Cases

United States v. Hamilton, 538 F.3d 162 (2d Cir. 2008) : The Court affirmed a marijuana conspiracy conviction, holding that testimony by a special agent that he learned beginning in 2003 that the defendant was living with his girlfriend in California on a particular street where he was found in 2004 was not hearsay, since it was offered to prove the government's efforts to find the defendant following his failure to appear in court after being arrested in 1999, and thus to rebut his claim that his indictment in 2005 was untimely.

United States v. Espinosa, 585 F.3d 418 (8th Cir. 2009) : Affirming a conviction for aggravated sexual abuse, the Court held that witness testimony about conversations with a child victim was not hearsay, because the witnesses did not testify to the substance of the statements, only that statements were made, and the testimony was offered to prove merely that conversations occurred and that witnesses took actions following those conversations.

United States v. Moran, 493 F.3d 1002 (9th Cir. 2007) : In a prosecution for tax fraud and wire and mail fraud, a defendant sought to introduce evidence that outside financial and legal experts had told her that the tax programs that she promoted were legal. The Court held that it was error to exclude the evidence as hearsay, as it was not offered for the truth of the matters asserted but to show the basis for a good faith belief inconsistent with the willfulness required for tax fraud.

United States v. Padron, 527 F.3d 1156 (11th Cir. 2008) : The Court affirmed a mail fraud conviction arising from a scheme to stage auto accidents and make false insurance claims. It found no abuse of discretion in the admission of police reports submitted to obtain advance funding from insurance companies. The reports were not hearsay, as they were not offered for their truth but simply to show how a coconspirator sought to obtain the funding.

[xix] Rule 801(c) -- Examples of Nonhearsay -- State of Mind

United States v. Quinones, 511 F.3d 289 (2d Cir. 2007) : The victim of a charged murder had set up a drug transaction with a defendant; when the defendant was arrested at the scene, the victim used an expletive to express that he was now in serious trouble, observing that the defendant was "going to know" that he had been responsible for the arrest. Affirming racketeering and murder convictions, the Court held there was no error in admitting the victim's statements, as they were nonhearsay circumstantially indicating his then-existing fearful state of mind, which indicated why he made himself scarce after the defendant's arrest and why it took the defendants months to locate him before luring him to his death.

United States v. Hyles, 479 F.3d 958 (8th Cir. 2007) : The Court affirmed a murder-for-hire conviction, finding no abuse of discretion when writing on the back of photographs was admitted. The photographs depicted the defendant, a coconspirator, and a car that the defendant gave to the coconspirator after the murder. The writings were hearsay because they were not offered to prove the facts stated ("Da Pony G 'Ride,' " " '2' of Da Most Wanted"), but as evidence of the importance of the car to the coconspirator and of the association between the men. The Court added that "it is the fact that there is writing on the back of these pictures and that [the men] found the pictures important enough to write on that makes them important; what exactly was written on them does not matter."

[xxii] Rule 801(c) -- Examples of Nonhearsay -- Tools of the Trade

United States v. Mendez, 514 F.3d 1035 (10th Cir. 2008) : Affirming a conviction for drug trafficking offenses, the Court held that a drug ledger listing names with dollar amounts was not hearsay, because it was not offered for the truth of the matters asserted therein but rather as a tool of the drug trade. For that reason, it was also not "testimonial" and thus its admission was not a *Confrontation Clause* violation.

[xxiii] Rule 801(c) -- Examples of Nonhearsay -- Trade Inscriptions and Identifying Marks

United States v. Buchanan, 604 F.3d 517 (8th Cir. 2010) : In a drug distribution prosecution, the government introduced evidence that a key bearing the number "2010" was found on the defendant's person during execution of a search warrant and that the key matched a large safe bearing the same number at an alleged "stash house." Affirming, the Court found no abuse of discretion in admitting the evidence over hearsay and best evidence objections. The numbers on the key and the safe were not hearsay because the were simply identifying marks and were neither assertions that the items matched nor offered to such an assertion. As for the best evidence objection, it was within the Judge's discretion to treat the written numbers as simple marks on a chattel identifying it; there was "little danger that

the witness would inaccurately remember the terms of the 'writing'," and the numeric inscription was not critical to the case, since the safe was merely collateral evidence of the crime.

[xxiii.1] Rule 801(c) -- Examples of Nonhearsay -- Unsuccessful Search of Records

United States v. Mendez, 514 F.3d 1035 (10th Cir. 2008) : To prove that the Mexican-born defendant had not entered the United States legally, an immigration agent testified that he searched a nationwide database of entry documents and found no match for the name and SSN the defendant had provided at his arrest. Affirming, the Court held that the testimony was not hearsay, and thus not a confrontation violation, because the person who conducted the data search testified at trial and no record was received into evidence.

[xxiv] Rule 801(c) -- Examples of Nonhearsay -- Verbal Acts

United States v. Childs, 539 F.3d 552 (6th Cir. 2008) : The Court affirmed a conviction for conspiracy to commit murder for hire, finding no error when a witness was permitted to testify that, in the presence of the defendant, an indicted co-conspirator had asked the witness if she "knew anyone who could kill someone for her." Although the statement had been admitted under Rule 801(d)(2)(E), the Court found that it was not hearsay at all and was "admissible evidence of a verbal act," offered not for the truth of the matter asserted but for "the fact that the declaration was made."

[3] Rule 801(d)(1)(A) -- Statements Which Are Not Hearsay -- Prior Statement by Witness -- Inconsistent
[Go To Main]

[b] Rule 801(d)(1)(A) -- Grand Jury Testimony

United States v. Butterworth, 511 F.3d 71 (1st Cir. 2007) : The Court affirmed drug convictions, holding that a witness' grand jury testimony was properly admitted for its truth as a prior inconsistent statement. When the witness contradicted her grand jury testimony on ten occasions, the prosecutor had attempted to refresh recollection; although the witness would then "somewhat reluctantly adopt her grand jury answers, her trial testimony was peppered with claims that she did not know or could not remember the answers she gave the grand jury." The Court reasoned that "testimony need not be diametrically opposed or logically incompatible to be considered inconsistent under the rule."

United States v. Mayberry, 540 F.3d 506 (6th Cir. 2008) : An accomplice testified against the defendant before a grand jury, but claimed a loss of memory when called as a witness at trial. Affirming a conviction for felon firearm possession, the Court held there was no error in admitting the accomplice's grand jury testimony as substantive evidence, as the claimed loss of memory was inconsistent with the testimony, the accomplice was subject to cross-examination by the defense, and the testimony had been given subject to penalties of perjury. There was no *Confrontation Clause* issue because the witness testified at the trial.

[c] Rule 801(d)(1)(A) -- Inconsistency Required

United States v. Butterworth, 511 F.3d 71 (1st Cir. 2007) : The Court affirmed drug convictions, holding that a witness' grand jury testimony was properly admitted for its truth as a prior inconsistent statement. When the witness contradicted her grand jury testimony on ten occasions, the prosecutor had attempted to refresh recollection; although the witness would then "somewhat reluctantly adopt her grand jury answers, her trial testimony was peppered with claims that she did not know or could not remember the answers she gave the grand jury." The Court reasoned that "testimony need not be diametrically opposed or logically incompatible to be considered inconsistent under the rule."

United States v. Cisneros-Gutierrez, 517 F.3d 751 (5th Cir. 2008) : An accomplice of the defendant in a methamphetamine distribution conspiracy was arrested and interviewed and had signed a factual resume saying that "[h]e agrees that" the defendant had delivered drugs to him. When the accomplice pleaded guilty, he admitted during his

plea hearing that the contents of the factual resume were true. Just before the defendant was brought to trial several years later, the accomplice told the prosecutors that he did not want to testify and that he was having problems remembering things. At trial he exhibited extensive memory problems and the government was permitted to treat him as an adverse witness and to use leading questions. When he testified that the defendant had not agreed to deliver drugs to him, his factual resume was admitted. Affirming, the Court held that the factual resume was admissible as substantive evidence under Rule 801(d)(1)(A). "The breadth and depth of [the witness'] claimed memory loss is facially suspect to say the least," so his testimony was opened to inconsistent statements. The direct testimony denying agreement to deliver was "not a *per se* repudiation of the factual resume," but statements "diametrically opposed or logically incompatible" are not required. And the witness had admitted under oath at the plea hearing that the factual resume was "true and correct in every respect," so the resume was adopted in "testimony ... given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding"; it was not simply a statement found in the notes, reports, or affidavits prepared by law enforcement officers, which have been found to fall outside the Rule.

[e] Rule 801(d)(1)(A) -- Memory Problems; Vague Testimony

United States v. Mayberry, 540 F.3d 506 (6th Cir. 2008) : An accomplice testified against the defendant before a grand jury, but claimed a loss of memory when called as a witness at trial. Affirming a conviction for felon firearm possession, the Court held there was no error in admitting the accomplice's grand jury testimony as substantive evidence, as the claimed loss of memory was inconsistent with the testimony, the accomplice was subject to cross-examination by the defense, and the testimony had been given subject to penalties of perjury. There was no *Confrontation Clause* issue because the witness testified at the trial.

United States v. Tran, 568 F.3d 1156 (9th Cir. 2009) : Although it reversed marijuana convictions on other grounds, the Court found no abuse of discretion in the admission of a statement in a plea agreement by a codefendant whose testimony at trial was "reluctant," "vague," and "evasive." It noted that "trial judges must retain a high degree of flexibility in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness's trial testimony to permit its use in evidence."

[g] Rule 801(d)(1)(A) -- Other Proceedings

United States v. Cisneros-Gutierrez, 517 F.3d 751 (5th Cir. 2008) : An accomplice of the defendant in a methamphetamine distribution conspiracy was arrested and interviewed and had signed a factual resume saying that "[h]e agrees that" the defendant had delivered drugs to him. When the accomplice pleaded guilty, he admitted during his plea hearing that the contents of the factual resume were true. Just before the defendant was brought to trial several years later, the accomplice told the prosecutors that he did not want to testify and that he was having problems remembering things. At trial he exhibited extensive memory problems and the government was permitted to treat him as an adverse witness and to use leading questions. When he testified that the defendant had not agreed to deliver drugs to him, his factual resume was admitted. Affirming, the Court held that the factual resume was admissible as substantive evidence under Rule 801(d)(1)(A). "The breadth and depth of [the witness'] claimed memory loss is facially suspect to say the least," so his testimony was opened to inconsistent statements. The direct testimony denying agreement to deliver was "not a *per se* repudiation of the factual resume," but statements "diametrically opposed or logically incompatible" are not required. And the witness had admitted under oath at the plea hearing that the factual resume was "true and correct in every respect," so the resume was adopted in "testimony ... given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding"; it was not simply a statement found in the notes, reports, or affidavits prepared by law enforcement officers, which have been found to fall outside the Rule.

[4] Rule 801(d)(1)(B) -- Statements Which Are Not Hearsay -- Prior Statement by Witness -- Consistent [Go To Main]

[d] Rule 801(d)(1)(B) -- Corroborating Witness' Testimony

United States v. Eagle, 498 F.3d 885 (8th Cir. 2007) : The Court affirmed a conviction for involuntary manslaughter in Indian country, but it held it was error to permit an officer to testify to statements made by three witnesses who were in the defendant's car at the time of the accident that resulted in death. The statements were offered as consistent with the witnesses' testimony, but there was no claim that they had recently fabricated their testimony.

[i] Rule 801(d)(1)(B) -- Prior Statement of Cooperating Witness

United States v. Chang Da Liu, 538 F.3d 1078 (9th Cir. 2008) : The Court affirmed convictions for sex trafficking, finding no error in the admission of prior consistent statements by cooperating witnesses. The defendant had challenged the witnesses' credibility by presenting evidence that they had received financial assistance from the FBI and implied that they fabricated their testimony in order to receive the assistance. The Court commented that admitting testimony about the content of statements made before the FBI began providing financial assistance was "a textbook example of when to apply *Federal Rule of Evidence 801(d)(1)(B)*."

[j] Rule 801(d)(1)(B) -- Rehabilitation Use Only

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) : The Court vacated convictions for conspiring to provide material support to designated terrorist organizations (Hamas and Al-Qaeda). The defense relied on an entrapment defense, and the focus of the case was on the defendants' predisposition. The Court held it was an abuse of discretion to admit a key informant-witness' handwritten notes purporting to memorialize the contents of his initial meeting with an FBI agent, since the notes were not shown to have been made before a motive to falsify arose. The Court added that the notes would probably have been inadmissible even for the limited purpose of rehabilitating the witness' credibility, since the defendants did not impeach the witness with prior inconsistent statements and the notes had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony.

United States v. Hoover, 543 F.3d 448 (8th Cir. 2008) : The Court affirmed a conviction for using a firearm in connection with a drug trafficking offense. It held that, whether or not witnesses' prior statements were made before a motive to falsify arose, there was no abuse of discretion in admitting the statements to show that there was really no inconsistency between the prior statements and the trial testimony. The jury was properly instructed that the statements could only be used to evaluate the witnesses' credibility, insofar as they might explain the alleged inconsistencies.

[n] Rule 801(d)(1)(B) -- Suggestion of Fabrication

[ii] Rule 801(d)(1)(B) -- Suggestion of Fabrication -- Criminal Cases

United States v. Washington, 434 F.3d 7 (1st Cir. 2006) : The Court affirmed a conviction for distribution of cocaine base, finding no abuse of discretion in admitting the prior consistent statement of a government witness. Defense counsel had suggested that the entirety of the witness' statement was false, that the witness was a habitual liar, and that he had a motive to lie to please the DEA. This was a sufficient attack, said the Court, to justify admission of a prior consistent statement.

United States v. Burden, 600 F.3d 204 (2d Cir. 2010) : In a RICO prosecution arising from a drug trafficking and murder conspiracy, after a witness testified that he had seen one defendant commit a shooting, the defense introduced a statement the witness made to police in October 1999 in which he said he was not sure the defendant was the shooter. In response, the government introduced a November 1999 statement in which the witness identified the defendant as the shooter. Affirming, the Court held that the latter statement was properly admitted as a prior consistent statement offered to rebut the defense suggestion that the witness' testimony was a recent fabrication.

United States v. Frazier, 469 F.3d 85 (3d Cir. 2006) : A police officer's testimony at the trial of a crack cocaine case was far more damaging to the defendant than was his suppression hearing testimony. The defendant contended that the

officer was telling the truth at the suppression hearing, and on cross-examination inquired into the discrepancies between the suppression hearing testimony and the trial testimony. The government offered statements made around the time of the defendant's arrest that were consistent with the officer's trial testimony. Affirming, the Court found no abuse of discretion in admitting the prior consistent statements. It rejected the defendant's argument that he had not raised a charge of improper motive or recent fabrication, noting that defense counsel asserted on cross-examination that the witness could not have been merely mistaken in giving two different and detailed accounts of how he discovered the crack cocaine; that he repeatedly asked the witness about all the preparations he had made to testify truthfully and accurately at the suppression hearing; and that he acted skeptically to the witness's explanation of why he left matters out of his account when testifying at the suppression hearing.

United States v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008) : At the trial of a sheriff's officer for acting under color of law to deprive three women of their right to bodily integrity by committing sexual assaults upon them, one of the women delivered her testimony in Spanish through an interpreter and then a police officer who interviewed her retold in English the story of the assault as she had told it to him. The Court held the officer's testimony was not an admissible prior consistent statement, as cross-examination of the woman regarding her civil suit against the defendant to bring out discrepancies in dates was not a sufficient suggestion of fabrication, but the error was harmless. The Court also held that an officer's account of another victim's statement was admissible rebuttal under Rule 801(d)(1)(B) because references to a pending civil case in the defense cross-examination of that victim were not incidental but made to suggest a mercenary purpose to her testimony.

[o] Rule 801(d)(1)(B) -- Timing of Prior Consistent Statement

United States v. Jahagirdar, 466 F.3d 149 (1st Cir. 2006) : The victim in a sexual abuse case was cross-examined regarding a motive to fabricate -- specifically, that she had contacted lawyers to try to obtain money damages from the defendant. The government responded by introducing a statement describing the assault that the victim made to the police shortly after the incident. Affirming, the Court concluded that any difference between the statement made to the officer and the victim's testimony at trial was superficial and that both statements were consistent in including the central point in dispute, i.e., whether the victim had been penetrated. The Court also rejected an argument that the statement to the police officer was made after the alleged attack and so did not precede the motive to falsify; it found that the motive to falsify arose after the victim spoke to the police officer and concluded that there was "no indication that [the victim] had a civil suit in mind when interviewed by the trooper not long after the incident."

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) : The Court vacated convictions for conspiring to provide material support to designated terrorist organizations (Hamas and Al-Qaeda). The defense relied on an entrapment defense, and the focus of the case was on the defendants' predisposition. The Court held it was an abuse of discretion to admit a key informant-witness' handwritten notes purporting to memorialize the contents of his initial meeting with an FBI agent, since the notes were not shown to have been made before a motive to falsify arose. The Court added that the notes would probably have been inadmissible even for the limited purpose of rehabilitating the witness' credibility, since the defendants did not impeach the witness with prior inconsistent statements and the notes had no rebutting force beyond the mere fact that the witness had repeated on a prior occasion a statement consistent with his trial testimony.

United States v. Frazier, 469 F.3d 85 (3d Cir. 2006) : A police officer's testimony at the trial of a crack cocaine case was far more damaging to the defendant than was his suppression hearing testimony. The defendant contended that the officer was telling the truth at the suppression hearing, and on cross-examination inquired into the discrepancies between the suppression hearing testimony and the trial testimony. The government offered statements made around the time of the defendant's arrest that were consistent with the officer's trial testimony. Affirming, the Court found no abuse of discretion in admitting the prior consistent statements. It rejected a defense argument that the party seeking to admit the prior consistent statement should have the burden of proving the specific point at which the witness's motive to falsify arose, as nothing in the Supreme Court's *Tome* decision imposed such a burden. The question of when a witness's motive to falsify arose is to be left to the Trial Judge, whose "determination of the premotive requirement -- which

should be made after an examination of the parties' positions, the record, and the Court's own judgment -- will not be reversed unless no reasonable person would adopt the district court's view." In this case, because the defendant argued that the officer was telling the truth at the suppression hearing, the motive to falsify must have arisen some time after that testimony, so there was no error in the finding that the consistent statements, made around the time of the arrest, predated the motive to falsify.

United States v. Bercier, 506 F.3d 625 (8th Cir. 2007) : Reversing sexual abuse convictions, the Court held it was an abuse of discretion to permit a doctor at the hospital to testify to an extensive interview he conducted with the victim on the morning after the alleged assault. The hearsay statements were not admissible as prior consistent statements of the victim, because the defendant argued that the victim fabricated her story of non-consensual contact immediately after leaving his bedroom, so the statements made to the doctor the next morning did not pre-date the motive to falsify. In *United States v. Gettel, 474 F.3d 1081 (8th Cir. 2007)* , although it affirmed firearms convictions, the Court held that it was error to admit evidence of a witness' prior consistent statement to police officers regarding the defendant's involvement. The defense had contended that the witness was lying and implicating the defendant in order to get a break on his own charges by cooperating with the government. Because the consistent statement was made while the witness was incarcerated and facing those charges, it was not made before the motive to lie arose.

United States v. Washington, 462 F.3d 1124 (9th Cir. 2006) : Affirming a conviction for armed bank robbery, the Court found no abuse of discretion in admitting an agent's statements that during an early interviews with the cooperating witnesses, they had identified the defendant as one of the bank robbers. Defense counsel, in cross-examining the witnesses had asked questions suggesting that, because of their plea agreements, the two men had colluded with each other to make up stories implicating the defendant. Because the statements to the agent were made months before the witnesses' plea agreement, they were admissible as prior consistent statements to rebut the accusations of recent fabrication and improper motive.

McInnis v. Fairfield Communities, Inc., 458 F.3d 1129 (10th Cir. 2006) : The Court affirmed a judgment for the plaintiff in a Title VII gender discrimination action, finding no abuse of discretion in the exclusion of emails written by a supervisor. The statements were not admissible under *Rule 801(d)(1)(B)*, because they were made after the controversy, and thus the declarant's improper motive, arose.

United States v. Vance, 494 F.3d 985 (11th Cir. 2007) : The Court affirmed a conviction for knowingly attempting to travel in foreign commerce for the purpose of engaging in illicit sexual conduct, finding no plain error in the exclusion of a statement the defendant made to his cousin as to the purpose of his going to Costa Rica. At the time the alleged statement was made, the defendant had already sent an e-mail to an undercover officer expressing his interest in engaging in illegal sexual activity with minors, which meant he mad a motive to falsify when he spoke to the cousin.

[5] Rule 801(d)(1)(C) -- Statements Which Are Not Hearsay -- Prior Statement by Witness -- Identification [Go To Main]

[c.1] Rule 801(d)(1)(C) -- Nontestifying Declarant

United States v. Baker, 432 F.3d 1189 (11th Cir. 2005) : Reviewing convictions for a cocaine distribution conspiracy, the Court held that two statements of identification were inadmissible hearsay, because the declarant was not present for cross-examination at trial.

[6] Rule 801(d)(2)(A) -- Statements Which Are Not Hearsay -- Admission by Party-Opponent -- Party's Own Statement [Go To Main]

[b.1] Rule 801(d)(2)(A) -- Class Action

Pierce v. County of Orange, 526 F.3d 1190 (9th Cir. 2008) : In this class action brought on behalf of pretrial detainees, the Court found no error in the admission of hearsay statements by class members under Rule 801(d)(2)(A). The Court explained:

> For an absent member of a Rule 23(b)(2) class to be treated as a party -- and, hence, as a party representative of the class as a whole -- for Rule 801 purposes there must be some mechanism to ensure that he or she will represent the interests of the class... . [P]laintiffs disclosed the identities of forty-five inmates they expected to have testify regarding prison conditions... . We are satisfied that, on the facts of this case, reliance on statements by detainees who had been disclosed by plaintiffs' counsel as potential witnesses adequately protected the class from the risk of having the class's interests undermined by unrepresentative class members.

In a footnote, the Court emphasized that class members' statements will not always satisfy the "party-opponent" requirement of Rule 801(d)(2)(A). It noted that absent class members "are considered parties for some purposes and not for others."

[d] Rule 801(d)(2)(A) -- Constitutional Problems

In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93 (2d Cir. 2008) : The Court affirmed convictions for al Queda terrorism in 1998, finding no *Bruton* violation in the admission of an FBI agent's report of an interview with a codefendant, where the defendant's name had been redacted and the defendant could be identified as being incriminated only through other evidence introduced at trial. The Court also held that coconspirators' post-arrest admissions were properly admitted only against the declarants and not for the purpose of establishing the existence of a conspiracy or conduct in furtherance, although Circuit precedent at the time of trial (pre-*Crawford*) would have permitted admission for the latter purpose against non-testifying conspirators.

United States v. Harper, 527 F.3d 396 (5th Cir. 2008) : The Court affirmed convictions for drug offenses, finding no violation of a defendant's confrontation rights when his nontestifying codefendant's confession to police was admitted into evidence. The Court noted that the confession was "testimonial" under *Crawford*, but concluded that *Crawford*'s historical approach to the confrontation right did not seem to have replaced the "pragmatic" approach of *Bruton*, *Richardson*, *Cruz*, and *Gray* in resolving whether jury instructions preclude a *Sixth Amendment* violation. Because the codefendant's statements did not directly or obviously implicate the defendant in the absence of other evidence, the jury instruction to admit the statements only against the declarant was sufficient under *Richardson*. In *United States v. Harper, 527 F.3d 396 (5th Cir. 2008)* , a drug prosecution, the Court held it was error to admit testimony by an agent regarding a non-testifying codefendant's statements that he owned some of the narcotics and firearms found in the house where the defendants were arrested. Although the jury was instructed not to consider the statements as evidence against the defendant, the Court held that, under *Crawford,* the codefendant was a "witness[] against the accused" because his statements were "testimony ... for the purpose of establishing or proving some fact." The error was harmless, however, because there was no " 'overwhelming probability of [the jury's] inability to' follow the judge's admonition to consider the statement as evidence only against [the codefendant]."

United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007) : Two defendants in a five-defendant trial appealed their convictions for defrauding their employer, an insurance company. At trial, the Judge admitted redacted deposition testimony previously given by the three other defendants in a civil action brought by the insurance company against all five. Those depositions were offered as party-admissions against each deponent; the term "another person" was substituted any time the deponent referred to one of the appealing defendants by name. The two appealing defendants argued that the admission of the redacted deposition testimony violated their right to confrontation, but the Court held that the redactions were sufficient to ensure that the deposition testimony would not be used against either of the

defendants. The Court reasoned that "[b]ecause the government was prosecuting multiple defendants for participation in an alleged conspiracy to defraud CICA, the declarant-codefendants' deposition statements did not ineluctably implicate Vasilakos or Lent. The effect of the redaction methodology used in this case is distinguishable from the circumstances in *Gray* [*v. Maryland*], in which the Supreme Court noted that the inferences at issue referred 'directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.' "

United States v. Tolliver, 454 F.3d 660 (7th Cir. 2006) : Affirming convictions for conspiracy to distribute crack cocaine, the Court held there was no *Confrontation Clause* violation when tape recordings of a drug transaction between a defendant and a confidential informant were admitted. The defendant's statements were party admissions, which, as nonhearsay, are not subject to the prohibition annunciated in *Crawford*. Furthermore, the defendant did not make the statements with any expectation that they would be used against him in a criminal trial -- if anything, he believed the exact opposite -- and they were not recitals of past events but "candid, real-time comments about drug transactions in progress," so they were not "testimonial" under *Crawford* and *Davis v. Washington, 547 U.S. 813 (2006)* . The confidential informant's statements were not admitted for their truth, but only to put the defendant's admissions into context, so they were not hearsay and not subject to *Crawford* and *Davis*.

United States v. Singh, 494 F.3d 653 (8th Cir. 2007) : Affirming convictions for methamphetamine distribution, the Court rejected the defendants' argument that there had been a *Bruton* violation in admitting a statement by his non-testifying codefendant that tended to incriminate him. The statements were admissible as coconspirator statements under Rule 801(d)(2)(E), and " *Bruton* ... does not preclude admission of otherwise admissible statements by a co-conspirator under Rule 801(d)(2)(E)." The Court also held there was no *Crawford* violation, as the statements were not testimonial.

United States v. Ramirez, 479 F.3d 1229 (10th Cir. 2007) : Affirming convictions for drug trafficking offenses, the Court rejected a defendant's argument that there had been a *Bruton* violation in admitting evidence of conversations between two codefendants that tended to incriminate him. The conversations were admissible as coconspirator statements under Rule 801(d)(2)(E), and " '[t]he *Bruton* doctrine does not rule situations ... in which the evidence is admissible under a well recognized exception to the hearsay rule.' " The Court also held there was no *Crawford* violation, as the statements were not testimonial.

United States v. Brown, 441 F.3d 1330 (11th Cir. 2006) : Affirming a capital murder conviction, the Court held that a statement the defendant made to a bystander, identifying himself just before the murder, was admissible as a party-admission under *Rule 801(d)(2)(A)*. Admission of the statement did not violate the *Confrontation Clause*, because a party "cannot seriously claim that his or her own statement should be excluded because it was not made under oath or subject to cross-examination."

[e] Rule 801(d)(2)(A) -- Depositions and Prior Testimony

Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070 (10th Cir. 2009) : The Court affirmed a judgment for a former employer who sued to rescind a settlement agreement on the ground that the former employee altered the agreement before signing and returning it to the company to be signed. The Court held that the company was properly permitted to read portions of the former employee's deposition at trial. Because the deposition testimony was an admission, no showing of unavailability was required.

[i] Rule 801(d)(2)(A) -- Interrelated Statements

United States v. Valerio, 441 F.3d 837 (9th Cir. 2006) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion in admitting a tape recording containing statements by a confidential informant in a conversation with the defendant. The informant's statements were introduced only to provide context to the defendant's

statements, which were admissions, and the jury was instructed not to consider the informant's statements for their truth.

[p.1] Rule 801(d)(2)(A) -- Receipts

United States v. Miller, 547 F.3d 718 (7th Cir. 2008) : The Court affirmed firearms convictions, holding that a folder of receipts showing that one defendant had ordered and paid for gun parts was admissible as an admission to the extent that they embodied the defendant's statements, and as business records to the extent that they reflected the seller's business records.

[s] Rule 801(d)(2)(A) -- Statements Offered in the Declarant's Favor

Agere Sys., Inc. v. Advanced Environmental Tech. Corp., 602 F.3d 204 (3d Cir. 2010) : Vacating the judgment in a CERCLA contribution action, the Court held it was error to admit a proposed stipulation against a party who had refused to sign it. Although the stipulation was properly an admission against the party who proposed it, it was only inadmissible hearsay with respect to the party who refused to sign.

[s.1] Rule 801(d)(2)(A) -- Substantive and Impeachment Use

United States v. Disantis, 565 F.3d 354 (7th Cir. 2009) : Affirming the conviction of a police officer for depriving a suspect of the right to be free from unreasonable seizure, the Court held that an inconsistent statement by the defendant in a police report was admissible as a personal admission. The defendant complained that an instruction to the jury that it could use the statement for its truth and also in deciding on the truthfulness of the defendant's trial testimony unduly emphasized the defendant's inconsistent statements as compared to other witnesses, but the Court pointed out that the Rules of Evidence treat a party's admission differently from most out-of-court statements by non-parties, by giving them both substantive and impeachment effect.

[t] Rule 801(d)(2)(A) -- Summary Judgment Use

In re McLain, 516 F.3d 301 (5th Cir. 2008) : A bankruptcy trustee sought to reopen a discharge for failure to disclose pre-petition assets, but the Trial Judge granted summary judgment to the debtor on the ground that a ledger sheet offered by the trustee was insufficient to create any genuine issue of material fact because it was insufficiently authenticated as a record of all the debtor's transactions during a particular period. Reversing, the Court held that the ledger sheet, which had been attached by the debtor to his summary judgment motion, was a party admission authenticated by the consistency of its entries with both bank records and a spreadsheet drafted by the debtor and admitted into evidence.

[7] Rule 801(d)(2)(B) -- Rule Statements Which Are Not Hearsay -- Admission by Party-Opponent -- Adoption or Belief in Truth [Go To Main]

[e] Rule 801(d)(2)(B) -- Adoption by Silence

United States v. Duval, 496 F.3d 64 (1st Cir. 2007) : The Court affirmed a conviction for felon firearm possession, finding no error in the admission of testimony by an informant that a codefendant had said that he and the defendant wanted to sell firearms in their possession. The conversation between the informant and the codefendant took place in a small room, in the presence of the defendant, from which it could reasonably be inferred that the defendant heard his accomplice's statements. The defendant's silence when the statements were made gave rise to a reasonable inference that he adopted them, making them admissible against him as party admissions.

[g] Rule 801(d)(2)(B) -- Documents Offered in Court or Arbitration

United States v. Hernandez-Hernandez, 431 F.3d 1212 (9th Cir. 2005) : The Court held there was no error when the Judge finding a sentencing enhancement relied on a stipulated document that served as the factual basis for the defendant's state guilty plea. Although a Judge dissenting in part argued that the defendant did not specifically confirm the facts in the document at his plea hearing, the Court noted that "criminal defendants are bound by the admissions of fact made by their counsel in their presence and with their authority."

[i] Rule 801(d)(2)(B) -- Insufficient Showing of Adoption

United States v. Williams, 445 F.3d 724 (4th Cir. 2006) : In a trial for felon firearm possession, the prosecution proved the defendant's possession of the weapon (which was never found) through evidence circumstantially linking the defendant to a murder. One witness testified that the defendant had been acting strangely, and when the asked him what was wrong and "did he, you know, did he kill somebody or what?," the defendant "didn't say anything. He was blank." Affirming, the Court agreed with the defendant that his silence was not admissible as an adoptive admission because the question was not accusatory. The jury could not reasonably view the failure to answer as an adoption of an implicit accusatory statement. However, admission of the interchange was not error, since neither the question nor the silent response was being offered for its truth but only as circumstantial evidence of the defendant's strange behavior around the time of the murder. If admission were error, it would be harmless as cumulative, since another witness testified that when she asked the defendant whether he had killed the victim, he responded that "[i]t was none of [her] concern," and that "what you don't know won't hurt you."

Tober v. Graco Children's Products, Inc., 431 F.3d 572 (7th Cir. 2005) : In an action brought by parents whose child was asphyxiated while in an infant swing, the plaintiffs offered a letter sent by the Consumer Product Safety Commission to the manufacturer, which letter stated that the Commission had made a preliminary determination that the swing presented a substantial risk of injury, as an adoptive admission, because the manufacturer never responded to the letter. Affirming a judgment for the defendants, the Court found no abuse of discretion in exclusion of the letter. The Commission had made only a preliminary determination, and that the letter did not mandate any corrective action; under these circumstances, "failure to respond was not so unnatural as to support an inference of acquiescence to the commission's preliminary findings."

United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) : Affirming in part a judgment for the defendant state in a suit by the United States alleging that the state was in violation of the National Voter Registration Act, the Court found no abuse of discretion when the Judge excluded the substance of responses by local election agencies to a survey by the Election Assistance Commission. The state had "merely passed the LEA's survey responses along to the federal government, with no indication that the state was adopting the truth of the responses," and it had indicated that additional time was needed.

United States v. Ramirez, 479 F.3d 1229 (10th Cir. 2007) : Affirming convictions for drug trafficking offenses, the Court held it was error (but harmless) to admit as adoptive admissions two cellular phone receipts possessed by one defendant at the time of his arrest. The receipts were dated only a week earlier, indicating only a short time of possession; there was no evidence that the defendant possessed the phones to which they related; the defendant's name was not on the bills; and the registrants of the phones and the individuals who paid the bills were never identified. "Because the facts fail to tie Mr. Vasquez to the receipts other than by possession, we conclude he did not adopt their contents," and their admission into evidence was error.

[k] Rule 801(d)(2)(B) -- Police Interrogations

United States v. Lafferty, 503 F.3d 293 (3d Cir. 2007) : The Court reversed a conviction for burglarizing a federally-licensed firearms dealer because statements made by an accomplice during a joint interrogation had been erroneously treated as admissible as adoptive admissions. The Court held that the defendant had not waived her right to remain silent, so considering her silence when the accomplice made incriminating statements as being an adoption of

those statements violated her *Fifth Amendment* rights.

[8] Rule 801(d)(2)(C) -- Statements Which Are not Hearsay -- Admission by Party-Opponent -- Authorized Statement [Go To Main]

[e] Rule 801(d)(2)(C) -- Interpreters

United States v. Vidacak, 553 F.3d 344 (4th Cir. 2009) : The defendant was convicted of lying on his immigration application, by failing to report his service in the Serbian Army during the Bosnian War. He argued that statements from a Serbian interpreter, who had translated statements he had made to an investigator, were hearsay of his statements to the investigator. Affirming, the Court noted that "an interpreter is no more than a language conduit and therefore his translation does not create an additional level of hearsay," absent unusual circumstances casting significant doubt upon the accuracy of the translation. The Court found none of the factors that have been cited in applying the exception: an interested party supplying the interpreter; an interpreter with a motive to mislead or distort; an interpreter whose qualifications and language skills are questionable; and actions taken subsequent to the conversation inconsistent with the statements translated.

Germano v. International Profit Ass'n, Inc., 544 F.3d 798 (7th Cir. 2008) : The Court reversed summary judgment for an employer sued by a job applicant who claimed a violation of the Americans with Disabilities Act when he was denied employment as a tax advisor because of his severe hearing impairment. It found error in the exclusion of testimony by the plaintiff as to statements made by an agent of the defendant during a telephone conversation in which the plaintiff used a telecommunications relay service's communications assistant to assist him to communicate. The defendant argued that the use of the communications assistant amounted to hearsay, but the Court noted that it had long presumed the trustworthiness of statements reported by an interpreter or translator, and it pointed out that the plaintiff did not supply the communications assistant, the assistant had no motive to distort or mislead, the assistant's qualifications and language skills are prescribed by federal regulations, and the defendant's actions after the conversations were consistent with the translated statements.

United States v. Sanchez-Godinez, 444 F.3d 957 (8th Cir. 2006) : When the defendant was interviewed by a DEA agent following his arrest and indicated a preference for speaking in Spanish, an ATF agent served as interpreter. The Court affirmed a conviction for possession of marijuana with intent to distribute, but noted that the DEA agent's testimony regarding the defendant's interview raised hearsay concerns. Generally an interpreter is viewed as an agent of the defendant, but in this case the ATF agent testified that he was acting as both a translator and a federal law enforcement agent and thus he was more than a "language conduit." The Court concluded, however, that even if the DEA agent's testimony was hearsay, it was harmless error in view of the fact that the ATF agent testified to the interview and the defendant was sufficiently proficient in English that he was able to understand the ATF agent's translation and assure its accuracy.

[g] Rule 801(d)(2)(C) -- Personal Knowledge

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) : This opinion supersedes the one annotated in the Main Volume of the *Manual*.

[g.1] Rule 801(d)(2)(C) -- Proving Authority

Carlisle v. Deere & Co., 576 F.3d 649 (7th Cir. 2009) : In a breach of warranty action against the manufacturer of an engine used on a commercial tree grinder, the plaintiffs sought to prove that the defendant had installed a critical component on the engine by introducing evidence from the dealer that had replaced the grinder's original engine with the engine at issue. Affirming summary judgment for the defendant, the Court held that the dealer's statements were not admissible under Rule 801(d)(2)(C) because the warranty on the engine explicitly provided that no dealer had any

authority to make any representations on behalf of the manufacturer, and the statements were not admissible under Rule 801(d)(2)(D) because the dealer was not the manufacturer's agent, as the latter did not have control over the former's day-to-day operations or otherwise make it an agent.

[h] Rule 801(d)(2)(C) -- Statements by Counsel

Butynski v. Springfield Term. Ry., 592 F.3d 272 (1st Cir. 2010) : The Court affirmed a judgment finding the defendant negligent and the plaintiff contributorily negligent in an FELA case. It held that the defense had not in its opening statement and summation admitted that the plaintiff was not negligent, since counsel had not in either argument made a clear and unambiguous concession regarding the plaintiff's due care.

Gill v. Maciejewski, 546 F.3d 557 (8th Cir. 2008) : The Court affirmed a judgment for an arrestee against a university police officer in an action claiming use of excessive force. It found no abuse of discretion in the exclusion of a statement made during the underlying criminal trial by the arrestee's attorney: "So almost four months after this incident we still don't know if it was Officer Maciejewski or Sergeant Reineke or Officer Hermes who did the knee drop. No one has accepted responsibility." The Court held that the defendant, Maciejewski, took unwarranted liberties in offering the statement, because when considered in context it was clear that the arrestee's attorney was not suggesting that the arrestee did not know who assaulted him but was calling attention to Maciejewski's failure to attend and testify at the criminal trial.

United States v. Hernandez-Hernandez, 431 F.3d 1212 (9th Cir. 2005) : The Court held there was no error when the Judge finding a sentencing enhancement relied on a stipulated document that served as the factual basis for the defendant's state guilty plea. Although a Judge dissenting in part argued that the defendant did not specifically confirm the facts in the document at his plea hearing, the Court noted that "criminal defendants are bound by the admissions of fact made by their counsel in their presence and with their authority."

Rooms v. SEC, 444 F.3d 1208 (10th Cir. 2006) : Affirming an SEC decision barring Rooms from participating in the securities industry, the Court noted: "A pleading prepared by an attorney is an admission ... because the attorney presumably speaks for the litigant."

[i] Rule 801(d)(2)(C) -- Trial or Deposition Testimony

In re Hanford Nuclear Reservation Litig., 534 F.3d 986 (9th Cir. 2008) : Reviewing the trials of claims by bellwether plaintiffs alleging that radioiodine emissions by plutonium producers at a nuclear facility caused cancers and other life-threatening diseases, the Court found no abuse of discretion when the defendants were permitted on retrial of one plaintiff's case to cross-examine an expert with testimony he had given at the first trial. The testimony was an admission of a party opponent under Rule 801(d)(2)(C), so the plaintiff "cannot now exclude trial testimony that she, herself, proffered."

[9] Rule 801(d)(2)(D) -- Statements Which Are Not Hearsay -- Admission by Party-Opponent -- Agency Relationship [Go To Main]

[f] Rule 801(d)(2)(D) -- Examples of Agents' Admissions

[i] Rule 801(d)(2)(D) -- Employment Discrimination Cases

In re Rodriguez, 487 F.3d 1001 (6th Cir. 2007) : In an employment discrimination action, the Court held that statements made by a supervisor to a lower-level supervisor, regarding the reason for the supervisor's refusal to promote the plaintiff, were admissible under Rule 801(d)(2)(D).

[ii] Rule 801(d)(2)(D) -- Examples of Agents' Admissions -- Other Cases

United States v. Yi, 460 F.3d 623 (5th Cir. 2006) : The Court affirmed a conviction for trafficking in counterfeit goods, finding no abuse of discretion in the admission of statements by the defendant's employee tending to show that the declarant knew the goods at issue were not of regular merchantable quality. The Court held that the statements "fall squarely within *Rule 801(d)(2)(D)*" and that if, because the statement's spoke to the employee's knowledge and not the defendant's, there was any *Crawford*-type error, it was harmless.

Thomas v. Cook County Sheriff's Dep't, 604 F.3d 293 (7th Cir. 2009, *amended* 2010): The Court affirmed in substantial part a judgment for the plaintiff in a § 1983 deliberate indifference action, finding no abuse of discretion in the admission of deposition testimony that a nurse at the jail had told him that the plaintiff's decedent was "just 'dope sick.'" The statement was made by a County employee in the course of employment to show that the County employees were deliberately indifferent to the decedent's illness and had a widespread practice of ignoring medical requests.

[g] Rule 801(d)(2)(D) -- Government Agents and Employees

Wilburn v. Robinson, 480 F.3d 1140 (D.C. Cir. 2006) : The former interim director of the D.C. Office of Human Rights sued the mayor's chief of staff in his individual and official capacities, alleging that she had been denied the position permanently as retaliation for exercising *First Amendment* rights in protesting D.C. salary policies. The plaintiff's only evidence of retaliation was contained in a conversation with her direct supervisor, a deputy mayor. The Trial Judge ruled that the supervisor's statements were not admissible as agency admissions because the employer, the District, was not a party, and granted summary judgment to the defendant. The Court found the ruling to be error (but harmless) because the District was a party by virtue of the claim against the chief of staff in his official capacity.

McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006) : Affirming a judgment for the plaintiff in a Title VII retaliation action, the Court found no error in the admission of hearsay statements from two City officials concerning the decision to place the plaintiff on administrative leave. The City argued that the statements were improperly admitted under *Rule 801(d)(2)(D)*, because the declarants were not "policymakers." But the Court held that the employee's "station is not relevant to the *Rule 801(d)(2)* analysis." Rather, the question is whether the statements concerned a matter within the employee's scope of authority. In this case, the statements were clearly within the scope of the officials' responsibilities for personnel management, and the statements related to a possible personnel action against the plaintiff.

United States v. Garza, 448 F.3d 294 (5th Cir. 2006) : In a drug case the defense proffered a report by a government investigator which concluded that a police officer who testified for the government was an untruthful person, based on an investigation for the Department of Justice conducted after receiving a report that the police officer had made representations to a United States Attorney that were not true. Affirming, the Court noted a split of authority about whether reports of government agents are admissible against the government in criminal cases. But even if *Rule 801(d)(2)(D)* were applicable to the government in criminal cases, it would not be applicable in this case. The Court explained that the investigation related to a different case; the results of the investigation were never adopted by the Department of Justice; and no prosecution was recommended. Accordingly, "[i]t hardly seems within the spirit of *Rule 801(d)(2)(D)* to admit Grimes' opinion regarding Officer Ragsdale's veracity as an admission by the government."

[h] Rule 801(d)(2)(D) -- Government Attorneys

United States v. Ford, 435 F.3d 204 (2d Cir. 2006) : The Court held in a bribery prosecution that there was no abuse of discretion in excluding an alleged extra-judicial statement by an Assistant U.S. Attorney describing a key prosecution witness as "a dirty dog and he's got no credibility." A government attorney's statements are not admissible against the government when they do not involve assertions of fact inconsistent with similar assertions at trial and when they are not the equivalent of testimonial statements made by the client.

[k] Rule 801(d)(2)(D) -- Independent Contractors

United States v. Bonds, 608 F.3d 495 (9th Cir. 2010) : In a perjury prosecution against a professional baseball player for falsely denying steroid use before a grand jury, the defendant moved *in limine* to preclude introduction of blood analysis reports for failure to establish that the blood had come from the defendant. A witness who could have made the connection refused to testify, so the government sought to introduce that witness' out of court statements. Affirming on interlocutory appeal the grant of the motion *in limine*, the Court held the statements were properly not admitted as agent's admissions because the record indicated the unavailable witness, a friend who served as the defendant's trainer, was an independent contractor and was not acting as the defendant's agent in delivering the blood samples. One Judge dissented, arguing that the record indicated that the witness was not only an agent but also an agent authorized to speak on the defendant's behalf.

[n] Rule 801(d)(2)(D) -- Judicial Admissions

Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC, 477 F.3d 383 (6th Cir. 2007) : Arguing for summary judgment in a copyright infringement action, the defendant had conceded that a particular renewal copyright had vested in the author's widow and children and not in it. However, following the Trial Court's decision, the defendant moved to alter or amend the judgment, arguing that the Judge had incorrectly interpreted the governing statute, which gave ownership to the defendant. The motion was denied on the ground that the defendant had made a judicial admission regarding the ownership, but the Court reversed, holding that the defendant's statements dealt with legal conclusions rather than matters of fact, so it was error to treat them as judicial admissions.

Sullivan v. Randolph, 504 F.3d 665 (7th Cir. 2007) : In an ERISA action by trustees of a multi-employer pension plan against a construction company, the Court affirmed summary judgment for the company. One question in the case was whether the company was bound by a collective bargaining agreement. In its initial answer the company admitted that it was bound, but was permitted to file an amended answer in which it withdrew the admission. The Court observed that an admission made in a pleading is ordinarily a "judicial admission" that is binding, but that it may nonetheless be withdrawn if the Trial Judge, as here, allows the filing of an amended pleading.

[q] Rule 801(d)(2)(D) -- Personal Knowledge

Marra v. Philadelphia Housing Auth., 497 F.3d 286 (3d Cir. 2007) : The Court affirmed a judgment for the plaintiffs in a suit alleging that the housing authority unlawfully retaliated against them for their roles in a Title VII lawsuit against the authority, finding no error in the admission of one plaintiff's testimony that his immediate supervisor constantly stated that there would be repercussions against any supervisor or management level employee who testified against the authority. The Court stated in a footnote that personal knowledge "was not a necessary predicate to the admission of his remarks under Rule 801(d)(2)(D)."

Mister v. Northeast Ill. Commuter R.R. Corp., 571 F.3d 696 (7th Cir. 2009) : In an FELA action arising when the plaintiff slipped on ice in an area where he parked, the Magistrate Judge excluded a report prepared by the defendant's safety officer, which said there was "a similar incident less then [sic] a week earlier in the same spot," because it was based on multiple hearsay and the safety officer had no personal knowledge on which to make the statement. The Court disagreed, noting that the Rule does not require personal knowledge or internal verification, but only that the report be made in the usual course of business by a person acting within the scope of his responsibilities. However, it affirmed the judgment for the defendant, finding no abuse of discretion in excluding the report under Rule 403 as unreliable because of its basis in multiple levels of hearsay and lack of precise factual statements.

United States v. Santisteban, 501 F.3d 873 (8th Cir. 2007) : Affirming a conspiracy conviction arising from a scheme to import and misbrand prescription drugs, the Court held that a statement in a prosecution memorandum, provided to the defense before trial to outline the government's case, was not admissible to prove the truth of a statement contained

therein, that a fake letter from the Pfizer pharmaceutical company that the coconspirator testified the defendant created had actually been created by an associate of the coconspirator. The Court reasoned that "[b]ecause the government employee who authored the memorandum could not have had personal knowledge as to who created the letter from Pfizer, the author was in no position to 'admit' that [the associate of the coconspirator] had forged the document." The paragraph of the memorandum containing the statement that the defendant tried to introduce had three levels of hearsay: (1) the author's statement, (2) the statement of the investigator to the author, and (3) the statement of the coconspirator to the investigator, which the investigator relayed to the author. The Court reasoned that, even if the author's statement was viewed as an admission, the other two levels of hearsay were not covered by an exception. We question this reasoning: If a person acting within the scope of employment accepts as true statements of others and makes an assertion, that assertion is held admissible in many cases notwithstanding the absence of personal knowledge by the declarant.

[r] Rule 801(d)(2)(D) -- Proving Agency

Carlisle v. Deere & Co., 576 F.3d 649 (7th Cir. 2009) : In a breach of warranty action against the manufacturer of an engine used on a commercial tree grinder, the plaintiffs sought to prove that the defendant had installed a critical component on the engine by introducing evidence from the dealer that had replaced the grinder's original engine with the engine at issue. Affirming summary judgment for the defendant, the Court held that the dealer's statements were not admissible under Rule 801(d)(2)(C) because the warranty on the engine explicitly provided that no dealer had any authority to make any representations on behalf of the manufacturer, and the statements were not admissible under Rule 801(d)(2)(D) because the dealer was not the manufacturer's agent, as the latter did not have control over the former's day-to-day operations or otherwise make it an agent.

United States v. Docampo, 573 F.3d 1091 (11th Cir. 2009) : In a trial on drug conspiracy charges, one Lorenzo testified that the defendant had made a threatening phone call. Because the call was taken by Lorenzo's girlfriend, and Lorenzo only heard the purported threat as it was related by the girlfriend, the girlfriend's statement about the threat was hearsay to prove the threat was made. The government argued that the girlfriend was acting as the defendant's agent in relating the threat to Lorenzo, but the Court found that "the government did not lay a foundation that Lorenzo's girlfriend was acting as Docampo's agent or that Docampo authorized the statement." The Court noted that even though the girlfriend's statement in context may have provided an indication of intended agency, the hearsay statement alone is insufficient to prove agency under the terms of Rule 801(d)(2).

[t] Rule 801(d)(2)(D) -- Scope of Agent's Employment

[i] Rule 801(d)(2)(D) -- Employment Cases

Davila v. Corporacion De P.R. Para La Difusion Publica, 498 F.3d 9 (1st Cir. 2007) : The Court affirmed summary judgment for the employer in an age discrimination case, finding no error when the Judge refused to give weight to the plaintiff's affidavit in which he asserted that unidentified co-workers had told him his supervisor believed he was "too old to hold the position." While statements by the supervisor might qualify as vicarious admissions, the absence of any evidence as to the employment status of the co-workers kept their statements as to what the supervisor said from being admissible. See also *Bennett v. Saint-Gobain Corp., 507 F.3d 23 (1st Cir. 2007)* (unsworn grievances referencing discriminatory remarks allegedly made by supervisor were hearsay inadmissible on summary judgment motion).

Marra v. Philadelphia Housing Auth., 497 F.3d 286 (3d Cir. 2007) : The Court affirmed a judgment for the plaintiffs in a suit alleging that the housing authority unlawfully retaliated against them for their roles in a Title VII lawsuit against the authority, finding no error in the admission of one plaintiff's testimony that his immediate supervisor constantly stated that there would be repercussions against any supervisor or management level employee that testified against the authority. The Court rejected the defendant's "mistaken premise that personal involvement in the employment decision being litigated is an absolute prerequisite to the admission of a statement by an employee against

his employer under Rule 801(d)(2)(D)." The Court reasoned that "[t]here is no question that DiPiero, in his capacity as DiGravio's immediate supervisor was authorized to speak with DiGravio about his perception of PHA's disciplinary practices, formal or otherwise, and thus his opinion that those employees who testified adversely to PHA would face 'repercussions' concerned a matter within the scope of his employment."

Stephens v. Erickson, 569 F.3d 779 (7th Cir. 2009) : The Court affirmed summary judgment for the employer in an action claiming retaliation for making discrimination complaints. It found no abuse of discretion in the exclusion of testimony regarding statements by the promoting authority's administrative assistant. Her statements about her boss's attitudes did not come within the exemption for agent's statements because her duties did not involve any component of the promotion process and she did not have any authority regarding any employment action; her statements about her own feelings toward the plaintiff were irrelevant to the plaintiff's claims. In *Simple v. Walgreen Co., 511 F.3d 668 (7th Cir. 2007)* , the court reversed summary judgment for the employer in an action by an assistant manager who was not offered a manager's position in a higher income white area that was given to a white woman with less experience. It held that another store manager's statements that the area "was possibly not ready to have a black manager" and the plaintiff "may not have been very happy working there" were admissible against the employer as vicarious admissions. The declarant had been consulted by the supervisor making the decision when the white woman was appointed and she was explaining her understanding of the criteria utilized by management in making the employment decisions. In *Keri v. Board of Trustees of Purdue Univ., 458 F.3d 620 (7th Cir. 2006)* , a black assistant professor who was not reappointed sued under Title VII. Affirming summary judgment for the defendant, the Court upheld the exclusion of statements about the racial climate at the university made by other professors. The statements did not relate to the declarants' teaching or other functions of their jobs and the declarants did not have decision-making authority regarding other faculty members' employment.

Rowell v. BellSouth Corp., 433 F.3d 794 (11th Cir. 2005) : Affirming summary judgment for the defendant in an ADEA case, the Court held that statements by the plaintiff's supervisor indicating that the ranking system in a proposed reduction in force was based on a company decision to keep younger employees was not admissible to support the plaintiff's claim. The supervisor had no participation in the employment decision or the employer's policy, and the plaintiff admitted that the supervisor was reflecting only his own personal opinion, not anything that he had been told by a senior person or upper management.

[ii] Rule 801(d)(2)(D) -- Scope of Agent's Employment -- Other Cases

Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007) : The plaintiff's decedent was killed when he attempted to stop a Dodge Ram from rolling down a driveway after his two-year-old grandson, who had been left alone in the truck with the key in the ignition and the engine running, apparently shifted the gear out of park. In an action against the manufacturer, the plaintiff alleged that the truck was defective because it did not have a brake-shift interlock device requiring the brake pedal to be depressed in order to shift out of park. Affirming a judgment for the defendant, the Court found no abuse of discretion in the exclusion of testimony by a former Chrysler employee that during a 1994 meeting, members of a safety leadership team stated that vehicles without BSI devices were unreasonably dangerous and that Chrysler vehicles should have been equipped with BSI devices. There was no showing that statements made by members of a SLT charged with evaluating minivan safety were within the scope of their employment when speaking about Ram safety.

[u] Rule 801(d)(2)(D) -- Statements by Counsel

United States v. Jung, 473 F.3d 837 (7th Cir. 2007) : In a prosecution for mail and wire fraud arising out of the defendant's management of a hedge fund, the Court held it was an abuse of discretion (but harmless error) to admit statements made by the defendant's former counsel to the person who started the hedge fund and to its special counsel, in which counsel stated that the defendant had engaged in improper and illegal trading. The Court noted that an attorney " *may be* the agent of his client for purposes of *Rule 801(d)(2)(D)*" but "the unique nature of the attorney-client

relationship demands that a trial court exercise caution in admitting statements that are the product of this relationship." In prior cases the lawyers spoke to witnesses to develop a defense strategy and took a risk that the witnesses would testify as to their contact, but here the lawyer was not acting in an investigative capacity and "[t] is is not a case where an attorney's pre-trial tactical decisions backfired." It concluded that the government "achieved the equivalent of having Jung's former attorney stand with the prosecutors and vouch for his indictment." In holding that the former attorney's statements were inadmissible, the Court reasoned that "[f]rom a policy perspective, defendants will be chilled from sharing information with their attorneys, defense attorneys will be deterred from vigorous advocacy and the attorney-client relationship will be impaired if statements like [the defendant's former attorney's] regarding Jung's criminal liability are admissible."

Gill v. Maciejewski, 546 F.3d 557 (8th Cir. 2008) : The Court affirmed a judgment for an arrestee against a university police officer in an action claiming use of excessive force. It found no abuse of discretion in the exclusion of a statement made during the underlying criminal trial by the arrestee's attorney: "So almost four months after this incident we still don't know if it was Officer Maciejewski or Sergeant Reineke or Officer Hermes who did the knee drop. No one has accepted responsibility." The Court held that the defendant, Maciejewski, took unwarranted liberties in offering the statement, because when considered in context it was clear that the arrestee's attorney was not suggesting that the arrestee did not know who assaulted him but was calling attention to Maciejewski's failure to attend and testify at the criminal trial.

[10] Rule 801(d)(2)(E) -- Statements Which Are Not Hearsay -- Admission by Party-Opponent -- Coconspirators [Go To Main]

[b] Rule 801(d)(2)(E) -- Appellate Review

United States v. Dowdell, 595 F.3d 50 (1st Cir. 2010) : The Court affirmed a cocaine distribution conviction and found no error in the admission of coconspirator statements. It noted that a Trial Judge's findings on foundational facts will be reversed only if they are clearly erroneous, and that findings cannot be clearly erroneous if they involve the choice of a plausible interpretation of the evidence. In *United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008)* , the Court affirmed drug and firearm convictions, and reiterated that to preserve an objection to coconspirator statements a party must renew the objection at the close of all of the evidence. Failure to renew results in only plain error review.

[c] Rule 801(d)(2)(E) -- Availability of Declarant

United States v. Gardner, 447 F.3d 558 (8th Cir. 2006) : Affirming a conviction for conspiracy to distribute methamphetamine, the Court held that the *Confrontation Clause* does not require that the government show that the declarant is unavailable in order to offer a coconspirator statement. Contrary Circuit precedent predated and was overruled by *United States v. Inadi, 475 U.S. 387 (1986)* (see Main Volume of the *Manual*, *§ 801.03[10][c], [g]*).

[f] Rule 801(d)(2)(E) -- Civil Cases

Gunville v. Walker, 583 F.3d 979 (7th Cir. 2009) : Affirming summary judgment for state officials sued by former employees who alleged that their termination violated their *First* and *Fourteenth Amendment* rights, the Court held that testimony by an assistant to a state personnel manager that the manager told her that voter records were "pulled" for certain personnel decisions was hearsay because it was offered to prove that the records were in fact pulled. The Court rejected the argument that the manager's statement was admissible as a coconspirator statement because there was no showing of a conspiracy; the plaintiffs' speculation of an undocumented, implicit conspiracy was not enough to establish the foundation required under Rule 801(d)(2)(E).

Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006) : In an antitrust action against distributors of aluminum products, the plaintiff offered statements by representatives of aluminum mills under the

coconspirator exception. The Court held it was an abuse of discretion to exclude the representatives' statements without making a preliminary factual determination whether a conspiracy existed between the defendants and the mills.

[g] Rule 801(d)(2)(E) -- Confrontation Concerns

United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) : The Court affirmed convictions for making false statements to government officials, finding no *Confrontation Clause* error in admitting statements made by the conspirators in their interviews with government agents against their coconspirators. Although the statements were made in a context that was otherwise "testimonial" under *Crawford v. Washington,* they were made with the intent of furthering a conspiracy to obstruct justice and thus admissible on an agency theory as coconspirator statements, which are not considered "testimonial" under *Crawford*.

United States v. Stover, 474 F.3d 904 (6th Cir. 2007) : The Court held that under the Supreme Court's decisions in *Crawford v. Washington* and *Davis v. Washington,* "co-conspirators' statements made in pendency and furtherance of a conspiracy [are] not testimonial" and therefore that the defendant's right to confrontation was not violated when a statement was properly admitted under *Rule 801(d)(2)(E)*. In *United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006)* , the Court found no *Confrontation Clause* violation in the admission of scraps of paper that testifying agents characterized as drug ledgers. Because the government had established by a preponderance of the evidence "the existence of a conspiracy, [defendant's] involvement in the conspiracy, and the drug ledgers' use in furtherance of the conspiracy, admission of the documents at issue did not violate [defendant's] rights under the *Confrontation Clause*."

United States v. Hargrove, 508 F.3d 445 (7th Cir. 2007) : The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The Court rejected the argument that the coconspirator's statements were testimonial, holding that "*Crawford* did not affect the admissibility of coconspirator statements." The Court specifically rejected the argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, "the Supreme Court specifically cited *Bourjaily* -- which as here involved a coconspirator's statement made to a government informant -- to illustrate a category of nontestimonial statements that falls outside the requirements of the *Confrontation Clause*."

United States v. Sturdivant, 513 F.3d 795 (8th Cir. 2008) : The Court held that because hearsay was properly admitted under Rule 801(d)(2)(E), " *Crawford* is inapplicable and the testimony did not violate Sturdivant's confrontation rights." In *United States v. Gardner, 447 F.3d 558 (8th Cir. 2006)* , the court affirmed a conviction for conspiracy to distribute methamphetamine, holding that the *Confrontation Clause* does not require that the government show that the declarant is unavailable in order to offer a coconspirator statement. Contrary Circuit precedent predated and was overruled by *United States v. Inadi, 475 U.S. 387 (1986)* (see Main Volume of the *Manual*).

United States v. Underwood, 446 F.3d 1340 (11th Cir. 2006) : Affirming a conviction for possession of cocaine with intent to distribute, the Court held that a coconspirator statement made to a confidential informant was not "testimonial" under *Crawford*. The statement was not made in a formal setting, but to arrange a drug transaction, and it was not made in circumstances that would lead the declarant reasonably to believe it would be available for use at a later trial.

[h] Rule 801(d)(2)(E) -- Conspiracy Not Charged

United States v. Washington, 434 F.3d 7 (1st Cir. 2006) : The Court affirmed a conviction for distribution of cocaine base, finding no plain error in the admission of statements by co-venturers. Even though a conspiracy was not charged, the Court noted that statements of coconspirators are admissible if made during and in furtherance of a conspiracy. The Court also stated that it considered "statements of joint venturers in a criminal scheme as equivalent to statements of co-conspirators for purposes of application of *Rule 801(d)(2)(E)*."

[i] Rule 801(d)(2)(E) -- Declarant's Participation in Conspiracy

United States v. Young, 553 F.3d 1035 (6th Cir. 2009) : The Court affirmed convictions for a marijuana conspiracy, finding no clear error in the admission of certain coconspirator statements. Although a buyer-seller relationship is not by itself sufficient to make someone a participant in a conspiracy, there was evidence that the defendants had fronted drugs to the declarants and that the quantities involved were significant, so there was a sufficient foundation that the declarants were coconspirators and their statements were in furtherance of the conspiracy.

United States v. Engler, 521 F.3d 965 (8th Cir. 2008) : The Court affirmed methamphetamine convictions, finding no abuse of discretion in admitting photographic images of text messages sent via cellular telephone to a defendant by an unknown person while law enforcement officers were about to execute a search warrant. The Court reasoned that "the very content of the text messages establishes by a preponderance of the evidence that the sender was a coconspirator."

[k] Rule 801(d)(2)(E) -- During the Conspiracy

[i] Rule 801(d)(2)(E) -- Miscellaneous Cases

United States v. Hargrove, 508 F.3d 445 (7th Cir. 2007) : The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. A recorded conversation, in which one of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies, was admitted against the defendant under Rule 801(d)(2)(E). The defendant claimed that he had withdrawn from the conspiracy by the time the conversation took place, but the Court held the defendant's having "retired" and moved out of town did not by itself mean that he had withdrawn from the conspiracy. "Inactivity alone does not mean withdrawal; to withdraw from a conspiracy, the defendant must terminate completely his active involvement in the conspiracy, as well as take affirmative steps to defeat or disavow the conspiracy's purpose." Here, there was no evidence that the defendant had taken any affirmative steps to withdraw, and in fact the evidence indicated that he "was still getting a cut of the take after his move to Las Vegas."

[ii] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements After Declarant's Arrest

United States v. Martinez, 430 F.3d 317 (6th Cir. 2005) : The Court affirmed convictions arising from a drug-trafficking conspiracy, finding no error in the admission of an anonymous letter found during the search of the apartment belonging to a defendant's girlfriend, which referred to conspirators who had been cooperating and to documents that had been disclosed to defense counsel in a prior case against the conspiracy and which warned the recipients to "cut off" their associates and not delay "like we did." Although the author was apparently incarcerated when the letter was written, the contents of the letter -- promoting the objectives of the conspiracy by providing information about the government's investigation -- indicated that he had not terminated his involvement in the ongoing conspiracy.

United States v. Cesareo-Ayala, 576 F.3d 1120 (10th Cir. 2009) : Soon after the defendant's coconspirator was arrested and agreed to cooperate, he received a call from the defendant setting up another cocaine transaction. Statements by the coconspirator in that conversation that implied the defendant was dealing were admitted under Rule 801(d)(2)(E). Affirming a conviction for cocaine trafficking, the Court held there was no error in admitting the statements, as they were not hearsay but only provided the context for the defendant's statements in the conversation that strongly suggested he had been involved in another transaction. The concurring Judge thought that the coconspirator's statements were inadmissible under Rule 801(d)(2)(E) because his statements were not in furtherance of the conspiracy after his arrest, and thought that the contents of the statements and the manner in which they were admitted supported an argument that they were admitted for their truth and thus hearsay, but that any errors were harmless.

[iii] Rule 801(d)(2)(E) -- During the Conspiracy -- Statements After Defendant's Arrest

United States v. Townley, 472 F.3d 1267 (10th Cir. 2007) : Affirming cocaine and methamphetamine convictions, the Court held that a tape-recorded conversation between a coconspirator who was cooperating with the police and another coconspirator was properly admitted even though the defendant had been arrested, because the non-cooperating coconspirator's statements indicated an attempt to continue the conspiracy.

[l] Rule 801(d)(2)(E) -- Existence of Conspiracy

United States v. Gewin, 471 F.3d 197 (D.C. Cir. 2006) : The Court affirmed a conviction for securities fraud, rejecting a defense argument that coconspirator statements had been admitted improperly because there was no finding before their admission of an *unlawful* conspiracy. Because *Rule 801(d)(2)(E)* is founded on concepts of agency and partnership law and is applicable in both criminal and civil trials, the foundation requires showing only action in concert toward a common goal.

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008) : The Court reversed convictions for conspiring to provide material support to designated terrorist organizations (Hamas and Al-Qaeda). The Court found an abuse of discretion in the admission of a mujahidin form during the government's rebuttal case that purported to show that one of the defendants had sponsored a fighter to attend a training camp. Although the form was properly authenticated, the Judge failed to make any findings about the existence of a conspiracy in which the defendant against whom the form was offered participated. The Court likewise found an abuse of discretion in the admission of a video of a wedding speech as a coconspirator statement, given the lack of evidence that the declarant and the defendants were involved together in a conspiracy. Finally, it was an abuse of discretion to admit the last will and testament of a mujahidin fighter, given the lack of independent evidence that the fighter and a defendant were members of a conspiracy.

[m] Rule 801(d)(2)(E) -- Foundation

[i] Rule 801(d)(2)(E) -- Conditional Admission of Statement

United States v. Colon-Diaz, 521 F.3d 29 (1st Cir. 2008) : Affirming a conviction for drug distribution, the Court found no abuse of discretion in admitting the testimony of an informant regarding a request she made to the defendant's stepson, since her statement put the stepson's statement (admitted as a coconspirator's statement) into context and was not offered for its truth. As for the stepson's statement, the Court observed that, to preserve an objection on appeal to admission of a coconspirator's statement, a defendant must at the close of the evidence request a determination by a preponderance whether the declarant and the defendant were members of a conspiracy and whether the declarant's statement was in furtherance of the conspiracy. In this case, the defendant objected to the stepson's statement only on the ground that it was not in furtherance of the conspiracy, so that was the only issue preserved. The Court found no abuse of discretion in overruling the objection, and found no plain error in the ruling that the other elements of coconspirator rule were satisfied.

United States v. Harris, 585 F.3d 394 (7th Cir. 2009) : Affirming a cocaine conviction, the Court noted that "[t]his Circuit requires that a district court make a ruling on the admissibility of a coconspirator's statement prior to their introduction at trial," but it added that "a failure to make the required findings does not necessarily doom the district court's decision to admit the testimony." It concluded that although the admissibility of the statements "presents a close question," "the preponderance of the evidence on record does support the existence of a conspiracy" because the defendant's actions and the surrounding circumstances corroborated the declarant's statements concerning a conspiracy.

[iii] Rule 801(d)(2)(E) -- Foundation -- Miscellaneous Cases

United States v. Mangual-Garcia, 505 F.3d 1 (1st Cir. 2007) : Affirming cocaine convictions, the Court held that there was no plain error in the admission of coconspirator statements despite the Trial Judge's failure to make a final determination at the close of the evidence that the declarant was a member of the conspiracy when the statements were

made. The Court noted that an FBI agent provided a "certification letter" that the declarant was a cooperating witness for the FBI before and after the statements were made, but not at the time the statements were made. Although the agent did not testify, a Trial Judge may consider any evidence other than privileged information in making a Rule 104(a) determination as to a preliminary question of fact.

United States v. Conrad, 507 F.3d 424 (6th Cir. 2007) : In a prosecution for methamphetamine possession, the Court remanded the case because the Trial Judge had failed to make a finding whether the declarant was still a conspirator and whether the statement was "mere idle chatter" before determining that the statement was made in furtherance of the purposes of the conspiracy and had used a "prima facie" rather than the proper "preponderance of evidence" standard when determining the admissibility of a purported coconspirator's statement.

Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006) : In an antitrust action against distributors of aluminum products, the plaintiff offered statements by representatives of aluminum mills under the coconspirator exception. The Court held it was an abuse of discretion to exclude the representatives' statements without making a preliminary factual determination whether a conspiracy existed between the defendants and the mills.

[v] Rule 801(d)(2)(E) -- Foundation -- Rulings

United States v. Fuller, 557 F.3d 859 (8th Cir. 2009) : The Court affirmed a conviction for conspiracy to distribute cocaine, finding no error in the Judge's failure to make an explicit ruling as to the various elements supporting admission of a coconspirator's statements. The rulings required by *United States v. Bell, 573 F.2d 1040 (8th Cir. 1978)* , need not be made explicitly, as long as the Judge "substantially complies with *Bell*'s procedures."

[n] Rule 801(d)(2)(E) -- Independent Evidence of Foundation

United States v. Mitchell, 596 F.3d 18 (1st Cir. 2010) : Affirming a conviction for conspiracy to distribute cocaine, the Court held that testimony by a cooperating witness was sufficient extrinsic evidence to prove the conspiracy and the declarant's and the defendant's roles in it.

United States v. Liera, 585 F.3d 1237 (9th Cir. 2009) : Reversing convictions for bringing aliens into the United States, the Court held it was an abuse of discretion to admit testimony by an alien whom the defendant attempted to smuggle into the country that while he was in China his mother told him what it would cost to have a person smuggled into the United States. Aside from the mother's statements, there was no independent evidence that the mother was involved in a conspiracy involving the defendant.

[o] Rule 801(d)(2)(E) -- In Furtherance Of

[i] Rule 801(d)(2)(E) -- Informants' Statements

United States v. Cesareo-Ayala, 576 F.3d 1120 (10th Cir. 2009) : Soon after the defendant's coconspirator was arrested and agreed to cooperate, he received a call from the defendant setting up another cocaine transaction. Statements by the coconspirator in that conversation that implied the defendant was dealing were admitted under Rule 801(d)(2)(E). Affirming a conviction for cocaine trafficking, the Court held there was no error in admitting the statements, as they were not hearsay but only provided the context for the defendant's statements in the conversation that strongly suggested he had been involved in another transaction. The concurring Judge thought that the coconspirator's statements were inadmissible under Rule 801(d)(2)(E) because his statements were not in furtherance of the conspiracy after his arrest, and thought that the contents of the statements and the manner in which they were admitted supported an argument that they were admitted for their truth and thus hearsay, but that any errors were harmless.

[ii] Rule 801(d)(2)(E) -- In Furtherance of -- Statement Admissible or Admission Required

[A] Rule 801(d)(2)(E) -- Efforts To Conceal

United States v. Diaz, 597 F.3d 56 (1st Cir. 2010) : The Court affirmed a conviction for conspiring to engage in the sexual trafficking of children, finding no abuse of discretion in the admission of a statement by one conspirator telling another to stop talking to a police officer, even though the two conspirators had already been arrested. The Trial Judge could properly find that the statement was intended to prevent law enforcement officers from terminating the sex trafficking operation and therefore was in furtherance.

United States v. Weaver, 507 F.3d 178 (3d Cir. 2007) : On interlocutory appeal in a fraud conspiracy prosecution, the Court vacated a ruling *in limine* that precluded the government from introducing a recorded telephone conversation between a conspirator and her sister. The Court held that if the Judge determined the sister was also a conspirator, statements in the conversation providing information about the state of the conspiracy satisfied the "in furtherance" requirement. Even if the sister was not a member, statements to conceal the conspiracy were intended to further it and would be admissible under the coconspirator statement exemption.

United States v. Ihsan Elashyi, 554 F.3d 480 (5th Cir. 2008) : Affirming conspiracy convictions, the Court observed that efforts to conceal an ongoing conspiracy obviously further the conspiracy by attempting to assure that it will not be brought to an end.

[B] Rule 801(d)(2)(E) -- In Furtherance of -- Statement Admissible or Admission Required -- Information to Conspirators

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) : The Court upheld convictions of five defendants in a case it described as "a story of mayhem and disorder in and round the 200 block of K Street, Southwest, in the District of Columbia from the 1980s until 1998." The case involved a large narcotics distribution ring that "led to an astonishing amount of violence and a seemingly complete repudiation of civil society and respect for human life." The Court found no error in admitting hearsay statements of coconspirators, as they were not "mere narrative or idle chatter" but rather part of an effort to update another coconspirator on the conspiracy's status and motivate his continued participation.

United States v. Weaver, 507 F.3d 178 (3d Cir. 2007) : On interlocutory appeal in a fraud conspiracy prosecution, the Court vacated a ruling *in limine* that precluded the government from introducing a recorded telephone conversation between a conspirator and her sister. The Court held that if the Judge determined the sister was also a conspirator, statements in the conversation providing information about the state of the conspiracy satisfied the "in furtherance" requirement. Even if the sister was not a member, statements to conceal the conspiracy were intended to further it and would be admissible under the coconspirator statement exemption.

United States v. Martinez, 430 F.3d 317 (6th Cir. 2005) : The Court affirmed convictions arising from a drug-trafficking conspiracy, finding no error in the admission of an anonymous letter found during the search of the apartment belonging to a defendant's girlfriend, which referred to conspirators who had been cooperating and to documents that had been disclosed to defense counsel in a prior case against the conspiracy and which warned the recipients to "cut off" their associates and not delay "like we did." It was apparent from the content of the letter that it was written with the intent to promote the objectives of the conspiracy by providing information relating to the government's ongoing investigation, warning that some of its members could no longer be trusted, and advising caution in future dealings.

United States v. Ragland, 555 F.3d 706 (8th Cir. 2009) : The Court affirmed a conviction for distributing heroin that resulted in death, finding no abuse of discretion in a ruling that statements made by one conspirator identifying the defendant as his source of drugs were made to promote sales and ensure the continuation of the conspiracy. In the Court's view, this theory of admissibility of the statements was not entirely convincing, because most of the people in the conspiracy were friends who frequently gave drugs to each other, so the identity of the defendant as a particular

supplier would not have done much to further the conspiracy. Nonetheless, because giving and sharing drugs is prohibited by law, a tacit understanding to do so even on a social basis constitutes a conspiracy to distribute, and "comments passing between [the participants] concerning sources of supply and the quality of the product available to each of them are made in furtherance of that continuing conspiracy." In *United States v. McKay, 431 F.3d 1085 (8th Cir. 2005)* , the court affirmed drug distribution convictions, finding no abuse of discretion in the admission of testimony by two cooperating witnesses that one defendant told each of them that he was purchasing drugs from his codefendant. In one case the statement was made to bring the witness up to date on changes in the conspiracy while he had been in prison, and in the other the information was provided in an effort to have the witness pool funds with the declarant in order to obtain more drugs to sell.

United States v. Larson, 495 F.3d 1094 (9th Cir. 2007) : A panel of the Court had affirmed convictions for conspiracy to distribute methamphetamine, finding no abuse of discretion in admitting coconspirator statements identifying a defendant as the source of the drugs because the statements kept the conspirator to whom they were addressed abreast of the conspiracy's activities, and they were responsive to his likely concern, given the danger of the endeavor, about knowing with whom he was dealing. *United States v. Larson, 460 F.3d 1200 (9th Cir. 2006)* . On rehearing, the *en banc* Court held that the District Court had abused its discretion in barring the questions, but also held that the resulting error was harmless, because defense counsel did explore the witness's "criminal past, history as a drug user and seller, and desire to obtain a lesser sentence through his testimony against his co-conspirators. We note, too, that the court instructed the jury that it should view the testimony of the cooperating witnesses with greater caution than that of other witnesses."

United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) : The Court affirmed convictions in a public corruption case, finding no abuse of discretion in the admission of statements by one conspirator to another that informed the latter that their plan had worked and that the latter's involvement had helped, and which also affected the conspirators' future dealings by encouraging future cooperation.

[C] Rule 801(d)(2)(E) -- In Furtherance of -- Statement Admissible or Admission Required -- Miscellaneous Cases

United States v. Rodriguez, 525 F.3d 85 (1st Cir. 2008) : The Court affirmed convictions for drug and firearms conspiracies, finding no plain error in the admission of coconspirator statements that, by identifying the defendant, directed potential customers to the source of narcotics and thus furthered the conspiracy.

In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93 (2d Cir. 2008) : The Court affirmed convictions for al Qaeda terrorism in 1998, finding no error in the admission of coconspirator statements made for purposes of providing reassurance or information about the current status of the conspiracy, maintaining trust and cohesiveness, and inducing the listener's assistance.

United States v. Davis, 457 F.3d 817 (8th Cir. 2006) : Affirming a conviction for conspiracy to distribute crack cocaine, the Court found no abuse of discretion in the admission of testimony regarding statements by a coconspirator that the defendant was his supplier. "Coconspirators' statements that discuss the supply source for the illegal drugs or identify a coconspirator's role in the conspiracy are considered statements made 'in furtherance' of the conspiracy."

United States v. Moran, 493 F.3d 1002 (9th Cir. 2007) : In a prosecution for tax fraud and wire and mail fraud, the Court found no abuse of discretion in admitting financial data recovered from a computer seized from the home of a defendant. Although the codefendants argued that the records were kept for the defendant's own purposes, the facts tended to show that the records were used to keep track of transactions that were part of the conspiracy's fraudulent schemes and were thus in furtherance of the conspiracy's purposes. In *United States v. Bridgeforth, 441 F.3d 864 (9th Cir. 2006)* , the Court affirmed a drug conviction, finding no abuse of discretion in the admission of statements by a coconspirator to a potential drug buyer that the declarant's supplier was present. The statements were in furtherance of

conspiracy and were not mere idle conversation, because they informed the buyer that the declarant was in a position to obtain and deliver drugs.

[D] Rule 801(d)(2)(E) -- In Furtherance of -- Statement Admissible or Admission Required -- Obtaining Assistance

United States v. Gardner, 447 F.3d 558 (8th Cir. 2006) : Affirming a conviction for conspiracy to distribute methamphetamine, the Court held that a coconspirator's statement concerning efforts to recruit other conspirators is in furtherance of conspiracy.

[E] Rule 801(d)(2)(E) -- In Furtherance of -- Statement Admissible or Admission Required -- Reassurance, Encouragement, etc.

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) : The Court upheld convictions of five defendants in a case it described as "a story of mayhem and disorder in and round the 200 block of K Street, Southwest, in the District of Columbia from the 1980s until 1998." The case involved a large narcotics distribution ring that "led to an astonishing amount of violence and a seemingly complete repudiation of civil society and respect for human life." The Court found no error in admitting hearsay statements of coconspirators, as they were not "mere narrative or idle chatter" but rather part of an effort to update another coconspirator on the conspiracy's status and motivate his continued participation.

United States v. Mooneyham, 473 F.3d 280 (6th Cir. 2007) : The Court affirmed cocaine and methamphetamine convictions, holding that statements by a coconspirator to an undercover officer concerning the defendant were admissible as statements made in furtherance of conspiracy. The statements were intended to assure a possibly recurring customer as to the reliability of the defendant as a supplier.

[F] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Admissible or Admission Required -- Statements to Undercover Agents or Informants

United States v. Rodriguez-Velez, 597 F.3d 32 (1st Cir. 2010) : The Court affirmed a conviction for conspiracy to possess drugs with intent to distribute, finding no abuse of discretion in the admission of statements made by coconspirators to a government witness, since they were invitations to the witness to wait until the defendant got to a certain place to replenish the drug supply and so were in furtherance of the distribution.

[iii] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Excludable or Exclusion Required

[B] Rule 801(d)(2)(E) -- In Furtherance Of -- Statement Excludable or Exclusion Required -- Criminal Cases

United States v. Warman, 578 F.3d 320 (6th Cir. 2009) : Affirming a drug conspiracy conviction, the Court held that it was error (but harmless) to admit statements by a member of a motorcycle club involved in drug trafficking who told confidential informants that he was the defendant's partner in the drug trade. The statements were not made in furtherance of the conspiracy, as the declarant was not inducing the informants to participate in the conspiracy or providing them with information that would assist in carrying out the conspiracy, but was only "bragging." By contrast, the Court held that testimony by a confidential informant that a member of the club told the informant about witnessing the murder of another informant was made in furtherance of the conspiracy.

[o.1] Rule 801(d)(2)(E) -- Lawful Combinations

United States v. Brockenborrugh, 575 F.3d 726 (D.C. Cir. 2009) : Affirming a conviction for wire fraud and conspiracy that arose from a scheme to file a fraudulent deed to obtain a property, the Court found no error in the admission of statements made by one alleged conspirator to the lawyer for the executor for the property, which stated

that the defendant wanted to buy the property. It explained that "Rule 801(d)(2)(E) allows for admission of statements by individuals acting in furtherance of a lawful joint enterprise," and concluded that the Judge was correct in finding that the declarant and the defendant were in a "business relationship" when the statement was made.

[p] Rule 801(d)(2)(E) -- Multiple Conspiracies

[i] Rule 801(d)(2)(E) -- Statement Admissible

United States v. Ihsan Elashyi, 554 F.3d 480 (5th Cir. 2008) : The Court affirmed convictions for illegally exporting computer equipment to Libya and Syria. It observed that the conspiracy that forms the basis for admitting coconspirator statements need not be the same conspiracy charged in the indictment, as long as the declarant and any defendant against whom the statements are admitted were members of the same conspiracy and the statements were made during and in furtherance of that conspiracy. In *United States v. Elashyi, 554 F.3d 480 (5th Cir. 2008)* , the defendants were convicted of a conspiracy to illegally export computers to Libya and Syria. Affirming, the Court found no error in the admission of statements by several conspirators, indicating an attempt to evade export requirements and avoid detection, against all the defendants at trial. Although these statements were made after the export conspiracy charged in the indictment had ended, the Court noted that the conspiracy that forms the basis for admitting coconspirators' statements need not be the same conspiracy for which the defendant is indicted. In this case, the statements were made pursuant to a conspiracy to make false statements, of which all the defendants were members.

United States v. Matthews, 431 F.3d 1296 (11th Cir. 2005) : This opinion supersedes the one annotated in the Main Volume of the *Manual*.

[t] Rule 801(d)(2)(E) -- Relationship to Other Rules

United States v. Schalk, 515 F.3d 768 (7th Cir. 2008) : Affirming a conviction for conspiracy to distribute marijuana and cocaine, the Court observed that "[a] government's informant's statements are not admissible under Rule 801(d)(2)(E) because he cannot be a conspirator; however, they are admissible if they provide context or were adopted by the conspirator during the course of the conversation." It found that a government informant's statements were properly admitted to provide context for a coconspirator's statements; when offered for context, the statements were not hearsay.

[x] Rule 801(d)(2)(E) -- Unidentified Declarants

United States v. Ayala, 601 F.3d 256 (4th Cir. 2010) : The Court affirmed convictions for offenses arising out from participation in a violent street gang, finding no abuse of discretion in admitting evidence of coconspirator statements. The Court noted that "it is not necessary for the offering party to identify the declarant by name" and the government need only show that the declarant was more likely than not a conspirator. It also remarked that a statement need not be made *to* a conspirator; a statement to a non-conspirator qualifies as long as it was made *by* a conspirator in furtherance of the conspiracy.

United States v. Martinez, 430 F.3d 317 (6th Cir. 2005) : The Court affirmed convictions arising from a drug-trafficking conspiracy, finding no error in the admission of an anonymous letter found during the search of the apartment belonging to a defendant's girlfriend, which referred to conspirators who had been cooperating and to documents that had been disclosed to defense counsel in a prior case against the conspiracy and which warned the recipients to "cut off" their associates and not delay "like we did." The location in which the letter was found and its contents supported a finding that the letter was more likely than not written by a member of the alleged conspiracy.

[y] Rule 801(d)(2)(E) -- Use by Accused

United States v. Rivera-Hernandez, 497 F.3d 71 (1st Cir. 2007) : The Court affirmed a conviction for money

laundering arising from a scheme in which a contractor building a juvenile facility under the defendant's authority paid money to the defendant for work never done. The Court found no abuse of discretion in the exclusion of testimony that the defendant told his father that he was providing consulting services to the contractor, but as a public servant he could not hold other employment and thus was having the payments made to his father's company. Although the statement might have been made in furtherance of conspiracy, it was not offered against the defendant; it was offered by him and therefore did not qualify as an admission.

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 802 RULE 802

4-802 Federal Rules of Evidence Manual 802.syn

§ 802.syn Synopsis to Chapter 802: RULE 802

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802.04 Legislative History

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4-802 Federal Rules of Evidence Manual 802.01

802.01 Official Text

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

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CHAPTER 802 RULE 802

4-802 Federal Rules of Evidence Manual 802.02

802.02 Editorial Explanatory Comment

[1] Basic Rule

This Rule provides for the standard exclusion of hearsay evidence; hearsay is simply inadmissible unless an exception is applicable. The significant thing about the Rule, however, is that hearsay exceptions can only be provided by the Federal Rules of Evidence or by "other Rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." The Rule is plain, therefore, that unless an exception to the hearsay rule is provided by statute or in these Rules or in other Court rules, the Supreme Court and lower Federal Courts are not free to create new categorical hearsay exceptions without engaging in rulemaking. In other words, whereas *Rule 501* explicitly permits the law of privilege to be changed by adjudication, hearsay rules can only be changed by rulemaking. It must be kept in mind that *Rule 801(d)* provides exemptions from the ban on hearsay evidence. Thus, one must consult that Rule, in addition to *Rules 803*, *804*, and *807*, to ascertain whether out-of-court statements offered for their truth may be admitted.

[2] Relationship to Residual Exception

This restriction on the development of hearsay exceptions represents the result of one of the great struggles during the codification process. The Advisory Committee had drafted *Rules 803 and 804* to give the Federal Courts discretion to create new hearsay exceptions whenever there were sufficient circumstantial guarantees that extrajudicial statements were trustworthy. Fearful that this gave too much discretion to the Courts, some members of Congress fought to ensure that the Courts would have little discretion to expand on the hearsay exceptions. Those advocating flexibility pointed to the dangers of wooden rules, while those desirous of controlling the use of hearsay evidence pointed to the responsibilities of Congress to supervise the Courts. As *Rule 807* specifically provides, Federal Courts can admit hearsay statements not specifically covered by another hearsay exception, but only if the requirements set forth in detail in *Rule 807* are satisfied. Hence, there is some flexibility, but if the requirements of *Rule 807* cannot be met, *Rule 802* mandates exclusion unless the Rules are amended or a statute is passed. As we will discuss more fully in the Editorial Explanatory Comment to *Rule 807*, however, most Federal Courts have applied the residual exception more broadly than Congress appears to have intended, in effect adding new exceptions to the hearsay rule in some kinds of cases.

[3] Statutory Exceptions

Congress can provide for admissibility of evidence by stating in a statute that certain evidence is admissible for a specified purpose. For example, *18 U.S.C. § 4245* provides that a certificate by the Director of the Bureau of Prisons stating that there is probable cause to believe that a convict is mentally incompetent at the time of trial "shall be prima facie evidence of the facts and conclusions certified therein." It does not matter that the word hearsay is not used; Congress has made its will known with respect to the admissibility of the evidence. Federal statutes are replete with provisions that certain evidence is admissible for specified purposes. n1

FOOTNOTES:
(n1)Footnote 1. See, e.g., *15 U.S.C. § 1115* (providing that certain trademark registrations shall be admissible in evidence); *38 U.S.C. § 8506* (providing that an affidavit setting forth the time and place of a posting of notice of sale of property shall be admissible).

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802.03 Annotated Cases

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[1] Appellate Review Standard

Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999) : The Court noted that because of the Supreme Court's statement in *General Elec. Co. v. Joiner*, n1 that "[a]ll evidentiary rulings are reviewed under an abuse of discretion standard," it would disregard its "heretofore well-settled precedents that hearsay evidentiary rulings are reviewed *de novo*," and would review rulings on whether evidence is hearsay or whether the foundation requirements for hearsay exceptions have been met for an abuse of discretion. We respectfully observe that the *Joiner* quotation comes from the Court's paraphrase of the respondent's argument, not the Court's statement of applicable law, and that the issue involved in the case (admissibility of expert testimony) is one that traditionally has been subject to abuse of discretion review, which both parties in *Joiner* agreed was the applicable standard.

[2] Bench Trials

Moore v. United States, 429 U.S. 20 (1976) : At a consolidated hearing on a motion to suppress evidence and a trial on the merits for possession of heroin with intent to distribute, the Trial Judge admitted hearsay evidence that the defendant possessed heroin and relied upon the hearsay in adjudging the defendant guilty. The Supreme Court found "unpersuasive" the government's argument that the error was probably harmless because the defendant was convicted in a bench trial and remanded the case to the Trial Court for a determination of whether the error was harmless.

[3] Exceptions in Other Rules

Ueland v. United States, 291 F.3d 993 (7th Cir. 2002) : The Court reversed a judgment for the United States in a Federal Tort Claims Act action brought by a prisoner after the prison van in which he was riding struck another car. The plaintiff proffered the deposition, taken in a separate lawsuit, of another prisoner in the van, who corroborated the plaintiff's account. The deposition was excluded on grounds of hearsay, but the Court held that the deposition was admissible under *Fed. R. Civ. P. 32(a)(3)*. The Court noted that "Rule 32(a), as a free-standing exception to the hearsay

rule, is one of the 'other rules' to which *Fed. R. Evid. 802* refers."

[4] Opening the Door to Hearsay

United States v. Brown, 921 F.2d 1304 (D.C. Cir. 1990) : In a trial for PCP possession, an arresting officer testified on cross-examination that an informant had said she had previously met the defendant, but the officer had not recorded that fact in his notes. On redirect, he testified that the informant could identify the defendant from previous dealings of PCP. The Court held that mention of the PCP dealings was error, as that was hearsay not rehabilitating the officer's credibility, and defense counsel had not opened the door because the cross-examination testimony was admissible under the prior identification exemption.

United States v. Candelaria-Silva, 162 F.3d 698 (1st Cir. 1998) : At the trial of a drug case, the defendant improperly asked a witness on direct examination what the witness had heard about the defendant's brothers and about the defendant. The witness' testimony suggested that the brothers, not the defendant, were involved in drug distribution. In light of this testimony, the Court found that the doctrine of curative admissibility permitted the government to ask whether the defendant was known to have participated along with his brothers. In *Polansky v. CNA Ins. Co.*, n2 the Court reversed a judgment against an insurer that claimed that a building fire was arson, and held it was error to admit a letter written by the plaintiff's public adjuster that related a hearsay statement allegedly made by an official working for the insurer. Although the plaintiff argued that the letter was offered in response to a hearsay statement to which he did not object, the Court declined "to approve the following rule: if plaintiff does not object to evidence possibly admitted against the rules of evidence, then plaintiff gets a free shot to violate those same rules."

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) : After a cooperating witness in a major narcotics and racketeering case testified, on the basis of what he had been told by others, that there was $1.1 million more cash in his apartment at the time of his arrest than the police accounted for, the prosecutor sought, in order to forestall a defense argument that officers had stolen the money, to ask the witness whether he had been told the apartment had been burglarized after his arrest. When defense counsel refused to agree not to cross-examine on the point, the Trial Judge permitted testimony as to the amount of money in the apartment and the burglary and advised the jury that it was hearsay and could be discounted. The Court held that the defendants had not waived their hearsay objection to mention of the burglary by refusing to forgo cross-examination, nor had that opened the door to inadmissible evidence. The hearsay statement about the amount of money was admissible as a coconspirator's statement, so the hearsay about the burglary was not responding to inadmissible evidence. More importantly, even if the amount statement were inadmissible, the government could not thereby open the door for itself. However, any error was harmless.

[5] Statutory Exceptions to Hearsay Ban

United States v. Garcia Abrego, 141 F.3d 142 (5th Cir. 1998) : The Court held, in a CCE prosecution, that foreign bank records meeting the criteria of *18 U.S.C. § 3505* were not precluded from admission by the hearsay rule.

United States v. Aikins, 946 F.2d 608 (9th Cir. 1990) , *amended* (9th Cir. 1991): Although reversing convictions for drug possession on the high seas, the Court held that proof of Panama's consent to enforcement of United States law was sufficiently supplied under *46 U.S.C. App. § 1903(c)(1)* by the Secretary of State's certificate.

FOOTNOTES:
(n1)Footnote 1. *General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997)* .

(n2)Footnote 2. *Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988)* .

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802.04 Legislative History

Advisory Committee's Note

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Federal Rules of Civil Procedure

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

Federal Rules of Criminal Procedure

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit of proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

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4-802 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 802, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 802. Hearsay Rule	**Rule 802. The Rule Against Hearsay**
Hearsay is not admissible except as provided by	Hearsay is not admissible unless any of the fol-

these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescrib

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Committee Note

The language of Rule 802 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 802.03 Annotated Cases

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[4] Opening the Door to Hearsay [Go To Main]

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) : In a prosecution for possession of methamphetamine with intent to distribute, a police officer testified on direct regarding the search of a truck, and on cross-examination defense counsel elicited that the officer suspected the truck because of information from a confidential informant, whose absence from the trial counsel emphasized. On redirect the officer testified over *Confrontation Clause* objections as to statements from the informant. Affirming, the Court held that the door had been opened when defense counsel went beyond asking the officer if he received information from the informant to asking what that information was. The Court also held that the door had been opened to the admission of statements implicating the defendant, which had been made by a codefendant at a change-of-plea hearing, when the officer was questioned about the codefendant's conviction in a way that suggested the codefendant had claimed full and sole responsibility for the crime.

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4-803 Federal Rules of Evidence Manual 803.syn

§ 803.syn Synopsis to Chapter 803: RULE 803

803.01 Official Text

803.02 Editorial Explanatory Comment

[1] Unavailability Irrelevant

[2] Rule 803(1) -- Present Sense Impressions

[a] Foundation for Exception

[b] Present Sense Impressions -- Corroboration Requirement

[3] Rule 803(2) -- Excited Utterances

[a] Foundation for Exception

[b] Excited Utterances -- What Is a Startling Event?

[c] Excited Utterances -- Timing of Statement

[d] Excited Utterances -- Responses to Questions

[e] Excited Utterances and Present Sense Impressions -- Unidentified Declarants

[4] Rule 803(3) -- Statements of Then Existing State of Mind or Physical Condition

[a] Foundation for Exception

[b] State of Mind -- Statements Looking Backward, Statements Looking Forward

[c] State of Mind -- Statements Offered to Prove the Subsequent Conduct of a Nondeclarant

[d] State of Mind -- Possibility of Fabrication

[5] Rule 803(4) -- Statements Made for Purposes of Medical Treatment or Diagnosis

[a] Foundation for Exception

[b] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements of Medical History, Causation, and Fault

[c] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements Made in Anticipation of Litigation

[d] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements by Nonpatients

[e] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements to Psychologists and Psychiatrists

[6] Rule 803(5) -- Prior Recollection Recorded

[a] Foundation for Exception

[b] Prior Recollection Recorded -- Two Party Vouching

[c] Prior Recollection Recorded -- Multiple Hearsay

[d] Prior Recollection Recorded -- Expansive Approaches

[7] Rule 803(6) -- Records of Regularly Conducted Activity

[a] Foundation for Exception

[b] Records of Regularly Conducted Activity -- Definition of "Business"

[c] Records of Regularly Conducted Activity -- "Business Duty"

[d] Records of Regularly Conducted Activity -- Foundation Requirements

[e] Records of Regularly Conducted Activity -- Regularly Conducted and Recorded

[f] Records of Regularly Conducted Activity -- Computerized Records

[g] Records of Regularly Conducted Activity -- Trustworthiness, Preparation in Anticipation of Litigation

[h] Records of Regularly Conducted Activity -- Opinions

[8] Rule 803(7) -- Absence of Records of Regularly Conducted Activity

[9] Rule 803(8) -- Public Records

[a] Foundation for Exception

[b] Public Records -- Which Reports Are "Public"?

[c] Public Records -- Law Enforcement Reports Offered by Criminal Defendants Against the Government

[d] Public Records -- Law Enforcement Reports Offered Against Criminal Defendants

[e] Public Records -- Relationship to Rule 803(6)

[f] Public Records -- Factual Findings and Investigative Reports

[g] Public Records -- Official's Lack of Personal Knowledge

[h] Public Records -- Judge and Jury Findings

[10] Rule 803(9) -- Records of Vital Statistics

[11] Rule 803(10) -- Absence of Public Records

[a] Foundation for Exception

[b] Absence of Public Record -- Scope of Search

[12] Rule 803(11) -- Records of Religious Organizations

[13] Rule 803(12) -- Marriage, Baptismal, and Similar Certificates

[14] Rule 803(13) -- Family Records

[15] Rule 803(14) -- Record of Documents Affecting an Interest in Property

[16] Rule 803(15) -- Statements in Documents Affecting an Interest in Property

[17] Rule 803(16) -- Ancient Documents

[18] Rule 803(17) -- Market Reports

[19] Rule 803(18) -- Learned Treatises

[a] Foundation for Exception

[b] Learned Treatises -- Not Received as Exhibits

[c] Learned Treatises -- Charts, Films and Tapes

[20] Rule 803(19) -- Reputation Concerning Personal or Family History

[21] Rule 803(20) -- Reputation Concerning Boundaries or General History

[22] Rule 803(21) -- Reputation as to Character

[23] Rule 803(22) -- Judgments in Felony Cases

[24] Rule 803(23) -- Judgment as to Personal, Family or General History, or Boundaries

[25] Residual Exception

[26] Confrontation Clause and Rule 803 Exceptions

[27] Specificity of Objection

803.03 Annotated Cases

[1] Rule 803(1) -- Present Sense Impression

[a] Rule 803(1) -- Constitutional Concerns

[b] Rule 803(1) -- Copyright Cases

[c] Rule 803(1) -- Interested Witness

[d] Rule 803(1) -- Interpretative Statements

[e] Rule 803(1) -- Personal Knowledge

[f] Rule 803(1) -- Relationship to Other Rules

[g] Rule 803(1) -- Reports of Conversations

[h] Rule 803(1) -- Responses to Questions

[i] Rule 803(1) -- Tape-Recorded Impressions

[j] Rule 803(1) -- Timing

[k] Rule 803(1) -- Valuations

[2] Rule 803(2) -- Excited Utterance

[a] Rule 803(2) -- Accidents

[b] Rule 803(2) -- Assault Victims

[c] Rule 803(2) -- Codefendant's Statement

[d] Rule 803(2) -- Constitutional Concerns

[e] Rule 803(2) -- Criminal Defendant's Statement

[f] Rule 803(2) -- Foundation

[g] Rule 803(2) -- Identifications

[h] Rule 803(2) -- Personal Knowledge

[i] Rule 803(2) -- Response to Questions

[j] Rule 803(2) -- Shooting Victim

[k] Rule 803(2) -- Scope of the Rule

[l] Rule 803(2) -- Threats

[m] Rule 803(2) -- Timing

[n] Rule 803(2) -- Unidentified Declarant

[o] Rule 803(2) -- Witnesses to Crimes

[3] Rule 803(3) -- Then Existing Mental, Emotional, Or Physical Condition

[a] Rule 803(3) -- Constitutional Concerns

[b] Rule 803(3) -- Customer Confusion

[c] Rule 803(3) -- Facts Reflected in State of Mind

[d] Rule 803(3) -- Intent

[i] Rule 803(3) -- Bearing Upon Motive of Another

[ii] Rule 803(3) -- Intent -- Inference from Present to Past State of Mind

[iii] Rule 803(3) -- Intent -- Miscellaneous Cases

[iv] Rule 803(3) -- Intent -- Proving Acts of Declarant

[v] Rule 803(3) -- Intent -- Proving Acts of Nondeclarant

[vi] Rule 803(3) -- Intent -- State of Mind

[e] Rule 803(3) -- Mixed Present and Past States of Mind

[f] Rule 803(3) -- Past Acts or State of Mind

[g] Rule 803(3) -- Present State of Mind

[i] Rule 803(3) -- Civil Cases

[ii] Rule 803(3) -- Present State of Mind -- Criminal Cases

[h] Rule 803(3) -- Requirement of Relevance

[i] Rule 803(3) -- Spontaneity

[j] Rule 803(3) -- Statement of Accused

[k] Rule 803(3) -- Statement of Belief or Memory

[l] Rule 803(3) -- Statement of Mental Condition

[m] Rule 803(3) -- Statement of Physical Condition

[n] Rule 803(3) -- Surveys and Opinion Polls

[4] Rule 803(4) -- Statements For Purposes Of Medical Diagnosis Or Treatment

[a] Rule 803(4) -- Abused Child

[b] Rule 803(4) -- Constitutional Concerns

[c] Rule 803(4) -- Medical Opinions

[d] Rule 803(4) -- Nonpatient Declarants

[e] Rule 803(4) -- Patient's Statement of Other Doctor's Opinion

[f] Rule 803(4) -- Statements Explaining Cause or Attributing Fault

[g] Rule 803(4) -- Statements for Purposes of Treatment

[h] Rule 803(4) -- Statements to Nonphysicians

[i] Rule 803(4) -- Summaries of Medical History

[5] Rule 803(5) -- Recorded Recollection

[a] Rule 803(5) -- Contemporaneous Recording Required

[b] Rule 803(5) -- Diaries

[c] Rule 803(5) -- Expert's Report

[d] Rule 803(5) -- Foundation

[e] Rule 803(5) -- Fresh in Memory When Statement Made

[f] Rule 803(5) -- Intoxicated Declarant

[g] Rule 803(5) -- Invocation of Self-Incrimination Privilege

[h] Rule 803(5) -- Memory Problems

[i] Rule 803(5) -- Not Receivable as Exhibit

[j] Rule 803(5) -- Personal Knowledge

[k] Rule 803(5) -- Police Reports

[l] Rule 803(5) -- Refreshing Recollection

[m] Rule 803(5) -- Two-Witness Voucher

[n] Rule 803(5) -- Weight

[6] Rule 803(6) -- Records Of Regularly Conducted Activity

[a] Rule 803(6) -- Affidavits

[b] Rule 803(6) -- At or Near the Time

[c] Rule 803(6) -- Audit Reports

[d] Rule 803(6) -- Bills and Invoices

[e] Rule 803(6) -- Computerized Records

[f] Rule 803(6) -- Diaries

[g] Rule 803(6) -- Electronic Mail

[h] Rule 803(6) -- Estimates

[i] Rule 803(6) -- Financial Statements

[j] Rule 803(6) -- Foreign Records

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[20] Rule 803(24) -- Other Exceptions

803.04 Legislative History

[1] Advisory Committee's Note

[2] 1997 Amendment Committee Note

[3] 2000 Amendment Committee Note

[4] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 283 (1999)

[5] House Subcommittee on Criminal Justice Notes

[6] Report of the House Committee on the Judiciary

[7] Report of the Senate Committee on the Judiciary

[8] Report of the House and Senate Conferees

[9] Citations to Hearings and Debates

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 803 RULE 803

4-803 Federal Rules of Evidence Manual 803.01

803.01 Official Text

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression*. -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance*. -- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition*. -- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment*. -- Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection*. -- A memorandum or record concerning a matter about which a witness once had

knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity*. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6)*. -- Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports*. -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics*. -- Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry*. -- To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations*. -- Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates*. -- Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records*. -- Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property*. -- The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property*. -- A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents*. -- Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications*. -- Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises*. -- To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history*. -- Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) *Reputation concerning boundaries or general history*. -- Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to character*. -- Reputation of a person's character among associates or in the community.

(22) *Judgment of previous conviction*. -- Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries*. -- Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Transferred to Rule 807]

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 803 RULE 803

4-803 Federal Rules of Evidence Manual 803.02

803.02 Editorial Explanatory Comment

[Go To Supp]

[1] Unavailability Irrelevant

This Rule defines hearsay exceptions that are applicable whether or not the declarant is available as a witness. The rationale for dispensing with an unavailability requirement is that a statement falling within one of the *Rule 803* exceptions is actually as reliable or more reliable than any in-court testimony that could come from the declarant. For example, a business record of a sale is frequently more reliable than any in-court testimony, replete with faded memory, of the person who made the sale. Each section of *Rule 803* is considered separately below.

While these exceptions are based on reliability, this may not be enough to satisfy the right to confrontation of an accused. The Supreme Court's decision in *Crawford v. Washington*, discussed in detail in § 803.02[26], held that hearsay that is "testimonial" can only be admitted in a criminal case if the declarant has been or can be cross-examined. Under *Crawford*, if hearsay is "testimonial" it doesn't matter how reliable it is -- there must be cross-examination. It follows that some hearsay that is admissible under the *Rule 803* exceptions might nonetheless be inadmissible under the *Confrontation Clause* after *Crawford* -- specifically that hearsay fitting the Court's still-in-development definition of "testimonial." While a full discussion of the impact of *Crawford* is reserved until the end of this Editorial Explanatory Comment, the reader should keep in mind that as each hearsay exception is discussed, the admissibility of any statement under that exception may be affected in criminal cases after *Crawford*.

[2] Rule 803(1) -- Present Sense Impressions

[a] Foundation for Exception

Rule 803(1) adopts a hearsay exception for statements describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. In most common-law jurisdictions, such statements would be excluded without some excitement qualifying the statement as an excited utterance. The theory underlying *Rule 803(1)* is that "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." n1 The critical element, therefore, is contemporaneity; the statement must be made at the time that the event or condition is being perceived or immediately thereafter. n2 If the statement is made right at the

time of the event, it is assumed that the declarant had no time to lie about it. Moreover there is little chance of misstatement due to loss of memory.

While contemporaneity is critical to admissibility, there is in fact no talismanic time period for admission as a present sense impression. Admissibility is determined on a case-by-case basis, in which the Court investigates the circumstances of the statement to determine whether the declarant had some time for reflection so that the statement is no longer spontaneous. n3 If there is no evidence, circumstantial or otherwise, as to the time lapse, there is no foundation to admit the statement. n4

[b] Present Sense Impressions -- Corroboration Requirement

Professor Waltz, in *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869 (1981), carefully traced the present sense impression from early American cases through the early Federal Rules decisions. He indicated that the history supports some sort of corroboration requirement for a present sense impression -- that is, a requirement that before the statement is admitted, there must be evidence independent of the statement itself to prove that the event described actually occurred.

Most Federal Courts (as shown in the Annotations, *§ 803.03*) have read a corroboration requirement into *Rule 803(1)*. The corroboration can be found in the in-court testimony of the declarant, or testimony of another person who also saw some of what the declarant saw, or simply circumstantial evidence that the event occurred. Imposing a corroboration requirement is a sensible approach. Under the plain language of the Rule, the proponent must show that the declaration was made at the time of, or immediately after, *an event*, and that the statements explained or described that event. To satisfy the timing, relationship, and event requirements, the witness in Court is probably going to have to be able to corroborate to some extent that the event actually occurred, unless the declarant is present to so testify or there is some other source of corroboration. In the absence of some proof other than the hearsay statement itself, a Trial Judge should conclude that the proponent has failed to prove by a preponderance of the evidence that the event occurred the way the declarant described it. Otherwise, the admissibility requirement is proved *solely* through the hearsay statement itself -- something that is not allowed, for example, with coconspirator hearsay statements. See *Rule 801(d)(2)(E)*. While the hearsay statement itself may certainly be considered as proof of the admissibility requirement that an event occurred (see *Rule 104(a)*), some corroboration must be provided for the statement to be admissible under *Rule 803(1)*.

The Advisory Committee Note to *Federal Rule 803(1)* stresses that present sense impressions are reliable in large part because the witness who testifies to the declarant's statement "may be examined as to the circumstances" described by the declarant. This indicates that the drafters intended a corroboration requirement for this exception, i.e., that the person who heard the declarant's statement was also at the event and could give his own account of it at trial. But this statement should not be taken to mean that a present sense impression is only admissible if an in-court witness can testify that the event occurred exactly as the declarant described it. While a witness who was in the same position to view the event as the declarant would certainly be able to provide sufficient corroboration, a requirement of equal percipience would rob the Rule of much of its practical effect; the declarant's hearsay statement would to some extent be cumulative if the witness could provide the same statement in court. The Rule should be and has been construed to permit corroboration short of equally percipient testimony.

A case that illustrates the correct approach to the corroboration requirement is *United States v. Blakey, 607 F.2d 779 (7th Cir. 1979)* . The defendants in *Blakey* were charged with extortion. The government offered the victim's hearsay statement that "stuff like tonight cost me a thousand dollars." The statement was made immediately after the victim and the three defendants came out from a short meeting in the back of the victim's shop. The defendants argued that the statement could not be admitted under *Federal Rule 803(1)* because there were no witnesses, other than the declarant and the defendants, to the relevant event -- the purported exchange of $1000 in the back of the declarant's shop -- and the declarant was no longer available to testify. The Court held, however, that the statement was properly admitted because "there were several witnesses who could testify to the events leading up to and following the meeting" in the

back of the shop. These witnesses would testify that the defendants acted in a very intimidating manner before going to the back of the shop with the declarant, and that after the defendants and the declarant briefly met in the back of the shop, the defendants came out looking "satisfied." The Court concluded that "it is not necessary that the witnesses be in the same position to observe as the declarant; it is only necessary that the witnesses be able to corroborate the declarant's statement." In other words, the government, through corroborative witnesses together with the hearsay statement itself, proved by a preponderance of the evidence that an "event" occurred as the declarant described it, and therefore satisfied that admissibility requirement of *Rule 803(1)*.

[3] Rule 803(2) -- Excited Utterances

[a] Foundation for Exception

Rule 803(2) codifies the well-established common-law excited utterance exception to the hearsay rule. n5 There is obviously some overlap between this exception and the present sense impression exception. For example, a statement describing a murder, made immediately after the event, could rationally qualify under either exception. Yet the two exceptions are based on different admissibility requirements, and it is not uncommon for a hearsay statement made shortly after an event to fit one of the exceptions but not the other. The most significant differences between the two exceptions are that: (1) an excited utterance must relate to a "startling" event or condition while a statement of present sense impression may describe any event or condition; (2) the present sense impression must "describe" the event, while the excited utterance need only "relate" to the event -- the excited utterance exception thus allows a broader scope of subject matter coverage than does the present sense impression exception; n6 and (3) the excited utterance exception does not contain an express contemporaneity requirement, as does *Rule 803(1)*.

Statements made while under the influence of a startling event are considered reliable because excitement is thought to still the reflective capacity and give rise to trustworthiness. Commentators have noted that excitement may also give rise to error, but this has generally not detracted from the admissibility of these statements. Once the excitement passes, however, statements made are not within this exception.

[b] Excited Utterances -- What Is a Startling Event?

In most cases it is not seriously disputed that the event to which the excited utterance relates is in fact a startling event. Occurrences such as accidents, fights, and physical crimes are generally deemed startling events. n7 However, admissibility under the Rule is not limited to events describing such clearly upsetting occurrences. The Courts have been quite expansive in finding that an event that triggered a startled statement is in fact a startling event. n8 Often such liberal treatment is used to admit a statement relating to a past event as to which the "under the influence" requirement cannot be satisfied at the time the statement was made. For instance, in *United States v. Napier, 518 F.2d 316 (9th Cir. 1975)* , a pre-Rules case, the declarant had been attacked and injured by an unknown assailant. About a week later, the victim saw the defendant's picture in the newspaper, and became upset and identified the defendant as her attacker. The Court, citing *Rule 803(2)*, held that this statement was properly introduced as an excited utterance. Of course, the attack itself was a startling event, but the statement was too far removed from the attack for the declarant to have remained continuously under the influence of that startling event. The Court found, however, that the relevant startling event was the victim's recognition of her assailant in the newspaper. The statement was clearly made under the influence of that startling event, and the Court assumed that the statement was sufficiently related to that event to be admissible under *Rule 803(2)*. n9 Recall that unlike a present sense impression, an excited utterance need only relate to the event, it need not actually describe the event.

Some Courts have held that an event cannot be startling if the declarant has planned for the event to occur, and the event occurs as planned. n10 This presumes, however, that all the factors leading up to the event are within the declarant's control; if not, the element of surprise may create excitement when the event occurs. A person may plan for an event to occur, but if the occurrence is outside the person's control, it may well be startling when the event actually occurs. n11

For example, a person has to plan to win the lottery in order to win, but actually winning the lottery is certainly a startling event.

[c] Excited Utterances -- Timing of Statement

There is no hard and fast rule prescribing the amount of time that may elapse between a startling event and an excited utterance. The closer in time the statement is to the startling event, the more likely the declarant is still to be under the influence of the event. Ordinary experience teaches that the stress of excitement tends to dissipate with time. n12 The issue, however, is not the passage of time as such but the state of mind of the declarant -- specifically whether the declarant has been excited during the entire time between the event and the statement. Even statements made an hour or so after the event can qualify for the exception if the proponent can establish by a preponderance that the declarant was under a continuous state of excitement during the entire period between the startling event and the making of the statement. n13

There are several circumstances that are relevant to admissibility even though a significant amount of time has passed between the event and the statement. These include:

(1) The nature of the startling event. Some events are more startling than others; a declarant could be expected to be under the influence of a high impact event for a longer period of time. n14

(2) Whether the declarant in fact appeared to be excited during the time between the event and the statement. n15

(3) The nature of the declarant. Some declarants, especially children, can be expected to be under the influence of a startling event for a longer period than others. n16

(4) The fact that the statement is self-serving to the declarant, while not dispositive, certainly raises the possibility that the declarant had time to reflect. n17

(5) If the statement describing a previous event also predicts a future event (e.g., "something bad is going to happen"), such a prediction generally shows deliberative thought, not excitedness.

[d] Excited Utterances -- Responses to Questions

Responses to questions, as opposed to spontaneous statements, are viewed with some suspicion because the process of answering involves at least sufficient reflection to respond appropriately to the question. However, statements made in response to questions are not by that fact alone disqualified from admissibility under *Rule 803(2)*. Questioning is a factor that the Court should consider in determining whether a statement is sufficiently spontaneous. It does not, in itself, conclusively negate spontaneity -- so long as there is a sufficient showing that the declarant remained in a continuous state of excitement. n18 If the questions are leading or found to have caused the answers to have been made, however, there will generally be an insufficient showing of excitedness.

[e] Excited Utterances and Present Sense Impressions -- Unidentified Declarants

One question that has arisen concerning admissibility of present sense impressions and excited utterances is whether the declarant must be an identifiable person. The Advisory Committee's Note on Federal Rules 803(1) and 803(2) mentions cases in which Courts had refused to admit the hearsay statement of an unidentified bystander. n19

There are two possible concerns that a Court might have when a witness testifies that a present sense impression or excited utterance was made by an unidentified declarant. One is that if the declarant cannot be identified as a real person, there is a possibility that the declarant never even existed; the witness may be creating a "phantom declarant" in

order to manufacture a hearsay statement ready-made to fit the present sense impression or excited utterance exception. For example, a plaintiff in a personal injury action might testify to an unidentified bystander's contemporaneous description of an accident, which just happens to track the plaintiff's version of the events, and the defendant may do likewise.

We submit, however, that any concern over fabricated hearsay statements does not present a hearsay problem, and therefore it should not result in exclusion of present sense impressions or excited utterances made by unidentified declarants. The concern over phantom declarants is that the *in-court witness* may be lying, i.e., testifying about hearsay statements that were never really made. This raises a question concerning the credibility of the in-court witness. Credibility of trial witnesses can be assessed by the traditional methods of oath, cross-examination, and the jury's opportunity to view the demeanor of the witness. Consequently, a statement proffered under Rules 803(1) or 803(2) should not be excluded simply because of the possibility that an unidentified declarant has been fabricated. The hearsay rule does not prohibit all lying; it simply provides that if a person is going to lie, it must be done on the witness stand so that he or she can be tested by the in-court guarantees of trustworthiness.

A more legitimate concern with respect to unidentified declarants is that it may be difficult to determine whether the declarant had personal knowledge of the event described. n20 If the declarant does not have personal knowledge of the event, then the statement describing the event is inadmissible under Rules 803(1) and 803(2). n21 This is because *Rule 803(1)* requires that the statement must be made "while the declarant was perceiving the event or condition, or immediately thereafter," and *Rule 803(2)* requires that the declarant must be "under the influence" of the startling event. These requirements cannot be met in the absence of the declarant's personal knowledge of the event. More fundamentally, as discussed in the Editorial Explanatory Comment to *Rule 602, § 602.02[2]*, hearsay declarants in general must have personal knowledge of the facts related in their statements (with the exception of admissions).

Identification of the declarant will often be helpful in establishing that he or she had personal knowledge of the event described. But this does not mean that identification of the declarant is a precondition to admissibility. The statement itself, or circumstantial evidence, may create an inference that the declarant perceived the event. Illustrative is *United States v. Medico, 557 F.2d 309 (2d Cir. 1977)* , where a bystander relayed the license plate number of a getaway car to a security guard who was locked inside a bank that had just been robbed. The bystander was never identified, but his personal knowledge was established by the fact that the guard saw him look in the direction of the getaway car as he relayed the license number. The Court held that the bystander's statement was admissible as a present sense impression. n22 In sum, if the declarant's personal knowledge can be established, the declarant need not be an identifiable person for purposes of *Rules 803(1) and 803(2)*.

[4] Rule 803(3) -- Statements of Then Existing State of Mind or Physical Condition

[a] Foundation for Exception

Rule 803(3) provides an exception for statements of present state of mind, emotion, or physical condition. The theory of trustworthiness supporting the admissibility of these statements is that they are based on unique perception; that is, the declarant has a unique perspective into his or her own physical condition, feelings, and emotions. There is also an argument that state of mind statements are spontaneous, because in order to be admissible under the exception they must be reflective of a "then existing" state of mind. Statements of a past state of mind or physical condition are not admitted. However, as applied to statements of a declarant's state of mind, the spontaneity requirement does not really guarantee sincerity. It is impossible to tell how spontaneous a state of mind statement really is, because it describes an internal event; a declarant's "then existing" state of mind could well be the product of days of contemplation and fabrication. n23 This is unlike, for instance, the present sense impression, where it can be determined through reference to an external event that the declarant did or did not have time to fabricate.

[b] State of Mind -- Statements Looking Backward, Statements Looking Forward

Rule 803(3) does not permit a statement of memory or belief to prove the fact remembered or believed. The "statement of memory or belief" exclusion is a codification of the holding in *Shepard v. United States, 290 U.S. 96 (1933)*, where the Court held that a statement of the defendant's wife, accusing him of poisoning her, could not be admitted under the state of mind exception when offered to prove that the defendant had actually poisoned her. The *Shepard* exclusion is considered necessary "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." n24

While a state of mind statement cannot be offered to prove that a past event occurred, it can be offered in some cases to prove the occurrence of an event *subsequent* to the statement. n25 The Advisory Committee states that *Rule 803(3)* preserves the rule of *Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892)*, allowing a hearsay statement by a declarant to prove the declarant's state of mind, when probative that the declarant subsequently acted in accordance with that state of mind. In *Hillman*, evidence a declarant's hearsay statement about his intent to go to a certain place was held admissible to prove that the declarant actually went there. n26

An example may help to illustrate what is included within the exception and what is not. If a declarant (*D*) states, "I am going to New York tomorrow," and subsequently disappears, the statement may be introduced as probative that *D* went to New York; intent to do an act in the future is probative that the act occurred. If, on the other hand, *D* states "Two years ago I went to New York," the statement may be said to reflect the state of mind called "memory," but the statement is not admissible under the state of mind exception, because that exception precludes a statement of memory when offered to prove that the fact remembered is actually true. If *D* says, "I am going to New York tomorrow because Joe stole my money and I have to get it back from him," the statement cannot be used to prove that Joe stole money from *D*, because that would be using the state of mind statement to prove the truth of a past fact, which is prohibited by *Shepard*. n27 But it could be used to prove that *D* went to New York, because that is permitted by *Hillmon*.

Where the state of mind statement is offered to prove future conduct of the declarant, the hearsay rule poses no bar, but the declarant's statement must be scrutinized under *Rule 403* (and of course a specific objection must be made under that Rule to preserve a claim of error on appeal). Exclusion under *Rule 403* could occur if the inference from state of mind to subsequent action by the declarant is weak; n28 if there is no dispute about the declarant's subsequent conduct; n29 or if prejudice, confusion, or delay is created that substantially outweighs the statement's probative value as to the declarant's future course of action. n30 The most obvious risk of prejudice is that the jury will consider the hearsay statement not as proof of state of mind and the subsequent conduct of the declarant, but rather for the truth of the facts that are related in the statement. For instance, in *State v. Charo, 156 Ariz. 561, 754 P.2d 288 (1988)*, a state case decided under a rule identical to Federal Rule 803(3), the defendant was accused of murder. The defendant denied the murder and presented evidence of an alibi. The prosecution offered the victim's out-of-court statement to the effect that she feared the defendant as the result of the defendant's prior sexual attack upon her. The Arizona Supreme Court held that if the statement was offered under *Rule 803(3)* to prove that the prior sexual attack occurred, it was clearly inadmissible under the "memory or belief" limitation of the Rule. To the extent the statement was offered to show the declarant's fearful state of mind, the Court held that the statement was inadmissible under *Rule 403*. The victim's state of mind was not at issue in the case; nor was the statement probative for any inference that could be drawn about the victim's subsequent course of conduct. There was no dispute about the victim's conduct in the case. The Court stated: "While there may be times when fear of the defendant is both admissible hearsay and relevant, the victim's statement in the present case is irrelevant unless the defendant asserts a defense which makes her feeling relevant." n31

In contrast to the facts of *Charo*, it is possible that a statement by the victim putting blame on the defendant might be admissible to prove the declarant's subsequent conduct if that conduct is in dispute and if the statement is relevant to prove that conduct. For example, assume a murder case in which the defendant claims that he killed the victim by accident. The defense is that the defendant and the victim were rabbit hunting together; the victim was walking ahead of the defendant to scare up rabbits; and the defendant tripped on a log and his gun accidentally discharged, killing the

victim. The prosecution proffers a hearsay statement from the victim, made three days before his death, in which the victim told his mother that he was afraid the defendant was going to kill him because the victim still owed the defendant a large sum of money from a drug deal. This statement should be admitted under Rules 803(3) and 403, with an instruction that the jury is not to use the statement for the fact that the victim owed the defendant money from a drug deal or that the victim had reason to fear the defendant. Rather, it is admissible to show that the victim feared the defendant, whether that fear was reasonable or not. This fearful state of mind is probative of the victim's subsequent conduct; it makes it much less likely that the victim would be walking voluntarily ahead of a person he feared while that person was carrying a loaded gun. The hearsay statement is prejudicial because the jury may use it for the truth of the facts related even though instructed not to do so. But, a Trial Court would certainly be within its discretion in finding that the prejudicial effect does not substantially outweigh the probative value of the statement in proving the victim's disputed actions. n32

[c] State of Mind -- Statements Offered to Prove the Subsequent Conduct of a Nondeclarant

The legislative history of *Rule 803(3)* fails to resolve whether, as in the famous *Hillmon* dictum, a declarant's statement of state of mind can be used to prove the subsequent conduct of someone other than the declarant. For example, if the declarant says, "I am going to meet Joe to buy some drugs from him," can the statement be used to prove the subsequent conduct of both the declarant *and* Joe? n33 The answer should be "no." The rationale for extending the state of mind exception to prove the subsequent conduct of a nondeclarant is dubious. Recall that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant's conclusion about the state of mind of someone else. A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person. n34

The report of the House Judiciary Committee stated that the Committee intended that *Rule 803(3)* be construed to limit the *Hillmon* doctrine "so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." The Senate Report made no mention of this limitation.

The Federal Courts have interpreted this ambiguous legislative history in differing ways. n35 Some Courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet. n36 One Court has permitted the declarant's statement to be used to show another's conduct, at least where the Trial Court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a nondeclarant). n37 The Second Circuit has taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a nondeclarant only "when there is independent evidence which connects the declarant's statement with the non-declarant's activities." n38

It will often occur that the declarant's statement will refer to another person, directly or indirectly, but the statement is not in fact offered to show that the nondeclarant had a certain state of mind or acted in accordance with a particular mental state. For instance, a statement of the victim that he planned to go to the defendant's *house* to deliver a package contains a *reference* to a third party, but it does not refer directly or indirectly to that third party's *state of mind or action*. In such cases, the statement is admissible under any view of *Rule 803(3)* to prove that the declarant went to the defendant's house, because the statement is offered only to show that the declarant acted in accordance with his or her own mental state. As a result, there is no reliability problem of determining the state of mind of a nondeclarant, as to which the declarant has no unique perception. n39

[d] State of Mind -- Possibility of Fabrication

As stated above, *Rule 803(3)* does not guarantee that the declarant's state of mind will be spontaneous in any meaningful sense. Indeed, there is a substantial risk under the Rule that a declarant will be able to fabricate a state of mind. For

example, in *United States v. Lawal, 736 F.2d 5 (2d Cir. 1984)* , the defendant arrived at Customs after a flight from Nigeria, and drugs were found in his luggage. At that point, the defendant made a "spontaneous" statement of anger at being "set up" and duped by a person in Nigeria. At trial, the defendant offered this statement to prove that he had no intent to smuggle drugs. The Trial Court excluded the statement on the ground that it was unreliable. But the Court of Appeals held that this was error. The Court reasoned that the statement expressed the declarant's then existing state of mind, and this is all that the Rule requires. The Court concluded that statements that fit the definition of *Rule 803(3)* cannot be excluded as hearsay, even if they are self-serving and made under untrustworthy circumstances; the Rule does not give the Courts discretion to exclude untrustworthy statements. The untrustworthiness of a statement of the declarant's existing state of mind affects the weight and not the admissibility of the statement. n40

Despite the apparent categorical approach taken by the Federal Rules in general and by *Rule 803(3)* in particular, some Courts have reasoned that statements of a state of mind made without spontaneity and with the likelihood of fabrication are not admissible. They reason that spontaneity is an inherent part of the rationale for the exception, albeit not stated in the text of the Rule. Exclusion in these Courts is particularly likely with respect to exculpatory statements of criminal defendants made under suspicious circumstances. n41 The problem with this reasoning is that, while trustworthiness may be a part of the *rationale* for *Rule 803(3)*, the Rule *as written* does not contain a provision for excluding untrustworthy statements that would otherwise fall within the hearsay exception -- in contrast to some other hearsay exceptions such as *Rule 803(6)*, which contain specific language excluding untrustworthy statements. All that is required under *Rule 803(3)* is that the statement must be of a "then existing" state of mind; and the defendant's statement in a case like *Lawal* clearly meets this requirement. Finally, the self-serving nature of a criminal defendant's expression of an innocent state of mind such as that in *Lawal* is subject to a clear attack as to weight. The lack of sincerity in such a statement can easily be understood by the jury, so it makes little sense for the Trial Judge to exclude the statement on trustworthiness grounds where to do so is contrary to the language of *Rule 803(3)*.

For all these reasons, we believe that it is inappropriate to superimpose a trustworthiness requirement on the provisions of *Rule 803(3)*; a statement of a present state of mind should be admissible if it passes the probative value-prejudicial effect balancing test of *Rule 403*. n42 Of course, if the declarant's statement describes a *past*, rather than present state of mind, or is used to prove either a past state of mind or a past event, it is inadmissible under the terms of the Rule. n43

[5] Rule 803(4) -- Statements Made for Purposes of Medical Treatment or Diagnosis

[a] Foundation for Exception

Rule 803(4) is based on two independent rationales that purportedly guarantee trustworthiness. First, a patient has a selfish interest in providing truthful information in order to be correctly treated or diagnosed. If the patient lies to medical personnel, the joke will be on the patient. n44 Second, a statement is reliable if a medical expert would rely upon it as a basis for diagnosis or treatment. Thus, if the statement is "pertinent" to medical diagnosis or treatment, as the Rule requires, it is the type of statement upon which medical personnel would rely; if it is reliable enough for medical work, it is reliable enough for trial work. n45

Most Courts subject statements proffered under *Rule 803(4)* to a two-part reliability test. First, the declarant must have a motive consistent with obtaining medical care or diagnosis, or at least have the awareness that truthfulness is required to further such care. Second, the content of the statement must be such as is reasonably relied upon by medical personnel for treatment or diagnosis. n46 This two-pronged test reflects the policy justifications that support the Rule, and it is consistent with the Rule's language.

[b] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements of Medical History, Causation, and Fault

Rule 803(4) breaks with prior practice by admitting statements regarding past symptoms, medical history, and those

that relate to the cause of the injury, whenever these statements are pertinent to treatment or diagnosis. Traditionally, statements of past symptoms and medical history were admissible only as part of the factual basis of expert testimony. Statements of cause (e.g., "my back hurts because I slipped on some ice") were excluded as inherently unreliable. The Advisory Committee took the position that statements of medical history and causation are likely to be reliable at least insofar as reasonably pertinent to treatment or diagnosis, given the motive for making the statements, and the reliance thereon by medical personnel. n47

On the other hand, statements attributing fault (e.g., "my back hurts because I slipped on some ice at a poorly maintained bus stop") are ordinarily excluded under the Rule, because they do not further and are not pertinent to the patient's treatment or diagnosis. The Advisory Committee provided a pertinent hypothetical: "A patient's statement that he was struck by an automobile would qualify, but not his statement that a car was driven through a red light." Adding the reference to the red light will not affect the treatment, nor would the patient expect it to have any effect on treatment.

A major exception has developed to the principle that statements attributing fault are not within the exception: cases involving child abuse. A statement from the child-declarant to medical personnel concerning abuse is ordinarily held admissible under the Rule even when the declarant identifies the abuser. The rationale is that the "pertinence" prong of the Rule is satisfied because a statement of identification is pertinent to treatment of the child-victim; the doctor must be concerned not only with the child's current physical condition, but also with the child's future welfare and safety and psychological well-being. n48 As to the "treatment motive" prong of the Rule, most Courts require a showing that the child understood that she was speaking to medical personnel and needed to tell the truth in order to get properly treated. n49 Other courts are more flexible and look to the circumstances to determine whether the child was seeking treatment or diagnosis. n50

Courts have occasionally extended the principles established in child abuse cases to other cases involving domestic abuse, allowing statements from an adult-declarant identifying the perpetrator to be admitted under *Rule 803(4)*. As the Court put it in *United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993)* :

> [T]he identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case, even those not involving children. All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household ... . [T]he domestic sexual abuser's identity is admissible under *Rule 803(4)* where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment.

Similarly, the principle from the child sex abuse cases can be applied to cases involving sexual abuse of adult-victims. Because of the possibility of sexually communicated diseases, the victim's identification of the perpetrator is pertinent to the victim's treatment.

[c] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements Made in Anticipation of Litigation

Rule 803(4) marks a departure from the analogous common-law exception in its coverage of statements made to nontreating physicians. At common law, statements made to a doctor consulted solely for diagnostic purposes (such as in anticipation of litigation) were not considered sufficiently trustworthy to escape hearsay proscription. *Rule 803(4)*, however, permits patient statements to a nontreating physician as substantive evidence. The reasoning of the Advisory Committee was that the doctor who is consulted for litigation purposes would at any rate be able to testify to the nature of statements given by the patient as a basis for forming an opinion under *Rule 703*. The Advisory Committee believed

that despite instructions to the contrary, juries would tend to treat evidence admitted under *Rule 703* as proof of the facts stated, so it made little practical sense to continue with a hearsay proscription. This rationale carries less power after the 2000 amendment to *Rule 703*, which substantially circumscribes the ability of a proponent to introduce hearsay under the guise of offering it solely to illustrate the basis of the expert's opinion. See the Editorial Explanatory Comment to *Rule 703*, *§ 703.02[4]*. If not for *Rule 803(4)*, there would be a good chance that the jury would never hear statements made to a litigation doctor.

A Trial Court might understandably be reluctant to admit statements to medical personnel who are retained by the party solely to prepare a case. However, most Courts have held consistently with the Rule that even if the doctor is retained solely to testify as a witness, statements made to that doctor are admissible under *Rule 803(4)*, so long as they are pertinent to diagnosis. A doctor consulted for litigation purposes is retained for "diagnosis," and the Rule abolishes all distinctions between doctors consulted for treatment and those consulted for diagnosis. n51 The fact that a statement was made to a doctor for purposes of litigation is a matter of weight and not admissibility.

[d] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements by Nonpatients

A statement offered under *Rule 803(4)* need not refer to the declarant's own medical condition. If the declarant relays information about another person for purposes of treating or diagnosing that person, then generally speaking the same guarantees of trustworthiness exist as when the declarant is seeking treatment for himself. n52 Accordingly, statements by bystanders, family members, and others, made for purposes of treating an injured person and pertinent to that treatment, have often been admitted under *Rule 803(4)*. n53

The Court in *United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995)* , cautioned, however, that statements by nonpatients should be strictly scrutinized in child abuse cases. The Court explained as follows:

> The plain language of the Rule does not limit its application to patient-declarants. In most circumstances, we believe that statements to a doctor by a parent of an injured child could easily qualify as a statement for the purpose of obtaining a proper medical diagnosis.
>
> A parent's statement to a doctor identifying the assailant in a child molestation case must be treated as suspect ... . In the drama that unfolds during the medical examination of a child molestation victim, a parent or guardian's motive for casting blame may or may not be in the child's best interest or for the purpose of medical diagnosis. For example, a parent might misidentify the assailant in an effort to protect the other spouse, to avoid reprisal from the other spouse, to avoid having suspicion cast upon him or her, or to incriminate falsely the other spouse for personal motives.
>
> Since child molestation cases challenge our assumptions about why certain statements might have been made, inquiry into the declarant's purpose must be exacting. When a party seeks to introduce the statement of a parent or guardian identifying a sex offender, the proponent must demonstrate from the context and content of the statements that they were made for the purpose of medical diagnosis or treatment.

The *Yazzie* Court applied its exacting scrutiny to two statements made by the mother of a nine-year-old victim, which identified the child's stepfather as the perpetrator. The first statement was made to a doctor when the mother brought the child to be examined for sexual abuse. The Court noted that the mother expressed concern for her son, and that she had specifically brought her son in to be examined for signs of sexual abuse. The Court found this statement properly admitted.

The second statement, made shortly after the first one and also to the doctor, implored the doctor to conceal the accusations from the victim, for fear that the victim would report this to the defendant. The Court noted that this statement "appears to have been motivated by fear of retribution from Yazzie, not a desire to obtain proper medical

treatment for the victim." The Court concluded that while the mother "probably had good reason" for making this statement, "the victim's medical diagnosis and treatment does not appear to have been that purpose." Therefore, the second statement was not admissible under *Rule 803(4)*.

[e] Statements Made for Purposes of Medical Treatment or Diagnosis -- Statements to Psychologists and Psychiatrists

Rule 803(4) is not limited to statements made for treatment of physical ailments. Statements to mental health professionals also fall within the Rule. n54 We believe, however, that statements made for purposes of psychological treatment should be more strictly scrutinized for reliability than statements made in the course of treating a physical ailment. A person seeking psychological treatment may be subject to various infirmities that inhibit his truthtelling. Indeed, the very reason for seeking such treatment may indicate some impairment of memory, perception, or credibility that creates a problem with which the hearsay rule is concerned. Moreover, fabrication of physical ailments is ordinarily easier to detect by empirical tests than is a fabrication of psychological symptoms. Finally, a central guarantor of reliability of *Rule 803(4)* is that the statement is reasonably pertinent to diagnosis or treatment. But, while a doctor relies only on reliable information to treat a patient for physical ailments, a psychiatrist relies on all information, truthful and untruthful, to treat the patient.

For all these reasons, we believe that Trial Courts confronted with statements made for purposes of psychological treatment should make sure that the treatment or diagnosis was based on the practitioner's assumption that the declarant's statements were *truthful*. Such a finding can be made on the basis of testimony by the person to whom the statement was made, or through testimony of other mental health professionals as to what they would deem pertinent in light of the treatment that was undertaken.

[6] Rule 803(5) -- Prior Recollection Recorded

[a] Foundation for Exception

Rule 803(5) is the familiar exception for prior recollection recorded. If a witness cannot remember facts about the case in which he is called to testify, but at one time had knowledge of the facts that is reflected in a memorandum or other record made or adopted by the witness when the matter was fresh in memory, the memorandum or record may be introduced in evidence.

The first thing that must be shown under this Rule is that the witness has an impaired memory. n55 Ordinarily, it is to be expected that counsel will show the memorandum or record to the witness and ask whether or not the witness' memory is refreshed so as to permit testimony from present memory. If the witness cannot do so, the requirement is probably satisfied.

It also must appear that the record was made when the witness had the matter fresh in mind. n56 But it need not be the witness who made the record. It is sufficient if the witness adopted the record. It appears from *Rule 803(5)* that the witness cannot adopt the statement for the first time on the witness stand. If that were possible, then it would seem that the witness's memory is adequate for testimony from present memory. The adoption should have taken place when the recordation was made or shortly thereafter -- the same contemporaneity requirement that applies if the witness prepares the memorandum herself.

To prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined, the Rule provides that the memorandum or record may be read into evidence but may not itself be received as an exhibit. n57 This is because the record is only a substitute for trial testimony; as trial testimony is not brought to the jury room, the record should receive the same treatment. However, if the party against whom the testimony is offered wishes to have the document introduced, it may be introduced.

[b] Prior Recollection Recorded -- Two Party Vouching

Congress made an unfortunate drafting error in revising the Supreme Court's version of *Rule 803(5)*. Under the version of the Rule approved by the Court, it was rather clear, in the light of the Advisory Committee's Note, that a recorded statement could qualify for admission if it reflected the recollection of an observer of the event and was recorded by another party, even if the observer did not actually adopt the writing after it was made. At common law, the way this was done was to call the observer to establish that although the observer had insufficient recollection at the time of trial, the statement made by the observer was made at a time when matters were fresh in mind and the matter was described accurately. In addition, the recorder of the statement was called to testify that the observer's statement was accurately transcribed. According to the Note of the Advisory Committee, the sufficiency of the foundation in particular cases would be scrutinized by the Trial Judge. Congress amended the Rule to make clear that statements adopted by a witness would come within the Rule. (They would have anyway, of course, under the Supreme Court version.) Unfortunately, the language chosen by Congress suggests that unless the witness made the record himself or actually adopted the record of another, the statement does not qualify for admission. In our view, Congress simply intended to make clear that the Rule was to be read broadly. There is no indication that Congress wanted to narrow the Supreme Court's version. We note that the Courts have readily held that a two-person vouching system is permitted by the Rule, so long as both the person with personal knowledge and the recorder testify and the foundation requirements of the Rule are otherwise established. n58

While two-party vouching is therefore permissible under the Rule, a problem arises if the observer and the recorder are at odds over the accuracy of the recorder's account. As one Court put it: "Where the witness differs with the recorder in regard to whether or not the recorder's transcription of the witness's statement is correct, *Rule 803(5)*'s requirement that the report be made or adopted by the witness has not been satisfied." n59

The authorities are not clear on what is required to show adoption of a statement recorded by someone else. Factors on which Courts may focus include whether the declarant inspected the statement recorded by the other person; whether there was a working relationship between the declarant and the recorder; and whether any formal recognition such as initialing the statement was involved. n60

[c] Prior Recollection Recorded -- Multiple Hearsay

It can occur that a memorandum offered as past recollection recorded may involve multiple levels of hearsay. That is, the recollection that is recorded may contain extrajudicial statements, each of which must separately satisfy the hearsay rule if they are offered for the truth of the matter asserted. See Rule 805. For example, the prosecution may wish to offer a statement made to and recorded by a police officer. The officer does not remember the statement made to him, so the record prepared by him is offered as past recollection recorded. The officer could testify as to the accuracy of what he heard based upon his record of the interview. However, in such circumstances, each layer of hearsay must satisfy an exception to, or exemption from, the hearsay rule. In the above situation, if the memorandum recorded the defendant's statement, it would be admissible as an admission in a past recollection recorded. If the recorded statement were that of a witness and were offered for its truth, a separate hearsay exception would have to be satisfied, or else the statement in the record could only be put to a nonhearsay use.

[d] Prior Recollection Recorded -- Expansive Approaches

As discussed above, a record is ordinarily qualified under *Rule 803(5)* through testimony by the person with knowledge of the facts recorded, who testifies that he lacks present memory of the events but that the record is an accurate reflection of the event. However, admissibility under *Rule 803(5)* is not limited to this procedure. A case that illustrates a broader use of *Rule 803(5)* is *United States v. Porter, 986 F.2d 1014 (6th Cir. 1993)* . Porter was indicted and ultimately convicted on narcotics and explosives offenses. His girlfriend, Niswonger, had given a very detailed written statement to the FBI; the statement related various personal experiences with Porter involving drugs and explosives.

The statement made it clear that Niswonger was afraid of Porter, and that he had threatened her. On the witness stand, Niswonger said that while she recalled giving the statement to the FBI and signing it, she did not remember much about what she said in the statement, because she was confused and on drugs at the time the statement was made. The Trial Judge, over the defendant's objection, then allowed the statement to be read into evidence as past recollection recorded. The Judge found that Niswonger, in attempting to distance herself from her statement to the FBI, was being "disingenuous" and "evasive" and was acting either out of her recently professed desire to marry Porter, or out of fear of Porter. Thus, the Judge considered Niswonger's lack of memory to be feigned.

On appeal, Porter argued that the Trial Court had erred in admitting Niswonger's statement as past recollection recorded, because, among other things, Niswonger had never actually testified that the record accurately reflected her knowledge at the time. But, the Court held that "*Rule 803(5)* does not specify any particular method of establishing the knowledge of the declarant nor the accuracy of the statement. It is not a *sine qua non* of admissibility that the witness actually vouch for the accuracy of the written memorandum."

The Court in *Porter* relied on circumstantial guarantees of trustworthiness to conclude that the written statement to the FBI was an accurate reflection of Niswonger's knowledge. The Court noted the following factors: (1) Niswonger admitted making the statement; (2) the statement was made soon after the events described; (3) the statement was signed by Niswonger on each of its five pages; (4) the wording of the statement had been changed and initialed by Niswonger eleven times; (5) the statement was made under penalty of perjury; (6) the statement contained considerable detail that was internally consistent; and (7) Niswonger made the statement at a time when she was fearful of reprisal from Porter, and yet implicated him anyway.

The above factors are the same kinds of circumstantial guarantees that have been relied upon for admissibility under the residual exception to the hearsay rule. The *Porter* Court's use of *Rule 803(5)* rather than the residual exception is more advantageous for the proponent of the record, however; the proponent is then freed from having to satisfy the other admissibility requirements of the residual exception: most notably, that the record is more probative than any other evidence reasonably available, and that the nonoffering party be given notice of intent to offer the statement and its particulars. We think that the flexible approach of *Porter* is preferable to unnecessary use of the residual exception, and that the *Porter* Court correctly viewed the language of the Rule as flexible.

Porter also challenged the admissibility of Niswonger's written statement on the ground that the prosecution had not shown that Niswonger's memory was sufficiently impaired at the time of trial. The *Porter* Court rejected this argument as well, stating that the Rule merely requires that the witness have "insufficient recollection to enable the witness to testify fully and accurately," and that Niswonger's insufficient recollection was established by her own testimony. According to the Court, it made no difference whether the insufficient recollection was "by virtue of mind-altering drugs or by intentional design." This is certainly an expansive interpretation of the Rule, given the Trial Judge's finding that Niswonger's professed lack of memory was completely implausible. Once again, the ruling makes sense. It is similar to the rulings, discussed in the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[3][d]*, which hold that a prior statement under oath can be admissible under *Rule 801(d)(1)(A)* when a witness has a bad-faith memory loss on the stand. A witness should not be able to preclude the use of an otherwise reliable statement or record by the simple expedient of a convenient loss of memory.

[7] Rule 803(6) -- Records of Regularly Conducted Activity

[a] Foundation for Exception

Rule 803(6) is derived from the traditional business records exception. This exception is based on the premise that the reliability of business records is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon, or by a duty to make an accurate record as part of a continuing job or occupation." n61 To qualify under *Rule 803(6)*, a record must be kept in the course of a "business"

activity and it must be the regular practice of the preparer to make the record. n62 While the organization's reliance on the records is a basis for the reliability of the exception, the proponent need not in fact show that the preparer of the record actually relied upon it: The Rule by its terms requires only that the record be kept in the course of "business" activity, pursuant to a regular practice of recording. n63

[b] Records of Regularly Conducted Activity -- Definition of "Business"

Rule 803(6) broadens the traditional business records exception. As promulgated by the Supreme Court, the Rule extended the exception to all records made in the course of any "regularly conducted activity," n64 not just a "business" activity in the colloquial sense. The House and ultimately the House-Senate Conference Committee confined the exception to "business" records, but expansively defined the term business "to make it clear that the records of nonprofit institutions and associations like schools, churches and hospitals are admissible under this provision." n65 It is notable that the caption of the Rule describes the exception as covering records of "regularly conducted activity." It seems clear from all this that the term "business" should be given an expansive reading. In the end there is no significant difference between the Advisory Committee's proposal and the Rule as adopted.

One question that has arisen is whether public reports that are made in the course of regularly conducted activity can qualify under *Rule 803(6)*. Does the term "business" cover government activity? Most Courts have taken the view that public records, such as police reports, prison reports, and the like can qualify for admission under *Rule 803(6)*, if the records are kept in the regular course of a regularly conducted activity. These Courts, in accord with the clear language of the Rule, do not read the term "business" in an overly restrictive manner. n66

The term "business" in *Rule 803(6)* is, we think, broad enough to cover any type of organized activity, including that of public agencies. n67 However, for the records of such activity to be admissible, they must satisfy all other requirements of the Rule, i.e., they must be made pursuant to a regular course of recordkeeping of regularly occurring events, and without the presence of untrustworthy circumstances.

Of course, records of public officials may also be admissible under *Rule 803(8)*, which does not require a showing that records are regularly kept. If a public report is admissible under *Rule 803(8)*, there is no requirement that the report also meet the regularity requirements of *Rule 803(6)*. On the other hand, the admissibility requirements under *Rule 803(8)* could theoretically be stricter than those of *Rule 803(6)* in certain cases, such as where police reports are offered against criminal defendants. Most Courts (although there is conflicting authority) have held that if a report is specifically excluded under *Rule 803(8)*, the exclusionary policies of that Rule cannot be evaded by showing that the public record was regularly kept under *Rule 803(6)*. n68 Such a conflict between the Rules is in any event unlikely, because public reports ordinarily suffer exclusion under *Rule 803(8)* only if they are untrustworthy -- and thus would be excluded under the trustworthiness criterion of *Rule 803(6)* as well. n69

[c] Records of Regularly Conducted Activity -- "Business Duty"

There is an important drafting error in *Rule 803(6)*, which defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity." This might be read as abolishing the business duty requirement for the person transmitting the information. The common-law business duty requirement covers the situation in which the party who prepares a business record has no personal knowledge of the underlying event record, but is relying on a source of information who does have personal knowledge. Under the business duty requirement, the record is not admissible unless the party reporting the information to the recorder of the information had a business duty to do so; i.e., was reporting the information in the regular course of regularly conducted activity. The business duty requirement was thought necessary to address the problem of double hearsay that arises when one person relates information offered for its truth to a person who records the information in a business record. The business record exception guarantees that the recording party recorded reliably, but an extra guarantee is necessary to assure that the party with personal knowledge of the underlying event related it accurately to

the recorder. n70

It is true that the Rule on its face appears to suggest that the business record must be kept in the regular course of the business, but that anyone can contribute information to the record as long as the information is based on personal knowledge. However, we conclude that Congress never intended to abandon the business duty concept. It is quite clear that the Advisory Committee intended to retain the concept. It is just as clear that Congress was concerned with the breadth of the Advisory Committee's term "regularly conducted activity," not with business duty. The only reference in the legislative history to the concept is in the Report of the Senate Committee on the Judiciary, which makes it clear that the person who supplied the information comprising the business record need not be specifically identified. But, there is not one word in the Report to suggest that the person need not be under a duty to the business.

In light of the strong statement by the Advisory Committee, we believe that the only correct approach is to continue to follow the business duty concept -- that all those who report information included in a business record must be under a business duty to do so, or else the hearsay problem created from the report by an outsider must be satisfied in some other way. n71 To abolish the business duty requirement (or some other means of satisfying the hearsay problem created by information related by those outside the business) would lead to the introduction of double hearsay by way of a business record, in violation of *Rule 805*. n72

The concern addressed by the business duty requirement is that the person with personal knowledge of an event may not be reporting accurately to the person who eventually records the information. If the reporter is operating under the same or similar "business" duty (i.e., duty to report accurately) as the recorder, then the risk of inaccuracy is substantially reduced -- the same guarantees of reliability apply to the observer and the recorder. n73

However, the existence of a business duty is not the only way to solve the double hearsay problem created when a business record is prepared by one who is relying on the personal knowledge of one outside the "business." There are three ways in which a business record can qualify for admissibility even though the reporter has no duty to report accurately to the recorder.

First, if the recorder actually verified the information for accuracy, the record would be held by most Courts to be admissible. n74 A case arising rather frequently is where the government offers Western Union records to prove that one person sent a wire transfer to another. Of course, the Western Union agent has no personal knowledge of the identity of the sender or the recipient, and neither the sender nor the recipient has a duty to report their identity accurately. However, Western Union, for obvious reasons, demands that the recipient produce valid identification. Therefore, it has been held that Western Union records can be offered to prove the identity of the recipient. On the other hand, Western Union does not verify whether the sender has accurately identified himself -- therefore the record cannot be offered to prove the truth of the sender's identity. n75

Second, if the underlying statement satisfies an independent hearsay exception, the double hearsay problem is satisfied. n76

Third, if the underlying statement is offered for a non-hearsay purpose, there is no double hearsay problem at all. The record is admissible if the proponent establishes a regular recording of regularly conducted activity. A good example is provided by *United States v. Cestnik, 36 F.3d 904 (10th Cir. 1994)* . In a prosecution for narcotics and money-laundering offenses, the government introduced Western Union "to-send-money" forms to support its charges that the defendant laundered money. The forms did not reveal the defendant's name as the sender. But, the government introduced independent evidence to show that the senders' names were aliases of the defendant. The Court held that the forms were properly admitted under the business records exception. To the extent the records were offered to prove the amount of money spent on a specific date, they were qualified under the Rule by the custodian of records for Western Union. The Court noted that the records would not have been admissible if offered to prove that the person named on the form was the *actual* sender, because "Western Union agents do not verify the information filled out by the sender."

However, since the government offered the senders' names "not to prove the identity of the sender but as circumstantial evidence linking the false names to the money transfers," the names were not hearsay and therefore the records did not present a "source of information" problem. In other words, the fact that *someone* knew enough to use the defendant's aliases in wiring the money was itself evidence of a conspiratorial association; the government did not offer the record to prove that the defendant himself actually wired the money. n77

[d] Records of Regularly Conducted Activity -- Foundation Requirements

While a records custodian is a proper witness for establishing the foundation requirements of a business record, *Rule 803(6)* provides for a much more expansive class of witnesses who can establish this foundation. A witness is a "qualified witness" if he or she has acquired knowledge of how the records are kept, and can testify that they are kept in the ordinary course of regularly conducted activity. n78 The foundation witness must know something about the recordkeeping process, but the witness need not have personal knowledge of any particular recording or how it was made. n79 Moreover, the foundation witness can obtain knowledge about the recordkeeping process from the statements of others who are familiar with the recordkeeping. That this may be hearsay information is not disqualifying, because *Rule 104* allows the Trial Court to consider hearsay in determining whether admissibility requirements are met. n80 It follows that a finding that records were recorded in the ordinary course of business activity can be based at least in part on the records themselves, e.g., that they were organized, precise, and looked routinely recorded. n81 In criminal cases, these flexible standards for determining the qualifications of a foundation witness have led Courts to conclude that a law enforcement agent can give proper foundation testimony for business records of an entity engaged in criminal conduct. n82

The foundation requirements of the Rule need not be established by in-court testimony. Under an amendment effective December 1, 2000, the qualified witness may establish the foundation "by certification that complies with *Rule 902(11)*, *Rule 902(12)*, or a statute permitting certification." The amendment is intended to limit unnecessary cost and inconvenience, by permitting a qualified witness to provide the foundation for business records by way of affidavit in lieu of in-court testimony. The amendment does not eliminate the need for a qualified witness, nor does it change the type of qualifications that have been found necessary for a witness to be able to establish a foundation for business records. It simply provides that the qualified witness can establish the foundation without being called to testify.

The Advisory Committee considered it necessary to amend the Rule to provide for a unified practice in the Federal Courts. Before the amendment, foreign business records offered in criminal cases could be qualified by affidavit under the terms of *18 U.S.C. § 3505*. However, qualified witnesses were required to testify before foreign records could be admitted in civil cases and before domestic records could be admitted in any case. This disparity in the practice made little sense; the amendment provides for a unitary practice along the terms of section 3505.

The amendment to *Rule 803(6)* provides for an alternative means of establishing admissibility under the hearsay exception. It does not, of course, purport to solve any problem of authentication. Authenticity questions are considered under *Rule 902*. Whether the affidavit procedure comports with the accused's right to confrontation in criminal cases is a question taken up at the end of this Editorial Explanatory Comment, *§ 803.02[26]*.

[e] Records of Regularly Conducted Activity -- Regularly Conducted and Recorded

To qualify a business record, it must be shown that the information recorded is the type of information that is recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. n83 If the event recorded is an isolated incident, or if it is a recurring event that is not recorded as a matter of regular practice, the guarantees of reliability supporting the business records exception do not exist. n84

Some Courts have applied the "ordinary course" and "regular practice" requirements liberally. These Courts state that while *Rule 803(6)* does not extend to activity or recording that is "casual or isolated," some degree of discontinuity or

selectivity is permissible, and affects only the weight of the evidence. n85 Most Courts, however, strictly construe the requirements of "ordinary course" and "regular practice," on the ground that this language was carefully considered by the drafters of the Rule and the requirements are important guarantees of the trustworthiness of the record. In these Courts, the record is excluded if the event recorded is unusual, or if the event when it occurs is not recorded in the ordinary course of the organization's activity. n86

[f] Records of Regularly Conducted Activity -- Computerized Records

Courts generally do not require any extra foundation testimony for computerized records. n87 Despite the fact that computerized records are often easier to tamper with than traditional records, the standards for admitting computer-generated records are ordinarily no more stringent than those for admitting other business records. n88 However, testimony by a witness about the accuracy of the software and reliability of the computerization will certainly bolster the minimal foundation that ordinarily suffices for both computerized and noncomputerized records.

If the record is a computer printout, it is not problematic that the printout was made in anticipation of litigation, so long as the data compiled in the printout was entered into the computer at a time when there was no suspect motivation. n89

Information taken off the Internet can potentially qualify as a business record. While the medium for the information is different, the same foundation requirements apply. For example, if information is found on a website and is offered for its truth, the proponent will have to establish through a qualified witness that the information is the type that is ordinarily posted in the course of regularly conducted organizational activity. At least one Court has held that postings to a website cannot be admitted as the business record of the Internet service provider, because such providers are simply conduits and not recordkeepers. n90 For a full discussion of the admissibility issues pertinent to Internet and email evidence, see the article by Gregory Joseph in Part Four of this Manual.

[g] Records of Regularly Conducted Activity -- Trustworthiness, Preparation in Anticipation of Litigation

Even if all of the foundation requirements of the Rule are met, the Trial Court has the discretion to exclude a business record if the source of the information contained in it or the method or circumstances of its preparation indicate a lack of trustworthiness. Documents prepared for litigation are prime candidates for exclusion as untrustworthy, at least where the report is favorable to the party who prepared the record. n91 The reason for exclusion of such reports as untrustworthy is that the motivation of the preparer is suspect, given the anticipation of litigation. n92 But if the report is unfavorable to the party who prepared it, it will be admissible because no inference of suspect motivation can be drawn. n93

The fact that records are trustworthy is not itself enough to warrant admission under *Rule 803(6)*. Even a trustworthy record must satisfy the other admissibility requirements of the Rule: there must be a regular practice of recording an event that occurs in the ordinary course of a regularly conducted activity. n94 If a record of a certain event is not regularly kept, it is inadmissible under *Rule 803(6)* upon objection, even if there is no dispute that the particular record is trustworthy. n95 This is because the Federal Rules have established admissibility requirements for each hearsay exception that must be met for a statement to fit under the respective exception. The Rules specifically reject an approach to hearsay that admits a statement whenever it is trustworthy under the circumstances. Such an argument is permissible only under the residual exception.

On the other hand, if the proponent of the record has shown that the admissibility requirements of the Rule are met, the proponent need not make an independent showing of trustworthiness. It is up to the objecting party to show that particular circumstances render the records unreliable. n96

[h] Records of Regularly Conducted Activity -- Opinions

Opinions and diagnoses contained in business records can qualify for admissibility under the terms of *Rule 803(6)*. It must be remembered, however, that *Rule 803(6)* provides that a Trial Court must exclude untrustworthy business records. This means that untrustworthy opinions will be excluded, just as they would be if the declarant were to testify at trial. See the discussion of *Daubert* in the Editorial Explanatory Comment to *Rule 702*, *§ 702.02[5]*. Problems of untrustworthiness especially arise when the person who states the opinion is unqualified to do so, or draws an opinion from an insufficient basis of facts or data. Any record prepared by such a person must be excluded. Like any other opinion, an opinion in a business record must be helpful to the finder of fact under the standards of *Rules 701-704*. n97

[8] Rule 803(7) -- Absence of Records of Regularly Conducted Activity

Rule 803(7) provides that the absence of an entry in records covered by *Rule 803(6)* may be introduced to prove the nonoccurrence or nonexistence of a matter, if the matter was of a kind for which a memorandum or report would have been made had it occurred. Although the absence of a statement would not qualify as hearsay in most common-law jurisdictions, and although it probably is not within the definition of hearsay in *Rule 801*, the Advisory Committee and Congress apparently wanted to be certain that such evidence is admissible over a hearsay objection.

Rule 803(7), unlike *Rule 803(6)*, does not specifically require foundation testimony from a custodian or other qualified witness. However, the first step in any analysis under *Rule 803(7)* is to determine whether the record qualifies under *Rule 803(6)* because, if it does not, *Rule 803(7)* cannot be used. Thus, admissibility is dependent upon an adequate foundation concerning the records from a qualified witness sufficiently familiar with them.

[9] Rule 803(8) -- Public Records

[a] Foundation for Exception

Rule 803(8) is one of the most complex of all the Federal Rules. The exception is divided into three parts and each is slightly different in its reach. Part (A) permits any record, report, etc., setting forth the activities of an office or agency to be admitted. It applies in both civil and criminal cases and allows *any* party to take advantage of it. n98 Part (B) covers matters observed by public officials pursuant to duty imposed by law when there is also a duty to report these matters; this Part does not on its face appear to allow anyone to use this exception in a criminal case to admit reports of matters observed by police officers and law enforcement personnel. Thus, (B) appears to apply to both sides equally in civil and criminal cases. In criminal cases it permits both the government and the accused to utilize the exception for some public reports, specifically reports of matters observed by someone who is a public official but not a law enforcement officer, but would seem to limit *both* sides by barring law enforcement reports from admission into evidence. Part (C) covers findings resulting from an investigation made pursuant to legal authority. It applies in *both* civil and criminal cases, but appears to state that *only* the defendant can utilize it in a criminal case. This is apparently a judgment that the government should be bound by its own findings, but that the defendant is protected by confrontation principles from being similarly bound. n99

There are two reasons for creating a special hearsay exception for public records. First, it is assumed that public officials perform their duties properly and that, given their multiple duties, it is unlikely that they will be able to remember the details of individual transactions independently of their records. Second, the exception often eliminates the need for public officials to testify or prepare for a trial, freeing them to spend more time performing their public duties. These twin rationales account for the major differences in admissibility requirements between *Rules 803(8)* and *803(6)*: (1) public records may be reliable and admissible even though they do not satisfy the regularity and contemporaneity requirements of business records, n100 and (2) public records may be admitted without the testimony or even the affidavit of a foundation witness. n101

One question that has arisen is whether the trustworthiness clause in the Rule applies to all three sections of the Rule, or only to (C). The former reading is preferable in our view; it is most consistent with *Rule 803(6)*, in which the

trustworthiness exclusionary clause is applicable to all records. Most Courts have held that the trustworthiness criterion applies to all reports offered under *Rule 803(8)*. n102

Because of the strong presumption of reliability accorded to public reports, the burden of proving untrustworthiness is borne by the party seeking exclusion. n103 The nonoffering party must make an affirmative and particularized showing that the preparation of the report was contrary to the general standard of public service that makes such reports reliable. n104

[b] Public Records -- Which Reports Are "Public"?

Rule 803(8) does not define what constitutes a public record. It is clear, though, that the Rule requires that the record or report must be prepared by a public office or agent. If the preparing party is not "official," the report might be admissible under some other hearsay exception, but it cannot be admitted as a public report.

Thus, in *Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989)* , the plaintiff offered a report prepared by the International Agency for Research on Cancer, and another report prepared by the Consensus Development Conference of the National Institute of Health. Both reports concluded that smokeless tobacco caused oral cancer. The Court held that the reports were inadmissible under *Rule 803(8)* because "[neither] document reflects the findings of a government agency authorized by law to report on the adverse health effects of smokeless tobacco." These agencies were not public agencies within the meaning of the Rule. They had official sounding names, but they were not in fact affiliated with any government body.

Still, the definition of a public agency is potentially a broad one; and it may well occur that a public agency could delegate, pursuant to government regulations, its duty to report on a certain matter. If the report is thereafter adopted by the government agency, it will be considered a public report for purposes of *Rule 803(8)*. Thus, in *United States v. Central Gulf Lines Inc., 974 F.2d 621 (5th Cir. 1992)* , the Court held that quarantine certificates kept by the Commodity Credit Corporation were properly admitted as public records to prove cargo damage, even though the reports were prepared by foreign port authorities that were not themselves authorized by law to report. The Court stated that "the duty to prepare the report can be delegated, under government regulations, to an independent agency or to a foreign government without the report losing its character when submitted through the appropriate United States agency, as a report of a department or agency of the United States."

[c] Public Records -- Law Enforcement Reports Offered by Criminal Defendants Against the Government

Despite the way that *Rule 803(8)(B)* appears to apply in criminal cases, some Courts have interpreted both subdivisions (B) and (C) to allow the admission of law enforcement reports when they are offered to exculpate a criminal defendant. *United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975)* , for example, interpreted part (B) of the exception as providing as much protection for defendants in criminal cases as does part (C).

Smith was convicted of robbery prior to the effective date of the Rules. In an opinion delivered after the effective date, the Court of Appeals held that an exculpatory police officer's report and broadcast transcript were admissible on the defendant's behalf. The Court cited *Rule 803(8)(B)* as support for its view, but it noted that "on its face" that Rule appears to exclude all law enforcement reports in criminal cases -- even those offered by the accused. But the Court held that the Rule should not be read literally:

> We are convinced, however, that 803(8)(B) should be read, in accordance with the obvious intent of Congress and in harmony with 803(8)(C) [which excludes only law enforcement reports offered by the government] to authorize the admission of the reports of police officers and other law enforcement personnel at the request of the defendant in a criminal case.
>
> ... [T]he apparently absolute language of 803(8)(B) had its origin in congressional concern that use

> of reports against defendants would be unfair ... . Since there is no apparent reason to allow defendants to use the reports admitted by 803(8)(C) but not those governed by 803(8)(B), we conclude that a police report, like that of Officer Carr, is an exception to the new hearsay rules when introduced at the request of the defense.

We agree with the Court's sensible construction in *Smith*. There is no reason to treat (B) reports differently from (C) reports when they are offered to exculpate the accused. There is an obvious overlap between the subdivisions: a report setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," could also be a report containing "factual findings resulting from an investigation made pursuant to authority granted by law." Congress could not have intended Courts to make a categorical distinction in admissibility for reports that could fairly be placed in one subdivision or the other. We note, however, that at least one Court has read *Rule 803(8)(B)* literally to exclude law enforcement reports offered to exculpate a criminal defendant. n105

[d] Public Records -- Law Enforcement Reports Offered Against Criminal Defendants

One of the most difficult recurring issues under *Rule 803(8)* concerns the admissibility of laboratory or similar scientific reports prepared under police auspices and offered in criminal cases. In the famous case of *United States v. Oates, 560 F.2d 45 (2d Cir. 1977)* , a defendant was convicted of possession of heroin with intent to distribute and of conspiracy. On appeal these convictions were reversed because the Court of Appeals was convinced that the Trial Judge erred in allowing the government to introduce two documentary exhibits purporting to be the official report and the accompanying worksheet of the United States Customs Service chemist who analyzed a white powdery substance seized from Oates' codefendant. In a lengthy opinion, the Court held that the reports were inadmissible against the defendant under the exclusionary clauses in *Rule 803(8)*. The Court construed the 803(8)(B) language "other law enforcement personnel" so that it included at least "any officer or employee of a governmental agency which has law enforcement responsibilities." Having made this decision, the Court engaged in a lengthy analysis of the legislative history and determined that it was "manifest that it was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases."

We respectfully believe that the *Oates* Court overstated the breadth of the exclusionary language of *Rule 803(8)(B)* and *(C)*. It is true that the legislative history indicates that police reports and the reports of government investigative officers were thought to present serious confrontation problems. In adding the exclusionary clauses, Congress was responding to one dominant concern: that law enforcement officers would create dossiers purporting to describe accurately the actions of criminal defendants and that these dossiers would be offered in lieu of live testimony. The legitimate fear is that an overbroad *Rule 803(8)* would result in the admission of an entire police file prepared in anticipation of a criminal prosecution, without any opportunity to cross-examine anyone. But it is clear that many law enforcement reports present no serious danger of being generated against accuseds in such a way as to impair their rights.

Most Courts have read the *Rule 803(8)(B)* and *(C)* exclusionary language in a far more limited fashion than the Court in *Oates*. Under the predominant view, the exclusionary language covers only those police-generated reports that are prepared under adversarial circumstances, and so are subject to manipulation by authorities bent on convicting a particular criminal defendant. n106 Where the risk of manipulation and untrustworthiness is minimal -- in particular where the report contains unambiguous factual matter prepared under nonadversarial circumstances -- Courts have held that the report should be admitted despite the apparently absolute language of the Rule. n107 Even the Second Circuit, in which *Oates* was decided, has held that a routine tabulation of serial numbers prepared by law enforcement personnel was admissible against a criminal defendant. n108

While a report that is ministerial in nature and made without contemplation of specific litigation is ordinarily held admissible, those law enforcement reports that are adversarial and evaluative in nature are ordinarily excluded, consistent with the exclusionary intent of *Rule 803(8)(B)* and *(C)*. n109

Most Courts have held, correctly we think, that the law enforcement exclusion in the Rule is inapplicable if the public official who prepared the report actually testifies at trial. The confrontation concerns that give rise to the statutory exclusions are allayed where the declarant is subject to cross-examination at trial. n110 It should also be noted that some public reports can be offered in a criminal case because they are reports of "matters observed" by public officials other than law enforcement personnel. Neither the terms nor the concerns of the exclusionary language will apply to reports prepared by officials without law enforcement responsibilities. The problem with law enforcement reports is that police officers are in the competitive enterprise of ferreting out crime; in the heat of battle, a law enforcement officer might shade or falsify a report in such a way as to prejudice a particular criminal defendant. However, this concern does not arise with officials outside law enforcement; it cannot be presumed that *every* government official has an adversary motive against a criminal defendant. So for example, autopsy reports prepared by public medical personnel have been held to be admissible against criminal defendants under *Rule 803(8)(B)* because these medical personnel have no law enforcement objectives. n111

[e] Public Records -- Relationship to Rule 803(6)

In criminal cases, the argument has sometimes been made that a report that is inadmissible due to the exclusionary language of *Rule 803(8)(B)* and *(C)* can nonetheless be admitted as a record of regularly conducted activity under *Rule 803(6)*. However, if the exclusionary language is properly applied so as to exclude only those law enforcement reports that are subjective and made under adversarial circumstances -- which is the position taken by most Courts, as discussed above -- then there is no conflict between the Rules. This is because records that are prepared in anticipation of litigation are excluded under the trustworthiness criterion of *Rule 803(6)*; and those are, in effect, the only records that are excluded under the prevailing view of *Rule 803(8)*. n112 Accordingly, under the predominant approach to *Rule 803(8)*, the issue of whether a law enforcement report excluded under *Rule 803(8)* can nonetheless be admitted under *Rule 803(6)* does not arise. Such a report is by definition untrustworthy and inadmissible under both Rules. n113

[f] Public Records -- Factual Findings and Investigative Reports

A difficult question under the Rule has been the appropriate scope of the term "factual findings" in subdivision (C). Some Courts had held that "evaluative conclusions" were not included, but the Supreme Court decided in *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)* , that "statements in the form of opinions or conclusions are not by that fact excluded from the scope of *Federal Rule of Evidence 803(8)(C)*." *Rainey* was a wrongful death action arising out of a military plane accident. The defendant offered the investigative report of a JAG commander, concluding that the crash was caused by "pilot error." The Lower Court held that this conclusion had to be excluded because *Rule 803(8)(C)* permitted the admission only of "factual findings." The Supreme Court gave five reasons for concluding that the Rule does not categorically exclude all opinions in a public investigative report:

(1) Most importantly, the Rule does not state that only "factual findings" are admissible, but rather that *reports* setting forth factual findings are admissible; thus, opinions in a report are not automatically excluded so long as the report itself contains factual findings. The term "factual findings" modifies the term "reports" and explains what type of reports are admissible; the term is not in the Rule to limit the admissible *contents* of the reports.

(2) There is nothing in the legislative history of the Rule to indicate that Congress had in mind a dichotomy between fact and opinion.

(3) The opposing party does not need an arbitrary exclusion of opinion in order to protect itself from unreliable information in a public report; protection is given by the provision that excludes evidence offered under *Rule 803(8)* if it was made under untrustworthy circumstances. Moreover, the term "reports based on factual findings" will still exclude the most suspect investigative reports: those that do not contain *any* factual findings, and thus are unlikely to be based on factual investigation. n114

(4) The line between fact and opinion is exceedingly hard to draw, and is essentially arbitrary. There is no policy reason for drawing such a line; if the concern is that an opinion is untrustworthy, that concern can be addressed on a case-by-case basis under the trustworthiness clause.

(5) A broad approach to admissibility under *Rule 803(8)(C)* is consistent with the general tenor of the Federal Rules, which relax the traditional constraints on opinion testimony. Much of the liberalization of opinion testimony, particularly as to lay witnesses, occurred in response to the ambiguous and arbitrary line between fact and opinion. The Supreme Court concluded: "We see no reason to strain to reach an interpretation of *Rule 803(8)(C)* that is contrary to the liberal thrust of the Federal Rules."

After *Rainey*, a Court may not exclude an opinion in an investigative report merely because it is an opinion. n115 Yet even after *Rainey*, there are several limitations on the admissibility of opinions, as well as factual findings, contained in investigative reports. Most of these limitations are imposed by the Courts pursuant to the trustworthiness clause of *Rule 803(8)*. n116 The most important limitations are:

(1) An opinion, to be admissible, must be made by a qualified person using reliable methods, and must be based upon sufficient information and investigation. As applied to opinions of public officials, the standard of trustworthiness in *Rule 803(8)* is parallel to those contained in *Federal Rules 702-704*, which regulate the opinions of experts testifying at trial. The reason for imposing these requirements is that the opinion of a government investigator is likely to be treated by the factfinder as tantamount to an expert opinion. The proponent should not be better off by introducing the report instead of live testimony from an expert. If the government official would not be able to satisfy the standards for expert testimony at trial, there is little reason to admit the official's hearsay statement. n117

(2) For similar reasons, opinions that are nothing more than legal conclusions are ordinarily excluded. The Court in *Rainey* expressed no view on the admissibility of legal conclusions contained in public reports. However, most Courts have excluded such conclusions, as they would with similar in-court testimony, on the ground that legal conclusions are unhelpful to the jury and usurp the role of the Judge in instructing the jury on the law. n118 See the Editorial Explanatory Comment to *Rule 704*, *§ 704.02[3]*.

(3) If the report is not a final report, but is merely preliminary or tentative, the report is not admissible, because it is not considered to contain "factual findings" as that term is used in the Rule. In other words, "factual findings" are final statements made at the end of the investigative process. Otherwise, an entire agency determination process would be piggy-backed into a trial. n119

(4) If the report has been revoked or superseded by the agency that prepared it, it no longer contains factual findings within the meaning of the Rule. n120

(5) Exclusion of the report is possible if the report appears to have been made under a suspect motivation. For example, if the public official or body who prepared the report has an institutional or political bias, and the final report is consistent with that bias, the report is subject to exclusion for untrustworthiness. n121

(6) Factual findings and conclusions made after a hearing are, for good reason, considered more trustworthy than findings made without a hearing. While the lack of a hearing is not dispositive, it does cut against admissibility. n122 And if the report is based on *ex parte* submissions to which an adversary has no opportunity to respond, such one-sidedness is a strong indication that the report is untrustworthy. n123

(7) The timeliness of an investigation is a factor in any inquiry into trustworthiness. If the time between the event and the investigation is so long as to render the underlying information stale or untrustworthy, the public report is subject to exclusion. n124

(8) Even if an investigative report is otherwise admissible under *Rainey*, it may be excluded by a special statute. For instance, probable cause determinations and other conclusions by the National Transportation Safety Board are excluded from all actions for damages pursuant to 49 U.S.C. § 1441(e). n125

[g] Public Records -- Official's Lack of Personal Knowledge

A public official usually does not have personal knowledge of all of the facts reported in an investigative report. An official who investigates the cause of a car accident may determine the angle of impact through her own personal investigation; but she is not likely to have personal knowledge about how the cars looked and sounded at the time of the accident. Often the official must rely on information from bystanders and others with personal knowledge pertinent to the investigation. The question is whether this reliance renders the official's factual findings and opinions untrustworthy.

Where the official who prepared the report receives his or her information from others, a hearsay-within-hearsay problem exists. n126 As applied to secondhand information contained in public reports, *Rule 805* would seem to require that the statements by private persons to public officers must ordinarily be found independently reliable and admissible. So, for example, in *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* , the Court affirmed a judgment for police officers alleged to have used excessive force, holding that a 911 tape describing the beating was properly excluded because the citizen caller's statement was not independently admissible or verifiable. The Court recognized that hearsay statements on a 911 tape can be admitted into evidence as a public record. But it noted that citizen callers are not under any duty to report correctly (unlike public officials who have such a duty) and that the official who made the record could not verify the accuracy of the citizen's description of the event. In the absence of a duty to report or some means of verification that the statement was true, the Court concluded that "a recorded statement by a citizen must satisfy a separate hearsay exception."

The *Bemis* Court acknowledged that a 911 caller might be reporting a present sense impression or an excited utterance, but it held that both of those exceptions require that the declarant have personal knowledge of the events described. In *Bemis*, the plaintiff had failed to show that the citizen caller had personal knowledge of the events related in the 911 call. n127

Yet it is fair to state that most Courts have considered the multiple hearsay problem somewhat flexibly under *Rule 803(8)*, given the strong presumption that public reports are reliable. Thus, if the Court finds that the person with firsthand knowledge had no reason under the circumstances to misrepresent information to the public official, the report will probably be found admissible -- even though there was, strictly speaking, no duty to report to the public agency or means of verification, and even though no specific hearsay exception or non-hearsay use is applicable.

For example, in *Ellis v. International Playtex Inc., 745 F.2d 292 (4th Cir. 1984)* , a report by the Centers for Disease Control and Prevention concerning toxic shock syndrome was held properly admitted, even though it was based upon information compiled from doctors throughout the country concerning the symptoms suffered by their patients. The Court recognized that the reporting doctors had no absolute duty to report reliably to the Centers for Disease Control, that the doctors' reports were not verified for accuracy by the CDC, and that the doctors' statements were not subject to a specific hearsay exception.

Nonetheless the Court found that under the circumstances, there was no conceivable motive for the reporting doctors to misrepresent information or to lie to the CDC. Therefore the defendant could not overcome the strong presumption of trustworthiness attached to the public report. n128

A flexible approach to secondhand information makes good sense, because a public report is treated at trial as tantamount to an expert's conclusion; and experts at trial are permitted under *Rule 703* to rely on hearsay if that reliance is reasonable. As the Court stated in *Moss v. Ole South Real Estate Inc., 933 F.2d 1300, 1310 (5th Cir. 1991)* :

> [Many] government reports, as with many expert witnesses, have to rely in part on hearsay evidence, and the reports are not generally excluded for this reason. Under *Rule 703*, experts are allowed to rely on evidence inadmissible in court in reaching their conclusions. There is no reason that government officials preparing reports do not have the same latitude. n129

In contrast, where a report is based on statements from persons who are biased or politically motivated, it will ordinarily be excluded because of the unreliable sources on which the report is based. Thus, in *Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986)* , the Court held that an accident report prepared by a police officer was inadmissible under *Rule 803(8)*. The report was untrustworthy because the officer prepared his report after talking to only one of the drivers.

[h] Public Records -- Judge and Jury Findings

It might seem odd that *Rule 803(8)(C)* does not appear to admit Judge or jury findings, although it plainly allows admission of findings that are probably less reliable. n130(Compare *Rule 803(22)*.) However, there is a good reason for excluding Judge and jury findings from the coverage of the Rule: Whenever *Rule 803(8)(C)* allows findings to be admitted, it leaves an opposing party free to challenge the reliability of the findings. Were Judge and jury verdicts to be similarly treated, Judges and juries would be subject to much more attack than at present. See, e.g., *Rule 606(b)*.

[10] Rule 803(9) -- Records of Vital Statistics

Rule 803(9) is similar to many existing statutes. It provides that records or data compilations of births, deaths, or marriages are admissible as an exception to the hearsay rule if the information was prepared by a public officer pursuant to legal requirements.

One question about the scope of this exception is whether it is only the fact of the reported vital statistic that is admissible (e.g., the fact of death or marriage), or whether the exception also covers collateral facts contained in the record (e.g., the cause of death or the date of marriage). Most Federal Courts have held that records of vital statistics are admissible for both the fact of the vital statistic and for the collateral facts contained in the record. n131 This broader view has much to commend it. Like public records, records of vital statistics are trustworthy because they are made pursuant to a legal duty; moreover, such records are usually, though not always, recorded in the ordinary course of a regularly conducted activity. There is no reason to think that these significant guarantors of reliability would be applicable only to the vital statistic itself and not to the collateral facts in the record. n132

[11] Rule 803(10) -- Absence of Public Records

[a] Foundation for Exception

Rule 803(10) is similar to *Rule 803(7)*. This Rule provides that the absence of a public record or entry may be introduced to prove the nonoccurrence of an event if the record is of a type that would ordinarily record the event if it occurred. The Rule abandons the common-law position that proof by a certificate of a lack of a record or entry cannot be admitted. Under the Rule such a certificate can be used, or testimony can be introduced, to prove that a diligent search failed to disclose the entry or record. This Rule extends to situations in which the absence of a record may itself be the ultimate focal point of inquiry, and is not limited to proof of nondispositive facts. n133 Whether this certification process is consistent with the right to confrontation of an accused is a matter taken up at the end of this Editorial Explanatory Comment, *§ 803.02[26]*.

Whether proof is offered by way of certification in accordance with *Rule 902* or by testimony, the key to satisfying *Rule 803(10)* is evidence that a diligent search failed to disclose the existence of the absent record. The diligence requirement insures reliability, and reliability is the basis for the hearsay exception. If there is a substantial doubt as to the diligence of the search conducted, evidence of the absence of the record is subject to exclusion. n134 Thus, if proof is by way of

affidavit, a conclusory statement that a diligent search was conducted tells the Court little about the breadth and reliability of the search. At a minimum, the affidavit should describe factually the method of the search and the safeguards undertaken to prevent an error. n135 It is not necessary that a *Rule 803(10)* certificate be prepared in any particular form or specifically employ the phrase "diligent search failed to disclose the record." It is necessary, however, to set forth in the certificate the relevant circumstances which reflect that a diligent search was made. n136

[b] Absence of Public Record -- Scope of Search

An affidavit offered to prove the lack of a public record may not be admissible if the scope of the search and the nature of the information sought are so far-ranging and value-laden as to create concerns about the reliability of the public official's investigation. For example, in *United States v. Nicely, 922 F.2d 850 (D.C. Cir. 1991)* , the government alleged that the defendant had committed fraud by representing to a client that he would obtain for the client a government contract to provide computers for a new government currency reform program, when in fact no such program was ever considered by government officials. To prove that a currency reform program was never considered, the government offered affidavits of Treasury Department officials, stating that they had checked the records for evidence of consideration of a currency reform program, and no such evidence was found. These affidavits were offered under *Rule 803(10)*. The Court of Appeals, granting a new trial on another issue, strongly intimated that these affidavits should be excluded on retrial. The Court stated that, "unlike routine searches of easily pinpointed data compilations that courts have upheld in the past," the Treasury Department affidavits were "based on a far-ranging review of different Department files for any evidence that the government considered a currency reform proposal." Thus, the vast scope of the search, as well as the ambiguous nature of the information sought, created significant questions about the reliability of the searches. The Court declared that if proof under *Rule 803(10)* is to be made by way of affidavit, the nature of the search must at least be limited to a mechanical view of localized records. Otherwise, the official who checked the records must be produced for cross-examination.

[12] Rule 803(11) -- Records of Religious Organizations

Rule 803(11) deals with religious records concerning births, marriages, divorces, deaths, and similar facts of personal or family history. Records of financial transactions are not covered by this exception. n137 Some records that qualify for admission under *Rule 803(11)* would also be covered by the business records exception. But, *Rule 803(11)* goes beyond *Rule 803(6)* by providing that evidence of births or deaths or marriages, etc., based on information supplied by someone not in an employment or other formal relationship with a religious organization, and therefore under no duty to that organization, is admissible as an exception to the hearsay rule. Thus, there is no business duty requirement as there is under *Rule 803(6)*.

The records covered by *Rule 803(11)* are considered reliable because it is in the interest of a religious organization to keep reliable records of important events conducted by it; also, the exception requires a showing that the records are regularly kept. However, there is a good argument that records of religious organizations are not uniformly reliable enough to justify a hearsay exception independent from *Rule 803(6)*. The term "religious organization" is broad; religious organizations have proliferated in modern times; and experience indicates that many organizations titling themselves as religious are in fact a front for bizarre, or criminal, activity. Perhaps the solution would be to include a trustworthiness clause in this Rule, similar to that found in Rules 803(6) and (8).

[13] Rule 803(12) -- Marriage, Baptismal, and Similar Certificates

Rule 803(12) provides a hearsay exception for statements of fact contained in certificates marking marriages, baptisms, confirmations, bar mitzvahs, and similar events of a religious or, in some instances, civil nature. There is some overlap here with *Rule 803(8)* but the significance of this particular section seems to be that it covers religious officers as well as public officers. The rationale for the exception is that a certificate of an important event would not be issued by a religious organization unless it was reliable. A certificate fitting the requirement of the Rule can be offered to prove the

fact of marriage, death, etc., as well as lineal relationship.

[14] Rule 803(13) -- Family Records

Rule 803(13) provides that statements of fact concerning personal or family history contained in family Bibles or on rings, or in inscriptions on family portraits, are excepted from the hearsay rule. The Rule is expansive in the openendedness signified by the final phrase, "or the like." It is also expansive in that the proponent need not show that the records were prepared by a family member or by somebody with personal knowledge of the facts recorded. The rationale for the exception is that trustworthiness is assured by the unlikelihood that family members would allow incorrect records to be prepared or retained.

[15] Rule 803(14) -- Record of Documents Affecting an Interest in Property

Rule 803(14) recognizes that with the advent of recording statutes, it is necessary that the record of any document that purports to establish or affect an interest in property should be admissible to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed. Trustworthiness is based upon the prerequisites to filing -- which generally include a specified procedure to ensure execution and delivery -- that are set forth in the statutes that authorize the recording of title documents.

One may wonder at first glance why the same problem is not presented here that was presented in the Supreme Court draft of Article V on privileges. The question is whether this is a federal statute that attempts to override state law in an area traditionally left to the states. The last sentence of this section seems to provide the answer. *Rule 803(14)* is only applicable if the record is a record of a public office and an applicable statute authorizes the recording of documents at that time in that office. The thought of the Advisory Committee was that the entire purpose of recording must be to have a ready means of evidence concerning what happened with respect to property interests in the past.

[16] Rule 803(15) -- Statements in Documents Affecting an Interest in Property

Rule 803(15) provides that any statement in a document purporting to establish or affect an interest in property is excepted from the hearsay rule if the matter stated was relevant to the purpose of the document. The exception does not apply where the property has been the subject of dealings after the document was made that are inconsistent with the statement or the purport of the document. The rationale for the exception is that the circumstances under which documents disposing of property are executed, coupled with the requirement that any fact contained therein be relevant to the purpose of the document, constitute adequate guarantees of trustworthiness, especially since there is an exclusionary safety valve if subsequent dealings with the property are inconsistent with the document. The exception covers dispositive documents respecting the disposition of real as well as personal property, and unlike *Rule 803(14)* there is no requirement that the document be recorded or recordable.

[17] Rule 803(16) -- Ancient Documents

As the discussion of *Rule 901(b)(8)*, *§ 901.02*, will demonstrate, evidence that a document meets the requirements of an ancient document is enough to authenticate it. In most common-law jurisdictions, the only impact of qualification as an ancient writing is authentication. Some common-law Courts have gone further, however, and provided that if a writing meets the requirements of an ancient writing, statements made therein are admissible as an exception to the hearsay rule. *Rule 803(16)* takes this latter, broader approach. The Rule also reduces the number of years necessary to qualify as an ancient writing from the traditional thirty or more to twenty.

According to the Advisory Committee, ancient documents are sufficiently reliable to justify an exception because the danger of mistake is minimized by authentication requirements, and age affords assurance that the writing was made well before the present controversy. While this is generally true, it should be noted that the Rule does not require an explicit showing of trustworthiness, nor does it contain a trustworthiness exclusionary clause such as can be found in

Rules 803(6) and *803(8)*. n138 So, for example, newspaper accounts of an event, which are ordinarily excluded as hearsay subject to no exception, can be admitted under *Rule 803(16)* if they are old enough. n139 Perhaps this is a function of necessity. n140

[18] Rule 803(17) -- Market Reports

Rule 803(17) provides a hearsay exception for market quotations and directories or other published compilations used and relied upon by the public generally or by persons in particular occupations. n141 The Rule does not apply unless the proponent establishes that the reports are relied upon by the public or by people in a relevant field. n142 This is because the trustworthiness of these reports is premised on the use and reliance by the public at large or by particular professionals, and from the compilers' consequent motivation to be accurate in order to be competitive and to satisfy the needs of their customers. Sales of a telephone book will not be strong if many of the numbers printed are wrong.

[19] Rule 803(18) -- Learned Treatises

[a] Foundation for Exception

Rule 803(18) greatly expands common-law doctrine. This is a very important exception and should be read in conjunction with Rules 702 and 703, and the Editorial Explanatory Comments accompanying them. As indicated in the discussion of those provisions, common-law jurisdictions do not permit an expert to rely explicitly on treatises or professional literature, because such items are deemed to be hearsay. Yet, common-law jurisdictions do permit some sort of cross-examination of an expert witness based on treatises. If it turns out that an expert did consult a treatise and relied upon it in forming an opinion, the treatise can be explored on cross-examination in most common-law jurisdictions, but solely for impeachment purposes.

Rule 803(18) permits statements from learned treatises to be admitted for the truth of the matters asserted, not just for impeachment purposes. The learned treatise exception is premised upon the "high standard of accuracy which is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of a writer at stake." n143 Another important guarantor of reliability is that the treatise must be credited as authoritative by an expert testifying in the case, or else the authoritative nature of the treatise must be so generally known that it may be judicially noticed. To avoid the danger of misapplication and misunderstanding of the treatise by the jury, the Rule limits the use of treatises as substantive evidence to situations in which the expert is on the stand and available to explain and assist.

The Rule works in tandem with Rules 702 and 703. Now, the expert can be asked about a learned treatise on direct examination. The method for using treatises on direct is simple: The expert on the stand testifies that the treatise (book, pamphlet, article or otherwise) is recognized as a reliable authority in the field and that he or she has relied upon it in forming the pertinent expert opinion. Then it can be read to the jury. Of course, *Rule 403* must be satisfied. In particular, the learned treatise exception was not intended to turn a trial into a seminar; long discourses on extraneous or confusing material can be excluded. n144

Even if the expert does not rely on a treatise on direct examination, if the cross-examiner can establish that the treatise is reliable -- either by the testimony of the witness being examined, by some other expert, or by judicial notice -- statements from the treatise can be introduced.

For a learned treatise to be admissible for its truth, the proponent must establish that the expert recognized the specific publication as authoritative. So, for example, the fact that a magazine is "highly regarded" does not mean that every article it publishes can be read into evidence under *Rule 803(18)*. Each article offered must be verified as authoritative. n145 It is clear that the Rule will not apply in the absence of any showing of authoritativeness, unless it is so obvious that judicial notice can be taken. n146

One advantage of the Rule is that it requires the jury to be informed, at the time a treatise is read into evidence, of some reason to rely or not to rely on it. It prevents a plaintiff from wasting judicial resources by forcing a defendant to put on a case to rebut the possible implications of a *generally* reliable treatise that no expert would rely on in a *particular* case. Presumably the experts will explain when they are asked about authoritativeness why the treatises are or are not helpful, and it is hardly likely that the plaintiff will gain much from a treatise without an expert willing to rely on it. The treatise is of *no* help under the Rule unless an expert is testifying when the treatise is used. n147

[b] Learned Treatises -- Not Received as Exhibits

Rule 803(18) provides that when a learned treatise is admitted, it is read into evidence but it cannot be received as an exhibit. Statements from learned treatises receive treatment similar to prior recollection recorded. This is to ensure that the evidence, which is simply a testimonial substitute, is not given more weight than actual trial testimony. n148

Judge Grady, in a letter to the Advisory Committee, has suggested that the Rule's limitation on use of a learned treatise in the jury room should be rethought. He analyzed the problem as follows:

> I have a question in regard to the "Learned Treatise Exception" to the hearsay rule contained in *Rule 803(18)*. I think it is an excellent rule and have used it fairly often in cases involving technical or scientific questions. The rule lets the treatise in as substantive evidence on the direct or cross examination of an expert witness. As the Advisory Committee noted at the time the rules were adopted, "[T]he rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise." So far so good. My problem is with the last sentence of the rule ... .
>
> The problem I have with the limitation is that it doesn't work very well. In a trial of any length, there is no way the jury can possibly remember what was read to them from the treatise (or treatises; there could be several). Usually, the precise language of the treatise is critical. Without the treatise, or a verbatim excerpt from it, counsel and the jury are substantially limited in making effective use of the substantive evidence the rule permits. For this reason, the last sentence of the rule is often ignored. In my experience, the last sentence is invoked only by a party who thinks he has come out on the short end of the battle of the treatises. It would obviously be error to defy the language of the rule, so where counsel insists that the treatise not be physically received in evidence, it doesn't come in except by way of the recitation during the examination of the witness. On the other hand, where both sides think they have gained an advantage from the treatise material, copies of the treatise language are usually received without objection, sometimes in the form of blowups which are used in final arguments and sent to the jury.
>
> My suggestion is that the Committee consider eliminating the final sentence of the rule. If it is thought necessary to take more precautions with treatises than with other kinds of evidence, perhaps the last sentence could be replaced with language giving the court discretion as to whether the material will be received as a physical exhibit and sent to the jury. (I would include the "sent to the jury" idea to avoid the argument lawyers frequently make to the effect that an exhibit that has been received in evidence doesn't necessarily go back to the jury for use in their deliberations.)

The Advisory Committee considered Judge Grady's suggestions, but decided against amending the Rule. The reasoning of the Advisory Committee is set forth in the minutes of the April 2000 meeting of the Committee:

> Judge Shadur [the Committee Chair] stated that one of the reasons often mentioned for preventing learned treatises from being admitted as an exhibit is that the jury might rummage through the treatise in the jury room, without proper guidance. He and other Committee members noted, however, that any risk

> of rummaging could be alleviated by redacting those portions of the treatise that have not been admitted. One Committee member pointed out that the point of any amendment would be to permit the jury to review the learned treatise in the jury room. However, it would be inappropriate for an Evidence Rule to specify how a piece of evidence should be handled in the jury room, since that is a question of trial practice, not admissibility.
>
> Judge Shadur and other members pointed out that the most important reason for the second sentence of the Rule is that learned treatises may be given undue weight if they are admitted as trial exhibits. For example, the jury is not ordinarily permitted to bring the transcript of an expert's testimony into the jury room, because the testimony is not an exhibit. Since learned treatises essentially operate as expert testimony, it would be inappropriate for the jury to be allowed to bring a treatise into the jury room because the treatise might receive more weight than the equivalent expert witness testimony. It might even occur that a learned treatise offered to impeach an expert witness would receive greater attention from the jury than the expert's testimony itself. An even greater danger might be posed by allowing learned treatises to be considered by the jury without the benefit of contemporaneous explanation by an expert.

On balance, the Committee decided that the current rule prohibiting use of a learned treatise as an exhibit was appropriate. As Judge Grady notes, the parties may and often do by stipulation waive the protection that the Rule provides.

[c] Learned Treatises -- Charts, Films and Tapes

Rule 803(18) does not on its face extend the learned treatise exception to evidence in electronic form, such as a video or a website. The Rule refers only to written material, and the last sentence of the Rule provides that the written material is to be "read" into evidence. But, the Second Circuit has upheld the admission of a videotape under the learned treatise exception. *Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2d Cir. 2000)* . Judge McLaughlin, writing for the Court, addressed the argument that the Rule's silence on the matter precluded its applicability to videotapes. The plaintiffs, who had contested admissibility, relied on the "plain language" of the Rule and argued that to add videotapes to the list set forth in the Rule would constitute "judicial legislation." Judge McLaughlin responded as follows:

> Uttering the dark incantation of "judicial legislation" is to substitute a slogan for an analysis. Indeed, we are exhorted in *Rule 102* to interpret the Rules of Evidence to promote the "growth and development of the law ... to the end that the truth may be ascertained." ... Because judges cannot escape the responsibility of filling in gaps which the finitude of even the most imaginative legislation renders inevitable, the problem is not whether the judges make the law, but when and how much.
>
> In this case, we are compelled to "make law." For we agree with [the Trial Court] that it is just "overly artificial" to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape. We see no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed, format. In this age of visual communication a videotape may often be the most helpful way to illuminate the truth in the spirit of *Rule 102 ...* . Accordingly, we hold that videotapes may be considered learned treatises under *Rule 803(18)*.

Judge McLaughlin has adopted a sound approach to determining questions on which the text of a Federal Rule of Evidence is silent. It is the approach that most Courts have used in filling the gaps in the Evidence Rules. The Courts consider the rationale for the Rule itself, and apply that rationale expansively to matters on which the Rule is silent. In this way the Courts "make law" consistently with the goals of the Evidence Rules -- to secure fairness and a just determination of the proceedings. n149

[20] Rule 803(19) -- Reputation Concerning Personal or Family History

Rule 803(19) provides that reputation evidence is admissible to prove personal or family history, and that the reputation can be established by members of the family or by close associates. n150 In some common-law jurisdictions, this would be a modification of existing law, which may be more restrictive in requiring unavailability of the declarant or in limiting the kinds of reputation evidence that might be presented.

The rationale for the exception is that "the natural effusions of those who talk over family affairs ... are fairly trustworthy." n151

[21] Rule 803(20) -- Reputation Concerning Boundaries or General History

Rule 803(20) codifies and expands two related hearsay exceptions for certain reputation testimony. The first extends to the location of property boundaries, and the second covers matters of general history. The Rule dispenses with the requirement, found in some prior case law, that the reputation attested to be ancient or be effectively the sole source of evidence available. By definition, of course, the reputation must arise before the controversy.

The rationale for the exception is that general reputation about facts of interest to the community is probably trustworthy; it is considered unlikely that a falsehood could become generally accepted as truth in the community, where the matter is of importance to the community. Of course, this would mean that Abner Doubleday really did invent baseball in Cooperstown, and that George Washington slept practically everywhere. In fact, reputation as to certain "facts" in the community may represent significant community-based and historically engrained self-interest.

To qualify for admission under *Rule 803(20)*, the testimony must report a general consensus in the community, an assertion of the group as opposed to one or a few of its constituents. The fact that the information has been considered by and was subject to the general scrutiny of the community is an essential guarantee of reliability for the exception. Consequently, if the statement is a personal assertion of a single declarant, it will not be admitted under *Rule 803(20)*.

Rule 803(20) covers reputation concerning "events of general history important to the community," as well as reputation concerning property boundaries and customs. To qualify under this prong of the exception, the proponent must make a showing that the matter on which reputation is offered is one of general concern throughout the community. Otherwise, the discussion within the community, on which reliability is based, may not have been sufficiently considered. n152

[22] Rule 803(21) -- Reputation as to Character

Rule 803(21) excepts from the hearsay rule the kind of reputation evidence that is provided for in Rules 405 and 608. Reputation is based in large part on what other people have said outside of Court, so there are hearsay problems with reputation evidence. This exception alleviates the problems.

[23] Rule 803(22) -- Judgments in Felony Cases

The rationale for admitting judgments of serious criminal convictions is that they are reliable, given the presumption that a guilty verdict is based upon a just determination pursuant to extensive procedural safeguards, and subject to a beyond-a-reasonable-doubt standard of proof. n153 Although the Advisory Committee recognized that the Rule might leave the jury with the evidence of conviction but without means to evaluate it, the Committee concluded that the jury would give substantial effect to the conviction unless the defendant offered a satisfactory explanation.

It is not certain that the Advisory Committee and the Congress pondered the practical problems of implementing this Rule. n154 Some cases are easy. For instance, if a defendant is charged with rape on federal land and is convicted, the

rape victim will be able to introduce the fact of conviction in a subsequent suit for damages arising out of the sexual assault. Any jury will be able to figure out how to use the rape conviction in connection with the assault case, because the elements involved in the two cases will be very similar. Other cases may be more complex, however. Assume a defendant is convicted of rape on a federal installation somewhere in the San Francisco area on March 22, 1988. If the same defendant is subsequently sued in a diversity action for damages arising out of some other assault on March 22, 1988, somewhere near San Francisco, may the rape conviction be introduced to prove that the defendant was in the geographic area of San Francisco on the date in question (assuming the defendant denies this)? If the answer is yes, then the previous criminal conviction may be highly prejudicial to the defendant. Ostensibly introduced to prove presence in the area, it may identify the defendant as a rapist and result in his losing the civil case irrespective of the merits.

We believe that the best solution in a circumstance like this is for the Trial Judge to tell the jurors something like the following:

> The defendant in this case has previously been charged with criminal activity arising out of his action on the day in question in the case before you. I would like to emphasize that the previous criminal case has no particular relationship to this case except the one that I am about to describe. In the criminal proceeding, the defendant was charged with a crime that was allegedly committed in the San Francisco area. His conviction was based in part on the finding that he was in the area on the day specified. You are entitled to consider this fact in deliberating whether or not defendant was in the area on the same day and therefore possibly may have committed the act for which he is being sued in this case.

The advantage of this instruction is that it does not get into the specifics of the crime for which the defendant is charged. The first sentence of *Rule 803(22)* suggests that the judgment itself can be introduced into evidence, but it also implies that the purpose is to establish certain facts that were presumably decided in the criminal case. It must also be remembered that a conviction admissible under *Rule 803(22)* may nonetheless be excluded, or redacted, under *Rule 403* if it is unduly prejudicial. An instruction such as the one described above may minimize prejudice, and if not, the Court should consider a redaction of inflammatory material.

Only convictions of a certain degree of seriousness are covered by *Rule 803(22)*; the Rule is limited to crimes punishable by death or imprisonment in excess of one year. The one-year limitation excludes convictions for less serious crimes on the theory that the defendant's incentive to defend may have been limited, thus bringing the reliability of the conviction into question. Proof of conviction of an offense not covered by the Rule is purely hearsay, and it is not substantively admissible unless it falls within another exception (e.g., the residual or the public records exception), n155 or is used for a nonhearsay purpose (e.g., collateral estoppel or impeachment).

The pendency of an appeal does not, by the terms of *Rule 803(22)*, affect admissibility of the conviction. The theory is that sufficient reliability flows from a conviction of a serious offense at the Trial Court level. Of course, the pendency of an appeal can be shown for the purpose of limiting the weight to be given to the conviction.

Rule 803(22) does not provide a hearsay exception for judgments of acquittal. n156

[24] Rule 803(23) -- Judgment as to Personal, Family or General History, or Boundaries

Rule 803(23) covers some of the same ground as Rules 803(19) and (20). It provides that judgments may be used to prove matters of personal, family, or general history, or boundaries if such matters were essential to the judgment and the same matters would be provable by evidence of reputation. According to the Advisory Committee, the process of litigating a case presents sufficient guarantees of reliability to equate a judgment with reputation evidence. The Advisory Committee recognized that this argument might suggest a broader area of application for judgments, but did not attempt to go further in this particular Rule.

[25] Residual Exception

Two residual hearsay exceptions were contained in the Federal Rules as initially adopted. These exceptions were designed to permit the admission of trustworthy hearsay that did not fit under any of the categorical exceptions. The residual exceptions were identically worded; one was placed in *Rule 803* (subdivision (24)), and the other was placed in *Rule 804* (subdivision (b)(5)). In 1997, the residual exceptions were transferred out of Rules 803 and 804, and combined in a single exception, *Rule 807*. This was done to facilitate additions to *Rules 803 and 804*. No change in meaning was intended. See the Editorial Explanatory Comment to *Rule 807*, *§ 807.02*, for a discussion of the residual exception. All of the Annotations to the residual exception, including cases decided before the effective date of the amendment, are set forth in *§ 807.03*.

[26] Confrontation Clause and Rule 803 Exceptions

Assume that a hearsay statement is admissible under a *Rule 803* hearsay exception. If the hearsay statement is offered against a criminal defendant, a further question arises: Is the statement admissible under the *Confrontation Clause*? Before the Court's decision in *Crawford v. Washington, 541 U.S. 36 (2004)*, the answer to that question was "yes." This was because the Court in *Ohio v. Roberts, 448 U.S. 56 (1980)*, held that the *Confrontation Clause* guarantees that only reliable hearsay can be admitted against an accused, and that hearsay fitting within a "firmly-rooted" hearsay exception automatically satisfied the constitutional reliability requirements. And cases after *Roberts* had essentially held that all of the *Rule 803* exceptions are "firmly-rooted."

But the Court's analysis in *Crawford* complicates that answer somewhat. What follows is a short discussion of *Crawford*, and then a discussion of how statements admitted under *Rule 803* square with *Crawford*.

Crawford:

The Court in *Crawford* held that the defendant's right to confrontation was violated because uncross-examined "testimonial" hearsay was admitted against him at trial under a state hearsay exception for declarations against interest. *Crawford* involved a statement made by the defendant's wife to police officers that implicated the defendant and herself. Under the jurisprudence established in *Ohio v. Roberts, 448 U.S. 56 (1980)*, a hearsay statement satisfies the *Confrontation Clause* if (1) it fits a "firmly-rooted" hearsay exception, or (2) the statement carries "particularized guarantees of trustworthiness" that assure its reliability. The State Courts found that Mrs. Crawford's statement to police officers satisfied the "particularized guarantees of trustworthiness" prong of *Roberts*, reasoning that Mrs. Crawford was not trying to shift blame, and that she was relating relatively recent events to a "neutral" police officer.

The Supreme Court, in an opinion by Justice Scalia, rejected the *Roberts* structure for determining whether a hearsay statement satisfies the *Confrontation Clause*, at least if the hearsay is "testimonial." Justice Scalia engaged in an extensive historical analysis and determined that the original intent of the *Confrontation Clause* was not to exclude unreliable evidence *per se*, but rather to exclude "testimonial" evidence that had not been cross-examined by the accused.

The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded even if it is clearly reliable and even if it fits into a standard hearsay exception. An example of a statement that would qualify under *Crawford* is testimony from a prior trial in which the defendant was subject to the same charges, and the witness is unavailable for the subsequent trial.

On the other hand, if the hearsay statement is not "testimonial," the Courts after *Crawford* have uniformly held that the *Roberts* test continues to regulate the admissibility of the hearsay. While the Court in *Crawford* at least implied that

there would be no constitutional regulation for non-testimonial hearsay, and was no fan of the *Roberts* reliability requirement, the Lower Courts after *Crawford* have reasoned that *Roberts* applies to non-testimonial hearsay until the Supreme Court specifically rules otherwise; and it did not so rule in *Crawford*, which involved only "testimonial" hearsay. n157

So a critical question after *Crawford* is whether a hearsay statement is "testimonial" or not. Surprisingly, the Court did not try to define the term "testimonial." The closest the Court came to a definition is set forth in the following passage:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois, 502 U.S. 346, 365 (1992)* (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.
>
> **...**
>
> ... Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.

In another part of the opinion, the Court indicated that statements taken at guilty plea allocutions are testimonial:

> Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar, 295 F.3d 1018, 1021-1023 (CA9 2002)* (plea allocution showing existence of a conspiracy); *United States v. Centracchio, 265 F.3d 518, 527-530 (CA7 2001)* (same); *United States v. Dolah, 245 F.3d 98, 104-105 (CA2 2001)* (same); *United States v. Petrillo, 237 F.3d 119, 122-123 (CA2 2000)* (same).

While the precise definition of "testimonial" is not clear, n158 what is clear is that *Crawford* provides some limitation on the use of hearsay by the prosecution in federal criminal trials.

Statements Admitted Under Rule 803 and the Confrontation Clause:

It seems clear after *Crawford* (even given the uncertainty about the meaning of "testimonial") that admissibility under the *Confrontation Clause* must be analyzed on a statement-by-statement, rather than exception-by-exception basis. If the statement is "testimonial" it is excluded in the absence of cross-examination, no matter how reliable it is. On the other hand, if the statement is not testimonial, then it by definition will satisfy the *Confrontation Clause* for such statements, i.e., the *Roberts* test, because *Rule 803* exceptions are firmly rooted.

While it is difficult to generalize in the absence of a clear definition of what "testimonial" means, a preliminary analysis of the major *Rule 803* exceptions indicates the following:

Present Sense Impressions and Excited Utterances:

Most statements fitting under these exceptions will not be testimonial, because they are made in spontaneous situations, outside the context of any possible criminal litigation or investigation. But some statements will present *Crawford* problems, most importantly statements made by crime victims to police officers, e.g., officers responding to a 911 call. The Supreme Court has taken two state cases in the 2005-6 Term for review to determine the scope of *Crawford* as applied to 911 calls and statements to responding officers.

State of Mind Statements:

A declaration of a person's state of mind is not usually made in anticipation of use in a criminal prosecution or investigation, and as such it will not ordinarily fit even the broadest definition of "testimonial." n159 However, it is not beyond the realm of possibility that a state of mind statement could be made under "testimonial" circumstances.

Statements for Purposes of Treatment or Diagnosis:

Most statements made for medical purposes will not be made in anticipation of use in a criminal prosecution or investigation, and as such they will not ordinarily fit even the broadest definition of "testimonial." n160 However, under some circumstances a statement made to a medical investigator might be found to be testimonial. An example is *United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005)* , a child sex abuse prosecution, in which the Trial Court admitted hearsay statements made by the victim to a forensic investigator. The Court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The Court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview ... . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Past Recollection Recorded:

Under certain circumstances a past recollection recorded will be "testimonial" -- for example, a police officer's record of a criminal investigation, or an officer's record of a witness statement. But the admission of the record will not violate the *Confrontation Clause*, because in order for the record to be admissible under *Rule 803(5)*, the person who made the record must testify and be available for cross-examination. Under *Crawford*, testimonial hearsay is admissible if the declarant is available for cross-examination. And even if the declarant lacks memory, he is considered sufficiently subject to cross-examination for purposes of the *Confrontation Clause*. n161

Business Records:

The *Crawford* Court specifically mentioned a business record as a classic example of nontestimonial hearsay. Indeed, if business records are prepared with an eye toward litigation, they are not admissible under *Rule 803(6)*. Because *Rule 803(6)* is also firmly rooted under *Roberts*, it follows that records fitting within the exception will not violate the accused's right to confrontation.

While the business record itself complies with *Crawford*, there may be a problem with the affidavit procedure that can be used to qualify business records after the 2000 amendment to *Rule 803(6)*. If an affidavit is prepared by a qualified witness for the purpose of establishing the foundation requirements against an accused in a criminal case, the affidavit

appears to be "testimonial" and prohibited by *Crawford*. Yet it is hard to see how the *Confrontation Clause* is implicated by the introduction of a *pro forma*, ministerial affidavit such as that embraced by *Rule 803(6)*. Accordingly, at least two Circuits after *Crawford* have held that the *Confrontation Clause* is not violated by the admission of ministerial affidavits used to qualify records under a hearsay exception. n162

Public Records:

Law enforcement reports are not admitted under *Rule 803(8)* if they are prepared under adversarial circumstances. Thus it would appear that the only kinds of public reports that could be found testimonial are those that are not admissible under *Rule 803(8)* anyway. It follows that if a report is admissible against an accused under *Rule 803(8)*, it is also very likely to be admissible under *Crawford* (and *Roberts*).

Absence of Public Records:

The public records as to which there is an absence are not prepared in anticipation of litigation and so the underlying records are not testimonial. The evidence of the *absence* of the records presented at trial, however, is a certification specifically prepared for the accused's prosecution. Like the affidavit procedure for *Rule 803(6)*, however, the *Rule 803(10)* certification can be argued to be ministerial. And at least two Courts after *Crawford* have found *Rule 803(10)* certifications to be nontestimonial. n163

Learned Treatises:

Learned treatises are by definition not prepared in anticipation of a specific criminal prosecution or investigation. As such, they are not testimonial under even the broadest definition floated in *Crawford*.

[27] Specificity of Objection

Does an objection to an out-of-court statement on hearsay grounds also preserve a *Confrontation Clause* objection? The question is an important one because a violation of the hearsay rule is treated under a different standard of harmless error than a violation of the *Confrontation Clause*; that is, it is easier to establish prejudicial error for a violation of the *Confrontation Clause* than it is for a violation of the hearsay rule. n164 The Courts have split on whether a defendant's objection to hearsay is sufficient to preserve the constitutional question. n165 If the two issues are in fact identical, we think that it is excessively formalistic to require the defendant to object specifically on both grounds. None of the policies behind the specific objection requirement of *Rule 103* are implicated when two admissibility questions are in fact decided by an identical test. However, especially after *Crawford*, which holds that the hearsay exceptions are not necessarily contiguous with the *Confrontation Clause*, it is prudent practice for defense counsel to make a specific objection on both hearsay and confrontation grounds.

FOOTNOTES:

(n1)Footnote 1. Federal Advisory Committee Note to *Rule 803(1)* and *(2)*.

(n2)Footnote 2. See, e.g., *United States v. Brewer, 36 F.3d 266 (2d Cir. 1994)* (testimony of a police officer concerning eyewitnesses' failure to identify the defendant was not admissible as a present sense impression; the statements of the identifying witnesses were not made immediately after the event -- the relevant event being the robbery itself and not the failure to identify the defendant); *United States v. Cain, 587 F.2d 678 (5th Cir. 1979)* (statement made at least 10 minutes after the event is not sufficiently contemporaneous).

(n3)Footnote 3. Compare *United States v. Blakey, 607 F.2d 779 (7th Cir. 1979)* (substantial contemporaneity requirement was satisfied even though the time lapse may have been as long as 23 minutes), with *Hilyer v. Howat Concrete Co., 578 F.2d 422 (D.C. Cir. 1978)* (statement made 15 to 45 minutes after the event was held not

contemporaneous and thus inadmissible under *Rule 803(1)*; but the statement was admissible under *Rule 803(2)* because it was made under the stress of excitement). See also *United States v. Parker, 936 F.2d 950 (7th Cir. 1991)* (skycap's statement that the defendant had just given him the suitcase he was transporting was properly admitted as a present sense impression; the statement was sufficiently contemporaneous with the event, because the time elapsed was only that taken by the skycap in carrying the suitcase from the train to the baggage claim area).

(n4)Footnote 4. See, e.g., *Cody v. Harris, 409 F.3d 853 (7th Cir. 2005)* (newspaper account of a libelous statement was not admissible as a present sense impression: "Cody has not provided enough information to evaluate whether these criteria [i.e., immediacy and spontaneity] have been met. For example, we have no idea whether [the reporter] wrote the article with 'calculated narration' nor do we know what the time lapse was between the statement and the writing of the article."); *United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985)* (statement by a deceased officer to his superiors concerning the source of a cocaine sample was inadmissible where it was unclear how much time passed between the receipt and the statement).

(n5)Footnote 5. For an incisive analysis of the excited utterance exception, see Aviva Orenstein, *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Calif. L. Rev. 159 (1997)*.

(n6)Footnote 6. See, e.g., *United States v. Moore, 791 F.2d 566 (7th Cir. 1986)* (statement referring to something that preceded the startling event does not describe the event, but is related to the event and hence admissible under *Rule 803(2)*); *David v. Pueblo Supermarket, 740 F.2d 230 (3d Cir. 1984)* (statement in slip and fall case that "I told them to clean it up two hours ago" does not describe the slip and fall for purposes of *Rule 803(1)*, but does relate to the event for purposes of *Rule 803(2)*).

(n7)Footnote 7. See, e.g., *United States v. Collins, 60 F.3d 4 (1st Cir. 1995)* (declarant's statement that he had been physically threatened was properly admitted as an excited utterance).

(n8)Footnote 8. See, e.g., *David v. Pueblo Supermarket, 740 F.2d 230 (3d Cir. 1984)* (watching another person slip and fall is a startling event). But see *United States v. Wolak, 923 F.2d 1193 (6th Cir. 1991)* (declarant's learning after the fact about a career felon's arrest "is hardly calculated to produce the spontaneous outburst that the rule envisions").

(n9)Footnote 9. See also *United States v. Beverly, 369 F.3d 516 (6th Cir. 2004)* (wife's identification of her husband in a surveillance photograph of a bank robbery was properly admitted as an excited utterance; the wife had no idea her husband was involved in the robbery and so viewing the photo was a startling event).

(n10)Footnote 10. See, e.g., *United States v. Knife, 592 F.2d 472 (8th Cir. 1979)* (preplanned shooting of a police officer cannot be startling when it occurs).

(n11)Footnote 11. See, e.g., *United States v. Moore, 791 F.2d 566 (7th Cir. 1986)* (secretary planned to expose her boss as a bribe taker if and when she found evidence; actually finding the evidence was a startling event because the event was not within the declarant's control; even though hoped for, it was nonetheless a surprise when the event occurred).

(n12)Footnote 12. See, e.g., *United States v. Wesela, 223 F.3d 656 (7th Cir. 2000)* (wife made statement to police officers two days after her husband threatened her with a knife; it was error to admit this statement as an excited utterance because of the lengthy time period between the startling event and the statement; the declarant had regained her composure and made the statement while at work); *United States v. Winters, 33 F.3d 720 (6th Cir. 1994)* (statement made by a shooting victim to police officers, two days after the victim was shot, was held not admissible as an excited utterance; the statement was made so far after the shooting that it was "the product of conscious reflection").

(n13)Footnote 13. See, e.g., *United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002)* (statements by child-victim of sexual abuse, made within two hours of the abuse, were properly admitted as excited utterances); *United States v.*

Scarpa, 913 F.2d 993 (2d Cir. 1990) (statement of a beating victim was admissible under *Rule 803(2)*; the victim named the defendants as his assailants five or six hours after the beating, while he was being treated in a hospital emergency room and his sister screamed that one of the defendants had come into the emergency room; there was little doubt that the declarant was still under the stress of excitement caused by his beating and by his sister's screams).

(n14)Footnote 14. See, e.g., *United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995)* (victim's statement, accusing the defendant of raping her, was properly admitted as an excited utterance; while the statement was made more than 30 minutes after intercourse, the victim was still under the influence of the startling event; the victim was only 15 years old, she reported the rape to her mother at the first opportunity to do so, and she was in a "semi-hysterical" state at the time she made the statement); *United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)* (statements by a declarant to two lawyers, stating that his wife and her boyfriend were going to kill him, were admissible under *Rule 803(2)*; it was not clear how soon the statements were made after the victim heard the plotters, but the Court held that hearing one's wife and her lover plotting one's own death is clearly a startling event, and the lawyers testified that the victim was in a state of panic when he related the story to them).

(n15)Footnote 15. See, e.g., *United States v. Moore, 791 F.2d 566 (7th Cir. 1986)* (statement made 20 minutes after an event was held admissible under *Rule 803(2)* where the declarant was "running around like a chicken with her head cut off" for the entire time).

(n16)Footnote 16. See, e.g., *United States v. Sowa, 34 F.3d 447 (7th Cir. 1994)* (statement made by a child-declarant 20 minutes after he was beaten, identifying the defendant as the perpetrator, was properly admitted as an excited utterance; the Court noted that the child had cried for the entire period between the beating and the statement); *Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988)* (child's statements were held admissible under 803(2) when they were made within three hours of the child's first opportunity to speak with the mother, even though the alleged abuse had occurred more than a day earlier); *United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)* (child's statements concerning sexual assault were admissible when they were made to a police officer between 45 and 75 minutes after the assault; the Court emphasized "the surprise of the assault, its shocking nature and the age of the declarant" to find a continuous state of excitement).

(n17)Footnote 17. See, e.g., *United States v. Sewell, 90 F.3d 326 (8th Cir. 1996)* (the defendant was stopped for a traffic violation; when a search of his car uncovered a gun, the defendant said the gun was not his; this statement was not admissible as an excited utterance; where "incriminating evidence is discovered in one's possession, it requires only the briefest reflection to conclude that a denial and a plea of ignorance is the best strategy. This hardly comports with the spirit of disinterested witness which pervades the rule.").

(n18)Footnote 18. See, e.g., *United States v. Alexander, 331 F.3d 116 (D.C. Cir. 2003)* (response to a single question during a 911 call did not diminish the declarant's excitedness and therefore did not disqualify the response as an excited utterance); *United States v. Joy, 192 F.3d 761 (7th Cir. 1999)* (finding statements made in response to questioning to be admissible under *Rule 803(2)*, where the statements were made in a 911 call only minutes after the defendant had waved a gun at the declarant in an argument).

(n19)Footnote 19. The Advisory Committee's concerns received extensive discussion in *United States v. Medico, 557 F.2d 309 (2d Cir. 1977)* .

(n20)Footnote 20. See, e.g., *Meder v. Everest & Jennings, 637 F.2d 1182 (8th Cir. 1981)* (a portion of a police officer's report concerning the cause of an accident was not admissible under *Rule 803(1)*, where the officer was unable to identify the source of the information, making it impossible to determine whether the declarant was an eyewitness to what occurred at the scene).

(n21)Footnote 21. See, e.g., *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* (911 tape was not admissible either as an excited utterance or as a present sense impression, because the citizen-caller apparently lacked personal

knowledge of the events that he was reporting; the Court noted that the proponent of a hearsay declaration has "the burden of establishing personal perception by a preponderance of the evidence").

(n22)Footnote 22. Compare *Miller v. Keating, 754 F.2d 507 (3d Cir. 1985)* (statement by an unidentified declarant was held inadmissible as excited utterance, because the defendant was unable to show the requisite personal knowledge and spontaneity to meet the requirements of the Rule; in some instances the substance of the statement itself might reveal perception, but the statement in the instant case did not).

See also *United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998)* : Police responding to a 911 call found the getaway car used in a bank robbery. On the seat of the car was an anonymous note indicating that the robbers had switched to another car; that other car was connected to the defendant. The Court held that the anonymous note was erroneously admitted under Rules 803(1) and (2):

> Both *Rules 803(1) and (2)* share certain requirements. One of the principal requirements is that the declarant personally observed the event or condition about which the statement was made ... . Although the government argues that a common sense reading of the note suggests that the person writing the note was perceiving the event and in close proximity, the record here is devoid of circumstances indicating by a preponderance that the author of the anonymous note actually saw Mitchell change cars. Thus, the requirement of personal perception necessary for both the present sense impression and excited utterance exceptions to the hearsay rule is not satisfied.

(n23)Footnote 23. See, e.g., *United States v. Lawal, 736 F.2d 5 (2d Cir. 1984)* (the defendant's statement of anger at being "set up," made at the time drugs were found in his suitcase in a Customs search, was admissible under *Rule 803(3)* as a statement of a then existing state of mind even though there was a likelihood of fabrication; the defendant had time during a long airplane trip to think up a story should he be caught).

(n24)Footnote 24. Advisory Committee Note to *Rule 803(3)*. See also *United States v. Cardascia, 951 F.2d 474 (2d Cir. 1991)* (*Rule 803(3)* could not be applied to admit statements of the declarant's state of mind with regard to conduct that occurred eight months earlier; a contrary rule would significantly erode the hearsay rule, beyond the intended breadth of the hearsay exception).

Under the Rule, a statement of memory can be offered to prove a fact relating to the execution, revocation, identification, or term of the declarant's will. There are no particular assurances of trustworthiness that justify creating an exception for will cases. But as the Advisory Committee Note states, this provision represents an *ad hoc* judgment that finds ample support in the decisions, and rests on practical grounds of necessity and expediency. Not surprisingly, the "will exception" receives minimal application in the Federal Courts.

(n25)Footnote 25. See, e.g., *United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996)* (statements of one defendant's wife that she intended to divorce the defendant were admissible to show a motive for the defendant to murder her).

(n26)Footnote 26. See also *Firemen's Fund Ins. Co. v. Thien, 8 F.3d 1307 (8th Cir. 1993)* (where insurance coverage depended on whether or not the declarant was acting within the scope of his employment, the declarant's statement that he was going on a flight to take a vacation was improperly excluded; the statement was "offered to prove [declarant's] present intention to do something in the future" and was thus admissible under *Rule 803(3)*).

(n27)Footnote 27. See, e.g., *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F.3d 1267 (3d Cir. 1995)* (in a Robinson-Patman Act case, the Trial Judge improperly relied upon testimony of the plaintiff's employees that customers said they purchased products from a competitor at a lower price; the customers' statements were admitted under *Rule 803(3)*, and therefore could be used only to prove the state of mind of the customers; the statements could not be used to prove the truth of the statements; thus, the Trial Court erred in admitting the customers' statements as proof of actual antitrust damages in the form of lost sales); *United States v. Liu, 960 F.2d 449 (5th Cir. 1992)* (no abuse of discretion

in excluding a defendant's hearsay statements that he had participated in a crime because he feared a police officer he thought to be corrupt; the Rule admits statements as to the declarant's fear, but not as to why he held that state of mind or what he believed induced it); *Grove Fresh Distrib., Inc. v. New England Apple Prods. Co., 969 F.2d 552 (7th Cir. 1992)* (in an action brought against a competitor for misrepresentation of orange juice, the plaintiff was properly permitted to offer statements by customers that they switched to the defendant's juice because it was cheaper; the statements were not admissible to prove the fact of underpricing, but they were admissible to show the customers' motives for no longer dealing with the plaintiff).

(n28)Footnote 28. See, e.g., *United States v. Williams, 704 F.2d 315 (6th Cir. 1983)* (statement of the defendant that he intended to satisfy a tax indebtedness when his mother sold her house, offered to explain his possession of a large amount of cash upon arrest, was admissible under *Rule 803(3)* as a statement of intent to prove subsequent conduct; however, the statement was properly excluded on relevance grounds because the intent to perform the future act was conditioned on the sale of the house, and this condition had not been met). Compare *United States v. Veltmann, 6 F.3d 1483 (11th Cir. 1993)* (defendants charged with setting a fire in which their wife and mother, respectively, died, claimed that she committed suicide; it was error to exclude testimony that the decedent had talked about the possibility of her death and mentioned suicide several times).

(n29)Footnote 29. See, e.g., *United States v. Scrima, 819 F.2d 996 (11th Cir. 1987)* (in a prosecution for income tax evasion, the defendant attempted to rebut the government's "net worth" theory by offering the testimony of someone to whom the defendant had boasted, prior to the relevant tax years, of having a large sum of money to invest; this testimony was inadmissible, because the defendant's state of mind was not relevant to any subsequent conduct at issue in the case; the only relevant fact was whether the defendant actually had the money, and his out-of-court boast was hearsay with respect to that fact).

(n30)Footnote 30. See generally the discussion in *United States v. Brown, 490 F.2d 758 (D.C. Cir. 1973)* (principal danger is that the jury will consider the declarant's statement for the truth of an out-of-court event, such as a prior threat by the defendant; such inferences are improper, and must be weighed against the probative value of the declarant's statement as tending to prove the declarant's subsequent course of action).

(n31)Footnote 31. See also *United States v. Fontenot, 14 F.3d 1364, 1371 (9th Cir. 1994)* :

> The state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed would have induced the state of mind. If the [memory or belief] reservation in the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition -- "I'm scared" -- and not belief -- "I'm scared because [someone] threatened me."

(n32)Footnote 32. See also *United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)* (a homicide victim's wife and others were charged with defrauding life insurance companies by, inter alia, fraudulently listing the wife as the husband's beneficiary on life insurance policies, and subsequently killing the husband; the husband's statements describing the dismal state of his marriage, his desire to replace his wife as beneficiary on his insurance policies, and his fear of being murdered by his wife and her lover were admissible as evidence of his state of mind and were relevant to prove that the declarant would not have listed his wife as beneficiary); *United States v. Green, 680 F.2d 520 (7th Cir. 1982)* (in a prosecution for kidnapping with intent to commit murder, statements by the victim concerning her attitude toward the defendant were properly admitted because they tended to negate the defendant's contention that she accompanied the defendant voluntarily).

(n33)Footnote 33. In *Hillmon*, the Court received the letters of a third party (Walters), to the effect that he was going to Colorado with Hillmon, to show that Hillmon went to Colorado with Walters.

(n34)Footnote 34. It is true that the Court in *Hillmon* stated that the letters were competent evidence to prove that Walters went to Colorado with Hillmon. However, the actual precedential import of that extension of the state of mind exception is subject to doubt. All of the cases relied upon by the *Hillmon* Court, except one, were cases in which the state of mind exception was used to prove only the conduct of the declarant (e.g., to prove that the declarant took a certain train at a certain time). Almost all of the analysis in the *Hillmon* opinion considers the use of the state of mind exception to prove the declarant's conduct. Discussion of using this exception to prove the conduct of someone other than the declarant is clearly an afterthought. Finally, the entire evidentiary discussion in *Hillmon* is, at least technically, dictum, because the Court reversed judgments for the plaintiff not on the ground that evidence was improperly excluded, but rather on the ground that the insurer-defendants were entitled to separate verdicts.

The Court in *Hillmon* cited the old New Jersey case of *Hunter v. State, 40 N.J.L. 495 (1878)* , where that Court allowed the state of mind exception to prove that a meeting between two people took place. But the reasoning in that case was peculiar, to say the least. The *Hunter* court stated that "a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?" This "analysis" amounts to an assertion that if one part of a statement is reliable, all parts of a statement must be admitted, no matter how unreliable those parts may be. Such a proposition has been rejected time and again by the United States Supreme Court, and would amount to an exception to the hearsay rule for "partly reliable narratives." See *Williamson v. United States, 512 U.S. 594 (1994)* (rejecting the notion that an entire narrative can be admissible simply because part of the narrative is reliable, and noting that "one of the most effective ways to lie is to mix falsehood with truth").

Finally, even if *Hillmon* were a holding that state of mind statements can be used to prove the conduct of a nondeclarant, this is a holding based on the common law. It is not a controlling discussion of the Federal Rules of Evidence, enacted almost 100 years later.

(n35)Footnote 35. See generally Note, *Federal Rule of Evidence 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 Vand. L. Rev. 659 (1982).

(n36)Footnote 36. See, e.g., *Gual Morales v. Hernandez Vega, 579 F.2d 677 (1st Cir. 1978)* (excluding a witness' statement that "I intend to see [the defendant]" when offered to prove that the witness met with the defendant); *United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978)* (accepting the House limitation on *Hillmon* but also finding that the declarant's statement, "I'm on my way to see Jenkins," was admissible as nonhearsay for the impeachment purpose of attacking Jenkins' testimony that he had left his house to see a friend other than the declarant; the dissent argued that the statement was in fact admitted to show that Jenkins met with the declarant and that such admission was error).

(n37)Footnote 37. See, e.g., *United States v. Astorga-Torres, 682 F.2d 1331 (9th Cir. 1982)* .

(n38)Footnote 38. See, e.g., *United States v. Delvecchio, 816 F.2d 859 (2d Cir. 1987)* (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). Compare *United States v. Sperling, 726 F.2d 69 (2d Cir. 1984)* (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place).

(n39)Footnote 39. See, e.g., *United States v. Donley, 878 F.2d 735 (3d Cir. 1989)* (in a first-degree murder prosecution a government witness testified that the victim said, in the presence of her husband the defendant, that she was moving out of the marital home and separating from him; shortly thereafter, the victim was found dead; the testimony was properly admitted to show the existence of her intention and plan and the defendant's awareness of it, from which could be inferred a motive for the killing; the statement did not purport to express an opinion about the nondeclarant's state of mind).

(n40)Footnote 40. See, e.g., *United States v. DiMaria, 727 F.2d 265, 271 (2d Cir. 1984)* (exculpatory statement of state of mind made under untrustworthy circumstances is admissible under *Rule 803(3)*: "False it may well have been but if it fell within *Rule 803(3)*, as it clearly did if the words of that Rule are read to mean what they say, its truth or falsity is for the jury to determine."); *United States v. Peak, 856 F.2d 825 (7th Cir. 1988)* (an exculpatory statement by the defendant was held admissible under *Rule 803(3)* despite the contention that the defendant had an opportunity to fabricate a then existing state of mind).

(n41)Footnote 41. See, e.g., *United States v. Reyes, 239 F.3d 722 (5th Cir. 2001)* (no error in excluding an exculpatory statement by a criminal defendant; the defendant suspected that the person he was speaking to was a government informant and that the conversation was being monitored; the defendant's statements "were more self-serving than candid" and lacked the spontaneity required for admission under *Rule 803(3)*); *United States v. Faust, 850 F.2d 575 (9th Cir. 1988)* (an exculpatory letter written by the defendant was not admissible under *Rule 803(3)* since the defendant had time to reflect in drafting the letter, and thus any evidence of state of mind provided by the letter was unreliable).

(n42)Footnote 42. See, e.g., *United States v. Partyka, 561 F.2d 118 (8th Cir. 1977)* (an exculpatory statement by the defendant was admissible under *Rule 803(3)* despite the contention that the defendant had an opportunity to fabricate a then existing state of mind; the Federal Rules provide a categorical approach, and if a statement fits within the terms of a hearsay exception, it is admissible even if made under untrustworthy circumstances).

(n43)Footnote 43. See, e.g., *United States v. LeMaster, 54 F.3d 1224 (6th Cir. 1995)* (the Trial Judge properly excluded a statement the defendant made a day after being interviewed by the FBI agent; to the extent that the statement communicated that the defendant may have answered questions mistakenly, it was a statement of a past, not a present state of mind).

(n44)Footnote 44. See generally Robert Mosteller, *Child Sexual Abuse and Statements Made for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257 (1989)*, for a thorough discussion of the reliability of statements admitted under *Rule 803(4)*.

(n45)Footnote 45. See, e.g., *United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980)* ("This principle recognizes that life and death decisions are made by physicians in reliance on such facts and as such should have sufficient trustworthiness to be admissible in a court of law.").

(n46)Footnote 46. The leading case establishing the two-pronged approach to admissibility of statements under *Rule 803(4)* is *United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)* ; accord *United States v. Nick, 604 F.2d 1199 (9th Cir. 1979)* .

(n47)Footnote 47. See, e.g., *United States v. Pollard, 790 F.2d 1309 (7th Cir. 1986)* (a statement of a patient describing how his arm was twisted was admissible because the cause of arm pain was reasonably pertinent to treatment, and the declarant made the statement with a motive to obtain treatment). Compare *Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986)* (a statement that a patient fell from a third-story stairway while wrestling was not admissible under *Rule 803(4)* to prove that the patient was wrestling; the cause of the accident was not pertinent to treatment because the doctor would treat a patient who fell from three stories the same way no matter what the cause of the fall).

(n48)Footnote 48. See, e.g., *United States v. Yazzie, 59 F.3d 807, 812 (9th Cir. 1995)* :

> Generally, statements of fault are not admissible under this exception. However, this Circuit has adopted a special rule for sexual abuse cases because sexual abuse involves more than physical injury; the physician must be attentive to treating the victim's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser. Thus, a child victim's statements about the identity of the perpetrator are admissible under the medical treatment exception when they are made for the purposes of medical diagnosis and treatment.

See also *United States v. Provost, 875 F.2d 172 (8th Cir. 1989)* (a statement identifying the defendant as the perpetrator was pertinent to treatment where the defendant occasionally lived in the victim's home).

(n49)Footnote 49. See, e.g., *United States v. Renville, 779 F.2d 430 (8th Cir. 1985)* (child's statement attributing fault is admissible under *Rule 803(4)* only "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."). See also *United States v. Sumner, 204 F.3d 1182 (8th Cir. 2000)* (child's statement to doctor accusing the defendant of sexual abuse was erroneously admitted under *Rule 803(4)*: "Although Dr. Zitzlow explained that he was a doctor, he did not discuss with [the victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzlow's attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected."). Compare *United States v. Pacheco, 154 F.3d 1236 (10th Cir. 1998)* (placing the burden on the defendant to provide evidence that the child-declarant did not understand she was being treated by doctors and needed to be truthful).

(n50)Footnote 50. See, e.g., *Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004)* (rejecting as "unnecessary inflexible" the rule that statements by children are admissible only where the physician makes clear to the child that truthfully identifying the abuser is necessary to diagnosis and treatment: "There are many ways in which a party wishing to enter into evidence as statement under *Rule 803(4)* can demonstrate that the statement was made for the purpose of diagnosis and treatment.")

(n51)Footnote 51. See, e.g., *United States v. Whitted, 11 F.3d 782 (8th Cir. 1993)* (statements were admissible even where a doctor was consulted only for the purpose of providing expert testimony in a criminal prosecution); *Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988)* (the term "diagnosis" is intended to refer to a doctor who is consulted only in order to testify as a witness). See also Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257, 260 (1989)* ("The rule admits statements made to a doctor consulted only for the purpose of diagnosis, when no treatment is anticipated by the declarant. The archetypal statement involved here is one made to a physician who is consulted for the purpose of the doctor giving expert testimony at trial.").

(n52)Footnote 52. See, e.g., *Lovejoy v. United States, 92 F.3d 628 (8th Cir. 1996)* (statements by a child's mother concerning attempted sexual abuse of the child by the father were properly admitted; the statements were made to a nurse; the child could not speak more than a few words; and the mother had attempted to convey details as to what the defendant had done in order to aid in diagnosis and treatment of the daughter).

(n53)Footnote 53. See, e.g., *Bucci v. Essex Ins. Co., 393 F.3d 285 (1st Cir. 2005)* ("There is no requirement, either in the text of the Rule, or the case law, that the speaker be the patient himself"; the question is whether the declarant's motive is to promote treatment or diagnosis of the patient); *Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986)* (statements by nonpatients can qualify under *Rule 803(4)* where they are pertinent to the patient's treatment or diagnosis). Compare *Stull v. Fuqua Indus., 906 F.2d 1271 (8th Cir. 1990)* (a statement in a medical record that the plaintiff "apparently" jumped from a lawn mower and got his foot caught in it was held not admissible under *Rule 803(4)*; while *Rule 803(4)* allows statements from nonpatients, there was no showing that this statement was made by a nonpatient for the purpose of treating the patient: "Here the word 'apparently' in the hospital record indicates that the statement may not have been made by [the patient]; it may instead represent conjecture on the part of the person filling out the record.").

(n54)Footnote 54. See, e.g., *United States v. Newman, 965 F.2d 206 (7th Cir. 1992)* ("Is psychology medicine? For purposes of this rule, it is. The idea behind the rule is that a person who believes he or she may be ill or injured has a strong incentive to tell the professional from whom he seeks diagnosis or treatment the truth about his medical history, symptoms, etc., because if he doesn't it will be harder for the professional to diagnose his problem and treat it effectively. The rationale applies as forcefully to a clinical psychologist as to a physician, and warrants us in reading 'medical' broadly."); *Morgan v. Foretich, 846 F.2d 941, 949 n.1 (4th Cir. 1988)* ("Statements to psychiatrists or psychologists are admissible under 803(4) the same as statements to physicians.").

(n55)Footnote 55. See, e.g., *Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998)* (the plaintiff was erroneously permitted to introduce a diary recording his version of various episodes at issue in the case; the plaintiff did not state that he could not recall the events recorded -- in fact, he gave testimony recalling those events in detail -- so the proper foundation was not laid for the diary as past recollection recorded).

(n56)Footnote 56. See, e.g., *Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985)* (a list of products that the plaintiff was allegedly exposed to while on the job cannot be admitted under *Rule 803(5)*, where the list was prepared at least five years after the plaintiff's exposure to the products). Compare *United States v. Smith, 197 F.3d 225 (6th Cir. 1999)* (no abuse of discretion in admitting a statement given by a cooperating witness to a detective 15 months after the incident described in the statement; *Rule 803(5)* has no contemporaneity requirement; the defendant showed no reason why the matter was not fresh in the witness' memory when the statement was made, and the Rule's requirements were otherwise satisfied).

(n57)Footnote 57. *Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914 (7th Cir. 2002)* (documents admitted as past recollection recorded may be read to the jury but not received as an exhibit).

(n58)Footnote 58. See, e.g., *United States v. Williams, 951 F.2d 853 (7th Cir. 1992)* :

> Where a person perceives an event and reports it to another person who records the statement, both must ordinarily testify to establish that the statement is a past recollection recorded under *rule 803(5)*. The person who witnessed the event must testify to the accuracy of his oral report to the person who recorded the statement. The recorder must also testify to the accuracy of his transcription.

Compare *Ricciardi v. Children's Hosp. Med. Center, 811 F.2d 18 (1st Cir. 1987)* (notes prepared by a doctor about problems occurring during an operation are not admissible as a recorded recollection where the doctor had no personal knowledge of the events recorded, and the proponent did not produce those who reported to the doctor who prepared the notes).

(n59)Footnote 59. *United States v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993)* :

> It is undisputed that Coleman would not put his name to Staedtler's report when it was first shown to him, and that he subsequently disavowed its accuracy on the witness stand. The district court erred in finding that Coleman had adopted Staedtler's report, and consequently abused its discretion in admitting the report as a past recollection recorded under *Rule 803(5)*.

(n60)Footnote 60. Compare *United States v. Benson, 961 F.2d 707, 709 (8th Cir. 1992)* ("The two interviews with [the witness] were not reported verbatim and they were unsigned and unsworn by [him]. Thus, both reports constitute inadmissible double hearsay and should not have been admitted into evidence" as past recollection recorded), with *United States v. Porter, 986 F.2d 1014 (6th Cir. 1993)* (adoption was found where, among other things, the witness admitted making the statement, had made the statement under penalty of perjury, had signed the statement on every page, and had changed and initialed the wording of the statement several times).

(n61)Footnote 61. Advisory Committee Note to *Rule 803(6)*.

(n62)Footnote 62. See, e.g., *Waddell v. Commissioner, 841 F.2d 264 (9th Cir. 1988)* (an appraisal report was not admissible under *Rule 803(6)* where no showing was made that it was the regular practice of the preparer to make such a report).

(n63)Footnote 63. See, e.g., *United States v. Catabran, 836 F.2d 453 (9th Cir. 1988)* (the fact that printouts were not relied upon for inventory purposes does not prevent admissibility where the printouts provided accurate inventory

figures and were kept on a monthly basis as a routine business practice; *Rule 803(6)* does not require that the business actually rely on the record in any specific way).

(n64)Footnote 64. 56 F.R.D. 183, 301 (1973).

(n65)Footnote 65. This legislative history is set forth in *§§ 803.04[5], [8]*.

(n66)Footnote 66. See, e.g., *United States v. Box, 50 F.3d 345 (5th Cir. 1995)* (records of arrests prepared by the County Attorney's office were properly admitted under *Rule 803(6)*).

(n67)Footnote 67. See, e.g., *Abdel v. United States, 670 F.2d 73 (7th Cir. 1982)* (Department of Agriculture transaction reports were properly admitted under *Rule 803(6)* as proof that a supermarket was engaging in improper food stamp transactions; the Court rejected an argument that only *Rule 803(8)* could be used to admit public records).

(n68)Footnote 68. See, e.g., *United States v. Cain, 615 F.2d 380, 382 (5th Cir. 1980)* (a report of a prison escape that was inadmissible under *Rule 803(8)* due to its adversarial nature cannot be admitted under *Rule 803(6)* by establishing a foundation of regularity); *United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002)* ("When public records are used against a defendant in a criminal prosecution, the public records exception is the exclusive applicable hearsay exception.").

(n69)Footnote 69. The dispute respecting the relationship between *Rule 803(6)* and *Rule 803(8)* occurs because a few cases have stated that *Rule 803(8)* absolutely excludes all law enforcement reports offered against criminal defendants. See *United States v. Oates, 560 F.2d 45 (2d Cir. 1977)* . Under that view, the issue of admissibility of law enforcement reports under *Rule 803(6)* is of great import. In fact, however, most Courts have held that police reports offered against criminal defendants are excluded only to the extent that they were prepared with an adversarial motive, in anticipation of litigation. See, e.g., *United States v. Orozco, 590 F.2d 789 (9th Cir. 1979)* (customs records of border crossings are admissible under *Rule 803(8)* because they are ministerial and not prepared under adversarial circumstances). Records prepared with an adversarial motive would, under this view, be excluded under the trustworthiness provisions of both *Rule 803(8)* and *Rule 803(6)*. Thus, for the majority of Courts, which take a less drastic view of the exclusionary effect of *Rule 803(8)*, the issue of whether a record excluded under *Rule 803(8)* can nonetheless be admitted under *Rule 803(6)* will not arise because the Rules are coextensive in these circumstances. See *United States v. Bohrer, 807 F.2d 159 (10th Cir. 1986)* (IRS contact card excluded under *Rule 803(8)* because it was prepared under adversarial circumstances is also excluded under *Rule 803(6)* because adversarial circumstances of its preparation show a lack of trustworthiness). For a further discussion of this point, see the Editorial Explanatory Comment to *Rule 803(8)*, *§ 803.02[9][e]*.

(n70)Footnote 70. See *United States v. Vigneau, 187 F.3d 70 (1st Cir. 1999)* (noting that business records are admissible because businesses have incentives to keep accurate records, "but no such safeguards of regularity or business checks automatically assure the truth of a statement to the business by a stranger to it").

(n71)Footnote 71. See, e.g., *Cameron v. Otto Bock Orthopedic Indus. Inc., 43 F.3d 14 (1st Cir. 1994)* (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by prosthesists who typically obtained their information from patients; the patients were under no business duty to the manufacturer and the reports were inadmissible hearsay).

(n72)Footnote 72. See, e.g., *United States v. Vigneau, 187 F.3d 70 (1st Cir. 1999)* ("despite its language, the business records exception does not embrace statements contained within a business record that were made by one who is not a part of the business if the embraced statements are offered for their truth"); *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* ("[h]earsay statements on a 911 tape can be admitted into evidence as either a 'public record,' *Fed.R.Evid. 803(8)(B)*, or a 'business record,' *Fed.R.Evid. 803(6)*," but citizen callers are not under any duty to report and thus "a recorded statement by a citizen must satisfy a separate hearsay exception"); *Gray v. Busch Entertainment Corp., 886 F.2d 14 (2d Cir. 1989)* (a record containing a statement of the plaintiff's daughter to an attending nurse about

how an accident occurred was held inadmissible under *Rule 803(6)*: the daughter "was not acting in the regular course of business, and the record of her statement was thus inadmissible unless it fell within some exception to the hearsay rule. See *Rule 805*").

(n73)Footnote 73. See, e.g., *United States v. Turner, 189 F.3d 712 (8th Cir. 1999)* (hearsay upon hearsay problem was excused where both the source of information and the recorder were acting in the regular course of the organization's business).

(n74)Footnote 74. See, e.g., *United States v. Reyes, 157 F.3d 949 (2d Cir. 1998)* (no abuse of discretion in admitting prison logbooks showing that certain individuals visited the defendant in prison; the visitors had no business duty to provide truthful information about their identity; however, the foundation witness testified that the employees preparing the logbooks checked identification in order to verify the identity of the visitors); *United States v. Bland, 961 F.2d 123 (9th Cir. 1992)* (identity of purchaser of a firearm can be proved by form filled out by gun-seller; because federal regulations required sellers of firearms to verify the name of each purchaser, and purchasers are under a legal duty to provide truthful information for Form 4473, the information transmitted by the buyer to the recorder was considered by the Court to be transmitted pursuant to a duty that guaranteed a reliable transmission of information). Compare *United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992)* (reversing a conviction in which the government offered a sales receipt to prove the defendant's address; the receipt was prepared by the merchant, and the government made no showing that the merchant had personal knowledge of the defendant's address, or that the merchant had verified the address in any way). See also *United States v. Vigneau,187 F.3d 70 (1st Cir. 1999)* (expressing doubt about verification as a means of solving the double hearsay problem).

(n75)Footnote 75. See, e.g., *United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993)* (Western Union money orders were properly admitted to prove the name of the person receiving them, because verification was required, but they were erroneously admitted to prove the names of the senders, where verification was not required; motel records from two different motels were offered to show that the registrant stayed in the respective motel; one record was improperly admitted where there was no testimony that the name on the register was verified for accuracy, and there was no guarantee of trustworthiness in the giving of the name; the other record was properly admitted where there was testimony of verification). See also *United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995)* (the government was allowed to introduce Western Union money transfer records to prove cash flow among the conspirators; a Western Union employee testified that a sender's identity is not verified, but that in order to receive the money a person must either show identification or answer a test question prepared by the sender; the District Court had found that both the identification process and the test question process constituted adequate verification by Western Union of the recipient's identity; the Court of Appeals was, however, "more dubious than the district court that the test question procedure adequately verifies the actual identity of the recipient"; the fact that a recipient answered a question posed by the sender indicates only that he "is the sender's intended recipient, not that he actually bears the name presented"; but any error was harmless, because 80 of the 84 recipients in the records admitted were verified by identification rather than by answering a test question).

(n76)Footnote 76. See, e.g., *Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041 (9th Cir. 1999)* (memorandum contained several levels of hearsay; to be admissible, "each level of hearsay must satisfy an exception to the hearsay rule"; in this case, each level was satisfied; some statements to the recorder were admissible under *Rule 803(3)* and some were admissible under *Rule 801(d)(2)(D)*); *Bondie v. Bic Corp., 947 F.2d 1531 (6th Cir. 1991)* (medical report was admissible because it was made and kept in the ordinary course of business and the included statement of the mother of the patient was a party admission; *Rule 803(6)* does not require that the underlying declarant have a business duty to supply the information recorded, so long as that declarant's statements come within a hearsay exception or exemption and recording such statements is part of the regularly conducted activity).

(n77)Footnote 77. See also *Hoselton v. Metz Baking Co., 48 F.3d 1056 (8th Cir. 1995)* (an accountant's notes containing statements made by others during a negotiation session were admissible as business records; as to the statements included in the notes, the Federal Rules "do not require each level of hearsay to meet the requirements of the

same exception"; the statements in the accountant's record were not hearsay because they were not offered to prove the truth of the matters asserted; rather, they were offered to show that the plaintiffs were on notice of certain expectations that the defendants had in negotiations).

(n78)Footnote 78. See, e.g., *United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003)* (doctor was a qualified witness to establish the admissibility requirements for medical records; the doctor designed the procedures for maintaining the records and observed them being implemented); *United States v. Box, 50 F.3d 345 (5th Cir. 1995)* (records of arrests prepared by the County Attorney's office were properly authenticated by a County Attorney; even though the authenticating witness had not worked at the office during the time the particular records were prepared, he was able to explain the system of record-keeping, he could recognize the records as those of the office, and he testified to the other requirements of the business records exception; the witness "need not have personal knowledge of the record keeping practice of the circumstances under which the objected to records were kept"); *United States v. Childs, 5 F.3d 1328 (9th Cir. 1993)* ("The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the recordkeeping system."); *United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992)* (toll receipts incorporated into corporate expense records could be authenticated by a custodian of the corporation that prepared the expense records: "Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity"; here the custodian testified that toll receipts were regularly submitted in expense reports and regularly incorporated into the business records of the corporation for general accounting purposes; the custodian was a qualified witness within the meaning of the Rule).

For cases in which a foundation witness was found unqualified under the Rule, see, e.g., *United States v. Riley, 236 F.3d 982 (8th Cir. 2001)* (lab reports erroneously admitted; foundation witness could identify the reports but had no knowledge of how they were prepared or maintained and thus could not testify that the reports had been kept in the ordinary course of regularly conducted activity); *Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998)* (hospital records erroneously admitted; the Rule does not require a foundation witness to have prepared the record or to have personal knowledge of the entries in the record; however, in this case the witness did not have knowledge of the hospital's regular business practices in making and keeping the record); *Belber v. Lipson, 905 F.2d 549 (1st Cir. 1990)* (one doctor is not a qualified witness with respect to the records of another doctor, where he merely received the records from an attorney who knew nothing about the other doctor's recordkeeping process).

(n79)Footnote 79. See, e.g., *United States v. Franco, 874 F.2d 1136 (7th Cir. 1989)* :

> A qualified witness is not required, however, to have personally participated in or observed the creation of the document ... or know who actually recorded the information ... . We broadly interpret the term "qualified witness" as requiring only someone with knowledge of the procedure governing the creation and maintenance of the type of records sought to be admitted.

See also *Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567 (6th Cir. 1999)* (person laying the foundation need not have personal knowledge concerning the preparation of the records: "All that is required of the witness is that he or she be familiar with the recordkeeping procedures of the organization.").

(n80)Footnote 80. See, e.g., *United States v. Franco, 874 F.2d 1136 (7th Cir. 1989)* (a witness was held qualified where he learned about recordkeeping through conversations with others familiar with the process: "The court relied on hearsay to determine whether Agent Garza understood the accounting system ... but that is clearly permissible under the Federal Rules of Evidence").

(n81)Footnote 81. See, e.g., *United States v. Franco, 874 F.2d 1136 (7th Cir. 1989)* ("The records themselves confirm that contemporaneous entries were made with each transaction because the records ... showed neatly written daily entries and notations."); *United States v. Draiman, 784 F.2d 248 (7th Cir. 1986)* (entries in the document itself may help to establish foundation).

(n82)Footnote 82. See, e.g., *United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986)* (FBI agent could provide foundation testimony on the admission of company records).

(n83)Footnote 83. See, e.g., *Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989)* (statement concerning an accident, taken on an ad hoc basis by a barge captain, was not recorded in the ordinary course of regularly conducted activity; it was not the regular practice of the barge captain to make such a report).

(n84)Footnote 84. See, e.g., *Waddell v. Commissioner, 841 F.2d 264 (9th Cir. 1988)* (an appraisal report was inadmissible where no showing was made that it was the regular practice of the preparer to prepare such a report).

(n85)Footnote 85. See, e.g., *Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989)* (contact reports of complaints are admissible even though a report is not filled out every time a complaint is made).

(n86)Footnote 86. See, e.g., *Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431 (7th Cir. 1997)* (memorandum recording an "unusual" incident "was not created with the kind of regularity or routine which gives business records their inherent reliability"); *United States v. Strother, 49 F.3d 869 (2d Cir. 1995)* (a bank memorandum indicating that an overdrawn check for $82,000 was covered by the bank was held inadmissible as a business record; this type of event was not one which routinely recurred; the Court stated that it was "reluctant to adopt a rule that would permit the introduction into evidence of memoranda drafted in response to unusual or isolated events").

(n87)Footnote 87. See, e.g., *United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990)* (foundation requirements for computerized records are the same as those for other records; proponent is not required to show that computers are tested for internal programming errors); *United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)* (foundation requirements for computerized records are no different from requirements for other business records); *United States v. Young Bros., 728 F.2d 682 (5th Cir. 1984)* (accuracy of software need not be specifically established); *United States v. Catabran, 836 F.2d 453 (9th Cir. 1988)* (presence of inaccuracies in computer records, as in other records, is a question of weight).

(n88)Footnote 88. See Peritz, *Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence, 80 NW. U. L. Rev. 956 (1986)* (critical of the fact that "federal judges substantially agree that computer output should be qualified like any other business record," and expressing concern that "computer systems store, retrieve, and manipulate information in ways significantly different from earlier manual or mechanical systems").

(n89)Footnote 89. See, e.g., *United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990)* :

> We note that the fact that the actual computer printouts presented at trial were prepared specifically for this case ... does not preclude their admission under *Rule 803(6)*. It is sufficient that the data compiled in the printouts was entered into the computer contemporaneous with the placing of each call and maintained in the regular course of business.

See also *United States v. Hernandez, 913 F.2d 1506 (10th Cir. 1990)* (so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility).

(n90)Footnote 90. See, e.g., *United States v. Jackson, 208 F.3d 633 (7th Cir. 2000)* ("The fact that the Internet service providers may be able to retrieve information that its customers posted or email that its customers sent does not turn that material into a business record of the Internet service provider.").

(n91)Footnote 91. This is the teaching of the famous case of *Palmer v. Hoffman, 318 U.S. 109 (1943)* , where the Supreme Court held that records prepared by a railroad after an accident occurred were inadmissible because they were

made in anticipation of litigation, and were favorable to the railroad. See also *Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200 (4th Cir. 2000)* (report not admissible under *Rule 803(6)* where "the primary motive for initially preparing the report was to prepare for litigation"); *Scheerer v. Hardee's Food Sys., Inc., 92 F.3d 702 (8th Cir. 1996)* (in a slip and fall suit, the Trial Judge erred in admitting an "incident report" by a restaurant employee who described the surface of the parking lot where the fall occurred as dry; the record "had been prepared in anticipation of litigation" and "it was not made in the ordinary course of business but instead with the knowledge that the incident could result in litigation"); *Weaver v. Phoenix Home Life Mut. Ins. Co., 990 F.2d 154 (4th Cir. 1993)* (an affidavit prepared for litigation purposes, describing opinions of doctors, is not admissible under *Rule 803(6)* because an "affidavit prepared for trial is not a record of regularly conducted activity").

(n92)Footnote 92. See, e.g., *Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004)* (manager's memos explaining why he hadn't promoted the plaintiff were not admissible under *Rule 803(6)*; the only purpose of the memos was to create evidence for use in the employee's anticipated discrimination suit); *Timberlake Constr. Co. v. United States Fid. & Guar., 71 F.3d 335 (10th Cir. 1995)* (Trial Judge erred in admitting letters written by the plaintiff's president and the company's lawyer, which had "all the earmarks of being motivated and generated to further Timberlake's interest, with litigation actually not far around the corner"); *Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233 (5th Cir. 1988)* (letters from proprietors of establishments where jukeboxes were located were not admissible as business records in a copyright infringement action: "the forms were not completed by the proprietors as part of the systematic course of their business; their primary utility, rather, is for litigation").

(n93)Footnote 93. See, e.g., *Yates v. Bair Transp., Inc., 249 F. Supp. 681 (S.D.N.Y. 1965)* (reports of doctors retained by the defendant in a personal injury litigation were admissible where they were favorable to the plaintiff).

(n94)Footnote 94. See, e.g., *United States v. Blackburn, 992 F.2d 666 (7th Cir. 1993)* (even though a report is trustworthy, it may not be admitted under *Rule 803(6)* where it was prepared in anticipation of litigation rather than in the ordinary course of business; however, the report was admissible under the residual exception).

(n95)Footnote 95. See, e.g., *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* (wire transfer documents prepared by various banks were held not admissible under *Rule 803(6)* because no qualified witness ever laid a foundation for their admission; the government argued that the records should be admissible because they were trustworthy; but *Rule 803(6)* does not permit admission of a record simply because it is trustworthy; the evidence offered for foundation must show that the records were made in the regular course of business, were regularly kept, and were made at or near the time of the event recorded); *United States v. Freidin, 849 F.2d 716 (2d Cir. 1988)* (an isolated document was inadmissible under *Rule 803(6)* even though there was no reason to think that the document was untrustworthy; trustworthiness is not the only precondition to admissibility).

(n96)Footnote 96. See, e.g., *United States v. Moore, 923 F.2d 910 (1st Cir. 1991)* (ordinary business circumstances described by *Rule 803(6)* "suggest trustworthiness, at least where absolutely nothing in the record implies the lack thereof. If counsel had some special reason for thinking the information untrustworthy, he failed to call it to the court's attention.").

(n97)Footnote 97. See, e.g., *United States v. LeRoy, 944 F.2d 787 (10th Cir. 1991)* (an opinion in an otherwise admissible record should not have been admitted where it did not satisfy the standards of *Rule 701*); *United States v. Anthony, 944 F.2d 780 (1st Cir. 1991)* :

> If the author of the notation had been present at trial, he would not have been allowed to give his opinion until it had first been shown that such opinion was rationally based on his perception. Such being the case, it would have been a bit incongruous to admit the notation, with no basis therefor, when the author was not present at trial.

(n98)Footnote 98. See, e.g., *United States v. Hardin, 710 F.2d 1231 (7th Cir. 1983)* (DEA statistical report showing the average retail price and purity of cocaine purchased by DEA undercover agents, offered to show the defendant's intent to distribute the large amount of cocaine he was arrested with, was admissible under *Rule 803(8)(A)*; the report set forth an activity of the DEA and was prepared for congressional review).

(n99)Footnote 99. As discussed in § 803.02[9][c], [d], the exclusionary language in *Rule 803(8)(B)* and *(C)* has not been applied as strictly as it actually reads.

(n100)Footnote 100. See, e.g., *United States v. Versaint, 849 F.2d 827 (3d Cir. 1988)* (a public record prepared one month after the event described in the report was admissible, so long as no affirmative showing was made that the report was untrustworthy; *Rule 803(8)* does not require that a report be made at or near the time of the event it is describing).

(n101)Footnote 101. See, e.g., *United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997)* (*Rule 803(8)* does not require a foundation by a qualified witness).

(n102)Footnote 102. See, e.g., *Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988)* (the trustworthiness criterion was applied to exclude a report offered under subdivision (B)).

(n103)Footnote 103. See, e.g., *Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984)* :

> Placing the burden on the opposing party makes considerable practical sense. Most government-sponsored investigations employ well-accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered ... . [I]t is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

See also *Boerner v. Brown & Williamson Tobacco Co, 394 F.3d 594 (8th Cir. 2005)* (reports on smoking by the Surgeon General were properly admitted under *Rule 803(8)*; the reports were prepared pursuant to a legal obligation, and the defendants made no affirmative showing that they were untrustworthy); *Ariza v. City of New York, 139 F.3d 132 (2d Cir. 1998)* (the party opposing the admission of a report under *Rule 803(8)* has the burden of showing untrustworthiness).

(n104)Footnote 104. See, e.g., *United States v. Versaint, 849 F.2d 827 (3d Cir. 1988)* (a public report was properly admitted where the government made no showing that the preparer of the report had any reason not to be accurate in setting out what he knew; the mere fact that the recording occurred a month after the investigation does not overcome the presumption of trustworthiness); *Johnson v. City of Pleasanton, 982 F.2d 350 (9th Cir. 1992)* (the Trial Court excluded a public report offered by the City on the ground that the City had not come forward with supporting affidavits detailing the expertise of the officials who prepared the report; this was error, because public reports are presumed trustworthy, and "a party opposing the introduction of a public record bears the burden of coming forward with enough negative factors to persuade a court that a report should not be admitted"; because the plaintiffs offered no evidence to indicate that the report was unreliable, the City was under no obligation to establish the expertise of the reporting officers).

(n105)Footnote 105. *United States v. Sharpe, 193 F.3d 852 (5th Cir. 1999)* .

(n106)Footnote 106. See, e.g., *United States v. Bishop, 264 F.3d 535 (5th Cir. 2001)* (in an income tax evasion case, the Trial Court erred in admitting IRS agents' notes describing meetings they had with the defendant; such notes are inadmissible under *Rule 803(8)* as they are generated under adversarial circumstances against a particular criminal defendant); *United States v. Enterline, 894 F.2d 287 (8th Cir. 1990)* ("It is clear that the exclusion concerns matters observed by the police at the scene of the crime. Such observations are potentially unreliable since they are made in an

adversary setting, and are often subjective evaluations of whether a crime was committed.").

(n107)Footnote 107. See, e.g., *United States v. Enterline, 894 F.2d 287 (8th Cir. 1990)* : Computerized lists prepared by police of vehicles reported stolen were admissible despite the exclusionary language in *Rule 803(8)(B)* and *(C)*:

> The computer report does not contain contemporaneous observations by police officers at the scene of a crime, and thus presents none of the dangers of unreliability that such a report presents. Rather, the report is based on facts: that cars with certain vehicle numbers were reported to have been stolen. Neither the notation of the vehicle identification numbers themselves nor their entry into a computer presents an adversarial setting or an opportunity for subjective observations by law enforcement officers.

See also *United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988)* (a breathalyzer report was properly admitted under *Rule 803(8)(B)* because "the preparation of this report is a routine, non- adversarial act made in a non-adversarial setting ... . [N]othing in the record reveals a motivation to misrepresent the test results or records."); *United States v. Dancy, 861 F.2d 77 (5th Cir. 1988)* (a fingerprint card in a penitentiary packet, offered to show that the defendant was a convicted felon, was properly admitted under *Rule 803(8)(B)* because the preparation of the card was unrelated to a criminal investigation; the Rule excludes only records that report the observation or investigation of crimes).

(n108)Footnote 108. *United States v. Grady, 544 F.2d 598 (2d Cir. 1976)* (admitting reports recording firearms serial numbers on the ground that they were records of routine factual matters prepared in a nonadversarial setting).

(n109)Footnote 109. See, e.g., *United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000)* (Trial Court erred in admitting into evidence "the on-the-scene investigative report of a crime by an INS official whose perceptions might be clouded and untrustworthy"); *United States v. Bohrer, 807 F.2d 159 (10th Cir. 1986)* (an IRS contact card was excluded under *Rule 803(8)* because it was prepared under adversarial circumstances and because information included therein was subjective rather than ministerial in nature, thus subject to manipulation).

(n110)Footnote 110. See, e.g., *United States v. Hayes, 861 F.2d 1225 (10th Cir. 1988)* (where the authoring officer testifies, the report is admissible against a criminal defendant because the in-court testimony protects against the loss of confrontation rights, which is the underlying rationale for the exclusionary language in *Rule 803(8)*); *United States v. King, 613 F.2d 670 (7th Cir. 1980)* (same).

(n111)Footnote 111. See, e.g., *United States v. Rosa, 11 F.3d 315 (2d Cir. 1993)* , holding that a medical examiner's autopsy report was properly admitted under *Rule 803(8)(B)*. The Court reasoned that a medical examiner is not "law enforcement personnel" as that term is used under the Rule:

> Unlike Customs, which has responsibility for enforcement of, inter alia, customs and narcotics laws, the Medical Examiner's Office is required simply to investigate unnatural deaths; it refers a death bearing any indicium of criminality to the appropriate district attorney and has no responsibility for enforcing any laws ... . Further, though law enforcement activities are typically accusatory and adversarial in nature, a medical examiner's reported observations as to a body's condition are normally made as part of an independent effort to determine a cause of death.

(n112)Footnote 112. See, e.g., *United States v. Bohrer, 807 F.2d 159 (10th Cir. 1986)* (an IRS contact card, excluded under *Rule 803(8)* because prepared under adversarial circumstances, was also excluded under *Rule 803(6)* because adversarial circumstances of preparation show lack of trustworthiness).

(n113)Footnote 113. See, e.g., *United States v. Brown, 9 F.3d 907 (11th Cir. 1993)* (property receipt properly held admissible under *Rule 803(6)*; while *Rule 803(6)* cannot be used to evade the exclusionary language of *Rule 803(8)*, a

property receipt is not the type of law enforcement report that is excluded under *Rule 803(8)*: "The police custodian in the instant case had no incentive to do anything other than mechanically record the relevant information on the property receipt. We believe that this is the type of reliable public record envisioned by the drafters of *Rule 803(8)*.").

(n114)Footnote 114. See, e.g., *Ariza v. City of New York, 139 F.3d 132 (2d Cir. 1998)* (holding that a public report was properly excluded; the report was the product of a research project in which three groups of 12 to 15 police officers each convened to participate in guided group discussions; the report summarized the discussions and made generalized recommendations regarding future departmental behavior; the report did not and was not intended to set forth factual findings based on a factual investigation; its stated purpose was to identify and explore some of the prevailing attitudes, perceptions and opinions of police officers).

(n115)Footnote 115. See, e.g., *In re Aircrash in Bali, 871 F.2d 812 (9th Cir. 1989)* (FAA report on a crash was not inadmissible under *Rule 803(8)(C)* simply because it included evaluative or normative findings, citing Rainey).

(n116)Footnote 116. See, e.g., *Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989)* (opinions in an OSHA investigator's report concerning a construction site accident could not be automatically excluded; however, opinions still must be trustworthy, and the Trial Court can take into account the expertise of the reporting official, whether a hearing was held, whether the conclusion was a legal conclusion, and other pertinent factors to determine whether the opinion is trustworthy).

(n117)Footnote 117. See, e.g., *Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986)* (conclusions in a report respecting the cause and responsibility for explosion of an atomic simulator were properly excluded where the person who made the report had no competence or experience with atomic simulators and did very little investigation); *Matthews v. Ashland Chem., Inc., 770 F.2d 1303 (5th Cir. 1985)* (conclusions in a report respecting the cause of a fire were properly excluded due to insufficient investigation and the public official's lack of qualifications). Compare *Simmons v. Chicago & N.W. Transp. Co., 993 F.2d 1326 (8th Cir. 1993)* (state trooper's accident investigation report was admissible in a FELA action, because the trooper was experienced and skilled, and the report was prepared after an investigation shortly after the accident so the underlying information was fresh).

(n118)Footnote 118. See, e.g., *Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989)* :

> *Rule 803(8)(C)* does not provide for the admissibility of the legal conclusions contained within an otherwise admissible public report ... . Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires.

(n119)Footnote 119. See, e.g., *Smith v. Isuzu Motors, Ltd., 137 F.3d 859 (5th Cir. 1998)* (staff report not admissible under *Rule 803(8)(B)* because the agency declined to accept the position set forth in the staff report; the Court notes that its conclusion was "in accord with other circuits that have held that interim agency reports or preliminary memoranda do not satisfy *Rule 803(8)(C)*'s requirements"); *Smith v. M.I.T., 877 F.2d 1106 (1st Cir. 1989)* (internal memoranda of EEOC investigators are not factual findings within the meaning of the rule); *Brown v. Sierra Nev. Mem. Miners Hosp., 849 F.2d 1186 (9th Cir. 1988)* (preliminary staff reports, and interim reports by outside consultants, are not reports containing factual findings, because they are not final determinations, and *Rule 803(8)(C)* covers only final reports); *United States v. Gray, 852 F.2d 136 (4th Cir. 1988)* (tentative internal IRS report, which did not purport to contain agency factual findings, was not admissible under *Rule 803(8)(C)*); *City of New York v. Pullman Inc., 662 F.2d 910 (2d Cir. 1981)* (where a report "did not embody the findings of an agency, but the tentative results of an incomplete staff investigation," it was not admissible under *Rule 803(8)(C)*). Compare *Vining v. Enterprise Fin. Group, Inc., 148 F.3d 1206 (10th Cir. 1998)* (report prepared by staff of the state insurance department concerning the defendant's business practices was properly admitted under *Rule 803(8)(C)*; the report was sufficiently final because it

was attached to and incorporated by reference into an order subsequently issued by the Insurance Commissioner, who was head of the agency).

(n120)Footnote 120. See, e.g., *Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988)* (FAA release concerning ice buildup on certain planes was not admissible where release had been canceled ten years earlier); *Haynes v. American Motors Corp., 691 F.2d 1268, 1273 (8th Cir. 1982)* (Trial Court did not err in refusing to admit a federal standard relating to requirements for utility vehicles, where that standard was rescinded before the date of the accident).

(n121)Footnote 121. See, e.g., *New Jersey Turnpike Auth. v. PPG Indus., 197 F.3d 96 (3d Cir. 1999)* (directives issued by the State Department of Environmental Protection, notifying the defendant that it was responsible for hazardous substances that needed to be removed, were not admissible under *Rule 803(8)(C)*; the Directives were in the nature of notice pleading, and thus were prepared in anticipation of litigation); *Pearce v. E.F. Hutton Group, Inc., 653 F. Supp. 810 (D.D.C. 1987)* (the plaintiff in a libel suit could not rely on a draft report of a congressional subcommittee in opposing a summary judgment motion; the Court commented that it was dealing "with documents produced by the Congress -- a politically motivated, partisan body"; the report was not based upon an adjudicatory proceeding and was not drafted to resolve a factual dispute; the report lacked trustworthiness because of the political nature of the investigating body; and the report would be excluded under *Rule 403* even if it satisfied the hearsay exception). Compare *Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983)* (no error to admit reports of epidemiological studies conducted by the Centers for Disease Control and various state agencies that analyzed the statistical relationship between tampon use and Toxic Shock Syndrome; the Court relied upon "the timeliness of the investigations, the special skills of the agencies conducting them, and their lack of any motive for conducting the studies other than to inform the public fairly and adequately.").

(n122)Footnote 122. See, e.g., *Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989)* (on remand, the District Court "might consider how the fact that no hearing was held in making the report affects its trustworthiness"); *Denny v. Hutchinson Sales Corp., 649 F.2d 816 (10th Cir. 1981)* (Civil Rights Commission's findings on discrimination were properly excluded where the ex parte investigation lacked formal procedures such as the opportunity to cross-examine witnesses).

(n123)Footnote 123. See, e.g., *Anderson v. City of New York, 657 F. Supp. 1571 (S.D.N.Y. 1987)* (report by a Subcommittee of the House of Representatives that summarized testimony concerning police misconduct in New York City was inadmissible; only one side's evidence was heard, the Subcommittee lacked personal knowledge of the events that were the subject of testimony, and the witnesses were self-interested; the Court observed that "hearings and subsequent reports are frequently marred by political expediency and grandstanding").

(n124)Footnote 124. See, e.g., *O'Dell v. Hercules, Inc., 904 F.2d 1194 (8th Cir. 1990)* (EPA investigative report on a chemical manufacturing plant, implicating the defendant, was held inadmissible because the investigation was not conducted until ten years after the defendant had terminated its operations at the plant, and others had operated the plant in the interim).

(n125)Footnote 125. See, e.g., *Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982)* (conclusions in a National Transportation Safety Board report could not be admitted because 49 U.S.C. § 1441(e) explicitly prohibits the use of conclusions in such a report in an action for damages).

(n126)Footnote 126. See, e.g., *United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000)* (INS investigative report containing statement of a deported witness was erroneously admitted under *Rule 803(8)*: "Even if we were to find the report itself admissible, the statement of the deported witness it contained was inadmissible hearsay.").

(n127)Footnote 127. See also *FDIC v. Mmahat, 907 F.2d 546 (5th Cir. 1990)* (in an action against an attorney for an insolvent savings and loan association, the Court held that regulatory agency examination reports admissible under *Rule 803(8)* satisfied *Rule 805* as to included hearsay because the statements were party-admissions made by a person

who, at the time they were introduced, was a defendant in the action). Compare *Miller v. Field, 35 F.3d 1088 (6th Cir. 1994)* (in a suit by a prison inmate claiming that official indifference led to his being raped, state police reports concerning the investigation of the alleged rape were improperly admitted; the statements in the report by alleged assailants and the local prosecutor were not admissible, because they were hearsay contained within a public record).

(n128)Footnote 128. Compare *Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988)* (while the public official personal knowledge requirement must be interpreted flexibly, the report of an aircraft incident was properly excluded where the author of the statement incorporated into the report was unknown); *United States v. Lanese, 890 F.2d 1284 (2d Cir. 1989)* (an exculpatory statement by a biased declarant, recorded in a police report, was held not admissible under *Rule 803(8)* because the source of the underlying information indicated lack of trustworthiness).

(n129)Footnote 129. See also In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, *37 F.3d 804 (2d Cir. 1994)* (Scottish investigator's report on an airplane bombing, which concluded that the bomb had been placed in an unaccompanied bag, was properly admitted under *Rule 803(8)(C)*; the report was prepared largely by compiling computerized records of passenger baggage, which records were amassed from reports of passengers' and crew members' friends and relatives; while some of this underlying information was hearsay, the defendant could not prove that the report was prepared under untrustworthy circumstances; it was not necessary, under the Rule, for the Trial Court to make an explicit finding that the report was trustworthy).

(n130)Footnote 130. See, e.g., *Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002)* (judicial findings of fact in an unrelated case cannot be admitted under *Rule 803(8)*); *Nipper v. Snipes, 7 F.3d 415 (4th Cir. 1993)* (judicial findings of fact are not admissible under *Rule 803(8)(C)*; that Rule applies to factual findings resulting from an investigation: "A judge in a civil trial is not an investigator, rather a judge. In fact, a review of the advisory committee note to *Rule 803* makes it plain that the drafters intended this portion of the rule to relate to findings of agencies and offices of the executive branch.").

(n131)Footnote 131. See, e.g., *Vaughn v. United States, 536 F. Supp. 498 (W.D. Va. 1982)* (a death certificate was properly admitted to show the time of death); *Burton v. Johns-Manville, 613 F. Supp. 91 (W.D. Pa. 1985)* (a death certificate was properly admissible to show the cause of death).

(n132)Footnote 132. The merits of the broader view of the exception are discussed in Martin, *Records of Vital Statistics,* N.Y. L.J., April 14, 1989, p. 3.

(n133)Footnote 133. See, e.g., *United States v. Combs, 762 F.2d 1343 (9th Cir. 1985)* (in a prosecution for possession of an unregistered firearm, absence of registration is an element of the crime and is proven by a report indicating the absence of registration under *Rule 803(10)*).

(n134)Footnote 134. See, e.g., *United States v. Yakobov, 712 F.2d 20, 24 (2d Cir. 1983)* (where the defendant's name was misspelled in the certificate, the certificate on its face shows that the search of the records was casual and unlikely to uncover the relevant record, and the affidavit was therefore inadmissible).

(n135)Footnote 135. See, e.g., *United States v. Yakobov, 712 F.2d 20, 24 (2d Cir. 1983)* (the diligent search requirement was not met merely because the certificate stated in a conclusory fashion that a "diligent search" was conducted: "The diligence requirement is one of substance, not form.").

(n136)Footnote 136. See, e.g., *United States v. Wilson, 732 F.2d 404, 414 (5th Cir. 1984)* (although preferable, the affidavit by the public official need not contain the specific statement that a "diligent search failed to disclose the record": "It suffices that the affidavit, and all relevant circumstances, reflect an adequate search.").

(n137)Footnote 137. See, e.g., *Hall v. Commissioner, 729 F.2d 632 (9th Cir. 1984)* (the Trial Court properly rejected proffered church records, because they were not shown to be business records, and statements of contributions

to a church did not qualify as religious records under *Rule 803(11)*).

(n138)Footnote 138. See, e.g., *George v. Celotex Corp., 914 F.2d 26 (2d Cir. 1990)* (if a document is authenticated as an ancient document, lack of trustworthiness is a matter of weight, not admissibility, since there is no independent trustworthiness requirement in *Rule 803(16)*).

(n139)Footnote 139. See, e.g., *Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984)* (the Court received newspaper articles that were more than 20 years old for their truth, but held that more recent newspaper accounts could not be admitted for their truth), *aff'd, 783 F.2d 982 (11th Cir. 1986)* .

(n140)Footnote 140. See, e.g., *Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985)* (statements in ancient documents are admissible due to the necessity arising from the disappearance of other evidence and a combination of two trustworthiness factors: that recitations in documents remove risks of mistransmission of information associated with oral statements, and that the time gap between subsequent litigation and the statements lessens the likelihood of conscious or unconscious falsehood).

(n141)Footnote 141. See, e.g., *United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)* (a listing of land sales that was used by real estate brokers, insurance agents, and appraisers, was properly admitted under *Rule 803(17)*).

(n142)Footnote 142. See, e.g., *Crane v. Crest Tankers, Inc., 47 F.3d 292 (8th Cir. 1995)* (the Trial Judge erred in admitting into evidence a "Future Damage Calculator," which was "a slide rule-type device which has life expectancy and work life expectancy tables on one side, and a 'present value' table on the other"; there was no showing that "the exhibit is generally used or relied upon by the public or persons in the legal or other professions"); *White Indus. v. Cessna Aircraft Co., 611 F. Supp. 1049 (W.D. Mo. 1985)* (various forms and a prospectus filed by a company with the SEC were not market reports under the Rule, since they were not used by others).

(n143)Footnote 143. Advisory Committee Note to *Rule 803(18)*.

(n144)Footnote 144. See, e.g., *Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984)* (Trial Court properly held that an expert for the plaintiff could not read during direct examination from an article published in a medical journal; the article referred to a procedure that was not employed in the case, and might have dealt with a product different from that involved in the case; thus, the Trial Court properly concluded that it might invite jury speculation and cause confusion).

(n145)Footnote 145. See, e.g., *Meschino v. North Am. Drager, Inc., 841 F.2d 429, 434 (1st Cir. 1988)* ("In these days of quantified research, and pressure to publish, an article does not reach the dignity of a 'reliable authority' merely because some editor, even a most reputable one, sees fit to circulate it.").

(n146)Footnote 146. See, e.g., *Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986)* (National Institute of Occupational Health and Safety manual was not admissible when there was no testimony that the manual was a reliable authority).

(n147)Footnote 147. See, e.g., *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* (the Court held that various articles were improperly admitted under *Rule 803(18)*; the articles were not used in connection with the plaintiff's expert testimony and therefore were hearsay).

(n148)Footnote 148. See, e.g., *Graham v. Wyeth Labs., 906 F.2d 1399 (10th Cir. 1990)* (AMA special report was sufficiently authoritative to qualify for admissibility under *Rule 803(18)*, but the Trial Court erred in submitting the report to the jury).

(n149)Footnote 149. See Daniel Capra, *Case Law Divergence from the Federal Rules of Evidence, 197 F.R.D. 531 (2001)* , for a discussion of case law that rejects the plain text of the Federal Rules of Evidence.

(n150)Footnote 150. See, e.g., *United States v. Jean-Baptiste, 166 F.3d 102 (2d Cir. 1999)* (*Rule 803(19)* "plainly contemplates that members of a family may testify with regard to the common understanding as to the firth of another family member.").

(n151)Footnote 151. *Johnson v. State, 737 S.W.2d 901, 905 (Tex. App. 1987), aff'd in part and vacated on other grounds in part, 784 S.W.2d 47 (Tex. Crim. App. 1990)* (en banc) (construing state counterpart to Federal *Rule 803(19)*),.

(n152)Footnote 152. See, e.g., *Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981)* (reputation in a non-Indian community as to Indian boundaries is not admissible under *Rule 803(20)*, because the subject matter is not of sufficient interest to the community), *aff'd in part, rev'd on other grounds in part, 716 F.2d 1298 (10th Cir. 1983)* .

(n153)Footnote 153. *Rule 803(22)* covers only convictions, not acquittals. In *United States v. Kerley, 643 F.2d 299 (5th Cir. 1981)* , the Court concluded that a prior acquittal on a state charge was inadmissible because "it does not prove innocence but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime." Also, said the Court, if the evidence were relevant, it would still be excluded under *Rule 403* where the elements of state and federal offenses were different. See also *United States v. Irvin, 787 F.2d 1506 (11th Cir. 1986)* (Trial Judge properly barred the defense from mentioning the defendant's acquittal and those of his three alleged coconspirators in a prior trial; the judgments of acquittal were inadmissible hearsay).

(n154)Footnote 154. See, e.g., *Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780 (D.C. Cir. 1982)* (in a claim by a corporation and its wholly owned subsidiary that the defendants exhausted the proceeds of a construction loan before an office building was completed, exclusion of judgments in two criminal cases involving two of the defendants was proper; the Court found that because general verdicts were rendered in the criminal cases, it was impossible to tell which overt acts the juries found had been committed).

(n155)Footnote 155. See, e.g., *United States v. Loera, 923 F.2d 725 (9th Cir. 1991)* (while docket entries of misdemeanor convictions are not admissible under *Rule 803(22)*, they are admissible under *Rule 803(8)*, because they are reliable, routine, and nonadversarial reports of a public official).

(n156)Footnote 156. *United States v. Gricco, 277 F.3d 339 (3d Cir. 2002)* .

(n157)Footnote 157. See, e.g., *Horton v. Allen, 370 F.3d 75 (1st Cir. 2004)* (non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation); *United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)* (with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."); *United States v. Franklin, 415 F.3d 537 (6th Cir. 2005)* ("the Supreme Court did not explicitly overrule its prior *Confrontation Clause* jurisprudence with its holding in *Crawford*" insofar as it applied to nontestimonial hearsay; "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.").

(n158)Footnote 158. The Court may provide a further indication of what it means by "testimonial" in the 2005-6 Term, as it has granted certiorari in two state cases involving the admissibility of 911 calls and reports to police officers after *Crawford*.

(n159)Footnote 159. *Horton v. Allen, 370 F.3d 75 (1st Cir. 2004)* (accomplice's statements of intent to commit a crime "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination ... . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial.").

(n160)Footnote 160. See, e.g., *Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004)* (statements of victim made for

purposes of medical treatment were not testimonial).

(n161)Footnote 161. *United States v. Owens, 484 U.S. 554 (1988)* .

(n162)Footnote 162. *United States v. Cervantes-Flores, 421 F.3d 825 (9th Cir. 2005)* (Certificate of Nonexistence of Record was prepared in anticipation of litigation, but it was not testimonial because it was nothing like the examples of testimonial hearsay listed in *Crawford*); *United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005)* (the affidavit "admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.").

(n163)Footnote 163. Id.

(n164)Footnote 164. See, e.g., *United States v. Owens, 789 F.2d 750 (9th Cir. 1986)* (violation of hearsay rule did not constitute prejudicial error, but violation of the *Confrontation Clause* did constitute prejudicial error), rev'd on other grounds, *484 U.S. 554 (1988)* .

(n165)Footnote 165. See, e.g., *United States v. Arambula-Ruiz, 987 F.2d 599 (9th Cir. 1993)* (the government at trial proffered a coconspirator's hearsay statement, and defense counsel objected on the ground that the statement was not in furtherance of the conspiracy; this was sufficient to preserve the confrontation question for review, because the requirements for admission of statements under *Rule 801(d)(2)(E)* are identical to the requirements for such statements under the *Confrontation Clause*). Contra *United States v. Perez, 989 F.2d 1574 (10th Cir. 1993)* ("where a *Confrontation Clause* objection is not explicitly made below we will not address the constitutional issue in the absence of a conclusion that it was plain error for the district court to raise the constitutional issue sua sponte.").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 803 RULE 803

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803.03 Annotated Cases

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[1] Rule 803(1) -- Present Sense Impression

[a] Rule 803(1) -- Constitutional Concerns

United States v. Jones, 299 F.3d 103 (2d Cir. 2002) : At the defendant's trial for violation of supervised release, a witness testified that his wife, who was standing at a front window of their house, told him that there was a man in the lobby of the apartment building directly across the street who had been masturbating and giving their 15-year-old daughter "catcalls." When the witness then spoke to his daughter, she gave the same account and told him that she was "scared." Affirming, the Court held there was no abuse of discretion in admitting the statements from the wife and daughter as either present sense impressions or excited utterances, since the events were certainly startling enough, the statements were nearly contemporaneous with the events described, and the daughter reported being scared and the wife appeared agitated, calling the witness to "come to the front, quick, quick, quick." The Court also held there was no *Confrontation Clause* violation under the then-applicable *Ohio v. Roberts* analysis in admitting the statements. We note that under *Crawford v. Washington* the statements seem not "testimonial," so there would be no *Confrontation Clause* issue.

People of Terr. of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993) : The three-year-old victim of a criminal sexual assault complained of pain in her vaginal area when her older sister was giving her a regularly scheduled bath on the evening of the molestation. The Court found no confrontation violation under the then-applicable *Ohio v. Roberts* analysis in admitting the statement as a present sense impression, because it was made while experiencing the pain and it had sufficient indicia of reliability from the nearness in time to the molestation, the naturalness of the situation in which made, and the expression of severe pain (akin to the self-interest rationale behind the medical exception). We note that under *Crawford v. Washington* the statement seems not "testimonial," so there would be no *Confrontation Clause* issue.

[b] Rule 803(1) -- Copyright Cases

MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976) , *aff'd*, *677 F.2d 180 (2d Cir. 1981)* : Finding for the plaintiff in a copyright infringement action, the District Judge relied upon the present sense impressions of cast and audience as some proof of improper copying.

[c] Rule 803(1) -- Interested Witness

United States v. Ruiz, 249 F.3d 643 (7th Cir. 2001) : Two undercover officers, one at the front and one at the back, maintained surveillance of a house suspected as a drug trafficking location. The defendant was arrested after an apparent drug transfer at the back of the house was interrupted by one of the officers. When that officer testified, his partner recounted what he had been told by radio about the incident as it was happening. The Court held the testimony was admissible as a present sense impression, since the declarant's statements were being made as he observed the events. The facts that the witness was not disinterested and there was no independent corroboration of the declarant's statements were only credibility problems going to the weight of the evidence.

[d] Rule 803(1) -- Interpretative Statements

United States v. Woods, 301 F.3d 556 (7th Cir. 2002) : In a trial for distributing narcotics, the government introduced a tape recording made when a confidential informant, outfitted with a wire, set up and consummated a drug sale. The tape included some narrative statements that the informant made about the surroundings and events as he was waiting for the seller to show up. The Court held that the informant's "simple descriptions of events as they occurred" were properly admitted as present sense impressions, but the statements clearly addressed to the FBI agents listening in via the microphone were calculated interpretations of events and not admissible under the exception. Any error was harmless, however.

[e] Rule 803(1) -- Personal Knowledge

Brown v. Keane, 355 F.3d 82 (2d Cir. 2004) : Brown was convicted in State Court for shooting at a police officer, after the officer testified that Brown fired at him when Brown came out of a bar. The prosecution introduced a 911 tape from an anonymous caller, who stated that a man fitting Brown's description was firing a gun, trying to shoot at the door of the bar. Reversing denial of Brown's habeas corpus petition, the Court held that admission of the 911 tape as a present sense impression violated Brown's right to confrontation, because the statement lacked any indication that the caller actually saw the shooting. The inconsistency between shooting at the door and shooting away toward the officer, and the failure to mention that the officer was shooting strongly suggested that the caller was not actually viewing the scene. In an inmate's § 1983 action against prison guards, *Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996)* , the defendants offered a "Use of Force" report prepared by one of the guards purporting to describe the beginning of the altercation, although she testified that she had not seen the incident until she heard a scream and observed another guard holding his genitals. The Court said the report was not admissible under *Rule 803(1)* because the witness did not have personal knowledge of the start of the incident and, in any event, there was no indication that she made the report at or immediately after the event recounted.

United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998) : Police responding to a 911 call found the getaway car used in a bank robbery approximately 45 minutes earlier. On the seat of the car was an anonymous note indicating that the robbers had switched to another car, which was connected with the defendant. The note was admitted as a present sense impression or an excited utterance or under the residual exception. The Court vacated the conviction, holding that the note was not admissible as a present sense impression or an excited utterance because there were no circumstances shown in the record indicating that the author of the note actually saw the change of cars.

Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784 (6th Cir. 2005) : In a wrongful death action brought after a helicopter crash, the plaintiff introduced a taped statement made by the pilot to ground control just before the crash: "Okay, I think my gyro just quit." The defendant argued that this statement could not be admitted as a present sense impression, because the pilot could not actually see the gyroscope -- he could only see the readings inside the cockpit. The Court found no error in admitting the statement, since it was "untenable" to suggest that the pilot must actually view the gyroscope to have personal knowledge of its failure -- the readings in the cockpit were sufficient to supply personal knowledge.

Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995) : Affirming a judgment for the defendants in an arrestee's civil rights action, the Court held there was no abuse of discretion in excluding a 911 tape of a call made by a neighbor during the incident, as the caller was not witnessing the events he described but was relaying descriptions from other people who were observing them.

[f] Rule 803(1) -- Relationship to Other Rules

United States v. Jones, 299 F.3d 103 (2d Cir. 2002) : At the defendant's trial for violation of supervised release, a witness testified that his wife, who was standing at a front window of their house, told him that there was a man in the lobby of the apartment building directly across the street who had been masturbating and giving their 15-year-old daughter "catcalls." When the witness then spoke to his daughter, she gave the same account and told him that she was "scared." Affirming, the Court held there was no abuse of discretion in admitting the statements from the wife and daughter as either present sense impressions or excited utterances, since the events were certainly startling enough, the statements were nearly contemporaneous with the events described, and the daughter reported being scared and the wife appeared agitated, calling the witness to "come to the front, quick, quick, quick." In a prosecution arising from a bank robbery, *United States v. Brewer, 36 F.3d 266 (2d Cir. 1994)* , the defendant sought to prove that eyewitnesses to the robbery failed to identify the defendant in a photo array. The defendant called the police officer who conducted the array, and argued that the officer could testify to the witnesses' failure to identify the defendant as a present sense impression. However, the Court held that the statements of the identifying witnesses were not made immediately after the event -- the relevant event being the robbery itself and not the failure to identify the defendant. The Court concluded that the admissibility of a failure to make an identification was covered by *Rule 801(d)(1)(C)* and not by *Rule 803(1)*.

[g] Rule 803(1) -- Reports of Conversations

Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City, 383 F.3d 110 (3d Cir. 2004) : In a bank's action for a declaratory judgment that it was not infringing a competitor's trademarks, the Judge established guidelines to ensure that "confusion log" entries prepared by the defendant's employees satisfied the Rules before being admitted. The guidelines required exclusion of log entries that reflected "the thought process, conclusion, analysis or interpretation" of the employees who recorded the entries. The Court found no abuse of discretion in the guidelines, since statements do not satisfy *Rule 803(1)* when they are "conclusions based upon information [the recorder] had processed rather than contemporaneous or spontaneous statements that [are] inherently trustworthy." In any event, the guidelines did permit written hearsay that reflected "an explanation or description of the event rather than a narration."

Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1994) : In an action to determine the beneficiary of a life insurance policy, the Court held that a note made by a personnel officer contemporaneously with a telephone conversation with the insured was properly admitted as a present sense impression to prove the insured's intent to change his beneficiary. In *United States v. Portsmouth Paving Corp.*, n1 the Court affirmed convictions for conspiracy to rig bids and fix prices in connection with highway construction, holding that testimony by a witness that another person described a telephone call immediately after it occurred was admissible under *Rule 803(1)* to prove the contents

of the call.

Michaels v. Michaels, 767 F.2d 1185 (7th Cir. 1985) : In a securities fraud action, the Court held that a telex sent immediately after a conversation, which reported the conversation, was admissible as a present sense impression.

Vitek Sys. v. Abbott Labs., 675 F.2d 190 (8th Cir. 1982) : In a trademark infringement action the Court found that the District Court properly excluded as hearsay a written memorandum prepared by one of the plaintiff's employees that reported a meeting with a customer and contained the employee's evaluation of the customer's thought processes rather than a record of present sense impressions of the customer.

[h] Rule 803(1) -- Responses to Questions

United States v. Narciso, 446 F. Supp. 252, 284 (E.D. Mich. 1976) : In this prosecution for murder and other crimes arising from a series of cardiopulmonary arrests at a V.A. hospital, the District Court held that *Rule 803(1)* would not support the introduction of a note, made in response to questions from an attending physician, in which the declarant wrote the initials possibly representing the nickname of a person who allegedly gave him an injection several hours earlier, prior to a respiratory arrest. The Court focused on the delay between the injection and the statement, the fact that the initials came in response to interrogation, the ambiguity in the use of initials, and problems with the capacity of the declarant.

[i] Rule 803(1) -- Tape-Recorded Impressions

United States v. Obayagbona, 627 F. Supp. 329 (E.D.N.Y. 1985) : Denying posttrial motions by a defendant convicted of conspiracy to distribute heroin, the Court held that an undercover officer's statements, recorded on tape immediately after he made an arrest, were admissible under *Rule 803(1)*.

United States v. Andrews, 765 F.2d 1491 (11th Cir. 1985) : In a prosecution for illegal trafficking in food stamps, the Court upheld the admission of a tape that recorded an undercover police officer's visual impressions while looking through the window of the defendant's home. The tape was a present sense impression.

[j] Rule 803(1) -- Timing

United States v. Guevara, 277 F.3d 111 (2d Cir. 2001) : The Court affirmed a conviction for conspiring to distribute heroin, holding there was no error in excluding exculpatory transcripts of six tape-recorded conversations involving the defendant, a paid government informant, and a Colombian woman who hired the informant to transport heroin. The conversations took place after the defendant was arrested and while he was attempting to cooperate with the government against his alleged coconspirators. The Court found no abuse of discretion in refusing to admit the Colombian woman's statements as excited utterances or present sense impressions, "because they were conclusions based upon information she had processed rather than contemporaneous or spontaneous statements that were inherently trustworthy." In an inmate's § 1983 action against prison guards, *Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996)* , the defendants offered a "Use of Force" report prepared by one of the guards purporting to describe the beginning of the altercation, although she testified that she had not seen the incident until she heard a scream and observed another guard holding his genitals. The Court said the report was not admissible under *Rule 803(1)* because the witness did not have personal knowledge of the start of the incident and, in any event, there was no indication that she made the report at or immediately after the event recounted.

United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998) : Police responding to a 911 call found the getaway car used in a bank robbery approximately 45 minutes earlier. On the seat of the car was an anonymous note indicating that the robbers had switched to another car, which was connected with the defendant. The note was admitted as a present sense impression or an excited utterance or under the residual exception. The Court vacated the conviction, holding that the note was not admissible as a present sense impression because there was no showing that the author of the note made the statement before s/he had time to reflect and fabricate.

United States v. Jackson, 124 F.3d 607 (4th Cir. 1997) : The Court held there was no abuse of discretion in a firearms possession case when the arresting officer testified that upon the officer's arrival at the scene, the defendant's mother stated that the defendant was threatening to shoot family members. The declarant was describing an event that was, from the officer's evidence, ongoing as well as startling.

First State Bank v. Maryland Cas. Co., 918 F.2d 38 (5th Cir. 1990) : To show that the insured was not at home when a fire destroyed a house he owned, which with other proof tended to show he set the fire, the defendant in an action on a fire insurance policy offered testimony by a police dispatcher that she called the listed number for the insured to notify him of the fire, that an unidentified person answered the phone and identified it as the insured's residence, and the person answering said after checking that the insured was not home. Affirming a judgment for the insurer, the Court held the response was sufficiently contemporaneous for admission under the Rule. In *United States v. Cain*, n2 the Court overturned a Dyer Act conviction on the ground that the Trial Judge erred in admitting into evidence the testimony of a state trooper that he received a CB radio transmission regarding two white, shirtless males leaving an abandoned truck. The Court held that the statement was not admissible as a present sense impression because the distance that the defendant was found from the truck and the timing of the statement made it "impossible to determine whether the declaration ... was made immediately following the observation or not."

Cargill, Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545 (6th Cir. 1995) : In a manufacturer's action for negligent storage of frozen turkeys, the Court held there was no abuse of discretion in admitting typed notes that had been taken by an investigator for the plaintiff. The investigator had taken notes of events as they had occurred, and there was no indication he had changed them in any way when he typed them up. His notes had also incorporated findings from another investigator, who had also recorded his observations contemporaneously, so those statements were admissible hearsay within hearsay.

Cody v. Harris, 409 F.3d 853 (7th Cir. 2005) : In a defamation action brought against his former employer, the plaintiff alleged that he was slandered by a statement that a supervisor made to a newspaper reporter. As proof that the statement was made, the plaintiff offered the published newspaper account. The Court found no error in the refusal to admit the statement as a present sense impression, since the plaintiff did not provide enough information to determine whether the reporter "wrote the article with 'calculated narration' nor do we know what the time lapse was between [the supervisor's] statement and the writing of the article." In *United States v. Santos, 201 F.3d 953 (7th Cir. 2000)* , the Chicago City Treasurer was convicted for illegally soliciting political contributions from banks and securities firms. Reversing, the Court held that a handwritten note containing incriminating material, which was attached to a typewritten draft prepared contemporaneously with the events it described, was an untimely reflective summary rather than a spontaneous reaction to an immediate sensation admissible under *Rule 803(1)*. In *United States v. Parker*, n3 the Court affirmed a conviction for possession of cocaine and PCP, holding that a redcap's statement that the defendant had shortly before given him a suitcase was properly admitted under the Rule. As the time elapsed was only sufficient to carry the suitcase from the train to the baggage claim area, the statements were sufficiently contemporaneous to be a present sense impression. In a Hobbs Act case, *United States v. Blakey*, n4 the Court held that a tape-recorded conversation between the victim and a witness that took place 23 minutes after the victim gave cash to the defendants was admissible as a present sense impression.

United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) : Affirming a conviction for an arson conspiracy, the Court held that a statement by a conspirator to a friend that he was late because he had been talking with the defendant, but could not disclose the contents of that conversation, was improperly admitted as a present sense impression, because too much time had passed between the conversation and the statement. However, the Court held that the part of the statement refusing to disclose the contents of the conversation was admissible as a statement of a coconspirator in furtherance of the conspiracy's purpose of concealing its nature from an inquisitive acquaintance. In *United States v. Beck, 122 F.3d 676 (8th Cir. 1997)* , the defendant, appealing from a conviction for felon firearm possession, argued that it was error to permit a law enforcement officer to testify about statements made to the officer by a government informant. The informant had turned over marijuana and firearms to the officer, and told the officer that he had just purchased these items from the defendant. Affirming, the Court held that the informant's statements were properly admitted as present sense impressions. The statements were made immediately after the purchases and "were part of a single, continuous event." In *United States v. Hawkins*, n5 the Court affirmed convictions for drug and weapon offenses, holding there was no abuse of discretion in admitting a 911 phone call, where it was made a few minutes after the events recounted and circumstantial evidence indicated its reliability. In *United States v. Cammisano*, n6 the Court affirmed a conviction for obstruction of justice, holding it was harmless error to admit hearsay statements regarding events three days earlier.

United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985) : The Court held that a statement by a deceased officer to his superiors concerning the source of a cocaine sample was inadmissible where it was unclear how much time passed between the receipt and the statement.

[k] Rule 803(1) -- Valuations

Makuc v. American Honda Motor Co., 835 F.2d 389 (1st Cir. 1987) : The Court affirmed a judgment for a defendant sued by an injured motorbike rider. It held that testimony by witnesses that a mechanic told them it would cost $325 to repair a motorbike was admissible as a present sense impression of the mechanic.

[2] Rule 803(2) -- Excited Utterance

[a] Rule 803(2) -- Accidents

David v. Pueblo Supermarket, 740 F.2d 230 (3d Cir. 1984) : In an action for personal injuries suffered when a pregnant woman slipped and fell in the defendant's supermarket, the Court held that the Trial Judge properly permitted the plaintiff's husband to testify that after the plaintiff fell, another woman stopped and stated that she had informed "them" an hour and a half ago that there was a foreign substance on the floor. The Court found that the woman's statement was an excited utterance, since the declarant saw an eight-months pregnant woman fall directly on her stomach, and the substance of her statement, which was unsolicited, was made within seconds of the fall.

[b] Rule 803(2) -- Assault Victims

United States v. Cruz, 156 F.3d 22 (1st Cir. 1998) : Appealing convictions for drug and firearms offenses, the defendant argued that it was error to admit a statement made by his former girlfriend when she arrived at a battered women's shelter four hours after having been beaten by the defendant. The evidence indicated that she was unable to escape from the defendant for some time after the assault occurred, and that she was upset and traumatized when she arrived at the shelter. The Court affirmed the convictions and found no abuse of discretion in admitting the statement as an excited utterance.

Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) : In an action by a four-year-old child and her mother alleging child abuse on the part of the child's father and his parents, the Court reversed a judgment for the defendants, concluding that statements made by the child within three hours of the child's being returned to the mother following visits with the defendants should have been admitted as excited utterances. The Court held that a child's out-of-court excited utterances are admissible whether or not the child would be competent to be a witness.

United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002) : The Court affirmed a conviction for sexual abuse of a seven-year-old, finding no abuse of discretion in the admission as excited utterances of statements by the victim. The statements related to a startling event, and all were made within one-to-two hours of the encounter, while the victim was still highly traumatized. In *United States v. Lawrence*, n7 the Court affirmed a conviction for assaulting a mail truck driver, finding no error when the officer who arrested the defendant was permitted to testify that the victim told him that "he (the victim) was a dead man." The statement was properly admitted as an excited utterance even though the statement came after the arrest.

United States v. Baggett, 251 F.3d 1087 (6th Cir. 2001) : When the defendant's wife was found hysterical, bruised, and bloodied near the dock where her husband's truck was being unloaded, she said that her husband had beaten her on three occasions over three days. Reinstating a jury verdict finding the defendant guilty of interstate domestic violence, the Court said that it would not have been an abuse of discretion to admit the testimony despite the time lapse between the beatings and the statements.

United States v. Marrowbone, 211 F.3d 452 (8th Cir. 2000) : The Court held in a sexual abuse prosecution that it was error (but harmless) to admit the victim's statement to tribal police officers that the defendant had molested him. The statement was made three hours after the incident, the victim was 16 years old, not a small child, and there was no evidence of continuous excitement or stress from the incident to the making of the statement. In *United States v. Phelps, 168 F.3d 1048 (8th Cir. 1999)* , the Court affirmed a conviction for assault with a dangerous weapon and using a firearm during a crime of violence, finding no error in the admission of hearsay statements from the defendant's girlfriend, in which she declared that the defendant had shot at her and her children. The statements were made to a 911 operator, a friend, and a police officer; all were made within 15 minutes of the event; and testimony indicated that the declarant was crying, scared, and upset during this period.

United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995) : Affirming a rape conviction, the Court held that the victim's statement accusing the defendant of raping her was properly admitted as an excited utterance. While the statement was made more than 30 minutes after intercourse, the victim was still under the influence of the startling event. The victim was only 15 years old, she reported the rape to her mother at the first opportunity to do so, and she was in a "semi-hysterical" state at the time she made the statement. In *People of Terr. of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993)* , the Court held that complaints by the three-year-old victim of a criminal sexual assault were properly admitted as excited utterances. Molestation by an adult family member was likely extremely traumatic, so it may be assumed the child was still under the stress of it when the statements were made within the hour.

United States v. Golden, 671 F.2d 369 (10th Cir. 1982) : Affirming a conviction of a police officer for wilfully depriving a person of his civil rights, the Court upheld as an excited utterance the admission of the victim's statement to his grandmother after being struck by the defendant. The statement was made after the victim drove approximately 120 miles per hour to his grandmother's house and told her that he feared for his life, 15 minutes after his altercation with the defendant.

[c] Rule 803(2) -- Codefendant's Statement

United States v. Vazquez, 857 F.2d 857 (1st Cir. 1988) : The Court affirmed drug convictions, as it found that one defendant's statement accusing a codefendant of leaving him holding the bag was admissible as an excited utterance when the two were in custody.

United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) : The defendant appealed from convictions for arson and related crimes, challenging the admission of a statement made by his alleged accomplice, who had run to a friend's house three hours after the defendant's business establishment had burned and people had been trapped inside. The Court held that the accomplice's statement to his friend that he had set the fire for the defendant was properly received as an excited utterance. The fire may itself have constituted a startling event, "but even if not, certainly [the accomplice's] subsequent realization that people could be trapped inside the burning building, which he had helped set, would comprise a startling event." Moreover, the accomplice was "all hyped" and "nervous" when he made the statement.

[d] Rule 803(2) -- Constitutional Concerns

United States v. Brito, 427 F.3d 53 (1st Cir. 2005) : Affirming a conviction for firearm possession by an illegal alien, the Court held that statements made in a 911 call were properly admitted as excited utterances and did not violate the defendant's right to confrontation. The caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. The Court declared that the relevant question in determining whether a statement is "testimonial" under *Crawford v. Washington* is whether the statement was made with an eye toward "legal ramifications." Thus, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, but once the initial danger has dissipated the declarant is more likely to comprehend the larger significance, so even an excited utterance can be testimonial. Here, the caller was in "imminent personal peril" when the call was made, so it was not testimonial. The Court also found that the 911 operator's "single off-handed question" did not make the answers testimonial.

United States v. Arnold, 410 F.3d 895 (6th Cir. 2005) : In a trial for felon firearm possession, the prosecution introduced evidence that Gordon called 911 and stated that the defendant had threatened her with a gun. After police arrived, the defendant showed up as well, and Gordon became upset and identified the defendant as the man who threatened her. The Court held that Gordon's identification qualified as an excited utterance, but it concluded that admitting the identification violated the defendant's right to confrontation after *Crawford v. Washington*. The identification was "testimonial," under a test of "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime."

United States v. Brun, 416 F.3d 703 (8th Cir. 2005) : At a trial for assault with a deadly weapon, the prosecution introduced three excited utterances: a 911 call from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance; another 911 call 20 minutes later from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left; and the girlfriend's statements to officers when they responded and found her in the kitchen crying, in which she said that the defendant had been drunk and had shot his rifle in the bathroom while she was in it. Affirming, the Court found that all three statements were properly admitted as excited utterances. The Court found that the nephew's and the girlfriend's 911 calls were not "testimonial" within the meaning of *Crawford v. Washington*, as they were not the kind of statements that were equivalent to courtroom testimony; they were "emotional and spontaneous rather than deliberate and calculated." The Court also found that the girlfriend's later statement to the police was not testimonial, because the

conversation "was unstructured, and not the product of police interrogation." Finally, the Court stated that the constitutional admissibility of non-testimonial hearsay continued to be governed by the *Ohio v. Roberts* reliability-based test, which was satisfied by the statements, as they fell within a firmly-rooted hearsay exception.

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) : In a habeas corpus proceeding by a state prisoner convicted of capital murder, the Court concluded that excited utterances by the victim in a call to police were not testimonial statements within the meaning of *Crawford v. Washington, 541 U.S. 36 (2004)* . The victim, not the police, had initiated their interaction, and she was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home.

[e] Rule 803(2) -- Criminal Defendant's Statement

United States v. Esparza, 291 F.3d 1052 (8th Cir. 2002) : The Court affirmed a cocaine conviction, finding no error in the exclusion of the defendant's statement, made at the time of his arrest, that he did not know that drugs were in his trailer. The statement did not qualify as an excited utterance, since "[p]olice discovery of contraband is not ordinarily the kind of 'startling event' to which this exception applies." When "incriminating evidence is discovered in one's possession, it requires only the briefest reflection to conclude that a denial and plea of ignorance is the best strategy." In *United States v. Sewell, 90 F.3d 326 (8th Cir. 1996)* , the defendant was stopped for a traffic violation and consented to a search of the trunk of his car. When he was informed that a gun was in the trunk, the defendant stated that the gun belonged to his brother and he had not known it was in the trunk. The Court affirmed his conviction for felon firearm possession, finding no error in the refusal to admit the statement as an excited utterance.

United States v. Alarcon-Simi, 300 F.3d 1172 (9th Cir. 2002) : The Court affirmed a bank fraud conviction, holding there was no abuse of discretion in excluding the defendant's exculpatory statement made at the time of his arrest. The statement did not qualify as an excited utterance because it referred to past events, not any incident that occurred at the time of the arrest.

[f] Rule 803(2) -- Foundation

United States v. Brown, 254 F.3d 454 (2d Cir. 2001) : The officer who arrested the defendant while he was brandishing a pistol testified that a minute or so before the arrest he had been approached by two unidentified men, who were very excited, very nervous, and hopping around, and who said there was a man waving a gun at people and threatening to shoot somebody. Affirming a conviction for felon firearm possession, the Court held that the officer's testimony was properly admitted as an excited utterance. The hearsay statement itself can be sufficient proof of the required exciting event without resort to independent corroborating evidence.

[g] Rule 803(2) -- Identifications

United States v. Beverly, 369 F.3d 516 (6th Cir. 2004) : The Court affirmed convictions for bank robberies and firearms offenses, rejecting the claims of one defendant that it was an abuse of discretion to admit evidence that the defendant's wife identified him from a surveillance photograph taken during the robbery. The Court held that the wife's viewing of the photograph was a startling event, as the wife had no idea that her husband was involved in a bank robbery. Moreover, the wife was clearly upset when she saw the photograph.

[h] Rule 803(2) -- Personal Knowledge

Brown v. Keane, 355 F.3d 82 (2d Cir. 2004) : Brown was convicted in State Court for shooting at a police officer, after the officer testified that Brown fired at him when Brown came out of a bar. The prosecution introduced a 911 tape from an anonymous caller, who stated that a man fitting Brown's description was firing a gun, trying to shoot at the door of the bar. Reversing denial of Brown's habeas corpus petition, the Court held that admission of the 911 tape as an excited utterance would violate Brown's right to confrontation, because the statement lacked any indication that the caller actually saw the shooting. The inconsistency between shooting at the door and shooting away toward the officer, and the failure to mention that the officer was shooting strongly suggested that the caller was not actually viewing the scene. The Court concluded: "An assertion of fact based on conjecture and surmise, to which the declarant would not be allowed to testify if called to the witness box, does not become admissible under an exception to the hearsay rule merely because it was uttered out of court in a state of excitement." In *United States v. Tocco, 135 F.3d 116 (2d Cir. 1998)* , the defendant appealed from arson convictions, challenging the admission of a statement made by his alleged accomplice, who had run to a friend's house three hours after the defendant's business establishment had burned and people had been trapped inside. The accomplice's statement to his friend that he had set the fire for the defendant was admitted as an excited utterance. Affirming, the Court held there was a sufficient showing that the declarant had personal knowledge of the inculpatory facts. The property burned was the defendant's clothing store, and the evidence indicated that the declarant entered the store with a key. Thus, "[a] trier of fact could reasonably believe that Tocco obtained the key from the store owner and therefore was aware that the arson was committed at the owner's direction."

United States v. Saada, 212 F.3d 210 (3d Cir. 2000) : The defendants attempted to defraud an insurance company by breaking a sprinkler head, causing water damage to insured merchandise in their warehouse, and claiming that it had happened accidentally. To prove the sprinkler head was broken by accident, the defendants offered evidence that just after the incident a vice-president of their company had run into the company kitchen and exclaimed that one of the defendants had just done something very stupid. The exclamation had been admitted under *Rule 803(2)*, but the Court noted the personal perception requirement was not satisfied because the declarant was not in the warehouse when the sprinkler head was broken. In *United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998)* , police responding to a 911 call found the getaway car used in a bank robbery approximately 45 minutes earlier. On the seat of the car was an anonymous note indicating that the robbers had switched to another car, which was connected with the defendant. The note was admitted as a present sense impression or an excited utterance or under the residual exception. The Court vacated the conviction, holding that the note was not admissible as a present sense impression or an excited utterance because there were no circumstances shown in the record indicating that the author of the note actually saw the change of cars.

Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784 (6th Cir. 2005) : In a wrongful death action brought after a helicopter crash, the plaintiff introduced a taped statement made by the pilot to ground control just before the crash: "Okay, I think my gyro just quit." The defendant argued that this statement could not be admitted as an excited utterance, because the pilot could not actually see the gyroscope -- he could only see the readings inside the cockpit. The Court found no error in admitting the statement, since it was made "while under the stress of the event that nineteen seconds later resulted in his death," and that the cockpit readings were sufficient to supply personal knowledge.

United States v. Joy, 192 F.3d 761 (7th Cir. 1999) : In a felon firearm possession case, the government proffered a tape of a 911 call made by the defendant's brother, indicating that the defendant was brandishing a gun and had just pulled some burglaries. The Court held that the statements made in the 911 call were properly admitted under the excited utterance exception, noting that "there was more than enough circumstantial evidence to show that Paul Joy could have inferred his brother committed a burglary, and that this inference was reasonable."

Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995) : Affirming a judgment for the defendants in an arrestee's civil rights action, the Court held there was no abuse of discretion in excluding a 911 tape of a call made by a neighbor

during the incident, as the caller was not witnessing the events he described but was relaying descriptions from other people who were observing them.

[i] Rule 803(2) -- Response to Questions

United States v. Alexander, 331 F.3d 116 (D.C. Cir. 2003) : Affirming a conviction for unlawful possession of a firearm and ammunition by a felon, the Court found no abuse of discretion in admitting a statement made in a 911 call by the defendant's girlfriend that the defendant threatened her and had a gun. The statement, made 15 or 20 minutes after the threat, was made under the stress of excitement and qualified as an excited utterance. The fact that the declarant phoned her mother before calling 911 did not disqualify the statement, nor did the fact that the declarant was responding to a dispatcher's question when she clarified that the defendant had a gun.

United States v. Joy, 192 F.3d 761 (7th Cir. 1999) : In a felon firearm possession case, the government proffered a tape of a 911 call made by the defendant's brother, indicating that the defendant was brandishing a gun. The Court held that the statements made in the 911 call were properly admitted under the excited utterance exception. The call was made only minutes after the declarant had been in a heated argument with the defendant, and the defendant had waved a gun around. The Court did not find it problematic that most of the brother's statements were in response to the 911 dispatcher's questions. "On the contrary, it is possible for someone to be too excited to volunteer pertinent information (as Paul Joy appeared to be) and thus the inherent guarantee of truthfulness supporting the admission of excited utterances applies equally to declarations made in response to an inquiry."

People of Terr. of Guam v. Cepeda, 69 F.3d 369 (9th Cir. 1995) : Within a few minutes of an armed robbery, the victims gave police, through an interpreter and in response to questions, a description of the robber and the robbery. The Court found no error in admitting the statements, since the fact that a statement is made in response to a question is but one factor to weigh in considering admissibility; in this case, the victims remained in an excited state, stilling reflective thought, when the statements were made.

[j] Rule 803(2) -- Shooting Victim

United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001) : Upholding the convictions of defendants for a drug trafficking conspiracy and weapons offenses, the Court held that a hearsay statement of a shooting victim identifying the defendant as his attacker was properly admitted as an excited utterance. The statement was made as the victim was lying in a pool of blood at the scene of the attack.

[k] Rule 803(2) -- Scope of the Rule

United States v. Napier, 518 F.2d 316 (9th Cir. 1975) : This case is discussed in the Editorial Explanatory Comment, *§ 803.02[3][b]*.

[l] Rule 803(2) -- Threats

United States v. Alexander, 331 F.3d 116 (D.C. Cir. 2003) : Affirming a conviction for unlawful possession of a firearm and ammunition by a felon, the Court found no abuse of discretion in admitting a statement made in a 911 call by the defendant's girlfriend that the defendant threatened her and had a gun. The statement, made 15 or 20 minutes after the threat, was made under the stress of excitement and qualified as an excited utterance. The fact that the declarant phoned her mother before calling 911 did not disqualify the statement, nor did the fact that the declarant was

responding to a dispatcher's question when she clarified that the defendant had a gun.

United States v. Collins, 60 F.3d 4 (1st Cir. 1995) : "Renewing an old and unfriendly acquaintance," the defendant got into an argument with Albizu. When Albizu's burly brother arrived at the scene, the defendant left, but vowed to come right back to shoot Albizu. Albizu called the police and when the defendant did return, he was arrested and a gun was found. Affirming a firearms conviction, the Court found no error in the admission of Albizu's statement to the police that the defendant had threatened him. The statement was properly admitted as an excited utterance. Albizu experienced the startling event of being threatened, and he was visibly upset and agitated when he made his statement.

[m] Rule 803(2) -- Timing

Hilyer v. Howat Concrete Co., 578 F.2d 422 (D.C. Cir. 1978) : A judgment for a defendant in a wrongful death action was affirmed on appeal, as the Court held that a statement of a co-worker of the deceased to a police officer was admissible as an excited utterance. The opinion discusses the difference between the "timing" requirements of paragraphs (1) and (2) of *Rule 803*.

United States v. Taveras, 380 F.3d 532 (1st Cir. 2004) : The defendant's supervised release had been revoked on the ground that he had threatened a woman with a gun and assaulted her. As proof of the threat and the assault, the government introduced the woman's hearsay statement made to a law enforcement officer. The Court held that the introduction of the hearsay was error, and vacated the judgment, noting that the hearsay statement was not an excited utterance, because there was a substantial delay between the threat/assault and the woman's statement -- the act occurred at night and the statement was made late the next morning. "Thus, the extended delay in this case was long enough to allow Pabon to reflect on the alleged events of the previous night and possibly to fabricate or alter the story that she related to [the officer]."

United States v. Guevara, 277 F.3d 111 (2d Cir. 2001) : The Court affirmed a conviction for conspiring to distribute heroin, holding there was no error in excluding exculpatory transcripts of six tape-recorded conversations involving the defendant, a paid government informant, and a Colombian woman who hired the informant to transport heroin. The conversations took place after the defendant was arrested and while he was attempting to cooperate with the government against his alleged coconspirators. The defendant argued that the Colombian woman's statements were admissible as excited utterances or present sense impressions. The Court found no abuse of discretion in excluding the statements, "because they were conclusions based upon information she had processed rather than contemporaneous or spontaneous statements that were inherently trustworthy." In *United States v. Scarpa, 913 F.2d 993 (2d Cir. 1990)* , the government offered testimony in a RICO prosecution that a beating victim named the defendants as his assailants five or six hours after the beating when the victim was being treated in a hospital emergency room and his sister screamed that one of the defendants had come into the emergency room. The Court held there was no error in admitting the statement, as there was little doubt that the declarant was still under the stress of excitement caused by his beating and by his sister's screams.

United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003) : In the hospital the day after he was shot, the victim mentioned a man's name to his sister, which the defendant claimed was an identification of the other man as the assailant. Affirming a murder conviction, the Court held that the purported identification was properly not admitted as an excited utterance, since the lapse of time indicated it was not the direct result of the exciting event.

United States v. Jackson, 124 F.3d 607 (4th Cir. 1997) : The Court held there was no abuse of discretion in a

firearms possession case when the arresting officer testified that upon the officer's arrival at the scene, the defendant's mother stated that the defendant was threatening to shoot family members. The declarant was describing an event that was, from the officer's evidence, both ongoing and startling. The Court also held that the mother's statement that the defendant had a gun which she had secured upstairs was properly admitted, as it was made immediately after the officer had separated the declarant and the defendant, who had been yelling and was very aggressive toward her.

United States v. Arnold, 410 F.3d 895 (6th Cir. 2005) : The Court reversed a conviction for felon firearm possession because a 911 call in which the declarant, Gordon, declared that the defendant had threatened her with a gun was erroneously admitted as an excited utterance. There was no evidence as to when the alleged incident occurred, so there was no basis for determining whether there was time to contrive or misrepresent before the call was made. For the same reason, the statements made by Gordon to the police officers who responded to the 911 call were improperly admitted as excited utterances. In *United States v. Schreane, 331 F.3d 548 (6th Cir. 2003)* , the defendant was charged with felon firearm possession after an officer, responding to a burglary in progress, stopped the defendant's car. Another occupant, the defendant's nephew, yelled "he's got a gun," referring to the defendant. The Court held that the statement was properly admitted as an excited utterance. The short length of time between the burglary and the statement, or the stop and the statement, plus evidence that the nephew was excited, established that the statement was made under the stress of a startling event. In *United States v. Baggett*, n8 when the defendant's wife was found hysterical, bruised, and bloodied near the dock where her husband's truck was being unloaded, she said that her husband had beaten her on three occasions over three days. Reinstating a jury verdict finding the defendant guilty of interstate domestic violence, the Court said that it would not have been an abuse of discretion to admit the testimony despite the time lapse between the beatings and the statements. In a murder-for-hire prosecution, *United States v. Winters*, n9 the Court found no error in the exclusion of a statement by the victim to police officers, made two days after the victim was shot. In the statement, the victim speculated as to who might want to hurt him, and identified several people other than the defendant. The Court held that the defendant's proffer of the victim's statement as an excited utterance was properly rejected, because the statement was made so far after the shooting that it was the product of conscious reflection.

United States v. Wesela, 223 F.3d 656 (7th Cir. 2000) : In a felon firearm possession case arising from an incident over almost two days in which the defendant had been threatening to kill his wife, the government offered a statement made by the wife during an interview with detectives an hour after police arrived. The Court held it was an abuse of discretion (but harmless error) to admit the statement as an excited utterance, since it referred to events occurring almost two days before; she had apparently regained her composure about the earlier events, since she was at work and away from the defendant for a full workday in the interim. In *United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)* , the Court affirmed a conviction for kidnapping and illegally transporting a teenage girl, and upheld the exclusion of proffered testimony concerning statements attributed to a third party upon whom the defendant sought to cast the blame for the crimes. The Court reasoned that one statement was made two days after the girl's disappearance and that it was unclear that the abduction was a startling event that triggered the statement; moreover, the time gap militated against a finding of spontaneity and there was no showing that the statement related to the abduction. Affirming a conviction for civil rights violations in *United States v. Sowa*, n10 the Court held that a 20-minute delay between a three-year-old's observation of a beating and her identification of the assailant was not excessive for admission of her statement as an excited utterance, where she cried the whole time and there was no reason to believe she had been coached regarding the ramifications of her statement. In *Webb v. Lane*, n11 the Court affirmed the denial of habeas relief to a prisoner convicted of murder, holding that statements made by the victim in response to police questioning more than an hour after the shooting were sufficiently spontaneous, as the tremendous shock and stress and consequent pain may well have postponed the declarant's opportunity to reflect. In *United States v. Hartmann*, n12 a man was murdered as part of a scheme by his wife and others to defraud life insurance companies. During the trial, evidence was introduced of separate statements by the victim to two lawyers in which he said that his wife and her boyfriend were going to kill him. Without specifying how soon the statements were made after the victim heard the plotters, the Court held there was no plain error in admitting the statements, as hearing one's wife and her lover plotting one's own death is a startling event

and the lawyers testified that the victim was in a state of panic when he related the story to them.

United States v. Marrowbone, 211 F.3d 452 (8th Cir. 2000) : The Court held in a sexual abuse prosecution that it was error (but harmless) to admit the victim's statement to tribal police officers that the defendant had molested him. The statement was made three hours after the incident, the victim was 16 years old, not a small child, and there was no evidence of continuous excitement or stress from the incident to the making of the statement. In *United States v. Phelps*, n13 the defendant was charged with assault with a dangerous weapon after he shot at his girlfriend and her children. Affirming his conviction, the Court found no abuse of discretion in admitting evidence of statements made by the girlfriend to a 911 dispatcher, a relative, and an investigating officer between two and thirty minutes after the incident, since each witness testified that the declarant was very upset when she made the statement. In *United States v. Moses*, n14 the defendant fled after an assault in which another inmate was badly cut on the neck. He was followed by a third inmate who, without any inquiry from an officer he encountered, blurted out an obscenity identifying the defendant as the assailant. The Court held the statement was properly admitted, since the seriousness of the victim's wound and the brief time between the assault and the statement made it evident that the declarant was still under the stress of excitement. Although it recognized that the issue was close, in *United States v. Iron Shell*, n15 the Court upheld the introduction of statements made by a nine-year-old victim of assault with intent to rape to a police officer 45-75 minutes after the assault. The Court emphasized "the surprise of the assault, its shocking nature and the age of the declarant" to find a continuing state of excitement.

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994) : The defendant, charged with hiring someone to murder his wife, sought to introduce as exculpatory evidence his statement shortly after a telephone conversation that "they are going to kill [my wife]," and another statement made four days later that he had to go to San Francisco and that his life was in danger by going but in even more danger if he did not go. The Court held there was no error in excluding the statements, as they were hearsay offered to prove the facts asserted. The second was clearly not an excited utterance, and even if the phone call before the first was as "extraordinarily terrifying" as defense counsel said, any error in excluding it was harmless. In *United States v. Lim, 984 F.2d 331 (9th Cir. 1993)* , the Court affirmed drug convictions, holding that a statement by a coconspirator immediately after his arrest was admissible as an excited utterance. In *United States v. Sherlock*, n16 the Court held that statements that they had been raped made by the school-girl victims more than one hour after the crime were erroneously (but harmlessly) admitted. Both had spoken to several other persons in the interim and had time to think about their actions and to invent an excuse about their late arrival at their dorm with alcohol on their breath. In *Pau v. Yosemite Park & Curry Co.*, n17 a wrongful death action arising out of a bicycle accident in a national park, the Court said there was no clear error or abuse of discretion in excluding evidence that the decedent, after two days in a coma, wakened, asked to go to the bathroom, and stated that "the brakes failed." As the case was being remanded for a new trial, however, the Trial Judge was urged to consider carefully the applicability of the excited utterance exception.

[n] Rule 803(2) -- Unidentified Declarant

United States v. Mitchell, 145 F.3d 572 (3d Cir. 1998) : Police responding to a 911 call found the getaway car used in a bank robbery approximately 45 minutes earlier. On the seat of the car was an anonymous note indicating that the robbers had switched to another car, which was connected with the defendant. The note was admitted as a present sense impression or an excited utterance or under the residual exception. The Court vacated the conviction, holding that the note was not admissible as an excited utterance because there was no showing that the author of the note was under the stress of excitement when s/he made the statements. In *Miller v. Keating*, n18 the Court reversed a judgment for the defendant in an automobile accident case, finding it was error to admit as "res gestae" a statement by an unidentified declarant at the scene of the accident which amounted to an accusation that the plaintiff was at fault. The Court stated that "[t]he old catchall, 'res gestae,' is no longer part of the law of evidence" and examined the statement as an excited utterance. It found that the defendant was unable to show the personal knowledge, spontaneity, and excitement required

under the Rule.

United States v. Hall, 165 F.3d 1095 (7th Cir. 1999) : Affirming a conviction for kidnapping and illegally transporting a teenage girl, the Court upheld the exclusion of proffered testimony concerning statements attributed to a third party upon whom the defendant sought to cast the blame for the crimes. The Court reasoned that the evidence as to one statement was unclear as to who made it or when it was made, and thus it failed to demonstrate any indicia of an excited utterance.

[o] Rule 803(2) -- Witnesses to Crimes

United States v. Bailey, 834 F.2d 218 (1st Cir. 1987) : The Court held it was not error to admit, in a prosecution for corruptly endeavoring to influence a juror, the testimony of a neighbor as to what the juror told her about the defendant's overture. The juror's statement to the neighbor was made approximately three minutes after the event at a time when the juror still appeared to be upset by the defendant.

United States v. Jones, 299 F.3d 103 (2d Cir. 2002) : At the defendant's trial for violation of supervised release, a witness testified that his wife, who was standing at a front window of their house, told him that there was a man in the lobby of the apartment building directly across the street who had been masturbating and giving their 15-year-old daughter "catcalls." When the witness then spoke to his daughter, she gave the same account and told him that she was "scared." Affirming, the Court held there was no abuse of discretion in admitting the statements from the wife and daughter as either present sense impressions or excited utterances, since the events were certainly startling enough, the statements were nearly contemporaneous with the events described, and the daughter reported being scared and the wife appeared agitated, calling the witness to "come to the front, quick, quick, quick."

United States v. Boyd, 620 F.2d 129 (6th Cir. 1980) : The Court found that it was not error to admit as excited utterances statements made to a police officer by unidentified persons while a defendant was running from apartment to apartment with stolen mail.

United States v. Water, 413 F.3d 812 (8th Cir. 2005) : The Court affirmed a murder conviction, finding no abuse of discretion in the admission of testimony from an officer regarding statements made by the defendant's brother, a witness to the shooting. The statements were made less than five minutes after the incident, the declarant was "excited, nervous, and fidgety," and while he was intoxicated, there was nothing in his demeanor or the circumstances to indicate he had a motive to lie, according to the officer.

[3] Rule 803(3) -- Then Existing Mental, Emotional, Or Physical Condition

[a] Rule 803(3) -- Constitutional Concerns

See *White v. Illinois*, discussed in the Editorial Explanatory Comment at *§ 803.02[26]*.

Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) : At the petitioner's state trial for drug-related murders, the prosecutor offered evidence that Christian, the petitioner's accomplice, had told a friend that he was broke, that he had asked a drug supplier to front him some drugs but the supplier declined, and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier shortly thereafter. Affirming denial of a habeas corpus petition, the Court

held that Christian's statement was not "testimonial" within the meaning of *Crawford v. Washington, 541 U.S. 36 (2004)* , because it was not made in circumstances "in which an objective person would reasonably believe that the statement would be available for use at a later trial." Evaluating the statements under *Ohio v. Roberts* because they were non-testimonial, the Court found that the state of mind exception was "firmly-rooted," so there was no constitutional violation.

[b] Rule 803(3) -- Customer Confusion

Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993 (2d Cir. 1997) : The Court held in a trademark infringement case that evidence of dealer complaints that the infringing product was being sold at a lower price to other retailers either was not hearsay or was admissible under the state of mind exception. The evidence indicated the dealers' state of mind and was being offered to prove the existence of customer confusion, not differential sale prices.

Freddie Fuddruckers, Inc. v. Ridgeline, Inc., 589 F. Supp. 72 (N.D. Tex. 1984) , *aff'd*, *783 F.2d 1062 (5th Cir. 1986)* : The Court found that a restaurant owner was entitled to injunctive relief barring a competitor from using similar "trade dress." It held that hearsay statements of customers were admissible to prove their state of mind. This was probative of customer confusion.

[c] Rule 803(3) -- Facts Reflected in State of Mind

United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999) : The defendant in a hijacking case told arresting officers, when they approached him, that "he was there unloading a truck and expected to be paid for his labor." The Court found no error in exclusion of the statement, since it was relevant only because of the implied assertion that the defendant was not involved in the hijacking, and was therefore hearsay. The Court distinguished the Second Circuit decision in *United States v. DiMaria* n19 on the ground that the expressed state of mind in *DiMaria* was relevant to the declarant's guilty knowledge. Here, the first part of the statement did not refer to a state of mind, and treating the second part as somehow a denial of guilty knowledge was precluded by Third Circuit precedent, *United States v. Palma-Ruedas, 121 F.3d 841 (3d Cir. 1997)* . In *Palma-Ruedas*, a kidnapping and cocaine conspiracy case, a defendant argued that his greeting, "Nice to meet you," tended to rebut a contention that he had previously attended a meeting with the person greeted. The Court held there was no error in excluding the statement as hearsay because it was offered for its implied assertion that the defendant had never previously met the person. It was not admissible under the exception for state of mind, which cannot be used to prove the truth of the underlying facts asserted. In *Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, n20 a Robinson-Patman Act case, the Court held that it was error to conclude that there was sufficient evidence to support a jury's finding of antitrust injury based upon testimony by the plaintiff's employees that customers said they purchased products from a competitor at a lower price. The customers' statements were admitted under *Rule 803(3)*, and therefore could be used only to prove the state of mind of the customers; they could not be used to prove the truth of the facts asserted, so it was error to treat the customers' statements as proof of actual lost sales constituting antitrust damages.

United States v. Newell, 315 F.3d 510 (5th Cir. 2002) : The defendant was charged in connection with a money-laundering scheme that involved billing a customer for expenses charged to American Express by an executive of the customer without proper documentation. The government introduced notes prepared by the defendant's in-house accountant, which expressed her concerns and described what had prompted her to confront the defendant about the billings. The notes were prepared after the confrontation, but while the events were still "fresh in her mind." The Court found no abuse of discretion in admitting the notes to prove the accountant's state of mind around the time she confronted the defendant, since whether the accountant become concerned was relevant to whether the executive's expenses were of such a suspicious nature that the defendant ought to have known of their falsity. Statements in the

notes about rumors that had been circulating were offered to show why the accountant confronted the defendant, not to prove the truth of the rumors.

Grove Fresh Distrib., Inc. v. New England Apple Prods. Co., 969 F.2d 552 (7th Cir. 1992) : In an action brought against a competitor for misrepresentation of orange juice, the Court held the plaintiff was properly permitted to offer testimony as to statements by customers that they switched to the defendant's juice because it was cheaper. The testimony was not admissible to prove the fact of underpricing, but it was admissible for showing the customers' motives for no longer dealing with the plaintiff.

[d] Rule 803(3) -- Intent

[i] Rule 803(3) -- Bearing Upon Motive of Another

United States v. Donley, 878 F.2d 735 (3d Cir. 1989) : The government offered testimony in a murder prosecution that the victim said, in the presence of her husband (the defendant), shortly before she was killed, that she was moving out of the marital home and separating from him. The Court held that the evidence was properly admitted to show the existence of her intention and plan and the defendant's awareness of it, from which could be inferred a motive for the killing other than the one he claimed.

United States v. Calvert, 523 F.2d 895 (8th Cir. 1975) : The widow of a deceased inventor was permitted to testify that, shortly before his murder, her husband declared that he intended to speak to the defendant about canceling the insurance and ending the partnership. This was deemed admissible under *Rule 803(3)* because it tended to prove that the husband carried out his intent and may have prompted the defendant to seek to quickly arrange the murder.

United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996) : Affirming two defendants' convictions arising from a cocaine-distribution ring that engaged in murder and other crimes, the Court concluded that statements by one defendant's wife that she intended to divorce the defendant were admissible to show a motive for the defendant to murder her.

[ii] Rule 803(3) -- Intent -- Inference from Present to Past State of Mind

United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) : During a public corruption investigation, an FBI agent who was posing as a businessperson taped a conversation with one of the defendants. In the conversation the defendant (not prompted to any discussion of corruption) referred the agent to another person with the recommendation that the other was "honest as the day is long" and an injunction that if the agent was asked for anything to call the defendant, who would have the man arrested. The defendant sought to introduce this tape as evidence of his state of mind, but the Court upheld its exclusion. The statements were at best relevant of the declarant's state of mind at the time they were made, and even that was doubtful, since later in the conversation, in introducing the agent to another person, the defendant said that "He's [i.e., the agent] probably an FBI agent."

United States v. Giles, 246 F.3d 966 (7th Cir. 2001) : In the prosecution of a Chicago Alderman for, *inter alia*, receiving bribes from a government mole, the defendant was precluded from introducing a tape-recorded conversation between himself and the mole. Although the defendant argued that the tape tended to prove his then-existing state of mind, the Trial Judge reasoned that the crime was complete when the defendant took the first payment, the conversation the defendant sought to admit occurred three weeks later, and the three-week gap offered an opportunity for reflection. Although it found no abuse of discretion, the Court said: "We think the February 11 tape should have been admitted,

especially in this case where Giles was going to (and did) testify. The government's argument that the tape was a product of Giles' reflection -- an attempt to cover his tracks in case he got caught -- should have been made to the jury, not the judge. On a close evidentiary call like this, we think it's best to err on the side of inclusion rather than exclusion if an error at all is to be made." In *Aetna Life Ins. Co. v. Wise, 184 F.3d 660 (7th Cir. 1999)* , the insured on a life insurance policy had filed a change of beneficiary form after his divorce, but had left the beneficiary line blank rather than inserting the name of his parents. In an interpleader action between the parents and the former wife, the principal issue was whether the insured had done all he reasonably could do under the circumstances to effectuate his intent to change his beneficiary election. The Court held there was no abuse of discretion in admitting into evidence the insured's suicide note, which stated that he was "leaving everything" to his parents, including the life insurance. The statement of his belief that the beneficiary change had been made was "evidence of his intent to make the beneficiary change and that his intent had not changed. The fact finder in this case was not required to determine whether the statement was true or false, only to recognize that the statement was made."

[iii] Rule 803(3) -- Intent -- Miscellaneous Cases

United States v. Williams, 704 F.2d 315 (6th Cir. 1983) : In a trial for attempting to possess cocaine, the evidence included testimony that $3,400 was confiscated from Williams when he was arrested, money the government claimed was to be used to make a cocaine purchase. Williams offered testimony of an IRS employee that Williams had stated that he owed $3,300 in taxes and had expressed an intention to repay that amount if his mother sold a house and gave him the money. Williams' statement to the witness qualified as a statement of a present intention to do a future act, but the statement was inadmissible absent evidence that the mother had sold the house and given him money. Without this additional evidence, the statement was not probative.

United States v. Hughes, 970 F.2d 227 (7th Cir. 1992) : To prove his theory of defense, the defendant offered testimony as to his numerous prior statements that he intended to go to the location of the charged narcotics distribution conspiracy just to purchase drugs for personal consumption. Affirming the defendant's conviction, the Court held that it was error (but harmless) to admit only the part of the statements indicating where he was going, but not the part telling why, as both reflected his then existing state of mind.

United States v. Silverman, 861 F.2d 571 (9th Cir. 1988) : Although the Court held that conspirator statements were improperly admitted in a drug-related prosecution, it also held that statements by the defendant's sister that she was going to call her brother were admissible to prove her intent to make a call, which was offered to show a connection between them.

[iv] Rule 803(3) -- Intent -- Proving Acts of Declarant

United States v. Torres, 901 F.2d 205 (2d Cir. 1990) : To prove he was at the scene when arrests were made only to borrow a car, one defendant in a massive heroin distribution conspiracy sought to have his common-law wife testify to his statements of the previous day that he would stop to pick up a car and then take her to the beach. The Court held that exclusion of the testimony on the ground it was untrustworthy was error (but harmless), because a statement of intent offered to prove subsequent consistent conduct is categorically admissible under *Rule 803(3)* regardless of trustworthiness. In *United States v. Margiotta*, n21 the Court found that a witness' testimony concerning his father's stated intention to engage in a certain plan qualified for admission under the Rule.

United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985) : The Court held that statements by a third party of his intent to rob the banks that the defendants allegedly robbed should have been admitted, but that their exclusion was

harmless error where the statements would not have established the defendant's innocence.

Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1994) : In an action to determine the beneficiary of a life insurance policy, the Court held that evidence of statements by the insured that he wished to make his new wife his beneficiary were properly admitted to prove subsequent conduct in conformity with his stated intention.

United States v. Calvert, 523 F.2d 895 (8th Cir. 1975) : The widow of a deceased inventor was permitted to testify that, shortly before his murder, her husband declared that he intended to speak to the defendant about canceling the insurance and ending the partnership. This was deemed admissible under *Rule 803(3)* because it tended to prove that the husband carried out his intent and may have prompted the defendant to seek to quickly arrange the murder.

United States v. Veltmann, 6 F.3d 1483 (11th Cir. 1993) : The defendants, charged with setting a fire in which their wife and mother (respectively) had died, alleged that the victim had committed suicide. The Trial Court had excluded the videotaped deposition of a man who testified that the victim had blackmailed him for 25-30 years, that in a conversation a few months before her death, she talked about the possibility of her death and mentioned suicide several times, and that on the day of her death, he refused in no uncertain terms to send her any more money. Reversing, the Court held the evidence of suicide threats was unquestionably relevant and should not have been excluded because of remoteness or uncertainty as to their exact date. Furthermore, the conversation on the day of her death was relevant to her state of mind and intent on that day.

[v] Rule 803(3) -- Intent -- Proving Acts of Nondeclarant

United States v. Best, 219 F.3d 192 (2d Cir. 2000) : Best was head of a division of an insurance company, and his codefendant was the CEO. At Best's trial for fraud in connection with the company's improper allocation of private business costs to the Medicare program, the government introduced a hearsay statement by the CEO, which indicated that he was going to talk to Best and ask Best to create a fraudulent document. Affirming the conviction, the Court noted that Second Circuit case law permits state of mind statements to be admitted to prove the subsequent conduct of a person other than the declarant, so long as there is "independent evidence that connected the declarant's statement with the non-declarant's activities." In this case, there was ample independent proof that the CEO and Best actually conferred about preparation of the fraudulent document.

[vi] Rule 803(3) -- Intent -- State of Mind

United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984) : The defendant was convicted of possessing stolen, contraband cigarettes and of conspiracy. The Trial Judge prevented him from eliciting from the FBI agent who arrested him that he said at the time that "I only came here to get some cigarettes real cheap." Reversing, the Court held that this was a statement of present state of mind and should have been admitted. The Court relied upon *DiMaria* in *United States v. Lawal*, n22 finding error (albeit harmless) in the exclusion of statements made by a defendant while he was detained during an investigation by drug enforcement agents at an airport. The statements might have shed light on his state of mind at the time of his arrest.

United States v. Serafini, 233 F.3d 758 (3d Cir. 2000) : The defendant was charged with perjury after he denied that he had been reimbursed for campaign contributions in violation of federal election law. The Court found no abuse of discretion in admitting statements, made by the drawer of a check that the defendant had denied was for reimbursement, in which the declarant indicated he intended the check to reimburse the defendant. The declarant's state

of mind was relevant and the statements were admissible under the state of mind exception.

United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978) : The defendant was convicted for making false material declarations to a grand jury that was inquiring into activities of one Lyles relating to the illicit distribution of narcotics, especially with one Johnson. The prosecution introduced evidence of a telephone conversation involving Lyles and Johnson, which indicated that Johnson intended to purchase narcotics from Lyles. Shortly after the conversation, the defendant appeared with Johnson at Lyles' residence. The Court ruled that Johnson's expressed intention to go to Lyles' residence was admissible as a state of mind declaration and said that "the jury might reasonably infer, from the fact that Johnson and Jenkins appeared at Lyles' residence very shortly thereafter, that Jenkins drove there because Johnson ... had asked him to do so."

United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992) : A man had been murdered as part of a scheme by his wife and others to defraud life insurance companies by, *inter alia*, fraudulently listing her as beneficiary of his policies. During the trial, evidence was introduced of the victim's statements describing the dismal state of his marriage, his desire to replace his wife as beneficiary on his insurance policies, and his fear of being murdered by his wife and her lover. The Court held there was no plain error in admitting the statements as evidence of his state of mind and intent relevant to whether he would have listed her as beneficiary. In *United States v. Hogan*, n23 the Court held that out-of-court statements that the declarant wanted to give some money to the defendant, a Judge charged with bribery and corruption offenses, and could do so if it were a gift, were properly excluded when offered to prove that payments the declarant subsequently made were not a payment for services because they were not a reliable indicator of the declarant's state of mind at the time he actually gave the money.

[e] Rule 803(3) -- Mixed Present and Past States of Mind

United States v. Mandel, 437 F. Supp. 262 (D. Md. 1977) : In an excellent discussion of the question whether a statement that impliedly refers to past, present, and future events runs afoul of *Rule 803(3)*'s prohibition against testimony about facts remembered to prove the facts remembered or believed, this opinion compares the approach of *Annunziato v. United States, 293 F.2d 373 (2d Cir. 1961)* , with the approach of critics of that decision. Making a tentative ruling to exclude proffered evidence, the *Mandel* Court focused on the lack of a pressing need for the testimony and the danger that introduction of statements that refer not only to a present state of mind, but also incorporate past conduct of the declarant and others, would threaten the continued existence of the hearsay rule.

United States v. Liu, 960 F.2d 449 (5th Cir. 1992) : In a prosecution for bribing a public official, the Court held there was no abuse of discretion in excluding a defendant's hearsay statements that he had participated because he feared a police officer he thought to be corrupt. The Rule admits statements as to the declarant's fear, but not as to why he held that state of mind or what he believed induced it. In *United States v. Cohen*, n24 the Court held that the exception "does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind."

United States v. Fontenot, 14 F.3d 1364 (9th Cir. 1994) : The defendant, charged with hiring someone to murder his wife, sought to introduce as exculpatory evidence his statement shortly after a telephone conversation that "they are going to kill [my wife]," and another statement made four days later that he had to go to San Francisco and that his life was in danger by going but in even more danger if he didn't go. The Court held there was no error in excluding the statements, as they were hearsay offered to prove the facts asserted. The statements did not fall within *Rule 803(3)* because they contained belief statements as to why the defendant was fearful.

[f] Rule 803(3) -- Past Acts or State of Mind

Colasanto v. Life Ins. Co. of N. Am., 100 F.3d 203 (1st Cir. 1996) : An interpleader action over the proceeds of a life insurance policy pitted the insured's estate against his former companion. The insured had notified the company to change a group policy to an individual policy in the companion's name, but had not completed the company's forms by the time he died. To prove that the insured had not intended to make the transfer, the estate offered letters written shortly before the insured's death. Affirming a judgment for the companion, the Court held there was no abuse of discretion in excluding the letters, as they were written several months after the insured had evinced a donative intent in letters to the insurer and subsequent to a bitter falling-out between the insured and the companion. Thus, they were not probative of the insured's intent and state of mind at the time he wrote to the insurer.

United States v. Cardascia, 951 F.2d 474 (2d Cir. 1991) : Affirming convictions for bank fraud offenses, the Court held there was no error in excluding a letter by one defendant in which he explained why he was thereby resigning. To admit statements of one's state of mind with regard to conduct that occurred eight months earlier would significantly erode the hearsay rule.

United States v. LeMaster, 54 F.3d 1224 (6th Cir. 1995) : Affirming a conviction for making false statements to an FBI agent, the Court held that a statement the defendant made a day after being interviewed by the FBI agent was properly excluded. To the extent that the statement communicated that the defendant may have answered questions mistakenly, the Court found that it was hearsay and was inadmissible, since the defendant "had an opportunity to reflect and possibly fabricate or misrepresent his thoughts." In *Cincinnati Fluid Power Co. v. Rexnord, Inc.*, n25 the Court reversed a judgment for a distributor who alleged promissory estoppel against a manufacturer on the basis of conduct by its officials. It found, *inter alia*, that the Trial Judge erred in permitting a witness to testify to out-of-court statements by a landlord concerning future rents to be received. The statement did not qualify as state of mind, because it was offered to prove the fact remembered, i.e., the amount of the future rents.

United States v. Neely, 980 F.2d 1074 (7th Cir. 1992) : Affirming convictions for racketeering acts involving staged automobile accidents and fraudulent insurance claims, the Court upheld the exclusion of a letter written by one defendant two and a half weeks after he received a letter from a participant who blamed the scheme on the defendant. The Court reasoned that "[t]wo and a half weeks is more than adequate time to reflect (and perhaps fabricate) one's thoughts." In *United States v. Harvey, 959 F.2d 1371 (7th Cir. 1992)* , the Court affirmed mail fraud convictions, holding there was no error in limiting cross-examination of a postal inspector about statements from the defendant that his funding sources were "hustlers," as the statements were made when he had time to reflect and perhaps misrepresent his thoughts and were, in any event, not relevant to his intent in connection with the charged acts two years previously. In *United States v. Carter*, n26 the Court affirmed robbery convictions, holding there was no error in excluding the defendant's statement that he confessed only to protect his girlfriend, as it was hearsay not coming within the state of mind exception because it was made at least an hour after the confession. Affirming racketeering and fraud convictions in *United States v. Binder*, n27 the Court held that a defendant's statement concerning the reasons that he claimed to be in a daze was a statement concerning past acts and was properly excluded. Moreover, the Court found that the portion concerning being in a daze was irrelevant when offered to prove a past state of mind.

United States v. Naiden, 424 F.3d 718 (8th Cir. 2005) : The Court affirmed convictions for attempting to entice a child to engage in and travel for unlawful sexual activity, finding no error in the exclusion of testimony by a friend of the defendant's who would have said that the defendant told him that he had met someone on line who said she was 14, but the defendant did not believe she really was only 14. The statement was not within the state of mind exception because his communication with the girl occurred the day earlier, and the exception does not cover declarations about "a

past attitude or state of mind." A concurring Judge argued that the defendant's statement was admissible to prove his state of mind at the time he made the statement, and that state of mind was relevant because it existed at the time of the alleged offenses. In *Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995)* , a declaratory judgment action to determine whether a fellow-employee exclusion in a liability policy applied to a fatal crash of a company plane, the Court held there was no abuse of discretion in excluding statements by the decedent that he had been or was going to be laid off from his employment, as the statements were offered to prove the facts remembered or believed, not the declarant's state of mind.

United States v. Emmert, 829 F.2d 805 (9th Cir. 1987) : The Court affirmed drug-related convictions and held that a coconspirator's testimony that one defendant had declared that he was scared and felt compelled to complete a narcotics deal because of threats made by government agents was properly excluded, because the defendant's statement referred to past events and was not confined to a present state of mind. In *United States v. Faust*, n28 the Court, affirming convictions for embezzlement and forgery, upheld the exclusion of a letter written by the defendant that was offered to support his claim that he was blackmailed into backdating an endorsement on a check. The Court observed that the defendant was permitted to testify concerning his state of mind and stated that "Faust's opportunity to reflect in drafting the letter ... weighs heavily against admission."

United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) : On remand after the Supreme Court held that hearsay statements made when the declarant had a motive to falsify could not be admitted as prior consistent statements (see the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[4][c]*), the Court held that statements by the child sexual abuse victim to her baby-sitter, stating that she did not want to return to her father because he "gets drunk and he thinks I'm his wife," were not admissible under the Rule as expressing fear, but instead were inadmissible statements of memory offered to prove the fact remembered. In *United States v. Joe, 8 F.3d 1488 (10th Cir. 1993)* , a murder prosecution, the Court held it was error to admit under the Rule the victim's statements that she feared the defendant because he had threatened her, as the portion about why she was afraid was a statement of memory or belief. In a drug prosecution, *United States v. Rodriguez-Pando*, n29 the Court held that a tape recording of the defendant's statement on the day following his arrest, in which the defendant claimed that he had been coerced to act, was inadmissible, since it was a statement of memory of past events and beliefs.

United States v. Samaniego, 345 F.3d 1280 (11th Cir. 2003) : In an interpleader action to determine ownership of championship belts allegedly stolen from a former professional boxer, the Court held it was error to admit under *Rule 803(3)* statements by the alleged thief expressing remorse, apologizing for, and asking forgiveness for having stolen the belts. The Rule expressly prohibits using a statement of a then-existing state of mind to prove a past fact. However, the error was harmless because the statements were admissible under *Rule 804(b)(3)* as declarations against interest.

[g] Rule 803(3) -- Present State of Mind

[i] Rule 803(3) -- Civil Cases

Southex Exhibitions, Inc. v. Rhode Island Builders Ass'n, 279 F.3d 94 (1st Cir. 2002) : The Court affirmed a judgment for the defendant in a suit alleging that the defendant and the plaintiff's predecessor had established a partnership and the defendant had breached its fiduciary duties to the plaintiff. It found no abuse of discretion in admitting evidence that the president of the plaintiff's predecessor told the head of the defendant company that he did not want an ownership interest in the home shows that he was producing. The statement reflected the declarant's state of mind before signing a contract.

Callahan v. A.E.V., Inc., 182 F.3d 237 (3d Cir. 1999) : Opposing a motion for summary judgment in an antitrust action by small beer distributors, the plaintiffs offered their deposition testimony that certain customers stopped purchasing from them and had stated that they did so because the defendants' stores had cheaper beer. The Court reversed in part summary judgment for the defendants, holding it was error to exclude the deposition testimony as inadmissible hearsay. The customers' statements were not being offered to prove the plaintiffs' actual loss -- that evidence was provided by the plaintiffs' own testimony that the customers no longer traded with them -- but only for the limited purpose of proving the customers' motive, a present state of mind admissible under *Rule 803(3)*. The Court also noted that it was not important that some of the declarants were unidentified, since the relevance of the statements depended on the fact that the declarants were the plaintiffs' customers, not their particular identities, and knowing the identity of the declarants would not make the statements more trustworthy evidence of the declarants' descriptions of their states of mind.

Hydrolevel Corp. v. American Soc'y of Mech. Eng'rs, Inc., 635 F.2d 118 (2d Cir. 1980) , aff'd, 456 U.S. 556 (1982) : In a private antitrust action, the Court said that the statements of the plaintiff's potential customers as to reasons for not dealing with the plaintiff came within the hearsay exception.

Wolfson v. Mutual Life Ins. Co., 455 F. Supp. 82 (M.D. Pa. 1978) , aff'd, 588 F.2d 825 (3d Cir. 1978) : Denying a motion for a new trial, the District Court held that statements by a deceased insured to his spouse concerning representations made to him by an insurance agent were admissible under the state of mind exception to the hearsay rule to show his good faith in filling out an insurance policy.

Morris Jewelers, Inc. v. General Elec. Credit Corp., 714 F.2d 32 (5th Cir. 1983) : Affirming a judgment that the credit corporation had mishandled accounts, the Court found that the Trial Judge properly admitted letters from customers and testimony by Morris' employees concerning oral complaints to show the state of mind of customers whose accounts were handled by the credit corporation. The evidence was relevant to prove loss of goodwill.

Forro Precision, Inc. v. International Bus. Machs., 673 F.2d 1045 (9th Cir. 1982) : In a damage action arising out of the search of business premises by police accompanied by IBM employees, the Court held that out-of-court statements made during IBM's investigation into misappropriation of trade secrets were admissible to show the company's state of mind when it contacted the police and were properly admitted as central to the defense in the case.

[ii] Rule 803(3) -- Present State of Mind -- Criminal Cases

United States v. Wright, 783 F.2d 1091 (D.C. Cir. 1986) : In a kidnapping case, the Court found that a statement to the victim allegedly made by one defendant who raised a duress defense should have been admissible as state of mind evidence. The error in excluding it was deemed harmless, however.

United States v. Ouimette, 753 F.2d 188 (1st Cir. 1985) : The Court reversed a conviction for illegal receipt of a firearm. Police officers testified that the defendant dropped the gun when they entered a bar, thinking that a robbery might be in progress. The defendant claimed to have been standing away from the place in the bar where the police said the gun was dropped, and alternatively, that no gun was dropped at all. He offered the testimony of a woman who had been in the bar to the effect that after the police entered the bar and made arrests, they searched her purse and looked elsewhere for a gun. She heard the police ask, "Where's the gun?" The Court found that exclusion of her testimony was improper, since the police officers' statements were admissible to show the officers' state of mind. It concluded that if the jury had heard and believed the witness, it could have inferred that no gun had been dropped. In *United States v.*

Kelly, n30 the Court upheld admission of statements showing an extortion victim's fear in a Hobbs Act case in which fear was an element of the offense charged.

United States v. DiNome, 954 F.2d 839 (2d Cir. 1992) : In a massive RICO prosecution the Court held there was no error in admitting statements by murder victims indicating their suspicions about the illegality of a defendant's business, as the statements indicated the declarants' then existing state of mind and were relevant to show the defendant's motive to kill them. In *United States v. Puglisi*, n31 the Court affirmed narcotics convictions, finding that postarrest statements by the defendants, which might have indicated an intent to cooperate, were properly excluded. They did not prove a state of mind. In *United States v. Southland Corp*., n32 the Court affirmed convictions of a corporation and a lawyer of conspiring to defraud the United States. It found that notes made by the corporation's general counsel were properly admitted, either as nonhearsay under *Rule 801(c)* or as state of mind evidence under *Rule 803(3)*, to prove counsel's understanding of the purpose of certain payments. In a narcotics case, *United States v. Terry*, n33 the Court held it was error (but harmless) to admit testimony that defendants refused to supply palm prints pursuant to a Court order, while excluding statements made by the defendants that they wanted their lawyers present when the prints were taken. Although the Court found that the statements were not required to be admitted under *Rule 106* since they were oral statements, not writings, it found that they qualified for admission under *Rule 803(3)*.

United States v. Taglione, 546 F.2d 194 (5th Cir. 1977) : The Court held that a defendant charged with having made extortionate demands for return of lost credit card invoices should be able to elicit evidence that he asked his attorney if he could negotiate for a reward on the lost items that he found. This was not offered to prove reliance on advice of counsel as a defense, but to prove state of mind and was admissible under *Rule 803(3)*.

United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992) : A man was murdered as part of a scheme by his wife and others to defraud life insurance companies by, *inter alia*, fraudulently listing her as beneficiary of his policies. During the trial, evidence was introduced of the victim's statements describing the dismal state of his marriage, his desire to replace his wife as beneficiary on his insurance policies, and his fear of being murdered by his wife and her lover. The Court held there was no plain error in admitting the statements as evidence of his state of mind and intent relevant to whether he would have listed her as beneficiary. In a drug conspiracy prosecution, *United States v. Peak*, n34 the Court held that it was error to exclude testimony by one defendant-brother as to what the other defendant-brother said in a telephone conversation. The testimony, the Court held, was state of mind evidence that should have been admitted to negate the government's theory as to intent. In *United States v. Green*, n35 a prosecution for kidnapping with intent to commit murder, the Court upheld the introduction of statements by the victim concerning her attitude toward the defendant. These statements, offered to prove her feeling toward the defendant, tended to negate evidence that she accompanied the defendant voluntarily. See also *United States v. Tuchow* n36(a victim's statements were admissible to prove state of mind in an extortion case).

United States v. Dolan, 120 F.3d 856 (8th Cir. 1997) : In the prosecution of an attorney for aiding and abetting in concealment of bankruptcy estate property, the Court held there was no abuse of discretion in admitting a statement by the debtor, made to his office manager shortly after returning from a meeting at which he had paid the defendant $50,000, that he "had [the defendant] by the balls." The statement showed the debtor's then existing state of mind regarding his transactions and relationship with the defendant. In *United States v. Udey*, n37 the Court affirmed convictions for conspiracy and harboring and concealing a fugitive. It upheld the exclusion of statements made by two defendants after their arrest, finding that the statements were not relevant to their state of mind two days earlier when the offenses charged against them occurred. In *United States v. Adcock*, n38 the Court affirmed convictions on Hobbs Act and income tax charges, holding that statements of a victim were admissible in an extortion case to show state of mind, an essential element of the charge.

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989) : The Court held that statements by a defendant two hours after taking a polygraph examination were not admissible as evidence of a present state of mind, since the time lapse gave the defendant time to fabricate an explanation.

United States v. Grassi, 783 F.2d 1572 (11th Cir. 1986) : The Court affirmed extortion convictions, finding that out-of-court statements by a victim concerning his fear of the defendants were properly admitted to prove his frightened state of mind.

[h] Rule 803(3) -- Requirement of Relevance

United States v. Williams, 704 F.2d 315 (6th Cir. 1983) : In a trial for attempting to possess cocaine, the evidence included testimony that $3,400 was confiscated from Williams when he was arrested, money the government claimed was to be used to make a cocaine purchase. Williams offered testimony of an IRS employee that Williams had stated that he owed $3,300 in taxes and had expressed an intention to repay that amount if his mother sold a house and gave him the money. Williams' statement to the witness qualified as a statement of a present intention to do a future act, but the statement was irrelevant absent evidence that the mother had sold the house and given him money.

Hong v. Children's Mem. Hosp., 993 F.2d 1257 (7th Cir. 1993) : The Court affirmed a summary judgment for the employer in an employment discrimination case, holding that an employee's deposition testimony that her brother-in-law told her that the employer said the plaintiff should move back to Korea was hearsay and not admissible under *Rule 803(3)* because the brother-in-law's state of mind was irrelevant. In *United States v. Harvey, 959 F.2d 1371 (7th Cir. 1992)* , the Court affirmed mail fraud convictions, holding there was no error in limiting cross-examination of a postal inspector about statements from the defendant that his funding sources were "hustlers," as the statements were made when he had time to reflect and perhaps misrepresent his thoughts and were, in any event, not probative of whether he had an intent to defraud. In *United States v. Jackson*, n39 the Court affirmed fraud convictions arising from a scheme to steal fuel from a trucking firm, holding that statements by defendants to a former employee of the firm denying participation in the theft were properly excluded as hearsay. The statements were made two years after the theft, the defendants had a motive to make self-serving statements, and that the defendants' state of mind at that time was not relevant.

United States v. French, 900 F.2d 1300 (8th Cir. 1990) : The Court held that a defendant's statement of an intent to sell his gun on the day he was arrested in a cocaine deal should have been admissible under *Rule 803(3)*, but there was no error in excluding it, as it was irrelevant to a charge of carrying a gun in relation to drug trafficking in light of undisputed evidence he was carrying a gun at the time of the charged cocaine transaction.

United States v. Scrima, 819 F.2d 996 (11th Cir. 1987) : In a prosecution for income tax evasion, the defendant attempted to rebut the government's "net worth" theory by offering the testimony of someone to whom the defendant had boasted, prior to the relevant tax years, of an intent to invest a large sum of money. The Court affirmed the ruling below that the testimony was inadmissible, since the defendant's state of mind was not relevant; the only relevant fact was whether the defendant actually had the money, and his out-of-court boast was hearsay with respect to that fact.

[i] Rule 803(3) -- Spontaneity

United States v. Reyes, 239 F.3d 722 (5th Cir. 2001) : In a prosecution arising out of a sting operation, the Court found no error in the exclusion of statements made by the defendant in a conversation with a person cooperating with

the authorities. The statements appeared to indicate that the defendant had no criminal intent. However, at the time he made the statements, the defendant suspected that the person he was speaking to was a government informant and that the conversation was being monitored. Thus, the defendant's statements "were more self-serving than candid" and lacked the spontaneity required for admission under *Rule 803(3)*.

[j] Rule 803(3) -- Statement of Accused

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) : Affirming a conviction for income tax offenses, the Court found no error when defendant's tax lawyer was permitted to testify that Bishop hired him in 1996 to assist with a 1996 civil audit, but was not allowed to say that Bishop said he did not expect the scope of the matter to be any greater, that is, he did not expect he would face criminal charges. "Bishop's statements ... did not reflect his then current feelings or plans, but rather were self-serving assertions that he did not have the requisite intent for the crime now charged."

[k] Rule 803(3) -- Statement of Belief or Memory

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) : Affirming a conviction for income tax offenses, the Court found no error in the exclusion of evidence that the defendant's former bookkeeper had said she knew Bishop received a $400,000 fee in 1994, that it was her fault it was omitted from the books used to prepare his tax returns, and that she did not know why she failed to record the fee. The statements were not an explanation of the declarant's current state of mind, "but rather was a recitation of her memories of what she did and thought at an earlier date."

United States v. Sayakhom, 186 F.3d 928 (9th Cir. 1999) : The Court held in a mail fraud prosecution arising out of an unlicensed insurance sales scheme that there was no abuse of discretion in excluding a tape recording of a meeting between the defendant and state Department of Insurance investigators. The defendant's statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good faith) were inadmissible hearsay under *Rule 803(3)*.

United States v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984) : The Court reversed convictions for conspiracy and violations of currency transaction reporting requirements because the Trial Judge erroneously excluded as hearsay testimony concerning the statements made by one defendant to counsel concerning his business. The defendants claimed that they had relied on the advice of counsel, and the Court concluded that the statements were admissible to show full disclosure of information to counsel. The Court cited *Rule 803(3)* in support of its holding. Actually, the testimony was not hearsay if offered to prove only the extent of the disclosure. *Rule 803(3)* would be the appropriate reference, however, if the defense intended to argue not only that the statements were made, but also that they were true.

[l] Rule 803(3) -- Statement of Mental Condition

Moss v. Feldmeyer, 979 F.2d 1454 (10th Cir. 1992) : In a malpractice action against a physician for alleged misdiagnosis leading to death from a heart attack, the defendant testified that he had encouraged the patient to enter a hospital and that she, directly and through her husband, had refused. The Court held that the statements of the patient and her husband were properly admitted as statements of her then existing mental condition.

[m] Rule 803(3) -- Statement of Physical Condition

Wolf v. Procter & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982) : The Court ruled *in limine* in an action against the manufacturer and distributor of a vaginal tampon to recover for toxic shock syndrome that plaintiffs could not offer

evidence of complaints made over the telephone and in letters to the defendants. Such evidence was hearsay and there was no showing that the complaints were made immediately after the complainants suffered pain or injury.

[n] Rule 803(3) -- Surveys and Opinion Polls

Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) : The plaintiff and defendants, manufacturers of competing antihistamines, had entered a settlement agreement in which the defendants had agreed not to advertise their product as "nonsedating" or "low sedating." Seeking an injunction against violations of the agreement and the Lanham Act, the plaintiff offered five surveys in which physicians were asked to relate their memories of communications made by the defendants' sales representatives. The Judge excluded the surveys and denied the injunction. Reversing, the Court held that the two surveys that polled physicians' impressions of the communications should have been admitted under the present state of mind exception.

[4] Rule 803(4) -- Statements For Purposes Of Medical Diagnosis Or Treatment

[a] Rule 803(4) -- Abused Child

Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004) : In an action by a father seeking to have his daughters returned pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction, the mother claimed that they would be at grave risk because the father had sexually abused them. At trial a psychologist to whom the girls had been brought for treatment recounted statements by the mother and others repeating what the girls had said to them about the abuse. The Court found no abuse of discretion in admitting the testimony under *Rule 803(4)*. Quoting this *Manual*, it noted that statements by family members and others, made for and pertinent to treatment of an injured person, are often admitted under the Rule. The Court rejected as "unnecessarily inflexible" the rule elsewhere that statements by children identifying abusers are admissible only where the physician makes clear to the victim that the identity of the abuser is important to diagnosis and treatment, and reasoned that "[t]here are many ways in which a party wishing to enter into evidence a statement under *Rule 803(4)* can demonstrate that the statement was made for the purpose of diagnosis and treatment."

Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) : In an action by a four-year-old and her mother alleging child abuse on the part of the child's father and his parents, the Court reversed a judgment for the defendants, concluding that statements the child made to a psychologist in which she identified her abusers were admissible under *Rule 803(4)*, whether or not the child would be competent to testify as a witness. Justice Powell, sitting by designation, dissented in part. In his view, doubts about whether the child realized the psychologist was treating her made the trustworthiness of the evidence questionable, so deference should have been given to the Trial Judge's discretion in excluding the evidence.

United States v. Cherry, 938 F.2d 748 (7th Cir. 1991) : The Court held in a sexual abuse case that the victim's statements to a treating physician that the defendant had told her not to tell anyone were properly admitted, as the task of a physician treating the victim of such an attack requires attention not only to the physical but also to the psychological manifestations of trauma.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed the defendant's conviction for aggravated sexual abuse of his children because a 12-minute videotape recording of an interview of one child by a forensic interviewer was erroneously admitted. The interview took place after the children had been taken into custody by the department of social services; it was conducted at a center for child evaluation before a physical examination by a

doctor. In it the child (aged three years and ten months) identified her abuser and provided descriptive details of the abuse. The Court found that there was insufficient evidence that the child understood that the inquiry into identity was important to diagnosis and treatment; there was no evidence that the child was aware she had an injury or that she understood that telling the truth was important to the treatment of that injury. In a prosecution for sexual abuse of a minor, *United States v. Gabe, 237 F.3d 954 (8th Cir. 2001)* , the Court held it was error (but harmless) to admit a hearsay statement identifying the defendant as the perpetrator, which the victim made to a doctor. The Court stated that a statement identifying the abuser is admissible under *Rule 803(4)* only where "the physician makes clear to the victim that the inquiry into the identify of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding." It was not sufficient to presume that because the victim was 15 when she consulted the doctor, she understood the need to tell the truth in order to obtain proper treatment; "not even an adult necessarily understands the connection between a sex abuser's identity and her medical treatment." In *United States v. Sumner*, n40 the Court reversed convictions for aggravated sexual abuse because hearsay statements made by the alleged child-victim to a clinical psychologist were improperly admitted. Although the psychologist explained to the declarant that he was a doctor, he did not discuss the need for truthful revelations or emphasize that the identification of her abuser was important to his attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected. In *United States v. Beaulieu*, n41 a child sexual abuse case, the prosecution was allowed to introduce testimony by a nurse practitioner and a psychologist that the victim had told them of abuse by the defendant. Reversing, the Court held it was an abuse of discretion to admit the evidence to prove the identity of the abuser, when there was no evidence that either practitioner explained to the victim that the identity of her abuser was important to diagnosis or treatment; further, the victim's testimony showed she understood the purpose of her visits with both practitioners was "[j]ust to get evidence." Compare *Lovejoy v. United States*, n42 where the Court found no abuse of discretion in admitting statements by a sexual abuse victim's mother to a nurse examining the victim a few days later that when she was awakened by noises from the bed in which the defendant and the victim were sleeping, she saw the defendant standing by the victim with an erection and the victim's underwear was down and her tee shirt was up. The declarant made the statements on behalf of her daughter, who could not communicate orally or in writing on her own, to a medical professional investigating allegations of sexual abuse, and the statements helped pinpoint the area of the body to be examined. In *United States v. Balfany*, n43 the child victim was examined by a physician and interviewed by a psychologist and a social worker more than six months after alleged abuse. All three of them gave testimony recounting the child's descriptions of the assaults and identification of the defendant as her attacker. The Court held the testimony was properly admitted for purposes of diagnosis and treatment, even though a general practitioner with little experience in abuse cases had previously examined the victim and found no evidence of abuse. The later examinations by experienced specialists were not simply designed to generate evidence for trial and were not shown to be untrustworthy. See also *United States v. Yellow* n44(a clinical psychologist was permitted to testify to statements made during diagnosis and treatment of a 13-year-old sister and her disabled brother, who were raped by the defendant); *United States v. Longie* n45(the identity of the victim's father as perpetrator of child sexual abuse was relevant to treatment and recommendations for counseling). In *United States v. Whitted*, n46 the Court noted that a child victim's statements about her physical condition made to a doctor consulted only for the purpose of providing expert testimony in a criminal prosecution for sexual abuse would be admissible under the Rule as statements for diagnosis.

United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) : In a child sexual abuse case, the Court held there was no error in admitting notes and statements identifying the defendant as the perpetrator that were given by the victim's mother to a doctor examining the victim. Although a parent's statement to a doctor identifying the assailant in a child molestation case must be treated as suspect, the circumstances in this case compelled the conclusion that the statements (except one imploring the doctor not to tell the victim, for fear of retribution from the defendant) were made for medical purposes. Error in admitting that one statement was harmless, however. In *People of Terr. of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993)* , the three-year-old victim of a criminal sexual assault disclosed the assault and identified the defendant in statements to a pediatrician and to a social worker. The Court held that the statements to the doctor pertained to the cause of the injury and were pertinent to diagnosis and treatment. By contrast, the statements to the social worker were aimed only at ensuring the child's safety, not treatment, so they did not come within the medical

statements exception. The error in admitting the statements to the social worker was harmless, however. In a sexual abuse case, *United States v. George*, n47 the Court held that statements by the 12-year-old victim to her physician identifying the defendant as her abuser were admissible under the Rule. The identity of the abuser is pertinent to the diagnosis and treatment of emotional and psychological injuries and of sexually transmitted diseases. In *United States v. Nick*, n48 statements of a three-year-old child to a doctor regarding an assault on his person, which omitted the name of his assailant, were held to be admissible under *Rule 803(4)*.

United States v. Edward J., 224 F.3d 1216 (10th Cir. 2000) : The defendant, convicted of juvenile delinquency for sexually abusing females under the age of 12, argued that it was an abuse of discretion to admit testimony of an examining physician under the medical history exception without establishing that the child understood the medical importance of telling the truth, as the Eighth Circuit requires (see annotations *supra)*. The Court stated that "we have specifically rejected this presumption against admission of hearsay evidence under the *Rule 803(4)* exception in the case of children. *See* [*United States v.*] *Pacheco*," n49 and held the testimony properly admitted. In *United States v. McHorse, 179 F.3d 889 (10th Cir. 1999)* , the Court held there was no abuse of discretion in admitting a seven-year-old witness' statements detailing abuse by the defendant, made to a family practitioner during a routine physical and to a psychotherapist after a year of counseling. The statements were likely reliable because a patient's medical care depends on the accuracy of information she provides to her doctors, so she has a motive to be truthful. In *United States v. Norman T.*, n50 the Court affirmed a juvenile delinquency adjudication for aggravated sexual abuse, finding no error in the admission of statements made by the five-year-old victim to medical personnel when she was taken to the hospital after complaining about vaginal pain. There was no indication that the victim did not understand she was seeking medical treatment, and the statements were reasonably pertinent to diagnosis or treatment of the pain of which she was complaining. In addition, when the doctor first met with the victim, he discussed with her the difference between telling the truth and telling a lie. Finally, the defendant had an opportunity to cross-examine the victim when she testified. In *United States v. Tome*, n51 the Court held that statements by the child sexual abuse victim identifying the defendant were properly admitted under *Rule 803(4)* when made to two physicians examining her for diagnostic purposes after an abuse complaint was made, as the identity of the abuser is reasonably pertinent in virtually every domestic sexual assault case. Similar statements in a pre-examination interview by a physician examining her for treatment of a skin rash in the vaginal area that was unrelated to any abuse were likewise admissible, as the interview was conducted to make the child feel comfortable, which contributed to the adequacy of the examination. However, similar statements made to a Child Protective Services caseworker were not admissible under the Rule, because the caseworker did not diagnose or treat the child, but only made an investigation before referring her to other professionals. In *United States v. Farley*, n52 the Court affirmed a conviction for aggravated assault on a child, holding that statements by the victim to a psychologist were admissible under *Rule 803(4)* and could also be relied upon under *Rule 703* to explain the doctor's opinion.

[b] Rule 803(4) -- Constitutional Concerns

White v. Illinois, 502 U.S. 346 (1992) : The Court's decision, holding that the Constitution does not require production of a declarant who makes a statement admissible under *Rule 803(4)*, is discussed in the Editorial Explanatory Comment at *§ 803.02[26]*.

Idaho v. Wright, 497 U.S. 805 (1990) : The Court's decision, holding that corroboration is irrelevant under the *Confrontation Clause*, is discussed in the Editorial Explanatory Comment to *Rule 807* at *§ 807.02[8]*.

People of Terr. of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993) : The three-year-old victim of a criminal sexual assault disclosed the assault and identified the defendant in statements to a pediatrician. The Court held that the statements to the doctor pertained to the cause of the injury and were pertinent to diagnosis and treatment and that under

the then-applicable *Ohio v. Roberts* analysis there was no *Confrontation Clause* violation because they came within a firmly rooted hearsay exception. We note that under *Crawford v. Washington* the statement seems not "testimonial," so there would be no *Confrontation Clause* issue.

[c] Rule 803(4) -- Medical Opinions

Field v. Trigg County Hosp., Inc., 386 F.3d 729 (6th Cir. 2004) : The Court held it was error in a medical malpractice action when the defendant physician testified that he had consulted unnamed doctors at a major medical center and they told him he was following appropriate treatment for the plaintiff. The rationale for *Rule 803(4)*, that statements gain reliability from the declarant's desire to receive proper care, does not apply to statements that are not made by or on behalf of the person seeking care. Thus, the statements from consulting physicians to the treating physician did not come within the exception.

Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) : The Court affirmed a judgment for the defendant in a medical malpractice suit, holding that a postoccurrence letter from the patient's family physician was not admissible under the Rule because it reflected only the patient's conclusions about the appropriate medical diagnosis, not symptoms, objective data, surrounding circumstances, or similar factual data that a reasonable physician would consider relevant in treating or diagnosing a medical condition.

Stull v. Fuqua Indus., 906 F.2d 1271 (8th Cir. 1990) : The Court held in a product liability action for injuries suffered when the plaintiff's foot became caught beneath a riding mower that a statement in a hospital record that he was "apparently" injured when he jumped off the mower after encountering wasps was properly excluded, because it may have represented the conjecture of the person filling out the record rather than a statement made by the plaintiff.

[d] Rule 803(4) -- Nonpatient Declarants

Bucci v. Essex Ins. Co., 393 F.3d 285 (1st Cir. 2005) : In an action denying insurance coverage because a nightclub patron was a victim of a battery, the Court found no error in admitting portions of medical records containing descriptions of the specific contacts that caused the patron's injuries, where the statements had been made for purposes of the patron's medical treatment by the patron, a witness to the attacks, or unidentified declarants. Citing this *Manual*, the Court declared that "[t]here is no requirement, either in the text of the Rule, or the case law, that the speaker be the patient himself," so long as the declarant's motive is to promote treatment or diagnosis of a patient. In *Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004)* , an action by a father seeking to have his daughters returned pursuant to the International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction, the mother claimed that they would be at grave risk because the father had sexually abused them. The Court found no abuse of discretion when a psychologist to whom the girls had been brought for treatment recounted statements by the mother and others repeating what the girls had said to them about the abuse. Quoting this *Manual*, it noted that statements by family members and others, made for and pertinent to treatment of an injured person, are often admitted under the Rule.

Wilson v. Zapata Off-Shore Co., 939 F.2d 260 (5th Cir. 1991) : The Court affirmed a judgment for the defendant in an action brought by a former employee alleging sex discrimination under Title VII and claims for emotional distress under the Jones Act, noting that a hospital record reporting a statement by the plaintiff's sister to a social worker recording that the plaintiff had always been a habitual liar could be admitted under the Rule. As the treating psychiatrists in this case were concerned with learning about the plaintiff's background and life-style, and it was important for them to know whether she was a credible informant, statements by her sister recorded two days after her

admission to the hospital could be appropriate and helpful background information for the psychiatrist to consider in diagnosis and treatment of the plaintiff's complaints.

Lovejoy v. United States, 92 F.3d 628 (8th Cir. 1996) : The Court affirmed a sexual abuse conviction, finding no abuse of discretion in admitting statements by the victim's mother to a nurse examining the victim a few days later that when she was awakened by noises from the bed in which the defendant and the victim were sleeping, she saw the defendant standing by the victim with an erection and the victim's underwear was down and her tee shirt was up. The declarant made the statements on behalf of her daughter, who could not communicate orally or in writing on her own, to a medical professional investigating allegations of sexual abuse, and the statements helped pinpoint the area of the body to be examined.

Moss v. Feldmeyer, 979 F.2d 1454 (10th Cir. 1992) : In a malpractice action against a physician for alleged misdiagnosis leading to death from a heart attack, the defendant testified that he had encouraged the patient to enter a hospital and that she, directly and through her husband, had refused. The Court held that the statements of the patient and her husband were properly admitted as statements of her then existing mental condition and as statements made to a physician for purposes of treatment.

[e] Rule 803(4) -- Patient's Statement of Other Doctor's Opinion

O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) : The Court noted in this personal injury action that *Rule 803(4)* allows a nontreating doctor to recite his patient's statements relevant to diagnosis, but added that "[n]owhere does the commentary on *Rule 803(4)* indicate ... whether the Rule was intended to go so far as to permit a doctor to testify to his patient's version of other doctors' opinions." The Court implied that it had serious reservations about this procedure, although in the instant case it had no need to resolve the question since the information supplied by the patient was also supplied to the doctor in the form of medical records.

Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560 (7th Cir. 1996) : Affirming summary judgment for the defendant on claims under the Americans with Disabilities Act, the Court held that the plaintiff's testimony that his physician had said he would be able to work half time was incompetent evidence of his ability to perform his job with accommodations, since *Rule 803(4)* excepts statements by a person seeking medical attention, but not statements by the person providing the medical attention, from the hearsay bar.

Bulthuis v. Rexall Corp., 789 F.2d 1315 (9th Cir. 1985) : Although it reversed a summary judgment for the defendant in a suit by a woman who claimed that her cervical cancer was a product of a drug injected into her mother during her pregnancy, the Court held that the mother's deposition testimony that her attending doctor told her that she was being given a certain drug did not fall within *Rule 803(4)*. It was a statement to, not by, the patient.

[f] Rule 803(4) -- Statements Explaining Cause or Attributing Fault

See also annotations under *§ 803.03[4][a]*.

Ramrattan v. Burger King Corp., 656 F. Supp. 522 (D. Md. 1987) : In a ruling on *in limine* motions in an automobile accident case, the Court held that a statement in the plaintiff's medical records as to the circumstances of the accident were not made for purposes of medical diagnosis or treatment and were inadmissible.

Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) : A summary judgment was granted for the defendants in a negligence suit for injuries allegedly suffered by an employee of an offshore catering service. The Court held that statements as to how the accident happened that were given by the since-deceased employee to a treating doctor were properly excluded because the particular cause of the alleged fall was not pertinent to treatment.

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) : The Court reversed a judgment for a landlord in a suit by a tenant's visitor who sustained injuries in a fall from an exterior stairway, finding it was error to admit statements in medical records indicating that the plaintiff had fallen from the stairway during a shoving or wrestling match. This was not the kind of information generally relied upon by doctors in providing treatment. In *United States v. Pollard*, n53 the Court reversed a conviction for conspiracy to distribute cocaine, holding it was error to exclude portions of medical records indicating that the defendant reinjured his previously broken arm during an arrest and suffered pain. These portions of the report were relevant to whether a confession by the defendant was voluntary. The Court also held that portions of the records identifying the arresting officer as the person who twisted the defendant's arm were not admissible.

United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) : In a prosecution for assault with intent to commit rape, the Court concluded that statements concerning the cause of vaginal injury made by the victim to a doctor were sufficiently related to treatment to qualify for admission. In *United States v. Iron Thunder*, n54 the Court reversed convictions for rape and assault with intent to commit rape because of the improper use of confessions, but it held that statements by the victim to a doctor that she had been raped were admissible under *Rule 803(4)*. They were responses to questions that were intended to shed light on her physical, emotional, and mental condition and related to treatment she sought. The Court noted that the statements did not point to the persons responsible for her condition and did not contain facts irrelevant to medical diagnosis or treatment.

[g] Rule 803(4) -- Statements for Purposes of Treatment

Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005) : Reversing a judgment for a police sergeant sued by an arrestee who claimed that her arrest violated the *Fourth Amendment*, the Court held that the plaintiff's statements to her treating physicians following her arrest, indicating that the officer pointed a gun at her, were admissible under *Rule 803(4)*. The plaintiff was suffering from pain and emotional trauma, and the statements were relevant to diagnosis and treatment of the emotional trauma. However, the plaintiff's statements to a physician describing her actions prior to the arrest were properly excluded because they were not relevant to diagnosis or treatment of any injury.

United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) , amended, 98 F.3d 1110 (9th Cir. 1996) : The defendant, charged in the kidnapping of a federal agent, offered the report of a prison psychologist to prove that he was illiterate. The Court held there was no abuse of discretion in excluding the report, since the defendant had been ordered to see the psychologist and did not believe he had any reason to do so, and therefore had no special incentive to be truthful.

United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) : On remand after the Supreme Court held that hearsay statements made when the declarant had a motive to falsify could not be admitted as prior consistent statements (see the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[4][c]*), the Court held that statements by the child sexual abuse victim identifying the defendant were properly admitted under *Rule 803(4)* when made to two physicians examining her for diagnostic purposes after an abuse complaint was made, as the identity of the abuser is reasonably pertinent in virtually every domestic sexual assault case. Similar statements in a pre-examination interview by a physician examining her for treatment of a skin rash in the vaginal area that was unrelated to any abuse were likewise admissible,

as the interview was conducted to make the child feel comfortable, which contributed to the adequacy of the examination. However, similar statements made to a Child Protective Services caseworker were not admissible under the Rule, because the caseworker did not diagnose or treat the child, but only made an investigation before referring her to other professionals. In *United States v. Joe, 8 F.3d 1488 (10th Cir. 1993)* , the Court held that a murder victim's statement to a physician identifying the defendant as her assailant was reasonably pertinent to her treatment for sexual abuse injuries. However, it was error (but harmless) to admit statements to the physician that she was afraid sometimes because the defendant had threatened to kill her, as the statement did not describe medical history, symptoms, etc., of the injury for which she was being treated. In *Moss v. Feldmeyer*, n55 a malpractice action against a physician for alleged misdiagnosis leading to death from a heart attack, the defendant testified that he had encouraged the patient to enter a hospital and that she, directly and through her husband, had refused. The Court held that the statements of the patient and her husband were properly admitted as statements made to a physician for purposes of treatment.

[h] Rule 803(4) -- Statements to Nonphysicians

Davignon v. Clemmey, 322 F.3d 1 (1st Cir. 2003) : In an action for civil rights violations and intentional infliction of emotional distress, statements regarding the distress that were made during family therapy sessions to a family therapist and social worker not licensed to practice medicine were admitted. The Court noted that "the ambit of *Rule 803(4)* is not limited to statements made to a licensed physician, but instead may encompass those made to social workers, provided that the declarant intended to procure medical treatment." In this case the plaintiffs sought counsel from the therapist to address mental health issues associated with the defendants' harassment of them. In *Navarro de Cosme v. Hospital Pavia, 922 F.2d 926 (1st Cir. 1991)* , the Court affirmed a judgment for the defendants in an action by the parents of a stillborn fetus, holding there was no error in admitting a social worker's notes written on medical records, as they recounted statements made by a plaintiff for the purpose of obtaining treatment.

United States v. Kappell, 418 F.3d 550 (6th Cir. 2005) : Affirming convictions for child sex abuse, the Court found no error in the admission of hearsay statements made by the victims to a psychotherapist/social worker. The Court noted that *Rule 803(4)* is broad enough to cover statements made to non-physicians. Furthermore, the fact that the psychotherapist was not treating the victims was not dispositive, as the exception "covers statements to non-treating persons who provide a diagnosis." The Court found that the "critical inquiry" was whether the psychotherapist undertook the interview "for the primary purpose of medical diagnosis, rather than for some other purpose, such as determining whether to notify state authorities of suspected abuse, or obtaining evidence." The Court also emphasized that the victims were informed of the importance of telling the truth to the psychotherapist.

United States v. Newman, 965 F.2d 206 (7th Cir. 1992) : The Court affirmed the sentence imposed on the defendant's fraud conviction, noting that statements to a psychologist are admissible under the Rule, as there is the same strong incentive to tell the truth in order to receive treatment as there is with statements to medical doctors.

United States v. Bear, 357 F.3d 730 (8th Cir. 2004) : The Court reversed the defendant's conviction for aggravated sexual abuse of his children because a 12-minute videotape recording of an interview of one child by a forensic interviewer was erroneously admitted. The interview took place after the children had been taken into custody by the department of social services; it was conducted at a center for child evaluation before a physical examination by a doctor. In it, the child (aged three years and ten months) identified her abuser and provided descriptive details of the abuse, violated the defendant's confrontation rights. The Court found there was insufficient evidence that the child understood that the inquiry into identity was important to diagnosis and treatment; there was no evidence that the child was aware she had an injury or that she understood that telling the truth was important to the treatment of that injury. In *United States v. Balfany, 965 F.2d 575 (8th Cir. 1992)* , more than six months after alleged abuse, the child victim was examined by a physician and interviewed by a psychologist and a social worker, all three of whom gave testimony

recounting the child's descriptions of the assaults and identification of the defendant as her attacker. The Court held the testimony was properly admitted for purposes of diagnosis and treatment, even though a general practitioner with little experience in abuse cases had previously examined the victim and found no evidence of abuse. The later examinations by experienced specialists were not simply designed to generate evidence for trial and were not shown to be untrustworthy. See also *United States v. Yellow* n56(a clinical psychologist was permitted to testify to statements made during diagnosis and treatment of a 13-year-old sister and her disabled brother, who were raped by the defendant).

People of Terr. of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993) : The three-year-old victim of a criminal sexual assault disclosed the assault and identified the defendant in statements to a social worker. The Court held that the statements to the social worker were aimed only at ensuring the child's safety, not treatment, so they did not come within the medical statements exception; furthermore, there was no affirmative reason to believe the statements were particularly trustworthy. The error in admitting the statements to the social worker was harmless, however.

United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) : On remand after the Supreme Court held that hearsay statements made when the declarant had a motive to falsify could not be admitted as prior consistent statements (see the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[4][c]*), the Court held that statements by the child sexual abuse victim identifying the defendant made to a Child Protective Services caseworker were not admissible under the Rule, because the caseworker did not diagnose or treat the child, but only made an investigation before referring her to other professionals.

[i] Rule 803(4) -- Summaries of Medical History

Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) : The Court affirmed a judgment for an African-American plaintiff who alleged racial harassment in the workplace. The Trial Judge admitted medical summaries prepared by psychologists contacted by the plaintiff after leaving the defendant's employment under *Rule 803(4)*, and the Court held that the collection of a medical history was a routine part of a medical diagnosis.

[5] Rule 803(5) -- Recorded Recollection

[a] Rule 803(5) -- Contemporaneous Recording Required

United States v. Green, 258 F.3d 683 (7th Cir. 2001) : In a trial for a crack cocaine distribution conspiracy, an investigator was permitted to read his notes of interviews with the defendant and with a cooperating witness. The Court held that the notes were properly admitted as past recollection recorded, even though they were not made until 11 days after the interview with the defendant, since there was no showing of circumstances making it likely that the declarant's memory was inaccurate and the delay was not so long as to make accurate recall unlikely.

United States v. Sollars, 979 F.2d 1294 (8th Cir. 1992) : The Court affirmed convictions for arson, holding there was no error in permitting the government to play a tape recording in which a defendant's stepdaughter told a BATF agent two months after the fire that she saw the defendant on the building's roof that night. The stepdaughter remembered at trial talking to the agent but could not remember what she told him, and the statement was made while her memory was still fresh.

[b] Rule 803(5) -- Diaries

Greger v. International Jensen, Inc., 820 F.2d 937 (8th Cir. 1987) : Although the Court reversed a judgment

awarding compensatory and punitive damages to property owners who filed a nuisance action against a manufacturing plant, it held the Trial Judge properly permitted one plaintiff to read a portion of a diary into the record, since the diary qualified as past recollection recorded.

[c] Rule 803(5) -- Expert's Report

United States v. Marshall, 532 F.2d 1279 (9th Cir. 1976) : Affirming the defendant's conviction for possession of cocaine, the Court upheld the admission of a chemist's report identifying the white powder found in a codefendant's apartment as cocaine. The police chemist testified that he did not have any independent recollection of the test that he performed on the powder, and the Trial Judge permitted the introduction of the report as past recollection recorded. Citing *Rule 803(5)*, the Court stated that the introduction of a report when a witness acknowledges it as an accurate recordation of events and one that was prepared "contemporaneously" with the event does not violate the right of confrontation protected by the *Sixth Amendment*.

[d] Rule 803(5) -- Foundation

Parker v. Reda, 327 F.3d 211 (2d Cir. 2003) : Affirming a judgment for corrections officers sued by an inmate who alleged use of excessive force, the Court held that a memorandum prepared by a corrections sergeant was properly permitted to be read to the jury. The memorandum bore the sergeant's signature and the date of the incident, and the sergeant testified that he wrote it when he had personal knowledge and that it accurately reflected his knowledge. The fact that the officer did not specifically remember the underlying event or writing the memorandum was not disqualifying as long as the witness could testify to his practice for preparing such memoranda.

United States v. Mornan, 413 F.3d 372 (3d Cir. 2005) : During a trial for mail and wire fraud growing out of a cross-border telemarketing scheme, the government offered videotaped deposition testimony of a woman who had worked for her cousin at his check-cashing service, which had allegedly been used by the defendant to cash money orders sent in response to the scheme. During the woman's testimony, she claimed that she no longer remembered details of her employment with her cousin. The government then directed her attention to an earlier statement she had given to the prosecutor and a Postal Inspector, in which she identified the defendant as the person who had cashed money orders. She asserted, however, that she did not remember the particulars of that statement either, attributing her memory loss to back and neck injuries suffered in an automobile accident. Affirming, the Court held that the Judge's rejection of the statement as a past recollection recorded was correct, since there was no evidence that the witness made the record containing the statement or that she had adopted the record after reviewing it. However, there was no abuse of discretion in admitting the statement as a prior inconsistent statement.

United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002) : The Court affirmed a bank embezzlement conviction, finding no error in the exclusion of a bank memo about a shipment of food stamps from one branch to another. The head teller of the recipient bank testified that he recalled the event that took place, so the memo was not admissible as past recollection recorded. See also *United States v. Porter, 986 F.2d 1014 (6th Cir. 1993)* , discussed in the Editorial Explanatory Comment, *§ 803.02[6][d]*.

United States v. Cash, 394 F.3d 560 (7th Cir. 2005) : The Court affirmed a conviction for threatening a federal employee, finding no error when the employee was permitted to quote the defendant's threats as she had recorded them during telephone conversations with him. The foundation for past recollections recorded was satisfied by the witness' testimony regarding each of the defendant's statements that he made it directly to her during their telephone conversation, that she could not remember the statement verbatim, and that she had recorded the defendant's exact

words during the course of the conversation. In *United States v. Severson, 49 F.3d 268 (7th Cir. 1995)* , to support their motion for a new trial in a marijuana prosecution, the defendants offered a memorandum dictated by an Assistant U.S. Attorney recounting a conversation with a detective, who indicated that she had observed the arresting officers threaten the defendants and induce them to cooperate by false promises not to prosecute. At a hearing on the motion, the detective denied making the statements and the AUSA had no independent or refreshed recollection of the conversation. The Court affirmed denial of the motion, holding that the memorandum would not be admissible as substantive evidence since the detective never adopted the statements, denying both their accuracy and having made them. In *United States v. Schoenborn*, n57 the Court held it was error (but harmless) to admit as past recollection recorded a statement by a witness to a prison assault, where the witness had refused to sign the statement when the FBI agent who took it showed it to him and had disavowed its accuracy on the stand.

United States v. Benson, 961 F.2d 707 (8th Cir. 1992) : The Court held it was error (but harmless) when the prosecutor in a kidnapping prosecution read into evidence reports by an FBI agent and a probation officer allegedly recounting statements made by the defendant. The declarants did not testify and the defendant maintained he had no recollection of what he said to them, so the requirement that the records be made or adopted by the witness had not been met.

[e] Rule 803(5) -- Fresh in Memory When Statement Made

United States v. Smith, 197 F.3d 225 (6th Cir. 1999) : In a prosecution of a scheme to defraud insurance companies by staging fake accidents, the Court held there was no abuse of discretion in admitting a statement given by a cooperating witness to a detective 15 months after the incident described in the statement. The Rule has no contemporaneity requirement, the defendant showed no reason why the matter was not fresh in the witness' memory when the statement was made, and the Rule's requirements were otherwise satisfied.

United States v. Patterson, 678 F.2d 774 (9th Cir. 1982) : Upholding a conviction for receiving stolen property, the Court approved the admission of a transcript of a witness' grand jury testimony when the witness had memory problems at trial. Although the grand jury testimony related a conversation between the witness and the defendant that had occurred ten months earlier, the Court said that the incident was sufficiently fresh to make the grand jury testimony prior recollection recorded. In our view, this case stretches the exception to the breaking point. The witness admitted hostility towards the defendant at the time he testified before the grand jury. Ten months had passed between the conversation and the testimony, there was no showing that anything in the interim had reminded the witness about the conversation, and the witness was evasive at trial about what he remembered. The fact that the grand jury transcript accurately recorded what the witness said does not signify that the witness testified before the grand jury while his memory of the underlying events was fresh.

[f] Rule 803(5) -- Intoxicated Declarant

United States v. Edwards, 539 F.2d 689 (9th Cir. 1976) : A witness in a rape prosecution had been with the defendant and the victim shortly before the rape and gave a statement to government investigators about the incident the next day. At trial the witness had no recollection of the matter, so the statement was introduced under *Rule 803(5)*. Although the witness was quite drunk when he made the statement, the Court found no error, since he affirmed in the statement and testified at trial that the statement accurately reflected his recollection at the time it was made.

[g] Rule 803(5) -- Invocation of Self-Incrimination Privilege

In re Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985) : Affirming a judgment absolving manufacturers from liability for damages in an antitrust case, the Court held that the Trial Judge properly rejected the plaintiffs' attempt to introduce an interview conducted by government attorneys with a witness pursuant to an immunity grant as substantive or impeachment evidence. The plaintiffs deposed the witness and used his deposition as evidence, but at a second deposition the witness invoked his privilege against self-incrimination. The Court reasoned that the interview statements could not be used under *Rule 803(5)* because there was no showing that the witness had memory problems or that the interview correctly reflected his memory.

[h] Rule 803(5) -- Memory Problems

Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998) : Vacating in part a judgment for the plaintiff in a Title VII race discrimination case, the Court found, *inter alia*, that the plaintiff was erroneously permitted to introduce a diary recording his version of various episodes at issue in the case. The plaintiff did not state that he could not recall the events recorded -- in fact, he gave testimony recalling those events in detail -- so the proper foundation was not laid for the diary as past recollection recorded. In any event, the diary was inadmissible as an exhibit unless offered by the adverse party. The errors were harmless, however. In *United States v. Micke*, n58 the Court held that an affidavit of a government witness was not admissible as recorded recollection absent a showing that the witness could not recall matters.

United States v. Ray, 768 F.2d 991 (8th Cir. 1985) , supplemented, 777 F.2d 423 (8th Cir. 1985) : In a prosecution for failure to appear, the Court found that a transcript of a lawyer's statements in Court concerning a telephone call made four days earlier was admissible where the lawyer testified that the transcript was accurate and he had no present recollection of the call.

United States v. Felix-Jerez, 667 F.2d 1297 (9th Cir. 1982) : In a prosecution for prison escape, an interpreter, who was present while a marshal interrogated the Spanish-speaking defendant in prison, testified that he interpreted accurately the marshal's questions and the defendant's answers, although he had no present recollection of what was said. The marshal, who testified that he made accurate notes of his questions and the translated answers and later typed them, was not asked whether he had an independent recollection of the questions and answers. The Court held that reading the typewritten summary was improper, since the defendant never adopted the statement and the government did not lay the proper foundation for past recollection recorded of the marshal.

[i] Rule 803(5) -- Not Receivable as Exhibit

Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914 (7th Cir. 2002) : Affirming a judgment for the defendants in an action for misappropriation of trade secrets, fraud, and breach of contract, the Court found no error in the exclusion of two memoranda written by an employer of the plaintiff which were offered as prior recollection recorded, noting that the Rule provides that documents qualifying as past recollection recorded may be read but not introduced into evidence.

[j] Rule 803(5) -- Personal Knowledge

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996) : In an inmate's § 1983 action against prison guards, the defendants offered a "Use of Force" report prepared by one of the guards purporting to describe the beginning of the altercation, although she testified that she had not seen the incident until she heard a scream and observed another guard holding his genitals. The Court said the report was not admissible under *Rule 803(5)* because the witness did not have personal

knowledge of the start of the incident.

[k] Rule 803(5) -- Police Reports

Newton v. Ryder Transp. Servs., Inc., 206 F.3d 772 (8th Cir. 2000) : Reversing a judgment for the lessee of a truck who alleged that the lessor negligently failed to complete repairs on the truck, the Court held it was error to refuse to permit the defendant to rely upon deposition testimony of a police officer. The officer was unable to recall the accident but read into the record his accident report, which referred to the plaintiff's falling asleep behind the wheel while wearing a seatbelt. The officer testified that there were no other witnesses and that he would not have put the plaintiff's statement in the block in his report where he put it unless the statement was made by the plaintiff. The officer testified that he prepared and signed the report on the day of the accident and that it was accurate to the best of his knowledge.

[l] Rule 803(5) -- Refreshing Recollection

United States v. Casoni, 950 F.2d 893 (3d Cir. 1991) : The Court held, in a racketeering prosecution, that it was an abuse of discretion (but harmless error) to admit an attorney's interview notes to prove a witness' prior consistent statements. Had the attorney been unable to testify fully after refreshing his recollection with the notes, they might have been read to the jury under the Rule, but it was an abuse of discretion to admit them where the attorney was able to testify fully about their contents after refreshing his recollection.

[m] Rule 803(5) -- Two-Witness Voucher

United States v. Green, 258 F.3d 683 (7th Cir. 2001) : In a trial for a crack cocaine distribution conspiracy, an investigator was permitted to read his notes of interviews with the defendant and with a cooperating witness. The Court held that the notes were properly admitted as past recollection recorded. The included statements of the defendant and the cooperating witness were admissible without being adopted by the declarants, since they were independently admissible as a party-admission and a prior consistent statement, respectively. In *United States v. Williams, 951 F.2d 853 (7th Cir. 1992)* , to prove that the defendant had called the post office to inquire about a parcel that contained cocaine, a postal clerk's statement to inspectors was admitted under the Rule to allow the clerk to identify the label number provided by the caller. Because the clerk was vacationing when the statement was prepared, the label number had been written in the statement by the clerk's supervisor from the clerk's notepad, and the clerk did not compare the notepad and the statement. Although it recognized that when one person perceives an event and the other records it, ordinarily the former must testify to the accuracy of his report and the latter to the accuracy of his recordation, the Court held there was no abuse of discretion here even though the supervisor did not testify. The record on the notepad would be admissible as a recorded recollection and the statement filled in by the supervisor was admissible under *Rule 1004* as a copy used to prove the contents of a lost or destroyed original writing. In *United States v. Lewis*, n59 the Court affirmed a conviction for a cocaine conspiracy, holding there was no abuse of discretion in admitting as past recollection a recorded statement given by a fellow inmate to an FBI agent. Although the six-month delay between the events referred to and the statement was significant, it was not so long that the declarant could not have accurately recalled the events. Although the 15-month interval between the statement and the time the declarant said he told the agent the truth essentially meant that the trier was forced to rely totally on the agent's rendering of what the declarant said, there was no abuse of discretion since the agent vouched for making an accurate recording, there were no indications the report was inaccurate, and the substance was corroborated by other evidence.

United States v. Hernandez, 333 F.3d 1168 (10th Cir. 2003) : To prove the serial number of a gun in an illegal firearm possession case, the government offered the contents of two memoranda and the testimony of three witnesses,

A, B, and *C*. When *C* had heard that her brother was keeping a gun at *A*'s house, she called *A* to ask for the serial number. *A* refused, but later called *B* and asked her to write down the number as *A* read it off the gun. Sometime later, *C* again called *A* to ask for the number, and *A* agreed to provide it. However, by that time the gun was no longer at *A*'s house, so *A* called *B* and asked her to recite the number back to her. After *B* did this, *A* called *C* and recited the number to her; *C* wrote down the number as *A* was saying it. At trial the three all testified that they performed their roles accurately: *A* said she accurately read the number from the gun to *B*, and that she accurately recited to *C* what *B* had told her. *B* testified that she accurately wrote down the number from *A*, and accurately read that number back to *A* in the later call. *C* testified that she accurately wrote down the number as *A* recited it to her. When *B*'s and *C*'s notes were read into evidence, the defendant objected that *A*, who had observed the number on the gun, never confirmed the notes, so they had not been "adopted" by the observer, as *Rule 803(5)* requires. Affirming, the Court held that the testimony of the three witnesses provided sufficient indicia of reliability to bring the notes within the ambit of the Rule.

[n] Rule 803(5) -- Weight

United States v. Williams, 571 F.2d 344 (6th Cir. 1978) : After a witness testifying at trial indicated some lapses of memory, the Trial Judge permitted the government to introduce a statement made by the witness to a Secret Service agent 15 months prior to trial. Although the defendant, in cross-examining the witness about the statement, elicited testimony that the witness did not think that his prior statement incriminated the defendant, the Court held that once the Trial Judge found from the testimony of the witness and the Secret Service agent that the statement had been shown to the witness, who subscribed it when made, the statement was admissible. The defendant's cross-examination went to the weight that the jury would give the evidence, not to its admissibility.

[6] Rule 803(6) -- Records Of Regularly Conducted Activity

[a] Rule 803(6) -- Affidavits

United States v. Ismoila, 100 F.3d 380 (5th Cir. 1996) : The Court held, in a credit-card fraud prosecution, that affidavits and other notices to the issuing banks from credit card holders indicating that their cards had been stolen and charges were not authorized were not admissible as business records, as it was not the holders' business to fill out the affidavits, and the holders had no business duty with respect to the banks.

[b] Rule 803(6) -- At or Near the Time

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) : The Court affirmed convictions for wire fraud and other offenses. It upheld the exclusion of a memorandum written by one defendant for a superior, finding that the document was not a business record, because it was not made in the regular practice of the business and it summarized events that had taken place some time before.

[c] Rule 803(6) -- Audit Reports

United States v. Polishan, 336 F.3d 234 (3d Cir. 2003) : Affirming the conspiracy and securities fraud convictions of a business executive, the Court, noting a division on the question whether the document would be admissible as a business record, found no plain error in the admission of a 369-page audit committee report which concluded that the companies had overstated their pre-tax net income for three years by more than $75 million.

[d] Rule 803(6) -- Bills and Invoices

Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424 (5th Cir. 1980) : In an action brought by an insured against the insurer to recover for damage to a cargo, the Court held that a clean bill of lading was admissible as a business record.

Redken Labs. v. Levin, 843 F.2d 226 (6th Cir. 1988) : The Court held sales slips inadmissible where they were undated, did not indicate to whom goods were sold, and were not in the possession of the regular custodian, and the company did not save all the slips.

Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998) : The Court vacated in part a judgment for the plaintiff in a Title VII race discrimination case, on the ground that hospital bills had been erroneously admitted solely on the basis of the plaintiff's testimony. Although the Rule does not require a foundation witness who prepared the record or who has personal knowledge of the entries in the record, the witness must have knowledge of the organization's regular business practices in making and keeping the record, which the plaintiff did not have.

United States v. Henneberry, 719 F.2d 941 (8th Cir. 1983) : The Court found the testimony of a warehouse manager sufficient to lay the foundation for the introduction of bills of lading as business records. In *In re King Enterprises*,, n60 an action by a bankrupt construction company against an airplane manufacturer in connection with a contract for construction of an aircraft hangar, the Court held that it was proper to admit invoices that the construction company received from businesses that supplied materials and services for work performed.

NLRB v. First Termite Control Co., 646 F.2d 424 (9th Cir. 1981) : In order to establish an interstate commerce nexus, the Board offered a railroad freight bill into evidence to prove the amount of interstate business done by the defendant company. The bill was hearsay and inadmissible as a business record, however, because the company's bookkeeper could not lay a foundation for the railroad's business records.

United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977) : The Court upheld the introduction of a freight bill containing penciled notations since the notations were made in the regular course of business and were adopted as part of the bill by the business.

United States v. Atchley, 699 F.2d 1055 (11th Cir. 1983) : Affirming convictions arising out of a scheme to destroy property and to defraud an insurance company, the Court found that telephone company toll records were properly admitted as business records when they were the company's microfiche copies and the originals were sent to the customers.

[e] Rule 803(6) -- Computerized Records

United States v. Loney, 959 F.2d 1332 (5th Cir. 1992) : In a prosecution of a scheme to defraud a frequent flyer program, the Court held that a report based on a search of the airline's frequent flyer records was properly admitted. Although the report was prepared in anticipation of the litigation, the underlying data it summarized was kept in the regular course of business. In an embezzlement prosecution, *United States v. Hutson*, n61 the Court affirmed the admission of computerized bank records, finding that the records were properly authenticated, even though the custodian who testified had not personally entered the data and could not attest to their accuracy. The Court observed that the printouts indicated the date of each banking transaction, which was sufficient to show that the entries were made at or near the time of relevant events, and it rejected the defendant's argument that, since she had manipulated the

records, they were untrustworthy. In *United States v. Young Bros.*, n62 the Court upheld the company's convictions for bid-rigging and mail fraud, rejecting athe company's claim that computer-generated business records are less reliable than other kinds of records because they depend on the accuracy of the software as well as on the person feeding data to the computer. See also *United States v. Sanders* n63(computerized records of the Texas Department of Human Resources, representing reimbursement claims filed by the defendant and showing payment of those claims, were properly admitted). In *Capital Marine Supply v. Thomas*, n64 a maritime action to secure judgment upon a defaulted note, the Court found that the balance due on the promissory note was adequately proved through testimony of the plaintiff's manager of industrial receivables, who testified concerning computerized business records prepared by an accounting clerk working under his supervision. The Court said that "[c]omputer business records are admissible if (1) they are kept pursuant to a routine procedure designed to assure their accuracy, (2) they are created for motives that tend to assure accuracy (e.g., not including those prepared for litigation), and (3) they are not themselves mere accumulations of hearsay." See also *United States v. Vela* n65(telephone company records were properly admitted in a drug case, even without testimony that the computers were in proper working order).

United States v. Salgado, 250 F.3d 438 (6th Cir. 2001) : In the prosecution of a drug conspiracy, the Court found no error in the admission of a computerized printout of telephone toll records that tended to prove a connection between the defendants and the conspiracy. The foundation was sufficiently provided by a witness who testified that the telephone company relied on these computer-generated records to ensure the accuracy of its billing; there was no need to present evidence of any programming features in place to guarantee the accuracy of the records, nor was there a requirement that the foundation witness be a computer programmer, so long as the foundation witness simply demonstrates familiarity with the recordkeeping system.

United States v. Fujii, 301 F.3d 535 (7th Cir. 2002) : The Court affirmed convictions for smuggling aliens, finding no abuse of discretion in admitting printouts of airline check-in and reservation records. Even though the printouts themselves were prepared specifically for trial and were not kept in the ordinary course of business, there was sufficient evidence that the computerized records from which the printouts were derived satisfied the business records exception. In *United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990)* , the Court affirmed convictions for a heroin importing and distribution conspiracy, holding that there was sufficient foundation for computerized records regarding wiretapped telephone calls. In *United States v. Croft*, n66 the Court held that computerized payroll data were admissible as business records, where printouts were made at or near the time that payments were made, and a university made and kept the records in the course of its business.

United States v. Scholle, 553 F.2d 1109 (8th Cir. 1977) : In a drug conspiracy case, the Court approved the admission of a computer printout prepared by the DEA revealing the physical characteristics of drugs seized and tested in eight regional laboratories across the country, offered in order to show that a rare adulterant was used in the instant case in cutting cocaine, and thus that the cocaine sold at the distribution end of the conspiracy was the same cocaine acquired at the importation end. The Court found that the evidence was relevant and admissible as a business record. It emphasized, however, that not only must the requirements of the Rule have been satisfied, "but in addition the original source of the computer program must be delineated, and the procedures for input control including tests used to assure accuracy and reliability must be presented."

Sea-Land Service, Inc. v. Lozen Int'l, LLC, 285 F.3d 808 (9th Cir. 2002) : Reversing summary judgment for a carrier on a claim by a shipper seeking damages for the carrier's failure to deliver a shipment in a timely manner, the Court held that the bills of lading of the carrier were properly admitted as business records, even though the physical documents were not generated when the contract was entered into but rather were generated later from computer records. The bills of lading "were produced from the same electronic information that *was* generated contemporaneously," and they were the type that would have been issued in the regular course of business had the

shipper not requested that the transaction be performed electronically. In *United States v. Catabran*, n67 the Court held that a computer printout of a business ledger kept via computer was admissible and that a proper foundation had been laid. Although the records were not kept for inventory purposes, the printouts provided accurate inventory figures. Errors in the records attributable to incorrect data entry or the operation of the computer program went to weight, not admissibility. In *United States v. Bonallo*, n68 the Court held that evidence of alterations in computerized business records was properly received, since the records were made by a business and were offered to prove that the defendant was responsible for their alteration. In *United States v. Miller*, n69 the Court affirmed criminal antitrust convictions, holding that a custodian could lay the foundation for computerized records even though he had no knowledge of the maintenance and technical operation of the computer. See also *Kennedy v. Los Angeles Police Dep't* n70(computer printouts of time records kept by the plaintiff's attorney were admissible as business records in determining an award of attorney's fees); *United States v. Linn* n71(a hotel's director of communications could lay the foundation for a computer printout recording telephone calls, even though he was not a computer programmer).

United States v. Hernandez, 913 F.2d 1506 (10th Cir. 1990) : Affirming a conviction for firearms offenses while an illegal alien, the Court rejected the defendant's argument that a computer printout of INS records prepared for the trial was not within the exception. So long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility.

[f] Rule 803(6) -- Diaries

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants. The Court found that the Trial Judge had improperly excluded minutes of association meetings, and diaries kept on a regular basis were found to be admissible.

United States v. Ramsey, 785 F.2d 184 (7th Cir. 1986) : The Court found error in the admission of occasional jottings on desk calendars as business records in a prosecution for mail and wire fraud. The entries were not made with sufficient regularity to satisfy the hearsay exception. But, the error was harmless because the entries could have been read to the jury as prior recollection recorded. In *United States v. McPartlin*, n72 the Court affirmed convictions growing out of a bribery scheme involving local officials, upholding the introduction of diaries compiled by an unindicted coconspirator who testified as a prosecution witness. The desk calendar appointment diaries qualified as business records, even though several entries were made out of sequence and even if no one relied on them other than the person who prepared them.

[g] Rule 803(6) -- Electronic Mail

Monotype Corp. v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994) : Affirming a judgment for a designer accused of breaching a license dealing with typefaces, the Court held there was no error in excluding electronic mail from an employee of Microsoft Corp. to a superior. The email contained some derogatory remarks and, according to the Court, "is far less of a systematic activity than a monthly printout," which had been admitted in *United States v. Catabran, 836 F.2d 453 (9th Cir. 1988)* .

[h] Rule 803(6) -- Estimates

United States v. Scholl, 166 F.3d 964 (9th Cir. 1999) : As proof of the defendant's gambling activities in his trial for tax fraud and structuring, the government offered reports prepared by casinos' floor workers keeping track of cash or chips that the gambler has when he arrives at the table, recording the average bet made by the gambler, and, to the extent possible, keeping track of how much money the gambler is winning or losing. The Court held that since the records were made at the time of the activity they recorded by a person with knowledge, were kept in the ordinary course of business, and were made as part of the regular practice of the casinos' operations, any inaccuracies went to the weight of the evidence and not its admissibility.

[i] Rule 803(6) -- Financial Statements

Ollag Constr. Equip. Corp. v. Manufacturers & Traders Trust Co., 665 F.2d 43 (2d Cir. 1981) : Affirming the judgment below in a bankruptcy action, the Court held that financial statements were business records of the bank since they were integrated into its records and relied upon in the bank's day-to-day operations.

United States v. Fawaz, 881 F.2d 259 (6th Cir. 1989) : Affirming a tax evasion conviction, the Court held that a balance sheet summarizing the defendant's financial condition that was prepared and used in the regular course of an accountant's business from information provided by the defendant had been properly admitted as a business record.

[j] Rule 803(6) -- Foreign Records

United States v. Doyle, 130 F.3d 523 (2d Cir. 1997) : The Court held in a prosecution for illegal exportation of fuel pumps to Libya that official certifications were sufficient to authenticate copies of privately-generated, as well as public, documents recorded in the Maltese Customs Department, but that there was insufficient showing that the procedures by which the documents were made, recorded, or monitored assured sufficient reliability to permit their admission under a hearsay exception. In an insurance coverage action arising out of the alleged disappearance of coffee from warehouses in Mexico, *In re Balfour MacLaine Int'l Ltd., 85 F.3d 68 (2d Cir. 1996)* , the Court held warehouse receipts issued for the coffee were admissible as business records of the amount of coffee received, even though they were contradicted by other "receiving reports," since there was evidence that they were based on information received from warehouse employees at the time of delivery. In *Raphaely Int'l, Inc. v. Waterman S.S. Corp.*, n73 the Court affirmed a shipper's claims for negligent damage to cargo, holding that inspection documents issued by a company that had been nationalized by the Sudanese government were properly admitted as business records upon a foundation provided by an employee of the Swiss company for which the Sudanese company was acting as agent.

[k] Rule 803(6) -- Foundation

[i] Rule 803(6) -- Circumstantial Evidence or Judicial Notice

United States v. Mendel, 746 F.2d 155 (2d Cir. 1984) : The Court sustained convictions for making false representations to the United States Department of Agriculture, as it found that business records prepared by a slaughterhouse were properly admitted even though no employee of the business testified. The defendant company's own records corroborated the entries on the business records.

FDIC v. Staudinger, 797 F.2d 908 (10th Cir. 1986) : Affirming a judgment upon a directed verdict for the FDIC in an action to collect on a note, the Court found an adequate foundation for the admission of bank records. It observed that the author of records need not testify and indicated agreement with a commentary's suggestion that a foundation for admissibility of a business record could be predicated upon judicial notice of the nature of the business and the nature of the records.

[ii] Rule 803(6) -- Foundation -- Custodian or Qualified Witness

[A] Rule 803(6) -- Civil Cases

Belber v. Lipson, 905 F.2d 549 (1st Cir. 1990) : The Court affirmed a judgment for the plaintiff in a medical malpractice action, holding that medical records offered by the defendants were properly excluded because the custodian had received them from prior counsel, not the purported maker, and there was no other qualified witness who could establish the required foundation. In *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, n74 a dispute between a dealership and an auto manufacturer, the Court held that the president and sole stockholder of the dealership was a qualified witness for purposes of laying the foundation for business records, since he could explain and be cross-examined concerning the manner in which the records were made and kept.

Phoenix Assocs. III v. Stone, 60 F.3d 95 (2d Cir. 1995) : Reversing a judgment for the defendant in an oral contract dispute between a partnership and a business associate, the Court held that a record generated by an investment partnership's employees upon the receipt of transfer of funds made by the business associate was admissible as a business record. Concluding that an accountant for the partnership was qualified to lay a foundation, the Court emphasized that to be qualified within the meaning of the Rule, a witness need not have knowledge of which employee filled out a particular record nor need he have prepared the records; the witness need only testify that it was the business entity's regular practice to get information from the person who created the document.

Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567 (6th Cir. 1999) : Affirming a judgment for the seller of ductile iron pipe who was sued for breach of contract by the buyer, the Court held there was no error in the admission of FedEx delivery records generated from FedEx's computer system after testimony by the manager of a FedEx office in Ohio regarding the company's records system. Although the manager was not a custodian of the records, he fell within the term "other qualified witness," since "[a]ll that is required of the witness is that he or she be familiar with the record-keeping procedures of the organization."

Collins v. Kibort, 143 F.3d 331 (7th Cir. 1998) : The Court vacated in part a judgment for the plaintiff in a Title VII race discrimination case, on the ground that hospital bills had been erroneously admitted solely on the basis of the plaintiff's testimony. The Rule does not require a foundation witness who prepared the record or who has personal knowledge of the entries in the record, but here the plaintiff did not have knowledge of the hospital's regular business practices in making and keeping the record, which is required for the foundation.

Latman v. Burdette, 366 F.3d 774 (9th Cir. 2004) : The Court affirmed a judgment holding that the Bankruptcy Court had erroneously admitted bank records submitted as an attachment to a supplemental declaration of the Trustee's counsel. Although a witness who only understood the record-keeping system could be an "other qualified witness" providing the foundation for business records, the Trustee's counsel here had no regular connection to the bank and no knowledge of the account except that gained by hearsay. In *Miller v. Fairchild Indus.*, n75 the Court held that the defendant's CFO was a "qualified person" to testify in Title VII case that termination clearance documents were regularly prepared when an employee turns in his security badge and that such documents offered in this case were prepared by the company's personnel department and signed by the department of finance, of which he was in charge. In *NLRB v. First Termite Control Co.*, n76 a railroad freight bill offered to show interstate commerce nexus was held inadmissible as a business record because the defendant company's bookkeeper could not lay a foundation for the railroad's business records.

Allen v. Safeco Ins. Co., 782 F.2d 1517 (11th Cir. 1986) , *vacated in part on other grounds*, *793 F.2d 1195 (11th Cir. 1986)* : Affirming a judgment that a fire that destroyed a home was accidental, the Court held that a fire marshal's testimony concerning a lab report was sufficient to lay a foundation for the report, even though the marshal did not prepare it, since the marshal's office relied upon the reports, they were prepared by the state agency in the regular course of business, and there was no indication that they lacked trustworthiness.

Conoco, Inc. v. Department of Energy, 99 F.3d 387 (Fed. Cir. 1996) : Although the Court vacated a summary judgment for DOE in an action for restitution of crude oil pricing overcharges, the Court held that a DOE auditor could lay the foundation for admission of certain oil company records based upon his experience with the types of documents that oil companies routinely maintain and the procedures used to prepare those documents.

[B] Rule 803(6) -- Foundation -- Custodian or Qualified Witness -- Criminal Cases

United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003) : In a trial for health care fraud, an anesthesiologist testifying for the government explained how he prepared charts and reports in which he disguised the true nature of the procedures employed by the defendant and sent them to a record-keeping business operated by his father. The government obtained the records from the business, and an FBI agent used the code supplied by the anesthesiologist to create a summary chart of the disguised procedures contained in the records. The Court held that the anesthesiologist was qualified to lay a foundation for the records as business records, and the father's testimony was not required. The anesthesiologist designed the procedures for maintaining the records and observed them being implemented.

United States v. Console, 13 F.3d 641 (3d Cir. 1993) : The Court affirmed RICO convictions of attorneys and a physician for a scheme to defraud insurance companies, holding records of the physician were sufficiently shown to be business records by the testimony of a witness familiar with the office's record keeping system, even though she was not the custodian of the records.

United States v. Parsee, 178 F.3d 374 (5th Cir. 1999) : The Court affirmed narcotics convictions, finding no abuse of discretion in admitting certain business records that had been generated by a company different from the one by which they were offered at trial. Where Enterprise Leasing Company of Houston generated the records, it was sufficient that the witness from Enterprise Leasing Company of New Orleans testified that the records in all Enterprise offices nationwide are generated and maintained in the same manner, and that the witness understood and could explain the system, point out any errors, and respond meaningfully on cross-examination. Likewise, regional telephone operating companies could provide a sufficient foundation for records containing information collected and generated by long distance carriers. Affirming convictions in an extortion prosecution, *United States v. Box, 50 F.3d 345 (5th Cir. 1995)* , the Court held that a County Attorney, who could testify that records came from his office and vouch that the requirements of *Rule 803(6)* were met, was properly permitted to provide the foundation for the records, even though he did not hold the position when the records were made. In *United States v. Iredia*, n77 the Court held that bank employees could lay the foundation for records, even though they could not attest personally to their accuracy.

United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003) : Although it reversed a conviction for crack cocaine distribution because other crimes evidence was erroneously admitted, the Court found no abuse of discretion when express mail package labels were admitted as business records. The postal inspector who provided the foundation did not have knowledge of the record keeping system at the post office where the packages were received, but he did have familiarity with the record keeping procedures of the U.S. Postal Service and he had instructed the local USPS supervisor to maintain the very records in question and had instructed the supervisor about how those records were to be maintained. Thus, the inspector was an "otherwise qualified witness." In *United States v. Laster, 258 F.3d 525 (6th Cir.*

2001) , the defendant was charged with drug offenses after ordering a component of methamphetamine from a chemical company using his employer's company name without its permission. The Court held that records of the chemical company were not admissible under *Rule 803(6)* because the foundation witness, a detective for a state drug task force, had no personal knowledge of or any familiarity with the company's record-keeping practices. In the prosecution of a kickback scheme involving a gambling casino, *United States v. Dakota*, n78 the Court found it was error (but harmless) to admit documents seized from the office of the brother of one of the defendants as business records. The witness offering foundation testimony was a law enforcement agent who was present when the documents were seized and who had analyzed them, but who did not have knowledge of the recordkeeping procedures, "and was certainly not the custodian of those records for the business." In *United States v. Weinstock*, n79 a prosecution of a podiatrist for defrauding Blue Cross, the government introduced a Physician Practice Profile, based on data from the Blue Cross computers, which listed all the similar procedures performed by the defendant and other participating podiatrists in the community. Affirming, the Court found no error when a Blue Cross fraud investigator was permitted to give the foundation for the evidence, since he was acquainted with Blue Cross' use of the data and the procedures followed to ensure its reliability. Affirming fraud convictions in *United States v. Hathaway*, n80 the Court held that the government properly laid the foundation for admission of business records through the testimony of an FBI agent. Since the agent was familiar with the record-keeping system, the Court stated there was no reason why he could not lay the requisite foundation.

United States v. Spiller, 261 F.3d 683 (7th Cir. 2001) : Affirming a conviction for distributing crack cocaine, the Court held that handwritten ledgers were not admissible as business records because the government experts who introduced them did not have personal knowledge that they had been kept in the ordinary course of business or were otherwise trustworthy. However, there was sufficient evidence connecting the ledgers to the defendant that they were admissible as party admissions under *Rule 801(d)(2)(A)*. In *United States v. Muhammad, 928 F.2d 1461 (7th Cir. 1991)* , to prove that a beeper was rented to the defendant in a drug conspiracy case, the government had a local service manager provide the foundation for records, the originals of which were kept by the beeper company at a central location. The Court held that the foundation was adequate, as the witness had knowledge of the procedures used in the creation and maintenance of the records and the defendant was afforded an opportunity to inquire into the accuracy of the records offered and the reliability of the procedures used for creating and maintaining them. In *United States v. Franco*, n81 the Court held that a narcotics agent was qualified to testify about the manner in which money exchange employees prepared and maintained records. It rejected the argument that a custodian of the records is required and concluded that the agent could testify on the basis of his conversations with knowledgeable people and his own observations of the records. In *United States v. Wables*, n82 the Court affirmed marijuana convictions and held that records seized by government agents were properly admitted. That a witness who explained portions of the records did not have personal knowledge of all the entries did not matter, since the witness could testify as to the procedures by which the records were prepared. In *United States v. Chappell*, n83 the Court affirmed mail fraud convictions arising out of misrepresentations that the defendant made to investors in his company, finding no error in the admission of certain corporate business records whose custodian had died before trial. Two former employees of the company testified that the deceased custodian had charge of the records, and an SEC agent testified that the defendant told him the same thing. The agent, a trained CPA, also testified that he examined the books and records obtained from the deceased custodian, that they appeared to have been made in the ordinary course of business, and that he corroborated the records with checks, bank statements, and other records. Finally, the Court found that testimony given by the deceased custodian before the SEC concerning his custody of the records was an agent's admission.

United States v. Riley, 236 F.3d 982 (8th Cir. 2001) : To prove the chemical identity of the substance sold to undercover officers, the government intended to offer the testimony of a state crime-lab chemist and a document entitled "State Crime Laboratory: Report of Laboratory Analysis." When the chemist had to leave the trial for medical reasons, the government prepared a stipulation form, but the defendant refused to sign it. The prosecutor then offered the report on the basis of testimony by an officer that he had delivered the substance to the crime lab, received the report

from the lab, and that the numbers on the sample and the report matched. Reversing the defendant's conviction, the Court held that the foundation for the report was inadequate. The officers had no personal knowledge of how the lab reports were prepared or maintained and thus could not testify that the documents had been kept in the course of a regularly conducted business activity or that it was the regular practice of that business to make the report. In *United States v. Turner, 189 F.3d 712 (8th Cir. 1999)* , the Court affirmed convictions in a scheme by off-duty police officers to submit false time cards, thereby defrauding a low-income housing project where they were security guards. The Court found no abuse of discretion in admitting time cards and payroll records showing overlaps between the time the defendants claimed to have been working at the project and the times reflected on their police department duty rosters. Although the records custodian called to lay the foundation for the time cards and payroll records had never seen the documents until shortly before the trial, the Court observed that "[a] sponsoring witness need not possess or even see the records in question before trial." In *United States v. Page*, n84 the Court affirmed a conviction for interstate transportation of a stolen motor vehicle, holding that a custodian of a business record could lay the proper foundation for its introduction whether or not the custodian was familiar with the circumstances underlying the preparation of the particular document. In *United States v. Pfeiffer*, n85 the Court emphasized that, in laying the foundation for a business record, a custodian is all that is necessary. The persons responsible for making the record need not testify.

United States v. Ray, 930 F.2d 1368 (9th Cir. 1990) , *amended* (9th Cir. 1991): The Court, affirming a conviction for manufacturing methamphetamine, held that a welfare fraud investigator familiar with filing and reporting requirements for public assistance benefits and forms was a qualified witness to establish the foundation for admitting certain documents in the defendant's welfare file tending to show his recently acquired wealth following a period of relative poverty.

United States v. Dickerson, 248 F.3d 1036 (10th Cir. 2001) : The Court affirmed drug convictions, but found (harmless) error in the admission of hotel records. The records were admitted under *Rule 803(6)*, but the Court noted that the government presented no custodian or other qualified witness to authenticate the records, so it was an abuse of discretion to admit them "without any basis for determining their reliability." In *United States v. Johnson, 971 F.2d 562 (10th Cir. 1992)* , the Court, affirming a conviction for money laundering in a fraud scheme, held there was no abuse of discretion in admitting bank records of deposits through the testimony of individual investors rather than through a bank custodian of records, as there was ample direct and circumstantial evidence of the documents' trustworthiness.

United States v. Parker, 749 F.2d 628 (11th Cir. 1984) : Affirming a conviction for stealing from an interstate shipment, the Court held that a document identified as a certificate of export to the United States was properly admitted as a business record of a Scottish distiller when a vice president of the United States importer of the distiller's Scotch whiskey testified that the document was prepared in the ordinary course of the distiller's business so that the purchaser could avoid taxation in the United Kingdom. The Court stated, "That the witness and his company had neither prepared the certificate nor had first-hand knowledge of the preparation does not contravene *Rule 803(6)*."

[iii] Rule 803(6) -- Foundation -- Examples

[A] Rule 803(6) -- Admissible Records

United States v. Tafoya, 757 F.2d 1522 (5th Cir. 1985) : The Trial Judge properly admitted an employer's memoranda regarding bills to Libya for the defendant's salary in a tax prosecution, where a secretary authenticated the memoranda and another employee testified they were typical of those made by the employer. See also *Gulf South Mach. Co. v. Kearney & Trecker Corp.* n86(upholding introduction of a machine purchaser's logbook of the machine's malfunctions in a suit alleging manufacturing defects).

White v. Godinez, 301 F.3d 796 (7th Cir. 2002) : The Court affirmed habeas corpus relief for a state defendant convicted of murder and conspiracy to commit murder, finding ineffective assistance of counsel. The petitioner offered jail logs to show that his trial counsel had visited him in jail for less than an hour. The sheriff testified that it was the jail's practice to record all inmate visits and that he could not remember a single incident of an officer's failing to record an attorney's visit during his 20-year tenure. The Court held that the sheriff's testimony was sufficient to support the jail logs as business records. In *United States v. Kasvin*, n87 the Court sustained a conviction for conspiracy to distribute and possess marijuana, finding that business records of an organization's marijuana purchases and sales were admissible. See also *Stone v. Morris* n88(admitting in a prisoner's civil rights action a memorandum written by a correctional counselor containing an account of the events leading to the injuries, where counselors made similar memoranda as part of their routine duties; that the memo did not reveal the source of the information contained within it went to weight and not admissibility).

Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754 (8th Cir. 1995) : In a declaratory judgment action to determine whether a fellow-employee exclusion in a liability policy applied to a fatal crash of a company plane, the Court held that paychecks and supporting documents related to the decedent whose status was at issue were properly admitted as business records upon the testimony of the payroll administrator and the secretary responsible for recording employees' hours. In *Hoselton v. Metz Baking Co., 48 F.3d 1056 (8th Cir. 1995)* , the Court affirmed a judgment for the defendant shareholders in an action for breach of fiduciary duty in a business transaction. An accountant's notes containing statements made by others during a negotiation session were admissible as business records to prove what the accountant heard, because the accountant testified in his deposition that the notes were prepared by him in the course of his accounting and consulting business and that it was his practice to take notes for his clients at negotiation sessions. The statements included in the notes were not hearsay but were offered only to show that the plaintiffs were on notice of certain expectations that the defendants had in the negotiations.

Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512 (11th Cir. 1993) : As evidence that the plaintiff, who was claiming for fire damage to his house, had a motive to commit arson, the defendant insurer offered a letter from the mortgagee bank's attorney announcing that foreclosure was imminent. The Court held that the exhibit should have been admitted as a business record, but the error was harmless. In *Itel Capital Corp. v. Cups Coal Co.*, n89 the Court, in the course of affirming a plaintiff's judgment for money owed under equipment leases and for possession of leased equipment, reiterated that "the person who actually prepared the documents need not have testified so long as other circumstantial evidence and testimony suggests their trustworthiness."

[B] Rule 803(6) -- Foundation -- Examples -- Inadmissible Records

Willco Kuwait (Trading) S.A.K. v. deSavary, 843 F.2d 618 (1st Cir. 1988) : The Court upheld the exclusion of a telex from a person employed by a Kuwait petroleum company in a suit alleging securities and common-law fraud. The telex was not made in the routine course of business, it made reference to an investigation and report that had been made three months earlier and was not made at or near the time of the investigation, and it was sent just two days prior to a letter by the company to the defendant in which the company alleged that the defendant had made misrepresentations.

United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983) : The Court held that a customer record book of drug transactions could not be admitted as a business record where the government failed to show who made the entries, the circumstances under which they were made, or their relationship to the person whom the government believed was involved in dispensing drugs.

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) : The Court reversed convictions for wire fraud because wire-transfer documents that had been subpoenaed from banks were erroneously admitted. No custodial or noncustodial witness familiar with the record keeping system laid an adequate foundation for their admission as business records. In *United States v. Furst*, n90 the Court held, in reviewing a conviction for embezzlement from pension funds, that a commodities firm's records, offered to show the value of securities traded, were not sufficiently established as business records by the testimony of an employee of a bank who testified they were accurate as to money transferred between the firm and the bank or by an employee of a data processing company who testified the records had been accurately prepared from data supplied by the firm.

Positive Black Talk Inc. v. Cash Money Records Inc., 394 F.3d 357 (5th Cir. 2004) : To rebut the claim by a defendant in a copyright suit that he had recorded an album containing the song at issue before hearing the plaintiffs' song, the plaintiffs offered a promotional mailer for the album that did not list the song. Affirming a judgment for the defendants, the Court held that the mailer was properly excluded because it was hearsay and not admissible under the business records exception. The plaintiff offered no witness or other evidence that the mailer was made at or near the time it was said to recount by or from information transmitted by a person with knowledge. In *Byrd v. Hunt Tool Shipyards, Inc.*, n91 the Court held that a medical report in a product liability case was properly excluded when no foundation was laid through a qualified witness.

United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986) : The Court held that a proper foundation had not been laid for 12 pages of handwritten notes found in a medical clinic where a handwriting expert identified five pages as being in the writing of the clinic's doctor and three in the writing of the father of the clinic's president. No witness testified to the record-keeping practices of the clinic and the circumstances under which notes were recorded.

City of Long Beach v. Standard Oil Co., 46 F.3d 929 (9th Cir. 1995) : Affirming a judgment for an oil company in an antitrust case, the Court found no error in the exclusion of handwritten notes offered against the defendant. The plaintiffs had failed to show that the author made the notes pursuant to company procedure rather than as "self-reflective musings."

Chen v. Bouchard, 347 F.3d 1299 (Fed. Cir. 2003) : The Court upheld the Board of Patent Appeals and Interferences' award of priority of inventorship to the senior party. It found no abuse of discretion in the exclusion of a nontestifying researcher's notebooks, given that the authentication evidence was weak and there was no evidence as to the company's policies regarding maintenance of laboratory notebooks.

[iv] Rule 803(6) -- Foundation -- Nonbusiness Purpose

United States v. Robinson, 700 F.2d 205 (5th Cir. 1983) : Affirming convictions for misrepresentation, the Court found it was error (but harmless) to admit notes made for his own use by a county purchasing clerk concerning meetings of the Board of Supervisors. The notes were introduced through a records custodian, who authenticated them but did not establish that they were made as part of routine business practice.

[v] Rule 803(6) -- Foundation -- Procedure for Laying Foundation

United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985) : The Court stated that it found nothing inherently wrong in a "wholesale" approach to taking foundation testimony, under which "the government witnesses provided foundation testimony about all of the documents at the same time and testified about large group of documents by type."

[vi] Rule 803(6) -- Foundation -- Produced in Discovery

United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991) : The Court affirmed tax evasion convictions arising out of a "skimming" scheme, holding that daily sales sheets were sufficiently authenticated and shown to be business records by proof, *inter alia*, that the defendants' attorney produced the documents in response to a subpoena calling for their business' records.

[l] Rule 803(6) -- Incomplete Records

United States v. Panza, 750 F.2d 1141 (2d Cir. 1984) : Affirming convictions for a scheme to defraud insurance companies in connection with an assigned risk plan, the Court held that properly authenticated insurance company files were admissible despite the fact that some minor papers were missing.

United States v. Foster, 711 F.2d 871 (9th Cir. 1983) : The Court held that a ledger listing drug transactions was properly admitted even though it was incomplete, had several pages missing, and contained entries made out of sequence, since the entries actually made were made regularly and at or near the time of events.

[m] Rule 803(6) -- Internal Memoranda

Gibbs v. State Farm Mut. Ins. Co., 544 F.2d 423 (9th Cir. 1976) : In a suit against a liability insurer for bad-faith failure to settle, the Court held that an interoffice memorandum stating that an injured child's father would have been happy with a settlement within the policy limits was admissible as a business record, since it was the regular practice of the insurer to prepare memoranda relating to a claim.

[n] Rule 803(6) -- Internet Postings

United States v. Jackson, 208 F.3d 633 (7th Cir. 2000) : The defendant, charged with fraud against the Postal Service in a scheme that included falsely attributing hate mail to white supremacist groups, attempted to introduce website postings from those groups that allegedly indicated responsibility for the hate mail. Affirming, the Court held that the web postings were hearsay that did not qualify as a business record of the Internet service providers, since the ISPs were merely conduits that did not post or monitor the contents of the web sites.

[o] Rule 803(6) -- Investigative Reports

Crimm v. Missouri Pac. R.R., 750 F.2d 703 (8th Cir. 1984) : The Court affirmed an employer's judgment in an age discrimination action, finding no error in the admission of handwritten notes and an investigative report prepared by the company's managing agent. The documents qualified as business records because the agent was directed to conduct an investigation and to prepare a report and he did so nine months before any complaint or suit was filed. However, the Court's opinion does not describe any testimony that the documents were prepared as part of the routine of the business.

United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) : The former president of a corporation providing technical and social services to Native Americans was convicted of misapplying federal funds provided to the corporation. The Court held there was no abuse of discretion in admitting an audit report prepared by an independent contractor at the direction of the Department of Labor after the DOL suspected the president of misappropriation. The audit report was not just for purposes of litigation, but also was part of the DOL's ongoing compliance review process;

furthermore, the neutrality of the preparer and the preparer's ten years' experience in preparing such audits lent trustworthiness to the report.

[p] Rule 803(6) -- Laboratory Reports

United States v. Roulette, 75 F.3d 418 (8th Cir. 1996) : Affirming cocaine-related convictions, the Court held that laboratory reports identifying a substance as cocaine base were admissible under the business records exception even though the person who actually conducted the tests did not testify.

United States v. Garnett, 122 F.3d 1016 (11th Cir. 1997) : The defendant, a physician's assistant, was convicted of taking hydrocodone tablets from their bottles and substituting other medications knowing that the substituted medications would be erroneously dispensed to patients. The Trial Judge admitted a report prepared by the FDA Forensic Chemistry Center, which identified the drugs in the bottles that the defendant had tampered with. The Court held that this report was properly admitted under the business records exception. A doctor employed by the FDA testified that reports like the one proffered are regularly prepared at the FDA lab in the normal course of business and that he physically observed the drug samples and reporting in this case.

[q] Rule 803(6) -- Opinions

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : In an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, the Court held there was no abuse of discretion under *Rule 403* in redacting references to mesothelioma in the death certificate, autopsy report, and hospital records. Although documents admissible under *Rule 803(6)* may contain opinions, the difficulty of diagnosing mesothelioma meant that unexamined references to the disease were not helpful to and could potentially have misled the jury.

[r] Rule 803(6) -- Oral Proof of Missing Records

United States v. Wells, 262 F.3d 455 (5th Cir. 2001) : Reversing a conviction for narcotics offenses, the Court found error in the admission of testimony by a cooperating witness that he and his friend, with whom he sold drugs to the defendant, kept little ledgers of sales and that the ledgers had the defendant's name in them indicating that she purchased drugs over a six-month period. The witness said that he kept the ledger every week to assure that his inventory of supplies and his money would be correct -- which might satisfy the foundation requirements of *Rule 803(6)* -- and that he threw the ledgers away each week -- which might have justified secondary evidence regarding their contents under *Rule 1004*. However, because "the rationale underlying this exception to the rule against hearsay is that the inherent reliability of business records is supplied by systematic checking, by regularity and continuity," the Court found that "we simply cannot conclude that the oral testimony of Antoine, a cooperating witness, with respect to his memories of drug sales apparently drafted by someone else several years earlier and destroyed soon thereafter had sufficient indicia of trustworthiness."

[s] Rule 803(6) -- Personal Knowledge

Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996) : In an inmate's § 1983 action against prison guards, the defendants offered a "Use of Force" report prepared by one of the guards purporting to describe the beginning of the altercation, although she testified that she had not seen the incident until she heard a scream and observed another guard holding his genitals. Although the Court indicated that the report was not admissible under Rules 803(1), (5), or (8) because the declarant lacked personal knowledge of the start of the incident, it said that the report might be admissible on remand as a business record if the declarant could show that the information was transmitted by a person with knowledge and did

not represent just her speculation.

[t] Rule 803(6) -- Records Created by Another Entity

United States v. Doe, 960 F.2d 221 (1st Cir. 1992) : In a prosecution for criminal possession of a firearm, the Court held that an invoice from a South Carolina telemarketing firm was properly admitted as a business record of a Massachusetts sports shop to which it had been sent. No custodian from the telemarketing firm needed to testify, as the invoice was relied on by the sports shop and had become integrated into itsthe shop's records.

United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992) : Affirming a conviction for kidnapping, the Court held there was no abuse of discretion in admitting a bridge toll receipt that had been included in a business' expense account records. Although the document was originally created by another entity, it had been incorporated into the business' records to a sufficient degree to permit an inference that the records were regularly prepared. Furthermore, a toll receipt is not the type of evidence that is so susceptible to fabrication that authentication by a representative of the bridge should be required; in fact, the defendant had relied on its authenticity when he submitted the receipt for reimbursement of his expenses.

United States v. Parsee, 178 F.3d 374 (5th Cir. 1999) : The Court affirmed narcotics convictions, finding no abuse of discretion in admitting business records that had been generated by a company different from the one by which they were offered at trial. Where Enterprise Leasing Company of Houston generated the records, it was sufficient that the witness from Enterprise Leasing Company of New Orleans testified that the records in all Enterprise offices nationwide are generated and maintained in the same manner, and that the witness understood and could explain the system, point out any errors, and respond meaningfully on cross-examination. Likewise, regional telephone operating companies could provide a sufficient foundation for records containing information collected and generated by long distance carriers. In a prosecution for defrauding insurance companies, *United States v. Duncan, 919 F.2d 981 (5th Cir. 1990)* , the government introduced insurance company records containing unauthenticated medical records and statements by doctors. The Court held there was no abuse of discretion in admitting the evidence, since the insurance company records were compiled from the business records of hospitals. Even though the records were not created by the business having custody of them, they were trustworthy because the hospitals and insurance companies relied on them in conducting business. See also *United States v. Ullrich* n92(a car dealer made a manufacturer's statement part of the dealer's records). In *Snyder v. Whittaker Corp.*, n93 the Court held that a memorandum written by employees of one company was not a business record of another company that received it and kept it.

MRT Constr. Inc. v. Hardrives, Inc., 158 F.3d 478 (9th Cir. 1998) : In an action for an accounting between two construction companies, the Court found no error in the admission of attorney bills generated by the law firm representing the defendant in a related proceeding over the construction project. The CFO of the defendant was a proper witness for qualifying the records, even though the records were prepared by another entity. The defendant received the bills directly from the law firm and maintained the bills in its files; the defendant relied upon the bills as statements of fees owed to the law firm; and the defendant had a substantial interest in the accuracy of the bills. In *United States v. Childs, 5 F.3d 1328 (9th Cir. 1993)* , the Court affirmed convictions for interstate transportation of stolen motor vehicles, holding there was no error in admitting an application for Alberta, Canada, license plates as a business record of the Alberta Division of Motor Vehicles. Although the application was made by a private auto club, it was contracted by the DMV to issue licenses, was hooked directly into the DMV's computer system, and could perform transactions on-line, so the private auto club and the DMV were essentially acting as one business entity in issuing license plates. The Court also upheld admission of several types of documentation kept by auto dealers (e.g., certificates of title, purchase orders, and odometer statements) even though they were not made by the dealers, since they were kept in the regular course of business and otherwise trustworthy. In *NLRB v. First Termite Control Co.*, n94 the Labor Board, to

establish an interstate commerce nexus by proving the amount of the defendant company's interstate business, offered a railroad freight bill into evidence. The bill was inadmissible as a business record, however, because the company's bookkeeper could not lay a foundation for the railroad's business records.

United States v. Bueno-Sierra, 99 F.3d 375 (11th Cir. 1996) : The Court affirmed convictions for drug-related offenses, finding no error in the admission of a vessel's berth request form that had been prepared by the company owning the vessel and had been kept by the Miami Port. The custodian of the records, who worked for the Port, testified that a vessel's agents personally prepare berth requests, they routinely submit them as a prerequisite to obtaining a docking location, and the reports are routinely maintained by the Port in its office. In *United States v. Hawkins, 905 F.2d 1489 (11th Cir. 1990)* , the Court affirmed mail fraud convictions, holding that stamped notations, such as "insufficient funds," on returned checks were admissible as the bank's business records, since they were made contemporaneously by an employee with the requisite knowledge in the course of a regularly-conducted business activity in which it was a regular practice to make the record, and there was ample circumstantial evidence of trustworthiness. "It is not necessary ... that the document be prepared by the business which has custody of it, so long as other circumstantial evidence suggests the trustworthiness of the record."

Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999) : When the government paid moving companies for transporting the belongings of military personnel, it offset unresolved property damage claims against charges due the carrier for other shipments. Affirming a judgment for the government in an action for refunds on certain offsets, the Court held there was no abuse of discretion in admitting as business records of the military repair estimates prepared by third parties and submitted by the service members in support of damage claims. The estimates had been incorporated into the military's records, they were customarily relied upon by the military in making decisions about proper compensation to be paid to the service member, and there were other assurances of reliability, including criminal penalties for making false claims and the familiarity of Military Claims Office personnel with estimators in the area and the estimating process in general. In a patent dispute, *Munoz v. Strahm Farms, Inc., 69 F.3d 501 (Fed. Cir. 1995)* , the defendant, to prove that a machine was in public use before a particular date, offered a photographic slide showing the machine, which had been inscribed by Kodak with a date on which it was developed. The Court held there was no abuse of discretion in admitting the date evidence, even without testimony from Kodak, as the date was part of a business record and the recipient's testimony that it was his regular practice to check the dates on the slides when he received them from Kodak and file them in his office was sufficient foundation to satisfy the Rule.

[u] Rule 803(6) -- Regular Practice To Make and Keep Record

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) : The Court affirmed fraud convictions, finding that a document was not a business record, since it was not made in the regular practice of the business and it summarized events that had taken place some time before.

Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989) : In a defamation action by a Veterans Administration psychologist who alleged that defendant's libelous newspaper story led to the VA's reassigning him to a position where he had nothing to do, the Court held that "report of contact" forms filled out by a VA official recording calls from aides to Senators regarding constituent complaints about the article were properly admitted as business records even though such a form was not "usually" completed, but only when the official "perceive[d] the need."

United States v. Strother, 49 F.3d 869 (2d Cir. 1995) : In a prosecution for obtaining funds from a financial institution by false pretenses, the disputed question was whether the defendant asked a bank official to honor a check for $82,000 drawn on insufficient funds, on the promise that he would wire in money to cover it, or had asked the official to

hold the check rather than to pay it and she mistakenly paid it. The Court found no abuse of discretion in the exclusion of several memoranda, made by bank officials who reviewed the transaction, that tended to support the defendant's contentions. The bank covering a check for $82,000 was not a situation that routinely recurred, and the Court was "reluctant to adopt a rule that would permit the introduction into evidence of memoranda drafted in response to unusual or isolated events." Another memorandum was found properly excluded because it was prepared six months after the relevant event. In *United States v. Freidin*, n95 the Court reversed a conviction for tax offenses, because of the erroneous admission of a memorandum found in the files of the accounting firm for which the defendant worked. Although a witness testified that the memorandum was made and kept by the firm in the ordinary course of business, the Court reasoned that the business records rule was not satisfied because it was not the regular practice of the business to make or keep similar memoranda. Although it opined that the better result would be to admit trustworthy records, the Court held that the plain language of the Rule required a showing that the record be made pursuant to a regular business practice. Although the Court reversed a Tax Court deficiency judgment in *Ruberto v. Commissioner*, n96 it upheld the Judge's ruling that receipts from a church offered by the taxpayers were inadmissible because there was no showing that they were made in the regular course of business.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , rev'g 505 F. Supp. 1190 (E.D. Pa. 1980) , rev'd on other grounds, 475 U.S. 574 (1986) : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants and found that evidence that qualified for admission as business records had been improperly excluded. The Court rejected the Trial Judge's requirement that records must have been "created by routine practices where careful checking and habits of precision and accuracy assure their accuracy," reasoning that "[g]iven the separate treatment in *Rule 803(6)* of untrustworthiness, we think the regular practice requirement should be generously construed to favor admission."

Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991) : A summary judgment was granted for the defendants in a negligence suit for injuries allegedly suffered by an employee of an offshore catering service. The Court held that statements by the since-deceased employee as to how the accident happened, which were included in records kept by the employer, were properly excluded, as the reports were not made and kept as an integral part of the employee's usual course of business. In *Wilander v. McDermott Int'l, Inc.*, n97 the Court reversed a finding that the plaintiff in this Jones Act case had been contributorily negligent, on the ground that there was no showing that a statement offered by the defendants, which was taken by the barge captain on his own initiative from the supposed sole witness to the accident, was one kept in the regular course of business or that it was the regular practice of the business to make such reports. See also *Malley v. United States Fid. & Guar. Co.* n98(a report of engineers concerning a mudslide was not admissible as a business record where it was not established that the company regularly wrote reports on the causes of mudslides); *United States v. Williams* n99(reversing a conviction for transportation of a stolen vehicle where the government attempted to prove value by offering a "verified statement" of a trailer maintenance facility operator without showing that the statement was made in the ordinary course of business).

United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002) : The Court affirmed bank embezzlement convictions, finding no error in the exclusion of a bank memo about a shipment of food stamps from one branch to another. The memo was not admissible as a business record, because the defense failed to lay a foundation for this exception and there was no evidence that the handwritten memo was kept in the ordinary course of business.

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) : In an action by an employee who claimed that she had been denied a promotion because of gender discrimination, the Court found no abuse of discretion in the exclusion of memos made by the plaintiff's supervisor after she complained to him about being passed over for discriminatory reasons. The memos said that the supervisor had not promoted her because of deficiencies in her interpersonal skills and that he was

planning to promote her soon. The company's regular personnel recordkeeping processes did not include records of employee conversations. These memos had been made only to create evidence for use in the plaintiff's anticipated lawsuit. In an action for age discrimination, *Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431 (7th Cir. 1997)* , the central question was whether the plaintiff had made a knowing and voluntary release of his ADEA claims. Affirming a judgment for the plaintiff, the Court found no error in the exclusion of a memorandum prepared by the plaintiff's supervisor, which purportedly summarized the meetings between the supervisor and the plaintiff leading up to the signing of the release. The memorandum memorialized an "unusual incident" and "was not created with the kind of regularity or routine which gives business records their inherent reliability." In *United States v. Ramsey*, n100 the Court found error (but harmless) in the admission of occasional jottings on desk calendars as business records in a prosecution for mail and wire fraud. The entries were not made with sufficient regularity to satisfy the hearsay exception.

Monotype Corp. v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994) : In an action by a typeface designer against a licenser of typefaces, the Court held that a document prepared by an employee of the designer's customer expressing the employee's views as to the similarities and differences of typefaces in issue was properly excluded because it was not the type of report the company was in the practice of making in the regular course of its business. In *Waddell v. Commissioner*, n101 the Court held that the Tax Court did not abuse its discretion in determining that an appraisal report prepared for a health care provider was inadmissible. The appraiser had died before trial, there was no evidence that the appraiser had a practice of making appraisals for the provider, no showing was made that the provider routinely obtained such appraisals, and there was genuine concern about the trustworthiness of the appraisal. In a suit by trustees of employee trust funds for breach of a collective bargaining agreement, *Paddack v. Dave Christensen, Inc.*, n102 the Trial Judge excluded compliance audit reports that were made by an independent accounting firm and offered by the plaintiffs to show contribution deficiencies on the part of the defendants. The Court agreed that the reports were not business records of the accounting firm because they were not part of a regularly conducted activity, but indicated that the reports might be relied upon under *Rule 703* to support an expert opinion.

Hertz v. Luzenac America, Inc., 370 F.3d 1014 (10th Cir. 2004) : The Court affirmed a judgment for a former employee who claimed that the defendant discriminated against him on religious grounds and retaliated against him. It found no abuse of discretion in the exclusion of evidence of notes made by a supervisor two days after meeting with the plaintiff to discuss problems with his performance. The supervisor testified that he made the notes because he thought he was going to fire the employee. The Court concluded that there was insufficient evidence that it was the routine practice of the business to make such notes.

United States v. Jacoby, 955 F.2d 1527 (11th Cir. 1992) : The Court affirmed convictions for fraud involving an insolvent savings and loan, holding that a law firm associate's memorandum to the files in connection with a real estate closing was properly admissible under the Rule. Although the event recorded was not a routine transaction, it was the attorney's routine practice to prepare a memorandum to the file whenever he believed it was necessary to explain something or make a record of an unusual circumstance.

[v] Rule 803(6) -- Relationship to Other Rules

Parker v. Reda, 327 F.3d 211 (2d Cir. 2003) : Affirming a judgment for corrections officers sued by an inmate who alleged use of excessive force, the Court held that a memorandum prepared by a corrections sergeant was properly permitted to be read to the jury as past recollection recorded. The Court concluded that the memorandum could be read to the jury even though the Judge ruled that it lacked sufficient indicia of reliability to be admitted as a business record; the two exceptions "are based on different rationales, and there is nothing inherently inconsistent about the admission, under 803(5), of evidence ruled inadmissible under 803(6)."

United States v. Blackburn, 992 F.2d 666 (7th Cir. 1993) : The Court held there was no error in admitting, in a trial for bank robbery, computer printouts of lensometer readings for eyeglasses left in a stolen getaway car. Because the analysis had been made at the request of the FBI in anticipation of litigation, the records did not have the reliability of business records under *Rule 803(6)*. Because they were made independently by a private company, they were not barred by the criminal-investigation exceptions of *Rule 803(8)*, but since the company was not the equivalent of government investigators, its reports were not records of public offices or agencies admissible under that Rule. However, because the tests were entirely mechanical and objective, and there was no possibility of bias since the investigation had no suspects at the time, the exhibit was reliable enough to be admitted under the residual exception. In *Abdel v. United States*, n103 the Court upheld a judgment that the Department of Agriculture properly disqualified a supermarket from the food stamp program because it accepted food stamps for nonfood items. The Court held that transaction reports prepared by a DOA agent after visiting the supermarket were properly admitted under *Rule 803(6)* and rejected an argument that only *Rule 803(8)* could be used to admit public records.

United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002) : The defendant was convicted of marriage fraud and making a false statement on an immigration document, after entering an allegedly sham marriage. Reversing, the Court held that a "Record of Sworn Statement," made when the defendant applied for a green card, was not admissible as a business record: "When public records are used against a defendant in a criminal prosecution, the public records exception [*Rule 803(8)*] is the exclusive applicable hearsay exception."

Haskell v. United States Dep't of Agriculture, 743 F. Supp. 765 (D. Kan. 1990) , *aff'd*, *930 F.2d 816 (10th Cir. 1991)* : In granting the government's motion for a summary judgment barring a store co-owner from the food stamp program, the Trial Judge held that statements of an Agriculture Department investigative aide who witnessed several of the illegal transactions were admissible under *Rule 803(8)*. The Court of Appeals affirmed, holding that the reports would be admissible under *Rule 803(6)*, so it was not necessary to reach the *Rule 803(8)* question.

United States v. Brown, 9 F.3d 907 (11th Cir. 1993) : The Court held in a firearms prosecution that a police department property receipt was properly admitted under *Rule 803(6)*, where the police custodian testified that the regular and customary procedure was to fill out a property receipt for any type of evidence. Although the business records exception may not be used as a back door to introduce matters from law enforcement personnel inadmissible under *Rule 803(8)(B)*, routine, nonadversarial police records like this property receipt were not the type of evidence contemplated by the exclusion in *Rule 803(8)*.

[w] Rule 803(6) -- Source of Information

[i] Rule 803(6) -- Business Duty

United States v. Vigneau, 187 F.3d 70 (1st Cir. 1999) : Affirming convictions for participating in a continuing criminal enterprise and drug offenses, but reversing convictions on 21 counts of money laundering, the Court held that it was error to admit, as business records, records of Western Union money transfers which contained the defendant's name, address, and phone number as the sender, because the declarants were not under any business duty to make truthful and accurate statements. In *United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992)* , a defendant charged with drug trafficking offenses argued that he was innocently visiting the apartment in which he was arrested, but the government introduced a receipt for a TV set in the room that bore the defendant's name and the address of the apartment. Reversing, the Court held that the receipt was hearsay not coming within any exception when offered to prove the name and address of the purchaser. When the source of information for a business record is not acting under a business duty, there must be a showing that it was the business' standard practice to verify the information if the record containing the information is to be admitted under the Rule.

Romano v. Howarth, 998 F.2d 101 (2d Cir. 1993) : Reversing a judgment for the defendants in a prisoner's civil rights action arising out of his treatment at a medical facility, the Court noted that a nurse's "progress notes" had been improperly admitted. The notes recounted a statement by a defendant corrections officer regarding how an injury to the plaintiff occurred, but it was unclear whether the corrections staff at the facility had any "business duty" to the medical staff so as to ensure the accuracy of the account. In any event, the officer's motive to fudge the truth of what happened meant that the statement lacked reliability. In *United States v. Bortnovsky*, n104 a RICO and fraud prosecution, the Trial Judge properly excluded an insurance adjuster's report offered by the defendant because the relevant statements in the report were made by a person with no business duty to report. In *Gray v. Busch Entertainment Corp.*, n105 the Court affirmed a judgment for an amusement park sued by an injured patron who fell from a small train, holding that the exception did not cover a hearsay statement in the park's first aid report. The statement was made by the patron's daughter who was not acting in the regular course of business.

Ramrattan v. Burger King Corp., 656 F. Supp. 522 (D. Md. 1987) : Ruling on *in limine* motions in an automobile accident case, the Court held that portions of a police report recording statements of witnesses were inadmissible because the witnesses were not acting in the regular course of business in making the statements.

United States v. Ismoila, 100 F.3d 380 (5th Cir. 1996) : The Court held, in a credit-card fraud prosecution, that affidavits and other notices to the issuing banks from credit card holders indicating that their cards had been stolen and charges were not authorized were not admissible as business records, as it was not the holders' business to fill out the affidavits, and the holders were not part of the banks' business in making and keeping the records.

United States v. Yates, 553 F.2d 518 (6th Cir. 1977) : Reversing a bank robbery conviction on other grounds, the Court noted that the government properly conceded at oral argument that a letter from bank employees to bank management relating that the FBI called the bank to say that the robber had turned himself in should not have been admitted at trial as a business record. The concession was proper because "[t]he document contained statements made by a third party outside of the scope of the business."

Datamatic Servs. v. United States, 909 F.2d 1029 (7th Cir. 1990) : In a suit by a taxpayer for refund of a penalty assessed by the IRS for abusive tax shelters, the Court held that a report to investors introduced by the government was not a business record because the sources of the information were outsiders with respect to the business, but any error in admitting the report was harmless.

United States v. Turner, 189 F.3d 712 (8th Cir. 1999) : The Court affirmed convictions in a scheme by off-duty police officers to submit false time cards, thereby defrauding a low-income housing project where they were security guards. It found no abuse of discretion in admitting time cards and payroll records showing overlaps between the time the defendants claimed to have been working at the project and the times reflected on their police department duty rosters. There was no evidence that any person not acting in the regular course of business provided any of the information in the records. In an FELA case, *Grogg v. Missouri Pac. R.R.*, n106 the plaintiff contended that it was error to exclude a railroad document stating that an air hose was broken on the date of a brake accident. The Court observed that, at a subsequent trial, the Judge must determine whether the person who provided the information recorded in the document was acting in the regular course of business or was an outsider. An outsider's recorded statement would not be admissible under *Rule 803(6)*, while a recorded statement by a person acting for the business would be within the Rule.

United States v. Pazsint, 703 F.2d 420 (9th Cir. 1983) : The Court reversed a conviction for assaulting a federal officer on other grounds, but it ruled that tape-recorded calls that witnesses made to police reporting the actions of the defendant were not properly received as business records, since the callers were not under any business duty to the police.

United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993) : The Court affirmed drug convictions, but observed that a motel's arrival-and-departure log had been erroneously admitted. Because the motel employee who filled out the log relied upon information provided by guests, the essential requirement that each actor in a chain of information be under a duty to provide accurate information to a business was not satisfied. The Court recognized that "[i]f the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person, the exception may still apply." In *United States v. Snyder*, n107 the Court affirmed a conviction for conveying a weapon in a federal prison, holding that a written report of the incident that contained statements by two prisoners was not admissible as a business record, since the inmates were not under any business duty when making their statements. In *United States v. Plum*, n108 the Court affirmed a conviction for receiving stolen silver bars, but sustained a claim by the defendant that an exhibit was improperly admitted as a business record because the person submitting the information retained in the business record was under no business duty.

[ii] Rule 803(6) -- Source of Information -- Hearsay Exception

United States v. McGill, 953 F.2d 10 (1st Cir. 1992) : Affirming a conviction for tax evasion, the Court held that a bank employee provided a sufficient foundation for admitting taxpayer identification numbers on deposit tickets prepared by the defendant. It was a regular practice for bank employees to copy the numbers onto the ticket from the envelope prepared by the depositor into which the ticket had been placed.

Bondie v. Bic Corp., 947 F.2d 1531 (6th Cir. 1991) : In a product liability action in which the plaintiff alleged her child started a fire with a cigarette lighter, the defendant introduced the report of a medical social worker, made at the hospital after interviewing the mother and child, which recounted the mother's statement that the fire was set with matches. Affirming a judgment for the defendant, the Court held there was no error in admitting the report, as it was made and kept in the ordinary course of business and the included statement of the mother was a party admission. Unlike some state rules, *Rule 803(6)* does not require that the ultimate declarant have a business duty to supply the information recorded, so long as the declarant's statements come within a hearsay exception or exemption and recording such statements is part of the regularly conducted activity.

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994) : Defendants charged with a drug distribution conspiracy objected to the admission of Western Union money transfer applications, which had been offered to prove money-laundering charges, on the ground that they were not business records because the forms were partially filled out by nonemployees. The Court held that the forms were properly admitted, since a sufficient foundation was provided that the defendants had partially filled out and signed the forms (making their portion admissions of a party-opponent), and the remainder of the forms were business records prepared in the ordinary course of business.

Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041 (9th Cir. 1999) : An employee on a cruise ship brought an action for maintenance and cure, after being diagnosed with encephalitis. To prove that he was ill at the time he worked on the ship, he offered a memorandum prepared by the investigator for the defendant's insurer, which contained statements from the plaintiff's fellow employees indicating that the plaintiff told them that he felt sick one day at work and that he was acting erratically while at work. The Court found it was error to exclude the memorandum, since each level of hearsay in it satisfied an exception to the hearsay rule. The plaintiff's statements to his coworkers about his physical

condition were admissible under *Rule 803(3)*; the employees' statements to the investigator were admissible as agency-admissions under *Rule 801(d)(2)(D)*, because the employees had the duty to monitor and report any injuries or illness among the staff; and the memorandum itself was admissible as a record of regularly conducted activity. Affirming a judgment for police officers alleged to have used excessive force, in *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* , the Court held that a 911 tape was properly excluded because the citizen caller apparently lacked personal knowledge of the events that he was reporting. The Court stated that "[h]earsay statements on a 911 tape can be admitted into evidence as either a 'public record,' *Fed.R.Evid. 803(8)(B)*, or a 'business record,' *Fed.R.Evid. 803(6)*," but that citizen callers are not under any duty to report and thus "a recorded statement by a citizen must satisfy a separate hearsay exception." Although a caller might be reporting a present sense impression or making an excited utterance, both exceptions require that a declarant have personal knowledge of the events described.

[iii] Rule 803(6) -- Source of Information -- Miscellaneous Cases

United States v. Franks, 939 F.2d 600 (8th Cir. 1991) : Affirming a conviction for cocaine possession, the Court held there was no double hearsay problem in admitting Federal Express airbill receipts. The exhibits were offered only to show that the packages were received at the defendant's address by someone who signed her name.

United States v. Johnson, 297 F.3d 845 (9th Cir. 2002) : The Court affirmed convictions arising from a fraudulent telemarketing scheme, holding that sales orders and tapes were properly admitted as business records. Even though various purchasers supplied some information, the defendants' employees provided most of the information and verified that provided by customers. The Court found that bank records were properly admitted because they revealed the amount deposited. However, it was error (but harmless) to admit checks provided by customers, since there was no indication that the banks sought to verify the name and account on each check. In *United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991)* , the Court reversed convictions for making false statements in a permanent resident application, holding that certain reports of Hong Kong police authorities were erroneously admitted to prove the defendant's prior criminal convictions. There was no showing that the declarants had firsthand knowledge or received their information from persons with firsthand knowledge of the facts stated.

United States v. Cestnik, 36 F.3d 904 (10th Cir. 1994) : In a prosecution for narcotics and money-laundering offenses, the Court held that Western Union "to-send-money" forms were properly admitted under the business records exception. This case is discussed in the Editorial Explanatory Comment, *§ 803.02[7][c]*. In *United States v. Moreno, 94 F.3d 1453 (10th Cir. 1996)* , the Court, relying on *Cestnik*, found no error in the admission of a hotel registration record showing that a person with a name and address similar but not identical to the defendant's registered in a motel. "The government did not seek admission of the forms to prove that the person named in the forms, Art Morino, actually checked into the motel. Rather, because the name and address in the forms were similar to Mr. Moreno's, the government was attempting to create the inference that Mr. Moreno had checked in under a false name." Thus, there was no "source of information" problem because the underlying information was not being offered for its truth.

[iv] Rule 803(6) -- Source of Information -- Statutory Duty

United States v. Sokolow, 91 F.3d 396 (3d Cir. 1996) : In a mail fraud prosecution brought against the owner of a company, the government offered a third-party administrator's summary of unpaid, valid health insurance claims filed against the company's health plan. The administrator was hired by a State Court to adjust unpaid claims after the plan was ordered liquidated. The defendant argued that this report was inadmissible as a business record, because it relied on information from outside sources (i.e., the claimants) who had no business duty to report. The Court found that the beneficiaries of the plan who filed claims "were under a duty to submit accurate proof of claims in order to be entitled to payment, and subject to criminal and/or civil penalties for submitting fraudulent claims," so the summary of these

claims by the adjuster was properly admitted as a business record.

United States v. Bland, 961 F.2d 123 (9th Cir. 1992) : The Court affirmed a conviction for felon firearm possession, holding that a firearms transaction record completed at the time of purchase was properly admitted. Federal regulations requiring that employees verify gun purchasers' names with a picture identification, and imposing a legal duty on purchasers to provide truthful information, obviated any double hearsay problem regarding the statement on the form identifying the purchaser.

[v] Rule 803(6) -- Source of Information -- Third Party Complaints

Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14 (1st Cir. 1994) : The Court held that reports of prosthesis failures received by the defendant manufacturer of prostheses were properly excluded because the reports were provided to the defendant by independent prosthetists who themselves derived some or all of their information from their own patients. Distinguishing pre-accident reports that are admitted to show notice, the Court held that the patients were under no business duty to make accurate reports to the manufacturer. The Court found it unnecessary to consider whether the exception might apply if the information were generated solely by the prosthetists in the course of their own business.

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) : The Chicago City Treasurer was charged with illegally soliciting political contributions from banks and securities firms. Reversing for this and other evidentiary errors, the Court held that complaints about the Treasurer filed with the City's Board of Ethics should not have been admitted as business records. Although the complaints were included in the Board's business records, the factual statements were never verified or otherwise adopted by the Board and thus, did not become the Board's own statements.

Baxter Healthcare Corp. v. Healthdyne, Inc., 944 F.2d 1573 (1991) , *vacated on settlement*, *956 F.2d 226 (11th Cir. 1992)* : In a breach of contract action related to allegedly defective hospital equipment, the Court held that records of customer complaints compiled by the plaintiff were properly admitted under the Rule, as the reports carried high indicia of reliability because the hospital employees who were the informants contacted the plaintiff to report a serious defect in a product that was endangering their patients. In our view, this case presents an extremely unusual situation in which customer complaints have sufficient trustworthiness to be admitted for their truth as business records.

[vi] Rule 803(6) -- Source of Information -- Unidentified Source

Rassoulpour v. Washington Metro. Area Transit Auth., 826 F.2d 98 (D.C. Cir. 1987) : The Court held that a statement in a transit authority report that the plaintiff was running down a stationary escalator at the time she fell was hearsay and prejudicial. There was no showing as to who provided the information that was reported in the report. Even though the employees who wrote the report acted for the business, the authority did not show that they saw the accident.

Ricciardi v. Children's Hosp. Med. Center, 811 F.2d 18 (1st Cir. 1987) : The Court affirmed a directed verdict for defendants in a medical malpractice case, and found no error in the exclusion of a doctor's handwritten note stating that an aortic cannula had accidentally come out of the patient during an operation. The doctor had no personal knowledge of the event described and could not recall the source of the information, so the necessary foundation for business records was lacking and there was concern about the trustworthiness of the note.

Saks Int'l, Inc. v. M/V Export Champion, 817 F.2d 1011 (2d Cir. 1987) : In an action by a consignee against a

shipowner for a cargo shortage and slackage, the Court held it was proper to admit loading tallies prepared by a stevedoring company. It observed that "there is no requirement that the person whose first-hand knowledge was the basis of the entry be identified, so long as it was the business entity's regular practice to get information from such a person." A ship's chief mate provided sufficient foundation testimony, since he supervised the loading of the cargo and had knowledge of the tally system.

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) : The Court reversed a judgment for a landlord in a suit by a tenant's visitor who sustained injuries in a fall from an exterior stairway, because statements in medical records indicating that the plaintiff had fallen from the stairway during a shoving or wrestling match had been improperly admitted. There was no showing of who provided this information, and the Court concluded that it was not made by the hospital staff in the ordinary course of business.

Scheerer v. Hardee's Food Sys., Inc., 92 F.3d 702 (8th Cir. 1996) : The Court reversed a judgment for the defendant in a slip and fall case because an "incident report" by a nonwitness employee of the defendant was improperly admitted. The report attributed to a "friend" of the plaintiff a statement suggesting that the plaintiff's slick shoes were the cause of the accident. Although one of the witnesses at trial might have been the source, she could not remember making the statement, and the absence of any evidence of the identity of the source made it impossible to test the statement's reliability or trustworthiness.

[vii] Rule 803(6) -- Source of Information -- Verification

United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995) : In a prosecution for conspiracy to possess and distribute cocaine, the government was allowed to introduce Western Union money transfer records to prove cash flow among the conspirators. A Western Union employee testified that a sender's identity is not verified, but that in order to receive the money a person must either show identification or answer a test question prepared by the sender. The Court relied on *United States v. Patrick*, *infra*, for the proposition that the business must verify the information from the customer in order for that information to be admissible under *Rule 803(6)*. The Trial Judge had found that both the identification process and the test question process constituted adequate verification by Western Union of the recipient's identity. The Court, however, doubted that the test question procedure adequately verifies the actual *identity* of the recipient; rather, the fact that a recipient answered a question posed by the sender indicates only that he "is the sender's *intended* recipient, not that he actually bears the name presented." Any error was harmless, however, because 80 of the 84 recipients in the records admitted were verified by identification rather than by answering a test question. In *United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992)* , a defendant charged with drug trafficking offenses argued that he was innocently visiting the apartment in which he was arrested, but the government introduced a receipt for a TV set in the room that bore the defendant's name and the address of the apartment. Reversing, the Court held that the receipt was hearsay not coming within any exception when offered to prove the name and address of the purchaser, because the purchaser providing information was not acting under a business duty and there was no showing that it was the business' standard practice to verify the information. A dissenting Judge believed that the receipt was not offered for its truth, but only for its circumstantial value in connecting the defendant with the apartment where he, the receipt, and the TV were all found.

United States v. Vigneau, 187 F.3d 70 (1st Cir. 1999) : In a prosecution for drug distribution, the Court held it was error to admit Western Union "To Send Money" forms to prove that the defendant sent money to a coconspirator, since the information concerning the identity of the sender resulted from Western Union's recording of information by a "stranger" to the business and it was not Western Union's practice to verify the sender's identity.

United States v. Reyes, 157 F.3d 949 (2d Cir. 1998) : In a narcotics and racketeering case the government proved that a defendant had ordered murders while in prison, by introducing prison logbooks showing that members of the conspiracy had visited the defendant close to the times of the killings. The Court found no abuse of discretion in admitting the logbooks, despite the fact that outsiders with no business duty (i.e., the visitors) were the source of the relevant information, since the foundation witness testified that prison officers checked identification in order to verify the identity of the visitors. In *United States v. Lieberman*, n109 the Court held that a hotel registration card could qualify as a business record, even if it was filled out by a guest rather than by a business employee, but also concluded that the record could not be used to show who stayed in the hotel when there was no proof that any hotel employee verified identity. The Court found that the card could be used to show that a person using a certain name registered, which evidence could be used with other evidence to connect a defendant to the registration.

United States v. Emenogha, 1 F.3d 473 (7th Cir. 1993) : The Court affirmed convictions for drug offenses, holding there was no error in admitting Currency Transaction Reports to prove currency exchange transactions by a defendant, where there was evidence of the business practice of taking some form of identification, together with the added safeguard of eyewitness testimony for several of the exchanges. See also *United States v. Zapata, 871 F.2d 616 (7th Cir. 1989)* (hotel guest registration records were admissible where the hotel demonstrated that it verified guest information, even though the guest filled out the form).

United States v. McIntyre, 997 F.2d 687 (10th Cir. 1993) : The Court affirmed drug convictions, but observed that a motel's arrival-and-departure log had been erroneously admitted. Because the motel employee who filled out the log relied upon information provided by guests, the essential requirement that each actor in a chain of information be under a duty to provide accurate information to a business was not satisfied. The Court also held that Western Union "to-send-money" forms were not admissible under *Rule 803(6)* where the forms were used to prove that the person named on the form actually sent the money, since Western Union did not verify the identity of those who send money. Such forms were admissible to prove the identity of the recipients, however, since Western Union required verification of recipients' names.

[x] Rule 803(6) -- Special Situations

United States v. Grossman, 614 F.2d 295 (1st Cir. 1980) : In a prosecution for receiving stolen property, the Court held that a manufacturer's catalog was properly admitted under *Rule 803(6)* or *803(17)* to assist the jury in deciding whether the lighters offered in evidence were the same as those shipped by the manufacturer and stolen from the shipment.

Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 23 F.3d 1175 (7th Cir. 1994) : In an action by an excess insurer against the primary insurer for failure to settle a claim within the policy limits, the Court held that a letter written by the primary insurer's counsel to the excess insurer was a business record admissible to prove that the claimant's lawyer had made a demand within the limits.

United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979) : The Court said that Dun & Bradstreet credit reports could be admitted as business records.

[y] Rule 803(6) -- Tax Records

Selig v. United States, 740 F.2d 572 (7th Cir. 1984) : In a dispute between a new owner of a baseball team and the

IRS concerning the valuation of players, the Court found that appraisals made within several months of the purchase of the club qualified as business records. The fact that the appraisals had tax consequences did not disqualify them as business records, since "[m]ost businesses must prepare as a matter of course documents relevant to tax matters."

United States v. Parker, 749 F.2d 628 (11th Cir. 1984) : Affirming a conviction for stealing from an interstate shipment, the Court held that a document identified as a certificate of export to the United States was properly admitted as a business record of a Scottish distiller when a vice president of the United States importer of the distiller's Scotch whiskey testified that the document was prepared in the ordinary course of the distiller's business so that the purchaser could avoid taxation in the United Kingdom.

[z] Rule 803(6) -- Trustworthiness

[i] Rule 803(6) -- Trustworthiness -- Miscellaneous Cases

United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979) : Convictions for conspiracy to defraud the United States and lying to a grand jury were affirmed, as the Court rejected an argument that the defendant should have been permitted to introduce a telex from the Korean Exchange Bank stating that the defendant had withdrawn a large sum of money from his account on a designated day. The telex was sent instead of the defendant's bank records, which the government had sought to obtain by subpoena. The Court concluded that the telex was inadmissible hearsay that could not qualify as a business record: (1) it was not made at or near the time of the transaction it described; (2) it was not made for a regular business purpose; and (3) the Trial Judge could have concluded that the circumstances of preparation indicated a lack of trustworthiness.

United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982) : Affirming convictions for conspiracy to defraud the United States and other offenses growing out of a scheme whereby the United States paid for shipments of oil it never received, the Court upheld the admission of pages of a notebook kept by a truck driver who made deliveries of oil. It said that a Trial Judge who finds business records trustworthy will not be reversed except for an abuse of discretion.

Romano v. Howarth, 998 F.2d 101 (2d Cir. 1993) : Reversing a judgment for the defendants in a prisoner's civil rights action arising out of his treatment at a medical facility, the Court noted that a nurse's "progress notes" had been improperly admitted. The notes recounted a statement by a defendant corrections officer regarding how an injury to the plaintiff occurred, but it was unclear whether the corrections staff at the facility had any "business duty" to the medical staff so as to ensure the accuracy of the account. In any event, the officer's motive to fudge the truth of what happened meant that the statement lacked reliability.

United States v. Casoni, 950 F.2d 893 (3d Cir. 1991) : The Court held in a racketeering prosecution that it was an abuse of discretion (but harmless error) to admit an attorney's interview notes, and a proffer of testimony he prepared based on the interview, to prove a witness' prior consistent statements. The proffer lacked trustworthiness because in preparing it as part of immunity discussions, the attorney had a motive to minimize his client's, and maximize potential codefendants', criminal responsibility. The interview notes might in other circumstances have qualified as business records, but it was an abuse of discretion to admit them where the attorney was able to testify fully about their contents after refreshing his recollection. In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, n110 the Court reversed most of the summary judgment entered for the defendants. The Trial Judge had improperly excluded evidence that qualified for admission as business records. The Court reasoned that "[g]iven the separate treatment in *Rule 803(6)* of untrustworthiness, we think the regular practice requirement should be generously construed to favor

admission," and that "unintelligibility is a factor extraneous to the trustworthiness inquiry" since "[a]mbiguities in a business record, as with any evidence, may be argued to the jury."

McNeese v. Reading & Bates Drilling Co., 749 F.2d 270 (5th Cir. 1985) : The Court affirmed the exclusion as untrustworthy of an accident report filed with the Coast Guard, where the individual whose name appeared on the report denied preparing and signing it and did not know the sources of information contained therein. In *Pan-Islamic Trade Corp. v. Exxon Corp.*, n111 an antitrust action against oil companies, a memorandum written by one of the plaintiff's officers was not admissible as a business record since it was not written as part of the business routine, but was drafted for the express purpose of preventing another company from canceling a contract and was not reliable under the circumstances.

United States v. Stavroff, 149 F.3d 478 (6th Cir. 1998) : Affirming a tax fraud conviction, the Court found no error in the admission of financial ledgers as business records. Neither the fact that the author of each of the entries was unidentified nor the testimony by one of the declarants that he "was not accountable" for his entries made the ledgers inadmissible as untrustworthy, where the custodians testified to the manner of making the records and there was no evidence that the source information was inaccurately recorded in the ledgers.

Wheeler v. Sims, 951 F.2d 796 (7th Cir. 1992) : In a civil rights action by an inmate who alleged paralysis as a result of a beating, the defendants introduced documents from the inmate's prison master file that documented his ability to move his legs and to walk. Affirming a judgment for the defendants, the Court held that the records were made in the regular course of the prison's business and were not untrustworthy under the Rule, as they were not made by the individual defendants in this case and they were not made in anticipation of litigation.

Lloyd v. Professional Realty Servs., 734 F.2d 1428 (11th Cir. 1984) : Affirming directed verdicts against two plaintiffs alleging securities violations and fraud and against the defendant on a counterclaim, the Court held that the Trial Judge properly excluded as untrustworthy draft minutes of the corporate secretary, which had been "marked and edited" and were quite different from the final copy of the minutes.

[ii] Rule 803(6) -- Trustworthiness -- Records Made in Contemplation of Litigation

United States v. Goodchild, 25 F.3d 55 (1st Cir. 1994) : In a prosecution for credit card fraud, the government introduced computer printouts of debt collection memos prepared by the defrauded credit card company. The qualifying witness testified that such memos were prepared by the debt collection department after telephone calls were made to cardholders of delinquent accounts to collect the outstanding debt. The defendant objected that the memos were untrustworthy because they were prepared in anticipation of litigation, but the Court held that the records were "primarily made to enable the department to track down debtors and collect money owed." Since the records were prepared in order to collect debts so that litigation would be unnecessary, and since they were prepared in the ordinary course of debt collection activity, the Court held that they were properly admitted under

Rule 803(6).

Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200 (4th Cir. 2000) : In an action by an insured yacht owner for a declaratory judgment seeking insurance coverage under a hull policy, the Court reversed a judgment rendered for the insurer after a bench trial. It held that the Trial Judge erroneously admitted the investigative report (and improper expert testimony) from a marine surveyor/investigator. Rejecting the insurer's argument that the report was

more trustworthy than one prepared by the insurer itself because it was prepared by an outside consultant, the Court held that the investigator's report for the insurer was inadmissible because it was prepared in anticipation of litigation.

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004) : In an action by an employee who claimed that she had been denied a promotion because of gender discrimination, the Court found no abuse of discretion in the exclusion of memos made by the plaintiff's supervisor after she complained to him about being passed over for discriminatory reasons. The memos said that the supervisor had not promoted her because of deficiencies in her interpersonal skills and that he was planning to promote her soon. The company's regular personnel recordkeeping processes did not include records of employee conversations. These memos had been made only to create evidence for use in the plaintiff's anticipated lawsuit. In *United States v. McPartlin*, n112 the Court affirmed convictions growing out of a bribery scheme involving local officials. It held that a bank statement relied upon by the defendants was not admissible as a business record since it was made two years after the transaction and since it was made in anticipation of litigation and therefore lacked trustworthiness.

Chadwell v. Koch Refining Co., 251 F.3d 727 (8th Cir. 2001) : Affirming a judgment for the defendant employer in an action brought by a former employee alleging wrongful termination, the Court held that notes of a meeting between the plaintiff and company representatives were properly excluded, since the notes were taken by a union representative at a time when the plaintiff was about to file a lawsuit against the employer, and the representative's presence at the meeting implied a "protective function, making the notes more analogous to records kept in anticipation of a lawsuit, which do not qualify for the *Rule 803(6)* hearsay exception." In *Scheerer v. Hardee's Food Sys., Inc., 92 F.3d 702 (8th Cir. 1996)* , the Court reversed a judgment for the defendant in a slip and fall case because an "incident report" by a nonwitness employee of the defendant was improperly admitted. In the Court's view, the incident report lacked reliability because it was made with the knowledge that the incident could result in litigation and not in the ordinary course of the defendant's usual restaurant business, although such reports were made for all incidents involving premises or product liability, fire, theft, or property damage.

Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041 (9th Cir. 1999) : An employee on a cruise ship brought an action for maintenance and cure, after being diagnosed with encephalitis. To prove that he was ill at the time he worked on the ship, he offered a memorandum prepared by the investigator for the defendant's insurer, which contained statements from the plaintiff's fellow employees indicating that the plaintiff told them that he felt sick one day at work and that he was acting erratically while at work. The Court found it was error to exclude the memorandum because it was prepared in contemplation of litigation. The rationale for excluding litigation-oriented reports was not applicable here, because this was not a self-serving document prepared by a litigant, but rather a document prepared by the defendant's insurer that was unfavorable to the interests of the defendant. In *United States v. Miller*, n113 the Court stated that records prepared in response to litigation rather than in the regular course of business are outside of the exception.

Echo Acceptance Corp. v. Household Retail Servs., 267 F.3d 1068 (10th Cir. 2001) : In an action for breach of contract between financing companies, the Court held there was no abuse of discretion in excluding three letters the defendant had sent to the plaintiff. The letters had been drafted by lawyers in anticipation of litigation and there was no showing that they were made and kept in the regular course of business. In *Timberlake Constr. Co. v. United States Fid. & Guar. Co., 71 F.3d 335 (10th Cir. 1995)* , the Court reversed a judgment for a contractor who sued his builder's risk insurer claiming bad faith in the handling of a fire loss claim, holding that it was error to admit letters written by the plaintiff's president and the company's lawyer, which had "all the earmarks of being motivated and generated to further Timberlake's interest, with litigation actually not far around the corner." In *United States v. Hernandez*, n114 the Court affirmed a conviction for firearms offenses while an illegal alien, rejecting the defendant's argument that a computer printout of INS records prepared for the trial was not within the exception. So long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard

copy offered as evidence was printed for purposes of litigation does not affect its admissibility. In *United States v. Bohrer*, n115 the Court affirmed a conviction for failing to file tax returns, but found that a "contact card" prepared by an IRS agent that contained a version of a telephone conversation should not have been admitted as a business record. The Court did not hold that a record prepared by a law enforcement officer could never satisfy the exception. It held instead that "[a]dmission under the business records exception is not available for documents prepared for ultimate purposes of litigation, when offered by the party maintaining the documents."

Noble v. Alabama Dep't of Environmental Mgt., 872 F.2d 361 (11th Cir. 1989) : The Court found error (but harmless) in the admission on behalf of the defendant in an employment discrimination suit of a letter from the defendant's director to another state employee, which addressed the defendant's concern that certain engineering graduates were not qualified for certain jobs, and other letters supporting the defendant's evaluation of the capabilities of these graduates. The defendant failed to show that its director's letter was written in the regular course of business rather than in anticipation of litigation, and offered no evidence of the circumstances in which the other letters were prepared.

[7] Rule 803(7) -- Absence Of Entry In Records

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) : In a negligence action brought by a truck driver against a forklift operator, the Court found no error in the rejection of testimony by a private investigator, offered to rebut the plaintiff's claim that he had been rejected for employment by Ryder Truck Lines, that the investigator had gone to Ryder's headquarters and had looked through job applications and had not found the plaintiff's name. The Court found that the testimony would have been hearsay. Even though Ryder's custodian of records was outside the 100-mile subpoena range, the custodian could have been deposed and the deposition could have laid the basis for the introduction of the records if the custodian was unwilling to appear at trial. In *United States v. Zeidman*, n116 the Court affirmed mail fraud convictions and approved the introduction of evidence that a file search of a business indicated that there was no record of monies collected by the defendants and transmitted to the business. The witness who testified about the file search did not himself conduct the search. The Court did not actually decide what the requisite foundation was under *Rule 803(7)*, but simply decided that the test advocated by the defendants was satisfied in this case.

United States v. Lanier, 578 F.2d 1246 (8th Cir. 1978) : This case holds that an auditor could testify that computer records contain no evidence of certain deposits.

United States v. Rich, 580 F.2d 929 (9th Cir. 1978) : A bank robbery defendant claimed that a certain person had borrowed his car on the day of the robbery. An FBI agent was permitted to testify that he examined police records, sheriff's office records, credit records, and city directories and contacted other sources in the town and that there was no trace of a person with the name mentioned by the defendant. The Court held that much of this evidence was admissible under *Rule 803(10)* and that *Rule 803(7)* could be used to justify the reference to other records. Noting that in order to utilize the business records exception itself, a foundation must be laid for the business record, the Court assumed, but did not decide, "that such a foundation is a necessary predicate to the admission of evidence of the absence of entries."

[8] Rule 803(8) -- public Records And Reports

[a] Rule 803(8) -- Administrative Findings

[i] Rule 803(8) -- Administrative Findings -- Investigations

[A] Employment Cases

Chandler v. Roudebush, 425 U.S. 840 (1976) : In the final footnote to its opinion extending to federal government employees the same rights as other workers in employment discrimination cases, the Supreme Court noted that the prior administrative findings were of use to the Federal Courts: "Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Rule 803 (8)(C) of the Federal Rules of Evidence.

Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21 (1st Cir. 2002) : The Court affirmed a judgment for an employer who was sued by a former employee alleging violations of the Americans with Disabilities Act and the Maine Human Rights Act. Finding no abuse of discretion when the right-to-sue letter the plaintiff received from the Maine Human Rights Commission was excluded, the Court rejected the Ninth Circuit's *per se* admissibility approach (see *infra*). The Court concluded: "The district court's routine exclusion of the MHRC letter ... reflects a tacit balancing under *Rule 403*. Although the findings of a fact-finding agency are entitled to deference, we cannot say that the district court abuses its discretion when it concludes that such an agency determination, unaccompanied by relevant facts, tends to be more prejudicial than probative."

Paolitto v. John Brown E. & C., Inc., 151 F.3d 60 (2d Cir. 1998) : The Court affirmed a judgment for the plaintiff in an age discrimination case, holding there was no abuse of discretion in excluding the decision and record of the state human rights agency that dismissed a charge by the plaintiff for lack of sufficient evidence of age discrimination. Following the majority rule that such findings are not categorically admissible, the Court noted that the plaintiff's evidence at trial undercut many of the agency's factual findings and the defendant had been given a full opportunity to present to the jury all the evidence it had submitted to the agency.

Coleman v. Home Depot, Inc., 306 F.3d 1333 (3d Cir. 2002) : The Court affirmed a judgment for an employer sued by a discharged African-American female employee, finding no abuse of discretion in the exclusion of an EEOC right-to-sue letter. The Court noted that the admissibility of such reports under the hearsay exception was dependent in part on an analysis of the *Rule 403* factors. In this case, the "proof value could be said to be low, given the fact that it would have been introduced to the jury after all the evidence had been offered (which evidence was at odds with the EEOC report), and was more conclusory than factual in nature," while "a great deal of time would have had to have been consumed to counter the report's conclusion about the fate of other employees, male and female."

Falcon v. General Tel. Co., 626 F.2d 369 (5th Cir. 1980) , *vacated on other grounds*, *450 U.S. 1036 (1981)* : In an employment discrimination action, the Court said that letters from the General Services Administration to the company were admissible under *Rule 803(8)(C)*, since they involved factual findings arising out of contract compliance review procedures, even though the GSA generally does not investigate discrimination claims. See also *Local Union No. 59 v. Namco Elec., Inc., 653 F.2d 143 (5th Cir. 1981)* (NLRB findings are admissible); *Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980)* (a report and evaluations by the EEOC were admissible in an employment discrimination action).

Young v. James Green Mgmt., Inc., 327 F.3d 616 (7th Cir. 2003) : Affirming a judgment for the defendant in an action alleging termination as a result of racial discrimination, the Court found no abuse of discretion in excluding a determination by the EEOC that the former employees had been discriminated against by the employer, given that the EEOC's investigator incorrectly testified to the number of employees working for the defendant and could not explain his error. The Court also noted that the evidentiary material available to the EEOC for its report had been presented to the jury at trial. In *Allen v. Chicago Transit Auth., 317 F.3d 696 (7th Cir. 2003)* , the Court reversed summary judgment for the Authority in an employment discrimination action because the Trial Judge failed to give any weight to a finding by the Authority's own investigator that a supervisor's explanation for promoting a white man over the African-American female plaintiffs was not credible. The finding was admissible both as an admission made by an

employee of a party opponent within the scope of his employment and as an investigative report of a public agency.

Johnson v. Yellow Freight Sys., 734 F.2d 1304 (8th Cir. 1984) : The Court affirmed a judgment for the defendant in an employment discrimination case, finding no error in the exclusion of the EEOC's determination that there was reason to believe the plaintiff had been the victim of discrimination. A majority of the Court declined to adopt a *per se* rule of admissibility of EEOC findings and concluded that the Judge had good reason to exclude the findings in this case, since they were supported by only two conclusory sentences and their admission "would have necessitated the taking of additional evidence to apprise the jury of the nature and extent of the EEOC investigation."

Brown v. Sierra Nevada Memorial Miners Hosp., 849 F.2d 1186 (9th Cir. 1988) : The Court affirmed a judgment for the defendants in a suit by a doctor who claimed racial discrimination in connection with hospital privileges. Although the Court agreed that a report of a state board was admissible, it found no reversible error in the Trial Judge's refusal to permit the plaintiff to testify as to the board's conclusions. The Court also held that two reports sent to the board by outside consultants were not admissible, since they were not findings of a public agency. In *Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986)* , after noting that it had previously held in *Plummer v. Western Int'l Hotels Co.*, *infra*, that a plaintiff in a Title VII case has a right to introduce the EEOC's probable cause determination, the Court distinguished that case and held in this age discrimination case that an EEOC letter of violation, which represents a determination that a violation actually occurred, might result in unfair prejudice in some cases. Thus, no automatic rule of admissibility applied. In the instant case, the Court ruled that even though the Trial Judge erroneously believed that the letter had to be admitted, any error was harmless. In *Plummer v. Western Int'l Hotels Co.*, n117 the Court held that there is a "per se rule of admissibility" that applies to EEOC probable cause determinations offered in subsequent civil rights suits charging employment discrimination, whether tried to Judge or jury. In our view, any "absolute right" to introduce this evidence appears to be inconsistent with the part of the Rule that permits exclusion when the circumstances in which particular findings were made suggest a lack of trustworthiness. It is also inconsistent with the notion that evidence that is generally reliable and helpful might be unreliable or prejudicial in a particular case and thus might be excluded under *Rule 403*.

Figures v. Board of Pub. Utils., 967 F.2d 357 (10th Cir. 1992) : In a Title VII action by an employee involving the employer's failure to promote him, the Court held there was no error in excluding a draft letter from the Office of Federal Contract Compliance Programs indicating race discrimination, as the letter did not represent findings adopted by an agency or government office. In *Hall v. Western Prod. Co., 988 F.2d 1050 (10th Cir. 1993)* , the Court affirmed a judgment for an employee who sued for age discrimination and breach of contract, holding there was no abuse of discretion when a report of a state fair employment commission finding no discrimination was excluded on the grounds that the evidentiary matter in the report could be presented to the jury by other means and the risk of unfair prejudice outweighed the probative value of the evidence.

Walker v. NationsBank of Fla. N.A., 53 F.3d 1548 (11th Cir. 1995) : In a Title VII and ADEA action by a discharged bank manager, the Court held there was no abuse of discretion in excluding a letter from the EEOC finding reasonable cause to believe the bank had discriminated. Although it is well established in the Circuit that EEOC determinations are generally admissible in bench trials, the Trial Judge was properly concerned in this jury trial that the determination by another EEOC office that there was no probable cause would shift the jury's focus away from the issue of whether the bank had discriminated and towards the procedural adequacy of the two investigations. In *Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990)* , the Court held there was no abuse of discretion in admitting an EEOC determination of "no reasonable cause" in a race and sex discrimination action, as the plaintiff made no showing of defects in trustworthiness or that the danger of unfair prejudice significantly outweighed the highly probative nature of the evidence. Rejecting a *per se* rule of admissibility for EEOC reports (see *Plummer v. Western Int'l Hotels Co. (9th Cir.), supra*) or a rule making such reports subject only to the trustworthiness proviso (see *Garcia v. Gloor (5th Cir.),*

supra), the Court noted that the change from a bench to a jury trial will not affect the analysis under the trustworthiness proviso of the Rule but will affect the balancing under *Rule 403*.

[B] Rule 803(8) -- Administrative Findings -- Investigations -- Other Cases

City of New York v. Pullman, Inc., 662 F.2d 910 (2d Cir. 1981) : In a breach of warranty action involving the sale of subway cars, the Court upheld the exclusion of a report prepared by the staff of the Urban Mass Transit Administration, a federal agency to which the Secretary of Transportation has delegated his statutory duty to investigate unsafe conditions in federally funded transportation programs. Since the report was an interim report of the staff and did not represent findings by the agency, the Court said that it did not qualify under the Rule. The Court added that because the UMTA did not do its own tests and relied instead upon "hand-outs" prepared by the parties to this case, the report was not trustworthy. Affirming convictions for securities convictions in *United States v. Corr*, n118 the Court held it was not error to exclude a SEC release concerning the stock controlled by one of the defendants. The evidence was inadmissible hearsay and outside of the exception of *Rule 803(8)(C)* because the release "was not a determination of facts obtained after administrative proceedings."

In re Complaint of Nautilus Motor Tanker Co., 85 F.3d 105 (3d Cir. 1996) : The Court held that a Coast Guard report of a tanker grounding was admissible in a limitation proceeding, notwithstanding a regulation providing that such reports are not intended to fix civil or criminal responsibility, which the tanker's owner had claimed deprived the report of evidentiary relevance. The Court reasoned, first, that the policy justification for the regulation's evidentiary bar -- ensuring frank disclosure by Coast Guard investigators -- was absent where, as here, the Coast Guard had no interest in the outcome. Second, a federal regulation cannot "trump" a Federal Rule of Evidence enacted by Congress, so Rules 401-402 set the applicable standard of relevant evidence. In so holding, the Court rejected contrary reasoning in *Huber v. United States, 838 F.2d 398 (9th Cir. 1988)* , which was followed in *In re Cleveland Tankers, Inc., 67 F.3d 1200 (6th Cir. 1995)* . A concurring Judge argued that the regulation did not purport to govern the admissibility of a report. A dissenting Judge argued that, while regulations cannot "trump" statutes, a regulation promulgated pursuant to congressional authority can create an exception to a general rule of evidence.

Combs v. Wilkinson, 315 F.3d 548 (6th Cir. 2002) : Reversing in part summary judgment granted for correction officers sued for using excessive force when quelling a prison disturbance, the Court held it was an abuse of discretion to strike, without explanation, the report of a Use of Force Committee that had investigated the incident for the state corrections department. The report was relevant to the plaintiffs' claims of excessive force, the plaintiffs provided a sufficient foundation for application of the public records and reports exception, and the defendants' argument that the committee members lacked personal knowledge of the incident was misplaced, since personal knowledge of the underlying events is not required for investigative reports. Upon remand, the report could still be excluded if the trustworthiness proviso of *Rule 803(8)* was found not satisfied.

Vining v. Enterprise Fin. Group, Inc., 148 F.3d 1206 (10th Cir. 1998) : When the surviving spouse made a claim under a credit life insurance policy after the insured died of a sudden heart attack, the insurer refused to pay on the ground that the insured's health condition had been misstated. Affirming a judgment for compensatory and punitive damages against the insurer for breach of contract, the Court held there was no abuse of discretion in admitting a report prepared by staff of the state insurance department regarding the defendant's business practices. The report was sufficiently final, since it was attached to and incorporated by reference into an order subsequently issued by the Insurance Commissioner, head of the agency. In a case alleging racial discrimination in housing, *Denny v. Hutchinson Sales Corp.*, n119 the Court found no abuse of discretion in excluding a state agency's finding of probable cause in favor of the plaintiffs where the jury was given substantial evidence, including a statistical explanation, concerning relevant events and there was a danger of undue deference to the agency.

[ii] Rule 803(8) -- Administrative Findings -- Quasi-judicial Proceedings

Henry v. Daytop Village, Inc., 42 F.3d 89 (2d Cir. 1994) : The defendant in an employment discrimination action alleged that the plaintiff had been discharged because she misrepresented her husband's insurance coverage. Reversing a summary judgment for the defendant, the Court held that an Administrative Law Judge's determination in a state unemployment benefits hearing that the plaintiff had not misrepresented the insurance coverage was admissible evidence, which, with the plaintiff's affidavits, was sufficient to raise a genuine dispute of material fact.

Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238 (4th Cir. 1999) : In an action for breach of a contract to restore a damaged aircraft to airworthy condition, the plaintiff introduced the decision of an NTSB administrative law judge finding that the repaired aircraft was not airworthy. Affirming a judgment for the plaintiff, the Court held that although the ALJ acted as a Judge and presided over a quasi-judicial proceeding, the proceeding was in the executive rather than the judicial branch and the findings were admissible under *Rule 803(8)(C)*. The Court also held it was error (but harmless) to admit an order of the NTSB dismissing an appeal from the ALJ's decision. Since the order merely held the defendant lacked standing to appeal, it was strictly a legal ruling and involved no factual determinations.

In re Plywood Antitrust Litig., 655 F.2d 627 (5th Cir. 1981) : The Court upheld admission of findings of an Administrative Law Judge adopted by the FTC, where the Trial Court edited from the findings any indication of the agency's conclusions or the outcome of the proceedings.

[b] Rule 803(8) -- Agency Manuals, Records, and Reports

United States v. Johnson, 722 F.2d 407 (8th Cir. 1983) : The Court rejected a claim that it was plain error to admit a Bureau of Alcohol, Tobacco and Firearms form to prove that a gun possessed by the defendant had moved in interstate commerce. The gun manufacturer prepared a report on the gun and ATF had custody of this report and the manufacturer's other records as a result of its going out of business. ATF had a duty to keep the report and the Court found that the report was neither a factual finding nor a matter observed by law enforcement officials. The Court also noted that the report was not prepared for this litigation. Thus, it was admissible under *Rule 803(8)(A)*. In *United States v. King*, n120 the Court found that state department of revenue documents were admissible to show ownership.

McGonigle v. Combs, 968 F.2d 810 (9th Cir. 1992) : In a stock fraud action arising out of a private placement of stock in a California horse breeding company, the Court held that the placement's exemption from Kentucky registration requirements was properly proved by a file memorandum written by a staff member of the Kentucky Director of Securities that noted that the Director had advised counsel for the company there would be no registration requirements.

Blim v. Western Elec. Co., 731 F.2d 1473 (10th Cir. 1984) : In an age discrimination action in which the plaintiffs prevailed below, the Court held that a Department of Labor document that memorialized a conversation between a DOL investigator and an employee of the defendant company concerning the possibility of reconciliation between the defendant and the plaintiffs was properly admitted pursuant to *Rules 803(6)* and *803(8)*. The Court reasoned that the defendant's employee was present in Court and carefully reviewed the document for the jury, pointing out portions with which she did not agree; absent the presence of this witness, admission of the report might have been improper.

United States v. Gold, 743 F.2d 800 (11th Cir. 1984) : Affirming convictions for Medicare fraud, the Court found that a manual the government prepared for the intermediaries who process Medicare claims -- e.g., Blue Cross -- was

properly admitted as evidence of what types of claims were properly payable under Medicare.

[c] Rule 803(8) -- Congressional and Legislative Findings

Pearce v. E.F. Hutton Group, Inc., 653 F. Supp. 810 (D.D.C. 1987) : The District Court granted a motion to prevent the plaintiff in a libel suit from relying on a draft report of a congressional subcommittee in opposing a summary judgment motion. It commented that it was dealing "with documents produced by the Congress -- a politically motivated, partisan body"; the report was not based upon an adjudicatory proceeding and was not drafted to resolve a factual dispute; the report lacked trustworthiness because of the political nature of the investigating body; and the report would be excluded under *Rule 403* even if it satisfied the hearsay exception.

Anderson v. City of New York, 657 F. Supp. 1571 (S.D.N.Y. 1987) : Ruling on a summary judgment motion in a civil rights action alleging various constitutional violations by police officers, the District Court held that a report by a Subcommittee of the House of Representatives that summarized testimony concerning police misconduct in New York City was inadmissible. Only one side's evidence was heard, the Subcommittee lacked personal knowledge of the events that were the subject of testimony, and the witnesses were self-interested. Moreover, the Court observed that "hearings and subsequent reports are frequently marred by political expediency and grandstanding."

Hill v. Marshall, 962 F.2d 1209 (6th Cir. 1992) : The Court held, in a prisoner's civil rights action for inadequate medical care, that a report prepared by a state legislature's institution inspection committee was properly admitted under the Rule. In *Bright v. Firestone Tire & Rubber Co.*, n121 the Court affirmed a verdict for the defendant, holding there was no error in excluding a report of a congressional subcommittee, which contained subjective conclusions concerning the defendant's tires rather than factual findings.

Ponce v. Construction Laborers Pension Trust, 774 F.2d 1401 (9th Cir. 1985) : The Court affirmed findings that the trustees of a pension fund violated federal law by adhering to a vesting rule that excluded 96 percent of the workers covered by the pension plan. The Court noted that an interim Senate Report was properly used as corroborative evidence in connection with expert testimony, even though "[i]t might have been error for the trial judge to accept the Senate Report statistics as proof of a disputed fact and rely completely upon the report in deciding that the CLPT exclusion rate was unreasonably high."

Baker v. Firestone Tire & Rubber Co., 793 F.2d 1196 (11th Cir. 1986) : Affirming a judgment for an automobile owner in an action against a tire manufacturer, the Court found that a report by a congressional subcommittee was properly excluded, since it did not contain "factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing."

[d] Rule 803(8) -- Constitutional Concerns

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) : The Court held, in a major narcotics and racketeering case, that admission of factual observations included in an autopsy report from the medical examiner's office did not violate confrontation rights. Using the then-applicable *Ohio v. Roberts* analysis, the Court concluded that the reports had particularized guarantees of trustworthiness, but we note that under *Crawford v. Washington* they might well be considered "testimonial," and thus inadmissible as violating the *Confrontation Clause*.

United States v. DeWater, 846 F.2d 528 (9th Cir. 1988) : Affirming convictions for driving under the influence,

the Court held that the results of intoxilyzer tests were admissible under the then-applicable *Ohio v. Roberts* analysis. We note that under *Crawford v. Washington* they might well be considered "testimonial," and thus inadmissible as violating the *Confrontation Clause*.

[e] Rule 803(8) -- Court Records

United States v. McIntosh, 200 F.3d 1168 (8th Cir. 2000) : Affirming a defendant's cocaine conviction, the Court held there was no error in admitting certified court documents identifying a state felony possession conviction as a drug trafficking conviction. Although the defendant claimed that the record misidentified the nature of the conviction, the Court held that "[w]hen an authorized person certifies facts in public records, the records are admissible under *Federal Rules of Evidence 803(8)* and *902(4)*." It added that the records are only prima facie evidence that may be rebutted and that the defendant in this case failed to offer any rebuttal evidence.

[f] Rule 803(8) -- Factual Findings

See also annotations in *§ 803.03[8][a]*, "Administrative Findings."

[i] Rule 803(8) -- Accidents and Defective Products

Lubanski v. Coleco Indus., 929 F.2d 42 (1st Cir. 1991) : Affirming a judgment for the defendant toy manufacturer in a product liability action brought by the mother of a child killed when struck by a car while riding on a three-wheeled riding apparatus, the Court held that a report of the investigating officer and his conclusions about the circumstances of the accident should not have been excluded *pro forma*. Exclusion might have been appropriate, however, because the report was untrustworthy or because it was confusing, misleading or cumulative; in any event, any error in excluding it was rendered harmless by oral testimony.

Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978) : In a Jones Act case arising out of a fight between the plaintiff and a fellow seaman, the Court reversed the judgment for the plaintiff, holding that *Rule 803(8)(C)* required admission of the factual findings of the hearing examiner at a Coast Guard hearing at which both seamen were represented by counsel and testified under oath.

Diaz v. United States, 655 F. Supp. 411 (E.D. Va. 1987) : In an action by a business invitee who fell aboard a naval vessel, the Court ruled that a report compiled by a Navy officer was admissible where the officer was appointed to conduct the investigation two days after the accident, the investigation was primarily concerned with factfinding, and the officer interviewed the witnesses who signed written statements. Although the plaintiff refused to sign the written summary of his interview, the Court rejected the argument that the report was personally biased against the plaintiff and concluded that the type of report made by the officer was routinely made and did not present the same problems as reports prepared with an eye toward litigation.

Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978) : Affirming a judgment for the defendant truck driver in an automobile negligence case, the Court held that *Rule 803(8)(C)* authorized the admission of a police report containing findings about the color of a traffic light at the time of an accident.

Simmons v. Chicago & N.W. Transp. Co., 993 F.2d 1326 (8th Cir. 1993) : Distinguishing its decision in *Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986)* , the Court held that a state trooper's accident investigation report was admissible in a FELA action, since the trooper was experienced and skilled and the report was timely. The

officer's testimony was also admitted as expert testimony. In *Roth v. Black & Decker, Inc.*, n122 the Court held Consumer Products Safety Commission reports admissible.

In re Aircrash in Bali, Indonesia, 871 F.2d 812 (9th Cir. 1989) : The Court held that an FAA report on an airline's safety record and procedures was admissible, even though it included evaluative or normative findings.

[ii] Rule 803(8) -- Factual Findings -- Accompanying and Supporting Material

FAA v. Landy, 705 F.2d 624 (2d Cir. 1983) : The Court affirmed a finding of violations of federal safety regulations, holding that a telex sent by the German government through the State Department to the FAA, which was incorporated in the FAA's factual findings, was admissible.

In re Air Crash Disaster, 586 F. Supp. 711 (E.D. Pa. 1984) , rev'd on other grounds, 769 F.2d 115 (3d Cir. 1985) : In an opinion denying posttrial motions by a helicopter manufacturer that lost a suit arising out of a helicopter crash, the District Court held that it had not erred in admitting an Army investigation report on the crash accompanied by certain exhibits. The Judge found no problem with the trustworthiness of the exhibits, saw no danger of undue prejudice, and observed that the exhibits had not been sent to the jury room.

McClure v. Mexia Indep. School Dist., 750 F.2d 396 (5th Cir. 1985) : The Court affirmed a judgment for a former school district employee who sued under § 1983 and Title VII, alleging retaliatory discharge for having filed a sex discrimination complaint. The Court held that an EEOC finding of probable cause to believe that the discharge was retaliatory was properly admitted under clause (C), but it was error (albeit harmless) to admit the entire EEOC report, which contained various hearsay statements including newspaper articles.

Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) : The Court held, in a suit to challenge displacement of residents as a result of a freeway project, that forms completed by state transportation agents and files containing information gathered by the agents were properly admitted in the form of an exhibit. Since federal and state law required the agency to keep data to verify compliance with relocation requirements, the data was not gathered solely for purposes of this litigation.

Fowler v. Blue Bell, Inc., 737 F.2d 1007 (11th Cir. 1984) : The Court affirmed a judgment for an employer in an employment discrimination case, finding that the Trial Judge properly admitted affidavits that the EEOC collected during its field investigation -- not for their truth, but to indicate the basis for findings by the EEOC admitted under *Rule 803(8)(C)*.

[iii] Rule 803(8) -- Factual Findings -- Civil Rights Cases

Ariza v. City of New York, 139 F.3d 132 (2d Cir. 1998) : A police officer brought a § 1983 action alleging that he had been retaliated against for exercise of his free speech rights. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in excluding a report prepared by the police department's internal affairs department. The report summarized attitudes and beliefs of a small "focus" group of officers toward "integrity-related issues," and thus did not set forth the department's factual findings based on a factual investigation.

Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc): The Court affirmed an arrestee's judgment against a

police officer for injuries suffered during an arrest. It found that a police report concerning the incident prepared by the defendant's supervisor was properly admitted against the defendant officer under *Rule 803(8)(A)* and *(C)*.

Vance v. Peters, 97 F.3d 987 (7th Cir. 1996) : In a prisoner's § 1983 action for excessive force and deliberate indifference to medical needs, the Court held there was no abuse of discretion in excluding a hearing officer's final report, which concluded that the corrections officer had used excessive force and recommended a 20-day suspension. Given that the evidence considered by the hearing officer had already been admitted, there was a risk that the jury would be confused by and give inordinate weight to the conclusion, which was not based on *Eighth Amendment* criteria.

[iv] Rule 803(8) -- Factual Findings -- Employment Discrimination Cases

See annotations in *§ 803.03[8][a][i][A]*, "Administrative Findings -- Investigations -- Employment Cases."

[v] Rule 803(8) -- Factual Findings -- Evalutive Findings and Opinions

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) : This case is discussed in the Editorial Explanatory Comment to *Rule 803(8)*, *§ 803.02[9][f]*.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants. The District Judge had set forth certain criteria for assessing trustworthiness; the Court did not reject the criteria, but disagreed with many of the rulings excluding findings by various public agencies. The Court said that there is a presumption that official findings are reliable. In a long analysis of the evidentiary questions presented by official findings, the Court noted that: findings need not be premised on an evidentiary hearing; the fact that the parties who were investigated had opportunities to make written and oral submissions may be significant; no statement of reasons is required as a prerequisite to admitting findings; findings regarding product prices and price differentials may be made industry-wide and still be relevant; findings may be made "at a nascent stage" of an investigation, especially where they are predicates for further government action; findings may be based on confidential information not available to the general public; findings may be admitted when they result from accusatory proceedings; and findings in which parties acquiesce may be thought to be reliable. Applying its analysis, the Court found that various findings were admissible, including findings by the Secretary of the Treasury regarding "dumping" of products and findings by the Japanese Fair Trade Commission (although not a consent agreement, which was inadmissible under *Rule 408*) that had investigated price fixing.

Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989) : The Court remanded this wrongful death case in light of the Supreme Court's decision in *Rainey*. The Trial Judge had admitted only the specific findings of fact in an OSHA report and had excluded all opinions and conclusions. The Court emphasized on remand that the Supreme Court had expressed no view as to whether a legal, as opposed to a factual, conclusion was admissible, and opined that legal conclusions do not fall within the exception. It added that in deciding whether a report is trustworthy, a Trial Judge might consider whether an investigator's expertise covers the questions addressed in the report. The Court reasoned that the unavailability of an OSHA investigator to testify in private civil litigation does not invalidate a report, but the absence of an opportunity for cross-examination is a proper factor to consider in evaluating trustworthiness. It added also that a report might be excluded under *Rule 403* even though it is otherwise admissible under *Rule 803(8)(C)*.

[vi] Rule 803(8) -- Factual Findings -- Medical and Scientific

In re "Agent Orange" Product Liab. Litig., 611 F. Supp. 1223, 1267 (E.D.N.Y. 1985) , *aff'd*, *818 F.2d 187 (2d Cir. 1987)* : The Court ruled, in the course of granting summary judgment for manufacturers of a herbicide in a suit by Vietnam veterans and members of their families, that various epidemiological studies by federal, state, and Australian governments would be admissible under *Rule 803(8)(C)*.

Wolf v. Procter & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982) : The Court ruled *in limine* in an action against the manufacturer and distributor of a vaginal tampon to recover for toxic shock syndrome that studies regarding TSS by the Center for Disease Control and state health agencies would be admitted under *Rule 803(8)(C)*.

Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984) : The Court reversed a judgment for the manufacturer of a tampon sued by the husband of a woman who died from toxic shock syndrome. It found error in the exclusion of studies of the syndrome carried out by the Center for Disease Control and various state health departments. The Court reasoned that the presumption is that public officials will perform their duties properly, so the burden is on a party objecting to admissibility of findings by public agencies to demonstrate that a report is unreliable. It declined to treat "scientific" reports differently from other reports, and it held that tentative conclusions as well as statistical findings could be admitted. Finally, the Court rejected a defense argument that the "inevitable debate over research technique" would have confused the jury.

Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. 2005) : Affirming a judgment for the plaintiff in an action alleging that cigarettes had a design defect, the Court found no error in the admission of reports on smoking by the Surgeon General that contained factual findings made by independent scientists and not on the basis of independent research by the Surgeon General. The reports were admissible under the public records exception, since they were prepared pursuant to a legal obligation, and the defendants made no affirmative showing that they were untrustworthy.

Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989) , *aff'g 639 F. Supp. 466 (W.D. Okla. 1986)* : The Court affirmed a judgment for the defendant in a suit by a plaintiff who claimed that her son developed oral cancer from using snuff, holding that a report by the Surgeon General's Advisory Committee on the health consequences of using smokeless tobacco would be admitted, but reports of the International Agency for Research on Cancer and the Conference of the National Institute of Health would not be. The excluded reports were described as "little more than opinions and conclusions drawn from existing research literature." In a wrongful death action arising from an automobile accident, *Crane v. Mekelburg*, n123 the Court upheld the introduction of a certificate stating the decedent's blood alcohol level after the accident. Although no witness testified to the conditions under which the blood alcohol tests were made or to the significance of the tests, the Court found that the document satisfied the definition found in *Rule 803(8)(C)*.

[vii] Rule 803(8) -- Factual Findings -- Miscellaneous Cases

Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983) : The Court upheld the admission of various FCC decisions that found the defendant's tariffs to be improper. It noted that the Trial Judge deleted from the documents words like "unlawful" and "illegal" and held that the FCC findings were admissible under *Rule 803(8)*. The Court found that it could not justify the exclusion of a New York State Public Service Commission decision that arguably supported the defendant's position, but its exclusion did not amount to prejudicial error. See also *Revlon, Inc. v. Carson Prods. Co.* n124(holding patents invalid, the Court admitted an affidavit by an FDA expert that had been used in support of

summary judgment in another case; the "affidavit was a statement by one who was in a public office, acting on behalf of the office, giving findings in accordance with an investigation").

Union Pac. R.R. Co. v. Kirby Inland Marine, Inc., 296 F.3d 671 (8th Cir. 2002) : In an action brought after a river barge ran into a bridge, the Court held that a Coast Guard Order which found the bridge to be "an unreasonable obstruction to navigation" was properly admitted. The determination by the Coast Guard was required by statute, and the process included a detailed investigation, a public hearing, and an administrative review.

Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520 (10th Cir. 1990) : In an action by new owners of a bank against former directors for making unlawful and imprudent loans, the Court held that reports by the Office of the Comptroller of the Currency containing conclusions critical of the defendants' actions were properly admitted.

[g] Rule 803(8) -- Foreign Records

[i] Rule 803(8) -- Civil Cases

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991) : The Court affirmed in part a plaintiffs' judgment in an action by representatives of passengers on an airline flight shot down in Soviet airspace, holding that a report by the Secretary General of the International Civil Aviation Organization was properly admitted. Even though the report was not adopted by the Council of the ICAO and it included a politically motivated Soviet report as an appendix, it constituted findings of a public official, and its untrustworthiness was not shown sufficiently to require exclusion.

In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994) : In an action by relatives of passengers killed in an aircraft bombing, the Court affirmed the jury's finding of liability against the airline for willful disregard of safety measures respecting security inspections of baggage. The Court held that a Scottish investigator's report on the bombing, which concluded that the bomb had been placed in a bag not checked by any passenger on the plane, was properly admitted. The report was prepared largely by compiling computerized records of passenger baggage, which records were amassed from reports of passengers' and crew members' friends and relatives. Accordingly, the defendant could not prove that the report was prepared under untrustworthy circumstances.

United States v. Central Gulf Lines, Inc., 575 F. Supp. 1430 (E.D. La. 1983) , *aff'd*, *747 F.2d 315 (5th Cir. 1984)* : In an action by the United States to recover for shortages in a consignment of refined soybean oil loaded aboard the defendant's vessel in the United States and discharged in India, the Court ruled that "shortlanding" certificates and a report prepared by foreign entities were admissible as government documents of the United States when they were prepared under pertinent government regulations and the duty to prepare the report was delegated to the entities by the United States.

In re Oil Spill by Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) : Affirming findings of liability arising from an oil spill in the English Channel, the Court held that receipt and disbursement records of French governmental authorities were admissible even though they incorporated information furnished by others, as the Rule is not limited to excusing the declarants' presence but states a multilevel exception.

[ii] Rule 803(8) -- Foreign Records -- Criminal Cases

United States v. Doyle, 130 F.3d 523 (2d Cir. 1997) : The Court held in a prosecution for illegal exportation of fuel pumps to Libya that official certifications were sufficient to authenticate copies of privately-generated, as well as public, documents recorded in the Maltese Customs Department, but that there was insufficient showing that the procedures by which the documents were made, recorded, or monitored assured sufficient reliability to permit their admission under a hearsay exception. In *United States v. Grady*, n125 the Court affirmed a conviction for conspiracy to violate federal firearms law and approved the introduction of records of a government agency in Northern Ireland. The Court noted that "Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime," but the reports in this case "simply related to the routine function of recording serial numbers and receipt of certain weapons found in Northern Ireland." In *United States v. Pinto-Mejia*, n126 defendants were found guilty of possessing marijuana on a vessel subject to United States jurisdiction. Jurisdiction depended on a finding that the vessel was stateless, and the determination below was based on a certificate of a Venezuelan agency that stated, *inter alia*, that the named vessel had been registered, that it had "sailed clandestinely from Venezuelan port," that the Maritime Authority had found grounds to hold that the registration became invalid, and that there was no evidence of a subsequent reregistration. The Court held that this was not a certificate qualifying for admission under *Rule 803(10)*, since it related facts that went beyond a simple statement that there was no record of a certain document in a place where it would be expected to be found. The certificate was also inadmissible under *Rule 803(8)*, because it contained factual findings that could not be offered in a criminal case under part (C) of the Rule.

United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991) : Reversing convictions for making false statements in a permanent resident application, the Court held that certain reports of Hong Kong police authorities were erroneously admitted to prove the defendant's prior criminal convictions, as there was no showing that the declarants had firsthand knowledge or received their information from persons with firsthand knowledge of the facts stated. In *United States v. Perlmuter*, n127 the Court overturned a conviction for knowingly procuring naturalization contrary to law. To prove that the defendant did not reveal prior convictions in Israel, the government introduced two documents, one listing four convictions, and the other stating that it contained the fingerprints of the person who was convicted. The Court found that the documents did not qualify as public records because it was possible that they had been specially prepared for this particular case and might involve multiple hearsay.

United States v. Mena, 863 F.2d 1522 (11th Cir. 1989) : Affirming convictions for marijuana offenses, the Court held that a document indicating Honduran registration of a ship was properly admitted as a public agency record. In *United States v. Castaneda-Reyes*, n128 the Court affirmed a conviction for attempted air piracy. It found that a document from the Cuban Ministry of Public Health, which purportedly showed the defendant's stay in a psychiatric hospital and a diagnosis that he had experienced hallucinations, was properly excluded where it appeared to have been tampered with.

[h] Rule 803(8) -- Foundation

United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997) : In a prosecution for being a deported alien found in the United States following an aggravated felony conviction, the Court held there was no error in admitting records of the defendant's prior arrest warrant, deportation order, and deportation warrant. The records had been introduced by means of an INS agent removing each document from the defendant's INS Alien Registry File and explaining its significance to the jury. This was proper since there is no foundation requirement for public records offered under *Rule 803(8)*.

[i] Rule 803(8) -- Included Hearsay

United States v. Houser, 746 F.2d 55 (D.C. Cir. 1984) : The Court overturned a conviction for illegal possession of a firearm, finding error in the admission of a tracer form that was used to show an interstate nexus by establishing the place where the firearm had been manufactured. A government agent testified concerning government tracing procedures, but he indicated that the form had been filled out by an ATF clerk who phoned the manufacturer. The unidentified clerk was not produced at trial and the person at the manufacturer's office who supplied the information was not produced or identified. Although the Court recognized that the manufacturer's records would have been admissible, it found that the tracer form was not a trustworthy public record.

United States v. Mackey, 117 F.3d 24 (1st Cir. 1997) : Affirming convictions for four bank robberies, the Court ruled that an out-of-court statement by the defendant's bookmaker that the defendant had won $60,000 on baseball bets was inadmissible. Although the FBI report containing the statement might be a public record, the statement in the report was "hearsay within hearsay" and not admissible as a statement against penal interest.

United States v. Sallins, 993 F.2d 344 (3d Cir. 1993) : In a prosecution for possession of a firearm by a felon, the government introduced a 911 record in which the caller reported a black male wearing all black clothing who was carrying a gun. The Court held the 911 record came within *Rule 803(8)(B)*, but it was reversible error to admit the contents of the call, which was hearsay not coming within any exception.

Ramrattan v. Burger King Corp., 656 F. Supp. 522 (D. Md. 1987) : Ruling on *in limine* motions in an automobile accident case, the Court held that portions of a police report recording statements of witnesses were inadmissible because the witnesses were not acting in the regular course of business in making the statements. The statements were not admissible under *Rule 803(8)* merely because they were included in a public document.

Reynolds v. Green, 184 F.3d 589 (6th Cir. 1999) : In a prisoner's civil rights action against a corrections officer, the Court held there was no abuse of discretion in excluding a report prepared by the Legislative Corrections Ombudsman's Office regarding the incident. Part of the report consisted of the inmate's statement describing his experience and arguing his conclusions about the corrections officer's motivation. The remainder consisted of the investigator's understanding of the events, including many hearsay statements from the participants, which did not come within any hearsay exception and were therefore inadmissible. In *Miller v. Field, 35 F.3d 1088 (6th Cir. 1994)* , the Court reversed a judgment for defendants in a suit by a prison inmate claiming that their indifference led to his being raped, and held that state police reports concerning the investigation of the alleged rape were improperly admitted. It concluded that statements in the report by alleged assailants and the local prosecutor were not admissible, since they were hearsay contained within a public record. The Court reasoned that factual findings based on inadmissible hearsay are untrustworthy and could not be admitted as public records or under the residual exception to the hearsay rule.

Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995) : Affirming a judgment for police officers alleged to have used excessive force, the Court held that a 911 tape was properly excluded because the citizen caller apparently lacked personal knowledge of the events that he was reporting. Although a 911 tape may qualify as either a public record or a business record, citizen callers are not under any duty to report and thus "a recorded statement by a citizen must satisfy a separate hearsay exception." While a caller might be reporting a present sense impression or making an excited utterance, both exceptions require that a declarant have personal knowledge of the events described.

[j] Rule 803(8) -- Judicial Findings

Trustees v. Lexington Ins. Co., 815 F.2d 890 (3d Cir. 1987) : In a suit by an insured hospital to recover the amount

of a settlement in a malpractice action from its excess insurance carrier, the Court held that it was error, but harmless, to admit a transcript of a State Court settlement hearing in the malpractice action. It reasoned that judicial findings are not admissible under *Rule 803(8)(C)* and that, even if they were, the statements of the Judge in the transcript did not amount to findings. The Court also found that statements at the hearing by counsel concerning the reasonableness of the settlement were hearsay and were not admissible simply because they were part of a transcript of a public proceeding.

Zeus Enters., Inc. v. Alphin Aircraft, Inc., 190 F.3d 238 (4th Cir. 1999) : In an action for breach of a contract to restore a damaged aircraft to airworthy condition, the plaintiff introduced the decision of an NTSB administrative law judge finding that the repaired aircraft was not airworthy. Affirming a judgment for the plaintiff, the Court held that although the ALJ acted as a Judge and presided over a quasi-judicial proceeding, the proceeding was in the executive rather than the judicial branch and the findings were admissible under *Rule 803(8)(C)*. In *Nipper v. Snipes, 7 F.3d 415 (4th Cir. 1993)* , a judgment for the plaintiffs in a civil fraud action was vacated because findings of fact from another litigation between the parties had been admitted. The Court noted that *Rule 803(8)(C)* applies to findings "resulting from an investigation," but a Judge in a civil trial is not an investigator, and that nothing in the text of the Rule or the Advisory Committee note hints that it applies to judicial findings of fact. Furthermore, there is a serious danger that the jury might give exaggerated weight to a judgment.

Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002) : The plaintiff in an FOIA action to obtain aircraft plans and specifications sought to prove corporate succession by means of a factual finding in a judicial opinion in another case. Affirming summary judgment for the defendant agency, the Court held that the opinion was hearsay and that *Rule 803(8)* did not apply to judicial findings of fact in an unrelated case.

United States v. Jones, 29 F.3d 1549 (11th Cir. 1994) : In a suit by the government to recover a medical student loan, the Court held it was error to admit findings of fact stated in the opinion from another case between the parties. The Court observed that the legislative history makes it clear that judicial findings are not encompassed by *Rule 803(8)(C)*; when the drafters wanted to admit judgments or their underlying facts, they did so expressly; and a judgment from another case would not be admissible at common law.

[k] Rule 803(8) -- Law Enforcement Reports and Matters Observed by Officials in Criminal Cases

[i] Rule 803(8) -- Admissible

United States v. Union Nacional de Trabajadores, 576 F.2d 388 (1st Cir. 1978) : Affirming a judgment that the defendants were guilty of criminal contempt for violating an anti-strike injunction, the Court held that *Rule 803(8)(B)* permitted the introduction of a marshal's return of service to prove that certain persons had been served with process. The Court reasoned that "[a] sheriff or marshal reporting the service of process is not reporting in the capacity of a police observer at the scene of a crime, nor is he ordinarily connected with the case in a law enforcement capacity. The 'adversarial' circumstances which might render a law enforcement officer's observations unreliable are unlikely, therefore, to be present."

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) : The Court held, in a major narcotics and racketeering case, that factual observations included in an autopsy report from the medical examiner's office were properly admitted, as the employees of the office have no responsibilities for enforcing laws and are therefore not "law enforcement personnel" whose observations are excluded under *Rule 803(8)(B)*. The part of the report containing factual findings as to the manner and cause of death was properly held inadmissible under *Rule 803(8)(C)*. In *United States v. Grady*, n129 the Court affirmed a conviction for conspiracy to violate federal firearms law and approved the introduction of records

of a government agency in Northern Ireland. The Court noted that "Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime," but the reports in this case "simply related to the routine function of recording serial numbers and receipt of certain weapons found in Northern Ireland."

United States v. Dudley, 941 F.2d 260 (4th Cir. 1991) : In a perjury prosecution the government offered a report, prepared by a Federal Reserve Bank staff assistant based on an exhaustive review of currency records maintained by the Bank, which concluded that certain bills were not in circulation at the relevant time. Although the report was prepared at the direction of a law enforcement officer, the Court held that when a government agency performs mechanical record keeping and provides a law enforcement officer with a computerized printout of that information, the printout is admissible. We note, however, that under *Crawford v. Washington* the report might be considered "testimonial," and thus inadmissible.

United States v. Box, 50 F.3d 345 (5th Cir. 1995) : Affirming convictions in an extortion prosecution of a sheriff and others, the Court held there was no abuse of discretion in admitting jail cards, arrest reports, record bail books, and jail logs from the sheriff's office, as the records were being admitted against the officers and coconspirators who were keeping the records and, as such, did not implicate the reliability concerns behind the "law enforcement" clause. In *United States v. Wiley, 979 F.2d 365 (5th Cir. 1992)* , the Court affirmed a conviction for conspiracy to pass counterfeit IRS obligations, holding there was no error in admitting evidence that the IRS had frozen a taxpayer's account and placed him under investigation because of a large tax refund claim. The report was prepared in a routine, nonadversarial setting, rather than in the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation. In *United States v. Puente*, n130 the Court affirmed a conviction for knowingly making a false statement to a grand jury, holding that a computer printout showing that the defendant's son's auto crossed into the United States, at a time the defendant claimed that the auto was in Mexico, was properly admitted. It concluded that Customs agents have no motivation to falsely record the license numbers of vehicles and that *Rule 803(8)(B)* did not bar the introduction of the evidence. See also *United States v. Vidaure* n131(certified copies of prior judgments of convictions and the defendant's "pen packets" from the state department of corrections were admissible; they did not include matters observed by law enforcement officers); *United States v. Dancy* n132(a fingerprint card was properly admitted under *Rule 803(8)*; the Rule does not exclude "records that merely document routine, unambiguous factual matters"); *United States v. Quezada* n133(a warrant of deportation was admissible notwithstanding subdivision (B); the Court distinguished "law enforcement reports prepared in a routine, nonadversarial setting" from "those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of that investigation," and found that the notations on the warrant were admissible as "ministerial, objective observation[s]").

United States v. Brown, 315 F.3d 929 (8th Cir. 2003) : In a prosecution for possessing counterfeit currency, the Court found no abuse of discretion in the admission of evidence from a Secret Service database that bills bearing the same serial numbers had appeared at other locations. Although the source data were initially gathered by law enforcement officials, the data were routinely entered by computer data entry personnel. Furthermore, the witness' testimony was limited to objective information in the database that was not collected in anticipation of the defendant's trial, and did not include information that might have reflected more subjective opinions of law enforcement investigators, such as whether the bills were "counterfeit." In *United States v. Smith, 973 F.2d 603 (8th Cir. 1992)* , the Court affirmed a bank robbery conviction, holding that a police department computer printout was properly admitted as a public record of police observations in a nonadversarial setting of reports of bank robberies in the surrounding area. In *United States v. Enterline*, n134 a prosecution of a scheme to change the identification numbers of stolen motor vehicles, an FBI agent testified that a computer check of several vehicles found in a search of the defendant's premises indicated they had been reported stolen. The Court held that the testimony was not excluded under *Rule 803(8)(B)* because the exclusion in the Rule concerns matters observed by police at the scene of the crime.

United States v. Contreras, 63 F.3d 852 (9th Cir. 1995) : The Court held there was no error when a warrant of deportation was admitted in a trial for illegal reentry, as the notation on the warrant form indicating that an alien has left the country is a routine, objective, indeed mechanical recording of an unambiguous factual matter. In *United States v. Wilmer*, n135 the Court upheld convictions for driving while intoxicated and with a suspended license, although it found that the Trial Judge erred in relying on state evidence law to admit a breathalyzer calibration certificate. The Court found that federal law applied, but that the calibration report was admissible under *Rule 803(8)(B)*, since that section was not intended to exclude "records of routine, nonadversarial matters." See also *United States v. Gilbert* n136(a criminologist's note on a latent fingerprint card indicating that prints were lifted from a statuette used in smuggling heroin was admissible under (B), since the routine act of reporting a latent print is ministerial and not evaluative).

United States v. Brown, 9 F.3d 907 (11th Cir. 1993) : The Court held in a firearms prosecution that a police department property receipt was properly admitted under *Rule 803(6)*, where the police custodian testified that the regular and customary procedure was to fill out a property receipt for any type of evidence. Although the business records exception may not be used as a back door to introduce matters from law enforcement personnel inadmissible under *Rule 803(8)(B)*, routine, nonadversarial police records like this property receipt were not the type of evidence contemplated by the exclusion in *Rule 803(8)*. See also *United States v. Agustino-Hernandez, 14 F.3d 42 (11th Cir. 1994)* (warrants of deportations and records that an alien had been warned of the penalties for reentry, prepared long before the alleged offense and relied on in the daily operations of the Immigration and Naturalization Service, were held admissible).

[ii] Rule 803(8) -- Law Enforcement Reports and Matters Observed by Officials in Criminal Cases -- Inadmissible

United States v. Rosa, 11 F.3d 315 (2d Cir. 1993) : The Court held, in a major narcotics and racketeering case, that factual observations included in an autopsy report from the medical examiner's office were properly admitted under *Rule 803(8)(B)*, but the part of the report containing factual findings as to the manner and cause of death was properly held inadmissible under *Rule 803(8)(C)*. In *United States v. Pinto-Mejia*, n137 defendants were found guilty of possessing marijuana on a vessel subject to United States jurisdiction. Jurisdiction depended on a finding that the vessel was stateless, and the determination below was based on a certificate of a Venezuelan agency stating that the named vessel had been registered, that it had "sailed clandestinely from Venezuelan port," that the Maritime Authority had found grounds to hold that the registration became invalid, and that there was no evidence of a subsequent reregistration. The Court held that this was not a certificate qualifying for admission under *Rule 803(8)*, because it contained factual findings that could not be offered in a criminal case under subdivision (C) of the Rule.

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) : The Court affirmed a conviction for income tax offenses, holding it was error to admit IRS agents' notes regarding meetings they had with the defendant. The Court noted that "[p]ersonal notes made by an investigator such as an IRS agent are not ordinarily admissible because they are hearsay. See *Rule 801(c)*, *803(8)(B)*." Although it found the error to be harmless in *United States v. Stone*, n138 the Court concluded that an affidavit of a Treasury Department officer could be used to authenticate under *Rule 902(4)* a sheet showing checks processed by the Department, but that it could not be used to explain in detail anything about a particular check, including the fact that it was mailed. The Court noted that *Rule 803(8)(A)* did not authorize introduction of the affidavit because it "is designed to allow admission of official records and reports prepared by an agency or government office *for purposes independent* of specific litigation" (emphasis added) and not to allow admission of "statements prepared solely for purposes of this litigation."

United States v. Romo, 914 F.2d 889 (7th Cir. 1990) : Affirming convictions for a cocaine distribution conspiracy, the Court held that an entry in a testifying officer's case report stating that a government informant who testified "deals in stolen property" was properly excluded as lacking trustworthiness, since defense counsel provided no evidence as to how the report was prepared or the basis of the information it contained.

United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002) : Reversing a conviction for marriage fraud and making a false statement on an immigration document, the Court held it was error to admit a "Record of Sworn Statement," made when the defendant applied for a green card, as a public record, because the record was prepared under adversarial, and therefore untrustworthy, circumstances. In a prosecution for smuggling illegal aliens, *United States v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000)* , the government introduced a report prepared by an INS inspector during her interview of one of the aliens, which contained his statements regarding his nationality. The report had been admitted under *Rule 803(5)*, but the Court said law enforcement reports should be admitted, if at all, only under *Rule 803(8)*. Here, because the INS inspector was conducting a criminal investigation, the report was inadmissible under *Rule 803(8)*, but admission was harmless error.

[iii] Rule 803(8) -- Law Enforcement Reports in Criminal Cases -- Offered by Defense

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975) : This case is discussed in the Editorial Explanatory Comment to *Rule 803(8)*, *§ 803.02[9][c]*.

United States v. Versaint, 849 F.2d 827 (3d Cir. 1988) : The Court reversed cocaine convictions for the improper exclusion of a police report, written by an officer who identified the defendant at trial, that described an individual other than the defendant who participated in drug sales. Without deciding whether the report might be admissible as a business record, the Court held that the report was admissible against the government unless it demonstrated a lack of trustworthiness.

United States v. Sharpe, 193 F.3d 852 (5th Cir. 1999) : In a prosecution for murder and related offenses, a defendant claimed that exculpatory FBI lab reports relating to hair, fiber, blood, and print analysis were admissible under *Rule 803(8)(B)*. The Court held that the defendant's reliance on the exception was "misplaced" because *Rule 803(8)(B)* excludes police reports "in criminal cases." We believe this holding is incorrect. See the Editorial Explanatory Comment, *§ 803.02[9][c]*.

United States v. Sutton, 337 F.3d 792 (7th Cir. 2003) : A defendant charged with several robberies sought to introduce reports made by the police laboratory indicating that the defendant's fingerprints did not match fingerprints taken from the crime scenes. The Court held that under *Rule 803(8)(C)* the reports were not excludable as hearsay, but there was no abuse of discretion in excluding the reports under *Rule 403*. Without an expert to explain them, the reports' probative value was outweighed by the risk that the jury would improperly rely on the reports in the absence of context and believe that the reports proved the negative, that the defendant had not been at the crime scene. In *United States v. Hatchett, 245 F.3d 625 (7th Cir. 2001)* , although the Court affirmed both the defendant's drug-related convictions and the exclusion of a fingerprint laboratory analysis for lack of a foundation, it observed that the Trial Judge erred in saying that *Rule 803(8)(C)* did not apply because "this isn't a matter against the government." The Rule "requires only that the report be offered against the government, not that the proceeding be one against the government."

[l] Rule 803(8) -- Matters Observed by Officials -- Civil Cases

See also annotations under *§ 803.03[8][o]*, "Police Reports -- Civil Cases."

Malkin v. United States, 243 F.3d 120 (2d Cir. 2001) : A taxpayer sued for a refund on the ground that the statute of limitations had run prior to the assessment of a deficiency. The IRS claimed that he had timely consented to extension of the limitations period, but the taxpayer's entire file, which contained the original extension form, had been lost or destroyed before the time of trial. Affirming a judgment for the government, the Court held there was no abuse of discretion in admitting IRS computer reports that indicated when items in the file had been entered, since there was no evidence that the unavailability of the original documents was anything other than inadvertent and the secondary evidence was shown to be reliable. IRS employees had the duty to receive extension forms and to record them in the appropriate computer data files, and an automatic dating feature prevents backdating of entries. In an inmate's § 1983 action against prison guards, *Hynes v. Coughlin, 79 F.3d 285 (2d Cir. 1996)* , the defendants offered a "Use of Force" report prepared by one of the guards purporting to describe the beginning of the altercation, although she testified that she had not seen the incident until she heard a scream and observed another guard holding his genitals. The Court said the report was not admissible under *Rule 803(8)(B)* because no adequate foundation was laid; the Court also quoted the 1972 Advisory Committee Note that police reports are excluded except when they reflect first-hand observations of the officer.

Williams v. Tri-County Growers, Inc., 747 F.2d 121 (3d Cir. 1984) : In a Fair Labor Standards Act suit, the Court found that a statement by an agent of the defendant company that was recorded in a Department of Labor investigative report should have been admitted on behalf of the plaintiffs. The statement was an agent's admission and the report was a public record under *Rule 803*. Since the statement was recorded as it was made, the Court concluded that "[i]t was ... very similar to an observation and did not involve the investigator's conclusions."

In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) : Affirming findings of liability arising from an oil spill in the English Channel, the Court held that receipt and disbursement records of French governmental authorities were admissible even though they incorporated information furnished by others, as the Rule is not limited to excusing the declarants' presence but states a multilevel exception.

Hughes v. United States, 953 F.2d 531 (9th Cir. 1992) : Affirming judgments against taxpayers, the Court held that computer-generated IRS Certificates of Assessments and Payments are admissible records of matters observed pursuant to duty imposed by law as to which there is a duty to report.

Haskell v. United States Dep't of Agriculture, 743 F. Supp. 765 (D. Kan. 1990) , *aff'd*, *930 F.2d 816 (10th Cir. 1991)* : In granting the government's motion for a summary judgment barring a store co-owner from the food stamp program, the District Court held that statements of an Agriculture Department investigative aide who witnessed several of the illegal transactions were admissible under the Rule. The Court of Appeals affirmed, holding on authority of *Abdel v. United States, 670 F.2d 73 (7th Cir. 1982)* , that the reports would be admissible under *Rule 803(6)*, so it was not necessary to reach the *Rule 803(8)* question.

[m] Rule 803(8) -- Nongovernmental Agencies

Ricciuti v. New York City Transit Auth., 754 F. Supp. 980 (S.D.N.Y. 1990) , *vacated on other grounds*, *941 F.2d 119 (2d Cir. 1991)* : The Court held in a civil rights action that a study made by a small management analysis group that had been commissioned by the Authority to investigate illegal arrests by transit police was not admissible under the Rule, because the group was not a public office or agency and its findings did not result from an investigation made

pursuant to authority granted by law.

United States v. Central Gulf Lines, 974 F.2d 621 (5th Cir. 1992) : In an action by the government on cargo damage claims, the Court held there was no error in admitting survey reports made by independent surveyors under *Rule 803(8)(C)*, as survey reports are public documents and the surveyors are performing a duty imposed by law.

United States v. Blackburn, 992 F.2d 666 (7th Cir. 1993) : The Court held there was no error in admitting, in the defendant's trial for bank robbery, computer printouts of lensometer readings for eyeglasses left in a stolen getaway car. Because the analysis had been made at the request of the FBI in anticipation of litigation, the records did not have the reliability of business records under *Rule 803(6)*. Because they were made independently by a private company, they were not barred by the criminal-investigation exceptions of *Rule 803(8)*, but since the company was not the equivalent of government investigators, its reports were not records of public offices or agencies admissible under the Rule. However, because the tests were entirely mechanical and objective, and there was no possibility of bias since the investigation had no suspects at the time, the exhibit was reliable enough to be admitted under the residual exception. We note, however, that under *Crawford v. Washington* the report might well be considered "testimonial," and thus inadmissible on confrontation grounds.

Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989) : Affirming a judgment for the defendant in a suit by a plaintiff who claimed that her son developed oral cancer from using snuff, the Court held that two published reports -- by the International Agency for Research on Cancer, and the Consensus Development Conference of NIH -- were properly excluded, as neither reflected the findings of a government agency.

[n] Rule 803(8) -- Opinions

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : In an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, the Court held there was no abuse of discretion under *Rule 403* in redacting references to mesothelioma in the death certificate, autopsy report, and hospital records. Although documents admissible under *Rule 803(8)* may contain opinions, the difficulty of diagnosing mesothelioma meant that unexamined references to the disease were not helpful to and could potentially have misled the jury.

Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989) , aff'g 639 F. Supp. 466 (W.D. Okla. 1986) : The Court affirmed a judgment for the defendant in a suit by a plaintiff who claimed that her son developed oral cancer from using snuff, holding that a report by the Surgeon General's Advisory Committee on the health consequences of using smokeless tobacco would be admitted, but reports of the International Agency for Research on Cancer and the Conference of the National Institute of Health would not be. The excluded reports were described as "little more than opinions and conclusions drawn from existing research literature."

Hines v. Brandon Steel Decks, Inc., 886 F.2d 299 (11th Cir. 1989) : The Court remanded this wrongful death case in light of the Supreme Court's decision in *Rainey*. The Trial Judge had admitted only the specific findings of fact in an OSHA report and had excluded all opinions and conclusions. The Court emphasized on remand that the Supreme Court had expressed no view as to whether a legal, as opposed to a factual, conclusion was admissible, and opined that legal conclusions do not fall within the exception. It added that in deciding whether a report is trustworthy, a Trial Judge might consider whether an investigator's expertise covers the questions addressed in the report. The Court reasoned that the unavailability of an OSHA investigator to testify in private civil litigation does not invalidate a report, but the absence of an opportunity for cross-examination is a proper factor to consider in evaluating trustworthiness. It added

also that a report might be excluded under *Rule 403* even though it is otherwise admissible under *Rule 803(8)(C)*.

[o] Rule 803(8) -- Police Reports -- Civil Cases

Lubanski v. Coleco Indus., 929 F.2d 42 (1st Cir. 1991) : Affirming a judgment for the defendant toy manufacturer in a product liability action brought by the mother of a child killed when struck by a car while riding on a three-wheeled riding apparatus, the Court held that a report of the investigating officer and his conclusions about the circumstances of the accident should not have been excluded *pro forma*. Exclusion might have been appropriate, however, because the report was untrustworthy or because it was confusing, misleading or cumulative; in any event, any error in excluding it was rendered harmless by oral testimony.

Parsons v. Honeywell, Inc., 929 F.2d 901 (2d Cir. 1991) : In a product liability action arising out of a gas explosion, the defendants offered a police report containing a statement from an eyewitness recounting the plaintiff's statement that he smelled gas and "shouldn't have lit it up." The police report would be admissible as a public record and the plaintiff's statement would be admissible as an excited utterance, but the Court held the witness' statement could not come within the residual exception because the witness apparently could testify in person. In *Lerner v. Seaboard Coast Line R.R.*, n139 the Court granted summary judgment for a railroad in an action by train passengers injured when a train collided with an auto. It found that there was no evidence that the grade crossing was dangerous and concluded that a police officer's notation on a report concerning the need for railroad crossing arms was inadmissible since the officer was not an expert on railroad crossings.

Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978) : Affirming a judgment for the defendant truck driver in an automobile negligence case, the Court held that *Rule 803(8)(C)* authorized the admission of a police report containing findings about the color of a traffic light at the time of an accident.

Simmons v. Chicago & N.W. Transp. Co., 993 F.2d 1326 (8th Cir. 1993) : Distinguishing its decision in *Faries v. Atlas Truck Body Mfg. Co., infra*, the Court held that a state trooper's accident investigation report was admissible in a FELA action, since the trooper was experienced and skilled and the report was timely. In *Faries v. Atlas Truck Body Mfg. Co.*, n140 the Court reversed a judgment for the manufacturers of a motorcycle and a truck in a suit by the motorcycle rider. It concluded that a police report should not have been admitted as a public record where the officer did not measure the position of the vehicles or skid marks, the conclusions were based upon statements of interested persons, and there was no corroboration of the report.

Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980) : In an automobile accident diversity case, the Court said that the Trial Judge might have erred in admitting a police report containing statements made by one driver as to how the accident occurred, although any error was deemed harmless.

[p] Rule 803(8) -- Preliminary Memoranda

Smith v. Isuzu Motors, Ltd., 137 F.3d 859 (5th Cir. 1998) : In a wrongful death action, the plaintiffs claimed that the vehicle in which the decedent died was not crashworthy. They sought to introduce three memoranda, prepared by staff members of the National Highway Traffic Safety Administration, which supported their position. The agency ultimately declined to accept the position of these staff members. The Court held that the memoranda were properly excluded as hearsay. They could not be introduced under *Rule 803(8)(A)* because they did not reflect "activities of the agency" within the meaning of that Rule. Nor did the memoranda constitute "factual findings" of the agency within the

meaning of *Rule 803(8)(C)*.

[q] Rule 803(8) -- Relationship to Other Rules

United States v. Arias-Santana, 964 F.2d 1262 (1st Cir. 1992) : Affirming convictions for cocaine distribution, the Court held that a police report identifying the defendant at a drug buy, which would normally be inadmissible under the Rule, was admissible as a prior consistent statement under *Rule 801(d)(1)(B)* after the report was used on cross-examination and the officer was implicitly charged with recent fabrication.

United States v. Oates, 560 F.2d 45 (2d Cir. 1977) : The Court reversed a conviction for possession of heroin with intent to distribute, holding that the exclusionary language of *Rule 803(8)(B)* and *(C)* made it error to admit the official report and the accompanying worksheet of the United States Customs Service chemist who analyzed a white powdery substance seized from Oates' codefendant under any other Rule. The case is discussed in the Editorial Explanatory Comment, *§ 803.02[9][d]*.

United States v. Sokolow, 91 F.3d 396 (3d Cir. 1996) : In a mail fraud prosecution brought against the owner of a company, the government offered a third-party administrator's summary of unpaid health insurance claims filed against the company's health plan. The administrator was hired by a State Court to adjust unpaid claims after the plan was ordered liquidated. The defendant argued that this report was inadmissible in a criminal case due to the exclusionary language of *Rule 803(8)(B)* and *(C)*. But the Court held that this exclusionary language "does not compel the exclusion of documents properly admitted under *Rule 803(6)* where the author testifies." Here, the employee of the administrator who supervised the claim adjustments testified and was cross-examined.

United States v. O'Keefe, 426 F.3d 274 (5th Cir. 2005) : The defendant, charged with "seaman's manslaughter" after he capsized a tugboat causing a passenger to drown, proffered the Coast Guard's accident report of the incident. The Trial Judge ruled that the body of the report could be admitted, but that the conclusory headings in the report would be excluded because, among other things, the jury might be confused as to the different burdens of proof used for the report and at the criminal trial. Affirming, the Court found no abuse of discretion and rejected the argument that the analysis was inappropriate under *Rule 803(8)* because the Rule authorizes exclusion of a public report only if it is untrustworthy and not if it is confusing. The Court stated that *Rule 803(8)* "is not the only basis upon which a district court may rely to exclude evidence stemming from investigative reports," and it found no error in excluding the report as unduly confusing under *Rule 403*. In *Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992)* , the Court affirmed a judgment for the plaintiff in a Title VII sexual harassment action, holding there was no abuse of discretion in excluding the EEOC's determination of no probable cause for the charge. Although agency reports are presumptively admissible under *Rule 803(8)(C)*, this report did not contain detailed evidentiary statements and findings of fact; rather it was a conclusory determination that could have unfairly prejudiced the plaintiff's case and so was inadmissible under *Rule 403*. In an action against an attorney for an insolvent savings and loan association, *FDIC v. Mmahat*, n141 the Court held that regulatory agency examination reports admissible under *Rule 803(8)* satisfied *Rule 805* as to included hearsay because the statements were party-admissions made by a person who, at the time they were introduced, was a defendant in the action. In *United States v. Dancy*, n142 the Court affirmed a felon's conviction for firearm possession, holding that a judgment of conviction was admissible under *Rule 803(22)* whether or not it also fell within *Rule 803(8)*. In *United States v. Cain*, n143 a conviction for transporting a stolen vehicle was reversed, because an escape report from a federal prison was used to prove that the defendant was at large when the vehicle was stolen. The Court concluded that "statements inadmissible as public agency reports under *Rule 803(8)* may not be received merely because they satisfy *Rule 803(6)*."

United States v. Blackburn, 992 F.2d 666 (7th Cir. 1993) : The Court held there was no error in admitting, in the defendant's trial for bank robbery, computer printouts of lensometer readings for eyeglasses left in a stolen getaway car. Because the analysis had been made at the request of the FBI in anticipation of litigation, the records did not have the reliability of business records under *Rule 803(6)*. Because they were made independently by a private company, they were not barred by the criminal-investigation exceptions of *Rule 803(8)*, but since the company was not the equivalent of government investigators, its reports were not records of public offices or agencies admissible under the Rule. However, because the tests were entirely mechanical and objective, and there was no possibility of bias since the investigation had no suspects at the time, the exhibit was reliable enough to be admitted under the residual exception. In *United States v. King*, n144 the Court affirmed a conviction for making false statements, holding that forms filled out by Social Security claims representatives could be admitted under *Rule 803(6)* and rejecting the argument that 803(8) was the exclusive rule for government records. In *United States v. Sawyer*, n145 the Court refused to rely on *Oates, supra* , and held that a memorandum of an IRS agent concerning a telephone conversation was admissible under *Rule 803(5)*, and that *Rule 803(8)* did not signify that 803(5) was unavailable in criminal cases.

United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002) : The defendant was convicted of marriage fraud and making a false statement on an immigration document, after entering an allegedly sham marriage. Reversing, the Court held that a "Record of Sworn Statement," made when the defendant applied for a green card, was not admissible as a business record. The Court noted that "[w]hen public records are used against a defendant in a criminal prosecution, the public records exception [*Rule 803(8)*] is the exclusive applicable hearsay exception." In *United States v. Loera, 923 F.2d 725 (9th Cir. 1991)* , the Court affirmed a motorist's assault conviction arising out of a drunk-driving incident, holding that docket entries of prior misdemeanor convictions were not admissible under *Rule 803(22)* but were admissible under *Rule 803(8)(A)*. In *United States v. Orozco*, n146 the Court affirmed convictions for possession of cocaine and heroin with intent to distribute, upholding the admission of computer data cards from the Treasury Enforcement Communications System, which cards revealed license plate numbers of vehicles passing through a border location at a particular time. The Court said that public records should be considered under *Rule 803(8)*, not 803(6), and that 803(8)(B) did not exclude "records of routine, nonadversarial matters such as those in question here."

United States v. Brown, 9 F.3d 907 (11th Cir. 1993) : The Court held in a firearms prosecution that a police department property receipt was properly admitted under *Rule 803(6)*, where the police custodian testified that the regular and customary procedure was to fill out a property receipt for any type of evidence. Although the business records exception may not be used as a back door to introduce matters from law enforcement personnel inadmissible under *Rule 803(8)(B)*, routine, nonadversarial police records like this property receipt were not the type of evidence contemplated by the exclusion in the Rule. In *Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990)* , the Court held there was no abuse of discretion in admitting an EEOC determination of "no reasonable cause" in a race and sex discrimination action, as the plaintiff made no showing of defects in trustworthiness or that the danger of unfair prejudice significantly outweighed the highly probative nature of the evidence. Rejecting a *per se* rule of admissibility for EEOC reports or a rule making such reports subject only to the trustworthiness proviso, the Court noted that the change from a bench to a jury trial will not affect the analysis under the trustworthiness proviso of the Rule but will affect the balancing under *Rule 403*.

[r] Rule 803(8) -- Relevance Requirement

United States v. Kail, 804 F.2d 441 (8th Cir. 1986) : In a prosecution for mail fraud involving the sale of coins, the Court held it was proper to exclude a 1977 Postal Service administrative decision that found that there were no industry-wide standards for the grading and valuation of coins. There was evidence that standards were developed thereafter, which rendered the earlier finding irrelevant.

Kloepfer v. Honda Motor Co., 898 F.2d 1452 (10th Cir. 1990) : In a product liability action arising out of the death of a passenger on an all-terrain vehicle (ATV), the Court held that although there is a strong presumption of admissibility for government reports, there was no abuse of discretion in excluding reports that were not limited to three-wheel vehicles and did not relate to an investigation of this accident or the model involved therein, but rather covered accidents, injuries, and statistics involving ATVs manufactured by over 20 manufacturers.

[s] Rule 803(8) -- Reports Setting Forth Activities

United States v. Koontz, 143 F.3d 408 (8th Cir. 1998) : In a prosecution for drug and weapons offenses, the government sought to rebut the defense contention that a gun found in the defendant's car belonged to a friend of his son by introducing a computerized booking record which indicated that a person by the friend's name was jailed during the relevant time. The Court found no error in admission of the record; it rejected the defendant's argument that a computer-generated booking report was more likely to be inaccurate than, presumably, a manually-prepared document, since the defendant did not explore this issue on examination of the agent presenting the report or cite any case law on the issue.

[t] Rule 803(8) -- Screening Panels

Daigle v. Maine Med. Center, Inc., 14 F.3d 684 (1st Cir. 1994) : The Trial Court in a diversity medical malpractice action ordered that the plaintiff present her case to a prelitigation screening panel as required by state law, and when the panel unanimously found no acts of negligence, followed the state law by admitting the findings into evidence without providing an opportunity for impeachment. Affirming a judgment for the defendant, the Court noted that, *Erie* principles to one side, because screening panels are administered through the Superior Court, admitting the findings is analogous to admitting the factual findings of public agencies resulting from investigations made pursuant to law.

[u] Rule 803(8) -- State Department Reports

Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) : The Court affirmed a summary judgment for a judgment debtor in an action to enforce a judgment rendered by the Supreme Court of Liberia. The Court concluded that State Department Country Reports concerning the fairness of the Liberian judicial system were admissible. They were prepared by area specialists at the Department and are annual undertakings. Moreover, the judgment creditor offered no suggestion of any motive of the United States to misrepresent facts about the Liberian civil war or its effect on the country's judicial system. The Court concluded that uncontradicted evidence established that Liberian courts did not provide a judicial system that offered fair and impartial justice and due process at the relevant time.

[v] Rule 803(8) -- State Law

Daigle v. Maine Med. Center, Inc., 14 F.3d 684 (1st Cir. 1994) : The Trial Court in a diversity medical malpractice action ordered that the plaintiff present her case to a prelitigation screening panel as required by state law, and when the panel unanimously found no acts of negligence, followed the state law by admitting the findings into evidence without providing an opportunity for impeachment. Affirming a judgment for the defendant, the Court held that the federal evidence rules governing hearsay and impeachment do not seek to displace the state's substantive policy implemented by the screening panel procedure.

Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979) : The Court denied posttrial motions by defendants who lost a civil rights case brought by a prisoner who was raped while in custody, stating that a report by the state police on

the problem of sexual assaults in prison was admissible as nonhearsay evidence to show notice and possibly for its truth also under *Rule 803(8)(C)*. That the report was characterized by the state as "confidential" was properly deemed irrelevant to the hearsay issues.

Johnson v. United States, 780 F.2d 902 (11th Cir. 1986) : Although the Court remanded a wrongful death case brought by the parents of an infant who died after being taken to a military hospital, it found no error in the exclusion of a report prepared by an insurance adjuster on behalf of another hospital to which the infant was taken. A state statute mandated the keeping of such a report, but barred its admission as evidence. Although the state law was not controlling, the Court held that the circumstances in which the report was prepared and its inclusion of improper matter justified the ruling below.

[w] Rule 803(8) -- Statistical Reports

United States v. Hardin, 710 F.2d 1231 (7th Cir. 1983) : The Court affirmed a conviction for possession of cocaine with intent to distribute. It found that a graph from a Drug Enforcement Agency statistical report purporting to show the average retail price and purity of illicit cocaine in the United States was properly admitted under subdivision (A) as circumstantial evidence of intent to distribute, and that subdivision (B) did not require its exclusion. The Court noted that "[t]he compilation of such information for the non-litigative purpose of identifying national trends in the illicit drug market provides little incentive for misrepresentation by these agents."

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) : In an action against the United States to recover for the alleged taking of unpatented mining claims, the Court vacated and remanded a summary judgment against the plaintiffs. The Trial Judge erred, *inter alia*, in refusing to consider a study prepared by the Secretary of Agriculture that estimated the amount of mineral deposits on a river, which was a public report admissible under *Rule 803(8)*.

[x] Rule 803(8) -- Statutes and Regulations

Chiron Corp. v. NTSB, 198 F.3d 935 (D.C. Cir. 1999) : The petitioners sued to compel the NTSB to share information obtained during an investigation of a fire that destroyed an aircraft containing cargo owned and manufactured by them, arguing that they may face civil liability claims for the fire. In an opinion dismissing the petition for lack of standing, the Court observed that the governing statute makes the NTSB's report inadmissible in a civil action, but that factual accident reports by NTSB investigators are, by regulation, not reports of the Board and are thus admissible.

In re Complaint of Nautilus Motor Tanker Co., 85 F.3d 105 (3d Cir. 1996) : The Court held that a Coast Guard report of a tanker grounding was admissible in a limitation proceeding, notwithstanding a regulation providing that such reports are not intended to fix civil or criminal responsibility, which the tanker's owner had claimed deprived the report of evidentiary relevance. The Court reasoned, first, that the policy justification for the regulation's evidentiary bar -- ensuring frank disclosure by Coast Guard investigators -- was absent where, as here, the Coast Guard had no interest in the outcome. Second, a federal regulation cannot "trump" a Federal Rule of Evidence enacted by Congress, so Rules 401-402 set the applicable standard of relevant evidence. In so holding, the Court rejected contrary reasoning in *Huber v. United States*, *infra*, which was followed in *In re Cleveland Tankers, Inc.*, *infra*. A concurring Judge argued that the regulation did not purport to govern the admissibility of a report. A dissenting Judge argued that, while regulations cannot "trump" statutes, a regulation promulgated pursuant to congressional authority can create an exception to a general rule of evidence.

Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982) : The Court upheld a judgment against an insurer in a subrogation suit arising out of a plane crash. It found that conclusions in a National Transportation Safety Board report could not be admitted because 49 U.S.C. § 1441(e) explicitly prohibits use of such a report in an action for damages.

Curry v. Chevron, USA, 779 F.2d 272 (5th Cir. 1985) : The Court reversed a directed verdict for a manufacturer in an action arising out of a helicopter crash, but it found no error in the exclusion of opinions and conclusions of the National Transportation Safety Board upon which the plaintiffs' expert sought to rely. The Court noted that "the judicial gloss on 761(e) [49 U.S.C. § 1441(e)], while allowing factual portions of the report to be admitted, forbids the use of any conclusory statements in the NTSB reports."

In re Cleveland Tankers, Inc., 67 F.3d 1200 (6th Cir. 1995) : In a limitation of liability action arising out of an explosion on a ship unloading gasoline, the Court held that the analysis and conclusions section of a Coast Guard accident report was not admissible, since the regulation under which the report was prepared clearly indicates that it is to be a safety-maximizing tool, not a forensic aid.

Huber v. United States, 838 F.2d 398 (9th Cir. 1988) : In an action between the United States and a shipowner for contribution following settlements with dependents of crewmembers of a ship that sank, the Court held that conclusions and recommendations contained in reports by Coast Guard investigating officers were not admissible in light of a regulation forbidding use of the reports to fix civil or criminal liability.

Mullan v. Quickie Aircraft Corp., 797 F.2d 845 (10th Cir. 1986) : Although the Court reversed a judgment for the purchaser of an aircraft kit against the manufacturer and remanded for further proceedings, it upheld the admission of expert testimony for the plaintiff that was based in part on the factual portions of National Transportation Safety Board reports. The Court indicated that only the portions of the reports that contain conclusions are inadmissible under 49 U.S.C. § 1441(e), and that there is no reason why an expert cannot reach the same conclusions as those found in a report.

Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985) : In a civil rights action for unlawful arrest, the Court sustained the exclusion of a report prepared by an observer-mediator of the Commerce Department's Community Relations Service. The statute establishing the Service provided that the activities of its employees "shall be conducted in confidence and without publicity," and the Trial Judge found that the report was one man's thoughts and was conclusory.

[y] Rule 803(8) -- Transcripts and Minutes of Hearings and Meetings

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) : A three-judge Court found that a redistricting plan that had been cleared by the Attorney-General was unlawful. Among the evidence that the Court considered were transcripts and minutes of public hearings and of legislative committees and subcommittees, which were admissible under *Rule 803(8)(A)*.

[z] Rule 803(8) -- Trustworthiness

[i] Rule 803(8) -- Computerized Records

United States v. Koontz, 143 F.3d 408 (8th Cir. 1998) : In a prosecution for drug and weapons offenses, the

government sought to rebut the defense contention that a gun found in the defendant's car belonged to a friend of his son by introducing a computerized booking record which indicated that a person by the friend's name was jailed during the relevant time. The Court found no error in admission of the record; it rejected the defendant's argument that a computer-generated booking report was more likely to be inaccurate than, presumably, a manually-prepared document, since the defendant did not explore this issue on examination of the agent presenting the report or cite any case law on the issue.

[ii] Rule 803(8) -- Trustworthiness -- Miscellaneous Cases

Distaff, Inc. v. Springfield Contracting Corp., 984 F.2d 108 (4th Cir. 1993) : In an action by a contractor arising out of a fire at a Naval Research Lab, the Trial Judge excluded a report by the Lab's Chief Fire Inspector identifying the cause of the accident on the ground that the author of the report was barred by the Navy from testifying as to his opinions and conclusions. The Court held that the inability to cross-examine the author of a report is not a basis for exclusion.

Moss v. Ole South Real Estate, Inc., 933 F.2d 1300 (5th Cir. 1991) : In a civil rights action arising out of an African-American couple's attempt to buy a house, the Magistrate Judge excluded reports of Air Force and HUD investigations into the incident on the ground they were incomplete and misleading and based on evidence from witnesses who were not credible. The Court reversed a judgment for the defendants, holding that credibility is not the focus of the trustworthiness inquiry. The presumption of trustworthiness was overcome as to the HUD report, however, because the investigation was untimely and a key player was not interviewed.

Ponce v. Construction Laborers Pension Trust, 774 F.2d 1401 (9th Cir. 1985) : Affirming findings that the trustees of a pension fund violated federal law regarding vesting rules, the Court noted that an interim Senate Report was properly used as corroborative evidence in connection with expert testimony, even though "[i]t might have been error for the trial judge to accept the Senate Report statistics as proof of a disputed fact and rely completely upon the report in deciding that the CLPT exclusion rate was unreasonably high."

[iii] Rule 803(8) -- Trustworthiness -- Presumption of Trustworthiness

Bradford Trust Co. v. Merrill Lynch Pierce, Fenner & Smith, Inc., 805 F.2d 49 (2d Cir. 1986) : The Court affirmed a judgment for a brokerage firm in a suit alleging breach of warranty, but it disagreed with the Trial Judge's handling of an evidence issue. The Court held that a party objecting to evidence under *Rule 803(8)(C)* must make an affirmative showing of untrustworthiness. In this case, two FBI reports indicating that a signature was genuine based upon a fingerprint analysis and a handwriting comparison should not have been merely admitted and given no weight in bench trial; instead a trier of fact "should be most reluctant to disregard the only expert testimony before it" on a point that it is not otherwise competent to determine.

In re Paducah Towing Co., 692 F.2d 412 (6th Cir. 1982) : Following a tow boat accident, the Coast Guard held a hearing to determine whether to revoke the license of the tow boat's captain. The Court found no error when the hearing examiner's conclusion that the captain had not acted improperly was admitted in a liability action arising from the accident. The finding might have been deemed untrustworthy because of the evidence relied on by the examiner, but the opponent had the burden of demonstrating that the sources of information were untrustworthy, and had not met its burden.

Union Pac. R.R. Co. v. Kirby Inland Marine, Inc., 296 F.3d 671 (8th Cir. 2002) : In an action brought after a river barge ran into a bridge, the Court held that a Coast Guard Order which found the bridge to be "an unreasonable obstruction to navigation" was properly admitted. The determination by the Coast Guard was required by statute, and the process included a detailed investigation, a public hearing, and an administrative review. The Court noted that the party opposing admission has the burden of proving a public report's untrustworthiness, i.e., whether it was compiled or prepared in a way that indicates that its conclusions cannot be relied upon.

Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993) : The Court reversed a judgment as a matter of law for the City in a civil rights action alleging excessive force by police. The Trial Judge should not have excluded portions of a report by an independent commission on the Los Angeles Police Department without first presuming the report to be trustworthy and shifting the burden to the City of proving untrustworthiness. In *Johnson v. City of Pleasanton, 982 F.2d 350 (9th Cir. 1992)* , an action by homeowners challenging a city ordinance regulating satellite-receive-only antennas, the Court reversed a summary judgment for the homeowners on a preemption claim. In opposing summary judgment, the City offered a declaration by a planning director based upon staff reports indicating that the ordinance did not place unreasonable limitations or place excessive costs on use of antennas. The Court reasoned that, even though the City did not submit affidavits listing the staff members' levels of expertise, Rule (803)(8)(C) presumes that public records are trustworthy. Since the homeowners offered no evidence to suggest otherwise, the Court held that the evidence should not have been excluded and summary judgment should not have been granted.

[iv] Rule 803(8) -- Trustworthiness -- Report Admissible or Required To Be Admitted

In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991) : The Court affirmed in part a plaintiffs' judgment in an action by representatives of passengers on an airline flight shot down in Soviet airspace, holding that a report by the Secretary General of the International Civil Aviation Organization was properly admitted. Even though the report was not adopted by the Council of the ICAO and it included a politically motivated Soviet report as an appendix, it constituted findings of a public official, and its untrustworthiness was not shown sufficiently to require exclusion.

Blake v. Pellegrino, 329 F.3d 43 (1st Cir. 2003) : Reviewing a wrongful death action brought by the parents of a disabled patient, the Court held it was error to redact the words "asphyxia by choking" from the death certificate that was admitted in evidence. The Court noted that the Trial Judge was not permitted to deem the evidence untrustworthy simply because he had come to believe that this was not the cause of death. In *Robbins v. Whelan*, n147 the Court found that a copy of the Department of Transportation National Highway Safety Bureau's report on stopping distances for all cars should have been admitted to bolster the plaintiff's contentions as to the cause of an accident. Although the report was based on tests conducted under controlled conditions, the defendant did not demonstrate that any conditions surrounding the accident were significantly different from the test conditions. The Court found that the report qualified for admission, even though the manufacturers actually had conducted the tests, since the government established detailed standards for the tests.

Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) : A judgment for the plaintiffs in a civil rights action against the County and some of its police officers was affirmed, the Court holding there was no error in admitting excerpts from a state investigation commission report outlining the County's failure to investigate and discipline cases of employee misconduct. The Trial Judge had reviewed the timeliness of the investigation, the special skill or experience of the investigating officials, the procedures governing any hearings, the existence of any motivation problems, and the finality of the findings, and had found the report trustworthy.

Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994) : Reversing a summary judgment for the defendants in a civil rights case arising out of a racial riot, the Court concluded that the Trial Judge properly considered a State Police report. The Rule does not require that an investigation leading to a report be undertaken by a person qualified as an expert, and the fact that officers interviewed parties to the litigation who may be biased did not justify imputing bias to the officers.

United States v. Central Gulf Lines, 974 F.2d 621 (5th Cir. 1992) : In an action by the government on cargo damage claims, the Court held there was no error in admitting survey reports made by independent surveyors under the Rule, as there was a sufficient showing that the surveys were based on personal knowledge and there was no showing the surveyors were biased by government ownership or control or by holding any interest in any aspect of the port operations.

Bank of Lexington & Trust Co. v. Vining Sparks Securities, Inc., 959 F.2d 606 (6th Cir. 1992) : The Court affirmed a judgment for the defendants in a securities fraud action, holding there was no abuse of discretion in admitting letters of caution issued by the NASD, as there was no sufficient showing that the investigation they reflected was untrustworthy. In *United States v. School Dist. of Ferndale*, n148 the Court opined that factual findings of an HEW hearing examiner were admissible under the public records exception. The Court rejected the claim that, because the HEW proceeding was not complete, it was untrustworthy.

Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983) : Affirming a judgment for the plaintiffs in a product liability action arising from a woman's death from toxic shock syndrome, the Court ruled that it was proper to admit reports of epidemiological studies conducted by the Center for Disease Control and various state agencies that analyzed the statistical relationship between tampon use and TSS. The Court rejected the manufacturer's argument that the reports should have been excluded because they reflected various statistical biases and it could not examine the sources of information. It noted "the timeliness of the investigations, the special skills of the agencies conducting them, and their lack of any motive for conducting the studies other than to inform the public fairly and adequately."

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) : The Court affirmed a judgment for police officers sued by the estate of a man killed when the officers attempted to obtain information about a traffic accident. It upheld admission of a report by the Oklahoma State Police Shooting Review Board that found that the officers had complied with regulations, stating that it was "unwilling to conclude that an internal investigation is necessarily biased, absent specific evidence."

[v] Rule 803(8) -- Trustworthiness -- Report Excludable or Required To Be Excluded

[A] Rule 803(8) -- Civil Cases

Strobl v. New York Mercantile Exch., 590 F. Supp. 875 (S.D.N.Y. 1984) : In an antitrust case, the Court denied the defendants' posttrial motions on the ground, *inter alia*, that the new evidence on which the defendants relied, a finding by an Administrative Law Judge that "rubberstamped" the allegations of the enforcement division of the Commodity Futures Trading Commission, was not trustworthy enough to be admissible under *Rule 803(8)(C)*.

New Jersey Turnpike Auth. v. PPG Indus., 197 F.3d 96 (3d Cir. 1999) : The Court affirmed summary judgment for the defendants in an action by the Turnpike Authority to recover clean-up costs at sites contaminated by chromite ore processing residues. As proof that the defendants were the sources of the pollution at the sites in question, the Authority offered Directives issued by the state Department of Environmental Protection that notified the companies

that the DEP believed them to be responsible for hazardous substances that needed to be removed. The Court held that the Directives were not admissible evidence, since even though they were presumably the result of the DEP's investigations, they were more in the nature of notice pleading used to serve as notice of potential liability and were not sufficiently trustworthy to be admitted. In a diversity suit arising out of two accidents involving a plane purchased by the plaintiff from the defendant, *John McShain, Inc. v. Cessna Aircraft Co.*, n149 the plaintiff unsuccessfully appealed rulings that excluded accident reports submitted to the National Transportation Safety Board regarding accidents involving the same plane apparatus involved in the instant case. Some were made by private persons and were not admissible under *Rule 803(8)*, and those that were made by officials presented such difficult trustworthiness problems that the Court found that they were properly excluded under *Rule 403*.

Anderson v. Westinghouse Savannah R. Co., 406 F.3d 248 (4th Cir. 2005) : The Court affirmed summary judgment for the defendants in an action by black employees alleging racial discrimination in pay and promotion practices. The Court held there was no abuse of discretion in excluding an assessment of the defendants' equal employment opportunity and diversity programs that had been prepared by the Department of Energy, since the assessment "suffered from multiple levels of hearsay," was a draft rather than a final report, and posed significant trustworthiness problems because of its limited factual base (e.g., considering the racial composition of only 30 selection panels during a period in which about 900 panels were utilized) and the failure to verify perceptions of self-selected respondents.

Matthews v. Ashland Chemical, Inc., 770 F.2d 1303 (5th Cir. 1985) : Affirming a directed verdict for a propane user in a suit by a propane deliveryman, the Court held it was not error to exclude a report by a fire investigator where it was unclear how great an inquiry was made and there was no evidence of the investigator's special skill and expertise.

Miller v. Caterpillar Tractor Co., 697 F.2d 141 (6th Cir. 1983) : In the course of affirming a judgment for the defendant manufacturer in an implied warranty negligence action against a truck manufacturer, the Court concluded it was proper to exclude two reports offered under the Rule. The first was made by a mining engineer who worked for the United States Bureau of Mines. His report was based on what people who were not clearly reliable told him, and it included a conclusion that was not independently verifiable. Moreover, his expertise was in mine engineering, not in mechanical operations. The second report was prepared by an investigating police officer. The Court concluded that it was properly excluded because it relied upon hearsay statements of witnesses.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988) : The Court affirmed a judgment for the manufacturer in an airplane crash case, holding that evidence of a Forestry Service Pilot's Report was properly excluded, since the relevant portion was written by someone whom the pilot could not identify and might not have been based on personal knowledge. The Court held also that a government bulletin concerning the type of plane involved in the case was properly excluded, since there was no evidence as to the author of the bulletin and the sources of information relied upon, and that another bulletin was properly excluded in view of the fact that it had been withdrawn.

Donald v. Rast, 927 F.2d 379 (8th Cir. 1991) : Affirming a judgment for the defendants in a civil rights action by a motorist who alleged he had been wrongfully administered a breathalyzer test following a collision with a police van, the Court held (2-1) there was no error in excluding evidence that an administrative law Judge had rescinded the suspension of the plaintiff's driver's license. It reasoned that the *ex parte* nature of the administrative proceedings could indicate lack of trustworthiness and the jury might have given undue consideration to the findings. In *O'Dell v. Hercules, Inc.*, n150 the Court held there had been no abuse of discretion in excluding, in an action for personal injuries from exposure to a toxic landfill, "health assessments" prepared by the Environmental Protection Administration. Although EPA reports are generally admissible under the Rule, these reports explicitly qualified their conclusions and

thus lacked trustworthiness.

Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986) : The Court affirmed most of a judgment holding the defendant liable for the death of a soldier resulting from the explosion of an atomic simulator supplied to the Army by the defendant. It found no error in the exclusion of opinions and conclusions found in investigative reports prepared by Army personnel concerning the simulators and the compliance by Army personnel with rules and regulations. The Trial Judge was concerned with the competence and reliability of the reports because of the questionable qualifications of the authors and their failure to interview everyone with knowledge and also found that the reports were the cumulative opinions of nonexperts that were not needed since the defendant intended to call an expert whom the plaintiffs could cross-examine.

Toole v. McClintock, 999 F.2d 1430 (11th Cir. 1993) : Reversing a judgment for the plaintiffs in a product liability case arising out of breast augmentation surgery in 1981, the Court held it was error to admit a 1990 FDA report setting forth "proposed findings" on risks posed by breast implant devices. The Court found that the report, made nine years after the surgery in this case, was irrelevant and that it was untrustworthy because it was only preliminary and an invitation to public comment. In *Wilson v. Attaway*, n151 a civil rights action in which the plaintiffs claimed that the defendants had unlawfully arrested them, the Court sustained the exclusion of a report prepared by an observer-mediator of the Commerce Department's Community Relations Service. The statute establishing the Service provided that the activities of its employees "shall be conducted in confidence and without publicity," and the Trial Judge found that the report was one man's thoughts and conclusory.

[B] Rule 803(8) -- Trustworthiness -- Report Excludable or Required To Be Excluded -- Criminal Cases

United States v. Lanese, 890 F.2d 1284 (2d Cir. 1989) : The Court held there was no error in excluding a police report offered by a defendant in an extortion case to show that he was a victim rather than a conspirator in his codefendant's threats. The report, made regarding the alleged arson of the defendant's car, noted the defendant had stated that an associate of the codefendant was a possible suspect; however, the report and the underlying incident occurred after the charged events, the defendant's full statement to police indicated his bias against the associate, and there was no showing why the officers making the report could not be produced.

United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994) : Affirming a conviction for drug offenses, the Court held there was no error in excluding statements taken by an ATF agent during his investigation that did not mention the defendant in connection with a drug ring. The raw interview transcripts were not "factual findings" under the Rule, since they did not result from any evaluative process. Furthermore, the circumstances in which they were made provided no guarantees of trustworthiness.

United States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002) : Affirming convictions for fraud arising from false claims made to government agencies for meals for economically disadvantaged children, the Court upheld the exclusion of a report regarding the meals program, which had been prepared by an administrative hearing officer and offered by the defendant. The report was untrustworthy because it was based upon the testimony of a codefendant who at the time of her testimony was heavily involved in the criminal activity and not yet charged. She therefore had a significant interest in testifying that there was no fraudulent activity with respect to the meals program.

United States v. Spano, 421 F.3d 599 (7th Cir. 2005) : The Court affirmed convictions in a public corruption case, finding no error in the exclusion of Town Board minutes as unreliable, where the records were controlled by the

defendants themselves rather than by clerks assumed to be disinterested. In *United States v. Romo, 914 F.2d 889 (7th Cir. 1990)* , the Court affirmed convictions for a cocaine distribution conspiracy, holding that an entry in a testifying officer's case report stating that a government informant who testified "deals in stolen property" was properly excluded as lacking trustworthiness, since defense counsel provided no evidence as to how the report was prepared or the basis of the information it contained.

[9] Rule 803(9) -- Records Of Vital Statistics

[a] Rule 803(9) -- Birth Certificates

Oglesby v. Williams, 484 F. Supp. 865 (M.D. Fla. 1980) : An unmarried mother sued to have the putative father's name entered on her child's birth certificate. Citing *Rule 803(9)*, the Court said that the state's interest in the accuracy of birth certificates, which may be relied on when parentage is a material concern, justifies a statute providing that a father's name may not be entered on the birth certificate of an unmarried woman unless he has been adjudicated the father or agrees in writing to inclusion of his name.

[b] Rule 803(9) -- Death Certificates

Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777 (3d Cir. 1996) : In an action alleging that a seaman's death from mesothelioma was caused by asbestos exposure, the Court held there was no abuse of discretion under *Rule 403* in redacting references to mesothelioma in the death certificate, autopsy report, and hospital records. Although documents admissible under *Rule 803(9)* may contain opinions, the difficulty of diagnosing mesothelioma meant that unexamined references to the disease were not helpful to and could potentially have misled the jury. In *Pollard v. Metropolitan Life Ins. Co.*, n152 a plaintiff suing under an accidental death policy proffered a death certificate and a coroner's certificate report describing the cause of death as asphyxia due to acute intoxication and concluding that death was "accidental." The Trial Judge ruled that the certificates would not be admitted unless the conclusions were excised, and the Court held that ruling was not manifestly erroneous. The probative value of the certificates was slight, because they were prepared before a toxicologist's report was completed, and the prejudicial effect was great, because the jury might give them excessive weight and might be confused by the term "accidental," which has a different meaning under the policy than for vital statistics purposes.

Vaughn v. United States, 536 F. Supp. 498 (W.D. Va. 1982) : In an action to recover taxes paid on behalf of an estate, the question of whether certain property was includable in the decedent's estate depended on whether she and her father died simultaneously. The Court admitted their death certificates, which had been issued by different states, and treated them as *prima facie* evidence that the decedent's father predeceased her by 73 minutes.

[10] Rule 803(10) -- Absence Of Public Record Or Entry

[a] Rule 803(10) -- Confrontation Issues

United States v. Hale, 978 F.2d 1016 (8th Cir. 1992) : Affirming a conviction for possession of unregistered firearms, the Court held there was no confrontation violation, under the then-applicable *Ohio v. Roberts* analysis, in admitting affidavits that a diligent search of government records had found no record of any registration application. We note that under *Crawford v. Washington* the affidavits might well be considered "testimonial," and thus inadmissible.

United States v. Rith, 164 F.3d 1323 (10th Cir. 1999) : The Court affirmed a conviction for unlawful possession of an unregistered sawed-off shotgun, holding there was no *Confrontation Clause* violation, under the then-applicable

Ohio v. Roberts analysis, in admitting a certificate by an ATF agent that diligent search of the National Firearms Registration and Transfer Record failed to disclose that the designated firearm had been registered to the defendant. We note, however, that under *Crawford v. Washington* the certificate might well be considered "testimonial," and thus inadmissible.

[b] Rule 803(10) -- Errors in Search

United States v. Yakobov, 712 F.2d 20 (2d Cir. 1983) : The Court reversed convictions for firearms offenses because of errors in admitting evidence that the defendant was not a licensed dealer. The proof consisted of two documents prepared by the Bureau of Alcohol, Tobacco and Firearms -- a statement signed by a regional administrator stating that Frank Hall was the custodian of ATF licensing records for several states, including New York, and another statement by Hall that he had made a diligent search of ATF records and could find no firearms license for Yakobov. At trial the government appeared to rely on *Rule 803(8)* to obtain admission of the Hall statement. On appeal the government relied instead on *Rule 803(10)*, but the Court found that *Rule 803(10)*'s requirement of a diligent search had not been satisfied, since the Hall statement indicated that the search was based on misspelled versions of Yakobov's first and last names. The Court indicated that at a second trial a certificate that satisfied *Rule 803(10)* could be used, notwithstanding *Oates*, on the ground that statements under *Rule 803(8)* may have "evaluative aspects" not associated with certificates offered under *Rule 803(10)*.

[c] Rule 803(10) -- Examples of Admissible Statements

United States v. Ventura-Melendez, 275 F.3d 9 (1st Cir. 2001) : Affirming a conviction for trespassing on a military installation, the Court upheld admission of a certificate signed by a Navy Lieutenant Commander stating that a diligent search of the records containing the names of those with permission to enter the installation had been conducted and that the search revealed no record or entry for the defendant. The Court concluded that *Rule 803(10)* does not require that an agency be under a legal duty to maintain certain records; it is sufficient that the agency has a practice of maintaining the records. We note, however, that under *Crawford v. Washington* the certificate might be considered "testimonial," and thus inadmissible.

United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995) : The Court affirmed a bank robbery conviction, holding there was no error in admitting a declaration by an Assistant Executive Secretary of the FDIC attesting that a diligent search of the agency's records revealed no entry terminating the bank's insurance on or before the date of the robbery. Although the declaration had been admitted at trial under the residual exception, it was admissible under *Rule 803(10)*. We note, however, that under *Crawford v. Washington* the declaration might well be considered "testimonial," and thus inadmissible on confrontation grounds.

[d] Rule 803(10) -- Foreign and International Searches

United States v. M'Biye, 655 F.2d 1240 (D.C. Cir. 1981) : A conviction for filing false information to get bank loans was affirmed, as the Court held that an affidavit of a United Nations official, properly authenticated under *Rule 902*, was properly admitted to show that a search of the records of a U.N. affiliate did not uncover any indication that the defendant was employed there as he claimed on his loan applications. The Court found that the U.N. qualified as a public office or agency. We note, however, that under *Crawford v. Washington* the affidavit might well be considered "testimonial," and thus inadmissible on confrontation grounds.

United States v. McDonald, 905 F.2d 871 (5th Cir. 1990) : A defendant charged with importing marijuana

claimed, when he was stopped at the border, that his wallet had been stolen in Mexico and that he had reported the theft to local authorities. The Court held it was error (but harmless) to admit testimony that an inquiry had been made of Mexican state police and found no report of the stolen wallet, as there was nothing in the record to indicate that such reports were regularly made, transmitted, and preserved by the relevant Mexican officials.

United States v. Regner, 677 F.2d 754 (9th Cir. 1982) : In a mail fraud case involving false claims of hospital expenses in Hungary, the Court found no plain error in the admission of three certified Hungarian documents showing no record of a traffic accident and no record of the defendant's hospitalization. The dissenting Judge argued that the Court knew too little about record keeping in Hungary to warrant acceptance of the documents and urged that *Rule 803(10)* should not lightly be expanded to foreign documents, especially when the documents deal not with governmental matters but with proprietary matters such as taxi and hospital businesses. We note that under *Crawford v. Washington* the Hungarian documents might well be considered "testimonial," and thus inadmissible on confrontation grounds.

United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983) : The Court affirmed marijuana convictions, finding that a certificate from the General Commander of the Naval Force of Honduras saying that an "extensive" search had been carried out and concluding that a ship was not registered in Honduras was properly admitted under Rules 803(10) and 902(3). The Court rejected an argument that *Rule 803(8)(C)* required that the certificate be excluded in a criminal case, reasoning that the certificate was not a factual finding. We note, however, that under *Crawford v. Washington* the certificate might well be considered "testimonial," and thus inadmissible on confrontation grounds.

[e] Rule 803(10) -- Incomplete Search

United States v. Robinson, 544 F.2d 110 (2d Cir. 1976) : A conviction for bank robbery was overturned because of, *inter alia*, improper impeachment of a defense witness who testified that he had been with the defendant on the day of the bank robbery and that he remembered the date because he had picked up an unemployment check. The government sought to show that the state labor department had no record of the witness' receipt of a check on that date. Because the records were not complete, the Court held that the testimony did not satisfy *Rule 803(10)*: "[A] casual or partial search cannot justify the conclusion that there was no record."

[f] Rule 803(10) -- Intelligence Agency Searches

United States v. Wilson, 732 F.2d 404 (5th Cir. 1984) : In a prosecution for illegally shipping plastic explosives out of the country, the defendant objected to an attempt to call the CIA employee who actually conducted a search of CIA records to testify under a pseudonym in order to protect his identity. The government then presented an affidavit by the third-ranking official in the CIA relating that he had authorized a search for material in the possession of the agency that related to the defendant, and the search uncovered no record indicating that the defendant was directly or indirectly associated with the CIA or acting with that agency's knowledge and approval. The Court rejected a confrontation attack on the affidavit, but we note that under *Crawford v. Washington* the affidavit might well be considered "testimonial," and thus inadmissible.

United States v. Lee, 589 F.2d 980 (9th Cir. 1979) : The Court upheld the introduction of affidavits of three CIA officials in an espionage case to show that searches of the records of their respective departments failed to disclose that the defendant had ever been employed by that agency. We note, however, that under *Crawford v. Washington* the affidavits might well be considered "testimonial," and thus inadmissible.

[g] Rule 803(10) -- IRS Searches

United States v. Bowers, 920 F.2d 220 (4th Cir. 1990) : The Court held in a tax evasion prosecution that IRS employees in the Philadelphia Service Center were proper persons to make a certificate under the Rule regarding a search of data stored in the mainframe computer in Martinsburg, West Virginia. We note that under *Crawford v. Washington* the certificate might well be considered "testimonial," and thus inadmissible on confrontation grounds.

Wiley v. United States, 20 F.3d 222 (6th Cir. 1994) : In an action to set aside a seizure of property for nonpayment of taxes, the Court held that absence of an entry in IRS records that a deficiency notice had been properly delivered to the post office for certified or registered mailing was evidence precluding entry of summary judgment for the IRS. In *United States v. Spine, 945 F.2d 143 (6th Cir. 1991)* , the Court affirmed a conviction for tax evasion, holding there was no error in admitting computer-generated documents stating there was no record of the filing of a return, as well as testimony regarding those documents.

United States v. Hutchison, 22 F.3d 846 (9th Cir. 1993) : Affirming convictions for bank fraud and making false statements to the IRS, the Court held there was no violation of confrontation rights, under the then-applicable *Ohio v. Roberts* analysis, when a certificate was introduced regarding an unsuccessful search of tax records for the defendant's return. We note, however, that under *Crawford v. Washington* the certificate might well be considered "testimonial," and thus inadmissible. In *United States v. Neff, 615 F.2d 1235 (9th Cir. 1980)* , an IRS employee's testimony that a file search revealed no information concerning the defendant's tax liability for certain tax years was properly admitted to show the absence of filings.

Brutsche v. Commissioner, 585 F.2d 436 (10th Cir. 1978) : The Court held that the failure of the IRS to locate a shareholders' consent statement concerning Subchapter S status is evidence that the document was not filed.

[h] Rule 803(10) -- Relationship to Rule 803(8)

United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1983) , *modified*, *728 F.2d 142 (2d Cir. 1984)* : The defendants were found guilty of possessing marijuana on a vessel subject to United States jurisdiction. Jurisdiction depended on a finding that the vessel was stateless, and the determination below was based on a certificate of a Venezuelan agency that stated, *inter alia*, that the named vessel had been registered, that it had "sailed clandestinely from Venezuelan port," that the Maritime Authority had found grounds to hold that the registration became invalid, and that there was no evidence of a subsequent reregistration. The Court held that this was not a certificate qualifying for admission under *Rule 803(10)*, since it related facts that went beyond a simple statement that there was no record of a certain document in a place where it would be expected to be found. The certificate was also inadmissible under *Rule 803(8)*, because it contained factual findings that could not be offered in a criminal case under part (C) of the Rule.

United States v. Metzger, 778 F.2d 1195 (6th Cir. 1985) : Affirming a conviction for crimes relating to an automobile explosion that killed two people, the Court upheld the admission of evidence that ATF officials conducted a search and found no evidence that two chemical companies were licensed to manufacture explosives in Kentucky. The Court rejected the defendant's argument that the limitation on the use of public record evidence in criminal cases under *Rule 803(8)(C)* carries over to *Rule 803(10)*.

United States v. Mateo-Mendez, 215 F.3d 1039 (9th Cir. 2000) : To prove that the defendant, charged with illegal

reentry into the United States, reentered without the permission of the Attorney General, the government proffered a "Certificate of Non-existence of Record" (CNER), prepared by an immigration official and attesting that she had failed to discover any evidence of the filing of an application for permission to reapply for admission to the United States on the part of the defendant. Holding that the CNER was properly admitted, the Court rejected the defendant's argument that *Rule 803(10)* imports requirements of "trustworthiness" and "duty imposed by law" from *Rule 803(8)*. The Court stated that nothing in the plain language of *Rule 803(10)* "supports the inference that the documents whose admission that rule allows must be found 'trustworthy' on precisely the same basis as Rule 803.8 contemplates." The Court concluded that if a certificate satisfies *Rule 902*, "it satisfies ipso facto the exception to the hearsay rule in Rule 803.10." The Court held in *United States v. Cervantes-Flores, 421 F.3d 825 (9th Cir. 2005)* , that a CNER was not "testimonial" under *Crawford v. Washington*, so its admission was not a confrontation violation.

United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983) : The Court affirmed marijuana convictions, finding that a certificate from the General Commander of the Naval Force of Honduras concluding that a ship was not registered in Honduras was properly admitted under *Rules 803(10)* and *902(3)*. The Court rejected an argument that *Rule 803(8)(C)* required that the certificate be excluded in a criminal case, reasoning that the certificate was not a factual finding. We question the conclusion that the certificate was not a factual finding and we note, in any event, that under *Crawford v. Washington* the certificate might well be considered "testimonial," and thus inadmissible on confrontation grounds.

[i] Rule 803(10) -- Relevance of Search

Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983) : The plaintiff brought a libel action against the publisher of a weekly newspaper complaining about false statements that suggested he was involved in the assassination of President Kennedy. The Court held that affidavits of CIA officials stating that after diligent searches, they were unable to find any evidence that the plaintiff was in Dallas on the date of the assassination or any memoranda discussing the need to explain his whereabouts on that date were properly admitted under Rules 902(2) and 803(10). The defendant's argument that the affidavits proved only that the material was not in the files after suit was filed, not that it was absent when the story was written, was rejected. The argument went to weight, not admissibility. In *United States v. Stout*, n153 illegal weapons convictions were reversed because a certification by the custodian of firearms registration records was erroneously used to prove that the defendants had not applied to make or transfer firearms and had not paid a tax. The custodian's records revealed only who was entitled to possession of a firearm and did not cover all of the matters mentioned by the custodian. The certification as to matters not covered was inadmissible hearsay.

[j] Rule 803(10) -- Scope of Search

United States v. City of McAlester, 410 F. Supp. 848 (E.D. Okla. 1976) , modified, 604 F.2d 42 (10th Cir. 1979) : In an action to quiet title to certain Indian lands, an important issue was whether the United States was a party in a condemnation suit in 1903. As part of its proof that it was not a party to the 1903 suit, the government offered an affidavit from an official of the National Archives and Records Service, which stated that he caused a diligent search to be made by his staff of the records of the Department of Justice in the National Archives concerning the period 1902 and 1903 and found no reference to the 1903 litigation. The Court found the affidavit admissible under Rules 902(4) and 803(10).

United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983) : The Court affirmed marijuana convictions, finding that a certificate from the General Commander of the Naval Force of Honduras concluding that a ship was not registered in Honduras was properly admitted under Rules 803(10) and 902(3). The certification to an "extensive," as opposed to "diligent," search was held sufficient. We note, however, that under *Crawford v. Washington* the certificate might well

be considered "testimonial," and thus inadmissible on confrontation grounds.

[11] Rule 803(11) -- Records Of Religious Organizations

Hall v. Commissioner, 729 F.2d 632 (9th Cir. 1984) : Upholding a decision that contributions to a congregation did not qualify for charitable deductions, the Court found that the Tax Court properly rejected proffered church records. They were not shown to be business records, and statements of contributions to a church do not qualify as religious records under *Rule 803(11)*.

[12] Rule 803(14) -- records Of Documents Affecting An Interest In Property

[a] Rule 803(14) -- Contents of Records

United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978) : In this tax evasion case, a government expert was permitted to testify as to the contents of various records in the county clerk's office. The Court held that the testimony was hearsay within hearsay and that, although the statements in the records were admissible under *Rule 803(14)*, the testimony as to what the contents were was a violation of the hearsay rule. In our view this confused the Best Evidence rule with a hearsay problem: the witness' testimony stating what he saw was not hearsay at all.

[b] Rule 803(14) -- Deeds

Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349 (2d Cir. 1977) : Affirming FPC orders licensing hydroelectric projects, the Court held that the agency properly relied on historic documents, including recorded deeds, to determine the navigability of a river.

Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985) : Determining in a quiet-title action that the marriage of an intestate and his purported wife was valid, the Court relied in part upon recitals in two warranty deeds executed as husband and wife and the conduct of the heirs over the years that was fully consistent with those recitals. The Court commented that "such instruments are executed in relation to serious and carefully planned transactions, and the financial stake in the transaction, plus the obvious reliance upon the truth of statements made in such instruments by third parties are adequate to at least imply that the recitals in such instruments are trustworthy."

[13] Rule 803(15) -- Statements In Documents Affecting An Interest In Property

United States v. Boulware, 384 F.3d 794 (9th Cir. 2004) : The Court reversed a conviction on tax charges, finding it was an abuse of discretion to exclude evidence of a State Court judgment in a suit by the defendant against a former girlfriend. The government alleged that the defendant diverted funds from a company by giving the funds to his girlfriend and wife without reporting any of the money on his income tax returns. The state judgment established that money given to the girlfriend was not a gift and was to be held in constructive trust for the corporation. The Court held that statements included in the State Court judgment were admissible pursuant to *Rule 803(15)*, since the judgment affected an interest in the money given to the girlfriend.

[14] Rule 803(16) -- Statements In Ancient Documents

[a] Rule 803(16) -- Business Records

Fulmer v. Connors, 665 F. Supp. 1472 (N.D. Ala. 1987) : In an opinion entering judgment for the widow of a deceased coal miner who sued the union pension fund, the Judge ruled that the company's cash book and time and payroll book, which contained entries for the early 1940s, were admissible as ancient documents.

[b] Rule 803(16) -- Deeds and Official Certificates

Compton v. Davis Oil Co., 607 F. Supp. 1221 (D. Wyo. 1985) : Determining in a quiet-title action that the marriage of an intestate and his purported wife was valid, the Court relied in part upon recitals of marital status in the intestate's death certificate that was made in 1935. The Court commented that statements in ancient documents are admissible due to necessity arising from the disappearance of other evidence, that recitals in documents remove risks of mistransmission of information associated with oral statements, and that the time gap between the statements and the subsequent litigation lessens the likelihood of conscious or unconscious falsehood.

United States v. Koziy, 728 F.2d 1314 (11th Cir. 1984) : The Court upheld a revocation of citizenship on the ground that the defendant procured citizenship by concealing or misrepresenting information concerning his membership in the Organization of Ukranian Nationalists and the Ukranian Police. To prove membership in the police force, the government offered two exhibits that bore the defendant's signature. The Court found that the exhibits were properly authenticated and that they were not inadmissible hearsay since they qualified as ancient documents, having been in existence for 20 years or more.

[c] Rule 803(16) -- Foundation

George v. Celotex Corp., 914 F.2d 26 (2d Cir. 1990) : Affirming a verdict for the plaintiff in an action for injuries from asbestos exposure, the Court said that an unpublished 1947 report regarding the dangers of asbestos could not be admitted for the nonhearsay purpose of showing notice because there was no proof the defendant ever saw the report or that it reasonably should have seen it as part of the published literature in the industry, but the report was properly admitted as an ancient document under *Rule 803(16)* after authentication pursuant to *Rule 901(b)(8)*. The Court rejected the defendant's argument that the need to test the reliability of the report's conclusions made it inadmissible as an ancient document.

Threadgill v. Armstrong World Indus., 928 F.2d 1366 (3d Cir. 1991) : The Court reversed the denial of a new trial following a jury verdict for the defendants in an asbestos wrongful death action, holding that the plaintiff should have been given the opportunity to authenticate the "Sumner Simpson documents"; if authenticated under *Rule 901(b)(8)*, the documents would automatically be excepted from hearsay under *Rule 803(16)*.

Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) : In a suit by a worker against various manufacturers alleging injury as a result of exposure to asbestos, the Court held that memoranda offered in connection with a deposition were hearsay, but that the memoranda might have qualified for admission as ancient documents if the plaintiff had laid a proper foundation.

[d] Rule 803(16) -- Letters

Martha Graham School & Dance Found., Inc. v. Martha Graham Center of Contemporary Dance, Inc., 380 F.3d 624 (2d Cir. 2004) : In an action by the legatee of a deceased choreographer's estate against a dance center and affiliated school to determine ownership of copyright in dances, the Court upheld a ruling that the choreographer had assigned 21 dances to the center. It held that the Trial Judge properly admitted 1968 and 1971 letters from the center's executive

administrator stating that the rights to the dances were assigned, as the letters qualified as ancient documents and were properly authenticated.

[e] Rule 803(16) -- Newspapers

Bell v. Combined Registry Co., 397 F. Supp. 1241 (N.D. Ill. 1975) , aff'd, 536 F.2d 164 (7th Cir. 1976) : In a copyright suit the Court relied upon letters and newspaper articles from the 1930s and 1940s, treating them as ancient documents.

Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984) , aff'd, 783 F.2d 982 (11th Cir. 1986) : In an action by African-American plaintiffs for an injunction to restrain city officials from providing municipal services in a racially discriminatory manner, the Court received newspaper articles that were more than 20 years old for their truth. It admitted other articles that did not qualify as ancient documents to show "how the events of the day were being recorded."

[f] Rule 803(16) -- Official Records

United States v. Stelmokas, 100 F.3d 302 (3d Cir. 1996) : The Court held, in denaturalization proceedings against an alleged Nazi collaborator, that records of the defendant's employment and activities during World War II, which were found in Lithuanian archives and other locations containing German records, were properly admitted. The records' authenticity and reliability were certified by experts possessing considerable experience with Eastern European Holocaust records.

Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648 (6th Cir. 2000) : In an action to recover contribution for an environmental clean-up, the plaintiffs offered a document from the files of the state Department of Natural Resources to prove that a defendant purchased a substance containing PCBs in 1970 and 1971. A DNR employee testified that the document had been in the files for over 20 years and that he believed that it was prepared by the federal Environmental Protection Agency. The Court held there was no error in excluding the document, since its reliability was seriously in question, given that the witness was unable to state with certainty that it was prepared by the EPA and did not establish why it was in the DNR files.

United States v. Hajda, 135 F.3d 439 (7th Cir. 1998) : The Court affirmed the denaturalization of an alleged Nazi concentration camp guard, holding there was no error in admitting signed statements given by his sister and concentration camp guards at a trial of family members for collaboration in 1945-46. An unsigned document prepared at the same time from statements by his brother was properly admitted as an ancient document containing a statement against interest.

[15] Rule 803(17) -- Market Reports, Commercial Publications

United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993) : In a complex wire fraud prosecution arising out of a "land flip" scheme, the Court held there was no abuse of discretion in admitting a listing of land sales that was used by real estate brokers, insurance agents, and appraisers. In a prosecution for interstate transportation of manuscripts allegedly stolen from the National Archives, *United States v. Mount, 896 F.2d 612 (1st Cir. 1990)* , the Court held there was no error in admitting volumes of *The Collected Works of Abraham Lincoln*, which a witness for the government testified were used by manuscript dealers like herself to locate original Lincoln documents.

Crane v. Crest Tankers, Inc., 47 F.3d 292 (8th Cir. 1995) : The Court reversed a judgment for a seaman in a Jones Act case, finding it was error to admit into evidence a "Future Damage Calculator," which was "a slide rule-type device which has life expectancy and work life expectancy tables on one side, and a 'present value' table on the other." The Court found that no foundation had been laid for the device and that there was no showing that "the exhibit is generally used or relied upon by the public or persons in the legal or other professions."

[16] Rule 803(18) -- Learned Treatises

[a] Rule 803(18) -- Charts

United States v. Mangan, 575 F.2d 32 (2d Cir. 1978) : After a defense lawyer called several charts in a learned treatise to the attention of a government expert, the defendant offered the charts into evidence. The Trial Judge rejected them. The Court suggested that, notwithstanding the last sentence of the Rule, it is difficult to see how a chart can be read into evidence and that "good sense would seem to favor its admission."

[b] Rule 803(18) -- Not Receivable as Exhibits

Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221 (5th Cir. 1984) : The Court affirmed a judgment for the defendant in a wrongful death action arising out of an accident with a conveyor, holding there was no error in the exclusion of the 1957 American Standard Safety Code for Conveyors. Although the Trial Judge permitted the plaintiffs' experts to read from the Code and to display photographic enlargements of it to the jury, he excluded the Code itself on the ground that *Rule 803(18)* permitted it to be read, but not shown to the jury. In an asbestos injury suit, *Dartez v. Fibreboard Corp*., n154 the Court held that various articles were improperly introduced as evidence. The articles were not used in connection with the plaintiff's expert testimony and therefore were hearsay. Moreover, as learned treatises they could only be read, not given, to the jury. See also *Gordy v. City of Canton* n155(error, albeit harmless, for jury to take portions of the National Electrical Safety Code into the jury room).

Graham v. Wyeth Labs., 906 F.2d 1399 (10th Cir. 1990) : Reversing a judgment for the plaintiffs in a suit for personal injuries allegedly caused by DPT vaccine, the Court held that the Trial Judge had committed error, first, in redacting references to compensation from a report of an AMA special panel on vaccine injuries in such a way that it distorted the thrust of the report, and, second, in submitting the redacted report to the jury contrary to the Rule.

[c] Rule 803(18) -- Reliable Authority

Meschino v. North American Drager, Inc., 841 F.2d 429 (1st Cir. 1988) : In a personal injury suit arising from an episode of cardiac arrest during an operation, the Court held that two articles the plaintiff offered as evidence were properly excluded. It rejected both the plaintiff's contention that any article may be used to impeach a witness whether or not it satisfies *Rule 803(18)*, and the "argument that the contents of all issues of a periodical may be qualified wholesale under *Rule 803(18)* by testimony that the magazine was highly regarded." The Court held also that the fact that one defendant listed one of the articles on a pretrial exhibit list did not bar an objection to the article.

Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2d Cir. 2000) : In a medical malpractice action against an obstetrician for injuries during delivery, the defendant introduced two articles published in the *American Journal of Obstetrics and Gynecology*. Affirming a judgment for the defendant, the Court found no error. It noted that no testifying expert need rely on a learned treatise on direct examination, so long as it is called to the expert's attention on cross-examination and its authoritativeness is established, which was done here by testimony that the journal is "probably the most reputable in our field" and its articles are reviewed by obstetricians and gynecologists before

publication "for accuracy and believability." In *Schneider v. Revici*, n156 the Court reversed a judgment for the plaintiff in a medical malpractice case and remanded for a trial of an assumption of risk defense, but it upheld the exclusion of a book authored by the defendant. The Trial Judge had repeatedly instructed defense counsel on the required foundation for introducing a text as a learned treatise, but defense counsel never established that the book was recognized as authoritative.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , *rev'd on other grounds*, *475 U.S. 574 (1986)* : In a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants, criticizing the Trial Judge's readiness to exclude expert testimony. It observed that an expert might rely upon a treatise, such as a foreign language publication, that might not be admissible under the hearsay exception. The expert might adopt portions of the treatise as part of his own testimony. In *Dawson v. Chrysler Corp.*, n157 the Court found that the authoritativeness of Department of Transportation reports used in a product liability action to cross-examine one of Chrysler's expert witnesses was "inferentially conceded" by the experts and that use of the reports was therefore proper.

United States v. Norman, 415 F.3d 466 (5th Cir. 2005) : The Court affirmed drug convictions, finding no error when the defense was precluded from cross-examining DEA agents using a Justice Department manual on eyewitness identification. The treatise was not established as a reliable authority because the defense did not offer an expert in this area, the testifying agents did not recognize the manual, and the Judge did not take judicial notice of its reliability. Moreover, the manual was not being used in cross-examination of expert testimony, since the agents' identification testimony was merely the testimony of lay witnesses. In a medical malpractice wrongful death case, *Carroll v. Morgan, 17 F.3d 787 (5th Cir. 1994)* , the Court held it was error (but harmless) to preclude the plaintiff from using certain medical textbooks and journal articles to cross-examine the defendant's expert witness. Although the witness refused to recognize the materials as authoritative, another medical expert recognized them as reliable. In *Dawsey v. Olin Corp.*, n158 the Court affirmed a judgment for a chemical company sued by workers who claimed damage from a chemical discharge, holding that the Trial Judge properly refused to permit the plaintiffs to question one of the defendant's experts by referring to a National Institute of Occupational Health and Safety manual when there was no testimony that the manual was a reliable authority. In *United States v. Jones*, n159 the Court upheld convictions for operating an illegal gambling business, holding that cross-examination of a government expert on gambling concerning testimony by another FBI expert in another trial was not permissible under *Rule 803(18)*, since the Rule "is confined to published works that have been subjected to widespread collegial scrutiny." In *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, n160 the Court found error in the exclusion of safety codes established as reliable through the testimony of an expert witness. In a medical malpractice action, *Hemingway v. Ochsner Clinic*, n161 the Court found that a text written by two nurses was not shown to be reliable.

United States v. Turner, 104 F.3d 217 (8th Cir. 1997) : Affirming drug convictions, the Court found no error in the exclusion of medical texts proffered by the defendant. The texts could not be admitted as learned treatises, because there was no expert testimony that the treatises were authoritative, nor were they admissible as residual hearsay, because to admit them as such would circumvent the general purposes of the Rules.

Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984) : In an action by investors in a tax shelter arrangement involving the purchase and sale of cattle, the Court found that an expert was properly permitted to rely on treatises by an author he indicated was the preeminent industry expert.

Allen v. Safeco Ins. Co., 782 F.2d 1517 (11th Cir. 1986) , *modified on other grounds*, *793 F.2d 1195 (11th Cir. 1986)* : The Court affirmed a judgment resting on a jury's finding that a fire that destroyed a home was accidental. It

held that an expert, who testified that he used a periodical to keep up to date and that articles therein were considered "somewhat" authoritative, could be cross-examined about articles in the periodical.

[d] Rule 803(18) -- Relevance Requirement

Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984) : Although it reversed a judgment for a tampon manufacturer sued by a husband whose wife died of toxic shock syndrome, the Court refused to disturb a ruling that an expert for the plaintiff could not read during direct examination from an article published in a medical journal. The article referred to a procedure that was not employed on the plaintiff's wife and did not indicate which tampon was involved. Thus, the Court concluded that it might invite jury speculation and cause confusion.

[e] Rule 803(18) -- Videotape

Costantino v. David M. Herzog, M.D., P.C., 203 F.3d 164 (2d Cir. 2000) : In a medical malpractice action against an obstetrician for injuries during delivery, the defendant introduced a 15-minute videotape put out by the American College of Obstetricians and Gynecologists to educate physicians and show various techniques used with the condition at issue. Affirming a judgment for the defendant, the Court held that videotapes can be considered learned treatises under the Rule. The Court also held that a proper foundation was established for the video -- if not by ACOG sponsorship alone, by the plaintiff's expert's implicit concession and the fact that it had won an ACOG award, credentials comparing favorably with any expert testifying at the trial.

[17] Rule 803(19) -- Reputation Concerning Personal Or Family History

[a] Rule 803(19) -- Birthplace

United States v. Jean-Baptiste, 166 F.3d 102 (2d Cir. 1999) : In the defendant's trial for falsely stating her place of birth in a passport application, the Court found it was error to exclude testimony by the defendant's father as to his belief where the defendant was born. There is no requirement under the Rule that the witness be testifying as to the fact of his own birth; the Rule plainly contemplates that members of a family may testify with regard to the common understanding as to the birth of another family member.

[b] Rule 803(19) -- Family Relationship

Blackburn v. United Parcel Serv., Inc., 179 F.3d 81 (3d Cir. 1999) : The plaintiff alleged that he had been discharged from UPS in violation of a state whistleblower statute; the defendant countered that he had violated the company's anti-nepotism policy. In support of his contention that the defense was pretextual, the plaintiff offered testimony that other UPS employees had informed him that certain named employees were related. Affirming summary judgment for the defendant, the Court held that most of the statements were not admissible as reputation concerning personal or family history. Although a workplace may constitute a relevant community for such reputation, the plaintiff did not in this case provide sufficient evidence that the declarants were knowledgeable about the alleged workplace reputations (e.g., there was no showing they worked at the same facility as the allegedly related persons).

[c] Rule 803(19) -- Names

United States v. Allen, 960 F.2d 1055 (D.C. Cir. 1992) (per curiam): Affirming convictions for drug charges, the Court held that if there was any error in admitting evidence of a defendant's alias to connect him with certain drugs, it was undoubtedly harmless. The Court noted that evidence of names is commonly regarded as either not hearsay because

it is not an assertion or so imbued with reliability because of its common usage as to make any objection frivolous. Use of names does not fall squarely within any of the exceptions (except possibly *Rule 803(19)*), but here, where use of the alias was clearly hearsay and was of disputable reliability, it might have been admitted as an admission or under some other specific hearsay exception.

[18] Rule 803(20) -- Reputation Concerning Boundaries Or General History

Ute Indian Tribe v. State of Utah, 521 F. Supp. 1072 (D. Utah 1981) , *rev'd in part on other grounds*, *716 F.2d 1298 (10th Cir. 1983)* : In a dispute about reservation boundaries, the Court found that "reputation in a *non-Indian* community as to *Indian* boundaries, rights, etc., is indeed a treacherous ground for decision," since reputation evidence is only reliable when it is of general interest and the Indian boundaries in the instant case were not of general interest before the dispute arose.

[19] Rule 803(22) -- Judgment of Previous Conviction

[a] Rule 803(22) -- Accomplices' Convictions

United States v. Diaz, 936 F.2d 786 (5th Cir. 1991) : The Court reversed a conviction for transporting undocumented aliens, because judicial notice was erroneously taken of an alien's guilty plea to a misdemeanor charge of being present in the United States without the necessary documentation, contrary to the Rule's limitation on judgments against persons other than the accused. See also *United States v. Crispin*, n162 holding a similar error in admitting aliens' convictions to be harmless.

United States v. Breitkreutz, 977 F.2d 214 (6th Cir. 1992) : In a trial for distributing amphetamines, the defense suggested that a witness had testified for the government in order to assist his stepfather, an alleged coconspirator; in response, the government introduced the judgment and commitment order showing that the stepfather had already been sentenced to the statutory maximum before the witness testified before the grand jury. Affirming, the Court held that *Rule 803(22)* did not bar the evidence, as it was offered on the issue of credibility, not to prove a fact essential to sustain the conviction. In *United States v. Vandetti*, n163 a conviction for conducting an illegal gambling business was overturned because the defendant's accomplices, who were convicted in a separate trial, were called to testify and the government elicited evidence of their convictions in violation of *Rule 803(22)*.

United States v. Davis, 838 F.2d 909 (7th Cir. 1988) : The Court held it was error (but harmless) to admit testimony by a government witness that three of her customers pleaded guilty to offenses related to the marijuana conspiracy charged against the defendants.

United States v. Austin, 786 F.2d 986 (10th Cir. 1986) : The Court reversed marijuana convictions because the government informed the jury that ten coconspirators had been previously tried and convicted for their parts in the alleged conspiracy. It concluded that the government engaged in "blatantly impermissible use of these convictions," and that it was plain error to have admitted evidence that two of the conspirators who testified had been convicted without giving the jury a limiting instruction.

[b] Rule 803(22) -- Fact of Conviction

Olsen v. Correiro, 189 F.3d 52 (1st Cir. 1999) : The plaintiff was found guilty of murder, but his conviction was reversed due to the prosecution's failure to disclose exculpatory evidence. Rather than go through another trial, the

plaintiff pleaded *nolo contendere* to a charge of manslaughter, and was sentenced to time served. He then brought a civil rights action, arguing that he was unconstitutionally subjected to imprisonment on murder charges. The defendants pleaded the conviction based on the *nolo contendere* plea as an affirmative defense, arguing that his imprisonment would have occurred anyway. The Trial Judge ruled that because the plaintiff had pleaded *nolo contendere* to the lesser charge, he could not collect damages for imprisonment on the murder charge. Affirming, the Court held that the conviction based on the *nolo* plea was not inadmissible under *Rule 803(22)*, because that Rule only addresses convictions that are offered to prove the facts essential to sustain the judgment.

[c] Rule 803(22) -- Foreign Judgments

Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978) : Reversing a seaman's Jones Act judgment, the Court held it was error to exclude evidence that the seaman was convicted in Japan of a criminal offense for his conduct. The Court said that "[t]he test of acceptance ... of foreign judgments for which domestic recognition is sought, is whether the foreign proceedings accord with civilized jurisprudence, and are stated in a clear and formal record." The Court emphasized the thoroughness of the investigation by Japanese authorities and the right to counsel provided, but noted that in other circumstances, where the foreign country's procedures were unfamiliar, *Rule 403* would be a ground to exclude evidence of a foreign conviction.

United States v. Garland, 991 F.2d 328 (6th Cir. 1993) : The Court vacated Garland's conviction for fraud arising out of what he claimed was a failed attempt to buy cocoa beans from Ghana. While his appeal was pending, a Court in Ghana convicted two Ghanians of defrauding Garland in connection with the cocoa bean transaction. The Court determined that judicial notice should be taken of the Ghanian judgment and findings and that the evidence was sufficient newly discovered evidence to warrant a new trial. Drawing an analogy to *Rule 803(8)*, the Court reasoned that "a foreign judgment that shows no sign of being unreliable should be admitted," "there is no reason to distinguish between facts and 'opinions' contained in foreign judgments," and "[e]xcept where foreign judgments appear to lack trustworthiness, the burden should be on the party opposing their admission to show lack of trustworthiness."

[d] Rule 803(22) -- Forfeiture Proceeding

Schwartz v. United States, 582 F. Supp. 224 (D. Md. 1984) : In a RICO prosecution, the jury determined by a general verdict that certain stock belonged to a defendant named Kovens and by special verdict that a certain number of shares should be forfeited to the government. Thereafter, Schwartz brought this action claiming ownership of the stock and objecting to its forfeiture. The Trial Judge ruled *in limine* that the judgment in the RICO case could be admitted under *Rule 803(22)* as evidence that Kovens rather than Schwartz owned the stock.

[e] Rule 803(22) -- General Verdict

Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780 (D.C. Cir. 1982) : In a case involving a claim that the defendants exhausted the proceeds of a construction loan before an office building was completed, the Court upheld the exclusion of judgments in two criminal cases involving two of the defendants. The Court found that since general verdicts were rendered in the criminal cases, it was impossible to tell which overt acts the juries found had been committed.

[f] Rule 803(22) -- Judgments of Acquittal

United States v. Gricco, 277 F.3d 339 (3d Cir. 2002) : Affirming convictions for tax fraud arising from a scheme to skim parking lot revenues, the Court found no abuse of discretion in the exclusion of evidence that the defendants

had been acquitted in a state prosecution for theft in the scheme, since a judgment of acquittal is hearsay not coming within any exception, and any probative value it has would be greatly outweighed by the danger of jury confusion.

United States v. Irvin, 787 F.2d 1506 (11th Cir. 1986) : Affirming a conviction for conspiring to violate another's civil rights, the Court found it was proper to bar the defense from mentioning that the defendant and his three alleged coconspirators had been acquitted in a prior trial.

[g] Rule 803(22) -- Misdemeanor Convictions

United States v. Gotti, 641 F. Supp. 283 (E.D.N.Y. 1986) : In a racketeering case, the Trial Judge held that, although misdemeanor convictions are not admissible under *Rule 803(22)*, he would admit them under the residual exception upon a showing that a defendant had a motivation to defend comparable to the motivation to defend against a felony charge.

Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) : In a civil rights action on behalf of an arrestee rendered incompetent allegedly as a result of the arrest, the Court held that although the arrestee's guilty plea to misdemeanor assault and battery charges arising out of the incident did not come within the Rule, it was admissible as a party admission or under the residual exception. A dissenting Judge believed that the plea was being proved only by the judgment of conviction, which is not admissible under the Rule; that the judgment lacked trustworthiness because it was the result of a plea bargain removing any motivation to defend against the charges; and that the judgment was not admissible under the residual exception because it is covered by a specific exception and is not trustworthy.

United States v. Loera, 923 F.2d 725 (9th Cir. 1991) : The Court affirmed a motorist's assault conviction arising out of a drunk-driving incident, holding that docket entries of prior misdemeanor convictions were not admissible under *Rule 803(22)*, but were admissible under *Rule 803(8)(A)*.

[h] Rule 803(22) -- Plea Agreement

Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995) : Affirming in part a summary judgment for the plaintiff in a receiver's action to recover funds that had been distributed by the since-convicted mastermind of a Ponzi scheme, the Court said that the mastermind's plea agreement was admissible under *Rule 803(22)* to establish the defendants' liability.

[i] Rule 803(22) -- Relationship to Other Rules

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) : In a product liability action arising out of a fatal automobile accident, the Court held it was improper to admit evidence that the driver of the other car had pleaded guilty to involuntary manslaughter. Although it recognized that the convictions were admissible under *Rule 803(22)*, the Court said that they should have been excluded under *Rule 403*. The admission of responsibility was made in the context of a criminal action to deter reckless driving and therefore "its relevance in a civil action based on a legal doctrine presumably intended to deter the negligent manufacture of automobiles is attenuated at best." The guilty plea would tend to confuse the jury into thinking that the manufacturer could not be the legal cause, in the civil action, of the plaintiff's decedent's death if the other driver was found to be the cause in the criminal action.

[j] Rule 803(22) -- State Judgments

Calusinski v. Kruger, 24 F.3d 931 (7th Cir. 1994) : The Court held in an arrestee's § 1983 action against police officers that the plaintiff's state conviction for resisting arrest was properly admitted as *prima facie* evidence that he forcefully resisted attempts by the officers to arrest him. The possible sanctions indicated that the proceedings were of sufficiently serious import to ensure the reliability of the conviction. In *Brown v. Green*, n164 the Court reversed a plaintiff's judgment in a civil rights action alleging excessive force against a police officer, holding that the plaintiff's convictions for criminal battery and resisting arrest, which resulted from the incident giving rise to the civil rights suit, should have been admitted. The Court based its decision on the full faith and credit statute, *28 U.S.C. § 1738*, but we believe that reliance on the statute was mistaken. Under the statute a Federal Court would have to respect a state law making a criminal judgment dispositive in a subsequent civil action. However, where state law treats convictions only as evidentiary, we believe that *Rule 803(22)* governs. Thus, in the instant case admissibility should have turned on the maximum punishment that might have been imposed by the State Court.

[20] Rule 803(24) -- Other Exceptions

The residual exception formerly stated in this Rule was transferred to *Rule 807* in 1997. Cases decided under the former Rule are collected in the Annotations to *Rule 807*, *§ 807.03*.

FOOTNOTES:

(n1)Footnote 1. *United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982)* .

(n2)Footnote 2. *United States v. Cain, 587 F.2d 678 (5th Cir. 1979)* .

(n3)Footnote 3. *United States v. Parker, 936 F.2d 950 (7th Cir. 1991)* .

(n4)Footnote 4. *United States v. Blakey, 607 F.2d 779 (7th Cir. 1979)* .

(n5)Footnote 5. *United States v. Hawkins, 59 F.3d 723 (8th Cir. 1995)* , *vacated on other grounds*, *516 U.S. 1168 (1996)* .

(n6)Footnote 6. *United States v. Cammisano, 917 F.2d 1057 (8th Cir. 1990)* .

(n7)Footnote 7. *United States v. Lawrence, 699 F.2d 697 (5th Cir. 1983)* .

(n8)Footnote 8. *United States v. Baggett, 251 F.3d 1087 (6th Cir. 2001)* .

(n9)Footnote 9. *United States v. Winters, 33 F.3d 720 (6th Cir. 1994)* .

(n10)Footnote 10. *United States v. Sowa, 34 F.3d 447 (7th Cir. 1994)* .

(n11)Footnote 11. *Webb v. Lane, 922 F.2d 390 (7th Cir. 1991)* .

(n12)Footnote 12. *United States v. Hartmann, 958 F.2d 774 (7th Cir. 1992)* .

(n13)Footnote 13. *United States v. Phelps, 168 F.3d 1048 (8th Cir. 1999)* .

(n14)Footnote 14. *United States v. Moses, 15 F.3d 774 (8th Cir. 1994)* .

(n15)Footnote 15. *United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)* .

(n16)Footnote 16. *United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1989)* , *amended* (9th Cir. 1992).

(n17)Footnote 17. *Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir. 1991)* .

(n18)Footnote 18. *Miller v. Keating, 754 F.2d 507 (3d Cir. 1985)* .

(n19)Footnote 19. *United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984)* (see annotation under *§ 803.03[3][d][v]*).

(n20)Footnote 20. *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., 63 F.3d 1267 (3d Cir. 1995)* .

(n21)Footnote 21. *United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982)* .

(n22)Footnote 22. *United States v. Lawal, 736 F.2d 5 (2d Cir. 1984)* .

(n23)Footnote 23. *United States v. Hogan, 886 F.2d 1497 (7th Cir. 1989)* .

(n24)Footnote 24. *United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980)* .

(n25)Footnote 25. *Cincinnati Fluid Power Co. v. Rexnord, Inc., 797 F.2d 1386 (6th Cir. 1986)* .

(n26)Footnote 26. *United States v. Carter, 910 F.2d 1524 (7th Cir. 1990)* .

(n27)Footnote 27. *United States v. Binder, 794 F.2d 1195 (7th Cir. 1986)* .

(n28)Footnote 28. *United States v. Faust, 850 F.2d 575 (9th Cir. 1988)* .

(n29)Footnote 29. *United States v. Rodriguez-Pando, 841 F.2d 1014 (10th Cir. 1988)* .

(n30)Footnote 30. *United States v. Kelly, 722 F.2d 873 (1st Cir. 1983)* .

(n31)Footnote 31. *United States v. Puglisi, 790 F.2d 240 (2d Cir. 1986)* .

(n32)Footnote 32. *United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985)* .

(n33)Footnote 33. *United States v. Terry, 702 F.2d 299 (2d Cir. 1983)* .

(n34)Footnote 34. *United States v. Peak, 856 F.2d 825 (7th Cir. 1988)* .

(n35)Footnote 35. *United States v. Green, 680 F.2d 520 (7th Cir. 1982)* .

(n36)Footnote 36. *United States v. Tuchow, 768 F.2d 855 (7th Cir. 1985)* .

(n37)Footnote 37. *United States v. Udey, 748 F.2d 1231 (8th Cir. 1984)* .

(n38)Footnote 38. *United States v. Adcock, 558 F.2d 397 (8th Cir. 1977)* .

(n39)Footnote 39. *United States v. Jackson, 780 F.2d 1305 (7th Cir. 1986)* .

(n40)Footnote 40. *United States v. Sumner, 204 F.3d 1182 (8th Cir. 2000)* .

(n41)Footnote 41. *United States v. Beaulieu, 194 F.3d 918 (8th Cir. 1999)* .

(n42)Footnote 42. *Lovejoy v. United States, 92 F.3d 628 (8th Cir. 1996)* .

(n43)Footnote 43. *United States v. Balfany, 965 F.2d 575 (8th Cir. 1992)* .

(n44)Footnote 44. *United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994)* .

(n45)Footnote 45. *United States v. Longie, 984 F.2d 955 (8th Cir. 1993)* .

(n46)Footnote 46. *United States v. Whitted, 11 F.3d 782 (8th Cir. 1993)* .

(n47)Footnote 47. *United States v. George, 960 F.2d 97 (9th Cir. 1992)* .

(n48)Footnote 48. *United States v. Nick, 604 F.2d 1199 (9th Cir. 1979)* .

(n49)Footnote 49. *United States v. Pacheco, 154 F.3d 1236, 1240-42 (10th Cir. 1998)* .

(n50)Footnote 50. *United States v. Norman T., 129 F.3d 1099 (10th Cir. 1997)* .

(n51)Footnote 51. *United States v. Tome, 61 F.3d 1446 (10th Cir. 1995)* . This decision was on remand after the Supreme Court held that hearsay statements made when the declarant had a motive to falsify could not be admitted as prior consistent statements (see the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[4][c]*).

(n52)Footnote 52. *United States v. Farley, 992 F.2d 1122 (10th Cir. 1993)* .

(n53)Footnote 53. *United States v. Pollard, 790 F.2d 1309 (7th Cir. 1986)* .

(n54)Footnote 54. *United States v. Iron Thunder, 714 F.2d 765 (8th Cir. 1983)* .

(n55)Footnote 55. *Moss v. Feldmeyer, 979 F.2d 1454 (10th Cir. 1992)* .

(n56)Footnote 56. *United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994)* .

(n57)Footnote 57. *United States v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993)* .

(n58)Footnote 58. *United States v. Micke, 859 F.2d 473 (7th Cir. 1988)* .

(n59)Footnote 59. *United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992)* .

(n60)Footnote 60. *In re King Enterprises, Inc., 678 F.2d 73 (8th Cir. 1982)* .

(n61)Footnote 61. *United States v. Hutson, 821 F.2d 1015 (5th Cir. 1987)* .

(n62)Footnote 62. *United States v. Young Bros., 728 F.2d 682 (5th Cir. 1984)* .

(n63)Footnote 63. *United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)* .

(n64)Footnote 64. *Capital Marine Supply v. Thomas, 719 F.2d 104 (5th Cir. 1983)* .

(n65)Footnote 65. *United States v. Vela, 673 F.2d 86 (5th Cir. 1982)* .

(n66)Footnote 66. *United States v. Croft, 750 F.2d 1354 (7th Cir. 1984)* .

(n67)Footnote 67. *United States v. Catabran, 836 F.2d 453 (9th Cir. 1988)* .

(n68)Footnote 68. *United States v. Bonallo, 858 F.2d 1427 (9th Cir. 1988)* .

(n69)Footnote 69. *United States v. Miller, 771 F.2d 1219 (9th Cir. 1985)* .

(n70)Footnote 70. *Kennedy v. Los Angeles Police Dep't, 901 F.2d 702 (9th Cir. 1989)* , *amended* (9th Cir. 1990).

(n71)Footnote 71. *United States v. Linn, 880 F.2d 209 (9th Cir. 1989)* .

(n72)Footnote 72. *United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979)* .

(n73)Footnote 73. *Raphaely Int'l, Inc. v. Waterman S.S. Corp., 972 F.2d 498 (2d Cir. 1992)* .

(n74)Footnote 74. *Wallace Motor Sales, Inc. v. American Motor Sales Corp., 780 F.2d 1049 (1st Cir. 1985)* .

(n75)Footnote 75. *Miller v. Fairchild Indus., 885 F.2d 498 (9th Cir. 1989)* .

(n76)Footnote 76. *NLRB v. First Termite Control Co., 646 F.2d 424 (9th Cir. 1981)* .

(n77)Footnote 77. *United States v. Iredia, 866 F.2d 114 (5th Cir. 1989)* .

(n78)Footnote 78. *United States v. Dakota, 188 F.3d 663 (6th Cir. 1999)* .

(n79)Footnote 79. *United States v. Weinstock, 153 F.3d 272 (6th Cir. 1998)* .

(n80)Footnote 80. *United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986)* .

(n81)Footnote 81. *United States v. Franco, 874 F.2d 1136 (7th Cir. 1989)* .

(n82)Footnote 82. *United States v. Wables, 731 F.2d 440 (7th Cir. 1984)* .

(n83)Footnote 83. *United States v. Chappell, 698 F.2d 308 (7th Cir. 1983)* .

(n84)Footnote 84. *United States v. Page, 544 F.2d 982 (8th Cir. 1976)* .

(n85)Footnote 85. *United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976)* .

(n86)Footnote 86. *Gulf South Mach. Co. v. Kearney & Trecker Corp., 756 F.2d 377 (5th Cir. 1985)* .

(n87)Footnote 87. *United States v. Kasvin, 757 F.2d 887 (7th Cir. 1985)* .

(n88)Footnote 88. *Stone v. Morris, 546 F.2d 730 (7th Cir. 1976)* .

(n89)Footnote 89. *Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253 (11th Cir. 1983)* .

(n90)Footnote 90. *United States v. Furst, 886 F.2d 558 (3d Cir. 1989)* .

(n91)Footnote 91. *Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44 (5th Cir. 1981)* .

(n92)Footnote 92. *United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978)* .

(n93)Footnote 93. *Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988)* .

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(n95)Footnote 95. *United States v. Freidin, 849 F.2d 716 (2d Cir. 1988)* .

(n96)Footnote 96. *Ruberto v. Commissioner, 774 F.2d 61 (2d Cir. 1985)* .

(n97)Footnote 97. *Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989)* , *aff'd*, *498 U.S. 337 (1991)* .

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(n101)Footnote 101. *Waddell v. Commissioner, 841 F.2d 264 (9th Cir. 1988)* .

(n102)Footnote 102. *Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984)* .

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(n104)Footnote 104. *United States v. Bortnovsky, 879 F.2d 30 (2d Cir. 1989)* .

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(n106)Footnote 106. *Grogg v. Missouri Pac. R.R., 841 F.2d 210 (8th Cir. 1988)* .

(n107)Footnote 107. *United States v. Snyder, 787 F.2d 1429 (10th Cir. 1986)* .

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(n118)Footnote 118. *United States v. Corr, 543 F.2d 1042 (2d Cir. 1976)* .

(n119)Footnote 119. *Denny v. Hutchinson Sales Corp., 649 F.2d 816 (10th Cir. 1981)* .

(n120)Footnote 120. *United States v. King, 590 F.2d 253 (8th Cir. 1978)* .

(n121)Footnote 121. *Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984)* .

(n122)Footnote 122. *Roth v. Black & Decker, Inc., 737 F.2d 779 (8th Cir. 1984)* .

(n123)Footnote 123. *Crane v. Mekelburg, 728 F.2d 439 (10th Cir. 1984)* .

(n124)Footnote 124. *Revlon, Inc. v. Carson Prods. Co., 602 F. Supp. 1071 (S.D.N.Y. 1985)* , *rev'd in part on other grounds, 803 F.2d 676 (Fed. Cir. 1986)* .

(n125)Footnote 125. *United States v. Grady, 544 F.2d 598 (2d Cir. 1976)* .

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1984) .

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(n130)Footnote 130. *United States v. Puente, 826 F.2d 1415 (5th Cir. 1987)* .

(n131)Footnote 131. *United States v. Vidaure, 861 F.2d 1337 (5th Cir. 1988)* .

(n132)Footnote 132. *United States v. Dancy, 861 F.2d 77 (5th Cir. 1988)* .

(n133)Footnote 133. *United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985)* .

(n134)Footnote 134. *United States v. Enterline, 894 F.2d 287 (8th Cir. 1990)* .

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(n140)Footnote 140. *Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986)* .

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(n149)Footnote 149. *John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977)* .

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(n152)Footnote 152. *Pollard v. Metropolitan Life Ins. Co., 598 F.2d 1284 (3d Cir. 1979)* .

(n153)Footnote 153. *United States v. Stout, 667 F.2d 1347 (11th Cir. 1982)* .

(n154)Footnote 154. *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* .

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(n157)Footnote 157. *Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980)* .

(n158)Footnote 158. *Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986)* .

(n159)Footnote 159. *United States v. Jones, 712 F.2d 115 (5th Cir. 1983)* .

(n160)Footnote 160. *Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820 (5th Cir. 1980)* .

(n161)Footnote 161. *Hemingway v. Ochsner Clinic, 608 F.2d 1040 (5th Cir. 1979)* .

(n162)Footnote 162. *United States v. Crispin, 757 F.2d 611 (5th Cir. 1985)* .

(n163)Footnote 163. *United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980)* .

(n164)Footnote 164. *Brown v. Green, 738 F.2d 202 (7th Cir. 1984)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 803 RULE 803

4-803 Federal Rules of Evidence Manual 803.04

803.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-41 (1962).

The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, *28 Colum. L. Rev. 432 (1928)*, it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot. 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot. 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception (1) are far less numerous. Illustrative are *Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So. 2d 83 (1942)* ; *Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942)* ; and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the *time element*, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, *46 Iowa L. Rev. 224, 243 (1961)*; McCormick § 272, p. 580.

Participation by the declarant is not required: a non-participant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. *Slough, supra ; McCormick, supra ;* 6 Wigmore § 1755; Annot. 78 A.L.R.2d 300 .

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely, 75 U.S. (8 Wall.) 397, 19 L. Ed. 437 (1869)* ; *Wheeler v. United States, 211 F.2d 19, 93 U.S. App. D.C. 159 (1953)* , *cert. denied*, *347 U.S. 1019, 74 S. Ct. 876, 98 L. Ed. 1140* ; *Wetherbee v. Safety Casualty Co., 219 F.2d 274 (5th Cir. 1955)* ; *Lampe v. United States, 229 F.2d 43, 97 U.S. App. D.C. 160 (1956)* . Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," *Slough, supra at 246*, and as the "prevailing practice," McCormick § 272, p. 579. Illustrative are *Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 P. 546 (1926)* ; *Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926)* . Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1961)* . However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963)* ; *Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939)* , a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co. v. Snead, 90 F.2d 374, 67 App. D.C. 129 (1937)* , slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc. v. Ball, 249 F.2d 508, 101 U.S. App. D.C. 416 (1957)* , upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), *6 Wayne L. Rev. 204, 206*-09 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); *California Evidence Code § 1240* (as to Exception (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception (1), presented separately to enhance its

usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933)* ; Maguire, The Hillmon Case -- Thirty-three Years After, *38 Harv. L. Rev. 709, 719*-31 (1925); Hinton, States of Mind and the Hearsay Rule, *1 U. Chi. L.Rev. 394, 421*-23 (1934). The rule of *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892)* , allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-78; Annot., 34 A.L.R.2d 588 , 62 A.L.R.2d 855 . A similar recognition of the need for and practical value of this kind of evidence is found in *California Evidence Code § 1260*.

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission, 2 Ill. 2d 590, 119 N.E.2d 224 (1954)* ; McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965)* , citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520 . The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State, 67 Md. 307, 316, 10 A. 210, 212 (1887)* .

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962)* , *cert. denied*, *373 U.S. 944, 83 S. Ct. 1553, 10 L. Ed. 2d 699* ; *Hall v. State, 223 Md. 158, 162 A.2d 751 (1960)* ; *State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965)* . Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are *California Evidence Code § 1237* and New Jersey Rule 63(1)(b), and this has been the position

of the federal courts. *Vicksburg & Meridian R. R. v. O'Brien, 119 U.S. 99, 7 S. Ct. 118, 30 L. Ed. 299 (1886)* ; *Ahern v. Webb, 268 F.2d 45 (10th Cir. 1959)* ; and see *N.L.R.B. v. Hudson Pulp and Paper Corp., 273 F.2d 660, 665 (5th Cir. 1960)* ; *N.L.R.B. v. Federal Dairy Co., 297 F.2d 487 (1st Cir. 1962)* . But cf. *United States v. Adams, 385 F.2d 548 (2d Cir. 1967)* .

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919)* , is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan *et al*., The Law of Evidence: Some Proposals for Its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. *28 U.S.C. § 1732*. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Differences of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941)* ; *La Porte v. United States, 300 F.2d 878 (9th Cir. 1962)* ; McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, *46 Iowa L. Rev. 276 (1961)*. The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a

requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business." **[This terminology was rejected by the Congress. -- Ed.]**

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander; the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930)* , held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948)* ; *Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954)* ; *Standard Oil Co. of California v. Moore, 251 F.2d 188, 214 (9th Cir. 1957)* , *cert. denied*, *356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148* ; *Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965)* ; Annot., 69 A.L.R.2d 1148 . Cf. *Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933* (2d Cir. 1966). Contra, 5 Wigmore § 1530a, n. 1, pp. 391-92. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge ... to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record ... ." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity. **[Editor's Note: Congress' amendment to the Rule makes it unclear whether the informant must be acting in the course of business activity; but Congress does not appear to have intended to reject the business duty requirement.]**

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, *28 U.S.C. § 1732*, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor, 147 F.2d 297, 79 U.S. App. D.C. 66 (1945)* ; *Lyles v. United States, 254 F.2d 725, 103 U.S. App. D.C. 22 (1957)* , *cert. denied*, *356 U.S. 961, 78 S. Ct. 997, 2 L. Ed. 2d 1067* ; *England v. United States, 174 F.2d 466 (5th Cir. 1949)* ; *Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967)* . Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941)* ; *Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944)* ; *Medina v. Erickson, 226 F.2d 475 (9th Cir. 1955)* ; *Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962)* ; *Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960)* . In the state courts, the trend favors admissibility. *Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938)* ; *Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956)* ; *People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940)* ; *Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947)* . In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* , exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in

the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942)* . The direct introduction of motivation is a disturbing factor, since absence of motive to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, *46 Iowa L. Rev. 276, 285 (1961)*. As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." *129 F.2d at 1002* . A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc., 249 F. Supp. 681 (S.D.N.Y. 1965)* , otherwise if offered by the opposite party, *Korte v. New York, N. H. & H. R. Co., 191 F.2d 86 (2d Cir. 1951)* , *cert. denied*, *342 U.S. 868, 72 S. Ct. 108, 96 L. Ed. 652* .

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954)* , error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware, 247 F.2d 698 (7th Cir. 1957)* , error to admit narcotics agents' records of purchases. See also Exception (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1962)* ; *Taylor v. Baltimore & O. R. Co., 344 F.2d 281 (2d Cir. 1965)* , since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews v. United States, 217 F.2d 409 (5th Cir. 1954)* . The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States, 163 F.2d 593, 82 U.S. App. D.C. 278 (1947)* , error to admit police records of convictions; *Standard Oil Co. of California v. Moore, 251 F.2d 188 (9th Cir. 1957)* , *cert. denied*, *356 U.S. 975, 78 S. Ct. 1139, 2 L. Ed. 2d 1148* , error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g., the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra* , decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); *California Evidence Code § 1272*; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of

statutes without number. McCormick § 291. See, for example, *28 U.S.C. § 1733*, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating resort to the less appropriate business record exception to the hearsay rule. *Kay v. United States, 255 F.2d 476 (4th Cir. 1958)* . The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952)* , and see *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S. Ct. 407, 63 L. Ed. 889 (1919)* . As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception (6) *supra*.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S. Ct. 407, 63 L. Ed. 889 (1919)* , Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin, 200 U.S. 71, 26 S. Ct. 195, 50 L. Ed. 374 (1906)* , General Land Office records; *Ballew v. United States, 160 U.S. 187, 16 S. Ct. 263, 40 L. Ed. 388 (1895)* , Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook, 284 F.2d 489 (7th Cir. 1960)* , remanded for resentencing, *365 U.S. 609, 81 S. Ct. 823, 5 L. Ed. 2d 821* , letter from induction officer to district attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957)* , affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the president; *Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945)* , Weather Bureau records of rainfall; *United States v. Meyer, 113 F.2d 387 (7th Cir. 1940)* , *cert. denied*, *311 U.S. 706, 61 S. Ct. 174, 85 L. Ed. 459* , map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas, 149 U.S. 278, 13 S. Ct. 872, 37 L. Ed. 734 (1893)* , statement of account certified by postmaster general in action against postmaster; *McCarty v. United States, 185 F.2d 520 (5th Cir. 1950)* , *rehearing denied*, *187 F.2d 234* , certificate of settlement of General Accounting Office showing indebtedness and letter from army official stating government had performed, in action on contract to purchase and remove waste food from army camp; *Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950)* , report of Bureau of Mines as to cause of gas tank explosion; Petition of W --, *164 F. Supp. 659 (E.D. Pa. 1958)* , report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944)* , state fire marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950)* , certificate of settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956)* , "status reports" offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148 . Various kinds of evaluative reports are admissible under federal statutes: *7 U.S.C. § 78*, findings of secretary of agriculture *prima facie* evidence of true grade of grain; *7 U.S.C. § 210(f)*, findings of secretary of agriculture *prima facie* evidence in action for damages against stockyard owner; *7 U.S.C. § 292*, order by secretary of agriculture *prima facie* evidence in judicial enforcement proceedings against producers association monopoly; *7 U.S.C. § 1622(h)*, Department of Agriculture inspection certificates of products shipped in interstate commerce *prima facie* evidence; *8 U.S.C. § 1440(c)*, separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; *18 U.S.C. § 4245*, certificate of director of prisons that convicted person has been examined and found probably incompetent at time of trial *prima facie* evidence in court hearing on competency; *42 U.S.C. § 269(b)*, bill of health by appropriate official *prima facie* evidence of vessel's sanitary history and condition and compliance with regulations; *46 U.S.C. § 679*, certificate of consul presumptive evidence of refusal of master to transport destitute

seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations, *42 Iowa L. Rev. 363 (1957)*; (2) the special skill or experience of the official, *id.;* (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944)* ; (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* . Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence, Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of *California Evidence Code § 1281*.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception (7). For instances of federal statutes recognizing this method of proof, see *8 U.S.C. § 1284(b)*, proof of absence of alien crewman's name from outgoing manifest *prima facie* evidence of failure to detain or deport, and *42 U.S.C. § 405(c)(3)*, *(4)(B)*, *(4)(C)*, absence of HEW record *prima facie* evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g., *People v. Love, 310 Ill. 558, 142 N.E. 204 (1923)* , certificate of secretary of state admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); *California Evidence Code § 1284*; Kansas Code of Civil Procedure § 60-460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. *8 U.S.C. § 1360(d)*, certificate of attorney general or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception (6) would be applicable. However, both the business record doctrine and Exception (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924)* , holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the information be in the course of the activity. See *California Evidence Code § 1315* and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); *California Evidence Code § 1316*; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, *20 C.F.R. § 404.703(c)*, recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. *Wigmore, supra*. The rule is substantially identical in coverage with *California Evidence Code § 1312*.

Exception (14). The recording of the documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgment or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under *Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939)* , is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); *California Evidence Code § 1330*; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b) (8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p.

429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co., Ltd., 286 F.2d 388 (5th Cir. 1961)* , upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see *California Evidence Code § 1331*.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); *California Evidence Code § 1340*; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). *Uniform Commercial Code § 2-724* provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939)* ; *Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis. 2d 69, 146 N.W.2d 505 (1966)* , *66 Mich. L. Rev. 183 (1967)*; Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(cc), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966)* ; *Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967)* ; *Colwell v. Gardner, 386 F.2d 56 (6th Cir. 1967)* ; *Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D. Mo. 1962)* ; *Cook v. Celebrezze, 217 F. Supp. 366 (W.D. Mo. 1963)* ; *Sosna v. Celebrezze, 234 F. Supp. 289 (E.D. Pa. 1964)* ; and see *McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964)* . The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77 . The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus, 338 U.S. 269, 70 S. Ct. 110, 94 L. Ed. 63 (1949)* , and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson, 193 So. 2d 648 (Fla. App. 1967)* , *cert. denied, Fla., 201 So.2d 556* ; *Darling v. Charleston Memorial Community Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965)* ; *Dabroe v. Rhodes Co., 64 Wash. 2d 431, 392 P.2d 317 (1964)* .

In *Reilly v. Pinkus, supra* , the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co., supra*. Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 613(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id*. § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935)* ; *State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956)* ; Mass. Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); *California Evidence Code §§ 1313*, *1314*; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id*., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); *California Evidence Code §§ 1320-1322*; Kansas Code of Civil Procedure § 60-460(y)(1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); *California Evidence Code § 1324*; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of *res judicata*, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of *res judicata* does not apply to make the judgment either a bar

or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299 , which manifest an increasing reluctance to reject *in toto* the validity of the law's fact-finding processes outside the confines of *res judicata* and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note, *27 Ill. L. Rev. 195 (1932)*, it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939)* , in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S. S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941)* ; *Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960)* .

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation of defendant at this level is often minimal or nonexistent. *Cope v. Goble, 39 Cal. App. 2d 448, 103 P.2d 598 (1940)* ; *Jones v. Talbot, 87 Idaho 498, 394 P.2d 316 (1964)* ; *Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943)* ; Annot. 18 A.L.R.2d 1287, 1295-97 ; *16 Brooklyn L. Rev. 286 (1950)*; *50 Colum. L. Rev. 529 (1950)*; *35 Cornell L.Q. 872 (1950)*. Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States, 174 U.S. 47, 19 S. Ct. 574, 43 L. Ed. 890 (1899)* , error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g., 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); *California Evidence Code § 1300*; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke, Carth. 181, 90 Eng. Rep. 710 (K.B. 1691)* ; *Neill v. Duke of Devonshire*, 8 App. Cas. 135 (1882) . The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character.

The leading case in the United States, *Patterson v. Gaines, 47 U.S. (6 How.) 550, 599, 12 L. Ed. 553 (1847)* , follows in the pattern of the English decisions, mentioning as illustrative matters thus provable; manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. Most recent recognition of the principle is found in *Grant Bros. Constr. Co. v. United States, 232 U.S. 647, 34 S. Ct. 452, 58 L. Ed. 776 (1914)* , in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933)* , records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936)* , board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, *In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966)* .

Exception (24). [Editor's Note: Rule 803(24) has been transferred to Rule 807. The Advisory Committee Note on Rule 803(24) has accordingly been transferred to that Rule as well.]

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] 1997 Amendment Committee Note

1997 Amendment Committee Note

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

[3] 2000 Amendment Committee Note

2000 Amendment Committee Note

The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp., 968 F.2d 999 (9th Cir. 1992)* (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and *18 U.S.C. § 3505* for foreign records in criminal cases.

[4] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 283 (1999)

Rule 803(6) -- Business Records

The Advisory Committee's proposed exception for business records was somewhat broader than that ultimately adopted by Congress. As a result, the Advisory Committee Note to the business records exception, Rule 803(6), is somewhat misleading. The Advisory Committee proposal covered any record made "in the course of a regularly conducted activity." It specifically eschewed the term "business" on the ground that other types of regularly prepared records should not have to be shoehorned "into the fact patterns which give rise to traditional business records." This was so even though the definition of "business" in the predecessor statute to Rule 803(6) (*28 U.S.C. 1732*) covered far more than traditional profit-making activity.

Congress was concerned about the breadth of the Advisory Committee proposal. The House Committee believed that there were insufficient guarantees of reliability in records made in the course of activities "falling outside the scope of business activities as that term is broadly defined in *28 U.S.C. 1732*." Therefore, the version of Rule 803(6) adopted by Congress covers records "kept in the course of a regularly conducted business activity." "Business" is defined as including "business, institution, association, profession, occupations, and calling of every kind, whether or not conducted for profit."

In the end, there is probably not much difference between the Advisory Committee's proposed Rule 803(6) and the rule ultimately adopted. Whether the term "business" is excised from the language of the rule, or whether it is defined so broadly as to cover all regularly conducted activity, is probably of little moment. Nonetheless, it is confusing to read the Advisory Committee Note and then to look at the rule. The note should be read with the understanding that the Advisory Committee's push to liberalize the hearsay exception was tempered, at least somewhat, by Congress.

[5] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

Subdivision (4) was approved as submitted by the Court, with the understanding that it was not intended in any way adversely to affect substantive privilege laws or any privilege rules which might be adopted.

Subdivision (5) was amended to include a memorandum of statements adopted by a witness as well as those made by him, a treatment consistent with the Jencks Act, *18 U.S.C. 3500*. Otherwise, the Rule was approved as submitted by the Court, with the understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. Moreover, the same principle was deemed applicable to all the hearsay rules.

Subdivision (6) of the Court Rule permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Subcommittee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 17322. Moreover, the Subcommittee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Rule was accordingly redrafted to incorporate these limitations.

Subdivision (7) was amended to reflect the Subcommittee's action with respect to subdivision (6).

Subdivision (8) was approved in substance as submitted by the Court, with the understanding that evaluations or opinions contained in public reports would not be admissible, and intending that the term "factual findings" should be strictly construed.

In subdivision (13) the Subcommittee intends that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in subdivision (11).

[6] Report of the House Committee on the Judiciary

Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-300 (1892)* , so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made," a treatment consistent with the definition of "statement" in the Jencks Act, *18 U.S.C. 3500*. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in *28 U.S.C. 1732*. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have

been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule [803(13)] in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

[7] Report of the Senate Committee on the Judiciary

The House approved this rule [803(4)] as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with *rule 35 of the Federal Rules of Civil Procedure* which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act.

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley*.

The committee also accepts the understanding of the House that a memorandum or report, although barred under this rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

[Footnotes deleted.]

...

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of *ejusdem generis*, the intent of "calling of every kind" would seem to be related to work-related endeavors -- e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment.

Therefore, the committee deleted the word "business" as it appears before the word "activity." The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of rule 804(b)(5), which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process. **[Latter rule deleted by Conferees. --Ed.]**

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. *7 U.S.C. § 78*, findings of Secretary of Agriculture prima facie evidence of true grade of grain; *42 U.S.C. § 269(b)*, bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

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> Factors which may be [of] assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? *42 Iowa L. Rev. 363 (1957)*; (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted. *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944)* ; (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* . Others no doubt could be added.
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> ...

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

[8] Report of the House and Senate Conferees

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment (Rule 804(b)(5) -- Criminal law enforcement records and reports, not enacted):

> In view of its action on Rules 804(b)(5) (Criminal law enforcement records and reports, not enacted), the Conference does not adopt the Senate amendment and restores the bill to the House version.

[9] Citations to Hearings and Debates

Letter from Hon. Clifford O'Sullivan to Hon. James Harvey, April 4, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 10-11 (1973).

Letter from George A. Spiegelberg to Herbert E. Hoffman, May 7, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 68-71 (1973).

Letter from James F. Schaeffer to Hon. William L. Hungate, June 26, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 134-37 (1973).

Letter from Hon. Clifford O'Sullivan to Hon. William L. Hungate, July 3, 1973, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 188-89 (1973).

Letter from James F. Schaeffer to Hon. William L. Hungate, July 18, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 212-14 (1973).

Debate in the House of Representatives, 120 Cong. Rec. H563-H567 (daily ed. February 6, 1974).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 53-54, 66-68 (1974).

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109, 111, 113-14 (1974).

Testimony of Albert E. Jenner, June 5, 1974, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 210-12 (1974).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
Supp. To CHAPTER 803 RULE 803

4-803 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 803, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial	**Rule 803. Exceptions to the Rule Against Hearsay -- Regardless of Whether the**

	Declarant Is Available as a Witness	
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:	
(1) Present sense impres	**(1)**	***Present Sense Impres***

	sion. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.		***sion.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
(2)	**Excited utterance.** A state	**(2)**	***Excited Utterance.*** A statemen

			men t re- lat- ing to a start ling even t or con- di- tion mad e whil e the de- clar- ant was un- der the stres s of ex- cite- men t caus ed by the even t or con- di- tion.
			t re- lat- ing to a start ling even t or con- di- tion, mad e whil e the de- clar- ant was un- der the stres s of ex- cite- men t that it caus ed.
(3)	**The n ex- ist- ing men tal, emo tion al, or phy**	**(3)**	***The n- Ex- ist- ing Men tal, Emo tion- al, or Phy***

sical con-di-tion. A state men t of the de-clar-ant's then ex-ist-ing state of min d, emo tion, sen-satio n, or phys ical con-di-tion (suc h as in-tent, plan, moti ve, desi gn, men tal feel-ing, pain, and bod-ily healt h), but

sical Con di-tion **.** A state men t of the de-clar-ant's then - ex-ist-ing state of min d (suc h as moti ve, in-tent, or plan) or emo tion-al, sens ory, or phys ical con-di-tion (suc h as men tal feel-ing, pain, or bod-

	not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.		ily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
(4)	**Statements**	**(4)**	***Statement***

for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

Made for Medical Diagnosis or Treatment. A statement that:

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(A) is made for -- and is reasonably pertinent to -- medical

			diagnosis or treatment; and
		(B)	describes medical history; past or present symptoms or sensations; their inception; or their general cause.
(5) Recorded recollection. A memorandum or re-		**(5)**	***Recorded Recollection.*** A record that:

cord concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or

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not itself be received as an exhibit unless offered by an adverse party.

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately

;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into

evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or dia-

form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducgnosis if:

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er qual ified wit- ness, or by cer- tific- atio n that com plies with Rule 902(11), Rule 902(12), or a stat- ute per- mit- ting cer- tific- atio n, un- less the sour ce of in- form atio n or the met hod or cir- cum stan ces of pre-

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whether or not conducted for profit.

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularl

y conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are

shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the

			source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.
(7) Absence of entry in records kept in accordance with the provisions of paragraph	**(7)**	***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not	

(6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrenc in-clud ed in a re-cord de-scrib ed in para grap h (6) if:

e or none xist- ence of the mat- ter, if the mat- ter was of a kind of whic h a me mor- an- dum , re- port, re- cord , or data com pila- tion was reg- ularl y mad e and pre- serv ed, un- less the sour ces of in- form atio

n or other circumstances indicate lack of trustworthiness.

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that

kind ; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data

(8) ***Public Records.*** A record or statement of a public office if:

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was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and agai

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stances indicate lack of trustworthiness.

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack

of trust worthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant	**(9)**	***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter	**(10)**	***Absence of a Public Record.*** Testimony -- or a certification under Rule 902 -- that a diligent search failed to disclose a public record or statement if the testi

of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with

mony or certification is admitted to prove that:

rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(A) the record or statement does not exist; or

(B) a matter did not occur

or ex- ist, if a pub- lic of- fice reg- ularl y kept a re- cord or state men t for a mat- ter of that kind .

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, le-

(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statemen

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		ganization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament,	**(12)**	***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:

made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been is-

sued at the time of the act or within a reasonable time thereafter.

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that

				the person performed a marriage or similar ceremony or administered a sacrament; and
				(C) purporting to have been issued at the time of the act or within a reasonable time after it.
(13) Family records	**(13)**		***Family Records***	

cords. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, cryp	***cords.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn

ts, or tombstones, or the like.		or burial marker.
(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of	**(14)**	***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:

the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office

and an applicable statute authorizes the recording of documents of that kind in that office.

(A) the record is admitted to prove the content of the original recorded document, along

with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that

		office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter state	**(15)**	***Statements in Documents That Affect an Interest in Property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter state

d was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document

d was relevant to the document's purpose -- unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

nt.		
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	**(16)**	***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.
(17) Market reports, commercial publications.	**(17)**	***Market Reports and Similar Commercial Publ***

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.		***ications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.
(18) Learne	**(18)**	***Statemе***

d trea tises . To the ex- tent calle d to the at- ten- tion of an ex- pert wit- ness upo n cros s- ex- ami na- tion or re- lied upo n by the ex- pert wit- ness in dir- ect ex- ami na- tion, state men ts con- taine d in ***nts in Lear ned Trea tises , Peri odic als, or Pam ph- lets.*** A state men t con- taine d in a treat ise, peri- odic al, or pam ph- let if:

published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or

by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(A) the statement is called to the attention of an

expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or

testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation concerning per-

(19) ***Reputation Concerning Per-***

son-al or fam-ily his-tory. Rep uta-tion amo ng me mbe rs of a per-son's fam-ily by bloo d, ad-op-tion, or mar-riage, or amo ng a per-son's as-soci-ates, or in the com mu-nity, con-cerni ng a per-son's birth, ad-op-

son-al or Fam ily His-tory. A repu ta-tion amo ng a per-son's fam-ily by bloo d, ad-op-tion, or mar-riage -- or amo ng a per-son's as-soci-ates or in the com mu-nity -- con-cerni ng the per-son's birth, ad-op-tion, le-

tion, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.		legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
(20) Reputation concerning boundaries	**(20)**	***Reputation Concerning Boundaries***

or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important	***or General History.*** A reputation in a community -- arising before the controversy -- concerning boundaries of land in the community or customs that affect the land, or concerning general

ant to the community or State or nation in which located.		historical events important to that community, state, or nation.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.	**(21)**	***Reputation Concerning Character.*** A reputation among a person's associates or in the community concerning the person's character

		ter.
(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punish-	***(22) Judgment of a Previous Conviction.***	Evidence of a final judgment of conviction if:

able by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution

for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(A) the judgment was

entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prov

e any fact es- sen- tial to the judg men t; and

(D) whe n offer ed by the pro- secu tor in a crim inal case for a pur- pose oth- er than im- peac hme nt, the judg men t was agai nst the de- fend ant.

The pen- denc

y of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or gen-	**(23)**	***Judgments Involving Personal, Family, or General History or a Boundary.*** A judgment that is admitted to prove a matter	

eral history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputa-

tion.

(24)	**[Other exceptions.]** [Transferred to Rule 807]	**(24)**	**[Other exceptions.]** [Transferred to Rule 807.]

Committee Note

The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
Supp. To CHAPTER 803 RULE 803

4-803 Federal Rules of Evidence Manual Supp. to § 803.02

Supp. to § 803.02 Editorial Explanatory Comment

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[26] Confrontation Clause and Rule 803 Exceptions [Go To Main]

In *Davis v. Washington, 547 U.S. 813 (2006)* (with the companion case of *Hammon v. Indiana*), the Court considered the admissibility under *Crawford* of hearsay statements made by two victims of domestic abuse. One was a report by the victim to a 911 operator, made essentially at the time of the assault. The other was a report made to responding police officers; the defendant was in the home and placed in another room, and the officer obtained, through questioning, the victim's account of the event. The Supreme Court held that the statement to the police officer was testimonial, but the statement to the 911 operator was not. Justice Scalia, writing for the majority, explained as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial

> inquiries" at the crime scene will not be testimonial, we do not hold the opposite -- that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

Of course, the *Crawford* rule applies only to "testimonial" hearsay. What if hearsay admissible under a hearsay exception is not testimonial? In *Whorton v. Bockting , 127 S.Ct. 1173 (2007)* , the habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford*. His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts*. It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the *Confrontation Clause*, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. *But see 418 F.3d at 1058* (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added)

This amounts to a holding that *Roberts* has been overruled even as to non-testimonial hearsay. One of the main reasons that *Crawford* is not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. So after *Whorton*, if hearsay is not testimonial, the *Confrontation Clause* provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions, not by the Constitution.

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PART TWO: THE RULES THEMSELVES
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Supp. to § 803.03 Annotated Cases

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[1] Rule 803(1) -- Present Sense Impression [Go To Main]

[a] Rule 803(1) -- Constitutional Concerns

United States v. Danford, 435 F.3d 682 (7th Cir. 2005) : The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had just asked the manager how to disarm the store alarm. The store manager's statement was made well before the robbery occurred. Rejecting the argument that the store manager's statement was testimonial under *Crawford v. Washington,* the Court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under *Fed.R.Evid. 803(1)*, the present-sense impression exception to the hearsay rule."

[g] Rule 803(1) -- Reports of Conversations

Schindler v. Seiler, 474 F.3d 1008 (7th Cir. 2007) : Affirming summary judgment for the defendant in a defamation action by a neurosurgeon who alleged that the defendant accused him of paralyzing patients, the Court held that testimony by the plaintiff, that another doctor told him that the defendant had said the plaintiff was a bad doctor who had paralyzed four patients, was inadmissible hearsay. Although statements that constitute slander are not hearsay, the doctor's out-of-court assertion that the defendant made the statement was hearsay. Because the statement was "a calculated narration, made for a specific reason," it was not admissible as a present sense impression. The Court observed that a declarant "who deliberates about what to say or provides statements for a particular reason creates the possibility that the statements are not contemporaneous, and, more likely, are calculated interpretations of events rather than near simultaneous perceptions."

[j] Rule 803(1) -- Timing

United States v. Shoup, 476 F.3d 38 (1st Cir. 2007) : Affirming a conviction for felon firearm possession, the Court

held there was no plain error in the admission of a 911 call reporting that the defendant had a gun, which was made immediately after the caller observed the defendant with the gun. "[S]ince the time-lapse delimitation on an 'excited utterance' or a 'present sense impression' is by no means a bright-line test, ... Shoup cannot demonstrate that the district court would have committed 'obvious error' had it determined that the 911 call was admissible under these two hearsay exceptions." By failing to make a contemporaneous objection, the defendant "precluded (thus relieved) the government from presenting its best evidence as to the time-lapse issue, and the district court from making the attendant findings of fact. For these reasons, we perceive no plain error."

United States v. Green, 556 F.3d 151 (3d Cir. 2009) : In a prosecution for distribution of cocaine base, the confidential informant involved in the controlled transaction testified as the sole defense witness, denying that the defendant was the seller. After the CI was extensively cross-examined by the government and was excused, a DEA agent was permitted to introduce as substantive evidence a signed statement by the CI, made 50 minutes after the transaction, after he was brought back to DEA offices and debriefed by case agents, in which he attested that it was the defendant who sold him the drugs. The statement was admitted as a present-sense impression, and no limiting instruction was given. The Court vacated the conviction because of error in admitting the statement, as it was not sufficiently contemporaneous to satisfy the requirements of Rule 803(1), in addition to having been made after the declarant had been questioned by DEA agents. In *United States v. Green, 541 F.3d 176 (3d Cir. 2008)* , a prosecution for narcotics trafficking, the confidential informant who had participated in the controlled buy testified for the defense that the individual depicted on the video recording of the transaction was not the defendant. The government then introduced the CI's signed statement made about 50 minutes after the transaction, in which he attested that it was the defendant who sold him the drugs. Vacating the conviction, the Court held it was error to admit the statement as a present-sense impression, since the time lapse prevented the statement from satisfying the requirement of substantial contemporaneity. Furthermore, the statement had been made after questioning by DEA agents, so it was made after being expressly asked to reflect on the events in question, which fatally disqualified it for admission as a present-sense impression.

United States v. Davis, 577 F.3d 660 (6th Cir. 2009) : Affirming a conviction for felon firearm possession, the Court held that the contents of a woman's 911 call, in which she recited the license number, make, and model of the car, were admissible as present sense impressions. The woman made the 911 call within 30 seconds to a minute after seeing a man she recognized as the defendant riding in a vehicle holding a gun, so the call was made "immediately after" the event and was "not distinguishable from one that was contemporaneous with the event itself." In *United States v. Penney, 576 F.3d 297 (6th Cir. 2009)* , the Court affirmed convictions for felon firearm possession and attempting to kill a federal agent, which arose from an incident in which the defendant shot an agent during execution of a search warrant. It found no abuse of discretion in the exclusion of the defendant's statement after his arrest that "you guys don't understand. I thought I was being robbed." The statement was made 10-15 minutes after the incident was over and after EMT vehicles had arrived with sirens blaring, so the defendant "had to have known ... that ... he had shot somebody, and most likely that that was a police officer." The fact that the statement was not made while the defendant was perceiving the events and when he had time and motive to "contrive or misrepresent" meant the statement was unreliable and inadmissible as a present sense impression.

[2] Rule 803(2) -- Excited Utterance [Go To Main]

[a] Rule 803(2) -- Accidents

Biegas v. Quickway Carriers, Inc., 573 F.3d 365 (6th Cir. 2009) : The plaintiff's decedent was killed when a tractor-trailer sideswiped his truck after he stopped it on the shoulder and was inspecting the load. The Court reversed partial summary judgment granted for the defendant on comparative negligence, but found no abuse of discretion in admitting evidence that the passenger accompanying the decedent had within minutes following the accident told other witnesses who had stopped that he had told the decedent prior to the accident to "get out of the road, he was going to get hit." In the Court's view, what the declarant told the decedent was not hearsay because it "was not offered to prove that

[the decedent] was in fact standing in the travel lane at the time of the accident, but rather to prove that [he] had been put on notice that he was in imminent danger and should have been aware of the risk he faced." When the declarant recounted this warning to the other witnesses, his statement was admissible as an excited utterance, since he had just witnessed a terrible accident that dismembered and killed his friend and employer and his statement was made before there was an opportunity to fabricate or misrepresent and while he was still under the stress of the excitement.

Brunsting v. Lutsen Mts. Corp., 601 F.3d 813 (8th Cir. 2010) : Reversing summary judgment against a skier who alleged that negligence caused him to collide with a tree, the Court held it was an abuse of discretion to exclude a statement by a resort employee that she saw the plaintiff stumble on a stump, then fall into a tree and hit his head. Although the statement was made some time after the accident itself, it was contemporaneous with the "singular startling event," which included the declarant's rushing to the scene and seeing the plaintiff near death, with others trying to stabilize him until medical assistance arrived. The Court also found that the Judge gave inadequate weight to the employee's deposition in which she said that she was "just frantic," "afraid" to go near the injured skier, and "scared" to get too close. Further, the employee's status as an employee "bolsters the conclusion that her immediate statements were not the product of reflective thought," and that although the statement was not an agent's admission, "the relationship is still notable in our analysis." Finally, the inconsistencies between the statement, made on the day of the accident, and statements made two months and four years later "under the tutelage of the [defendants] ... enhance the veracity and credibility of the statements she made the day of the accident."

[b] Rule 803(2) -- Assault Victims

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The defendant was convicted for the fatal carjacking of his ex-wife, after a witness testified that the victim told her that bruises on her arm were caused by the defendant and that "she was afraid, afraid of him." On appeal, the government "correctly concede[d]" that the statements were improperly admitted as excited utterances, as there was no evidence of a startling event occurring any time near when the statements were made. Testimony by the victim's mother that the victim accused the defendant of stalking her was likewise improperly admitted under the excited utterance exception. The Court nonetheless held that the admissible evidence against the defendant was sufficient, and affirmed.

United States v. Jennings, 496 F.3d 344 (4th Cir. 2007) : Affirming a conviction for abusive sexual contact with a 13-year-old, which arose from groping on a transcontinental flight, the Court found no error in the admission of testimony regarding statements the victim made five minutes after the defendant left the seat beside her and again after deplaning. In each case the victim was in a state of shock, anger, and confusion, and she broke down crying and became hysterical as she began relating the events that had occurred. Although the core acts occurred an hour or two before the deplaning, the victim was still being pursued by the defendant at the time she made her statements.

United States v. Hadley, 431 F.3d 484 (6th Cir. 2005) : In a felon firearm possession prosecution, the Court found no abuse of discretion in the admission of statements made by the defendant's wife to police, when they responded to a domestic disturbance call, that the defendant "has a gun." There was sufficient evidence of a startling event, because the 911 dispatcher could hear the incident in progress when receiving the wife's call. There was also sufficient evidence that the wife made her statement under the influence of the startling event: officers responded within two minutes of receiving the report from the dispatcher, at which point the wife was in a state of panic, crying and shaking. The Court rejected the defendant's argument that the hearsay should be excluded as unreliable because the wife subsequently repudiated her statement. It explained that "a statement that satisfies all of the elements of our test for excited utterances meets the threshold for admissibility under *Rule 803(2)*, even though its reliability might be subject to challenge on such grounds as inconsistency with subsequent statements or the speaker's motive to fabricate." Thus, any challenges to the reliability of the hearsay went to weight and not admissibility.

United States v. DeMarce, 564 F.3d 989 (8th Cir. 2009) : The defendant was convicted for attempted aggravated sexual abuse of his 11-year-old niece after he attempted to rape her in his car. When he dropped her off at home

following the incident, she first lied about the source of her injuries, but a few minutes later told the true story, which her mother related at trial. Affirming, the Court held that admission of most of the testimony was error, but harmless. It rejected the government's argument that the testimony was admissible to explain why the mother contacted the police, because the testimony was not restricted at trial to this purpose and was admitted for its truth. It held that the daughter's statement was inadmissible as an excited utterance because the fact that she first fabricated a statement before correcting it demonstrated a level of reflection inconsistent with an excited utterance. In *United States v. Bercier, 506 F.3d 625 (8th Cir. 2007)* , although it reversed a defendant's convictions for sexual abuse of his sister's 18-year-old foster daughter, the Court held there was no error in admitting the victim's statements to her boyfriend as excited utterances, as they were made 15-20 minutes after the alleged assault while the victim was shaking and crying uncontrollably. In *United States v. Wilcox, 487 F.3d 1163 (8th Cir. 2007)* , the court affirmed a conviction for sexual abuse of a minor, finding no abuse of discretion in admitting hearsay statements of the victim as excited utterances. One set of statements were made in a call to the police department. The Court found that the victim had called the police at her first opportunity and that only a brief period of time passed between the abuse and her call to the police. Her continuous excitement was shown in the recording of the call: she was crying and her voice sounded noticeably upset. A second set of statements was made by the victim to her mother. The Court found it was reasonable to conclude these statements were made shortly after the call to the police, that her demeanor evidenced stress and excitement, and that no appreciable amount of time had passed since the startling event of sexual abuse.

United States v. Smith, 606 F.3d 1270 (10th Cir. 2010) : The Court affirmed a sexual assault conviction, finding no abuse of discretion in the admission, as an excited utterance, of the victim's statement, "Help me, help me. He raped me." Although the statement was made two hours after the assault, it was made regarding a stressful event to the first person encountered immediately after the victim had escaped from the defendant and she was still under obvious stress. In *United States v. Pursley, 577 F.3d 1204 (10th Cir. 2009)* , the victim in a witness-retaliation case had testified against the defendant on tax-fraud charges and, after testifying, was brutally beaten in a cell at the courthouse. A federal marshal was permitted to testify that, while being transported to the hospital after the beating, the victim said that one assailant yelled as he entered the cell that the victim had just entered, and the defendant responded "well, you know what to do." Finding that the overall time between the assault and the statement was one hour, and that for over half of that time the victim was in close quarters with his assailants, the Court concluded that making the statement within 20 to 30 minutes of the end of his ordeal was "well within the temporal range of trauma contemplated by Rule 803(2)." Other factors relevant to a finding that the victim had been continually excited from the time he left the cell until he made the statement included: the victim testified that he was in considerable pain; the marshal testified that the victim seemed excited, nervous, and unable to stop moving; and there was "no intervening event ... that could have diluted the effect of the event's trauma." The Court rejected an argument that the victim might have made the statement in contemplation of a lawsuit against the government for failing to protect him: "[a]t the very least, we find dubious the notion that any such thoughts of a payday would have been sufficiently strong and pervasive to dispel [the victim's] stress occasioned by the assault," and "we question whether the prospect of a lawsuit against the Marshals Service would have provided [the victim] with a motive to lie about *who* perpetrated the assault." In *United States v. Ledford, 443 F.3d 702 (10th Cir. 2005)* , in a felon firearm prosecution, the Court found no error in admitting a statement made by the defendant's wife to an officer responding to a domestic violence call. The wife stated that she was afraid that the defendant might kill her for calling the police -- then she led the officer to a bedroom and gave him a handgun from a dresser drawer. The Court found that the wife's statement, if offered for its truth, was admissible as an excited utterance. The domestic dispute was a startling event, and there was also "a future trigger for startling," *i.e.*, that the defendant's threat was contingent on calling the police. The statement to the officer was sufficiently close to both the domestic violence (35 minutes) and the startling event of reporting to the police and triggering the defendant's threat (immediate) to be considered under the influence of both events.

[d] Rule 803(2) -- Constitutional Concerns

Davis v. Washington, 547 U.S. 813 (2006) : The Supreme Court considered the admissibility under *Crawford v. Washington* of hearsay statements offered as excited utterances that had been made by victims of domestic abuse in two

cases. One was a report by the victim to a 911 operator, made essentially at the time of the assault. The other was a report made to responding police officers; the defendant was in the home and placed in another room, and the officer obtained, through questioning, the victim's account of the event. The Supreme Court held that the statement to the police officer was testimonial, but the statement to the 911 operator was not. Justice Scalia, writing for the majority, explained as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

The Court emphasized the narrowness of its opinion. It was not attempting to establishing an all-encompassing test of which statements are testimonial and which are not. The Court did not decide, for example, whether statements made to someone other than law enforcement personnel can be testimonial. It did not even decide that all statements to responding police officers are testimonial and all statements to 911 operators are not. According to the Court, whether a statement is "testimonial" even in these narrow circumstances depends on the facts.

United States v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc), *rev'g 434 F.3d 396* (*vacating 410 F.3d 895 (2005)* (see *Manual* § 803.03[2][d])): In a trial for felon firearm possession, the government introduced evidence that Gordon called 911 and stated that the defendant had threatened her with a gun. After police arrived, Gordon, crying and screaming, again named the defendant. Shortly thereafter the defendant showed up as well, and Gordon became upset and identified the defendant as the man who had threatened her. Affirming, the *en banc* Court held that Gordon's statements qualified as excited utterances, and all were nontestimonial under *Crawford* and *Davis*. Gordon was seeking protection, and questioning by the 911 operator and the police officers was directed at resolving the crisis rather than obtaining evidence for a possible later criminal trial. Because *Davis* held that the *Confrontation Clause* is "solely concerned with testimonial hearsay," the Court ceased its pre-*Davis* practice of applying an *Ohio v. Roberts* analysis to nontestimonial hearsay; thus, it found no error in the admission of Gordon's statements. Dissenting Judges disagreed with the conclusions that the statements qualified as excited utterances and that they (or, according to two Judges, the statements made in response to police questions) were nontestimonial under *Crawford*.

United States v. Pursley, 577 F.3d 1204 (10th Cir. 2009) : The victim in a witness-retaliation case had been beaten in a jail cell, and thereafter made statements about the beating to a federal marshal on the way to the hospital. The defendant argued that those statements were testimonial under *Crawford v. Washington*. The Court found the statements to be admissible under the excited utterance exception, but stated that "an excited utterance is not per se excluded from the *Confrontation Clause*." The Court found it unnecessary to decide whether the victim's hearsay was testimonial, because even if it was, the victim testified at trial and so the defendant had an opportunity to cross-examine the victim about the statement.

United States v. Brown, 441 F.3d 1330 (11th Cir. 2006) : The Court affirmed a conviction for murder of a federal employee, finding no violation of *Crawford v. Washington* in the admission of testimony that the defendant's mother had received a phone call, apparently from the defendant, had asked the caller whether he had killed the victim, and after receiving an answer had started crying. The mother's reaction was admitted at trial as an excited utterance. The Court held the mother's statements were not testimonial, as the phone conversation "obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial."

[f] Rule 803(2) -- Foundation

United States v. Arnold, 486 F.3d 177 (6th Cir. 2007) (en banc), *rev'g 434 F.3d 396* (*vacating 410 F.3d 895 (2005)* (see *Manual* § 803.03[2][m])): In a trial for felon firearm possession, the government introduced evidence that Gordon called 911 and stated that the defendant had threatened her with a gun. After police arrived Gordon, crying and screaming, again named the defendant. Shortly thereafter the defendant showed up as well, and Gordon became upset and identified the defendant as the man who had threatened her. Affirming, the *en banc* Court held that the evidence showed that the statements were all made sufficiently proximate to the stressful events and while Gordon was still fearful for her own safety. Dissenting Judges contended that the prosecution had not satisfied its burden of proving the foundation, arguing that the only proof of the startling event came from the statements themselves.

United States v. Erickson, 610 F.3d 1049 (8th Cir. 2010) : In a prosecution for assault with a deadly weapon, the Court found that the admission as an excited utterance of a statement to a 911 dispatcher made by a person at the scene was problematic because there was "no way to identify the basis of the statement with any certainty," but any error was harmless.

[k] Rule 803(2) -- Scope of the Rule

United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) : The Court affirmed a conviction for carjacking, finding no abuse of discretion in the admission, as an excited utterance, of a victim's statement to a 911 operator telling police to back off pursuit of the defendant's vehicle in which she was being held or she would be killed. Although the victim's original abduction at gunpoint did not result in her making excited utterances (because she was calm at that time), a second traumatic event occurred when the police came on the scene and a chase resulted; "the initiation of the police chase could have served as a new and independent startling event, sufficient to effectuate the excited utterance hearsay exception."

[m] Rule 803(2) -- Timing

United States v. Shoup, 476 F.3d 38 (1st Cir. 2007) : Affirming a conviction for felon firearm possession, the Court held there was no plain error in the admission of a 911 call reporting that the defendant had a gun, which was made immediately after the caller observed the defendant with the gun. "[S]ince the time-lapse delimitation on an 'excited utterance' or a 'present sense impression' is by no means a bright-line test, ... Shoup cannot demonstrate that the district court would have committed 'obvious error' had it determined that the 911 call was admissible under these two hearsay exceptions." By failing to make a contemporaneous objection, the defendant "precluded (thus relieved) the government from presenting its best evidence as to the time-lapse issue, and the district court from making the attendant findings of fact. For these reasons, we perceive no plain error."

United States v. Penney, 576 F.3d 297 (6th Cir. 2009) : The Court affirmed convictions for felon firearm possession and attempting to kill a federal agent, which arose from an incident in which the defendant shot an agent during execution of a search warrant. It found no abuse of discretion in the exclusion of the defendant's statement after his arrest that "you guys don't understand. I thought I was being robbed." The statement was made 10-15 minutes after the incident was over and after EMT vehicles had arrived with sirens blaring, so the defendant "had to have known ... that ... he had shot somebody, and most likely that that was a police officer." The fact that the defendant had time and motive to "contrive or misrepresent" meant the statement was unreliable and inadmissible as an excited utterance.

United States v. McPike, 512 F.3d 1052 (8th Cir. 2008) : After the defendant was arrested, he had a telephone conversation from the jail with a woman in which she indicated that he had taken the firearm to his girlfriend's home. Affirming a conviction for felon firearm possession, the Court held it was error (but harmless) to admit the woman's statement as an excited utterance. Although she was "crying" and "hysterical" during the conversation, the Court noted that the government "failed to identify a startling event or condition that caused Schmidt's stress of excitement, and we

reject any argument that she was still under the stress of excitement caused by McPike's arrest three months after the fact." In *United States v. Kenyon, 481 F.3d 1054 (8th Cir. 2007)* , the court, affirming a conviction for sexual abuse of a child, found it was error (but harmless) to admit hearsay statements made by the alleged victim to a physician's assistant as excited utterances. The statements were made three years after the first alleged instance of abuse and a week after the most recent alleged instance. "Given those lapses of time, we do not think it can reasonably be said that A.L. was still under the stress or excitement caused by a startling event when she made the disputed statements."

United States v. Smith, 606 F.3d 1270 (10th Cir. 2010) : The Court affirmed a sexual assault conviction, finding no abuse of discretion in the admission, as an excited utterance, of the victim's statement, "Help me, help me. He raped me." Although the statement was made two hours after the assault, it was made regarding a stressful event to the first person encountered immediately after the victim had escaped from the defendant and she was still under obvious stress.

[o] Rule 803(2) -- Witnesses to Crimes

United States v. Davis, 577 F.3d 660 (6th Cir. 2009) : Affirming a conviction for felon firearm possession, the Court held that the contents of a woman's 911 call, in which she recited the license number, make, and model of the car in which she saw a man she recognized as the defendant riding in a vehicle holding a gun, were admissible as excited utterances. The woman testified that she thought the defendant had been involved in a recent murder, so she had walked away quickly because she felt responsible for taking care of the small children in her custody. The Court observed that there was some question as to whether the statements were made prior to there being time to contrive or misrepresent, because the woman told the dispatcher it had been five minutes since she saw the defendant rather than 30 seconds to one minute as she testified a trial, and that the woman's statements contained some exaggerations (e.g., the defendant had two guns instead of one). It concluded that the exaggerations went to the weight to be given the statements, not their admissibility.

[3] Rule 803(3) -- Then Existing Mental, Emotional, or Physical Condition [Go To Main]

[c] Rule 803(3) -- Facts Reflected in State of Mind

United States v. Kaiser, 609 F.3d 556 (2d Cir. 2010) : The Court reversed a company executive's securities fraud conviction in part because a hearsay statement by another executive, named Abramson, that he had discovered the defendant's wrongdoing and wanted to go to the SEC to expose him, was improperly admitted as state of mind. "[T]he obvious premise of the statement is that Kaiser was violating the law. It is this assertion, and not Abramson's intent to report Kaiser to the SEC, that constitutes inadmissible hearsay." Even if the statement were offered to prove Abramson's intent, its probative value was substantially outweighed by the risk that the jury would misuse the statement for the truth of the accusation; so in any event it should have been excluded under Rule 403.

Apanovitch v. Houk, 466 F.3d 460 (6th Cir. 2006) : Although it denied habeas corpus relief, the Court held that admission of hearsay testimony from six witnesses describing the reasons that the victim feared the defendant violated his constitutional right to a fair trial. The Court noted that "a witness may testify that someone expressed to them fear of someone or something, but they may not testify as to that person's explanations of *why* they were afraid."

[d] Rule 803(3) -- Intent

[ii] Rule 803(3) -- Intent -- Inference from Present to Past State of Mind

United States v. Rivera-Hernandez, 497 F.3d 71 (1st Cir. 2007) : The Court affirmed a conviction for money laundering arising from a scheme in which a contractor building a juvenile facility under the defendant's authority paid money to the defendant for work never done. The Court held there was no abuse of discretion in the exclusion of testimony that the defendant told his father that he was providing consulting services to the contractor, but as a public

servant he could not hold other employment and thus was having the payments made to his father's company. Because the statement was not made contemporaneously with the demand that the defendant made to the contractor for payment, it was not admissible as an expression of an innocent state of mind at the time of the allegedly illegal transaction. In our view, the statement was in fact a statement of the defendant's contemporaneous state of mind -- it reflected how he felt at the time the statement to his father was made and so it was "then existing" within the terms of Rule 803(3). However, the Trial Court would have been well within its discretion to exclude the statement under Rule 403, because the defendant's state of mind at the time of the statement to his father was only probative insofar as it raised an inference that he had the same state of mind at the time he made the demand for payment. A Judge could well conclude that the defendant's state of mind could have changed over that time, and therefore that the risk of jury confusion could substantially outweigh the probative value of the statement.

[iii] Rule 803(3) -- Intent -- Miscellaneous Cases

United States v. Barraza, 576 F.3d 798 (8th Cir. 2009) : The Court affirmed a conviction for kidnapping resulting in death, finding no error in the admission of statements by the victim that she was taking her son and going with the defendant to Mexico, on a drug-buying trip. The statements referred to her then-existing intention and were properly admitted under Rule 803(3).

United States v. Duran, 596 F.3d 1283 (11th Cir. 2010) : The Court affirmed a conviction for acting in the United States as a foreign government's agent without prior notification to the Attorney General and conspiracy, finding no abuse of discretion when statements by the defendant, which he argued showed that he did not intend to act as an agent of the Venezuelan government, were excluded. Two of the statements were properly excluded on relevance grounds and a third because it explained why the defendant had a certain state of mind and so was not a statement of intent. With respect to a statement, "I'm never bringing that money" to a business partner to pay bribes, the Court concluded that admissibility "was a close call under Rule 803 (3)" and that if exclusion was error it was harmless.

[e] Rule 803(3) -- Mixed Present and Past States of Mind

McInnis v. Fairfield Communities, Inc., 458 F.3d 1129 (10th Cir. 2006) : The Court affirmed a judgment for the plaintiff in a Title VII gender discrimination action, finding no abuse of discretion in the exclusion of emails written by a supervisor. The statements were not admissible under *Rule 803(3)* although some expressed then-existing states of mind, because others were assertions of why the declarant had those feelings. As statements of memory or belief, the latter are expressly outside the exception, and the defendant did not offer to redact the inadmissible portions.

[g] Rule 803(3) -- Present State of Mind

[ii] Rule 803(3) -- Present State of Mind -- Criminal Cases

United States v. Rivera-Hernandez, 497 F.3d 71 (1st Cir. 2007) : The Court affirmed a conviction for money laundering arising from a scheme in which a contractor building a juvenile facility under the defendant's authority paid money to the defendant for work never done. The Court held there was no abuse of discretion in the exclusion of testimony that the defendant told his father that he was providing consulting services to the contractor, but as a public servant he could not hold other employment and thus was having the payments made to his father's company. Because the statement was not made contemporaneously with the demand that the defendant made to the contractor for payment, it was not admissible as an expression of an innocent state of mind at the time of the allegedly illegal transaction. In our view, the statement was in fact a statement of the defendant's contemporaneous state of mind -- it reflected how he felt at the time the statement to his father was made and so it was "then existing" within the terms of Rule 803(3). However, the Trial Court would have been well within its discretion to exclude the statement under Rule 403, because the defendant's state of mind at the time of the statement to his father was only probative insofar as it raised an inference that he had the same state of mind at the time he made the demand for payment. A Judge could well conclude that the defendant's state of mind could have changed over that time, and therefore that the risk of jury confusion could

substantially outweigh the probative value of the statement.

[k] Rule 803(3) -- Statements of Belief or Memory

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The defendant was convicted for the fatal carjacking of his ex-wife, after a witness testified that the victim told her that bruises on her arm were caused by the defendant and that "she was afraid, afraid of him." On appeal, the government "correctly concede[d]" that the statement regarding the bruises was improperly admitted as a statement of a then existing mental, emotional, or physical condition. While the statement of fear referred to an existing emotional condition, the government correctly acknowledged that the victim's state of mind was not relevant to any issue in the case. Testimony by the victim's mother that the victim accused the defendant of stalking her were likewise improperly admitted under the state of mind exception. The Court nonetheless held that the admissible evidence against the defendant was sufficient, and affirmed.

United States v. DeMarce, 564 F.3d 989 (8th Cir. 2009) : The defendant was convicted for attempted aggravated sexual abuse of his 11-year-old niece after he attempted to rape her in his car. When he dropped her off at home following the incident, she first lied about the source of her injuries, but a few minutes later told the true story, which her mother related at trial. Affirming, the Court held that admission of most of the testimony was error, but harmless. It rejected the government's argument that the testimony was admissible to explain why the mother contacted the police, because the testimony was not restricted at trial to this purpose and was admitted for its truth. It held that the daughter's statement was admissible under Rule 803(3) to the extent that she described her physical state at the time of the statement, but not to the extent she described the events leading up to her physical state, as that was an inadmissible statement of memory.

[4] Rule 803(4) -- Statements for Purposes of Medical Diagnosis or Treatment [Go To Main]

[a] Rule 803(4) -- Abused Child

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) : The Court upheld convictions for child sexual abuse, finding no error in the admission of hearsay statements that the victim, who testified at trial, had made to a physician. The statements were pertinent to treatment or diagnosis, because they identified the abuser as a family member, and the government presented sufficient evidence to indicate that the child was aware of the need to be truthful when talking to the doctor.

[b] Rule 803(4) -- Constitutional Concerns

United States v. Santos, 589 F.3d 759 (5th Cir. 2009) : The Court affirmed a conviction for assault resulting in serious bodily injury, finding no violation of Rule 803(4) or *Crawford v. Washington* in the admission of a statement from the victim to a prison nurse that his pain was nine on a scale of ten. Rejecting the argument that a statement must be "necessary" for medical treatment in order to be admissible, the Court stated that the standard for admissibility is whether the statement was "reasonably pertinent to diagnosis or treatment." In this case, there was no question that the victim's statement regarding his pain was reasonably pertinent to treatment for that pain. For similar reasons, that the victim's statement was not testimonial, because the nurse was engaged in treatment and was not interrogating the victim to gather evidence for trial or prison disciplinary proceedings.

[f] Rule 803(4) -- Statements Explaining Cause or Attributing Fault

United States v. Bercier, 506 F.3d 625 (8th Cir. 2007) : The Court reversed sexual assault convictions, finding it was an abuse of discretion to permit a doctor at the hospital to testify to an extensive interview he conducted with the victim on the morning after the alleged assault. There was no foundation establishing that the doctor's lengthy interview of the victim, including questions as to the identity of the assailant, were essential to diagnosis and treatment or that the victim

manifested an understanding that they were essential. The presence of law enforcement agents near the time of the doctor's interview reinforced the inference that the interview was not pertinent to treatment. In *United States v. Miller, 477 F.3d 644 (8th Cir. 2007)* , the court, affirming a jailer's conviction for *Eighth Amendment* violations in abusing prisoners, found no error in admitting medical records that, together with other evidence, could be used to identify the defendant as the assailant. Although statements concerning identity or fault are usually not considered reliable enough to come within Rule 803(4), these records did not by themselves identify the defendant or anyone else as the individual responsible, and the Court doubted "that a statement that is otherwise admissible as a statement made for the purposes of treatment or diagnosis is rendered inadmissible merely because it may also indirectly and incidentally suggest the person responsible for the declarant's injuries."

[g] Rule 803(4) -- Statements for Purposes of Treatment

United States v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008) : At the trial of a sheriff's officer for acting under color of law to deprive three women of their right to bodily integrity by committing sexual assaults upon them, a registered nurse and sexual examiner testified that she had examined one of the women on the night of the assault and the woman had told her that "she had been forced to have oral copulation." The Court found no abuse of discretion in admitting this statement under Rule 803(4), as the witness testified that the victim's description of the assault affects the examination she conducts and that she examined the woman's mouth for injury. It was true that she was collecting evidence, but she was also a hospital nurse performing a medical examination of a victim of a sexual assault.

[5] Rule 803(5) -- Recorded Recollection [Go To Main]

[.1] Rule 803(5) -- Constitutional Concerns

United States v. Jones, 601 F.3d 1247 (11th Cir. 2010) : Affirming firearms convictions, the Court found no abuse of discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. Even though the videotaped statement was testimonial, the Court also rejected a *Confrontation Clause* challenge because the declarant testified at trial and was subject to unrestricted cross-examination.

[k] Rule 803(5) -- Police Reports

United States v. Rommy, 506 F.3d 108 (2d Cir. 2007) : The Court affirmed a conviction for conspiracy to import "Ecstasy" into the United States, finding no error in the admission, as past recollection recorded, of a transcript of a tape-recorded telephone conversation between the defendant and another drug dealer. The recording was made by Dutch law enforcement officials pursuant to a wiretap, but Dutch law prohibited production of the tape itself. The government produced a Dutch detective who was personally involved in the wiretap investigation and who prepared the transcript. Although the detective had no specific recollection of the call or of transcribing it, she testified that it had been her general practice upon listening to calls intercepted during the investigation to prepare a contemporaneous transcript. This testimony was sufficient to establish the foundation requirements for a past recollection recorded.

[m.1] Rule 803(5) -- Video Recordings

United States v. Jones, 601 F.3d 1247 (11th Cir. 2010) : Affirming firearms convictions, the Court found no abuse of discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. When the witness had memory problems at trial, the prosecution showed her the videotape outside the presence of the jury. The witness responded that she could remember only some of the events, and the Judge found that she lacked sufficient memory to testify to the subject matter of the video. The witness testified that it was easier to remember the events at the time of the videotape than at trial and that the things said on the tape were true and accurate to the best of her

knowledge. Under these circumstances, "admission of the video as past recollection recorded was not a clear error of judgment on the part of the district judge."

[6] Rule 803(6) -- Records of Regularly Conducted Activity [Go To Main]

[e] Rule 803(6) -- Computerized Records

U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009) : In an action over insurance coverage obligations the plaintiffs proved claims-defense and settlement costs by introducing computer-generated summaries detailing the indemnity and expenses paid on each claim. Affirming a judgment for the plaintiffs, the Court held that the summaries were properly admitted under Rule 803(6) because they were printouts from a database, where the underlying data was entered into the database at or near the time of each payment event, the persons who entered the data had knowledge of the payment event, and the data was kept in the course of the business' regularly conducted business activity. The Court rejected arguments that the exhibits were inadmissible because they had been prepared for the litigation -- why the printouts were produced was irrelevant when the underlying data met the requirements of the business record exception -- and that the foundation witness was unqualified because he had not input each piece of data -- all that is required is that the witness be knowledgeable about the business' practices and procedures concerning the records.

United States v. Sanchez, 586 F.3d 918 (11th Cir. 2009) : The Court affirmed convictions for conspiracy to possess marijuana with the intent to distribute, finding no abuse of discretion in admitting call records for cell phones used by the conspirators, a summary of those records prepared by the prosecution, and a map showing the general location of the subject cell phones in relation to specific cell phone call towers at the times the phones were used. Although the defendants argued that the electronic records that contained the information about calls stored by VeriSign under contract with MetroPCS (who maintained the towers) were not business records of MetroPCS, the Court concluded that the argument was frivolous and that the information that was stored was recorded contemporaneously with the transactions it depicted and were business records. In our view, the records were not hearsay requiring an exception, since they were mechanical recordings not involving any human "statement" subject to infirmities of perception, memory, sincerity, or ambiguity. The Court held that given the fact that the records were admissible, it was not an abuse of discretion to permit the government to offer summaries and maps based upon the records.

[e.1] Rule 803(6) -- Constitutional Concerns

United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) : In a prosecution for racketeering that included charges of murder, the government proved the manner of death through autopsy reports introduced by a medical examiner who had not conducted any of the autopsies. Affirming, the Court held that the reports were properly admitted as business records and that their admission did not violate confrontation rights. The Court noted that statements that are testimonial within the meaning of *Crawford* do not qualify as business records under *Rule 803(6)*, and statements properly admitted as business records cannot be testimonial. "Because business records cannot be made in anticipation of litigation or include observations made by law enforcement personnel, they 'bear[] little resemblance to the civil-law abuses the *Confrontation Clause* targeted.' "

United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007) : The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The Court held that the government established a proper foundation for the post office box records through the testimony of a postal inspector, making them admissible as business records; rejecting an argument that admission of the records was a confrontation violation, the Court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

[k] Rule 803(6) -- Foundation

[ii] Rule 803(6) -- Foundation -- Custodian or Qualified Witness

[A] Rule 803(6) -- Civil Cases

U.S. CFTC v. Dizona, 594 F.3d 408 (5th Cir. 2010) : The Court affirmed judgment as a matter of law given for the defendant in a civil enforcement action regarding alleged commodities market manipulation, holding that the CFTC had not established that documents admitted at trial were business records within the hearsay exception. The only foundation proffered came from a CFTC investigator who did not have any knowledge regarding the making or keeping of the records. A dissenting Judge would have found no abuse of discretion in admitting the evidence, as it was produced by the defendant's employer in response to the government's subpoena to deliver the record of its trades, and the investigator gave undisputed testimony regarding the general practice by which trade data was recorded.

Thanongsinh v. Board of Educ., 462 F.3d 762 (7th Cir. 2006) : The Court reversed in part summary judgment for the defendant in a Title VII action by an employee who claimed he had been demoted because a qualification exam had been administered in a discriminatory manner. The Court held it was error to exclude interviewers' score sheets on the ground that they had not been authenticated by the interviewers themselves. As records made and kept in the ordinary course of the business, the sheets would come within the business records exception, and the foundation for that exception could be provided by the custodian or any other witness with knowledge of the business' practices. Although the plaintiff did not submit an affidavit by the custodian of these records, the Court held the foundation for consideration at the summary judgment stage was satisfied by the defendant's discovery responses and reliance on the sheets in its arguments on the motion.

[B] Rule 803(6) -- Foundation -- Custodian or Qualified Witness -- Criminal Cases

United States v. Brown, 553 F.3d 768 (5th Cir. 2008) : Two pharmacists were convicted of conspiring with physicians to distribute large quantities of pain medications under cover of false prescriptions written by the physicians. Affirming, the Court found no abuse of discretion in the exclusion of exhibits purporting to represent data from the defendants' pharmacy records, broken down in such a way as to demonstrate facts favorable to their claims of innocence, as the defendants were unable to provide a sufficient foundation. Their first witness, who was quite familiar with the computer program and had statistics training that enabled him to parse and present the data, had never worked at the pharmacy and first encountered the records long after they were compiled, so he could not testify to the business' record-keeping practices. The defendants could not provide a foundation because they were unwilling to testify because of *Fifth Amendment* concerns, and their suggestion that the foundation come from one defendant's mother was met with a prosecution warning that she too could have self-incrimination concerns. Finally, their attempt to use a business records affidavit pursuant to Rule 902(11) was rejected as untimely.

United States v. Baker, 458 F.3d 513 (6th Cir. 2006) : The Court affirmed a mail fraud conviction, holding that an experienced postal inspector familiar with the Postal Service and postal records was qualified to establish that post office box records introduced in the case were business records.

United States v. Oros, 578 F.3d 703 (7th Cir. 2009) : Affirming a conviction for bribery of a public official, the Court held it was error (but harmless) to admit charts summarizing voluminous bank and telephone records, because the introducing witness did not provide evidence that the underlying records met the requirements of the business records exception and were thus admissible. The Trial Judge had erroneously accepted the government's argument that "because the government was only introducing the summary (and not the underlying records themselves), no certification or testimony from a custodian was required."

[iii] Rule 803(6) -- Foundation -- Examples

[A] Rule 803(6) -- Admissible Records

United States v. Ford, 435 F.3d 204 (2d Cir. 2006) : The Court held in a bribery prosecution that there was no abuse of discretion in admitting the key prosecution witness' calendar as a business record. Although the witness claimed not to remember when or why he made a critical entry, he had testified that it was his regular business practice to keep a calendar in which he documented events of which he had personal knowledge at or near the time they occurred.

[v] Rule 803(6) -- Foundation -- Procedure for Laying Foundation

United States v. Petroff-Kline, 557 F.3d 285 (6th Cir. 2009) : The Court affirmed summary judgment for the government in an action to collect the amount owed on a student loan. It held that a declaration by the Chief of the Referral Control Section of the Debt Management Branch of the Department of Health and Human Services complied with Rule 902(11) and laid the foundation for the introduction of promissory notes as business records. The Court also noted that a qualifying witness "need only have knowledge of the procedures under which the records were created, not knowledge of the actual entries in the records."

[q] Rule 803(6) -- Opinions

Wood v. Valley Forge Life Ins. Co., 478 F.3d 941 (8th Cir. 2007) : In a beneficiary's action on a life insurance policy, the insurer contested on the ground that the insured committed suicide and offered the coroner's conclusion to that effect in the death certificate and the autopsy report. Affirming a judgment for the plaintiff, the Court held it was error (but harmless) to exclude evidence of the coroner's conclusion. The Court explained only that the certificate and the report were "both admissible into evidence without redactions as business records" under Rule 803(6). In our view, Rules 803(9) and 803(8), respectively, would provide stronger support for that conclusion.

Brawner v. Allstate Indem. Co., 591 F.3d 984 (8th Cir. 2010) : In an insurance dispute, the Court rejected the plaintiffs' argument that certain records offered by the insurer were not properly established as business records because the foundation witness was not a representative of the entity that created the document. It noted that "a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are met." The foundation witness testified that the insurer relied on the documents prepared by another entity.

[t] Rule 803(6) -- Records Created by Another Entity

United States v. Gwathney, 465 F.3d 1133 (10th Cir. 2006) : In a prosecution for possession of marijuana, the defendant truck driver argued that he obtained cash from money wired to him via Western Union by the truck's owner. To disprove that account, the prosecution introduced under *Rule 803(6)* an exhibit containing a subpoena issued by the DEA and Western Union's response to the subpoena indicating that it had no record of such a wire transfer. Affirming, the Court held it was error (but harmless) to admit the response as a business record of the DEA, since the agency did not prepare the document. And it was not an admissible business record of Western Union (even on the questionable assumption that it was a record made and kept in the ordinary course of business), since the DEA agent testifying about the exhibit lacked knowledge to lay the foundation.

[u] Rule 803(6) -- Regular Practice To Make and Keep Record

United States v. Kaiser, 609 F.3d 556 (2d Cir. 2010) : In a securities fraud prosecution, the Court found no error in the admission of a business planner maintained by an executive which included a "contact log" of his notes pertaining to his phone conversations. The Court rejected an argument that note-taking of phone conversations is not a regular practice because phone calls are sporadic and the executive only recorded selected phone calls, noting that the selectivity raised by the defendant "is the nature of all notetaking" and that a business record "need not be mechanically generated" to be part of a regular practice. The contact log was "different in kind from the kinds of 'miscellaneous jottings' that courts have found inadmissible under this exception, because it was maintained in a consistent way and was focused on a certain range of issues that were relevant to his business." Finally, the fact that pages had been removed from the

business planners raised questions about their trustworthiness that would go to the weight of the evidence and not its admissibility.

United States v. LeShore, 543 F.3d 935 (7th Cir 2008) : The Court affirmed a conviction for armed bank robbery, finding no abuse of discretion in the admission of a list of bait money as a business record. The defendant argued that it could not be a "regular practice" to compile such a list, since a new list is made only after the theft or loss of an existing bait money packet, which happens only on an irregular basis. However, the Court concluded that the argument overstated the spirit of the requirement, and it noted that the bank verified the list three times a year. Actual reliance on the list by the business, and compilation of the list by someone whose duty it is to do so provided additional indicia of reliability.

[w] Rule 803(6) -- Source of Information

[i] Rule 803(6) -- Business Duty

United States v. Bonds, 608 F.3d 495 (9th Cir. 2010) : In a perjury prosecution against a professional baseball player for falsely denying steroid use before a grand jury, the defendant moved *in limine* to preclude introduction of blood analysis reports for failure to establish that the blood had come from the defendant. A witness who could have made the connection refused to testify, so the government sought to introduce that witness' out of court statements. Affirming on interlocutory appeal the grant of the motion *in limine*, the Court held that log sheets of the testing company could not be used to establish that the blood came from the defendant, since the source of the information on the logs was the unavailable witness, who was under no business duty with respect to preparation of the log sheets. In *United States v. Marguet-Pillado, 560 F.3d 1078 (9th Cir. 2009)* , the court reversed a conviction for being a removed alien who was found in the United States, holding it was an abuse of discretion to admit evidence that an application for permanent resident status in the defendant's immigration file contained a statement by a person, who held himself out to be the defendant's father, that the defendant was born in and was a citizen of Mexico. The Court found that the statement did not fall within the business record or public records exception because the person who made the statement had no governmental duties whatsoever.

United States v. Ary, 518 F.3d 775 (10th Cir. 2008) : Affirming convictions for fraud and stolen property offenses arising from transactions involving space artifacts, the Court found no abuse of discretion in admitting computer and paper inventory records of the Cosmosphere and Space Center, a museum that the defendant managed from 1976 until 2002. The Court found that the records were prepared in the ordinary course of the museum's business and that, even though the museum's curators sometimes relied on outside sources to track down invoices and documentation that came with an artifact when it was purchased, the sources of the invoices and documentation were also a under a business duty to provide accurate information. "Therefore no link the trustworthiness chain was broken."

[z] Rule 803(6) -- Trustworthiness

[i] Rule 803(6) -- Trustworthiness -- Miscellaneous Cases

United States v. Arledge, 553 F.3d 881 (5th Cir. 2008) : The Court affirmed mail and wire fraud convictions arising from submission of false claims to a mass tort settlement, finding no abuse of discretion in the exclusion of a multi-page list of names, addresses, and phone numbers entitled "Arledge Accepted Cases." Although an employee of the defendant verified that the document was a record of regularly conducted activity, no witness testified to the purpose of the document or identified handwritten notations, so there was reason to be concerned about the trustworthiness of the document.

United States v. Hill, 552 F.3d 541 (7th Cir. 2008) : Affirming a conviction for bank robbery, the Court held it was error (but harmless) to admit the purchase record from a car dealer to prove that the defendant had used the proceeds from a robbery to purchase an expensive car. Evidence showed that the dealer sometimes, at the request of a buyer,

listed a different individual's name as the buyer and sometimes misreported the sales price and down payment of the car being sold, so the purchase records lacked trustworthiness. In *United States v. Price, 516 F.3d 597 (7th Cir. 2008)* , the Court affirmed a conviction for bank robbery, holding it was error (but harmless) to admit a purchase order as a business record, where there was evidence that the employees of the business "frequently and deliberately crammed [the orders] with inaccurate information at the request of the purchaser."

United States v. Rogers, 556 F.3d 1130 (10th Cir. 2009) : The Court affirmed drug and gun convictions arising from a police officer's confrontation with the defendant in the hallway and a suite of a local hotel. It found no abuse of discretion in excluding testimony by the general manager of the hotel and a departure log, which were offered to prove that one "Ricky Smith" checked out of the hotel suite the day after the defendant was arrested. The Court noted that the departure log was different from the original log provided to investigating officers and offered by the defendant at a suppression hearing, which was enough to question the trustworthiness of the record.

[ii] Rule 803(6) -- Trustworthiness -- Records Made in Contemplation of Litigation

Millenkamp v. Davisco Foods Int'l, Inc., 562 F.3d 971 (9th Cir. 2009) : In a breach of warranty action by buyers of milk permeate for cattle food, who alleged that calves died as a result of ingesting the product, the Court held it was error to admit a letter placing the blame for the calves' illness on the seller, which had been written by a nutritionist at a company that settled with the buyers. Although the letter was admitted as a business record, the Court observed that it appeared to be in response to an inquiry from the buyers and was generated in anticipation of litigation rather than in the ordinary course of business.

United States v. Arias-Izquierdo, 449 F.3d 1168 (11th Cir. 2006) : Affirming convictions arising from the hijacking of an aircraft bound for Havana that was diverted to Key West, the Court held it was error (but harmless) to admit a report from Cubana Airlines showing that five of the defendants had been passengers on the same flight to Havana in the months before the hijacking. The report was a typewritten summary of handwritten business records, which was prepared solely for the trial of these defendants. Noting that reports prepared for litigation are not admissible under *Rule 803(6)*, the Court distinguished cases admitting computer printouts prepared for use in litigation. In those cases, the information was simply a printout of electronically stored information that had been prepared without litigation in mind.

[7] Rule 803(7) -- Absence of Entry in Records [Go To Main]

United States v. Munoz, 487 F.3d 25 (1st Cir. 2007) : Affirming convictions of former bank executives for bank fraud, the Court found no abuse of discretion in permitting minutes of board meetings nearly 20 years earlier to be introduced for the purpose of proving, by the absence of any mention, that the board had not been informed of certain matters. There was sufficient foundation evidence that the minutes were prepared with the regularity required for business records and that they included sufficient detail that it could reasonably be inferred a matter was not discussed if there was no reference to it in the minutes.

[8] Rule 803(8) -- Public Records and Reports [Go To Main]

[a] Rule 803(8) -- Administrative Findings

[i] Rule 803(8) -- Administrative Findings -- Investigations

[A] Employment Cases

DeCorte v. Jordan, 497 F.3d 433 (5th Cir. 2007) : In a Title VII action, the Court found no abuse of discretion in the

admission of EEOC findings of discrimination, reaffirming its view that such determinations, while not binding on the trier of fact, are admissible as evidence in civil proceedings as probative of a claim of employment discrimination.

Alexander v. Caresource, 576 F.3d 551 (6th Cir. 2009) : The Court affirmed summary judgment for the defendant in an employment discrimination case, finding no error when no evidentiary weight was given to a probable cause letter from the state civil rights commission. It noted that the Trial Judge had misapplied earlier dicta authorizing blanket exclusion of such determinations at trial, where they "carrie[d] an evidentiary value of practically zero" "at the summary judgment stage, the report ought to be considered for the factual material it contains to determine if a fact question is raised." It also noted that the Judge had erred in discounting the letter because it was not made on personal knowledge; "the personal knowledge requirement does not extend to official reports admissible under Rule 803(8)." However, it found that the letter was properly accorded little weight because "the conclusions were not tied to specific facts, and it was unclear what evidence the investigator considered in reaching her conclusion," which indicated a lack of trustworthiness.

[d] Rule 803(8) -- Constitutional Concerns

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) : In a drug case, the Trial Court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine," and were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contested 5-4 decision, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements, and the documents at issue, "while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves." In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Notably, the Court approved the basic analysis of federal courts after *Crawford* with respect to business and public records, that is, if the record is admissible under *FRE 803(6)* or *803(8)*, it is for that reason, nontestimonial under *Crawford*. For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

United States v. Garcia, 452 F.3d 36 (1st Cir. 2006) : In an illegal re-entry case, the Court found no violation of confrontation rights in the admission of a warrant of deportation. Finding that the warrant was not testimonial under *Crawford v. Washington,* the Court noted that every Circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter."

United States v. Torres-Villalobos, 487 F.3d 607 (8th Cir. 2007) : Affirming a conviction for illegal re-entry after deportation, the Court held that a warrant of deportation recording the defendant's departure from the country was not testimonial hearsay, as such warrants "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."

United States v. Orozco-Acosta, 607 F.3d 1156 (9th Cir. 2010) : In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8). The trial was conducted and the defendant convicted before the Supreme Court's decision in *Melendez-Diaz*. On appeal, the Court rejected an argument that the warrant of deportation was testimonial under *Melendez-Diaz*, reasoning that "neither a warrant of removal's sole

purpose nor even its primary purpose is use at trial," since a warrant of removal must be prepared in every case resulting in a final order of removal, and only a "small fraction of these warrants are used in immigration prosecutions." The Court concluded that "*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal -- or, for that matter, any business or public record -- could be used in a later criminal prosecution renders it testimonial under *Crawford*."

United States v. Caraballo, 595 F.3d 1214 (11th Cir. 2010) : In an alien smuggling case, the government introduced I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information on the people found, and were used at trial to prove that they were aliens and not admittable. Affirming, the Court found that the forms were properly admitted as public records, and that the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, since the I 213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States, and it is "of little moment that an incidental or secondary use of the interviews underlying the I 213 forms actually furthered a prosecution."

[e] Rule 803(8) -- Court Records

United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010) : In a prosecution for conspiracy to burglarize pharmacies and distribute controlled substances, the use of which resulted in death or serious bodily injury, one of the individuals whom the government alleged died as a result of the use of the defendants' drugs was an informant in another case. The Court held that an order from that other case dismissing it because of the informant's death was not excluded by Rule 803(8)(B), because it was not the product of law enforcement observations.

[f] Rule 803(8) -- Factual Findings

[vii] Rule 803(8) -- Factual Findings -- Miscellaneous Cases

Christopher Phelps & Assoc., LLC v. Galloway, 492 F.3d 532 (4th Cir. 2007) : In an architectural firm's action for copyright infringement against a homeowner who used its plans to construct his house, the Court found no error in admitting a county tax assessment as evidence of the value of the defendant's property. Although the assessment reflected an expert opinion, it was not subject to Rule 702 but was admissible under Rule 803(8) because it represented the outcome of a governmental process relied upon for non-judicial purposes.

Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603 (7th Cir. 2009) : In an environmental organization's citizens' suit under the Clean Water Act, the Court held there was no abuse of discretion in disregarding a letter from the Environmental Protection Agency to the Wisconsin Department of Natural Resources following up on a meeting between the two agencies. The letter was not admissible under Rule 803(8) because it did not state any findings of the EPA but rather simply repeated the opinion of the WDNR.

Wood v. Valley Forge Life Ins. Co., 478 F.3d 941 (8th Cir. 2007) : In a beneficiary's action on a life insurance policy, the insurer contested on the ground that the insured committed suicide and offered the coroner's conclusion to that effect in the death certificate and the autopsy report. Affirming a judgment for the plaintiff, the Court held it was error (but harmless) to exclude evidence of the coroner's conclusion. The Court explained only that the certificate and the report were "both admissible into evidence without redactions as business records" under Rule 803(6). In our view, Rules 803(9) and 803(8), respectively, would provide stronger support for that conclusion.

United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) : In a prosecution for racketeering that included charges of murder, the government proved the manner of death through autopsy reports introduced by a medical examiner who had not conducted any of the autopsies. Affirming, the Court held that the reports were properly admitted as public records and

that their admission did not violate confrontation rights. The Court noted that statements properly admitted as public records cannot be testimonial: because the exception excludes documents prepared for the ultimate purpose of litigation or including observations made by law enforcement personnel, they " 'bear[] little resemblance to the civil-law abuses the *Confrontation Clause* targeted.' "

United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006) (per curiam): The Court affirmed a conviction for unlawful re-entry into the United States, holding that warrants of deportation are not testimonial hearsay under *Crawford*. The Court relied on precedents stating that documents in a defendant's immigration file are analogous to nontestimonial business records and holding that a warrant of deportation was reliable and admissible because the official preparing it had no motivation other than to "mechanically register an unambiguous factual matter."

[g] Rule 803(8) -- Foreign Records

[i] Rule 803(8) -- Civil Cases

Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) : The Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It found no abuse of discretion in the admission of a report prepared by the Commission on the Truth for El Salvador, an entity established under 1992 United Nations-sponsored peace agreements. Although the Commission did not hold a hearing, the report could be found sufficiently trustworthy because the Commission interviewed numerous witnesses, victims, and relatives; viewed thousands of complaints of violence; examined documents; interviewed members of the military; and visited locations of acts of violence.

[ii] Rule 803(8) -- Foreign Records -- Criminal Cases

United States v. Vidacak, 553 F.3d 344 (4th Cir. 2009) : The defendant was convicted of lying on his immigration application, by failing to report his service in the Serbian Army (VRS) during the Bosnian War. The Court found that foreign military documents indicating that the defendant had served in VRS were properly admitted under Rule 803(8)(A), and remarked that "Courts regularly admit foreign records pursuant to this exception." It further noted that "[n]o foundational testimony is required in order to admit evidence under Rule 803(8)."

[i] Rule 803(8) -- Included Hearsay

United States v. Taylor, 462 F.3d 1023 (8th Cir. 2006) : As evidence that he was not the source of a handgun found after police chasing him saw him discard a small object, the defendant offered a 2002 suburban police report documenting a citizen's report that a handgun with the same serial number had been lost or stolen. Affirming a conviction for drug trafficking and illegal firearm possession, the Court found no abuse of discretion in the exclusion of the police report. The citizen's statements were hearsay coming within no exception and the report contained no factual findings from an investigation that would make it admissible under *Rule 803(8)(C)*.

United States v. Marguet-Pillado, 560 F.3d 1078 (9th Cir. 2009) : Reversing a conviction for being a removed alien who was found in the United States, the Court held it was an abuse of discretion to admit evidence that an application for permanent resident status in the defendant's immigration file contained a statement by a person, who held himself out to be the defendant's father, that the defendant was born in and was a citizen of Mexico. The Court found that the included statement was hearsay that did not fall within the public records exception because the person who made the statement had no governmental duties whatsoever.

United Techs. Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009) : The Court held that statements in a police report "made by third persons under no business duty to report" are not admissible for their truth under Rule 803(8).

[j] Rule 803(8) -- Judicial Findings

United States v. Sine, 483 F.3d 990 (9th Cir. 2007) : In a mail fraud prosecution, the Court held it was error, but not reversible plain error, to permit the government to ask witnesses on cross-examination questions that incorporated adverse findings by a Judge in related civil litigation. Factual determinations by a Judge in a civil action are inadmissible hearsay not coming within any hearsay exception, and a Judge's findings can unduly affect a jury, which is likely to defer to credibility determinations made by an authoritative, professional factfinder rather than determine those issues for themselves. In *United States v. Nguyen, 465 F.3d 1128 (9th Cir. 2006)* , the defendant was convicted of violating an order of supervision requiring that he not "commit any crimes," based on pleas of *nolo contendere* to two State misdemeanors. Reversing, the Court held that *Rule 410* prohibits the admission of *nolo* pleas and the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged. The evidence was also not admissible under *Rule 803(22)*, which "allows judgments of felony convictions resulting from guilty pleas to be admitted into evidence but not convictions resulting from *nolo contendere* pleas and not misdemeanor convictions." Finally, the Court held that although a judgment of conviction could be said to be a public record, *Rule 803(8)* could not be used to evade the more specific limitations of *Rule 803(22)*. It explained that prior decisions admitting misdemeanor convictions under *Rule 803(8)* involved using the conviction to prove some other element of a subsequently charged crime but not to prove that the defendant actually committed the underlying crimes charged.

United States v. $125,938.62, 537 F.3d 1287 (11th Cir. 2008) : Reversing in part a judgment ordering forfeiture of funds allegedly embezzled from the Nicaraguan treasury by the president of the country, the Court held it was error to admit the judgment of a Nicaraguan court as a public record to prove facts found by that court. The Court noted that the judgment would be admissible under Rule 803(22) to prove the fact of the president's conviction and his sentence.

[k] Rule 803(8) -- Law Enforcement Reports and Matters Observed by Officials in Criminal Cases

[i] Rule 803(8) -- Admissible

United States v. Dowdell, 595 F.3d 50 (1st Cir. 2010) : The Court affirmed a cocaine distribution conviction, finding no abuse of discretion in the admission as a public record of the defendant's booking sheet, since was a routine, non-adversarial document.

United States v. Edelmann, 458 F.3d 791 (8th Cir. 2006) : The Court affirmed a fraud conviction, finding no abuse of discretion in the admission of a memorandum to file prepared by the Inmate Systems Manager at a federal prison where the defendant had previously been incarcerated. The memorandum included and discussed three forged court orders that had been presented to secure the defendant's release, as well as the Manager's disposition of the orders and her response when informed that the orders were fraudulent. The Court held that the memorandum was not barred by *Rule 803(8)(B)*, because it was not prepared by a member of law enforcement, and even if the Manager were considered a law enforcement officer, the memorandum was not prepared in the course of investigating a crime.

[ii] Rule 803(8) -- Law Enforcement Reports and Matters Observed by Officials in Criminal Cases -- Inadmissible

United States v. Pintado-Isiordia, 448 F.3d 1155 (9th Cir. 2006) (per curiam): In a prosecution for unlawful re-entry into the United States, the Court held that the defendant's Mexican birth record was self-authenticating, but there was no showing that the record fell within the public records exception to the hearsay rule. It was not possible to tell if the document was a record of matters "observed pursuant to duty imposed by law," because the portion of the document purporting to set forth the legal authority for maintaining the record was shown as "illegible" in the translated copy submitted to the District Court. However, any error in admitting the record was harmless.

[n] Rule 803(8) -- Opinions

United States v. De La Cruz, 469 F.3d 1064 (7th Cir. 2006) : In the prosecution of two City workers for

misappropriating public funds, the government introduced evidence that the State had done an audit of the City's finances, found violations, and requested that each member of the Board of Works reimburse the City for money spent in violation of the law. The defendants sought to introduce the City's own legal opinion in response, which was appended to the audit report. Affirming, the Court concluded that the City's legal opinion was not a public record, although it was included in one. The Court reasoned that the hearsay exception focuses on the activities of a public office and on the observations and investigations made under authority of law, so a legal opinion in response to an audit is not a public record.

[p.1] Rule 803(8) -- Private Contractors

United States v. Hoffman-Vaile, 568 F.3d 1335 (11th Cir. 2009) : Affirming a conviction of a dermatologist for health care fraud, the Court held that any error in the admission of records prepared by a private contractor that administers the Medicare program in Florida as business records was not "plain." Although the defendant argued that the records were inadmissible under the exclusionary language of Rule 803(8)(B), the Court noted that the administrator was a private firm and that the defendant offered no authority holding a private entity to be preparing law enforcement reports.

[z] Rule 803(8) -- Trustworthiness

[iv] Rule 803(8) -- Trustworthiness -- Report Admissible or Required To Be Admitted

Dortch v. Fowler, 588 F.3d 396 (6th Cir. 2009) : The Court affirmed a judgment for the defendants in a personal injury action arising from a car-truck collision, finding no abuse of discretion when a report by a police accident reconstruction expert was admitted. The report recorded matters observed pursuant to a duty to report, and it was made timely (the officer arrived about 35 minutes after the accident) by an officer with extensive experience and training in accident reconstruction and with no motivation problems, based primarily on his team's personal observations. Any inconsistencies between the report and the officer's testimony, and any questions about how the investigation was conducted, could be explored on cross-examination. In *Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009)* , the Court upheld an award of compensatory and punitive damages for victims of torture and their families in a suit against a former Salvadoran military officer. It found no abuse of discretion in the admission of a report prepared by the Commission on the Truth for El Salvador, an entity established under 1992 United Nations-sponsored peace agreements. Although the Commission did not hold a hearing, the report could be found sufficiently trustworthy because the Commission interviewed numerous witnesses, victims, and relatives; viewed thousands of complaints of violence; examined documents; interviewed members of the military; and visited locations of acts of violence.

[v] Rule 803(8) -- Trustworthiness -- Report Excludable or Required To Be Excluded

[A] Rule 803(8) -- Civil Cases

United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) : Affirming in part a judgment for the defendant state in a suit by the United States alleging that the state was in violation of the National Voter Registration Act, the Court found no abuse of discretion when the Judge excluded the substance of responses by local election agencies to a survey by the Election Assistance Commission. The state had "merely passed the LEA's survey responses along to the federal government, with no indication that the state was adopting the truth of the responses," and it had indicated that additional time was needed. As business or public records, they could have been found not trustworthy because they were hastily gathered and inaccurate in part.

[9] Rule 803(9) -- Records of Vital Statistics [Go To Main]

[b] Rule 803(9) -- Death Certificates

Wood v. Valley Forge Life Ins. Co., 478 F.3d 941 (8th Cir. 2007) : In a beneficiary's action on a life insurance policy, the insurer contested on the ground that the insured committed suicide and offered the coroner's conclusion to that effect in the death certificate and the autopsy report. Affirming a judgment for the plaintiff, the Court held it was error (but harmless) to exclude evidence of the coroner's conclusion. The Court explained only that the certificate and the report were "both admissible into evidence without redactions as business records" under Rule 803(6). In our view, Rules 803(9) and 803(8), respectively, would provide stronger support for that conclusion.

[10] Rule 803(10) -- Absence of Public Record or Entry [Go To Main]

[a] Rule 803(10) -- Confrontation Issues

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) : In a drug case, the Trial Court admitted three "certificates of analysis" showing the results of the forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine," and were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contested 5-4 decision, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements, and the documents at issue, "while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves." In one passage of the opinion, the Court in dictum stated that certificates offered to prove the lack of a public record are testimonial and therefore barred by the *Confrontation Clause*.

United States v. Orozco-Acosta, 607 F.3d 1156 (9th Cir. 2010) : In an illegal reentry case, the government proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before the Supreme Court's decision in *Melendez-Diaz*. On appeal, the government conceded that introducing the CNR violated the defendant's right to confrontation because under *Melendez-Diaz* that record is testimonial. The Court in a footnote agreed with the government's concession, stating that its previous cases holding that CNRs were not testimonial were "clearly inconsistent with *Melendez-Diaz*" because like the certificates in that case, a CNR is prepared solely for purposes of litigation. The error was harmless, however.

United States v. Mendez, 514 F.3d 1035 (10th Cir. 2008) : To prove that the Mexican-born defendant had not entered the United States legally, an immigration agent testified that he searched a nationwide database of entry documents and found no match for the name and SSN the defendant had provided at his arrest. Affirming, the Court held that the testimony was not hearsay, and thus not a confrontation violation, because the person who conducted the data search testified at trial and no record was received into evidence. The Court further noted that the underlying database consisted of public records created by officials under a duty to accurately record matters in connection with ongoing regulatory functions independent of prosecution, and that Rule 803(10) provides a hearsay exception for evidence of the absence of a public record of a matter for which a record is regularly made. Finally, the Court held that the database "is not testimonial and not subject to the strictures of the *Confrontation Clause*."

[c] Rule 803(10) -- Examples of Admissible Statements

United States v. Giambro, 544 F.3d 26 (1st Cir. 2008) : The Court affirmed a conviction for possession of an unregistered firearm, finding no abuse of discretion in admitting Certificates of Nonexistence of a Record in the National Firearms Registration and Transfer Record regarding the firearm. A witness from the ATF provided sufficient evidence regarding the reliability of the NFRTR and the searches conducted for this particular record.

United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006) (per curiam): The Court affirmed a conviction for unlawful re-entry into the United States, finding no abuse of discretion when a Border Patrol agent was permitted to testify that there was no record of the defendant's application for permission to enter the United States. The evidence indicated that the agent had performed a diligent search of both of the names by which the defendant was known and their corresponding alien registration numbers.

United States v. Mendez, 514 F.3d 1035 (10th Cir. 2008) : To prove that the Mexican-born defendant had not entered the United States legally, an immigration agent testified that he searched a nationwide database of entry documents and found no match for the name and SSN the defendant had provided at his arrest. Affirming, the Court held that the testimony was not hearsay, and thus not a confrontation violation, because the person who conducted the data search testified at trial and no record was received into evidence. The Court further noted that the underlying database consisted of public records created by officials under a duty to accurately record matters in connection with ongoing regulatory functions independent of prosecution, and that Rule 803(10) provides a hearsay exception for evidence of the absence of a public record of a matter for which a record is regularly made.

[15] Rule 803(17) -- Market Reports, Commercial Publications [Go To Main]

United States v. Masferrer, 514 F.3d 1158 (11th Cir. 2008) : A bank CEO was convicted of fraudulently misrepresenting certain transactions related to bank assets that had dramatically lost value. To prove the bank's losses from the transactions, the government introduced testimony from accountants who had relied on securities quotes provided by Bloomberg Financial Service. The Court found no error, noting that the quotes were admissible under Rule 803(17), where the government had presented evidence establishing that Bloomberg financial information "is universally relied upon by individuals and institutions involved in financial markets."

[16] Rule 803(18) -- Learned Treatises [Go To Main]

[e] Rule 803(18) -- Videotape

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009) : In a prosecution for health care fraud, the government offered, to prove that the defendant's manner of giving pain injections was improper, a video it had commissioned in which a physician demonstrated the proper manner for giving the injections. The Court held it was error (but harmless) to admit the video. All portions of the video were "statements": not only the oral and written verbal parts, but also the depictions of the physician's conduct, which was nonverbal conduct intended as an assertion of the proper way to do the procedure. The statements were offered for the truth of the assertion that that was the way to give the injection. And no hearsay exception applied. In particular, this video did not come within the learned treatise exception of Rule 803(18) because it was prepared for litigation purposes, not subject to peer review or public scrutiny, and not prepared primarily for professionals with the reputation of the author at stake.

[19] Rule 803(22) -- Judgment of Previous Conviction [Go To Main]

[a] Rule 803(22) -- Accomplices' Convictions

United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 608 F.3d 871 (D.C. Cir. 2010) : In a False Claims Act case arising from a bid-rigging conspiracy, the Court held there was no abuse of discretion in admitting one defendant's guilty plea to violating the Sherman Act by engaging in the conspiracy, and the accompanying memorandum, which explained the roles of the other defendants. Because this was a civil case, the guilty plea could be admitted against persons other than the pleader (i.e., the other defendants) to prove any fact essential to sustain the judgment, including

the facts stated in the memorandum. To avoid prejudice to the other defendants in the FCA case, the Judge redacted the names of the other conspirators from the criminal case caption and the memorandum and instructed the jury that the fact of the defendant's guilty plea did not permit any inference against the others.

[c] Rule 803(22) -- Foreign Judgments

United States v. $125,938.62, 537 F.3d 1287 (11th Cir. 2008) : Reversing in part a judgment ordering forfeiture of funds allegedly embezzled from the Nicaraguan treasury by the president of the country, the Court held it was error to admit the judgment of a Nicaraguan court as a public record to prove facts found by that court. The Court noted that the judgment would be admissible under Rule 803(22) to prove the fact of the president's conviction and his sentence.

[g] Rule 803(22) -- Misdemeanor Convictions

United States v. Nguyen, 465 F.3d 1128 (9th Cir. 2006) : The defendant was convicted of violating an order of supervision requiring that he not "commit any crimes," based on pleas of *nolo contendere* to two State misdemeanors. Reversing, the Court held that *Rule 410* prohibits the admission of *nolo* pleas and the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged. " *Rule 410*'s exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." The evidence was also not admissible under *Rule 803(22)*, which "allows judgments of felony convictions resulting from guilty pleas to be admitted into evidence but not convictions resulting from *nolo contendere* pleas and not misdemeanor convictions."

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 804 RULE 804

4-804 Federal Rules of Evidence Manual 804.syn

§ 804.syn Synopsis to Chapter 804: RULE 804

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[i] Rule 804(b)(3) -- Civil Cases

[ii] Rule 804(b)(3) -- Corroborating Circumstances -- Statements Offered by Accused

[A] Rule 804(b)(3) -- No Abuse of Discretion to Exclude

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[a] Rule 804(b)(6) -- Constitutional Objection Forfeited

[b] RULE 804(b)(6) -- Determination of Wrongdoing

[c] Rule 804(b)(6) -- Discovery by the Defense

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[e] Rule 804(b)(6) -- Forfeiture by Coconspirator's Actions

[f] Rule 804(b)(6) -- Statement Offered To Prove Murder of Declarant

[g] Rule 804(b)(6) -- Wrongdoing Intended To Procure Unavailability

804.04 Legislative History

[1] Advisory Committee's Note

[2] 1997 Amendment Committee Note

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 284 (1999)

[4] House Subcommittee on Criminal Justice Notes

[5] Report of the House Committee on the Judiciary

[6] Report of the Senate Committee on the Judiciary

[7] Report of the House and Senate Conferees

[8] Citations to Hearings and Debates

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4-804 Federal Rules of Evidence Manual 804.01

804.01 Official Text

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.A declarant is not unavailable as a witness if exemption, refusal, claim

of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. -- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. -- In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. -- A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. -- (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. -- A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

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804.02 Editorial Explanatory Comment

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[1] Unavailability Required

This Rule concerns hearsay exceptions that are applicable only when the declarant is unavailable as a witness. The rationale for these exceptions is that statements falling within them are not as reliable as in-court testimony; however, the statements are better than no evidence at all coming from the declarant. Subdivision (a) defines unavailability to include the following situations:

(1) The declarant is exempted by the Judge on the ground of privilege from testifying.

(2) The witness persists in refusing to testify even though the Judge has ruled that there is no proper claim of privilege and orders the witness to speak.

(3) The witness testifies to having no memory of the event or events to which the hearsay statements relate. But what if the Court determines that the witness is feigning loss of memory? We believe that the Court must order the witness to answer questions. If the witness persists in refusing to answer, the witness should be deemed to be unavailable under (a)(2).

(4) Illness or death prevents the witness from appearing to testify. If the illness is temporary, the Trial Judge must balance the importance of the testimony with the expected length of delay in determining whether to dispense with production of the witness, or instead to grant a continuance until the declarant can testify. n1

(5) The declarant is absent from the jurisdiction. Again, if the absence is temporary, the Trial Judge must balance the importance of the testimony with the expected length of absence.

The doctrine of unavailability developed haphazardly at common law in connection with specific hearsay exceptions, rather than as a uniform body of law. *Rule 804(a)* generally takes a unitary approach, with the exception of the ground of absence, which is discussed below.

[2] Rule 804(a) -- Procuring Unavailability and Party-Specific Availability

The typical common-law provision -- that if the unavailability is wrongly procured by the person calling for the statements of the declarant, the various exceptions will not apply -- is continued in *Rule 804(a)*. A problematic application of this proviso arose in *United States v. Kimball, 15 F.3d 54 (5th Cir. 1994)* . Kimball's first trial ended in a mistrial. At his second trial, he proffered a transcript of his own testimony given at his first trial. He argued that his testimony was admissible under *Rule 804(b)(1)*, and that he was unavailable to testify at his second trial due to his invocation of his *Fifth Amendment* privilege. The Court held that the prior testimony was inadmissible because "the sponsor of a declarant's former testimony may not create the condition of unavailability and then benefit therefrom." It reasoned that Kimball had created his own unavailability by declaring the *Fifth Amendment* privilege. n2

We are troubled by the reasoning in *Kimball*. Kimball was essentially penalized for exercising a constitutional right. The Court stated that it was "sensitive to the importance of not discouraging or prejudicing a defendant who invokes the *fifth amendment*." However, it concluded that "a defendant seeking to testify and make exculpatory statements must face cross-examination." What the Court misses is that Kimball had already faced cross-examination at his prior trial. We see no reason why the prior testimony of criminal defendants should be treated any differently from prior testimony of other declarants who invoke the privilege.

[3] Rule 804(a) -- Absence of the Declarant and the Deposition Preference

A declarant is not absent under the terms of *Rule 804(a)(5)* simply because he is out of the jurisdiction or cannot be located. The party relying on absence to support an offer of hearsay evidence, in the case of any of the basic exceptions covered by subdivision (b) of *Rule 804* aside from former testimony, must demonstrate that it has not been possible to take a deposition. The Senate objected to the requirement that an attempt to depose be required. However, the Rule follows the House provision in requiring a showing of inability to obtain *testimony* of a declarant before a dying declaration, statement against interest, or statement of pedigree can be admitted on the ground that the declarant is absent. As a practical matter, the issue does not arise for statements offered as dying declarations or statements of pedigree. The ground of unavailability for dying declarations is ordinarily death, not absence; and statements of pedigree are rarely offered. So the deposition requirement with respect to the absence ground of unavailability is really limited to situations in which the proponent has a statement that would otherwise be admissible as a declaration against interest, and the asserted ground of unavailability is absence. n3

Rule 804(a)(5) requires an attempt to depose. The rationale is that if a deposition can be taken, the deposition testimony will be admissible as prior testimony; and prior testimony is preferred to the declaration against interest, because prior testimony has been subject to cross-examination. Consequently, if the attempt to depose is successful, the hearsay declarant is no longer considered unavailable and statements falling within 804(b)(3), (or technically (2) or (4)) are no longer admissible for their truth. Note, however, that if the deposition is offered, the deponent may be *impeached* under *Rule 806* with the statements that are inadmissible for their truth.

If the hearsay statement is offered under *Rule 804(b)(1)*, the proponent need not prove an attempt to depose, for the obvious reason that a deposition or its equivalent has already been taken. When the statement is admissible under *Rule 804(b)(1)*, the declarant has *already* testified under oath and subject to cross-examination; there is thus no need to obtain what would amount to duplicative evidence.

The problems created by the deposition preference in *Rule 804(a)(5)* are well illustrated by *Campbell v. Coleman Co., 786 F.2d 892 (8th Cir. 1986)* . The minor plaintiffs alleged that they were severely burned by a defective gasoline lantern that exploded. Coleman had a different theory: that Johnnie Hayes, who was babysitting the children, overfilled the lighted lantern with gasoline, then panicked and threw the burning lantern out of the house where it accidentally hit the children. Coleman had deposed Hayes, but at the deposition, Hayes flatly denied having anything to do with the accident. The deposition was not introduced at trial. However, Hayes had made several statements to various people

implicating himself in the accident, and these were introduced at trial as declarations against interest. Coleman contended that Hayes was unavailable on the ground of absence because it had made good-faith attempts to locate him before trial, and he could not be found. The Trial Court admitted the statements, but the Court of Appeals found that this was reversible error, because Hayes was not absent within the meaning of *Rule 804(a)(5)*. As the Court put it, the "subsection is concerned with the absence of testimony, rather than the physical absence of the declarant." Thus, while Hayes was absent from the trial, his testimony was available (i.e., the deposition), and his hearsay statements were therefore not admissible under *Rule 804(b)(3)*.

The result in *Coleman* shows that the deposition preference can create anomalous results. Hayes's deposition was undoubtedly a *less* reliable indicator of what happened than were his informal statements against interest. The congressional assumption that a declaration against interest is not necessary where a deposition can be or has been taken assumes that the proponent will get the same information, only better, from the deposition as from the declaration against interest. However, *Coleman* shows that this is not always the case. The anomaly of the Rule is even more striking when it is considered that if Hayes were dead or declaring the privilege at the time of trial, the declarations against interest would have been admissible. The deposition preference is applied only when absence is the asserted ground of unavailability. Clearly, this makes no sense. If nothing else it is inconsistent with the general goal of *Rule 804(a)*, which was to provide a unitary test of unavailability for all hearsay exceptions. Finally, the deposition preference is problematic because it ends up penalizing parties who depose witnesses in a timely fashion. If Coleman had not bothered to depose Hayes before he disappeared, the declarations against interest would have been admissible. It seems odd to penalize Coleman for engaging in diligent efforts to prepare for litigation.

Of course, as discussed above, the declarations against interest in *Coleman* would still have been admissible to impeach Hayes under *Rule 806*. But this assumes that the Hayes deposition would be proffered at the trial. The plaintiffs in *Coleman* were unlikely to do so, and in fact did not do so, because introducing the deposition would have accomplished little more than to open the door to the damaging "impeachment" evidence that the jury would misuse for its truth. The plaintiffs did not need the Hayes deposition as substantive evidence, given the availability of expert testimony and the sympathetic nature of their case. Moreover, even if the plaintiffs had introduced the deposition, the declarations against interest could not have been used as substantive evidence on Coleman's behalf. This point was made by the Court in *Coleman* when it rejected Coleman's argument that the introduction of the declarations against interest at trial was harmless error:

> At the close of plaintiffs' case-in-chief, no evidence had been introduced from which Coleman could have argued that plaintiffs' injuries were caused by the negligent actions of a nonparty. Introduction of the inadmissible hearsay created a substantive defense for Coleman... . Plaintiffs were thereby prejudiced.

Because there is a deposition preference in *Rule 804(a)(5)*, however misguided it might be, it follows that a declarant will not be considered absent for purposes of Rules 804(b)(2)-(4) simply because he is outside the jurisdiction and beyond the subpoena power. The Federal Rules of Civil and Criminal Procedure make provision for deposing witnesses who are beyond the territorial jurisdiction of the Court. If the witness is deposable, he is not absent under *Rule 804(a)(5)*. n4

[4] Rule 804(b)(1) -- Former Testimony

Subdivision (b)(1) of *Rule 804* provides that former or prior recorded testimony is admissible as an exception to the hearsay rule. Such testimony is defined as that given by a witness at another hearing of the same or a different proceeding, or during the taking of a deposition, under circumstances such that the party against whom the testimony is now offered (or that party's predecessor in interest in a civil case) had an opportunity and similar motive to that which would exist at the time the testimony is offered, to develop testimony.

The touchstone of admissibility is a similar motive to develop the testimony on the part of the nonoffering party (or a predecessor in interest in a civil case).

The way to determine whether or not motives are similar is to look at the issues and the context in which the opportunity for examination previously arose, and compare that to the issues and context in which the testimony is currently proffered. The similar motive inquiry is essentially a hypothetical one: is the motive to develop the testimony at the prior time similar to the motive that would exist if the declarant were produced (which of course he is not) at the current trial or hearing? n5

Under *Rule 804(b)(1)*, it does not matter whether the opportunity for examination came in the form of direct or cross-examination, as long as there was a similar motive and adequate opportunity to develop the testimony of the witness.

[5] Former Testimony -- Predecessor in Interest

In civil cases only, it will suffice that a predecessor in interest had an opportunity and a motive to examine the testimony similar to that of the party against whom the testimony is offered. The Advisory Committee attempted to expand this exception in civil cases to cover situations in which some unrelated party had a similar motive and opportunity for examination. But Congress rejected this innovation. There was a general feeling that it was unfair to bind one party to the examination of another, and so the term "predecessor in interest" was included, to provide for binding effect against nonparties only if they had some juridical relationship with a party to the prior litigation. Yet many of the Court decisions under the Rule are closer to the Advisory Committee's view than to that of Congress. Most Courts apply the term "predecessor in interest" broadly. n6 The difference in views is set forth by Judge Becker and Professor Orenstein in *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, *60 Geo. Wash. L. Rev. 857, 898 (1992)*:

> Another circuit split revolves around the definition of the "predecessor-in-interest" requirement of the former testimony exception to hearsay. *Rule 804(b)(1)* admits testimony of an unavailable witness in a civil case if the party against whom the testimony is offered, or his predecessor in interest, possessed a similar motive and opportunity to cross examine the witness. The definition is complicated by a tortured legislative history. The predecessor-in-interest requirement was added to the Rule to restrict its scope. ... In *Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978)* , the Third Circuit construed the predecessor-in-interest language as mandating only a "sufficient community of interest" between the prior litigant and party against whom the hearsay is offered. This construction arguably reads the predecessor-in-interest standard out of the Rule. ... Many courts have followed *Lloyd's* interpretation, n7 but others have adhered to a more narrow interpretation. n8

In our view, the "predecessor-in-interest" language of the Rule should be revised. Congress was concerned about one party being bound by the inadequate cross-examination of a previous litigant with whom the party had no legal relationship. But this assumes that the previous litigant in fact engaged in inadequate cross-examination. As most Courts recognize, if the prior cross-examination was as effective and thorough as the subsequent party could expect to have done, it is not unfair to admit the testimony against that later party. We note that those Courts that adhere to a strict construction of the "predecessor-in-interest" requirement of *Rule 804(b)(1)* have nonetheless admitted prior testimony under the residual exception as a "near miss" -- so long as the prior cross-examination was effective enough to bind the party against whom the testimony is offered. n9 These Courts are simply evading the "predecessor-in-interest" requirement by invoking the residual exception rather than reading it out of *Rule 804(b)(1)* -- but the end result is the same. Obviously the Courts are showing discontent with the "predecessor-in-interest" requirement; Congress may have intended to protect against unfairness, but in fact, unfairness is created if probative and reliable evidence is unnecessarily excluded.

[6] Former Testimony -- Grand Jury Testimony

Grand jury testimony is not admissible under *Rule 804(b)(1)* against a criminal defendant, because the defendant has no opportunity to cross-examine a witness at a grand jury proceeding. But, can grand jury testimony be admitted against the government under *Rule 804(b)(1)* when it exculpates the defendant? This question arose in *United States v. Salerno, 505 U.S. 317 (1992)* .

The prosecutor in *Salerno* granted use immunity to two witnesses who then testified before the grand jury. Contrary to the prosecutor's expectations, the testimony was exculpatory to the defendants. At trial the defendants called the two witnesses, hoping either to obtain favorable trial testimony, or to use the grand jury testimony as prior inconsistent statements admissible under *Rule 801(d)(1)(A)*, should the witnesses change their testimony on the stand. But the witnesses invoked their *Fifth Amendment* privileges and refused to testify. So the defendants argued that the grand jury testimony was admissible against the government as prior testimony. The government contended that the grand jury testimony could not be admitted under that Rule because the "similar motive" requirement had not been met. The Trial Court agreed with the government, stating that the "motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting a trial."

The Second Circuit held that it was reversible error to exclude the exculpatory grand jury testimony. It found it unnecessary to decide whether a similar motive existed, because it held that "adversarial fairness" prohibited the Government from relying on the similar motive requirement to exclude the exculpatory testimony. The Court of Appeals found it unfair for the government to develop evidence in a one-sided manner, by immunizing some witnesses and not others, depending on whether their testimony was favorable to the Government.

However, the "adversarial fairness" rationale of the Court of Appeals was rejected by the Supreme Court in *Salerno*. The Court declared that the plain language of *Rule 804(b)(1)* requires proof of a similar motive in all cases in which hearsay is proffered as prior testimony. The Court contended that it had no authority to override the plain meaning of the Rule by applying notions of adversarial fairness, because Congress "presumably made a careful judgment as to what hearsay may come into evidence and what may not," and that to respect Congress's determination, "we must enforce the words that it enacted." In essence, the Court held that it didn't matter if the government had acted unfairly and had developed the evidence in a one-sided manner: the plain meaning rule prohibited the Court from considering this unfairness.

The question remained whether the prosecution indeed *had* a similar motive to develop the witnesses' testimony at the grand jury as it would have had at the trial. The Supreme Court remanded this question to the Second Circuit, which ultimately decided it in an *en banc* opinion. *United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993)* (Salerno having died in the interim). The *DiNapoli* Court rejected the extreme views of both the government and the defendant -- the government arguing that the prosecution *never* has a similar motive to develop testimony at the grand jury as it would have at trial, and the defendant arguing that the prosecution *always* has a similar motive to develop grand jury testimony as it would have at trial. The Court analyzed the question of similar motive as follows:

> The proper approach ... in assessing similarity of motive under rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings -- both what is at stake and the applicable burden of proof -- and, to a lesser extent, the cross-examination at the prior proceeding -- both what was undertaken and what was foregone -- will be relevant though not conclusive on the ultimate issue of similarity of motive. n10

Applying these principles to the facts, the *DiNapoli* Court found that the government did not, in the instant case, have a similar motive to develop the testimony of the witnesses at the grand jury as it would have had at the trial. The Court noted that at the time the witnesses gave exculpatory testimony at the grand jury, there was no question of probable

cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other defendants should be indicted. The witnesses had essentially denied that there was any conspiracy among the defendants, and at that point, the prosecution could not have been concerned that the grand jury proceeding would have been altered in any way as to the defendants by the testimony. As the Court put it, "The grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes." In contrast, at trial, where the government has the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of exculpatory witnesses.

The *DiNapoli* Court also relied on the fact that the record showed that the grand jurors had indicated to the prosecutor that they did not believe the testimony of the exculpatory witnesses. The Court concluded that "a prosecutor has no interest in showing the falsity of testimony that a grand jury already disbelieves."

The defendants in *DiNapoli* argued that the prosecutor himself showed a similar motive to attack the testimony at the grand jury proceeding when he challenged the witnesses, accused them of lying, and confronted them with contradictory evidence. However, the Court did not find this enough for the grand jury proceeding to be considered a trial-like situation:

> A prosecutor may have varied motives for asking a few challenging questions of a grand jury witness who the prosecutor thinks is lying. The prosecutor might want to afford the witness a chance to embellish the lie, thereby strengthening the case for a subsequent perjury prosecution. Or the prosecutor might want to provoke the witness into volunteering some critical new fact in the heat of an emphatic protestation of innocence.

Thus, a prosecutor can challenge an exculpatory witness at a grand jury, to some extent, without crossing the line into a trial-like cross-examination that would result in a finding of a similar motive under *Rule 804(b)(1)*. The *DiNapoli* Court particularly noted the prosecutor's "careful limitation of questioning to matters already publicly disclosed." That is, the prosecutor was not pulling out all the stops at the grand jury by attacking the witness with secret information, as he might well have done at trial.

While the *DiNapoli* Court refused to establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under *Rule 804(b)(1)*. A similarity of motive is likely to be found only where each of three factors exists: (1) the issuance of an indictment is in doubt because the case as to probable cause is close; n11(2) it appears as if the grand jury could have believed the witness; n12 and (3) the witness is in fact attacked in much the same way as he would have been at trial. n13

The same case-by-case sensitivity shown to the government by the *DiNapoli* Court should also, we think, be applied to determine whether testimony at a preliminary hearing can be admitted against the defendant at the subsequent trial. Strong arguments can be made that the defendant does not have a similar motive to develop preliminary hearing testimony as he would have at trial: (1) the preliminary hearing is at such an early stage of the proceedings that the defendant may not have sufficient evidence with which to cross-examine the witness; (2) like the prosecutor at the grand jury, the defendant at the preliminary hearing has no wish to "tip his hand" by aggressive cross-examination, and would much prefer to attack the witness at trial; and (3) because of the minimal standard of proof, it is often a foregone conclusion that the defendant will lose at the preliminary hearing, so that any attempted cross-examination or impeachment of inculpatory witnesses will be so much wasted effort at that point.

Before *Salerno* and *DiNapoli*, the Courts had generally held that preliminary hearing testimony could virtually always be admitted against the defendant at trial under the prior testimony exception. That rule was applied with reluctance by the Third Circuit in *Government of Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967)* :

> Were the question one of first impression it would seem that a clear distinction should be recognized between testimony given at a prior trial and testimony given at a preliminary hearing. ... At the preliminary hearing the cross-examiner is much more confined by the nature of the proceeding. ... The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case remains still in doubt. ... All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing. Nevertheless, we must accept for present purposes the rule which makes no distinction between testimony given at a prior trial and the testimony given at a preliminary hearing.

We believe that in light of *Salerno* and *DiNapoli*, the admissibility of preliminary hearing testimony under *Rule 804(b)(1)* should be reconsidered. If Courts are sympathetic to the prosecutor's plight at the grand jury, we believe that they should be equally sympathetic to the defendant's plight at the preliminary hearing.

It should also be noted that some Circuits appear to have a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial, i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. n14

[7] Rule 804(b)(2) -- Dying Declarations

Rule 804(b)(2) expands the common-law exception for dying declarations. Unlike the common law, the Federal Rule provides that dying declarations are admissible in civil cases as well as in homicide prosecutions. n15

The Rule contains a subject matter limitation, in that the statement must concern the immediate causes and circumstances of the death. n16 Statements of historical fact ("Joe shot me, just like he tried to do last year") are not admissible under this exception.

The proponent must prove that the declarant made the statement under belief of impending death and have given up all hope of recovery. So for example if the declarant's injuries do not appear serious, or are not treated as such by medical personnel, then the statement is unlikely to be admissible as a dying declaration. n17

[8] Rule 804(b)(3) -- Statements Against Interest

Rule 804(b)(3) expands the common-law exception for declarations against interest. Prior to the enactment of the Federal Rules, declarations against interest were usually limited to statements against pecuniary or proprietary interests. This Rule expands the exception to cover declarations against penal interests, i.e., statements that could tend to subject the declarant to criminal liability. n18 Both Houses of Congress rejected the Advisory Committee position that this exception should include statements against "social" interest. But the Rule makes clear that statements subjecting a person to civil liability and statements rendering claims invalid are included in the definition of statements against interest.

[9] Statements Against Interest -- Corroboration Requirement for Against Penal Interest Statements

If the defendant in a criminal case offers evidence of a declaration against penal interest to exculpate himself, he must make a showing that corroborating circumstances exist that "clearly indicate the trustworthiness of the statements." n19 The mere fact that the statement could tend to subject the declarant to criminal liability is not enough if the accused offers it in his favor; the accused must also show other factors supporting the truthfulness of the statement. n20 This is apparently an attempt to respond to the problem of one criminal of dubious credibility trying to exculpate another. n21

Rule 804(b)(3) does not purport to define "corroborating circumstances." The Advisory Committee on Evidence Rules is considering an amendment to *Rule 804(b)(3)*, and the Advisory Committee Note to the proposed amendment provides

a helpful discussion of the corroborating circumstances requirement. That discussion proceeds as follows:

> The Committee notes that there has been some confusion over the meaning of the "corroborating circumstances" requirement. *See United States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990)* ("the precise meaning of the corroboration requirement in rule 804(b)(3) is uncertain"). For example, some courts look to whether independent evidence supports or contradicts the declarant's statement. *See, e.g., United States v. Mines, 894 F.2d 403 (4th Cir. 1990)* (corroborating circumstances requirement not met because other evidence contradicts the declarant's account). Other courts hold that independent evidence is irrelevant and the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone, 114 F.3d 1284, 1300 (1st Cir. 1997)* ("The corroboration that is required by *Rule 804(b)(3)* is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").
>
> The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995)*) :
>
> (1) the timing and circumstances under which the statement was made;
>
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
>
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
>
> (4) the party or parties to whom the statement was made;
>
> (5) the relationship between the declarant and the opponent of the evidence; and
>
> (6) the nature and strength of independent evidence relevant to the conduct in question.
>
> Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses. *United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983)* .
>
> The corroborating circumstances requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States, 512 U.S. 594, 603 (1994)* (statement must be "squarely self-inculpatory" to be admissible under *Rule 804(b)(3)*). "Corroborating circumstances" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a corroborating circumstance. n22

Neither the text of *Rule 804(b)(3)* nor the legislative history is precise on the *degree* of corroboration required. Some Courts have construed the "clearly indicating trustworthiness" requirement very strictly, demanding that "the inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable." n23 Other Courts, in consideration of the defendant's constitutional right to due process and an effective defense, have refused to apply the corroboration requirement in so strict a manner. n24 We believe that the burden placed on the accused has in many cases been too high -- so high that the exception itself often has little utility. It makes no sense to apply the corroboration standard so strictly that, if the defendant can meet it, he will probably never have been charged or tried in

the first place.

On the other hand, the defendant's own protestations of innocence cannot be deemed sufficient corroboration; if that were enough, the corroboration requirement would be read out of the Rule as a practical matter. n25

[10] Declarations Against Interest -- In Which Cases Does the Corroborating Circumstances Requirement Apply?

Rule 804(b)(3) is striking in its asymmetry. Assume that three people are allegedly involved in a drug conspiracy -- Declarant, who is now dead, and Bill and Mike, who are being tried separately. Assume further that Declarant told a friend that he and Bill were selling the drugs as a two-person team. Under the plain meaning of the Rule, assuming this entire statement in context is disserving to Declarant's penal interest, it would be admissible against Bill without more. However, Mike would have to provide corroborating circumstances supporting the trustworthiness of the statement before it could be admitted in his favor. Thus, the Rule on its face imposes an evidentiary burden on the accused, to which the prosecution is not subject for the same statement.

Congress gave no explanation for its discriminatory application of the corroborating circumstances requirement of *Rule 804(b)(3)*. n26 Commentators have argued that it violates due process and equal protection to impose an evidentiary burden on the defendant, but not on the state, for the same statement. n27

If anything, the admissibility requirements for a declaration against penal interest should be applied more strictly against the prosecution than against the defendant. The defendant has both a right to confront adverse witnesses, and a right to compulsory process for favorable witnesses. This should mean that as a general matter the defendant should receive at least some slight benefit of the doubt in excluding hearsay offered by the prosecution and in admitting hearsay offered by the defense.

These arguments have led some Courts to impose a corroborating circumstances requirement for *all* declarations against penal interest, whether they are offered by the prosecution or the defense. n28 The problem is that a symmetrical application of the Rule, though reasonable, is contrary to the plain meaning of the Rule; and as indicated in *Salerno*, the Court construes the Rules by their plain meaning without regard to whether they are fair in application -- at least so long as the unfairness does not approach absurdity or unconstitutionality. In light of the plain meaning mandate of the Supreme Court cases, some Courts have felt constrained to hold that declarations against penal interest need not be corroborated when offered by the prosecution. n29

The Advisory Committee considered an amendment to *Rule 804(b)(3)* that would have applied a corroborating circumstances requirement to government-offered statements. But this proposal was ultimately rejected due to strong opposition from the Justice Department. The Department argued that it already had an evidentiary burden beyond that set forth in the Rule -- specifically the requirement that the hearsay statement satisfy not only the text of the Rule but also the accused's right to confrontation. The argument was that it would be unduly burdensome to saddle the government with a third evidentiary requirement of corroborating circumstances.

Another question is whether corroborating circumstances should be required when a declaration against penal interest is offered in civil cases. The Rule does not by its terms require such a showing. Yet at least one Court has held that the requirement must be met. In *American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999)* , the Court found it important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered.

[11] Statements Against Interest -- Disserving of Declarant's Interest

The Courts are in some disagreement about the degree to which a statement must be disserving to the declarant in order

to qualify as a declaration against interest under *Rule 804(b)(3)*. An example of the problem is *United States v. Harwood, 998 F.2d 91 (2d Cir. 1993)* . Harwood and McKee were both charged with drug offenses arising from a search of a van in which drugs were found. Both defendants employed blame-shifting defenses, each claiming that he was an unwitting rider and the other defendant was the drug dealer. Harwood offered a statement made by McKee to a newspaper reporter after they were arrested. McKee had stated that Harwood had simply been "at the wrong place at the wrong time," and that the same thing would have happened to anyone who was driving with McKee at that time. The Trial Court excluded the statement, and the Court of Appeals found no error. Judge McLaughlin concluded that McKee's statement was not sufficiently disserving to qualify under *Rule 804(b)(3)*. He argued that the statement did not "expose McKee to criminal liability" and that it seemed "only to suggest that Harwood was arrested at an inopportune time."

According to the *Harwood* Court, a statement will not be sufficiently disserving to qualify under the Rule unless it squarely and unequivocally implicates the declarant in criminal activity or exposes the declarant to civil liability. n30 Yet this is not the only possible reading of the Rule; that strict reading conflicts with the Rule's permissive language that a statement need only "tend" to subject the declarant to criminal liability. As the Ninth Circuit has stated: "If Congress had wanted courts to take a restrictive approach to whether a statement is against penal interest, it would not have chosen the broadly worded phrase 'tended to subject' in *Rule 804(b)(3)*." n31 In fact situations similar to *Harwood*, other Courts have found statements exculpating a defendant to be sufficiently disserving to the declarant. n32 These Courts reason that when the declarant says that the defendant was not involved, he is implicitly stating that he, the declarant, *was* involved. This reasoning is, we think in harmony with the permissive language of the Rule.

It is true that McKee did not explicitly state that Harwood was never involved in the drug transaction. He said, more colloquially, that Harwood was in the wrong place at the wrong time. But certainly, a reasonable person in the declarant's position would know what could be taken from that statement. Given the oblique and coded manner in which most people talk in real life, it is unreasonable to limit *Rule 804(b)(3)* to explicit statements admitting guilt. We think that the Rule was designed for real life, and was not intended to be limited to the statements of masters of locution or students of English composition.

All this is not to say that the context in which a statement is made is irrelevant. A statement that appears to be highly incriminating on its face may in fact be either neutral or self-serving depending on the context in which it was made. n33 For example, in *United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984)* , the defendant was charged with murdering a prison guard. He proffered a statement from another prisoner who confessed to the murder. However, the Court found that the statement was not sufficiently disserving because the declarant was already serving three consecutive life sentences -- "and what would a fourth consecutive life sentence add to the three previous ones?" In addition, there was evidence that the declarant was a sympathizer with the prison gang to which the defendant belonged. Accordingly, the Court, correctly we think, held that the statement was only facially and not contextually disserving, and thus was inadmissible even under the liberal "tendency" test set forth in the Rule. n34

Is a hearsay statement sufficiently disserving to a declarant's penal interest if the declarant subsequently declares the *Fifth Amendment* privilege as to the same subject matter? This was one of the questions in *United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995)* . The defendants were loan brokers who were convicted of fraud. The government offered proof at trial that the defendants took fees and yet made no effort to obtain loans for their customers. The defendants proffered hearsay statements from members of a Texas brokerage group with which the defendants did business. These statements indicated that the defendants had aggressively pursued their clients' interests, and had relied upon the representations of the Texas brokers group that the group would present the defendants' loan packages to lenders for funding. The Court held that the statements of the Texas brokers were not admissible under *Rule 804(b)(3)*, because the statements did not inculpate the declarants in any way -- indeed the statements tended to exculpate both the declarants and the defendants from any allegation of participation in a fraud. The defendants argued that the statements had to be inculpatory, because the Texas brokers had invoked their *Fifth Amendment* privilege and refused to testify at the defendants' trial. But the Court rejected this argument:

> The "against penal interest" requirement of *Rule 804(b)(3)* is more narrow than the *Fifth Amendment's* declaration that no person "shall be compelled in any criminal case to be a witness against himself." The [Texas brokers] might well have invoked their *Fifth Amendment* privilege because they feared that on crossexamination ... the prosecutor would wrench from them statements, within the scope of the direct examination, that incriminated them even though their earlier testimony had not. In contrast, *Rule 804(b)(3)* requires the proffered statements themselves to be so against ... penal interest that [the Texas brokers] would not have made those statements unless they believed them to be true.

Thomas is, we believe, another example of a Court that has construed the "against penal interest" requirement too strictly -- at least where the statement is offered to exculpate a criminal defendant. A person invokes the *Fifth Amendment* privilege where a compelled statement would "tend" to incriminate him. It is hard to see why the "tendency" test for the *Fifth Amendment* should be construed any differently from the "tendency" test for the "against penal interest" requirement.

[12] Statements Against Interest -- Accomplice Statements to Law Enforcement

In *Williamson v. United States, 512 U.S. 594 (1994)* , the Court considered the admissibility under *Rule 804(b)(3)* of a confession by a defendant's accomplice made to law enforcement. The declarant, Harris, was stopped and arrested for possessing a large quantity of cocaine in his rental car. Harris admitted trafficking in drugs and identified Williamson as the source of the drugs. The agent testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney, but that Harris was not promised any reward or other benefit for cooperating. Harris refused to testify at Williamson's trial. The District Court then ruled that, under *Rule 804(b)(3)*, the agent could relate all of what Harris had said to him. The Judge reasoned that while the part of the confession implicating Williamson was not particularly disserving to Harris, it was part of a broader account (Harris's confession of drug activity) that was disserving. The Court of Appeals affirmed.

The Supreme Court unanimously vacated and remanded the decision, on the ground that the Lower Courts had not properly applied *Rule 804(b)(3)*. However, there was dispute among the Justices as to the scope of the Rule. Justice O'Connor, writing for six members of the Court on this point, held that the Rule covers statements only to the extent that they are disserving; neutral or self-serving aspects of a broader declaration are not admissible under the Rule. Justice O'Connor began her analysis by noting two possible readings of the term "statement" in the Rule:

> One possible meaning, "a report or narrative," Webster's Third New International Dictionary 2229, defn. 2(a) (1961), connotes an extended declaration. Under this reading, Harris' entire confession -- even if it contains both self-inculpatory and non-self-inculpatory parts -- would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," ibid., defn. 2(b), would make *Rule 804(b)(3)* cover only those declarations or remarks within the confession that are individually self-inculpatory.

Justice O' Connor contended that the narrower meaning of "statement" was mandated by the "principle behind the Rule." She elaborated as follows:

> *Rule 804(b)(3)* is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature. ... [W]hen part of the confession is actually self-exculpatory, the generalization on which *Rule 804(b)(3)* is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to

> make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

In our view, the most faithful reading of *Rule 804(b)(3)* is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The District Court may not just assume for purposes of *Rule 804(b)(3)* that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

While six members of the Court agreed that the narrow definition of "statement" was mandated by the Rule, these Justices split four to two in applying that narrow test to Harris' declarations. Justice O'Connor, writing only for herself and Justice Scalia on this point, declared that "[s]ome of Harris' confession would clearly have been admissible under *Rule 804(b)(3)*; for instance, when he said he knew there was cocaine in the suitcase, he essentially forfeited his only possible defense to a charge of cocaine possession, lack of knowledge." n35 On the other hand, the parts of the confession that implicated Williamson by name "did little to subject Harris himself to criminal liability. A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes." Because the District Court failed to make a searching, fact-intensive inquiry as to whether each of Harris' statements was self-inculpatory, Justice O'Connor concluded that a remand was required.

Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, agreed that *Rule 804(b)(3)* "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." Unlike Justice O'Connor, however, Justice Ginsburg concluded that none of the statements made by Harris were self-inculpatory in any sense, because "Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy." She contended that Harris' statements projected "an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else." Thus, Justice Ginsburg was much more skeptical about whether a post-custodial statement to a police officer could ever be self-inculpatory to the extent it implicated a nondeclarant. Justice Ginsburg concluded that the case should be remanded, but only to determine whether the admission of Harris' statements constituted harmless error.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, argued for a broader meaning of the term "statement." He contended that *Rule 804(b)(3)* "contemplates exclusion of a collateral self-serving statement, but admission of a collateral neutral statement."

While there certainly was disagreement among the Justices in *Williamson*, it is clear that the majority of the Court has taken a cautious and narrow approach to statements offered under *Rule 804(b)(3)*, especially when they are post-custodial statements to police officers and identify the defendant as a perpetrator. Even Justice Kennedy, who rejected the majority's narrow view of the term "statement," nonetheless emphasized that hearsay would not be admissible under the Rule unless, in context, it was truly self-inculpatory at least in part. All the Justices in *Williamson* were clearly aware of the possibility that a statement made by an arrestee to a police officer may in fact be self-serving to the extent it implicates others. It may well be an attempt to curry favor even though it appears on its face to inculpate the declarant. Because of *Williamson* -- and especially because of the later *Confrontation Clause* case of *Crawford v. Washington* -- Courts have now consistently held that accomplice confessions to law enforcement are not admissible against the accused in any part. n36

Lower Courts after *Williamson* and now *Crawford* have distinguished between statements made while in custody to police officers and statements made to others before the declarant has been arrested. Statements made to police officers have been found not disserving under *Williamson*, given their context and the likelihood that the declarant may be simply shifting blame or currying favor with law enforcement. Indeed, the very facts and result in *Williamson* indicate that it is not disserving to the declarant to implicate others in a post-arrest confession. n37 Even more importantly, such statements are "testimonial" under *Crawford*, in which the Court held that statements made during police interrogation

are "testimonial" and that if hearsay is "testimonial" its admission violates the accused's right to confrontation. n38

On the other hand, if the statement is made outside the context of a post-custodial confession, Courts generally conclude that a statement identifying another as taking part in a crime tends to implicate the declarant as well. A good example is *United States v. Moses, 148 F.3d 277 (3d Cir. 1998)* . Moses was a County official who allegedly accepted kickbacks from Gaudelli, a commercial vendor who did business with the County. Moses challenged the admissibility of Gaudelli's statements implicating Moses in the kickback scheme. At the trial, Gaudelli's friend and colleague testified that Gaudelli said on several occasions that he was "taking care" of Moses "moneywise." The Court held that these statements directly implicating Moses were also self-inculpatory of Gaudelli, and therefore were properly admitted under *Rule 804(b)(3)*. The Court analyzed the impact of *Williamson* as follows:

> Under *Williamson*, the proper approach in cases involving out-of-court statements implicating other people is to examine the circumstances in which the statements are made in order to determine whether they are self-inculpatory or self-serving. In *Williamson*, where the declarant implicated another person while in police custody and after already having confessed to the crime, the Court concluded that the naming of the defendant did little to further implicate the declarant and may have been an effort to secure a lesser punishment through cooperation. ... In the instant case, by contrast, Gaudelli made his statements to a friend during lunch conversations that took place long before Gaudelli was arrested. Under these circumstances, there is no reason to believe that Gaudelli was trying to avoid criminal consequences by passing blame to Moses. Moreover, by naming Moses, as well as the place where he was meeting Moses to make payments, Gaudelli provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing. *See Williamson* (explaining that a declarant's statement as to where he hid a gun would be self-inculpatory "if it is likely to help the police find the murder weapon"). Given the context and content of Gaudelli's statements to Tutro, we agree with the district court that they were sufficiently self-inculpatory so as to satisfy the requirements of *Rule 804(b)(3)*.

Thus, Gaudelli's statement "I am paying off Moses" tends to inculpate Gaudelli more than a statement like "I am paying kickbacks." The specific identification of Moses, as opposed to anyone else, would make it easier for the police to investigate the crime and prosecute Gaudelli if they ever received the information. Moreover, by identifying Moses, a government official, Gaudelli implicated himself in a more serious crime of bribery than if he simply admitted making kickbacks to an unidentified person. n39 In contrast, if the specific identification of Moses occurred in Gaudelli's post-arrest interview, the part identifying Moses could not be deemed inculpatory of Gaudelli. Once Gaudelli has been arrested, the incentive to curry favor with authorities would outweigh any self-inculpatory possibility in identifying a specific accomplice.

Thus, admissions of crime by accomplices made other than to law enforcement are sufficiently disserving to the declarant to be admissible under *Williamson*. And as a constitutional matter, such admissions are not "testimonial" for the same reason -- they are not made to law enforcement with an expectation that they will be used in a criminal prosecution. n40

[13] Statements Against Interest -- Are Statements Exculpating Another Disserving to the Declarant?

On its face the *Williamson* Court's narrow construction of the term "statement" is equally applicable to inculpatory and exculpatory statements offered under *Rule 804(b)(3)*. So a statement that "I robbed the bank and Joe did not" runs into similar problems under *Williamson* when it is offered by Joe. The argument from the government is that the statement "I robbed the bank" is self-inculpatory, but the statement "Joe did not" is a collateral statement that adds nothing to inculpate the declarant. There is a good argument to be made, however, that the concerns expressed by the Court in *Williamson* are not necessarily applicable to statements exculpating a nondeclarant. Clearly the main concern of all of the Justices in *Williamson* was that a declarant could inculpate a person in a postcustodial confession in an attempt to curry favor with the authorities. This danger generally does not arise with respect to statements that exculpate another,

so there is some argument for applying the *Williamson* standard more flexibly for exculpatory statements -- especially given the criminal defendant's constitutional right to an effective defense. n41

This more flexible approach is exemplified by the Ninth Circuit's decision in *United States v. Paguio, 114 F.3d 928 (9th Cir. 1997)* . The defendants, husband and wife, were charged with bank fraud arising out of forged documentation filed in a bank loan application. The application was prepared and the loan was arranged by Paguio's father, ostensibly on behalf of the defendants; the application was ultimately signed by the defendants. After the fraud was uncovered, the father made a statement to the son's lawyer, to the effect that he, the father, had engineered the whole transaction, and that the defendants "had nothing to do with it." The father was unavailable for trial. The Trial Court held that the part of the father's statement referring to his own conduct was admissible as a declaration against penal interest, but that the part exculpating the defendants was not. The Court found this ruling reversible error. The Court reasoned that the father admitted "not only participation but leadership, leading his son and daughter-in-law into the abyss. Because leading others into wrongdoing has always been seen as bad, there is a sentencing enhancement for it. Also, in context, the inculpating and exculpating statements were not practically separable." The Court held that *Williamson* did not require severance of the statements:

> *Williamson* does not mean that the trial judge must always parse the statement and let in only the inculpatory part. It means that the statement must be examined in context, to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true. Sometimes that requires exclusion of part of the statement, sometimes not. A reasonable man caught with a trunk full of cocaine, like the unavailable declarant in *Williamson*, might well imagine that he could advance his own penal interest by fingering someone else. But Paguio Sr.'s statement that "my son had nothing to do with it" was not an attempt to shift blame or curry favor.

The *Paguio* Court noted that the *Williamson* analysis might play out differently when statements exculpating, rather than inculpating, another person are involved:

> When the prosecution attempts to take advantage of the rule, as in *Williamson*, the statement is typically in the form, "I did it, but X is guiltier than I am." As a matter of common sense, that is less likely to be true of X than "I did it alone, and not with X." That is because the part of the statement touching on X's participation is an attempt to avoid responsibility or curry favor in the former, but to accept undiluted responsibility in the latter.
>
> Prosecution use of an unavailable declarant's accusation of the defendant, as in *Williamson*, raises different concerns from a defendant's use of an unavailable declarant's confession which exonerates him. ... The Constitution gives the "accused," not the government, the right of confrontation. ... The accused's right to present witnesses in his own defense may be implicated where an absent declarant's testimony is improperly excluded from evidence. ... We raise the constitutional asymmetry because it helps explain why application of the rule of evidence is to some extent asymmetrical between defense and prosecution.

Accordingly, after *Williamson*, *inculpatory* declarations against interest should be strictly construed, especially when the statement is made while the declarant is in custody, and especially after *Criwford*. *Exculpatory* declarations against interest should receive a somewhat more permissive scrutiny. So long as an exculpatory statement would tend to disserve the declarant's interest, and is supported by some corroborative circumstances or independent evidence, the statement should be admitted.

[14] Rule 804(b)(4) -- Statements of Personal or Family History

Subdivision (b)(4) of *Rule 804* is divided into two parts. Part (A) provides that declarants' statements concerning their own family history (including marriage, divorce, birth, and ancestry) are admissible as an exception to the hearsay rule

even though the declarant had no means of acquiring personal knowledge of the matters stated. n42

Part (B) of the Rule provides that a statement concerning the same kind of personal or family history can be introduced even though the declarant is speaking about another person, if the declarant is closely related to the other person (as by blood, adoption, or marriage), or so intimately associated with the other's family, as to have accurate information concerning the matter declared. This expands the common-law exception somewhat. It drops the general common-law requirement that a declaration in this area must be made *ante litem motam*, on the ground that this bears more appropriately on weight than admissibility. It also expands the class of cases in which a declarant can speak about someone else, rejecting the common-law rule that a declarant could not speak on the basis of intimate association with someone's family.

[15] Residual Exception

Two residual hearsay exceptions were contained in the Federal Rules as initially adopted. These exceptions were designed to permit the admission of trustworthy hearsay that did not fit under any of the categorical exceptions. The residual exceptions were identically worded; one was placed in *Rule 803* (subdivision (24)), and the other was placed in *Rule 804* (subdivision (b)(5)). In 1997, the residual exceptions were transferred out of Rules 803 and 804, and combined in a single exception, *Rule 807*. This was done to facilitate additions to Rules 803 and 804. No change in meaning was intended. See the Editorial Explanatory Comment to *Rule 807*, *§ 807.02*, for a discussion of the residual exception. All of the annotations to the residual exception, including cases decided before the effective date of the amendment, are set forth under *Rule 807*, *§ 807.03*.

[16] Forfeiture by Wrongdoing

In 1997, a new hearsay exception was added to *Rule 804*. *Rule 804(b)(6)* provides that a party forfeits the right to object to a hearsay statement when the declarant has become unavailable and the party has caused or acquiesced in wrongdoing that was intended to and did create that unavailability. The most obvious situation for employing this exception is where a criminal defendant kills a witness, or has him killed, to prevent him from testifying; by engaging in this conduct, the defendant has forfeited the right to object on hearsay grounds to any of the victim's statements. The Rule was derived from cases that have held that a criminal defendant forfeits his right to confrontation if he causes or acquiesces in the witness' unavailability. n43 If the defendant's conduct is such as to cause a forfeiture of the constitutional objection, it should *a fortiori* be enough to cause a forfeiture of the parallel hearsay objection.

The Rule is not limited to criminal defendants, however. Any party who causes or acquiesces in wrongdoing with the intent to render a declarant unavailable forfeits the right to object to the unavailable declarant's hearsay statement. So for example, if a prosecutor intentionally intimidates a defense witness so that the witness refuses to testify, the prosecution loses the right to interpose a hearsay objection with respect to any statement that the witness may have made. The same goes for parties in civil cases. The Rule mandates forfeiture for "wrongdoing" but the conduct need not rise to the level of criminal activity. n44

Under the Rule, it must be shown that the party against whom the evidence is offered acted with intent to procure the unavailability of the declarant as a witness. If the defendant kills a declarant simply because he did not like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant's hearsay statement.

This does not mean, however, that a forfeiture can be found only if the party wakes up one day and says "I intend to act wrongfully and render the witness unavailable." The intent to render a witness unavailable can be inferred from wrongful activity. As the Court stated in *United States v. Cherry, 217 F.3d 811 (10th Cir. 2000)* , a defendant may be deemed to have forfeited a hearsay objection if "(1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing, ... or (2) *the wrongful procurement was in furtherance, within the scope,*

and reasonably foreseeable as a necessary consequence of an ongoing conspiracy." (emphasis added) In *Cherry*, a witness was murdered by conspirators of the defendants. The Trial Judge found that some of the defendants had no knowledge of or participation in the murder of the witness; it therefore found that their hearsay objections had not been forfeited. The Court of Appeals reversed and remanded. Under the test set out above, a forfeiture still can be found even if the defendants did not have specific input into the murder of the witness. The Court remanded to determine whether the murder could reasonably have been foreseen as a necessary consequence of the conspiracy. Thus, a forfeiture would be found if it was implicitly understood by the conspirators that all witnesses should be killed if any of their fellow conspirators were brought to trial. n45

Before the amendment, there was dispute among the Courts as to the standard of proof required to prove a forfeiture. In *United States v. Thevis, 665 F.2d 616 (5th Cir. 1982)* , the Court required clear and convincing evidence that the defendant had a declarant killed before finding a forfeiture. In contrast, the Court in *United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982)* , found a forfeiture where the prosecution proved by a preponderance of the evidence that the defendant procured the death of a declarant. According to the Advisory Committee, *Rule 804(b)(6)* adopts the "usual *Rule 104(a)* preponderance of the evidence standard ... in light of the behavior the new *Rule 804(b)(6)* seeks to discourage." n46 The Advisory Committee apparently reasoned that if a standard of proof higher than a preponderance were required, more parties would be disposing of witnesses. The preponderance standard discourages this misconduct, relatively speaking, because the hearsay testimony is more likely to be admitted than it would be under a clear and convincing standard -- making disposal of the witness more likely to be an inefficient act. One might question, however, whether a party thinking about disposing of a witness will factor in the Federal Rules of Evidence in deciding on a course of action -- especially a Rule based on the rather nuanced difference between two standards of proof.

[17] The Rule 804 Exceptions and the Confrontation Clause

The Editorial Explanatory Comments to Rules 801 and 803 considered whether statements admissible under those exceptions would satisfy the *Confrontation Clause* if admitted against an accused. A similar question arises with respect to hearsay statements admissible under *Rule 804* -- does the fact that a hearsay statement satisfies the admissibility requirements of one of the *Rule 804* exceptions also mean that it satisfies the requirements of the *Confrontation Clause*?

Before the Court's decision in *Crawford v. Washington, 541 U.S. 36 (2004)* , the answer to that question was "yes." This was because the Court in *Ohio v. Roberts, 448 U.S. 56 (1980)* , held that the *Confrontation Clause* guarantees that only reliable hearsay can be admitted against an accused, and that hearsay fitting within a "firmly-rooted" hearsay exception automatically satisfied the constitutional reliability requirements. Moreover, if the hearsay does not fit a firmly-rooted exception, the statement can nonetheless be found reliable if it carries "particularized guarantees of trustworthiness." Cases after *Roberts* had essentially held that all of the *Rule 804* exceptions were either "firmly-rooted" or required particularized guarantees of trustworthiness.

But the Court's analysis in *Crawford* complicates that answer somewhat. What follows is a short discussion of *Crawford*, and then a discussion of how statements admitted under *Rule 804* square with *Crawford*.

Crawford:

The Court in *Crawford* held that the defendant's right to confrontation was violated because uncross-examined "testimonial" hearsay was admitted against him at trial under a state hearsay exception for declarations against interest. *Crawford* involved a statement made by the defendant's wife to police officers that implicated the defendant and herself. Under the jurisprudence established in *Ohio v. Roberts, 448 U.S. 56 (1980)* , a hearsay statement satisfies the *Confrontation Clause* if (1) it fits a "firmly-rooted" hearsay exception, or (2) the statement carries "particularized guarantees of trustworthiness" that assure its reliability. The State Courts found that Mrs. Crawford's statement to police officers satisfied the "particularized guarantees of trustworthiness" prong of *Roberts*, reasoning that Mrs. Crawford was not trying to shift blame, and that she was relating relatively recent events to a "neutral" police officer.

The Supreme Court, in an opinion by Justice Scalia, rejected the *Roberts* structure for determining whether a hearsay statement satisfies the *Confrontation Clause*, at least if the hearsay is "testimonial." Justice Scalia engaged in an extensive historical analysis and determined that the original intent of the *Confrontation Clause* was not to exclude unreliable evidence *per se*, but rather to exclude "testimonial" evidence that had not been cross-examined by the accused.

The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded even if it is clearly reliable and even if it fits into a standard hearsay exception. An example of a statement that would qualify under *Crawford* is testimony from a prior trial in which the defendant was subject to the same charges, and the witness is unavailable for the subsequent trial.

On the other hand, if the hearsay statement is not "testimonial," the Courts after *Crawford* have uniformly held that the *Roberts* test continues to regulate the admissibility of the hearsay. While the Court in *Crawford* at least implied that there would be no constitutional regulation for non-testimonial hearsay, and was no fan of the *Roberts* reliability requirement, the Lower Courts after *Crawford* have reasoned that *Roberts* applies to non-testimonial hearsay until the Supreme Court specifically rules otherwise; and it did not so rule in *Crawford*, which involved only "testimonial" hearsay. n47

So a critical question after *Crawford* is whether a hearsay statement is "testimonial" or not. Surprisingly, the Supreme Court did not try to define the term "testimonial." The closest the Court came to a definition is set forth in the following passage:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois, 502 U.S. 346, 365 (1992)* (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.
>
> **...**
>
> ... Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.

In another part of the opinion, the Court indicated that statements taken at guilty plea allocutions are testimonial:

> Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar, 295 F.3d 1018, 1021-1023 (CA9 2002)* (plea allocution showing existence of a conspiracy); *United States v. Centracchio, 265 F.3d 518, 527-530 (CA7 2001)* (same); *United States v. Dolah, 245 F.3d 98, 104-105 (CA2 2001)* (same); *United States v. Petrillo, 237 F.3d 119, 122-123 (CA2 2000)* (same).

While the precise definition of "testimonial" is not clear, n48 what is clear is that *Crawford* provides some limitation on the use of hearsay by the prosecution in federal criminal trials.

Statements Admitted Under Rule 804 and the Confrontation Clause:

While it is difficult to generalize in the absence of a clear definition of what "testimonial" means, a preliminary analysis of the major *Rule 804* exceptions indicates the following:

(1) *Prior testimony*. Prior testimony is by definition "testimonial" but it also by definition comports with the *Confrontation Clause* under *Crawford* because it has been subject to cross-examination by the defendant.

(2) *Dying declarations*. Statements admitted as dying declarations may or may not be testimonial. If the declarant is being questioned by a police officer just before he dies, it is likely that the statement is testimonial under *Crawford*. If the declarant makes a deathbed statement to his mother, then it is probably not testimonial. Yet there remains a question, after *Crawford*, about the constitutional admissibility of even testimonial dying declarations. In a footnote in *Crawford*, the Court noted that it had held in the 19th century that a statement admitted as a dying declaration did not violate the accused's right to confrontation. That particular statement may have been testimonial. In the *Crawford* footnote, the Court bowed to precedent and entertained the possibility that a hearsay statement fitting the dying declarations exception might be admissible even though it is testimonial. The posited rationale was that the dying declarations exception was essentially as old as time itself. Ultimately, the Court found it unnecessary to decide whether a dying declaration would be an "exception" to the Court's new rule precluding testimonial hearsay. It did say that if it was an exception, it would be "sui generis." And as to nontestimonial dying declarations, they clearly comply with *Roberts*. In *Bourjaily v. United States, 483 U.S. 171 (1987)* , the Court held that a hearsay exception is firmly rooted if it has had a longstanding tradition of acceptance by the Courts. Clearly, *Rule 804(b)(2)* satisfies this standard.

(3) *Declarations against interest*. As discussed earlier, the standards of admissibility under *Williamson* (for the hearsay exception) and *Crawford* (for the *Confrontation Clause*) are essentially the same. If a confession is made to law enforcement, it is not admissible under the hearsay exception because it is not disserving, and it is not admissible under the *Confrontation Clause* because it is testimonial. And if a confession is made informally to friends, it is admissible under the hearsay exception because it is disserving, and it is admissible under the *Confrontation Clause* because it is not testimonial. n49

If the declaration against penal interest is not testimonial, then its constitutional admissibility is governed by the *Roberts* test. The application of *Roberts* to *Rule 804(b)(3)* is somewhat complicated. The Supreme Court in *Lilly v. Virginia, 527 U.S. 116 (1999)* , held that the hearsay exception for declarations against penal interest is not firmly-rooted. Therefore, to satisfy *Roberts* such statements must carry particularized guarantees of trustworthiness. It is highly likely, if not certain, that a statement admissible as a declaration against penal interest after *Williamson* will by that fact carry sufficient particularized guarantees of trustworthiness to satisfy *Roberts*. As the Court stated in *Williamson*, "The very fact that a statement is generally self-inculpatory -- which our reading of *Rule 804(b)(3)* requires -- is itself one of the particularized guarantees of trustworthiness that makes a statement admissible under the *Confrontation Clause*." The disserving nature of the statement, which is required for admissibility under *Rule 804(b)(3)*, will generally qualify the statement under the *Confrontation Clause* requirements for non-firmly rooted hearsay. n50 Lower Courts have found it unnecessary to hold that *Rule 804(b)(3)* is firmly-rooted, because they have found that statements that fall within the exception after *Williamson* will, by that fact, carry the circumstantial guarantees of trustworthiness required for non-firmly-rooted hearsay under the *Confrontation Clause*. n51 So the bottom line, even after *Lilly*, is that statements that are admissible under Federal *Rule 804(b)(3)* after *Williamson* will, by that fact, satisfy the *Confrontation Clause*.

(4) *Statements of pedigree*. To the extent this exception is applicable in criminal cases, it appears that statements of pedigree would not be made under testimonial circumstances; and as nontestimonial hearsay, the exception would

satisfy the "traditionally accepted" definition of a firmly rooted exception set forth in *Bourjaily*.

(5) *Residual exception*. This has been transferred to *Rule 807*. See the Editorial Explanatory Comment to *Rule 807* at *§ 807.02[8]* for a discussion of the relationship between the residual exception and the *Confrontation Clause*.

(6) *Forfeiture by wrongdoing*. In *Crawford* the Court held that if the defendant engaged in wrongdoing to keep a witness from testifying, this conduct would constitute a forfeiture of the right to confrontation. The standards for forfeiture under *Rule 804(b)(6)* and the *Confrontation Clause* are the same. n52

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Faison, 679 F.2d 292 (3d Cir. 1982)* (a key government witness was found unavailable because he was in the hospital with a heart problem, but the Court of Appeals found that this ruling was error; while much deference is accorded a Trial Judge when deciding whether or not to adjourn a trial, the Court found that in this case, there was an abuse of discretion in refusing to grant a continuance for a reasonable period).

(n2)Footnote 2. See also *United States v. Bollin, 264 F.3d 391 (4th Cir. 2001)* (defendant procured his own unavailability by refusing to testify; therefore his exculpatory grand jury testimony was not admissible as prior testimony); *United States v. Peterson, 100 F.3d 7 (2d Cir. 1996)* (exculpatory grand jury testimony given by the defendant at a parallel state proceeding was not admissible under the prior testimony exception, because the defendant was not unavailable to testify at trial; the defendant exercised his privilege not to testify at trial, and by doing so he procured his own unavailability: "When the defendant invokes his *Fifth Amendment* privilege, he has made himself unavailable to any other party, but he is not unavailable to himself.").

(n3)Footnote 3. The deposition preference issue will probably not arise under *Rule 804(b)(6)*, the hearsay exception based on forfeiture by misconduct. That exception applies only if the party against whom the hearsay is offered intentionally created the witness's unavailability. If the party has engaged in such conduct, the declarant is quite unlikely to be available for a deposition. At any rate, the deposition preference by its terms applies only to statements offered under Rules 804(b)(2)-(4).

(n4)Footnote 4. See, e.g., *United States v. Curbello, 940 F.2d 1503 (11th Cir. 1991)* (a declaration against interest was not admissible where the declarant was incarcerated in the Bahamas and could have been deposed under *Fed. R. Crim. P. 15*).

(n5)Footnote 5. See, e.g., *United States v. Tannehill, 49 F.3d 1049 (5th Cir. 1995)* (testimony from a prior multi-defendant trial on the same charges was admissible under *Rule 804(b)(1)*; the defendant argued that at the first trial, his strategy was to "disappear into the woodwork and hope for the best," but the defendant's motive for cross-examination at both trials was similar: "to discredit the witness and separate himself from the other members of the conspiracy"). See also *Battle v. Memorial Hosp., 228 F.3d 544 (5th Cir. 2000)* (deposition testimony should have been admitted against the defendants under *Rule 804(b)(1)*; the defendants were on the same side of the same issues at the deposition and at trial and they had the same interest in asserting and prevailing on those issues; the defendants claimed that they did not aggressively test the witness' deposition answers with cross-examination-type questions because they were motivated only by the desire to understand the plaintiffs' case; but the defendants could not suggest a single question or line of questions that would have added reliability to the deposition); *United States v. Poland, 659 F.2d 884 (9th Cir. 1981)* (identification testimony given at a hearing on a defendant's motion to suppress could be admitted when the identification witness died; the basic questions at the hearing concerned suggestiveness and reliability, so the defense had the same motive to examine the witness at the hearing as it would have at the trial); *New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989)* (an insurance company brought an action to set aside a life insurance policy as fraudulently procured by a beneficiary, who allegedly conspired to murder the insured, her first husband; testimony given by an unavailable witness at the trial of another conspirator was properly excluded, as the defendant in that case was not disposed to protect the interests of the defendant in the instant case, but rather would be likely to shift the blame to her, so he had no "like motive" to develop the same facts).

(n6)Footnote 6. See, e.g., *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119 (4th Cir. 1995)* (in an antitrust action, testimony by a dairy official testifying as a government witness in a prior criminal conspiracy trial was admissible as former testimony, even though the dairies were not the defendants in the criminal case; privity is not the gravamen of a *Rule 804(b)(1)* analysis; rather, the issue is whether the party who cross-examined the witness had a motive similar to that of the party against whom the testimony is offered).

(n7)Footnote 7. See, e.g., *Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993)* (in a product liability case resulting from asbestos exposure, the Court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship to the plaintiff in that prior litigation; the party against whom the deposition is offered "must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"; the plaintiff in this case was in the same situation with respect to asbestos exposure as the plaintiff in the case in which the deposition was taken); *Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983)* (deposition from a prior litigation is admissible against a nonparty to that litigation, where the party who cross-examined the deponent had the same goal in cross-examination as the party against whom the deposition is now offered).

(n8)Footnote 8. See, e.g., *In re Screws Antitrust Litig., 526 F. Supp. 1316 (D. Mass. 1981)* (testimony was not admissible against a nonparty to the prior litigation who had no legal relationship with the party against whom the testimony was originally offered).

(n9)Footnote 9. See, e.g., *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was not a predecessor in interest because there was no legal relationship between them; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible against the defendant under the residual exception, as a "near miss" of the prior testimony exception).

(n10)Footnote 10. See also *United States v. Lombard, 72 F.3d 170 (1st Cir. 1995)* (the defendant was acquitted in State Court on two murder charges, then charged with firearms possession and other charges arising out of the murder; testimony from the State Court trial as to the events preceding and after the murders was properly admitted, because the defendant had a similar motive to cross-examine a witness in the prior murder charges about these matters).

(n11)Footnote 11. See, e.g., *United States v. Peterson, 100 F.3d 7 (2d Cir. 1996)* (exculpatory grand jury testimony in a prior state criminal proceeding was not admissible as prior testimony in a federal trial on firearm charges; even assuming that the state government could be considered a predecessor in interest of the federal government, the similar motive requirement of *Rule 804(b)(1)* was not met; the evidence before the state grand jury "provided ample probable cause to indict Peterson for possession" and therefore there was no reason for the government to attack Peterson's exculpatory testimony in the same manner as it would have done at trial).

(n12)Footnote 12. See, e.g., *United States v. Foster, 128 F.3d 949 (6th Cir. 1997)* (exculpatory grand jury testimony should have been admitted against the government under *Rule 804(b)(1)*; at the time the witness testified, the outcome of the grand jury proceeding was in doubt, and there was no indication that the grand jury did not believe the witness).

(n13)Footnote 13. See also *United States v. Jackson, 335 F.3d 170 (2d Cir. 2003)* (statement made at guilty plea proceeding was not admissible against the government under *Rule 804(b)(1)*, because the government's motive to develop the testimony at a plea hearing is not similar to the motive it would have at trial).

(n14)Footnote 14. See *United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990)* (holding that the requirements of *Rule 804(b)(1)* were satisfied because the government had the same motive and opportunity to question the witness at the grand jury as it would have had if the witness had testified at trial); *United States v. Lester, 749 F.2d 1288 (9th Cir. 1984)* (error to exclude exculpatory grand jury testimony where the government had ample opportunity to

cross-examine the witness during the grand jury proceeding); *United States v. Young Brothers, Inc., 728 F. 2d 682 (5th Cir. 1984)* (*Rule 804(b)(1)*'s concern for adversarial cross-examination is met by the government's previous opportunity to question a witness during a grand jury hearing).

(n15)Footnote 15. The effect of the *Confrontation Clause* on the admissibility of dying declarations offered against the accused is discussed at the end of this Editorial Explanatory Comment, *§ 804.02[17]*.

(n16)Footnote 16. See, e.g., *United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989)* (holding it was improper to admit grand jury testimony as a dying declaration; the witness' belief of impending death would not bring his statements within the dying declaration exception because he was not testifying as to the cause or circumstances of his impending death).

(n17)Footnote 17. *United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003)* (victim's statement not admissible as a dying declaration where medical treatment was undertaken with the expectation that he would survive, and the nursing staff "tried to keep his spirits up" by telling him he would recover).

(n18)Footnote 18. The impact of the *Confrontation Clause* on the declaration against penal interest exception in criminal cases is discussed at the end of this Editorial Explanatory Comment, *§ 804.02[17]*.

(n19)Footnote 19. By the terms of the Rule, there is no corroborating circumstances requirement for statements against the declarant's pecuniary interest. Such a statement is admissible upon a showing that it so tends to disserve the declarant's pecuniary interest that a reasonable person would not have made the statement unless it were true.

(n20)Footnote 20. See, e.g., *United States v. DeVillio, 983 F.2d 1185 (2d Cir. 1993)* (defendants sought to intro duce a statement from a surveillance tape made by a member of the conspiracy, to the effect that the declarant, and not the defendants, had participated in a burglary; the Court held that the *Rule 804(b)(3)* exception was inapplicable because there was no eyewitness corroboration for the statement).

(n21)Footnote 21. See, e.g., *United States v. Mackey, 117 F.3d 24 (1st Cir. 1997)* (justifying the corroborating circumstances requirement in light of the possibility that "one criminal can make out-of-court statements exculpating another and then rather easily claim the privilege when the government seeks to cross-examine him to discredit the statement.").

(n22)Footnote 22. See, e.g., *United States v. Dean, 59 F.3d 1479 (5th Cir. 1995)* (finding no error in the Trial Court's exclusion of a hearsay statement by the defendants' accomplice, made during the accomplice's plea negotiations, and which exculpated the defendants; the statement was not sufficiently corroborated; the fact that the accomplice admitted guilt did not preclude others' guilt; the statement contained many questionable claims; and the evidence of the defendants' involvement in the crime was strong).

(n23)Footnote 23. See, e.g., *United States v. Salvador, 820 F.2d 558 (2d Cir. 1987)* (independent evidence must corroborate both the declarant's trustworthiness and the truth of the statement). See also *United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984)* (the fact that the declarant had the opportunity to commit the crime with which the defendant was charged "was not clearly corroborative of his confession, but merely consistent with it"); *United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982)* (statement by a declarant that she was involved in the murder of the defendant doctor's family was not sufficiently corroborated, in part because the declarant was a drug addict, even though the defendant's claim was that his family was killed by drug addicts looking for drugs in his home).

(n24)Footnote 24. See, e.g., *United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)* (noting that because of constitutional concerns, the standard for corroboration cannot be so strict "as to be utterly unrealistic.").

(n25)Footnote 25. See, e.g., *United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983)* (a statement is not admissible where the only corroboration is the defendant's own statements).

(n26)Footnote 26. The legislative history of the second sentence of *Rule 804(b)(3)* indicates that the merits of a one-way corroboration requirement were never seriously considered or debated. Professor Tague has done an exhaustive search of the Advisory Committee proceedings, Standing Committee proceedings, and Congressional proceedings on *Rule 804(b)(3)*. See Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception, 69 Georgetown L.J. 851 (1981)*. His research indicates the following:

(1) The initial Advisory Committee proposal had no corroboration requirement at all. To the contrary, the proposal contained a sentence, referred to as "the *Bruton* sentence." This sentence provided that "a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused," was not admissible under the exception. Thus, the initial proposal was basically a one-way rule of admissibility in favor of criminal defendants.

(2) Senator McClellan vigorously opposed the proposed Rule. This opposition threatened to scuttle all the proposed Evidence Rules, and the Advisory Committee thought that it might even lead to Congressional change of the Rules process itself. Senator McClellan was concernned that defendants would get unsavory characters to claim that they and not the defendant did the crime charged -- then these unsavory characters would simply declare the privilege and refuse to testify at the defendant's trial. He suggested a corroboration requirement. The Advisory Committee saw no problem with a corroboration requirement because Professor Cleary, the Reporter, believed that it was already inherent in the "against penal interest" requirement. Cleary also reasoned that any corroboration requirement would be automatically met by a simple declaration from the defendant that he was innocent. So essentially, the Advisory Committee saw no harm in throwing Senator McClellan a bone. As a result, the Advisory Committee added the following sentence to the proposed Rule:

> "Statements tending to expose the declarant to criminal liability and offered to exculpate the accused must, in addition, be corroborated."

(3) Apparently the Committee saw no need to consider the application of a corroboration requirement to statements offered by the prosecution, because under its proposal, declarations against penal interest could not be offered by the prosecution due to the *Bruton* sentence. But Senator McClellan was not satisfied. He demanded that the Committee delete the *Bruton* sentence. He convinced the Committee that the *Bruton* sentence was overbroad "because not every statement made by a declarant implicating the accused is an attempt to curry favor with the authorities." The Committee decided to delete the *Bruton* sentence from the rule and to change the note to state that a court should determine the penal interest effect of such a statement in each case. But the Committee never addressed or recognized the disparity it then created by imposing a corroboration requirement on the accused but not on the prosecution. This seems simply to have been an oversight due to the sequencing of the changes -- first the addition of a corroboration requirement at a time when inculpatory statements were inadmissible under the Rule; then a change to the rule to permit some admissibility of inculpatory statements, without thinking about how the two changes would fit together.

(4) The House Subcommittee decided to beef up the corroboration requirement -- apparently unconvinced that the Advisory Committee version would prevent the accused from corroborating by a simple protestation of his own innocence. The Subcommittee changed the second sentence of the rule to provide that "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The House Subcommittee also decided to put the "*Bruton* sentence" back into the Rule, apparently because the Subcommittee thought it was constitutionally impermissible to admit accomplice hearsay against an accused.

(5) The Senate Judiciary Committee accepted the House's version of the rule and the corroboration requirement, but deleted the *Bruton* sentence. The Senate passed this version of the rule without discussion. The Senate's position on the *Bruton* sentence prevailed in Conference. The rationale for deleting the *Bruton* sentence was that the Evidence Rules

should avoid trying to codify constitutional doctrine. No thought was given to the evidentiary question of whether the Rule would permit uncorroborated declarations against penal interest when offered by the prosecution.

(6) Only one person in the entire legislative process flagged the anomaly of the one-way corroboration requirement. During a markup session in the House Subcommittee, Representative Holtzman asked why the corroboration requirement should not be imposed on the government. Associate counsel to the subcommittee responded that a corroboration requirement imposed on the government would be superfluous "because *Bruton* created a *confrontation clause* bar to all government offered penal interest statements by an unavailable declarant." Thus, the Subcommittee was (mis)informed that inculpatory penal interest statements would never be admissible as a constitutional matter. Clearly, *Bruton* does not extend so far as to exclude all against-penal-interest statements offered against the accused.

(n27)Footnote 27. See, e.g., Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, *69 GEO. L.J. 851, 990 (1981)* (concluding that due process and equal protection are violated by an asymmetrical corroborating circumstances requirement).

(n28)Footnote 28. See, e.g., *United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)* (applying a corroborating circumstances requirement for statements offered by the prosecution under *Rule 804(b)(3)*, while noting that the Rule "does not explicitly require" corroboration for such statements); *United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990)* (requiring corroborating circumstances for inculpatory declarations against penal interest); *United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1986)* (applying corroborating circumstances requirement to government-offered statements; noting the defendant's right to confrontation); *United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978)* (noting that "by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying *Rule 804(b)(3)*").

(n29)Footnote 29. See, e.g., *United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993)* (an inculpatory declaration against interest was properly admitted even without a showing of corroboration).

(n30)Footnote 30. See also *United States v. Butler, 71 F.3d 243 (7th Cir. 1995)* (the Trial Court properly excluded a hearsay statement from a person on the premises during a police raid; the declarant accused the police of planting guns found in the house on the defendant because they knew that the defendant was a felon; the defendant argued that the hearsay statement was disserving to the declarant, because the declarant admitted that he was in the room where the weapons were found, and was thus opening himself up to possible weapons charges; but the Court held that the statement was not sufficiently disserving, because the declarant did not specifically admit that he had possession of or owned any gun; at most, the statement put the declarant at risk of being in some type of constructive possession of a gun, which "is not a risk sufficient to provide the guarantee of reliability or truthfulness the 804(b)(3) exception is based on"); *United States v. Wilkinson, 754 F.2d 1427 (2d Cir. 1985)* (a statement made by the declarant that the defendant did not know that the declarant was selling drugs was held insufficiently disserving to qualify under *Rule 804(b)(3)*).

(n31)Footnote 31. *United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978)* . See also *United States v. Thomas, 571 F.2d 285 (5th Cir. 1978)* (rejecting a government argument that the statement did not qualify as a declaration against interest because the declarant did not expressly confess guilt: "[B]y referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant.").

(n32)Footnote 32. See, e.g., *United States v. Barrett, 539 F.2d 244 (1st Cir. 1976)* (statement that Buzzy was not at the robbery inculpates the declarant due to the implication that the declarant was at the robbery).

(n33)Footnote 33. See, e.g., *United States v. Jones, 124 F.3d 781 (6th Cir. 1997)* (statement by the defendant's son, exculpating the defendant, was properly excluded; the defendant and his son had a close relationship, the statement was made on the eve of the defendant's trial, and was made in response to two letters from the defendant telling the son to say, and it was made after consultation with the defendant's attorney); *United States v. Bobo, 994 F.2d 524 (8th Cir.*

1993) (a statement by the defendant's brother to the effect that he, and not the defendant, had a gun, was insufficiently trustworthy to be admissible in the defendant's trial for felon-gun possession; the sibling relationship diminishes the trustworthiness of the statement, and the statement was suspiciously timed, having been made on the eve of trial); *United States v. Riley, 657 F.2d 1377, 1384 (8th Cir. 1981)* ("Depending on the circumstances in which it is made, a particular statement which is ostensibly disserving may in fact be either neutral or self-serving.").

(n34)Footnote 34. See also *United States v. Innamorati, 996 F.2d 456 (1st Cir. 1993)* (grand jury testimony of an accomplice was not sufficiently disserving to the declarant to be admissible as a declaration against interest; taken as a whole, the statement greatly minimized the declarant's role in the wrongdoing; the declarant admitted a few acts of logistical assistance, claiming they were innocently motivated); *United States v. Albert, 773 F.2d 386 (1st Cir. 1985)* (codefendant's statement accepting total responsibility for a crime was not admissible to exculpate the defendant; the statement was taken at the time of the codefendant's sentencing, at which point the codefendant had a self-interest in accepting responsibility).

(n35)Footnote 35. This interpretation of *Rule 804(b)(3)* -- that an accomplice's confession to law enforcement could be admitted in some part -- has now been rejected as a matter of constitutional law in *Crawford v. Washington*. Under *Crawford,* an accomplice's confession to law enforcement is "testimonial" and as such its admission violates the confrontation rights of the accused. *Crawford* is discusssed at the end of this Editorial Explanatory Comment, *§ 804.02[17].*

(n36)Footnote 36. See, e.g., *United States v. Rodriguez-Marrero, 390 F.3d 1 (1st Cir. 2004)* (confession of an accomplice that incriminated the defendant could not be admitted against the defendant after *Crawford;* whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers, and *Crawford* holds that "testimonial" hearsay is barred by the *Confrontation Clause* in the absence of cross-examination); *United States v. Jones, 371 F.3d 363 (7th Cir. 2004)* (accomplice's statement to law enforcement was inadmissible against the defendant even though it was redacted to take out any direct reference to the defendant; even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement; as the defendant never had a chance to cross-examine the accomplice, "under *Crawford,* no part of Rock's confession should have been allowed into evidence").

(n37)Footnote 37. See, e.g., *United States v. McCleskey, 228 F.3d 640 (6th Cir. 2000)* (statement by declarant implicating the defendant, made to police officers after arrest, was erroneously admitted; the statement was not admissible under *Rule 804(b)(3)* because of "the incentive brought to bear upon such an accomplice to shift and spread blame to other persons"); *United States v. Mendoza, 85 F.3d 1347 (8th Cir. 1996)* (statement made while accomplice in custody is not against the declarant's interest and therefore was improperly admitted under *Rule 804(b)(3)*)

(n38)Footnote 38. *United States v. Rashid, 383 F.3d 769 (8th Cir. 2004)* (an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference).

(n39)Footnote 39. See also *United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)* (in a RICO prosecution of a Mafia leader, it was not error to admit statements made by another Mafia leader to his son that described the roles of the declarant, the defendant and others in the organization; the statements were not inadmissible simply because they identified someone other than the declarant; the declarant's statements linked him to specific coconspirators and thus were against his own penal interest, especially since the statements were not made with the hope of implicating others to gain favor with the police); *United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998)* (in a trial for murdering a government witness, the prosecution introduced post-murder statements by a codefendant to two friends in which he said that he had gone to the other defendants' home on the evening of the murder and told them the victim was in the area; the Court found the statements were against the declarant's interest; they were made the day after the murder to a man who had witnessed the murder and to another who knew the victim, and they were potentially incriminating because they linked the declarant to a specific conspiracy).

(n40)Footnote 40. See, e.g., *United States v. Franklin, 415 F.3d 537 (6th Cir. 2005)* (accomplice told a friend that he was "stressed out," because he and the defendant had robbed a bank and he thought the authorities were on their trail; this statement was admissible as a declaration against penal interest, as it disserved the accomplice's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities; moreover the statement was not testimonial under *Crawford* because it was made by happenstance to a friend, not to a "police officer or a government informant seeking to elicit statements to further a prosecution"); *Ramirez v. Dretke, 398 F.3d 691 (5th Cir. 2005)* (accomplice's confession to his roommate were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.").

(n41)Footnote 41. See, e.g., *United States v. Nagib, 56 F.3d 798 (7th Cir. 1995)* (statements exculpating the defendant, made by the declarant at sentencing, were all sufficiently against the declarant's penal interest: "[T]here is no indication in the record that [the declarant] attempted to curry favor with the authorities when making his statement at sentencing. There is no record of any plea agreement or downward departure for cooperation.").

(n42)Footnote 42. See, e.g., *United States v. Olafson, 203 F.3d 560 (9th Cir. 2000)* (in a prosecution for transporting illegal aliens, statements given to the Border Patrol by men found in the defendant's van were properly admitted; the men stated that they were citizens of Mexico, so their declarations were admissible as statements of their own personal history).

(n43)Footnote 43. See, e.g., *United States v. Aguiar, 975 F.2d 45 (2d Cir. 1992)* ; *United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976)* .

(n44)Footnote 44. See, e.g., *United States v. Scott, 284 F.3d 758 (7th Cir. 2002)* ("Scott argues that his actions were not sufficiently evil because they were not akin to murder, physical assault, or bribery. Although such malevolent acts are clearly sufficient to constitute 'wrongdoing,' they are not necessary.").

(n45)Footnote 45. See also *United States v. Thompson, 286 F.3d 950 (7th Cir. 2002)* (agreeing with *Cherry* "that if a murder is reasonably foreseeable to a conspirator and within the scope and in furtherance of the conspiracy, the conspirator waives his right to confront that witness just as if he killed the witness himself.").

(n46)Footnote 46. See *United States v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001)* (holding that the clear and convincing evidence standard of *Thevis* has been rejected by *Rule 804(b)(6)*).

(n47)Footnote 47. See, e.g., *Horton v. Allen, 370 F.3d 75 (1st Cir. 2004)* (non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation); *United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)* (with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."); *United States v. Franklin, 415 F.3d 537 (6th Cir. 2005)* ("the Supreme Court did not explicitly overrule its prior *Confrontation Clause* jurisprudence with its holding in *Crawford*" insofar as it applied to nontestimonial hearsay; "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.").

(n48)Footnote 48. The Court may provide a further indication of what it means by "testimonial" in the 2005-6 Term, as it has granted certiorari in two state cases involving the admissibility of 911 calls and reports to police officers after *Crawford*.

(n49)Footnote 49. See, e.g., *United States v. Manfre, 368 F.3d 832 (8th Cir. 2004)* (an accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant; this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor but rather was made informally to a loved one; for the same reason, the statement was not testimonial under *Crawford;* it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.").

(n50)Footnote 50. See *United States v. Sasso, 59 F.3d 341 (2d Cir. 1995)* (statements implicating the defendant were admissible under *Rule 804(b)(3)* because they exposed the declarant to criminal liability and were not made to curry favor with anyone: "Given the totality of the circumstances as to the content and context [of the statements], we conclude that the statements bore sufficient indicia of reliability that their admission against Sasso did not violate Sasso's confrontation rights.").

(n51)Footnote 51. See, e.g., *United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)* (the Court reads *Lilly* as requiring a showing of "particularized guarantees of trustworthiness" for accomplice's statements, but finds that standard met in this case, because the statements were truly self-inculpatory and made to the declarant's son in confidence rather than to the police).

(n52)Footnote 52. See *United States v. Montague, 421 F.3d 1099 (10th Cir. 2005)* ("Forfeiture by wrongdoing is an independent ground for the admissibility of hearsay testimony that survives *Crawford*.").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 804 RULE 804

4-804 Federal Rules of Evidence Manual 804.03

804.03 Annotated Cases

[Go To Supp]

[1] Rule 804(a) -- Definition Of Unavailability

[a] Rule 804(a) -- Absent or Unavailable

[i] Rule 804(a) -- Absent or Unavailable -- Codefendant in Criminal Case

United States v. Robbins, 197 F.3d 829 (7th Cir. 1999) : The Court affirmed convictions arising out of a large-scale marijuana operation. It held that a codefendant was unavailable for purposes of *Rule 804* because he was not subject to being called by the government in its case-in-chief; the codefendant's statement to his former fianc'e that he "sold pot" with Robbins was admissible against the codefendant as an admission and against Robbins as a declaration against interest.

[ii] Rule 804(a) -- Absent or Unavailable -- Good Faith Effort To Produce

Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495 (D. Del. 1983) : The Court indicated that former testimony could be admitted where a witness was shown to be unavailable by an affidavit stating that counsel was unable to locate the witness even though he checked the telephone directory of the last known city of residence, reviewed transcripts and Court files in order to discover the address of the witness, contacted government agencies and attorneys, and contacted the witness' local attorney.

United States v. Mathis, 550 F.2d 180 (4th Cir. 1976) : The Court affirmed armed bank robbery convictions, rejecting the contention that a government witness' prior testimony should not have been admitted under *Rule 804(b)(1)* because the government had erroneously released the witness from a District of Columbia penal institution pursuant to a Court order requiring the release of another prisoner bearing the same name. The Court held that the government had made a good faith effort, and that the witness was not reasonably available.

United States v. Foster, 128 F.3d 949 (6th Cir. 1997) : The Court reversed a conviction for cocaine offenses because the defendant had not been permitted to introduce exculpatory testimony given by a witness before the grand jury. Although defense counsel was informed that the witness gave exculpatory testimony in July, he did not learn the substance of the testimony until it was ordered turned over to him on September 7; he issued a subpoena for the witness on the 8th, three days before the start of the trial, and that subpoena was returned unexecuted. The Court held that in these circumstances, the defense had made a good faith effort to procure the declarant's attendance, and the fact the effort was unsuccessful made the witness unavailable for purposes of *Rule 804(a)(5)*.

United States v. Johnson, 108 F.3d 919 (8th Cir. 1997) : In the retrial of a drug-trafficking case, the government had not subpoenaed the K-9 officer who supervised the dog-sniff search of the defendant's car, but upon learning he was on vacation in Florida, moved unsuccessfully for a continuance when he could not be located. The Court held there was no abuse of discretion in admitting the officer's former testimony, given its relative unimportance to the case, its reliability, and the defendant's failure to note any specific need for cross-examination beyond that at the first trial. In the fourth trial of the defendant's drug trafficking and firearms charges in *United States v. Flenoid, 949 F.2d 970 (8th Cir. 1991)* , defense counsel showed he was unable to locate one "not very rooted" witness. The Court held that in the circumstances it was prejudicial error not to declare the witness unavailable and admit her testimony given at previous trials of the case. In a dispute arising out of a barge breakaway, *Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp.*, n1 the Court upheld the admission of an unavailable witness' testimony from a prior trial, rejecting an argument that the party offering the testimony had not adequately demonstrated unavailability because it waited until three days before trial to attempt to serve a subpoena on the witness. The Court noted that there was no showing that an earlier attempt would have been successful.

[iii] Rule 804(a) -- Absent or Unavailable -- Inadequate Efforts To Produce

[A] Rule 804(a) -- Civil Cases

Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995) : Reversing a verdict for the plaintiff in an asbestos case, the Court also held that it was error to admit the testimony given by an expert for the defendant in an unrelated asbestos trial. In proffering the testimony as prior testimony contradicting the defendant's defense in the instant case, the plaintiff argued that the expert was unavailable because he was beyond the subpoena power. The Court noted, however, that the plaintiff had made no attempt to contact the expert and offer him his usual expert witness fee, so she failed to prove that she used "reasonable means" to enlist his services.

Perricone v. Kansas City S. Ry., 630 F.2d 317 (5th Cir. 1980) : The Court reversed a judgment for the plaintiff in a railroad crossing case on the ground that a witness' prior testimony was erroneously admitted when counsel claimed the witness could not be found, even though he had not looked in the phone book for the name of the witness (where it was listed). After the jury returned its verdict, the defendant's claims agent showed he was able to find the witness in two hours. But, in *Bailey v. Southern Pac. Transp. Co.*, n2 the Court said that a Trial Judge could accept counsel's representations about the unavailability of a witness, and that an objecting party must demonstrate error in the Judge's acceptance of the representations.

Garcia-Martinez v. City & County of Denver, 392 F.3d 1187 (10th Cir. 2004) : The plaintiff, an illegal immigrant, brought a § 1983 action for use of excessive force in an arrest. Fearing arrest for immigration offenses, he returned to Honduras before the trial. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in excluding a deposition of the plaintiff, which was offered in lieu of his live testimony. The plaintiff's absence at trial was calculated, so it was "due to the procurement or wrongdoing" of the proponent, and his failure to attempt to obtain a temporary visa or to use an alternative to live testimony, such as video-conferencing, meant that he had not

demonstrated "a good faith effort ... to obtain the declarant's presence at trial using reasonable means." One Judge dissented, on the ground that the plaintiff's absence was not procured by him but by the government, which placed him under a standing deportation order, and any effort to obtain a temporary visa would have been futile. In *Angelo v. Armstrong World Indus., 11 F.3d 957 (10th Cir. 1993)* , the Court affirmed a judgment for the defendants in an asbestos personal injury action, holding there was no abuse of discretion in excluding a witness' deposition, where there was no showing the plaintiffs had made reasonable efforts by subpoena or otherwise to procure the witness' appearance to testify.

[B] Rule 804(a) -- Absent or Unavailable -- Inadequate Efforts To Produce -- Criminal Cases

United States v. Mann, 590 F.2d 361 (1st Cir. 1978) : The Court reversed a narcotics conviction because the government's efforts to produce a witness were inadequate. The Court said that "[i]mplicit ... in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to keep a present witness from becoming absent."

Government of Canal Zone v. P. (Pinto), 590 F.2d 1344 (5th Cir. 1979) : The Court held that the government had not shown the unavailability of two witnesses to an assault by offering evidence that the witnesses were tourists scheduled to depart the Canal Zone the day after the assault, rather than by offering proof of where the witnesses were at the time of the trial.

United States v. Quinn, 901 F.2d 522 (6th Cir. 1990) : The Court reversed a conviction for cocaine offenses on the ground that there was insufficient showing of a witness' unavailability to admit under *Rule 804(b)(1)* testimony she gave at a suppression hearing. The officer attempting to subpoena the witness was given less than the usual five working days to try to locate her and no one followed up with relatives, the manager of the apartment where she formerly lived, or possible employers.

United States v. Hite, 364 F.3d 874 (7th Cir. 2004) : The Court affirmed a conviction for unlawful possession of firearms, holding there was no abuse of discretion in precluding a hearsay statement offered by the defense in which the declarant asserted ownership of the weapons in question. The defense's efforts "fell far short of exhibiting a reasonable effort" to locate the declarant, as they did not begin the "search" until four months before the trial began, had previously made no effort to seek the assistance of law enforcement although the declarant had been in and out of the county court system numerous times during that period, and their investigator admitted that his only efforts to find the declarant consisted of talking to family members.

United States v. Harbin, 112 F.3d 974 (8th Cir. 1997) : Although it affirmed drug convictions of a husband and wife, the Court found that grand jury testimony of the wife's sister was improperly admitted because the prosecutor failed to demonstrate that serious attempts were made to locate the sister prior to trial. The prosecution learned that the sister was working in a motel at a specified city in Mississippi and made no effort to serve her there or to serve her when she visited her mother every three weeks. The Court found no evidence to corroborate the Trial Judge's conclusion that the sister had avoided efforts to serve her with process. The error was harmless, however.

United States v. Fuentes-Galindo, 929 F.2d 1507 (10th Cir. 1991) : The Court reversed convictions for illegally transporting aliens, where the government did not meet its burden of demonstrating a good faith effort to obtain the witnesses' presence before offering videotaped depositions by alien material witnesses. In *United States v. Puckett*, n3 the Court found no error in the exclusion of prior testimony where the defense counsel's unavailability claim was a

result of his failure to attempt to subpoena a witness until the end of the second week of trial.

[iv] Rule 804(a) -- Absent or Unavailable -- Miscellaneous Cases

Bailey v. Southern Pac. Transp. Co., 613 F.2d 1385 (5th Cir. 1980) : The Court said that a Trial Judge could accept counsel's representations about the unavailability of a witness, and that an objecting party must demonstrate error in the Judge's acceptance of the representations.

United States v. Rothbart, 653 F.2d 462 (10th Cir. 1981) : This case illustrates how *Confrontation Clause* considerations may influence the interpretation of subdivision (a). The Trial Judge found a witness unavailable "solely because he was outside the jurisdiction of the court." The Court noted that the government must make a good faith effort to produce the witness and implied that the government must avoid acting in a way that might encourage a witness to be absent.

[v] Rule 804(a) -- Absent or Unavailable -- Request for Voluntary Appearance

Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495 (D. Del. 1983) : The Court held that a witness, who was in the government's witness protection program, was not shown to be unavailable simply because he could not be subpoenaed. The Court reasoned that the language "or other reasonable means" required that the witness be requested to attend voluntarily.

United States v. Kehm, 799 F.2d 354 (7th Cir. 1986) : The Court held, in a drug prosecution, that a deposition was properly admitted where the government showed that the deponent was a Bahamian citizen who could not be extradited and he had indicated that he would not voluntarily testify.

[vi] Rule 804(a) -- Absent or Unavailable -- Witness in Custody

United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989) : In affirming a defendant's conviction in a massive drug conspiracy, the Court held that a declarant imprisoned in Italy was sufficiently shown to be unavailable by an Assistant U.S. Attorney's affidavit that Italian authorities said they would not extradite him and that the government believed Italy's position was "sound." The government's efforts were made in good faith and reasonable in light of the complexity of the trial and the apparent futility of further efforts.

[vii] Rule 804(a) -- Absent or Unavailable -- Witness Out of United States

United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989) : See annotation in *§ 804.03[1][a][vi]*. In *United States v. Losada*, n4 the Court found that the government had made a good faith effort to produce a witness living in Colombia who had testified against the defendants at an earlier trial, so the witness' former testimony was properly admitted.

United States v. Jones, 404 F. Supp. 529 (E.D. Pa. 1975) , *aff'd*, *538 F.2d 321 (3d Cir. 1976)* : In a prosecution for possessing heroin with intent to distribute, the Court held that a federal drug agent out of the country on special assignment was unavailable within the meaning of the Rule, and that his former testimony (at defendant's first trial) would be admitted to establish a chain of custody for the heroin involved in the case.

United States v. Allie, 978 F.2d 1401 (5th Cir. 1992) : In a prosecution for harboring illegal aliens, the Court held there was no confrontation violation in admitting deposition testimony of alien witnesses, as the government had made extensive good faith efforts to keep the witnesses (who had been released from custody after almost 60 days) in the United States and otherwise to secure their reappearance at trial.

United States v. Kehm, 799 F.2d 354 (7th Cir. 1986) : See annotation under *§ 804.03[1][a][v].*

United States v. Pena-Gutierrez, 222 F.3d 1080 1080 (9th Cir. 2000) : In a prosecution for smuggling illegal aliens, the government introduced a report prepared by an INS inspector during her interview of one of the aliens, which contained his statements regarding his nationality. The Court held that the report was inadmissible, but even if the report itself were admissible, the alien's statements were not admissible because he was not shown to be unavailable. The alien had been deported to Mexico, and the government had his address there, so the requirement that a good faith effort be made to secure his presence before using his hearsay had not been satisfied when the prosecutor made no effort at all to contact him and had no reason to believe he would not return to the United States to testify. Admission of the statements was harmless error, however. In *United States v. Johnson*, n5 the Court affirmed fraud convictions, finding it was proper to admit the deposition of a witness who was serving as Ambassador to Italy at the time of trial. It rejected the defendant's argument that the Ambassador was available because he could have been subpoenaed pursuant to *28 U.S.C. § 1783(a)* (authorizing subpoenas to United States nationals residing in foreign countries in the interests of justice) and held that the Ambassador was unavailable since the Trial Judge reasonably determined that it was not in the interests of justice to compel the Ambassador to appear at trial.

United States v. Samaniego, 345 F.3d 1280 (11th Cir. 2003) : In an interpleader action to determine ownership of championship belts allegedly stolen from a former professional boxer, the Court found no abuse of discretion in the admission of statements by the alleged thief expressing remorse, apologizing for, and asking forgiveness for having stolen the belts. Although the statements were erroneously admitted under *Rule 803(3)*, they were admissible under *Rule 804(b)(3)* because they would subject the declarant to civil or criminal liability and the declarant was sufficiently shown to be unavailable to testify. He was a Panamanian citizen apparently living in that country at the time of trial, and thus not amenable to process. Further, the claimant offering the statements, who was the declarant's brother-in-law, had enlisted his wife and the declarant's mother to try on five occasions to locate the declarant and persuade him to come back to testify, but the efforts were unsuccessful. In *United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000)* , a college professor was charged with making false statements to the National Science Foundation after it was determined that he had himself submitted a nomination and recommendations in the names of others for an award. The Court held that the government had established the unavailability of two witnesses sufficiently to permit introduction of their depositions. Both witnesses were in Europe, had been offered reimbursement for expenses if they were to attend the trial, and had indicated (in the case of one witness, repeatedly) that they would not testify at trial.

[b] Rule 804(a) -- Claim of Privilege

United States v. Salerno, 505 U.S. 317 (1992) , *rev'g 937 F.2d 797* , *modified & reh'g en banc denied, 952 F.2d 624 (2d Cir. 1991)* , *on remand sub nom. United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993)* (en banc): These opinions, in which the Courts found that witnesses who declared their self-incrimination privilege, after testifying before the grand jury, were unavailable for trial, are discussed in the Editorial Explanatory Comment, *§ 804.02[6].*

United States v. Gary, 74 F.3d 304 (1st Cir. 1996) : The Court affirmed a conviction for firearms possession by a felon, holding that the defendant was properly precluded from calling a witness who had testified at a first trial and who indicated that he would testify for the defense on direct examination but would invoke his privilege against

self-incrimination on cross-examination. The witness was testifying about the merits of the case, not about a collateral matter, so he could not properly testify for one side and avoid examination by the other. Because the witness was unavailable, his former testimony was admissible.

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) : The Court affirmed a conviction for felon firearm possession, rejecting the defendant's argument that his own state grand jury testimony should have been admitted as prior testimony. The Court concluded that "[w]hen the defendant invokes his *Fifth Amendment* privilege, he has made himself unavailable to any other party, but he is not unavailable to himself." In *United States v. Rodriguez*, n6 a conviction for aiding and abetting the making of a false statement on a passport application was affirmed. The Court found that the unavailability of a declarant of exculpatory statements against penal interest was sufficiently established when the declarant claimed the privilege against self-incrimination and refused to testify, even though she had entered an *Alford* plea of guilty.

United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982) : In a prosecution for conspiracy, a witness, who had been threatened with indictment if she testified for the defendant at his trial, testified at a hearing on the threats and was cross-examined by the prosecution about her knowledge of the case. The witness refused to testify at trial, the government argued that the self-incrimination privilege had been waived, and the Trial Judge refused to permit the witness' testimony at the hearing to be used on the defendant's behalf. The Court held exclusion of the former testimony was reversible error. If the Judge believed that the privilege had been waived he should have ordered the witness to testify. Had she refused, even if her refusal were improper, she would have been unavailable and former testimony could have been used.

United States v. Kimball, 15 F.3d 54 (5th Cir. 1994) : Where the defendant invoked his *Fifth Amendment* privilege not to testify at a retrial on charges of firearms possession, he could not introduce exculpatory testimony he gave at the first trial. The proponent of former testimony may not create the condition of unavailability and then benefit therefrom. In *United States v. Fernandez-Roque*, n7 the Court found that the defendant, charged with obstruction of criminal investigations and interstate travel in aid of racketeering, did not make a sufficient showing that a witness in a previous criminal conspiracy case was unavailable at trial. The defendant asserted that the witness would claim the *Fifth Amendment* privilege, but did not subpoena him or provide the Trial Judge with an opportunity to evaluate any refusal to testify and whether any type of immunity might be available, so the witness' former testimony was inadmissible.

United States v. Pelton, 578 F.2d 701 (8th Cir. 1978) : Affirming Mann Act convictions, the Court ruled that a defendant failed to establish that a witness was unavailable to testify at trial when his lawyer stated to the Trial Judge that the witness' attorney had indicated that, because of a self-incrimination fear, he would advise his client not to testify. The showing was inadequate to establish that the witness *actually* would not testify.

United States v. Montague, 421 F.3d 1099 (10th Cir. 2005) : The defendant's wife had identified firearms at their home as his to officers investigating a domestic violence complaint, but later told defense investigators she had framed her husband, and then before a grand jury changed her story yet again to confirm his ownership. When called by the government at his trial for felon firearm possession, she invoked her privilege against adverse spousal testimony; her grand jury testimony was then admitted under *Rule 804(b)(6)*. Affirming, the Court held that the Judge properly recognized the wife's testimonial privilege and was not required to force her to testify regarding her reasons for invoking that privilege. Furthermore, the Court found there was sufficient evidence, from the defendant's communicating with his wife while in jail despite an order not to and his history of spousal abuse, to conclude that he had procured his wife's unavailability as a witness. Finally, the Court held that the defendant's wrongdoing was a forfeiture of his confrontation claim, and that that equitable principle survived *Crawford*.

[c] Rule 804(a) -- Dead Man's Statute

Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996) : In an art dealer's breach of contract action against an artist's estate, the Court indicated that the dealer, who was disqualified from testifying to transactions with the artist by New York's Dead Man's Statute, was not "unavailable" under the Rule because the Dead Man's Statute is a rule of competency, not of privilege. In our view, this result unfortunately follows from what appears to be a legislative oversight; "incompetent" witnesses are as unavailable as those claiming privilege, and many states treat statutory incompetency as a ground of unavailability.

[d] Rule 804(a) -- Depositions

Battle v. Memorial Hosp., 228 F.3d 544 (5th Cir. 2000) : After the infant plaintiff suffered extensive neurological injuries from viral encephalitis, he and his parents brought a medical malpractice action against the physicians and hospitals that had treated him. During discovery the defendants deposed a microbiomedical researcher who had conducted tests that supported the plaintiffs' position. When the plaintiffs offered the deposition, the Magistrate Judge conducting the trial excluded it because there was no showing that the researcher was unavailable. Reversing in part a judgment for the defendants, the Court held that because the deponent was more than 100 miles from the place of trial, the unavailability requirement of *Fed. R. Civ. P. 32(a)(3)(B)* was satisfied.

[e] Rule 804(a) -- Memory Loss

North Miss. Commun. Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986) : The Court held that a witness was not unavailable where he remembered the general subject matter of a conversation but did not remember certain details. In *United States v. Amaya*, n8 the Court upheld the admission of testimony in a heroin conspiracy case of prior testimony from a witness who was injured in an automobile accident and sustained a loss of memory (which was shown might never return) regarding his prior testimony. The Court noted that the duration of an illness is a proper element for consideration in making a determination of unavailability, but stated that, to constitute unavailability, the duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed.

[f] Rule 804(a) -- Mental or Physical Infirmity

United States v. Keithan, 751 F.2d 9 (1st Cir. 1984) : The Court sustained convictions for mail fraud arising out of a scheme to defraud elderly persons in the sale of insurance policies. It held that the Trial Judge properly found two witnesses to be unavailable and their depositions to be admissible. One witness was 87 years old and suffered from a back condition that kept him from walking. The other was 83 years old and suffered from a heart condition that kept her confined at home.

Complaint of Bankers Trust Co., 752 F.2d 874 (3d Cir. 1984) : Although the Court found that the District Judge had erred in failing to invoke a commission for the purpose of taking testimony in India relevant to a claim by the mother of a deceased seaman that her name had been forged upon a special power of attorney and release, it upheld the Judge's ruling that the mother's deposition, taken pursuant to another commission, could not be used as former testimony. The mother was not shown to be unavailable on the basis of her lawyer's assertion that she suffered a physical infirmity, where the lawyer had never met the mother and no affidavits were filed in support of the assertion. After a jury was unable to reach a verdict in *United States v. Faison*, n9 a prosecution for wire fraud and interstate transportation of securities, a second trial was scheduled. When it began, the key government witness, who had pleaded

guilty and testified at the first trial, was in the hospital with a heart problem. The Court held it was an abuse of discretion to admit the witness' testimony from the first trial rather than to grant a continuance for a reasonable period; the case was remanded for consideration of whether it was likely that the witness would be available to testify at a new trial.

United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) : In a RICO case, the Court upheld the introduction of a videotape deposition of a prosecution witness who was incapacitated by a stroke. The defendants were present at the deposition, and it was used only after the witness remained incapacitated following a continuance.

United States v. Donaldson, 978 F.2d 381 (7th Cir. 1992) : Affirming a conviction for bank robbery, the Court held there was no abuse of discretion in finding that a bank teller was unavailable so that her videotaped deposition might be used in a four-day trial. The teller had recently delivered a child, had been hospitalized the day before she was to testify with chest pain, and experienced chest pain again when she attempted to rise from her bed the day of her scheduled testimony.

United States v. McGuire, 307 F.3d 1192 (9th Cir. 2002) : Before the retrial (after a hung jury) of a complex fraud case against the Montana Freemen, which also involved a charge of theft of sound recording equipment from an ABC news crew, a doctor for one of the news crew members wrote to the Trial Judge to say that the victim would be unable to travel to trial because of her pregnancy. The Court found no abuse of discretion in admitting her testimony at the first trial and in the findings that a 28-week pregnant mother was unable to undergo the stress of testimony and that adhering to the trial date was important to accommodate so many competing schedules. In a legal malpractice action, *Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992)* , the Court held that a witness had been sufficiently shown to be unavailable where, although he could have testified on the afternoon of the first day of trial, he required surgery the next morning that would leave him indisposed for one to two weeks.

Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983) : The Court affirmed a judgment for officials in an action brought by a mother whose son was killed by a deputy marshal during the course of an eviction. The Trial Judge found the deputy who shot the deceased to be unavailable because of mental disability and permitted the deputy's deposition to be admitted. The Court ruled that the diagnosis by the deputy's psychiatrist indicated a probability that the deputy would be unable to testify for a lengthy period, which justified the finding of unavailability. The Court found in *United States v. Acosta* n10 that the uncorroborated statement of defense counsel that the defendant's wife was unavailable to testify because of her child's illness was insufficient to support introduction of her testimony at a suppression hearing.

[g] Rule 804(a) -- Mid-Trial Availability

Bickel v. Korean Air Lines Co., 96 F.3d 151 (6th Cir. 1996) : In the course of affirming in part judgments for the plaintiffs in Warsaw Convention wrongful death actions, the Court held that videotaped testimony from a prior trial was properly admitted. The experts were testifying elsewhere and were unavailable when the videotaped testimony began. Before the videotaped testimony was completed, however, the experts had finished their testimony in the other proceeding and had become available. The Court held that under these circumstances it was not error to finish the videotape testimony, rather than to call the experts at that point.

[h] Rule 804(a) -- Other Unavailability

Secretary of Labor v. DeSisto, 929 F.2d 789 (1st Cir. 1991) : In reversing a judgment for the Secretary in a Fair

Labor Standards Act case, the Court noted that the hearsay exceptions requiring witness unavailability do not apply when the witness' unavailability is due solely to a limit imposed by the Trial Judge.

United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994) : Affirming convictions for marijuana importation, the Court noted that the custodian of a Panamanian bank's records would be unavailable because of the Panamanian bank secrecy laws.

[i] Rule 804(a) -- Party's Unavailability

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) : The Court affirmed a conviction for felon firearm possession, rejecting the defendant's argument that his own state grand jury testimony should have been admitted. It noted that "[w]hen the defendant invokes his *Fifth Amendment* privilege, he has made himself unavailable to any other party, but he is not unavailable to himself."

United States v. Bollin, 264 F.3d 391 (4th Cir. 2001) : Affirming convictions arising from involvement in an investment fraud scheme and the subsequent coverup, the Court found no error in refusing to admit exculpatory statements that the defendant made to a grand jury. This testimony could not be admitted as prior testimony because the defendant was not unavailable to testify at trial, since a criminal defendant who invokes his *Fifth Amendment* privilege makes himself unavailable to other parties, but not to himself.

United States v. Kimball, 15 F.3d 54 (5th Cir. 1994) : Where the defendant invoked his *Fifth Amendment* privilege not to testify at a retrial on charges of firearms possession, he could not introduce exculpatory testimony he gave at the first trial. The proponent of former testimony may not create the condition of unavailability and then benefit therefrom.

Garcia-Martinez v. City & County of Denver, 392 F.3d 1187 (10th Cir. 2004) : The plaintiff, an illegal immigrant, brought a § 1983 action for use of excessive force in an arrest. Fearing arrest for immigration offenses, he returned to Honduras before the trial. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in excluding a deposition of the plaintiff, which was offered in lieu of his live testimony. The plaintiff's absence at trial was calculated, so it was "due to the procurement or wrongdoing" of the proponent, and his failure to attempt to obtain a temporary visa or to use an alternative to live testimony, such as video-conferencing, meant that he had not demonstrated "a good faith effort ... to obtain the declarant's presence at trial using reasonable means." One Judge dissented, on the ground that the plaintiff's absence was not procured by him but by the government, which placed him under a standing deportation order, and any effort to obtain a temporary visa would have been futile.

[j] Rule 804(a) -- Procuring Unavailability

United States v. Dolah, 245 F.3d 98 (2d Cir. 2001) : The Court held that government witnesses who declared their privilege against self-incrimination were unavailable under *Rule 804(a)*, and that the government did not wrongfully procure their unavailability by the selective use of immunity (immunizing some witnesses for trial but not those whose hearsay statements the government proffered).

United States v. Reed, 227 F.3d 763 (7th Cir. 2000) : In Reed's first trial for bank robbery, his codefendant Simmons testified as a cooperating witness. The trial ended in a hung jury, and by the time of Reed's retrial, Simmons had already been sentenced. When Simmons refused to testify at the second trial, his prior testimony was admitted under *Rule 804(b)(1)*. Affirming Reed's conviction, the Court rejected the argument that the government had procured

Simmons' unavailability by arranging to have him sentenced before Reed's second trial began. The Court found that the sentencing Judge, and not the government, retained control over the date and time of Simmons' sentencing.

Garcia-Martinez v. City & County of Denver, 392 F.3d 1187 (10th Cir. 2004) : The plaintiff, an illegal immigrant, brought a § 1983 action for use of excessive force in an arrest. Fearing arrest for immigration offenses, he returned to Honduras before the trial. Affirming a judgment for the defendants, the Court held there was no abuse of discretion in excluding a deposition of the plaintiff, which was offered in lieu of his live testimony. The plaintiff's absence at trial was calculated, so it was "due to the procurement or wrongdoing" of the proponent, and his failure to attempt to obtain a temporary visa or to use an alternative to live testimony, such as video-conferencing, meant that he had not demonstrated "a good faith effort ... to obtain the declarant's presence at trial using reasonable means." One Judge dissented, on the ground that the plaintiff's absence was not procured by him but by the government, which placed him under a standing deportation order, and any effort to obtain a temporary visa would have been futile.

[k] Rule 804(a) -- Requirement of Depositions

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980) , *rev'd on other grounds*, *723 F.2d 238 (3d Cir. 1983)* , *rev'd on other grounds*, *475 U.S. 574 (1986)* : The Court noted that inability to procure a witness' attendance by process or other reasonable means satisfies the Rule. It concluded that *Rule 804(b)(1)* does not require that an effort be made to take depositions outside the country before offering former testimony, but that more effort must be expended in connection with statements offered under *Rule 804(b)(3)*.

Campbell v. Coleman Co., 786 F.2d 892 (8th Cir. 1986) : This case is discussed in the Editorial Explanatory Comment, at *§ 804.02[3]*.

[l] Rule 804(a) -- Unprivileged Refusal To Testify

Jennings v. Maynard, 946 F.2d 1502 (10th Cir. 1991) : In affirming denial of a habeas corpus petition, the Court noted that it was not necessary to order a witness to testify before a finding of unavailability was made, where the witness testified in an *in camera* hearing that he would not obey such an order and there was a determination that his reason for refusing to testify -- the threats that most likely came from the petitioner made against the witness and his family -- made an order to testify inappropriate. Most importantly, no order was made because the witness would have stated that he had been threatened, which would have prejudiced the defendant's right to an impartial jury.

[m] Rule 804(a) -- Witness Available to One Party but Not to Another

United States v. Dolah, 245 F.3d 98 (2d Cir. 2001) : The Court held that government witnesses who declared their privilege against self-incrimination were unavailable under *Rule 804(a)*. The Court rejected the defendants' argument that the government's power to grant immunity meant that these witnesses were in fact available to the government.

United States v. Bollin, 264 F.3d 391 (4th Cir. 2001) : Affirming convictions arising from involvement in an investment fraud scheme and the subsequent coverup, the Court found no error in refusing to admit exculpatory statements that the defendant made to a grand jury. This testimony could not be admitted as prior testimony because the defendant was not unavailable to testify at trial, since a criminal defendant who invokes his *Fifth Amendment* privilege makes himself unavailable to other parties, but not to himself.

[2] Rule 804(b)(1) -- Hearsay Exceptions -- Former Testimony

[a] Rule 804(b)(1) -- Adequacy of Prior Examination

United States v. Ciak, 102 F.3d 38 (2d Cir. 1996) : At the retrial of a felon firearm possession case, the testimony given at the first trial by a prosecution witness who had become unavailable was read into the record. The defendant argued that the testimony was inadmissible under *Rule 804(b)(1)* and the *Confrontation Clause* because defense counsel at the first trial was conflicted (which was why the retrial was ordered). Affirming, the Court refused to find the cross-examination at the earlier trial inadequate *per se*, and looked to the transcript of the witness' actual testimony. It found that counsel had made a "serious effort" to undermine and discredit the witness, and that the conflict under which defense counsel labored had nothing to do with the witness.

[b] Rule 804(b)(1) -- Bail or Detention Hearing

United States v. Fischl, 16 F.3d 927 (8th Cir. 1994) : The Court held in a prosecution for distributing methamphetamine that there was no abuse of discretion in excluding testimony given at a detention hearing by an accomplice who asserted his self-incrimination privilege at trial. The Trial Judge credited the government's contention that it did not have a similar motive to develop the testimony at the hearing; even if the evidence was admissible, any error was harmless.

[c] Rule 804(b)(1) -- Constitutional Concerns

United States v. McKeeve, 131 F.3d 1 (1st Cir. 1997) : Affirming a conviction for attempting to export computer equipment to Libya, the Court found no error in the admission of a transcript of a deposition taken in England. The deponent, a British national, was an important witness in the case and refused to attend the proceedings in the United States. The deposition was conducted under the auspices of a British judicial officer, and in accordance with the provisions of *Fed. R. Crim. P. 15*; defense counsel was present and cross-examined the witness, and the defendant, while remaining in prison in the United States, could hear the proceedings and confer by phone with defense counsel. The Court concluded that the deposition procedures were not "so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable." Accordingly, the deposition testimony was admissible under *Rule 804(b)(1)*, and satisfied the then-applicable *Ohio v. Roberts Confrontation Clause* analysis. We note that under *Crawford v. Washington* the deposition was "testimonial" but the defendant was accorded an opportunity to cross-examine the witness through counsel.

United States v. Mann, 161 F.3d 840 (5th Cir. 1998) : The Court held in a prosecution for offenses arising out of dealings with financial institutions that a deposition taken in a civil suit of a codefendant was properly admitted against the codefendant, where the civil suit was brought by the FDIC on generally the same issues as were raised in the criminal prosecution, and the codefendant against whom the deposition was offered had been a party to the suit when it was taken. Although the deponent did not testify in the criminal trial, the Court found no *Bruton* violation in admitting the deposition, since *Rule 804(b)(1)* satisfies the *Confrontation Clause*. We note that the same result obtains for this hearsay exception under *Crawford v. Washington* as under the prior *Ohio v. Roberts* analysis.

[d] Rule 804(b)(1) -- Depositions

Battle v. Memorial Hosp., 228 F.3d 544 (5th Cir. 2000) : After the infant plaintiff suffered extensive neurological injuries from viral encephalitis, he and his parents brought a medical malpractice action against the physicians and hospitals that had treated him. During discovery the defendants deposed a microbiomedical researcher who had conducted tests that supported the plaintiffs' position. The Magistrate Judge conducting the trial ruled that there was no

showing that the researcher was unavailable and the deposition was hearsay not satisfying *Rule 804(b)(1)* because the defendants did not have the requisite similar motive to develop the testimony as would be the case at trial, and thus inadmissible. Reversing in part a judgment for the defendants, the Court held that because the deponent was more than 100 miles from the place of trial, the unavailability requirement of *Fed. R. Civ. P. 32(a)(3)(B)* was satisfied. The Court also concluded that the defendants had sufficiently similar motive to develop the testimony in the deposition, so it was error to exclude the deposition testimony. In *United States v. Mann, 161 F.3d 840 (5th Cir. 1998)* , a prosecution for offenses arising out of dealings with financial institutions, the Court held that a deposition of a codefendant taken in a civil suit was properly admitted against the codefendant, where the civil suit was brought by the FDIC on generally the same issues as were raised in the criminal prosecution, and the defendant against whom the deposition was offered had been a party to the suit when it was taken.

McKnight v. Johnson Controls, Inc., 36 F.3d 1396 (8th Cir. 1994) : The Court held, in a personal injury action against the manufacturer by the user of a car battery that exploded, that there was no error in admitting the deposition testimony of a witness who had been injured in another explosion involving a battery manufactured by the defendant. The defendant had every incentive to cross-examine the testimony of the deponent, who was also suing for injuries in a substantially similar battery explosion.

[e] Rule 804(b)(1) -- Foreign Examination

United States v. McKeeve, 131 F.3d 1 (1st Cir. 1997) : Affirming a conviction for attempting to export computer equipment to Libya, the Court found no error in the admission of a transcript of a deposition taken in England. The deponent, a British national, was an important witness in the case and refused to attend the proceedings in the United States. The deposition was conducted under the auspices of a British judicial officer, and in accordance with the provisions of *Fed. R. Crim. P. 15*; defense counsel was present and cross-examined the witness, and the defendant, while remaining in prison in the United States, could hear the proceedings and confer by phone with defense counsel. The Court concluded that the deposition procedures were not "so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable." Accordingly, the deposition testimony was admissible under *Rule 804(b)(1)*, and satisfied the then-applicable *Ohio v. Roberts Confrontation Clause* analysis. We note that under *Crawford v. Washington* the deposition was "testimonial" but the defendant was accorded an opportunity to cross-examine the witness through counsel.

United States v. Salim, 855 F.2d 944 (2d Cir. 1988) : Denying a motion for a new trial in a narcotics case, the Trial Judge held that deposition testimony taken in France was admissible under the residual exception in light of the deponent's unavailability and the circumstantial guarantees of reliability. The Court held that the deposition was admissible under *Rule 804(b)(1)*, because it was taken "in compliance with law." The Court reasoned that comity required acquiescence in the insistence of the French Court that French law be applied to the taking of the deposition. It concluded that cross-examination was not rendered inadequate by the requirement that questions be submitted in writing.

United States v. Kelly, 892 F.2d 255 (3d Cir. 1989) : In affirming a conviction for drug offenses, the Court held that videotaped depositions of witnesses taken in Belgium were properly admitted. The witnesses were unwilling to attend trial in the United States, and the government could not compel their attendance; the depositions were taken in accordance with American procedures before an American Judge applying American evidentiary rules; and even though the defendant was not physically present, he could listen to the depositions live and consult with his attorneys through an open private telephone line.

United States v. King, 552 F.2d 833 (9th Cir. 1976) : Affirming convictions for narcotics offenses tried prior to the effective date of the Rules, the Court upheld admission of videotaped depositions (taken pursuant to *18 U.S.C. § 3503*) of unindicted coconspirators who were imprisoned in Japan. The defendants and their attorneys were present in Japan for the taking of the depositions.

Mainland Indus. v. Standal's Patents Ltd., 799 F.2d 746 (Fed. Cir. 1986) : The Court found that a videotaped deposition of a witness (since deceased) that had been taken in a prior patent action in Canada met the requirements of the Rule and was properly admitted.

[f] Rule 804(b)(1) -- Grand Jury Testimony

United States v. Salerno, 505 U.S. 317 (1992) , *rev'g 937 F.2d 797* , *modified & reh'g en banc denied, 952 F.2d 624 (2d Cir. 1991)* , *on remand sub nom. United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993)* (en banc): These decisions, which require a finding of similar motive to cross-examine before exculpatory grand jury testimony can be admitted against the prosecution at trial, are discussed in the Editorial Explanatory Comment, *§ 804.02[6]*.

United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990) : The Court reversed wire fraud convictions, holding that if (under the Circuit's minority view) the witness waived his self-incrimination privilege by testifying before the grand jury, the defendants were entitled to compel him to testify at trial, and if he did not waive the privilege and was therefore unavailable at trial, they were entitled to introduce his grand jury testimony, in which the government had the same motive and opportunity to develop testimony on the defendant's guilt or innocence.

United States v. Omar, 104 F.3d 519 (1st Cir. 1997) : The Court held, in a case arising from an armored car robbery, that there was no error in excluding exculpatory grand jury testimony from a witness who had died before trial. It was arguable that the government had no meaningful opportunity to discredit the witness at the time, since there was no indication that there was any evidence then available to it with which to confront and contradict the witness. In any event, there was no evident motive to discredit the witness, since other evidence allayed any fear that the grand jury would refuse to indict based on the witness' testimony.

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) : The Court affirmed a conviction for felon firearm possession, rejecting the defendant's argument that his own state grand jury testimony should have been admitted. The Court concluded that the prosecutorial interest in cross-examining him before the grand jury was not the same as at trial, and that the United States was not a party to that proceeding.

United States v. Klauber, 611 F.2d 512 (4th Cir. 1979) : The Court implied that it might admit exculpatory grand jury statements against the government.

United States v. Foster, 128 F.3d 949 (6th Cir. 1997) : The Court reversed a conviction for cocaine offenses because the defendant had not been permitted to introduce exculpatory testimony given by a witness before the grand jury. The Court held that the government had the same motive and opportunity in the grand jury as it would have had at trial to develop the witness' testimony. It distinguished *United States v. DiNapoli, supra* , on the grounds that the testimony here was given a month before any indictment was returned and there was no indication from the grand jurors that the group as a whole did not believe the witness.

[g] Rule 804(b)(1) -- Motive To Develop the Testimony

[i] Rule 804(b)(1) -- Civil Cases

Pacelli v. Nassau County Police Dep't, 639 F. Supp. 1382 (E.D.N.Y. 1986) : The Court granted summary judgment for the defendants in an action by a convicted murderer who claimed his civil rights were violated, ruling that a statement of an alleged murder accomplice in an unrelated prosecution that was inconsistent with his confession on a point was inadmissible. The prosecutor in the unrelated case had no motive to question the accomplice concerning the substantive accuracy of his statement. In *In re Sterling Nav. Co., 444 F. Supp. 1043 (S.D.N.Y. 1977)* , the Court found that an unofficial creditors committee did not have the same motivation as a bankruptcy trustee.

Complaint of Bankers Trust Co., 752 F.2d 874 (3d Cir. 1984) : In an action by the mother of a deceased seaman claiming that her name had been forged upon a special power of attorney and release, the Court upheld a ruling that the mother's deposition could not be used as former testimony. The shipowners who opposed the mother in the instant case had no opportunity to examine the mother in the deposition. Although the shipowners' law firm was a defendant in the other proceeding and did have a chance to examine the mother, the firm and the shipowners had dissimilar motives for examining the mother.

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119 (4th Cir. 1995) : The Court reversed a summary judgment for dairies sued by retail food stores for alleged antitrust violations, holding that testimony by a dairy official testifying as a government witness in a prior criminal conspiracy trial was admissible as former testimony. The Court found that the defendants' motivation in the criminal trial (to show that no conspiracy occurred) was substantially similar to the dairies' motive in the civil trial (to show that it never occurred, or if it did, that no affirmative acts of concealment took place). It was sufficient that the motive in the former proceeding was similar, even if not identical, to the motive in the instant case.

Murphy v. Owens-Ill., Inc., 779 F.2d 340 (6th Cir. 1985) : Affirming a judgment for a defendant manufacturer in an asbestosis case, the Court upheld the exclusion of deposition testimony given by a medical expert in a prior case. It found that the party in the previous case had a dissimilar motivation to cross-examine the doctor and that the testimony was therefore inadmissible.

Oberlin v. Marlin Am. Corp., 596 F.2d 1322 (7th Cir. 1979) : A deposition taken during a separate lawsuit in another state was excluded on the ground that the defendant in the instant case did not have the same motivation for cross-examination in the first case.

McKnight v. Johnson Controls, Inc., 36 F.3d 1396 (8th Cir. 1994) : The Court held, in a personal injury action against the manufacturer by the user of a car battery that exploded, that there was no error in admitting the deposition testimony of a witness who had been injured in another explosion involving a battery manufactured by the defendant. The defendant had every incentive to cross-examine the testimony of the deponent, who was also suing for injuries in a substantially similar battery explosion. In *Hannah v. City of Overland*, n11 the Court affirmed judgments for police officers sued for false arrest. It held that deposition testimony of third parties that they felt pressured and threatened by the police into implicating the plaintiff in murder was inadmissible. The depositions were taken in connection with a criminal prosecution, and, even assuming that the prosecutor was a predecessor in interest of the defendant police officers, the prosecutor did not have a motive similar to the defendants' to develop the testimony of these witnesses. In *DeLurya v. Winthrop Labs*, n12 the plaintiff claimed that the defendant's drug Talwin caused her to become drug dependent and resulted in certain injuries. Reversing a judgment for the plaintiff, the Court found that deposition testimony given in a worker's compensation proceeding by a psychiatrist who had treated the plaintiff and who was

dead at the time of trial should have been admitted as former testimony. Since one issue in that proceeding was whether the plaintiff abused drugs and had been warned not to use Talwin, the Court reasoned that the plaintiff's motive to cross-examine was similar to the motive that existed at trial.

New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646 (10th Cir. 1989) : An insurance company brought an action to set aside a life insurance policy as fraudulently procured by a beneficiary, who allegedly conspired to murder the insured, her first husband. The Court held that testimony given by an unavailable witness at the trial of another conspirator was properly excluded, as the defendant in that case was not the beneficiary's predecessor in interest and was not disposed to protect her interests there, so he had no "like motive" to develop the same facts.

[ii] Rule 804(b)(1) -- Motive To Develop the Testimony -- Criminal Cases

United States v. Salerno, 505 U.S. 317 (1992) , *rev'g 937 F.2d 797* , *modified & reh'g en banc denied, 952 F.2d 624 (2d Cir. 1991)* , *on remand sub nom. United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993)* (en banc): These decisions, requiring a similar motive to cross-examine before grand jury testimony can be admitted against the government, are discussed in the Editorial Explanatory Comment, *§ 804.02[6]*.

United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) : After the defendant was acquitted of murder charges in State Court, he was tried for federal firearms offenses in connection with the homicide. The Court held there was no error in admitting another participant's testimony from the state trial regarding the events preceding and following the murders, since the defendant's interest in discrediting the account in the state trial could hardly have been any stronger at the federal trial. However, the defendant had little real incentive at the state murder trial to attack the coparticipant's statements concerning ownership or possession of the rifle at issue in the federal firearms case; nonetheless, any error in admitting this part of the state testimony was harmless because the defendant had himself admitted the rifle belonged to him during direct examination at the state trial.

United States v. Tannehill, 49 F.3d 1049 (5th Cir. 1995) : The defendant was tried with six others for fraud, but a mistrial was declared when the jury was unable to reach a verdict. He was then tried separately on the same charges, and a witness' testimony from the prior trial was admitted against him under *Rule 804(b)(1)*. The Court rejected the defendant's argument that at the first trial his strategy was to "disappear into the woodwork and hope for the best," and responded that his motive in cross-examining was the same at both trials: "to discredit the witness and separate himself from the other members of the conspiracy." In a mail fraud prosecution, *United States v. McDonald*, n13 the Court suggested that a civil litigant may be a predecessor in interest to the government so that deposition testimony in a civil case might be admissible on behalf of a criminal defendant. However, here the government and the civil litigant had sufficiently different strategies that the civil litigant's motives for cross-examining the deponent were different from the government's, so there was no error in excluding the deposition testimony. In *United States v. Atkins*, n14 the Court affirmed a narcotics conviction, finding that the government did not have the same motive in examining a witness at a hearing on the admissibility of coconspirators' statements as at trial, and that a transcript of the hearing was properly excluded.

United States v. Vartanian, 245 F.3d 609 (6th Cir. 2001) : Affirming convictions for interfering with the civil housing rights of real estate agents and a family, the Court held it was proper to admit the testimony of a deceased witness who had testified at an earlier civil trial against the defendant. The testimony in the civil case addressed allegations that the defendant communicated threats to the real estate agents intended to intimidate them and to interfere with a family's right to purchase a home. Since these were the same issues on which the former testimony was admitted in the criminal trial, "the motives of the civil action lawyer would necessarily be synonymous with those of the criminal

defense attorney regarding the elicitation or possible challenge to such testimony." In *United States v. Licavoli*, n15 the Court affirmed RICO convictions, holding that the prior testimony of a witness in state prosecutions charging the defendants with murder was admissible, since the witness refused to testify, even though the government offered immunity, and the murder and conspiracy to commit murder charges brought in State Court were the predicate acts charged in the RICO prosecution. The witness had testified in several different state trials and the Trial Judge instructed the jury that it could use the witness' prior testimony in a particular state case only against the defendant charged in that case. Although the Court agreed with the defendants "that it may be humanly impossible for a juror to completely compartmentalize multiple versions of an event and apply each version only against a certain defendant," it concluded that the witness' testimony was substantially the same in all the state cases.

United States v. Reed, 227 F.3d 763 (7th Cir. 2000) : In Reed's first trial for bank robbery, his codefendant Simmons testified as a cooperating witness. The trial ended in a hung jury, and by the time of Reed's retrial, Simmons had already been sentenced. When he refused to testify at the second trial, his prior testimony was admitted under *Rule 804(b)(1)*. Affirming Reed's conviction, the Court rejected Reed's argument that his motive to cross-examine Simmons at the second trial differed from that at the first trial, given that Simmons had pleaded guilty and been sentenced in the interim. The fact that Simmons "was actually sentenced and received a downward departure after the first trial, does not really change Reed's motives on cross. Simmons had entered into the plea agreement well before the first trial and Reed knew that he would be getting a substantial reduction in his sentence in exchange for cooperation. He used this information to impeach Simmons on cross-examination." In a drug conspiracy case, *United States v. Powell, 894 F.2d 895 (7th Cir. 1990)* , the defendant called as a witness a coconspirator who invoked his self-incrimination privilege. The Court held there was no error in excluding former testimony from the witness' guilty plea hearing because, regardless of its opportunity to cross-examine at such a hearing, the government's motive in examining, to assure that the plea is voluntary and that a factual basis exists for it, is not the same as at a trial. In *United States v. Feldman*, n16 the Court reversed wire fraud convictions because a deposition taken in an earlier civil proceeding was introduced against defendants who had no notice at the time of the deposition that the witness might incriminate them on criminal charges. The Court found that *Rule 804(b)(1)* was violated, since the defendants were not adverse to the witness at the time of the deposition and therefore did not have a similar motive or realistic opportunity to examine the witness. In *United States v. Pizarro*, n17 a prosecution for the sale of heroin, the Court reversed a conviction because the Trial Judge refused to admit testimony given by a codefendant at his separate trial that his supplier was someone other than the defendant. The government had sufficient motivation to demonstrate that the codefendant was untruthful in his separate trial sufficient to warrant admission of his prior testimony.

United States v. Fischl, 16 F.3d 927 (8th Cir. 1994) : In a prosecution for distributing methamphetamine, the Court held that there was no abuse of discretion in excluding testimony given at a detention hearing by an accomplice who asserted his self-incrimination privilege at trial. The Trial Judge credited the government's contention that it did not have a similar motive to develop the testimony at the hearing; even if the evidence was admissible, any error was harmless.

United States v. Poland, 659 F.2d 884 (9th Cir. 1981) : The Court held that identification testimony given at a hearing on a defendant's motion to suppress in-court identification testimony could be admitted when the identification witness died. The basic questions at the hearing concerned suggestiveness and reliability. Thus, the defense had the same motive to examine the witness at the hearing and at the trial.

[h] Rule 804(b)(1) -- Opportunity To Develop the Testimony

United States v. North, 910 F.2d 843 (D.C. Cir. 1990) , modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990) : Vacating and reversing convictions for crimes relating to a congressional investigation, the Court held that the

defendant's proffer of a videotape of an unavailable witness' testimony before Congress was properly rejected, as a congressional committee is not the same party as an executive branch prosecutor for purposes of the former testimony exception and the independent prosecutor in this case had no opportunity (and did not desire) to develop the witness' congressional testimony.

United States v. Shaw, 69 F.3d 1249 (4th Cir. 1995) : The Court held that testimony given by witnesses (since deceased) at the trial of a coconspirator was not admissible under *Rule 804(b)(1)* because the defendant had no opportunity to develop the testimony, even if the reason for the missed opportunity was that he was a fugitive from justice at the time.

Rodriguez v. Pacificare of Tex., Inc., 980 F.2d 1014 (5th Cir. 1993) : Affirming a summary judgment for the defendants in an action against a physician and an HMO for failing to provide adequate medical care and coverage, the Court held there was no error in rejecting deposition testimony of a physician involved in a state worker's compensation case that had been offered by the plaintiff to show breach of the standard of care, as neither defendant was a party to the compensation case and they never had an opportunity to cross-examine the deposed physician.

Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993) : The Court granted habeas corpus relief to a petitioner whose conviction for drug offenses was based on the video deposition of a paid police informant that was taken in the absence of both the petitioner and his counsel. In *In re Paducah Towing Co.*, n18 at a Coast Guard hearing held to determine whether to revoke the license of the captain of Paducah's tow boat following a barge accident, the captain of another boat testified to what he had observed. Although he had been called by the Coast Guard, the witness testified as an expert and answered hypothetical questions favorably towards Paducah. The examiner refused to permit the Coast Guard representative to impeach the witness. The Court held that this testimony was not admissible in a subsequent liability action under *Rule 804(b)(1)*, even assuming that the Coast Guard was a predecessor in interest of Exxon. The Coast Guard did not have an adequate opportunity to examine the witness on the prior occasion, as it had no lawyer present at the hearing, while Paducah did, and the Coast Guard representative did not have the necessary skills to test the witness' qualifications.

United States v. Koon, 34 F.3d 1416 (9th Cir. 1994) , aff'd in part on other grounds, 518 U.S. 81 (1996) : The Court affirmed the convictions of two police officers for the deprivation of the rights of an arrestee, Rodney King, who was severely beaten after a high-speed chase. This federal conviction was obtained after a state trial on the same matter resulted in a mistrial on one count and an acquittal on the others. The Court held that testimony in the state trial, by an officer who was at the scene of the beating (and who was actually acquitted as a defendant in both trials), was properly admitted under *Rule 804(b)(1)* against the two defendants in the federal trial. The defendants argued that their opportunity to cross-examine the testifying officer at the state trial was not similar to that which would have existed at the federal trial, since most of the officer's testimony concerned events that had been recorded on videotape, which had been enhanced in the time between the state and federal trials to make it more definitive and thus a more effective tool in cross-examination. The Court held, however, that the "failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine."

United States v. Harenberg, 732 F.2d 1507 (10th Cir. 1984) : Affirming convictions for misapplying bank funds, participating in a kickback scheme, and violating tax laws, the Court upheld the exclusion of deposition testimony given by two codefendants in a civil case, since the government had had no opportunity to examine the codefendants.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000) : The Court affirmed convictions for fraudulent absentee

voting. It found no error when the defendants had been precluded from introducing testimony given at a selective-prosecution hearing by a witness who was unavailable at trial. The witness had pleaded her *Fifth Amendment* rights in the middle of testifying, so the government did not have a sufficient opportunity to develop the testimony. At a trial for cocaine importation and possession in *United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994)* , testimony given by a coconspirator at a prior trial *in absentia* at which the defendant was neither present nor represented was admitted as a prior consistent statement, as former testimony, and under the residual exception. The Court held that it was not admissible under *Rule 804(b)(1)* because the defendant, being absent, had no opportunity to develop the testimony at the trial. However, the former testimony was properly admitted under the residual exception.

[i] Rule 804(b)(1) -- Plea Hearing Testimony

United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) : The Court affirmed a conviction for importing cocaine, holding there was no abuse of discretion in excluding statements from an accomplice's plea allocution that allegedly exculpated the defendant. Although the accomplice was unavailable because he invoked his *Fifth Amendment* right at the defendant's trial, the statements were not admissible as former testimony because the government does not have an opportunity and the same motive to develop the testimony at a plea proceeding.

United States v. Preciado, 336 F.3d 739 (8th Cir. 2003) : The Court affirmed a conviction for possession with intent to distribute methamphetamine, finding no error in the exclusion of statements made during a change-of-plea hearing for a codefendant who pleaded guilty. Some of those statements tended to exculpate the defendant, but the Court reasoned that the government's motive at the hearing was to assure that the codefendant's plea was knowing, voluntary, and intelligent, and that "it had no need or motive to develop testimony" about the one defendant who went to trial.

[j] Rule 804(b)(1) -- Predecessor in Interest

In re Screws Antitrust Litig., 526 F. Supp. 1316 (D. Mass. 1981) : The Court granted an *in limine* motion by antitrust plaintiffs to have testimony given at a criminal antitrust trial admitted in the instant case. The Court examined the legislative history of the term "predecessor in interest" and concluded that it could not be read so broadly as to include defendants in a criminal action and unrelated defendants in a subsequent civil action arising out of the same facts. However, the Court found that the prior testimony of the unavailable witness satisfied the residual exception.

United States v. Peterson, 100 F.3d 7 (2d Cir. 1996) : The Court affirmed a conviction for felon firearm possession, rejecting the defendant's argument that exculpatory grand jury testimony he gave in a parallel state proceeding should have been admitted. It was not admissible as prior testimony, because the federal government was not a party to the state proceeding, the state government could not fairly be considered a predecessor in interest of the federal government, and there was no evidence that the federal government participated in or controlled the state proceedings. This case is discussed in the Editorial Explanatory Comment, at *§ 804.02[2]*. In *In re Master Key Antitrust Litig.*, n19 the District Court ruled that the defendant could treat the government as a predecessor in interest of the plaintiff class for purposes of *Rule 804(b)(1)*. The Court stressed the "unique relationship" between government enforcement efforts and private litigation.

Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir. 1978) : In a Jones Act case arising from a fight between the plaintiff and a fellow seaman, the Court reversed the judgment for the plaintiff, holding that *Rule 804(b)(1)* permitted admission of the other seaman's testimony at a Coast Guard hearing (at which both seamen were represented by counsel and testified under oath), as the Coast Guard was a predecessor in interest of the seaman who prevailed

below. The Court noted that the Coast Guard preferred charges against the other seaman and attempted to prove what was alleged in the instant case. A concurring Judge argued that the residual exception, not *Rule 804(b)(1)*, required admission of the prior testimony, and that the majority's approach equated "predecessor in interest" with similarity of motive, an approach to *Rule 804(b)(1)* that Congress rejected. In *Creamer v. General Teamsters Local Union 326*, n20 a suit by former employees of a labor-leasing company to enforce rights under a collective bargaining agreement, the District Court found that the testimony in a prior criminal trial of the owner of the company was admissible against the company, since the owner was a predecessor in interest who had an opportunity and similar motive to examine the witnesses. It also found that the testimony in the prior criminal trial of a labor union official was inadmissible, since this official was not a predecessor in interest of the company and did not have a motive similar to that of the company in examining the witnesses.

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119 (4th Cir. 1995) : The Court reversed a summary judgment for dairies sued by retail food stores for alleged antitrust violations, holding that testimony by a dairy official testifying as a government witness in a prior criminal conspiracy trial was admissible as former testimony, even though the dairies were not the defendants in the criminal case. The Court reiterated that privity is not the gravamen of a *Rule 804(b)(1)* analysis; rather, the issue is whether the party who cross-examined the witness had a motive similar to that of the party against whom the testimony is offered. In any event, a privity requirement would be satisfied here because the individual defendants in the prior criminal case were officials of one of the defendant dairy companies in the present civil suit. In *Horne v. Owens-Corning Fiberglas Corp., 4 F.3d 276 (4th Cir. 1993)* , the Court affirmed a judgment for a manufacturer in an asbestos products liability action, holding that depositions taken in a prior suit against the defendant's predecessor company were properly admitted against the plaintiff, even though the plaintiff in the instant case was unrelated to the plaintiff in the prior litigation. It rejected the argument that privity is required and stated that "the party against whom the deposition is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination."

United States v. McDonald, 837 F.2d 1287 (5th Cir. 1988) : The Court suggested in a mail fraud prosecution that a civil litigant may be a predecessor in interest to the government so that deposition testimony in a civil case might be admissible on behalf of a criminal defendant. However, here the government and the civil litigant had sufficiently different strategies that the civil litigant's motives for cross-examining the deponent were different from the government's, so it was not error to exclude the deposition testimony.

United States v. Jackson-Randolph, 282 F.3d 369 (6th Cir. 2002) : Affirming convictions for fraud arising from false claims made to government agencies for meals for economically disadvantaged children, the Court found no error in the exclusion of prior testimony given by a codefendant at a state administrative hearing, which was conducted before the codefendant pleaded guilty. The Court noted that the "predecessor in interest" clause of *Rule 804(b)(1)* did not appear to apply in criminal cases, but without deciding the point held that the prosecution in the federal case had a different motive than the state in the administrative proceeding. In an asbestosis action, *Dykes v. Raymark Indus.*, n21 the Court held that one defendant was a successor in interest to another asbestos manufacturer, and found no error in admitting the former testimony of an expert. In *Clay v. Johns-Manville Sales Corp.*, n22 the Court, vacating a judgment for the defendant in a product liability action involving alleged injuries attributable to exposure to asbestos, adopted the approach to "predecessor in interest" advocated by the Third Circuit in *Lloyd v. American Export Lines, supra* , which focuses on similarity of motive in deciding whether a party in a prior case was a predecessor in interest.

In re Johns-Manville/Asbestosis Cases, 93 F.R.D. 853 (N.D. Ill. 1982) : In a suit against a building products manufacturer and certain subsidiaries by employees, the employees wished to use the depositions of a doctor who died after being deposed in two earlier asbestos-related cases against other subsidiaries. The Court found the testimony admissible as former testimony, since the corporate structure was "close-knit" and the doctor effectively worked for the

whole structure, making the subsidiaries in the former case predecessors in interest of the parties in the instant case.

Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455 (8th Cir. 1986) : In a dispute arising out of a barge breakaway, the Court upheld the admission of an unavailable witness' testimony in a prior trial. It found that another company was a predecessor in interest to Dreyfus, presumably because Dreyfus was in a position of possibly having to indemnify the other company for any damages it paid. The Court rejected the argument that the other company did not have a sufficient motive to examine the witness because it knew that it could pass on liability.

O'Banion v. Owens-Corning Fiberglas Corp., 968 F.2d 1011 (10th Cir. 1992) : Affirming a judgment for the defendants in an action for asbestos-related disease, the Court held it was error, because there was no showing of the witness' unavailability, to admit a transcript of expert testimony given in another asbestos action. The error was harmless, however, because the plaintiffs did not show how their interests were compromised, or the cross-examination inadequate, by the counsel for the party (described as the plaintiffs' "predecessor in interest") in the prior case.

[k] Rule 804(b)(1) -- Relationship to Other Rules

Li v. Canarozzi, 142 F.3d 83 (2d Cir. 1998) : An inmate, suing for civil rights violations following an alleged assault by corrections officers, sought to introduce deposition testimony given by another inmate, after the deponent refused to testify at trial. Although the deposition qualified as former testimony under *Rule 804(b)(1)*, the Court found no abuse of discretion in exclusion of the deposition under *Rule 403*. On the basis of the deponent's testimony (out of the jury's presence) that his answers had not been full, complete, and truthful, and in light of other evidence very much along the same lines, the Trial Judge had found that the potential prejudicial effect of the evidence substantially outweighed its probative value.

SEC v. American Realty Trust, 429 F. Supp. 1148 (E.D. Va. 1977) , *rev'd on other grounds*, *586 F.2d 1001 (4th Cir. 1978)* : In an action by the SEC for relief against alleged securities violations, the District Judge discussed the relationship between *Fed. R. Civ. P. 32* and the Federal Rules of Evidence. "Even if the deposition is admissible under the Federal Rules of Civil Procedure, statements contained therein must be admissible under the Federal Rules of Evidence." This represents sound thinking. Since *Fed. R. Civ. P. 26* allows parties to use discovery devices to gather evidence that may be relevant to preparation, but inadmissible at trial, questions asked during a deposition may be permissible for purposes of discovery and yet may produce inadmissible evidence at trial. Of course, a party is not free to sit by and forgo all evidentiary objections at a deposition. It is clear that objections to the form of questions that could easily be corrected at the time of the deposition should be made then. See *Fed. R. Civ. P. 32(d)(3)*.

United States v. King, 713 F.2d 627 (11th Cir. 1983) : The government successfully appealed from a pretrial ruling that testimony of a key witness in a trial ending in a mistrial would be excluded in the retrial. Although the Court rejected the government's argument that the Trial Judge lacked authority to exclude evidence under *Rule 403* that was admissible under *Rule 804(b)(1)*, it found in the instant case that the Trial Judge reached an incorrect balancing ruling. The Court pointed out that evidence should be excluded only sparingly under *Rule 403* and that the greater the need for the evidence the less likely it is to be excluded. The Court recognized the legitimacy of the Trial Judge's concern that without seeing and hearing a key witness the jury might have trouble evaluating his credibility, but it concluded that the probative value of the testimony was extremely high and the risk of prejudice was low.

[l] Rule 804(b)(1) -- Suppression Hearing Testimony

United States v. Bartelho, 129 F.3d 663 (1st Cir. 1997) : The defendant, charged with armed bank robbery, sought to introduce statements made on cross-examination at his own suppression hearing by an accomplice who pleaded, in order to undermine the credibility of hearsay statements by the accomplice that had been admitted. Affirming, the Court found no error in exclusion of the prior testimony, as the government's motive at the hearing to attack the accomplice's claim that his own admissions were involuntary was different from its motive at the trial to support the accomplice's implicating of the defendant.

United States v. Wingate, 520 F.2d 309 (2d Cir. 1975) : Affirming a pre-Rules conviction for heroin distribution, the Court held there was no error in excluding the suppression hearing testimony of a nontestifying defendant, as the government had no opportunity for meaningful cross-examination.

United States v. Grandison, 783 F.2d 1152 (4th Cir. 1986) : The Court found that a transcript of a deceased witness' suppression hearing testimony was admissible where the witness was under oath and fully cross-examined at that hearing.

United States v. Taplin, 954 F.2d 1256 (6th Cir. 1992) : A conviction for cocaine offenses was reversed for erroneous admission of a coconspirator's testimony given at a hearing on the coconspirator's suppression motion. Although the defendant's counsel was present at the hearing, the Court held that the defendant did not have the requisite opportunity and motive to develop the testimony because the defendant's presence was not required for the motion.

United States v. Geiger, 263 F.3d 1034 (9th Cir. 2001) : After the defendant murdered a man by attaching a bomb to the victim's truck and detonating it, he was indicted first in State Court for murder. Following a hearing, the State Court suppressed his taped confession for failure to comply with state custodial interrogation requirements. In a subsequent federal prosecution, the defendant again moved to suppress his confession. An officer who had testified at the state hearing had died in the meantime, so the Magistrate Judge admitted the officer's former testimony. The Court found no abuse of discretion, since the issues in the two suppression hearings were virtually the same: whether the confession was coerced, whether the defendant had been *Mirandized*, whether the arrest was pretextual, and whether the defendant had been unlawfully detained. The officer's actual testimony demonstrated that the defendant had a similar motive to cross-examine in State Court, and the fact that the cross-examination focused on the state law issues resulted not from lack of opportunity to develop the testimony but from tactical choices about utilizing that opportunity.

[m] Rule 804(b)(1) -- Unavailability

United States v. Martinez-Perez, 916 F.2d 1020 (5th Cir. 1990) : The Court reversed a conviction for bringing in and harboring illegal aliens because deposition testimony of the government's primary witness, an undocumented alien who had been released after being deposed pursuant to a standing order of the District Court, was admitted without any showing on the record that she was unavailable.

United States v. Vargas, 933 F.2d 701 (9th Cir. 1991) : When the prosecutor indicated that a principal government witness (an informant) in a drug case would invoke the *Fifth Amendment*, the Trial Judge *sua sponte* established a procedure by which the witness was examined outside the jury's presence and an edited transcript was prepared. When the witness was then examined in front of the jury, counsel were permitted to ask only questions from the transcript, and if the Judge deemed an answer inconsistent with that in the transcript, he read the earlier answer to the jury. The Court reversed, holding that the procedure violated the Rules and the *Confrontation Clause*. Because the witness was available, the transcript read to the jury was not admissible as former testimony, and because the Judge would not

permit cross-examination questions before the jury if they were not included in the transcript, the transcript was not admissible as prior inconsistent statements by a witness subject to cross-examination.

O'Banion v. Owens-Corning Fiberglas Corp., 968 F.2d 1011 (10th Cir. 1992) : Affirming a judgment for the defendants in an action for asbestos-related disease, the Court held it was error, because there was no showing of the witness' unavailability, to admit a transcript of expert testimony given in another asbestos action. The error was harmless, however, because the plaintiffs did not show how their interests were compromised, or the cross-examination inadequate, by the counsel for the party (described as the plaintiffs' "predecessor in interest") in the prior case.

[3] Rule 804(b)(2) -- Hearsay Exceptions -- Statement Under Belief Of Impending DEATH

United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003) : A few days before he died from his wounds, the victim of a shooting was shown a photo array, and the defendant claimed that the victim used it to identify another man as his assailant. Affirming a murder conviction, the Court held that the purported identification was properly not admitted as a dying declaration because there was no showing that the victim's statement was made under belief of impending death. The Court noted that the victim's medical treatment "was rigorous and undertaken with the expectation that he would survive," and that doctors had been discussing with him their plans for post-discharge care.

Webb v. Lane, 922 F.2d 390 (7th Cir. 1991) : Affirming the denial of habeas corpus relief to a prisoner convicted of murder, the Court held there was no error in admitting the victim's identification of the defendant's photograph as a dying declaration, where the victim had communicated to relatives six hours earlier his belief that he was going to die.

[4] Rule 804(b)(3) -- Hearsay Exceptions -- Statement Against Interest

[a] Rule 804(b)(3) -- Against Pecuniary Interest

Silverstein v. Chase, 260 F.3d 142 (2d Cir. 2001) : The decedent, Marvin, held a one-third interest, in common with his brother Edward and sister Rita, in a brokerage account containing securities received from their father's estate. In order to reimburse Rita for money spent on their father, Edward executed a "Cancellation of Indebtedness," which recited that the brothers had agreed to reimburse Rita and which assigned their interests in the account to her. Marvin never signed the COI. In a subsequent action by Marvin's estate to recover his interest in the account, the Trial Judge ruled that the entire COI was admissible under *Rule 804(b)(3)* and that therefore the collateral statements affecting Marvin's interest were admissible as well. Vacating a decision for the defendants, the Court held that the statements against Marvin's interests were not admissible under *Rule 804(b)(3)* because they were not against the pecuniary interests of the declarant, Edward, and they did not gain reliability by being collateral to his statements. In the Court's view, the *Williamson* rationale was equally applicable to statements against pecuniary interest as to those against penal interest. The Court remanded for consideration whether the statements would be admissible under *Rule 807* or *Rule 803(15)*.

United States v. Ashfield, 735 F.2d 101 (3d Cir. 1984) : Convictions for tax evasion were sustained as the Court upheld the exclusion of testimony by an accountant that the owner of the accounting firm, who died before trial, told him to tell the IRS that any misreporting of the defendants' income was an "accounting error." The owner's statement was not "objectively contrary" to his interest, it was made after the IRS had begun to look at the defendants' tax returns, it failed to identify who made the error and what the error might have been, and the accountant-witness conceded that the statement might have been suggested by the defendants.

United States v. L'Hoste, 640 F.2d 693 (5th Cir. 1981) : The Court found that deposition testimony from a civil case was not admissible for a defendant where the deposition witness had a pecuniary interest in stating things a certain way, even if the testimony might also have been damaging, and the defendant offered nothing to support the declaration against interest claim.

Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984) : In a civil rights action by a former police officer against a sheriff, deputy sheriffs, and others, the Court sustained a judgment for the plaintiff. It found that statements by the sheriff, which acknowledged a concert of action with other defendants, were admissible as declarations against pecuniary interest where they were made after the suit charging a conspiracy had been filed.

Donovan v. Crisostomo, 689 F.2d 869 (9th Cir. 1982) : In a suit for injunctive relief and back pay brought by the Secretary of Labor, the Court held that statements of foreign employees that they did not in fact work overtime were not admissible as declarations against interest, since they may have felt that it was in their interest to make the statements to avoid being sent back to their country of origin.

[b] Rule 804(b)(3) -- Against Penal Interest

[i] Rule 804(b)(3) -- Civil Cases

PECO Energy Co. v. Boden, 64 F.3d 852 (3d Cir. 1995) : In an insurance coverage dispute arising out of a scheme to steal fuel oil from the insured, the Court held there was no abuse of discretion in admitting evidence of a driver's statement that he had been told by his boss to steal from deliveries. A person's admission that he stole for someone else is as much against his interest as an admission that he stole for himself, since it subjects him to possible criminal responsibility and civil liability.

McClung v. Wal-Mart Stores, Inc., 270 F.3d 1007 (6th Cir. 2001) : The plaintiff's decedent was abducted from the parking lot of a shopping mall and later murdered. The plaintiff sued Wal-Mart and other tenants of the mall for negligence in providing security in the lot. To prove the since-deceased kidnapper's location in the lot, the plaintiff offered the kidnapper's sworn affirmance at his guilty plea hearing to a statement by the prosecutor that he kidnapped the victim from the "Wal-Mart parking lot." Although the Court reversed summary judgment for Wal-Mart, it found no error in the Judge disregarding this statement. The guilty plea as a whole was against the declarant's interest, but whether the kidnapping was in the Wal-Mart lot as opposed to the Circuit City lot was not against his interest. It was inconceivable he would have corrected the prosecutor's recitation on this point, and his simple "Yes, sir" affirming the recitation did not provide sufficient reliability to each individual statement it contained. The Court held, however, that narratives the kidnapper provided to the police were sufficiently reliable, when taken with other evidence that the victim had been shopping at Wal-Mart, to justify their admission of the kidnapper's location within the parking area.

American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999) : In an action to recover embezzled funds, the embezzling employee had made a confession implicating Fishman, owner of the currency exchange where bogus checks were cashed, but the employee exercised his self-incrimination privilege at his deposition and all other alleged participants denied any knowledge of the check-cashing scheme. Affirming summary judgment for Fishman, the Court held that declarations setting forth the employee's confessions were hearsay not admissible under *Rule 804(b)(3)*. There was no abuse of discretion in the finding below that the plaintiffs had not met their burden of showing corroborating circumstances indicating the trustworthiness of the employee's statements, since it was a reasonable inference, based on the timing and contents of settlement agreements made along with the confessions, that the statements were made to curry favor with the plaintiffs. The Court held that its requirement of corroborating

circumstances for statements offered under the Rule, whether they inculpated or exculpated third parties, survived the *Williamson* decision and applied to both criminal and civil cases. In *United States v. Hajda, 135 F.3d 439 (7th Cir. 1998)* , the Court affirmed the denaturalization of an alleged Nazi concentration camp guard, holding there was no error in admitting an ancient document containing an unsigned statement given by his father at a trial of family members for collaboration in 1945-46. The Court noted that because of "the danger of guilt by association, ... a declarant's statement that his son collaborated with the Nazis is contrary to a father's interest when made at a Nazi collaboration trial." Furthermore, the statement was clearly corroborated by the other documentary evidence.

Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808 (8th Cir. 1992) : In an action by an investor against a commodities futures market, the Court held that statements by a participant (since deceased) that he had help from another (clearly the defendant) in defrauding the plaintiff had been admitted improperly, but the error was harmless. Only those parts of a statement clearly against the declarant's interest are admissible under the Rule; here, the declarant may have been attempting to shift attention from himself to the defendant and thereby improve his position, so the part implicating the defendant lacked the necessary reliability. In an antitrust case, *Pink Supply Corp. v. Hiebert, Inc.*, n23 the Court ruled that a statement by an employee implicating the employer in price fixing was not a declaration against interest absent evidence that the employee had some understanding of price-fixing when he made the statement.

United States v. Samaniego, 345 F.3d 1280 (11th Cir. 2003) : In an interpleader action to determine ownership of championship belts allegedly stolen from a former professional boxer, the Court found no abuse of discretion in the admission of statements by the alleged thief expressing remorse, apologizing for, and asking forgiveness for having stolen the belts. Although the statements were erroneously admitted under *Rule 803(3)*, they were admissible under *Rule 804(b)(3)* because they would subject the declarant to civil or criminal liability and the declarant was sufficiently shown to be unavailable to testify.

[ii] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered Against Accused

[A] Rule 804(b)(3) -- Admissible

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) : In a trial for murdering a government witness, the prosecution introduced post-murder statements by a codefendant to two friends in which he said that he had gone to the other defendants' home on the evening of the murder and told them the victim was in the area. The Court found the statements were against interest, since they were made the day after the murder to a man who had witnessed the murder and to another who knew the victim, and they were potentially incriminating had there been evidence that the declarant was a part of the conspiracy.

United States v. Shea, 211 F.3d 658 (1st Cir. 2000) : The Court affirmed racketeering, carjacking, and other convictions, finding no error in the admission of statements by some defendants as declarations against penal interest. The statements were made to friends or companions, not to police, and were not of the blame-shifting variety. In *United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)* , the Court affirmed a racketeering conviction, upholding the admission of statements against penal interest implicating the defendant that were made by a declarant whom the defendant was alleged to have murdered. The declarant made the statements to a close friend and did not shift the blame for criminal acts away from himself.

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) : The Court affirmed mail fraud convictions growing out of arson of a diner. A government witness testified that he visited his friend, who had been burned in the arson, in the hospital and that the friend, heavily bandaged and unable to speak, nodded his head affirmatively when asked

whether he had been paid to burn the diner. The friend died before trial. The Court found that the nodding was a statement against penal interest, admissible against all defendants. The circumstances made the statement especially reliable -- i.e., there was no indication that by nodding the friend thought that he would obtain any advantage.

United States v. Mussare, 405 F.3d 161 (3d Cir. 2005) : Affirming convictions for drug-related offenses and extortion, the Court found no error in the admission of a statement by an accomplice bragging to friends that he and the defendant had beaten up a person the previous day while collecting a debt. The accomplice was not attempting to deflect criminal liability, and the statement was made to friends in informal circumstances. In *United States v. Moses, 148 F.3d 277 (3d Cir. 1998)* , the defendant was charged with tax evasion for failure to report income he received from illegal kickbacks. The prosecution introduced statements, made in luncheon conversation by the person who paid the kickbacks to a friend, which indicated that the declarant was "taking care" of the defendant "moneywise." The Court found no error in admission of the statements, since they were not made while in custody, there was no reason to believe the declarant was trying to pass the blame to the defendant, and by naming Moses the declarant "provided self-inculpatory information that might have enabled the authorities to better investigate his wrongdoing."

United States v. Triplett, 922 F.2d 1174 (5th Cir. 1991) : Affirming an arson conviction, the Court held that a coconspirator's threats to a witness, made in jail after the declarant's arrest, were properly admitted under the Rule because the threat would have subjected the declarant to criminal liability and the statement that he could be convicted if the witness told the truth could be construed as an admission of incriminating facts.

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) : In a bank robbery prosecution, the government offered testimony from a witness recounting statements by the non-testifying codefendant, a long-time friend of the witness, that he and the defendant had committed the robbery. Affirming, the Court held there was no error in admitting the testimony. It satisfied the hearsay exception, since the declarant was unavailable, the declarant inculpated himself, and the trustworthiness requirement was satisfied by factors also meeting the *Confrontation Clause* requirements. The declarant's statements were not "testimonial" under *Crawford* because they were not made to the police or otherwise to further a prosecution, so the confrontation analysis was that of *Ohio v. Roberts*. Circuit precedent suggests that, except possibly for statements made by the defendant inculpating himself, statements against penal interest do not constitute a firmly-rooted exception under *Roberts* but rather are only admissible if they bear particularized guarantees of trustworthiness. Here, the declarant's statements about his own participation did not minimize his role, and to the extent they inculpated the defendant they were not puffing or bragging or made to curry favor with law enforcement; they were made to a friend who had expressed concern about the declarant's "paranoid" and "stressed-out" behavior. Thus, they were made in circumstances providing indicia of trustworthiness that satisfied the *Sixth Amendment* and the hearsay exception. In a RICO prosecution of a Mafia leader, *United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)* , the Court found no error in the admission of statements made by another Mafia leader (since deceased) to his son that described the roles of the declarant, the defendant, and others in the organization. The declarant's statements about the conspiracy linked him to others in the conspiracy and were therefore against his own penal interest. The Court also noted that the statements were not made with the hope of implicating others to gain favor with the police. Finally, the Court rejected the argument that certain statements were not against penal interest because the declarant had already been convicted and sentenced for the conduct described; the statements were still against interest because the conduct was a predicate act of a RICO conspiracy for which the declarant was never tried and convicted.

United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) : In a bench trial on charges of conspiracy to possess stolen property, the Judge admitted testimony from an accomplice's brother-in-law that the accomplice had made statements implicating the defendant. The accomplice was unavailable at the trial, and the defendant's counsel waived the argument that his statements were not against penal interest under *Williamson v. United States*, contesting only whether they were supported by corroborating circumstances. The Court held that the waiver and the failure to argue the statements were

not against penal interest were not ineffective assistance of counsel, but a "reasonable tactic," since the statements were against penal interest. In *United States v. Robbins, 197 F.3d 829 (7th Cir. 1999)* , the Court affirmed convictions arising out of a large-scale marijuana operation, holding that an unavailable codefendant's statement to his former fiancee that he "sold pot" with Robbins was admissible against the codefendant and also against Robbins as a declaration against penal interest. The Court noted that the statement was not a confession to law enforcement officers, where the declarant may have been trying to shift blame to others, but was made voluntarily in a conversation between the declarant and a trusted confidante.

United States v. Manfre, 368 F.3d 832 (8th Cir. 2004) : Affirming a conviction for an arson conspiracy, the Court held that a statements by a conspirator to friends that he was going to burn down a nightclub for the defendant was properly admitted as a declaration against penal interest. The declarant was unavailable because he had died in the fire, the statements were against his interest, and they were trustworthy in naming the defendant because they were made casually to an intimate confidant rather than while in custody or under official suspicion.

[B] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered Against Accused--Constitutional Concerns

Lee v. Illinois, 476 U.S. 530 (1986) : Lee and a codefendant were charged with committing a double murder and tried jointly in a bench trial in which neither testified. In rejecting Lee's claim that she had not participated in the murders and finding her guilty, the Trial Judge expressly relied upon portions of the codefendant's confession. Although Lee also made a statement that overlapped with the codefendant's "to a great extent," the two statements differed with respect to Lee's participation. The Supreme Court found a violation of the defendant's *Confrontation Clause* rights under the then-applicable *Ohio v. Roberts* analysis. Because the statement was made to police, it would be held "testimonial" and inadmissible under *Crawford v. Washington*.

Lilly v. Virginia, 527 U.S. 116 (1999) : The Court held that the admission of an accomplice's custodial confession as a declaration against penal interest violated a state defendant's right to confrontation. The concurring opinions of justices Scalia and Thomas applied the analysis later adopted by the Court in *Crawford v. Washington*; the other opinions used the then-applicable *Ohio v. Roberts* analysis. This case is discussed in the Editorial Explanatory Comment, *§ 804.02[17]*.

United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) : In a trial for murdering a government witness, the prosecution introduced post-murder statements by a codefendant to two friends in which he said that he had gone to the other defendants' home on the evening of the murder and told them the victim was in the area. The Court found the statements were against interest and were reliable: they were made to two different lay persons, not law enforcement officials, shortly after the murder, and the declarant had no motive to diminish his role by shifting blame. Thus, there was no *Confrontation Clause* problem under the then-applicable *Ohio v. Roberts* analysis. We note that under *Crawford v. Washington* the statements were probably not "testimonial," given the circumstances of their making, so there would be no confrontation issue. In *United States v. Coachman*, n24 the Court affirmed fraud, theft, and other convictions of a former clerk who serviced the Defense Intelligence Agency, although it found that the defendant's confrontation rights were violated when the government offered into evidence an inculpatory statement made by a codefendant after his arrest.

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) : The Court affirmed a racketeering conviction, upholding the admission of statements against penal interest implicating the defendant that were made by a declarant whom the defendant was alleged to have murdered. The Court found no confrontation violation under the then-applicable *Ohio v. Roberts* analysis. We note that under *Crawford v. Washington* the statements were probably not "testimonial," given the

circumstances of their making, so there would be no confrontation issue. In *United States v. Seeley*, n25 the Court affirmed robbery convictions, holding that neither *Rule 804(b)(3)* nor the Constitution requires a special assessment of the credibility of a witness who relates an out-of-court declaration against penal interest, since the witness' credibility is a matter for the jury.

United States v. Matthews, 20 F.3d 538 (2d Cir. 1994) : Affirming bank robbery convictions, the Court rejected a *Confrontation Clause* attack on declarations against penal interest. It reasoned that ordinarily a confession that follows formal police interrogation cannot be admitted against a third person, but if the statement is made to a person whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that the inculpatory portion is any less trustworthy than the part that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the *Confrontation Clause*. We note that under *Crawford v. Washington* a declaration against penal interest made to an ally does not raise a confrontation issue.

United States v. Moses, 148 F.3d 277 (3d Cir. 1998) : Admitting inculpatory statements made by the declarant to a friend during lunch conversations, the Court held that a hearsay statement admissible as a declaration against penal interest satisfied the *Confrontation Clause* under the then-applicable *Ohio v. Roberts* analysis. We note that under *Crawford v. Washington* the statements were probably not "testimonial," given the circumstances of their making, so there would be no confrontation issue.

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) : In a bank robbery prosecution, the government offered testimony from a witness recounting statements by the non-testifying codefendant, a long-time friend of the witness, that he and the defendant had committed the robbery. Affirming, the Court held there was no error in admitting the testimony. It satisfied the hearsay exception, since the declarant was unavailable, the declarant inculpated himself, and the trustworthiness requirement was satisfied by factors also meeting the *Confrontation Clause* requirements. The confrontation analysis was that of *Ohio v. Roberts*; the declarant's statements were not "testimonial" under *Crawford* because they were not made to the police or otherwise to further a prosecution. Circuit precedent suggests that, except possibly for statements made by the defendant inculpating himself, statements against penal interest do not constitute a firmly-rooted exception under *Roberts* but rather are only admissible if they bear particularized guarantees of trustworthiness. Here, the declarant's statements about his own participation did not minimize his role, and to the extent they inculpated the defendant they were not puffing or bragging or made to curry favor with law enforcement; they were made to a friend who had expressed concern about the declarant's "paranoid" and "stressed-out" behavior. Thus, they were made in circumstances providing indicia of trustworthiness that satisfied the *Sixth Amendment* and the hearsay exception. In *United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)* , the Court found no error in the admission of statements made by another Mafia leader (since deceased) to his son that described the roles of the declarant, the defendant, and others in the organization. Although the defendant did not raise a *Confrontation Clause* argument, the Court stated that it would have been unavailing under the then-applicable *Ohio v. Roberts* analysis. We note that under *Crawford v. Washington* the statements were probably not "testimonial," given the circumstances of their making, so there would be no confrontation issue.

United States v. Westmoreland, 240 F.3d 618 (7th Cir. 2001) : The Court held inculpatory declarations against penal interest made to police inadmissible, and those made to the declarant's son and to a cell mate admissible, under the then-applicable *Ohio v. Roberts* analysis. We note that the results would likely be the same under *Crawford v. Washington*.

[C] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered Against Accused -- Inadmissible

Williamson v. United States, 512 U.S. 594 (1994) : The Court held (6-3) that the exception applies only to self-inculpatory statements; neutral or self-serving portions of a broader narrative that is generally self-inculpatory are not admissible under the Rule. This case is discussed in the Editorial Explanatory Comment, *§ 804.02[12]*.

[iii] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered for Accused

[A] Rule 804(b)(3) -- Admissible or Required To Be Admitted

United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) : Reversing a theft conviction, the Court held that a defense witness' testimony to the effect that he was at a card game when one of the participants in the theft scheme made a statement admitting his participation and declaring that someone else, but not the defendant, was involved qualified as a declaration against interest and should have been admitted if there was sufficient corroboration. The exception is not limited to direct confessions; any statements qualify that a reasonable person would not have made under the circumstances unless he believed the statements to be true.

United States v. Ditizio, 530 F. Supp. 175 (E.D. Pa. 1982) : In a prosecution for conspiracy to commit arson, the District Judge granted a severance motion so that Ditizio could offer a statement, made by a codefendant during "an off-the-record interview" with the government, which tended to exculpate Ditizio. Even though the statement was made pursuant to a grant of use immunity, the Judge concluded that "sufficient risk of prosecution remained so that a reasonable declarant would not have made the statement without believing it to be true."

United States v. Brainard, 690 F.2d 1117 (4th Cir. 1982) : In the trial of two defendants on charges arising out of a fraudulent investment scheme, the Court held it was error to exclude testimony that a third person, who had pleaded guilty to involvement in the scheme, had told his secretary that the two defendants had no knowledge of the scheme. The Court concluded that where it was clear that the declarant would exercise his privilege against self-incrimination, the defense did not have to go through the motions of producing the declarant at trial; that the statement to the secretary was against penal interest by suggesting that the declarant had inside knowledge of the fraudulent scheme; and that the circumstances surrounding the statement provided corroboration.

United States v. Thomas, 571 F.2d 285 (5th Cir. 1978) : The Court reversed a conviction for bank robbery because the Trial Judge excluded evidence that a codefendant, who chose not to testify and thus was unavailable, had made statements exculpating the defendant at the close of the preliminary hearing. The statements were made spontaneously in the presence of a number of people, including a United States Magistrate. Rejecting an argument that the statement did not qualify as a declaration against interest because the declarant did not expressly confess guilt, the Court observed that "by referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant."

United States v. Toney, 599 F.2d 787 (6th Cir. 1979) : The Court reversed a bank robbery conviction because the defendant was precluded from introducing a statement by another alleged robber (who asserted his self-incrimination privilege at trial) that the defendant had won a substantial sum of money from him. This evidence would have supported the defendant's claim that the "bait" money found on his person was obtained by gambling. The Court said that the statement, made when the declarant was arrested for the bank robbery, should have been admitted either as a declaration against interest or under the residual exception.

United States v. Nagib, 56 F.3d 798 (7th Cir. 1995) : During a drug conspiracy trial, one codefendant changed his plea. When the defendant sought to introduce portions of the transcript from the codefendant's change-of-plea hearing, the Trial Judge ruled it inadmissible under *United States v. Powell, 894 F.2d 895 (7th Cir. 1990)* , which held a coconspirator's plea hearing transcript inadmissible under *Rule 804(b)(1)* because the government does not have the opportunity to develop the testimony on cross-examination at the plea hearing. Reversing, the Court noted that *Powell* had reserved ruling on admissibility under *Rule 804(b)(3)*. Applying *Williamson v. United States*, the Court held that all the codefendant's statements, including those tending to exculpate the defendant, were against his penal interest, for they implicated him in the conspiracy.

Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004) : Chia was convicted in state court for being an accessory to the murder of two DEA agents killed in a shootout. The Court reversed denial of his habeas corpus petition because statements by one of the shooters were erroneously excluded at trial. In the statements, made to police and the FBI within two days of the shooting and after life-saving surgery, the declarant stated that not only was Chia not involved in the plot and would not have shared in the drugs or money to be stolen but also that Chia had tried to talk him out of the plot. The Court held that the statements were reliable, inculpating the declarant and corroborated in their details by independent evidence; they were also material and critical to Chia's defense, as the other conspirators were killed in the shootout. In *United States v. Paguio, 114 F.3d 928 (9th Cir. 1997)* , a husband and wife were charged with bank fraud arising out of forged documentation filed in a bank loan application. The application was prepared and the loan was arranged by the husband's father, ostensibly on behalf of the defendants; the application was ultimately signed by the defendants. The father made a statement to the son's lawyer to the effect that he had engineered the whole transaction and that the defendants "had nothing to do with it." The Trial Judge admitted the part of the father's statement referring to his own conduct as a declaration against penal interest, but excluded the part exculpating the defendants. Reversing, the Court noted that the father admitted "not only participation but leadership, leading his son and daughter-in-law into the abyss. Because leading others into wrongdoing has always been seen as bad, there is a sentencing enhancement for it. Also, in context, the inculpating and exculpating statements were not practically separable." This case is discussed in the Editorial Explanatory Comment, at *§ 804.02[13]*.

United States v. Lopez, 777 F.2d 543 (10th Cir. 1985) : The Court reversed a drug conviction because statements by the defendant's companion were erroneously excluded. It found that the statements tended to shift guilt from the defendant to the companion and that "a reasonable man in his position would not have made the statements unless he believed them to be true."

[B] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered for Accused -- Constitutional Concerns

United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977) : The Court reversed a drug conviction on the ground it was error to exclude testimony of a defense investigator regarding his interviews with a participant in the drug dealings while permitting the key government witness, a paid informant, to testify as to statements made by the same person. Noting that the government refused to grant immunity to the participant and emphasizing that there was significant external evidence to support the defendant's entrapment theory, the Court held that the statements to the defense investigator tended to place the declarant in a compromised position with respect to criminal liability and qualified as declarations against interest when the declarant invoked the *Fifth Amendment* at trial. The Court cited *Chambers v. Mississippi, 410 U.S. 284 (1973)* , to support its conclusion that the defendant was denied "crucial substantiation of his asserted defense of entrapment and thereby deprived him of a fair opportunity to defend against the Government's accusations."

United States v. Delgado, 903 F.2d 1495 (11th Cir. 1990) : The Court affirmed convictions for conspiring to import cocaine in furniture, holding there was no error in excluding evidence of a statement by one of the defendants

when arrested that four persons (including defendants) showed up at his warehouse and he did not know why. The Court rejected the defendant's argument under *Chambers v. Mississippi, 410 U.S. 284 (1973)* , because the statement, rather than being trustworthy, was a self-serving attempt to exculpate the declarant from the conspiracy.

[C] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered for Accused -- No Abuse of Discretion to Exclude

United States v. Tajeddini, 945 F.2d 458 (1st Cir. 1991) : The Court affirmed a conviction for importing heroin, holding there was no error in excluding a statement made by the alleged source to Iranian police authorities in which the source indicated he had duped the defendant into carrying innocent vegetable seeds into the United States. The statement was not against any significant penal interest of the declarant and was not imbued with sufficient indicia of reliability to render it admissible.

United States v. Abreu, 342 F.3d 183 (2d Cir. 2003) : Affirming cocaine convictions, the Court found no abuse of discretion in the exclusion of testimony by the defendant that, when his son showed him a brick-shaped package containing drugs and the defendant instructed him to get rid of it, the son said that the drugs were "beat," and that he had been duped and would try to get his money back. The Court reasoned that the statements were offered for their truth, to prove that the seized cocaine belonged to the son. It declined to find that the statements were declarations against interest, because there were no corroborating circumstances to indicate their trustworthiness and the defendant had made no efforts to procure the testimony or attendance at trial of his son, who was in the Dominican Republic. In a prosecution for illegal exportation of fuel pumps to Libya, *United States v. Doyle, 130 F.3d 523 (2d Cir. 1997)* , defendants sought to introduce exculpatory statements made in the presence of counsel by a cooperating witness at an interview with the government pursuant to a proffer agreement. The declarant was unavailable at trial, and the Judge found the statements were against his penal interest but excluded them for lack of trustworthiness. The Court found no abuse of discretion, since the statements were unsworn and were contradicted by the declarant in subsequent statements, as well as by other witnesses. The Court also expressed doubt, although it was not necessary to decide, whether the statements were in fact sufficiently against the declarant's interest to satisfy *Williamson*. In *United States v. DeVillio*, n26 the Court rejected the defendants' claims that a tape-recorded statement of a witness made while cooperating with the government and wearing a wire recording device was admissible, since the statement was not against his penal interests under the circumstances. *United States v. Harwood, 998 F.2d 91 (2d Cir. 1993)* , is discussed in the Editorial Explanatory Comment, *§ 804.02[11]*.

United States v. Torcasio, 959 F.2d 503 (4th Cir. 1992) , *amended*, *993 F.2d 368 (4th Cir. 1993)* (per curiam): In a prosecution arising out of payments to a West Virginia state senator for the purpose of influencing the passage of a statute, the defendant was precluded from offering a statement given by another person to New Jersey investigators that the declarant had made one of the payments to the senator to do public relations work. The Court held there was no abuse of discretion, as no adverse consequence could result to the declarant from the admission.

United States v. Williams, 809 F.2d 1072 (5th Cir. 1987) : The Court noted in a racketeering case that a codefendant's statements would have been excluded since they were made under the protection of an immunity grant "and therefore they were not statements against his interest."

United States v. Alvarez, 266 F.3d 587 (6th Cir. 2001) : The defendant was charged with killing a person who owed him a drug debt. To show that others had a motive to kill the victim, the defendant proffered a statement from another drug dealer to the effect that the victim owed that drug dealer money as well. Affirming, the Court held there was no abuse of discretion in excluding the statement, as it was not sufficiently disserving to the declarant's interest.

The statement had been made in the defendant's counsel's office, after counsel said there was no way that the declarant could be convicted on the basis of the statements. In a prosecution for drug trafficking offenses, *United States v. Jones, 124 F.3d 781 (6th Cir. 1997)* , the Court held that there was no abuse of discretion in excluding a letter from the defendant's son that claimed responsibility for some of the acts charged to the defendant. The letter was not trustworthy because: the two had a close relationship; it was written on the eve of trial and two years after the events in question; it was sent in response to two letters from the defendant telling the son what to say at trial; it was written after a visit from the defendant's attorney, who indicated he could get the son immunity; and the exculpatory statements were contradicted by statements the son gave under oath and with counsel present to an ATF agent a few days before the trial.

United States v. Bonty, 383 F.3d 575 (7th Cir. 2004) : The Court affirmed convictions of two men for interstate transportation of minors with intent to commit aggravated sexual abuse, finding no abuse of discretion in the exclusion of the codefendant's statement during an FBI interview that the defendant "had nothing to do with" the crime. The exculpatory statement was not inculpatory of the declarant, and even evaluating the statement in the context of the declarant's entire interview would not change that conclusion, since the declarant at the time was continuing to deny that he sexually assaulted the victim. In *United States v. Andreas, 216 F.3d 645 (7th Cir. 2000)* , the government's case for price-fixing was based in large part on tape recordings made by an informant, who had concurrently committed other crimes not known to the FBI. When he learned he was about to be indicted, the informant met with an agent and told her that his FBI handler had instructed him to destroy tapes exculpatory of the defendants. He later recanted the allegations, but the defendants sought to introduce them as statements against penal interest. The Court found no abuse of discretion in excluding these hearsay statements. They were not corroborated, and lacked credibility, since the declarant both recanted them and had an undoubted propensity to lie. Furthermore, the request to destroy tapes was against the FBI's interest, not the declarant's, and might even have been helpful in the case on which he was about to be indicted. In *United States v. Hall*, n27 the Court, affirming a conviction for kidnapping and illegally transporting a teenage girl, upheld the exclusion of evidence that another man confessed after going to the funeral home and asking to see the girl's body. The other man "confessed to any crime he was questioned about by the police" and "lacked knowledge regarding the pertinent facts of the case," and there was no evidence corroborating any part of his story. Affirming firearms convictions in *United States v. Butler*, n28 the Court held that a hearsay statement from a person on the premises during a police raid was properly excluded. The hearsay declarant accused the police of planting guns found in the house on the defendant because they knew that the defendant was a felon. The Court held that the declarant had not admitted anything remotely criminal; he did not admit that he had possession of or owned any gun. At most, the statement put him at risk of being in some type of constructive possession of a gun, a risk not sufficient to provide a circumstantial guarantee of reliability. In *United States v. Williams*, n29 the Court upheld the exclusion of statements offered by the defense, suggesting that the statements not only lacked corroboration, but also that they might not have been against interest when made.

United States v. Bobo, 994 F.2d 524 (8th Cir. 1993) : The Court affirmed a firearms conviction, upholding the exclusion of the defendant's brother's statement that a gun was his rather than the defendant's. The sibling relationship, the brother's criminal record, the inconsistency of the brother's statements, and the timing of the statement on the eve of trial all supported exclusion. In *United States v. Richards, 967 F.2d 1189 (8th Cir. 1992)* , the defendant, charged with interstate transportation of firearms, sought to introduce a statement made three days before he was arrested in which the woman arrested with him had said that guns found in the car with them were hers. The Court held the evidence was properly excluded because the statement was not against the declarant's interest at the time it was made, although her subsequent behavior, concealing one of the guns in her purse and transporting marijuana, subjected her to criminal liability. In *United States v. Thomas*, n30 the Court affirmed a conviction for drug offenses, holding that a statement by a deceased codefendant to his attorney that indicated that the defendant and another had not been involved in the charged transaction was not admissible under the Rule. It was not inculpatory of the declarant and it was not trustworthy in light of the other codefendant's guilty plea and evidence of the defendant's guilt.

United States v. Shryock, 342 F.3d 948 (9th Cir. 2003) : The Court affirmed convictions for gang-related crimes, finding no abuse of discretion in the exclusion of testimony that an alleged accomplice, not present at trial, had said he shot a murder victim in self-defense. The Court concluded that the statement may have been made to absolve the declarant of criminal liability rather than to implicate him, so it was not a declaration against interest. In *United States v. Fowlie, 24 F.3d 1059 (9th Cir. 1994)* , the Court held there was no abuse of discretion in excluding a videotaped interview between a defense investigator and a witness who had testified before the grand jury. The witness' statement, made in Holland, that he committed perjury lacked reliability, as he indicated he intended never again to be physically present in the United States, so he must have believed he was under little or no threat of criminal liability when he made the statement. In *United States v. Ospina*, n31 the Court held that one defendant was properly not permitted to introduce statements made by two other defendants that cocaine belonged only to them, where the statements were made after arrest and the codefendants had an opportunity to talk among themselves.

United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987) : In a prosecution for murder and other crimes, the Court held there was no error in excluding statements by the defendant's brother and cousin that the defendant was drunk on the day of the murder and that they were in the vicinity. The Court found that the statements did not establish that the defendant was too intoxicated to commit the crime and did not clearly subject the two declarants to criminal liability.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995) : At the fraud trial of loan brokers charged with taking fees but making no effort to obtain loans for their customers, the defendants proffered hearsay statements from members of a Texas brokerage group with which they had done business. These statements indicated that the defendants had aggressively pursued their clients' interests, and had relied upon the representations of the Texas brokers group that the group would present the defendants' loan packages to lenders for funding. The Court found no error in exclusion of the statements, since they did not inculpate the Texas brokers in any way -- indeed, the statements tended to exculpate both the declarants and the defendants from any allegation of participation in a fraud. The Court rejected the argument that the statements were necessarily inculpatory because the declarants had invoked their *Fifth Amendment* privilege against testifying at the defendants' trial.

[c] Rule 804(b)(3) -- Appellate Review

United States v. Bagley, 537 F.2d 162 (5th Cir. 1976) : Affirming a conviction for possession of heroin in a prison, the Court found no clear error in the determination below that the surrounding circumstances did not clearly indicate the trustworthiness of a proffered exculpatory statement. The Court noted that in reviewing the ruling on admissibility, consideration of the trustworthiness of the statement required a review of findings of fact, a situation analogous to the review of a preliminary determination of the voluntariness of a confession. Holding that the clearly erroneous standard of review governed, the Court stated that the absence of express findings of fact by the Trial Judge did not prevent the application of this test in the instant case. The reviewing Court's task is to determine whether any reasonable view of the evidence would support the lower Court's ruling.

[d] Rule 804(b)(3) -- Corroborating Circumstances

[i] Rule 804(b)(3) -- Civil Cases

American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999) : In an action to recover embezzled funds, the embezzling employee had made a confession implicating Fishman, owner of the currency exchange where bogus checks were cashed, but the employee exercised his self-incrimination privilege at his deposition

and all other alleged participants denied any knowledge of the check-cashing scheme. Affirming summary judgment for Fishman, the Court held that declarations setting forth the employee's confessions were hearsay not admissible under *Rule 804(b)(3)*. The plaintiffs had not met their burden of showing corroborating circumstances indicating the trustworthiness of the employee's statements, since it was a reasonable inference, based on the timing and contents of settlement agreements made along with the confessions, that the statements were made to curry favor with the plaintiffs. The Court held that its requirement of corroborating circumstances for statements offered under the Rule, whether they inculpated or exculpated third parties, survived the *Williamson* decision and applied to both criminal and civil cases.

[ii] Rule 804(b)(3) -- Corroborating Circumstances -- Statements Offered by Accused

[A] Rule 804(b)(3) -- No Abuse of Discretion to Exclude

United States v. Edelin, 996 F.2d 1238 (D.C. Cir. 1993) : The Court affirmed a conviction for possessing cocaine base with intent to distribute, holding there was no error in excluding a statement by the defendant's roommate purportedly exculpating the defendant, as there were no independent indicia of trustworthiness for the statement and the roommate may have had a motive to fabricate. In *United States v. Mackin*, n32 the Court affirmed the denial of new trial motions based on a prosecution witness' recantation of her trial testimony. If believed, the recantation would have placed most of the responsibility for the criminal activity on the declarant and her husband. But the Court held that it was properly rejected because of a lack of corroborating circumstances, citing *Rule 804(b)(3)*.

United States v. Millan, 230 F.3d 431 (1st Cir. 2000) : Affirming carjacking and firearms convictions, the Court held there was no error in excluding the defendant's testimony about a conversation he had overheard between two participants in the events concerning trading illicit firearms, since there were insufficient corroborating circumstances to warrant admission of the testimony. In *United States v. Mackey, 117 F.3d 24 (1st Cir. 1997)* , a defendant charged with bank robbery sought to explain his sudden wealth with statements by his bookie that he had won $60,000 on baseball bets. The Court found no abuse of discretion in exclusion of the statements, since there were insufficient corroborating circumstances. There was no specific evidence of a long winning streak or large winnings, and two girlfriends familiar with the defendant's betting habits testified that he was not interested in baseball. Other cases in which the Court found insufficient corroborating circumstances include: *United States v. Hemmer, 729 F.2d 10 (1st Cir. 1984)* ; *United States v. Zirpolo, 704 F.2d 23 (1st Cir. 1983)* ; *United States v. Annese, 631 F.2d 1041 (1st Cir. 1980)* .

United States v. Abreu, 342 F.3d 183 (2d Cir. 2003) : Affirming cocaine convictions, the Court found no abuse of discretion in the exclusion of testimony by the defendant that, when his son showed him a brick-shaped package containing drugs and the defendant instructed him to get rid of it, the son said that the drugs were "beat," and that he had been duped and would try to get his money back. The Court reasoned that the statements were offered for their truth, to prove that the seized cocaine belonged to the son. It declined to find that the statements were declarations against interest, because there were no corroborating circumstances to indicate their trustworthiness and the defendant had made no efforts to procure the testimony or attendance at trial of his son, who was in the Dominican Republic. In a narcotics prosecution, *United States v. Lumpkin, 192 F.3d 280 (2d Cir. 1999)* , the defendant offered a statement made in the office of the defendant's attorney by the broker of the transaction, which indicated that the defendant was not involved in the drug transaction. The Court found no error in exclusion of the statement on the ground of insufficient corroborating circumstances. It noted that the declarant entered a plea agreement the day after making the challenged statement in which she made admissions that conflicted with her previous statement that the defendant was not involved. In *United States v. Bahadar*, n33 the Court affirmed a conviction for heroin offenses, holding there was no abuse of discretion in excluding allegedly exculpatory statements by a coconspirator who asserted his self-incrimination privilege. Even if the statements were against penal interest when made, there were insufficient corroborating circumstances to support the trustworthiness of the statements. Other cases in which the Court found insufficient corroborating circumstances include: *United States v. Salvador, 820 F.2d 558 (2d Cir. 1987)* ; *United States v.*

Rodriguez, 706 F.2d 31 (2d Cir. 1983) ; *United States v. Ford, 771 F.2d 60 (2d Cir. 1985)* (2-1 decision); *United States v. Beltempo, 675 F.2d 472 (2d Cir. 1982)* .

United States v. Green, 694 F. Supp. 107 (E.D. Pa. 1988) , *aff'd*, *875 F.2d 312 (3d Cir. 1989)* : The Trial Judge held that an uncorroborated statement by a confessing codefendant that the defendant was not involved in the unlawful handling of a machine gun was inadmissible. The Judge concluded that the facts did not "distinguish this case from others in which a confessing co-conspirator or co-participant in criminal conduct seeks merely to make the best of a situation by insulating his partners through protestations of their innocence."

United States v. Bumpass, 60 F.3d 1099 (4th Cir. 1995) : The Court affirmed a conviction for possession of ammunition as a convicted felon, holding there was no abuse of discretion in excluding a written confession by the defendant's friend, because the defendant did not meet his burden of clearly establishing by corroborating circumstances the reliability of the confession: the friend had a motive to take responsibility because of the defendant's long criminal record; the statement was given several days after the events and was directly contradicted by three eyewitnesses; and the defendant never produced alleged witnesses who could corroborate the statement and testify to the circumstances. In *United States v. MacDonald*, n34 a former Army doctor charged with murdering his wife and children claimed that extrajudicial statements of a witness whose memory was faulty at trial should have been admitted as declarations against interest to support his theory that the murders were part of a bizarre cult attack. The Court found there was an inadequate showing of trustworthiness and corroborating circumstances, and that there was no abuse of discretion in excluding the statements.

United States v. Dean, 59 F.3d 1479 (5th Cir. 1995) : The Court found no error in the exclusion of a hearsay statement exculpating the defendants that was made during plea negotiations by the defendants' accomplice. The statement was not sufficiently supported by corroborating circumstances; the fact that the accomplice admitted guilt did not preclude others' guilt; the statement contained many questionable claims; and the evidence of the defendants' involvement in the crime was strong.

United States v. Forest, 355 F.3d 942 (6th Cir. 2004) : The Court affirmed convictions for offenses related to cocaine distribution, finding no abuse of discretion in the exclusion of a codefendant's statement against interest, because there was no corroboration of its allegedly exculpatory implications. In *United States v. Noel, 938 F.2d 685 (6th Cir. 1991)* , the Court affirmed a conviction for possession of cocaine with intent to distribute, holding there was no error in excluding a statement made by an accomplice immediately after her arrest in which she claimed ownership of the cocaine. The statement was contrary to the declarant's penal interest, but it was not sufficiently supported by corroborating circumstances to render it clearly trustworthy, as it was not repeated subsequent to the arrest and she disclaimed ownership of the cocaine when she entered her guilty plea.

United States v. Amerson, 185 F.3d 676 (7th Cir. 1999) : The defendant offered Heard's affidavit to prove that drugs found by police were thrown out the window by Heard, not thrown by the defendant, who was approaching the house. Affirming exclusion of the affidavit, the Court found several points on which the affidavit was unreliable, such as: the drugs were found more than 30 feet from the window that Heard allegedly threw the drugs from; Amerson had a history of coercing associates into taking blame for him; and Heard's own name was misspelled on the affidavit, while Amerson's name was spelled correctly. In *United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)* , the Court affirmed a conviction for kidnapping and illegally transporting a teenage girl, and upheld the exclusion of evidence that another man confessed after going to the funeral home and asking to see the girl's body. The other man "confessed to any crime he was questioned about by the police" and "lacked knowledge regarding the pertinent facts of the case," and there was no evidence corroborating any part of his story. In *United States v. Groce*, n35 the Court affirmed a firearms conviction,

finding no clear error in the determination below that an unavailable witness' statements were not sufficiently trustworthy. The declarant made several conflicting statements, and there was evidence that he may have changed his story out of fear.

United States v. Eagle Hawk, 815 F.2d 1213 (8th Cir. 1987) : The Court upheld the exclusion, for insufficient corroborating circumstances, of exculpatory out-of-court declarations by a declarant who refused to testify. See also *United States v. Savage* n36(finding insufficient corroborating circumstances of a statement that a gun in the defendant's car was given to her and put in the car by another man); *United States v. Hardrich* n37(statements offered by a defendant were properly excluded where they were not supported by corroborating circumstances); *United States v. Mansaw* n38(a statement of a codefendant was properly excluded as not necessarily against interest and uncorroborated).

United States v. Rhodes, 713 F.2d 463 (9th Cir. 1983) : The Court affirmed a conviction for conspiracy and possession of stolen mail, holding there was no error in excluding testimony that during the trial a codefendant -- who had pleaded guilty and who was hospitalized with a heart attack before being called as a witness -- had stated that the defendant was not the source of stolen checks. The statement was not against penal interest, since the codefendant had already pleaded guilty and was not subject to additional liability, and there were no corroborating circumstances to "clearly indicate" the trustworthiness of the witness' declaration. See also *United States v. Poland* n39(a statement was properly excluded due to insufficient corroborating circumstances); *United States v. Hoyos* n40(statements must be solidly against penal interest and solidly corroborated).

United States v. Spring, 80 F.3d 1450 (10th Cir. 1996) : In a bank robbery prosecution, the defendant offered statements, allegedly exculpating the defendant, that had been made to an FBI agent by another man being questioned about the robberies. The Court held there was no abuse of discretion in excluding the statements, as the declarant provided no information about his own involvement in the robbery and there was no substantiation of his bald assertion that the defendant was not involved. In *United States v. Porter*, n41 the defendant, prosecuted for bank burglaries allegedly committed with his brother, was permitted to introduce statements by the brother (since deceased) that the brother and his wife had "hit" the banks, but was not permitted to elicit the brother's further statements that defendant should not plea bargain because "he has done nothing." The Court affirmed, holding that the statements were properly severed because the part exculpating the defendant was not sufficiently corroborated because there was a lack of evidence that only the brother and his wife were involved in the burglaries.

United States v. Jernigan, 341 F.3d 1273 (11th Cir. 2003) : The defendant was convicted of felon firearm possession and moved for a new trial on the basis of newly discovered evidence, a statement by one Nelson that he had placed the gun in the defendant's truck, where it was found by police officers. The Court affirmed the denial of a new trial on the ground that Nelson's statement was hearsay and would not have been admissible. The statement could not be admitted as a declaration against penal interest because there was no showing of corroborating circumstances clearly indicating that it was trustworthy. The Court noted that Nelson's statement "was contradicted by all of the government's evidence inculpating Jernigan," and also found it relevant that the person who allegedly heard Nelson make the statement was an unreliable person with a criminal record. We note that the Court's focus on the unreliability of the *witness* is misplaced. At any new trial, it would be the jury's job to assess the witness's credibility and determine whether Nelson in fact made the statement. In *United States v. Hendrieth, 922 F.2d 748 (11th Cir. 1991)* , the Court affirmed a conviction for conspiring to pass counterfeit money, holding there was no error in excluding an alleged exculpatory statement by an unavailable declarant, as the witness to the alleged statement was completely unworthy of belief and there was no evidence to corroborate the making of the alleged statement. We note that the Rule requires corroboration for the statement's trustworthiness, but not for its making. In *United States v. Carlin*, n42 the Court affirmed a conviction for interstate transportation of stolen and forged securities, and upheld the exclusion of a

statement by an unavailable witness whose explanation of the delivery of certain checks to the defendant supported the defense. The Court said that there were no corroborating circumstances remotely indicating the trustworthiness of the statement, which was obtained by the defendant's investigator.

[B] Rule 804(b)(3) -- Corroborating Circumstances -- Statements Offered by Accused -- Admission Required

United States v. Atkins, 558 F.2d 133 (3d Cir. 1977) : The Court ordered a new trial in a bank robbery case for erroneous exclusion as hearsay of a third-party confession to the robbery. The Court suggested that the error might have been in considering the credibility of the witness as a factor supporting exclusion of the evidence, when *Rule 804(b)(3)* directs the Judge's attention to the trustworthiness of the declarant, not of the witness. Here there were substantial corroborating circumstances indicating the trustworthiness of the declarant's statement.

United States v. Price, 134 F.3d 340 (6th Cir. 1998) : In an appeal from narcotics convictions, the Court held it was error (but harmless) to exclude post-custodial statements from a person involved in the drug transaction, which indicated that the money for the drugs belonged only to the declarant, and that while the defendant must have been aware of what was going on, he was not a substantial participant in the transaction. The Trial Judge excluded the statements on the ground that they were not sufficiently corroborated, but the Court noted that "*Rule 804(b)(3)* does not require that the information within the statement be clearly corroborated; it requires only that there be corroborating circumstances which clearly indicate the trustworthiness of the statement, itself." The Court found the exculpatory statement trustworthy because: the declarant and the defendant did not have a close relationship; the statement was made after the declarant was advised of his *Miranda* rights; there was no evidence that the declarant made the statement in an effort to curry favor with the authorities; and independent evidence was consistent with the declarant's assertion. In a prosecution for drug trafficking offenses, *United States v. Hilliard, 11 F.3d 618 (6th Cir. 1993)* , the Court held it was an abuse of discretion (but harmless) to exclude a post-arrest statement in which an accomplice claimed ownership of the cocaine and currency found with the men at their arrest. The Trial Judge had excluded the statement because the accomplice had refused to confirm it in a written confession; in the Court's view, it was error to rely on this single fact in determining trustworthiness and, not considering corroborating evidence presented by the defendant, improperly to assess the credibility of the accomplice rather than the reliability of the accomplice's statement. In *United States v. Arthur*, n43 after an accomplice gave testimony implicating himself and a codefendant in a bank robbery concededly committed by only two men, he was induced by the Trial Judge to assert his self-incrimination privilege. Reversing the defendant's conviction, the Court held it was an abuse of discretion to then bar introduction of the accomplice's statement to the FBI confessing to this and other bank robberies and exculpating the defendant, as there was considerable corroboration of the confession.

United States v. Nagib, 56 F.3d 798 (7th Cir. 1995) : During a drug conspiracy trial, one codefendant changed his plea. The Court held it was error to preclude the defendant from introducing portions of the transcript from the codefendant's change-of-plea hearing. Corroborating circumstances, including the nature of the relationship between the defendant and the codefendant, the voluntariness of the statements, and the lack of indication they were made at sentencing to curry favor, provided sufficient indicia of reliability to require admission. Reversing the defendant's conviction for possession of 100 kilos of marijuana found in the cab of a truck in which he was codriver, the Court in *United States v. Garcia, 986 F.2d 1135 (7th Cir. 1993)* , held that the other driver's statements completely exculpating the defendant should have been admitted, as the two barely knew each other, the statements were made voluntarily shortly after a *Miranda* warning, there was nothing indicating they were made to curry favor, and the declarant inculpated only himself when entering his guilty plea. The Court noted that the corroborating circumstances requirement applies not to the substance of the statements but to their trustworthiness.

United States v. Slaughter, 891 F.2d 691 (9th Cir. 1989) : A conviction for cocaine distribution was reversed because a prior statement by an unavailable declarant that she, the defendant, and the government's key witness (a confidential informant) used cocaine at their first meeting had been erroneously excluded. The Court held that the statements were against the declarant's penal interest, were corroborated by the defendant's testimony that the key witness had used cocaine on that occasion, and were crucial to the defendant's defense that he had been entrapped by the informant.

[iii] Rule 804(b)(3) -- Corroborating Circumstances -- Statements Offered by Government

United States v. Barone, 114 F.3d 1284 (1st Cir. 1997) : The Court affirmed a racketeering conviction, upholding the admission of statements against penal interest implicating the defendant that were made by a declarant whom the defendant was alleged to have murdered. The Court stated that "the corroboration that is required by *Rule 804(b)(3)* is not independent evidence supporting the truth of the matters asserted by the hearsay statement, but evidence that clearly indicates that the statements are worthy of belief, based on the circumstances in which the statements were made."

United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) : In the course of reversing a conviction on heroin trafficking charges, the Court held that the corroborating circumstances requirement that is imposed on defendants who offer evidence under *Rule 804(b)(3)* must also be imposed on the government.

United States v. Shukri, 207 F.3d 412 (7th Cir. 2000) : At the defendant's bench trial on charges of conspiracy to possess stolen property, the Judge admitted testimony from an accomplice's brother-in-law that the accomplice had made statements implicating the defendant. The accomplice was unavailable at the trial, and the defendant's counsel waived the argument that his statements were not against penal interest under *Williamson v. United States*, contesting only whether they were supported by corroborating circumstances. The Court held that the waiver and the failure to argue the statements were not against penal interest was not ineffective assistance of counsel, but a "reasonable tactic," since the statements were against penal interest. The Court also held that the circumstances, including the fact that the declarant and his brother-in-law shared a confidential relationship within which candor is presumed, provided sufficient corroborating circumstances to support the trustworthiness of the statements. In *United States v. Harty, 930 F.2d 1257 (7th Cir. 1991)* , the Court affirmed convictions for offenses in connection with an attempt to burglarize the vault at a race track, holding there was no error in admitting tape recordings of conversations among the defendants two years after the attempt. The statements were against the declarant's penal interest, and both his strong motivation to recount the events accurately and corroboration by other witnesses demonstrated that they were trustworthy.

United States v. Rasmussen, 790 F.2d 55 (8th Cir. 1986) : Ruling on an interlocutory appeal by the government in a tax evasion prosecution, the Court held that statements offered by the government as declarations against interest were properly excluded due to insufficient corroborating circumstances. It stated that the factors to be considered in examining corroborating circumstances include:

> (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, (5) the timing of the declaration and the relationship between the speaker and the witness.

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) : In a prosecution arising out of arson of a home, the

Court declined to decide whether corroborating circumstances are required when a declaration against interest is offered to inculpate an accused. The Court found that, even if such circumstances are required, they existed in this case. In *United States v. Williams, 989 F.2d 1061 (9th Cir. 1993)* , the Court affirmed drug convictions and approved the admission of a coconspirator statement, in which a conspirator expressed frustration to a girlfriend. It was not in furtherance of the conspiracy, but was deemed admissible as a declaration against interest. The Court reserved decision on whether incriminating statements require corroborating circumstances, noting that any such requirement was met in this case.

[e] Rule 804(b)(3) -- Employee's Statements

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980) , *rev'd on other grounds*, *723 F.2d 238 (3d Cir. 1983)* , *rev'd on other grounds*, *475 U.S. 574 (1986)* : The Court said that

> [t]o qualify as an exception to the hearsay rule under *Rule 804(b)(3)*, a declaration must be against the employee's interest, not just the employer's interest. Since the trustworthiness of the declaration is insured only by the accompanying threat of loss or liability, the statement must be to the declarant's "immediate prejudice."

Pink Supply Corp. v. Hiebert, Inc., 612 F. Supp. 1334 (D. Minn. 1985) , *aff'd*, *788 F.2d 1313 (8th Cir. 1986)* : The Court ruled in this antitrust case that a statement by an employee implicating the employer in price fixing was not a declaration against interest absent evidence that the employee had some understanding of price fixing when he made the statement.

[f] Rule 804(b)(3) -- Personal Knowledge Requirement

United States v. Lang, 589 F.2d 92 (2d Cir. 1978) : The Court reversed a conviction for possession of counterfeit notes with intent to defraud, because a declaration against interest was admitted when there was no demonstration that the declarant had first-hand knowledge of the facts.

[g] Rule 804(b)(3) -- Statement Implicating Another

See also annotations under *§ 804.03[4][b][ii]*.

Williamson v. United States, 512 U.S. 594 (1994) : The Court held (6-3) that the exception applies only to self-inculpatory statements; neutral or self-serving portions of a broader narrative that is generally self-inculpatory are not admissible under the Rule. This case is discussed in the Editorial Explanatory Comment, *§ 804.02[12]*.

United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) : In a bank robbery prosecution, the government offered testimony from a witness recounting statements by the non-testifying codefendant, a long-time friend of the witness, that he and the defendant had committed the robbery. Affirming, the Court held there was no error in admitting the testimony. It satisfied the hearsay exception, since the declarant was unavailable, the declarant inculpated himself, and the trustworthiness requirement was satisfied by factors also meeting the *Confrontation Clause* requirements. The confrontation analysis was that of *Ohio v. Roberts*; the declarant's statements were not "testimonial" under *Crawford* because they were not made to the police or otherwise to further a prosecution. Circuit precedent suggests that, except

possibly for statements made by the defendant inculpating himself, statements against penal interest do not constitute a firmly-rooted exception under *Roberts* but rather are only admissible if they bear particularized guarantees of trustworthiness. Here, the declarant's statements about his own participation did not minimize his role, and to the extent they inculpated the defendant they were not puffing or bragging or made to curry favor with law enforcement; they were made to a friend who had expressed concern about the declarant's "paranoid" and "stressed-out" behavior. Thus, they were made in circumstances providing indicia of trustworthiness that satisfied the *Sixth Amendment* and the hearsay exception.

[5] Rule 804(b)(4) -- Hearsay Exceptions -- Statement Of Personal Or Family History

[a] Rule 804(b)(4) -- Constitutional Concerns

United States v. Medina-Gasca, 739 F.2d 1451 (9th Cir. 1984) : Although the Court found that even though statements by one undocumented alien to immigration officers concerning his place of birth and ancestry might have satisfied *Rule 804(b)(4)*, the Trial Judge would have been better advised to avoid confrontation problems and to refuse to admit the statements in a prosecution for illegal transportation of aliens. It found any error to be harmless, however.

[b] Rule 804(b)(4) -- Statements of Motive or Purpose

United States v. Carvalho, 742 F.2d 146 (4th Cir. 1984) : The Court reversed convictions of a husband and wife for knowing use of false alien registration cards. It found that the government improperly used affidavits of former spouses of the defendants in an effort to establish that the defendants were attempting to use various devices to obtain residency in the United States. The Court reasoned that while "for some purposes a statement regarding one's reasons for entering a marriage might well be a 'statement concerning' one's marriage, it is also clear that evidence as to motive or purpose, highly debatable or controversial matters, is simply not within the scope of *Rule 804(b)(4)*."

[6] Rule 804(b)(5) -- Hearsay Exceptions -- Other Exceptions

The residual exception formerly stated in this Rule was transferred to *Rule 807* in 1997. Cases decided under the former Rule are collected in the Annotations to *Rule 807*, *§ 807.03*.

[7] Rule 804(b)(6) -- Forfeiture By Wrongdoing

[a] Rule 804(b)(6) -- Constitutional Objection Forfeited

United States v. Aguiar, 975 F.2d 45 (2d Cir. 1992) : The Court held that the defendant, charged in connection with a heroin importing conspiracy, had forfeited any hearsay objections and confrontation rights with respect to statements given to an investigating agent and a prosecutor, where the defendant had procured the absence of the witness. In *United States v. Mastrangelo*, n44 where a grand jury witness was murdered hours before he was scheduled to testify at trial and the Trial Judge declared a mistrial as to Mastrangelo pursuant to a finding that he either ordered or acquiesced in the killing, the Judge held that the grand jury testimony was admissible in a second trial for drug-related offenses. The Court remanded, saying that an evidentiary hearing was required at which the government bore the burden of establishing by a preponderance of the evidence that Mastrangelo was in fact involved in the death of the witness through knowledge, complicity, planning, or in some other way. On remand, the Judge found by a preponderance of the evidence, but not by clear and convincing evidence, that the defendant had prior knowledge of a plan to murder a government witness and took no action to warn appropriate authorities. As a result, the defendant forfeited any constitutional objection to introduction of the murdered witness' grand jury testimony, which was admissible under the residual exception. We note that under the 1997 amendment, the proper standard of proof is by a preponderance. See the

Editorial Explanatory Comment to *Rule 804*, *§ 804.02[16]*.

United States v. Smith, 792 F.2d 441 (4th Cir. 1986) : The Court affirmed convictions for involvement in burning a barn, holding that the defendant forfeited all hearsay and confrontation objections to the introduction of a statement by a codefendant where the Trial Judge found clear and convincing evidence that the defendant had procured the absence of the codefendant from the trial. We note that under the 1997 amendment, the proper standard of proof is by a preponderance. See the Editorial Explanatory Comment to *Rule 804*, *§ 804.02[16]*.

United States v. Thevis, 665 F.2d 616 (5th Cir. 1982) : The Court upheld a ruling that once the government showed by clear and convincing evidence that a defendant was involved in the murder of a witness, the defendant would be deemed to have waived any confrontation objection to the use of the witness' grand jury testimony. The waiver would also apply to a hearsay objection. We note that under the 1997 amendment, the proper standard of proof is by a preponderance. See the Editorial Explanatory Comment, *§ 804.02[16]*.

United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005) : The Court held that evidence that the defendant had five months earlier assaulted his wife because of jealousy when she had talked to a former boyfriend was properly admitted as probative of motive in his trial for murdering his wife. The defense argued that it was a confrontation violation to admit statements made by the wife to police officers regarding the circumstances of the assault, but the Court held that the defendant had forfeited his confrontation right by killing his wife (a fact he admitted). The Court also held that, regardless of whether *Rule 804(b)(6)* requires that the defendant have acted with the intent to prevent the declarant from testifying, the "right secured by the *Sixth Amendment* does not depend on, in the recent words of the Supreme Court [in *Crawford v. Washington*], 'the vagaries of the Rules of Evidence,' " and the " 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's inapplicability does not hinge on the wrongdoer's motive."

United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976) : In a cocaine distribution case, the Trial Judge found that one defendant had intimidated a witness into refusing to testify. The Court found that by the intimidation of the witness, the defendant forfeited his right to complain about the absence of cross-examination.

United States v. Balano, 618 F.2d 624 (10th Cir. 1979) : The Court affirmed a conviction, and held that the defendant forfeited any confrontation objection to the introduction of a witness' grand jury testimony because he had threatened the witness.

[b] RULE 804(b)(6) -- Determination of Wrongdoing

United States v. White, 116 F.3d 903 (D.C. Cir. 1997) : In a case decided before the effective date of *Rule 804(b)(6)*, the Court held that two defendants, who murdered a witness, had thereby forfeited their confrontation and hearsay objections to the statements of that witness, as the government proved by a preponderance of the evidence that the defendant has procured the unavailability of an adverse witness. The Court, citing *Rule 104(a)*, found no error in the Trial Judge's partial reliance on hearsay in making the determination. The Court also held that it was proper for the Judge to make a preliminary ruling on forfeiture, and then to defer a final ruling until all the evidence of the murder had been introduced at trial.

United States v. Miller, 116 F.3d 641 (2d Cir. 1997) : The Court held in a massive drug conspiracy prosecution

that statements made by homicide victims were admissible against their murderers, regardless of whether the defendant's purpose was to prevent the victim from testifying; merely participating in the deceased witness' murder operates as a forfeiture of the defendant's confrontation right and hearsay objection. An evidentiary hearing is required, at which the government must show by a preponderance of the evidence that the declarant's unavailability was caused by the defendant's misconduct. The failure to hold such a hearing in this case was harmless error.

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) : Affirming convictions for a murder conspiracy, the Court upheld a ruling that admitted under *Rule 804(b)(6)* a deceased declarant's statement relating the defendant's boast of committing the murder. The government had satisfied its preponderance of the evidence burden that Rivera was responsible for procuring the declarant's unavailability. The Court rejected Rivera's argument that he could not be responsible for the killing of a witness which occurred while he was incarcerated, since "a defendant need only tacitly assent to wrongdoing in order to trigger the Rule's applicability." In a drug dealing and murder case, *United States v. Johnson, 219 F.3d 349 (4th Cir. 2000)* , the Court found no error in the admission of hearsay statements by a former associate under *Rule 804(b)(6)*. The Court held that there is no rigid hearing requirement. In this case, the Judge held a lengthy conference to discuss the admissibility of the hearsay, as briefed by the government before trial. Moreover, defense counsel did not request a separate hearing, nor did he contest the fact that the defendant murdered the associate to prevent him from testifying. See also *United States v. Emery* n45(holding that a Trial Judge need not hold a hearing under *Rule 804(b)(6)*, but can admit the hearsay statement at trial "contingent upon proof of the underlying murder by a preponderance of the evidence").

United States v. Scott, 284 F.3d 758 (7th Cir. 2002) : The Court affirmed drug trafficking convictions, finding no error in the admission of grand jury testimony that had been given by a coconspirator who refused to testify at trial. The government offered evidence that the defendant had made threats through an intermediary while he and the witness were confined in the same jail and followed up with a direct 20-minute conversation in the jail's law library, after which he seemed "happy" and "relieved" that the witness would not testify. The Court held that applying pressure on a potential witness not to testify, including threats of harm and suggestions of future retribution, constitutes "wrongdoing" under *Rule 804(b)(6)*, and that there was a sufficient showing in this case.

[c] Rule 804(b)(6) -- Discovery by the Defense

United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) : Affirming convictions for a murder conspiracy, the Court upheld a ruling that admitted under *Rule 804(b)(6)* a deceased declarant's statement relating the defendant's boast of committing the murder. However, the Court rejected the government's argument that a defendant has no right to discover information regarding the alleged wrongdoing relied upon by the government when it seeks admission of a statement under *Rule 804(b)(6)*. The Court reasoned that "[o]nce a defendant demonstrates that a witness can provide testimony material to his defense, then the government's interest in its evidentiary privilege must give way."

[d] Rule 804(b)(6) -- Evidence of Cover-up Insufficient

United States v. Thompson, 286 F.3d 950 (7th Cir. 2002) : Affirming convictions arising out of a drug conspiracy, the Court addressed whether the Trial Judge properly admitted evidence of a murdered informant's hearsay statements. The Court suggested that the fact that defendants participate in the cover-up of a murder does not necessarily prove that they intended to procure the witness' unavailability. It found any error in admission of a murdered informant's hearsay statements to be harmless.

[e] Rule 804(b)(6) -- Forfeiture by Coconspirator's Actions

United States v. Thompson, 286 F.3d 950 (7th Cir. 2002) : Affirming convictions arising out of a drug conspiracy, the Court addressed whether the Trial Judge properly admitted evidence of a murdered informant's hearsay statements. The Court agreed with the analysis in *United States v. Cherry, 217 F.3d 811 (10th Cir. 2000)* (*infra*). It concluded that the murder of the informant was not reasonably foreseeable by the conspiring defendants, but admission of the statements was harmless error.

United States v. Cherry, 217 F.3d 811 (10th Cir. 2000) : In a drug conspiracy prosecution, the Trial Judge ruled that statements by a murdered witness could be admitted against the defendant who committed the murder but not against other conspirator-defendants. On an interlocutory appeal, the Court reversed and remanded, holding (2-1) that a defendant may be deemed to forfeit *Confrontation Clause* and hearsay objections if "(1) he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing, or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary consequence of an ongoing conspiracy." The Court found no clear error in the determination below that some of the defendants had no knowledge of or participation in the murder of the witness, but a remand was required to determine whether the murder could reasonably have been foreseen by these defendants as a necessary consequence of the conspiracy. One Judge, dissenting in part, argued that a finding of forfeiture simply on the basis of participation in a drug conspiracy "is too expansive and goes against the rule of fundamental fairness."

[f] Rule 804(b)(6) -- Statement Offered To Prove Murder of Declarant

United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) : Affirming convictions for racketeering, murder, and related charges, the Court held it was proper to admit statements of two hearsay declarants to prove that the defendant murdered them. Rejecting the argument that *Rule 804(b)(6)* limits the admission of hearsay statements to past events or offenses committed by the defendant about which the declarant could have testified, the Court reasoned that the exception refers to the intent of a party to procure the unavailability of a witness and does not limit the subject matter of a declaration; a defendant forfeits his right to object to hearsay by participating in wrongful conduct designed to make a witness unavailable. However, a Trial Judge must perform a *Rule 403* balancing test before admitting statements to assure that facially unreliable hearsay is not admitted.

United States v. Gray, 405 F.3d 227 (4th Cir. 2005) : The defendant was convicted of insurance fraud, resulting from collecting insurance proceeds after committing murders, including that of her husband. The husband had made many statements reflecting his fear of the defendant, and had brought charges against her for attempting to murder him, before he finally met his demise. The Court upheld admission of the husband's hearsay statements under *Rule 804(b)(6)*, despite the defendant's argument that the Rule was inapplicable because she had no intent to procure her husband's unavailability as a witness in *this* trial. The Court noted that the policy of the Rule is to prevent a defendant from profiting by her own wrongdoing.

[g] Rule 804(b)(6) -- Wrongdoing Intended To Procure Unavailability

United States v. Scott, 284 F.3d 758 (7th Cir. 2002) : The Court affirmed drug trafficking convictions, finding no error in the admission of grand jury testimony that had been given by a coconspirator who refused to testify at trial. The government offered evidence that the defendant had made threats through an intermediary while he and the witness were confined in the same jail and followed up with a direct 20-minute conversation in the jail's law library, after which he seemed "happy" and "relieved" that the witness would not testify. The Court held that, although "murder, physical assault, or bribery" is sufficiently malevolent to constitute "wrongdoing," such offenses "are not necessary," and that applying pressure on a potential witness not to testify, including threats of harm and suggestions of future retribution, constitutes "wrongdoing" under *Rule 804(b)(6)*. The Court held that circumstantial evidence could establish coercion, as

well as the intent to cause unavailability and causing unavailability, and that the Trial Judge had sufficient evidence to find that the exception applied in this case. In *United States v. Ochoa, 229 F.3d 631 (7th Cir. 2000)* , a prosecution for conspiracy to commit mail fraud, arising from a scheme in which he arranged for his car to "disappear" in order to obtain insurance proceeds, the Court held it was error (but harmless) to admit a hearsay statement by the person who arranged the car's disposal for the defendant, which was made to an FBI agent while the declarant was a target of the investigation. There was insufficient evidence that the defendant assisted the declarant to flee the jurisdiction and become unavailable for trial.

United States v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001) : Affirming convictions for conspiracy to violate immigration laws and transportation of illegal aliens, the Court held that the government provided sufficient evidence to prove more likely than not that the defendant wrongfully procured the unavailability of the hearsay declarant, thus justifying a finding that the defendant forfeited his hearsay objection.

FOOTNOTES:

(n1)Footnote 1. *Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp., 782 F.2d 1455 (8th Cir. 1986)* .

(n2)Footnote 2. *Bailey v. Southern Pac. Transp. Co., 613 F.2d 1385 (5th Cir. 1980)* .

(n3)Footnote 3. *United States v. Puckett, 692 F.2d 663 (10th Cir. 1982)* .

(n4)Footnote 4. *United States v. Losada, 674 F.2d 167 (2d Cir. 1982)* .

(n5)Footnote 5. *United States v. Johnson, 735 F.2d 1200 (9th Cir. 1984)* .

(n6)Footnote 6. *United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983)* .

(n7)Footnote 7. *United States v. Fernandez-Roque, 703 F.2d 808 (5th Cir. 1983)* .

(n8)Footnote 8. *United States v. Amaya, 533 F.2d 188 (5th Cir. 1976)* .

(n9)Footnote 9. *United States v. Faison, 679 F.2d 292 (3d Cir. 1982)* .

(n10)Footnote 10. *United States v. Acosta, 769 F.2d 721 (11th Cir. 1985)* .

(n11)Footnote 11. *Hannah v. City of Overland, 795 F.2d 1385 (8th Cir. 1986)* .

(n12)Footnote 12. *DeLurya v. Winthrop Labs, 697 F.2d 222 (8th Cir. 1983)* .

(n13)Footnote 13. *United States v. McDonald, 837 F.2d 1287 (5th Cir. 1988)* .

(n14)Footnote 14. *United States v. Atkins, 618 F.2d 366 (5th Cir. 1980)* .

(n15)Footnote 15. *United States v. Licavoli, 725 F.2d 1040 (6th Cir. 1984)* .

(n16)Footnote 16. *United States v. Feldman, 761 F.2d 380 (7th Cir. 1985)* .

(n17)Footnote 17. *United States v. Pizarro, 717 F.2d 336 (7th Cir. 1983)* .

(n18)Footnote 18. *In re Paducah Towing Co., 692 F.2d 412 (6th Cir. 1982)* .

(n19)Footnote 19. *In re Master Key Antitrust Litig., 72 F.R.D. 108 (D. Conn. 1976)* , *aff'd, 551 F.2d 300 (2d Cir. 1977)* .

(n20)Footnote 20. *Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495 (D. Del. 1983)* .

(n21)Footnote 21. *Dykes v. Raymark Indus., 801 F.2d 810 (6th Cir. 1986)* .

(n22)Footnote 22. *Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983)* .

(n23)Footnote 23. *Pink Supply Corp. v. Hiebert, Inc., 612 F. Supp. 1334 (D. Minn. 1985)* , *aff'd*, *788 F.2d 1313 (8th Cir. 1986)* .

(n24)Footnote 24. *United States v. Coachman, 727 F.2d 1293 (D.C. Cir. 1984)* .

(n25)Footnote 25. *United States v. Seeley, 892 F.2d 1 (1st Cir. 1989)* .

(n26)Footnote 26. *United States v. DeVillio, 983 F.2d 1185 (2d Cir. 1993)* .

(n27)Footnote 27. *United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)* .

(n28)Footnote 28. *United States v. Butler, 71 F.3d 243 (7th Cir. 1995)* .

(n29)Footnote 29. *United States v. Williams, 738 F.2d 172 (7th Cir. 1984)* .

(n30)Footnote 30. *United States v. Thomas, 919 F.2d 495 (8th Cir. 1990)* .

(n31)Footnote 31. *United States v. Ospina, 739 F.2d 448 (9th Cir. 1984)* .

(n32)Footnote 32. *United States v. Mackin, 561 F.2d 958 (D.C. Cir. 1977)* .

(n33)Footnote 33. *United States v. Bahadar, 954 F.2d 821 (2d Cir. 1992)* .

(n34)Footnote 34. *United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982)* .

(n35)Footnote 35. *United States v. Groce, 999 F.2d 1189 (7th Cir. 1993)* .

(n36)Footnote 36. *United States v. Savage, 863 F.2d 595 (8th Cir. 1988)* .

(n37)Footnote 37. *United States v. Hardrich, 707 F.2d 992 (8th Cir. 1983)* .

(n38)Footnote 38. *United States v. Mansaw, 714 F.2d 785 (8th Cir. 1983)* .

(n39)Footnote 39. *United States v. Poland, 659 F.2d 884 (9th Cir. 1981)* .

(n40)Footnote 40. *United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978)* .

(n41)Footnote 41. *United States v. Porter, 881 F.2d 878 (10th Cir. 1989)* .

(n42)Footnote 42. *United States v. Carlin, 698 F.2d 1133 (11th Cir. 1983)* .

(n43)Footnote 43. *United States v. Arthur, 949 F.2d 211 (6th Cir. 1991)* .

(n44)Footnote 44. *United States v. Mastrangelo, 533 F. Supp. 389 (E.D.N.Y. 1982)* , *vacated & remanded*, *693 F.2d 269 (2d Cir. 1982)* , *on remand*, *561 F. Supp. 1114 (E.D.N.Y.)* , *aff'd*, *722 F.2d 13 (2d Cir. 1983)* .

(n45)Footnote 45. *United States v. Emery, 186 F.3d 921 (8th Cir. 1999)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 804 RULE 804

4-804 Federal Rules of Evidence Manual 804.04

804.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45 (e) of the Federal Rules of Civil Procedure and *Rule 17(e) of the Federal Rules of Criminal Procedure*.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State, 35 Ala. App. 147, 46 So. 2d 837 (1950)* ; *State v. Stewart, 85 Kan. 404, 116 P. 489 (1911)* ; Annot., 45 A.L.R.2d 1354 ; Uniform Rule 62(7)(a); *California Evidence Code § 240(a)(1)*; Kansas Code of Civil Procedure § 60459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People, 152 Colo. 586, 384 P.2d 454 (1963)* ; *People v. Pickett, 339 Mich.*

294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra*, *Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1949)* .

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to crossexamination.

(4) Death and infirmity find general recognition as grounds. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); *California Evidence Code § 240(a)(3)*; Kansas Code of Civil Procedure § 60459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in *Rule 32(a)(3) of the Federal Rules of Civil Procedure* and *Rule 15(e) of the Federal Rules of Criminal Procedure*.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); *California Evidence Code § 240(a)(4)* and *(5)*; Kansas Code of Civil Procedure § 60459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)* .

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant. **[Editor's Note: A deposition preference was included when unavailability is asserted on grounds of absence. See the text of Rule 804(a)(5).]**

Subdivision (b). Rule 803 *supra* is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and crossexamination, since both oath and opportunity to crossexamine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803 *supra* . However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and crossexamination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one *against* whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of crossexamination or decision not to crossexamine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by*

whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 52627; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of crossexamining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, *38 N.Y.U.L. Rev. 651, n.1 (1963)*; McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in *California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)* , to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. *Falknor, supra, at 652*; McCormick § 232, pp. 48788. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. The position is supported by modern decisions. McCormick § 232, pp. 48990; 5 Wigmore § 1388. **[This approach was rejected by the Congress, which provided that prior testimony cannot be used against a party unless that party or a predecessor in interest had a similar motive and opportunity to develop the testimony. --Ed.]**

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 12901292; Kansas Code of Civil Procedure § 60460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895)* , held that the right was not violated by the government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the question (1) whether direct and redirect are equivalent to crossexamination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by crossexamination is constitutionally admissible, former testimony tested by the crossexamination of one similarly situated does not offend against confrontation. *Falknor, supra, at 659-60*. The constitutional acceptability of dying declarations has often been conceded. *Mattox v. United States, 156 U.S. 237, 243, 15 S. Ct. 337, 39 L. Ed. 409 (1895)* ; *Kirby v. United States, 174 U.S. 47, 61, 19 S. Ct. 574, 43 L. Ed. 890 (1899)* ; *Pointer v. Texas, 380 U.S. 400, 407, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)* .

[The Advisory Committee's Note accompanying proposed, but not enacted, exception (b)(2) ("statement of recent perception") is found in Part Three of this Manual. We have renumbered the remainder of the headings to conform to the Rules as enacted. --Ed.]

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its

traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex v. Woodcock*, 1 Leach 500, 502, *168 Eng. Rep. 352, 353 (K.B. 1789)* .

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g., a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo. R.S. § 52120, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 223, n. 4. Kansas by decision extended the exception to civil cases. *Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914)* . While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of firsthand knowledge is assured by Rule 602. **[The Congress adopted a more limited exception. --Ed.]**

Comparable provisions are found in Uniform Rule 63(5); *California Evidence Code § 1242*; Kansas Code of Civil Procedure § 60460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman v. Northwest Engineering Co., 346 F.2d 668 (6th Cir. 1965)* . If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2) **[Editor's Note: now Rule 801(d)(2)]**, and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against interest aspect. *Highman v. Ridgway*, 10 East 109, *103 Eng. Rep. 717 (K.B. 1808)* ; *Reg. v. Overseers of Birmingham*, 1 B. & S. 763, *121 Eng. Rep. 897 (Q.B. 1861)* ; McCormick § 256, p. 551, nn.2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 54849. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913)* , but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377 (1964)* ; *Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945)* ; *Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522, 163 A.2d 465 (1960)* ; *Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950)* ; *Annot., 162 A.L.R. 446* . The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication. [The Congress adopted a more limited exception, rejecting the admissibility of

statements against social interest. --Ed.]

Ordinarily the third party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)* , and *Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1967)* , both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of selfserving against disserving aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); *California Evidence Code § 1230*; Kansas Code of Civil Procedure § 60460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is selfevident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii) deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id*. § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id*. § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); *California Evidence Code §§ 1310*, *1311*; Kansas Code of Civil Procedure § 60460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

Exception (5). **[Editor's Note: Rule 804(b)(5) has been transferred to Rule 807. The Advisory Committee Note on Rule 804(b)(5) simply referred to the commentary under the identical Rule 803(24), which in 1997 was combined with Rule 804(b)(5) into a single Rule 807.]**

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."

Following the 1987 amendments to Rule 804, Congress adopted a technical amendment correcting syntax, effective November 18, 1988. AntiDrug Abuse Act of 1988, Pub. L. 100690, § 7075(b), 102 Stat. 4181 (1988).]

[2] 1997 Amendment Committee Note

1997 Amendment Committee Note

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)* , *cert. denied*, *467 U.S. 1204 (1984)* . The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. *See, e.g.*, *United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992)* ; *United States v. Potamitis, 739 F.2d 784, 789 (2d Cir.)* , *cert. denied*, *469 U.S. 918 (1984)* ; *Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982)* , *cert. denied*, *460 U.S. 1053 (1983)* ; *United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979)* , *cert. denied*, *449 U.S. 840 (1980)* ; *United States v. Carlson, 547 F.2d 1346, 135959 (8th Cir.)* , *cert. denied*, *431 U.S. 914 (1977)* . The foregoing cases apply a preponderance of the evidence standard. *Contra United States v. Thevis, 665 F.2d 616, 631 (5th Cir.)* (clear and convincing evidence standard), *cert. denied*, *459 U.S. 825 (1982)* . The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 284 (1999)

Rule 804(a)(5)--Deposition Preference

Rule 804 sets forth exceptions to the hearsay rule that are premised on the unavailability of the hearsay declarant. The rationale of these exceptions is that while statements falling within them are not as reliable as the in-court testimony of the declarant, they are better than nothing at all. Therefore, if the declarant is unavailable, statements falling within these exceptions are admissible for their truth.

Rule 804(a) defines unavailability for purposes of the Rule 804 exceptions. Rule 804(a)(5) sets forth the ground of "absence," and defines when a declarant can be considered absent so that a qualifying hearsay statement can be admitted. The Advisory Committee's proposed definition of absence was that the proponent "has been unable to procure [the declarant's] attendance by process or other reasonable means." The Advisory Committee Note states categorically that "[t1he rule contains no requirement that an attempt be made to take the deposition of a declarant." The question of absence was to be determined, in the Advisory Committee's view, by "whether the declarant could be physically produced; if not, any statement qualifying under the Rule 804(b) exceptions would be admissible."

The House Committee on the Judiciary was in favor of requiring the proponent to attempt to depose a witness before a witness could be declared absent. The Senate Committee on the Judiciary disagreed with this position, calling a deposition requirement a "needless, impractical, and highly restrictive complication." Nonetheless, the House version was adopted in Conference and incorporated in Rule 804(a)(5). Now, before a declarant can be found absent for purposes of dying declarations, declarations against interest, and statements of pedigree (i.e., Rules 804(b)(2),(3), and (4)), the proponent must show that an attempt was made to depose the declarant. An attempt to depose must be made even if the declarant is abroad, since both the Civil and Criminal Rules of Procedure provide a means for deposing witnesses outside the country. It should be noted, however, that there is no deposition preference for an absent declarant who has given prior testimony that would otherwise be admissible under Rule 804(b)(1). This is because, as the House recognized, prior testimony has already been cross-examined either at trial or deposition, so it makes little sense to require the proponent to try to depose the declarant again to give exactly the same kind of testimony.

Because of Congress's inclusion of a deposition preference in Rule 804(a)(5), the Advisory Committee Note to that rule, which treats absence only in terms of inability to physically produce the declarant at trial, should not be relied upon as a proper statement of the rule.,

Rule 804(b)(1)--Prior Testimony

Congress and the Advisory Committee were in disagreement about the proper scope of the prior testimony exception to the hearsay rule. The justification for the exception is that the declarant has already been crossexamined under oath about the same subject matter previously, so the statement is reliable enough to be admitted despite the fact that it is hearsay. The dispute between Congress and the Advisory Committee was over whether a party could be bound by the testimony if someone other than that party conducted the prior cross-examination.

The Advisory Committee proposal provided for admissibility if the party against whom it was offered or a person with motive and interest similar to that of the party had an opportunity to examine the declarant when the testimony was given. An example may help to illustrate how this would work. Assume a series of cases arising from an airplane accident. In the first case, a witness gives favorable testimony for the airline, and is crossexamined thoroughly by the first plaintiff's counsel. Under the Advisory Committee's version of Rule 804(b)(1), the transcript of this testimony could be admitted against subsequent plaintiffs, since the first plaintiff had a "similar motive and opportunity" to cross-examine the witness as the subsequent plaintiffs would have were the witness now available.

The House Committee on the Judiciary objected to the Advisory Committee's proposal on the ground that it is "generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party." The sole exception to this principle, according to the House Committee, is when a party's "predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness." The House Committee's view prevailed in Congress even though, in the words of the Senate Committee on the Judiciary, there is "considerable merit" to the Advisory Committee's version. The merit in the Advisory Committee position is that if the prior party conducted basically the same cross-examination that the current party would conduct if the witness were available, there is no unfairness in admitting the testimony against the current party; indeed, it is patently unfair to exclude such testimony when the alternative is no evidence at all, given the declarant's unavailability. The Senate Committee consoled itself, however, with the conclusion that the difference between the House and Advisory Committee versions was "not great."

As enacted, *Rule 804(b)(1)* provides that prior testimony is admissible "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony." This would seem to mean that in the hypothetical airplane cases posed above, the testimony favorable to the airline would not be admissible against subsequent plaintiffs. The first plaintiff could not be deemed a "predecessor in interest" of subsequent unrelated parties, at least insofar as that term is ordinarily used in a legal context. The common understanding of "predecessor in interest" is, of course, that the first party is in some kind of privity relationship with the subsequent party. Accordingly, the Advisory Committee Note to Rule 804(b)(1) would appear to be misleading when it states that the rule allows "substitution of one with the right and opportunity to develop the testimony with similar motive and interest."

[4] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Subcommittee amendment to Subdivision (a)(5) is primarily designed to require that an attempt be made to depose a witness as a precondition to the witness being deemed unavailable; the Subcommittee, however, recognized the propriety of an exception to this requirement in the case where it is the witness' former testimony that is sought to be admitted under Subdivision (b)(1).

Subdivision (b)(1) of the Court Rule allowed prior testimony of a witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Subcommittee believed it is generally unfair to impose upon the party against whom the hearsay is being offered

responsibility for the manner in which the witness was previously handled. The sole exception to this, in the Subcommittee's view, is where a party's predecessor in interest had the prior opportunity and similar motive to examine the witness. The subdivision was amended to reflect these policy determinations.

The Subcommittee voted to delete Subdivision (b)(2) as creating a new and unwarranted hearsay exception of great potential breadth. The Subcommittee did not believe that statements of the type referred to in the proposed Court Rule bore sufficient guarantees of trustworthiness to justify admissibility.

Subdivision (b)(3) [(b)(2) as enacted] of the Court Rule proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause of circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Subcommittee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. At the same time, the Subcommittee approved the expansion to civil cases, although noting the possibility that this could lead to forum shopping in some cases.

Under Subdivision (b)(4) [(b)(3) as enacted] the Subcommittee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject the declarant to civil liability or to render invalid a claim by him against another to be unnecessary as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner v. Antonio Triano Tile & Marble Co., 410 F.2d 238 (D.C. Cir. 1968)* . Those additional references were accordingly deleted. The Court's Rule also proposed to expand the hearsay exception from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make the declarant an object of hatred, ridicule, or disgrace. The Subcommittee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. As for statements against penal interest, the Subcommittee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending also to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Subcommittee settled on the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in cases like *Donnelly v. United States, 228 U.S. 243* , where the circumstances clearly indicated reliability, would be changed. The Subcommittee also determined to add to the Rule the final sentence from the 1971 draft, designed to codify the doctrine of *Bruton v. United States, 391 U.S. 123* . The Subcommittee did not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to crossexamination, but believed there was no need to make specific provision for this situation in the Rule since in that event the declarant would not be "unavailable."

[5] Report of the House Committee on the Judiciary

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana, 423 F.2d 1165, 1169-70 (2d Cir.) , cert. denied, 400 U.S. 841 (1970)* .

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable," that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)." The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee,

however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

> "*Statement against interest*.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated."

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner v. Antonio Triano Tile & Marble Co., 410 F.2d 238 (D.C. Cir. 1968)* . Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States v. Dovico, 380 F.2d 325, 327* , nn.2, 4 (2d Cir.), *cert. denied*, *389 U.S. 944 (1967)* . As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly v. United States, 228 U.S. 243 (1912)* , where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton v. United States, 391 U.S. 123 (1968)* . The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to crossexamination, but believed there was no need to make specific provision for this situation in the Rule, since in that event [*sic*] the declarant would not be

"unavailable."

[6] Report of the Senate Committee on the Judiciary

Subdivision (a) of Rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable."

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases.

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and timeconsuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant [sic]." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trail [*sic*]. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three states which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability.

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to *supra*, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton v. United States, 391 U.S. 123 (1968)*. *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the *confrontation clause of the sixth amendment*.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the *fifth amendment's* right against selfincrimination and, here, the *sixth amendment's* right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g., where the codefendant takes the stand and is subject to crossexamination; where the accused confessed, see *United States v. Mancusi, 404 F.2d 296 (2d Cir. 1968)*, *cert. denied*, *397 U.S. 942 (1967)*; where the accused was placed at the scene of the crime, see *United States v. Zelker, 452 F.2d 1009 (2d Cir. 1971)*. For these reasons, the committee decided to delete this provision.

Former testimony.--Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

[Footnotes deleted. --Ed.]

[7] Report of the House and Senate Conferees

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Subsection (a) defines the term "unavailability as a witness." The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the

accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

The Senate amendment adds a new hearsay exception, not contained in the House bill, which provides that certain law enforcement records are admissible if the officerdeclarant is unavailable to testify or be present because of (1) death or physical or mental illness or infirmity or (2) absence from the proceeding and the proponent of the statement has been unable to procure his attendance by process or other reasonable means.

The Conference does not adopt the Senate amendment, preferring instead to leave the bill in the House version, which contained no such provision.

[8] Citations to Hearings and Debates

Letter from George A. Spiegelberg to Herbert E. Hoffman, May 7, 1973, and accompanying material, in Supp. to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess., at 68, 7274 (1973).

Letter from Hon. Roszel C. Thomsen to Hon. James O. Eastland, May 22, 1974, and accompanying material, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 5354, 6870 (1974).

Prepared Statement of W. Vincent Rakestraw, June 5, 1974, in Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 109, 114 (1974).

Debate in the House of Representatives, 120 Cong. Rec. H12255H12257 (December 18, 1974).

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Supp. To CHAPTER 804 RULE 804

4-804 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 804, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 804. Hearsay Exceptions; Declarant Unavailable	**Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Un-**

availablle as a Witness

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant --

(a) Criteria for Being Unavailablle. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted by ruling of the court on the ground of

(1) is exempted from testifying about the subject matter of

	privilege from testifying concerning the subject matter of the declarant's statement; or		the declarant's statement because the court rules that a privilege applies;
(2)	persists in refusing to testify concerning the subject matter of the declarant's statement despite an	**(2)**	refuses to testify about the subject matter despite a court order to do so;

	order of the court to do so; or		
(3)	testifies to a lack of memory of the subject matter of the declarant's statement; or	**(3)**	testifies to not remembering the subject matter;
(4)	is unable to be present or to testify at the hearing because of death or then ex-	**(4)**	cannot be present or testify at the trial or hearing because of death or a

	ist-ing phys ical or men tal ill-ness or in-firm ity; or		then - ex-ist-ing in-firm ity, phys ical ill-ness, or men tal ill-ness ; or
(5)	is ab-sent from the heari ng and the pro-pon-ent of a state men t has been un-able to pro-cure the de-clar-ant's at-tend ance (or in the	**(5)**	is ab-sent from the trial or heari ng and the state men t's pro-pon-ent has not been able, by pro-cess or oth-er reas-on-able mea ns,

case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness to procure:

(A) the declarant's attendance, in the case of a

ness if ex-emp tion, re-fus-al, clai m of lack of me mor y, in-abil-ity, or ab-senc e is due to the pro-cure men t or wro ng-do-ing of the pro-pon-ent of a state men t for the pur-pose of pre-vent ing the hear say ex-cep-tion un-der Rule 804(b)(1) or (5); or

witness from attending or testifying.

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the

statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) Hearsay exceptions. The

(b) **The Exceptions.** The fol-

following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or

(1) ***Former Testimony.*** Testimony that:

a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil ac-

tion or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(A) was given as a witness at a trial,

hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had

-- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2)	**Statement under belief of impending death.** In a prosecution for homicide or in a civil ac-	**(2)**	***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil

tion or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be imminent, case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

pending death.

(3) Statement against interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when

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civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant

civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant

to crim inal liab- ility.

to crim inal liab- ility.

(4) Stat eme nt of per- son- al or fam- ily his- tory . (A) A state men t con- cerni ng the de- clar- ant's own birth , ad- op- tion, mar- riage , di- vorc e, le- git- imac y, rela- tion- ship by bloo d, ad- op- tion, or

(4) ***Stat eme nt of Per- son- al or Fam ily His- tory.*** A state men t abou t:

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(A) the de-clar-ant's own birth, ad-op-tion, le-git-imac y, an-ces-try, mar-riage, di-vorc e, rela-tion-ship by

blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any

of thes e facts , as well as deat h, if the de- clar- ant was re- lated to the per- son by bloo d, ad- op- tion, or mar- riage or was so in- tim- ately as- soci- ated with the per- son's fam- ily that the de- clar- ant's in-

				formation is likely to be accurate.
(5)	**[Other exceptions.]** [Transferred to Rule 807]	**(5)**	**[Other exceptions.]** [Transferred to Rule 807.]	
(6)	**Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in	**(6)**	***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statemen	

wro ng- do- ing that was in- ten- ded to, and did, pro- cure the un- avail abil- ity of the de- clar- ant as a wit- ness.

t offer ed agai nst a part y that wro ng- fully caus ed -- or ac- qui- esce d in wro ng- fully caus ing -- the de- clar- ant's un- avail abil- ity as a wit- ness, and did so in- tend ing that res- ult.

Committee Note

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

No style changes were made to Rule 804(b)(3), because it was already restyled in conjunction with a substantive amendment, effective December 1, 2010.

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[17] The Rule 804 Exceptions and the Confrontation Clause [Go To Main]

In *Davis v. Washington, 547 U.S. 813 (2006)* (with the companion case of *Hammon v. Indiana*), the Court considered the admissibility under *Crawford* of hearsay statements made by two victims of domestic abuse. One was a report by the victim to a 911 operator, made essentially at the time of the assault. The other was a report made to responding police officers; the defendant was in the home and placed in another room, and the officer obtained, through questioning, the victim's account of the event. The Supreme Court held that the statement to the police officer was testimonial, but the statement to the 911 operator was not. Justice Scalia, writing for the majority, explained as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial

> inquiries" at the crime scene will not be testimonial, we do not hold the opposite -- that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

Of course, the *Crawford* rule applies only to "testimonial" hearsay. What if hearsay admissible under a hearsay exception is not testimonial? In *Whorton v. Bockting, 127 S. Ct. 1173 (2007)* , the habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford*. His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts*. It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the *Confrontation Clause*, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. *But see 418 F.3d at 1058* (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added)

This amounts to a holding that *Roberts* has been overruled even as to non-testimonial hearsay. One of the main reasons that *Crawford* is not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. So after *Whorton*, if hearsay is not testimonial, the *Confrontation Clause* provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions, not by the Constitution.

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[1] Rule 804(a) -- Definition of Unavailability [Go To Main]

[a] Rule 804(a) -- Absent or Unavailable

[i] Rule 804(a) -- Absent or Unavailable -- Codefendant in Criminal Case

United States v. US Infrastructure, Inc., 576 F.3d 1195 (11th Cir. 2009) : In the prosecution of a corporation and its officers for bribery arising from a scheme in which they made payments to a public official who had awarded them no-bid contracts, the Court found no abuse of discretion when a witness testified that the official had told him one of the corporate officers had been paying the official's mortgage. The official's statement was against his penal interest, and he "was 'unavailable' within the meaning of Rule 804(a) because he was a codefendant under the same indictment as appellants and, therefore, could not be called as a witness."

[ii] Rule 804(a) -- Absent or Unavailable -- Good Faith Effort To Produce

Thomas v. Cook County Sheriff's Dep't, 604 F.3d 293 (7th Cir. 2009, *amended* 2010): Affirming in substantial part a judgment for the plaintiff in a § 1983 deliberate indifference action, the Court found there was no abuse of discretion when deposition testimony by a former inmate, who had been detained at the same time as the plaintiff's decedent, was read at the trial. After "two subpoenas, a show cause order, numerous phone calls, and a search by a private investigator" were unsuccessful in getting the deponent to testify, the Court held that although "it would make sense to issue an arrest warrant," it was within the Judge's discretion to permit the deposition to be read without having issued a warrant.

[v] Rule 804(a) -- Absent or Unavailable -- Request for Voluntary Appearance

United States v. Yida, 498 F.3d 945 (9th Cir. 2007) : After a mistrial in a prosecution charging a conspiracy to import the drug "Ecstasy," the government's motion to admit the former testimony of a witness who had been deported was denied. On interlocutory appeal, the Court affirmed, holding that the government's decision to deport the witness

without informing either the Trial Judge or the defense, and without having a means of compelling the witness' return, was not reasonable. Therefore the witness was therefore not unavailable within the meaning of Rule 804(a)(5). The Court noted that "allowing the prosecution to present a transcript, rather than live testimony, may lead to the presentation of that transcript when live testimony is vulnerable for the prosecution's case." The choices open to the government were not limited to either detaining the witness or deporting him: "Instead, the government could have released Reziniano from federal custody, but required him to remain in the United States until he had testified at the retrial." Alternatively, the government could have taken a video-recorded deposition of the witness before his release. Given these unexplored alternatives, the government's effort to seek a voluntary return did not satisfy the Rule's requirement of undertaking reasonable means to secure production.

[f] Rule 804(a) -- Mental or Physical Infirmity

United States v. McGowan, 590 F.3d 446 (7th Cir. 2009) : The Court affirmed a conviction for fraud, finding no abuse of discretion or *Confrontation Clause* violation when the victim's testimony was offered through a videotaped deposition. The government satisfied its burden of showing that the witness was unavailable because her severe and chronic medical problems meant that traveling from her home in South Carolina to Chicago and enduring the rigors of testifying at trial would seriously damage her already precarious health.

[2] Rule 804(b)(1) -- Hearsay Exceptions -- Former Testimony [Go To Main]

[d] Rule 804(b)(1) -- Depositions

Nationwide Life Ins. Co. v. Richards, 541 F.3d 903 (9th Cir. 2008) : In an interpleader action to resolve conflicting claims to the proceeds of a life insurance policy, the Trial Court admitted deposition testimony of a witness under *Fed. R. Civ. P. 32(a)(4)(B)*. Rejecting an argument that the deposition was not admissible under Rule 804(b)(1)'s more stringent admissibility requirements (particularly with respect to unavailability of the declarant), the Court held that the deposition was properly admitted under the Civil Rule. It noted that "Rule 32(a) is an independent exception to the hearsay rule" that is intended to eliminate "the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court."

[e.1] Rule 804(b)(1) -- Government Investigations

United States v. Hunt, 521 F.3d 636 (6th Cir. 2008) : The Court affirmed convictions for health care fraud and making false statements, holding that an affidavit provided to the government by a potential defense witness during the government's investigation was not admissible against the government as former testimony. "The affidavit in question was not given at a hearing or in a deposition," as is required by Rule 804(b)(1). "A hearing connotes some kind of adversarial proceeding presided over by an impartial third party, while 'deposition' is a term of art referring to the out-of-court adversarial questioning of a witness under oath. Writing and signing a narrative affidavit during an interview with Government officers plainly is not the same as testimony given during a hearing or deposition."

[f] Rule 804(b)(1) -- Grand Jury Testimony

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) , the Court upheld convictions of five defendants in a case it described as "a story of mayhem and disorder in and round the 200 block of K Street, Southwest, in the District of Columbia from the 1980s until 1998." The case involved a large narcotics distribution ring that "led to an astonishing amount of violence and a seemingly complete repudiation of civil society and respect for human life." Finding no error in the exclusion of exculpatory testimony by two witnesses before a Maryland state grand jury investigating triple murders, the Court held that the state prosecutor and the United States were not the same party for purposes of *Rule 804(b)(1)*. As there was no evidence that "the state authorities who directed the testimony before the Maryland grand jury were in any way controlled or even used by federal authorities," the federal government never had an opportunity

to develop the testimony before the Maryland grand jury. The Court also concluded that there was no showing that the motives for eliciting testimony at the state grand jury stage and at the federal trial stage were similar, since "the purpose of the Maryland grand jury proceeding was to investigate a crime and identify possible criminals. The state prosecutor was not attempting to prove that the appellants were involved in the triple murders."

United States v. McFall, 558 F.3d 951 (9th Cir. 2009) : In a prosecution for attempted extortion, the Court found an abuse of discretion in the exclusion of a witness's exculpatory grand jury testimony, where the witness invoked his privilege against self-incrimination and would not testify at trial. The Court concluded that the government's motivation to elicit testimony before the grand jury was the same motive it possessed at trial; even though the motive might not have been as intense before the grand jury, "Rule 804(b)(1) does not require an identical quantum of motivation." Because the witness's testimony bore directly on the charges in the indictment, prosecutors had "ample incentive to develop testimony that would incriminate McFall." The Court also held that exclusion of the grand jury testimony under Rule 403 was an abuse of discretion, particularly because the Judge appeared to have given no consideration to the probative value of the testimony.

[g] Rule 804(b)(1) -- Motive To Develop the Testimony

[ii] Rule 804(b)(1) -- Motive To Develop the Testimony -- Criminal Cases

United States v. Hunt, 521 F.3d 636 (6th Cir. 2008) : The Court affirmed convictions for health care fraud and making false statements, holding that an affidavit provided to the government by a potential defense witness during the government's investigation was not admissible against the government as former testimony. "The affidavit in question was not given at a hearing or in a deposition,"and "it is unlikely that he [the defendant] could demonstrate that the Government agents who were conducting the investigation had a similar motive to develop the statements as the prosecution had at trial." The Court explained that in an investigation "the Government agents desire to obtain information from the suspect without revealing the information that they already have," so it is not necessarily in their best interest to cross-examine the declarant. "At trial, however, it is in the Government's best interest to lay all of its cards on the table so that the unvarnished truth can be presented publicly to the jury."

[h] Rule 804(b)(1) -- Opportunity To Develop the Testimony

S.E.C. v. Ficken, 546 F.3d 45 (1st Cir. 2008) : The Court affirmed a summary judgment for the SEC in an enforcement action against a former stock broker. The defendant had testified in an SEC proceeding before the complaint was filed in this case, and after the complaint was filed he also testified in an investigation proceeding conducted by the National Association of Securities Dealers and claimed his privilege against self-incrimination as to certain questions. The defendant sought to rely upon his prior testimony to raise a genuine issue of material fact. The Court suggested, but did not hold, that the defendant's invocation of the privilege in this case did not render him unavailable for purposes of Rule 804(a), because by invoking the privilege he was creating his own unavailability. It did not decide the point, because it held that, even if the defendant were considered unavailable, his testimony in the NASD proceeding would be inadmissible because his invocation of the privilege there as to certain questions meant that the government and its predecessor (NASD) did not have an adequate opportunity to develop his testimony in the NASD proceeding.

[i] Rule 804(b)(1) -- Plea Hearing Testimony

United States v. Ricardo, 472 F.3d 277 (5th Cir. 2006) : Affirming marijuana-related convictions, the Court found no abuse of discretion in the exclusion of statements made by a codefendant's attorney at a plea colloquy, which tended to exculpate one of the defendants tried in this case, as the government had no opportunity to question the pleading defendant about his attorney's statements.

[3] Rule 804(b)(2) -- Hearsay Exceptions -- Statement Under Belief of Impending Death [Go To Main]

United States v. Two Shields, 497 F.3d 789 (8th Cir. 2007) : In a murder prosecution, the defendant offered evidence that the victim, who suffered a badly broken jaw and facial injuries, shook his head negatively when asked if the defendant had caused his injuries. The Court found no error in exclusion of the evidence, holding that it was not admissible as a dying declaration because there was no evidence the victim believed his death was imminent. He had not indicated that he believed he would die, and "[h]is injuries, though severe, were limited to his face and were not life-threatening in nature; no doctor had diagnosed them as life-threatening, and everyone expected him to survive."

[4] Rule 804(b)(3) -- Hearsay Exceptions -- Statement Against Interest [Go To Main]

[.a] Rule 804(b)(3) -- "Admissions Against Interest"

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) : In an action challenging a city's refusal to grant a permit to a church to open a day care facility, the Trial Judge admitted a letter from a bishop of the church undercutting the church's position as an "admission against interest," without referring to a particular Federal Rule. Upholding admission of the letter, the Court noted that a declaration against interest is admissible under *Rule 804(b)(3)* only if the declarant is unavailable, and in this case the bishop was deposed, so it concluded that "we assume here that the district court actually relied on *Rule 801(d)(2)*, which deems an admission by a party-opponent to be non-hearsay."

[a] Rule 804(b)(3) -- Against Pecuniary Interest

United States v. Two Shields, 497 F.3d 789 (8th Cir. 2007) : In a murder prosecution, the defendant offered evidence that the victim, who suffered a badly broken jaw and facial injuries, shook his head negatively when asked if the defendant had caused his injuries. The Court found no error in exclusion of the evidence, holding that it was not admissible as a statement against interest. The Court rejected the argument that the statement was contrary to the victim's pecuniary interest because by denying that the defendant was his attacker, the victim rendered invalid any civil claim he might have for assault and battery. The medical evidence indicated that the victim was highly intoxicated and unable to recall simple facts like his age, so he would not have been able to appreciate that the statement was against his interest.

[b] Rule 804(b)(3) -- Against Penal Interest

[i] Rule 804(b)(3) -- Civil Cases

United Techs. Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009) : In an action by the manufacturer of an aircraft engine against two companies allegedly responsible for the theft and sale of blueprints relating to the engine, the Court held that statements made by an individual under investigation to the Inspector General of the Department of Defense were not admissible as declarations against interest. The Court declared that "it is reasonable to infer that spreading blame for the misconduct by implicating others, even falsely, could have been at least as big a priority ... at the time of his interview with government investigators as would have been protecting his financial stake in APM [the company]."

[ii] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered Against Accused

[A] Rule 804(b)(3) -- Admissible

United States v. Wexler, 522 F.3d 194 (2d Cir. 2008) : Affirming a dermatologist's conviction for illegal distribution of controlled substances and health care fraud, the Court found no abuse of discretion in admitting statements by an addict who was a former patient of the defendant to three close friends in which the former patient described the controlled

substances that the defendant prescribed, the false claims that the patient permitted the defendant to file, and kickbacks provided by the defendant to the former patient. The statements so far subjected the former patient to criminal liability that a reasonable person would not have made them unless they were true, and each statement inculpated the former patient as well as the defendant. In *United States v. Williams, 506 F.3d 151 (2d Cir. 2007)* , the Court affirmed convictions for narcotics trafficking, racketeering, and murder, finding that a confession made by one of the codefendants was properly admitted against the other, as a declaration against penal interest. The codefendant confessed to friends, not to a police officer. Thus, "the context of these statements shows that Bobby was not attempting to minimize his own culpability, shift blame onto Michael, or curry favor with authorities."

United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008) : Affirming convictions for holding another in involuntary servitude and harboring a juvenile alien, the Court found no abuse of discretion in admitting two telephone conversations between the former husband of the defendant and the victim. Although the former husband's statements were not entirely inculpatory, in that he suggested that his sexual relationship with the victim was consensual, the Court found that his statements in context were sufficiently against his penal interest that a reasonable person would not have made them unless they were true. In the conversation he admitted smuggling the victim into the United States and hitting her, asked whether she told the police she had been beaten, demanded the victim tell him everything she told the police, and clearly admitted to sexual intercourse with a minor. In *United States v. Jordan, 509 F.3d 191 (4th Cir. 2007)* , accomplice of the defendant, who was convicted of murder while engaged in a drug-trafficking offense, confessed her part in the crime in a statement to her roommate. Affirming, the Court held that the accomplice's statement was properly admitted as a declaration against penal interest, since "although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder," and she "made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure."

United States v. Johnson, 581 F.3d 320 (6th Cir. 2009) : Affirming convictions for bank robbery, conspiracy, and murder, the Court held that the tape-recorded statement of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement."

United States v. Watson, 525 F.3d 583 (7th Cir. 2008) : The Court affirmed Hobbs Act convictions, finding no abuse of discretion in admitting a codefendant's statement to an accomplice that one defendant could not possibly have been identified in a bank robbery because he had worn a mask. The Court found that the statement exposed the codefendant to criminal liability as a member of the conspiracy because it revealed his inside knowledge of the conspiracy and his role in helping one of the members avoid detection.

United States v. Honken, 541 F.3d 1146 (8th Cir. 2008) : While incarcerated, an accomplice of the defendant in a capital murder case became acquainted with a prisoner serving a life sentence for an unrelated offense. The prisoner told the accomplice that she (the accomplice) could escape responsibility of the murders if he (the prisoner) could arrange for another inmate already serving a life sentence claim responsibility for murdering the five victims. To make the other inmate's confession believable, the accomplice prepared maps and notes describing where the bodies were buried, but the prisoner turned them over to law enforcement rather than to the other inmate. Affirming, the Court held that the maps and notes were properly admitted as statements against penal interest offered to prove the government's theory that the accomplice and the defendant acted together to kill the victims. Although the accomplice made the statements in the evidence as part of a scheme to escape liability, they implicated her in the murders or at least the cover-up, and no reasonable person would make such a statement unless she believed it to be true. And admission of the statements did not violate the *Confrontation Clause* because they were not "testimonial": although the prisoner procuring the maps and notes may have known that they would be used at a later trial, they were not "solemn declarations" or "formal

statements" and the declarant had no such expectations.

United States v. US Infrastructure, Inc., 576 F.3d 1195 (11th Cir. 2009) : In the prosecution of a corporation and its officers for bribery arising from a scheme in which they made payments to a public official who had awarded them no-bid contracts, the Court found no abuse of discretion when a witness testified that the official had told him one of the corporate officers had been paying the official's mortgage. The statement was against the official's penal interest because it tended to show that he had accepted bribes, and it did not seek to lessen blame as to his crime by spreading blame to others. Further, the statement was trustworthy, as it was given to a witness who had previously bribed the official and was a confidant of the official's regarding the bribery scheme, and the official had no reason to lie about the officer's payments (such as attempting to curry favor with government officials while under arrest). In *United States v. Westry, 524 F.3d 1198 (11th Cir. 2008)* , the Court affirmed convictions arising from a drug conspiracy, finding no error in the admission of statements indicating that a conspirator was the source of drugs, made by a drug addict whose death was caused by using drugs allegedly supplied by members of the conspiracy. Although he was speaking to a confidante unlikely to cause his prosecution, the Court noted that "we do not think a reasonable man would falsely admit to waiting for cocaine ..., a serious crime, knowing there was a chance, albeit slight, that the admission could be used to subject him to severe penalties."

[B] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered Against Accused -- Constitutional Concerns

United States v. Williams, 506 F.3d 151 (2d Cir. 2007) : Affirming convictions for narcotics trafficking, racketeering, and murder, the Court found that a confession made by one of the codefendants was properly admitted against the other, as a declaration against penal interest. The codefendant confessed to friends, not to a police officer. Thus, "the context of these statements shows that Bobby was not attempting to minimize his own culpability, shift blame onto Michael, or curry favor with authorities." For similar reasons, admitting the statement did not violate the defendant's right to confrontation. The confession was not testimonial, because it was made to friends, without the participation of law enforcement. The Court dismissed an argument that the confession lacked particularized guarantees of trustworthiness, because the *Confrontation Clause* "does not bar such nontestimonial statements, whatever their guarantees of trustworthiness." In *United States v. Al-Sadawi, 432 F.3d 419 (2d Cir. 2005)* , the Court held it was error to admit portions of a cohort's plea allocution against the defendant. Under *Crawford v. Washington* statements in a plea allocution are clearly "testimonial," so it was irrelevant that the Trial Court redacted all direct references to the defendant.

United States v. Jordan, 509 F.3d 191 (4th Cir. 2007) : An accomplice of the defendant, who was convicted of murder while engaged in a drug-trafficking offense, confessed her part in the crime in a statement to her roommate. Affirming, the Court held that the accomplice's statement was properly admitted as a declaration against penal interest, since she "made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure," and its admission was not a *Confrontation Clause* violation for the same reason: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates."

United States v. Johnson, 581 F.3d 320 (6th Cir. 2009) : Affirming convictions for bank robbery, conspiracy, and murder, the Court held that the tape-recorded statement of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." And because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant, the hearsay was not testimonial under *Crawford v. Washington*. Even though the questioner was an informant encouraged by the government to obtain a statement from the declarant, "precedent makes clear that the intent of O'Reilly, the declarant,

determines whether the statements on the tape-recording are testimonial."

United States v. Honken, 541 F.3d 1146 (8th Cir. 2008) : While incarcerated, an accomplice of the defendant in a capital murder case became acquainted with a prisoner serving a life sentence for an unrelated offense. The prisoner told the accomplice that she (the accomplice) could escape responsibility of the murders if he (the prisoner) could arrange for another inmate already serving a life sentence to claim responsibility for murdering the five victims. To make the other inmate's confession believable, the accomplice prepared maps and notes describing where the bodies were buried, but the prisoner turned them over to law enforcement rather than to the other inmate. Affirming, the Court held that the maps and notes were properly admitted as statements against penal interest offered to prove the government's theory that the accomplice and the defendant acted together to kill the victims. Although the accomplice made the statements in the evidence as part of a scheme to escape liability, they implicated her in the murders or at least the cover-up and no reasonable person would make such a statement unless she believed it to be true. And admission of the statements did not violate the *Confrontation Clause* because they were not "testimonial": although the prisoner procuring the maps and notes may have known that they would be used at a later trial, they were not "solemn declarations" or "formal statements" and the declarant had no such expectations.

United States v. Smalls, 605 F.3d 765 (10th Cir. 2010) : The Court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial, so their admission did not violate the *Confrontation Clause*, because they were not made with "the primary purpose ... of establishing or proving some fact potentially relevant to a criminal prosecution." That the statements were made in a conversation with a government informant did not make them testimonial, because the declarant did not know he was being interrogated and the statements was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

[iii] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered for Accused

[A] Rule 804(b)(3) -- Admissible or Required To Be Admitted

United States v. Guzman, 603 F.3d 99 (1st Cir. 2010) : Affirming an arson conviction, the Court held it was error (but harmless) to exclude a hearsay statement made by Cruz, whom the government alleged committed the arson with the defendant. A police officer was handing out flyers offering a reward for information, and Cruz said to his friend, "now that the people know it's me, they are going to rat me out." The Judge had concluded that the statement was not against penal interest because testimony at the *in limine* proceeding indicated that Cruz was engaged in a joking conversation at the time, but the Court concluded that the statement was "plainly" against Cruz's penal interest and that the government could have argued the context of the statement to the jury.

United States v. Hatfield, 591 F.3d 945 (7th Cir. 2010) : Reversing convictions for conspiracy to burglarize pharmacies and distribute controlled substances, the Court observed that a statement by a third person recorded in a police report that he and three others rather than the defendants had committed one of the pharmacy burglaries should have been admitted. Although the third person changed his story twice, before admitting his involvement in the burglary, there was no suggestion that he knew the defendants and he never implicated them. Moreover, his ultimate version was corroborated by the fact that he had dialed 911 while the burglary was in progress and made an accurate statement as to what was happening.

[C] Rule 804(b)(3) -- Against Penal Interest -- Statement Offered for Accused -- No Abuse of Discretion To Exclude

United States v. Guzman, 603 F.3d 99 (1st Cir. 2010) : The Court affirmed an arson conviction., finding no abuse of

discretion in the exclusion of statements made by an alleged accomplice, Cruz, to a confidential informant as he and Cruz were driving past the site of the arson. Cruz denied participation, said that others wanted him to do the arson but he did not, and added that the one who did it didn't even get paid. The Court agreed with the Judge that the statements were not inculpatory and were not against Cruz's penal interest.

United States v. Paulino, 445 F.3d 211 (2d Cir. 2006) : A search of the defendant's father's house uncovered drugs; the defendant was in the house at the time of the search, but claimed that he did not know that drugs were present. Affirming a conviction for possession of cocaine with intent to distribute, the Court found no abuse of discretion in excluding testimony that the father made a statement to defense counsel "that the drugs for which his son had been arrested were his, and not his son's." Counsel asserted that the father would invoke his privilege against self-incrimination if called to testify. The Court found insufficient corroborating circumstances to warrant admission of the statement and observed that the father had a motive to exculpate his son and already faced charges for cocaine, so that taking additional responsibility might have added only incrementally to the evidence against him.

United States v. Blake, 571 F.3d 331 (4th Cir. 2009) : The Court affirmed a carjacking conviction, finding no abuse of discretion in excluding an alleged exculpating statement by the defendant's accomplice. The statement was allegedly overheard in jail, and there was no evidence corroborating even the fact that the accomplice made the statement, much less that it was trustworthy.

United States v. Jones, 600 F.3d 847 (7th Cir. 2010) : The Court affirmed a conviction for conspiracy to distribute narcotics, finding no abuse of discretion in excluding evidence that a conspirator, in a change-of-plea hearing, stated that he had never given cocaine to two of the defendants on trial. The statement was hearsay, and it did not satisfy Rule 804(b)(3) because it was not against the declarant's interest to make it when he was pleading guilty. In *United States v. Loggins, 486 F.3d 977 (7th Cir. 2007)* , the court affirmed a conviction for robbing a federal credit union, finding no error in the exclusion of a statement made by the attorney for an alleged coconspirator. At that coconspirator's plea hearing, the attorney stated that the defendant was present at the robbery, "but didn't know what was about to happen." The Court held that the statement was not admissible as a declaration against penal interest, because it did not implicate either the attorney or the coconspirator and thus it was not sufficiently disserving to be admissible under Rule 804(b)(3).

[d] Rule 804(b)(3) -- Corroborating Circumstances

[ii] Rule 804(b)(3) -- Corroborating Circumstances -- Statements Offered by Accused

[A] Rule 804(b)(3) -- No Abuse of Discretion To Exclude

United States v. Jackson, 540 F.3d 578 (7th Cir. 2008) : In a prosecution for bank fraud arising from a scheme by bank employees to create false mortgage documents, one of the conspirators implicated another in her guilty plea proffer and her plea hearing, but then recanted the incriminating testimony just before the trial. The Judge granted a government motion to preclude the defense from presenting evidence of the recantation and ruled that it was not admissible under Rule 804(b)(3) because of insufficient corroborating circumstances. Affirming, the Court found no abuse of discretion in the Judge's determinations that "a lot of corroboration would be needed to admit the recanting hearsay statements of an incredible and untrustworthy declarant," and that the defendants had not provided sufficient corroborating circumstances to admit the statements.

United States v. Ironi, 525 F.3d 683 (8th Cir. 2008) : Affirming a conviction for aiding and abetting the possession with intent to distribute cocaine, the Court found no abuse of discretion in excluding a codefendant's statement to a defense witness that the defendant did not know that the codefendant, who rented a room in the defendant's house, was selling drugs in the house. The Court found that the statement was not supported by corroborating circumstances clearly indicating the trustworthiness of the statement and was undermined by the codefendant's contrary testimony at his plea hearing and the fact that in a prior version of his proffered statement he said there were no drugs being sold in the

house.

[7] Rule 804(b)(6) -- Forfeiture by Wrongdoing [Go To Main]

[a] Rule 804(b)(6) -- Constitutional Objection Forfeited

United States v. Johnson, 495 F.3d 951 (8th Cir. 2007) : The defendant was convicted of murder and sentenced to death for aiding and abetting her boyfriend in killing three adults and two children who witnessed the boyfriends's drug trafficking. Affirming, the Court held that admission of hearsay statements by the victims did not violate confrontation rights, because those rights are " 'forfeited with respect to any witness or potential witness whose absence a defendant wrongfully procures.' " The Court also rejected the defendant's argument that Rule 804(b)(6) could not be applied to her case because it had been enacted four years after the murders took place. The Rule reflects legal principles widely recognized at the time of the murders, and even if it enlarged the class of admissible hearsay, this expansion would not violate the Ex Post Facto Clause.

[a.1] Rule 804(b)(6) -- Constitutional Requirement of Confrontation

Giles v. California, 128 S. Ct. 2678 (2008) : The defendant was convicted of murdering his ex-girlfriend. The prosecution was permitted to introduce statements the victim made to police in connection with a domestic violence report, under a California law admitting out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy. The Supreme Court vacated the conviction, holding that the confrontation exception for "forfeiture by wrongdoing" applies only when the wrongdoing has the purpose, not simply the effect, of rendering the declarant unavailable to testify. The Court noted that this is the forfeiture doctrine codified in Rule 804(b)(6). Responding to the dissenters' argument that this reading of the exception would make it difficult to prosecute many domestic violence cases, the Court observed that "[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities," which would make the exception applicable.

[b] Rule 804(b)(6) -- Determination of Wrongdoing

United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) : Affirming the convictions of the former Enron CEO for securities fraud offenses, the Court found no plain error when the Trial Judge rejected the defendant's claim that prosecutorial misconduct had led witnesses to refuse to cooperate with the defense. Although the defendant complained that the Judge failed to credit affidavits from his attorneys that relayed information from the witnesses' attorneys who purportedly conveyed the views of their clients, the Court found that the defendant failed to rely on Rule 804(b)(6) below, so it reviewed only for plain error. The Court noted that the Judge held a hearing in which two of the attorneys for witnesses appeared for questioning and it concluded that the Judge implicitly considered all the declarations that were submitted. The Court added: "[T]his court has not resolved whether, to invoke Rule 804(b)(6) properly, a party must make this evidentiary showing with material independent of the hearsay itself. This is a question of first impression, and there are persuasive arguments for either position or for a hybrid of the two. This question is especially difficult here given that it was the defense counsel who made the uncorroborated hearsay declarations."

[e] Rule 804(b)(6) -- Forfeiture by Coconspirator's Actions

United States v. Martinez, 476 F.3d 961 (D.C. Cir. 2007) : The Court affirmed a conviction for conspiracy to import cocaine, finding no error in the admission of testimony by a DEA agent regarding statements made by a cooperating member of the conspiracy. The informant had been killed shortly after one drug shipment had been intercepted and he told the agents about the conspirators' future plans. Evidence that the defendant, a leader in the conspiracy, had

threatened another conspirator and his family showed that the coconspirators considered murder to be "a possible sanction to protect the privacy of the conspiracy." That the murder was committed by members of the conspiracy was shown circumstantially by the proximity of the murder to the interception of the shipment, and more directly by testimony that coconspirators had stated the fact. And the defendant's intent to procure the witness' unavailability was not belied by a suggestion that the murder was to retaliate for loss of the shipment; it is quite "reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying." In *United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006),* the Court upheld convictions of five defendants in a case it described as "a story of mayhem and disorder in and round the 200 block of K Street, Southwest, in the District of Columbia from the 1980s until 1998." The case involved a large narcotics distribution ring that "led to an astonishing amount of violence and a seemingly complete repudiation of civil society and respect for human life." The Court upheld a ruling that hearsay statements by a murdered witness could be admitted pursuant to *Rule 804(b)(6)*, and that all of the defendants waived any Confrontation rights, in view of the Trial Judge's findings of fact that a coconspirator murdered the witness and the murder was within the scope of the conspiracy and reasonably foreseeable. The Court noted that "the reasons why a defendant forfeits his confrontation rights apply with equal force to a defendant whose coconspirators render the witness unavailable, so long as their misconduct was within the scope of the conspiracy and reasonably foreseeable to the defendant, as it was here... . That there is no direct evidence of an explicit agreement to kill adverse witnesses in this case is of no moment."

[e.1] Rule 804(b)(6) -- Intent to Procure Unavailability in Another Proceeding

United States v. Stewart, 485 F.3d 666 (2d Cir. 2007) : Affirming convictions for racketeering and drug offenses, the Court held that the Trial Judge did not err in finding by a preponderance of the evidence that the defendant acted through a coconspirator to murder a potential witness with the intent to prevent the witness from testifying. It also held that Rule 804(b)(6) applied even though the defendant's effort had been focused on preventing the witness from testifying in a state trial for assault rather than in the instant case, which had not yet been initiated. The text of the Rule 804(b)(6) "requires only that the defendant intend to render the declarant unavailable 'as a witness' " therefore, a defendant "who wrongfully and intentionally renders a witness unavailable as a witness in any proceeding forfeits the right to exclude, on hearsay grounds, the declarant's statements at that proceeding and any subsequent proceeding."

[g] Rule 804(b)(6) -- Wrongdoing Intended To Procure Unavailability

United States v. Lentz, 524 F.3d 501 (4th Cir. 2008) : The defendant was convicted of murdering his ex-wife while they were engaged in an acrimonious dispute over custody and property issues. Affirming, the Court found no abuse of discretion in the admission of statements by the victim recounting that the defendant had told her that "[i]f O.J. [Simpson] can do it and get away with it, so can I," as well as similar comments. The Trial Judge's finding by "a preponderance of evidence that Lentz engaged in wrongdoing that was intended, at least in part, to procure [the victim's] unavailability as a witness and that did, in fact, procure her unavailability," was not clearly erroneous and was sufficient for admitting the statements under Rule 804(b)(6).

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 805 RULE 805

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805.04 Legislative History

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 805 RULE 805

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805.01 Official Text

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 805 RULE 805

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805.02 Editorial Explanatory Comment

[1] Hearsay Within Hearsay

Sometimes a hearsay statement includes, or repeats, one or more other hearsay statements. When this occurs, in order for the statement to be admitted into evidence, there must be an applicable hearsay exception or exemption for each level of hearsay. n1

Consider, for example, the following illustration: an insurance investigator goes to the scene of an accident and takes the statement of one of several persons involved in the accident. The witness admits fault, taking the entire blame for the accident. Suppose that the police charge another person with reckless driving, and the witness is unavailable at trial. If the investigator is also unavailable, an offer of a report by the investigator concerning the witness' statement would have to overcome two hearsay hurdles: one for the out-of-court statement of the witness who admitted fault, and one for the investigator's statement (the report). Probably the witness' statement is a declaration against interest. However, the second hearsay hurdle is not overcome unless the investigator's report meets the requirements of the exception for regularly conducted business activities.

[2] Relationship to Rule 801(d)

Note that admissions under *Rule 801(d)(2)* and certain prior statements of available witnesses under *Rule 801(d)(1)* are defined as not hearsay. So *Rule 805* could technically be read to be inapplicable to situations in which these statements are included within another statement that is hearsay. But, Courts have held that the technical difference between *Rule 801(d)* "not hearsay" and *Rule 803*, *804*, and *807* "hearsay subject to exception" cannot control the application of *Rule 805*'s limitation on multiple hearsay. As one Court put it: "For the purposes of the hearsay-within-hearsay principle expressed in *Rule 805*, nonhearsay statements under *Rule 801(d)* ... should be considered in analyzing a multiple hearsay statement as the equivalent of a level of the combined statements that conforms with an exception to the hearsay rule." n2 Thus, the mere fact that one level of a multiple level statement qualifies as exempt from the hearsay rule does not excuse the other levels from satisfying the *Rule 805* requirement that each level satisfy the hearsay rule. n3 Conversely, a statement admissible under *Rule 801(d)* can be admitted when included in another hearsay statement if the other hearsay statement qualifies as an exception. n4

[3] Relationship to Rule 403

The fact that hearsay objections to statements consisting of multiple hearsay can be overcome by exceptions to the hearsay rule for each level of hearsay does not mean that the Court must admit the evidence. Under *Rule 403*, the Trial Judge certainly can determine that hearsay within hearsay is especially dangerous evidence and can exclude it in cases in which the probative value of the evidence is substantially outweighed by its prejudicial effect. The possibility of exclusion should logically increase with each extra level of hearsay. n5

[4] Relationship to Rule 1101

Rule 1101 establishes the principle that the Rules of Evidence are not binding when a search warrant is sought. Thus, hearsay evidence can be used to support a warrant. Even hearsay within hearsay can be used. However, in determining whether probable cause exists, the magistrate must take into account the nature of the information provided, and so hearsay is more strictly scrutinized than information based on the officer's personal knowledge; and presumably there is more concern about reliability if the application is based on multiple hearsay. One way of demonstrating reliability is to show that the two hearsay levels satisfy exceptions established by the Federal Rules. See *United States v. Harris, 403 U.S. 573 (1971)* (a declaration against interest is reliable information upon which a warrant may be issued). It must be remembered, however, that the standards for scrutinizing hearsay in a warrant application are nowhere near as rigorous as those applied to hearsay at trial. A warrant application containing hearsay upon hearsay can readily suffice to show probable cause if the affidavit provides some independent information to corroborate the hearsay. See *Illinois v. Gates, 462 U.S. 213 (1983)* ("The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."). n6

Rule 1101 also establishes that the Rules of Evidence are inapplicable to sentencing proceedings. So it can occur that sentencing determinations may be based in part on double hearsay. See generally *United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)* (discussing the use of hearsay under Federal Guidelines sentencing).

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Hart v. O'Brien, 127 F.3d 424 (5th Cir. 1997)* (in a suit for wrongful incarceration, the plaintiff's testimony that a trustee at the jail told her that someone at the jail informed the bail bondsman that the plaintiff could not be released was inadmissible double hearsay).

(n2)Footnote 2. *United States v. Dotson, 821 F.2d 1034, 1035 (5th Cir. 1987)* (prior consistent statements within a report could not be admitted because the report itself was hearsay subject to no exception).

(n3)Footnote 3. See, e.g., *Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982)* (even if one level of a double hearsay statement is admissible under *Rule 801(d)(2)(A)*, the second level of hearsay was not subject to an exception, so the document was inadmissible).

(n4)Footnote 4. See, e.g., *Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982)* (a statement by the defendant's employee qualified as an agent's admission, and the transcribed version of the statement that was made by an insurance adjuster who obtained it qualified as a business record).

(n5)Footnote 5. See, e.g., *United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989)* (grand jury testimony held not sufficiently trustworthy where it contained many levels of hearsay within hearsay: "Although the government argues that each individual piece of double or triple hearsay would come in under one of the standard exceptions, see *Rule 805*, experience suggests an inverse relationship between the reliability of a statement and the number of hearsay layers it contains").

(n6)Footnote 6. For a more complete discussion on the use of hearsay in the determination of probable cause, see SaltzburG & Capra, American Criminal Procedure ch. 2 (7th ed. 2004).

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 805 RULE 805

4-805 Federal Rules of Evidence Manual 805.03

805.03 Annotated Cases

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[1] Agents' Statements

Weston-Smith v. Cooley Dickinson Hospital, Inc., 282 F.3d 60 (1st Cir. 2002) : The Court affirmed summary judgment for the hospital in a suit by an employee who claimed she was laid off because she had taken maternity leave. According to the plaintiff, the person hired to replace her (who formerly reported to her) told the plaintiff that the plaintiff's supervisor had said that one reason for the layoff was the maternity leave. The Court assumed that the supervisor's statement might be an agent's admission, but found that there was double hearsay; there was no exception or exemption for the replacement's statement, and the replacement denied making it, so there was no error in excluding the testimony.

Pittman v. Grayson, 149 F.3d 111 (2d Cir. 1998) : The Court upheld a judgment for an airline sued by the father of a child whose mother flew her to Iceland in violation of a court order. It found no error in the exclusion of deposition testimony by a television news producer who described a conversation she had with a flight attendant for the airline who said that she had heard a story that the airline had assisted in sneaking the child from the country. What the attendant was reported to have said included hearsay based on what someone else allegedly said, and the Court found that there was nothing to tie what this someone else said to the airline. In *Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995)* , the Court reversed summary judgment against an employee alleging she had been discharged because of her gender. It found no error in admitting the plaintiff's testimony that her immediate supervisor and the supervisor who dismissed her had said her firing was because the General Manager wanted a man in the job, as all were making statements admissible under *Rule 801(d)(2)(D)* concerning a matter within the scope of their employment.

Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994) : The Court reversed a summary judgment for the defendant in an age discrimination case, but held that an alleged statement that the employer could not afford to keep employees over 50 years of age was properly disregarded because the declarant was not a decisionmaker and the original source of the comment could not be identified as a person with authority in the matter. In a prosecution for

illegal ocean dumping and making false statements to a grand jury, *United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994)*, the Court held that radiotelegrams between the defendant and the ship in question satisfied multiple levels of hearsay as party or authorized admissions or as prior consistent statements and as business records. In an age discrimination case, *Carden v. Westinghouse Elec. Corp.*, n1 the Court reversed a judgment for the plaintiff, finding it was error to admit the plaintiff's testimony that his supervisor had said that he "thought they wanted a younger person" for a position that the plaintiff sought. The statement of the supervisor might have been an agent's admission, but the "they" referred to by the supervisor indicated that someone else must have said something to the supervisor.

Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987) : The Court held that a credit union employee's statement to the assistant manager that she had obtained the credit information at issue at the request of the credit union's manager was admissible as an agent's statement in a suit against the union under the Fair Credit Reporting Act. Although the employee's statement included within it statements made by the manager, both were agents' statements and the combination was admissible under *Rule 805*.

Wilkerson v. Columbus Separate School Dist., 985 F.2d 815 (5th Cir. 1993) : In an employment discrimination action by a white football coach claiming his contract was not renewed after a black teacher had been fired, the coach offered deposition testimony that the school board president had said a black board member told him, "You got the black, now we are going to get the white." The Court held the statements were double hearsay admissible against the school district because both declarants were its agents, but were not admissible against individual defendants.

Haywood v. Lucent Techs., 323 F.3d 524 (7th Cir. 2003) : Affirming summary judgment for an employer sued by a former employee who alleged racial discrimination and defamation, the Court noted that the plaintiff's only evidence of a defamatory statement was her own testimony that another employee told her about information received from the employee's superiors in corporate security. Although statements by the superiors might have been *Rule 801(d)(2)(D)* admissions, there was no evidence that the employee who related those statements spoke within the scope of employment, so there was a level of hearsay that was not overcome.

EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) : Affirming a judgment for the EEOC and two former employees who alleged racial discrimination by a hotel owned by the defendant, the Court upheld the admission of various statements by company employees concerning the racial views of the man who was the controlling figure in running the hotel. The testimony involved statements by agents of the hotel within the scope of their employment, so the double hearsay -- statements by these agents as to what the controlling figure had said -- was admissible because both levels qualified as agents' statements. In *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, n2 the Court affirmed a judgment for the defendant in a Title VII action claiming sex discrimination in promotion and hiring. The Court held it was proper to exclude the plaintiff's testimony that her superior told her that someone else told him something suggesting that the plaintiff could not be promoted unless she were a man. Even though the superior's statement probably was an agent's admission under *Rule 801(d)(2)(D)*, the included statement by the "someone else" could not be admitted as a party admission because the author of the statement was unknown.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998) : In an antitrust action by five municipalities against five chemical companies for an alleged conspiracy to fix prices for repackaged chlorine, the Court found no error in the exclusion of testimony by the widow of the sales manager of one of the companies. She would have testified that her husband told her that a vice-president of the company had told him about a conspiracy to fix chlorine prices in which the vice-president was involved. This testimony was inadmissible double hearsay. The statement of the vice-president to the sales manager would be admissible as a statement about a matter within the vice-president's scope of authority, but the statement from the sales manager to his wife would not so qualify, since the

sales manager did not set prices for chlorine, and thus was speaking about a matter outside the scope of his authority. Nor was the sales manager's statement to his wife admissible under the coconspirator exemption, because it merely informed an outsider of the existence of a conspiracy and so was not in furtherance of the conspiracy. In *O'Donnell v. Georgia Osteopathic Hosp.*, n3 the Court affirmed a finding that the defendant hospital discriminated against the plaintiff because of her age. The Court upheld the admission of testimony by the person who replaced the plaintiff that related statements by the director of medical affairs concerning his reasons for hiring her and discussions he had with the executive director of the hospital concerning the treatment of the plaintiff. The statements by the director of medical affairs were agent's admissions, and his statements relating what the director of the hospital said represented two-step agents' admissions.

[2] Business Records

United States v. David, 96 F.3d 1477 (D.C. Cir. 1996) : The Court affirmed a cocaine conviction, finding no error in permitting the custodian of records for a paging service to testify that the defendant opened an account, listed a certain address, obtained a new pager and gave a new address, and that the service sent bills to the new address which were paid. Even if a proper hearsay objection had been made at trial, the records of the service could be used to prove that certain statements (e.g., address) had been made by the defendant. The statements were tied to the defendant by a picture he provided when seeking his pager.

United States v. Abell, 586 F. Supp. 1414 (D. Me. 1984) : Overruling motions to suppress evidence, the Court ruled that booking cards, which were prepared when the defendants were put in a county jail, were admissible at trial. The information on the cards was provided by the defendants and was admissible under *Rule 801(d)(2)(A)*; the translation by a deputy at the time the information was given was a present sense impression under *Rule 803(1)*; and the cards were business records admissible under *Rule 803(6)*.

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) : In a prosecution for illegal ocean dumping and making false statements to a grand jury, the Court held that radiotelegrams between the defendant and the ship in question satisfied multiple levels of hearsay as party or authorized admissions or as prior consistent statements and as business records.

United States v. Diez, 515 F.2d 892 (5th Cir. 1975) : The Court held in a tax evasion prosecution that an accountant's business records containing statements of a conspirator were admissible because the records and the statements both fell outside the hearsay exclusion.

United States v. Turner, 189 F.3d 712 (8th Cir. 1999) : Affirming convictions in a scheme by off-duty police officers to submit false time cards, thereby defrauding a low-income housing project where they were security guards, the Court found no abuse of discretion in admitting time cards and payroll records showing overlaps between the time the defendants claimed to have been working at the project and the times reflected on their police department duty rosters. The Court noted that business records containing information from multiple sources involve hearsay upon hearsay only when the source of information and the recorder of that information are not the same person, and that the hearsay upon hearsay problem may be excused if both the source and the recorder were acting in the regular course of the organization's business. Here, there was no evidence that any person not acting in the regular course of business provided any of the information in the records. In *Wright v. Farmers Co-op*, n4 a negligence action, the Court found that a statement by the co-op's employee qualified as an agent's admission and that the transcribed version of the statement that was made by the insurance adjuster who obtained it qualified as a business record.

United States v. Bland, 961 F.2d 123 (9th Cir. 1992) : The Court affirmed a conviction for felon firearm possession, holding that a firearms transaction record completed at the time of purchase was properly admitted. Federal regulations requiring that employees verify gun purchasers' names with a picture identification, and imposing a legal duty on purchasers to provide truthful information, obviated any double hearsay problem regarding the statement on the form identifying the purchaser.

[3] Coconspirator Statements

United States v. Montanye, 962 F.2d 1332 (1992) , *on reh'g in part en banc*, *996 F.2d 190 (8th Cir. 1993)* : Affirming convictions for conspiring to distribute drugs, the Court held that a coconspirator's statements based on statements by other conspirators, as well as those based on personal knowledge, were properly admitted.

[4] Contemporaneous Notes

Cargill, Inc. v. Boag Cold Storage Warehouse, Inc., 71 F.3d 545 (6th Cir. 1995) : Affirming a judgment for a turkey producer against a warehouse for negligent handling of frozen turkeys, the Court found that contemporaneous notes made by the plaintiff's employees during an investigation were properly admitted as present sense impressions. To the extent that one employee incorporated another's findings into his own notes, the Court found that the incorporated findings were made contemporaneously and qualified as present sense impressions, and the notes describing those findings also qualified as present sense impressions, thus satisfying *Rule 805*.

[5] Government Records

Parsons v. Honeywell, Inc., 929 F.2d 901 (2d Cir. 1991) : In a product liability action arising out of a gas explosion, the defendants offered a police report containing a statement from an eyewitness recounting the plaintiff's statement that he smelled gas and "shouldn't have lit it up." The police report would be admissible as a public record and the plaintiff's statement would be admissible as an excited utterance, but the Court held the witness' statement could not come within the residual exception because the witness apparently could testify in person.

United States v. Sallins, 993 F.2d 344 (3d Cir. 1993) : In a prosecution for felon firearm possession, the government introduced a 911 record in which the caller reported a black male wearing all black clothing who was carrying a gun. The Court held the 911 record came within *Rule 803(8)(B)*, but it was reversible error to admit the contents of the call, which was hearsay not coming within any exception. In *United States v. De Peri*, n5 a prosecution of police officers for extortion, the Court refused to permit a defendant to offer into evidence FBI reports of interviews with two persons. Assuming that the report might be admissible under *Rule 803(8)* against the government, the Court found that the statements of the two people were hearsay and were therefore properly excluded. In a Fair Labor Standards Act suit, *Williams v. Tri-County Growers, Inc.*, n6 the Court found that a statement by an agent of the defendant company that was recorded in a Department of Labor investigative report should have been admitted on behalf of the plaintiffs. The statement was an agent's admission and the report was a public record under *Rule 803*.

United States v. Dotson, 821 F.2d 1034 (5th Cir. 1987) : The Court affirmed drug convictions, but it found that a police report was improperly admitted. The report stated that an officer said that a government witness told him that he carried marijuana for one defendant. The statement attributed to the witness would have been admissible as a prior consistent statement under *Rule 801*, but no exception covered the officer's account of having heard the witness. In *United States v. Sanders*, n7 the Court affirmed a pharmacist's convictions for Medicaid fraud, drug offenses, and tax violations, holding that computerized records of the Texas Department of Human Resources were properly admitted.

The records represented reimbursement claims filed by the defendant and showed payment of those claims. The Court treated the reimbursement requests as authorized admissions that were incorporated in business records.

Pridemore v. Legal Aid Soc'y, 625 F. Supp. 1171 (S.D. Ohio 1985) : Granting summary judgment for the defendant in an action alleging employment discrimination against a handicapped plaintiff, the Court found that statements that the plaintiff claimed were made to him by a state investigator were inadmissible hearsay. Although the investigator's statements repeated statements by others that might have qualified for admission under *Rule 801(d)(2)(D)*, the investigator's own statements fit within no exception.

[6] Hospital and Medical Records

Onujiogu v. United States, 817 F.2d 3 (1st Cir. 1987) : Affirming a judgment for a stove manufacturer in a suit by a mother and child who alleged that a defective stove caused a pot of boiling water to spill on them, the Court held that hospital records containing the mother's statement that the child had pulled the water down were properly admitted. The plaintiffs did not dispute the general admissibility of the records (presumably business records), and the Court found that the statement was admissible against the mother as a personal admission and against her in her representative capacity as her child's "next friend." In *Petrocelli v. Gallison*, n8 the Court affirmed a defendant's judgment in a medical malpractice case, finding no error in the exclusion of hospital records that stated that a nerve had been severed during an earlier visit to another hospital. The Court observed that there was no indication as to where the information in the records came from and concluded that the Trial Judge was properly concerned that it may have come from the plaintiff or his wife. The Court noted that had the plaintiff provided the information it might have been admissible as falling within *Rule 803(4)*; however, the plaintiff appeared to avoid relying on this Rule, perhaps because he did not want the jury to know that the information might have been no more than reiteration of his complaint.

Harrigan v. New England Mut. Life Ins. Co., 693 F. Supp. 1531 (S.D.N.Y. 1988) : In a suit by a former employee to recover disability benefits from the employer's insurance carrier, the Judge held that an optometrist's records noting the plaintiff's headaches were admissible. The records were business records, and the complaints of headaches were statements falling within *Rule 803(4)*.

[7] Inadmissible Hearsay

United States v. Mackey, 117 F.3d 24 (1st Cir. 1997) : Affirming bank robbery convictions, the Court ruled that an out-of-court statement by the defendant's bookmaker that the defendant had won $60,000 on baseball bets was inadmissible. The Court recognized that the FBI report containing the statement might be a public record, but it held that the statement in the report was "hearsay within hearsay" and not admissible as a statement against penal interest.

United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988) : Affirming an antitrust judgment for $1, the Court held that handwritten notes of an NFL official that allegedly recorded statements by a players' union official at a meeting were properly excluded, since there was no foundation for the notes and they were double hearsay.

United States v. Melia, 691 F.2d 672 (4th Cir. 1982) : The Court reversed a conviction for receipt of stolen property, partly because an FBI agent testified as to what one person had told him that others said about selling jewelry to the defendant. This was double hearsay and required an exception at each level.

Hart v. O'Brien, 127 F.3d 424 (5th Cir. 1997) : Reviewing immunity issues in a civil rights suit brought by a plaintiff who was arrested, charged with possession of marijuana, and detained in jail for two weeks, the Court noted that testimony by the plaintiff in her deposition that a trustee at the jail told her that someone at the jail informed the bail bondsman that the plaintiff could not be released because of a federal hold was double hearsay that did not fall within any exception. In *Winans v. Rockwell Int'l Corp.*, n9 the Court affirmed a judgment for the defendants in a wrongful death suit arising out of an airplane explosion, finding it was proper to exclude an undated document prepared by the employee of one of the defendant companies that purported to recount complaints by one of the plane's pilots. The writing may have been an agent's admission that complaints were made, but the complaints related in the writing constituted inadmissible hearsay when offered to prove the defects that were the subject of the complaint.

Burns v. Board of County Comm'rs, 330 F.3d 1275 (10th Cir. 2003) : The Court affirmed summary judgment against a terminated Native American employee in his § 1981 and § 1983 action against county officers. There was no error in excluding the plaintiff's deposition testimony that someone had told him that a county commissioner had said "[s]omething about the damn Indians or something." Even if the commissioner's statement was a party admission, there was no exception to the hearsay rule that would apply to the out-of-court statement the plaintiff had recounted. In a sex discrimination case, *Gross v. Burggraf Constr. Co., 53 F.3d 1531 (10th Cir. 1995)* , the Court affirmed summary judgment for the defendant, holding that testimony concerning sexually derogatory comments made by the plaintiff's supervisor was inadmissible double hearsay. While the supervisor's statements were potentially admissible as admissions by an agent, the plaintiff "failed to present percipient witnesses to testify" to the statements she attributed to the supervisor. Thus, there was no admissible evidence that the statements were ever made.

United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988) : The Court reversed a conviction for marijuana offenses, finding that a Coast Guard officer's handwritten report of events on the night of a chase of a small boat from which marijuana was thrown was improperly admitted. Even if the officer had been sufficiently attacked to justify rehabilitation, the report contained hearsay within hearsay and therefore was more than a prior statement of the officer.

[8] Party Admissions

United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) : A coal mining company and two of its superintendents were convicted for violating mine safety regulations. Affirming, the Court held there was no abuse of discretion when a government witness was permitted to testify that one of the superintendents had told him that the other had said that the company was operating equipment in an illegal manner. Although the testimony was double hearsay to prove how the equipment was operated, both declarants' statements were those of party opponents, so the testimony was admissible.

[9] Recorded Recollection

United States v. Green, 258 F.3d 683 (7th Cir. 2001) : In a trial for a crack cocaine distribution conspiracy, an investigator was permitted to read his notes of interviews with the defendant and with a cooperating witness. The Court held that the notes were properly admitted as past recollection recorded, even though they were not made until 11 days after the interview with the defendant, since there was no showing of circumstances making it likely that the declarant's memory was inaccurate and the delay was not so long as to make accurate recall unlikely. The included statements of the defendant and the cooperating witness were admissible without the declarants' voucher, since they were independently admissible as a party-admission and a prior consistent statement, respectively.

FOOTNOTES:
(n1)Footnote 1. *Carden v. Westinghouse Elec. Corp., 850 F.2d 996 (3d Cir. 1988)* .

(n2)Footnote 2. *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977)* .

(n3)Footnote 3. *O'Donnell v. Georgia Osteopathic Hosp., 748 F.2d 1543 (11th Cir. 1984)* .

(n4)Footnote 4. *Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982)* .

(n5)Footnote 5. *United States v. De Peri, 778 F.2d 963 (3d Cir. 1985)* .

(n6)Footnote 6. *Williams v. Tri-County Growers, Inc., 747 F.2d 121 (3d Cir. 1984)* .

(n7)Footnote 7. *United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)* .

(n8)Footnote 8. *Petrocelli v. Gallison, 679 F.2d 286 (1st Cir. 1982)* .

(n9)Footnote 9. *Winans v. Rockwell Int'l Corp., 705 F.2d 1449 (5th Cir. 1983)* .

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805.04 Legislative History

Advisory Committee's Note

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611.

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4-805 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 805, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 805. Hearsay Within Hearsay	**Rule 805. Hearsay Within Hearsay**
Hearsay included within hearsay is not excluded	Hearsay within hearsay is not excluded by the rule

under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

against hearsay if each part of the combined statements conforms with an exception to the rule.

Committee Note

The language of Rule 805 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[6] Hospital and Medical Records [Go To Main]

Zwygart v. Board of County Comm'rs, 483 F.3d 1086 (10th Cir. 2007) : A terminated employee bringing an ADA action sought to establish that his impairment substantially limited his major life activity of working by offering his physician's letter, which stated: "According to Mr. Zwygart, his cardiologist specifically told him that he could not work while on the intravenous antibiotics and in the most recent postoperative period." Affirming summary judgment for the defendants, the Court held that this statement was inadmissible double hearsay and insufficient to defeat a motion for summary judgment.

[7] Inadmissible Hearsay [Go To Main]

United States v. Vosburgh, 602 F.3d 512 (3d Cir. 2010) : Affirming a conviction for possession of child pornography, the Court held it was error (but harmless) when the prosecution attempted to prove the age of a girl depicted in an exhibit through testimony of a retired postal inspector that he had seen her birth records in the course of a prior investigation. Although the records might have been admissible under Rule 803(9) as records of vital statistics, they were never introduced. And the witness' testimony regarding the records was not admissible under Rule 807 because no pretrial notice was given by the prosecution. In *Smith v. City of Allentown, 589 F.3d 684 (3d Cir. 2009)* , the court affirmed summary judgment for the City and its mayor in a suit by a terminated City employee who alleged age and political affiliation discrimination. It held that the plaintiff's proffered testimony that a co-worker commented that the mayor purportedly considered the plaintiff to be a political enemy was properly excluded. The co-worker's statement was a level of hearsay that did not fall within any hearsay exception even though the mayor's statement, if made, was a statement by a party-opponent.

Nooner v. Norris, 594 F.3d 592 (8th Cir. 2010) : The Court affirmed a summary judgment for state officials in a suit

by prisoners awaiting execution who challenged the constitutionality of the state's protocol for execution by lethal injection. It held that a newspaper article reporting that a Corrections Department official said that the Department would use a certain medical procedure was inadmissible, since "[e]ven if Tyler's statement is viewed as a non-hearsay admission of a party opponent, the newspaper article reporting the statement is offered to prove the truth of the matter asserted and is not covered by any hearsay exception."

Johnson v. Weld Co., Colo., 594 F.3d 1202 (10th Cir. 2010) : The Court affirmed summary judgment for the defendant in an action for gender and disability discrimination. The plaintiff offered evidence that she had been told that the officer making the hiring decision had admitted that he did not hire the plaintiff because she was female and suffered from multiple sclerosis, but the Court found no error in the exclusion of that evidence because the declarants who reported the officer's statement to the plaintiff were persons whose statements did not qualify for any hearsay exception. In *Regan-Touhy v. Walgreen Co., 526 F.3d 641 (10th Cir. 2008)* , the plaintiff alleged that the defendant was responsible for intentional infliction of emotional distress because its pharmacist had disclosed her health information, and her ex-husband learned of it. Affirming summary judgment for the defendant, the Court held that the plaintiff's testimony -- that she heard about the pharmacist's conduct from her ex-husband, who heard about it from a girlfriend, who heard about it from the pharmacist -- was inadmissible multiple hearsay, even if the pharmacist's original statement was a nonhearsay party-opponent admission, and there was no other admissible evidence creating an issue of material fact.

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CHAPTER 806 RULE 806

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§ 806.syn Synopsis to Chapter 806: RULE 806

806.01 Official Text

806.02 Editorial Explanatory Comment

[1] Basic Rule

[2] Legislative Confusion

[3] Inconsistent Statements

[4] Scope of Impeachment

[5] Introducing a Hearsay Statement Solely To Impeach It

806.03 Annotated Cases

[1] Admissions

[2] Bias or Motive To Lie

[3] Contradiction of Non-Declarant

[4] Impeachment of Coconspirator-Declarant

[5] Impeachment of Persons Whose Declarations Are Adopted

[6] Nontestifying Accused

[7] Prejudice to Codefendants

[8] Prior Convictions

[9] Prior Inconsistent Statements

[10] Prior Statements of Declarant

[11] Prosecutorial Abuse

[12] Rehabilitation Evidence

[13] Reputation and Opinion Evidence

[14] Scope of the Rule

[15] Self-Impeachment by a Party

[16] Specific Instances of Conduct

806.04 Legislative History

[1] Advisory Committee's Note

[2] Report of the Senate Committee on the Judiciary

[3] Report of the House and Senate Conferees

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806.01 Official Text

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 806 RULE 806

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806.02 Editorial Explanatory Comment

[1] Basic Rule

If a hearsay statement is introduced into evidence because it qualifies as an exception to the hearsay rule, it is being introduced for its truth. This makes the credibility of the hearsay declarant important. The hearsay declarant's statements are the equivalent of trial testimony. Thus, *Rule 806* provides that the credibility of the hearsay declarant can be attacked and supported just as if the declarant is on the stand testifying. As a general principle, the ways in which a witness can be impeached and rehabilitated are also the ways in which a hearsay declarant can be impeached and rehabilitated. n1

If a declarant's statement is not being offered for its truth, then it is not hearsay, and impeachment of the declarant is not permitted under *Rule 806*. This makes sense because if the statement is not offered for its truth, there is no concern about the credibility of the declarant, and so there is no need for evidence on that subject. n2

[2] Legislative Confusion

In an effort to clarify *Rule 806*, the Senate Committee on the Judiciary created some confusion. The first sentence of the Rule creates no difficulty, as it reasonably provides that certain statements, defined as nonhearsay admissions by *Rule 801*, can be attacked or supported in the same manner as if the declarant had made the nonhearsay admission on the witness stand. However, the second sentence begins the confusion. It omits references to nonhearsay admissions and provides only that a statement inconsistent with a hearsay statement can be used to impeach a hearsay declarant even though no foundation was laid for the statement. The sentence also does not answer whether an authorized speaker, an agent, or a coconspirator can also be impeached by an inconsistent statement without laying a foundation first. The last sentence continues the confusion by leaving open the question of whether an authorized speaker, an agent, or a conspirator can be cross-examined as to nonhearsay admissions. While arguments can be made for different treatment of nonhearsay admissions in the last two sentences from the treatment provided in the first sentence, we think that the Senate intended to group admissions with hearsay for all purposes in *Rule 806*. Thus, we recommended reading all three sentences as if they included a reference to *Rules 801(d)(2)(C), (D), and (E)*. n3

[3] Inconsistent Statements

Evidence of an inconsistent statement or conduct inconsistent with the hearsay statement may be introduced to impeach the declarant. The test for inconsistency is the same as if the declarant were testifying; statements are inconsistent when they appear to proceed from beliefs that are necessarily contradictory. n4

In many cases, the inconsistent statement will be made after the hearsay declaration; and, of course, the declarant is being impeached with a hearsay declarant in absentia. Thus, the timing of the statement may differ from a prior inconsistent statement used to impeach a witness at trial, where the statement of course obviously precedes the testimony. For a hearsay declarant, the inconsistent statement will not necessarily be made "prior" to the statement offered as testimony.

Moreover, impeachment of a witness at trial is governed by *Rule 613(b)*. Under that Rule, no foundation need be laid prior to the introduction of a witness' inconsistent statement, but at some point the witness must be given a chance to explain. n5 In contrast, a hearsay declarant by definition will have no opportunity to explain the inconsistency.

Nonetheless, *Rule 806* provides that a hearsay declarant may still be impeached with an inconsistent statement; the *Rule 613(b)* procedure is inapplicable to hearsay declarants. If that were not the case, hearsay declarants could never be impeached with their inconsistent statements; and that would be contrary to the purpose of *Rule 806*, which is to provide the same modes of impeachment of a hearsay declarant as are available for trial witnesses.

[4] Scope of Impeachment

Rule 806 provides that a hearsay declarant may be impeached by any evidence that would be admissible if the declarant had testified as a witness. There are some cases in which the declarant's presence as a witness and the opportunity for the jury to observe the witness' demeanor would result in the Trial Judge's excluding evidence that might be deemed embarrassing to the witness (*Rule 611*) or unduly prejudicial to a party (*Rule 403*). When the declarant is not present as a witness and hearsay statements are offered, we would decide close cases in favor of allowing impeachment, because only by impeachment is the hearsay likely to be put into proper perspective, as cross-examination is not available to test the declarant. This should be particularly true when the hearsay statement is offered against a criminal defendant. n6

It would seem that almost all forms of impeachment available to attack a trial witness could be used to impeach a hearsay declarant. Inconsistent statements, we have seen, can be used. Bias evidence may be elicited. Character for truthfulness can be explored. n7 Even evidence concerning a declarant's eyesight or hearing might be available. Prior conviction impeachment is possible, too. n8

There is one form of impeachment, however, that presents a difficulty: impeachment of the witness' character for truthfulness by evidence of prior bad acts. *Rule 608(b)* restricts impeachment to questions addressed to a witness on the stand and limits the examiner to the witness' answers; *Rule 608(b)* precludes extrinsic evidence of bad acts offered to impeach the witness' character for truthfulness. It can therefore be argued that bad act impeachment of a hearsay declarant who is not present to testify is impermissible, because it would require admission of extrinsic evidence. However, we think that the need to determine the credibility of a hearsay declarant is even greater than the need with respect to an in-court witness. We also think that *Rule 806* is clear in its intent that the adverse party is to have at least the same impeachment weapons as he would have had if the witness had testified. Therefore, we believe that bad act impeachment should be a permissible means of impeaching a hearsay declarant. n9 Counsel should be able to inform the jury about the declarant's bad act, presuming that it is not unduly prejudicial or confusing under *Rule 403*, in the same way that counsel would inform the jury were the witness to testify. Extrinsic evidence of the bad act should in most cases be prohibited, for the same reason that it would be prohibited if the witness were to testify -- unless resort to extrinsic evidence is the only meaningful way, in the absence of the witness, to disclose the bad act to the jury. n10

We note, however, that at least one Court has held that extrinsic evidence may never be admitted to prove a bad act

offered to impeach a hearsay declarant's character for truthfulness. The Court in *United States v. Saada, 212 F.3d 210 (3d Cir. 2000)* , relied on the "plain language" of *Rule 806*, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception--impeachment with inconsistent statements (discussed above). Because extrinsic evidence could not be used if the witness were to testify at trial, it cannot be used if the statement is introduced as hearsay. The Court found that the Rule's express exception for different treatment of inconsistent statements cut against any judicially-created differential treatment for bad-acts impeachment; that is, if Congress had wanted to create differential treatment for bad acts, it knew how to do so because it had done so for prior inconsistent statements. The Court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of *Rules 806* and *608(b)*."

The problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of *Rule 806*, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The bad acts could at least be referred to if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts.

[5] Introducing a Hearsay Statement Solely To Impeach It

In the Editorial Explanatory Comment to *Rule 607*, *§ 607.02[2]*, we discuss the line of cases that have held that a party cannot call a witness for the sole purpose of impeaching that witness with otherwise inadmissible evidence. Courts have not looked kindly on deliberate attempts to evade the rules of evidence by introducing evidence as "impeachment," when in fact there is no good-faith strategic reason for calling a witness solely to impeach him or her. Similar considerations have been applied to *Rule 806*. Thus, Courts have held that a party cannot introduce an adverse hearsay statement, and then invoke *Rule 806* to "impeach" the hearsay declarant with evidence that would not otherwise be admissible, e.g., a prior inconsistent statement. n11

FOOTNOTES:
(n1)Footnote 1. For a discussion of some of the problems involved in adapting impeachment rules to hearsay declarants, see Margaret Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, *56 Ohio State L.J. 495 (1995)*.

(n2)Footnote 2. See, e.g., *United States v. McClain, 934 F.2d 822 (7th Cir. 1991)* (the Court held there was no error in prohibiting impeachment of an accomplice whose recorded statements were admitted only for their effect on others; the Rule permits impeachment only of hearsay declarants and declarants of statements admitted as authorized, vicarious, or coconspirator's admissions).

(n3)Footnote 3. See, e.g., *United States v. Wali, 860 F.2d 588 (3d Cir. 1988)* (a coconspirator's exculpatory statements regarding the defendant should have been admitted to impeach, as statements inconsistent with other statements by the conspirator that were admitted under *Rule 801(d)(2)(E)*; no foundation was required).

(n4)Footnote 4. See, e.g., *United States v. Trzaska, 111 F.3d 1019 (2d Cir. 1997)* (in a firearm prosecution it was error to admit the defendant's statement to a probation officer under *Rule 806*; the statement to the probation officer indicated that the defendant was obsessed with guns, while the hearsay statement admitted was to the effect that the defendant wanted to give some specific guns to his son because he wanted nothing to do with them: "[T]here is no necessary inconsistency between Trzaska indicating his desire to give specific guns to his son, and later admitting that he (Trzaska) was obsessed with guns in general. Alcoholics may give away alcohol and cigarette smokers may give away cigarettes.").'

(n5)Footnote 5. Some Courts have returned to the common-law rule requiring a foundation to be made before the

statement is introduced. See the discussion in the Editorial Explanatory Comment to *Rule 613*, *§ 613.02[6]*.

(n6)Footnote 6. See, e.g., *United States v. Inadi, 475 U.S. 387 (1986)* (noting the importance of impeachment of hearsay declarants whose statements are offered against a criminal defendant, citing *Rule 806*).

(n7)Footnote 7. See, e.g., *United States v. Barrett, 8 F.3d 1296 (8th Cir. 1993)* (a declarant's statement, made at a competency hearing, that she didn't know the difference between the truth and a lie, should have been admitted to impeach the declarant's character for truthfulness); *United States v. Moody, 903 F.2d 321 (5th Cir. 1990)* (a conviction was reversed because the defendant had not been permitted to offer evidence that coconspirators, whose hearsay statements had been admitted against him, had poor reputations for truthfulness).

(n8)Footnote 8. See, e.g., *United States v. Burton, 937 F.2d 324 (7th Cir. 1991)* (error to preclude cross-examination of an FBI agent regarding the criminal record of a nontestifying government informant whose voice was heard in several tape-recorded conversations).

(n9)Footnote 9. For commentary agreeing with and amplifying our view, see Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, *56 Ohio State L.J. 495, 526 (1995)*:

> If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. ...
>
> In addition, if *Rule 806* is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under *Rule 608(b)*, that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. ...
>
> These considerations militate strongly in favor of modifying *Rule 608(b)*'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness.

(n10)Footnote 10. See, e.g., *United States v. Friedman, 854 F.2d 535 (2d Cir. 1988)* (the Court observed that when an unavailable declarant cannot be cross-examined, "resort to extrinsic evidence may be the only means of presenting such evidence to the jury"; in this case, however, the declarant's videotaped admission that he had lied on a single occasion was properly excluded under *Rule 403*).

(n11)Footnote 11. See, e.g., *United States v. Finley, 708 F. Supp. 906 (N.D. Ill. 1989)* (statements by a government informant were not authorized or agent's statements and could not be used by a defendant under *Rule 801*; moreover, such statements could not be presented by a defendant who intends to offer other statements to impeach them; just as a party may not call a witness for the sole purpose of eliciting prior inconsistent statements that do not qualify as substantive evidence, a party may not attempt to offer adverse hearsay under an exemption for the sole purpose of admitting otherwise unnecessary and inadmissible evidence in the guise of impeachment).

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PART TWO: THE RULES THEMSELVES
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806.03 Annotated Cases

[Go To Supp]

[1] Admissions

United States v. Shay, 57 F.3d 126 (1st Cir. 1995) : The Court held that a statement admitted under *Rule 801(d)(2)(A)* could be impeached even though *Rule 806* does not so state.

United States v. Newman, 849 F.2d 156 (5th Cir. 1988) : The Court held that the government was properly permitted to impeach the defendant with prior convictions after he elicited testimony concerning his own hearsay statements to support an entrapment defense.

United States v. Lawson, 608 F.2d 1129 (6th Cir. 1979) : When defense counsel not only cross-examined a government agent to bring out the fact that the defendant denied his guilt but also introduced a written denial, the government was allowed to impeach the nontestifying defendant under *Rule 806* by using a prior conviction.

United States v. McClain, 934 F.2d 822 (7th Cir. 1991) : In a public corruption case, the defendant (who did not testify) offered tapes of exculpatory statements he had made. The Court held there was no error in permitting introduction on rebuttal of other tapes containing the defendant's expansively exculpatory public statements, which seemed to have been thoroughly deflated by the evidence at trial. In *United States v. Noble*, n1 the Court held that the government was properly permitted to impeach the defendant with a dishonesty conviction after defense counsel introduced a taped conversation between the defendant and an agent in which the defendant denied on four or five occasions any knowledge of counterfeiting activities.

United States v. Price, 792 F.2d 994 (11th Cir. 1986) : The Court held, in affirming a drug conviction, that various tape recordings were admitted as personal admissions by the defendant and that statements by third parties were only admitted to put the defendant's statements in context. Thus, the third parties were not subject to impeachment

under *Rule 806*. The Court observed, however, that there is persuasive authority that a person making a statement that is admitted as an adoptive admission should be subject to impeachment.

[2] Bias or Motive To Lie

United States v. Lechoco, 542 F.2d 84 (D.C. Cir. 1976) : In a prosecution for kidnapping the Philippine Ambassador to the United States, the government emphasized on cross-examination of doctors who presented the insanity defense that their testimony depended on the truth of statements made in psychiatric interviews with the defendant. Reversing on another ground, the Court said that upon remand inquiry into the statements made by the defendant to his psychiatrist should be treated as statements made to a physician and therefore admissible under *Rule 803(4)*, and that the government was free to attack the credibility of the hearsay declarant under *Rule 806*.

United States v. Check, 582 F.2d 668 (2d Cir. 1978) : In the course of reversing drug convictions because inadmissible hearsay was utilized by the government, the Court pointed out that a party can attack a hearsay declarant by showing his possible bias and that the attack can be made by questioning the witness who reports the hearsay statement.

[3] Contradiction of Non-Declarant

United States v. Maliszewski, 161 F.3d 992 (6th Cir. 1998) : In a prosecution for marijuana trafficking, one defendant complained that he was not permitted to question a witness about a statement allegedly made to her by another defendant. Affirming, the Court found that the statement was actually being offered not to impeach the declarant who made it, but as substantive evidence to contradict another witness, and that *Rule 806* did not warrant admission of a prior statement as substantive evidence.

[4] Impeachment of Coconspirator-Declarant

United States v. Vegas, 27 F.3d 773 (2d Cir. 1994) : In affirming a narcotics conviction, the Court upheld the government's introduction of testimony given by the defendant's coconspirator at the coconspirator's previous trial. The testimony contradicted post-arrest statements by the coconspirator that had been introduced by the defendant.

United States v. Wali, 860 F.2d 588 (3d Cir. 1988) : The Court reversed a conviction for conspiracy to import drugs, holding that a coconspirator's exculpatory statements regarding the defendant should have been admitted to impeach, as prior inconsistent statements, other statements by the conspirator that were admitted under *Rule 801(d)(2)(E)*. The Court observed that impeachment of a conspirator-declarant is permitted without the need for cross-examination and regardless of whether the declarant could have been deposed.

[5] Impeachment of Persons Whose Declarations Are Adopted

United States v. Price, 792 F.2d 994 (11th Cir. 1986) : The Court held, in affirming a drug conviction, that various tape recordings were admitted as personal admissions by the defendant and that statements by third parties were only admitted to put the defendant's statements in context. Thus, the third parties were not subject to impeachment under *Rule 806*. The Court observed, however, that there is persuasive authority that a person making a statement that is admitted as an adoptive admission should be subject to impeachment.

[6] Nontestifying Accused

United States v. Newman, 849 F.2d 156 (5th Cir. 1988) : The Court held that the government was properly permitted to impeach the defendant with prior convictions after he elicited testimony concerning his own hearsay statements to support an entrapment defense.

[7] Prejudice to Codefendants

United States v. Robinson, 783 F.2d 64 (7th Cir. 1986) : Affirming cocaine convictions, the Court held that a defendant was properly barred from impeaching nontestifying codefendants whose statements were admitted under *Rule 801(d)(2)(E)*. The Court found that exclusion was necessary to protect the codefendants from unnecessary prejudice and that the Trial Judge was not bound to grant a severance.

United States v. Lenfesty, 923 F.2d 1293 (8th Cir. 1991) : In affirming convictions for offenses arising out of a methamphetamine distribution conspiracy, the Court held there had been no abuse of discretion in permitting impeachment of a nontestifying codefendant's coconspirator statements with evidence of her reputation for truthfulness but prohibiting evidence of her numerous prior felony convictions. Enough impeachment of the declarant must be allowed to protect the other codefendants' confrontation rights, but the declarant's right to be fairly tried for this crime and not convicted for her prior bad acts must also be safeguarded.

[8] Prior Convictions

United States v. Lawson, 608 F.2d 1129 (6th Cir. 1979) : When defense counsel not only cross-examined a government agent to bring out the fact that the defendant denied his guilt but also introduced a written denial, the government was allowed to impeach the nontestifying defendant under *Rule 806* by using a prior conviction.

United States v. Burton, 937 F.2d 324 (7th Cir. 1991) : Affirming convictions on charges arising out of an interstate scheme to steal tires and trucks, the Court held that it was error (but harmless) to preclude cross-examination of an FBI agent regarding the criminal record of a nontestifying government informant whose voice was heard in several tape-recorded conversations. In *United States v. Noble*, n2 the Court held that the government was properly permitted to impeach the defendant with a dishonesty conviction after defense counsel introduced a taped conversation between the defendant and an agent in which the defendant denied on four or five occasions any knowledge of counterfeiting activities.

United States v. Bovain, 708 F.2d 606 (11th Cir. 1983) : A government witness in a heroin prosecution testified to out-of-court statements by one defendant, Finch, that concerned the drug activities of another defendant, Rickett. Rickett was permitted to impeach Finch with certified records of Finch's prior convictions for stolen money orders and narcotics, even though Finch never testified. The Court upheld the impeachment under *Rule 806* and observed that the Trial Judge carefully instructed the jury that evidence of Finch's convictions could be used to discredit his out-of-court statements, but could not be considered as evidence of Finch's guilt. In *United States v. Kabbaby*, n3 the Court found that the Trial Judge properly excluded evidence of a prior conviction of a government informant where the informant did not testify and there was no evidence of any statement or act of the informant that might have been considered as a statement.

[9] Prior Inconsistent Statements

United States v. Trzaska, 111 F.3d 1019 (2d Cir. 1997) : The defendant had twice previously been convicted of firearms offenses. At this trial for firearms offenses, the defendant's son testified for the defense that in 1992 the defendant had said the son should take the guns then being stored at a friend's apartment because he "didn't want nothing to do with them anymore." To impeach the 1992 statement, the prosecution then offered the defendant's statement during the course of an illegal search leading to the instant charges that "I'm a drug addict with this [i.e., guns]. It's a sickness." Reversing, the Court held that this impeachment was erroneous because the statements were not inconsistent. There is no necessary inconsistency between indicating a desire to dispose of specific guns and admitting an obsession with guns in general; further, the year's time lapse between the statements clouds whatever inconsistency might have existed. The government's argument that there was an inconsistency between the defendant's admission that he possessed the guns found at the time of his arrest and the implicit denial that he possessed the guns in the friend's apartment was likewise unavailing, since the two statements referred to different guns.

United States v. McClain, 934 F.2d 822 (7th Cir. 1991) : In a public corruption case, the defendant (who did not testify) offered tapes of exculpatory statements he had made. The Court held there was no error in permitting introduction on rebuttal of other tapes containing the defendant's expansively exculpatory public statements, which seemed to have been thoroughly deflated by the evidence at trial.

United States v. Grant, 256 F.3d 1146 (11th Cir. 2001) : The defendant in a drug conspiracy case attempted to impeach coconspirator statements by means of an affidavit given by the coconspirator (who had been deported before trial), which stated that the defendant had not been involved in the scheme. The affidavit was excluded because the coconspirator's statements, as reported by the agent, did not specifically identify the defendant as a participant in the conspiracy. Reversing, the Court held that that was too narrow a view of the permissible impeachment: the coconspirator's statements circumstantially linked the defendant to the conspiracy, and if he had been testifying at trial, there was no question that the statements in the affidavit would have been admissible to impeach him. In *United States v. Wuagneux*, n4 the Court affirmed convictions for racketeering and mail fraud, and upheld the government's introduction of an inconsistent statement offered to impeach a statement made by the defendant's accountant that the defendant had introduced as a declaration against interest. The government acted properly in impeaching the unavailable declarant, even though the unavailability resulted from the government's refusal to grant use immunity.

[10] Prior Statements of Declarant

United States v. Barrett, 8 F.3d 1296 (8th Cir. 1993) : At a hearing on whether the four-year-old victim of an assault was competent to testify, the child indicated that she did not know (or at least could not explain) what it meant to tell the truth or to lie. When her hearsay statements were admitted at trial, the defendant was not permitted to introduce the child's statements from the competency hearing. The Court vacated the conviction, holding it was a denial of confrontation rights to exclude relevant impeaching evidence.

[11] Prosecutorial Abuse

United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1989) , *amended* (9th Cir. 1992): Reversing the defendant's conviction in a joint trial for assault with intent to commit rape because the prosecutor improperly used an inculpatory statement by the nontestifying codefendant, the Court noted that the defendant would have been permitted to impeach the statement with the codefendant's prior sex offense conviction, had there not been a joint trial in which the impeachment would have been unfair to the codefendant.

[12] Rehabilitation Evidence

United States v. Bernal, 719 F.2d 1475 (9th Cir. 1983) : In the course of affirming drug convictions, the Court sustained the introduction of a coconspirator's statement to rehabilitate a conspirator whose statement had been introduced under *Rule 801(d)(2)(E)* and who was impeached with a prior inconsistent statement.

[13] Reputation and Opinion Evidence

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983) : Affirming mail fraud and conspiracy convictions arising from the arson of a diner, the Court found it was error (but harmless) to preclude the defense from asking a government witness questions about the reputation of a hearsay declarant.

United States v. Moody, 903 F.2d 321 (5th Cir. 1990) : The Court reversed convictions for mail and wire fraud because the defendant had not been permitted to offer evidence that coconspirators, whose hearsay statements had been admitted against him, had abysmal reputations for truthfulness.

[14] Scope of the Rule

United States v. Shay, 57 F.3d 126 (1st Cir. 1995) : The Court held that a statement admitted under *Rule 801(d)(2)(A)* could be impeached even though *Rule 806* does not so state.

United States v. Graham, 858 F.2d 986 (5th Cir. 1988) : The Court affirmed cocaine convictions, holding there was no error in barring the defendant from cross-examining a police officer about an accomplice's statements while pleading guilty that denied that he had implicated the defendant in previous statements to the officer. The cross-examination attempted to challenge the credibility of the officer, not the accomplice, and was therefore outside the scope of *Rule 806*.

United States v. McClain, 934 F.2d 822 (7th Cir. 1991) : The Court held there was no error in prohibiting impeachment of an accomplice whose recorded statements were admitted only for their effect on others, as the Rule permits impeachment of only hearsay declarants and declarants of statements admitted as authorized, vicarious, or coconspirator's admissions.

United States v. Martinez, 979 F.2d 1424 (10th Cir. 1992) : Affirming convictions for drug trafficking offenses, the Court held that the defendants had no need for disclosure of an informant's identity in order to impeach him, as the informant's statements were used only to explain the conduct of government agents and not for their truth, so the informant could not be impeached under the Rule.

United States v. Harris, 908 F.2d 728 (11th Cir. 1990) : In affirming cocaine importation conspiracy convictions, the Court held there was no abuse of discretion in precluding a defendant from offering evidence impeaching a confidential informant whose voice was recorded on tapes of conversations with the defendant. Although the government listed the informant on their pretrial witness list, he never testified, and he did not provide evidence against the defendant.

[15] Self-Impeachment by a Party

United States v. Dent, 984 F.2d 1453 (7th Cir. 1993) : In a prosecution for felon firearm possession, the Trial

Judge admitted evidence that the defendant had pleaded guilty to a misdemeanor charge of unlawful use of a weapon growing out of the same facts. The defendant argued that a statement made to the State Court by his lawyer that he was pleading guilty against the lawyer's advice and that he had stated to counsel he did not know the gun was in the car should have been admitted under, *inter alia*, *Rule 806*. The Court found that the statements were really offered not for impeachment but for their truth, but it recognized that in some circumstances a party may impeach a statement admitted under *Rule 801(d)(2)(A)* and *(B)*, as well as under *(C), (D), and (E)*.

[16] Specific Instances of Conduct

United States v. White, 116 F.3d 903 (D.C. Cir. 1997) (per curiam): The Court affirmed convictions for a drug trafficking conspiracy, holding there was no abuse of discretion in precluding cross-examination of an undercover officer as to whether a deceased declarant whose hearsay statements he had testified to had ever made false statements on an employment application or had ever violated any Court orders. The Court noted *Rule 608(b)*'s bar on extrinsic evidence of misconduct to impeach; "[a]ccordingly, [defendant]'s counsel could have asked [the officer] only if [the declarant] had ever lied on an employment form or violated any court orders, and could not have made reference to any extrinsic proof of those acts." Because the officer had known the declarant for only two months, and because there was other evidence in the record concerning the declarant's credibility, the Court found no abuse of discretion in the conclusion "that the questions were of little utility."

United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) : After the Trial Judge admitted numerous declarations of a deceased declarant as conspirator statements in a racketeering prosecution, the Judge excluded evidence that the declarant had lied to a hospital and pretended that he had been assaulted when he had actually attempted suicide. The Court observed that the government did not press on appeal its argument that *Rule 608(b)* barred the use of extrinsic evidence -- in this case, a videotape of the declarant's admission of his attempted suicide and fabrication of an assault -- and that when an unavailable declarant cannot be cross-examined, "resort to extrinsic evidence may be the only means of presenting such evidence to the jury." The Court found that the excluded evidence cast little doubt on the credibility of the conspirator statements and would have injected evidence of the declarant's subsequent suicide into the case, so there was no error in excluding the evidence under *Rule 403*.

United States v. Saada, 212 F.3d 210 (3d Cir. 2000) : The defendants attempted to defraud an insurance company by breaking a sprinkler head, causing water damage to insured merchandise in their warehouse, and claiming that it had happened accidentally. To prove the sprinkler head was broken by accident, the defendants proved that just after the incident a vice-president of their company (a former judge, since deceased) had run into the company kitchen and exclaimed that one of the defendants had just done something very stupid. The exclamation was admitted under *Rule 803(2)*, but the Court noted the personal perception requirement was not satisfied because the declarant was not in the warehouse when the sprinkler head was broken. Nonetheless, the Court deferred to the ruling admitting the statement for its truth for purposes of reviewing the Trial Judge's taking judicial notice of two New Jersey Supreme Court decisions removing the declarant from the bench and disbarring him. The Court held that *Rule 608(b)*'s bar on extrinsic evidence of misconduct offered to impeach applies to hearsay declarants under *Rule 806*, even when the declarant is unavailable. The unavailable declarant may still be impeached either by the witness who testifies to the hearsay incorporating knowledge of the misconduct in cross-examination about the declarant's character for truthfulness or untruthfulness (*Rule 608(a)*) or by other impeachment under *Rules 608(a)*, *609*, or *613*. The Court supported its conclusion by reference to the "plain -- albeit imperfectly meshed -- language" of *Rules 806* and *608(b)* and the explicit modification of *Rule 613*'s foundation requirement in *Rule 806*. In this case, admitting the extrinsic evidence of the declarant's misconduct was harmless error.

FOOTNOTES:

(n1)Footnote 1. *United States v. Noble, 754 F.2d 1324 (7th Cir. 1985)* .

(n2)Footnote 2. *United States v. Noble, 754 F.2d 1324 (7th Cir. 1985)* .

(n3)Footnote 3. *United States v. Kabbaby, 672 F.2d 857 (11th Cir. 1982)* .

(n4)Footnote 4. *United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 806 RULE 806

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806.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946)* ; *People v. Rosoto, 58 Cal. 2d 304, 23 Cal. Rptr. 779, 373 P.2d 867 (1962)* ; *Carver v. United States, 164 U.S. 694, 17 S. Ct. 228, 41 L. Ed. 602* (1897). *Contra, Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895)* ; *People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940)* . The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of crossexamination when the hearsay is former testimony or a deposition but he is deprived of crossexamining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that *Rule 26(f) of the Federal Rules of Civil Procedure*, as originally submitted by the Advisory Committee, ended with the following: "... and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent." This language did not appear in the rule as promulgated in December, 1937. See 4 *Moore's Federal Practice §§ 26.01[9]*, 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule: "Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S. Neb. § 251267.07.

For similar provisions, see Uniform Rule 65; *California Evidence Code § 1202*; Kansas Code of Civil Procedure § 60462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in *California Evidence Code § 1203*.

[The entire Advisory Committee Note accompanying the genderneutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[The 1997 amendment to the Rule deleted a comma in the Text of the Rule. The Advisory Committee Note is as follows: "The amendment is technical. No substantive change is intended."]

[2] Report of the Senate Committee on the Judiciary

Rule 906 [*sic*], as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party -- see Rule 801(d)(2)(C), (D), and (E) -- are traditionally defined as exceptions to the hearsay rule, Rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, Rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of Rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of

being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in Rule 801(d)(2)(C), (D), and (E)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in Rule 801(d)(2)(A) and (B) -- the statement by the party-opponent himself or the statement of which he has manifested his adoption -- because the credibility of the party-opponent is always subject to attack. (Footnote 28)]

[3] Report of the House and Senate Conferees

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D), and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

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Supp. To CHAPTER 806 RULE 806

4-806 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 806, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 806. Attacking and Supporting Credibility of Declarant	**Rule 806. Attacking and Supporting the Declarant's Credibility**
When a hearsay state	When a hearsay state

ment, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any

ment -- or a statement described in Rule 801(d)(2)(C), (D), or (E) -- has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admiss

evid ence whic h wou ld be ad- miss ible for thos e pur- pose s if de- clar- ant had test- ified as a wit- ness. Evid ence of a state men t or con- duct by the de- clar- ant at any time , in- con- sist- ent with the de- clar- ant's hear ible for thos e pur- pose s if the de- clar- ant had test- ified as a wit- ness. The cour t may ad- mit evid ence of the de- clar- ant's in- con- sist- ent state men t or con- duct, re- gard less of whe n it oc- curr ed or whet

say state men t, is not sub- ject to any re- quir eme nt that the de- clar- ant may have been af- ford ed an op- por- tun- ity to deny or ex- plai n. If the part y agai nst who m a hear say state men t has been ad- mit- her the de- clar- ant had an op- por- tun- ity to ex- plai n or deny it. If the part y agai nst who m the state men t was ad- mit- ted calls the de- clar- ant as a wit- ness, the part y may ex- ami ne the de- clar-

ted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ant on the statement as if on cross-examination.

Committee Note

The language of Rule 806 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 806.03 Annotated Cases

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[6] Nontestifying Accused [Go To Main]

United States v. Greenidge, 495 F.3d 85 (3d Cir. 2007) : In a bank fraud prosecution, the government introduced the nontestifying defendant's prior conviction for stealing money from his employer, to impeach a hearsay statement made by the defendant tending to indicate he had no intent to defraud. Affirming, the Court held that the conviction would have been admissible under Rule 609 if the defendant had testified, and so it was admissible to impeach his credibility as a hearsay declarant. The Court saw "no basis for altering the Rule 609 balancing in the circumstances of a non-testifying defendant-declarant."

[9] Prior Inconsistent Statements [Go To Main]

United States v. Ebbers, 458 F.3d 110 (2d Cir. 2006) : The Court affirmed convictions for securities fraud, finding no abuse of discretion when the Judge did not compel the prosecution to choose between giving use immunity to defense witnesses or forgoing its own use of immunized testimony. The defendant argued that the unimmunized witnesses were necessary to impeach coconspirator hearsay offered by the government, but the Court held that their proffered testimony would not have contradicted the evidence that was admitted.

[14] Scope of the Rule [Go To Main]

United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009) : The Court affirmed the defendant's conviction for the fatal carjacking of his ex-wife, finding no error in the exclusion of tape records of the victim talking to passengers in her vehicle and on her cell phone while driving. The defense offered the tapes to impeach -- not so much by the words as by the tone and attitude -- hearsay accusations by the victim of abuse by the defendant. The Judge had excluded the

evidence on the grounds, first, that the victim was not a declarant because she was not "a person who takes the witness stand," and, second, because the statements sought to be impeached were not hearsay but rather "exceptions to hearsay." The Court stated that both reasons were based on a misreading of the Rules: in fact, a declarant is "a person who makes a statement," and the statements were hearsay under Rule 801, and thus proper subjects for impeachment under Rule 806, even if they were admitted under a hearsay exception under Rule 803. Nevertheless, the evidence was properly excluded, because it strongly corroborated rather than contradicted the victim's hearsay statements.

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[i] Statement Admissible or Admission Required

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807.04 Legislative History

[1] Advisory Committee Note to Rule 803(24)

[2] 1997 Amendment Committee Note

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 278 (1999)

[4] House Subcommittee on Criminal Justice Notes

[5] Report of the Senate Committee on the Judiciary

[6] Report of the House and Senate Conferees

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807.01 Official Text

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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807.02 Editorial Explanatory Comment

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[1] A Single Residual Exception

Two residual hearsay exceptions were contained in the Federal Rules as initially adopted. These exceptions were designed to permit the admission of trustworthy hearsay that did not fit under any of the categorical exceptions. The residual exceptions were identically worded; one was placed in *Rule 803* (subdivision (24)), and the other was placed in *Rule 804* (subdivision (b)(5)). In 1997, the residual exceptions were transferred out of *Rules 803 and 804*, and combined in a single exception, *Rule 807*. This was done to facilitate additions to *Rules 803 and 804*. No change in meaning was intended. This Editorial Explanatory Comment discusses the residual exception, making reference to many of the cases decided under Rules 803(24) and 804(b)(5). For ease of reference, the residual exception is referred to in the singular, even though the Rules as initially adopted contained two separate residual exceptions.

[2] Breadth of the Residual Exception

The residual exception was the subject of significant controversy when originally proposed by the Advisory Committee. A catchall provision was deleted by the House, but the Senate resurrected it in a more restricted form. Under the Senate version, the Court must determine that a statement is offered as evidence of a material fact, that it is more probative on the point for which it is offered than any other evidence that a proponent can procure by reasonable efforts, and that the general purposes of the Rules and the interests of justice will be served by admitting the evidence. In addition, the evidence must demonstrate circumstantial guarantees of trustworthiness. The final bill adopted the Senate language. Added to the Senate version, however, was a provision that a party intending to proffer residual hearsay must notify any adverse party of that intention before trial. Included in the notice must be the particulars of the statement as well as the name and address of the declarant. The notice requirement is discussed in more detail below.

The residual exception is designed to leave room for limited growth and development in the law of hearsay exceptions. The Advisory Committee thought it "presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued," and therefore adopted a residual exception to allow Judges to admit hearsay in "new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." n1 It is clear, however, that the intent of the drafters was that the exception would be used sparingly; the

concern was that overuse of the residual exception would undermine the categorical approach to the hearsay exceptions set forth in the Federal Rules. n2 An early draft of the Federal Rules contained only one hearsay exception, which mandated a case-by-case inquiry to determine the trustworthiness of each proffered hearsay statement. This approach was rejected because it was too unpredictable and time-consuming, and was replaced by a system of categorical admissibility requirements. The residual exception was the safety valve to the underinclusiveness of the categorical approach; but it was not intended to subsume the use of categorical exceptions and exclusions.

Unfortunately, the intent of the drafters to limit the residual exception has often been ignored, as the discussion below will indicate. Liberal use of the residual exception runs the risk of establishing, *de facto,* the dominance of the case-by-case approach that was rejected previously. A broad application of the residual exception could permit the case-by-case exception to swallow the categorical rules.

Certainly there is an argument against the inclusion of a residual exception in a code of evidence. The Washington Task Force on Evidence made the following comment in rejecting residual exceptions for the Washington Rules of Evidence:

> There is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial difficult. Nor would it be likely that an appellate court could effectively apply corrective measures. There would be doubt whether an affirmance of an admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.

While these concerns have merit, we think that the alternative of having no residual exception is worse. Without a residual exception, Trial Courts might well be pushed to expand the categorical exceptions beyond their ordinary application, in order to qualify a statement that the Court thinks is reliable but does not fit into any of the categorical exceptions. We note that Courts in states without a residual exception have been prone to distort certain hearsay exceptions by engaging in a generalized trustworthiness inquiry, instead of focusing on the grounds for admissibility applicable to a particular exception. This is particularly true with respect to *Rules 803(2)* and *(4)*, where the prosecution offers statements of children concerning sexual abuse. Courts in states without a residual exception have often admitted statements of child-victims under these exceptions, even where the declarant was not excited or seeking treatment; these Courts undertake a residual-type analysis and admit the statement when it is trustworthy under the circumstances. n3 We think that ultimately it is more honest to apply a residual exception than it is to try to cram a statement into an exception where it clearly does not belong. However, we caution that flexibility should not be an excuse for unconstrained judicial activism. n4

[3] Relationship to Other Exceptions

The residual exception applies to statements "not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness." Thus, Courts must face the issue whether hearsay that almost, but not quite, fits one of the standard exceptions may be admitted under the residual exception. A major concern of some members of Congress was that certain types of hearsay deliberately excluded from the categorical exceptions might nevertheless be admitted as residual hearsay. n5 Many decisions have demonstrated that there were good grounds for the congressional concerns, as Courts have often admitted hearsay under the residual exception where it is a "near miss" of an enumerated exception. n6

We believe that the residual exception was meant to cover special cases -- reliable statements that could not have been anticipated by a categorical approach and that are "not specifically covered" by those exceptions. But most Courts have construed "not specifically covered" to mean "not admissible under" a categorical exception. n7 It is obvious that this construction renders the language redundant, because the residual exception will only apply if the hearsay statement is "not admissible under" another exception.

[4] Trustworthiness Requirement

The most important requirement for residual hearsay is that it possess guarantees of trustworthiness equivalent to those supporting the Rule 803 and 804 exceptions. No inclusive list of factors determining admissibility can be devised because admissibility hinges upon the peculiar factual context within which the statement was made. But some nondispositive generalizations can be made

There are certain standard factors all Courts consider in evaluating the trustworthiness of a declarant's statement under the residual exception. n8 These include:

(1) The relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante should be considered more reliable than a statement to a total stranger. n9

(2) The capacity of the declarant at the time of the statement. For instance, if the declarant was drunk or on drugs at the time, that would cut against a finding of trustworthiness, and vice versa. n10

(3) The personal truthfulness of the declarant. If the declarant is an untruthful person, this cuts against admissibility, while an unimpeachable character for veracity cuts in favor of admitting the statement. n11

(4) Whether the declarant appeared to carefully consider the statement. n12

(5) Whether the declarant recanted or repudiated the statement after it was made. n13

(6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement. n14

(7) Whether the behavior of the declarant was consistent with the content of the statement. n15

(8) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement. n16

(9) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

(10) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it. n17

(11) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement. n18

(12) Whether the declarant was a disinterested bystander or rather an interested party. n19

[5] "More Probative" Requirement

Statements offered under the residual exception must be more probative than any other evidence reasonably available to prove the point. The rationale for this requirement is that the residual exception should be reserved for cases of clear necessity.

Courts have held that live testimony by the declarant is as a general rule more probative than or at least equally probative as hearsay. n20 These Courts have generally excluded statements offered as residual hearsay when the

declarant was not called to testify and was not shown to be unavailable. n21

However, the failure to call an available declarant will not always preclude the admission of residual hearsay. A declarant may be technically available and yet may be unable or unwilling to give testimony on the point for which the hearsay statement is offered, or at least unable or unwilling to give testimony that is as probative as the out-of-court statement. In such circumstances, the hearsay statement may be more probative evidence. For example, in child abuse cases the child's out-of-court statement concerning the abuse is often considered the more probative evidence because the child may not be able to communicate as well on the stand as he or she did out of court. n22

Moreover, the Rule states that the proffered hearsay must be the most probative evidence that can be produced through *reasonable* efforts. In some cases, a declarant might be technically available, but it would be unreasonably prohibitive and time-consuming to demand that the declarant testify in Court. For example, in an action where thousands of consumers have been defrauded, reliable affidavits prepared by each consumer have been admitted as residual hearsay in lieu of in-court testimony. n23 Because the probative value of the hearsay is compared with that of other evidence that could be procured through "reasonable" efforts, limitations upon the financial resources available to the parties and the Court are rightfully considered. As one Court has stated, the question of whether there is more probative evidence reasonably available depends upon "the importance of the evidence, the means at the command of the proponent, and the amount in controversy." n24

The term "more probative" must be distinguished from the term "more credible." For instance, if there are two eyewitnesses to an event, and one witness, now unavailable, makes a hearsay statement that is offered as residual hearsay, the statement is not more probative than the other eyewitness' in-court testimony would be. This is true even if the declarant's credibility is strong and the witness's credibility is weak. The term "probative" refers to the tendency of the statement to prove a proposition if the jury decides to believe it. As one Court has stated: "The credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact it seeks to prove. ... [T]he law does not consider credibility as a component to relevance." n25

[6] Materiality Requirement

The Rule requires that residual hearsay be "offered as evidence of a material fact." It is ironic that the word "material," which found its way into the residual exception, was studiously avoided in the definition of relevance set forth in *Rule 401*. The Advisory Committee on the Federal Rules believed that the word should not be used because it has many different legal meanings. Nonetheless, Congress selected the word in defining the residual exception. It is probable that Congress intended to use one of the meanings other than relevance. Congress appears to have intended to limit the use of the residual exception to *important* evidence -- evidence likely to affect the outcome of a case.

We think that it makes sense to limit the use of the residual exception to crucial evidence. The exception is not to be abused and was intended for extraordinary situations of trustworthiness and necessity. Applying the residual exception to a statement that is only marginally relevant (but yet admissible under the liberal provisions of *Rules 401* and *403*) is inconsistent with this intent. Illustrative of our position is *United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998)* . The defendants were charged with a drug conspiracy. The government presented evidence that an address book seized from one of the defendants contained the notation "Ranchito." The government contended that the defendants used drug proceeds to purchase a cattle ranch in Mexico, and that "Ranchito" was a reference to this ranch. In an attempt to rebut this contention, the defendant proffered a letter from a Mexican Consul Attache indicating that there is a small village in Mexico named "El Ranchito." The defendant argued that the letter was admissible as residual hearsay, but the Court found no error in its exclusion, reasoning that the letter was not "offered as evidence of a material fact" as required by the Rule. The Court stated that evidence concerning the town of Ranchito in Mexico "at most would have called into question the meaning of a single entry in the defendant's notebook -- a matter that clearly was not material to the jury's determination of his guilt on the drug charges." Thus, while the evidence was probative of a possibly innocent explanation for government-proffered evidence, it was not really important to the case.

[7] Notice Requirement

The purpose of the notice requirement is to protect against excessive liberalization and unfair surprise and to lend more predictability to preparation for trial when residual hearsay is to be proffered. Some Courts have interpreted the notice requirement literally, excluding the evidence unless the adversary has been notified before trial of the intent to invoke the residual exception to admit a specific statement. n26 Generally speaking, however, the notice requirement has been applied flexibly in accordance with its intent, which is to prevent surprise and to allow time to prepare to meet the evidence. n27 Under the majority, liberal approach, it is ordinarily possible to satisfy the notice requirement by notifying the adversary during the trial, so long as the adversary has sufficient time to challenge the evidence effectively. Postponing notification until trial may require the granting of a continuance, depending on the circumstances; the Court will also consider whether the delay in notice could have been avoided. n28

There is some dispute among the Courts as to the type of notice that the opponent of the evidence must receive. The Third Circuit holds that the opponent must be notified not only about the evidence itself but also of the proponent's intent to invoke the residual exception. All of the other Circuits that have decided the question appear to hold that the opponent need only be made aware in advance of the existence of the evidence and its potential proffer at trial. The usual fact situation in which this question arises is where the proponent has not even purported to give pretrial notice, and yet the opponent is well aware before trial of the existence of the evidence and its possible proffer at trial, albeit perhaps not under the residual exception.

The minority position is found in *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* . The *Pelullo* Court noted that while the Rule could be read to require notice only of the statement itself, the Third Circuit requires specific notice of the proponent's intent to use the residual exception. Here, even though the defendant was given the documents months before trial, there was no specific notice of the government's intent to invoke the residual exception, so the documents were held improperly admitted as residual hearsay. n29

The more common result is that the notice requirement is deemed satisfied when the opponent has received actual notice, before trial, of the existence of the evidence and its possible use at the trial. The reasoning is that under these circumstances, the opponent cannot complain about surprise or inability to prepare. Thus, in *United States v. Bachsian, 4 F.3d 796 (9th Cir. 1993)* , the Court declared that "failure to give [explicit] pretrial notice will be excused if the adverse party had an opportunity to attack the trustworthiness of the evidence." In *Bachsian*, the government did not give notice under the residual exception, but the defendant was more generally notified two months before trial that the government intended to use the evidence, and the defendant was given copies. Also, the defendant did not move for a continuance. Under these circumstances, the Court found that the spirit of the notice requirement was met. n30

Query whether the cases finding the notice requirement satisfied whenever the opponent somehow becomes aware of the evidence are consistent with the terms of the Rule. The Rule specifies that the proponent must herself provide notice to the adverse party; these terms would not be met if the opponent, as is often the case, becomes aware of the information other than through the proponent. On the other hand, where the proponent has in fact given some kind of advance notice about the hearsay evidence, but has failed to invoke the residual exception specifically, the Rule is, as the Third Circuit admits, vague as to whether the notice requirement is satisfied.

One consequence of the notice requirement is that an Appellate Court may be unable to admit a statement retroactively as residual hearsay. If the Trial Court admits a hearsay statement under the wrong exception the Appellate Court ordinarily can still affirm the judgment so long as the statement could have been admitted under a different exception. n31 For example, if a hearsay statement is erroneously admitted as an excited utterance, the Court will affirm if the statement could have been admitted as a party-admission. The reasoning is that the non-offering party is not prejudiced. However, there is an exception to this rule where the retroactive use of a theory would deprive the opponent of some argument or protection that could have been used if the theory had been presented below. Such is the case with the residual exception and its notice requirement. Advance notice that would meet the Rule is unlikely to have been given if

the statement was not offered at trial as residual hearsay. And notice obviously cannot be given retroactively on appeal. n32

[8] The Residual Exception and the Confrontation Clause

The Supreme Court's cases on the *Confrontation Clause* were treated in detail in the Editorial Explanatory Comments to Rules 801, 803 and 804. Those same cases are pertinent to the constitutionality of hearsay statements that are found admissible under *Rule 807*.

As discussed more fully in *§ 803.02[26]*, the Court in *Ohio v. Roberts, 448 U.S. 56 (1980)* , held that hearsay statements are admissible under the *Confrontation Clause* if they are sufficiently reliable. Reliability is found either by the statement fitting within a firmly rooted hearsay exception, or by a showing that the statement carries particularized guarantees of trustworthiness. The Supreme Court made clear in *Idaho v. Wright, 497 U.S. 805 (1990)* , that a residual exception is not "firmly rooted." So at least as far as *Roberts* goes, if residual hearsay is offered against a criminal defendant, and the declarant is not testifying at trial, the trustworthiness analysis for the residual exception is the same as the trustworthiness analysis for the *Confrontation Clause* -- that is, the inquiry is whether the hearsay statement carries particularized guarantees of trustworthiness sufficient to assure that it is reliable. The Court in *Idaho v. Wright, 497 U.S. 805 (1990)* , held that this inquiry into particularized guarantees of trustworthiness could not consider independent corroborating evidence supporting the truth of the hearsay statement. Rather, "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief"; that is, the hearsay "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."

The *Roberts* reliability analysis was replaced in part by the Court in *Crawford v. Washington, 541 U.S. 36 (2004)* . The Court in *Crawford* held that the defendant's right to confrontation was violated because uncross-examined "testimonial" hearsay was admitted against him at trial under a state hearsay exception for declarations against interest. *Crawford* involved a statement made by the defendant's wife to police officers that implicated the defendant and herself. Under the jurisprudence established in *Ohio v. Roberts, 448 U.S. 56 (1980)* , a hearsay statement satisfies the *Confrontation Clause* if (1) it fits a "firmly-rooted" hearsay exception, or (2) the statement carries "particularized guarantees of trustworthiness" that assure its reliability. The State Courts found that Mrs. Crawford's statement to police officers satisfied the "particularized guarantees of trustworthiness" prong of *Roberts*, reasoning that Mrs. Crawford was not trying to shift blame, and that she was relating relatively recent events to a "neutral" police officer.

The Supreme Court, in an opinion by Justice Scalia, rejected the *Roberts* structure for determining whether a hearsay statement satisfies the *Confrontation Clause*, at least if the hearsay is "testimonial." Justice Scalia engaged in an extensive historical analysis and determined that the original intent of the *Confrontation Clause* was not to exclude unreliable evidence *per se*, but rather to exclude "testimonial" evidence that had not been cross-examined by the accused.

The bottom line from *Crawford* is that "testimonial" hearsay statements cannot be admitted against an accused unless the declarant is unavailable *and* the accused has or had the opportunity to cross-examine the declarant. Unless these two requirements are met, the "testimonial" hearsay statement must be excluded even if it is clearly reliable and even if it fits into a standard hearsay exception. An example of a statement that would qualify under *Crawford* is testimony from a prior trial in which the defendant was subject to the same charges, and the witness is unavailable for the subsequent trial.

On the other hand, if the hearsay statement is not "testimonial", the Courts after *Crawford* have uniformly held that the *Roberts* test continues to regulate the admissibility of the hearsay. While the Supreme Court in *Crawford* at least implied that there would be no constitutional regulation for non-testimonial hearsay, and was no fan of the *Roberts* reliability requirement, the Lower Courts after *Crawford* has reasoned that *Roberts* applies to non-testimonial hearsay

until the Supreme Court specifically rules otherwise; and it did not so rule in *Crawford*, which involved only "testimonial" hearsay. n33

So a critical question after *Crawford* is whether a hearsay statement is "testimonial" or not. Surprisingly, the Supreme Court did not try to define the term "testimonial." The closest the Court came to a definition is set forth in the following passage:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois, 502 U.S. 346, 365 (1992)* (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.
>
> **...**
>
> ... Whatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.

In another part of the opinion, the Court indicated that statements taken at guilty plea allocutions are testimonial:

> Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States v. Aguilar, 295 F.3d 1018, 1021-1023 (CA9 2002)* (plea allocution showing existence of a conspiracy); *United States v. Centracchio, 265 F.3d 518, 527-530 (CA7 2001)* (same); *United States v. Dolah, 245 F.3d 98, 104-105 (CA2 2001)* (same); *United States v. Petrillo, 237 F.3d 119, 122-123 (CA2 2000)* (same).

While the precise definition of "testimonial" is not clear, n34 what is clear is that *Crawford* provides some limitation on the use of hearsay by the prosecution in federal criminal trials.

The change wrought by *Crawford*, as applied to statements offered under *Rule 807*, is likely to be dramatic for certain categories of statements that previously have been admitted routinely as residual hearsay. The most obvious example is grand jury testimony. Before *Crawford*, Courts had routinely admitted grand jury testimony against the accused on the ground that it was reliable under the circumstances and therefore satisfied the *Roberts* requirements. But the Court in *Crawford* makes clear that grand jury testimony is "testimonial." It is clearly "testimony" made in a formal proceeding. As such it cannot be admitted unless the declarant is produced and subject to cross-examination. It does not matter that the grand jury testimony is reliable under the circumstances, as that is no longer the constitutional inquiry under *Crawford* for testimonial hearsay. So *Crawford* has swept away a good deal of case law admitting grand jury testimony under the residual exception.

Other possible candidates for exclusion include statements made by children to law enforcement personnel; statements made to police officers by eyewitnesses; testimony that was cross-examined in a prior trial, but one in which the defendant was not a party; and statements made by laboratory personnel concerning forensic testing. If the statement is not testimonial, however, the residual hearsay is screened under the traditional *Roberts* requirements.

FOOTNOTES:

(n1)Footnote 1. Advisory Committee Note to *Rule 803(24)*.

(n2)Footnote 2. See, e.g., S. Rep. No. 93-1277, 93d Cong., 2d Sess. 19-20 (1974) ("It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances."). See also *Rock v. Huffco Gas & Oil Co., 922 F.2d 272 (5th Cir. 1991)* (noting that the exception must be used "sparingly," and holding that statements of the deceased concerning the cause of his injury were not sufficiently trustworthy).

(n3)Footnote 3. For a discussion of these cases, see G. Joseph & S. Saltzburg, Evidence In America, ch. 58.

(n4)Footnote 4. The relationship between the residual exception and the right to confrontation of the accused is discussed at the end of this Editorial Explanatory Comment, *§ 807.02[8]*.

(n5)Footnote 5. See 120 Cong. Rec. H12255-57 (Dec. 18, 1974).

(n6)Footnote 6. See, e.g., *United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994)* (the Trial Court properly admitted, as residual hearsay, the prior inconsistent statements of a prosecution witness; the statements were not admissible under *Rule 801(d)(1)(A)* because they were not made under oath; the Court rejected the defendants' argument "that *Rule 801(d)(1)(A)* provides the only test for admission of unsworn prior inconsistent statements as substantive evidence"; the reference in the residual exception to "guarantees of trustworthiness equivalent to those in the enumerated exceptions strongly suggests that almost fitting within one of these exceptions cuts in favor of admission, not against"); *United States v. Furst, 886 F.2d 558 (3d Cir. 1989)* (the residual exception "is not limited in availability as to types of evidence not addressed in the other exceptions; [it] is also available when the proponent fails to meet the standards set forth in the other exceptions"); *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was not a predecessor-in- interest as that term is used in *Rule 804(b)(1)*; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible under the residual exception, as a "near miss" of the prior testimony exception); *United States v. Doe, 860 F.2d 488 (1st Cir. 1988)* (telexes and a certificate issued by the Honduran Naval Force, verifying that permission had been granted to board a vessel, were not admissible under *Rule 803(6)* because no foundation witness had been provided; however, they were admissible as residual hearsay because they were normal and regular, similar to business records); *Turbyfill v. International Harvester Co., 486 F. Supp. 232 (E.D. Mich. 1980)* (a statement that failed to meet the requirements of *Rule 803(5)* because the preparer of the record was not available to testify was admitted as residual hearsay on "near miss" grounds).

(n7)Footnote 7. See, e.g., *United States v. Laster, 258 F.3d 525 (6th Cir. 2001)* (business records were not admissible under *Rule 803(6)* because the foundation witness was not sufficiently familiar with recordkeeping; but there was no error in admitting the records under the residual exception; "the phrase 'specifically covered' means only that if a statement is admissible under one of the exceptions, such subsection should be relied upon instead of the residual exception").

(n8)Footnote 8. The use of corroborative evidence to establish the trustworthiness of residual hearsay in criminal cases has been complicated by *Confrontation Clause* jurisprudence, and is discussed in a subsequent section. See the discussion in § 807.02[8].

(n9)Footnote 9. See, e.g., *United States v. Morgan, 385 F.3d 196 (2d Cir. 2004)* (letter written by a codefendant to her boyfriend was properly admitted against the defendant; it was sufficiently trustworthy because it was written to an intimate acquaintance in the privacy of the codefendant's hotel room, with no expectation that it would ever find its way to the police).

(n10)Footnote 10. See, e.g., *United States v. Wilkus, 875 F.2d 649 (7th Cir. 1989)* (an affidavit signed while the declarant was under heavy medication, and as to which the declarant had no memory at the time of trial, was

insufficiently trustworthy to qualify as residual hearsay). See also *United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003)* (victim's identification of someone other than the defendant as the perpetrator was properly excluded; the victim had been severely injured and was capable of only blinks and nods; thus the "statement" was potentially ambiguous and untrustworthy).

(n11)Footnote 11. See, e.g., *United States v. Brothers Constr. Co., 219 F.3d 300 (4th Cir. 2000)* (grand jury testimony could not be admitted under the residual exception; the government offered the testimony and yet had begun an independent criminal investigation to determine whether the declarant had committed perjury in his grand jury testimony; the fact that the suspected perjury was on a different point than the portion proffered by the government at trial did not render it reliable; the Court expressed "serious reservations about the reliability of testimony which, at least in part, the government finds so untrustworthy that it would consider bringing perjury charges"); *United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)* (confession of another person could not be admitted on the defendant's behalf as residual hearsay; the declarant "confessed to any crime he was questioned about by the police" and thus was untrustworthy).

(n12)Footnote 12. See, e.g., *United States v. York, 852 F.2d 221, 226 (7th Cir. 1988)* (where the declarant answered affirmatively to every question asked by the United States Attorney, trustworthiness could not be found: "Apparently, not even a single placebo question was amongst the lot to ensure that Tommy was considering the substance of each question and answering responsively, rather than simply agreeing with every question that the government posed.").

(n13)Footnote 13. See, e.g., *United States v. York, 852 F.2d 221, 226 (7th Cir. 1988)* (a statement was not trustworthy where the declarant recanted).

(n14)Footnote 14. See, e.g., *United States v. Dunford, 148 F.3d 385 (4th Cir. 1998)* (statements by daughters accusing their father of abuse were properly admitted as residual hearsay; indicia of trustworthiness were present because the girls told different people the same story at different times: "The serious nature of the repeated statements made by the children to government officials as well as the consistency of their stories to those officials provide clear indicia of the trustworthiness of their statements."). Compare *United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996)* (a statement offered by the defendant as residual hearsay was properly excluded, in part because of the great lapse of time between the declarant's statement and the events described and in part because the statement was inconsistent with prior statements made by the declarant to the FBI).

(n15)Footnote 15. See, e.g., *United States v. Bradley, 145 F.3d 889 (7th Cir. 1998)* (statement by the defendant's wife that the defendant brandished a gun at her was properly admitted as residual hearsay; among other things, the declarant was distraught when she made the statement, and this was "consistent with the trauma she described").

(n16)Footnote 16. See, e.g., *Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996)* (the Trial Judge properly excluded testimony relating statements made by a deceased declarant who was hired by the defendant cigarette manufacturer in 1954 to examine Kent cigarettes under an electron microscope; there was no documentary evidence of her study, but a journalist who interviewed the declarant and the declarant's son would have testified that the declarant said that she reported to the manufacturer that the Kent filters leaked asbestos into the lungs; the statements were made years after the work had been done and therefore were not sufficiently reliable to qualify as residual hearsay); *United States v. York, 852 F.2d 221, 226 (7th Cir. 1988)* (a statement about events occurring five years earlier was insufficiently trustworthy). Compare *United States v. Bradley, 145 F.3d 889 (7th Cir. 1998)* (statement by the defendant's wife that the defendant brandished a gun at her was properly admitted as residual hearsay; the statement was made two hours after the event, so the "episode was therefore fresh in her mind").

(n17)Footnote 17. See, e.g., *United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1998)* (statements made by aliens to Border Patrol officers should have been admitted as residual hearsay; among other things, the statements were made under oath). See also *Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1990)* (S-1 registration statement filed with Securities Exchange Commission held admissible as residual hearsay to prove the

corporate history of the plaintiff; "The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial guarantees of trustworthiness.").

(n18)Footnote 18. See, e.g., *United States v. Walker, 410 F.3d 754 (5th Cir. 2005)* (no error in excluding a videotaped statement to police officers made by an associate of the defendant, in which she categorically denied that the defendant had brought any drugs into a room; the declarant "was in a room with a lot of cocaine," and was not under oath; she was facing the threat of criminal charges and "had every incentive to lie."); *Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995)* (the Trial Court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant's contention that the plaintiff's injury was solely caused by the settling defendant; the interrogatory responses were not sufficiently trustworthy, because they were made while the declarant was still a defendant in the litigation and "had every incentive to set forth the facts in a light most favorable to itself"); *Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989)* (a statement was not admissible as residual hearsay where it was later contradicted by the declarant and where it appeared to have been prepared in anticipation of litigation).

(n19)Footnote 19. See, e.g., *United States v. Doerr, 886 F.2d 944 (7th Cir. 1989)* ("Another indicium of reliability is the declarant's disinterest; the testimony of a mere bystander with no axe to grind tends to be more trustworthy."); *Dogan v. Hardy, 587 F. Supp. 967 (N.D. Miss. 1984)* (the Court held inadmissible in a personal injury action a self-serving statement by the driver of a car, made while he was hospitalized).

(n20)Footnote 20. See, e.g., *United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996)* (a hearsay statement offered by the defendant as residual hearsay was properly excluded, in part because the defendant did not seek to fly the declarant to the trial to testify in person); *Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991)* (newspaper reports of a disputed quotation were trustworthy because the reports were identical; however, the reports were not admissible as residual hearsay because the newspaper reporters were available to testify and would have provided better evidence of the statements); *Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988)* (a letter prepared by the plaintiff as to his understanding of a certain transaction was not the most probative evidence reasonably available since the plaintiff could have testified about these matters on the stand).

(n21)Footnote 21. See, e.g., *United States v. Azure, 801 F.2d 336 (8th Cir. 1986)* (in a second trial on the same matter, where the witness testified in the first trial, an out-of-court statement by that witness could not be admitted as residual hearsay; if the witness were available for the second trial, her in-court testimony would be as probative as the residual hearsay; if the witness were not available at the second trial, her prior testimony at the first trial would be as probative as the residual hearsay; therefore, the "more probative" requirement of the Rule would not be met).

(n22)Footnote 22. See, e.g., *United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986)* (where the child was frightened and uncommunicative on the stand, her residual hearsay statement was more probative); *United States v. St. John, 851 F.2d 1096 (8th Cir. 1988)* (child-witness was hampered by developmental problems, and his verbal abilities were overcome by the courtroom setting and the delicate nature of the material to which he was attesting; "Under these circumstances, we are unwilling to hold that a child victim's testimony is always more probative than the prior hearsay statements he or she may have made in the more relaxed environs of a doctor's or social worker's office.").

(n23)Footnote 23. See, e.g., *FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993)* (letters of complaint sent to the FTC from customers of the seller of heat detectors were admissible as residual hearsay to establish the price of the detectors; the letters were sufficiently trustworthy because they were sent independently from many, unrelated members of the public, and all of the letters were basically identical in their assertions; the letters were the most probative evidence reasonably available, since it was obviously not reasonable to require the proponent to produce all the letter-writers for in-court testimony); *FTC v. Amy Travel Serv., 875 F.2d 564, 576 (7th Cir. 1989)* (thousands of consumer affidavits were properly admitted under the residual exception as the most probative evidence reasonably available: "The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony.").

(n24)Footnote 24. *Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1552 (9th Cir. 1990)* .

(n25)Footnote 25. *United States v. Welsh, 774 F.2d 670, 672 (4th Cir. 1985)* (a hearsay statement was not more probative than the in-court testimony of another eyewitness, even though the hearsay declarant was a trustworthy person and the in-court witness's credibility was subject to attack).

(n26)Footnote 26. See, e.g., *Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995)* (Trial Court erred in admitting, as residual hearsay, interrogatory responses from a codefendant who had settled; the plaintiff never gave the defendant notice that she intended to introduce this evidence under the residual exception); *United States v. Furst, 886 F.2d 558 (3d Cir. 1989)* (notice given one day prior to the introduction of residual hearsay is insufficient, and the statement was inadmissible as a result); *United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978)* (rejecting a good cause defense for the failure to provide pretrial notice). See also *United States v. Coney, 51 F.3d 164 (8th Cir. 1995)* (residual hearsay inadmissible where the defendant failed to meet the notice requirement of the Rule; she offered the report during the trial, only 45 minutes before she wanted to introduce it).

(n27)Footnote 27. See, e.g., *United States v. Doe, 860 F.2d 488 (1st Cir. 1988)* (collecting cases adopting the majority view that the notice requirement will not preclude admission where the adversary has not been prejudiced).

(n28)Footnote 28. See, e.g., *United States v. Baker, 985 F.2d 1248 (4th Cir. 1993)* (where the need for rebuttal evidence did not become apparent until trial, and the rebuttal witness disappeared after the government announced it was offering rebuttal evidence, the witness' trustworthy statement was properly admitted as residual hearsay and pretrial notice was wholly impracticable and properly dispensed with); *United States v. Doe, 860 F.2d 488 (1st Cir. 1988)* (the notice requirement was satisfied where the government did not learn about the existence of evidence until the trial, and the defendant was offered a continuance to prepare for the statement).

(n29)Footnote 29. See also *Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995)* ("[T]he proponent must give notice of the hearsay statement itself as well as the proponent's intention specifically to rely on the rule as a grounds for admissibility of the statement.").

(n30)Footnote 30. See also *United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994)* (defendants knew about the statements, but did not know of the intent to offer them under the residual exception: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it -- and thus has an opportunity to counter it and protect himself against surprise -- the rule's notice requirement is satisfied.").

(n31)Footnote 31. See Daniel Capra, *Upholding Rulings on Grounds Not Used by the Trial Court,* N.Y.L.J., Jan. 12, 1990, at 3, col. 1.

(n32)Footnote 32. See, e.g., *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* (records erroneously admitted as business records at trial cannot be retroactively held admissible on appeal as residual hearsay; because the records were not offered under the residual exception at trial, the defendant never received notice in accordance with the Rule, and the Trial Court never made the predicate findings required by that Rule). Compare *United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989)* (government gave notice that the statement would be offered as residual hearsay, but the Trial Court admitted the hearsay under the business records exception; the Appellate Court held that the hearsay was not admissible as a business record, but could have been admitted under the residual exception; the judgment was affirmed, because the government had in fact complied with the notice requirement of the residual exception).

(n33)Footnote 33. See, e.g., *Horton v. Allen, 370 F.3d 75 (1st Cir. 2004)* (non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation); *United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)* (with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."); *United States v. Franklin, 415 F.3d 537 (6th Cir. 2005)* ("the Supreme Court did not explicitly overrule its prior *Confrontation Clause* jurisprudence with its holding in

Crawford" insofar as it applied to nontestimonial hearsay; "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.").

(n34)Footnote 34. The Court may provide a further indication of what it means by "testimonial" in the 2005-6 Term, as it has granted certiorari in two state cases involving the admissibility of 911 calls and reports to police officers after *Crawford*.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article VIII. Hearsay
CHAPTER 807 RULE 807

4-807 Federal Rules of Evidence Manual 807.03

807.03 Annotated Cases

[Go To Supp]

[1] Agency Proceedings

NLRB v. United San. Serv., 737 F.2d 936 (11th Cir. 1984) : The Court held that an ALJ erred in admitting an affidavit by a former employee who had died before the hearing, which described events concerning the unfair labor practice charge at issue in great detail. Treating the hearsay rules as governing, the Court noted that "the burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of the requisite guarantees of trustworthiness," and it found that the Board had not met the burden. The fact that the affidavit was consistent with some other evidence was not enough, especially since the affidavit contained important statements not plainly supported by corroborative evidence.

[2] Availability of Equally Probative Evidence

[a] Civil Cases

De Mars v. Equitable Life Assurance Soc'y, 610 F.2d 55 (1st Cir. 1979) : Although it upheld a plaintiff's judgment in a suit to recover accidental death benefits, the Court noted that a letter of a deceased physician hired by the plaintiff should not have been admitted under the residual exception. The exception is to be read narrowly, and another expert could have been retained and would have produced at least equally probative evidence.

Parsons v. Honeywell, Inc., 929 F.2d 901 (2d Cir. 1991) : In a product liability action arising out of a gas explosion, the defendants offered a police report containing a statement from an eyewitness recounting the plaintiff's statement that he smelled gas and "shouldn't have lit it up." The police report would be admissible as a public record and the plaintiff's statement would be admissible as an excited utterance, but the Court held the witness' statement could not come within the residual exception because the witness apparently could testify in person.

Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953 (3d Cir. 1978) : In a purchaser's action against a manufacturer, the Court found no error in the admission of a memorandum prepared by the plaintiff's attorney containing his recollection of an interview with the former executive vice president of the plaintiff's steel division. This memorandum was not admissible as an admission of the plaintiff, because the executive vice president was no longer an employee or agent of the plaintiff when he made the statements to the attorney, but the Trial Judge admitted it under the residual exception, finding that: there was no reason to doubt its truth, the former vice president reviewed the memorandum and adopted it as his statement, and it was more probative than any other evidence available.

Page v. Barko Hydraulics, 673 F.2d 134 (5th Cir. 1982) : In a negligence action arising from the plaintiff's son's death when he was engulfed in flames while operating equipment manufactured by the defendant, the defendant offered the plaintiff's deposition relating what her son said in the hospital about the accident. Because there were other, better witnesses available, the Court concluded that it would have been better to have excluded the son's statement, but it declined to find reversible error.

Eisenstadt v. Centel Corp., 113 F.3d 738 (7th Cir. 1997) : In a securities fraud action based in part on statements by the corporation reported in a newspaper article, the Court held that the article was not admissible under the residual exception, since the plaintiffs easily could have obtained the reporter's affidavit or deposed him and the article was not free from ambiguity. In a negligence action brought by a truck driver against a forklift operator, *Abernathy v. Superior Hardwoods, Inc.*, n1 the Court found no error in the rejection of testimony by a private investigator, offered to rebut the plaintiff's claim that he had been rejected for employment by Ryder Truck Lines, that the investigator had gone to Ryder's headquarters and had looked through job applications and had not found the plaintiff's name. Even though Ryder's custodian of records was outside the 100-mile subpoena range, the custodian could have been deposed and the deposition could have laid the basis for the introduction of the records if the custodian was unwilling to appear at trial. Since better evidence was available, the defendant could not rely on the residual exception.

Stokes v. City of Omaha, 23 F.3d 1362 (8th Cir. 1994) : In an age discrimination case brought by a police officer, the Court held it was an abuse of discretion to admit a two-paragraph affidavit from a former deputy chief who died before trial, which stated that he had heard the chief of police mention that he wanted to "weed out" older officers. The affidavit did not fall "within the rare and exceptional circumstances required by our cases applying [the residual exception]," since the affiant's death before the time of trial had not been unexpected, and therefore the plaintiff should have deposed him. Furthermore, the chief of police could have been called to testify. Affirming a judgment for the defendants in a suit alleging racial discrimination in promotion, *Netterville v. State of Missouri*, n2 the Court held that testimony by a witness that he had been told that another person had coached a successful candidate for promotion was properly excluded. Since the alleged coach was present to testify, the out-of-court statement was not admissible for its truth.

Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991) : In a civil rights action brought against police officers, the chief of police, and the City arising out of the officers' use of excessive force during a search, newspaper reports quoted the chief as saying after he testified that one of the plaintiffs was lucky that a broken nose was all he had suffered. The Court held that where three independent newspapers attributed the same quotations to the chief, they had circumstantial guarantees of trustworthiness, but because the newspaper reporters would have provided better evidence of the statements and would have been subject to cross-examination, it was reversible error to admit the statements.

Noble v. Alabama Dep't of Environmental Mgt., 872 F.2d 361 (11th Cir. 1989) : The Court found error (but harmless) in the admission on behalf of the defendant in an employment discrimination suit of a letter from the defendant's director to another state employee, which addressed the defendant's concern that certain engineering

graduates were not qualified for certain jobs, and other letters supporting the defendant's evaluation of the capabilities of these graduates. No showing was made that the writers of the letters were unavailable to testify.

[b] Availability of Equally Probative Evidence -- Criminal Cases

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001) : In a RICO prosecution, the defendant argued that portions of a search warrant affidavit concerning the timing of certain events, which would have contradicted testimony from some of the government witnesses, should have been admitted as residual hearsay. Affirming, the Court found no abuse of discretion in excluding the affidavit, since the defendant could have called as a witness any officer whose conduct was described in the affidavit, and thus the hearsay was not more probative than any other evidence reasonably available.

United States v. Gotti, 641 F. Supp. 283 (E.D.N.Y. 1986) : In a racketeering case, the Trial Judge held that he would not admit evidence concerning a murder victim's statements to third parties concerning threats made by one defendant, since the government had at least equally probative evidence to show that the defendants had a motive to kill the victim.

United States v. Simmons, 773 F.2d 1455 (4th Cir. 1985) : The Court affirmed firearms convictions, finding that trade forms of the Bureau of Alcohol, Tobacco and Firearms used to prove the interstate commerce element of the offenses were properly admitted under the residual exception. An ATF agent testified that ATF contacts a manufacturer and requests its records custodian to fill out the form. Reasoning that it was not reasonable to require the government to bring records custodians to testify from all over the country, the Court found that "there is simply no reason for the manufacturers of these weapons to falsify the entries on the routine ATF forms." A dissenting Judge argued that the assumption that a manufacturer will obey the law is not the kind of reliability contemplated by the drafters of the exception and that the evidence was not more probative than other available evidence. He reasoned that the exception is to be used only in exceptional circumstances, not whenever the government finds it to be convenient. In *United States v. Welsh*, n3 the Court affirmed a ruling that three written statements given to the FBI by a suspect who entered into a plea agreement before committing suicide were inadmissible under the residual exception in a prosecution for interstate transportation of stolen property. The government had another witness available to testify, but claimed that this witness lacked credibility. A majority of the Court rejected the argument that doubts about the credibility of a witness available for cross-examination warranted admission of hearsay statements by an unavailable witness. In *United States v. Heyward*, n4 the Court sustained a conviction for income tax evasion, holding there was no error in excluding a memorandum found in the files of a deceased attorney who had handled the affairs of an estate of a third party. The defendant claimed that he received money from this third party, although the third party's wife, business partner, and accountant testified that the third party did not have access to the amount of money the defendant claimed to have received. The Court noted that the residual exception is to be used only in "exceptional circumstances" and found them lacking in the instant case. Other equally probative evidence existed.

United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) : In the course of an investigation into firearms offenses, the government learned that the defendant's wife had evidence of his criminal activity. After the couple was divorced, agents interviewed the wife and obtained statements. Subsequently, the former wife was offered money and was threatened in an effort by the defendant to force a remarriage. Before the remarriage took place, she testified before the grand jury and repeated her incriminating statements. At the time of trial the couple was again married and the wife indicated that she did not wish to testify against her husband, although she said that if the government called her to the stand and asked her questions she would answer them truthfully. Concerned for the woman's health and safety, the Trial Judge excused her from testifying and permitted two agents who took her statement to testify about it. The Court reversed, finding that the woman was not unavailable. She had said that if ordered to testify she would do so, and with

the implicit determination that the second marriage was a sham, the Trial Judge was not bound to respect any claim of privilege. Given her availability, it was improper to rely on the residual exception, since "[t]he live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ... agents."

United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) : The Court affirmed the conviction of a bank officer for taking kickbacks, holding that a hearsay statement offered by the defendant as residual hearsay was properly excluded, in part because the defendant did not seek to fly the declarant to the trial to testify in person. The Court distinguished its prior decision in *FTC v. Amy Travel Serv., Inc*., n5 which upheld a decision to admit affidavits of witnesses spread all over the country, noting that *Amy Travel* "does not establish a general rule applicable to all situations involving distant witnesses."

United States v. Gabe, 237 F.3d 954 (8th Cir. 2001) : In a prosecution for sexual abuse of a minor, the Court held it was error (but harmless) to admit under *Rule 803(4)* and the residual exception a hearsay statement by the victim to a doctor that identified the defendant as the perpetrator. As to the residual exception, the Court noted that the victim's hearsay statement was "cumulative" of her own in-court testimony, and therefore it did not satisfy the requirement that the hearsay must be more probative than any other evidence on the point. In a prosecution for possession of stolen property, *United States v. Calkins, 906 F.2d 1240 (8th Cir. 1990)* , the Court held that there was no abuse of discretion in admitting under the residual exception testimony that the witness' grandmother had made statements asserting ownership over the property, even though there were insurance policies issued on the property that also would have indicated its ownership. In *United States v. Fredericks*, n6 a defendant charged with assault with a dangerous weapon offered hearsay statements of a witness who was unavailable at the time of trial. The Court upheld a ruling excluding the evidence, because the missing witness had a possible motive to make a statement favorable to the defendant, and because there was better evidence available -- i.e., other eyewitnesses' testimony.

[3] Cautionary Instructions

United States v. Medico, 557 F.2d 309 (2d Cir. 1977) : At the trial of a bank robbery, a bank employee testified that about five minutes after the robbers had fled with the bank funds, a bank customer knocked on the door and relayed information from another person whom the employee did not know, but who was sitting in a car outside the door, concerning the make and license plate number of the getaway car. Another witness testified that he had seen the defendant driving a car with the same license plate number. The Trial Judge admitted the evidence under the residual exception and advised the jury that it was hearsay that must be examined with the thought in mind that neither the bank customer nor the person who supplied the license plate number and description of the car was subject to cross-examination or under oath at the time he relayed information. The Court affirmed.

[4] Children's Statements

[a] Admissible

United States v. Ellis, 935 F.2d 385 (1st Cir. 1991) : Affirming a conviction for interstate transportation of a minor to engage in illegal sexual activity, the Court held there was no abuse of discretion in admitting testimony by a social worker that, when playing with anatomically correct dolls, the victim's younger half-sister spontaneously took the hand of the adult male doll and put it into the vaginal opening of the female doll. That the child was never asked to reenact a situation but only given the dolls to play with, that the witness asked virtually no questions of the child, and that the child gave a negative answer to the later question of whether the defendant asked her to touch his penis all

provided strong indicia of trustworthiness.

Doe v. United States, 976 F.2d 1071 (7th Cir. 1992) : In a Federal Tort Claims Act case brought after children were allegedly sexually molested at an Air Force base day care center, the Court held that statements by two three-year-olds to their parents were properly admitted under the Rule, where the core of their stories remained consistent over time, the children volunteered specific information when asked general, nonleading questions, and one child became agitated and uncomfortable when discussing the incident.

United States v. NB, 59 F.3d 771 (8th Cir. 1995) : The Court held there was no error in admitting, in the prosecution of a juvenile for sexual abuse of two nieces, statements that the seven-year-old victims made to social workers regarding the separate incidents. The social workers were well trained and were strangers to the girls; the girls were very young (lessening motivation concerns) and used age-appropriate language; the interviewers used open-ended techniques; one of the interviews took place shortly after the incident; and the girls' stories were essentially consistent. One Judge dissented, arguing, *inter alia*, that even though there was no *Confrontation Clause* issue because the girls testified, corroboration is irrelevant to a statement's reliability. In *United States v. Grooms*, n7 the Court affirmed a conviction for abusive sexual contact with three nine-year-old girls, holding that an FBI agent's testimony recounting statements made by the girls at their school was more probative than the girls' in-court testimony because it contained specific descriptions of the incidents, including the dates and place of abuse; furthermore, the girls testified they remembered the events more clearly when they spoke with the agent than at the time of trial. The statements had sufficient circumstantial guarantees of trustworthiness, including that they were made to an agent with special training in interviewing child victims, they were responsive to open-ended rather than leading questions, there was nothing to suggest the girls were likely to have fabricated their stories, they identified and marked anatomically correct drawings during their interviews and discussed the incidents of sexual abuse in a childlike way, and the girls were subject to extensive cross-examination at trial. In *United States v. Spotted War Bonnet*, n8 the Court affirmed the defendant's conviction for sexual abuse of his daughters, holding that there had been no abuse of discretion in admitting statements by the four- and six-year-old victims to a psychologist and social worker about acts committed on them by the defendant, given the girls' unwillingness or inability to testify fully about the details. The dissenting Judge said that the statements' trustworthiness had been severely undermined by the declarants' youth, the fact one had been abused by an uncle, suggestive and manipulative use of anatomically correct dolls, and psychological coercion and suggestive methods in the interviews. See also *United States v. Shaw* n9(holding the victim's statements to an interviewer admissible under the residual exception; the statements were more probative than the victim's trial testimony, because they were made just days after the last incidents, included specific dates that the victim could not remember, and were the first known statements made by the young victim); *United States v. Renville* n10(a child victim's statements to a deputy sheriff were held admissible where she testified at trial, admitted making the statements, made similar statements to others, and later recanted).

United States v. Harrison, 296 F.3d 994 (10th Cir. 2002) : Affirming convictions for sexual abuse of a child, the Court upheld the admission, under *Rule 807*, of a hearsay statement by the victim to an FBI agent. Although the victim recanted the statement when testifying at trial, the Court emphasized the consistency of her three hearsay statements, one of which was admissible as made to a doctor under *Rule 803(4)*, and one of which was adopted by the defendant. The Court opined that "[t]he specificity and peculiarity of C.V.'s account to [FBI Agent] Amman are also relevant because those features in themselves can suggest trustworthiness." Carefully applying the three conditions of *Rule 807*, the Court noted in connection with the "interests of justice" requirement, that the victim's recantation "increased the value to the prosecution of her statements at the same time that it afforded Defendant the equivalent of a devastating cross-examination regarding her statements (what more can the cross-examiner hope for than a recantation?)." In *United States v. Farley, 992 F.2d 1122 (10th Cir. 1993)* , the Court affirmed a conviction for aggravated assault on a child, holding that statements by the victim to her mother the night of the assault and the next morning were properly

admitted under the residual exception and might have been admitted as excited utterances.

[b] Children's Statements -- Error To Admit

United States v. Azure, 845 F.2d 1503 (8th Cir. 1988) : The Court found that it was error (but harmless) to have admitted testimony of a social worker that the ten-year-old sexual abuse victim told her that the defendant was her assailant.

United States v. Tome, 61 F.3d 1446 (10th Cir. 1995) : On remand after the Supreme Court held that hearsay statements made when the declarant had a motive to falsify could not be admitted as prior consistent statements (see the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[4][c]*), the Court held that statements by the child sexual abuse victim identifying the defendant, made to a Child Protective Services caseworker, were not admissible under *Rule 803(4)*, because the caseworker did not diagnose or treat the child, and were not admissible under the residual exception, because they were not especially trustworthy. The statements were not spontaneous, since the child knew she had been brought to the caseworker to tell "what [defendant] had done to her"; they were made more than a year after the events described; and the child had a motive to fabricate, since she wanted to remain with her mother rather than being returned to her father's custody.

[5] Constitutional Concerns

Idaho v. Wright, 497 U.S. 805 (1990) : The Court held that statements admitted under the state residual hearsay exception, which had been made by the victim in a child sex abuse prosecution to a specialist examining her, did not satisfy the then-applicable *Confrontation Clause* requirement of particularized guarantees of trustworthiness. We note that under *Crawford v. Washington* the first question would be whether the statements were "testimonial." If they were, the statement would be inadmissible because the victim did not testify at trial. If not, the statement would still be inadmissible under the *Ohio v. Roberts* analysis, which the Court applied in *Wright*. See the Editorial Explanatory Comment, *§ 807.02[8]*.

United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) : In a narcotics prosecution, prior inconsistent statements of a government witness, not made under oath, were admitted under the residual exception, in part because they were heavily corroborated. The Court found no confrontation violation under the then-applicable *Ohio v. Roberts* analysis. We note that the result would not change under *Crawford v. Washington,* as the witness was available for cross-examination.

[6] Consumer Complaints

FTC v. Kuykendall, 312 F.3d 1329 (10th Cir. 2002) : The Court affirmed findings in a civil contempt proceeding that the defendants had violated an injunction regulating their telemarketing businesses, and found no abuse of discretion in the admission under the residual hearsay exception of numerous consumer declarations and complaints filed with the FTC. Since all were made under oath subject to penalty of perjury, they had circumstantial guarantees of trustworthiness, and " 'reasonable efforts' could not have produced more probative evidence under the circumstances of the hearing."

[7] Error To Exclude

Moffett v. McCauley, 724 F.2d 581 (7th Cir. 1984) : The Court affirmed a judgment for prison officials in a civil

rights suit by an inmate, but it found error in the exclusion of a prison report. One of the few cases in which a Court of Appeals has found error in the rejection of evidence offered under a residual exception, it illustrates the not uncommon situation in which reliance on a categorical exception (in this case, Rule 808(8)(C)) would require less foundation and lead to the same result.

[8] Examples of Residual Hearsay

[a] Civil Cases

Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79 (3d Cir. 2001) : Affirming most of a judgment for a former joint venturer against others involved in the joint venture, the Court found no error in the admission of portions of an affidavit given by a since-deceased former president of the plaintiff company. The case involved claims of breach of contract and breach of fiduciary duties. Although the Court agreed with the defendants that "*Rule 807* should only be used in rare situations," it relied upon the Trial Judge's "careful and extensive findings in support of its conclusion that this was such a situation."

[b] Examples of Residual Hearsay -- Criminal Cases

United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y. 1976) , *aff'd, 540 F.2d 574 (2d Cir. 1976)* : In a bribery case, the chief prosecution witness, an officer of a corporation seeking a government contract, testified that the defendant had said no contract could be awarded unless a bribe was paid. The defendant denied the conversation, saying it was the officer who offered the bribe. In rebuttal, the government introduced two witnesses who testified that the officer reported to them on the same day as the alleged bribe request that the defendant had solicited a bribe. The Trial Judge found the evidence highly reliable because the declarant was available for cross-examination and the statement was made close on the heels of the criminal event to persons with whom it was appropriate and even necessary to communicate, and the risks of insincerity and faulty memory were not substantial. The Court affirmed admission of the testimony under the residual exception.

United States v. Vretta, 790 F.2d 651 (7th Cir. 1986) : Affirming a kidnapping conviction, the Court upheld the introduction of evidence of statements by the victim relating threats by the defendant. It held that these statements were admissible under the residual exception, where the victim had been killed, the threats were reported by the victim to disinterested third parties, circumstantial evidence corroborated the evidence (though this factor was subsequently held irrelevant as a constitutional matter in *Wright*), and the defendant had told the victim's wife that terrible things would happen if his money were not returned by the victim.

United States v. Bachsian, 4 F.3d 796 (9th Cir. 1993) : Affirming a defendant's convictions for possession of stolen goods, the Court held that shipping documents relating to a stolen container of goods were admissible under the residual exception as trustworthy and the most probative evidence available.

United States v. Treff, 924 F.2d 975 (10th Cir. 1991) : The defendant's conviction for an attempt to kill his former supervisor at the IRS was affirmed, the Court holding there was no error in admitting entries from a diary kept by the defendant's late wife. The diary, kept on advice of the wife's counsel when the parties were having marital difficulties, had circumstantial guarantees of trustworthiness.

[9] Foreign Documents

United States v. Marsh, 747 F.2d 7 (1st Cir. 1984) : In a marijuana conspiracy prosecution involving a ship of Danish registry, the Court upheld the admission under the residual exception of documents evidencing Denmark's consent to the prosecution of the defendants by the United States.

United States v. Wilson, 249 F.3d 366 (5th Cir. 2001) : Affirming money laundering convictions, the Court held there was no abuse of discretion in admitting records of a foreign bank under the residual exception. Apparently, the residual exception was used because a satisfactory foundation could not be provided for admission under *Rule 803(6)*. In *United States v. Loalza-Vasquez*, n11 the Court affirmed convictions on drug importation-related charges, and upheld the admission as residual hearsay of testimony by a Coast Guard Commander as to how he was advised by a series of teletype messages that the government of Panama had authorized the boarding of a ship of Panamanian registry. The Panamanian official who gave boarding permission was outside the subpoena power of the United States and there was no nonhearsay alternative way to prove permission. The teletype messages "reflected the attainment and transmittal through diplomatic channels of the foreign government's authorization," no issue was raised as to the verity of the substantive content of the teletypes, and pretrial notice had been given to the defendants of the government's intent to use the teletypes.

Branca v. Security Benefit Life Ins. Co., 773 F.2d 1158 (1985) , modified on other grounds, 789 F.2d 1151 (11th Cir. 1986) : In an action by beneficiaries to recover on a life insurance policy, the Court affirmed the admission of an Argentine judicial decree of "presumptive death" under the residual exception.

[10] Foundation

Karme v. Commissioner, 673 F.2d 1062 (9th Cir. 1982) : After ruling that certain records from a Netherlands Antilles bank were inadmissible as business records because of the absence of foundation testimony by a custodian, the Court sustained a ruling admitting them under the residual exception. In our view, before admitting such records the Trial Judge should have required more of a foundation than the testimony of an FBI agent who microfilmed the documents. At a minimum the government should have obtained the affidavit of a bank official to indicate how the particular records were made and kept. All that the FBI agent could say was that he was careful in copying the records. He could not explain the nature of the records or how the bank used them.

United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986) : Affirming a judgment for the United States in a restitution action against crude oil resellers, the Court held that documents obtained from third parties who transacted business with the resellers were properly admitted under the residual exception to prove sales, where the resellers failed to maintain records required by law and the documents were supported by interrogatories sent by the government to several third parties.

[11] Government Custom

United States v. Cowley, 720 F.2d 1037 (9th Cir. 1983) : In a prosecution for making false statements to a grand jury, the Court found that testimony by the managing director of a bank in Anguilla that he had received two letters, one of which bore a Santa Barbara postmark, was properly admitted. The Court reasoned that the postmark was hearsay when used to prove that a letter passed through a certain post office on a certain day, but that "the postmark's circumstantial guarantees of trustworthiness make it a perfect candidate for [the residual exception]." Although the Court recognized that the residual exception could not be utilized where no notice had been given, it found the admission of the testimony to be harmless error.

[12] Grand Jury Testimony -- Offered by Prosecution

United States v. Vigoa, 656 F. Supp. 1499 (D.N.J. 1987) , *aff'd*, *857 F.2d 1467 (3d Cir. 1988)* : The Court denied the government's motion to admit grand jury testimony of a deceased witness in a narcotics prosecution. The Court concluded that the residual exception is unavailable when grand jury testimony is offered, since *Rule 804(b)(1)* specifically covers former testimony and does not include grand jury testimony. Assuming, however, that the residual exception could be used if its criteria were satisfied, the Court held that admission of the grand jury testimony would violate the *Confrontation Clause* under the then-applicable *Ohio v. Roberts* analysis. We note that the same result would obtain under *Crawford v. Washington*.

United States v. Brothers Constr. Co. of Ohio, Inc., 219 F.3d 300 (4th Cir. 2000) : The Court affirmed convictions for fraudulently receiving public funds in a scheme involving a public construction project, but found that it was improper to admit under the residual exception grand jury testimony by the general counsel of one of the defendants. Rejecting "the idea that grand jury testimony is sufficiently reliable *per se*," the Court noted that reliability in this case was belied by the fact that the government had begun an investigation to determine whether the counsel committed perjury during the very same grand jury testimony that was offered at trial. We note that the same result would obtain under *Crawford v. Washington*.

United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) : The Court overturned a conviction for possession of marijuana with intent to distribute on the ground that grand jury testimony by a witness who refused to testify at trial was improperly admitted. The evidence could not properly be accepted under the residual exception because of the pressure put on the witness by the prosecutor, the leading nature of the questions, the prosecutor's threat to call the witness repeatedly before grand juries and to seek contempt citations for failure to testify, the threats of physical harm to the witness that might have produced unreliable testimony, and the lack of cross-examination. We note that the same result would obtain under *Crawford v. Washington*.

United States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991) : In a drug prosecution two coconspirators testified before the grand jury; because they refused to testify at trial, their grand jury testimony was read into evidence. The Court reversed, finding a violation of the *Confrontation Clause* under the then-applicable *Ohio v. Roberts* analysis. We note that the same result would obtain under *Crawford v. Washington*.

United States v. Lang, 904 F.2d 618 (11th Cir. 1990) : The Court held it was error, but harmless, to admit in a mail fraud prosecution grand jury testimony by an unavailable witness, the defendant's father. There were suggestions that the witness had recanted, the witness may have been concerned with potential liability for himself, and the familial relation created, if anything, a strong possibility of coloring the testimony. In *United States v. Fernandez*, n12 the Court reversed convictions of conspiracy to illegally influence the operations of an employee benefit plan, because of improper admission of grand jury testimony by a witness who died before the trial. The testimony was open to troubling doubt: the witness testified under a grant of immunity, he responded to pregnant questions put by the government attorney, and he was an "almost comically unreliable character." We note that the same result would obtain under *Crawford v. Washington*.

[13] Material Fact

United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998) : This case is discussed in the Editorial Explanatory Comment, *§ 807.02[6]*.

[14] Notice

United States v. Benavente Gomez, 921 F.2d 378 (1st Cir. 1990) : The Court held it was error, but harmless, in a cocaine conspiracy prosecution to admit a telephone toll record under the residual exception where the defendant had no notice before trial of its existence or the government's intention to introduce it. In a prisoners' civil rights suit, *Furtado v. Bishop*, n13 the Court found no error in the admission of an affidavit by an attorney (since deceased) stating that a prison official admitted withholding letters sent by one of the plaintiffs. The Court said that the absence of pretrial notice was not as serious in a civil as in a criminal case.

United States v. Oates, 560 F.2d 45 (2d Cir. 1977) : The Court, reviewing the legislative history of the residual exception, concluded that it left "no doubt that it was the intention of Congress that that requirement [notice] be read strictly." Accord *United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978)* .

Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995) : Reversing a verdict for the plaintiff in an asbestos case on non-evidentiary grounds, the Court also held that it was error to admit, as residual hearsay, interrogatory responses from a codefendant who had settled. The plaintiff never gave the defendant notice that she intended to introduce this evidence under the residual exception, which requires not just notice of the hearsay statement, "but also notice of the proponent's intention specifically to rely on the rule as a grounds for admissibility of the hearsay statement." In *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* , the Court reversed convictions for wire fraud because wire-transfer documents that had been subpoenaed from banks were erroneously admitted. No witness familiar with the record-keeping system laid an adequate foundation for their admission as business records and the government did not provide the requisite advance notice of its intent to offer them under the residual exception. Because the government first made its residual exception argument on appeal, the Trial Judge had not made any findings regarding the foundation required under the Rule.

United States v. Hogan, 763 F.2d 697 (5th Cir. 1985) : Reversing marijuana convictions because the government called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay evidence, the Court refused to consider whether the prior statements could have been admitted under the residual exception, since no notice was given and the Trial Judge never had an opportunity to make the findings required by the Rule.

United States v. Williams, 272 F.3d 845 (7th Cir. 2001) : Affirming cocaine-related convictions, the Court found no error in the exclusion of probation records from Texas that Williams claimed showed that he was in New Jersey cooperating with authorities when the prosecution claimed he was in Texas. Although Williams argued on appeal for admission under *Rule 807*, the Court noted that the argument was not made below and that the government had no notice at all of the attempt to rely on the residual hearsay exception.

United States v. Coney, 51 F.3d 164 (8th Cir. 1995) : Affirming a conviction for cashing a Social Security check with a forged endorsement, the Court found no abuse of discretion in refusing to admit a report offered by the defendant as residual hearsay, where the defendant offered the report during the trial, only 45 minutes before she wanted to introduce it. In a prosecution for possession of stolen property, *United States v. Calkins, 906 F.2d 1240 (8th Cir. 1990)* , the Court held that there was no abuse of discretion in admitting under the residual exception testimony that the witness' grandmother had made statements asserting ownership over the property, where the government received notice of the declarant's unavailability on the day before trial began, it promptly notified the Court, and a continuance was granted the defendant before the evidence was admitted. In *United States v. Lyon*, n14 the Court approved a ruling that allowed an FBI agent to read a portion of his transcribed interview of a witness after the witness testified she could

not recall giving real evidence to the government, but the evidence bore both the agent's and the witness' signatures. Since the government was unaware before trial of the witness' poor memory, the Court said that "[u]nder the circumstances, strict compliance with the notice provision of the Rule is not required."

United States v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990) : In reversing a conviction for drug offenses because a witness' prior statements were admitted without an instruction limiting their use to impeachment, the Court refused to consider the residual exception as a basis for admissibility when the government first raised it in its amended jury instructions but the Trial Judge made no finding whether it applied. In a Title VII case, *Piva v. Xerox Corp.*, n15 the Court observed that the defendant's failure to give notice of the intended use of a summary of hiring results concerning men and women, admitted under the residual exception, did not prejudice the plaintiff. The Court focused on whether the plaintiff had "ample opportunity to address the trustworthiness of the evidence" and found that she had. In *United States v. Brown*, n16 the Court upheld the admission of passports despite a failure by the government to provide pretrial notice as required by the residual exception.

United States v. Parker, 749 F.2d 628 (11th Cir. 1984) : Affirming a conviction for stealing from an interstate shipment, the Court held that testimony of the vice president of the company that imported Scotch whiskey from a Scottish distiller concerning information that he had received over the telephone from an unidentified representative of the distiller concerning the manner in which whiskey bottles were marked was properly admitted under the residual exception. Although the government had not strictly complied with the notice requirement, the telephone conversation was the subject of a pretrial hearing and the defendant did not ask for a continuance. In a securities fraud case, *Lloyd v. Professional Realty Servs.*, n17 the Court held there was no abuse of discretion in excluding hearsay statements by an unavailable declarant, where the plaintiffs had given no notice of their intent to use the statements.

[15] Relationship to Other Hearsay Exceptions

Attorney-General v. Irish People, Inc., 595 F. Supp. 114 (D.D.C. 1984) , rev'd in part on other grounds, 796 F.2d 520 (D.C. Cir. 1986) : In an action by the government to compel a weekly newspaper to register as a foreign agent, the Court held that letters between managing persons or officers of the alleged foreign principal were admissible under the residual exception. The letters were similar to business records, although there was no duty to generate the letters. Since the letters were circulated internally, the Court believed that there was no motive for the writers to falsify the contents.

United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989) : In upholding fraud convictions, the Court held that records of a corporation used by the defendants were inadmissible as business records because the federal agent who introduced them could not explain their making and keeping, but they were admissible under the residual exception, as there was nothing to suggest they were other than as they appeared and they were the only proof of the corporation's activities.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983) , rev'g 505 F. Supp. 1190 (E.D. Pa. 1980) , rev'd on other grounds, 475 U.S. 574 (1986) : In its second evidence opinion in this massive antitrust case, the District Judge examined the residual exceptions to the hearsay rule and their relationship to more specific exceptions, concluding that the residual exceptions "cannot be invoked when there is a specific exception which sets forth conditions governing the admissibility of a clearly defined category of hearsay evidence." As examples the Judge used *Rules 804(b)(1), 803(18),* and *803(22).* The Judge said that Rules like *803(6)* and *803(1)* apply "to a relatively amorphous category of evidence," not to clearly defined categories, and that the residual exception could be applied in connection with these Rules. The Court found the analysis to be unpersuasive, finding the "near miss" approach too restrictive and as placing Federal Courts in a "straightjacket." It held that testimony before the Japanese Fair Trade

Commission and one protocol were admissible under the residual exception.

Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) : In a suit by a worker against various manufacturers alleging injury as a result of exposure to asbestos, the Court held that a physician's testimony, given in a prior asbestos case, was admissible against all manufacturers, even though not all had an opportunity to cross-examine in the prior case. Unlike *Clay v. Johns-Manville Sales Corp.*, n18 which held that the testimony was admissible under *Rule 804(b)(1)* following the physician's death, the Court relied on the residual exception and the searching cross-examination in the former case by litigants who had the same motive to attack the testimony as the manufacturers in the instant case. In a wrongful death action arising out of an accident on a conveyor, *Alexander v. Conveyors & Dumpers, Inc.*, n19 the Court affirmed a judgment for a manufacturer, holding it was not error to exclude as an exhibit the 1957 American Standard Safety Code for Conveyors. Although the Trial Judge permitted the plaintiffs' experts to read from the Code and to display photographic enlargements of it to the jury, he excluded the Code itself on the ground that *Rule 803(18)* permitted it to be read, but not shown to the jury. The Court noted that it had previously suggested that safety codes can be admitted under the residual exception.

United States v. Laster, 258 F.3d 525 (6th Cir. 2001) : The defendant was charged with drug offenses after ordering a component of methamphetamine from a chemical company using his employer's company name without its permission. The Court found that records of the chemical company were not admissible under *Rule 803(6)* because the foundation witness, a detective for a state drug task force, had no personal knowledge of or any familiarity with the company's record-keeping practices. However, there was no error in admitting the records under the residual exception, "as there was 'no indication' that the records were not reliable." The Court declined to adopt a narrow reading of *Rule 807*, under which proffered evidence failing to meet the requirements of a *Rule 803* exception cannot qualify for admission under the residual exception. Rather, it read the "specifically covered" language of *Rule 807* to mean only that evidence admissible under one of the categorical exceptions should be admitted under that exception rather than under the residual exception. One Judge dissented on the grounds that the majority's interpretation of "specifically covered" was far too broad and that in this case the absence of a qualified foundation witness put into question whether there were adequate "circumstantial guarantees of trustworthiness" for the records. In a civil rights action on behalf of an arrestee rendered incompetent allegedly as a result of the arrest, *Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992)* , the Court held that although the arrestee's guilty plea to misdemeanor assault and battery charges arising out of the incident did not come within *Rule 803(22)*, it was admissible as a party admission or under the residual exception. In a criminal tax prosecution, *United States v. Popenas*, n20 the defendant unsuccessfully sought to offer an affidavit of the attorney who prepared his tax return as substantive evidence. Because the attorney testified, the Trial Judge admitted the affidavit as impeachment evidence, but ruled that under *Rule 801* it could not be received as substantive evidence. The Court remanded for consideration whether the affidavit was admissible under the residual exception, reasoning that a statement that failed to qualify for admission under *Rule 801* was not necessarily inadmissible under the residual exception.

United States v. Singleton, 125 F.3d 1097 (7th Cir. 1997) : The Court affirmed convictions for distribution of crack, finding no error in the admission of tape recordings of conversations between an unavailable informant and various defendants at various times. Although admitted under the residual exception, the statements in the tapes were all admissible as party admissions, adoptive admissions, or coconspirator statements. In *Cook v. Hoppin*, n21 the Court reversed a judgment for a landlord in a suit by a tenant's visitor who sustained injuries in a fall from an exterior stairway, finding that statements in medical records indicating that the plaintiff had fallen during a shoving or wrestling match were erroneously admitted. The statements did not come within the exceptions for business records or statements made for purposes of diagnosis or treatment, and the Court rejected an argument that the records were admissible under the residual exception. In a wrongful death action, *Huff v. White Motor Co.*, n22 the Court concluded that a statement of the plaintiff's decedent, made while he was hospitalized for treatment of the injuries from which he later died, should

have been admitted under the residual exception unless the decedent was not mentally competent when he spoke. The Court noted that privity-based admissions do not come under *Rule 801*, but analogized to *Rule 804(b)(3)*.

United States v. Turner, 104 F.3d 217 (8th Cir. 1997) : Affirming drug convictions, the Court found no error in the exclusion of medical texts proffered by the defendant at trial. The medical texts could not be admitted as learned treatises, because there was no expert testimony that the treatises were authoritative. Neither were the texts admissible as residual hearsay, because to do so, "when *Federal Rule of Evidence 803(18)* specifically deals with the admissibility of this type of evidence, would circumvent the general purposes of the rules." In *United States v. Balfany, 965 F.2d 575 (8th Cir. 1992)* , the Court affirmed a conviction for sexual abuse, holding that statements made by the child victim to a psychologist and a social worker were admissible under *Rule 803(4)* and there had been no need to resort to the residual exception.

United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) : In a narcotics prosecution, a prosecution witness' prior inconsistent statements were admitted as residual hearsay; they were not admissible under *Rule 801(d)(1)(A)* because they were not made under oath. Affirming, the Court rejected the argument "that *Rule 801(d)(1)(A)* provides the *only* test for admission of unsworn prior inconsistent statements as substantive evidence." It reasoned that the reference in the residual exception to guarantees of trustworthiness equivalent to those in Rules 803 and 804 "strongly suggests that almost fitting within one of these exceptions cuts in favor of admission, not against." The prior inconsistent statements were found sufficiently trustworthy because: the declarant was cross-examined; the statements were consistent with the physical evidence in the case; they were contemporaneously recorded; and the declarant made the statements in an effort to cooperate with the government, and therefore would have realized that lying "would seriously jeopardize any chance he had to benefit from cooperating."

Ark-Mo Farms v. United States, 530 F.2d 1384 (Ct. Cl. 1976) : In an action against the government for allegedly taking a part of the value of the plaintiff's farm by causing flooding when it closed a dam, the government was permitted to rely on a hydrological study prepared by an expert. To the extent that the evidence was not a business record because it was gathered in part by persons technically not employed by the same governmental agency, the Court relied upon the residual exception to admit "the best evidence reasonably available and to have assurances of accuracy and reliability."

[16] Sources of Information

Litton Sys. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983) : Affirming a large antitrust judgment for the plaintiff, the Court upheld the admission of testimony of a former executive of the plaintiff who testified in part from recollection of oral reports made by subordinates. Much of his testimony was based on personal knowledge, and the Trial Judge cited the residual exception in permitting him to rely on the subordinates' statements. The Court said that the trustworthiness of some of the recollections was subject to question, but found that the "potential hearsay taint" of the testimony was insufficient to require reversal.

[17] Surveys and Opinion Polls

Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) : The plaintiff and defendants, manufacturers of competing antihistamines, had entered a settlement agreement in which the defendants had agreed not to advertise their product as "nonsedating" or "low sedating." Seeking an injunction against violations of the agreement and the Lanham Act, the plaintiff offered five surveys in which physicians were asked to relate their memories of communications made by the defendants' sales representatives. The Judge excluded the surveys and denied the injunction. Reversing, the Court held it was an abuse of discretion to rely on a *per se* rule against memory surveys offered to prove the facts

remembered, and remanded for a determination of the surveys' trustworthiness based on their methodological strengths and their relative susceptibilities to the risks of faulty memory and perception. In *Starter Corp. v. Converse, Inc., 170 F.3d 286 (2d Cir. 1999)* , Starter's declaratory judgment action to establish its right to use a "star" trademark on athletic footwear, Starter offered a consumer survey to prove the unlikelihood of confusion between the parties' trademarks. Finding no abuse of discretion in exclusion of the survey, the Court noted that a survey possessing sufficient circumstantial guarantees of trustworthiness may be admitted under *Rule 807* on the confusion issue in a trademark case. However, it held that the survey in this case was irrelevant because the method used did not test or demonstrate likelihood of consumer confusion, and any probative value was outweighed by its potential to confuse the issues.

Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978) : The Court rejected an expert's opinion and the survey on which it was largely based, noting that "[w]hile some polls are not hearsay in that they are admitted to show the beliefs or attitudes of the respondents ..., other polls are unquestionably hearsay," and that some polls may fall within a hearsay exception. The Court then commented that, in relying on the residual exception, the proponent of a poll must show that it followed generally accepted survey principles and that the results are used in a statistically correct way. Among other things, "the survey must be conducted independently of the attorneys involved in the litigation."

Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996) : The Court reversed a judgment for the State and held that it failed to establish undue hardship from proposed accommodations of the plaintiff's religious beliefs. The Court found that the State had relied on the results of a flawed opinion poll. A program supervisor at the department that hired the plaintiff instructed another supervisor to conduct a poll of the staff to determine whether voluntary trading of shifts would be feasible to accommodate the plaintiff. The resulting survey was not sufficiently reliable to be admissible as residual hearsay, however, because the poll involved a faulty assumption about the nature of the accommodation sought by the plaintiff.

Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533 (10th Cir. 1996) : The Court held in an action for infringement of a copyrighted fabric design that there was no abuse of discretion in admitting a survey conducted by the plaintiff's expert to support damages claims, as it covered an adequate universe of respondents and was conducted according to generally accepted survey principles. In *Brunswick Corp. v. Spinit Reel Co.*, n23 a trademark infringement case, the Court held that evidence of a survey of persons over 14 years of age who had fished in fresh water in the previous 12 months to ascertain who they believed manufactured a reel was admissible to prove the likelihood of confusion. It noted that certain survey responses were not admitted for their truth, but to prove state of mind, and that other responses were properly analyzed under the residual exception.

[18] Testifying Witness

United States v. Marshall, 856 F.2d 896 (7th Cir. 1988) : The Court affirmed a conviction for illegal handling of savings bonds. It held that an FBI agent's testimony, at a hearing on a statute of limitations issue, that the defendant's sister stated that she had told the defendant of an outstanding warrant was admissible under the residual exception, where the sister testified at trial and the Trial Judge determined that her testimony to the opposite effect was not credible.

[19] Trustworthiness

[a] Civil Cases

[i] Statement Admissible or Admission Required

SEC v. First City Fin. Corp., 890 F.2d 1215 (D.C. Cir. 1989) : The defendant, charged with failure to make timely disclosure of significant stock purchases, argued that a phone call to the broker making the purchases was only a recommendation that the broker buy for its own account. The Court held that a chronology stating the broker had been asked to make the purchases, which had been submitted by the broker in response to the SEC's request, was properly admitted under the residual exception, since the participants in the conversation and the preparer of the chronology could be cross-examined, false statements would be subject to penalties of perjury, and it was the most contemporaneous account of the conversation.

Brookover v. Mary Hitchcock Mem. Hosp., 893 F.2d 411 (1st Cir. 1990) : In a medical malpractice action brought after a mentally retarded patient fell getting out of bed, the patient's mother testified that the patient told her 11 hours after the accident that he had gotten out of bed when no one responded to his call button and that a nurse several days later said she heard the calls, but the hospital was short-handed and she could not leave another patient. The Court held there was no error in admitting the patient's and nurse's statements under the residual exception, as they were corroborated by the nurse's admissible notes that the patient "had called for help but not quick enough response." We note that corroboration may be used to establish the trustworthiness of residual hearsay in civil cases, even after *Idaho v. Wright*. In *Furtado v. Bishop*, n24 the Court affirmed a judgment for the plaintiffs in a prisoners' civil rights suit, holding it was proper to admit an affidavit by an attorney (since deceased) that said that a prison official admitted withholding letters sent by one of the plaintiffs. The Court expressed reservations about the Trial Judge's reliance on his knowledge that the attorney had been an honorable man, but held that the lawyer's disinterested status and his knowledge of the meaning of an oath warranted a finding of reliability and a decision to admit.

Robinson v. Shapiro, 646 F.2d 734 (2d Cir. 1981) : In an action by the widow of an employee who was killed while attempting to clean up debris at an apartment building damaged by a windstorm, the Court said it was proper to admit testimony by a co-worker that the deceased told him what the building superintendent said about the conditions under which the repair crew was to work. Although it recognized that the residual exception should be invoked sparingly, the Court emphasized the following facts: the deceased and the superintendent were both unavailable, the conversation occurred immediately after the deceased returned from seeing the superintendent, there was an absence of a motive for the deceased to lie, and there was circumstantial evidence concerning the building's condition that suggested why the superintendent might have said what the deceased reported. We note that corroboration may be used to establish the trustworthiness of residual hearsay in civil cases, even after *Idaho v. Wright*.

King v. Armstrong World Indus., 906 F.2d 1022 (5th Cir. 1990) : Affirming a judgment for the plaintiff in an asbestos case, the Court upheld admission under the Rule of a deposition given in another case by a scientist working for another company. As sworn testimony in an adversary proceeding it possessed circumstantial guarantees of trustworthiness and it was probative of the state of scientific knowledge at the time. A statute of limitations defense in *Herdman v. Smith* n25 turned on whether the defendant actively concealed his identity. The plaintiff produced an affidavit of a witness to an assault by the defendant upon the plaintiff which stated that the defendant asked her and her husband to conceal his identity. The affiant had taken the affidavit to the police voluntarily. When she was deposed, she refused to answer any questions concerning the assault, claiming her privilege against self-incrimination. The Court upheld the admission of the affidavit under the residual exception, noting that the affiant risked criminal sanctions if she gave a false statement to the police and also risked prosecution for falsely stating that she had no knowledge of the assault when the police first contacted her.

Doe v. United States, 976 F.2d 1071 (7th Cir. 1992) : In a Federal Tort Claims Act case brought after children were allegedly sexually molested at an Air Force base day care center, the Court held that statements by two three-year-olds to their parents were properly admitted under the Rule, where the core of their stories remained consistent over time, the children volunteered specific information when asked general, nonleading questions, and one

child became agitated and uncomfortable when discussing the incident.

FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993) : The FTC entered an order that the seller cease and desist from unfair or deceptive practices used to market heat detectors, and then sought consumer redress in District Court. Approving the assessment of the maximum amount of redress, the Court held that it was properly based on prices paid by consumers, as described in 127 letters of complaint to the FTC. The letters had the necessary indicia of trustworthiness, having been sent independently to the FTC and reporting roughly similar experiences, and the complaints corroborated each other. We note that corroboration may be considered as part of the reliability inquiry for residual hearsay in civil cases, even after *Idaho v. Wright*. In a legal malpractice action, *Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992)* , the Court held that a declaration under oath subject to penalty of perjury that had been made in opposition to a summary judgment motion possessed sufficient indicia of trustworthiness, where the opponents could offer as cross-examination a deposition they had taken of the unavailable declarant. In a copyright licensing case, *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, n26 the Court affirmed in part a summary judgment granted the plaintiff, holding that an S-1 Securities Registration Statement was properly admitted under the residual exception, since the standard of due diligence applied by securities lawyers with regard to registration statements is sufficient to guarantee the requisite circumstantial trustworthiness of the facts contained in the statement and there was no reason to believe the registration statement at issue contained false statements regarding the relevant facts.

State Farm Mut. Auto Ins. Co. v. Gudmunson, 495 F. Supp. 794 (D. Mont. 1980) : In a declaratory judgment concerning insurance coverage, the Court admitted as substantive evidence prior statements by defense witnesses that contradicted their trial testimony, were given to an insurance adjuster, and were deemed especially reliable by the Trial Judge.

Osterneck v. E.T. Barwick Indus., 106 F.R.D. 327 (N.D. Ga. 1984) : The Court ruled *in limine* that portions of a report by a special review committee to the Board of a corporation, which was made pursuant to a consent agreement between the SEC and the corporation, were admissible under the residual exception. The information in the portions of the report was corroborated by other documents, and the representative of the national accounting firm that prepared the report had no interest in the report other than being accurate.

[ii] Trustworthiness -- Civil Cases -- Statement Excludable or Exclusion Required

SEC v. Scott, 565 F. Supp. 1513 (S.D.N.Y. 1983) , *aff'd, 734 F.2d 118 (2d Cir. 1984)* : In an action against a securities analyst, the Court refused to admit hearsay statements under the residual exception. It found that there were insufficient guarantees of reliability, especially since the declarant had been shown to be "an inherently untrustworthy character."

Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995) : Reversing a verdict for the plaintiff in an asbestos case on non-evidentiary grounds, the Court also held that it was error to admit, as residual hearsay, interrogatory responses from a codefendant who had settled. The responses, which denied liability, were offered by the plaintiff to rebut the non-settling defendant's contention that the plaintiff's injury was solely caused by the settling defendant. The Court held that the interrogatory responses were not sufficiently trustworthy to qualify as residual hearsay, as they were made while the declarant was still a defendant in the litigation and "had every incentive to set forth the facts in a light most favorable to itself."

Stevens Shipping & Term. Co. v. Japan Rainbow II MV, 334 F.3d 439 (5th Cir. 2003) : The Court affirmed the

dismissal of a stevedore's in rem claims against a vessel, seeking payment for agency and stevedoring services. To rebut a claim that the Trial Judge found that the plaintiff had actual knowledge that the charter of the vessel contained a prohibition of liens clause, the plaintiff offered affidavits and e-mail correspondence from the plaintiff's employees indicating that they were unaware of the no-liens clause. The Court found no "clear error" when this evidence was not admitted under the residual hearsay exception on the ground that it was untrustworthy. In an antitrust case, *In re Corrugated Container Antitrust Litig.*, n27 the Court affirmed a judgment absolving manufacturers from liability for damages, holding it was proper to exclude, as substantive or impeachment evidence, an interview conducted by government attorneys with a witness pursuant to an immunity grant. The plaintiffs deposed the witness and used his deposition as evidence, but at a second deposition the witness invoked his privilege against self-incrimination. The Court reasoned that the interview statements could not be used under the residual exception because that exception is to be used sparingly. Because "a government interview under a grant of use immunity which includes testimony the witness is unable or unwilling to repeat at trial is neither rare nor exceptional," the Court declined to find such an interview to be inherently trustworthy.

Cody v. Harris, 409 F.3d 853 (7th Cir. 2005) : In a defamation action brought against his former employer, the plaintiff alleged that he was slandered by a statement that a supervisor made to a newspaper reporter. As proof that the statement was made, the plaintiff offered the published newspaper account. The statement was offered under the residual exception, but the Court found no error in the ruling that the statement was inadmissible under that exception, since "Cody has not offered any evidence related to [the reporter] or his method of reporting, or anything else that would give the district court guarantees that [the reporter's] statement was trustworthy." In a product liability action alleging that a smoker had died from cancer caused by asbestos contained in cigarette filters, *Braun v. Lorillard Inc., 84 F.3d 230 (7th Cir. 1996)* , the Court affirmed a judgment for the defendant, holding there was no abuse of discretion in excluding evidence of statements by a chemist (since deceased) who had examined the cigarettes under an electron microscope in 1954. Her son, who had heard the statements in the 1960s and 1970s, and a journalist who interviewed the chemist in 1980, would have testified that she said she had told the manufacturer that the filters leaked asbestos into the smoke. Given the remoteness of the reported statements and their lack of precision, there were substantial questions about the reliability of the evidence.

EEOC v. Independent Stave Co., 754 F. Supp. 713 (E.D. Mo. 1991) : In the course of granting judgment for the plaintiff in a sex and age discrimination case, the Court held that the plaintiff's testimony that her supervisor's son told her that the supervisor had said she was not recalled from a layoff because she was too old and the men did not want women working in the mill could not be admitted under the Rule. The mere fact that the declarants were related did not provide the indicia of reliability necessary for admission.

Johnson v. Pacific Lighting Land Co., 817 F.2d 601 (9th Cir. 1987) : Reversing a judgment for citrus fruit growers who sued a packing house alleging breach of contract and antitrust violations, the Court held that statements by a prospective witness at a conference with the plaintiffs' counsel and several other witnesses should not have been admitted simply because the witness was ill and could not testify at trial, where there were no guarantees of trustworthiness in the statement.

Balogh's of Coral Gables Inc. v. Getz, 798 F.2d 1356 (11th Cir. 1986) (en banc), *reinstating 778 F.2d 649 (11th Cir. 1985)* : In an antitrust case, the Court held that a statement by a former employee of a defendant company, which was handwritten by the plaintiff's counsel and initialed by the former employee, was properly excluded. Although "prior notarized statements may be admitted under [the residual exception] at the trial judge's discretion," the Court found no error here, where the Trial Judge determined, after a hearing on admissibility, that the circumstances in which the statement was made were insufficiently trustworthy.

[b] Trustworthiness -- Criminal Cases

[i] Statement Admissible or Admission Required

United States v. Morgan, 385 F.3d 196 (2d Cir. 2004) : The Court affirmed a conviction for conspiracy to import controlled substances, holding there was no error in refusing to instruct the jury to disregard, as against the defendant, a letter written by her codefendant to her boyfriend. The letter was properly admitted against the defendant under the residual exception. It had circumstantial guarantees of trustworthiness, since it was not responding or addressed to law enforcement authorities and it was not written in a coercive atmosphere, but rather it was written to an intimate acquaintance in the privacy of the codefendant's hotel room, with no expectation that it would ever find its way in the hands of the police and with no intention to curry official favor. In *United States v. Bryce, 208 F.3d 346 (2d Cir. 1999)* , the defendant was charged with drug trafficking after federal agents intercepted and recorded seven telephone conversations in which he negotiated (in coded phrases) to sell cocaine to his codefendant, Darren Johnson. Within the same time period the agents recorded another conversation in which Johnson told another individual, Gomez, in less cryptic language that Bryce was selling "straight powder" at a particular price and had sold seven kilos the prior day. The Court held there was no error, under *Rule 807*, when the last conversation was admitted, since it had a high degree of trustworthiness: "(i) the statements were obtained via a covert wiretap of which neither Johnson nor Gomez was aware; (ii) the statements were made during the same time period Johnson was conversing with Bryce; (iii) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and (iv) Gomez was Johnson's colleague in the narcotics trade."

United States v. Ismoila, 100 F.3d 380 (5th Cir. 1996) : The Court held, in a credit-card fraud prosecution, that notices to the issuing banks from credit card holders indicating that their cards had been stolen and charges were not authorized were admissible under the residual exception. An experienced investigator testified that he could remember only three or four instances in over 1000 fraud investigations in which a card holder had lied about unauthorized charges. The Court also noted that issuing banks have an incentive to ensure the veracity of such claims because they bear the fraud loss, and that the Trial Judge had delayed ruling on the admissibility of the records until the prosecution had presented live testimony of five of the cardholders, who were only minimally cross-examined. In a forgery case, *United States v. White*, n28 the Court observed that the residual exception should be used sparingly, but found sufficient guarantees of reliability in a Treasury Department claim form by a payee of a government check that he did not see or endorse it, when the payee read a warning in the presence of a witness regarding criminal penalties for a false claim and made the statement only three months after the check should have arrived.

United States v. Sanchez-Lima 161 F.3d 545 (9th Cir. 1998) : The defendant, an illegal alien, was charged with assaulting a Border Patrol officer after being apprehended with other aliens in an attempt to cross into the United States. Before the other aliens were deported, defense counsel obtained videotaped statements from them; these statements supported the defendant's claim of self-defense. The Court found reversible error in the exclusion of these videotaped statements at trial. The statements were sufficiently trustworthy because: (1) the declarants were under oath and subject to the penalty of perjury; (2) they made the statements voluntarily; (3) the statements were based on facts within the declarants' personal knowledge; (4) the statements did not contradict any previous statements given to government investigators; (5) the testimony was preserved on videotape, allowing the jurors an opportunity to view the demeanor of the declarants; and (6) the government had an opportunity to develop the testimony of these witnesses before they were deported, and the government also had notice and the option to participate when the statements were videotaped. In a sexual abuse case, *United States v. George, 960 F.2d 97 (9th Cir. 1992)* , the Court held that statements by the 12-year-old victim to an investigator regarding the dates of acts of abuse satisfied the trustworthiness requirements under the Rule. The victim (who testified at trial) had no motive to lie about the dates, she referred to the dates in a manner expected of a child her age, and there was no indication the investigator used leading questions.

[ii] Trustworthiness -- Criminal Cases -- Statement Excludable or Exclusion Required

[A] Defense Evidence

United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) : The Court affirmed a conviction for importing cocaine, holding there was no abuse of discretion in excluding statements from an accomplice's plea allocution that allegedly exculpated the defendant. The statements were not admissible as prior testimony or declarations against interest, essentially for lack of trustworthiness; the same lack of trustworthiness precluded their admission under the residual exception.

United States v. Wright, 363 F.3d 237 (3d Cir. 2004) : The Court affirmed a conviction for conspiracy to transport stolen property, holding there was no error in the exclusion of an allegedly exculpatory statement that a deceased coconspirator had made to his attorney. While the confidential relationship with the attorney is one indication the statements would be truthful, other circumstances -- including that the statements were not under oath and there was no penalty for lying to the attorney, and that they were self-serving statements made at a time when the declarant (a public official) knew he was under investigation -- indicated that the statement lacked the circumstantial guarantees of trustworthiness required for admission under *Rule 807*. In *United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003)* , the victim of a shooting was shown a photo array a few days before he died from his wounds, and the defendant claimed that the victim used it to identify another man as his assailant. Affirming a murder conviction, the Court held that the purported identification was properly not admitted under the residual exception. The victim was capable of only blinks and nods, and the Judge determined that these gestures were simply too ambiguous to constitute a meaningful statement. Therefore, the victim's response lacked the circumstantial guarantees of trustworthiness required by *Rule 807*. In *United States v. Ferri*, n29 the Court affirmed convictions for conspiracy and attempting to damage a building, holding it was proper to exclude statements, offered under the residual exception, made by a codefendant to an informant. The statements were made after the codefendant had been subpoenaed by a grand jury and told that he was under investigation.

United States v. Hinkson, 632 F.2d 382 (4th Cir. 1980) : The Court held that a third party's confession of murder was not admissible when offered by the defendant, since the third party denied that he had made the statement and there was evidence that he "gloried" in parading a certain image before others. Thus, the confession was not shown to be trustworthy enough to be admitted under the residual exception.

United States v. Walker, 410 F.3d 754 (5th Cir. 2005) : The Court affirmed drug convictions, finding no error in the exclusion of a statement made by an associate of the defendant's who was present in a room in which drugs were found by police. The associate made a videotaped statement to police officers in which she categorically denied that the defendant had brought any drugs into the room. The Court held the statement was inadmissible under *Rule 807* because it lacked trustworthiness. The declarant "was in a room with a lot of cocaine," and was not under oath. She was facing the threat of criminal charges and "had every incentive to lie." The Court also noted that the declarant had disappeared by the time of the defendant's trial, which "confirms her lack of trustworthiness." In *United States v. Perez, 217 F.3d 323 (5th Cir. 2000)* , the Court affirmed a conviction for aiding and abetting the harboring of an illegal alien. It upheld the exclusion of statements made by alien witnesses before they were deported from the United States, that Perez was not involved in the alien smuggling. A Special Agent of the INS testified that 90% of undocumented aliens who are apprehended do not give a truthful and accurate account of the events that led to their arrest. In the instant case, two material witnesses who were detained by the defense and designated as defense witnesses ultimately provided testimony implicating Perez in the smuggling operation. These facts, plus the fact that the statements were not under oath, led the Court to conclude that the hearsay statements lacked circumstantial guarantees of trustworthiness.

United States v. Hall, 165 F.3d 1095 (7th Cir. 1999) : Affirming a conviction for kidnapping and illegally transporting a teenage girl, the Court upheld the exclusion of evidence that another man confessed after going to the funeral home and asking to see the girl's body. The other man "confessed to any crime he was questioned about by the police" and "lacked knowledge regarding the pertinent facts of the case," and there was no evidence corroborating any part of his story, so the Court concluded that the confession "lacked even the barest indicia of reliability." In the prosecution of a financial institution officer for taking kickbacks, *United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996)* , the Court held that there was no abuse of discretion in excluding a hearsay statement offered under the residual exception to contradict a principal government witness. Although the statement was against interest and made when the declarant was less likely to be biased, the great lapse of time between the statement and the event it described meant that it did not have the indicia of trustworthiness characterizing the categorical exceptions. Affirming a conviction for mail fraud in *United States v. Wilkus*, n30 the Court held that an affidavit made by a defense witness was properly excluded as hearsay not admissible under the residual exception because it was inherently untrustworthy. At the time it was purportedly executed -- the witness had no recollection of the affidavit or of his signature to it -- he was bedridden with a herniated disk, under medication, and suffering a diminished ability to read and comprehend documents. In *United States v. Hooks*, n31 a prosecution for conspiracy to defraud the United States, the Court found that a defendant had not overcome the presumption of unreliability of out-of-court statements made by two witnesses to the prosecutor at a time when they had a reason to deny conspiratorial activity.

United States v. Gaines, 969 F.2d 692 (8th Cir. 1992) : Affirming convictions for heroin distribution offenses, the Court held there was no abuse of discretion in refusing to admit a private investigator's testimony that one defendant's ex-husband had said he never saw her deal or use heroin. The statement lacked circumstantial guarantees of trustworthiness, especially in light of the codefendants' challenges to the declarant's competency because of his heroin addiction.

United States v. DeLuca, 692 F.2d 1277 (9th Cir. 1982) : In a racketeering prosecution, one defendant offered a tape recording made when a government witness, a former accomplice, called and attempted to get the defendant to make incriminating statements. In fact, the statements were exculpatory. Since the tape was made after the defendant learned that he was under investigation and after he employed counsel, the Court found that the tape was properly excluded as insufficiently reliable under the residual exception.

United States v. Trujillo, 136 F.3d 1388 (10th Cir. 1998) : The Court affirmed a bank robbery conviction, finding no abuse of discretion in the exclusion of FBI reports of statements by witnesses who were unavailable at the time of trial. The defense made no showing why the statements were inherently trustworthy. Furthermore, the witnesses who made them had a limited opportunity to observe, and made significant errors in, the facts recounted, so the reports were not corroborated in any real sense.

United States v. Colson, 662 F.2d 1389 (11th Cir. 1981) : The Court affirmed drug convictions and rejected a claim that the Trial Judge should have admitted under the residual exception the transcript of a taped conversation between a witness and several police officers in which the witness admitted procuring false testimony against one defendant. The Court noted that the witness was a twice-convicted felon, the transcript was replete with opinions and conclusions not based upon personal knowledge, and it contained self-laudatory comments.

[B] Trustworthiness -- Criminal Cases -- Statement Excludable or Exclusion Required -- Prosecution Evidence

United States v. Trenkler, 61 F.3d 45 (1st Cir. 1995) : Although the Court affirmed a conviction on various

charges resulting from a bomb explosion, it found error, albeit harmless, in the admission of evidence concerning information obtained from an ATF database of explosion and arson incidents. The prosecution sought to show that, out of more than 14,000 bombing and attempted bombing incidents, only the bombing charged and one prior incident alleged to have been committed by the defendant shared certain queried characteristics. The government's expert explained that the database was derived from reports by a variety of law enforcement agencies, that no agency was required by law to send reports to the database, and that no procedures or standards were required as the basis for reports. The Court noted that "it is far from clear the extent to which information memorialized in any of the reports derives from laboratory analyses, on-the-scene observations of police officers, second-hand descriptions of the device by layperson witnesses, or some other source," and it concluded that the reports lacked sufficient guarantees of trustworthiness to be admitted.

United States v. Ruppel, 666 F.2d 261 (5th Cir. 1982) : The Court found that taped post-arrest conversations of coconspirators should not have been admitted under the residual exception where there was nothing exceptional about the conversations that would have guaranteed trustworthiness.

FOOTNOTES:

(n1)Footnote 1. *Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983)* .

(n2)Footnote 2. *Netterville v. State of Mo., 800 F.2d 798 (8th Cir. 1986)* .

(n3)Footnote 3. *United States v. Welsh, 774 F.2d 670 (4th Cir. 1985)* .

(n4)Footnote 4. *United States v. Heyward, 729 F.2d 297 (4th Cir. 1984)* .

(n5)Footnote 5. *FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989)* .

(n6)Footnote 6. *United States v. Fredericks, 599 F.2d 262 (8th Cir. 1979)* .

(n7)Footnote 7. *United States v. Grooms, 978 F.2d 425 (8th Cir. 1992)* .

(n8)Footnote 8. *United States v. Spotted War Bonnet, 882 F.2d 1360 (8th Cir. 1989)* , *vacated on other grounds*, *497 U.S. 1021 (1990)* .

(n9)Footnote 9. *United States v. Shaw, 824 F.2d 601 (8th Cir. 1987)* .

(n10)Footnote 10. *United States v. Renville, 779 F.2d 430 (8th Cir. 1985)* .

(n11)Footnote 11. *United States v. Loalza-Vasquez, 735 F.2d 153 (5th Cir. 1984)* .

(n12)Footnote 12. *United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989)* , *amended* (11th Cir. 1990).

(n13)Footnote 13. *Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979)* .

(n14)Footnote 14. *United States v. Lyon, 567 F.2d 777 (8th Cir. 1977)* .

(n15)Footnote 15. *Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981)* .

(n16)Footnote 16. *United States v. Brown, 770 F.2d 768 (9th Cir. 1985)* .

(n17)Footnote 17. *Lloyd v. Professional Realty Servs., 734 F.2d 1428 (11th Cir. 1984)* .

(n18)Footnote 18. *Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983)* .

(n19)Footnote 19. *Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221 (5th Cir. 1984)* .

(n20)Footnote 20. *United States v. Popenas, 780 F.2d 545 (6th Cir. 1985)* .

(n21)Footnote 21. *Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986)* .

(n22)Footnote 22. *Huff v. White Motor Co., 604 F.2d 80 (1st Cir. 1979)* .

(n23)Footnote 23. *Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513 (10th Cir. 1987)* .

(n24)Footnote 24. *Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979)* .

(n25)Footnote 25. *Herdman v. Smith, 707 F.2d 839 (5th Cir. 1983)* .

(n26)Footnote 26. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542 (9th Cir. 1990)* .

(n27)Footnote 27. *In re Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985)* .

(n28)Footnote 28. *United States v. White, 611 F.2d 531 (5th Cir. 1980)* .

(n29)Footnote 29. *United States v. Ferri, 778 F.2d 985 (3d Cir. 1985)* .

(n30)Footnote 30. *United States v. Wilkus, 875 F.2d 649 (7th Cir. 1989)* .

(n31)Footnote 31. *United States v. Hooks, 848 F.2d 785 (7th Cir. 1988)* .

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807.04 Legislative History

[Editor's Note: Below is the Advisory Committee's original Note to what was then Rule 803(24). In 1997, Rule 803(24) was combined with Rule 804(b)(5) and transferred to a new Rule 807.]

[1] Advisory Committee Note to Rule 803(24)

Advisory Committee Note to Rule 803(24)

The preceding 23 exceptions of Rule 803 and the first five [four actually enacted -- Ed.] exceptions of Rule 804(b) *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) [enacted as 804(b)(5) -- Ed.] are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. See *Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961)* .

[The original Advisory Committee Note to Rule 804(b)(5) stated as follows: "In language and in purpose, this exception is identical with Rule 803(24). See the Advisory Committee's Note to that provision."]

[2] 1997 Amendment Committee Note

1997 Amendment Committee Note

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

[3] Excerpt from "Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification," by Daniel Capra, 182 F.R.D. 268, 278 (1999)

Residual Exception

A final aspect of dissonance between the Advisory Committee Notes on hearsay and the resulting Federal Rules involves the residual exceptions to the hearsay rule. The residual exceptions were proposed by the Advisory Committee, and adopted by Congress, to permit the admission of reliable hearsay that was "not specifically covered" by any of the foregoing categorical exceptions. The intent of the Advisory Committee and Congress was to provide some flexibility to admit clearly reliable statements that could not have been anticipated by the drafters.

The Advisory Committee proposed, and Congress adopted, two residual exceptions. One was placed in *Rule 803* (subdivision 24), and one was placed in *Rule 804* (subdivision (b)(5)). The former provision technically applied when the declarant was available to testify, while the latter provision technically applied when the declarant was unavailable. The exceptions were identically worded, and it soon became clear that it made little difference which of the two exceptions was invoked; regardless of enumeration, the question for residual hearsay was whether the statement was reliable, and whether it was, as both rules required, "more probative" than other evidence reasonably available to prove the point.

In 1994, the reconstituted Advisory Committee proposed a consolidation of the two residual exceptions into a single exception, *Rule 807*. The intent was to clarify any confusion resulting from two identically worded hearsay exceptions, and also to provide a means of adding new exceptions to *Rules 803 and 804* without having to worry about the reference in Rules 803(24) and 804(b)(5) to "the foregoing exceptions." The proposal to consolidate the two residual exceptions into one became effective on December 1, 1997.

While the consolidation of two residual exceptions into one is not intended to have a substantive effect, it does render the original Advisory Committee Notes on the residual exceptions somewhat confusing. Obviously, the original Advisory Committee Notes refer to two residual exceptions, located in Rules 803 and 804, respectively. While the substance of the original Advisory Committee Note is still very useful in determining the scope of a residual hearsay exception, the note as a whole must be considered in light of the procedural shift to a new *Rule 807*.

[Editor's Note: The following legislative history is in reference to original Evidence Rules 803(24) and 804(b)(5), which were combined and transferred to Rule 807 in 1997.]

[4] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

[Rule 803] Subdivision (24) was deleted as injecting too much uncertainty into the law of evidence. It was noted that Rule 102 directs the courts to construe these Rules of Evidence so as to promote "growth and development." If additional hearsay exceptions are to be created, they should be by amendments to these Rules, not on a case by case basis.

[Rule 804] Subdivision (b)(6) [(b)(5) as enacted] was deleted for the same reasons underlying the deletion of Rule 803(24).

[5] Report of the Senate Committee on the Judiciary

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6) [enacted as 804(b)(5) -- Ed.]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development,

would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assur. Co., Ltd., 286 F.2d 388 (5th Cir. 1961)* illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also *United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968)* .

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the nowrecognized exceptions to the hearsay rule.

In order to establish a welldefined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates [*sic*] that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

[6] Report of the House and Senate Conferees

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twentythree subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

The Senate amendment [to Rule 804] adds a new subsection, (b)(6) [enacted as (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

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Scope

The chart below shows the proposed style amendments for Rule 807, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 807. Residual Exception	**Rule 807. Residual Exception**	
A statement not specifically covered by Rule 803 or 804	**(a)**	**In General.** Under the following circumstances, a

but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
(C) the general purposes of these

rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent

of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's

intention to offer the statement and the particulars of it, including the name and address of the declarant.

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offer

ed as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting

it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable

notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Committee Note

The language of Rule 807 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[8] The Residual Exception and the Confrontation Clause [Go To Main]

In *Davis v. Washington, 547 U.S. 813 (2006)* (with the companion case of *Hammon v. Indiana*), the Court considered the admissibility under *Crawford* of hearsay statements made by two victims of domestic abuse. One was a report by the victim to a 911 operator, made essentially at the time of the assault. The other was a report made to responding police officers; the defendant was in the home and placed in another room, and the officer obtained, through questioning, the victim's account of the event. The Supreme Court held that the statement to the police officer was testimonial, but the statement to the 911 operator was not. Justice Scalia, writing for the majority, explained as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial

> inquiries" at the crime scene will not be testimonial, we do not hold the opposite -- that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

Of course, the *Crawford* rule applies only to "testimonial" hearsay. What if hearsay admissible under a hearsay exception is not testimonial? In *Whorton v. Bockting, 127 S. Ct. 1173 (2007)* , the habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford*. His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts*. It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the *Confrontation Clause*, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. *But see 418 F.3d at 1058* (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added)

This amounts to a holding that *Roberts* has been overruled even as to non-testimonial hearsay. One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. So after *Whorton*, if hearsay is not testimonial, the *Confrontation Clause* provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions, not by the Constitution.

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Supp. to § 807.03 Annotated Cases

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[2] Availability of Equally Probative Evidence [Go To Main]

[b] Availability of Equally Probative Evidence -- Criminal Cases

United States v. W.B., 452 F.3d 1002 (8th Cir. 2006) : Affirming an adjudication of juvenile delinquency on a charge of aggravated sexual abuse of a minor, the Court found no error in the admission of testimony from a forensic interviewer regarding statements made by the victim regarding the assault. Although the victim testified, the hearsay recounted by the interviewer was more probative than any available evidence, since the victim was unable or unwilling to recall specific details during her in-court testimony, including the time frame of the abuse and whether the defendant's pants were on or off.

[4] Children's Statements [Go To Main]

[a] Admissible

United States v. W.B., 452 F.3d 1002 (8th Cir. 2006) : Affirming an adjudication of juvenile delinquency on a charge of aggravated sexual abuse of a minor, the Court found no error in the admission of testimony from a forensic interviewer regarding statements made by the victim regarding the assault. Although the victim testified, the hearsay recounted by the interviewer was more probative than any available evidence, since the victim was unable or unwilling to recall specific details during her in-court testimony, including the time frame of the abuse and whether the defendant's pants were on or off. In *United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005)* , the Court affirmed a conviction for child sexual abuse, finding no error in the admission of hearsay statements that the victim, who testified at trial, made to various individuals. The statements were trustworthy because: "T.P. consistently alleged both sexual and physical abuse prior to trial, she used language appropriate for a young child in talking about the abuse, she circled the parts of her body that Peneaux had touched on an anatomically correct diagram, and there was no allegations of coercion or coaching. Her out of court statements were either made in response to open ended questions ... or were simply volunteered."

[15] Relationship to Other Hearsay Exceptions [Go To Main]

United States v. Banks, 514 F.3d 769 (8th Cir. 2008) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission under the residual hearsay exception of an ATF purchase form, which was offered to prove the name of the person to whom the gun in question was sold. The Court noted that the form would fall within the business records exception (Rule 803(6)), but the government had not called a foundation witness familiar with the seller's record-keeping practices. However, because the record-keeping practices of gun sellers are prescribed by law and ATF regulations, the purchase form possessed trustworthiness equivalent to a business record, and was thus properly admitted.

United States v. Bonds, 608 F.3d 495 (9th Cir. 2010) : In a perjury prosecution against a professional baseball player for falsely denying steroid use before a grand jury, the defendant moved *in limine* to preclude introduction of blood analysis reports for failure to establish that the blood had come from the defendant. A witness who could have made the connection refused to testify, so the government sought to introduce that witness' out of court statements. Affirming on interlocutory appeal the grant of the motion *in limine*, the Court held that the statements could not be admitted under Rule 807. Even if the statements "almost" met several other hearsay exceptions, they "miss[ed]" those exceptions, as well as the requirements of Rule 807, which is supposed to be used only in exceptional circumstances not shown here.

[18] Testifying Witness [Go To Main]

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) : Affirming a conviction for child sexual abuse, the Court found no error in the admission of hearsay statements that the victim made to various individuals. The Court found the hearsay properly admitted even though the victim testified, noting that "[w]here testifying adults are able to provide information that the victim is unwilling or unable to give, this testimony may come in under *Rule 807*." Here, the victim's testimony was "inconsistent and unclear" and the testimony from the adult witnesses about the victim's hearsay statements "aided the jury in its fact finding task to determine whether T.P.'s allegations were true."

[19] Trustworthiness [Go To Main]

[a] Civil Cases

[ii] Trustworthiness -- Civil Cases -- Statement Excludable or Exclusion Required

Keri v. Board of Trustees of Purdue Univ., 458 F.3d 620 (7th Cir. 2006) : A black assistant professor who was not reappointed sued under Title VII. Affirming summary judgment for the defendant, the Court upheld exclusion of statements made by another professor concerning the decision not to reappoint the plaintiff. The statements lacked trustworthiness because the source of all the significant information was the plaintiff and the declarant had no personal knowledge.

United Techs. Corp. v. Mazer, 556 F.3d 1260 (11th Cir. 2009) : In an action by the manufacturer of an aircraft engine against two companies allegedly responsible for the theft and sale of blueprints relating to the engine, the Court held that statements made by an individual under investigation to the Inspector General of the Department of Defense were not admissible under the residual hearsay exception, because the individual's "position as a target in a criminal investigation provided him ample motivation to implicate others (even falsely) ... in his misconduct in order to diffuse and mitigate his own culpability."

[b] Trustworthiness -- Criminal Cases

[i] Statement Admissible or Admission Required

United States v. Banks, 514 F.3d 769 (8th Cir. 2008) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in the admission under the residual hearsay exception of an ATF purchase form, which was offered to prove the name of the person to whom the gun in question was sold. The Court noted that the form would fall within the business records exception (Rule 803(6)), but the government had not called a foundation witness familiar with the seller's record-keeping practices. However, because the record-keeping practices of gun sellers are prescribed by law and ATF regulations, the purchase form possessed trustworthiness equivalent to a business record, and was thus properly admitted.

[ii] Trustworthiness -- Criminal Cases -- Statement Excludable or Exclusion Required

[A] Defense Evidence

United States v. Hunt, 521 F.3d 636 (6th Cir. 2008) : Affirming convictions for health care fraud and making false statements, the Court held that an affidavit provided to the government by a potential defense witness during the government's investigation was not admissible against the government as residual hearsay, given the Trial Judge's finding that the statements lacked trustworthiness. The defendant argued that the statements were trustworthy because they tended to incriminate the affiant while exculpating the defendant. But the Court responded that "it is at least equally reasonable to conclude that the statements are not trustworthy" because "[i]t would not be bizarre for an individual to lie in order to protect another individual with whom he has a business relationship." The Court noted that "a statement is not rendered trustworthy simply by the fact that it tends to exculpate one other than the declarant. This principle is seen clearly in Rule 804(b)(3), which says that a statement that exposes the declarant to criminal liability while exculpating the accused is not admissible unless corroborating circumstances indicate its trustworthiness."

United States v. Hughes, 535 F.3d 880 (8th Cir. 2008) : The defendant, charged with purchasing furs without an out-of-state fur dealer's licence, offered a witness to testify that the defendant had called after returning home from his fur buying trip and told the witness that he did not know his license application was rejected until after the trip. Affirming, the Court found no abuse of discretion in excluding the witness' testimony, as the statement was not admissible under Rule 804(b)(3) because the defendant had testified and was not unavailable, and it was not admissible under Rule 807 because it lacked any indicia of reliability and was cumulative of the defendant's own testimony. In *United States v. Two Shields, 497 F.3d 789 (8th Cir. 2007)* , a murder prosecution, the defendant offered evidence that the victim, who suffered a badly broken jaw and facial injuries, shook his head negatively when asked if the defendant had caused his injuries. The Court found no error in exclusion of the evidence, holding that it was not admissible under the residual exception because it lacked circumstantial guarantees of trustworthiness. Even if the victim had a motive arising from revenge to accurately identify his attacker, the testimony of his relatives and medical personnel indicated that he had an extremely his high blood alcohol concentration, he had stated that he did not recall how he was injured, he was incoherent to the doctors, and his head shake was an ambiguous response to a leading question.

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
CHAPTER 901 RULE 901

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[iv] Rule 901(a) -- Tape Recordings -- Enhanced Tapes

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[vi] Rule 901(a) -- Tape Recordings -- Transcripts

[A] Rule 901(a) -- Tape Recordings -- Foreign Language Conversations

[B] Rule 901(a) -- Tape Recordings -- Transcripts -- Recorded Conversations

[n] Rule 901(a) -- Telephone Conversations and Similar Conversations

[o] Rule 901(a) -- Videotapes

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[3] Rule 901(b)(2) -- Illustrations -- Nonexpert Opinion On Handwriting

[4] Rule 901(b)(3) -- Illustrations -- Comparison By Trier Or Expert Witness

[5] Rule 901(b)(4) -- Illustrations -- Distinctive Characteristics And The Like

[a] Rule 901(b)(4) -- Contents

[b] Rule 901(b)(4) -- Fingerprints

[c] Rule 901(b)(4) -- Location or Possession

[d] Rule 901(b)(4) -- Nondocumentary Evidence

[e] Rule 901(b)(4) -- Other Examples

[f] Rule 901(b)(4) -- Photographs

[g] Rule 901(b)(4) -- Reply

[h] Rule 901(b)(4) -- Telephone Conversations

[6] Rule 901(b)(5) -- Illustrations -- Voice IdentificatioN

[7] Rule 901(b)(6) -- Illustrations -- Telephone Conversations

[a] Rule 901(b)(6) -- Calls to Businesses

[b] Rule 901(b)(6) -- Calls to Individuals

[8] Rule 901(b)(7) -- Illustrations -- Public Records Or Reports

[9] Rule 901(b)(8) -- Illustrations -- Ancient Documents Or Data Compilation

[10] Rule 901(b)(9) -- Illustrations -- Process Or System

901.04 Legislative History

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
CHAPTER 901 RULE 901

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901.01 Official Text

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. -- Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. -- Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. -- Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. -- Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. -- Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. -- Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. -- Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. -- Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. -- Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. -- Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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901.02 Editorial Explanatory Comment

[1] Authentication: The Basic Rule

One of the general requirements of introducing evidence at trial is that the evidence must be authenticated. This means that someone must lay a sufficient foundation so that the trier of fact is able to determine that the evidence is what it is supposed to be. For example, if the prosecution proffers a gun as the murder weapon, it must establish a foundation that the gun is in fact the murder weapon. Similarly, when a witness testifies to statements made by someone else, the witness must be able to identify the person from whom the statements emanated so that the trier of fact is able to properly attribute the statements. And when a proponent wishes to introduce a letter written by the adversary, the proponent must establish a foundation that the letter actually was written by the adversary.

Rule 901 provides that the proponent must provide evidence sufficient to support a finding that the proffered material is what the proponent says it is. Under the Rule, the question of authenticity is generally considered one of conditional relevance -- a document or other piece of evidence is not relevant unless it is what the proponent purports it to be. (For example, a diary in which the defendant purportedly admitted a crime is probative only if the entry was made by the defendant). As a question of conditional relevance, the admissibility standard is the same as that provided by *Rule 104(b)*: Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a liberal standard favorable to admitting the evidence. The drafters of the Rule apparently believed that authenticity should generally be a jury question, subject to the limitation that there is no reason to bother the jury with evidence that clearly is not what the proponent claims it to be. n1 However, as discussed below, the Trial Judge retains the traditional power to exclude evidence that appears fabricated or altered.

[2] Trial Court Authority to Regulate Fabricated or Altered Evidence

The Advisory Committee Note to *Rule 901* appears to state that *all* questions of authenticity are questions of conditional relevance rather than competency. If that were so, authenticity would in all cases be established by a showing sufficient to support a finding that the evidence is what the proponent claims it to be. We believe, however, that while the aforesaid standard is correct in most cases, the Federal Rule on authenticity is by no means unitary. Certainly, a unitary standard -- enough evidence to support a finding -- does not comply with all of the policies underlying all authentication requirements.

We begin with the premise that the confusion found in *Rule 901* derives from the confusion that exists even in common-law jurisdictions over whether authentication is a problem involving a question of "competency" that must be resolved by preliminary factfinding and decisionmaking by the Trial Judge, or whether it involves a question of conditional relevancy that requires that the Judge only ensure that a *prima facie* case is made before leaving the matter to the jury to resolve. (The difference between these two concepts is discussed in the Editorial Explanatory Comment accompanying *Rule 104* in *§ 104.02[2].*) Problems of how to qualify the results of a scientific test, how to justify introduction of an experiment, how to authenticate a tape recording, and how to establish a chain of custody do not lend themselves to one simple solution. In fact, common-law jurisdictions, without saying as much, have divided up authentication problems so that some are really problems of relevancy and some involve requirements of preliminary factfinding and judicial screening to ensure a minimal level of reliability. Requirements like the chain of custody requirement, for example, are designed to ensure that unnecessary doubts concerning the identity of an object are removed. To eliminate the requirement and to substitute a relevance approach in all cases is to change the amount of care required of a party, especially the government in a criminal case. Similarly, to say that a tape recording can be admitted without a preliminary showing that the machine was in good working order, and perhaps also that no one tampered with the tape, is to say that *Rule 901* is not concerned with screening highly powerful evidence in a reasonably careful way.

We believe that the text of *Rule 901* casts doubt on the proposition that it requires only a bare showing of relevance in all cases, and never more, when evidence is authenticated or identified. If this were the case, why would *Rule 901(b)(2)* intimate that a nonexpert should not be permitted to authenticate a challenged writing if he has become familiar with the handwriting only for purposes of pending litigation? We think the rationale for this Rule is that a nonexpert with an interest in litigation might be affected by bias. Since an expert could be retained, there is little reason to assume this risk. If relevance were the sole test, however, any witness with knowledge, no matter how or when it was obtained, ought to be able to identify handwriting.

Consider also *Rule 901(b)(6)*. Assume that a person answers the phone and identifies himself as "John Steven" and that the government later charges someone named John Steven with conspiracy and the proof that he received the call would be helpful to the government's case. The Rule suggests that a jury cannot receive evidence of the conversation on the basis of this foundation. It seems to require more than simple self-identification. In fact, many, though not all, Courts have required something more, such as circumstantial evidence indicating that the person who took the call was the person identified. n2 But have they done it because they believe that the evidence is not relevant without that additional showing? We think not. Our view is that they recognize how easy it is for one person to say he is someone else and how attractive it might be for people to do just that if it became clear that any statement of identification could be used in litigation against the person identified. There is a concern about reliability in these circumstances that justifies a stronger showing than the minimal *prima facie* standard requires.

Finally, examine the ancient documents provision in *Rule 901(b)(8)*. If a document is only ten years old, and otherwise meets the standard of the Rule, it cannot be authenticated as an ancient document. Certainly, a simple relevance analysis cannot explain this. In our view, the reason that Courts demand something more than minimal relevance in some contexts is that the absence of some reliability standard might readily lead to fabrication.

[3] Case-by-Case Approach

The lesson of *Rule 901* is that there is more than one way to authenticate evidence. But when it comes to the question of whether the Judge must make a preliminary determination before admitting evidence, as opposed to simply deciding there is enough for the jury to decide whether to rely on the evidence, the best reading of *Rule 901* would be to follow a case-by-case approach and to demand a more substantial foundation where the circumstances might create a suspicion that evidence is altered or fabricated. Given that there is no evidence that anyone who played a major part in the drafting of this Rule explicitly stated that the common law would be drastically modified and the supervisory role of the Trial

Judge drastically reduced, Judges should await more specific instructions from the Congress or the Supreme Court before abandoning the supervisory role that they played under the common-law rules. If there is a question as to the Trial Judge's authority for taking a more aggressive approach to authentication, we think that such a stance can be justified under *Rule 403*. n3

[4] Tape Recordings

The cases on tape recordings illustrate what we implied in the previous section: that there is not, and should not be, a unitary and almost completely permissive approach to authentication when there are legitimate concerns about the reliability and integrity of evidence. *United States v. Branch, 970 F.2d 1368 (4th Cir. 1992)* , is exemplary of the approach taken toward tape recordings in most Federal Courts. In that case, the defendant objected to the introduction of tape recordings on authenticity grounds. The Court looked to seven factors, but noted that not all had to be met in all cases, given the liberal admissibility standards of the Federal Rules. The Court held that the proponent was generally required to show that:

(1) the recording device was capable of recording the conversation;

(2) the operator was competent to operate the machine;

(3) the recording is a correct rendition of the occurrence;

(4) no changes, additions or deletions have been made;

(5) the recording has been preserved in a manner shown to the Court;

(6) the speakers are identified; and

(7) there was no impermissible inducement.

The Court in *Branch* found that there was sufficient evidence of authenticity where an agent described the implementation and operation of the wiretaps; described how the extracted tape recordings were prepared for trial; stated that he was familiar with the voices on the tapes and identified them; and stated that the recording machine was in good working order and that the tapes had not been altered.

We think the Court in *Branch* did an effective job of attending to the generally liberal standards of *Rule 901* while remaining cognizant of the problems of fabrication and alteration that arise with respect to tape recordings. n4 Although this approach may seem at odds with the minimal conditional relevancy standard expressed in *Rule 901*, we think that *Rule 901*, together with *Rule 403*, can be read to allow the Judge to give more scrutiny to questions of authenticity and reliability on a case-by-case basis. Courts that do not require, for example, at least some showing that the tape is unaltered, and that the machinery was in working order, are leaving too much to the jury, often at the expense of a criminal defendant. n5 We note that some Courts are so concerned about the risks of alteration of tape recordings, and the impact of such recordings on the jury, that they have required clear and convincing evidence of authenticity of tape recordings before they can be considered by the jury. n6

[5] The Requirement of Admissible Evidence

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must be admissible and it must actually be placed before the jury if the Judge admits the evidence. Otherwise the evidence will not be relevant. This means that the Judge's role when an authentication issue arises differs from the Judge's role when other issues arise involving the admissibility of evidence.

For example, a Judge may consider inadmissible evidence in deciding such matters as whether a coconspirator's statement is admissible -- as in *Bourjaily v. United States, 483 U.S. 171 (1987)* -- and, once the decision is made that the statement is admissible, the jury does not reconsider that decision and need not be informed of the evidentiary basis for it. This is but one illustration of the principle that a Trial Judge who is called upon to decide whether a variety of evidence standards have been satisfied often is a factfinder for evidence purposes. When the Judge assumes this role, the evidence relevant to the admissibility decision is that which is before the Judge, but may be different evidence from that which goes to the jury.

However, when authentication evidence is offered, a jury must be provided sufficient evidence for it to find that it is what the proponent claims or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.

This point is well illustrated by *United States v. Branch, 970 F.2d 1368 (4th Cir. 1992)* , discussed in the preceding section. Branch challenged the authenticity of wiretap recordings. The Trial Court conducted an *in camera* hearing to address the question of authenticity. The Judge heard witnesses, and ultimately determined that there was sufficient evidence of authenticity.

During the trial, the prosecution called Agent Thompson, the FBI supervisor of the wiretap operations as a witness to identify many of the voices in the recorded conversations and to explain how he prepared extracts from the original tape recordings. The prosecution also called a coconspirator, who had participated in many of the conversations, to testify to the accuracy of the recordings and to identify additional voices. The prosecution's third authentication witness was a detective who participated in the investigation and prepared transcripts of the tapes. He also identified voices on the tapes. The prosecution chose not to present before the jury testimony from the agents who had monitored the tapes and who testified at the *in camera* hearing. Branch argued that the District Judge had erred in hearing evidence at the *in camera* hearing and relying upon it when that evidence was never offered to the jury.

The Court of Appeals noted that because the jury must make the ultimate decision whether the evidence is what its proponent claims, "[a]n *in camera* hearing addressing authenticity does not replace the presentation of authenticating evidence before the jury; the district court must revisit this issue at trial." Thus, the Court observed that, even though the District Court might have been persuaded during the *in camera* proceeding that the prosecution had sufficient evidence to support a finding that a tape recording was authentic, the prosecution was obliged to present sufficient evidence again, to the jury, before the tape recording could properly be admitted.

Luckily for the government, on the facts of the *Branch* case, the Court of Appeals held that the prosecution had offered sufficient evidence at trial for a jury to find that the tapes were what the prosecution claimed: tapes of Branch and coconspirators involved in illegal activity. Accordingly, even though the prosecution might have chosen to offer more evidence in the hearing before the Judge alone, it was not required to offer the same evidence before the jury provided that the evidence it did offer was sufficient for authentication purposes.

[6] *In Camera* Proceedings

The Trial Judge in *Branch* made the choice to have an *in camera* hearing with respect to the sufficiency of the prosecution's foundation evidence. The Court of Appeals noted that such a hearing might be useful in dealing with tape recordings because the Judge often will be required to rule on hearsay objections to coconspirator statements in addition to determining the adequacy of authentication. The Court specifically stated, however, that it was not requiring pretrial hearings. It said that it did "not intend to suggest that *in camera* authentication is required in circumstances beyond those mandated by *Rule 104(c)*," and that it "merely recognize[d] that it is not improper to conduct a preliminary investigation into such matters outside of the presence of the jury."

In most cases, the relatively slight burden of establishing authenticity or identification will not justify the time required for an *in camera* hearing. Trial Judges have discretion, however, to hold such hearings regarding authentication when they believe that the hearings will enable the Judge to rule on matters so as to protect the jury from hearing prejudicial information that might not be admissible or to enable the Judge to rule on matters reserved for the Court rather than the jury.

The *in camera* proceeding is one in which the Trial Judge requires or permits a party to set forth the evidence it will rely upon for authentication purposes. When it is utilized, *Branch* serves as a reminder that the party offering evidence must repeat enough of the *in camera* evidence or offer other evidence in the presence of the jury to permit the jury to make a final decision as to whether evidence is what the proponent claims. The most elaborate presentation to a Trial Judge in an *in camera* hearing will not excuse the party who offers evidence from laying an appropriate foundation before the jury.

[7] Conditional Rulings

In most cases it is unlikely that Trial Judges will hold *in camera* hearings on all authentication issues. Indeed, it is common for a Trial Judge to permit a party to introduce evidence with a promise that the party subsequently will authenticate the evidence previously introduced. Some Courts refer to this as "conditional admission" (i.e., the evidence is admitted on the condition that the requisite foundation is subsequently laid). Other Courts refer to this as "admission subject to connection" (evidence is admitted subject to a connection later provided by foundation evidence). The terms differ, but the result is the same. At some point a party must authenticate the evidence it offers, provided that the other side insists upon it. In *Huddleston v. United States, 485 U.S. 681, 690 n.7 (1988)* , the Supreme Court recognized that "[i]t is, of course, not the responsibility of the judge *sua sponte* to insure that the foundation evidence is offered; the objector must move to strike evidence if at the close of the trial the offeror has failed to satisfy the condition."

[8] The Requirement of Proof

The requirement for authenticating evidence is not burdensome, but it usually means that foundational evidence must be presented. Courts will not assume that evidence is what the proponent claims simply because on the face of the evidence it is possible that it might be.

A case in point is *United States v. Skipper, 74 F.3d 608 (5th Cir. 1996)* . Skipper was charged with and convicted for possession of crack cocaine with intent to distribute. At trial, the prosecution introduced evidence under *Rule 404(b)* of two other State Court convictions for crimes allegedly committed by Skipper. Government Exhibit No. 3 was a certified copy of a judgment against "John Derrick Skipper" indicating that the defendant in that case had pleaded guilty to possession of a controlled substance. An expert testified that the fingerprints on this conviction matched Skipper's fingerprints. Government Exhibit No. 2 was a certified copy of a deferred adjudication order indicating that "John D. Skipper" was placed on ten-year probation for possession of a controlled substance. However, Exhibit No. 2 bore no fingerprints and the government did not otherwise identify Skipper as the person named in the order.

The Court of Appeals held that the Trial Judge erred in admitting Exhibit No. 2 because the prosecution failed to produce evidence proving that the defendant was the actual "John D. Skipper" named in the deferred adjudication order. The Court held "that the mere similarity in name between a criminal defendant and a person named in a prior conviction alone does not satisfy *Rule 901*'s identification requirement."

A similar case is *United States v. Dockins, 986 F.2d 888 (5th Cir. 1993)* . Dockins was charged and convicted in Federal Court in Mississippi with being a felon in possession of a firearm. The prosecution needed to prove that Dockins had previously been convicted of a felony as an element of its case. It offered evidence of a fingerprint card and police record sheet reflecting the arrest and conviction in Denver, Colorado. The Court of Appeals held that the

Denver police department documents did not qualify as self-authenticating under *Rule 902* because they were not provided under seal and there was no certification under seal that the documents were genuine. The Court also held that the basic requirements of authentication were not satisfied because the Mississippi agents who testified merely said that the documents had been prepared by the Denver police and that the signature and fingerprints on the Denver documents matched those of Dockins. But no witness testified that the Denver police had actually provided the documents, which would have qualified the documents for admission as public records kept in a public office. Because there was no evidence that the documents came from the Denver police, the jury could not find that they originated there. Thus, admission of the documents was error, although harmless. n7

The lesson of *Skipper* and *Dockins* is that proof is required to authenticate evidence, unless it falls within one of the categories of self-authenticating materials covered by *Rule 902*. It is not enough for a party to show that evidence *might* be what it is purported to be. Rather, the party offering evidence must demonstrate an evidentiary basis for the jury to find that it is what the proponent claims.

[9] Ten Basic Principles of Authentication

The cases decided under *Rule 901* suggest ten basic principles of authentication that trial lawyers and Trial Judges should keep in mind.

(1) In civil cases, authentication and identification issues often will be resolved by requests for admission or by the fact that the evidence is produced in discovery. n8 In criminal cases, there are no requests for admission and production in discovery is so limited that it is not nearly as likely to eliminate authentication issues at trial.

(2) There is a basic distinction between authentication and believability. Evidence need not be totally credible to be admissible in a jury trial. The fact that a jury might disbelieve it or probably will disbelieve it does not mean it cannot be authenticated.

(3) There is a basic distinction between sufficiency for purposes of authentication and sufficiency for purposes of withstanding a motion for judgment. Evidence is sufficient for authentication purposes if the foundation for particular evidence warrants the trier of fact in finding that it is what the proponent claims, though in some situations, as discussed above, the Court has the discretion to require a stronger showing. Evidence is sufficient for purposes of withstanding a motion for judgment if taken as a whole it is enough to meet the burden of persuasion imposed by the law (e.g., the beyond a reasonable doubt burden imposed upon the prosecution to prove the requisite elements of crimes charged).

(4) There may be a different standard of persuasion for authentication and for the merits. A prosecutor, for example, generally need only demonstrate that a jury could find by a preponderance of the evidence that an exhibit is authentic, even though the prosecutor must prove guilt beyond a reasonable doubt. A defendant in a criminal case may have no burden of persuasion at all, but still must demonstrate that a jury could find by a preponderance of the evidence that an exhibit is what the defense claims it to be.

(5) The Trial Judge does not decide whether he or she believes authentication evidence. Instead, the Judge decides whether a reasonable jury could believe it.

(6) There are many ways to authenticate evidence. The fact that a party cannot lay a foundation one way does not prohibit that party from finding another way to prove authenticity.

(7) To satisfy the authentication requirement, a party must have admissible evidence and that evidence must be placed before a jury, not just before the Judge. Thus, if a Judge holds an *in camera* hearing on disputed evidence and rules that it is admissible, a party offering evidence must be certain to put sufficient authentication evidence before the jury and not be content to rely upon the fact that the Judge heard it at a hearing.

(8) When a Judge admits evidence conditionally or subject to connection, the objecting party must move to strike the evidence if at the close of trial the offeror has failed to satisfy the requisite condition or make the required connection.

(9) Courts generally will not assume that evidence is what its proponent claims. They will require proof of authentication, unless the evidence falls in one of the categories of self-authenticating evidence under *Rule 902*.

(10) Evidence that is authenticated is potentially admissible but not immune from attack. The fact that a party has lost an objection to evidence on authenticity grounds does not mean that the party may not attack the evidence on grounds of relevance, prejudice, or hearsay. Moreover, the opponent can attack the weight of the evidence after it is admitted.

[10] Chain of Custody

In criminal cases a question of authenticity arises if something is seized from the defendant and then introduced at trial, and the defendant disputes that it is his or argues that the thing has been altered in some way. One way for the prosecution to authenticate the evidence in these circumstances is to establish a chain of custody. (Of course, a chain of custody can establish authenticity in civil cases as well, though it happens far less frequently.) Most Courts have been very permissive in determining whether the government has established a sufficient chain of custody. n9 The standard line is that gaps in the chain of custody go to weight and not admissibility. n10 Moreover, if evidence is in official custody at all times, there is a presumption that it has been handled properly and not altered or fabricated. n11

In our view, the strictness with which a chain of custody requirement is applied should depend on the importance of the evidence, the likelihood that it can be changed, and the extent to which its probative value depends on its unchanged condition. A unitary, conditional relevance approach is not appropriate because the Trial Court must also be concerned with prejudice and unreliability of evidence under *Rule 403*. So, for example, in the usual drug case, the most important chain of custody is the one from the original seizure of the evidence to the analysis of the substance. Given the fungibility of drugs, it is essential to make a connection between the substance seized from the defendant and the substance actually tested. We think that any substantial gap in this chain of custody or any indication of alteration should be treated as fatal, because otherwise there is an unacceptable risk that the test does not reflect the contents of the substance seized. n12 A gap in the chain occurring after testing can be treated much more permissively, given the admissibility of the test itself and the fact that the only purpose for introducing the substance in Court is to illustrate the testimony of government witnesses. n13 This function could be performed by any package wrapped identically to that originally found by the officer. n14 Thus, an intact chain of custody after testing is not essential.

Moreover, the degree of proof necessary to support a chain of custody will also properly depend on the nature of the evidence proffered. If the evidence is unique and resistant to change (e.g., an ancient pearl-handled scimitar), then the chain of custody is relatively unimportant. n15 On the other hand, "if the evidence is open to alteration or tampering, or is not readily identifiable, the trial court requires a more elaborate chain of custody to establish that the evidence has not been tampered with or altered." n16

[11] Illustrations

Subdivision (b) of *Rule 901* contains ten illustrations of ways of authenticating evidence. It is plain that these are only illustrative; they are not limitations on the ways authentication can be accomplished. These examples are considered seriatim below.

(1) Testimony of a witness who has personal knowledge as to a piece of evidence is a classic way of authenticating the evidence. Someone who is an eyewitness to the signing of a document may authenticate the document, for example.

(2) A lay person can identify handwriting based upon familiarity with the handwriting, as long as the familiarity was not

acquired solely for purposes of the litigation in which the testimony is offered. n17

(3) Handwriting, fingerprints, blood, hair, clothing fibers, and numerous other things can be authenticated by comparison with specimens that have been authenticated. Sometimes the comparison can be done by the trier of fact; at other times, an expert witness will be required, especially when scientific knowledge is needed to make a valid examination of the samples. Although the Rule does not retain the common-law requirement that the exemplar's genuineness be established to the Court's satisfaction, the Trial Judge still has discretion under *Rule 403* to exclude specimens when questions as to their authenticity will be confusing and excessively time-consuming.

(4) Sometimes the characteristics of an item will themselves serve to authenticate the item. A letter may be authenticated, for example, by content and the circumstances indicating it was a reply to a duly authenticated letter. n18

An interesting example of circumstantial proof of authenticity is found in *United States v. McGlory, 968 F.2d 309 (3d Cir. 1992)* , a drug conspiracy case, where the government sought to admit notes indicative of drug activity against the defendant. The government relied on the following circumstances to establish that the notes were McGlory's: (1) the notes were seized from the trash outside McGlory's residence during the course of the conspiracy; (2) they were torn from a notebook found inside McGlory's house; (3) they were contained in the same trash bag as other papers clearly identified with McGlory; (4) the government's handwriting expert testified that the handwriting on the notes was similar to McGlory's, although he could not be conclusive; and (5) the notes were similar in form and contained similar information as that found in the books and ledgers in McGlory's home. The Court found that all this together was sufficient circumstantial evidence upon which a juror could find that the notes were McGlory's. n19

(5) One who is familiar with the voice of another may authenticate a conversation or identify the speaker on a tape or other recording. n20

However, if the tape or recording is offered for its truth, hearsay problems still will exist and must be solved following the satisfaction of the authentication requirement. n21

Best evidence problems may likewise exist, and they too must be addressed. Authentication is thus just one hurdle among several to admissibility. Note that the person making the identification may have become familiar with the voice for purposes of litigation, something not allowed in connection with handwriting.

(6) A speaker in a conversation may be identified other than by voice identification. For example, a telephone conversation might be authenticated in the case of a business by showing that a call was made to the number assigned to a business by the telephone company, that someone answered the phone purporting to represent the business, and that the conversation related to business reasonably transacted over the telephone. In the case of an individual, the fact that the number was assigned to the individual and that the person talking on the phone identified himself as being a certain person may be enough to authenticate the conversation, but, as discussed above, the Rule appears to require something more, and as discussed previously most Courts have required some circumstantial evidence in addition to self-identification.

(7) Public records are usually authenticated by proof of custody. n22 This illustration extends the traditional thinking to cover data stored by the government in computers.

(8) A document can be authenticated as an ancient document if evidence is presented that it is in such condition as to create no suspicion concerning its authenticity, is in a place where it would likely be if it were authentic, and has been in existence twenty years or more at the time it is offered. n23

(9) Authentication may be accomplished by showing that a process or system produces an accurate result when it is employed. In order to introduce an X-ray, for instance, it may be necessary to demonstrate that the X-ray machine is

accurate. Judicial notice may sometimes solve the problem here. Judges must be careful to differentiate, however, between authentication of a process generally and a showing that a particular machine works as intended.

(10) Any method of authentication or identification provided by an Act of Congress or by Rules prescribed by the Supreme Court shall be valid to authenticate. This is included to ensure that no one interprets the Rules of Evidence as superseding statutes or the established Civil and Criminal Rules of Procedure or Bankruptcy Rules. Because subdivision (b) offers illustrations, it is arguable that some of its stated limitations -- e.g., that the person identifying handwriting have been familiar with the writing prior to the litigation -- are hortatory only and need not be honored. Whether they are binding or not, most Courts are following the limitations and seem to appreciate the guidance provided by the Rule.

[12] Authentication of Internet Evidence, Email, Etc.

The following is an excerpt from Gregory P. Joseph's article, *Internet and email Evidence* (2005). Mr. Joseph is the former Chair of the ABA Section of Litigation, and a former member of the Advisory Committee on Evidence Rules. His article provides important guidance on the authentication issues that arise with this electronic evidence. The entire article (covering hearsay questions as well) is set forth in Part Four of this Treatise.

> The explosive growth of the Internet and burgeoning use of electronic mail are raising a series of novel evidentiary issues. The applicable legal principles are familiar -- this evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns. The novelty of the evidentiary issues arises out of the novelty of the media -- thus, it is essentially factual. These issues can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.
>
> **I. Internet Evidence**
>
> There are primarily three forms of Internet data that are offered into evidence -- (1) data posted on the website by the owner of the site ("website data"); (2) data posted by others with the owner's consent (a chat room is a convenient example); and (3) data posted by others without the owner's consent ("hacker" material). The wrinkle for authenticity purposes is that, because Internet data is electronic, it can be manipulated and offered into evidence in a distorted form. Additionally, various hearsay concerns are implicated, depending on the purpose for which the proffer is made.
>
> **A. Authentication**
>
> **Website Data.** Corporations, government offices, individuals, educational institutions and innumerable other entities post information on their websites that may be relevant to matters in litigation. Alternatively, the fact that the information appears on the website may be the relevant point. Accordingly, courts routinely face proffers of data (text or images) allegedly drawn from websites. The proffered evidence must be authenticated in all cases, and, depending on the use for which the offer is made, hearsay concerns may be implicated.
>
> The authentication standard is no different for website data or chat room evidence than for any other. Under *Rule 901(a)*, "The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Simpson, 152 F.3d 1241, 1249 (10th Cir. 1998)* ; *Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001)* .
>
> In applying this rule to website evidence, there are three questions that must be answered, explicitly or implicitly:
>
> 1. What was actually on the website?

2. Does the exhibit or testimony accurately reflect it?

3. If so, is it attributable to the owner of the site?

In the first instance, authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with *www*); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw. n24 This last testimony is no different than that required to authenticate a photograph, other replica or demonstrative exhibit. n25 The witness may be lying or mistaken, but that is true of all testimony and a principal reason for cross-examination. Unless the opponent of the evidence raises a genuine issue as to trustworthiness, testimony of this sort is sufficient to satisfy *Rule 901(a)*, presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a web site (other than chat room conversations) was placed there by the owner of the site.

The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site. First, even if the proffer fairly reflects what was on the site, the data proffered may have been the product of manipulation by hackers (uninvited third parties). n26 Second, the proffer may not fairly reflect what was on the site due to modification -- intentional or unintentional, material or immaterial -- in the proffered exhibit or testimony.

Detecting modifications of electronic evidence can be very difficult, if not impossible. That does not mean, however, that nothing is admissible because everything is subject to distortion. The same is true of many kinds of evidence, from testimony to photographs to digital images, but that does not render everything inadmissible. It merely accentuates the need for the judge to focus on all relevant circumstances in assessing admissibility under *Fed.R.Evid. 104(a)*

n27-- and to leave the rest to the jury, under *Rule 104(b)*. n28

In considering whether the opponent has raised a genuine issue as to trustworthiness, and whether the proponent has satisfied it, the court will look at the totality of the circumstances, including, for example:

- The length of time the data was posted on the site.
- Whether others report having seen it.
- Whether it remains on the website for the court to verify.
- Whether the data is of a type ordinarily posted on that website or websites of similar entities (*e.g.*, financial information from corporations).
- Whether the owner of the site has elsewhere published the same data, in whole or in part.
- Whether others have published the same data, in whole or in part.
- Whether the data has been republished by others who identify the source of the data as the website in question.

A genuine question as to trustworthiness may be established circumstantially. For example, more by way of authentication may be reasonably required of a proponent of Internet evidence who is known to be a skilled computer user and who is suspected of possibly having modified the proffered website data for purposes of creating false evidence. n29

In assessing the authenticity of website data, important evidence is normally available from the personnel managing the website ("webmaster" personnel). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server. It is possible that the content provider -- the author of the material appearing on the site that is in issue -- will be someone other than the person who installed the file on the web. In that event, this second witness (or set of documentation) may be necessary to reasonably ensure that the content which appeared on the site is the same as that proffered.

Self-Authentication. Government offices publish an abundance of reports, press releases and other information on their official web sites. Internet publication of a governmental document on an official website constitutes an "official publication" within *Federal Rule of Evidence 902(5)*. n30 Under *Rule 902(5)*, official publications of government offices are self-authenticating. n31

Chat Room Evidence. A proffer of chat room postings generally implicates the same authenticity issues discussed above in connection with web site data, but with a twist. While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence. By definition, chat room postings are made by third parties, not the owner of the site. Further, chat room participants usually use screen names (pseudonyms) rather than their real names.

Since chat room evidence is often of interest only to the extent that the third party who left a salient posting can be identified, the unique evidentiary issue concerns the type and quantum of evidence necessary to make that identification -- or to permit the finder of fact to do so. Evidence sufficient to attribute a chat room posting to a particular individual may include, for example:

- Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question).

- Evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up.

- Evidence that the person using the screen name identified him- or herself as the individual (in chat room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.

- Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).

- Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

See generally United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000) ; *United States v. Simpson, 152 F.3d 1241, 1249-50 (10th Cir. 1998)* ; *Perfect 10, Inc. v. Cybernet Ventures, Inc, 213 F.*

Supp. 2d 1146, 1154 (C.D. Cal. 2002) .

* * *

II. Email Evidence

The authenticity of email evidence is governed by *Federal Rule of Evidence 901(a)*, which requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." Under *Fed.R.Evid. 901(b)(4)*, email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See generally United States v. Siddiqui, 215 F.3d 1318, 1322 (11th Cir. 2000)* ; *Bloom v. Comw. of Virginia, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001)* .

If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity. n32 Authenticity may also be established by testimony of a witness who sent or received the emails -- in essence, that the emails are the personal correspondence of the witness. n33

It is important, for authentication purposes, that email generated by a business or other entity on its face generally reflects the identity of the organization. The name of the organization, usually in some abbreviated form, ordinarily appears in the email address of the sender (after the @ symbol). This mark of origin has been held to self-authenticate the email as having been sent by the organization, under *Fed.R.Evid. 902(7)*, which provides for self-authentication of: "*Trade inscriptions and the like*.--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." *See Superhighway Consulting, Inc. v. Techwave, Inc., 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999)* . Where the email reflects the entire email name of a party (and not just the mark of origin), it has been held to comprise a party admission of origin. n34

Independently, circumstantial indicia that may suffice to establish that proffered email were sent, or were sent by a specific person, include evidence that:

- A witness or entity received the email.
- The email bore the email address of a particular individual.
- This email contained the typewritten name or nickname of this individual in the body of the email. n35
- The email recited matters that would normally be known only to the individual who is alleged to have sent it (or to a discrete number of persons including this individual).
- Following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it, and the conversation reflected this individual's knowledge of the contents of the email.

See generally United States v. Siddiqui, 215 F.3d 1318, 1322-23 (11th Cir. 2000) ; *Bloom v. Comw. of Virginia, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001)* ; *Massimo v. State, 144 S.W.3d 210, 215-16 (Tex. App. 2004)* (unpublished opinion).

As with all other forms of authentication, the testimony of a witness with knowledge is prerequisite to authenticate email. It is insufficient to proffer email through a witness with no knowledge of the

transmissions at issue, unless the witness has sufficient technical knowledge of the process to be in a position to authenticate the email through expert testimony. *See, e.g.*, *Richard Howard, Inc. v. Hogg, 1996 Ohio App. LEXIS 5533 at *8 (Ohio App. Nov. 19, 1996)* (affirming exclusion of email where the authenticating witness "was neither the recipient nor the sender of the E-mail transmissions and he offered no other details establishing his personal knowledge that these messages were actually sent or received by the parties involved. Furthermore, the transmissions were not authenticated by any other means").

There are a variety of technical means by which email transmissions may be traced. *See, e.g.*, *Clement v. California Dep't of Corrections, 2002 U.S. Dist. LEXIS 17426 at *32 (N.D. Cal. Sept. 9, 2002)* ("major e-mail providers include a coded Internet Protocol address (IP address) in the header of every e-mail ... . The IP address allows the recipient of an e-mail to identify the sender by contacting the service provider"). Therefore, if serious authentication issues arise, a technical witness may be of assistance. n36 This may become important, for example, in circumstances where a person or entity denies receipt of an email and has not engaged in conduct that furnishes circumstantial evidence of receipt (such as a subsequent communication reflecting knowledge of the contents of the email). *See, e.g. Ellison v. Robertson, 189 F.Supp.2d 1051, 1057 n.7 (C.D. Cal. 2002)* ("Plaintiff has provided no evidence that AOL actually did receive the email. To the contrary, Plaintiff's former counsel states that while she received an acknowledgment of receipt for her April 17, 2000, email from [a local Internet provider], no such acknowledgment came from AOL"); *Carafano v. Metrosplash.com, Inc., 207 F.Supp.2d 1055, 1072 (C.D. Cal. 2002)* ("Plaintiff provides no evidence that [defendant Internet service] ever received the reply email in response to its welcome confirmation email").

* * *

FOOTNOTES:

(n1)Footnote 1. See e.g., *United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997)* ("*Rule 901* requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence.").

(n2)Footnote 2. See, e.g., *United States v. Kingston, 971 F.2d 481 (10th Cir. 1992)* (the Court noted that there is a split in the Circuits as to whether self-identification alone is sufficient to establish the identity of a party to a telephone conversation where that party is called at a place where he or she could reasonably be expected to be reached; citing cases, the Court states that the Seventh Circuit has required additional circumstantial evidence that shows the person answering to be the person called -- for example, that the person subsequently acted in accordance with directions given over the telephone; the Fifth Circuit follows the Seventh; the Second Circuit has held self-identification to be enough; the Court did not find it necessary to resolve the issue, because there was sufficient circumstantial evidence provided in this case).

(n3)Footnote 3. See, e.g., *United States v. Citro, 938 F.2d 1431 (1st Cir. 1991)* (there was no error in excluding an answering machine taped message offered by a defendant to impeach a conspirator on cross-examination; at a hearing *in camera* the witness specifically denied the communication, and at trial the defendant, who said she heard the message being recorded and recognized the witness' voice, only said the tape looked like a tape her sister had removed from the answering machine and she had given to defense counsel; that testimony might have sufficed to authenticate the tape, but there was no abuse of discretion in excluding it as suspect under *Rule 403*).

See also *United States v. Jackson, 208 F.3d 633 (7th Cir. 2000)* (the defendant proffered web postings as proof of some statements made by a white supremacist group; the Court found no error in excluding these postings for failure to establish a foundation of authenticity; the defendant failed to address the possibility that the postings may have been made by hackers, including the defendant, who was a skilled computer user). *Jackson* is an example of a Court requiring more that a *prima facie* showing of authenticity due to concerns about fabrication. Certainly, the fact that the

posting was on the group's web page could lead a reasonable jury to believe that the posting was by the group that maintained the page. However, because of the possibility of hacking in the particular circumstances of the case, the Court required a stronger showing that the posting was what the defendant claimed it to be.

(n4)Footnote 4. See also *United States v. Brown, 136 F.3d 1176 (7th Cir. 1998)* (tape of surreptitiously recorded transactions was properly authenticated by the following: (1) the confidential informant testified that the transactions recorded on the tape actually occurred; (2) the CI testified that the speakers on the tape were himself and the defendants; (3) the CI testified that the tapes were in the same condition as when he last saw them; and (4) the agent who monitored the taped conversations testified that he listened to the conversations during each transaction and that he personally observed one transaction); *United States v. Buchanan, 70 F.3d 818 (5th Cir. 1995)* (in order to authenticate a tape recording, the government has the burden of establishing that the recording is "an accurate reproduction of relevant sounds previously audited by a witness"; generally, this requires the government to demonstrate (1) the operator's competency, (2) the fidelity of the recording equipment, (3) the absence of material alterations, and (4) the identification of relevant sounds or voices); *United States v. Biggins, 551 F.2d 64 (5th Cir. 1977)* (observing that the government in a criminal case has a heavier burden of justifying the introduction of a tape recording than a criminal defendant; "[t]his burden properly falls to the government because it has access to such information in a way the criminal defendant does not").

(n5)Footnote 5. See, e.g., *United States v. Jewel, 947 F.2d 224 (7th Cir. 1991)* (general testimony by a participant in a taped discussion, to the effect that the tape accurately reflected the discussion, was held sufficient to authenticate the tape).

(n6)Footnote 6. See, e.g., *United States v. Ruggiero, 928 F.2d 1289 (2d Cir. 1991)* (clear and convincing evidence of authenticity and accuracy is required); *United States v. Faurote, 749 F.2d 40 (7th Cir. 1984)* ("It is a well-settled principle of law that the party attempting to admit a tape recording into evidence must prove, by clear and convincing evidence, that the tape is a true, accurate, and authentic recording of the conversation, at a given time, between the parties involved."). We also note, however, that application of a clear and convincing standard to a question of admissibility is inconsistent with the Supreme Court's application of a preponderance standard as to competency questions in *Bourjaily v. United States, 483 U.S. 171 (1987)* .

(n7)Footnote 7. Compare *United States v. Jimenez Lopez, 873 F.2d 769 (5th Cir. 1989)* (a judgment of conviction was properly authenticated where a witness testified that he personally requested the document and received it from a Border Patrol agent who procured it from a Magistrate's Court).

(n8)Footnote 8. See, e.g., *Chavez v. Thomas & Betts Corp., 396 F.3d 1088 (10th Cir. 2005)* (documents were authenticated by the fact that they were produced by the defendant on its letterhead during discovery); *Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004)* (documents were properly authenticated by a witness who testified that they were produced by the defendants in response to a discovery request).

(n9)Footnote 9. See, e.g., *United States v. Dent, 149 F.3d 180 (3d Cir. 1998)* (prosecution sufficiently established a chain of custody for seized drugs, despite the fact that there was a tear in the plastic bag holding the drugs that was not present when the drugs were tested and weighed); *United States v. Miller, 994 F.2d 441 (8th Cir. 1993)* (a one-year gap in the chain of custody for contraband goes to the weight and not the admissibility of the evidence; there was no showing of bad faith on the part of government officials, who are entitled to a presumption that they did not alter the proffered evidence).

(n10)Footnote 10. See, e.g., *United States v. Scharon, 187 F.3d 17 (1st Cir. 1999)* (break in the chain of custody respecting a suitcase containing drugs "factors into the weight given to the evidence rather than its admissibility"); *United States v. Hon, 904 F.2d 803 (2d Cir. 1990)* (the defendant pointed to defects in the chain of custody including an incorrectly labeled evidence bag, a bag carried by a witness who did not testify, bags that were left open for a couple of months, and a lack of written records; the Court concluded that these deficiencies went to weight and not admissibility);

United States v. Shaw, 920 F.2d 1225 (5th Cir. 1991) (no abuse of discretion to admit contraband evidence against the defendant, even though the custodian of the search team could not remember who delivered the contraband for analysis or whether it was delivered by hand or placed in the analyst's night deposit box; there was sufficient evidence to support a finding that the drugs introduced at trial were the drugs found in the defendant's motel room, and any gaps or deficiencies went to weight and not admissibility); *United States v. Roberson, 897 F.2d 1092 (11th Cir. 1990)* (gaps in the chain of custody go to weight and not admissibility).

(n11)Footnote 11. See, e.g., *United States v. Thomas, 294 F.3d 899 (7th Cir. 2002)* (tape recording properly authenticated as it was clear that the tape was in police custody at all times and this creates "a presumption that the tapes were handled properly").

(n12)Footnote 12. See, e.g., *United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989)* (there was insufficient authentication that a bag tested by a chemist came from the defendant's garage; the officer who seized property in the garage could not remember whether he seized a bag, and the bag was not mentioned on the inventory list of property seized from the garage).

(n13)Footnote 13. See, e.g., *United States v. Price, 265 F.3d 1097 (10th Cir. 2001)* (chain of custody attack concerning drugs after they were tested was "off-target because the actual drugs were never admitted into evidence").

(n14)Footnote 14. See, e.g., *United States v. Kelly, 14 F.3d 1169 (7th Cir. 1994)* (chain of custody was sufficiently established where seals on the evidence bags remained intact until broken by the chemist for laboratory analysis; subsequent loss of the evidence was not fatal because "the government is not required to introduce narcotics in evidence in order to obtain a narcotics conviction").

(n15)Footnote 15. See, e.g., *United States v. Thomas, 987 F.2d 1298 (7th Cir. 1993)* : At trial, the officer testified that he found a shotgun at the defendant's premises. He identified a picture of the shotgun, and described the gun by brand, gauge, length of barrel, and cut-back stock. He identified the government's exhibit by the same brand, length of barrel, gauge, and cut-back stock. But he was never specifically asked, and did not state, whether the government exhibit was in fact the shotgun that he found at the defendant's premises. The Court held that this was not fatal to proper authentication of the shotgun under *Rule 901*. The Court reasoned that the similarities noted between the shotgun described by the officer and the gun introduced at trial were "striking" and that the jury was able to compare the gun to a picture of the shotgun identified by the officer.

See also *United States v. Humphrey, 208 F.3d 1190 (10th Cir. 2000)* (gap in chain of custody of several weeks did not render documents inadmissible, because the documents were not "fungible evidence, such as drugs or cash, where absent a reliable chain of custody there would be a relatively high risk that the original item had been contaminated or tampered with").

(n16)Footnote 16. *United States v. Clonts, 966 F.2d 1366 (10th Cir. 1992)* .

(n17)Footnote 17. See, e.g., *United States v. Whittington, 783 F.2d 1210, 1215 (5th Cir. 1986)* ("A signature may be identified by testimony of a person familiar with the signature. It is not essential that the witness have been present when the signature was executed.").

(n18)Footnote 18. See, e.g., *United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997)* (notes concerning a marijuana operation were properly authenticated as belonging to the defendant: "The written materials were found in an isolated and remote area where law enforcement agents observed no one other than Harvey. The materials were within Harvey's campsite; indeed, they were next to Harvey's own bed. The writings also make numerous references to Harvey's beloved dog, Drigo. These distinctive characteristics and circumstances are sufficient to support a finding that the materials were written by Harvey."); *United States v. Jones, 107 F.3d 1147 (6th Cir. 1997)* (in a prosecution for credit card fraud, the government offered a card purportedly signed by the defendant and sent to the father of the defendant's son-in-law; the recipient testified that he did not know the defendant's handwriting, but that the card was signed in the defendant's name

and the card contained references to the recipient's family "that no one else could have written"; this was sufficient authentication); *United States v. Collado, 957 F.2d 38 (1st Cir. 1992)* (circumstantial evidence indicated that the bag of powder dropped by the defendant while attempting to elude arrest was the bag that was introduced against him at trial).

(n19)Footnote 19. See also *United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991)* : The government offered a note, purportedly written by McMahon, which indicated that he was participating in an act of extortion at a county planning board meeting. McMahon argued that the note was not admissible because there was no testimony from any witness that the handwriting was McMahon's. The Court concluded that testimony as to handwriting is only one means by which a document may be authenticated; under *Federal Rule 901(b)(4)*, a document can be authenticated through circumstantial evidence alone. In this case, there was sufficient circumstantial evidence to support a finding that McMahon was the author of the note: McMahon was seen passing the note at the county planning board meeting; the note was written in the first person, "suggesting in the absence of a signature that the passer of the note was the author"; the note repeated nearly verbatim the conversation between McMahon and the person to whom the note was passed, which conversation was overheard only moments earlier by another board member; and the person to whom the note was passed was hard of hearing, "so there was some basis for thinking that the conversation needed repeating."

(n20)Footnote 20. See, e.g., *United States v. Bush, 405 F.3d 909 (10th Cir. 2005)* (no error to allow an undercover officer to testify as an authenticating witness that it was the defendant's voice in an incriminating conversation that was surreptitiously recorded and played at trial; the witness had sufficient familiarity with the defendant's voice as he had spoken to him in person and numerous times over the phone; voice identification "need only rise to the level of minimal familiarity" and once that standard has been satisfied, "it is for the jury to assess any issues regarding the extent of the witness's familiarity with the voice."); *United States v. Saulter, 60 F.3d 270 (7th Cir. 1995)* (no error in a government witness' identification of two coconspirators on a tape recording; the witness' familiarity with one of the coconspirators was limited to having purchased narcotics from him on two occasions, but "minimal familiarity is sufficient for admissibility purposes"); *United States v. Torres, 908 F.2d 1417 (9th Cir. 1990)* (a voice heard on tape recordings was sufficiently identified by testimony of a DEA agent that he had spoken with a defendant and recognized her voice on the tapes and by evidence that she was the only person at the location who responded to the name used on the tapes).

(n21)Footnote 21. See *United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997)* (admitting a tape recording as a party-admission requires proof by a preponderance of evidence that the defendant was the speaker on the tape; while authenticity is governed by *Rule 104(b)*, admissibility of hearsay is governed by *Rule 104(a)*).

(n22)Footnote 22. See, e.g., *Baulch v. Johns, 70 F.3d 813 (5th Cir. 1995)* (autopsy report was properly authenticated when it was turned over by the Chief of Police, one of the defendants, in response to the plaintiffs' subpoena duces tecum); *United States v. Blackwood, 878 F.2d 1200 (9th Cir. 1989)* (tax forms were properly authenticated because they were in the custody of the IRS).

(n23)Footnote 23. See, e.g., *United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986)* (Nazi SS card was properly authenticated by testimony that: it matched other authenticated Nazi personnel cards in form; it was found in Soviet Union archives, which were a depository for such documents; and its paper fiber was consistent with documents more than 20 years old).

(n24)Footnote 24. *See Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001) . See also Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002)* (admitting on a preliminary injunction motion copies of pages from defendant's and third party websites (as to the latter of which the furnished "webpages contain[ed] ... the internet domain address from which the image was printed and the date on which it was printed") because "the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are;" noting the "reduced evidentiary standard in preliminary injunction motions").

(n25)Footnote 25. *See, e.g., Actonet, Ltd. v. Allou Health & Beauty Care, 219 F.3d 836, 848 (8th Cir. 2000)*

("HTML codes may present visual depictions of evidence. We conclude, therefore, that HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes").

(n26)Footnote 26. *See, e.g., Wady v. Provident Life & Accident Ins. Co. of Am., 216 F. Supp. 2d 1060, 1064-1065 (C.D. Cal. 2002)* ("Defendants have objected on the grounds that [counsel] has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents" -- objections sustained).

(n27)Footnote 27. *Fed.R.Evid. 104(a)* provides that:

> *Questions of admissibility generally.* -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(n28)Footnote 28. *Fed.R.Evid. 104(b)* provides that:

> *Relevancy conditioned on fact.*-- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(n29)Footnote 29. *See, e.g., United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000)* ("Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailing actually were posted by the groups, as opposed to being slipped onto the groups' web sites by Jackson herself, who was a skilled computer user.").

(n30)Footnote 30. *Fed.R.Evid. 902(5)* provides that the following are self-authenticating: *Official publications.* -- Books, pamphlets, or other publications purporting to be issued by public authority.

(n31)Footnote 31. *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc., 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999)* ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under *Rule 902(5) of the Federal Rules of Evidence*"). *See also Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.R.D. 116, 121 (S.D.N.Y. 2000)* (discussed below; holding that prime rates published on the Federal Reserve Board website satisfy the hearsay exception of *Federal Rule of Evidence 803(17). But see State v. Davis, 141 Wash.2d 798, 854, 10 P.3d 977, 1010 (2000)* (no abuse of discretion in excluding, in death penalty case, defendant's proffer of state population statistics obtained from official state website; affirming exclusion on hearsay grounds but stating that "[a]n unauthenticated printout obtained from the Internet does not ... qualify as a self authenticating document under ER 902(e) [the Washington State equivalent of *Federal Rule of Evidence 902(5)*]"). There is reason to believe, however, that *Davis* may be limited to its facts. *See* State v. Rapose, 2004 WL 585856 [2004 Wash. App. LEXIS 560] at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion).

(n32)Footnote 32. *See, e.g., Superhighway Consulting, Inc. v. Techwave, Inc., 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999)* .

(n33)Footnote 33. *Tibbetts v. RadioShack Corp., 2004 U.S. Dist. LEXIS 19835, at *44 (N.D. Ill. Sept. 30, 2004)* .

(n34)Footnote 34. *Middlebrook v. Anderson, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005)* (jurisdictional motion).

(n35)Footnote 35. Thus, courts have looked at the "electronic 'signature' " at the end of the email message identifying the name and business affiliation of the sender. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d*

808, 821 (9th Cir. 2002) (held, email by one employee forwarded to party opponent by a fellow employee -- containing the electronic signature of the latter -- constitutes an admission of a party opponent and thus is not hearsay).

(n36)Footnote 36. Since authentication issues are decided by the court under *Federal Rule of Evidence 104(a)*, live testimony from such a witness is not essential; an affidavit or declaration may be equally effective.

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
CHAPTER 901 RULE 901

5-901 Federal Rules of Evidence Manual 901.03

901.03 Annotated Cases

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[1] Rule 901(a) -- General Provisions

[a] Rule 901(a) -- Altered Evidence

Siegal v. American Honda Motor Co., 921 F.2d 15 (1st Cir. 1990) : The Court affirmed a summary judgment for the defendant in a product liability action arising out of a motorcycle accident, holding the Trial Judge properly excluded the motorcycle's handlebar assembly upon finding it had been intentionally altered following the parties' inspection of it and while in the plaintiff's exclusive control. Once the assembly had been altered beyond restoration to its condition at the time of the accident, it was no longer probative evidence of the only defect alleged by the plaintiff.

[b] Rule 901(a) -- Beeper Charts

United States v. Alicea-Cardoza, 132 F.3d 1 (1st Cir. 1997) : At a narcotics conspiracy trial, the government introduced "beeper charts" -- a record of all calls made to a beeper of one of the coconspirators. Many of the calls were from "Burbuja," and independent evidence indicated that the defendant went by that name. The Court rejected, as having nothing to do with authenticity, the argument that the records were not sufficiently authenticated because there was no evidence, other than self-identification, that the defendant actually made any of the calls to the beeper. The charts purported only to record the messages that were received, and that was sufficiently established by testimony of an investigating officer, who stated that beeper charts are produced by a pen register, and are checked against a cloned beeper, i.e., a beeper identical to that to which the message is sent. Whether the "Burbuja" who sent the messages was the defendant "is a separate question not within the purview of *Rule 901*."

[c] Rule 901(a) -- Chain of Custody

[i] Rule 901(a) -- Chain of Custody -- Blood and Tissue

United States v. Ladd, 885 F.2d 954 (1st Cir. 1989) : The Court affirmed a conviction for distribution of heroin, holding that authenticity of blood and urine samples processed by a state laboratory was sufficiently established and stating that "some links in the chain were rusty, but none were missing." Missing links in the chain of samples submitted to a private lab made admission error, but the error was held harmless.

United States v. Mendel, 746 F.2d 155 (2d Cir. 1984) : The Court sustained a company's convictions for making false representations to the United States Department of Agriculture, as it found that the government satisfactorily authenticated certain blood samples that it introduced by conclusively establishing a chain of custody.

Ballou v. Henri Studios, Inc., 656 F.2d 1147 (5th Cir. 1981) : The Court said that exclusion of blood tests indicating that the automobile driver was intoxicated at the time of a collision was reversible error:

> [T]he question whether the proponent of evidence has proved an adequate chain of custody goes to the weight rather than the admissibility of the evidence, and is thus reserved for the jury ... . Likewise, the issue of alteration, contamination or adulteration of the evidence is a question for the jury *once the proponent of the evidence makes a threshold showing that reasonable precautions were taken against the risk of alteration, contamination or adulteration* (emphasis added).

Cooper v. Eagle River Mem. Hosp., 270 F.3d 456 (7th Cir. 2001) : Affirming a judgment for the hospital in a malpractice action on behalf of an infant who died eight months after his mother's treatment at the hospital, the Court found no error in the admission of a pathology slide containing tissue samples from the plaintiff's placenta. Although the plaintiff complained that there was no chain of custody shown, *Rule 901(a)* was satisfied by evidence that the reference number on the slide matched the specimen number contained in the plaintiff's pathology report. There was no evidence of misconduct by the hospital nor was there any evidence to suggest that the sample came from a source other than the plaintiff.

United States v. Vallie, 284 F.3d 917 (8th Cir. 2002) : The Court affirmed convictions for sexual abuse and incest on an Indian reservation, finding no error in the admission of DNA evidence obtained from items collected by the victim's sister. It concluded that the defendant failed to make a showing of bad faith, ill will, or tampering. In *Hoover v. Thompson*, n1 the Court affirmed a judgment for the defendant in a suit by a widow whose husband was killed in an auto accident, finding no error in the admission of a blood alcohol test showing that the husband's blood alcohol level was.11. Although the blood sample lacked a seal when it reached the state lab, the Court found that the testimony showed that the probability of tampering was low.

In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) : Affirming a judgment against the captain of an oil tanker that ran aground and caused massive pollution damage, the Court found no abuse of discretion in admitting evidence of intoxication based on blood samples taken 11 hours after the incident. The captain argued that a discrepancy between the evidence log and the lab notes regarding the color of stoppers on the tubes containing blood samples was fatal to admission, but the Court held that evidence regarding sealed tubes with the captain's name and social security number on them was good enough that reasonable jurors could conclude that the tubes contained the captain's blood.

[ii] Rule 901(a) -- Chain of Custody -- Drugs

United States v. Scharon, 187 F.3d 17 (1st Cir. 1999) : Reviewing under a plain error standard the defendant's

argument that there was a break in the chain of custody with respect to a suitcase seized from him that contained drugs, the Court in this drug and counterfeiting case stated that "[a] possible defect in the chain of custody for a certain piece of evidence factors into the weight given to the evidence rather than its admissibility." In *United States v. Abreu, 952 F.2d 1458 (1st Cir. 1992)* , the Court affirmed cocaine conspiracy and related firearms convictions, holding that distinguishing characteristics sufficiently identified a sawed-off shotgun and bags of cocaine, even though there were gaps in the chain of custody. In *United States v. Collado*, n2 the Court affirmed a conviction for possessing cocaine and heroin, holding that a plastic bag containing heroin and cocaine had been sufficiently connected with the defendant by a chain of custody and by testimony regarding its distinctively packaged and labeled contents.

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003) : In a crack cocaine prosecution, the government presented a videotape showing one defendant giving drugs to an informant. To establish authenticity, a DEA agent testified to surveilling the informant before and after the videotaped transaction, an agent testified as to DEA field testing and storage of the drugs, and a chemist testified as to laboratory testing. The Court found no abuse of discretion in a ruling that a proper chain of custody had been established. The fact that the informant delivered four rocks to the DEA, whereas the video showed the informant receiving five rocks, went to the weight of the evidence and not its admissibility. In *United States v. Grant, 967 F.2d 81 (2d Cir. 1992)* (per curiam), the Court held that a 14-day gap in the chain of custody between the time packages allegedly containing drugs were seized and the time they were analyzed did not make the chemist's testimony insufficient to support the defendant's drug importation conviction. The Court stated that because the drugs were not introduced at trial, there was no need to authenticate them; the chemist's testimony needed only to meet the *Rule 401* relevancy test of a "tendency" to make a material fact more or less probable.

United States v. Dent, 149 F.3d 180 (3d Cir. 1998) : The Court affirmed a conviction for conspiracy to distribute crack cocaine, holding the prosecution sufficiently established a chain of custody for seized drugs, despite a tear (which was not present when the drugs were tested and weighed) in the plastic bag holding the vials and minor variations in the witnesses' descriptions of the drugs.

United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982) : In a prosecution involving marijuana seized on the high seas, the Court commented that "the ultimate question is whether the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original item had been exchanged with another or otherwise tampered with." In *United States v. Arias*, n3 the Court held that a prosecution expert was properly permitted to rely on a sample pill sent to the expert by a DEA agent in Colombia "in a heat sealed container by diplomatic pouch with the agent's identification thereupon." The Court indicated that forensic scientists reasonably rely upon samples provided by field agents.

United States v. Dixon, 132 F.3d 192 (5th Cir. 1997) : Two government witnesses each testified that they delivered a particular bag of cocaine; one testified that the other's testimony was mistaken because the other had delivered the bag to him. The Court found no abuse of discretion in admitting the bag, even if the apparent contradiction between the witnesses did support an inference of a break in the chain of custody, since that simply goes to the weight of the evidence. In *United States v. Logan, 949 F.2d 1370 (5th Cir. 1991)* , the Court affirmed convictions for drug and firearms offenses, holding there was no abuse of discretion in admitting cocaine and a pistol that had been locked in the trunk of an officer's car for four days from the defendants' arrest until it was turned over for proper processing. The delay did not shatter irreparably the chain of custody, as only the officer had access to the trunk, and there was otherwise a *prima facie* showing of the authenticity of the evidence. In *United States v. Shaw*, n4 the Court affirmed a conviction for possession of methamphetamine with intent to distribute, holding there was no abuse of discretion in admitting the contraband evidence, even though the custodian of the search team could not remember whether he or another officer delivered it for analysis or whether it was hand-delivered or placed in the analyst's night deposit box, and

even though numerous chemists had access to the evidence in the course of analysis. There was sufficient evidence to conclude that the drug analyzed and introduced came from the defendant's motel room.

United States v. Kelly, 14 F.3d 1169 (7th Cir. 1994) : The Court held that the government's failure to explain the loss of seized narcotics did not require suppression of the seizing officer's testimony, as there is no need for a sample of the narcotics seized to be placed before the jury and there was no indication that the lost contraband was anything but what the chemical analysis indicated it to be. The Court noted, however, that explanations should be provided in case of loss, to protect the integrity of the criminal justice system. As to drugs that were introduced, the Court found a minimally sufficient chain of custody had been provided. In *United States v. Boykins, 9 F.3d 1278 (7th Cir. 1993)* , the Court affirmed drug and firearms convictions, holding there was no error in admitting two exhibits containing cocaine, where the officer who vouchered the evidence was unable to tell which exhibit had been recovered by one officer who retrieved it after it was discarded from a fleeing van and which had been found by another officer during a subsequent search of the van. Where both exhibits were safely in custody of the police department from the time of recovery to introduction at trial and they showed no evidence of any tampering, any gaps in the chain of custody went only to the weight of the evidence.

United States v. Pressley, 978 F.2d 1026 (8th Cir. 1992) : The defendant, convicted for possession of cocaine with intent to sell, asserted that there was no sufficient showing that the substances analyzed and admitted into evidence were the same as those seized, because the person who took the seized substances to a vault after a first prosecution ended in a mistrial was not produced by the government. Affirming, the Court held it was sufficient that the officer making the seizure had testified he marked the substances at that time and that the packages admitted still bore his marks, and that the chemist testified that the substances she tested had come from the same bags. Once the Trial Judge is satisfied that the relevant article has not, in all reasonable probability, been changed in any important respect, doubts about its identity go only to its weight. In *United States v. Houston*, n5 the Court held that a sufficient chain of custody for seized cocaine offered at trial had been established by evidence that a police officer delivered the exhibits and watched as they were transferred to new containers at the drug laboratory and that his handwriting appeared on the packaging of the exhibits, and by the testimony of a witness who accepted the exhibits at the laboratory, removed and transferred the cocaine from the original to the trial containers, and weighed and marked the exhibits.

United States v. Price, 265 F.3d 1097 (10th Cir. 2001) : Affirming narcotics-related convictions, the Court held there was no chain of custody problem because the actual drugs recovered were never admitted into evidence, and that, in any event, the government had established an adequate chain of custody of the drugs from the defendant's possession to the state bureau of investigation. In *United States v. Washington, 11 F.3d 1510 (10th Cir. 1993)* , the Court held there was no abuse of discretion in admitting cocaine purchased by an informant in a series of controlled buys. Even though the informant had at least one opportunity during the course of each transaction to tamper with the contraband, there was a reasonable probability that the cocaine base recovered had not been altered in any material respect, so any flaws in the chain of custody went to the weight of the evidence, not to its admissibility. In *United States v. Cardenas*, n6 the Court found that an adequate chain of custody had been laid for cocaine to be admitted. It stated that the test for an item that is not readily identifiable and is subject to alteration by contamination or tampering is whether the chain is complete enough to render it improbable that the original item has been exchanged or tampered with.

United States v. Roberson, 897 F.2d 1092 (11th Cir. 1990) : Affirming a conviction for cocaine offenses, the Court rejected complaints that there were two gaps in the making of the chemical analysis, holding that gaps in the chain of custody affect only the weight of the evidence and not its admissibility.

[iii] Rule 901(a) -- Chain of Custody -- Other Evidence

United States v. Del Rosario, 388 F.3d 1 (1st Cir. 2004) : In a drug distribution conspiracy trial, a government witness described a cell phone as having been seized from a defendant upon his arrest in New York. The Court held the reference was error (but harmless), as the witness had only processed the phone at the DEA's San Juan office and had no personal knowledge that it was the defendant's, the agent who seized the phone did not testify, and the government never established a chain of custody tracing the phone from the defendant's bag to the witness' hands.

United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003) : In a trial for health care fraud, an anesthesiologist testifying for the government explained how he prepared charts and reports in which he disguised the true nature of the procedures employed by the defendant and sent them to a record-keeping business operated by his father. The government obtained the records from the business, and an FBI agent used the code supplied by the anesthesiologist to create a summary chart of the disguised procedures contained in the records. The Court held that testimony by the FBI agent that the records were produced by the father in response to a subpoena and were faithfully maintained by the FBI while in government custody was sufficient to demonstrate that the contents had not changed. In *United States v. Grant, 967 F.2d 81 (2d Cir. 1992)* (per curiam), the Court held that a 14-day gap in the chain of custody between the time packages allegedly containing drugs were seized and the time they were analyzed did not make the chemist's testimony insufficient to support the defendant's drug importation conviction. The Court stated that because the drugs were not introduced at trial, there was no need to authenticate them; the chemist's testimony needed only to meet the *Rule 401* relevancy test of a "tendency" to make a material fact more or less probable. In our view, this case illustrates an anomaly in the way a chain of custody question is usually approached. As a matter of relevance, a chain of custody between seizure and chemical analysis is more important than between analysis and introduction at trial. That is, it is critical that the white powder analyzed is the same as the powder seized from the defendant, but the powder introduced at trial is really only illustrative (because the jury cannot analyze it), so it is not important whether it is exactly the same as the powder seized. Thus, the Court's reliance only on *Rule 401* -- although consistent with the language of the Rules (which have no explicit chain of custody requirement) -- seems to apply the less strict standard of relevance at just the place where a stricter chain of custody foundation should be required. In *United States v. Hon, 904 F.2d 803 (2d Cir. 1990)* , the Court affirmed a conviction for trafficking in counterfeit wristwatches, holding that although the government could have been more careful in handling exhibits, there was ample evidence supporting admission of the watches allegedly seized from the defendant.

United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982) : In a prosecution involving marijuana seized on the high seas, the Court commented with respect to authentication that "the ultimate question is whether the authentication testimony was sufficiently complete so as to convince the court that it is improbable that the original item had been exchanged with another or otherwise tampered with."

United States v. Guidry, 406 F.3d 314 (5th Cir. 2005) : The Court affirmed a conviction for felon firearm possession arising from a robbery. It found no abuse of discretion in the admission of duct tape and twine found at the crime scene. Although the chain of custody for the exhibits was not completely documented, it was established by testimony from the relevant police officers, and the defense was able to explore any weakness in the chain on cross-examination. In *United States v. Jardina*, n7 the Court sustained a conviction for passing counterfeit notes, finding that a sufficient foundation was laid for admission of two counterfeit notes, even though the chain of custody was not complete. A reasonable jury could find from the evidence that there was a connection between the notes and the defendant, and any break in the chain of custody went to weight, not admissibility. In *United States v. White, 569 F.2d 263 (5th Cir. 1978)* , the Court said that "the mere possibility of a break in the chain does not render the physical evidence inadmissible." And in *United States v. Henderson, 588 F.2d 157 (5th Cir. 1979)* , the Court said that chain of custody problems went to weight, not admissibility.

United States v. Smith, 308 F.3d 726 (7th Cir. 2002) : Affirming convictions for marijuana and tax offenses, the

Court found a sufficient chain of custody for documents seized at the defendant's residence during execution of a search warrant. The documents were in official custody at all times, which creates a presumption of regularity, and the defendant did not point to evidence specifically raising the issue of tampering, so his claims that the documents were not properly catalogued and could not be identified by the agents went only to the weight of the evidence. In *United States v. Lampson, 627 F.2d 62 (7th Cir. 1980)* , the Court said:

> [I]t has been held that whether the Government has proven an adequate chain of custody goes to the weight of the evidence, rather than admissibility ... . [T]his principle is usually applied in cases where there is a question about some change in the condition of the evidence between apprehension and testing ... . Courts need exercise greater care when the issue concerns the very identity of the evidence, rather than just possible changes in its condition. The Government's burden of proving each and every element of the crime cannot be diluted by unwarranted presumptions about the evidence it seeks to introduce. Although such heightened scrutiny is appropriate for chain of custody identification claims, automatic exclusion is not required. Whether or not the possible problem with the Government's proof is sufficiently serious to take it from the jury rests in the sound discretion of the trial judge.

United States v. Briley, 319 F.3d 360 (8th Cir. 2003) : The defendant, charged with possession of counterfeit currency, claimed that the bills allegedly seized from him should not have been admitted because they did not correspond to the receipt that the Secret Service had given to the seizing deputy. The Court held that the chain of custody was sufficient because the total number of bills was the same, all bore notations made by the Secret Service when the deputy turned them over, and the discrepancy was easily explainable as a clerical error. In *United States v. Mays*, n8 the Court held dye-stained money was properly admitted even though none of the witnesses could testify that the bills were the same ones they received. In *United States v. McCowan, 706 F.2d 863 (8th Cir. 1983)* (per curiam), the Court affirmed a conviction for fraud involving food stamps, and in response to a challenge to the chain of custody of tape recordings, observed that "[g]enerally, a district court may assume that public officials who had custody of the evidence properly discharged their duty and did not tamper with the evidence." The Court added that an article may be introduced "[i]f the trial court is satisfied that in reasonable probability the article has not been changed in any important respect."

United States v. Edwards, 235 F.3d 1173 (9th Cir. 2000) (per curiam): The defendant was charged with cocaine possession after a bag containing crack cocaine was found in a car driven by the defendant. The car was registered to another person, and one officer who was present when the car was searched testified that there was nothing in the bag that established the identity of the owner. The night the officer testified, the prosecutor, in violation of the local rule requiring that admitted evidence be kept by the clerk, examined the bag, which had been in the custody of the police for two years, and found a bail receipt bearing the defendant's name under a piece of cardboard at the bottom. The defendant's conviction was reversed, *154 F.3d 915 (9th Cir. 1998)* (see annotation at *§ 601.03[1]*) for violation of the attorney-voucher rule when the officers present at the examination testified to the prosecutor's discovery. On retrial, the Court reversed the defendant's conviction again, holding that the bail receipt should have been excluded. The search of the bag in violation of the local rule and the failure to take other necessary precautions, such as inventorying the numerous papers seized from the car in which the bag was found, led the Court to conclude the evidence was "inherently unreliable" and that the bail receipt should have been excluded. In *United States v. Coades, 549 F.2d 1303 (9th Cir. 1977)* , a bank robber claimed that it was error to admit into evidence a microscopic piece of glass found in a leather jacket belonging to him, because the chain of custody of the jacket was not sufficiently established to ensure that the glass was not inadvertently introduced by someone handling the jacket subsequent to the crime. Affirming, the Court said, "A mere showing that an opportunity existed for unlawful tampering with the evidence is insufficient to justify exclusion; affirmative evidence of bad faith or actual tampering is required."

United States v. Humphrey, 208 F.3d 1190 (10th Cir. 2000) : Remanding methamphetamine possession convictions on other grounds, the Court ruled that a purse containing documents need not have been excluded even though an officer kept it in his office for several weeks without examining the contents or transferring it to a secure evidence room. The contents of the purse were not "fungible evidence, such as drugs or cash, where absent a reliable chain of custody there would be a relatively high risk that the original item had been contaminated or tampered with." There was no abuse of discretion in concluding that the jury could find that the documents were what the government claimed them to be, and that any deficiency in the chain of custody went to weight. In *United States v. Brewer, 630 F.2d 795 (10th Cir. 1980)* , the Court framed the authentication issue as follows:

> This preliminary issue of admissibility is for the court to decide -- it must ascertain whether there is a reasonable probability that the evidence has not been altered in any material aspect since the time of the crime and that it reasonably has a tendency to establish facts of consequence in the action as more probable than they would be without the evidence ... . Absent a clear abuse of discretion, the court's decision on this issue will not be disturbed.

It said that the lack of positive identification and proof of connection of the specific drugs to the defendants went to the weight, not the admissibility, of the evidence.

[iv] Rule 901(a) -- Chain of Custody -- Tape Recordings

United States v. Thomas, 294 F.3d 899 (7th Cir. 2002) : The Court affirmed cocaine-related convictions, holding that a tape recording of a conversation among the defendant, another participant in a drug deal, and an undercover officer was properly authenticated when the other participant identified the voices on the tape and authenticated the conversation. In response to the argument that the government did not establish a chain of custody for the recording, the Court stated that "so long as other evidence is sufficient to establish the accuracy and authenticity of the tapes, lack of proof regarding a chain of custody does not render tapes inadmissible."

[v] Rule 901(a) -- Chain of Custody -- Weapons

United States v. Carlos Cruz, 352 F.3d 499 (1st Cir. 2003) : The Court affirmed drug-trafficking convictions, finding that a sufficient chain of custody for two machine guns was laid where the agent who seized the guns testified that he took them to police headquarters and kept them until a BATF agent arrived to take them, and the BATF agent testified that he kept them in his custody until he prepared a property-inventory form on which the guns were listed. In *United States v. Myers, 294 F.3d 203 (1st Cir. 2002)* , the defendant was detained after a high-speed chase, during which he was seen throwing an object out the window. Ammunition was found in his car. A search of the area traversed during the chase yielded a handgun, and later a citizen turned in a gun found in the same vicinity. Affirming a conviction for felon firearm possession, the Court found no error in admitting the guns. Witnesses testified how they came upon the guns, and given the circumstantial evidence (that ammunition was found in the car, that the defendant threw something from the car, and that the guns were found along the route), the Court concluded that the government had made an "ample" showing to connect the defendant with the guns. In *United States v. Abreu*, n9 the Court affirmed cocaine conspiracy and related firearms convictions, and held that distinguishing characteristics sufficiently identified a sawed-off shotgun and bags of cocaine, even though there were gaps in the chain of custody.

United States v. Logan, 949 F.2d 1370 (5th Cir. 1991) : Affirming convictions for drug and firearms offenses, the Court held there was no abuse of discretion in admitting cocaine and a pistol that had been locked in the trunk of an

officer's car for four days from the defendants' arrest until it was turned over for proper processing. The delay did not shatter irreparably the chain of custody, as only the officer had access to the trunk, and there was otherwise a *prima facie* showing of the authenticity of the evidence.

United States v. Douglas, 964 F.2d 738 (8th Cir. 1992) : The Court held that the chain of custody for a handgun in a felon firearm possession case was adequately shown, even though reports identified the weapon originally seized as.38-caliber, rather than the.32-20-caliber revolver introduced into evidence.

[d] Rule 901(a) -- Depositions and Trial Transcripts

Orr v. Bank of Am., NT & SA, 285 F.3d 764 (9th Cir. 2002) : In an action by a bank organizer against her former employer for allegedly disclosing disparaging information to the FDIC, the Court affirmed summary judgment granted for the defendant after many of the exhibits for her opposition were ruled inadmissible. The Court held that exhibits purporting to be deposition extracts lacked the reporter's certification and the names of the deponent and the action, and that the defense attorney's affidavit that the exhibit was a "true and correct copy" was insufficient because the attorney lacked personal knowledge of the deposition. Likewise, exhibits purporting to be transcripts of testimony from a trial were not sufficiently authenticated when they did not identify the names of the witness, the trial, and the Judge and were not certified copies of the reporter's transcript.

[e] Rule 901(a) -- Extent of Foundation Required

United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982) : A defendant convicted of firearms offenses claimed that the government could not lay a foundation for the inference that the gun he was shown carrying in photos was the one seized during a search. The Court found sufficient circumstantial evidence to support a finding that the photos were taken close in time to the search and that the gun pictured was the gun found in the search. Furthermore, any gap in the government's foundation was cured by the defendant's testimony.

United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991) : In a prosecution for extortion, the Court held that even though a witness was unable to testify that he recognized handwriting on a note as the defendant's, the note was sufficiently authenticated by evidence that the defendant was observed passing the note to a colleague, it repeated nearly verbatim the contents of a conversation between the defendant and the colleague (who was hard of hearing) that a different witness had overheard only moments before, and it raised matters unique to the defendant.

United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004) : The Court vacated a conviction arising from an immigration fraud scheme because credit card receipts offered by the defendant to prove an alibi were improperly excluded as lacking authentication. The defendant's proffered testimony from (1) his wife, a co-holder of the credit card, that she had not made the purchases, (2) from a store manager regarding their transaction practices, and (3) from a handwriting expert identifying the defendant's signature was sufficient to surmount the relatively low authentication hurdle. Prosecution evidence placing the defendant in China at the time the receipts were generated, and possibilities that the originals had been signed by the wife or left unsigned, went to the weight of the evidence, not its admissibility. In *SCS Communications, Inc. v. Herrick Co., 360 F.3d 329 (2d Cir. 2004)* , a breach of contract action arising from a failed attempt by a joint venture to acquire a company, the Court held there was no abuse of discretion in the admission of a notebook belonging to one of the venturers, which contained a note that "[t]he more you [underlined four times] say, the more you will get hurt on cross unless it is our party line." Although the note was written in a different hand from notes admittedly written by the venturer, a reasonable juror could find that the venturer or someone known to him wrote the statement to remind him not to stray from the defendants' scenario, from evidence that the venturer admitted

he owned the notebook, that he brought it to his deposition, that it was full of his handwriting from the year he was deposed, and that he wrote the five lines immediately preceding the "party line" notation. In *Ricketts v. City of Hartford*, n10 the Court affirmed a judgment for the defendants in a civil rights action by a plaintiff who alleged the use of excessive force. After one police officer testified, the plaintiff proffered a tape recording which he claimed contained a statement by this particular officer. The Trial Court excluded the tape because it was not satisfied that the voice belonged to the police officer who testified. The Court concluded that this approach was improper (but harmless error), since "[s]o long as a jury is entitled to reach a contrary conclusion, it must be given the opportunity to do so." In *United States v. Ruggiero*, n11 the Court affirmed convictions for racketeering, holding that the government had satisfied its burden of producing clear and convincing evidence of authenticity and accuracy as a foundation for admission of tape recordings. The Court noted that this foundation standard was more demanding than that required by the Rule, because recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration. In our view, the stricter standard may be inconsistent with the admissibility standards set forth in *Huddleston v. United States*, n12 although a Court may wish to provide greater assurances of reliability through application of *Rule 403*. In a civil rights action alleging that three police officers beat a suspect after taking him into custody, *O'Neal v. Esty*, n13 the alleged victim died of other causes before trial and the plaintiff attempted to offer testimony of a police officer for whom the victim had done undercover work that he had called the arresting officer to find out what had happened and that a person, after saying he was a partner of the arresting officer, admitted the beating. The Court reversed exclusion of the evidence, holding that the calling of a listed number, together with self-identification, were enough to authenticate a phone call. As for the fact that the witness could not say which of the defendants he had spoken with, the Court said:

> We conclude that when a plaintiff presents to the trial judge sufficient evidence from which a jury can reasonably find that an admission was made by one of a limited group of two or more of the defendants, the admission should be received in evidence and the jury should be instructed that it may consider the admission against each member of that group of defendants who fails to persuade the jury that he did not make the statement.

United States v. McGlory, 968 F.2d 309 (3d Cir. 1992) : This case is discussed in the Editorial Explanatory Comment, *§ 901.02[11]*. In *United States v. Tyler, 878 F.2d 753 (3d Cir. 1989)* , the Court held that a baseball cap introduced in a robbery prosecution was sufficiently authenticated by the testimony of a postal inspector who found it in a search of the defendant's home, and that the differences in color and markings between the cap and the one described by a witness went to the weight rather than the admissibility of the evidence.

United States v. Mojica, 746 F.2d 242 (5th Cir. 1984) : The Court found that a photograph was properly authenticated in a marijuana conspiracy case by testimony that the photo depicted the scene of the arrest. The testimony warranted an inference that the photograph reflected the scene soon after a raid began and established to a reasonable degree the time and place of the photo.

United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991) : Affirming tax evasion convictions arising out of a "skimming" scheme, the Court held that daily sales sheets were sufficiently authenticated and shown to be business records by proof, *inter alia*, that the defendants' attorney produced the documents in response to a subpoena calling for their business' records. In a prosecution for conspiracy to embezzle government funds, *United States v. Brown*, n14 the Court upheld the admission of business records that the defendant had turned over through an agent in response to a subpoena. The defendant had produced the records pursuant to an agreement with the government that spared him the need to go before a grand jury. The Court reasoned that, having made the agreement and having had his agent turn over the records, the defendant could not complain that the records were not properly authenticated.

United States v. Coohey, 11 F.3d 97 (8th Cir. 1993) : The Court affirmed a drug trafficking conviction, holding that telephone records had been properly identified by the telephone company's custodian for records from the area code involved. Although the particular records had been sent directly from the depository to the government, the custodian's conclusion on subsequent review that they did not appear to have been altered was sufficient for admissibility. In *United States v. Englebrecht, 917 F.2d 376 (8th Cir. 1990)* , the Court affirmed a conviction for drug offenses, holding that photographs of the defendant posing next to marijuana plants were sufficiently authenticated, even though there was no direct proof of when or where the pictures were taken. In *United States v. Drews*, n15 the Court affirmed drug convictions, holding that drugs admitted into evidence were sufficiently shown to be those possessed and distributed by the defendant, even though the evidence on that point was not entirely consistent.

United States v. Pang, 362 F.3d 1187 (9th Cir. 2004) : At a trial for structuring currency transactions and income tax evasion, the prosecution introduced invoices from the defendant and checks from a customer paying those invoices. The Court held that the checks were self-authenticating as negotiable instruments, but the invoices, not being commercial paper, required authentication. A reasonable juror could find the invoices were authentic from the facts that the invoices were identical to other invoices admitted into evidence, they matched carbonless copies of the same invoices in evidence, the numbers were in sequence with numbers of other invoices in evidence, and they correlated dollar-for-dollar with the cancelled checks. In a prosecution for making false statements in a permanent resident application, *United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991)* , the Court held that certain Hong Kong criminal records were sufficiently authenticated by testimony together with various certifications and declarations. In *E.W. French & Sons, Inc. v. General Portland, Inc.*, n16 the Court, reversing a directed verdict granted for the defendant in an antitrust case, held that the Trial Judge should not have admitted certain mailing lists located in the defendant's files only "for the limited purpose [of] indicating they were found within [defendant's] files," but should have treated them as *prima facie* authentic and left authenticity and probative value to the jury. In *United States v. Soulard*, n17 the Court affirmed convictions for subscribing false corporate income tax returns, holding that the use of bank deposits as circumstantial evidence of unreported income was proper even though the government witnesses apparently did not make an effort to assure that the bank records were complete. The Court reasoned that once authenticity and relevance were demonstrated, the issue of completeness was a question for the jury. See also *People of Terr. of Guam v. Ojeda* n18(holding that pictures of stolen jewelry were properly admitted in a burglary prosecution when identified by the victim; no chain of custody was required for the jewelry); *United States v. One 56-Foot Motor Yacht* n19(a diary was properly authenticated by circumstantial evidence); *United States v. Johnson* n20(the victim of an assault with an ax was permitted to testify that he was "pretty sure" that the exhibit was the ax used against him).

Nolin v. Douglas Cty., 903 F.2d 1546 (11th Cir. 1990) : Affirming dismissal of a civil rights action brought by a former deputy sheriff, the Court held that there was no abuse of discretion in excluding copies of personnel guidelines proffered by the plaintiff, where the only foundation evidence elicited was a defendant's response on cross-examination that he was "somewhat familiar" with the document and a somewhat different document that was offered as self-authenticating but properly excluded as not under seal. In *United States v. Garcia*, n21 the Court found that testimony that government agents discovered the defendants in possession of counterfeit notes, that these notes were turned over to other agents, and that the notes offered in evidence were counterfeit was sufficient to demonstrate that the notes put in evidence were the same notes taken from the defendants. In *Itel Capital Corp. v. Cups Coal Co.*, n22 the Court affirmed a plaintiff's judgment in an action related to equipment leases, finding that leases and other documents were authenticated by testimony concerning the preparation and maintenance of the documents, even though there was no testimony regarding the signatures. Since the plaintiff relied on theories of ratification and estoppel, proving the signatures was not essential.

[f] Rule 901(a) -- Foreign Language Translation

Kassim v. City of Schenectady, 415 F.3d 246 (2d Cir. 2005) : The operator of a variety store sued for violation of

§ 1983 after the City closed his business without notice when it foreclosed on his lessor for delinquent property taxes. To prove his losses, the plaintiff offered an English translation of his business records (kept in Arabic), which indicated higher profits than his recent tax returns, but the Judge excluded the records, apparently either because the tax returns were more reliable or because of a notion that a taxpayer is estopped from inconsistently claiming higher earnings in a civil suit against a private party. The Court held that neither explanation would justify the ruling, but that exclusion was proper because the translation was not sufficiently authenticated. The woman who prepared it neither spoke nor read Arabic, so the exhibit consisted of what the plaintiff told her to write, and neither of them testified that she had accurately translated the notes.

[g] Rule 901(a) -- Illustrative Evidence

Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) : In a civil rights case in which the plaintiff claimed that deputy sheriffs used excessive force upon him, the Trial Judge had permitted the defendants to offer a knife to illustrate the type of knife found on the plaintiff when he was arrested. The Court found that it was not made clear to the jury that the knife that was offered was not the knife taken from the plaintiff, but another used for purposes of illustration. This was one of the prejudicial errors requiring a new trial. The Court also suggested that the knife should not have been sent to the jury room.

[h] Rule 901(a) -- Inadequate Authentication

Kassim v. City of Schenectady, 415 F.3d 246 (2d Cir. 2005) : The operator of a variety store sued for violation of § 1983 after the City closed his business without notice when it foreclosed on his lessor for delinquent property taxes. To prove his losses the plaintiff offered an English translation of his business records (kept in Arabic), which indicated higher profits than his recent tax returns, but the Judge excluded the records, apparently either because the tax returns were more reliable or because of a notion that a taxpayer is estopped from inconsistently claiming higher earnings in a civil suit against a private party. The Court held that neither explanation would justify the ruling, but that exclusion was proper because the translation was not sufficiently authenticated. The woman who prepared it neither spoke nor read Arabic, so the exhibit consisted of what the plaintiff told her to write, and neither of them testified that she had accurately translated the notes. In *United States v. Almonte, 956 F.2d 27 (2d Cir. 1992)* , the Court affirmed a conviction for distributing heroin, holding that an Assistant U.S. Attorney's shorthand summary made after debriefing a witness was not shown to reflect what the witness said sufficiently to be used as a prior inconsistent statement impeaching the witness.

Railroad Mgmt. Co. v. CFS La. Midstream Co., 428 F.3d 214 (5th Cir. 2005) : The plaintiff sued to recover license payments under an agreement of which it claimed to be the assignee. When asked in discovery to produce the assignment agreement, the plaintiff refused on the ground it contained proprietary information. Instead, it submitted, *inter alia*, a four-page excerpt of the agreement. Affirming summary judgment for the defendant because there was insufficient evidence of a contractual relationship between the parties, the Court held that the contents of the agreement, particularly the relevant time period, were at issue, so the best evidence rule applied. The Court found no abuse of discretion in rejecting the excerpt for insufficient authentication, as it was produced during discovery by the party seeking to benefit from it, rather than the adversary, and there was nothing in the record tending to authenticate it. In *Positive Black Talk Inc. v. Cash Money Records Inc., 394 F.3d 357 (5th Cir. 2004)* , to rebut the claim by a defendant in a copyright suit that he had recorded an album containing the song at issue before hearing the plaintiffs' song, the plaintiffs offered a promotional mailer for the album that did not list the song. Affirming a judgment for the defendants, the Court held that the mailer was properly excluded because it was not authenticated. One of the foundation witnesses had worked for the alleged source of the mailer, but he had never worked in any capacity related to the creation of mailers and he had no personal knowledge whatsoever regarding the offered mailer. The other foundation witness could only testify that he had received the mailer in the mail. None of this testimony established that the mailer was created by

the alleged source or that it had any connection with the defendants. In *Stahl v. Novartis Pharms. Corp.*, n23 the Court affirmed summary judgment for the defendant in an action alleging inadequate warnings on a prescription drug, and held there was no error in refusing to consider, as evidence of the contemporary knowledge of the risks, "a collection of lists of medical journal articles [and] paragraph-long summaries of medical journal articles (apparently obtained from an unidentified computerized database)," since there were insufficient indicia as to the authenticity of those resources to satisfy the requirements of *Rule 901*. In *United States v. Skipper*, n24 the Court held it was error (but harmless) to admit a deferred adjudication order as evidence of other crimes under *Rule 404(b)*. Although the name on the order was the same as the defendant's, there was no proof that the defendant was in fact the same person named in the order. See also *United States v. Dockins, 986 F.2d 888 (5th Cir. 1993)* , discussed with *Skipper* in the Editorial Explanatory Comment, *§ 901.02[8]*.

United States v. Stierwalt, 16 F.3d 282 (8th Cir. 1994) : The Court held there was no abuse of discretion in excluding a photograph taken a few days before trial where no witness testified that it was an accurate representation of the view between vehicles when the charged drug deal took place.

Orr v. Bank of Am., NT & SA, 285 F.3d 764 (9th Cir. 2002) : In an action by a bank organizer against her former employer for allegedly disclosing disparaging information to the FDIC, the Court affirmed summary judgment granted for the defendant after many of the exhibits for her opposition were ruled inadmissible. The Court held that exhibits purporting to be deposition extracts lacked the reporter's certification and the names of the deponent and the action, and that the defense attorney's affidavit that the exhibit was a "true and correct copy" was insufficient because the attorney lacked personal knowledge of the deposition. Likewise, exhibits purporting to be transcripts of testimony from a trial were not sufficiently authenticated when they did not identify the names of the witness, the trial, and the Judge and were not certified copies of the reporter's transcript. A memo on state agency letterhead, which identified both the author and recipient and contained a signature next to their names, lacked foundation because there was no affidavit from the author stating that he wrote the letter or from someone who witnessed the writing or was familiar with the author's signature.

Linear Technology Corp. v. Micrel, Inc., 275 F.3d 1040 (Fed. Cir. 2001) : To prove sales of an allegedly patented product before a certain date, a party in an infringement action offered certain letters ostensibly mentioning the product to customers. The Court found no abuse of discretion in excluding the letters as insufficiently authenticated, since they were not signed, were not on company letterhead, bore no outward indicia of ever having been mailed to a customer, and were not shown by the testimony of any witness to have been mailed.

[i] Rule 901(a) -- Internet and Computer Evidence

[i] Rule 901(a) -- Computer Records

United States v. Whitaker, 127 F.3d 595 (7th Cir. 1997) : The Court held that computer records were sufficiently authenticated in a drug prosecution when an FBI agent testified that the records were retrieved from a computer seized from a conspirator pursuant to a search warrant and that he had observed installation of software on the machine and retrieval of the records using that software.

United States v. Tank, 200 F.3d 627 (9th Cir. 2000) : The defendant participated in an Internet chat room, whose 16 members discussed, traded, and produced child pornography. One of the members of the chat room had recorded all the discussions as text files on his computer whenever he was online; to save space, he had deleted nonsexual conversations and extraneous material, such as date and time stamps. Affirming convictions for sexual exploitation of

children, the Court held that these files and printouts from them were sufficiently authenticated by the maker's testimony as to how they were created and that they were an accurate representation of the chat room conversations, and by testimony from several members of the chat room that when they arranged a meeting with the person who used the screen name allegedly used by the defendant in the chat room, it was the defendant who showed up. Any deletions from the computer files went only to the weight of the evidence.

[ii] Rule 901(a) -- Internet Communications

United States v. Jackson, 208 F.3d 633 (7th Cir. 2000) : The defendant, charged with fraud against the Postal Service in a scheme that included falsely attributing hate mail to white supremacist groups, attempted to introduce website postings from those groups that allegedly indicated responsibility for the hate mail. Affirming, the Court held that the web postings lacked authentication, since the defendant failed to show that they were actually posted by the groups, as opposed to being slipped onto the groups' websites by the defendant herself, who was a skilled computer user.

United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998) : In a trial for receiving child pornography over the Internet, the government introduced the printout of a chat room discussion between the defendant and a detective. The Court found no abuse of discretion, since the evidence was sufficiently authenticated by the use of the defendant's first initial, last name, and street address, and by an e-mail address belonging to the defendant, as well as by notations of the detective's name, street address, e-mail address, and telephone number in papers found near the computer in the defendant's home.

United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000) : A college professor was charged with making false statements to the National Science Foundation after it was determined that he had himself submitted a nomination and recommendations in the names of others for an award. During the investigation the purported nominator and a purported recommender received e-mails asking the recipient, if contacted by the NSF, to "tell good words" or confirm that the defendant's actions had been authorized. The Court held there was no abuse of discretion in admitting the e-mails, as they bore the defendant's e-mail address (which was the same as was on an e-mail from the "nominator" that the defense introduced), they contained information likely known only to the defendant, they referred to the author by the nickname the defendant used with the recipients, and the same messages had been communicated by phone calls from the defendant shortly afterwards.

[j] Rule 901(a) -- Party Admission or Production in Discovery

Lexington Ins. Co. v. Western Pa. Hospital, 423 F.3d 318 (3d Cir. 2005) : The Court affirmed summary judgment for the insurer in a coverage dispute, holding that an internal business form containing handwritten notations without indication of authorship was authenticated by its having been produced by the insurer in response to discovery requests, which was sufficient at least in the absence of any dispute that it was filled out by an employee of the insurer for the purpose for which the form was typically used. In *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, n25 a massive antitrust case in which the plaintiffs alleged that the defendants conspired to drive them out of the market for television receivers, the Court reversed most of the summary judgment entered for the defendants and held that the Trial Judge erred in holding that documents that were authenticated against some defendants -- generally by their admissions -- were not authenticated against them all. The Court reasoned that, first, the Trial Judge should see whether there is "evidence admissible against the party having such a relationship to the proffered materials that it is likely to know the facts as to genuineness," and, second, that "[o]nce a *prima facie* case of genuineness against that party is established, the court should regard the materials as sufficiently authenticated against all parties, subject, of course, to the right of any party to offer evidence to the ultimate factfinder disputing authenticity." In *McQueeney v. Wilmington Trust Co.*, n26

the Court reversed a judgment for a seaman in a Jones Act case, finding that the defendants should have been permitted to offer the seaman's "Sea Records" to limit his damage claim, since the records were amply supported by circumstantial evidence. The seaman produced the records in response to a discovery request, they contained information not widely held, and they appeared to be genuine copies of standard Coast Guard documents.

Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988) : Notes that were produced by a corporation during discovery and that the corporation did not deny were written by one of its senior employees were sufficiently authenticated.

United States v. Lawrence, 934 F.2d 868 (7th Cir. 1991) : Affirming tax evasion convictions arising out of a "skimming" scheme, the Court held that daily sales sheets were sufficiently authenticated and shown to be business records by proof, *inter alia*, that the defendants' attorney produced the documents in response to a subpoena calling for their business' records. In a prosecution for conspiracy to embezzle government funds, *United States v. Brown*, n27 the Court upheld the admission of business records that the defendant had turned over through an agent in response to a subpoena. The defendant had produced the records pursuant to an agreement with the government that spared him the need to go before a grand jury. Having made the agreement and having had his agent turn over the records, the Court reasoned that the defendant could not complain that the records were not properly authenticated.

Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004) : The Court affirmed a damage award for a chiropractor who sued his disability insurer for breach of contract and misrepresentation. It held that all of the documents were properly authenticated by a witness who testified that the documents were produced by the defendants in response to a document discovery request. In *Orr v. Bank of Am., NT & SA, 285 F.3d 764 (9th Cir. 2002)* , an action by a bank organizer against her former employer for allegedly disclosing disparaging information to the FDIC, the Court affirmed summary judgment granted for the defendant after many of the exhibits for her opposition were ruled inadmissible. The Court held that exhibits purporting to be deposition extracts lacked the reporter's certification and the names of the deponent and the action, and that the defense attorney's affidavit that the exhibit was a "true and correct copy" was insufficient because the attorney lacked personal knowledge of the deposition. However, it was error (but harmless) to exclude one such exhibit, because it had been authenticated when offered by the defendant.

Chavez v. Thomas & Betts Corp., 396 F.3d 1088 (10th Cir. 2005) : The Court held that documents produced by the defendant on its letterhead during discovery were properly authenticated.

[k] Rule 901(a) -- Photographs

United States v. Soto-Beniquez, 356 F.3d 1 (1st Cir. 2003) : Affirming convictions in a complex drug conspiracy prosecution, the Court held that a photograph of a gun seized from one defendant was properly admitted when specific markings on the gun matched a description in the police report and the arresting officer identified the photo.

[l] Rule 901(a) -- Scope of the Rule

Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986) : Although the Court reversed a judgment for a landlord in a suit by a tenant's visitor who sustained injuries in a fall from an exterior stairway, it found that the Trial Judge properly permitted a witness to testify that during one evening in the winter of 1979 she had heard two men arguing and had later seen one man lying on the ground near the spot where the plaintiff had fallen. The Court rejected the plaintiff's argument that *Rule 901(a)* was not satisfied, noting that *Rule 901* "is applicable to offers of real proof as opposed to

testimonial proof."

[m] Rule 901(a) -- Tape Recordings

[i] Rule 901(a) -- Audibility

United States v. Arango-Correa, 851 F.2d 54 (2d Cir. 1988) : Affirming cocaine convictions, the Court held there was no error in admitting tape recordings, even though some portions were inaudible. It noted that "[o]ur decisions in this area reveal a clear preference for the admission of recordings notwithstanding some ambiguity or inaudibility, as long as the recordings are probative."

United States v. Booker, 334 F.3d 406 (5th Cir. 2003) : Affirming convictions for conspiracy to distribute crack cocaine, the Court held that evidence of an audiotape and transcript of a conversation was admissible even if parts were difficult to understand. It noted that the recorded conversation in this case was in English, much of its content was undisputed, two of the three speaking parties confirmed its accuracy, and the Trial Judge instructed the jury to disregard the transcript if it did not accurately reflect the audio recording.

United States v. Moncivais, 401 F.3d 751 (6th Cir. 2005) : Affirming a conviction for conspiring to distribute cocaine, the Court rejected the defendant's argument that a tape recording of a telephone call should have been disregarded because the sound quality was too poor to be reliable. It noted that the defendant had hired his own translator of the Spanish-language conversation of the tape, who had been able to produce a transcript of substantially all of the conversation and also an English translation with which the government agreed. In *United States v. Segines, 17 F.3d 847 (6th Cir. 1994)* , the Court vacated cocaine convictions, holding that a composite tape recording was admissible under *Rule 1006*, but that it was error to admit a transcript, where the tape was unintelligible in part. It noted that "[w]hen tapes are unintelligible, ... a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself." In *United States v. West*, n28 the Court affirmed convictions for cocaine offenses and false grand jury testimony, holding there was no abuse of discretion in admitting recordings where the incomprehensible portions were not so substantial as to render them untrustworthy as a whole.

United States v. Powers, 75 F.3d 335 (7th Cir. 1996) : Affirming a cocaine conspiracy conviction, the Court held that a recording that contains inaudible or unintelligible parts may be admitted unless the inaudible or unintelligible portions are so substantial that they render the recording as a whole untrustworthy.

United States v. Rrapi, 175 F.3d 742 (9th Cir. 1999) : The Court affirmed a conviction for bank robbery, holding that the Trial Judge had a sufficient basis for determining the audibility of a surveillance tape recording. Although the Judge did not speak Albanian, the language of the recorded conversation, he could determine by listening to the tape with headsets in a quiet room whether the tape was of sufficient quality and clarity in terms of sounds to allow the jury to assess whether the FBI agent who prepared the translation could have translated the tape. The Judge was not required to rely solely on the conflicting opinions of the government's and the defendant's translators to determine whether the tape was of sufficient clarity to allow a jury to hear it.

United States v. Mittleider, 835 F.2d 769 (10th Cir. 1987) : In a firearms prosecution, the Court found no error in the admission of tape recordings of the defendant's conversations during the sale of a machine gun, even though portions of the tapes were inaudible. Three witnesses who had heard the conversations testified and were subject to cross-examination, and the jury was instructed that written transcripts of the conversations were not evidence and were

used only to help them.

United States v. Phelps, 733 F.2d 1464 (11th Cir. 1984) : Affirming Mann Act convictions of a husband and wife, the Court held that the Trial Judge acted properly in reading a summary of a tape recording to the jury as requested by a third defendant. The Judge was concerned about the poor quality of the recording and about possible prejudice to a fourth defendant. He summarized the conversations relied on by the third defendant and told the jury that, although the parties had not agreed that the summary was accurate, he believed that it fairly summarized a tape that could not be played because of its poor quality.

[ii] Rule 901(a) -- Tape Recordings -- Authenticity

United States v. White, 116 F.3d 903 (D.C. Cir. 1997) : Affirming convictions arising from a drug conspiracy, the Court rejected a challenge to the authenticity of tape recordings, declaring that "where one witness testified at length about the process of creating the tapes and identified the originals, and where another witness confirmed the accuracy of the portions of the tapes with which he was familiar, the Government met its burden."

United States v. Citro, 938 F.2d 1431 (1st Cir. 1991) : Affirming convictions for drug offenses, the Court held there was no error in excluding an answering machine taped message offered by a defendant to impeach a conspirator on cross-examination. At a hearing *in camera*, the witness specifically denied the communication, and at trial the defendant, who said she heard the message being recorded and recognized the witness' voice, only said the tape looked like a tape her sister had removed from the answering machine and she had given to defense counsel. That testimony might have sufficed to authenticate the tape, but there was no abuse of discretion in excluding it under *Rule 403*. See also *United States v. Rengifo* n29(holding that a wiretap tape could be authenticated by the testimony of an agent who supervised the taping; once a sufficient foundation is laid, the litigant who opposes admission bears the burden of showing the tape is inaccurate).

United States v. Hamilton, 334 F.3d 170 (2d Cir. 2003) : Affirming the convictions of two former police officers for narcotics-related offenses, the Court upheld the admission of two tape-recorded conversations and rejected the argument that the tapes were not reliable because an informant had supplied some of the participants with drugs. The recordings were adequately authenticated by a witness who heard the conversations and made the recordings, and by various parties to the conversations. In *United States v. Tropeano, 252 F.3d 653 (2d Cir. 2001)* , the Court affirmed a conviction for securities and wire fraud, finding that tape recordings of telephone conversations were sufficiently authenticated by the testimony of participants, without also requiring proof of a chain of custody for the tapes. Affirming convictions for racketeering in *United States v. Ruggiero*, n30 the Court held that the government had satisfied its burden of producing clear and convincing evidence of authenticity and accuracy as a foundation for admission of tape recordings. It noted that this foundation standard was more demanding than that required by the Rule, because recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration. In our view, the stricter standard may be inconsistent with the admissibility standards set forth in *Huddleston v. United States*, although a Court may wish to provide greater assurances of reliability through application of *Rule 403*. In a prosecution for a scheme to defraud a bank by cashing fraudulent checks, *United States v. Sliker*, n31 the government introduced a tape recording in connection with a witness' testimony even though the witness refused to identify his voice or the voice of a defendant on the tape. The Court held that this was proper, since the Trial Judge determined that the tape was clear enough to support an identification and thus it satisfied authentication principles.

United States v. Wilson, 115 F.3d 1185 (4th Cir. 1997) : Affirming drug convictions, the Court found no error in the introduction of both original and composite tape recordings of drug transactions between the defendants and an

undercover police officer. The original tape recordings were properly authenticated by witnesses who monitored the audio recording equipment and by the undercover officer who reviewed the tapes and testified that they accurately recorded the conversations. The composite tape was properly authenticated by the same witnesses, who listened to the original recordings and compared them to the composite tape, and testified that the composite tape accurately represented the relevant portions of the original tapes. In *United States v. Branch, 970 F.2d 1368 (4th Cir. 1992)* , a drug distribution prosecution, an extensive hearing was held *in camera* before the trial on the authenticity of numerous tape recordings of wiretaps. The Judge ruled that there was sufficient authenticating evidence and that, although the government would not have to present the testimony of all the monitors, it would have to lay a proper foundation for admission of the tapes before the jury. The Court held there was no error in the procedure followed or admission of the tapes; the ruling following the *in camera* hearing did not replace the required presentation of authenticating evidence before the jury and the assessment of the adequacy of that presentation, and there was evidence presented in this case sufficient to support a finding that the recordings were authentic.

United States v. Buchanan, 70 F.3d 818 (5th Cir. 1995) : In a drug conspiracy case, the Court found no abuse of discretion in admitting a tape recording of a conversation between a defendant and an undercover officer, where all voices were identified, there was no intimation that the tape had been altered, and the testifying officer explained how the recording was made and testified to its accuracy. In *United States v. Stone, 960 F.2d 426 (5th Cir. 1992)* , the Court held there was no abuse of discretion in admitting tape recordings of meetings between an undercover agent and participants in a conspiracy to manufacture methamphetamine. Although not all the foundation elements were thoroughly covered before the tapes were admitted, a sufficient showing was made. The Trial Judge took adequate precautions in dealing with the poor quality and partial unintelligibility of the tapes and with the transcripts offered by the government to assist the jury listening to the tapes. In *United States v. Lance*, n32 the Court rejected a stringent foundation requirement for tape recordings in affirming drug convictions. It was sufficient that law enforcement agents who participated in the conversations testified that the recordings were accurate and that the person who made the tapes could identify the voices. See also *United States v. Stephenson* n33(duplicate tape recordings were properly authenticated by testimony that they were accurate representations of the recorded conversations).

United States v. DeJohn, 368 F.3d 533 (6th Cir. 2004) : The Court affirmed drug trafficking convictions, holding there was no abuse of discretion in the admission of audio tape recordings of conversations made on a conspirator's cell phone. The defendant made no argument that the tapes were in fact inaccurate, and a sufficient foundation of authenticity was provided by an agent's testimony as to the court authorization to get the wiretaps, the simultaneous taping by two recording devices, the monitoring of conversations, and the log made of them, as well as testimony that each tape played at trial was made by isolating a conversation on the original tapes and dubbing it onto a blank tape. In addition, a foundation was laid for each individual recording before it was played for the jury.

United States v. Dawson, 425 F.3d 389 (7th Cir. 2005) : Affirming convictions for a narcotics trafficking conspiracy, the Court found no error in the admission of recorded conversations, although no chain of custody was established and there were gaps in the tapes. The defendants did not deny that it was their voices on the tapes, there was no showing of splicing or other alterations that might have changed the meaning of what was actually said, and there was no indication that the gaps or erasures contained exculpatory evidence. In *United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002)* , the Court affirmed a conviction of murder-for-hire in connection with drug trafficking, holding that four tapes of incriminating conversations between the defendant and a coconspirator involving a plot to murder the coconspirator's wife were properly admitted. Although the tape recorder's operator died before trial, the Court concluded that the tapes were sufficiently authenticated by the testimony of an agent that he had been present when the calls were made and had listened in on headphones, and that the tapes were "first generation copies" of the tapes made that night. The Court applied a standard of clear and convincing evidence for the foundation. In our view, that standard may be inconsistent with the admissibility standards set forth in *Huddleston v. United States*, although a Court may wish

to provide greater assurances of reliability through application of *Rule 403*. In *United States v. Brown*, n34 the Court affirmed convictions for food stamp fraud, finding no error in the admission of audiotapes of transactions in which the defendants exchanged food stamps for cash, even though the government had not established a chain of custody for the tapes. A confidential informant testified that the transactions recorded on the tapes actually occurred, that he listened to the tapes, that the speakers on the tape were himself and the defendants, and that the tapes were in the same condition as when he last saw them. Moreover, the agent who monitored the taped conversations testified that he listened to the conversations during each transaction, and that he personally observed one transaction. See also *United States v. Boyd* n35(upholding admission of duplicate tape recordings of conversations ten years earlier on testimony of participant and of agent who had spot-checked duplicates against sealed originals).

McAlinney v. Marion Merrell Dow, Inc., 992 F.2d 839 (8th Cir. 1993) : Affirming a judgment for an employer in an action for national origin employment discrimination, the Court applied a seven-part test for admission of tape recordings (discussed in the Editorial Explanatory Comment, *§ 901.02[4]*). It found no error in the exclusion of surreptitiously recorded conversations between the plaintiff and others that were largely inaudible and difficult to track, and contained numerous blank spots. There were serious questions whether the tapes had been altered, especially in light of the plaintiff's concession that he edited the tapes. In *United States v. Pecina, 956 F.2d 186 (8th Cir. 1992)* , the Court affirmed convictions for narcotics offenses, holding that a proper foundation was laid for tape recordings of telephone conversations, where a detective testified he accurately recorded each of the tapes and personally made the copies that were played for the jury and that he recognized the voices recorded. In a civil rights action in which a Court clerk established that her firing violated the *First Amendment*, *Williams v. Butler*, n36 the Court upheld the admission of tape recordings and accompanying transcripts. Although suggesting that it might be preferable to have the person who prepared the transcript testify to its accuracy, the Court sustained authentication by a witness who had monitored the recording and who testified that he listened to the recording and read the transcript and that both accurately reflected the taped conversation. It also applied a rebuttable presumption that police officers having custody of tape recordings do not tamper with them.

United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) , amended, 98 F.3d 1100 (9th Cir. 1996) : In a prosecution for the kidnapping of a federal agent, the Court upheld the admission of audiotape recordings of the agent's torture that had been made by the conspirators. It said that the seven-factor test (discussed in the Editorial Explanatory Comment, *§ 901.02[4]*) applies when a government agent or informant initiates a conversation knowing it is to be recorded, but in other cases *Rule 901(a)* requires only sufficient proof that a reasonable juror could find in favor of authenticity. Here, the tapes were obtained from a codefendant, and the government had presented evidence that it had not tampered with the tapes and that the speakers were parties involved in this case.

United States v. Harrell, 788 F.2d 1524 (11th Cir. 1986) : The Court affirmed marijuana convictions, finding that taped statements of one defendant were properly admitted. It reiterated its general rule in criminal cases that "requires the prosecution to go forward with respect to the competency of the operator, the fidelity of the recording equipment, the absence of material deletions, additions or alterations in the relevant portions of the recording, and the identification of the relevant speakers." See also *United States v. Richardson*, n37 where the Court found that the government had laid a sufficient foundation even though it had not offered evidence as to the fidelity of the machine used, since there were independent indicia of accuracy.

[iii] Rule 901(a) -- Tape Recordings -- Chain of Custody

United States v. Thomas, 294 F.3d 899 (7th Cir. 2002) : The Court affirmed cocaine-related convictions, holding that a tape recording of a conversation among the defendant, another participant in a drug deal, and an undercover officer was properly authenticated when the other participant identified the voices on the tape and authenticated the

conversation. In response to the argument that the government did not establish a chain of custody for the recording, the Court stated that "so long as other evidence is sufficient to establish the accuracy and authenticity of the tapes, lack of proof regarding a chain of custody does not render tapes inadmissible."

[iv] Rule 901(a) -- Tape Recordings -- Enhanced Tapes

Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999) : A journalist was arrested after videotaping a local board meeting; when he retrieved his videotape, the video portion was erased, but the audio portion picked up conversations after he was taken into custody. In a subsequent § 1983 action, the journalist enhanced the audibility of the audio by playing it on a high-quality play-back system. The Court found no abuse of discretion in admitting the tape, as the plaintiff testified he did not alter the tape in any way, and the defendant offered no evidence in contradiction.

United States v. Thompson, 130 F.3d 676 (5th Cir. 1997) : The Court held there was no error in admitting a tape recording of the defendant soliciting another inmate to murder a Federal Judge, where an FBI signal processing analyst testified that the recording was made by electronically filtering out noises, such as from a public address system, on the original recording. The analyst explained that he did not add or delete any words in making the enhanced recording, and the inmate testified that the enhanced tapes accurately reflected the conversation. The Court also found no error in providing a transcript for the jury's use in listening to the tapes, where the defendant did not offer his own transcription or point to any inaccuracies in the government's.

United States v. Calderin-Rodriguez, 244 F.3d 977 (8th Cir. 2001) : In a drug prosecution, the Court found no error in the admission of digitally enhanced recordings of intercepted conversations, where the government established that the recording device and the enhancement device were both operative at the appropriate times; that the operator of devices was competent to operate them; that the recording was authentic; and that no changes were made (other than a change in volume as a result of the digital enhancement).

[v] Rule 901(a) -- Tape Recordings -- Incomplete Record of Conversation

United States v. Doyon, 194 F.3d 207 (1st Cir. 1999) : The Court affirmed a cocaine conviction, finding that two tape recordings of the defendant's conversations with a drug dealer were properly admitted, even though the tape recorder was old and manually operated in a way that omitted the first few seconds of both conversations. The Court reasoned that "[a]n accurate tape recording of part of a conversation is not inherently less admissible than the testimony of a witness who heard only part of a conversation and recounts the part that he heard." It also held that the probative value of the tapes was not outweighed by the prejudice associated with the omissions since this was a case in which "the recorded portion of the conversation ... contain[ed] straightforward admissions" and there was "no reason to suspect that they were qualified by anything said in the omitted portions."

United States v. Ray, 250 F.3d 596 (8th Cir. 2001) : Affirming drug convictions, the Court found no error in the admission of a tape and transcript of the defendant's conversation with a drug buyer. Although there were a number of places on the tape in which the conversation was unintelligible, the "gaps to which Ray points are by no means so substantial as to render the entire recording untrustworthy."

[vi] Rule 901(a) -- Tape Recordings -- Transcripts

[A] Rule 901(a) -- Tape Recordings -- Foreign Language Conversations

United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986) : The Court affirmed drug convictions, upholding the admission of English language transcripts of tape recordings that contained conversations in Spanish. It suggested that the Trial Judge should endeavor to obtain a stipulated transcript when the decision has been made that the jury should receive the transcript as evidence. If there is a difference of opinion as to the accuracy of the transcripts, each side should be able to introduce its own properly authenticated transcript and the jury should be instructed that it must decide which version, if any, is accurate.

United States v. Ben-Shimon, 249 F.3d 98 (2d Cir. 2001) : The Court affirmed an inmate's conviction for possession of contraband, holding there was no abuse of discretion in admitting a transcript of a tape-recorded conversation in English and Hebrew. Although the translation of the Hebrew portions was prepared by a cooperating witness who was not a certified translator, the defendant specified no inaccuracy in the transcript, the defendant refused several invitations to prepare a competing transcript with the assistance of a court-appointed translator, and the jury was properly instructed on the limited purpose of the transcript. In *United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996)* , the Court held there was no abuse of discretion in admitting an English-language transcript of a Spanish-language audiotape of a drug transaction, where the defendant was offered an opportunity to present an alternative transcript and the jury was instructed that it need not accept the transcript.

United States v. Garcia, 20 F.3d 670 (6th Cir. 1994) : The Court affirmed convictions for conspiracy to possess marijuana with intent to distribute, holding there was no abuse of discretion in admitting an English translation of an audiotape in Spanish, where a professional translator testified to its accuracy and the defendant did not point to any inaccuracies or offer an alternative translation.

United States v. Estrada, 256 F.3d 466 (7th Cir. 2001) : The Court held there was no abuse of discretion when the prosecution in a drug case was permitted to introduce transcripts in English of taped Spanish-language conversations without playing any of the tapes. The jury was not proficient in Spanish, and it was doubtful they would have been able to interpret inflections and tone of conversations in that language. In *United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990)* , the Court affirmed convictions of a heroin importing and distribution conspiracy, holding that government-prepared transcripts containing English translations of tape-recorded telephone conversations conducted in Yoruba were sufficiently authenticated with respect to both the identity of the speakers and the accuracy of the translations.

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir. 1997) : The Court held in a narcotics conspiracy case that there was no abuse of discretion in admitting transcripts of translations of tape-recorded conversations that had been conducted in Spanish, without introducing the tapes. It was unlikely that jurors who were not proficient in Spanish would be able to discern relevant inflections without knowing the language being spoken.

United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001) : Tape-recorded Spanish-language conversations were key evidence in a drug prosecution. Before trial, the government provided the defense with successive drafts of its verbatim transcriptions (in Spanish) and English translations of the conversations. At trial, every member of the jury was given a copy of both the final transcription and the translation to take into deliberations, the tapes were played for the jury, and the English translations were read to the jury. Although the defendant argued on appeal that the tapes were of poor quality and the transcription process problematic, the Court found no abuse of discretion, since there was no specific allegation of inaccuracies and the procedures used gave the defense a fair opportunity to highlight alleged inaccuracies and to introduce alternative versions. In a bank robbery case, *United States v. Rrapi, 175 F.3d 742 (9th Cir. 1999)* , a surveillance tape recording of a conversation in Albanian was introduced, along with an English translation transcript. The Court found no error in the failure to instruct that the tape is the evidence and the transcript

only a guide, since such an instruction is not only nonsensical in situations like this, but it also has the potential for harm. In *United States v. Pena-Espinoza*, n38 the prosecution of a cocaine distribution conspiracy, the government introduced over 4,800 recorded phone conversations (mostly in Spanish) and transcripts for 50 of the conversations. The Court held there was no abuse of discretion in admitting the English-language transcripts, where the defense made no meaningful attempt to check the transcripts for accuracy or at least to obtain a continuance to examine the crucial evidence.

[B] Rule 901(a) -- Tape Recordings -- Transcripts -- Recorded Conversations

United States v. Holton, 116 F.3d 1536 (D.C. Cir. 1997) : At a drug trial, the government introduced body-wire recordings of conversations with an undercover agent and offered transcripts of the recordings. After the defendants objected and offered an alternative transcript, the Trial Judge ruled that the government transcripts would aid the jury in listening to the tapes during the trial but that the transcripts would not be given to the jury during its deliberations. However, when the jury asked to hear the tapes again during deliberations, the Judge consulted with counsel and arranged a procedure whereby his law clerk would play the tapes for the jury in the courtroom and distribute the transcripts as listening aids during the playback. The Court held that the procedure was error (but harmless). The Trial Judge has discretion whether to admit a transcript into evidence as an aid to the jury and whether to permit transcripts to be used during deliberations. That decision should be reached sufficiently early in the trial for the defense to challenge a government-prepared transcript and support the accuracy of any alternative, to make objections, and to request appropriate jury instructions. If the parties do not agree on a transcript, each party should be permitted an opportunity to introduce its own transcript, and the jury should be instructed that it is up to them which, if any, version to accept. In *United States v. Strothers, 77 F.3d 1389 (D.C. Cir. 1996)* , the Court held it was error (but harmless) in a drug case to actually admit a government-prepared transcript of tape recordings into evidence, because it created a risk that the jury might have relied on that version of the conversations without simultaneously listening to the authenticated tapes to verify the transcript's accuracy.

United States v. Gonzalez-Maldonado, 115 F.3d 9 (1st Cir. 1997) : In a money laundering and cocaine prosecution, the government provided transcripts of taped conversations which included quotation marks around certain words that the government claimed were code words used to conceal the illegal nature of the conversations. The Court held it was error to allow use of the transcripts, where there was no audible emphasis or vocal inflection placed on the marked words that was discernible when listening to the tapes, even though the government subsequently presented evidence that the words were code words and the jury was instructed that only the tapes and not the transcripts were evidence. In *United States v. Rengifo*, n39 the Court affirmed drug convictions, holding that a wiretap tape could be authenticated by the testimony of the agent who supervised the taping. It suggested that the Trial Judge should endeavor to obtain a stipulated transcript when the decision has been made that the jury should receive the transcript as evidence. If there is a difference of opinion as to the accuracy of the transcripts, each side should be able to introduce its own properly authenticated transcript and the jury should be instructed that it must decide which version, if any, is accurate. In *United States v. Mazza*, n40 the Court affirmed cocaine convictions, finding that government-prepared transcripts were properly admitted to assist the jury in understanding tape recordings. It rejected the argument that the Judge should have made an independent inquiry into the accuracy of the transcripts before admitting them. In *United States v. Lopez-Pena*, n41 the Court held that voice identifications in transcripts used in a heroin conspiracy trial as an aid to the jury in listening to tape recordings, but not admitted into evidence, were sufficiently authenticated by testimony of an undercover agent who participated in the conversations transcribed. The Court also held that earlier drafts of the transcripts containing different voice identifications were properly excluded because no person authenticated those voice identifications and the agent specifically testified they were incorrect.

United States v. Rosa, 17 F.3d 1531 (2d Cir. 1994) : The Court, affirming convictions for conspiring to receive stolen goods, held there was no abuse of discretion in allowing the jury to have tape recording transcripts during its

deliberations, where the jury was instructed that the transcripts themselves were not evidence and could be used only as aids in listening to the audiotapes and as nonbinding guides subject to the jurors' own assessment of the transcripts' accuracy.

United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984) : The Court found no abuse of discretion in permitting the government to use transcripts of tape recordings admitted into evidence even though the defendants did not stipulate to the accuracy of the transcripts and the Judge did not attempt to verify their accuracy. The defendants made only a few objections to alleged inaccuracies in the transcripts, they did not challenge the methods used to prepare the transcripts, and the Judge carefully cautioned the jury on the proper use of transcripts.

United States v. Polk, 56 F.3d 613 (5th Cir. 1995) : The Court affirmed convictions for cocaine distribution offenses, holding there was no abuse of discretion in admitting tape recordings of undercover operations or in permitting the jury to use transcripts of the recordings during the playing of the tapes. Although some portions of the recordings were inaudible or unintelligible, the quality was not so poor that the transcripts could not be challenged effectively; further, the jury was not permitted to have the transcripts during deliberations and it was instructed that the tapes should control any difference with the transcripts.

United States v. Scarborough, 43 F.3d 1021 (6th Cir. 1994) : Affirming convictions for obstruction of justice, the Court found that a transcript of surreptitiously recorded conversations was properly admitted and that there was no error in allowing the jury to use the transcript in deliberation. While the parties did not stipulate to the accuracy of the government-prepared transcript, the Trial Judge determined that it was accurate by reviewing both the tapes and transcript. The Court noted that the jury was instructed that the transcript was not evidence and that it represented the government's version of the tape; it also noted that the defendant had not shown that the transcript was inaccurate in any respect. In *United States v. Segines, 17 F.3d 847 (6th Cir. 1994)* , the Court vacated cocaine convictions, holding that a composite tape recording was admissible under *Rule 1006*, but that it was error to admit a transcript, where the tape was unintelligible in part. It noted that "[w]hen tapes are unintelligible, ... a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself." In *United States v. West*, n42 the Court affirmed convictions for cocaine offenses and false grand jury testimony, holding there was no abuse of discretion in admitting recordings where the incomprehensible portions were not so substantial as to render the recordings untrustworthy as a whole. Further, there was no abuse of discretion in allowing the jury to use government-prepared transcripts, as there was evidence of their accuracy and the Judge made an independent determination of their accuracy after listening to the tapes.

United States v. Singleton, 125 F.3d 1097 (7th Cir. 1997) : The Court affirmed convictions for distribution of crack, finding no abuse of discretion in allowing the use of written transcripts to aid the jury in listening to partially inaudible recorded conversations, where the tapes were reasonably intelligible and the jury was repeatedly instructed to consider only those parts of the tapes they could understand and to be guided solely by what they heard and not by the transcripts. In *United States v. Howard, 80 F.3d 1194 (7th Cir. 1996)* , the Court affirmed convictions for crack cocaine distribution, holding there was no abuse of discretion in permitting use of a government-prepared transcript in connection with tape-recorded conversations. Although the tape was quite difficult to follow, it was not so unintelligible that the properly instructed jury could not reasonably be expected to rely on it rather than on the transcript. As for the transcript's accuracy, the defendants neither singled out portions they considered inaccurate nor provided an alternative version. The Court did express concern that the transcript provided the only basis for identifying several voices on the tape, but that issue had not been raised below and the error, if any, was harmless.

United States v. Frazier, 280 F.3d 835 (8th Cir. 2002) : Affirming convictions arising from a heroin distribution

operation, the Court ruled that the jury was properly permitted to view transcripts of recorded conversations while they were being played at trial. The agent responsible for the wiretap investigation provided sufficient foundation for the transcripts when he testified that he was familiar with the voices on the tapes through his work with the wiretaps and he described how he prepared the transcripts and that he proofread them by comparing them to the actual tape-recorded conversations.

United States v. Delgado, 357 F.3d 1061 (9th Cir. 2004) : Affirming drug convictions, the Court found no abuse of discretion when the Trial Judge allowed the jury to use transcripts of recorded conversations for the limited purpose of a listening aid. Although there was no indication that the Judge reviewed the transcripts for accuracy, the defendant was allowed to highlight alleged inaccuracies through testimony; the jury was instructed that the tape, rather than the transcript, was evidence; and the jury was allowed to compare the transcript to the tape and to hear counsel's arguments as to the meaning of the conversations.

United States v. Wright, 932 F.2d 868 (10th Cir. 1991) : In affirming convictions for drug trafficking, the Court held that transcripts of taped conversations of the defendants had been properly authenticated by the unrebutted testimony of one of the participants in the conversations, a government informant. Although the preferable means of authentication is a stipulation between the parties or a pretrial determination, here the defense counsel were given access to the tapes before trial, made their own transcripts, and neither attempted to enter into a stipulation nor offered to submit their own version of the transcripts at trial. In a firearms prosecution, *United States v. Mittleider*, n43 the Court found no error in the admission of tape recordings of the defendant's conversations during the sale of a machine gun, even though portions of the tapes were inaudible. Three witnesses who had heard the conversations testified and were subject to cross-examination, and the jury was instructed that written transcripts of the conversations were not evidence and were used only to help them. In *United States v. Devous*, n44 the Court affirmed the convictions of a doctor for illegally dispensing drugs, and upheld the introduction of a transcript of a tape recording that had been played to the jury. Although a judicial determination of the accuracy of transcripts should be made when the parties dispute the accuracy of the transcripts, defense counsel did not request cautionary procedures in this case, and the Trial Judge was not required to implement them *sua sponte*.

United States v. Green, 40 F.3d 1167 (11th Cir. 1994) : Affirming drug convictions, the Court held that transcripts of wiretapped conversations among the defendants were properly admitted. It stated that "[i]t is not a necessary predicate for admission of transcripts of tape recordings that each officer who prepared the transcript testify to its accuracy." In a racketeering case involving cocaine, *United States v. Rosenthal*, n45 the Court held that a defendant was not entitled to exclusion of a government-prepared transcript of a videotape based on alleged inaudibility of portions of the tape, where the defendant failed to tender a transcript offering a different version of the conversation.

[n] Rule 901(a) -- Telephone Conversations and Similar Conversations

United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) : Affirming a conviction for racketeering and murder, the Court held that it was proper to admit testimony by the girlfriend of a murdered witness regarding threatening phone calls from a person whose voice she could not identify. The Court reasoned that the caller identified himself as the defendant, and it was important for the defendant to identify himself in order to receive the "benefit" of the threat.

United States v. Espinoza, 641 F.2d 153 (4th Cir. 1981) : The Court found circumstantial authentication of a telephone call.

United States v. Pool, 660 F.2d 547 (5th Cir. 1981) : A conviction for illegal importation of marijuana was overturned because a DEA agent could not identify the voice on a telephone call during which the caller used a particular nickname. Absent other evidence, self-authentication by the caller was insufficient identification. In a prosecution for conspiracy to import marijuana, *United States v. Scott*, n46 the Court suggested that the government laid an inadequate foundation for testimony concerning radio communications where it neither identified the parties to the communications nor showed that certain ships had radios capable of communicating with one another. Any error was harmless, however.

United States v. Garrison, 168 F.3d 1089 (8th Cir. 1999) : In a narcotics prosecution, one of the witnesses was permitted to testify that a person who called himself "Ike" threatened to injure her and her daughter if she testified. The Court rejected the defense argument that no sufficient foundation was laid that "Ike" was a member of the conspiracy. Besides testifying to the fact of the telephone conversation, the witness also testified that she had been informed that other conspirators were working for a person named "Ike," and that the voice that threatened her did not belong to any of the other people she knew to be involved in the conspiracy. Finally, the government provided proof that one of the coconspirators went by the name "Ike." In *United States v. Hassell*, n47 the Court affirmed convictions for drug-related offenses, holding that a proper foundation was laid for a tape recording of a telephone conversation. According to the Court, "[T]he circumstances of this case are such that it could reasonably be inferred that [the defendant] was indeed the person whose conversation with the informant had been recorded."

United States v. Cook, 794 F.2d 561 (10th Cir. 1986) : The Court upheld convictions for cocaine offenses, finding that taped conversations were properly admitted where voices were identified by witnesses and circumstantial evidence, such as name references and pen register records, connected the tapes to the defendants.

United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988) : The Court found sufficient circumstantial evidence to support admission of a telephone call from an unidentified caller to a witness telling him what price to use on a bid.

[o] Rule 901(a) -- Videotapes

Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985) : The Court upheld a judgment for trademark owners against sellers of counterfeit handbags, concluding that no chain of custody was required for admission of a videotape showing the defendants telling an undercover agent of their counterfeiting activities. No challenge was made to the accuracy of the tape.

United States v. Goldin, 311 F.3d 191 (3d Cir. 2002) : The Court affirmed convictions of protesters at a National Historic Park, finding no abuse of discretion in the admission of a 15-minute videotape, which had been edited from a two-hour tape. The tape was authenticated by the camera operator, a person with knowledge, and it was not necessary that the editor authenticate it.

United States v. Sivils, 960 F.2d 587 (6th Cir. 1992) : The Court held there was no abuse of discretion in admitting video and audiotape recordings in a conspiracy prosecution where agents testified to regular checks on the recording equipment and to a chain of custody of the tapes.

United States v. Mills, 194 F.3d 1108 (10th Cir. 1999) : In order to curtail a problem with prison guards beating

inmates, escort teams at a federal penitentiary were required to videotape inmate movements. The defendant corrections officer was charged with beating a prisoner, but the videotape did not show the incident. The officer in charge of the video camera testified that it had been working properly and that he had recorded the entire incident, but that the defendant had ordered him to hand over the camera after the beating and had then returned it to him with instructions to begin filming the escort moving down the hall. The defendant argued that the tape was inadmissible because no chain of custody was established and because a five-minute gap in the digital time designation clearly indicated that it had been tampered with. Affirming a conviction for depriving a prisoner of his *Eighth Amendment* rights, the Court held there was no error in admission of the videotape. Chain of custody is not required for evidence with distinctive characteristics making it unique, readily identifiable, and relatively resistant to change; the officer confirmed that the tape, except for the deleted portion, accurately depicted the entire episode; and the deletion did not affect the accuracy of the remaining images, including the clear indication that some of the event was missing.

[2] Rule 901(b)(1) -- Illustrations -- Testimony Of Witness With Knowledge

United States v. Masse, 816 F.2d 805 (1st Cir. 1987) : The Court affirmed a cocaine distribution conviction, holding that testimony by government agents that they had seized items from the defendant, that the items were in substantially the same condition at trial as when they were seized, and that the agents followed standard procedure in handling the evidence was sufficient authentication. It rejected the defendant's contention that the agents' inability to recall which of them had seized the items or exactly where they were on the defendant's person undermined the evidentiary foundation.

United States v. Barone, 913 F.2d 46 (2d Cir. 1990) : Affirming a conviction for tax evasion and perjury, the Court held there was no error in admitting a tape recording authenticated through the testimony of the technician who made it; the government is not required to call as an authenticating witness a participant in the conversation.

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) : In a prosecution for illegal ocean dumping and making false statements to a grand jury, the Court held that radiotelegrams were sufficiently authenticated by, *inter alia*, testimony of telegraph operators, contents known only by the purported source, and the reply letter doctrine.

NLRB v. General Wood Preserving Co., 905 F.2d 803 (4th Cir. 1990) : The Court granted enforcement of a collective bargaining order, holding that signatures on a petition to designate the bargaining representative were sufficiently authenticated by witnesses who testified they observed the named employees affix their signatures.

In re Bobby Boggs, Inc., 819 F.2d 574 (5th Cir. 1987) : In a bankruptcy dispute over entitlement to a subcontractor's funds, the Court held that there was ample evidence to authenticate certain bonds issued by a surety that was defunct at the time of trial. It reasoned that state law permitted files from a defunct insurer's files to be admitted, and it concluded that the testimony of the surety's receiver concerning the documents was tantamount to testimony by a person with knowledge. Reviewing a bankruptcy proceeding in *In re Clifford*, n48 the Court held that an improperly recorded security deed was admissible under *Rule 901* in the light of a notary public's testimony as to execution of the deed.

United States v. Long, 857 F.2d 436 (8th Cir. 1988) : In a prosecution arising out of the deposit of a forged treasury check, the Court held that a witness sufficiently authenticated a document when she testified that she recognized it as the contract that she had seen the defendant sign.

United States v. Vasquez, 858 F.2d 1387 (9th Cir. 1988) : The Court affirmed convictions for drug offenses, finding that an officer gave sufficient testimony to lay the foundation for fingerprint evidence. Although it noted that the government could have offered better evidence and that the officer did not testify that he personally lifted the print, the Court found that the testimony established that two officers lifted all of the prints taken and that the print had to come from a cocaine package seized in a search.

United States v. Davis, 780 F.2d 838 (10th Cir. 1985) : Affirming drug convictions, the Court held that a notepad was properly authenticated by the testimony of the person who made most of the notes, even though the author of one of the words on the pad was unknown.

[3] Rule 901(b)(2) -- Illustrations -- Nonexpert Opinion On Handwriting

United States v. Scott, 270 F.3d 30 (1st Cir. 2001) : The Court affirmed false claims and bank fraud convictions, finding no error in the admission of testimony from a law enforcement agent, who was not an expert on handwriting identification, that certain documents in evidence were in Scott's handwriting. The agent had not acquired his knowledge of Scott's handwriting "for purposes of the litigation," but during the course of many years investigating Scott's criminal conduct.

United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986) : In a false claims prosecution, the Court held that a multipage lease was properly authenticated by an identification of the signatures on one page: "To identify a document sufficiently to warrant its admissibility, a witness need not be able to attest familiarity with every page." In *United States v. Barron*, n49 the Court affirmed perjury convictions, upholding the admission of testimony by a witness that a signature on a note was *A*'s rather than *B*'s where the witness knew the handwriting of both persons and had once seen *A* sign *B*'s name. In *United States v. Pitts*, n50 the Court upheld the rejection of a nonexpert's opinion on handwriting, where the witness "acquired any expertise he arguably had for purposes of a pending criminal investigation."

United States v. Tipton, 964 F.2d 650 (7th Cir. 1992) : Affirming an embezzlement and tax evasion conviction, the Court held that a co-worker familiar with the defendant's handwriting and signature as a result of observing many of the documents on which the defendant worked was qualified to identify the defendant's handwriting or signature on phony documents. In *United States v. Binzel, 907 F.2d 746 (7th Cir. 1990)* , an action to recover on a Small Business Administration loan guaranty, the defendant made an affidavit that, based on his familiarity with another's signature gained from observing him sign documents and seeing documents executed by him, a particular signature was a forgery. The Court affirmed summary judgment for the SBA, holding that because the affidavit did not identify the documents, establish the genuineness of the documents, or identify a relationship with the purported signer permitting reasonable familiarity with the signature, the opinion was based on nothing more than conclusory, self-serving allegations not raising a genuine issue of material fact. Affirming convictions for smuggling weapons into a prison in *United States v. Mauchlin*, n51 the Court found that prison file documents purporting to have been written by Mauchlin, which were used by a handwriting expert to support his conclusion that Mauchlin was the author of a trial exhibit, were properly authenticated by a prison official who for 16 months had daily contact with Mauchlin and had seen him write on approximately six occasions.

United States v. Humphrey, 208 F.3d 1190 (10th Cir. 2000) : Remanding convictions for possession of methamphetamine, the Court ruled that if a new trial was required, a witness' testimony that she was familiar with one defendant's handwriting was sufficient to authenticate documents found in a purse, "[a]lthough it is true that there was almost no elaboration on the opportunities that [the witness] had to observe the defendant's handwriting."

Hall v. United Ins. Co. of Am., 367 F.3d 1255 (11th Cir. 2004) : The Court affirmed summary judgment for the insurer in an action to obtain benefits under a policy that the insurer had terminated. The plaintiff in the action had filed an affidavit stating that, based on her familiarity with the insured's handwriting, the insured had not signed the letter of termination. The Court held that such an opinion requires detailed information regarding documents relied upon to establish familiarity -- including identification of the documents with particularity -- and detailed information regarding the witness' relationship with the signatory, whether it be familial, professional, or otherwise personal. In *United States v. Williams*, n52 the Court held that "yellow sheets" were properly admitted against a defendant charged with filing a false tax return, where the defendant's initials were identified at the bottom of several sheets. In *United States v. Barker*, n53 a bank employee convicted of misapplying and converting traveler's checks unsuccessfully appealed, as the Court held that testimony of two fellow employees, who identified the defendant's handwriting on checks, was properly admitted.

[4] Rule 901(b)(3) -- Illustrations -- Comparison By Trier Or Expert Witness

United States v. Mangan, 575 F.2d 32 (2d Cir. 1978) : Affirming conspiracy and tax fraud convictions, the Court upheld the use of the defendant's signatures on his returns as exemplars offered to support an expert opinion that he signed certain documents in the course of the fraudulent scheme.

United States v. Clifford, 704 F.2d 86 (3d Cir. 1983) : The Trial Judge ruled that the government could not introduce correspondence in the defendant's handwriting to show stylistic similarities between it and threatening letters that he allegedly wrote. The Court recognized the broad discretion given by *Rule 403*, but found that the Judge had misconstrued the government's offer of proof and confused the question of the sufficiency of the evidence to convict with the question of the admissibility of the correspondence. The Court saw no reason "why jurors cannot examine the documents for themselves and consider the similarities between the documents along with the rest of the evidence presented by the government."

NLRB v. General Wood Preserving Co., 905 F.2d 803 (4th Cir. 1990) : The Court granted enforcement of a collective bargaining order, holding that signatures on a petition to designate the bargaining representative were sufficiently authenticated by comparison with undisputed authentic specimens.

United States v. Saadey, 393 F.3d 669 (6th Cir. 2005) : Affirming convictions for attempted extortion and filing false tax returns and credit applications, the Court found no error in the admission of false credit applications unaccompanied by expert testimony that the handwriting on the applications matched that of the defendant. The government had previously entered into evidence tax returns that the defendant admitted were his. Thus, the jury could compare the signatures on the returns with those on the applications. In a prosecution for threatening the President, *United States v. Glover*, n54 the Court upheld the admission of expert testimony that handwriting in one letter could have been the defendant's, although the evidence was far from conclusive.

Greater Kansas City Laborers Pension Fund v. Thummel, 738 F.2d 926 (8th Cir. 1984) : Affirming a judgment holding a company and its owner liable for unpaid contributions to employee benefit funds, the Court upheld the admission of a carbon copy of a contract, which contained a dim signature of the owner. This signature was sufficiently authenticated by the Trial Judge comparing it with other handwriting samples of the owner. "[T]he trier of fact may compare a contested sample of handwriting with an authenticated sample and decide that the contested sample is authentic even in the absence of expert testimony."

United States v. Alvarez-Farfan, 338 F.3d 1043 (9th Cir. 2003) : The defendant argued that the confidential informant, not the defendant, rented the motel room in which the charged drug transaction occurred. Reversing, the Court held it was an abuse of discretion to exclude the informant's debriefing statement and the motel receipt in support of the defendant's argument. The jury could properly compare the handwriting on the proved statement with that on the receipt and make its own determination whether the same person's handwriting was on the two documents; no expert testimony from a questioned document examiner was required. In *United States v. Woodson*, n55 the Court affirmed convictions for theft and sale of government property, and upheld the sending of invoices signed by the perpetrator and exemplars of the defendant to the jury for its comparison, even though the government's expert could not say whether the signatures were of similar or dissimilar authorship.

United States v. Hernandez-Herrera, 952 F.2d 342 (10th Cir. 1991) : The Court affirmed convictions for immigration offenses, holding that a photocopy of a fingerprint card was sufficiently authenticated by comparison with other exhibits already admitted into evidence.

[5] Rule 901(b)(4) -- Illustrations -- Distinctive Characteristics And The Like

[a] Rule 901(b)(4) -- Contents

United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991) : In a prosecution for extortion, the Court held that even though a witness was unable to testify that he recognized handwriting on a note as the defendant's, the note was sufficiently authenticated by evidence that the defendant was observed passing the note to a colleague, it repeated nearly verbatim the contents of a conversation between the defendant and the colleague (who was hard of hearing) overheard by a different witness only moments before, and it raised matters unique to the defendant. To prove that the proceeds of a marijuana importation conspiracy were deposited in Swiss bank accounts in *United States v. Newton*, n56 the government offered an unsigned and undated typed document seized from one of the alleged participants that included lists of names (including aliases proved to have been used by the conspirator), account numbers, and Swiss banking officers. The Court held that the document was sufficiently authenticated by circumstantial evidence, including references to the conspirator's wife, lawyer, and girlfriend, bank account numbers next to proven aliases, and external evidence corroborating the connections made in the document. See also *United States v. Drougas* n57(admitting in a marijuana conspiracy case placemats found in a conspirator's apartment that contained the first names of many conspirators along with four- and five-digit figures).

United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990) : The Court affirmed convictions for bank robbery offenses committed by members of a Puerto Rican independence group, holding that a communiqu'e bearing the group's logo was sufficiently authenticated as having been authored by one or more of the conspirators because it contained information unlikely to have been known by others.

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) : In a prosecution for illegal ocean dumping and making false statements to a grand jury, the Court held that radiotelegrams were sufficiently authenticated by, *inter alia*, testimony of telegraph operators, contents known only by the purported source, and the reply letter doctrine.

United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) : In a prosecution for credit card fraud, the government offered a card purportedly signed by the defendant and sent to the father of the defendant's son-in-law. The recipient testified that he did not know the defendant's handwriting, but that the card was signed in the defendant's name and the card contained references to the recipient's family "that no one else could have written." Affirming the convictions, the Court found that the card was properly authenticated.

United States v. Mokol, 957 F.2d 1410 (7th Cir. 1992) : Affirming a racketeering conviction, the Court held that handwritten bribe sheets seized from a codefendant's home were sufficiently authenticated by evidence that they included initials corresponding to the defendant's and amounts the codefendant paid him; furthermore, the information conformed to information in recorded conversations among coconspirators and to testimony at trial. In *United States v. De Gudino*, n58 the Court affirmed convictions for conspiracy to transport illegal aliens, finding that the contents of "*pollo* lists" (names, amounts of money paid, etc.), considered in connection with the testimony concerning the smuggling conspiracy, established that they were written by someone involved in the conspiracy.

United States v. Sanders, 421 F.3d 1044 (9th Cir. 2005) : When the defendant was in jail awaiting trial he attempted to dissuade an accomplice, also held there, from testifying by conversations through vents and by notes; he also sent a false declaration exonerating him to the accomplice to be signed. Affirming a bank robbery conviction, the Court held that the defendant's various statements were sufficiently identified by testimony from the accomplice that: he recognized the defendant's voice; the defendant knew his booking number that was on the declaration; a note from the defendant was in response to one he sent; and no other inmate had any significant interest in getting him to sign the exonerating declaration.

[b] Rule 901(b)(4) -- Fingerprints

United States v. Patterson, 277 F.3d 709 (4th Cir. 2002) : In a narcotics prosecution, the Court held that a fingerprint image taken by a Digital Biometrics Tenprinter was sufficiently authenticated by a matching print recovered from a bag containing narcotics that the police discovered during their investigation of the defendant. The expert testimony that one of the fingerprints recorded by the Tenprinter matched a print on the bag provided "compelling evidence that the Tenprinter reliably imaged Patterson's fingers." The alternative -- that the machine generated an inaccurate image that happened to be identical to a fingerprint recovered by a different person using a different process on a different object in a different location -- was "simply implausible."

[c] Rule 901(b)(4) -- Location or Possession

United States v. Paulino, 13 F.3d 20 (1st Cir. 1994) : To prove the defendant's connection with the drug business in an apartment in which he was arrested, the government offered a postal money order receipt found in the apartment that bore his name, the address of the apartment, and a notation that it was used for a rent payment. The Court held that the authenticity of the receipt was sufficiently shown by the circumstances, including the fact that it was of a type likely to be saved only by the rent-payer and that the defendant had been seen in and around the apparently uninhabited apartment during the rental period covered by the receipt. In a prosecution for extortion, *United States v. McMahon, 938 F.2d 1501 (1st Cir. 1991)* , the Court held that even though a witness was unable to testify that he recognized handwriting on a note as the defendant's, the note was sufficiently authenticated by evidence that the defendant was observed passing the note to a colleague, it repeated nearly verbatim the contents of a conversation between the defendant and the colleague (who was hard of hearing) overheard by a different witness only moments before, and it raised matters unique to the defendant.

United States v. Smith, 63 F.3d 766 (8th Cir. 1995) : The Court affirmed cocaine convictions, holding that receipts and similar documents seized at the defendant's house were sufficiently connected to the defendant, since it is reasonable to assume that the true owner or purchaser of goods would have receipts for those goods. In *United States v. Eisenberg*, n59 the Court affirmed a defendant's cocaine convictions, finding that a letter found in his roommate's suitcase was circumstantially authenticated, in part by its location.

Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984) : The Court held in a tax shelter case that certain records offered by the plaintiffs could be authenticated by the fact that they were found in the company's warehouse. See also *United States v. Black* n60(in a mail fraud and tax evasion case, allegedly forged documents were authenticated by their being in the defendant's possession).

[d] Rule 901(b)(4) -- Nondocumentary Evidence

United States v. Schrock, 855 F.2d 327 (6th Cir. 1988) : Affirming drug convictions, the Court held that the nature of substances in which the defendant dealt could be proved by circumstantial evidence and that scientific evaluation of a substance is not required.

United States v. Lepanto, 817 F.2d 1463 (10th Cir. 1987) : The Court affirmed a conviction for being an accessory to the manufacture of a destructive device, holding that a carpet was sufficiently authenticated by: testimony of a postal inspector that he saw the defendant throw it into a dumpster (although it was not recovered until the next day); testimony of an expert that the carpet came from the defendant's apartment; and testimony of the defendant's brother identifying the carpet.

[e] Rule 901(b)(4) -- Other Examples

United States v. Bruner, 657 F.2d 1278 (D.C. Cir. 1981) : In a drug conspiracy, the government properly authenticated prescriptions by circumstantial evidence of authenticity.

United States v. Bello-Perez, 977 F.2d 664 (1st Cir. 1992) : The Court held there was ample circumstantial evidence that a letter from prison urging the recipient not to implicate the author in drug dealing had originated with the defendant. In a mail fraud case, *United States v. Gordon*, n61 the Court found that "the appearance, contents, substance, internal patterns, and like characteristics of the documents purporting to have been authorized by the defendant" supported a finding that the documents were so authorized.

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983) : In a RICO prosecution, the Court found that a letter was circumstantially authenticated by its postmark, its salutation, its contents, and its use of nicknames, as well as by the location in which it was found.

Link v. Mercedes-Benz, 788 F.2d 918 (3d Cir. 1986) : In a class action antitrust case involving an unsuccessful claim that a manufacturer conspired with its dealers to fix prices of nonwarranty repairs, the Court held that industry publications involving other automobile manufacturers, offered to support the defense that certain practices were independent responses to market pressures, were properly authenticated by the testimony of a defense witness or by the distinctive characteristics of the publications. The characteristics included logos, trademarks, and professional appearance and internal consistency. In *McQueeney v. Wilmington Trust Co.*, n62 the Court reversed a judgment for a seaman in a Jones Act case, finding that the defendants should have been permitted to offer the seaman's "Sea Records" to limit his damage claim, since the records were amply supported by circumstantial evidence. The seaman produced the records in response to a discovery request, they contained information not widely held, and they appeared to be genuine copies of standard Coast Guard documents.

United States v. Martin, 756 F.2d 323 (4th Cir. 1985) (en banc): In a drug conspiracy case, the Court upheld admission of an owner's registration card for a boat, since it "speaks for itself" and was obviously the card relating to the boat named.

United States v. Dumeisi, 424 F.3d 566 (7th Cir. 2005) : Affirming convictions of a defendant who was acting as an agent of Saddam Hussein's Iraqi regime, the Court held that a file obtained in Baghdad as an Iraq Intelligence Service file had been sufficiently authenticated. A witness who had worked for the Service from 1979 to 2003 and advanced to a high position identified distinctive characteristics such as the style and form of the documents, but did not identify the blue and clear plastic folder in which the file was found. The Court also noted that classified information surrounding the initial discovery of the file bolstered the contention that the file was what the government claimed it to be. In the prosecution of a massive street gang drug conspiracy, *United States v. Smith, 223 F.3d 554 (7th Cir. 2000)* , the Court found no abuse of discretion in admitting "The List," a document describing the territorial and hierarchical organization of the entire operation, which had been found in the files of an organization owned by the gang leader's female partner. There was ample proof of its authenticity, including recordings of the gang leaders discussing its creation, its place of discovery, the gang leader's name on the file where it was found, and contents indicating its connection to the gang. In *United States v. Thornton*, n63 the Court affirmed convictions for a drug conspiracy, finding that 50 documents seized by law enforcement personnel from the person, residence, or vehicle of a coconspirator were sufficiently authenticated without testimony from the authors of the documents. Some, such as utility bills, merchandise receipts, and business cards, were distinctive enough to authenticate themselves; for others, evidence of their location and substance provided an adequate foundation. In *United States v. Harvey*, n64 the Court held that the government provided sufficient circumstantial evidence that handwritten notes concerning the charged marijuana operation were prepared by the defendant. The notes were found in a remote area where law enforcement agents observed no one other than the defendant; the notes were found next to the defendant's bed; and the notes made reference to the defendant's dog. In *United States v. Hoag*, n65 a prosecution for making false statements on mortgage applications, the Court held that letters written on a company letterhead were properly authenticated by the circumstances and distinctive characteristics, as well as by company employees.

United States v. Baker, 855 F.2d 1353 (8th Cir. 1988) : The Court found sufficient authentication of items seized from the trash in a drug investigation in the distinctive characteristics linking the items to the defendants. In a prosecution for drug trafficking and other offenses, *United States v. Lewis*, n66 the Court found that a ledger reference that listed cash disbursements was circumstantially authenticated. In *United States v. Helmel*, n67 the Court upheld convictions for conducting an illegal gambling enterprise, finding that a lease agreement for the rental of an office was properly admitted despite the fact that no witness identified the handwriting on the agreement as that of one of the defendants. Since the office was used by the gambling business, and a ledger admitted as a conspirator's statement showed payments on the lease, the lease agreement was authenticated as relating to the charges against the defendants.

United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988) : The Court affirmed an espionage conviction and held that certain anonymous letters were properly admitted as having been written by the defendant. The authentication was circumstantial and included evidence of the places of mailing, connections with other evidence found in the defendant's home, and the use of a name in the letters that the defendant used for a friend.

United States v. Henry, 164 F.3d 1304 (10th Cir. 1999) : The defendant was charged with filing false statements in obtaining worker's compensation benefits. The Court held that the forms that included the false statements were sufficiently authenticated as having come from the defendant by: their having been received in reply to instructions and blank forms that the government mailed to the defendant; defense counsel's testimony that he assisted the defendant in completing such forms; personal information (including the defendant's Veterans Administration number); internally consistent biographical information; and corroboration of certain information by other witnesses. In *United States v.*

Markopoulos, n68 the Court found insufficient evidence of distinctive characteristics to admit as party admissions signatures on various rental documents in a marijuana conspiracy case. Admission of the documents was harmless error, however. See also *United States v. Reyes* n69(the source of handwritten notes seized from the defendant's residence and the correspondence of information contained therein to members of a drug conspiracy authenticated the notes).

United States v. Munoz, 16 F.3d 1116 (11th Cir. 1994) : Affirming convictions for marijuana importation, the Court held that Panamanian bank documents were sufficiently authenticated as belonging to the defendant by the location where they were seized, their bearing markings typical of bank documents, and signatures similar to those on other documents of the defendant's. In *United States v. Smith, 918 F.2d 1501 (11th Cir. 1990)* , the Court affirmed convictions for offenses in a cocaine distribution conspiracy, holding that ledgers containing references to the defendants and composed of special color and notation codes were sufficiently authenticated by the similarity to color codes on containers of narcotics and on business cards seized from the defendants. In *United States v. Caldwell*, n70 the Court affirmed fraud convictions, but rejected the Trial Judge's implication "that the testimony of someone present at the time of creation of the document was necessary for authentication." Although this is one form of authentication, a document also may be authenticated by circumstantial evidence.

[f] Rule 901(b)(4) -- Photographs

United States v. Englebrecht, 917 F.2d 376 (8th Cir. 1990) : The Court affirmed a conviction for drug offenses, holding that photographs of the defendant posing next to marijuana plants were sufficiently authenticated, even though there was no direct proof of when or where the pictures were taken.

United States v. Stearns, 550 F.2d 1167 (9th Cir. 1977) : Affirming theft convictions, the Court held that photographs of two boats, one of which was allegedly stolen, were properly admitted into evidence, even though no witness testified explicitly as to where or when the pictures were taken or what they represented. It noted: "Even if direct testimony as to foundation matters is absent, however, the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence."

[g] Rule 901(b)(4) -- Reply

United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) : In a prosecution for illegal ocean dumping and making false statements to a grand jury, the Court held that radiotelegrams were sufficiently authenticated by, *inter alia*, testimony of telegraph operators, contents known only by the purported source, and the reply letter doctrine.

United States v. Sanders, 421 F.3d 1044 (9th Cir. 2005) : When the defendant was in jail awaiting trial he attempted to dissuade an accomplice, also held there, from testifying by conversations through vents and by notes; he also sent a false declaration exonerating him to the accomplice to be signed. Affirming a bank robbery conviction, the Court held that the defendant's various statements were sufficiently identified by testimony from the accomplice that: he recognized the defendant's voice; the defendant knew his booking number that was on the declaration; a note from the defendant was in response to one he sent; and no other inmate had any significant interest in getting him to sign the exonerating declaration.

United States v. Weinstein, 762 F.2d 1522 (11th Cir. 1985) : In a racketeering conspiracy and mail fraud case, the Court approved the admission of a telex that was circumstantially authenticated by its responsiveness to a letter that was

in evidence.

[h] Rule 901(b)(4) -- Telephone Conversations

United States v. Console, 13 F.3d 641 (3d Cir. 1993) : The Court affirmed RICO and fraud convictions, holding that a telephone conversation was sufficiently authenticated by the caller's self-identification plus his disclosing knowledge of facts known peculiarly to him.

United States v. Parker, 133 F.3d 322 (5th Cir. 1998) : In the prosecution of a husband and wife for public bribery, the Court found that the husband was sufficiently identified as having made a threat in a phone conversation, where the wife placed the call to the witness and thereafter a man interrupted the conversation and referred to the wife as his "old lady."

United States v. Sawyer, 607 F.2d 1190 (7th Cir. 1979) : In a prosecution for failure to file tax returns, the Court held that a telephone conversation was properly authenticated by evidence that the number listed in an IRS agent's report was the defendant's, and the personal nature of the facts made it unlikely that anyone else would have answered for the defendant.

United States v. Miller, 771 F.2d 1219 (9th Cir. 1985) : Affirming criminal antitrust convictions, the Court held that a telephone call could be authenticated by the caller's reference to another call made ten minutes earlier.

[6] Rule 901(b)(5) -- Illustrations -- Voice IdentificatioN

United States v. Cambindo Valencia, 609 F.2d 603 (2d Cir. 1979) : The Court indicated that it was not necessary for a witness to be an expert in order to identify a voice speaking in Spanish on a tape. In *United States v. James*, n71 the Court found that a telephone call was admissible as a statement of a coconspirator without a showing of the identity of the caller, but suggested that the jury should have been told that there was insufficient evidence to connect a particular defendant with the call.

United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995) : The Court held there was no error in admitting incriminating audio tapes in a drug prosecution. Although one witness who identified the defendant's voice had listened to the tapes with the aid of a government-prepared transcript containing portions of dialogue labeled with the defendant's name, the witness testified that he knew the defendant's voice and that he had not seen the transcripts until after he had recognized the voice on the tapes. The defendant objected that another witness had gained his knowledge of the defendant's voice during plea negotiations, but the Court held that the Rules only limit admissibility of statements, not sounds, in plea bargaining. In a drug prosecution, *United States v. Robinson*, n72 the Court found that a government witness was properly permitted to testify that a person who identified himself as Ralph, the defendant's first name, spoke to her during several telephone calls and once in person. She could identify the voice as the same in all the conversations.

United States v. Norman, 415 F.3d 466 (5th Cir. 2005) : The Court affirmed drug convictions, finding no error in permitting DEA agents to identify a defendant's voice on an audiotape, since the agents had an hour-long discussion with the defendant from which they could make the identification. The fact that the recording of defendant's voice was short in duration and accompanied by background noise went to weight rather than admissibility, especially given extrinsic evidence supporting the reliability of the identification.

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002) : The Court affirmed drug trafficking convictions, finding no error in the admission of tape recordings and translations of intercepted telephone conversations that had been conducted in Farsi. An FBI language specialist identified two of the defendants as participants in the conversations, based on having heard them speak at a Court proceeding that took place in advance of trial. While agreeing with the defendants that the basis for the witness' identification "was relatively weak," the Court found that it could not say the brief opportunity was insufficient as a matter of law to permit the voice identification. In *United States v. Magana, 118 F.3d 1173 (7th Cir. 1997)* , the Court affirmed drug convictions, holding there was no error in refusing to give the defendant's proposed instruction that the value of voice identification evidence depends on the witness' opportunity to hear the offender at the time of the offense and later to make a reliable identification. The instruction did not accurately reflect the law, that voice identifications can be based on the witness' opportunity to hear the speaker's voice at any time in circumstances connecting the speaker with the voice. In *United States v. Saulter*, n73 the Court affirmed crack cocaine convictions, finding no error in a government witness' identification of two coconspirators on a tape recording. The witness' familiarity with one of the coconspirators was limited to having purchased narcotics from him on two occasions. Nonetheless, "minimal familiarity is sufficient for admissibility purposes," and two meetings formed a sufficient basis for a voice identification. In *United States v. Gironda*, n74 the Court held that a person who spoke with a defendant on three occasions could identify his voice over the telephone.

United States v. Vitale, 549 F.2d 71 (8th Cir. 1977) : Affirming convictions for distributing controlled substances, the Court approved a ruling that a police officer could testify as to his identification of the defendant's voice in telephone conversations since he had spoken with her personally on two occasions and said that he could identify her voice. The Court also noted that the identity of a speaker in a telephone conversation might be proved by circumstantial evidence. In *United States v. Kirk*, n75 the Court affirmed convictions for heroin distribution offenses, noting that voice identification is not necessarily a subject of expert testimony. Under *Rule 901* the standard for the admissibility of an opinion as to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time.

United States v. Sanders, 421 F.3d 1044 (9th Cir. 2005) : When the defendant was in jail awaiting trial he attempted to dissuade an accomplice, also held there, from testifying by conversations through vents and by notes; he also sent a false declaration exonerating him to the accomplice to be signed. Affirming a bank robbery conviction, the Court held that the defendant's various statements were sufficiently identified by testimony from the accomplice that: he recognized the defendant's voice; the defendant knew his booking number that was on the declaration; a note from the defendant was in response to one he sent; and no other inmate had any significant interest in getting him to sign the exonerating declaration. In *United States v. Duran, 4 F.3d 800 (9th Cir. 1993)* , the Court affirmed a bank robbery conviction, holding there was no abuse of discretion in admitting bank tellers' in-court voice identification of the defendant, where he had their undivided attention during the robbery, they gave an accurate description of the defendant and his voice, and the identification occurred just three months after the robbery. In *United States v. Torres*, n76 the Court affirmed drug conspiracy convictions, holding that a voice heard on tape recordings was sufficiently identified by testimony of a DEA agent that he had spoken with a defendant and recognized her voice on the tapes and by evidence that she was the only person at the location who responded to the name used on the tapes.

United States v. Bush, 405 F.3d 909 (10th Cir. 2005) : The Court affirmed a conviction for cocaine distribution, finding no error in allowing an undercover officer to testify as a lay witness that it was the defendant's voice in an incriminating conversation that was surreptitiously recorded and played at trial. The witness had sufficient familiarity with the defendant's voice from speaking to him in person and numerous times over the phone. A voice identification "need only rise to the level of minimal familiarity" and once that standard has been satisfied, "it is for the jury to assess any issues regarding the extent of the witness' familiarity with the voice." In a drug trafficking prosecution, *United States v. Hardwell, 80 F.3d 1471 (10th Cir. 1996)* , the Court held there was no plain error in admitting a detective's

opinion identifying a defendant's voice on a tape recording even though the detective had not heard the taped conversations in person, since the detective later heard the defendant's voice both in person and on a tape of his Court appearance. In *United States v. Watson*, n77 the Court held that, for purposes of voice identification, familiarity with another's voice may be acquired either before or after the conversation that is the subject of the identification.

United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995) : Affirming a narcotics conviction, the Court held that transcripts of wiretapped conversations were properly admitted. An inspector with the Spanish National Police, who conducted the wiretap, had read the transcript to the jury. Although the inspector was not familiar with the defendant's voice prior to the wiretaps, the Court held that it was sufficient under the Rule that the inspector became familiar with the defendant's voice during the two-month wiretap surveillance.

[7] Rule 901(b)(6) -- Illustrations -- Telephone Conversations

[a] Rule 901(b)(6) -- Calls to Businesses

United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982) : The Court held that a telephone conversation was properly authenticated under the Rule by evidence that it had been placed to a defendant's office.

United States v. Kingston, 971 F.2d 481 (10th Cir. 1992) : The Court affirmed fraud convictions, holding that a telephone conversation was sufficiently identified with the defendant by evidence that the witness had called the number listed for the defendant's business and left a message on the answering machine, which prompted a return call from a person informing the witness that the defendant could be reached at a given number, and that when the witness called that number, the person answering identified himself as the defendant and stated his familiarity with the matter at issue.

[b] Rule 901(b)(6) -- Calls to Individuals

United States v. Khan, 53 F.3d 507 (2d Cir. 1995) : In a prosecution for Medicaid fraud, the Court held that telephone calls allegedly made by a defendant were sufficiently authenticated by evidence that they were made to a number provided by the defendant on an application form and in regard to a matter as to which the defendant had indicated a strong interest in returning the call.

First State Bank v. Maryland Cas. Co., 918 F.2d 38 (5th Cir. 1990) : To show that the insured was not at home when a fire destroyed a house he owned, which with other proof tended to show he set the fire, the defendant in an action on a fire insurance policy offered testimony by a police dispatcher that she called the listed number for the insured to notify him of the fire, that an unidentified person answered the phone and identified it as the insured's residence, and the person answering said the insured was not home. Affirming a judgment for the insurer, the Court held that the telephone conversation was sufficiently authenticated.

United States v. Roberts, 22 F.3d 744 (7th Cir. 1994) : In a prosecution for fraud in the sale of distributorships, an undercover informant testified for the government that he called an advertised 800 number, expressed interest in buying a distributorship, and was told to call "Doug Jones" at a certain number. When he dialed that number, a person who identified himself as "Doug Jones" answered and made fraudulent representations. The Court held there was no error in admitting the representations against the defendant Doug Jones at trial. Although "self-identification by the speaker alone is insufficient to authenticate the source of a telephone call," here there was more than simple self-identification: the agent was directed to Jones' telephone number and dialed that number, and the person who identified himself as

Doug Jones made several representations consistent with those that Doug Jones had made in similar circumstances.

United States v. Pruitt, 702 F.2d 152 (8th Cir. 1983) : Affirming a conviction for making a fraudulent claim to the government, the Court found that testimony about several conversations involving the defendant were admissible even though neither of the witnesses who testified was familiar with his voice: "Identification of a party to a telephone conversation may be established by circumstantial evidence, including self-identification, tending to relate a phone number to a particular person."

United States v. Kingston, 971 F.2d 481 (10th Cir. 1992) : The Court affirmed fraud convictions, holding that a telephone conversation was sufficiently identified with the defendant by evidence that the witness had called the number listed for the defendant's business and left a message on the answering machine, which prompted a return call from a person informing the witness that the defendant could be reached at a given number, and that when the witness called that number, the person answering identified himself as the defendant and stated his familiarity with the matter at issue.

[8] Rule 901(b)(7) -- Illustrations -- Public Records Or Reports

United States v. Childs, 5 F.3d 1328 (9th Cir. 1993) : The Court affirmed convictions for interstate transportation of stolen motor vehicles, holding there was no error in admitting documents filed with the Alberta, Canada, Division of Motor Vehicles upon the testimony of a custodian of those records, even though they did not meet the requirements for self-authentication under *Rule 902(3)*. In *United States v. Wilson*, n78 the Court affirmed convictions for fraud and possession of false identity cards, finding no abuse of discretion in the admission of a map referred to in the testimony of a Navy realty specialist and draftsman that established federal jurisdiction over the area in which two of the alleged crimes were committed. The map was identified as one prepared and maintained under the supervision of the Naval Department charged with responsibility for real estate acquisition and management in the area, and the witness was sufficiently qualified as an expert draftsman and cartographer.

United States v. Meienberg, 263 F.3d 1177 (10th Cir. 2001) : The Court affirmed a conviction for selling a firearm in violation of state law, finding no abuse of discretion in the admission of printouts of computerized records reflecting the approval numbers issued by the state Bureau of Investigation to the defendant's firearms business. The printouts were sufficiently authenticated by testimony from a government witness to that fact; any question as to their accuracy went only to weight, not admissibility. In *United States v. Hernandez-Herrera, 952 F.2d 342 (10th Cir. 1991)* , the Court affirmed convictions for immigration offenses, holding that an INS agent with knowledge of the agency's procedures could sufficiently authenticate INS records, even though no chain of custody was established.

[9] Rule 901(b)(8) -- Illustrations -- Ancient Documents Or Data Compilation

George v. Celotex Corp., 914 F.2d 26 (2d Cir. 1990) : Affirming a verdict for the plaintiff in an action for injuries from asbestos exposure, the Court said that an unpublished 1947 report regarding the dangers of asbestos was properly admitted as an ancient document under *Rule 803(16)* after authentication pursuant to *Rule 901(b)(8)*.

United States v. Stelmokas, 100 F.3d 302 (3d Cir. 1996) : The Court held, in denaturalization proceedings against an alleged Nazi collaborator, that records of the defendant's employment and activities during World War II, which were found in Lithuanian archives and other locations containing German records, were properly admitted. The records' authenticity and reliability was certified by experts possessing considerable experience with Eastern European

Holocaust records. In *Threadgill v. Armstrong World Indus., 928 F.2d 1366 (3d Cir. 1991)* , the Court held that the plaintiff in an asbestos wrongful death action should have been given the opportunity to authenticate the "Sumner Simpson papers" under the Rule. The Trial Judge's reliance on other decisions excluding the documents was misplaced, as they focused on the completeness and trustworthiness of the information in the documents rather than on whether the documents offered were what they purported to be.

United States v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004) : Affirming the revocation of the defendant's citizenship on the ground it was illegally procured, the Court found no abuse of discretion in the admission of a German identification card identifying the defendant as a prison guard at a Polish concentration camp. Under *Rule 901(b)(8)*, "*[t]*he question of whether evidence is suspicious, and therefore inadmissible, is within the trial court's discretion." "Although *Rule 901(b)(8)* requires that the document be free of suspicion, that suspicion goes not to the content of the document, but to whether the document is what it purports to be." The Court also found authenticity on the alternative ground of circumstantial evidence. In an action to recover contribution for an environmental clean-up, *Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648 (6th Cir. 2000)* , the plaintiffs offered a document from the files of the state Department of Natural Resources to prove that a defendant purchased a substance containing PCBs in 1970 and 1971. A DNR employee testified that the document had been in the files for over 20 years and that he believed that it was prepared by the federal Environmental Protection Agency. The Court held there was no error in excluding the document, since its reliability was seriously in question, given that the witness was unable to state with certainty that it was prepared by the EPA and did not establish why it was in the DNR files.

Chemetall GMBH v. Zr Energy, Inc., 320 F.3d 714 (7th Cir. 2003) : In an action to enforce an employee's confidentiality agreement, the defendants attempted to prove that the alleged trade secrets were public knowledge by introducing a 1974 memorandum that had been obtained through discovery from the files of an expert for the plaintiff. The memorandum was excluded as not authenticated, and the Court found no abuse of discretion, "even though a contrary conclusion on this evidence might also have been reasonable." Since the expert was not identified as a recipient on the document's distribution list and he was unable to say who sent him the document or how he obtained it, it was reasonable to conclude that the expert's files were not where one would expect to find an authentic copy of the document. In *United States v. Kairys*, n79 the Court affirmed an order revoking the defendant's citizenship, rejecting the defendant's claim that a Nazi identification card should not have been admitted as an ancient document because allegedly "the Soviet Union routinely disseminates forged documents as part of propaganda campaigns."

Fulmer v. Connors, 665 F. Supp. 1472 (N.D. Ala. 1987) : Entering judgment for the widow of a deceased coal miner who sued a union pension fund, the Judge ruled that the coal company's cash book and time and payroll book, which contained entries for the early 1940s, were authenticated as ancient documents.

[10] Rule 901(b)(9) -- Illustrations -- Process Or System

United States v. Rembert, 863 F.2d 1023 (D.C. Cir. 1988) : The Court affirmed convictions for kidnapping, armed robbery, and other offenses, as it found that photographs taken by an automatic teller machine were properly admitted even though no foundation testimony was offered as to the process by which the pictures were taken. It found that circumstantial evidence concerning the events, the contents of the photos, and testimony concerning the loading and security of the film constituted sufficient identification.

FOOTNOTES:

(n1)Footnote 1. *Hoover v. Thompson, 787 F.2d 449 (8th Cir. 1986)* .

(n2)Footnote 2. *United States v. Collado, 957 F.2d 38 (1st Cir. 1992)* .

(n3)Footnote 3. *United States v. Arias, 678 F.2d 1202 (4th Cir. 1982)* .

(n4)Footnote 4. *United States v. Shaw, 920 F.2d 1225 (5th Cir. 1991)* .

(n5)Footnote 5. *United States v. Houston, 892 F.2d 696 (8th Cir. 1989)* .

(n6)Footnote 6. *United States v. Cardenas, 864 F.2d 1528 (10th Cir. 1989)* .

(n7)Footnote 7. *United States v. Jardina, 747 F.2d 945 (5th Cir. 1984)* .

(n8)Footnote 8. *United States v. Mays, 822 F.2d 793 (8th Cir. 1987)* .

(n9)Footnote 9. *United States v. Abreu, 952 F.2d 1458 (1st Cir. 1992)* .

(n10)Footnote 10. *Ricketts v. City of Hartford, 74 F.3d 1397 (2d Cir. 1996)* .

(n11)Footnote 11. *United States v. Ruggiero, 928 F.2d 1289 (2d Cir. 1991)* .

(n12)Footnote 12. See the Editorial Explanatory Comments, *§§ 104.02[9], 404.02[18].*

(n13)Footnote 13. *O'Neal v. Esty, 637 F.2d 846 (2d Cir. 1980)* .

(n14)Footnote 14. *United States v. Brown, 688 F.2d 1112 (7th Cir. 1982)* .

(n15)Footnote 15. *United States v. Drews, 877 F.2d 10 (8th Cir. 1989)* .

(n16)Footnote 16. *E.W. French & Sons, Inc. v. General Portland, Inc., 885 F.2d 1392 (9th Cir. 1989)* .

(n17)Footnote 17. *United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984)* .

(n18)Footnote 18. *People of Terr. of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985)* .

(n19)Footnote 19. *United States v. One 56-Foot Motor Yacht, 702 F.2d 1276 (9th Cir. 1983)* .

(n20)Footnote 20. *United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980)* .

(n21)Footnote 21. *United States v. Garcia, 718 F.2d 1528 (11th Cir. 1983)* , *aff'd, 469 U.S. 70 (1984)* .

(n22)Footnote 22. *Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253 (11th Cir. 1983)* .

(n23)Footnote 23. *Stahl v. Novartis Pharms. Corp., 283 F.3d 254 (5th Cir. 2002)*

(n24)Footnote 24. *United States v. Skipper, 74 F.3d 608 (5th Cir. 1996)* .

(n25)Footnote 25. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238 (3d Cir. 1983)* , *rev'd on other grounds, 475 U.S. 574 (1986)* .

(n26)Footnote 26. *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* .

(n27)Footnote 27. *United States v. Brown, 688 F.2d 1112 (7th Cir. 1982)* .

(n28)Footnote 28. *United States v. West, 948 F.2d 1042 (6th Cir. 1991)* .

(n29)Footnote 29. *United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)* .

(n30)Footnote 30. *United States v. Ruggiero, 928 F.2d 1289 (2d Cir. 1991)* .

(n31)Footnote 31. *United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* .

(n32)Footnote 32. *United States v. Lance, 853 F.2d 1177 (5th Cir. 1988)* .

(n33)Footnote 33. *United States v. Stephenson, 887 F.2d 57 (5th Cir. 1989)* .

(n34)Footnote 34. *United States v. Brown, 136 F.3d 1176 (7th Cir. 1998)* .

(n35)Footnote 35. *United States v. Boyd, 208 F.3d 638 (7th Cir. 2000)* .

(n36)Footnote 36. *Williams v. Butler, 746 F.2d 431 (8th Cir. 1984)* , *adhered to*, *802 F.2d 296 (8th Cir. 1986)* .

(n37)Footnote 37. *United States v. Richardson, 764 F.2d 1514 (11th Cir. 1985)* .

(n38)Footnote 38. *United States v. Pena-Espinoza, 47 F.3d 356 (9th Cir. 1995)* .

(n39)Footnote 39. *United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)* .

(n40)Footnote 40. *United States v. Mazza, 792 F.2d 1210 (1st Cir. 1986)* .

(n41)Footnote 41. *United States v. Lopez-Pena, 912 F.2d 1536 (1989)* , *rev'd in part on other grounds en banc*, *912 F.2d 1552 (1990)* , *panel opinion reinstated*, *944 F.2d 51 (1st Cir. 1991)* .

(N42)Footnote 42. *United States v. West, 948 F.2d 1042 (6th Cir. 1991)* .

(n43)Footnote 43. *United States v. Mittleider, 835 F.2d 769 (10th Cir. 1987)* .

(n44)Footnote 44. *United States v. Devous, 764 F.2d 1349 (10th Cir. 1985)* .

(n45)Footnote 45. *United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986)* .

(n46)Footnote 46. *United States v. Scott, 678 F.2d 606 (5th Cir. 1982)* .

(n47)Footnote 47. *United States v. Hassell, 547 F.2d 1048 (8th Cir. 1977)* .

(n48)Footnote 48. *In re Clifford, 566 F.2d 1023 (5th Cir. 1978)* .

(n49)Footnote 49. *United States v. Barron, 707 F.2d 125 (5th Cir. 1983)* .

(n50)Footnote 50. *United States v. Pitts, 569 F.2d 343 (5th Cir. 1978)* .

(n51)Footnote 51. *United States v. Mauchlin, 670 F.2d 746 (7th Cir. 1982)* .

(n52)Footnote 52. *United States v. Williams, 837 F.2d 1009 (11th Cir. 1988)* .

(n53)Footnote 53. *United States v. Barker, 735 F.2d 1280 (11th Cir. 1984)* .

(n54)Footnote 54. *United States v. Glover, 846 F.2d 339 (6th Cir. 1988)* .

(n55)Footnote 55. *United States v. Woodson, 526 F.2d 550 (9th Cir. 1975)* .

(n56)Footnote 56. *United States v. Newton, 891 F.2d 944 (1st Cir. 1989)* .

(n57)Footnote 57. *United States v. Drougas, 748 F.2d 8 (1st Cir. 1984)* .

(n58)Footnote 58. *United States v. De Gudino, 722 F.2d 1351 (7th Cir. 1983)* , *amended* (7th Cir. 1984).

(n59)Footnote 59. *United States v. Eisenberg, 807 F.2d 1446 (8th Cir. 1986)* .

(n60)Footnote 60. *United States v. Black, 767 F.2d 1334 (9th Cir. 1985)* .

(n61)Footnote 61. *United States v. Gordon, 634 F.2d 639 (1st Cir. 1980)* .

(n62)Footnote 62. *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* .

(n63)Footnote 63. *United States v. Thornton, 197 F.3d 241 (7th Cir. 1999)* .

(n64)Footnote 64. *United States v. Harvey, 117 F.3d 1044 (7th Cir. 1997)* .

(n65)Footnote 65. *United States v. Hoag, 823 F.2d 1123 (7th Cir. 1987)* .

(n66)Footnote 66. *United States v. Lewis, 759 F.2d 1316 (8th Cir. 1985)* .

(n67)Footnote 67. *United States v. Helmel, 769 F.2d 1306 (8th Cir. 1985)* .

(n68)Footnote 68. *United States v. Markopoulos, 848 F.2d 1036 (10th Cir. 1988)* .

(n69)Footnote 69. *United States v. Reyes, 798 F.2d 380 (10th Cir. 1986)* .

(n70)Footnote 70. *United States v. Caldwell, 776 F.2d 989 (11th Cir. 1985)* .

(n71)Footnote 71. *United States v. James, 609 F.2d 36 (2d Cir. 1979)* .

(n72)Footnote 72. *United States v. Robinson, 707 F.2d 811 (4th Cir. 1983)* .

(n73)Footnote 73. *United States v. Saulter, 60 F.3d 270 (7th Cir. 1995)* .

(n74)Footnote 74. *United States v. Gironda, 758 F.2d 1201 (7th Cir. 1985)* .

(n75)Footnote 75. *United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976)* .

(n76)Footnote 76. *United States v. Torres, 908 F.2d 1417 (9th Cir. 1990)* .

(n77)Footnote 77. *United States v. Watson, 594 F.2d 1330 (10th Cir. 1979)* .

(n78)Footnote 78. *United States v. Wilson, 535 F.2d 521 (9th Cir. 1976)* .

(n79)Footnote 79. *United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986)* .

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
CHAPTER 901 RULE 901

5-901 Federal Rules of Evidence Manual 901.04

901.04 Legislative History

Advisory Committee's Note

Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, *5 Vand. L. Rev. 344, 362 (1952)*; McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378 (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3d ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp.395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least *prima facie* genuine items of the kind treated in Rule 902 *infra* . However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer printouts. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3d ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See *California Evidence Code § 1413*, eyewitness to signing.

Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also *California Evidence Code § 1416*. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3).

The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g., *California Evidence Code §§ 1417*, *1418*. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091 (1929)* , or by experts, Annot., 26 A.L.R.2d 892 , and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with *28 U.S.C. § 1731*: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon v. Collins, 267 F.2d 731 (2d Cir. 1959)* ; *Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue, 61 F.2d 879 (7th Cir. 1932)* ; *Desimone v. United States, 227 F.2d 864 (9th Cir. 1955)* .

Example (4).

The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff, 89 Okl. 105, 214 P. 127 (1923)* ; *California Evidence Code § 1421*; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; *California Evidence Code § 1420*. Language patterns may indicate authenticity or its opposite. *Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925)* ; Arens and Meadow, Psycholinguistics and the Confession Dilemma, *56 Colum. L. Rev. 19 (1956)*.

Example (5).

Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this

respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2) *supra*. *People v. Nichols, 378 Ill. 487, 38 N.E.2d 766 (1942)* ; *McGuire v. State, 200 Md. 601, 92 A.2d 582 (1952)* ; *State v. McGee, 336 Mo. 1082, 83 S.W.2d 98 (1935)* .

Example (6).

The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4) *supra*, or voice identification, under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v. Hoover Co., 350 Mo. 506, 166 S.W.2d 557 (1942)* ; *City of Pawhuska v. Crutchfield, 147 Okl. 4, 293 P. 1095 (1930)* ; *Zurich General Acc. & Liability Ins. Co. v. Baum, 159 Va. 404, 165 S.E. 518 (1932)* . Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnishes adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; *Annot., 71 A.L.R. 5* ; *Annot., 105 A.L.R. 326* .

Example (7).

Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See *California Evidence Code §§ 1532, 1600.*

Example (8).

The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, ? 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9) is designated for situations in which the accuracy of a result is dependent upon a process or system which produces it. X rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965)* ; *State v. Veres, 7 Ariz. App. 117, 436 P.2d 629 (1968)* ; *Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968)* ; Freed, Computer Print-Outs as Evidence, 16 Am. Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); *37 Albany L. Rev. 61 (1967)*. Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10).

The example makes clear that methods of authentication provided by act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in *28 U.S.C. § 753(b)* and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
Supp. To CHAPTER 901 RULE 901

5-901 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 901, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION	**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION**
Rule 901. Requir	**Rule 901. Authen**

ement of Authentication or Identification

Authenticating or Identifying Evidence

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficie

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to sup-

	nt to support a finding that the matter in question is what its proponent claims.		port a finding that the item is what the proponent claims it is.
(b)	**Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of	**(b)**	**Examples.** The following are examples only -- not a complete list -- of evidence that satisfies the requirement:

authentication or identification conforming with the requirements of this rule:

(1)	**Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.	**(1)**	***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.
(2)	**No nexpert opinion**	**(2)**	***No nexpert Opinion***

	on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.		***About Handwriting.*** A non-expert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
(3)	**Comparison by trier or expert witness**	**(3)**	***Comparison by an Expert Witness or***

	. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.		***the Trier of Fact*.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4)	**Distinctive characteristics and the like.** Appearance, contents, substance,	**(4)**	***Distinctive Characteristics and the Like*.** The appearance, contents, sub-

	internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.	stance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5)	**Voice identification.** Identification of a voice, whether heard	**(5)**	***Opinion About a Voice.*** An opinion identifying a person's voice -- whet

first hand or through mechan-ical or elec-tron-ic trans mis-sion or re-cord ing, by opin ion base d upo n heari ng the voic e at any time un-der cir-cum stan ces con-nect-ing it with the al-lege d spea ker.

her hear d first hand or thro ugh mec han-ical or elec-tron-ic trans mis-sion or re-cord ing - - base d on heari ng the voic e at any time un-der cir-cum stan ces that con-nect it with the al-lege d spea ker.

(6)	**Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in	**(6)**	***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the con-

versation related to business reasonably transacted over the telephone.

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law

(7) ***Evidence About Public Records.*** Evidence that:

to be re-cor-ded or filed and in fact re-cor-ded or filed in a pub-lic of-fice, or a pur-por-ted pub-lic re-cord , re-port, state men t, or data com pila-tion, in any form , is from the pub-lic of-fice wher e item s of

this nature are kept.

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind

are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that

	g that the process or system produces an accurate result.		it produces an accurate result.
(10)	**Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other	**(10)**	***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescrib

rules prescribed by the Supreme Court pursuant to statutory authority.

ed by the Supreme Court.

Committee Note

The language of Rule 901 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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PART TWO: THE RULES THEMSELVES
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[1] Rule 901(a) -- General Provisions [Go To Main]

[c] Rule 901(a) -- Chain of Custody

[ii] Rule 901(a) -- Chain of Custody -- Drugs

United States v. Rawlins, 606 F.3d 73 (3d Cir. 2010) : The Court affirmed a conviction for cocaine distribution, finding no abuse of discretion in the admission of test results on drugs allegedly seized from the conspiracy. It agreed with the defendant that there were substantial gaps in the chain of custody for the drugs, but deferred to the finding below in the absence of a "clear abuse of discretion" and because of the presumption of regularity in the handling of evidence by law enforcement, which was unchallenged in this case.

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) : Affirming a conviction for possession of cocaine base with intent to distribute, the Court found no abuse of discretion in admitting two exhibits, one containing the cocaine base purchased from the defendant, and the other containing cocaine base seized after the defendant's arrest. Trooper Perdue identified Government Exhibit 1 as the cocaine purchased from the defendant by Trooper Berry, and identified Government Exhibit 2 as the cocaine seized after the defendant's arrest. But subsequently, Trooper Berry identified Exhibit 2 as the cocaine he purchased, noting that his initials were on a piece of tape on the packaging. The government then recalled Trooper Perdue, who reiterated that the purchased cocaine base was Exhibit 1. He surmised that the packaging had been confused, and switched, at the lab. The Court found that the testimony regarding the chain of custody of the exhibits was sufficient to allow the jury to conclude that the substances in both exhibits were obtained from the defendant, and that the conflict in the officers' testimony went to weight, not admissibility.

United States v. Prieto, 549 F.3d 513 (7th Cir. 2008) : Affirming a conviction for possession with intent to distribute methamphetamine, the Court found no abuse of discretion in admitting several methamphetamine exhibits that were seized by the police after the defendants' arrest and that remained in police custody up until trial. Although the Court noted that the chain of custody was "somewhat sloppy" and that "the government did not offer any testimony about

what happened to the drug packages removed from the rear bumper from the time they were removed to the time they appeared on the floor of the police garage," it held that "gaps in the chain go to the weight of the methamphetamine exhibits rather than their admissibility." Because the defendants had not shown that the exhibits ever left police custody, the Court found that a "presumption of regularity" applied. In *United States v. Tatum, 548 F.3d 584 (7th Cir. 2008)* , the Court affirmed a conviction for possession of drugs with intent to distribute, finding no abuse of discretion in the admission of drugs allegedly seized from the defendant. There was sufficient evidence connecting the drugs with the defendant at the time of arrest to satisfy the preponderance standard of proof for preliminary questions. Any gaps in the chain of custody went to the weight of the evidence and not to its admissibility.

[iii] Rule 901(a) -- Chain of Custody -- Other Evidence

United States v. Mejia, 597 F.3d 1329 (D.C. Cir. 2010) : The Court affirmed a conviction for conspiring to import cocaine, which arose from a DEA-initiated Central American sting operation. It found no abuse of discretion in the admission of a handwritten note with "DEA" and a list of names on it that a DEA agent testified was in the defendant's wallet which the agent received in a bag of evidence from a Salvadoran officer. The agent did not witness the defendant's arrest or the seizure of evidence from him. Responding to a prosecution argument that a Judge is entitled to presume the integrity of evidence routinely handled by government officials, the Court said that "[w]hile we agree with the proposition as a general matter, we do not believe it extends automatically to *all* government officials, including those of a foreign government." Here, the record did not reveal what procedure the Salvadoran police used, the identity of the person making the seizure, or what was done with the evidence before the agent received it. Nonetheless, the brief, 10-minute delay between seizure and delivery to the DEA agent made it "implausible that it was planted, tampered with, or misidentified."

United States v. Lee, 502 F.3d 691 (7th Cir. 2007) : Affirming a conviction for felon firearm possession, the Court found no abuse of discretion when the government's gunshot-residue expert was permitted to testify to gunshot residue found on the cuff of the defendant's jacket, despite the facts that the jacket had been placed in a reusable property bag that was not sterilized or laundered between each use and the government could not establish who removed the jacket from the cloth bag and put it into a plastic bag that was transferred to the state police for testing. "Lee's arguments regarding the chain of custody and potential contamination of his jacket go to the weight of the evidence, not its admissibility."

United States v. Wilson, 565 F.3d 1059 (8th Cir. 2009) : The Court affirmed a conviction for transporting a minor to engage in criminal sexual activity and related offenses, rejecting the defendant's challenge, based on chain of custody, to the admissibility of a cell phone containing child pornography found in a search of his car. It reasoned that "[t]he location and custody of the cellular phone were adequately identified and Wilson has failed to aver any facts showing change or alteration of the images on the cellular phone," and "[a]ccordingly, he has failed to rebut the presumption of integrity."

[e] Rule 901(a) -- Extent of Foundation Required

United States v. Hampton, 464 F.3d 687 (7th Cir. 2006) : In a bank robbery trial, the prosecution proved the banks' federally insured status by introducing photocopies purporting to be insurance certificates, with an employee of each bank, typically a teller, testifying that an identical photocopy hanging on the wall of the witness' bank was a true copy of the bank's certificate. The Court held that the photocopies were not properly admitted under *Rule 902(1)*, because the copies were copies of sealed documents rather than sealed documents themselves. They were also not admissible under *Rule 1005*, because there was no indication that the certificates on the walls of the banks to which the copies were compared were themselves originals. Nonetheless, the Court held the copies admissible, and affirmed the convictions, on the grounds that the copies were duplicates admissible under *Rule 1003* unless there was a genuine question raised about the authenticity of the original and that the testimony of the tellers satisfied the authentication requirement of *Rule 901(a)*: the testimony was "pretty compelling evidence that the copies were not forgeries prepared by or for, or

somehow obtained by, the government," so that "[a]s between the parties' rival hypotheses ... the defendant's hypothesis is so improbable that without some evidence to support the hypothesis no reasonable person would accept it."

[f.1] Rule 901(a) -- Foreign Official Records

Vatyan v. Mukasey, 508 F.3d 1179 (9th Cir. 2007) : Vatyan sought asylum in the United States after alleged persecution in Armenia. As proof of his persecution, he offered letters purportedly sent to him by the Armenian Ministry of Internal Affairs and National Security. The Immigration Judge refused to recognize the letters on the ground that they were not properly certified by the Armenian government. Remanding, the Court found an error as a matter of law because the Immigration Judge had wrongly assumed that certification -- required for authentication under *Fed. R. Civ. P. 44* and *Fed. R. Evid. 902* -- was the only way in which the documents could be authenticated. The Court held that "an immigration petitioner may resort to any recognized procedure for authentication of documents in general, including the procedures permitted under *Federal Rule of Evidence 901*, and thus a petitioner's failure to obtain government certification of a foreign public document's authenticity is not necessarily a bar to admission of the document." The Court reasoned that to require an asylum petitioner "to obtain a certification from the very government he claims has persecuted him or has failed to protect him from persecution would in some cases create an insuperable barrier to admission of authentic documents." Here, the petitioner himself "arguably could have supported authentication" as he was a longtime resident of Armenia, he recognized the official stamps on the letter, and he might have been able to establish a chain of custody by explaining how the letter came into his possession.

[h] Rule 901(a) -- Inadequate Authentication

United States v. Baker, 538 F.3d 324 (5th Cir. 2008) : Yahoo! found 46 images on a Web site it hosted and reported the incident (as required by statute) to the National Center for Missing and Exploited Children. An investigation determined that the defendant was the source of the images, and he was charged with possessing, receiving, and distributing child pornography. At trial the government introduced a report from NCMEC with 46 images and their filenames, to prove that the defendant distributed child pornography. Reversing the defendant's conviction on the distribution count, the Court held it was plain error to admit the NCMEC report, as the prosecution had introduced no affidavit or testimonial evidence connecting the 46 images in the report with the 46 images Yahoo! had reported finding to NCMEC; the only witness testifying that the images in the report were the ones on the Web site was an agent with no personal knowledge.

United States v. Wilder, 597 F.3d 936 (8th Cir. 2010) : The Court affirmed convictions for cocaine-related offenses, finding no abuse of discretion in the exclusion of a document that one defendant claimed was a police department record, where the witness asked to authenticate the document was a detective who said only that it "appears to be a copy of a possibly genuine document."

[i] Rule 901(a) -- Internet and Computer Evidence

[i] Rule 901(a) -- Computer Records

U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009) : In an action over insurance coverage obligations the plaintiffs proved claims defense and settlement costs by introducing computer-generated summaries detailing the indemnity and expenses paid on each claim. Affirming a judgment for the plaintiffs, the Court held that the summaries were sufficiently authenticated by a witness who testified to the practices of the business, the process of inputting data into the computer, and the process of querying the computer to compile the information to create the summaries. The Court noted that it is not necessary to have the computer programmer testify, nor to have an expert provide testimony regarding the computer's mechanical accuracy where there is evidence that the computer was sufficiently accurate that the business relied upon it.

[ii] Rule 901(a) -- Internet Communications

United States v. Gagliardi, 506 F.3d 140 (2d Cir. 2007) : Affirming a conviction for attempting to entice a minor to engage in prohibited sexual activity, the Court found no error in the admission of e-mails and transcripts of instant messages. The Court rejected the defendant's argument that because the documents were largely cut from his electronic communications to others and then pasted by the recipients into word processing files, they could have been subject to fabrication and misrepresentative editing. It noted that the standard for authentication is "minimal," and in this case the recipients testified that the exhibits were accurate records of the defendant's conversations. "Based on their testimony, a reasonable juror could have found that the exhibits did represent those conversations, notwithstanding that the e-mails and online chats were editable."

[iii] Rule 901(a) -- Website Information

Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007) : Reversing a judgment for a former employee and his new employer that held a non-compete covenant invalid, the Court held that the Trial Judge should not have considered information about the former employer's business based on information contained on its website, because the information was not properly authenticated: "Anyone may purchase an internet address, and so, without proceeding to discovery or some other means of authentication, it is premature to assume that a webpage is owned by a company merely because its trade name appears in the uniform resource locator."

United States v. Baker, 538 F.3d 324 (5th Cir. 2008) : Yahoo! found 46 images on a Web site it hosted and reported the incident (as required by statute) to the National Center for Missing and Exploited Children. An investigation determined that the defendant was the source of the images, and he was charged with possessing, receiving, and distributing child pornography. At trial the government introduced a report from NCMEC with 46 images and their filenames, to prove that the defendant distributed child pornography. Reversing the defendant's conviction on the distribution count, the Court held it was plain error to admit the NCMEC report, as the prosecution had introduced no affidavit or testimonial evidence connecting the 46 images in the report with the 46 images Yahoo! had reported finding to NCMEC; the only witness testifying that the images in the report were the ones on the Web site was an agent with no personal knowledge.

[j] Rule 901(a) -- Party Admission or Production in Discovery

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : As evidence of the defendant's intent in a check fraud scheme, the prosecution introduced a book he had written that detailed a virtually identical scheme. Affirming, the Court held that the book was sufficiently authenticated as the defendant's by his reference to it on his Website, his picture on the cover, and his name as author.

Law Co., Inc. v. Mohawk Constr. & Supply Co., 577 F.3d 1164 (10th Cir. 2009) : Reversing summary judgment for a general contractor in a breach of contract suit against a subcontractor, the Court held that it was an abuse of discretion to categorically reject documentary evidence relied upon by the subcontractor: "We do not require an affidavit to authenticate every document submitted for consideration at summary judgment ... . Rather, documents produced during discovery that are on the letterhead of the opposing, producing party are authentic per se for purposes of *Federal Rule of Evidence 901*."

[k] Rule 901(a) -- Photographs

United States v. Lawson, 494 F.3d 1046 (D.C. Cir. 2007) : The defendant was convicted of selling narcotics after a police officer testified that he was sitting at an observation post when he saw the defendant dealing drugs from his car to a person on a bicycle. The defendant contended that it was physically impossible for the officer to see any transaction given the location of the defendant's car, the bicycle, and the observation post. The defendant attempted to introduce two photographs of the scene that he took in preparation for trial. The photographs, taken from the location of the

observation post, showed a car placed in the same spot that the defendant had occupied, and a man on a bicycle in two different positions relative to the car. The Court found no abuse of discretion when the photos were excluded because the officer -- "the only witness at trial with knowledge of the scene" -- stated that they did not accurately represent what he had seen: the bicycle did not appear in the exact position he had recalled seeing it.

Schmidt v. Magyari, 557 F.3d 564 (8th Cir. 2009) : Affirming summary judgment for the City in an action by an arrestee who claimed that photographing her tattoo violated her rights, the Court found no abuse of discretion in the exclusion of a photograph purporting to show the location of her tattoo and the position of her clothing when the photos were taken by the police chief. The legal secretary to the plaintiff's lawyer, who provided the affidavit accompanying the photograph, had no personal knowledge of the circumstances in which the police chief took his photos, and the depiction of the clothing in the excluded photo varied from the factual allegations in the complaint.

[m] Rule 901(a) -- Tape Recordings -- Authenticity

[i] Rule 901(a) -- Audibility

United States v. Trogdon, 575 F.3d 762 (8th Cir. 2009) : The Court affirmed a drug conspiracy conviction, finding no plain error in the admission of two partially inaudible recordings. Although the recordings were of poor quality, the conversations were audible enough to provide the jury with the gist of them.

[ii] Rule 901(a) -- Tape Recordings -- Authenticity

United States v. Emerson, 501 F.3d 804 (7th Cir. 2007) : The Court affirmed convictions for offenses arising from a conspiracy to commit "licks" (robbing drug dealers of their drugs), finding no abuse of discretion in the admission of a tape recording of a meeting among the conspirators. The foundation was supplied by a detective, who testified that he turned on the recording device before he gave it to an informant attending the meeting (who did not know how to turn it on or off) and that after the meeting he listened to the tape and was familiar with the voices record thereon. However, he conceded that he did not personally monitor the conversations as they were being recorded and he could not verify whether the tape had been altered or the recorder had been turned off for periods of time while it was in the informant's possession. The Court noted that it was questionable whether the detective's testimony alone was sufficient to establish the authenticity of the recording by clear and convincing evidence, but it held that there was no abuse of discretion in the authenticity determination, given the testimony establishing the location of the recording device, the informant's lack of knowledge about turning it on and off, and the identification of the voices, together with the failure of the defendants to assert or provide evidence that the tape was altered or was anything other than what it purported to be. In *United States v. Eberhart, 467 F.3d 659 (7th Cir. 2006)* , the court, affirming a conviction for conspiracy to distribute cocaine, held that tape recordings of conversations between an informant and the defendant were sufficiently authenticated by an agent who heard only the informant's half of the conversations as they occurred. The agent recognized the defendant's voice on the tape, and the fact he did not hear half of the conversation goes only to the weight of the recording, not its admissibility. However, a tape recording of a conversation that the agents heard only a very short part of because of an equipment malfunction may not have been authenticated by clear and convincing evidence, but the defendant did not show that its admission was plain error.

United States v. Oslund, 453 F.3d 1048 (8th Cir. 2006) : Affirming convictions for robbery and murder, the Court found no error in the admission of a taped conversation between the defendant and his friend Russell, who was cooperating with the government at the time of the conversations. Rejecting an argument that the tape was not properly authenticated because Russell was not present at trial to establish a foundation, the Court held that authenticity was sufficiently established by the testimony of the officer who arranged the conversations. The agent testified that Russell would contact him prior to meeting with the defendant, that he would then provide Russell with a digital recorder, that he would turn the recorder on and then turn it off after receiving it back, and that it was not possible for Russell to turn the recorder off. The agent was also able to identify each speaker in the recordings. The Court also held that any gaps in

the recording affected the weight of the evidence, not its admissibility.

[vi] Rule 901(a) -- Tape Recordings -- Transcripts

[A] Rule 901(a) -- Tape Recordings -- Transcripts -- Foreign Language Conversations

United States v. Nunez, 532 F.3d 645 (7th Cir. 2008) : In a drug prosecution government introduced transcripts of wiretap calls that included quotation marks around certain words that it claimed were code words for drugs and footnotes giving definitions for the words provided by the language specialists translating. Affirming, the Court held it was error for the Judge to tell the jury it "could afford as much weight as it felt proper" to the transcripts, since transcripts should not ordinarily be given independent weight. However, the error was harmless, since the language specialists testified at trial as to their definitions of the code words marked in the transcripts, and that testimony was entitled to as much or as little weight as the jury wanted to give it.

United States v. Chavez-Alvarez, 594 F.3d 1062 (8th Cir. 2010) : The Court affirmed a conviction for distributing methamphetamine, finding no abuse of discretion when jurors were furnished English-language transcripts of recorded telephone conversations during deliberations. The transcripts were not cumulative, since without translation, an English-speaking jury would not have been able to understand the content of recorded conversations that took place in Spanish. Also, the transcripts were not prejudicial, because there was no contention that the translations were inaccurate or the speakers misidentified.

[B] Rule 901(a) -- Tape Recordings -- Transcripts -- Recorded Conversations

United States v. Anderson, 452 F.3d 66 (1st Cir. 2006) : In a drug prosecution, the government introduced a taped conversation between the defendant and an undercover informant. Because the tape was unclear in parts, the government also submitted a transcript of the conversation. Although the person who prepared the transcript (i.e., the prosecutor) did not take the stand to authenticate it, the Court held it was sufficiently authenticated by a police officer who was monitoring the conversation when it occurred. That officer reviewed the transcript and testified that it fairly and accurately represented the conversation on the tape. The Court also rejected an argument that the tape recording was itself so garbled that the transcript became the actual evidence that the jury relied upon, noting that the Judge gave a limiting instruction that the tape not the transcript was the evidence, and that the government never attempted to interpret portions of the tape that were completely unintelligible.

United States v. Rommy, 506 F.3d 108 (2d Cir. 2007) : The Court affirmed a conviction for conspiracy to import "Ecstasy" into the United States, finding no error in the admission of a transcript of a tape-recorded telephone conversation between the defendant and another drug dealer. The recording was made by Dutch law enforcement officials pursuant to a wiretap, but Dutch law prohibited production of the tape itself. The government produced a Dutch detective who was personally involved in the wiretap investigation and who prepared the transcript. Although the detective had no specific recollection of the call or of transcribing it, she testified that it had been her general practice upon listening to calls intercepted during the investigation to prepare a contemporaneous transcript. This testimony, together with the production of the transcript by the Dutch government in response to the request of the United States, "demonstrated a sufficiently reliable process to authenticate the transcript as a product of the Dutch wiretap investigation." Moreover, the Dutch detective sufficiently authenticated the defendant's voice on the conversation, by testifying that she personally recognized his voice as the one she had heard on the recorded calls and identified as his on the transcripts.

United States v. Thompson, 482 F.3d 781 (5th Cir. 2007) : The prosecution had a video and audio recording of a drug transaction with which the defendant was charged, but at trial they showed only the video portion with a scrolling

transcript superimposed. Affirming, the Court held that it was error to show the transcript without allowing the jury to hear the underlying audio; however, it was not plain error, as the audio would not help the jury identify the defendant, who did not testify, and the defendant did not challenge the accuracy of the transcript.

United States v. Neighbors, 590 F.3d 485 (7th Cir. 2009) : The Court affirmed cocaine convictions, finding no abuse of discretion when jurors were permitted to follow along with government-created transcripts containing marginal notations of who was speaking while listening to recorded phone conversations during the trial and during deliberations. The Judge carefully instructed that the transcripts were not evidence but only aids, and had not permitted the transcripts into the jury room until it became necessary to expedite the deliberation process. In *United States v. Wilson, 481 F.3d 475 (7th Cir. 2007)* , the Court affirming convictions for conspiring to distribute crack cocaine in a public housing complex, found no abuse of discretion when the jury was provided with a transcript of a recorded conversation. Although the recording was difficult to hear, the jury was repeatedly admonished that only the tape was evidence and that if they could not make out parts of the recording, they should disregard the corresponding portions of the transcript.

[o] Rule 901(a) -- Videotapes

United States v. Thompson, 482 F.3d 781 (5th Cir. 2007) : The prosecution had a video and audio recording of a drug transaction with which the defendant was charged, but at trial they showed only the video portion with a scrolling transcript superimposed. Affirming, the Court held that it was error to show the transcript without allowing the jury to hear the underlying audio; however, it was not plain error, as the audio would not help the jury identify the defendant, who did not testify, and the defendant did not challenge the accuracy of the transcript.

United States v. Smith, 591 F.3d 974 (8th Cir. 2010) : In a child sex abuse prosecution, the Court held that a DVD of the forensic interview with the victim was sufficiently authenticated when Seviour, the person who conducted the interview, "identified the DVD as a recording of her forensic interview with B.R. and indicated that the DVD was an accurate recording of the interview. This was sufficient to authenticate the DVD under Rule 901(b). There is no requirement that Seviour mark the DVD to identify it." In *United States v. Seifert, 445 F.3d 1043 (8th Cir. 2006)* , the Court affirmed a conviction for arson, finding no abuse of discretion in the admission of a surveillance videotape that had been enhanced -- but not manipulated -- by being "real-timed," keeping only images from the relevant camera of the four used, and brightening the suspect and the surrounding area more than the rest of the image.

United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007) : The Court affirmed a drug distribution conspiracy conviction, finding no error when a surveillance videotape was admitted based on an agent's opinion that it was the defendant's image on the tape. The agent's identification was corroborated by the fact that he observed the defendant in court before his testimony.

[2] Rule 901(b)(1) -- Illustrations -- Testimony of Witness With Knowledge [Go To Main]

United States v. Barlow, 568 F.3d 215 (5th Cir. 2009) : The Court affirmed a defendant's convictions for attempting to persuade a person he believed to be minor to engage in sexual activity and for sending obscene material to a person he believed to be younger than 16 years. It held that the testimony by the witness who pretended to be a 14-year-old girl that the transcripts fairly and fully reproduced the "chats" between her and the defendant was adequate authentication by a participant in the chats.

United States v. Estrada-Eliverio, 583 F.3d 669 (9th Cir. 2009) : The Court affirmed a conviction for illegal re-entry, holding that the government properly authenticated the defendant's immigration (A-file) documents with testimony by a Border Patrol agent that the documents were accurate copies of documents in the defendant's file. In *United States v. Iribe, 564 F.3d 1155 (9th Cir. 2009)* , the defendant, convicted for conspiracy to kidnap, had been extradited from

Mexico. Affirming, the Court held that the authenticity of a Diplomatic Note initialed but not signed by a Mexican government official was sufficiently established by a declaration from an Assistant Legal Advisor for the U.S. State Department that the Diplomatic Note was an official communication of the Government of Mexico.

[3] Rule 901(b)(2) -- Illustrations -- Nonexpert Opinion on Handwriting [Go To Main]

United States v. Samet, 466 F.3d 251 (2d Cir. 2006) : In a racketeering trial, a postal inspector, who had been working on the investigation for three years and spent 80% of her time on the investigation, was permitted to identify the handwriting of one of the defendants. Affirming, the Court found no abuse of discretion in admitting the handwriting opinion. Lay opinion testimony offered to authenticate handwriting must comport with both *Rules 701* and *901(b)(2)*. Here, the witness did not acquire her handwriting knowledge for purposes of litigation, and her opinion was admissible under both Rules. The Court reasoned that during the investigation -- before there was litigation -- the inspector's opportunity to observe the defendant's handwriting "was no less (and little different) than if she had been his accountant, employee or family member."

[5] Rule 901(b)(4) -- Illustrations -- Distinctive Characteristics and the Like [Go To Main]

[a] Rule 901(b)(4) -- Contents

United States v. Thompson, 449 F.3d 267 (1st Cir. 2006) : Affirming drug convictions, the Court found no error in the admission of an anonymous letter sent to the defendant's coconspirator in jail. The letter was admitted as the defendant's own incriminating statements, and the defendant argued that the government had failed to adduce evidence that the letter was in fact sent by him. Declaring that a document "need not be signed or proven to be in the defendant's handwriting to be authenticated," the Court found that the content of the letter "precisely fits Thompson's circumstances and predicament" as of the time it was written. Moreover, the coconspirator testified that he recognized the return address, provided in the letter, as the defendant's address. In *United States v. Garcia, 452 F.3d 36 (1st Cir. 2006)* , an illegal reentry case, the Court held that an affidavit allegedly signed by the defendant, in which he admitted that he entered the country illegally, had been sufficiently authenticated. "The content of the affidavit, the circumstances surrounding its creation, and its location in an Alien Registration File containing not only Garcia's photograph but also several examples of his signature (a signature that appeared to be the same as the signature placed on the waiver-of-presence form signed by Garcia in the presence of the district court) all support the district court's decision to admit the affidavit as an authentic document."

United States v. Watkins, 591 F.3d 780 (5th Cir. 2009) : The Court affirmed drug convictions, holding that a rental application in which the defendant listed a present member of the conspiracy as his landlord was properly admitted to impeach the defendant's trial testimony denying that an alleged member of the conspiracy was his landlord. The exhibit was sufficiently authenticated by the fact that it had the defendant's name, date of birth, address, and signature on it.

[c] Rule 901(b)(4) -- Location or Possession

Jones v. National Am. Univ., 608 F.3d 1039 (8th Cir. 2010) : To prove in an age discrimination action the stated qualifications for the position at issue, the plaintiff offered a job posting that witnesses testified they had seen on bulletin boards in the administration building and outside the president's office. Although the posting differed in format from the defendant's other job postings and no employee could identify the author, the foundation was sufficient to admit the posting, and those facts went only to weight.

[e] Rule 901(b)(4) -- Other Examples

United States v. Seale, 600 F.3d 473 (5th Cir. 2010) : In the prosecution of a fatal kidnapping committed in 1964, the prosecution introduced contemporaneous statements regarding the defendant's racial animus and membership in the KKK, including a journal kept by the pastor of a church that the conspirators had searched. Affirming, the Court found no abuse of discretion in admitting the whole journal, including portions unrelated to the defendant, since that permitted the jury to "evaluate the journal's authenticity and credibility by comparing the handwriting, writing style, and content of those other entries to the ones being offered in connection with this case." In *In re McLain, 516 F.3d 301 (5th Cir. 2008)* , a bankruptcy trustee sought to reopen a discharge for failure to disclose pre-petition assets, but the Trial Judge granted summary judgment to the debtor on the ground that a ledger sheet offered by the trustee was insufficient to create any genuine issue of material fact because it was insufficiently authenticated as a record of all the debtor's transactions during a particular period. Reversing, the Court held that the ledger sheet, which had been attached by the debtor to his summary judgment motion, was a party admission authenticated by the consistency of its entries with both bank records and a spreadsheet drafted by the debtor and admitted into evidence.

United States v. Fraser, 448 F.3d 833 (6th Cir. 2006) : As evidence of the defendant's intent in a check fraud scheme, the prosecution introduced a book he had written that detailed a virtually identical scheme. Affirming, the Court held that the book was sufficiently authenticated as the defendant's by his reference to it on his Website, his picture on the cover, and his name as author.

Law Co., Inc. v. Mohawk Constr. & Supply Co., 577 F.3d 1164 (10th Cir. 2009) : Reversing summary judgment for a general contractor in a breach of contract suit against a subcontractor, the Court held that it was an abuse of discretion to categorically reject documentary evidence relied upon by the subcontractor because no authenticating affidavit was provided. "We do not require an affidavit to authenticate every document submitted for consideration at summary judgment." The Court noted that the documents might have been sufficiently authenticated by distinctive characteristics or other circumstantial evidence under Rule 901(b)(4).

[6] Rule 901(b)(5) -- Illustrations -- Voice Identification [Go To Main]

United States v. Brown, 510 F.3d 57 (1st Cir. 2007) : The Court affirmed a conviction for felon firearm possession, finding no abuse of discretion in denying the defendant's motion *in limine* to preclude police officers from testifying that they identified the defendant's voice in a cell phone conversation. The officers, although not trained in voice identification, had listened in on "hundreds of hours" of the defendant's telephone conversations and had debriefed him in person during an investigation in the early 1990s. The defendant had subsequently undergone cancer surgeries on his tongue, but one of the officers had later spoken with him on a couple of occasions; and, even if his voice had changed, he also had a distinctive manner of speech. The Court also held that references to the prior investigation had been handled in a way that avoided undue prejudice. In *United States v. Panico, 435 F.3d 47 (1st Cir. 2006)* , the Court affirmed a conviction for extortionate debt collection, finding no abuse of discretion in the admission of lay witness testimony identifying the defendant's voice on tape recordings. Although questions during the investigation were suggestive, the lay witnesses had heard the defendant's voice before (and one of them had known him since childhood), so there was no showing that under the totality of the circumstances the identification was unreliable.

United States v. Jones, 600 F.3d 847 (7th Cir. 2010) : The Court vacated the conviction of one defendant charged with conspiracy to distribute narcotics, because a detective identifying the voice on a tape recording indicated that he recognized the defendant's voice based on overhearing a courtroom conversation between the defendant and his attorney. The Court noted that the detective's identification met its "minimal familiarity" standard for admissibility under Rule 901(b)(5). However, the defendant challenged whether the conversation even occurred, but under the advocate-witness rule could not use his counsel to dispute the detective's story. The Court vacated the conviction because the Judge had not addressed the conflict of interest in ruling on a mistrial motion. In *United States v. Neighbors, 590 F.3d 485 (7th Cir. 2009)* , the Court affirmed cocaine convictions, holding that officers' short

conversations with the defendants at the time of arrest were sufficient to satisfy "the minimal familiarity standard" for making identifications of voices on wiretap recordings.

United States v. Parker, 551 F.3d 1167 (10th Cir. 2008) : The Court affirmed a conviction for conveying false information about an attempt to blow up buildings, finding no abuse of discretion in the admission of testimony by an investigating agent opining that the voice heard on 911 calls was that of the defendant. The agent had acquired knowledge of the defendant's voice during a four-hour interview. The claim that he had concluded the defendant was the culprit before hearing the 911 calls went to the weight, not the admissibility, of the evidence. In *United States v. Zepeda-Lopez, 478 F.3d 1213 (10th Cir. 2007)* : The Court affirmed a drug distribution conspiracy conviction, finding no error when audiotapes of six recorded telephone calls were admitted based on an agent's opinion that it was the defendant's voice on the tapes. The bases for the agent's opinion were a comparison between the defendant's voice on one call in which he self-identified with the voices on the other calls and the agent's having heard the defendant speak in court a few days before the trial began. Although the conversations were in Spanish and the agent spoke no Spanish, that went only to the weight of the identification evidence.

[8] Rule 901(b)(7) -- Illustrations -- Public Records or Reports [Go To Main]

United States v. Vidacak, 553 F.3d 344 (4th Cir. 2009) : The defendant was convicted of lying on his immigration application, by failing to report his service in the Serbian Army (VRS) during the Bosnian War. The defendant challenged the authenticity of foreign military documents indicating that he had served in VRS, arguing that the government could not account for the history of the documents prior to their seizure by authorities. Affirming, the Court noted that the documents "were discovered in a place where they would be expected to be found"; they "bore unique indexing numbers that rendered them readily identifiable as VRS records that dated to the period of the Bosnian War"; the government witness "explained that the VRS, like most military entities, had a vested interest in keeping records on its soldiers for accountability purposes and to determine eligibility for benefits"; and the defendant "offered no basis for inferring that the exhibits were forged or altered that would arouse this Court's suspicion as to their authenticity."

Article II Gun Shop, Inc. v. Gonzales, 441 F.3d 492 (7th Cir. 2006) : The Court, affirming summary judgment for the government in a proceeding to revoke a gun shop's license for willful violation of recordkeeping requirments, held that 1981 and 1998 ATF inspection reports were properly authenticated as public records by an ATF agent's affidavit that they were public reports kept in a public office where reports of that type were kept.

[9] Rule 901(b)(8) -- Illustrations -- Ancient Documents or Data Compilation [Go To Main]

United States v. Mandycz, 447 F.3d 951 (6th Cir. 2006) : The Court affirmed a denaturalization order issued because the defendant illegally procured his naturalization by failing to disclose his service as a guard in a concentration camp. The defendant claimed that Soviet interrogation records, although more than 20 years old, were not "authentic" because the Soviet Union did not value truth, and so documents of that regime lack trustworthiness. The Court concluded that "[a]lthough *Rule 901(b)(8)* requires the document to be free from suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be... . Because Mandycz does not argue, much less prove, that the Soviet interrogation records are not what they purport to be -- Soviet interrogation records -- his contention fails."

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PART TWO: THE RULES THEMSELVES
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[6] Rule 902(7) -- Trade Inscriptions And The Like

[7] Rule 902(8) -- Acknowledged Documents

[8] Rule 902(9) -- Commercial Paper And Related Documents

[9] Rule 902(11) -- Certified Domestic Records Of Regularly Conducted Activity

902.04 Legislative History

[1] Advisory Committee's Note

[2] 2000 Amendment Committee Note

[3] House Subcommittee on Criminal Justice Notes

[4] Report of the House Committee on the Judiciary

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902.01 Official Text

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* -- A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* -- A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* -- A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and

accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records*. -- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications*. -- Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals*. -- Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like*. -- Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents*. -- Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents*. -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress*. -- Any signature, document, or other matter declared by Act of Congress to be presumptively or *prima facie* genuine or authentic.

(11) *Certified domestic records of regularly conducted activity*. -- The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record --

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity*. -- In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record --

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

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PART TWO: THE RULES THEMSELVES
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CHAPTER 902 RULE 902

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902.02 Editorial Explanatory Comment

[1] Self-Authentication

The difficulty of authenticating certain items of evidence has been eased over the years by judicial decisions and by legislative enactments that have provided that some matters can be self-authenticating. In other words, no evidence other than the document or item itself is needed to authenticate it. *Rule 902* gathers together some of the more common examples of self-authentication and expands several categories.

In the original draft of the Rules published in March 1969, *Rule 902* was entitled "Presumption of Authenticity." In line with the title, the Rule presumed the listed items to be authentic, but the presumption would give way to conflicting evidence. In the official text as promulgated, the presumption language is virtually eliminated, except for some mention in paragraphs (3) and (10) of *Rule 902*. Since there is little danger of fraud with respect to the first nine classes of documents and tangible things, the change should not threaten the truth-finding function of the Courts. That evidence is authenticated does not mean that it must be accepted as valid by a factfinder. Authentication signifies only that the proponent of the evidence has done enough to identify or to explain the evidence for the trier to be justified in finding that the evidence is what the proponent claims. After the item is admitted an opposing party can offer evidence attacking its authenticity and the factfinder may accept that as true. Thus, self-authentication lifts some of the usual burden in introducing evidence from its proponent without inhibiting an opponent from offering conflicting evidence. n1

[2] Factfinding Required

There are times when factfinding will be needed in connection with *Rule 902* despite the elimination of the reference to a presumption. Thus, it may be necessary under paragraph (3) of *Rule 902* for the Court to rule on whether a foreign official is authorized to make an attestation under the laws of the foreign country. And under paragraph (4) of the Rule, it may be necessary to find whether a document is an official record, whether it is a type that may be recorded, or whether the person certifying it was a proper person for the task. n2 These are all questions on which the Judge must be satisfied; if the factual premise is established before the Judge, the document may be considered by the jury as authentic, without any foundation being presented.

[3] Originals and Copies

There are some writers who assert that self-authentication is only permissible where an original document is offered to a Court. We believe that this is not necessarily so. It certainly makes sense to conclude that self-authentication ought not to be permitted when the circumstances thought to guarantee genuineness are no longer present. Thus, if someone offered a piece of a magazine or periodical and asked the Court to accept it as a genuine part of that magazine or periodical, the Court might well want to see the original; the piece might be misleading, drawn from a different issue of the magazine or periodical, or drawn from a different source entirely. Similarly, if the character of a seal cannot be judged from a copy, an original might be required under paragraphs of the Rule requiring documents to be under seal.

We see no reason, however, why a trade inscription that is reflected in a picture or a videotape of an object should not be self-authenticating. Nor do we see any reason why signatures on commercial paper that are reflected in copies or photos should not be self-authenticating. Even with respect to seals, to the extent that an officer with a seal is attaching it to a copy of a document bearing the signature of another officer, as provided in paragraph (2), we believe that the copy should be self-authenticating. The test should be whether the circumstances giving rise to the assumption of genuineness are sufficiently present to justify doing without authentication evidence. If so, self-authentication should be permitted. If not, additional evidence should be required.

[4] Types of Self-Authentication

Because many of the categories are not only self-authenticating, but self-explanatory as well, only brief comments on the twelve paragraphs of this Rule are offered below.

(1) A document bearing a seal purporting to be that of a governmental subdivision in the United States or of an officer or agency thereof together with a signature purporting to be an attestation or execution is enough to make the document self-authenticating. n3 There is no requirement that the certifying party must use the magic word "attest"; nor does the attesting person need to be formally authorized to make a certification. n4 More formal authorization requirements are set forth in *Rules 902(2)* and *(4)*.

(2) Authentication is also accomplished if a document is offered purporting to bear the signature of an officer or an employee of a governmental entity in an official capacity if an officer who has a seal and has official duties in the district or political subdivision of the officer or employee signing the document certifies under seal that the signer has the official capacity and that the signature is genuine. The Advisory Committee states that in the absence of an official seal, the greater ease of effecting a forgery is apparent and the requirement of authentication by an officer who has a seal is designed to legitimate the document. n5

On the face of the Rule, it seems that it is not applicable to a situation where an officer has a seal and fails to employ it. Yet, there appears to be no reason why that situation should be differentiated from one in which a low echelon employee of a governmental subdivision has no seal and authentication is provided through certification of another officer of the subdivision with the seal.

Courts have applied the sealing requirement of *Rule 902* without questioning the underlying policy of the Rule (i.e., that self-authentication on anything less than a seal would create too great a risk of admitting forged documents). If a public document lacks a seal or certification under seal, the courts have consistently held that the document is not self-authenticating. n6 The argument for providing an alternative to sealing is that developments in technology have made it much easier to detect a forgery, rendering the sealing procedure time-consuming and unnecessary. But the obvious contrary argument is that developments in technology have made it much easier to *forge* a document in the first place, making a sealing requirement more important than ever, at least if the proponent wants to establish authenticity through the document itself.

(3) Derived from *Fed. R. Civ. P. 44(a)(2)*, paragraph (3) of *Rule 902* provides a method for self-authentication of foreign public documents. Paragraph (3) provides that a document can be authenticated if it purports to be executed or attested by someone authorized by the laws of a foreign country to make the execution or attestation who appears to be acting in his official capacity, if the document is accompanied by a final certification as to the genuineness of the signature and the official position of the person executing the documents. The final certification can be made by the executing or attesting person, or by any foreign official who certifies the genuineness of the signature and the official position. Moreover, a final certification can be made by a secretary of an embassy, a consul general, a consul, or a diplomatic or consular official of a foreign country assigned or accredited to the United States. Finally, this paragraph provides that as long as reasonable opportunity is given the parties to investigate authenticity, the Court may order that foreign public documents be presumed to be authenticated without final certification. n7

The parameters of *Rule 902(3)* are well-illustrated by *Raphaely v. Waterman Steamship Corp., 972 F.2d 498 (2d Cir. 1992)* . An importer received a shipment of contaminated peanuts and sued the shipper, claiming that the peanuts were not contaminated when they left Sudan. To prove that point, the importer offered a record by the Sudanese National Laboratory, which had commissioned a nationalized company called Gezira to inspect outgoing goods. The report indicated that the peanuts were not contaminated. The defendant challenged the report on authenticity grounds. One question was whether this was a foreign public document for purposes of *Rule 902(3)*, because Gezira was not itself a foreign agency. The Court found that Gezira, as a nationalized company, was a governmental entity. The Court noted, however, that if Gezira were merely working pursuant to a contract with the Sudanese government, the report would not be a public document and could not be authenticated under *Rule 902(3)*.

Under *Rule 902(3)*, the public record is self-authenticating if it is accompanied by a final certificate of genuineness from a duly authorized government official. There was no such attestation in *Raphaely*. However, the Court properly noted that *Rule 902(3)* provides that even in the absence of attestation, the document is presumptively authentic if two conditions are satisfied. First, the opponent must have been given a reasonable opportunity to investigate the accuracy and authenticity of the document. Second, there must be a showing of good cause to treat the document as presumptively authentic. The *Raphaely* Court found that these two conditions were met, because the steamship company had nine years preceding the trial to challenge the authenticity of the record, and yet failed to produce any evidence that the report was not genuine. n8

(4) Confined to official records and reports, and documents authorized to be recorded or filed in a public office or actually recorded in public files (including data compilations), n9 paragraph (4) of *Rule 902* provides that a copy of a public record can be certified as correct by the custodian or any other person authorized to make the certification by a certificate that complies with any of the three previous sections discussed. This paragraph, together with *Rules 803(8)* and *1005*, provides the customary way by which the contents of most public records are offered into evidence.

(5) Books, pamphlets, or other publications purporting to be issued by public authority are considered to be self-authenticating. This goes beyond common-law rules. As the Advisory Committee notes, this paragraph does not mean that all official publications are *admissible*; it merely provides a means whereby their *authenticity* may be taken as established for purposes of admissibility. Authenticity is simply one aspect of admissibility. n10

Assume, for example, that a congressional committee issues a report including hearing testimony from a person who claims to have been injured by a toxic substance. The person states that the substance causes a certain set of injuries. If a member of the public then brings a suit against the company claiming that injuries resulted from exposure to the substance, it is doubtful that the plaintiff will be able to introduce the report even though it is self-authenticating. The testimony before the committee is hearsay, and subject to suspect motivation, and probably will not qualify for admission into evidence under any exception. See the discussion in the Editorial Explanatory Comment to *Rule 803(8)*, *§ 803.02[9][f]*.

On the other hand, assume that the manufacturer of the substance brings a suit against the government to restrain

publication of the report on the grounds that it is malicious and inaccurate. Surely the report will be admissible in such a case; it is authenticated and it is not hearsay because it is not being offered for its truth. See the discussion in the Editorial Explanatory Comment to *Rule 801*, *§ 801.02[1][e]*.

In both situations, if a copy of the pamphlet purporting to be an official copy is offered into evidence, *Rule 902(5)* would hold that the pamphlet is self-authenticating. Yet, we have seen that admissibility would differ in the two cases.

(6) Printed materials purporting to be newspapers or periodicals are self-authenticating. Again it should be emphasized that they are not necessarily admissible. Thus, if a newspaper prints a story that says that Mr. Doe lied in his testimony before a Senate Committee, the newspaper account is not admissible in a perjury prosecution of Mr. Doe. n11 If, however, Mr. Doe sues the newspaper for libel, the report would be admissible and necessary to prove his case. In both cases, production of materials purporting to be the newspaper would amount to self-authentication. Admissibility, though, depends on other Rules of Evidence as well.

It is doubtful that this paragraph of the Rule could be used to authenticate the authorship of a letter to the editor, something that might easily be forged. Authorship is different from authenticating the newspaper itself. Advertisements are more likely to be self-authenticating, though arguably they do not fall within the paragraph. But, they might fall within *Rule 901(b)(4)*.

The reference in the Rule to "printed" materials would seem to make it difficult to use paragraph (6) to authenticate electronic or hardcopy of material made available only over the Internet, such as Slate magazine, to wire service reports like Reuters. This does not mean that online materials cannot be authenticated. It simply means that the Rule does not appear to provide for self-authentication. For a discussion of authentication of online materials, see Gregory P. Joseph's article on Internet and email evidence, excerpted in the Editorial Explanatory Comment to *Rule 901*, *§ 901.02[12]*.

(7) Concluding that the risk of forgery of trademarks is minimal in light of the serious penalties accompanying such offenses, the Advisory Committee drafted this Rule providing that inscriptions on labels purporting to have been affixed in the course of business and indicating ownership, control, or origin are self-authenticating.

(8) If a document is accompanied by a certificate of acknowledgment executed by a notary public in the manner provided by law, or by any other officer in the manner provided by law, this is enough for authentication of the document.

(9) This paragraph provides that commercial paper, signatures thereon, and documents relating thereto are authenticated to the extent provided by general commercial law. n12 General commercial law is intended to be the Uniform Commercial Code, except that when federal commercial paper is involved, federal commercial law will apply.

(10) This paragraph simply recognizes that whenever Congress decides to make any signature, document, or other matter presumptively genuine, or whenever Congress already has done so, self-authentication can be accomplished in the manner provided by the statute.

(11) and (12). In 2000, *Rule 902* was amended to provide for a means of self-authentication of business records that are otherwise admissible under *Rule 803(6)*. *Rule 902(11)* covers domestic records and *Rule 902(12)* covers foreign records in civil cases. The reason for breaking out domestic and foreign business records and for limiting *Rule 902(12)* to civil cases is that a federal statute (*18 U.S.C. § 3505*) already provides for self-authentication of foreign business records in criminal cases. Under these amendments, the foundation requirements for the business records exception can be established by the certification of a proper foundation witness. The witness no longer has to testify. Pretrial notice of intent to use the certification procedures must be provided. The intent of the notice requirement is to provide the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the certification.

In a criminal case authentication under *Rule 902(11)* and *(12)* may raise constitutional issues because there will be no person available for cross-examination with respect to the business records. See the discussion in § 803.02[26].

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. McIntosh, 200 F.3d 1168 (8th Cir. 2000)* (per curiam) (no error in admitting certified court documents under *Rule 902(4)*; the Court notes that the opponent could attack the authenticity of the records at trial).

(n2)Footnote 2. See, e.g., *United States v. Doyle, 130 F.3d 523 (2d Cir. 1997)* (Trial Court did not err in finding that the Senior Inspector of the Customs Department was a proper person to certify an official record).

(n3)Footnote 3. See, e.g., *United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991)* (the defendant objected to the admission of two certified documents from the Bureau of Alcohol, Tobacco and Firearms, arguing that the copies of the documents provided to him did not bear seals; the Court responded that the original documents, which were admitted into evidence, did bear the appropriate seal and therefore were admissible as self-authenticating government documents under *Rule 902(1)*; there was no authority for the proposition that the document copies provided to the defendant must also have been sealed); *Amfac Distrib. Corp. v. Harrelson, 842 F.2d 304 (11th Cir. 1988)* (a State Court judgment, which had the attestation stamped on back of the last page of the judgment, and which was signed by the deputy clerk bearing the Court's official seal, was self-authenticating under *Rule 902(1)*).

(n4)Footnote 4. See, e.g., *United States v. Mateo-Mendez, 215 F.3d 1039 (9th Cir. 2000)* . (a certificate prepared by an immigration official and attesting that she had failed to find that a certain application had been filed was properly admitted under *Rule 902(1)*; the document was under seal and bore the signature of the immigration official, and stated that she intended to "certify to the following:").

(n5)Footnote 5. See, e.g., *United States v. Dockins, 986 F.2d 888 (5th Cir. 1993)* (police records are not self-authenticating where they were not sealed, and there was no certification under seal that the documents were genuine; the certification was by way of rubber stamp, and this is not sufficient).

(n6)Footnote 6. See, e.g., *United States v. Jimenez-Lopez, 873 F.2d 769 (5th Cir. 1989)* (copy of judgment of conviction was not self-authenticating where it had no seal nor any certification under seal that the document was genuine); *Acosta-Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49 (1st Cir. 1998)* (document that was not sealed was not self-authenticating under *Rule 902*); *Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990)* (document certified by the county personnel director as a true copy of the county merit system was properly excluded because the certificate was not under seal).

(n7)Footnote 7. In 1979 the United States ratified an international Convention making it easier for parties than it is under *Rule 902(3)* to authenticate foreign public documents. Under the Convention, each country designates public officials by title who may stamp what is called an "apostille," a form of certification, on the document itself or affix it to an accompanying paper. The apostille states that the document was signed by an individual acting in an official capacity and that the official's stamp or seal is genuine. Authorities employing apostilles must keep a record of how they are used. American Courts will recognize documents to which the apostille is affixed as long as they are from countries that have ratified the Convention. The Convention covers all official documents as well as private papers that have been notarized.

(n8)Footnote 8. Compare *United States v. De Jongh, 937 F.2d 1 (1st Cir. 1991)* (a purported foreign certificate of good conduct was properly excluded because: it lacked a final certification by foreign officials; a consular official called as a witness could not verify the document; there was no reasonable opportunity for investigation when the evidence was offered the same day its existence was revealed to the prosecution; and there was no showing of circumstances constituting good cause for relaxing the certification requirements).

(n9)Footnote 9. See, e.g., *Acosta-Mestre v. Hilton Int'l of P.R., Inc., 156 F3d 49 (1st Cir. 1998)* (a document does not qualify for self-authentication under *Rule 902(4)* simply because it has been notarized).

(n10)Footnote 10. See, e.g., *United States v. Southard, 700 F.2d 1 (1st Cir. 1983)* (the defendant offered a Nevada driver's license and work permit in the name of a person that he spoke with on the phone to support his claim that he had no knowledge that telephone conversations with this person were interstate; the documents were self-authenticating, but they had not been connected up with the party who made the telephone calls and the defendant had made no showing as to the other party's residency at the time of the phone calls: "Self-authentication merely eliminates the requirement of testimony by a public official that a document is authentic. It does not eliminate the requirement of relevancy.").

(n11)Footnote 11. See, e.g., *Abruzzi Foods, Inc. v. Pasta & Cheese, Inc., 986 F.2d 605 (1st Cir. 1993)* (a newspaper article is clearly inadmissible to prove the facts asserted therein); *Horta v. Sullivan, 4 F.3d 2 (1st Cir. 1993)* (newspaper account of an accident is inadmissible hearsay).

(n12)Footnote 12. See, e.g., *United States v. Pang, 362 F.3d 1187 (9th Cir. 2004)* (cancelled checks "did not require extrinsic evidence of authenticity. As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating"; in contrast, an invoice was not self-authenticating because it is not commercial paper; the UCC "makes no provision for invoices").

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
CHAPTER 902 RULE 902

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902.03 Annotated Cases

[Go To Supp]

[1] Rule 902(1) -- Domestic Public Documents Under Seal

[a] Rule 902(1) -- Banking Certificates

United States v. Wingard, 522 F.2d 796 (4th Cir. 1975) : Affirming a pre-Rules bank robbery conviction, the Court cited *Rule 902* and held that an FDIC certificate was properly introduced into evidence to prove the bank's insured status.

[b] Rule 902(1) -- Judgments

Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989) : Affirming a judgment finding violation of a federal debt-collection statute, the Court held that a State Court record, which contained a raised seal and signature of a prothonotary, was self-authenticating.

Amfac Distrib. Corp. v. Harrelson, 842 F.2d 304 (11th Cir. 1988) : Affirming a creditor's summary judgment in an action to enforce a State Court judgment, the Court held that the judgment was self-authenticating where it bore a seal purporting to be that of a State Court and a signature purporting to be an attestation of the custodian of the original judgment.

[c] Rule 902(1) -- Postal Service

United States v. Moore, 555 F.2d 658 (8th Cir. 1977) : The Court held that for purposes of *Rule 902(1)*, the Postal Service is an agency of the United States.

[d] Rule 902(1) -- Relationship to Other Rules

United States v. Southard, 700 F.2d 1 (1st Cir. 1983) : To support his claim in a gambling prosecution that he had no knowledge that telephone conversations were interstate, the defendant offered a Nevada driver's license and work permit issued in 1974 in the name of a person with whom he spoke. The Court noted that the documents were self-authenticating, but that they had not been connected up with the party who made the telephone calls and the defendant had made no showing as to the other party's residency at the time of the phone calls. The Court said that "[s]elf-authentication merely eliminates the requirement of testimony by a public official that a document is authentic. It does not eliminate the requirement of relevancy."

[e] Rule 902(1) -- Tax Records

United States v. Ryan, 969 F.2d 238 (7th Cir. 1992) (per curiam): The Court affirmed a conviction for tax evasion, holding that computer-generated IRS printouts offered to prove the defendant's failure to file tax returns were properly admitted as self-authenticating.

Hughes v. United States, 953 F.2d 531 (9th Cir. 1992) : Affirming judgments against taxpayers, the Court held that computer-generated IRS Certificates of Assessments and Payments are admissible records of matters observed pursuant to duty imposed by law as to which there is a duty to report, and self-authenticating when certified under seal.

[2] Rule 902(2) -- Domestic Public Documents Not Under Seal

Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983) : In a libel action against the publisher of a weekly newspaper for allegedly false statements suggesting that the plaintiff was involved in the assassination of President Kennedy, the Court held that affidavits of certain CIA officials stating that, after diligent searches, they were unable to find any evidence that the plaintiff was in Dallas on the date of the assassination or any memoranda discussing the need to explain his whereabouts on that date were properly admitted under Rules 902(2) and 803(10).

[3] Rule 902(3) -- Foreign Public Documents

[a] Rule 902(3) -- Certification by Consular Officials

United States v. Montemayor, 712 F.2d 104 (5th Cir. 1983) : Upholding the defendant's conviction for making false statements in an effort to establish that her two children were born in the United States and not subject to deportation, the Court found that Mexican birth certificates were properly authenticated under *Rule 902(3)* by certification of American consular officials.

[b] Rule 902(3) -- Certification by Foreign Officials

United States v. Doyle, 130 F.3d 523 (2d Cir. 1997) : The Court held in a prosecution for illegal exportation of fuel pumps to Libya that certifications from the Senior Inspector of the Customs Department and the Deputy Attorney General of Malta were sufficient to authenticate copies of privately-generated, as well as public, documents recorded in the Maltese Customs Department.

United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000) : The Court affirmed convictions for espionage, holding that records of the former East German spy agency were sufficiently authenticated by certifications of the director of the

unified Germany's counter-intelligence service and a German consul to the United States. In *United States v. Pena-Jessie*, n1 a prosecution under the Marijuana on the High Seas Act, the Court held that Panama's grant of permission to board a ship was properly admitted as self-authenticating under *Rule 902(3)*.

United States v. Koziy, 728 F.2d 1314 (11th Cir. 1984) : The Court upheld a revocation of citizenship on the ground that the defendant procured citizenship by concealing or misrepresenting information concerning his membership in the Organization of Ukranian Nationalists and the Ukranian Police. To prove membership in the police force, the government offered two exhibits bearing the defendant's signature. *Rule 902(3)* was satisfied by the certificate of a Russian official authorized to authenticate documents, and expert testimony concerning the nature of the exhibits was sufficient to warrant admission of the exhibits.

[c] Rule 902(3) -- Failure To Challenge Documents

Raphaely Int'l, Inc. v. Waterman S.S. Corp., 972 F.2d 498 (2d Cir. 1992) : This case is discussed in the Editorial Explanatory Comment, *§ 902.02[4]*. See also *In re Sterling Nav. Co.* n2(upholding admission of copies of purported Articles of Association and bylaws of a bankrupt corporation, accompanied by an affidavit of an attorney appointed by the Court as special counsel averring that the copies were true copies of original documents on file in the Bahamas).

[d] Rule 902(3) -- Failure To Prove Authority of Foreign Officials

United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991) : In a prosecution for making false statements in a permanent resident application, the Court held that certain Hong Kong criminal records were not self-authenticating, even though the government complied with the execution and attestation requirements, because there was no final certification. The Court did not determine whether the government demonstrated good cause for its failure, because the requirements of *Rule 901* were satisfied. In *United States v. Perlmuter*, n3 the Court overturned a conviction for illegally procuring naturalization by failing to reveal prior convictions in Israel. Two documents, one listing four convictions, and the other stating that it contained the fingerprints of the person who was convicted, were not properly admitted because there was no evidence as to the authority or position of the person who signed the documents.

United States v. Garate-Vergara, 942 F.2d 1543 (1991), *amended* 991 F.2d 662 (11th Cir. 1993) : In a prosecution for drug trafficking, the Court held there was no abuse of discretion in excluding a foreign official document where the consular certification did not establish that the foreign officials were authorized to make the original document or the attestation.

[e] Rule 902(3) -- Good Cause

United States v. De Jongh, 937 F.2d 1 (1st Cir. 1991) : Affirming a conviction for possession of cocaine, the Court held that a purported foreign certificate of good conduct was properly excluded because it lacked a final certification by foreign officials, a consular official called as a witness could not verify the purported certificate, there was no reasonable opportunity for investigation when the evidence was offered the same day its existence was revealed to the prosecution, and there was no showing of circumstances constituting good cause for relaxing the certification requirements.

[4] Rule 902(4) -- Certified Copies Of Public Records

[a] Rule 902(4) -- Appropriate Official

United States v. Pent-R-Books, Inc., 538 F.2d 519 (2d Cir. 1976) : In a proceeding to enforce postal prohibitory orders under the Pandering Law, *39 U.S.C. § 3008*, the Court noted that a postal official in Washington was authorized to authenticate certain administrative records.

[b] Rule 902(4) -- Notarized Documents

Acosta-Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49 (1st Cir. 1998) : The plaintiff was resting on a chaise lounge on the beach at the defendant's hotel; he reached back to adjust the chaise lounge, and his finger got caught and it was severed. At trial he offered 18 photographs of chaise lounges, taken by the plaintiff after the accident; attached to the photos was a notarized document. When the plaintiff failed to authenticate the photographs during his testimony, he argued that they were self-authenticating under *Rule 902(4)*. Affirming a judgment for the defendant, the Court found no error in the exclusion of the photographs. A notarized document does not constitute an official record within the meaning of *Rule 902(4)*, and even if the notarized photos were self-authenticating, it would not necessarily make them admissible; none of the photos depicted the chair involved in the accident, so they were properly excluded under *Rule 403* in any event.

[5] Rule 902(6) -- Newspapers And Periodicals

Price v. Rochford, 947 F.2d 829 (7th Cir. 1991) : The Court noted, in an action for willful violations of an automatic stay, that newspaper articles reporting that the plaintiff was in bankruptcy were self-authenticating.

[6] Rule 902(7) -- Trade Inscriptions And The Like

Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002) : The plaintiff news organization videotaped the notorious beating of Reginald Denny and obtained copyrights for four segments of its tape. Reversing in part summary judgment for the defendants in a copyright infringement action, the Court held that the identifying slate that appeared on the opening frames of the tape "appears to fall directly within the text of the relevant Federal Rule, which provides that no extrinsic evidence is required to support the authentication of 'labels purporting to be affixed in the course of business and indicating ownership, control, or *origin*.' *Rule 902(7)* (emphasis added)." In *United States v. Alvarez, 972 F.2d 1000 (9th Cir. 1992)* (per curiam), a prosecution of a felon for criminal possession of a firearm that had moved in interstate commerce, the Court held that the inscription "Garnika, Spain" on the gun was a "mechanical trace" not excludable under the hearsay rule and not requiring extrinsic evidence of authenticity.

[7] Rule 902(8) -- Acknowledged Documents

In re Bobby Boggs, Inc., 819 F.2d 574 (5th Cir. 1987) : In a bankruptcy dispute over entitlement to a subcontractor's funds, the Court observed that notarized bonds may well have been self-authenticating.

[8] Rule 902(9) -- Commercial Paper And Related Documents

United States v. Carriger, 592 F.2d 312 (6th Cir. 1979) : Reversing an income tax evasion conviction, the Court held that promissory notes should have been admitted on behalf of the defendant. It cited *Rule 902(9)* and noted that "[u]nder *Uniform Commercial Code § 3-307* mere production of a note is *prima facie* evidence of its validity and of the holder's right to recover on it."

United States v. Little, 567 F.2d 346, 349 n.1 (8th Cir. 1977) : Affirming convictions for mail fraud, the Court

noted that corporate checks "were relevant, admissible under *Federal Rule of Evidence 902(9)* as commercial paper *or* as an exception to the hearsay rule under *Rule 803*" (emphasis added). The italicized "or" is misleading. Real evidence always must be authenticated; only after authentication, if it is hearsay, must an exception be found. Authentication and hearsay problems should not be confused.

United States v. Pang, 362 F.3d 1187 (9th Cir. 2004) : At a trial for structuring currency transactions and income tax evasion, the prosecution introduced invoices from the defendant and checks from a customer paying those invoices. The Court held that the checks were self-authenticating as negotiable instruments, but the invoices, not being commercial paper, required authentication, which was sufficiently provided.

United States v. Varner, 13 F.3d 1503 (11th Cir. 1994) : The Court affirmed a judgment for the government in an action to recover on notes assumed by the defendant, holding that the promissory notes were properly found self-authenticating under the Rule. In *United States v. Hawkins, 905 F.2d 1489 (11th Cir. 1990)* , the Court affirmed mail fraud convictions, holding that checks were properly admitted in evidence as self-authenticating commercial paper.

[9] Rule 902(11) -- Certified Domestic Records Of Regularly Conducted Activity

United States v. Lauersen, 343 F.3d 604 (2d Cir. 2003) : In a prosecution for health care fraud, an anesthesiologist (Ratner) who testified for the government explained how he prepared charts and reports in which he disguised the true nature of the procedures employed by the defendant and sent them to a record-keeping business operated by his father. The government obtained the records from the business, and an FBI agent used the code supplied by Ratner to create a summary chart of the disguised procedures contained in the records. The basis of the defendant's objection at trial was unclear. To the extent that the defendant was objecting to the foundation for the records as business records, the Court held that Ratner was qualified to lay a foundation and the father's testimony was not required. Therefore, "[b]ecause *Rule 803(6)* was satisfied by Ratner's testimony, *Rule 902(11)* certification and notice were unnecessary." *Rule 902(11)* provides for a means of authenticating a domestic business record in lieu of live testimony.

FOOTNOTES:

(n1)Footnote 1. *United States v. Pena-Jessie, 763 F.2d 618 (4th Cir. 1985)* .

(n2)Footnote 2. *In re Sterling Nav. Co., 444 F. Supp. 1043 (S.D.N.Y. 1977)* .

(n3)Footnote 3. *United States v. Perlmuter, 693 F.2d 1290 (9th Cir. 1982)* .

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PART TWO: THE RULES THEMSELVES
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CHAPTER 902 RULE 902

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902.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; *California Evidence Code § 1452*. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; *California Evidence Code § 1453*, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraphs (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records.

It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. *39 U.S.C. § 4005(b)*, public advertisement *prima facie* evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper *prima facie* evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932)* , Baby Ruth candy bar; *Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928)* , loaf of bread; *Weiner v. Mager & Throne, Inc., 167 Misc. 338, 3 N.Y.S.2d 918 (1938)* , same. And see W. Va. Code 1966, § 47-3-5, trademark on bottle *prima facie* evidence of ownership. Contra, *Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954)* ; *Murphy v. Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933)* . Cattle brands have received similar acceptance in the western states. Rev. Code Mont. 1947, § 46-606; *State v. Wolfley, 75 Kan. 406, 89 P. 1046 (1907)* ; *Annot., 11 L.R.A. (N.S.) 87* . Inscriptions on trains and vehicles are held to be *prima facie* evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill. 406, 41 N.E. 909 (1895)* ; 9 Wigmore § 2510a. See also the provision of *19 U.S.C. § 1615(2)* that marks, labels, brands, or stamps indicating foreign origin are *prima facie* evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are *California Evidence Code § 1451* and *NYCPLR 4538* , McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* . Rule 302, *supra* . There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943)* . *Cf. United States v. Yazell, 382 U.S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966)* . In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complications inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 121 U.S. App. D.C. 315 (1965)* . Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various acts of Congress. See, for example, *10 U.S.C. § 936*, signature without seal, together with title, *prima facie* evidence of authenticity of acts of certain military personnel who are given notarial powers; *15 U.S.C. § 77f(a)*, signature on SEC registration presumed genuine; *26 U.S.C. § 6064*, signature to tax return *prima facie* genuine.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."

Following the 1987 amendment to Rule 902(3), the Supreme Court sent to Congress a technical amendment restoring two sentences inadvertently omitted, effective November 1, 1988.]

[2] 2000 Amendment Committee Note

2000 Amendment Committee Note

The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Fed. R Evid. 803(6). *18 U.S.C. § 3505* currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies *28 U.S.C. § 1746* would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

[3] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

Subdivision (8) was redrafted to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended, the Rule merely requires that the document be executed in the manner required by the law of the State which authorized the notary to take the acknowledgment.

Subdivision (9) was approved as submitted by the Court. However, there was considerable discussion concerning the meaning of the term "general commercial law." The Subcommittee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that Federal commercial law will apply where Federal commercial paper is involved. Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)* , State law will apply irrespective of whether it is the Uniform Commercial Code.

[4] Report of the House Committee on the Judiciary

Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law," the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every

State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)* . Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)* , State law will apply irrespective of whether it is the Uniform Commercial Code.

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PART TWO: THE RULES THEMSELVES
Article IX. Authentication And Identification
Supp. To CHAPTER 902 RULE 902

5-902 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 902, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 902. Self-authentication	**Rule 902. Evidence That Is Self-Authenticating**
Extrinsic evidence of authenticit	The following items of evidence are

y as a condition precedent to admissibility is not required with respect to the following: self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivi-

sion, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(A) a seal purporting to be that of the United States; any state, district, commonwealth,

territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a depart-

		ment, agency, or officer of any entity named above; and
		(B) a signature purporting to be an execution or attestation.
(2) Domestic public documents not under seal. A document	**(2)**	***Domestic Public Documents That Are Not Sealed but Are Sign***

purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official

ed and Certified. A document that bears no seal if:

cial duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(A) it bears the signatu

re of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal -- or its equivalent --

			that the signer has the official capacity and that the signature is genuine.
(3)	**Foreign public documents.** A document purporting to be executed or attested in an official capacity by a person	**(3)**	***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a

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for- eign offi- cial who se cer- tific- ate of genu ine- ness relat es to the sig- natu re or at- test- atio n or is in a chai n of cer- tific- ates of genu ine- ness re- lat- ing to the sig- natu re or at- test- atio n. The cer- tific- atio

n of cer- tific- ates of genu ine- ness of sig- natu re and offi- cial pos- ition re- lat- ing to the exe- cu- tion or at- test- atio n. A final cer- tific- atio n may be mad e by a sec- ret- ary of an em- bass y or lega- tion, n may be mad e by a sec- ret- ary of a Unit ed Stat es em- bass y or lega- tion; by a con- sul gen- eral, vice con- sul, or con- sular agen t of the Unit ed Stat es; or by a dip- lo- mat- ic or con- sular offi- cial of the for-

consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable

eign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may,

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			authentic without final certification; or
		(B)	allow it to be evidenced by an attested summary with or without final certification.
(4)	**Certified copies of public records.** A copy of an official	**(4)**	***Certified Copies of Public Records.*** A copy of an official

cial re- cord or re- port or entr y there in, or of a doc- ume nt au- thor- ized by law to be re- cor- ded or filed and actu- ally re- cor- ded or filed in a pub- lic of- fice, in- clud ing data com pila- tions in any form

re- cord -- or a copy of a doc- ume nt that was re- cor- ded or filed in a pub- lic of- fice as au- thor- ized by law -- if the copy is cer- tifie d as cor- rect by:

,
certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any

Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(A) the custodian or another person authorized to make the certification; or

(B) a certific-

ate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official publications. Books, pamphlets, or other publications purporting to be

(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be

	is-sued by pub-lic au-thor-ity.		is-sued by a pub-lic au-thor-ity.
(6)	**Ne wsp aper s and peri odic als.** Print ed ma-teri-als pur-port-ing to be new spa-pers or peri-odic als.	**(6)**	***Ne wsp aper s and Peri odic als.*** Print ed ma-teri-al pur-port-ing to be a new spa-per or peri-odic al.
(7)	**Tra de in-scri ptio ns and the like.** In-scrip tions , sign s, tags,	**(7)**	***Tra de In-scri ptio ns and the Like*** **.** An in-scrip tion, sign, tag, or

	or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.		label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
(8)	**Acknowledged documents.** Documents accompanied by a certificate of	**(8)**	***Acknowledged Documents.*** A document accompanied by a certificate of

	acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.		acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
(9)	**Commercial paper and related documents.**	**(9)**	***Commercial Paper and Related Documents.***

Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.		Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
(10) Presumptions under Acts of Congress. Any signature, document, or	**(10)**	***Presumptions Under a Federal Statute.*** A signature, document, or

other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.		anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
(11) Certified domestic records of regularly conducted activity. The original or a	**(11)**	***Certified Domestic Records of a Regularly Conducted Activity.*** The original or

duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person

a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a

son, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record --

rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record -- and must mak

e the record and certification available for inspection -- so that the party has a fair opportunity to challenge them.

(A) was made at or near the time of the occurrence of the matters set forth

by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activ

ity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and

			declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
(12)	**Certified foreign re-**	**(12)**	***Certified Foreign Re-***

cords of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied	***cords of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than com

by a written declaration by its custodian or other qualified person certifying that the record --

plying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is

signed. The proponent must also meet the notice requirements of Rule 902(11).

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a per-

son with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must

be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evid

ence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of

their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Committee Note

The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 902.03 Annotated Cases

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[1] Rule 902(1) -- Domestic Public Documents Under Seal [Go To Main]

United States v. Hampton, 464 F.3d 687 (7th Cir. 2006) : In a bank robbery trial, the prosecution proved the banks' federally insured status by introducing photocopies purporting to be insurance certificates, with an employee of each bank, typically a teller, testifying that an identical photocopy hanging on the wall of the witness' bank was a true copy of the bank's certificate. The Court held that the photocopies were not properly admitted under *Rule 902(1)*, because the copies were copies of sealed documents rather than sealed documents themselves. They were also not admissible under *Rule 1005*, because there was no indication that the certificates on the walls of the banks to which the copies were compared were themselves originals. Nonetheless, the Court held the copies admissible, and affirmed the convictions, on the grounds that the copies were duplicates admissible under *Rule 1003* unless there was a genuine question raised about the authenticity of the original and that the testimony of the tellers satisfied the authentication requirement of *Rule 901(a)*: the testimony was "pretty compelling evidence that the copies were not forgeries prepared by or for, or somehow obtained by, the government," so that "[a]s between the parties' rival hypotheses ... the defendant's hypothesis is so improbable that without some evidence to support the hypothesis no reasonable person would accept it."

[3] Rule 902(3) -- Foreign Public Documents [Go To Main]

[a] Rule 902(3) -- Certification by Consular Officials

United States v. Pintado-Isiordia, 448 F.3d 1155 (9th Cir. 2006) (per curiam): In a prosecution for unlawful re-entry into the United States, the Court held that the defendant's Mexican birth record was self-authenticating under *Fed. R. Civ. P. 44(a)(2)*. The government was not required to submit a "final certification" because the record and its attestation were certified by an Apostille in accordance with the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, to which Mexico and the Untied States are parties.

United States v. Deverso, 518 F.3d 1250 (11th Cir. 2008) : Affirming a conviction for possession of child

pornography, the Court held that the copy of a Philippine birth certificate was sufficiently authenticated under Rule 902(3). The copy was accompanied by a certificate of a Philippine official attesting that it was a true copy of an official record, and by a final certification by the U.S. Vice Consul in the Philippines. The copy was also stamped as a certified copy and affixed with a seal of an officer whom the Vice Consul certified was a clerk in the Philippines National Statistics Office. The Court noted that challenges to the reliability of information contained in the birth certificate, such as the date of birth and the lack of signature of the attendant at birth, went to the weight rather than the admissibility of the evidence.

[b] Rule 902(3) -- Certification by Foreign Officials

Vatyan v. Mukasey, 508 F.3d 1179 (9th Cir. 2007) : Vatyan sought asylum in the United States after alleged persecution in Armenia. As proof of his persecution, he offered letters purportedly sent to him by the Armenian Ministry of Internal Affairs and National Security. The Immigration Judge refused to recognize the letters on the ground that they were not properly certified by the Armenian government. Remanding, the Court found an error as a matter of law because the Immigration Judge had wrongly assumed that certification -- required for authentication under *Fed. R. Civ. P. 44* and *Fed. R. Evid. 902* -- was the only way in which the documents could be authenticated. The Court held that "an immigration petitioner may resort to any recognized procedure for authentication of documents in general, including the procedures permitted under *Federal Rule of Evidence 901*, and thus a petitioner's failure to obtain government certification of a foreign public document's authenticity is not necessarily a bar to admission of the document." The Court reasoned that to require an asylum petitioner "to obtain a certification from the very government he claims has persecuted him or has failed to protect him from persecution would in some cases create an insuperable barrier to admission of authentic documents." Here, the petitioner himself "arguably could have supported authentication" as he was a longtime resident of Armenia, he recognized the official stamps on the letter, and he might have been able to establish a chain of custody by explaining how the letter came into his possession.

[4] Rule 902(4) -- Certified Copies of Public Records [Go To Main]

[a.1] Rule 902(4) -- Constitutional Concerns

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008) : Affirming conviction for bank fraud and mortgage fraud, the Court held that it need not decide whether IRS Form 2866 certifications used under Rule 902(4) to authenticate tax records offered under Rule 803(8) were "testimonial" and subject to the *Confrontation Clause* under *Crawford v. Washington, 541 U.S. 36 (2004)* , as any error in their admission would be harmless.

[9] Rule 902(11) -- Certified Domestic Records of Regularly Conducted Activity [Go To Main]

United States v. Adefehinti, 510 F.3d 319 (D.C. Cir. 2007) : Affirming fraud convictions, the Court held that Rule 902(11) does not require the custodian who provides the certificate to have personal knowledge of the actual creation of the business record; it is sufficient that the affiant have knowledge of a business's processes for creating and retaining records. It also rejected an argument that use of Rule 902(11) to lay the foundation for business records violates the *Confrontation Clause*.

United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008) : Affirming conviction for bank fraud and mortgage fraud, the Court held that it need not decide whether Rule 902(11) declarations used to authenticate bank records offered under Rule 803(6) were "testimonial" and subject to the *Confrontation Clause* under *Crawford v. Washington, 541 U.S. 36 (2004)* , as any error in their admission would be harmless.

United States v. Petroff-Kline, 557 F.3d 285 (6th Cir. 2009) : The Court affirmed a summary judgment for the

government in an action to collect the amount owed on a student loan. It held that a declaration by the Chief of the Referral Control Section of the Debt Management Branch of the Department of Health and Human Services complied with Rule 902(11) and laid the foundation for the introduction of promissory notes as business records. In *United States v. Jordan, 544 F.3d 656 (6th Cir. 2008)* , the Court affirmed convictions for mail fraud and aggravated identity theft, finding no abuse of discretion when the government was permitted to provide a corrected notice of the intention to rely on T-Mobile phone records, where the government's pretrial notice contained a typographical error as to the phone number.

United States v. Ellis, 460 F.3d 920 (7th Cir. 2006) : To prove that the defendant, a felon arrested for possession of a firearm, was a user of a controlled substance in violation of *18 U.S.C. § 922(g)(3)*, the prosecution introduced records of blood and urine tests conducted by the local hospital and by other laboratories. Affirming, the Court held there was no *Confrontation Clause* violation when a certification pursuant to *Rule 902(11)* was used to authenticate the records. The certification was nontestimonial evidence, as it did not purport to convey information about the defendant, but simply established the existence of the procedures necessary to create a business record.

United States v. Lewis, 594 F.3d 1270 (10th Cir. 2010) : In a massive fraud case the prosecution notified the defense 12 days before trial that it would authenticate 16 boxes of bank records using the certification process under Rule 902(11). Affirming, the Court found no abuse of discretion in denying a defense request for a continuance and in admitting the records, since the originals of the records had been available to the defense for more than two years and a defense investigator had in fact reviewed the records more than 18 months before the trial. Furthermore, the defense had 39 days from the time of the Rule 902(11) notice until they were introduced but devoted only two hours to inspecting them.

[10] Rule 902(12) -- Certified Foreign Records of Regularly Conducted Activity [Go To Main]

United States v. Jawara, 474 F.3d 565 (9th Cir. 2006) : In an immigration fraud case, the Court upheld the admission of Gambian school examination records under *18 U.S.C. § 3505*, the criminal counterpart to *Rule 902(12)*.

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§ 903.syn Synopsis to Chapter 903: RULE 903

903.01 Official Text

903.02 Editorial Explanatory Comment

[1] Common-Law Rule

[2] Proving Execution of a Document

903.03 Annotated Cases

903.04 Legislative History

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903.01 Official Text

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

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903.02 Editorial Explanatory Comment

[1] Common-Law Rule

At common law an attesting witness was a preferred witness for proving execution of an attested document. Unless the attesting witness was called or his absence was satisfactorily explained, no other evidence of execution could be received. If the attesting witness was unavailable, the next best evidence was that of the witness' handwriting, which was proof of the attestation. Yet the common-law provision was an odd one, for it did not confine the evidence to testimony of the attesters. Rather, it merely required that the attesters be called before other evidence could be introduced. If all the attesters when called denied having witnessed the execution and denied having attested, the proponent of a document could introduce other evidence in order to prove that the maker of the document had executed the writing in the presence of the attesters and that they had signed as attesters. Thus, the proponent might still convince the tribunal that the writing was executed with attestation as required by statute.

It is important to note that the older common-law rule required the production of attesting witnesses or, in lieu thereof, a satisfactory explanation for failure to produce them before other evidence could be produced of the execution of any attested writing, whether or not attestation was necessary to a legally effective execution of the writing. This rule once prevailed with varying degrees of strictness in the United States. It has now been generally abolished as to writings that are not required to be attested. Unless the laws of the jurisdiction whose laws govern the validity of the writing require the testimony of a subscribing or attesting witness, the attesting witness' testimony is not necessary for authentication.

The Rule does not say what is required to authenticate an attested document; it only says what is not required. The authentication requirements for an attested document, like any other, are found in *Rules 901 and 902*.

[2] Proving Execution of a Document

Wigmore makes a point that should be kept in mind in conjunction with Rule 903. Even where the state law of authentication is applicable and requires the subscribing witness to testify first or to be otherwise accounted for, the rule "applies only in proving execution, not in using the document for other purposes." 4 J. Wigmore, Evidence § 1293 (Chadbourn rev. 1972). If, for example, a statement in a will is offered in a suit where the validity of the will is not being contested, the Rule does not apply. If, however, a state has a more restrictive rule and requires attesters to

authenticate a will in every case, the language of Rule 903 makes it difficult to escape the application of the state rule.

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903.03 Annotated Cases

No significant decisions.

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903.04 Legislative History

Advisory Committee's Note

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states. McCormick § 188; Uniform Rule 71; *California Evidence Code § 1411*; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; NYCPLR, Rule 4537.

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5-903 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 903, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 903. Subscribing Witness' Testimony Unnecessary	**Rule 903. Subscribing Witness's Testimony**
The testimony of a subscrib	A subscribing witness's

ing wit- ness is not ne- ces- sary to au- then tic- ate a writ- ing un- less re- quir ed by the laws of the jur- is- dic- tion who se laws gov- ern the vali dity of the writ- ing.

testi mon y is ne- ces- sary to au- then tic- ate a writ- ing only if re- quir ed by the law of the jur- is- dic- tion that gov- erns its vali dity.

Committee Note

The language of Rule 903 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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§ 1001.syn Synopsis to Chapter 1001: RULE 1001

1001.01 Official Text

1001.02 Editorial Explanatory Comment

[1] Definitions

[2] Business Records

1001.03 Annotated Cases

[1] Rule 1001(3) -- Original

[2] Rule 1001(4) -- Duplicate

1001.04 Legislative History

[1] Advisory Committee's Note

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

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5-1001 Federal Rules of Evidence Manual 1001.01

1001.01 Official Text

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

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PART TWO: THE RULES THEMSELVES
Article X. Contents Of Writings, Recordings, And Photographs
CHAPTER 1001 RULE 1001

5-1001 Federal Rules of Evidence Manual 1001.02

1001.02 Editorial Explanatory Comment

[1] Definitions

Rules 1001, 1002, 1003, and 1004 constitute the basic federal version of the Best Evidence Rule. *Rule 1001* provides the definitions that are carried forth in the three succeeding Rules.

Section (1) defines "writings" and "recordings" to include letters, words, or numbers set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or any other form of data compilation. Prior to the adoption of the Rules, several jurisdictions had extended the definition of "writing" to cover photostating and electronic recording. This section makes it clear that computers and other modern reproduction systems are also included in the Federal Rule.

Rule 1001 is somewhat narrower than corresponding portions of the Model Code of Evidence and the Uniform Rules of Evidence, restricting itself to letters, words, or numbers, or their equivalent, rather than extending to any form of communication or representation. Still, the Rule is comprehensive, covering as it does all forms of photographs, including X-rays, computer printouts, and every sort of writing or recording of words or word-substitutes.

Section (2) simply states that "photographs" include still photos, X-ray films, videotapes, and motion pictures. This definition recognizes that non-writing and non-documentary materials can still be subject to the Best Evidence Rule, if the proponent is attempting to prove the contents of such materials. n1

If evidence is not a writing, recording, or photograph, then it is not subject to the Best Evidence Rule. For example, in a criminal trial, a defendant charged with drug possession cannot make a best evidence objection when the prosecution proves the possession through the testimony of a police officer. The government is under no obligation to produce the drugs in lieu of testimony, because possession of drugs is not a writing, recording or photograph. See the discussion under the section "Chain of Custody" in the Editorial Explanatory Comment to *Rule 901*, *§ 901.02[10]*.

Section (3) defines an original of a writing or recording as the writing or recording itself and any counterpart intended to have the same effect by the person executing or issuing it. An original of a photograph includes the negative or any print therefrom, even though logically this may not be the case. Any printout of computer data, such as a digital photo, is an

original. The key point is that the particular counterpart was intended to function as an original. For example, parties to a contract may create one document they intend to serve as the ultimate manifestation of their agreement, as well as copies to be held by each party. Or they may have multiple documents, each of which is to be considered an original, a definitive recording of their agreement.

Section (4) defines a duplicate as a counterpart produced by the same impression as the original, from the same matrix, by means of photography, by rerecording, or by other equivalent techniques that accurately reproduce the original. It is evident that the word "duplicate" is reserved for copies that are produced by methods possessing a high degree of accuracy. n2

[2] Business Records

Montana has added the following subdivision to its state version of *Federal Rule 1001*, so that the covered material would be admissible under its version of *Rule 1003*:

> (5) Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

The Commission Comment accompanying the Rule explained that it was based on a Montana statute (derived from the widely-adopted Uniform Photographic Copies of Business and Public Records as Evidence Act; see also *28 U.S.C. § 1732*), that provides in relevant part that "[w]hen an entry is repeated in the regular course of business, one being copied from another or [*sic*] at or near the time of the transaction, all the entries are equally regarded as originals." The Commission felt that the evidence was not admissible under the federal version of *Rule 1003*. The Commission Comment states:

> The entry cannot be considered an original because the person making the entry has no such intent, but is carrying on a normal business function of collecting information to be stored in a single record. The entry cannot be considered a duplicate because, as previously indicated, duplicates are defined to include only mechanical means of duplication and not manual means.

Query whether the addition by Montana is necessary. Every record compiled by a business in the ordinary course of business that is kept as part of the business routine can qualify as a business record, even though portions of the record originally appeared in other writings. As long as several different kinds of writings are made in the ordinary course of business, it would seem that all of the writings could be introduced as originals, if the business retained them as such in the ordinary course of conducting its affairs. Of course, if the business records were being introduced to prove the content of the writings from which they were originally derived, they could only come in without explaining absence of the originals if they were "duplicates," and the Montana provision makes it possible to treat manual as well as photographic reproductions within that category. The comment to Minnesota's Rule 1003 is in accord with our view. Minnesota did not find it necessary to make the addition.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Stockton, 968 F.2d 715 (8th Cir. 1992)* (the government introduced a photograph taken of miscellaneous papers found in the residence of a drug laboratory, and the photos were introduced to prove the contents of the writings; held, subject to Best Evidence Rule).

(n2)Footnote 2. See, e.g., *United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997)* (microform copy of a check was a duplicate under *Rule 1001(4)*; the copy was properly admitted under the terms of *Rule 1003*); *United States v. Carroll, 860 F.2d 500 (1st Cir. 1988)* (microfilm copy of a check is a duplicate within the meaning of the Rule: "Additionally, the fact that what was actually admitted into evidence was technically a duplicate of a duplicate, i.e., a print made from the microfilm does not affect our analysis.").

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CHAPTER 1001 RULE 1001

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1001.03 Annotated Cases

[1] Rule 1001(3) -- Original

Greater Kansas City Laborers Pension Fund v. Thummel, 738 F.2d 926 (8th Cir. 1984) : Affirming a judgment against a company and its owner for unpaid contributions to employee benefit funds, the Court upheld the admission of a carbon copy of a contract, noting that the contract was executed in quadruplicate. Thus, the carbon copies were originals under *Rule 1001(3)*, even though the signature at the bottom of the contract was dim and someone had written the owner's name over the signature.

[2] Rule 1001(4) -- Duplicate

United States v. Savarese, 404 F.3d 651 (2d Cir. 2005) : The Court affirmed convictions for conspiring to rob a credit union, holding that copies of digital recordings of conversations between the conspirators were properly admitted, since "electronic re-recordings" are "duplicates," which are admissible to the same extent as originals unless there is a genuine issue of authenticity or admission would be unfair. In this case the government's testimonial evidence was sufficient to establish authenticity.

Railroad Mgmt. Co. v. CFS La. Midstream Co., 428 F.3d 214 (5th Cir. 2005) : The plaintiff sued to recover license payments under an agreement of which it claimed to be the assignee. When asked in discovery to produce the assignment agreement, the plaintiff refused on the ground it contained proprietary information. Instead, it submitted, *inter alia,* a retyped redacted version of the agreement. Affirming summary judgment for the defendant because there was insufficient evidence of a contractual relationship between the parties, the Court held that the contents of the agreement, particularly the relevant time period, were at issue, so the Best Evidence Rule applied. There was no abuse of discretion in rejecting the retyped version, offered as a "duplicate," since there were physical inconsistencies with an excerpt of the agreement and no sufficient showing that it was an accurate reproduction.

United States v. Perry, 925 F.2d 1077 (8th Cir. 1991) : The Court affirmed a conviction for bank robbery, holding

that a still photograph made from the bank videotape was a duplicate, as it was a counterpart produced by the same impression as the original.

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1001.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

In an earlier day, when discovery and other related procedures were strictly limited, the misleadingly named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary & Strong, The Best Evidence Rule: An Evaluation in Context, *51 Iowa L. Rev. 825 (1966).*

Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Paragraph (3). In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965)* .

Paragraph (4). The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003 *infra* . Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a

duplicate. This result is substantially consistent with *28 U.S.C. § 1732(b)*. Compare *26 U.S.C. § 7513(c)*, giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the secretary of the treasury, and *44 U.S.C. § 399(a)*, giving original status to photographic copies in the National Archives.

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Subcommittee amended subdivision (2) specifically to include video tapes in the definition of "photographs."

[3] Report of the House Committee on the Judiciary

The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

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Supp. To CHAPTER 1001 RULE 1001

5-1001 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1001, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS	**ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS**

RAPHS Rule 1001. Definitions	RAPHS Rule 1001. Definitions That Apply to This Article		
For purposes of this article the following definitions are applicable:	In this article:		
	(1) Writings and recordings. "Writings" and "re-	**(a)**	A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

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(b) A "re- cord ing" con- sists of let- ters, wor ds, num bers, or their equi vale nt re- cor- ded in any man ner.

(c) A "pho- to- grap h" mea ns a pho- to- grap hic im- age

or its equivalent stored in any form.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout -- or other output readable by sight -- if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(d) An "original" of a writ-

ing or re- cord ing is the writ- ing or re- cord ing it- self or any coun terpa rt in- ten- ded to have the sam e ef- fect by a per- son ex- ecut- ing or issu- ing it. An "ori- gin- al" of a pho- to- grap h in- clud es the

negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplic **(e)** A "duplicate" means a counterpart produced by

ate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

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Committee Note

The language of Rule 1001 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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CHAPTER 1002 RULE 1002

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§ 1002.syn Synopsis to Chapter 1002: RULE 1002

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1002.02 Editorial Explanatory Comment

[1] The Best Evidence Rule: Proving the Contents

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[2] Inadmissible or Properly Excluded Evidence

[a] Documents

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CHAPTER 1002 RULE 1002

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1002.01 Official Text

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

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CHAPTER 1002 RULE 1002

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1002.02 Editorial Explanatory Comment

[1] The Best Evidence Rule: Proving the Contents

This is the familiar part of the Best Evidence Rule that requires the production of an original in order to prove the contents of a writing, recording, or photograph, unless an exception is provided in another Rule. n1 The traditional rationale of the Best Evidence Rule -- that accuracy is promoted by production of the original, because the process of copying creates a risk of error -- has clearly been undermined by technological advances with respect to copying of writings and recordings. The Federal Rules take account of these developments by establishing broad exceptions to *Rule 1002*. *Rule 1002* must be read together with the exceptions provided in *Rules 1003 and 1004*. The only legitimate concern remaining is where the proponent seeks to prove the content of a writing or recording by way of oral testimony or handwritten replication, i.e., where there is no duplicate of the final document.

The one difficult concept that arises in connection with *Rule 1002* is the notion of proving the contents of a writing, recording, or photograph. If the contents are not sought to be proved, the Best Evidence Rule is inapplicable, and the proponent can prove the fact in any otherwise permissible way. n2 The fact that a writing is made to describe or record an event or a condition does not prevent testimony by knowledgeable witnesses as to the same event or condition, if it is the event or condition to be proved and not the contents of the document itself. n3

One familiar example relates to the question whether *A* paid *B* a certain sum of money at a specified time. *B* may have given *A* a written receipt, but that does not prevent oral testimony concerning an alleged payment. The proponent is trying to prove whether or not a payment is made, not the content of any agreement. n4 However, should *A* choose to prove the fact of payment by using the receipt, the Rule requires that the original or a duplicate of the receipt be introduced, or its absence explained, because in that case the content of the receipt (i.e., the amount, date, signature, etc.) is the point to be proven. The same can be said of the use of most photographs, a point made by the Advisory Committee. Ordinarily, a witness takes the stand and states that a photograph represents the scene as he saw it. The contents of the picture are not then in issue; the scene is in dispute. So the Rule seldom applies to ordinary photographs. n5 However, in an obscenity prosecution or copyright case, the contents might be in dispute. n6 The contents of a photograph would also be in dispute if the proponent merely took a picture of documents and offered the photograph to prove the contents of the documents. n7

The most common example of non-applicability of the Best Evidence Rule in criminal cases is police testimony as to the contents of a confession. Officers who heard a defendant confess may testify to what they heard even if there is a recording of the confession and a transcript of that recording. Only when the recording or transcript is actually offered, as proof of the content therein, is the Best Evidence Rule triggered. n8

An interesting example of Best Evidence Rule application arose in *United States v. Bennett, 363 F.3d 947 (9th Cir. 2004)* . The Coast Guard found large quantities of marijuana on the defendant's boat, and the major contested issue was whether the defendant was importing the marijuana from Mexico. The government did not have eyewitness testimony that the boat crossed into the United States from Mexican waters. The government relied at trial chiefly on the testimony of a customs officer that he found a global positioning system (GPS) on the defendant's boat and that the GPS revealed that the boat had traveled from Mexican waters to San Diego Bay. A GPS device uses global positioning satellites to track and record the location of the device, and thus the location of any object to which it is attached. The GPS device in question came with a "backtrack," that graphed the boat's journey the day of the search. The officer testified at trial that the backtrack feature mapped the defendant's journey from Mexican territorial waters and then north to San Diego Bay. The officer admitted on cross-examination that he had not taken possession of the GPS device itself nor had he obtained any printout record of the data contained in it. Rather, he simply pressed the "backtrack" button and viewed the graphic display, which indicated where the boat had been. The Court found the testimony about the GPS information to be a best evidence violation for three reasons. First, the GPS display the officer saw was a writing or recording. Second, the officer never actually observed the defendant's boat travel the path depicted by the GPS. Third, he did not observe anyone entering way points into the machine. Thus, his testimony concerned the "content" of the GPS to prove the defendant's travels. The government did not produce the GPS itself, in which case the backtrack feature could be employed in court; nor did it produce a printout of the GPS data. Either of these sources would have been the best evidence of the boat's travels; as a result, testimony did not satisfy the Best Evidence Rule. Finally, the government provided no excuse for relying on the witness' testimony instead of the GPS or a printout.

[2] Statutes

Congress has specifically made it possible for certain photographic reproductions to be treated as originals. For example, in *26 U.S.C. § 7513*, Congress provided that photographic reproductions of tax returns and documents made by authority of the Secretary of the Treasury are treated as originals. To accommodate these statutes and any others that may be enacted, *Rule 1002* provides an exception from the requirement that an original be produced for whenever Congress may provide or has provided for such an exception. Familiar examples are *28 U.S.C. §§ 1732* (permitting destruction of business records and allowing proof through "reproduction") and *1733* (providing that properly authenticated government documents may be admitted in lieu of originals).

[3] Proving the Absence of an Item

The Advisory Committee's Note to *Rule 1002* states that the Best Evidence Rule does not apply "to testimony that books or records have been examined and found not to contain any reference to a designated matter." In our view, this is not so clear. What is plain is that the drafters of the Rule did not intend that following a search of numerous documents the searcher must produce all of them in Court in order to testify that none contained a certain matter. See also Rule 1006, *infra*. It may be a different situation altogether, however, when a witness says that a specific document had a blank space at an important point. For example, if an insurance company witness said that there was no information provided on an application for insurance concerning prior hospitalization even though the form asked for a listing of such hospitalization, we believe that the theory of the Best Evidence Rule requires that the application (or a duplicate, see Rule 1003) be produced. While there is really no difference anymore between an original and a duplicate, there is a significant difference between oral testimony and either an original or a duplicate, where that testimony concerns the details of a document.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Humphrey, 104 F.3d 65 (5th Cir. 1997)* (the defendants were charged with operating a loan brokerage service that was "essentially a scam"; at trial, the defendants sought to call their former lawyer to testify that the defendants obtained a judgment awarding them brokerage fees in a certain transaction -- this tended to show that they were operating a legitimate business; there was no error in the exclusion of the lawyer's testimony because the proponents were trying to prove the content of the judgment and the testimony of the lawyer was not the best evidence of the judgment).

(n2)Footnote 2. See, e.g., *United States v. Jones, 958 F.2d 520 (2d Cir. 1992)* (the defendant asserted that she did not file tax returns because she believed that a taxpayer could not file without paying the taxes due; the government offered a summary of her transactions from an earlier year, indicating she had filed in that year without paying; the original of her previous return was not required, because the summary was introduced to demonstrate conduct inconsistent with her stated belief, not to prove the content of the return); *R & R Assoc. v. Visual Scene, Inc., 726 F.2d 36, 38 (1st Cir. 1984)* ("*Rule 1002* applies not when a piece of evidence sought to be introduced has been somewhere recorded in writing but when it is that written record itself that the party seeks to prove.").

(n3)Footnote 3. See, e.g., *United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995)* (jurisdictional component of assault crime -- that Raybrook penitentiary was within the special territorial jurisdiction of the United States -- was properly proved through the testimony of a witness who saw the deed establishing federal status; *Rule 1002* did not require that the deed be placed in evidence, because it was the fact of federal status that was relevant, not the terms of the deed establishing that status); *United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* (the government could prove that a bank was federally insured through testimony, without producing a writing documenting the insurance; the fact to be proved was the existence of insurance, not the contents of the writing).

(n4)Footnote 4. See e.g., *Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989)* (Best Evidence Rule did not prevent a plaintiff from questioning a witness concerning a flyer that solicited potential witnesses to come forward; the purpose of the questions was to prove how the witness learned of the case rather than the contents of the flyer).

(n5)Footnote 5. See, e.g., *People of Territory of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985)* (photographs of stolen jewelry were properly admitted in a burglary case); *United States v. Alexander, 415 F.2d 1352 (7th Cir. 1969)* (Best Evidence Rule does not prevent the introduction of a photograph of stolen mail, because the photograph was offered to show the quantity of mail and not to prove the contents of a writing).

(n6)Footnote 6. See, e.g., *United States v. Levine, 546 F.2d 658 (5th Cir. 1977)* (in an obscenity prosecution, "[t]he contents of the film are what is sought to be proved. Thus, the best evidence standard embodied in *Rule 1002* applies to the introduction of the film.").

(n7)Footnote 7. See, e.g., *United States v. Stockton, 968 F.2d 715 (8th Cir. 1992)* (photographs of miscellaneous papers found in a laboratory in which illegal drugs were made; the Best Evidence Rule applied where the photos were introduced to prove the contents of the writings that were photographed).

(n8)Footnote 8. See, e.g., *United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992)* (no error in relying on testimony as to what one defendant said in a recorded conversation even though the statements did not appear on the tape recording; there is no requirement that the government rely on a tape recording to prove a conversation); *United States v. Howard, 953 F.2d 610 (11th Cir. 1992)* (no error in permitting a DEA agent to testify to recorded statements he overheard even though the recording was only partially audible; the testimony was offered not to prove the content of the tapes, but rather the content of the conversations, therefore the Best Evidence Rule did not apply).

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1002.03 Annotated Cases

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[1] Admissible Testimony

R & R Assocs. v. Visual Scene, Inc., 726 F.2d 36 (1st Cir. 1984) : The Court sustained a breach of contract judgment for a distributor of sunglasses, holding that its president was properly permitted to testify regarding the cost of procuring from the defendant the defective sunglasses. The president did not seek to prove the contents of a document, so the Rule did not require the production of any document, even though one might have supported the testimony.

United States v. Hernandez-Fundora, 58 F.3d 802 (2d Cir. 1995) : The defendant, who beat up a fellow inmate at Raybrook penitentiary, was convicted of assault committed within the special territorial jurisdiction of the United States. The Court held that the jurisdictional component was properly proved through the testimony of a witness who saw the deed establishing Raybrook's federal status. *Rule 1002* did not require that the deed be placed in evidence, since it was the fact of federal status that was relevant, not the terms of the deed establishing that status. Affirming convictions arising out of a scheme to defraud a bank by cashing fraudulent checks in *United States v. Sliker*, n1 the Court held that the government could prove that the bank was federally insured through testimony, without producing a writing documenting the insurance. The fact to be proved was the existence of insurance, not the contents of the writing.

Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989) : The Court held that the Best Evidence Rule did not prevent a plaintiff from questioning a witness concerning a flyer that solicited potential witnesses to come forward, since the purpose of the questions was to prove how the witness learned of the case rather than the contents of the flyer.

[2] Inadmissible or Properly Excluded Evidence

[a] Documents

Dugan v. R.J. Corman R.R. Co., 344 F.3d 662 (7th Cir. 2003) : In an action for contributions by a pension plan

against an employer, the Judge, who conducted the trial by agreement of the parties on a stipulated paper record, struck an affidavit in which the plaintiff quoted from a "Trust Agreement," because the agreement itself was never made a part of the record. Affirming in part a judgment for the plaintiff, the Court found no error in striking the affidavit, since the quotation in it was not the best evidence of the agreement, and thus it was unreliable.

[b] Inadmissible or Properly Excluded Evidence -- Testimony

Conway v. Consolidated Rail Corp., 720 F.2d 221 (1st Cir. 1983) : In a FELA case, the Court held that a conductor's testimony that he did not have any authority to stop a passenger with a footlocker from boarding a train was properly excluded, since it was not the best evidence of the railroad's written rules and regulations.

Time Share Vacation Club v. Atlantic Resorts, 735 F.2d 61 (3d Cir. 1984) : The Court affirmed a dismissal of a breach of contract action for lack of in personam jurisdiction. It observed that the plaintiff bears the burden of demonstrating sufficient contacts once the defendant raises a jurisdictional defense and concluded that the plaintiff must produce a copy of the entire contract or proffer an explanation for its absence where it relies wholly upon the contract to establish the contacts.

United States v. Humphrey, 104 F.3d 65 (5th Cir. 1997) : The defendants, charged with operating a loan brokerage service that was "essentially a scam," sought to call their former lawyer to testify that the defendants obtained a judgment awarding them brokerage fees in a certain transaction, as that tended to show they were operating a legitimate business. Affirming fraud convictions, the Court found no error in the exclusion of the lawyer's testimony, since the testimony was not the best evidence of the judgment.

Ridgway v. Ford Dealer Computer Servs., Inc., 114 F.3d 94 (6th Cir. 1997) : Affirming a discharged employee's judgment for severance benefits, the Court noted that had the defendant objected to the plaintiff's oral proof regarding the employment contract and the relevant contract provision, the proof could have been excluded on best evidence grounds.

United States v. Bennett, 363 F.3d 947 (9th Cir. 2004) : In a trial for illegal importation, the government relied chiefly on the testimony of a Customs officer that he found a global positioning system on defendant's boat, which graphed the boat's journey the day of the search from Mexican territorial waters and then north to San Diego Bay. The officer admitted on cross-examination that he had not taken possession of the GPS device itself or obtained any printout record of the data contained in it. The Court found that the officer's testimony concerned the "content" of the GPS to prove the defendant's travels, so the government was required to produce the GPS itself, or a printout of the GPS data, or an excuse for relying on the witness' testimony instead of the GPS or a printout. In *Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002)* , the plaintiff news organization videotaped the notorious beating of Reginald Denny and obtained copyrights for four segments of its tape. In a copyright infringement action, the plaintiff submitted a declaration by a producer for MTV who stated that he had used a clip from the video in an MTV program, he had obtained the clip from a beta tape in the MTV library, and the tape box identified Group W News Service as the source. Affirming in part summary judgment for the defendants, the Court found that the declaration violated the Best Evidence Rule: "Even assuming that the label's contents were not inadmissible hearsay, LANS was required to produce the original label (or a duplicate, *see Fed. R. Evid. 1003*) or at least explain why it could not do so. *See Fed. R. Evid. 1002*, *1004*."

[3] Proving the Contents

United States v. Jones, 958 F.2d 520 (2d Cir. 1992) : In a prosecution for failing to file 1984-87 tax returns, the defendant asserted that she did not file because she believed that a taxpayer could not file without paying the taxes due; the government offered a summary of her 1982 transactions indicating she had filed that year without paying. The Court held that the original of her 1982 return was not required, as the summary was being introduced to demonstrate conduct inconsistent with her stated belief, not to prove the contents of her 1982 return.

Railroad Mgmt. Co. v. CFS La. Midstream Co., 428 F.3d 214 (5th Cir. 2005) : The plaintiff sued to recover license payments under an agreement of which it claimed to be the assignee. When asked in discovery to produce the assignment agreement, the plaintiff refused on the ground it contained proprietary information. Instead, it submitted affidavits attesting to the assignment, a four-page excerpt of the agreement, and a retyped redacted version of the agreement. Affirming summary judgment for the defendant because there was insufficient evidence of a contractual relationship between the parties, the Court held that the contents of the agreement, particularly the relevant time period, were at issue, so the Best Evidence Rule applied. There was no abuse of discretion in rejecting the evidence offered by the plaintiff, when it had the original agreement at its disposal. In *United States v. Levine*, n2 the Court reversed convictions for interstate shipment of obscene films, noting that in an obscenity prosecution "[t]he contents of the film are what is sought to be proved. Thus, the 'best evidence' standard embodied in *Rule 1002* applies to the introduction of the film."

United States v. Ziesman, 409 F.3d 941 (8th Cir. 2005) : Affirming convictions for manufacturing methamphetamine and making a false statement to a federal agent, the Court held that three crime lab exhibits were properly admitted. The exhibits were as they had been generated by the lab, except that the name of a second suspect was omitted. The lab analyst testified that the crime lab generated two names rather than just the defendant's by mistake. Although the defendant argued that the alterations disqualified the reports and that originals were required, the Court found that the testimony was sufficient to authenticate the reports and that the reports "had no independent evidentiary significance." On the best evidence point, we suggest that the Court reached the right result for the wrong reason. Clearly, the reports were offered to prove the results of the lab tests and thus to prove their contents. But there was no question as to the genuineness of the duplicate. The originals had the wrong name, as did the duplicate. Thus, the two were identical, and the mistake as to the second name was explained to the jury, so there was no possibility that use of the duplicate was prejudicial.

United States v. Workinger, 90 F.3d 1409 (9th Cir. 1996) : Before he was indicted for tax fraud, the defendant had been interviewed by an attorney representing his former wife. He had affirmed that he would tell the truth and the interview was tape-recorded; subsequently, the attorney's secretary typed a transcription and the tape was erased. Holding there was no error in admitting the transcript, the Court noted that the Best Evidence Rule does not require a recording to prove a recorded conversation, but here the government sought to prove the content of the tape, so the recording itself or a proper excuse would be required. In this case, the original tape had been destroyed in good faith, so the transcript was admissible under *Rule 1004(1)*. One Judge, concurring in the result on this point, applied what is in our view the better analysis: The government was seeking to prove what the defendant said at his deposition, not the content of the tape; therefore, the Best Evidence Rule had no application. Rather, the problem was one of hearsay, and here the attorney testified that the transcript accurately reflected what the defendant said at the deposition. Reversing convictions for cocaine offenses on other grounds in *United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994)* , the Court noted that it was error to sustain best evidence objections when the defendant attempted to cross-examine codefendant witnesses about their understanding of their plea agreements. Both the terms of the agreements and the witnesses' understanding of those terms were relevant.

[4] Real and Demonstrative Evidence

United States v. Rodriguez, 968 F.2d 130 (2d Cir. 1992) : Affirming convictions for drug offenses, the Court held there was no unfair prejudice to a defendant when witnesses testified that a purse and an identification card in it, which were observed in a search but not seized or introduced into evidence, belonged to her. The fact that a physical object is not available does not require exclusion of relevant oral testimony describing the object if the witness has the requisite personal knowledge.

United States v. Stockton, 968 F.2d 715 (8th Cir. 1992) : In a prosecution for conspiring to manufacture methamphetamine, the government offered photographs of miscellaneous papers seized at a coconspirator's house. Rejecting the government's argument that the Best Evidence Rule does not apply to photographs of demonstrative evidence, the Court held that the contents of the photographs were at issue in this case because a DEA agent testified to the contents of the photographs and specifically read from them. There was no error in admitting the photographs in lieu of the originals, however, because they were "duplicates" admissible under *Rule 1003*.

People of Terr. of Guam v. Ojeda, 758 F.2d 403 (9th Cir. 1985) : The Court held that pictures of stolen jewelry were properly admitted in a burglary case, since the Best Evidence Rule applies only to writings and recordings, not to other physical evidence.

[5] Tape Recordings

United States v. Holton, 116 F.3d 1536 (D.C. Cir. 1997) : In the course of upholding drug-related convictions, the Court rejected a best-evidence attack on the use of transcripts of tape-recorded conversations, since the original recording was before the jury and the transcript was only used to assist the jury in understanding the original.

United States v. Ortiz, 966 F.2d 707 (1st Cir. 1992) : Affirming convictions for aiding and abetting drug trafficking, the Court held there was no error in relying on testimony as to what one defendant said in a recorded conversation even though the statements did not appear on the tape recording. It noted that there is no requirement that the government rely on a tape recording to prove a conversation.

United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987) : The Court held that the Best Evidence Rule was not violated when testimony was admitted concerning a conversation even though a tape was available, since the testimony was offered to prove the content of the conversation, not the content of the tape.

United States v. Martin, 920 F.2d 393 (6th Cir. 1990) : Affirming a conviction for distributing cocaine, the Court held that the Rule did not apply to a tape recording used not to prove its content but to corroborate a conversation the government claimed to have occurred. Thus, there was no error in permitting an informant to be asked about some of his statements heard on the tape.

United States v. Rose, 590 F.2d 232 (7th Cir. 1978) : Affirming convictions for transportation of stolen goods, the Court rejected arguments that testimony about a tape-recorded telephone conversation violated the Best Evidence Rule. It observed that "the government sought to prove the contents of a conversation, not the contents of a tape recording."

United States v. Workinger, 90 F.3d 1409 (9th Cir. 1996) : Before he was indicted for tax fraud, the defendant had been interviewed by an attorney representing his former wife. He had affirmed that he would tell the truth and the interview was tape-recorded; subsequently, the attorney's secretary typed a transcription and the tape was erased.

Holding there was no error in admitting the transcript, the Court noted that the Best Evidence Rule does not require a recording to prove a recorded conversation, but here the government sought to prove the content of the tape, so the recording itself or a proper excuse would be required. In this case, the original tape had been destroyed in good faith, so the transcript was admissible under *Rule 1004(1)*. One Judge, concurring in the result on this point, applied what is in our view the better analysis: The government was seeking to prove what the defendant said at his deposition, not the content of the tape; therefore, the Best Evidence Rule had no application. Rather, the problem was one of hearsay, and here the attorney testified that the transcript accurately reflected what the defendant said at the deposition. In *United States v. Gonzales-Benitez*, n3 the parties appeared to misunderstand the meaning of offering a recording to prove its contents, but the Court properly noted that under the Rule the government was not bound to introduce tape recordings of conversations between the defendants and informers. The government had an option of introducing the tapes or offering the testimony of witnesses who heard the conversations.

United States v. Howard, 953 F.2d 610 (11th Cir. 1992) (per curiam): Affirming a conviction for possession of marijuana, the Court held there was no error in permitting a DEA agent to testify to recorded statements he overheard even though the recording was only partially audible. Since the proffered testimony was offered not to prove the content of the tapes, but rather the content of the conversations, the Rule did not apply.

FOOTNOTES:

(n1)Footnote 1. *United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* .

(n2)Footnote 2. *United States v. Levine, 546 F.2d 658 (5th Cir. 1977)* .

(n3)Footnote 3. *United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir. 1976)* .

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CHAPTER 1002 RULE 1002

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1002.04 Legislative History

Advisory Committee's Note

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2) *supra*.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, the Celluloid Witness, *37 U. Colo. L. Rev. 235, 249*-51 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly as to situations in which the picture is offered as having independent probative value, *e.g.*, automatic photograph of bank robber. See *People v. Doggett, 83 Cal. App. 2d 405, 188 P.2d 792 (1948)* , photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence: Is There a Recognized Basis for Admissibility? *8 Hastings L.J. 310 (1957)*. The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels v. Iowa City, 191 Iowa 811, 183 N.W. 415 (1921)* ; *Cellamare v. Third Ave. Transit Corp., 273*

App. Div. 260, 77 N.Y.S.2d 91 (1948) ; *Patrick & Tilman v. Matkin, 154 Okla. 232, 7 P.2d 414 (1932)* ; *Mendoza v. Rivera, 78 P.R.R. 569 (1955)* .

It should be noted, however, that Rule 703, *supra* , allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to acts of Congress is made in view of such statutory provisions as *26 U.S.C. § 7513*, photographic reproductions of tax returns and documents, made by authority of the secretary of the treasury, treated as originals, and *44 U.S.C. § 399(a)*, photographic copies in National Archives treated as originals.

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5-1002 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1002, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1002. Requirement of Original	**Rule 1002. Requirement of the Original**
To prove the content of a writing, recording,	An original writing, recording, or pho-

or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

to-graph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Committee Note

The language of Rule 1002 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 1002.03 Annotated Cases

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[1] Admissible Testimony [Go To Main]

Waterloo Furniture Components, Ltd. v. Haworth, Inc., 467 F.3d 641 (7th Cir. 2006) : The plaintiff and the defendant had a patent licensing agreement under which the plaintiff was entitled to receive the benefit of the most favorable royalty terms the defendant gave any licensee. The plaintiff sued for breach of contract after the defendant resolved a patent dispute with another company, SoftView. In support of its motion for summary judgment, the defendant presented an affidavit from its employee responsible for negotiating the agreement with SoftView. The plaintiff argued that the statement in the affidavit that the defendant "has never licensed the '798 patent to SoftView" violated the Best Evidence Rule and that the defendant should have to produce the original or a copy of the Haworth-SoftView agreement as the best evidence of the affiant's assertions. Affirming summary judgment for the defendant, the Court found no abuse of discretion in considering the affidavit, as the Best Evidence Rule does not apply unless a witness is testifying about the contents of a document. Here, the affiant was testifying as to his personal knowledge of the negotiations and not as to the contents of the settlement agreement.

[3] Proving the Contents [Go To Main]

United States v. Smith, 566 F.3d 410 (4th Cir. 2009) : The Court affirmed convictions for firearms offenses and drug trafficking, finding no error when an ATF agent was permitted to testify as an expert to the place of manufacture of four firearms seized from the defendant's apartment. The agent consulted various references including one reference book and an ATF database in arriving at his opinion. The defendant objected that the testimony violated the best evidence rule, but the Court held that the agent was not attempting to prove the contents of any book or record. Instead, the agent was relying on materials reasonably relied upon by experts to form an opinion.

[4] Real and Demonstrative Evidence [Go To Main]

United States v. Buchanan, 604 F.3d 517 (8th Cir. 2010) : In a drug distribution prosecution, the government introduced evidence that a key bearing the number "2010" was found on the defendant's person during execution of a search warrant and that the key matched a large safe bearing the same number at an alleged "stash house." Affirming, the Court found no abuse of discretion in admitting the evidence over hearsay and best evidence objections. The numbers on the key and the safe were not hearsay because the were simply identifying marks and were neither assertions that the items matched nor offered to such an assertion. As for the best evidence objection, it was within the Judge's discretion to treat the written numbers as simple marks on a chattel identifying it; there was "little danger that the witness would inaccurately remember the terms of the 'writing'," and the numeric inscription was not critical to the case, since the safe was merely collateral evidence of the crime. In *United States v. Blaylock, 535 F.3d 922 (8th Cir. 2008)* , the defendant, charged with felon firearm possession and other offenses, moved *in limine* to exclude photographs of items that had been seized during a search of his residence and destroyed after his indictment but before trial. Affirming, the Court found no abuse of discretion in denial of the motion, as nothing in the Best Evidence doctrine requires that seized items be introduced; the government may rely on testimony from the officers making the seizure or upon properly authenticated photographs.

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§ 1003.syn Synopsis to Chapter 1003: RULE 1003

1003.01 Official Text

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[1] Presumption of Admissibility for Duplicates

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[1] Demonstrative Evidence

[2] Foundation for Duplicate

[3] Presumption of Genuineness

[a] Documents

[b] Presumption of Genuineness -- Tape Recordings

[4] Questions of Fairness

[5] Questions of Genuineness

1003.04 Legislative History

[1] Advisory Committee's Note

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

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1003.01 Official Text

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

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1003.02 Editorial Explanatory Comment

[1] Presumption of Admissibility for Duplicates

Rule 1003 departs from the common law by providing that a duplicate (as defined in *Rule 1001(4)*) is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate under the circumstances of a particular case. In essence, someone opposing the introduction of a duplicate must show some reason why the original should be produced. n1 Duplicates and originals are ordinarily interchangeable. In contrast, the assumption in common-law jurisdictions is that the Best Evidence Rule, adopted for purposes of avoiding fraud and ensuring accuracy, must rest on the opposite premise, i.e., the original must be favored without any special showing.

One of the explanations for *Rule 1003* is that Article X as a whole deals with items that differ greatly from the traditional writings covered by the Best Evidence Rule. In addition, copying machines and other familiar devices for reproducing writings and recordings have provided us with new ways of enhancing the accuracy of copies. Article X expands coverage of the Best Evidence Rule to reach all of these devices, but pays tribute to their accuracy by making duplicates presumptively acceptable.

[2] Questions of Genuineness

While the House indicated that it wished the Courts to be "liberal" in permitting questions of genuineness to be raised and thereby to require an original, the Senate expressed no such view. Nor did the Advisory Committee. "Liberal" is a word that signifies different things to different people. We suggest that Judges examine the quality of the duplicate, the possibility that the duplicate does not fully reproduce all aspects of the original, n2 the specificity and sincerity of the challenge, the importance of the evidence to the case, and the burdens of producing the original before determining whether a genuine question is raised as to authenticity. n3 In our view, the Trial Judge should err on the side of admitting the duplicate, leaving it to the jury to consider the possibility that the original might not be genuine or that the duplicate might be inaccurate or incomplete. n4

Of course, if the original itself would be inadmissible under other rules of evidence (e.g., hearsay), then the duplicate must be inadmissible as well.

An additional factor that Trial Judges may wish to consider in deciding whether a genuine question as to authenticity is raised or whether admission of a duplicate would be unfair is the opportunity for discovery before trial. Civil and criminal cases may receive different treatment because of the broader opportunities for pretrial examination of evidence in civil cases and the concomitant expectation that a stronger showing can be made in a civil case as to why a duplicate should not be admitted.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Pahl v. Commissioner, 150 F.3d 1124 (9th Cir. 1998)* (no error in admitting the duplicate of an amendment to the articles of incorporation of a law firm; the taxpayer's law partner testified that he saw the taxpayer sign the original document, so there was no genuine question as to the authenticity of the original); *United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997)* (a duplicate of a check was admissible where the defendant "failed to elicit any testimony or make any proffer suggesting that the original had been tampered with or altered in any way and that the copy was not what it purported to be"); *United States v. Garmany, 762 F.2d 929 (11th Cir. 1985)* (the Court rejected a Best Evidence Rule attack on a photocopy of a check; the defendant failed to explain his objection to the copy, and the Court stated that "[t]he burden of challenging admissibility ... rests with the party against whom it is offered").

(n2)Footnote 2. See, e.g., *SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997)* (the Trial Judge properly refused to admit photocopies of check stubs offered to prove their contents; the stubs were "altered" before they were copied, there was no showing of what was changed as a result of the alteration, and the canceled checks could not be located); *Amoco Prod. Co. v. United States, 619 F.2d 1383 (10th Cir. 1980)* (a duplicate file copy of a deed was properly excluded under *Rule 1003*, because the most critical part of the original conformed copy was not completely reproduced in the copy).

(n3)Footnote 3. See, e.g., *Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756 (7th Cir. 1992)* (the plaintiff did not make the requisite showing that there was a genuine issue of authenticity by merely objecting to the admission of duplicates).

(n4)Footnote 4. See, e.g., *United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002)* (copies of tapes were properly admitted as duplicates under *Rule 1003*; the defendant had the opportunity to have the tapes tested and provided no reason to believe the tapes were not authentic); *United States v. Stockton, 968 F.2d 715 (8th Cir. 1992)* (a photograph offered to prove the contents of writings did not violate Best Evidence Rule; the photograph was a duplicate, and there was no genuine challenge to the authenticity of the documents); *United States v. Smith, 893 F.2d 1573 (9th Cir. 1990)* (a photocopy of a calendar/drug ledger was properly admitted, even though the handwriting on the ledger was not positively identified by an expert; the handwriting was identified by three witnesses who knew the purported author's handwriting and other witnesses provided circumstantial evidence supporting the authenticity of the document).

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1003.03 Annotated Cases

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[1] Demonstrative Evidence

United States v. Stockton, 968 F.2d 715 (8th Cir. 1992) : In a prosecution for conspiring to manufacture methamphetamine, the government offered photographs of miscellaneous papers seized at a coconspirator's house. Rejecting the government's argument that the Best Evidence Rule does not apply to photographs of demonstrative evidence, the Court held that the contents of the photographs were at issue in this case because a DEA agent testified to the contents of the photographs and specifically read from them. There was no error in admitting the photographs in lieu of the originals, however, because they were "duplicates" admissible under the Rule.

[2] Foundation for Duplicate

United States v. Carroll, 860 F.2d 500 (1st Cir. 1988) : Affirming a defendant's Hobbs Act convictions, the Court held that a print made from a microfilm copy of a check was a duplicate and was not barred by either exception in *Rule 1003*.

United States v. Savarese, 404 F.3d 651 (2d Cir. 2005) : The Court affirmed convictions for conspiring to rob a credit union, holding that copies of digital recordings of conversations between the conspirators were properly admitted, since "electronic re-recordings" are "duplicates," which are admissible to the same extent as originals unless there is a genuine issue of authenticity or admission would be unfair. In this case the government's testimonial evidence was sufficient to establish authenticity. In *United States v. Chang An-Lo*, n1 the Court upheld racketeering convictions, finding that duplicate telephone logs were properly admitted where a hotel manager identified the logs as records kept in the ordinary business of the hotel. Although he had not compared the duplicate with the original, he did recognize the names and signatures of the hotel operators and the handwriting and format of the logs. Moreover, the American Consulate in Brazil affixed a certification under seal stating that the duplicate was a true and faithful copy of the original.

Pahl v. Commissioner, 150 F.3d 1124 (9th Cir. 1998) : Affirming a determination of the Tax Court, the Court upheld the admission of a duplicate of an amendment to the articles of incorporation for a law firm, which bore the taxpayer's signature. The Tax Court did not err in crediting the testimony of the taxpayer's law partner that he saw the taxpayer sign the original document. Thus, there was no genuine question as to the authenticity of the original. In *United States v. Childs, 5 F.3d 1328 (9th Cir. 1993)* , the Court affirmed convictions for interstate transportation of stolen motor vehicles, holding there was no error in admitting copies of several types of documentation kept by auto dealers (e.g., certificates of title, purchase orders, and odometer statements) even though copies were also recorded and filed as public records. When the proponent is trying to establish the content of the original document, it is not necessary to follow *Rule 1005*; rather, it is more appropriate to admit a copy of the document under *Rule 1003*, the general provision addressing the admission of duplicates. In this case, there was no genuine question as to the authenticity of the original, nor was it unfair to admit the duplicate in lieu of the original. In *United States v. Skillman*, n2 the Court affirmed a conviction for burning a cross outside the house of an African-American family, holding there was no abuse of discretion in admitting a photocopy of a target as probative of the defendant's racial animus. There was no genuine issue of authenticity raised; because extraneous handwriting was entirely incomprehensible, there was no persuasive argument of unfairness; and there was no evidence that the original had been lost in bad faith.

[3] Presumption of Genuineness

[a] Documents

United States v. Mulinelli-Navas, 111 F.3d 983 (1st Cir. 1997) : The Court held in a bank fraud prosecution that there was no abuse of discretion in admitting a microform copy of a check, since the defendant, despite objecting to the document's "authenticity," made no proffer suggesting that the original had been tampered with or altered or that the copy was not what it purported to be, and the prosecution had sufficiently authenticated the evidence.

United States v. Angle, 230 F.3d 113 (4th Cir. 2000) , *aff"d in pertinent part, vacated and remanded on other grounds, 254 F.3d 514* (en banc): In preparing marked money for use in a sting operation during the investigation of a drug conspiracy, a detective made a photocopy of the marked money before she turned the money over to an undercover officer; she wrote the date on the photocopy. A fax and an extra photocopy of the dated photocopy provided by the detective were used to compare the serial numbers of the money recovered in the sting operation, and a photocopy was made of the seized money. The seized money was not offered at trial because it had been returned in the normal course for use in other operations. The Court held there was no abuse of discretion in admitting the photocopies, since no question was raised concerning their authenticity or accuracy. In *United States v. Moore*, n3 a prosecution for armed robbery of a savings and loan, the Court held that the Trial Judge properly admitted photocopies of both sides of a piece of paper found in the wallet of one of the alleged participants in the robbery. The original had been returned to the participant; he testified and identified the photocopies. See also *FDIC v. Rodenberg* n4(copies of the defendant's guarantee and promissory note were properly considered as evidence on a motion for summary judgment, even though portions had been deleted when they were duplicated, as no genuine issue appeared to be raised concerning the deleted portions).

In re Bobby Boggs, Inc., 819 F.2d 574 (5th Cir. 1987) : The Court observed in a bankruptcy dispute over entitlement to a subcontractor's funds that no genuine question was raised as to the accuracy of duplicate copies of bonds. In *United States v. Hausmann*, n5 a prosecution for making false statements to a federal agency, the Court held that duplicates of receipts submitted by the defendant to the Small Business Administration were properly admitted where no issue as to their authenticity was raised.

Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756 (7th Cir. 1992) : The Court affirmed a judgment for the

employer in an employment discrimination action, holding that the plaintiff had not made the requisite showing that there was a genuine issue of authenticity by merely objecting to admission of duplicates. In *United States v. Leight*, n6 the Court affirmed a mother's conviction for murdering her infant son, finding no error in admission of diagnostic copies of an X-ray. The government had destroyed the original film in an effort to erase some grease-pencil marks. Without deciding whether the copies were originals or duplicates, the Court held that the defendant did not raise a genuine question concerning the copies by speculating that there might be some difference between them and the original. In *CTS Corp. v. Pikher Int'l Corp.*, n7 a patent infringement case, the Court emphasized that carbon copies and other reproductions can be admitted under the "misnamed" Best Evidence Rule as long as there is no reason to suspect the authenticity of the copy.

United States v. Smith, 893 F.2d 1573 (9th Cir. 1990) : The Court held that a photocopy of a calendar/drug ledger was properly admitted in the trial of a drug conspiracy, where there was no genuine issue as to the authenticity of the original. In *United States v. Morgan*, n8 the Court held that unless something is offered for the record to suggest that a genuine question is raised as to the authenticity of an original or as to the fairness of admitting a duplicate, *Rule 1003* makes the duplicate, here a photocopy, presumptively admissible.

United States v. Garmany, 762 F.2d 929 (11th Cir. 1985) : Affirming drug convictions, the Court rejected an attack on a photocopy of a check. The defendant failed to explain his objection to the copy, and the Court observed that "[t]he burden of challenging admissibility ... rests with the party against whom it is offered."

[b] Presumption of Genuineness -- Tape Recordings

United States v. Balzano, 687 F.2d 6 (1st Cir. 1982) : Affirming convictions for sale of "slugs," the Court found there was no error in permitting the government to play for the jury a copy of a tape, where the original was erased in the process of making the copy, the Judge heard extensive evidence concerning the mechanics of making both the tape and the copy, and there was no challenge to the authenticity of the original.

United States v. Stephenson, 887 F.2d 57 (5th Cir. 1989) : Affirming drug convictions, the Court held that duplicate tape recordings were properly admitted after being authenticated by testimony that they were accurate representations of the recorded conversations.

United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002) : Affirming convictions related to a murder for hire, the Court held that four tapes of incriminating conversations between the defendant and a coconspirator involving a plot to murder the coconspirator's wife were properly admitted. It concluded that the "first generation copies" were admissible as duplicates under *Rule 1003*. The defendant had the opportunity to have the tapes tested and pointed to no reason to believe that they were not authentic. In *United States v. Carrasco*, n9 the Court held that the government adequately established that duplicate tapes were true and accurate with the testimony of a knowledgeable witness.

United States v. DiMatteo, 716 F.2d 1361 (11th Cir. 1983) , vacated on other grounds, 469 U.S. 1101 (1985) : In a prosecution for conspiracy to import marijuana, the Court held that the government was properly permitted to introduce copies of recorded telephone calls. Since the witness who tape-recorded the calls testified that the duplicates were exact recordings of what was on the original tapes, the government established that they were duplicates that were admissible unless a defendant raised a genuine question about their authenticity, and none was raised in this case.

[4] Questions of Fairness

United States v. Sinclair, 74 F.3d 753 (7th Cir. 1996) : The Court held, in the prosecution of a financial institution officer for taking kickbacks, that there was no abuse of discretion in admitting copies of expense account reports that did not reproduce the reverse side of the originals. Only three of the eight originals had any entries on the reverse side, and the entries lacked detail and were insignificant compared to the expenses claimed in the reports as a whole, so reproductions of the reverse would not have been useful to the defense.

[5] Questions of Genuineness

Ruberto v. Commissioner, 774 F.2d 61 (2d Cir. 1985) : Although the Court reversed a Tax Court judgment that taxpayers were liable for deficiencies, it upheld the Trial Judge's ruling that photocopies of canceled checks that the taxpayers claimed had been written to a church were inadmissible in light of problems in matching copies of the back of the checks with copies of the fronts. The taxpayers should have been given an opportunity to obtain and submit the originals.

SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997) : Affirming summary judgment for the SEC in an action against alleged participants in a stock fraud scheme, the Court found no error in the refusal to admit photocopies of check stubs that purported to establish the distribution of the proceeds of the securities fraud. The stubs were "altered" before they were copied, there was no showing of what was changed as a result of the alteration, and the canceled checks could not be located. Under these circumstances, the copies were properly excluded as untrustworthy.

United States v. Bolton, 977 F.2d 1196 (7th Cir. 1992) : To prove that a health inspector charged with extortion and RICO offenses had visited certain establishments on given days, the government offered copies of inspection reports signed by the defendant. The Court held there was no abuse of discretion in admitting the copies, even though the middle third of each report was missing. The government satisfactorily explained that the forms were too long to fit in the agency's copier, so it was standard practice to fold the reports so that the middle, which contained checkoffs repeated in the inspector's written description at the bottom, was not reproduced; the defendant did not even suggest he filled out the middle and bottom sections of his reports differently.

United States v. Ziesman, 409 F.3d 941 (8th Cir. 2005) : Affirming convictions for manufacturing methamphetamine and making a false statement to a federal agent, the Court held that three crime lab exhibits were properly admitted. The exhibits were as they had been generated by the lab, except that the name of a second suspect was omitted. The lab analyst testified that the crime lab generated two names rather than just the defendant's by mistake. Although the defendant argued that the alterations disqualified the reports and that originals were required, the Court found that the testimony was sufficient to authenticate the reports and that the reports "had no independent evidentiary significance." On the best evidence point, we suggest that the Court reached the right result for the wrong reason. Clearly, the reports were offered to prove the results of the lab tests and thus to prove their contents. But there was no question as to the genuineness of the duplicate. The originals had the wrong name, as did the duplicate. Thus, the two were identical, and the mistake as to the second name was explained to the jury, so there was no possibility that use of the duplicate was prejudicial.

United States v. Haddock, 956 F.2d 1534 (10th Cir. 1992) : In a bank fraud prosecution, the Court held there was no error in excluding photocopies of six documents offered by the defendant, as only the defendant could recall ever seeing either the original or a copy of these documents, persons who allegedly typed or received the documents were not familiar with their contents, and witnesses testified the documents bore markings and included statements that did

not comport with similar documents prepared by the purported sources in the ordinary course of business. In *Amoco Prod. Co. v. United States*, n10 the Court approved exclusion of a duplicate file copy of a deed under *Rule 1003*, because the most critical part of the original conformed copy was not completely reproduced in the duplicate.

FOOTNOTES:

(n1)Footnote 1. *United States v. Chang An-Lo, 851 F.2d 547 (2d Cir. 1988)* .

(n2)Footnote 2. *United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990)* .

(n3)Footnote 3. *United States v. Moore, 710 F.2d 157 (4th Cir. 1983)* .

(n4)Footnote 4. *FDIC v. Rodenberg, 571 F. Supp. 455 (D. Md. 1983)* .

(n5)Footnote 5. *United States v. Hausmann, 711 F.2d 615 (5th Cir. 1983)* .

(n6)Footnote 6. *United States v. Leight, 818 F.2d 1297 (7th Cir. 1987)* .

(n7)Footnote 7. *CTS Corp. v. Pikher Int'l Corp., 527 F.2d 95 (7th Cir. 1975)* .

(n8)Footnote 8. *United States v. Morgan, 555 F.2d 238 (9th Cir. 1977)* .

(n9)Footnote 9. *United States v. Carrasco, 887 F.2d 794 (7th Cir. 1989)* .

(n10)Footnote 10. *Amoco Prod. Co. v. United States, 619 F.2d 1383 (10th Cir. 1980)* .

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PART TWO: THE RULES THEMSELVES
Article X. Contents Of Writings, Recordings, And Photographs
CHAPTER 1003 RULE 1003

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1003.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in *Rule 1001(4)*, *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, *Myrick v. United States, 332 F.2d 279 (5th Cir. 1964)* , no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns v. United States, 323 F.2d 421 (5th Cir. 1963)* , not error to admit concededly accurate tape recording made from original wire recording; *Sauget v. Johnston, 315 F.2d 816 (9th Cir. 1963)* , not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. *United States v. Alexander, 326 F.2d 736 (4th Cir. 1964)* . And see *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959)* .

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

With respect to clause (1), the Subcommittee intends that the courts should be liberal in deciding "a genuine question is raised as to the authenticity of the original."

[3] Report of the House Committee on the Judiciary

The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

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5-1003 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1003, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1003. Admissibility of Duplicates	**Rule 1003. Admissibility of Duplicates**
A duplicate is admissible to the same ex-	A duplicate is admissible to the same ex-

tent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original

tent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

al.

Committee Note

The language of Rule 1003 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 1003.03 Annotated Cases

[Go To Main]

[2] Foundation for Duplicate [Go To Main]

United States v. Rosado-Perez, 605 F.3d 48 (1st Cir. 2010) : The Court affirmed convictions for conspiring to distribute drugs, and held that the government did not violate the best evidence rule by playing for the jury digital copies of video recordings made on tape, where a government witness testified that he had seen the original recordings and the digital copies were identical.

[3] Presumption of Genuineness [Go To Main]

[a] Documents

United States v. Hampton, 464 F.3d 687 (7th Cir. 2006) : In a bank robbery trial, the prosecution proved the banks' federally insured status by introducing photocopies purporting to be insurance certificates, with an employee of each bank, typically a teller, testifying that an identical photocopy hanging on the wall of the witness' bank was a true copy of the bank's certificate. The Court held that the photocopies were not properly admitted under *Rule 902(1)*, because the copies were copies of sealed documents rather than sealed documents themselves. They were also not admissible under *Rule 1005*, because there was no indication that the certificates on the walls of the banks to which the copies were compared were themselves originals. Nonetheless, the Court held the copies admissible, and affirmed the convictions, on the grounds that the copies were duplicates admissible under *Rule 1003* unless there was a genuine question raised about the authenticity of the original and that the testimony of the tellers satisfied the authentication requirement of *Rule 901(a)*: the testimony was "pretty compelling evidence that the copies were not forgeries prepared by or for, or somehow obtained by, the government," so that "[a]s between the parties' rival hypotheses ... the defendant's hypothesis is so improbable that without some evidence to support the hypothesis no reasonable person would accept it."

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[c] Rule 1004(2) -- Unsuccessful Subpoena

1004.04 Legislative History

[1] Advisory Committee's Note

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

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1004.01 Official Text

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) *Originals lost or destroyed*. -- All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable*. -- No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent*. -- At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral matters*. -- The writing, recording, or photograph is not closely related to a controlling issue.

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1004.02 Editorial Explanatory Comment

[1] Original Lost or Destroyed

Rule 1004 recognizes that the Best Evidence Rule is a rule of preference, not necessarily a rule of exclusion. *Rule 1004(1)* states that one excuse for the failure to produce the original of a writing or recording is its destruction or loss through no wrongdoing on the part of the proponent of the evidence. Under these circumstances, secondary evidence can be used to prove the contents of the document.

A party who loses or destroys a document or writing is not necessarily prohibited from proving the contents of the destroyed document through secondary evidence. n1 *Rule 1004(1)* provides that secondary evidence is admissible so long as the proponent shows that the loss or destruction was not in bad faith. n2 Good faith (or absence of bad faith) destruction has been broadly construed to include the destruction or reformulation of records in the ordinary course of proper recordkeeping, for example, pursuant to an established document retention policy. n3

Note that the Rule disqualifies secondary evidence only upon a finding of bad faith loss or destruction *by the proponent*. Secondary evidence is thus permitted if the original was lost or destroyed (even if in bad faith) by a person or entity unaffiliated with the proponent. n4

When an original is lost or destroyed, it still must be authenticated under Article IX. Thus, the Trial Judge must ensure that a reasonable jury could find the existence and execution of the original in the same way it would make such a finding if the original were available. See also Rule 1008. And, of course, while secondary evidence may be permitted in lieu of an original insofar as the Best Evidence Rule is concerned, other rules of evidence (e.g., *Rule 403* and the hearsay rule) are still applicable, and may operate to exclude the evidence.

The Rule does not mention where the burden of proof lies on a claim of loss or destruction, but Courts have placed the burden on the proponent and have required a diligent search for the original unless it has clearly been destroyed. n5

There is some dispute among the commentators as to the exact order of proof that should be followed when the original is not available. Some would prefer that proof of the document's existence and execution should precede proof of its loss, while others would prefer that proof of loss should come first. A Federal Trial Judge has wide discretion under

Rule 611 to select the appropriate order of proof for any given case.

[2] Original Not Obtainable

If the writing or recording is in the possession of someone who is not a party to the case, and if no original can be obtained by any available judicial process or procedure such as a subpoena duces tecum, secondary evidence can be introduced under paragraph (2) of *Rule 1004*. Absent some specific statute to the contrary, it appears that a claim of great expense or difficulty is not enough to establish that the original is not obtainable.

Courts have tended to enforce strictly the due diligence requirement inherent in the Rule when it appears that the secondary evidence is suspect. For example, in *Cartier v. Jackson, 59 F.3d 1046 (10th Cir. 1995)* , Cartier sued the performer Michael Jackson for copyright infringement. She claimed that she had circulated a demo tape of a song, "Dangerous," throughout the music community, and that Michael Jackson had written a virtually identical song of the same name after hearing the tape. However, she could not produce either the demo tape or a copy at trial. She claimed that all her friends had lost their copies, and that the music industry executives to whom she had sent copies of the tape would not speak to her. As secondary evidence, she tried to introduce a recording of her version of "Dangerous" made two years *after* Jackson had released his song. She termed this recording a "recreation" of the original demo tape, based on her memory of the version she originally distributed.

The Court upheld the Trial Court's ruling that the conditions of *Rule 1004* had not been satisfied. Cartier had not made a diligent effort to find the original. She made no attempt to subpoena the record company executives to whom she had sent the demo tape. Her bare contention that the executives would not speak to her was insufficient, as was her contention that record companies regularly destroy the tapes that are sent to them.

If there is any case in which the Best Evidence Rule retains vitality, it is a case like *Cartier*. The secondary evidence was obviously a suspect recreation of the original demo tape, in light of the fact that Jackson's song had already been released; it is too likely under the circumstances that Cartier's new recording would copy Jackson's song, rather than the other way around. Cartier did not try very hard to find the original. A reasonable inference from this lack of effort is that the original was not similar to Jackson's song, and therefore producing the original for trial would have resulted in the dismissal of her copyright infringement claim. It is this kind of suspicious litigation conduct that the Best Evidence Rule can and should still regulate.

[3] Original in Possession of Adversary

If a writing or recording is in the control of an adverse party, secondary evidence of its contents becomes admissible if that party does not produce the original after reasonable notice to do so. The purpose of notice is to advise the adverse party that the document or recording or writing will be necessary for trial. Notice can come in the pleadings or otherwise. While notice may be either express or implied, counsel should be careful to provide the best possible notice in order to preserve the right to introduce secondary evidence.

[4] Collateral Matters

Paragraph (4) of *Rule 1004* provides that secondary evidence can be introduced if a writing, recording, or photograph is not closely related to a controlling issue. Often this is referred to as collateral evidence. Obviously, some leeway is left to the Judge to determine when evidence is so closely related to a controlling issue as to require production of the original.

[5] Degrees of Secondary Evidence

One of the most significant things about this Rule is that it recognizes no degrees of secondary evidence. n6 At one time in most American jurisdictions, if non-production of an original was excused, a certified copy or a satisfactory

explanation of non-production of the copy was required before other secondary evidence would be received. According to the Advisory Committee, strict logic might call for extending the principle of preference beyond the original, but development of a proper hierarchy of preferences is too complex. Thus, if secondary evidence is admissible in lieu of the original, the proponent can offer any kind of proof on the point.

Although there are no degrees of secondary evidence when production of the original is excused under *Rule 1004*, a hierarchy of secondary evidence is established by *Rule 1005*, which excuses production of the originals of public records. See the Editorial Explanatory Comment to *Rule 1005*, *§ 1005.02[1]*.

[6] Relationship to Rule 1003

Rules 1003 and 1004 provide separate means of overcoming a Best Evidence objection made under *Rule 1002*. The difference between the Rules is that with *Rule 1003*, the proponent does not have to show that the original is unavailable; a duplicate is admissible unless there is some reason to suspect the authenticity of the original. In contrast, *Rule 1004* requires that the proponent must show that the original is unavailable through no bad faith or lack of diligence of the proponent; but if that showing is made, the substitute evidence need not be a duplicate. Thus, if a document has been destroyed in good faith, a witness could testify to prove the contents of the document under *Rule 1004*. n7

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Balzano, 687 F.2d 6 (1st Cir. 1982)* (secondary evidence was held admissible where a tape recording was knowingly erased by the government in order to transfer the tape to a cassette capable of audio replay; there was no bad faith destruction).

(n2)Footnote 2. See, e.g., *Malkin v. United States, 243 F.3d 120 (2d Cir. 2001)* (no abuse of discretion in admitting IRS computer reports, where there was no evidence that the unavailability of the original documents was anything other than inadvertent and the secondary evidence was shown to be reliable); *Estate of Gryder v. Commissioner, 705 F.2d 336 (8th Cir. 1983)* (business records were destroyed negligently, but not in bad faith, therefore secondary evidence was permissible under *Rule 1004*).

(n3)Footnote 3. See, e.g., *United States v. Dudley, 941 F.2d 260 (4th Cir. 1991)* (the government offered a "GX4" form prepared by a Federal Reserve official that traced the serial numbers of currency found on the defendant, which indicated a circulation date of the currency after the date on which her boyfriend, whom the defendant sought to blame for obtaining the currency, had died; the circulation records on which the GX4 form was based had been destroyed pursuant to the routine policy of the Federal Reserve to destroy old records of currency issuance; the Court found that the routine practice belied any bad faith destruction, and therefore that the form was admissible under *Rule 1004*).

(n4)Footnote 4. See, e.g., *United States v. Carroll, 860 F.2d 500 (1st Cir. 1988)* (*Rule 1004* allows the government to prove the contents of a writing through secondary evidence because the original was destroyed by an individual who acted against the wishes of the government).

(n5)Footnote 5. See, e.g., *United States v. McGaughey, 977 F.2d 1067 (7th Cir. 1992)* (affidavits describing IRS procedures requiring destruction of forms after a specified period of time and indicating a futile search for the original sufficiently proved that the taxpayer's original waiver of limitations form had been destroyed in good faith); *Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986)* (copyright infringement action by an artist who claimed that the defendant copied his drawings in making a film; the plaintiff had no originals of his drawings, and the Trial Judge found that the plaintiff failed to establish that it was more probable than not that originals of materials assertedly copied by the defendants were destroyed or lost without bad faith; the Judge therefore properly excluded drawings by the plaintiff that purported to reproduce the originals).

(n6)Footnote 6. See, e.g., *United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1996)* (oral testimony

describing the contents of a destroyed note was permissible; *Rule 1004* does not recognize degrees of secondary evidence).

(n7)Footnote 7. See, e.g., *Neville v. Cook Paint, 671 F.2d 1107 (8th Cir. 1982)* (a buyer was permitted to testify to the contents of a manufacturers' brochure that was destroyed in a fire).

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1004.03 Annotated Cases

[1] Secondary Evidence

United States v. McGaughey, 977 F.2d 1067 (7th Cir. 1992) : In a suit on a tax-related debt, the Court held that a detailed description of the procedures involved in processing, which indicated that the taxpayer's settlement offer could not have reached the processing steps it did without a validly executed waiver of limitations, was sufficient secondary evidence of the waiver; it was not necessary that anyone specifically recalled the presence of the waiver on the taxpayer's offer. In *United States v. Bolton, 977 F.2d 1196 (7th Cir. 1992)* , the government offered copies of inspection reports signed by the defendant to prove that a health inspector charged with extortion and RICO offenses had visited certain establishments on given days. The Court held there was no abuse of discretion in admitting the copies, even though the middle third of each report was missing. The government satisfactorily explained that the forms were too long to fit in the agency's copier, so it was standard practice to fold the reports so that the middle, which contained checkoffs repeated in the inspector's written description at the bottom, was not reproduced; the defendant did not even suggest he filled out the middle and bottom sections of his reports differently.

United States v. Gerhart, 538 F.2d 807 (8th Cir. 1976) : In a prosecution for knowingly making a material false statement on a loan application, the Court held that it was not necessary to show by clear and convincing evidence the trustworthiness of a photocopy of a check the defendant had altered in support of his loan application. It noted that once a proper excuse under *Rule 1004* is given, the proponent may provide evidence of the contents by any properly authenticated secondary evidence.

[2] Rule 1004(1) -- Originals Lost Or Destroyed

[a] Rule 1004(1) -- Failure To Show Good Faith

Wright v. Farmers Co-op, 681 F.2d 549 (8th Cir. 1982) : In an action by owners of a motor home against a co-op for overfilling the motor home's propane tank, the Court observed that it was a close question whether a transcription of a statement by the co-op's employee was properly admitted, where the statement was originally recorded on tape and the

only foundation for the written version was testimony by the person who took the statement that often the tapes were discarded after they were transcribed. The Court suggested that "more specific testimony should be adduced concerning the ground upon which a finding that an 'original' was lost or destroyed is to be based," although it declined to find error in the ruling admitting the statement.

Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986) : The Court affirmed summary judgment for the defendant in a copyright infringement action by an artist who claimed that the defendant copied his drawings in making a film. The plaintiff had no originals of his drawings, and the Trial Judge found that the plaintiff failed to establish that it was more probable than not that originals of materials assertedly copied by defendants were destroyed or lost without bad faith. Thus, the Judge properly excluded drawings by the plaintiff that purported to reproduce the originals.

[b] Rule 1004(1) -- Loss by Destruction

Malkin v. United States, 243 F.3d 120 (2d Cir. 2001) : A taxpayer sued for a refund on the ground that the statute of limitations had run prior to the assessment of a deficiency. The IRS claimed that he had timely consented to extension of the limitations period, but the taxpayer's entire file, which contained the original extension form, had been lost or destroyed before the time of trial. Affirming a judgment for the government, the Court held there was no abuse of discretion in admitting IRS computer reports that indicated when items in the file had been entered, since there was no evidence that the unavailability of the original documents was anything other than inadvertent and the secondary evidence was shown to be reliable.

United States v. Dudley, 941 F.2d 260 (4th Cir. 1991) : In a perjury prosecution, the government offered a report, prepared by a Federal Reserve Bank staff assistant based on an exhaustive review of currency records maintained by the Bank, which concluded that certain bills were not in circulation at the relevant time. Although the report was prepared at the direction of a law enforcement officer, the Court held that when a government agency performs mechanical record-keeping and provides a law enforcement officer with a computerized printout of that information, the printout is admissible. The report was based on records destroyed pursuant to a routine policy of destroying outdated records, and there was no ground raised for contesting the accuracy or trustworthiness of the information, so the fact that the report was a summary and derivative in nature did not impose any impediment to its admissibility.

Beggerly v. United States, 114 F.3d 484 (5th Cir. 1997) : Reversing the dismissal of an action to set aside a consent judgment entered in a quiet title suit by the government, the Court found it proper to admit an English translation of a 1781 Spanish land grant in which the Governor-General of Spanish Louisiana conveyed Horn Island to Catarina Boudreau. It was the only copy available after a fire destroyed the archives in which the original would have been stored.

United States v. McGaughey, 977 F.2d 1067 (7th Cir. 1992) : In a suit on a tax-related debt, the Court held that affidavits describing IRS procedures requiring destruction of forms after a specified period of time and indicating a futile search for the original sufficiently proved that the taxpayer's original waiver of limitations form had been destroyed.

Neville Constr. Co. v. Cook Paint & Varnish Co., 671 F.2d 1107 (8th Cir. 1982) : In an action brought by a buyer of insulation against the manufacturer to recover property loss suffered in a fire, the Court found that the buyer was properly permitted to testify concerning the manufacturer's brochure, which was destroyed in the fire.

United States v. Ross, 33 F.3d 1507 (11th Cir. 1994) : The Court affirmed drug importation conspiracy convictions, holding it was not an abuse of discretion to admit transcripts of recordings made in Spain of telephone conversations. The recordings, which the prosecution never possessed, had been destroyed in a routine procedure by the Spanish police, and the transcripts were admissible secondary evidence of the contents.

[c] Rule 1004(1) -- Loss by Negligence

Estate of Gryder v. Commissioner, 705 F.2d 336 (8th Cir. 1983) : The Court held that the Tax Court properly permitted the Commissioner to rely on a transcript of a prior criminal trial to prove the contents of business records that had negligently, but not in bad faith, been destroyed by the IRS following the criminal trial.

Medical Lab. Mgmt. Consultants v. American Broadcasting Cos., 306 F.3d 806 (9th Cir. 2002) : In an action for torts in connection with a broadcast about errors in the reading of Pap smear slides, the plaintiff sought an adverse inference against the defendants because some of the allegedly misread slides were lost while in the defendants' control. The Trial Judge found that the loss was at most a result of negligence and that the plaintiff had the means to challenge the validity of the defendants' conclusion that the slides were abnormal. Affirming a judgment for the defendants, the Court noted that "[w]hen a proponent cannot produce original evidence of a fact because of the inadvertent loss of the evidence, proof by secondary evidence is permissible."

[d] Rule 1004(1) -- Loss by Theft

United States v. Bueno-Risquet, 799 F.2d 804 (2d Cir. 1986) : The Court affirmed narcotics convictions, holding that various forms were properly admitted to prove the contents of bags that had been stolen during the trial. It cited *Rule 1004(1)* as authority for use of the forms to prove the markings on the bags, and noted that the bags were not lost in bad faith.

United States v. Shoels, 685 F.2d 379 (10th Cir. 1982) : In a prosecution for stealing money from a savings and loan association, the Court held there was no error in permitting the government to offer photographs of checks that were stolen from an FBI agent's car. The Court cited *Rule 1004*, although it might have relied also on *Rule 1003* unless there was some real claim made that the photographs were not accurate representations of the checks.

[3] Rule 1004(2) -- Original Not Obtainable

[a] Rule 1004(2) -- Diligent Efforts To Obtain Original

Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83 (2d Cir. 2002) : In an insurance coverage action, the Court concluded that the "diligence" requirement of *Rule 1004* was a question for the Judge, to be resolved under *Rule 104(a)*, and not a matter to be determined by the fact finder.

Cartier v. Jackson, 59 F.3d 1046 (10th Cir. 1995) : The plaintiff, suing for infringement of a copyrighted song, alleged that the defendant had had access to a "demo tape" version of her song, but because she no longer had any of the demo tapes, she sought to introduce secondary evidence to prove the contents of the missing cassettes. The Court held there was no abuse of discretion in excluding the secondary evidence, since even though the plaintiff carefully searched among her possessions and called friends and former colleagues, she had not subpoenaed record companies to which she had sent demo tapes.

[b] Rule 1004(2) -- Failure To Find

United States v. Marcantoni, 590 F.2d 1324 (5th Cir. 1979) : The Court held that a police officer who had seen several $10 bills in the defendant's home, but who could not find them when he returned with a search warrant, could testify as to the serial numbers of the bills, because it was obvious they were not available to the government.

[c] Rule 1004(2) -- Unsuccessful Subpoena

United States v. Taylor, 648 F.2d 565 (9th Cir. 1981) : A key jurisdictional issue in the defendant's wire fraud trial was whether he had signed a letter before or after he telecopied it from San Diego to Houston, where a photocopy of the telecopy was made and delivered to a bank that relied on it in making a loan. Neither the original nor the telecopy was produced at trial, only the photocopy or a more remote reproduction. The Court upheld the admission of the photocopy on the basis of the prosecutor's representation that the original had been subpoenaed unsuccessfully.

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1004.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Paragraph (1). Loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by

production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922)*, and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903)*. Numerous cases are collected in McCormick § 200, p. 412, n.1.

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendments are technical. No substantive change is intended."]

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

With respect to subdivision (1), the Subcommittee assumes that loss or destruction of an original by another at the instigation of the proponent would be tantamount to loss or destruction by the proponent himself.

[3] Report of the House Committee on the Judiciary

The Committee approved *Rule 1004(1)* in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

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5-1004 Federal Rules of Evidence Manual Scope

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The chart below shows the proposed style amendments for Rule 1004, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1004. Admissibility of Other Evidence of Contents	**Rule 1004. Admissibility of Other Evidence of Contents**
The original is not re-	An original is not re-

quired, and other evidence of the contents of a writing, recording, or photograph is admissible if --

quired and other evidence of the content of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the pro-

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

			ponent lost or destroyed them in bad faith; or
(2)	**Original not obtainable.** No original can be obtained by any available judicial process or procedure; or	**(b)**	an original cannot be obtained by any available judicial process;
(3)	**Original in possession of opponent**	**(c)**	the party against whom the ori-

ent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the trial or hearing; and fails to produce the original, the proponent may prove its contents by a copy or by testimony or deposition that correctly reflects the contents.

(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure.

(3) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the trial or hearing, and that party does not produce the original at the hearing.

(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(c) **Admissibility of Duplicates.** A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

(d) **Admissibility of Other Evidence of Content.** An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(1) **Originals Lost or Destroyed.** All the originals are lost or destroyed, and not by the proponent acting in bad faith;

(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure;

(3) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the trial or hearing, and that party does not produce the original at the hearing; or

(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(e) **Admissibility of Certified Copies.** A certified copy is admissible to the same extent as the original.

(f) **Summaries.** A party may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

(g) **Testimony or Statement of a Party.** In a criminal case, the proponent must prove the content of a statement made by the opposing party. Testimony or a written admission of the party is admissible without accounting for the original.

(h) **Functions of the Court and Jury.** Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of content under (d) or (e). But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(1) an asserted writing, recording, or photograph ever existed;

(2) another one produced at the trial or hearing is the original; or

(3) other evidence of content accurately reflects the content.

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Statement of a Party to Prove Content

In a criminal case, the proponent must prove the content of a statement made by the opposing party. Testimony or a written admission of the party is admissible without accounting for the original.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of content under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

	of proof at the hearing, and that party does not produce the original at the hearing; or		to produce it at the trial or hearing; or
(4)	**Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.	**(d)**	the writing, recording, or photograph is not closely related to a controlling issue.

Committee Note

The language of Rule 1004 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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1005.01 Official Text

1005.02 Editorial Explanatory Comment

[1] Purpose and Effect of the Rule

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1005.01 Official Text

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

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1005.02 Editorial Explanatory Comment

[1] Purpose and Effect of the Rule

The Rule provides different treatment for public records than for most documents. The reason for the difference lies in a concern that removing public documents from their usual place of keeping might be disruptive to both the public and the custodian. The Rule provides that evidence concerning a public record may be proved either by a self-authenticating copy or by testimony of a witness who has compared the copy to the original. If neither method is reasonably possible then other evidence of the contents is permissible. Thus, unlike *Rule 1004*, this Rule provides for a ranking of secondary evidence.

There is no requirement that the original of a public record be introduced, thereby taking public records out of the otherwise applicable Best Evidence Rule; however, there is a preference for the two specific kinds of proof mentioned above. Of course, the original itself must meet the admissibility requirements of the Rules other than *Rule 1002* (see, e.g., *Rule 803(8)*), or else the copy is excluded as well.

The rationale for the preference for two kinds of alternative evidence is that without it, all kinds of secondary evidence of public records would be offered, some of which would be of questionable accuracy. According to the Advisory Committee, establishment of a preferential ranking of secondary evidence is an appropriate *quid pro quo* for not requiring the original.

If a certified or compared copy of a record or document covered by *Rule 1005* "cannot be obtained by the exercise of reasonable diligence" (which should be an extremely rare occurrence), the Rule provides that "other evidence of the contents may be given." Reasonable diligence will vary much like the search requirement for a lost original under *Rule 1004*. "Other evidence" signifies that no hierarchy of preferences is created after certified or compared copies.

[2] Relationship to Rule 1003

Rule 1005 is not applicable unless the proponent is offering to prove the contents of the document as a public document. *United States v. Childs, 5 F.3d 1328 (9th Cir. 1993)* , illustrates this point. Childs was an auto dealer who was tried for possessing stolen vehicles. The government proffered photocopies of documentation kept by various auto

dealers in connection with the stolen cars, such as certificates of title, purchase orders and odometer statements. Childs objected that these were "uncertified copies of documents authorized to be recorded and supposedly recorded or filed" with the States of Arizona and Minnesota, and therefore that they did not comply with *Rule 1005*. But the Court held that *Rule 1003* controlled this situation:

> If the proponent is not attempting to establish the content of the public record as such, but rather is trying to prove the content of the original document regardless of whether or not it is a public record, the rationale behind *Rule 1005* does not apply. In that situation it is more appropriate to admit a copy of that document under *Rule 1003*, the general provision addressing the admission of duplicates, rather than under *Rule 1005*. This reasoning is particularly applicable if the copy was made from an outsider's files, and not from the public record.

The prosecutor in *Childs* had copied the documents from the files of the auto dealers and was not offering the documents to prove the content of the public record itself, but rather as a means of identifying the stolen cars. Therefore the Court held that the copies were admissible as duplicates under *Rule 1003*. n1

FOOTNOTES:

(n1)Footnote 1. See also *Amoco Prod. Co. v. United States, 619 F.2d 1383 (10th Cir. 1980)* (*Rule 1005* authorizes the admission of recorded deeds, but does not cover an original deed that is not filed and stored in a public office; the Rule does not exclude all evidence other than the public record of the contents of the deed when the very question in controversy is whether the original deed was correctly transcribed onto the recorded version).

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1005.03 Annotated Cases

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[1] Comparisons

United States v. Rodriguez, 524 F.2d 485 (5th Cir. 1975) : Affirming convictions for marijuana distribution offenses, the Court upheld admission of a photocopy of an automobile certificate of title that tended to tie the defendant to the auto in which the marijuana was found. Citing *Rule 1005* as persuasive authority although the Rules were not in effect at the time of trial, the Court indicated that an agent's certificate that he made the photocopy from the original was sufficient for admitting the evidence.

[2] Unrecorded Documents

United States v. Childs, 5 F.3d 1328 (9th Cir. 1993) : This case is discussed in the Editorial Explanatory Comment, *§ 1005.02[2]*.

Amoco Prod. Co. v. United States, 619 F.2d 1383 (10th Cir. 1980) : In a quiet-title action, the Court held that *Rule 1005* authorizes the admission of recorded deeds, but does not cover an original deed that is not filed and stored in a public office. The Court also said that it could not interpret the Rule to exclude all evidence other than the public record of the contents of the deed when the very question in controversy is whether the original deed was correctly transcribed onto the recorded version.

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1005.04 Legislative History

Advisory Committee's Note

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of *28 U.S.C. § 1733(b)* apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

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The chart below shows the proposed style amendments for Rule 1005, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1005. Public Records	**Rule 1005. Copies of Public Records to Prove Content**
The contents of an official	The proponent may use a

record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified copy to prove the content of an official record -- or of a document that was recorded or filed in a public office as authorized by law -- if these conditions are met: the record or document is

d as cor- rect in ac- cord ance with rule 902 or test- ified to be cor- rect by a wit- ness who has com pare d it with the ori- gin- al. If a copy whic h com plies with the fore- go- ing can- not be ob- taine d by the ex- er- cise oth- er- wise ad- miss ible; and the copy is cer- tifie d as cor- rect in ac- cord ance with Rule 902(4) or is test- ified to be cor- rect by a wit- ness who has com pare d it with the ori- gin- al. If no such copy can be ob- taine d by

of reasonable diligence, then other evidence of the contents may be given.

reasonable diligence, then the proponent may use other evidence to prove the content.

Committee Note

The language of Rule 1005 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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[.1] Certified or Compared Copy Unavailable [Go To Main]

United States v. Phillips, 543 F.3d 1197 (10th Cir. 2008) : The Court affirmed convictions for immigration fraud, finding no abuse of discretion in the admission of copies of public records without certification or testimony that they had been compared. The Court concluded that the government had sufficiently shown that it had exercised reasonable diligence in its attempts to obtain an original.

[1] Comparisons [Go To Main]

United States v. Hampton, 464 F.3d 687 (7th Cir. 2006) : In a bank robbery trial, the prosecution proved the banks' federally insured status by introducing photocopies purporting to be insurance certificates, with an employee of each bank, typically a teller, testifying that an identical photocopy hanging on the wall of the witness' bank was a true copy of the bank's certificate. The Court held that the photocopies were not properly admitted under *Rule 902(1)*, because the copies were copies of sealed documents rather than sealed documents themselves. They were also not admissible under *Rule 1005*, because there was no indication that the certificates on the walls of the banks to which the copies were compared were themselves originals. Nonetheless, the Court held the copies admissible, and affirmed the convictions, on the grounds that the copies were duplicates admissible under *Rule 1003* unless there was a genuine question raised about the authenticity of the original and that the testimony of the tellers satisfied the authentication requirement of *Rule 901(a)*: the testimony was "pretty compelling evidence that the copies were not forgeries prepared by or for, or somehow obtained by, the government," so that "[a]s between the parties' rival hypotheses ... the defendant's hypothesis is so improbable that without some evidence to support the hypothesis no reasonable person would accept it."

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1006.02 Editorial Explanatory Comment

[1] Summary Devices

[2] Foundation for Underlying Information

[3] Relationship to Rule 803(6)

[4] Voluminous and Inconvenient

[5] Summaries of Trial Evidence

1006.03 Annotated Cases

[1] Access to Underlying Data

[2] Computer Records

[3] Examples of Properly Admitted Summaries

[4] Expert Testimony

[5] Foundation Requirement

[6] Inadmissible Underlying Materials

[7] Jury Instructions

[8] Notice

[9] Providing Underlying Materials to Jury

[10] Reasonable Time

[11] Relationship to Rule 611(a)

[12] Summaries of Trial Evidence

[a] Civil Cases

[b] Summaries of Trial Evidence -- Criminal Cases

[i] Drug Cases

[ii] Summaries of Trial Evidence -- Criminal Cases -- Fraud Cases

[iii] Summaries of Trial Evidence -- Criminal Cases -- Miscellaneous Cases

[iv] Summaries of Trial Evidence -- Criminal Cases -- Tax Cases

[13] Summary Judgment

[14] Tape Recordings

[15] Testimony from Prior Proceeding

[16] Transcripts

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1006.01 Official Text

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

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1006.02 Editorial Explanatory Comment

[1] Summary Devices

Rule 1006 continues the tradition that voluminous writings, recordings, or photographs may be presented in the form of a chart, summary, or calculation when they cannot be examined conveniently in court. It is necessary, however, that the proponent of the summary make available for examination or copying, or both, the original evidence. n1 The purpose of the availability requirement "is to provide the opposing party who desires to attack the authenticity or accuracy of a chart, summary, or calculation, with an opportunity to prepare for cross-examination, or to offer exhibits of its own as rebuttal evidence, which would serve to counteract the impression made on the jury by the proponent's witness." n2 The Judge can order the original information produced in court, and probably will if there is a dispute as to the accuracy of the summary. If the underlying information is not available for inspection, the summary is inadmissible. n3

It should be noted that the provisions of *Rule 1006* (most importantly the requirement that the underlying information be made available) are inapplicable when the underlying information has been destroyed other than through the misconduct of the proponent, and the summary is admitted as secondary evidence under the terms of *Rule 1004*. n4 The summary might well be a helpful elucidation of voluminous evidence, but that is incidental to its admission under *Rule 1004*.

[2] Foundation for Underlying Information

Before offering a summary under *Rule 1006*, the proponent will have to lay a proper foundation for the admission of the originals. n5 Once the originals are authenticated, the summary must be authenticated.

If the data or material that is used as the basis for a summary or chart would not be accepted at trial (even to illustrate the basis for the testimony of an expert under *Rule 703*), the summary or chart itself is not admissible in evidence. n6 For example, in *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* , a government agent in a RICO prosecution summarized his analysis of the defendant's financial activity. The summary was based in part on interviews with people who engaged in suspect financial transactions with the defendant, and also upon information obtained from bank documents describing wire transfers. The Court held that the summary was inadmissible under *Rule 1006*, because the underlying materials upon which the summary was based were out-of-court statements that the witness used for their

truth in making the conclusions set forth in the summary. The Court stated that "the schedules are inadmissible not because [the witness] merely interviewed people during the course of his investigation, but because the schedules were predicated upon inadmissible evidence. *Rule 1006* does not permit such a result." n7 The *Pelullo* Court noted that "the schedules were not pedagogical devices used to summarize or organize testimony or documents that have been admitted into evidence," in which case *Rule 1006* would have been inapplicable and there would have been no need for the underlying information to satisfy independent admissibility requirements.

Ford Motor Co. v. Auto Supply Co., 661 F.2d 1171 (8th Cir. 1981) , is another example of the kind of analysis that a Court should employ under *Rule 1006*. In a trademark and copyright infringement action, the defendants claimed that the Trial Judge erred in admitting an exhibit containing sales and costs figures relating to the auto parts that were the subject of the suit. The plaintiffs offered the manager of their financial analysis department, who testified that the figures were taken from annual reports on pricing and purchasing. After noting that only summaries of admissible evidence may be used under *Rule 1006*, the Court of Appeals held that the Trial Judge ruled properly in admitting the summaries, because the year-end reports were admissible as business records. n8

It should be noted that *Rule 1006* requires only that the underlying evidence be admissible and made available to the adversary; the underlying evidence need not actually have been admitted at trial. n9 In fact, if the summary is nothing more than an overview of previously admitted evidence, it is not covered by *Rule 1006* at all. See the discussion of "Summaries of Trial Evidence" in *§ 1006.02[5]*.

[3] Relationship to Rule 803(6)

Under *Rule 1006*, summaries of business records are admissible, so long as the underlying business records are admissible under *Rule 803(6)*. The criteria of *Rule 1006* must also be satisfied: the records must have been made available to opposing counsel in advance of the offer of the summary, and the records must be "voluminous" and not conveniently examinable in Court. n10 It is not a problem if a summary of business records is prepared in anticipation of litigation, so long as the underlying records themselves were prepared in the regular course of business. n11

Rule 803(6) does not require that the *summary* of the data be kept in the regular course of business. Rather, it is the underlying data that must be so kept. If the underlying data are admissible under the business records exception, a summary of that data can be admitted under *Rule 1006* where the contents of the records cannot conveniently be examined in court.

It could well occur that a summary (e.g., a computerized summary or spreadsheet of transactions) is itself a business record. If so, *Rule 1006* is inapplicable; there is no need for foundation other than that required by *Rule 803(6)*. n12 For the summary itself to be admissible as a business record, it need not be prepared at or near the time of the events recorded, so long as the underlying information was recorded at or near the time of the events and the summary is prepared in the regular course of business activity as defined by *Rule 803(6)*. n13 Nor is it problematic that the underlying records are not available, so long as the summary itself fits the admissibility requirements of *Rule 803(6)*. This is because the *Rule 1006* requirements of availability and voluminousness need not be met if the summary is itself a business record.

[4] Voluminous and Inconvenient

A summary is not admissible under *Rule 1006* if the underlying information can be examined conveniently in Court. The Trial Judge has substantial discretion to decide whether the underlying evidence can be presented conveniently in lieu of a summary. The proponent of a summary should not have to show that presentation of the underlying evidence would be impossible or even extremely difficult before a summary can be presented. n14 The convenience standard is based on trial convenience. n15

[5] Summaries of Trial Evidence

Rule 1006 allows admission of summaries in lieu of having the voluminous originals presented at trial. This use of summaries must be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. n16 For example, a government agent in a tax evasion trial may use a chart to help the jury see how hundreds of business records already admitted as exhibits show that the defendant's tax returns understated his income. Although some Courts have considered such charts and summaries under *Rule 1006*, the Rule is really not applicable, because pedagogical summaries are not evidence. Rather, they are demonstrative aids governed by *Rules 403* and *611*. n17 A pedagogical or demonstrative summary may be considered by the factfinder so long as it is consistent with the evidence and not misleading. n18 Where a chart or summary is introduced solely as a pedagogical device, the jury should be instructed that it is not to be considered as evidence but only as an aid in evaluating the evidence. n19 In contrast, no limiting instruction is required or even appropriate if the summary is properly admitted as evidence under *Rule 1006*. n20

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1 (1st Cir. 1996)* (to satisfy the "made available" requirement of *Rule 1006*, a party seeking to use a summary "must identify its exhibit as such, provide a list or description of the documents supporting the exhibit, and state when and where they may be reviewed").

(n2)Footnote 2. *United States v. Bray, 139 F.3d 1104 (6th Cir. 1998)* . See also *United States v. Jamieson, 427 F.3d 394 (6th Cir. 2005)* (under *Rule 1006*, the proponent has a duty to "state when and where the documents underlying its summaries could be viewed," and "merely making the records available upon request is insufficient"; however, *Rule 1006* does not require that the government provide the defendant with a copy of the actual summary or send copies of the relevant documents to the defendant; notice was sufficient because the government served the defendant with its notice of the intent to use summary evidence, and the notice was "reasonably specific in identifying the underlying documents.").

(n3)Footnote 3. See, e.g., *Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614 (9th Cir. 1993)* (in a dispute on attorney's fees, summaries of hours worked were inadequate without providing the adversary an opportunity to see just what was charged and why); *Hackett v. Housing Auth., 750 F.2d 1308 (5th Cir. 1985)* (a summary should have been excluded where underlying information was not provided to the adversary).

(n4)Footnote 4. See, e.g., *United States v. Dudley, 941 F.2d 260 (4th Cir. 1991)* (a summary of records that were destroyed in good faith was held admissible under *Rule 1004*; *Rule 1006* was found inapplicable).

(n5)Footnote 5. See, e.g., *United States v. Samaniego, 187 F.3d 1222 (10th Cir. 1999)* (reversing drug convictions because the government had introduced summaries of telephone records without making any effort to establish a foundation for the admissibility of the underlying records); *SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997)* (summary of the information contained on check stubs was properly excluded where the proponent failed to establish that the check stubs were admissible).

(n6)Footnote 6. See, e.g., *Needham v. White Labs., 639 F.2d 394 (7th Cir. 1981)* (*Rule 1006* could not be used to introduce a summary of articles that an expert claimed had proven a causal relationship between estrogen and cancer; the articles were not independently admissible under any hearsay exception, and they were not admissible as the basis of the expert's opinion under *Rule 703* because the expert admitted that he had not read all of the articles).

(n7)Footnote 7. See also *PEAT, Inc., v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir. 2004)* (error to admit the summary as evidence, where it was not compiled in the ordinary course of business, nor was it based on otherwise admissible evidence; the summary was "based on inadmissible hearsay and contained conclusory allegations concerning Vanguard's alleged misappropriation and intent."); *Fagiola v. National Gypsum Co., 906 F.2d 53 (2d Cir. 1990)* (error

to base a summary on records that had not been established as records of regularly conducted activity); *Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993)* (summary of pending claims, lawsuits, and complaints against Ford is "nothing more than a summary of allegations by others which constitute hearsay"); *United States v. Goss, 650 F.2d 1336 (5th Cir. 1981)* ("There is no provision for the admission of summaries of the testimony of out-of-court witnesses.").

(n8)Footnote 8. See also *Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985)* (in an action related to low-income housing in the path of a proposed freeway, the Court admitted a summary of a survey of residents after finding that the survey was admissible under the residual hearsay exception, and admitted a summary of files generated by state and federal officials after finding that the files fell within *Rule 803(8)*), *aff'd*, *858 F.2d 467 (9th Cir. 1988)* .

(n9)Footnote 9. See, e.g., *United States v. Bakker, 925 F.2d 728 (4th Cir. 1991)* (composite tapes prepared from over 200 hours of broadcasts were properly admitted even though the broadcasts themselves were not in evidence; the broadcasts were made available to the defendant and were admissible; objections to the misrepresentative nature of the summary went to weight and not admissibility); *United States v. Strissel, 920 F.2d 1162 (4th Cir. 1990)* (it is not necessary that all the information upon which a summary is based must be in evidence; *Rule 1006* requires only that the underlying evidence be admissible and available to the opponent for purposes of cross-examination).

(n10)Footnote 10. See, e.g., *Martin v. Funtime, Inc., 963 F.2d 110 (6th Cir. 1992)* (summaries of an employer's personnel records were properly admitted, as the original records were voluminous and admissible under *Rule 803(6)*).

(n11)Footnote 11. See, e.g., *United States v. Loney, 959 F.2d 1332 (5th Cir. 1992)* .

(n12)Footnote 12. See, e.g., *United States v. Catabran, 836 F.2d 453 (9th Cir. 1988)* (general ledgers summarizing regularly conducted activity are treated as business records, not summaries, so the admissibility requirements of *Rule 1006* are inapplicable).

(n13)Footnote 13. See the discussion of this point in the Editorial Explanatory Comment to *Rule 803(6)*, *§ 803.02[7]*.

(n14)Footnote 14. See, e.g., *United States v. Scales, 594 F.2d 558, 562 (6th Cir. 1979)* (it is not necessary that the documents be so voluminous as to be "literally impossible to examine.").

(n15)Footnote 15. See, e.g., *United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990)* (summaries of tape-recorded conversations were properly admitted; the Rule does not require that it be impossible to examine all the underlying records; all that is required is that an in-court examination would be inconvenient; that standard was met in this case).

(n16)Footnote 16. See, e.g., *United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998)* ("Since the government did not offer the charts into evidence and the trial court did not admit them, we need not decide whether ... they were not admissible under *Fed.R.Evid. 1006* ... . Where, as here, the party using the charts does not offer them into evidence, their use at trial is not governed by *Fed.R.Evid. 1006*."); *Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994)* (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; *Rule 1006* objection was misplaced because the trial transcripts were records of testimony at the trial itself); *Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985)* (distinguishing between summaries that are admitted under *Rule 1006* and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence"; concluding that summaries admitted under *Rule 1006* should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties); *White Indus. v. Cessna Aircraft Co., 611 F. Supp. 1049 (W.D. Mo. 1985)* ("[T]here is a distinction between a *Rule 1006* summary and a so-called 'pedagogical' summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.").

(n17)Footnote 17. See, e.g., *United States v. Baker, 10 F.3d 1374 (9th Cir. 1993)* (while summary testimony was not covered by *Rule 1006* because it simply summarized previously admitted oral testimony, it was admissible as a valid exercise of the Court's discretion under *Rule 611(a)*).

(n18)Footnote 18. See, e.g., *United States v. Wood, 943 F.2d 1048 (9th Cir. 1991)* (in a complex tax fraud case, the Trial Court allowed a government witness to testify to his opinion of Wood's tax liability, as summarized by two charts, but prohibited the defendant's witness from using his own charts; *Rule 1006* was not applicable, because the charts were pedagogical devices and not evidence; the Court found no error in allowing the use of the prosecution's chart but prohibiting the use of the defense's chart, because the prosecution's chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis). See also *United States v. Bakker, 925 F.2d 728 (4th Cir. 1991)* (the defendant's summaries were properly excluded because they did not fairly represent the evidence).

(n19)Footnote 19. See, e.g., *United States v. DeBoer, 966 F.2d 1066, 1069 (6th Cir. 1992)* ("Notwithstanding *Rule 1006*, this Circuit has traditionally endorsed summary evidence so long as an appropriate limiting instruction informs the jury that the chart is not itself evidence but is only an aid in evaluating the evidence.").

(n20)Footnote 20. See, e.g., *United States v. Bray, 139 F.3d 1104 (6th Cir. 1998)* ("Since *Rule 1006* authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a *limiting* instruction for a *Rule 1006* summary.").

Federal Rules of Evidence Manual

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PART TWO: THE RULES THEMSELVES
Article X. Contents Of Writings, Recordings, And Photographs
CHAPTER 1006 RULE 1006

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1006.03 Annotated Cases

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[1] Access to Underlying Data

Air Safety, Inc. v. Roman Catholic Archbishop, 94 F.3d 1 (1st Cir. 1996) : In its Boston trial to recover payments for asbestos removal, the plaintiff sought to introduce exhibits summarizing records kept in Chicago relating to its overhead expenses. The Court held there was no error in excluding the exhibits, since the plaintiff had not made the documents underlying the summary exhibits available to the defendants. The exhibits had not been identified in the pretrial period as summaries, no description of the underlying documents had been provided, and no reasonably convenient opportunity for review of the documents had been specified. Without such explicit information, the underlying documents had not been "made available" to the defendants.

Hackett v. Housing Auth., 750 F.2d 1308 (5th Cir. 1985) : Although the Court affirmed a judgment for the housing authority in a civil rights suit by a landlord who claimed that the authority discriminated against him on racial grounds in setting the rents he could charge under a federal program, it found that the Trial Judge erred in admitting an exhibit that purported to summarize the rents authorized in other units in the same area. The underlying documents were not in existence at the time of the bench trial, so the impossibility of testing the summary against the originals meant that *Rule 1006* could not be used. Moreover, the summary appeared to rest on conversations with owners of other subsidized housing, which would have been inadmissible hearsay, so the summary would also have been inadmissible.

United States v. Modena, 302 F.3d 626 (6th Cir. 2002) : The Court affirmed a fraud conviction, holding it was error (but not plain error) to admit voluminous summaries when the government had not "state[d] when and where" the underlying records could be viewed, without regard to whether the defendant made a request for the records, and when the government's Statement of Discovery provided that the defendant could inspect the records only if he allowed the government to examine the materials that he planned to introduce at trial. Nothing in *Rule 1006* indicates that the right of inspection may be conditioned in such a manner.

Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) : The Court affirmed a judgment for the defendant in an employment discrimination action, finding that summaries of the employer's disciplinary records were properly admitted. The records were business records, and the underlying records (although not the summaries) were made available prior to trial.

Amarel v. Connell, 102 F.3d 1494 (9th Cir. 1996) , *amended* (9th Cir. 1997): Reversing in part an antitrust judgment, the Court found error under *Rule 1006* in the admission of two summary exhibits. One was a summary of California and Thai rice prices that had been adjusted by the defendants' expert, and the other was a graph prepared by the expert. The defendants had not made available to the plaintiffs all the materials that went into the summary exhibit, including certain raw data. The error was not prejudicial, however, because under *Rule 703* the experts could have discussed the information contained in the exhibits even though the exhibits themselves were not admissible. In a trademark infringement suit, *Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614 (9th Cir. 1993)* , the Court affirmed on the merits but remanded as to the determination of attorney's fees, holding that summaries of hours worked were inadequate without providing the adversary an opportunity to see just what was charged and why. In *Davis & Cox v. Summa Corp.*, n1 an action by an attorney to recover fees and expenses, the Court held there was no error in excluding a series of summaries where the party offering them did not make the summaries or the underlying documents available until just before trial and one of the summaries did not "fairly represent" the underlying documents. In *United States v. Miller*, n2 the Court relied upon its prior opinion in *Paddack v. Dave Christensen, Inc.* n3 to state that summaries may not be admitted unless the underlying documents are provided to the opposing party prior to their being offered. In *Frank Music Corp. v. Metro-Goldwyn-Mayer*, n4 the Court recognized that the Trial Judge may have to make a finding as to whether the underlying records were provided. See also *Rager v. Commissioner* n5(letters from the parent church acknowledging receipt of contributions were inadmissible to prove claims of charitable deductions to the local church, where the letters were written in 1983 and the contributions were allegedly made in 1980 and 1981; since the church records were unavailable, the letters could not be used as summaries).

[2] Computer Records

United States v. Loney, 959 F.2d 1332 (5th Cir. 1992) : In a prosecution of a scheme to defraud a frequent flyer program, the Court held that a report based on a search of the airline's frequent flyer records was properly admitted. Although the report was prepared in anticipation of the litigation, the underlying data it summarized was kept in the regular course of business. In *United States v. Sanders*, n6 the Court affirmed a pharmacist's convictions for Medicaid fraud, drug offenses, and tax violations. It found that computerized records from the Texas Department of Human Resources, representing reimbursement claims filed by the defendant and payments on those claims, were properly admitted as business records. The Court rejected the assertion that the computerized evidence was a summary under *Rule 1006*; the evidence was simply a retrieval of data stored in a computer, not a selective compilation of random pieces of data.

United States v. Catabran, 836 F.2d 453 (9th Cir. 1988) : The Court held that a printout of a business ledger kept via computer was admissible. The computerized summary was itself a business record of the company. Thus, admissibility depended on a foundation under *Rule 803(6)*, not on *Rule 1006*.

[3] Examples of Properly Admitted Summaries

R & R Assocs. v. Visual Scene, Inc., 726 F.2d 36 (1st Cir. 1984) : The Court sustained a judgment for the plaintiff in a breach of contract action, holding that a summary of allegedly defective merchandise supplied by the defendant was properly admitted. It noted that the defendant had ample opportunity to examine the underlying documents and that it failed to ask the Judge to order that the documents be produced for inspection.

United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153 (2d Cir. 1996) : In a construction contract dispute, the Court held there was no abuse of discretion in admitting the plaintiff's expert's testimony supported by summaries of some 5000 documents, where the Trial Judge had determined that the underlying documents were admissible and had been made available to the defendant.

United States v. Strissel, 920 F.2d 1162 (4th Cir. 1990) : The defendant, a public official convicted for taking kickbacks from contractors, argued that chart summaries were erroneously admitted because not all of the supporting documents were in evidence. The Court, considering the issue for the first time, held that the Rule requires only that the underlying evidence be admissible and available to the opponent so that a proper cross-examination may be had, not that it actually be introduced into evidence. In *Barnes Group, Inc. v. C & C Prods., Inc.*, n7 the Court rejected a claim that the admission of summaries of damages in an action for tortious interference with contract was an abuse of discretion.

Martin v. Funtime, Inc., 963 F.2d 110 (6th Cir. 1992) : In affirming injunctive relief against an employer for wage and hour violations, the Court held that summaries of the employer's personnel records introduced by the Department of Labor were properly admitted, as the original records were voluminous and admissible under *Rule 803(6)*. In *United States v. Campbell*, n8 a prosecution for Medicare fraud, the Court held that a summary chart based on the defendant's medical files was admissible, since without the chart the jury would have had to read hundreds of pages of technical information.

United States v. Turner, 400 F.3d 491 (7th Cir. 2005) : The Court affirmed a money laundering conviction, finding no abuse of discretion in the admission of summary charts analyzing the bank records of the defendant and his wife for the years 1995-2000. The underlying evidence was relevant to show unexplained cash deposits in excess of his reported income and was not overly prejudicial because it allowed an inference that the laundering represented the proceeds of some illicit activity, and the summaries were not claimed to be inaccurate. In an installation subcontractor's fraud action against the manufacturer of screws used to anchor windows, *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc., 896 F.2d 1035 (7th Cir. 1990)* , the Court held that the plaintiff properly proved the amount of damages by means of summaries derived from its regular business records. In *United States v. Meyers*, n9 the Court held that a chart summarizing long distance phone calls and surveillance logs of FBI teams was properly admitted.

EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) : In an employment discrimination action arising from the firing of a black personnel manager in a hotel, the Court held there was no error in admitting a chart that summarized almost 200 employment applications. The summarized information was straightforward and accurate, the underlying employment records were admissible business records, and the defendant had ample time to examine the summary and compare it with the records, which belonged to the defendant. In *United States v. Robinson*, n10 the Court affirmed mail fraud convictions arising out of a bogus loan scheme, holding there was no abuse of discretion in admitting a summary and chart listing 105 loan applications. A sufficient foundation was laid for the underlying documents, they were made available to the defendants, and they were sufficiently voluminous to warrant summarization.

City of Phoenix v. Com/Sys., 706 F.2d 1033 (9th Cir. 1983) : The Court held in a breach of contract case that a City officer was properly permitted to give testimony, based on a computer printout summarizing numerous individual documents, as to the total amount of money the City had expended in completing a communications system. Since each individual document was prepared by a City employee who did the work reported, each was a business record, and their numerosity justified admission of the summary. See also *Keith v. Volpe* n11(in an action related to low-income housing

in the path of a proposed freeway, the Court admitted a summary of a survey of residents in the path of the freeway after finding that the survey was admissible under the residual exception, and admitted a summary of files generated by state and federal officials after finding that the files fell within *Rule 803(8)*).

FTC v. Kuykendall, 312 F.3d 1329 (10th Cir. 2002) : The Court affirmed findings in a civil contempt proceeding that the defendants had violated an injunction regulating their telemarketing businesses, and found no abuse of discretion in the admission under *Rule 1006* of declarations by FTC employees summarizing the defendants' business records.

[4] Expert Testimony

United States v. Consolidated Edison Co., 580 F.2d 1122 (2d Cir. 1978) : In modifying a judgment awarding damages to the United States for the defendant's breach of contract, the Court indicated that under *Rule 1006* an expert might summarize the business records of several different businesses.

United States v. Hart, 295 F.3d 451 (5th Cir. 2002) : In a prosecution for making false statements in applications for farm loans by omitting debts from Farm and Home Plans (computer-generated projections of the borrower's plan of operation), an employee of the loan servicing agency was permitted to introduce, as summaries under *Rule 1006*, revised FHPs that she prepared, which the government said illustrated what the results would have been if all the debts testified to by the prosecution witnesses had been included on the actual FHPs. Reversing, the Court held that the government had failed to adduce any evidence in support of the assumptions and conclusions that the witness drew when preparing her versions of the "proper" FHPs. While the government had shown undisclosed debts, it had not shown that the full amount of those debts belonged on a properly prepared FHP, so the "summary" impermissibly assumed what the government "was required to prove beyond a reasonable doubt as operative facts of the alleged offense.' "

Needham v. White Labs, 639 F.2d 394 (7th Cir. 1981) : In product liability suit against a drug manufacturer, the Court held it was error to allow the plaintiff's expert witness to read into evidence a list of medical article titles published before the defendant manufactured its drug in order to show that the defendant should have known about the problem with the drug. Since the expert had not read all of the articles, the foundation for the summary was inadequate.

Goldberg v. United States, 789 F.2d 1341 (9th Cir. 1986) : The Court approved permitting an IRS agent to summarize voluminous tax records.

State Office Sys. v. Olivetti Corp., 762 F.2d 843 (10th Cir. 1985) : The Court affirmed a judgment for an agent-dealer against a manufacturer, finding that a "damage summary" was properly admitted under *Rule 1006*. The summary was based on actual business records which themselves were admissible. The Court noted, however, that projections of lost future profits were not summaries of otherwise admissible data, but it found that they were properly admitted as part of an expert opinion by a qualified witness.

[5] Foundation Requirement

United States v. North Am. Reporting, Inc., 740 F.2d 50 (D.C. Cir. 1984) : The Court remanded a criminal case for determination of whether certain prosecutor's notes were producible as Jencks Act material, but it affirmed the exclusion of a summary chart offered by the defendant as a calendar of *under*billings to counter the government's

evidence of *over*billings. The Court found that the prosecution's summary chart was properly authenticated and relied upon employee time sheets, while the defendant's chart was based upon a "hodge-podge collection of personal memory, unauthorized evidence, surmise and *post hoc* contract interpretation."

United States v. Sorrentino, 726 F.2d 876 (1st Cir. 1984), vacated in part on other grounds, 726 F.2d 888 (1st Cir. 1984): In a prosecution for attempted income tax evasion, the Court upheld the prosecution's use of a summary exhibit to prove the defendant's net worth, since the net worth schedule "was based exclusively on primary evidence which was available to test the accuracy of the summary; the agent who prepared the chart was available for cross-examination concerning disputed items; and the purpose and effect of the chart were made clear to the jury." It also upheld the exclusion of a summary exhibit prepared by the defendant's accountant that used figures for which "there was virtually no documentation." See also *United States v. Massachusetts Maritime Academy* n12(summaries of the academy's application files were admissible to prove sex discrimination where the academy had an opportunity to contest accuracy and failed to do so).

Fagiola v. National Gypsum Co., 906 F.2d 53 (2d Cir. 1990) : In an action for injuries from asbestos allegedly sold by defendants to the shipyard employing the plaintiff's decedent, the Court held that there was no abuse of discretion in admitting summaries of purchase and sales records. Even though the assumptions used in preparing the summaries may not have been completely correct, the total amount of all sales (whether the products contained asbestos or not) was so small that any error was harmless; the fact that some of the underlying documents were not directly authenticated was not significant because similar documents were authenticated; and no hearsay objection was made (perhaps for tactical reasons) to possibly objectionable underlying documents.

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) : This case is discussed in the Editorial Explanatory Comment, *§ 1006.02[2]*.

United States v. Janati, 374 F.3d 263 (4th Cir. 2004) : The Judge presiding over a prosecution for a complex healthcare fraud conspiracy limited the government's case-in-chief to presentation of the 61 overt acts alleged in the indictment and ruled that charts and summary testimony regarding 1300 transactions within the scope of the conspiracy could only be presented in rebuttal if necessary. On interlocutory appeal, the Court held that the limitation on the case-in-chief was an abuse of discretion. Although the Judge had not ruled on any specific summary chart, the Court noted that *Rule 1006* could be used to provide independent evidence of voluminous records if the chart is an accurate compilation of records otherwise admissible in evidence that have been made available to the opposing party. To the extent that the charts would summarize witness' conclusions or opinions, they would be pedagogical charts subject to regulation under *Rule 611(a)*. In reviewing a TV evangelist's fraud conviction in *United States v. Bakker, 925 F.2d 728 (4th Cir. 1991)* , the Court rejected the defendant's argument that eleven composite tapes edited from 200 hours of broadcasts were erroneously admitted because the original tapes had not been introduced into evidence. The language of the Rule simply requires that the underlying material be made available to the other party, as was done here. Objections to the representativeness of the composite tapes properly go to their weight, not their admissibility.

United States v. Jennings, 724 F.2d 436 (5th Cir. 1984) : Affirming a conviction for making false statements to a government agency, the Court upheld the government's use of summary charts to compare the number of meals the defendant claimed had been served at day-care centers with the number the government alleged had actually been served. The fact that the government made certain assumptions in preparing the charts did not disqualify them, and the Court reasoned that "when a chart does not contain complicated calculations requiring the need of an expert for accuracy, no special expertise is required in preparing the chart."

United States v. Seelig, 622 F.2d 207 (6th Cir. 1980) : Reversing convictions for improperly dispensing drugs, the Court found that a summary of 1409 of the defendants' sales was properly admitted, but it was error to admit a sales chart comparing the defendants' pharmacy's sale of certain items with those of eight other pharmacies. The Court found that the underlying records were not made available to the defendants and that there was no attempt to compare the stores in total sales, marketing area, hours of operation, etc. In *United States v. Denton*, n13 the Court upheld the admission of a composite tape recording rather than the original recordings, where the defense lawyers had reasonable access to the originals, the government laid a proper foundation as to the accuracy and authenticity of the composite tape, use of the one tape saved time at trial, and the defense was free at trial to cross-examine the agents who prepared the composite tape. To have a proper foundation for transcripts of tapes, testimony must be offered that the transcripts accurately summarize the tapes.

Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745 (7th Cir. 2005) : In a suit alleging fraud and unjust enrichment arising out of the disappearance of funds from insured escrow accounts, the Judge refused to admit summaries that the plaintiff had furnished to the defendant 30 days before the start of trial. The Judge excluded the summaries on two grounds: (1) a Court should be wary of permitting a party to use a summary that might misstate evidence, and (2) 30 days' notice was too little. Finding an abuse of discretion, the Court concluded that "[t]he first ground was unreasoned, and the second incorrect." *Rule 1006* does not express any "wariness" concerning summaries and "the fact that they *might* be inaccurate is not a ground for excluding them without any determination of whether they are inaccurate." As for timeliness of the notice, the Court found that the defendant's counsel was "a huge law firm that could easily have spot checked the summaries for accuracy immediately upon receiving them 30 days before the trial began, and if the check had revealed inaccuracies [the defendant] would then have had solid grounds for moving to exclude them from the trial unless the inaccuracies were promptly corrected." By failing to employ this simple expedient the defendant forfeited any claim of untimeliness. In *Zayre Corp. v. S.M. & R. Co.*, n14 the Court sustained a summary judgment for a corporate store owner who sued a company for reimbursement of vacation pay that accrued during a time that the company operated jewelry departments. Even if it would have been unduly burdensome for the defendant company to visit hundreds of stores to examine the records underlying summaries offered by the store owner, the company failed to submit an affidavit requesting a continuance or seeking other relief below. The Court expressed concern, however, that the store owner's affidavit in support of the summaries did not fully address authentication and foundation concerns.

United States v. Samaniego, 187 F.3d 1222 (10th Cir. 1999) : The Court reversed drug convictions because the government had introduced summaries of telephone records with no effort whatsoever to establish the foundational requirements of *Rule 803(6)* for admissibility of the underlying records. The burden of establishing the underlying foundation falls on the proponent of the summary, and even when faced with a hearsay objection the prosecution did not call a single witness or ask a single question related to business records. In *United States v. Behrens*, n15 the Court affirmed convictions for conspiracy to unlawfully distribute narcotics, and upheld the use of a summary of prescriptions written by a doctor and filled by a pharmacist. The foundation was laid by a DEA agent who testified that he served the pharmacist with an administrative search warrant, the pharmacist identified his files, the agent removed all prescriptions for a certain drug, all the prescriptions were written by the doctor, and a witness admitted that he received all of the prescriptions that were made out to him.

[6] Inadmissible Underlying Materials

United States v. Davis, 261 F.3d 1 (1st Cir. 2001) : Affirming most of the judgment in a suit by a hazardous waste generator for contribution under CERCLA from potentially responsible parties, the Court found no error in the exclusion of a chart prepared by the generator that summarized information about the claims and theories of the various parties. The chart was simply a summary of hearsay, and the hearsay statements were not admissible under any hearsay exception.

SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997) : The Court affirmed summary judgment for the SEC in an action arising from a stock fraud scheme, holding that the Trial Judge properly refused to admit photocopies of check stubs that purported to establish the distribution of the proceeds of the securities fraud. The Court observed that the stubs were "altered" before they were copied, there was no showing of what was changed as a result of the alteration, and the canceled checks could not be located. Under these circumstances, the Judge properly excluded a summary of the information contained on the stubs after finding that the stubs themselves were untrustworthy. *United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992)* , which held that a summary must be based on admissible evidence, is discussed in the Editorial Explanatory Comment, *§ 1006.02[2].*

United States v. Goss, 650 F.2d 1336 (5th Cir. 1981) : The Court held in a mail fraud case that it was improper to permit an FBI agent to give a summary of his interviews with various people. The Court said that "[t]here is no provision for the admission of summaries of the testimony of out-of-court witnesses."

Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984) : In a suit by trustees of employee trust funds for breach of a collective bargaining agreement, the Trial Judge excluded compliance audit reports that were made by an independent accounting firm and offered by the plaintiffs to show contribution deficiencies on the part of the defendants. The Court agreed that the reports were not admissible under *Rule 1006* because the reports relied not only upon the employer's business records, but also upon inadmissible information provided by union sources as to employees whose work for the employer was not recorded in the records.

PEAT, Inc. v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir. 2004) : The plaintiff alleged that the defendant misappropriated trade secrets. In preparation for litigation, the plaintiff prepared a summary of all of the information that its officials "thought might be a trade secret" and that was allegedly misappropriated by the defendant. Reversing a judgment for the plaintiff, the Court held it was error to admit the summary as evidence, which was based on inadmissible hearsay, since it was not compiled in the ordinary course of business, nor was it based on otherwise admissible evidence, as is required by *Rule 1006*.

Conoco, Inc. v. Department of Energy, 99 F.3d 387 (Fed. Cir. 1996) : The Court vacated a summary judgment for DOE in an action for restitution of crude oil pricing overcharges. It held that summaries of purchases of oil from various fields that were prepared long after the purchases were made in response to an oil company's request for information in connection with a DOE audit were improperly admitted. Although DOE argued that the purchasers had no motive to falsify the information they provided, the Court reasoned that the records had none of the indicia of reliability associated with business records. In a case like this, where no foundation for the documents underlying the summaries was laid and the underlying documents were not made available because the proponent did not have them, summaries could not be used under *Rule 1006*.

[7] Jury Instructions

United States v. Williams, 264 F.3d 561 (5th Cir. 2001) : Affirming a conviction for an extortion and bribery conspiracy, the Court upheld the admission of summary charts detailing telephone calls between the defendant and other alleged conspirators. The defendant argued that the charts should not have been admitted without an instruction that they were not evidence. The Court noted that the charts were properly admitted under *Rule 1006* and that a summary chart "that meets the requirements of *Rule 1006* is itself evidence and no instruction is needed ... . Such charts are distinguishable from pedagogical aids, which are merely to assist the jury in understanding the evidence and should

be accompanied by an appropriate limiting instruction."

United States v. Bray, 139 F.3d 1104 (6th Cir. 1998) : A postal clerk was convicted for embezzling money received from stamp purchases. The government introduced charts summarizing the forms that kept daily track of the clerk's transactions. Affirming, the Court held there was no error in refusing to give a limiting instruction that the charts were not evidence or proof of facts. Such an instruction may be appropriate when a summary is a pedagogical device, governed by *Rule 611(a)*, but the charts in this case were properly introduced under *Rule 1006* as primary evidence of records so voluminous that they could not be conveniently examined in court, and so constituted the evidence to be considered by the factfinder. The Court noted that its prior opinions on the distinction between the two types of summaries had been "less than clear."

[8] Notice

United States v. Jamieson, 427 F.3d 394 (6th Cir. 2005) : Affirming convictions for fraudulent sale of insurance policies, the Court found no error in allowing the government to use summary evidence. The Court noted that under *Rule 1006*, the proponent has a duty to "state when and where the documents underlying its summaries could be viewed," and that "merely making the records available upon request is insufficient," but the Rule does not require that the government provide the defendant with a copy of the actual summary or send copies of the relevant documents to the defendant. In this case, notice was sufficient because the government served the defendant with its notice of the intent to use summary evidence, and the notice was "reasonably specific in identifying the underlying documents."

[9] Providing Underlying Materials to Jury

Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182 (4th Cir. 1994) : In a price discrimination action by a steel fabricator against a raw steel supplier, the plaintiff introduced summaries in chart form to prove its purchases. During deliberations the jury asked whether it needed invoices to prove sales, and the defendant suggested submitting the invoices. The Trial Judge declined on the ground that the invoices had not been admitted, and explained to the jury that summaries had been introduced instead of the actual invoices. Affirming a judgment for the defendant, the Court held there was no abuse of discretion, as the jury never requested any invoices, the plaintiff never moved to have the invoices admitted, it would have been erroneous to submit to the jury documents that were not admitted into evidence, and *Rule 1006* does not require that both the summaries and the underlying documents be admitted.

[10] Reasonable Time

Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745 (7th Cir. 2005) : In a suit alleging fraud and unjust enrichment arising out of the disappearance of funds from insured escrow accounts, the Judge refused to admit summaries that the plaintiff had furnished to the defendant 30 days before the start of trial. The Judge excluded the summaries on two grounds: (1) a court should be wary of permitting a party to use a summary that might misstate evidence, and (2) 30 days' notice was too little. Finding an abuse of discretion, the Court concluded that "[t]he first ground was unreasoned, and the second incorrect." *Rule 1006* does not express any "wariness" concerning summaries and "the fact that they *might* be inaccurate is not a ground for excluding them without any determination of whether they are inaccurate." Regarding timeliness, the Court found that the defendant's counsel was "a huge law firm that could easily have spot checked the summaries for accuracy immediately upon receiving them 30 days before the trial began, and if the check had revealed inaccuracies [the defendant] would then have had solid grounds for moving to exclude them from the trial unless the inaccuracies were promptly corrected." By failing to employ this simple expedient the defendant forfeited any claim of untimeliness.

[11] Relationship to Rule 611(a)

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) : In the prosecution of a conspiracy to bomb United States commercial airliners in southeast Asia and of crimes relating to the 1993 bombing of the World Trade Center, the Court held that it was not an abuse of discretion to admit the government's summary charts of telephone records, but this brief portion of the lengthy opinion is muddled. The Court affirmed the admission of the charts under *Rule 1006*, while commenting that "any possible prejudice was cured by the District Court's limiting instruction stating that the charts were not evidence; they were only graphic demonstrations of the underlying evidence, and the jury had to determine for itself whether they fairly and accurately summarized the underlying evidence." The confusion arises because summaries under *Rule 1006* are evidence; they summarize voluminous material that cannot practically be brought to court. Summaries of trial evidence are *Rule 611(a)* summaries and may or may not be admitted as illustrative exhibits.

United States v. Buck, 324 F.3d 786 (5th Cir. 2003) : In a prosecution for misapplying federal grant payments, the Court held that it was error to admit into evidence and allow into the jury room a diagram showing connections between the defendant and the misapplied payments, but the error was harmless because the diagram accurately summarized testimony and other evidence that had been properly admitted and was thus already before the jury. Although the defendant argued the issue in terms of *Rule 1006*, the Court, quoting this *Manual,* noted that pedagogical aids such as the diagrams in this case are properly analyzed under *Rule 611*.

[12] Summaries of Trial Evidence

[a] Civil Cases

Management Sys. Assocs. v. McDonnell Douglas Corp., 762 F.2d 1161 (4th Cir. 1985) : In a contract dispute over royalty payments allegedly due pursuant to a software licensing agreement, the Court found reversible error in the admission of a summary exhibit. Summaries must fairly represent competent evidence before the jury, and the summary in this case unfairly and improperly purported to calculate the royalty on the basis of two "vitally important faulty assumptions."

Moore v. Johns-Manville Sales Corp., 781 F.2d 1061 (5th Cir. 1986) : In an asbestosis case, the Court, citing *Rule 1006*, sustained the admission of lists setting out various job sites where each plaintiff worked during his insulating career as summaries of other exhibits and oral testimony. In *Pierce v. Ramsey Winch Co.*, n16 the Court, affirming an antitrust judgment for a terminated distributor of winches and accessories, distinguished between summaries that are admitted under *Rule 1006* and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence." It concluded that summaries admitted under *Rule 1006* should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties. See also *Big John, B.V. v. Indian Head Grain Co.* n17(finding no error where the jury was permitted to use a chart not admitted into evidence, under an instruction that the chart was only argument and not evidence).

Gomez v. Great Lakes Steel Div., 803 F.2d 250 (6th Cir. 1986) : Vacating a judgment for the plaintiff in an employment discrimination action, the Court determined that a summary that the defendant was confronted with for the first time at trial should not have been admitted as evidence. This summary was more akin to "argument than evidence," and when it was used a limiting instruction should have been given informing the jury that the summary was a pedagogical device rather than evidence.

White Indus. v. Cessna Aircraft Co., 611 F. Supp. 1049 (W.D. Mo. 1985) : The Court noted in a Robinson-Patman Act case that "there is a distinction between a *Rule 1006* summary and a so-called 'pedagogical' summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted." It added, however, "that a pedagogical summary can itself be admitted in evidence where the trier of fact will find it helpful and will not be unduly influenced thereby."

Daniel v. Ben E. Keith Co., 97 F.3d 1329 (10th Cir. 1996) : The Court stated that "[s]ummaries not offered as evidence should be used only with a limiting instruction stating that the summary itself is not evidence."

[b] Summaries of Trial Evidence -- Criminal Cases

[i] Drug Cases

United States v. Rivera-Maldonado, 194 F.3d 224 (1st Cir. 1999) : In a drug conspiracy case, the Court found no abuse of discretion in the admission of composite videotapes of drug transactions involving the defendants' organization. The tapes summarized daily videos previously admitted in evidence, which an agent who had observed the events had testified accurately reflected what he observed. In *United States v. Drougas*, n18 the Court, affirming convictions for importation and possession of marijuana, indicated that seven telephone charts depicting telephone traffic between the conspirators' homes, businesses, and meeting places were properly admitted. Following an extensive *voir dire*, the Trial Judge first excluded the charts, and subsequently admitted modified versions that were less argumentative.

United States v. Pinto, 850 F.2d 927 (2d Cir. 1988) : The Court upheld the use of charts that summarized aspects of 66 wiretaps of calls placed to 35 telephone numbers and the submission of the charts for jury use during deliberations. It observed that the Trial Judge repeatedly reminded the jury that it was to decide whether the charts accurately reflected the evidence presented.

United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995) : The Court held there was no abuse of discretion when a detective, at the end of the government's case-in-chief, offered an organizational chart based on prior witnesses' testimony that diagrammed drug transactions among members of the charged conspiracy. After an extended discussion of summary testimony from expert witnesses, the Court concluded that the summary chart would be helpful because of the complexity of the case. Furthermore, appropriate safeguards were utilized to minimize any potential prejudice to the defendants: the parties stipulated that the chart accurately reflected the testimony of prior witnesses; the detective was voir dired before giving testimony as to the chart, and extensively cross-examined regarding the chart's creation; the defendants were given a recess to prepare the cross-examination regarding the chart; and numerous limiting instructions were given. The Court likewise held there was no abuse of discretion in admitting summary testimony from the detective, but it cautioned that the dangers inherent in the dual roles of expert and summary witness make the practice inappropriate in the ordinary drug prosecution lacking the complexity of this case.

United States v. Solis, 299 F.3d 420 (5th Cir. 2002) : Affirming convictions in a complex drug trafficking case, the Court found no abuse of discretion in the admission of a series of charts summarizing evidence of communications among the defendants. The Court noted that the charts "were drawn from competent evidence before the jury, which was available to the defendants at trial and was subject to cross-examination," and that "the jury was properly instructed concerning use of the charts and the limitations thereof." In *United States v. Taylor, 210 F.3d 311 (5th Cir. 2000)* , the Court reversed convictions for drug trafficking offenses because a government chart purporting to list the players in the

conspiracy and their positions within the hierarchy was improperly admitted into evidence. The chart did not accurately reflect the underlying testimony, showing connections to the defendant that did not exist and giving her a more central role in the conspiracy than the evidence supported. In *United States v. Castillo*, n19 a marijuana distribution prosecution, the Court held that a DEA agent, who properly presented summary charts relating to numerous wiretaps, had improperly been permitted to testify to matters that had nothing to do with summarizing any documents or records, were not anything observed or personally known by him, and were not the basis of any expert opinion expressed by him. The error was harmless, however.

United States v. Paulino, 935 F.2d 739 (6th Cir. 1991) : The Court affirmed convictions for conspiring to possess and distribute cocaine, holding there was no error in permitting a witness to give testimony explaining an organizational chart that showed the various players and their roles in the conspiracy and a chart that indicated the cash generated from cocaine sales for a specified period. A proper cautionary instruction was given at the close of evidence, the defendants had a full opportunity to cross-examine the witness, and the charts were not substantially inconsistent with the evidence adduced at trial.

United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990) : The Court affirmed convictions for a heroin importing and distribution conspiracy, holding that cover sheets summarizing transcripts of tape-recorded telephone conversations admitted into evidence were properly admitted under *Rule 1006*, as the Rule does not require that it be literally impossible to examine all the underlying records, but only that an in-court examination would be an inconvenience.

United States v. Grajales-Montoya, 117 F.3d 356 (8th Cir. 1997) : The Court held it was error (but harmless) to admit in a narcotics conspiracy case a chronology prepared by the government of what it believed to be relevant events. The chronology listed occurrences such as wire transfers, bank deposits, airplane travel, and coconspirators' meetings, and was derived from documents such as bank and Western Union records, receipts, and surveillance records that were all admitted into evidence. The Court believed that *Rule 1006* contemplates a summary admitted instead of, rather than in addition to, the documents it summarizes, and that the summary will have been prepared by a witness available for cross-examination rather than the lawyers trying the case. In *United States v. Possick*, n20 the Court held that a chart summarizing 250 telephone calls and 20 drug transactions was properly admitted as a summary of the evidence and was not unduly argumentative in prominently mentioning the defendant's name. It also held that *Rule 1006* charts may be sent to the jury room in the Judge's discretion, although it suggested that a limiting instruction is generally required when demonstrative charts are submitted to the jury.

United States v. Pena-Espinoza, 47 F.3d 356 (9th Cir. 1995) : At the trial of a cocaine distribution conspiracy, the government introduced over 4,800 recorded phone conversations (mostly in Spanish) and transcripts for 50 of the conversations. The investigating agents testified, serving as "readers" of relevant portions of the transcripts and sometimes summarizing the contents of the conversations. The Court held there was no abuse of discretion in permitting the agents to summarize transcript contents in their own words, where the transcripts themselves were in evidence, the defense was permitted to require a reading of the full transcript on cross-examination, and the Trial Judge sustained objections when made to impermissible commentary by the agents that went beyond summarization. In a complex narcotics manufacturing prosecution, *United States v. Baker, 10 F.3d 1374 (9th Cir. 1993)* , the Court held there was no abuse of discretion in permitting an FBI agent to present a summary including a total value of the narcotics transactions and expenditures testified to during the government's case. The agent was presenting neither summary evidence under *Rule 1006* nor expert evidence under *Rule 702*; rather, the testimony was permissible under *Rule 611(a)* as clarifying the government's presentation for the jury. Because of the dangers of undue prejudice, such summaries should be admitted only in exceptional cases, but in this case careful precautions had been taken (e.g., a week's continuance for the defense to examine the materials, a full opportunity to cross-examine the agent, thorough limiting instructions three times during the testimony).

[ii] Summaries of Trial Evidence -- Criminal Cases -- Fraud Cases

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) : Affirming convictions for wire fraud and other offenses, the Court held that an FBI agent properly used four charts, which summarized the testimony of government witnesses, to explain to the jury how cash flowed through certain companies. Although the Court relied on *Rule 1006*, a summary of evidence already before the jury is not evidence, and is more properly considered under *Rule 611*. The Court did express concern about the possible misuse of summaries -- e.g., a jury might erroneously view a summary as additional or corroborative evidence, a summary might incorporate inadmissible evidence, and it might be used as an extra summation -- but it found that the charts were not misused in the instant case.

United States v. Walker, 191 F.3d 326 (2d Cir. 1999) : Affirming the convictions of an attorney and an interpreter in a scheme to submit fraudulent asylum applications, the Court held that the Trial Judge properly admitted the testimony of a research specialist for the INS indicating that many of the asylum applications found in one defendant's law office were very similar or identical in wording. The applications were before the jury, and the testimony amounted to summary evidence.

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) : Reviewing a TV evangelist's fraud conviction, the Court held there had been no error in excluding charts offered by the defense. The charts allegedly summarized information already introduced into evidence, but they did not fairly represent that evidence.

United States v. Hart, 295 F.3d 451 (5th Cir. 2002) : In a prosecution for making false statements in applications for farm loans by omitting debts from Farm and Home Plans (computer-generated projections of the borrower's plan of operation), an employee of the loan servicing agency was permitted to introduce, as summaries under *Rule 1006*, revised FHPs that she prepared, which the government said illustrated what the results would have been if all the debts testified to by the prosecution witnesses had been included on the actual FHPs. Reversing, the Court held that the government had failed to adduce any evidence in support of the assumptions and conclusions that the witness drew when preparing her versions of the "proper" FHPs. While the government had shown undisclosed debts, it had not shown that the full amount of those debts belonged on a properly prepared FHP, so the "summary" impermissibly assumed what the government "was required to prove beyond a reasonable doubt as operative facts of the alleged offense." In *United States v. Bishop, 264 F.3d 535 (5th Cir. 2001)* , the Court affirmed a conviction for income tax offenses, holding there was no error in the admission of summary charts that were intended to clarify trial evidence. "Summary charts in particular are admissible when (1) they are based on competent evidence already before the jury, (2) the primary evidence used to construct the charts is available to the other side for comparison so that the correctness of the summary may be tested, (3) the chart preparer is available for cross-examination, and (4) the jury is properly instructed concerning use of the charts." The Court approved a cautionary instruction that "summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already submitted."

United States v. Stoecker, 215 F.3d 788 (7th Cir. 2000) : The Court affirmed convictions for making false statements to financial institutions and giving or receiving bribes, finding no abuse of discretion in the admission of stock pledge charts that detailed which stocks the defendant's corporation pledged as security for its bank loans and revealed that, in a number of instances, the same stock was pledged to more than one bank. The charts were properly considered as a summary of the witness testimony regarding dates and pledges that the jury might forget during the course of a long trial, and the jury was properly instructed to analyze the underlying evidence on which the charts were based. In *United States v. Swanquist, 161 F.3d 1064 (7th Cir. 1998)* , a prosecution for making false statements in loan applications, the government introduced charts contrasting the loans the defendant actually had outstanding with those

disclosed in the applications, but the defendant contested the characterizations of some of the outstanding loans. The Court found no abuse of discretion, since a party is not required to include within its charts or summaries an opponent's version of the facts, and the jurors were properly instructed that the charts were not evidence, but were only admitted to aid them in evaluating other evidence, and that it was for them to decide whether the evidence supported the summaries. In *United States v. Bentley*, n21 the Court affirmed fraud convictions, stating that charts may be admitted that summarize other trial evidence, even though not all evidence was summarized: "charts need not be encyclopedic to be admissible."

United States v. Richardson, 233 F.3d 1285 (11th Cir. 2000) : The Court held there was no abuse of discretion in a complex six-week money laundering, fraud, and embezzlement trial when a government witness was permitted to present charts summarizing the transaction histories of the accounts of the 14 alleged embezzlement victims. The Trial Judge issued numerous limiting instructions to the jury, the expert specifically testified that the label "unauthorized transaction" on one of the columns represented his opinion, the expert was available for cross-examination, and the label was ultimately changed to "questioned transaction" before the charts went to the jury. In *United States v. Atchley*, n22 the Court affirmed insurance fraud convictions, holding that telephone company toll records were properly introduced and that a chart summarizing relevant portions of the records also was properly admitted under *Rule 1006*.

[iii] Summaries of Trial Evidence -- Criminal Cases -- Miscellaneous Cases

United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) : Although it reversed convictions for bribery-related offenses for error in jury instructions, the Court approved the admission of summaries based upon evidence that was already admitted. The Trial Judge determined that there was a factual basis for the summaries and ensured that the defendant had an opportunity to explore them on cross-examination.

United States v. Porter, 821 F.2d 968 (4th Cir. 1987) : The Court held there was no error in admitting charts summarizing telephone toll records previously introduced. Any prejudice attributable to the highlighting of names was cured by a cautionary instruction. See also *United States v. Dorta* n23(affirming admission of summaries of lengthy telephone records that had been admitted as evidence).

United States v. Winn, 948 F.2d 145 (5th Cir. 1991) : At the trial of a kidnapping-for-ransom scheme, an FBI agent testified as a fact and summary witness, using chronological charts tracking the various events by dates. Affirming, the Court held there was no abuse of discretion in admitting the charts, as they were based on competent evidence, the primary evidence was available for testing the summary, the person who prepared them was available for cross-examination, the jury was properly instructed concerning their use, and they made evidence already before the jury conveniently examinable. In *United States v. Stephens*, n24 the Court held that *Rule 1006* not only permits a summary to be substituted for admissible evidence but also authorizes admission of a chart summarizing voluminous and complex evidence that has been admitted at trial. Actually, such a summary is governed by Rules 403 and 611 rather than *Rule 1006*. See also *United States v. Means* n25(permitting use of a chart to illustrate how the proceeds of a check were divided).

United States v. Scales, 594 F.2d 558 (6th Cir. 1979) : The Court found no error in allowing the government to use large charts in connection with the testimony of a witness who served only to lay the foundation for the charts, which did little more than summarize the government's case.

United States v. Petty, 132 F.3d 373 (7th Cir. 1997) : In a prosecution for aiding and abetting tampering with

motor vehicle identification numbers, the government introduced computer-generated telephone records. The records were cumbersome and difficult to read, and contained much irrelevant information, so an FBI technical analyst prepared charts summarizing the relevant phone calls. For "reasons unapparent to [the Court]," the Trial Judge declined to admit the charts as summary evidence under *Rule 1006*, but did permit the analyst to use them as demonstrative aids under *Rule 611(a)*. The Court found no abuse of discretion, nor would it have had the charts been admitted into evidence, since they summarized complex evidence that was admissible. In *United States v. Howard*, n26 the Court, affirming convictions for vote fraud, recognized that summaries of trial evidence may not fall within *Rule 1006*, but that they might be admissible as "a pedagogical device." It suggested, however, that the preferred practice would be to give a limiting instruction explaining the permissible use of such summaries.

United States v. Wainright, 351 F.3d 816 (8th Cir. 2003) : Affirming a conviction for interstate transportation of stolen property in a scheme to divert timber that the defendant was paid to cut and haul, the Court found no abuse of discretion in the admission of summaries of voluminous logging records and of bank records, which had been introduced into evidence. Although the Court relied upon *Rule 1006*, these summaries almost certainly fell within *Rule 611(a)*. They summarized evidence already admitted, so they were not summaries of evidence too voluminous to be brought to court. Summaries of admitted evidence are demonstrative or illustrative exhibits, which may be admitted into evidence in the Judge's discretion. In *United States v. Orlowski*, n27 the Court held that exhibits summarizing trial testimony and documents could be sent to the jury room.

United States v. Meyers, 847 F.2d 1408 (9th Cir. 1988) : The Court held that a chart summarizing long distance phone calls and surveillance logs of FBI teams was properly admitted.

United States v. Gold, 743 F.2d 800 (11th Cir. 1984) : The Court held that a summary of evidence derived from exhibits that had been admitted into evidence was properly admitted to demonstrate the amount of claims payable under Medicare.

[iv] Summaries of Trial Evidence -- Criminal Cases -- Tax Cases

United States v. Oshatz, 912 F.2d 534 (2d Cir. 1990) : Affirming tax fraud convictions, the Court held that although it was greatly desirable to make computer programs used in the preparation of a chart summarizing trial evidence available to the defense a reasonable time before trial, there was no error in failing to do so when the defendant had ample time to check the validity of the program and cross-examine the government witness as to errors during the trial, and errors were corrected before the chart was ultimately admitted into evidence.

United States v. Pree, 384 F.3d 378 (7th Cir. 2004) : Affirming a conviction for filing false tax returns, the Court found no plain error in the admission of two summary charts prepared by a testifying IRS agent. The Judge gave a pattern instruction stating that the charts accurately summarized voluminous books, records, or documents. That instruction was problematic because the charts summarized evidence already admitted, and thus were akin to "a teaching device rather than ... substantive evidence." Although the Court recognized that the preferred practice when such charts are offered is to instruct the jury that the charts are not evidence and purport to summarize already admitted evidence, it declined to find plain error in view of the absence of any challenge to the accuracy of the charts. In *United States v. Radseck, 718 F.2d 233 (7th Cir. 1983)* , the Court affirmed mail fraud and income tax convictions as it found the government was properly permitted to utilize several exhibits that summarized trial testimony in connection with the testimony of an IRS agent. The Court indicated that cross-examination of a summary witness like the agent is an adequate protection against error in the exhibits.

United States v. Nelson, 735 F.2d 1070 (8th Cir. 1984) : In a prosecution for failing to file tax returns, the Court upheld the admission of three charts that summarized an IRS agent's testimony and indicated a defendant's gross income for two years based on bank deposits and his filing history.

United States v. Wood, 943 F.2d 1048 (9th Cir. 1991) : In a prosecution for tax fraud, the government was permitted to introduce a summary chart by its expert, but a summary chart by the defendant's expert was not admitted. The Court affirmed the conviction, holding that although the better practice is to allow charts to be used as testimonial aids only, it was no abuse of discretion to admit the government's chart; the disparate treatment between the charts was justified because the defendant's chart was not supported by the record. In *United States v. Soulard*, n28 the Court, affirming convictions for subscribing false corporate income tax returns, observed that the Trial Judge should examine summary charts outside the presence of the jury to see that they are supported by the proof in the case, should allow the charts to be used as testimonial aids, and should not admit them as evidence.

United States v. Kapnison, 743 F.2d 1450 (10th Cir. 1984) : The Court found that an expert witness in a criminal tax trial was properly permitted to summarize government exhibits and testimony. In *United States v. Kaatz*, n29 the Court held that a government summary of 2,300 exhibits that were business records was properly admitted in an income tax evasion case. See also *United States v. Harenberg* n30(approving use of a summary exhibit by an IRS agent to demonstrate that income reported by the defendant was incorrect; the chart was "very helpful in sorting out the numerous exhibits presented by the government," and provided a basis for the agent's conclusions).

United States v. Evans, 910 F.2d 790 (11th Cir. 1990) , *aff'd*, *504 U.S. 255 (1992)* : In affirming a public official's Hobbs Act and tax fraud convictions, the Court held that a government chart summarizing payments to the defendant and showing their effects was properly admitted. However, the Trial Judge properly excluded charts and testimony by a proposed defense expert in linguistics because the expert would not be helpful to the jury in understanding taped conversations and the charts impermissibly reflected the expert's opinion of the content of recorded testimony previously presented to the jury. In *United States v. Scrima*, n31 an income tax evasion case, the defendant offered a summary exhibit that assumed that he had a large amount of money prior to the relevant tax years. The Court held that the Trial Judge properly cautioned the jury that the chart assumed a fact that was not in evidence. Since a summary must be based upon admissible evidence or evidence actually before the jury, the chart could have been excluded altogether, and the Judge actually gave the defendant more favorable treatment than the Rule required.

[13] Summary Judgment

Tamarin v. Adam Caterers, Inc., 13 F.3d 51 (2d Cir. 1993) : In a union's action to recover unpaid ERISA benefit contributions from an employer, the Court held there was no error in relying on the plaintiff's summary of payroll records in granting summary judgment, as the underlying documents would have been admissible as business records and they would have been available to the defendant during discovery.

In re Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999) : Affirming summary judgment for a manufacturer charged with conspiring with competitors to fix prices and market shares, the Court held that facts stated in an expert report are not admissible simply because the expert relied upon them, nor was the expert's report admissible as a summary of data, since there was no showing that the report purported to summarize voluminous data that could not be conveniently examined.

[14] Tape Recordings

United States v. Wilson, 115 F.3d 1185 (4th Cir. 1997) : Affirming drug convictions, the Court found no error in the introduction of both original and composite tape recordings of drug transactions between the defendants and an undercover police officer. The original tape recordings were properly authenticated by witnesses who monitored the audio recording equipment and by the undercover officer who reviewed the tapes and testified that they accurately recorded the conversations. The composite tape was properly authenticated by the same witnesses, who listened to the original recordings and compared them to the composite tape, and testified that the composite tape accurately represented the relevant portions of the original tapes. In *United States v. Bakker, 925 F.2d 728 (4th Cir. 1991)* , the Court, reviewing a TV evangelist's fraud conviction, rejected the defendant's argument that eleven composite tapes edited from 200 hours of broadcasts were erroneously admitted because the original tapes had not been introduced into evidence. The language of the Rule simply requires that the underlying material be made available to the other party, as was done here. Objections to the representativeness of the composite tapes properly go to their weight, not their admissibility.

United States v. Segines, 17 F.3d 847 (6th Cir. 1994) : Vacating cocaine convictions, the Court held that a composite tape recording was admissible under the Rule, but that it was error to admit a transcript, where the tape was unintelligible in part, and to send to the jury original tapes expressly excluded from admission into evidence. In *United States v. Denton*, n32 the Court upheld the admission of a composite tape recording rather than the original recordings, where the defense lawyers had reasonable access to the originals, the government laid a proper foundation as to the accuracy and authenticity of the composite tape, use of the one tape saved time at trial, and the defense was free at trial to cross-examine the agents who prepared the composite tape. To have a proper foundation for transcripts of tapes, testimony must be offered that the transcripts accurately summarize the tapes.

United States v. Nunez, 658 F. Supp. 828 (D. Colo. 1987) : The Court held, in ruling on various pretrial motions in a narcotics prosecution, that composite tapes could be used to summarize 112 tape recordings if the composites were representative and in proper context.

United States v. Phelps, 733 F.2d 1464 (11th Cir. 1984) : Affirming Mann Act convictions of a husband and wife, the Court held that the Trial Judge acted properly in reading a summary of a tape recording to the jury as requested by a third defendant. The Judge was concerned about the poor quality of the recording and about possible prejudice to a fourth defendant. He summarized the conversations relied on by the third defendant and told the jury that, although the parties had not agreed that the summary was accurate, he believed that it fairly summarized a tape that could not be played because of its poor quality.

[15] Testimony from Prior Proceeding

United States v. Leon-Reyes, 177 F.3d 816 (9th Cir. 1999) : The defendant was charged with committing perjury in a previous trial in which he testified on behalf of defendants charged with drug crimes. To prove the materiality of his testimony, the government offered summaries of the testimony of a number of witnesses at the previous trial. The Court found no error, stating that "we believe admission of summaries like the ones from this case offer numerous advantages to district courts. Rather than admitting the potentially voluminous transcript or subpoenaing witnesses from the prior trial to repeat their testimony, the prior testimony can be reduced to short summaries tending to prove materiality. Additionally, the district court is better able to monitor and exclude unduly prejudicial material from short summaries than the entire transcript."

[16] Transcripts

United States v. Alwan, 279 F.3d 431 (7th Cir. 2002) : Affirming a contempt of court conviction for failure to testify before a grand jury, the Court held that a government agent was properly permitted to testify that he reviewed transcripts to determine whether the defendant ever stated he feared for his safety. Although the defendant raised no objection at trial, he alleged hearsay on appeal. The Court found that "*Rule 1006* specifically permits voluminous writings as a practical matter to be summarized."

FOOTNOTES:

(n1)Footnote 1. *Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985)* .

(n2)Footnote 2. *United States v. Miller, 771 F.2d 1219 (9th Cir. 1985)* .

(n3)Footnote 3. *Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984)* .

(n4)Footnote 4. *Frank Music Corp. v. Metro-Goldwyn-Mayer, 772 F.2d 505 (9th Cir. 1985)* .

(n5)Footnote 5. *Rager v. Commissioner, 775 F.2d 1081 (9th Cir. 1985)* .

(n6)Footnote 6. *United States v. Sanders, 749 F.2d 195 (5th Cir. 1984)* .

(n7)Footnote 7. *Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023 (4th Cir. 1983)* .

(n8)Footnote 8. *United States v. Campbell, 845 F.2d 1374 (6th Cir. 1988)* .

(n9)Footnote 9. *United States v. Meyers, 847 F.2d 1408 (9th Cir. 1988)* .

(n10)Footnote 10. *United States v. Robinson, 774 F.2d 261 (8th Cir. 1985)* .

(n11)Footnote 11. *Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985)* , *aff'd*, *858 F.2d 467 (9th Cir. 1988)* .

(n12)Footnote 12. *United States v. Massachusetts Maritime Academy, 762 F.2d 142 (1st Cir. 1985)* .

(n13)Footnote 13. *United States v. Denton, 556 F.2d 811 (6th Cir. 1977)* .

(n14)Footnote 14. *Zayre Corp. v. S.M. & R. Co., 882 F.2d 1145 (7th Cir. 1989)* .

(n15)Footnote 15. *United States v. Behrens, 689 F.2d 154 (10th Cir. 1982)* .

(n16)Footnote 16. *Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985)* .

(n17)Footnote 17. *Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143 (5th Cir. 1983)* .

(n18)Footnote 18. *United States v. Drougas, 748 F.2d 8 (1st Cir. 1984)* .

(n19)Footnote 19. *United States v. Castillo, 77 F.3d 1480 (5th Cir. 1996)* .

(n20)Footnote 20. *United States v. Possick, 849 F.2d 332 (8th Cir. 1988)* .

(n21)Footnote 21. *United States v. Bentley, 825 F.2d 1104 (7th Cir. 1987)* .

(n22)Footnote 22. *United States v. Atchley, 699 F.2d 1055 (11th Cir. 1983)* .

(n23)Footnote 23. *United States v. Dorta, 783 F.2d 1179 (4th Cir. 1986)* .

(n24)Footnote 24. *United States v. Stephens, 779 F.2d 232 (5th Cir. 1985)* .

(n25)Footnote 25. *United States v. Means, 695 F.2d 811 (5th Cir. 1983)* .

(n26)Footnote 26. *United States v. Howard, 774 F.2d 838 (7th Cir. 1985)* .

(n27)Footnote 27. *United States v. Orlowski, 808 F.2d 1283 (8th Cir. 1986)* .

(n28)Footnote 28. *United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984)* .

(n29)Footnote 29. *United States v. Kaatz, 705 F.2d 1237 (10th Cir. 1983)* .

(n30)Footnote 30. *United States v. Harenberg, 732 F.2d 1507 (10th Cir. 1984)* .

(n31)Footnote 31. *United States v. Scrima, 819 F.2d 996 (11th Cir. 1987)* .

(n32)Footnote 32. *United States v. Denton, 556 F.2d 811 (6th Cir. 1977)* .

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CHAPTER 1006 RULE 1006

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1006.04 Legislative History

Advisory Committee's Note

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore 1230.

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5-1006 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1006, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1006. Summaries	**Rule 1006. Summaries to Prove Content**
The contents of voluminous writings, re-	The proponent may use a summary, chart

cord ings, or pho- to- grap hs whic h can- not con- veni entl y be ex- ami ned in cour t may be pres en- ted in the form of a chart , sum mar y, or cal- cula- tion. The ori- gin- als, or du- plica tes, shall be mad e , or cal- cula- tion to prov e the con- tent of vo- lu- min- ous writ- ings, re- cord ings, or pho- to- grap hs that can- not be con- veni entl y ex- ami ned in cour t. The pro- pon- ent must mak e the ori- gin- als or du-

available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.	plicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Committee Note

The language of Rule 1006 has been amended as part of the restyling of the Evidence Rules to make them more easily

understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 1006.03 Annotated Cases

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[2] Computer Records [Go To Main]

U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009) : In an action over insurance coverage obligations the plaintiffs proved claims defense and settlement costs by introducing computer-generated summaries detailing the indemnity and expenses paid on each claim. Affirming a judgment for the plaintiffs, the Court held that the summaries were not subject to Rule 1006, because "the summaries *themselves* constituted the business records. They were the writings at issue, not summaries of other evidence." (Emphasis in original.)

[3] Examples of Properly Admitted Summaries [Go To Main]

United States v. Hemphill, 514 F.3d 1350 (D.C. Cir. 2008) : In a prosecution for various crimes arising from the theft of millions of dollars from the Washington Teachers Union, the government charged six specific acts of embezzlement as well as a conspiracy to embezzle to commit fraud, and offered evidence of thousands of transactions in which one defendant took money from the union. Affirming, the Court rejected one defendant's argument that it was error to admit summary charts because the underlying documents were not admitted. It noted that "the point of Rule 1006 is to avoid introducing all the documents." The Court also rejected the argument that the charts were "argumentative, prejudicial and selective." It reasoned that "the fact that a non-expert witness ... prepared a chart or testified about it does not make the chart inadmissible," "[n]or is it problematic for a witness to perform some calculations in preparing a chart," and "[e]ven if the calculations are mistaken, the chart is itself admissible, since admissible evidence may be unpersuasive and a defendant has the opportunity to rebut it."

United States v. Valencia, 600 F.3d 389 (5th Cir. 2010) : The Court affirmed fraud convictions arising from a scheme to give false information regarding natural gas trades to industry publications in order to manipulate natural gas markets. It found no abuse of discretion when a former risk manager at one of the involved companies testified to the

effects of the false reporting, based on analyses he conducted on all relevant trades in the company's vast databases. These records had been made available to the defense in a timely manner, and the witness' testimony would assist the jury in understanding how voluminous records boiled down to the potential for profit or loss. The Court distinguished this evidence from a summary of trial evidence, and held that limitations on the latter were inapplicable, given the plain language and purposes of Rule 1006.

[4] Expert Testimony [Go To Main]

Eichorn v. AT&T Corp., 484 F.3d 644 (3d Cir. 2007) : Affirming summary judgment for the plaintiffs in an action alleging improper termination of pension benefits under ERISA, the Court found no abuse of discretion in the exclusion of spreadsheets prepared by the son of plaintiffs. The son, who was not an expert, made various assumptions about future events, such as when the plaintiffs would have retired, how their salaries would have increased, what choices the plaintiffs would have made with respect to pension benefits, and life expectancy of the plaintiffs. Although the plaintiffs claimed that the spreadsheets were admissible under Rule 1006, the Court concluded that "[t]he calculations went beyond the data they summarized and included several assumptions, inferences, and projections about future events, which represent Mr. Crowley's opinion, rather than the underlying information." The evidence was thus subject to the rules governing opinion testimony, and was properly held inadmissible, given there was no abuse of discretion in finding that the son was not qualified to render an opinion as a lay witness.

[5] Foundation Requirement [Go To Main]

United States v. Oros, 578 F.3d 703 (7th Cir. 2009) : Affirming a conviction for bribery of a public official, the Court held it was error (but harmless) to admit charts summarizing voluminous bank and telephone records, because the introducing witness did not provide evidence that the underlying records met the requirements of the business records exception and were thus admissible. The Trial Judge had erroneously accepted the government's argument that "because the government was only introducing the summary (and not the underlying records themselves), no certification or testimony from a custodian was required."

[8] Notice [Go To Main]

United States v. Isaacs, 593 F.3d 517 (7th Cir. 2010) : In a case involving computer fraud, the government provided relevant data to the defendant 15 months before trial. It then provided the defendant a summary of the data three days before trial. The Court held that the summary and underlying data were made available at a "reasonable time" within the meaning of Rule 1006. The defendant "had at least fifteen months to review the data and compare it to the summary exhibits to determine if there were any inaccuracies."

[12] Summaries of Trial Evidence [Go To Main]

[b] Summaries of Trial Evidence -- Criminal Cases

[ii] Summaries of Trial Evidence -- Criminal Cases -- Fraud Cases

United States v. Nguyen, 504 F.3d 561 (5th Cir. 2007) : Affirming convictions arising from a fraudulent home buying scheme, the Court held it was error (but harmless) to admit summary testimony from an FBI financial analyst. The testimony "was inappropriate" because, for example, the analyst referred to one defendant as a coconspirator and

thereby offered an opinion on mental state that is prohibited by Rule 704(b). Moreover, the analyst provided a summary of her investigation and authenticated a summary chart that relied in part on out-of-court statements that unspecified witnesses made to FBI agents during their investigation; the Court held that this testimony "was in error because the supporting evidence must have been *presented previously* to the jury to establish any assumptions reflected in the summary." The Court observed that it has allowed the use of summary witnesses in limited situations, but that it "has repeatedly warned of its dangers" and that "[s]ummary witnesses may not be used as a substitute for, or a supplement to, closing argument."

United States v. Green, 428 F.3d 1131 (8th Cir. 2005) : The Court affirmed a conviction for fraud in an identity-theft scheme, finding no abuse of discretion in the admission of charts outlining individual transactions and summarizing the evidence in spreadsheet form. The charts summarized evidence already introduced at trial and assisted the jury in understanding how the scheme was perpetrated, and the witness who prepared the charts was available for cross-examination. Instructions to consider the charts as evidence while also taking into account "all the testimony" heard and the "way in which [the charts] were prepared" were sufficient.

United States v. Lewis, 594 F.3d 1270 (10th Cir. 2010) : In a massive fraud case the prosecution created a database from which it prepared summary exhibits for presentation at trial. Affirming, the Court held that the defense was not entitled under Rule 1006 to disclosure of the database, since the underlying documents were not the database but the bank records that were admitted into evidence, which the defense had been given ample time to inspect and review. In *United States v. Schuler, 458 F.3d 1148 (10th Cir. 2006)* , the Court affirmed a conviction for fraud. It cited *Rule 1006* in upholding the use of exhibits summarizing voluminous financial records, where the underlying financial records "were admissible and were in fact admitted into evidence" and had been made available to the defendant in advance of trial.

[iii] Summaries of Trial Evidence -- Criminal Cases -- Miscellaneous Cases

United States v. Milkiewicz, 470 F.3d 390 (1st Cir. 2006) : Toward the end of a fraud and tax fraud case in which several thousand pages of financial records were offered by the government to prove transactions in the scheme, the prosecutor called an IRS agent to testify about a series of charts that summarized the information contained in those financial records. The defense initially objected only to admission of the charts as independent evidence, but later argued that they should not have been given to the jury because one set contained errors and significant omissions rendering it unreliable and the other was improperly admitted through the agent, who was not qualified as a witness. Affirming, the Court took the occasion to clarify its approach to the treatment of summaries under the Rules, noting that "[i]n a case where voluminous underlying records are involved, the key difference between [the] various approaches appears to be the purpose for which the summaries are offered":

> Charts admitted under *Rule 1006* are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently they must fairly represent the underlying documents and be " 'accurate and non-prejudicial.' " [citations omitted]
>
> By contrast, a pedagogical aid that is allowed under *Rule 611(a)* to illustrate or clarify a party's position, or allowed under *Rule 703* to assist expert testimony, may be less neutral in its presentation. Record support is necessary because such devices tend to be "more akin to argument than to evidence," and "may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent." In some cases, however, such pedagogical devices may be sufficiently accurate and reliable that they, too, are admissible in evidence, even though they do not meet the specific requirements of *Rule 1006*.

The Court held that although most, if not all, of the charts would have been admissible into evidence under *Rule 1006*,

there certainly was no abuse of discretion in allowing the jury to consider them under *Rules 611(a)* and *703*. Deficiencies in the underlying records were explored on examination of the witnesses, "and gaps or other imperfections in the underlying data do not necessarily undermine the value of the summary charts as pedagogical aids under *Rule 611(a)*." As for the tax charts, the summarization of documents "took patience but not expertise," and an IRS agent was well qualified to make the computations, "particularly where, as here, the computation required no subjective judgment."

United States v. Whitfield, 590 F.3d 325 (5th Cir. 2009) : An attorney and two state judges were convicted for a bribery scheme in which the attorney arranged, guaranteed, and paid off loans for the judges, in order to corruptly influence the outcome of cases he had filed in their courts. Affirming, the Court found no abuse of discretion when a government witness was permitted to explain charts summarizing the financial transactions at issue in the case. Although the Court had "properly expressed some reluctance to generally endorse the use of summary evidence," the testimony and charts were neither cumulative nor prejudicial; the information presented to the jury synthesized voluminous records that were properly admitted; the witness was cross-examined fully; and the defendant did not contend that the charts were incorrect or misleading.

[13] Summary Judgment [Go To Main]

Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371 (7th Cir. 2008) : Affirming summary judgment for the defendants in an action by a judgment creditor seeking to set aside allegedly fraudulent transfers, the Court held there was no abuse of discretion in striking two charts that the plaintiff had prepared, which summarized the allegedly fraudulent transfers. The charts were not admissible under Rule 1006 because the plaintiff had neither established the admissibility of the records on which the summaries were purportedly based nor authenticated the summaries in any way.

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1007.02 Editorial Explanatory Comment

[1] Admissions Proving Genuineness

[2] Relationship to Rule 1004

[3] Relationship to Rule 801(d)(2)

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1007.01 Official Text

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

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1007.02 Editorial Explanatory Comment

[1] Admissions Proving Genuineness

Although some cases have taken a different view, most American Courts have held that if the secondary evidence offered consists of an admission of the contents by the opponent of the evidence, no showing is required of why the original is not produced. Prior to the enactment of the Federal Rules, it was not altogether clear whether all admissions would serve to prove the contents of an item otherwise covered by the Best Evidence Rule. *Rule 1007* provides that the contents of writings and recordings may be proved only by admissions made in the course of giving testimony under oath or by written admissions. The policy underlying the Best Evidence Rule is to obtain an accurate version of the contents of writings and the other items covered by the Rule. If all oral admissions sufficed to prove the contents of writings, accuracy might be jeopardized. The Advisory Committee accepted the argument that the possibility of error was reduced if admissibility under this Rule was confined to written admissions or admissions under oath.

[2] Relationship to Rule 1004

Admissions not covered by *Rule 1007* might still be used under *Rule 1004* to prove the contents of a writing. If *A* sues *B* for breach of contract, for example, and *A* satisfies *Rule 1004* by showing that the original of the contract was destroyed and that there was no bad faith in *A*'s doing so, *A* can then offer, as secondary evidence, admissions made by *B* concerning the contents of the contract. The difference between *Rule 1004* and the instant Rule is that the former requires an accounting for the original, while the instant Rule does not.

[3] Relationship to Rule 801(d)(2)

The exact relationship between *Rule 1007* and *Rule 801(d)(2)* is unclear. If an authorized speaker, an agent or employee, or a coconspirator admits the content of a writing or recording, should a party against whom ordinary admissions could be introduced under *Rule 801(d)(2)* be deemed to have admitted the authenticity of the writing or recording? Arguably, the answer is yes; whatever reasons justify the use of ordinary 801(d)(2) admissions as substantive evidence on the merits would seem to carry over to the often less significant question of proving the contents of a writing or recording.

[4] Testimony

There is a question under the Rule as to what "testimony" of a party qualifies as establishing the contents of a document. The fact that a deposition explicitly qualifies suggests that grand jury testimony and testimony in other proceedings should also qualify. In fact, any testimonial statement made by the person against whom a writing is offered should be sufficient to establish the contents of the writing, as long as the statement is reliably recorded. The Advisory Committee's concern about mistransmission is adequately answered by a reliable recording (e.g., at a legislative hearing).

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1007.03 Annotated Cases

No significant decisions.

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1007.04 Legislative History

Advisory Committee's Note

While the parent case, *Slatterie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004 *supra* .

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

[The entire Advisory Committee Note accompanying the gender-neutralizing changes effective October 1, 1987 is as follows: "The amendment is technical. No substantive change is intended."]

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Scope

The chart below shows the proposed style amendments for Rule 1007, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1007. Testimony or Written Admission of Party	**Rule 1007. Testimony or Statement of a Party to Prove Content**
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Committee Note

The language of Rule 1007 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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5-1008 Federal Rules of Evidence Manual 1008.syn

§ 1008.syn Synopsis to Chapter 1008: RULE 1008

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1008.02 Editorial Explanatory Comment

[1] Preliminary Questions for the Court

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5-1008 Federal Rules of Evidence Manual 1008.01

1008.01 Official Text

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

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1008.02 Editorial Explanatory Comment

[1] Preliminary Questions for the Court

The Editorial Explanatory Comment accompanying *Rule 104* discusses the role of the Judge in deciding preliminary questions of fact relating to "rules of competency" and the Judge's role in handling problems of conditional relevancy. See § 104.02[2]. Some further discussion concerning the difference between the two roles is offered in the Editorial Explanatory Comment accompanying *Rule 901*, *§ 901.02[1]*. *Rule 1008*, which is basically a specialized application of the principles set forth in *Rule 104*, makes it necessary to deal with the problem once more.

Prior to permitting evidence of the contents of a writing, recording, or photograph to go to the jury, the Judge must ensure that the technical requirements of the Best Evidence Rule have been satisfied. Hence, the Judge must determine, at least, the following questions:

(1) whether a given item of evidence is an "original";

(2) whether a given item of evidence qualifies as a duplicate and is thus presumptively admissible;

(3) whether a genuine question is raised as to the authenticity of the original for purposes of *Rule 1003*;

(4) whether it would be unfair to admit a duplicate in lieu of an original as provided for in *Rule 1003*;

(5) whether an original is lost or destroyed, and whether a diligent search has been conducted for the original; n1

(6) whether the proponent lost or destroyed evidence in bad faith;

(7) whether an original can be obtained by any available judicial process;

(8) whether an adverse party has possession or control over the original and, if so, whether proper notice was given to that party;

(9) whether evidence goes to a collateral matter or to a controlling issue.

All of the above questions are concerned with the policies behind the Best Evidence Rule. None would be of much interest to the jury, and would only serve to distract and confuse. Hence, they are properly left to the Trial Judge.

[2] Jury Issues

If an issue is raised as to: (a) whether the asserted writing ever existed, (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the jury to determine. An example is provided in the Advisory Committee's Note. If the plaintiff offers secondary evidence of the contents of an alleged contract, having produced evidence to show the loss of the original, the Trial Judge cannot take from the jury the question of whether a contract was ever executed. If the Judge could decide the point, the Advisory Committee states that the case is at an end without ever going to the jury on a central issue. The same reasoning applies where the question of admissibility is the accuracy of the secondary evidence. The parties should not be deprived of a jury trial where what might be thought of as a preliminary issue is also the ultimate issue to be decided by the jury.

Assume *A* and *B* are involved in a contract dispute, and each offers a photocopy of what each claims the contract to be. What are the respective functions of Judge and jury? It seems that the Judge should determine the following question: Assuming that *A* (or *B*) is correct in asserting that his copy is a copy of the actual contract, has *A* (or *B*) shown a valid excuse for not producing the original? If the answer is yes, the Judge should let the evidence in for *A*, and do the same for *B* if *B* makes a similar showing, and let the jury decide which of the two copies actually represents the contract between the parties.

As with *Rule 104(b)*, where the factual determination is for the jury, the Trial Judge must decide whether the evidence is sufficient to support a finding; the Court does not make a credibility determination. Where the factual determination is for the Judge, it is the Judge who must be persuaded, and it is the Judge who makes the determinations of credibility and probative force on the evidence offered to prove the preliminary question of fact.

One of the advantages of *Rule 1008* is that it deals explicitly with some of the trickiest problems of distinguishing between conditional relevance questions and competency questions. If, as we suspect, Trial Judges have an easier time dealing with *Rule 1008* than with *Rule 104*, it suggests that *Rule 104* could be amended to address more explicitly some of the difficult Judge-jury questions that frequently arise, especially in complex litigation.

FOOTNOTES:
(n1)Footnote 1. See *Burt Rigid Box, Inc. v. Travelers Property Cas. Corp., 302 F.3d 83 (2d Cir. 2002)* (whether a party exercised due diligence under *Rule 1004* is a question for the Court and not the jury).

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1008.03 Annotated Cases

Seiler v. Lucasfilm, Ltd., 808 F.2d 1316 (9th Cir. 1986) : The Court affirmed a summary judgment for the defendant in a copyright infringement action by an artist who claimed that the defendant copied his drawings in making a film. The plaintiff had no originals of his drawings, and the Trial Judge found that the plaintiff failed to establish that it was more probable than not that originals of materials assertedly copied by the defendant were destroyed or lost without bad faith. Thus, the Judge properly excluded drawings by the plaintiff which purported to reproduce the originals. The plaintiff argued that *Rule 1008* required a trial on whether the reconstructions correctly reflected the originals, but the Court said fulfillment of the conditions of admissibility, including those in *Rule 1004*, is a preliminary question for the Judge. Only if the reconstructions were found admissible would their accuracy have become a jury question.

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1008.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104 *supra* . Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004 *supra* , is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, *10 Rutgers L. Rev. 632, 644 (1956)*. The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b) *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60-467(b); New Jersey Evidence Rule 70(2), (3).

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The phrase "in accordance with the provisions of Rule 104" was added to make clear that the procedures set forth in Rule 104 apply to the situation described in the first sentence of this Rule.

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Scope

The chart below shows the proposed style amendments for Rule 1008, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1008. Functions of Court and Jury	**Rule 1008. Functions of the Court and Jury**
When the admissibility of other	Ordinarily, the court determines

evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the

ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writ- jury determines -- in accordance with Rule 104(b) -- any issue about whether:

ing, re- cord ing, or pho- to- grap h pro- duce d at the trial is the ori- gin- al, or (c) whet her oth- er evid ence of con- tents cor- rectl y re- flect s the con- tents , the is- sue is for the trier of fact to de- ter- min

e as in the case of other issues of fact.

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence

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Committee Note

The language of Rule 1008 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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§ 1101.syn Synopsis to Chapter 1101: RULE 1101

1101.01 Official Text

1101.02 Editorial Explanatory Comment

[1] Rationale for Inapplicability of Evidence Rules to Certain Proceedings

[2] Situations in Which Some Evidence Rules Might Be Applicable

[3] Supervised Release Revocation Proceedings

[4] Suppression Hearings

[5] Psychiatric Release and Commitment Proceedings

[6] Arbitrations and Administrative Hearings

[7] Juvenile Transfer Proceedings

[8] Preliminary Injunction Proceedings

[9] Proceedings Listed in Rule 1101(e)

[10] Non-Jury Trials: An Anomaly?

[11] Military Courts

1101.03 Annotated Cases

[1] Rule 1101(a) -- Courts and Magistrates

[2] Rule 1101(b) -- Proceedings Generally

[a] Rule 1101(b) -- Administrative Proceedings

[b] Rule 1101(b) -- Arbitration Proceedings

[c] Rule 1101(b) -- Bankruptcy Cases

[d] Rule 1101(b) -- Class Action Settlement Fairness Hearing

[e] Rule 1101(b) -- Forfeiture Proceedings

[f] Rule 1101(b) -- Nonjury Trials

[g] Rule 1101(b) -- Preliminary Injunction Proceedings

[3] Rule 1101(c) -- Rule of Privilege

[4] Rule 1101(d)(1) -- Rules Inapplicable -- Preliminary Questions of Fact -- Suppression Hearing

[5] Rule 1101(d)(2) -- Rules Inapplicable -- Grand Jury

[6] Rule 1101(d)(3) -- Rules Inapplicable -- Miscellaneous Proceedings

[a] Rule 1101(d)(3) -- Extradition and Rendition Proceedings

[b] Rule 1101(d)(3) -- Immigration Proceedings

[c] Rule 1101(d)(3) -- Parole, Probation, and Supervised Release Revocation Proceedings

[d] Rule 1101(d)(3) -- Penalty Phase of Capital Trial

[e] Rule 1101(d)(3) -- Release From Psychiatric Commitment Proceedings

[f] Rule 1101(d)(3) -- Sentencing

1101.04 Legislative History

[1] Advisory Committee's Note

[2] House Subcommittee on Criminal Justice Notes

[3] Report of the House Committee on the Judiciary

[4] 1993 Amendment Committee Note

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1101.01 Official Text

Rule 1101. Applicability of Rules

(a) *Courts and judges*. -- These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) *Proceedings generally*. -- These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) *Rule of privilege*. -- The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) *Rules inapplicable*. -- The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. -- The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. -- Proceedings before grand juries.

(3) Miscellaneous proceedings. -- Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) *Rules applicable in part*. -- In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under *section 706(2)(F) of title 5, United States Code*; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (*7 U.S.C. 292*), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (*7 U.S.C. 499f, 499g(c)*); naturalization and revocation of naturalization under sections 310-*318 of the Immigration and Nationality Act* (*8 U.S.C. 1421-1429*); prize proceedings in admiralty under *sections 7651-7681 of title 10, United States Code*; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (*15 U.S.C. 522*); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935 (*15 U.S.C. 715d*); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (*19 U.S.C. 1581-1624*), or under the Anti-Smuggling Act (*19 U.S.C. 1701-1711*); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (*21 U.S.C. 301-392*); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (*22 U.S.C. 256-258*); habeas corpus under *sections 2241-2254 of title 28, United States Code*; motions to vacate, set aside or correct sentence under *section 2255 of title 28, United States Code*; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (*46 U.S.C. 679*); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved March 3, 1925 (*46 U.S.C. 781-790*), as implemented by *section 7730 of title 10, United States Code*.

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1101.02 Editorial Explanatory Comment

[1] Rationale for Inapplicability of Evidence Rules to Certain Proceedings

With the exception of rules of privilege, which apply at all stages of all actions, cases, and proceedings, n1 the Federal Rules of Evidence do not ordinarily govern preliminary stages of litigation, criminal or civil, n2 or preliminary factfinding relating to the application of an evidentiary Rule, as opposed to factfinding relating to the merits of the case. Nor do the Rules generally apply to post-adjudicative hearings such as sentencing proceedings. n3

It should be remembered, however, that even where the Rules do not apply, they may be helpful in assessing the reliability of statements made in such proceedings. n4

[2] Situations in Which Some Evidence Rules Might Be Applicable

Even though Congress has chosen to provide that the Federal Rules of Evidence should not apply during most preliminary and post-trial parts of litigation, the fact remains that many of the Rules will be borrowed and continued in effect during these proceedings. Most of the Congressional concern was with the extension of the hearsay rule outside the trial context. It is difficult to imagine that Congress intended that witnesses should testify without taking an oath, that interpreters should not be provided for non-English speaking persons, and that proper objections should not be made to offers of evidence in proceedings other than trials on the merits. The decisions to date indicate that *Rule 1101* is primarily a restriction on the application of the hearsay rule. n5

[3] Supervised Release Revocation Proceedings

The Federal Sentencing Reform Act of 1984 abolished parole and replaced it with a system of supervised release. *Rule 1101(d)(3)* provides that the Rules of Evidence are not applicable to "sentencing, or granting or revoking probation"; but it makes no reference to supervised release revocation proceedings. Of course, supervised release proceedings did not exist when *Rule 1101* became law. But the absence of a specific reference to these proceedings has created an issue for the Courts to resolve.

In the leading case of *United States v. Frazier, 26 F.3d 110 (11th Cir. 1994)* , Frazier made several interesting

arguments in support of the proposition that the Evidence Rules are applicable to supervised release revocation proceedings. These arguments were: (1) supervised release proceedings are not specifically listed in *Rule 1101(d)*; (2) *Rule 1101* was amended after supervised release proceedings were instituted in 1984 (for example, to refer to "magistrate judges" rather than "magistrates"), and yet no attempt was made to amend subdivision (d) to include a reference to supervised release proceedings; (3) the Criminal Rules have been amended to refer to supervised release proceedings, while the Evidence Rules have not; and (4) supervised release proceedings are different from parole and probation proceedings, because supervised release is statutorily required in specified circumstances, whereas parole and probation are discretionary acts of grace.

The Court in *Frazier* rejected all these arguments. It reasoned that the failure to amend *Evidence Rule 1101* to refer to supervised release revocation proceedings was not dispositive, "because we believe that Congress considered probation revocation and supervised release revocation so analogous as to be interchangeable." It also concluded that supervised release is "conceptually the same" as parole. A proceeding to revoke either parole or supervised release is by definition more flexible than a trial, and therefore neither proceeding should be constrained by the Rules of Evidence. Finally, the Court observed that as with parole revocation proceedings, the subject of a supervised release proceeding remains protected by minimal evidentiary standards of reliability. The Courts that have dealt with the question have all held, consistently with *Frazier*, that the Federal Rules of Evidence (with the exception of privilege rules) are inapplicable to supervised release revocation proceedings. n6

[4] Suppression Hearings

Unlike proceedings to obtain a warrant, suppression hearings are not specifically covered by the *Rule 1101(d)* exclusion. This has not deterred most Courts, however, from holding that the Federal Rules are not applicable to suppression hearings. The Supreme Court dealt with the question in *United States v. Matlock, 415 U.S. 164 (1974)* , a pre-Rules case which discussed the then-proposed *Rule 1101*. The Court reasoned that suppression hearings are essentially preliminary hearings on the admissibility of evidence, and are thus controlled by the general provision of *Rule 1101(d)* exempting the determination of preliminary questions of fact from the Evidence Rules. The Court also relied on the rationale that "in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." In other words, the Evidence Rules are by and large designed to protect against misuse of information by the jury; where the proceedings are before the Judge, the need for the Evidence Rules diminishes. The *Matlock* Court concluded that at a suppression hearing "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." n7

There is one important case, however, that holds that at least certain Evidence Rules are applicable in suppression hearings. In *United States v. Brewer, 947 F.2d 404 (9th Cir. 1991)* , the defendant moved to sequester a police officer who was scheduled to testify after another police officer at a suppression hearing. The Trial Judge denied the motion on the ground that *Rule 615* (requiring sequestration upon motion) was not applicable to suppression hearings. The two police officers testified virtually identically. The Ninth Circuit reversed Brewer's conviction due to error at the suppression hearing. The panel addressed the government's argument that *Rule 1101(d)(1)* (exempting preliminary determinations from the Evidence Rules) covered suppression hearings. The Court noted that *Rule 1101(d)(1)* essentially restates *Rule 104*, and elaborated as follows:

> The commentary that follows *Rule 104* makes it clear that this section is limited to the preliminary requirements or conditions that must be proved before a particular rule of evidence may be applied. Notes of the Advisory Committee on 1972 Proposed Rules. The examples of foundational facts that may be proved without complying with the exclusionary Rules of Evidence include the qualifications of an expert, the unavailability of a witness whose former testimony is being offered, the presence of a third person during a conversation between an attorney and client, proof of the interest of the declarant in determining whether the out-of-court statement threatens that interest, the competency of a child to

testify as a witness.

The *Brewer* Court distinguished "between the type of proof that may be presented as a foundation for the admission of evidence, such as a declaration against interest, or a dying declaration, and procedural rules that have been developed to enhance the search for the truth." It construed *Rule 1101(d)* to mean "that the traditional exclusionary rules do not apply, but that procedural regulation of the process of admission and exclusion remains applicable." The *Brewer* Court found that *Rule 615* was a procedural rule designed to guarantee a fair proceeding, as opposed to a rule dealing with the admissibility of evidence. Therefore *Rule 615* was fully applicable in suppression hearings. The Court distinguished the Supreme Court's decision in *Matlock,* which held specifically that the hearsay rule is inapplicable in suppression hearings. The *Brewer* Court stated that *Matlock* "does not support the notion that procedural rules designed to protect the integrity of the fact finding process are inapplicable in a suppression hearing."

We believe that the distinction put forth in *Brewer*, between exclusionary rules (that are not applicable to preliminary, Judge-conducted proceedings) and rules guaranteeing procedural fairness (that are applicable to such proceedings) has much to commend it. The distinction is consistent with the policy of *Rule 104*; and *Rule 1101* is simply a particularized application of the principles of *Rule 104*.

[5] Psychiatric Release and Commitment Proceedings

Rule 1101 is silent on whether it exempts proceedings for psychiatric commitment and release from the application of the Evidence Rules. In *United States v. Palesky, 855 F.2d 34 (1st Cir. 1988)* , the Court held that the Rules of Evidence are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility. The Court analogized such hearings to bail release hearings, which are specifically exempted from the Evidence Rules, and further reasoned that a Court determining the question of psychiatric commitment or release "should not be too confined in the kinds of evidence it considers." Thus, the more flexible and informal the proceedings, the more the need for exemption from the Evidence Rules. The reasoning of *Palesky* and is consistent with the rationale for exempting other types of proceedings from the Evidence Rules, such as bail hearings and sentencing hearings.

[6] Arbitrations and Administrative Hearings

Rule 1101 does not specifically exempt arbitrations and administrative proceedings from the Rules of Evidence. However, those proceedings are inferentially so exempted, because *Rule 1101(a)* provides that the Rules are applicable to "courts," and arbitration and administrative proceedings are not considered "court" proceedings. Nor are they considered "civil actions and proceedings" within the meaning of *Rule 1101(b)*. Despite the lack of specificity in the Rule, the Courts have had no problem in exempting arbitrations and administrative hearings from the Evidence Rules. n8 Besides the implicit text of *Rule 1101(a)*, the Courts rely on the rationale that administrative and arbitration hearings are designed to be informal and flexible--the nature of the proceedings would be undermined by formal, trial-geared rules. For good measure, there are a plethora of statutes and regulations providing that particular administrative and arbitration proceedings are outside the scope of the Federal Rules of Evidence. n9

As with other proceedings to which the Federal Rules are inapplicable, administrative proceedings are not devoid of evidentiary protection. The Federal Rules are often used as "a helpful guide to proper hearing practices." n10 And there are many cases, rules, and statutes imposing requirements on the presentation of evidence that are analogous to those found in the Federal Rules. n11

[7] Juvenile Transfer Proceedings

The Evidence Rules have been held inapplicable to proceedings brought under 8 U.S.C. § 5032 to determine whether a juvenile should be tried as an adult. *Rule 1101* is silent as to such proceedings, but the Courts have reasoned that a transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial."

Government of Virgin Islands ex rel. A.M., 34 F.3d 153 (3rd Cir. 1994) . The court in *A.M.* stated that juvenile transfer proceedings were most analogous to preliminary examinations in criminal cases, which are specifically exempted by *Rule 1101(d)(3)*. n12

[8] Preliminary Injunction Proceedings

Rule 1101 is silent on whether the Federal Rules are applicable to preliminary injunction proceedings. The rather sparse case law on the matter provides that the Evidence Rules are not applicable to such proceedings when they are held independently from the trial. There are at least three reasons for this exemption. First is the familiar principle that the Federal Rules are really designed to protect against misuse of information by juries, and therefore they should not be used to hinder Judges in making preliminary determinations, because Judges can properly weigh information that would be inadmissible at a trial. Second, when preliminary injunction hearings are held independently from a trial on the merits, there is a need for speed and flexibility that is inconsistent with the formal Rules of Evidence. Third, *Fed. R. Civ. P. 65(a)* appears to contemplate that a Judge can and will consider inadmissible evidence in determining whether a preliminary injunction will be issued. *Rule 65(a)(2)* provides that where consolidation of the preliminary injunction proceeding and the trial is not ordered, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." This provision presumes that some of the evidence considered at the preliminary injunction hearing would *not* be admissible if offered at trial. It also presumes, reasonably enough, that if the preliminary injunction proceeding *is* consolidated with a trial, then the Rules of Evidence will apply.

The court in *SEC v. General Refractories Co., 400 F. Supp. 1248 (D.D.C. 1975)* , summed it up as follows:

> *Rule 65(a) of the Federal Rules of Civil Procedure* contemplates the introduction at a hearing on a preliminary injunction of evidence which would not be admissible in a final trial on the merits. This relaxation of the rule of evidence at the preliminary injunction stage is consonant with one of the key purposes of a preliminary injunction: the need for speedy relief. Sworn affidavits and investigatory transcripts of testimony taken under oath are properly admitted as probative evidence at a preliminary injunctive hearing, where, as here, testimony of numerous live witnesses is simply not practical and the magnitude of inquiry would preclude any meaningful "trial type" hearing at a preliminary stage.

[9] Proceedings Listed in Rule 1101(e)

Rule 1101(e) sets forth a laundry list of proceedings in which the Evidence Rules are applicable to the extent that matters of evidence are not governed by other rules or statutes. It appears that this provision is devoid of substantive effect. All of the proceedings specified are civil actions or proceedings tried in the Federal Courts (e.g., habeas corpus proceedings). The Evidence Rules are already applicable to these proceedings under the provisions of *Rule 1101(a)* and *(c)*. So the only apparent purpose for subdivision (e) is to highlight the fact that other rules and statutes might trump the Evidence Rules in particular circumstances. Yet this merely states the obvious. There are in fact over 100 statutes that trump the Evidence Rules in specific circumstances. *Rule 1101(e)* provides some (incomplete) guidance, but it appears to have no independent content.

An argument can be made that *Rule 1101(e)* should be abrogated, given the fact that it makes no attempt to be comprehensive and has no substantive effect. On the other hand, it appears to be doing no harm, and can be said to usefully highlight the relationship between the Evidence Rules and some of the evidentiary law outside those Rules.

It could also be argued that *Rule 1101(e)* should be retained because it is necessary to prevent the enumerated statutes from being superseded by the later-enacted Evidence Rules. But these independent statutes will not be superseded if *Rule 1101(e)* is abrogated. This is because the Evidence Rules are written so as not to supersede *any* statutory rule of evidence. The statutory rules of evidence generally govern one of five topics: (1) presumptions; (2) relevance and

prejudice; (3) privilege; (4) hearsay; and (5) authentication. On none of these topics do the Evidence Rules preclude statutory authority from determining whether evidence is admissible. For example, *Rule 301* provides a rule on presumptions to the extent "not otherwise provided for by Act of Congress." *Rule 402* says that relevant evidence is admissible, unless otherwise provided by Act of Congress, etc. *Rule 501* provides for a federal common law of privilege except as otherwise provided by Act of Congress, etc. *Rule 802* provides that hearsay is not admissible except as otherwise provided by Act of Congress, etc. And *Rule 901* governs authenticity, but does not purport to supersede statutes that provide for authentication; the examples in 901 are illustrative only.

[10] Non-Jury Trials: An Anomaly?

Many of the proceedings conducted outside the purview of the Evidence Rules are preliminary proceedings in which the Trial Judge operates as a factfinder. As stated above, a major justification for exemption of such proceedings from the Federal Rules is that the Judge is the factfinder, and the Judge will not be misled by evidence that would be inadmissible if offered at a trial. For example, a Judge, unlike a jury, will be able to weigh inadmissible hearsay "for what it's worth." But if that premise is accepted, one might wonder why the Evidence Rules (or at least why certain Evidence Rules) should be applicable in bench trials.

It should be noted that at least two Evidence Rules by their terms operate more permissively in bench trials, on the rationale that the Trial Judge can properly assess the evidence that might improperly affect a jury. Under *Rule 403*, evidence proffered in a bench trial cannot be excluded on grounds of prejudice or confusion. See *Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517 (5th Cir. 1981)* ("*Rule 403* assumes that a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence"). And the limitations added to *Rule 703* in 2000 apply only in jury trials.

On the other hand, the hearsay rule has been held fully applicable in bench trials. As the Court stated in *In re Oil Spill by Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992)* :

> During the damages trial the district court admitted a great deal of evidence it characterized as hearsay. It did so because it thought that if the rule were to be applied the trial would be too cumbersome. Yet the hearsay rule applies in all trials -- jury and bench, big and small. *Rule 101*, *1101*; *Walton v. United Consumers Club, Inc., 786 F.2d 303, 313 (7th Cir. 1986)* . A defendant faced with a single $200 million claim is no less entitled to the protection of the rule than is a person defending against 200 claims for $1 million each, or 2,000 claims for $100,000. See, e.g., *UNR Industries, Inc. v. Continental Casualty Co., 942 F.2d 1101, 1107 (7th Cir. 1991)* (enforcing the rules of evidence in a multi-million dollar case with approximately 100,000 claimants).

The *Amoco Cadiz* Court has certainly read *Rule 1101* correctly. But the question is, why is the Rule as it is? If a Trial Judge can reliably consider hearsay in determining whether coconspirator testimony is admissible, or whether the defendant being sentenced sold a certain amount of cocaine, why can't the Trial Judge reliably consider the same evidence in a trial on the merits? Certainly there is a tension under current law between the rationale for exempting preliminary determinations from the Evidence Rules and the application of some of those Rules in bench trials.

Of course, no reasonable person could advocate that *all* of the Evidence Rules should be abrogated in bench trials. For example, rules on sequestration of witnesses and the oath requirement, and the rules on judicial notice and presumptions, are necessary to promote accurate factfinding even in a bench trial.

[11] Military Courts

Since September 1, 1980, military courts-martial have been using the Military Rules of Evidence. These rules were implemented by Executive Order, pursuant to the President's authority in Article 36, Uniform Code of Military Justice,

10 U.S.C.A. §§ 801-940, to prescribe procedures and modes of proof in cases tried by courts-martial. Implementation of the Rules is generally designed to adopt the Federal Rules of Evidence. Sections I, II, IV and VI-XI of the Military Rules of Evidence follow Articles I, II, IV and VI-XI of the Federal Rules and adopt those rules, unless such adoption is impracticable, contrary to or inconsistent with the Uniform Code of Military Justice. The Rules apply only to criminal proceedings and throughout substitute the words "military judge" for the term "court," as used in the Federal Rules. Section III of the Military Rules addresses the exclusionary rules concerning self-incrimination, search and seizure, and eyewitness identification. Of particular note are rules governing procedures for litigating constitutional issues, an innovative rule governing bodily views and intrusions, and a rule that governs examination of the accused. Section V of the Military Rules departs from the Federal Rules and continues the present military practice of detailing specific rules of privilege, rather than adopting the Federal Rules approach of looking to development of privileges under common law. The Military Rules are analyzed in S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules Of Evidence Manual.

FOOTNOTES:

(n1)Footnote 1. See, e.g., *United States v. Eirven, 987 F.2d 634 (9th Cir. 1993)* (it was improper to impose an enhanced sentence where the defendant would probably have to use privileged information in order to challenge the enhancement).

(n2)Footnote 2. See, e.g., *In re Subpoena to Testify Before Grand Jury, 39 F.3d 973 (9th Cir. 1994)* (under *Rule 1101*, neither the hearsay rule nor the personal knowledge requirement is applicable to grand jury proceedings). See also *Thompson v. Board of Education, 71 F.R.D. 398 (W.D. Mich. 1976)* (rules of evidence inapplicable in a preliminary hearing to determine whether a class should be certified).

(n3)Footnote 3. See, e.g., *United States v. Crosby, 397 F.3d 103 (2d Cir. 2005)* (judicial factfinding in sentencing is not limited by the Federal Rules of Evidence); *United States v. Davis, 170 F.3d 617 (6th Cir. 1999)* (hearsay evidence is admissible in sentencing proceedings under the Federal Sentencing Guidelines); *United States v. McGill, 32 F.3d 1138 (7th Cir. 1994)* (hearsay rule is inapplicable in sentencing proceedings).

(n4)Footnote 4. See, e.g., *United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)* (while evidence rules do not apply at sentencing, evidence must still meet minimum standards of reliability); *United States v. Atkin, 29 F.3d 267 (7th Cir. 1994)* ("hearsay is a staple" in sentencing proceedings, so long as it carries minimum indicia of reliability).

(n5)Footnote 5. See, e.g., *McMorrow v. Schweiker, 561 F. Supp. 584 (D.N.J. 1982)* (the principal significance of *Rule 1101*'s inapplicability to administrative agency hearings is "that ordinarily hearsay evidence is routinely received," but "[e]vidence lawfully received need not be accepted as true merely because it is admissible").

(n6)Footnote 6. See, e.g., *United States v. Redd, 318 F.3d 778 (8th Cir. 2003)* (Federal Rules of Evidence are not applicable to supervised release revocation proceedings; however, minimal standards of reliability must be met); *United States v. Portalla, 985 F.2d 621 (1st Cir. 1993)* ; *United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991)* (at a supervised release revocation proceeding, a "judge may consider hearsay if it is proven to be reliable"); *United States v. Walker, 117 F.3d 417 (9th Cir. 1997)* .

(n7)Footnote 7. See also *United States v. Jackson, 213 F.3d 1269 (10th Cir. 2000)* (hearsay statement properly credited at a suppression hearing; the Federal Rules of Evidence do not apply to suppression hearings); *United States v. Schaefer, 87 F.3d 562 (1st Cir. 1996)* ("[A] judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability.").

(n8)Footnote 8. See, e.g., *Renteria-Gonzalez v. INS, 322 F.3d 804 (5th Cir. 2003)* (Federal Rules of Evidence are not applicable in immigration proceedings); *Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)* (arbitrators are not bound by rules of evidence); *Woolsey v. National Transp. Safety Bd., 993 F.2d 516 (5th Cir. 1993)* (Evidence Rules inapplicable in NTSB proceedings); *American Coal Company v. Benefits Review Board, 738 F.2d 387 (10th Cir. 1984)* (Evidence *Rule 301* not applicable in an administrative hearing held under the Black Lung Benefits Act, because such a

proceeding is not in the Federal Court); *Yanopoulos v. Dept. of the Navy, 796 F.2d 468 (Fed. Cir. 1986)* (leading questions rule does not apply to Merit Systems Protection Board hearings); *Dallo v. INS, 765 F.2d 581 (6th Cir. 1985)* (deportation proceedings are administrative in nature and therefore the Federal Rules of Evidence do not apply).

(n9)Footnote 9. See, e.g., 8 C.F.R. 242.14(c) (in immigration proceedings, "the special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case"); *5 C.F.R. 1201.62(a)* (in MSPB hearings, the hearing examiner has broad discretion to admit most forms of evidence, including that which is irrelevant, immaterial, or repetitious). *9 U.S.C. §§ 1-9* (governing admission of evidence in arbitration proceedings).

(n10)Footnote 10. *Yanopoulos v. Dept. of the Navy, 796 F.2d 468 (Fed. Cir. 1986)* .

(n11)Footnote 11. See, e.g., *Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983)* (in immigration deportation proceedings, the Federal Rules are not applicable, but hearsay affidavits must at least be shown to be authentic, and the government must make a reasonable attempt to produce the affiant for cross-examination).

(n12)Footnote 12. See also *United States v. Anthony Y, 990 F. Supp. 1310 (D.N.M. 1998)* (juvenile court records admissible even though hearsay, because the Evidence Rules do not apply to juvenile transfer hearings).

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PART TWO: THE RULES THEMSELVES
Article X. Contents Of Writings, Recordings, And Photographs
CHAPTER 1101 RULE 1101

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1101.03 Annotated Cases

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[1] Rule 1101(a) -- Courts and Magistrates

Air-Sea Brokers, Inc. v. United States, 454 F. Supp. 451 (Cust. Ct. 1978) : "Evidence admissible under the rules of evidence applicable in the courts of the United States are [*sic*] admissible in the Customs Court. Rule 10.4(a) of this Court so provides."

[2] Rule 1101(b) -- Proceedings Generally

[a] Rule 1101(b) -- Administrative Proceedings

Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349 (2d Cir. 1977) : The Court implied that the Administrative Law Judge hearing evidence on the navigability of a river should follow the Federal Rules of Evidence. In *NLRB v. Stark*, n1 the Court observed that the governing statute provides that unfair labor practice proceedings by the NLRB "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts."

Ortiz v. Eichler, 794 F.2d 889 (3d Cir. 1986) : Affirming an order requiring state officials to permit cross-examination of adverse witnesses before denying or terminating various federally-funded public assistance benefits, the Court approved the admission of hearsay falling within recognized exceptions. In *Heinze v. Heckler*, n2 the District Court remanded a disability claim to the Secretary of HHS, finding that an Administrative Law Judge erred in rejecting the diagnosis of the plaintiff's treating physician, a cardiologist, on the ground that a diagnosis of cardiac neurosis must be made by a psychiatrist. In *McMorrow v. Schweiker*, n3 the District Court affirmed a decision denying a claim for widow's insurance benefits, finding insufficient proof of a marriage between the claimant and the deceased. The Court observed that the principal significance of *Rule 1101*'s inapplicability to administrative agencies is "that ordinarily hearsay evidence is routinely received," but also commented that "[e]vidence lawfully received need not be accepted as true merely because it is admissible."

Walter N. Yoder & Sons v. NLRB, 754 F.2d 531 (4th Cir. 1985) : The Court enforced an order requiring an employer to cease and desist withholding information from a union. It noted that generally the Board must not rely upon hearsay evidence, but found that certain hearsay was not relied upon for its truth, but to show the basis for the union's request for information. In *McCrea v. Heckler*, n4 an opinion remanding a disability claim to the Secretary of HHS, the Distict Court observed that relevant evidence may be excluded if it would be wasteful to admit it, but suggested that it should not be excluded simply because of the hearing demands on the agency.

Central Freight Lines v. NLRB, 653 F.2d 1023 (5th Cir. 1981) : The Court modified a Board order on the ground that the Administrative Law Judge improperly relied on the residual exception to admit an affidavit of a deceased employee without any adequate showing of trustworthiness under circumstances in which it was the only support for a portion of the order. In *NLRB v. Jacob E. Decker & Sons*, n5 after noting that the NLRB "is required to conduct its proceedings, 'so far as practicable,' in accord with the Federal Rules of Evidence," the Court held that the Board erred in deciding that it could exclude all convictions for any crimes other than those involving dishonesty or false statement without engaging in balancing under *Rule 609(a)(1)*. Departures from the Federal Rules of Evidence must be justified on the basis of peculiar characteristics of administrative hearings. See also *NLRB v. Houston Distribution Servs.* n6(the agency should follow "accepted rules of competency").

Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981) : The Court held that the Social Security Administration may adopt a rule of convenience that would result in the notice of adjudicative facts whenever the Administrative Law Judge knows of information that would be useful in making a decision. However, a claimant must be afforded an opportunity to present information that might bear upon the propriety of taking such notice or on the truth of the matter to be noticed. Such an opportunity was lacking in this case, so it was remanded.

NLRB v. United San. Serv., 737 F.2d 936 (11th Cir. 1984) : The Court held that an Administrative Law Judge erred in an unfair labor practice case by admitting an affidavit of a former employee who had died before the hearing. The Court found "no reason why the hearsay rules should not govern here," since the NLRB is directed to conduct proceedings insofar as practicable pursuant to the Rules of Evidence.

[b] Rule 1101(b) -- Arbitration Proceedings

National Post Office Mailhandlers v. United States Postal Serv., 751 F.2d 834 (6th Cir. 1985) : The Court affirmed a judgment for the Postal Service following arbitration decisions in its favor concerning disciplinary actions against an employee. It noted that the formal rules of evidence do not apply to arbitration proceedings and that the arbitrator properly excluded cumulative testimony.

[c] Rule 1101(b) -- Bankruptcy Cases

In re Clifford, 566 F.2d 1023 (5th Cir. 1978) : The Court utilized *Rule 901* in reviewing a bankruptcy proceeding.

[d] Rule 1101(b) -- Class Action Settlement Fairness Hearing

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) (en banc): In reviewing an order imposing Rule 11 sanctions, the Court noted that sanctioned counsel could have, but did not, make an argument that affidavits should not have been admitted at a class action settlement fairness hearing because no case expressly holds

that *Rule 1101(d)* suspends the usual rules of evidence for fairness hearings.

[e] Rule 1101(b) -- Forfeiture Proceedings

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (en banc): In holding that continuation of an *ex parte* restraint of assets subject to forfeiture in the event of conviction requires a postrestraint, pretrial adversary hearing as to probable cause that the defendant committed the crimes providing a basis for forfeiture, the Court held that the Rules of Evidence do not apply in the hearing.

United States v. Carrell, 252 F.3d 1193 (11th Cir. 2001) : The Court held that hearsay testimony may be used to establish probable cause in a civil *in rem* forfeiture proceeding.

[f] Rule 1101(b) -- Nonjury Trials

In re Oil Spill by Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) : In a nonjury damages trial arising from an oil spill in the English Channel, the Trial Judge admitted considerable evidence it characterized as hearsay, thinking it would be too cumbersome to apply the rule. The Court noted that the hearsay rule applies in all trials -- jury and bench, big and small -- but after considering available exceptions found no reason to upset the damages award on evidentiary grounds.

[g] Rule 1101(b) -- Preliminary Injunction Proceedings

SEC v. General Refractories Co., 400 F. Supp. 1248 (D.D.C. 1975) : In an action by the SEC to enjoin use of manipulative and deceptive devices in security transactions, the District Judge admitted affidavits by an SEC staff attorney into evidence at the hearing on a preliminary injunction, noting that *Fed. R. Civ. P. 65(a)* contemplates the introduction of evidence that is not admissible in a final trial on the merits.

[3] Rule 1101(c) -- Rule of Privilege

United States v. Eirven, 987 F.2d 634 (9th Cir. 1993) : An attorney for a defendant convicted of armed robbery filed an objection to the presentence report, suggesting that the defendant's criminal history was overstated and that his prior convictions were for acts committed by someone else. The Trial Judge found that the defendant had attempted to mislead and enhanced the sentence for willful obstruction of justice. The Court vacated the enhanced sentence on the ground that it was unclear whether the objection had been based on information that the defendant wanted the Judge to have or on the beliefs of counsel. Since anything that the lawyer wrote was likely based upon privileged communications that could not be revealed, the Court found that there was no need for further factfinding and that obstruction of justice was not an available enhancement.

[4] Rule 1101(d)(1) -- Rules Inapplicable -- Preliminary Questions of Fact -- Suppression Hearing

United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981) : The Court recognized that "a defendant has some right to cross-examine Government witnesses at a suppression hearing," and that the right is important enough that "any limitations on this right (beyond the typical evidentiary rules limiting its scope to the subject matter of direct examination and to matters affecting witness credibility, *Rule 611(b)*) must be justified by weighty considerations."

United States v. Tussell, 441 F. Supp. 1092 (M.D. Pa. 1977) : Denying a motion to suppress evidence seized

through electronic surveillance, the Judge noted that hearsay evidence is admissible at a hearing on the motion, "although the court remains obligated to weigh the evidence and discount that which is less reliable."

United States v. Lee, 541 F.2d 1145 (5th Cir. 1976) : The Court reversed a decision suppressing evidence seized without a search warrant, holding that the hearsay rule and other exclusionary rules did not apply to hearings *in limine* before a Judge.

United States v. Ienco, 92 F.3d 564 (7th Cir. 1996) : The Court vacated a conviction for offenses arising out of an unsuccessful extortion scheme, finding that the Trial Judge "made a serious error at the suppression hearing." At the hearing, defense counsel called a witness who had first told him that she had seen facts consistent with the defendant's version of events, but the day before the hearing she changed her story. When she testified at the hearing as she said she would a day earlier, defense counsel asked leading questions to which the Judge sustained objections. The Court observed that *Rule 607* permits any party to impeach any witness and "the asking of leading questions" is a standard technique of impeachment. The Judge compounded his error in sustaining objections by striking the testimony of the witness as a sanction. The Court concluded that "when, as in a suppression hearing, a jury is not involved, there is no reason for the judge to become preoccupied with the niceties of the rules of evidence."

United States v. Elliott, 893 F.2d 220 (9th Cir. 1990) , *amended*, *904 F.2d 25 (9th Cir. 1990)* : Reversing an order suppressing evidence seized in a narcotics case, the Court held that testimony at a probable cause hearing from a woman who had lived with the defendant regarding his marijuana-growing operation is not barred, and should not be discounted, merely because it was delivered in response to leading questions. In *United States v. Brewer, 947 F.2d 404 (9th Cir. 1991)* , the Court reversed a conviction for possession of cocaine, holding that a witness should have been excluded from a suppression hearing on the defendant's motion. Under *Rule 1101(d)(1)*, the traditional exclusionary rules do not apply, but the procedural rules regulating the process of admission and exclusion remain applicable. Because *Rule 615* is a procedural rule directed at the fairness of the proceedings, and not a rule governing the admissibility of evidence, it applies in suppression hearings.

United States v. Jackson, 213 F.3d 1269 (10th Cir. 2000) : At a hearing to suppress evidence allegedly obtained in violation of the *Fourth Amendment*, the government introduced a hearsay statement to prove that a third party consented to the challenged search. The Court found no error, because the Rules of Evidence do not apply to suppression hearings. In *United States v. Merritt*, n7 two police officers' testimony at a suppression hearing as to what another officer told them before a vehicle stop and search was excluded as hearsay. Reversing a ruling suppressing the evidence, the Court noted that hearsay need not be excluded at a suppression hearing.

United States v. Sorrells, 714 F.2d 1522 (11th Cir. 1983) : Although the Rules do not apply in a suppression hearing, the Court properly noted that the Trial Judge made an inappropriate comment at a hearing on a motion to suppress when he indicated that he had personal knowledge of the reliability of an informant. In *United States v. Bent-Santana*, n8 the Court declined to rule on whether certain Panamanian documents qualified for admission under *Rule 803(8)*, since they were used in a suppression hearing in which hearsay is admissible.

[5] Rule 1101(d)(2) -- Rules Inapplicable -- Grand Jury

United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975) : This case is a good reminder that common-law privileges remain in force before grand juries.

In re Grand Jury Investigation, 412 F. Supp. 943 (E.D. Pa. 1976) : Citing Rules 501 and 1101, the Court held that the work product doctrine was among the privileges that could be invoked in a grand jury investigation.

In re Special Nov. 1975 Grand Jury, 433 F. Supp. 1094 (N.D. Ill. 1977) : Two persons, who were suspected of improprieties in transactions that they handled as trust officers for a bank, submitted personal papers and records for inspection by an accounting firm with the understanding that they would be treated in the same fashion as the bank's corporate records. A grand jury, already possessing 38 auditors' reports, subpoenaed the papers and records submitted to the accounting firm. Rejecting under *Rule 1101(d)(2)* a claim that *Rule 408* barred disclosure of the papers and records, the District Judge denied a motion to quash the grand jury subpoena issued to the accounting firm.

United States v. Callahan, 442 F. Supp. 1213 (D. Minn. 1978) , *rev'd on other grounds*, *596 F.2d 759 (8th Cir. 1979)* : Relying on *Rule 1101(d)*, the Court held that polygraph evidence inadmissible at trial could be presented to a grand jury.

In re Subpoena to Testify Before Grand Jury, 39 F.3d 973 (9th Cir. 1994) : An attorney sought to quash a grand jury subpoena that demanded disclosure of the identity of a client who paid the attorney with counterfeit money. The attorney argued that he lacked the personal knowledge to testify on the matter, because someone else in his office physically received money from the clients and prepared the bank deposits. The Court refused to quash the subpoena, noting that under *Rule 1101*, neither the hearsay rule nor the personal knowledge requirement is applicable to grand jury proceedings. The attorney could "tell his receptionist or office manager to give him the cash receipts and other records" and ask them how the office came into possession of the counterfeit money.

[6] Rule 1101(d)(3) -- Rules Inapplicable -- Miscellaneous Proceedings

[a] Rule 1101(d)(3) -- Extradition and Rendition Proceedings

United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997) : Reversing an order preventing extradition, the Court held that the Rules of Evidence are not applicable to extradition proceedings, so hearsay statements accusing the petitioner of bribery were admissible.

Messina v. United States, 728 F.2d 77 (2d Cir. 1984) : Affirming the denial of habeas corpus relief to two men extradited to Italy, the Court noted that the Rules of Evidence do not apply in extradition proceedings.

Bovio v. United States, 989 F.2d 255 (7th Cir. 1993) : The Court held that hearsay was admissible in a hearing to extradite the petitioner to Sweden, as the Rules are inapplicable to extradition proceedings.

[b] Rule 1101(d)(3) -- Immigration Proceedings

Renteria-Gonzalez v. INS, 322 F.3d 804 (5th Cir. 2003) : In the course of denying a petition for review of the Board of Immigration Appeals' decision approving removal based upon a conviction for transporting illegal aliens, the Court noted that I-213 forms, which corroborated the testimony of an INS agent, were admissible because the hearsay rule is inapplicable in immigration proceedings.

[c] Rule 1101(d)(3) -- Parole, Probation, and Supervised Release Revocation Proceedings

United States v. Taveras, 380 F.3d 532 (1st Cir. 2004) : The defendant's supervised release had been revoked on the ground that he had threatened a woman with a gun and assaulted her. As proof of the threat and the assault, the government introduced the woman's hearsay statement made to a law enforcement officer. The Court held that the introduction of the hearsay was error, and vacated the judgment, noting that the hearsay statement was not an excited utterance, because there was a substantial delay between the threat/assault and the woman's statement. Moreover, the hearsay statement lacked any other indicia of reliability necessary to satisfy the requirements of due process that are applicable to supervised release revocation proceedings. The statement was not corroborated in any way, and the government provided no background details about the declarant or her relationship with the defendant.

United States v. McCallum, 677 F.2d 1024 (4th Cir. 1982) : At a revocation hearing, the District Judge admitted a letter from the probationer's program coordinator and counselor at an Atlanta Salvation Army center explaining why the probationer lost his job and was expelled from the center. Neither the authors of the letter nor the Atlanta probation officer testified. Only a Virginia probation officer testified and he had no personal knowledge of what happened in Atlanta, although he had talked on the phone to the Atlanta probation officer about the probationer's difficulties. The Court found no confrontation problem in the Judge's reliance on the letter in finding a violation of probation conditions.

United States v. Verbeke, 853 F.2d 537 (7th Cir. 1988) : The Court affirmed a probation revocation, finding that an investigative report of a treatment center, which related the defendant's effort to fabricate a report of an attack upon him, was properly admitted. Hearsay evidence is admissible in a revocation proceeding, and there was no challenge to the reliability of the report in this case. In *United States v. Smith*, n9 the Court affirmed an order revoking the defendant's probation, but found that it was error (harmless in this case) for the Judge to permit one witness at the revocation hearing to repeat the entire story of another witness. Recognizing that *Rule 1101(d)* provides that, except for privileges, the Rules of Evidence do not apply in revocation hearings, the Court grounded its opinion in the confrontation and cross-examination portions of the Supreme Court's decision in *Gagnon v. Scarpelli*. n10

United States v. Redd, 318 F.3d 778 (8th Cir. 2003) : The Court held that although the Rules of Evidence are not applicable to supervised release revocation proceedings, the Trial Judge must balance the defendant's right to confront a witness against the grounds asserted by the government for not requiring confrontation. The Court found no error in the Judge's use of records of test results: the evidence admitted was reliable and "the de minimis value of testimony from the proposed technician-witnesses did not outweigh the government's inconvenience and expense in making those witnesses available." See also *United States v. Reynolds, 49 F.3d 423 (8th Cir. 1995)* (vacating an order revoking supervised release for failure to balance the defendant's confrontation right against the government's asserted reasons).

United States v. Frazier, 26 F.3d 110 (11th Cir. 1994) : The Court held that proceedings for revocation of supervised release are to be treated like probation revocation proceedings for purposes of the Rule, so hearsay evidence is admissible, subject to due process limitations. In *United States v. Penn*, n11 the Court affirmed a probation revocation, observing that *Rule 1101(d)*'s provision that the Rules do not apply in probation proceedings "has limits in the *Sixth Amendment confrontation clause*." It suggested "that the hearing officer in a probation revocation proceeding must balance the probationer's right to confront and cross-examine witnesses against any good cause asserted by the government for not allowing confrontation."

[d] Rule 1101(d)(3) -- Penalty Phase of Capital Trial

United States v. Fell, 360 F.3d 135 (2d Cir. 2004) : Equating the Rules of Evidence with a defendant's constitutional rights, the District Court held the Federal Death Penalty Act unconstitutional because it provides that the Rules are not applicable to the penalty phase. Vacating the ruling, the Court found this reasoning flawed, as the Rules

"do not set forth the constitutional parameters of admissible evidence"; it noted that the Rules in many cases provide broader protection than the Constitution requires by excluding constitutionally permissible evidence. The Court also noted that the presumption of admissibility of relevant evidence under the Federal Death Penalty Act is "actually narrower" than under *Rule 403*, while the Act does not purport to hold admissible any evidence that could not constitutionally be admitted.

[e] Rule 1101(d)(3) -- Release From Psychiatric Commitment Proceedings

United States v. Palesky, 855 F.2d 34 (1st Cir. 1988) : The Court held that in psychiatric commitment proceedings, involving a defendant who was committed for psychiatric evaluation following a trial in which she was found not guilty by reason of insanity, the Rules of Evidence do not apply. The Court analogized the release proceeding to a bail release hearing.

[f] Rule 1101(d)(3) -- Sentencing

United States v. Simmons, 164 F.3d 76 (2d Cir. 1998) : The Court found no error in enhancing the defendant's sentence for possession of a firearm on the basis of the defendant's statements made during his guilty plea hearing. The guilty plea was later withdrawn, and although *Rule 410* would preclude the admission of such statements at trial, *Rule 410* is not applicable in sentencing proceedings. Besides citing *Rule 1101(d)(3)*, the Court relied on *18 U.S.C. § 3661*, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) : Reviewing a 12-fold, 330-month upward departure from the median of the applicable guideline range in sentencing an alleged terrorist for interstate transportation of explosive devices, the Court held that a *Confrontation Clause* analysis is not appropriate for hearsay admitted at sentencing but that hearsay statements cannot be considered unless other evidence indicates they are reasonably trustworthy. In this case, an informant's statements regarding the defendant's presence in a terrorist training camp in Lebanon were verified by numerous other details in the record. In *United States v. Sciarrino*, n12 the Court, without citing *Rule 1101(d)(3)*, held that hearsay was admissible in proceedings under the Sentencing Guidelines, as it had been previously in sentencing proceedings.

United States v. Roberts, 881 F.2d 95 (4th Cir. 1989) : In affirming convictions and sentences for narcotics offenses, the Court held there was no error when the Trial Judge considered hearsay in determining the sentences.

United States v. McDonald, 964 F.2d 390 (5th Cir. 1992) : The Court held there was no error in relying on hearsay documents prepared by Florida correctional officers in assessing the defendant's career offender status at sentencing, as the documents had sufficient indicia of reliability. In *United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992)* , the Court held there was no *Sixth Amendment* violation when reliable hearsay was used in sentencing the defendant for Clean Water Act violations.

United States v. Davis, 170 F.3d 617 (6th Cir. 1999) : The Court affirmed convictions for telemarketing fraud, holding there was no error when the sentencing Judge considered testimony from an IRS Criminal Investigation Division agent, which was based on her prior conversation with an FBI special agent, regarding a defendant's criminal activities. Under *Rule 1101(d)(3)*, hearsay evidence is admissible in guideline sentencing hearings.

United States v. Atkin, 29 F.3d 267 (7th Cir. 1994) : The Court held there was no error in relying on hearsay in sentencing, where the defendant was provided an opportunity for live questioning had he so chosen.

United States v. Wise, 976 F.2d 393 (8th Cir. 1992) (en banc): The Court held that the *Confrontation Clause* does not apply at sentencing and that corroboration may be sufficient to satisfy due process in establishing the reliability of hearsay at sentencing. Three Judges dissented.

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) : A husband and wife involved in a drug conspiracy were tried separately for their crimes. After the wife was convicted, her lawyer delivered to the Judge letters from four jurors explaining their beliefs that the wife had been severely abused by her husband. The Court found that the Judge's decision not to consider the letters in sentencing was not an abuse of discretion, since a practice of doing so could lead to harassment of jurors.

United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990) : In affirming a sentence for drug offenses, the Court held there was no error in the Judge considering testimony from another trial involving the same conspiracy and noted that the Rules of Evidence that might bar hearsay do not apply to sentencing proceedings. In *United States v. Ruminer*, n13 the Court upheld convictions in a drug case and ruled that the Trial Judge properly considered in sentencing the fact that the defendants supplied false leads to the government during plea discussions. It cited *Rule 1101(d)(3)* and observed that *Rule 410* did not override the general principle that a defendant's conduct could be considered in sentencing.

FOOTNOTES:

(n1)Footnote 1. *NLRB v. Stark, 525 F.2d 422 (2d Cir. 1975)* .

(n2)Footnote 2. *Heinze v. Heckler, 581 F. Supp. 13 (E.D. Pa. 1983)* .

(n3)Footnote 3. *McMorrow v. Schweiker, 561 F. Supp. 584 (D.N.J. 1982)* .

(n4)Footnote 4. *McCrea v. Heckler, 580 F. Supp. 1106 (W.D.N.C. 1984)* .

(n5)Footnote 5. *NLRB v. Jacob E. Decker & Sons, 569 F.2d 357 (5th Cir. 1978)* .

(n6)Footnote 6. *NLRB v. Houston Distribution Servs., 573 F.2d 260 (5th Cir. 1978)* .

(n7)Footnote 7. *United States v. Merritt, 695 F.2d 1263 (10th Cir. 1982)* .

(n8)Footnote 8. *United States v. Bent-Santana, 774 F.2d 1545 (11th Cir. 1985)* .

(n9)Footnote 9. *United States v. Smith, 571 F.2d 370 (7th Cir. 1978)* .

(n10)Footnote 10. *Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973)* .

(n11)Footnote 11. *United States v. Penn, 721 F.2d 762 (11th Cir. 1983)* .

(n12)Footnote 12. *United States v. Sciarrino, 884 F.2d 95 (3d Cir. 1989)* .

(n13)Footnote 13. *United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986)* .

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PART TWO: THE RULES THEMSELVES
Article X. Contents Of Writings, Recordings, And Photographs
CHAPTER 1101 RULE 1101

5-1101 Federal Rules of Evidence Manual 1101.04

1101.04 Legislative History

[1] Advisory Committee's Note

Advisory Committee's Note

Subdivision (a). The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to "the district courts ... of the United States in civil actions, including admiralty and maritime cases ... ." *28 U.S.C. sec. 2072*, Pub. L. 89-773, sec. 1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure "under the Bankruptcy Act." *28 U.S.C. sec. 2075*, Pub. L. 88-623, sec. 1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of "the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable." *11 U.S.C. secs. 1(10), 11(a)*. The provision as to criminal rules up to and including verdicts applies to "criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the districts of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates." *18 U.S.C. sec. 3771*.

These various provisions do not in terms describe the same courts. In congressional usage the phrase "district courts of the United States," without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are "constitutional" courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are "legislative" courts. *Hornbuckle v. Toombs, 85 U.S. 648, 21 L. Ed. 966 (1873)* . However, any doubt as to the inclusion of the District Court for the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, *28 U.S.C. sec. 81 et seq.* creating district courts therein, *id.* sec. 132, and specifically providing that the term "district court of the United States" means the courts so constituted. *Id.* sec. 451. The District of Columbia is included. *Id.* sec. 88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. *28 U.S.C. sec. 2072*. Likewise Puerto Rico is made a district, with a district court, and included in the term. *Id.* sec. 119. The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court for the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include "the United States district courts," which includes those enumerated above. Bankruptcy courts also include "the district courts of the Territories and possessions to which this title is or may hereafter be applicable." *11 U.S.C. secs. 1(10), 11(a)*. These courts include the district courts of Guam and the Virgin Islands. *48 U.S.C. secs. 1424(b), 1615*. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy "is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone." He further observes that while there seems to be little doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, *11 U.S.C. sec. 1 (10)*, it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 Moore's Collier on Bankruptcy sec. 1.10, pp. 67, 72, n. 25 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of: "(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and (5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law." Canal Zone Code, 1962, Tit. 3, sec. 141.

Admiralty jurisdiction is expressly conferred. *Id.* sec. 142. General powers are conferred on the district court, "if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States ..." *Id.* sec. 279. Neither these provisions nor sec. 1(10) of the Bankruptcy Act ("district courts of the Territories and possessions to which this title is or may hereafter be applicable") furnishes a satisfactory answer as to the status of the District Court for the District of the Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts of the Canal Zone and the Virgin Islands, the Supreme Court of the Commonwealth of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of Guam but by specific mention removes the Canal Zone from the doubtful list.

The further difference in including the Supreme Court of the Commonwealth of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of the Commonwealth of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, *Rule 54(a) of the Federal Rules of Criminal Procedure*, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

> Civil actions, including admiralty and maritime cases -- district courts in the states, District of Columbia, and Puerto Rico.
>
> Bankruptcy -- same as civil actions, plus Guam and Virgin Islands.
>
> Criminal cases -- same as civil actions, plus Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted. Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase "district courts of the United States" did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to Alaska, the Virgin Islands or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. 2 Moore's Federal Practice sec. 1.07 (2d ed. 1967); 1 Barron and Holtzoff, Federal Practice and Procedure sec. 121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 384-390 (1950), and the Virgin Islands, 68 Stat. 497, 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal

Zone and the Virgin Islands. The Commonwealth of Puerto Rico was blanketed in by creating its court a "district court of the United States" as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of "district court of the United States," the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases and bankruptcy should apply to the District Court of Guam, *48 U.S.C. sec. 1424(b)*, and two Ninth Circuit decisions upholding the applicability of the Rules of Criminal Procedure to Guam. *Pugh v. United States, 212 F.2d 761 (9th Cir. 1954)* ; *Hatchett v. Guam, 212 F.2d 767 (9th Cir. 1954)* ; Orfield, The Scope of the *Federal Rules of Criminal Procedure, 38* U. of Det. L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or profession [possession] is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by *Rule 54 of the Federal Rules of Criminal Procedure* is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90-578, approved October 17, 1968, 82 Stat. 1107.

Subdivision (b) is a combination of the language of the enabling acts, *supra*, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph (1) restates, for convenience, the provisions of the second sentence of Rule 104(a) *supra*. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments be based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore sec. 4(5), the Supreme Court has not accepted this view. In *Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1965)* , the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented. "It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id. at 364* . The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meager and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, *69 Yale L.J. 1149, 1168, n. 53 (1960)*; Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa. L. Rev. 589, 592-93 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. *18 U.S.C. §§ 3181-3195*. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore sec. 4(6). Extradition proceedings are accepted [*sic*] from the operation of the Rules of Criminal Procedure. *Rule 54 (b)(5) of Federal Rules of Criminal Procedure*.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. *Rule 32(c) of the Federal Rules of Criminal Procedure* requires a presentence investigation and report in every case unless the court otherwise directs. In *Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949)* , in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures sec. 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in *Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967)* , but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses and search warrants are issued upon complaint or affidavit showing probable cause. *Rules 4(a)* and *41(c) of the Federal Rules of Criminal Procedure*. The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. *Rule 42(a) of the Federal Rules of Criminal Procedure*. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides: "Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." *18 U.S.C.A. sec. 3146(f)*.

This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, sec. 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in *Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure* and in *18 U.S.C.A. sec. 3146(b)*, as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941)* , that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.' " This view accords with the emphasis in *Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)* , upon trial-type proceedings, *id. 311, 83 S. Ct. 745* , with demeanor evidence as a significant factor, *id. 322, 83 S. Ct. 745* , in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Subdivision (e). In a substantial number of special proceedings, *ad hoc* evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

[The entire Advisory Committee Note accompanying the amendments effective October 1, 1987 is as follows: "Subdivision (a) is amended to delete the reference to the District Court for the District of the Canal Zone, which no longer exists, and to add the District Court for the Northern Mariana Islands. The United States bankruptcy judges are added to conform the subdivision with Rule 1101(b) and *Bankruptcy Rule 9017*."]

[Following the 1987 amendments to Rule 1101, Congress adopted a technical amendment correcting capitalization, effective November 18, 1988. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, sec. 7075(c), 102 Stat. 4181 (1988).]

[2] House Subcommittee on Criminal Justice Notes

House Subcommittee on Criminal Justice Notes

The Subcommittee amendment in subdivision (a) extends the application of the Federal Rules of Evidence to the Court of Claims and its commissioners.

Subdivision (e) was amended to substitute positive law citations for those which were not.

[3] Report of the House Committee on the Judiciary

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

[4] 1993 Amendment Committee Note

1993 Amendment Committee Note

The following is the entire Committee Note for the 1993 amendment to Rule 1101:

> This revision is made to conform the rule to changes in terminology made by *Rule 58 of the Federal Rules of Criminal Procedure* and to the changes in the title of United States magistrates made by the Judicial Improvements Act of 1990.

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PART TWO: THE RULES THEMSELVES
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Supp. To CHAPTER 1101 RULE 1101

5-1101 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1101, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

ARTICLE XI. MISCELLANEOUS RULES	**ARTICLE XI. MISCELLANEOUS RULES**
Rule 1101. Applicability of Rul	**Rule 1101. Applicability of the**

es	Rules	
(a)	**Courts and judges.** These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mari	(a) **To Courts and Judges.** These rules apply to proceedings before:

ana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, case

s, and pro-ceed ings and to the ex-tent herei nafte r set forth . The term s "jud ge" and "cou rt" in thes e rules in-clud e Unit ed Stat es bank rupt cy judg es and Unit ed Stat es ma-gis-trate judg es.

- Unit

ed States district courts;

- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the

Virgin Islands, and the Northern Mariana Islands.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases

(b) To Cases and Proceedings. These rules apply in:

and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

- civil cases and proceedings, includ

ing bankruptcy, admiralty, and maritime cases;

- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

(c) Rule of privilege. The rule with re-

(c) Rules on Privilege. The rules on

	spect to privilege s applies at all stages of all actions, cases, and proceedings.		privilege apply to all stages of a case or proceeding.
(d)	**Rules inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:	**(d)**	**Exceptions.** These rules -- except for those on privilege -- do not apply to the following:

(1)	**Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.	**(1)**	the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
(2)	**Grand jury**	**(2)**	grand-jury

. Proceedings before grand juries

pro-ceedings; and

(3) **Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or re-

(3) miscellaneous proceedings such as:

voking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

- extradition or rendition;
- issu-

ing an arrest warrant, criminal summons, or search warrant;

- a preliminary examination in a criminal case;
- sentencing;
- granting or revoking probation or supervised release; and
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(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding

in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offens evidence independently from these rules.

es before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders

of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292)

, and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of

the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary

of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of pet-

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e of pet-ro-leu m and its prod ucts pro-duce d in viol-atio n of Stat e law, and for oth-er pur-pose s", ap-prov ed Feb-ru-ary 22, 193 5 (15 U.S. C. 715 d); ac-tions for fines , pen-al-ties, or for-feit-

ures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of im-

ports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Stat-

utes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United

States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act

entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for oth-

er pur-pose s", ap-prov ed Mar ch 3, 192 5 (46 U.S. C. 781-790) , as im-ple-men ted by sec-tion 773 0 of title 10, Unit ed Stat es Cod e.

Committee Note

The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Supp. to § 1101.03 Annotated Cases

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[2] Rule 1101(b) -- Proceedings Generally [Go To Main]

[d.1] Enemy Combatant Proceedings

Barhoumi v. Obama, 609 F.3d 416 (D.C.Cir. 2010) : The Court affirmed denial of habeas corpus in a proceeding challenging detention at Guantanamo as an enemy combatant. It found no error in the Judge's reliance on hearsay diary evidence, noting that under the legislation governing trials of enemy combatants, the Federal Rules of Evidence are not applicable. Thus, "hearsay evidence is admissible in this type of habeas proceeding if it is reliable"; and here the diary was sufficiently reliable.

[4] Rule 1101(d)(1) -- Rules Inapplicable -- Preliminary Questions of Fact -- Suppression Hearing [Go To Main]

United States v. Ozuna, 561 F.3d 728 (7th Cir. 2009) : The Court affirmed a conviction for possession of cocaine with intent to distribute, finding no abuse of discretion when the Judge accepted expert testimony comparing handwriting in a suppression hearing without conducting a *Daubert* hearing. Noting that the Rules do not apply at suppression hearings, the Court stated that "[w]e see no persuasive reason to disregard the Rules of Evidence and impose a new requirement on district judges to conduct a *Daubert* analysis during suppression hearings."

[6] Rule 1101(d)(3) -- Rules Inapplicable -- Miscellaneous Proceedings [Go To Main]

[c] Parole, Probation, and Supervised Release Revocation Proceedings

United States v. Bari, 599 F.3d 176 (2d Cir. 2010) : The Court affirmed revocation of the defendant's supervised release, noted that the Federal Rules of Evidence do not apply in a supervised release revocation proceeding, and held

there was no reversible error when the Judge conducted an independent Internet search to confirm an intuition that there were many types of yellow rain hats for sale. A bank surveillance film showed the robber wearing a yellow rain hat and such a hat was found in the garage of the defendant's landlord.

[d] Rule 1101(d)(3) -- Penalty Phase of Capital Trial

United States v. Pepin, 514 F.3d 193 (2d Cir. 2008) : In a prosecution for murders committed while engaged in drug trafficking, for which the government sought the death penalty, the Trial Judge granted pretrial motions to exclude evidence at the penalty phase of the defendant's " 'continuing pattern of violence,' including 'child abuse' " and his prior conviction for child endangerment and related behavior, as well as photographs of the victims' dismembered bodies at either the guilt phase or the penalty phase. On interlocutory appeal, the Court held that, although the Rules of Evidence do not apply to sentencing proceedings, the federal death penalty act, *18 U.S.C. § 3593(c)*, gives the Trial Judge discretion to exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." The Court found no abuse of discretion in the exclusion of evidence of child abuse by the defendant and of his child endangerment conviction, as the Trial Judge had "conscientiously balanced" the probative value -- "[This evidence does] not relate to the homicidal characteristics which form the basis of the prosecution," and the probability that the defendant, if convicted and spared, would spend the rest of his life in prison, so his potential dangerousness to minor children and women is of little relevance -- with the risks of the jury overvaluing the evidence in light of recent publicity, the necessity of a diversionary trial within the trial regarding the abuse evidence, and the jury's passions becoming inflamed. The Court, however, reversed the ruling excluding evidence of post-mortem dismemberment at the guilt phase. It first held that "a district court ordinarily has somewhat less latitude to exclude probative evidence based on unfair prejudice at the guilt phase, under Rule 403, than it does where the evidence is offered only at the penalty phase," because Rule 403 permits exclusion only when the probative value is "substantially outweighed" by the countervailing dangers. Thus, to the extent the Judge had excluded the photographs at the guilt phase because they would be inadmissible at the penalty phase, it was an error of law. The Court also held it was an abuse of discretion to exclude the photographs at the guilt phase, because, as the Judge had concluded, they were highly probative of the defendant's mental state when committing the murders.

United States v. Fields, 483 F.3d 313 (5th Cir. 2007) : The Court held that in a capital sentencing proceeding, an expert's opinion on future dangerousness was not to be assessed under *Daubert,* because of the Federal Death Penalty Act, *18 U.S.C. § 3593(c)*, which states that evidence may be admitted at a capital sentencing proceeding "regardless of its admissibility under the rules governing admission of evidence at criminal trials." The section provides only that evidence may be excluded if its "probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Under that standard, the expert's opinion was properly admitted because "Fields's jury was required to make an assessment of future dangerousness and because the jury could benefit from the opinion of a psychological expert on that matter."

United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) : Affirming a death sentence, the Court observed that the Rules of Evidence do not apply during sentencing and held that "[t]o the extent Mitchell suggests that they, or similar constraints, constitutionally must apply, we disagree." It concluded that, while capital punishment demands increased reliability, more evidence rather than less on the presence of aggravating and mitigating factors would promote reliability. The Court noted, however, that the federal death penalty statute allows the Trial Judge to exclude unduly prejudicial evidence under Rule 403.

United States v. Brown, 441 F.3d 1330 (11th Cir. 2006) : The Court held that the Federal Rules of Evidence (other than *Rule 403*) are inapplicable to the penalty phase of a capital trial, as *18 U.S.C. § 3593(c)* provides that information is admissible during the capital phase "regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded it its probative value is substantially outweighed by the danger of creating unfair prejudice, confusion of issues, or misleading the jury."

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1102.01 Official Text

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in *section 2072 of title 28 of the United States Code*.

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5-1102 Federal Rules of Evidence Manual 1102.02

1102.02 Editorial Explanatory Comment

[1] Review of Amendments by Congress

Sharp controversy was provoked in Congress by various proposals for amendments of the Rules of Evidence. The Evidence Rules, and especially rules on privileges, are thought to have more "substantive" content than the Rules of Criminal or Civil Procedure, so Congress has sought more control over the amendment process. As originally reported by the Supreme Court, future amendments by the Supreme Court would have gone into effect as they do when the Federal Rules of Civil and Criminal Procedure are amended -- that is, unless Congress enacted a bill to stop them within ninety days. The House approved *28 U.S.C. § 2076* providing that either House of Congress could stop an amendment of any new Evidence Rule approved by the Supreme Court and transmitted to Congress by the Chief Justice, within 180 days after it was so reported. The Senate favored allowing 365 days for either House to reject an amendment before it became effective. The Senate then added a provision that explicitly stated that the Congress could defer implementation of the Rules and amend any Rule after it is enacted. A controversial proposal approved by the House and disapproved by the Senate required explicit Congressional approval of Rules relating to privileges.

By way of compromise, § 2076 was eventually adopted providing for a 180-day waiting period and one-House disapproval. It further provided that either House could defer the effective date of an amendment, that any Rule could be amended by Act of Congress, and that any amendment creating, abolishing, or modifying a privilege required an Act of Congress to become effective.

The compromise was redone in 1988, when Congress adopted the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, tit. IV, sec. 401, 102 Stat. 4648 (1988). Former § 2076 was repealed, and evidence rulemaking was once again treated with other rules of practice and procedure under *28 U.S.C. § 2072*. New *§ 2073* opens up the rulemaking process for more public participation and scrutiny. New *§ 2074(a)* provided that all proposed Rules shall be transmitted to Congress not later than May 1 to become effective not earlier than December 1, thus giving a seven-month period for review. The former statute permitting one-House disapproval was replaced by a provision that the proposed "rule shall take effect ... unless otherwise provided by law." *Subdivision (b) of § 2074* restated the limitation in former § 2076 that any Rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." Thus privilege rules must be affirmatively enacted.

Several Rules have already been amended through the rulemaking process, including *Rules 103*, *404(a) and (b)*, *407*, *608(b)*, *609(a)*, *701-703*, *801*, *803(6)*, *804* and *902*. A new *Rule 807* was created by the transfer of the residual exceptions into a single exception. Rule 410 was superseded by a Rule of Criminal Procedure and subsequently amended, as our discussion of that Rule explains. Minor amendments have been made to Rules such as *101*, *705*, *806* and *1101*. Congress added *Rule 412* (and thereafter amended it) and *Rules 413-415* and *704(b)* on its own. A new batch of amendments -- to *Rules 404(a)*, *408*, *606(b)*, and *609(a)* -- is scheduled to take effect on December 1, 2006. Finally, technical amendments have also been adopted to make the Rules gender-neutral.

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1102.03 Annotated Cases

No significant decisions.

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1102.04 Legislative History

[1] Report of the House Committee on the Judiciary

[We have included legislative excerpts relating to the amendment process here, even though in the Report itself this excerpt does not purport to relate to Rule 1102. The Reader will have no trouble in seeing the relevance of the excerpt to the Rule. -- Ed.]

Section 2 of H.R. 5463

Subsection (a) sets forth the method by which future amendments may be made to the Rules of Evidence. The present Rules Enabling Acts (*18 U.S.C. 3771*, *3772*, *3402*; *28 U.S.C. 2072*, *2075*), which the Supreme Court invoked as the authority pursuant to which it promulgated the Rules of Evidence, provide that the Court may prescribe rules of "practice and procedure" and submit them to Congress. The rules then take effect automatically either at such time as the Court directs, or after ninety days following their submission. An Act of Congress is necessary to prevent any rule so submitted from taking effect.

The Committee believed that many of the Rules of Evidence, particularly in the privilege and hearsay fields, involve substantive policy judgments as to which it is appropriate that the Congress play a greater role than that provided for in the present Enabling Acts. Accordingly, the Committee concluded that it should provide for a new statutory procedure by which amendments to the Rules of Evidence may be made, designed to insure adequate congressional participation in the evidence rule-making process. Section 2(a) as adopted by the Committee adds a new section, 2076, to title 28, United States Code, permitting the Court to prescribe amendments to the Rules of Evidence, which amendments must be reported to the Congress. However, unlike the situation under the present Rules Enabling Acts, either House of Congress may, by resolution, prevent a rule from becoming operative. Moreover, rather than the 90-day period allowed in the existing Rules Enabling Acts, a 180-day period is prescribed for Congressional action.

The Committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court, and recognized that a similar judgment inhered in Public Law 93-12, pursuant to which the Court's proposed Rules of Evidence were barred from taking effect, until approved by Congress. However, the Committee determined that requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, but

was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, it believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The Committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.

[2] Report of the Senate Committee on the Judiciary

The House, in order to clarify the power of the Supreme Court to issue Rules of Evidence or amendments to them, added a new section 2076 to title 28, United States Code, specifying the Supreme Court's authority. The present Rules Enabling Acts (*18 U.S.C. §§ 3771*, *3772*, *3402*; *28 U.S.C. 2072*, *2075*), which the Supreme Court invoked as the authority pursuant to which it promulgated the Rules of Evidence, provide that the Court may prescribe rules of "practice and procedure" and submit them to Congress. The rules then take effect automatically either at such time as the Court directs, or after ninety days following their submission. An act of Congress is necessary to prevent any rule so submitted from taking effect.

The House believed that the Rules of Evidence involve policy judgments as to which it is appropriate for the Congress to play a greater role than that provided in the present Enabling Acts. Accordingly, the bill provides for a new statutory procedure by which amendments to the Rules of Evidence may be made, designed to insure adequate congressional participation in the evidence rule-making process. Section 2(a) adds a new section, 2076, to title 28, United States Code, permitting the Court to prescribe amendments to the Rules of Evidence, which amendments must be reported to the Congress. However, three changes were made with respect to the role of Congress. First, any rule, rather than the entire package of rules may be disapproved. Second, either House of Congress, rather than both Houses acting together, can prevent a rule from becoming operative. Third, rather than the 90-day period allowed in the existing Rules Enabling Acts, a 180-day period is prescribed for congressional action.

In order to augment the power of Congress to review rules of evidence, the committee made two additional amendments. It decided to extend the review period to 365 days -- one full year -- and adopted a provision under which either House of Congress can defer the effective date of a rule to permit further study, either until a later date or until approved by Act of Congress. Thus, either House of Congress can disapprove or defer consideration of any proposed rule or combination of rules. The committee also added one clarifying amendment which provides that either a proposed rule or a rule already in effect may be amended by act of Congress. While this has been generally understood, the committee feels it should be made clear.

The committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court. We determined, however, that while requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, it was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, the committee believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.

For the same reasons, the committee has deleted an amendment made on the floor of the House providing that no amendment creating, abolishing or modifying a privilege could take effect until approved by act of Congress. The basis for the House action was the belief that rules of privilege constitute matters of substance that require affirmative congressional approval. While matters of privilege are, in a sense, substantive, and also involve particularly sensitive issues, the committee does not believe that privileges necessarily require different treatment from other rules, provided there are adequate safeguards so that the Congress retains sufficient review power to review effectively proposed

changes in this area, as well as in others. By extending the period of review from 90 to 365 days, and by providing that any proposed rule may be disapproved or its effective date deferred by either House of Congress, the committee believes that the Congress does, in fact, retain sufficient review power to reflect its views on such matters.

[3] Report of the House and Senate Conferees

Section 2 of the bill adds a new section to title 28 of the United States Code that establishes a procedure for amending the rules of evidence in the future. The House bill provides that the Supreme Court may promulgate amendments, and these amendments become effective 180 days after being reported to Congress. However, any amendment that creates, abolishes or modifies a rule of privilege does not become effective until approved by Act of Congress. The Senate amendments changed the length of time that must elapse before an amendment becomes effective to 365 days. The Senate amendments also added language, not contained in the House provision, that (1) either House can defer the effective date of a proposed amendment to a later date or until approved by Act of Congress and (2) an Act of Congress can amend any rule of evidence, whether proposed or in effect. Finally, the Senate amendments struck the provision requiring that amendments creating, abolishing or modifying a privilege be approved by Act of Congress.

The Conference adopts the House provision on the time period (180 days) and the House provision requiring that an amendment creating, abolishing or modifying a rule of privilege cannot become effective until approved by Act of Congress. The Conference adopts the Senate amendment providing that either House can defer the effective date of an amendment to the rules of evidence and that any rule, either proposed or in effect, can be amended by Act of Congress. In making these changes in the enabling Act, [the] Conference recognizes the continuing role of the Supreme Court in promulgating rules of evidence.

[4] Citations to Hearings and Debates

Debate in the House of Representatives, 120 Cong. Rec. H567-H568 (daily ed. February 6, 1974).

Testimony of Hon. Albert B. Maris, Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 43-44 (1974).

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5-1102 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1002, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1002. Amendments	**Rule 1002. Amendments**
Amendments to the Federal Rules of Evidence may be made as	These rules may be amended as provided in 28 U.S.C. § 207

provided in section 2072 of title 28 of the United States Code.

Committee Note

The language of Rule 1102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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5-1103 Federal Rules of Evidence Manual 1103.syn

§ 1103.syn Synopsis to Chapter 1103: RULE 1103

1103.01 Official Text

1103.02 Editorial Explanatory Comment

1103.03 Annotated Cases

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5-1103 Federal Rules of Evidence Manual 1103.01

1103.01 Official Text

Rule 103. Title

These rules may be known and cited as the Federal Rules of Evidence.

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1103.02 Editorial Explanatory Comment

The title "Federal Rules of Evidence" signifies the Rules discussed in this *Manual*, enacted on January 2, 1975, and effective on July 1, 1975, and all amendments subsequently adopted.

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1103.03 Annotated Cases

No significant decisions.

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1103.04 Legislative History

None.

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5-1103 Federal Rules of Evidence Manual Scope

Scope

The chart below shows the proposed style amendments for Rule 1103, with the current version of the rule in the left column and the proposed new version of the rule in the right column. The style amendments are designed to make the Evidence Rules more easily understood and to make style and terminology consistent throughout the rules. The changes are intended to be stylistic only, and there is no intent to change any result in any ruling on evidence admissibility. At press time (December 2010), it is anticipated that the style amendments will take effect on December 1, 2011.

Rule 1103. Title	**Rule 1103. Title**
These rules may be known and cited as the Federal Rules of Evidence.	These rules may be cited as the Federal Rules of Evidence.

ce.

Committee Note

The language of Rule 1103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

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Part Three: Rules Approved by Supreme Court But Rejected by Congress

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Rule 505 HUSBAND-WIFE PRIVILEGE

Rule 506 COMMUNICATIONS TO CLERGYMEN

Rule 507 POLITICAL VOTE

Rule 508 TRADE SECRETS

Rule 509 SECRETS OF STATE AND OTHER OFFICIAL INFORMATION

Rule 510 IDENTITY OF INFORMER

Rule 511 WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

Rule 512 PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

Rule 513 COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

Rule 804 HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
Part Three: Rules Approved by Supreme Court But Rejected by Congress

5-Three Federal Rules of Evidence Manual I

I Introduction

The following Rules were approved by the Supreme Court, but were not thereafter enacted by the Congress. Advisory Committee's Notes are also set forth. Many of these proposed Rules have been mentioned earlier in our Comments.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 105

Rule 105 SUMMING UP AND COMMENT BY JUDGE

[Not enacted.]

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

note

ADVISORY COMMITTEE'S NOTE

The rule states the present rule in the federal courts. *Capital Traction Co. v. Hof, 174 U.S. 1, 13-14, 19 S. Ct. 580, 43 L. Ed. 873 (1899)* . The judge must, of course, confine his remarks to what is disclosed by the evidence. He cannot convey to the jury his purely personal reaction to credibility or to the merits of the case; he can be neither argumentative nor an advocate. *Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933)* ; *Billeci v. United States, 184 F.2d 394, 402, 87 U.S. App. D.C. 274, 24 A.L.R.2d 881 (1950)* . For further discussion see the series of articles by Wright, The Invasion of Jury: Temperature of the War, *27 Temp. L.Q. 137 (1953)*, Instructions to the Jury: Summary Without Comment, *1954 Wash. U.L.Q. 177*, Adequacy of Instructions to the Jury, *53 Mich. L. Rev. 505, 813 (1955)*; A.L.I. Model Code of Evidence, Comment to Rule 8; Maguire, Weinstein, et al., Cases and Materials on Evidence 737-40 (5th ed. 1965); Vanderbilt, Minimum Standards of Judicial Administration 224-29 (1949).

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 303

Rule 303 PRESUMPTIONS IN CRIMINAL CASES

[Not enacted.]

(a) Scope. Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(b) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

note

ADVISORY COMMITTEE'S NOTE

Subdivision (a). This rule is based largely upon A.L.I. Model Penal Code § 1.12(5) P.O.D. (1962) and *United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965)* . While the rule, unlike the Model Penal Code provision, spells out the effect of common law presumptions as well as those created by statute, cases involving the latter are no doubt of more frequent occurrence. Congress has enacted numerous provisions to lessen the burden of the prosecution, principally though not exclusively in the fields of narcotics control and taxation of liquor. Occasionally, in the pattern of the usual common law treatment of such matters as insanity, they take the form of assigning to the defense

the responsibility of raising specified matters as affirmative defenses, which are not within the scope of these rules. See comment, A.L.I. Model Penal Code § 1.13, T.D. No. 4 (1955). In other instances they assume a variety of forms which are the concern of this rule. The provision may be that proof of a specified fact (possession or presence) is sufficient to authorize conviction. 26 U.S.C. § 4704(a), unlawful to buy or sell opium except from original stamped package -- absence of stamps from package prima facie evidence of violation by person in possession; 26 U.S.C. § 4724(c), unlawful for person who has not registered and paid special tax to possess narcotics -- possession presumptive evidence of violation. Sometimes the qualification is added, "unless the defendant explains the possession [presence] to the satisfaction of the jury." *18 U.S.C. § 545*, possession of unlawfully imported goods sufficient for conviction of smuggling, unless explained; 21 U.S.C. § 174, possession sufficient for conviction of buying or selling narcotics known to have been imported unlawfully, unless explained. See also *26 U.S.C. § 5601(a)(1)*, *(a)(4)*, *(a)(8)*, *(b)(1)*, *(b)(2)*, *(b)(4)*, relating to distilling operations. Another somewhat different pattern makes possession evidence of a particular element of the crime. 21 U.S.C. § 176b, crime to furnish unlawfully imported heroin to juveniles -- possession sufficient proof of unlawful importation, unless explained; *50 U.S.C.A. App. § 462(b)*, unlawful to possess draft card not lawfully issued to holder, with intent to use for purposes of false identification -- possession sufficient evidence of intent, unless explained. See also 15 U.S.C. § 902(f), (i).

Differences between the permissible operation of presumptions against the accused in criminal cases and in other situations prevent the formulation of a comprehensive definition of the term "presumption," and none is attempted. Nor do these rules purport to deal with problems of the validity of presumptions except insofar as they may be found reflected in the formulation of permissible procedures.

The presumption of innocence is outside the scope of the rule and unaffected by it.

Subdivisions (b) and (c). It is axiomatic that a verdict cannot be directed against the accused in a criminal case, 9 Wigmore § 2495, p. 312, with the corollary that the judge is without authority to direct the jury to find against the accused as to any element of the crime, A.L.I. Model Penal Code § 1.12(1) P.O.D. (1962). Although arguably the judge could direct the jury to find against the accused as to a lesser fact, the tradition is against it, and this rule makes no use of presumptions to remove any matters from final determination by the jury.

The only distinction made among presumptions under this rule is with respect to the measure of proof required in order to justify submission to the jury. If the effect of the presumption is to establish guilt or an element of the crime or to negative a defense, the measure of proof is the one widely accepted by the Courts of Appeals as the standard for measuring the sufficiency of the evidence in passing on motions for directed verdict (now judgment of acquittal): an acquittal should be directed when reasonable jurymen must have a reasonable doubt. *Curley v. United States, 160 F.2d 229, 81 U.S. App. D.C. 389 (1947)*, *cert. denied*, *331 U.S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850*; *United States v. Honeycutt, 311 F.2d 660 (4th Cir. 1962)*; *Stephens v. United States, 354 F.2d 999 (5th Cir. 1965)*; *Lambert v. United States, 261 F.2d 799 (5th Cir. 1958)*; *United States v. Leggett, 292 F.2d 423 (6th Cir. 1961)*; *Cape v. United States, 283 F.2d 430 (9th Cir. 1960)*; *Cartwright v. United States, 335 F.2d 919 (10th Cir. 1964)*. Cf. *United States v. Gonzales Castro, 228 F.2d 807 (2d Cir. 1956)*; *United States v. Masiello, 235 F.2d 279 (2d Cir. 1956)*, *cert. denied*, *Stickel v. United States, 352 U.S. 882, 77 S. Ct. 100, 1 L. Ed. 2d 79*; *United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944)*. But cf. *United States v. Arcuri, 282 F. Supp. 347 (E.D.N.Y.1968)*, *aff'd*, *405 F.2d 691*, *cert. denied*, *395 U.S. 913*; *United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y.1968)*. If the presumption operates upon a lesser aspect of the case than the issue of guilt itself or an element of the crime or negativing a defense, the required measure of proof is the less stringent one of substantial evidence, consistently with the attitude usually taken with respect to particular items of evidence. 9 Wigmore § 2497, p. 324.

The treatment of presumptions in the rule is consistent with *United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965)*, where the matter was considered in depth. After sustaining the validity of the provision of *26 U.S.C. § 5601(b)(2)* that presence at the site is sufficient to convict of the offense of carrying on the business of distiller without giving bond, unless the presence is explained to the satisfaction of the jury, the Court turned to procedural considerations and reached several conclusions. The power of the judge to withdraw a case from the jury for

insufficiency of evidence is left unimpaired; he may submit the case on the basis of presence alone, but he is not required to do so. Nor is he precluded from rendering judgment notwithstanding the verdict. It is proper to tell the jury about the "statutory inference," if they are told it is not conclusive. The jury may still acquit, even if it finds defendant present and his presence is unexplained. [Compare the mandatory character of the instruction condemned in *Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1945)* .] To avoid any implication that the statutory language relative to explanation be taken as directing attention to failure of the accused to testify, the better practice, said the Court, would be to instruct the jury that they may draw the inference unless the evidence provides a satisfactory explanation of defendant's presence, omitting any explicit reference to the statute.

The Final Report of the National Commission on Reform of Federal Criminal Laws § 103(4) and (5) (1971) contains a careful formulation of the consequences of a statutory presumption with an alternative formulation set forth in the Comment thereto, and also of the effect of a prima facie case. In the criminal code there proposed, the terms "presumption" and "prima facie case" are used with precision and with reference to these meanings. In the federal criminal law as it stands today, these terms are not used with precision. Moreover, common law presumptions continue. Hence it is believed that the rule here proposed is better adapted to the present situation until such time as the Congress enacts legislation covering the subject, which the rule takes into account. If the subject of common law presumptions is not covered by legislation, the need for the rule in that regard will continue.

Article V. Privileges

[The 13 rules numbered 501-513 prescribed by the Supreme Court as Article V were replaced by a single rule 501 in the rules enacted by the Congress. -- Ed.]

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 501

Rule 501 PRIVILEGES RECOGNIZED ONLY AS PROVIDED

[Not enacted.]

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

note

ADVISORY COMMITTEE'S NOTE

No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. The grand design of these provisions does not readily lend itself to codification. The final reference must be the provisions themselves and the decisions construing them. Nor is formulating a rule an appropriate means of settling unresolved constitutional questions.

Similarly, privileges created by act of Congress are not within the scope of these rules. These privileges do not assume the form of broad principles; they are the product of resolving particular problems in particular terms. Among them are included such provisions as *13 U.S.C. § 9*, generally prohibiting official disclosure of census information and conferring a privileged status on retained copies of census reports; *42 U.S.C. § 2000e-5(a)*, making inadmissible in evidence anything said or done during Equal Employment Opportunity conciliation proceeding; *42 U.S.C. § 2240*, making required reports of incidents by nuclear facility licensees inadmissible in actions for damages; *45 U.S.C. §§ 33*, *41*, similarly as to reports of accidents by railroads; 49 U.S.C. § 1441(e), declaring C.A.B. accident investigation reports inadmissible in actions for damages. The rule leaves them undisturbed.

The reference to other rules adopted by the Supreme Court makes clear that provisions relating to privilege in those rules will continue in operation. See, for example, the "work product" immunity against discovery spelled out under the Rules of Civil Procedure in *Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*, now formalized in revised Rule 26(b)(3) of the Rules of Civil Procedure, and the secrecy of grand jury proceedings provided by Criminal Rule 6.

With respect to privileges created by state law, these rules in some instances grant them greater status than has heretofore been the case by according them recognition in federal criminal proceedings, bankruptcy, and federal question litigation. See Rules 502 and 510. There is, however, no provision generally adopting state-created privileges.

In federal criminal prosecutions the primacy of federal law as to both substance and procedure has been undoubted. See, for example, *United States v. Krol, 374 F.2d 776 (7th Cir. 1967)*, sustaining the admission in a federal prosecution of evidence obtained by electronic eavesdropping, despite a state statute declaring the use of these devices unlawful and evidence obtained therefrom inadmissible. This primacy includes matters of privilege. As stated in 4 Barron, Federal Practice and Procedure § 2151, p. 175 (1951):

"The determination of the question whether a matter is privileged is governed by federal decisions and the state statutes or rules of evidence have no application." In *Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933)*, the Court had considered the competency of a wife to testify for her husband and concluded that, absent congressional action or direction, the federal courts were to follow the common law as they saw it "in accordance with present day standards of wisdom and justice." And in *Wolfle v. United States, 291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (1934)*, the Court said with respect to the standard appropriate in determining a claim of privilege for an alleged confidential communication between spouses in a federal criminal prosecution:

"So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute." *Id., 13, 54 S. Ct. at 280*. On the basis of *Funk and Wolfle*, the Advisory Committee on Rules of Criminal Procedure formulated Rule 26, which was adopted by the Court. The pertinent part of the rule provided:

"The ... privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted ... in the light of reason and experience."

As regards bankruptcy, section 21(a) of the Bankruptcy Act provides for examination of the bankrupt and his spouse concerning the acts, conduct, or property of the bankrupt. The Act limits examination of the spouse to business transacted by her or to which she is a party but provides "That the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding." *11 U.S.C. § 44(a)*. The effect of the quoted language is clearly to override any conflicting state rule of incompetency or privilege against spousal testimony. A fair reading would also indicate an overriding of any contrary state rule of privileged confidential spousal communications. Its validity has never been questioned and seems most unlikely to be. As to other privileges, the suggestion has been made that state law applies, though with little citation of authority. 2 Moore's Collier on Bankruptcy 21.13, p. 297 (14th ed. 1961). This position seems to be contrary to the expression of the Court in *McCarthy v. Arndstein, 266 U.S. 34, 39, 45 S. Ct. 16, 69 L. Ed. 158 (1924)*, which speaks in the pattern of *Rule 26 of the Federal Rules of Criminal Procedure*:

"There is no provision [in the Bankruptcy Act] prescribing the rules by which the examination is to be governed. These are, impliedly, the general rules governing the admissibility of evidence and the competency and compellability of witnesses."

With respect to federal question litigation, the supremacy of federal law may be less clear, yet indications that state privileges are inapplicable preponderate in the circuits. *In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953), cert. denied, Cincotta v. United States, 347 U.S. 960, 74 S. Ct. 709, 98 L. Ed. 1104*; *Colton v. United States, 306 F.2d 633 (2d Cir. 1962)*; *Falsone v. United States, 205 F.2d 734 (5th Cir. 1953)*; *Fraser v. United States,*

145 F.2d 139 (6th Cir. 1944) , *cert. denied*, *324 U.S. 849, 65 S. Ct. 684, 89 L. Ed. 1409* ; *United States v. Brunner, 200 F.2d 276* (6th Cir. 1952). Contra, *Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960)* . Additional decisions of district courts are collected in Annot., 95 A.L.R.2d 320, 336 . While a number of the cases arise from administrative income tax investigations, they nevertheless support the broad proposition of the inapplicability of state privileges in federal proceedings.

In view of these considerations, it is apparent that, to the extent that they accord state privileges standing in federal criminal cases, bankruptcy, and federal question cases, the rules go beyond what previously has been thought necessary or proper.

On the other hand, in diversity cases, or perhaps more accurately cases in which state law furnishes the rule of decision, the rules avoid giving state privileges the effect which substantial authority has thought necessary and proper. Regardless of what might once have been thought to be the command of *Erie R. R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* , as to observance of state created privileges in diversity cases, *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)* , is believed to locate the problem in the area of choice rather than necessity. Wright, Procedural Reform: Its Limitations and Its Future, *1 Ga. L. Rev. 563, 572-73 (1967)*. Contra, *Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555, n. 2 (2d Cir. 1967)* , and see authorities there cited. Hence all significant policy factors need to be considered in order that the choice may be a wise one.

The arguments advanced in favor of recognizing state privileges are: a state privilege is an essential characteristic of a relationship or status created by state law and thus is substantive in the *Erie* sense; state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction. There are persuasive answers to these arguments.

(1) As to the question of "substance," it is true that a privilege commonly represents an aspect of a relationship created and defined by a State. For example, a confidential communications privilege is often an incident of marriage. However, in litigation involving the relationship itself, the privilege is not ordinarily one of the issues. In fact, statutes frequently make the communication privilege inapplicable in cases of divorce. McCormick § 88, p. 177. The same is true with respect to the attorney-client privilege when the parties to the relationship have a falling out. The reality of the matter is that privilege is called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege. The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous.

(2) By most standards, criminal prosecutions are attended by more serious consequences than civil litigation, and it must be evident that the criminal area has the greatest sensitivity where privilege is concerned. Nevertheless, as previously noted, state privileges traditionally have given way in federal criminal prosecutions. If a privilege is denied in the area of greatest sensitivity, it tends to become illusory as a significant aspect of the relationship out of which it arises. For example, in a state having by statute an accountant's privilege, only the most imperceptible added force would be given the privilege by putting the accountant in a position to assure his client that, while he could not block disclosure in a federal criminal prosecution, he could do so in diversity cases as well as in state court proceedings. Thus viewed, state interest in privilege appears less substantial than at first glance might seem to be the case.

Moreover, federal interest is not lacking. It can scarcely be contended that once diversity is invoked the federal government no longer has a legitimate concern in the quality of judicial administration conducted under its aegis. The demise of conformity and the adoption of the Federal Rules of Civil Procedure stand as witness to the contrary.

(3) A large measure of forum shopping is recognized as legitimate in the American judicial system. Subject to the limitations of jurisdiction and the relatively modest controls imposed by venue provisions and the doctrine of forum non conveniens, plaintiffs are allowed in general a free choice of forum. Diversity jurisdiction has as its basic purpose the

giving of a choice, not only to plaintiffs but, in removal situations, also to defendants. In principle, the basis of the choice is the supposed need to escape from local prejudice. If the choice were tightly confined to that basis, then complete conformity to local procedure as well as substantive law would be required. This, of course, is not the case, and the choice may in fact be influenced by a wide range of factors. As Dean Ladd has pointed out, a litigant may select the federal court "because of the federal procedural rules, the liberal discovery provisions, the quality of jurors expected in the federal court, the respect held for federal judges, the control of federal judges over a trial, the summation and comment upon the weight of evidence by the judge, or the authority to grant a new trial if the judge regards the verdict against the weight of the evidence." Ladd, Privileges, *1969 Ariz. St. L.J. 555, 564*. Present Rule 43(a) of the Civil Rules specifies a broader range of admissibility in federal than in state courts and makes no exception for diversity cases. Note should also be taken that Rule 26(b)(2) of the Rules of Civil Procedure, as revised, allows discovery to be had of liability insurance, without regard to local state law upon the subject.

When attention is directed to the practical dimensions of the problem, they are found not to be great. The privileges affected are few in number. Most states provide a physician-patient privilege; the proposed rules limit the privilege to a psychotherapist-patient relationship. See Advisory Committee's Note to Rule 504. The area of marital privilege under the proposed rules is narrower than in most states. See Rule 505. Some states recognize privileges for journalists and accountants; the proposed rules do not.

Physician-patient is the most widely recognized privilege not found in the proposed rules. As a practical matter it was largely eliminated in diversity cases when Rule 35 of the Rules of Civil Procedure became effective in 1938. Under that rule, a party physically examined pursuant to court order, by requesting and obtaining a copy of the report or by taking the deposition of the examiner, waives any privilege regarding the testimony of every other person who has examined him in respect of the same condition. While waiver may be avoided by neither requesting the report nor taking the examiner's deposition, the price is one which most litigant-patients are probably not prepared to pay.

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5-Three Federal Rules of Evidence Manual Rule 502

Rule 502 REQUIRED REPORTS PRIVILEGED BY STATUTE

[Not enacted.]

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

note

ADVISORY COMMITTEE'S NOTE

Statutes which require the making of returns or reports sometimes confer on the reporting party a privilege against disclosure, commonly coupled with a prohibition against disclosure by the officer to whom the report is made. Some of the federal statutes of this kind are mentioned in the Advisory Committee's Note to Rule 501, *supra* . See also the Note to Rule 402, *supra* . A provision against disclosure may be include in a statute for a variety of reasons, the chief of which are probably assuring the validity of the statute against claims of self-incrimination, honoring the privilege against self-incrimination, and encouraging the furnishing of the required information by assuring privacy.

These statutes, both state and federal, may generally be assumed to embody policies of significant dimension. Rule 501 insulates the federal provisions against disturbance by these rules; the present rule reiterates a result commonly specified in federal statutes and extends its application to state statutes of similar character. Illustrations of the kinds of returns and reports contemplated by the rule appear in the cases, in which a reluctance to compel disclosure is manifested. *In re Reid, 155 F. 933 (E.D. Mich. 1906)* , assessor not compelled to produce bankrupt's property tax return in view of statute forbidding disclosure; *In re Valecia Condensed Milk Co., 240 F. 310 (7th Cir. 1917)* , secretary of state tax commission not compelled to produce bankrupt's income tax returns in violation of statute; *Herman Bros. Pet Supply, Inc. v. N. L. R. B., 360 F.2d 176 (6th Cir. 1966)* , subpoena denied for production of reports to state employment security commission prohibited by statute, in proceeding for back wages. And see the discussion of motor vehicle accident reports in *Krizak v. W. C. Brooks & Sons, Inc., 320 F.2d 37, 42-43 (4th Cir. 1963)* . Cf. *In re*

Hines, 69 F.2d 52 (2d Cir. 1934) .

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5-Three Federal Rules of Evidence Manual Rule 503

Rule 503 LAWYER-CLIENT PRIVILEGE

[Not enacted.]

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) *Furtherance of crime or fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants through same deceased client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) *Breach of duty by lawyer or client*. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) *Document attested by lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients*. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

note

ADVISORY COMMITTEE'S NOTE

Subdivision (a). (1) The definition of "client" includes governmental bodies, *Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y.1955)* ; *People ex rel. Department of Public Works v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 41 Cal. Rptr. 303 (1965)* ; *Rowley v. Ferguson, 48 N.E.2d 243 (Ohio App. 1942)* ; and corporations, *Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314* (7th Cir. 1963). Contra, Gardner, A Personal Privilege for Communications of Corporate Clients -- Paradox or Public Policy, *40 U. Det. L.J. 299, 323, 376 (1963)*. The definition also extends the status of client to one consulting a lawyer preliminarily with a view to retaining him, even though actual employment does not result. McCormick, § 92, p. 184. The client need not be involved in litigation; the rendition of legal service or advice under any circumstances suffices. 8 Wigmore § 2294 (McNaughton Rev.1961). The services must be professional legal services; purely business or personal matters do not qualify. McCormick § 92, p. 184.

The rule contains no definition of "representative of the client." In the opinion of the Advisory Committee, the matter is better left to resolution by decision on a case-by-case basis. The most restricted position is the "control group" test, limiting the category to persons with authority to seek and act upon legal advice for the client. See, e.g., *City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D.Pa.1962)* , *mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir.)* , *cert. denied, 372 U.S. 943* ; *Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963)* ; *Hogan v. Zletz, 43 F.R.D. 308 (N.D. Okla. 1967)* , *aff'd sub nom. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968)* ; *Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964)* . Broader formulations are found in other decisions. *See, e.g., United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950)* ; *Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del.1954)* ; *Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970)* , *aff'd without opinion by equally divided court, 400 U.S. 955 (1971)* , *reh. denied, 401 U.S. 950* ; *D. I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 36 Cal. Rptr. 468, 388 P.2d 700 (1964)* . Cf. *Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969)* . *See generally* Simon, The Attorney-Client Privilege as Applied to Corporations, *65 Yale L.J. 953, 956-66 (1956)*; Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, *84 Harv. L. Rev. 424 (1970)*.

The status of employees who are used in the process of communicating, as distinguished from those who are parties to the communication, is treated in paragraph (4) of subdivision (a) of the rule.

(2) A "lawyer" is a person licensed to practice law in any state or nation. There is no requirement that the licensing state or nation recognize the attorney-client privilege, thus avoiding excursions into conflict of laws questions. "Lawyer" also includes a person reasonably believed to be a lawyer. For similar provisions, see *California Evidence Code § 950*.

(3) The definition of "representative of the lawyer" recognizes that the lawyer may, in rendering legal services, utilize the services of assistants in addition to those employed in the process of communicating. Thus the definition includes an expert employed to assist in rendering legal advice. *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)* (accountant). Cf. *Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949)* . It also includes an expert employed to assist in the planning and conduct of litigation, though not one employed to testify as a witness. *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563 (S.D.N.Y.1898)* , and see revised Civil Rule 26(b)(4). The definition does not, however, limit "representative of the lawyer" to experts. Whether his compensation is derived immediately from the lawyer or the client is not material.

(4) The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential. McCormick § 95. The intent is inferable from the circumstances. Unless intent to disclose is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent.

Practicality requires that some disclosure be allowed beyond the immediate circle of lawyer-client and their representatives without impairing confidentiality. Hence the definition allows disclosure to persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client," contemplating those in such relation to the client as "spouse, parent, business associate, or joint client." Comment, *California Evidence Code § 952*.

Disclosure may also be made to persons "reasonably necessary for the transmission of the communication," without loss of confidentiality.

Subdivision (b) sets forth the privilege, using the previously defined terms: client, lawyer, representative of the lawyer, and confidential communication.

Substantial authority has in the past allowed the eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. Today, the evolution of more sophisticated techniques of eavesdropping and interception calls for abandonment of this position. The rule accordingly adopts a policy of protection against these kinds of invasion of the privilege.

The privilege extends to communications (1) between client or his representative and lawyer or his representative, (2) between lawyer and lawyer's representative, (3) by client or his lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or the client and a representative of the client, and (5) between lawyers representing the client. All these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach.

The third type of communication occurs in the "joint defense" or "pooled information" situation where different lawyers represent clients who have some interests in common. In *Chahoon v. Commonwealth, 62 Va. 822 (1871)* , the court said that the various clients might have retained one attorney to represent all; hence everything said at a joint conference was privileged, and one of the clients could prevent another from disclosing what the other had himself said. The result seems to be incorrect in overlooking a frequent reason for retaining different attorneys by the various clients, namely actually or potentially conflicting interests in addition to the common interest which brings them together. The needs of these cases seem better to be met by allowing each client a privilege as to his own statements. Thus if all resist disclosure, none will occur. *Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)* . But, if for reasons of his own, a client wishes to disclose his own statements made at the joint conference, he should be permitted to do so,

and the rule is to that effect. The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis. *Vance v. State, 190 Tenn. 521, 230 S.W.2d 987 (1950)* , *cert. denied*, *339 U.S. 988, 70 S. Ct. 1010, 94 L. Ed. 1389* . Cf. *Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)* .

Subdivision (c). The privilege is, of course, that of the client, to be claimed by him or by his personal representative. The successor of a dissolved corporate client may claim the privilege. *California Evidence Code § 953*; New Jersey Evidence Rule 26(1). Contra, Uniform Rule 26(1).

The lawyer may not claim the privilege on his own behalf. However, he may claim it on behalf of the client. It is assumed that the ethics of the profession will require him to do so except under most unusual circumstances. American Bar Association, Canons of Professional Ethics, Canon 37. His authority to make the claim is presumed unless there is evidence to the contrary, as would be the case if the client were now a party to litigation in which the question arose and were represented by other counsel. *Ex parte Lipscomb, 111 Tex. 409, 239 S.W. 1101 (1922)* .

Subdivision (d) in general incorporates well established exceptions.

(1) The privilege does not extend to advice in aid of future wrongdoing. 8 Wigmore § 2298 (McNaughton Rev.1961). The wrongdoing need not be that of the client. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised that a proposed action is within the law. No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required. Cf. *Clark v. United States, 289 U.S. 1, 15-16, 53 S. Ct. 465, 77 L. Ed. 993 (1933)* ; Uniform Rule 26(2)(a). While any general exploration of what transpired between attorney and client would, of course, be inappropriate, it is wholly feasible, either at the discovery stage or during trial, so to focus the inquiry by specific questions as to avoid any broad inquiry into attorney-client communications. Numerous cases reflect this approach.

(2) Normally the privilege survives the death of the client and may be asserted by his representative. Subdivision (c) *supra*. When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view. McCormick § 98; Uniform Rule 26(2)(b); *California Evidence Code § 957*; Kansas Code of Civil Procedure § 60-426(b)(2); New Jersey Evidence Rule 26(2)(b).

(3) The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client, as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct. McCormick § 95; Uniform Rule 26(2)(c); *California Evidence Code § 958*; Kansas Code of Civil Procedure § 60-426(b)(3); New Jersey Evidence Rule 26(2)(c).

(4) When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communications is a proper result. McCormick § 92, p. 184; Uniform Rule 26(2)(d); *California Evidence Code § 959*; Kansas Code of Civil Procedure § 60-426(b)(d) [*sic*].

(5) The subdivision states existing law. McCormick § 95, pp. 192-193. For similar provisions, see Uniform Rule 26(2)(e); *California Evidence Code § 962*; Kansas Code of Civil Procedure § 60-426(b)(4); New Jersey Evidence Rule 26(2). The situation with which this provision deals is to be distinguished from the case of clients with a common interest who retain different lawyers. See subdivision (b)(3) of this rule *supra*.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
Part Three: Rules Approved by Supreme Court But Rejected by Congress

5-Three Federal Rules of Evidence Manual Rule 504

Rule 504 PSYCHOTHERAPIST-PATIENT PRIVILEGE

[Not enacted.]

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) *Proceedings for hospitalization*. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in

the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge*. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense*. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

note

ADVISORY COMMITTEE'S NOTE

The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated; communications not made for purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. *California Evidence Code §§ 990*-1007. For other illustrative statutes see Ill. Rev. Stat. 1967, c. 51, § 5.1; *N.Y.C.P.L.R. § 4504*; *N.C. Gen. Stat.1953, § 8-53*. Moreover, the possibility of compelling gratuitous disclosure by the physician is foreclosed by his standing to raise the question of relevancy. See Note on "Official Information" Privilege following Rule 509 *infra* .

The doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient. While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, *47 Nw. U.L. Rev. 384 (1952)*, when legislatures began moving into the field.

The case for the privilege is convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960):

"Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule ..., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment." A much more extended exposition of the case for the privilege is made in Slovenko, Psychiatry and a Second Look at the Medical Privilege, *6 Wayne L. Rev. 175, 184 (1960)*, quoted extensively in the careful Tentative Recommendation and Study Relating to the Uniform Rules of Evidence (Article V. Privileges), Cal. L. Rev. Comm'n, 417 (1964). The conclusion is reached that Wigmore's four

conditions needed to justify the existence of a privilege are amply satisfied.

Illustrative statutes are *Cal. Evidence Code §§ 1010*-1026; Ga. Code § 38-418 (1961 Supp.); *Conn. Gen. Stat., § 52-146a* (1966 Supp.); Ill. Rev. Stat. 1967, c. 51, § 5.2.

While many of the statutes simply place the communications on the same basis as those between attorney and client, 8 Wigmore § 2286, n. 23 (McNaughton Rev.1961), basic differences between the two relationships forbid resorting to attorney-client save as a helpful point of departure. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, *36 Conn. B.J. 175, 182 (1962)*.

Subdivision (a). (1) The definition of patient does not include a person submitting to examination for scientific purposes. Cf. *Cal. Evidence Code § 1101*. Attention is directed to *42 U.S.C. 242 (a)(2)*, as amended by the Drug Abuse and Control Act of 1970, P.L. 91-513, authorizing the Secretary of Health, Education, and Welfare to withhold the identity of persons who are the subjects of research on the use and effect of drugs. The rule would leave this provision in full force. See Rule 501.

(2) The definition of psychotherapist embraces a medical doctor while engaged in the diagnosis or treatment of mental or emotional conditions, including drug addiction, in order not to exclude the general practitioner and to avoid the making of needless refined distinctions concerning what is and what is not the practice of psychiatry. The requirement that the psychologist be in fact licensed, and not merely be believed to be so, is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories. Cal. Law Rev. Comm'n, supra, at pp. 434-37.

The clarification of mental or emotional condition as including drug addition is consistent with current approaches to drug abuse problems. See, *e.g.*, the definition of "drug dependent person" in *42 U.S.C. 201(q)*, added by the Drug Abuse Prevention and Control Act of 1970, P.L. 91-513.

(3) Confidential communication is defined in terms comformable with those of the lawyer-client privilege, Rule 503(a)(4) *supra*, with changes appropriate to the difference in circumstance.

Subdivisions (b) and (c). The lawyer-client rule is drawn upon for the phrasing of the general rule of privilege and the determination of those who may claim it. See Rule 503(b) and (c).

The specific inclusion of communications made for the diagnosis and treatment of drug addiction recognizes the continuing contemporary concern with rehabilitation of drug dependent persons and is designed to implement that policy by encouraging persons in need thereof to seek assistance. The provision is in harmony with Congressional actions in this area. See 42 U.S.C. § 260, providing for voluntary hospitalization of addicts or persons with drug dependence problems and prohibiting use of evidence of admission or treatment in any proceeding against him, and *42 U.S.C. § 3419* providing that in voluntary or involuntary commitment of addicts the results of any hearing, examination, test, or procedure used to determine addiction shall not be used against the patient in any criminal proceeding.

Subdivision (d). The exceptions differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships. While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, Louisell, The Psychologist in Today's Legal World: Part II, *41 Minn. L. Rev. 731, 746 (1957)*, the committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship. Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, *36 Conn. B. J. 175 (1962)*. These three exceptions are incorporated in the present rule.

(1) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over

disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(2) In a court ordered examination, the relationship is likely to be an arm's length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The rule thus conforms with the provisions of *18 U.S.C. § 4244* that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt and of *42 U.S.C. § 3420* that a physician conducting an examination in a drug addiction commitment proceeding is a competent and compellable witness.

(3) By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. Similar considerations prevail after the patient's death.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 505

Rule 505 HUSBAND-WIFE PRIVILEGE

[Not enacted.]

(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of *8 U.S.C. § 1328*, with transporting a female in interstate commerce for immoral purposes or other offense in violation of *18 U.S.C. §§ 2421-2424*, or with violation of other similar statutes.

note

ADVISORY COMMITTEE'S NOTE

Subdivision (a). Rules of evidence have evolved around the marriage relationship in four respects: (1) incompetency of one spouse to testify for the other; (2) privilege of one spouse not to testify against the other; (3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses, sometimes extended to information learned by virtue of the existence of the relationship. Today these matters are largely governed by statutes.

With the disappearance of the disqualification of parties and interested persons, the basis for spousal incompetency no longer existed, and it, too, virtually disappeared in both civil and criminal actions. Usually reached by statute, this result was reached for federal courts by the process of decision. *Funk v. United States, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933)* . These rules contain no recognition of incompetency of one spouse to testify for the other.

While some 10 jurisdictions recognize a privilege not to testify against one's spouse in a criminal case, and a much smaller number do so in civil cases, the great majority recognizes no privilege on the part of the testifying spouse, and this is the position taken by the rule. Compare *Wyatt v. United States, 362 U.S. 525, 80 S. Ct. 901, 4 L. Ed. 2d 931 (1960)*, a Mann Act prosecution in which the wife was the victim. The majority opinion held that she could not claim privilege and was compellable to testify. The holding was narrowly based: The Mann Act presupposed that the women with whom it dealt had no independent wills of their own, and this legislative judgment precluded allowing a victim-wife an option whether to testify, lest the policy of the statute be defeated. A vigorous dissent took the view that nothing in the Mann Act required departure from usual doctrine, which was conceived to be one of allowing the injured party to claim or waive privilege.

About 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying. It is believed to represent the one aspect of marital privilege the continuation of which is warranted. In *Hawkins v. United States, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958)*, it was sustained. Cf. McCormick § 66; 8 Wigmore § 2228 (McNaughton Rev. 1961): Comment, Uniform Rule 23(2).

The rule recognizes no privilege for confidential communications. The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 Wigmore §§ 2228, 2241 (McNaughton Rev. 1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage. See Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, *13 Minn. L. Rev. 675 (1929)*. Cf. McCormick § 90; 8 Wigmore § 2337 (McNaughton Rev. 1961).

The parties are not spouses if the marriage was a sham, *Lutwak v. United States, 344 U.S. 604 (1953)*, or they have been divorced, *Barsky v. United States, 339 F.2d 180 (9th Cir. 1964)*, and therefore the privilege is not applicable.

Subdivision (b). This provision is a counterpart of Rules 503(c), 504(c), and 506(c). Its purpose is to provide a procedure for preventing the taking of the spouse's testimony notably in grand jury proceedings, when the accused is absent and does not know that a situation appropriate for a claim of privilege is presented. If the privilege is not claimed by the spouse, the protection of Rule 512 is available.

Subdivision (c) contains three exceptions to the privilege against spousal testimony in criminal cases.

(1) The need of limitation upon the privilege in order to avoid grave injustice in cases of offenses against the other spouse or a child of either can scarcely be denied. 8 Wigmore § 2239 (McNaughton Rev. 1961). The rule therefore disallows any privilege against spousal testimony in these cases and in this respect is in accord with the result reached in *Wyatt v. United States, 362 U.S. 525, 80 S. Ct. 901, 4 L. Ed. 2d 931 (1960)*, a Mann Act prosecution, denying the accused the privilege of excluding his wife's testimony, since she was the woman who was transported for immoral purposes.

(2) The second exception renders the privilege inapplicable as to matters occurring prior to the marriage. This provision eliminates the possibility of suppressing testimony by marrying the witness.

(3) The third exception continues and expands established Congressional policy. In prosecutions for importing aliens for immoral purposes, Congress has specifically denied the accused any privilege not to have his spouse testify against him. *8 U.S.C. § 1328*. No provision of this nature is included in the Mann Act, and in *Hawkins v. United States, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958)*, the conclusion was reached that the common law privilege continued. Consistency requires similar results in the two situations. The rule adopts the Congressional approach, as

based upon a more realistic appraisal of the marriage relationship in cases of this kind, in preference to the specific result in *Hawkins*. Note the common law treatment of pimping and sexual offenses with third persons as exceptions to marital privilege. 8 Wigmore § 2239 (McNaughton Rev. 1961).

With respect to bankruptcy proceedings, the smallness of the area of spousal privilege under the rule and the general inapplicability of privileges created by state law render unnecessary any special provision for examination of the spouse of the bankrupt, such as that now contained in section 21(a) of the Bankruptcy Act. *11 U.S.C. § 44(a)*.

For recent statutes and rules dealing with husband-wife privileges, see *California Evidence Code §§ 970*-973, 980-987; Kansas Code of Civil Procedure §§ 60-423(b), 60-428; New Jersey Evidence Rules 23(2), 28.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 506

Rule 506 COMMUNICATIONS TO CLERGYMEN

[Not enacted.]

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

note

ADVISORY COMMITTEE'S NOTE

The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen. During the period when most of the common law privileges were taking shape, no clear-cut privilege for communications between priest and penitent emerged. 8 Wigmore § 2394 (McNaughton Rev. 1961). The English political climate of the time may well furnish the explanation. In this country, however, the privilege has been recognized by statute in about two-thirds of the states and occasionally by the common law process of decision. *Id*., § 2395; *Mullen v. United States, 263 F.2d 275, 105 U.S. App. D.C. 25 (1959)* .

Subdivision (a). Paragraph (1) defines a clergyman as a "minister, priest, rabbi, or other similar functionary of a religious organization." The concept is necessarily broader than that inherent in the ministerial exemption for purposes of Selective Service. See *United States v. Jackson, 369 F.2d 936 (4th Cir. 1966)* . However, it is not so broad as to

include all self-denominated "ministers." A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. No further specification seems possible in view of the lack of licensing and certification procedures for clergymen. However, this lack seems to have occasioned no particular difficulties in connection with the solemnization of marriages, which suggests that none may be anticipated here. For similar definitions of "clergyman" see *California Evidence Code § 1030*; New Jersey Evidence Rule 29.

The "reasonable belief" provision finds support in similar provisions for lawyer-client in Rule 503 and for psychotherapist-patient in Rule 504. A parallel is also found in the recognition of the validity of marriages performed by unauthorized persons if the parties reasonably believed them legally qualified. Harper and Skolnick, Problems of the Family 153 (rev. ed. 1962).

(2) The definition of "confidential" communication is consistent with the use of the term in Rule 503(a)(5) for lawyer-client and in Rule 504(a)(3) for psychotherapist-patient, suitably adapted to communications to clergymen.

Subdivision (b). The choice between a privilege narrowly restricted to doctrinally required confessions and a privilege broadly applicable to all confidential communications with a clergyman in his professional character as spiritual adviser has been exercised in favor of the latter. Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen.

State statutes and rules fall in both the narrow and the broad categories. A typical narrow statute proscribes disclosure of "a confession ... made ... in the course of discipline enjoined by the church to which he belongs." *Ariz.Rev.Stats.Ann. 1956, § 12-2233*. See also *California Evidence Code § 1032*; Uniform Rule 29. Illustrative of the broader privilege are statutes applying to "information communicated to him in a confidential manner, properly entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating ... is seeking spiritual counsel and advice," Fla. Stats. Ann. 1960, § 90.241, or to any "confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," *Iowa Code Ann. 1950, § 622.10*. See also Ill. Rev. Stats. 1967, c. 51, § 48.1; *Minn. Stats. Ann. 1945, § 595.02(3)*; New Jersey Evidence Rule 29.

Under the privilege as phrased, the communicating person is entitled to prevent disclosure not only by himself but also by the clergyman and by eavesdroppers. For discussion see Advisory Committee's Note under lawyer-client privilege, Rule 503(b).

The nature of what may reasonably be considered spiritual advice makes it unnecessary to include in the rule a specific exception for communications in furtherance of crime or fraud, as in Rule 503(d)(1).

Subdivision (c) makes clear that the privilege belongs to the communicating person. However, a prima facie authority on the part of the clergyman to claim the privilege on behalf of the person is recognized. The discipline of the particular church and the discreteness of the clergyman are believed to constitute sufficient safeguards for the absent communicating person. See Advisory Committee's Note to the similar provision with respect to attorney-client in Rule 503(c).

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 507

Rule 507 POLITICAL VOTE

[Not enacted.]

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

note

ADVISORY COMMITTEE'S NOTE

Secrecy in voting is an essential aspect of effective democratic government, insuring free exercise of the franchise and fairness in elections. Secrecy after the ballot has been cast is as essential as secrecy in the act of voting. Nutting, Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs, *47 Mich. L. Rev. 181, 191 (1948)*. Consequently a privilege has long been recognized on the part of a voter to decline to disclose how he voted. Required disclosure would be the exercise of "a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people, as well as tending to create cabals and disturbances between contending parties in popular elections." *Johnston v. Charleston, 1 Bay 441, 442 (S.C. 1795)* .

The exception for illegally cast votes is a common one under both statutes and case law, *Nutting, supra, at p. 192*; 8 Wigmore § 2214, p. 163 (McNaughton Rev. 1961). The policy considerations which underlie the privilege are not applicable to the illegal voter. However, nothing in the exception purports to foreclose an illegal voter from invoking the privilege against self-incrimination under appropriate circumstances.

For similar provisions, see Uniform Rule 31; *California Evidence Code § 1050*; Kansas Code of Civil Procedure § 60-431; New Jersey Evidence Rule 31.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 508

Rule 508 TRADE SECRETS

[Not enacted.]

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

note

ADVISORY COMMITTEE'S NOTE

While sometimes said not to be a true privilege, a qualified right to protection against disclosure of trade secrets has found ample recognition, and, indeed, a denial of it would be difficult to defend. 8 Wigmore § 2212(3) (McNaughton Rev. 1961). And see 4 Moore's Federal Practice PP 30.12 and *34.15* (2d ed. 1963 and Supp.1965) and 2A Barron and Holtzoff, Federal Practice and Procedure § 715.1 (Wright ed. 1961). Congressional policy is reflected in the Securities Exchange Act of 1934, *15 U.S.C. § 78x*, and the Public Utility Holding Company Act of 1933, *id.* § 79v, which deny the Securities and Exchange Commission authority to require disclosure of trade secrets or processes in applications and reports. See also Rule 26(c)(7) of the Rules of Civil Procedure, as revised, mentioned further hereinafter.

Illustrative cases raising trade-secret problems are: *E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S. Ct. 575, 61 L. Ed. 1016 (1917)* , suit to enjoin former employee from using plaintiff's secret processes, countered by defense that many of the processes were well known to the trade; *Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944)* , question whether expert locksmiths employed by FTC should be required to disclose methods used by them in picking petitioner's "pick-proof" locks; *Dobson v. Graham, 49 F. 17 (E.D. Pa.1889)* , patent infringement suit in which plaintiff sought to elicit from former employees now in the hire of defendant the respects in which defendant's machinery differed from plaintiff's patented machinery; *Putney v. Du Bois Co., 240 Mo. App. 1075, 226 S.W.2d 737 (1950)* , action for injuries allegedly sustained from using defendant's secret formula dishwashing compound. See 8 Wigmore § 2212(3) (McNaughton Rev. 1961); Annot., 17 A.L.R.2d 383 ; *49 Mich. L. Rev. 133 (1950)*. The need for accommodation between protecting trade secrets, on the one hand, and eliciting facts required for full and fair presentation of a case, on the other hand, is apparent. Whether disclosure should be required depends upon

a weighing of the competing interests involved against the background of the total situation, including consideration of such factors as the dangers of abuse, good faith, adequacy of protective measures, and the availability of other means of proof.

The cases furnish examples of the bringing of judicial ingenuity to bear upon the problem of evolving protective measures which achieve a degree of control over disclosure. Perhaps the most common is simply to take testimony *in camera*. Annot., 62 A.L.R.2d 509 . Other possibilities include making disclosure to opposing counsel but not to his client, *E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 37 S.Ct. 575, 61 L. Ed. 1016 (1917)* ; making disclosure only to the judge (hearing examiner), *Segal Lock & Hardware Co. v. FTC, 143 F.2d 935 (2d Cir. 1944)* ; and placing those present under oath not to make disclosure, *Paul v. Sinnott, 217 F. Supp. 84 (W.D. Pa.1963)* .

Rule 26(c) of the Rules of Civil Procedure, as revised, provides that the judge may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. ..." While the instant evidence rule extends this underlying policy into the trial, the difference in circumstances between discovery stage and trial may well be such as to require a different ruling at the trial.

For other rules recognizing privilege for trade secrets, see Uniform Rule 32; *California Evidence Code § 1060*; Kansas Code of Civil Procedure § 50-432; New Jersey Evidence Rule 32.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
Part Three: Rules Approved by Supreme Court But Rejected by Congress

5-Three Federal Rules of Evidence Manual Rule 509

Rule 509 SECRETS OF STATE AND OTHER OFFICIAL INFORMATION

[Not enacted.]

(a) Definitions.

(1) *Secret of state*. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.

(2) *Official information*. "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of *18 U.S.C. § 3500*, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to *5 U.S.C. § 552*.

(b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

(c) Procedures. The privilege for secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret information sought concerns, but the privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form *in camera*. If the judge sustains the privilege upon a showing *in camera*, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination *in camera* of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

note

ADVISORY COMMITTEE'S NOTE

Subdivision (a). (1) The rule embodies the privilege protecting military and state secrets described as "well established in the law of evidence," *United States v. Reynolds, 345 U.S. 1, 6, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* , and as one "the existence of which has never been doubted," 8 Wigmore § 2378, p. 794 (McNaughton Rev. 1961).

The use of the term "national defense," without attempt at further elucidation, finds support in the similar usage in statutory provisions relating to the crimes of gathering, transmitting, or losing defense information, and gathering or delivering defense information to aid a foreign government. *18 U.S.C. §§ 793*, *794*. See also *5 U.S.C. § 1002*; *50 U.S.C. App. § 2152(d)*. In determining whether military or state secrets are involved, due regard will, of course, be given to classification pursuant to executive order.

(2) The rule also recognizes a privilege for specified types of official information and in this respect is designed primarily to resolve questions of the availability to litigants of data in the files of governmental departments and agencies. In view of the lesser danger to the public interest than in cases of military and state secrets, the official information privilege is subject to a generally overriding requirement that disclosure would be contrary to the public interest. It is applicable to three categories of information.

(A) Intergovernmental opinions or recommendations submitted for consideration in the performance of decisional or policy making functions. The policy basis of this aspect of the privilege is found in the desirability of encouraging candor in the exchange of views within the government. *Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 141 Ct. Cl. 38 (1958)* ; *Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966)* ; *Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969)* . A privilege of this character is consistent with the Freedom of Information Act, *5 U.S.C. § 552(b)(5)*, and with the standing of the agency to raise questions of relevancy, though not a party, recognized in such decisions as *Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 659, 108 U.S. App. D.C. 106 (1960)* (*Renegotiation Board) and Freeman v. Seligson, 405 F.2d 1326, 1334, 132 U.S. App. D.C. 56 (1968)* (Secretary of Agriculture).

(B) Investigatory files compiled for law enforcement purposes. This category is expressly made subject to the provisions of the Jencks Act, *18 U.S.C. § 3500*, which insulates prior statements or reports of government witnesses in criminal cases against subpoena, discovery, or inspection until the witness has testified on direct examination at the trial but then entitles the defense to its production. Rarely will documents of this nature be relevant until the author has testified and thus placed his credibility in issue. Further protection against discovery of government files in criminal cases is found in Criminal Procedure Rule 16(a) and (b). The breadth of discovery in civil cases, however, goes beyond ordinary bounds of relevancy and raises problems calling for the exercise of judicial control, and in making provision for it the rule implements the Freedom of Information Act, *18 U.S.C. § 552(b)(7)*.

(C) Information exempted from disclosure under the Freedom of Information Act, *5 U.S.C. § 552*. In 1958 the old

"housekeeping" statute which had been relied upon as a foundation for departmental regulations curtailing disclosure was amended by adding a provision that it did not authorize withholding information from the public. In 1966 the Congress enacted the Freedom of Information Act for the purpose of making information in the files of departments and agencies, subject to certain specified exceptions, available to the mass media and to the public generally. *5 U.S.C. § 552*. These enactments are significant expressions of Congressional policy. The exceptions in the Act are not framed in terms of evidentiary privilege, thus recognizing by clear implication that the needs of litigants may stand on somewhat different footing from those of the public generally. Nevertheless, the exceptions are based on values obviously entitled to weighty consideration in formulating rules of evidentiary privilege. In some instances in these rules, exceptions in the Act have been made the subject of specific privileges, *e.g.*, military and state secrets in the present rule and trade secrets in Rule 508. The purpose of the present provision is to incorporate the remaining exceptions of the Act into the qualified privilege here created, thus subjecting disclosure of the information to judicial determination with respect to the effect of disclosure on the public interest. This approach appears to afford a satisfactory resolution of the problems which may arise.

Subdivision (b). The rule vests the privileges in the government where they properly belong rather than a party or witness. See *United States v. Reynolds, supra, p. 7, 73 S. Ct. 528* . The showing required as a condition precedent to claiming the privilege represents a compromise between complete judicial control and accepting as final the decision of a departmental officer. See *Machin v. Zuckert, 316 F.2d 336, 114 U.S. App. D.C. 335 (1963)* , rejecting in part a claim of privilege by the Secretary of the Air Force and ordering the furnishing of information for use in private litigation. This approach is consistent with *Reynolds*.

Subdivision (c). In requiring the claim of privilege for state secrets to be made by the chief departmental officer, the rule again follows *Reynolds*, insuring consideration by a high-level officer. This provision is justified by the lesser participation by the judge in cases of state secrets. The full participation by the judge in official information cases, on the contrary, warrants allowing the claim of privilege to be made by a government attorney.

Subdivision (d) spells out and emphasizes a power and responsibility on the part of the trial judge. An analogous provision is found in the requirement that the court certify to the Attorney General when the constitutionality of an act of Congress is in question in an action to which the government is not a party. *28 U.S.C § 2403*.

Subdivision (e). If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable, as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary. The rule therefore deals only with the effect of a successful claim of privilege by the government in proceedings to which it is a party. Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of government witness, as under the *Jencks* statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. *18 U.S.C. § 3500(d)*. Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. *United States v. Beekman, 155 F.2d 580 (2d Cir. 1946)* . Or they may bear directly upon a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. *United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944)* ; and see *United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)* . Or they may relate to an element of a plaintiff's claim against the government, with the decisions indicating unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it. *United States v. Reynolds, supra* ; *Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956)* .

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
Part Three: Rules Approved by Supreme Court But Rejected by Congress

5-Three Federal Rules of Evidence Manual Rule 510

Rule 510 IDENTITY OF INFORMER

[Not enacted.]

(a) Rule of privilege. The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(c) Exceptions.

(1) *Voluntary disclosure; informer a witness*. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) *Testimony on merits*. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed

without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera*, at which no counsel or party shall be permitted to be present.

(3) *Legality of obtaining evidence*. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made *in camera*. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure *in camera*, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made *in camera*, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

note

ADVISORY COMMITTEE'S NOTE

The rule recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent. In either event, the basic importance of anonymity in the effective use of informers is apparent, *Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962)* , and the privilege of withholding their identity was well established at common law. *Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)* ; McCormick § 148; 8 Wigmore § 2374 (McNaughton Rev. 1961).

Subdivision (a). The public interest in law enforcement requires that the privilege be that of the government, state, or political subdivision, rather than that of the witness. The rule blankets in as an informer anyone who tells a law enforcement officer about a violation of law without regard to whether the officer is one charged with enforcing the particular law. The rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations.

Although the tradition of protecting the identity of informers has evolved in an essentially criminal setting, noncriminal law enforcement situations involving possibilities of reprisal against informers fall within the purview of the considerations out of which the privilege originated. In *Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959)* , the privilege was given effect with respect to persons informing as to violations of the *Fair Labor Standards Act, and in Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561 (5th Cir. 1964)* , a similar case, the privilege was recognized, although the basis of decision was lack of relevancy to the issues in the case.

Only identity is privileged; communications are not included except to the extent that disclosure would operate also to disclose the informer's identity. The common law was to the same effect. 8 Wigmore § 2374, at p. 765 (McNaughton Rev. 1961). See also *Roviaro v. United States, supra, 353 U.S. at p. 60, 77 S. Ct. 623* ; *Bowman Dairy Co. v. United States, 341 U.S. 214, 221, 71 S. Ct. 675, 95 L. Ed. 879 (1951)* .

The rule does not deal with the question whether presentence reports made under Criminal Procedure Rule 32(c) should be made available to an accused.

Subdivision (b). Normally the "appropriate representative" to make the claim will be counsel. However, it is possible that disclosure of the informer's identity will be sought in proceedings to which the government, state, or subdivision, as the case may be, is not a party. Under these circumstances effective implementation of the privilege requires that other representatives be considered "appropriate." See, for example, *Bocchicchio v. Curtis Publishing Co., 203 F. Supp. 403 (E.D. Pa. 1962)* , a civil action for libel, in which a local police officer not represented by counsel successfully claimed the informer privilege.

The privilege may be claimed by a state or subdivision of a state if the information was given to its officer, except that in criminal cases it may not be allowed if the government objects.

Subdivision (c) deals with situations in which the informer privilege either does not apply or is curtailed.

(1) If the identity of the informer is disclosed, nothing further is to be gained from efforts to suppress it. Disclosure may be direct, or the same practical effect may result from action revealing the informer's interest in the subject matter. See, for example, *Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 122 U.S. App. D.C. 65 (1965)*, on remand *246 F. Supp. 839 (D.D.C. 1965)*, which held that the filing of civil antitrust actions destroyed as to plaintiffs the informer privilege claimed by the Attorney General with respect to complaints of criminal antitrust violations. While allowing the privilege in effect to be waived by one not its holder, i.e. the informer himself, is something of a novelty in the law of privilege, if the informer chooses to reveal his identity, further efforts to suppress it are scarcely feasible.

The exception is limited to disclosure to "those who would have cause to resent the communication," in the language of *Roviaro v. United States, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)*, since disclosure otherwise, e.g. to another law enforcing agency, is not calculated to undercut the objects of the privilege.

If the informer becomes a witness for the government, the interests of justice in disclosing his status as a source of bias or possible support are believed to outweigh any remnant of interest in nondisclosure which then remains. See *Harris v. United States, 371 F.2d 365 (9th Cir. 1967)*, in which the trial judge permitted detailed inquiry into the relationship between the witness and the government. Cf. Attorney General v. Briant, 15 M. & W. 169, 153 Eng. Rep. 808 (Exch. 1846). The purpose of the limitation to witnesses for the government is to avoid the possibility of calling persons as witnesses as a means of discovery whether they are informers.

(2) The informer privilege, it was held by the leading case, may not be used in a criminal prosecution to suppress the identity of a witness when the public interest in protecting the flow of information is outweighed by the individual's right to prepare his defense. *Roviaro v. United States, supra*. The rule extends this balancing to include civil as well as criminal cases and phrases it in terms of "a reasonable probability that the informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case." Once the privilege is invoked a procedure is provided for determining whether the informer can in fact supply testimony of such nature as to require disclosure of his identity, thus avoiding a "judicial guessing game" on the question. *United States v. Day, 384 F.2d 464, 470 (3d Cir. 1967)*. An investigation *in camera* is calculated to accommodate the conflicting interests involved. The rule also spells out specifically the consequences of a successful claim of the privilege in a criminal case; the wider range of possibilities in civil cases demands more flexibility in treatment. See Advisory Committee's Note to Rule 509(e) *supra*.

(3) One of the acute conflicts between the interest of the public in nondisclosure and the avoidance of unfairness to the accused as a result of nondisclosure arises when information from an informer is relied upon to legitimate a search and seizure by furnishing probable cause for an arrest without a warrant or for the issuance of a warrant for arrest or search. *McCray v. Illinois, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967)*, *rehearing denied, 386 U.S. 1042*. A hearing *in camera* provides an accommodation of these conflicting interests. *United States v. Jackson, 384 F.2d 825 (3d Cir. 1967)*. The limited disclosure to the judge avoids any significant impairment of secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with *McCray* and the decisions there discussed.

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PART THREE: RULES APPROVED BY SUPREME COURT BUT REJECTED BY CONGRESS
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5-Three Federal Rules of Evidence Manual Rule 511

Rule 511 WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

[Not enacted.]

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

note

ADVISORY COMMITTEE'S NOTE

The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys this confidentiality. McCormick §§ 87, 97, 106; 8 Wigmore §§ 2242, 2327-2329, 2374, 2389-2390 (McNaughton Rev. 1961).

The rule is designed to be read with a view to what it is that the particular privilege protects. For example, the lawyer-client privilege covers only communications, and the fact that a client has discussed a matter with his lawyer does not insulate the client against disclosure of the subject matter discussed, although he is privileged not to disclose the discussion itself. See McCormick § 93. The waiver here provided for is similarly restricted. Therefore a client, merely by disclosing a subject which he had discussed with his attorney, would not waive the applicable privilege; he would have to make disclosure of the communication itself in order to effect a waiver.

By traditional doctrine, waiver is the intentional relinquishment of a known right. *Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)* . However, in the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it, and knowledge or lack of knowledge of the existence of the privilege appears to be irrelevant. *California Evidence Code § 912*; 8 Wigmore § 2327 (McNaughton Rev. 1961).

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5-Three Federal Rules of Evidence Manual Rule 512

Rule 512 PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

[Not enacted.]

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

note

ADVISORY COMMITTEE'S NOTE

Ordinarily a privilege is invoked in order to forestall disclosure. However, under some circumstances consideration must be given to the status and effect of a disclosure already made. Rule 511, immediately preceding, gives voluntary disclosure the effect of a waiver, while the present rule covers the effect of disclosure made under compulsion or without opportunity to claim the privilege.

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. See *Fraser v. United States, 145 F.2d 139 (6th Cir. 1944)* , cert. denied *324 U.S. 849, 65 S.Ct. 684, 89 L.Ed. 1409* ; *United States v. Johnson, 76 F.Supp. 538 (M.D.Pa.1947)* , aff'd *165 F.2d 42 (3d Cir. 1947)* , cert. denied *332 U.S. 852, 68 S.Ct. 355, 92 L.Ed. 422* , reh. denied *333 U.S. 834, 68 S.Ct. 457, 92 L.Ed. 1118* . However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); McCormick § 127; 8 Wigmore § 2270 (McNaughton Rev. 1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of

having one simple rule, assuring at least one opportunity for judicial supervision in every case.

The second circumstance stated as a basis for exclusion is disclosure made without opportunity to the holder to assert his privilege. Illustrative possibilities are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank.

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5-Three Federal Rules of Evidence Manual Rule 513

Rule 513 COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

[Not enacted.]

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

note

ADVISORY COMMITTEE'S NOTE

Subdivision (a). In *Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)* , the Court pointed out that allowing comment upon the claim of a privilege "cuts down on the privilege by making its assertion costly." Consequently it was held that comment upon the election of the accused not to take the stand infringed upon his privilege against self-incrimination so substantially as to constitute a constitutional violation. While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect. Hence the present subdivision forbids comment upon the exercise of a privilege, in accord with the weight of authority. *Courtney v. United States, 390 F.2d 521 (9th Cir. 1968)* ; 8 Wigmore §§ 2243, 2322, 2386; Barnhart, Privilege in the Uniform Rules of Evidence, *24 Ohio St. L.J. 131, 137-38 (1963)*. Cf. McCormick § 80.

Subdivision (b). The value of a privilege may be greatly depreciated by means other than expressly commenting to a jury upon the fact that it was exercised. Thus, the calling of a witness in the presence of the jury and subsequently excusing him after a sidebar conference may effectively convey to the jury the fact that a privilege has been claimed, even though the actual claim has not been made in their hearing. Whether a privilege will be claimed is usually ascertainable in advance and the handling of the entire matter outside the presence of the jury is feasible. Destruction of the privilege by innuendo can and should be avoided. *Tallo v. United States, 344 F.2d 467 (1st Cir. 1965)* ; *United*

States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957) ; *San Fratello v. United States, 343 F.2d 711 (5th Cir. 1965)* ; *Courtney v. United States, 390 F.2d 521 (9th Cir. 1968)* ; 6 Wigmore § 1808, pp. 275-76; *6 U.C.L.A.L. Rev. 455 (1959)*. This position is in accord with the general agreement of the authorities that an accused cannot be forced to make his election not to testify in the presence of the jury. 8 Wigmore § 2268, p. 407 (McNaughton Rev. 1961).

Unanticipated situations are, of course, bound to arise, and much must be left to the discretion of the judge and the professional responsibility of counsel.

Subdivision (c). Opinions will differ as to the effectiveness of a jury instruction not to draw an adverse inference from the making of a claim of privilege. See *Bruton v. United States, 389 U.S. 818, 88 S. Ct. 126, 19 L. Ed. 2d 70 (1968)* . Whether an instruction shall be given is left to the sound judgment of counsel for the party against whom the adverse inference may be drawn. The instruction is a matter of right, if requested. This is the result reached in *Bruno v. United States, 308 U.S. 287, 60 S. Ct. 198, 84 L. Ed. 257 (1939)* , holding that an accused is entitled to an instruction under the statute (now *18 U.S.C. § 3481*) providing that his failure to testify creates no presumption against him.

The right to the instruction is not impaired by the fact that the claim of privilege is by a witness, rather than by a party, provided an adverse inference against the party may result.

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5-Three Federal Rules of Evidence Manual Rule 804

Rule 804 HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

[Subdivision (b)(2) not enacted.]

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(2) *Statement of recent perception*. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear.

note

ADVISORY COMMITTEE'S NOTE

Exception (2). The rule finds support in several directions. The well known Massachusetts Act of 1898 allows in evidence the declaration of any deceased person made in good faith before the commencement of the action and upon personal knowledge. *Mass. G.L., c. 233, § 65*. To the same effect is *R.I.G.L. § 9-19-11*. Under other statutes, a decedent's statement is admissible on behalf of his estate in actions against it, to offset the presumed inequality resulting from allowing a surviving opponent to testify. *California Evidence Code § 1261*; Conn. G.S., § 52-172; and statutes collected in 5 Wigmore § 1576. See also Va. Code § 8-286, allowing statements made when capable by a party now incapable of testifying.

In 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association recommended adoption of a statute similar to that of Massachusetts but with the concept of unavailability expanded to include, in addition to death, cases of insanity or inability to produce a witness or take his deposition. 63 A.B.A. Reports 570, 584, 600 (1938). The same year saw enactment of the English Evidence Act of 1938, allowing written statements made on personal knowledge, if declarant is deceased or otherwise unavailable or if the court is satisfied that undue delay or

expense would otherwise be caused, unless declarant was an interested person in pending or anticipated relevant proceedings. Evidence Act of 1938, 1 & 2 Geo. 6, c. 28; Cross on Evidence 482 (3d ed. 1967).

Model Code Rule 503(a) provided broadly for admission of any hearsay declaration of an unavailable declarant. No circumstantial guarantees of trustworthiness were required. Debate upon the floor of the American Law Institute did not seriously question the propriety of the rule but centered upon what should constitute unavailability. 18 A.L.I. Proceedings 90-134 (1941).

The Uniform Rules draftsman took a less advanced position, more in the pattern of the Massachusetts statute, and invoked several assurances of accuracy: recency of perception, clarity of recollection, good faith, and antecedence to the commencement of the action. Uniform Rule 63(4) (c).

Opposition developed to the Uniform Rule because of its countenancing of the use of statements carefully prepared under the tutelage of lawyers, claim adjusters, or investigators with a view to pending or prospective litigation. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VIII. Hearsay Evidence), Cal. Law Rev. Comm'n, 318 (1962); Quick, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), *6 Wayne L. Rev. 204, 219-24 (1960)*. To meet this objection, the rule excludes statements made at the instigation of a person engaged in investigating, litigating, or settling a claim. It also incorporates as safeguards the good faith and clarity of recollection required by the Uniform Rule and the exclusion of a statement by a person interested in the litigation provided by the English act.

With respect to the question whether the introduction of a statement under this exception against the accused in a criminal case would violate his right of confrontation, reference is made to the last paragraph of the Advisory Committee's Note under Exception (1) *supra*.

Federal Rules of Evidence Manual

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
Case Law Divergence from the Federal Rules of Evidence

5-Four Federal Rules of Evidence Manual Four.syn

AUTHOR: By Daniel J. Capra Philip Reed Professor of Law, Fordham Law School Reporter to the Judicial Conference Advisory Committee on Evidence Rules

§ Four.syn Synopsis to Chapter Four: Case Law Divergence from the Federal Rules of Evidence

I Introduction

II Examples of Case Law In Conflict With the Text of the Rule and/or Committee Note:

III Examples of Case Law Development Where the Rules and Committee Note Are Silent

By Daniel J. Capra
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Federal Rules of Evidence Manual

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
Case Law Divergence from the Federal Rules of Evidence

5-Four Federal Rules of Evidence Manual I

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I Introduction

Assume that a lawyer is reading one of the Federal Rules of Evidence to determine whether a piece of evidence will be admissible at trial -- for example, the lawyer wants to know whether a videotape can be admitted as a learned treatise. Obviously, the best place to start is with the text of the Federal Rules of Evidence. But if the lawyer thinks that the text of a particular rule plainly answers the question of admissibility, or simply leaves the question open for argument, that lawyer will often be wrong. That is because the case law has diverged from the text of the Federal Rules on many important points. Thus, in our example, the Rule admitting learned treatises does not on its face permit introduction of videotapes, and yet such tapes have been admitted under the case law.

The Advisory Committee on Evidence Rules, which this author currently serves as Reporter, has expressed concern that the divergence between case law and the text of the Rule might create a trap for the unwary. See generally Becker and Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 868 (1992)* (noting the need to "resolve discrepancies between the plain text of the Federal Rules and the generally shared interpretation of the Rules deriving from preexisting common law traditions"). One way to correct this divergence might be to propose an amendment to the text of any Rule subject to divergent case law. But the Advisory Committee is acutely aware of the costs of amending an evidence rule. Amendments can lead to the disruption of settled expectations, and may create further problems of interpretation and divergence. The Advisory Committee resolved to take a less drastic course -- a course that would not require an amendment of any rules and yet would highlight for lawyers and judges the existence of divergent case law. The Committee directed the Reporter to prepare this report in an effort to increase the awareness of counsel practicing in federal courts, as well as judges, about the possibility that case law has diverged from the text of some of the Federal Rules of Evidence. This divergence comes in two forms: (1) where the case law (defined as case law in at least one circuit) is inconsistent with either the text of the Rule, the Advisory Committee Note explaining the text, or both; and (2) where the case law has provided significant development on a point that is not addressed by either the text of the Rule or the Committee Note.

This report highlights the major instances in which case law has diverged from an applicable Rule. Before proceeding to these illustrations, it is important to stress several qualifications on the scope of this report.

First, there is no intent to imply that any of the case law discussed herein is incorrect or "wrongly decided." The goal of this report is to point out the case law divergence from the Federal Rules of Evidence, without commenting on the merits of that divergence. Indeed, commentators have opined that much of the divergent case law is sensible and well-decided. See, e.g., Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence, 71 Ind. L.J. 551, 571 (1996)* ("Sometimes we must look beyond the words of the Rules to understand evidentiary doctrine. We must do so when the Rules are not definitive or ambiguous ... but sometimes even when the text is clear.").

Second, there is no intent to imply that any of the Rules discussed herein are problematic or need to be amended. The fact that the case law diverges from the Rule might be relevant to the need for an amendment, but it is certainly not dispositive. Whether a particular Rule should be amended is a complex question that is well beyond the scope of this report.

Third, there is no attempt to be comprehensive in the treatment of the case law construing the Evidence Rules discussed herein. Divergent case law is defined as case law in at least one circuit that has diverged from the text of the particular rule. This report does not purport to provide a treatise-like discussion of all the pertinent case law, from all the circuits, construing a particular rule. The goal of this report is to raise "red flags" with lawyers and judges, by providing basic information about areas where case law can be found that diverges from the text of the Federal Rules of Evidence.

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
Case Law Divergence from the Federal Rules of Evidence

5-Four Federal Rules of Evidence Manual II

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II Examples of Case Law In Conflict With the Text of the Rule and/or Committee Note:

1. Rule 106: *Rule 106* sets forth a rule of completeness, providing that when a party introduces a writing or recorded statement, the adversary may "require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *Rule 106* by its terms permits the adversary to introduce completing statements only where the proponent introduces a *written or recorded* statement. The language of the Rule does not on its face permit completing evidence when the proponent introduces an oral statement, such as a criminal defendant's oral confession. Some courts have found, however, that *Rule 106*, or at least the principle of completeness embodied therein, applies to require admission of omitted portions of an oral statement when necessary to correct a misimpression. See *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* (prior oral statements of a government witness were properly offered on redirect examination since the defendant had used portions of the statements in cross-examination and the omitted portions placed the statements in context). See also the discussion in *United States v. Branch, 91 F.3d 699 (5th Cir. 1996)* (noting the case law permitting criminal defendants to offer omitted parts of statements they make to law enforcement officers that provide exculpatory information). Compare *United States v. Harvey, 914 F.2d 966 (7th Cir. 1990)* (*Rule 106* does not apply to oral statements).

Moreover, some courts have held that *Rule 106* can operate as a de facto hearsay exception when the opponent opens the door by creating a misimpression by offering only part of a statement. In other words, completing evidence is found admissible under *Rule 106* even if it would otherwise be hearsay. See *United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986)* ("*Rule 106* can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that that proffered evidence should be considered contemporaneously"). See also C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (supporting this approach). Such a reading is not apparent from the text or Committee Note. See *United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996)* (interpreting *Rule 106* as purely a timing device, not as a rule permitting the admission of otherwise inadmissible evidence).

2. Rule 403: *Rule 403* provides that a trial judge may exclude proffered evidence if its probative value is substantially

outweighed "by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Of the negative factors listed that would support exclusion, only one refers to the jury directly -- the danger of "misleading the jury." This would seem to indicate that other negative factors mentioned in the Rule, specifically the danger of unfair prejudice and confusion of the issues, must be taken into account in a bench trial. Yet courts have held to the contrary, reasoning that unfair prejudice and confusing evidence will not have the same negative impact on the judge as it would have on the jury. See, e.g., *Schultz v. Butcher, 24 F.3d 626 (4th Cir. 1994)* (trial court erred in excluding evidence in a bench trial on the ground of its prejudicial effect); *Gulf States Utils. v. Ecodyne Corp., 635 F.2d 517 (5th Cir. 1981)* (the portion of *Rule 403* referring to prejudicial effect "has no logical application in bench trials").

3. Rule 404(a): The Rule states that no party is permitted in the first instance to introduce character evidence to prove action in accordance with character, except for the "accused" -- i.e., only the "accused" can open the door to circumstantial use of character evidence. Thus, the Rule seems explicit in prohibiting the circumstantial use of character evidence in civil cases. And the Advisory Committee Note confirms this exclusionary principle. Yet some courts have permitted civil defendants to use character evidence circumstantially "when the central issue in a civil case is by its nature criminal." *Palmquist v. Selvik, 111 F.3d 1332, 1342 (7th Cir. 1997)* (assuming that character evidence could be admissible in certain civil cases); *Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)* (police officers charged with excessive force are permitted to prove the decedent's character for violence). The Advisory Committee has proposed an amendment to *Rule 404(a)* that would clarify that character evidence is never admissible in a civil case when it is offered to prove a person's conduct. Barring unforeseen developments, that proposed amendment will become effective on December 1, 2006.

4. Rule 407: *Rule 407* prohibits the admission of actions taken after an injury or harm which, if taken previously, would have made the injury or harm less likely to occur, if the remedial measure is offered to prove negligence, culpable conduct, product defect, design defect, or failure to warn. The Rule by its terms would appear to preclude evidence of any action by *anyone* that would have made the injury or harm less likely to occur. Courts have held, however, that subsequent remedial measures are not excluded by *Rule 407* if the measure is taken by someone *other than the defendant*, i.e., if it is a "third party repair." See, e.g., *TLT-Babcock, Inc. v. Emerson Elec. Co., 33 F.3d 397 (4th Cir. 1994)* (design change not excluded by *Rule 407* where the change was made by an entity that was not a party to the case); *Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985)* (repair by tractor owner after an accident not excluded when offered against tractor manufacturer).

Also, the Rule states that "impeachment" is a proper purpose for admitting subsequent remedial measures. Taken literally, this would mean that a plaintiff in a product liability case could offer proof of a subsequent remedial measure to "impeach" a defense witness' assertion that the product used by the plaintiff was safely designed. Yet courts have generally limited the use of subsequent remedial measures when offered for impeachment by way of contradiction. The fear is that this exception would swallow the rule of exclusion. See, e.g., *Harrison v. Sears, Roebuck & Co., 981 F.2d 25 (1st Cir. 1992)* (a desire merely to undercut an expert's credibility cannot be sufficient to trigger the impeachment exception to *Rule 407*, or else the exception would swallow the rule of exclusion); *Kelly v. Crown Equip. Co., 970 F.2d 1273 (3d Cir. 1992)* (subsequent remedial measure cannot be offered for simple contradiction of expert's statement that a design was safe). Thus, the "impeachment" permitted by the Rule has been limited to cases where defense witnesses have made extravagant claims of safety. See *Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995)* (post-accident design change admissible for impeachment where defense witness testified that the original design was the safest possible design); *Muzyka v. Remington Arms Co., 774 F.2d 1309 (5th Cir. 1985)* (design change should have been admitted for impeachment where defense witnesses testified that the product was the best and safest product of its kind).

5. Rule 601: *Rule 601* essentially states that all questions that had been treated previously as matters of competency are now matters of credibility for the factfinder. The Advisory Committee Note, elaborating on the Rule, indicates an intent to prohibit a trial judge from excluding a witness on grounds of incompetence. Yet courts have excluded witnesses who have been found incapable of testifying in a competent fashion. See, e.g., *United States v. Gates, 10 F.3d 765, 766*

(11th Cir. 1993) ("Notwithstanding *Rule 601*, a court has the power to rule that a witness is incapable of testifying, and in an appropriate case it has the duty to hold a hearing to determine that issue."); *United States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984)* (trial court retains the power, and sometimes the duty, to hold a hearing "to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion.").

6. Rule 607: The Rule states categorically that a party can impeach any witness it calls. On its face, the Rule permits the following scenario: (1) in a criminal case, a witness would testify at trial that the defendant was not at the scene of the crime, though having stated previously to a police officer that the defendant committed the crime; (2) the prior statement to the police officer could not be admitted as substantive evidence because it is hearsay; (3) but the prosecutor calls the witness, knowing he will give testimony favorable to the defendant, and then "impeaches" the witness with his prior statement to the police officer, on the ground that it is inconsistent with the witness' in-court testimony. Thus, *Rule 607* by its terms permits the prosecutor to proffer prior inconsistent statements, not made under oath (and therefore not admissible for their truth under *Rule 801(d)(1)(A)*) in the guise of impeachment. Yet despite the affirmative and permissive language of the Rule, courts have held that a prosecutor cannot call a witness solely to impeach that witness, because to allow this practice would undermine the hearsay rule. See, e.g., *United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985)* ("The prosecution, however, may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule. The danger in this procedure is obvious."); *United States v. Morlang, 531 F.2d 183 (4th Cir. 1975)* (conviction reversed on the ground that the government should not have been permitted to call a witness for no other purpose than to impeach him). See generally Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 Tex. L. Rev. 745 (1990)* (noting this and other situations where courts have felt compelled to diverge from the text of an Evidence Rule in order to reach a just result).

7. Rule 613(b): The Rule and the Advisory Committee Note both indicate that it is not necessary to give a witness an opportunity to examine a prior inconsistent statement before that statement is admitted to impeach the witness. All that is necessary is that the witness be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule from Queen Caroline's case, under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Note, however, some courts have reverted to the common-law rule. See, e.g., *United States v. Sutton, 41 F.3d 1257 (8th Cir. 1994)* (trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while cross-examined by defense counsel); *United States v. Marks, 816 F.2d 1207, 1211 (7th Cir. 1987)* (trial judge is entitled despite the language of *Rule 613(b)* "to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and juries").

8. Rule 704(b): *Rule 704(b)* would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness ... may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." But some courts have held (and others have implied) that the rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from law enforcement personnel such as narcotics agents. See, e.g., *United States v. Gastiaburo, 16 F.3d 582 (4th Cir. 1994)* (stating that *Rule 704(b)* does not apply to the testimony of an expert law enforcement agent); *United States v. Lipscomb, 14 F.3d 1236 (7th Cir. 1994)* (expressing sympathy with such a position, but finding it unnecessary to decide the matter). Other courts, while technically applying the *Rule 704(b)* limitation to all expert witnesses, have applied it in such a way as to nullify its impact -- permitting, for example, an expert to opine as to the mental state of a hypothetical person whose fact situation mirrors the fact situation in issue. See, e.g., *United States v. Williams, 980 F.2d 1463 (D.C.Cir. 1992)* (permitting a law enforcement agent to testify that a hypothetical person carrying ziplock bags each containing small amounts of drugs was intending to distribute them; the hypothetical matched the facts of the case).

9. Rule 801(c) (Implied Assertions): *Rule 801(c)* defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." The Committee Note states that "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" is excluded from the definition of hearsay "by the language of subdivision (c)." This would mean that a statement would be hearsay only if it were offered for the truth of the express assertion in the statement -- offering it for any implied assertion would escape hearsay proscription. So for example, a statement "It is raining cats and dogs" would be admissible to prove it is raining -- the statement would not be offered to prove the express assertion that cats and dogs were falling from the sky.

This highly constricted definition of hearsay generally has been rejected by the courts. The cases generally state that statements are hearsay if (1) they are offered for the truth of a matter *implied* in the statement and (2) the speaker *intended* to communicate that implication. See, e.g., *United States v. Reynolds, 715 F.2d 99 (3rd Cir. 1983)* (rejecting the government's suggestion that only a statement's express assertion should be considered in deciding whether it constitutes hearsay); *Lyle v. Koehler, 720 F.2d 426, 433 (6th Cir. 1983)* (concluding that letters were hearsay because "the inferences they necessarily invite form an integral part of the letters"; the reference to "matters asserted" in *Rule 801(c)* covers both express and implied assertions); *United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996)* (stating that the important question under *Rule 801(c)* is whether the assertion, express or implied, "is intended"). See also Milich, *Re-examining Hearsay Under the Federal Rules: Some Method for the Madness, 39 Kan. L. Rev. 893 (1991)* (arguing for an intent-based test in determining whether implied assertions are hearsay).

10. Rule 801(d)(2)(D): The rule provides a hearsay exemption for a statement made by a party's agent, when offered against the party, and when the statement concerns a matter within the agent's scope of authority. So for example, a statement by a janitor, "I am sorry the floor was slippery, I should have cleaned up the spill before you slipped in it," can be admitted against the employer in a slip-and-fall case. But what if the party against whom the statement is offered is the government, and the statement is that of a government agent? The Rule provides no relief for statements from government agents, and so it would appear that a statement of a government agent should be admissible against the government in the same way as it would against a private employer. But several courts have held that *Rule 801(d)(2)(D)* cannot be used against the government. See *United States v. Yildiz, 355 F.3d 80 (2d Cir. 2003)* . These courts rely on the common-law rule that refused to hold the government to the statements of its agents. But in principle, the common-law did not survive the enactment of the Federal Rules of Evidence.

11. Rule 803(4): The Rule provides a hearsay exception for statements made for purposes of treatment or diagnosis when the statements deal with the "cause or external source" of the medical condition. The exception does not, by its terms, provide a hearsay exception for statements attributing fault. The Committee Note states that statements of fault "would not ordinarily qualify" under the exception, and distinguishes a statement "I was hit by a car" (admissible when made to medical personnel) from "I was hit by a car that ran a red light" (inadmissible). Yet in at least some classes of cases, statements attributing fault, when made to medical personnel, are admitted by the courts under *Rule 803(4)*. The most common example is a statement from a child victim of sexual abuse, specifically identifying her attacker. See, e.g., *United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985)* (child's statement attributing fault is admissible under *Rule 803(4)* "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding"); *United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993)* ("[T]he domestic sexual abuser's identity is admissible under *Rule 803(4)* where the abuser has such an intimate relationship with the victim that the abuser's identity becomes reasonably pertinent to the victim's proper treatment.").

12. Rule 803(5): The Rule provides a hearsay exception for past recollection recorded: a record "containing a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately" where the record is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." What happens, however, when a person makes a statement to another person, and that other person is the one who writes it down? The exception by its terms does not seem to permit a "two-party voucher" system of proving past recollection recorded, since it states that the record must

be shown to have been "made or adopted by the witness." Thus, the Rule does not envision that a person with personal knowledge might make a statement recorded by another, with the record being made admissible by calling both the reporter and the recorder. Despite the language of the Rule, however, cases can be found that permit two-party vouching under *Rule 803(5)*. See, e.g., *United States v. Williams, 951 F.2d 853 (7th Cir. 1993)* .

13. Rule 803(6): The Rule defines a business record as one "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted activity." This language could be read as abrogating the common-law requirement that the person transmitting the information to the recorder must have a business duty to do so. It states only that the transmitting person must have "knowledge," not that the person must be reporting within the business structure. Yet despite the text, the courts have held that all those who report information included in a business record must be under a business duty to do so -- or else the hearsay problem created from the report by an outsider must be satisfied in some other way. See *United States v. Turner, 189 F.3d 712, 719-20 (8th Cir. 1999)* ("[W]hen the source of information and the recorder of that information are not the same person, the business record contains hearsay upon hearsay. If both the source and recorder of the information were acting in the regular course of the organization's business, however, the hearsay upon hearsay problem may be excused by the business records exception to the rule against hearsay."); *Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995)* (911 call was not admissible as a business record because the caller was not under any business duty to report, and the report did not independently satisfy any hearsay exception); *Cameron v. Otto Bock Orthopedic Indus. Inc., 43 F.3d 14 (1st Cir. 1994)* (product failure reports submitted to the manufacturer after the plaintiff's accident were inadmissible; the reports were submitted by parties who had no business duty to report accurately to the manufacturer).

14. Rule 803(8)(B): *Rule 803(8)* provides a hearsay exception for public reports. But the Rule specifically excludes from its coverage public reports setting forth "matters observed by police officers and other law enforcement personnel" if such reports are offered "in criminal cases." Read literally, the Rule would not provide a hearsay exception for a forensic report prepared by the police that concluded that the defendant was innocent. Such a report would be offered by the defendant, but the exclusionary language of *Rule 803(8)(B)* covers all police reports offered in criminal cases. Yet some lower courts have refused to be bound by the plain meaning of the rule, reasoning that Congress intended to regulate only police reports that unfairly inculpate a criminal defendant, and that the exception should therefore apply to public reports offered by the accused. See, e.g., *United States v. Smith, 521 F.2d 957 (D.C.Cir. 1975)* (despite its exclusionary language, *Rule 803(8)(B)* should be read in light of Congress' intent to exclude police reports only when offered *against* a criminal defendant). But see *United States v. Sharpe, 193 F.3d 852, 868 (5th Cir. 1999)* (the defendant's reliance on *Rule 803(8)(B)* to admit an exculpatory police report was "misplaced" because the Rule does not grant admissibility for any such reports offered in criminal cases).

15. Rule 803(8)(B) and (C): *Rule 803(8)(B)* and *(C)* both contain language appearing to exclude from the hearsay exception all records prepared by law enforcement personnel, when such records are offered against a criminal defendant. Read literally, these provisions would prevent the government from introducing simple tabulations of non-adversarial information. For example, these subdivisions appear not to grant a hearsay exception for a routine printout from the Customs Service recording license plates of cars that crossed the border on a certain day, when offered in a criminal case. Courts have refused to apply the plain exclusionary language of these subdivisions literally, however. They reason that the language could not have been intended to cover reports that are ministerial in nature and prepared under non-adversarial circumstances; it is only adversarial, evaluative reports (such as crime scene reports) that carry the risk of fabrication that the exclusionary language was designed to regulate. See, e.g., *United States v. Orozco, 590 F.2d 789 (9th Cir. 1979)* (customs records of border crossings are admissible under *Rule 803(8)* because they are ministerial and not prepared under adversarial circumstances); *United States v. Grady, 544 F.2d 598 (2d Cir. 1976)* (reports concerning firearms' serial numbers were admissible because they were records of routine factual matters prepared in nonadversarial circumstances).

16. Rule 803(18): *Rule 803(18)* provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert

witness or by judicial notice. The Rule does not on its face permit evidence in electronic form, such as a film or video. But the Second Circuit has rejected a literal reading of the Rule and upheld the admission of an authoritative videotape under the learned treatise exception. See *Costantino v. Herzog, 203 F.3d 164, 171 (2d Cir. 2000)* (reasoning that it is "overly artificial to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape").

17. Rule 804(b)(1): The Rule provides a hearsay exception for prior testimony when offered against a party who either (1) had a similar motive and opportunity to develop the testimony at the time it was given, or (2) in civil cases, had a predecessor in interest with such a similar motive and opportunity at the time the testimony was given. Some courts have defined the term "predecessor in interest" in civil cases as *anyone* who had a similar motive and opportunity to develop the testimony, at the time it was given, as the opponent would have at the instant trial; these courts do not require some legal relationship between the prior party and the party against whom the evidence is now offered. This construction collapses the term "predecessor in interest" with the term "similar motive." See, e.g., *Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3rd Cir. 1978)* (prior testimony properly admitted against plaintiff, where prior party had a similar motive to develop the testimony as the plaintiff in the instant case would have were the declarant to testify at trial; Judge Stern, concurring, states that such an expansive definition of "predecessor in interest" effectively reads that term out of the Rule); *Horne v. Owens-Corning Fiberglass Corp., 4 F.3d 276 (4th Cir. 1993)* (prior testimony from a different case properly admitted against the plaintiff, where the previous plaintiff, though not affiliated in any way with the plaintiff, had a similar motive to develop the testimony). Other courts have admitted such evidence not as prior testimony (for want of a predecessor in interest) but as residual hearsay. See *Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985)* .

18. Rule 804(b)(3): The Rule provides that if a declaration against penal interest is offered to exculpate an accused, it is not admissible under this hearsay exception "unless corroborating circumstances clearly indicate the trustworthiness of the statement." On its face, the rule does not require a showing of corroborating circumstances for statements offered by the government that *inculpate* the accused. Yet many courts have required the government to establish corroborating circumstances for inculpatory statements offered under *Rule 804(b)(3)*. See, e.g., *United States v. Barone, 114 F.3d 1284 (1st Cir. 1997)* (imposing a corroborating circumstances requirement for statements offered by the prosecution under *Rule 804(b)(3)*, while acknowledging that the Rule does not explicitly require a showing of corroborating circumstances for such statements); *United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990)* (requiring a showing of corroborating circumstances for inculpatory declarations against penal interest). Similarly, the corroborating circumstances requirement does not appear to apply when declarations against penal interest are offered in civil cases, because the requirement covers statements offered to exculpate the "accused." At least one court, however, has applied the corroborating circumstances requirement to declarations against penal interest offered in civil cases. See *American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 541 (7th Cir. 1999)* (reasoning that it is important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered).

19. Rule 806: The Rule states that a hearsay declarant's credibility may be attacked "by any evidence which would be admissible" if the declarant had testified as a witness. The language raises a problem when the proponent wishes to attack the declarant by proffering specific bad acts to prove the witness' bad character for veracity. *Rule 608(b)* prohibits extrinsic proof of bad acts when offered to show the witness' character for untruthfulness. *Rule 806* could therefore be read literally as prohibiting bad acts impeachment of a hearsay declarant. This is because the only way usually available to introduce bad acts without the witness being there to be asked about them would be to proffer extrinsic evidence in apparent violation of *Rule 608(b)*. But some courts have stated that extrinsic evidence of a bad act can be admitted to prove a hearsay declarant's character for veracity, subject to *Rule 403*. The reasoning is that because the declarant is not available for cross-examination, extrinsic evidence is "the only means of presenting such evidence to the jury." *United States v. Friedman, 854 F.2d 535, n.8 (2d Cir. 1988)* . See the extensive discussion of this problem in Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant, 56 Ohio State L.J. 495 (1995)*. But see *United States v. Saada, 212 F.3d 210 (3d Cir. 2000)* , holding that extrinsic evidence may never be admitted to prove a bad act

offered to impeach a hearsay declarant's character for truthfulness. The *Saada* Court relied on the "plain language" of *Rule 806*, which it read as creating exactly the same impeachment rules for hearsay declarants as apply for in-court witnesses, with one exception -- impeachment with inconsistent statements (as to which the requirement at trial of confronting the witness with the statement is specifically excused under *Rule 806*).

20. Rule 807: *Rule 807* provides a "residual exception" to the hearsay rule, granting admissibility to trustworthy statements that are "not specifically covered by" other exceptions. There are at least two ways in which the case law diverges from the text and/or Committee Note to *Rule 807*. First, the Rule permits the admission of residual hearsay only if that hearsay is "not specifically covered" by another exception. This might seem to indicate that hearsay that "nearly misses" one of the established exceptions should not be admissible as residual hearsay -- because it is specifically covered by, and yet not admissible under, another exception. In fact, however, most courts have construed the term "not specifically covered" by another hearsay exception to mean "not admissible under" another hearsay exception. See, e.g., *United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989)* (grand jury statement is "not specifically covered" by another hearsay exception because it is not admissible under any such exception).

The second divergence between the case law and the text of the residual exception involves the notice requirement. The Rule states that "a statement may not be admitted" under this exception unless the proponent gives notice "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." Most courts have read the notice requirement far more flexibly than its language would seem to indicate. For example, most courts have held that the notice requirement can be satisfied by providing notice at trial, so long as the adversary is given sufficient time to prepare. See, e.g., *United States v. Baker, 985 F.2d 1248 (4th Cir. 1993)* . Other courts have read a good cause exception into the notice requirement. See, e.g., *United States v. Lyon, 567 F.2d 777 (8th Cir. 1977)* . But see *United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978)* (rejecting a good cause exception as not permitted by the text of the Rule).

21. Rule 1006: *Rule 1006* allows admission of summaries in lieu of having the voluminous originals presented at trial. Thus the Rule allows a summary to operate as evidence when admitting the underlying components would be too burdensome. The use of summaries as evidence must be distinguished from the use of charts and summaries only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted. *See, e.g., Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994)* (finding no error where experts gave their opinions on the adequacy of PanAm security measures, relying from time to time on trial transcripts displayed on a projection screen; *Rule 1006* objection was misplaced because the trial transcripts were records of testimony at the trial itself). Some courts have considered the "admissibility" of charts and summaries of trial evidence under *Rule 1006*, but this is a mistake; the Rule is really not applicable because pedagogical summaries are not evidence. See, e.g., *United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996)* (applying *Rule 1006* to approve the use of summaries based on evidence that had already been admitted at trial); *United States v. Stephens, 779 F.2d 232 (5th Cir. 1985)* (same).

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE

Case Law Divergence from the Federal Rules of Evidence

5-Four Federal Rules of Evidence Manual III

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III Examples of Case Law Development Where the Rules and Committee Note Are Silent

1. Rule 103: The Rule provides conditions for a party wishing to preserve a claim of evidentiary error for appeal. It states that a party must make a timely objection or motion to strike, stating the specific ground of objection if that ground is not apparent from the context. An amendment to *Rule 103* effective December 1, 2000, further provides that if the trial court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. But the Rule does not address the question whether a party can appeal an advance ruling holding evidence admissible, if the evidence is not actually admitted at trial. For example, assume that a criminal defendant moves in advance of trial to preclude the prosecution from impeaching him with his prior convictions. Assume further that the trial court rules definitively that the convictions are admissible impeachment evidence. Can the defendant decide not to testify at trial, and then argue on appeal that the trial court erred in its advance ruling?

While *Rule 103* is silent on whether an appeal can be taken from a ruling holding evidence admissible where the evidence is not eventually admitted at trial, there is significant case law on this question. The Supreme Court, in *Luce v. United States, 469 U.S. 38 (1984)* , specifically held that an accused must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the accused's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other comparable situations. See *United States v. DiMatteo, 759 F.2d 831 (11th Cir. 1985)* (applying *Luce* where the defendant's witness would be impeached with evidence offered under *Rule 608*). See also *United States v. Goldman, 41 F.3d 785, 788 (1st Cir. 1994)* ("Although *Luce* involved impeachment by conviction under *Rule 609*, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of *Rule 403* and *404* objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria, 88 F.3d 136 (2d Cir. 1996)* (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz, 857 F.2d 900 (2d Cir. 1988)* (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond, 87 F.3d 695 (5th Cir. 1996)* (where the trial court rules *in limine* that the defendant

would waive his *fifth amendment* privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

Rule 103 is also silent on whether a party who objects to evidence that the trial court definitively rules admissible, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. Lower courts had been in conflict on this question. See, e.g., *Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997)* (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996)* ("by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal"). The Supreme Court, in *Ohler v. United States, 529 U.S. 753 (2000)* , resolved this question by holding that a party who introduces evidence of a prior conviction on direct examination waives any right to appeal an *in limine* ruling holding that the evidence would be admissible at trial. The Court, in an opinion by Chief Justice Rehnquist, recognized that *Rule 103* was silent on this question. It refused to depart from the general common-law rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."

2. Rule 104(a): This Rule states that preliminary questions "concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court ... ." But the Rule is silent on who bears the burden of proof on admissibility questions, and it is also silent on what standard of proof is to be employed. A significant body of case law has been developed to answer these questions. Most importantly, in *Bourjaily v. United States, 483 U.S. 171 (1987)* , the Court held that the party seeking to admit the evidence -- the proponent -- generally has the burden of proving that the admissibility requirements set forth in the Federal Rules are met. Furthermore, the *Bourjaily* Court held that the burden of proving an admissibility requirement under *Rule 104(a)* is by a preponderance of the evidence. The specific holding in *Bourjaily* was that for a statement to be admissible under the coconspirator exception to the hearsay rule, the trial court must find that the prosecution has established by a preponderance of the evidence that the defendant and the hearsay declarant were members of the same conspiracy. The reasoning in *Bourjaily* has been extended to most other questions of admissibility under the Federal Rules of Evidence. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)* (proponent of expert testimony has the burden of showing it is more likely than not reliable). So, for example, a proponent who proffers a hearsay statement under the excited utterance exception has the burden of showing it more likely than not that the declarant was under the influence of a startling event when he spoke. See *Miller v. Keating, 754 F.2d 507 (3d Cir. 1985)* (proponent must establish admissibility of an excited utterance by a preponderance of the evidence). One important exception arises with privileges. Because privilege rules operate to exclude relevant and reliable evidence, they are not favored. Therefore, the party seeking to *exclude* proffered evidence on the ground that it is privileged bears the burden of showing, by a preponderance of the evidence, that a privilege applies. See generally *United States v. Zolin, 491 U.S. 554 (1989)* .

3. Rule 301: This Rule provides some guidance on the effect of a presumption. The Rule does not define the term "presumption"; it simply states that unless otherwise provided, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion." The Rule specifically leaves it to substantive law to determine when proffered evidence establishes a presumption that a fact exists. Generally speaking, presumptions are based on one or more of the following rationales: (1) one party has superior access to proof; (2) social or economic policies warrant a presumption; (3) experience indicates the high probability of a given conclusion from a given set of facts; (4) a presumption will promote efficiency and convenience. So, for example, it has been held that proof that a letter was mailed establishes a presumption that it was received. *Anderson v. United States, 966 F.2d 487 (9th Cir. 1982)* (in a taxpayer's suit for a refund, the Government failed to rebut the common-law presumption of receipt that arose from the taxpayer's proof of mailing her return).

Rule 301 is also silent on whether a party favored by a presumption is entitled to a peremptory instruction if the party against whom the presumption operates fails to offer any rebuttal evidence. For example, if a party proves that he

mailed a letter, and the opponent provides no conflicting evidence, is the mailing party entitled to an instruction to the jury that the letter is to be deemed mailed? Courts have held that such an instruction must be given upon request. See, e.g., *A.C. Aukerman Co., v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1037 (Fed.Cir. 1992)* (where presumption applies, the presumed fact "must be inferred, absent rebuttal evidence."). See also C. Mueller & L. Kirkpatrick, *Evidence* at 137 (1st ed. 1995) ("[I]f the basic facts of a presumption are established, the presumption controls decision on the presumed fact unless there is counterproof that the presumed fact is not so. In jury-tried cases, the judge gives an appropriate instruction. In bench-tried cases, the judge must find the presumed fact.").

4. Rule 404(b): *Rule 404(b)* provides that a person's uncharged acts of misconduct can be offered to prove something other than a person's character, such as intent or motive. *Rule 404(b)* imposes a notice requirement on the prosecution in criminal cases, which is intended to protect the accused from unfair surprise; it provides that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

What happens if the government gives pretrial notice of its intent to proffer a prior bad act, and then subsequently discovers a *different* bad act that it wants to use as well? Or what if the government responds to a defense request by stating that it does not intend to use *Rule 404(b)* evidence, and *then* uncovers a bad act committed by the defendant that it does intend to use? The notice requirement of *Rule 404(b)* does not state whether the prosecution has a continuing obligation to notify the defendant, should it discover *Rule 404(b)* evidence after an initial response to the defendant's request. But it has been held that the Rule imposes a continuing obligation of notice. See, e.g., *United States v. Barnes, 49 F.3d 1144, 1148 (6th Cir. 1995)* (declaring that *Rule 404(b)* requires "a continuing obligation on the government to comply with the notice requirement ... whenever it discovers information that meets the previous defense request"; noting that a contrary reading "would force the defense to make numerous, periodic requests until the trial has been completed "surely a wasteful procedure.").

The notice requirement of *Rule 404(b)* is conditioned on a request by the accused. The Rule does not state how specific the request must be to trigger the government's notice obligation. For example, is an omnibus motion for discovery sufficient to trigger the notice requirement? Courts have held that an omnibus motion is not sufficient to trigger the government's obligation to notify under the Rule. Rather, a request for notification, "at a minimum, must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any *Rule 404(b)* evidence the prosecution intends to introduce." *United States v. Tuesta-Toro, 29 F.3d 771, 774 (1st Cir. 1994)* (notice not required where defense demanded outright pretrial disclosure of statements in any form, referring to the defendant in any way, without regard to their admissibility or the government's intention to introduce them). Compare *United States v. Williams, 792 F.Supp. 1120, 1133 (S.D. Ind. 1992)* (notification required in response to detailed request reciting text of *Rule 404(b)*); *United States v. Alex, 791 F.Supp. 723, 728 (N.D. Ill. 1992)* (notification required in response to request specifically referencing *Rule 404(b)*).

5. Rule 410: *Rule 410* provides certain protections to criminal defendants during the process of plea bargaining. *Rule 410* is silent, however, on whether its protections can be waived by a criminal defendant. In *United States v. Mezzanatto, 513 U.S. 196 (1995)* , during guilty plea negotiations the defendant agreed that he could be impeached with statements made during the negotiations if he ultimately went to trial and testified inconsistently with those statements. The Supreme Court upheld the agreement, finding that the defendant had knowingly and voluntarily waived his right to the protection of *Rule 410*. The Court refused to hold that the Rule's silence on the matter meant that its protections could not be waived. Instead the Court presumed that any statutory right could be waived in the absence of a specific provision to the contrary, so long as the waiver was knowing and voluntary. The facts of *Mezzanatto* involved a waiver permitting the use for impeachment purposes of statements made during guilty plea negotiations. Neither *Mezzanatto* nor *Rule 410* itself says anything explicitly about whether a defendant can waive the protections of the Rule so as to provide that the prosecution can admit his statements during plea negotiations as substantive evidence at trial, i.e., as party-admissions admissible even if the defendant does not testify. At least one court has relied on the rationale of *Mezzanatto* to uphold a waiver of *Rule 410* protections that permitted the government to use the defendant's statements

as substantive evidence in its case-in-chief. See *United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998)* .

6. Article VI: Article VI governs treatment of testifying witnesses. The Article is silent about many of the common forms of impeachment, such as bias, contradiction, and mental capacity. There is, of course, a significant amount of case law dealing with impeachment matters on which Article VI is silent. Case law generally regulates the forms of impeachment not specifically covered by Article VI by using principles derived from *Evidence Rules 402 and 403* -- such impeachment is permitted unless the probative value of the impeachment evidence is substantially outweighed by the risks of prejudice, confusion and delay. See *United States v. Abel, 469 U.S. 45 (1984)* (impeachment for bias governed by *Rule 403* principles). See generally Imwinkelreid, *The Silence Speaks Volumes: A Brief Reflection on the Question of Whether It Is Necessary To Fill the Seeming Gaps In Article VI of the Federal Rules of Evidence, Governing the Admissibility of Evidence Logically Relevant to the Witness's Credibility*, *1998 Univ. Ill. L. Rev. 1013, 1036* (noting that Article VI is silent about most matters of impeachment, but concluding that "as a general proposition, there is little to be gained and much to be lost by initiating the process of revising Article VI.").

7. Rule 615: *Rule 615* provides that at the request of a party, and with some exceptions, "the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may also make the order of its own motion." The Rule specifically provides only for exclusion of witnesses from the courtroom. It is silent about whether a trial judge can order witnesses not to talk to each other outside the courtroom; it says nothing about a judge's power to order a potential witness to refrain from obtaining access to certain information, such as newspaper articles, that might taint the witness' testimony. The courts have held, however, that the trial court retains its common-law power to fashion a more far-reaching sequestration order appropriate to the circumstances of the case. See the extensive discussion in *United States v. Sepulveda, 15 F.3d 1161, 1175 (1st Cir. 1993)* (*Rule 615* "demarcates a compact procedural heartland, but leaves appreciable room for judicial innovation beyond the perimeters of that which the rule explicitly requires"). This common-law power includes the discretion to sequester witnesses before, during, and after their testimony, see *Geders v. United States, 425 U.S. 80 (1976)* , and to compel the parties to present witnesses in a prescribed sequence. *United States v. Machor, 879 F.2d 945, 954 (1st Cir. 1989)* . As the court in *Sepulveda* stated: "*Rule 615* neither dictates when and how this case-management power ought to be used nor mandates any specific extra-courtroom prophylaxis, instead leaving the regulation of witness conduct outside the courtroom to the district judge's discretion."

8. Rule 801(d)(1)(B): This Rule provides that a statement is not excluded as hearsay if the witness is subject to cross-examination and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication." The hearsay exemption for prior consistent statements does not specifically provide that the prior consistent statement must *precede* the existence of the alleged motive to falsify in order to be admissible. However, the Supreme Court in *Tome v. United States, 513 U.S. 150 (1995)* , held that a statement is not admissible under *Rule 801(d)(1)(B)* unless it was made before the witness's alleged motive to falsify arose.

Rule 801(d)(1)(B) is also silent on whether prior consistent statements can be admitted independently of the Rule, not for their truth but rather to rehabilitate the credibility of the witness. The courts have held that a consistent statement could be probative and admissible for rehabilitation purposes even if it is not admissible under the hearsay exemption. See, e.g., *United States v. Brennan, 798 F.2d 581, 587 (2d Cir. 1986)* (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an apparent inconsistency that had been brought out by defense counsel on cross-examination: "prior consistent statements may be admissible for rehabilitation even if not admissible under *Rule 801(d)(1)(B)*."). Accord *United States v. Parodi, 703 F.2d 768 (4th Cir. 1983)* .

9. Rule 803(3): The Rule provides a hearsay exception for statements of a declarant's state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. When the victim says, "I am going to meet Frank tonight", is the statement admissible to prove that Frank and the victim actually met? Or is the statement admissible only to prove the future conduct of the declarant? The Advisory Committee Note refers to the Rule as allowing "evidence of intention as tending to prove the act intended." The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a

third party as proof that they actually did meet. See, e.g., *Gual Morales v. Hernandez Vega, 579 F.2d 677 (1st Cir. 1978)* ; *United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978)* (statements of intent can prove only the declarant's subsequent conduct). Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place. See, e.g., *United States v. Delvecchio, 816 F.2d 859 (2d Cir. 1987)* . See C. Mueller and L. Kirkpatrick, *Evidence* at 938 (1st ed. 1995) ("Some modern cases take the clearly correct position that the exception in its present form cannot justify use of statements of intent by themselves as proof of what others did. And yet a growing number of cases approve use of a statement to prove what the speaker and another did together if other evidence confirms what the statement suggests the other did.").

10. Rule 1101. *Rule 1101* states that the Federal Rules of Evidence are generally applicable to all federal proceedings. *Rule 1101(d)* lists certain proceedings to which the Rules are inapplicable, including grand jury and bail proceedings. Courts have found that the Federal Rules are inapplicable to a number of proceedings that are not specifically mentioned as exempt in *Rule 1101(d)*. Examples include suppression hearings, proceedings to obtain a temporary restraining order, and proceedings seeking release from psychiatric commitment. See, e.g., *United States v. Frazier, 26 F.3d 110 (11th Cir. 1994)* (Evidence Rules inapplicable in supervised release revocation proceedings); *United States v. Schaefer, 87 F.3d 562 (1st Cir. 1996)* (evidence rules inapplicable at suppression hearings); *United States v. Palesky, 855 F.2d 34 (1st Cir. 1988)* (Evidence Rules are not applicable in hearings held to determine whether a person will be committed to or released from a psychiatric facility). The courts establish these exemptions because they are within the spirit of *Rule 1101(d)* -- exempting from the Rules those proceedings that are less formal than a trial and in which the judge is the finder of fact. See e.g., *Government of Virgin Islands in Interest of A.M., 34 F.3d 153, 161 (3rd Cir. 1994)* (Evidence Rules do not apply in juvenile transfer proceedings, even though such proceedings are not specifically exempted in *Rule 1101(d)(1)*; a juvenile transfer proceeding "is of a preliminary nature and is consequently not comparable to a civil or criminal trial.").

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
INTERNET AND EMAIL EVIDENCE

5-FOUR Federal Rules of Evidence Manual FOUR.syn

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§ FOUR.syn Synopsis to Chapter FOUR: INTERNET AND EMAIL EVIDENCE

I Introduction

II Internet Evidence

[A] Authentication

[B] Hearsay.

III Email Evidence

Gregory P. Joseph n*

FOOTNOTES:
(n1)Footnote *.
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5-FOUR Federal Rules of Evidence Manual I

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I Introduction

The explosive growth of the Internet and burgeoning use of electronic mail are raising a series of novel evidentiary issues. The applicable legal principles are familiar -- this evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns. The novelty of the evidentiary issues arises out of the novelty of the media -- thus, it is essentially factual. These issues can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
INTERNET AND EMAIL EVIDENCE

5-FOUR Federal Rules of Evidence Manual II

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II Internet Evidence

There are primarily three forms of Internet data that are offered into evidence -- (1) data posted on the website by the owner of the site ("website data"); (2) data posted by others with the owner's consent (a chat room is a convenient example); and (3) data posted by others without the owner's consent ("hacker" material). The wrinkle for authenticity purposes is that, because Internet data is electronic, it can be manipulated and offered into evidence in a distorted form. Additionally, various hearsay concerns are implicated, depending on the purpose for which the proffer is made.

[A] Authentication

Website Data. Corporations, government offices, individuals, educational institutions and innumerable other entities post information on their websites that may be relevant to matters in litigation. Alternatively, the fact that the information appears on the website may be the relevant point. Accordingly, courts routinely face proffers of data (text or images) allegedly drawn from websites. The proffered evidence must be authenticated in all cases, and, depending on the use for which the offer is made, hearsay concerns may be implicated.

The authentication standard is no different for website data or chat room evidence than for any other. Under *Rule 901(a)*, "The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Simpson, 152 F.3d 1241, 1249 (10th Cir. 1998)* ; *Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001)* .

In applying this rule to website evidence, there are three questions that must be answered, explicitly or implicitly:

1. What was actually on the website?

2. Does the exhibit or testimony accurately reflect it?

3. If so, is it attributable to the owner of the site?

In the first instance, authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with *www*); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw. n1 This last testimony is no different than that required to authenticate a photograph, other replica or demonstrative exhibit. n2 The witness may be lying or mistaken, but that is true of all testimony and a principal reason for cross-examination. Unless the opponent of the evidence raises a genuine issue as to trustworthiness, testimony of this sort is sufficient to satisfy *Rule 901(a)*, presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a web site (other than chat room conversations) was placed there by the owner of the site.

The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site. First, even if the proffer fairly reflects what was on the site, the data proffered may have been the product of manipulation by hackers (uninvited third parties). n3 Second, the proffer may not fairly reflect what was on the site due to modification -- intentional or unintentional, material or immaterial -- in the proffered exhibit or testimony.

Detecting modifications of electronic evidence can be very difficult, if not impossible. That does not mean, however, that nothing is admissible because everything is subject to distortion. The same is true of many kinds of evidence, from testimony to photographs to digital images, but that does not render everything inadmissible. It merely accentuates the need for the judge to focus on all relevant circumstances in assessing admissibility under *Fed.R.Evid. 104(a)* n4-- and to leave the rest to the jury, under *Rule 104(b)*. n5

In considering whether the opponent has raised a genuine issue as to trustworthiness, and whether the proponent has satisfied it, the court will look at the totality of the circumstances, including, for example:

- The length of time the data was posted on the site.
- Whether others report having seen it.
- Whether it remains on the website for the court to verify.
- Whether the data is of a type ordinarily posted on that website or websites of similar entities (*e.g.*, financial information from corporations).
- Whether the owner of the site has elsewhere published the same data, in whole or in part.
- Whether others have published the same data, in whole or in part.
- Whether the data has been republished by others who identify the source of the data as the website in question.

A genuine question as to trustworthiness may be established circumstantially. For example, more by way of authentication may be reasonably required of a proponent of Internet evidence who is known to be a skilled computer

user and who is suspected of possibly having modified the proffered website data for purposes of creating false evidence. n6

In assessing the authenticity of website data, important evidence is normally available from the personnel managing the website ("webmaster" personnel). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server. It is possible that the content provider -- the author of the material appearing on the site that is in issue -- will be someone other than the person who installed the file on the web. In that event, this second witness (or set of documentation) may be necessary to reasonably ensure that the content which appeared on the site is the same as that proffered.

Self-Authentication. Government offices publish an abundance of reports, press releases and other information on their official web sites. Internet publication of a governmental document on an official website constitutes an "official publication" within *Federal Rule of Evidence 902(5)*. n7 Under *Rule 902(5)*, official publications of government offices are self-authenticating. n8

Chat Room Evidence. A proffer of chat room postings generally implicates the same authenticity issues discussed above in connection with web site data, but with a twist. While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence. By definition, chat room postings are made by third parties, not the owner of the site. Further, chat room participants usually use screen names (pseudonyms) rather than their real names.

Since chat room evidence is often of interest only to the extent that the third party who left a salient posting can be identified, the unique evidentiary issue concerns the type and quantum of evidence necessary to make that identification -- or to permit the finder of fact to do so. Evidence sufficient to attribute a chat room posting to a particular individual may include, for example:

- Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question).

- Evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up.

- Evidence that the person using the screen name identified him- or herself as the individual (in chat room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.

- Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).

- Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

See generally United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000) ; *United States v. Simpson, 152 F.3d 1241, 1249-50 (10th Cir. 1998)* ; *Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002)* .

[B] Hearsay.

Authenticity aside, every extrajudicial statement drawn from a website must satisfy a hearsay exception or exemption if the statement is offered for its truth. *See United States v. Jackson, 208 F.3d 633, 637 (7th Cir.)* ("The web postings

were not statements made by declarants testifying at trial, and they were being offered to prove the truth of the matter asserted. That means they were hearsay."), *cert. denied, 531 U.S. 973 (2000)* ; *Savariego v. Melman, 2002 U.S. Dist. LEXIS 8563 at *5 (N.D. Tex. 2002)* (excluding on summary judgment "unauthenticated hearsay from an Internet search").

To establish that material appeared on a website, it is sufficient for a witness with knowledge to attest to the fact that the witness logged onto the site and to describe what he or she saw. That obviates any hearsay issue as to the contents of the site. *Van Westrienen v. Americontinental Collection Corp., 94 F.Supp.2d 1087, 1109 (D. Or. 2000)* ("The only remaining question is whether the content of the website is hearsay under *FRE 801...* . Here, [plaintiff], by his own account, personally viewed the website and submitted an affidavit detailing specifically what he viewed. Therefore, the contents of the website are not hearsay for purposes of this summary judgment motion"); *State v. Rapose*, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion) (affirming admission of Internet and email documents because "each exhibit was identified and authenticated by the person testifying from personal knowledge of the contents").

Data Entry. Some website data is entered into Internet-readable format in the same way that a bookkeeper may enter numbers into a computer. This act of data entry is an extrajudicial statement -- *i.e.*, assertive nonverbal conduct within *Rule 801(a)* -- which means that the product is hearsay, within *Rule 801(c)*. Since each level of hearsay must satisfy the hearsay rule, under *Rule 805* (Hearsay within Hearsay), the act of data entry must be addressed separately from the content of the posted declaration.

Data entry is usually a regularly-conducted activity within *Rule 803(6)* (or, in the context of a government office, falls within *Rule 803(8)* (public records exception)). It also often falls within *Rule 803(1)* (present sense impression exception).

The real question about the data entry function is its accuracy. This is, in substance, an issue of authenticity and should be addressed as part of the requisite authentication foundation whenever a genuine doubt as to trustworthiness has been raised. If the foundational evidence establishes that the data have been entered accurately, the hearsay objection to the data entry function should ordinarily be overruled. *See also* Rule 807 (residual exception).

Much Internet evidence does not involve data entry, in the sense described above. If the webmaster is simply transferring an image or digitally converting an electronic file into web format, that is a technical process that does not involve assertive non-verbal conduct within *Rule 801(a)* and is best judged as purely an authentication issue. The difference, analytically, is between the grocery store clerk who punches the price into the check-out computer (this is assertive non-verbal conduct), and the clerk who simply scans the price into the computer (non-assertive behavior). Only assertive non-verbal conduct raises hearsay issues and requires an applicable hearsay exception or exemption.

Business and Public Records. Businesses and government offices publish countless documents on their websites in ordinary course. Provided that all of the traditional criteria are met, these documents will satisfy the hearsay exception for "records" of the business or public office involved, under Rules 803(6) or (8). Reliability and trustworthiness are said to be presumptively established by the fact of actual reliance in the regular course of an enterprise's activities. *Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *12-*13 (Ohio App. July 26, 2001)* (Internet public record). (Recall that public records which satisfy *Rule 803(8)* are presumptively authentic under *Rule 901(b)(7)* (if they derive from a "public office where items of this nature are kept") and even self-authenticating under *Rule 902(5)* (discussed above in note 6 and the accompanying text).)

As long as the website data constitute business or public records, this quality is not lost simply because the printout or other image that is proffered into evidence was generated for litigation purposes. Each digital data entry contained on the website is itself a *Rule 803(6)* or *(8)* "record" because it is a "data compilation, in any form." n9 Consequently, if each entry has been made in conformance with *Rule 803(6)* or *Rule 803(8)*, the proffered output satisfies the hearsay

exception even if it: (a) was not printed out at or near the time of the events recorded (as long as the entries were timely made), (b) was not prepared in ordinary course (but, *e.g.*, for trial), and (c) is not in the usual form (but, *e.g.*, has been converted into graphic form). n10 If the data are simply downloaded into a printout, they do not lose their business-record character. To the extent that significant selection, correction and interpretation are involved, their reliability and authenticity may be questioned. n11

While website data may constitute business records of the owner of the site, they are not business records of the Internet service provider (*e.g.*, America Online, MSN, ATT). "Internet service providers ... are merely conduits ... . The fact that the Internet service provider may be able to retrieve information that its customers posted ... does not turn that material into a business record of the Internet service provider." *United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000)* ("The Internet service providers did not themselves post what was on [the relevant] web sites. [Defendant] presented no evidence that the Internet service providers even monitored the contents of those web sites.").

Rules 803(6) and (8) effectively incorporate an authentication requirement. *Rule 803(6)* contemplates the admission of hearsay, if its criteria are satisfied, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Rule 803(8)* contains substantially identical language. This trustworthiness criterion parallels the *Rule 901(a)* requirement of "evidence sufficient to support a finding that the matter in question is what its proponent claims." As a result, untrustworthy proffers of business or public records may be excluded on hearsay as well as authenticity grounds. n12

Market Reports & Tables. *Rule 803(17)* excepts from the hearsay rule "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." A number of cases have applied this rule to commercial websites furnishing such data as interest rates n13 and blue-book prices of used cars. n14 This rationale plainly extends to the other sorts of traditional information admitted under *Rule 803(17)*, such as tables reflecting the prices of such items as stock, bonds and currency; real estate listings; and telephone books.

Admissions. Website data published by a litigant comprise admissions of that litigant when offered by an opponent. n15 Accordingly, even if the owner of a website may not offer data from the site into evidence, because the proffer is hearsay when the owner attempts to do so, an opposing party is authorized to offer it as an admission of the owner. n16

Non-Hearsay Proffers. Not uncommonly, website data is not offered for the truth of the matters asserted but rather solely to show the fact that they were published on the web, either by one of the litigants or by unaffiliated third parties. For example, in a punitive damages proceeding, the fact of Internet publication may be relevant to show that the defendant published untruths for the public to rely on. n17 Or, in a trademark action, Internet listings or advertisements may be relevant on the issue of consumer confusion or purchaser understanding. n18 In neither of these circumstances is the website data offered for its truth. Accordingly, no hearsay issues arise.

Judicial Skepticism. As they were with computerized evidence prior to the mid-1990s, some judges remain skeptical of the reliability of anything derived from the Internet. *See, e.g., St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp.2d 773, 774-75 (S.D. Tex. 1999)* ("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation ... . Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules found in *Fed.R.Evid. 807*"). While there is no gainsaying a healthy judicial skepticism of any evidence that is subject to ready, and potentially undetectable, manipulation, there is much on the web which is not subject to serious dispute and which may be highly probative. As with so many of the trial judge's duties, this is a matter that can only be resolved on a case-by-case basis.

FOOTNOTES:

(n1)Footnote 1. *See Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001) . See also Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002)* (admitting on a preliminary injunction motion copies of pages from defendant's and third party websites (as to the latter of which the furnished "webpages contain[ed] ... the internet domain address from which the image was printed and the date on which it was printed") because "the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are;" noting the "reduced evidentiary standard in preliminary injunction motions").

(n2)Footnote 2. *See, e.g., Actonet, Ltd. v. Allou Health & Beauty Care, 219 F.3d 836, 848 (8th Cir. 2000)* ("HTML codes may present visual depictions of evidence. We conclude, therefore, that HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes").

(n3)Footnote 3. *See, e.g., Wady v. Provident Life & Accident Ins. Co. of Am., 216 F. Supp. 2d 1060, 1064-1065 (C.D. Cal. 2002)* ("Defendants have objected on the grounds that [counsel] has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents" -- objections sustained).

(n4)Footnote 4. *Fed.R.Evid. 104(a)* provides that: *Questions of admissibility generally*.--Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(n5)Footnote 5. *Fed.R.Evid. 104(b)* provides that: *Relevancy conditioned on fact*.--When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(n6)Footnote 6. *See, e.g., United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000)* ("Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailing actually were posted by the groups, as opposed to being slipped onto the groups' web sites by Jackson herself, who was a skilled computer user.").

(n7)Footnote 7. *Fed.R.Evid. 902(5)* provides that the following are self-authenticating: *Official publications*.--Books, pamphlets, or other publications purporting to be issued by public authority.

(n8)Footnote 8. *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc., 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999)* ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under *Rule 902(5) of the Federal Rules of Evidence*"). *See also Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.R.D. 116, 121 (S.D.N.Y. 2000)* (discussed below; holding that prime rates published on the Federal Reserve Board website satisfy the hearsay exception of *Federal Rule of Evidence 803(17). But see State v. Davis, 141 Wash.2d 798, 854, 10 P.3d 977, 1010 (2000)* (no abuse of discretion in excluding, in death penalty case, defendant's proffer of state population statistics obtained from official state website; affirming exclusion on hearsay grounds but stating that "[a]n unauthenticated printout obtained from the Internet does not ... qualify as a self authenticating document under ER 902(e) [the Washington State equivalent of *Federal Rule of Evidence 902(5)*]"). There is reason to believe, however, that *Davis* may be limited to its facts. *See* State v. Rapose, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion).

(n9)Footnote 9. *See, e.g., United States v. Sanders, 749 F.2d 195, 198 (5th Cir. 1984)* (dealing with computerized records); *United States v. Catabran, 836 F.2d 453, 456 (9th Cir. 1988)* (same).

(n10)Footnote 10. *See, e.g., United States v. Russo, 480 F.2d 1228, 1240 (6th Cir.) , cert. denied, 414 U.S. 1157 (1973)* (dealing with computerized records).

(n11)Footnote 11. *See, e.g., Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., 38 F.3d 627, 631, 633 (2d Cir. 1994)* (dealing with computerized business records).

(n12)Footnote 12. *United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000)* ("Even if these web postings did qualify for the business records hearsay exception, 'the business records are inadmissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness'") (citation omitted).

(n13)Footnote 13. *Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.R.D. 116, 121 (S.D.N.Y. 2000)* (prime rates published on the Bloomberg website satisfy the hearsay exception of *Federal Rule of Evidence 803(17)*.

(n14)Footnote 14. *See, e.g., State v. Erickstad, 620 N.W.2d 136, 145 (N.D. 2000)* (*citing Irby-Greene v. M.O.R., Inc., 79 F. Supp.2d 630, 636 n.22 (E.D. Va. 2000))* .

(n15)Footnote 15. *See, e.g., Van Westrienen v. Americontinental Collection Corp., 94 F. Supp.2d 1087, 1109 (D. Or. 2000)* ("the representations made by defendants on the website are admissible as admissions of the party-opponent under *FRE 801(d)(2)(A)*"); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp., 2004 U.S. Dist. LEXIS 20845, at *16-17 (N.D. Ill. Oct. 14, 2004)* .

(n16)Footnote 16. *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., 38 F.3d 627, 631, 633-34 (2d Cir. 1994)* (dealing with computerized business records).

(n17)Footnote 17. *See, e.g., Van Westrienen v. Americontinental Collection Corp., 94 F. Supp.2d 1087, 1109 (D. Or. 2000)* .

(n18)Footnote 18. *See, e.g., Microware Sys. Corp. v. Apple Computer, Inc., 2000 U.S. Dist. LEXIS 3653 at *7 n.2 (S.D. Iowa March 15, 2000)* ("Microware's internet and e-mail submissions are not ideal proffers of evidence since their authors cannot be cross-examined. However, in a case involving an industry where e-mail and internet communication are a fact of life, these technical deficiencies must go to the weight of such evidence, rather than to their admissibility. In any case, to the extent any of these stray comments bear on the issue of confusion, they come in for that purpose...") (citations omitted); *Mid City Bowling Lanes & Sports Palace, Inc. v. Don Carter's All Star Lanes-Sunrise Ltd., 1998 U.S.Dist.LEXIS 3297 at *5-*6 (E.D. La. March 12, 1998)* .

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PART FOUR: CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE; INTERNET AND EMAIL EVIDENCE
INTERNET AND EMAIL EVIDENCE

5-FOUR Federal Rules of Evidence Manual III

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III Email Evidence

Like Internet evidence, email evidence raises both authentication and hearsay issues. The general principles of admissibility are essentially the same since email is simply a distinctive type of Internet evidence -- namely, the use of the Internet to send personalized communications.

Authentication. The authenticity of email evidence is governed by *Federal Rule of Evidence 901(a)*, which requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." Under *Fed.R.Evid. 901(b)(4)*, email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See generally United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000)* ; *Bloom v. Comw. of Virginia, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001)* .

If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity. n1 Authenticity may also be established by testimony of a witness who sent or received the emails -- in essence, that the emails are the personal correspondence of the witness. n2

It is important, for authentication purposes, that email generated by a business or other entity on its face generally reflects the identity of the organization. The name of the organization, usually in some abbreviated form, ordinarily appears in the email address of the sender (after the @ symbol). This mark of origin has been held to self-authenticate the email as having been sent by the organization, under *Fed.R.Evid. 902(7)*, which provides for self-authentication of: "*Trade inscriptions and the like*.--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of

business and indicating ownership, control, or origin." *See Superhighway Consulting, Inc. v. Techwave, Inc., 1999 U.S. Dist. LEXIS 17910 at *6 (N.D. Ill. Nov. 15, 1999)* . Where the email reflects the entire email name of a party (and not just the mark of origin), it has been held to comprise a party admission of origin. n3

Independently, circumstantial indicia that may suffice to establish that proffered email were sent, or were sent by a specific person, include evidence that:

- A witness or entity received the email.
- The email bore the email address of a particular individual.
- This email contained the typewritten name or nickname of this individual in the body of the email. n4
- The email recited matters that would normally be known only to the individual who is alleged to have sent it (or to a discrete number of persons including this individual).
- Following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it, and the conversation reflected this individual's knowledge of the contents of the email.

See generally United States v. Siddiqui, 215 F.3d 1318, 1322-23 (11th Cir. 2000) ; *Bloom v. Comw. of Virginia, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001)* ; *Massimo v. State, 144 S.W.3d 210, 215-16 (Tex. App. 2004)* (unpublished opinion).

As with all other forms of authentication, the testimony of a witness with knowledge is prerequisite to authenticate email. It is insufficient to proffer email through a witness with no knowledge of the transmissions at issue, unless the witness has sufficient technical knowledge of the process to be in a position to authenticate the email through expert testimony. *See, e.g., Richard Howard, Inc. v. Hogg, 1996 Ohio App. LEXIS 5533 at *8 (Ohio App. Nov. 19, 1996)* (affirming exclusion of email where the authenticating witness "was neither the recipient nor the sender of the E-mail transmissions and he offered no other details establishing his personal knowledge that these messages were actually sent or received by the parties involved. Furthermore, the transmissions were not authenticated by any other means").

There are a variety of technical means by which email transmissions may be traced. *See, e.g., Clement v. California Dep't of Corrections, 2002 U.S. Dist. LEXIS 17426 at *32 (N.D. Cal. Sept. 9, 2002)* ("major e-mail providers include a coded Internet Protocol address (IP address) in the header of every e-mail... . The IP address allows the recipient of an e-mail to identify the sender by contacting the service provider"). Therefore, if serious authentication issues arise, a technical witness may be of assistance. n5 This may become important, for example, in circumstances where a person or entity denies receipt of an email and has not engaged in conduct that furnishes circumstantial evidence of receipt (such as a subsequent communication reflecting knowledge of the contents of the email). *See, e.g. Ellison v. Robertson, 189 F. Supp.2d 1051, 1057 n.7 (C.D. Cal. 2002)* ("Plaintiff has provided no evidence that AOL actually did receive the email. To the contrary, Plaintiff's former counsel states that while she received an acknowledgment of receipt for her April 17, 2000, email from [a local Internet provider], no such acknowledgment came from AOL"); *Carafano v. Metrosplash.com, Inc., 207 F. Supp.2d 1055, 1072 (C.D. Cal. 2002)* ("Plaintiff provides no evidence that [defendant Internet service] ever received the reply email in response to its welcome confirmation email").

Hearsay. The hearsay issues associated with email are largely the same as those associated with conventional correspondence. The prevalence and ease of use of email, particularly in the business setting, makes it attractive simply to assume that all email generated at or by a business falls under the business-records exception to the hearsay rule. That assumption would be incorrect.

What Is a Business Record? Or a Present Sense Impression? In *United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997)* , the government offered into evidence a multi-paragraph email from a subordinate to his superior describing a telephone conversation with the defendant (not a fellow employee). In that conversation, the defendant inculpated himself, and the email so reflected. Chief Judge Young rejected the proffer under *Fed.R.Evid. 803(6)* because, "while it may have been [the employee's] routing business practice to make such records, there was not sufficient evidence that [his employer] required such records to be maintained... . [I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type." *Id., 996 F. Supp. at 98* . The *Ferber* Court nonetheless admitted the email, but under 803(1), the hearsay exception for present sense impressions. n6 *See also State of New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 7683 at *9 (D.D.C. April 12, 2002)* ("While Mr. Glaser's email [recounting a meeting] may have been 'kept in the course' of RealNetworks regularly conducted business activity, Plaintiffs have not, on the present record, established that it was the 'regular practice' of RealNetworks employees to write and maintain such emails.") (separately holding the present sense impression exception inapplicable); *Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004)* ("Email is far less of a systematic business activity than a monthly inventory printout"), quoting *Monotype Corp. v. Intl. Typeface Corp., 43 F.3d 443, 450 (9th Cir. 1994)* .

Hearsay within Hearsay. Because business records are written without regard for the rules of evidence, they commonly contain multiple layers of hearsay. Under *Federal Rule of Evidence 805*, n7 each layer of hearsay must independently satisfy an exception to the hearsay rule. Absent that, any hearsay portion of an email that is offered for the truth n8 will be excluded. *See, e.g., State of New York v. Microsoft Corp., 2002 U.S. Dist. LEXIS 7683 at *14 (D.D.C. April 12, 2002)* (" 'If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by *Rule 803(6)*. If the source of the information is an outsider, *Rule 803(6)* does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have' ") (citation omitted).

Admission of Party Opponent. Under *Fed.R.Evid. 801(d)(2)*, n9 emails sent by party opponents constitute admissions and are not hearsay. *See, e.g., Riisna v. ABC, Inc., 2002 U.S. Dist. LEXIS 16969 at *9-*10 (S.D.N.Y. Sept. 11, 2002)* . The email address itself, which reflects that it originates from a party, may be admissible as a party admission. *Middlebrook v. Anderson, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005)* (jurisdictional motion). Further, an email from a party opponent that forwards another email may comprise an adoptive admission of the original message, depending on the text of the forwarding email. *Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 821 (9th Cir. 2002)* (one of plaintiff's employees "incorporated and adopted the contents" of an email message from a second of plaintiff's employees when she forwarded it to the defendant with a cover note that "manifested an adoption or belief in [the] truth" of the information contained in the original email, within *Fed.R.Evid. 801(d)(2)(B)*). If there is not an adoptive admission, however, the forwarded email chain may comprise hearsay-within-hearsay. *Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004)* .

Excited Utterance. In dicta, the Oregon Court of Appeals has indicated that, in appropriate circumstances, an email message might fall within the excited utterance exception to the hearsay rule. *State v. Cunningham, 40 P.3d 1065, 1076 n.8 (2002)* . (The federal excited utterance exception, contained in *Fed.R.Evid. 803(2)*, n10 is identical to the Oregon exception, Oregon Rule 803(2).)

Non-Hearsay Uses. Not all extrajudicial statements are hearsay or, more precisely, need not be offered for hearsay purposes. The contents of an authenticated email may, for example, constitute a verbal act -- *e.g.*, constitute defamation or the offer or acceptance of a contract. *Middlebrook v. Anderson, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005)* (jurisdictional motion); *Tibbetts v. RadioShack Corp., 2004 U.S. Dist. LEXIS 19835, at *45 (N.D. Ill. Sept. 30, 2004)* .

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Superhighway Consulting, Inc. v. Techwave, Inc., 1999 U.S. Dist. LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999)* .

(n2)Footnote 2. *Tibbetts v. RadioShack Corp., 2004 U.S. Dist. LEXIS 19835, at *44 (N.D. Ill. Sept. 30, 2004)* .

(n3)Footnote 3. *Middlebrook v. Anderson, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005)* (jurisdictional motion).

(n4)Footnote 4. Thus, courts have looked at the "electronic 'signature' " at the end of the email message identifying the name and business affiliation of the sender. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 821 (9th Cir. 2002)* (held, email by one employee forwarded to party opponent by a fellow employee -- containing the electronic signature of the latter -- constitutes an admission of a party opponent and thus is not hearsay).

(n5)Footnote 5. Since authentication issues are decided by the court under *Federal Rule of Evidence 104(a)*, live testimony from such a witness is not essential; an affidavit or declaration may be equally effective. *Fed.R.Evid. 104(a)* is set forth in n.4, *supra*.

(n6)Footnote 6. *Fed.R.Evid. 803(1)* sets forth the hearsay exception for present sense impressions, which are defined to include any "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

(n7)Footnote 7. *Fed.R.Evid. 805* provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

(n8)Footnote 8. Email communications not offered for the truth are not subject to exclusion as hearsay. *See, e.g., Rombom v. Weberman, 2002 N.Y. Misc. LEXIS 769 at *20 (Sup. Ct. Kings Cty. June 13, 2002)* ("since plaintiff introduced the e-mails to establish their effect upon plaintiff, as opposed to the truth of their content, the e-mails did not constitute inadmissible hearsay").

(n9)Footnote 9. *Fed.R.Evid. 801(d)(2)* provides that a statement is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(n10)Footnote 10. *Fed.R.Evid. 803(2)* excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 1 OBJECTIONS, OFFERS OF PROOF, LIMITING INSTRUCTIONS

6-1 Federal Rules of Evidence Manual 1.syn

§ 1.syn Synopsis to Chapter 1: OBJECTIONS, OFFERS OF PROOF, LIMITING INSTRUCTIONS

1-1 Objections: Basic Requirements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Objections Generally

[2] Objection -- First Occasion

[3] Objections -- Reminder

[4] Motion to Strike

[5] Sidebar Conference

1-2 Offers of Proof: Basic Requirements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Objection -- First Occasion

[2] Objections -- Reminder

[3] Sidebar Conference

1-3 Limiting Instructions Generally.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Evidence Admissible Against One Party but Not Others

[2] Evidence Admissible on One Claim but Not Others

[3] Evidence Admissible on One Issue but Not Others

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 1 OBJECTIONS, OFFERS OF PROOF, LIMITING INSTRUCTIONS

6-1 Federal Rules of Evidence Manual 1-1

1-1 Objections: Basic Requirements.

[a] Governing Rules.

Rule 103. Rulings on Evidence

(a) *Effect of erroneous ruling*. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. -- In case the ruling is one admitting evidence, ***a timely objection or motion to strike appears of record, stating the specific ground of objection***, if the specific ground was not apparent from the context; * * *.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

* * *

(c) *Hearing of jury*. -- ***In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.***

* * *

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning*** the qualification of a person to be a witness, the existence of a privilege, or ***the admissibility of evidence shall be determined by the court***, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

[b] Key Points.

1. A timely objection is required. The objection must be made as soon as the grounds reasonably appear.

2. If the objection is to the form of a question, the objection should be made before the answer is given, if practicable.

3. If the objection is to the answer, a motion to strike the answer should accompany the objection. An instruction to the jury to disregard may be requested under *Rule 105*.

4. One or more specific grounds for objection generally must be stated. A general objection does not preserve an issue for appeal. The objection "incompetent, irrelevant and immaterial" is a general, not a specific, objection.

5. If the ground for objection is obvious, it need not be stated. Careful counsel, however, will always state the specific ground for objection, because reviewing courts may not agree on what is obvious.

6. If a motion *in limine* has been made to exclude evidence and has been denied, generally it must be renewed at trial, *Luce v. United States, 469 U.S. 38 (1984)* , unless it is a definitive ruling. *Rule 103(a)*. It is difficult to know what a definitive ruling is, and circumstances may change between the time the motion *in limine* is denied and when the issue arises at trial. Thus, prudent counsel will renew an objection at trial. When a motion *in limine* is granted or denied, the losing counsel must be careful not to waive any right to appeal by anticipating opposing counsel's actions. For example, when the defendant in a criminal case moves to exclude evidence of a prior conviction under *Rule 609* and the trial judge denies the motion, the defendant waives the right to appeal by introducing the prior conviction during direct examination. The Supreme Court so held in *Ohler v. United States, 529 U.S. 753 (2000)* .

7. If the objecting counsel believes that the jury might be prejudiced as a result of hearing the objection, counsel should seek to be heard outside the presence of the jury as provided in *Rule 103(c)*.

8. In civil cases, as part of the final pretrial order under *Fed. R. Civ. P. 16*, the trial judge may require all exhibits to be marked and all objections other than relevance to be raised or waived. A party seeking to preserve an objection must be certain to raise it in conformity with any specific procedures imposed by the court.

9. In criminal cases, certain motions to exclude evidence must be raised prior to trial or they will be waived. *Fed. R.*

Crim. P. 12(b) lists five categories of motions that must be raised before trial: defenses and objections based on defects in the institution of the prosecution or on defects in the charging document, motions to suppress evidence, discovery motions, and severance requests.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence or testimony. Unless a timely objection is made, the witness will be permitted to testify or the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The judge will often find it useful to make a record *outside the hearing of the jury* justifying a ruling. A good record will indicate that the judge appropriately used either *Rule 104(a)* or *Rule 104(b)* in considering an objection, and grasped the particular evidence rule that supported the objection.

If the judge does not make a statement for the record, the party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude testimony or evidence, the party wishing to offer the testimony or evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on an objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Objections Generally

Counsel have a duty to raise objections to evidence when they believe the evidence is not proper for one reason or another. An objection asks the court to decide whether the rules of evidence, which the court must apply, require that certain evidence be excluded. You must not draw any adverse inference from an objection.

[2] Objection -- First Occasion

The court applies the rules of evidence when an objection is made. The parties do not always agree on what the rules of evidence permit and forbid. The court must resolve their disagreements. You must not draw any negative or positive inference about a party or about counsel simply because the court sustains or overrules an objection. Your job is to consider only the evidence that is actually admitted. You should disregard any question or answer to which an objection is sustained and accept the fact that the parties and the court are bound by the rules of evidence.

[3] Objections -- Reminder

I remind you that you must not draw any negative or positive inference about a party or about counsel simply because the court sustains or overrules an objection.

[4] Motion to Strike

You must ignore that answer [or specify the specific part of the answer]. It is not admissible and may not be considered by you as evidence in this case.

[5] Sidebar Conference

From time to time, the lawyers and I may have a conversation outside of your hearing or we may excuse you from the courtroom. These conversations involve questions of law that the court is required to resolve. You must not draw any negative inference against a party simply because counsel may seek to address a legal question outside of your hearing. Please excuse the delay that sometimes occurs when legal questions arise. I can assure you that the parties and the court will do everything possible to keep the delay as short as possible. The court and the parties thank you for your patience.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 1 OBJECTIONS, OFFERS OF PROOF, LIMITING INSTRUCTIONS

6-1 Federal Rules of Evidence Manual 1-2

1-2 Offers of Proof: Basic Requirements.

[a] Governing Rules.

Rule 103. Rulings on Evidence

(a) *Effect of erroneous ruling*. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

* * *

(2) Offer of proof. -- In case the ruling is one excluding evidence, ***the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked***.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling*. -- The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury*. -- ***In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.***

* * *

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning*** the qualification of a person to be a witness, the existence of a privilege, or ***the admissibility of evidence shall be determined by the court***, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

[b] Key Points.

1. If the court sustains an objection and excludes evidence, the proponent of the evidence must "make a record" by establishing the contents of the excluded evidence.

2. The proponent may make an offer of proof as to testimony in several different ways: (a) counsel may orally represent what the testimony of a witness would have been; (b) counsel may make an offer of proof by putting a witness on the stand and asking questions when there is a recess and the jury is not present; (c) counsel may submit a written offer of proof as to testimony; and (d) counsel may refer to a deposition or other statement of a witness and indicate that the witness would testify to the contents of the deposition or statement.

3. The court may direct that an offer of proof must be made in one form or another. The court also may state for the record matters that explain why evidence is excluded.

4. The proponent may mark an exhibit for identification and make it part of the record if it is excluded by the court. The excluded exhibit will not be shown to the jury, of course.

5. An offer of proof need not be made if the answer is apparent from the context, but careful counsel will make the offer anyway if testimony is important.

6. Generally, a cross-examiner will not be required to make the same kind of offer of proof as a direct examiner, since the cross-examiner may not have prepared the witness and may not know what answers the witness would give to certain questions.

7. If the reasons for a cross-examiner's questions are not apparent and the court sustains a relevance objection, the cross-examiner is required to demonstrate relevance by some kind of offer of proof.

8. A cross-examiner who is able to make an offer of proof may enhance the likelihood that erroneous limitations on cross-examination will be perceived to be prejudicial.

9. Since an offer of proof is not part of the evidence before a jury, it should be made outside the hearing of the jury, as provided in *Rule 103(c)*.

10. If a motion *in limine* to exclude evidence is granted prior to trial, the proponent should seek reconsideration at trial to assure that any error is preserved, *Luce v. United States, 469 U.S. 38 (1984)* , unless the ruling is a definitive one. *Rule 103(a)*. It is difficult to know what a definitive ruling is, and circumstances may change between the time the motion *in limine* is denied and when the issue arises at trial. Thus, prudent counsel will seek review at trial of *an in limine* ruling excluding evidence. If an offer of proof was made when the motion was granted or denied, it need not be repeated, but careful counsel will incorporate the prior offer of proof in seeking reconsideration. When a motion *in limine* is granted, the losing counsel must be careful not to waive any right to appeal by anticipating opposing counsel's actions. For example, when the defendant in a criminal case moves to exclude evidence of a prior conviction under *Rule 609* and the trial judge denies the motion, the defendant waives the right to appeal by introducing the prior conviction during direct examination. The Supreme Court so held in *Ohler v. United States, 529 U.S. 753 (2000)* .

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence or testimony. Unless a timely objection is made, the witness will be permitted to testify or the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The judge will often find it useful to make a record *outside the hearing of the jury* justifying a ruling. A good record will indicate that the judge appropriately used either *Rule 104(a)* or *Rule 104(b)* in considering an objection, and will demonstrate a grasp of the particular evidence rule that supported the objection.

If the judge does not make a statement for the record, the party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude testimony or evidence, the party wishing to offer the testimony or evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on an objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Objection -- *First Occasion*

The court applies the rules of evidence when an objection is made. The parties do not always agree on what the rules of evidence permit and forbid. The court must resolve their disagreements. You must not draw any negative or positive inference about a party or about counsel simply because the court sustains or overrules an objection. Your job is to consider only the evidence that is actually admitted. You should disregard any question or answer to which an objection

is sustained and accept the fact that the parties and the court are bound by the rules of evidence.

[2] Objections -- Reminder

I remind you that you must not draw any negative or positive inference about a party or about counsel simply because the court sustains or overrules an objection.

[3] Sidebar Conference

From time to time, the lawyers and I may have a conversation outside of your hearing or we may excuse you from the courtroom. These conversations involve questions of law that the court is required to resolve. You must not draw any negative inference simply because counsel for one party may seek to address a legal question outside of your hearing.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 1 OBJECTIONS, OFFERS OF PROOF, LIMITING INSTRUCTIONS

6-1 Federal Rules of Evidence Manual 1-3

1-3 Limiting Instructions Generally.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning*** the qualification of a person to be a witness, the existence of a privilege, or ***the admissibility of evidence shall be determined by the court***, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, ***the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly***.

[b] Key Points.

1. The court must give a limiting instruction upon request. Rarely, if ever, is the court required to give an instruction *sua sponte*.

2. Counsel should request the language they want the court to use in the instruction. If the court chooses its own

language, counsel must object under *Rule 103(a)* if the instruction is inaccurate.

3. The limiting instruction may indicate that evidence is admissible as to one party but not as to others; that evidence is admissible on one issue but not on others; or that evidence is admissible for one purpose and not others.

4. Counsel may request that an instruction be given immediately after evidence is admitted for a limited purpose, and that the instruction be repeated as part of the final instructions to the jury.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence or testimony. Unless a timely objection is made, the witness will be permitted to testify or the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The judge will often find it useful to make a record *outside the hearing of the jury* to justify a ruling. A good record will indicate that the judge appropriately used either *Rule 104(a)* or *Rule 104(b)* in considering an objection, and will demonstrate a grasp of the particular evidence rule that supported the objection.

If the judge does not make a statement for the record, the party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude testimony or evidence, the party wishing to offer the testimony or evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on an objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Evidence Admissible Against One Party but Not Others

The testimony of this witness [summarize substance] is only admissible against [name of party]. You may not consider this evidence in connection with any other party.

[2] Evidence Admissible on One Claim but Not Others

The testimony of this witness [summarize substance] is only admissible in connection with [count 1 of the indictment *or* the claim of negligence]. You may not consider this evidence in connection with [any other count of the indictment *or* any other claim in this case].

[3] Evidence Admissible on One Issue but Not Others

The testimony of this witness is only admissible in connection with one issue in this case [state issue]. You may not use this evidence for any other purpose.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 2 JUDICIAL NOTICE

6-2 Federal Rules of Evidence Manual 2.syn

§ 2.syn Synopsis to Chapter 2: JUDICIAL NOTICE

2-1 Judicial Notice.

[a] Governing Rule.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Civil Case

[2] Criminal Case

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 2 JUDICIAL NOTICE

6-2 Federal Rules of Evidence Manual 2-1

2-1 Judicial Notice.

[a] Governing Rule.

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope of rule*. -- This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts*. -- ***A judicially noticed fact must be one not subject to reasonable dispute*** in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary*. -- A court may take judicial notice, whether requested or not.

(d) *When mandatory*. -- ***A court shall take judicial notice if requested by a party and supplied with the necessary information.***

(e) *Opportunity to be heard*. -- A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice*. -- Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury*. -- ***In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed***.

[b] Key Points.

1. A party may ask the court to take judicial notice at any time. If the court takes judicial notice, the party need not offer proof of the fact that is noticed.

2. The court must take judicial notice if a party makes a request and provides the court with sufficient information or material to justify the court's finding that the fact to be noticed is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3. In a civil case, judicial notice is conclusive on the jury.

4. In a criminal case, the jury must be instructed that it may, but is not required to, accept a noticed fact as true.

5. The court may take judicial notice *sua sponte*, but must give the parties a chance to be heard on the propriety of taking notice.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 201 is triggered when a party asks the court to take judicial notice or the court decides on its own to do so. Unless a timely objection is made, judicial notice is almost surely proper. A timely objection requires the trial judge to make a ruling on the propriety of taking notice.

The judge will often find it useful to make a record *outside the hearing of the jury* to justify the taking of judicial notice over objection. The judge may state, for example: I find that [insert judicially noticed fact] is not subject to reasonable dispute. This fact is [generally known within the jurisdiction of the court to be true] [capable of accurate and ready determination by resort to -- identify source -- the reliability of which cannot reasonably be questioned].

If the judge does not make a statement for the record, the party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

The effect of judicial notice in a civil case may be the exclusion of evidence that contradicts the judicially noticed fact. Should the judge exclude testimony or evidence, the party wishing to offer the testimony or evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has taken judicial notice, the judge should instruct the jury on the impact of judicial notice. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge may consider *sua sponte* one or more instructions, but often will find it helpful to inquire

whether the parties prefer a particular form of instruction.

In a criminal case, even though the defendant has not objected to evidence, the defendant usually will want to request a limiting instruction from the judge to explain to the jury that judicial notice is not binding upon it.

The following instructions can easily be requested and readily be adopted by trial judges to explain judicial notice to the jury.

[1] Civil Case

The court has determined that reasonable people would all agree that [insert fact to be noticed] is true. This fact is so [generally known within this jurisdiction ***or*** clearly established as true by sources whose accuracy cannot reasonably be questioned] that the court will not require any evidence to prove it. The court instructs you that you must accept this fact as true.

[2] Criminal Case

The court has determined that reasonable people would all agree that [insert fact to be noticed] is true. This fact is so [generally known within this jurisdiction or clearly established as true by sources whose accuracy cannot reasonably be questioned] that the court will not require any evidence to prove it. The court instructs you it is taking notice that the fact is true. Although you are not required to do so, you are entitled to accept this fact as true on the basis of the court's notice.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 3 PRESUMPTIONS

6-3 Federal Rules of Evidence Manual 3.syn

§ 3.syn Synopsis to Chapter 3: PRESUMPTIONS

3-1 Presumptions in Civil Cases.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Insufficient or No Rebuttal Evidence Regarding Presumed Fact

[2] Triggering Fact Admitted or Stipulated

[3] Statutory or State Law Shifting Burden of Persuasion

3-2 Presumptions in Criminal Cases.

[a] Governing Rule.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

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CHAPTER 3 PRESUMPTIONS

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3-1 Presumptions in Civil Cases.

[a] Governing Rules.

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, ***a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion***, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, ***the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law***.

[b] Key Points.

1. The only rules on presumptions govern in civil actions and proceedings. *Rule 301* provides the general rule that will be used in actions arising under federal law unless Congress provides otherwise, previous judge-made presumptions in admiralty and certain other actions persist, or the rules are amended to provide additional provisions on presumptions.

2. The party against whom a presumption operates must offer rebuttal evidence to contradict the presumed fact or the presumption will be binding. For example, if one party offers evidence that a letter was mailed to a proper address, a presumption may arise that it was received in a reasonable period of time. If the opposing side challenges the presumed fact (*i.e.*, the fact of receipt) with sufficient evidence to create a disputed issue regarding the presumed fact, the presumption will disappear. If the opposing side does not offer sufficient evidence, the presumption remains and the jury is instructed that if it finds the triggering fact (*i.e.*, the fact of mailing) it must also find the presumed fact.

3. If sufficient rebuttal evidence is offered, the burden of persuasion remains undisturbed. It does not switch as a result of *Rule 301*.

4. If the opposing party challenges the triggering fact but not the presumed fact, the jury must be instructed that if it

finds the triggering fact it must also find the presumed fact.

5. State law on presumptions governs when state law provides the rule of decision in a case. When state and federal claims are merged, the trial judge may have to choose one rule for presumptions if federal and state law are different.

6. If sufficient rebuttal evidence is offered to raise a disputed issue as to the presumed fact, no instruction should be given to the jury. The presumption serves its purpose when it results in the offer of rebuttal evidence and thereafter the presumption plays no part in the decision of the case.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence or testimony or a request is made for an instruction regarding presumptions. Unless a timely request for instruction or objection is made, the judge may or may not instruct the jury on the effect of a presumption. A timely objection requires the trial judge to make a ruling.

The judge will often find it useful to make a record *outside the hearing of the jury* to justify a ruling. A good record will indicate that the judge appropriately applied *Rule 301* and distinguished between the fact that gives rise to a presumption and the presumed fact. For example, the judge may state for the record a finding that the party opposing a presumption has not offered sufficient evidence to warrant a jury in believing that a presumed fact is untrue, which requires the judge to tell the jury that if it finds the fact giving rise to the presumption to be true then it must find that the presumed fact also is true. Or, the judge may state for the record a finding that the party opposing a presumed fact has offered sufficient rebuttal evidence so that the presumption disappears and no mandatory instruction will be given to the jury.

If the judge does not make a statement for the record, the party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge find rebuttal evidence to be insufficient, the party relying on that evidence should be certain to move its admission and to make an offer of proof on the sufficiency question. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. Under *Rule 301*, the trial judge may choose, even without a request, to instruct the jury when a presumption is binding; the judge is precluded from giving a mandatory instruction when the presumption disappears, but an objection will be required if an instruction is proposed. The rule does not prohibit the judge from considering *sua sponte* or in response to a party's request whether to give an instruction on a permissible inference.

Three instructions are set forth below. The first two assume that *Rule 301* applies. The first instruction should be given whenever the opposing party either offers insufficient rebuttal evidence regarding the presumed fact or limits rebuttal evidence to the triggering fact. The third instruction assumes that a federal statute shifts the burden of persuasion, or that it is a diversity case and state law provides the rule of decision and shifts the burden of persuasion.

[1] Insufficient or No Rebuttal Evidence Regarding Presumed Fact

You have heard evidence that [insert triggering fact -- *e.g.*, the plaintiff mailed a letter to the defendant on a given date]. It is for you to decide whether this is true. I instruct you that if you find that [triggering fact -- *e.g.*, the letter was mailed on or about this date] you must also find that [insert presumed fact -- *e.g.*, the letter was received within a reasonable

time thereafter].

[2] Triggering Fact Admitted or Stipulated

The parties have agreed that [insert triggering fact -- *e.g.*, the plaintiff mailed a letter to the defendant on a given date]. You must accept this fact as true. I instruct you also must accept as true [insert presumed fact -- *e.g.*, the letter was received within a reasonable time thereafter].

[3] Statutory or State Law Shifting Burden of Persuasion

You have heard evidence that [insert triggering fact -- *e.g.*, the plaintiff mailed a letter to the defendant on a given date]. It is for you to decide whether this is true. I instruct you that if you find that [triggering fact -- *e.g.*, the letter was mailed on or about this date], the burden is on [name party -- *e.g.*, the defendant] to prove by a preponderance of the evidence that [insert opposite of the presumed fact -- *e.g.*, the letter was not received within a reasonable time thereafter].

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CHAPTER 3 PRESUMPTIONS

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3-2 Presumptions in Criminal Cases.

[a] Governing Rule.

NO RULE

[b] Key Points.

1. There is no rule on presumptions in criminal cases.

2. The Supreme Court approved Rule 303 in 1972 and sent it to Congress, but Congress declined to enact it as part of the Federal Rules of Evidence.

3. Proposed, but unenacted Rule 303, read, in part, as follows:

> * * *
>
> (b) **Submission to jury.** The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.
>
> (c) **Instructing the jury.** Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

4. Congress was concerned with the constitutionality of the proposed rule.

5. In *County Court of Ulster v. Allen, 442 U.S. 140 (1979)* , the Supreme Court emphasized that, in assessing the validity of presumptions, the key is what the trial judge tells the jury. The Court indicated that if the trial judge does no more than inform the jury of a permissible inference, the instruction will be upheld as long as it is rational.

6. Presumptions in criminal cases, as *Allen* recognizes, are potentially affected by the constitutional rule that the prosecution must prove beyond a reasonable doubt all elements of crimes charged against a defendant under *In re Winship, 397 U.S. 358 (1970)* . *Winship* spawned a line of Supreme Court cases -- *e.g.*, *Mullaney v. Wilbur, 421 U.S. 684 (1975)* , and *Patterson v. New York, 432 U.S. 197 (1977)* -- that address the question of when a burden of persuasion may be placed on a defendant.

7. In *Sandstrom v. Montana, 442 U.S. 510 (1979)* , the Supreme Court held that an instruction to the jury in a homicide case that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the Constitution because it may have removed from the prosecution some of its burden to prove beyond a reasonable doubt all elements of the crime charged. Prudence would indicate that trial judges should not use the words "presumption" or "presume" other than to refer to the presumption of innocence in their instructions to the jury.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Generally, parties must object to a trial judge's instructions or they will waive complaint. A timely objection requires the trial judge to make a ruling.

The judge will often find it useful to make a record *outside the hearing of the jury* explaining or justifying an instruction. Given the constitutional implications surrounding presumptions in criminal cases, judges must be extremely careful in the language they choose to use in their instructions. Indeed, the best advice for judges is probably to avoid ever using the word "presumption" in criminal cases except to refer to the presumption of innocence. Since the word "presumption" is confusing even to lawyers, its avoidance and reliance on permissible inference instructions is likely to be a safe course for a judge who is compelled to deal with a criminal presumption.

The following instruction should be safe in most cases:

Permissible Inference Instruction

You have heard evidence that [insert triggering fact -- *e.g.*, the defendant had possession of recently stolen property]. It is for you to decide whether this is true. I instruct you that if you find that [triggering fact -- *e.g.*, the defendant did have possession of recently stolen property] you may, but are not required to, infer that [insert inferred fact -- *e.g.*, the defendant knew that the property was stolen]. The prosecution must prove [insert inferred fact] beyond a reasonable doubt.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 4 RELEVANCE AND RELATED MATTERS

6-4 Federal Rules of Evidence Manual 4.syn

§ 4.syn Synopsis to Chapter 4: RELEVANCE AND RELATED MATTERS

4-1 Relevant Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Relevance Objection Overruled

[2] Relevance Objection to Question Sustained

[3] Relevance Objection to Answer Sustained

[4] Stipulation of Fact

[5] Stipulation of Testimony

4-2 Prejudicial Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prejudice Objection Overruled in Jury's Hearing

[2] Prejudice Objection to Question Sustained in Jury's Hearing

[3] Prejudice Objection to Answer Sustained in Jury's Hearing

4-3 Other Crimes, Wrongs, Acts, etc.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Rule 404(b) Evidence in Criminal Case

[2] Rule 404(b) Evidence in Civil Case

[3] Admission or Stipulation by Defendant in Criminal Case

[4] Rule 413 and Rule 414 Evidence in Criminal Cases

[5] Rule 415 Evidence in Civil Cases

4-4 Evidence of Criminal Defendant's Character.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Defendant Offers Favorable Character Evidence

[2] Prosecutor's Rebuttal Evidence

[3] Defendant Attacks Victim

[4] Prosecutor's Rebuttal Evidence

[5] Cross-Examination About Specific Bad Acts -- Witness Denies Acts

[6] Cross-Examination About Specific Events -- Witness Admits Knowledge

[7] Rule 413 and Rule 414 Evidence in Criminal Cases

4-5 Evidence of the Victim's Character -- Criminal Case.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Defendant Offers Character Evidence

[2] Prosecutor's Rebuttal Evidence Regarding Victim

[3] Prosecutor's Rebuttal Evidence Regarding Defendant

[4] Prosecutor's Rebuttal Evidence Regarding Both Victim and Defendant

[5] Cross-Examination About Specific Bad Acts -- Witness Denies Acts

[6] Cross-Examination About Specific Events -- Witness Admits Knowledge

[7] Prosecutor's Evidence of Victim's Character in Homicide Case

[8] Defense Rebuts Prosecution Evidence

[9] Rule 412 Evidence -- Prior Relationship with Defendant

[10] Rule 412 Evidence -- Source of Semen or Injury

4-6 Defendant's Character -- Civil Case.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Rule 415 Evidence Offered by Plaintiff

[2] Rebuttal Evidence Offered by Defendant

4-7 Evidence of Victim's Character -- Civil Case.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Rule 412 Evidence -- Prior Relationship with Defendant

[2] Rule 412 Evidence -- Source of Semen or Injury

4-8 Habit Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Habit Evidence

[2] Business Custom

4-9 Subsequent Remedial Measures.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Evidence Admitted for Limited Purpose -- Negligence Case

[2] Evidence Admitted for Limited Purpose -- Product Liability Case

[3] Third Party Repair -- Negligence Case

4-10 Settlements and Offers to Compromise.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Limiting Instruction -- Settlement by a Witness with Party to Show Bias

[2] Settlement by Party After Trial Begins

[3] Settlement Admitted in Criminal Case

4-11 Payment of Medical and Similar Expenses.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Evidence of Statement Made at Time a Payment Is Offered

[2] Evidence of Payment Offered for Other Purpose

4-12 Plea Negotiations and Related Statements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Mezzanatto Example -- Statements Introduced for Impeachment

[2] Mezzanatto Extended -- Statements Admitted as Substantive Evidence

[3] Contemporaneous Statements

4-13 Liability Insurance.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Impeachment of Defendant's Witness for Bias

[2] Impeachment of Plaintiff's Witness for Bias

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CHAPTER 4 RELEVANCE AND RELATED MATTERS

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4-1 Relevant Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning*** the qualification of a person to be a witness, the existence of a privilege, or ***the admissibility of evidence shall be determined by the court***, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges***.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition***.

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of ***any fact*** that is ***of consequence to the determination of the action more probable or less probable*** than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. ***Evidence which is not relevant is not admissible***.

[b] Key Points.

1. Relevant evidence is admissible unless the Constitution, a statute, or rules enacted pursuant to the Rules Enabling Act provide otherwise.

2. The burden is on a party who claims an exception to the rule of admissibility to raise a specific objection and point out the exception.

3. Most of the exceptions to admissibility are found in other rules of evidence. *Rule 403* is a principal example. Other non-evidence rules may also restrict the use of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions.

4. Irrelevant evidence is inadmissible. The burden is on a party claiming that evidence is not relevant to make a specific objection.

5. Relevance determinations involve both logic and experience. They also require knowledge of the issues in dispute in a particular case and the law governing those issues.

6. The rule covers both the common-law concepts of materiality and relevance. The words "of consequence to the action" suggest a materiality analysis, while the words "more or less probable" suggest a relevance analysis.

7. An objection "irrelevant" is sufficient to cover any point that at common law would fall under either a materiality or relevance objection.

8. The trial judge, in making a relevance determination, may be using both *Rule 104(a)* and *(b)*. If the judge is making a basic relevance determination, the issue is a question for the court under *Rule 104(a)*. If, however, one item of evidence is relevant only if another item is proved, the issue for the judge is whether there is sufficient evidence for a trier of fact to find the other item, which is an issue falling within *Rule 104(b)*.

9. Even when the judge is making a basic relevance analysis under *Rule 104(a)*, the judge does not decide whether a witness or an item of evidence is credible, only whether a reasonable jury could find the witness or evidence credible.

10. *Rule 104(b)* issues are often "connecting up" issues. For example, a party who offers evidence that a witness who testified for the other side recently deposited $10,000 into the bank may promise to connect this evidence with evidence that the opposing party gave the witness the money. If the party does not keep this promise and offers no evidence to warrant a finding that the opposing party had anything to do with the money, the deposit becomes irrelevant and the previously admitted evidence would be stricken.

11. *Rule 104(b)* thus makes it clear that, if one piece of evidence (piece 1) is relevant only if some piece (piece 2) is established as true, the trial judge must decide whether there is *sufficient* admissible evidence of piece 2 to warrant a jury finding it to be true. If so, the evidence of both pieces 1 and 2 is admitted. If not, evidence of piece 1 is irrelevant and will be stricken. The jury decides whether to believe both piece 1 and piece 2 if both are admitted into evidence.

12. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and the issues of a particular case.

13. The standard of probability under the rule is "more or less probable than it would be without the evidence." If a trier of fact could find evidence to make even the slightest difference on any disputed matter, the evidence is relevant.

14. Evidence may be relevant because it makes other evidence more understandable, thereby having at least some

tendency to make facts more or less probable.

15. Relevance is not the same as sufficiency. The trial judge may find that various items of evidence are relevant and may admit them. The same trial judge may determine as a matter of law that these items could not support a verdict by a rational fact finder, and may grant judgment as a matter of law.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely relevance objection is made. Unless a timely objection is made, evidence will be admitted and relevance issues will be waived. A timely objection requires the trial judge to make a ruling.

The basic ruling that the trial judge makes on relevance is a *Rule 104(a)* ruling. When a relevance objection is made, the judge does not engage in the kind of fact finding that is often required when other objections to evidence are made. The judge decides whether the evidence has any probative value. If so, it is relevant. In making a relevance ruling, the judge may want to state for the record *outside the hearing of the jury* something like the following: [Name of party] objects that this evidence is irrelevant. [Name of opposing party] contends that the evidence tends to prove [short description of fact that is made more probable or less probable]. To be relevant an item of evidence standing alone need not be sufficient to prove a fact, nor need it be more than minimally probative. Evidence is relevant if it tends to make any fact that is of consequence to the action even a little more or a little less likely. Applying this test, I find that this evidence [is or is not] relevant. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

As noted in the Key Points, above, an item of evidence may be admissible if connected to one or more additional pieces of evidence. The judge who admits evidence conditionally may want to say *outside the hearing of the jury* something like the following: [Name of party] objects that this evidence is irrelevant. [Name of opposing party] contends that the evidence tends to prove [short description of fact that is made more probable or less probable]. Evidence is relevant if it tends to make any fact that is of consequence to the action even a little more or a little less likely. Applying this test, I find that this evidence is relevant as long as there is also sufficient evidence for a jury to find [assert additional fact]. [Name of party] has represented that such evidence will be forthcoming, and I therefore admit [evidence to which objection was made] subject to connection. [Name of objecting party] may renew the objection and move to strike evidence if the connection is not made.

Should the judge exclude evidence as irrelevant, the party wishing to offer the evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. The offer of proof should make clear how the excluded evidence fits the case.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence -- *e.g.*, when a stipulation is offered -- that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Relevance Objection Overruled

It is for you to decide how much weight, if any, to give the evidence that is put before you. The fact that I overrule an objection does not signify in any way that the evidence is important or that you should give it any special weight.

[2] Relevance Objection to Question Sustained

Please keep in mind at all times that questions are not evidence. You must completely disregard any question that I rule to be improper, and you must not speculate about why the question was asked or what answer might have been given.

[3] Relevance Objection to Answer Sustained

You must disregard the answer that you just heard. That answer is not relevant to any of the issues that you are called upon to decide. That answer is not part of the evidence that you are to consider. Remember also that questions are not evidence. Thus, when an answer must be disregarded, so must the question that produced the answer.

[4] Stipulation of Fact

The parties have entered into an agreement, which they call a stipulation, that a certain fact is true. They agree that [insert stipulated fact]. The agreement means that no evidence of this fact will be produced. The court accepts this fact as true and instructs that you also must accept it as true.

[5] Stipulation of Testimony

The parties have entered into an agreement, which they call a stipulation, as to the testimony of a witness who will not be called to testify. The parties agree that [insert name of witness] would testify that [insert stipulation]. The parties have not agreed that this witness's testimony is true or accurate. You must decide whether you believe the stipulated testimony and how much weight to give it. It is for you to decide how important it is that you did not have the opportunity to see and hear this witness.

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CHAPTER 4 RELEVANCE AND RELATED MATTERS

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4-2 Prejudicial Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, ***evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice***, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[b] Key Points.

1. This is probably the rule invoked most often in support of an objection. A *Rule 403* objection amounts to a claim that evidence will detract from rather than enhance the jury's ability to decide a case fairly.

2. Probative evidence that greatly helps one side will almost surely greatly hurt the other side. This is not "unfair prejudice." Unfair prejudice signifies that evidence is likely to confer an advantage or disadvantage on one side that is out of proportion to the probative value of the evidence.

3. The trial judge should consider whether a limiting instruction may ameliorate some or all of the unfair prejudice in deciding whether or not to admit or exclude evidence.

4. The trial judge may also consider the availability of other means of proof in striking a balance between admission and exclusion.

5. The trial judge may also consider admitting some but not all of the evidence offered, when it is possible to eliminate the parts most likely to result in unfair prejudice.

6. Counsel must raise a *Rule 403* objection specifically, either by stating the rule by number or by articulating the basis for objection recognized under the rule. An objection that evidence is irrelevant is generally not enough to preserve a *Rule 403* objection.

7. *Rule 403* is one of the rules that counsel should know by number. Counsel should avoid arguing about unfair prejudice within the hearing of the jury. By mentioning *Rule 403* by number and asking for an opportunity to be heard outside the jury's hearing, counsel can avoid highlighting the evidence for the jury.

8. The rule does not enumerate surprise as a ground for exclusion. The drafters assumed that a continuance would generally be an appropriate remedy. If a party does surprise an adversary unfairly, particularly when representations have been made to the court that certain issues will not be raised, the court may decide to exclude evidence on one of the grounds enumerated in *Rule 403*. *E.g.*, it might be unfairly prejudicial to admit certain evidence on an issue a party indicated would not be raised and as to which the opposing party cannot reasonably respond even with a continuance.

9. Unfair prejudice is the most common complaint when *Rule 403* is invoked in jury cases. But the other grounds for objection under the rule should not be overlooked: (a) confusion of the issues, (b) misleading the jury, (c) and considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

10. When a *Rule 403* objection is made, the trial judge must weigh the harm to the proponent of excluding relevant evidence against the unfairness the evidence may work against an opposing party. *Rule 403* rulings involve the sound exercise of discretion, not actual fact finding.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 403 is triggered when a timely objection is made that evidence should be excluded because its prejudicial effect or other deficiency substantially outweighs its probative value. Unless a timely objection is made, evidence will be admitted and relevance issues will be waived. A timely objection requires the trial judge to make a ruling.

The basic ruling that the trial judge makes on relevance is a *Rule 104(a)* ruling, since the judge is ruling on the admissibility of evidence. When a relevance/*Rule 403* objection is made, the judge does not engage in the kind of fact finding that is often required when other objections to evidence are made. The judge decides what probative value the evidence has and compares that value to the possible dangers associated with the evidence. In short, the judge engages in balancing. In striking a balance, the judge may find it useful to ask the proponent of the evidence to articulate its probative value and the purposes for which it is offered and the opponent to describe the unfairness that supports the objection. Thereafter, the judge may want to state for the record *outside the hearing of the jury* something like the following: [Name of objecting party] objects that the prejudicial effect of this evidence substantially outweighs its probative value. [Name of proponent] contends that the evidence tends to prove [state the purpose for which the evidence is offered]. [Name of objecting party] identifies possible unfair prejudice in [describe claim of prejudice]. I have considered the evidence and the arguments of the parties, the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I also observe that all evidence is prejudicial or it would not be offered, and it is only unfair prejudice that should be of concern. Having weighed the probative value against the possible unfair prejudice, I [overrule or sustain] the objection.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the

record on appeal.

Should the judge exclude evidence under *Rule 403*, the party wishing to offer the evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. The offer of proof should make clear how the excluded evidence fits the case, and should emphasize the lack of substitute proof when none is available.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prejudice Objection Overruled in Jury's Hearing

Counsel are required to object to questions or answers that they believe violate the rules of evidence. Objections are directed to the court, not to you, the jury. Therefore, you should pay no attention to the words used by counsel in an objection or in response to an objection. The fact that an objection was made before evidence was admitted neither increases nor decreases the importance of the evidence. Your job is to decide what weight, if any, to give any evidence that is admitted regardless of whether an objection was made at some point.

[2] Prejudice Objection to Question Sustained in Jury's Hearing

Counsel are required to object to questions or answers that they believe violate the rules of evidence. Objections are directed to the court, not to you, the jury. Therefore, you should pay no attention to the words used by counsel in an objection or in response to an objection. I have sustained an objection to the last question, and you must disregard that question.

[3] Prejudice Objection to Answer Sustained in Jury's Hearing

Counsel are required to object to questions or answers that they believe violate the rules of evidence. Objections are directed to the court, not to you, the jury. Therefore, you should pay no attention to the words used by counsel in an objection or in response to an objection. I have sustained an objection to the witness's answer, and therefore you must disregard the last answer [or the portion of the last answer that mentioned (insert name or fact)]. That answer is not part of the evidence you are permitted to consider.

Federal Rules of Evidence Manual

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 4 RELEVANCE AND RELATED MATTERS

6-4 Federal Rules of Evidence Manual 4-3

4-3 Other Crimes, Wrongs, Acts, etc.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning*** the qualification of a person to be a witness, the existence of a privilege, or ***the admissibility of evidence shall be determined by the court***, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) *Other crimes, wrongs, or acts*. -- Evidence of ***other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith***. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraph (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraph (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

[b] Key Points.

1. *Rule 404(b)* is one of the most frequently litigated rules. It establishes the basic proposition that crimes, wrongs, or acts that are not the subject of the charges in a criminal case or of the claims or defenses in a civil case often are highly prejudicial. The danger is that a trier of fact will reward or punish parties based on their general character rather than decide who did what to whom with respect to the charges, claims, or defenses.

2. The rule excludes evidence of other crimes, wrongs, or acts only if it is offered to show character in order to support a claim that a person acted in conformity with that character. Evidence offered for any other purpose is not excluded by *Rule 404(b)*. Evidence offered for other purposes might be excluded as irrelevant under *Rule 401* or as unduly prejudicial under *Rule 403*, however. *Rule 404(b)* does not exclude evidence that is rendered admissible by *Rules 413, 414, and 415*.

3. When evidence is offered for a permissible purpose, the party offering it need only satisfy the basic requirements of relevance and authentication, not a higher standard. In *Huddleston v. United States, 485 U.S. 681 (1988)* , the Supreme Court rejected an argument that the prosecution should have to prove other acts by clear and convincing evidence.

4. *Rules 404(b), 413, 414, and 415* all contain notice provisions. *Rule 404(b)*, which requires notice only in criminal cases, is more general in its requirements than the other three rules, all of which require a summary of the substance of testimony. *Rule 404(b)* is the one rule without a specific timing requirement regarding the notice. The fifteen-day requirement does not apply to *Rule 404(b)*, although a trial judge would have the authority to impose a similar timing provision in a criminal case as part of a pretrial scheduling order.

5. A party who objects to *Rule 404(b)* evidence generally should consider raising relevance and *Rule 403* objections in conjunction with a *Rule 404(b)* objection. The party who offers *Rule 404(b)* evidence should be prepared to explain to the court the specific purpose(s) for which the evidence is offered and how the evidence proves whatever it is offered to prove.

6. A party offering evidence under *Rules 413, 414, and 415* may urge admission for any relevant purpose. This includes offering evidence to prove that a party has a propensity to act in a certain way and that the party therefore is likely to have acted as alleged in accordance with that propensity. A party offering evidence under *Rules 413, 414, and 415* may offer the evidence for any purpose for which it could be used under *Rule 404(b)* but these additional rules do not contain the limitation on use of evidence to prove character or predisposition.

7. A party opposing evidence offered under Rules 413, 414, and 415 should consider relevance and *Rule 403* objections. The plain language and legislative history of the rules could support both an argument that *Rule 403* does not apply to these rules and a counter argument that it applies to these rules in the same manner it applies to other rules. Thus far, all reported decisions find *Rule 403* to be applicable.

8. A party who is concerned about possible prejudice from *Rule 404(b)* evidence should consider "admitting" for purposes of the case or "stipulating" that an element is true and that the jury should be so instructed. If the admission or

stipulation fairly gives an opposing party all that *Rule 404(b)* evidence would be admitted to prove, the probative value of the evidence may disappear or diminish so significantly that the possible prejudice would substantially outweigh any probative value and result in exclusion. *See Old Chief v. United States, 519 U.S. 172 (1997)* (error to admit proof of prior conviction to prove defendant was a convicted felon in firearms case when defendant stipulated to felony status). Stipulations or admissions are the exception, however, rather than the rule. *Old Chief* and lower court cases recognize that a party generally should be permitted to prove its case with robust evidence and that stipulations may result in a sterile or artificial presentation that may deprive a party of the legitimate force of its proof.

9. It is unlikely that admissions and stipulations generally will be adequate substitutes for evidence offered pursuant to *Rules 413, 414, and 415*. Specific acts may provide information concerning the degree or particular characteristics of a person's predisposition and may have particular value.

10. Because evidence offered to prove character under *Rules 413, 414, and 415* may have tremendous influence on a jury, the nuances of prior acts and surrounding circumstances may be important. The party against whom such evidence is offered should have a full opportunity to offer evidence of surrounding circumstances. The notice requirement may be especially important with respect to this kind of evidence. The fifteen-day requirement appears to be intended to assure that there is adequate time to prepare and to gather relevant evidence.

11. *Rule 404(b)* evidence is offered for substantive purposes. Thus, evidence admitted under this rule goes to prove the substance of the charges, claims, or defenses to which it is relevant. *Rule 404(b)* should be analyzed completely apart from *Rule 608(b)*, which permits questions about prior acts that might shed light on credibility. *Rule 608(b)* limits questioning to credibility, and it bars extrinsic evidence. The fact that questions might not be permissible to attack a witness under *Rule 608(b)* is not relevant to an analysis of whether evidence should be admitted under *Rule 404(b)*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and relevance issues will be waived. A timely objection requires the trial judge to make a ruling.

When evidence offered under *Rule 404(b)* is the subject of an objection, the trial judge will often have to make both a *Rule 104(a)* and a *Rule 104(b)* ruling. The *104(a)* ruling is that evidence is offered for a proper purpose, not to prove propensity. The *104(b)* ruling is whether there is sufficient evidence for a jury to find the other acts by a preponderance of the evidence. In addition to these rulings, the judge often will be faced with a *Rule 403* objection.

In ruling on *Rule 404(b)* evidence, the judge may want to state for the record *outside the hearing of the jury* something like the following: [Name of party] objects to this evidence of other acts. Other act evidence is not admissible under *Rule 404(b)* to prove propensity but it is admissible to prove other matters. [Name of proponent] contends that the evidence is admissible to prove [identify purpose]. I find that this [is or is not] a permissible use of other act evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge finds that it is a permissible use, the judge may want to make an additional statement for the record *outside the hearing of the jury*: It is not the court's role to decide whether these other acts occurred or the weight to give them. This is for the jury, provided that there is sufficient evidence for the jury to find that the acts occurred. [Name of party] has represented that such evidence will be forthcoming, and I therefore admit [evidence to which objection was made] on the basis of that representation. [Name of objecting party] may renew the objection and move to strike evidence if sufficient proof is not forthcoming.

If a *Rule 403* objection is made, the judge may want to make a third statement for the record *outside the hearing of the jury*: [Name of objecting party] also objects that the prejudicial effect of this evidence substantially outweighs its probative value. [Name of proponent] contends that the evidence tends to prove [state the purpose for which the

evidence is offered]. [Name of objecting party] identifies possible unfair prejudice in [describe claim of prejudice]. I have considered the evidence and the arguments of the parties, the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I also observe that all evidence is prejudicial or it would not be offered, and it is only unfair prejudice that should be of concern. Having weighed the probative value against the possible unfair prejudice, I [overrule or sustain] the objection.

The party who prevails on the evidence issue may find it useful to request one or more statements on the record to protect the record on appeal.

When evidence is offered under *Rules 413, 414, and 415*, an objection often will be made under *Rule 403*. The statement set forth above should make an adequate record when any such objection is made.

Should the judge exclude evidence under these rules, the party wishing to offer the evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. The offer of proof should make clear how the excluded evidence fits the case.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Rule 404(b) Evidence in Criminal Case

The defendant in this case is charged with having committed specific acts. The prosecution has presented evidence that the defendant committed acts other than those charged in this case. This evidence of uncharged acts is offered for a specific purpose. It is offered to prove [insert purpose -- *e.g.*, that the defendant intended to do the acts charged, the defendant knew marijuana when he saw it, or that the defendant must have been the person who committed the acts charged because those acts and the other acts were so similar that they must have been committed by the same person]. You must decide whether you believe the prosecution's evidence and whether you find that it helps you decide whether the defendant committed the acts charged in this case. You may not use the evidence of uncharged acts for any other purpose. Your responsibility is to decide whether the prosecution proves beyond a reasonable doubt the acts charged. The defendant is on trial only for those acts and may not be held responsible in this case for any other acts.

[2] Rule 404(b) Evidence in Civil Case

The plaintiff in this case alleges that the defendant committed certain specific acts for which the plaintiff seeks to hold the defendant accountable. The defendant denies the plaintiff's allegations. The plaintiff has presented evidence that the defendant committed additional acts other than those for which the plaintiff seeks to hold the defendant accountable. This evidence of additional acts is offered for a specific purpose: to prove [insert purpose -- *e.g.*, that the defendant

intended to deny a promotion to the plaintiff because of race, the defendant intended to agree on the price to be charged for various products, or the defendant knew he was obliged to file certain reports]. You must decide whether you believe the plaintiff's evidence of additional acts and whether you find that it helps you decide whether the defendant committed the acts for which the plaintiff seeks to hold the defendant accountable. You may not use the evidence of additional acts for any other purpose.

[3] Admission or Stipulation by Defendant in Criminal Case

Ordinarily the prosecution must prove each element of every crime charged beyond a reasonable doubt. But, the defendant in this case has agreed that [insert stipulation -- *e.g.*, drugs were sold, and whoever sold them knew that they were narcotic drugs and intended to distribute them]. This element is now conceded, and I instruct you that you must accept this element as having been conclusively established. The prosecution bears no further burden to prove this element.

[4] Rule 413 and Rule 414 Evidence in Criminal Cases

The defendant in this case is charged with having committed specific acts. The prosecution has presented evidence that the defendant committed acts other than those charged in this case. This evidence of uncharged acts is offered to prove that the defendant had a tendency to engage in similar conduct on other occasions. The evidence is also offered to prove [insert other purpose -- *e.g.*, that the defendant intended to do the acts charged]. You must decide whether you believe the prosecution's evidence and whether you find that it helps you decide whether the defendant committed the acts charged in this case. Your responsibility is to decide whether the prosecution proves beyond a reasonable doubt the acts charged. The defendant is on trial only for those acts and may not be held responsible in this case for any other acts.

[5] Rule 415 Evidence in Civil Cases

The plaintiff in this case alleges that the defendant committed certain specific acts for which the plaintiff seeks to hold the defendant accountable. The defendant denies the plaintiff's allegations. The plaintiff has presented evidence that the defendant committed additional acts other than those for which the plaintiff seeks to hold the defendant accountable. This additional evidence is offered to prove that the defendant had a tendency to act as the plaintiff claims he acted and also to prove [insert other purpose -- *e.g.*, that the defendant intended to do the acts alleged]. You must decide whether you believe the plaintiff's evidence of additional acts and whether you find that it helps you decide whether the defendant committed the acts for which the plaintiff seeks to hold the defendant accountable.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
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4-4 Evidence of Criminal Defendant's Character.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- ***Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith*** on a particular occasion, except:

(1) Character of accused. -- Evidence of ***a pertinent trait of character offered by an accused***, or by ***the prosecution to rebut*** the same, or ***if evidence of a trait of character of the alleged victim*** of the crime ***is*** offered by an accused and ***admitted*** under Rule 404(a)(2), ***evidence of the same trait of character of the accused offered by the prosecution***;

* * *

Rule 405. Methods of Proving Character

(a) *Reputation or opinion*. -- In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. -- In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraph (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in *section 513 of title 18, United States Code*) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraph (1)-(5).

[b] Key Points.

1. *Rule 404(a)* provides the defendant in a criminal case with the opportunity to offer evidence about his or her own character, or about the character of the victim. These opportunities are exceptions from the general rule that character evidence is not admissible to prove that a person acted on any given occasion in conformity with a particular character trait. *Rule 404(a)(1)* covers evidence of the character of the accused.

2. *Rule 404(a)(1)* provides that only the accused may open the door to character evidence, except when another rule provides an exception to the general ban on such evidence -- *e.g.*, *Rules 413 and 414*.

3. *Rule 404(a)* does not state which types of evidence may be admitted. *Rule 405* governs the types of evidence that may be used.

4. As a general rule, *Rule 405(a)* indicates that reputation or opinion evidence may be used to prove character, but not specific acts. *Rule 405(a)* expands the common-law rule, which had limited character evidence to reputation testimony.

5. Specific acts may be inquired into on cross-examination. The direct examiner who calls a character witness generally may not inquire into specific acts.

6. The cross-examiner who asks a character witness about specific acts is engaging in a form of examination approved by the Supreme Court in *Michelson v. United States, 335 U.S. 469 (1948)* . When proof of character was limited to reputation evidence, cross-examiners were permitted to ask a character witness "Have you heard" questions about prior acts. Such questions remain permissible. Cross-examiners may also ask "Do you know" questions of opinion witnesses. The cross-examiner is bound by the witness's answer.

7. The rule does not so state, but courts have always insisted that there be a good-faith basis for any questions asked on cross-examination about specific acts. A good-faith basis does not necessarily mean that the cross-examiner has admissible evidence, however.

8. A character witness is limited to testifying about a pertinent trait of character. For example, in a theft case the pertinent trait would likely be honesty. In a homicide case, the pertinent trait is peaceableness or its equivalent.

9. *Rule 404(a)(1)* permits a prosecutor to rebut a defendant's character evidence. Such evidence might rebut the defendant's evidence about his or her own character or, if the defendant has introduced negative character evidence about the victim, the prosecution may introduce evidence showing that the defendant has the same undesirable character trait. Rebuttal evidence should be distinguished from cross-examination. A prosecutor may cross-examine a character witness about specific acts, but may not offer evidence to prove that such acts occurred. The prosecutor who wishes to prove affirmatively the defendant's pertinent trait under this Rule may call witnesses to testify only as to reputation or opinion.

10. Although the rule does not so state, because character evidence offered under *Rule 404(a)(1)* is offered to negate a criminal charge, the relevant time period for the character trait is the time that the crime took place. Often this will be so close in time to a trial that there is no real difference between the date of the crime and the date of the trial, but if there is a gap the reputation or opinion should relate to the date of the alleged offense rather than the date of trial.

11. *Rules 413 and 414* give the prosecutor authority to offer evidence irrespective of whether the defendant opens the door to character evidence. Specific act evidence is admissible under these rules.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and relevance issues will be waived. A timely objection requires the trial judge to make a ruling.

When evidence offered under *Rule 404(a)* is the subject of an objection, the trial judge will often have to make both a *Rule 104(a)* ruling as to whether the evidence relates to a relevant character trait, and a ruling under *Rule 405* as to whether evidence is offered in a proper form.

In ruling on *Rule 404(a)* evidence, the judge may want to state for the record *outside the hearing of the jury* something like the following: [Name of party] objects to this evidence as outside the scope of *Rule 404(a)*. The defendant in a criminal case is permitted to offer evidence of relevant character traits in reputation or opinion form. [Name of opponent] contends that the evidence is not of a relevant character trait. I find that the [insert character trait] [is or is not] a relevant character trait in a prosecution in which the defendant is charged with [describe charges]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the cross-examiner seeks to ask a witness questions about what the witness has heard or knows about the defendant, often a *Rule 403* objection will be made by the defendant. If a *Rule 403* objection is made, the judge may want to make a statement for the record *outside the hearing of the jury*: The defendant objects that the prejudicial effect of these questions substantially outweighs their probative value. The government contends that the cross-examination fairly tests the witness. I have considered the evidence and the arguments of the parties, the scope of the witness's direct examination, and the usefulness of limiting instructions in dealing with any prejudice problem. Having weighed the probative value of the questions for impeachment purposes against the possible unfair prejudice, I [overrule or sustain] the objection.

The party who prevails on the evidence issue may find it useful to request one or more statements on the record to protect the record on appeal.

When evidence is offered under *Rules 413 and 414*, an objection often will be made under *Rule 403*. The trial judge may want to make a record *outside the hearing of the jury* something like the following: The defendant objects that the prejudicial effect of this evidence substantially outweighs its probative value. The government contends that the evidence tends to prove [state the purpose for which the evidence is offered, including propensity]. The defendant identifies possible unfair prejudice in [describe claim of prejudice]. I have considered the evidence and the arguments of the parties, the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I also observe that all evidence is prejudicial or it would not be offered, and it is only unfair prejudice that should be of concern. Having weighed the probative value against the possible unfair prejudice, I [overrule or sustain] the objection.

Should the judge exclude evidence, the party wishing to offer the evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. If the judge excludes questions of a character witness on cross-examination, the cross-examiner may want to voir dire the witness and elicit answers to the questions so that a reviewing court will know the true impact of the judge's ruling.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Defendant Offers Favorable Character Evidence

The defendant has presented evidence of his good character for [insert trait]. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider whether you believe the defendant's character for [insert trait] creates or helps to create a reasonable doubt as to guilt.

[2] Prosecutor's Rebuttal Evidence

The defendant has presented evidence of his good character for [insert trait]. The prosecutor has presented evidence to rebut the defendant's evidence. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider whether you believe the defendant's character for [insert trait] creates or helps to create a reasonable doubt as to guilt.

[3] Defendant Attacks Victim

The defendant has presented evidence regarding [name of victim's] character for [insert trait]. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider whether you believe the [name of victim's] character for [insert trait] creates or helps to create a reasonable doubt as to guilt.

[4] Prosecutor's Rebuttal Evidence

The defendant has presented evidence of [name of victim's] character for [insert trait]. The prosecutor has responded with evidence of the defendant's character for [insert trait]. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider whether you believe any of this evidence creates or helps to create a reasonable doubt as to guilt or whether it tends to prove guilt.

[5] Cross-Examination About Specific Bad Acts -- Witness Denies Acts

Questions are not evidence. The prosecutor asked a character witness whether the witness had heard or was aware of certain things. The witness said "no." There is no evidence in this case that these things actually occurred, and you should not assume that they did. You may consider, however, the demeanor of the witness in answering questions in deciding how much weight to give the witness's testimony.

[6] Cross-Examination About Specific Events -- Witness Admits Knowledge

The defendant called a witness to testify about his good character for [insert trait]. On cross-examination the witness said that she heard or knew about certain things that the prosecution claims cast doubt on the defendant's character for [insert trait]. It is for you to decide how much weight to give the witness's testimony, and you may consider the fact that the witness said that she heard or knew certain things in making your decision.

[7] Rule 413 and Rule 414 Evidence in Criminal Cases

The defendant in this case is charged with having committed specific acts. The prosecution has presented evidence that the defendant committed acts other than those charged in this case. This evidence of uncharged acts is offered to prove

that the defendant had a tendency to engage in similar conduct on other occasions. The evidence is also offered to prove [insert other purpose -- *e.g.*, that the defendant intended to do the acts charged]. You must decide whether you believe the prosecution's evidence and whether you find that it helps you decide whether the defendant committed the acts charged in this case. Your responsibility is to decide whether the prosecution proves beyond a reasonable doubt the acts charged. The defendant is on trial only for those acts and may not be held responsible in this case for any other acts.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 4 RELEVANCE AND RELATED MATTERS

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4-5 Evidence of the Victim's Character -- Criminal Case.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- ***Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith*** on a particular occasion, except:

(1) Character of accused. -- Evidence of ***a pertinent trait of character offered by an accused***, or by ***the prosecution to rebut*** the same, or ***if evidence of a trait of character of the alleged victim*** of the crime ***is*** offered by an accused and ***admitted*** under Rule 404(a)(2), ***evidence of the same trait of character of the accused offered by the prosecution***;

* * *

(2) Character of victim. -- Evidence of ***a pertinent trait of character of the victim of the crime offered by an accused***,

or***by the prosecution to rebut the same***, or evidence of ***a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence*** that the victim was the first aggressor;

* * *

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible*. -- The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions*. --

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

* * *

(c) *Procedure to determine admissibility*. --

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

[b] Key Points.

1. *Rule 404(a)(2)* provides the defendant in a criminal case with the right to offer character evidence as to a pertinent character trait of a victim. The rule is overridden, however, in sexual misconduct cases by *Rule 412*, the federal rape shield rule.

2. *Rule 404(a)(2)* does not indicate the kinds of evidence that may be used to prove character. *Rule 405(a)* provides that reputation and opinion evidence may be used to prove a pertinent character trait.

3. A cross-examiner may ask "Have you heard" or "Do you know" questions to test the knowledge of a character witness. The cross-examiner must have a good-faith basis for questions and is bound by the witness's answer.

4. A character witness is limited to testifying about a pertinent trait of character. In most cases, it is unlikely that a victim's character trait will be relevant. The most typical case in which it is relevant is a self-defense case. In such a case, the pertinent trait is peaceableness or its equivalent.

5. *Rule 404(a)(2)* permits a prosecutor to rebut a defendant's character evidence. Rebuttal evidence may include both favorable evidence regarding the pertinent trait of the victim that was attacked by the defendant's evidence and negative evidence regarding the defendant's character for the same trait. Rebuttal evidence should be distinguished from cross-examination. A prosecutor may cross-examine a character witness about specific acts, but may not offer evidence to prove that such acts occurred. The prosecutor who wishes to prove affirmatively that the victim's pertinent trait is different from the trait claimed by the defendant may call witnesses to testify only as to reputation or opinion.

6. *Rule 404(a)(2)* gives the prosecution the affirmative right to offer character evidence regarding a victim in a homicide case if the defendant alleges that the victim was the first aggressor. This right of the prosecutor to rebut the defendant's allegation does not depend upon the defendant's actually offering evidence of character. It is the allegation that provides the right of the prosecution to offer evidence. The prosecutor may not respond, however, to a claim that the victim was the first aggressor by attacking the defendant's character; unless the defendant has offered character evidence the prosecution's rebuttal right does not arise.

7. Although the rule does not so state, because character evidence offered under *Rule 404(a)(2)* is offered to negate a criminal charge, the relevant time period for the character trait is the time that the crime took place. Often this will be so close in time to a trial that there is no real difference between the date of the crime and the date of the trial, but if there is a gap the reputation or opinion should relate to the date the alleged offense occurred rather than the date of trial.

8. In cases in which the defendant is charged with sexual misconduct, reputation and opinion evidence are not admissible to prove the character of the victim, unless the Constitution requires admission of such evidence. Evidence of specific acts is admissible in sexual misconduct cases under the circumstances specified in *Rule 412*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these rules will be waived. A timely objection requires the trial judge to make a ruling.

When evidence offered under *Rule 404(a)* is the subject of an objection, the trial judge will often have to make both a *Rule 104(a)* ruling as to whether the evidence relates to a relevant character trait, and a ruling under *Rule 405* as to whether evidence is offered in a proper form.

In ruling on *Rule 404(a)* evidence, the judge may want to state for the record *outside the hearing of the jury* something like the following: [Name of party] objects to this evidence as outside the scope of *Rule 404(a)*. The defendant in a criminal case is permitted to offer evidence of relevant character traits of a victim in reputation or opinion form. [Name of opponent] contends that the evidence is not of a relevant character trait. I find that the [insert character trait] [is or is not] a relevant character trait in a prosecution in which the defendant is charged with [describe charges]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In cases in which the defendant is charged with sexual misconduct, the judge must look to *Rule 412*, which excludes by implication reputation and opinion evidence concerning the sexual behavior or predisposition of the victim, unless such evidence is necessary to protect the constitutional right of a defendant to put on a defense. The judge will want to indicate for the record *outside the hearing of the jury* the section of *Rule 412* that permits a defendant to offer specific act evidence, and to indicate whether the notice requirement of the rule has been satisfied.

The party who prevails on the evidence issue may find it useful to request one or more statements on the record to protect the record on appeal.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Defendant Offers Character Evidence

The defendant has presented evidence of [name of victim's] character for [insert trait]. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider whether you believe this evidence creates or helps to create a reasonable doubt as to guilt.

[2] Prosecutor's Rebuttal Evidence Regarding Victim

The defendant has presented evidence of [name of victim's] character for [insert trait]. The prosecutor has presented evidence to rebut the defendant's evidence. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider whether you believe the evidence creates or helps to create a reasonable doubt as to guilt.

[3] Prosecutor's Rebuttal Evidence Regarding Defendant

The defendant has presented evidence of [name of victim's] character for [insert trait]. The prosecutor has responded with evidence of the defendant's character for [insert trait]. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider whether you believe any of this evidence creates or helps to create a reasonable doubt as to guilt or whether it tends to prove guilt.

[4] Prosecutor's Rebuttal Evidence Regarding Both Victim and Defendant

The defendant has presented evidence of [name of victim's] character for [insert trait]. The prosecutor has responded with evidence regarding both [name of victim's] and the defendant's character for [insert trait]. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider whether you believe any of this evidence creates or helps to create a reasonable doubt as to guilt or whether it tends to prove guilt.

[5] Cross-Examination About Specific Bad Acts -- Witness Denies Acts

Questions are not evidence. The prosecutor asked a character witness whether the witness had heard or was aware of certain things. The witness said "no." There is no evidence in this case that these things actually occurred, and you should not assume that they did. You may consider, however, the demeanor of the witness in answering questions in deciding how much weight to give the witness's testimony.

[6] Cross-Examination About Specific Events -- Witness Admits Knowledge

The defendant called a witness to testify about [name of victim's] character for [insert trait]. On cross-examination the witness said that he heard or knew about certain things that the prosecution claims cast doubt on the witness's testimony. It is for you to decide how much weight to give the witness's testimony, and you may consider the fact that the witness said that he heard or knew certain things in making your decision.

[7] Prosecutor's Evidence of Victim's Character in Homicide Case

The prosecutor has presented evidence concerning [name of victim's] character for peaceableness. You must decide whether to believe this evidence and how much weight to give it. You may consider this evidence as you decide whether [name of victim] started the incident that led to the killing, and for no other purpose.

[8] Defense Rebuts Prosecution Evidence

The prosecutor has presented evidence concerning [name of victim's] character for peaceableness. The defendant has presented evidence to rebut the prosecution's evidence. It is for you to decide whether to believe some or all of this evidence and how much weight to give it. You may consider this evidence as you decide whether [name of victim] started the incident that led to the killing, and for no other purpose.

[9] Rule 412 Evidence -- Prior Relationship with Defendant

The defendant has presented evidence concerning his relationship with [name of victim] prior to the sexual misconduct with which the defendant is charged. It is for you to decide whether to believe this evidence and how much weight to

give it. You may consider this evidence in deciding only whether [name of victim] consented to the defendant's actions. The fact that two people had a sexual relationship or voluntarily engaged in sexual relations with each other at one time does not excuse or justify conduct that is otherwise criminal.

[10] Rule 412 Evidence -- Source of Semen or Injury

The defendant has presented evidence that [name of victim] engaged in sexual conduct prior to the sexual misconduct with which the defendant is charged. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider this evidence in deciding only whether any prior sexual conduct by [name of victim] explains the injury [or accounts for the semen] that existed after the sexual misconduct with which the defendant is charged. The fact that a person might have voluntarily engaged in sexual relations with one person does not excuse or justify conduct by another that is otherwise criminal.

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4-6 Defendant's Character -- Civil Case.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, * * *.

* * *

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

[b] Key Points.

1. The defendant in a civil case, unlike the defendant in a criminal case, generally is not permitted to offer evidence of good character to cast doubt on allegations of misconduct brought by a plaintiff. Some courts may create an exception for "quasi-criminal" cases, but in most civil cases the general exclusionary rule set forth in *Rule 404(a)* will govern a defendant's evidence.

2. In cases in which the plaintiff claims sexual assault or child molestation as the basis for liability, the plaintiff is entitled under *Rule 415* to offer evidence of other instances of sexual molestation or sexual assault.

3. *Rule 415* is somewhat unclear as to whether instances of sexual assault can be offered when child molestation forms the basis of the civil suit, or whether instances of child molestation can be shown when sexual assault forms the basis of the civil suit. Since child molestation and sexual assault may involve similar conduct, an argument can be made that they are similar acts and should be treated similarly. Alternatively, a court may examine the similarity of the acts in each case. The court may have to make a case-by-case determination if an objection is made under *Rule 403*.

4. Counsel objecting to evidence should be permitted to raise relevance objections. Nothing in *Rule 415* purports to authorize admission of irrelevant evidence.

5. The fifteen-day notice requirement appears to be a minimum requirement. It does not excuse a party from discovery obligations that may be imposed by the Federal Rules of Civil Procedure.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

When evidence is offered under *Rule 415*, an objection often will be made under *Rule 403*. The trial judge may want to make a statement *outside the hearing of the jury* something like the following: The defendant objects that the prejudicial effect of this evidence substantially outweighs its probative value. The plaintiff contends that the evidence tends to prove [state the purpose for which the evidence is offered, including propensity]. The defendant identifies possible unfair prejudice in [describe claim of prejudice]. I have considered the evidence and the arguments of the parties, the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I also observe that all evidence is prejudicial or it would not be offered, and it is only unfair prejudice that should be of concern. Having weighed the probative value against the possible unfair prejudice, I [overrule or sustain] the objection.

Should the judge exclude evidence, the party wishing to offer the evidence should be certain to make an offer of proof.

The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Rule 415 Evidence Offered by Plaintiff

The plaintiff in this case alleges that the defendant committed certain specific acts for which the plaintiff seeks to hold the defendant liable. The plaintiff also has presented evidence that the defendant committed acts other than those alleged in the complaint. It is for you to decide whether to believe this evidence and what weight to give it. These other acts are offered to prove that the defendant had a tendency to engage in similar conduct on other occasions. The evidence is also offered to prove [insert other purpose -- *e.g.*, that the defendant intended to do the acts charged]. You must decide whether you believe the plaintiff's evidence and whether you find that it helps you decide whether the defendant committed the acts alleged in this case. Your responsibility is to decide whether the plaintiff proves by a preponderance of the evidence the specific acts alleged in the complaint. The plaintiff seeks to hold the defendant responsible only for these specific acts.

[2] Rebuttal Evidence Offered by Defendant

The defendant has offered evidence to rebut the plaintiff's claim that the defendant committed acts other than those alleged in the complaint. It is for you to decide whether to believe this evidence and what weight to give it.

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4-7 Evidence of Victim's Character -- Civil Case.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, * * *.

* * *

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) *Evidence generally inadmissible*. -- The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions*. --

* * *

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) *Procedure to determine admissibility*. --

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

[b] Key Points.

1. *Rule 404(a)* generally precludes the use of character evidence to prove a pertinent character trait of an alleged victim in a civil case. *Rule 412* effectively bars reputation or opinion evidence from ever being used in a case involving sexual misconduct, even if such evidence might be relevant under another rule.

2. Nothing in *Rule 404(a)* precludes a defendant from relying on *Rule 404(b)*.

3. Since *Rule 412* permits use of a victim's prior sexual conduct with a defendant to prove consent or with others to prove the source of semen or injury in a criminal case, it is likely that the same evidence would be admissible in a civil case.

4. The balancing test under *Rule 412(b)(2)* requires that the probative value outweigh the danger both of harm to the victim and of prejudice to a party.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

When evidence is offered under *Rule 412*, an objection can be expected that the probative value does not substantially outweigh the danger of harm to the victim and prejudice to the plaintiff. The trial judge may want to make a statement *outside the hearing of the jury* something like the following: The defendant offers evidence concerning the sexual behavior or propensity of the plaintiff, and the plaintiff objects that the probative value of this evidence does not substantially outweigh the danger of harm to the plaintiff and prejudice to the plaintiff's case. The defendant contends that the evidence tends to prove [state the purpose for which the evidence is offered, including propensity]. The plaintiff identifies [state harm to plaintiff personally] and identifies possible unfair prejudice in [describe claim of prejudice to plaintiff's case]. I have considered the evidence and the arguments of the parties, the extent to which other, less prejudicial evidence is or is not available, the degree to which the plaintiff might be harmed by this testimony, whether it is possible to limit the detail of the testimony, and the usefulness of limiting instructions in dealing with any prejudice problem. Having weighed the probative value against the possible harm to the plaintiff and the danger of unfair prejudice to the plaintiff's case, and recognizing that the probative value must substantially outweigh both the danger of harm to the plaintiff or of prejudice to the plaintiff's case, I [overrule or sustain] the objection.

Should the judge exclude evidence, the defendant should be certain to make an offer of proof. The defendant should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the defendant may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. If the judge excludes the evidence in whole or in part on the basis of harm to the victim no voir dire of the victim would seem appropriate.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Rule 412 Evidence -- Prior Relationship with Defendant

The defendant has presented evidence concerning his relationship with [name of victim] prior to the sexual misconduct alleged in the complaint. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider this evidence in deciding only whether [name of victim] consented to the defendant's actions. The fact that two people had a sexual relationship or voluntarily engaged in sexual relations with each other at one time does not

excuse or justify conduct that is otherwise criminal.

[2] Rule 412 Evidence -- Source of Semen or Injury

The defendant has presented evidence that [name of victim] engaged in sexual conduct prior to the sexual misconduct alleged in the complaint. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider this evidence in deciding only whether any prior sexual conduct by [name of victim] explains the injury [or accounts for the semen] that existed after the sexual misconduct alleged in the complaint. The fact that a person might have voluntarily engaged in sexual relations with one person does not excuse or justify conduct by another that is illegal.

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4-8 Habit Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

[b] Key Points.

1. Habit evidence and evidence of business custom are admissible in both civil and criminal cases. The rules distinguish between character evidence, which usually is not admissible, and habit evidence, which usually is admissible.

2. Generally, habit or custom assumes that an action or practice was done on a number of occasions and that it was typically done in a particular way.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 406 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

When an objection is made that evidence does not qualify as habit or business custom, the trial judge may find it useful to state *outside the hearing of the jury* the following: [Name of objecting party] objects that the evidence does not qualify as [habit or business custom] evidence. In deciding whether a practice is more than character evidence and can be fairly characterized as habit or business custom, it is important for a court to determine whether there is evidence of a routine which indicates that the same practice occurs on a regular basis. I have examined the evidence of the total number of occasions on which [name of person or organization with habit or custom] was observed and the number of times the practice alleged to be [habit or custom] was observed. I find by a preponderance of the evidence that the evidence [is or is not] sufficient to constitute [habit or business custom]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

Should the judge exclude evidence, the defendant should be certain to make an offer of proof. The defendant should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the defendant may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Habit Evidence

Evidence has been offered that [name of person] had a habit of doing [describe action]. You may, but are not required to, infer that a person acted in conformity with a habit. It is for you to decide whether to believe this evidence and what weight to give it.

[2] Business Custom

Evidence has been offered that [name of person or business] had a habit or custom of doing [describe action]. You may, but are not required to, infer that a person or business acted in conformity with a habit or custom. It is for you to decide whether to believe this evidence and what weight to give it.

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4-9 Subsequent Remedial Measures.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[b] Key Points.

1. This rule bars the admission of subsequent remedial measures or repairs to prove negligence or culpable conduct prior to the taking of the subsequent measures or repairs. The rule does not bar evidence of subsequent remedial measures if offered for another purpose.

2. *Rule 407* is an absolute bar on admission of subsequent remedial measures offered to prove negligence, product defect, the need for a product warning or instruction, or culpable conduct. No balancing occurs when evidence is offered for a forbidden purpose and a proper objection is made.

3. Evidence offered for a permissible purpose may not be relevant, or if relevant, may be unduly prejudicial, especially where a jury might use it for a forbidden purpose. Thus, a party objecting to *Rule 407* evidence often will raise *Rule 401* (relevance) and *Rule 403* (unduly prejudicial) objections as well.

4. If ownership, control, feasibility, and similar issues are not disputed, the subsequent remedial evidence is unlikely to be relevant and is likely to be unduly prejudicial.

5. Although almost all cases involving *Rule 407* are civil cases, *Rule 407* on its face is not limited to civil cases. Evidence offered to prove culpable conduct in a criminal case would appear to be within the literal coverage of the rule.

6. Most courts have held that *Rule 407* does not apply to repairs by a non-party. However, such repairs may raise relevance and prejudice concerns.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 407 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

The judge rules on the admissibility of *Rule 407* evidence under *Rule 104(a)*. In making a ruling the trial judge may find it useful to state *outside the hearing of the jury* the following: [Name of objecting party] objects to the admissibility of this evidence claiming that it is evidence of a subsequent remedial measure. The decision whether evidence is a subsequent remedial measure is for the court under *Rule 104(a)*. I find that [describe evidence] [is or is not] evidence of a subsequent remedial measure that falls under *Rule 407*. But [name of proffering party] argues that the evidence is not offered to prove [state forbidden purpose -- *e.g.*, negligence, culpable conduct, product defect, need for a warning] but is offered to prove [state permissible purpose -- *e.g.*, feasibility]. Thus, it is necessary to determine whether [identify permissible purpose -- *e.g.*, feasibility] is in dispute. I find that it [is or is not] in dispute and that the evidence therefore [may or may not] be admitted on this issue. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge rules that the evidence is offered for a permissible purpose, the objecting party or the judge *sua sponte* may raise *Rule 403*. The judge may want to make an explicit statement for the record in regard to *Rule 403* balancing: I have also considered the possibility that evidence admitted for a limited purpose might be misused by the jury as proof of [state forbidden purpose -- *e.g.,* negligence, culpable conduct, product defect, need for a warning]. I have weighed the probative value of the evidence as to [identify permissible purpose -- *e.g.,* feasibility] against the possible prejudicial effect of the evidence. I have also considered the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I find that the possible prejudicial effect of this evidence [does or does not] substantially outweigh its probative value. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party who offered it should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Evidence Admitted for Limited Purpose -- Negligence Case

The plaintiff has presented evidence that after the accident the defendant [describe the subsequent measures]. This evidence has been admitted for a limited purpose, to prove [that the defendant had control of the premises, that an action was feasible, etc.]. You may only use this evidence for the limited purpose I have described. The issue in a negligence case such as this is whether the defendant exercised due care prior to the accident. What people do after an accident when they are aware of a problem is not evidence of whether they exercised due care before they were aware of the results of the accident.

[2] Evidence Admitted for Limited Purpose -- Product Liability Case

The plaintiff has presented evidence that after the accident the defendant [describe the subsequent measures]. This evidence has been admitted for a limited purpose, to prove [that the defendant had control of the premises, that an action was feasible, etc.]. You may only use this evidence for the limited purpose I have described. The issue in a product liability case such as this is whether the defendant [manufactured or sold] a product that was defective at the time it was [manufactured or sold], not whether the product was changed at a later time.

[3] Third Party Repair -- Negligence Case

The plaintiff has presented evidence that [name of third party] made a [describe subsequent remedial measure] after the accident. This evidence has been admitted for a limited purpose, to prove [that an action was feasible, etc.]. You may only use this evidence for the limited purpose I have described. The issue in a negligence case such as this is whether the defendant exercised due care prior to the accident. What a third party person does after an accident when he or she is aware of a problem is not evidence of whether the defendant exercised due care before being aware of the results of the accident.

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4-10 Settlements and Offers to Compromise.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or ***offering*** or promising to furnish, ***or*** (2) ***accepting or offering*** or promising to accept, ***a valuable consideration*** in compromising or attempting***to compromise a claim*** which was ***disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount***. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. ***This rule also does not require exclusion when the evidence is offered for another purpose***, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[b] Key Points.

1. *Rule 408* applies to evidence that a person has offered or accepted a valuable consideration as part of an attempt to settle a case. The basic rule is that offers to settle or actual settlements are not admissible to prove liability for or invalidity of a claim, or the amount of a claim.

2. Statements made in settlement negotiations are not admissible for the prohibited purposes, whether or not they are

inextricably bound up in a settlement proposal. Similarly, conduct during settlement negotiations also is not admissible for the prohibited purposes.

3. Settlements and offers to settle can be used for purposes other than to prove liability for, invalidity of, or the amount of a claim. The most common example is the use of a settlement by a witness with a party to demonstrate the possible bias of the witness.

4. *Rule 408* makes clear that a party cannot immunize otherwise discoverable material by disclosing it in settlement discussions.

5. Several appellate decisions hold that settlements in civil cases are admissible in subsequent criminal prosecutions.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 408 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

The judge rules on the admissibility of *Rule 408* evidence under *Rule 104(a)*. In making a ruling the trial judge may find it useful to state *outside the hearing of the jury* the following: [Name of objecting party] objects to the admissibility of this evidence claiming that it is evidence of an offer to compromise. The decision whether evidence falls under *Rule 408*, the offer of compromise rule, is for the court under *Rule 104(a)*. I find that [describe evidence] [is or is not] evidence of an offer to compromise or compromise negotiations that falls under *Rule 408*.

If the judge finds that the evidence is not evidence of an offer to compromise, the objection will be overruled and no further finding will be required. If, however, the judge finds that the evidence falls within *Rule 408*, the judge may want to make another on the record ruling: [Name of proffering party] argues that the evidence is not offered to prove [state forbidden purpose -- *e.g.*, validity or invalidity of a claim or its amount] but is offered to prove [state permissible purpose -- *e.g.*, bias]. Thus, it is necessary to determine whether [identify permissible purpose -- *e.g.*, bias] is in dispute. I find that it [is or is not] in dispute and that the evidence therefore [may or may not] be admitted on this issue. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge rules that the evidence is offered for a permissible purpose, the objecting party or the judge *sua sponte* may raise *Rule 403*. The judge may want to make an explicit statement for the record in regard to *Rule 403* balancing: I have also considered the possibility that evidence admitted for a limited purpose might be misused by the jury as proof of [state forbidden purpose -- *e.g.,* validity or invalidity of a claim or its amount]. I have weighed the probative value of the evidence as to [identify permissible purpose -- *e.g.,* bias] against the possible prejudicial effect of the evidence. I have also considered the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I find that the possible prejudicial effect [does or does not] substantially outweigh the probative value of the evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If evidence of a civil settlement is offered in a criminal case, the trial judge may want to make an explicit statement for the record in regard to *Rule 403* balancing: The government has offered evidence that [name of defendant] entered into a civil settlement to prove [identify purpose of evidence -- e.g., that the defendant was aware of the substance of the regulations alleged to have been violated in this case]. A civil settlement is not excluded in a criminal case by *Rule 408*. [Name of defendant] objects, however, that the settlement evidence might be given undue weight by the jury. I have considered the possibility that the settlement might be mistaken by the jury as an admission of wrongdoing. I have weighed the probative value of the evidence against the possible prejudicial effect of the evidence. I have also considered the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I find that the possible prejudicial effect [does or does not]

substantially outweigh the probative value of the evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party who offered it should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Limiting Instruction -- Settlement by a Witness with Party to Show Bias

Evidence has been presented that [name of witness] entered into a settlement with [the plaintiff or the defendant]. You may consider this evidence only in deciding whether as a result of the settlement the witness is or might be biased for one side or against the other. The fact that a party settles with someone who is called as a witness is not evidence of the validity or invalidity of the claims made by the plaintiff, the defenses raised by the defendant, or the amount that should be awarded on any claim that succeeds.

[2] Settlement by Party After Trial Begins

Evidence has been presented that [name of witness] entered into a settlement with [the plaintiff or the defendant]. As you know, [name of witness] originally was a [plaintiff or defendant] in this trial. You may consider the evidence that [name of witness] has reached an agreement with the [plaintiff or defendant] only in deciding whether as a result of the settlement the witness is or might be biased for one side or against the other. The fact that a party settles with someone who once was an adverse party in the case is not evidence of the validity or invalidity of the claims made by the plaintiff, the defenses raised by the defendant, or the amount that should be awarded on any claim that succeeds.

[3] Settlement Admitted in Criminal Case

Evidence has been presented that [name of defendant] entered into a settlement with [name of other party in civil case]. You may consider this evidence in deciding whether [name of defendant] committed the [name offense(s) to which the settlement is relevant] in this case. There are many reasons why parties choose to settle cases. Parties may want to avoid the uncertainty of a trial, to avoid the costs of a trial, to resolve a dispute in a cooperative rather than combative way, to foster future relations with the opposing party, or to achieve other goals. You should consider the substance of the settlement as well as any other evidence that may be presented regarding the circumstances of the settlement in deciding what weight, if any, to give the settlement in this case.

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4-11 Payment of Medical and Similar Expenses.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury ***is not admissible to prove liability*** for the injury.

[b] Key Points.

1. *Rule 409* renders inadmissible evidence of a party's offering or providing medical, hospital or similar expenses to an injured person when such evidence is offered to prove liability for the injury.

2. Evidence offered for a purpose other than to prove liability for the injury on behalf of which payments were offered or made is not excluded under *Rule 409*. Such evidence might be excluded as irrelevant under *Rule 402* or as unduly prejudicial or confusing under *Rule 403*.

3. Although *Rule 409* is usually applied in civil cases, there is nothing on the face of the rule to limit it to civil cases.

4. In contrast to *Rule 408*, statements that are made or conduct that occurs in connection with the offer or payment of expenses are not rendered inadmissible by *Rule 409*. Statements or conduct could be excluded under *Rule 403*, however.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 409 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and relevance issues will be waived. A timely objection requires the trial judge to make a ruling.

The judge rules on the admissibility of *Rule 409* evidence under *Rule 104(a)*. In making a ruling the trial judge may find it useful to state *outside the hearing of the jury* the following: [Name of objecting party] objects to the admissibility of this evidence claiming that it is evidence that is excluded by *Rule 409*. The decision whether evidence falls under *Rule 409*, which covers offers to pay medical and other expenses, is for the court under *Rule 104(a)*. I find that [describe evidence] [is or is not] evidence of the type of offer that falls under *Rule 409*. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party who offered it should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Evidence of Statement Made at Time a Payment Is Offered

The only evidence you may consider is the statement itself. You may not consider the fact that the defendant offered to pay medical expenses in deciding whether the defendant is responsible for the plaintiff's injury. The law encourages parties who may be entirely without fault to be generous in dealing with persons who suffer injury. Thus, the payment or offer to pay a plaintiff's medical expenses is not an admission of fault. However, the plaintiff has presented evidence that the defendant made a statement at the time he/she offered to pay the medical expenses. It is for you to decide whether to believe that the statement was made and how much weight to give it.

[2] Evidence of Payment Offered for Other Purpose

The plaintiff has presented evidence that the defendant offered to pay the plaintiff's medical expenses after the plaintiff was injured. You may not consider the fact that the defendant offered to pay medical expenses in deciding whether the defendant is responsible for the plaintiff's injury. The law encourages parties who may be entirely without fault to be generous in dealing with persons who suffer injury. Thus, the offer to pay a plaintiff's medical expenses is not an admission of fault by the defendant. The defendant has presented evidence that the plaintiff did not complain about any injury at or near the time the plaintiff claims it occurred. It is for you to decide whether to believe this evidence and how much weight to give it. You may consider any offer that the defendant made to the plaintiff in evaluating what weight to give the fact that the plaintiff did not complain about the injury at or near the time it occurred.

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4-12 Plea Negotiations and Related Statements.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 410. Inadmissibility of Plea Discussions, and Related Statements

Except as otherwise provided in this rule, ***evidence of the following is not***, ***in any civil or criminal proceeding, admissible against the defendant*** who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under *Rule 11 of the Federal Rules of Criminal Procedure* or comparable state procedure regarding either of the foregoing pleas; or

(4) ***any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn***.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

[b] Key Points.

1. *Rule 410* generally excludes all evidence of withdrawn pleas of guilty, pleas of *nolo contendere*, any statements made in course of a plea colloquy in connection with either a withdrawn plea of guilty or a *nolo contendere* plea, or any statement made in the course of plea discussions with an attorney for the government. The rule renders evidence inadmissible "against the defendant who made the plea or was a participant in the plea discussions."

2. *Rule 410* distinguishes between guilty and nolo pleas. Guilty pleas and statements made in connection therewith are admissible unless the pleas are withdrawn. Nolo pleas and statements made in connection therewith are not. Judgments of conviction entered pursuant to a nolo plea may be admissible under other rules like *Rule 609*.

3. Statements made in discussions with police, FBI, and law enforcement are generally subjected to constitutional scrutiny but are not governed by *Rule 410*, which is limited to discussions with an attorney for the prosecuting authority.

4. The Supreme Court in *United States v. Mezzanatto, 115 S. Ct. 797 (1995)* , held that a defendant may waive the protection of *Rule 410* and agree that statements made in plea negotiations shall be admissible for impeachment purposes if no plea agreement is reached and the defendant testifies at trial. Some courts have extended *Mezzanatto* to agreements that statements may be used for all purposes.

5. The other exceptions to the exclusionary rule arise in proceedings in which a statement made in the course of a plea colloquy or plea bargaining is introduced and another statement should in fairness be considered along with it, and in perjury or false statement prosecutions where the statement made by the defendant was made under oath, on the record, and in the presence of counsel.

6. *Rule 410* excludes evidence in both civil and criminal cases if offered against a person who was an accused in a prior criminal proceeding when a plea or statement was made.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 410 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

The judge rules on the admissibility of *Rule 410* evidence under *Rule 104(a)*. In making a ruling the trial judge may find it useful to state *outside the hearing of the jury* the following: The defendant objects to the admissibility of this evidence claiming that it is evidence of plea negotiations. The decision whether evidence falls under *Rule 410*, the plea negotiation rule, is for the court under *Rule 104(a)*. I find that [describe evidence] [is or is not] evidence of plea negotiations that falls under *Rule 410*.

If the judge finds that the evidence is not *Rule 410* evidence, the objection will be overruled and no further finding will be required. If, however, the judge finds that the evidence falls within *Rule 410*, the judge may want to make another on the record ruling: The government argues that the evidence is admissible because the defendant agreed to waive the protections of *Rule 410* in discussions with the government and agreed that statements could be used at trial for impeachment purposes. The decision whether there was a valid waiver is another decision for the court under *Rule 104(a)*. Having considered the evidence presented and the arguments of the parties, I find by a preponderance of the evidence that the defendant [did or did not] waive the benefit of *Rule 410* and agree that statements could be used at trial for impeachment purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge rules that there was a valid waiver, the defendant or the judge *sua sponte* may raise *Rule 403*. The judge

may want to make an explicit statement for the record in regard to *Rule 403* balancing: I have also considered the possibility that statements admitted for impeachment might be misused by the jury as substantive evidence. I have weighed the probative value of the evidence for impeachment purposes against the possible prejudicial effect of the evidence. I have also considered the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I find that the possible prejudicial effect [does or does not] substantially outweigh the probative value of the evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the government should be certain to make an offer of proof. If the ruling is made prior to trial, it is possible that the government will appeal it before trial starts. It is also possible that, if there is an appeal, the appellate court will address the issue. Thus, the government should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the government may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Mezzanatto Example -- Statements Introduced for Impeachment

The prosecution has presented evidence that during the course of discussions with the defendant about the possibility of disposing of this case without a trial the defendant made certain statements. The prosecution contends that these statements are inconsistent with the defendant's testimony at trial and that the inconsistency casts doubt on the defendant's testimony. You must decide whether to believe the defendant made these statements and whether they cast doubt on the defendant's testimony. You may not consider any statement made by the defendant in the course of discussions with the prosecutor for any other purpose.

[2] Mezzanatto Extended -- Statements Admitted as Substantive Evidence

The prosecution has presented evidence that during the course of discussions with the defendant about the possibility of disposing of this case without a trial the defendant made certain statements. The prosecution contends that these statements tend to prove the defendant's guilt. You must decide whether to believe that the defendant made these statements and if they were made what weight to give them.

[3] Contemporaneous Statements

The defense in this case has presented evidence that shortly after he was arrested, the defendant met with an attorney for the government and told the attorney for the government that the deceased was trying to kill him before the defendant shot the deceased in self-defense. The defense argues that this evidence demonstrates that the defendant did not have

criminal intent in shooting the deceased. It is for you to decide whether to believe this evidence and how much weight to give it. The prosecution has responded to the defendant's evidence with other statements made by the defendant in the same meeting. These statements are admitted to put the statements presented by the defendant in context. You may consider these statements in deciding what weight to give the statements upon which the defendant relies.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 4 RELEVANCE AND RELATED MATTERS

6-4 Federal Rules of Evidence Manual 4-13

4-13 Liability Insurance.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

[b] Key Points.

1. *Rule 411* excludes evidence that a person was insured or was not insured when offered to prove that the person acted negligently or otherwise wrongfully.

2. The rule does not exclude evidence of liability insurance when offered for other purposes. Evidence offered for other purposes might be excluded as unduly prejudicial under *Rule 403*.

3. *Rule 411* is usually invoked in civil cases, but nothing on the face of the rule indicates that it would not apply in a criminal case. As a practical matter, liability insurance is less likely to be relevant in criminal cases than other forms of insurance such as life or property insurance.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Rule 411 is triggered when a timely objection is made. Unless a timely objection is made, evidence will be admitted and issues arising under these Rules will be waived. A timely objection requires the trial judge to make a ruling.

The judge rules on the admissibility of *Rule 411* evidence under *Rule 104(a)*. In making a ruling the trial judge may find it useful to state *outside the hearing of the jury* the following: [Name of objecting party] objects to the admissibility of this evidence claiming that it is evidence of liability insurance which cannot be admitted. The decision whether this evidence is liability insurance falling within *Rule 411* is for the court under *Rule 104(a)*. I find that [describe evidence] [is or is not] evidence of liability insurance that falls under *Rule 411*.

If the judge finds that the evidence is not *Rule 411* evidence, the objection will be overruled and no further finding will be required. If, however, the judge finds that the evidence falls within *Rule 411*, the judge may want to make another on the record ruling: [Name of proffering party] argues that the evidence is not offered to prove [state forbidden purpose -- *e.g.*, negligence] but is offered to prove [state permissible purpose -- *e.g.*, bias]. Thus, it is necessary to determine whether [identify permissible purpose -- *e.g.*, bias] is in dispute. I find that it [is or is not] in dispute and that the evidence therefore [may or may not] be admitted on this issue. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge rules that the evidence is offered for a permissible purpose, the objecting party or the judge *sua sponte* may raise *Rule 403*. The judge may want to make an explicit statement for the record in regard to *Rule 403* balancing: I have also considered the possibility that evidence admitted for a limited purpose might be misused by the jury as proof of [state forbidden purpose -- *e.g.*, negligence]. I have weighed the probative value of the evidence as to [identify permissible purpose -- *e.g.*, bias] against the possible prejudicial effect of the evidence. I have also considered the extent to which other, less prejudicial evidence is or is not available, and the usefulness of limiting instructions in dealing with any prejudice problem. I find that the possible prejudicial effect of this evidence [does or does not] substantially outweigh its probative value. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party who offered it should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Impeachment of Defendant's Witness for Bias

You have heard evidence that this witness is employed by an insurance company that insures the defendant. You may consider the fact that the witness's employer has a financial stake in the outcome of the case in deciding what weight to give the witness's testimony. You may not use this evidence for any other purpose. The fact that a defendant had or did not have insurance is not something that you may consider in deciding whether the defendant is liable for any injuries the plaintiff might have suffered or what damages the plaintiff should receive.

[2] Impeachment of Plaintiff's Witness for Bias

You have heard evidence that this witness is employed by an insurance company that insures the plaintiff. You may consider the fact that the witness's employer has a financial stake in the outcome of the case in deciding what weight to give the witness's testimony. You may not use this evidence for any other purpose. The fact that a plaintiff did or did not have insurance is not something that you may consider in deciding whether the defendant is liable for any injuries the plaintiff might have suffered or what damages the plaintiff should receive.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 5 PRIVILEGES

6-5 Federal Rules of Evidence Manual 5.syn

§ 5.syn Synopsis to Chapter 5: PRIVILEGES

5-1 Privilege Claims Generally.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Witness Properly Claims Privilege During Trial

[2] Witness Improperly Claims Privilege During Trial -- Striking Testimony

[3] Party Claims a Privilege

[4] Criminal Case -- Defendant Does Not Testify

[5] Civil Case -- Party Invokes Privilege Against Self-Incrimination

[6] Striking a Claim or Defense of Party Who Refuses to Answer

[7] Striking Testimony of Party Who Refuses to Answer

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 5 PRIVILEGES

6-5 Federal Rules of Evidence Manual 5-1

5-1 Privilege Claims Generally.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, ***the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience***. However, ***in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law***.

Rule 608. Evidence of Character and Conduct of Witness

(b) *Specific instances of conduct*. -- Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to

which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 1101. Applicability of Rules

(b) *Proceedings generally*. -- These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) *Rule of privilege*. -- ***The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.***

(d) *Rules inapplicable*. -- The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. -- The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. -- Proceedings before grand juries.

(3) Miscellaneous proceedings. -- Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

* * *

[b] Key Points.

1. Privilege claims may be raised at any stage of any proceeding. The trial judge decides pursuant to *Rule 104(a)* whether or not to sustain a claim of privilege.

2. Generally, a party must raise a timely claim of privilege, and the failure to do so will constitute a waiver. Thus, at the earliest possible stage of a case, a party should claim an applicable privilege to avoid disclosure of protected information and consequent loss of the privilege.

3. Although *Rules 104(a)* and *1101(d)(1)* state that privileges apply even when the trial judge is deciding preliminary questions of fact to rule on the admissibility of evidence, the Supreme Court has held that a trial judge may examine documents that fall within a claim of attorney-client privilege in camera once a prima facie showing of crime or fraud is made. *United States v. Zolin, 491 U.S. 554 (1989)* .

4. Generally, a witness should be given the opportunity to claim privilege outside the hearing of the jury. The basic rule for most witnesses is that a claim of privilege is not evidence for or against either party.

5. In a criminal case, the defendant has a constitutional right not to testify. Upon request, the judge should instruct the jury that it is to draw no adverse inference from the defendant's exercise of his constitutional right. *Carter v. Kentucky, 450 U.S. 288 (1981)* . Although it is not a constitutional error to instruct the jury over the defendant's objection, the defendant should be able to choose to forgo an instruction. *Lakeside v. Oregon, 435 U.S. 333 (1978)* .

6. In a civil case, a party's invocation of the privilege against self-incrimination entitles the opposing party to an instruction that the jury may infer that the information subject to the claim of privilege would be unfavorable to the party claiming it. *Baxter v. Palmigiano, 425 U.S. 308 (1976)* .

7. Except in a civil case when a party invokes the privilege against self-incrimination, the general rule is that a claim of privilege is not evidence. This general rule applies to both long-standing privileges such as attorney-client or spousal privilege and to relatively new privileges such as the psychotherapist-patient privilege.

8. *Rule 608(b)* establishes that a witness does not forgo the right to claim the privilege against self-incrimination as to "bad acts" that are the subject of impeachment.

9. When state law provides the rule of decision -- *e.g.*, in a diversity case -- state law on privileges will govern.

10. If federal and state issues are joined together for trial and federal and state privilege law is inconsistent, it may be impractical to instruct the jury on both federal and state privileges. Parties are well advised to seek a ruling prior to trial on the privilege law that will apply at trial whenever a conflict is likely.

11. In most cases, claims of privilege can be heard outside the jury's presence. When this occurs, no limiting instructions are needed. There will be times, however, when a privilege claim is not anticipated and is raised while the jury is present. When this occurs, the jury needs some assistance in dealing with the claim.

12. When an ordinary witness claims a privilege, the judge will generally instruct the jury that neither side is to be advantaged or disadvantaged as a result of the privilege claim. It should not matter whether the witness properly or improperly claims the privilege. If a witness refuses to answer questions after the judge rejects a claim of privilege and orders the witness to answer, neither side should suffer from the witness's obstinance.

13. When a party successfully claims a privilege, the judge may find it helpful to tell the jury that the claim was properly made. If a party is unsuccessful in asserting a privilege and thereafter refuses to answer questions, the judge may strike the party's claim or defense or strike the party's testimony.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

A privilege issue will arise when a party, or in some instances a witness, makes a timely claim of privilege. Absent a timely claim, testimony about privileged matters will constitute a waiver of privilege in most instances. A timely privilege claim requires the trial judge to make a ruling.

Since the trial judge rules on the validity of a claim of privilege under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the question of privilege. The party claiming privilege has the burden of demonstrating entitlement to it. I find by a preponderance of the evidence that the [describe the evidence in dispute] [is or is not] covered by the [state name of privilege -- *e.g.*, attorney-client privilege]. Therefore, the objection is [overruled or sustained], and the evidence [is or

is not] admissible.

The party who prevails on the privilege issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge rule that the privilege applies and evidence is excluded, the party wishing to offer evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. Because *Rule 1101(c)* makes privileges applicable at all stages of a proceeding, the proffering party may not compel disclosure of privileged information in order to make the offer of proof, and may therefore be compelled to describe the nature of the evidence excluded rather than its details.

Once the judge has ruled on the privilege claim, the parties and the trial judge may find its useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Witness Properly Claims Privilege During Trial

This witness has claimed a privilege not to answer one or more questions. It is my job as judge to decide whether a witness has a valid privilege and may refuse to answer questions. You must disregard the fact that the witness claimed a privilege in deciding this case. You may not speculate as to what the witness's answers would have been. A witness's claim of privilege is not something that may help or hurt either side.

[2] Witness Improperly Claims Privilege During Trial -- Striking Testimony

This witness has claimed a privilege not to answer one or more questions. It is my job as judge to decide whether a witness has a valid privilege and may refuse to answer questions. I have decided that the witness has no valid privilege claim but the witness continues to refuse to answer questions. I therefore will strike the witness's testimony and instruct you to disregard it completely. You may not speculate as to what the witness's answers would have been. A witness's refusal to testify is not something that may help or hurt either side. The parties are not responsible for the witness's conduct.

[3] Party Claims a Privilege

The [plaintiff or defendant] has claimed a privilege not to answer one or more questions. It is my job as judge to decide whether a witness has a valid privilege and may refuse to answer questions. I have found that the [plaintiff or defendant] has a valid privilege claim. Therefore, you must disregard the fact that [plaintiff or defendant] claimed a privilege in deciding this case. You may not speculate as to what the answers would have been. A proper claim of privilege is not something that may help or hurt either side.

[4] Criminal Case -- Defendant Does Not Testify

The defendant in a criminal case has the constitutional right to put the prosecution to its proof. The government must

prove its charges beyond a reasonable doubt, and the defendant is not required to lend the government any assistance. The defendant may choose to require the government to put on its evidence and not to testify during the trial. This choice is protected by the Constitution of the United States, and it is your duty to be certain that you do not draw any adverse inference as a result of the defendant's choosing to do what the Constitution permits.

[5] Civil Case -- Party Invokes Privilege Against Self-Incrimination

The [plaintiff or defendant] has declined to answer certain questions and has claimed the privilege against self-incrimination. The [plaintiff or defendant] has the right to claim this privilege and to refuse to answer questions. But, you should assume from the fact that the [plaintiff or defendant] refuses to answer these questions that the answers would be helpful to the opposing party.

[6] Striking a Claim or Defense of Party Who Refuses to Answer

The [plaintiff or defendant] has claimed a privilege not to answer one or more questions. It is my job as judge to decide whether a witness has a valid privilege and may refuse to answer questions. I have found that the [plaintiff or defendant] has no valid privilege claim. I instruct you to disregard all of the evidence that the [plaintiff or defendant] offered to support [describe claim or defense]. I am striking the [describe claim or defense] and granting judgment as a matter of law for the [plaintiff or defendant] as to this [claim or defense].

[7] Striking Testimony of Party Who Refuses to Answer

The [plaintiff or defendant] has claimed a privilege not to answer one or more questions. It is my job as judge to decide whether a witness has a valid privilege and may refuse to answer questions. I have found that the [plaintiff or defendant] has no valid privilege claim. I instruct you to disregard all of the testimony that the [plaintiff or defendant] gave while on the witness stand and to assume that the [plaintiff or defendant] refused to answer questions because the answers would have helped the opposing party.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 6 DIRECT AND CROSS-EXAMINATION OF WITNESSES; IMPEACHMENT AND REHABILITATION

6-6 Federal Rules of Evidence Manual 6.syn

§ 6.syn Synopsis to Chapter 6: DIRECT AND CROSS-EXAMINATION OF WITNESSES; IMPEACHMENT AND REHABILITATION

6-1 Competency.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Ordinary Witnesses

[2] Child Witnesses

6-2 Interpreters.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Non-English Speaking Witnesses

[2] Interpreters

[3] Juror Disagreement

6-3 Impeachment -- by Direct Examiner.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Impeachment by Direct Examiner

[2] Prior Inconsistent Statements -- Not Admissible for Their Truth

[3] Prior Inconsistent Statements -- Admissible as Substantive Evidence

6-4 Impeachment -- Prior Bad Acts.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Witness Admits Prior Bad Act

[2] Witness Denies Prior Bad Act

[3] Witness Invokes Privilege Against Self-Incrimination

[4] Absence of Good Faith

6-5 Impeachment -- Character Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Negative Character Witness Generally

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

[4] Multiple Character Witnesses

6-6 Rehabilitation -- Character Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Positive Character Witness Generally

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

[4] Multiple Character Witnesses

6-7 Impeachment -- Prior Convictions.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Conviction of a Non-Party Witness

[2] Prior Conviction of a Party in a Civil Case Admissible Only for Impeachment

[3] Prior Conviction of a Criminal Accused Admissible Only for Impeachment

[4] Prior Conviction of a Party in a Civil Case Admissible as Substantive Evidence

[5] Prior Conviction of a Criminal Accused Admissible for Substantive Evidence

6-8 Impeachment -- Bias.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Plea Bargain Elicited by Government Witness in Criminal Case

[2] Plea Bargain Elicited by Defendant on Cross-Examination in Criminal Case

[3] Settlement by Co-Defendant in Civil Case

[4] Settlement by Co-Plaintiff in Civil Case

[5] Group Membership

6-9 Impeachment -- Group Membership.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Group Membership Generally

[2] Group Membership Denied

6-10 Impeachment -- Leading Questions.

[a] Governing Rule.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Questions Are Not Evidence

[2] Evasive Answers

[3] Inconsistent Answers

6-11 Impeachment -- Materials Used to Refresh Memory.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Inadmissible Item Used at Trial to Refresh Recollection

[2] Admissible Item Used at Trial to Refresh Recollection

[3] Inadmissible Item Used Before Trial to Refresh Recollection

[4] Admissible Item Used Before Trial to Refresh Recollection

6-12 Impeachment -- Prior Inconsistent Statements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Inconsistent Statements -- Not Admissible for Their Truth

[2] Prior Inconsistent Statements -- Admissible as Substantive Evidence

[3] Prior Inconsistent Statements Not Admissible for Their Truth -- Witness Denies Statements

[4] Prior Inconsistent Statements Admissible for Their Truth -- Witness Denies Statements

6-13 Judge Calls Witness.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Court Calls Lay Witness

[2] Court Calls Expert Witness

[3] Counsel Objects to Court's Calling Witness or Asking Questions in Jury's Presence

6-14 Judge Questions Witness.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Court Questions Witness

[2] Counsel Objects to Court's Questions in Jury's Presence

6-15 Sequestration Violation.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Sequestration Violation -- Conceded or Found by Court

[2] Facts Surrounding Alleged Violation of Sequestration Order Disputed

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 6 DIRECT AND CROSS-EXAMINATION OF WITNESSES; IMPEACHMENT AND REHABILITATION

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6-1 Competency.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

Rule 603. Oath or Affirmation

Before testifying, ***every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation*** administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) *At the trial*. -- ***A member of the jury may not testify as a witness*** before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, ***the opposing party shall be afforded an opportunity to object out of the presence of the jury***.

* * *

[b] Key Points.

1. *Rule 601* presumes that witnesses are competent to testify in cases governed by federal law. When state law provides the rule of decision -- in diversity cases, for example -- state law on competency governs.

2. The trial judge rules on the competency of a witness to testify under *Rule 104(a)*. The jury decides on the weight to be given any witness's testimony once the witness is found competent to testify.

3. *Rules 603 and 604* set forth oath or affirmation requirements for all witnesses and the requirements for interpreters.

4. *Rules 605 and 606(a)* disqualify judges and jurors from simultaneously being witnesses.

5. Any ground for disqualifying a witness at common law is likely to be transformed into a credibility issue for the jury under the Federal Rules of Evidence.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to the competency of a witness. Unless a timely objection is made, the witness will be permitted to testify. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on competency under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection made to the competency of this witness. I begin with the presumption that all witnesses are competent to testify. I find by a preponderance of the evidence that the witness [does or does not] understand the duty to tell the truth and [is or is not] capable of understanding the proceedings and communicating information. Therefore, the objection is [overruled or sustained], and the witness [may or may not] testify.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude a witness as incompetent, the party wishing to offer the witness's testimony should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to a witness as incompetent, but may want the judge to explain to the jury something about the jury's right to assess credibility.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Ordinary Witnesses

It is for you to decide whether or not any witness is credible and reliable and how much weight to give to each witness's testimony. You may consider any factors that you deem appropriate in making your judgment. Among the factors you may choose to consider are the witness's demeanor, candor, intellect, experience, education, judgment, relationship to the parties, mental and emotional condition, and possible interest in the case. These factors are only illustrative and you are free to consider any other evidence you heard about the witness and to weigh it as you find appropriate.

[2] Child Witnesses

It is for you to decide whether or not any witness is credible and reliable and how much weight to give to each witness's testimony. In evaluating the testimony of a child witness, you may want to consider the child's age, intellect, experience, and relationship to the parties. You also may want to consider to what extent the child's testimony appeared to be influenced by the questions being asked or by the preparation of the child to testify.

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6-6 Federal Rules of Evidence Manual 6-2

6-2 Interpreters.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[b] Key Points.

1. Before allowing an interpreter to participate in a proceeding, the trial judge must find that the interpreter is qualified as an expert. To be qualified, the interpreter must have sufficient specialized knowledge of the language in question and

English to assist the court in understanding the testimony of a witness who testifies in whole or in part in a language other than English. The expert's specialized knowledge may come from education, training, or experience.

2. The typical court reporter will not be an expert in all languages and thus can record the interpreter's English translation but not the witness's testimony in another language. The parties may want to request that the witness's testimony be tape recorded and/or that a specialized reporter be retained to record the witness's testimony in the language in which it is provided.

3. The interpreter is a "witness" to what the non-English speaking witness is saying. Thus, the interpreter must be sworn to provide an accurate translation.

4. In some cases, a juror may know the language used by a witness. The juror cannot provide an independent interpretation of the witness's testimony without becoming a witness and running afoul of *Rule 605*. Judges who are willing to have jurors raise questions in limited circumstances may want to consider an instruction to the jurors that, if they have proficiency in a language used by a witness and disagree with an interpreter's English translation, they should call their disagreement to the court's attention either by writing a note to the court or in whatever other manner the court directs.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

Evidence rules usually are triggered when a timely objection is made to evidence. Unless a timely objection is made, evidence usually will be admitted. A timely objection requires the trial judge to make a ruling. In the case of interpreters, it is possible that an objection will be made to a witness's testifying through an interpreter, but such objections are relatively unusual. *Rule 604* does not usually give rise to objections, although in some instances a party will claim that an interpreter is not qualified as an expert. The decision whether the interpreter is qualified is for the court.

Since the trial judge rules on the qualifications of an interpreter under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection made to the qualifications of the interpreter. I find by a preponderance of the evidence that the [name of interpreter] [does or does not] have the specialized experience necessary to assist the jury in understanding the testimony of [name of witness]. I also find by a preponderance of the evidence that [name of interpreter] [does or does not] understand his duty to translate questions and answers correctly. Therefore, the objection is [overruled or sustained], and [name of interpreter] [may or may not] serve as an interpreter in this case.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge overrule an objection and admit testimony because a witness does not speak English and an interpreter is deemed qualified, the objecting party should be certain to make an offer of proof as to the qualifications of the interpreter or as to the ability of the witness to testify in English.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to an interpreter's

qualifications, but may want the judge to explain to the jury something about the role of an interpreter.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Non-English Speaking Witnesses

I have permitted this witness to testify in [insert language]. This is the language the witness ordinarily uses and will enable the witness to communicate to you as fully as possible with the help of an interpreter. No party should be penalized because it relies upon a witness who is not fluent in English. You should pay the same careful attention to this witness as to witnesses who testify in English. You may consider whether your inability to understand the words used by the interpreter or by the witness affects your ability to assess the credibility of the witness.

[2] Interpreters

[Insert name] has taken an oath similar to the oath given to the witness and has assumed the obligation to translate accurately the questions asked of and the answers given by the witness.

[3] Juror Disagreement

[Insert name] has taken an oath similar to the oath given to the witness and has assumed the obligation to translate accurately the questions asked of and the answers given by the witness. You are required to accept the interpreter's translation as accurate. Some of you may know the language used by the witness. If this is the case and if your understanding of the questions to or answers of the witness differs from the interpreter's translation, I ask that you submit a written note to the court indicating your disagreement with the interpreter's translation.

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6-6 Federal Rules of Evidence Manual 6-3

6-3 Impeachment -- by Direct Examiner.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. ***Evidence which is not relevant is not admissible***.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement*. -- In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness*. -- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

(1) Prior statement by witness. -- ***The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition***, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; * * *.

* * *

[b] Key Points.

1. The direct examiner may impeach a witness and thereby "remove the sting" of anticipated impeachment by the cross-examiner. The direct examiner may tactically decide to offer impeachment evidence during direct examination in the hope that, by volunteering facts that might be damaging if withheld on direct and exposed on cross-examination, the credibility of the witness and the direct examiner both will be enhanced. *Rule 607* permits the direct examiner to make this choice. When a motion *in limine* is granted or denied, the losing counsel must be careful not to waive any right to appeal by anticipating opposing counsel's actions. For example, when the defendant in a criminal case moves to exclude evidence of a prior conviction under *Rule 609* and the trial judge denies the motion, the defendant waives the right to appeal by introducing the prior conviction during direct examination. The Supreme Court so held in *Ohler v. United States, 529 U.S. 753 (2000)* .

2. There is a difference between (a) calling a witness who has a positive contribution to make to the direct examiner's case and impeaching the witness, and (b) calling a witness who has no positive contribution to make in order to elicit prior inconsistent statements of the witness that are not admissible for their truth. In (a), the direct examiner is seeking

the legitimate help of the witness and seeking also to elicit the impeachment evidence to protect the witness from cross-examination. In (b), the direct examiner is seeking to put prior inconsistent statements into the case that would never be admitted if the other party chose not to call the witness (which is likely if the other party knows the witness has made prior inconsistent statements). A party may not legitimately call a witness knowing that the witness will have nothing positive to say in order to offer prior inconsistent statements not admissible for their truth as impeachment evidence, because the party has no legitimate reason to call the witness. A party who legitimately calls a witness may be able to elicit prior inconsistent statements not admissible for their truth that could be used by a cross-examiner to impeach the witness.

3. In contrast to example (b), a party may call a witness knowing that the witness will be unfavorable with the intent of offering prior inconsistent statements of the witness that are admissible for their truth under *Rule 801(d)(1)(A)*. These prior inconsistent statements are substantive evidence. A party who calls a witness for the purpose of eliciting substantive evidence acts properly.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to prior inconsistent statements of a witness offered by a direct examiner. Unless a timely objection is made, the statements will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of prior inconsistent statements under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the grounds for a ruling. If the trial judge has determined, for example, that a prior inconsistent statement may be used by the direct examiner for impeachment or to remove the sting, the judge may make a statement like this: I have considered all the evidence and arguments presented to me with regard to the prior inconsistent statement(s) that is offered on direct examination. I find by a preponderance of the evidence that [name of party] [did or did not] call [name of witness] to elicit relevant evidence in support of [name of party's] case, the statements offered by [name of party] are at least arguably inconsistent with [name of witness's] trial testimony, these statements might be used by opposing counsel as impeachment evidence, and the use of the prior inconsistent statements on direct examination [is or is not] a permissible effort to elicit impeachment evidence on direct examination as permitted by *Rule 607*. Therefore, the objection is [overruled or sustained], and the statements [may or may not] be used on direct examination.

If the judge is ruling on the admissibility of prior inconsistent statements that are admissible for their truth under *Rule 801(d)(1)(A)*, the judge may make a statement *outside the hearing of the jury* like the following: I find by a preponderance of the evidence that [name of witness] made statements that [are or are not] inconsistent with [name of witness's] trial testimony, and the prior statements [were or were not] made under oath, subject to penalty of perjury, and in a proceeding. Therefore, the objection is [overruled or sustained], and the statements [may or may not] be used as substantive evidence.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to a prior inconsistent statement, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury the proper use of the statement.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Impeachment by Direct Examiner

The party who calls a witness to testify may bring out any relevant information about the witness to assist you in assessing the witness's credibility. You must decide whether information that you find to be true has a positive or a negative effect on a witness's credibility.

[2] Prior Inconsistent Statements -- Not Admissible for Their Truth

The party who calls a witness to testify may bring out any relevant information about the witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. You must decide whether the witness made prior statements, whether they are inconsistent with the witness's testimony, and whether any prior statements cause you to doubt the trial testimony of the witness. It is important that you consider prior statements of a witness that were not made under oath, subject to penalty of perjury, or in proceeding like this trial only for the purpose of assessing the credibility of the testimony given in this trial by the witness.

[3] Prior Inconsistent Statements -- Admissible as Substantive Evidence

The party who calls a witness to testify may bring out any relevant information about the witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. These prior statements were made under oath, subject to penalty of perjury, and in a formal proceeding like this trial. You may give these statements the same weight that you would give trial testimony by a witness. If you find these prior statements to be inconsistent with the trial testimony, you must decide what parts, if any, you believe of the trial testimony and the prior statements.

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6-4 Impeachment -- Prior Bad Acts.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges***.

* * *

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(b) *Specific instances of conduct*. -- ***Specific instances*** of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, ***may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination*** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, * * *.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment***.

* * *

[b] Key Points.

1. *Rule 608(b)* is not a clear rule. It permits the court to allow a party to ask a witness on cross-examination about prior acts that shed light on the witness's character for truthfulness or untruthfulness. Because the rule permits this impeachment on cross-examination, it seems to anticipate that most questions about prior acts will be intended to attack the witness.

2. *Rule 608(b)* is one of the few rules of evidence to specifically refer to the court's discretion to admit or exclude evidence. Absent a mandate that evidence be admitted, the court generally has discretion to weigh the probative value of evidence against its dangers under *Rule 403*. Mention of the court's discretion in this particular rule may reflect both doubts about the probative value of many prior acts, especially those that are stale, and concerns about the possible unnecessary embarrassment of witnesses. The court may guard against witness embarrassment using this discretion or its authority under *Rule 611(a)*.

3. Although *Rule 608(b)* says that the trial judge may permit questions about bad acts on cross-examination, *Rule 607* would seem to permit any party to ask any witness questions relevant to impeachment.

4. *Rule 608(b)* provides that extrinsic evidence of prior bad acts, other than criminal convictions covered by *Rule 609*, is not admissible. This limitation on use of extrinsic evidence applies only when a party seeks to contradict a witness's denial of a prior bad act and the only relevance of the act is impeachment under *Rule 608(b)*. Prior bad acts may be proved by extrinsic evidence when such acts are relevant for purposes other than *Rule 608(b)* impeachment. Prior acts may be admissible under *Rule 404(b)*, for example, to prove intent, knowledge, and many other elements of a claim or defense.

5. Counsel must have a good-faith basis for believing that the prior act occurred to ask a question under *Rule 608(b)*. The good-faith basis need not necessarily be admissible evidence, however.

6. The final paragraph of *Rule 608(b)* provides that, by testifying, a witness does not lose the *Fifth Amendment* right to refuse to answer potentially incriminating questions when the questions are asked solely to elicit testimony about prior acts under *Rule 608(b)*.

7. The objecting party under *Rule 608(b)* often, if not always, will combine a *Rule 403* objection with a *Rule 608(b)* objection.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to questions about prior bad acts. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the permissibility of questions about prior acts under *Rule 104(a)*, generally the judge will

want to state for the record *outside the hearing of the jury* the following: I have considered the objection made to the questions about prior acts of this witness. I find by a preponderance of the evidence that the questions [do or do not] relate to acts which, if true, are probative of the witness's credibility, and that the possible prejudicial effect of evidence concerning these acts [does or does not] substantially outweigh the probative value of the evidence. Therefore, the objection is [overruled or sustained], and the questions [may or may not] be asked.

If the issue of good faith arises, the trial judge may request a party to make a proffer as to its good-faith basis for asking questions. If the party lacks a good-faith basis, the judge may want to state for the record the following: The court has asked [name of party] to proffer the basis for questions asked to this witness. Having considered the proffer, the court finds by a preponderance of the evidence that [name of party] [has or lacks] a good-faith basis for the questions, and that they [are proper or should be stricken from the record].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude questions, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. Since *Rule 608(b)* bars extrinsic evidence, it often will be important to a reviewing court to know whether the witness would have admitted or denied the prior acts. Thus, the preferred offer of proof might be a voir dire of the witness when the jury is not present.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of a witness's answers.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Witness Admits Prior Bad Act

The witness has testified that he/she [summarize prior act]. You may consider his/her evidence in assessing the witness's credibility and in deciding how much weight you will give his/her testimony.

[2] Witness Denies Prior Bad Act

This witness has denied that he/she engaged in certain conduct about which he/she was questioned. I instruct you that questions are not evidence even when they suggest that something is true. There is no evidence in this case that the witness engaged in the conduct about which he/she was questioned. You must disregard the suggestions contained in the questions in evaluating the credibility of the witness and deciding what weight to give his/her testimony. You may consider, however, the witness's demeanor while testifying in assessing credibility.

[3] Witness Invokes Privilege Against Self-Incrimination

A witness who testifies at a trial retains the right not to answer questions that might be incriminating as to matters that are not in dispute in the trial. This witness was asked a question and properly invoked the privilege against self-incrimination and refused to answer. You must disregard the question and the witness's invocation of the privilege in assessing the credibility of the witness and deciding how much weight to give his/her testimony. You must not penalize or reward any party because the witness chose to exercise a right conferred by the Constitution of the United States.

[4] Absence of Good Faith

[Insert name of counsel] asked this witness a question that suggested the witness had engaged in certain acts. Counsel had no basis in fact or in law for asking such a question. You must disregard the question. The court shall instruct counsel to apologize to the witness for asking it.

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6-5 Impeachment -- Character Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. -- ***The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation***, but subject to these limitations: (1) ***the evidence may refer only to character for truthfulness or untruthfulness***, and (2) ***evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked*** by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct*. -- ***Specific instances of the conduct of a witness***, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They ***may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination*** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) ***concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified***.

* * *

[b] Key Points.

1. A party may call a character witness to attack the credibility of a previous witness in a case. When character witnesses are called to attack credibility, their testimony must focus on the previous witness's character for untruthfulness.

2. The character witness is limited on direct examination to testifying about the reputation of the other witness for truthfulness or the character witness's opinion as to another witness's character for untruthfulness. The character witness may not rely upon specific acts in providing reputation or opinion testimony.

3. In theory, a character witness who has testified that a previous witness's character for truthfulness is bad may be asked on cross-examination whether the character witness has heard of or knows of specific acts on the part of the previous witness which, if the answer is yes, would appear inconsistent with an untruthful character. In practice, however, the questioning in the form of "have you heard" or "do you know" about specific acts is usually done in an effort to attack a favorable character witness. It appears that one or more negative acts is more likely to undermine favorable character testimony than one or more positive acts is to undermine negative character evidence.

4. Counsel must have a good-faith basis for the questions on cross-examination of a character witness.

5. Generally an objection under *Rule 608* will be accompanied by a *Rule 403* objection.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to character evidence or to questions asked of a character witness. Unless a timely objection is made, the evidence will be admitted and the questions allowed. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of character evidence and the validity of cross-examination under *Rule 104(a)*, in ruling on objections to character evidence the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this character evidence. I find by a preponderance of the evidence that the evidence that is proffered [does or does not] qualify as reputation or opinion evidence which is admissible under *Rule 608(a)*, and that the possible prejudicial effect of such evidence [does or does not] substantially outweigh the probative value of the evidence for impeachment purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In ruling on the validity of cross-examination questions, the judge may want to state for the record *outside the hearing of the jury* something like this: I have considered the objection to this form of cross-examination. Having considered the direct testimony of this witness, including the time period addressed by the witness, I find by a preponderance of the evidence that the cross-examination questions [are or are not] valid attempts to test the knowledge of the witness, and that the possible prejudicial effect of these questions and the answers to them [does or does not] substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the questions [are or are not] permissible.

If the issue of good faith arises, the trial judge may request a party to make a proffer as to its good-faith basis for asking questions. If the party lacks a good-faith basis, the judge may want to state for the record the following: The court has asked [name of party] to proffer the basis for questions asked to this witness. Having considered the proffer, the court finds by a preponderance of the evidence that [name of party] [has or lacks] a good-faith basis for the questions, and that they [are proper or should be stricken from the record].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. If the judge has excluded cross-examination questions, the cross-examiner may want to make an offer of proof by voir dire of the witness. This may be especially important because the answer that the witness would give to the question may be significant in a determination of whether exclusion, even if erroneous, is harmless or prejudicial.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to character evidence or to cross-examination questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Negative Character Witness Generally

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Name of character witness] has testified concerning [name of previous witness]. It is for you to assess the credibility of [name of character witness] and to decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness].

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Name of character witness] has testified concerning [name of previous witness]. The [plaintiff or defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of previous witness]. [Name of character witness] testified that he had heard or knew of these acts. You may consider what [name of character witness] heard of or knew as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that [name of character witness] heard or knew certain things casts doubt on the reputation or opinion evidence concerning [name of previous witness].

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Name of character witness] has testified concerning [name of previous witness]. The [plaintiff or

defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of previous witness]. [Name of character witness] denied hearing or knowing of these acts. I remind you that questions are not evidence, and there is no evidence that any of these acts actually occurred. You must not assume that they occurred as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness].

[4] Multiple Character Witnesses

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Names of character witnesses] have testified concerning [name of previous witness]. The [plaintiff or defendant] questioned [names of character witnesses] concerning whether [names of character witnesses] had heard or knew about specific acts involving [name of previous witness]. Some witnesses testified they had heard of or knew of these acts while other witnesses denied hearing or knowing of these acts. You may consider that some witnesses heard or knew things that others did not in assessing the credibility of [names of character witnesses] and decide how much weight you will give their testimony in connection with your assessment of the credibility of [name of previous witness]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that some witnesses heard or knew certain things casts doubt on their reputation or opinion testimony, and whether the fact that other witnesses did not hear or know these things casts doubt on their reputation or opinion testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 6 DIRECT AND CROSS-EXAMINATION OF WITNESSES; IMPEACHMENT AND REHABILITATION

6-6 Federal Rules of Evidence Manual 6-6

6-6 Rehabilitation -- Character Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. -- ***The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation***, but subject to these limitations: (1) ***the evidence may refer only to character for truthfulness or untruthfulness***, and (2) ***evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise***.

(b) *Specific instances of conduct*. -- ***Specific instances of the conduct of a witness***, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They ***may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination*** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) ***concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified***.

* * *

[b] Key Points.

1. A party may call a character witness to bolster the credibility of a previous witness in a case. When character witnesses are called to bolster credibility, their testimony must focus on the previous witness's character for truthfulness.

2. A witness may not be rehabilitated unless the witness has been previously attacked. The attack may have been through character evidence, but need not be. Any evidence that suggests that a previous witness is an untruthful person is a sufficient attack to warrant rehabilitation.

3. The character witness is limited on direct examination to testifying about the reputation of or the character witness's opinion as to another witness's untruthfulness. The character witness may not rely upon specific acts in providing reputation or opinion testimony.

4. A character witness who has testified that a previous witness's character for truthfulness is good may be asked on cross-examination whether the character witness has heard of or knows of specific acts on the part of the previous witness which, if the answer is yes, would appear inconsistent with a truthful character. The Supreme Court approved such questioning in *Michelson v. United States, 335 U.S. 469 (1948)* .

5. Counsel must have a good-faith basis for the questions on cross-examination of a character witness.

6. Generally an objection under *Rule 608* will be accompanied by a *Rule 403* objection.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to character evidence or to questions asked of a character witness. Unless a timely objection is made, the evidence will be admitted and the questions allowed. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of character evidence and the validity of cross-examination under *Rule 104(a)*, in ruling on objections to character evidence the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this character evidence. I find by a preponderance of the evidence that the credibility of [name of witness] [was or was not] sufficiently attacked to warrant the admission of character evidence for rehabilitation purposes, and that the evidence that is proffered [does or does not] qualify as reputation or opinion evidence which is admissible under *Rule 608(a)*. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In ruling on the validity of cross-examination questions, the judge may want to state for the record *outside the hearing of the jury* something like this: I have considered the objection to this form of cross-examination. Having considered the direct testimony of this witness, including the time period addressed by the witness, I find by a preponderance of the evidence that the cross-examination questions [are or are not] valid attempts to test the knowledge of the witness, and that the possible prejudicial effect of these questions and the answers to them [does or does not] substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the questions [are or are not] permissible.

If the issue of good faith arises, the trial judge may request a party to make a proffer as to its good-faith basis for asking questions. If the party lacks a good-faith basis, the judge may want to state for the record the following: The court has asked [name of party] to proffer the basis for questions asked to this witness. Having considered the proffer, the court finds by a preponderance of the evidence that [name of party] [has or lacks] a good-faith basis for the questions, and

that they [are proper or should be stricken from the record].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. If the judge has excluded cross-examination questions, the cross-examiner may want to make an offer of proof by voir dire of the witness. This may be especially important because the answer that the witness would give to the question may be significant in a determination of whether exclusion, even if erroneous, is harmless or prejudicial.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to character evidence or to cross-examination questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Positive Character Witness Generally

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Name of character witness] has testified concerning [name of previous witness]. It is for you to assess the credibility of [name of character witness] and to decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness].

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Name of character witness] has testified concerning [name of previous witness]. The [plaintiff or defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of previous witness]. [Name of character witness] testified that he had heard or knew of these acts. You may consider what [name of character witness] heard of or knew as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that [name of character witness] heard or knew certain things casts doubt on the reputation or opinion evidence concerning [name of previous witness].

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or

untruthful character. [Name of character witness] has testified concerning [name of previous witness]. The [plaintiff or defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of previous witness]. [Name of character witness] denied hearing or knowing of these acts. I remind you that questions are not evidence, and there is no evidence that any of these acts actually occurred. You must not assume that they occurred as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of previous witness].

[4] Multiple Character Witnesses

A party may call a witness to testify about the reputation and/or the witness's opinion of another witness's truthful or untruthful character. [Names of character witnesses] have testified concerning [name of previous witness]. The [plaintiff or defendant] questioned [names of character witnesses] concerning whether [names of character witnesses] had heard or knew about specific acts involving [name of previous witness]. Some witnesses testified they had heard of or knew of these acts while other witnesses denied hearing or knowing of these acts. You may consider that some witnesses heard or knew things that others did not in assessing the credibility of [names of character witnesses] and decide how much weight you will give their testimony in connection with your assessment of the credibility of [name of previous witness]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that some witnesses heard or knew certain things casts doubt on their reputation or opinion testimony, and whether the fact that other witnesses did not hear or know these things casts doubt on their reputation or opinion testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 6 DIRECT AND CROSS-EXAMINATION OF WITNESSES; IMPEACHMENT AND REHABILITATION

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6-7 Impeachment -- Prior Convictions.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule*. -- For the purpose of attacking the credibility of a witness,

(1) ***evidence that the witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year*** under the law under which the witness was convicted, and ***evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused***; and

(2) ***evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment***.

(b) *Time limit*. -- ***Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction***, whichever is the later date, ***unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect***. However, ***evidence*** of a conviction more than ten years old as calculated herein, ***is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence*** to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation*. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications*. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal*. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

[b] Key Points.

1. Criminal convictions for offenses involving dishonesty or false statement are always admissible to impeach any witness, including a criminal accused. It makes no difference whether the prior convictions are felonies or misdemeanors. There is no balancing test employed for these convictions. Generally, dishonesty crimes are not crimes of violence, but are crimes that involve falsity, misrepresentation, or deceit.

2. No misdemeanor convictions other than those involving dishonesty or false statement are admissible in any case for impeachment.

3. Felony convictions (crimes punishable by more than one year's incarceration) that do not involve dishonesty or false

statement are all subject to a balancing test. The traditional *Rule 403* balancing test is used for all witnesses other than the criminal accused. The criminal accused who testifies gets the benefit of a twist on the *Rule 403* balancing test. Instead of the accused's having to demonstrate that the prejudicial effect of the prior conviction outweighs its probative value, which would be required under *Rule 403*, the government must show that the probative value of the conviction outweighs its prejudicial effect. The trial judge need not find that the probative value substantially outweighs the prejudicial effect, just that the probative value is greater.

4. Convictions that are more than ten years old -- measured from the latter of the date of conviction or release from confinement -- cannot be used absent notice of an intent to rely upon the conviction and specific findings by the trial judge that the probative value of the specific facts and circumstances of the conviction substantially outweighs its prejudicial effect. This is the reverse of the ordinary *Rule 403* balancing.

5. Generally, the prejudicial effect of the prior conviction will be greatest when the conviction and the crime charged are similar, and will be least when the conviction bears little similarity to the crime charged. The probative value of the prior conviction increases when the conviction has elements of dishonesty as opposed to violence.

6. A direct examiner may offer evidence of a prior conviction to remove the sting of impeachment. However, when a motion *in limine* is granted or denied, the losing counsel must be careful not to waive any right to appeal by anticipating opposing counsel's actions. For example, when the defendant in a criminal case moves to exclude evidence of a prior conviction under *Rule 609* and the trial judge denies the motion, the defendant waives the right to appeal by introducing the prior conviction during direct examination. The Supreme Court so held in *Ohler v. United States, 529 U.S. 753 (2000)* . The direct examiner who has unsuccessfully sought to exclude a prior conviction through a motion *in limine* should seek a final court ruling that the conviction can be used by the other side before offering it, and should make clear on the record that any use of the conviction is not intended to be a waiver of the *in limine* objection but is a response to the trial judge's decision that the opponent may use the evidence for impeachment. It is not clear, however, that this effort will avoid a waiver finding under *Ohler*.

7. If the trial judge has denied a motion in limine and has ruled that a witness -- *e.g.*, the criminal accused -- can be impeached if he testifies, the witness must testify and be impeached for the motion in limine to be preserved on appeal. The Supreme Court so held in *Luce v. United States, 469 U.S. 38 (1984)* .

8. *Rule 609* governs the use of prior convictions for impeachment purposes only. It does not preclude convictions from being offered under other rules -- *e.g.*, Rules 404, 413, 414, and 415.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to prior conviction evidence. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of prior convictions under *Rule 104(a)*, in ruling on objections to such evidence the judge will want to make a statement for the record *outside the hearing of the jury* that indicates that the proper standard was used in making a ruling.

If the judge is dealing with a conviction that qualifies as a "dishonesty or false statement" conviction, whether misdemeanor or felony and regardless of the nature of the case or the witness who is to be impeached, the judge may choose a statement like the following: I have considered the objection to the prior conviction for [name of crime]. I find by a preponderance of the evidence that it is a conviction involving dishonesty or false statement. Therefore, I must admit it because *Rule 609(a)(2)* provides that such convictions are always admissible.

In a criminal case when the objection is to the defendant's prior felony conviction for a crime not involving dishonesty

or false statement, the judge may choose a statement like the following: I have considered the objection to the defendant's prior conviction for [name of crime]. I find by a preponderance of the evidence that the probative value of the conviction for impeachment purposes [does or does not] outweigh the possible prejudicial effect of such evidence, particularly the danger that it will be used as general character evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In a civil case in which the credibility of a plaintiff or defendant is at issue, the judge may choose a statement like the following: I have considered the objection to [name of party's] prior conviction for [name of crime]. I find by a preponderance of the evidence that the possible prejudicial effect of the conviction, particularly the danger that it will be used as general character evidence, [does or does not] substantially outweigh the probative value of the evidence for impeachment purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In a civil or a criminal case, a similar statement can be used when an objection is made to the prior conviction of a non-party witness. But, the judge may substitute "particularly the danger of spill-over to a party" for the words "particularly the danger that it will be used as general character evidence."

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to prior convictions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Conviction of a Non-Party Witness

You may consider evidence of a witness's criminal convictions in assessing the witness's credibility and deciding how much weight to give the witness's testimony.

[2] Prior Conviction of a Party in a Civil Case Admissible Only for Impeachment

You may consider evidence that [the plaintiff or defendant] has been convicted of certain crimes in assessing [the plaintiff's or the defendant's] credibility as a witness and deciding how much weight to give [the plaintiff's or the defendant's] testimony. You must decide whether a conviction renders a person less worthy of belief than other witnesses. Your job is not to punish [the plaintiff or defendant] for past crimes. Your job is to assess fairly and impartially every witness's credibility in this case. You may consider all that you heard about a prior conviction in

assessing its importance, including the nature of the crime for which [the plaintiff or the defendant] was convicted, whether that crime involved untruthfulness or deceit, when the crime occurred, and whether there were extenuating circumstances.

[3] Prior Conviction of a Criminal Accused Admissible Only for Impeachment

You may consider evidence that the defendant has been convicted of certain crimes in assessing the defendant's credibility as a witness and deciding how much weight to give the defendant's testimony. You must decide whether a conviction renders a defendant less worthy of belief than other witnesses. Your job is not to punish the defendant for past crimes. Your job is to assess fairly and impartially every witness's credibility in this case. You may consider that the defendant had the constitutional right not to testify in this case as you evaluate the importance of evidence of a prior conviction. You may consider all that you heard about a prior conviction in assessing its importance, including the nature of the crime for which the defendant was convicted, whether that crime involved untruthfulness or deceit, when the crime occurred, and whether there were extenuating circumstances.

[4] Prior Conviction of a Party in a Civil Case Admissible as Substantive Evidence

You may consider evidence that [the plaintiff or defendant] has been convicted of certain crimes in assessing [the plaintiff's or the defendant's] credibility as a witness and deciding how much weight to give [the plaintiff's or the defendant's] testimony. You must decide whether a conviction renders a person less worthy of belief than other witnesses. You may consider all that you heard about a prior conviction in assessing its importance, including the nature of the crime for which [the plaintiff or the defendant] was convicted, whether that crime involved untruthfulness or deceit, when the crime occurred, and whether there were extenuating circumstances. You may also consider evidence that [the plaintiff or the defendant] has been convicted of certain crimes on the question whether [describe issue -- *e.g.*, whether the defendant intended to touch the plaintiff without consent]. Your job is not to punish [the plaintiff or defendant] for past crimes. Your job is to assess fairly and impartially every witness's credibility in this case and to decide only the issues that are disputed in this case.

[5] Prior Conviction of a Criminal Accused Admissible for Substantive Evidence

You may consider evidence that the defendant has been convicted of certain crimes in assessing the defendant's credibility as a witness and deciding how much weight to give the defendant's testimony. You must decide whether a conviction renders a defendant less worthy of belief than other witnesses. You may consider all that you heard about a prior conviction in assessing its importance, including the nature of the crime for which the defendant was convicted, whether that crime involved untruthfulness or deceit, when the crime occurred, and whether there were extenuating circumstances. You may also consider evidence that the defendant has been convicted of certain crimes in deciding whether [describe issue -- *e.g.*, the defendant knew that he possessed heroin and intended to possess it]. Your job is not to punish the defendant for past crimes. Your job is to assess fairly and impartially every witness's credibility in this case and to decide only the issues that are disputed in this case.

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6-8 Impeachment -- Bias.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. ***Evidence which is not relevant is not admissible***.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

[b] Key Points.

1. No specific rule of evidence addresses bias evidence. However, *Rule 401* defines relevant evidence and *Rule 402* states that relevant evidence is admissible unless a legal restriction provides otherwise. Not only is bias evidence relevant, but it is regarded as such a powerful form of impeachment that in criminal cases the defendant has a *Sixth Amendment Confrontation Clause* right to demonstrate the potential bias or interest of government witnesses. *Davis v. Alaska, 415 U.S. 308 (1974)* . The Confrontation right may override provisions of rules of evidence that would exclude defense evidence. *See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988)* .

2. The Supreme Court recognized the importance of bias evidence and its admissibility under *Rule 402* in *United States v. Abel, 469 U.S. 45 (1984)* .

3. A direct examiner may elicit evidence of bias or potential bias to remove the sting of expected impeachment by the cross-examiner. At some point, however, a direct examiner may move beyond eliciting evidence of bias to vouching for a witness -- *e.g.*, bringing out extensive details of a plea bargain agreement -- which is improper.

4. The Supreme Court recognized in *Abel* that a trial judge, in the sound exercise of discretion, may permit a party to elicit testimony that a witness is a member of an organization, but may exclude the name of or details about the organization. For example, the judge may permit testimony that a witness is a member of a "prison gang" while excluding the name of the gang -- *e.g.*, "Aryan Brotherhood" -- if the name might be especially prejudicial in the locale of the trial.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to bias evidence. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to bias evidence the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this evidence. I find by a preponderance of the evidence that the evidence [is or is not] probative of a possible bias and that the possible prejudicial effect of the evidence [does or does not] substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction

before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to bias evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Plea Bargain Elicited by Government Witness in Criminal Case

The prosecution has presented evidence that this witness has [agreed to plead or pled] guilty to some or all of the crimes charged against the defendant. The witness's plea agreement is not evidence that the defendant is guilty of any crime charged in this case. You may consider the extent to which the witness [agreed to accept or has accepted] responsibility for criminal acts, and the extent to which the witness has avoided responsibility and obtained some benefit from the plea agreement in assessing the credibility of the witness and deciding how much weight to give the witness's testimony.

[2] Plea Bargain Elicited by Defendant on Cross-Examination in Criminal Case

The fact that this witness has [agreed to plead or pled] guilty to some or all of the crimes charged against the defendant is not evidence that the defendant is guilty of any crime charged in this case. You may consider the extent to which the witness [agreed to accept or has accepted] responsibility for criminal acts, and the extent to which the witness has avoided responsibility and obtained some benefit from the plea agreement in assessing the credibility of the witness and deciding how much weight to give the witness's testimony.

[3] Settlement by Co-Defendant in Civil Case

The fact that a witness has [agreed to a settlement or entered into a settlement agreement] with [the plaintiff or the defendant] is something you may consider in assessing the credibility of the witness and deciding how much weight to give the witness's testimony. You may consider the extent to which the witness [or the witness's employer] obtained some advantage from the agreement or suffered some disadvantage in deciding whether the agreement may cause the witness to favor or disfavor one party in this case. The agreement has no bearing on whether the defendant is liable or on the extent of any liability in this case.

[4] Settlement by Co-Plaintiff in Civil Case

The fact that a witness has [agreed to a settlement or entered into a settlement agreement] with [the plaintiff or the defendant] is something you may consider in assessing the credibility of the witness and deciding how much weight to give the witness's testimony. You may consider the extent to which the witness [or the witness's employer] obtained some advantage from the agreement or suffered some disadvantage in deciding whether the agreement may cause the witness to favor or disfavor one party in this case. The agreement has no bearing on whether the plaintiff can establish liability or the extent of any liability in this case.

[5] Group Membership

You may consider the fact that a witness is a member of [insert name or description of group] in deciding whether the witness's membership may cause the witness to favor or disfavor one party in this case. You must not favor or disfavor witnesses or parties who call witnesses because you approve or disapprove of their associates or organizations. But, you may consider whether a witness has reason to favor or disfavor a party in assessing the credibility of a witness and how much weight to give the witness's testimony.

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6-6 Federal Rules of Evidence Manual 6-9

6-9 Impeachment -- Group Membership.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. ***Evidence which is not relevant is not admissible***.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

[b] Key Points.

1. *Rule 610* provides that a witness's beliefs or opinions on matters of religion are not admissible to enhance or impair credibility. The rule does not exclude evidence that a witness is affiliated with a religion when such evidence is relevant to show bias or interest in a case.

2. The Supreme Court recognized the importance of bias evidence and its admissibility under *Rule 402* in *United States v. Abel, 469 U.S. 45 (1984)* .

3. The Supreme Court recognized in *Abel* that a trial judge, in the sound exercise of discretion, may permit a party to elicit testimony that a witness is a member of an organization, but may exclude the name of or details about the organization. For example, the judge may permit testimony that a witness is a member of a "prison gang" while excluding the name of the gang -- *e.g.*, "Aryan Brotherhood" -- if the name might be especially prejudicial in the locale of the trial. The same approach could result in a witness testifying to membership in a religious or quasi-religious group without revealing the name of the group.

4. A direct examiner may elicit evidence of bias or potential bias to remove the sting of expected impeachment by the cross-examiner.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence of group membership. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to group membership evidence the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this evidence. I find by a preponderance of the evidence that the evidence [is or is not] probative of a possible bias or motive and that the possible prejudicial effect of the evidence [does or does not] substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give

one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to group membership evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Group Membership Generally

You may consider the fact that a witness is a member of [insert name or description of group] in deciding whether the witness's membership may cause the witness to favor or disfavor one party in this case. You must not favor or disfavor witnesses or parties who call witnesses because you approve or disapprove of their associates or organizations. But, you may consider whether a witness has reason to favor or disfavor a party in assessing the credibility of a witness and how much weight to give the witness's testimony.

[2] Group Membership Denied

It is for you to decide whether or not the witness is a member of [insert name or description of group]. If you find that the witness is a member, you may consider that fact in deciding whether the witness's membership may cause the witness to favor or disfavor one party in this case. You must not favor or disfavor witnesses or parties who call witnesses because you approve or disapprove of their associates or organizations. But, you may consider whether a witness has reason to favor or disfavor a party and whether the witness tried to conceal membership in a group in assessing the credibility of the witness and how much weight to give the witness's testimony.

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6-6 Federal Rules of Evidence Manual 6-10

6-10 Impeachment -- Leading Questions.

[a] Governing Rule.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination*. -- Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions*. -- ***Leading questions should not be used on the direct examination*** of a witness ***except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions***.

[b] Key Points.

1. Generally, the cross-examiner is permitted to ask leading questions. Leading questions may point out inconsistencies in a witness's testimony and thereby impeach the witness.

2. It is common for counsel to state facts as part of a leading question -- *e.g.*, "Isn't it true that ...," or "Isn't it a fact that ...." Such questions require a good-faith basis.

3. The direct examiner usually will have the right to ask leading questions not only of hostile witnesses but of adverse parties and witnesses identified with adverse parties.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to leading questions. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The trial judge rules on the permissibility of leading questions under *Rule 611(c)*, and has enormous discretion to permit leading questions when they are helpful in eliciting testimony from a witness. Generally, the judge need not give much explanation for allowing or not allowing such questions. However, if the judge denies a cross-examiner the right to ask leading questions, the judge may want to state for the record *outside the hearing of the jury* a reason, such as the judge's view that the witness is actually favorably disposed toward the cross-examiner. Similarly, if the judge grants a direct examiner the right to ask leading questions over objection, the judge may want to explain why outside the hearing of the jury. For example, the judge may conclude that a witness's demeanor is sufficient evidence of hostility toward a direct examiner that leading questions should be permitted.

Once the judge has ruled on an objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to leading questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of questions and answers.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Questions Are Not Evidence

The testimony of the witnesses is evidence. Statements made by counsel in their questions are not evidence unless a witness adopts these statements in answering a question.

[2] Evasive Answers

You may consider whether a witness has answered questions candidly and forthrightly or whether the witness has been evasive in assessing the witness's credibility and in deciding how much weight to give to the witness's testimony.

[3] Inconsistent Answers

You must decide whether a witness's answers have been consistent or inconsistent. You may consider whether a witness has answered questions consistently or inconsistently in assessing the witness's credibility and in deciding how much weight to give to the witness's testimony.

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6-6 Federal Rules of Evidence Manual 6-11

6-11 Impeachment -- Materials Used to Refresh Memory.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, ***either*** --

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

[b] Key Points.

1. A party generally may use anything to refresh the recollection of a witness at trial. At trial, the object used should be marked for identification before being shown to the witness. If the witness's memory is not refreshed, the item is not admissible. If, however, the witness's memory is refreshed, opposing counsel may examine the item, cross-examine the witness about it, and offer into evidence portions relevant to the refreshed recollection.

2. The purpose of admitting the item used to refresh recollection is to demonstrate that the witness may have been influenced by the item rather than by memory.

3. The judge has discretion to order items used before trial by a witness to prepare for testifying turned over to an opposing party. In criminal cases, however, statements covered by the Jencks Act, *18 U.S.C. § 3500*, need not be disclosed until after a government witness testifies on direct examination.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to evidence. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to admission of evidence of materials used to refresh memory during a trial, the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this evidence and have reviewed the material that [name of party] wants to introduce. I find by a preponderance of the evidence that [none, some, or all] of this evidence is related to the testimony of [name of witness]. Therefore, the objection is [overruled or sustained in whole or in part], and [describe whether any evidence is] admissible.

If the judge finds that none of the material is related to the testimony, it will be excluded. If the judge finds that all of the material is related, it will be admitted in its entirety. If the judge finds that only some of the material is related, the judge may want to add for the record the following: I shall admit that portion of the material that is related to the testimony and make the remaining portion part of the record of this proceeding.

When the objection is made to materials used to refresh recollection prior to trial, the judge may want to consider making the following statement for the record *outside the hearing of the jury*: [Name of party] has asked that I order [name of witness] to produce materials used to refresh recollection or prepare for testimony prior to trial. I have considered the testimony that [name of witness] has given and its importance in this case, and I find by a preponderance of the evidence that the interests of justice [do or do not] require that these materials be produced for [name of party] and that [name of party] be permitted to cross-examine the witness on the basis of these materials and to offer them into evidence.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

As long as the judge follows *Rule 612*, materials used to refresh recollection during trial should be part of the record whenever an opposing party has sought to admit them. Thus, no additional proffer will usually be needed. It will be difficult for a party seeking disclosure of materials used before trial to make a proffer. However, if the party has obtained disclosure and has unsuccessfully sought to admit these materials at trial, the party should submit the materials as an offer of proof.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the

advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence used to refresh recollection, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Inadmissible Item Used at Trial to Refresh Recollection

Exhibit [number] was shown to the witness for the purpose of refreshing memory. The witness has indicated that the exhibit did refresh memory. The [plaintiff, prosecutor, or defendant] suggests that the witness's memory was not refreshed and that the witness simply repeated the contents of the exhibit. The contents of the exhibit may not be used to prove any facts in dispute in this case. If the contents did refresh the witness's recollection, you may consider the witness's refreshed testimony and give it the weight you deem proper. If, however, the witness merely repeated the contents of the document and did not testify from a refreshed memory, you must disregard that part of the witness's testimony that merely repeated the contents of the document. You may consider in deciding whether memory actually was refreshed the testimony given by the witness before the exhibit was shown, the words used by the witness after seeing the exhibit, the contents of the exhibit, the witness's level of confidence, the witness's ability to recall events unrelated to the contents of the exhibit, and any other circumstances that you find helpful. You may consider the fact that a witness pretended to remember in assessing the overall credibility of the witness.

[2] Admissible Item Used at Trial to Refresh Recollection

Exhibit [number] [is or will be] in evidence, and you may decide how much weight to give it. This exhibit was shown to the witness for the purpose of refreshing memory. The witness has indicated that the exhibit did refresh memory. The [plaintiff, prosecutor, or defendant] suggests that the witness's memory was not refreshed and that the witness simply repeated the contents of the exhibit. If the contents did refresh the witness's recollection, you may consider the witness's refreshed testimony and give it the weight you deem proper. If, however, the witness merely repeated the contents of the document and did not testify from a refreshed memory, you must disregard that part of the witness's testimony that merely repeated the contents of the document. You may consider in deciding whether memory actually was refreshed the testimony given by the witness before the exhibit was shown, the words used by the witness after seeing the exhibit, the contents of the exhibit, the witness's level of confidence, the witness's ability to recall events unrelated to the contents of the exhibit, and any other circumstances that you find helpful. You may consider the fact that a witness pretended to remember in assessing the overall credibility of the witness.

[3] Inadmissible Item Used Before Trial to Refresh Recollection

The evidence is that exhibit [number] was used by the witness for the purpose of preparing to testify at trial. The witness stated that he based his testimony on his memory of events not on the contents of the exhibit that he used to prepare for testifying. The [plaintiff, prosecutor, or defendant] suggests that the witness's memory was not refreshed and that the witness simply repeated the contents of the exhibit. The contents of the exhibit may not be used to prove any facts in dispute in this case. If you find that the witness testified from actual memory, it does not matter that he reviewed the exhibit and you may consider the witness's refreshed testimony and give it the weight you deem proper. If you find, however, that the witness did not testify from memory and merely repeated the contents of the exhibit, you must disregard that part of the testimony that merely repeated the contents of the exhibit. You may consider in deciding whether the exhibit refreshed the witness's memory the contents of any statements made by the witness before seeing the exhibit, the contents of the exhibit, the words used by the witness while testifying, the witness's level of confidence,

the witness's ability to recall events unrelated to the contents of the exhibit, and any other circumstances that you find helpful. You may consider the fact that a witness pretended to remember in assessing the overall credibility of the witness.

[4] Admissible Item Used Before Trial to Refresh Recollection

Exhibit [number] [is or will be] in evidence, and you may decide how much weight to give it. [Name of witness] stated that he used this exhibit for the purpose of preparing to testify at trial. [Name of witness] also testified that he based his testimony on his memory of events not on the contents of the exhibit that he used to prepare for testifying. The [plaintiff, prosecutor, or defendant] suggests that the witness's memory was not refreshed and that the witness simply repeated the contents of the exhibit, If you find that the witness testified from actual memory, it does not matter that he reviewed the exhibit and you may consider the witness's testimony when you find the facts in dispute. If you find, however, that the witness's memory was not refreshed and that the witness merely repeated the contents of the exhibit, you must disregard that part of the testimony that merely repeated the contents of the exhibit. You may consider in deciding whether the exhibit refreshed the witness's memory the contents of any statements made by the witness before seeing the exhibit, the contents of the exhibit, the words used by the witness while testifying, the witness's level of confidence, the witness's ability to recall events unrelated to the contents of the exhibit, and any other circumstances that you find helpful. You may consider the fact that a witness pretended to remember in assessing the overall credibility of the witness.

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6-6 Federal Rules of Evidence Manual 6-12

6-12 Impeachment -- Prior Inconsistent Statements.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement*. -- In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness*. -- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This

provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if --***

(1) Prior statement by witness. -- ***The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition***, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; * * *.

* * *

[b] Key Points.

1. Although *Rule 613* does not explicitly state that prior inconsistent statements are a permissible form of impeachment, the rule assumes that they are and provides the procedures that must be followed when a party seeks to use a prior inconsistent statement for impeachment purposes.

2. Subdivision (a) eliminates the rule laid down in Queen Caroline's case that a party seeking to impeach a witness with a prior written inconsistent statement must show it to the witness before asking questions about it. Now impeaching counsel must, upon request, show it to opposing counsel, but not to the witness. There is no restriction upon impeaching counsel's showing the statement to the witness, but the rule permits impeaching counsel to choose when to do so.

3. Subdivision (b) provides that a party who wants to offer extrinsic evidence of a prior inconsistent statement must give the witness who made the statement the opportunity to deny making the statement or to explain it. Whereas the common-law requirement was that the foundation had to be laid before extrinsic evidence could be used, *Rule 613(b)* eases the foundation requirement and permits impeaching counsel to afford a witness an opportunity to deny or explain after extrinsic evidence is presented. The rule does not indicate whose burden it is to assure that the witness will be present so that the opportunity to deny or explain will be available. The party who holds back using an inconsistent statement during cross-examination may surprise the other side with the statement after the witness has been excused, and argument may occur as to who should be responsible if the witness is not available. To avoid this argument, it would be prudent for the trial judge to consider adopting a standing rule that any party who plans to use an inconsistent statement to impeach a witness and who intends to offer the inconsistent statement before providing the witness with the opportunity to deny or explain it must assure that the witness will be available to be recalled. Counsel may suggest that the trial judge adopt such a rule for any particular case if no standing rule is in effect.

4. *Rule 613* governs impeachment with an inconsistent statement, while *Rule 801(d)(1)(A)* governs the substantive use of inconsistent statements. The same foundation -- *i.e.*, opportunity for witness to explain or deny -- must be laid for a statement that qualifies for admission under *Rule 801(d)(1)(A)* as for a *Rule 613* statement.

5. The direct examiner may impeach a witness and thereby "remove the sting" of anticipated impeachment by the

cross-examiner. The direct examiner may tactically decide to offer impeachment evidence during direct examination in the hope that, by volunteering facts that might be damaging if withheld on direct and exposed on cross-examination, the credibility of the witness and the direct examiner both will be enhanced. *Rule 607* permits the direct examiner to make this choice. When a motion *in limine* is granted or denied, the losing counsel must be careful not to waive any right to appeal by anticipating opposing counsel's actions. For example, when the defendant in a criminal case moves to exclude evidence of a prior conviction under *Rule 609* and the trial judge denies the motion, the defendant waives the right to appeal by introducing the prior conviction during direct examination. The Supreme Court so held in *Ohler v. United States, 529 U.S. 753 (2000)* .

6. There is a difference between (a) calling a witness who has a positive contribution to make to the direct examiner's case and impeaching the witness, and (b) calling a witness who has no positive contribution to make in order to elicit prior inconsistent statements of the witness that are not admissible for their truth. In (a), the direct examiner is seeking the legitimate help of the witness and seeking also to elicit the impeachment evidence to protect the witness from cross-examination. In (b), the direct examiner is seeking to put prior inconsistent statements into the case that would never be admitted if the other party chose not to call the witness (which is likely if the other party knows the witness has made prior inconsistent statements). A party may not legitimately call a witness knowing that the witness will have nothing positive to say in order to offer prior inconsistent statements not admissible for their truth as impeachment evidence, because the party has no legitimate reason to call the witness. A party who legitimately calls a witness may be able to elicit prior inconsistent statements not admissible for their truth that could be used by a cross-examiner to impeach the witness.

7. In contrast to example (b), a party may call a witness knowing that the witness will be unfavorable with the intent of offering prior inconsistent statements of the witness that are admissible for their truth under *Rule 801(d)(1)(A)*. These prior inconsistent statements are substantive evidence. A party who calls a witness for the purpose of eliciting substantive evidence acts properly.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to prior inconsistent statements. Unless a timely objection is made, the statements will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to prior inconsistent statements the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to the use of these prior statements. I find by a preponderance of the evidence that the statements [are or are not] sufficiently inconsistent with the witness's trial testimony to be probative, and that the possible prejudicial effect of these statements, particularly the danger they will be used as substantive evidence, [does or does not] substantially outweigh their probative value for impeachment purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to prior inconsistent statements, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Inconsistent Statements -- Not Admissible for Their Truth

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. You must decide whether the witness made prior statements, whether they are inconsistent with the witness's testimony, and whether any prior statements cause you to doubt the trial testimony of the witness. It is important that you consider any of these prior statements of a witness only for the purpose of assessing the credibility of the testimony given in this trial by the witness.

[2] Prior Inconsistent Statements -- Admissible as Substantive Evidence

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. These prior statements were made under oath, subject to penalty of perjury, and in a formal proceeding like this trial. You may give these statements the same weight that you would give trial testimony by a witness. If you find these prior statements to be inconsistent with the trial testimony, you must decide what parts, if any, you believe of the trial testimony and the prior statements.

[3] Prior Inconsistent Statements Not Admissible for Their Truth -- Witness Denies Statements

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. You must decide whether the witness made prior statements, whether they are inconsistent with the witness's testimony, and whether any prior statements cause you to doubt the trial testimony of the witness. It is important that you consider any of these prior statements of a witness only for the purpose of assessing the credibility of the testimony given in this trial by the witness. You may consider the witness's denial of making statements in assessing the witness's overall credibility.

[4] Prior Inconsistent Statements Admissible for Their Truth -- Witness Denies Statements

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that were made under oath, subject to penalty of perjury, and in a formal proceeding like this trial. You must decide whether the witness made these statements and whether they are inconsistent with the witness's testimony in this trial. You may give any statements that were made and that are inconsistent the same weight that you would give trial testimony. You must decide what parts, if any, you believe of the trial testimony and of any prior inconsistent statements that were made.

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6-6 Federal Rules of Evidence Manual 6-13

6-13 Judge Calls Witness.

[a] Governing Rules.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by court*. -- ***The court may***, on its own motion or at the suggestion of a party, ***call witnesses***, and ***all parties are entitled to cross-examine witnesses*** thus called.

(b) *Interrogation by court*. -- ***The court may interrogate witnesses***, whether called by itself or by a party.

(c) *Objections*. -- ***Objections*** to the calling of witnesses by the court or to interrogation by it ***may be made at the time or at the next available opportunity when the jury is not present***.

Rule 706. Court Appointed Experts

(a) *Appointment*. -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. ***The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection***. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; ***and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party***, including a party calling the witness.

* * *

[b] Key Points.

1. *Rule 614(a)* provides that the court may call a witness to testify, and all parties may cross-examine any witness called by the court. The rule does not set forth guidelines as to when the court should consider calling witnesses. It does not require the court to call any witness.

2. The court is free to indicate to the parties its interest in having a witness testify and to provide the parties with an opportunity to call the witness.

3. *Rule 706(a)* provides specifically that the court may call a court-appointed expert to testify, and that all parties may cross-examine any court-appointed expert called either by the court or by another party.

4. Like *Rule 605*, which provides that the judge may not be a witness while judging a trial and that a party may object outside the presence of the jury if the judge proposes to give testimony, *Rule 614* permits objections to the judge's calling or questioning witnesses to be made outside the hearing of the jury. A prudent party should make an objection to the judge's calling a witness as soon as possible during the jury's absence to avoid waiving the objection.

5. Nothing in *Rule 614* precludes a party from objecting in the jury's presence. In some instances counsel may be prepared to risk confronting the judge before the jury and to object to the court's calling or questioning a witness in the hope that the court may reconsider its proposed course of action before any damage occurs.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to the judge's calling a witness. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The trial judge has authority under *Rule 611(a)* and *614* to call witnesses. Because it is unusual for the judge to call a witness, the judge may want to state for the record *outside the hearing of the jury* the reasons why the court calls a particular witness. For example, the judge may say: [Name of party] requested that the court call [name of witness]. [Name of party] contends that [name of witness] can provide relevant testimony, but that certain facts surrounding [name of witness] may prejudice any party who calls the witness to the stand. I find by a preponderance of the evidence that by calling the witness as a court's witness and providing both parties a full opportunity to examine the witness, the probative value of the witness's testimony will be enhanced while avoiding unfair prejudice to any party.

Regarding a court-appointed expert, the judge might say: The court determined that it should call [name of witness] as the court's witness. The court is aware of the danger that a jury may give a court-appointed expert's testimony undue weight, and the court has determined that it is preferable that neither party be seen as calling the court's expert as its witness. I find by a preponderance of the evidence that by calling the witness a court's witness, instructing the jury on the witness's role in the case, and providing both parties a full opportunity to examine the witness, the probative value of the witness's testimony will be enhanced while avoiding unfair prejudice to any party.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has a particular interest in considering *sua sponte* whether to give one or more instructions when calling a court-appointed expert, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to the court's calling a witness, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper role of the witness.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Court Calls Lay Witness

I am about to call a witness to testify as the court's witness; this means that neither party is calling the witness. The fact that I call the witness does not indicate that the witness's testimony is any more important or any more likely to be true than the testimony of any other witness. Nor does the fact that I ask questions of the witness indicate that these questions are any more important than the questions asked by the lawyers or that the answers given by the witness to my questions are any more likely to be true or entitled to weight than the answers to the questions asked by the lawyers.

[2] Court Calls Expert Witness

I am about to call a witness to testify as the court's witness; this means that neither party is calling the witness. The fact that I call the witness does not indicate that the witness's testimony is any more important or any more likely to be true than the testimony of any other witness. Nor does the fact that I ask questions of the witness indicate that these questions are any more important than the questions asked by the lawyers or that the answers given by the witness to my questions are any more likely to be true or entitled to weight than the answers to the questions asked by the lawyers. This witness was asked by the court to testify and was not retained by either party. The fact that I asked the witness to testify does not indicate that the testimony is more likely to be accurate and complete than the testimony of witnesses retained and called by the parties. However, you may consider the fact that neither party hired this witness to testify in assessing the witness's credibility.

[3] Counsel Objects to Court's Calling Witness or Asking Questions in Jury's Presence

Counsel have the responsibility to object when they believe I am improperly calling a witness or asking questions. You should not draw any adverse inference against counsel or a party from an objection whether the objection is sustained or overruled.

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6-6 Federal Rules of Evidence Manual 6-14

6-14 Judge Questions Witness.

[a] Governing Rules.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by court*. -- ***The court may***, on its own motion or at the suggestion of a party, ***call witnesses***, and ***all parties are entitled to cross-examine witnesses*** thus called.

(b) *Interrogation by court*. -- ***The court may interrogate witnesses***, whether called by itself or by a party.

(c) *Objections*. -- ***Objections*** to the calling of witnesses by the court or to interrogation by it ***may be made at the time or at the next available opportunity when the jury is not present***.

Rule 706. Court Appointed Experts

(a) *Appointment*. -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. ***The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection***. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; ***and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party***, including a party calling the witness.

* * *

[b] Key Points.

1. The court is permitted to ask questions of any witness, whether the witness was called by a party or by the court. Nothing in the rule requires that the court ask questions. The court is free to suggest that counsel may want to pursue an inquiry or clarify matters and to leave the questioning to them.

2. Like *Rule 605*, which provides that the judge may not be a witness while judging a trial and that a party may object outside the presence of the jury if the judge proposes to give testimony, *Rule 614* permits objections to the judge's calling or questioning witnesses to be made outside the hearing of the jury. A prudent party should make an objection to the judge's questioning of a witness as soon as possible during the jury's absence to avoid waiving the objection.

3. Nothing in *Rule 614* precludes a party from objecting in the jury's presence. In some instances counsel may be prepared to risk confronting the judge before the jury and to object to the court's questioning a witness in the hope that the court may reconsider its proposed course of action before any damage occurs.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to questions by the court. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The trial judge rules on the permissibility of the court's questions under *Rule 614*. In ruling on objections, the judge might find it helpful to state for the record *outside the hearing of the jury* something like the following: [Name of party] has objected to questions asked by the court of [name of witness]. The court asked these questions [explain reason: to clarify the witness's testimony, to clear up an ambiguity in the testimony, to repeat testimony that was difficult to hear]. The court invites [name of objecting party] to request an appropriate limiting instruction to assure that it suffers no unfair prejudice from the court's questions.

Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has a particular interest in considering *sua sponte* whether to give one or more instructions when an objection is made to the court's questions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to the court's questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Court Questions Witness

The fact that I ask questions of a witness does not indicate that these questions are any more important than the questions asked by the lawyers or that the answers given by the witness to my questions are any more likely to be true or entitled to weight than the answers to the questions asked by the lawyers.

[2] Counsel Objects to Court's Questions in Jury's Presence

Counsel have the responsibility to object to any questions that I ask that they believe are improper. You should not draw any adverse inference against counsel or a party from an objection whether or not the objection is sustained or

overruled.

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6-6 Federal Rules of Evidence Manual 6-15

6-15 Sequestration Violation.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and ***it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person*** designated as its representative by its attorney, (3) ***a person whose presence is shown by a party to be essential*** to the presentation of the party's cause, or (4) ***a person authorized by statute to be present.***

[b] Key Points.

1. Any party has a right to invoke the sequestration power of the court. The court "shall" exclude witnesses upon request. The court also may order sequestration on its own.

2. There are four classes of witnesses exempt from a sequestration order: natural persons who are parties; a designated representative who is an officer or employee of an entity; persons whose presence during the testimony of other witnesses is shown to be essential, which often includes expert witnesses; and persons who are authorized by statute to be present, such as the alleged victim in certain criminal prosecutions. The Advisory Committee's Note to *Rule 615*

indicates that it contemplated that agents who handled transactions and experts who are needed to assist counsel would be candidates for exemption from sequestration. Logic suggests that experts who will be asked to offer an opinion based upon testimony or other evidence also might reasonably be exempted from sequestration.

3. *Rule 615* only provides that the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. Counsel who want a stronger sequestration order should ask for the specific provisions that they want the court to enforce. For example, counsel may ask the court to order that no witnesses may talk with other witnesses about their testimony after they have testified, that no transcripts of other witnesses' testimony may be shown to a witness, and that counsel may not disclose the substance of a witness's testimony to a witness who has not yet testified.

4. The court has broad power to enforce its sequestration orders. It may hold witnesses or counsel in contempt for willful violations, it may permit testimony and instruct the jury about a sequestration violation, and in extreme cases it may exclude the testimony of a witness who has violated an order.

5. Technically, the question whether a sequestration order was violated is for the court under *Rule 104(a)*. If the court finds that there was no violation, the court may bar questioning before the jury about an alleged violation to avoid confusing the jury about sequestration, which is a legal term with which most jurors will have no experience. If the judge decides to exclude a witness as a sanction, there will be no need for a jury instruction. Difficulty may arise if the judge concludes that there is a factual dispute underlying a violation, and the judge decides that the jury should hear the facts in order to fairly assess the credibility of the witness. In such a case the judge may decide as a matter of law that a sequestration violation occurred if certain facts are true and so instruct the jury. The judge might leave to the jury the ultimate task of finding the facts, since they are relevant to assessing credibility and to determining the weight to be given to testimony.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to testimony by a witness who has violated a sequestration order. Unless a timely objection is made, the testimony will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to testimony because of an alleged sequestration violation, the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered all evidence concerning the objection that the witness violated the court's sequestration order. I find by a preponderance of the evidence that the witness [did or did not] violate the order.

If the court finds that the witness did violate a sequestration order, the question arises as to what the appropriate remedy is. The court may want to state for the record *outside the hearing of the jury* its reasons for choosing a remedy with a statement like the following: I have found that [name of witness] violated the sequestration order. I have considered the nature of the violation, *i.e.*, the degree to which it was intentional; the extent to which the witness was exposed to the testimony of other witnesses; the importance of the witness to the case, and the extent to which differences between this witness's testimony and that of previous witnesses might affect the outcome of the case; any previous statements by this witness; and the ability of [name of opposing party] to demonstrate on cross-examination how exposure to previous testimony may have changed the witness's testimony. I find by a preponderance of the evidence that the most appropriate remedy for the sequestration violation is [describe court's choice of remedy].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be

made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Sequestration Violation -- Conceded or Found by Court

The court entered an order that precluded witnesses who have not yet testified from hearing or learning the testimony of previous witnesses. [Name of witness] violated this order. You may consider the fact that this witness violated the court's order and [heard or learned] of another witness's testimony in evaluating [name of witness's] credibility and deciding how much weight to give to this witness's testimony. You may consider whether the violation was willful on the part of [name of witness] or counsel, the extent to which [name of witness] was exposed to previous testimony, the extent to which the testimony of [name of witness] was the same as or different from previous testimony to which [name of witness] was exposed, the extent to which [name of witness's] testimony was consistent or inconsistent with prior statements, and any other factor that you find helpful.

[2] Facts Surrounding Alleged Violation of Sequestration Order Disputed

The court entered an order that precluded witnesses who have not yet testified from hearing or learning the testimony of previous witnesses. The [plaintiff or defendant] claims that [name of witness] violated this order by [insert summary of the claim -- *e.g.,* reading a transcript of the testimony of another witness]. I instruct you that my order was violated if this is true. The [plaintiff or defendant] denies that any violation occurred. You have heard the evidence regarding the alleged violation. It is for you to decide whether or not the claim made by the [plaintiff or defendant] is true. If you find that it is true, you may consider the fact that this witness violated the court's order and [heard or learned] of another witness's testimony in evaluating [name of witness's] credibility and deciding how much weight to give to this witness's testimony. You may consider whether the violation was willful on the part of [name of witness] or counsel, the extent to which [name of witness] was exposed to previous testimony, the extent to which the testimony of [name of witness] was the same as or different from previous testimony to which [name of witness] was exposed, the extent to which [name of witness's] testimony was consistent or inconsistent with prior statements, and any other factor that you find helpful. You may consider the fact that a witness falsely denied violating an order in assessing the overall credibility of the witness.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 7 OPINION AND EXPERT TESTIMONY

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§ 7.syn Synopsis to Chapter 7: OPINION AND EXPERT TESTIMONY

7-1 Lay Opinion Testimony.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Opinions and Inferences Generally

[2] Opinions on Ultimate Issues

7-2 Expert Witnesses -- Generally.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Qualifications of Witness

[2] Reliance on Inadmissible Facts or Data

[3] Exemption from Sequestration

7-3 Court-Appointed Experts.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Court Calls Expert Witness

[2] Party Calls Witness -- Court-Appointed Status Revealed

[3] Court Questions Witness

[4] Counsel Objects to Court's Calling Witness or Questions in Jury's Presence

[5] Qualifications of Witness

[6] Reliance on Inadmissible Facts or Data

[7] Exemption from Sequestration

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7-1 Lay Opinion Testimony.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning the qualification of a person to be a witness***, the existence of a privilege, or the admissibility of evidence ***shall be determined by the court***, subject to the provisions of subdivision (b). In making its determination ***it is not bound by the rules of evidence except those with respect to privileges***.

* * *

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' ***testimony in the form of opinions or inferences is limited to those*** opinions or inferences which are (a) ***rationally based on the perception of the witness***, and (b) ***helpful*** to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) ***not based on scientific, technical, or other specialized knowledge*** within the scope of Rule 702.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), ***testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue*** to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an

element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

[b] Key Points.

1. *Rule 701* recognizes that testimony by a lay witness that includes opinions or inferences may be of assistance to the trier of fact and may be admitted provided that the opinions or inferences are both rationally based on the perceptions of the witness and helpful in understanding the testimony of the witness or resolving a disputed issue.

2. *Rule 704(a)* provides that testimony is not rendered inadmissible because it addresses an ultimate issue that the trier of fact is called upon to decide. But, the testimony must be otherwise admissible, which means that it must be rationally based on the perceptions of the witness and helpful, as required by *Rule 701*.

3. It is not always clear when an opinion or inference of a witness will be helpful to the trier of fact. As a general rule, the witness is not permitted to tell the jury how the witness would decide a disputed issue. Rather, the witness is expected to communicate as completely as possible the information that arises from the witness's perceptions of events or conditions. To the extent that the witness adds information that the trier of fact can use to resolve an issue, the witness's testimony is likely to be helpful.

4. *Rule 701* was amended effective December 1, 2000, to clearly provide that expert testimony that should be offered under *Rule 702* cannot be smuggled in under *Rule 701*. One principal reason for the amendment was to prevent parties from subverting the discovery requirements concerning expert witnesses found in *Fed. R. Civ. P. 26*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to lay opinion testimony. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of lay opinion evidence under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection made to the lay opinion testimony. The party offering the testimony must show that it is rationally based on the perceptions of the witness and helpful to a clear understanding of the witness's testimony or the determination of a disputed issue. I find by a preponderance of the evidence that the [describe the lay opinion evidence in dispute] [is or is not] rationally based on the perceptions of the witness, [is or is not] helpful to a clear understanding of the witness's testimony [and/or] a determination of an issue in dispute, and [is or is not] expert testimony that must be assessed under *Rule 702*. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude lay opinion evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection to lay opinion testimony, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a

limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to lay opinion testimony, but may want the judge to explain to the jury something about opinion testimony and the respective roles of witness and jury.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Opinions and Inferences Generally

Sometimes a witness testifies in the form of opinions or inferences. The witness does so in order to provide you with all of the information that might help you resolve disputed issues. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

[2] Opinions on Ultimate Issues

Sometimes a witness testifies in the form of opinions or inferences. The witness does so in order to provide you with all of the information that might help you resolve disputed issues. A witness sometimes expresses an opinion in an effort to provide as much information for your use as possible on one of the issues that you must decide. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is your job, not the witness's job, to decide the disputed issues in this case. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 7 OPINION AND EXPERT TESTIMONY

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7-2 Expert Witnesses -- Generally.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally.* -- ***Preliminary questions concerning the qualification of a person to be a witness***, the existence of a privilege, or the admissibility of evidence ***shall be determined by the court***, subject to the provisions of subdivision (b). In making its determination ***it is not bound by the rules of evidence except those with respect to privileges***.

* * *

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. ***This rule does not authorize exclusion of*** (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) ***a person whose presence is shown by a party to be essential to the presentation of the party's cause***, or (4) ***a person authorized by statute to be present.***

Rule 702. Testimony by Experts

If ***scientific, technical, or other specialized knowledge will assist the trier of fact*** to understand the evidence or to determine a fact in issue, ***a witness qualified as an expert*** by knowledge, skill, experience, training, or education, ***may testify thereto in the form of an opinion or otherwise***, ***if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case***.

Rule 703. Bases of Opinion Testimony by Experts

The ***facts or data*** in the particular case ***upon which an expert bases an opinion or inference may be those perceived by or made known to the expert*** at or before the hearing. ***If of a type reasonably relied upon by experts in the particular field*** in forming opinions or inferences upon the subject, ***the facts or data need not be admissible in evidence*** in order for the opinion or inference to be admitted. ***Facts or data that are otherwise inadmissible shall not be disclosed to the jury*** by the proponent of the opinion or inference ***unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect***.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), ***testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue*** to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant ***in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto***. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. ***The expert may in any event be required to disclose the underlying facts or data on cross-examination.***

[b] Key Points.

1. The trial judge is the gatekeeper when expert witnesses are called to testify and an objection is made to their testimony. Under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* , the trial judge generally decides whether the expert's testimony is relevant to the issues in dispute and sufficiently reliable to be admitted. *Daubert* was a scientific evidence case, but the Supreme Court extended its requirements in *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)* , which held that the gatekeeping function is one that the trial judge performs as to all experts, although the factors the judge will consider will differ along with the nature of the expertise claimed by the expert. When the trial judge performs the gatekeeping function, appellate courts will defer and apply an "abuse of discretion" standard on appeal from rulings admitting or excluding expert testimony. *General Electric Co. v. Joiner, 522 U.S. 136 (1997)* .

2. The trial judge performs the gatekeeping role under *Rule 104(a)* and thus may consider any evidence (except privileged information) in determining the admissibility of expert testimony. Any factual disputes are resolved under a preponderance of the evidence standard. *Bourjaily v. United States, 483 U.S. 171 (1987)* .

3. Although some judges state before the jury that an expert is "qualified," the better practice is for the trial judge not to indicate to the jury findings regarding a rule of evidence. The judge can overrule any objection to expert testimony and permit an expert to testify without placing before the jury the court's imprimatur as to a witness's expertise.

4. An expert witness may testify in the form of an opinion or "otherwise." The "otherwise" is a reminder that an expert may be asked to give background information instead of an opinion.

5. An expert may testify on the basis of information provided at the trial or before. Some experts will be exempt from sequestration under *Rule 615* and will testify on the basis of hearing the trial evidence. Other experts will testify on the

basis of hypothetical questions. Some experts will testify on the basis of reviewing before trial facts or data that either are admitted at trial or are inadmissible but are the type of information upon which similar experts rely in forming opinions or drawing inferences with respect to that subject matter.

6. Just as the trial judge must determine whether an expert qualifies under *Rule 702* and whether the basis of the expert's opinion is sufficient under *Daubert*, the trial judge also must decide whether an expert may rely upon inadmissible data in rendering an opinion. This is also a *Rule 104(a)* ruling. The last sentence of *Rule 703* was added on December 1, 2000, to make very clear that the fact that a witness may rely upon inadmissible facts or data does not mean that the jury must hear the inadmissible matter. Under the amended Rule, the judge may not permit the jury to hear inadmissible facts or data unless the probative value of the evidence in evaluating the expert testimony substantially outweighs the prejudicial effect of the evidence (*i.e.*, the likelihood it may be used as substantive evidence by the trier of fact). This is a reverse-*Rule 403* balancing test. Under *Rule 703*, in close cases the jury does not hear the inadmissible facts or data. Even when the judge decides that it might be important for the jury to know something about the basis for the witness's opinion, the trial judge may put limits on the details that the jury is permitted to hear when an expert relies on otherwise inadmissible evidence.

7. *Rule 705* permits counsel to offer expert testimony in the way that it is most likely to be understood, with the facts either preceding or following opinions. The court may, however, require that the facts be presented first.

8. Although *Rule 705* states that an inquiry into the facts upon which an expert relies "may" be permitted on cross-examination, the court is almost certain to permit a cross-examiner latitude to ask the expert about facts or data upon which an opinion is based. The word "may" suggests, however, that reasonable time limits and limitations on cumulative testimony are permissible.

9. *Rule 704(b)* places a limit on expert testimony regarding the mental state of a criminal accused at the time an alleged crime was committed.

10. *Rule 615(3)* provides authority for a trial judge to permit an expert to remain in the courtroom during trial, but the party who wants to exempt the expert from a sequestration order must demonstrate, if there is an objection, that the presence of the expert is essential. Prudent counsel will not permit an expert in the courtroom until the trial judge has ruled that the expert is essential and thus may be present while other witnesses testify.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to expert testimony. Unless a timely objection is made, the evidence will be admitted. However, a timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of expert testimony under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection to this expert testimony. The party offering the testimony must show that it constitutes scientific, technical, or specialized knowledge that will assist the jury in understanding the evidence or resolving disputed issues and that the witness is qualified to provide such testimony. I have considered both the relevance of the evidence, including its fit in this case, and the reliability of such evidence in making my ruling. I find by a preponderance of the evidence that the [describe the expert opinion evidence in dispute] [does or does not] constitute scientific, technical, or specialized knowledge, it [will or will not] assist the jury in this case, the witness [is or is not] qualified to provide such testimony, the testimony [is or is not] based upon sufficient facts or data, the testimony [is or is not] the product of reliable principles and methods, and the witness [has or has not] applied the principles and methods reliably to the facts of the case. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the expert relies upon evidence not otherwise admissible, the trial judge may also consider stating for the record the

following: The witness has relied upon facts or data that are not otherwise admissible in evidence. I find by a preponderance of the evidence that these facts or data [are or are not] of a type reasonably relied upon by experts in the field. I have carefully considered the extent to which such facts or data should be admitted and the danger that they might be used for their truth rather than to explain the witness's opinion. I find that the probative value of the inadmissible facts or data in assisting the jury to evaluate the expert's opinion [does or does not] substantially outweigh the prejudicial effect of permitting the jury to hear the facts or data. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude expert evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection to the expert testimony, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to expert testimony, but may want the judge to explain to the jury something about expert or opinion testimony and the respective roles of witness and jury.

The following instructions can easily be requested by parties and readily be adopted by trial judges to explain trial developments to the jury.

[1] Qualifications of Witness

Some witnesses who testify claim to have special knowledge, skill, training, experience, or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience, or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

[2] Reliance on Inadmissible Facts or Data

This witness's opinion is based on certain facts or data that the court has determined are admissible only to explain the basis of the expert's opinion. These facts or data are [describe in summary the inadmissible facts or data]. You may consider these facts or data when you assess the witness's credibility and you decide what weight to give the opinion that the witness offered. You must not use this information for any other purpose.

[3] Exemption from Sequestration

You might have noticed that most witnesses were excluded from the courtroom while other witnesses testified, but that [name of witness] was present during the testimony of some or all witnesses. The court permitted [name of witness] to be present because it was expected that this witness's testimony would refer to that of other witnesses. You should ignore the fact that this witness was present in comparing her credibility with that of other witnesses. She is neither more nor less credible simply because she was allowed to be present when other witnesses testified.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 7 OPINION AND EXPERT TESTIMONY

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7-3 Court-Appointed Experts.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by court*. -- ***The court may***, on its own motion or at the suggestion of a party, ***call witnesses***, and ***all parties are entitled to cross-examine witnesses*** thus called.

(b) *Interrogation by court*. -- ***The court may interrogate witnesses***, whether called by itself or by a party.

(c) *Objections*. -- ***Objections*** to the calling of witnesses by the court or to interrogation by it ***may be made at the time or at the next available opportunity when the jury is not present***.

Rule 702. Testimony by Experts

If ***scientific, technical, or other specialized knowledge will assist the trier of fact*** to understand the evidence or to determine a fact in issue, ***a witness qualified as an expert*** by knowledge, skill, experience, training, or education, ***may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case***.

Rule 703. Bases of Opinion Testimony by Experts

The ***facts or data*** in the particular case ***upon which an expert bases an opinion or inference may be those perceived by or made known to the expert*** at or before the hearing. ***If of a type reasonably relied upon by experts in the particular field*** in forming opinions or inferences upon the subject, ***the facts or data need not be admissible in evidence*** in order for the opinion or inference to be admitted. ***Facts or data that are otherwise inadmissible shall not be disclosed to the jury*** by the proponent of the opinion or inference ***unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect***.

Rule 706. Court Appointed Experts

(a) *Appointment*. -- The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. ***The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection***. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; ***and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party***, including a party calling the witness.

* * *

[b] Key Points.

1. *Rule 614(a)* and *Rule 706(a)* provide that the court may call a court-appointed witness to testify, and all parties may cross-examine any witness called by the court. The rules do not set forth guidelines as to when the court should consider calling witnesses and when it should leave the decision whether to call an expert to the parties. Neither rule requires the court to call any witness.

2. The court is free to indicate to the parties its interest in having a witness testify and to provide the parties with an opportunity to call the witness.

3. *Rule 706(a)* provides specifically that all parties may cross-examine any court-appointed expert called either by the court or by another party. *Rule 706* does not explicitly state that the court may question a court-appointed expert, but the assumption appears to be that the court may. *Rule 614(b)* provides specific authority for the court to examine any witness, including a court-appointed expert.

4. Like *Rule 605*, which provides that the judge may not be a witness while judging a trial and that a party may object outside the presence of the jury if the judge proposes to give testimony, *Rule 614* permits objections to the judge's calling or questioning witnesses to be made outside the hearing of the jury. A prudent party should make an objection to the judge's calling a witness as soon as possible during the jury's absence to avoid waiving the objection.

5. Nothing in *Rule 614* precludes a party from objecting in the jury's presence. In some instances counsel may be

prepared to risk confronting the judge before the jury and to object to the court's calling or questioning a witness in the hope that the court may reconsider its proposed course of action before any damage occurs.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to testimony by a court-appointed expert. Unless a timely objection is made, the expert's evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of expert testimony under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection to this expert testimony. To be admissible, expert testimony must constitute scientific, technical, or specialized knowledge that will assist the jury in understanding the evidence or resolving disputed issues and the witness must be qualified to provide such testimony. I have considered both the relevance of the evidence, including its fit in this case, and the reliability of such evidence in making my ruling. I find by a preponderance of the evidence that the [describe the expert opinion evidence in dispute] [does or does not] constitute scientific, technical, or specialized knowledge, it [will or will not] assist the jury, the witness [is or is not] qualified to provide such testimony, the testimony [is or is not] based upon sufficient facts or data, the testimony [is or is not] the product of reliable principles and methods, and the witness [has or has not] applied the principles and methods reliably to the facts of the case. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

If the judge excludes the testimony, no further ruling is required. If the judge admits the testimony, two additional rulings might be required for a complete record. The first deals with disclosure of the court appointment. The second deals with disclosure of inadmissible facts and data. With respect to the first ruling, the judge might consider the following statement for the record: I have also considered whether the fact that the court appointed the witness should be revealed to the jury and have carefully weighed the probative value of this fact against its possible prejudicial effect. I find that the possible prejudicial effect [does or does not] substantially outweigh the probative value of the evidence. I shall therefore [disclose or not disclose] to the jury the fact that the court appointed the expert.

If the expert relies upon evidence not otherwise admissible, the trial judge may also consider stating for the record the following: The witness has relied upon facts or data that are not otherwise admissible in evidence. I find by a preponderance of the evidence that these facts or data [are or are not] of a type reasonably relied upon by experts in the field. I have carefully considered the extent to which such facts or data should be admitted and the danger that they might be used for their truth rather than to explain the witness's opinion. I find that the probative value of the inadmissible facts or data in assisting the jury to evaluate the expert's opinion [does or does not] substantially outweigh the prejudicial effect of permitting the jury to hear the facts or data. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

Should the judge exclude the expert evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document, including any report the expert may have made to the court, setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection to court-appointed expert testimony, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or

both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to the testimony of a court-appointed expert, but may want the judge to explain to the jury something about opinion testimony and the respective roles of witness and jury.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Court Calls Expert Witness

I am about to call a witness to testify as the court's witness; this means that neither party is calling the witness. The fact that I call the witness does not indicate that the witness's testimony is any more important or any more likely to be true than the testimony of any other witness. Nor does the fact that I ask questions of the witness indicate that these questions are any more important than the questions asked by the lawyers or that the answers given by the witness to my questions are any more likely to be true or entitled to weight than the answers to the questions asked by the lawyers. This witness was asked by the court to testify and was not retained by either party. The fact that the court asked the witness to testify does not indicate that the testimony is more likely to be accurate and complete than the testimony of witnesses who are retained and called by the parties. However, you may consider the fact that neither party hired this witness to testify in assessing the witness's credibility.

[2] Party Calls Witness -- Court-Appointed Status Revealed

This witness was asked by the court to testify and was not retained by either party. The fact that the court asked the witness to testify does not indicate that the testimony is more likely to be accurate and complete than the testimony of witnesses who are retained and called by the parties. However, you may consider the fact that neither party hired this witness to testify in assessing the witness's credibility.

[3] Court Questions Witness

The fact that I ask questions of a witness does not indicate that these questions are any more important than the questions asked by the lawyers or that the answers given by the witness to my questions are any more likely to be true or entitled to weight than the answers to the questions asked by the lawyers.

[4] Counsel Objects to Court's Calling Witness or Questions in Jury's Presence

Counsel have the responsibility to object when they believe I am improperly calling a witness or asking questions. You should not draw any adverse inference against counsel or a party from an objection whether or not I sustain the objection.

[5] Qualifications of Witness

This witness claims to have special knowledge, skill, training, experience, or education that enable him/her to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience, or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

[6] Reliance on Inadmissible Facts or Data

This witness's opinion is based on certain facts or data that the court has determined are only admissible to explain the basis of the expert's opinion. These facts or data are [describe in summary the inadmissible facts or data]. You may consider these facts or data when you assess the witness's credibility and you decide what weight to give the opinion that the witness offered. You must not use this information for any other purpose.

[7] Exemption from Sequestration

You might have noticed that most witnesses were excluded from the courtroom while other witnesses testified, but that [name of witness] was present during the testimony of some or all witnesses. The court permitted [name of witness] to be present because it was expected that this witness's testimony would refer to that of other witnesses. You should ignore the fact that this witness was present in comparing his credibility with that of other witnesses. The witness is neither more nor less credible simply because he/she was allowed to be present when other witnesses testified.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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§ 8.syn Synopsis to Chapter 8: HEARSAY

8-1 Statement Not Admitted for Its Truth.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Cases in Which No Hearsay Is Admitted for Its Truth

[2] Cases in Which Some Hearsay Is Admitted for Its Truth

8-2 Statement Not Intended as an Assertion.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Unavailable Actor

[2] Available Actor

8-3 Prior Inconsistent Statements -- Substantive Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Inconsistent Statements Admissible for Their Truth

[2] Prior Inconsistent Statements Admissible for Their Truth -- Witness Denies Statements

[3] Prior Inconsistent Statements Not Admissible for Their Truth

[4] Prior Inconsistent Statements Not Admissible for Their Truth -- Witness Denies Statements

8-4 Prior Consistent Statements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Consistent Statements -- Admissible as Substantive Evidence

[2] Prior Consistent Statements -- Inadmissible as Substantive Evidence

[3] Combination of Statements Admissible and Inadmissible as Substantive Evidence

8-5 Prior Identifications.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Identification Undisputed

[2] Identification Disputed

8-6 Personal Admission.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Single Party Case

[2] Multiple Party Civil Case -- Basic Rule

[3] Multiple Party Criminal Case -- Basic Rule

[4] Multiple Party Civil Case -- Additional Statements Admitted Under Exceptions

[5] Multiple Party Criminal Case -- Additional Statements Admitted Under Exceptions

8-7 Adoptive Admission.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Adoption Uncontested

[2] Adoption Contested

8-8 Authorized Admission.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Single Party Civil Case

[2] Multiple Party Civil Case

[3] Single Defendant Criminal Case

[4] Multiple Defendant Criminal Case

8-9 Agent's Admission.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Single Party Civil Case

[2] Multiple Party Civil Case

[3] Single Defendant Criminal Case

[4] Multiple Defendant Criminal Case

8-10 Coconspirator's Statement.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Single Defendant Civil Case

[2] Multiple Defendant Civil Case -- Admissible Against All Defendants

[3] Multiple Defendant Civil Case -- Admissible Against Some Defendants

[4] Single Defendant Criminal Case

[5] Multiple Defendant Criminal Case -- Admissible Against All Defendants

[6] Multiple Defendant Criminal Case -- Admissible Against Some Defendants

8-11 Present Sense Impression.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant Testifies at Trial

[2] Declarant Does Not Testify at Trial

8-12 Excited Utterance.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant Testifies at Trial

[2] Declarant Does Not Testify at Trial

8-13 Existing Mental or Physical Condition, State of Mind.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant Testifies at Trial

[2] Declarant Does Not Testify at Trial

8-14 Statements for Medical Diagnosis or Treatment.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant Testifies at Trial

[2] Declarant Does Not Testify at Trial

8-15 Prior Recollection Recorded.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant's Own Recordation

[2] Declarant Adopted Record

8-16 Business Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Business Record to Prove Contents -- Custodian Testifies

[2] Business Record to Prove Contents -- Foundation by Certificate

[3] Business Record -- Admitted by Stipulation

[4] Absence of Entry in Business Record

8-17 Public Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Public Records to Prove Contents -- Custodian or Other Witness Testifies

[2] Public Record -- Self-authenticating

[3] Absence of Entry in Public Record -- Custodian Testifies

[4] Absence of Entry in Public Records -- Self-authenticating

8-18 Religious Organization Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Organizational Record to Prove Contents -- Custodian Testifies

[2] Organizational Record -- Admitted by Stipulation

8-19 Family Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Family Record to Prove Contents -- Witness Testifies

[2] Family Record to Prove Contents -- Circumstantial Authentication

8-20 Property Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Recorded Document

[2] Unrecorded Document

[8-21 Ancient Documents.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Ancient Documents Generally

[2] Witness Reliance on Ancient Documents

8-22 Market Reports and Commercial Publications.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Self-authenticated Exhibit -- No Explanatory Witnesses

[2] Exhibit with Explanatory Witnesses

8-23 Learned Treatises.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Use of Treatise on Direct Examination

[2] Use of Treatise on Cross-Examination

8-24 Reputation Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Reputation Regarding Family or Personal History

[2] Reputation Regarding Boundary

8-25 Judgments Admitted to Prove Underlying Facts.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Judgment in Criminal Case -- Use in Civil Case

[2] Judgment in Criminal Case -- Use in Criminal Case -- Single Defendant

[3] Judgment in Criminal Case -- Use in Criminal Case -- Multiple Defendants

[4] Civil Judgment on Personal History or Boundaries

8-26 Former Testimony.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Former Testimony Generally

[2] Former Testimony and Predecessors in Interest

8-27 Dying Declaration.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Dying Declaration -- Civil Case

[2] Dying Declaration -- Criminal Homicide Case

8-28 Declarations Against Interest.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declaration Against Pecuniary Interest

[2] Declaration Against Property Interest

[3] Declaration Concerning Civil Liability

[4] Declaration Against Penal Interest

8-29 Family History.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Declarant's Own History

[2] Statement About Another's History

8-30 Forfeiture by Wrongdoing.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Evidence of Wrongdoing Admitted

[2] Evidence of Wrongdoing Excluded

8-31 Residual Hearsay.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Hearsay Declarant Unavailable

[2] Hearsay Declarant Testifies

8-32 Hearsay Within Hearsay.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Admissions in Business or Public Records -- Single Party Case

[2] Admissions in Business or Public Records -- Multiple Party Case

[3] Hearsay Exceptions in Business or Public Records

8-33 Impeaching Declarants -- Prior Bad Acts.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Witness Admits Prior Bad Act

[2] Witness Denies Prior Bad Act

[3] Witness Invokes Privilege Against Self-Incrimination

[4] Absence of Good Faith

[5] Extrinsic Evidence

8-34 Impeaching Declarants -- Character Evidence.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Negative Character Witness Generally

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

[4] Multiple Character Witnesses

8-35 Impeaching Declarants -- Prior Convictions.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Conviction of a Hearsay Declarant Generally

[2] Prior Conviction of Particular Declarant

8-36 Impeaching Declarants -- Bias.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Bias Generally

[2] Plea Bargain by Hearsay Declarant

[3] Group Membership

8-37 Impeaching Declarants -- Prior Inconsistent Statements.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Prior Inconsistent Statements -- Declarant Not Called as Witness

[2] Prior Inconsistent Statements -- Declarant Called as Witness

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-1

8-1 Statement Not Admitted for Its Truth.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended

by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

[b] Key Points.

1. Hearsay statements are those made by a declarant outside of the trial, when the statements are offered for their truth. A statement is not hearsay if offered for a purpose that does not require that the statements be believed by the trier of fact. For example, an out-of-court statement by a declarant to the driver of a car that "your tires are bad" is not hearsay if offered to prove that the statement put the driver on notice of a possible problem. The statement is hearsay if offered to prove that the tires were, in fact, bad.

2. Generally, if an objection is made that a proffered statement is hearsay, the proffering party must articulate a relevant, nonhearsay use for the statement to circumvent the objection.

3. When a statement is admissible for a nonhearsay purpose but contains an assertion of fact that might easily be considered for its truth, the objecting party may rely upon *Rule 403* and urge exclusion of the statement on the ground that its prejudicial effect (*i.e.*, the consideration by the trier of fact of the statement for its truth) substantially outweighs its probative value. If the trial judge overrules a *Rule 403* objection, the objecting party should consider asking for a limiting instruction regarding the permissible and impermissible uses of the statement.

4. Difficult cases arise when a declarant makes a statement that is offered not for its truth but as circumstantial evidence of something else. Suppose, for example, that a declarant makes a statement that the "defendant is a donkey." If this statement is offered to prove that it is unlikely that the declarant would have voluntarily entrusted his funds to the defendant, a trial judge could conclude that the statement is relevant, circumstantial evidence and is not offered to prove the truth of what the declarant asserted. In some circumstances the content of a statement not offered for its truth may present dangers associated with character evidence. *Rule 403* objections are likely to be made under these circumstances. If the evidence is admitted, a limiting instruction might well be important.

5. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling. Generally, there are no *Confrontation Clause* issues when statements are not offered for their truth.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to

statements the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered [name of party's] hearsay objection. I find by a preponderance of the evidence that the statement [is or is not] offered for its truth and thus [is or is not] hearsay as defined by *Rule 801(c)*.

If the judge has found the statement to be hearsay, the judge will exclude it unless it qualifies under *Rule 801(d)* or one of the exceptions in *Rule 803*, *804*, or *807*. If the judge finds that the statement is offered for a nonhearsay purpose and is therefore admissible under *Rule 802*, the judge may want to add the following statement for the record *outside the hearing of the jury*: I have considered the probative value of the statement for [identify nonhearsay purpose] and have weighed this against the possible prejudicial effect of the statement were the jury to use it for its truth. I have considered the utility of limiting instructions as part of the weighing process, and I find that the possible prejudicial effect of the statement [does or does not] substantially outweigh its probative value. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Cases in Which No Hearsay Is Admitted for Its Truth

[Name of witness] has testified that [name of or description of declarant] made a statement concerning [brief description of subject matter -- *e.g.*, the condition of the tires]. It is for you to decide whether such a statement was made. I instruct you, however, that you may consider any such statement only for the limited purpose of [briefly state the limited purpose -- *e.g.*, deciding whether the defendant had notice of a bad tire]. You may not consider such a statement in deciding [describe truth of matter stated -- *e.g.*, whether the tire was in fact bad]. In other words, you are not to decide whether any such statement was true. Instead, you are to decide, whether or not it was true, if it helps you determine [reiterate the limited purpose -- *e.g.*, whether the defendant had notice of a bad tire].

[2] Cases in Which Some Hearsay Is Admitted for Its Truth

[Name of witness] has testified that [name of or description of declarant] made a statement concerning [brief description of subject matter -- *e.g.*, the condition of the tires]. It is for you to decide whether such a statement was made. I instruct you, however, that you may consider any such statement only for the limited purpose of [briefly state the limited

purpose -- *e.g.*, deciding whether the defendant had notice of a bad tire]. You may not consider such a statement in deciding [describe truth of matter stated -- *e.g.*, whether the tire was in fact bad]. In other words, you are not to decide whether any such statement was true. Instead, you are to decide, whether or not it was true, if it helps you determine [reiterate the limited purpose -- *e.g.*, whether the defendant had notice of a bad tire].

When I instruct you that a statement is admitted for a limited purpose, you must use the statement for only that purpose. You have heard or might hear testimony about other statements that you are permitted to accept as true. The only limitations on your use of any statements admitted as evidence are those stated in my instructions.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-2

8-2 Statement Not Intended as an Assertion.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- ***A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion***.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

* * *

[b] Key Points.

1. *Rule 801(a)* limits the definition of hearsay to oral or written assertions or conduct that is nonverbal when the

assertions or conduct are intended by the declarant as an assertion. Thus, evidence that a person laughed or cried or jumped up and down with joy usually will not constitute hearsay under *Rule 801*.

2. *Rule 104(a)* governs any dispute as to whether a declarant intended to make an assertion. Thus, under the Supreme Court's decision in *Bourjaily v. United States, 483 U.S. 171 (1987)* , the trial judge may consider inadmissible as well as admissible evidence in deciding whether or not an assertion was intended.

3. Evidence that is not hearsay must be relevant to be admitted. The proponent of the evidence generally bears the burden of demonstrating relevance. For example, evidence that a plaintiff screamed might be offered in a personal injury case to show suffering. The plaintiff will have to show, however, that the scream was temporally related to the injury at issue in litigation.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [the oral or written words (were or were not) assertions, the conduct (was or was not) intended as an assertion by the actor] and thus [are or are not, is or is not] a statement under *Rule 801(a)*. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

If the judge finds that the words or conduct are not statements, they will not be hearsay. But, if the judge finds that they qualify as statements, the proponent may next argue that they are not offered for their truth. In ruling on whether this is so, the judge may want to add for the record *outside the hearing of the jury* something like the following: I have considered [name of party's] hearsay objection. I find by a preponderance of the evidence that the statement [is or is not] offered for its truth and thus [is or is not] hearsay as defined by *Rule 801(c)*.

If the judge has found the statement to be hearsay, the judge will exclude it unless it qualifies under *Rule 801(d)* or one of the exceptions in *Rule 803*, *804*, or *807*. If the judge finds that the statement is offered for a nonhearsay purpose and is therefore admissible under *Rule 802*, the judge may want to add the following statement for the record *outside the hearing of the jury*: I have considered the probative value of the statement for [identify nonhearsay purpose] and have weighed this against the possible prejudicial effect of the statement were the jury to use it for its truth. I have considered the utility of limiting instructions as part of the weighing process, and I find that the possible prejudicial effect of the statement [does or does not] substantially outweigh its probative value. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the

advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Unavailable Actor

You have heard evidence that [describe evidence -- *e.g.*, the automobile passed inspection the day before the accident]. The [insert party relying on evidence] contends that [describe contention -- *e.g.*, this proves that the brakes were in good condition at the time of the accident]. The person whose conduct is relied upon [identify actor -- *e.g.*, the inspector] is unavailable as a witness. You must decide how much weight to give this evidence and the significance of the fact that the [identify actor] is not available to testify.

[2] Available Actor

You have heard evidence that [describe evidence -- *e.g.*, the automobile passed inspection the day before the accident]. The [insert party relying on evidence] contends that [describe contention -- *e.g.*, this proves that the brakes were in good condition at the time of the accident]. The person whose conduct is relied upon [identify actor -- *e.g.*, the inspector] has now testified as a witness. You must decide how much weight to give both [describe conduct -- *e.g.*, the inspection] and the testimony of the [identify actor].

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CHAPTER 8 HEARSAY

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8-3 Prior Inconsistent Statements -- Substantive Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement*. -- In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness*. -- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if --***

(1) Prior statement by witness. -- ***The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition***, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; * * *.

* * *

[b] Key Points.

1. *Rule 801(d)(1)(A)* provides that certain prior inconsistent statements of a witness may be used as substantive evidence. These statements must have been made (a) under oath, (b) subject to penalty of perjury, and (c) in a proceeding. Unlike the hearsay exception for former testimony (*Rule 804(b)(1)*), *Rule 801(d)(1)(A)* imposes no requirement that the party against whom a prior statement is offered have been present at or had an opportunity to participate in the proceeding in which a prior statement was made. Thus, grand jury testimony may be used by the prosecution in a criminal case as substantive evidence if it is inconsistent with a trial witness's testimony, even though the defendant was not present when the grand jury testimony was given.

2. *Rule 801* does not specifically refer to *Rule 613*, but *Rule 613* specifically refers to *Rule 801(d)(2)*. It appears that the basic requirements for all prior inconsistent statements, whether admitted as substantive evidence (except for admissions) or simply as impeachment, are set forth in *Rule 613*. *Subdivision (a)* of *Rule 613* eliminates the rule laid down in Queen Caroline's case that a party seeking to impeach a witness with a prior written inconsistent statement must show it to the witness before asking questions about it. Now impeaching counsel must, upon request, show it to opposing counsel, but not to the witness. There is no restriction upon impeaching counsel's showing the statement to the witness, but the rule permits impeaching counsel to choose when to do so.

3. *Rule 613(b)* eliminates the foundation requirement for prior inconsistent statements that qualify as admissions under *Rule 801(d)(2)*. It does not eliminate the foundation requirement for prior inconsistent statements that are admissible under *Rule 801(d)(1)*. When a party seeks to offer extrinsic evidence of a prior inconsistent statement as substantive evidence, the witness who made the prior inconsistent statement must be provided an opportunity to explain or deny the prior inconsistent statement. Whereas the common-law requirement was that the foundation had to be laid before extrinsic evidence could be used, *Rule 613(b)* eases the foundation requirement and permits impeaching counsel to afford a witness an opportunity to deny or explain after extrinsic evidence is presented. *Rule 801(d)(1)(A)* requires that the witness whose prior inconsistent statement is offered as substantive evidence be present and available for cross-examination. This requirement is consistent with the basic foundation required by *Rule 613* and generally is satisfied even if the witness claims loss of memory about the prior statement.

4. It is permissible for counsel to call a witness knowing that the witness will depart from a prior statement that is admissible under *Rule 801(d)(1)(A)* and intending to use the prior inconsistent statement as substantive evidence.

5. It is not permissible for a direct examiner to call a witness who will be unfavorable for the purpose of eliciting a prior inconsistent statement that is not admissible for its truth. In this circumstance, the direct examiner is seeking to put prior inconsistent statements into the case that would never be admitted if the other party chose not to call the witness (which is likely if the other party knows the witness has made prior inconsistent statements). A party may not legitimately call a witness knowing that the witness will have nothing positive to say in order to offer prior inconsistent statements not admissible for their truth as impeachment evidence, because the party has no legitimate reason to call the witness.

6. A party who legitimately calls a witness may be able to elicit prior inconsistent statements not admissible for their truth that could be used by a cross-examiner to impeach the witness. There is a difference between (a) calling a witness who has a positive contribution to make to the direct examiner's case and impeaching the witness, and (b) calling a witness who has no positive contribution to make in order to elicit prior inconsistent statements of the witness that are not admissible for their truth. In (a), the direct examiner is seeking the legitimate help of the witness and seeking also to elicit the impeachment evidence to protect the witness from cross-examination. It is (b) that is impermissible.

7. The fact that a prior inconsistent statement is admissible as substantive evidence does not mean that the party who offers it is barred from arguing that the prior statement also is relevant to assessing the credibility of the witness-declarant. A prior inconsistent statement that is admitted under *Rule 801(d)(1)(A)* may be used as both impeachment and substantive evidence.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to prior inconsistent statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the prior statement [is or is not] a statement of a trial witness, it [is or is not] sufficiently inconsistent with the witness's trial testimony to qualify as a prior inconsistent statement, it [was or was not] made under oath, subject to penalty of perjury in a [trial hearing, proceeding or deposition], and the witness [is or is not] available for cross-examination on the statement. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Inconsistent Statements Admissible for Their Truth

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. These prior statements were made under oath, subject to penalty of perjury, and in a formal proceeding like this trial. You may give these statements the same weight that you would give trial testimony by a witness. If you find these prior statements to be inconsistent with the trial testimony, you must decide what parts, if any, you believe of the trial testimony and the prior statements.

[2] Prior Inconsistent Statements Admissible for Their Truth -- Witness Denies Statements

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that were made under oath, subject to penalty of perjury, and in a formal proceeding like this trial. You must decide whether the witness made these statements and whether they are inconsistent with the witness's testimony in this trial. You may give any statements that were made and that are inconsistent the same weight that you would give trial testimony by a witness. You must decide what parts, if any, you believe of the trial testimony and of any prior inconsistent statements that were made.

[3] Prior Inconsistent Statements Not Admissible for Their Truth

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. You must decide whether the witness made prior statements, whether they are inconsistent with the witness's testimony, and whether any prior statements cause you to doubt the trial testimony of the witness. It is important that you consider any of these prior statements only for the purpose of assessing the credibility of the testimony given in this trial by the witness.

[4] Prior Inconsistent Statements Not Admissible for Their Truth -- Witness Denies Statements

Any party may bring out any relevant information about a witness to assist you in assessing the witness's credibility. The [insert party] has asked this witness about prior statements of the witness that might be inconsistent with the witness's testimony in this trial. You must decide whether the witness made prior statements, whether they are inconsistent with the witness's testimony, and whether any prior statements cause you to doubt the trial testimony of the witness. It is important that you consider any of these prior statements only for the purpose of assessing the credibility of the testimony given in this trial by the witness. You may consider the witness's denial of making statements in assessing the witness's overall credibility.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-4 Prior Consistent Statements.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

(1) *Prior statement by witness*. -- ***The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is*** (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) ***consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive,*** or (C) one of identification of a person made after perceiving the person; * * *.

* * *

[b] Key Points.

1. At common law, prior consistent statements generally were admissible only for rehabilitation, not for their truth. However, *Rule 801(d)(1)(B)* makes certain prior inconsistent statements admissible as substantive evidence when the declarant whose statement is offered testifies during the trial and is available for cross-examination. As long as the cross-examiner has the opportunity to question the witness concerning the prior statements, the foundation is likely to be deemed adequate even if the witness has memory problems.

2. Aside from the requirement that the witness be available and subject to cross-examination, *Rule 801(d)(1)(B)* requires that a prior statement be consistent with the trial testimony and be offered to rebut one or more of three express or implied charges: (a) recent fabrication, (b) improper influence, and (c) improper motive.

3. The Supreme Court held in *Tome v. United States, 513 U.S. 150 (1995)* that a prior consistent statement is admissible as substantive evidence to rebut a charge of recent fabrication or improper influence or motive only if the statement was made prior to the time of the charged fabrication or the time that that the alleged influence or motive arose.

4. A number of reported decisions uphold the admission of prior consistent statements simply to rehabilitate a witness, not for the truth of the prior statements. Prior consistent statements made after a motive to falsify arose raise relevance problems. Common-law courts traditionally observed that mere repetition of a statement does not increase the likelihood that it is true.

5. The fact that a prior consistent statement is admissible as substantive evidence does not mean that the party relying upon it cannot also argue that the consistency of the statement and the trial testimony also bolsters the credibility of the witness-declarant.

6. There is no requirement in *Rule 801(d)(1)(B)* that prior consistent statements must have been made under oath, subject to penalty of perjury, and in a proceeding in order to qualify as substantive evidence. This requirement is confined to prior inconsistent statements under (d)(1)(A).

9. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to prior consistent statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the prior statement [is or is not] a statement of a trial witness, it [is or is not] sufficiently consistent with the witness's trial testimony to qualify as a prior consistent statement, it [is or is not] offered to rebut a charge of [recent fabrication or improper influence or motive], the prior statement [was or was not] made prior to the time that the [motive to falsify or the improper influence or motive arose], and the witness [is or is not] available for cross-examination on the statement. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Consistent Statements -- Admissible as Substantive Evidence

[Name of party] has presented prior statements of [name of witness] to rebut any suggestion that [name of witness] decided to give false testimony or that the testimony was the product of some improper influence or motive. You must decide whether [name of witness] made these prior statements, and you may give any of these prior statements the same weight as trial testimony. You must decide what portion of the witness's testimony and the prior statements is true.

[2] Prior Consistent Statements -- Inadmissible as Substantive Evidence

[Name of party] has presented prior statements of [name of witness] to rebut any suggestion that [name of witness] decided to give false testimony or that the testimony was the product of some improper influence or motive. You must decide whether [name of witness] made these prior statements. You may consider how consistent any such statements were with the witness's trial testimony in assessing the credibility of this witness at trial.

[3] Combination of Statements Admissible and Inadmissible as Substantive Evidence

[Name of party] has presented prior statements of [name of witness]. Some of these statements are presented to rebut any suggestion that [name of witness] decided to give false testimony or that the testimony was the product of some improper influence or motive. These statements include [summarize statements]. You must decide whether [name of witness] made these prior statements, and you may give any of these prior statements the same weight as trial testimony. You must decide what portion of the witness's testimony and these prior statements is true. Other statements are presented simply because [name of party] contends that their consistency with the witness's trial testimony bolsters the credibility of the witness. These statements include [summarize statements]. You may consider how consistent any such statements were with the witness's trial testimony in assessing the credibility of this witness at trial.

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8-5 Prior Identifications.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

(1) *Prior statement by witness*. -- ***The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is*** (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) ***one of identification of a person made after perceiving the person***; * * *.

* * *

[b] Key Points.

1. Pretrial identifications made by a trial witness qualify as non-hearsay under *Rule 801* provided that the witness who made the identification testifies and is subject to cross-examination. There is no requirement that the pretrial identification be made in any particular format or that there have been any oath or other formality associated with the identification.

2. Generally, the provision that a witness be subject to cross-examination is satisfied if the cross-examiner has the opportunity to put questions to the witness. A witness's lack of memory does not render the witness unavailable.

3. There may be constitutional limitations on the use of pretrial identifications in criminal cases. Some procedures may be so unreliable as to violate due process. *Manson v. Brathwaite, 432 U.S. 98 (1977)* . Some identifications occurring after an accused has been formally charged require the presence of counsel. *Kirby v. Illinois, 406 U.S. 682 (1972)* .

4. An identification may also be a prior consistent statement, but *Rule 801(d)(1)(C)* establishes that all prior identifications are admissible as substantive evidence. There is no limitation on the use of these identifications that is analogous to the "rebuttal" limitation on the use of prior consistent statements.

5. Although pretrial identifications are admissible as substantive evidence, there is nothing in the rules that precludes the offering party from arguing that the pretrial identifications also corroborate and bolster the credibility of a trial witness.

6. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to prior statements of identification that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the prior statement [is or is not] a statement of a trial witness, it [is or is not] a statement by the witness identifying [name person identified] made by the witness after perceiving [name person identified], and the witness [is or is not] available for cross-examination on the statement. Therefore, the objection is [sustained or overruled], and the evidence is [excluded or admitted].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on

the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Identification Undisputed

The government has presented evidence that this witness identified the defendant prior to trial. You may give a pretrial identification the same weight as trial testimony, and you may consider the pretrial identification in assessing the credibility of the witness. You should consider all of the circumstances surrounding an identification in deciding what weight to give it. These may include the timing of the identification, the consistency of the identification with any description given by the witness, whether the witness chose the defendant from a group or viewed him alone, whether any suggestiveness might have influenced the witness, and the certainty or lack thereof expressed by the witness.

[2] Identification Disputed

The government has presented evidence that this witness identified the defendant prior to trial. You must decide whether this identification actually occurred. You may give a pretrial identification the same weight as trial testimony, and you may consider the pretrial identification in assessing the credibility of the witness. You should consider all of the circumstances surrounding any identification that was made in deciding what weight to give it. These may include the timing of the identification, the consistency of the identification with any description given by the witness, whether the witness chose the defendant from a group or viewed him alone, whether any suggestiveness might have influenced the witness, and the certainty or lack thereof expressed by the witness.

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8-6 Personal Admission.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

* * *

(2) Admission by party-opponent. -- ***The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity*** or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. * * *

[b] Key Points.

1. *Rule 801(d)(2)(A)* establishes that one party may admit into evidence the statements of an adverse party as admissions. At common law, admissions were hearsay but admissible as an exception. Under *Rule 801*, admissions are nonhearsay. The difference between treating admissions as exceptions and treating them as nonhearsay is semantic. The result is the same: The only evidentiary limitations are that the adverse party's statement must be relevant and must not violate another rule of evidence. For example, an adverse party's offer of settlement, while arguably relevant, is inadmissible under *Rule 408*. Similarly, statements made during settlement negotiations, otherwise admissible as admissions, may be excluded by *Rule 408*.

2. A statement need not admit anything to qualify as an admission. Any statement by a party offered against that party is admissible if relevant and not barred by another rule.

3. In a multi-party case, it is important for parties against whom a statement is not admissible to seek an instruction that lets the jury know that an admission is evidence only against the party who made the statement.

4. In criminal cases, the trial judge may have to make a voluntariness determination with respect to confessions when a defendant moves to suppress pretrial statements. The trial judge's determination, like most evidence determinations, uses a preponderance of the evidence standard. *Lego v. Twomey, 404 U.S. 477 (1972)* ; *Bourjaily v. United States, 483 U.S. 171 (1987)* .

5. In criminal cases, limiting instructions are not sufficient to protect codefendants from the prejudicial effect of admissions made by nontestifying codefendants. *Bruton v. United States, 389 U.S. 818 (1968)* . If two or more defendants are charged with a crime and one has confessed, the government may seek a severance so that it can use the confession against the defendant who made it without violating the rights of other defendants. Alternatively, the government may seek to have all defendants tried together by choosing not to use the confession against anyone or by seeking to redact the confession so that it does not refer to anyone other than the confessing defendant.

6. The proponent of an admission is not required to show that the party who made the admission had personal knowledge. Also, a party generally cannot object that an admission was stated in the form of an opinion. The theory of party admissions is that a party is responsible for statements it makes and that it has the opportunity to point out any deficiencies in its statements and to explain them.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the evidence [is or is not] a statement of [identify declarant-party] and is offered by [name of proponent] against [identify declarant-party]. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as a party admission under *Rule 801(d)(2)(A)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record

on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Single Party Case

One party is permitted to present as evidence statements made by another party. You may give these statements the same weight as trial testimony.

[2] Multiple Party Civil Case -- Basic Rule

One party is permitted to present as evidence statements made by another party. Each party is responsible, however, only for its own statements. You must be sure to use statements that one party offers against another only against the party who actually made the statement. No other party is responsible for these statements, and these statements may not be used as evidence against any other party.

[3] Multiple Party Criminal Case -- Basic Rule

The government is permitted to offer statements made by a defendant as evidence against that defendant, but not against other defendants. It is for you to decide whether a defendant made the statement offered by the government. You must be certain to use any statement of a defendant only against that defendant.

[4] Multiple Party Civil Case -- Additional Statements Admitted Under Exceptions

One party is permitted to present as evidence statements made by another party. Each party is responsible, however, only for its own statements, and the usual rule is that you must be sure to use evidence of a party's statements only against the party who actually made the statement. There are some statements that fall outside the usual rule and that may be used against all parties. You must be certain to use any statement of a party only against that party unless I specifically instruct you that the statement may also be used against other parties. I now instruct you that evidence of a statement [describe statement -- *e.g.*, that the defendant truck driver shouted immediately after an accident that "I ran the light"] may be used against all of the [describe parties -- *e.g.*, defendants] in this case.

[5] Multiple Party Criminal Case -- Additional Statements Admitted Under Exceptions

The government is permitted to offer statements made by a defendant as evidence against that defendant, but the usual rule is that such statements may not be used against other defendants. It is for you to decide whether a defendant made the statement offered by the government. You must be certain to use any statement of a defendant only against that defendant unless I specifically instruct you that a statement may be used against a defendant who did not make that statement. I now instruct you that [summarize statement] may be used against all defendants in this case.

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8-7 Adoptive Admission.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) ***a statement of which the party has manifested an adoption or belief in its truth,*** or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. * * *

[b] Key Points.

1. An adoptive admission is one in which a party adopted or ratified the statement of another. At common law, adoptive admissions were exceptions to the hearsay rule; under *Rule 801*, they and other admissions are deemed nonhearsay. The result under *Rule 801* is the same as under the common law. Adoptive admissions are admissible as long as they are relevant and not barred by some other rule. In short, they are treated virtually the same as admissions actually made by a party. Although there are cases that seem to hold that a trial judge should determine whether there is sufficient evidence for a jury to find adoption, *Rule 104(a)* would seem to be as applicable to adoptive admissions as to any other hearsay exemption or exception. Thus, the trial judge must decide whether adoption has been proved to the judge's satisfaction by a preponderance of the evidence. *Bourjaily v. United States, 483 U.S. 171 (1987)* .

2. In making the *Rule 104(a)* determination, the trial judge will usually consider all of the circumstances surrounding the making of a statement by someone other than a party and the party's purported adoption. These circumstances include whether the statement was the sort that would normally have elicited a response, whether the party heard and understood the statement, whether the party was in a position to respond, and what the party did in response to the statement.

3. Even though the trial judge must engage in fact finding to decide admissibility of contested statements, *Rule 104(e)* makes clear that a party against whom an adoptive admission is offered may develop all of the circumstances and ask the jury to give little or no weight to a so-called adoption.

4. The proponent of an adoptive admission is not required to show that the party who adopted a statement had personal knowledge. Also, a party generally cannot object that an admission was stated in the form of an opinion. The theory of party admissions is that a party is responsible for statements it makes or adopts and that it has the opportunity to point out any deficiencies in its statements or in adopted statements and to explain them.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the evidence [is or is not] a statement of [identify declarant], that [name of party against whom offered] [did or did not] adopt the statement, and the statement [is or is not] offered by [name of proponent] against [identify declarant-party]. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as an adoptive admission under *Rule 801(d)(2)(B)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or

other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Adoption Uncontested

One party to a case may present statements made by opposing parties as evidence. You may consider any statement made by a party and decide how much weight to give to such a statement. In this case, [name of proffering party] has presented evidence that [name of adopting party] adopted a statement made by someone else. You may treat an adopted statement as though it had been made by the party who adopted it.

[2] Adoption Contested

One party to a case may present statements made by opposing parties as evidence. You may consider any statement made by a party and decide how much weight to give to such a statement. In this case, [name of proffering party] has presented evidence that [name of adopting party] adopted a statement made by someone else. [Name of adopting party] disputes adopting the statement. It is for you to decide what weight, if any, to give this evidence. In deciding whether [name of adopting party] adopted a statement, you may consider whether someone else did make a statement, whether and how well [name of adopting party] heard and understood the statement, whether [name of adopting party] made any response, how easy or difficult it would have been to respond, and the extent to which a reasonable person in the position of [name of adopting party] would have thought that a response or failure to respond would be considered to be an adoption.

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8-8 Authorized Admission.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) ***a statement by a person authorized by the party to make a statement concerning the subject***,

or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. ***The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C),*** * * *.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. Any statement by a person authorized by a party to speak concerning a subject is admissible as readily as if the party actually made the statement. At common law, authorized statements were exceptions to the hearsay rule, while *Rule 801* makes them nonhearsay. *Rule 801* expands the scope of authorized admissions from the common law by making even internal statements by a party admissible.

2. In many cases, there will be no question that a party authorized someone to make a statement on behalf of the party. In some cases, however, authorization will be a disputed question. The trial judge resolves disputes under *Rule 104(a)* and determines admissibility using a preponderance of the evidence standard. *See Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 801* as amended in 1997 makes clear that, in determining whether the declarant was authorized to speak for a party, the trial judge may consider the contents of the statements themselves but must also find some independent evidence of authorization. A party may offer evidence under *Rule 104(e)* designed to affect the weight any authorized admission is given.

3. The proponent of an admission is not required to show that the authorized speaker who made the admission had personal knowledge. Also, a party generally cannot object that an admission was stated in the form of an opinion. The theory of party admissions is that a party is responsible for statements it makes or authorizes and that it has the opportunity to point out any deficiencies in its statements and to explain them.

4. *Rule 806* provides that, when an authorized admission is introduced, the party against whom it is admitted may impeach the declarant in the various ways a party may impeach a trial witness. Moreover, the rule provides that a party need not lay the foundation required for prior inconsistent statements by *Rule 613* when impeaching an authorized agent. The last sentence of *Rule 806* is ambiguous, referring to hearsay and declarants, not to admissions. The thrust of *Rule 806* seems consistent with permitting any party against whom a statement, other than the party's own statement, is introduced to attack the declarant who made the statement. Thus, it is reasonable to expect that a party seeking to attack a declarant could call the declarant and ask leading questions directed at the credibility of the declarant and the statement that was introduced against the party.

5. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling. Generally, there are no *Confrontation Clause* issues when statements are not offered for their truth.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the evidence [is or is not] a statement of [identify declarant], [name of declarant] [was or was not] authorized by [name of party against whom offered] to make a statement on this subject, and the statement is offered by [name of proponent] against [name of party against whom offered]. In making this finding, I have considered the contents of the statement and also the additional evidence relied upon by the parties. The objection is [overruled or sustained], and the statement [is or is not] admissible as an authorized admission under *Rule 801(d)(2)(C)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Single Party Civil Case

The [plaintiff or defendant] presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use these statements as evidence against the [plaintiff or defendant]. You may consider the relationship of [name of declarant] to [name of party against whom statement is offered] in deciding the weight to give [name of declarant's] statements.

[2] Multiple Party Civil Case

The [plaintiff or defendant] presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may only use these statements as evidence against [name of plaintiff or defendant]. You may consider the relationship of [name of declarant] to [name of party against whom statement is offered] in deciding the weight to give [name of

declarant's] statements.

[3] Single Defendant Criminal Case

The government has presented evidence of certain statements made by [name or description of declarant]. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use them against the defendant. You may consider evidence concerning the relationship of [name of declarant] to the defendant in deciding the weight to give [name of declarant's] statements.

[4] Multiple Defendant Criminal Case

The government has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may only use these statements as evidence against [name of defendant]. You may consider the relationship of [name of declarant] to [name of defendant against whom statement is offered] in deciding the weight to give [name of declarant's] statements.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-9 Agent's Admission.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

* * *

(2) Admission by party-opponent. -- ***The statement is offered against a party and*** is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) ***a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship,*** or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. ***The contents of the statement shall be considered but are not alone sufficient to establish * * * the agency or employment relationship and scope thereof under subdivision (D),*** * * *.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(d)(2)(D)* makes admissible against a party any statement made by the party's agent or employee concerning a matter within the scope of the agent's or employee's agency or employment as long as the statement was made while the agency or employment relationship continued.

2. Unlike the common-law rule which restricted agent's statements to agents who had "speaking authority," *Rule 801(d)(2)(D)* contains no such restriction.

3. The trial judge makes the decision under *Rule 104(a)* whether the agency requirement is satisfied, generally using the preponderance of the evidence standard. *See Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 801* as amended in 1997 makes clear that, in determining whether the declarant was an agent or employee of a party, the trial judge may consider the contents of the statements themselves but must also find some independent evidence of agency or employment. Even though the trial judge may find agency, the party against whom an agent's statement is offered should be able to offer evidence to suggest that the employment or agency relationship was not one that should inspire confidence in the reliability of the statements.

4. In some cases, the agency issue for evidence purposes may overlap with an issue in the case. For example, the agent of a company might have admitted tortious conduct prior to a trial in which the company defends on the ground that the agent acted outside the scope of his/her agency. The trial judge may have to decide under *Rules 104(a)* and *801(d)(2)(D)* whether the agent's statement concerned a matter within the scope of the agency. The proponent of the evidence must show that this was so under the preponderance standard. If the trial judge is persuaded, the statement will be admitted, but the jury may well choose to give the statement no weight. If the trial judge is not persuaded, the statement will be excluded, and the jury will not hear it; but, the jury may still find for the plaintiff on the basis of other evidence.

5. The proponent of an admission is not required to show that the agent or employee who made the admission had personal knowledge. Also, a party generally cannot object that an admission was stated in the form of an opinion. The theory of party admissions is that a party is responsible for statements made by agents or employees relating to their employment or agency while the relationship continues, and that the party has the opportunity to point out any deficiencies in agent statements and to explain them.

6. *Rule 806* provides that a party may impeach an agent-declarant whose statement was admitted pursuant to *Rule 801(d)*, that the impeachment devices available for trial witnesses are also available for agent-declarants, and that the usual foundation requirement for prior inconsistent statements under *Rule 613* is suspended. The last sentence of *Rule*

806 is ambiguous, referring to hearsay and declarants, not to admissions. The thrust of *Rule 806* seems consistent with permitting any party against whom a statement, other than the party's own statement, is introduced to attack the declarant who made the statement. Thus, it is reasonable to expect that a party seeking to attack a declarant could call the declarant and ask leading questions directed at the credibility of the declarant and the statement that was introduced against the party.

7. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the evidence [is or is not] a statement of [identify declarant], [name of declarant] [was or was not] an [agent or employee] of [name of party against whom statement is offered] when the statement was made, the statement [does or does not] concern a matter that was within the scope of agency or employment, and the statement is offered by [name of proponent] against [identify declarant-party]. In making this finding, I have considered the contents of the statement and also the additional evidence relied upon by the parties. The objection is [overruled or sustained], and the statement [is or is not] admissible as an agent's admission under *Rule 801(d)(2)(D)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Single Party Civil Case

The [plaintiff or defendant] presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use these statements as evidence against the [plaintiff or defendant]. You may consider the relationship of [name of declarant] to [name of party against whom statement is offered] in deciding the weight to give [name of declarant's] statements.

[2] Multiple Party Civil Case

The [plaintiff or defendant] presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may only use these statements as evidence against [name of plaintiff or defendant]. You may consider the relationship of [name of declarant] to [name of party against whom statement is offered] in deciding the weight to give [name of declarant's] statements.

[3] Single Defendant Criminal Case

The government has presented evidence of certain statements made by [name or description of declarant]. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use them against the defendant. You may consider evidence concerning the relationship of [name of declarant] to the defendant in deciding the weight to give [name of declarant's] statements.

[4] Multiple Defendant Criminal Case

The government has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may only use these statements as evidence against [name of defendant]. You may consider the relationship of [name of declarant] to [name of defendant against whom statement is offered] in deciding the weight to give [name of declarant's] statements.

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8-10 Coconspirator's Statement.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

(d) *Statements which are not hearsay*. -- ***A statement is not hearsay if*** --

* * *

(2) Admission by party-opponent. -- ***The statement is offered against a party and*** is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) ***a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish * * * the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).***

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(d)(2)(E)* codifies the common-law coconspirator exception to the hearsay rule, although the rule defines coconspirator statements as nonhearsay. The difference is largely semantic, and *Rule 801(d)(2)(E)* is recognized as the equivalent of the traditional exception.

2. In ruling on the admissibility of coconspirator statements, the trial judge decides whether statements were made (a) by a member of the conspiracy, (b) in furtherance of the conspiracy, and (c) during the conspiracy, and (d) whether they are offered against a defendant who also was a member of the conspiracy. The trial judge makes this finding by a preponderance of the evidence. *Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 801* as amended in 1997 makes clear that, in determining whether the declarant and the defendant were members of a conspiracy, the trial judge may consider the contents of the statements themselves but must also find some independent evidence of conspiracy.

3. The proponent of a coconspirator's statement is not required to show that the declarant had personal knowledge. Also, a party generally cannot object that an admission was stated in the form of an opinion. The theory of party admissions is that a party is responsible for statements of its criminal agents and that it has the opportunity to point out any deficiencies in its statements and to explain them.

4. *Rule 806* provides that a party may attack a coconspirator-declarant using the same means that could be used to attack a trial witness, and that the normal foundation requirement for prior inconsistent statements found in *Rule 613* is suspended. The last sentence of *Rule 806* is ambiguous, referring to hearsay and declarants, not to admissions. The thrust of *Rule 806* seems consistent with permitting any party against whom a statement, other than the party's own statement, is introduced to attack the declarant who made the statement. Thus, it is reasonable to expect that a party seeking to attack a declarant could call the declarant and ask leading questions directed at the credibility of the declarant and the statement that was introduced against the party.

5. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence

will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that the evidence [is or is not] a statement of [identify declarant], [name of declarant] [was or was not] a member of a conspiracy, [name of party against whom statement is offered] [was or was not] also a member of that conspiracy, the statement [was or was not] made during the conspiracy, the statement [was or was not] made in furtherance of the conspiracy, and the statement is offered by [name of proponent] against [identify party]. In making this finding, I have considered the contents of the statement and also the additional evidence relied upon by the parties. The objection is [overruled or sustained], and the statement [is or is not] admissible as a coconspirator's statement under *Rule 801(d)(2)(E)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Single Defendant Civil Case

The plaintiff has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use them as evidence against the defendant.

[2] Multiple Defendant Civil Case -- Admissible Against All Defendants

The plaintiff has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use these statements against all defendants.

[3] Multiple Defendant Civil Case -- Admissible Against Some Defendants

The plaintiff has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may

use these statements only against [names of defendants]. You may not use these statements against any other defendant.

[4] Single Defendant Criminal Case

The prosecution has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use them as evidence against the defendant.

[5] Multiple Defendant Criminal Case -- Admissible Against All Defendants

The prosecution has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony and use these statements against all defendants.

[6] Multiple Defendant Criminal Case -- Admissible Against Some Defendants

The prosecution has presented evidence that [name or identify declarant] made certain statements. It is for you to decide whether these statements were made. You may give these statements the same weight as trial testimony, but you may use these statements only against [names of defendants]. You may not use these statements against any other defendant.

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8-11 Present Sense Impression.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- *Preliminary questions* concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression*. -- ***A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, the hearsay declarant may or may not be present at trial as the hearsay statement is introduced pursuant to an exception.

6. For a statement to qualify as a present sense impression, the proponent must prove by a preponderance of the evidence that the declarant made a statement that described or explained an event or condition either while it occurred or immediately thereafter. Some courts require corroboration of the event or condition.

7. *Rule 806* does the following: it (a) permits any party against whom a present sense impression is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, a party who seeks to impeach a trial witness with an inconsistent statement must comply with the foundation requirement found in *Rule 613*, but the same party need not lay a foundation before offering extrinsic evidence to impeach a hearsay declarant whose present sense impression is admitted.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify declarant] [did or did not] make a statement describing an event or condition, and [identify declarant] [did or did not make] this statement while perceiving the event or condition or immediately thereafter. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as a present sense impression under *Rule 803(1)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to

the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant Testifies at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. [Name or identify declarant] has testified or will testify. You may give the statement the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give to the earlier statement.

[2] Declarant Does Not Testify at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. You may give the statement the same weight as you give trial testimony. You should consider all of the circumstances surrounding the statement in deciding its weight. [Name or identify declarant] will not testify in this trial. You may consider this in deciding what weight to give the statement.

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CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-12

8-12 Excited Utterance.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(2) *Excited utterance*. -- ***A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United*

States, 483 U.S. 171 (1987) . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, the hearsay declarant may or may not be present at trial as the hearsay statement is introduced pursuant to an exception.

6. For a statement to qualify as an excited utterance, the proponent must prove by a preponderance of the evidence that the declarant made a statement that related to a startling event or condition while the declarant remained under the stress of the condition. The terms "related" and "under the stress" provide some flexibility for a trial judge to find that a statement is an excited utterance even though it does not directly describe or explain an event, and even though some time passes between the event or condition and the statement.

7. *Rule 806* does the following: it (a) permits any party against whom an excited utterance is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, a party who seeks to impeach a trial witness with an inconsistent statement must comply with the foundation requirement found in *Rule 613*, but the same party need not lay a foundation before offering extrinsic evidence to impeach a hearsay declarant whose excited utterance is admitted.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify declarant] [did or did not] make a statement relating to a startling event or condition, and [identify declarant] [did or did not make] this statement while under the stress of this startling event or condition. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as an excited utterance under *Rule 803(2)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give

one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant Testifies at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. [Name or identify declarant] has testified or will testify. You may give the statement the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give to the earlier statement.

[2] Declarant Does Not Testify at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. You may give the statement the same weight as you give trial testimony. You should consider all of the circumstances surrounding the statement in deciding its weight. [Name or identify declarant] will not testify in this trial. You may consider this in deciding what weight to give the statement.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-13

8-13 Existing Mental or Physical Condition, State of Mind.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) *Then existing mental, emotional, or physical condition*. -- ***A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed*** unless it relates to the execution, revocation, identification, or terms of declarant's will.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek

to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, the hearsay declarant may or may not be present at trial as the hearsay statement is introduced pursuant to an exception.

6. *Rule 803(3)* preserves the distinction the Supreme Court recognized in its pre-Rules decisions -- *Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892)* , and *Shepard v. United States, 290 U.S. 96 (1933)* -- between statements of a current state of mind or physical or mental condition (which include a present intention to do something in the future) and statements looking backward. Only statements of a present state of mind or physical or mental condition qualify for admission under the exception. Statements looking backward do not qualify except in disputes about a will.

7. In *Hillmon*, the Supreme Court observed in dictum that a statement by a declarant as to his intent to do something with a third party could be used to prove not only what the declarant did but also what the third party did. *Rule 803(3)* does not indicate whether this approach is retained under the rule, and the legislative history indicates disagreement on the point between the House of Representatives and the Senate.

8. *Rule 806* does the following: it (a) permits any party against whom a state of mind statement is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, a party who seeks to impeach a trial witness with an inconsistent statement must comply with the foundation requirement found in *Rule 613*, but the same party need not lay a foundation before offering extrinsic evidence to impeach a hearsay declarant whose state of mind statement is admitted.

9. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify declarant] [did or did not] make a statement and that this statement described his/her then existing [emotion, sensation, pain, physical condition, intention, etc.]. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as a statement of a then existing mental, emotional, or physical condition under *Rule 803(3)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be

made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant Testifies at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. [Name or identify declarant] has testified or will testify. You may give the statement the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give to the earlier statement.

[2] Declarant Does Not Testify at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. You may give the statement the same weight as you give trial testimony. You should consider all of the circumstances surrounding the statement in deciding its weight. [Name or identify declarant] will not testify in this trial. You may consider this in deciding what weight to give the statement.

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8-14 Statements for Medical Diagnosis or Treatment.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) *Statements for purposes of medical diagnosis or treatment*. -- ***Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof*** insofar as reasonably pertinent to diagnosis or treatment.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek

to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, the hearsay declarant may or may not be present at trial as the hearsay statement is introduced pursuant to an exception.

6. *Rule 803(4)* expands the common-law exception for statements of medical history. The rule provides that statements made for medical diagnosis or treatment that report present or past pain and symptoms and even statements concerning the external source of pain or symptoms are admissible. Thus, unlike *Rule 803(3)*, *Rule 803(4)* covers statements relying on the memory of a declarant as well as statements of present mental or physical condition.

7. Nothing in *Rule 803(4)* limits the exception to a patient's own statements. Statements of family members, rescue squad members, or other persons who are providing information about the patient that is reasonably pertinent to medical diagnosis or treatment come within the exception. The rule permits statements to be admitted that describe the general character of the cause or source of an injury and thus is a broad hearsay exception.

8. *Rule 803(4)* is not a hearsay exception for the medical diagnosis itself. Statements by a doctor concerning a diagnosis or proposed treatment are not statements made for medical diagnosis. Such statements, if incorporated in records, may qualify as legitimate parts of business records under *Rule 803(6)*, but they do not fit within *Rule 803(4)*.

9. *Rule 806* does the following: it (a) permits any party against whom a statement of medical condition is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, a party who seeks to impeach a trial witness with an inconsistent statement must comply with the foundation requirement found in *Rule 613*, but the same party need not lay a foundation before offering extrinsic evidence to impeach a hearsay declarant whose statement of medical condition is admitted.

10. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify declarant] [did or did not] make a statement, this statement was made for purposes of medical diagnosis or treatment of [identify declarant or other person], and this statement [did or did not] describe [medical history, past or present symptoms, pain, or sensations]. I also find by a preponderance of the evidence that the portions of the statement that describe the cause or external source of pain or symptoms [were or were not] reasonably pertinent to diagnosis or treatment. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as a statement made for medical diagnosis or treatment under *Rule 803(4)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant Testifies at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. [Name or identify declarant] has testified or will testify. You may give the statement the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give to the earlier statement.

[2] Declarant Does Not Testify at Trial

[Name of party] has presented evidence that [name or identify declarant] made a statement concerning [subject matter] before this trial started. It is for you to decide whether this statement was made. You may give the statement the same weight as you give trial testimony. You should consider all of the circumstances surrounding the statement in deciding its weight. [Name or identify declarant] will not testify in this trial. You may consider this in deciding what weight to give the statement.

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8-15 Prior Recollection Recorded.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded recollection*. -- ***A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence*** but may not itself be received as an exhibit unless offered by an adverse party.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Although *Rule 803(5)* on its face is one of the many rules that make the availability of the declarant immaterial, the effect of the rule is to require availability since the foundation requires that the witness whose recorded recollection is offered be unable to testify fully and accurately. This requirement means that the witness must be present to lay this foundation. Moreover, the witness's presence is also required to demonstrate that when the witness wrote or adopted the statement the matters were fresh in the witness's memory and were recorded accurately.

6. *Rule 803(5)* does not require a total memory loss. Any loss of memory that results in the witness being unable to testify fully and accurately warrants recourse to recorded recollection.

7. *Rule 803(5)* only permits the proffering party to read recorded recollection to the jury. Recorded recollection is not admissible in written form.

8. *Rule 806* does the following: it (a) permits any party against whom prior recollection recorded is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, a party who seeks to impeach a witness testifying from memory with an inconsistent statement must comply with the foundation requirement found in *Rule 613*, but the same party need not lay a foundation before offering extrinsic evidence to impeach prior recollection recorded that is read to the jury. If the prior inconsistent statement is in writing, it may be introduced and the jury will have the opportunity to view the written inconsistent statement but will not have a written copy of the recorded recollection.

9. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of witness] [is able or is unable] to testify fully and accurately concerning a matter about which [name of witness] once had knowledge, [name of witness] [did or did not] [make or adopt] the contents of a memorandum or record, [name of witness] [did or did not] do so while the matter set forth therein was fresh in [name of witness's] mind, and the memorandum or record [does or does not] correctly reflect the witness's knowledge at the time it was made. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible as recorded recollection under *Rule 803(5)* and [may or may not] be read to the jury.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record

on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant's Own Recordation

[Name of party] has presented evidence that [name of witness] made a record of what he/she remembered before this trial started. [Name of witness] testified that his/her memory was fresh when he/she made the record and that this memory is accurately set forth in the record that was read to you. It is for you to decide how fresh the witness's memory was when the record was made, how accurate the witness's memory was when the record was made, and how accurate the record of that memory is. You may give the record that was read to you the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give this record.

[2] Declarant Adopted Record

[Name of party] has presented evidence that [name of declarant] had a memory of certain matters prior to trial that was more complete and accurate than the witness's current memory, [name of declarant] described this memory to [name or describe third party], and [name of declarant] confirmed that [name or describe third party] accurately recorded this memory in the record that was read to you. It is for you to decide how fresh the witness's memory was when the record was made, how accurate the witness's memory was when the record was made, how carefully the memory was recorded, how carefully [name of declarant] examined the record in confirming that it was accurate, and how reliable the witness's memory and the record are. You may give the record that was read to you the same weight as you give trial testimony. You may consider [name of declarant's] trial testimony when you decide the weight to give this record.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-16 Business Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) *Records of regularly conducted activity*. -- ***A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.*** The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6)*. -- ***Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6)***, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the

following:

* * *

(11) *Certified domestic records of regularly conducted activity*. -- The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record --

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity*. -- In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record --

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Although *Rule 803(6)* on its face is one of the many rules that make the availability of the declarant immaterial, the effect of the rule is to require availability of some witness to lay the foundation for the business record or to have a witness provide a certificate in conformity with *Rule 902(11)*, *Rule 902(12)*, or a corresponding federal statute. The foundation may be laid by a custodian of records or by any other qualified witness. The custodian or other foundation witness need not be able to say exactly who in the business made a certain record. The rule requires that the record be made in the ordinary course of business, at or near the time of the events recorded, by a person with knowledge or as a result of information provided by a person with knowledge, and kept in the ordinary course of business.

6. The rule was amended on December 1, 2000, to permit certificates to be used rather than live witnesses. This raises a question as to whether a certificate that is self-authenticating should be admitted along with the business record. The answer should be "yes," so that a trier of fact can consider the certificate in deciding the weight to give to the business record.

7. The title of this subdivision refers to regularly conducted activities; the first sentence of *Rule 803(6)* limits the exception to records of a business; and the final sentence defines business to refer to virtually any regularly conducted activity, whether for profit or not. The result is a very broad rule.

8. *Rule 803(6)* explicitly covers opinions and diagnoses, thereby clearly signaling that subjective assessments in business records are not excluded from the hearsay exception.

9. Business records may be excluded as lacking trustworthiness, but the burden is on the party objecting to the records to make a showing of untrustworthiness.

10. *Rule 803(7)* permits business records to be used to prove that the absence of a recording means that an event or condition did not take place. The reasoning is that, if an event or condition would have been recorded in the ordinary course of the business, the absence of a record is proof that it did not occur.

11. *Rule 806* does the following: it (a) permits any party against whom a business record is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior

inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. It can be tricky to decide who the declarant is when a business record is offered. It seems clear that the business is a declarant and can be impeached. If individual contributions to business records can be identified, these individuals may also be declarants and be subject to impeachment.

12. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] a [memorandum, report, record, or data compilation] of [acts, events, conditions, opinions, or diagnoses], the document [was or was not] made at or near the time of the matters recorded therein, the matters recorded [were or were not] based upon information transmitted by a person with knowledge, the document [was or was not] kept in the course of a regularly conducted business activity of [identify business activity], and it [was or was not] the regular practice of [identify business activity] to make such a document. I also find by a preponderance of the evidence that [name of witness or certifier] [was or was not] qualified to lay the foundation for this document. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible as a record of a regularly conducted activity under *Rule 803(6)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Business Record to Prove Contents -- Custodian Testifies

[Name of party] has presented records of [name of business]. [Name of custodian] testified that these records were made by [name of business] in the ordinary course of its business, were based upon the knowledge of the person who transmitted or recorded the information, were made at or near the time of the matters recorded, and were kept in the ordinary course of its business. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; the testimony about who provided the information that was recorded and who actually recorded it; whether the business actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[2] Business Record to Prove Contents -- Foundation by Certificate

[Name of party] has presented records of [name of business] along with a certificate of [identify person certifying the records] certifying that these records were made by [name of business] in the ordinary course of its business, were based upon the knowledge of the person who transmitted or recorded the information, were made at or near the time of the matters recorded, and were kept in the ordinary course of its business. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; the appearance and contents of the certificate offered along with the records, whether the business actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[3] Business Record -- Admitted by Stipulation

[Name of party] has presented records of [name of business]. The parties agree that these records were made by [name of business] in the ordinary course of its business, were based upon the knowledge of the person who transmitted or recorded the information, were made at or near the time of the matters recorded, and were kept in the ordinary course of its business. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[4] Absence of Entry in Business Record

[Name of party] has presented records of [name of business]. [Name of custodian] testified that these records were made by [name of business] in the ordinary course of its business, were based upon the knowledge of the person who transmitted or recorded the information, were made at or near the time of the matters recorded, and were kept in the ordinary course of its business. [Name of party] contends that the absence of any entry in these records for [describe event or condition] is evidence that it did not occur. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; the testimony about who provided the information that was recorded and who actually recorded it; whether the business actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-17 Public Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) *Public records and reports*. -- ***Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness***.

(9) *Records of vital statistics*. -- Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry*. -- To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

* * *

(12) *Marriage, baptismal, and similar certificates*. -- ***Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(1) *Domestic public documents under seal*. -- A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal*. -- A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents*. -- A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records*. -- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications*. -- Books, pamphlets, or other publications purporting to be issued by public authority.

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. *Rule 803(8)* and *(9)* are often used in connection with *Rule 902*, which means that documents are both self-authenticating and admissible as public records. Thus, it is unnecessary even to have a foundational witness such as a custodian testify. The fact that no foundation witness is required as a matter of law does not mean that such witnesses are forbidden or that they might not be required as a tactical necessity to demonstrate the import and the reliability of records. A party relying on public records may find it extremely helpful to offer foundation testimony.

6. *Rule 803(8)* contains three separate and distinct variations on the public records exception. (A) provides an exception for records setting forth the activities of a public office or agency. This exception applies in all cases. (B) provides an exception for records that include matters observed pursuant to a duty imposed by law, but on its face seems to create an exception in criminal cases for matters observed by law enforcement officers. (C) provides an exception for factual findings made pursuant to an official inquiry, but is limited to civil cases and to evidence offered against the government in criminal cases. Despite the fact that (B) and (C) are worded differently, the case law tends to treat them similarly and to interpret (B) as forbidding records of matters observed by law enforcement officers from being used against the defendant in a criminal case, but not forbidding use against the government itself. A number of courts have interpreted (B) as not excluding reports of ministerial or mechanical observations by government officers that are made routinely and involve little subjectivity.

7. The Supreme Court has taken a very broad view of "factual findings." In *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)* , the Court held that the term includes evaluative reports. The result is that factual findings include subjective as well as objective judgments that are made pursuant to an investigation. The Supreme Court's interpretation of "factual findings" means that *Rule 803(8)(C)* is similar in its scope, at least in civil cases and when used against the government in criminal cases, to *Rule 803(6)*. *Rule 803(6)* explicitly covers opinions and diagnoses, thereby clearly signaling that subjective assessments in business records are not excluded from the hearsay exception.

8. Public records may be excluded as lacking trustworthiness, but the burden is on the party objecting to the records to make a showing of untrustworthiness. *Rule 803(9)* creates a special exception for records of vital statistics that are kept by public agencies. This rule does not include an exception for records shown to be untrustworthy.

9. *Rule 803(10)* permits a party to show the absence of a particular event or filing from the appropriate public records as evidence that the event or filing did not take place. The reasoning is that, if the event, filing, or occurrence did take place, it would have been recorded in public records.

10. It is somewhat ironic that *Rule 803(10)* provides that, to prove the absence of a record, testimony must reveal that a diligent search of the records was conducted, but the rule permits introduction of a certified copy of records without any certification that a diligent search was conducted to assure that the records produced are complete.

11. The scope of *Rule 803(9)* is not clear on its face. It provides a hearsay exception for records of such matters as births and deaths, but does not indicate whether a record purporting to set forth facts surrounding a birth or a death is admissible. The thrust of the rule appears to be to permit events to be proved by these records, not surrounding circumstances.

12. *Rule 803(12)* provides a hearsay exception for certificates of ceremonial acts that are prepared either by religious officials or public officials. There is no requirement that these certificates be kept by any public office. *Rule 803(12)* requires only that the religious official or public official be authorized by the religion or law to perform the act and that the certificate be issued at the time of the act or reasonably soon thereafter.

13. *Rule 806* does the following: it (a) permits any party against whom a public record is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. It can be tricky to decide who the declarant is when a public record is offered. It seems clear that the agency that created the record is a declarant and can be impeached. If individual contributions to public records can be identified -- *e.g.*, the investigator who made factual findings -- these individuals may also be declarants and be subject to impeachment.

14. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] a [record, report, statement, or data compilation] of a public office or agency, the document [does or does not] set forth [the activities of the office or agency, matters observed pursuant to duty imposed by law as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to legal authority], and the sources of the information or circumstances [do or do not] indicate that the matters recorded are untrustworthy. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible as a public record or report under *Rule 803(8)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Public Records to Prove Contents -- Custodian or Other Witness Testifies

[Name of party] has presented records of [name of agency]. [Name of custodian] testified that these records were made and kept by [name of agency] in its official capacity. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; whether the agency actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[2] Public Record -- Self-authenticating

[Name of party] has presented records of [name of agency]. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; whether the agency actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[3] Absence of Entry in Public Record -- Custodian Testifies

[Name of party] has presented records of [name of agency]. [Name of party] contends that the absence of any record of [describe event, occurrence, or filing] proves that it did not occur. [Name of custodian] testified that these records were made and kept by [name of agency] in its official capacity. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; whether the agency actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[4] Absence of Entry in Public Records -- Self-authenticating

[Name of party] has presented records of [name of agency]. [Name of party] contends that the absence of any record of [describe event, occurrence, or filing] proves that it did not occur. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; whether the agency actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-18

8-18 Religious Organization Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(11) *Records of religious organizations*. -- ***Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.***

(12) *Marriage, baptismal, and similar certificates*. -- ***Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. *Rule 803(11)* is similar to the business records rule. On its face *Rule 803(11)* makes the availability of the declarant immaterial. However, the effect of the rule is to require some witness to lay the foundation for the record. A witness generally will be required to demonstrate that the record is regularly kept by the religious organization. Unlike *Rule 803(6)*, *Rule 803(11)* does not require that the record be made at or near the time of the events recorded, by a person with knowledge, or as a result of information provided by a person with knowledge. The last clause of *Rule 803(11)* is ambiguous. Is a regularly kept record one that is regularly made and kept or merely one that, if made, is regularly kept? The ambiguity may be intentional. Records of religious organizations may not include all marriages, divorces, etc., since some events may go unreported to the organization, and it should be sufficient that the organization regularly keeps a record of events that are reported. Hence, the rule does not require any showing that the religious organization purports to record all relevant events. Indeed, there is no provision in the rules to use the absence of an entry in records of religious organizations to prove anything, which signals that *Rule 803(11)* is intended to be different from *Rules 803(6)* and *803(8)*.

6. *Rule 803(11)* is limited in its scope. Unlike *Rule 803(6)*, *Rule 803(11)* does not cover opinions and diagnoses of why events happened. *Rule 803(11)* is directed at events in a family or personal history rather than to explanations of events.

7. Although business records and public records may be excluded as lacking trustworthiness, no such provision is included in *Rule 803(11)*. This might well be a recognition of the point made above that the drafters understood that these records would be less complete than many business and public records.

8. *Rule 803(12)* provides a hearsay exception for certificates of ceremonial acts that are prepared either by religious officials or public officials. There is no requirement that these certificates be kept by any public office. *Rule 803(12)* requires only that the religious official or public official be authorized by the religion or law to perform the act and that the certificate be issued at the time of the act or reasonably soon thereafter.

9. *Rule 806* does the following: it (a) permits any party against whom an organizational record is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. It can be tricky to decide who the declarant is when an organizational record is offered. It seems clear that the organization is a declarant and can be impeached. If individual contributions to organizational records can be identified, these individuals may also be declarants and be subject to impeachment.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury*

something like the following if the document purports to be a record of a religious organization: I find by a preponderance of the evidence that [identify document] [is or is not] a document that was regularly kept by [name of organization], that [name of organization] [is or is not] a religious organization, and the document [does or does not] contain a statement of [births, marriages, divorces, deaths, or family history]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible as a record of a religious organization under *Rule 803(11)*.

If the document purports to be a particular certificate, the judge will want to consider the following instruction for the record *outside the hearing of the jury*: I find by a preponderance of the evidence that [identify document] [is or is not] a certificate stating that the maker of the document [performed a marriage, administered a sacrament], the maker [was or was not] [a public official, member of the clergy] who [was or was not] authorized by law or the rules or practices of a religious organization to perform the act certified, and the certificate [does or does not] purport to have been issued at the time of the act or within a reasonable time thereafter. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under *Rule 803(12)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Organizational Record to Prove Contents -- Custodian Testifies

[Name of party] has presented records of [name of organization]. [Name of custodian] testified that these records were regularly kept by [name of organization]. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; the testimony about who provided the information that was recorded and who actually recorded it; whether the organization actually relied upon these records and would likely have been aware of any mistakes; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

[2] Organizational Record -- Admitted by Stipulation

[Name of party] has presented records of [name of organization]. The parties have agreed that these records were made by [name of organization] in the ordinary course of its business, were based upon the knowledge of the person who transmitted or recorded the information, were made at or near the time of the matters recorded, and were kept in the

ordinary course of its business. You may consider the completeness or incompleteness of the records; their appearance, and the care or lack of care with which they have been preserved; any evidence about who provided the information that was recorded and who actually recorded it; and any other evidence admitted in this case in deciding what weight to give these records. You may give these records the same weight as trial testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-19

8-19 Family Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(13) *Family records*. -- ***Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. -- Testimony that a matter is what it is claimed to be.

* * *

(4) Distinctive characteristics and the like. -- ***Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.***

* * *

(8) Ancient documents or data compilation. -- ***Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.***

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. *Rule 803(13)* might appear to be a rule that will require a foundation witness to identify a bible, crypt, or urn. In some cases, however, a crypt or urn can be authenticated by circumstantial evidence or by age under *Rule 901(b)(4)* and *(8)*.

6. *Rule 806* does the following: it (a) permits any party against whom a family record is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. It can be tricky to decide who the declarant is when a family record is offered. If individual contributions to family records can be identified, these individuals may be declarants and be subject to impeachment. It is doubtful that an entire family is subject to impeachment because someone in the family created a record that falls within *Rule 803(13)*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify object] [does or does not] contain a statement of fact concerning personal or family history, and [identify object] [is or is not] a family record. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under *Rule 803(13)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Family Record to Prove Contents -- Witness Testifies

[Name of party] has presented [describe object]. [Name of witness] testified that this [describe object] belonged to [identify individual or family]. You may consider the appearance of [describe object], whether the matters recorded within it are consistent with the nature and purpose of [describe object], whether there is evidence that [identify individual or family] relied upon or acted consistently with the information contained in [describe object], and any other evidence admitted in this case in deciding what weight to give the information contained in [describe object]. You may give this information the same weight as trial testimony.

[2] Family Record to Prove Contents -- Circumstantial Authentication

[Name of party] has presented [describe object] and contends that it belonged to [identify individual or family]. You may consider the appearance of [describe object], whether the matters recorded within it are consistent with the nature and purpose of [describe object], whether there is evidence that [identify individual or family] relied upon or acted consistently with the information contained in [describe object], and any other evidence admitted in this case in deciding what weight to give the information contained in [describe object]. You may give this information the same weight as trial testimony.

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8-20 Property Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(14) *Records of documents affecting an interest in property*. -- ***The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.***

(15) *Statements in documents affecting an interest in property*. -- ***A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document***, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. -- Testimony that a matter is what it is claimed to be.

* * *

(7) Public records or reports. -- ***Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.***

(8) Ancient documents or data compilation. -- ***Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.***

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, *Rule 803(14)* and *(15)* may be used whether or not the people who dealt with property are available to testify. *Rule 901(b)(7)* provides for ready authentication of recorded documents affecting interests in property.

6. *Rule 803(14)* makes the record of a document that purports to demarcate a property interest admissible to prove the content of the original recorded document and its execution and delivery by all who have purported to execute and deliver it, provided that the record is kept in a public office and a statute authorizes the recording of such a document.

7. *Rule 803(15)* governs documents that are not recorded but purport to demarcate a property interest. It makes statements in such documents admissible unless dealings with the property after the document was made have been inconsistent with the statements contained therein. The rule does not clearly indicate whether the proponent of the evidence must prove that the dealings with the property have been consistent or whether the opponent must prove that the dealings have not been consistent. It would make sense to impose at a minimum upon the opponent the burden of making a good-faith allegation that the dealings have been inconsistent. If such an allegation is made, to require the proponent to demonstrate that the dealings have been consistent would require the proponent to establish some element of trustworthiness which is typically required when a hearsay exception is invoked. The trial judge decides by a preponderance of the evidence whether the exception is satisfied, but if the document is admitted all evidence concerning the consistency or inconsistency of the dealings and the contents of the document should be admissible as going to the weight a jury might choose to give the document.

8. *Rule 806* does the following: it (a) permits any party against whom a record is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, *Rule 806* permits a party to impeach the declarant whose statements are contained in documents purporting to create or affect a property interest.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [does or does not] purport to affect an interest in property, the document [is or is not] a record of a public office, and an applicable statute [does or does not] authorize the recording of such documents in that office. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under *Rule 803(14)* to prove the content of the originally recorded document and its execution and delivery by each person by whom it purports to have been executed.

If the document is not recorded, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [does or does not] purport to affect an interest in property, the matter stated in the document [was or was not] relevant to the purpose of the document, and dealings with the property since the document was made [have or have not] been consistent with the contents of the document. This document therefore [is or is not] admissible under *Rule 803(15)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give

one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Recorded Document

[Name of party] has presented a record obtained from [identify public office]. [Name of party] relies upon this record to prove [identify the relevant portion of the document]. You may give this information the same weight as trial testimony.

[2] Unrecorded Document

[Name of party] has presented [identify document] and relies upon it to prove [identify the relevant portion of the document]. You may consider whether the dealings with the property after this document was made were consistent or inconsistent with the document in deciding how much weight to give this document. You may give it the same weight as trial testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

[8-21 Ancient Documents.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence exept those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended

by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(16) *Statements in ancient documents*. -- ***Statements in a document in existence twenty years or more the authenticity of which is established.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(8) Ancient documents or data compilation. -- ***Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.***

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. The ancient document exception is one of the broadest exceptions found in the Federal Rules of Evidence. It provides a hearsay exception for any statement in any document more than twenty years old as long as the authenticity of the document is established. The authenticity of many documents is easily established. *Rule 901(b)(8)* provides, for example, for authentication of ancient documents, and any other showing under *Rule 901* that would permit a fact finder to find that the document is what the proponent claims is sufficient authentication. The only guarantee of trustworthiness associated with *Rule 803(16)* is the age of the document, and age is not always a guarantee of reliability. Although properly authenticated ancient documents will not be excluded on hearsay grounds, there may be other reasons a trial judge would exclude ancient documents. For example, since the opponent of hearsay is entitled to impeach the declarant, as explained below, the opponent may convince the trial judge that some documents are so inherently untrustworthy that the probative value of their contents is substantially outweighed by the prejudicial effects of admission. The trial judge may then exclude the ancient document under *Rule 403*.

6. The relationship between *Rule 803(16)* and *Rule 901(b)(8)* is interesting. The latter is an illustration of how a document may be authenticated. Generally, authentication questions are resolved by the trial judge under *Rule 104(b)* while hearsay issues like those arising under *Rule 803(16)* are resolved by the judge under *Rule 104(a)*. If the trial judge finds that a document has not been in existence for twenty years, the document will fail under the hearsay rule if offered for its truth. The same document might, however, be sufficiently authenticated under *Rules 104(b)* and *901* and thus be admissible if offered for some other purpose.

7. *Rule 806* does the following: it (a) permits any party against whom a document is offered to impeach the declarant in

the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, *Rule 806* permits a party to impeach the declarant who prepared *Rule 803(16)* documents. In some instances, *Rule 806* will permit an entity to be impeached. In other instances where individual contributors to *Rule 803(16)* documents can be identified, *Rule 806* will permit them to be impeached.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [has or has not] been in existence for at least twenty years and that there [is or is not] sufficient evidence for the jury to find that the document is what [name of party] claims. I have considered whether the document is in such condition as to create no suspicion concerning its authenticity and was in a place where an authentic document would likely be. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under *Rule 803(16)* as an ancient document.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Ancient Documents Generally

[Name of party] has presented [describe ancient document] and relies upon it to prove [identify the relevant portion of the document]. This document was prepared in [state year]. You may consider in deciding what weight to give the information in this document any evidence that is presented concerning the nature of the document, the audience for whom it was intended, the circumstances in which it was made, how important or unimportant it was that the information was accurate when the document was made, the condition of the document, where it was found, the length of time it has been in existence, and whether the passage of time increases or decreases the reliability of the information. You may give the information in this document the same weight as trial testimony.

[2] Witness Reliance on Ancient Documents

[Name of party] has presented [describe ancient document] and relies upon it to prove [identify the relevant portion of the document]. This document was prepared in [state year]. You may consider in deciding what weight to give the information in this document any evidence that is presented concerning the nature of the document, the audience for whom it was intended, the circumstances in which it was made, how important or unimportant it was that the information was accurate when the document was made, the condition of the document, where it was found, the length of time it has been in existence, and whether the passage of time increases or decreases the reliability of the information. You may give the information in this document the same weight as trial testimony. The weight that you give the document may affect the weight you give to the testimony of a witness who relies upon the document at trial.

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8-22 Market Reports and Commercial Publications.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(17) *Market reports, commercial publications*. -- ***Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(5) *Official publications*. -- Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals*. -- ***Printed materials purporting to be newspapers or periodicals.***

(7) *Trade inscriptions and the like*. -- ***Inscriptions, signs, tags, or labels purporting to have been affixed in the***

course of business and indicating ownership, control, or origin.

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. Hearsay exceptions that are included in *Rule 803* do not require a showing of unavailability. Thus, a party may rely upon tables, lists, and the like even though the authors of the documents are available to testify. One aspect of *Rule 803(17)* may require a foundation witness. If a list or document is used in particular occupations, a witness may have to so testify. The trial judge may in some cases take judicial notice that some lists or quotations are widely used by the general public. The self-authentication provisions of *Rule 902* limit the need for a witness to identify the preparer of most documents that fall within *Rule 803(17)*.

6. Although foundation testimony may not be required to admit lists and tabulations, parties may choose to offer foundation testimony to explain *Rule 803(17)* documents and to convince a jury that they are reliable. In many cases, the testimony will come from an expert who relies upon these documents and who is able to explain their significance.

7. *Rule 806* does the following: it (a) permits any party against whom a record is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, *Rule 806* permits a party to impeach the declarant who prepares *Rule 803(17)* documents. In some instances, *Rule 806* will permit an entity to be impeached. In other instances where individual contributors to *Rule 803(17)* documents can be identified, *Rule 806* will permit them to be impeached.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] a

published compilation of [describe compilation] and that this document [is or is not] generally used and relied upon by [the public or persons in a particular occupation]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under *Rule 803(17)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Self-authenticated Exhibit -- No Explanatory Witnesses

[Name of party] has presented [identify publication] and relies upon it to prove [identify the relevant portion of the document]. You may give this information the same weight as trial testimony.

[2] Exhibit with Explanatory Witnesses

[Name of party] has presented [identify publication] and relies upon it to prove [identify the relevant portion of the document]. You may consider the contents of this document as well as testimony about the document in deciding what weight to give it. You may give it the same weight as trial testimony.

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8-23 Learned Treatises.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 201. Judicial Notice of Adjudicative Facts

(a) *Scope of rule*. -- This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts*. -- A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(18) *Learned treatises*. -- ***To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 803(18)* is limited to using learned treatises in connection with expert testimony. The exception does not permit a party to introduce a treatise for the truth of its contents except in connection with expert testimony. To qualify a treatise for the exception, the proponent must establish that it is a reliable authority. This can be done through expert testimony or by an admission from an adversary. The rule also indicates that reliability can be established by judicial notice, although *Rule 201* does not make it easy for a trial judge to find that many treatises are reliable enough to satisfy *Rule 803(18)*.

6. *Rule 803(18)* permits the proponent to call an expert and to have the expert not only rely upon reliable treatises, but also to read from those treatises to the jury. The rule does not permit the treatise itself to be introduced, however, presumably to prevent a jury from examining technical material without the help of an expert. Under the rule, admission of the evidence is limited to having the witness read it to the jury. In the case of a chart found in a treatise, it might be necessary to show the jury the chart rather than to read it. This is technically not permissible, but it appears to be necessary to reach the result intended by the drafters. After the chart has been shown to the jury, however, it should not be provided to the jury during deliberations, since that would appear to circumvent the rule and go beyond what is necessary to acquaint the jury with the contents of the treatise.

7. *Rule 803(18)* also permits a cross-examiner to utilize a reliable treatise whether or not the expert being cross-examined has relied upon or even is familiar with the treatise. The cross-examiner can read from it and question why the expert is not aware of it, why the expert did not utilize it, or whether and why the expert disagrees with it.

8. *Rule 806* does the following: it (a) permits any party against whom a learned treatise is offered to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions. Thus, *Rule 806* permits a party to impeach the declarant who authored a learned treatise and to cross-examine the declarant. The rule does not address whether a declarant-author who is within the subpoena power of the court may be compelled to testify without being compensated as an expert witness.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] established as a reliable authority on the basis of [insert basis -- admission by a party opponent, testimony, judicial notice], this document was [relied upon by an expert witness on direct examination, called to the attention of an expert witness on cross-examination], and this document [does or does not] contain statements that are relevant to the issues in dispute. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible as a learned treatise, and the contents [may or may not] be read into evidence.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Use of Treatise on Direct Examination

[Name of party] has presented [identify publication] and relies upon it to prove [identify the relevant portion of the document]. You may give this information that was read to you the same weight as trial testimony by a witness. You may also consider the witness's reliance on this information in deciding the weight to give the witness's testimony.

[2] Use of Treatise on Cross-Examination

[Name of party] has read portions of [identify publication] during cross-examination of this witness. You may give the information that was read to you the same weight as trial testimony by a witness. You may also consider the witness's answers to questions about this information in deciding the weight to give the witness's testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-24 Reputation Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally*. -- Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. -- Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of victim. -- Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. -- Evidence of the character of a witness, as provided in rules 607, 608, and 609.

* * *

Rule 405. Methods of Proving Character

(a) *Reputation or opinion*. -- In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. -- In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. -- The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or***

hearing, offered in evidence to prove the truth of the matter asserted.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(19) *Reputation concerning personal or family history*. -- ***Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.***

(20) *Reputation concerning boundaries or general history*. -- Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) *Reputation as to character*. -- ***Reputation of a person's character among associates or in the community.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 803(19)*, *(20)*, and *(21)* provide hearsay exceptions for reputation evidence. *Rule 803(19)* covers family-type information. *Rule 803(20)* covers property and historical issues. *Rule 803(21)* covers individuals, and must be examined in connection with limitations on the use of personal character evidence that are set forth in *Rules 404(a), 405*, and *608(a)*.

6. The witness who testifies at trial about reputation must lay a foundation and demonstrate knowledge of conversations in the relevant community sufficient to give rise to a reputation.

7. Although *Rule 806* permits any party against whom hearsay is offered to impeach the declarant, impeachment of reputation evidence is difficult since reputation generally reflects the conversations of many unidentified persons.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of witness] [does or does not] have a sufficient basis to testify as to the reputation of [describe reputation], and that this reputation testimony [does or does not] relate to [personal or family history, boundaries or events of general history that are important to the community, or a person's character among associates in the community]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible under [*Rule 803(19)*, *(20)*, or *(21)*].

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction

before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Reputation Regarding Family or Personal History

[Name of witness] has testified that the reputation of [identify person or family] is that [describe relevant fact -- *e.g.*, was married and divorced before marrying X]. You may give the reputation evidence the same weight as the trial testimony of witnesses. In deciding how much weight to give the reputation evidence, you may consider the length of time the reputation endured, the likelihood or unlikelihood this reputation would endure if it was false, and the opportunities or lack thereof for correcting a false reputation.

[2] Reputation Regarding Boundary

[Name of witness] has testified that the reputation or common understanding in the community is that [describe relevant fact -- *e.g.*, the lake formed the boundary between the property of X and Y]. You may give the reputation evidence the same weight as the trial testimony of witnesses. In deciding how much weight to give the reputation evidence, you may consider the length of time the reputation endured, the likelihood or unlikelihood this reputation would endure if it was false, and the opportunities or lack thereof for correcting a false reputation.

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8-25 Judgments Admitted to Prove Underlying Facts.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(22) *Judgment of previous conviction*. -- ***Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.***

(23) *Judgment as to personal, family, or general history, or boundaries*. -- Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal*. -- A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature

purporting to be an attestation or execution.

(2) *Domestic public documents not under seal*. -- A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents*. -- A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records*. -- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

* * *

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 803(22)* and *(23)* provide hearsay exceptions for judgments in certain criminal cases and to prove the same sort of family history, personal history, property history, and other general history that may be proved by reputation evidence pursuant to *Rule 803(19)* and *(20)*.

6. *Rule 803(22)* is limited to convictions for crimes punishable by death or imprisonment for more than one year (*i.e.*, felonies in federal court and most states). Although the exception is drafted in a somewhat confusing fashion, it seems to permit admission of any final judgment of conviction based upon a plea of not guilty or guilty. Judgments entered pursuant to pleas of nolo contendere are excluded by the rule. The judgment may be offered to prove any fact essential to the judgment, which means any fact that must be true for the judgment of conviction to be valid. Convictions are admissible in both civil and criminal cases. The confusing language in the rule relates to whose convictions may be admitted. The rule appears to permit any conviction of any person to be used in a civil proceeding provided that the fact that is essential to the judgment of conviction is relevant. However, in criminal cases the rule appears to be limited to convictions of the defendant who is on trial (except that convictions of other persons may be used for impeachment under *Rule 609*).

7. *Rule 803(23)* permits any of the historical information that can be proved by reputation evidence to be proved by a judgment. The historical information must be essential to the judgment for the judgment to be used as evidence, which means that the historical information must be true for the judgment to be valid.

8. Certified copies of judgments will be self-authenticating, and no witness will be required to lay a foundation for a judgment.

9. Although *Rule 806* permits any party against whom hearsay is offered to impeach the declarant, impeachment of judgments is difficult because the declarant is the tribunal that entered the judgment. It is permissible, however, for a party against whom a judgment is offered to elicit evidence that the judgment is on appeal.

10. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] evidence of a final judgment that was rendered after a trial or upon a plea of guilty, this document [does or does not] adjudge a person guilty of a crime punishable by death or imprisonment for more than one year, and the following fact [insert fact] [was or was not] essential to sustain the judgment. Therefore, the objection is [overruled or sustained], and the document [is or is not] admissible under *Rule 803(22)* to prove the fact that was essential to the judgment.

In a case in which a judgment as to personal, family, or general history is offered, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [identify document] [is or is not] evidence of a judgment in a judicial proceeding and [insert fact] [was or was not] essential to the judgment, and [insert fact] concerns [personal or family history, boundaries, or events of general history

important to the community]. This document therefore [is or is not] admissible under *Rule 803(23)* to prove the fact that was essential to the judgment.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Judgment in Criminal Case -- Use in Civil Case

[Name of party] has presented a judgment in a previous criminal case. In that case [name of convicted party] was convicted of [state crime or crimes]. One fact that was essential to the conviction was [state fact]. You may give the judgment the same weight as to this fact as you would give the trial testimony of a witness. You may consider in deciding what weight to give the evidence that a judgment in a criminal case requires either proof beyond a reasonable doubt or a plea of guilty by the defendant.

[2] Judgment in Criminal Case -- Use in Criminal Case -- Single Defendant

The prosecution has presented evidence of a judgment in a previous criminal case. In that case the defendant was convicted of [state crime or crimes]. One fact that was essential to the conviction was [state fact]. You may give the judgment the same weight as to this fact as you would give the trial testimony of a witness. You may consider in deciding what weight to give the evidence that a judgment in a criminal case requires either proof beyond a reasonable doubt or a plea of guilty by the defendant. The previous conviction is offered to prove [state fact]. Your job is to decide what weight to give the conviction as to this fact. Your job is not to punish the defendant for a previous conviction or to use the conviction as evidence of any other fact in this case.

[3] Judgment in Criminal Case -- Use in Criminal Case -- Multiple Defendants

The prosecution has presented evidence of a judgment in a previous criminal case. In that case [name of defendant] was convicted of [state crime or crimes]. One fact that was essential to the conviction was [state fact]. You may give the judgment the same weight as to this fact as you would give the trial testimony of a witness as you consider the evidence against [name of defendant]. This judgment is not admissible against any other defendant, and you must not use the judgment as to any other defendant. You may consider in deciding what weight to give the evidence against [name of

defendant] that a judgment in a criminal case requires either proof beyond a reasonable doubt or a plea of guilty by the defendant. The previous conviction is offered to prove [state fact]. Your job is to decide what weight to give the conviction as to this fact. Your job is not to punish the defendant for a previous conviction or to use the conviction as evidence of any other fact in this case.

[4] Civil Judgment on Personal History or Boundaries

[Name of party] has presented a judgment in a prior civil case. One fact essential to that judgment was [state fact]. You may give the judgment the same weight as to this fact as you would give the testimony of a trial witness. You may consider in deciding the weight to give the judgment that a judgment requires a finding that essential facts are true by a preponderance of the evidence. A preponderance of the evidence means that something is more likely than not true.

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8-26 Former Testimony.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- ***The following are not excluded by the hearsay rule if the declarant is unavailable as a witness***:

(1) Former testimony. -- ***Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 804* requires a showing of unavailability of the declarant. The proponent of any *Rule 804(b)* exception must demonstrate by a preponderance of the evidence that the declarant is unavailable under the definition provided in *Rule 804(a)*.

6. The focus of the exception for former testimony is on the party against whom the evidence is offered. It is this party or a predecessor in interest who must have had a prior opportunity and similar motive to examine the declarant whose testimony is offered. It is irrelevant in most instances whether the proponent of the evidence was present or represented when the former testimony was taken. The only relevance of the proponent's status may be on the issue of whether the motive of the party against whom the testimony was offered was similar when the former testimony was generated to the motive that party would have at trial.

7. *Rule 806* does the following: it (a) permits any party against whom former testimony is admitted to impeach the

declarant in the same ways that a trial witness could be impeached, and (b) provides that the usual foundation for prior inconsistent statements is not required, even though the party against whom the former testimony is offered might have had many opportunities to lay the foundation while the former testimony was taken. Although *Rule 806* permits the party against whom hearsay is offered to call the declarant and ask leading questions, that right is effectively negated by the proponent's demonstration that the declarant is unavailable as a condition of introducing the testimony.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] previously testified in a proceeding in which [name of party against whom evidence is offered] [did or did not] have an opportunity to examine [name of declarant] and that [name of party against whom evidence is offered] [did or did not] have an interest in developing the testimony of [name of declarant] similar to the interest [name of party against whom evidence is offered] has during this trial. Therefore, the objection is [overruled or sustained], and [name of declarant's] former testimony [is or is not] admissible under *Rule 804(b)(1)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Former Testimony Generally

[Name of party] has presented the testimony given under oath and subject to penalty of perjury by [name of declarant] in [describe proceedings]. [Name of opposing party] had the opportunity to examine [name of declarant] when this testimony was given. You may give this testimony the same weight as the trial testimony of a witness. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the testimony.

[2] Former Testimony and Predecessors in Interest

[Name of party] has presented the testimony given under oath and subject to penalty of perjury by [name of declarant] in [describe proceedings]. [Name of predecessor in interest] had the opportunity to examine [name of declarant] when this testimony was given. [Name of predecessor in interest] was the [explain relationship to party -- *e.g.*, was a former owner of the company that is currently before you as the defendant in this case]. You may give this testimony the same weight as the trial testimony of a witness. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-27 Dying Declaration.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- ***The following are not excluded by the hearsay rule if the declarant is unavailable as a witness***:

* * *

(2) Statement under belief of impending death. -- ***In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 804* requires a showing of unavailability of the declarant. The proponent of any *Rule 804(b)* exception must demonstrate by a preponderance of the evidence that the declarant is unavailable under the definition provided in *Rule 804(a)*. Although the common law frequently provided that the declarant must die as a result of the circumstances giving rise to the dying declaration, *Rule 804(b)(2)* provides that any showing of unavailability is sufficient provided that the statement was made while the declarant believed death was imminent. The trial judge must find by a preponderance of the evidence that the declarant believed death to be imminent before admitting a statement as a dying declaration.

6. The rule provides that dying declarations may be admitted not only in homicide cases as at common law, but also in civil cases.

7. A dying declaration is one that addresses the cause and/or circumstances of what the declarant believes to be impending death.

8. *Rule 806* permits any party against whom a dying declaration is admitted to impeach the declarant in the same ways that a trial witness could be impeached. Although *Rule 806* permits the party against whom hearsay is offered to call the declarant and ask leading questions, that right is effectively negated by the proponent's demonstration that the declarant is unavailable as a condition of introducing the testimony.

9. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] [did or did not] make a statement at a time when he/she believed death was imminent, and this statement [did or did not] relate the cause and circumstances of the death believed to be imminent. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible under *Rule 804(b)(2)* as a dying declaration.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Dying Declaration -- Civil Case

[Name of party] has presented evidence of a statement by [name of declarant]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. In deciding how much weight to give the statement, you may consider whether the circumstances in which the statement was made make it more or less likely that [name of declarant] would speak the truth and whether the circumstances increased or decreased the ability of [name of declarant] to observe and communicate accurately and completely. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[2] Dying Declaration -- Criminal Homicide Case

The prosecution has presented evidence of a statement by [name of declarant]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. In deciding how much weight to give the statement, you may consider whether the circumstances in which the statement was made make it more or less likely that [name of declarant] would speak the truth and whether the circumstances increased or decreased the ability of [name of declarant] to observe and communicate accurately and completely. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-28 Declarations Against Interest.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- ***The following are not excluded by the hearsay rule if the declarant is unavailable as a witness***:

* * *

(3) Statement against interest. -- ***A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.*** A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 804* requires a showing of unavailability of the declarant. The proponent of any *Rule 804(b)* exception must demonstrate by a preponderance of the evidence that the declarant is unavailable under the definition provided in *Rule 804(a)*.

6. The rule provides that declarations against interest include not only statements against a declarant's pecuniary or proprietary interest but also declarations against penal interest. The key provision in the rule is that the trial judge must find that the statements were sufficiently against interest that a reasonable person would not have made such a statement without believing that it was true. The Supreme Court has made clear in *Williamson v. United States, 512 U.S. 594*

(1994) , that, when a person makes a series of statements, the trial judge must examine each statement that is offered as a declaration against interest to determine whether it satisfies the requirements of the rule.

7. There are, unfortunately, reported cases in which courts confuse the terms "admission against interest" and declarations against interest. Admissions are covered by *Rule 801(d)(2)*. An admission is any statement of a party or its agent offered against that party, whether or not the statement purported to "admit" anything at the time it was made. A declaration against interest may be a statement by any declarant; it must have been against that declarant's interest when made. Whereas an admission is only admissible against the party responsible for the statement, a declaration against interest is admissible against any party.

8. The final sentence of *Rule 804(b)(3)* limits declarations against interest offered by a defendant in a criminal case. It provides that statements offered to exculpate the defendant must not only be corroborated, but must be corroborated by evidence that clearly demonstrates the trustworthiness of the statements.

9. *Rule 806* permits any party against whom a declaration against interest is admitted to impeach the declarant in the same ways that a trial witness could be impeached. Although *Rule 806* permits the party against whom hearsay is offered to call the declarant and ask leading questions, that right is effectively negated by the proponent's demonstration that the declarant is unavailable as a condition of introducing the testimony.

10. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] [did or did not] make a statement, and the statement [was or was not] so much against [name of declarant's] [pecuniary, proprietary, or penal interest] that a reasonable person would not have made the statement unless it were true. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible under *Rule 804(b)(3)* as a statement against interest.

If the statement is one against a declarant's penal interest and is offered by the defendant in a criminal case because it tends to exculpate the defendant, the trial judge should add -- before stating the conclusion "Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible under *Rule 804(b)(3)* as a statement against interest" -- the following statement for the record *outside the hearing of the jury*: I find also that there [are or are not] sufficient corroborating circumstances as to clearly indicate that [name of declarant's] statement is trustworthy.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among

the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declaration Against Pecuniary Interest

[Name of party] has presented evidence that [name of declarant] made a statement that [describe statement]. It is for you to decide whether this statement was made. You may give this statement the same weight as trial testimony. You may consider in deciding the weight to give this statement whether [name of declarant] reasonably would have thought that such a statement might be financially damaging and whether a reasonable person would have made such a statement without believing it to be true. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[2] Declaration Against Property Interest

[Name of party] has presented evidence that [name of declarant] made a statement that [describe statement]. It is for you to decide whether this statement was made. You may give this statement the same weight as trial testimony. You may consider in deciding the weight to give this statement whether [name of declarant] reasonably would have thought that such a statement might damage his/her interest in property and whether a reasonable person would have made such a statement without believing it to be true. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[3] Declaration Concerning Civil Liability

[Name of party] has presented evidence that [name of declarant] made a statement that [describe statement]. It is for you to decide whether this statement was made. You may give this statement the same weight as trial testimony. You may consider in deciding the weight to give this statement whether [name of declarant] reasonably would have thought that such a statement might expose him/her to civil liability and whether a reasonable person would have made such a statement without believing it to be true. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[4] Declaration Against Penal Interest

[Name of party] has presented evidence that [name of declarant] made a statement that [describe statement]. It is for you to decide whether this statement was made. You may give this statement the same weight as trial testimony. You may consider in deciding the weight to give this statement whether [name of declarant] reasonably would have thought that such a statement would expose him/her to criminal liability and whether a reasonable person would have made such a statement without believing it to be true. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-29 Family History.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- ***The following are not excluded by the hearsay rule if the declarant is unavailable as a witness***:

* * *

(4) Statement of personal or family history. -- ***(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.***

* * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987) . Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 804* requires a showing of unavailability of the declarant. The proponent of any *Rule 804(b)* exception must demonstrate by a preponderance of the evidence that the declarant is unavailable under the definition provided in *Rule 804(a)*.

6. *Rule 804(b)(4)* is an extremely broad rule. It permits a party to introduce any statement that a person has made about his own personal history whether or not the person could have had personal knowledge of the facts asserted. Thus, a declarant's statement that "I was born in Country X, and the King was my real father" qualifies for this exception. Moreover, the exception extends to statements made by a person related to another by blood, marriage, or adoption

concerning the history of that other person, including statements about that person's death. It also applies to statements about another's personal history that are made by someone who is not a family member but who is so intimately associated with the other's family as to be likely to have accurate information. Otherwise, the rule does not require any showing of trustworthiness.

7. *Rule 806* permits any party against whom personal or family history is admitted to impeach the declarant in the same ways that a trial witness could be impeached. Although *Rule 806* permits the party against whom hearsay is offered to call the declarant and ask leading questions, that right is effectively negated by the proponent's demonstration that the declarant is unavailable as a condition of introducing the testimony.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] made a statement concerning his/her own personal or family history. Therefore, the objection is [overruled or sustained], and [name of declarant's] statement [is or is not] admissible under *Rule 804(b)(4)*.

If the statement was made concerning the personal or family history of another, the judge will want to make a different statement for the record *outside the hearing of the jury*: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] made a statement concerning the personal or family history of [name of other person], and that [name of declarant] was related to this other person by [blood, marriage, or intimate association] such that [name of declarant] would be likely to have accurate information about [name of other person's] personal or family history. Therefore, the objection is [overruled or sustained], and [name of declarant's] statement [is or is not] admissible under *Rule 804(b)(4)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Declarant's Own History

[Name of party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. You may consider in deciding the weight whether [name of declarant] would have made such a statement without believing it to be true, whether [name of declarant] spoke from personal knowledge, whether [name of declarant] made the statement to someone in a position to know whether or not it was true, and other circumstances surrounding the making of the statement. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[2] Statement About Another's History

[Name of party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. You may consider in deciding the weight whether [name of declarant] would have made such a statement about [describe relationship between declarant and other person -- *e.g.*, his father, his mother, his son] without believing it to be true, whether [name of declarant] spoke from personal knowledge, whether [name of declarant] made the statement to someone in a position to know whether or not it was true, and other circumstances surrounding the making of the statement. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

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CHAPTER 8 HEARSAY

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8-30 Forfeiture by Wrongdoing.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Definition of unavailability*. -- "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions*. -- ***The following are not excluded by the hearsay rule if the declarant is unavailable as a witness***:

* * *

(6) Forfeiture by wrongdoing. ***A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.***

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not, that sheds light on the admissibility of the hearsay statement.

5. *Rule 804* requires a showing of unavailability of the declarant. The proponent of any *Rule 804(b)* exception must demonstrate by a preponderance of the evidence that the declarant is unavailable under the definition provided in *Rule 804(a)*. In addition, the proponent of hearsay who claims forfeiture by wrongdoing must show that the party against whom the statement is offered either engaged or acquiesced in wrongdoing with the intention of making the declarant unavailable and that this party succeeded in doing so.

6. In many instances the party proffering *Rule 804(b)(6)* evidence will offer additional evidence concerning the wrongdoing of the party against whom the evidence is offered to show consciousness of guilt or implicit adoption of the hearsay statement. The trial judge will have to balance the prejudicial effect of having the jury hear about the wrongdoing against its probative value.

7. *Rule 806* permits any party against whom a hearsay declaration is admitted to impeach the declarant in the same ways that a trial witness could be impeached. Although *Rule 806* permits the party against whom hearsay is offered to call the declarant and ask leading questions, that right is effectively negated by the proponent's demonstration that the declarant

is unavailable as a condition of introducing the testimony. Under *Rule 804(b)(6)*, the wrongdoer forfeits only the hearsay objection. Wrongdoing by the opponent of the statement does not forfeit the right to assert other objections to the evidence, or to impeach the declarant under *Rule 806*.

8. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, that [name of declarant] [did or did not] make a statement that is relevant to these proceedings, that [name of party against whom evidence is offered] [did or did not] engage or acquiesce in wrongdoing that was intended to, and did, have the effect of making [name of declarant] unavailable to testify as a witness. Therefore, the objection is [overruled or sustained], and [name of declarant's] statement [is or is not] admissible under *Rule 804(b)(6)*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Evidence of Wrongdoing Admitted

[Name of proffering party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. [Name of declarant] is unavailable and will not appear as a witness. It is for you to

decide whether this affects the weight you give the statement. [Name of proffering party] has also presented evidence that [name of party against whom statement is offered] engaged or acquiesced in conduct with the intent to make [name of declarant unavailable]. It is for you to decide whether [name of party against whom statement is offered] engaged in such conduct, and whether this conduct affects the weight you give to a statement made by [name of declarant] and whether this conduct affects how you weigh other evidence in the case.

[2] Evidence of Wrongdoing Excluded

[Name of proffering party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

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8-31 Residual Hearsay.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[b] Key Points.

1. *Rule 801(c)* defines hearsay. *Rule 802* creates an exclusionary rule for hearsay statements but provides that they may be admitted pursuant to exceptions found in the Federal Rules of Evidence or in other provisions of law.

2. The party making a hearsay objection need only say, "I object, hearsay" in a timely fashion to invoke the protection of *Rule 802*. The proffering party has the opportunity to respond that a statement is not being offered for its truth. The trial judge rules on whether the proffering party's use of the statement amounts to a hearsay use.

3. When a declaration has a permissible nonhearsay use but also might be used for its truth, a prudent objecting party will raise a *Rule 403* objection and claim that the prejudicial effect (*i.e.*, the likelihood the statement will erroneously be used for its truth) substantially outweighs the probative value of the declaration for the nonhearsay purpose for which it is offered. The trial judge strikes the balance.

4. Assuming that the declaration is offered for its truth and is therefore hearsay, the proponent of the evidence may seek to demonstrate entitlement to an exception. The proponent must prove to the trial judge's satisfaction under *Rule 104(a)* that a statement qualifies as an exception for it to be admissible over a hearsay exception. *Cf. Bourjaily v. United States, 483 U.S. 171 (1987)* . *Rule 104(a)* permits the trial judge to consider any evidence, whether admissible or not,

that sheds light on the admissibility of the hearsay statement.

5. *Rule 807* requires the proponent of the evidence to show that the hearsay statement is evidence of a material fact, which presumably means it is important, it is better than other evidence that is available through reasonable efforts, and its admission would be consistent with the rules and the interests of justice.

6. *Rule 807* imposes a pretrial or prehearing notice requirement that is intended to avoid surprise and to permit the trial judge to consider any advance objections that parties may choose to make to residual hearsay.

7. Although the hearsay declarant will often have to be unavailable for the proponent of residual hearsay to satisfy the requirement that no better evidence is reasonably available, the fact is that in some cases the declarant's memory may have failed or some intervening event may make a hearsay statement better evidence than trial testimony.

8. *Rule 806* permits any party against whom residual hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached.

9. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to statements that are offered for their truth, the judge will want to state for the record *outside the hearing of the jury* something like the following: I find by a preponderance of the evidence that [name of declarant] [is or is not] available to testify, [name of declarant] [did or did not] make a statement that is relevant to these proceedings, [name of proponent of statement] [did or did not] provide notice of an intention to rely upon this statement sufficiently in advance of the trial to provide [name of party against whom statement is offered] with a fair opportunity to prepare to meet it, the statement [is or is not] offered as evidence of an important fact, the statement [is or is not] more probative as to this fact than any other evidence that [name of proponent] can procure through reasonable efforts, and the general purposes of the Rules of Evidence and the interests of justice [will or will not] best be served by [admission or exclusion] of the statement. Therefore, the objection is [overruled or sustained], and [name of declarant's] statement [is or is not] admissible under *Rule 807*.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting

instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Hearsay Declarant Unavailable

[Name of proffering party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. You may give this statement the same weight as trial testimony. [Name of declarant] is unavailable and will not appear as a witness. It is for you to decide whether this affects the weight you give the statement.

[2] Hearsay Declarant Testifies

[Name of proffering party] has presented evidence of a statement by [name of declarant] concerning [describe statement]. It is for you to decide whether [name of declarant] made this statement. [Name of declarant] is a witness in this case. You may give this statement the same weight as trial testimony and you may consider [name of declarant's] trial testimony in deciding the weight to give this statement.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

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8-32 Hearsay Within Hearsay.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded recollection*. -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity*. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * *

(8) *Public records and reports*. -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 805* provides that, when one hearsay statement is contained within another, they both can be admitted if each statement comes within a hearsay exception. In this context, statements defined as nonhearsay in *Rule 801* also qualify as coming within a hearsay exception. For example, *Rule 805* applies when one level of hearsay qualifies as a party admission. The most common examples of multiple levels of hearsay are admissions contained in other records -- *e.g.*, prior recollection recorded, business records, or public records. *Rule 805* is important whenever an out-of-court statement offered for its truth [*Rule 801(c)*] is found within any other out-of-court statement also offered for its truth. The proponent must justify admission of both statements, using either *Rule 801*'s definitions of some statements as nonhearsay or the hearsay exceptions that are found in *Rules 803, 804*, or *807*.

2. The defense in a criminal case must make clear if it intends to make a *Confrontation Clause* objection in addition to or instead of a hearsay objection. This is especially important when the defense claims that a statement is testimonial and inadmissible under *Crawford v. Washington, 541 U.S. 36 (2004)* . A hearsay objection alone generally is insufficient to preserve a confrontation claim on appeal. A *Confrontation Clause* objection requires the trial judge to make a constitutional rather than an evidence ruling.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely hearsay objection is made. Unless a timely objection is made, evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of alleged hearsay evidence under *Rule 104(a)*, in ruling on objections to

statements that are offered for their truth, the judge will want to make for the record a statement supporting a ruling admitting or excluding evidence *outside the hearing of the jury*. If a business record containing an admission is offered, the judge might consider the following: I find by a preponderance of the evidence that [identify document] [is or is not] a [memorandum, report, record, or data compilation] of [acts, events, conditions, opinions, or diagnoses], the document [was or was not] made at or near the time of the matters recorded therein, the matters recorded [were or were not] based upon information transmitted by a person with knowledge, the document [was or was not] kept in the course of a regularly conducted business activity of [identify business activity] and it [was or was not] the regular practice of [identify business activity] to make such a document. I also find by a preponderance of the evidence that [name of witness or certifier] [was or was not] qualified to lay the foundation for this document. Therefore, the objection is [overruled or sustained], and the record [is or is not] admissible as a business record.

If, however, the judge finds that the rule is satisfied as to a document but that statements contained in the document do not themselves qualify as business records, the judge will want to make an additional finding: As a result of these findings, the document is admissible as a record of a regularly conducted activity under *Rule 803(6)* to prove that certain statements contained therein were made but standing alone the business records rule does not establish that those statements may be considered for their truth. I find also by a preponderance of the evidence that the [identify statement within document] [is or is not] a statement of [identify declarant-party] and [is or is not] offered by [name of proponent] against [identify declarant-party]. Therefore, the objection is [overruled or sustained], and the statement [is or is not] admissible as an admission.

The party who prevails on the evidence issue may find it useful to request a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to hearsay, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Admissions in Business or Public Records -- Single Party Case

[Name of proffering party] has presented certain records that state that [name of opposing party] made a statement about [describe statement]. It is for you to decide whether [name of opposing party] made this statement. In doing so, you may give these records the same weight as trial testimony. One party is permitted to use as evidence against another party statements made by that other party.

[2] Admissions in Business or Public Records -- Multiple Party Case

[Name of proffering party] has presented certain records that state that [name of opposing party] made a statement about [describe statement]. It is for you to decide whether [name of opposing party] made this statement. In doing so, you may give these records the same weight as trial testimony. One party is permitted to use as evidence against another party statements made by that other party. Each party is responsible, however, only for its statements. You must be sure to use statements that one party offers against another only against the party who actually made the statement. No other party is responsible for these statements, and these statements may not be used as evidence against any other party.

[3] Hearsay Exceptions in Business or Public Records

[Name of proffering party] has presented certain records that state that [name or identify declarant] made a statement about [describe statement]. It is for you to decide whether this statement was made. In doing so, you may give these records the same weight as trial testimony.

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CHAPTER 8 HEARSAY

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8-33 Impeaching Declarants -- Prior Bad Acts.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(b) *Specific instances of conduct*. -- ***Specific instances*** of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, ***may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination*** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, * * *.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court

pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 806* does the following: it (a) permits any party against whom a certain admission or hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions.

2. The party wishing to impeach the declarant may use the same impeachment tools that are available to attack trial witnesses. Thus, the impeaching party may ask the declarant about prior bad acts.

3. *Rule 608(b)* is not a clear rule. It permits the court to allow a party to ask a witness on cross-examination about prior acts that shed light on the witness's character for truthfulness or untruthfulness. Because the rule permits this impeachment on cross-examination, most questions about prior bad acts are intended to attack the witness.

4. *Rule 608(b)* is one of the few rules of evidence to specifically refer to the court's discretion to admit or exclude evidence. Absent a mandate that evidence be admitted, the court generally has discretion to weigh the probative value of evidence against its dangers under *Rule 403*. Mention of the court's discretion in this particular rule may reflect doubts about the probative value of many prior acts on the truthfulness of a witness, especially those that are stale, as well as concerns about the possible unnecessary embarrassment of witnesses. The court may guard against witness embarrassment using this discretion or its authority under *Rule 611(a)*.

5. Although *Rule 608(b)* says that the trial judge may permit questions about bad acts on cross-examination, *Rule 806* provides that a party may attack a hearsay declarant by calling the declarant as a witness and proceeding as if on cross-examination. Thus, *Rule 806* authorizes the party calling a declarant for impeachment to question the declarant about prior bad acts.

6. *Rule 608(b)* provides that extrinsic evidence of prior bad acts, other than criminal convictions covered by *Rule 609*, is not admissible. This limitation on use of extrinsic evidence applies only when a party seeks to contradict a witness's denial of a prior bad act and the only relevance of the act is impeachment under *Rule 608(b)*. Prior bad acts may be proved by extrinsic evidence when such acts are relevant for purposes other than *Rule 608(b)* impeachment. Prior acts may be admissible under *Rule 404(b)*, for example, to prove intent, knowledge, and many other elements of a claim or defense.

7. Counsel must have a good-faith basis for believing that the prior act occurred to ask a question under *Rule 608(b)*. The good-faith basis need not necessarily be admissible evidence, however.

8. The final paragraph of *Rule 608(b)* provides that, by testifying, a witness does not lose the *Fifth Amendment* right to refuse to answer potentially incriminating questions when the questions are asked solely to elicit testimony about prior

acts under *Rule 608(b)*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to questions about prior bad acts. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling. Thus, a party must object to evidence offered to impeach a hearsay declarant to call the issue to the judge's attention.

If the hearsay declarant is called as witness, the normal evidence rules apply. Since the trial judge rules on the permissibility of questions about prior acts under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered the objection made to the questions about prior acts of this witness. I find by a preponderance of the evidence that the questions [do or do not] relate to acts that, if true, are probative of the witness's credibility, and that the possible prejudicial effect of evidence concerning these acts [does or does not] substantially outweigh the probative value of the evidence. Therefore, the objection is [overruled or sustained], and the questions will be [permitted or disallowed].

If the issue of good faith arises, the trial judge may request a party to make a proffer as to its good-faith basis for asking questions. If the party lacks a good-faith basis, the judge may want to state for the record the following: The court has asked [name of party] to proffer the basis for questions asked to this witness. Having considered the proffer, the court finds by a preponderance of the evidence that [name of party] [has or lacks] a good-faith basis for the questions, and that they [are proper or should be stricken from the record].

If the hearsay declarant does not testify, the question arises whether the party seeking to impeach the declarant should be able to offer extrinsic evidence if that is the only way to impeach the declarant. Since the rules provide no clear answer, the judge surely will want to make a record *outside the hearing of the jury* whenever admitting or excluding extrinsic evidence: I find that [name of declarant] [is or is not] unavailable and thus [name of impeaching party] [does or does not] have an opportunity to ask [name of declarant] questions that relate to acts that, if true, are probative of [name of declarant's] credibility, and that the probative value of these acts [is or is not] sufficiently great that I shall [admit or exclude] extrinsic evidence relating to these acts.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude questions, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. Since *Rule 608(b)* bars extrinsic evidence, it often will be important to a reviewing court to know whether the witness would have admitted or denied the prior acts. Thus, the preferred offer of proof might be a voir dire of the witness when the jury is not present.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of a witness's answers.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Witness Admits Prior Bad Act

The witness has testified that he [summarize prior act]. You may consider this evidence in assessing the witness's credibility and in deciding how much weight you will give his testimony and any statements made by this witness.

[2] Witness Denies Prior Bad Act

This witness has denied that he engaged in certain conduct about which he was questioned. I instruct you that questions are not evidence even when they suggest that something is true. There is no evidence in this case that the witness engaged in the conduct about which he was questioned. You must disregard the suggestions contained in the questions in evaluating the credibility of the witness and deciding what weight to give this testimony and any statements by this witness. You may consider, however, the witness's demeanor while testifying in assessing credibility.

[3] Witness Invokes Privilege Against Self-Incrimination

A witness whose statements are admitted into evidence and who is called to testify at a trial retains the right not to answer questions that might be incriminating as to matters that are not in dispute in the trial. This witness was asked a question and properly invoked the privilege against self-incrimination and refused to answer. You must disregard the question and the witness's invocation of the privilege in assessing the credibility of the witness and deciding how much weight to give his testimony and any statements by the witness. You must not penalize or reward any party because the witness chose to exercise a right conferred by the Constitution of the United States.

[4] Absence of Good Faith

[Insert name of counsel] asked this witness a question that suggested the witness had engaged in certain acts. Counsel had no basis in fact or in law for asking such a question. You must disregard the question. The court shall instruct counsel to apologize to the witness for asking it.

[5] Extrinsic Evidence

You will recall that [name of party] presented evidence of a statement by [name of declarant], and I told you that you could give this statement the same weight as trial testimony. [Name of opposing party] has presented evidence that [name of declarant] [describe bad act]. You may consider this evidence in assessing the credibility of [name of declarant] and in deciding the weight to give to his/her statement. You may also consider that [name of declarant] did not testify and had no opportunity to deny that he/she did this act.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
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8-34 Impeaching Declarants -- Character Evidence.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character*. -- ***The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation***, but subject to these limitations: (1) ***the evidence may refer only to character for truthfulness or untruthfulness***, and (2) ***evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked*** by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct*. -- ***Specific instances of the conduct of a witness***, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They ***may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination*** of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) ***concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified***.

* * *

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made

during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 806* does the following: it (a) permits any party against whom a certain admission or hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions.

2. A party may call a character witness to attack the credibility of a hearsay declarant. When character witnesses are called to attack credibility, their testimony must focus on the hearsay declarant's character for untruthfulness.

3. The character witness is limited on direct examination to testifying about the declarant's reputation for untruthfulness or the witness's opinion of the declarant's character for untruthfulness. The character witness may not rely upon specific acts in providing reputation or opinion testimony.

4. In theory, a character witness who has testified that a previous witness's character for truthfulness is bad may be asked on cross-examination whether the character witness has heard of or knows of specific acts on the part of the previous witness that, if the answer is yes, would appear inconsistent with an untruthful character. In practice, however, the questioning in the form of "have you heard" or "do you know" of specific acts is usually done in an effort to attack a favorable character witness. It appears that negative acts are more likely to undermine favorable character testimony than positive acts are to undermine negative character evidence.

5. Counsel must have a good-faith basis for the questions on cross-examination of a character witness.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to character evidence or to questions asked of a character witness. Unless a timely objection is made, the evidence will be admitted and the questions allowed. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of character evidence and the validity of cross-examination under *Rule 104(a)*, in ruling on objections to character evidence the judge will want to state for the record *outside the hearing of the*

jury something like the following: I have considered the objection to this character evidence. I find by a preponderance of the evidence that the evidence that is proffered [does or does not] qualify as reputation or opinion evidence which is admissible under *Rule 608(a)*, and that the possible prejudicial effect of such evidence [does or does not] substantially outweigh the probative value of the evidence for impeachment purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

In ruling on the validity of cross-examination questions, the judge may want to state for the record *outside the hearing of the jury* something like this: I have considered the objection to this form of cross-examination. Having considered the direct testimony of this witness, including the time period addressed by the witness, I find by a preponderance of the evidence that the cross-examination questions [are or are not] valid attempts to test the knowledge of the witness, and that the possible prejudicial effect of these questions and the answers to them [does or does not] substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the questions [will or will not] be permitted.

If the issue of good faith arises, the trial judge may request a party to make a proffer as to its good-faith basis for asking questions. If the party lacks a good-faith basis, the judge may want to state for the record the following: The court has asked [name of party] to proffer the basis for questions asked to this witness. Having considered the proffer, the court finds by a preponderance of the evidence that [name of party] [has or lacks] a good-faith basis for the questions, and that they [are proper or should be stricken from the record].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. If the judge has excluded cross-examination questions, the cross-examiner may want to make an offer of proof by voir dire of the witness. This may be especially important because the answer that the witness would give to the question may be significant in a determination of whether exclusion, even if erroneous, is harmless or prejudicial.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to character evidence or to cross-examination questions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Negative Character Witness Generally

A party may call a witness to give reputation or opinion testimony about the truthful or untruthful character of any person whose out-of-court statements have been presented as having the same weight as trial testimony. [Name of

character witness] has testified concerning [name of hearsay declarant]. It is for you to assess the credibility of [name of character witness] and to decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of hearsay declarant].

[2] Cross-Examination Concerning Specific Acts Acknowledged by Witness

A party may call a witness to give reputation or opinion testimony about the truthful or untruthful character of any person whose out-of-court statements have been presented as having the same weight as trial testimony. [Name of character witness] has testified concerning [name of hearsay declarant]. The [plaintiff or defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of hearsay declarant]. [Name of character witness] testified that he had heard or knew of these acts. You may consider what [name of character witness] heard of or knew as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of hearsay declarant]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that [name of character witness] heard or knew certain things casts doubt on the reputation or opinion evidence concerning [name of hearsay declarant].

[3] Cross-Examination Concerning Specific Acts Not Acknowledged by Witness

A party may call a witness to give reputation or opinion testimony about the truthful or untruthful character of any person whose out-of-court statements have been presented as having the same weight as trial testimony. [Name of character witness] has testified concerning [name of hearsay declarant]. The [plaintiff or defendant] questioned [name of character witness] concerning whether [name of character witness] had heard or knew about specific acts involving [name of hearsay declarant]. [Name of character witness] denied hearing or knowing of these acts. I remind you that questions are not evidence, and there is no evidence that any of these acts actually occurred. You must not assume that they occurred as you assess the credibility of [name of character witness] and decide how much weight you will give this testimony in connection with your assessment of the credibility of [name of hearsay declarant].

[4] Multiple Character Witnesses

A party may call a witness to give reputation or opinion testimony about the truthful or untruthful character of any person whose out-of-court statements have been presented as having the same weight as trial testimony. [Names of character witnesses] have testified concerning [name of hearsay declarant]. The [plaintiff or defendant] questioned [names of character witnesses] concerning whether [names of character witnesses] had heard or knew about specific acts involving [name of hearsay declarant]. Some witnesses testified they had heard of or knew of acts while other witnesses denied hearing or knowing of these acts. You may consider that some witnesses heard or knew things that others did not in assessing the credibility of [names of character witnesses] and decide how much weight you will give their testimony in connection with your assessment of the credibility of [name of hearsay declarant]. You are not called upon to decide whether these acts actually occurred. You need only decide whether the fact that some witnesses heard or knew certain things casts doubt on their reputation or opinion testimony, and whether the fact that other witnesses did not hear or know these things casts doubt on their reputation or opinion testimony.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 8 HEARSAY

6-8 Federal Rules of Evidence Manual 8-35

8-35 Impeaching Declarants -- Prior Convictions.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule*. -- For the purpose of attacking the credibility of a witness,

(1) ***evidence that the witness other than an accused has been convicted of a crime shall be admitted, subject to***

Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and ***evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused***; and

(2) ***evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment***.

(b) *Time limit*. -- ***Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction***, whichever is the later date, ***unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect***. However, ***evidence*** of a conviction more than ten years old as calculated herein, ***is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence*** to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation*. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications*. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal*. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 806* does the following: it (a) permits any party against whom a certain admission or hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation

for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions.

2. Criminal convictions for offenses involving dishonesty or false statement are always admissible to impeach any witness or hearsay declarant, including a criminal accused. It makes no difference whether the prior convictions are felonies or misdemeanors. There is no balancing test employed for these convictions. Generally, dishonesty crimes are not crimes of violence, but are crimes that involve falsity, misrepresentation, or deceit.

3. No misdemeanor convictions other than those involving dishonesty or false statement are admissible in any case for impeachment.

4. Felony convictions (crimes punishable by more than one year's incarceration) that do not involve dishonesty or false statement are all subject to a balancing test. The traditional *Rule 403* balancing test is used for all witnesses or hearsay declarants other than the criminal accused. The criminal accused whose hearsay statement is admitted gets the benefit of a twist on the *Rule 403* balancing test. Instead of the accused's having to demonstrate that the prejudicial effect of the prior conviction outweighs its probative value, which would be required under *Rule 403*, the government must show that the probative value of the conviction outweighs its prejudicial effect. The trial judge need not find that the probative value substantially outweighs the prejudicial effect, just that the probative value is greater.

5. Convictions that are more than ten years old -- measured from the latter of the date of conviction or release from confinement -- cannot be used absent notice of an intent to rely upon the conviction and specific findings by the trial judge that the probative value of the specific facts and circumstances of the conviction substantially outweighs its prejudicial effect. This is the reverse of the ordinary *Rule 403* balancing.

6. Generally, the prejudicial effect of the prior conviction will be greatest when the conviction and the crime charged are similar, and will be least when the conviction bears little similarity to the crime charged. The probative value of the prior conviction increases when the conviction has elements of dishonesty as opposed to violence.

7. *Rule 609* governs the use of prior convictions for impeachment purposes only. It does not preclude convictions from being offered under other rules -- *e.g.*, *Rules 404*, *413, 414, 415*, and *803(22)*.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to prior conviction evidence. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of prior convictions under *Rule 104(a)*, in ruling on objections to such evidence the judge will want to make a statement for the record *outside the hearing of the jury* that indicates that the proper standard was used in making a ruling.

If the judge is dealing with a conviction that qualifies as a "dishonesty or false statement" conviction, whether misdemeanor or felony and regardless of the nature of the case or the witness who is to be impeached, the judge may choose a statement like the following: I have considered the objection to the prior conviction for [name of crime]. I find by a preponderance of the evidence that it is a conviction involving dishonesty or false statement. Therefore, I must admit it because *Rule 609(a)(2)* provides that such convictions are always admissible.

In a civil or criminal case in which the credibility of any hearsay declarant is at issue, the judge may choose a statement like the following: I have considered the objection to [name of declarant's] prior conviction for [name of crime]. I find by a preponderance of the evidence that the possible prejudicial effect of the conviction, particularly the danger of spill-over to a party, [does or does not] substantially outweigh the probative value of the evidence for impeachment

purposes. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to prior convictions, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instruction can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Conviction of a Hearsay Declarant Generally

You may consider evidence of the criminal convictions of any person whose statements were presented and whose statements may be given the same weight as trial testimony in assessing this person's credibility and deciding how much weight to give this person's statement.

[2] Prior Conviction of Particular Declarant

You will recall that [name of party] presented evidence of a statement of [name of declarant], and that I told you that you could give this statement the same weight as trial testimony. [Name of party] has presented evidence that [name of declarant] was convicted of [insert crime]. You may consider this conviction is assessing [name of declarant's] testimony and in deciding how much weight to give his/her statement.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
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8-36 Impeaching Declarants -- Bias.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. ***Evidence which is not relevant is not admissible***.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment.***

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 806* does the following: it (a) permits any party against whom a certain admission or hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions.

2. Because *Rule 806* permits a party to impeach a hearsay declarant in the same ways the party could impeach a trial witness, the rule permits a party to call a hearsay declarant to the stand to elicit testimony about bias. The rule also permits a party to offer extrinsic evidence of bias.

3. No specific rule of evidence addresses bias evidence. However, *Rule 401* defines relevant evidence and *Rule 402* states that relevant evidence is admissible unless a legal restriction provides otherwise. Not only is bias evidence relevant, but it is regarded as such a powerful form of impeachment that in criminal cases the defendant has a *Sixth Amendment Confrontation Clause* right to demonstrate the potential bias or interest of government witnesses. *Davis v. Alaska, 415 U.S. 308 (1974)* . The Confrontation right may override provisions of rules of evidence that would exclude defense evidence. *See, e.g., Olden v. Kentucky, 488 U.S. 227 (1988)* .

4. The Supreme Court recognized the importance of bias evidence and its admissibility under *Rule 402* in *United States v. Abel, 469 U.S. 45 (1984)* .

5. The Supreme Court recognized in *Abel* that a trial judge, in the sound exercise of discretion, may permit a party to elicit testimony that a witness is a member of an organization, but may exclude the name of or details about the organization. For example, the judge may permit testimony that a witness is a member of a "prison gang" while excluding the name of the gang -- *e.g.*, "Aryan Brotherhood" -- if the name might be especially prejudicial in the locale of the trial.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to bias evidence. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to bias evidence the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to this evidence. I find by a preponderance of the evidence that the evidence [is or is not] probative of a possible bias on the part of [name of declarant] and that the possible prejudicial effect of the evidence [does or does not]

substantially outweigh the probative value of this evidence. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to bias evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Bias Generally

You may consider the bias or interest of any person whose statement has been presented and whose statement may be given the same weight as trial testimony in deciding what weight to give the statement.

[2] Plea Bargain by Hearsay Declarant

The fact that [name of hearsay declarant] has [agreed to plead or pled] guilty to some or all of the crimes charged against the defendant is not evidence that the defendant is guilty of any crime charged in this case. You may consider the extent to which [name of hearsay declarant] [agreed to accept or has accepted] responsibility for criminal acts, and the extent to which [name of hearsay declarant] has avoided responsibility and obtained some benefit from the plea agreement in assessing the credibility of [name of hearsay declarant] and deciding how much weight to give statements made by [name of hearsay declarant].

[3] Group Membership

You may consider the fact that a person whose statement was presented to you and whose statement may be given the same weight as trial testimony is a member of [insert name or description of group] in deciding whether this person might favor or disfavor one party in this case. You must not favor or disfavor parties who call witnesses or offer statements because you approve or disapprove of their associates or organizations. But, you may consider whether a person has reason to favor or disfavor a party in assessing the credibility of this person and how much weight to give his/her statements.

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8-37 Impeaching Declarants -- Prior Inconsistent Statements.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- ***The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence*** so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) ***protect witnesses from harassment or undue embarrassment.***

* * *

Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement*. -- In examining a witness concerning a prior statement made by the witness, whether written or not, ***the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.***

(b) *Extrinsic evidence of prior inconsistent statement of witness*. -- ***Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).***

Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement*. -- A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. -- A "declarant" is a person who makes a statement.

(c) *Hearsay*. -- ***"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.***

(d) *Statements which are not hearsay*. -- A statement is not hearsay if --

* * *

(2) Admission by party-opponent. -- The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

* * *

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2)(C), (D), or (E), ***has been admitted in evidence, the credibility of the declarant may be attacked,*** and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

[b] Key Points.

1. *Rule 806* does the following: it (a) permits any party against whom a certain admission or hearsay is admitted to impeach the declarant in the same ways that a trial witness could be impeached, (b) provides that the usual foundation for prior inconsistent statements is not required, and (c) permits the party against whom the evidence is offered to call the declarant and ask leading questions.

2. *Rule 806* trumps the procedural requirement of a foundation for inconsistent statements that is found in *Rule 613(b)*. Hence, even though *Rule 613(b)* provides that a party who wants to offer extrinsic evidence of a prior inconsistent statement must give the witness who made the statement the opportunity to deny making the statement or to explain it, *Rule 806* lifts this burden from the proponent of an inconsistent statement offered to impeach a hearsay declarant.

3. *Rule 613(a)* eliminates the rule laid down in Queen Caroline's case that a party seeking to impeach a witness with a prior written inconsistent statement must show it to the witness before asking questions about it. Now impeaching counsel must, upon request, show it to opposing counsel, but not to the witness. This requirement is not trumped by *Rule 806*, and counsel must comply with it if counsel has called the declarant for purposes of cross-examination. There is no restriction upon impeaching counsel's showing the statement to the witness, but the rule permits impeaching counsel to choose when to do so.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to prior inconsistent statements. Unless a timely objection is made, the statements will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of evidence under *Rule 104(a)*, in ruling on objections to prior inconsistent statements the judge will want to state for the record *outside the hearing of the jury* something like the following: I have considered the objection to the use of these prior statements. I find by a preponderance of the evidence that the statements [are or are not] sufficiently inconsistent with the statement of [name of hearsay declarant] that has been admitted for its truth to be probative, and that the possible prejudicial effect of these statements, particularly the danger they will be used as substantive evidence, [does or does not] substantially outweigh their probative value for impeachment purposes. Therefore, the objection is [overruled or sustained], and the statements [are or are not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to prior inconsistent statements, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about the proper use of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Prior Inconsistent Statements -- Declarant Not Called as Witness

[Name of party relying on hearsay] has presented evidence of a statement by [name of declarant]. I have already instructed you that you must decide whether this statement was made and that you may give this statement the same weight as trial testimony. [Name of opposing party] has presented evidence about prior statements of [name of declarant] that might be inconsistent with the statement presented by [name of party relying on hearsay]. You must decide whether [name of declarant] made a prior statement, whether the prior statement was inconsistent with the statement upon which [name of party relying on hearsay] relies, and whether any prior statement causes you to doubt the statement upon which [name of party relying on hearsay] relies.

[2] Prior Inconsistent Statements -- Declarant Called as Witness

[Name of party relying on hearsay] has presented evidence of a statement by [name of declarant]. I have already instructed you that you must decide whether this statement was made and that you may give this statement the same weight as trial testimony. [Name of party] has now called [name of declarant] as a witness, asked [name of declarant] about the statement, and presented evidence of other statements by [name of declarant] that [name of party] contends are inconsistent with the statement relied upon by [name of party relying on hearsay]. You must decide whether [name of declarant] made these other statements, whether they are inconsistent with the statement upon which [name of party relying on hearsay] relies, and whether any of these other statements cause you to doubt the statement upon which [name of party relying on hearsay] relies. You may consider the contents of the several statements as well as the testimony of [name of declarant] in deciding the weight to give the statement upon which [name of party relying on hearsay] relies.

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CHAPTER 9 AUTHENTICATION AND IDENTIFICATION

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§ 9.syn Synopsis to Chapter 9: AUTHENTICATION AND IDENTIFICATION

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[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Authentication Generally

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[1] Nonexpert Opinion

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9-3 Voice Identification.

[a] Governing Rules.

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9-4 Telephone Conversations.

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[b] Key Points.

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9-5 Public Records.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Public Records Authorized to Be Filed -- Judicial Notice Taken

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9-6 Ancient Documents.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

9-7 Processes and Systems.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

9-8 Self-Authentication.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Public Records

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9-1 Basic Authentication.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the offered evidence [describe evidence and conclusion -- e.g., is the defendant's hotel bill]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Authentication Generally

[Name of proponent] has presented [cite exhibit number] and contends [summarize contention -- *e.g.*, that it is an authentic hotel bill]. It is for you to decide whether [cite exhibit number] is authentic and how much weight to give it.

[2] Identification Generally

[Name of proponent] has presented [cite exhibit number or describe testimony] and contends that it [summarize contention -- *e.g.*, is a watch the defendant was wearing at the time of the accident, or establishes that the defendant participated in the telephone conversation]. It is for you to decide whether or not the evidence supports this contention and how much weight to give it.

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9-2 Handwriting.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. -- Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. -- ***Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.***

(3) Comparison by trier or expert witness. -- ***Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.***

(4) Distinctive characteristics and the like. -- ***Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.***

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)* offers examples of ways to authenticate evidence. It is unclear whether the limitations in these examples -- *e.g.*, the limitation that nonexpert opinion about handwriting cannot be based on knowledge acquired for litigation -- are binding or advisory.

5. *Rule 901(b)(2)* and *(b)(3)* provide two specific ways to authenticate handwriting, and *Rule 901(b)(4)* provides a third way. It is never necessary to authenticate evidence by all available means. However, a party may choose as a matter of strategy to use more than one method of authentication.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of handwriting authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., note contains the handwriting of the defendant]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Nonexpert Opinion

[Name of proponent] has presented the testimony of [name of witness] to establish that [cite exhibit number] contains the handwriting of [name of writer]. It is for you to decide whether [name of witness] is able to identify this handwriting and the accuracy of the identification, and also to decide how much weight to give this testimony.

[2] Expert Opinion

[Name of proponent] has presented the testimony of [name of witness] to establish that [cite exhibit number] contains the handwriting of [name of writer]. [Name of witness] testified that he compared [cite challenged exhibit number] with [cite exemplar exhibit number] which [name of proponent] contends contains the handwriting of [name of writer]. It is for you to decide whether [cite exemplar exhibit number] contains the handwriting of [name of writer], whether [name of witness] is able to compare this handwriting with the writing on [cite challenged exhibit number] and the accuracy of the comparison, and how much weight to give this testimony.

[3] Circumstantial Evidence

[Name of proponent] contends that [cite exhibit number] contains the handwriting of [name of writer]. It is for you to decide whether the distinctive characteristics of this exhibit, the circumstances surrounding its creation, or other evidence establishes that it contains the handwriting of [name of writer] and how much weight to give this evidence.

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9-3 Voice Identification.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(5) Voice identification. -- ***Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.***

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)(5)* provides that any witness who claims to have experience with a voice may make a voice identification.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of voice authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and conclusion -- e.g., voice on the telephone was that of the defendant]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe

the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Voice Identification Generally

[Name of witness] has testified that he/she recognized the voice of [identify speaker] in a conversation on the basis of prior experience with this voice. It is for you to decide whether [name of witness] was able to make an accurate identification and how much weight to give this testimony.

[2] Tape Recording

[Name of witness] has testified that he/she recognized the voice of [identify speaker] on [cite exhibit number], a tape recording which you heard, on the basis of prior experience with this voice. It is for you to decide whether [name of witness] was able to make an accurate identification and how much weight to give this testimony.

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9-4 Telephone Conversations.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(6) Telephone conversations. -- ***Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.***

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)* offers examples of ways to authenticate evidence. It is unclear whether the limitations in these examples -- *e.g.*, the limitation that telephone calls to listed numbers of individuals are properly authenticated if the individual identifies himself or herself -- are binding or advisory.

5. *Rule 901(b)(6)* provides for ways of authenticating telephone calls to individuals or to businesses.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification as to telephone conversations under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., telephone call was made by the plaintiff]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Calls to Individuals -- Specific Number

[Name of witness] testified that he/she telephoned [number] and that the person who answered the phone identified himself/herself as [identity of person]. [Name of offering party] has also presented evidence that this telephone number was in fact assigned to [identity of person]. It is for you to decide whether [identity of person] received the call and participated in the telephone conversation and the weight to give this evidence.

[2] Calls to Individuals -- Telephone Directory

[Name of witness] testified that he/she telephoned the number in the telephone directory listed for [identity of person] and that the person who answered the phone identified himself/herself as [identity of person]. It is for you to decide whether [identity of person] received the call and participated in the telephone conversation and the weight to give this evidence.

[3] Calls to Business -- Specific Number

[Name of witness] testified that he/she telephoned [number], a person answered the phone, and a conversation took place which [name of witness] described. [Name of offering party] has also presented evidence that this telephone number was in fact assigned to [identity of business]. It is for you to decide whether [identity of business] received the call, whether someone at [identity of business] participated in the conversation, and the weight to give this evidence.

[4] Calls to Business -- Telephone Directory

[Name of witness] testified that he/she telephoned the number in the telephone directory listed for [identity of business], a person answered the phone, and a conversation took place which [name of witness] described. It is for you to decide whether [identity of business] received the call, whether someone at [identity of business] participated in the conversation, and the weight to give this evidence.

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9-5 Public Records.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(7) Public records or reports. -- ***Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.***

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)(7)* provides for authentication of public records.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., document is a record kept in the office of the Secretary of State]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the

offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Public Records Authorized to Be Filed -- Judicial Notice Taken

[Name of party] has presented evidence that [cite exhibit number] is a record that is filed with [name of public office]. I instruct you that the law of [e.g., United States, State, or local government] authorizes such records to be filed. It is for you to decide whether this record was filed, whether the filing of this record proves that it is authentic, and the weight to be given this record.

[2] Public Records Generally

[Name of party] has presented evidence that [cite exhibit number] was prepared by [name of public office]. It is for you to decide whether [name of public office] prepared this record and the weight to be given it.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 9 AUTHENTICATION AND IDENTIFICATION

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9-6 Ancient Documents.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(8) Ancient documents or data compilation. -- ***Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.***

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)* provides various ways to authenticate or identify evidence. It is unclear whether the limitations in the examples -- *e.g.*, an ancient document must be twenty years old -- are binding on a trial judge. It is clear that if the limitations are satisfied, the proponent of evidence has done enough to authenticate it.

5. *Rule 901(b)(8)* provides a mechanism for authenticating ancient documents. Assuming that the limitations are binding or that the trial judge will choose to apply them even if they are not binding, the trial judge must find that there is sufficient evidence for a jury to find that the requirements are true. However, the judge must leave the final decision as to whether the document is authentic for the jury.

6. An ancient document may be hearsay. *Rule 803(16)* contains a hearsay exception for ancient documents. An authentication objection does not raise a hearsay issue. A hearsay objection must be specifically raised and dealt with under Article VIII of the Federal Rules of Evidence.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does

not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., this document is the map created by the defendant's father]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instruction can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

Ancient Documents Generally

[Name of party] has presented evidence that [cite exhibit number] was found in [describe place], that this document has been in existence for more than twenty years, and the place where the document was found is a place in which a genuine document likely would have been. It is for you to decide whether the evidence concerning this document, including its appearance and the circumstances in which it was found, proves that it is authentic and the weight to be given this document.

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9-7 Processes and Systems.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) *General provision*. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations*. -- By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(9) Process or system. -- *Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result*.

* * *

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge makes the determination pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 901(b)* provides various ways to authenticate or identify evidence. *Rule 901(b)(9)* provides a general example for authenticating results generated by any process or system.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification of processes and systems under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses in making its ruling. It decides only whether a reasonable jury could find witnesses credible and could accept their testimony as true. I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., the computer program produced accurate results]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe

the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instruction can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

Process or System Generally

[Name of party] has presented evidence that [describe testimony or cite exhibit number] was produced using a particular process or system. It is for you to decide whether this process or system has produced reliable evidence and the weight to be given this evidence.

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9-8 Self-Authentication.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal*. -- A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal*. -- A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents*. -- A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records*. -- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications*. -- Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals*. -- Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like*. -- Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents*. -- Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents*. -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress*. -- Any signature, document, or other matter declared by Act of Congress to be presumptively or *prima facie* genuine or authentic.

(11) *Certified domestic records of regularly conducted activity*. -- The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) *Certified foreign records of regularly conducted activity*. -- In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

[b] Key Points.

1. Authentication or identification of evidence requires only that the proponent provide a basis for a reasonable fact finder to determine that the offered evidence is what the proponent claims it to be. The role of the trial judge when an objection is made on authentication or identification grounds is to decide whether there is sufficient evidence for a jury to find that the matter in question is what the proponent claims.

2. Thus, the trial judge generally makes the determination as to authenticity and identification pursuant to *Rule 104(b)*. The trial judge must make this determination by assessing only admissible evidence. *Rule 902* makes certain kinds of evidence self-authenticating and removes the need to call witnesses to lay a foundation for various public documents and other evidence.

3. The fact that the trial judge admits evidence does not bar the opposing party from offering evidence to suggest that the matter is a fraud or improperly identified.

4. *Rule 902* provides various mechanisms for authenticating evidence without calling witnesses. It is not a prohibition on the calling of witnesses. A party who faces an adversary's attack on the genuineness of evidence may choose to call witnesses even though they are not required to testify as a condition of admitting the challenged evidence.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made on authentication or identification grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the adequacy of authentication or identification under *Rule 104(b)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: [Name of party] has objected to [describe evidence] as lacking a sufficient foundation. I have considered all the evidence and argument presented to me with regard to this objection. The task of the court is to determine whether there is sufficient evidence from which the jury could find by a preponderance of the evidence that the proffered evidence is what its proponent claims. The court does not decide on the credibility of witnesses or whether it believes witnesses or other evidence in making its ruling. Relying on *Rule 902*, I find that a reasonable jury [could or could not] find that the [describe evidence and the conclusion -- e.g., exhibit is a genuine copy of a public document prepared by the Department of Commerce]. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude evidence as lacking a sufficient foundation, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony.

Once the judge has ruled on the objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence on foundational grounds, but may want the judge to explain to the jury its role in assessing the credibility of witnesses and the reliability of evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Public Records

[Name of party] has presented [cite exhibit number]. This document appears to be [describe document -- *e.g.*, a copy certified by the custodian of the X public office as an accurate copy of a document on file in that office]. It is for you to decide whether this is an authentic copy and the weight to give it.

[2] Newspapers or Periodicals

[Name of party] has presented [cite exhibit number] and contends that this document is what it appears to be [describe document -- *e.g.*, a copy of the New York Times for September 15, 1997]. You may consider the appearance of the document as well as any other evidence presented in this case in deciding whether the document is authentic and the weight to give it.

[3] Trade Inscriptions

[Name of party] has presented [cite exhibit number] and contends that this object is what it appears to be [describe document -- *e.g.*, a bottle containing XYZ soda]. You may consider the appearance of this object as well as any other evidence presented in this case in deciding whether the object is authentic and the weight to give it.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
CHAPTER 10 CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

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§ 10.syn Synopsis to Chapter 10: CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

10-1 Writing or Recording Used to Prove Contents.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Writing or Recording Not Admitted to Prove Contents

[2] Writing or Recording Used to Prove Contents -- Impermissible Evidence

[3] Party's Admission

10-2 Duplicates.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Duplicate Admitted by Stipulation

[2] Duplicate Admitted Over Objection

[3] Party's Admission

10-3 Excuses for Nonproduction

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Claim of Bad Faith

[2] Certified Copy -- Public Record

[3] Testifying Witness--Public Record

10-4 Competing Originals, Duplicates, or Testimony.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Competing Originals

[2] Competing Documents -- Original and Duplicate

[3] Oral Testimony -- Existence of Contract

[4] Oral Testimony -- Disputing Existence of Document

[5] Oral Testimony -- Disputing Contents of Document

10-5 Summaries.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Summaries of Voluminous Material -- Stipulation

[2] Summaries of Voluminous Material -- Accuracy Disputed

[3] Competing Summaries of Voluminous Material

[4] Summaries of Trial Testimony -- Exhibit Shown but Not Admitted

[5] Summaries of Trial Testimony -- Exhibit Admitted

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10-1 Writing or Recording Used to Prove Contents.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning the qualification of a person to be a witness***, the existence of a privilege, or the admissibility of evidence ***shall be determined by the court***, subject to the provisions of subdivision (b). In making its determination ***it is not bound by the rules of evidence except those with respect to privileges***.

* * *

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- ***An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.*** An "original" of a photograph includes the

negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- ***A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.***

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

[b] Key Points.

1. Article X sets forth the Federal Rules of Evidence version of the best evidence rule. Article X greatly relaxes the common-law rule, especially with its ready acceptance of duplicates. Like the common-law rule, however, *Rule 1002* imposes the best evidence requirement only when a writing, recording, or photograph is used to prove its contents rather than being used for another purpose.

2. It is the trial judge's decision under *Rule 104(a)* whether a writing or recording is being offered to prove its contents. This decision usually is made without resort to fact finding, since the determination when an item is being offered to prove its content or for some other purpose is largely based on a logical analysis of the relationship between the contents and the issues in the case.

3. It is also the judge's decision whether a writing or recording that is offered for its contents qualifies as an original under *Rule 1001(3)*. Even though the judge makes a determination that a writing or recording is an original, the jury may decide that is not authentic. When adversaries each claim that a different writing or recording is an original, or where one party claims that a writing or recording is an original and another denies that any such document ever existed, or where adversaries offer competing evidence regarding the contents of a document, *Rule 1008* indicates that the jury, not the judge, is to decide which party is correct. The subject of competing evidence is covered in § 10-4.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to a writing or recording on best evidence grounds. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on whether a writing or recording is offered to prove its contents under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered the [writing or recording] and the objection that it is not the best evidence. An objection on best evidence grounds can only be made when a writing or recording is used to prove its contents. I find by a preponderance of the evidence that the [describe writing or recording] [is or is not] offered to prove its contents. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

If the judge finds that the best evidence rule applies, the judge will have to decide whether the writing or recording that is offered is an original, an admissible duplicate, or admissible secondary evidence, or whether the objecting party has acknowledged the genuineness of the writing or recording in a way that moots a best evidence objection under *Rule 1007*.

If the judge finds that the writing or recording is an original, *Rule 1002* is satisified. Generally, the judge will want to make a finding *outside the hearing of the jury* on the record as to whether the writing or recording is an original in a form such as the following: I find by a preponderance of the evidence that the [writing or recording] [is or is not] an original under *Rule 1001(3)*.

If the judge finds that the writing or recording is not an original, the judge may have to decide whether the objecting party has admitted authenticity as provided in *Rule 1007*. The judge will generally make a a finding *outside the hearing of the jury* on the record as to whether *Rule 1007* is satisfied in a form such as the following: I find by a preponderance of the evidence that, even though the [writing or recording] is not an original, [name of party] [has or has not] [testified at trial, testified in a deposition, or stated in writing] that the [writing or recording] is genuine. Therefore, the requirement of an original [is or is not] excused.

Once the judge has ruled on the best evidence objection, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to a writing or recording, but may want the judge to explain to the jury the reason why a writing or recording is admitted into evidence.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Writing or Recording Not Admitted to Prove Contents

[Name of party] has presented [describe writing or recording -- *e.g.*, a photograph] that [name of witness] has testified is a fair and accurate depiction of what he/she observed. You may use the photograph to help you understand the testimony of [name of witness] and to decide what weight to give that testimony.

[2] Writing or Recording Used to Prove Contents -- Impermissible Evidence

[Name of witness] has referred to [describe writing or recording]. The contents of this [describe writing or recording] are in dispute in this case. You may not consider the testimony of [name of witness] in deciding on the contents of [describe writing or recording].

[3] Party's Admission

[Name of offering party] has presented [cite exhibit number] and contends it accurately reflects the contents of the original. [Name of offering party] has produced evidence that [name of opposing party] admitted in [testimony, a

deposition, or a writing] that the contents of [cite exhibit number] accurately reflect the contents of the original document. [Name of opposing party] contends that he/she erred in making this admission. It is for you to decide what the contents of the original were. You may consider the fact that [name of opposing party] made an admission, the explanation offered by [name of opposing party] for the admission and all other evidence that is before you in deciding what the contents of the original were.

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6-10 Federal Rules of Evidence Manual 10-2

10-2 Duplicates.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- ***Preliminary questions concerning the qualification of a person to be a witness***, the existence of a privilege, or the admissibility of evidence ***shall be determined by the court***, subject to the provisions of subdivision (b). In making its determination ***it is not bound by the rules of evidence except those with respect to privileges***.

* * *

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- ***An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.*** An "original" of a photograph includes the

negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- ***A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.***

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

[b] Key Points.

1. Article X sets forth the Federal Rules of Evidence version of the best evidence rule. Article X greatly relaxes the common-law rule, especially with its ready acceptance of duplicates. Like the common-law rule, however, *Rule 1002* imposes the best evidence requirement only when a writing, recording, or photograph is used to prove its contents rather than being used for another purpose.

2. Most documents and recordings copied on a machine will be presumptively admissible under *Rule 1003*.

3. It is the trial judge's decision under *Rule 104(a)* whether a genuine question is raised as to the authenticity of the original. Even though the judge admits a duplicate, a party may seek to persuade a jury that the document is not authentic.

4. *Rule 1007* provides that a party can offer an opposing party's testimony, deposition, or written admission to prove the contents of a document without accounting for nonproduction of the original. In many cases where a party has admitted the contents of a document, there will be no dispute about the contents at trial. In some cases the admission may be binding -- *e.g.*, under *Fed. R. Civ. P. 36* -- unless the trial judge grants relief. However, there will be cases in which a party will admit genuineness of a document at some stage of a proceeding and later change its mind. *Rule 1007* provides for admissibility of evidence; it does not preclude a party from challenging the contents of a document it once admitted.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to writings or recordings. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of writings and recordings under *Rule 104(a)*, generally the judge will

want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection made to the use of a duplicate. The party opposing such use must demonstrate that it has raised a genuine question as to authenticity of the document or that it would be unfair to permit the use of the duplicate. I find by a preponderance of the evidence that a genuine question as to authenticity [has or has not] been raised and that it [would or would not] be unfair to permit the use of the duplicate. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude the duplicate, the party relying on it may well decide to use the duplicate as its offer of proof. The party should request an opportunity to make such an offer and assure that the duplicate is made part of the record. The judge may prescribe the form in which any offer must be made, but the proffer of the duplicate is likely to be the most efficient and most accurate form of offer in these circumstances.

Even if a judge determines that a writing or recording does not qualify as a duplicate or should not be admitted as a duplicate, the proponent may still rely upon *Rule 1007*. If so, the judge will generally make a a finding *outside the hearing of the jury* on the record as to whether *Rule 1007* is satisfied in a form such as the following: I find by a preponderance of the evidence that, even though the [writing or recording] is not an original, [name of party] [has or has not] [testified at trial, testified in a deposition, or stated in writing] that the [writing or recording] is genuine. Therefore, the requirement of an original [is or is not] excused.

Once the judge has ruled on the objection to the duplicate, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

As the first limiting instruction set forth below demonstrates, even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to a writing or recording, but may want the judge to explain to the jury something about its role regarding documents.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Duplicate Admitted by Stipulation

The parties have agreed that [cite exhibit number] is an accurate copy of the original of this document. You must give this copy the same weight you would give the original.

[2] Duplicate Admitted Over Objection

[Name of party] has presented [cite exhibit number] and contends it is an accurate copy of the original. It is for you to decide whether [cite exhibit number] is an accurate copy and the weight to give it. You may consider the appearance of the document as well as any testimony or other evidence concerning it in making your decision.

[3] Party's Admission

[Name of offering party] has presented [cite exhibit number] and contends it is an accurate copy of the original. [Name

of offering party] has produced evidence that [name of opposing party] admitted in [testimony, a deposition, or a writing] that the contents of [cite exhibit number] accurately reflect the contents of the original document. [Name of opposing party] contends that he/she erred in making this admission. It is for you to decide what the contents of the original were. You may consider the fact that [name of opposing party] made an admission, the explanation offered by [name of opposing party] for the admission and all other evidence that is before you in deciding what the contents of the original were.

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6-10 Federal Rules of Evidence Manual 10-3

10-3 Excuses for Nonproduction

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- ***This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.***

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent,

set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- ***An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.*** An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- ***A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.***

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) *Originals lost or destroyed*. -- ***All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith***; or

(2) *Original not obtainable*. -- No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent*. -- At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral matters*. -- The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

[b] Key Points.

1. Article X sets forth the Federal Rules of Evidence version of the best evidence rule. Article X greatly relaxes the common-law rule, especially with its ready acceptance of duplicates. Like the common-law rule, however, *Rule 1002* imposes the best evidence requirement only when a writing, recording, or photograph is used to prove its contents rather being used than for another purpose.

2. The trial judge generally decides the legal questions that arise in connection with the best evidence rule. For example, it is the trial judge's decision under *Rule 104(a)* whether a genuine question is raised as to the authenticity of the original or whether an original was lost in good faith.

3. *Rule 1004* comes into play when the original of a document is lost or unavailable. With respect to all writings and recordings except those covered by *Rule 1005*, a party who has shown a recognized excuse for not producing the original may offer any other admissible evidence to prove the contents. The trial judge determines under *Rule 104(a)* whether the excuse has been demonstrated.

4. Article X makes duplicates presumptively admissible, but it does not require a party to produce a duplicate rather than other evidence of the contents of documents not covered by *Rule 1005*. In short, a party who shows that an original was lost in good faith may either submit a duplicate or provide other evidence of the contents of the original.

5. *Rule 1005* makes a special provision for public records. It does not require the original, but it limits proof of the contents of public records to two forms of evidence unless these forms are unavailable.

6. The fact that the trial judge may have determined that an original was destroyed in good faith may not be a bar to a party's offering evidence from which a jury might find bad faith and draw the inference that the writing or recording was destroyed to hide its contents.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to writings or recordings. Unless a timely objection is

made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

The trial judge generally rules on the admissibility of writings and recordings under *Rule 104(a)*, and *Rule 104(a)* governs when the trial judge decides whether an adequate excuse has been shown under *Rule 1004* for nonproduction of the original of a writing or recording. When making a ruling under *Rule 1004*, the judge will want to state for the record *outside the hearing of the jury* the following: [Name of offering party] contends that the original of the [describe writing or recording] is unavailable [explain why -- e.g., was lost or destroyed in good faith]. I find by a preponderance of the evidence that the original [was or was not] lost or destroyed in good faith. Therefore, the objection is [overruled or sustained], and other evidence of the contents of the original [will or will not] be admitted.

Similarly, when a public record is to be proved and an objection is raised, the judge will want to state for the record *outside the hearing of the jury* the following: [Name of offering party] contends that the original of [describe writing or recording] is [found in an official record or a document that is recorded or filed in an official office] and that [(exhibit number) is a copy certified to be correct in accordance with *Rule 902* or a witness will testify that he/she has compared the original to (exhibit number) and has found it to be correct]. I find by a preponderance of the evidence that the original of [describe writing or recording] [is or is not] [found in an official record or a document that is recorded or filed in an official office].

If the judge finds that the writing or recording is a public record, the judge will want to continue and state for the record *outside the hearing of the jury* the following: I further find by a preponderance of the evidence that [exhibit number] [is or is not] [a duly certified copy of the original under *Rule 902* or demonstrated by testimony to be a correct copy of the original]. Accordingly, I will [admit or exclude] [exhibit number].

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Claim of Bad Faith

[Name of offering party] has introduced [describe evidence -- e.g., a copy or testimony] and claims that this evidence accurately states the contents of the original [describe writing or recording]. [Name of opposing party] contends that this evidence does not accurately state the contents of the original and that [name of offering party] deliberately destroyed the original to prevent its use as evidence. It is for you to decide whether the evidence presented by [name of offering party] accurately states the contents of the original. You may consider whether [name of offering party] deliberately destroyed the original to prevent its use in making your decision.

[2] Certified Copy -- Public Record

[Name of offering party] has presented a certified copy of a [writing or recording] that is [describe circumstances -- e.g., filed in a public office]. It is for you to decide whether you are satisfied that the copy accurately reflects the contents of the original. You make consider the nature of the certification, the appearance of the [writing or recording] and all testimony and other evidence in the case in making your decision.

[3] Testifying Witness--Public Record

[Name of offering party] has presented testimony by [name of witness] that [name of witness] compared [exhibit number] to an original document that [describe circumstances -- e.g., is filed in a public office]. It is for you to decide whether you are satisfied from the testimony that [exhibit number] accurately reflects the contents of the original. You make consider the testimony of [name of witness], the appearance of [exhibit number] and all testimony and other evidence in the case in making your decision.

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6-10 Federal Rules of Evidence Manual 10-4

10-4 Competing Originals, Duplicates, or Testimony.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- ***This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.***

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent,

set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- ***An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.*** An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- ***A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.***

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

[b] Key Points.

1. Article X sets forth the Federal Rules of Evidence version of the best evidence rule. Article X greatly relaxes the common-law rule, especially with its ready acceptance of duplicates. Like the common-law rule, however, *Rule 1002* imposes the best evidence requirement only when a writing, recording, or photograph is used to prove its contents rather than being used for another purpose.

2. The trial judge generally decides the legal questions that arise in connection with the best evidence rule. For example, it is the trial judge's decision under *Rule 104(a)* whether a writing or recording is offered to prove the contents thereof, whether a writing or recording qualifies as an original, and whether a writing or recording qualifies as a duplicate.

3. Nevertheless, *Rule 1008* provides that three issues, which will usually be at the heart of a dispute, are for the jury to decide. These are (A) whether a writing ever existed (for example, where one party claims breach of contract and the other denies there was a contract), (B) which of two documents actually is the original, and (C) whether other evidence correctly reflects the contents of a document (for example, where one party claims that the other substituted a contract with forged signatures for the actual contract signed by the parties).

4. Under *Rule 1008*, if both parties claim to have originals, the trial judge should permit both documents to be admitted and let the jury decide which, if either, is genuine. If one party has what it claims to be an original and the other party has a duplicate of what it claims was the original, both documents should be admitted. Finally, if one party has a document and the other wants to offer testimony that the document is a fraud, the testimony should be admitted.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to writings or recordings. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Although the trial judge generally rules on the admissibility of writings and recordings under *Rule 104(a)*, *Rule 1008* provides that certain disputed issues are for the jury to decide. When *Rule 1008* issues are before the court, the judge will want to state for the record *outside the hearing of the jury* the following: There is a dispute in this case as to [whether a writing or recording ever existed, which of two writings or recordings is the original, or which evidence is the actual evidence of the contents of the writing or recording]. Although most best evidence objections are for the court to resolve under *Rule 104(a)*, this question is specifically reserved for the jury by *Rule 1008*. Accordingly, I make no finding on this issue and shall instruct the jury on its responsibilities as fact finder.

The judge will almost always want to instruct the jury as to its responsibilities on *Rule 1008* matters. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Competing Originals

Each party has presented an exhibit that it claims is the original [describe document]. It is for you to decide whether either of these documents is the original. You make consider the appearance of the documents as well as testimony and other evidence regarding them in making your decision.

[2] Competing Documents -- Original and Duplicate

[Name of party] has presented [cite exhibit number] and contends that it is the original [describe document]. [Name of opposing party] has presented [cite exhibit number] and contends that it is a copy of the actual original. It is for you to decide whether either document is authentic. You may consider the appearance of the documents as well as testimony and other evidence regarding them in making your decision.

[3] Oral Testimony -- Existence of Contract

[Name of party] has presented testimony by [name of witness] that there was a [describe writing or recording -- *e.g.*, written contract between the plaintiff and the defendant]. [Name of opposing party] has offered contrary testimony and has denied the existence of such a [describe writing or recording]. It is for you to decide whether such a [describe document] existed and if so what it provided.

[4] Oral Testimony -- Disputing Existence of Document

[Name of party] has presented [cite exhibit number] and contends that it is [the original or a copy of] [describe document]. [Name of opposing party] has presented testimony of [name of witness] and contends that [cite exhibit number] is not genuine and that no such document ever existed. It is for you to decide whether [cite exhibit number] is genuine.

[5] Oral Testimony -- Disputing Contents of Document

Both parties agree that there was a [describe writing or recording] and that neither party can produce it at this time. Each party has offered testimony as to the contents of the [describe writing or recording]. It is for you to decide, based on all the evidence that is before you, what the contents of the [describe writing or recording] actually were.

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10-5 Summaries.

[a] Governing Rules.

Rule 104. Preliminary Questions

(a) *Questions of admissibility generally*. -- Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). ***In making its determination it is not bound by the rules of evidence except those with respect to privileges.***

(b) *Relevancy conditioned on fact*. -- ***When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.***

* * *

(e) *Weight and credibility*. -- ***This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.***

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 611. Mode and Order of Interrogation and Presentation

(a) *Control by court*. -- The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

* * *

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings*. -- "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs*. -- "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original*. -- ***An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.*** An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate*. -- ***A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.***

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

[b] Key Points.

1. Article X sets forth the Federal Rules of Evidence version of the best evidence rule. Article X greatly relaxes the common-law rule, especially with its ready acceptance of duplicates. Like the common-law rule, however, *Rule 1002*

imposes the best evidence requirement only when a writing, recording, or photograph is used to prove its contents rather than being used for another purpose.

2. It is the trial judge's decision whether a chart, summary, or calculation should be admitted. The purpose of *Rule 1006* is to avoid burdening the court with voluminous documents that are more helpful when presented in summary form. Presumably, the trial judge's control over the mode of proof under *Rule 611(a)* applies to summaries as well as to other exhibits.

3. The single most important prerequisite to admissibility of a summary exhibit is that the proponent must show that the underlying documents are themselves admissible. A party cannot take voluminous inadmissible documents and generate from them an admissible summary.

4. The procedural requirements of the rule are intended to assure that the party against whom a summary is offered has an opportunity to check the summary for accuracy and to raise any objections before the summary is admitted. The trial judge has authority to reject any misleading or inaccurate summary under *Rule 403*, since it is likely to be more prejudicial than helpful. The fact, however, that a summary may not be 100% perfect does not mean that it cannot be admitted. A summary that contains small mistakes might still be probative and might not raise much of a concern about prejudice.

5. The trial judge's decision to admit a summary does not preclude an opposing party from presenting some of the underlying documents to challenge the summary.

6. *Rule 1006* addresses only summaries of evidence too voluminous to be readily produced at trial. It does not address summaries of evidence that has been admitted. Many judges permit these summaries to be used as illustrative evidence. Some judges admit summaries of trial evidence as exhibits.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The rules set forth are triggered when a timely objection is made to a summary exhibit. Unless a timely objection is made, the evidence will be admitted. A timely objection requires the trial judge to make a ruling.

Since the trial judge rules on the admissibility of a summary under *Rule 104(a)*, generally the judge will want to state for the record *outside the hearing of the jury* the following: I have considered all the evidence presented to me with regard to the objection made to the summary exhibit. A summary may be offered when it is not practicable to introduce the original documents. The opposing party is guaranteed an opportunity to examine and copy the underlying documents in order to assure that it may object to inaccuracies or irregularities in the summary. I find by a preponderance of the evidence that this summary [is or is not] a compilation of documents or records that are too voluminous to be produced, that this summary [is or is not] a summary of documents or records that would themselves be admissible, and that the objecting party [has or has not] had a full and fair opportunity to examine the underlying documents or records. Therefore, the objection is [overruled or sustained], and the evidence [is or is not] admissible.

A judge who rules on a summary of trial testimony may want to make the following statement for the record *outside the hearing of the jury*: I have considered all evidence and argument presented to me concerning the use of this summary of trial testimony. Using the authority vested in me by *Rule 611(a)* with respect to the mode and order of proof, and considering the probative value and possible prejudicial effect of this summary under *Rule 403*, I find that it is more likely than not that this summary [will or will not] assist the jury in resolving the disputed issues in this case and in understanding the evidence, and that the possible prejudicial effect of this evidence [does or does not] substantially outweigh its probative value. I have also considered whether the exhibit should be admitted into evidence or simply used for illustrative purposes, and I have decided [to admit it or to rule that it shall not be admitted but shall be used only for illustrative purposes].

The party who prevails on the evidence issue may find it useful to request such a statement on the record to protect the record on appeal.

Should the judge exclude a summary, the party wishing to offer such evidence should be certain to make an offer of proof. The party should request an opportunity to make the offer. The judge may prescribe the form in which the offer must be made, but if the judge permits the party some freedom to choose how to make the offer, the party may choose among the following alternatives: (a) a proffer by counsel as to the substance of the excluded evidence; (b) putting a witness on the stand to testify in question and answer form; (c) a written summary of the excluded evidence; and (d) a deposition or other document setting forth the substance of the excluded testimony. The party making the offer will certainly want to make the excluded summary part of the record, but may also find it useful to make an additional proffer in view of the fact that the underlying records are probably not before the court.

Once the judge has ruled on the objection to the summary, the judge may find it useful in some circumstances to give a limiting instruction to the jury. Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence -- *e.g.*, where evidence is admitted by stipulation -- that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to a summary, but may want the judge to explain to the jury something about a summary exhibit.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Summaries of Voluminous Material -- Stipulation

[Name of party] has presented [cite exhibit number] which is [describe exhibit]. A party may use a summary exhibit to present voluminous information that could not easily be produced in court. The parties have agreed that this exhibit is an accurate summary.

[2] Summaries of Voluminous Material -- Accuracy Disputed

[Name of party] has presented [cite exhibit number] and contends that it is [describe summary -- *e.g.*, an accurate summary of the company's sales for a three-year period]. A party may use a summary exhibit to present voluminous information that could not easily be produced in court. [Name of opposing party] has challenged the accuracy of the summary. It is for you to decide the weight to give this summary. You may consider the testimony about how the summary was prepared, the appearance of the summary, whether [name of opposing party] had an opportunity to examine both the summary and underlying information, and other testimony and exhibits that relate to the summarized information in making your decision.

[3] Competing Summaries of Voluminous Material

[Name of party] has presented [cite exhibit number] and contends that it is [describe summary -- *e.g.*, an accurate summary of the company's sales for a three-year period]. [Name of opposing party] has presented [cite exhibit number] and contends that it is [describe summary -- *e.g.*, an accurate summary of the company's sales for a three-year period]. Both parties may use summary exhibits to present voluminous information that could not easily be produced in court. Each side challenges the accuracy of the other's summary. It is for you to decide the weight to give each summary. You

may consider the testimony about how each summary was prepared, the appearance of each summary, whether the party against whom a summary is offered had an opportunity to examine both the summary and underlying information, and other testimony and exhibits that relate to the summarized information in making your decision as to the weight to give to either or both summaries.

[4] Summaries of Trial Testimony -- Exhibit Shown but Not Admitted

[Name of party] has used [cite exhibit number or describe exhibit] to illustrate or summarize evidence presented to you. This exhibit is not evidence. It is put before you to assist you in recalling or understanding the evidence that was presented to you. You must disregard all or part of this exhibit if you find that it inaccurately describes the evidence, and you must be aware that no summary is likely to include all of the evidence that has been presented and that the party who prepared it may have emphasized evidence favorable to it.

[5] Summaries of Trial Testimony -- Exhibit Admitted

[Name of party] has used [cite exhibit number] to illustrate or summarize evidence presented to you. I admitted this exhibit solely to assist you to recall or understand the evidence that was presented to you. You must disregard all or part of this exhibit if you find that it inaccurately describes the evidence, and you must be aware that no summary is likely to include all of the evidence that has been presented and that the party who prepared it may have emphasized evidence favorable to it.

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CHAPTER 11 MISCELLANEOUS RULES

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11-1 Miscellaneous Rules.

[a] Governing Rules.

[b] Key Points.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

[1] Evidence from Other Proceedings -- Rules Inapplicable -- Party Was Participant

[2] Evidence from Other Proceedings -- Rules Inapplicable -- Party Was Not Participant

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11-1 Miscellaneous Rules.

[a] Governing Rules.

Rule 1101. Applicability of Rules

(a) *Courts and judges*. -- These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) *Proceedings generally*. -- ***These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.***

(c) *Rule of privilege*. -- ***The rule with respect*** to privileges applies at all stages of all actions, cases, and proceedings.

(d) *Rules inapplicable*. -- ***The rules (other than with respect to privileges) do not apply in the following situations***:

(1) ***Preliminary questions of fact. -- The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.***

(2) Grand jury. -- Proceedings before grand juries.

(3) Miscellaneous proceedings. -- Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) *Rules applicable in part*. -- In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under *section 706(2)(F) of title 5, United States Code*; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (*7 U.S.C. 292*), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (*7 U.S.C. 499f, 499g(c)*); naturalization and revocation of naturalization under sections 310-*318 of the Immigration and Nationality Act* (*8 U.S.C. 1421-1429*); prize proceedings in admiralty under *sections 7651-7681 of title 10, United States Code*; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (*15 U.S.C. 522*); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935 (*15 U.S.C. 715d*); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (*19 U.S.C. 1581-1624*), or under the Anti-Smuggling Act (*19 U.S.C. 1701-1711*); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (*21 U.S.C. 301-392*); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (*22 U.S.C. 256-258*); habeas corpus under *sections 2241-2254 of title 28, United States Code*; motions to vacate, set aside or correct sentence under *section 2255 of title 28, United States Code*; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (*46 U.S.C. 679*); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved March 3, 1925 (*46 U.S.C. 781-790*), as implemented by *section 7730 of title 10, United States Code*.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in *section 2076 of title 28 of the United States Code*.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

[b] Key Points.

1. *Rule 1101* clearly establishes that *Rule 501* and privileges apply at all stages of all proceedings. The rule also provides that the trial judge is not bound by rules of evidence in making determinations of fact regarding preliminary questions of admissibility. *See Bourjaily v. United States, 483 U.S. 171 (1987)* .

2. *Rule 1101* also indicates the proceedings in which the rules of evidence do not apply.

[c] Rulings on the Record, Proffers, and Limiting Instructions.

The trial judge is unlikely to have to make rulings under *Rule 1101* in most circumstances, since the rule provides good guidance as to when the Federal Rules of Evidence apply and when they do not. It might be wise in some cases in which grand jury or other testimony is admitted from proceedings that do not follow the Federal Rules for the trial judge to instruct the jury to that effect.

Parties generally must request limiting instructions under *Rule 105*, and should consider the advisability of requesting a specific instruction. The trial judge has an interest in considering *sua sponte* whether to give one or more instructions, but often will find it helpful to inquire whether one or both parties wants a limiting instruction before making a final decision on whether to give a particular limiting instruction.

Even if a party has not objected to evidence, that party may nonetheless request a limiting instruction from the judge to the jury to explain to the jury or caution it about certain evidence. For example, a party may not object to evidence from other proceedings, but may want the judge to tell the jury that the evidence rules did not apply in those proceedings.

The following instructions can easily be requested and readily be adopted by trial judges to explain trial developments to the jury.

[1] Evidence from Other Proceedings -- Rules Inapplicable -- Party Was Participant

[Name of party] has presented evidence that was developed in [describe proceeding]. The same rules of evidence that we use in jury trials do not apply in these proceedings. Thus, the questions and answers may be less formal than many you have heard in this trial. It is for you to decide whether the nature of the questions and answers affects the weight you give this evidence. You may consider in deciding the weight to give this evidence that [name of party against whom evidence is offered] was a participant in the [describe proceeding] when the evidence you have heard was presented.

[2] Evidence from Other Proceedings -- Rules Inapplicable -- Party Was Not Participant

[Name of party] has presented evidence that was developed in [describe proceeding]. The same rules of evidence that we use in jury trials do not apply in these proceedings. Thus, the questions and answers may be less formal than many you have heard in this trial. It is for you to decide whether the nature of the questions and answers affects the weight you give this evidence. You may consider in deciding the weight to give this evidence that [name of party against whom evidence is offered] was not a participant in the [describe proceeding] when the evidence you have heard was presented.

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APPENDIX B: THE FEDERAL RULES OF EVIDENCE

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6-B Federal Rules of Evidence Manual ARTICLE I

ARTICLE I GENERAL PROVISIONS

Rule 101. Scope.

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988; Apr. 22, 1993, effective Dec. 1, 1993.*]

Rule 102. Purpose and Construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 103. Rulings on Evidence.

(a) Effect of erroneous ruling.--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof.--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a

party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.--The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury.--In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error.--Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 104. Preliminary Questions.

(a) Questions of admissibility generally.--Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.--When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury.--Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused.--The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility.--This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

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ARTICLE II JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts.

(a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.--A court may take judicial notice, whether requested or not.

(d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.--A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.--Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.--In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

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ARTICLE III PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings.

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 302. Applicability of State Law in Civil Actions and Proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

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ARTICLE IV RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) **Character evidence generally.--**Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.--Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness.--Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.--**Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 405. Methods of Proving Character.

(a) Reputation or opinion.--In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.--In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 406. Habit; Routine Practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 407. Subsequent Remedial Measures.

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Apr. 11, 1997, effective Dec. 1, 1997.*]

Rule 408. Compromise and Offers To Compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a

valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 409. Payment of Medical and Similar Expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Dec. 12, 1975; Apr. 30, 1979, effective Dec. 1, 1980.*]

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.

(a) Evidence Generally Inadmissible.--The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must--

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise. [*Adopted Oct. 28, 1978, effective Nov. 28, 1978; amended Nov. 18, 1988; Apr. 29, 1994, effective Dec. 1, 1994; Sept. 13, 1994, effective Dec. 1, 1994.*]

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4). [*Adopted Sept. 13, 1994, effective July 9, 1995.*]

Rule 414. Evidence of Similar Crimes in Child Molestation Cases.

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code:

(3) contact between any part of the defendant's body or an object and the genitals of the body of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5). [*Adopted Sept. 13, 1994, effective July 9, 1995.*]

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule. [*Adopted Sept. 13, 1994, effective July 9, 1995.*]

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ARTICLE V PRIVILEGES

Rule 501. General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

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ARTICLE VI WITNESSES

Rule 601. General Rule of Competency.

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988.*]

Rule 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1. 1987.*]

Rule 605. Competency of Judge as Witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 606. Competency of Juror as Witness.

(a) At the trial.--A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment.--Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Dec. 12, 1975; Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 607. Who May Impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 608. Evidence of Character and Conduct of Witness.

(a) Opinion and reputation evidence of character.--The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988.*]

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule.--For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.--Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.--Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.--The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Jan. 26, 1990, effective Dec. 1, 1990.*]

Rule 610. Religious Beliefs or Opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by court.--The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.--Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.--Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 612. Writing Used To Refresh Memory.

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 613. Prior Statements of Witnesses.

(a) Examining witness concerning prior statement.--In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.--Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2). [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988.*]

Rule 614. Calling and Interrogation of Witnesses by Court.

(a) Calling by court.--The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court.--The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections.--Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 615. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988; Nov. 18, 1988; Apr. 24, 1998, effective Dec. 1, 1998.*]

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6-B Federal Rules of Evidence Manual ARTICLE VII

ARTICLE VII OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 704. Opinion on Ultimate Issue.

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Oct. 12, 1984.*]

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993.*]

Rule 706. Court Appointed Experts.

(a) Appointment.--The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation.--Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment.--In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection.--Nothing in this rule limits the parties in calling expert witnesses of their own selection. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

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6-B Federal Rules of Evidence Manual ARTICLE VIII

ARTICLE VIII HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement.--A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.--A "declarant" is a person who makes a statement.

(c) Hearsay.--"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.--A statement is not hearsay if--

(1) Prior statement by witness.--The declarant testifies at the trial or hearing and is subject to cross- examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent.--The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E). [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Oct. 16, 1975, effective Oct. 31, 1975; Mar. 2, 1987, effective Oct. 1, 1987; Apr. 11, 1997, effective Dec. 1, 1997.*]

Rule 802. Hearsay Rule.

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.--A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.--A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.--Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.--A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in the paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).--Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.--Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.--Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.--To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.--Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.--Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other

person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.--Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.--The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.--A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.--Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.--Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.--To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.--Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.--Reputation in a community, arising before the

controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.--Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction.--Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history or boundaries.--Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) [Transferred to Rule 807.]
[*Adopted Jan. 2, 1975, effective July 1, 1975; amended Dec. 12, 1975; Mar. 2, 1987, effective Oct. 1, 1987; Apr. 11, 1997, effective Dec. 1, 1997; Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 804. Hearsay Exceptions; Declarant Unavailable.

(a) Definition of unavailability.--"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death.--In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history.--(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807.]

(6) Forfeiture by wrongdoing.--A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Dec. 12, 1975; Mar. 2, 1987, effective Oct. 1, 1987; Nov. 18, 1988; Apr. 11, 1997, effective Dec. 1, 1997.*]

Rule 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 806. Attacking and Supporting Credibility of Declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 11, 1997, effective Dec. 1, 1997.*]

Rule 807. Residual Exception.

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. [*Adopted Apr. 11, 1997, effective Dec. 1, 1997.*]

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6-B Federal Rules of Evidence Manual ARTICLE IX

ARTICLE IX AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification.

(a) General provision.--The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.--By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.--Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting.--Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness.--Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like.--Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification.--Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations.--Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports.--Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation.--Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system.--Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule.--Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.--A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.--A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal

and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents.--A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records.--A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications.--Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals.--Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like.--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents.--Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents.--Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress.--Any signature, document, or other matter declared by Act of Congress to

be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity.--The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.--In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record--

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988; Apr. 17, 2000, effective Dec. 1, 2000.*]

Rule 903. Subscribing Witness' Testimony Unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

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6-B Federal Rules of Evidence Manual ARTICLE X

ARTICLE X CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings.--"Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs.--"Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original.--An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate.--A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 1002. Requirement of Original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is

required, except as otherwise provided in these rules or by Act of Congress. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 1004. Admissibility of Other Evidence of Contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed.--All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable.--No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent.--At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters.--The writing, recording, or photograph is not closely related to a controlling issue. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.*]

Rule 1005. Public Records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Rule 1007. Testimony or Written Admission of Party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original. [*Adopted*

Jan. 2, 1975, effective July 1, 1975; amended Mar. 2, 1987, effective Oct. 1, 1987.]

Rule 1008. Functions of Court and Jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. [*Adopted Jan. 2, 1975, effective July 1, 1975.*]

Federal Rules of Evidence Manual

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
APPENDIX B: THE FEDERAL RULES OF EVIDENCE

6-B Federal Rules of Evidence Manual ARTICLE XI

ARTICLE XI MISCELLANEOUS RULES

Rule 1101. Applicability of Rules.

(a) Courts and judges.--These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

(b) Proceedings generally.--These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege.--The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.--The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.--The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.--Proceedings before grand juries.

(3) Miscellaneous proceedings.--Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusinof imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Dec. 12, 1975; Nov. 6, 1978, effective Oct. 1, 1979; Apr. 2, 1982, effective Oct. 1, 1982; Mar. 2, 1987, effective Oct. 1, 1987; Apr. 25, 1988, effective Nov. 1, 1988; Apr. 22, 1993, effective Dec. 1, 1993*.]

Rule 1102. Amendments.

Amendments to the Federal Rules of Evidence may be made as provided in Section 2072 of title 28 of the United States Code. [*Adopted Jan. 2, 1975, effective July 1, 1975; amended Apr. 30, 1991, effective Dec. 1, 1991*.]

Rule 1103. Title.

These rules may be known and cited as the Federal Rules of Evidence. [*Adopted Jan. 2, 1975, effective July 1, 1975*.]

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
APPENDIX C: CIVIL TRIAL PRACTICE STANDARDS

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§ C.syn Synopsis to Appendix C: CIVIL TRIAL PRACTICE STANDARDS

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
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6-C Federal Rules of Evidence Manual

PREFACE

These Civil Trial Practice Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. The Standards address practical aspects of trial that are not fully addressed by rules of evidence or procedure. They are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The Standards are predicated on the recognition that, in an era of increasingly complicated evidence and litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. These Standards are designed to furnish practical guidance for the implementation and use of many of these methods.

The Standards suggest a variety of approaches but recognize that ultimately the trial court must exercise its discretion in light of the circumstances before it, and nothing in these Standards limits that discretion. The Standards are drafted on the assumption that each litigant before the court is represented by counsel. The court's exercise of discretion will necessarily be affected if parties are appearing *pro se*.

These Standards do not reflect any substantive legal doctrines. They are not comprehensive in the sense that many other issues arise at trial that are not addressed in the rules of evidence or procedure and yet have an impact on a jury's ability to perform its function. They are advisory only and, while they have been drafted to operate consistently with existing law, in the event of any conflict, the law governing in the jurisdiction prevails. It is hoped that, notwithstanding these limitations, these Standards will prove useful to both bench and bar.

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
TASK FORCE ON CIVIL TRIAL PRACTICE STANDARDS

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
APPENDIX C: CIVIL TRIAL PRACTICE STANDARDS

6-C Federal Rules of Evidence Manual PART ONE

PART ONE THE JURY

1. Juror Questionnaires & Voir Dire.

a. Juror Questionnaires.

i. Party-Proposed Questionnaire. To expedite and enhance voir dire, the court should in appropriate cases permit the parties to submit a proposed juror questionnaire to be completed privately by each member of the venire panel.

A. Conferral Requirement. The parties should be required to confer on the form and content of the questionnaire prior to its submission to the court.

B. Parties Not in Agreement. If the parties cannot agree on the form and content of the questionnaire, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

ii. Court Questionnaire. If the court routinely uses a form of juror questionnaire, a copy of that form should be made available to the parties before any party's proposal is due or, if no proposals are permitted, in advance of jury selection.

b. Voir Dire.

i. Court & Counsel Roles. The trial judge should conduct an initial voir dire examination. Counsel should then be permitted to question panel members for a reasonable period of time.

ii. Multiple Parties. In a case involving multiple parties, the court should permit each separately-represented party to participate meaningfully in voir dire, subject to reasonable time limitations and avoidance of repetition.

Comment

Subdivision (a)(i). The increasing use of jury consultants, coupled with the limitations on, or elimination of,

lawyer-conducted voir dire in some courts, has led to increased reliance on questionnaires to permit expeditious, informed jury selection. It is well recognized that the use of juror questionnaires may expedite juror selection and can be helpful in rooting out bias. *See, e.g., United States v. Thai,* 29 F.3d 785, 801 (2d Cir. 1994). Questionnaires have proved particularlyuseful in lengthy, complicated or highly-publicized cases. *See, e.g., United States v. Faulkner,* 17 F.3d 745, 758 n.14 (5th Cir. 1994); Federal Judicial Center, Manual for Complex Litigation 3d § 22.41 (1995). The Manual for Complex Litigation 3d provides a generic form of questionnaire that is to "be adapted for use in particular litigation by taking into account the facts of that litigation" (at § 41.7).

Whether to permit the use of a questionnaire -- and, if so, the extent of questioning permitted -- is discretionary with the court. *See, e.g., United States v. Padilla-Valenzuela*, 896 F. Supp. 968 (D. Ariz. 1995). The fact that the parties may agree on a form of questionnaire, or that one party may propose a questionnaire to which no objections are interposed, does not necessarily mean that the court will use it as submitted, or at all. The constitutional limits that circumscribe the use of peremptory challenges (*see, e.g., Purkett v. Elem,* 115 S. Ct. 1769 (1995); *J.E.B. v. Alabama ex rel. T.B.,* 114 S. Ct. 1419 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986)) stress the importance both of judicial supervision of the selection process and of ensuring that voir dire be as effective as possible in supporting challenges for cause. See Manual for Complex Litigation 3d at § 22.41.

Subdivision (a)(ii). To the extent that courts use form juror questionnaires that are not published or otherwise publicly available, they should be furnished to the parties to afford them the opportunity to suggest emendations tailored to the case. This is routinely done at present. See, e.g., United States v. Preston, No. 95-40083-01-SAC, 1996 U.S. Dist. LEXIS 6712, at *72 (D. Kan. Apr. 5, 1996).

Subdivision (b)(i). Subdivision (b)(i) of this Standard is Standard 7(b) of the Standards Relating to Juror Use & Management (1993 rev. ed.) of the American Bar Association Judicial Administration Division and the National Center for State Courts.

Subdivision (b)(ii). Subdivision (b)(ii) recognizes that multiple plaintiffs, defendants or other parties on the same side of a caption -- while ostensibly aligned in interest -- often have differing interests, whether or not those differences are in the nature of, or have matured to, cross-claims, third-party claims or any other sort of formal adversity. This subdivision also recognizes that differences in the nature of the co-parties (e.g., natural person vs. corporation; ethnicity; unique aspects of background) will often require different voir dire questions. The court should therefore permit counsel for co-parties to question independently, subject to reasonable limitations.

2. Juror Notebooks.

a. Use & Contents. In cases of appropriate complexity, the court should distribute, or permit the parties to distribute, to each juror identical notebooks, which may include copies of:

i. The court's preliminary instructions;

ii. Selected exhibits that have been ruled admissible (or excerpts thereof);

iii. Stipulations of the parties;

iv. Other material not subject to genuine dispute, which may include:

A. Photographs of parties, witnesses, or exhibits;

B. Curricula vitae of experts;

C. Lists or seating charts identifying attorneys and their respective clients;

D. A short statement of the parties' claims and defenses;

E. Lists or indices of admitted exhibits;

F. Glossaries;

G. Chronologies or timelines; and

v. The court's final instructions.

The notebooks should include paper for the jurors' use in taking notes, if permitted under Standard 3.

b. Procedure.

i. Conferral Requirement. The court should require counsel to confer on the contents of the notebooks before trial begins.

ii. Parties Not in Agreement. If counsel cannot agree, each party should be afforded the opportunity to submit its proposal and to comment upon any proposal submitted by another party.

iii. Use at Trial.

A. At the time of distribution, the court should instruct the jurors concerning the purpose and use of the notebooks.

B. During the course of trial, the court may permit the parties to supplement the materials containedin the notebooks with additional documents as they become relevant and after they have been ruled admissible or otherwise approved by the judge for inclusion.

C. The court should require the jurors to sign their notebooks and should collect them at the end of each trial day until the jury retires to deliberate. The notebooks should be available to the jurors during deliberations.

Comment

This Standard encourages the increasingly common practice of using juror notebooks to maximize comprehension of the evidence in appropriately complex cases. In addition to copies of the court's instructions, important exhibits (or salient excerpts from exhibits) and stipulations, contents may consist of any other aids to the understanding of the jury that the court finds appropriate in the circumstances. *See, e.g., Consorti v. Armstrong World Indus.,* 72 F.3d 1003, 1008 (2d Cir. 1995); *United States v. Rana*, 944 F.2d 123, 126 (3d Cir. 1991), *cert. Denied*, 112 S. Ct. 981 (1992); *ACandS, Inc. v. Godwin,* 340 Md. 334, 400 n.22, 667 A.2d 116, 148 n.22 (1995); *Gray v. Phillips Petrol. Co.*, No. 84-2107-S, 1990 U.S. Dist. LEXIS 5677 at *2-*3 (D. Kan. 1990); *United States v. Plitt Southern Theaters, Inc.*, 671 F. Supp. 1095, 1096 (W.D.N.C. 1987); Federal Judicial Center, Manual for Complex Litigation 3d §§ 22.32, 22.42 (1995); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations § IV-7 (Munsterman *et al.* eds. 1997); Hon. Robert M. Parker, *Streamlining Complex Cases,* 10 Rev. Litig. 547, 550 (1991); Robert E. Litan (ed.), Verdict: Assessing the Civil Jury System 388 (Brookings 1993).

It lies within the court's discretion to decide not only whether but also when notebooks should be distributed. Ordinarily, if notebooks are to be provided, they should be distributed at or near the outset of trial for convenience of reference throughout the proceedings. Alternatively, the court may determine that distribution should follow the introduction of some or all of the exhibits or salient testimony. In either event, the court may permit the parties to supplement the notebooks with additional materials that the court rules admissible or includible (*e.g.*, instructions) later in the trial. Materials that have not specifically been approved by the judge may not be included in jury notebooks.

The court may suggest or, in appropriate cases, direct the parties to prepare notebooks for jurors. This should ordinarily be resolved prior to trial.

3. Juror Note-Taking.

a. Notes Permitted. The court should ordinarily permit jurors to take notes during the proceedings and use them during deliberations.

b. Cautionary Instructions. Prior to permitting jurors to take notes, the court should give an appropriate cautionary instruction to the jury, including that:

i. Jurors are not required to take notes, and those who take notes are not required to take notes extensively;

ii. Note-taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility;

iii. Notes are merely memory aids and are not evidence or the official record;

iv. Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced solely by the fact that other jurors have taken notes;

v. Notes are confidential and will not be reviewed by the court or anyone else. They may not be disclosed to other jurors until deliberations begin; and

vi. After the trial is over, all juror notes will be collected and destroyed.

c. Procedure.

i. The court should ensure that jurors have writing instruments and notepaper.

ii. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate. The notes should be available to the jurors during deliberations.

iii. All juror notes will be collected and destroyed.

Comment

The Federal Judicial Center has observed that "[p]ermitting jurors to take notes, once discouraged, has now become widely accepted." Federal Judicial Center, Manual for Complex Litigation 3d § 22.42 (1995). The vast majority of courts recognize that it is within the sound discretion of the trial judge to permit jurors to take notes. *See, e.g., Esaw v. Friedman,* 217 Conn. 553, 559-61, 586 A. 2d 1164, 1167-68 (1991) (collecting cases); *State v. Mejia*, 233 Conn. 215, 238-40, 658 A.2d 571, 582-83 (1995); *Murphy v. United States*, 670 A.2d 1361 (D.C. App. 1996); *State v. Trujillo*, 869

S.W.2d 844, 849-50 (Mo. App. 1994); *People v. DiLuca*, 85 A.D.2d 439, 448 N.Y.S.2d 730, 734-35 (App. Div. 1982);*State v. Waddell*, No. 94-2462, 1996 Ohio LEXIS 166 at *14 (Ohio Sup. Ct. March 4, 1996); *Sugar v. Bartlett*, 916 P.2d 1383, 1385-87 (Okla. 1996); *State v. Triplett,* 187 W.Va. 760, 421 S.E.2d 511, 519-20 (1992).

This Standard is consistent with the position taken in the American Bar Association Standards for Criminal Justice. *See* 3 ABA Standards for Criminal Justice § 15-3.2 at 15-84 (2d ed. 1986). It is also the position taken in Standard 16(c)(i) of the Standards Relating to Juror Use & Management (1993 rev. ed.) of the American Bar Association Judicial Administration Division and the National Center for State Courts, n1 and in American Bar Association Section of Litigation/Brookings Institution, Charting a Future for the Civil Jury System 18-19 (1992).

This Standard encourages note-taking because "[t]here is abundant evidence that individuals tend to be better able to recall events and testimony if they have taken notes at the time; the very process of writing things down helps to encode the events in one's memory." ABA Section of Litigation/Brookings Institution, Charting a Future for The Civil Jury System 18 (1992). *See also Heuer & Penrod, Increasing Juror Participation in Trials Through Note Taking and Question Asking,* 79 Judicature 256 (1996); Robert E. Litan (ed.), Verdict: assessing the Civil Jury System 358-60, 386-88, 444 (Brookings 1993); *Developments in the Law -- The Civil Jury*, 110 Harv. L. Rev. 1408, 1509-11 (1997); Statement of Robert MacCoun, University of California at Berkeley Graduate School of Public Policy, before the Judiciary Committee of the California State Senate concerning Improving Jury Comprehension in Criminal and Civil Trials at 1 (July 27, 1995). At the same time, the Standard recognizes the need for court discretion to address unusual circumstances in which note-taking may be contraindicated.

The cautionary instructions recommended in this Standard are derived from the cases and from suggestions made by the American Judicature Society and the Federal Judicial Center. *See, e.g., State v. Mejia*, 233 Conn. at 238-40, 658 A.2d at 577-78, 581; *State v. Waddell*, 1996 Ohio LEXIS 166, at *18-*19; *Price v. State*, 887 S.W.2d 949, 954-55 (Tex. Crim. App. 1994); American Judicature Society, Toward More Active Juries: taking Notes and Asking Questions 13-14 (1991); Federal Judicial Center, Litigation Management Manual Exhibit B (1992).

4. Juror Questions for Witnesses.

a. Discretion. If it will assist the jury to understand the evidence or to determine a fact in issue, the court may permit jurors to submit written questions for witnesses.

b. Cautionary Instructions. Prior to permitting the submission of questions, the court should instruct the jury that:

i. Questions should be reserved for important points only;

ii. The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it;

iii. Jurors are not to argue with the witness;

iv. Jurors are to remember that they are not advocates and must remain neutral fact finders;

v. Jurors are not to reach any definite conclusions until the end of the case, after they have heard all of the evidence and arguments of counsel;

vi. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case;

vii. Jurors are to draw no inference if a question is not asked -- it is no reflection on either the juror or the question;

viii. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case;

ix. Questions will be accepted only in writing, at the court's invitation, and are not to be disclosed to other jurors; and

x. Any question must be submitted in writing to the court, with the juror's signature or designated number affixed.

Instructions (vi), (vii) and (viii) should ordinarily be reiterated in the final jury charge.

c. Procedure. If the court permits juror questioning:

i. Upon receipt of a written question, the court should make it part of the court record and disclose it to counsel outside the presence of the jury;

ii. Counsel must be given the opportunity, outside the hearing of the jury, to interpose objections, including objections predicated on litigation strategy or stipulation of the parties;

iii. Counsel should have the opportunity to suggest modifications to the question;

iv. The court should modify the question to eliminate any objectionable matter;

v. The court may pose the question to the witness, or permit counsel to do so, at that time or later; in so deciding, the court should consider whether counsel prefer to ask, or to have the court ask, the question; and

vi. After the question is answered, counsel should be given an opportunity to ask appropriate follow-up questions.

Comment

This Standard reflects the position taken in Standard 16(c)(i) of the Standards Relating to Juror Use & Management (1993 rev. ed.) ("Juror Use Standards") of the American Bar Association Judicial Administration Division and the National Center for State Courts, n2 and in the American Bar Association Section of Litigation/Brookings Institution symposium report, Charting a Future for the Civil Jury System 20 (1992). *See also* American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations § V-7 (Munsterman et al. eds. 1997); *Developments in the Law -- The Civil Jury,* 110 Harv. L. Rev. 1408, 1508-09 (1997); Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement,* 47 HASTINGS L.J. 1433, 1507 (1996); Amar, *Reinventing Juries: Ten Suggested Reforms,* 28 U.C. Davis L. Rev. 1169, 1185 (1995); Minnesota State Bar Association Civil Litigation Section, Committee on Civil Juries: Report at 6-7 (June 1995).

Questioning is primarily the province of counsel, not jurors. This Standard is not intended to suggest that juror questioning would be appropriate, or is necessary, in every case. Rather, it is intended to focus the court on this option

and to acknowledge that, in appropriate contexts, it is an option that may profitably be exercised. It is predicated on the notion that, with appropriate safeguards, juror questioning can materially advance the pursuit of truth, particularly when a jury is confronted with a complex case, complicated evidence or unclear testimony. *See, e.g.*, American Judicature Society, Toward More Active Juries: Taking Notes & Asking Questions 11-14 (1991); Heuer & Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking,* 79 Judicature 256 (1996); Robert E. Litan (ed.), Verdict: Assessing the Civil Jury System 358-60, 390-91 (Brookings 1993); Statement of Robert MacCoun, University of California at Berkeley Graduate School of Public Policy, before the Judiciary Committee of the California State Senate concerning Improving Jury Comprehension in Criminal and Civil Trials at 1 (July 27, 1995).

State and federal courts have overwhelmingly recognized that whether to allow juror questioning of witnesses is a matter vested in the sound discretion of the trial judge. *See, e.g., United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995); *United States v. Cassiere*, 4 F.3d 1006, 1017-18 (1st Cir. 1993); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985); *United States v. Callahan,* 588 F.2d 1078, 1086 (5th Cir.), *cert. denied,* 444 U.S. 26 (1979); *Spitzer v. Haims & Co.*, 217 Conn. 532, 546-47, 587 A.2d 105, 112-13 (1991); *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 555-56 (Iowa 1980); *State v. Hays*, 883 P.2d 1093, 1101-02 (Kan. 1994); *State v. Graves*, 907 P.2d 963, 966-67 (Mont. 1995); *People v. Bacic*, 202 A.D.2d 234, 608 N.Y.S.2d 452, 452 (1st Dept.), *appeal denied,* 616 N.Y.S.2d 483 (1994); 3 Wigmore, Evidence § 784(a) (Chadbourn rev.).

As the courts have observed, in the context of complex cases or complicated testimony, "[j]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror." *United States v. Sutton*, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992).

The practice of jury questioning -- especially oral questioning -- has often been frowned upon, particularly in criminal cases, due to concern that it risks compromising jury neutrality, encouraging premature deliberations, and unduly delaying the proceedings. These concerns can be addressed with proper precautions, as adumbrated in subdivisions (b) and (c) of this Standard, and a vigilant trial judge. Moreover, civil actions rarely present the same constitutional issues or liberty interests that foster judicial sensitivity in criminal cases. In deciding whether, or when, to permit counsel to ask a juror's question, the court should consider, and take care to avoid, any risk that the inquiring lawyer will thereby gain some form of advantage by becoming in some sense aligned with the juror.

Ordinarily, the court should not invite or entertain questions from jurors until after the parties' examination and cross-examination of a witness has concluded. Counsel should generally be afforded wide latitude to try their cases as they see fit, and juror questions should be permitted on purely a supplemental basis.

Affording counsel the "opportunity, outside the hearing of the jury, to interpose objections" does not necessarily entail a formal break in the proceedings. In the court's discretion, depending on the nature of the question, the opportunity may appropriately consist of a sidebar.

Effective December 1, 1995, the State of Arizona by court rule authorized jurors to submit written questions to the court, provided that counsel are afforded an opportunity to object outside the presence of the jury. Ariz. R. Civ. P. 39(b)(1), (10). The Federal Judicial Center's Manual for Complex Litigation 3d§ 22.42 (1995) expressly notes that the trial court may, in its discretion, permit juror questioning.

The substance of this Standard is drawn in part from the cases and from the Arizona Rule. *See, e.g., United States v. Sutton*, 970 F.2d at 1005-06; *United States v. Thompson,* 76 F.3d 442 (2d Cir. 1996); *United States v. Bascope-Zurita,* 68 F.3d 1057, 1064 (8th Cir. 1995); Ariz. R. Civ. P. 39(b)(1), (10); *Sommers v. Friedman*, 493 N.W.2d 393, 399-400 (Wis. App. 1992); *Spitzer v. Haims & Co.*, 217 Conn. at 546-47, 587 A.2d at 112-13; *Rudolph v. Iowa Methodist Med. Ctr.,* 293 N.W.2d at 555-56; *State v. Graves,* 907 P.2d at 966-67; Dann & Logan, *Jury Reform: The Arizona Experience*

, 79 Judicature 280 (1996); Hon. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 592 (1990).

The Standard provides that jurors should identify themselves when submitting questions. This is designed to enable the parties and the judge to address any potential or apparent violations of the judge's instructions or the juror's duties.

5. Instructing the Jury.

a. Notice to Parties. Before delivering any instructions to the jury, the court should:
i. Inform counsel on the record of the content of the instructions it intends to deliver;

ii. Allow argument by counsel concerning the proposed instructions;

iii. Allow counsel to make a record of any objections; and

iv. Provide counsel with copies of the instructions.

b. Preliminary Instructions. Before opening statements begin, the court should give preliminary instructions that explain:

i. The jury's role;

ii. Trial procedures, including:
A. Juror note-taking;

B. Juror questioning; and

C. The nature of evidence and its evaluation;

iii. The issues in dispute; and

iv. The basic relevant legal principles.

c. Interim Instructions. During the trial, the court may sua sponte, and should upon request of a party, consider giving instructions at any point at which they might be helpful to the jury.

d. Final Instructions. The court should consider delivering final instructions on the law and other important matters prior to final argument. In all events, instructions concerning the appropriate procedures to be followed during deliberations -- and for reporting the results of deliberations -- should be given following closing argument.

e. Substance of Instructions.

i. Understandable Instructions. The instructions should be readily understood by lay persons of average education and sophistication.

ii. Conferral Requirement. The court should require counsel to confer on the substance of instructions before trial begins.

iii. Parties Not in Agreement. If counsel cannot agree, each party should be afforded the opportunity to submit proposed instructions and to comment upon any instructions proposed by another party. If, based upon the evidence presented at trial, the court determines that different or additional instructions

are appropriate, it should permit counsel to confer, propose and comment on the substance of any such instructions before they are delivered by the court.

f. Availability During Deliberations. Final instructions should be provided for the jurors' use during deliberations.

Comment

This Standard is modeled on Standard 16(c) of the Standards Relating To Juror Use & Management (1993 rev. ed.) of the American Bar Association Judicial Administration Division and the National Center for State Courts, n3 with minor emendations. Subdivision (c) is drawn from Federal Judicial Center, Manual for Complex Litigation 3d § 22.433 (1995). The Standard is also consistent with the recommendations of: American Bar Association Section of Litigation/Brookings Institution, Charting a Future for the Civil Jury System 22-23 (1992); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations §§ VI-1 to VI-5 (Munsterman *et al*. eds. 1997); Manual for Complex Litigation 3d §§ 22.432 and 22.434; *Developments in the Law -- The Civil Jury*, 110 Harv. L. Rev. 1408, 1503-07 (1997); Minnesota State Bar Association Civil Litigation Section, Committee on Civil Juries: Report at 7-8 (June 1995); and Robert E. Litan (ed.), Verdict: Assessing the Civil Jury System 444-46 (Brookings 1993).

Preliminary Instructions. The use of preliminary instructions has widespread support among members of the bench and bar, and former jurors, as a valuable aid to juror comprehension. *See, e.g*., New York State Bar Association Federal Courts Committee, Improving Jury Comprehension in Complex Civil Litigation 8-11 (July 1988); Hon. William W. Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575, 583-84 (1990); Ninth Circuit Council, Survey of Juror Attitudes: Final Report 7 (1986); Wisconsin Judicial Council Committee on Improving Jury Communications, Draft Final Report 17-18 (May 1985); Report of the Committee on Juries of the Judicial Council of the Second Circuit 42-43 (Aug. 1984); Manual for Complex Litigation 3d § 22.21.

Judges should develop standard preliminary jury instructions concerning the matters set forth in subdivision (b)(i) and (ii). These instructions should be made available for review in all cases by all counsel, who should be encouraged to suggest any additional instructions they believe would be helpful in their particular cases.

Procedures relating to juror questions and note-taking referred to in subdivision (b)(ii)(A)-(B) are set forth in Standards 3 and 4. Preliminary instructions should be included in juror notebooks distributed pursuant to Standard 2.

Substantive Instructions. Judges should require counsel to confer and to seek agreement on substantive instructions before trial begins. Where counsel cannot agree, each party should be required to submit proposed instructions and objections to the opponent's instructions before trial. The judge should consider having a pretrial conference to rule on instructions prior to trial. At a minimum, where there is dispute over basic, relevant legal principles, the court should advise counsel as to its determination of the law, which will be reflected in its preliminary instructions, so that counsel can prepare their openings, and otherwise finalize preparation of their cases, based on the court's resolution of the governing law.

Interim Instructions. The judge should consider summarizing the key points of law that govern the most important disputed issues not only at the outset of the case but also at those points in the trial when, in the court's judgment, it might assist the jurors. This practice offers several potential advantages:

> First, interim instructions ... may enhance the jury's ability to remember the evidence presented at trial. ... Second, by serving as a sort of continually updated roadmap of the issues in the case, interim instructions may increase the jury's ability to organize and assimilate evidence and ultimately to connect that evidence to the legal issues on which it bears. Third, ... interim instructions on matters of procedure (e.g., presumptions, the nature of reasonable inferences or the evaluation of credibility) ... allow jurors to

> appreciate their significance ... [Fourth,] interim instructions ... may be better understood and more effectively applied by the jury than when they are buried in an omnibus charge at the close of trial.

New York State Bar Association Federal Courts Committee, Improving Jury Comprehension in Complex Civil Litigation 13-14 (July 1988).

Understandable Instructions. Instructions should be written in plain English, tailored to the facts of the case, and logically organized to assist the jurors in their deliberations. *See generally* Standard 16(c)(iii) of the ABA Standards Relating to Juror Use & Management and accompanying Commentary ("The instructions should be formulated and presented with primary concern for facilitating the jurors' understanding of the questions they must decide"). *See also* Jury Trial Innovations at § VI-2 ("The frustrations expressed by jurors during deliberations indicate a need to improve the clarity (and, thereby, the efficacy) of jury instructions").

Availability During Deliberations. Subdivision (f) reflects the view that the "[a]vailability of the ... charge in the jury room is almost certain to assist the jury in arriving at an informed verdict while reducing the need to send questions to the judge and to have parts of the charge re-read." Schwarzer, *Reforming Jury Trials,* 132 F.R.D. at 585. In accordance with subdivision (f), the final instructions may be included within juror notebooks, if those are provided pursuant to Standard 2. Instructions may also be provided to the jury on tape, if that is more useful or appropriate in certain cases.

6. Verdict: Form and Availability During Deliberations.

a. Form of Verdict. In cases of appropriate complexity, the court should consider the desirability of a special verdict form tailored to the issues in the case.

b. Submissions from Parties. The court should afford the parties the opportunity to propose for the court's consideration an agreed form of verdict to be submitted to the jury.

i. Parties Not in Agreement. If counsel cannot agree on a form of verdict, each party should be afforded the opportunity to propose a form of verdict and to comment upon any proposal submitted by another party.

ii. Judicially Fashioned Verdict Form. The court should afford counsel the opportunity to comment upon any form of verdict that it fashions independently of the parties.

c. Availability. A copy of the verdict form should be provided to each juror for use during deliberations. Where the court determines that it will assist the jurors, a copy of the verdict form should be available to each juror during closing arguments and final instructions.

Comment

Subdivisions (a)-(b). Subject to governing law, the court has the discretion to submit any of a broad array of potential verdict forms to the jury. This Standard recognizes that "[c]hoosing among these alternatives is not subject to scientific precision; each has desirable and undesirable features." New York State Bar Association Federal Courts Committee, Improving Jury Comprehension in Complex Civil Litigation 31 (July 1988). Accordingly, counsel should be permitted to be heard on this subject.

To assist the court and expedite the trial, the parties should be encouraged to agree on a verdict form. The court may provide sample verdict forms to counsel to expedite the process. If the parties come to agreement, and the agreed form

is neither defective under applicable law nor otherwise inappropriate, the court should ordinarily furnish that form to the jury. If the parties disagree, the court should receive submissions from the parties and fashion an appropriate form of verdict, permitting the parties to be heard on the judicially-crafted form.

Subdivision (c). The purpose of providing each juror with a copy of the verdict form is to assist them with their deliberations. It will also make it easier for each juror -- especially if a special verdict is involved -- to answer questions if the jury is polled at the end of the case. The verdict form may be included within juror notebooks, if those are provided pursuant to Standard 2.

7. Exhibit Availability During Jury Deliberations.

a. Generally. Exhibits admitted into evidence should ordinarily be provided to the jury for use during deliberations.

b. Aids. The court may provide the jurors with aids to facilitate their review of the evidence.

c. Exhibits Offered for Limited Purposes. If an exhibit that has been admitted for any limited purpose is provided for juror use during deliberations, the court should consider re-instructing the jury as to the limited purpose for which the exhibit was admitted.

Comment

Subdivision (a) is animated by the widespread conviction that jurors should ordinarily be permitted to review the tangible evidence during their deliberations. If the evidence is voluminous, the court may invite counsel to identify those exhibits that they wish initially be delivered to the jury room. If certain evidence is potentially dangerous to the jurors, the court may prefer to substitute, at least initially, a photograph for the jurors' use.

Subdivision (b) recognizes that certain types of aids may be necessary for the jury to review evidence efficiently -- or, in some cases, at all -- during deliberations. One category of aid is mechanical, such as a videocassette recorder to view a videotape. A second type may be textual, such as an index to facilitate retrieval and review of documents. The Standard is drafted broadly in view of the large number of items that fall within this category, including those to be developed in the future. In exercising its discretion in this regard, the court should take into account any risk that the aid sent to the jury room, coupled with whatever else is available to the jury, might be used for improper experimentation purposes.

Subdivision (c) is drawn from the cases, which find that certain admonitory instructions may be appropriate when evidence admitted for a limited purpose is sent to the jury room. *See, e.g., United States v. Cox,* 633 F.2d 871, 874 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981); *State v. Lord*, 117 Wash. 2d 829, 856-57, 822 P.2d 177, 193-94 (1991).

8. Post-Trial Contact of Jurors by Counsel.

a. Notification of Jury. At the time that the jury is dismissed -- or earlier if counsel is not expected to be present when the jury is dismissed -- the court should inform the jurors in the presence of counsel:

i. Approach. Whether counsel may approach them after the trial has concluded and, if so,

ii. Discretion. That the jurors are free to discuss the trial with counsel, or to refuse to do so, in their discretion.

b. Authorization. Unless prohibited by law, the court should ordinarily permit counsel to contact jurors after their terms of jury service have expired, subject, in the court's discretion, to reasonable restrictions.

Comment

Because different jurisdictions, and different judges within the same jurisdiction, sometimes have conflicting views on this matter, the judge should inform the jury, in the presence of counsel, whether counsel may discuss the case with individual jurors after the trial has concluded. If post-trial discussions are permitted, the jurors should be apprised of their right to decline to participate, if they so choose.

Except in unusual circumstances, the court should exercise its discretion in favor of permitting counsel to contact jurors after their terms of jury service have expired. See, e.g., Delvaux v. Ford Motor Co., 764 F.2d 469, 471 (7th Cir. 1985) ("Considerations of some weight favor allowing such questioning"). The exchange may enhance the understanding of both participants. Lawyers areindependently prohibited from asking questions of, or making comments to, a discharged juror for the purpose of harassing or embarrassing the juror, or influencing the juror's actions in future jury service. See, e.g., ABA Model Rule of Professional Conduct 4.4; ABA Model Code of Professional Responsibility DR 7-108(D).

9. Inquiry into Jury Misconduct.

a. Allegation of Juror Misconduct.

i. Court. Upon receipt of an allegation of juror misconduct, the court should promptly apprise the parties and afford them the opportunity to be heard as to whether the allegation warrants further inquiry or other judicial action.

ii. Counsel. Counsel should promptly refer an allegation of juror misconduct to the court and to counsel for all parties in the proceeding.

b. Nature and Scope of Inquiry. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with counsel concerning the nature and scope of the inquiry, including:

i. Which jurors should be questioned;

ii. Whether the court or counsel should ask the questions; and

iii. The substance of the questions.

c. Relief. If the court ascertains that juror misconduct has occurred, it should afford counsel the opportunity to be heard as to an appropriate remedy.

d. Pendency of Deliberations. If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.

Comment

Not all allegations of juror misconduct are substantial or require examination. A juror's statement that he or she

acquiesced in a verdict but did so harboring doubts is facially insufficient to impeach the verdict. In contrast, a juror's statement that jurors consulted an encyclopedia or text book during deliberations will ordinarily necessitate further inquiry. Whenever an allegation of misconduct is received, it must promptly be brought to the attention of all concerned, regardless of whether the recipient deems the allegation likely to lead to juror disqualification or verdict impeachment. If the jury is still deliberating at the time the allegation is received, time is of the essence to permit the court to decide, on an adequate record, whether a remedy short of a mistrial (or disqualification of too many jurors) is available and appropriate.

FOOTNOTES:

(n2)Footnote 1. As of 1996, fourteen states had adopted standards based on the ABA Standards Relating to Juror Use & Management and four others are in "substantial compliance" with these standards. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 Judicature 216, 218 (1996).

(n3)Footnote 2. *See* n.1, *supra*.

(n4)Footnote 3. *See* n.1, *supra*.

Federal Rules of Evidence Manual

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
APPENDIX C: CIVIL TRIAL PRACTICE STANDARDS

6-C Federal Rules of Evidence Manual PART TWO

PART TWO JUDICIAL PARTICIPATION IN DEVELOPING EVIDENCE

10. Questioning by the Court in Jury Trials. A trial court may question a witness if necessary to assist the jury but should exercise self-restraint and preserve an atmosphere of impartiality and detachment.

a. Subject Matter. Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes that questioning on the subject is necessary, the court should afford the parties an opportunity to develop the subject on further examination prior to questioning the witness itself.

b. Illustrations. The court may exercise its discretion to:
i. Ask questions that clarify answers given by a witness;

ii. Ask a witness to repeat an answer that the court had difficulty hearing or believes the jury might have had difficulty hearing;

iii. Assist counsel who is having difficulty properly formulating a question;

iv. Direct an evasive or unresponsive witness to answer a question; or

v. Instruct a witness as to the court's expectations of all witnesses.

c. Impeachment; Rehabilitation; Emphasis. Except in unusual circumstances, the court should not seek to impeach or to rehabilitate a witness, nor seek to emphasize or de-emphasize the importance of any witness or testimony.

d. Instruction. The court should instruct the jury that questions from the court, like questions from the lawyers, are not evidence; that only the answers are evidence; that questions by the court should not be given special weight or emphasis; and that the fact that the court asks a question does not reflect a view

on the merits of the case or of the credibility of any witness.

Comment

This Standard starts from the premise that witness questioning is ordinarily for counsel, not the court. The basic principle that the trial judge "should exercise self-restraint and preserve an atmosphere of impartiality and detachment" is drawn from Judge Augustus Hand's opinion in *Pariser v. City of New York,* 146 F.2d 431, 433 (2d Cir. 1945). *Accord People v. Hawkins*, 10 Cal. 4th 920, 42 Cal. Rptr. 2d 636, 897 P.2d 574, 589 (1995); *People v. Melendez*, 634 N.Y.S.2d 607, 608-09 (App. Div. 1996); *Auger v. Auger*, 149 Vt. 559, 563, 546 A.2d 1373, 1375 (1988) (" 'Active judicial interrogation runs afoul of basic principles underlying the adversary system' ") (citation omitted); Federal Judicial Center, Manual for Complex Litigation 3d § 22.24 (1995). This Standard nonetheless recognizes that for certain limited purposes the trial court may "question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side." *United States v. Filani,* 74 F.3d 378, 385 (2d Cir. 1996).

The corollaries articulated in subdivisions (a) through (c) are drawn from practice and reflect numerous decisions. *See, e.g., United States v. Dreamer,* 88 F.3d 655, 659 (8th Cir. 1996); *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995); *United States v. Evans,* 994 F.2d 317 (7th Cir.), *cert. Denied*, 114 S. Ct. 335 (1993); *United States v. Gonzalez-Torres*, 980 F.2d 788 (1st Cir. 1992); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. Denied*, 111 S. Ct. 297 (1990); *Van Leirsburg v. Sioux Valley Hosp.*, 831 F.2d 169 (8th Cir. 1987); *United States v. Block*, 755 F.2d 770 (11th Cir. 1985); *Lane v. Wallace*, 579 F.2d 1200 (10th Cir. 1978). *See generally* 2 Saltzburg, Martin & Capra, Federal Rules of Evidence Manual 1005-06 (6th ed. 1994); Federal Judicial Center, Manual for Complex Litigation 3d § 22.24 (1995).

In dealing with inexperienced counsel, particularly those with little or no trial experience, the court from time to time may interject questions without consulting counsel in order to save time. This may be especially appropriate when opposing counsel makes numerous objections to the form of questions and those objections have merit. The court may suggest to counsel questions that would avoid objections as to form.

In any case in which the court asks more than a few questions, at a recess when the jury is absent, the court should inquire whether counsel believe the court's questions were either objectionable or otherwise counterproductive. Although objections may be made outside the presence of the jury under Federal Rule of Evidence 614(c) and analogous rules in effect in most states (see 2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 48.2, 48.3 (Supp. 1994)), counsel often will be reluctant to volunteer objections to the court's questions. The court can ameliorate counsel's concern about questioning the court's decision to intervene with a witness by inviting counsel's views. n4

11. Court-Appointed Experts. The court may appoint an expert to serve as a judicial tutor as to esoteric subject matter or, in exceptional cases, as a witness to testify at a trial. The same expert may serve in both capacities.

a. Selection.

i. The court should invite the parties to recommend jointly an expert to be appointed by the court.

ii. If the parties cannot agree, the court should invite them to submit names of a specified number of experts with a summary of their qualifications and an explanation of the manner in which those qualifications "fit" the issues in the case.

iii. The court may choose one or more experts recommended by each party; it may choose one or more experts from those recommended by any of the parties; or it may

reject the experts recommended by the parties and select an expert unilaterally.

iv. Before selecting an expert, the court should:

A. Consider seeking recommendations from a relevant professional organization or entity that is responsible for setting standards or evaluating qualifications of persons who have expertise in the relevant area, or from the academic community, and

B. Afford the parties an opportunity to object to the appointee on the basis of bias, qualifications or experience.

b. Scope of Expert's Duties. The court should afford the parties the opportunity to participate in defining the scope of the expert's duties.

c. Communications between Court and Expert. The court should ensure that the parties are aware of all communications pertaining to the merits between the court and a court-appointed expert by:

i. Permitting the parties to be present when the court meets or speaks with the expert;

ii. Providing that all communications between court and expert will be in writing with copies to the parties; or

iii. Recording oral communications between court and expert and making a transcript or copy of the recording available to the parties.

d. Communications between Parties and Expert. The court should ensure that every party is:

i. Informed of, and afforded the opportunity to explore, in advance of trial, the findings and opinions of any court-appointed expert; and

ii. Aware of all communications between any party and a court-appointed expert by:

A. Permitting all parties to be present when any party meets or speaks with the expert, or

B. Providing that all communications between any party and the expert will be in writing with copies to all parties.

e. Testimony at Trial. If an expert witness appointed by the court testifies at trial:

i. Questioning. The court ordinarily should not call and question the witness. The witness should be examined by counsel, in an order determined by the court.

ii. No Identification as Court Appointee. The witness should not ordinarily be identified as one appointed by the court.

iii. If Identified as Court Appointee. If the court determines that, in the circumstances, it is appropriate to identify the witness as a court appointee, the court should instruct the jury that:

A. It is not to give greater weight to the testimony of a court-appointed expert than any other witness simply because the court chose the expert;

B. The jury may consider the fact that the witness is not retained by either party in evaluating the witness's opinion; and

C. The jury should carefully assess the nature of, and basis for, each witness's opinion.

Comment

Trial judges have inherent authority to appoint experts as technical advisors to assist the court. *See, e.g., Reilly v. United States*, 863 F.2d 149, 156-57 (1st Cir. 1988); Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 Harv. L. Rev. 941, 949-51 (1997). They may also appoint expert witnesses for testimonial purposes under Federal Rule of Evidence 706(c) and similar provisions in force in most states. 2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 55.2, 55.3 (Supp. 1994). This Standard applies to experts appointed in either capacity.

Courts should be reluctant to have court-appointed experts testify in jury trials. Identification of an expert with the court may artificially enhance that expert's status and confer a false aura of authority and credibility. n5 It may be difficult for a jury to understand why a court-appointed expert was retained and how the expert is being compensated. The process through which a court-appointed expert arrives at an opinion is often one from which counsel have been excluded. The result may be that neither counsel is comfortable with the approach the expert has taken.

A court-appointed expert may aid both in decision-making and in settlement. Among the myriad services such an expert may provide are: to advise the court on technical issues, to provide the jury with background information, or to offer an opinion on disputed technical issues. The appointment of experts by the court is rare, among other reasons, because of: (1) the cost involved; (2) the difficulty of finding truly neutral experts; (3) the concern that testimony from a court-appointed expert -- if the fact of court appointment is disclosed to the jury n6-- may be perceived as the court taking sides in the controversy; (4) the potential delay involved; and (5) the recurring problem that, by the time the need is known, the appointment may entail significant delay in the proceedings. See generallyFederal Judicial Center, Manual for Complex Litigation 3d § 21.51 (1995); Cecil & Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 (Federal Judicial Center 1993) ("Cecil & Willging, Court-Appointed Experts").

The court is not free to engage in substantive *ex parte* discussions with court-appointed experts on the merits of the case. Canon 3A(4) of the Code of Conduct for United States Judges, for example, provides: "A judge should ... except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Subdivision (c) of this Standard is designed to afford the court the latitude it needs to communicate with the court-appointed expert while preserving the parties' rights to be fully apprised of discussions between judge and expert pertaining to the merits.

The procedures suggested in this Standard are drawn from a variety of sources, including the *Reilly* case; the Federal Judicial Center's Manual for Complex Litigation 3d § 21.51; Cecil & Willging, Court-Appointed Experts; and Cecil & Willging, *Court-Appointed Experts*, in Federal Judicial Center, Reference Manual on Scientific EvidencE 525-71 (1994); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations § IV-4 (Munsterman *et al*. eds. 1997). *See also* Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence,* 110 Harv. L. Rev. 941, 954-58 (1997).

Most evidence codes permit the trial court, in its discretion, to disclose the fact of the appointment of the expert witness by the court. *See, e.g.,* Fed. R. Evid. 706(c); Cal. Evid. Code § 722(a); and the numerous state evidence codes modeled on the Federal Rules. Joseph & Saltzburg, Evidence in America: The Federal Rules in the States at §§ 55.2, 55.3.

However, this Standard reflects the view -- borne out by Federal Judicial Center research -- that, if the expert's court-appointed status is disclosed, "concern about undue influence [on the jury] seems reasonable." Cecil & Willging, Court-Appointed Experts at 51.

The court may prohibit *ex parte* communications between the parties and a court-appointed expert. This may be impractical where, for example, the expert needs to contact one or more parties for specimens to examine. Subdivision (d)(ii) is operative only if the court has not prohibited such contact. Subdivision (d)(i) contemplates that, if the court-appointed expert is to testify at trial, the expert will be subject to the same type and degree of discovery (*e.g.*, deposition, disclosure, interrogatories) as a party-proffered expert.

FOOTNOTES:

(n5)Footnote 4. Although the court has the power to call witnesses under Fed. R. Evid. 614(a) and analogous state provisions, this power is rarely exercised, probably because the court has no opportunity to prepare a witness to testify and may, by calling an unprepared witness, inject evidence into a case that might damage a party unfairly. The court, especially in a bench trial, may invite a party to explain the failure to call a witness, particularly when the failure to call a witness might give rise to an adverse inference. The court should, however, bear in mind that the party may have made a conscious and informed judgment not to call the witness, and that judgment should ordinarily be respected.

(n6)Footnote 5. In European countries in which judges decide civil cases to the exclusion of juries, court-appointed experts are not uncommon and, according to a noted comparative law scholar, "[t]he fear is spreading that courts are covertly delegating decision-making powers to an outsider without political legitimacy. ... Regularly subjected to dueling experts, adjudicators need not surrender to the authority of science as blindly as those confronted with a single opinion of their chosen expert: they can decide whom to believe by engaging their ordinary judgments of witness[es]' credibility." Damaska, Evidence Law Adrift 151-52 (1997).

(n7)Footnote 6. It need not be, under Fed. R. Evid. 706(c) and analogous state provisions.

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
APPENDIX C: CIVIL TRIAL PRACTICE STANDARDS

6-C Federal Rules of Evidence Manual PART THREE

PART THREE JUDICIAL CONTROL OVER TRIAL PRESENTATION

12. Limits on Trial Presentation.

a. Procedure. Limits on trial presentation should be imposed only after the court has:
i. Made an informed analysis of the case and of the parties' plans for trial;

ii. Discussed with the parties the possibility of voluntary, self-imposed limits; and

iii. Afforded the parties the opportunity to be heard as to the amount of time, or number of witnesses or exhibits, they believe they require in order to present their positions fairly.

b. Discretion. Subject to the judge's ultimate responsibility to ensure a fair trial and to afford the parties a fair opportunity to be heard, the court should consider whether to enforce voluntary limits agreed to by the parties or to impose reasonable limits on trial presentation, including limits on:

i. The total time to be allowed each party or side for all direct and cross-examinations;

ii. The length of examination and cross-examination of particular witnesses;

iii. The number of witnesses or exhibits to be offered on a particular issue or in the aggregate; and

iv. The length of opening statements and closing arguments.

c. Notice to Parties. The court should notify the parties of any limits it intends to impose sufficiently in advance of trial to permit them to prepare their cases accordingly.

d. Factors. In fashioning trial presentation limits, the court should consider:

i. The complexity of the case;

ii. The claims and defenses of the parties;

iii. The respective evidentiary burdens of the parties;

iv. The subject matter of evidence that is considered for limitation; and

v. Whether proposed limits allocate trial time fairly.

e. Types of Limits. If the court determines that limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a particular examination.

f. Modification. The court should reassess imposed limits in light of developments during trial, and may grant an extension upon a showing of good cause. After trial has commenced, the court ordinarily should not shorten imposed limits, in light of the parties' reliance thereon, absent disposition of claims or defenses as to which evidence or argument was planned.

Comment

The power of the court to impose reasonable time limits on a trial derives from the inherent power of the court and from codified sources such as Fed. R. Civ. P. 16(c)(4) and (15), Fed. R. Evid. 403 and 611(a), and analogous provisions in force in most states. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1170-71 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983); *Hicks v. Commonwealth,* 805 S.W.2d 144, 151 (Ky. App. 1991); *Varnum v. Varnum,* 586 A.2d 1107, 1114-15 (Vt. 1990); Federal Judicial Center, Manual for Complex Litigation 3d §§ 21.643, 22.35 (1995); 1 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 13.2, 13.3 (Supp. 1994); 2 *Id.* §§ 45.2, 45.3.

The Federal Judicial Center counsels that "courts should be reluctant to interfere with counsel's control over the presentation of their case and should ensure that each side has the opportunity to present its case fully and fairly." Manual for Complex Litigation 3d § 22.35 (1995). This Standard is premised on this principle and the corollary that trial courts therefore "should not exercise this discretion as a matter of course," *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995), and witnesses should not be excluded "on the basis of mere numbers." *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1170-71 (7th Cir.), *cert. denied,* 464 U.S. 891 (1983). In many cases, efficient management of court time can obviate the need for the imposition of time limits. *See generally* Final Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia at Part D, Recommendations 31-34, pp. 66-68 (1993).

Tailored judicial scrutiny is necessary before any limits are imposed. The court should ascertain at the outset whether counsel can voluntarily satisfy the court's reasonable concerns about its docket and the jury since, by definition, they know the case far more intimately than the court. For the same reason, if limits are appropriate, it is generally preferable to limit the total amount of time allocated to each party or side, rather than to limit the number of witnesses or exhibits, or the duration of a particular direct or cross-examination. *See* Hon. Pierre N. Leval, *From the Bench: Westmoreland v. CBS,* 12 Litigation No. 1 at 7 (Fall 1985); Hon. William W. Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575, 579 (1990); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations § IV-1 (Munsterman *et al.* eds. 1997).

Before imposing limits, the court should indicate to counsel its own view of the time that should be required for trial in cases in which the court believes that counsel's assessment is unrealistic or that the time requested is so clearly excessive as to amount to an unacceptable drain on public resources and imposition on the jury. The court should

provide counsel with an opportunity to reassess their time requirements and seek, where possible, to reach a consensus on a realistic trial schedule before imposing its own view. In no event should the court permit any party to be prejudiced because of arbitrary time limits.

The substance of this Standard is drawn in part from the case law (*see, e.g., General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1508 (9th Cir. 1995); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3d Cir. 1995)); the Federal Judicial Center's Manual for Complex Litigation 3d §§ 21.643, 22.35 (1995); and ABA Trial Management Standards 1, 2 and 3 (1992).

13. Interim Statements and Arguments.

a. Discretion. In cases of appropriate complexity, the court should afford counsel the opportunity during trial to address the jury to comment on, or to place in context, the evidence that has been, or will be, presented.

b. Factors. In deciding whether to permit counsel to address the jury during trial, the court should consider:

i. The duration of the trial;

ii. The number and complexity of the legal and factual issues; and

iii. The volume and complexity of the evidence.

c. Procedure.

i. The court should allow each side to address the jury.

ii. Time should be allocated equally to each side or equitably if there are conflicting interests among parties on the same side.

iii. The court may:

A. Allocate to each party or side a total amount of time that may be used at counsel's discretion at any reasonable point during the trial;

B. Allocate to each party or side a certain amount of time that must be used within prescribed intervals or will be forfeited; or

C. Schedule interim addresses at prescribed points during the trial.

iv. If timing is left to counsel's discretion pursuant to subdivision (c)(iii)(A) or (B), counsel may not choose a time that interferes with another party's presentation of evidence or with the court's schedule.

v. Counsel's remarks should be confined to the meaning or significance of the evidence and its relationship to the issues.

vi. The court should remind the jury of the difference between evidence and counsel's statements.

Comment

Permitting counsel to address the jury to comment on the evidence in long or complex cases, or cases dealing with particularly complicated evidence or issues, is endorsed by the Federal Judicial Center, Manual for Complex Litigation 3d §§ 22.21, 22.34 (1995), and is not uncommon. *See, e.g., Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1008 (2d Cir. 1995); *ACandS, Inc. v. Godwin,* 340 Md. 334, 407-09, 667 A.2d 116, 152-53 (1995). *See also* Robert E. Litan (ed.), Verdict: Assessing the Civil Jury System 389 (Brookings 1993); Hon. Robert M. Parker, *Streamlining Complex Cases*, 10 Rev. Litig. 547, 553-54 (1991); Hon. Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 Litigation No. 1 at 66-67 (Fall 1985). This Standard adopts the flexible approach urged by these authorities, recognizing that juror comprehension may substantially be advanced by affording counsel the opportunity to summarize and place in context evidence that has been, or is to be, presented.

Whether these interim remarks to the jury should be characterized as "interim argument," which is the description frequently found in the cases (*see, e.g., Armstrong and ACandS, supra*), or "supplementary opening statements," which is the Federal Judicial Center's phrase (Manual for Complex Litigation 3d § 22.34), is less important than a clear recognition of the purpose: to afford counsel the opportunity to comment on the meaning and significance of evidence as it is presented. Highly inflammatory rhetoric is out of place. *See, e.g., AcandS*, 340 Md. at 407-09, 667 A.2d at 152-53.

14. Order of Proceedings. In cases of appropriate complexity, the court should exercise its discretion to alter the traditional order of trial where that will enhance jury comprehension and recollection or facilitate the effective presentation of evidence and argument, without unfair advantage to either side. Among the alternatives the court should consider are:

a. Venire Panel. In advance of voir dire, presenting to the entire venire panel: i. Preliminary instructions (see Standard 4(a), *supra*), and ii. Opening statements (in either abbreviated or complete form).

b. Issue Organization. Organizing the trial by issue, or clusters of issues, with each party presenting its opening statement and evidence on a designated subject matter before proceeding to the next.

c. Interim Instructions. Giving interim instructions (see Standard 5(b), *supra*).

d. Interim Statements and Arguments. Permitting interim statements and arguments (*see* Standard 13, *supra*).

e. Sequential Verdicts. Submitting issues or claims to the jury sequentially, if a decision on one issue may render others moot or may facilitate settlement, or if alternative claims involve differing or conflicting theories of liability or damages.

f. Post-Impasse Argument. Permitting additional arguments by counsel after the jury has reached an impasse in deliberations.

Comment

The court is vested with the inherent power to control the mode and order of proceedings before it, a power that is codified in part in Fed. R. Civ. P. 16(c)(13)-(14), 42, 50 and 52, and Fed. R. Evid. 611(a), and analogous provisions in force in most states. *See, e.g.*, 2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 45.2, 45.3 (Supp. 1994).

This Standard is drawn from a variety of sources in addition to the general precepts of Fed. R. Civ. P. 16(c)(13)-(14),

42, 50 and 52, and Fed. R. Evid. 611(a), including Federal Judicial Center, Manual for Complex Litigation 3d §§ 22.34, 22.432 (1995) (sequencing of evidence and arguments; sequential verdicts; preliminary instructions); American Bar Association Section of Litigation, National Center for State Courts & State Justice Institute, Jury Trial Innovations § VI-11 (Munsterman *et al*. eds. 1997) (post-impasse argument); Hon. William W. Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575, 594-96 (1990) (issue organization; interim statements or summations); and Saltzburg, *The Quality of Jury Decisionmaking*, in Robert E. Litan (ed.), Verdict: Assessing the Civil Jury System 361 (Brookings 1993) (sequential verdicts).

15. Demonstrative Evidence.

a. Preview. As with all other exhibits, the court should afford each party an adequate opportunity to review, and interpose objections to, demonstrative evidence before it is displayed to the jury.

b. Unwieldy Evidence. Voluminous, complicated or other information that cannot conveniently be examined in court should be presented, when practicable, in the form of a chart, diagram, graph or other demonstrative evidence. At the request of a party, the court should provide guidance concerning admissibility before substantial expense is incurred.

Comment

Demonstrative evidence is the generic label applied to exhibits that share the common characteristic of visualizing for the factfinder data that have been, or can be, admitted into evidence. Common types include diagrams, charts, graphs, models, photographs, maps, plats, videotapes, animations, and computer simulations. Although demonstrative evidence has occasionally been contrasted with "real" evidence, most courts now hold that in some circumstances, and with a proper foundation, demonstrative evidence may be admitted for all. (*See* the Comment to Standard 8.) For example, a chart that summarizes voluminous, admissible data may be independently admissible into evidence under Rule 1006 of the Federal Rules of Evidence and analogous provisions in force in most states (2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the States §§ 70.2-70.3 (Supp. 1994)). Similarly, photographs are admissible as substantive evidence. *United States v. May*, 622 F.2d 1000, 1007 (9th Cir.), *cert. Denied*, 449 U.S. 984 (1980); *State v. Pulphus,* 465 A.2d 153, 161 (R.I. Sup. Ct. 1983); 3 Wigmore, Evidence § 790 (Chadbourn rev.).

Subdivision (a). Because demonstrative evidence can be quite potent, it should not be shown to the jury until the court is satisfied that the evidence is admissible. This Standard therefore articulates the practical necessity that the opponent be afforded the opportunity to view the exhibit -- and raise any objection -- before it is shown to the jury. This Standard reflects the procedure suggested by the case law and the Federal Judicial Center. *See, e.g., Robinson v. Missouri,* 16 F.3d 1083, 1088 (10th Cir. 1994); *Brandt v. French,* 638 F.2d 209, 212 (10th Cir. 1981); *Mills v. Nichols,* 467 So. 2d 924, 930-31 (Miss. Sup. Ct. 1985); Federal Judicial Center, Manual for Complex Litigation 3d § 22.21 (1995). Under the 1993 amendments to the Federal Rules of Civil Procedure, Rules 26(a)(2)(B)-(C) and 26(a)(3)(C) require the pretrial disclosure of all non-impeachment exhibits, including demonstrative evidence. *See also* Standard 18 (Motions in Limine).

Subdivision (b). Generally, "[c]ourts look favorably upon the use of demonstrative evidence because it helps the jury understand the issues raised at trial." *People v. Burrows,* 148 Ill. App. 3d 208, 213, 498 N.E.2d 682 (1986). *See also* Hon. William W. Schwarzer, *Reforming Jury Trials,* 132 F.R.D. 575, 588 (1990) ("Much evidence becomes more comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, an enlarged picture of an object, a diagram of a building, or a map."). Exercising powers such as those codified in Federal Rule of Evidence 611(a), which most states have adopted (2 Joseph & Saltzburg, Evidence in America: The Federal Rules in the StateS §§ 45.2-45.3 (Supp. 1994)), the court should encourage counsel to package information in the most concise and understandable format. At the same time, because the reduction of voluminous or complicated data into demonstrative

form can be expensive, the court should provide a requesting party with a preliminary ruling or at least parameters of admissibility before substantial expense is incurred. This subdivision reflects the view set forth in the Federal Judicial Center's Manual for Complex Litigation 3d §§ 21.492, 21.64, 21.642 (1995), and in American Bar Association Section of Litigation/Brookings Institution symposium report, Charting a Future for the Civil Jury System 22 (1992).

> **16. Multiple Parties & Questioning.** In a case involving multiple parties, the court should encourage the parties to cooperate in, coordinate, and streamline, the presentation of evidence and the making of objections, and it should be receptive to their efforts to do so. Unless the parties agree to the contrary, the court should permit each separately-represented party to develop the testimony of each witness, subject to reasonable time limitations and avoidance of repetition.

Comment

In any case involving multiple plaintiffs, defendants or other parties on the same side of the caption, there is sometimes an understandable temptation to restrict counsel for co-parties from independently exploring the same subject matter. There is an inherent tension between the systemic need to avoid the needless presentation of cumulative evidence and the parties' need to ensure that salient evidence has been adequately elucidated. Because the parties are most familiar with the evidence, it is sensible in the first instance to encourage them to attempt to reach agreement on procedures that will facilitate the presentation of evidence -- e.g., by designating principal examiners or cross-examiners for particular witnesses -- and to permit an objection made by one party to extend to all parties on the same side of the caption. Except in unusual circumstances, and subject to reasonable time limitations and avoidance of repetition, the court should ordinarily be receptive to the parties' efforts in this regard.

While it is appropriate and necessary for the judge to be vigilant about avoiding waste of court time, the judge should simultaneously be sensitive to arguments that certain subject matter has not been covered, or has been only inadequately covered, by prior questioning. The court should also take into account the existence of any differences in position among parties that are ostensibly aligned in interest (whether or not those differences are in the nature of, or have maturedto, cross-claims, third-party claims or any other sort of formal adversity) and the risk of potential prejudice if apparent coordination by counsel on questioning might generate an inference on the part of the jurors going to the merits (*e.g.*, in a case alleging civil conspiracy). Hence, if the parties are unable to reach agreement, each party should presumptively be afforded an opportunity to examine each witness in a non-repetitive, expeditious fashion.

With respect to voir dire in cases involving multiple parties, see Standard 1(b)(ii).

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PART FIVE: FEDERAL RULES OF EVIDENCE MANUAL: THE TRIAL BOOK
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6-C Federal Rules of Evidence Manual PART FOUR

PART FOUR EXPERT AND SCIENTIFIC EVIDENCE

17. "Qualifying" Expert Witnesses. Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

Comment

It is not uncommon for a proponent of expert testimony to tender an expert witness to the judge, following a recitation of the witness's credentials and before eliciting an opinion, in an effort to secure a ruling that the witness is "qualified" as an expert in a particular field. The tactical purpose, from the proponent's perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.

A judicial ruling that a proffered expert is "qualified" prior to the time that counsel has posed a precise question eliciting expert testimony is premature and -- unless an objection is interposed -- unnecessary. In the words of the United States Court of Appeals for the Sixth Circuit, "the key question is not the expert's general qualifications in some field, but whether the precise question on which he will be asked to opine is within his field of expertise or meets some other test. ..." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) (citation and internal quotations omitted).

Experts are no different from other witnesses in this regard. It is unnecessary for the court to rule on the competency of any witness prior to the time that the witness has been asked a question to which an objection -- on competency grounds -- is interposed. Only if competency is challenged need the court rule on that subject.

Because expert testimony is not entitled to greater weight than other testimony, the practice of securing what may appear to be a judicial endorsement is undesirable for that reason as well. As United States District Judge Charles R. Richey has observed in a related context, "It may be an inappropriate judicial comment ... for the court to label a witness an'expert.' " Hon. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials,* 154 F.R.D. 537, 554 (1994). The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony.

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6-C Federal Rules of Evidence Manual PART FIVE

PART FIVE MOTIONS IN LIMINE

18. Motions & Rulings.

a. Timing & Subjects. In advance of trial, counsel should seek, and the court should provide, judicial resolution of significant evidentiary and legal issues that are susceptible of pretrial adjudication and are likely to have an impact of consequence on the trial. Counsel should refrain from making, and the court should defer ruling on, any motion in limine if the nature of the evidence at issue cannot fairly be discerned, or its relevance or significance determined, prior to trial.

b. Conferral Requirement. Counsel should be required to confer in an effort to resolve motions in limine before filing any with the court.

c. Rulings. The court should issue its ruling before opening statements begin, stating for the record whether its decision is final or whether it prefers to revisit the issue during trial if the objection or proffer is renewed.

Comment

The use of the motion in limine (literally a "threshold motion") to secure a ruling on the admissibility of evidence prior to trial is firmly established in state and federal court. *See generally* Fed. R. Civ. P. 16(c)(3)-(4) and analogous state provisions; Saltzburg, *Tactics of the Motion in Limine,* 9 Litigation No. 4 at 17 (1983); Hyde, *The Motion in Limine*, 27 U. Fla. L. Rev. 531 (1975). This Standard is predicated on the recognition that certain types of evidentiary rulings often require context -- e.g., whether certain evidence is: (1) relevant; (2) more probative than prejudicial; (3) cumulative; (4) unduly delaying, time-consuming or confusing; and (5) sufficiently trustworthy to fall within certain hearsay exceptions.

The Standard also operates to mitigate some of the practical problems associated with the fact that the rules as to the appealability of in limine decisionsare far from clear. *Compare United States v. Vest,* 842 F.2d 1319, 1325 (1st Cir.) (absence of objection at trial is "fatal"), *cert. denied,* 488 U.S. 965 (1988); *Allison v. Ticor Title Ins. Co.,* 979 F.2d 1187,

1200 (7th Cir. 1992) ("the law in this circuit is that an unsuccessful motion in limine does preserve the issue for appeal"); American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985) ("test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider"); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1411 (9th Cir. 1986) (circuit's position is "unclear").

This issue can largely be resolved if the court makes it clear whether its pretrial ruling is final. *See, e.g., Rosenfeld v. Basquiat,* 78 F.3d 84, 90 (2d Cir. 1996) ("Because the district court at the outset made a definitive ruling ... on the admissibility..., there was no need ... to challenge admissibility again during the trial when plaintiff asked to introduce the testimony."). This is consistent with the trend toward efficient judicial case management through effective and meaningful pretrial proceedings. A clear record not only permits parties to plan their trial strategy -- and, potentially, their approach to settlement -- but also avoids unnecessary appellate issues relating to appealability.

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6-C Federal Rules of Evidence Manual PART SIX

PART SIX BENCH TRIALS

19. Submissions & Rulings.

a. Ruling from Bench. In deciding the appropriateness of ruling from the bench at the conclusion of a trial to the court, the judge should consider the duration of the trial, the complexity of the legal and factual issues involved, the trial briefs, pretrial order or other submissions previously received from the parties, and the prospective advantage afforded by an opportunity to review the transcript, and to receive post-trial submissions from the parties, before ruling. Rulings should be made in a timely fashion.

b. Submissions from Counsel. Prior to rendering its decision, the court should permit counsel to furnish an oral or written statement of position on the law and facts. If complicated legal or factual issues are involved, and depending on the nature and extent of other submissions previously received, the court should ordinarily invite the parties to submit proposed findings of fact and conclusions of law (or like submissions however denominated under applicable law).

Comment

The desire to issue decisions promptly should be tempered by the realization that, as a trial progresses, it is not necessarily a great deal easier for the court than for a jury to keep in mind all of the evidence, and to apply the law to it, particularly where complex legal and factual issues are involved. The present Standard urges the court to permit the parties to submit proposed findings and conclusions to facilitate the decisional process. At the same time, this Standard recognizes that, in particular cases, the parties' prior submissions may suffice and the cost and additional delay will not offset the potential benefit of written post-trial submissions.

20. Continuity of Proceedings. Subject to the exigencies of its calendar and the needs of the parties, the court should endeavor to hear bench trials without lengthy continuances and interruptions in the proceedings, striving for the same level of continuity it insists on in jury trials.

Comment

Jury trials are ordinarily tried continuously, from opening statement to closing argument, in deference to the schedules of the jurors and in recognition of the adverse effect that lengthy continuances have on jury comprehension. Bench trials, in contrast, are sometimes tried very sporadically, with days or weeks intervening between witnesses or in the midst of a single witness's testimony. This approach not only causes hardship to the parties -- who must pay for constant refreshers of counsel -- and to the witnesses, whose schedules may repeatedly be interrupted by readiness alerts, but can also have an adverse effect on the judicial finder of fact.

This Standard takes the position that, subject to the exigencies of its calendar, the court should endeavor to try bench trials in the same continuous fashion that it tries jury trials. It recognizes, however, that in some circumstances the needs of the parties -- *e.g.*, the availability of witnesses or the most expeditious sequencing of the proceedings (*see* Standard 23) -- may warrant an exception to the presumption that bench trials ought to be tried continuously. *See generally* Final Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District Of Columbia at Part D, Recommendation 31, pp. 66-67 (1993).

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6-C Federal Rules of Evidence Manual PART SEVEN

PART SEVEN GENERAL

21. Computer-Readable Submissions. The court should consider requiring the parties to serve and file court papers in computer readable form inaddition to, or in lieu of, hard copy, unless doing so would work undue hardship on a party.

Comment

The overwhelming preponderance of court papers are generated electronically, by computer or other form of word processor. Consequently, serving and filing a disk together with a hard copy of a court paper typically works no hardship on a litigant, but it can substantially facilitate the work of court and counsel. It is suggested that, at a minimum, the court consider ordering the parties to exchange and file in electronic format lengthy briefs and affidavits (exclusive of appendices and exhibits that have not been computer-generated), and all draft orders, jury questionnaires, voir dire questions, jury instructions, findings and conclusions, and forms of verdict.

22. Televised Court Proceedings. In deciding whether or in what respects to permit a court proceeding to be televised, where that is permitted by applicable law, the court should consider all relevant factors, including:

a. The identity of the parties;

b. The nature and subject matter of the proceeding, including any significant social, political or legal issues involved, and any public interest served by televising it;

c. The identity of participants to the proceeding, including whether witnesses, jurors or minors are involved;

d. The extent and duration of contemplated television coverage, including:
i. Whether the entirety of the proceeding, or only portions, would be televised; and

ii. What the broadcast equipment should, and should not, disseminate;

e. The impact of television coverage on the proceeding and any prospective later proceeding (such as trial), including any potential prejudice to:

i. The importance of maintaining public trust and confidence in, and promoting public access to, the judicial system;

ii. The advancement of a fair trial;

iii. The ability to impanel an impartial jury at the time or subsequently; and

iv. The rights of any party, prospective witness, victim, juror or other participant, including any right to privacy, confidentiality or witness sequestration.

f. The impact of television coverage on any law enforcement activity;

g. The objections of any party, prospective witness, victim, juror or other participant in the proceeding; and

h. The physical structure of the courtroom, including whether broadcast equipment can be installed and operated without disturbance to the proceeding or any other proceeding in the courthouse.

Comment

Debate has long raged over whether televising of court proceedings should be permitted. *See, e.g., Hunt, Cameras in the Courts After O.J. -- A Mixed Legacy*, 22 Litigation News No. 2 at 16 (Jan. 1997); Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response,* 23 U. Mich. J.L. Ref. 769 (1990); Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. Cal. L. Rev. 827 (1996). Many state courts permit the practice, in the discretion of the trial judge. See, e.g., Cal. Rule 980; McKinney's 1996 New York Rules of Court § 131. Although the Judicial Conference of the United States in March 1996 adopted a resolution "strongly urging" each federal judicial council to adopt an order prohibiting television coverage of district court proceedings, some federal judges permit it, and one has found a "presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings." *Katzman v. Victoria's Secret Catalog Div.,* 923 F. Supp. 580, 589 (S.D.N.Y. 1996).

It is not the intent of these Standards to take a position on the pros and cons of televising judicial proceedings, but simply to articulate the factors to be considered if the court is weighing whether to do so. The criteria set forth in this Standard are drawn from the cases and from a variety of court rules. Cal. Rule 980; McKinney's 1997 New York Rules of Court § 131.4(c); former S.D.N.Y./E.D.N.Y. Gen. Rules, App. D., R. 4(c); *Katzman*, 923 F. Supp. at 587-88; *Marisol A. v. Giuliani,* No. 95 Civ. 10533 (RJW), 1996 WL 91638 (S.D.N.Y. Mar. 1, 1996).

23. Courtroom Technology.

a. Receptivity. Judges should be receptive to using technology in managing the trial and the presentation of evidence.

b. Hardware. The parties should be encouraged to agree on common courtroom hardware, consistent with their rights to confidentiality of, and exclusive access to, work product and privileged information.

Comment

Subdivision (a) of this Standard is modeled on ABA Trial Management Standard 9 (1992). It is also the recommendation made in the American Bar Association Section of Litigation/Brookings Institution symposium report, Charting a Future for the Civil Jury System 19-20 (1992). Types of 1995-vintage courtroom technology are described in Federal Judicial Center, Manual for Complex Litigation 3d § 34.3 (1995).

Subdivision (b) recognizes that there is a finite amount of space available in any courtroom and that certain hardware can be shared by the parties without risk of divulging privileged or protected information -- e.g., videotape recorders, monitors, and easels. To the extent that the amount of hardware can be contained, it is in the interests of all concerned to limit it. See Federal Judicial Center, Manual for Complex Litigation 3d § 22.32 (1995).

24. Videotaped Testimony.

a. Edited by Subject Matter.

i. If it will assist the jury to understand the evidence or to determine a fact in issue, the court should permit the parties to edit and present videotaped testimony by subject matter.

ii. The testimony of a single witness, or of multiple witnesses, relating to designated subject matter may be combined into a single presentation.

b. Advance Ruling. Objections to, and rulings on, the admissibility of videotaped testimony should be made sufficiently in advance of its presentation to the jury to permit it to be edited to reflect the court's rulings.

Comment

This Standard operates to apply the same rules to videotape that already apply to textual depositions. It is well settled that "[v]ideotape is generally more effective [than reading a transcript] for the presentation of deposition testimony, for impeachment and rebuttal, and for reference during argument." Federal Judicial Center, Manual for Complex Litigation 3d § 22.332 (1995), *citing* Michael J. Henke, *The Taking and Use of Videotaped Depositions,* 16 Am. J. Trial Advoc. 151, 165 (1992) and Joseph, Modern Visual Evidence § 3.03[2][f] (1984; Supp. 1997). *See, e.g., Sandidge v. Salen Offshore Drilling Co*., 764 F.2d 252, 259 n.6 (5th Cir. 1985); *United States v. Tunnell* 667 F.2d 1182, 1188 (5th Cir. 1982); *Weiss v. Wayes*, 132 F.R.D. 152, 154-55 (M.D. Pa. 1990); *Rice's Toyota World v. S.E. Toyota Dist*., 114 F.R.D. 647, 649 (M.D.N.C. 1987). This Standard addresses only one of the myriad of issues associated with the introduction of videotaped deposition evidence.

This Standard is drawn from a variety of sources, including Manual for Complex Litigation 3d § 22.333; Modern Visual Evidence § 3.03[2][c]; and Hon. Robert M. Parker, *Streamlining Complex Cases*, 10 Rev. Litig. 547, 552 (1991).